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

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Petitioners chartered an oil tanker, the M/T ATHOS I (ATHOS I), to carry crude oil from Venezuela to petitioners' refinery on the Delaware River. The ATHOS I struck a submerged anchor while docking at petitioners' facility, spilling approximately 264,000 gallons of crude oil into the river. The question presented is:

Whether a contractual "safe berth" clause required petitioners to designate a port that was actually safe for the ATHOS I, or merely required petitioners to exercise due diligence in selecting the port.

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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 petition for a writ of certiorari was granted on April 22, 2019. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case arose from an oil spill caused when the M/T 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 the 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 sought to recover the costs of the spill from petitioners under the contractual "safe berth" clause in the parties' voyage charter. The clause required petitioners to direct the ATHOS I to a "safe place or wharf * * * provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." Pet. Br. Add. 8a; see *id.* at 4a (requiring vessel to "proceed * * * direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat)"); *id.* at 24a (requiring petitioners to direct ATHOS I to "[o]ne (1) or two (2) safe port(s)" in the United States). Respondents and the government argued that the longstanding, prevailing interpretation

of this standard contractual language required petitioners to select a port that was actually safe—not merely, as petitioners contended, to exercise due diligence in choosing the port. The district court initially rejected the contract claims, Pet. App. 340a-343a, but the court of appeals reversed, holding that the safe berth clause constitutes an express warranty of safety. *Id.* at 292a-311a. This Court denied review. 571 U.S. 1197. On remand, the district court entered judgment for respondents and the United States on the contract claims. Pet. App. 163a-180a, 258a-260a. The court of appeals affirmed in relevant part, reiterating that "[t]he safe berth warranty is an express assurance" of safety "made without regard to the amount of diligence taken by the charterer." *Id.* at 14a.

1. a. The ATHOS I was a 748-foot, single-hulled oil tanker owned by respondent Frescati and managed by respondent Tsakos (collectively, respondents). Pet. App. 3a-4a. In October 2001, respondents entered into a "time charter"—"'a contract for the use of the carrying capacity of a particular vessel for a specified period of time'"—which placed the ATHOS I into a pool of tankers managed by Star Tankers, Inc. *Id.* at 84a-85a (citation omitted). Under the time charter, Star Tankers served as an intermediary with the right to arrange for the 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 2008). Star Tankers placed the ATHOS I in a tanker pool, a "collection of tanker vessels under various ownership" managed by a single manager, which markets the ships in the pool to "companies interested in hiring vessels to carry cargo,

facilitating the employment of each vessel." Pet. App. 84a n.33.

In November 2004, petitioners sub-chartered the ATHOS I from the Star Tankers pool to carry a load of crude oil from Venezuela to petitioners' asphalt refinery in Paulsboro, New Jersey. Pet. App. 4a, 278a. The sub-charter between petitioners and Star Tankers was made in a "voyage charter party," a contract under which "the owner of the vessel agrees to carry cargo from one port to another on a particular voyage." *Id.* at 85a; see *id.* at 279a.

The voyage charter party was "based on a standard industry * * * form" known as the "ASBATANKVOY." Pet. App. 279a. In customary language, the voyage charter provided that the vessel "shall load and discharge at any safe place or wharf, * * * which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." Pet. Br. Add. 8a. It further stated that once loaded, the ATHOS I "shall forthwith proceed, as ordered on signing Bills of Lading, direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo." *Id.* at 4a. In addition, the charter party included a "Special Provision[]" stating that petitioners would direct the ATHOS I to "[o]ne (1) or two (2) safe port(s)" along the "United States Atlantic Coast." *Id.* at 2a, 24a (capitalization altered); see *id.* at 52a (final recapitulation confirming that the ATHOS I's "discharge range" would be "1/2 safe port(s)" on the Atlantic Coast) (capitalization omitted); *id.* at 62a (fixture note confirming same). The parties and the court of appeals have referred to the contractual provisions collectively as the safe berth clause, as any difference between the clauses

is immaterial here. See Pet. App. 13a-14a, 275a, 279a-280a; Pet. Br. 5 n.1.

b. After entering into the voyage charter, petitioners directed the ATHOS I to take its cargo of crude oil to petitioners' refinery in Paulsboro, New Jersey. Pet. App. 4a, 279a-280a, 310a. To reach the refinery's dock on the Delaware River, ships must pass through the adjacent Mantua Creek Anchorage, also known as "Anchorage Number 9," which separates petitioners' berth from the shipping channel. *Id.* at 5a-6a. Anchorage Number 9 is a "federally-designated section of the river in which ships may anchor." *Id.* at 6a; see 33 U.S.C. 471 (authorizing designation of federal anchorages); 33 C.F.R. 110.157(a)(10) (designating Anchorage Number 9). The government designates anchorage grounds because it is not "lawful to tie up or anchor vessels or other craft in navigable channels in such a manner as to prevent or obstruct the passage of other vessels or craft." 33 U.S.C. 409. A ship may nonetheless need to anchor if, for example, bad weather or congestion in the shipping lanes prevents it from proceeding safely with its voyage. See, *e.g.*, *The Southern Cross*, 93 F.2d 297, 299 (2d Cir. 1937). Although the government authorizes anchorages, it has no proprietary interest in the waters or bed of an anchorage ground. 43 U.S.C. 1311(a); see *Acts Relating to Anchorage and Anchorage Grounds*, 25 Op. Att'y Gen. 37, 38 (1903). "No government agency is responsible for preemptively searching for unknown obstructions to navigation in the anchorage," and "[a]nyone who wishes to search for obstructions in the anchorage may do so." Pet. App. 6a.

On November 26, 2004, the ATHOS I had nearly completed its voyage to Paulsboro and had entered An-

chorage Number 9 to complete its final docking procedures. See Pet. App. 6a. Following the ordinary procedure for ships of its size docking at petitioners' refinery, the ATHOS I was being pushed sideways through the anchorage by tugboats when it struck a large anchor lying on the river bottom. *Ibid.*; see *id.* at 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," *id.* at 275a, and "only 900 feet—not much more than the ship's length—from [petitioners'] berth," *id.* at 6a. The anchor punched two holes in the ship's hull, causing approximately 264,000 gallons of oil to spill into the Delaware River. See *id.* at 7a, 275a.

c. Since 1990, the OPA has governed oil-spill cleanup in the United States. The OPA "was passed in the wake of the Exxon Valdez accident in 1989, and was designed to facilitate oil spill cleanups by" designating "'responsible parties'" who must pay for cleanup in the first instance, regardless of fault or ultimate legal liability. Pet. App. 283a; see 33 U.S.C. 2702(a) (making responsible parties liable for removal costs and damages); 33 U.S.C. 2701(32) (defining "responsible party"); see also H.R. Rep. No. 242, 101st Cong., 1st Sess. Pt. 2, at 34 (1989) (bill that became the OPA would "encourage prompt and complete cleanup of oil spills" and "establish a clear and predictable legal and regulatory framework"). The responsible parties for a spill from an oil tanker include the vessel's owner and operator. 33 U.S.C. 2701(32)(A).

A responsible party's liability under the OPA is limited to covered removal costs and damages. 33 U.S.C. 2702(a) and (b). The OPA generally allows a responsi-

ble party to limit its liability based on statutory formulae, so long as it did not cause the spill through gross negligence or other misconduct, and it cooperates fully in the cleanup. 33 U.S.C. 2704(a) and (c). Costs in excess of the statutory limit are reimbursed by the federal Oil Spill Liability Trust Fund (Fund). 33 U.S.C. 2708, 2713; see 33 U.S.C. 2701(11).

The OPA expressly preserves responsible parties' rights under general maritime law to pursue claims not addressed by the statute. See 33 U.S.C. 2710, 2751(e); Russell V. Randle, *The Oil Pollution Act of 1990: Its Provisions, Intent, and Effects*, 21 Envtl. L. Rptr. 10119, 10133 (1991). When the Fund reimburses a responsible party for cleanup costs, it becomes subrogated to the responsible party's applicable "rights, claims, and causes of action" against third parties. 33 U.S.C. 2715(a). "Any recovery won by the United States" from a third party liable for cleanup costs "is returned to the Trust Fund to cover future oil spill reimbursements." Pet. App. 31a n.24; see 26 U.S.C. 9509.

After the spill from the ATHOS I, respondents promptly carried out their obligations under the OPA. Pet. App. 30a. The cost of cleaning up the spill was $143 million. *Id.* at 3a, 7a. Respondents submitted administrative claims to limit their liability under the OPA, and to recover from the Fund cleanup costs that exceeded their liability limitation. The Coast Guard's National Pollution Funds Center determined that respondents had satisfied the statutory criteria for limiting their liability, which was capped at $45,474,000. *Id.* at 284a. 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 that reimbursement. *Ibid.*; see 33 U.S.C. 2715(a).

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 their 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 the ATHOS I. *Id.* at 275a-276a.

Following a bench trial, the district court rejected the contract claims. Pet. App. 330a-344a. The court held that respondents (and thus the government as their subrogee) could not claim the benefit of the safe berth clause because respondents were neither parties to nor third-party beneficiaries of the voyage charter between petitioners and Star Tankers. *Id.* at 340a-341a.

