No.

In the Supreme Court of the United States

HOWMEDICA OSTEONICS CORP.,
PETITIONER,

v.

DEPUY SYNTHES SALES, INC. AND JONATHAN WABER,
RESPONDENTS.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity apply federal procedural law and state substantive law. Eight circuits have held that the validity and enforceability of forum-selection clauses is a procedural question governed by federal law. In the decision below, the Ninth Circuit joined the Seventh Circuit's minority position and instead held that whether a forum-selection clause is valid is a substantive state-law issue. Thus, the Ninth Circuit refused to enforce a forum-selection clause under California's ban on forum-selection clauses in employee non-compete agreements. *See* Cal. Lab. Code § 925.

The question presented is:

Whether, under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity should apply federal or state law to determine the validity of forum-selection clauses.

PARTIES TO THE PROCEEDING

Petitioner Howmedica Osteonics Corp. was a defendant in the district court and the appellant in the Ninth Circuit. Howmedica's parent company, Stryker Corporation, was a defendant in the district court but was not a party to the appeal in the Ninth Circuit.

Respondents DePuy Synthes Sales, Inc., a Massachusetts corporation, and Jonathan L. Waber, an individual, were the plaintiffs in the district court and the appellees in the Ninth Circuit.

STATEMENT OF RELATED PROCEEDINGS

This case arises from the following proceedings:

- *DePuy Synthes Sales, Inc. v. Howmedica Osteonics Corp.*, No. 21-55126, 9th Cir. (Mar. 14, 2022) (affirming grant of summary judgment in part for plaintiffs); and
- *DePuy Synthes Sales, Inc. v. Stryker Corp.*, No. 18-cv-1557, C.D. Cal. (Sept. 29, 2020) (granting in part plaintiffs' motion for summary judgment), and *DePuy Synthes Sales, Inc. v. Stryker Corp.*, No. 18-cv-1557, C.D. Cal. (Feb. 5, 2019) (denying motion to dismiss, or in the alternative, transfer).

There are no other proceedings in state or federal trial or appellate courts, or in this Court, directly related to this case under Supreme Court Rule 14.1(b)(iii).

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Petitioner Howmedica Osteonics Corp. respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit.

OPINIONS BELOW

The opinion of the court of appeals is reported at 28 F.4th 956. Pet.App.3a-27a. The opinion of the district court granting summary judgment in part is unreported but available at 2020 WL 6205702. Pet.App.28a-55a. The opinion of the district court denying the motion to dismiss or transfer the suit is unreported but available at 2019 WL 1601384. Pet.App.56a-68a.

JURISDICTION

The opinion of the court of appeals was filed on March 14, 2022. Pet.App.3a. On May 16, 2022, the court denied rehearing en banc. Pet.App.1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATEMENT

This case is the ideal vehicle for resolving an important, constantly recurring choice-of-law question that has divided the circuits. Forum-selection clauses feature in millions of contracts nationwide. Eight circuits hold that, under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), federal courts sitting in diversity must apply federal law to resolve the validity of forum-selection clauses.

Those eight circuits thus apply the pro-enforcement federal-law standard the Court articulated in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and deem forum-selection clauses valid and enforceable absent "clear[]" evidence that the clause resulted from "fraud or overreaching," enforcement would be "unreasonable and unjust," the forum would be so "inconvenient" as to effectively "deprive[]" a contracting party "of his day in court," or enforcement would "contravene a strong public policy of the forum in which suit is brought." *Id.* at 15, 18. Across most of the country, courts routinely uphold forum-selection clauses in the face of state laws that purport to void them, vindicating parties' contractual expectations and promoting predictability as to where litigation will occur.

In direct conflict, the Ninth Circuit in the decision below joined the Seventh Circuit and held that federal courts sitting in diversity must apply state law to determine the validity of forum-selection clauses. In those circuits, if state law declares certain forum-selection clauses void or

voidable, the clause is invalid. That minority approach nullifies forum-selection clauses in countless contracts.

This intractable 8-2 split is plain as day. Eight circuits, including the Ninth Circuit below, have recognized the split. So have commentators and leading treatises.

This circuit split is unquestionably outcome-determinative here. The Ninth Circuit, applying state law, held that California's anti-forum-selection law invalidated a standard forum-selection clause in petitioner's employment agreement designating New Jersey as the forum for litigation. But, had this case arisen in the Third Circuit, that court would have upheld the forum-selection clause had respondents tried to void it. Indeed, the District of New Jersey—applying federal law—upheld this very forum-selection clause, despite arguments that the clause was void under the same California law the Ninth Circuit applied here. Courts in the Fifth, Tenth, and Eleventh Circuits likewise have refused to void forum-selection clauses under the exact California law at issue.

Only this Court can restore uniformity on this important, recurrent legal question. The issue arises in dozens of federal diversity cases each year. Given the significant consequences of the decision below, review is particularly imperative now. Every State in the Ninth Circuit has enacted laws that invalidate forum-selection clauses in employment agreements or other contexts. *Infra* p. 21. By holding that state law governs the validity of forum-selection clauses, the Ninth Circuit paved the way for parties to invoke state law to invalidate those clauses in federal court. Given the massive number of contracts that the decision below affects, this Court should intervene now to prevent the arbitrariness of having the same fo-

rum-selection clause declared valid in most federal jurisdictions but worthless within the Seventh and Ninth Circuits.

