No. 18-565

IN THE

Supreme Court of the United States

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

v.

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

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

BRIEF OF AMICI CURIAE THE AMERICAN FUELS & PETROCHEMICAL MANUFACTURERS ASSOCIATION AND INTERNATIONAL LIQUID TERMINALS ASSOCIATION IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

Amici, The American Fuels & Petrochemical Manufacturers Association and The International Liquid Terminals Association, are adversely affected by the Third Circuit's decision to impose absolute liability on charterers or shippers such as the *amici*, who enter into contracts for the marine transport of goods, including oil and petrochemical products.[2] The decision does not merely impact the Petitioner, but all parties who enter into vessel charter agreements using standard forms that provide that the charterer shall procure a "safe place or wharf" that the vessel can "proceed thereto, lie at, and depart therefrom always safely afloat."

The matter arises from a voyage charter agreement – a maritime contract for the carriage of a cargo of crude oil by ship – between Star Tankers Inc.,[3] a time charterer or chartered owner of the M/T

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[1] Pursuant to this Court's Rule 37.6, *Amici* hereby state no counsel for any party authored this brief in whole or in part and no person other than the Amici, their members, or their counsel made any monetary contribution intended to fund the preparation or submission of this brief. *Amici* also state that pursuant to this Court's Rule 37.2(a), counsel of record received timely notice of the intent to file this brief and all parties have consented to its filing.

[2] Such contracts are referred to as "charter agreements" or "charter parties" and the shippers are referred to as "charterers."

[3] Frescati Shipping Co. ("Frescati"), the titled Owner of the Athos who is the Plaintiff here, contends that it is a third-party

Athos I ("Athos" or "Vessel"), and Citgo Asphalt Company Refining Company ("CARCO" or "Charterer").

An oil spill occurred in the Delaware River on the evening of November 26, 2004, when the ATHOS allided with a hidden anchor that had been abandoned in Federal Anchorage No. 9 ("Anchorage"). The allision occurred when the Vessel was in Anchorage.

Remediation of the incident was administered in accordance with The Oil Pollution Act of 1990 ("OPA"), 33 U.S.C. §§ 2701-2761. Frescati, as the owner of the Vessel that discharged the oil, was designated as the "responsible party" for the clean up in the first instance. Frescati was able to limit its liability and to obtain reimbursement above a certain amount from the OPA's Oil Spill Liability Trust Fund (the "Fund"). Frescati applied for exoneration from liability under a provision in OPA allowing such exoneration if the incident was the sole fault of another party – here the party that discarded the anchor that allided with the Vessel. Frescati later inexplicably withdrew this claim. Petition for a Writ of Certiorari (hereinafter "Pet.") at App. D 284a n.6.

Subsequently, Frescati and the United States ("Government"), who administers the Fund, decided to join forces and pursue a recovery from CARCO, by implicating it as the party responsible for the allision and spill.

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beneficiary of the voyage charter agreement's safe-berth provision.

The American Fuels & Petrochemical Manufacturers Association ("AFPMA") and International Liquid Terminals Association ("ILTA") have members who are stakeholders in the maritime transportation, storage and oil refining and petrochemical industries. And they have an interest in the proper allocation of responsibilities under maritime law. As such, they believe it is important to inform the Court of their views and the reasons why they support Petitioner CARCO in this matter. Members of the *amici* are similarly situated as CARCO, and their operations will be adversely impacted if the Third Circuit's decision is not reversed.

AFPMA (formerly the National Petrochemical and Refiners Association) is a national trade association whose members include approximately 400 companies, including virtually all United States petroleum refining and petrochemical manufacturing capacity. AFPMA members supply consumers with a wide variety of products that are used daily in homes and businesses. Many AFPMA members operate marine terminals. As such, they often act both as wharfingers and as shippers of cargo under charter agreements. Member companies with terminals along the Delaware River and its tributaries include Monroe Energy and PBF Energy. *See*: http://www.afpm.org/ for more information.

ILTA is composed of 80 member companies that own and/or operate about 1,000 bulk liquid storage terminals in 37 countries. In the U.S., ILTA members operate in all 50 states. Member companies with terminals along the Delaware River

and its tributaries include Buckeye Terminals, LLC, Contanda LLC, Kinder Morgan Energy Partners, L.P., Magellan Midstream Partners, L.P., MIPC, LLC, Plains All American Pipeline, L.P., and Sunoco Logistics Partners, L.P. *See*: http://www.ilta.org/ for more information.

