Case No. 18-565

In the Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

BRIEF OF THE NORTH AMERICAN EXPORT GRAIN ASSOCIATION AS *AMICUS CURIAE* IN SUPPORT OF THE PETITIONERS

RACHAEL A. HARRIS
SQUIRE PATTON BOGGS (US) LLP
2550 M. St, NW
Washington, D.C. 20037
(202) 457-6000

BENJAMIN BEATON
Counsel of Record
LAUREN S. KULEY
SQUIRE PATTON BOGGS (US) LLP
201 E. Fourth Street
Cincinnati, OH 45202
(513) 361-1200
benjamin.beaton@squirepb.com

Counsel for the North American Export Grain Association

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INTEREST OF *AMICUS CURIAE*[1]

The North American Export Grain Association, Inc., promotes and sustains the international trade of grain and oilseeds from the United States. Established in 1912, NAEGA's members include private and publicly owned companies and farmer-owned cooperatives serving the bulk grain and oilseed exporting industry. NAEGA represents the industry in communications with foreign buyers, U.S. and foreign governmental bodies, and before international institutions.

The U.S. grain export industry is a robust, diverse, and dynamic system. It reaches publicly, privately and cooperatively owned and managed facilities and trading entities. NAEGA works in the best interest of the entire value chain to provide for optimal commercial and official practices that provide for safe and secure commerce, increased efficiency, risk management and mitigation, promotion of trade and investment, and a level and competitive global playing field. NAEGA and its members, in cooperation with the U.S. Department of Agriculture's trade-related programming and the U.S. Coast Guard's security programming, provide market education, contract models, dispute resolution, and guidance related to trading and logistics functions for the international trade of

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[1] No counsel for a party authored this brief in whole or in part. No person or entity, other than *amicus curiae*, its members, or its counsel, made a monetary contribution to the preparation or submission of this brief. The parties have consented to this filing.

grains, oilseeds, and several of their primary derivative products.

Whether federal maritime law imposes greater liability on charterers that contract with vessels than on vessels and wharfingers—or rather expects due diligence from all—is a question of critical importance to the U.S. grain industry, to NAEGA's members, and to the entire American export economy. NAEGA's members have extensive experience with the plans, contracts, commercial partnerships, and insurance necessary to each foreign shipment of U.S. grain. Today most grain is shipped from within the Fifth Circuit, where—fortunately—the diligence standard prevails. The robust export trade that has emerged there would be substantially impaired were this Court to extend the Third Circuit's misbegotten rule nationwide. Strict liability would misalign safety incentives, increase costs, and diminish industry certainty and efficiency.

Such a ruling from this Court would cause certain and vast disruption of U.S. shipping and trading. The Third Circuit offered no textual, doctrinal, or policy justification—and none exists—for injecting strict liability into such a large number of maritime contracts and such a large portion of the U.S. export economy. Indeed, the Third Circuit's oversimplified and stylized attempt to explain the relationship between charterers and vessels reveals a fundamental misunderstanding of the shipping and exporting NAEGA's members do every day.

By construing a provision found in countless contracts governing NAEGA members' shipping, this Court's decision will directly affect grain exporters

and the broader economy. Because NAEGA's practical experience under the contract clauses and legal decisions at issue may aid this Court's consideration of the question presented, NAEGA respectfully submits this amicus brief supporting Petitioner's request to reject strict liability and reverse the decision below.

SUMMARY OF ARGUMENT

The decision below misinterprets "safe-berth" clauses to shunt liability from vessels to charterers, regardless of fault, knowledge, or proximity. Nothing in the contractual text justifies offering vessels such a blank-check indemnity. Under standard principles of contract interpretation, as the Fifth Circuit held decades ago, the charterer owes a duty to diligently select a safe berth, while the vessel owes a duty to proceed safely to that port. Neither party agreed to insure the other against unknown and unknowable hazards.[2]

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[2] The contract between Star Tankers and CARCO was governed by U.S. law and contained the following safe-berth clause:

> The vessel shall load and discharge at any safe place or wharf, . . . which shall be designated and procured by the Charterer, provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat, any lighterage [transfer of cargo] being at the expense, risk and peril of the Charterer. . . .

Frescati Shipping Co. v. Citgo Asphalt Ref. Co., 718 F.3d 184, 191 (3d Cir. 2013) ("*Frescati I*"). This provision of the contract, in combination with others, constitutes the "safe berth" and "safe port" obligations. This brief, like the decisions below, refers to these provisions collectively as the "safe-berth clause."

