No. 22-252

In the
Supreme Court of the United States

HOWMEDICA OSTEONICS CORP.,
Petitioner,

v.

DEPUY SYNTHES SALES, INC., ET AL.,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF IN OPPOSITION

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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. In the decision below, the Ninth Circuit affirmed the district court on alternative grounds: (1) steadfastly hewing to the *Erie* doctrine and in line with its sister Circuits, it held that state law applied to the threshold question of whether the contract at issue contained a valid forum-selection provision because the clause had been voided before the litigation began; and (2) consistent with its own longstanding precedent and in line with its sister Circuits, it applied federal law to the procedural question of the enforceability of the forum-selection provision for purposes of the transfer analysis under 28 U.S.C. § 1404(a) ("§ 1404(a)"). Based on federal law, the Ninth Circuit held that the district court did not abuse its discretion in applying the balancing of interests test under § 1404(a) and concluding that the forum-selection provision should not be enforced under the standards set forth in *M/S Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1 (1972) ("*The Bremen*") because, on the specific facts of this case, it contravened a strong public policy of the forum state.

The Ninth Circuit expressly declined to decide, and did not reach, the question of whether state or federal law would apply to determine the validity of the forum-selection provision had it not been voided before initiation of the lawsuit.

The question presented by Petitioner (which the Ninth Circuit declined to decide) 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

Respondents Jonathan L. Waber, a California citizen, and DePuy Synthes Sales, Inc., a Massachusetts corporation, were the Plaintiffs in the district court and the Appellees in the Ninth Circuit.

Petitioner Howmedica Osteonics Corp. ("HOC") was a Defendant in the district court and the Appellant in the Ninth Circuit. HOC's parent company, Stryker Corporation, was a Defendant in the district court but was not a party to the appeal in the Ninth Circuit.

CORPORATE DISCLOSURE STATEMENT

Respondent DePuy Synthes Sales, Inc. states that it is a Massachusetts corporation, which is a wholly-owned subsidiary of DePuy Spine, LLC, an Ohio limited liability company, which is, in turn, a wholly-owned subsidiary of Synthes USA, LLC, a Delaware limited liability company, which is, in turn, a wholly owned subsidiary of DePuy Products, Inc., an Indiana corporation, which is, in turn, a wholly-owned subsidiary of Cerenovus, Inc., a New Jersey corporation, which is, in turn, a wholly-owned subsidiary of Medical Device Business Services, Inc., an Indiana corporation, which is, in turn, a wholly-owned subsidiary of Synthes, Inc., a Delaware corporation, which is, in turn, a wholly-owned subsidiary of DePuy Synthes, Inc., a Delaware corporation, which is, in turn, a wholly-owned subsidiary of Johnson & Johnson International, a New Jersey corporation, which is, in turn, a wholly-owned subsidiary of Johnson & Johnson, a New Jersey

corporation, whose stock is publicly traded in the United States.

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STATEMENT OF THE CASE

A. Introduction

The Petition in this case asks the Court to grant review on the broad question of whether, under *Erie*, federal courts sitting in diversity should apply federal or state law to determine the validity of forum-selection clauses. Petitioner contends that, in the decision below, the Ninth Circuit ignited an 8-2 Circuit split on that question by holding that state law governs and thereby diverging from other Circuits on the pro-enforcement federal law standard.

The problem for Petitioner is that the entirety of its contention is incorrect. The decision below turned on the unusual operation of a unique state statute, California Labor Code § 925 ("§ 925"), and the facts of the case. The Ninth Circuit ruled on alternative grounds. It held: (1) that Mr. Waber had voided the forum-selection clause under state law before the litigation began, and therefore there was no forum-selection clause for the district court to enforce; and (2) the district court did not abuse its discretion in balancing the interests under § 1404(a) by applying federal law to the enforcement analysis and determining, under the Court's standards in *The Bremen*, that giving effect to the forum-selection clause on the specific facts of this case contravened a strong public policy of the forum state. The Petition challenges the first ground but not the second.

In deciding the issues before it on appeal, the Ninth Circuit explicitly declined to address the very question presented by the Petition stating: "We need

not decide whether state law would govern the validity of a forum selection clause that had not been voided and is before the district court for consideration in the transfer analysis." Pet. App. 20a, fn. 6.

