No. 18-565

In the Supreme Court of the United States

CITGO ASPHALT REFINING COMPANY, ET AL.,
PETITIONERS

v.

FRESCATI SHIPPING COMPANY, LTD., ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Petitioners chartered an oil tanker, M/V ATHOS I (ATHOS I), to carry crude oil from Venezuela to petitioners' refinery on the Delaware River. ATHOS I struck a submerged anchor while docking at petitioners' facility, spilling approximately 263,000 gallons of crude oil into the river. The sole question presented is:

Whether contractual "safe port" and "safe berth" clauses providing that petitioners would direct ATHOS I to a "'safe place or wharf * * * provided the [v]essel can proceed thereto, lie at, and depart therefrom always safely afloat,'" Pet. App. 279a-280a (citation omitted), constituted a warranty of safety, or merely required petitioners to exercise due diligence.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-44a) is reported at 886 F.3d 291. The opinion of the district court (Pet. App. 45a-269a) is not published in the Federal Supplement but is available at 2016 WL 4035994. A prior opinion of the court of appeals (Pet. App. 272a-329a) is reported at 718 F.3d 184.

JURISDICTION

The judgment of the court of appeals was entered on March 29, 2018. A petition for rehearing was denied on May 30, 2018 (Pet. App. 270a-271a). On July 31, 2018, Justice Alito extended the time within which to file a petition for a writ of certiorari to and including September 27, 2018. On September 4, 2018, Justice Alito further extended the time to and including October 27, 2018,

and the petition was filed on October 26, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arose from an oil spill caused when M/V ATHOS I (ATHOS I), an oil tanker chartered by petitioners CITGO Asphalt Refining Company, CITGO Petroleum Corporation, and CITGO East Coast Oil Corporation, struck a large submerged anchor while docking at petitioners' oil refinery on the Delaware River. Pet. App. 3a. Respondents Frescati Shipping Company, Ltd. (Frescati) and Tsakos Shipping & Trading, S.A. (Tsakos) owned and managed ATHOS I and paid for the spill's cleanup in the first instance. *Ibid.* The United States reimbursed respondents for approximately $88 million of their expenses under the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, thereby becoming partially subrogated to respondents' rights against third parties. Pet. App. 3a, 9a. As relevant here, respondents and the government seek to recover the costs of the spill from petitioners under contract theories.

1. a. ATHOS I was a 748-foot, single-hulled oil tanker owned by respondent Frescati and managed by respondent Tsakos. Pet. App. 3a-4a. In October 2001, respondents entered into a "time charter" placing ATHOS I into a pool of tankers managed by Star Tankers, Inc. *Id.* at 275a, 278a. Under the time charter, Star Tankers served as an intermediary with the right to arrange for ATHOS I's employment through sub-charters, while respondents "remained responsible for keeping the vessel staffed and serviceable." *Id.* at 279a; see *id.* at 278a-279a; Terence Coghlin et al., *Time Charters* ¶ 1.59, at 34 (6th ed. 2008) (Coghlin).

In November 2004, petitioners sub-chartered ATHOS I from the Star Tankers pool of tankers in order to carry a load of crude oil from Venezuela to petitioners' asphalt refinery in Paulsboro, New Jersey. Pet. App. 4a, 278a. The subcharter between petitioners and Star Tankers was made in a "voyage charter party," a contract under which a ship "is hired 'to perform one or more designated voyages.'" *Id.* at 279a (quoting Julian Cooke et al., *Voyage Charters* ¶ 1.1, at 3 (3d ed. 2007) (Cooke)). This particular voyage charter party, based on a standard form known as the "ASBATANKVOY," included customary provisions known as "safe port" and "safe berth" warranties (collectively, the safe berth clause). *Ibid.* The safe berth clause provided in part that ATHOS I would "load and discharge at any safe place or wharf, . . . which shall be designated and procured by [petitioners], provided the [v]essel can proceed thereto, lie at, and depart therefrom always safely afloat."[1] *Id.* at 280a (citation omitted). The voyage charter party did not name a specific discharge port, instead directing that the ATHOS I "would transit to one or two safe ports located somewhere on the United States Atlantic Coast, Gulf Coast, or the Caribbean Sea." *Id.* at 310a.

b. Pursuant to the voyage charter, petitioners directed ATHOS I to take its cargo of crude oil to petitioners' refinery in Paulsboro, New Jersey. Pet. App.

