No. 18-565

IN THE

Supreme Court of the United States

CITGO ASPHALT REFINING COMPANY; CITGO PETROLEUM CORPORATION; CITGO EAST COAST OIL CORPORATION,

Petitioners,

v.

FRESCATI SHIPPING COMPANY, LTD.; TSAKOS SHIPPING & TRADING, S.A.; UNITED STATES,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION FOR PRIVATE RESPONDENTS

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QUESTION PRESENTED

Whether petitioners' promise in a particular maritime contract to provide a safe port for respondents' ship was a warranty of safety or merely a promise to exercise due diligence.

RULE 29.6 STATEMENT

Respondents Frescati Shipping Company, Ltd. and Tsakos Shipping & Trading, S.A. have no parent companies, and no publicly held company owns more than 10% of their shares.

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INTRODUCTION

The question presented asks this Court to interpret the meaning of a safe-port clause in a maritime charter contract. This Court has already held that such a clause is a warranty, not a commitment to exercise only due diligence. That is what the court of appeals held below, consistent with more than 80 years of case law from the Second Circuit. Nearly 30 years ago, the Fifth Circuit reached the opposite conclusion. But the existence of that outlier opinion has had no negative consequence for the maritime industry or maritime commerce. Charterers—including petitioners—routinely choose between the type of unqualified safe-port warranty at issue here and a clause specifying a due-diligence standard of care. Whatever this Court might say about the plain or inferred meaning of a safe-port clause, charterers and owners will continue to choose between an unqualified warranty and a due-diligence standard, even if it became necessary to revise the wording of the clause depending on this Court's ruling. This Court's intervention to opine on the meaning of this contract term is therefore unwarranted and would be a waste of resources.

In light of the unfortunate end to the voyage at issue here, petitioners plainly regret their decision not to bargain for a due-diligence standard. But that was their choice and they should not now be heard to cry foul when made to live up to the warranty they did bargain for.

STATEMENT OF THE CASE

1. This case involves the contractual allocation of cleanup responsibility and other damages resulting from a 2004 oil spill off the shores of New Jersey in the Delaware River. Pet. App. 3a-13a.

a. Petitioners CITGO Asphalt Refining Co., CITGO Petroleum Corp., and CITGO East Coast Oil Corp. (collectively, CARCO) chartered *Athos I* to deliver crude oil from Venezuela to a berth in Paulsboro, New Jersey that was owned and operated by CARCO. Pet. App. 3a-4a. *Athos I* was a single-hulled tanker owned by respondent Frescati Shipping Company, Ltd. and managed by respondent Tsakos Shipping & Trading, S.A. (collectively, respondents). *Id.* at 3a. After safely traveling 1,900 miles from Venezuela to the Delaware River, *Athos I* struck an abandoned submerged anchor only 900 feet from CARCO's berth. *Ibid.* As a result, 264,000 gallons of crude oil spilled into the river. *Ibid.* The resulting cleanup costs and other damages amounted to $143 million. *Ibid.* Respondents paid the cleanup costs and were later reimbursed $88 million by the United States pursuant to the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.* Pet. App. 3a.

b. As it comes to this Court, this case presents a dispute over a contract term in the charter contract. At the relevant time, *Athos I* had been chartered into a tanker pool managed by Star Tankers, Inc., which is not a party to this case. Pet. App. 52a. CARCO subchartered the ship from Star Tankers for the voyage that gave rise to this dispute. *Ibid.* The sub-charter contract took the form of a "voyage charter party," a "common form of maritime contract for shipping services." *Ibid.* A "charter party" is "a contract for the

use . . . of a vessel in whole or in part" under which "the parties are free to allocate risks contractually either by express contractual provision or by allocating specific duties concerning the cargo, the voyage, and the ship." Thomas J. Schoenbaum, 2 *Admiralty & Maritime Law* § 11:1 (6th ed.) (Schoenbaum); *see* Pet. App. 278a n.1 (explaining that "[t]he term 'charter party' may be confusing in that it does not refer to an entity, but a document" due to the "historical genesis" of the term).

The charter party (*i.e.*, the contract) at issue was based on an industry standard form known as an ASBATANKVOY form. Pet. App. 279a, 332a. The charter party included what is known as a safe-port warranty, which provided in relevant part that *Athos I* would proceed "direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo" and that "[t]he vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer [CARCO], provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." *Id.* at 279a-280a (alterations in original). The Special Provisions to the charter party also provided that the "discharge port(s)" would be one or two "safe port(s)" on the Atlantic Coast of the United States.[1] C.A. J.A. 1214.

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[1] CARCO refers (Pet. 4) to the contract provision at issue as a "'safe berth' clause." In fact, it is both a safe-port and a safe-berth clause, relating to the safety of the "place or wharf" where *Athos I* would discharge its cargo. The distinction between safe-berth and safe-port clauses is immaterial to the question presented in the petition. Pet. App. 298a.