There is no Circuit split on the issues decided by the Ninth Circuit, and its decision did not ignite an 8-2 split on the pro-enforcement federal law standard applied to forum-selection clauses. In law and fact, the Ninth Circuit has long been a leading proponent of the proposition that federal law governs the enforceability of forum-selection clauses in diversity cases, and it applied that standard in this very case.

Even if the decision below did somehow implicate the question presented by Petitioner, this case would be an exceedingly unsuitable vehicle for resolving it. The argument made by Petitioner in this Court is not the argument advanced to the Ninth Circuit below,[1] and any resolution of the question now presented by Petitioner is not outcome determinative. The Ninth Circuit's ruling was limited to the unusual requirements of § 925 and the specific facts of the case. It does not present a matter of national importance, and the decision is not controversial.

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[1] Petitioner's position below was that this Court's decision in *Stewart Organization, Inc. v. Ricoh Corporation*, 487 U.S. 22 (1988) stood for the proposition that § 1404(a) occupies the field of federal law related to forum-selection provisions and preempts all state laws on the subject. Section 925 uniquely establishes limited prerequisites for there to be a valid foreign forum-selection and choice-of-law provision in an employment agreement and the right to void the provision if the preconditions are not met.

Notably, this Court recently denied certiorari in a similar case posing a related question from the Ninth Circuit applying the same unique state law.

In sum, the case neither presents the question for which Petitioner seeks review nor would it be an appropriate vehicle for addressing that question. The Petition for a Writ of Certiorari should be denied.

B. Background and District Court Proceedings

Respondents Jonathan Waber ("Waber") and his employer DePuy Synthes Sales, Inc. ("DSS") (together "Respondents") filed this action to gain certainty as to their rights in the face of a threat by Waber's former employer, Howmedica Osteonics Corp. ("HOC"), to enforce certain restrictive covenants, illegal under California law, contained in Waber's employment agreement with HOC, which was signed in October 2017.

Section 925, which applies to contracts entered into on or after January 1, 2017, permits employees, like Waber, who were not represented by counsel when entering into an employment agreement, to void provisions that impose a non-California forum or choice of law if the employee primarily lives and works in California. Waber's employment agreement contained a New Jersey forum-selection and choice-of-law provision, but Waber was not represented by counsel when the agreement was presented and signed in October 2017, and HOC did not inform him of his § 925 rights. HOC threatened to enforce these provisions and the non-compete and non-solicitation

restrictions of the employment agreement when Waber left to work for DSS. Faced with this threat and by then understanding his rights as a California-based employee and resident, Waber expressly voided the forum-selection and choice-of-law provisions pursuant to his statutory rights under § 925. *After* the provisions were voided, Respondents filed this action for declaratory and injunctive relief to protect Waber from HOC's threats to seek enforcement of the restrictive covenants. In response, HOC filed a motion to dismiss or transfer on the basis that the voided forum-selection and choice-of-law provisions required the litigation to take place in New Jersey and under New Jersey law.

The district court denied HOC's motion on two grounds: (1) there was no forum-selection provision to enforce because it had been voided before litigation commenced; and (2) even if there were a valid clause, applying federal law, the provision was not enforceable under *The Bremen* standards. Specifically, in its alternative analysis, the district court analyzed the enforceability factors enumerated by this Court in *The Bremen*. These factors are that a forum-selection clause should control unless it is clearly shown that (1) the clause is "unreasonable or unjust"; (2) the clause is "invalid for such reason as fraud or overreaching"; and (3) "the clause should be held unenforceable if enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *The Bremen*, 407 U.S. at 15. Having determined that no enforceable forum-selection clause was present under either § 925 or *The Bremen*, the

district court conducted the traditional transfer analysis under § 1404(a), rather than the modified transfer analysis applying to a presumptively valid forum-selection clause. *Atlantic Marine Constr. Co. v. U.S. Dist. Court for Western Dist. of Tex.*, 571 U.S. 49 (2013). Petitioner subsequently filed a petition for a writ of mandamus to the Ninth Circuit, which was summarily rejected. Respondents ultimately moved for summary judgment. The district court granted partial summary judgment reaffirming its transfer analysis and determining that the non-compete and non-solicitation provisions of the employment agreement were contrary to California Business & Professions Code § 16600 and void as a matter of law.