Amici consider the matter before the Court to be of critical importance not only to their commercial operations, but also to the appropriate administration of the U.S. marine transportation system. The duties and responsibilities of the participants in the marine transportation industry must be consistently applied and uniformly enforced.

Amici object to the Third Circuit's imposition of absolute liability on charterers entering into charter agreements for damages that may occur during the voyage, even absent any negligence on the part of the charterer. This decision creates a further split among the circuits,[4] disregards Supreme Court authority holding that a safe-berth provision in a charter agreement does not constitute a warranty, ignores well established, codified maritime law that shippers should not be held liable absent negligence or fault on their part, and introduces uncertainty into *amici's* operations.

For these reasons, *amici* have a direct, substantial, and vested interest in the outcome of

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[4] The Second Circuit and now the Third Circuit impose absolute liability on charterers under charter party agreements with safe-berth clauses. The Fifth Circuit requires a showing of a lack of due diligence on the part of the shipper before imposing liability.

this litigation. The Third Circuit's decision is contrary to sound law and policy and, if left to stand, will have far reaching consequences. *Amici* want to inform the Court why the decision is wrong and how the industry will be impacted.

ARGUMENT

The Third Circuit's decision interprets commonly used ASBATANKVOY charter forms which state in relevant part that vessels "shall proceed, as ordered on signing Bills of Lading, direct the Discharging Port(s) or so near them as she may safely get (always afloat) and deliver said cargo." The ASBATANKVOY forms further provide that the vessel shall load and discharge at any safe place or port "which shall be designated and procured by the Charterer [*i.e.,* the shipper] providing the Vessel can proceed thereto, lie at, and depart therefrom always safely afloat . . . ."

The Third Circuit's decision interpreting the so-called "safe berth" language in the ASBATANKVOY forms exacerbates the split of authorities between the federal circuits by imposing absolute liability upon charterers, even where they exercise appropriate due diligence. Imposing liability without fault on charterers has enormous adverse consequences on international trade. The Third Circuit decision also ignores Supreme Court precedent dating back almost a century and half, where the Supreme Court affirmed a lower court holding that a charter agreement's safe-berth provision does not constitute an absolute warranty on the part of the charterer.

The Third Circuit's decision is internally inconsistent, holding that a wharfinger satisfies its obligation to provide a safe berth when it exercises due diligence but imposing strict liability upon a charterer who designates the use of the same berth regardless of fault. No logical rationale is offered, or exists, however, as to why a wharfinger who offers a safe berth is held to a standard of due diligence, but a charterer who designates the same safe berth should be deemed to have assumed an absolute duty to prevent harm to the vessel. Indeed, to the extent that the requirement of due diligence could be different for a charterer and a wharfinger, it logically would be the wharfinger, who operates the terminal, of whom a greater diligence would be expected, not the charterer who merely designates a berth where its cargo should be shipped. This is especially the case as the vessel master has the absolute obligation not to dock at a berth that he or she deems to be unsafe.

Reading the safe-berth provision of the charter agreement so as to impose strict liability on a shipper absent any negligence on its part also runs contrary to the policy goals reflected in the Carriage of Goods by Sea Act of the United States ("COGSA"). COGSA, which reflects not only nationwide but worldwide standards governing the maritime shipment of cargo, expressly provides that shippers cannot be held liable for loss or damages sustained by a carrier or a vessel absent a showing of negligence and that contracts providing to the contrary should be deemed void. Reading the safe-berth provision of the voyage charter contract to

impose liability under these circumstances, where CARCO was not negligent, runs flatly contrary to the policy goals of COGSA and other international maritime conventions, which bar holding a shipper liable for damages to vessels absent a finding of wrongdoing.

Imposing absolute liability upon a charterer based upon a safe-berth provision in the charter agreement while simultaneously recognizing that the same entity acting as a wharfinger cannot be held liable absent a showing of negligence, is particularly inappropriate here where the allision at issue did not occur in the wharfinger's facility but instead on federally maintained navigable waters where vessels anchor to await entry into a number of terminals located along a stretch of the Delaware River. Because there is no duty on the part of a wharfinger to protect against harm to vessels occurring in adjacent waters, imposing liability upon a charterer for damages for a purported violation of a safe-berth provision lacks any legitimate basis. Quite simply, here the berth designated by the charterer was safe; the unknown, and unknowable, danger was in adjacent navigable waters.

