No. 18-

IN THE

Supreme Court of the United States

CITGO ASPHALT REFINING COMPANY; CITGO PETROLEUM CORPORATION; CITGO EAST COAST OIL CORPORATION,

Petitioners,

v.

FRESCATI SHIPPING COMPANY, LTD.; TSAKOS SHIPPING & TRADING, S.A.; AND UNITED STATES,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether under federal maritime law a safe berth clause in a voyage charter contract is a guarantee of a ship's safety, as the Third Circuit below and the Second Circuit have held, or a duty of due diligence, as the Fifth Circuit has held.

PARTIES TO THE PROCEEDING

The parties to the proceeding are listed in the caption.

RULE 29.6 STATEMENT

CITGO Asphalt Refining Company is not a corporation and has no parent corporations. It is a privately held General Partnership whose general partners are CITGO Petroleum Corporation and CITGO East Coast Oil Corporation, both of which are private, non-publicly held entities.

CITGO Petroleum Corporation's parent is CITGO Holding, Inc., which is a wholly owned subsidiary of PDV Holding, Inc., which is a wholly owned subsidiary of Petróleos de Venezuela, S.A. ("PDVSA"). No publicly held company owns 10% or more of CITGO Petroleum Corporation's stock.

CITGO East Coast Oil Corporation's parent is CITGO Investment Company, a private, non-publicly held entity. No publicly held company owns 10% or more of CITGO East Coast Oil Corporation's stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, CITGO Asphalt Refining Company, CITGO Petroleum Corporation, and CITGO East Coast Oil Corporation (collectively, "CARCO"), respectfully petition for a writ of certiorari to review the judgments and opinions of the United States Court of Appeals for the Third Circuit.

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-44a, is reported at 886 F.3d 291. The court of appeals' order denying CARCO's petition for panel rehearing and rehearing en banc, Pet. App. 270a-271a, is unreported. The opinion of the district court, Pet. App. 45a-269a, is reported at 2016 WL 4035994.

An earlier opinion of the court of appeals, Pet. App. 272a-329a, is reported at 718 F.3d 184. The court of appeals' order denying CARCO's petition for panel rehearing and rehearing en banc of this earlier opinion, Pet. App. 345a-346a, is unreported. An earlier opinion of the district court, Pet. App. 330a-344a, is reported at 2011 WL 1436878.

JURISDICTION

The court of appeals issued its opinion on March 29, 2018. Pet. App. 1a-44a. CARCO's timely petition for rehearing was denied on May 30, 2018. *Id.* at 270a-271a. On July 31, 2018, Justice Alito extended the time for filing this petition to and including September 27, 2018. On September 4, 2018, Justice Alito extended the time for filing this petition to and including October 27, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

This case involves issues of federal common law. Relevant statutes are discussed in the case background.

STATEMENT OF THE CASE

The court of appeals' rulings widen an acknowledged circuit conflict on an important issue of contract law concerning risk-allocation in the maritime setting. The court of appeals' interpretation that a commonly used safe berth provision in a ship charter contract imposes strict liability on innocent charterers conflicts directly with the Fifth Circuit's conclusion that the provision creates merely a duty of due diligence. This conflict on an outcome determinative issue undermines the national uniformity of federal maritime law and commerce. In addition, the court of appeals' strict liability rule is unsound, both as a matter of contract interpretation and maritime policy, and imposes onerous and unwarranted liability on blameless charterers. Nowhere is that more starkly illustrated than in this case, where CARCO faces potential liability for more than $140 million in damages based on a safe berth provision, even though it is undisputed that CARCO bears no fault for the oil spill that gave rise to this litigation and, among the parties, was the least capable of doing anything that would have prevented the accident.