2. In 2005, respondents initiated a federal action in the District Court for the Eastern District of Pennsylvania pursuant to the court's admiralty jurisdiction by filing a Petition for Exoneration from or Limitation of Liability pursuant to former 46 U.S.C. app. § 181 *et seq.* Pet. App. 9a, 287a. CARCO filed a claim in the action, seeking compensation for the loss of its cargo; respondents then counterclaimed, asserting both contract claims based on the safe-port warranty and tort claims based on CARCO's role as owner of the wharf where *Athos I* was supposed to dock (wharfinger negligence). *Id.* at 275a-276a, 287a-288a. Respondents seek compensation for unreimbursed cleanup costs and additional damages. *Id.* at 288a. The United States later filed a separate action against CARCO, asserting subrogation rights in a contract claim, and seeking reimbursement for the $88 million it had paid to respondents. *Id.* at 276a, 288a. The two actions were consolidated. *Id.* at 288a.

a. Following a 41-day bench trial, the district court found in favor of CARCO. Pet. App. 330a-344a. In brief, the court held that respondents are not third-party beneficiaries of the safe-port clause in the contract between CARCO and Star Tankers (the voyage charter party); that even if they were, the safe-port clause was a promise only of due diligence, not a warranty; and that any warranty was excused because CARCO specified the port in advance, placing the burden on the captain of *Athos I* to reject it as unsafe. *Ibid.* With respect to the tort claims, the court held that an approach to a berth is limited to the immediate

access and that CARCO had no duty of care in the area where the allision[2] occurred. *Id.* at 336a-337a.

b. Respondents and the United States appealed, and the Third Circuit affirmed in part, vacated in part, and remanded for further proceedings. Pet. App. 272a-329a. Because the district court had failed to clearly set forth its findings of fact and conclusions of law, as required by Federal Rule of Civil Procedure 52, the court of appeals remanded the matter so that the district court could set out findings of fact sufficient to apprise the court of appeals of "the core facts" of the matter. *Id.* at 291a-292a. Contrary to CARCO's contention (Pet. 8) that "proper appellate review was not possible," the court of appeals did decide some legal questions even though it was not in a position to review the district court's ultimate determinations. Thus, "for the sake of efficiency," the court "discuss[ed]—and, to the extent necessary, ma[d]e holdings on—the legal issues appealed." Pet. App. 276a.

On respondents' contract claims, the court of appeals first held that respondents are third-party beneficiaries of the safe-port clause in the voyage charter party. Pet. App. 292a-297a. The court then held that the safe-port clause was an "express assurance of safety"—*i.e.*, a warranty—that covers hazards unknown to the ship's master. *Id.* at 277a, 297a-304a. The court relied on the "deeply rooted" understanding that "a port is unsafe—and in violation of the safe berth warranty—where the named ship cannot reach

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[2] An allision is "[t]he contact of a vessel with a stationary object such as an anchored vessel or a pier." Pet. App. 6a n.4 (quoting *Black's Law Dictionary* (10th ed. 2014)) (brackets in original).

it without harm (absent abnormal conditions or those not avoidable by adequate navigation and seamanship)." *Id.* at 298a. The court explained that this Court has twice held that charterers "failed to provide a safe dock where the ship in question could not reach it without damage" because of an obstacle either below or above the water. *Id.* at 298a-299a (citing *Mencke v. Cargo of Java Sugar*, 187 U.S. 248, 253 (1902); *The Gazelle*, 128 U.S. 474, 485-486 (1888)). The court reasoned that a safe-port clause allocates to the party that chooses the port (the charterer) the risk that the port it chooses is unsafe. *Id.* at 299a-300a. And the court noted that, with the exception of the Fifth Circuit's decision in *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990), "it was well settled that a safe port clause in a charter constituted a warranty given by a charterer to an owner." Pet. App. 300a (quoting Julian Cooke et al., *Voyage Charters* ¶ 5.124 (3d ed. 2007)). Finally, the court explained that viewing the safe-port clause as "an 'express assurance' warranty is most consistent with industry custom," as illustrated by the fact that some charterers use clauses that expressly specify a due-diligence standard rather than an unqualified safe-port clause like the one at issue here. *Id.* at 303a.

Because the district court "neglected to make the necessary factual findings to resolve whether the warranty was actually breached," Pet. App. 305a, the court of appeals remanded for additional factfinding. In so doing, the court noted that if the district court found either that *Athos I*'s draft (*i.e.*, the distance from the ship's water line to the ship's bottom) at the time of the allision was less than or equal to the maximum ship-draft contemplated by the charter party or that

the clearance above the anchor was less than the agreed-upon maximum ship draft, "that finding would indicate that the warranty had been breached." *Id.* at 307a; *see id.* at 305a-308a.

