

SUPREME COURT OF THE UNITED STATES

IN THE SUPREME COURT OF THE UNITED STATES

CITGO ASPHALT REFINING COMPANY,)
ET AL.,)
 Petitioners,)
 v.) No. 18-565
FRESCATI SHIPPING COMPANY, LTD.,)
ET AL.,)
 Respondents.)

Pages: 1 through 67
Place: Washington, D.C.
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11 Washington, D.C.

12 Tuesday, November 5, 2019

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14 The above-entitled matter came on

15 for oral argument before the Supreme Court of

16 the United States at 10:05 a.m.

17

18 APPEARANCES:

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20 on behalf of the Petitioners.

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22 General, Department of Justice, Washington,

23 D.C.; on behalf of the federal Respondent.

24 THOMAS C. GOLDSTEIN, ESQ., Bethesda, Maryland; on

25 behalf of the private Respondents.

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P R O C E E D I N G S

(10:05 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument first this morning in Case 18-565, CITGO Asphalt Refining Company versus Frescati Shipping Company.

Mr. Phillips.

ORAL ARGUMENT OF CARTER G. PHILLIPS

ON BEHALF OF THE PETITIONERS

MR. PHILLIPS: Thank you, Mr. Chief Justice, and may it please the Court:

The basic issue in this case is what ought to be the default rule for what is the generally referred to as safe-port or safe-berth clause in the standard charter party form that has, frankly, governed the transportation of ocean-going vessels for a very, very long time.

There are -- the court below concluded that -- based on the language referring specifically to "staying afloat and safely," that this imposed a strict liability on the charterer, my client, who designated that Paulsboro, New Jersey, would be the port of entry for these particular goods.

That is an extraordinary

1 interpretation under the circumstances in which
2 my client is now facing well in excess of \$140
3 million in -- in -- in an award based solely on
4 an accident that was, candidly, unknown and
5 unknowable at the time that the designation was
6 made and, candidly, at any time until the actual
7 allision occurred.

8 The question then is, is there a
9 different or better or more sensible default
10 rule that the Court might turn to? And it seems
11 worth spending a second and just focusing on the
12 exact language of this clause, which is at the
13 appendix to the Petitioners' brief at 8a.

14 "The vessel shall discharge at any
15 safe place or wharf" -- that, of course, says
16 nothing about any obligations of any of the
17 parties -- "which shall be designated and
18 procured by the charterer" -- so that is the
19 obligation of my client to designate and -- and
20 procure the space -- "provided that the vessel
21 can proceed thereto, lie at, and depart
22 therefrom always safely afloat, any lighterage
23 being at the expense, risk, and peril of the
24 charterer."

25 And it seems to me the difficulty with

1 saying that this is an unlimited source of
2 liability on a strict liability theory is that
3 why would you identify lighterage as the
4 specific remedy to be worried about unless what
5 you're really concerned about is, has the
6 charterer made essentially a safe choice as far
7 as everyone can tell, and then, when the captain
8 gets there, if for whatever reason the captain
9 in his or her judgment decides it's not a safe
10 choice and decides to go off into another port
11 or to offload some portion at the expense and
12 the risk, all of that is then imposed upon the
13 charterer.

14 JUSTICE GINSBURG: Mr. Phillips, this
15 has been the rule for some time in the Seventh
16 Circuit -- in the Second Circuit --

17 MR. PHILLIPS: Second Circuit.

18 JUSTICE GINSBURG: -- including an
19 opinion by Henry Friendly. And isn't this
20 something that the parties can adjust to? If
21 you know what the rule is, they can adjust to it
22 and insure accordingly?

23 MR. PHILLIPS: That's -- that is
24 precisely what the Court said about Norfolk
25 Southern versus James Kirby in terms of how do

1 you interpret the contract. Obviously, it will
2 always be possible to write around whatever the
3 contract interpretation has to be, but the Court
4 still has the fundamental obligation to
5 determine what should be the default rule.

6 And while it is true that there was --
7 that there's certainly been a period of time
8 when the Second Circuit adopted a -- a broader
9 construction of this clause, it is equally true
10 that for almost 30 years, the Fifth Circuit has
11 adopted precisely the opposite construction of
12 this clause, and Gilmore and Black for more than
13 40 years, 50 years, have adopted a fundamentally
14 different --

15 JUSTICE GINSBURG: Contrary to -- to
16 the -- to the --

17 MR. PHILLIPS: -- construction of this
18 clause.

19 JUSTICE GINSBURG: -- to the other
20 treatises. But there is another clause that is
21 adopted in some charter parties, and it's
22 called -- what is it called -- the due diligence
23 clause.

24 So, if that clause, that clause would
25 be unnecessary under your reading because you

1 say that's all that the safe-berth clause
2 required. So all of these charters that have
3 been adopting the specific language of due
4 diligence, they're doing -- they've done
5 something that's entirely unnecessary?

6 MR. PHILLIPS: The -- the difficulty,
7 I think, with looking at other forms and other
8 clauses and other contracts between other
9 parties is -- is, candidly, there's no evidence
10 that ties any knowledge of any of that to the
11 decision that was made between the Star Tanker
12 and my client when they entered into the -- into
13 the charter party arrangement in this particular
14 case.

15 It's true that there were other
16 options available, but the question is, what did
17 the parties intend when they chose this language
18 under these circumstances? And against the
19 backdrop -- because I -- I do think the text
20 itself tells you that the basic problem this is
21 designed to deal with is what do you do when you
22 show a -- when you pick a place that's safe, it
23 turns out it's not safe, and then the -- then
24 the captain has to act in response to that,
25 what's the -- what's the outcome?

1 But, if you put it contextually and
2 look at other provisions of this contract, where
3 you have the general exceptions clause that says
4 that the -- that there -- that for perils of the
5 sea, neither the charterer, nor the owner of the
6 ship, nor anybody else is responsible for those
7 kinds of injuries.

8 And so that suggests to you that for
9 what we're looking at, unknown and unknowable
10 hazards, that that's -- that that's not what the
11 parties expected would be imposed on the
12 charterer by simply designating at the time a
13 safe port.

14 Second --

15 JUSTICE KAGAN: Mr. Phillips, even if
16 we're looking just to this contract, these
17 parties, you said, well, look, there is the
18 Second Circuit, but we have the Fifth Circuit on
19 our side. But this contract actually seems
20 pretty well oriented to the Second Circuit.

21 So there's a arbitration provision in
22 the contract which says that any and all
23 differences in disputes of whatever nature shall
24 be put to arbitration in the city of New York or
25 in the city of London.

1 And then there's another provision in
2 the contract, a jurisdiction clause, which says
3 that disputes concerning non-delivery or damage
4 to cargo may be submitted for adjudication to
5 the United States District Court for the
6 Southern District of New York.

7 So every time that this contract says
8 something about where it expects disputes to go,
9 it points to New York.

10 MR. PHILLIPS: Well, but those are --
11 but those are choice-of-forum clauses. They're
12 not choice-of-law clauses. They don't say
13 specifically that we intend --

14 JUSTICE KAGAN: Well, we know what
15 happens --

16 MR. PHILLIPS: -- for the Second
17 Circuit rule.

18 JUSTICE KAGAN: -- we know what
19 happens in arbitration in New York. Arbitrators
20 -- arbitrators in New York follow the Second
21 Circuit rule.

22 MR. PHILLIPS: They tend to follow the
23 --

24 JUSTICE KAGAN: And certainly --

25 MR. PHILLIPS: -- Second Circuit rule,

1 although the --

2 JUSTICE KAGAN: -- certainly, the
3 Southern District of New York is following the
4 Second Circuit rule, isn't it?

5 MR. PHILLIPS: To be sure. But the --
6 but the -- but the flip side of that, first of
7 all, this wasn't litigated in -- in New York.
8 This was litigated in the Third Circuit --

9 JUSTICE KAGAN: Well, I know --

10 MR. PHILLIPS: -- and properly so.

11 JUSTICE KAGAN: -- there was some
12 strange circumstance, you know, it didn't --
13 didn't end up going to arbitration. But mostly
14 people expect that these kinds of disputes will
15 go to arbitration.