The court of appeals' holding presents a recurring and important issue of federal maritime law that warrants this Court's review, particularly in light of this Court's vital role in shaping rules of admiralty and safeguarding maritime commerce. See *Fitzgerald* v. *U.S. Lines Co.,* 374 U.S. 16, 20 (1963) ("Congress has largely left to this Court the

responsibility for fashioning the controlling rules of admiralty law."); *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955) ("[T]his Court has fashioned a large part of the existing rules that govern admiralty."); *Exxon Corp.* v. *Cent. Gulf Lines, Inc.,* 500 U.S. 603, 608 (1991) ("[T]he 'fundamental interest giving rise to maritime jurisdiction is "the protection of maritime commerce."'"); *Black Diamond S.S. Corp.* v. *Robert Stewart & Sons, Ltd.*, 336 U.S. 386, 388 (1949) (granting certiorari to "determin[e] important issues in the administration of admiralty law").

A. Factual and Regulatory Background.

This case involves claims for contract damages against CARCO arising from an oil spill caused when the oil tanker *Athos I* struck a submerged and uncharted anchor abandoned by an unknown party in a portion of the Delaware River that was exclusively maintained and controlled by the United States. It is undisputed that CARCO neither knew, nor had any reason to know, that the anchor was in the river.

The Charter Contracts. In 2001, the ship owner, Frescati Shipping Company, Ltd. ("Frescati"), chartered the *Athos I* to Star Tankers Inc. ("Star") via a standard industry form contract known as a "time charter," which granted Star authority to subcharter the ship for specific voyages. That contract between Frescati and Star contained an English choice-of-law clause.

Three years later, Star chartered the tanker to CARCO for a single voyage to carry a cargo of crude oil from Venezuela to CARCO's asphalt refinery in Paulsboro, New Jersey under a "voyage charter" contract. That contract was between Star and CARCO, and provided that any disputes between the

parties would be governed by U.S. law. Frescati—the titled ship owner—was not a party to the contract. The voyage charter defined Star as the "owner" of the vessel for purposes of the contract. It also included the following "safe berth" clause, see Pet. App. 88a-89a:

> [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, any lighterage [cargo transfer] being at the expense, risk and peril of the Charterer. . . .

This clause does not mention Frescati or contain any language reflecting any intent to benefit it. Frescati only obtained the benefit of this clause by a judicial finding that it was a third-party beneficiary of the voyage charter contract.

The Casualty. The casualty occurred on November 26, 2004, near the end of the ship's 1900-mile voyage. The *Athos I* was crossing and "approximately halfway through" an area of the Delaware River known as Federal Anchorage No. 9 (the "Federal Anchorage Area"), when the vessel struck an abandoned anchor. Pet. App. 281a-282a. The Anchorage is essentially a federally maintained and regulated parking lot for large ships waiting to dock along, or depart from, the Delaware River. The entirety of the Federal Anchorage Area, including where the abandoned anchor laid, is open to general commercial and recreational vessel traffic and "is neither controlled nor maintained by CARCO." *Id.* at 285a. The *Athos I* was still some 900 feet (or three football fields) away from CARCO's berth and well within the Federal Anchorage Area when it hit the anchor. *Id.* at 282a and 329a (illustration). It was a

single-hull vessel, and its hull was punctured, causing approximately 263,000 gallons of crude oil to spill into the Delaware River. *Id.* at 275a, 278a.

The Cleanup under the Oil Pollution Act. The post-casualty cleanup was conducted pursuant to the Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701, *et seq.*, a statute passed in the wake of the Exxon-Valdez incident and designed to "encourage rapid private party responses" to oil spills, *In re Complaint of Metlife Capital Corp.*, 132 F.3d 818, 822 (1st Cir. 1997). OPA statutorily identifies "responsible part[ies]," who are required to pay for a cleanup in the first instance. 33 U.S.C. § 2702(a). As the titled owner of the vessel that discharged the oil, Frescati was designated as a "responsible party." *Id.* § 2701(32)(A).

OPA also permits "responsible part[ies]" to limit their liability. *Id.* § 2704. Frescati filed an ex parte administrative claim asking the National Pollution Fund Center ("NPFC") to limit its liability as a responsible party under § 2704 of OPA, and reimburse it for cleanup costs incurred above the limit. The NPFC limited Frescati's liability to $45,475,000 and reimbursed Frescati from the federal Oil Spill Liability Trust Fund for approximately $88 million in excess of the limitation amount. The Trust Fund, which is separate from the general treasury, consists of taxes collected on imported petroleum products, plus payments received from environmental taxes and penalties. 26 U.S.C. § 9509(b). CARCO paid approximately $103 million into this Fund between 1990 and 2004. Once the Trust Fund reimbursed Frescati, the United States acquired by subrogation Frescati's rights against third parties for the $88 million paid. 33 U.S.C. § 2715(a).