In the alternative, the district court held that petitioners "did not breach any contractual warranties." Pet. App. 341a. The court acknowledged cases holding that a safe berth clause is a warranty that the port chosen by the charterer will be safe, and thus that a charterer is liable for damages caused by an unsafe port without regard to the charterer's diligence or lack of fault. *Ibid.* But the court found "more persuasive" a Fifth Circuit decision holding that a safe berth clause imposes only "a duty of due diligence" to select a safe port. *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, reasoning

that petitioners exercised reasonable diligence in sending the ATHOS I to their Paulsboro refinery. *Id.* at 342a-343a. The 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 "'[w]hen a charter names a port [or berth] and the master proceeds there without protest, the owner accepts the port [or berth] as a safe port, and is bound to the conditions that exist there.'" *Ibid.* (quoting *Bunge Corp.* v. *M/V Furness Bridge*, 558 F.2d 790, 802 (5th Cir. 1977)) (brackets in original). But see Pet. Br. Add. 8a, 23a-24a (charter party did not name a particular port).

3. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 272a-329a. At the outset, the court 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" required a remand. *Id.* at 291a; see *id.* at 276a. "[F]or the sake of efficiency," the court of appeals also "discuss[ed]—and, to the extent necessary, ma[d]e holdings on—the legal issues appealed." *Id.* at 276a.

a. The court of appeals first held that respondents were third-party beneficiaries of the voyage charter's safe berth clause. Pet. App. 292a-297a. The court observed that this Court had "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 then 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)). The court explained that, 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 was "mindful of the parties' ability to contract differently," it concluded that the safe berth clause manifests the parties' intent "to endow the vessel"—and thus its owner—"with 'the benefit of the promised performance.'" *Id.* at 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 the ATHOS I to a safe port and berth, not merely a promise to exercise due diligence in selecting the vessel's destination. Pet. App. 297a-304a. The court adopted a formulation of the clause's scope that it explained was "deeply rooted" in American and English cases. *Id.* at 298a; see *id.* at 298a-299a (discussing *The Gazelle & Cargo*, 128 U.S. 474, 485 (1888), and *Mencke* v. *Cargo of Java Sugar*, 187 U.S. 248, 253 (1902)). Under that formulation, a port is "deemed safe where 'the particular chartered vessel can proceed to it, use it, and depart from it without, in the absence of abnormal

weather or other occurrences, being exposed to dangers which cannot be avoided by good navigation and seamanship.'" *Id.* at 298a (quoting Julian Cooke et al., *Voyage Charters* ¶ 5.137 (3d ed. 2007) (Cooke 2007), and citing *Leeds Shipping Co.* v. *Societe Francaise Bunge* (*The Eastern City*), [1958] 2 Lloyd's List L.R. 127 at 131).

In determining that the safe berth clause functions as a warranty, the court of appeals explained that it followed a well-established line of Second Circuit cases. Pet. App. 299a-300a. That court 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 Second Circuit has further explained that "the purpose of the warranty [i]s to memorialize the relationship between the contracting entities: '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.'" *Id.* at 299a-300a (quoting *Park S.S. Co.* v. *Cities Serv. Oil Co.*, 188 F.2d 804, 806 (2d Cir.), cert. denied, 342 U.S. 862 (1951)). The charterer is thus "contractually bound to provide 'not only a place which he believes to be safe, but a place'" that actually *is* safe, where the chartered vessel can discharge "'always afloat.'" *Id.* at 300a (quoting *Paragon Oil*, 310 F.2d at 173).

The court of appeals rejected the contrary "due diligence" interpretation adopted by the district court and the Fifth Circuit in *Orduna* as inconsistent with the plain language of the safe berth clause, the "near consensus" of relevant authorities, and industry custom. Pet. App. 303a; see *id.* at 300a-304a. The court explained that *Orduna* had relied primarily on "critical

commentar[y]" from a single source, Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* (2d ed. 1975) (Gilmore & Black), that was "not compelling." Pet. App. 300a-301a. While *Orduna* had reasoned, in reliance on Gilmore & Black, that "it is more sensible to impose fault on the 'master on the scene' rather than" on the charterer, the court in this case saw "no policy reason why a master on board a ship would normally be in any better position to appraise [the] port's more subtle dangers than the [charterer] who actually selected that port." *Id.* at 301a-302a (citation omitted). The court further explained that "an 'express assurance' warranty is most consistent with industry custom," because other standard voyage charters "explicitly adopt a due diligence standard." *Id.* at 303a (citation omitted). The adoption of an express due diligence standard in other contracts "suggests that the understood default is to impose liability on the charterer without regard" to its fault. *Ibid.* For the same reasons, the court rejected petitioners' suggestion that the "warranty applies only to known hazards." *Id.* at 304a n.18.

Although the court of appeals determined that the safe berth clause is a warranty of safety, the district court had "neglected to make the necessary factual findings to resolve whether the warranty was actually breached." Pet. App. 305a. In particular, the court of appeals found that petitioners had warranted a safe berth with the understanding that the ATHOS I would have a "draft"—the measurement from the water line to the bottom of the ship's hull, *id.* at 4a n.3—of up to 37 feet when it approached petitioners' facility. *Id.* at 306a. The court of appeals thus stated that 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," those findings "would indicate that the warranty had been breached." *Id.* at 307a.[1]

The court of appeals also determined that the named-port exception to the safe berth warranty did not apply. Pet. App. 308a-311a. The charter party did not name a particular port, and the court declined to decide how far in advance a port must be designated for the exception to become relevant. *Id.* at 310a. Instead, the court determined that because "the particular hazard—the submerged anchor—was unknown to the parties," naming the Paulsboro port ahead of time could not have provided 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. This Court denied a petition for a writ of certiorari. 571 U.S. 1197.

4. On remand, the district court recalled more than 20 witnesses over the course of a 31-day proceeding, pursuant to Federal Rule of Civil Procedure 63. Pet. App. 63a. As relevant here, the court found that the ATHOS I had a "draft of 36 feet, 7 inches during its approach to the Paulsboro facility," *id.* at 169a, and that its "crew and pilots engaged in good navigation and seamanship," which "could not have avoided the allision" with the anchor, *id.* at 180a. In light of those findings,

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[1] The court of appeals further stated that it had no occasion to "define the outer geographical bounds of the safe berth/safe port warranty," because petitioners had "conceded that the warranty—if applicable—'would include the area in and around Paulsboro,' including the Anchorage" where the allision occurred. Pet. App. 298a n.12 (citation omitted).

the court determined that petitioners "breached the safe berth warranty." *Ibid.*

The district court held that petitioners were liable to respondents and the United States as subrogee 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 had reimbursed respondents for cleanup expenses. *Id.* at 56a, 259a. The court reduced the award to the United States based on a theory of equitable recoupment, concluding that although the government had no "affirmative duty to search for hazards to navigation or obstructions" in Anchorage Number 9, it "took actions which led [petitioners] to believe that the Government was maintaining" the anchorage, "such that it would be inequitable to hold [petitioners] fully responsible to reimburse the Fund for the entire amount paid to [respondents]." *Id.* at 234a; see *id.* at 212a-234a.

5. The court of appeals affirmed in part, vacated in part, and reversed in part. Pet. App. 1a-44a. The court affirmed the district court's liability ruling in favor of respondents and the United States on the contract claims. *Id.* at 12a-25a. It reaffirmed 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 of appeals 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 the ATHOS I had a draft of 36' 7" at the time of the allision, and that its crew and

pilots had engaged in good navigation and seamanship, the court of appeals affirmed the district court's determination that "the allision resulted from a breach of [petitioners'] safe berth warranty." *Id.* at 19a, 25a.

In addition, the court of appeals determined that the United States was entitled to fully recover its $88 million in reimbursement costs. Pet. App. 30a-39a.[2] The court explained that petitioners were not entitled to equitable recoupment because they lacked a cognizable claim against the United States and did not seek the same kind of relief as the United States. *Id.* at 38a. Although acknowledging that it was "not necessary" to the court's holding, the court also rejected petitioners' equitable argument. *Id.* at 37a n.28. The court reasoned that the government "does not preemptively search for obstructions in the anchorage, it is not responsible for doing so, and it did not tell [petitioners] that it would do so." *Ibid.* The court further rejected petitioners' contention that "equity requires the Oil Spill Liability Trust Fund to bear the cost of the cleanup." *Id.* at 37a. The court explained that the Act's subrogation provision supports "the purpose of the Trust Fund," which is "not to absorb the cost of cleaning up oil spills," but rather "to quickly compensate victims of spills, minimize environmental damage, and internalize the costs of oil spills within the oil industry" by "letting cleanup costs fall upon the liable party." *Id.* at 37a-38a & n.28.

6. 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

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

$97,229,447.28. 05-cv-305 D. Ct. Doc. 904 (July 17, 2018).

SUMMARY OF ARGUMENT

Pursuant to an industry-standard contract, petitioners promised to "designate[] and procure[]" a "safe place or wharf" where the ATHOS I could berth and discharge its cargo "always safely afloat." Pet. Br. Add. 8a; see *id.* at 4a, 24a, 52a, 62a. The plain language of that contractual provision, industry custom as revealed through longstanding judicial and arbitral decisions, and policy considerations all support construing the safe berth clause as a warranty that the port petitioners selected would be safe for the ATHOS I, rather than a promise only that petitioners would exercise due diligence in selecting the ship's destination.

A. The safe berth clause's language is plain and unambiguous. Petitioners promised to send the ATHOS I to a "safe place or wharf," Pet. Br. Add. 8a—not one that they merely believed to be safe. The safety of a location depends on its characteristics, rather than the diligence of the party that selects it. Basic principles of contract law confirm that interpretation, because a party's liability under a contract generally does not depend on its culpability (or lack thereof).

