No. 18-1484

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

REPLY BRIEF FOR THE PETITIONERS

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CORPORATE DISCLOSURE STATEMENT

The corporate disclosure statement included in the petition for a writ of certiorari remains accurate.

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REPLY BRIEF FOR THE PETITIONERS

Respondent fails to resolve the stark conflict between the rulings below and this Court's decisions. In *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 30-31 (1988), the Court held that state policy cannot trump enforcement of forum-selection clauses under 28 U.S.C. § 1404(a). It then explained how to apply § 1404(a) in *Atlantic Marine Construction Co.* v. *United States District Court*, 571 U.S. 49, 62-68 (2013), holding that plaintiffs must not receive state-law advantages because they refused to file suit in the contractually chosen forum, nor avoid transfer based on the alleged inconvenience of litigating there. Yet the district court below held that state policy *can* trump the federal-law analysis *because* respondent filed suit in a state that wishes to spare respondent the alleged inconvenience of litigating in the contractually chosen forum.

Such disregard for the Court's precedents would have prompted mandamus in many circuits, but not the Ninth. It denied mandamus out of hand, undoubtedly because of two well-established lines of Ninth Circuit case law, one on mandamus standards and the other on the role of state policy. Each line of cases conflicts with the precedents of several other circuits, and respondent cannot explain these conflicts away either.

Facing two questions worthy of certiorari, the brief in opposition posits case-specific reasons to deny review. These arguments are meritless. This is an appropriate vehicle for resolving these pressing questions

over the enforceability of forum-selection clauses and ensuring adherence to *Atlantic Marine* and *Stewart*.

I. Respondent's Claims Are Clearly Covered By The Forum-Selection Clauses.

Respondent's lead argument rests on the district court's July 2 ruling, which postdates the erroneous transfer denial *and* the filing of the petition for certiorari. The Court should not even consider this ruling: it is not under review here and should never have been entered because the earlier transfer denial rested on clear legal error. But the ruling is irrelevant regardless, for it addressed a question unrelated to respondent himself.

The July 2 ruling granted respondent's motion to certify a nationwide collective action under the Fair Labor Standards Act (FLSA). The issue was whether respondent could "represent *other* sales representatives who were classified as independent contractors and allegedly subsequently denied overtime pay under the FLSA." Resp. App. 3a (emphasis added). Because the district court's transfer ruling rested on California law, petitioners sought to limit the collective action to California residents, leaving non-Californians to litigate in Indiana. *Id.* at 6a-7a.

In its certification reply brief, however, respondent for the first time challenged the applicability of the two forum-selection clauses to the claims in this action. See D. Ct. Doc. 59, at 13-16 (May 23, 2019). Respondent contended that those forum-selection clauses

do not apply to the FLSA claims of the absent sales representatives he seeks to represent: the first clause because it supposedly is limited to claims based on the enforcement of restrictive covenants, and the second because it appears in Exhibit C to the Sales Associate Agreement, which allegedly does not bind Sales Associate Agreement signatories. Resp. App. 8a-9a. The district court sided with respondent and concluded that he "may therefore represent the FLSA claim nationwide for other sales representatives who are similarly situated." *Id.* at 13a.

But none of this bears on whether respondent *himself* is bound by the second forum-selection clause—for a simple reason. Regardless of whether Exhibit C applies to absent collective members who merely signed the Sales Associate Agreement, respondent specifically agreed to be bound by Exhibit C terms. He deliberately wrote his name in the blank space at the top of Exhibit C, agreeing, "I, Jim Karl, am or shall be a sales representative ('Sales Representative') of Zimmer Biomet," and then signed and dated Exhibit C at the bottom. C.A. App. 82, 85. He also personally initialed every page in between, including the page that contains Exhibit C's forum-selection clause, which undisputedly applies to every possible dispute between the contracting parties. *Id.* at 84. Whatever its effect on other collective members, Exhibit C is certainly binding on respondent. So the district court's limitation of the other clause to restrictive-covenant disputes is irrelevant to the appropriate forum for respondent's claims.