On respondents' tort claim for wharfinger negligence, the court of appeals held that a ship is in an approach when it "transitions from its general voyage to a final, direct path to its destination," Pet. App. 316a, and that the "*Athos I* was well within the approach to CARCO's terminal when the casualty occurred," *id.* at 320a. Holding that CARCO "had a duty to exercise reasonable diligence in providing the *Athos I* with a safe approach," *ibid.*, the court of appeals remanded to the district court for findings on the standard of care required to meet CARCO's duty of reasonable diligence, on whether CARCO breached that duty, and on whether any breach caused the casualty, *id.* at 324a, 328a.

The court of appeals denied a petition for rehearing en banc. Pet. App. 345a.

c. CARCO filed a petition for a writ of certiorari seeking review of two questions related to safe-port clauses: (1) whether the court of appeals correctly interpreted the safe-port clause in the contract and (2) whether the court of appeals correctly determined that respondents are third-party beneficiaries of the safe-port clause in the charter party. 13-462 Pet. i, 2013 WL 5616729. This Court denied the petition. 571 U.S. 1197 (2014).[3]

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[3] In its current cert. petition, CARCO again asks this Court to review the contract-interpretation question, but does not ask

d. On remand to the district court, the case was reassigned to a different judge, who recalled more than 20 witnesses to assess their credibility. Pet. App. 63a. In a detailed opinion, *see id.* at 45a-269a, the court found CARCO liable on respondents' contract claims. The court first found that the warranty was predicated on a maximum draft of 37 feet—and that the actual draft was 36 feet, 7 inches (based on underlying calculations that CARCO did not subsequently challenge on appeal). *Id.* at 169a-171a. The court also held that CARCO breached the safe-port warranty because the evidence on the nature of the damage to the hull and to the anchor established that the anchor was upright, intruding into the warranted safe depth (thereby reducing the actual safe depth). *Id.* at 163a-180a. The court further held that CARCO was liable in tort because the applicable standard of care required CARCO to inspect the approach periodically using side-scan sonar. *Id.* at 180a-206a. CARCO admitted it had done nothing to search for—and remove or warn invited ships of—submerged hazards in its approach and berth. *Ibid.*

The district court awarded respondents $55,497,375.95 on the contract and tort claims, plus

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the Court to review the third-party beneficiary issue (Pet. i). Although CARCO criticizes the Third Circuit's holding that respondents are third-party beneficiaries of the voyage charter party (Pet. 19-21), the question presented in the petition addresses *only* the correct interpretation of the safe-port clause in the charter party (Pet. i). And resolution of the third-party beneficiary question has no bearing on the contract-interpretation question presented in CARCO's petition. As the case comes to the Court, it is therefore uncontested that respondents are third-party beneficiaries of the safe-port clause in the voyage charter party between Star Tankers and CARCO.

prejudgment interest of $16,010,773.35. Pet. App. 12a, 240a-257a. The court specified that respondents were awarded that amount "independently on each count, but [are] entitled to a total award only in this amount." *Id.* at 260a. The court also ordered CARCO to reimburse the United States for half of the money it paid to respondents, for a total of $43,994,578.66 plus $4,620,159.98 in prejudgment interest. *Id.* at 12a, 233a-234a, 256a.

e. All parties appealed. Pet. App. 12a. The Third Circuit affirmed the judgment in favor of respondents on the contract claim and the award of prejudgment interest, vacated the judgment in favor of respondents on the negligence claim, affirmed in part the judgment in favor of the United States, and remanded the case to the district court. Pet. App. 1a-44a.

Relying on its earlier holding that CARCO provided a safe-port warranty in the charter party, the court of appeals explained that such a warranty "provides, among other things, 'protection against damages to a ship incurred in an unsafe port to which the warranty applies.'" Pet. App. 13a (quoting *id.* at 292a). Noting that it was undisputed at that point that the safe-port warranty applied to "ships drawing less than 37 feet," the court of appeals affirmed the district court's finding that *Athos I* had a draft of 36 feet, 7 inches at the time of the allision. *Id.* at 14a-19a. In so holding, the court relied on uncontested (on appeal) experts' calculations of the ship's drafts and record evidence that the damage to the ship's hull and to the anchor indicated that the anchor must have been upright at the time of the allision. *Id.* at 18a-19a. The court of appeals also affirmed the district court's con-

clusion that the safe-port warranty was not made inapplicable by any bad navigation or negligent seamanship on the part of respondents or the ship's master. *Id.* at 19a-25a.