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[1] The voyage charter further provided that ATHOS I would "proceed as ordered to Loading Port(s) named . . . , or so near thereunto as she may safely get (always afloat), . . . and being so loaded shall forthwith proceed, as ordered on signing Bills of Lading, directly to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo." Pet. App. 279a (citation omitted).

4a, 279a-280a, 310a. On November 26, 2004, ATHOS I had almost completed that voyage and was approaching petitioners' facility to discharge. *Id.* at 5a. To reach the refinery's dock on the Delaware River, ships must pass through the adjacent Mantua Creek Anchorage, also known as Anchorage Nine, a federally designated area for vessels to anchor outside the river's shipping channel. *Id.* at 5a-6a, 281a; see 33 U.S.C. 471 (providing for federal anchorages); 33 C.F.R. 110.157(a)(10) (designating Anchorage Nine).

Following the ordinary procedure for ships of its size docking at the refinery, ATHOS I was being pushed sideways through the anchorage by tugboats when it struck a large anchor lying on the river bottom. Pet. App. 6a, 281a. The anchor had been abandoned by an unknown party sometime before 2001. *Id.* at 283a. It was located "squarely within the *Athos I's* path and only 900 feet" from petitioners' dock. *Id.* at 275a. The anchor punched two holes in ATHOS's hull, causing approximately 263,000 gallons of oil to spill into the Delaware River. See *id.* at 7a, 275a. The cost of cleaning up the spill was $143 million. *Id.* at 3a.

c. To ensure that sufficient funds are immediately available to clean up oil spills, the OPA identifies "responsible part[ies]" who must pay for cleanup in the first instance, regardless of fault or ultimate legal liability. 33 U.S.C. 2702(a); see 33 U.S.C. 2701(32) (defining "responsible party"). The OPA generally allows a responsible party to limit its liability so long as it did not cause the spill through gross negligence or other misconduct, and provided it cooperates fully in the cleanup. 33 U.S.C. 2704(a) and (c). Costs in excess of the statutory limit are then reimbursed by the federal Oil Spill Liability Trust Fund (Fund). 33 U.S.C. 2708,

2713. When the Fund makes a reimbursement, it becomes subrogated to the responsible party's applicable "rights, claims, and causes of action" against third parties. 33 U.S.C. 2715(a).

The responsible parties for a spill from an oil tanker include the vessel's owner and operator. 33 U.S.C. 2701(32)(A). After the spill from ATHOS I, respondents promptly carried out their obligations under the OPA and had their liability capped at approximately $45 million. Pet. App. 31a. The Fund reimbursed respondents for approximately $88 million in additional cleanup costs, thereby becoming subrogated to respondents' claims against third parties to the extent of the reimbursement they received from the Fund. *Ibid.*

2. In June 2008, the United States sued petitioners in the United States District Court for the Eastern District of Pennsylvania, asserting the Fund's subrogated rights and seeking to recover the $88 million it paid for the spill's cleanup. Pet. App. 3a, 9a, 288a. The government's suit was consolidated with respondents' pending claim against petitioners for its unreimbursed costs from the accident. *Id.* at 9a, 287a-288a. As relevant here, both respondents and the government sought to recover under the voyage charter's safe berth clause, arguing that the submerged anchor rendered the Paulsboro facility unsafe for ATHOS I. *Id.* at 275a-276a.

The district court rejected that claim after a 41-day bench trial. Pet. App. 330a-344a. First, the court held that respondents (and thus the government as its subrogee) could not claim the benefit of the safe berth clause. *Id.* at 340a-341a. Respondents were not parties to the voyage charter between petitioners and Star Tankers, and the district court concluded that they did not qualify as third-party beneficiaries. *Id.* at 340a.