Consistent with his unequivocal assent to Exhibit C, respondent did not dispute that he was subject to both forum-selection clauses in opposing petitioners' motion to transfer. *Id.* at 113-17. That motion contended that the two agreements "together governed Plaintiff's business relationship * * * with Defendants" and that both clauses were "applicable to Plaintiff." *Id.* at 25, 38-39. Respondent's opposition did not argue otherwise. Rather than arguing that his claims were outside either forum-selection clause, respondent's lone challenge to transfer was that "enforcement of Zimmer Biomet's forum selection clause would contravene a strong public policy of California." *Id.* at 115. The district court appropriately took the clauses' applicability to respondent as a given, quoting Exhibit C's language in particular. Pet. App. 6.[1]

In its July 2 certification ruling, the district court did not revisit its earlier conclusion in relation to respondent. It did not address his express assent to Exhibit C at all. The court's attention was on whether "*other* sales representatives" were bound by a forum-selection clause that would make a nationwide collective action improper. Respondent is therefore wrong to assert that the district court found Exhibit C inapplicable to him, and he offers no citation to support that characterization.

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[1] The district court's quotation from Exhibit C is why the petition for certiorari quoted the same clause, while also citing the other. See Pet. 5 (citing C.A. App. 75, 84).

Nor did petitioners concede Exhibit C's inapplicability to respondent. Respondent's contrary assertion relies on one selective quotation characterizing *respondent's* position and its implications for whether absent collective members' claims are governed by the other clause, but respondent misleadingly omits the start of the quotation saying that petitioners were characterizing what "Plaintiff [had] admitted in his Reply." See D. Ct. Doc. 68, at 3 (June 10, 2019) (citing respondent's certification reply brief).

In all events, the district court's reading of the two forum-selection clauses should be rejected. The first applies to *all* legal proceedings between the parties: "to the extent *any* legal proceedings are initiated pursuant to the restrictive covenants set forth above *or otherwise*, the exclusive venue for such litigation shall be a court [in Indiana]." C.A. App. 75 (emphasis added). The district court effectively rewrote "otherwise" as "elsewhere," limiting the clause to claims under restrictive covenants wherever such covenants are found. But the actual wording shows that the clause applies whether the legal proceedings rest on the agreement's restrictive covenants or some other ground.

There is likewise no justification for setting aside Exhibit C's clause. The Sales Associate Agreement's integration provision declares that "all exhibits" are "include[d]" in the Agreement. C.A. App. 74; see also Resp. App. 11a-12a. As the district court recognized in concluding that Exhibit C's restrictive covenants are binding between the parties, this "integration clause

itself contemplate[s] that other documents outside the agreement (but attached to or incorporated by reference) * * * [are] also controlling." Resp. App. 12a. Yet the court never explained why Exhibit C's forum-selection clause is not equally controlling.

The district court's July 2 order thwarts the parties' clearly chosen forum. It should not be counted as a reason for denying certiorari.

II. The Rulings Below Conflict With The Decisions Of This Court And Other Circuits.

1. Respondent does not dispute that the district court refused to enforce the parties' forum-selection clause because of respondent's personal convenience and the state in which respondent chose to file suit—considerations *Atlantic Marine* forbids. Pet. 21-22; *Atl. Marine*, 571 U.S. at 63-65. Nor does he dispute that the district court never even mentioned *Atlantic Marine* in its § 1404(a) analysis.

Respondent instead contends (at 10) that the analysis is "consistent with *Atlantic Marine*" because the district court was deciding whether the clause was "valid." But the court never addressed the clause's validity—the words "valid" and "invalid" appear nowhere in the opinion, and "validity" appears only in a quotation from the forum-selection clause. Pet. App. 6. Nor, more fundamentally, is respondent right to suppose that states may defeat forum-selection clauses' enforcement in federal court, for reasons *Atlantic Marine* declared impermissible, under the rubric of validity.

On the contrary, *Atlantic Marine* requires a "*contractually* valid" clause. 571 U.S. at 62 n.5 (emphasis added). Validity is measured by basic contract-formation principles, not state law's hostility to forum-selection clauses. And that is how this Court has always construed forum-selection clauses' validity, distinguishing between "unreasonable and unjust" clauses and clauses that are "invalid for such reasons as fraud or overreaching." *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972). Respondent drew much the same distinction in opposing transfer below. C.A. App. 112. Yet as the petition noted (without contradiction from respondent), respondent has never challenged the clauses' contractual validity by arguing that they were procured through fraud or overreaching. Pet. 5.

