No. 13-462

In the Supreme Court of the United States

CITGO ASPHALT REFINING COMPANY, ET AL.,
PETITIONERS

v.

FRESCATI SHIPPING COMPANY, LTD., ET AL.

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

BRIEF FOR THE UNITED STATES IN OPPOSITION

DONALD B. VERRILLI, JR.
Solicitor General
Counsel of Record
STUART F. DELERY
Assistant Attorney General
ZANE M. MEMEGER
United States Attorney
MATTHEW M. COLLETTE
ANNE MURPHY
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

Petitioner chartered an oil tanker, M/V ATHOS I, to carry crude oil from Venezuela to petitioner's refinery on the Delaware River. ATHOS I struck a submerged anchor while docking at petitioner's facility, spilling approximately 263,000 gallons of crude oil into the river. The questions presented are:

1. Whether contractual "safe port" and "safe berth" clauses providing that petitioner would direct ATHOS I to a "safe place or wharf * * * provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat" constituted a warranty of safety, or merely required petitioner to exercise due diligence.

2. Whether respondent, as ATHOS I's owner, was a third-party beneficiary of the safe port and safe berth clauses in a sub-charter agreement between petitioner and an intermediary charterer.

3. Whether petitioner's tort duty to exercise reasonable care to provide vessels with a safe "approach" to its dock includes the path ships customarily use to travel from the shipping channel to the dock.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 10
Conclusion 30

TABLE OF AUTHORITIES

Cases:

Arbitration of T. Klaveness Shipping A/S - Duferco Int'l Steel Trading, In re, 2001 A.M.C. 1954 (N.Y. Arb. 2001) 16
Atkins v. *Fibre Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874) 14
Canadian Pac. (Bermuda) Ltd. v. *United States*, 534 F.2d 1165 (5th Cir. 1976) 26
Cities Serv. Transp. Co. v. *Gulf Ref. Co.*, 79 F.2d 521 (2d Cir. 1935) 8
Complaint of Nautilus Motor Tanker Co., In re, 862 F. Supp. 1260 (D. N.J. 1994), aff'd, 85 F.3d 105 (3d. Cir. 1996) 28
Crumady v. *The Joachim Hendrik Fisser*, 358 U.S. 423 (1959) 7, 18, 19, 22
Eklof Marine Corp. v. *United States*, 762 F.2d 200 (2d Cir. 1985) 26
Elting v. *East Chester*, 50 F. 112 (S.D.N.Y 1892) 28
Exxon Co. v. *Sofec, Inc.*, 54 F.3d 570 (9th Cir. 1995), aff'd, 517 U.S. 830 (1996) 16
Hamilton-Brown Shoe Co. v. *Wolf Bros. & Co.*, 240 U.S. 251 (1916) 11

Cases—Continued: Page

Indian Towing Co. v. *United States*, 350 U.S. 61 (1955) 27
Japan Line, Ltd. v. *United States*, 1976 A.M.C. 355 (E.D. Pa. 1975), aff'd, 547 F.2d 1161 (3d Cir. 1976)(Table) 26
McCaldin v. *Parke*, 142 N.Y. 564, 570 (N.Y. 1894) 28
Nault v. *United States*, 517 F.3d 2 (1st Cir. 2008) 20
Norfolk S. Ry. Co. v. *Kirby*, 543 U.S. 14 (2004) 13, 14
Orduna S.A. v. *Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990) 6, 10, 14, 15, 16
Osprey Ship Mgmt., Inc. v. *Jackson Cnty. Port Auth.*, No. 1:05CV390, 2007 WL 4287701 (S.D. Miss. Dec. 4, 2007) 28
Paragon Oil Co. v. *Republic Tankers, S.A.,* 310 F.2d 169 (2d Cir. 1962), cert. denied, 372 U.S. 967 (1963) 7, 12, 18, 20, 22
Park S.S. Co. v. *Cities Serv. Oil Co.*, 188 F.2d 804 (2d Cir.), cert. denied 342 U.S. 862 (1951) 12, 15
Robins Dry Dock & Repair Co. v. *Flint*, 275 U.S. 303 (1927) 17, 23
Smith v. *Burnett*, 173 U.S. 430 (1899) 22, 24
The Calliope, [1891] App. Cas. 11 (H.L. 1890) 23
The Gazelle v. *Brun*, 128 U.S. 474 (1888) 12
The Moorcock, [1889] 14 P.D. 64 (L.R. 1889) 24
Trade Banner Line, Inc. v. *Caribbean S.S. Co.*, 521 F.2d 229 (5th Cir. 1975) 23
Waterman S.S. Corp. v. *Dugan & McNamara, Inc.*, 364 U.S. 421 (1960) 7, 18, 22
Western Bulk Carriers v. *United States*, No. 97-2423, 1999 U.S. Dist. LEXIS 22371 (E.D. Cal. Sept. 14, 1999), aff'd, 371 F.3d 1119 (9th Cir. 2004) 28

Statutes, regulations and rules: Page

Oil Pollution Act of 1990, 33 U.S.C. 2701 *et seq.*:
33 U.S.C. 2701(32)(A) (Supp. V 2011) 4
33 U.S.C. 2702(a) 4
33 U.S.C. 2704(a) (2006 & Supp. V 2011) 4
33 U.S.C. 2704(c) 4
33 U.S.C. 2708 (2006 & Supp. V 2011) 4
33 U.S.C. 2715(a) 4
33 U.S.C. 403 25
33 U.S.C. 471 (Supp. V 2011) 3
33 U.S.C. 905(b) 19
33 C.F.R.:
Section 322.3(a) 26
Section 329.11(a) 25
Section 110.157(10) 3
Fed. R. Civ. P. 52(a)(1) 6
Sup. Ct. R. 10 ..... 21, 27

Miscellaneous:

Terence Coghlin et al., *Time Charters* (6th ed. 2008) 2, 14, 15, 16
Julian Cooke et al., *Voyage Charters* (3d ed. 2007) 2, 13, 14
Restatement (First) of Contracts (1932) 19
Restatement (Second) of Contracts (1981) 8, 17, 19, 21
2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* (5th ed. 2011) 13
Society of Maritime Arbitrators Awards Decisions:
The Mercandian Queen, SMA 2713 (1990) 16
The Mountain Lady, SMA 3704 (2001) 16

Miscellaneous—Continued: Page

2A Michael F. Sturley, *Benedict on Admiralty* (7th ed. rev. 2013) 13

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-58a) is reported at 718 F.3d 184. The opinion of the district court (Pet. App. 120a-134a) is not reported in the *Federal Supplement*, but is available at 2011 WL 1436878.