The district court also held, in the alternative, that petitioners "did not breach any contractual warranties." Pet. App. 341a. The court acknowledged the authorities holding that a safe berth clause is a warranty that the berth chosen by the charterer will be safe—and thus that a charterer is liable for damages caused by an unsafe berth without regard to its diligence or fault. *Ibid.* But the court instead followed a Fifth Circuit decision holding that a safe berth clause imposes only "a duty of due diligence to select a safe berth." *Id.* at 341a-342a (quoting *Orduna S.A.* v. *Zen–Noh Grain Corp.*, 913 F.2d 1149, 1157 (5th Cir. 1990)). The district court found no breach of such a duty here because it believed that petitioners exercised reasonable diligence in sending ATHOS I to their Paulsboro refinery. *Id.* at 342a-343a. The district court also held that even if petitioners had breached the safe berth clause, respondents could not recover because of the "named port" exception, a doctrine providing that under some circumstances, an owner waives the protection of the safe berth clause if the charter itself names a specific port and the owner accepts that port without protest. *Ibid.*; see p. 15, *infra*.

3. In 2013, the court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 272a-329a. At the outset, it held that the district court had failed to make the separate findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52(a)(1). Pet. App. 276a. The resulting "dearth of clear factual findings" left the court of appeals unable to "derive a full understanding of the core facts." *Id.* at 291a. This error alone required a remand. *Id.* at 276a. But

"for the sake of efficiency," the court also clarified several legal principles that would govern further proceedings. *Ibid.*

a. The court of appeals first held that respondents were third-party beneficiaries of the safe berth clause. Pet. App. 292a-297a. In an analogous context, this Court "held that vessels are automatic third-party beneficiaries of warranties of workmanlike service made to their charterers by stevedores who unload vessels at docks." *Id.* at 294a (citing *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, 428 (1959)). This Court also extended third-party beneficiary status to the vessels' owners, reasoning that the "owner, no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service." *Ibid.* (quoting *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421, 425 (1960)).

The court of appeals followed a Second Circuit decision holding that the same logic applies where, as here, a vessel's owner claims the benefit of a safe berth clause in an agreement between a charterer and a third party. Pet. App. 294a-295a (citing *Paragon Oil Co.* v. *Republic Tankers, S. A.*, 310 F.2d 169, 175 (2d Cir. 1962) (Friendly, J.), cert. denied, 372 U.S. 967 (1963)). Like the stevedore's warranty of workmanlike service, "a safe berth warranty necessarily benefits the vessel, and thus benefits its owner as a corollary beneficiary." *Id.* at 295a. Although the court of appeals was "mindful of the parties' ability to contract differently" if they wished to avoid creating a third-party beneficiary relationship, it concluded that absent such contrary indications a safe berth clause itself manifests the parties' intent "to endow the vessel"—and thus the vessel's owner—"with 'the benefit of the promised performance.'" *Id.* at

295a-296a (quoting Restatement (Second) of Contracts § 302(1)(b) (1981)).

b. The court of appeals next held that the voyage charter's safe berth clause was a warranty that petitioners would send ATHOS I to a safe berth, not merely a promise to exercise due diligence. Pet. App. 297a-304a. The court of appeals followed a well-established line of cases from the Second Circuit, which has "long held that promising a safe berth effects 'an express assurance' that the berth will be as represented." *Id.* at 299a (quoting *Cities Serv. Transp. Co.* v. *Gulf Ref. Co.*, 79 F.2d 521, 521 (2d Cir. 1935) (per curiam)). The court of appeals rejected the contrary "due diligence" interpretation adopted by the district court and the Fifth Circuit's decision in *Orduna* as inconsistent with the "near consensus" of relevant authorities, the language of the safe berth clause, and industry custom. *Id.* at 303a; see *id.* at 300a-304a.