C. Ninth Circuit Proceedings

HOC appealed the denial of the transfer motion and the decision granting Respondents' partial summary judgment to the Ninth Circuit.[2] After full briefing and oral argument, the Ninth Circuit unanimously affirmed the district court's transfer analysis and grant of partial summary judgment. The Ninth Circuit held that: (1) under state law the forum-selection provision had been voided before the lawsuit was filed; and (2) the district court appropriately exercised its discretion in considering *The Bremen*

[2] The district court held there was a factual dispute as to whether HOC's parent, Stryker Corporation, was a joint employer and jointly liable. This issue was resolved by the parties in a settlement agreement by which HOC assumed all liability, leading to a final appealable order being issued by the district court. Respondents' fee petition under § 925 is the only aspect of the case still pending in the district court.

factors and the public policy of the forum state in its § 1404(a) transfer analysis.

As to the first ground, the Ninth Circuit began its analysis with a review of the applicable law of forum-selection clauses in the federal courts, noting that, starting with *The Bremen*, "the Supreme Court in an admiralty case applied the common law doctrine of *forum non conveniens* and held that forum-selection clauses are presumptively valid and should be enforced unless 'enforcement would be unreasonable and unjust, or…the clause [is] invalid for such reasons as fraud or overreaching.'" Pet. App. 16a. The Ninth Circuit stated that "concerns over the enforceability of a forum selection clause and the law governing venue have thus been resolved," but that there was a question about whether "federal or state law governs the validity of a forum-selection clause." Pet. App. 18a. On this point, the Ninth Circuit held that "the state law applicable here, § 925(b), which grants employees the option to void a forum-selection clause under a limited set of circumstances, determines the threshold question of whether Waber's contract contains a valid forum-selection clause." Pet. App. 19a-20a. As the Ninth Circuit explained, § 925 "includes three problems relevant" to the issues on appeal: (1) § 925(a) limits employers in employment agreements from requiring California employees to litigate disputes outside of California and to give up the protection of California laws; (2) § 925(b) protects California employees who are not represented by counsel in the negotiation of the employment agreement from being bound by such a provision and gives them the right to declare the provision void; and

(3) § 925(e) specifies that the first two provisions do not apply to any California employee who is represented by counsel when signing the agreement. In this regard, as the Ninth Circuit held, § 925 "is not a rule of state law that would remove all discretion from the federal court on questions of venue." Pet. App. 20a. The Ninth Circuit expressly declined to decide the question "whether state law would govern validity of a forum-selection clause that had not been voided and is before the district court for consideration in the transfer analysis." Pet. App. 20a, n. 6.

In reaching its decision, the Ninth Circuit rejected the argument advanced by HOC in the district court and on appeal that *Stewart* stands for the proposition that § 1404(a) preempts any state law—like § 925—that would render a previously agreed-to forum-selection clause void or unenforceable under certain conditions. The Ninth Circuit explained that "HOC overreads the *Stewart* majority decision as preempting all state laws relating to forum-selection clauses. That is not what the Supreme Court did." Pet. App. 21a. Rather, the Ninth Circuit explained:

> Nothing in § 1404(a) relates to questions of contract formation or a party's unilateral withdrawal of consent to a provision, and nothing in *Bremen*, *Stewart*, or *Atlantic Marine* or any other Supreme Court decision creates a federal rule of contract law that preempts a state law like § 925 from addressing the upstream question of whether the

> contract sought to be enforced includes a viable forum-selection clause.

Id.