16 And this arbitration clause says
17 you're in New York or you're in London, both of
18 which have a warranty interpretation of this
19 safe-berth clause.

20 MR. PHILLIPS: Right.

21 JUSTICE KAGAN: So even if we're just
22 looking to this particular contract between
23 these two parties, I -- I guess I'm thinking
24 these two parties thought that this was going to
25 be adjudicated in New York --

1 MR. PHILLIPS: But --

2 JUSTICE KAGAN: -- under New York
3 rules.

4 MR. PHILLIPS: -- but even under --
5 even under that interpretation, which I don't
6 think is a fair way to interpret this, because
7 it seems to me that when you're engaged in a
8 very broad contract entry position, to say that
9 this was -- that this was something that was
10 entertained because they knew how New York law
11 worked in certain ways, I don't think is a fair
12 way to interpret the contract.

13 But I -- but -- but even aside from
14 that, if you actually look at the arbitration
15 decisions that our friends cite and -- and
16 examine them, they say things like, of course,
17 the charterer is not the insurer against all
18 risk that takes place. So there's at least some
19 reason to doubt that the rule would ever be
20 interpreted as broadly as it is in this context.

21 And to me -- and -- and so -- and that
22 there are others in which the court has said
23 that strict liability doesn't extend to the ends
24 of the earth. So there -- there are -- it's --
25 it's -- it's far from clear what that would

1 mean.

2 But what we do know is that the
3 provision specifically says U.S. law. And U.S.
4 law, obviously, at this stage, ought to be what
5 this Court decides it ought to be.

6 And, again, remember, this is not an
7 agreement between my friends over here and my
8 client. This is an agreement between a
9 third-party and my client. And there is no
10 evidence as to what either -- either of them had
11 in mind with respect to this particular issue.

12 So I think what you should look at is
13 the language and the text and what does that
14 lead you to, what's the conclusion to take from
15 that, the context that tells you the general
16 exceptions that we're not liable for perils of
17 the sea, nor is anybody else liable. That's
18 what insurance --

19 JUSTICE KAGAN: Well, can I just --

20 MR. PHILLIPS: -- ought to be for.

21 JUSTICE KAGAN: -- can I just ask, Mr.
22 Phillips, about the text, because the text does
23 say a safe berth, yeah?

24 MR. PHILLIPS: Yes, Your Honor, safe
25 -- safe place.

1 JUSTICE KAGAN: Safe place or wharf,
2 right, safe place or wharf. I mean, just
3 thinking about that as, you know, under Black
4 Letter rules of contract, which -- which
5 suggests that material statements of fact are,
6 indeed, warranties, I mean, what would be the
7 difference if I said to you, I'm going to sell
8 you a working car for \$1,000 and then I give you
9 the car and it breaks down two minutes later?

10 I mean, would you -- would you think
11 that that's anything other than a warranty?

12 MR. PHILLIPS: No, I would think that
13 that is, in -- in fact, a warranty, but I think
14 that --

15 JUSTICE KAGAN: Even though, like I --
16 I said, I didn't know that this car was ready to
17 break down. It's unknown and unknowable. I had
18 no -- I had no idea.

19 MR. PHILLIPS: Well, my guess is,
20 first of all, I mean, I hate to -- to fight your
21 hypothetical, but my guess is that's -- that's
22 something that is at least potentially knowable,
23 although I -- I can envision a circumstance
24 where it wouldn't be.

25 Here, you're talking about something

1 that is absolutely unknown and unknowable under
2 these particular circumstances. And -- and --

3 JUSTICE KAGAN: Well, absolutely --

4 MR. PHILLIPS: -- the term "safe" --

5 JUSTICE KAGAN: -- I mean, there are
6 ways of --

7 MR. PHILLIPS: -- doesn't mean as
8 against all possible risk.

9 JUSTICE KAGAN: Aren't there --

10 MR. PHILLIPS: It doesn't have to mean
11 that. It can just mean safe for the ordinary
12 use that you're going to put it to, as the -- as
13 the Ocean Victory decision in the U.K. says,
14 which I think is the best way to think about
15 this: Was it safe for that vessel on that day
16 at that place, given what we knew about the
17 characteristics --

18 JUSTICE ALITO: What if --

19 JUSTICE GORSUCH: Well, Mister --

20 MR. PHILLIPS: -- of the port.

21 JUSTICE ALITO: -- what if we think
22 the text can be read your way, but it can also
23 be read the other way? What should we do then?

24 MR. PHILLIPS: Then you should go to
25 the other criteria, which is the context, which

1 I've already identified, and the billion dollars
2 of liability insurance that the other side has.

3 I think the case law tends to support
4 us more. I think Atkins can be read as having
5 rejected exactly the kind of warranty, because
6 there the situation was that the -- one of the
7 parties said to the ship's captain it's a safe
8 port, and the Court rejected the idea that that
9 was a warranty on its face that you could get in
10 under any circumstances and regardless of
11 knowledge.

12 Then I think you look at the other two
13 criteria that the Court uses in deciding the
14 right way to interpret admiralty con --
15 contracts in admiralty.

16 One is, is it -- is the -- you know,
17 does this promote maritime commerce? And the --
18 the answer to that seems to me clearly not.

19 We know from the amicus briefs that
20 operate in the Fifth Circuit, those merchants
21 don't routinely get -- get insurance and don't
22 -- can't get insurance for a lot of what we're
23 talking about here. And it would completely
24 disrupt all of the commerce that goes into the
25 Gulf under these circumstances.

1 JUSTICE ALITO: Well, if we get to
2 custom and usage, which is what you seem to be
3 talking about, can that be decided on the record
4 that we have? Isn't that a factual question?
5 And was that fact decided by the district court?

6 MR. PHILLIPS: No -- well, it wasn't
7 decided by the district court because the court
8 of appeals in its prior opinion had basically
9 said this is a strict liability to the limits of
10 the earth holding, and, therefore, there was no
11 opportunity for the district court to entertain
12 that.

13 On the other hand, what we -- what we
14 do know in terms of transactional costs and
15 insurance I think is probably knowable from
16 common sense. I don't know that it's
17 necessarily a triable fact.

18 I mean, this Court has in the past
19 examined whether or not a particular rule is
20 going to adversely affect maritime commerce.

21 And it seems to me that any rule that
22 exposes a defendant to limitless liability
23 interferes with maritime commerce and efficient
24 maritime commerce.

25 JUSTICE GORSUCH: Well, along those

1 lines, Mr. Phillips, I'm trying to -- I'm trying
2 to figure out the difference between your rule
3 and -- and your colleague's suggested rule.

4 As I understand it, you would like us
5 to essentially impose a negligence standard, a
6 due diligence standard. We -- we couldn't have
7 known that the anchor was there in the river
8 when we hit it and, therefore, we shouldn't be
9 liable.

10 The other side says, no, there's a
11 warranty of safe berth, but at least as it's
12 been interpreted by many courts, including the
13 English court you -- you -- you alluded to
14 earlier, there's an exception for abnormal
15 circumstances under -- under the particular
16 circumstances. I think you alluded to it as
17 well in these circumstances at this time and
18 this place.

19 It seems to me that those two rules,
20 strict liability minus abnormal circumstances
21 and negligence, are awfully close at the end of
22 the day. And if that -- is that true, first of
23 all? Would you agree with that?

24 And isn't your real problem at least
25 the argument from the other side that you didn't

1 make an abnormal circumstances argument below
2 and so that you are stuck with more of a strict
3 liability result in this case but might not have
4 been on a different record in different
5 circumstances?

6 MR. PHILLIPS: The -- the answer to
7 your question, Justice Gorsuch, is that we did
8 make an abnormal occurrence argument. And if
9 you look at the reply brief in our footnote, we
10 devote, you know, an entire --

11 JUSTICE GORSUCH: Yeah.

12 MR. PHILLIPS: -- footnote to the six
13 times that we referred to abnormal
14 circumstances.

15 And, again, put it in the context of
16 the litigation, which is the district court had
17 held that we were not liable under these
18 circumstances. And the court of appeals says,
19 well, we're just going to decide some legal
20 issues here and sort of -- and now you lose on
21 that legal issue.