JURISDICTION

The judgment of the court of appeals was entered on May 16, 2013. A petition for rehearing was denied on July 12, 2013 (Pet. App. 135a-136a). The petition for a writ of certiorari was filed on October 10, 2013. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

This case arose from an oil spill caused when M/V ATHOS I, an oil tanker chartered by petitioner the

CITGO Asphalt Refining Company (hereinafter, petitioner), struck a large submerged anchor while docking at petitioner's refinery on the Delaware River. Respondent Frescati Shipping Company (hereinafter, respondent) owned ATHOS I and paid for the spill's cleanup in the first instance. The United States reimbursed respondent for $88 million of its expenses under the Oil Pollution Act of 1990 (OPA), 33 U.S.C. 2701 *et seq.*, thereby becoming partially subrogated to respondent's rights against third parties. In this litigation, respondent and the government seek to recover the costs of the spill from petitioner under contract and tort theories.

1. ATHOS I was a 748-foot, single-hulled oil tanker owned by respondent. Pet. App. 7a. In October 2001, respondent entered into a "time charter" placing ATHOS I into a pool of tankers managed by Star Tankers, Inc. *Ibid.* Under the time charter, Star Tankers served as an intermediary, arranging for ATHOS I's employment through sub-charters while respondent continued to staff and operate the vessel. *Id.* at 7a-8a; see Terence Coghlin et al., *Time Charters* ¶ 1.59 (6th ed. 2008) (Coghlin).

In November 2004, petitioner sub-chartered ATHOS I to carry heavy crude oil from Venezuela to petitioner's asphalt refinery in Paulsboro, New Jersey. The sub-charter between petitioner and Star Tankers was made in a "voyage charter party," a contract under which a ship is hired "to perform one or more designated voyages." Julian Cooke et al., *Voyage Charters* ¶ 1.1 (3d ed. 2007) (Cooke). Petitioner and Star Tankers used a standard industry form known as the "ASBATANKVOY," supplemented with additional clauses inserted by the parties. Pet. App. 8a. The

ASBATANKVOY form included customary provisions known as safe port and safe berth clauses (collectively, the safe berth clause), which provided in part that ATHOS I would "load and discharge at any safe place or wharf, . . . which shall be designated and procured by [petitioner], provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." *Id.* at 9a.[1]

2. Pursuant to the voyage charter, petitioner directed ATHOS I to discharge at its refinery in Paulsboro, New Jersey. The refinery's dock is on the Delaware River near Anchorage Nine, a federally designated area for vessels to anchor outside the river's shipping channel. Pet. App. 10a; see 33 U.S.C. 471 (Supp. V 2011) (providing for federal anchorages); 33 C.F.R. 110.157(10) (designating Anchorage Nine). The anchorage is located between the shipping channel and petitioner's facility; the border of the anchorage "runs diagonally to [petitioner's] waterfront, ranging between 130 and 670 feet from the face of its ship dock." Pet. App. 10a; see *id.* at 58a (diagram).

ATHOS I reached the Paulsboro refinery on November 26, 2004. Following the ordinary procedure for ships of its size docking at the refinery, ATHOS I was being pushed sideways through the anchorage by tugboats when it struck a large anchor lying on the river bottom. Pet. App. 10a. The anchor

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[1] The voyage charter further provided that ATHOS I would "proceed as ordered to Loading Port(s) named . . . , or so near thereunto as she may safely get (always afloat), . . . and being so loaded shall forthwith proceed, as ordered on signing Bills of Lading, direct to the Discharging Port(s), or so near thereunto as she may safely get (always afloat), and deliver said cargo." Pet. App. 8a.

had been abandoned by an unknown party sometime before 2001. *Id.* at 12a. It was located "squarely within the *Athos I*'s path and only 900 feet"—or a little more than a ship's length—from petitioner's dock. *Id.* at 4a. The anchor punched two holes in ATHOS I's hull, releasing approximately 263,000 gallons of oil into the river. *Id.* at 10a.

3. To ensure that sufficient funds are immediately available to clean up oil spills, the OPA identifies "responsible parties" who must pay in the first instance regardless of fault or ultimate legal liability. 33 U.S.C. 2702(a). The OPA generally allows a responsible party to limit its liability so long as it did not cause the spill through gross negligence or other misconduct, and provided it cooperates fully in the cleanup. 33 U.S.C. 2704(a) and (c) (2006 & Supp. V 2011). Costs in excess of the statutory limit are then reimbursed by the federal Oil Spill Liability Trust Fund. 33 U.S.C. 2708. When the Fund makes a reimbursement, it becomes subrogated to the responsible party's applicable "rights, claims, and causes of action" against third parties. 33 U.S.C. 2715(a).

The responsible parties for a spill from an oil tanker include the vessel's owner and operator. 33 U.S.C. 2701(32)(A) (Supp. V 2011). After the spill from ATHOS I, respondent promptly carried out its obligations under the OPA and had its liability capped at approximately $45 million. Pet. App. 13a. The Fund reimbursed respondent for approximately $88 million in additional cleanup costs, thereby becoming subrogated to respondent's claims against third parties to the extent of the reimbursement. *Ibid.*

4. In June 2008, the United States sued petitioner in the United States District Court for the Eastern

District of Pennsylvania, asserting the Fund's subrogated rights and seeking to recover the $88 million it paid for the spill's cleanup. Pet. App. 17a. The government's suit was consolidated with respondent's pending claim against petitioner for its unreimbursed costs from the accident. *Ibid.* Both respondent and the government sought to recover under the voyage charter's safe berth clause, arguing that the submerged anchor rendered the Paulsboro facility unsafe for ATHOS I. Respondent also contended that petitioner breached its tort duty to exercise reasonable care to provide a safe approach to its dock.[2]

The district court rejected both claims after a 41-day bench trial. Pet. App. 120a-134a. First, the court held that respondent (and thus the government as its subrogee) could not claim the benefit of the safe berth clause. *Id.* at 130a-131a. Respondent was not a party to the voyage charter between petitioner and Star Tankers, and the district court concluded that it did not qualify as a third-party beneficiary. *Id.* at 130a. The district court also held, in the alternative, that the safe berth clause was not breached. The court acknowledged the authorities holding that a safe berth clause is a warranty that the berth chosen by the charterer will be safe—and thus that a charterer is liable for damages caused by an unsafe berth without regard to its diligence or fault. *Id.* at 131a. But the court instead followed a Fifth Circuit decision holding that a safe berth clause imposes only "a duty of due diligence to select a safe berth." *Id.* at 131a-132a (quoting *Orduna S.A.* v. *Zen-Noh Grain Corp.*, 913

[2] The government waived its tort claims against petitioner in exchange for petitioner's waiver of any claim that the accident was caused by the government's negligence. Pet. App. 17a.

