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

BRIEF OF AMICI CURIAE THE AMERICAN FUELS & PETROCHEMICAL MANUFACTURERS ASSOCIATION AND INTERNATIONAL LIQUID TERMINALS ASSOCIATION IN SUPPORT OF PETITIONERS

RICHARD MOSKOWITZ
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1800 M STREET, N.W.
WASHINGTON, DC 20036
(202) 457-0480

BRENDAN COLLINS
Counsel of Record
EDWARD D. GREENBERG
KRISTINE O. LITTLE
GKG LAW, P.C.
1055 THOMAS JEFFERSON STREET N.W.
SUITE 500
WASHINGTON, D.C. 20007
(202) 342-5200
BCOLLINS@GKGLAW.COM

Counsel for Amici Curiae

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

Cases

Statutes and Regulations

Treaties

Other Authorities

STATEMENT OF INTEREST[1]

Amici, The American Fuel & Petrochemical Manufacturers ("AFPM") and the International Liquid Terminals Association ("ILTA"), are adversely affected by the Third Circuit's decision to impose absolute liability on charterers, who enter into contracts for the marine transport of goods, including oil and petrochemical products.[2] The decision does not merely affect the Petitioner but all parties who enter into charter agreements using standard forms that provide that the charterer shall procure a "safe place or wharf" that the vessel can "proceed thereto, lie at, and depart therefrom always safely afloat."

The matter arises from a voyage charter agreement—a marine contract for the carriage of a cargo of crude oil by ship—between Star Tankers Inc., a time charterer or chartered owner of the M/T Athos I ("*Athos*" or "Vessel"), and Citgo Asphalt Refining Company ("CARCO" or "Charterer").

An oil spill occurred in the Delaware River on November 26, 2004, when the *Athos* allided with a hidden anchor that had been abandoned in Federal Anchorage No. 9 ("Anchorage"). The allision occurred

---

[1] Pursuant to this Court's Rule 37.6, no counsel for any party authored this brief in whole or in part and no person other than *amici*, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. Pursuant to this Court's Rule 37.2(a), counsel of record received timely notice of the intent to file this brief and all parties have consented to its filing.

[2] Such contracts are referred to as "charter agreements" or "charter parties" and the shippers are referred to as "charterers."

300 yards from the destination terminal, in an area dredged and maintained by the Army Corp of Engineers.

Remediation of the incident was administered in accordance with The Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701-2761. Frescati Shipping Co. Ltd. ("Frescati"), as owner of the Vessel that discharged the oil, initially was designated as the "responsible party" for the clean-up. Frescati was able to limit its liability and obtain reimbursement above a certain amount from the OPA's Oil Spill Liability Trust Fund (the "Fund"). Frescati applied for exoneration from liability under a provision in OPA allowing such exoneration if the incident was the sole fault of another party – here the party that discarded the anchor. Frescati later inexplicably withdrew this claim. Petition for a Writ of Certiorari Appendix (hereinafter "Pet. at App.") at App. D 284a n.6.

Subsequently, Frescati and the United States ("Government"), who administers the Fund, joined forces and pursued recovery from CARCO, by implicating it as the party responsible for the allision.

The AFPM and ILTA have members who are stakeholders in maritime transportation, storage and oil refining and petrochemical industries. And they have an interest in the proper allocation of responsibilities under maritime law. Members of the *amici* are similarly situated as CARCO, and their operations will be adversely affected if the Third Circuit's decision is not reversed.

AFPM (formerly the National Petrochemical and Refiners Association) is a national trade

association whose members include nearly all United States petroleum refining and petrochemical manufacturing capacity, one of whom is CITGO. AFPM members supply consumers with a variety of products that are used daily in homes and businesses. Many AFPM members operate marine terminals. *Amici* often wear two hats: one as a shipper (or charterer) and one as a wharfinger. As such, they often act both as wharfingers and as shippers of cargo under charter agreements and shippers or consignees under bill of lading contracts. Member companies with terminals along the Delaware River and its tributaries include Monroe Energy and PBF Energy. *See*: http://www.afpm.org/ for more information.

ILTA is composed of more than 80 member companies that own and/or operate about 1,000 bulk liquid storage terminals in 37 countries. In the U.S., ILTA members operate in all 50 states. Member companies with terminals along the Delaware River and its tributaries include Buckeye Partners, L.P., Contanda LLC, Kinder Morgan Inc., Magellan Midstream Partners, L.P., MIPC, LLC, Plains All American Pipeline, L.P., and Energy Transfer L.P. *See*: http://www.ilta.org/ for more information.

The matter before the Court is of critical importance not only to a*mici*'s commercial operations, but also to the appropriate administration of the U.S. marine transportation system. The duties and responsibilities of the participants in the marine transportation industry must be consistently applied and uniformly enforced.

Amici object to the Third Circuit's imposition of absolute liability on charterers entering into charter agreements for damages that may occur during the voyage. That decision disregards, indeed, it fails to even acknowledge, Supreme Court authority holding that a safe berth provision in a charter agreement does not constitute a warranty and introduces uncertainty into *amici's* operations. The Third Circuit decision runs afoul of well-established maritime policies as reflected in the Carriage of Goods by Sea Act of the United States ("COGSA"), 46 U.S.C. § 30701 *note*, and is flatly contrary to English common law which does not impose liability on charterers where, as here, the damages result from an abnormal occurrence rather than inherent conditions of the port.