The Third Circuit's decision, however, skipped past the contractual text and structure. Starting from the assumption that the charterer had agreed to indemnify the vessel, the court identified "no basis to upset this contractual arrangement." *Frescati I*, 718 F.3d at 202. This of course begs the question presented: whether the charterer in fact contractually indemnified the vessel. Instead, the court below focused on its own understanding of the commercial relationship between charterer and vessel—a characterization that is inconsistent with the reality of U.S. shipping today.

As explained below, the Third Circuit's decision treated charterers as better positioned than vessels to anticipate and prevent accidents. That is wrong. The vessel is on the scene, while the charterer generally is absent. The vessel's master and pilot have control of the vessel, while the charterer does not. The master and pilot have the ability to delay or redirect the vessel's docking, while the charterer has surrendered any such authority. The vessel's pilots typically have specialized knowledge of and extensive experience with the channel and port, while the charterer must rely on another's expertise. The vessel has access to up-to-date information, while any available to the charterer dates back to the time of contracting. Plainly, the vessel is better able to prevent an accident and insure against damage. Given this control, the vessel is obliged to exercise it diligently. Nothing in the law or the record suggests the parties nevertheless assigned liability elsewhere.

The decision below, moreover, reaches much further than a single vessel and a single charterer. Safe-berth clauses appear in contracts up and down

shipping supply chains. The nature of integrated maritime commerce today, which the Third Circuit's decision either misunderstood or ignored, links many parties in a given shipment of goods: multiple vessels, multiple charterers, and multiple wharfs or elevators could be affected by the imposition of strict liability amidst a series of interrelated contracts. The safe-berth clause at issue appears in "charterparty" and other shipping contracts across virtually all industries, including the grain-export industry in which NAEGA's members operate. Yet the court of appeals' decision relied on a sanitized two-party account of commercial shipping that does not reflect the multi-party reality of exporters' highly segmented business model.

Interposing strict liability among so many parties and contracts would introduce far more confusion and disruption than the Third Circuit contemplated. Its decision creates misaligned incentives that will increase costs and litigation without improving safety. It introduces uncertainty into complex commercial relationships. Under a strict-liability rule, exporters of grain and other commodities would find it harder and costlier to re-route shipments, subcontract delivery, or utilize available terminals. Each of those steps, under the Third Circuit's view, could effectively require the exporter to fully insure unfamiliar vessels, ports, or terminals. The information asymmetry and moral hazard are obvious and uninviting. Liability risk, insurance costs, and transaction costs would rise—without any corresponding efficiency or safety benefits. All of which will serve as a drag on the competitiveness of

U.S. farmers, manufacturers, shippers, and other exporters.

The stakes are high: in 2018, the United States relied on maritime commerce to export billions of dollars of grain and related agricultural products around the world. Many other successful domestic industries would tell a similar story and suffer a similar burden under a strict-liability ruling. The Fifth Circuit's due diligence regime—which has successfully governed the robust Gulf of Mexico export market for decades—better aligns shippers' and vessels' mutual interest in safety, efficiency, and productivity.

ARGUMENT

I. The Decision Below Mischaracterizes the Realities of Commercial Shipping.

A. Shipping under safe-berth provisions.

Safe-berth clauses appear in contracts across many industries and enterprises that rely on maritime transportation, including the grain exporters that constitute NAEGA's membership. Amicus Br. of the Maritime Law Association of the United States and the Association of Ship Brokers & Agents at 23 ("MLA/ASBA Petition-stage Br.") ("The safe-berth clause is common in standard-form charterparties . . .").

The contractual text those manufacturers, shippers, wharfingers, and vessels agreed to, however, cannot be read to promise strict liability for unknown, uncabined damages. As explained in CITGO's opening brief (at 19–21), the safe-berth

language merely authorizes a charterer to pick a berth; it does not also amount to an express indemnity for unknowable hazards. Rather, the familiar safe-berth clause is a limited provision whose terms oblige the *vessel* to proceed safely to the designated port, unless the vessel deems it unsafe. *See supra* n.2. The provision's language does not afford heads-I-win/tails-you-lose protection: vessels do not enjoy the right to divert from *or* proceed into an unsafe port—with full indemnity either way.

The decision below largely ignored this text, which is concededly the source of the parties' bargained-for obligations. It simply assumed the charterer "bargains to send a ship to a particular port and warrants that it shall be safe there." *Frescati I*, 718 F.3d at 202. Then the court proceeded to address its principal focus: whether "industry custom," *id.*, or "policy reason[s]," *id.* at 202, allowed the court to *override* liability purportedly undertaken by a charterer.

