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.; AND UNITED STATES,

Respondents.

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Petitioners (collectively, "CARCO") have demonstrated that the decision below widens an acknowledged circuit conflict on the interpretation of "safe berth" provisions in maritime charter contracts. Frescati and the United States concede in their oppositions (respectively, "Frescati Opp." and "U.S. Opp.") that a longstanding and outcome-determinative conflict exists, and they do not dispute that it is squarely and cleanly presented in this case. Add to that the observation of the Maritime Law Association and the Association of Ship Brokers & Agents as *amici curiae* that "the conflict concerns the interpretation of a widely used standard-form clause, and standard-form clauses provide substantial benefits to the industry when they are interpreted uniformly." Br. of The Maritime Law Association of the United States and The Association of Ship Brokers & Agents (USA) Inc. as *Amici Curiae* Supp. Pet'rs 10 ("MLA/ASBA Br."). The case for certiorari is compelling.

Respondents offer various reasons why the conflict does not warrant this Court's review and thus why the state of the law should remain muddled. But none of them is persuasive. Only this Court can resolve the important and recurring questions of federal maritime law that this case presents.

THE COURT OF APPEALS' INTERPRETATION OF A SAFE BERTH PROVISION IN A CHARTER CONTRACT CEMENTS AN ACKNOWLEDGED CIRCUIT SPLIT ON THE SCOPE OF THE DUTY THAT THE PROVISION IMPOSES UPON THE CHARTERER.

A. Respondents Concede That The Courts Of Appeals Are Hopelessly Divided On The Question Presented.

Respondents concede that the decision below widens an acknowledged circuit conflict on the interpretation of safe berth provisions in charter contracts. See Pet. 12-17; Frescati Opp. 13 (recognizing that "the decision below is in accord with decisions of the Second Circuit and conflicts with a decision of the Fifth Circuit"); U.S. Opp. 19 (recognizing the "conflict between *Orduna* [*S.A.* v. *Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990)] and the decisions of other courts of appeals").

Faced with an undeniable split, respondents half-heartedly attempt to dismiss the Fifth Circuit's ruling in *Orduna* as an "outlier" that the Fifth Circuit "may well" revisit. Frescati Opp. 1, 14; see also U.S. Opp. 18 (describing *Orduna* as a "singular" ruling that the Fifth Circuit "might reconsider"). Respondents' suggestion that the circuit split might resolve itself is nothing more than speculation and wishful thinking, particularly given that it has persisted "for almost three decades." U.S. Opp. 18. Moreover, the Fifth Circuit has never expressed the slightest doubt about the correctness of its decision in *Orduna*. To the contrary, *Orduna* continues to be cited by the Fifth Circuit for numerous principles of maritime law, and the district courts in that Circuit

correctly recognize its controlling authority. See Pet. 15 n.5.

Respondents also attempt to downplay the circuit split as "shallow" and "narrow." Frescati Opp. 12, 14, 22; U.S. Opp. 19. This Court, however, can hardly ignore a 2-1 split among circuits that are particularly prominent in addressing federal maritime issues because they contain within them major port cities. This Court for more than two centuries has ensured uniformity in the rules of admiralty, and it should continue to play that critical role by granting certiorari here. See Pet. 2-3.

Respondents do not dispute that the circuit split is outcome-determinative in this case. Nor could they. The Third Circuit vacated the wharfinger tort judgment against CARCO, finding that it was not liable under the "reasonable diligence" standard applicable to that claim. Pet. App. 26a, 43a. This shows that CARCO would *not* have been found liable in contract under *Orduna*'s due diligence standard. Accordingly, the Third Circuit's finding of contract liability is wholly attributable to its rejection of the due diligence standard in favor of the Second Circuit's absolute warranty standard. In addition to confirming that the circuit split affects case outcomes, the asymmetry between CARCO's tort and contract liability in this case makes little sense. As *amici* American Fuels & Petrochemical Manufacturers Association and International Liquid Terminals Association observe, "[n]o logical rationale exists for imposing differing, and more onerous, standards on a charterer than on a wharfinger with respect to its efforts to provide a safe berth for vessels, particularly when the assurances being provided are identical." Br. of The American Fuels & Petrochemical Manufacturers Association and

International Liquid Terminals Association as *Amici Curiae* Supp. Pet'rs 13 ("AFPMA/ILTA Br.").