The Third Circuit's reliance upon the fact that the allision occurred 300 yards away from the wharf as grounds for finding a breach of the safe-berth provision highlights the *ad hoc* nature of the court's ruling. The Third Circuit's decision provides no guidance as to what the magic number might be as to how far away a danger might lurk in waters adjacent to the terminal and still be the responsibility of the charterer. Would the safe

berth's absolute liability obligation apply if the lost anchor happened to be a thousand yards away, or maybe two miles away, as opposed to three football fields? In either event, the Vessel still would have been within Federal Anchorage Number Nine. *See infra* at 19.

The inability of maritime parties to rationally address the risks now imposed by the Third Circuit's decision is further highlighted by the fact that there are numerous wharfs along the area of the Delaware River where the allision occurred. Determining which wharfinger would have the duty to provide a safe berth for adjoining areas would be impossible. Quite simply, such a ruling creates tremendous uncertainty for charterers and wharfingers as there is no way to determine whether they are assuming potentially hundreds of millions of dollars of damages based upon the serendipity of how far away from a wharf an unknown and unknowable hazard may lurk or which wharf that a vessel may seek to call.

I. The Third Circuit's Decision Widens the Rift between Circuits

The Third Circuit's decision imposing strict liability against charterers widens a circuit conflict on an important issue of maritime law. The decision below that a safe-berth provision in the ASBATANKVOY forms[5] imposes strict liability on

[5] The ASBATANKVOY charter party agreement forms are one of the most widely used charter forms for tanker voyages. Despoina Aspragkathou, *The Asbatankvoy Charterparty*

innocent charterers conflicts directly with Fifth Circuit holdings that such provisions merely impose a duty of due diligence. Failure to address this rift will be detrimental to maritime commerce, create uncertainty for shippers and carriers, and impose unwarranted liability on charterers.

Safe-berth clauses, such as the one at issue, are standard in maritime charter contracts. Here, the clause at issue provides that CARCO was to designate a "safe place or wharf" where the Vessel "could proceed thereto, lie at, and depart therefrom always safely afloat." Pet. at App. B 88a-89a.

When confronted with this type of language, the Fifth Circuit has held that language in a charter agreement providing that the charterer should designate "safe discharging berths [the vessel] being always afloat," does not impose liability without fault against the charterer. *Orduna S.A. v. Zen-Hoh Grain Corp.*, 913 F.2d 1149, 1156, n. 6 (5th Cir. 1990). The Fifth Circuit explained that although its decision was contrary to Second Circuit authority, commentators have strongly criticized those decisions. *Id.* at 1156. The Fifth Circuit also recognized that the vessel master on the scene is in a position to judge the safety of a particular berth. *Id.* The court further reasoned that requiring negligence as a predicate for the shipper's liability does not increase the risk that the vessel will be exposed to an unsafe berth. *Id.* Instead, because courts have interpreted a safe-berth clause to free the master

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Clauses for the Commencement of Laytime-Interpretation under England and American Law, 40 J. MAR. L. & COM. 133 (2009).

from any obligation to enter into an unsafe port or berth, "it is by no means necessary that they be given the quite different meaning of creating an affirmative liability of charterer to ship, in case of mishap." *Id.* (citations omitted).

In making its decision, the Fifth Circuit recognized that the Supreme Court's affirmance of *Atkins v. Fibre Disintegrating Co.*, 2 F. Cas. 78 (E.D.N.Y. 1868) (No. 601), *aff'd*, 85 U.S. (18 Wall) 272 (1873), supported its holdings. There, the district court had rejected the argument that a safe-berth provision in a charter agreement amounted to a warranty. *Id.* at 79. On appeal of a jurisdictional issue, the Supreme Court affirmed, holding that it found no reason to differ with the merits of the district court's decision. 85 U.S (18 Wall) at 299.

Based upon all of those considerations, the Fifth Circuit concluded that:

> We agree with commentators cited above that no legitimate legal or social policy is furthered by making the charterer warrant the safety of the berth it selects. Such a warranty could discourage the master on the scene from using his best judgment in deterring the safety of the berth. Moreover, avoiding strict liability does not increase risk because the safe berth clause itself gives the master the freedom to take his vessel into an unsafe port.