F.2d 1149, 1156-1157 (5th Cir. 1990)). The court found no breach of that duty here because it believed that petitioner exercised diligence in sending ATHOS I to its Paulsboro refinery. *Id.* at 132a.[3]

Second, the district court rejected respondent's claim that petitioner breached its tort duty as the owner and operator of the Paulsboro facility. The court acknowledged that wharfingers must exercise reasonable care to provide vessels with a safe berth and approach. Pet. App. 126a. But it held that the relevant "approach" includes only "the area immediately adjacent to the berth or within immediate access to the berth." *Id.* at 127a (citation and internal quotation marks omitted). The court therefore concluded that petitioner had no duty in the area where the submerged anchor was found: Although the anchor was in a path ships customarily took to get from the channel to petitioner's dock, it was outside the dock's immediate area and in the neighboring anchorage. *Ibid.*

5. The court of appeals affirmed in part, vacated in part, and remanded. Pet. App. 1a-58a. At the outset, it held that the district court failed to make the separate findings of fact and conclusions of law required by Federal Rule of Civil Procedure 52(a)(1). Pet. App. 5a. The resulting "dearth of clear factual findings" left the court of appeals unable to "derive a full understanding of the core facts." *Id.* at 20a. This error

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[3] The district court also held that even if petitioner had breached the safe berth clause, respondent could not recover because of the "named port" exception, a doctrine providing that under some circumstances an owner waives the protection of a safe berth clause if the charter itself names a specific port and the owner accepts that port without protest. Pet. App. 132a-133a.

alone required a remand. *Id.* at 5a. But "for the sake of efficiency," the court of appeals also clarified several legal principles that would govern further proceedings. *Ibid.*

a. The court of appeals first held that respondent was a third-party beneficiary of the safe berth clause. Pet. App. 21a-26a. In an analogous context, this Court "held that vessels are automatic third-party beneficiaries of warranties of workmanlike service made to their charterers by stevedores who unload vessels at docks." *Id.* at 23a (citing *Crumady* v. *The Joachim Hendrik Fisser*, 358 U.S. 423, 428 (1959)). This Court also extended third-party beneficiary status to the vessels' owners, reasoning that the "owner, no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service." *Ibid.* (quoting *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421, 425 (1960)).

The court of appeals followed a Second Circuit decision holding that the same logic applies where, as here, a vessel's owner claims the benefit of a safe berth clause in an agreement between a charterer and a third party. Pet. App. 23a-24a (citing *Paragon Oil Co.* v. *Republic Tankers, S.A.*, 310 F.2d 169, 175 (2d Cir. 1962) (Friendly, J.), cert. denied, 372 U.S. 967 (1963)). Like the stevedore's warranty of workmanlike service, "a safe berth warranty necessarily benefits the vessel, and thus benefits its owner as a corollary beneficiary." *Id.* at 24a. Although the court of appeals was "mindful of the parties' ability to contract differently" if they wished to avoid creating a third-party beneficiary relationship, it concluded that absent such contrary indications a safe berth clause itself manifests the parties' intent "to endow the ves-

sel"—and thus the vessel's owner—"with 'the benefit of the promised performance.'" *Id.* at 24a-25a (quoting Restatement (Second) of Contracts § 302(1)(b) (1981)).

b. The court of appeals next held that the voyage charter's safe berth clause was a warranty that petitioner would send ATHOS I to a safe berth, not merely a promise to exercise due diligence. Pet. App. 26a-33a. The court of appeals followed a well-established line of cases from the Second Circuit, which has "long held that promising a safe berth effects 'an express assurance' that the berth will be as represented." *Id.* at 28a (quoting *Cities Serv. Transp. Co.* v. *Gulf Ref. Co.*, 79 F.2d 521, 521 (2d Cir. 1935) (per curiam)). The court of appeals rejected the contrary "due diligence" interpretation adopted by the district court and the Fifth Circuit's decision in *Orduna* as inconsistent with the "near consensus" of relevant authorities, the language of the safe berth clause, and industry custom. *Id.* at 31a-33a.[4]

c. Finally, the court of appeals held that respondent's tort claim could go forward because ATHOS I was within the "approach" to petitioner's dock when it struck the anchor. Pet. App. 41a-53a. The court rejected as "too constricted" the district court's view that an approach—and thus a wharfinger's duty to exercise reasonable care—is limited to the "immediate" area of the berth. *Id.* at 42a. It also declined to adopt petitioner's argument that the duty of reasonable care extends only to areas the wharfinger "con-

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[4] The court of appeals also reversed the district court's holding that the named port exception barred recovery under the safe berth clause. Pet. App. 37a-40a; see note 3, *supra*. Petitioner does not challenge that aspect of the court's decision.

trol[s]." *Id.* at 47a-49a. Instead, the court of appeals held that an "approach" should be "understood by its ordinary terms," with its scope "derived from custom and practice at the particular port in question." *Id.* at 42a. In "most instances," the court explained, "the approach will begin where the ship makes its last significant turn from the channel toward its appointed destination following the usual path of ships docking at that terminal." *Id.* at 45a. Here, the court found that ATHOS I was clearly within the approach when it struck the anchor. *Id.* at 46a. It had left the shipping channel, was being pushed sideways by tugboats, and was following a usual path for ships docking at petitioner's facility. *Id.* at 46a-47a.

d. The court of appeals denied petitioner's requests for rehearing and rehearing en banc. Pet. App. 135a-136a.