For these reasons, *amici* have a direct, substantial, and vested interest in the outcome of this litigation. The Third Circuit's decision is contrary to sound law and policy and, if left to stand, will have far-reaching negative consequences.

ARGUMENT

The Third Circuit's decision is internally inconsistent, holding that a wharfinger satisfies its obligation to provide a safe berth when it exercises due diligence but a charterer who designates the use of the same berth is liable regardless of fault. No logical rationale is offered, or exists, however, as to why a wharfinger who offers a safe berth is held to a standard of due diligence, but a charterer who designates the same safe berth is deemed to have

assumed an absolute duty to prevent harm to the vessel.

Reading the safe berth provision of the charter agreement as imposing strict liability on a shipper also runs contrary to the policy goals reflected in COGSA, which reflects not only nationwide but worldwide standards governing the maritime shipment of cargo. COGSA expressly provides that shippers cannot be held liable for damages sustained by a carrier or a vessel absent a showing of negligence and that contracts providing to the contrary are void. Reading the safe berth provision of the voyage charter contract to impose liability on CARCO, where it was not negligent, runs flatly contrary to the plain language and policy goals of COGSA.

Imposing liability for unknown and unknowable dangers based upon a safe berth provision also creates an unnecessary rift between the maritime laws of the United States and those of the United Kingdom – two of the world's largest, and most legally influential, maritime nations. Under well-established English law, a charterer providing a safe port only promises that the berth is safe in normal circumstances. Neither logic nor consistency warrant imposing absolute liability on the inherently ambiguous language at issue, particularly given that the owner of a vessel, as opposed to a charterer, is best situated to obtain insurance in order to protect against unknown and unknowable risks encountered on the high seas.

Finally, imposing absolute liability upon a charterer based upon a safe berth provision while

simultaneously recognizing that the same entity acting as a wharfinger cannot be held liable absent a showing of negligence, is particularly inappropriate here. This allision occurred 300 yards from the wharfinger's premises in a federally-maintained anchorage outside of the wharfinger's control. Because a wharfinger has no duty to protect vessels against harm that occurs in adjacent navigable waters, imposing liability upon a charterer for damages for a purported violation of a safe berth provision lacks any legitimate basis.

I. The Third Circuit's Decision Imposes Inappropriate Obligations on Charterers

The Third Circuit's decision – that legal and policy reasons warrant imposing strict liability on charterers rather than an obligation to exercise due diligence – lacks merit. Holding that a safe berth provision in the ASBATANKVOY forms[3] imposes strict liability on innocent charterers conflicts with the Supreme Court's decision in *Atkins v. Fibre Disintegrating Co.,* 2 F. Cas. 78 (E.D.N.Y. 1868) (No. 601), *aff'd,* 85 U.S. (18 Wall) 272 (1873), as well as better reasoned Fifth Circuit authority and the laws of the United Kingdom governing how to interpret such language.

---

[3] The ASBATANKVOY charter party agreement forms are the most widely used charter forms for tanker voyages. Despiona Aspragkathou, *The Asbatankvoy Charterparty Clauses for the Commencement of Laytime-Interpretation under England and American Law*, 40 J. MAR. L. & COM. 133, 133 (2009).

Safe berth clauses, such as the one at issue, are standard in maritime charter contracts. Here, the clause at issue provides that CARCO was to designate a "safe place or wharf" where the Vessel could "proceed thereto, lie at, and depart therefrom always safely afloat." Pet. at App. B 88a-89a.

When confronted with this language, the Fifth Circuit has held that a charter agreement providing that the charterer should designate "safe discharging berths [the] vessel being always afloat," does not impose liability without fault against the charterer. *Orduna S.A. v. Zen-Hoh Grain Corp.*, 913 F.2d 1149, 1156, n. 6 (5th Cir. 1990). The Fifth Circuit explained that although its decision was contrary to Second Circuit authority, commentators have strongly criticized those decisions. *Id.* at 1156. The Fifth Circuit also recognized that the vessel master on the scene is in the best position to judge the safety of a particular berth. *Id.* The court further reasoned that requiring negligence as a predicate for the shipper's liability does not increase the risk that the vessel will be exposed to an unsafe berth. *Id.* Instead, because courts have interpreted a safe berth clause to free the master from any obligation to enter into an unsafe port or berth, "it is by no means necessary that they be given the quite different meaning of creating an affirmative liability of charterer to ship, in case of mishap." *Id.* (citations omitted). The Fifth Circuit also recognized that, as discussed below, the Supreme Court's affirmance of *Atkins* supported its holdings.

Based upon all of those considerations, the Fifth Circuit concluded that:

> We agree with commentators cited above that no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects. Such a warranty could discourage the master on the scene from using his best judgment in deterring the safety of the berth. Moreover, avoiding strict liability does not increase risk because the safe berth clause itself gives the master the freedom to take his vessel into an unsafe port.