22 So the opportunity to try to parse out
23 the nuance of what you've just described wasn't
24 available to us, but we certainly posed at --

25 JUSTICE GORSUCH: Okay.

1 MR. PHILLIPS: -- at every stage that
2 argument. So if you wanted to remand --

3 JUSTICE GORSUCH: Yeah. Alright.

4 MR. PHILLIPS: -- for that issue, that
5 would -- you know, if you vacate the -- the --
6 the decision and send it back to is this a peril
7 of the sea or is this a natural occurrence --

8 JUSTICE GORSUCH: I got you. I got
9 you, Mr. Phillips. So I guess let's -- let's
10 get away from the specifics of this case, though
11 I know they're very near and dear to you and
12 your client.

13 What's the difference between those
14 two legal rules, if any?

15 MR. PHILLIPS: The due diligence
16 standard, frankly, doesn't go to the question,
17 to my mind, to the question of this particular
18 obstruction.

19 The due diligence goes to the question
20 of whether you -- whether you did due diligence
21 in selecting the port or the berth in the first
22 instance. And that's usually regulated on the
23 basis of the -- the history of the port.

24 And -- and, again, if you look at the
25 original district court opinion that talks about

1 the 147 ships just like this one that pass
2 through exactly that stretch, there's no
3 question this was a safe port when selected
4 under those circumstances.

5 CHIEF JUSTICE ROBERTS: Mr. Phillips,
6 you --

7 MR. PHILLIPS: And we did our due
8 diligence there.

9 CHIEF JUSTICE ROBERTS: -- you've been
10 using terms like strict liability and due
11 diligence, and those -- those sound in tort to
12 me, and yet we're dealing with a contract.

13 The contract doesn't say anything like
14 that -- any familiar tort terms. It just says
15 you're going to provide a safe place. And you
16 either did or you didn't, but that's a matter of
17 contract.

18 I don't know. It -- it seems to be
19 introducing -- you seem to be introducing these
20 tort concepts into a contract case.

21 MR. PHILLIPS: I'm not sure I'm the
22 one who's introduced them into the -- into the
23 contract case, other than I think the lower
24 courts, frankly, are the ones who've decided
25 that the better way to conceptualize the problem

1 is in -- is in these terms.

2 I -- I -- you know, from my
3 perspective, I'm perfectly comfortable if the
4 question is, is this a safe port, there was no
5 breach of the contract. This, of course, was a
6 safe port. Ships had gone in and out of there
7 for years and years and years. And what we
8 faced was an unknown and unknowable obstacle
9 that caused this particular allision.

10 So the question that Justice Gorsuch
11 -- to go back to Justice Gorsuch's question,
12 what do you do in that circumstance, is you --
13 is you say who should be liable under --

14 CHIEF JUSTICE ROBERTS: Well, but it's
15 not --

16 MR. PHILLIPS: -- in that --

17 CHIEF JUSTICE ROBERTS: -- it's not a
18 safe port. What made it unsafe, as you say, was
19 something that was unknown and unknowable, but
20 it's still a question of contract law.

21 MR. PHILLIPS: Right. But the
22 question is, did the parties envision that for
23 something that was unknown and unknowable, that
24 one of the parties would -- that that made it
25 unsafe under those circumstances? Or isn't the

1 more logical conclusion to draw, particularly in
2 the context of a provision that says that there
3 is no responsibility and -- and does it in terms
4 of damages for losses that are -- that are
5 caused by perils of the sea?

6 JUSTICE SOTOMAYOR: Under the
7 contract, and separating out tort law and
8 contract law, under tort law, it happens because
9 there is an accident. In its classic terms,
10 it's unknown and unknowable.

11 MR. PHILLIPS: Right.

12 JUSTICE SOTOMAYOR: Under contract
13 law, why should the vessel bear the risk of
14 someone else's choice? Because of the unknown
15 and unknowable? The voyage is -- the vessel is
16 there only because of the charterer's choice,
17 not because of its own.

18 MR. PHILLIPS: Right.

19 JUSTICE SOTOMAYOR: And so, if we're
20 talking in terms of contract, why does that make
21 any sense to view it in any other way than to
22 say the charterer picks, the charterer has the
23 expense, risk, and peril of lighterage -- and
24 lighterage, in my mind, can include all the
25 charges related to the transfer to a safe berth.

1 There was no ability to do that. It just was
2 destroyed there.

3 So I -- I'm -- I'm just not quite sure
4 you're -- you were answering the Chief's
5 question.

6 MR. PHILLIPS: Well, I -- I --

7 JUSTICE SOTOMAYOR: Which is --

8 MR. PHILLIPS: Right.

9 JUSTICE SOTOMAYOR: -- if you're
10 talking about the parties' expectations, why
11 would the vessel think it should be responsible
12 for losses occasioned by someone else's choice?

13 MR. PHILLIPS: Because all that the
14 choice imposed as a -- as an obligation on my
15 client was to identify someplace that is safe in
16 the sense that it -- there are no obvious risks,
17 that it is not obviously un- --

18 JUSTICE SOTOMAYOR: I don't see --

19 MR. PHILLIPS: -- inappropriate.

20 JUSTICE SOTOMAYOR: -- those words
21 anywhere in the contract.

22 MR. PHILLIPS: Well, but that -- they
23 only make sense in the context of what is the
24 remedy by choosing poorly. It's not as -- as
25 you would get in dealing with the general

1 exceptions clause, which says they would be
2 responsible for any loss or damage resulting
3 from the perils of the sea.

4 If you were going to say that you are
5 responsible for everything, you would use
6 precisely that same language. And if you depart
7 from there, then you are responsible for any
8 loss or damages arising from the choice made by
9 the -- by the charterer. The fact that they
10 don't use that language suggests that this is a
11 much narrower obligation.

12 And the reason why you would interpret
13 it in light of that is -- again, goes back to
14 the core notions of maritime commerce, that any
15 time you begin to impose virtually limitless
16 liability on a party who has no ability to make
17 a choice, and you do so in a way that we know
18 from our amicus will dash the expectations of a
19 very large part of the economy that operates in
20 the Gulf of Mexico, this Court ought to think
21 long and hard about whether that's the more
22 sensible rule and adopt the more -- the more
23 restrained rule and realize at the end of the
24 day, the reason why the -- the -- the ship owner
25 would expect this liability to be on it is

1 twofold.

2 One, it took out insurance. It has a
3 billion dollars of insurance against the
4 ultimate liability here. And, two, it almost
5 certainly had insurance for its hull.

6 And that's -- that is exactly the
7 position that -- that Gilmore and Black
8 explained many, many years ago as to the why --
9 as to the reason why it's not reasonable to
10 expect that the ship owner thinks he's getting a
11 pass on this circumstance. And it is certainly
12 not reasonable to think that the charterer under
13 these circumstances would assume that kind of
14 liability.

15 JUSTICE KAVANAUGH: Back to the text,
16 it does say "safe place or wharf which shall be
17 designated and procured by the charterer." So
18 the words "designated and procured" are not just
19 the place but the fact that it's safe as well.

20 So, if it turns out not to be safe,
21 just as a matter of logic, it hasn't designated
22 or procured a safe place or wharf.

23 MR. PHILLIPS: Well, the question --
24 it seems to me the question, Justice Kavanaugh,
25 really is, does safe mean that you -- you --

1 that you will assure that regardless of what
2 happens, if it -- if it gets hit by a meteor, if
3 it gets -- if somebody, a vandal, goes on the --
4 on the ship while it's in a berth and blows it
5 up, that that's all on the charterer? Did the
6 charterer assume all of those obligations?

7 JUSTICE KAVANAUGH: Well, it says
8 designated or procured, and procured a safe
9 place. And it doesn't say usually safe place.
10 So, if it turns out not to be safe, then --

11 MR. PHILLIPS: I mean, I do think
12 that's one interpretation you can give to it.
13 The other interpretation, which is much more
14 sensible in -- in terms of maritime commerce and
15 the rest of the provisions and the other
16 protections that the other parties have against
17 this particular liability, is -- is to say it's
18 safe in the way the U.K. Supreme Court said.