The court of appeals vacated the district court's holding that CARCO was liable in tort. Pet. App. 25a-29a. The court of appeals noted that "a wharfinger's duty is to use reasonable diligence to ascertain whether the approach to its berth is safe for an invited vessel." *Id.* at 26a. But the court expressed "doubts about the District Court's balancing of the cost of preventative measures on one hand and the cost of potential accidents on the other." *Id.* at 27a-28a. Explaining that single-hulled tankers like *Athos I* have since been phased out in U.S. waters, *see* 46 U.S.C. § 3703a, the court of appeals opined that a different duty of care might apply where a double-hulled ship is involved. Pet. App. 28a-29a. The court emphasized that "CARCO had some duty to use reasonable diligence to provide the *Athos I* with a safe approach to its berth—a duty it may or may not have breached." *Id.* at 29a. But "given CARCO's independent liability in contract and [the court's] decision to affirm on that basis," the court "once again decline[d] to outline precisely what CARCO's duty of reasonable diligence entailed." *Ibid.*

As CARCO correctly notes (Pet. 11), the Third Circuit "made no inquiry into CARCO's conduct." CARCO therefore errs in contending (*ibid.*) that the court "conclu[ded] that CARCO was completely innocent." CARCO further errs in asserting that "it is undisputed that CARCO bears no fault for the oil spill that gave rise to this litigation," Pet. 2, 10, "was the least capable" of "prevent[ing] the accident," Pet. 2, and had no "reason to know" of the anchor's presence, Pet. 3.

CARCO had a duty to exercise reasonable diligence to ascertain the safety of its approach—under tort law and under its own interpretation of the safe-port clause. The Third Circuit noted the district court's finding that CARCO "did nothing to look for obstructions." Pet. App. 27a, 192a-193a. If this Court were to reverse the warranty holding, the case would have to be remanded again to decide whether, by doing nothing, CARCO satisfied its duty of due diligence.

The court of appeals also held that the district court erred in concluding that CARCO was entitled to an equitable recoupment defense against the United States' contractual subrogation claim and remanded that claim to the district court for recalculation of damages and prejudgment interest. Pet. App. 30a-39a, 43a-44a. And the court of appeals affirmed the district court's award of prejudgment interest to respondents. *Id.* at 42a-43a.

The Third Circuit denied CARCO's petition for rehearing en banc. Pet. App. 270a-271a.

THE PETITION SHOULD BE DENIED

CARCO asks this Court to decide the meaning of a specific contract provision in the charter party at issue in this case. Consistent with 130 years of precedent from this Court and more than 80 years of case law from the Second Circuit, the Third Circuit held that CARCO's promise that the port it chose for *Athos I* would be safe was in fact a promise that the port would be safe, not a promise to exercise due diligence in ensuring safety. Pet. App. 297a-301a. CARCO urges this Court to review that contract-interpretation holding because, nearly 30 years ago, the Fifth Circuit reached a different conclusion about a

similar contract provision. But CARCO fails to identify *any* problem that has arisen in the last 28 years from the Fifth and Second Circuit's conflicting views on the meaning of safe-port provisions. And there is no reason to think that the Third Circuit's siding with the Second Circuit will suddenly create problems. To the contrary, shipping parties already contract around the conflicting decisions, expressly promising due diligence when they wish to and expressly promising (warranting) safety when that is in their interest. Petitioners themselves use a due-diligence safe-port clause when it suits them and the shipowner agrees. *See* p. 18 & n.6, *infra*. It may now regret its decision not to insist on a due-diligence clause in the charter party at issue here. But the Third Circuit correctly held CARCO to its contractual promise and there is no need for this Court to step in now to offer its interpretation of the contractual provision at issue. The Court should deny the petition.

I. The Question Presented Does Not Warrant This Court's Review.

CARCO insists (Pet. 12-17) that this Court's immediate intervention is needed to resolve a decades-old narrow circuit conflict about the meaning of a particular contract clause. In support of its plea, CARCO devotes nearly all of its argument pages to a detailed description of the conflicting decisions of the Second and Third Circuits on one hand and the Fifth Circuit on the other. Notably absent from the petition, however, is any illustration or explanation of why this Court should step in to offer its own interpretation of the relevant contract term. Parties already contract around the conflicting opinions to give effect to the bargain they choose to make. Whatever this Court

might say on plenary review about the meaning of a safe-port clause, parties will continue to contract around that holding to give effect to their bargain. No charterer is forced to provide a safe-port warranty. But when a safe-port warranty is included in a charter party and the port turns out to be unsafe, there is nothing unfair about making a charterer stick to its bargain.