Orduna S.A. at 1157.[4]

The Third Circuit's reasoning is predicated upon a finding that when a wharfinger invites a party to use its dock facilities it is agreeing to use due diligence, but the same wharfinger (as a charterer) designating the same wharf in a charter agreement, is necessarily assuming an absolute obligation to protect against any harm regardless of fault. Such a holding cannot withstand scrutiny. Further,

---

[4] One of the foremost commentators, GRANT GILMORE & CHARLES L. BLACK, Jr., THE LAW OF ADMIRALTY, 204-05 (2d ed. 1975), observed that "there is no reason in policy or interpretation, for holding the charterer liable for ship's damages on the basis of the safe port and safe berth clauses." The treatise further suggested: "It is to be hoped that the Supreme Court will one day . . . reaffirm the principle of the *Atkins* decision, confining charterer's liability to the case wherein his special knowledge or actions make it reasonable to charge him." *Id.* at 207. Other commentators similarly have observed that basic fairness requires that decisions imposing strict liability on the charterer be reconsidered. J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth,* 49 TUL L. REV. 878 (1975).

interpreting a safe berth clause[5] as imposing liability without fault runs contrary to well-established admiralty precedent, including COGSA and other international conventions, which expressly hold as a matter of maritime policy that shippers should not be held liable for damages absent a showing of the shipper's negligence. In choosing to read the language of a safe berth clause as imposing strict liability, the Third Circuit ignores this sound public policy and invites confusion in maritime law.

A. Wharfinger and Charterers' Duty to Provide a Safe Berth Should Be Similarly Construed, Not Construed Asymmetrically

The law has been well established for over a century that a wharfinger does not guarantee the safety of vessels coming to his wharf but instead is bound to exercise reasonable due diligence in assessing the condition of the berths and to give notice if there is any known dangerous obstruction to the use of its berth. *See Smith v. Burnett*, 173 U.S. 430, 433 (1899). The Third Circuit recognized as much in its 2013 and 2018 decisions, holding that a wharfinger is not a guarantor of a visiting ship's safety but instead is only bound "to use reasonable diligence to ascertain whether the approach to its berth is safe for an invited vessel." Pet. at App. A 26a.

It is illogical to impose more onerous duties to provide a safe berth on a charterer, particularly when

[5] The brief refers to safe port/safe berth clauses interchangeably.

the assurances being provided are identical. In both instances, parties have a duty to select a safe berth that the vessel can safely enter and exit. In the ASBATANKVOY form, this is framed as the ability to proceed to the port, "lie at, and depart therefrom always safely afloat." The same assurances provided by the same party as a wharfinger and charterer of the vessel are not transformed into an absolute warranty when charterers contractually agree to use a safe berth.

People of State of California v. S/T Norfolk, 435 F. Supp. 1039 (N.D. CA. 1977), is instructive regarding the illogic involved in holding a charterer to a higher standard than a wharfinger. There, the state of California sued a charterer (who was also a wharfinger) for damages arising from an allision between a vessel and a bridge. In denying liability, the court concluded that the wharfinger was not liable because it had exercised reasonable diligence in furnishing a safe berth. *Id.* at 1048. In rejecting the claim against the wharfinger in his capacity as a charterer, the court recognized that there was no basis for applying different obligations upon a charterer as opposed to a wharfinger. *Id*. Here, the Third Circuit's analysis turns that logical conclusion upside down by imposing an absolute warranty on the charterer while simultaneously and (correctly) holding that the wharfinger is not liable absent a failure to exercise due diligence.[6]

---

[6] *In re Frescati*, below, the court failed to explain why safe berth provisions are a warranty, merely citing the District Court's

Almost a century ago, the Second Circuit recognized the fallacy of imposing a different and more onerous legal standard on shippers and consignees as opposed to wharfingers, as the Third Circuit has done here (and as the Second Circuit itself has done in some cases). In *M. & J. Tracy,* 283 F. 100 (2d Cir. 1922),[7] the court adopted the same reasoning as the Fifth Circuit later did in *Orduna,* holding that:

> The consignee of a vessel is "bound to provide a safe berth,". . . which means no more than that such consignee while not guaranteeing the safety of the destinated wharf, "is bound to exercise diligence in ascertaining the condition of the dock and of the berths, and to give to notice of any obstruction or of any danger to vessels." This also, is an obligation to exercise due care according to the circumstances, and as against a consignee it is as necessary to prove negligence as against a wharfinger. There is no warranty or insurance in either instance. Yet a distinction has been suggested between the standard of duty required of a wharf owner and that of a consignee.
>
> The difference between the obligations of consignees and wharfingers does not rest upon any legal distinction that can be drawn between their respective "standards of duty."

---

opinion without analysis. *In re Frescati Shipping Co., Ltd.,* 886 F.3d 291, 300-01, 306-08 (3d Cir. 2018).

[7] Although the case did not involve a voyage charter, the court's interpretation of the meaning of the words "safe berth" are equally applicable to a voyage moving under a charter.

> Both are bound to the exercise of care and diligence under the circumstances; . . . a consignee, who knows that a berth has a good reputation, that it has been used for years without complaint or known accident, is entitled to transact business on that reputation.

Id. (citations omitted).