A. Legal Background

1. As their name suggests, forum-selection clauses prescribe the judicial forum for litigating issues arising from a contract, and thus waive any objections parties could otherwise make to that forum. *Atl. Marine Constr. Co. v. U.S. Dist. Ct.*, 571 U.S. 49, 63-64 (2013). Forum-selection clauses are "nearly ubiquitous in all manner of contracts." 14D Charles Alan Wright, Arthur R. Miller & Richard D. Freer, *Federal Practice and Procedure* § 3803.1 (4th ed. 2022). They have long been "an indispensable element in international trade, commerce, and contracting." *Bremen*, 407 U.S. at 13-14. Nonetheless, "[f]orum-selection clauses have historically not been favored by American courts," which expressed their hostility by invalidating such clauses as "contrary to public policy." *Id.* at 9.

This Court has rejected such hostility to forum-selection clauses. In *Bremen*, this Court held that as a matter of federal law, "the forum clause should control absent a strong showing that it should be set aside." *Id.* at 15. Under the so-called *Bremen* standard, forum-selection clauses "are prima facie valid and should be enforced" unless the party opposing the clause can show that enforcement would be "unreasonable and unjust," that the clause is "invalid for such reasons as fraud or overreaching," or that enforcement would "contravene a strong public policy of the forum in which suit is brought." *Id.* at 10, 15; *accord Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585, 593-95 (1991).

Thus, in contexts like admiralty, where federal law controls the underlying cause of action and associated procedures, it is settled that courts apply the federal *Bremen* factors to assess the validity of forum-selection clauses, and overwhelmingly uphold them. *See, e.g.*, *Ambraco, Inc. v. Bossclip B.V.*, 570 F.3d 233, 239-41 (5th Cir. 2009); *Fireman's Fund Ins. Co. v. M.V. DSR Atl.*, 131 F.3d 1336, 1338-40 (9th Cir. 1997).

2. This case involves the validity of forum-selection clauses in federal diversity-jurisdiction cases. Under *Erie*, federal courts in diversity apply federal procedural law, but must apply state substantive law. *See Hanna v. Plumer*, 380 U.S. 460, 465 (1965). The question presented here, and on which the circuits are split, is whether, under *Erie*, federal courts in diversity should apply federal or state law to determine the validity of forum-selection clauses. *See infra* pp. 10-16.

This Court has repeatedly addressed a related question in diversity cases, namely whether federal or state law governs the procedures parties must follow to enforce valid forum-selection clauses. Answer: federal law controls. Parties enforce valid forum-selection clauses by seeking to transfer venue to the contractually designated forum. Because venue-transfer rules are procedural, federal venue-transfer law applies in federal court under *Erie*. *See Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 32 (1988). This Court in *Stewart* accordingly held that 28 U.S.C. § 1404(a), the federal transfer-of-venue statute, "controls respondent's request to give effect to the parties' contractual choice of venue and transfer this case to" the specified venue. *Id.* at 29. *Stewart* thus gave a forum-selection clause significant weight in analyzing whether to

transfer venue under section 1404(a), notwithstanding Alabama law disfavoring forum-selection clauses. *See id.* at 29-31 & n.10.

This Court in *Atlantic Marine* subsequently held that "in all but the most exceptional cases," "a valid forum-selection clause [should be] given controlling weight" in the section 1404 analysis. 571 U.S. at 63 (alteration in original) (citation omitted). Thus, if a forum-selection clause is valid, federal courts virtually always grant motions to transfer the case to the contractually designated forum as a matter of federal procedural law.

B. Factual and Procedural Background

1. Petitioner Howmedica Osteonics Corp. develops, makes, and sells orthopedic implants and related products and services. Pet.App.31a. Howmedica also relies upon a national sales force of some 1,400 people to provide in-person sales and services to medical centers and orthopedic surgeons across the country. *See* C.A. Excerpts of Record (E.R.) 338. But Howmedica is incorporated and headquartered in New Jersey, which is also where Howmedica manufactures and distributes products and where its leadership and administrative staff work. E.R.138, 338.

Howmedica's parent company, Stryker, uses standard employment agreements for all employees, including the national sales force that promotes Howmedica products. Given New Jersey's centrality to Howmedica's business, the agreements at issue here included a forum-selection clause whereby employees "agree and consent that any and all litigation … relating to this Agreement will take place exclusively [in New Jersey]." Pet.App.8a & n.1. These agreements also provided that New Jersey law will govern such disputes. Pet.App.8a & n.1.

In 2017, Howmedica hired respondent Jonathan Waber as a sales associate, and in 2018 promoted him to sales representative for California's Palm Springs and Palm Desert regions. E.R.339. Waber was responsible for selling and promoting various medical products for repairing traumatic bone injuries. E.R.339-40. Like all employees promoting Howmedica products, Waber signed the standard employment agreement, which included the New Jersey forum-selection and choice-of-law provisions described above as well as non-compete and non-solicitation clauses precluding departing employees from competing with Howmedica or servicing or soliciting Howmedica clients for one year after departure. Pet.App.80a-84a, 86a, 89a, 91a.