Had petitioners wanted to limit their obligation to the exercise of due diligence, they could have adopted one of the industry form contracts that expressly includes a due diligence standard, or amended the ASBATANKVOY agreement to limit their liability in that manner. Indeed, the existence of express due diligence standards in other such clauses makes clear that the traditional safe berth clause at issue here is not so limited.

The traditional safe berth clause functions as a warranty. In the context of maritime contracts, a warranty is simply a material statement of fact. Petitioners' selection of their Paulsboro facility violated the safe berth warranty because the ATHOS I struck an anchor that punctured its hull while approaching the berth. Petitioners therefore are liable for damages.

B. To the extent the safe berth clause is ambiguous, this Court should look to industry custom, as revealed by longstanding judicial and arbitral interpretations, to determine the intent of the parties. The safe berth clause has existed in materially similar form since at least the mid-19th century. During that time, this Court, the Second Circuit, English courts, and arbitration panels all have construed the traditional safe berth language as assuring a port's safety. Those decisions necessarily formed the backdrop against which the parties here selected the traditional safe berth clause.

Although the Fifth Circuit has held that a safe berth clause warrants only that the charterer will exercise due diligence, that decision does not grapple with the text of the clause, industry participants' adoption of express due diligence clauses in other contracts, or the longstanding authority interpreting the clause to impose a warranty of safety. The "near consensus" of that authority, Pet. App. 303a, confirms that when petitioners here selected a form contract with the customary safe berth clause, they adopted the clause's customary meaning.

C. In light of the plain text of the safe berth clause and its longstanding interpretation, policy considerations should not govern its interpretation. But to the extent such considerations are relevant, sound policy

supports construing the safe berth clause as a warranty of safety.

As the Second Circuit has long recognized, the safe berth clause reflects a contractual bargain. The charterer obtains the right to nominate a port; in exchange for giving up that right, the ship receives the charterer's warranty that the chosen destination will be safe. Enforcing the longstanding interpretation of the safe berth clause honors the parties' agreement. It also protects maritime commerce by providing a clear allocation of the risk of loss. By contrast, petitioners' due diligence standard would create uncertainty, for which the parties did not bargain, as to when a charterer has exercised sufficient care to escape liability under the contract.

The warranty interpretation of the safe berth clause also fits comfortably with other areas of maritime law. Because the safe berth clause is a matter of contract rather than tort, there is no need, as petitioners contend (Br. 38), for "special justifications" to impose "strict liability." Nor must petitioners' contractual duty as charterer mirror their tort-law duty as wharfinger. In addition, while maritime statutes like the OPA and the Carriage of Goods by Sea Act (COGSA), ch. 229, 49 Stat. 1207 (46 U.S.C. 30701 note), limit certain parties' liability, they permit parties to assume greater liability by contract.

Finally, interpreting the safe berth clause to impose a warranty of safety yields a fair result in this case. Petitioners are sophisticated commercial entities that agreed to a traditional safe berth clause with a well-established meaning. Had they wished to limit their liability to the exercise of due diligence, petitioners

could have adopted a different form contract, or modified the ASBATANKVOY (as they did in other ways).

Petitioners are incorrect in suggesting that it would be more equitable to hold either the ship owner or the United States liable for the damages caused by the allision in this case. Petitioners acknowledge that the ship owner and master were not at fault, and the lower courts correctly held that the United States was under no obligation to affirmatively monitor the anchorage for obstructions. While the Fund covered much of the cost of the cleanup in the first instance, it is not designed to bear those costs indefinitely. Instead, the OPA's subrogation provision ensures that where another party is liable for damages, the Fund will be reimbursed. Because the court of appeals correctly held that petitioners are so liable under the safe berth clause, its judgment should be affirmed.

ARGUMENT

THE SAFE BERTH CLAUSE IS A WARRANTY OF SAFETY, NOT MERELY A PROMISE TO EXERCISE DUE DILIGENCE IN SELECTING A PORT OR BERTH

The court of appeals correctly held that "the safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer." Pet. App. 304a. That holding is in accord with the plain language of the form contract the parties selected, which stands in stark contrast to other industry forms that expressly limit a charterer's obligation to the exercise of "due diligence." The court's holding also is consistent with decades of decisions from this Court, the Second Circuit, English courts, and arbitrators. And to the extent policy considerations are relevant, they too support enforcing the plain terms of the sophisticated parties' contractual agreement.

A. By Its Plain Terms, The Safe Berth Clause Warrants A Safe Berth, Not Merely Due Diligence

This Court's authority over the interpretation of maritime contracts "stems from the Constitution's grant of admiralty jurisdiction to federal courts." *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 23 (2004); see U.S. Const. Art. III, § 2, Cl. 1; 28 U.S.C. 1333(1). "When a contract is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." *Kirby*, 543 U.S. at 22-23. Maritime contracts "must be construed like any other contracts: by their terms and consistent with the intent of the parties." *Id.* at 31.

Here, the plain terms of the voyage charter provided an unqualified assurance that petitioners would select a "safe place or wharf" for the ship to deliver its cargo. Pet. Br. Add. 8a. In contrast to other industry contracts in existence at the time, nothing in the safe berth clause limited petitioners' duty to one of due diligence or disclaimed a warranty of safety. As in other contractual contexts, "[t]here is no reason to contravene the clause's obvious meaning." *Kirby*, 543 U.S. at 31-32. Because petitioners warranted a safe berth and one was not provided, petitioners are liable for damages.

1. a. As this Court has recognized, "[v]oyage charter parties are highly standardized." *Stolt-Nielsen S.A.* v. *AnimalFeeds Int'l Corp.*, 559 U.S. 662, 667 (2010) (citation omitted). In this case, the parties selected a form contract, known as the ASBATANKVOY, to govern the ATHOS I's transportation of crude oil from Venezuela to petitioners' asphalt refinery in Paulsboro, New Jersey. Pet. App. 87a-88a, 279a; see *Stolt-Nielsen*, 559 U.S. at 666-667. The ASBATANKVOY, which was first published by the Association of Ship Brokers & Agents (ASBA) in 1977,

"is one of the most universally accepted and widely used charterparties in the ocean transportation of crude oil, petroleum products, and liquid chemicals." Maritime Law Ass'n & ASBA Cert. Amici Br. 4 (ASBA Amicus Br.); see James M. Textor, *OilVoy Clauses—Vessel Late Arrival at Load Port: Recovery of Commercial Damages*, 27 Tul. Mar. L.J. 467, 468 (2003).

The ASBATANKVOY's safe berth clause provides that "[t]he vessel shall load and discharge at any safe place or wharf, * * * which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." Pet. Br. Add. 8a; see *id.* at 4a (requiring that once loaded, the ATHOS I "shall forthwith proceed * * * direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo"). The Special Provisions of the voyage charter party confirmed that petitioners would direct the ATHOS I to "[o]ne (1) or two (2) safe port(s)" along the "United States Atlantic Coast." *Id.* at 24a; see *id.* at 52a, 62a.

As most courts have understood for decades, see pp. 32-41, *infra*, the standard safe berth clause functions as a warranty that the charterer will select a port or berth that is actually safe, and where the ship can "proceed thereto, lie at, and depart therefrom always safely afloat." Pet. Br. Add. 8a; see *id.* at 4a, 24a. The clause promises a "safe" destination—one that "[a]fford[s] or confer[s] safety," *Webster's Second New International Dictionary* 2196 (1942), or is "[f]ree from danger or injury," *American Heritage Dictionary of the English Language* 1142 (1970). As the ordinary meaning of the word "safe" demonstrates, the "safety" of the port or berth does not depend on whether the charterer acted diligently or knew of a particular danger.

No reason exists to read into the safe berth clause an implicit limitation that charterers will not be liable so long as they exercise due diligence in nominating a port or berth. But see, *e.g.*, Pet. Br. 21. Under basic principles of contract law, unless the contract states otherwise or a common-law exception applies, "the performing party [is] an insurer against the consequences of his failing to perform, even if the failure is not his fault." *Wisconsin Elec. Power Co.* v. *Union Pac. R.R.*, 557 F.3d 504, 506 (7th Cir. 2009); see also, *e.g.*, 2 Restatement (Second) of Contracts, ch. 11 intro. note ("Contract liability is strict liability."); 23 Richard A. Lord, *Williston on Contracts* § 63.8 (4th ed. 2018) (23 *Williston*) (same). Thus, if petitioners had wanted to limit their liability to the failure to exercise due diligence or to "[k]nown" risks, *e.g.*, Pet. Br. 21, they should have said so expressly. Indeed, other provisions of the ASBATANKVOY expressly limit the parties' obligations to the exercise of due diligence. See Pet. Br. Add. 4a (vessel owner promises that the ship is to be "seaworthy, and hav[e] all pipes, pumps and heater coils in good working order, and be[] in every respect fitted for the voyage, *so far as the foregoing conditions can be attained by the exercise of due diligence*") (emphasis added); see also *id.* at 13a, 41a.

The safe berth clause's silence with respect to the charterer's fault stands in contrast to safe berth provisions in other maritime contracts, which expressly adopt the type of limited liability for which petitioners advocate here. For example, two decades before the parties selected the ASBATANKVOY for the ATHOS I's voyage, the ASBA introduced a second version of the form contract, known as the ASBA II. ASBA, *Tanker Voyage Charter Party*, pt. II, Cl. 9, https://shippingforum.files.wordpress.com/

2012/08/asba-ii1.pdf. Compare Pet. Br. Add. 1a (parties' contract from 2004), with Textor 468 (discussing ASBA II's promulgation in 1984). The ASBA II is "relatively more charterer oriented" than the ASBATANKVOY, Textor 468, and it includes an express limitation that the

> Charterer shall not be deemed to warrant the safety of any port, berth, dock, anchorage and/or other place to which the vessel may be ordered to load or discharge and shall not be liable for any loss, damage, injury, or delay resulting from conditions at such ports, berths, docks, anchorages or other places not caused by Charterer's fault or neglect or which could have been avoided by the exercise of reasonable care on the part of the Master.

