No. _____

In The
Supreme Court of the United States

ZIMMER BIOMET HOLDINGS, INC., et al.,

Petitioners,

v.

UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF CALIFORNIA, SAN FRANCISCO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

In *Atlantic Marine Construction Co.* v. *United States District Court*, 571 U.S. 49, 52 (2013), a district court refused to enforce a forum-selection clause, denying the defendant's motion to transfer based partly on concern for the plaintiff's convenience. The court of appeals then denied the defendant's mandamus petition, and this Court unanimously reversed. "When a defendant files such a motion," the Court held, "a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer."

The district court below also refused to enforce a forum-selection clause. Without acknowledging, much less following, *Atlantic Marine*'s holding on the subject, the district court denied petitioners' motion to transfer based on California's public policy concern for California plaintiffs' convenience. And the Ninth Circuit summarily denied petitioners' mandamus petition notwithstanding the district court's disregard of *Atlantic Marine*.

The questions presented are:

1. Whether a district court's disregard of *Atlantic Marine* is sufficient grounds for mandamus relief.

2. Whether federal courts may refuse to enforce a forum-selection clause because of a public policy of the state in which the plaintiff inappropriately filed suit.

PARTIES TO THE PROCEEDING

Petitioners are Zimmer Biomet Holdings, Inc., Zimmer US, Inc., Biomet U.S. Reconstruction, LLC, Biomet Biologics, LLC, and Biomet, Inc., which were defendants-petitioners below.

Respondents are the United States District Court for the Northern District of California, San Francisco, respondent below, and James Karl, plaintiff below and the real party in interest.

CORPORATE DISCLOSURE STATEMENT

Zimmer Biomet Holdings, Inc., is a publicly traded corporation and has no parent company. No publicly held corporation owns 10% or more of the stock of Zimmer Biomet Holdings, Inc.

Zimmer US, Inc., Biomet U.S. Reconstruction, LLC, Biomet Biologics, LLC, and Biomet, Inc., are wholly owned indirect subsidiaries of Zimmer Biomet Holdings, Inc.

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INTRODUCTION

This petition presents two exceptionally important questions that divide the circuits.

The first is whether a district court's failure to follow *Atlantic Marine*'s standards for enforcing a forum-selection clause is a sufficient basis for mandamus. The Ninth Circuit thinks not. But many circuits recognize that a clearly erroneous transfer ruling is a sufficient basis for mandamus. And the Third and Fifth Circuits grant mandamus when the clear error—as here—is failure to follow *Atlantic Marine*.

Petitioners' motion to transfer in the district court repeatedly invoked *Atlantic Marine*'s holdings on the proper enforcement of forum-selection clauses. But the district court said not a word about them in the course of denying transfer. App. 5-20. The court's lone reference to *Atlantic Marine* appeared in the brief section of the opinion denying petitioners' alternative request for a Rule 12(b)(3) dismissal on grounds of improper venue. App. 20. Worse yet, the district court denied petitioners' motion to compel based on the very consideration that *Atlantic Marine* deemed wholly irrelevant: the "inconvenience" respondent would purportedly suffer if required to litigate in the parties' agreed forum. App. 8 (citation omitted).

Petitioners then argued to the Ninth Circuit that this disregard of *Atlantic Marine* was itself sufficient for mandamus, citing Third and Fifth Circuit decisions granting mandamus solely because of the district court's misapplication of *Atlantic Marine*. But the

Ninth Circuit denied mandamus all the same, summarily stating that petitioners had not satisfied that court's mandamus standards.

This Court should grant certiorari to address the circuits' varying treatment of *Atlantic Marine*. The clear failure of the district court to follow *Atlantic Marine* in this case would have warranted mandamus in the Third Circuit, the Fifth Circuit, and likely many other circuits as well. It should have also prompted a writ of mandamus here.