A. CARCO is correct (Pet. 13-14) that the decision below is in accord with decisions of the Second Circuit and conflicts with a decision of the Fifth Circuit. But that conflict does not merit this Court's intervention. The safe-port clause in the charter party provided that *Athos I* would "load and discharge at any safe place or wharf" that "shall be designated and procured by [CARCO], provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." Pet. App. 88a; *see id.* at 13a. This Court explained 130 years ago that the "clear meaning" of such an "express term[]" in a charter party is that the charterer must order the ship "to a port which she can safely enter with her cargo." *The Gazelle*, 128 U.S. 474, 485 (1888). For more than a century, that was the settled understanding of a safe-port clause, in both judicial and industry circles. The Second Circuit has long held that a traditional safe-port clause is "an express assurance . . . that at the berth 'indicated' the ship would be able to lie 'always afloat.'" *Cities Serv. Transp. Co. v. Gulf Ref. Co.*, 79 F.2d 521, 521 (2d Cir. 1935) (per curiam). Where, as here, "[a] place to which the [ship] could proceed and from which she could depart 'always safely afloat' was warranted" and "was not provided," "the warranty was broken and the warrantor was liable for the resulting damage." *Paragon*

Oil Co. v. Republic Tankers, S.A., 310 F.2d 169, 173 (2d Cir. 1962) (Friendly, J.), *cert. denied*, 372 U.S. 967 (1963); *accord Park S.S. Co. v. Cities Serv. Oil Co.*, 188 F.2d 804, 806 (2d Cir.) (Swan, J.), *cert. denied*, 342 U.S. 862 (1951); *Cities Serv.*, 79 F.2d at 521.

The Fifth Circuit's holding to the contrary in *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990), is incorrect, as discussed at pp. 21-24, *infra*. No other court of appeals has adopted its reasoning—and CARCO does not identify any industry group or tribunal that has blessed its holding. Indeed, if the Fifth Circuit is presented with an opportunity to revisit that holding en banc, it may well do so. It does not appear that the losing party in *Orduna* sought rehearing en banc to try to resolve the circuit conflict the decision created. If the issue arises again in the Fifth Circuit, the circuit conflict may well resolve itself. Whether it does or does not, this shallow conflict on a question of contract interpretation does not warrant certiorari review.

B. This Court does not exercise its certiorari jurisdiction every time courts of appeals differ on the meaning of a contract term. The Fifth Circuit's outlier decision in *Orduna* has been on the books for nearly 30 years. And for nearly 130 years, charterers and shipowners have contracted against the well-established background principle that a safe-port clause like the one at issue here is a warranty. Where a charterer does not wish to provide a warranty, it can—and does—bargain for a safe-port clause that expressly includes a due-diligence standard. But where, as here, it expressly promises to direct the ship to a safe port, it cannot rely on courts to amend the contract after the fact.

CARCO is correct (Pet. 2-3) that uniformity in maritime law is generally important—particularly in determining statutory and tort-law duties imposed automatically or unilaterally. But there is no value in requiring all maritime contracts to be the same. Contract obligations are assumed voluntarily through negotiation between private parties. Signatories to a charter party are free to decide for themselves whether they wish to bargain for a safe-port warranty or bargain for a due-diligence standard. And that is exactly what they do.

Sophisticated charterers like CARCO know that safe-port clauses like the one at issue here are viewed as warranties. *See*, *e.g.*, *The Gazelle*, 128 U.S. at 485. When a charterer prefers *not* to provide a safe-port warranty, it may bargain for a clause that specifies a due-diligence standard of care. Julian Cooke et al., *Voyage Charters* ¶ 5A.8, at 151 (4th ed. 2014) (*Voyage Charters*) ("The warranty can be and often is modified by contract by the inclusion of language which *reduces* it to a due diligence standard.") (emphasis added). The Third Circuit acknowledged that some charter party forms expressly adopt a due-diligence standard—suggesting that the accepted default is to view an unqualified safe-port clause as a warranty. Pet. App. 303a. Indeed, due-diligence safe-port clauses have been in use since long before the Fifth Circuit's 1990 decision in *Orduna*. *See*, *e.g.*, *Victoria Transp. Corp. v. Antco Shipping Co.*, SMA 1196, 1978 WL 403940 (1978) (involving a due-diligence clause from a charter form published in 1965).

The facts on the ground confirm that unqualified safe-port warranties like the one at issue here are accepted in the industry as warranties. Q88.com is a

subscription industry website that, *inter alia*, provides a database of tanker charter terms and clauses from more than 150 charterers.[4] The Q88 database demonstrates widespread use in the industry of safe-port clauses that *expressly* require only due diligence and/or disclaim a warranty. The database contains tanker charter-party forms and clauses from 157 charterers, some of which use multiple forms. Of those 157 charterers, 79 publish charter parties with safe-port clauses. Of those 79, 46 use a due-diligence clause and/or expressly disclaim a warranty in one or more of their charter forms (including several members of *amicus* American Fuels & Petrochemical Manufacturers Association such as BP, Chevron, ExxonMobil, and Shell); 27 use an unqualified warranty clause in one or more of their charter forms; and 6 use both types of clauses in their various forms.[5] An additional 78 charterers do not publish their own safe-port clauses at all

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[4] Q88.com, *Charter Party Terms & Clauses*, https://www.q88.com/Feature_CPTerms.aspx?c=1 (last visited Mar. 1, 2019).