19 It's safe for this ship under these
20 circumstances on that particular day as a
21 prediction made at the time that the prediction
22 is made.

23 JUSTICE KAGAN: So --

24 MR. PHILLIPS: And there's no question
25 we satisfied that standard under these

1 circumstances. We knew -- and the record's very
2 clear about this in 342, 343 of the -- of the
3 appendix to the petition -- hundreds of ships of
4 the same size and dimensions of this one had
5 passed right there, right through there --

6 JUSTICE KAGAN: So --

7 MR. PHILLIPS: -- completely safe.

8 JUSTICE KAGAN: -- Mr. Phillips, what
9 you're saying is sensible seems to be doing a
10 lot of the work there, in contrast to the
11 language that Justice Kavanaugh read.

12 And, again, this goes back to the
13 question of what you're supposed to do in tort
14 and what you're supposed to do in contract. I
15 always thought that the contract rule is that
16 you view as sensible whatever the parties chose,
17 that there is not -- you know, courts are not
18 here to decide what's sensible or what's
19 efficient. If the parties chose something,
20 that's by definition sensible and efficient.

21 MR. PHILLIPS: I don't -- I mean,
22 obviously, in the abstract, I don't -- I don't
23 disagree with that proposition. The question
24 is, was this language meant to carry as much
25 water as -- as the -- as the other side would

1 ask it to carry?

2 And, again, I would go back to the
3 other language, the exceptions clause.

4 JUSTICE KAVANAUGH: Well --

5 MR. PHILLIPS: -- which talks about
6 unless otherwise in this charter expressly
7 exempted, they shall not be responsible for any
8 loss arising out of the peril of the sea. It
9 doesn't seem to me under those circumstances
10 that this -- that -- that the provision on the
11 safe berth envisions that we are taking on the
12 responsibility for everything that can happen
13 that would be a peril of the sea or that would
14 be an abnormal occurrence.

15 I would say that the Court ought to
16 draw that line. And whether it draws that line
17 as a matter of due diligence in tort concepts or
18 whether it draws that line as the better way to
19 read this particular contract, I'm perfectly
20 comfortable with that.

21 And even if the Court thinks that
22 there ought to be a remand to determine whether
23 this was an abnormal occurrence or whether this
24 was a peril of the sea, that would be fine too,
25 because the answer to the question is this is

1 clearly a peril of the sea. The Supreme Court
2 -- this Court said as much in G.R. Booth
3 already.

4 And -- and is this an abnormal
5 occurrence? The idea of a ten-ton anchor that
6 leaps -- floops up, catches my -- my -- my --
7 this ship, floops down again, that is not only
8 an abnormal occurrence -- and this is a bad pun
9 -- but that is maybe the flukiest outcome
10 imaginable.

11 (Laughter.)

12 MR. PHILLIPS: I knew I'd get
13 somebody. If there are no further questions,
14 I'll reserve the balance of my time, Your Honor.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 counsel.

17 Ms. Ross.

18 ORAL ARGUMENT OF ERICA L. ROSS
19 ON BEHALF OF THE FEDERAL RESPONDENT

20 MS. ROSS: Mr. Chief Justice, and may
21 it please the Court:

22 The sophisticated commercial parties
23 in this case chose a form contract to govern the
24 transport of oil from Venezuela to Petitioners'
25 berth on the Delaware River. When the parties

1 entered their agreement in 2004, they had the
2 choice of two types of safe-berth clauses that
3 predominate within the industry.

4 As this Court's already recognized
5 this morning, some contracts include a
6 traditional safe-berth clause, which gives the
7 charterer the right to designate the port but
8 requires that the charterer choose a port that
9 is safe. In stark contrast, other contrasts --
10 other contracts include a more limited clause,
11 which expressly provides that the charterer will
12 not be liable so long as it exercises due
13 diligence in selecting the port or expressly
14 disclaims a warranty of safety.

15 The parties here chose the first
16 traditional type of clause, which lacks any due
17 diligence language. By the time they had done
18 so, courts, arbitrators, and scholars on both
19 sides of the Atlantic had for decades construed
20 the safe-berth clause as a warranty that the
21 charterer would choose a port that is actually
22 safe, not merely one that the charterer believes
23 to be safe after the exercise of due diligence.

24 JUSTICE GORSUCH: Ms. Ross, I'm -- I'm
25 going to pose to you the same sort of question I

1 posed to Mr. Phillips, which is I'm not sure
2 what the difference or delta is between the two
3 proposed tests at the end of the day.

4 Yes, this is a contract case, but
5 Mr. Phillips has argued for something like a due
6 diligence, right? I think of it as really a
7 negligence-type standard.

8 You've argued for something more like
9 strict liability, right, that it's a warranty,
10 absolute. But you've also recognized, at least
11 in passing, that there's an exception to that
12 warranty for abnormal circumstances, whatever
13 that is. Nobody knows what that is.

14 At the end of the day, don't the two
15 wind up in pretty much the same place? And if
16 they do, my question for you is, given the
17 difficulty of knowing what an abnormal
18 circumstance is and how atextual that would be
19 in this contract, which speaks only of a
20 guarantee of safe berth, why shouldn't we adopt
21 the Petitioners' position as more administrable
22 at least?

23 MS. ROSS: So, Justice Gorsuch, I
24 disagree that they wind up in the same place. I
25 also disagree that Petitioners have preserved an

1 abnormal occurrence argument.

2 And I think it's very important here,
3 Your Honor used the phrase "abnormal
4 characteristic." It's actually an abnormal
5 occurrence under that -- well, it matters
6 because the way that "abnormal occurrence" is
7 defined in the English cases, which have done
8 the bulk of the work in this area, is it is
9 something from outside the port. It is not a
10 prevailing characteristic of the port. It's
11 something from outside the port that comes in
12 and causes an abnormal event.

13 And it's not the accident itself that
14 has to be abnormal. It's that cause of the
15 accident that has to be abnormal.

16 JUSTICE KAGAN: Like -- like what?

17 MS. ROSS: So, for example, there's an
18 old -- so Mr. Phillips mentioned a meteor. I
19 think that's exactly the example that the Sir
20 Bernard Eder amicus brief gives. That's -- he's
21 a well-known English judge and scholar on this
22 topic. So that might be an example.

23 There's an English case called the
24 EVIEFF from the 1980s where, when the parties
25 selected the port, everything was well and good,

1 everything was fine. Turns out the Iran/Iraq
2 war breaks out and the ship gets stuck in the
3 port.

4 That has nothing to do with the
5 characteristics of the port. It's an entirely
6 external --

7 JUSTICE GORSUCH: Well, the --

8 MS. ROSS: -- event that causes --

9 JUSTICE GORSUCH: -- U.K. Supreme
10 Court has recently just held, though, that a big
11 storm that sweeps into the port also counts as
12 an abnormal occurrence, if you want, though that
13 surely -- those types of storms have not been
14 unknown to that port in the past. They're rare,
15 but they happen.

16 So whether or not the abnormal
17 occurrence situation applies here, again, given
18 the difficulty of knowing what that is and the
19 fact that we might have to just more or less
20 make that up as we go, why isn't Mr. Phillips'
21 test more reasonable?

22 MS. ROSS: So I think the fact, Your
23 Honor, I -- I agree that a large weather event
24 could be an abnormal occurrence. I don't think
25 that that actually changes that the abnormal

1 occurrence doctrine doesn't apply here.

2 Now, as I mentioned earlier,
3 Petitioners didn't preserve this argument below
4 when they used abnormal occurrence. They were
5 saying something very different in the context.
6 But, nonetheless, there is evidence in the
7 record that debris of this sort on the floor of
8 the Delaware River is not anywhere near
9 abnormal, given the fact that it's an industrial
10 river.

11 JUSTICE GORSUCH: I know you're --
12 you're liking to focus on the facts of the case
13 just as much as Mr. Phillips, and for that I
14 admire you. But, if we could just back up, move
15 up one level of generality for me.