The second question meriting review is the circuits' entrenched disagreement over the sources of law that can make forum-selection clauses unenforceable. Both before and after *Atlantic Marine*, the Ninth Circuit has held that state public policy—including the state in which the suit was inappropriately brought—can trump the parties' forum selection. So, here, the district court concluded that California's "strong public policy to protect employees from litigating labor disputes outside of their home state"—which reflects the state's concern for the employees' "inconvenience"—made the parties' forum-selection clause unenforceable. App. 7-8 (citation omitted). The Second and Fourth Circuits, on the other hand, have held that it is *federal* public policy that determines whether a forum-selection clause is enforceable in federal court.

Had this suit been brought in a district court within the Second or Fourth Circuits rather than the Ninth, the forum-selection clause's enforceability would not have been dictated by the public policy of

California, or any other state. And the disposition of petitioners' motion to transfer would have been different.

Such circuit-by-circuit disparities in the treatment of forum-selection clauses call out for this Court's resolution. Enforcement of a forum-selection clause should not depend on where the case was filed. That would only "encourage gamesmanship" and "forum shopping," by a plaintiff who had already promised to bring suit in a specified forum. *Atl. Marine*, 571 U.S. at 65 (citation omitted). As this Court has already determined, such a plaintiff must not receive "state-law advantages" from the law of the state "in which the plaintiff inappropriately filed suit." *Ibid.* (citation omitted).

For these reasons and others discussed below, the Court should grant certiorari and reverse.

OPINIONS AND ORDERS BELOW

The order of the Ninth Circuit (App. 1-2) is unreported. The order of the district court (App. 3-35) is not published in the *Federal Supplement* but is available at 2018 WL 5809428.

STATEMENT OF JURISDICTION

The Ninth Circuit issued its order on February 26, 2019 (App. 1-2). This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

Section 1404(a) of Title 28 of the U.S. Code states:

> For the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented.

STATEMENT OF THE CASE

1. This action was brought by respondent James Karl. He alleges he worked as an independent sales representative for petitioners, managing accounts and sales relationships of petitioners' customers and promoting, marketing, and servicing petitioners' products. C.A. App. 6. He asserts that petitioners misclassified him and other sales representatives as independent contractors. *Id.* at 4. That classification purportedly resulted in the denial of overtime compensation, meal and rest periods, and reimbursement for certain business expenses in alleged violation of federal and California law. *Ibid.* Respondent seeks to bring his federal claims as a nationwide collective action under the Fair

Labor Standards Act and to bring his state law claims as a California class action. *Id.* at 9-10.

Respondent signed a sales associate agreement with certain petitioners in August 2015. *Id.* at 59-88. In addition to a choice-of-law provision stating that Indiana law would govern the parties' disputes, respondent also agreed to the following forum-selection clause:

> [T]o the extent any legal proceedings are initiated pursuant to this Agreement or otherwise, the exclusive venue for such litigation shall be a court located in Kosciusko County, Indiana or the United States District Court for the Northern District of Indiana, South Bend Division. Accordingly, Sales Representative [*i.e.*, respondent] irrevocably consents to the personal jurisdiction and exclusive venue in such courts.

Id. at 84; see also *id.* at 75.

Despite this provision, respondent filed his lawsuit in federal district court in San Francisco. *Id.* at 6. Petitioners, headquartered in Indiana, moved to transfer the action to the Northern District of Indiana. *Id.* at 24-25, 56. Respondent argued that enforcement of the forum-selection clause would be "unreasonable" under Ninth Circuit precedent because of "strong public policies of California." *Id.* at 113-15. He did not argue that the clause was the product of fraud or otherwise invalid. See *id.* at 112.

The district court denied petitioners' motion, accepting respondent's argument that enforcement of the

parties' forum-selection clause would be unreasonable. App. 5-6, 14. In particular, the court held that forum-selection clauses are unenforceable when they contravene a strong public policy of the state in which the lawsuit was brought. *Ibid.* In this case, the court found a California statute dispositive. *Id.* at 6-7 (quoting CAL. LAB. CODE § 925(a)(1)).