In *M. & J. Tracy*, this meant that the consignee could not be held liable for damages caused by a boulder lying on "an otherwise safe and soft bottom," the existence of which was not known to the consignee or the public. 283 F. at 102. Subsequently, the Second Circuit cited *M. & J. Tracy* for the proposition that a consignee could not be held liable where the "damage [occurred] in a berth which had been frequently and safely used and had a good repute." *The Gildersleeve No. 339*, 68 F.2d 845, 848 (2d Cir. 1934).[8] Thus, the Second Circuit, which inconsistently has held that safe berth provisions constitute an express warranty, has also held that the duty to ensure a safe berth requires only reasonable care.[9]

---

[8] *See also Berwind-White Coal Mining Co. v. City of N.Y.*, 48 F. 2d 105, 107 (2d Cir. 1931) (ruling that a steamship line was not liable for damages where there was no reason to believe that hidden risks existed and "the slip was one in common use").

[9] *See, e.g., Eastchester Plymouth Transp. Co. v. Red Star Towing & Transp. Co*, 20 F.2d 357, 358-59 (2d Cir. 1927) (consignee failed to exercise reasonable care by failing to adequately safeguard against known dangers of low tide); *Red Star Barge Line Inc. v. Lizza Asphalt Constr. Co.,* 264 F.2d 467, 468-69 (2d Cir. 1959) (consignees have a duty of reasonable care).

B. Safe Berth Clauses are Conditions, Not Warranties, Under Which a Charterer has a Duty of Reasonable Diligence to Select a Safe Berth.

In imposing strict liability on CARCO based upon a safe berth provision, the Third Circuit ignores binding Supreme Court precedent. One and a half centuries ago, this Court held that a safe berth provision is a condition to a master's obligation to perform, not a warranty by the charterer regardless of fault. *Atkins v. Fibre Disintegrating Co.*, 2 F. Cas. 78, *aff'd*, 85 U.S. (18 Wall.) 272 (1873). *Atkins* involved a charter agreement providing for the charterer to select a "safe port." 2 F. Cas. at 79-80. The district court refused to find the charterer liable even though it admitted that the port was unsafe. *Id.* Although the charterer failed to nominate a safe port, by proceeding to the port anyway without objection, the master waived the charterer's failure to meet the safe berth condition. *Id.* at 79. In so holding, the district court flatly rejected the argument that the master could not have waived its right to object to the designated port because the safe port representations constituted a "warranty." This Court expressly approved the district court's reasoning and conclusion on the merits, namely that a safe berth provision in a charter agreement was a condition that merely gives a ship master an option not to proceed to a designated port if it is unsafe, and not a warranty. *Atkins*, 85 U.S. at 299; *Atkins*, 2 F. Cas. at 79.

To the extent that English[10] and American courts have erroneously backtracked from the recognition that charterers are not warrantors under safe berth clauses, such decisions are of relatively recent vintage and in the case of English decisions clearly are no longer good law.[11] *See, e.g.,* J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 TUL. L. REV. 860, 862 (1975) ("Until comparatively recently, the decisions, with few exceptions, held that the charterer's liability under safe port clauses was not that of an insurer or warrantor. While the charterer was held responsible to the owner if it acted negligently, it was required to exercise only ordinary and reasonable care under the circumstances."); *The Pass of Leny*, [1936] 54 Lloyd's List Rep. 288, 293-94 (Adm.) (safe berth provision's words "as near thereunto as she may safely get" are neither an express nor implied warranty).

Under existing English law, CARCO would not be liable for unknown and unknowable dangers lurking in the Federal Anchorage based upon a charter party's safe berth provision. Thus, although English case law sometimes uses the language of "warranty" in describing safe berth clauses, the

---

[10] "The interpretation of the clause in English law is important because charter parties are commonly governed by English law, and as a result, that law has been influential on the American law of charter parties." David R. Maass, *The Safe-Berth Warranty and Its Critics*, 39 TUL. MAR. L.J. 317, 323 (2014).

[11] *See Gard Marine and Energy Ltd. v. China National Chartering Company Ltd.*, [2017] UKSC 35 [14]-[16] ("*Ocean Victory*").

holdings thereunder make clear that liability cannot be imposed where the damages do not arise out of an inherent condition of the port. Any uncertainty that might have existed in this regard has been dispelled by the Supreme Court of the United Kingdom's recent decision in *Gard Marine and Energy Ltd. v. China Nat'l Chartering Company Ltd.*, [2017] UKSC 35 [10]-[11] ("*Ocean Victory*"). In *Ocean Victory*, the court unanimously recognized that a safe port warranty does not impose liability on a charterer if the damage sustained by the vessel was caused by an "abnormal occurrence." *Id.* at 5. Specifically, the court recognized that a port will not be safe unless a ship can reach it, use it and return from it without, "*in the absence of some abnormal* occurrence, being exposed to dangers. . . ." *Id.* (emphasis supplied.). Thus, if a vessel could enter and exit the designated port under normal circumstances, a claim for breach of a safe berth clause would not lie. "So a charterer did not assume the risk of loss from an unusual event which was not characteristic of the port at the time when the ship would be there. The obligation to give indemnity for the loss from such unusual events lay properly and legally with the owner's hull insurer." *Id.*[12] at 6.