16 MS. ROSS: Sure.

17 JUSTICE GORSUCH: Okay. The two legal
18 rules. You're the judge. You have to pick
19 between these two legal rules.

20 Again, why not Mr. Phillips' on at
21 least administrability grounds?

22 MS. ROSS: So, I mean, I will -- I'm
23 happy to get to administrability grounds, but I
24 think the number one reason would be that's not
25 what the text of the contract says and it's

1 not --

2 JUSTICE GORSUCH: But the text of the
3 contract also doesn't have abnormal occurrence
4 in it, right?

5 MS. ROSS: Well --

6 JUSTICE GORSUCH: So you're -- you're
7 arguing for an atextual position yourself, I
8 think. And if we're -- if -- if that's where
9 we're at, then, last shot. Last shot.

10 MS. ROSS: Sure.

11 JUSTICE KAGAN: Are you -- are you
12 arguing for that position, Ms. Ross?

13 MS. ROSS: So -- so we're not saying
14 that the abnormal occurrence possibility does
15 not exist, but I don't think it's atextual.

16 And if the Court will just bear with
17 me, I think that is one example of a -- a set of
18 doctrines that have grown up around this clause
19 that show that this clause has a long lineage,
20 but also are just sort of applications of
21 causation principles.

22 If there is an abnormal occurrence,
23 Petitioners' failure to designate a safe berth
24 is not the cause of the vessel's injury.

25 Now that is also true of the bad

1 navigation and seamanship doctrine. It's also
2 true of the waiver type named port exception
3 doctrine that came up in -- in the district
4 court's decision in Atkins.

5 Now, putting all that to one side, to
6 get back to Justice Gorsuch's administrability
7 question, I do think that this is quite
8 administrable. And the way that we know that is
9 that this has been the rule in the vast majority
10 of jurisdictions for -- dating back to England,
11 1861.

12 Ogden versus Graham, the first case
13 anyone can find on a safe-berth clause, actually
14 involves a situation in which the court says it
15 is possible that the charterers were perfectly
16 innocent as to this danger and they are still
17 liable.

18 So we know that it's administrable
19 because parties have continued to choose this
20 contract for 150 years since that decision.

21 Now, going to another point on
22 administrability, my friend pointed out that the
23 law has changed in the Fifth Circuit for the
24 last 30 years.

25 That, too, we think is insufficient to

1 change the weight of authority here. And that's
2 because, again, we have one Fifth Circuit
3 decision against 150 years of English law, cases
4 from the Second Circuit, including Judge
5 Friendly's opinion in Paragon Oil --

6 JUSTICE ALITO: Well --

7 MS. ROSS: -- beginning in the 1930s.

8 JUSTICE ALITO: -- the Association of
9 Ship Brokers and Agents publishes the -- the
10 form on which this contract was based, doesn't
11 -- doesn't it?

12 MS. ROSS: It does, Your Honor.

13 JUSTICE ALITO: And which
14 interpretation does it think is the correct one?

15 MS. ROSS: So it has not taken a
16 position in this case. At the cert stage, it
17 simply asked the Court to grant and didn't say
18 which side.

19 I think it does, however, take a
20 position sort of without taking a position by
21 having a separate form contract that was
22 promulgated in 1984, so six years before the
23 Fifth Circuit's decision in Orduna and 20 years
24 before the parties here contracted. That's
25 known as the ASBA II. And that --

1 JUSTICE ALITO: Well, I think it's
2 done more than not take a position. It says it
3 would be entirely rational to construe a
4 safe-berth clause to impose an absolute
5 warranty.

6 It also would be entirely rational to
7 construe a safe-berth clause to impose only a
8 due diligence obligation.

9 So, if it doesn't know which is the
10 right interpretation of this clause, which it is
11 offering to the public, how can -- how can you
12 say that it's clear?

13 MS. ROSS: So I think it's clear for
14 the same reason that Judge Friendly said it was
15 clear in Paragon Oil. As he said, a simple set
16 of propositions was sufficient to resolve the
17 case. A safe berth was warranted. It was not
18 provided. Therefore, the warrantor is liable.

19 I think the language actually is quite
20 clear. But, even if you disagreed with me on
21 that, I think you would look to other contracts.
22 I think it's simply implausible that a
23 sophisticated commercial entity like CITGO
24 didn't know that there were other contracts,
25 including one from the ASBA itself, promulgated

1 again in 1984, that --

2 JUSTICE ALITO: But there is --

3 MS. ROSS: -- expressly explains the
4 warranty.

5 JUSTICE ALITO: -- a lot of authority
6 both ways on this -- on this issue, is there
7 not?

8 MS. ROSS: There is not, Justice
9 Alito. I really would resist that impulse.

10 JUSTICE ALITO: Well, there's the --
11 there's the Gilmore and Black treatise, which is
12 we have long regarded as one of the leading, if
13 not the leading, admiralty treatise. Isn't that
14 correct?

15 MS. ROSS: So that's correct, Your
16 Honor. But what Gilmore and Black actually
17 says, and it's important to note that Gilmore
18 and Black are writing in 1975, but what they say
19 is that, at that time, there were many
20 authorities that construed this as a warranty.
21 So they're not debating what the state of the
22 law was.

23 They're simply saying on policy
24 grounds that they disagree with that. And they,
25 like my friend, say that, in fact, you should

1 require very clear language to have a safe-berth
2 clause that actually functions as a warranty.

3 But there's no basis for that in
4 contract law, as I believe Justice Kagan was
5 pointing out earlier. There's no basis for
6 that. They don't purport to provide any basis
7 for that either in the language of the contract
8 or in background principles.

9 CHIEF JUSTICE ROBERTS: You -- you
10 mentioned some time ago that it's not abnormal
11 to have debris in the Delaware River. It's the
12 Delaware River, right?

13 MS. ROSS: Yes, Your Honor.

14 CHIEF JUSTICE ROBERTS: Is that what
15 we look at, or do we look at the actual event,
16 which is, you know, the anchor leaps up from the
17 bottom, you know, damages the hull, then returns
18 to the bottom? I mean, that -- that -- that's a
19 pretty abnormal occurrence, even if there are a
20 lot of anchors.

21 MS. ROSS: So it's possible, Your
22 Honor, that some court might, with actual
23 evidence about that question, decide that that
24 is an abnormal occurrence. I don't think that's
25 correct.

1 I think you would look at the presence
2 of large debris on the floor of the river. And
3 one question you would have to ask is, even
4 without the leaping up, so to speak, how much of
5 that debris sits that high above the river?

6 And all of this -- or the river bed.
7 All of this goes to the fact that, as I was
8 saying earlier, there's no evidence on this
9 question because Petitioners did not raise it.

10 JUSTICE KAVANAUGH: You --

11 MS. ROSS: This case has gone through
12 two trials with a total of 71 days of testimony.
13 I think the idea that at this point Petitioners
14 would come in and raise, in their reply brief no
15 less, this idea of an abnormal occurrence and
16 then this Court would remand would be quite
17 surprising.

18 JUSTICE KAVANAUGH: You earlier
19 mentioned causation principles. Can you tell us
20 how you would phrase the causation principle
21 that applies to these circumstances?

22 MS. ROSS: To the abnormal occurrence?

23 JUSTICE KAVANAUGH: Uh-huh.

24 MS. ROSS: So, Justice Kavanaugh, I
25 mean --

1 JUSTICE KAVANAUGH: A line draw -- the
2 line of causation, is it damage caused by the
3 condition of the port, for example?

4 MS. ROSS: Yes. I mean, I think,
5 roughly speaking, that's probably correct. It's
6 -- the -- what Petitioners have warranted is a
7 safe port. They actually don't disagree, at
8 least in their brief, with the definition of
9 "safe." It's on page 19 of their brief.

10 And that means that when they fail to
11 provide a safe port, if the characteristics of
12 that port have caused the damage, then they are
13 liable.

14 JUSTICE KAVANAUGH: And if it's
15 weather or a meteor, obviously, that's not the
16 condition of the port. I guess people could
17 argue about the things on the floor of the
18 Delaware River, though.

19 MS. ROSS: Well, I think people would
20 argue about weather just in terms of how
21 frequent that type of a storm is and things of
22 that nature.

