No. 13-462

IN THE

Supreme Court of the United States

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

Petitioners,

v.

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

Respondents.

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

REPLY BRIEF OF PETITIONERS

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INTRODUCTION

Petitioners (collectively, "CARCO") demonstrated that the decision below widens an acknowledged circuit conflict on the interpretation of "safe berth" provisions in maritime charter contracts, and also massively expands third-party beneficiary status in ways that conflict with decisions of other federal courts. In addition, the ruling below on the scope of a wharf owner's tort duty to provide a safe approach is unprecedented and conflicts with the decisions of other federal courts. The oppositions of Frescati/ Tsakos ("Frescati Opp.") and the United States ("U.S. Opp.") fail to show otherwise. The vehicle problem asserted by respondents is illusory. Only this Court can resolve the important and recurring questions of federal maritime law that this case squarely presents.

I. THE COURT OF APPEALS' INTERPRETATION OF A "SAFE BERTH" PROVISION IN A STANDARD CHARTER CONTRACT VASTLY EXPANDS BOTH WHAT DUTIES THE PROVISION IMPOSES UPON THE CHARTERER AND WHO CAN BRING A CLAIM BASED UPON THE PROVISION.

A. Respondents concede that the decision below widens an acknowledged circuit conflict on the interpretation of "safe berth" provisions in charter contracts. See Pet. 12-18; Frescati Opp. 13 (acknowledging the "conflict" among the circuits); U.S. Opp. 16 (same). Their attempts to dismiss this square conflict as not "warranting this Court's review," U.S. Opp. 11, are unavailing.

Petitioners demonstrated that this conflict needs to be resolved because the current lack of uniformity in

the interpretation of provisions used in virtually every chartering arrangement is detrimental to maritime commerce and creates the prospect of inconsistent case outcomes; the Third Circuit's recent broadening of the split makes plain that the conflict will not resolve itself; and commentators, including the leading Gilmore & Black treatise, have urged the resolution of this conflict. Pet. 15-18.

Respondents do not refute any of these showings. They instead assert that the Fifth Circuit's "singular" ruling in *Orduna S.A.* v. *Zen-Noh Grain Corp.*, 913 F.2d 1149 (5th Cir. 1990), is "anomalous" and should simply be ignored. U.S. Opp. 16; Frescati Opp. 13. But this Court can hardly ignore a 2-1 split among circuits with major port cities that are prominent in addressing federal maritime issues. *Orduna* has never been called into question by the Fifth Circuit, or any district court within it, and continues to be cited for numerous principles of maritime law. See, *e.g.*, *Union Oil Co.* v. *Buffalo Marine Servs.*, No. 12-40848, 2013 U.S. App. LEXIS 17116, at *2 n.1 (5th Cir. Aug. 16, 2013) (per curiam); *One Beacon Ins. Co.* v. *Crowley Marine Servs., Inc.*, 648 F.3d 258, 266-70 (5th Cir. 2011). The United States' suggestion (at 16) that the Fifth Circuit might revisit its position on safe berth provisions is wishful thinking.

Respondents devote much attention to why they think the Fifth Circuit's interpretation of safe berth provisions is wrong, Frescati Opp. 13-15, U.S. Opp. 13-15, but these arguments go to the merits and do not provide a reason to leave the circuit conflict unresolved. Space constraints preclude a full response on the merits, but the liability that respondents seek to impose on CARCO in this lawsuit – tens of millions of dollars in damages based on an oil spill for which it bore no fault – starkly

illustrates the unjust results for which the "full warranty" approach has been criticized. See Pet. 17. At a minimum, the United States' suggestion (at 13-14) that such a lopsided allocation of risk is compelled by the plain language of the standard safe berth provision used here attributes more meaning to that simple phrasing than it can bear. Nor is it correct that this Court's decisions in *The Gazelle* v. *Brun*, 128 U.S. 474, 485 (1888), and *Mencke* v. *A Cargo of Java Sugar*, 187 U.S. 248, 253 (1902), embraced the "full warranty" approach. See Frescati Opp. 11-12; U.S. Opp. 12. Those decisions only involved the issue whether the ship was justified in refusing to proceed to the berth/port in the face of a known hazard and did not address whether the charterer provides a warranty or merely has a duty of due diligence.

