NO. 18-565

In the Supreme Court of the United States

CITGO ASPHALT REFINING COMPANY, ET AL.,

Petitioner,

v.

FRESCATI SHIPPING COMPANY, LTD., ET AL.,

Respondent.

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

BRIEF OF AMICUS CURIAE TRICON ENERGY, LTD. IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

Tricon Energy, Ltd. ("Tricon" or "*amicus*") is in the business of trading bulk petrochemicals and polymers all over the world. As a trader, Tricon both sells and buys bulk petrochemicals and polymers. When it sells, Tricon acquires material on the global market. It then has the obligation under its sales contracts to arrange for transport of the material to the place designated for delivery. In the overwhelming majority of cases, transportation is by sea. Tricon owns no ships, vessels, docks or terminals. In order to transport the material it sells, Tricon regularly charters vessels owned and operated by parties like respondent Frescati Shipping Company, Ltd. Tricon charters vessels to transport material to ports all over the world hundreds of times a year. Nearly all the charter contracts Tricon makes with vessel owners and operators include "safe berth" provisions similar, if not identical, to the one in this case.

Tricon has its principal office in Houston, Texas. It employs approximately 440 people. It employs no mariners or persons who navigate or operate ocean-going ships. Tricon has limited knowledge of the navi-

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[1] Petitioner has filed a blanket consent to the filing of *amicus* briefs. Respondents Frescati Shipping Company, Ltd. and Tsakos Shipping & Trading, S.A. gave consent to filing this *amicus* brief on July 3, 2019. Respondent, the United States, gave consent to filing this amicus brief on July 5, 2019.

Amicus affirms that no counsel for a party wrote a part or the whole of this brief, and no counsel or a party made a monetary contribution intended to fund this brief's preparation or submission.

gational conditions at the ports throughout the world where it makes deliveries using chartered vessels, or of the approaches to them. In most cases, the delivery port is chosen by the buyer, not Tricon.

Tricon's manner of doing business is not unique or unusual. Many trading companies in the United States and throughout the world operate in a similar manner.

Tricon is interested in this case because, if the Court were to adopt the Third Circuit's interpretation of the "safe berth" provisions of the charter contract, Tricon's potential liability will be greatly increased, and it will be difficult for Tricon to adequately insure against this potential liability, or contract around it. In this case, the judgment against the charterer exceeds $140 million. A judgment in a similar amount against Tricon would likely put it out of business.

SUMMARY OF THE ARGUMENT

The Third Circuit holds that the "safe berth" provision of a ship charter contract requires the charterer to expressly guarantee that the vessel will reach the berth safely. This imposes strict liability on the charterer for any damage to the vessel, and even for pollution damage, caused by an accident at the berth or the approach to it. In contrast, both the master of the vessel and the wharfinger are held only to exercise reasonable care. This places the greatest liability on the charterer, the party least capable of avoiding the loss or insuring against it. The Third Circuit's conclusion that because the charterer selects

the port it is in the best position to assess the safety of the berth ignores commercial reality. Contracting around this rule to avoid potentially existential liability will be difficult and costly for parties like *amicus*. The Fifth Circuit properly holds that the "safe berth" provisions of a ship charter contract only require the charterer to exercise reasonable care in selecting the berth. The Fifth Circuit's rule better reflects commercial reality and should be adopted by the Court.

ARGUMENT

I. THE THIRD CIRCUIT PLACES THE GREATEST, AND ULTIMATE, LIABILITY ON THE PARTY LEAST CAPABLE OF AVOIDING THE LOSS.

By holding that the "safe berth" provision of a ship charter contract expressly guarantees that the vessel will reach the berth safely, the Third Circuit imposes strict liability on the charterer. *In re Frescati Shipping Co., Ltd.*, 718 F.3d 184, 202-03 (3rd Cir. 2013). In contrast, the master of the vessel and the wharfinger (the owner or occupier of the berth) are held only to a duty to exercise reasonable care. *Id.* at 201. In cases like this one where no party was at fault, this places the ultimate liability on the charterer.

However, the master and the wharfinger are both in a better position to assess the safety of the berth and the approaches to it than the charterer. In many cases, the charterer is, like Tricon, a merchant without expertise in navigation or knowledge of the navigational conditions in or around the berth, which could be located on the other side of the world from the

charterer. The charterer has no control whatsoever on the navigation, maneuvering or operation of the vessel as it neither owns the vessel nor has any of its employees on board.

With regard to the master of the vessel, the Fifth Circuit noted in *Orduna* that

> . . . the master of the vessel on the scene, rather than a distant charterer, is in the better position to judge the safety of a particular berth. The master is an expert in navigation, knows the draft and trim of his vessel, and is on the spot. Conversely the charterer, who is usually a merchant, may know nothing about navigation or the vessel and is ordinarily far from the scene. Moreover, the charterer customarily chooses ports and berths based on commercial as opposed to nautical grounds.

Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149, 1156 (5th Cir. 1990). The Fifth Circuit aptly describes Tricon's situation. It is a merchant. It employs no mariners or persons who navigate or operate ocean-going ships. It owns no ships, docks or other facilities. Ports and berths are determined by the place where the buyer requires delivery. Tricon has limited knowledge of the navigational conditions at distant ports where it delivers material to its buyers. Tricon is not on the scene, and is not able to respond to unanticipated or unknown hazards. This describes not only Tricon, but most traders.

Disagreeing with the Fifth Circuit, the Third Circuit states that "we see 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." *Frescati*, 718 F.3d at 202. The Third Circuit misperceives the commercial reality. In many cases the charterer is, like Tricon, a merchant with no knowledge of the "subtle dangers" at or around the port, or any good way to learn about them. It selected the port because its buyer requires delivery at or near that port, not for any nautical reason. The master, on the other hand, is an expert mariner on the scene, in full command of the vessel with the full right to maneuver and handle the vessel. Charterers have no say in the actual navigation or maneuvering of the vessel. The master of the vessel is clearly better situated to "appraise a port's more subtle dangers" than *amicus* or others like it.