23 But putting that to one side, I don't
24 think that you would -- again, I think based on
25 the limited evidence we have here, and common

1 sense, I don't think that the presence of debris
2 on an industrial river would be in the same vein
3 as a meteor or the outbreak of a war or
4 something of that nature.

5 And that is where we see -- or -- or
6 as sort of a once-in-a-generation storm even.
7 That is --

8 JUSTICE ALITO: I mean, do you think
9 we can sort of take judicial notice of the fact
10 that an anchor popping up like this in a port
11 that is very heavily used is more foreseeable
12 than a big storm?

13 MS. ROSS: So, Your Honor, my
14 suggestion, if I -- if I were to be sort of bold
15 enough to make one, would be that the Court not
16 address this particular question at all because
17 Petitioners haven't preserved it.

18 And so I think it would be perfectly
19 appropriate for the Court to say in a different
20 case, where Petitioners have not gone through
21 two trials and failed to ever raise this
22 question, it might be appropriate for a -- a --
23 a United States court to consider the scope of
24 the abnormal occurrence doctrine, but that
25 that's not this case.

1 JUSTICE KAGAN: You -- you referred to
2 the fact that it's the London courts that have
3 done the work on this.

4 MS. ROSS: Uh-huh.

5 JUSTICE KAGAN: Have -- has the Second
6 Circuit or any of the New York arbitrators, do
7 they recognize this doctrine or not?

8 MS. ROSS: So, Justice Kagan, to my
9 knowledge, there are statements, including in
10 the Third Circuit's opinion here, that sort of
11 acknowledge that this safety definition includes
12 a carveout for abnormal weather or other
13 occurrences, is usually how it's phrased in the
14 American cases. I'm not aware of an American
15 case that actually applies it or an American
16 arbitration, for that matter, that actually
17 applies it.

18 The arbitration point, if I might, it
19 just loops back to something that we were
20 briefly discussing earlier. The -- Mr. Phillips
21 relies on the Fifth Circuit's decision in Orduna
22 as sort of a sea change, so to speak.

23 The -- I think that that's incorrect,
24 not only because we think it's sort of too
25 little too late and it's poorly reasoned, but

1 also because, in following Orduna itself,
2 Petitioners have not pointed to any case that
3 has actually applied the rule of Orduna, nor
4 have they pointed to any arbitration.

5 Now they say that, well, the Maritime
6 Arbitration Society in Houston doesn't publish
7 its decisions. We also are not aware of and
8 they have not put forth a single arbitration
9 clause that would send arbitration to the Fifth
10 Circuit.

11 So, if you look at the New York
12 arbitrations, some of them, in fact, involve
13 accidents that occurred in New Orleans, and
14 they -- because of the standard forms that
15 Justice Kagan was discussing earlier, they still
16 wind up in New York arbitration. And so we
17 don't think --

18 JUSTICE ALITO: I mean, arbitrators
19 don't have to interpret the law the same way a
20 court does, and to the extent they do it, it's
21 not reviewable by a court. So how much can we
22 read into arbitration decisions?

23 MS. ROSS: So, Justice Alito, I
24 certainly take the point that arbitrators may
25 not be bound in the same way that lower courts

1 would be. I think where you have a situation --
2 although, actually, in the Second Circuit, there
3 is a case overturning an arbitrator's decision
4 for failing to follow Second Circuit law and
5 following other courts.

6 I take the point that this Court might
7 not agree with that decision. But I think when
8 you have a case like this one where you have 67
9 arbitrations on one side of the ledger and zero
10 on the other, you don't actually need to decide
11 these sort of more difficult edge cases about
12 what would happen if it were closer or if you
13 really had a question as to what law the
14 arbitrators were applying.

15 It's quite clear in these, again,
16 reported, well-reasoned, quite predictable
17 after, you know, the first 20 or so, arbitration
18 decisions.

19 JUSTICE ALITO: I don't know. I'd be
20 very nervous about saying that we should
21 interpret the law in accordance with a body of
22 arbitral decisions, having read a fair number of
23 arbitral decisions and seen how they treat the
24 law.

25 MS. ROSS: So I think, Justice Alito,

1 the way I would phrase it, if I might, is that
2 the -- the arbitration decisions are really
3 confirmation of the industry's understanding
4 because these are expert arbitrators.

5 And, again, going back to where I
6 started this morning, the industry had and has
7 had, I believe since the 1950s, two sort of
8 standard form contracts that govern. And so it
9 is consistent with that dichotomy between --

10 JUSTICE SOTOMAYOR: Excuse me.

11 MS. ROSS: -- express due diligence --

12 JUSTICE SOTOMAYOR: With respect to
13 that issue, your -- Mr. Phillips says that you
14 can't get insurance, that a ruling in your favor
15 will destroy the industry. Could you address
16 that issue?

17 MS. ROSS: If I might.

18 CHIEF JUSTICE ROBERTS: Yes.

19 MS. ROSS: Sure. So I don't think
20 that's correct. I don't think they have any
21 evidence for that. I think on the insurance
22 point, two points are really important here.

23 One is that the reason why vessel
24 owners have that insurance is because the Oil
25 Pollution Act requires it because they're the

1 statutory responsible parties. It's not
2 specific to this contract.

3 The second is that their amici suggest
4 that charterers can't get insurance. I think
5 there's plenty of evidence in the red brief and
6 in some of our amicus briefs that that's just
7 not true. So I don't think that that should be
8 driving the decision here.

9 Thank you.

10 CHIEF JUSTICE ROBERTS: Thank you,
11 counsel.

12 Mr. Goldstein.

13 ORAL ARGUMENT OF THOMAS C. GOLDSTEIN
14 ON BEHALF OF THE PRIVATE RESPONDENTS

15 MR. GOLDSTEIN: Thank you, Mr. Chief
16 Justice, and may it please the Court:

17 I thought I would come at this from
18 the perspective that Justice Alito asked about.
19 What if we regard the text as in equipoise? It
20 says safe, and that could mean different things
21 in different contexts. And I'd ask the Court to
22 just look at what the position of the parties
23 was at the time they entered into this
24 agreement.

25 So, at the time that they did this, it

1 wasn't just you had to interpret safe port.
2 There were two different kinds of forms, and
3 they were basically evenly divided. This was
4 all done by an industry that they just choose
5 forms off the shelf, and there are a bunch that
6 say safe port and there are a bunch that say the
7 charterer will exercise due diligence in
8 selecting a safe port. And so that's a pretty
9 meaningful choice.

10 Then you say, okay, with respect to
11 the ones that say safe port, what was the
12 understanding of the industry at the time? Now
13 every one of those forms said that any dispute
14 will be resolved by arbitration in either New
15 York or London. There were none for Houston.
16 So every single one of them said we'll go to New
17 York or London.

18 And you say, okay, how were these
19 provisions interpreted in London and New York?
20 Well, they were uniformly interpreted, the safe
21 port provisions, as importing a warranty. So
22 there were 67, as my friend mentioned, from
23 expert arbitrators in New York. That would
24 include four on this particular form, not just
25 in general but this specific form.

1 Every decision of the Second
2 Circuit -- Justice Kagan cited a provision of
3 the charter party, in particular, that dealt --
4 deals with lost cargo, so when the oil spilled
5 out of the oil tanker into the Delaware River,
6 that would be a lost cargo claim. And that was,
7 you know, in -- going to be done in the Southern
8 District of New York.

9 And then all of the London decisions,
10 all of the U.K. courts, and unlike U.S.
11 arbitrations, U.K. arbitrations do get reviewed
12 by the courts, and there was absolute uniform
13 authority.

14 So, if you just ask, ah, I'm just not
15 sure exactly how I would look at these words, I
16 do think it's quite clear how the industry would
17 look at these words.

18 Then I wanted to turn, if I could, to
19 Justice Gorsuch's question about, okay, you
20 know, what really is the difference here? I do
21 think the critical textual difference is between
22 whether the injury is caused by the port or by
23 some other thing. Justice Kavanaugh, this is
24 the question of causation.

25 And so, if it is a characteristic of

1 the port -- and I would also encourage the Court
2 to look at the phrase "always safely afloat."
3 There are two parts to this provision. And what
4 they're -- they cite, the authorities, they're
5 quite right, that says "always safely afloat"
6 means you're not going to hit something on the
7 bottom. And that's the kind of obstruction that
8 you have with an anchor. Whether it flips up or
9 down, it is on the bottom. And that is a very
10 common thing. It is the kind of thing that you
11 worry about in chartering a ship.