OPA further provides that a responsible party can be exonerated from liability if it demonstrates that the spill was caused by "an act or omission of a third party" and the responsible party exercised due care. 33 U.S.C. § 2703(a)(3). Frescati applied for exoneration under this provision, claiming that the incident was the sole fault of the unknown party that lost or discarded the anchor, but later inexplicably withdrew this claim. See Pet. App. 284a n.6 (noting that "[i]t is unclear why Frescati withdrew this claim"). If granted, Frescati's exoneration claim would have reimbursed all of its cleanup costs from the Trust Fund. See 33 U.S.C. §§ 2708(a)(1), 2713(b)(1)(B).

B. Prior Proceedings.

Respondents' Lawsuits. On January 31, 2005, Frescati filed an action in the district court pursuant to the court's admiralty jurisdiction, 28 U.S.C. § 1333(1). Specifically, Frescati filed a "Petition for Exoneration from or Limitation of Liability," under 46 U.S.C. app. § 183 (2005). CARCO filed a claim in this limitation action for the loss of its cargo, and Frescati then counterclaimed against CARCO in both contract and tort[1] for its unreimbursed clean-up costs and additional damages totaling nearly $56 million. Frescati's contract claims asserted that CARCO breached the safe berth clause in the Star-CARCO voyage charter contract (even though Frescati was not a party to that contract). As partial subrogee to

[1] The tort claims, based on CARCO's alleged negligence in its role as the wharf owner, are no longer at issue. The court of appeals' decision vacated the district court's tort judgment in Frescati's favor, which had been based on a duty the district court created from whole cloth that CARCO was supposed to use sonar equipment in the federally-controlled Anchorage to discover potential hazards. Pet. App. 25a-29a, 43a.

Frescati's claims, the United States later filed a separate action against CARCO raising contract and tort claims, in which it sought to recover the $88 million paid by the Trust Fund to Frescati. Star is not a party to either of these actions.

The two disputes involving CARCO were consolidated for trial. At trial, the United States' claims were limited to its contract claims because, by pre-trial agreement, the United States forfeited its tort-based theories of recovery against CARCO. The resulting bench trial was conducted over 41 days in the fall of 2010, and involved 61 live witnesses, 48 witnesses by deposition, and 1,800 exhibits.

First District Court Decision. The district court found CARCO "not liable in either tort or contract." Pet. App. 336a. The court determined that there was "no evidence" that CARCO or any other party to the litigation "knew or had reason to believe that the anchor was in the river." *Id.* at 334a. "After hearing all of the evidence," the court concluded that "the fault for the casualty lies with the anchor's former owner, who abandoned it in the river without notifying anyone." *Id.* at 344a; see also *id.* at 334a (noting "supposition" that the anchor "may have been used as part of dredging operations" by a federal contractor).

The district court denied the claim of Frescati (and the United States as its subrogee) that CARCO was liable in contract pursuant to the safe berth clause in the voyage charter. Although Frescati was not a party to that contract, it sought to invoke the clause "as an intended third-party beneficiary." Pet. App. 340a. The district court rejected this argument. *Id.* at 340a-341a. The district court also held that CARCO did not breach the safe berth clause. *Id.* at 341a-342a. The district court acknowledged that

some courts have interpreted such clauses "as an unconditional guarantee, in effect imposing strict liability" upon charterers, but found "more persuasive" the view of the Fifth Circuit that such clauses merely "'impose[] upon the charterer a duty of due diligence to select a safe berth.'" *Id.* (quoting *Orduna S.A.* v. *Zen-Noh Grain Corp.*, 913 F.2d 1149, 1156-57 (5th Cir. 1990)). It then found that "CARCO fulfilled its duty of due diligence" and that "the port and berth were generally safe." *Id.* at 342a. The court also noted that "the crew of the *ATHOS I* did not devote the care and attention to preparation of the voyage planning that might have been advisable." *Id.* at 344a.

