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.,

Respondents.

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

BRIEF OF *AMICI CURIAE* BIMCO (FORMERLY THE BALTIC AND INTERNATIONAL MARITIME COUNCIL), THE INTERNATIONAL ASSOCIATION OF INDEPENDENT TANKER OWNERS ("INTERTANKO"), AND THE INTERNATIONAL ASSOCIATION OF DRY CARGO SHIPOWNERS ("INTERCARGO") IN SUPPORT OF RESPONDENTS

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STATEMENT OF INTEREST[1]

Amici BIMCO (formerly The Baltic and International Maritime Council), The International Association of Independent Tanker Owners ("INTERTANKO"), and The International Association of Dry Cargo Shipowners ("INTERCARGO") are maritime industry associations, the members of which represent most of the owners of ocean-going vessels in the world. The members of these associations are particularly interested in, and impacted by, the Court's interpretation of the safe berth and safe port clause in the charter party at issue, which is widely used in the tanker trade. Interpreting what the industry has long regarded as a warranty imposing strict liability as imposing only a due diligence obligation would alter the long-settled understanding of how risk is allocated between contracting parties. The result would necessitate a comprehensive revision of widely used industry forms, individual charters, and insurance arrangements placed in reliance on this common understanding. The consequence would be sweeping disruption as the market struggled to react, to the considerable detriment of all shipping interests.

BIMCO

BIMCO, the world's largest shipping association, was founded in 1905. Its more than 1,900 members come from over 120 countries. Its more than 800

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[1] No counsel for any party authored this brief in whole or in part. No party or its counsel made a monetary contribution intended to fund the preparation or submission of the brief. No person other than the *amici curiae* represented in this brief or their counsel made any monetary contribution to its preparation or submission. All parties have consented to the filing of this *amici* brief.

shipowner, operator, and manager members control more than 1,100,000,000 deadweight tons or around about 58% of the world's tonnage. BIMCO is well represented in the three main segments: Dry bulk 59%, tank 49%, and container 83%.

BIMCO also has more than 600 broker members and more than 300 agents as members. Its associate members include Protection & Indemnity clubs (mutual marine insurance), national shipowners' associations, law firms, and educational institutions.

All segments of the shipping community participate in BIMCO. Members from all categories may be appointed to its Documentary Committees. Moreover, as is also the case with *Amici* INTERTANKO and INTERCARGO, because of the charter chains prevalent in maritime commerce, BIMCO's owner members are also charterers in many voyages.

Because certainty and consistency of obligations speeds the negotiation of contracts and reduces the chance of disputes about the parties' respective responsibilities, developing standard terms and clauses for shipping contracts was one of BIMCO's original aims and led to the early establishment of its Documentary Committee to draft standard forms and clauses. BIMCO, *About Us and Our Members*, https://www.bimco.org/about-us-and-our-members/about-us (last visited Sept. 13, 2019). BIMCO's "standardisation of charter parties and other shipping documents would go on to benefit the maritime industry for over the next 100 years and is still going strong today." *Id.*

While BIMCO is primarily a shipowners' organization, the goal of BIMCO's Documentary Committee is "to produce flexible commercial agreements that are fair to both parties. We work with

industry experts to produce modern contracts tailored to specific trades and activities. Our world-recognised contracts are widely used and this familiarity provides greater certainty of the likely commercial outcome - *helping members manage contractual risk.*" *Id.* (emphasis added). That familiarity provides the advantage of greater certainty and risk management to the entire industry when using these agreements (which are available publicly, either in sample copies for free or in amendable versions for a fee), not just BIMCO members.

Seeking certainty and standardization in global legal regimes as well as contracts, BIMCO maintains relationships with national governments and other stakeholders in the major shipping hubs of the European Union, the United States, and Asia. With the same goal, BIMCO participates as an accredited Non-Governmental Organization in all relevant United Nations organs, including the International Maritime Organization (IMO). BIMCO also worked with the United Nations Commission on International Trade Law (UNCITRAL) to develop a framework for the facilitation of international trade and investment and to draft the UNCITRAL Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea (the Rotterdam Rules).

BIMCO's core missions and activities are to facilitate trade by providing the world's leading standard contracts and clauses for the shipping industry, to interact with global and regional regulators, to provide information and advice to members, including guidance on interpretation of clauses and forms, and to provide training to all

segments of maritime commerce, members and nonmembers alike.[2]

INTERTANKO

INTERTANKO was founded in 1970. Its 198 owner members own, operate, and manage over 3,900 tankers with a carrying capacity of nearly 346 million deadweight tons, or 75% of the independent global tanker fleet. Its 244 associate members include brokers, oil companies, and others interested in the transportation of oil, gas, and chemical products.