6. The case returned to the district court when the court of appeals issued its mandate on July 22, 2013, and remand proceedings are ongoing.[5] When it issues new findings of fact and conclusions of law, the district court will determine whether there was a breach of the safe berth clause—that is, whether petitioner's facility was "unsafe for a ship of the *Athos I's* agreed-upon dimensions and draft." Pet. App. 33a-34a. That question turns on the depth of the anchor and the draft of the ship at the time of the accident. *Id.* at 34a-37a. The court will also consider petitioner's claim that the accident was caused by "bad navigation or seamanship" by ATHOS I's operator, which would reduce or eliminate petitioner's liability under the safe berth clause. *Id.* at 36a & n.22.

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[5] See 2:05-cv-00305 Docket entry No. 668 (E.D. Pa. Oct. 11, 2013) (order denying petitioner's motion to stay proceedings).

The court of appeals directed the district court not to address respondent's tort claim unless it finds that respondent and the government cannot recover under the safe berth clause. Pet. App. 6a. If the district court does reach the tort claim, it will need to resolve numerous factual and legal issues, including "the appropriate standard of care," "whether [petitioner] breached that standard," and "whether any such breach caused the accident." *Ibid.*

ARGUMENT

Petitioner renews its claims (Pet. 12-32) that a safe berth clause is not a warranty but merely a promise to exercise due diligence, that respondent was not a third-party beneficiary of the safe berth clause, and that a wharfinger's duty to exercise reasonable care is limited to areas it controls. The court of appeals correctly rejected these arguments, and its decision does not warrant further review. Petitioner's principal basis for seeking certiorari is the disagreement between the decision below and *Orduna S.A.* v. *Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990). But in the more than two decades since *Orduna* was decided, its interpretation of the customary safe berth clause has attracted virtually no following in the courts or the maritime industry, and has never been reaffirmed by the Fifth Circuit itself. This shallow conflict on a question of contract interpretation does not merit review by this Court, and the other two questions raised by petitioner present even weaker candidates for certiorari. The court of appeals' conclusions that respondent is a third-party beneficiary of the safe berth clause and that ATHOS I was in the approach to petitioner's dock when the accident occurred do not conflict with any decision of this Court or another

court of appeals. And notwithstanding petitioner's claim (Pet. 1) that the decision below "upends decades of settled expectations," the court of appeals' reasoning and results are consistent with established principles of contract and tort law and the expectations of the maritime industry.

Moreover, the current interlocutory posture "alone furnishe[s] sufficient ground for the denial of [the petition]." *Hamilton-Brown Shoe Co.* v. *Wolf Bros. & Co.*, 240 U.S. 251, 258 (1916). The usual reasons for deferring review until final judgment apply with special force here, where the court of appeals concluded that the "dearth of clear factual findings" would have compelled a remand even if it had not made the legal rulings petitioner challenges. Pet. App. 20a; see *id.* at 5a. And because the court of appeals did not completely resolve any of the claims in the case, some or all of the questions presented may prove to be irrelevant to petitioner's ultimate liability. Even if the issues raised otherwise warranted certiorari, review at this stage would be premature.

1. Petitioner first contends (Pet. 12-18) that the court of appeals erred and widened a circuit conflict by holding that the voyage charter's safe berth clause was a warranty of safety. The court of appeals' ruling was correct and in accord with the great weight of authority. The existence of a single aberrant decision from the Fifth Circuit does not create a conflict warranting this Court's review.

a. The voyage charter's safe berth clause provided that ATHOS I would "load and discharge at any safe place or wharf, . . . which shall be designated and procured by [petitioner], provided the Vessel can proceed thereto, lie at, and depart therefrom always

safely afloat." Pet. App. 9a. As this Court recognized more than a century ago, the "clear meaning" of this customary language is that the vessel "must be ordered to a port which she can safely enter with her cargo." *The Gazelle*, 128 U.S. 474, 485 (1888). The Second Circuit, likewise, has for many decades interpreted the traditional safe berth clause as "an express assurance * * * 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 (1935) (per curiam).

If the charterer sends the vessel to an unsafe berth, it has breached this "express assurance" and is liable for the resulting damage, regardless of its diligence or fault: "A place to which the [vessel] could proceed and from which she could depart 'always safely afloat' was warranted; it was not provided; therefore the warranty was broken and the warrantor was liable for the resulting damage." *Paragon Oil Co.* v. *Republic Tankers, S.A.*, 310 F.2d 169, 173 (2d Cir. 1962) (Friendly, J.), cert. denied, 372 U.S. 967 (1963); accord *Park S.S. Co.* v. *Cities Serv. Oil Co.*, 188 F.2d 804, 806 (2d Cir.) (Swan, J.), cert. denied, 342 U.S. 862 (1951); *Cities Serv.*, 79 F.2d at 521. Safe berth clauses thus serve to allocate the risk of damage between the contracting parties: "[T]he charterer bargains for the privilege of selecting the precise place for discharge, and the ship surrenders that privilege in return for the charterer's acceptance of the risk of its choice." *Park S.S. Co.*, 188 F.2d at 806. Prior to the Fifth Circuit's decision in *Orduna*, this understanding of

safe berth clauses as warranties was "well settled." Cooke ¶ 5.124.[6]

Neither the Fifth Circuit nor petitioner offers any sound basis for rejecting this established understanding. Most notably, as the court of appeals explained, the language of the clause—promising a "safe" berth to which the vessel can proceed "always safely afloat"—"plainly suggests an express assurance" and provides no textual basis for a due diligence standard. Pet. App. 33a. Maritime contracts "must be construed like any other contracts: by their terms and consistent with the intent of the parties." *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 31 (2004). The judicial imposition of an extra-textual due diligence qualification would be particularly inappropriate because parties to maritime charters can and do expressly modify customary warranties when they intend to substitute a diligence standard. The ASBATANKVOY form used in this case, for example, qualified the owner's traditional warranty that the chartered vessel was seaworthy to require only that the owner exercise "due diligence." C.A. App. 1222. Even more significantly, the customary language of the safe berth clause "can be and often is modified * * * by the inclusion of language which reduces it to a due diligence standard."

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[6] Accord 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 11-10 (5th ed. 2011) ("Unless this is modified by language reducing this obligation to due diligence, the charterer who nominates a port is held to warrant that the particular vessel can proceed to port or berth without being subjected to the risk of physical damage."); 2A Michael F. Sturley, *Benedict on Admiralty* § 175 (7th ed. rev. 2013) ("The obligation to furnish a safe port or berth is considered a warranty, breach of which justifies the master's refusal to enter the port or entitles the shipowner to sue for damages.").