[5] For example, since 1998, BP has used a form that includes the following safe-port clause:

> The Vessel shall be loaded and discharged at any port in accordance with Charterers' Voyage Orders. Before instructing Owners to direct the Vessel to any port, Charterers shall exercise due diligence, to ascertain that the Vessel can always lie safely afloat at such port, but Charterers do not warrant the safety of any port and shall be under no liability in respect thereof except for loss or damage caused by Charterers' failure to exercise due diligence.

BP Shipping, *BP VOY 4*, cl. 5.1 (June 1998).

Chevron uses a form based on an ASBATANKVOY form, modified so that the safe-port clause states:

but are plainly free to use printed industry forms that contain either type of safe-port clause.

CARCO contends (Pet. 19) that it did not "bargain[] for" an absolute warranty here. That assertion is difficult to square with the ordinary industry practice of using an explicit due-diligence clause instead of a warranty clause when a charterer wants the advantage of designating a port without the liability of warranting its safety. Indeed, petitioners themselves use a due-diligence safe-port clause in some of their contracts, departing from the standard-form warranty

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> Charterer shall exercise due diligence to ensure that the Vessel is ordered to ports, berths, docks, anchorages and/or other places for loading and discharging which are safe for the Vessel and where she can lie always safely afloat, but Charterer shall not be deemed to warrant the safety of any such port, berth, dock, anchorage or other place and shall be under no liability in respect thereof except for direct loss or damage caused by Charterer's failure to exercise due diligence as aforesaid.

ChevronTexaco, *Charter Party Clauses*, cl. 35(B) (May 2004).

ExxonMobil uses a form that similarly provides that the "Charterer shall exercise due diligence" in ordering a ship to a port that is "safe for [the] Vessel and where it can lie always safely afloat," but specifies that the "Charterer shall not be deemed to warrant the safety of any such port(s)." ExxonMobil, *EXXONMOBILVOY2005*, cl. 16(b).

And Shell uses a safe-berth clause promising that the "Charterers [will] exercise due diligence to order the vessel only to ports and berths which are safe for the vessel," and specifying that the "Charterers do not warrant the safety of any port, berth or tran[s]shipment operation and Charterers shall not be liable for loss or damage arising from any unsafety if they can prove that due diligence was exercised in the giving of the order." Shell, *Shellvoy 6 Part II*, cl. 4 (Mar. 2005).

clauses that CARCO suggests (Pet. 13, 21) are the industry default. CITGO's *pro forma* October 2005 Addendum, for example, includes a safe-port clause that expressly disclaims a warranty.[6]

Amicus Association of Shipbrokers & Agents (USA) Inc. (ASBA) agrees (at 7) that the longstanding interpretation of the safe-port clause affirmed below is reasonable but contends (at 10) that existing uncertainty about the meaning of the clause is detrimental to the industry. But industry practice with ASBA's own ASBATANKVOY standard form proves otherwise. There is no doubt that standard industry forms serve an important function in facilitating the negotiation of charter parties and their terms. The parties in this case used a standard ASBATANKVOY form as the starting point for their negotiations. But nothing requires parties to accept every clause in a standardized form. To the contrary, oil companies and other chartering entities routinely use pro forma addenda ("riders") in conjunction with the standard ASBATANKVOY form. That is true *in this case* where CARCO used 43 CITGO rider clauses with the ASBATANKVOY form. C.A. J.A. 1209-1228.

Moreover, if ASBA is truly concerned about uncertainty over the meaning of clauses in its own ASBATANKVOY form, it can amend its form to remove any uncertainty. Contrary to its suggestion (at 5), ASBA

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[6] The form is available at the Q88 website. The clause states in relevant part that the "charterer shall not be liable for any loss, damages, injury, or delay resulting from conditions at ports, public channels and fairways, anchorage or other places not caused by charterer's fault or neglect" and expressly states that the "charterer shall not be deemed to warrant the safety of any of the aforesaid." CITGO Petroleum Corp., *Clauses*, cl. 5.7 (Oct. 2005).

can amend its forms when it sees fit, as it did in 2015 when it amended a form first published in 1913. *See* ASBA, *Announcing Release of the NYPE 2015*, www.asba.org/charter-party-editor (last visited Mar. 1, 2019). *Amici* fail to mention that ASBA has offered an alternative tanker voyage charter form (the ASBA II) that included a safe-port clause expressly disclaiming a warranty. ASBA, *Tanker Voyage Charter Party*, pt. II, cl. 9, https://shippingforum.files.wordpress.com/2012/08/asba-ii1.pdf (last visited Mar. 1, 2019) ("Charterer shall not be deemed to warrant the safety of any port, berth, dock, anchorage and/or other place to which the vessel may be ordered to load or discharge" and "shall not be liable for any loss, damage, injury, or delay resulting from conditions at such ports, berths, docks, anchorages or other places not caused by Charterer's fault or neglect or which could have been avoided by the exercise of reasonable care on the part of the Master."). Other types of clauses in standard forms offer parties a choice between two or more options. If ASBA is genuinely concerned that parties are uncertain about the meaning of a safe-port clause like the one the parties used here, it can offer parties a choice between an express due-diligence clause and an express warranty clause. ASBA has had nearly 30 years since *Orduna* to resolve any perceived ambiguity; its failure to do so suggests that the decision in *Orduna* did not create anything close to the type of commercial problem CARCO alleges. There is no reason for this Court to step in where ASBA has felt no need to act for nearly three decades.