Orduna S.A. at 1157.[6]

The split noted above between the Second and Fifth Circuits regarding the meaning of a safe-berth clause in a charter agreement is compounded by the Third Circuit's decision below. Absent clarification by the Supreme Court, this conflict regarding an important issue of maritime law will remain unresolved, undermining the vital goal of a uniform application of maritime law.[7]

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[6] One of the foremost commentators, Grant Gilmore & Charles L. Black, Jr., THE LAW OF ADMIRALTY, 204-05 (2d Ed. 1975), observed that "there is no reason in policy or interpretation, for holding the charterer liable for ship's damages on the basis of the safe port and safe berth clauses." In so recognizing, the treatise further suggested that: "It is to be hoped that the Supreme Court will one day . . . reaffirm the principle of the *Atkins* decision, confining charterer's liability to the case wherein his special knowledge or actions make it reasonable to charge him." *Id.* at 207. Other commentators similarly have observed that if the law is to afford basic fairness to both charterer and owner, decisions imposing strict liability on the charterer should be reconsidered. J Bond Smith, Jr., *Time and Voyage Charters: Safe Port/Safe Berth,* 49 TUL L. REV. 878 (1975).

[7] The Third Circuit's suggestion that its approach of imposing strict liability absent fault on the part of charterer promotes uniformity of maritime law "along the mid-Atlantic seaboard" highlights the need for Supreme Court review. Pet. at App. D 303a. Important questions of maritime law require uniform national application, not decisions based on the state, seaboard or federal circuit where the shipments occur. *See, e.g., Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 29 (2004) (vindication of maritime policies demands adherence to uniform federal rules of law). The Third Circuit fails to explain what standards

II. The Third Circuit's Decision Imposes Unwarranted Obligations on Charterers

Amici respectfully submit that the Third Circuit's decision – that sound policy reasons warrant imposing strict liability on charterers rather than an obligation to exercise due diligence – lacks merit. The Third Circuit's reasoning is predicated upon a finding that when a wharfinger invites a party to use its dock facilities it is agreeing to use due diligence but when the same wharfinger (as a charterer) designates a safe wharf in a charter agreement, it is assuming an absolute obligation to protect against any harm regardless of fault. Such a holding cannot withstand scrutiny. Further, interpreting the language of a safe-berth clause as imposing liability without fault runs contrary to well-established admiralty precedent, including COGSA and other international conventions, which expressly adopts as a matter of maritime policy that shippers should not be held liable for damages to a vessel or carrier absent a showing of negligence on their part. In choosing to read the language of a safe-berth clause as imposing strict liability, the Third Circuit ignores this sound public policy and invites confusion in maritime law.

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would apply to a shipment of goods from Louisiana to New Jersey or vice versa.

A. Wharfinger and Charterer's Duty to Provide A Safe Berth Should be Similarly Construed

The law has been well established for over a century that a wharfinger does not guarantee the safety of vessels coming to his wharf but instead is only bound to exercise reasonable due diligence in assessing the condition of the berths, and if there is any known dangerous obstruction to give notice of its existence to vessels about to use its berths. *See Smith v. Burnett*, 173 U.S. 430, 433 (1899). Here, the Third Circuit recognized as much in its initial decision holding that a wharfinger is not a guarantor of a visiting ship's safety but instead is only bound "to use reasonable diligence in ascertaining whether the berths themselves and the approaches to them are in an ordinary condition of safety for vessels coming to and laying at the wharf." Pet. at App. A 26a. The Third Circuit, in its second decision, reaffirmed the holding in this regard, stating that "a wharfinger's duty is to use reasonable diligence to ascertain whether the approach to its berth is safe for an invited vessel." *Id.*

