No. 18-565

# In The Supreme Court of the United States

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

*Petitioners,*

v.

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

*Respondents.*

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

## BRIEF OF THE MARITIME LAW ASSOCIATION OF THE UNITED STATES AND THE ASSOCIATION OF SHIP BROKERS & AGENTS (USA) INC. AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS


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## INTEREST OF *AMICI CURIAE*[1]

### A. The Maritime Law Association of the United States

The Maritime Law Association of the United States (MLA) is a nationwide bar association founded in 1899 and incorporated in 1993. It has a membership of 2,650 attorneys, state and federal judges, law professors, and others interested in maritime law. It is affiliated with the American Bar Association and is represented in the Association's House of Delegates.

The MLA's attorney members, most of whom specialize in admiralty, represent all maritime interests—shipowners, charterers, cargo owners, shippers, forwarders, port authorities, port agents, seamen, longshoremen, stevedoring companies, passengers, marine insurance underwriters and brokers, and other maritime plaintiffs and defendants.

The objectives of the MLA, as stated in its Articles of Incorporation, are to advance reforms in the maritime law of the United States; to facilitate justice in its administration; to promote uniformity in its enactment and interpretation; to furnish a forum for the discussion and consideration of problems affecting maritime law and its administration; to participate as

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

a constituent member of the Comité Maritime International and as an affiliated organization of the American Bar Association; and to act with other associations in efforts to bring about greater harmony in the shipping laws, regulations, and practices of different nations.

To further those objectives, the MLA has sponsored a wide range of legislation dealing with maritime matters and has cooperated with congressional committees in formulating maritime legislation.[2] Similarly, the MLA has assisted with international maritime projects undertaken by the United Nations, the International Maritime Organization, and the Comité Maritime International.

Consistent with its mission to promote uniformity in the interpretation of maritime law, the MLA has appeared as *amicus curiae* in cases that raise substantial questions affecting uniformity.[3] This case presents an irreconcilable split between multiple circuit courts

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[2] *E.g.*, Carriage of Goods by Sea Act, 46 U.S.C. § 30701 *note*; Death on the High Seas Act, 46 U.S.C. §§ 30301-08; Federal Arbitration Act, 9 U.S.C. §§ 1-16; Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1330, 1602-11; Jones Act, 46 U.S.C. § 30104; Water Pollution Control Act Amendments of 1972, 33 U.S.C. §§ 1251-1367; Convention of the International Regulations to Prevent Collisions at Sea, 28 U.S.T. 3459, *as amended*, T.I.A.S. 10672; United States Inland Navigation Rules, 33 C.F.R. part 83.

[3] *E.g.*, *American Triumph LLC v. Tabingo*, 138 S. Ct. 648 (2018); *Sprietsma v. Mercury Marine*, 537 U.S. 51 (2002); *United States v. Locke*, 529 U.S. 89 (2000); *American Dredging Co. v. Miller*, 510 U.S. 443 (1994); *Sisson v. Ruby*, 497 U.S. 358 (1990); *Offshore Logistics, Inc. v. Tallentire*, 477 U.S. 207 (1986); *Ray v. Atlantic Richfield Co.*, 435 U.S. 151 (1978).

concerning the interpretation of a standard safe-berth clause in a maritime contract commonly referred to as a "charterparty." Because that split significantly alters the contracting parties' risk allocation, the MLA urges this Court to grant certiorari to resolve the conflict and restore uniformity.

### B. The Association of Ship Brokers & Agents (USA) Inc.

The Association of Ship Brokers & Agents (USA) Inc. ("ASBA") is a membership trade organization founded in 1934. Its members consist of the leading North American ship brokers and agents. The brokers, on behalf of their principals, negotiate the sale and purchase of ships or the chartering of ships. The agents represent ships while they are in port, attending to clearing the ship with the port authorities; supplying the ship with fuel, food, and sundry supplies; and performing similar husbanding functions. ASBA exists to foster and improve high standards of professional conduct and practice. It promotes the interest of its members, in particular, and the ocean shipping industry, in general, in various ways. It conducts educational seminars and home-study and on-line courses about the shipping business; requires members to adhere to a code of ethics; and has adopted a certification process that reinforces competencies for ship agents. ASBA publishes a newsletter containing articles of current interest to its members and several times has reported on developments in this case. It also represents its members in various regulatory matters. Further

information is available on ASBA's website at www.asba.org.