Respondents also do not dispute that the split is squarely and cleanly presented in this case and do not identify any vehicle problems. The fact that the Court "previously declined to review this issue in 2014," U.S. Opp. 19, when the case was in an interlocutory posture and was saddled with a tort issue that now has disappeared, is no reason to deny the petition. Instead, the litigation subsequent to the previous denial has teed up a single issue as cleanly as it can be for this Court's review. See *United States* v. *Virginia*, 518 U.S. 515, 526 (1996) (noting that the Court had denied a prior petition for certiorari when the litigation was in an interlocutory posture).

B. The Circuit Split Warrants This Court's Review.

Petitioners have demonstrated that the circuit conflict needs to be resolved because the current lack of uniformity in the interpretation of provisions used in virtually every chartering arrangement is detrimental to maritime commerce and creates the prospect of inconsistent case outcomes. Pet. 16-17. Commentators, including the leading Gilmore & Black treatise, Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (2d ed. 1975), have urged the resolution of this conflict. Pet. 17. Industry stakeholders have submitted *amici* briefs that support the need to resolve the conflict. AFPMA/ILTA Br. 9 ("Failure to address this rift will be detrimental to maritime commerce . . . ."); MLA/ASBA Br. 10 (resolution of the "clearly established" conflict is "important" because safe berth clauses must be "interpreted uniformly").

Respondents' principal answer is that the circuit split is not worth resolving, and poses no problems for maritime commerce, because parties to charter contracts can draft safe berth provisions as they wish. Frescati Opp. 14-19; U.S. Opp. 18-19. Parties contract against the background of common law principles, however, and it is always true that they can try to contract around principles that are unclear or lack uniformity. But the role of courts—and this Court in particular in the maritime context, see Pet. 2-3, 16—is to clarify and harmonize federal common law contract principles so that maritime negotiations can occur against a clear and consistent background.

Norfolk Southern Railway v. *Kirby*, 543 U.S. 14 (2004), is instructive. In that maritime case, this Court construed two bills of lading, which it noted were "essentially, contracts." *Id.* at 18. The Court acknowledged that its decision "does no more than provide a legal backdrop against which future bills of lading will be negotiated." *Id.* at 36. While recognizing that "[f]uture parties remain free to adapt their contracts to the rules set forth here," the Court noted that its determination provided those parties with "the benefit of greater predictability concerning the rules for which their contracts might compensate." *Id.*

Petitioners' *amici* confirm that parties' ability to negotiate contracts does not undo the harm caused by the circuit split. MLA/ASBA explain that "[f]ailing to articulate a uniform rule and requiring parties to contract around the clause themselves is not a solution" because it hinders maritime commerce by forcing parties to incur "increased transaction costs," "slower negotiations," and "weakened efficiency gains." MLA/ASBA Br. 26. These are significant problems in a context in which "time is typically of

the essence when it comes to fixing a ship between an owner and a charterer." *Id.* at 22. Contracting around unclear form language also increases the risks of "new ambiguities and drafting errors." *Id.* at 26.

The fact that shipping disputes are typically arbitrated, rather than litigated in federal court, likewise does not provide a reason for this Court to decline to resolve the clear circuit split. See Frescati Opp. 20-22. Maritime arbitrators apply federal common law principles established by courts, and certainly would follow any standard this Court would adopt. See MLA/ASBA Br. 20-21 (judicial decisions are "essential" to the development of charterparty law because "[a]rbitrators rely on judicial decisions to interpret the meaning of charterparty clauses"). Accordingly, Frescati's argument—which, if accepted, would remove innumerable shipping issues from this Court's docket—simply ignores this Court's vital role in shaping and in ensuring uniformity in rules of admiralty law and maritime commerce. See 28 U.S.C. § 1333(1) (federal courts have exclusive jurisdiction over admiralty cases); Pet. 2-3 (discussing this Court's historic role in fashioning admiralty rules).

This Court should intervene to prevent inconsistent case outcomes based solely on the vagaries of geography. When different circuits have different default rules for the interpretation of safe berth provisions, the meaning of the provision can and will change, and disparate results can occur, depending on where the berth or port is located and which circuit's law applies. See MLA/ASBA Br. 25 ("Without a uniform rule or specific contract provision, the meaning of the safe-berth clause may change from port to port."). The existing arbitrariness is a classic reason for this Court to grant review.