The Ninth Circuit went on to state that this Court in *Stewart* "simply held that, on matters of venue in federal court, § 1404(a) governed and took primacy over any state law purporting to set a categorical rule within the scope of § 1404(a)." *Id.*

In *Stewart*, this Court considered the question of whether the district court abused its discretion by giving determinative effect to an Alabama procedural policy expressed in an Alabama Supreme Court decision, *Redwing Carriers, Inc. v. Foster*, 382 So.2d 554 (Ala. 1980), against ouster of its jurisdiction. The *Redwing* rule prohibited litigants from either consenting to or consenting out of state court jurisdiction. The majority in *Stewart* held that the district court erred by considering this categorical rule of Alabama procedure as being determinative of the transfer question, without consideration of the §1404(a) factors. The Court, however, also held that the policy must be considered and given weight as part of the §1404(a) balancing test. As the Ninth Circuit pointed out, the *Stewart* holding is "simply that any state law that would prohibit the multi-factor analysis required by 1404(a) must give way to federal law," and nothing in *Stewart* supports HOC's contention that *Stewart* preempts all state laws relating to contract interpretation and formation. Pet. App. 22a. "The majority in *Stewart r*epeatedly presumed the validity of the forum selection clause and nowhere addressed

the effect of any state law like § 925 that permits a party unilaterally to void a forum selection clause agreed to without the assistance of counsel." Pet. App. 22a-23a.

As to the second ground, the Ninth Circuit held that the district court did not abuse its discretion by considering the public policy argument under *The Bremen* when weighing the § 1404(a) factors. The district court determined, as one of the factors, that § 925 represented a strong public policy of California and constituted an exceptional circumstance, which, in the court's discretion, should preclude enforcement of the forum-selection provision under *The Bremen* and *Atlantic Marine* public policy standards. Consistent with *Stewart*, "[t]he district court here did not rely exclusively on California's public policy to deny transfer, but correctly analyzed it as one of the multiple § 1404(a) factors," Pet. App. 24a-25a, as it would have been even under the modified *Atlantic Marine* transfer analysis. In addressing the second ground, the Ninth Circuit rejected HOC's argument that "state law is irrelevant to the determination of enforcement of a forum-selection clause under § 1404."[3] Pet. App. 24a. As the Ninth Circuit explained, this Court in *Stewart* explicitly stated that "the public policy of the forum state is not dispositive in a § 1404(a) determination, but, rather, it is another factor that should be weighed in the court's § 1404(a)

[3] HOC argued to the Ninth Circuit that *Atlantic Marine* required the district court to apply the choice of law selected by the parties. Pet. App. 14a. As the Ninth Circuit pointed out, the choice of law provision had also been voided before the action commenced. Pet. App. 23a.

'interest of justice' analysis.'" *Id.* Here, the district court properly analyzed the public policy of the forum state as but one factor in the § 1404(a) analysis, consistent with this Court's mandate. Accordingly, the Ninth Circuit found that the district court had conducted the appropriate balancing test under federal law—§ 1404(a) and *The Bremen*—in concluding that the denial of the transfer motion was not an abuse of discretion, and the granting of partial summary judgment was correct.

REASONS FOR DENYING THE PETITION

This Court should deny the petition for five separate reasons that make this case unsuitable for review. First, the case does not present the question which Petitioner poses to the Court. Second, this case does not create a conflict among the Circuits. Third, this case is a poor vehicle for deciding the question presented, even if it were an issue in this case. Fourth, the Ninth Circuit's decision neither presents a matter of national importance nor is it controversial, and it adheres to this Court's precedent. Fifth, this Court only recently denied certiorari on a related issue under the exact same California statute. The result here should be the same.

A. This Case Does Not Present The Question In The Petition

Petitioner asks this Court to review the question of whether federal courts sitting in diversity should apply federal or state law to determine the validity of forum-selection provisions. But the Ninth Circuit found it unnecessary to answer that broad

question given that the forum-selection clause in this case had been voided before suit, and it expressly declined to answer the exact issue on which Petitioners seek review.

When the matter reached the district court and before the motion to transfer under § 1404(a) was filed, the forum-selection provision had been voided by Waber pursuant to his statutory rights under § 925 as an individual primarily working and residing in California. The Ninth Circuit decision addresses a threshold question antecedent to the question presented by the Petitioner—namely, whether the parties' contract continued to contain a forum-selection clause after Waber voided it under § 925 before any litigation began.