The district court also rejected Frescati's negligence claim against CARCO in its role as the wharf owner because the court concluded that CARCO "had no duty to scan for hazards within the Anchorage." Pet. App. 338a.

Initial Third Circuit Decision. The court of appeals vacated most of the district court's opinion and remanded. It determined that the district court's narrative discussion of its factual findings and legal conclusions, and the "overall dearth of clear factual findings," constituted "a violation" of Federal Rule of Civil Procedure 52 and necessitated a remand. Pet. App. 291a-292a. Despite its conclusion that proper appellate review was not possible, the court of appeals proceeded to review the case and make its own legal determinations.

The court concluded that Frescati's contract claim is viable. Despite acknowledging that third-party beneficiary status requires proof that the contracting parties *intended* to confer a benefit on the third party (not merely that a benefit incidental to performance of the contract accrued to it), the court of appeals held

that "the *Athos I*—and by extension, its owner, Frescati—was an implied" or "corollary" third-party beneficiary of the safe berth clause in the voyage charter between Star and CARCO because the clause "necessarily benefits the vessel." Pet. App. 277a, 295a.

The court of appeals then turned to the scope of CARCO's safe berth obligation and held that the district court had "incorrectly" adopted the Fifth Circuit's position in *Orduna* that a safe berth provision "require[s] only due diligence." Pet. App. 298a; see also *id.* at 304a ("we . . . decline to follow" the Fifth Circuit). Instead, the Third Circuit adopted what it called the Second Circuit's "longstanding formulation" that a safe berth provision guarantees the safety of the berth "without regard to the amount of diligence taken by the charterer." *Id.* at 303a-304a; see also *id.* at 304a n.18 (emphasizing the "strict nature" of the warranty and rejecting the argument that it "applies only to known hazards").

The court of appeals remanded the question whether the safe berth clause "was actually breached." Pet. App. 305a. It reasoned that the relevant question was whether the berth was "unsafe for a ship of the *Athos I*'s agreed-upon dimensions and draft," and that the district court's findings did not answer that question. *Id.* at 304a-305a. Although Frescati's negligence claim was allowed to proceed because the court of appeals found that CARCO had a duty of care, the court remanded the questions of the exact standard of care required, breach of duty and causation. *Id.* at 312a-324a.

The court of appeals denied rehearing and rehearing en banc. Pet. App. 345a-346a. This Court denied *certiorari*. *Citgo Asphalt Ref. Co.* v. *Frescati Shipping Co.*, 134 S. Ct. 1279 (2014).

District Court Decision on Remand. In the remanded proceeding before the district court, CARCO newly faced the prospect of strict liability to Frescati under CARCO's contract with Star. After a "successor-judge" hearing under Rule 63 that took place over 31 days in 2015, the court ruled for Frescati on the contract and negligence claims. With respect to the contract claim, the district court made clear that it was bound by the Third Circuit's rulings that Frescati was a third-party beneficiary of the Star-CARCO contract and that the safe berth provision constitutes an absolute guarantee of the safety of the berth. Pet. App. 79a-80a, 165a-168a. Applying that strict liability standard, it found CARCO liable based on its view that the safe berth provision was an express assurance that the *Athos I* would reach the berth safely, provided that it maintained a draft of 37 feet or less, and that it maintained that draft at the time of the casualty. *Id.* at 168a-171a.[2] The district court made its liability determination without any consideration of CARCO's conduct and notwithstanding the fact that it is undisputed that CARCO had no knowledge of, and bore no fault for, the hidden anchor. The court awarded Frescati $55.5 million, and awarded the

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[2] The *Athos I*'s draft at the time of the casualty—the measurement from the water-line to the vessel's bottom—was sharply disputed. The district court's finding that the vessel's draft was 37 feet or less ultimately depended on its finding that at some unknown point in time the 9-ton anchor had sprung upright from its resting "flukes-down" position on the riverbed, which in turn depended on the court's speculation—without evidentiary support—that an unidentified vessel's "sweeping anchor chain" somehow snagged the anchor and pulled it upright in time for the casualty. Pet. App. 126a-127a. And then somehow the anchor returned to the "flukes-down" position it was found in after the casualty. *Id.* at 127a-128a.

government $88 million for its subrogated contract claim. *Id.* at 258a-259a. The court then applied the doctrine of equitable recoupment and halved the government's award to $44 million. *Id.* at 233a-234a, 259a.