Respondent also fails to reconcile the Ninth Circuit's denial of mandamus with the holdings of other circuits. He mentions *In re Rolls Royce Corp.*, 775 F.3d 671, 681 (5th Cir. 2014), only in passing (at 13), and says nothing about *In re Howmedica Osteonics Corp.*, 867 F.3d 390, 397 (3d Cir. 2017). But both granted mandamus precisely because the district court had failed to follow *Atlantic Marine*. Pet. 13. Respondent cannot harmonize those cases with the Ninth Circuit's refusal to do the same.

Nor can he negate the Ninth Circuit's broader aversion to mandamus for forum rulings. While the Ninth Circuit's five-factor *Bauman* test partly overlaps

the three-factor tests applied elsewhere,[2] it is far more difficult to satisfy the Ninth Circuit's test. And, tellingly, respondent identifies *zero* grants of mandamus in Ninth Circuit forum disputes. The Ninth Circuit routinely holds that there are other adequate means of relief besides mandamus for having to litigate in the wrong forum, because such litigants can wait until final judgment for an appeal. *E.g.*, *In re Orange, S.A.*, 818 F.3d 956, 963-64 (9th Cir. 2016); *In re Octagon, Inc.*, 600 F. App'x 581, 581 (9th Cir. 2015); *Wash. Pub. Utils. Grp.* v. *U.S. Dist. Court*, 843 F.2d 319, 325 (9th Cir. 1987).[3]

The Third, Fifth, Seventh, Eighth, and Federal Circuits categorically hold the opposite. Pet. 14 (collecting cases). Indeed, the Third Circuit even says that two of its three mandamus factors—lack of other

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[2] The Ninth Circuit includes some factors that other circuits do not consider, such as whether the ruling involves an oft-repeated error or legal issues of first impression. *Bauman* v. *U.S. Dist. Court*, 557 F.2d 650, 655 (9th Cir. 1977).

[3] Respondent claims that *Orange* is irrelevant because it involved *forum non conveniens* rather than § 1404(a). This is a distinction without a difference: "Section 1404(a) is merely a codification of the doctrine of *forum non conveniens* for the subset of cases in which the transferee forum is within the federal court system." *Atl. Marine*, 571 U.S. at 60. In fact, *Orange*'s rejection of the petitioner's concerns about litigation expense relied on the Ninth Circuit's § 1404(a) precedents. 818 F.3d at 964 (citing, *inter alia*, *Wash. Pub. Utils.*, 843 F.2d at 325, and *Am. Fidelity Fire Ins. Co.* v. *U.S. Dist. Court*, 538 F.2d 1371, 1375 n.2 (9th Cir. 1976)). Nor does *Lauro Lines s.r.l.* v. *Chasser*, 490 U.S. 495, 496 (1989), suggest mandamus operates differently in these areas: it addressed appeals as of right through the collateral order doctrine, not mandamus.

adequate remedies and irreparable injury—"collapse[]" wholly into the first—clear and indisputable error. *Howmedica*, 867 F.3d at 401; accord *In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 56 (3d Cir. 2018). A clear legal error over forum-selection clause enforcement will justify mandamus relief in these circuits, but not in the Ninth. See Pet. 12.

Further illustrating the conflict over whether other means of relief are adequate, the Fifth Circuit acknowledges the "inconvenience" of litigating outside the chosen forum, which "will already have been done by the time the case is tried and appealed" and "cannot be put back in the bottle." *In re Volkswagen of Am., Inc.*, 545 F.3d 304, 319 (5th Cir. 2008) (en banc). But the Ninth Circuit dismisses any concerns about "the expense and inconvenience" that flows from restricting review to post-judgment appeals. *Wash. Pub. Utils.*, 843 F.2d at 325; see also, *e.g.*, *Orange*, 818 F.3d at 964.

Respondent is left to lean (at 14-15, 19) on the cursory nature of the Ninth Circuit's reasoning. There is no question, however, that the Ninth Circuit rejected petitioners' argument that mandamus was appropriate because of the district court's clear failure to apply *Atlantic Marine*. The Ninth Circuit did so either because it disagreed that the district court clearly erred or because clear error is insufficient in the Ninth Circuit. The decision thus conflicts with either this Court's decisions or other circuits'. Either way, certiorari is warranted.