Consciously avoiding being drawn into the fray, the Ninth Circuit stated in footnote 6:

> ***We need not decide whether state law would govern the validity of a forum-selection clause that had not been voided and is before the district court for consideration in the transfer analysis.***

Pet. App. 20a, n. 6. (emphasis added.) As the Ninth Circuit pointed out, the resolution of the issues before it on the appeal lay "upstream." The question for which Petitioner seeks review before this Court lies downstream.

The Ninth Circuit's decision was thus rooted in the provisions of § 925 and the specific facts of the case

under which the forum-selection clause had been voided before the civil action began. The Ninth Circuit decided only the issues before it and went no further than necessary to resolve the issues presented on appeal. Because the Ninth Circuit did not reach the question presented by Petitioner, review is neither warranted nor appropriate.

B. The Ninth Circuit's Decision Does Not Implicate Any Conflict Among The Courts Of Appeals

There is no Circuit split on the issues decided by the Ninth Circuit and its decision did not ignite an 8-2 split on the pro-enforcement federal law standard.

1. There Is No Circuit Split On The Issues Actually Decided by The Ninth Circuit

When the matter reached the district court and before the motion to transfer under § 1404(a) was filed, the forum-selection had been voided by Waber pursuant to his statutory rights under § 925 as an individual primarily working and residing in California. The Ninth Circuit, consistent with *Erie* principles and in a manner applied by other Circuits on similar threshold issues, determined that state law governed the threshold inquiry of whether the clause had been voided in the context of § 925 and on the specific facts of this case.

The Circuits have frequently applied state law to determine preliminary issues such as whether the forum-selection clause covers the dispute or party in

question and whether the forum-selection clause is mandatory or permissive. For example, in *Collins v. Mary Kay, Inc.*—a case cited by Petitioner—the Third Circuit held that, under *Erie*, state contract law governed the analysis of whether the claim was covered by the forum-selection clause in an agreement. *Collins*, 874 F.3d 176, 182 (3d Cir. 2017). In *Weber v. PACT XPP Technologies, AG*, 811 F.3d 758, 770 (5th Cir. 2016), the Fifth Circuit applied state law to the preliminary question of whether the provision was mandatory or permissive and stated that only *after* such a determination is made "does [the provision's] enforceability come into play." *See also Martinez v. Bloomberg, LP*, 740 F.3d 211, 214 (2d Cir. 2014) (parties' chosen law governed question of scope); *Albemarle Corporation v. AstraZeneca UK Ltd.,* 628 F.3d 643, 646 (4th Cir. 2010) (parties' chosen law governed whether clause was mandatory or permissive); *cf. Azima v. RAK Investment Authority*, 926 F. 3d. 870, 872 (D.C. Cir. 2019) (applying general contract principles to the question of whether the provision was mandatory or permissive).

There is no Circuit split on the question decided by the Ninth Circuit with respect to the application of state law to the preliminary inquiry of whether the forum-selection provision had been voided before the litigation began. The Petitioner claims that the Ninth Circuits' observation in footnote 4 amounts to an acknowledgment of an open issue as to whether federal or state law governs the validity of a forum-selection clause, which Petitioner characterizes as one which has "long divided the courts, commentators, and split the circuits." Pet. 9, 11. But footnote 4 is in

relation to this Court's opinions in *Stewart* and *Atlantic Marine* and all it says is as follows: "Our sister circuits have recognized that the Supreme Court did not answer whether state or federal law governs the validity of a forum-selection clause." Pet. App. 19a, n.4. Having made this observation, the Ninth Circuit concluded it did not need to reach this issue to decide the case at hand and, in footnote 6, as noted above, it expressly declined to address the question left unanswered by *Stewart* and *Atlantic Marine,* which both presuppose an otherwise valid forum-selection clause for the enforcement analysis. *See Atlantic Marine*, 571 U.S. 49, n. 5 ("Our analysis presupposes a contractually valid forum-selection clause.")

There may come a day when this Court considers it necessary to address the question left open in *Stewart* and *Atlantic Marine.* But in this case, the Ninth Circuit ruled only on the preliminary question of whether the clause had been voided before suit, and its decision that state law applies to this analysis swims in the mainstream of Circuit opinion.