To the extent such extrinsic evidence is even relevant to this Court's interpretation of the safe-berth provision, the decision below offered an erroneous account of the realities of commercial shipping. U.S. exporters today operate in a complex and dynamic marketplace with supply chains and subcontracts requiring many maritime actors to work in harmony under parallel or interrelated contracts. That cooperation is bolstered by a regime in which all actors owe a duty of due diligence. But it would be undermined if courts singled out a subset of maritime actors—charterers—for strict liability.

Grain exporters, for example, often use one another's terminals to meet delivery schedules or manage vessel demurrage (payment for use of a vessel beyond the contractually specified time period). To operate efficiently, exporters naturally try to keep their berths fully occupied. But many factors can interfere with a terminal's capacity, volume, and delivery schedule. When an exporter's own terminal is at capacity, exporters often contract with neighboring berths. This is a common practice and important attribute in and around the ports of New Orleans, where NAEGA members regularly divert vessels to different berths, make spot purchases of grain from competitors, or utilize nearby grain elevators.

This marketplace is complex, dynamic, and efficient. It has helped U.S. agricultural exports flourish. That success depends on a system of frequent and low-friction contracting. The shipment of any goods—whether grain, oil, or other cargo—is a complicated undertaking, often involving lengthy supply chains and a series of interconnected shipping agreements. Those commercial relationships rely on a series of interrelated contracts, including charterparties, vessel supply contracts, dockage or wharfage agreements, and marine insurance contracts. These intricate relationships and contracts are often intertwined, and reflect the "realities of a complex and international commercial maritime system." *Coats v. Penrod Drilling Corp.*, 61 F.3d 1113, 1136 (5th Cir. 1995).

A single, ordinary grain shipment, therefore, can involve many parties and many contracts that include safe-berth provisions. A supplier may enter into an

FOB ("free on board") contract to sell and deliver goods. The supplier may enter into a voyage charter contract in the same maritime transaction. The voyage charterer may have contracted for the use of the vessel with a time charterer, which itself contracted with the vessel owner. And a separate agreement may govern the use of a wharfinger's facilities for the operation of the berth at issue.

This system works well in places like New Orleans where, under the Fifth Circuit's precedent, safe-berth clauses are understood to impose due diligence obligations on the various maritime parties. Each actor has an incentive to take precaution within its own sphere of control. Parties can quickly adjust schedules, destinations, and contracts to accommodate business needs. They have less cause for concern about liability emerging outside that sphere of control, such as from a downstream terminal or a subcontracted vessel. Equivalent diligence obligations streamlines commerce and economizes risk.

If some of those contracts and some of those actors are understood to indemnify certain (potentially unspecified) downstream actors, however, the situation looks much different. Under the law of the Third Circuit, the exporter's liability may turn on the contract language of unfamiliar parties. Risk may arise from actors or areas outside its knowledge or control. In a fast-moving industry, precious little time or capacity allows for the information gathering that a strict-liability regime for charterers would necessitate. And in the event of an accident, the sources of litigation and liability multiply. Any of several contracting parties, enticed by the possibility

of a "full warranty," might under a strict-liability regime assert at least colorable claims for damage caused or suffered by others, regardless of privity or control. *Frescati I*, 718 F.3d at 200.

B. The Third Circuit's decision relies on an oversimplified and erroneous account of a charterer-vessel relationship.

Despite this dynamic marketplace, the Third Circuit focused on an oversimplified comparison of the roles of only two actors: a charterer and a vessel owner (CARCO and Frescati). The court's consideration of "industry custom," *id.* at 202, does not reflect the experience of U.S. exporters of grain and other commodities, and failed to account for the complex, multi-party transactions that occur every day in U.S. ports. A handful of mischaracterizations illustrate this error.

First, the Third Circuit concluded (on what evidence remains unclear) that the master of a vessel, despite typically being aided by an experienced local pilot, has no greater knowledge "than a far away merchant charterer." 718 F.3d at 201–02 (quoting, and rejecting, *Orduna S.A. v. Zen-Noh Grain Corp.*, 913 F.2d 1149, 1156 (5th Cir. 1990)). The court saw "no policy reason why a master on board a ship would normally be in any better position to appraise a port's more subtle dangers than the party who actually selected that port." *Id.* at 202. The "commercial reality," according to the court, indicated that "the charterer rather than the [vessel] owner … [was] more likely to have at least some familiarity with the port it selected." *Id.*

This "commercial reality," however, does not comport with NAEGA members' experience—or common sense. If anyone had been able to detect the latent hazards contemplated in the opinion—"the remnants of a shipwreck, a range of rocks, a jutting reef, or a shoal"—it plainly would have been an experienced master or local pilot on board. *Id.* at 205. Vessel owners hire and masters supervise expert pilots precisely because they are more likely to "appraise a port's more subtle dangers" than others on the scene. *Id.* Certainly they are more likely than absent charterers—who typically are in the business of producing and selling commodities, rather than maritime transport—to recognize signs of danger or latent causes for precaution.