The court of appeals determined that the district court had "neglected to make the factual findings necessary to resolve whether the warranty was actually breached." Pet. App. 305a. The court of appeals found that petitioners had warranted a safe berth with the understanding that the ATHOS I would have a "draft" of up to 37 feet when it approached petitioners' asphalt facility.[2] *Id.* at 306a. If the district court found on remand that the ATHOS I "was drawing 37 feet or less" and that respondents had not engaged in "bad navigation or seamanship," the court of appeals stated, those findings "would indicate that the warranty had been breached." *Id.* at 307a. The court of appeals also determined that the named-port exception did not apply because "the

[2] A ship's draft is the measurement from the water line to the bottom of the ship's hull, known as the keel. Pet. App. 4a n.3.

particular hazard—the submerged anchor—was unknown to the parties," and thus naming the Paulsboro port ahead of time did not provide respondents "with an opportunity to accept this unknown hazard." *Id.* at 311a; see *id.* at 308a-311a.

c. The court of appeals denied petitioners' requests for rehearing and rehearing en banc, Pet. App. 345a-346a, and petitioners filed a petition for a writ of certiorari. 13-462 Pet. One of the questions presented in the petition was "[w]hether a safe berth provision in a voyage charter contract is a guarantee of the safety of the berth, rather than a duty of due diligence." *Id.* at i. The Court denied the petition on February 24, 2014. 571 U.S. 1197.

4. On remand, the district court recalled more than 20 witnesses over the course of a 31-day proceeding. Pet. App. 63a. As relevant here, the court found that ATHOS I's "draft was 36 feet, 7 inches before it struck the anchor," *id.* at 135a, and that ATHOS I "was in a seaworthy condition and not exposed to dangers that were avoidable by good navigation and seamanship" when it approached petitioners' facility, *id.* at 179a. In light of those findings, the court concluded that petitioners "breached the safe berth warranty" and were liable in contract to respondents. *Id.* at 180a.

The district court determined that petitioners were liable to respondents and the United States in the amounts of $55,497,375.95 and $43,994,578.66, respectively, plus prejudgment interest. Pet. App. 258a-259a. The latter amount constituted half of the nearly $88 million that the government reimbursed respondents for cleanup expenses, reflecting the district court's reduction of the award to the United States based on a theory of equitable recoupment. *Id.* at 56a, 212a-234a, 259a.

5. a. The court of appeals affirmed in part, vacated in part, and reversed in part. Pet. App. 1a-44a. As relevant here, the court affirmed the district court's judgment in favor of respondents on the contract claim. *Id.* at 12a-25a. The court of appeals reiterated its prior holding that "[t]he safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer." *Id.* at 14a (citation omitted). "For our purposes," the court explained, "a safe berth warranty promises that a ship with a draft less than the warrantied depth is covered by the warranty in the absence of bad navigation or negligent seamanship." *Ibid.* Finding "no clear error" in the district court's determination that ATHOS I had a draft of 36' 7" at the time of the allision, the court of appeals found that the ship was thus "within the scope of [petitioners'] safe berth warranty." *Id.* at 19a. The court also agreed that respondents had operated ATHOS I "with neither bad navigation nor negligent seamanship" and thus affirmed the district court's holding that "the allision resulted from a breach of [petitioners'] safe berth warranty." *Id.* at 25a.

In addition, the court of appeals determined that the United States was entitled to a full recovery of its $88 million in reimbursement costs, holding that petitioners had not established a basis for equitable recoupment to reduce the United States' entitlement in subrogation to reimburse the Oil Spill Liability Trust Fund.[3] Pet. App. 30a-39a. Accordingly, the court affirmed the district court's judgment in favor of the United States with respect to petitioners' liability on the contract

[3] Petitioners do not challenge the court of appeals' rejection of their equitable recoupment defense.

claim but reversed the judgment and remanded for further proceedings for the purposes of recalculating damages and prejudgment interest. *Id.* at 43a-44a.

b. On remand the district court amended its final order and entered judgment in favor of the United States and against petitioners in the amount of $97,229,447.28. 05-cv-305 Docket entry No. 904 (Jul. 17, 2018).

ARGUMENT

Petitioners renew their contention (Pet. 12-21) that a safe berth clause in a voyage charter is not a warranty but merely a promise to exercise due diligence. Petitioners previously asked the Court to review the same question in 2014, after the court of appeals' 2013 opinion in this case. See 13-462 Pet. i. The court of appeals' decision is correct and does not warrant further review. Once again, petitioners' principal basis for seeking certiorari is the disagreement between the 2013 decision below and *Orduna S. A.* v. *Zen–Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990). But in the almost three decades since *Orduna* was decided, its interpretation of the customary safe berth clause has attracted virtually no following in the courts or the maritime industry, and has never been reaffirmed by the Fifth Circuit itself. This question of contract interpretation did not merit this Court's review in 2014, and it does not warrant further review now.