INTERTANKO assists its members by developing best practices to achieve "zero fatalities, zero pollution, and zero detentions." INTERTANKO, *Mission Statement*, https://www.intertanko.com/about-us/mission-statement (last visited Sept. 13, 2019).

INTERTANKO is the leading authority on tanker charter terms and forms. Like BIMCO, INTERTANKO formed a Documentary Committee from its outset. The Committee's mandates are to promote balanced and reasonable charter party provisions in the tanker industry and to consider, prepare and review tanker charter parties, as well as other related documents, including any clauses contained in such documents as well as prepare model clauses for consideration by INTERTANKO members.

To that end, the INTERTANKO Documentary Committee has both owner and charterer members and includes one or more American lawyers to ensure that their work product complies with US law and will

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[2] The full scope of activities of BIMCO can be found on its website at http://www.bimco.org.

be interpreted consistently by the courts and arbitrators on both sides of the Atlantic.

In addition to drafting, the Documentary Committee provides guidance on clauses and contracts to ensure that agreements respond to industry changes and are clear about allocation of risks. INTERTANKO, *Documentary Committee*, http://www.intertanko.com/committees/committee/documentary (last visited Sept. 13, 2019). The result of these works can be found in an extensive library of recommended clauses and explanatory notes for its members as well as a series of publications on many standard oil major tanker charterparty forms. The clauses and chartering books are in the public domain and therefore available to nonmembers as well as members. *See* INTERTANKO, *Info Centre,* https://www.intertanko.com/info-centre (last visited Sept. 16, 2019).

INTERTANKO'S Legal and Insurance Committee has a mandate to ensure that members achieve certainty on both liability and insurance of risks, including allocation of liability and risk under the terms of their charterparties. INTERTANKO, *Insurance and Legal Committee,* https://www.intertanko.com/committees/committee/insurance-legal (last visited Sept. 16, 2019). That Committee, which again includes charterers as well as owners, works to further common interests of the independent tanker industry concerning all relevant insurance and liability issues and to link INTERTANKO with the insurance industry. *Id.* Particular issues such as the safe berth and safe port clause interpretations by decision-makers around the world are assessed at meetings. Should the need arise, the committee arranges for training of members concerning the state of the law so they are fully informed when entering

into charter parties. For example, the district court's erroneous interpretation of the safe berth and safe port clause in 2011 necessitated a training session by INTERTANKO to warn of the impact of the ruling. *See* Point III, *infra*.

In addition to committees for particular segments of the bulk liquid trade,[3] INTERTANKO has active committees focused on the Environment, Safety and Technical matters, Vetting, and the Human Element in Shipping Committee.

INTERCARGO

INTERCARGO, formed in 1980, represents the owners of vessels that carry bulk commodities such as coal, grain, and iron ore, and other entities serving that trade.

As of August 2019, INTERCARGO has 143 full members that own, operate, and manage 2,252 bulkers with a capacity of over 214 million deadweight tons, 20% of the number of dry bulkers operating worldwide and about 25% of the total global dry cargo carrying capacity. INTERCARGO'S 79 associate members include P&I clubs, hull underwriters, classification societies, ship registries, brokers, educational institutions, and others interested in dry bulk transportation.

INTERCARGO's charge is to work with its members, relevant regulators, and other shipping organizations to promote safety, efficiency, and environmental protection. To that end, INTERCARGO

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[3] E.g., Chemical Tanker Committee (CTC), Chemical Tanker Sub-Committee Americas (CTSCA), Gas Tanker Committee (GTC), and the Offshore Tanker Committee (IOTC).

participates in the development of international regulations through the IMO and similar bodies.

SUMMARY OF ARGUMENT

Since ancient times, maritime commerce has been conducted in an environment rife with dangers that may or may not materialize on a given voyage but are certain to occur over the course of time. Uncertainty over which party to a maritime venture will bear the consequences when things go wrong can lead to prolonged litigation as well as the souring of commercial relationships.

Warranties are a long-familiar feature of maritime law and commerce. Because of the range and force of the perils of waterborne transport, maritime ventures can come to grief even when both parties act responsibly. Accordingly, courts have not hesitated to enforce warranties and their characteristic strict liability to create clarity about which party would bear the loss even when both shipowners and charterers had performed their duties.