Of particular relevance, ASBA maintains and promulgates several standard-form charterparty contracts in common usage in the shipping business. Those forms are valuable intellectual-property assets of ASBA, and among them is the tanker voyage charterparty (known as ASBATANKVOY) at issue here. The ASBATANKVOY contract form is one of the most universally accepted and widely used charterparties in the ocean transportation of crude oil, petroleum products, and liquid chemicals. *See* D. THOMAS MCCUNE, THE ASBATANKVOY CHARTER, AN ANALYSIS OF SELECTED CLAUSES TOGETHER WITH ANNOTATIONS OF ARBITRATION AWARDS AND JUDICIAL DECISIONS 2 (1984) (detailing the prominence, origin, and history of usage of the ASBATANKVOY form charterparty).

ASBA first published the ASBATANKVOY form in October 1977, and it has remained unchanged and unamended to this day. One of the more valuable aspects of the form arises from the fact that maritime arbitration tribunals in New York and London have frequently interpreted its clauses. (Under the charterparty's dispute resolution clause, parties must select one forum or the other.) For example, the ASBATANKVOY has been the subject of some 526 published New York maritime arbitration awards. (At least as many London maritime arbitrations have probably addressed the form, but the numbers are difficult to quantify because London maritime arbitration awards are not typically published.)

Well-respected and recognized treatises on maritime law have also given special attention to the ASBATANKVOY form, which aids in its consistent interpretation. *See*, *e.g.*, JULIAN COOKE ET AL., VOYAGE CHARTERS § 5.30, at 124 (4th ed. 2014). Consequently, over the years, shipowners and charterers have acquired a general understanding as to the meaning of many of the ASBATANKVOY clauses, which brings clarity and predictability to their contractual relations.

Petitioners ask this Court to interpret the meaning of the ASBATANKVOY's "safe berth" clause because there is a divergence among the circuit courts as to whether the clause is a warranty or imposes on the charterer merely an obligation to exercise "due diligence" to select a safe berth. ASBA's main concern, as the sponsor of the standard form, is to have the conflict resolved so that the safe-berth clause is subject to a consistent, uniform interpretation under U.S. law. Otherwise, parties to ASBATANKVOY charters subject to U.S. law and jurisdiction may be required to negotiate separate riders to the contract that adopt one interpretation of the safe-berth clause or the other. Updating the form to expressly provide that the safe-berth clause either constitutes a warranty or imposes an obligation on the charterer to exercise due diligence is not a realistic alternative; one of the great values of the ASBATANKVOY is that it has remained unchanged for many years and the industry has widely accepted it. Either way, the ongoing circuit conflict undermines the value of the ASBATANKVOY form to the industry and to ASBA. Consequently, ASBA has a

genuine and direct interest as an *amicus* in this matter and urges this Court to grant the petition.

## INTRODUCTION

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. A contract for the use of a ship, known as a "charterparty," accordingly includes clauses identifying who bears the risk of specified losses—either the "owner" (the person granting the right to use the ship, either because it in fact owns the ship or because it has obtained that right under a prior charterparty) or the "charterer" (the person obtaining the right to use the ship under the charterparty). Some clauses tie a risk to a party's fault. Other clauses identify which of two innocent parties bears a risk when neither party is at fault. Either type of clause is logical so long as the risk allocation is clear.

A "safe berth" clause determines whether the owner or the charterer is responsible for losses that arise when the berth selected by the charterer causes damage to or delays the ship. If a safe-berth clause imposes an absolute warranty on the charterer, as it does in the Second and Third Circuits, then the charterer bears the risk of loss even when it is not at fault. Alternatively, if a safe-berth clause imposes only a due-diligence obligation, as it does in the Fifth Circuit, then

the charterer bears the risk of loss only if it fails to exercise the required diligence.