At the very least, the master and crew of a vessel have a significant informational advantage over the charterer: they are present at the moment of the berthing. A charterer's role in a voyage, by contrast, involves (at most) planning that is carried out at a distance, days or even months before the voyage.[3] That disparity is undoubtedly why the safe-berth clause allows vessels to avoid berths perceived to be unsafe, *see Frescati I*, 718 F.3d at 201 n.14; *Orduna*, 913 F.2d at 1156. Giving charterers that option would make no sense. Yet the Third Circuit imposed on charterers the risks and costs of vessels that both do *and do not* choose to enter berths that may be unsafe.

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[3] Indeed, the court of appeals acknowledged that "similar ships had successfully berthed at the port," 718 F.3d at 204, leaving one to wonder why advance knowledge should be prioritized over the contemporaneous view on the scene.

Second, the court below also conflated the duty of a wharfinger with that of a charterer. This was doubly wrong. The wharfinger's duty is one of due diligence, not (as the Third Circuit appeared to suggest) a charterer's alleged "full warranty" of safety. *Frescati I*, 718 F.3d at 200. Therefore CITGO's tort duty as a wharfinger could not ratchet up the contractual duty CITGO undertook by agreeing to a standard safe-berth clause.

Moreover, these duties are legally distinct in any event. This case concerns the interpretation of safe-berth language found in countless contracts governing countless commercial permutations. Courts should not interpret standard contract language differently based on the happenstance that, "in the case before us, CARCO … had selected its own berth." *Id.* at 202. That would distort the meaning of contractual provisions, like this one, that address the duties of charterers, not wharfingers. Though a wharfinger might be able to "provide a safe berth," *id.* at 200, it makes no sense to speak (as the Third Circuit did) of a charterer "provid[ing]" the berth of another maritime actor it may not police or control. Conflating these duties does not reflect either the contractual language or the commercial realities affected by *Frescati I* and this Court's ruling.

Third, the Third Circuit purported to rely on "industry custom" that it deemed "most consistent with" an "'express assurance' warranty … to impose liability on the charterer without regard to the care taken." *Id.* at 203. Again, the source of this supposed custom remains unclear. And strict liability for charterers is *not* consistent with U.S. grain exporters' "industry custom" as described above. It is no answer

to assert, as the court did, that reading the contracts to require due diligence would render express diligence provisions mere surplusage. *Id.* This point cuts both ways: these contracts are "[d]appled with" express warranties too, *contra id.* at 203, set forth in language far clearer than anything in the safe-berth provision, *see* CITGO Br. 15, 25–26. The parties knew how to create an actual warranty when they wanted to, and expressly did so many times in the contract at issue. *See e.g.,* Pet. Add. 26a–45a (§§ 3, 24, 28, 35, 36). The absence of such express language here, where Frescati claims an uncabined warranty, is telling.

Finally, the court noted that under its contract, Frescati—as the owner—"remained responsible for insuring, maintaining, and restoring the *Athos I* throughout the term of the charter." 718 F.3d at 199 n.10 (citing Time Charter Party ¶¶ 3, 6). The court's analysis, however, overlooked the real-world implication of this fact. Damage related to a vessel is typically insured by the vessel, not by a charterer, whose relationship with the ship may last only one voyage. That vessel owners rather than charterers maintain insurance coverage for ship damage "cannot be irrelevant to an evaluation of the suitability of the allocation of risk" under safe-berth clauses. G. Gilmore & C. Black, THE LAW OF ADMIRALTY § 4-4, at 205 (2d ed. 1975).

Indeed, charterers do not control either of the types of insurance relevant here. As the court noted, the vessel owner quite naturally insures its own vehicle. (Here to the tune of $1 billion in oil-pollution coverage. CITGO Br. 14.) U.S. Coast Guard requirements and NAEGA members' voyage contracts require vessel owners to show proof of

insurance. The charterers, who own the cargo and hire the vessel, bear no equivalent obligation. This is consistent with Congress' choice, in the Oil Pollution Act, to place liability on the ship rather than the cargo owner. *See* Marva Jo Wyatt, Financing the Clean-Up: Cargo Owner Liability for Vessel Spills, 7 U.S.F. Mar. L.J. 353 (1995). It also aligns with Congress' creation, in the oil industry, of an industry-seeded fund that covers damage caused by unknown actors. CITGO Br. 49. Blameless charterers should not be effectively double-billed by hiring insured vessels *and* covering their damages.