Second Third Circuit Decision. A different panel of the Third Circuit affirmed the district court's damages awards on the basis of the strict liability contract ruling, applying (with no further analysis) the prior panel's holdings that Frescati was a third-party beneficiary of the safe berth clause in the Star-CARCO charter and that the safe berth obligation is "an express assurance made without regard to the amount of diligence taken by the charterer." Pet. App. 9a, 14a (quoting 718 F.3d at 203). Under the strict liability interpretation, the panel below noted, it did not matter whether the district court's wholly speculative explanation for this accident—the "'sweeping anchor chain'" theory—was "plausible or implausible." *Id.* at 17a. And, like the district court, the panel made no inquiry into CARCO's conduct and found no shortcomings in the diligence that CARCO exercised as the vessel charterer.

Although the panel also vacated the district court's judgment in favor of Frescati on the negligence claims, Pet. App. 43a, and despite the panel's conclusion that CARCO was completely innocent, it affirmed an award of more than $140 million in damages.[3]

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[3] The panel below also vacated the district court's equitable-recoupment holding, increasing CARCO's exposure by $44 million. Pet. App. 35a-39a.

REASONS FOR GRANTING THE PETITION

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

A. The Court of Appeals' Ruling Widened An Acknowledged Circuit Split.

The court of appeals acknowledged in its initial panel opinion that the scope of a charterer's obligation under a safe berth provision in a charter contract presented "a question of first impression" in the Circuit and that its ruling on this issue widens an existing circuit conflict because it rejected the view of the Fifth Circuit. Pet. App. 297a, 299a-304a. This circuit split on an "important matter" of federal maritime law unquestionably warrants this Court's review. Sup. Ct. R. 10(a).[4] In addition, the court of appeals' sweeping liability rule will be detrimental to, and create uncertainty in, maritime commerce because it erroneously imposes unprecedented liability on charterers. In this case, for example, the court applied its rule to impose massive liability upon a charterer who bore no fault for the loss and was in the worst position of the parties in the litigation to prevent the casualty.

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[4] Where, as here, a contract "is a maritime one, and the dispute is not inherently local, federal law controls the contract interpretation." *Norfolk S. Ry.* v. *James N. Kirby, Pty Ltd.*, 543 U.S. 14, 22-23 (2004). This lawmaking power in the federal courts derives from their admiralty jurisdiction. *Id.*; U.S. Const. art. III, § 2, cl. 1.

Safe berth clauses are standard provisions in maritime charter contracts. See Pet. App. 279a (noting that the clause in the charter between Star Tankers and CARCO was based on a standard industry form). Here, CARCO undertook to "designate[] and procure[]" a "safe place or wharf" where the *Athos I* could "proceed thereto, lie at, and depart therefrom always safely afloat." *Id.* at 88a-89a.

According to the Second Circuit, under these safe berth clauses, the charterer "bargains for the privilege of selecting the precise place for discharge [of its cargo] and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice." *Park S.S. Co.* v. *Cities Serv. Oil Co.*, 188 F.2d 804, 806 (2d Cir. 1951). The Second Circuit has long adhered to the view that such clauses guarantee the safety of the berth: "the charter [contract is] itself an express assurance, on which the master [is] entitled to rely, that at the berth 'indicated' the ship would be able to lie 'always afloat.'" *Cities Serv. Transp. Co.* v. *Gulf Ref. Co.*, 79 F.2d 521, 521 (2d Cir. 1935) (per curiam); *Park S.S. Co.*, 188 F.2d at 806 (clause is "an express assurance that the berth [is] safe"); *Paragon Oil Co.* v. *Republic Tankers, S.A.*, 310 F.2d 169, 173 (2d Cir. 1962) (clause is a "warranty"); *Venore Transp. Co.* v. *Oswego Shipping Corp.*, 498 F.2d 469, 472-73 (2d Cir. 1974) (voyage charterer "had an express obligation to provide a *completely* safe berth, an obligation which was nondelegable") (emphasis added).