Waber eventually was Howmedica's sole representative for traumatic bone-injury products in Palm Springs and Palm Desert. E.R.339, 341. But in July 2018, Waber resigned and accepted a position with Howmedica's competitor, respondent DePuy Synthes Sales, Inc. E.R.341. Immediately thereafter, Howmedica asked Waber to "please respect your noncompete." D.Ct. Dkt. 117-15 at 10. Instead, Waber undisputedly violated his employment agreement with Howmedica by continuing to service the same surgeons at the same hospitals, but now promoting DePuy's products over Howmedica's. *See* E.R.341-42.

2. On July 17, 2018, Howmedica sent Waber a cease-and-desist letter. Pet.App.8a. Instead of complying, on July 23, 2018, Waber (represented by DePuy's counsel) responded with a letter purporting to void the agreement's forum-selection and choice-of-law clauses under California Labor Code § 925. *See* Pet.App.8a-9a.

Enacted in 2016, California Labor Code § 925 limits employers' contractual rights and lets employees unilater-

ally invalidate contractual provisions they agreed to in employment contracts. This provision forbids employers nationwide from "[r]equir[ing] the employee to adjudicate outside of California a claim arising in California," or from agreeing to apply non-California law in such disputes. Cal. Lab. Code § 925(a). Only those employees who were individually represented by counsel during contractual negotiations cannot invoke these provisions. *Id.* § 925(e). Otherwise, employees can void forum-selection and choice-of-law provisions at will, in which case employers must litigate matters "in California and California law shall govern the dispute[s]." *Id.* § 925(b).

3. The same day respondents purported to void the agreement's provisions by letter, they filed a declaratory judgment action in the Central District of California against Howmedica's parent company, Stryker, asking the court to declare those provisions and others void. Pet.App.9a-10a, 33a.

Stryker moved under 28 U.S.C. § 1404(a) to transfer the case to New Jersey pursuant to the parties' agreed-upon forum-selection clause. Pet.App.57a. The district court denied the motion. Pet.App.68a. Citing other district-court cases within the Ninth Circuit, the court held that state, not federal, law governed "whether a valid forum-selection clause exists within the subject contract." Pet.App.60a-61a (citations omitted). The court then deemed the forum-selection provision unenforceable for "violat[ing] … [California Labor Code] § 925" by requiring adjudication of disputes outside California. Pet.App.63a-64a. Having deemed the forum-selection clause "unenforceable," the court gave that clause no weight when declining to transfer venue under 28 U.S.C. § 1404(a). Pet.App.64a-68a.

Respondents then added petitioner Howmedica as a defendant, and the case proceeded to discovery. Pet.App.12a-13a. The parties moved for summary judgment, and Howmedica renewed the argument that the forum-selection clause was enforceable under federal law. Pet.App.45a-46a. The district court rejected that argument on the same grounds as before, granted respondents partial summary judgment, and declared the forum-selection, choice-of-law, and non-compete contractual provisions void under California law. Pet.App.45a-47a, 49a-52a, 54a. Pursuant to a joint stipulation, the court then dismissed Stryker as the wrong party. Pet.App.11a.

4. After determining that it had appellate jurisdiction, Pet.App.12a-13a, the Ninth Circuit affirmed. The panel acknowledged an open question "whether federal or state law governs the validity of a forum-selection clause," and observed that the "issue … has long divided courts" and "has divided the commentators and split the circuits." Pet.App.19a & n.4 (quoting *Barnett v. DynCorp Int'l, LLC*, 831 F.3d 296, 301 (5th Cir. 2016), and *Lambert v. Kysar*, 983 F.2d 1110, 1116 n.10 (1st Cir. 1993)).

The Ninth Circuit came down on the minority side of the split, holding that "the state law applicable here, § 925(b) … determines the threshold question of whether Waber's contract contains a valid forum-selection clause." Pet.App.19a-20a. The Ninth Circuit considered the validity issue a substantive question of state contract law. *Id.* The court further reasoned that "nothing in" this Court's decisions "creates a federal rule of contract law that preempts a state law like § 925 from addressing the upstream question of whether the contract … includes a viable forum-selection clause." Pet.App.21a. Having determined that the parties' forum-selection clause was invalid under state law, the Ninth Circuit held that the district

court did not abuse its discretion in denying petitioner's motion to transfer venue under section 1404(a). Pet.App.27a.

On May 16, 2022, the Ninth Circuit denied rehearing en banc. Pet.App.2a.

REASONS FOR GRANTING THE PETITION

This petition is an ideal vehicle for resolving a widely acknowledged, 8-2 circuit split on an important and recurring question. Nearly every circuit has resolved whether federal or state law governs the validity of forum-selection clauses in diversity cases. Eight circuits consider the validity of forum-selection clauses a question of federal procedure. They thus apply federal law and routinely enforce forum-selection clauses, notwithstanding state laws that would otherwise void such clauses. Two circuits—including the Ninth Circuit below—consider the validity of forum-selection clauses a question of substantive state contract law. They thus apply state law and thus refuse to enforce forum-selection clauses if state laws void such clauses. That split was outcome-determinative below. Only this Court can resolve this intractable split and prevent geographical happenstance from determining the validity of forum-selection clauses in federal court.

I. The Circuits Are Split 8-2 Over Whether Federal or State Law Governs the Validity of Forum-Selection Clauses

As the decision below acknowledged, whether federal or state law governs the validity of a forum-selection clause "has divided the commentators and split the circuits." Pet.App.19a n.4.