1. Petitioners again contend (Pet. 17-21) that the court of appeals erred by holding that the voyage charter's safe berth clause was a warranty of safety. See 13-462 Pet. 12-18 (pressing similar arguments). The court of appeals' ruling was correct and does not warrant this Court's review.

a. The voyage charter's safe berth clause provided that ATHOS I would "load and discharge at any safe

place or wharf, . . . which shall be designated and procured by [petitioners], provided the [v]essel can proceed thereto, lie at, and depart therefrom always safely afloat." Pet. App. 280a (citation omitted). As this Court recognized more than a century ago, the "clear meaning" of this customary language is that the vessel "must be ordered to a port which she can safely enter with her cargo." *The Gazelle & Cargo*, 128 U.S. 474, 485 (1888). The Second Circuit, likewise, has for many decades interpreted the traditional safe berth clause as "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 (1935) (per curiam); see also *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) (recognizing that a charterer is "bound by the express terms of his contract 'to furnish, not only a place which he believes to be safe, but a place where the chartered vessel can discharge 'always afloat'") (citation omitted).

If the charterer sends a vessel to an unsafe berth, it has breached this "express assurance" and is liable for the resulting damage, regardless of its diligence or fault. *Cities Serv. Transp. Co.*, 79 F.2d at 521. As Judge Friendly explained with respect to a safe berth clause: "A place to which the [vessel] could proceed and from which she could depart 'always safely afloat' was warranted; it was not provided; therefore the warranty was broken and the warrantor was liable for the resulting damage." *Paragon Oil,* 310 F.2d at 173; 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. Safe berth clauses thus serve to allocate the risk of damage between the contracting

parties: "[T]he 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. Prior to the Fifth Circuit's decision in *Orduna*, this understanding of safe berth clauses as warranties was "well settled." Cooke ¶ 5.124, at 135.[4]

b. Neither the Fifth Circuit nor petitioners have offered any sound basis for rejecting this established understanding. Most notably, as the court of appeals explained in its 2013 opinion, the language of the clause—promising a "safe" berth to which the vessel can proceed "'always safely afloat'"—"plainly suggests an express assurance" and provides no textual basis for a due diligence standard. Pet. App. 280a, 304a. Maritime contracts "must be construed like any other contracts: by their terms and consistent with the intent of the parties." *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 31 (2004).

Petitioners argue (Pet. 17) that the text of the safe berth clause "merely specifies where a vessel may be docked: at a wharf the charterer specifies, unless the master decides that destination is unsafe." But that interpretation gives the language of the clause only half its effect. The full text of the safe berth provision "triggers two separate protections: a contractual excuse for

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[4] Accord 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 11-10, at 31 (5th ed. 2011) ("Unless this is modified by language reducing this obligation to due diligence, the charterer who nominates a port is held to warrant that the particular vessel can proceed to port or berth without being subjected to the risk of physical damage."); 2A Michael F. Sturley, *Benedict on Admiralty* § 175, at 17-24 to 17-25 (7th ed. rev. 1997) ("The obligation to furnish a safe port or berth is considered a warranty, breach of which justifies the master's refusal to enter the port or entitles the shipowner to sue for damages.").

a master who elects not to venture into an unsafe port, and protection against damages to a ship incurred in an unsafe port to which the warranty applies." Pet. App. 292a (citing 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 11-10, at 32-33 (5th ed. 2011)). The master's option to avoid an unsafe port does not vitiate the charterer's promise that the vessel itself may remain "safely afloat" at the destination the charterer has chosen.

The judicial imposition of an extra-textual due diligence qualification would be particularly inappropriate because parties to maritime charters, typically sophisticated commercial parties, can and do expressly modify customary warranties when they intend to substitute a diligence standard. The ASBATANKVOY form used in this case, for example, qualified the owner's traditional warranty that the chartered vessel was seaworthy to require only that the owner exercise "due diligence." 11-2576 C.A. App. 1222. Moreover, the customary language of the safe berth clause "can be and often is modified * * * by the inclusion of language which reduces it to a due diligence standard." Coghlin ¶ 10.119, at 225; see also Cooke ¶ 5.127, at 136.[5] Petitioners' view would render that express due diligence qualification surplusage.