That is even more true of the wharfinger. The owner of the dock or berth, always present at the port and constantly operating in and near it, is certainly in a better position than a distant merchant to asses and avoid "a port's more subtle dangers." Yet the Third Circuit holds the master of the vessel and the owner of the berth only to a duty of reasonable care, while imposing strict liability on the charterer.

The Third Circuit notes that in this case the charterer owned the berth, *id.*, but that is not true in most cases. A liability rule that conflates charterers with the owner of the berth will tend to push out of the market the very large number of charterers, like *amicus*, that do not own berths, severely limiting trade and increasing shipping costs globally. The Third Circuit's assumption that charterers are usually more familiar with the berth than the master ignores

commercial reality. While the owner of the berth, the wharfinger, must be more familiar with the berth than the charterer, the Third Circuit holds the charterer to strict liability, but holds the wharfinger only to reasonable care. The Fifth Circuit's rule that holds all parties to a reasonable care standard better reflects the commercial reality.

Finally, charterers have no involvement in ship design or port design. Ship owners and port owners control ship and port design. Ship design and port design are critical to avoiding accidents. Double hull ship designs avoid pollution in the case of breach of the outer hull.[2] In Port design, wharfs are designed to minimize the effects of wind and sea to improve safety of navigation. Channels are cut, widened and dredged to avoid vessels going aground or hitting obstructions on the channel bottom. Placing ultimate liability for an accident where no party was at fault on the charterer, as the Third Circuit does, will tend to diminish the incentive of ship owners and port owners to improve ship and port design, and thus safety.

II. THE THIRD CIRCUIT PLACES THE GREATEST, AND ULTIMATE, LIABILITY ON THE PARTY LEAST CAPABLE OF INSURING AGAINST THE LOSS.

Charterers like *amicus* are also the parties least capable of insuring against major losses like the one involved in this case. Tricon regularly carries insurance against damage to a chartered vessel, but does not carry pollution insurance. This is a common practice among traders like Tricon. In this case, the vast major-

[2] In this case the vessel had a single hull. A double hull design may have avoided the vast majority of the damages.

ity of the $140 million in damages relate to pollution damages. It is difficult for traders like Tricon that own no ships, vessels, docks or terminals, to obtain pollution insurance at an affordable price. On the other hand, the owners of vessels, port facilities and terminals regularly carry pollution insurance, and pollution insurance products are readily available to such parties.[3]

By imposing strict liability on the charterer but holding the master and the wharfinger only to a duty of reasonable care, in cases like this one where no party was at fault, the Third Circuit imposes ultimate liability on the charterer. Yet in many cases the charterer will be like *amicus* a merchant and least capable of insuring against the loss. The Third Circuit again ignores commercial reality.

III. CONTRACTING AROUND THE THIRD CIRCUIT RULE IS NOT COST FREE.

It can be argued that because the Third Circuit decision merely interprets a contractual provision, its rule is not commercially consequential because parties that are dissatisfied with the Third Circuit's interpretation can negotiate a different contractual provision. However, contracting around a faulty interpretation of a common contractual provision is not so easy, and it is never cost free.

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[3] The facts of this case demonstrate this. In this case petitioner CARCO chartered the vessel from Star Tankers, which had leased the vessel from its owner, respondent Frescati. Under its contract with CARCO, Star Tankers was required to maintain $1 billion in oil pollution insurance. Petitioner's Add. 42a. CARCO was not required to maintain pollution insurance.

Vessel charter contracts are frequently based on highly standardized and venerable forms[4] so it can be difficult to persuade vessel owners to depart from them. While the commercial terms of ship charter contracts, like price and schedule, are intensely negotiated between vessel owners and charterers, terms like the "safe berth" provision are rarely the subject of discussion between vessel owners and charterers. If the Third Circuit's rule is adopted nationally, Tricon will have to intensely negotiate the "safe berth" provisions in the hundreds of ship charter contracts it makes every year because it simply cannot afford the potential liability. This will immediately increase transaction costs. Further, in order to modify highly standardized and venerable clauses that vessel owners are used to seeing in their charter contracts, Tricon will likely have to make commercial concessions, increasing its cost of doing business and reducing its profitability. This is also true for the many other trading companies like Tricon that must regularly charter vessels to fulfill their sales contracts.

It is true that parties always may negotiate around a judicial interpretation of a contractual provision, or at least can try to. But negotiation is not without cost. Courts should endeavor to interpret common contractual terms in a way that comports with the commercial realities. As discussed above, the Third Circuit's interpretation of the "safe berth" provision of ship charter contracts does not.

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[4] In this case the form used was the ASBATANKVOY. Tricon frequently enters into ship charter contracts based on this very same form.

CONCLUSION

In this case, the Court is asked to resolve a conflict between the circuit courts as to whether the "safe berth" provisions of ship charter contracts are an absolute guarantee that the vessel will reach the berth safely, and thus impose strict liability on the charterer. The Third Circuit held that it does, although it recognizes that the master of the vessel and the wharfinger are both held to only a duty of reasonable care. The Third Circuit's rule ignores commercial reality by placing the greatest potential liability on the party least capable of avoiding and insuring against the loss. This imposes significant costs on charterers like Tricon. The Fifth Circuit, by contrast holds all parties, the master, the wharfinger and the charterer, to a duty of reasonable care. The Fifth Circuit's rule better reflects commercial reality and should be adopted by the Court.

The judgment of the Third Circuit Court of Appeals should be reversed.

Respectfully submitted,

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