*Amici* express no view on the proper interpretation of the safe-berth clause here. When the party that actually causes a loss—in this case, the party that abandoned the anchor that later damaged the *Athos I*—cannot be identified, some innocent party must bear the risk. Because the charterer typically nominates the berth, it would be entirely rational to construe a safe-berth clause to impose an absolute warranty, thus allocating the loss to the charterer when both parties are innocent. It would also be entirely rational to construe a safe-berth clause to impose only a due-diligence obligation. That would have the effect of imposing the loss on the owner if the charterer exercised reasonable care to discover any conditions that might render the berth unsafe for the vessel.

However the safe-berth clause is construed, it is important for both parties to have a clear understanding of the risks they bear when they enter into a transaction. Whether this Court affirms or reverses the judgment below, therefore, it should grant the petition and rule on the merits. Only if the result is clear in advance will the parties obtain the benefit of the risk allocation for which they bargained when they concluded the charterparty.

## SUMMARY OF ARGUMENT

Whether this Court affirms or reverses the judgment below, it is important to the maritime industry that it resolve the acknowledged conflict among the circuits on the interpretation of a safe-berth clause in a charterparty.

**1.** The maritime industry has long relied on standard-form contracts, particularly in the charterparty context. As this Court has recognized, most charterparty contracts today are concluded on the basis of standard forms drafted by international organizations such as *amicus* ASBA, which promulgated the standard form used in the present case.

**2.** Contracting parties obtain numerous benefits by using standard forms. Using familiar, common terms permits the parties to conclude contracts more quickly and at a lower cost. Parties are better able to manage risks with standard-form contracts because they can be more confident in how the familiar terms will be construed.

**3.** Many of the benefits of standard-form contracts depend on having uniform judicial interpretations of the standard terms. If courts disagree on the meaning of standard terms (as the Second, Third, and Fifth Circuits do here), many of those benefits are lost. Parties must either contract individually to clarify the meaning of terms on which the courts disagree, or they must live with the ambiguity created by the conflicting interpretations.

If parties contract individually, they lose the benefits of the standard form (at least to the extent of the individual contracts). It takes longer and costs more to negotiate individual terms. Because those individual terms are not part of the standard-form contract, parties have less confidence in how those individual terms will be interpreted.

If parties decide to live with the ambiguity created by the conflicting interpretations, they risk expensive litigation or arbitration (as in this case), and they are unable to plan efficiently for the risks that they face. When the parties cannot anticipate in advance how a standard term will be interpreted, both parties need to be prepared to bear that risk and neither will be in a position effectively to mitigate the risk.



## ARGUMENT

The decision below is indisputably in direct conflict with the Fifth Circuit's decision in *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1156-57 (5th Cir. 1990). The court below expressly acknowledged that it was "not persuaded by [the *Orduna* court's] reasoning" and that it "decline[d] to follow the course [*Orduna*] charted." Pet. App. 304a. The Fifth Circuit, in turn, expressly acknowledged that it disagreed with three Second Circuit decisions. *See Orduna*, 913 F.2d at 1156-57 (declining to follow *Venore Transportation Co. v. Oswego Shipping Corp.*, 498 F.2d 469, 472-473 (2d Cir. 1974); *Ore Carriers of Liberia, Inc. v. Navigen Co.*,

435 F.2d 549, 550 (2d Cir. 1970) (per curiam); *Paragon Oil Co. v. Republic Tankers, S.A.*, 310 F.2d 169 (2d Cir. 1962)). And to complete the circle, *Venore* and *Paragon* are two in a line of Second Circuit decisions that the court below followed in rejecting *Orduna*. *See* Pet. App. 300a.

With the circuit conflict so clearly established, the primary issue at this stage of the proceedings is whether that acknowledged conflict is important enough for this Court to resolve. Because the conflict concerns the interpretation of a widely used standard-form clause, and standard-form clauses provide substantial benefits to the industry when they are interpreted uniformly, it is important for this Court to grant the petition and resolve the conflict.