Petitioners repeat and now appear to endorse (Pet. 14) *Orduna*'s erroneous assertion that the due diligence standard is supported by *Atkins* v. *The Disintegrating*

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[5] In this case, for example, the time charter between respondents and Star Tankers—which also used a standard form—qualified the safe berth clause to provide that Star Tankers would exercise "due diligence to ensure that the vessel is only employed between and at safe places." Pet. App. 280a (citation omitted).

Co., 85 U.S. (18 Wall.) 272 (1874).[6] As the court of appeals explained in its 2013 opinion, however, *Atkins* "was essentially an application of the named port exception." Pet. App. 301a n.14; see *id.* at 309 n.24. The named port exception is a "limitation to the broad protection generally afforded by the safe berth warranty" that "may apply in instances in which a master—without lodging any objection—is charged 'with full knowledge of local conditions which make it unsafe for that particular voyage.'" *Id.* at 308a-309a (quoting Coghlin ¶ 10.158, at 232). "The purpose of the exception is to shift liability to the owner once a ship's master has had ample opportunity to discover a port's hazards." *Ibid.*

As the court of appeals recognized in its 2013 opinion, *Atkins* reflected an application of the named port exception. Pet. App. 309a n.24. In *Atkins*, "the peril of the port was such that no vessel of [the ship's] size could get out without making her safety from the reefs dependent entirely upon the continuance of the breeze." *Ibid.* (quoting *Atkins* v. *Fibre Disintegrating Co.*, 2 F. Cas. 78, 79-80 (E.D.N.Y. 1868), rev'd, 7 Blatchf. 555 (C.C.E.D.N.Y. 1870); rev'd *sub nom. Atkins* v. *The Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874)) (brackets in original). Although "*Atkins* featured a safe berth warranty," the ship master "made outside inquiries" about the port in question and "was fully aware of the port's dangers and yet did not object." *Id.* at 301a-302a n.14 (citing *Atkins*, 2 F. Cas. at 79-80). After the breeze failed and the ship was damaged on the reef, the district court concluded that the ship master had "waived his right to claim later for the damage" because he had

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[6] In its 2014 petition for a writ of certiorari, petitioners repeated *Orduna*'s characterization of *Atkins* but did not appear to endorse it. See 13-462 Pet. 13-14.

"failed to object to the port after having 'made inquiries . . . as to the character of the port, which was, moreover, fully described in * * * [the official publication describing the coast].'" *Id.* at 302a n.14, 309a n.24 (quoting *Atkins*, 2 F. Cas. at 79-80) (brackets in original).

While the district court in *Atkins* "never use[d] the term 'named port exception'" in its opinion, Pet. App. 309a n.24, its analysis applied that doctrine and did not reject the general proposition that a safe berth clause constitutes a warranty of safety, see *Atkins*, 2 F. Cas. 79-80. Accordingly, this Court did not "reject[] the [safe berth] clause as a warranty" when it affirmed the district court's ruling and analysis in *Atkins*. Pet. 14; see Atkins, 85 U.S. (18 Wall.) at 299.

c. Lacking support in the text of the safe berth clause, *Orduna* sought to justify its due diligence standard primarily based on considerations of "legal or social policy." 913 F.2d at 1157. Petitioners rely (Pet. 18-19) on similar arguments here. Such arguments would not justify the judicial modification of the parties' agreement; courts have no license to disregard or supplement the plain terms of a contract between sophisticated parties. See *Kirby*, 543 U.S. at 31. But the considerations relied upon by *Orduna* and petitioners are unsound in any event.

First, petitioners contend (Pet. 18) that treating safe berth clauses as warranties "reduces the incentives of masters and vessel owners to exercise due care" to avoid hazards. See *Orduna*, 913 F.2d at 1157. But as petitioners themselves recognized in their brief in the initial appeal, see 11-2576 Pet. C.A. Br. 75, 77-78, a safe berth clause "does not relieve the master of his duty to exercise due care" because "[a] port or berth will not be unsafe if the dangers are avoidable by good navigation

and seamanship on the part of the master." Coghlin ¶ 10.119, at 225; *id.* ¶ 10.146, at 230; see also Pet. App. 19a ("A safe berth warranty applies only in the absence of bad navigation or negligent seamanship"). The settled understanding that a safe berth clause is a warranty thus does not diminish the master's incentive to exercise reasonable care.