Coghlin ¶ 10.119; accord Cooke ¶ 5.127.[7] Petitioner's view would render that express due diligence qualification surplusage.

Lacking support in the text of the safe berth clause, *Orduna* sought to justify its due diligence standard primarily based on considerations of "legal or social policy." 913 F.2d at 1157. Petitioner relies on similar concerns here.[8] Such considerations would not justify the judicial modification of the parties' agreement; courts have no license to disregard or supplement the plain terms of a contract between sophisticated parties. See *Kirby*, 543 U.S. at 31. But the considerations relied upon by *Orduna* and petitioner are unsound in any event.

First, petitioner contends (Pet. 17) that treating safe berth clauses as warranties "reduces the incentives of masters and vessel owners to exercise due care" to avoid hazards. See *Orduna*, 913 F.2d at 1157. But as petitioner itself recognized below, see Pet. C.A. Br. 75, 77-78, a safe berth clause "does not relieve the master of his duty to exercise due care" because "[a] port or berth will not be unsafe if the dangers are avoidable by good navigation and seamanship on the

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[7] In this case, for example, the time charter between respondent and Star Tankers—which also used a standard form—qualified the safe berth clause to provide that Star Tankers would exercise "due diligence to ensure that the vessel is only employed between and at safe places." Pet. App. 9a.

[8] Petitioner repeats but does not appear to endorse (Pet. 13-14) *Orduna*'s erroneous assertion that the due diligence standard is supported by *Atkins* v. *Fibre Disintegrating Co.*, 85 U.S. (18 Wall.) 272 (1874). As the court of appeals explained—and as petitioner does not dispute—*Atkins* "was essentially an application of the named port exception." Pet. App. 30a & n.14, 38a n.24; accord Coghlin ¶ 10.120.

part of the master." Coghlin ¶¶ 10.119, 10.146. The settled understanding that a safe berth clause is a warranty thus does not diminish the master's incentive to exercise reasonable care.

Second, petitioner contends (Pet. 17) that it is "manifestly unjust" to require it to bear the costs of the spill "even though it exercised due diligence." But "[t]he charterer's undertaking to provide a safe port or berth is a matter of contract," not tort, and the purpose of contractual warranties is to allocate risks between the parties without regard to fault. Coghlin ¶ 10.118; see *Park S.S. Co.*, 188 F.2d at 806. Moreover, the safe berth clause serves only to apportion financial responsibility for a loss between the charterer and the ship's owner. If the charterer believes that fault for the accident lies with someone else—here, for example, the unknown party who abandoned the anchor—it remains free to seek to recover from that party.

b. Although the Fifth Circuit erred when it departed from the settled understanding of safe berth clauses in *Orduna*, the resulting conflict does not warrant this Court's review. Even petitioner implicitly acknowledges that *Orduna* has been approved only in academic circles. See Pet. 14-15 (citing three academic commentaries, but no judicial endorsement of *Orduna*). No other court of appeals has adopted the Fifth Circuit's view, and before the district court's decision in this case, *Orduna* had not been applied outside the Fifth Circuit.[9] Maritime arbitrators, who

[9] A district judge in Hawaii adopted *Orduna*'s view, but on appeal the Ninth Circuit affirmed on other grounds while expressly declining to resolve this issue. See *Exxon Co.* v. *Sofec, Inc.*, 54 F.3d 570, 575-576 (1995), aff'd, 517 U.S. 830 (1996).

resolve the majority of disputes in the shipping industry, have likewise applied the traditional rule both before and after *Orduna*.[10] Moreover, the Fifth Circuit itself has not revisited this issue since *Orduna*, and the full Fifth Circuit has never addressed the question—indeed, it appears that no petition for rehearing en banc was filed in *Orduna*. See 913 F.2d at 1149 (noting the denial of rehearing but not mentioning rehearing en banc). When presented with an opportunity to do so, the Fifth Circuit might well resolve the circuit conflict by reconsidering *Orduna*'s singular approach.

Petitioner is also mistaken in suggesting (Pet. 18) that the court of appeals' decision creates sufficient "uncertainty" to warrant review in this interlocutory case. The circuit conflict created by *Orduna* has existed for more than two decades, and the court of appeals in this case merely reaffirmed the longstanding view that is "consistent with industry custom." Pet. App. 32a. Moreover, the issue is one of contract interpretation, and parties seeking greater certainty are free to resolve this question by agreement. Indeed, parties "often" do just that by expressly adopting a due diligence standard. Coghlin ¶ 10.119. Their ability to do so further undermines any claim that this Court's intervention is required.

2. Petitioner next contends (Pet. 18-25) that the court of appeals erred in holding that respondent, as ATHOS I's owner, was a third-party beneficiary of the

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[10] See, *e.g.*, *The Mountain Lady*, SMA 3704 (2001); *In re Arb. of T. Klaveness Shipping A/S - Duferco Int'l Steel Trading*, 2001 A.M.C. 1954 (N.Y. Arb. 2001); *The Mercandian Queen*, SMA 2713 (1990).

voyage charter's safe berth clause.[11] But that holding accords with the only other decision by a court of appeals to have considered the issue. Moreover, petitioner does not challenge the court of appeals' formulation of the legal standard for determining third-party beneficiary status. Petitioner's contention that the court misapplied that standard to the circumstances of this case lacks merit, and would not warrant this Court's review even if it were correct.

a. In general, a third-party beneficiary may enforce the terms of a private commercial contract "if recognition of a right to performance in the beneficiary is appropriate to effectuate the intention of the parties" and "the circumstances indicate that the promisee intends to give the beneficiary the benefit of the promised performance." Restatement (Second) of Contracts § 302 (1981). A plaintiff claiming third-party beneficiary status must show that the contractual provision at issue "was intended for his direct benefit." *Robins Dry Dock & Repair Co.* v. *Flint*, 275 U.S. 303, 307 (1927) (citation omitted).