## I. The maritime industry relies heavily on standard forms, particularly standard-form charterparties.

### A. Standard-form charterparties have a long history in admiralty.

Historically, charterparties were memorialized on a single sheet of paper, with each term hand-written on one half of the paper and duplicated on the other half. NIKI ANTONIADOU, CHARTER PARTIES: AN OUTDATED FORM OF CONTRACT? 11 (2016). Once all the terms were reduced to the written instrument, the paper was torn in half, and each party received half of it so that each party had a record of both parties' obligations. *Id.* In the event of any disagreement over

terms, the parties would compare their respective halves to settle the disagreement. *Id.* Indeed, the term "charterparty" derives from the Latin phrase *carta partita*, which literally translates as "a deed divided." *See* SIR BERNARD EDER ET AL., SCRUTTON ON CHARTERPARTIES AND BILLS OF LADING ¶ 1-006 n.11 (23d ed. 2017).

As time passed and globalization transformed the speed and nature of trade, more thorough and specific charterparty terms were necessary to accommodate parties' needs. ANTONIADOU, *supra*, at 13. That made the negotiation process more complicated and difficult. By "the end of the nineteenth century the need was felt [within the industry] to make the formula of the charter party more uniform and updated." *Id.* Different organizations within the shipping industry began to promulgate and issue standard-form charterparties for use around the world. *Id.* Those forms were adapted for the shipping needs of the time and are still used today. *Id.*

### B. Charterparties today are usually concluded on standard forms.

"Charter parties are commonly drafted using highly standardized forms specific to the particular trade and business needs of the parties." *Stolt-Nielsen S.A. v. AnimalFeeds Int'l Corp.*, 559 U.S. 662, 666 n.1 (2010); *see also*, *e.g.*, GRANT GILMORE & CHARLES L. BLACK, JR., THE LAW OF ADMIRALTY § 1-6, at 193 (2d ed. 1975). Heavy reliance on standardization within the maritime industry has created a subset of maritime

contracts—including charterparties—fraught with "laconic" language. *Id*. § 4-1, at 195. For instance, "a single short (and often, to the uninitiate, obscure) expression may refer to a whole set of complicated practices perfectly familiar to those who deal regularly in such matters." *Id*. The overall meaning of standardized maritime contracts is created, in part, by the vast array of judicial decisions interpreting those standardized contracts. 22 RICHARD A. LORD, WILLISTON ON CONTRACTS § 58:6 (4th ed. 1990) ("Much of the law of charter parties is composed of judicial and arbitral decisions interpreting the standardized clauses."). Thus, the courts play an essential role in interpreting the standardized contractual language, which furthers the uninterrupted flow of maritime commerce.

### C. Organizations such as *amicus* ASBA and BIMCO create and promulgate the standard-form charterparties used by the maritime industry.

Two of the primary organizations that promulgate and issue standard-form charterparties are *amicus* ASBA and the Baltic and International Maritime Council (BIMCO). *Amicus* ASBA, described above at 3-6, is responsible for the ASBATANKVOY charterparty at issue here (among many others). BIMCO, founded in 1905, is the world's largest international shipping association. BIMCO, *About Us and Our Members*, https://www.bimco.org/about-us-and-our-members. BIMCO's shipowner members represent more than 65 percent of the world's cargo-carrying capacity, and it

has created and circulated more than fifty standard-form charterparties. ALAN E. BRANCH & MICHAEL ROBARTS, BRANCH'S ELEMENTS OF SHIPPING 178 (9th ed. 2014); BIMCO, *Contracts & Clauses*, https://www.bimco.org/contracts-and-clauses/bimco-contracts (listing BIMCO's charterparties, bills of lading, and standard agreements).

## II. Standard-form contracts decrease transaction costs, increase certainty, and allow contracting parties to allocate risk accordingly.

Standard-form contracts predominate in today's commercial landscape. *See* W. David Slawson, *Standard Form Contracts and Democratic Control of Lawmaking Power*, 84 HARV. L. REV. 529, 529-530 (1971). That proliferation reflects parties' recognition that standard-form contracts provide substantial economic and legal advantages, including decreased transaction costs and increased certainty.