That statute prohibits an "employer" from "requir[ing] an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would * * * [r]equire the employee to adjudicate outside of California a claim arising in California." *Ibid.* Relying on Ninth Circuit precedent enforcing an analogous California statute, the district court concluded that this provision was a sufficient basis for denying petitioners' motion to transfer because it "expresse[d] a strong public policy of the State of California to protect [Californians] from the expense, inconvenience, and possible prejudice of litigating in a non-California venue." *Id.* at 8 (quoting *Jones* v. *GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000)).

The district court then engaged in a lengthy merits-centered analysis to decide whether respondent fell within the scope of the California statute. *Id.* at 8-20. The statute only purports to apply to "employees," and the core dispute between the parties is whether respondent was an "employee" or an independent contractor. *Id.* at 8-9. Concluding that respondent had pleaded "facts sufficient to show that his misclassification claim (under [California's] ABC test) is plausible,"

the district court held that respondent qualified as an employee for purposes of the statute. *Id.* at 11.[1] After finding the forum-selection clause unenforceable and irrelevant, the district court proceeded to rule that the factors governing transfer under Section 1404(a) did not support a transfer to Indiana federal court. *Id.* at 14-20.

2. Petitioners filed a petition for a writ of mandamus in the Ninth Circuit. Their lead argument was that mandamus was warranted because the district court failed to apply this Court's decision in *Atlantic Marine*, despite petitioners' repeated invocation of that decision. Mandamus Pet. 13-14. Petitioners noted that other circuits had granted mandamus when the district court failed to apply the *Atlantic Marine* framework. *Id.* at 14 (citing *In re Rolls Royce Corp.*, 775 F.3d 671, 681 (5th Cir. 2014); *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 397 (3d Cir. 2017)).

The Ninth Circuit summarily denied petitioners' mandamus petition. App. 1-2. The terse order stated only that petitioners supposedly had "not demonstrated that this case warrants the intervention of this court by means of the extraordinary remedy of mandamus. See *Bauman* v. *U.S. Dist. Court*, 557 F.2d 650 (9th Cir. 1977)." *Ibid.*

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[1] The California Supreme Court has endorsed the "ABC" test to assist in classifying workers as employees or independent contractors. See *Dynamex Operations W.* v. *Superior Court*, 416 P.3d 1, 40 (Cal. 2018).

REASONS FOR GRANTING THE PETITION

In two ways, the Ninth Circuit's approach to forum-selection clauses conflicts with the approach taken by other circuits and with this Court's own decision in *Atlantic Marine*.

First, the Ninth Circuit refuses to correct clear disregard of *Atlantic Marine* through mandamus. Unlike the Ninth Circuit, the Third and Fifth Circuits treat disregard of *Atlantic Marine* as sufficient justification for mandamus, and other circuits likewise treat clearly erroneous transfer rulings as sufficient justification for mandamus.

Second, the Ninth Circuit permits state policy—including the policy of the state where suit was improperly brought—to override federal policy. The Second and Fourth Circuits, consistent with this Court's precedent, have held transfer motions to be governed by federal policy. The relevant federal policy, embodied in the federal transfer statute, strongly supports enforcement of forum-selection clauses, as this Court has made clear. That federal policy should not be open to defeat in federal court simply because of the state in which that federal court happens to sit.

Certiorari is warranted to resolve these circuit conflicts and vindicate the unanimous holding in *Atlantic Marine*.

I. The Ninth Circuit's Refusal To Grant Mandamus Relief Conflicts With Decisions From Other Circuits.

A. The District Court Plainly Disregarded *Atlantic Marine*'s Approach To Forum-Selection Clauses.

In the district court, petitioners stressed *Atlantic Marine*'s clear command that denial of a motion to enforce a forum-selection clause is permissible "[o]nly under extraordinary circumstances unrelated to the convenience of the parties." *Atl. Marine*, 571 U.S. at 62. Yet the convenience of the plaintiff in this case was the driving factor behind the district court's refusal to enforce the forum-selection clause to which he had agreed.