In finding the charterer not liable for damages due to an unusual confluence of storm patterns, that

---

[12] The evidence suggests that the parties here operated under the assumption that CARCO would not be responsible for oil spills as Star Tankers, the time charterer of the vessel, was obligated to maintain $1 billion in "insurance coverage for oil pollution" throughout the period of the charter. Brief of Petitioners dated July 9, 2019, at pg. 26.

court noted that the test is not whether the event causing the loss is reasonably foreseeable but instead whether the relevant event is an abnormal occurrence. *Id*. at 7.[13] Thus, in order to breach a safe port clause, the damage must occur as a result of the "set-up" or a characteristic of the port. *Id*. at 7-8. Most tellingly, the court rejected as "heresy" the position adopted by the Third Circuit below that "there was an absolute continuing contractual promise that at no time during her chartered service would the ship find herself in any port which was or had been unsafe for her." *Id.* at 9.[14]

Based on these policy considerations, the court held that: 1) a safe port promise is not a continuing warranty; and 2) the promise of a safe port necessarily assumes normality, *i.e.*, the characteristics, features, systems and state of affairs which are normal at the port at the particular time the vessel should arrive. *Id.* at 10. Applying this standard, the court concluded that analysis of safe port disputes should be

---

[13] The distinction drawn is that the mere fact that a danger is foreseeable does not turn a rare event into a normal characteristic or attribute of the port. *Id.* at 16. Thus, while an earthquake in San Francisco may be foreseeable, it is still an abnormal occurrence. Here, even under a "foreseeability test," CARCO could not reasonably have foreseen the existence of the hidden anchor at issue.

[14] It is noteworthy that the Third Circuit recognized that there is an exception under a safe port promise for "abnormal weather or other occurrences" but then failed to address why damages from an unknown and unknowable danger would not constitute an abnormal occurrence. *See Frescati Shipping Co., Ltd.*, 718 F.3d 184, 200 (3d Cir. 2013).

straightforward. "Was the danger alleged an abnormal occurrence, that is something rare and unexpected, or was it something which is normal for the particular port for the particular ship's visit and the particular time of the year?" *Id.* at 10.

The court reasoned that this approach provides a coherent allocation of risks such that: 1) the vessel owner assumes responsibility for damages avoidable by good navigation and seamanship; 2) the charterer is responsible for predictable losses caused by dangers that are normal at the time when the ship is at the nominated port; and 3) the owner's insurer is responsible for loss caused by abnormal occurrences.[15]

Applying this straightforward and common-sense approach here, there can be no legitimate dispute that CARCO should not be held liable for the damages at issue. The fact that a long-lost anchor resting in the Federal Anchorage somehow miraculously flipped over and its flanges tore a hole in

---

[15] The same logic applies to previous cases where English courts recognized that when changes arose making a port unsafe after formation of the charter agreement, there is no breach of the safe berth provision. *See* SIR ALAN ABRAHAM MOCATTA ET AL., SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING, Art. 66, Note, at 124-125 (18th ed. 1974) (no liability where port "becomes unsafe, through some unusual event, between the date of the order and the arrival of the ship."); *see also Kodros Shipping Corp. v. Empresa Cbana de Fletes,* [1982] 2 Lloyd's Rep. 307, 315 (H.L.) (safe berth provision means that, when the order is given, that port or place is prospectively safe). For the same reason that a charterer should not be held liable for changed circumstances, it should not be liable for damages resulting from unknown hazards not discoverable through reasonable diligence.

the *Athos* cannot be described as anything but an abnormal occurrence. It certainly is not a characteristic of the terminal (or more accurately characteristic of a government-maintained area 300 yards away from the terminal) given that countless ships have traversed those same waters for decades without encountering any harm. *See In re Frescati Shipping Co., Ltd.,* 886 F.3d 291, 297 (3d Cir. 2018) (*"*between 2001 and the allision in 2004, 241 vessels went to CARCO's Paulsboro berth, and many others have anchored in the anchorage over the years" without incident.).[16]

Beginning in *Cities Service Transportation Co. v. Gulf Refining Co.*, 79 F.2d 521 (2d Cir. 1935), the Second Circuit ignored the holdings in *M & J Tracy* and its progeny and, in a terse *per curiam* opinion, found liability based upon a charterer employee's representations regarding a "fair" berth when the ship ran aground in shallow water. There, the court added in dictum, without justification, that "the charter party was itself an express assurance, on which the master was entitled to rely, that at the berth 'indicated' the ship would be able to lie 'always afloat.'" *Id.*

From this dictum morphed a line of cases that ultimately were followed by the Third Circuit below. In *Park S.S. Co. v. Cities Serv. Oil Co.*, 188 F.2d 804,

---

[16] The anchor appears in a geographical study of the river done in 2001, App. A at 8a, but the anchor is believed to have been lost long before that. Thus, the number of vessels that entered and exited the Paulsboro berth without incident is likely of a magnitude greater than the figure cited by the Third Circuit.

806 (2d Cir. 1951), the Second Circuit ruled that safe berth clauses entail a warranty because "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." But, as Gilmore and Black's leading admiralty law treatise observes, the only risk conceded by a charterer in safe berth clauses is the risk of non-performance by the vessel master if the charterer selects an unsafe port, which is a significant concession as it expressly allows a master to refuse to enter an unsafe port without liability for delay. *See* GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY §4-4 (2d Ed. 1975) ("[T]he master, by the very words of the usual clauses, is *not* obligated to take his vessel to any unsafe port or berth. The very purpose of the clauses is to free him of this obligation.").