Because shipowners are in charge of accomplishing a safe sea passage, for centuries, courts and arbitrators have imposed a warranty of seaworthiness, requiring shipowners to bear the consequences if the vessel became unseaworthy during the course of the voyage, even if shipowners had diligently readied her and diligently maintained her during the voyage. Where charterers agreed to send the vessel only to safe ports and berths, courts have recognized a safe berth or safe port warranty, obligating charterers to answer for the results of casualties at an unsafe port or berth even if charterers had been careful in its selection.

The value of certainty about which party bears certain risks also led to the development of standardized charter forms that came to dominate the market. As charter parties were developed for different trades, most forms reflected this traditional allocation of risk: Shipowners generally warranted the seaworthiness of their ships and charterers generally warranted the safety of the ports and berths to which they directed the ship.[4] When parties wished to avoid the scope of potential liability inherent in a warranty, they adopted language expressly limiting their respective obligations for seaworthiness and port and berth safety to the exercise of due diligence.

There is no unfairness in enforcing a party's contractual undertakings. Though a marine casualty resulting from a breach of warranty can produce enormous losses, especially when there is pollution, insurance cover for such risks is equally available to shipowners and charterers, having been developed exactly because charterers assume in vessel charters some of the risks that might otherwise fall to shipowners, including damage suffered or inflicted in port.

Characterizing the clause at issue as a warranty, imposing liability on charterers for breach even in the absence of fault, satisfies the industry's expectations and understanding and provides the stability and consistency required to conduct business. Any other

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[4] Oil, coal, grain and other bulk commodities usually are carried under charter parties which are considered to be private (and not public) carriage. Accordingly, charter parties are not subject to legislation such as the Carriage of Goods by Sea Act, 46 U.S.C. §§ 30701-30707 *note* (2006), so owners and charterers are free to allocate risks as they wish. Thomas J. Schoenbaum, *Admiralty & Maritime Law* § 11-1 (6th ed. 2018).

result would inject legal uncertainty and cause disruption to trade, requiring the revision of countless forms, including those that have been in use for over a century, and triggering the renegotiation of thousands of individual charters.

For that reason, when the district court issued its first opinion relying on the Fifth Circuit's anomalous view, *Amici* immediately recognized the implications of the error, particularly the dangers to the charter market affecting both owners and charterers alike, and were permitted to file an *amicus* brief in the United States Court of Appeals for the Third Circuit in support of Respondents' appeal. The argument was then, as it is now, that the safe port and berth clauses are absolute warranties and not due diligence obligations only. *See In re Petition of Frescati Shipping Co., Ltd.*, Case No. 11-2577 (3d Cir.), Dkt. # 003110719759 at 24-30.

The circuit split that led to the district court's first opinion introduced uncertainty into an environment that relies on clarity of obligations and consistency in contractual interpretation and legal rules. That uncertainty impairs the ability of all stakeholders in a maritime venture to identify their risks and promotes unnecessary litigation and forum shopping as parties can urge reliance on opposing precedents. Such wasteful disputes affect not only the parties to a contract but also their insurers, who often bear litigation and arbitration costs.

The information and industry perspective these *Amici* presented in 2011 is as important for the Court's consideration today as it then was for the Third Circuit. Unlike Petitioners, *Amici*, as the voice of the trade, can speak with authority on the effects of upending the settled expectations in the industry. No

other party or *amicus* interest can match the credibility of BIMCO and INTERTANKO, the drafters of a wide range of the most frequently-used forms in maritime commerce, on the meaning the industry attributes to common clauses in common forms. When BIMCO and INTERTANKO state that much-used forms and thousands of contracts will be adversely affected if the Court disturbs the warranty character of the safe berth clause at issue, they represent the voice of industry.

The balance and understanding that have characterized maritime warranties for centuries should not be disturbed.

ARGUMENT

I. CERTAINTY OF RISK ALLOCATION IS ESSENTIAL IN A HAZARDOUS ENVIRONMENT.

All maritime ventures are subject to the peculiar perils of the seas in addition to the risks common to all commercial ventures, from weather to human error and from epidemics to international hostilities. In a dangerous environment in which mishaps occur, disputes about who will bear damages are particularly wasteful, especially because the general categories of risks can be identified and allocated. To avoid such expensive and distracting disputes, legal principles have developed and standardized contracts have been drafted to allocate these risks with certainty.