In contrast, the Fifth Circuit rejected this strict liability standard in *Orduna S.A.* v. *Zen-Noh Grain Corp.*, 913 F.2d 1149, 1156-57 (5th Cir. 1990). It acknowledged the Second Circuit's precedents, but noted that "commentators have strongly criticized"

them because they "impose liability without fault on the charterer." *Id.* at 1156. It also noted that the Second Circuit's standard is in apparent conflict with "a Supreme Court decision which has never been overruled or weakened." *Id.* (citing *Atkins* v. *Fibre Disintegrating Co.*, 2 F. Cas. 78 (E.D.N.Y. 1868), *aff'd*, 85 U.S. (18 Wall.) 272 (1873)). The Fifth Circuit explained that the district court in *Atkins* rejected the argument that a safe berth clause was a warranty, *id.* (citing 2 F. Cas. at 79), and that this Court on review affirmed the district court's merits rulings in conjunction with addressing a jurisdictional issue, *id.* at 1156-57 (citing 85 U.S. (18 Wall.) at 299). That summary disposition in *Atkins* (rejecting the clause as a warranty) remains good law and should bind all lower courts. Only this Court is free to overturn that holding, but its effect will be zero in two Circuits unless the Court intervenes here.

Based on these authorities, the Fifth Circuit in *Orduna* noted compelling practical reasons for not interpreting the safe berth clause as a warranty:

> [N]o legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects. Such a warranty could discourage the master on the scene from using his best judgment in determining the safety of the berth. Moreover, avoiding strict liability does not increase risks because the safe berth clause itself gives the master the freedom not to take his vessel into an unsafe port.

Id. at 1157. It expressly rejected the Second Circuit's view that "make[s] a charterer the warrantor of the safety of a berth," and held instead that a safe berth

clause merely "imposes upon the charterer a duty of due diligence to select a safe berth." *Id.*[5]

As the Fifth Circuit noted, commentators have sharply criticized the Second Circuit's standard that a safe berth clause makes the charterer a guarantor against any casualties arising in approaching or docking at a berth. The leading Gilmore & Black admiralty treatise[6] states that this view "go[es] too far" because the ship's master "ordinarily has the best means of judging the safety of a port or berth" and "is *not* obligated to take his vessel to any unsafe port or berth." Grant Gilmore & Charles L. Black, Jr., *The Law of Admiralty* § 4-4, at 204 (2d ed. 1975); see also *id.* (stating that holding the charterer liable "regardless of fault" is "quite inconsonant with the positions of the parties" with respect to vessel safety). See also J. Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth*, 49 Tul. L. Rev. 860, 868 (1975) (the Second Circuit's approach places "an undeserved burden on the charterer in holding him to a warrantor's liability" and the due diligence approach achieves "more equitable result[s]"); Peter G. Hartman, Comments, *Safe Port/Berth Clauses: Warranty or Due Diligence?*, 21 Tul. Mar. L.J. 537, 555 (1997) ("[u]nless the charterer is negligent in

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[5] *Orduna* has never been called into question by the Fifth Circuit, or any district court within it, and continues to be cited for numerous principles of maritime law. *See, e.g., Comar Marine, Corp.* v. *Raider Marine Logistics, L.L.C.*, 792 F.3d 564, 576 n.35 (5th Cir. 2015); *Union Oil Co.* v. *Buffalo Marine Servs.*, 538 F. App'x 575, 576 n.1 (5th Cir. 2013) (per curiam); *One Beacon Ins. Co.* v. *Crowley Marine Servs., Inc.*, 648 F.3d 258, 266-70 (5th Cir. 2011).

[6] This Court routinely cites Gilmore & Black on admiralty matters. *See, e.g.*, *Atl. Sounding Co.* v. *Townsend*, 557 U.S. 404, 412, 413, 423-24 (2009); *Norfolk S. Ry.*, 543 U.S. at 24.

some manner," there is "no economic reason to place the risk of damage on the charterer").