Without mentioning *Atlantic Marine*, the district court gave decisive weight to a California statute that generally forbids forum-selection clauses in the employment context. App. 6. In particular, the statute purportedly bars enforcement of forum-selection clauses that would "[r]equire the employee to adjudicate outside of California a claim arising in California." *Id.* at 7 (quoting CAL. LAB. CODE § 925(a)(1)). Relying on Ninth Circuit precedent interpreting "an analogous statute," the district court concluded that this statute effectively makes the parties' forum-selection clause "unenforceable" regardless of whether it is valid otherwise. *Id.* at 7-8. The goal of both California statutes is "to protect [Californians] from the expense, inconvenience, and possible prejudice of litigating in a

non-California venue." *Id.* at 8 (quoting *Jones*, 211 F.3d at 498).

After *Atlantic Marine*, that is plainly not a permissible basis for refusing to enforce a valid forum-selection clause in federal court. This Court could not have been clearer that "[w]hen parties agree to a forum-selection clause, they waive the right to challenge the preselected forum as inconvenient or less convenient for themselves or their witnesses, or for their pursuit of the litigation." 571 U.S. at 64. At the very outset of its opinion, the Court gave the same instruction: "a district court should transfer the case unless extraordinary circumstances unrelated to the convenience of the parties clearly disfavor a transfer." *Id.* at 52. Toward the end of its opinion, the Court echoed this point, specifically faulting the district court in *Atlantic Marine* for considering the plaintiff's convenience: "the District Court should not have given *any weight* to [the plaintiff's] current claims of inconvenience." *Id.* at 67 (emphasis added).

The district court here committed the same mistake. It refused to enforce the parties' clause because of concern for the plaintiff's "inconvenience," despite *Atlantic Marine*'s unmistakable instructions not to do so. App. 8 (quoting *Jones*, 211 F.3d at 498).

Nor is there any argument that the existence of the California statute makes *Atlantic Marine* irrelevant. As the district court acknowledged, the statute transparently reflects the California legislature's concern for the convenience to California employees of

litigating in California courts. App. 8. But *Atlantic Marine* says that a motion to transfer under a forum-selection clause may be denied "[o]nly under extraordinary circumstances unrelated to the convenience of the parties." 571 U.S. at 62. The justification for denial here was not "unrelated to the convenience of the parties," and there will be nothing "extraordinary" about this case if the district court's ruling stands.

On the contrary, it will quickly become the rule, not the exception, in California employment disputes that forum-selection clauses are unenforceable. In fact, in the short time since the district court's decision below, numerous plaintiffs have successfully invoked that decision and the Ninth Circuit authority on which it rests to defeat similar motions to transfer. See *Fleming* v. *Matco Tools Corp.*, No. 19-cv-00463, 2019 WL 1980696, at *3, *8 (N.D. Cal. May 3, 2019); *Alabsi* v. *Savoya, LLC*, No. 18-cv-06510, 2019 WL 1332191, at *6-7 (N.D. Cal. Mar. 25, 2019); *Friedman* v. *Glob. Payments Inc.*, No. CV 18-3038, 2019 WL 1718690, at *3 (C.D. Cal. Feb. 5, 2019); *Depuy Synthes Sales Inc.* v. *Stryker Corp.*, No. ED CV 18-1557, 2019 WL 1601384, at *3-4 (C.D. Cal. Feb. 5, 2019).

The district court's lone acknowledgement of *Atlantic Marine* was a sentence elsewhere in the opinion addressing a completely separate issue. Having denied petitioners' motion for *transfer*, the court then turned to petitioners' alternative motion for *dismissal* on grounds of improper venue. App. 20. Having ignored *Atlantic Marine*'s implications for the transfer motion, the court nonetheless gave the decision

prominence in rejecting petitioners' motion to transfer: "An action filed in a district that satisfies 28 U.S.C. § 1391 may not be dismissed under Federal Rule of Civil Procedure 12(b)(3). *Atlantic Marine Const. Co.* v. *U.S. Dist. Court for W. Dist. of Texas*, 571 U.S. 49, 55-56 (2013)." *Ibid.* That statement of the law is correct, but it does not explain or excuse the district court's complete disregard of *Atlantic Marine*'s holdings about how to resolve a motion to transfer, which made up over half of the Court's opinion. See *Atl. Marine*, 571 U.S. at 59-68.