II. WARRANTIES PROVIDE CERTAINTY ABOUT RISK ALLOCATION WHEN A CASUALTY RESULTS WITHOUT FAULT BY EITHER PARTY.

Savage seas and uncharted hazards can defeat well-found ships, cautious navigation, and conscientious

terminal selection by contract partners. Maritime casualties, whether at sea or in port, can and often do occur without fault on the part of either shipowners or charterers and produce damages that sometimes reach titanic proportions.

Warranties are part of an established system *Amici* have relied on because such warranties were designed to ensure clarity of risk allocation in commerce conducted in an environment in which many risks beyond the control of either party regularly produce dire consequences.

A. Maritime Law Imposes Warranties and thus Strict Liability on Both Shipowners and Charterers.

Warranties and other forms of strict liability are common in maritime law[5] precisely because of the unpredictability of the marine environment and thus the need to establish clearly, and without litigation, that one party or the other will answer for the consequences of certain risks, whether produced with or without actual fault on the part of the warrantor. The maritime industry has long been familiar with, and even embraced, such warranties. They are understood to be "[a]n express or implied promise that something in furtherance of the contract is guaranteed by one of the contracting parties." *Warranty*, *Black's Law Dictionary* (10th ed. 2014).

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[5] For example, the Oil Pollution Act of 1990, 33 U.S.C. § 2701 *et seq.*, the widely adopted International Conventions on Civil Liability for Oil Pollution Damage, Nov. 29, 1969, 973 U.N.T.S. 3, and on Civil Liability for Bunker Oil Pollution Damage, Mar. 23, 2001, IMO LEG/CONF. 12/19, all impose strict liability on shipowners regardless of fault and even though the spill might have been caused by a third party.

As the party that controls the vessel and her navigation and in the absence of disclaimers or limiting language, shipowners are held to have warranted the seaworthiness of their ships, giving rise to strict liability if a ship is rendered unseaworthy even if there were no fault or neglect on the owners' part:

> [A shipowner's liability for unseaworthiness has an] absolute character. It is essentially a species of liability without fault, analogous to other well known instances in our law. Derived from and shaped to meet the hazards which performing the service imposes, the liability is neither limited by conceptions of negligence nor contractual in character.

Seas Shipping Co., Inc. v. Sieracki, 328 U.S. 85, 94 (1946) (citations and footnote omitted), *superseded by statute with respect to claims falling within the purview of the* Longshore and Harbor Workers' Compensation Act, 33 U.S.C. § 901 *et seq., as recognized in Miles v. Apex Marine Corp.*, 498 U.S. 19, 27-28 (1990); *see also The Caledonia*, 157 U.S. 124 (1895).[6]

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[6] In a similar context, the Court stated:

> In every contract for the carriage of goods by sea, unless otherwise expressly stipulated, there is a warranty on the part of the shipowner that the ship is seaworthy at the time of beginning her voyage, and not merely that he does not know her to be unseaworthy, or that he has used his best efforts to make her seaworthy. The warranty is absolute that the ship is, or shall be, in fact seaworthy at that time, and does not

Correspondingly, courts have held that a warranty is created when, without limiting language, charterer agrees to load and discharge at safe ports and safe berths. *See generally Park S.S. Co. v. Cities Serv. Oil Co.*, 188 F.2d 804, 805 (2d Cir. 1951). As with shipowners' seaworthiness warranty, the charterers' safe port warranty is absolute, as reflected in an informative English decision issued over a century and a half ago:

> It may be that the charterers were perfectly innocent on this occasion as regards any knowledge of the danger that might be incurred by the vessel, but at the same time

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> depend on his knowledge or ignorance, his care or negligence.
>
> After renewed consideration of the subject, in the light of the able arguments presented at the bar, we see no reason to doubt the correctness of the rule thus enunciated.
>
> The proposition that the warranty of seaworthiness exists by implication in all contracts for sea carriage we do not understand to be denied, but it is insisted that the warranty is not absolute, and does not cover latent defects not ordinarily susceptible of detection. If this were so, the obligation resting on the shipowner would be not that the ship should be fit, but that he had honestly done his best to make her so. We cannot concur in this view.
>
> In our opinion, the shipowner's undertaking is not merely that he will do and has done his best to make the ship fit, but that the ship is really fit to undergo the perils of the sea and other incidental risks to which she must be exposed in the course of the voyage, and, this being so, that undertaking is not discharged because the want of fitness is the result of latent defects.

The Caledonia, 157 U.S. 124, 130-32 (1895) (internal quotation marks omitted.)

> here is a contract that she is to go into a safe port . . . which charterers shall name.