As noted, the initial district court decision adopted the Fifth Circuit's "due diligence" standard, reasoning that the Second Circuit's "unconditional guarantee" standard would "impos[e] strict liability" upon the charterer. Pet. App. 341a. The court of appeals, however, widened and cemented the circuit conflict by expressly "part[ing] from th[e] holding" of the Fifth Circuit and instead adopting the Second Circuit's view that the safe berth clause "is an express assurance made without regard to the amount of diligence taken by the charterer." *Id.* at 297a-298a, 304a.

The resulting conflict between the Fifth Circuit versus the Third and Second Circuits (all Circuits with major port cities that are prominent in developing federal maritime law) warrants this Court's review. It is clear that if Frescati and the United States had brought their contract claims in the Fifth Circuit, that court would have held that the safe berth clause imposed on CARCO only a duty of due diligence to provide a safe berth, which would have meant no liability at all in this case. Important questions of federal law should not be decided by the vagaries of geography. See *Norfolk S. Ry.,* 543 U.S. at 28 ("Article III's grant of admiralty jurisdiction "'must have referred to a system of law coextensive with, and operating uniformly in, the whole country'"" (quoting *Am. Dredging Co.* v. *Miller,* 510 U.S. 443, 451 (1994))); *Yamaha Motor Corp., U.S.A.* v. *Calhoun*, 516 U.S. 199, 210 (1996) (recognizing that "vindication of maritime policies demand[s] uniform adherence to a federal rule of decision").

The prospect that charterers with identical contract clauses can have categorically different liability in

different Circuits is intolerable. See Hartman, *supra,* at 554 (charterers with identical clauses should not be subject to different legal standards and liability with respect to vessel damage, based on the "twist of fate" of where the litigation occurs). This is precisely the sort of inconsistency in federal law that this Court grants certiorari to prevent. See Gilmore & Black, *supra,* at 207 (urging this Court to resolve this circuit split); Hartman, *supra,* at 556 (same).

B. The Court of Appeals' Ruling Is Wrong.

The court of appeals' ruling merits this Court's review because interpreting the safe berth clause as a guarantee is erroneous. This interpretation misreads the contractual text. The text of the safe berth provision in the Star-CARCO agreement does not assign all risk of loss to the charterer, regardless of fault:

> [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, any lighterage being at the expense, risk and peril of the Charterer. . . .

Pet. App. 88a-89a.

As the Fifth Circuit and leading commentators have explained, this language merely specifies where a vessel may be docked: at a wharf the charterer specifies, unless the master decides that destination is unsafe. "It is clear on the face of it that, if the port or berth is unsafe, the master is excused from taking his ship in, and the charterer must bear the extra expense, such as lighterage, entailed by the refusal." Gilmore & Black, *supra*, at 204. Giving this text "the quite different meaning of creating an affirmative liability of charterer to ship, in case of mishap" is "by

no means necessary." *Orduna*, 913 F.2d at 1156. And it does not remotely reflect the intention of the parties. No charterer would assume full liability for *any* accident that occurs as a ship approaches the charterer's nominated destination, including accidents that it has little or no ability to prevent.

Apart from the absence of textual support for open-ended, no-fault liability, the court of appeals' policy reasons for rejecting the "due diligence" approach are unsound, and ignore the onerous and unwarranted liability its ruling imposes upon charterers. The court of appeals' main rationale was that the charterer, as the party that selects the port, is "normally" in a "better position" than the ship master "to appraise a port's more subtle dangers." Pet. App. 302a. As noted, the reasoning of the Fifth Circuit and the Gilmore & Black treatise cast serious doubt on this premise. *Orduna*, 913 F.2d at 1156 ("[T]he master on the scene, rather than a distant charterer, is in a better position to judge the safety of a particular berth."); Gilmore & Black, *supra,* at 204 (the master is "an expert in navigation," "knows his vessel," and is "on the spot," while the charterer is not a "nautical expert at all"). Even if the Third Circuit's premise were "normally" correct, using it as the basis for imposing strict liability on charterers ignores the facts and circumstances of particular cases, and therefore reduces the incentives of masters and vessel owners to exercise due care. *Orduna*, 913 F.2d at 1157. It also ignores the modern sources of information and sophisticated equipment available to navigators who ultimately determine whether a port and berth are safe before the vessel embarks.[7]