1. Eight circuits—the Second, Third, Fourth, Fifth, Sixth, Tenth, Eleventh, and D.C. Circuits—apply federal law to determine the validity of forum-selection clauses. Under the federal *Bremen* factors, the courts ask whether

honoring the forum-selection clause would "clearly" be "unreasonable and unjust," whether "trial in the contractual forum will be so gravely difficult and inconvenient that [the contracting party] will for all practical purposes be deprived of his day in court," whether the clause is a product of "fraud or overreaching," or whether enforcement would "contravene a strong public policy of the forum in which suit is brought." *Bremen*, 407 U.S. at 15, 18. Courts within these circuits thus routinely uphold forum-selection clauses, including when faced with state laws like California's that declare forum-selection clauses void.

Start with the Second Circuit, which recognizes that "[t]he overriding framework governing the effect of forum selection clauses in federal courts … is drawn from federal law." *Martinez v. Bloomberg LP*, 740 F.3d 211, 217 (2d Cir. 2014). Thus, the Second Circuit "determine[s] whether a forum selection clause is invalid under *Bremen*." *Id.* at 227; *accord Jones v. Weibrecht*, 901 F.2d 17, 19 (2d. Cir. 1990) (rejecting argument that, "under the doctrine of [*Erie*], state law, rather than the federal rule in *Bremen*, should control").

Under that approach, courts within the Second Circuit have refused to invalidate forum-selection clauses under state laws resembling California Labor Code § 925. For example, the Southern District of New York reasoned that "it need not address Defendants' arguments that, under Louisiana state law, [a non-compete] agreement[]—including [its] forum selection provision[]—[was] 'void' and 'unenforceable'" "[b]ecause the Court applies federal law to determine the enforceability of" forum-selection clauses. *NuMSP, LLC v. St. Etienne*, 462 F. Supp. 3d 330, 342 n.13 (S.D.N.Y. 2020); *see also Zeppelin Sys. USA, Inc. v. Pyrolyx USA Ind., LLC*, 2020 WL 1082774, at *4

(S.D.N.Y. Mar. 5, 2020) (upholding validity of forum-selection clause under federal law notwithstanding Indiana law that would void the clause).

Similarly, the "settled law" in the Third Circuit is that "federal law" governs "questions of enforceability of forum-selection clauses." *Collins v. Mary Kay, Inc.*, 874 F.3d 176, 181 (3d Cir. 2017); *accord In re McGraw-Hill Glob. Educ. Holdings LLC*, 909 F.3d 48, 58 (3d Cir. 2018); *Jumara v. State Farm Ins. Co.*, 55 F.3d 873, 877 (3d Cir. 1995). Thus, the Third Circuit applies federal law to evaluate arguments that "the clause is invalid." *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 97 (3d Cir. 2018). Courts within the Third Circuit have accordingly refused to apply a Pennsylvania law "categorically render[ing] invalid all" forum-selection clauses in construction contracts, instead applying federal law to uphold such clauses. *KNL Constr., Inc. v. Killian Constr. Co.*, 2014 WL 4185769, at *1 (M.D. Pa. Aug. 21, 2014).

The Fourth Circuit hews to the majority rule too: when "a forum selection clause is invoked" in federal court, "federal law applies." *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 652 (4th Cir. 2010). Thus, the Fourth Circuit refused to apply a South Carolina law that overrode certain forum-selection clauses. *Id.* The Fourth Circuit instead applied the federal-law *Bremen* factors and upheld the forum-selection clause, reasoning that *Bremen* "would have little effect if states could effectively override the decision by expressing disagreement with the decision's rationale." *Id.*; *accord Hilb Grp. of New Eng., LLC v. LePage*, 2022 WL 1538583, at *2 n.2, *4 (E.D. Va. May 16, 2022) (upholding under federal law "the validity of a forum selection clause" notwithstanding Massachusetts law overriding forum-selection clauses in noncompete agreements).

The Fifth Circuit applies the same approach: "[T]he enforceability of a forum selection clause in a diversity case … is governed by federal law." *Dynamic CRM Recruiting Sols., L.L.C. v. UMA Educ., Inc.*, 31 F.4th 914, 917-18 (5th Cir. 2022); *see PCL Civ. Constructors, Inc. v. Arch Ins. Co.*, 979 F.3d 1070, 1074 (5th Cir. 2020). Courts within the Fifth Circuit accordingly prescribe the opposite approach from the decision below and decline to apply state laws that purport to void forum-selection clauses. *See, e.g.*, *CyrusOne LLC v. Hsieh*, 2021 WL 2936379, at *5-6 & n.1 (E.D. Tex. July 13, 2021).

The Sixth Circuit likewise embraces "the law used in the majority of circuits," namely that "the enforceability of [a] forum selection clause is governed by federal law." *Wong v. PartyGaming Ltd.*, 589 F.3d 821, 827-28 (6th Cir. 2009). Like its sister circuits, the Sixth Circuit applies federal law to determine whether to honor forum-selection clauses, not state law voiding "out-of-state forum-selection clauses contained in franchise agreements." *Lakeside Surfaces, Inc. v. Cambria Co., LLC*, 16 F.4th 209, 216 (6th Cir. 2021); *see also Brand Energy Servs., LLC v. Enerfab Power & Indus., Inc.*, 2016 WL 10650607, at *3-4 (M.D. Tenn. Oct. 28, 2016) (upholding forum-selection clause under federal law despite Tennessee law purportedly voiding forum-selection clause).