In this case, petitioner promised that it would direct ATHOS I to a "safe place or wharf * * * provided the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat." Pet. App. 9a. As this Court recognized in an analogous context, respondent is a third-party beneficiary of this safe berth clause because petitioner's promise "is plainly for the benefit of the vessel whether the vessel's own-

[11] Although petitioner frames this issue as part of the same question presented as the interpretation of the safe berth clause, Pet. i, the two questions are addressed separately in the decisions below and the petition, involve distinct legal issues, and would not need to be considered together.

ers are parties to the contract or not." *Crumady*, 358 U.S. at 428. That relationship "is enough to bring the vessel"—and the vessel's owner—"into the zone of modern law that recognizes rights in third-party beneficiaries." *Ibid.*; see *Waterman S.S. Corp.* v. *Dugan & McNamara, Inc.*, 364 U.S. 421, 425 (1960) ("The owner, no less than the ship, is the beneficiary of the stevedore's warranty of workmanlike service."). As Judge Friendly explained in *Paragon Oil*, the logic of these cases applies equally to a safe berth clause like the one at issue here. See 310 F.2d at 175. Indeed, if anything a safe berth clause is even more clearly directed at benefiting the ship than a stevedore's warranty of workmanlike service because it expressly promises that the charterer will send "*the Vessel*" to a "safe place or wharf * * * provided *the Vessel* can proceed thereto, lie at, and depart therefrom always safely afloat." Pet. App. 9a (emphases added).

Petitioner contends (Pet. 19-21, 22) that respondent cannot be a third-party beneficiary because it was not explicitly named in the voyage charter and because there was no testimony that the parties intended the safe berth clause for its benefit. But the charter did expressly identify ATHOS I, and respondent's third-party beneficiary status follows from its ownership of the chartered vessel. As *Paragon Oil*, *Crumady*, and *Waterman* demonstrate, in these circumstances the intent to benefit the vessel's owner need not be shown through extrinsic evidence. Instead, it is demonstrated by the contract itself where, as here, the contract contains a promise that "is plainly for the benefit of the vessel." *Crumady*, 358 U.S. at 428. Petitioner offers no persuasive response to those authorities—indeed, the relevant portion of the petition does not

even cite *Paragon Oil* and addresses *Crumady* and *Waterman* only in a footnote.[12]

Petitioner also asserts (Pet. 22-23) that respondent is engaged in "forum shop[ping]" by bringing this third-party action while also pursuing a British arbitration against Star Tankers under the safe berth provision of the time charter. But petitioner cites no authority suggesting that the possibility of other avenues of relief extinguishes a plaintiff's right to sue as a third-party beneficiary.[13] Petitioner warranted in the voyage charter that it would direct ATHOS I only to safe places. That promise was plainly for the direct benefit of ATHOS I, and under this Court's precedents that is sufficient to make ATHOS I—and thus respondent as its owner—a third-party beneficiary. The terms of the time charter between respondent and Star Tankers have no bearing on that analysis.

b. The court of appeals' holding that respondent is a third-party beneficiary of the safe berth clause does

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[12] Petitioner's attempts (Pet. 22 n.5) to distinguish *Crumady* and *Waterman* lack merit. Although those cases involved an implied contractual warranty rather than an express provision like the one at issue here, this Court's decisions were based on third-party beneficiary principles that apply equally in this context. See *Crumady*, 358 U.S. at 428 (citing Restatement (First) of Contracts § 133 (1932), the predecessor to Section 302 in the Restatement (Second)). Petitioner also notes that Congress has superseded the implied contractual warranty that was at issue in *Crumady* and *Waterman*. See 33 U.S.C. 905(b). But as the court of appeals explained, that change in the underlying substantive law does nothing to undermine the precedential force of *Crumady* and *Waterman* as applications of the law governing third-party beneficiaries. Pet. App. 24a.

[13] Furthermore, because the British arbitration has been stayed pending the outcome of this litigation, Pet. App. 9a, there is no reason to believe that respondent will recover twice for its injury.

not conflict with any decision of this Court or another court of appeals. To the contrary, the court of appeals explicitly *avoided* a circuit conflict by following the only other decision to consider the question, Judge Friendly's opinion in *Paragon Oil*. In the absence of any conflict on the question presented, petitioner asserts that three aspects of the court of appeals' reasoning conflict with decisions addressing third-party beneficiary issues in other contexts. All three arguments lack merit.

First, petitioner contends (Pet. 18-19) that the court of appeals erred in treating third-party beneficiary status as a question of law rather than "a mixed question of law and fact." But the court of appeals did not state that third-party beneficiary determinations are always questions of law, only that the issue could be resolved as a matter of law here because the contract itself unambiguously establishes that respondent is a third-party beneficiary. Pet. App. 22a. That result follows from the settled rule that "[i]nterpretation of the terms of an unambiguous contract is a matter of law." *Nault* v. *United States*, 517 F.3d 2, 4 (1st Cir. 2008); accord Pet. App. 19a. Even if it did not, petitioner waived any objection by arguing below that "whether the language of the contract shows an intent to confer a direct benefit on a third party" is a "question[] of law." Pet. C.A. Br. 66-67. And in any event, any error could not have affected the outcome: Whether the issue is treated as a question of law or a mixed question of law and fact, petitioner agrees (Pet. 18) that the proper standard of review was "*de novo*," the standard the court of appeals actually applied.

Second, petitioner contends (Pet. 19-21) that the court of appeals "employed a more lenient standard

for establishing third-party beneficiary status than the standard used by other federal courts." But the court of appeals adopted its test from Restatement (Second) of Contracts and this Court's decision in *Robins Dry Dock*, 275 U.S. at 307. See Pet. App. 21a-22a, 24a-25a. It also stated that a putative third-party beneficiary must make a "compelling showing" that it was "an intended beneficiary" of the contract. *Id.* at 21a. Petitioner does not contend that this standard is at odds with the rule applied by other courts of appeals. Instead, it claims only that the decision below misapplied that standard to the particular facts of this case. That contention is meritless, as explained above. But in any event, a "misapplication of a properly stated rule of law" would not warrant this Court's review. Sup. Ct. R. 10.

Third, petitioner argues (Pet. 21-22) that the court of appeals erred by failing to consider industry custom and usage. But the court of appeals did not hold that custom and usage are irrelevant to determining contracting parties' intent—to the contrary, it expressly relied on "industry custom" in interpreting the safe berth clause. Pet. App. 32a. The court simply did not address the issue in the context of the third-party beneficiary question, presumably because petitioner failed to advance any developed argument based on custom and usage.[14]

c. Petitioner vastly overstates the potential consequences of the court of appeals' third-party beneficiary holding when it predicts (Pet. 23-24) "serious ramifications for all contracts, maritime and otherwise," and the exposure of "*all* contract parties to

[14] Petitioner referred to industry custom only in passing, in a summary of an arbitral decision. See Pet. C.A. Br. 69-70.

unintended liability to non-parties." The Second Circuit's decision in *Paragon Oil* has not disrupted contract law in this fashion, and the court of appeals went no further than *Paragon Oil* in applying *Crumady* and *Waterman* to the narrow and discrete category of safe berth clauses. The court of appeals' holding—that on this record, respondent satisfies the test for third-party beneficiary status established by the Restatement and this Court's decisions—falls well within the boundaries of prior law. Furthermore, parties are free to "contract differently" if they wish to agree to a safe berth clause without creating a third-party beneficiary relationship. Pet. App. 25a.