### A. Standard-form contracts decrease transaction costs and increase efficiency.

Standard-form contracts "lessen the transaction costs associated with contractual negotiation." Mark R. Patterson, *Standardization of Standard-Form Contracts: Competition and Contract Implications*, 52 WM. & MARY L. REV. 327, 342 (2010). By providing a uniform set of common terms that are familiar to the contracting parties, standard-form contracts lower transaction costs by speeding up negotiations and the

contract-drafting process. *See id.* Furthermore, standard forms, especially those created and relied upon within a specific industry, provide a set of rules that both parties understand. Because parties need not start from scratch at the outset of each negotiation, both sides realize efficiency gains. For sophisticated parties that use standard-form contracts in their day-to-day operations, standardization "keep[s] the cost of writing, performing, and enforcing [such contacts] within bearable limits." Slawson, 84 HARV. L. REV. at 552.

Commentators have analogized the benefits of standardized contracts to those of general product standardization:

> The transaction cost savings that result from standardization of terms are akin to the economies of scale that are realized in manufacturing when an investment in fixed assets is spread across a large number of outputs. Like customized production processes, individually tailored contracting incurs high variable costs that must be renewed with each unit of production. These variable costs are comprised of the time and resources that must be invested in developing new contract terms for otherwise familiar transactions, and analyzing these customized terms whenever a contract is consulted.

Steven R. Salbu, *Evolving Contract as a Device for Flexible Coordination and Control*, 34 AM. BUS. L.J. 329, 375-76 (1997); *see also* RESTATEMENT (SECOND) OF

CONTRACTS § 211 comment a (1979) ("Standardization of agreements serves many of the same functions as standardization of goods and services; both are essential to a system of mass production and distribution. Scarce and costly time and skill can be devoted to a class of transactions rather than to details of individual transactions.").

In addition to the benefit of reducing transaction costs, standard terms and provisions also improve negotiation efficiency. The parties responsible for negotiating contracts "must work together, and contracts with standard terms provide a common 'interface' to ease that negotiation process and reduce transaction costs." Patterson, 52 WM. & MARY L. REV. at 342-343. When an industry relies on standard-form contracts, or at least standard contract provisions, it becomes "easier for parties to compare contracts and to switch from one provider to another, because the parties need not familiarize themselves with a variety of alternative contracts." *Id*. at 342.

### B. Standard-form contracts increase certainty and clarity.

Certainty improves commerce, particularly when both parties are sophisticated and have relatively equal bargaining power, because certainty allows contracting parties to allocate risk as they see fit. "Standardization of legal obligation[s] may be necessary for the proper functioning of a corporation [that] issues large numbers of contracts in the course of its business" because standardization makes a risk more

predictable and thus more manageable. Slawson, 84 HARV. L. REV. at 552. Increased certainty further benefits the contracting parties by creating efficiencies. Standardized language, specifically the consistent *interpretation* of standard language, ultimately "increase[s] the speed with which firms can understand and evaluate potential deals within a network," allowing parties to negotiate more effectively. Salbu, 34 AM. BUS. L.J. at 373. Time is a valuable asset to all businesses and, just like other resources, it must be allocated wisely. By streamlining the contracting process, standard-form contracts enable entities to use their resources more effectively, save time, and complete deals faster. Those benefits are especially vital among industries, like maritime commerce, that are by nature fast-paced and rely heavily on agency relationships.

Standard-form contracts also provide value to contracting parties by containing uniform terms that are frequently seen and interpreted by courts, thus becoming "contract[s] whose meaning and interpretation [are] more certain." Patterson, 52 WM. & MARY L. REV. at 343. When a standard-form contract is prevalent and commonly used within an industry, courts interpret it more commonly. *See id*. As a result, judicial interpretations of standard-form contracts create a body of law that works in tandem with those contracts to increase user certainty.

Because standard-form contracts are widely used, their provisions are more likely to have been interpreted not only by courts but also by users. The

meaning and interpretations of standard terms and provisions accordingly offer more certainty than customized or individualized contracts. Increased certainty establishes clearer expectations regarding losses, enforcement, or dispute resolution. Sophisticated business parties rely on that certainty to predict, allocate, and then mitigate their operational and legal risks.