Second, petitioners contend (Pet. 19) that it is "manifestly unjust" to require them to bear the costs of the spill "even though [they] exercised due diligence." But "[t]he charterer's undertaking to provide a safe port or berth is a matter of contract," not tort, and the purpose of contractual warranties is to allocate risks between the parties without regard to fault. Coghlin ¶ 10.118 at 225; see *Park S. S. Co.*, 188 F.2d at 806. Although petitioners assert (Pet. 12) that they were "in the worst position of the parties in the litigation to prevent the casualty," the court of appeals correctly perceived "no policy reason why a master on board a ship would normally be in any better position to appraise a port's more subtle dangers than the party who actually selected the port," Pet. App. 302a—especially here, where the charterer selected its own refinery as the destination. When a charterer "bargains to send a ship to a particular port and warrants that it shall be safe there," a court has "no basis to upset this contractual arrangement." *Ibid.* Moreover, the safe berth clause serves only to apportion financial responsibility for a loss between the charterer and the ship's owner. If the charterer believes that fault for the accident lies with someone else—here, for example, the unknown party who abandoned the anchor—it remains free to seek to recover from that party.

2. Although the Fifth Circuit erred in *Orduna* when it departed from the settled understanding of safe berth

clauses, the resulting conflict does not warrant this Court's review. Even petitioners implicitly acknowledge that *Orduna* has been approved only in academic circles. See Pet. 15-16 (citing three academic commentaries, but no judicial endorsement of *Orduna*). No other court of appeals has adopted the Fifth Circuit's view.[7] Maritime arbitrators, who resolve the vast majority of disputes in the shipping industry, have likewise applied the traditional rule both before and after *Orduna*.[8] Moreover, the Fifth Circuit itself has not revisited this issue since *Orduna*, and the full Fifth Circuit has never addressed the question—indeed, it appears that no petition for rehearing en banc was filed in *Orduna*. See 913 F.2d at 1149 (noting the denial of rehearing but not mentioning rehearing en banc). When presented with an opportunity to do so, the Fifth Circuit might reconsider *Orduna*'s singular approach.

Petitioners are also mistaken in suggesting (Pet. 12) that the court of appeals' 2013 decision creates "uncertainty" that warrants review. The circuit conflict created by *Orduna* has existed for almost three decades, and the court of appeals in this case merely reaffirmed the longstanding view that is "consistent with industry custom." Pet. App. 303a. Furthermore, since *Orduna*, the international shipping industry has proceeded with its business, apparently unaffected. According to one

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[7] A district judge in Hawaii adopted *Orduna*'s view, but on appeal the Ninth Circuit affirmed on other grounds while expressly declining to resolve this issue. See *Exxon Co.* v. *Sofec, Inc.*, 54 F. 3d 570, 575-576 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996).

[8] See, *e.g.*, *The Mountain Lady*, SMA 3704 (2001); *In re Arbitration of T. Klaveness Shipping A/S–Duferco International Steel Trading*, 2001 A.M.C. 1954 (N.Y. Arb. 2001); *The Mercandian Queen*, SMA 2713 (1990).

set of amici curiae, "the standard safe-berth clause" remains "common" in standard charter forms, and those forms "generally do not specify the level of duty owed under the safe-berth clause." Mar. Law Ass'n of U.S. & Ass'n of Ship Brokers & Agents (USA) Inc. Amicus Br. 18, 23. Moreover, the issue is one of contract interpretation, and parties seeking greater certainty are free to resolve this question by agreement. Indeed, parties "often" do just that by expressly adopting a due diligence standard. Coghlin ¶ 10.119. Their ability to do so further undermines any claim that this Court's intervention is required.