12 Now some -- then you ask, okay, was
13 this a characteristic of the port or something
14 else that caused the injury? Well, what other
15 things might happen? You could have negligence
16 of the ship's master. That could be a
17 superseding cause. The ship's master should
18 have been aware of an obstruction on the floor.
19 It should have been aware of different things
20 that were in the way, other ships and the like.
21 Or you can have just a superseding cause that is
22 not negligence, it is not the characteristic of
23 the port, but it is truly some abnormal
24 occurrence.

25 Now this is a relatively undeveloped

1 area of the law. It is, though, intended to be
2 very much the exception, not the rule. And so
3 it's not just a storm, but it is a 150-year
4 storm combined with long waves. And in that
5 situation, the courts have said, well, maybe
6 that isn't a condition of the port. But we are
7 unaware of any authority ever indicating that
8 something that is on the floor of the port is
9 not a characteristic of the port.

10 You're worried about running aground.
11 You naturally are accounting for the things that
12 are on the bottom.

13 JUSTICE BREYER: Who is responsible --
14 who is responsible for negligence of the master?
15 Is the master an employee of the ship's owner or
16 is --

17 MR. GOLDSTEIN: Yes.

18 JUSTICE BREYER: So -- so, if the
19 master is negligent, then the charterer is not
20 responsible?

21 MR. GOLDSTEIN: Yes.

22 JUSTICE BREYER: Then so what we have
23 is a situation where the master is negligent and
24 the charterer is not responsible, but where the
25 master isn't negligent, then suddenly the

1 charterer is responsible?

2 MR. GOLDSTEIN: It's not -- it's not
3 suddenly. That's what they've bargained for.
4 It's a condition of the port.

5 JUSTICE BREYER: Then why would
6 somebody do it that way? I mean, that --
7 that's --

8 MR. GOLDSTEIN: Well, Justice Breyer,
9 here's -- here's the little bit of the bait and
10 switch if I can -- can say, and that is my
11 friend is very concerned that someone would be
12 held liable without fault. And he's very
13 concerned that \$140 million might turn on this.
14 He's not actually concerned about that. He just
15 wants it to be us, right? He's not saying that
16 there shouldn't be strict liability. He's
17 saying it should be we are strictly liable.

18 JUSTICE BREYER: Yeah, yeah, yeah.
19 No, well, but they still go back to the original
20 thing. There's a master who's hired by the
21 owner, and he says, I'm going to take it into
22 port X. And he should know that port X is
23 filled with poison ivy, which drives the crew
24 wild or, you know -- or some odd thing about it.

25 MR. GOLDSTEIN: That would be odd.

1 JUSTICE BREYER: He's supposed to know
2 that.

3 MR. GOLDSTEIN: Yes.

4 JUSTICE BREYER: And then, when he
5 does that incorrectly --

6 MR. GOLDSTEIN: Yes.

7 JUSTICE BREYER: -- mistakenly --

8 MR. GOLDSTEIN: Yes.

9 JUSTICE BREYER: -- that's your
10 problem? It's the owner's problem?

11 MR. GOLDSTEIN: Yes. That's Atkins.
12 This Court -- that's the district court ruling
13 in Atkins.

14 JUSTICE BREYER: All right. And --
15 but the owner -- the master had nothing to do
16 with it. It's just a total fluke -- leaving out
17 that other.

18 MR. GOLDSTEIN: Right.

19 JUSTICE BREYER: And, suddenly, the
20 charterer is liable.

21 MR. GOLDSTEIN: There's --

22 JUSTICE BREYER: I guess people have
23 operated under this rule, as you say, for a long
24 time.

25 MR. GOLDSTEIN: Long time.

1 JUSTICE KAGAN: Well, isn't it
2 because --

3 JUSTICE BREYER: But why?

4 JUSTICE KAGAN: -- the charterer chose
5 the port?

6 MR. GOLDSTEIN: Yes. So that's
7 exactly right. If you ask me why --

8 JUSTICE BREYER: Who?

9 MR. GOLDSTEIN: He did. The charterer
10 did. He said, I want to take your ship. You
11 have a ship.

12 JUSTICE BREYER: Yeah.

13 MR. GOLDSTEIN: I want it to go to
14 Paulsboro and I promise it'll be safe. And we
15 said, okay, let's go. But that is not at all
16 irrational or strange or anything. And if he
17 instead wanted to say, look, I want to go to
18 Paulsboro, but all I'm promising is that I'll --
19 that I've exercised due diligence, I've done my
20 best, I'm not taking responsibility, it -- we
21 have to realize when you have a situation of
22 unknown and not reasonably knowable damages,
23 someone is going to be strictly liable. It is
24 inevitable. We're just trying to figure out who
25 it is.

1 Our point is he wrote a contract -- he
2 picked the contract. And the contract said
3 it'll be safe, rather than the contract saying
4 --

5 JUSTICE BREYER: But Gilmore and Black
6 think that the language is ambiguous. Is that
7 why they recommended the other?

8 MR. GOLDSTEIN: Well, Gilmore -- let's
9 just be clear. Gilmore and Black, written some
10 40 some years ago --

11 JUSTICE BREYER: Yeah, but they're
12 pretty good.

13 MR. GOLDSTEIN: And as my -- my
14 colleague from the Solicitor General's Office
15 says, what Gilmore and Black says is we
16 recognize that all the authority is on the other
17 side. We just think we would read it
18 differently. We would apply a higher bar.

19 Both the district --

20 JUSTICE BREYER: Because?

21 MR. GOLDSTEIN: Because we just think
22 it -- it doesn't make sense. It just --

23 JUSTICE BREYER: And it doesn't make
24 sense in their view because?

25 MR. GOLDSTEIN: Because it would just

1 make -- it would -- it's not fair to the
2 charterer. You -- you should just put it on --

3 JUSTICE BREYER: Because?

4 MR. GOLDSTEIN: It doesn't go a lot
5 farther than that, Justice Breyer.

6 JUSTICE BREYER: Well, Gilmore and
7 Black are not -- I mean, they're -- they're very
8 good experts.

9 MR. GOLDSTEIN: They were.

10 JUSTICE BREYER: They don't make
11 things up.

12 So -- so -- so why?

13 MR. GOLDSTEIN: Justice Breyer, they
14 actually didn't say they are making it up, just
15 to be clear.

16 JUSTICE BREYER: Yeah.

17 MR. GOLDSTEIN: They recognize that
18 the authority says one thing. We -- you -- the
19 Court tends to look to treatises to describe the
20 state of the law.

21 If you asked Gilmore and Black in 1975
22 and 1977 what the state of the law was, they
23 would say we -- the state of the law is that the
24 Respondents are right.

25 And then you would ask them, with the

1 exception of the Fifth Circuit's decision in
2 Orduna, which is a complete fluke. Remember,
3 all the forms say that these things will be
4 litigated and arbitrated in New York and London.

5 Sometimes it escapes those
6 jurisdictions because some third-party who's not
7 a party to the contract, like the crane operator
8 in the port in Orduna, gets involved in the
9 litigation.

10 But were it not for that, Orduna would
11 not even have existed. And the reason Orduna
12 has not been a problem, the reason it has not
13 been regarded as a lot of authority on either
14 side, is that in the wake of Orduna, all these
15 contracts still call for arbitration and
16 litigation in New York and London. That's why
17 there are no follow-on --

18 JUSTICE BREYER: I got that. I knew
19 Gilmore and Black in '75 and I should have asked
20 them. But I didn't.

21 (Laughter.)

22 MR. GOLDSTEIN: Yes. Poor foresight
23 on your end. You could have asked them about
24 the poison ivy. But -- but --

25 JUSTICE KAGAN: I mean, Mr. Goldstein,

1 would it be fair to say Gilmore and Black were
2 incredibly smart men? There are two kinds of
3 treatises in the world. There's the kind of
4 treatise that just sets out the law. And
5 there's the kind of treatise that says we are
6 incredibly smart men and we could do it better.