It is noteworthy that in many cases, despite stating that safe berth clauses are warranties of liability without fault by charterers, those courts have found exceptions to the purported "warranty." In other words, courts routinely refuse to hold charterers strictly liable when accidents are *not* charterers' fault. Thus, where the master or shipowner is negligent, *i.e.*, has failed to exercise good navigation and seamanship to avoid an avoidable risk, courts universally refuse to find a breach of the safe berth provision. *Ocean Victory* at 19.

A safe port, by definition, does not mean a port free from risk. As the court recognized in *Ocean Victory*, a port is safe when "the particular ship can reach it, use it and return from it without, *in the*

absence of some abnormal occurrence being exposed to danger which cannot be avoided by good navigation and seamanship." Id. at 5*; see also* JULIAN COOKE *ET AL.*, VOYAGE CHARTERS ¶ 5.137 (3d ed. 2007); *Scrutton*, *supra,* Art. 66, at 123 (noting that known, avoidable risks and temporary dangers or obstacles do not mean a port is unsafe).

This Court in *Atkins,* similarly defined a "safe port" as "a port which this vessel could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the seas." *Atkins*, 2 F. Cas. at 79. In other words, *Atkins* expressly acknowledged that charterers did not breach safe berth clauses if a port was rendered unsafe by abnormal occurrences. There is no logical or legal basis for concluding that latent, unknown dangers like an abandoned anchor are not within this exclusion from the safe port definition.[17]

Although United States courts generally have not elaborated on the meaning of "abnormal occurrence" (as the Supreme Court of the United Kingdom did in *Ocean Victory),* abnormal occurrences or conditions should be construed to include Acts of God and Perils of the Sea. Acts of God, which by definition include accidents "due to natural causes … without human intervention," are those acts that "could not have been prevented by any amount of foresight, pains and care, *reasonably expected* from

---

[17] COGSA specifically provides that the carrier is not "responsible for loss or damages arising or resulting from . . . (c) Perils, dangers, and accidents of the sea or other navigable waters." 46 U.S.C. § 30701 *note*.

him" and are already exceptions to shipowner liability. *Scrutton*, *supra*, Art. 104, at 219 (emphasis added).

The "exceptions" noted above suggest that courts are applying a standard of reasonable diligence *ex ante*, *i.e.*, liability *with fault*, which is implicit in charterer's obligation to select a berth. *See Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1157 (5th Cir. 1990) ("a charter party's safe berth clause does not make a charterer the warrantor of the safety of a berth. Instead the safe berth clause imposes upon the charterer a duty of due diligence to select a safe berth.").

The Third Circuit below expressly acknowledged the exception for abnormal occurrences yet failed to consider that a latent abandoned anchor presented an abnormal occurrence such that CARCO did not breach the safe port clause. *See In re Frescati Shipping Co., Ltd.*, 886 F.3d 291, 300 (3d Cir. 2018) (A port is deemed safe "without, *in the absence of abnormal weather or other occurrences*, being exposed to dangers which cannot be avoided by good navigation and seamanship.") (emphasis added). Given, as the Third Circuit itself recognized, hundreds if not thousands of vessels have used the terminal at issue without incident, the condition confronted by the *Athos* was an abnormal occurrence and certainly not a characteristic of the port. Under these circumstances, the Third Circuit should have applied the law it cites and concluded that CARCO was not in breach of the charter party.

C. The Third Circuit's Rationale Runs Afoul of Well-Established Admiralty Law Policies and Introduces Unfair and Uncertain Allocations of Liability

The Third Circuit's decision imposing liability without fault against charterers runs afoul of the policy goals reflected in maritime law, including COGSA.

Federal admiralty law should be "a system of law coextensive with, and operating uniformly in, the whole country." *The Lottawanna*, 88 U.S. (21 Wall.) 558, 575 (1874). Congress furthered this goal by establishing COGSA, which governs "all contracts for the carriage of goods by sea to or from ports of the United States in foreign trade." 46 U.S.C. § 30701 (*note* § 13).

As noted by the Second Circuit, "COGSA is the central statute in commercial admiralty, governing over $200 billion worth of American foreign commerce annually." *Senator Linie GMBH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145, 168 (2d Cir. 2002). Lifted almost completely from the Hague Rules of 1921, as amended by the Brussels Convention of 1924,[18] COGSA codified the United States' obligations under the Hague Rules, and "applies *ex proprio vigore* to all contracts of carriage of goods by sea between the ports

---

[18] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Article 4 § 3, 120 LNTS 187, 51 Stat. 233 (Aug. 25, 1924) ("Hague Rules").

of the United States and the ports of foreign countries." *Senator Linie*, 291 F.3d at 153.

COGSA's goal is to "foster international uniformity in sea-carriage rules and allocating risks between shippers and carriers in a manner that is consistent and predictable." *Id.* at 148; Carriage of Goods by Sea: Hearing Before the Comm. on Commerce, 74th Cong. 37 (1935), reprinted in 3 Legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoires of the Hague Rules 359 (Michael F. Sturley, ed. 1990) ("Shipowners would also benefit from the passage of H.R. 3830 through a more definite and uniform fixing of their liabilities . . .").