2. The Ninth Circuit Decision Did Not Ignite an 8-2 Split On The Pro-Enforcement Federal Law Standard

Far from being the cause of an 8-2 Circuit split on the pro-enforcement federal law standard, the Ninth Circuit was an early adopter of this standard and has been a steadfast proponent of it, as stated in the seminal case of *Manetti-Farrow v. Gucci*. In *Manetti-Farrow,* the Ninth Circuit held that "the

federal rule announced in *The Bremen* controls the enforcement of forum clauses in diversity cases." 858 F.2d 509, 513 (9th Cir. 1988). *Manetti-Farrow* remains the law in the Ninth Circuit today. *See*, *e.g.*, *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081, 1086 (9th Cir. 2018). In the case at bar, the Ninth Circuit noted that "enforceability of a forum-selection clause in a federal court is a well-established matter of federal law in this Circuit following *Bremen* …" Pet. App. 15a.

The cases cited by Petitioner as evidence of an 8-2 split show quite the opposite. Rather, this body of case law demonstrates that in diversity cases (and even in federal question cases depending on the issue), the Courts of Appeals have been readily able to harmonize the holdings of *The Bremen* and *Atlantic Marine*, which evince a strong presumption for enforcement of forum-selection provisions in the federal courts, with the concerns set forth in *Erie* that federal courts sitting in diversity apply the substantive law of the forum state. In so doing, these decisions demonstrate that federal courts, as discussed above, look to state law on threshold contractual determinations (such as whether a contract has been formed, whether it applies to the dispute between the parties, the scope of the clause, whether the language is mandatory or permissive, and, as here, whether it has been voided) and, as reflected below, apply federal law enforcement principles under the standards set forth in *The Bremen* and *Atlantic Marine*.

a. In *Martinez v. Bloomberg, LP*, the Second Circuit considered a motion to dismiss based on a forum-selection clause that required the parties to litigate covered claims in English courts. *Martinez*, 740 F.3d 211, 214 (2d Cir. 2014). The question presented in *Martinez* was whether the claims at issue in the case were covered by the terms of the contract such that the forum-selection provision would apply. On this question, the Second Circuit applied the law of the jurisdiction chosen by the parties (in the absence of any other state law or any suggestion by the parties that another law should apply). *See id.* at 221. On the question of enforcement, the Second Circuit, citing *Manetti-Farrow* with approval, held that *every circuit* applies "federal law, as articulated by *Bremen*, to decide the clause's enforceability." *Id.* at 222. This case does not squarely address the question presented in the Petition as there was no argument that the clause was invalid under state law.

b. In *Collins v. Mary Kay, Inc.*, the Third Circuit reviewed an order dismissing the case on forum non conveniens grounds based on a Texas forum-selection clause in a consulting agreement. 847 F.3d at 179. There was a threshold question about whether the claim was covered by the forum-selection provision. On this preliminary question, the Third Circuit applied state law to determine whether the claim was covered by the language of the contract. *Id.* at 181. Having concluded the claim was covered by the forum-selection clause, the Third Circuit, citing *Manetti-Farrow* with approval, affirmed the district court's dismissal order because it was "settled law" that federal law applies to the enforceability analysis.

874 F.3d at 181, fn. 3. There was no claim of invalidity made or addressed. The Petitioner also cited to the Third Circuit case *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 97 (3d Cir. 2018), which also does not address the validity question presented in the Petition.

c. In *Albemarle Corporation v. AstraZeneca UK Ltd.*, the Fourth Circuit reviewed an order dismissing the case based on a forum-selection clause selecting the English High Court as the forum for disputes under the contract. 628 F.3d 643, 646 (4th Cir. 2010). The parties disputed whether the clause was mandatory or permissive. *Id.* at 651. To resolve this issue, the Fourth Circuit, applying a conflict of laws analysis under state law, held that English law as the chosen law of the contract should apply and that, under English law, the clause was mandatory, even though federal principles would have analyzed it as permissive. The Fourth Circuit rejected the application of a South Carolina law which rendered all forum-selection clauses permissive, no matter the language. Having reached the determination that the forum-selection clause should be considered, citing *Manetti-Farrow* with approval, the Fourth Circuit applied *The Bremen* standards to enforce the forum-selection provision.