ASBA II ¶ 9.

Thus, while petitioners suggest (Br. 23) that the ASBA "repudiates" the warranty interpretation of the traditional safe berth clause, that is incorrect. The organization filed an amicus brief at the certiorari stage urging this Court to resolve the question presented, but "express[ed] no view on the proper interpretation of the safe-berth clause." ASBA Amicus Br. 7. It has likewise declined to file a brief supporting petitioners on the merits. But the ASBA's adoption in the ASBA II of an express, fault-based clause that disclaims a warranty confirms that the unadorned safe berth clause in the ASBATANKVOY is not so limited.

Other standard charter parties similarly limit the charterer's obligation to due diligence. See, *e.g.*, Howard Bennett, *Carver on Charterparties* § 4-007, at 197 (2017) ("Some charterparties * * * expressly reduce the required standard of the charterer's primary safe port undertaking" from "strict liability for prospective unsafety

to * * * due diligence."); Terence Coghlin et al., *Time Charters* ¶ 10.54, at 212 (7th ed. 2014) (Coghlin 2014) ("Some charter forms expressly reduce the charterers' safe port obligations to one of due diligence only."); Julian Cooke et al., *Voyage Charters* ¶¶ 5.30, 5.31, 5.47, at 124, 129 (4th ed. 2014) (Cooke 2014) (similar); 2E Joshua S. Force and Steven F. Friedell, *Benedict on Admiralty*, ch. XVII (7th ed. 2019) (collecting safe berth clauses, several of which include due diligence language); see also Pet. App. 303a n.17 (observing that the time charter party between Star Tankers and Frescati, which is "predicated on a Shelltime 4 form," contains a due diligence clause).

In addition, where parties adopt a form contract like the ASBATANKVOY that includes a traditional safe berth clause, they "often" expressly modify the customary provision to include "language which reduces it to a due diligence standard." Coghlin 2008 ¶ 10.119, at 225; see Cooke 2014 ¶ 5A.8, at 151. Petitioners here chose not to do so. Although the parties added 19 "Special Provisions," Pet. Br. Add. 24a, and 43 "Citgo Petroleum Corporation (or Nominee) Clauses," *id.* at 30a (capitalization altered; emphasis omitted), none of those modifications altered the ASBATANKVOY's safe berth clause to limit it to an obligation of due diligence.[3] The court of appeals correctly recognized that the existence of other contracts expressly adopting a "due diligence" standard strongly "suggests that the understood default is to impose liability on the

[3] By contrast, petitioners more recently have altered their contracts to include a due diligence standard. In October 2005—following the allision here, but before the courts below issued their decisions—petitioners adopted a *pro forma* addendum including a safe port clause that expressly disclaims a warranty. See Frescati Br. in Opp. 17-18 & n.6.

charterer without regard to the care taken." Pet. App. 303a.

b. The court of appeals also correctly determined that the assurance of a safe berth functions as a warranty. See Pet. App. 300a-304a. Under basic principles of contract law as applied to charter parties, a warranty is simply a "[s]tatement of fact[] * * * relating to some material matter." Richard A. Lord, 22 *Williston on Contracts* § 58.11, at 40-41 (4th ed. 2017) (22 *Williston*). It makes no difference whether the provision is expressly described as a "warranty." *Id.* § 58.11, at 41 (citing *Romano* v. *West India Fruit & S.S. Co.*, 151 F.2d 727 (5th Cir. 1945); *Denholm Shipping Co.* v. *W.E. Hedger Co.*, 47 F.2d 213 (2d Cir. 1931)); see *The Whickham*, 113 U.S. 40, 49-50 (1885). But see Pet. Br. 25-26. A promise to direct the ship to a safe port or berth is material, and thus a warranty.

c. Under these principles, the court of appeals correctly determined that petitioners were liable for breach of the safe berth warranty. As the court explained, "a port is unsafe—and in violation of the safe berth warranty—where the named ship cannot reach it without harm," regardless of the charterer's fault or whether the risk was known. Pet. App. 298a. Because the ATHOS I struck an anchor that punctured its hull while approaching petitioners' Paulsboro facility, petitioners' designation of that port violated the safe berth warranty, and petitioners are liable for the resulting damages.[4]

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[4] The court of appeals acknowledged (Pet. App. 298a) that the safe berth clause does not protect a ship against "abnormal conditions" or harm that is "avoidable by adequate navigation and seamanship." Neither of those factual exceptions is at issue here. Petitioners have not argued that the presence of an anchor in Anchorage Number 9

2. Petitioners provide no sound reason to interpret the safe berth clause to impose a "due diligence" limitation that is nowhere stated in the text of the provision.

a. Petitioners' fundamental textual argument is that "no language [in the safe berth clause] assign[s] all risk of loss to the charterer, regardless of fault." Pet. Br. 21. Petitioners rely heavily (*id.* at 21-23) on Gilmore & Black, which took the view that "'[v]ery clear language' should be required" before a charterer is held liable for damages based on a ship's entry into an unsafe port to which the charterer directed it. *Id.* at 21 (quoting Gilmore & Black § 4-4, at 205) (brackets in original). But Gilmore & Black acknowledged that as of 1975, a number of cases and several treatises interpreted the standard safe berth clause to provide that "the charterer, *regardless of fault*, be held liable for damages to the ship resulting from her having entered an unsafe port, or tied up at an unsafe berth." Gilmore & Black § 4-4, at 204 (emphasis added); see *id.* at 204 n.34a, 206 & n.36. Although Gilmore & Black disagreed with those decisions on policy grounds, its argument about what the result *should* be is contrary to the "near consensus" of authority interpreting the safe berth clause as a warranty of safety. Pet. App. 303a; see Pet. Br. 35 (collecting treatises that disagree with petitioners' interpretation). See also, *e.g.*, Cooke 2014 ¶ 5.30, at 124 (describing the ASBATANKVOY's safe berth clause as "[a]n express warranty on the part of the charterer of the safety of the loading or discharging port or berth"); *id.* ¶ 5A.6, at

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constituted an abnormal condition. See p. 41 n.7, *infra*. And while petitioners previously asserted that respondents engaged in negligent seamanship, both courts below rejected that argument, see Pet. App. 19a, and petitioners do not renew it in this Court.

151 ("disagree[ing]" with the Fifth Circuit's contrary interpretation); Coghlin 2014 ¶ 10.52, at 211 ("The charterers' primary obligation is 'absolute' rather than being one to exercise due diligence.").

Gilmore & Black's argument, adopted by petitioners here, gets the contractual analysis backwards. The default rule in contract law is that a party is responsible for breach of its contractual undertakings, regardless of its culpability. See p. 22, *supra*. Thus, no additional, "[v]ery clear" language was needed to make petitioners liable for directing the ATHOS I to a port that was not safe. Pet. Br. 21 (citation omitted). To the contrary, when sophisticated parties to maritime contracts wish to limit their liability to injuries resulting from a lack of due diligence, they have adopted contracts including that express limitation. See pp. 22-25, *supra*.

b. Petitioners' other arguments are similarly misplaced. Petitioners contend (Br. 19-20) that under the safe berth clause, "the charterer gains the right to select the place or wharf of discharge," while "the vessel gains the corresponding right to refuse an unsafe berth, with the charterer bearing any extra expenses resulting from the vessel master's refusal to enter the unsafe berth." That proposition is uncontroversial, supported by significant authority, and uncontested by the United States. But petitioners err in suggesting (Br. 21-22) that the master's right of refusal is the *only* protection the safe berth clause affords the chartered vessel and its owner. Instead, the full text of the safe berth provision "triggers two separate protections: a contractual excuse for 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; see 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 11-10, at

32-33 (5th ed. 2011) (noting these two "effect[s]" of the safe berth warranty). The master's option to avoid an unsafe port does not vitiate the charterer's promise to "designate[] and procure[]" a "safe place or wharf" that the vessel "can proceed thereto, lie at, and depart therefrom always safely afloat." Pet. Br. Add. 8a.

c. Petitioners further argue (Br. 24) that the words "'always afloat'" do not guarantee a port or berth that is safe in all respects, but merely one that "permit[s] the vessel to float, rather than strike the ground (or encounter physical barriers that block the ship's path)." But petitioners again focus on only part of the safe berth clause. They ignore the provision's more general statement that the charterer will "designate[] and procure[]" a "safe place or wharf." Pet. Br. Add. 8a; see *id.* at 24a. Moreover, petitioners' interpretation of the phrase "always safely afloat" does not advance their position. The ATHOS I plainly "encounter[ed] physical barriers that block[ed] the ship's path," Pet. Br. 24, when it struck an anchor less than 900 feet from petitioners' chosen berth. See *Mencke* v. *Cargo of Java Sugar*, 187 U.S. 248, 253 (1902) ("A ship could not be said to be afloat, whether the obstacle encountered was a shoal or bar in the port over which she could not proceed * * * nor could she be said to have safely reached a dock if required to mutilate her hull."); *Crisp* v. *United States & Australasia S.S. Co.*, 124 F. 748, 750 (S.D.N.Y. 1903) (explaining that "[a] covenant for a safe loading or discharging place implies" not only that the port selected by the charterer "shall be one where the vessel can safely get with her whole cargo and can discharge her whole cargo without touching the ground," but also, "of course," a port where the vessel can discharge "without being subject to obstructions").

d. Nor is petitioners' interpretation of the safe berth clause supported by other provisions of the contract.