COGSA and the Hague Rules standardized liability to create international fairness. *Senator Linie*, 291 F.3d at 158 ("In essence, the purpose of these laws is to allow international maritime actors to operate with greater efficiency and under a mantle of fairness.") (Citation omitted). The concern was not only fairness between nations but placing charterers and carriers on equal footing. "One of the outstanding purposes of the proposed legislation (COGSA) is to increase the character and degree of responsibility of the carriers; and the bill was designed in large measure in the interest of the shippers rather than of the carriers." 79 Cong. Rec. 13340-43 (1935) reprinted in 1 Legislative History of the Carriage of Goods by Sea Act and the Travaux Preparatoires of the Hague Rules at 588.

COGSA expressly provides that "[t]he shipper shall not be responsible for loss or damages sustained

by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect" of the shipper, 46 U.S.C. § 30701 (*note* §4). This principle did not exist prior to the statute's enactment when carriers could completely limit their own liability. As reflected by its plain terms, Section 30701 (*note* §4) has been read as abolishing common law warranties and requiring that a carrier prove actual fault or neglect on the part of a shipper in order to recover damages or be indemnified. *See Excel Shipping Corp. v. Seatrain Int'l S.A.*¸584 F. Supp. 734, 747 (E.D.N.Y. 1984).

In construing whether the public policies reflected in COGSA for the shipment of goods should apply or whether maritime common law should be adopted, this Court has stated that where the issue of federal statutory or federal common law governs, "we start with the assumption that it is for Congress, not federal courts to articulate the appropriate standard to be applied as a matter of federal law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). Thus, "when Congress addresses a question previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 314. Furthermore, the Court has previously extended congressional policy decisions to areas not expressly covered by federal statute to ensure the uniformity of admiralty and maritime law. *See Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 397-403 (1970).

Congress's policy of ensuring fair, uniform limits on the contractual liability of shippers under COGSA militates against interpreting safe berth provisions to establish shippers' liability without

fault. Just as COGSA and the Hague Rules were designed to restrict carriers from contractually limiting their liability, the unlimited *imposition* of liability upon shippers should be avoided. In imposing strict liability on charterers, the Third Circuit ignores well-founded congressional policy decisions and express statutory language reflecting a refusal to impose liability on charterers like CARCO absent a showing of negligence.

In imposing liability without fault on charterer, the Third Circuit not only promotes inconsistency in maritime law (both nationally and internationally) it manages to advance a fundamentally unfair and irrational public policy flatly contrary to the regime established by COGSA. As the Supreme Court of the United Kingdom recognized in *Ocean Victory*, imposing liability on vessel owners and charterers based upon their ability to prevent and insure against such losses promotes fairness and a coherent approach to allocation of risk. Utilizing that common-sense approach, vessel owners are responsible for damages avoidable by good navigation and seamanship, while charterers are responsible for loss caused by dangers which are predictable as normal for the parties at the time when the ship is entering or exiting the nominated port. To the extent that abnormal conditions are encountered, vessel owners are best positioned to obtain insurance to address that risk. *Ocean Victory* at 9-11.[19]

---

[19] CARCO and other AFPM members pay substantial sums into the Fund established under OPA, which exists to address circumstances like these. OPA provides that, ordinarily, owners

The Third Circuit's decision will impair maritime commerce by imposing duties and responsibilities inconsistent with the language of standard form charter contracts used throughout the maritime shipping industry. By transforming a safe berth condition into a safe berth warranty, the Third Circuit unfairly imposes liability on charterers despite no showing of charterer negligence. Holding that safe berths are warranties leads to bizarre results, particularly under the Third Circuit's expansive definition of "safe berth." Here, for example, the government (as subrogee) seeks to recover from the charterer despite the fact that it had control over and maintained the area in which the accident occurred (Federal Anchorage No. 9). Pet. at App. D 285a (noting that the area is dredged and maintained by the Army Corps of Engineers, which conducts hydrographic surveys and dredges as necessary to maintain the Anchorage's depth); *Japan Line, Ltd. v. U.S.*, 1976 A.M.C. 355, 364 (E.D. Pa. 1975), *aff'd* 1977 AMC 265 (3d Cir. 1976) ("Congress

---

of single hulled vessels such as the *Athos* are responsible parties for oil spills. OPA further established the Fund to pay for clean-up when there is no viable responsible party to do so, which Fund is financed by a tax on each barrel of oil imported into or processed in the United States. Indeed, although CARCO paid approximately $103 million into the Fund between 1990 and 2004, the Third Circuit's decision dictates that although CARCO was not at fault here, it faces potential liability of more than $140 million in damages for which CARCO is not entitled to any reimbursement from the Fund. OPA was not intended to incentivize the government to sue to recover Fund payments paid out because of accidents occurring in waters the government itself maintains.

has charged the Secretary of the Army and the Chief of Engineers with the responsibility of seeing the navigable waterways remain unobstructed and safe for navigation."); *In re Frescati Shipping Co., Ltd.*, 886 F.3d 291, 296-97 (3d Cir. 2018) (defining "safe berth" to include areas adjacent to and in the general vicinity of the berth, over which a charterer has no control and has no specific duty to maintain even when it is also a wharfinger).