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[7] Indeed, the established maritime legal principle known as the Named Port doctrine places the onus for knowledge of a port's (or berth's) condition on the master. If the port is named,

In addition, as this case starkly illustrates, the court of appeals' approach inevitably results in liability on wholly "'innocent[]'" charterers. Julian Cooke et al., *Voyage Charters* ¶ 5A.10 (4th ed. 2014). CARCO had no knowledge of the abandoned anchor (in a federally maintained waterway) that caused the casualty. Pet. App. 334a (finding no evidence that CARCO "knew or had reason to believe that the anchor was in the river"). Yet because the court of appeals imposed an absolute warranty where none was bargained for, CARCO faces liability for tens of millions of dollars in damages, even though it exercised due diligence and bears no fault for the oil spill. Nothing in either court of appeals decision persuasively explains why a mere contracting party (rather than the vessel or the United States operating the Anchorage) should bear the massive risk from a hazard the charterer could not possibly have anticipated or avoided. Moreover, the court of appeals' ruling goes further than even the Second Circuit's approach, by extending the charterer's obligation beyond mere vessel damage to encompass environmental clean-up costs and damages not remotely addressed by the text of the provision. This is unprecedented. The due diligence standard avoids such manifestly unjust results. See Smith, *supra*, at 868 (due diligence approach avoids placing "an undeserved burden on the charterer").

The broad sweep of the court of appeals' strict liability rule is compounded by the initial panel's ruling that Frescati, as titled owner of the *Athos I*, is "by extension" an "implied" or "corollary" third-party beneficiary of the safe berth provision in the Star-

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as it was in this case, the master of the vessel has the duty and greatest ability to determine its safety, and whether to proceed there without protest. *See Atkins*, 2 F. Cas. at 79.

CARCO voyage charter on the rationale that the clause "necessarily benefits" the ship, even though Frescati was not a party to the contract, which defines Star (not Frescati) as the "owner" of the vessel for purposes of the voyage charter. See Pet. App. 277a, 292a-297a. Nothing in the voyage charter and its safe berth clause even remotely suggests that Star and CARCO intended for Frescati to be a third-party beneficiary. Indeed, Frescati had its own separate time charter contract with Star with a safe berth clause under English law, pursuant to which it filed an arbitration in the United Kingdom.[8]

The court of appeals' erroneous third-party beneficiary ruling undermines the doctrine of privity of contract—which is a central feature of maritime contracts that are negotiated between entities that are continents apart with defined expectations—and therefore will disrupt maritime commerce. Indeed, the Fifth Circuit has held that the intentions and expectations of the parties are paramount. Cf. *The Rice Company (Suisse) S.A.* v. *Precious Flowers Ltd.*, 523 F.3d 528, 534 (5th Cir. 2008) (vessel owner not bound by arbitration clause in voyage charter contract because the contracting parties "unambiguously structured their relationship such that the [titled] vessel owner was not a party to the voyage charter."). This Court's review therefore is particularly warranted because the court of appeals' ruling vastly expands not only the scope of the duties that a safe berth provision imposes upon the

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[8] The Third Circuit's third-party beneficiary ruling is akin to allowing plumbers, electricians, and carpenters to become beneficiaries of clauses in the contract between the general contractor and the building owner for the sole reason that the building is identified in the sub-contracts.

charterer, but also who can take advantage of the safe berth clause.

C. The Court of Appeals' Ruling Presents A Recurring And Important Question.

This case presents a recurring and "important question" of federal law. See Sup. Ct. R. 10(c). Safe berth clauses are standard provisions in charter contracts, so the question of what obligations they impose affects virtually every chartering arrangement. The uncertainty and unfairness created by the existing circuit conflict are detrimental to maritime commerce, which "depend[s] on consistent application of law." Hartman, *supra,* at 554. The Third Circuit's expansion and strengthening of the circuit split makes clear that the conflict will not resolve itself. It is therefore vital that this Court grant review to ensure uniformity in this important area of federal common law.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted,

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