The Third Circuit's understanding of "industry custom," therefore, was mistaken in several respects. Nothing about the parties' relationship or responsibilities suggests that a one-off charterer, rather than the permanent vessel owner, should insure vessels against no-fault accidents.

C. The Fifth Circuit's analysis reflects the dynamic and efficient reality of maritime commerce.

The Fifth Circuit, by contrast, offered a far more realistic account of maritime commerce and the role of a safe-berth provision. In short, the best reading of the warranty's scope aligns with the duties of the parties: the charterers pick the berth and the vessel travels to the berth. *Orduna*, 913 F.3d at 1157. Both must act with diligence, but neither must indemnify the other.

The custom and policy reasons offered in support of the Fifth Circuit's interpretation align far better with the experience of the U.S. export community. Echoing Gilmore and Black, the court recognized that

"the master on the scene, rather than a distant charterer, is in a better position to judge the safety of a particular berth." 913 F.3d at 1156. The master (often assisted by a pilot, as noted above) "is an expert in navigation, [should] kno[w] the draft and trim of his vessel, and is on the spot." *Id.* A charterer—like the grain exporters represented here—is none of those things. It is "usually a merchant," which "chooses ports and berth based on commercial as opposed to nautical grounds." *Id.* This account, unlike that of the Third Circuit, is entirely consistent with the experience of the export community.

The *Orduna* decision likewise recognized the limits and import of the contractual text. It "free[d] the master from any obligation to enter an unsafe port or berth." 913 F.3d at 1156. This limited obligation, the court inferred, is at least in tension with assigning another quite broader obligation to the charterer based on the same spare language.

Recognizing the moral hazard of a complete indemnity, moreover, the Fifth Circuit observed that it could disserve maritime law's goals of safety and efficiency. Strict liability could potentially "discourage[ing] the master on the scene from using his best judgment in determining the safety of the berth." *Id.* at 1157. As in the Port of New Orleans, commerce is well served when every actor has skin in the game—and no charterer has to wonder about its liability for unknown downstream conduct.

II. A Strict-Liability Regime Would Misalign Incentives for Safety and Cooperation.

A. Strict liability insulates the party best able to avoid damage.

The Third Circuit's decision does not merely misunderstand the nature of maritime commerce today; it affirmatively distorts that activity and harms market participants. The court, as described above, relied heavily on the notion that the charterer, which selected the berth, is generally in a "better position" than the ship's master "to appraise a port's more subtle dangers." *Frescati I*, 718 F.3d at 202. On that basis, the Third Circuit presumed the parties' contract impliedly required the charterer to indemnify the vessel, regardless of the charterer's fault. That view is both wrong and risky: it ignores that the vessel is typically the actor best positioned to avoid damage from an unknown hazard.

In general, the party best able to prevent damage should have the greatest incentivizes to do so. *See* Guido Calabresi, THE COSTS OF ACCIDENTS 262–63 (1970); *see also* CITGO Br. 39. Rather than the Fifth Circuit regime in which wharfingers, vessels, and charterers all share a duty to exercise due diligence, the Third Circuit regime would create tiers of responsibility: strict liability for the charterer, due diligence for the wharfinger, and indemnity for the vessel.[4] *See Smith v. Burnett*, 173 U.S. 430, 433 (1899)

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[4] To be sure, "negligent seamanship will nullify the safe port warranty," as the Third Circuit noted. 718 F.3d at 205–06. But the court characterized that basic standard as "*not apply[ing]* to the case before us," simply because the master did not know of

(wharfinger is "bound to exercise reasonable diligence in ascertaining the condition of the berths."). Strangely, the absent party would bear the highest risk.

Yet as the Fifth Circuit discussed in *Orduna*, the vessel's master typically has the most knowledge and control: "an expert in navigation, [who] knows the draft and trim of his vessel, and is on the spot." 913 F.2d at 1156 (citing G. Gilmore & C. Black, *The Law of Admiralty*, § 4-4, at 204–06 (2d ed. 1975)). The charterer may have chosen the berth months before the voyage, often without any way of anticipating the conditions at berth when the vessel actually arrives.

The master, by contrast, possesses modern technology that can assess the port, the approach, and the berth in real time. Contrary to the Third Circuit's characterization, the master typically does not work alone; knowledgeable pilots, who specialize in navigating approaches and ports, are present to assist. *Cf. Frescati I*, 718 F.3d at 192 (noting that the *Athos* I master was accompanied by a river pilot and later a docking pilot when entering the port).