No logical rationale exists for imposing differing, and more onerous, standards on a charterer than on a wharfinger with respect to its efforts to provide a safe berth for vessels, particularly when the assurances being provided are identical. In this regard, *amici* often wear two hats. One as a shipper (or charterer) and one as a wharfinger. In both instances, assurances are provided that the vessel can safely enter and exit the

berth. In the language of the ASBATANKVOY form, this is framed as the ability to proceed to the port, "lie at, and depart therefrom always safely afloat." In acting as a wharf operator, the same assurance is provided to nautical invitees, *i.e.*, a berth that can be safely entered and exited.[8] There is no valid reason that the same assurances that the same party provides as charterer of the vessel when inserted into a charter agreement, somehow transforms the charterer's obligation from that of exercising due diligence to one of an absolute warranty. Indeed, the decision of the court in *People of State of California v. S/T Norfolk*, 435 F. Supp 1039, 1048 (N.D. Cal. 1977), is instructive in this regard. There, the state of California sued a charterer (who was also a wharfinger) for damages arising from an allision between a vessel and a bridge. In denying liability, the court followed the well-established authority cited above in concluding that the wharfinger had no liability because it had satisfied its obligation to exercise reasonable diligence in furnishing a safe berth from which the vessel could enter and exit. *Id.* In rejecting the claim against the wharfinger in its capacity as charterer, the court further observed that to the extent due diligence obligations between a charterer and wharfinger should be applied differently, logically it would be the wharfinger, who operates the facility, of whom a greater diligence would be expected. Here, the Third Circuit's

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[8] *See, e.g., Sims v. Chesapeake & O. Ry Co.*, 520 F.2d 556, 561 (6th Cir. 1975) (wharfinger's duty is to furnish safe means of egress and ingress to berthed ships).

analysis turns that logical conclusion upside down by imposing an absolute liability on the charterer while simultaneously and (correctly) holding that the wharfinger is not liable absent a showing of lack of due diligence.

B. The Third Circuit's Rationale Runs Afoul of Well-Established Admiralty Law Policies

The Third Circuit's decision imposing liability without fault against charterers runs afoul of the policy goals reflected in maritime law, including COGSA. COGSA, which was enacted in 1936, governs "all contracts for the carriage of goods by sea to or from ports of the United States in foreign trade." 46 U.S.C. § 1312. COGSA "represents the codification of the United States' obligations under the International Conventions for the Unification of Certain Rules of Law Relating to Bills of Lading [the Hague Rules]," and "applies *ex proprio vigore* to all contracts of carriage if goods by sea between the ports of the United States and the ports of foreign countries." *Senator Linie GMBH & Co. KG v. Sunway Line, Inc.*, 291 F.3d 145, 153 (2d Cir. 2002). The language of COGSA was lifted almost bodily from the Hague Rules of 1921, as amended by the Brussels Convention of 1924. *Id.* at 158.[9]

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[9] International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading, Article 4 § 3, 120 LNTS 187, 51 Stat. 233 (Aug. 25, 1924) ("Hague Rules"); *see also* United Nations Convention on the Carriage of Goods by Sea, Article 12, UN Doc. A/CONF.89/13 (Hamburg, 31 March 1978) ("the Hamburg Rules").

COGSA is the central statute in commercial admiralty governing over $200 billion worth of American foreign commerce annually." *Id.* at 168-69. COGSA applies independently of the terms and provision of a particular bill of lading where the carriage by sea involves foreign trade. *Sea-Land Service, Inc. v. The Purdy Co. of Washington*, 1982 A.M.C. 1593 (W.D. Wash. 1981). It is designed to set forth uniform rules for the allocation of risk between shippers and carriers in contracts for the shipment of goods. *Senator Linie GMBH & Co. KG* at 153. COGSA's goal is to "foster international uniformity in sea-carriage rules and allocating risks between shippers and carriers in a manner that is consistent and predictable." *Id.* One important aspect of the Hague Rules and its United States counterpart is the standardization of liability. *Id.* at 158. Thus, "in essence the purpose of these laws is to allow international maritime actors to operate with greater efficiency and under a mantle of fairness." *Id.* COGSA legislators appear to have been intent on preserving international consensus embodied in the language of the Hague Rules. *Id.* at 159.

COGSA expressly provides in 46 U.S.C. § 1304(3) that: "The shipper shall not be responsible for loss or damages sustained by the carrier or the ship arising or resulting from any cause without the act, fault, or neglect" of the shipper. This provision reflects a well-considered policy decision that shippers should not be deemed liable for damages

that are not avoidable by due diligence.[10] As reflected by § 1304(3)'s plain terms, it has been read as abolishing common law warranties and requires that a carrier prove actual fault or neglect on the part of a shipper in order to recover damages or be indemnified. *Excel Shipping Corp. v. Seatrain International S.A.*, 584 F. Supp. 734, 747 (E.D.N.Y.1984); *Serrano v. United States Lines Corp.*, 238 F. Supp. 383 (S.D.N.Y. 1965) (rejecting a reading of § 1304(3) that shipper was liable for personal injuries caused by the explosion of a tire on board the vessel due to failure to establish negligence).