B. Other Circuits Would Have Granted Mandamus Relief In This Case.

In the Ninth Circuit, petitioners argued that the district court's disregard of *Atlantic Marine* was a sufficient basis for mandamus all on its own. But the Ninth Circuit disagreed, summarily holding that mandamus was not warranted on this ground (or any of the others petitioners raised). App. 1-2. Under the Ninth Circuit's approach to mandamus in the context of transfer rulings, not even a "clear legal error" is "sufficient for mandamus relief." *In re Bozic*, 888 F.3d 1048, 1054-55 (9th Cir. 2018); see also *In re Octagon, Inc.*, 600 F. App'x 581, 581 (9th Cir. 2015) ("Even if the district court erred in denying the motion to transfer [under a forum-selection clause], which we need not decide, the remaining *Bauman* factors weigh against mandamus relief.").

Other circuits take the opposite approach, and at least two—the Third and Fifth Circuits—have already done so when facing a district court's failure to follow *Atlantic Marine*. See *Rolls Royce*, 775 F.3d at 681 ("By failing to properly consider the impact of *Atlantic Marine* in considering the severance and transfer motion, we conclude that the district court erred in its construction of law, and thus mandamus is appropriate."); *Howmedica*, 867 F.3d at 397 ("Because we conclude the District Court erred in its application of *Atlantic Marine* * * * , we will issue a writ of mandamus[.]").

If anything, it was far less obvious in those cases that the district court had defied *Atlantic Marine*. Both involved parties who had agreed to a forum-selection clause and other parties who had *not* agreed to the clause. See *Rolls Royce*, 775 F.3d at 679; *Howmedica*, 867 F.3d at 403. Here, the analysis is much more straightforward: everyone in this case validly agreed to the clause, and yet the district court refused to enforce it based on the convenience of one of the parties—exactly what *Atlantic Marine* prohibits.

Consistent with its approach in this case, the Ninth Circuit has determined that mandamus petitioners aggrieved by a failure to enforce a forum-selection clause can—and generally must—wait until after final judgment to contest such rulings. See *In re Orange, S.A.*, 818 F.3d 956, 964 (9th Cir. 2016); cf. *Bozic*, 888 F.3d at 1056 n.8 (citing *Wash. Pub. Utils. Grp.* v. *U.S. Dist. Court*, 843 F.2d 319, 325 (9th Cir. 1987)).

Other courts recognize, however, that transfer rulings are effectively unreviewable apart from mandamus, making mandamus a party's only hope of securing the bargained-for benefit of litigating in the agreed-upon forum. Outside the Ninth Circuit, "[i]t is well established that mandamus is available to contest a patently erroneous error in an order denying transfer of venue." *In re EMC Corp.*, 677 F.3d 1351, 1354 (Fed. Cir. 2012); see also, *e.g.*, *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 56 (3d Cir. 2018) ("In the venue transfer context, the three-factor mandamus test collapses into the first factor * * * because transfer orders 'as a class' meet the second and third requirements."); *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc) ("[T]he harm—inconvenience to witnesses, parties and other[s]—will already have been done by the time the case is tried and appealed, and the prejudice suffered cannot be put back in the bottle."); *In re Nat'l Presto Indus., Inc.*, 347 F.3d 662, 663 (7th Cir. 2003) ("[Defendant] would not have an adequate remedy for an improper failure to transfer the case by way of an appeal from an adverse final judgment because it would not be able to show that it would have won the case had it been tried in a convenient forum."); *In re Apple, Inc.*, 602 F.3d 909, 912 (8th Cir. 2010) (per curiam) ("The usual post-judgment appeal process is not an adequate remedy for an improper failure to transfer.").