Petitioners first contend (Br. 25-26) that because the ASBATANKVOY elsewhere includes provisions expressly denominated as "warranties," the safe berth clause must function as something less. As discussed above, however, warranties need not be designated as such; a contractual promise is a warranty so long as it is material to the parties' agreement. See p. 25, *supra*.[5]

Petitioners next argue (Br. 26) that the CITGO-specific clause requiring Star Tankers to obtain oil pollution insurance, see Pet. Br. Add. 30a, indicates that petitioners would not be liable for an oil spill under the safe berth clause. But the provisions address different risks. The required insurance would cover an oil spill that occurred elsewhere in the vessel's voyage, while the safe berth clause's application is geographically limited, cf. Pet. App. 298a n.12, and covers risks in addition to oil spills. Moreover, petitioners' own theory of the case refutes their argument that only the insurance provision covers oil spills. Under petitioners' interpretation, they could be liable if they had failed to exercise "some diligence" in selecting the berth. Pet. Br. 21.

Petitioners next turn (Br. 27) to the ASBATANKVOY's "General Exceptions Clause." Pet. Br. Add. 13a (capitalization altered). Petitioners reason (*id.* at 27) that this clause excuses the charterer from liability for damage sustained from "perils of the sea," and that the anchor that holed the ATHOS I was such a

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[5] In any event, in the context of charter parties, that a promise constitutes a warranty (rather than a representation) means only that the non-breaching party may cease performance in addition to suing for damages. 22 *Williston* § 58.11. Only damages are at issue here.

peril. But petitioners forfeited that argument by failing to raise it below or in either of their two petitions for a writ of certiorari. "[T]he determination of whether a peril of the sea exists is wholly dependent on the facts of each case and is not amenable to a general standard." *Ferrara* v. *A. & V. Fishing, Inc.*, 99 F.3d 449, 454 (1st Cir. 1996) (citation and internal quotation marks omitted). It therefore cannot be decided by this Court at this stage of the litigation.

In any event, the General Exceptions Clause does not apply here. As its name suggests, that clause is a catchall provision that does not apply to matters specifically addressed elsewhere in the voyage charter party. See Pet. Br. Add. 14a (limiting liability for perils of the sea "unless otherwise in this Charter expressly provided"). Petitioners cite no authority considering such a General Exceptions Clause to supersede a charterer's liability under the more specific safe berth clause.[6] Moreover, the General Exceptions Clause appears in Part II of the charter party, which states that "[i]n the event of a conflict, the provisions of Part I will prevail over those contained in Part II." *Id.* at 1a. Part I of the charter party includes Special Provision 2, *id.* at 2a, which requires petitioners to specify "[o]ne (1) or two (2) safe port(s)," *id.* at 24a. The General Exceptions Clause therefore does not override petitioners' obligation to select a safe destination for the ATHOS I.

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[6] In fact, the cases on which petitioners rely do not concern charterers' liability at all. They involve ship owners who relied on the "perils of the sea" doctrine in an attempt to avoid liability for damage to cargo, see *The G.R. Booth*, 171 U.S. 450, 452, 460-461 (1898); *Campbell Soup Co.* v. *Federal Motorship Corp.*, 1935 WL 57939 (S.D.N.Y. Feb. 25, 1935), or liability for physical and psychological injuries to the ship's captain, see *Ferrara*, 99 F.3d at 451, 454.

B. Longstanding Judicial And Arbitral Interpretations Confirm That The Safe Berth Clause Should Be Given Its Plain Meaning

The plain language of the safe berth clause is unambiguous and resolves this case. But to the extent this Court perceives an ambiguity, it should look to "'custom and usage'" to "determin[e] the parties' intent." *Stolt-Nielsen S.A.*, 559 U.S. at 674 n.6 (citation omitted); see *Kirby*, 543 U.S. at 31.

"[M]aritime law is a body of sea customs' and the 'custom of the sea . . . includes a customary interpretation of contract language." *Stolt-Nielsen S.A.*, 559 U.S. at 675 n.6 (quoting Charles Merrill Hough, *Admiralty Jurisdiction—Of Late Years*, 37 Harv. L. Rev. 529, 536 (1924)). Here, charterers and vessel owners have for more than a century used the same traditional words and phrases in the safe berth clause. "The majority view, in both England and the United States, is that these words constitute an express warranty by the charterer that it will send the vessel to a safe port." David R. Maass, *The Safe-Berth Warranty and Its Critics*, 39 Tul. Mar. L.J. 317, 320 (2014); see also, *e.g.*, Coghlin 2014 ¶ 10A.4, at 225 ("American and English authorities generally are in agreement that the[] words ['between safe port and/or ports'] constitute an express warranty of safe port by [the] charterer."); Cooke 2014 ¶ 5A.4, at 150-151 (explaining that American courts and arbitrators have largely followed English interpretation). The parties' agreement thus should be interpreted to adopt the well-accepted understanding that "[i]f the vessel is damaged because of an unsafe condition at the port named by the charterer," the charterer has breached the warranty and "becomes liable to the owner for the damage." Maass 320.

1. For many years, both this Court and the Second Circuit have interpreted the safe berth clause as an assurance or warranty of safety

When federal courts sitting in admiralty interpret standard contract terms, their construction provides the "legal backdrop" against which future contracts will be negotiated. *Kirby*, 543 U.S. at 36; see ASBA Amicus Br. 16. For decades, American courts—including this Court—have interpreted the safe berth clause to function as a warranty of safety.

a. i. More than 130 years ago, this Court construed the safe berth clause as an assurance of safety for the chartered vessel. In *The Gazelle & Cargo*, 128 U.S. 474 (1888), the charter party provided that the ship would travel from Baltimore "to a safe, direct, Norwegian or Danish port, * * * or as near thereunto as she can safely get and always lay and discharge afloat." *Id.* at 485. The Court stated that the "clear meaning" of the provision was that the charterer was required to direct the ship "to a port which she can safely enter with her cargo." *Ibid.* Because the charterer instead ordered the ship to the port of Aalborg, "a fiord or inlet having a bar across its mouth, which it was impossible for the Gazelle to pass," *ibid.*, the Court held that the charterer had been "rightly held to be in default and answerable in damages," *id.* at 486.

The Court confirmed that interpretation in *Mencke*, *supra*. There, the charter party directed the ship to "discharge at New York or Boston or Philadelphia or Baltimore, or so near the port of discharge as she may safely get and deliver [her cargo], always afloat." 187 U.S. at 251. The charterer later ordered the ship to New York, but its masts were too tall to clear the Brooklyn Bridge. *Id.* at 250. This Court explained that the contractual

clause, which "g[a]ve the charterers or their assigns the right to appoint the dock in which to discharge cargo," also "contains conditions that the port must be safe." *Id.* at 253. "It would not be a just exercise of the right to select a dock," the Court held, if the charterer ordered the ship to a port "in getting to which the vessel could not always be afloat or to which she could not safely get." *Ibid.* The Court further observed that a ship could not "be said to have safely reached a dock if required to mutilate her hull or her permanent masts." *Ibid.* The Court concluded that the safe berth clause had been breached, explaining that it was "unable to see anything" that might "warrant[] any other construction of the language employed than that suggested by its ordinary meaning." *Id.* at 257.

ii. The Second Circuit likewise "has long held that promising a safe berth effects an 'express assurance' that the berth will be as represented." Pet. App. 299a (citation omitted). In *Cities Service Transportation Co.* v. *Gulf Refining Co.*, 79 F.2d 521, 521 (2d Cir. 1935) (per curiam), a ship ran aground at the loading berth after being directed in the charter party to load and discharge "where she can lie always afloat." *Ibid.* In affirming liability for the charterer, the court explained 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.'" *Ibid.*

Similarly, in *Park S.S. Co.* v. *Cities Service Oil Co.*, 188 F.2d 804 (2d Cir. 1951), the voyage charter included a "safe berth clause" providing that the ship would "'load and discharge at any safe place or wharf, or alongside vessels or lighters reachable on her arrival, which shall be designated and procured by the Charterer, provided that the vessel can proceed thereto, lie at, and depart therefrom always safely afloat.'" *Id.* at 805. The ship sailed to

the destination port and anchored, but grounded on a shoal. *Ibid.* Although the Second Circuit concluded that the pilot was negligent in selecting the particular spot where the anchor was dropped, see *ibid.*, it held the charterer liable under the safe berth clause for the damage. *Id.* at 805-806. The court explained that "the natural meaning of 'safe place' is a place entirely safe, not an area only part of which is safe." *Id.* at 805. And it stated that its interpretation of the clause drew support from the clause's "purpose." *Id.* at 806. Because "[t]he charterer wishes to control the manner and place of discharging its cargo," it "bargains for the privilege of selecting the precise place for discharge." *Ibid.* The ship "surrenders that privilege in return for the charterer's acceptance of the risk of its choice." *Ibid.* Thus, at least where the ship's "officers had no knowledge of the danger, the charter party was an express assurance that the berth was safe, on which they were entitled to rely." *Ibid.*