Similarly, NAEGA members rely heavily on the expertise of vessel captains and local pilots to safely navigate vessels into port. Every vessel that comes into the Convent port in Louisiana, for example, uses at least three pilots—a federal bar pilot from the mouth of the river to just below New Orleans, a Crescent pilot through New Orleans, and a NOBRA pilot from just above New Orleans to Convent. In

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the anchor's existence. *Id.* at 206 (emphasis added). Presumably that is typically the case when latent dangers are at issue.

each case, the pilot controls the movement of the vessel and, when berthing, the assisting tugs. The pilot—not the charterer—decides how to approach and exit the berth. That decision depends on the pilot's experience, expertise, and discretion; on the local traffic and tide; and on other real-time conditions of the berth and surrounding areas.

Indemnifying the vessel, despite these comparative advantages relative to the charterer, *Orduna*, 913 F.3d at 1156, would distort the efficient allocation of risk and precaution. A "full warranty," regardless of fault, necessarily reduces the indemnitee's incentives to take appropriate precautions to minimize risks. Courts should hesitate to infer in contracts a choice to indemnify the party in the best position to avoid risks and maritime hazards. Yet the decision below ranked the vessel's ability to recover for damages above its incentive to prevent damage in the first place. Absent a clear contractual agreement to the contrary, parties should be required to take the reasonable precautions available to them to avoid unnecessary damages to a vessel and its cargo. That is the situation that prevails (and operates well) within the Fifth Circuit.

Given charterers' general lack of supervision and control over the pertinent facilities and sources of risk, a strict liability rule "leads to the master's gambling at the charterer's risk." J. Bond Smith, Jr., Time and Voyage Charters: Safe Port/Safe Berth, 49 Tul. L. Rev. 860, 868 (1975). The law and common sense both recognize, however, that liability generally should rest with the "cheapest cost avoider." *See* Calabresi, *supra*, at 135–36, 262. That is decidedly not the absent charterer.

B. Imposing strict liability injects uncertainty into dynamic commercial relationships.

A strict liability standard also creates incentives that run contrary to the purpose of maritime law—to encourage, not discourage, maritime commerce. *See, e.g., Exxon Corp. v. Cent. Gulf Lines, Inc.,* 500 U.S. 603, 608 (1991). Maritime law should work to promote just the sort of efficient, dynamic, and productive maritime commerce described above. "The fundamental interest giving rise to maritime jurisdiction," this Court has emphasized, "is the protection of maritime commerce." *Sisson v. Ruby*, 497 U.S. 358, 367 (1990). The strict liability rule injects uncertainty into a well-functioning market, increases the frictions and costs of contracting within a multiparty supply chain, and raises the risk of a dispute over a counterparty's diligence.

As the drafters of this form contract recognize, the language of the safe-berth clause "does not specify whether it imposes a strict-liability warranty or a due-diligence obligation." MLA/ASBA Petition-stage Br. at 4. Thus there is no textual basis to assign the liability to charterers. And even if charterers had the leverage to update various maritime form contracts to expressly override a misinterpretation of the safe-berth clause, that "is not a realistic alternative," according to the contractual drafters. *Id.* These contracts have been used for decades, during which time a vast amount of custom and interpretation has built up around their existing structure. Moreover, existing agreements based on pre-existing form contracts will remain applicable for years, covering

voyages undertaken through existing contractual relationships.

Left undisturbed, the Third Circuit's expansive interpretation may induce litigious parties to pursue novel arguments for liability that the parties never anticipated or bargained for. Accordingly, strict liability would serve as a magnet for litigation. Such interpretive "[u]ncertainty not only spawns litigation difficulties, like those retrospectively found in this case, but it also drives up insurance costs for vessel owners." *Molett v. Penrod Drilling Co.*, 872 F.2d 1221, 1230 (5th Cir. 1989) (espousing the importance of certainty in maritime commerce). Many actors may find suing at least worth a shot, given the prospect of a full indemnity delivered in the court below.

Contracting parties also may begin to doubt the meaning and reliability of other terms in their shipping agreements. This can generate still more defensive steps, as parties guard against a court's willingness to alter other provisions in their agreements. Courts and commentators alike have recognized the efficiencies of using form contracts with well-recognized party obligations. *See* MLA/ASBA Petition-stage Br. at 4.

But faced with the Third Circuit's interpretation, exporters and other may be driven to attempt to (re)negotiate contractual provisions whose meaning they previously thought settled. As noted above, it is hardly clear that revising maritime form contracts, or attaching riders to those contracts, would succeed. But at least some parties will be motivated by the vast potential liability ($140 million plus in this case alone) to try. That process is itself costly, increasing

the time, expense, and risk of bargaining with other entities (for example, the spot use of neighboring grain facilities discussed above). The added friction hardly serves the "fundamental interest" in "the protection of maritime commerce." *Sisson*, 497 U.S. at 364.