2. Respondent likewise cannot escape the conflicts surrounding the second question presented. *Stewart* specifically rejected the contention "that Alabama law may refuse to enforce forum-selection clauses providing for out-of-state venues as a matter of state public policy," and faulted the district court for applying "Alabama's categorical policy disfavoring forum-selection clauses." 487 U.S. at 30. States cannot declare a forum-selection clause "automatically void" when federal law dictates otherwise: "§ 1404(a) controls the issue" in federal court, and "a state policy focusing on a single concern or a subset of the factors identified in § 1404(a) would defeat [Congress's] command" contravening federal supremacy on matters of federal procedure. 487 U.S. at 31 & n.10.

Respondent never confronts *Stewart*. True, he purports to derive from *Stewart* (at 22) the view that state public policy may be given some weight in the analysis. But respondent fails to acknowledge that he cites the *Stewart concurrence* for that view, which the Court did not endorse. See *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring). Besides, the district court here did not give state policy *some* weight; it gave it dispositive weight, just like the reversed district court in *Stewart*, 487 U.S. at 30. This departure from *Stewart* justifies certiorari on its own.

But here there is also recognized conflict and confusion between the circuits over the proper interpretation of this Court's precedents. "The circuits are split around the question of whether a federal court sitting in diversity should apply federal or state law to

determine the enforceability of a forum selection clause designating a domestic forum." *Martinez* v. *Bloomberg LP*, 740 F.3d 211, 222 (2d Cir. 2014).

The Second and Fourth Circuits explain why applying federal law is the better approach, and the Fourth has squarely rejected the argument that prevailed here—namely, "that enforcement of the forum selection clause would violate a strong public policy of [the state in which suit was brought]." *Albemarle Corp.* v. *AstraZeneca UK Ltd.*, 628 F.3d 643, 651 (4th Cir. 2010). Among other reasons, accepting that argument would contravene federal supremacy over federal procedure, much as *Stewart* explained. *Id.* at 652.

Meanwhile, the Ninth Circuit has repeatedly allowed state public policy to defeat enforcement of a forum-selection clause, including in the *Jones* case followed by the district court here. *Jones* v. *GNC Franchising, Inc.*, 211 F.3d 495, 498 (9th Cir. 2000); see also *Doe 1* v. *AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009) (per curiam). The Ninth Circuit and its district courts continue to treat these cases as good law even after *Atlantic Marine* and despite *Stewart*, and the First and Fifth Circuits take the same view. Pet. 17-18. This entrenched conflict is not going away without this Court's intervention.

III. Respondent's Waiver Argument Fails.

Finally, the Court should reject respondent's assertion that petitioners needed to challenge the Ninth Circuit's precedent on state public policy in the lower courts. Those who seek certiorari need not make futile attacks on a "binding precedent for the panel below." *United States* v. *Williams*, 504 U.S. 36, 44 (1992). In fact, the Court often grants certiorari on issues that went unchallenged in the lower courts because of those courts' binding precedent.[4]

Such a rule would be especially perverse in the mandamus setting, where success depends on a clear and indisputable entitlement to relief. An attack on *Jones* and its progeny below not only would have made no difference, it would have detracted from petitioners' other arguments.

All the petition's arguments are properly before this Court. The district court rested its ruling entirely on *Jones*, and that ruling in turn was the basis for the Ninth Circuit's mandamus decision. The lower courts passed upon the proper role of state policy, and that is enough to properly place the question before this Court. See, *e.g.*, *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

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[4] See, *e.g.*, Reply Brief for Petitioner, *Lozman* v. *City of Riviera Beach*, No. 17-21 (Oct. 18, 2017); Reply Brief for Petitioner, *Leidos, Inc.* v. *Ind. Pub. Ret. Sys.*, No. 16-581 (Feb. 21, 2017); Reply Brief for the Petitioners, *Gelboim* v. *Bank of Am.*, No. 13-1174 (June 3, 2014).

In addition, petitioners may challenge the lower courts' reliance on state public policy because they are not advancing a "new claim" but simply "a new argument to support what has been [their] consistent claim:" § 1404(a) requires transfer to the parties' mutually chosen forum. *Ibid.* "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992).

The Ninth Circuit's departure from *Stewart* goes hand-in-hand with its failure to enforce *Atlantic Marine*, and both merit correction at once.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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