In *Paragon Oil Co.* v. *Republic Tankers, S.A.*, 310 F.2d 169 (2d Cir. 1962), cert. denied, 372 U.S. 967 (1963), the court of appeals affirmed a judgment against a charterer for damages sustained by a ship that had grounded near a dock selected by the charterer. See *id.* at 171. The charter party (and an additional contract) included a standard safe berth clause. *Ibid.* Judge Friendly explained for the court that the case could be resolved "on a simple series of propositions: 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." *Id* at 172-173. The court further explained that the charterer was "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.'" *Ibid.* (quoting *Constantine & Pickering S.S. Co.* v. *West India S.S. Co.*, 199 F. 964, 967 (S.D.N.Y. 1912)); see also *Venore Transp. Co.* v. *Oswego Shipping Corp.*, 498 F.2d 469, 472 (2d Cir.) (voyage charterer "had an express obligation to provide a completely safe berth, an obligation which was nondelegable"), cert. denied, 419 U.S. 998 (1974).

b. The court of appeals accordingly was correct to recognize that before the Fifth Circuit's adoption of a "due diligence" approach to a safe berth clause in 1990, see *Orduna S.A.* v. *Zen-Noh Corp.*, 913 F.2d 1149, 1155-1156, "it was well settled that a safe port clause in a charter constituted a warranty given by a charterer to an owner." Pet. App. 300a (quoting Cooke 2007 ¶ 5.124). Petitioners' attempts to minimize the longstanding interpretation of the safe berth clause lack merit.

i. Petitioners contend (Br. 30-33) that this Court's decisions in *Mencke* and *The Gazelle & Cargo* are irrelevant to the question whether the safe berth clause requires only due diligence, because they involved "known" risks, Br. 30, rather than "unknown and unknowable" ones, Br. 32 (emphasis omitted). But because the contractual safe berth clause does not distinguish between those categories, nothing suggests that this Court would have reached different results had the charterer not known of the hazards in *Mencke* and *The Gazelle & Cargo*. Instead, this Court's language was unequivocal: It explained that the safe berth clause's "clear meaning" is that the charterer must direct the ship "to a port which she can safely enter with her cargo," *The Gazelle & Cargo*, 128 U.S. at 485, and that a ship cannot "be said to have safely reached a dock if," as here, she is "required to mutilate her hull," *Mencke*, 187 U.S. at 253.

Petitioners further argue (Br. 28-30) that this Court's decision in *Atkins* v. *The Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874), supports reading a due diligence limitation into the safe berth clause. The contract in *Atkins* required the charterer to direct the ship to a "second safe port," and the charterer directed the ship to Port Morant, Jamaica. *Atkins* v. *Fibre Disintegrating Co.*, 2 F. Cas. 78, 79 (E.D.N.Y. 1868) (No. 601), rev'd, 7 Blatchf. 555 (C.C.E.D.N.Y. 1870), rev'd, 85 U.S. (18 Wall.) 272 (1874). "[T]he peril of the port," however, "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.* When the ship was coming out of the port, the breeze failed, and the ship "struck the reefs," sustaining damage. *Ibid.*

The district court determined that in light of the reefs, "Port Morant cannot be held to be a safe port, within the meaning of the charter." *Atkins*, 2 F. Cas. at 79. The court held, however, that the ship's master had "waived" the safe berth obligation: He had made "inquiries elsewhere as to the character of the port," which was "fully described in" an official publication describing the coast, but did not object to the port's designation. *Ibid.*; see Pet. App. 301a-302a n.14.

Petitioners do not dispute that the district court in *Atkins* held that the ship's master had waived the safe berth clause's protection; nor do they suggest that the ATHOS I's master did so here. See Pet. Br. 29-30. Instead, petitioners rely (*id.* at 28) on the statement by the district court in *Atkins* that the charterer's promise to send the ship to a "'second safe port,' impl[ied] a port which th[e] vessel could enter and depart from without legal restraint, and without incurring more than the ordinary perils of the sea." 2 F. Cas. at 79. According to petitioners (Br. 28-29),

that language "indicates that the charterer does not guarantee that the port is free of *all* perils and that the charterer undertakes no duty and assumes no liability with respect to 'ordinary perils.'" The *Atkins* court's statement, however, does not support petitioners' position here. The court considered the port unsafe because of the presence of reefs. See 2 F. Cas. at 79. Even assuming the court's interpretation of the safe berth clause in *Atkins* governed, the anchor in the anchorage here likewise would render the port unsafe.

Nor are petitioners correct (Br. 29) that this Court "endorsed" what petitioners assert was the district court's view in *Atkins* as to the scope of the safe berth clause. As petitioners acknowledge (*ibid.*), in reversing the court of appeals' reversal of the district court's decision, see 7 Blatchf. 555, this Court focused on a jurisdictional issue, *Atkins*, 85 U.S. (18 Wall.) at 299-307. The Court also stated that "[i]n regard to the merits—after a careful examination of the record," it "found no reason to dissent from the views of the learned district judge," and would "announce the same conclusions" as he had. *Id.* at 299. But that statement is best read to affirm the district court's holding—that the ship's master had waived the safe berth clause's protection. That this Court did not later cite *Atkins* in *The Gazelle* or *Mencke* supports the view that it did not regard the decision as having provided an authoritative interpretation of the safe berth clause.

ii. Petitioners also dispute (Br. 33-37) the relevance of the Second Circuit cases, arguing that they failed to consider *Atkins*, are assertedly thinly reasoned, and do not address prior decisions from that court holding charterers to a standard of reasonable care. But even if petitioners' critiques were well-founded, the Second Circuit cases still would embody the longstanding interpretation

of the safe berth clause, and thus the industry custom that provided the backdrop for petitioners' selection of the customary safe berth clause here.

Petitioners' criticisms, however, are unpersuasive. The Second Circuit decisions interpreting the safe berth clause had no need to address *Atkins*: This Court's decision there did not expressly discuss the clause, and the district court had resolved the case based on waiver. The Second Circuit cases, moreover, are well reasoned. They rely on the plain language of the safe berth clause and the contractual bargain it reflects. See, *e.g.*, *Park S.S. Co.*, 188 F.2d at 805-806. As Judge Friendly observed, the simplicity of the analysis based on the clause's plain terms and their breach was "sufficient and appropriate." *Paragon Oil Co.*, 310 F.2d at 172-173. And the Second Circuit cases cited above had no need to distinguish the prior Second Circuit cases on which petitioners rely. As petitioners concede (Br. 36), those earlier cases "did not involve voyage charters" at all, but rather concerned the duties of consignees and bailees in tort. See *The Eastchester*, 20 F.2d 357, 358 (2d Cir. 1927); *M. & J. Tracy* v. *Marks, Lissberger & Son*, 283 F. 100, 102 (2d Cir. 1922); *Hastorf* v. *O'Brien*, 173 F. 346, 347 (2d Cir. 1909); see also *Waldie* v. *Steers Sand & Gravel Corp.*, 151 F.2d 129, 130-131 (2d Cir. 1945) (cited at Pet. Br. 48) (liability of charterer with no mention of contractual provision); J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul. L. Rev. 860, 862-863 (1975) (failing to distinguish between tort and contract cases); Peter G. Hartman, Comments, *Safe Port/Berth Clauses: Warranty or Due Diligence?*, 21 Tul. Mar. L.J. 537 (1997) (same).

iii. Petitioners accordingly are left with the Fifth Circuit's decision in *Orduna*, which held that a safe berth

clause requiring a charterer to designate "safe discharging berths [the] vessel being always afloat," imposed upon the charterer only "a duty of due diligence to select a safe berth." 913 F.2d at 1155 n.6, 1157 (brackets in original). But *Orduna* was decided in 1990; it does not undermine the "majority view" that had existed for many decades, and the industry custom that necessarily informed the parties' adoption of the customary safe berth clause here. Maass 320. That is particularly so because *Orduna* did not rely on the text of the safe berth clause at all. See 913 F.2d at 1155-1157. Instead, it took the view—incorrectly, see pp. 44-47, *infra*—that "no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects." 913 F.2d at 1157. That decision gives insufficient weight to the decades of precedent interpreting the safe berth clause as a warranty of safety, and the many contracts that expressly limit that obligation to one of due diligence, thereby demonstrating that parties know how to adopt the limitation petitioners urge when they intend to do so. See, *e.g.*, Cooke 2014 ¶ 5A.6, at 151. *Orduna*'s outlier, policy-based determination does not outweigh the longstanding industry understanding that the safe berth clause imposes a warranty of safety.

2. English courts have likewise interpreted the safe berth clause to impose a warranty

English decisions further support construing the safe berth clause to impose a warranty of safety. This Court has explained that uniformity with English decisions is "[e]specially * * * desirable where, as here, the particular form of words employed [in a maritime contract] originated in England." *Standard Oil Co.* v. *United States*,

340 U.S. 54, 59 (1950). Although that proposition "does not mean that American courts must follow [English] decisions automatically," *ibid.*, it favors adopting the long-held interpretation of the safe berth clause on both sides of the Atlantic. See *Kirby*, 543 U.S. at 29 (While "'a [maritime] contract . . . may well have been made anywhere in the world,' it 'should be judged by one law wherever it was made.'") (quoting *Kossick* v. *United Fruit Co.*, 365 U.S. 731, 741 (1961)) (brackets in original).