A party's ability to enforce a forum-selection clause should not turn on the idiosyncrasies of the circuit in which the case was brought. *Atlantic Marine*

itself explains why. It held, among other things, that "when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum, a § 1404(a) transfer of venue will not carry with it the original venue's choice-of-law rules." 571 U.S. at 64. That holding departs from the usual rule in Section 1404(a) transfers. See *id.* at 65 (citing *Van Dusen* v. *Barrack*, 376 U.S. 612, 639 (1964)). But the departure is justified precisely because the plaintiff agreed to the forum-selection clause: given that agreement, the plaintiff is not entitled to "the law of the court in which the plaintiff inappropriately filed suit." *Ibid.* From this holding that such plaintiffs cannot retain preferable choice-of-law rules after transfer, it follows *a fortiori* that a plaintiff should not be able to altogether escape enforcement of the forum-selection clause because of the law of the state in which the plaintiff inappropriately filed suit. That is what happened here.

As this Court knows from *Atlantic Marine*, mandamus petitions are a common and even necessary vehicle for appellate review in this setting. In that case, too, the court of appeals denied mandamus—and this Court granted certiorari and reversed. *Id.* at 54. It should do the same in this case.

II. The Ninth Circuit's Deference To State Public Policy Conflicts With Decisions From The Second And Fourth Circuits And Decisions From This Court.

A. The Circuits Are Divided Over Whether State Or Federal Policy Controls Forum-Selection Clause Enforcement.

As noted above, the district court refused to enforce the parties' forum-selection clause because of a California statute, CAL. LAB. CODE § 925(a)(1). This statute says in relevant part that "[a]n employer shall not require an employee who primarily resides and works in California, as a condition of employment, to agree to a provision that would * * * [r]equire the employee to adjudicate outside of California a claim arising in California." *Ibid.*

According to the district court, this statute expresses California's "strong public policy to protect employees from litigating labor disputes outside of their home state." App. 7. The district court believed that purported state policy was sufficient grounds for denying enforcement of the clause based on the Ninth Circuit's decision in *Jones*. *Id.* at 7-8 ("In an analogous context, our court of appeals made unenforceable a forum-selection clause due to California's strong public policy as expressed in an analogous statute[.]").

In *Jones*, the Ninth Circuit considered the effect of a California statute that prohibited forum-selection clauses choosing "a non-California forum for claims arising under or relating to a franchise located in the

state." 211 F.3d at 498. The court of appeals affirmed the district court's refusal to enforce the parties' forum-selection clause because the plaintiff "chose California as the forum for his lawsuit, and his choice [was] supported by California's strong public policy to provide a protective local forum for local franchisees." *Id.* at 499.

The Ninth Circuit has stuck with that approach to forum-selection clauses through the years. In *Doe 1* v. *AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009) (per curiam), the court similarly refused to enforce a forum-selection clause because a California appellate court had previously declared that the very same forum-selection clause "contravene[d] a strong public policy of California." In that case, the California public policy was to protect Californians' procedural ability to proceed through class litigation and substantive right to remedies under California consumer law. *Id.* at 1084.

Even after *Atlantic Marine*, moreover, the Ninth Circuit continues to follow the principles recognized in *Jones* and *Doe 1*. See, *e.g.*, *Yei A. Sun* v. *Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1088-91 (9th Cir. 2018) (citing *Doe 1* and reaffirming the principle that state policy can be determinative); *Adema Techs., Inc.* v. *Wacker Chem. Corp.*, 657 F. App'x 661, 663 (9th Cir. 2016) ("Enforcement is unreasonable and unjust * * * if 'enforcement would contravene a strong public policy' of California." (citation omitted)). And district courts within the Ninth Circuit continue to follow these circuit court precedents despite *Atlantic Marine*. App. 8 (quoting *Jones*, 211 F.3d at 498); *Fleming*, 2019

WL 1980696, at *3 (same); *Alabsi*, 2019 WL 1332191, at *6 ("*Jones* makes clear that a strong [state] public policy alone can invalidate a forum selection clause.").

The First and Fifth Circuits agree that the public policy of the state in which the lawsuit was filed can make a forum-selection clause unenforceable. See *Huffington* v. *T.C. Grp., LLC*, 637 F.3d 18, 23-24 (1st Cir. 2011); *Ginter ex rel. Ballard* v. *Belcher, Prendergast & Laporte*, 536 F.3d 439, 442 (5th Cir. 2008); *Barnett* v. *DynCorp Int'l, L.L.C.*, 831 F.3d 296, 303-04 (5th Cir. 2016); *Al Copeland Invs., L.L.C.* v. *First Specialty Ins. Corp.*, 884 F.3d 540, 543 (5th Cir. 2018).