Standard-form contracts also increase user confidence. "[C]ommon, familiar language increases both one's acuity of understanding and one's faith in the quality of that understanding." Salbu, 34 AM. BUS. L.J. at 373. Parties gain increased familiarity through their ordinary course of dealing with standard terms and language, allowing them to establish a common basis of understanding and to clarify their intent. That increased familiarity with standardized contract language speeds up the negotiation and contract-drafting process, and it thereby allows parties to better assess their options and risks so that they can make more informed decisions. The more widely used standard-form contracts become, the more confident the contracting parties become.

The advantages gained from standard-form contracts, especially within a specialized industry, are important to the efficient operation of the market as a whole. Standardization facilitates trade. Salbu, 34 AM. BUS. L.J. at 365. Having confidence in standardized contract language allows parties to adjust their behavior according to the uniform interpretation or understanding of the contract terms. When there is ambiguity, all parties must depart from the standard

form if they wish to protect themselves, allocate risk, and contract around the uncertainty. By departing from the standard form, individualized contracts relinquish the benefits generated by standardized contracts. Transaction costs will increase because parties need to spend more time understanding, evaluating, and negotiating the customized contract provisions. *See* RESTATEMENT (SECOND) OF CONTRACTS § 211, comment a (1979). "[B]ecause customized language is new and unfamiliar," parties incur additional costs in order to understand idiosyncratic terms. Salbu, 34 AM. BUS. L.J. at 377. A delay in drafting and negotiating wastes valuable time and resources. Moreover, without a uniform interpretation of the underlying contractual language, contracting parties will face greater uncertainty when attempting to predict their risks and will adjust their behavior.

## III. The uniform interpretation of a safe-berth clause is important for the maritime industry.

The circuit split presents two dramatically different interpretations of a charterparty safe-berth clause, *see* Pet. 12-17, significantly impacting the contracting parties' risk allocation. The vast majority of charterparties are standard-form contracts, and those contracts generally do not specify the level of duty owed under the safe-berth clause. Guidance regarding the appropriate interpretation of the safe-berth clause is accordingly needed to create a uniform interpretation

across the circuits.[4] If the current circuit split persists, parties must either lose the benefits of standard-form charterparties (at least to some extent) by individually contracting around the ambiguity or (as in the present case) risk costly litigation (or arbitration) if an unsafe berth subsequently causes damage. It is therefore important for this Court to resolve the conflict and decide on the proper interpretation of a safe-berth clause under U.S. law when the clause does not specify whether the charterer absolutely warrants the safety of the berth or assumes only an obligation to exercise due diligence.

### A. Standard-form charterparties depend on and become more valuable through judicial interpretation of their terms.

The proliferation of standard-form contracts throughout the maritime industry has created a need for parties to understand the workings and terms of standard forms. In response, a specialized body of law has developed alongside the standard charterparties to explain their provisions. *See* GILMORE & BLACK § 1-6, at 16. That development allows standard-form charterparties to serve one of their primary functions by increasing the certainty and thus the inherent value of the contract. *See* Salbu, 34 AM. BUS. L.J. at 373.

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[4] Maritime commerce naturally involves travel across circuit boundaries. When multiple interpretations of a clause exist, parties cannot predict with any confidence which circuit's interpretation of the clause will govern.

The leading admiralty authorities agree that "the special law of charter parties consists almost entirely in the accumulated gloss of judicial decision surrounding certain more or less stereotyped terms and clauses." GILMORE & BLACK § 4-1, at 195; *see also*, *e.g.*, 22 RICHARD A. LORD, WILLISTON ON CONTRACTS § 58:6 (4th ed. 1990) ("Much of the law of charter parties is composed of judicial and arbitral decisions interpreting the standardized clauses."). That body of law, interpreting the frequently used language of standard-form charterparties, is evident in treatises exploring maritime law. In the most respected U.S. admiralty treatise, for example, Professors Gilmore and Black explain voyage charters by examining the terms of "a single one of the many charter forms." GILMORE & BLACK § 4-2, at 199. The treatise explains, clause by clause, how various courts have interpreted those standard clauses. *Id*. §§ 4-3 to 4-13, at 200-229.