This Court previously declined to review this issue in 2014 when it denied petitioners' first petition for a writ of certiorari, and petitioners identify no legal developments since that denial that have deepened the shallow conflict between *Orduna* and the decisions of other courts of appeals. See Pet. 12-17. Indeed, petitioners cite only one court decision issued since this Court denied the first petition in this case. See Pet. 15 n.5 (citing *Comar Marine, Corp.* v. *Raider Marine Logistics, L.L.C.*, 792 F.3d 564, 576 n.35 (5th Cir. 2015)). That opinion does not address safe berth clauses and cites *Orduna* only for an unrelated legal proposition. See *Comar Marine*, 792 F.3d at 576 n.35 (citing *Marine Transp. Lines, Inc.* v. *M/V Tako Invader*, 37 F.3d 1138, 1140 (5th Cir. 1994)) ("A district court's lost profits methodology must permit it to arrive at a damages amount 'with reasonable certainty. No more is required.'") (quoting *Orduna*, 913 F.2d at 1155). As the dearth of new cases suggests, the question presented has not spawned a flurry of litigation that might warrant this Court's intervention.

3. In its previous petition for a writ of certiorari, petitioners asked the Court to review whether a safe berth clause in a voyage charter contract "runs to the benefit of a third-party vessel owner when there is no evidence of the contracting parties' intent to benefit the vessel owner." 13-462 Pet. i. Petitioners' current petition does not include that issue as a question presented. See Pet. i. Petitioners nevertheless discuss that issue in the petition, arguing (Pet. 19-21) that the court of appeals erred in holding that respondent Frescati, as ATHOS I's owner, was a third-party beneficiary of the voyage charter's safe berth clause. Because that argument is not fairly included in the question presented, the Court should not consider it. See, *e.g.*, *Wood* v. *Allen*, 558 U.S. 290, 304 (2010) ("[T]he fact that petitioner discussed this issue in the text of his petition for certiorari does not bring it before us. Rule 14.1(a) requires that a subsidiary question be fairly included in the question presented for our review.") (brackets, citation, and emphasis omitted).

In any event, petitioners do not challenge the court of appeals' formulation of the legal standard for determining third-party-beneficiary status, and their contention that the court misapplied that standard to the circumstances of this case lacks merit. In general, a third-party beneficiary may enforce the terms of a private commercial contract "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement (Second) of Contracts § 302(1)(b). A plaintiff claiming third-party beneficiary status must show that the contractual provision at issue "was intended for his direct

benefit." *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 307 (1927) (citation omitted).

In this case, petitioners promised to direct ATHOS I to a "safe place or wharf * * * provided the [v]essel can proceed thereto, lie at, and depart therefrom always safely afloat." Pet. App. 280a (citation omitted). As this Court recognized in an analogous context, respondent Frescati is a third-party beneficiary of this safe berth clause because petitioners' promise "is plainly for the benefit of the vessel whether the vessel's owners are parties to the contract or not." *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, 428 (1959). That relationship "is enough to bring the vessel"—and the vessel's owner—"into the zone of modern law that recognizes rights in third-party beneficiaries." *Ibid.*; see *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421, 425 (1960) ("The owner, no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service."). As Judge Friendly explained in *Paragon Oil*, the logic of these cases applies equally to a safe berth clause like the one at issue here. See 310 F.2d at 175. Indeed, if anything a safe berth clause is even more clearly directed at benefiting the ship than a stevedore's warranty of workmanlike service because it expressly promises that the charterer will send "*the Vessel*" to a "safe place or wharf * * * provided *the Vessel* can proceed thereto, lie at, and depart therefrom always safely afloat." Pet. App. 280a (emphases added; citation omitted).

Petitioners contend (Pet. 20) that respondent Frescati cannot be a third-party beneficiary because it was not explicitly named in the voyage charter. But the charter did expressly identify ATHOS I, and Frescati's

third-party beneficiary status follows from its ownership of the chartered vessel. The intent to benefit the vessel's owner is thus demonstrated by the contract itself where, as here, the contract contains a promise that "is plainly for the benefit of the vessel." *Crumady*, 358 U.S. at 428. The court of appeals' holding that Frescati is third-party beneficiary of the safe berth clause is correct and in accord with the only other decision to consider the question, Judge Friendly's opinion in *Paragon Oil*.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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