3. Finally, petitioner contends (Pet. 25-32) that a wharfinger's duty to exercise reasonable care extends only to areas within its "control." The court of appeals correctly rejected that view, and even petitioner does not contend that its holding conflicts with any decision by this Court or another court of appeals. Moreover, petitioner's claim (Pet. 25) that the decision below will impose sweeping and "unprecedented" liability on wharfingers—an assertion echoed in even more strident terms by petitioner's amici—ignores the clearly expressed limitations of the court of appeals' interlocutory decision.

a. "Although a wharfinger does not guarantee the safety of vessels coming to his wharves, he is bound to exercise reasonable diligence in ascertaining the condition of the berths" and to "remove" or "give due notice" of "any dangerous obstruction." *Smith* v. *Burnett*, 173 U.S. 430, 433 (1899). This duty extends not only to "the berths themselves," but also to "the approaches to them." *Id.* at 436 (quoting Lord Wat-

son's opinion in *The Calliope*, [1891] App. Cas. 11 (H.L. 1890)).

This duty is simply an application of ordinary negligence principles: A wharfinger is generally in a better position than a visiting ship to identify potential hazards in the berth and the approach. When a wharfinger invites a vessel to use its facility and the vessel is damaged by a "hidden hazard or deficiency" which is "not reasonably known to the shipowner" but which is "known to the wharfinger or which, in the exercise of reasonable care and inspection, should be known to him," it is entirely sensible to hold the wharfinger liable for his failure to exercise reasonable care. *Trade Banner Line, Inc.* v. *Caribbean S.S. Co.*, 521 F.2d 229, 230 (5th Cir. 1975) (per curiam); accord *Smith*, 173 U.S. at 433-434.

The district court held that the duty to exercise reasonable care extends only to the "the area immediately adjacent to the berth or within immediate access to the berth." Pet. App. 127a (citation and internal quotation marks omitted). The court of appeals correctly rejected that cramped view, explaining that the "approach" described in *Smith* should be given its "plain meaning," *id.* at 44a, and defined based on "custom and practice at the particular port in question," *id.* at 42a. In most cases, including this one, "the approach will begin where the ship makes its last significant turn from the channel toward its appointed destination following the usual path of ships docking at that terminal." *Id.* at 45a.

Petitioner does not appear to defend the district court's "immediately adjacent" definition of approach. Indeed, petitioner fails to offer *any* affirmative definition of an approach's geographic scope. Instead, it

contends only that the court of appeals erred to the extent it held that the approach to petitioner's facility includes a portion of a federal anchorage over which petitioner does not exercise "control." But petitioner's proposed limitation is unsupported by precedent and rests on a misunderstanding of the legal status of the anchorage.

First, petitioner's proposed "control" limitation is inconsistent with *Smith*. In that case, this Court endorsed the analysis in *The Moorcock*, [1889] 14 P.D. 64, 69-70 (L.R. 1889), which held wharfingers liable for damage caused by "the uneven condition of the bed of the river" adjoining their jetty even though they "had no control over the bed." 173 U.S. at 435. Petitioner seeks to distinguish *The Moorcock* on the ground that in that case, "the wharf owner was in the best position to know the hazardous condition." Pet. 29. But the same is true here: Petitioner was in a far better position than visiting ships to identify a hidden hazard located just over a ship's length from its dock and in a path customarily taken by vessels arriving at its facility.[15] And petitioner's concern that wharfingers may be unable to remove obstacles from areas they do not control is unfounded: A wharfinger who learns of a hazard in the approach to its facility may comply with its obligations by "giv[ing] due notice of [the hazard's] existence." *Smith*, 173 U.S. at 433.

Second, petitioner's argument rests on a misunderstanding of the legal status of the federal anchorage and the neighboring area over which petitioner con-

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[15] Petitioner also notes (Pet. 29) that *The Moorcock* was decided on a theory of implied contractual warranty rather than tort. But *Smith* nonetheless relied upon *The Moorcock* in articulating the scope of a wharfinger's tort duty. See 173 U.S. at 435.

cedes that it exercises the requisite "control." The Army Corps of Engineers exercises jurisdiction, including authority to regulate construction and dredging, over all of the navigable waters of the United States. 33 U.S.C. 403. That area "extend[s] laterally to the entire water surface and bed of a navigable waterbody, which includes all the land and waters below the ordinary high water mark." 33 C.F.R. 329.11(a). Federal jurisdiction over the Delaware River thus encompasses not only the shipping channel and the neighboring anchorage, but also the immediate area of petitioner's facility. Petitioner has "control" over that area only by virtue of "a permit to dredge for maintenance purposes that was issued by the Corps to [petitioner's] predecessor in 1991." Pet. App. 15a. The geographic scope of that permit was "derived from [petitioner's] initial request"; in other words, it was "self-defined subject to approval by the Corps." *Ibid.* As the court of appeals explained, it would make little sense to limit the duty of reasonable care to the area covered by such a permit. Such a rule would allow an owner "to define the scope of its own liability regardless of the port's actual approach." *Id.* at 48a. Here, for example, the area covered by petitioner's permit "is not large enough to rotate the 748 foot-long *Athos I*." *Id.* at 15a.

Petitioner and its amici also contend that a wharfinger's traditional duty to exercise reasonable care should not apply when the approach to its facility traverses a portion of a federal anchorage. Pet. 25; Plains Amicus Br. 10-11; South Jersey Amicus Br. 14-22. But petitioner was free to take the same precautionary measures, under the same conditions, inside and outside the anchorage. The undisputed evidence

at trial showed that petitioner did not need a permit to survey the relevant portion of the anchorage for hazards. See C.A. App. 459, 460, 696. And petitioner could have sought a permit to dredge in the anchorage just as its predecessor secured a permit to dredge in the immediate area of its dock. See 33 C.F.R. 322.3(a). Thus, as the court of appeals recognized, no aspect of the government's regulatory jurisdiction over the anchorage would have prevented petitioner from satisfying any obligation that a duty of reasonable care might be held to impose. Pet. App. 49a.