The process of developing the law of charterparties through commentary on standard provisions not only clarifies their meaning but also makes standard forms more valuable. When a large number of courts have construed a particular form or clause, the resulting certainty and predictability allow parties adopting that form or clause to rely on its meaning with greater confidence. *See*, *e.g.*, Patterson, 52 WM. & MARY L. REV. at 343.

Even though most charterparty disputes are resolved in arbitration, judicial decisions—particularly by the highest courts—are still essential to the orderly development of charterparty law. Arbitrators

rely on judicial decisions to interpret the meaning of charterparty clauses, and thus the arbitration process is less effective in the absence of judicial decisions on fundamental legal questions. More importantly, arbitration decisions lack the authority necessary to establish the widely accepted level of understanding that industry needs.

### B. Clarity and uniformity are critical for the success of standard-form charterparties.

As this Court held in *Kirby*, the "touchstone" in cases such as this "is a concern for the uniform meaning of maritime contracts." *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 28 (2004). The need for clarity and uniformity in the interpretation of standard-form contracts is especially compelling in the context of charterparties because they are, by their very nature, performed in multiple jurisdictions. The smooth operation of maritime commerce requires that the provisions of commonly used standard-form charterparties be interpreted clearly and uniformly.

Long-standing customs and business practices of the shipping industry reinforce that conclusion. Charterparties are normally agreed through brokers who must act quickly because the charterer is often under a corresponding obligation to move a cargo, and a shipment cannot await protracted contractual negotiations. *See*, *e.g.*, GILMORE & BLACK § 1-6, at 15 ("goods are loaded in a hurry"); 2 THOMAS J. SCHOENBAUM, ADMIRALTY AND MARITIME LAW § 11:2, at 6 (6th ed.

2018) ("Charters are frequently negotiated with a sense of urgency and under severe time constraints."). Brokers use standard-form charterparties to reach an understood contractual agreement quickly. Standard-form charterparties promote expediency by setting out the standard terms and containing blank spaces where parties fill in pertinent information, such as the owner's and charterer's names, cargo description, ports of loading and discharge, and the amount of charter hire. Because time is typically of the essence when it comes to fixing a ship between an owner and a charterer, "it would be simply impossible to chaffer, in each case, over all the terms of the proposed contract." GILMORE & BLACK § 4-2, at 198.

That heavy reliance on standard-form charterparties by agents—acting as brokers for the charterer or the owner—emphasizes the need for clarity and uniformity. "[O]wners, charterers, and their attorneys have resisted strictly draft[ing] charterparty forms," likely because the fast-paced environment of maritime commerce demands a contract that can easily and quickly be used to contractually obligate parties to perform their contractual duties. William Tetley, *Good Faith in Contract: Particularly in the Contracts of Arbitration and Chartering*, 35 J. MAR. L. & COM. 561, 607 (2004). As a result, the owner and the charterer expect that the standard-form clauses to which they agree will be subject to a uniform and consistent interpretation that is not cast into doubt by virtue of conflicting circuit court decisions. Continued ambiguity would require additional contracting, decrease the

parties' confidence and certainty, increase costs, and weaken the value of standard-form contracts.

### C. The interpretation of the safe-berth clause is important to maritime law.

To achieve the full benefits of standard-form charterparties, including the safe-berth clause, the courts must give the forms clear meaning and uniform application. Without uniform meaning and application, the benefits afforded by standard-form contracts will be correspondingly limited. Only this Court can choose an interpretation of the standard safe-berth clause that will be uniformly applied on a nationwide basis.