The Tenth Circuit also applies federal law to determine the validity of forum-selection clauses. *See Niemi v. Lasshofer*, 770 F.3d 1331, 1351 (10th Cir. 2014) (applying *Bremen*). There, too, federal law governs whether courts will honor forum-selection clauses notwithstanding state laws that purport to void such clauses. For instance, courts within the Tenth Circuit have applied federal law to uphold forum-selection clauses, notwithstanding California state law voiding forum-selection clauses in franchise

agreements. *See Postnet Int'l Franchise Corp. v. Wu*, 521 F. Supp. 3d 1087, 1093-96 (D. Colo. 2021).

The Eleventh Circuit takes the same tack. Applying the federal *Bremen* standard, that court holds that "[f]orum-selection clauses are presumptively valid and enforceable unless the plaintiff makes a 'strong showing' that enforcement would be unfair or unreasonable under the circumstances." *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009) (citing *Carnival*, 499 U.S. at 593-95, and *Bremen*, 407 U.S. at 10).

Finally, the D.C. Circuit follows an identical approach, applying the federal *Bremen* factors to determine whether "a mandatory forum-selection clause is legally valid and enforceable." *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 874-75 (D.C. Cir. 2019) (citing *Bremen*, 407 U.S. at 15, 18); *accord Dahman v. Embassy of Qatar*, 815 F. App'x 554, 558 (D.C. Cir. 2020).

The question presented remains open in the Eighth Circuit. *Smart Commc'ns Collier Inc. v. Pope Cnty. Sheriff's Off.*, 5 F.4th 895, 897 n.2 (8th Cir. 2021). But that court has strongly signaled that federal law should govern: "*Bremen* provides the proper analysis for determining the enforceability of a forum selection clause." *Union Elec. Co. v. Energy Ins. Mut. Ltd.*, 689 F.3d 968, 974 (8th Cir. 2012). The Eighth Circuit also has observed that "the successful invocation of [state] public interests to defeat a selection clause should be rare." *In re Union Elec. Co.*, 787 F.3d 903, 910 (8th Cir. 2015).

2. In stark contrast, the Ninth Circuit below joined the Seventh Circuit and held that the validity of forum-selection clauses is a matter of state substantive law. Thus, in those circuits, state laws that void forum-selection clauses control.

The Seventh Circuit has explained that it "take[s] a different approach" than the majority of circuits. *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 774 (7th Cir. 2014). Thus, in that circuit, "the validity of a forum-selection clause depends on the law of the jurisdiction whose rules will govern the rest of the dispute." *E.g.*, *IFC Credit Corp. v. United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 991 (7th Cir. 2008); *Abbott Lab'ys v. Takeda Pharm. Co.*, 476 F.3d 421, 423 (7th Cir. 2007). Courts within the Seventh Circuit routinely invalidate forum-selection clauses under state laws resembling California's. *E.g.*, *Cont'l Glass Sales & Inv. Corp. v. First Finish, LLC*, 2022 WL 1620233, at *4-5 (N.D. Ill. May 23, 2022) (applying Illinois law to invalidate forum-selection clause in construction contract); *Evoqua Water Techs. LLC v. AFAM Concept Inc.*, 2022 WL 117769, at *3 & n.2 (N.D. Ill. Jan. 12, 2022) (same and acknowledging "that the Seventh Circuit's approach diverges from that of other Circuits").

The Ninth Circuit below also held that state rather than federal law determines the "validity" of forum-selection clauses. *See* Pet.App.18a, 21a. And, because California Labor Code § 925 deems forum-selection clauses in the employment context voidable in most circumstances, invalidation was a foregone conclusion. Pet.App.20a-23a.

In sum, the split with other circuits could not be sharper. Eight circuits uphold forum-selection clauses under federal law, even when state laws would void such clauses. What's more, courts within the Third, Fifth, Tenth, and Eleventh Circuits have refused to invalidate forum-selection clauses under the state law at issue, California Labor Code § 925, and upheld those clauses under federal law. *See Westrock Servs., LLC v. Roberts*, 2022 WL 1715964, at *1, *3 n.6 (N.D. Ga. May 4, 2022); *CyrusOne LLC*, 2021 WL 2936379, at *5-6 & n.1; *Howmedica*

Osteonics Corp. v. Howard, 2020 WL 1082601, at *1 (D.N.J. Mar. 5, 2020); *Cherry Creek Mortg. Co. v. Jarboe*, 2018 WL 6249887, at *2-3 (D. Colo. Nov. 29, 2018).

Indeed, the District of New Jersey—applying federal law—upheld the exact same forum-selection clause in the exact same employment contract at issue here, after rejecting arguments that California Labor Code § 925 should invalidate the contract. *Howmedica Osteonics Corp. v. Howard*, 2020 WL 1102494, at *3 (D.N.J. Jan. 17, 2020), *report and recommendation adopted*, 2020 WL 1082601, at *1 (D.N.J. Mar. 5, 2020). Only this Court can solve this arbitrary disuniformity.