But other circuits reject that approach. Both the Second and Fourth Circuits have concluded that the "public policy" relevant to the forum analysis in a federal court is *federal* public policy.

For instance, in *Martinez* v. *Bloomberg LP*, 740 F.3d 211, 219-20 (2d Cir. 2014), the Second Circuit reasoned that such a rule was necessary to vindicate the "strong federal public policy supporting the enforcement of forum selection clauses": "To ensure that federal courts account for both the important interests served by forum selection clauses and the strong public policies that might require federal courts to override such clauses, * * * federal law must govern their enforceability." The court then reiterated, "In determining whether enforcement of a forum selection clause would contravene a strong public policy of the forum in which suit is brought, we look to *federal* cases or statutes." *Id.* at 228 (citation, quotation marks, and

brackets omitted; emphasis added); see also *Midamines SPRL Ltd.* v. *KBC Bank NV*, 601 F. App'x 43, 46 (2d Cir. 2015) (relying on *Martinez* to conclude that New York's alleged public policy against enforcement of parties' forum-selection clause was not enough to prove the clause unreasonable).

The Fourth Circuit is in accord and has identified additional reasons why the public policy of the state in which suit was brought cannot control a forum-selection clause's enforcement. *Albemarle Corp.* v. *AstraZeneca UK Ltd.*, 628 F.3d 643, 652 (4th Cir. 2010). First, allowing state policy to drive federal courts' application of the federal transfer and venue statutes would impermissibly subject the federal courts to state procedural rules. *Ibid.* Such state law "would be preempted by federal law." *Ibid.* Second, this Court "specifically addressed and countered" state skepticism about the enforcement of forum-selection clauses in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 9 (1972), establishing that, "in federal court, forum selection clauses enjoy a presumption of enforceability." *Albemarle*, 628 F.3d at 652. And of course "it can hardly be a strong public policy to countermand the very policy that the Supreme Court adopted in *The Bremen*." *Ibid.* As discussed next, that is all the clearer today.

B. The Ninth Circuit's Approach Is Wrong Under This Court's Precedents.

Two of this Court's precedents since *Bremen* expose the error in the Ninth Circuit's persistent deference to the public policy of the state in which the suit was brought.

Even before *Atlantic Marine*, this Court rejected the notion that Section 1404(a) transfer motions premised on a forum-selection clause are "controlled by [state] law." *Stewart Org., Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 24 (1988). In *Stewart*, a plaintiff brought suit in Alabama federal court, and the defendant filed a Section 1404(a) transfer motion based on the parties' selection of a federal New York forum. *Ibid.* The district court denied the motion on the premise that "the transfer motion was controlled by Alabama law," which "look[ed] unfavorably upon contractual forum-selection causes." *Ibid.*

This Court showed why that was a mistaken premise. "Alabama's categorical policy disfavoring forum-selection clauses" cannot override the analysis prescribed by Congress in Section 1404(a). *Id.* at 30. Section 1404(a) is "a procedural rule," *id.* at 32, and it is well settled that "federal courts are to apply * * * federal procedural law," not state procedural law, *Hanna* v. *Plumer*, 380 U.S. 460, 465 (1965). So the Court in *Stewart* readily concluded that Alabama's public policy against enforcement of forum-selection clauses could not "exist side by side" with the prescriptions of Section 1404(a), and as between the two, "the

instructions of Congress" were necessarily "supreme" in a federal court. 487 U.S. at 30-31. Hence Section "1404(a) govern[ed] the parties' dispute notwithstanding any contrary Alabama policy." *Id.* at 30 n.9.