C. Respondents' Merits Arguments Do Not Provide A Basis For Denying Review.

Respondents devote many words to challenging the correctness of the Fifth Circuit's interpretation of safe berth provisions, but these arguments go to the merits and do not provide a reason to leave the circuit conflict unresolved. See Frescati Opp. 22-25; U.S. Opp. 11-17. As the MLA/ASBA brief correctly observes: "Whether this Court affirms or reverses the judgment below, it is important to the maritime industry that it resolve the acknowledged conflict among the circuits." MLA/ASBA Br. 8.

In any event, respondents' merits arguments are wrong. Space constraints preclude a full response on the merits, but the liability that respondents seek to impose on CARCO in this lawsuit—tens of millions of dollars in damages based on an oil spill for which it bore no fault and had no ability to prevent—starkly illustrates the unjust results for which the "full warranty" approach has been roundly criticized. See Pet. 19. At a minimum, respondents' suggestion that such a lopsided allocation of risk is compelled by the plain language of the standard safe berth provision used here (Frescati Opp. 23-24; U.S. Opp. 13-14), attributes more meaning to that simple phrasing—"always safely afloat"—than it can bear. See MLA/ASBA Br. 23 (the ASBATANKVOY safe berth clause used here "does not specify whether it imposes a strict-liability warranty or a due-diligence obligation").

Nor is it correct that this Court "has already held that such a [safe berth] clause is a warranty, not a commitment to exercise only due diligence." Frescati Opp. 1. Frescati and the United States suggest that this Court's decision in *The Gazelle & Cargo*, 128 U.S. 474 (1888), embraced the "full warranty" approach.

Frescati Opp. 13, 15; U.S. Opp. 12. That decision, however, only involved the issue whether the ship was justified in refusing to proceed to a berth/port in the face of a *known hazard*: "a bar across its mouth, which it was impossible for the Gazelle to pass." 128 U.S. at 485. This Court held that the "clear meaning" of the charter party was that the charterer was bound to order the Gazelle "to a port which she can safely enter." *Id.* It reasoned that the charterer had breached this duty because it had "insisted on ordering her" to the obviously hazardous port. *Id.* at 486. In reaching this common-sense result, the Court did not have any occasion to address whether the charterer provides a warranty (a term never used in the opinion) or merely has a duty of due diligence.

In *Atkins*, in contrast, this Court affirmed the district court's ruling that a charterer was *not* liable under a safe berth clause to a vessel owner for damage to the ship—an outcome showing that this Court did not view the clause as imposing an absolute warranty. *Atkins* v. *Fibre Disintegrating Co.*, 85 U.S. (18 Wall.) 272, 299 (1874), *aff'g* 2 F. Cas. 78 (E.D.N.Y. 1868) (No. 601). Frescati and the United States contend that this result was due to the fact that the ship's master had proceeded in the face of local conditions (no breeze) that he knew made the port's reef a hazard to his ship. Frescati Opp. at 23; U.S. Opp. at 14-16. But this overlooks the fact that the district court (whose ruling was affirmed by this Court) never referred to the safe berth clause as a warranty and instead stated that the charterer's obligation was limited to providing "a port which this vessel could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the seas." 2 F. Cas. at 79. The district court also rejected the vessel owner's

argument that the charterer's agent had made "representations which amounted to a warranty." *Id.*

The pertinent policy considerations warrant full merits briefing, but Frescati and the United States never explain how imposing strict and unlimited liability on charterers—including for unknown hazards that they cannot prevent—serves the interests of maritime commerce. Commentators have long recognized that open-ended liability can discourage maritime commerce and render insurance unattainable. See 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 15-1 (6th ed. 2018); Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the Second Decade*, 36 Tul. Mar. L.J. 1, 43-45 (2011). In this regard, one of the purposes of the Oil Pollution Act of 1990 ("OPA"), Pub. L. No. 101-380, 104 Stat. 484, was to update caps on maritime liability that have been a feature of U.S. law for more than 150 years. Imposing uncapped liability for oil spills on charterers for risks that they cannot foresee or prevent is hardly consistent with the concerns that led Congress to adopt the liability limits in OPA. If admiralty law is going to permit the kind of open-ended liability imposed on CARCO in this case, it should be decided by this Court.

CONCLUSION

For the foregoing reasons and those stated in the petition, certiorari should be granted.

Respectfully submitted,

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