3. Courts, treatises, academics, and commentators have widely recognized the square circuit conflict over whether federal or state law governs the validity of forum-selection clauses under *Erie*. Eight circuits—including the Ninth below—have acknowledged the divide. *E.g.*, Pet.App.19a n.4; *Lakeside Surfaces*, 16 F.4th at 218 (cataloguing split); *Barnett*, 831 F.3d at 301 (issue "has long divided courts"); *Jackson*, 764 F.3d at 774 ("[T]he majority of federal circuits" apply federal law, but "[w]e have taken a different approach."); *Martinez*, 740 F.3d at 222 ("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."); *Albemarle*, 628 F.3d at 650 (recognizing Seventh Circuit minority view and "[f]ollowing the majority rule" of applying federal law); *Servewell Plumbing, LLC v. Fed. Ins. Co.*, 439 F.3d 786, 789 (8th Cir. 2006) (noting "disagreement among the circuits over whether state or federal law applies"); *Lambert*, 983 F.2d at 1116 & n.10 (issue "has divided the commentators and split the circuits").

Leading treatises likewise have flagged this split. As Wright and Miller state, "[i]t seems rather clear that federal law should govern" this "question of obvious importance," but the circuits are divided. Wright & Miller, *supra*, § 3803.1; *see also* 17 James Moore, *Moore's Federal Practice – Civil* § 111.04 (3d ed. 2022) (noting a "real conflict[]" between the circuits).

Prominent academics have also observed that "[t]he Supreme Court has long avoided the question [of whether federal law governs the validity of a forum-selection clause], the courts of appeals are divided on it, and scholarly commentators are no less split." Stephen E. Sachs, *The Forum Selection Defense*, 10 Duke J. Const. L. & Pub. Pol'y 1, 14-15 (2014). Countless law-review articles bemoan "the split among federal courts concerning the application of federal or state law to determine the validity and enforceability of forum-selection clauses." Matthew J. Sorensen, Note, *Enforcement of Forum-Selection Clauses in Federal Court After* Atlantic Marine, 82 Fordham L. Rev. 2521, 2525 (2014).[1] And commentators have emphasized that the decision below deepens that split by "weigh[ing] in on an issue that has confounded federal cir-

[1] *Accord, e.g.*, Linda S. Mullenix, *Gaming the System: Protecting Consumers from Unconscionable Contractual Forum-Selection and Arbitration Clauses*, 66 Hastings L.J. 719, 743-44 (2015); Kelly Amanda Blair, Note, *A Judicial Solution to the Forum-Selection Clause Enforcement Circuit Split: Giving* Erie *a Second Chance*, 46 Ga. L. Rev. 799, 803 (2012); Maxwell J. Wright, Note, *Enforcing Forum-Selection Clauses: An Examination of the Current Disarray of Federal Forum-Selection Clause Jurisprudence and a Proposal for Judicial Reform*, 44 Loy. L.A. L. Rev. 1625, 1634 (2011); Ryan T. Holt, Note, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 Vand. L. Rev. 1913, 1926-29 (2009).

cuits for decades." *Restrictive Agreements/Forum Selection/Employment Litigation*, 34 No. 7 Bus. Torts Rep. 143, 144 (2022). This entrenched split merits review.

II. The Question Presented Is Important, Constantly Recurring, and Squarely Presented

1. Forum-selection clauses appear in all sorts of contracts, from the employment context to corporate mergers to securities transactions. *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 n.14 (1985); Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 Vand. L. Rev. 1975, 1978 (2006); Wright & Miller, *supra*, § 3803.1. Forum-selection clauses can be "a vital part of the agreement" and can "figur[e] prominently" in the whole bargain. *Bremen*, 407 U.S. at 14.

Forum-selection clauses are ubiquitous because they give contracting parties advance certainty as to where litigation over the contract will occur. Forum-selection clauses have "the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended." *Carnival*, 499 U.S. at 593-94. And forum-selection clauses "protect [parties'] legitimate expectations" about where they may sue or be sued. *Atl. Marine*, 571 U.S. at 63 (citations omitted).

Forum-selection clauses also save "the time and expense of pretrial motions to determine the correct forum." *Carnival*, 499 U.S. at 594. Plus, forum-selection clauses conserve judicial resources by "reliev[ing] courts of time-consuming pretrial motions" and advance "vital interests of the justice system." *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring); *accord Atl. Marine*, 571 U.S. at 63; *Carnival*, 499 U.S. at 594. On top of that, enforcing forum-selection clauses "accords with ancient concepts of freedom

of contract," *Bremen*, 407 U.S. at 11, and promotes fairness "by holding parties to their bargain," *Atl. Marine*, 571 U.S. at 66.

Absent this Court's intervention, forum-selection clauses would be a dead letter in some of the nation's biggest centers of business and employment, from Chicago to Los Angeles. Forum-selection clauses are supposed to guarantee certainty as to a litigation forum when parties cannot in advance predict where litigation over a contract will arise. But if the litigation arises in the Seventh or Ninth Circuits, parties cannot depend on being able to hold counterparties to their agreement to proceed in a designated forum.