III. This Court's Decision Will Have Vast Practical Consequences for the U.S. Maritime Community and Economy.

The Third Circuit's strict liability regime, if affirmed, will have profound implications across all facets of the U.S. maritime community. Commentators have long recognized that open-ended liability can discourage maritime commerce and render insurance unattainable. *See* Thomas J. Schoenbaum, Admiralty and Maritime Law § 15-1 (5th ed. 2012); Lawrence I. Kiern, *Liability, Compensation, and Financial Responsibility Under the Oil Pollution Act of 1990: A Review of the Second Decade*, 36 Tul. Mar. L.J. 1, 43–45 (2011). Altogether, these disruptions will result in decreased efficiencies and increased costs for U.S. industries utilizing maritime commerce, and particularly for those exporters (like members of NAEGA) operating out of the nation's busiest ports and waterways.

1. Strict and unlimited liability would discourage maritime commerce by introducing additional uncertainties into the shipping relationships and making it harder to obtain insurance that shippers need to engage in such commerce. *See e.g.*, *Mack v. GE*, 896 F. Supp. 2d 333, 342 (E.D. Pa. 2012) (recognizing that limits on claims "would serve to encourage participation in maritime commerce by

limiting—in a reasoned manner—potential liability of those entities involved in such commerce while continuing to protect those sea workers in need of protection (*i.e.*, those workers who are not sophisticated as to the hazards to which their work exposes them)"); Kiern, 36 Tul. Mar. L.J. at 43–45 (acknowledging the limits on liability will continue to encourage maritime commerce).

In effect, the Third Circuit's rule requires charterers to insure the vessel and wharf from harm. This task is difficult enough when the counterparty is known; the difficulties increase exponentially when the liability may extend to unknown or non-contractual parties. When a number of unrelated maritime actors must work together on a shipment or within a port, as described above, undertaking such an open-ended obligation may prove downright daunting.

Other aspects of the Third Circuit's *Frescati* decision illustrate just how broadly this decision reaches. As discussed above, the court below mainly considered the roles of two players—CITGO and Frescati—even though many export transactions involve far more parties. *See supra* 8–9. Indeed, CITGO and Frescati were not even in privity before facing off in this litigation: the *Athos I* was subchartered by CITGO's counterparty Star Tankers, whose contracts with CITGO and Frescati contained similar provisions, but were governed by different laws and were signed years apart. The existence of multiple contractual counterparties increases the risk of voluminous and potentially inconsistent litigation when accidents affect multiple maritime actors.

CITGO's purported indemnity, moreover, was *not* limited to its single contractual counterparty (Star) as interpreted by the Third Circuit. Rather, CITGO's open-ended obligation was deemed to reach a third-party, Frescati. *See Frescati I,* 718 at 197–200. This is particularly significant for the industry because CITGO had not negotiated a contractual relationship with Frescati when it undertook its safe-berth obligation. So not only is the indemnity open-ended in amount, it could also stretch to reach strangers across a lengthy contract chain. Even the most diligent and least cost-constrained shipper would struggle to assess the litigation and liability risk of multiple potential or unknown parties before entering into a safe-berth agreement with an intermediary like Star. Without relitigating the third-party beneficiary ruling, it suffices to say that the strict liability at issue here is not necessarily cabined to two counterparties in privity; this very case shows the obligations can stretch much further.

Finally, the Third Circuit's ruling also stretched the geographic scope of CITGO's implied indemnity. Its purported safe-berth duty was (counterintuitively) not limited to the berth itself. Rather, the Third Circuit read it to include "the area in and around Paulsboro, *including the Anchorage*." 718 F.3d at 203 (emphasis added).[5] This assigned the charterer a vast amount of territory within which to insure against

[5] That the court below ascribed the vast scope of the indemnified territory to a purported concession is beside the point. 718 F.3d at 200 n.12. Plainly, the charterer never intended to be responsible for *any* of the relevant waters. Yet under the Third Circuit's view of the contract, it would be stuck with *all* of them.

unknown hazards and faultless accidents. And despite the Third Circuit's faulty assumption that a charterer is well positioned to understand the nature of the berth, *id.* at 202, there is no basis to think charterers have in fact inspected or investigated such a broad swath of navigable waters. Indeed, much of the area at issue in this case, for which CITGO was held legally responsible, was actually a federal anchorage controlled by the U.S. Coast Guard. CITGO, therefore, could not exercise control over federal anchorage even though its own wharf was nearby.