The Fourth Circuit was not presented with a situation like this case, where the choice-of-law provision had been voided before litigation, so it differs materially in this respect. However, the Fourth Circuit and the Ninth Circuit are in agreement on the pro-enforcement federal law standard.

d. In *Dynamic CRM Recruiting Solutions, LLC v. UMA Education, Inc.*, the Fifth Circuit affirmed the district court's remand of a case to state court based on a forum-selection provision requiring adjudication in state court. 31 F. 4th 914, 916 (5th Cir. 2022). The issue presented was whether the clause established an exclusive venue for disputes arising under the contract and whether the waiver of the party's rights to remove was sufficiently clear. *Id.* at 916-17. To answer these questions, the Fifth Circuit held that "the clause's interpretation is governed by the law of the forum state," which was also the state law chosen by the parties to govern disputes. *Id.* 31 F.4th at 917. The Fifth Circuit recognized that, had it been faced with a question about enforcement, "the enforceability of a forum selection clause in a diversity case such as this one is governed by federal law…." *Id.* at 917-18. None of the Fifth Circuit cases cited by the Petitioner concern questions of validity such that they would have any relevance to the question presented by the Petition.

e. In *Wong v. PartyGaming Ltd.*, the Sixth Circuit affirmed the district court's *sua sponte* dismissal on forum non conveniens grounds in favor of a forum-selection clause providing that all disputes would be subject to the exclusive jurisdiction of the courts of Gibraltar. 589 F.3d 821, 824 (6th Cir. 2009). The parties did not raise or litigate any threshold questions, and there was no claim of invalidity on appeal. The dispute was about whether the federal courts should enforce the forum-selection provision despite the fact that it would be an inconvenient forum for the plaintiffs. On that question, the Sixth Circuit

followed the majority rule, citing *Manetti-Farrow* with approval, and held that there was no doubt that "in this diversity suit, the enforceability of the forum selection clause is governed by federal law." *Id.* at 827-28.

In *Lakeside Surfaces, Inc. v. Cambria Co., LLC*, also cited by Petitioner, the Sixth Circuit reversed the district court's dismissal of a case filed in Michigan based on a forum-selection provision selecting Minnesota. 16 F.4th 209 (6th Cir. 2021). It did not address any type of threshold issues because "[t]he parties here dispute only the forum-selection clause's enforceability." *Id.* at 216 (citing to the Ninth Circuit's decision in *Gemini*). The Sixth Circuit applied federal law to the analysis of enforceability. In doing so, like the Ninth Circuit's decision in this case, it declined to enforce the contractual choice-of-forum clause because it contravened a strong public policy of the forum in which suit is brought. *Id.* at 220-21. The forum state of Michigan had a franchise statute that voids out-of-state forum-selection clauses in franchise agreements. *Id.* Consistent with the Ninth Circuit's analysis in this case, the Sixth Circuit stated: "when assessing a forum-non-conveniens motion relying on a forum-selection clause, we first ask several contract-specific questions, including whether the forum-selection clause is applicable, mandatory, valid, and enforceable. An answer of 'yes' to all those questions means *Atlantic Marine*'s modified forum-non-conveniens analysis applies, and the plaintiff bears the burden of showing that the public factors weigh heavily against dismissal; an answer of 'no' to any of

them means the traditional forum-non-conveniens analysis applies instead." *Id.*

f. In *Niemi v. Lasshofer*, the Tenth Circuit affirmed the district court's denial of the enforcement of a forum-selection provision. 770 F.3d 1331 (10th Cir. 2014). There were no threshold disputes, and the Tenth Circuit had no occasion to address validity. Instead, at a preliminary injunction hearing, the district court was presented with compelling evidence that the contract had been fraudulently induced. *Id.* at 1351. On this basis, the district court, applying *The Bremen* standards, declined to enforce the forum selection provision. *Id.* at 1352. The Tenth Circuit held that the district court did not abuse its discretion in determining that "the inclusion of the forum selection clause was the product of fraud" and was not enforceable. *Id.*

g. In *Krenkel v. Kerzner International Hotels Limited*, the Eleventh Circuit affirmed the district court's dismissal of the action giving effect to a forum-selection clause which called for all claims to be exclusively resolved in the Supreme Court of The Bahamas. 579 F.3d 1279, 1281 (11th Cir. 2009). There was no question presented about threshold determinations; rather, the defendants opposed enforcement on the grounds that the clause was the product of overreaching and unfair bargaining power as a non-negotiated form. In rejecting these arguments, the Eleventh Circuit held that the district court did not abuse its discretion by enforcing the forum-selection clause and dismissing the case in

favor of the foreign forum based on *The Bremen* standards.