CARCO asserts (Pet. 12) that the decision below "imposes unprecedented liability on charterers." That is obviously untrue, as CARCO knows. For more than

80 years, the Second Circuit has held that an unqualified safe-port clause like the one at issue in this case is a promise to provide a safe port, not a promise to exercise due diligence in ensuring that the port is safe. The Third Circuit's decision merely confirmed that correct interpretation of this type of contract term. CARCO also errs in contending (Pet. 19) that the decision below "goes further than even the Second Circuit's approach" by imposing liability for consequences of the allision other than damage to *Athos I*. But CARCO does not identify *any* decision of the Second Circuit even suggesting that liability would be limited to damage to the ship and would not include, *e.g.*, lost profits, damage to cargo, or damage to another ship or a dock. The extent of liability of a charterer who promises to designate a safe port will be governed by ordinary principles of proximate cause. CARCO notably does not suggest that the unsafe conditions in the port were not the proximate cause of the environmental damage in this case. To be sure, CARCO is on the hook for a large amount of money to repair the damage caused by the unsafe condition of the approaches to its own dock. If those approaches had been safe, CARCO would not owe any of that money. And that is precisely what CARCO bargained for when it warranted the safety of its chosen port.

CARCO declares (Pet. 2-3, 12, 21) that this Court must exercise its certiorari jurisdiction in this case to protect maritime commerce. But they have pointed to literally nothing that even hints that there is a problem with the status quo. That is because there is no problem. The question presented almost never arises in the courts. In four decades, it has been decided in only two reported cases—this case and *Orduna*—and

there is no reason to think it will arise with increasing frequency in the future.[7] Indeed, there is every reason to believe it will not because nearly all charters include a clause requiring that disputes be resolved in arbitration rather than in courts. Schoenbaum § 11:19 ("Virtually all charter party forms contain an arbitration clause."); Richard A. Lord, 21 *Williston on Contracts* § 57:157 (4th ed.) ("[C]harter parties . . . have, from early times, provided for recourse to arbitration as a preferred method for the resolution and settlement of disputes."). Trade custom is particularly important in the world of charter parties, where courts should follow the "established practices and customs of the shipping industry," *Stolt-Nielsen, S.A. v. Animal-Feeds Int'l Corp.*, 559 U.S. 662, 675 n.6 (2010) (internal quotation marks omitted), not the other way around. Maritime arbitrators are "expert adjudicators," hired to "resolve specialized disputes," *id.* at 685—and they routinely apply the traditional view that a safe-port

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[7] One Ninth Circuit decision mentions a safe-berth clause without deciding its meaning. *Exxon Co. v. Sofec, Inc.*, 54 F.3d 570, 575-576 (9th Cir. 1995), *aff'd*, 517 U.S. 830 (1996). The safe-berth clause at issue in that case is not the unqualified clause at issue here; instead, it expressly disclaimed any warranty as to "the safety of public channels, fairways, approaches thereto, anchorages, or other publicly-maintained areas either inside or outside the port area where the vessel may be directed." Joint Appendix at 142a-143a, *Exxon*, 517 U.S. 830 (No. 95-129), 1996 WL 33414130. One other district court decision mentions a "safe anchorage" clause—but the outcome of that case turned on the so-called named-port exception, which is not at issue here. *Marine Trading, Ltd. v. L.B. Foster Co.*, 1996 WL 700652, at *2 (E.D. La. Dec. 3, 1996). The most recent safe-port decision before *Orduna* and this case was *Board of Commissioners of the Port of New Orleans v. M/V Maplebank*, 1982 A.M.C. 2564, 2572 (E.D. La. 1981), *aff'd*, 698 F.2d 1215 (5th Cir. 1983) (table).

clause like the one in this case is a warranty. There are too many published arbitration awards to cite holding charterers like CARCO liable under a safe-port warranty. *See Voyage Charters* ¶ 5A.4, at 150-151. *Orduna* was wrongly decided, but the industry marches on without a hitch. The narrow circuit conflict on the meaning of this contract term does not merit this Court's intervention.

II. The Decision Below Is Correct.

Review is unwarranted for the additional reason that the Third Circuit's decision is correct.