There is no merit to respondents' suggestion that this Court's intervention is not required because parties to charter contracts can draft safe berth provisions as they wish. Frescati Opp. 15-16; U.S. Opp. 13-14, 16. Parties contract against the background of common law principles, and it is always true that they can try to contract around principles that are unclear or lack uniformity. But the role of courts – and this Court in particular in the maritime context, see Pet. 2, 16 – is to clarify and harmonize common law contract principles so that negotiations can occur against a clear and consistent background. When different circuits have different default rules for the interpretation of safe berth provisions, the meaning of the provision can change, and disparate results can occur, depending on where the berth or port is located and which circuit's law applies. That is a classic reason for this Court to exercise its review.

The fact that shipping disputes are typically arbitrated, rather than litigated in federal court, likewise does not provide a reason for this Court to decline to resolve the clear circuit split. See Frescati Opp. 16-17. As Frescati and the United States acknowledge, arbitrators apply federal common law principles. *Id.*; U.S. Opp. 15-16. Accordingly, Frescati's argument – which, if accepted, would remove innumerable shipping issues from this Court's docket – simply ignores this Court's vital role in shaping rules of admiralty law and safeguarding maritime commerce. See 28 U.S.C. § 1333(1) (federal courts have exclusive jurisdiction over admiralty cases); Pet. 2 (discussing this Court's historic role in fashioning admiralty rules).

B. CARCO demonstrated that the court of appeals' ruling that Frescati is a third-party beneficiary of the "safe berth" provision in the voyage charter contract between CARCO and Star is flatly contrary to the standards recognized by other federal courts in several respects, and constitutes an unprecedented departure from the doctrine of privity of contract. Pet. 18-25. Respondents' arguments to the contrary are unavailing.

First, respondents do not dispute that there is a conflict between the Third Circuit's holding that third-party beneficiary status is purely "a question of law" and the holdings of numerous other courts of appeals that it is a mixed question of law and fact. See Pet. 18-19. Instead, respondents attempt to justify the court of appeals' ruling on the ground that the interpretation of the "unambiguous" Star-CARCO contract is a question of law. Frescati Opp. 19; U.S. Opp. 20. Respondents, however, conflate the issue of contract interpretation with the broader issue of third-party beneficiary status, where the critical

question is the parties' intent – a question of fact on which Frescati has the burden of proof. See*, e.g.,* Pet. 19; *Murphy* v. *DirecTV*, *Inc.,* 724 F.3d 1218, 1233-34 (9th Cir. 2013) (nonparty to contract "bears the burden of proving that it is a third-party beneficiary"). By treating the issue as solely one of law and limiting its analysis to the contract – rather than analyzing the issue as a mixed question of law and fact, as its sister circuits would have – the court of appeals effectively ignored the intent issue and Frescati's lack of evidence supporting its contentions regarding the intent of CARCO and Star in the voyage charter contract solely between themselves. As CARCO demonstrated, nothing in the contract, or in the circumstances surrounding the formation of the contract, even remotely suggests that the contracting parties intended to make Frescati a beneficiary. Pet. 19-20, 22.[1]

Second, respondents have no answer to CARCO's showing that the court of appeals employed a more lenient standard for establishing third-party beneficiary status than the standard used by other federal courts. See Pet. 19-21. The court of appeals ruled, in essence, that Frescati's status as a third-party beneficiary of the voyage charter can be established merely by proof that it received *some* benefit from the contract, regardless of the will of the contracting parties. That approach has been rejected by other federal courts because it ignores the contracting parties' intent and relieves the nonparty of its burden of proof on the issue. See*, e.g., id.* at 20-21.

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[1] Contrary to the assertions of Frescati and the United States, CARCO did not admit in the court of appeals that the issue of third-party beneficiary status is purely one of law. *See* Br. for Appellees at 66-67 (3d Cir. filed Apr. 2, 2012) ("Pet. C.A. Br."); Frescati Opp. 19; U.S. Opp. 20.

Third, the court of appeals departed from the holdings of this Court and other federal courts that under general maritime law, evidence of "custom and usage" – including the type of contract and the industry involved – are relevant in determining the parties' intent. Pet. 21-22. Respondents *admit* that the court of appeals did not consider custom and usage in resolving the third-party beneficiary issue, but instead claim that CARCO made no showing on this point. Frescati Opp. 24; U.S. Opp. 21. CARCO, however, *did* make such a showing in the courts below, demonstrating that at the time the Star-CARCO contract was made, it was well-established in the courts and the industry that a vessel owner is not a third-party beneficiary of a safe berth clause in a voyage charter.[2] Federal courts today continue to recognize that shipowners are not third-party beneficiaries of agreements between a charterer and a subcharterer. See, *e.g.*, *Chios Island Shipping & Trading S.A.* v. *MGI Marine, LLC,* No. 11-2766, 2013 WL 5945192, at *3-5 (S.D. Tex. Nov. 6, 2013); *River Docks, Inc.* v. *J. Gerber, Inc.,* No. 08-689, 2009 U.S. Dist. LEXIS 15255, at *15-28 (E.D. La. Feb. 25, 2009).