In construing whether the public policies reflected in COGSA for the shipment of goods should apply or whether maritime common law should be adopted, this Court has stated that where the issue of federal statutory or federal common law governs, "we start with the assumption that it is for Congress, not federal courts to articulate the appropriate standard to be applied as a matter of federal law." *City of Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981). Thus, "when Congress addresses a question

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[10] This codification of the rule that shippers not be held liable for damages absent a showing of negligence is not applied to the shipment of inherently dangerous goods when the shipper fails to provide notice of the cargo's potentially dangerous characteristics. *See* 46 U.S.C. § 1304(6). Consistent with the plain language of section 1304(6), courts do not apply strict liability against the shipper when the carrier is aware of the cargo's dangerous properties. *See, e.g., Contship Containerlines, Ltd. v. PPG Indus., Inc.,* 442 F.3d 74, 77 (2d Cir. 2006).

previously governed by a decision rested on federal common law the need for such an unusual exercise of lawmaking by federal courts disappears." *Id.* at 315.

Here, in construing the language in safe-berth clauses in a fashion that imposes strict liability on shippers absent any showing of negligence, the Third Circuit ignores well founded policy decisions reflecting a refusal to impose liability on charterers such as CARCO absent a showing of negligence.[11]

C. A Safe Berth Was Provided

Because the allision at issue did not occur on the wharfinger's terminal (or on the means of ingress and egress thereto) but instead on a federally maintained area where vessels anchor before entering any number of ports located along a stretch of the Delaware River, the safe-berth provision in the charter agreement could not have been violated.

The Third Circuit recognizes that the allision occurred squarely within Federal Anchorage Number Nine. Pet. at App. D 284a. The Anchorage, which is where vessels anchor while awaiting cargo or orders or awaiting accommodation at a number of wharves along the Delaware River, was dredged and is maintained by the Federal Government's Army

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[11] In *Kirby*, the Supreme Court held that COGSA applied to not only the ocean bound transportation of goods moving on through bills of lading but to the inland portion of such transportation as well. In so holding, the Court recognized the nation's fundamental interest in promoting maritime commerce through the uniform application of federal maritime law. 543 U.S. at 29. The same policy considerations warrant granting *certiorari* here.

Corps of Engineers (the "Corps"). *Id.* at 285a. The Corps conducts hydrographic surveys and dredges as necessary to maintain the Anchorage's depth. *Id.* The Anchorage is 2.2 miles along the Delaware River Channel. *Id.* Further, "Congress has charged the Secretary of the Army and the Chief of Engineers with the responsibility of seeing the navigable waterways remain unobstructed and safe for navigation." *Japan Line, Ltd. v. United States*, 1976 A.M.C. 355, 364 (E.D. Pa. 1975), *aff'd* 1977 AMC 265 (3d Cir. 1976).

In this case, the charterer designated as a safe berth a roughly triangular-shaped area comprising the waters of the berth footprint and the "immediate access areas next to it where vessels enter and exit the footprint." Pet. at App. D 286a. As reflected above, the allision did not occur in what has been designated as CARCO's area of responsibility but instead occurred squarely within the Anchorage.

It is well established that wharf owners are not responsible for maintaining navigable waterways or for damages occurring thereon. In *Nautilus Motor Tanker Co. v. Naughton*, 862 F. Supp. 1260 (D.N.J. 1994), *aff'd* 85 F.3d 105 (3d Cir. 1996), a vessel owner attempted to impose liability upon the terminal when its vessel was caught in currents, pushed out of the Federal Channel, and grounded on rocks in shallow water. Although the location was only approximately 125 feet off the berth at the terminal, the court rejected the claim, emphasizing that a wharf owner "does not guarantee the safety of vessels coming to its docks." *Id.*