2. A strict liability rule creates negative consequences for all shippers. For example, it would be make it harder and more costly for shippers, elevators, vessels, and terminal operators in the grain export market to cooperate and contract efficiently. Cooperation requires that all parties exercise diligence in ensuring that a vessel makes it to port safely. A strict-liability standard inhibits those efforts.

For exporters of grain and other commodities, consistent standards for all vessels, charterers, and wharfingers facilitates the use of neighboring berths and multiple ships to assist in completing transactions. As discussed above, the increased risk and cost of using neighboring berths to meet delivery obligations can raise costs and reduce efficiency in several ways. Diminished access to facilities can incur vessel demurrage charges that regularly cost tens of thousands of dollars per day, per vessel even under routine operation conditions. (During periods of tight vessel availability, they can reach far higher.) Barge demurrage costs, the risk of buying-out or "washing"

customer contracts at higher price, and the threat of business interruptions all rise when contracting among maritime actors becomes more difficult and more costly.

The due diligence standard helps mitigate these risks. All parties know that whether the vessel loads at the exporter's berth or a competitor terminal, the loading facility will have incentives to exercise due diligence to make the berth safe and to resist (where appropriate) any damages claimed by the vessel owner. In a strict-liability model, however, parties would have less ability to utilize competitor facilities to manage delivery risks. New Orleans grain exports—like many other U.S. exporters—would become less efficient and competitive in the world market.

The court of appeals' interpretation will also make maritime shipping more costly to insure. Insurers, like exporters, struggle to price the risk of unlimited damages at unknown facilities. Declining to expand limited liability, by contrast, allow parties to "procur[e] insurance at reasonable rates." Kiern, 36 Tul. Mar. L. J. at 44.

Adoption of strict liability in the Fifth Circuit—where many of the NAEGA's members have terminals—would increase the ultimate risk that charterers, exporters, and spot sellers face. The inefficient result would be increased insurance costs across an industry that already hasan extensive insurance system in place. As noted, vessels are required to maintain large insurance policies to protect damage to the vessel. *See supra* 13–14; Peter G. Hartmann, Safe Port/Safe berth Clauses:

Warranty or Due Diligence?, 21 Tul. Mar. L. J. 537, 551 ("owners typically have hull insurance on their vessels, therefore, the risk of hull damage has already been allocated; the issue in most cases is whether the insurer or the charterer will pay for the damage") (citing Gilmore & Black, *supra* § 4-4, at 204); *see also* CITGO Br. 14 (CITGO's voyage contract required Star Tankers to maintain $1 billion in oil pollution insurance). And in "Cost, Insurance, Freight" shipping contracts, the seller assumes responsibility for insuring the value of the cargo. The Third Circuit's decision would only impose further layers and further costs of insurance for shippers and those they serve.

3. Such cost increases will decrease overall competitiveness for a range of exporting industries that utilize maritime commerce to facilitate domestic and international trade. The United States is a large producer of grains, oilseeds and related agricultural products—and as much as one-third of these products produced in the U.S. moves into export. During 2018, for example, the United States exported 179.8 million metric tons of grains, oilseeds, and related products valued at $55.3 billion. Almost all of this (an estimated 168.1 million metric tons valued at $52.6 billion) was exported through waterborne commerce.[6] A tremendous portion of that commerce implicated at least one safe-berth provision.

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[6] This data was derived from U.S. Census Bureau Trade Data, queried from the U.S. Department of Agriculture/Foreign Agricultural Service's Global Agricultural Trade System on July 3, 2019; and U.S.D.A, data set forth in its January 16, 2019 Market News Report titled "Grains Inspected and/or Weighed for Export by Rail to Canada and Mexico."

Decreased efficiencies and increased insurance costs will in turn inflate grain prices, rendering the United State less competitive on the global market. This will not just affect the grain-export sector, for instance, but will ripple through the supply chain: from farmers and co-ops to country grain terminals, railroads, barge companies, and other service providers. The cycle would repeats in other trade-intensive sectors as well. Thus, the detrimental effects of a strict liability interpretation of the safe-berth clause will touch maritime commerce as a whole and the grain, energy, and other exporting industries in particular. The court can curtail many of these far-reaching consequences by rejecting the Third Circuit's unbounded interpretation of the safe-berth clause.

CONCLUSION

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

Rachael A. Harris
SQUIRE PATTON
BOGGS (US) LLP
2550 M. St, NW
Washington, D.C. 20037
(202) 457-6000

Benjamin Beaton
Counsel of Record
Lauren S. Kuley
SQUIRE PATTON
BOGGS (US) LLP
201 E. Fourth Street
Cincinnati, OH 45202
(513) 361-1200
benjamin.beaton@squirepb.com

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