Charterers contemplating waterborne commerce with U.S. ports may rightfully fear the increased liability and increased risk of danger from federal waterways due to the Third-Circuit's decision, because charterer strict liability means the government can avoid depleting OPA's Funds by recovering from charterers under safe berth clauses no matter the circumstance, thereby decreasing the government's incentives to maintain its waterways. Distrust of federally-maintained anchorages will harm maritime commerce and should be avoided under uniform federal maritime policy. There are 16 federal anchorages in the Delaware Bay and River alone. *See* 33 C.F.R. § 110.157. In total, there are 67 federal anchorage grounds, plus 101 more federal special anchorage areas, all with one or more anchorages. *See* 33 C.F.R. Subparts A and B. There is already a uniform system in place for disseminating navigational information to vessels in U.S. waters. This system is designed to encourage United States' trading partners to participate in maritime commerce. The Third Circuit's decision suggests to our trading partners that the United States has shed its responsibility for maintaining this uniform system,

leaving our trading partners to decide which of the many wharfs and ports can be trusted to provide a safe berth. These harms readily can be avoided by holding that safe berth clauses only require reasonable due diligence, because few charterers would be held negligent in relying on the reputation of Federal Anchorage areas in choosing which ports and berths through which chartered vessels will travel.

The Third Circuit's decision could lead charterers to take extreme precautions to ensure a safe berth. First, to avoid liability, charterers would have to engage in wasteful practices to ensure the safety of the berth. The difficulty in locating every conceivable obstruction potentially within a few hundred yards of a berth is daunting because it is never conclusive that no further obstructions remain. Here, it took more than 40 days of searching by Frescati and the Government to locate the anchor (it was finally discovered on January 5, 2005), despite knowing the GPS track of the *Athos*, the area of allision, and the location of the allision based on the oil scour marks on the boom. *See In re Frescati Shipping Co., Ltd.*, 886 F.3d 291, 297 (3d Cir. 2018).[20]

Second, the charterer also would be compelled to micromanage the vessel's decision-making process, even though its master or local pilot (with local knowledge) is best positioned on-the-spot. As Gilmore and Black explain, the charterer ordinarily does not

---

[20] Discovering the anchor required 93 survey runs with a side scanner, and the use of divers who were ultimately unable to locate the anchor. *Id.*

have an informational advantage to the ship master,[21] nor does a charterer's selection of a port or berth cause the master to enter an unsafe port or berth because safe berth clauses excuse a master from entering an unsafe port or berth. Often, a shipper or charterer is not even situated at the destination.[22] As this Court agreed, "[t]he master is the navigator, presumed to know best the channel of the ports within the natural range of the adventure, and the capacities of his vessel; and he is the proper person to determine whether his vessel can or cannot enter any particular port." *Atkins*, 2 F. Cas. at 79; *Atkins*, 85 U.S. at 299. Thus, the notion that a shipper from Australia or Europe is better equipped to assess and prevent damage to a vessel than a pilot who operates regularly in the Delaware River lacks foundation. Even if the charterer is aware of special factors making a port or berth unsafe, which the master does not have, tort liability provides an adequate remedy for harms

---

[21] GILMORE & BLACK, supra, §4-4 ("It is the master who ordinarily has the best means of judging the safety of a port or berth, first because he is an expert in navigation, furnished with aids thereto, secondly because he knows his vessel (including its draft and its present trim), and thirdly because he is on the spot. The charterer, on the other hand, need not be a nautical expert at all, knows nothing about the vessel except its capacity, and normally is far from the scene of decision as to safety; his designations of port and berth are made (and are known to be made) on commercial rather than nautical grounds.").

[22] While CARCO's facility was in the area where this mishap occurred, many, if not most, charter agreements are entered into by shippers who are thousands of miles from the intended destination wharf.

resulting from concealing information from the ship master.[23] This is especially true because charterers, like *amici*, frequently are wharfingers or consignees, which carry their own independent tort duties. Unless reversed, the decision below would have enormous, adverse consequences for shippers and charterers worldwide, all of whom would be charged with knowledge of any potential, hidden obstacles at terminals around the world.

CONCLUSION

This Court should follow its long-established precedent as articulated in *Atkins* that a safe berth provision is not a warranty by the charterer regardless of fault. In so doing, the Court will align United States maritime law with international norms and adopt a coherent and rational policy of risk allocation between charterers and owner of vessels.

---

[23] GILMORE & BLACK, supra, §4-4 ("[I]t may well be that the charterer or consignee ought to be held liable, not because of the 'safe port' and 'safe berth' clauses, but because it ought to be held to be an actionable wrong for him to invite the ship without warning into a peril known to him, with or without the clauses."). This does not mean masters are at the mercy of careless charterers—"[t]he very purpose of the [safe berth] clauses is to free him of this obligation" to enter unsafe ports, and a reasonable diligence standard ensures that charterers remain liable for negligence. GILMORE & BLACK, supra, §4-4.

For the foregoing reasons, the judgment of the court of appeals should be reversed.

Respectfully submitted,

BRENDAN COLLINS
Counsel of Record
EDWARD D. GREENBERG
KRISTINE O. LITTLE
GKG LAW, P.C.
1055 THOMAS JEFFERSON STREET N.W.
SUITE 500
WASHINGTON, D.C. 20007
(202) 342-5200
BCOLLINS@GKGLAW.COM

RICHARD MOSKOWITZ
GENERAL COUNSEL
AMERICAN FUEL & PETROCHEMICAL MANUFACTURERS
1800 M STREET, N.W.
WASHINGTON, DC 20036
(202) 457-0480

Counsel for Amici Curiae The American Fuels & Petrochemical Manufacturers Association and The International Liquid Terminals Association

JULY 16, 2019