Underscoring the scale of the problem, the question presented recurs all the time. This year alone, dozens of district courts have addressed whether state or federal law governs the validity and enforceability of forum-selection clauses in diversity-jurisdiction cases. District courts within circuits that apply federal law uphold forum-selection clauses under the *Bremen* factors, while district courts within the Seventh and Ninth Circuits invalidate those clauses when state law declares them void.[2]

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[2] *Compare, e.g.*, *VF Corp. v. Gray*, 2022 WL 3021855, at *2-3 (W.D.N.C. July 29, 2022); *Onward Search LLC v. Noble*, 2022 WL 2669520, at *11 (D. Conn. July 11, 2022); *Cognizant Tech. Sols. Corp. v. Bohrer PLLC*, 2022 WL 1720319, at *3 (S.D.N.Y. May 27, 2022); *ExxonMobile Glob. Servs. Co. v. Bragg Crane Serv.*, 2022 WL 1507204, at *4 (S.D. Tex. May 12, 2022); *Hilb Grp.*, 2022 WL 1538583, at *2 n.2, *4; *Westrock Servs.*, 2022 WL 1715964, at *3 n.6; *Canovai v. NTS Mikedon LLC*, 2022 WL 1215655, at *2 (W.D.N.C. Apr. 25, 2022); *K.R.W. Constr., Inc. v. Stronghold Eng'g Inc.*, 2022 WL 1136309, at *6 (D. Kan. Apr. 18, 2022); *Warfighter FOCUSed Logistics, Inc. v. Partminer Indus., LLC*, 2022 WL 1001779, at *1 (E.D. Mich. Apr. 4, 2022); *United States v. Cincinnati Ins. Co.*, 2022 WL 1801193, at *2 & n.4 (M.D. Fla. Mar. 25, 2022); *Parker Powersports Inc. v. Textron*

2. The decision below threatens acute consequences for businesses and other contracting parties that operate within the Ninth Circuit—which is to say, thousands of businesses employing more than 33 million people. *See* Bureau of Lab. Stats., *Civilian Labor Force and Unemployment by State and Selected Area, Seasonally Adjusted*, bit.ly/3dZvyWp, (Aug. 19, 2022). The scale of consequences in the Ninth Circuit alone warrants this Court's intervention.

The number of employers with any employees within California is enormous in of itself. Under the decision below, those employers now face the likelihood that millions of employees who live in or move to California will unilaterally invalidate forum-selection clauses in their employment contracts under California Labor Code § 925. The many employers that rely on forum-selection clauses will have to treat those clauses as potential nullities for California employees, yet those clauses remain key contractual terms for employees based in New York or Florida. Businesses cannot readily operate without a single, predictable set of terms for all employees nationwide. Employees, too, will have wildly different options for bringing suit depending on where they live at the time when litigation arises, or the type of contract at issue.

Specialized Vehicles Inc., 2022 WL 796788, at *3-4 (D. Colo. Mar. 16, 2022); *Hyde v. Orthofix, Inc.*, 2022 WL 577662, at *3 (M.D. La. Feb. 1, 2022) (all applying federal law to uphold forum-selection clauses), *with Young v. Refined Techs., Inc.*, 2022 WL 3012536, at *3 n.2 (C.D. Cal. June 17, 2022); *Ruff v. Wilson Logistics, Inc.*, 2022 WL 1500014, at *6-7 (N.D. Cal. May 12, 2022); *Cont'l Glass*, 2022 WL 1620233, at *3-4; *Evoqua Water*, 2022 WL 117769, at *2-3 (all applying state law to invalidate forum-selection clauses).

Heightening the consequences of the decision below, every state within the Ninth Circuit has adopted similar anti-forum-selection laws in various contexts. In addition to California Labor Code § 925, California voids forum-selection clauses in contracts involving consumer leases, private child-support collection services, franchise agreements, and construction. *See* Cal. Com. Code § 10106(b); Cal. Fam. Code § 5614(a)(7); Cal. Bus. & Prof. Code § 20040.5; Cal. Civ. Proc. Code § 410.42(a)(1). Eight States within the Ninth Circuit void forum-selection clauses in certain consumer leases. *See* Alaska Stat. § 45.12.106(b); Cal. Com. Code § 10106(b); Haw. Rev. Stat. § 490:2A-106(b); Idaho Code § 28-12-106(2); Mont. Code Ann. § 30-2A-106(2); Nev. Rev. Stat. § 104A.2106(2); Or. Rev. Stat. § 72A.1060(2); Wash. Rev. Code § 62A.2A.106(2). On top of that, Arizona voids all forum-selection clauses in equipment supply contracts. *See* Ariz. Rev. Stat. § 44-6709(B). Idaho voids all forum-selection clauses in franchise agreements. *See* Idaho Code § 29-110(1)-(2). Nevada, Oregon, and Montana void forum-selection clauses in construction contracts. *See* Nev. Rev. Stat. § 108.2453(2)(d); Or. Rev. Stat. § 701.640(1)(a), (2); Mont. Code Ann. § 28-2-2116(1). And Washington voids all forum-selection clauses in non-compete agreements. *See* Wash. Rev. Code § 49.62.050. With the stroke of a pen, the decision below rendered all forum-selection clauses subject to such laws unenforceable in federal courts within the Ninth Circuit. Yet those same clauses remain enforceable in eight other circuits.

Courts in different jurisdictions could reach different rulings concerning the validity of the same forum-selection clause, simply because federal law generally upholds such clauses and state laws may invalidate them. Indeed, courts are already reaching completely disparate out-

comes in cases involving forum-selection clauses that implicate California Labor Code § 925. *Supra* pp. 15-16. Geography should not determine outcomes on a fundamental legal issue of nationwide importance.