English decisions have long interpreted the safe berth clause to require the charterer to select a port or berth that will actually be safe for the ship. In *Ogden* v. *Graham*, (1861), 1 B. & S. 773 (Q.B.), the charter required the ship to sail to a "safe port in Chili * * * or so near thereunto as she may safely get." *Id.* at 774; see *id.* at 779. The charterers later selected Carrisal Bajo, which had been closed by the Chilean government, rendering "all vessels unloading there without a permit * * * liable to confiscation." *Id.* at 777; see *id.* at 779. Judge Wightman concluded that even if the charterers were "perfectly innocent * * * as regards any knowledge of the danger that might be incurred by the vessel," the port was one "into which the vessel could not enter," and thus "clearly not within the terms contemplated by the parties." *Id.* at 780. The charterers therefore were required to "pay the damage occasioned by the breach of contract in not naming a safe port, to which they ha[d] made themselves liable by the specific terms of the contract." *Ibid.*; see *id.* at 781-782 (Blackburn, J.) (concluding that safe port clause was violated because "at the time [the charterers] named" the port, "it was a port into which the ship-owner could not take his ship").

As several treatises recognize, see p. 31, *supra*, English courts have continued to hold that safe berth clauses

are contractual undertakings by the charterer that the port or berth will be safe for the ship. In *Leeds Shipping Co.* v. *Societe Francaise Bunge* (*The Eastern City*), [1958] 2 Lloyd's List L.R. 127, the court explained that "a port will not be safe unless, in the relevant period of time, 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 131. The court held the charterer liable when the ship went aground in the port of Mogador, explaining that "[t]he only reason why the master went to Mogador" was because the charterers had nominated that port pursuant to the charter party, and "that contract included a warranty that the port was safe." *Id.* at 136. The Supreme Court of the United Kingdom recently reaffirmed that the *Eastern City* explication of the safe port obligation has "stood the test of time." *Gard Marine & Energy Ltd.* v. *China Nat'l Chartering Co.* (*The Ocean Victory*), [2017] 1 Lloyd's Rep. 521, [11].[7]

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[7] The Court in *The Ocean Victory* determined that the confluence of certain weather conditions constituted an "abnormal occurrence" on the facts of that case, which absolved the charterer from liability under the safe berth clause. 1 Lloyd's Rep. [9], [24]–[25], [46]–[47]. Although petitioners' amici contend (Am. Fuels & Petrochemical Mfrs. Ass'n Merits Amicus Br. 15-18) that the anchor here likewise constitutes an "abnormal occurrence," petitioners have not made that argument, and have therefore forfeited it. In any event, American law has not addressed the concept of an "abnormal occurrence," see *id.* at 20, and amici point to no English or American case holding that the presence of a preexisting physical obstacle like the anchor here constitutes an abnormal occurrence, rather than a "characteristic[]" or "feature[]" of the port to which the safe berth warranty applies, *The Ocean Victory*, 1 Lloyd's Rep. [24]. To the contrary,

3. Arbitral decisions confirm that the safe berth clause functions as a warranty

Disputes in the maritime shipping industry are often resolved by arbitration. See 2 Schoenbaum, § 11-1, at 4; *id.* § 21-15, at 590. Charter parties "usually include compulsory arbitration clauses," which "generally" provide that arbitration will take place in New York or London. 2A *Benedict on Admiralty* § 184. Arbitral decisions confirm the industry's understanding that the safe berth clause constitutes a warranty of safety.

"[T]he vast majority of New York arbitration panels" considering the traditional safe berth clause "have long followed the basic proposition" that the clause "provides a warranty that the port nominated by the charterer will be completely safe for the particular vessel so that she can proceed there and leave in the normal course of operations without being exposed to risks of physical damage." Cooke 2014 ¶ 5A.4, at 150-151; see, *e.g.*, *MV Baltic Confidence*, SMA No. 3723, 2002 WL 34461633, at *4-*5 (Mar. 20, 2002) (construing safe berth clause as a warranty that was breached by presence of "underwater scrap [iron] or some other submerged shaped object which penetrated [the ship's] bottom plating"); *MT Mountain Lady*, SMA 3704, 2001 WL 36175192, at *3 (Sept. 12, 2001) ("In our experience it is a well-known and accepted practice in the industry that charterers assume responsibility for any port risk involved when negotiating a charter party with a range of unnamed ports."); *M/V Caribbean Nostalgia*, SMA No. 1788, 1983 WL 825110, at *5-*7 (Feb. 18, 1983) (construing safe berth clause as a warranty, but finding

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the record contains testimony that finding large debris on the Delaware Riverbed was "very common" at the time of the allision here. No. 11-2576 C.A. App. 357; see *id.* at 357-361, 673-675, 969.

that master's negligence caused the damage); *M/V Acropolis*, SMA No. 1601, 1981 WL 640663, at *5 (Nov. 6, 1981) ("Charterers breached their express [safe berth] warranty" by failing to have sufficient water depth available for vessel.).

In so holding, arbitrators have declined to apply the due diligence standard adopted in *Orduna*. See, *e.g.*, *M.V. Aristides*, SMA No. 3686, 2001 WL 36175174, at *8-*10 (Apr. 18, 2001). And they have contrasted the customary safe berth clause with express due diligence provisions. See, *e.g.*, *M/T DEA Brovig*, SMA No. 1931, 1984 WL 922804, at *2 (Feb. 9, 1984). For example, in *M/V Agia Erini II*, SMA No. 1602, 1981 WL 640664 (Oct. 30, 1981), the arbitral panel rejected the argument that "the safe port/safe berth clauses do not give rise to a warranty," explaining that "[i]f the obligation is impracticable or burdensome, a Charterer need only provide otherwise in his charter party." *Id.* at *13. Arbitrators also have applied the safe berth clause's plain terms to hold charterers liable for unknown or unforeseeable risks. In *M.V. Mercandian Queen*, SMA No. 2713, 1990 WL 10555726 (Sept. 4, 1990), the panel found a breach of the safe berth clause where "neither Charterer, nor Owner, nor the pilot were aware of the uncharted rock which holed the vessel," and the charterer had "quite innocently designated an unsafe berth." *Id.* at *5. These decisions are strong evidence of the industry custom—and thus the parties' intent—that the traditional safe berth clause imposes a warranty of safety.

C. Policy Considerations Support The Longstanding Warranty Interpretation Of The Safe Berth Clause

Despite the safe berth clause's plain language and the "near consensus" of relevant authority, Pet. App. 303a,

petitioners urge (Br. 37-50) this Court to adopt a due diligence standard based on petitioners' conceptions of the best maritime policy. The Court should not do so. The shipping industry is highly sophisticated, and as the many agreements expressly adopting a due diligence standard show, its participants are able to negotiate for different terms as they see fit. The best policy is therefore to be "true to the contract language [and] to the intent of the parties." *Kirby*, 543 U.S. at 31.

1. To the extent policy is relevant, sound policy supports the prevailing interpretation of the safe berth clause

Petitioners suggest that this Court should read a due diligence limitation into the safe berth clause on the theory that it best serves "the protection of maritime commerce." Pet. Br. 37 (quoting *Exxon Corp.* v. *Central Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991)). But because the safe berth clause "plain[ly] and obvious[ly]" imposes a warranty, petitioners' policy arguments are irrelevant. *Kirby*, 543 U.S. at 32 (quoting *Green* v. *Biddle*, 21 U.S. (8 Wheat.) 1, 89-90 (1823)).

In any event, the warranty approach protects maritime commerce by honoring the parties' agreement and creating clear, predictable rules. As the Second Circuit has explained, the safe berth clause reflects a commercial bargain. "The charterer wishes to control the manner and place of discharging its cargo"; it therefore "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. By contrast, limiting the charterer's obligation to "at most a duty of

due diligence," Pet. Br. 3, would "misconstrue the intention of the parties and * * * defeat the very purpose of the safe berth clause," *Park S.S. Co.*, 188 F.2d at 806.

Relying on *Orduna* and Gilmore & Black, petitioners suggest (*e.g.*, Br. 42-43) that the due diligence approach embodies a better policy, because "the master on the scene, rather than a distant charterer, is in a better position to judge the safety of a particular berth." Pet. Br. 43 (quoting *Orduna*, 913 F.2d at 1156). But petitioners' argument for a due diligence standard is based (at least in part) on their view that charterers should not be held liable for "unknown and unknowable risks." *Id.* at 21. By definition, no party is in a "better position" to discover "unknown and unknowable risks"—that is why parties assign such risks by contract.

With respect to what petitioners might consider "knowable" risks, the court of appeals correctly explained that there is "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 that port." Pet. App. 302a. "The 'commercial reality [is] that it is the charterer rather than the owner who is selecting the port or berth,'" and is therefore more likely to be familiar with the area. *Ibid.* (quoting Cooke 2007 ¶ 5.126) (brackets in original). Indeed, here, petitioners directed the ATHOS I to their own facility in Paulsboro. See *id.* at 4a.

Petitioners further suggest (Br. 43) that "whether it was ever true that charterers 'normally' had better access to information about berths and ports than distant vessel owners or crews, it is not true today," due to the advent of modern technology. But the safe berth clause has existed in substantially similar form for at least 150 years. See p. 40, *supra* (discussing English case

from 1861 interpreting materially similar language). Modern technology cannot change its meaning. Cf. *Hall* v. *Hall*, 138 S. Ct. 1118, 1128 (2018) (undefined term "presumably carried forward the same meaning" it had previously been given). To the extent parties wish to account for technological advances, they are free to adopt contractual terms expressly limiting the charterer's obligation to the exercise of due diligence.