Ogden v. Graham, (1861) 121 Eng. Rep. 901, 1 B& S 733, 780; *see also* Terrence Coghlin *et al., Time Charters* 224 (6th ed. 2008) (Time Charterers) ("The warranty means that the port or berth nominated by the charterer must be completely safe for the particular vessel so that she can proceed there and leave in the normal course of operation without being exposed to the risk of physical damage").

The owners' warranty of seaworthiness and the charterers' safe berth warranty strike a balance of risks and duties, but of course, parties are free to allocate risks or limit their responsibilities as they see fit. To avoid the creation of warranties, including those of seaworthiness and berth safety, parties have only to include contractual language *expressly* restricting their obligations to the exercise of due diligence. Point II B, *infra* at 13-16. Where there is no express shift or circumscribing language, however, courts and arbitrators consistently have enforced seaworthiness and safe berth clauses as warranties imposing strict liability on the warrantor, shipowners or charterers as the case might be, for potentially significant losses, even if the warrantor was without fault and did not have control over the precise mechanism or events that triggered the casualty. These are the situations in which warranties best demonstrate their utility.

B. Parties Can Manage and Define the Scope of their Risks by Selecting Clauses and Forms that Impose Warranties or that Limit their Obligations to the Use of Due Diligence.

From the beginning of the 20th century, several groups, including trade organizations, broker groups, trade boards, oil companies, and, notably, *Amicus* BIMCO, have drafted standard forms[7] to establish a mutual understanding of the parties' basic obligations, thus speeding negotiations by allowing parties to focus on the details of the transaction and minimizing the wasteful disputes that flourish when there is room for parties to disagree about their obligations.

Some of the most frequently used charter forms reflect the same warranties recognized by the courts. Among them are:

- *amicus* BIMCO's "Uniform Time-Charter," first issued in 1939 as "BALTIME 1939" and last revised in 2001, *see Time Charters*, at 782;[8]

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[7] The BIMCO forms referenced below are available to the industry in electronic format using its online pay-as-you-go charter party editing system. BIMCO, *BIMCO Contracts*, https://www.bimco.org/contracts-and-clauses/bimco-contracts (last visited Sept. 12, 2019).

[8] The warranty appears in clause 2: "The Vessel shall be employed in lawful trades for the carriage of lawful merchandise only between safe ports or places where the Vessel can safely lie always afloat . . . ."

- New York Produce Exchange form ("NYPE"), originated by the Association of Ship Brokers and Agents ("ASBA") and now joined by BIMCO in the latest revision, a time charter that remains the most important standard form for dry cargo charters[9] and
- ASBA's ASBATANKVOY, a voyage charter that is "the most used tanker charter party in the world." Søren Wolmar, *A New Charter Party for the Chemical Special Products and Parcel Tanker Industry, The Arbitrator*, (Jan. 2010), at 10.[10]

When parties do not wish to undertake the strict liability imposed by a warranty, they can choose other charters or clauses or modify existing forms to bind themselves to a lesser obligation. In the maritime industry, the lesser obligation is one of "due diligence."

BIMCO and INTERTANKO as well as other groups offer standard clauses limiting parties' obligation to the exercise of due diligence on matters that would otherwise have been warranties, in particular, safe berth and port warranties.[11] Because major oil

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9 The safe port and safe berth warranties appear in clause 1(b)-(d) of NYPE 2015: "[t]he Vessel shall be employed in such lawful trades between safe ports and safe places . . . ."

10 The safe port and safe berth warranties appear in clause 9, Part II: "The vessel shall load and discharge at any safe place or wharf . . . provided the Vessel can proceed thereto, lie at, and depart there from always safely afloat . . . ."

11 *See* BIMCO LNGVOY clause 7(b) ("The Charterers warrant that they have exercised due diligence to ensure that the Loading and Discharging Ports are safe and that the Vessel can safely lie always afloat at such Ports. Notwithstanding anything contained in this or any other clause of this Charter Party, the Charterers do not warrant the safety of any place to which they

companies are frequent charterers and have considerable bargaining power, most have issued charter forms that include the due diligence standard for port and berth safety. For example, ExxonMobil's standard form, the EXXONMOBILVOY2005, states in clause 16(b): "Charterer shall exercise due diligence to order Vessel to port(s) or place(s) which are safe for Vessel and where it can be always safely afloat."[12]