Atlantic Marine only bolsters that conclusion. It reiterated that Section 1404(a) provides statutory authority to enforce a forum-selection clause. *Atl. Marine*, 571 U.S. at 59-60. And "because the overarching consideration under § 1404(a) is whether a transfer would promote 'the interest of justice,' 'a valid forum-selection clause should be given controlling weight in all but the most exceptional cases.' " *Id.* at 63 (citation and brackets omitted). Three principles followed, each underscoring the error of the denial of petitioners' motion in this case:

First, "the plaintiff's choice of forum merits no weight." *Ibid.* In this case, however, the plaintiff's decision to sue in California federal court received conclusive weight. The district court entirely based its decision not to transfer on the policy of the state in which respondent chose to bring suit, believing that the forum state's public policy governed the inquiry. App. 6.

Second, "a court evaluating a defendant's § 1404(a) motion to transfer based on a forum-selection clause should not consider arguments about the parties' private interests," including arguments that "the preselected forum [is] inconvenient." *Atl. Marine*, 571 U.S. at 64. As discussed above, however, the district court relied on state policy aimed at saving California

employees from the "expense, inconvenience, and possible prejudice of litigating in a non-California venue." App. 8 (quoting *Jones*, 211 F.3d at 498).

Third, "when a party bound by a forum-selection clause flouts its contractual obligation and files suit in a different forum," it is not entitled to "state-law advantages that might accrue from the exercise of the plaintiff's venue privilege." *Atl. Marine*, 571 U.S. at 64-65 (citation and brackets omitted). Of course, allowing the public policy of the state in which suit was inappropriately filed to trump the usual Section 1404(a) analysis, as the district court did here, is an even greater state-law advantage than the choice-of-law advantage that the Court unanimously rejected in *Atlantic Marine*. See *ibid.*

The district court, following Ninth Circuit precedent, believed that use of state public policy was justified by this Court's decision in *Bremen*. App. 5. Although the Court did say in that admiralty case that "[a] contractual choice-of-forum clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought," *Bremen*, 407 U.S. at 15, the Court was talking about the policy of the *federal* forum, not the policy of the state in which that federal court sits.

That is evident from the principal case on which *Bremen* relied for this proposition, *Boyd* v. *Grand Trunk Western Railroad Co.*, 338 U.S. 263, 265-66 (1949) (per curiam). There, the Court declined to enforce a forum-selection clause because it conflicted

with a *federal* policy expressed in Section 6 of the Federal Employers' Liability Act, 45 U.S.C. § 56. *Ibid.* Concluding that a federal statute can override the federal policy supporting federal courts' enforcement of forum-selection clauses in no way suggests that a state statute can do likewise.

Here, Section 1404(a) and the policy it embodies "control[] [petitioners'] request to give effect to the parties' contractual choice of venue." *Stewart*, 487 U.S. at 28-29. The import of that statute and federal policy are clear, and they are "served by holding [the] parties to their bargain." *Atl. Marine*, 571 U.S. at 66.

III. This Court's Review Is Needed Now.

There is no reason to let these important issues wait for another day. Several courts in the Ninth Circuit have already followed the lead of the district court in this case and denied motions to enforce forum-selection clauses based on the same California statute and Ninth Circuit precedent. *Alabsi*, 2019 WL 1332191, at *6-7; *Friedman*, 2019 WL 1718690, at *3; *Depuy*, 2019 WL 1601384, at *3-4. And in response to the district court's order in this case, the Ninth Circuit adhered to its unusually strict approach to mandamus and showed no intention of enforcing this Court's instructions in *Atlantic Marine*. Other courts would have decided both issues differently, and such a "threat to the goal of uniformity of federal procedure" is ample reason for certiorari. *Hanna*, 380 U.S. at 463.

Without this Court's clear reaffirmation of *Atlantic Marine* and the enforceability of forum-selection clauses, lower courts and parties will continue to spend time and resources in transfer disputes, only to encounter varying results based solely on where the case arose. "Nothing is more wasteful than litigation about where to litigate." *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting). And where the wasteful litigation stems from lower courts' refusal to follow and enforce this Court's precedent, it deserves an especially swift end.

CONCLUSION

For all these reasons, the Court should grant the petition for a writ of certiorari.

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