Respondents contend that the court of appeals' decision is fully consistent with this Court's decisions in *Crumady* v. *The Joachim Hendrik Fisser,* 358 U.S.

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[2] *See* Pet. C.A. Br. at 68-71; *In re Arb. New Ideal Shipping Corp.* v. *Maraven S.A.*, S.M.A. Award No. 2975, 1993 WL 13653014 (Apr. 30, 1993) (Kalaidjian, Berg & Linsenmeyer Arbs.) ("both the language of the contract and standard industry practice require the conclusion that each charter party is to be regarded as presuming to extend benefits and impose obligations only between or among its own parties or signatories"); *Bunge Corp.* v. *MV Furness Bridge*, 390 F. Supp. 603 (E.D. La. 1974).

423 (1959), and *Waterman Steamship Corp.* v. *Dugan & McNamara, Inc.,* 364 U.S. 421 (1960), and with the Second Circuit's decision in *Paragon Oil Co.* v. *Republic Tankers, S.A.,* 310 F.2d 169 (2d Cir. 1962). See Frescati Opp. 20-23; U.S. Opp. 17-18, 20, 22. *Crumady* and *Waterman,* however, are inapposite because their holdings that owners and vessels can be third-party beneficiaries did not involve an express contractual provision, but rather a stevedore's *implied* warranty to perform its services in a workmanlike manner. Pet. 22 n.5. The court of appeals itself conceded that *Crumady* and *Waterman* "aid Frescati's position … only by analogy." Pet. App. 23a.

Paragon is hardly in harmony with the Third Circuit's decision, because its "consideration" of the third-party beneficiary issue consisted of a *single sentence. Paragon,* 320 F.2d at 175. That sentence was pure *dictum* because the alleged third-party beneficiary's claim was dismissed by the district court, and the dismissal was not appealed. *Id.* at 171. Moreover, the sentence was merely a passing reference in the midst of the court's rejection of an argument by the third-party defendant that the plaintiff and defendant had acted in "collusion" against it. *Id.* at 174-75.

Because the court of appeals' ruling conflicts with decisions of other federal courts, and will have serious adverse consequences for the maritime industry and contracting parties generally (see Pet. 23-25), review of those conflicts by this Court is warranted.

II. THE COURT OF APPEALS' HOLDING REGARDING THE SCOPE OF CARCO'S TORT DUTY TO PROVIDE A SAFE BERTH CONFLICTS WITH THE RULINGS OF OTHER FEDERAL COURTS.

Petitioners demonstrated that the court of appeals' ruling, that CARCO's duty as wharf owner extended to the location of the casualty, conflicts with decisions of other federal courts and is unprecedented. Pet. 25-32. The amicus briefs of Plains Products Terminals LLC and the Terminal *Amici* confirm this conflict and the disruption to maritime commerce that will occur if the decision below is allowed to stand.

Respondents fail to refute CARCO's showing that the court of appeals' ruling conflicts with decisions of numerous federal courts that have refused to extend a wharf owner's duty to areas that it does not maintain or control (and the Third Circuit did not dispute that the Federal Anchorage Area "is neither controlled nor maintained by CARCO," Pet. App. 14a). See Pet. 27-28 (citing rulings). Neither Frescati nor the United States even attempts to show how the ruling below can be reconciled with these decisions. It cannot. In all of the other jurisdictions, Frescati's tort claim would have been dismissed on the ground that CARCO did not control the Federal Anchorage Area in which the anchor lay hidden, while the Third Circuit's ruling allows the claim to go forward. This inconsistency in outcomes is intolerable and warrants this Court's intervention.