Nor is there any merit to the repeated suggestions by petitioner and its amici that federal authority over the anchorage somehow displaces petitioner's traditional duty to exercise reasonable care over the approach to its dock. While federal agencies are charged with specific tasks in federal waters, "[n]o Government entity * * * is responsible for preemptively searching all federal waters for obstructions, and the District Court found that the Government does not actually survey the Anchorage for hazards." Pet. App. 14a. It is well-settled that the government "has no statutory mandate to *ensure* the safety of all navigable waterways in the United States and thus it has no duty to mark all obstructions." *Eklof Marine Corp.* v. *United States*, 762 F.2d 200, 202 (2d Cir. 1985); accord *Canadian Pac. (Bermuda) Ltd.* v. *United States*, 534 F.2d 1165, 1169 (5th Cir. 1976).[16] This

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[16] Amicus South Jersey (Br. 7) cites *Japan Line, Ltd.* v. *United States*, 1976 A.M.C. 355, 364 (E.D. Pa. 1975), aff'd, 547 F.2d 1161 (3d Cir. 1976) (Table), for the principle that the United States is responsible for keeping navigable waterways safe for shipping. But *Japan Line* involved a dangerous shoal known to the Corps, but not disclosed to the shipping public. That case was thus decid-

rule is entirely sensible: The government has authority over vast expanses of navigable waters but greatly limited resources. Petitioner, by contrast, operates a commercial refinery with a berth to which it invites tankers carrying crude oil and other hazardous substances, and it is well aware that those vessels use a specific portion of the anchorage as part of a customary procedure for docking at its facility. There is no basis in law or logic for petitioner's claim that the federal government's designation of that area as an anchorage justifies a categorical exemption to its otherwise-applicable duty to exercise reasonable care to ensure the safety of the approach to its dock.

b. As the court of appeals explained, "[t]he geographic scope of a safe approach has been largely unaddressed by the courts." Pet. App. 42a. Accordingly, petitioner does not contend that the decision below conflicts with any decision of this Court or another court of appeals. Instead, petitioner rests primarily on the claim (Pet. 27-28) that the court of appeals' decision is at odds with decisions by several district courts. Such a conflict would not warrant this Court's review, see Sup. Ct. R. 10, and in any event no disagreement exists. Petitioner does not cite any case holding that a hazard was outside the approach where,

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ed under a distinct line of authority established in *Indian Towing Co.* v. *United States*, 350 U.S. 61, 69 (1955), which holds that where a federal agency assumes a duty, it may be required to perform that duty with reasonable care. See 1976 A.M.C. at 370. Here, by contrast, the government has not assumed any duty to search out underwater debris in areas designated as anchorage grounds.

as here, it was in the path customarily taken from the channel to the dock.[17]

c. Petitioner and its amici greatly exaggerate the scope and significance of the court of appeals' interlocutory ruling. First, petitioner is wrong to claim (Pet. 25) that the court of appeals extended a wharfinger's duty of reasonable care to "the limitless navigational paths of vessels." The court of appeals merely applied the longstanding principle that a wharfinger owes a duty to safeguard the "approach" to its dock (a principle petitioner does not challenge). The court's decision is quite limited, holding that a ship is "on an approach" only after it has left the shipping channel to take the "final, direct path to its destination"—and even then, only where it is "following the usual path of ships docking at that terminal." Pet. App. 45a. As the court of appeals emphasized, "[e]ntire rivers, bays,

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[17] See *Osprey Ship Mgmt., Inc.* v. *Jackson Cnty. Port Auth.*, No. 1:05CV390, 2007 WL 4287701, at *10 (S.D. Miss. Dec. 4, 2007) (accident occurred *outside* the "area between the [defendant's] dock (located on the western side of the Pascagoula River) and the western most line indicating where the federal channel was"); *Western Bulk Carriers* v. *United States*, No. 97-2423, 1999 U.S. Dist. LEXIS 22371, at *3, *19-20 (E.D. Cal. Sept. 14, 1999) (ship ran aground in "the [shipping] Channel" rather than the approach), aff'd, 371 F.3d 1119 (9th Cir. 2004); *In re Complaint of Nautilus Motor Tanker Co.*, 862 F. Supp. 1260, 1268 (D. N.J. 1994) (ship ran aground not in the usual approach to the wharf, but in "a relatively shallow area" that was marked on charts), aff'd, 85 F.3d 105 (3d Cir. 1996); *Elting* v. *East Chester*, 50 F. 112, 113 (S.D.N.Y 1892) (boat damaged not while it was approaching the dock, but while moored "very near the center of the stream" in a place of the captain's choosing); see also *McCaldin* v. *Parke*, 142 N.Y. 564, 570 (N.Y. 1894) (rocks causing damage to the vessel were "not in a place necessary for approach to the defendants' wharf").

and oceans will not be transformed into approaches." *Ibid.*

Second, petitioner and its amici are wrong to assert that the decision below imposes "an affirmative duty to locate and remove hidden obstructions in federal waters," Pet. 29, to "dredge, survey, inspect or maintain navigable waterways of the United States," Plains Amicus Br. 8, or to conduct "weekly" surveys, South Jersey Amicus Br. 20. To the contrary, the court of appeals expressly declined to delineate "the exact standard of care required by [petitioner], let alone whether there was a breach of that standard" in this case. Pet. App. 50a-51a (footnote omitted). Thus, far from establishing the burdensome set of obligations that petitioner and its amici fear, the court of appeals merely held that the location of the accident did not "necessarily preclude[]" a tort claim based on petitioner's duty to exercise reasonable care. *Id.* at 41a. The content of that duty—which the court of appeals emphasized "varies greatly according to the circumstances of the case," *id.* at 51a (internal quotation marks omitted)—remains to be determined. And it will be determined on remand only if the district court finds petitioner not liable on the contract claim and thereby reaches the tort claim. *Id.* at 6a. Unless and until the standard of care is addressed by the courts below, review by this Court would be premature.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

DONALD B. VERRILLI, JR.
Solicitor General
STUART F. DELERY
Assistant Attorney General
ZANE M. MEMEGER
United States Attorney
MATTHEW M. COLLETTE
ANNE MURPHY
Attorneys

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