7 MR. GOLDSTEIN: Yes.

8 (Laughter.)

9 JUSTICE KAGAN: Don't you think
10 Gilmore and Black is the second kind of
11 treatise?

12 MR. GOLDSTEIN: I do, yeah. And I --
13 they -- they, in fact, say it themselves. And
14 --

15 (Laughter.)

16 MR. GOLDSTEIN: -- and I'm sure they
17 appreciated all the citations of the Court.
18 But, if you were to actually cite them in your
19 opinion, you would be citing Gilmore and Black
20 says the rule should be X.

21 My point, or I was trying to start
22 from Justice Alito's question, is what actually,
23 if you thought the text was in equipoise, what
24 would you look at, how the industry actually
25 treats things? You would not cite Gilmore and

1 Black against me on that position, on that
2 question.

3 JUSTICE ALITO: Well, if we thought
4 that the -- the text was perfectly ambiguous,
5 couldn't we say we are incredibly smart people,
6 and we think --

7 (Laughter.)

8 JUSTICE ALITO: -- that the better
9 rule --

10 MR. GOLDSTEIN: Yes.

11 JUSTICE ALITO: -- is the Gilmore and
12 Black rule?

13 MR. GOLDSTEIN: Justice Alito, I
14 learned a long time ago that if the question is
15 couldn't -- could the Supreme Court do X, the
16 answer is yes.

17 (Laughter.)

18 MR. GOLDSTEIN: What -- it would be
19 somewhat of a departure from this Court's
20 decisions saying that you, in these kinds of
21 cases, look to two things, and that is the
22 industry practice and how the United Kingdom has
23 interpreted maritime contracts.

24 And so, while you could depart from
25 that understanding, it would not be in a

1 contract case what the parties actually expect
2 because it is the case that they can get
3 insurance. We have cited the insurance policies
4 in our brief.

5 It would be very strange if the
6 insurance industry said we recognize to the
7 charterers you're undertaking this liability,
8 but we just don't -- we just don't like to give
9 you insurance.

10 We'll give the ship owner the exact
11 same insurance for the same liability, but, for
12 the charterers, we -- we just don't like
13 charterers. That's not true. It doesn't make
14 any sense. And it would be contrary to the fact
15 that this has been the industry's understanding
16 for a long time.

17 I did want to explain the lighterage
18 provision, if I could, which is on 8A. I think
19 what happened here is that my friend
20 inadvertently just skipped some of the language
21 in the contract.

22 And it says at 8A: "The vessel shall
23 load and discharge at any safe place or wharf,"
24 and then here's the part that gets skipped, "or
25 alongside vessels or lighters reachable on her

1 arrival, which shall be designated and procured
2 by the charterer provided the vessel can proceed
3 thereto, lie at, depart, and therefrom always
4 safely afloat," and we agree that's don't hit
5 the bottom or hit something on the bottom, "any
6 lighterage being at the expense, risk, and peril
7 of the charterer.

8 The reason there's a reference to the
9 cost of lighterage is that in the third line the
10 charterer is allowed to designate lighterers.
11 They're allowed to say don't go actually to the
12 port. Unload onto a ship.

13 On the question of where we get our
14 damages, there is a damages provision in the
15 contract, and it is at 20A. It's very simple.
16 Paragraph 23: "Damages for breach of this
17 charter shall include all provable damages and
18 all costs of suit and attorneys' fees incurred
19 in any action hereunder."

20 They promised us a safe port. It was
21 not safe. It was a bad accident. But, if you
22 were to ask where is the textual basis for his
23 position, where is there a reference in the safe
24 port clause to due diligence, where is there a
25 -- a reference to the idea that there will be no

1 responsibility if the port turns out not to be
2 safe and only if they are negligent? It doesn't
3 exist.

4 And just the last point, Justice
5 Gorsuch, on administrability, remember, there is
6 always going to be a question of causation. And
7 they agreed that they're liable if they didn't
8 exercise due diligence.

9 So it's not that their rule just
10 avoids those questions. It just points them --
11 it just puts the burden on another party.

12 Thank you.

13 CHIEF JUSTICE ROBERTS: Thank you,
14 counsel.

15 Five minutes, Mr. Phillips.

16 REBUTTAL ARGUMENT OF CARTER G.

17 PHILLIPS ON BEHALF OF PETITIONERS

18 MR. PHILLIPS: Thank you, Mr. Chief
19 Justice, and, again, may it please the Court:

20 First of all, both of my friends refer
21 specifically to these two forms. There's not a
22 shred of evidence in this case that any form
23 other than the one that was actually implemented
24 in this case was ever considered by the parties.

25 And, indeed, one of the parties has

1 never been in this litigation. So the notion
2 that there should construe what the meaning to
3 these parties were with the language of the
4 contract on the basis of a different contract
5 that we have no idea whether it had any input
6 whatsoever into this case --

7 JUSTICE GINSBURG: But those --

8 MR. PHILLIPS: -- seems to me --

9 JUSTICE GINSBURG: -- those -- those
10 other -- those other contracts were not a
11 mystery. They were well-known and in the trade.
12 You could pick the safe berth or you could pick
13 the due diligence.

14 MR. PHILLIPS: You may have had -- to
15 be sure, Justice Ginsburg, they had the option
16 to do that if they knew about that option, but
17 there's -- again, typically, in a contract case,
18 there's some evidence between the contracting
19 parties that tells you who did what to whom and
20 who made the selections here.

21 All I'm saying is the fact that there
22 are other alternatives does not tell you
23 anything about the contract that the parties
24 understood when they entered in -- into this
25 agreement.

1 With respect to abnormal occurrence,
2 again, that is clearly an atextual analysis,
3 again, by my friends over here. There is no way
4 you can get from the simple language of just
5 safe berth and say but that excludes abnormal --
6 abnormal occurrence.

7 You only do that because, at the end
8 of the day, that is the most sensible way to
9 read "safe berth," which is to say it doesn't --
10 it doesn't make you the insurer against all
11 things that can happen.

12 And I submit to you that if you're not
13 the insurer against all bad things that happen,
14 one of the bad things that you're not insuring
15 against is the anchor in this particular case.

16 It is not a characteristic of this
17 port. This Court specifically defined objects
18 in the sea, submerged objects in the sea that
19 are unknown and unknowable as perils of the sea,
20 not as characteristics of the port.

21 The Court's already been down this
22 road. It ought to follow that same position
23 that it took in G.R. Booth.

24 And then finally, with respect to
25 Gilmore and Black, what they say is the text is

1 being way over-read by the prior decisions.

2 All of those decisions ignore this
3 Court's statement in Atkins that this cannot
4 fairly be immediately assumed to operate as a
5 warranty.

6 And, finally, what they said as a
7 matter of both policy and maritime commerce
8 concerns is that the charterer is in the least
9 effective position to prevent the prob -- the --
10 the injuries that will arise under these
11 circumstances.

12 And it makes no sense to put it on the
13 backs of the party least capable of dealing with
14 the problem because it creates insurance risks,
15 it imposes unlimited potential liability, which
16 this Court has consistently recognized.

17 I'm not saying that this all should
18 fall on -- on Mr. Goldstein's client. Mr.
19 Goldstein, if determined today, if this Court
20 were to decide today that there's no liability
21 for CITGO, he can go back to -- to the federal
22 government and seek complete exoneration because
23 the third-party here, the person who left the
24 anchor in that -- in that waterway, didn't
25 identify it, didn't tell anybody about it,

1 that's the person who should be liable.

2 We can't find that person. There are
3 two ways to deal with that. There's exoneration
4 for him completely because of that third-party,
5 and there's the oil spill fund which would take
6 care of it.

7 My client's already spent more than
8 \$100 million on that fund. It should not be --
9 it is not an equitable result to impose another
10 \$140 million solely on the party least capable
11 of avoiding this particular problem.

12 If there are no other questions, I
13 would urge you to reverse, Your Honor.

14 CHIEF JUSTICE ROBERTS: Thank you,
15 counsel. The case is submitted.

16 (Whereupon, at 11:02 a.m., the case
17 was submitted.)

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