It has long been settled that a safe-port clause means what it says: that the charterer promises to direct the ship to a safe port where it will remain *always* safely afloat. A promise is a promise and CARCO cannot identify anything in the language of the clause (or any other clause of the charter party) that suggests a due-diligence standard. Maritime contracts, like all contracts, "must be construed" "by their terms and consistent with the intent of the parties." *Norfolk S. Ry. Co. v. James N. Kirby, Pty Ltd.*, 543 U.S. 14, 31 (2004). Nothing in the terms of the charter party or its negotiation history would support an after-the-fact judicial imposition of a counter-textual due-diligence qualification. Maritime voyages will always face unforeseen risks. But signatories to a charter party are free to allocate the consequences of those risks *ex ante*. A safe-port clause allocates to the charterer the risks of damage resulting from unsafe conditions in a port designated by the charterer. As the Second Circuit has put it, "the charterer bargains for the privilege of selecting the precise place for discharge and the ship surrenders that privilege in return for the charterer's

acceptance of the risk of its choice." *Park S.S. Co.*, 188 F.2d at 806.

CARCO's contention (Pet. 14) that this Court held otherwise in *Atkins v. Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874), is misplaced. In that case, this Court expressly approved the district court's conclusions, including its determination that "[t]he words 'second safe port' imply a port which this vessel could enter and depart from without legal restraint, and without incurring more than ordinary perils of the seas." *Atkins v. Fibre Disintegrating Co.*, 2 F. Cas. 78, 79 (E.D.N.Y. 1868) (No. 601); *see* 85 U.S. (18 Wall.) at 299. The courts did not ultimately hold the charterer to the terms of the warranty in that case—but not because they viewed the safe-port clause as anything other than a warranty. The lower court held in *Atkins* that the ship's master *waived* the charterer's warranty because the master knew that the port was unsafe and proceeded anyway. 2 F. Cas. at 79-80; *see* Pet. App. 301a n.14 ("*Atkins* featured a safe berth warranty[.]"); *Voyage Charters* ¶ 5A.9, at 151-152 ("Judge Benedict found in that case that there was a safe berth warranty, but that it was waived[.]").

None of the policy reasons CARCO offers is persuasive. CARCO contends (Pet. 18) that the well-established view of safe-port clauses as warranties "reduces the incentives of masters and vessel owners to exercise due care." That assertion ignores the fact that a safe-port clause does not relieve a master of his duty to exercise due care. *Voyage Charters* ¶ 5A.8, at 151 (noting that "courts and arbitrators have consistently held that the safe port/safe berth warranty does not relieve the master of his duty to exercise due care in navigating the vessel"). Where a master is negligent

in navigating or in piloting the ship, a charterer's liability will be reduced or eliminated. *Id.* ¶ 5A.36, at 157; *Venore Transp. Co. v. Oswego Shipping Corp.*, 498 F.2d 469, 471 (2d Cir. 1974); *Paragon Oil*, 310 F.2d at 173-174. Equally unpersuasive is CARCO's contention that safe-port clauses should not be viewed as warranties because a master is often better suited than the charterer to determine the safety of a port. The point of allocating responsibility for unknown safety risks in advance is to avoid a post-hoc assessment of which party was in a better position to assess safety conditions. When parties bargain for a safe-port clause, the meaning of that clause is fixed at the time of the bargain, not free to change based on who turns out to be better suited to uncover an unknown hazard. CARCO's premise also lacks support in the real world. In this case, for example, the master had no way of knowing about the submerged anchor; in contrast, CARCO was owner of the dock and operator of the berth, but made no attempt to discover submerged hazards. The same was true in *Orduna*, where the master had no way of knowing about a latent defect in the shoreside loading arm. *See* 913 F.2d at 1154.

CARCO repeatedly asserts (*e.g.*, Pet. 19) that it is an "innocent" party. The purpose of contractual warranties is to allocate risk regardless of fault. The legal question presented in the petition is not who is "guilty" of causing the allision, but which party has contractually agreed to be responsible for the adverse consequences of the accident. CARCO suggests (*ibid.*) that respondents should be liable for the adverse consequences of an *unknown* hazard in the port of CARCO's choosing. If that is what CARCO wanted, that is what

CARCO should have bargained for. Shipping is an inherently dangerous industry, and many hazards are unknown or unknowable to the parties operating a ship. Parties to a charter contract decide in advance who will be responsible for harm from unknown hazards. When a charterer promises to designate a safe port and declines to specify that its promise encompasses only a promise to exercise due diligence, it agrees to be liable for harm that results from a port that is in fact unsafe. The allocation of liability is not a declaration of guilt; it is a simple contract term that is part of the overall bargain embodied in the charter party.

For that reason, *Amici* American Fuels & Petrochemical Manufactures Association et al. are misguided in urging (at 13-15) that the longstanding interpretation of a safe-port *contract* clause be upended to bring it into line with a wharfinger's duty *in tort* to maintain a safe approach. Tort duties are imposed unilaterally; a contractual duty is assumed voluntarily. If CARCO did not want to warrant the safety of its chosen port, it should have bargained for a due-diligence standard of care, as it has done in other charter parties.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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