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order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid."); BIMCO SUPPLYTIME, the most widely used form in the industry, clause 6(a) ("The Charterers do not warrant the safety of any such port or place or Offshore Units but shall exercise due diligence in issuing their orders to the Vessel and having regard to her capabilities and the nature of her employment."); BIMCO SUPPLYTIME 89 clause 5(a) and WINDTIME clause 7(a) ("the Charterers do not warrant the safety of any such port or place or offshore Units but shall exercise due diligence in issuing their orders to the Vessel as if the Vessel were their own property and having regard to her capabilities and the nature of her employment."); INTERTANKO TANKERVOY 87 clause 3 ("Charterers shall exercise due diligence to ascertain that any port or places to which they order the vessel are safe for the vessel and that she can lie there always afloat [...] Charterers shall, however, not be deemed to warrant the safety of any place and shall be under no liability in respect of any loss or damage arising from unsafety unless they fail to prove the exercise of due diligence as aforesaid.") *available at* https://www.intertanko.com/info-centre (last visited Sept. 12, 2019); *see also* 2E *Benedict on Admiralty*, Chapter XXVII, Charter Party Clauses (containing a collection of reprinted safe berth and safe port clauses).

12 Clause 16(b) continues:

> Notwithstanding anything contained in this or any other Clause to the contrary, Charterer shall not be deemed to warrant the safety of any such port(s) or place(s) and shall not be liable for any loss, damage, injury or delay resulting from any unsafe condition at

Parties negotiating a charter have a wide range of forms to choose from in order to adjust and define their risks and scope of liability. When they wish to avoid the strict liability of a seaworthiness or safe berth warranty, they have only to select a form qualifying their obligations to require only due diligence or modify a form's existing language.[13]

> such port(s) or place(s) which could have been avoided by the exercise of reasonable care on the part of the Master or Owner.

INTERTANKO, *EXXONMOBILVOY2005* (2005), *available at* https://www.intertanko.com/images/SiteGlobalFiles/LegalandDocumentary/EMVOY_2005.pdf (last visited Sept. 13, 2019). Similarly, Shell's standard form, SHELLTIME4 states in clause 4(c):

> Charterers shall use due diligence to ensure that the vessel is only employed between and at safe places (which expression when used in this charter shall include ports, berths, wharves, docks, ...) where she can safely lie always afloat. Notwithstanding anything contain in this or any other clause of this charter, Charterers do not warrant the safety of any place to which they order the vessel and shall be under no liability in respect thereof except for loss or damage caused by their failure to exercise due diligence as aforesaid")

INTERTANKO, *SHELLTIME4 (2003), available at* https://www.intertanko.com/images/SiteGlobalFiles/LegalandDocumentary/shelltime4.pdf (last visited Sept. 13, 2019).

[13] BIMCO's charter negotiation platform, SMARTCON, allows parties to select a form and conduct negotiations for its completion *and* modification through their pay-as-you-go website. *See* BIMCO, *Contracts and Clauses*, https://www.bimco.org/contracts-and-clauses/create-a-contract (last visited Sept. 13, 2019).

C. Conflating Warranties with Due Diligence Would Cause Great Confusion and Disrupt the Market.

There are different forms for a reason. To read a due diligence limitation into a seaworthiness or safe port clause lacking limiting language is to render the term "due diligence" superfluous and thus meaningless in clauses that include it, contrary to the rule of interpretation that avoids making terms unnecessary or ineffective. *Garza v. Marine Transp. Lines, Inc.*, 861 F.2d 23, 27-28 (2d Cir. 1988).

If "due diligence" were read into all seaworthiness and safe berth or port clauses, parties would be hard pressed on how to include an absolute obligation should they desire one.

Charter negotiations, particularly voyage charter negotiations, usually proceed quickly, with the parties relying on their common understanding of the forms they have chosen and the terms to which they have agreed. If safe port and safe berth clauses no longer mean what parties understood them to mean, negotiating parties will have to examine what would otherwise be boilerplate, thousands of existing charters need review and possible reformation, and, for forms intended to retain the character of their warranties, the issuing organizations will have to make revisions that will prevent any implication that only due diligence is required.

Parties that thought they had transferred risks to other parties through a warranty might suddenly find otherwise. The P&I clubs and other marine insurance interests would have to reexamine the new contractual liability risks, rates, and covers as a consequence of the

new meaning of the warranty. There is no reason to wreak such havoc in the market.

Preserving the distinction between clauses that contain a "due diligence" limitation and those that do not provides clarity and promotes the flow of commerce.

D. Parties Can Manage Both Fault-Based and Strict Liability Risks through Insurance

The consequences of a breach of warranty can be catastrophic, as they were here. Such losses, however, can be insured, and charterers can obtain the same insurance coverage as shipowners for the same types of risks.