Because they cannot deny this fundamental conflict, respondents again devote much of their discussion to defending the Third Circuit's ruling that "control" is irrelevant, even though such merits arguments do not provide a basis for denying the petition. Although a full merits response is not possible here,

the United States is incorrect that the "control" limitation uniformly adopted by other federal courts "is inconsistent with" this Court's decision in *Smith* v. *Burnett*, 173 U.S. 430 (1899). U.S. Opp. 24. *Smith* involved a vessel that grounded on a rock *in a berth*, so this Court did not address – or have occasion to address – the scope of a wharf owner's tort duty with respect to an area outside its berth that it did not control.[3]

Respondents also defend the Third Circuit's ruling on policy grounds, essentially arguing that wharf owners *should* have a tort duty to survey for hidden obstructions in public waters that they do not control because the federal government purportedly does not, and cannot, afford to conduct such surveys, and wharf owners "have the wherewithal" to do so. Frescati Opp. 8-9, 32-35; U.S. Opp. 24-27. CARCO and its *amici* strongly disagree with these policy arguments, but the point for purposes of certiorari is that respondents' attempted policy justification of the Third Circuit's ruling powerfully underscores why this Court should review it. Respondents do not dispute that no statute or regulation currently requires CARCO or any private wharf owner to survey the Federal Anchorage Area or other public waters for unknown obstructions, and that the Third Circuit is the first and only court to impose such obligations as a matter of federal common law. See

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[3] Although this Court in *Smith* summarized *The Moorcock*, (1889) L.R. 14 P.D. 64 (appeal taken from Eng.), in canvassing prior law, it did not "endorse[] the analysis" of that English decision, as the United States suggests (at 24), or apply it in the section of the opinion that analyzed the much different facts of *Smith*. In any event, as the United States acknowledges (at 24 n.1), *The Moorcock* was decided on a contract theory and did not even address a wharf owner's tort duty.

Pet. 29-30. Given the unprecedented nature of such obligations, and the fact that other courts have declined to impose them, this Court should address whether such expanded tort duties are in fact controlling rules of federal maritime law. This Court's responsibility to formulate federal maritime law in the first instance demands no less.

The need for this Court's intervention is particularly compelling because the court of appeals' newly-minted definition of "approach" – which focuses on the "usual path" of the vessel – is unworkable and multiplies the uncertainty that wharf owners will face under the Third Circuit's ruling. There is no merit to Frescati's assertion that there is precedent for the court's broad definition and the expansive tort duty that it would impose. Frescati Opp. 26-27.[4] Respondents' contention that this definition is easily applied in this or any other case, *id.* at 5-6, is belied by the issues raised by the industry participants who submitted amicus briefs. Plains Br. 17-22; Terminal *Amici* Br. 8-10, 18-19.

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[4] Neither *MS Tabea Schiffahrtsgesellschaft, MBH & Co.* v. *Board of Commissioners,* No. 08-3909, 2010 U.S. Dist. LEXIS 103171 (E.D. La. Sept. 29, 2010), *aff'd*, 434 F. App'x 337 (5th Cir. 2011), nor *P. Dougherty Co.* v. *Bader Coal Co.*, 244 F. 267 (D. Mass. 1917), addressed a wharf owner's tort duty at all. As CARCO showed in its petition, the wharf owner in *Osprey Ship Management, Inc.* v. *Jackson County Port Authority*, No. 05-390, 2007 WL 4287701 (S.D. Miss. Dec. 4, 2007), was found not liable for the casualty, and the wharf owners in *Bouchard Transportation Co.* v. *Tug Gillen Bros.*, 389 F. Supp. 77 (S.D.N.Y. 1975), and *Sonat Marine Inc.* v. *Belcher Oil Co.*, 629 F. Supp. 1319 (D.N.J. 1985), *aff'd*, 787 F.2d 583 (3d Cir. 1986) (table), were found liable only because they exercised control over the location of the casualty. *See* Pet. 27-28.

III. THERE ARE NO BARRIERS TO REVIEW.

The interlocutory posture of this case is not an impediment to review. See Frescati Opp. 9-10; U.S. Opp. 11. This Court has "unquestioned jurisdiction" to review interlocutory rulings of federal courts and such review is warranted when "there [are] important and clear-cut issue[s] of law that [are] fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Stephen Shapiro et al., *Supreme Court Practice* § 4.18, at 283 (10th ed. 2013) (citing cases); see also *id.* at 283-84 (review of interlocutory decision particularly appropriate where it is "patently incorrect" or presents a circuit or other conflict "that would justify review of a final decree or judgment"). The court of appeals ruled on the pertinent legal issues, which the district court's decision shows are outcome determinative. These issues qualify for certiorari because they present and widen conflicts in the federal courts that merit this Court's plenary review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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