3. This case is the ideal vehicle to resolve the circuit split. The Ninth Circuit was squarely presented with the issue of whether state or federal law governs the validity of a forum-selection clause. After acknowledging the circuit split, Pet.App.19a n.4, the Ninth Circuit sided with the minority rule and applied state law.

That decision was outcome determinative. The Ninth Circuit held that California law automatically invalidated the forum-selection clause. Pet.App.19a-20a. Had the Ninth Circuit applied federal law, that forum-selection clause would have been valid. Again, courts within circuits that apply federal law have upheld materially identical forum-selection clauses notwithstanding the exact California law at issue. *Supra* pp. 15-16.

No further percolation is necessary. The eight circuits that apply federal law have hewed to that position across dozens of cases. *Supra* pp. 11-14. The Third and Fourth Circuits have even switched sides: They once applied state law, but now apply federal law after further consideration. *Compare Gen. Eng'g Corp. v. Martin Marietta Alumina, Inc.*, 783 F.2d 352, 356-58 (3d Cir. 1986), *and Nutter v. New Rents, Inc.*, 1991 WL 193490 at *5-6 (4th Cir. 1991), *with Jumara*, 55 F.3d at 877 (switching to majority view that federal law applies), *and Albemarle*, 628 F.3d at 652 (same). Meanwhile, the Ninth Circuit declined to reconsider the decision below en banc, signaling that its position is unlikely to change. And the Seventh Circuit has held since 2007 that state law controls, despite acknowledging its outlier status. *Abbott Lab'ys*, 476 F.3d at 423; *Jackson*, 764 F.3d at 774.

The battle lines between the circuits are entrenched and will not abate unless this Court intervenes. And with the Ninth Circuit weighing in and rendering millions of forum-selection clauses a nullity in federal diversity cases, this Court's intervention is imperative.

III. The Decision Below Is Wrong

Under *Erie*, federal law controls the validity of forum-selection clauses in diversity cases. *Erie* and its progeny require federal courts sitting in diversity to apply "state substantive law and federal procedural law." *Hanna*, 380 U.S. at 465. The validity of forum-selection clauses undoubtedly is a procedural issue, so federal procedural law should control. *See* Sachs, *supra*, at 5.

Forum-selection clauses are waivers of procedural rights. "When 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." *Atl. Marine*, 571 U.S. at 64. Whether that waiver is effective in federal court determines "which among various competent courts will decide the case" and thus "goes to process rather than substantive rights." *See Am. Dredging Co. v. Miller*, 510 U.S. 443, 453 (1994); *see also Albemarle*, 628 F.3d at 650 ("As an agreement purporting to modify or waive the venue of a federal court, a forum selection clause implicates what is recognized as a procedural matter."); *Martinez*, 740 F.3d at 220 ("[E]nforcement of forum selection clauses [is] essentially procedural."); *Wong*, 589 F.3d at 827 ("[F]orum selection clauses significantly implicate federal procedural issues.").

The Ninth Circuit instead treated the validity of forum-selection clauses as a substantive contract-law question. *See* Pet.App.19a. But just because forum-selection

clauses are found in contracts does not mean "that their validity is determined by … substantive contract law." Sachs, *supra*, at 4. Forum-selection clauses concern the "waiver of specific procedural rights." *Id.*; *see Atl. Marine*, 571 U.S. at 64. And when "a forum selection agreement [is] invoke[d] in federal court … the rights to be waived are *federal* rights." Sachs, *supra*, at 4-5. Because "[o]nly federal law can tell us … whether and when parties can waive such rights ex ante," "the proper law to govern forum selection in federal court is the law of federal procedure." *Id.* at 5.

Applying federal law also comports with *Erie*'s aims. Applying federal law does not result in "inequitable administration of the laws." *See Hanna*, 380 U.S. at 468. Quite the contrary, when parties contract in advance to litigate in a specific forum, equity is served by "holding parties to their bargain." *Atl. Marine*, 571 U.S. at 66. Moreover, applying federal law vindicates the "strong federal policy" against allowing States to dictate the availability of a federal forum. *See Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 538 (1958).

Finally, this Court's decision in *Stewart* strongly suggests that federal law should control. *Stewart* held that when a party invokes a forum-selection clause and moves to transfer a case to another federal court, "federal law, specifically 28 U.S.C. § 1404(a), governs the District Court's decision whether to give effect to the parties' forum-selection clause." 487 U.S. at 32. *Stewart* thus rejected the argument that a state's "categorical policy disfavoring forum-selection clauses" should be dispositive, holding that States "cannot pre-empt a district court's consideration of a forum-selection clause by holding that the clause is automatically enforceable" or "by holding the clause automatically void." *Id.* at 30, 31 n.10.

Justice Scalia's dissent in *Stewart* thus viewed the Court's analysis as "inevitably import[ing]" a federal standard to determine the antecedent question of "what law governs whether the forum-selection clause is valid or invalid." *See id.* at 34-35 (Scalia, J., dissenting); *accord Ferens v. John Deere Co.*, 494 U.S. 516, 526 (1990). That *Stewart* considered venue-transfer rules procedural, and thus subject to federal procedural law in federal court, reinforces that the validity of forum-selection clauses equally is a procedural question. *See* 487 U.S. at 31-32; *accord Albemarle*, 628 F.3d at 650 (adopting *Stewart*'s "reasoning" that "a forum selection clause implicates … a procedural matter").

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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SEPTEMBER 14, 2022