Petitioners' *amicus curiae* Tricon Energy, Ltd. argues that charterers typically are the party least capable of insuring against losses arising from an unsafe berth. That contention is untenable because insurance is available to charterers to address these and other risks and liabilities arising from a charter party. In addition to liability cover, P&I clubs offer shipowners cover for their strict liability under environmental laws for damage and third party claims arising from pollution events.[14] P&I Clubs and marine underwriters offer charterers the same comprehensive cover, including liabilities for pollution.[15] This cover

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14 *See supra* note 5.

15 *See, e.g.*, The Swedish Club, *Charterers' Liability All-in-One Cover*, https://www.swedishclub.com/media_upload/files/factsheets2015/TSC%20Charterer%27s%20brochure%202016-02-22%20web.pdf (last visited Sept. 13, 2019); The London P&I Club, *Cover for Charterers*, https://www.londonpandi.com/documents/lpi-charterers-cover/ (Last visited Sept. 13, 2019);

has been offered for many years by P&I clubs including Gard, the largest of the thirteen members of the International Group of P&I Clubs.[16]

III. COURTS IN THE TWO MAJOR MARITIME JURISDICTIONS SHOULD GIVE THE SAME INTERPRETATION TO MARITIME CONTRACTS.

Because maritime transportation serves international commerce, it is essential to aim for consistency in legal obligations and interpretation of standard clauses under both U.S. and English law. This Court has acknowledged the desirability of uniform rules in both U.S. and English courts on the interpretation of maritime contracts, particularly when the clause at issue originated in England. *See Standard Oil Co. of New Jersey v. United States*, 340 U.S. 54, 59 (1950); *see also L & L Marine Serv. v. Ins. Co. of N. Am.*, 796 F.2d 1032, 1036 (8th Cir. 1986) ("We are mindful of the Supreme Court's admonition that

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Steamship Mutual, *Charterers' Liability Cover*, https://www.steamshipmutual.com/Downloads/Charterers/Steamship%20Mutual%20Charterers%20Liability%20Cover%20Full.pdf (last visited Sept. 13, 2019).

[16] *See, e.g.*, Gard (North America) Inc., *Charterers' Liability for Damage to Vessels*, GARD NEWS (Aug. 1, 2001), http://www.gard.no/web/updates/content/53038/charterers-liability-for-damage-to-vessels ("Gard has seen a continued increase in charterers' P&I entries ...");

Gard (North America) Inc., *Charterers' Liability for Oil Pollution*, GARD NEWS (Feb. 1, 2002), http://www.gard.no/web/updates/content/53296/charterers-liability-for-oil-pollution ("Where the oil has escaped because of a damaged hull, owners may allege that the oil spill was caused by charterers' breach of their obligation to nominate a safe port or berth. Breach of this warranty may translate to charterers' liability not only for damage to the hull itself but also any damage to third party property (including pollution) which results from the damage to hull.").

courts should endeavor to preserve the general uniformity between federal maritime law and English maritime law.") (citations omitted).

In order to foster uniformity and ensure consistency of interpretation of contracts and clauses in the two most relevant jurisdictions, *Amici* INTERTANKO and BIMCO both include American maritime attorneys as well as English solicitors on their Documentary Committees to vet their products before they are issued.

As explained in Respondents' brief, under English law, the language at issue here, which does not expressly limit charterers' obligation to due diligence in selecting a port and berth, is viewed as a warranty. (Resp. Br. 39-40). This reading is both fundamental and uncontroversial. The district court's deviation from this rule was so significant to the industry that INTERTANKO conducted special training at its tanker chartering seminar by admiralty Professor Martin Davies. *See* Martin Davies, *Safe ports, safe berths*, INTERTANKO Tanker Chartering Seminar, at 5 (May 11, 2011), *available at* https://www.intertanko.com/images/presentations/athensmay11_chartering_safeportssafeberths.pdf (describing the absolute warranty under English law) (last visited Sept. 13, 2019). Just as it is in the U.S., under English law, charterers' obligation under a safe berth clause to select a safe port is "absolute," and whether charterers were negligent or unaware of the unsafe feature is of no consequence. *Gard Marine & Energy Ltd. v. China Nat'l Chartering Co.* (*The Ocean Victory*), [2017] UKSC 35, [2017] 1 Lloyd's Rep. 521, 526 (citing *The Eastern City*, [1958] 2 Lloyd's Rep. 127, 131).

The interpretation of safe berth clauses should remain consistent in both jurisdictions.