The prevailing warranty interpretation of the safe berth clause also "protect[s] * * * maritime commerce," *Exxon Corp.*, 500 U.S. at 608 (citation omitted), by providing certainty and minimizing litigation costs. "Because shipping is such a risky business, it is essential for the parties in a shipping transaction to allocate as much of the risk as possible in advance." ASBA Amicus Br. 6. Contractual allocation of the risk of loss through a safe berth warranty allows the parties to specify and understand what risks they bear; enables them to obtain appropriate insurance; and favors the prompt settlement of claims when accidents occur. See *id.* at 17.

By contrast, petitioners' due diligence proposal is a recipe for uncertainty. In light of the longstanding authority interpreting the safe berth clause to impose a warranty of safety, accepting petitioners' reading would not accord with the parties' reasonable expectations (or those of the industry more generally) at the time the parties adopted the clause. And it would increase uncertainty and litigation costs when accidents occur, even though the parties never expressly agreed to such an open-ended inquiry. For example, petitioners do not explain what it would mean for a charterer to exercise due diligence in choosing a port. Would the standard require inquiries made in advance? At what frequency and level of detail? Would it be sufficient for charterers

to "choose[] ports and berth[s] based on commercial as opposed to nautical grounds," N. Am. Export Grain Ass'n Amicus Br. 15 (quoting *Orduna*, 913 F.2d at 1156), or to extend safe berth warranties despite "limited knowledge of the navigational conditions" at the ports they select, Tricon Energy, Ltd. Amicus Br. 1-2? Would the degree of care required depend on whether (as here) the charterer also was the wharfinger of the port to which it directed the vessel? See Am. Fuels & Petrochemical Mfrs. Ass'n Merits Amicus Br. 30 (suggesting this scenario is common). Petitioners answer none of these questions. At a minimum, their interpretation would yield significant uncertainty and litigation following an accident (or delay) in an unsafe port.

Petitioners are thus wrong to criticize the majority interpretation of the safe berth clause as "preclud[ing] consideration of the facts and circumstances of individual cases." Pet. Br. 45. Certainty and predictability are a feature of commercial warranties, not a bug. To the extent that particular parties prefer a factual inquiry, nothing precludes them from adopting a safe berth clause with a due diligence limitation. But in the absence of such an express standard, construing the safe berth clause as a warranty of safety best promotes maritime commerce.

2. Tort principles have no relevance to the parties' contractual agreement

Petitioners contend that the longstanding warranty interpretation of the safe berth clause should be rejected because it "is a form of 'strict liability'" for charterers that is not supported by "special justifications" that this Court has cited in the context of maritime torts. Pet. Br. 38 (quoting *Orduna*, 913 F.2d at 1157); see *id.* at 38-41 (citing cases involving tort liability and

implied warranties). But petitioners again ignore the distinction between contract and tort. "Contract liability *is* strict liability." 2 Restatement (Second) of Contracts, ch. 11 intro. note (emphasis added); see 23 *Williston* § 63.8; *Wisconsin Elec. Power Co.*, 557 F.3d at 506. Thus, no "special justifications" (Pet. Br. 38) are needed to hold petitioners to the plain terms of the contract to which they agreed.

Nor are petitioners correct in contending (Br. 41-42, 47-49) that the industry-standard reading of the safe berth clause would fit uneasily with other bodies of maritime law. Petitioners contend (Br. 41-42) that the warranty interpretation is in tension with limitations on liability in the OPA and COGSA. But neither of those statutes impedes the parties' ability to choose greater liability via contract. The OPA's "[s]avings provision" makes clear that its liability limitations "do[] not affect" the "remedies" to which parties are "otherwise entitled" under the federal courts' "admiralty and maritime jurisdiction." 33 U.S.C. 2751(e)(2); see 33 U.S.C. 2710(c) ("Nothing in this Act * * * bars a cause of action that a responsible party subject to liability under this Act * * * has or would have * * * against any person."). Similarly, COGSA—which expressly does not apply to charter parties, Tit. I, § 5, 49 Stat. 1211—states that "[a] carrier shall be at liberty * * * to increase any of his responsibilities and liabilities under this Act, provided such surrender or increase shall be embodied in the bill of lading issued to the shipper."[8]

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[8] Petitioners further note (Br. 41) that 46 U.S.C. App. 183 (now 46 U.S.C. 30505) caps vessel owners' liability for maritime casualties when they are not at fault. Petitioners elsewhere acknowledge (Br. 8), however, that that provision does not apply to casualties covered by the OPA. See 33 U.S.C. 2702(a).

Petitioners next contend that "the warranty approach * * * is inconsistent with the * * * duty of wharfingers," who are "only 'bound to exercise reasonable diligence in ascertaining the condition of the berths.'" Pet. Br. 47 (quoting *Smith* v. *Burnett*, 173 U.S. 430, 433 (1899)). But because wharfinger liability is a matter of tort, see *Smith*, 173 U.S. at 433; Pet. App. 312a, no reason exists why the wharfinger's duty of care must be the same as the charterer's express contractual obligation. See, *e.g.*, *Constantine & Pickering S.S. Co.*, 199 F. at 967 (rejecting "analogy" between wharfinger's duty to exercise reasonable care and the "charterer's liability" based "on the express terms of his charter party"); cf. *East River S.S. Corp.* v. *Transamerica Delaval Inc.*, 476 U.S. 858, 872-873 (1986) (rejecting a products-liability claim in tort for a product that injures itself, explaining that "[c]ontract law, and the law of warranty in particular, is well suited to commercial controversies of th[is] sort * * * because the parties may set the terms of their own agreements"). Nor does the fact that petitioners served as both wharfinger and charterer render the different standards anomalous. See Pet. Br. 48. Indeed, petitioners elsewhere state (*id.* at 44) that their "separate role as the wharfinger * * * should not affect this Court's analysis of the proper default interpretation of the" safe berth clause. At a minimum, petitioners do not explain why their dual role should *decrease* their responsibility for the berth they selected, maintained, and promised would be "safe," *e.g.*, Pet. Br. Add. 8a.

3. Interpreting the safe berth clause according to its plain terms and longstanding industry custom produces a fair result

Finally, holding the parties to their clear contractual agreement produces an equitable result. Petitioners, who are sophisticated commercial entities, entered into a form contract with a safe berth clause that has been interpreted for decades to impose a warranty of safety. Had petitioners wished to limit their liability, they could have instead adopted one of the industry forms that includes an express due diligence clause, or added such a limitation to their own specific clauses. See Pet. Br. Add. 30a-48a.

Petitioners' attempts to shift liability in the face of their contractual agreement are unconvincing. Petitioners suggest (*e.g.*, Br. 43-44) that the ship owner should be liable because "[v]essel captains * * * have * * * the last clear opportunity to avoid a problem." But petitioners elsewhere concede that the ship owner and captain could not have known about the anchor and were not at fault. See Pet. Br. 49. Holding the ship owner liable would not be equitable, particularly where the ATHOS I approached petitioners' facility with express assurances of a "safe place or wharf," where it would remain "always safely afloat." Pet. Br. Add. 8a; see *id.* at 4a, 24a.[9]

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[9] Petitioners briefly suggest (Br. 50 n.10) that it is inequitable for Frescati to recover damages under the voyage charter, to which it was not a party. But while petitioners raised the third-party beneficiary issue in their prior petition for a writ of certiorari, see 13-462 Pet. i, they did not do so in the petition here, see Pet. i; Gov't Br. in Opp. 20, and the issue is not fairly included within the question presented, see Sup. Ct. R. 14(1)(a). Moreover, the court of appeals correctly determined that Frescati was a third-party beneficiary of the voyage charter. Pet. App. 292a-297a; see Gov't Br. in Opp. 20-22.

Petitioners also suggest (Br. 44-45) that because "the casualty occurred in the Federal Anchorage waters," the government should be liable for the loss. That assertion misunderstands the nature of federal anchorages. See Pet. Br. 6 (incorrectly describing federal anchorages as "essentially * * * federally maintained and regulated parking lot[s]"). While the government designated Anchorage Number 9, the district court correctly determined that the United States had no "affirmative duty" to search for hazards or obstructions there. Pet. App. 234a. The court of appeals likewise explained that the "equities do not appear to favor" petitioners because "[t]he United States does not preemptively search for obstructions in the anchorage, it is not responsible for doing so, and it did not tell [petitioners] that it would do so." *Id.* at 37a n.28. The rule could not sensibly be otherwise. The National Oceanic and Atmospheric Administration's charting mission, for example, encompasses 3.4 million square nautical miles, but congressional appropriations to the agency enable it to survey only approximately 3000 square nautical miles per year. No. 16-3470 C.A. App. 483, 488.

Nor are petitioners correct (Br. 49) that the Fund should absorb the cost of cleaning up the oil spill despite petitioners' contractual obligation. The OPA allows statutorily designated "responsible parties" (like Frescati) to limit their liability, and it provides for the Fund to pay for oil spill cleanup above the cap in the first instance. See 33 U.S.C. 2704, 2712(a)(4). But the Fund "was not designed to bear those costs indefinitely." Pet. App. 37a n.28. Instead, the statute expressly preserves responsible parties' "remedies" under other sources of law, 33 U.S.C. 2751(e)(2); see 33 U.S.C. 2710, and it allows "the United States, on behalf of the Trust Fund, to pursue any claim a responsible party could have brought against a third

party under any law," as the United States has done here. Pet. App. 37a n.28; see 33 U.S.C. 2715. That subrogation provision allows the United States "to recover the money paid out by the Trust Fund and preserve the Trust Fund's ability to respond quickly to spills in the future." Pet. App. 37a n.28. The OPA thus provides no basis for limiting petitioners' contractual liability.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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