The safe-berth clause is common in standard-form charterparties, including the ASBATANKVOY charterparty at issue here. The ASBATANKVOY safe-berth clause, like many standard-form safe-berth clauses, does not specify whether it imposes a strict-liability warranty or a due-diligence obligation. As is the case in many aspects of contract law, it is difficult to anticipate every circumstance that could befall the contracting parties, so the courts must fill in the gaps. The Second, Third, and Fifth Circuits have done that, creating a circuit split in the process. An owner or a charterer, if it wishes to protect itself from the risks of the resulting ambiguity, must now specify which standard is intended. But with any individually negotiated provision, the parties lose—to the extent of that provision—the benefits created through the use of standard-form charterparties.

### D. Drafting around ambiguity using riders will result in the loss of the benefits gained by using standard-form contracts.

Even if petitioners have altered their contracts in light of the decision below, it remains important for this Court to rule on the safe-berth clause and resolve the inter-circuit conflict for the benefit of the multitude of other owners and charterers that conclude charterparties with substantially the same provision. If this Court fails to resolve the conflict, contracting parties seeking an unambiguous risk allocation will be forced to draft and negotiate the safe-berth clause themselves on an individual basis. While that is possible in the abstract, the result would not be favorable for the owner, the charterer, or the maritime industry as a whole.

Without a uniform interpretation resolving the requisite liability imposed by a safe-berth clause, parties must either devote resources to supplement the safe-berth clause or leave the clause ambiguous with little confidence about which circuit's standard will apply if a dispute arises. If the parties fail to contract around the clause, ambiguity will persist—and because standard-form charterparties with safe-berth clauses are so common, that ambiguity is widespread. Ambiguity decreases the contracting parties' certainty and confidence. Not knowing what standard will apply, and thus suffering decreased certainty, parties will be less able to predict, allocate, and mitigate their operational and legal risks. Furthermore, by decreasing

uniformity and user confidence, parties will be less efficient in assessing their options and risks. As a result, contracting parties will be less able to make informed decisions or appropriately adjust their behavior than they would under a clear, uniform standard.

The harms of leaving the safe-berth clause ambiguous are further magnified by the nature of maritime commerce, as a single voyage routinely passes through multiple jurisdictions. Without a uniform rule or specific contract provision, the meaning of the safe-berth clause may change from port to port. That is particularly concerning given the substantial damages that could hinge on the applicable safe-berth standard (as this case illustrates). When there is ambiguity, contracting parties are unable to calculate, allocate, and mitigate the numerous risks involved in maritime commerce, and maritime commerce suffers.

With no uniform rule, parties that wish to avoid ambiguity and protect themselves will be required to depart from the standard-form charterparty and specifically contract around the uncertainty. Without a uniform interpretation of the safe-berth clause, no other option exists. By departing from the standard-form charterparty, parties will lose some of the benefits generated by standard-form contracts. For example, by adding idiosyncratic provisions, parties lose the increased speed and negotiation efficiencies that are enjoyed when firms, through the use of standardized contracts, can quickly understand and evaluate potential deals. *See* Salbu, 34 AM. BUS. L.J. at 373.

Consequently, transaction costs will rise. The consequences of mandating individually contracted provisions, and thus requiring parties to stray away from standard-form contracts, are felt most by industries that, by their nature, are fast-paced and rely heavily on agency relationships—such as maritime commerce. Additionally, by having to draft around uncertainty on an individual basis, parties will be forced to open themselves up to new ambiguities and drafting errors—two risks that are reduced when courts provide uniform interpretations of standard-form provisions.

If this Court does not resolve the conflict and provide a nationwide interpretation of the safe-berth clause, parties will need to contract around safe-berth clauses to avoid being harmed by the side effects of uncertainty. But in doing so, parties will stray away from standard-form charterparties and move closer to idiosyncratic contracts. With each additional clause that needs to be individually negotiated, the benefits of standard-form contracts are reduced—meaning increased transaction costs, slower negotiations, and weakened efficiency gains for maritime commerce and all parties involved. In a fast-paced, agency-based industry like maritime commerce, losing the benefits of standard-form contracts will hamper commerce. By articulating a uniform rule for a charterparty's safe-berth clause, however, the benefits of standard-form contracts can be preserved. Failing to articulate a uniform rule and requiring parties to contract around the clause themselves is not a solution.

## CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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