Numerous other courts, including the Supreme Court, recognize that there is no duty on part of wharfinger to provide a berth with safe surroundings other than an entrance and exit, or to warn that hazards exist in its vicinity. *Smith*, 173 U.S. at 433.; *Trade Banner Line, Inc. v. Caribbean Steamship Co.*, 521 F.2d 229, 230 (5th Cir. 1975). The duty of a terminal operator extends only to the berth and to its approach, *and not to adjacent areas*. S*onat Marine Inc. v. Belcher Oil Co.*, 629 F. Supp. 1319, 1326 (D.N.J. 1985), *aff'd* 787 F.2d 583 (3d Cir. 1986).[12]

Given these facts, CARCO in fact did designate a safe berth or wharf as required by the charter agreement. Accordingly, there is no basis for finding a breach of the safe-berth clause in the charter agreement.

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[12] Although the Third Circuit allowed that established case law reflects that a wharfinger is not obligated to ensure safe surroundings or to warn of hazards in the vicinity of its terminal, Pet. at App. D 312a, it nonetheless rejected the analysis of the district court in its first decision which focused on the obvious fact that the hidden anchor was not in the area of CARCO's control and which defined the approach to the berth as the waters that a vessel "naturally would traverse" in reaching the berth. *Id.* at 313a. Thus, it rejected authority holding that the approach to a berth is limited to areas immediately adjacent to the berth or within immediate access to it. *Id.*

D. The Third Circuit's Decision to Construe a Safe-Berth Provision as Applicable to Navigable Waters in the General Vicinity of the Wharf Is Unfair and Invites Uncertainty

The Third Circuit's decision extending a wharfinger's duty to areas in the general vicinity of their berths creates an uncertain and unfair duty on wharfingers and charterers. This new, undefined duty undermines previously well-settled allocations of responsibility, requiring that wharfingers assume responsibility for their berths and areas immediately adjacent thereto, which areas reasonably can be known to and inspected by the wharfinger.

Here, the Third Circuit takes comfort from the fact that although the area where the unknown anchor was dropped was in the Anchorage, navigable waters maintained by the Government, the anchor was only 300 hundred yards from the CARCO terminal. In rejecting well-established precedent holding that wharfingers are liable only for waters immediately adjacent to or within immediate access to their berths, and instead to impose a duty on wharfingers to ensure that navigable waters anywhere in the general vicinity of the berths are also risk free, the court imposes unfair obligations on wharfingers (and charterers) and eliminates legal certainty which is vital to maritime parties. The Third Circuit provides no guidance as to how far into the sea a wharfinger or charterer's obligations extend. There is no way of determining whether the duty to ensure safe surroundings should be

measured in feet, yards, miles or beyond. The fact that here there are numerous terminals in this same stretch of the Delaware River which presumably could fall with the scope of the expanded duty merely compounds the uncertainty created by the Third Circuit's new legal standard.

The Third Circuit's conclusion that a charterer is in a better position to assess the risk associated with a terminal than the master or a local pilot with particular expertise regarding those waters is particularly unsupported when a shipper or charterer is not situated at the intended destination. For example, the notion that a shipper from Australia or Europe is better equipped to assess and prevent damage to a vessel than a pilot who operates regularly in the Delaware River is dubious at best. Unless reversed, this would have enormous, adverse consequences for shippers and charterers worldwide, all of whom would be charged with knowledge of any potential, hidden obstacles at terminals around the world. While CARCO's facility was located in the area where this mishap occurred, many, if not most, charter agreements are entered into by shippers selling – rather than buying – products who are thousands of miles distant from the intended destination wharf.[13]

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[13] Imposition of liability without fault against CARCO for damages arising from an allision in navigable waters that was not CARCO's fault is particularly unfair and unwarranted here. OPA provides that ordinarily owners of single hulled vessels such as the Athos are responsible parties for oil spills. OPA further established the Fund to pay for clean up when there is no viable responsible party to do so, which Fund is financed by

CONCLUSION

For the foregoing reasons, *amici* request that the petition for certiorari be granted.

Respectfully submitted,

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a tax on each barrel of oil imported into or processed in the United States. CARCO and *amici* members pay into the Fund. Indeed, although CARCO paid approximately $103 million into the Fund between 1990 and 2004, the Third Circuit's decision dictates that although CARCO was not at fault here, it faces potential liability of more than $140 million in damages for which CARCO is not entitled to any reimbursement from the Fund.