IV. THE THIRD CIRCUIT'S ANALYSIS BELOW IS PREFERABLE TO THE FIFTH CIRCUIT'S ANALYSIS IN *ORDUNA* AND IS MORE CONSISTENT WITH LONGSTANDING JUDICIAL PRECEDENT AND THE INDUSTRY'S UNDERSTANDING OF SAFE BERTH CLAUSES

Orduna S.A. v. Zen-Noh Grain Corp., 913 F.2d 1149 (5th Cir. 1990), on which Petitioners found their arguments, is an anomalous deviation from the established Second Circuit precedent and U.S. arbitral awards interpreting safe berth clauses as warranties. In focusing on "policy" issues such as whether a charterer is in the better position to judge the safety of a berth and whether a warranty of berth safety would discourage masters from navigating prudently, 913 F.2d at 1155-57, the Fifth Circuit missed the overriding policy issues of freedom of contract, *i.e.*, respecting the parties' own distribution of risk, and the need for the certainty of a warranty in allocating responsibility for the damages when neither party is to blame for a casualty.[17]

Both social and legal policies favor freedom of contract and encourage judicial and arbitral

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[17] In its criticism of Second Circuit precedent, the *Orduna* court relied heavily on the commentary from Grant Gilmore & Charles L. Black, *The Law of Admiralty* (2d ed. 1975). As noted by the Third Circuit, Gilmore & Black have themselves been criticized as "'more adapted for the teacher than for the active lawyer or judge. As teachers, the authors are interested in controversy. Wherever they can find it, in the long past or in the nearer present, they stir it up, and frequently label it as confusion . . . .'" *In re Frescati Shipping Co., Ltd.*, 718 F.3d 184, 202 n.13 (citing Arnold W. Knauth, Book Review, 58 COLUM. L. REV. 424, 426-28 (1958) (reviewing Grant Gilmore & Charles L. Black, *The Law of Admiralty* (1957)).

enforcement of rather than interference with the terms agreed by the parties. The safe berth clause is a contractual allocation of risk. Long before *Orduna* was decided, such clauses had consistently been interpreted by courts and arbitrators as an absolute warranty shifting the risk of an unsafe berth to the charterer.

For example, in *Park S.S.*, 188 F.2d at 805, Learned Hand explained that by agreeing to a safe berth clause, a "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." As in the case at bar, *Park S.S.* involved a ship that was damaged when it grounded twice on uncharted and unknown obstacles in the port designated by the charterer even though these hazards were not known by, or knowable to, the ship or the charterer. *Id.* Judge Hand held that "since the 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." *Id.* at 806 (citing *Serv. Transp. Co. v. Gulf Refining Co.*, 79 F.2d 521 (2d Cir. 1935)). The Third Circuit's holding below that "the safe berth warranty is an express assurance made without regard to the amount of diligence taken by the charterer," 718 F.3d at 203, is consistent with this venerable precedent from a venerated jurist.

Each of the *amici curiae* supporting Petitioners argue that the *Orduna* court's interpretation of an unqualified safe port clause as a promise of due diligence better reflects the commercial realities of the industry. The commercial realities are, they argue, that the charterer is often distant from, and unfamiliar with, the designated berth or port, and is

usually the party that is the least capable of identifying and assessing dangers to the vessel.

That argument misses the point: Charterers are not obligated to warrant the safety of a port or berth. When charterers are unwilling to accept the strict liability imposed by warranting a safe berth, they can negotiate for a qualified clause imposing only a duty of due diligence. *See, e.g., supra* notes 10 & 11. If owners would agree, by appropriate language, charterers could disclaim any undertaking concerning berth or port safety.

At issue here, however, is the interpretation of a negotiated contractual provision that is intended to shift the risks related to an unsafe berth to the party that designated the berth. The Third Circuit below understood and respected the bargained for nature of the safe berth clause, explaining that "[t]o any extent a charterer, however distant, bargains to send a ship to a particular port and warrants that it shall be safe there, we see not basis to upset this contractual agreement." 718 F.3d at 202. This reasoning not only respects the parties' contractual undertaking and allocation of risk, but also comports with both the longstanding precedents of this Court and the Second Circuit and the industry's understanding.

CONCLUSION

For the good of international harmony in interpretation of this critical industry issue and the foregoing reasons, *Amici* urge the Court to affirm the decision of the Court of Appeals for the Third Circuit and to rule that absent limiting language, a safe berth clause is a warranty by charterers assuming strict liability for operation of any perils encountered in the port, whether or not charterers had exercised due diligence in selecting the port and berth.

Respectfully submitted,

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