h. In *Azima v. RAK Investment Authority*, the D.C. Circuit reversed the district court's denial of a motion to dismiss to enforce an English forum-selection clause. 926 F. 3d. 870, 872 (D.C. Cir. 2019). The parties disputed whether the forum-selection provision was mandatory or permissive. To analyze that issue, and with neither party advocating that English law should apply, the D.C. Circuit applied general principles of contract law to make its determination. *Id*. at 876. Having resolved this threshold issue, the D.C. Circuit, relying on *The Bremen* factors, applied federal law to determine the enforceability of the clause. *Id.* at 875.

i. The Seventh Circuit's approach to determining the validity and enforceability of forum-selection clauses in diversity cases is not in significant tension with the approach taken by the other courts of appeals. In *Jackson v. Payday Financial, LLC*, the Seventh Circuit was confronted with the question of whether to enforce a mandatory arbitration provision conducted by the Cheyenne River Sioux Tribe on the Cheyenne River Sioux Tribe Reservation. 764 F.3d 765, 768 (7th Cir. 2014). It concluded that it "need not decide the question of what law governs the validity and interpretation of the loan agreements, however, because whether federal, tribal or Illinois law applies, the same result obtains." *Id.* at 775, n. 23. The Seventh Circuit assumed, for the purposes of its analysis, that the choice-of-law provision was valid, applied the tribal law chosen by the parties, which

borrows from federal law to stand in for or amplify tribal law where necessary, and applied *The Bremen* standards to conclude that the clause contained an illusory forum and, as a result, was unconscionable under federal law. *Id.* at 776.

In sum, the Ninth Circuit decision in this case did not ignite an 8-2 Circuit split in the Circuits, and there is broad acceptance among them on the federal law pro-enforcement standard, with the Ninth Circuit as a standard-bearer.

C. This Case Would Be A Decidedly Unsuitable Vehicle For Considering The Question Presented

Even if this case presented the question in the Petition (which it does not), it would be an exceedingly poor vehicle for doing so. Petitioner did not raise the precise question presented below, and the answer to the question presented would not be outcome determinative in this case.

1. The entirety of Petitioner's briefing below— its initial motion to dismiss, its failed petition for writ of mandamus in the Ninth Circuit, its motion for summary judgment in district court, and its briefing on appeal to the Ninth Circuit—rested on Petitioner's overreaching and incorrect reading of the Supreme Court's decision in *Stewart*. Petitioner argued below that *Stewart* requires federal courts sitting in diversity to apply federal law to forum-selection provisions in all circumstances, preempting state contract law. Pet. Br. 21-34. As discussed above, the Ninth Circuit devoted a segment of its opinion

dissecting and putting to rest Petitioner's argument. Pet. App. 20a-23a. Petitioner now abandons the unsustainable *Stewart* preemption argument, relegating reference to *Stewart* to the final paragraph of the Petition. Instead, Petitioner attempts to reach the same result by arguing there is a Circuit split. This transmuted argument was not presented to the Ninth Circuit. The Court should not now take up a question which was not squarely and fairly addressed by the Ninth Circuit.

2. This case is unsuitable for review by this Court because, even if the Court were to grant the Petition and consider the issue as Petitioner has stated it, answering the question presented in the Petition is not outcome determinative. The Ninth Circuit's decision rested on two alternative grounds: (1) that the forum-selection provision had been voided under state law; and (2) the district court appropriately exercised its discretion to consider the public policy of California in its transfer analysis under applicable federal law and controlling Ninth Circuit authority. Petitioner does not challenge the second ground, nor could it, and that fully resolves the dispute.

The Ninth Circuit has been crystal clear that "the federal rule announced in *The Bremen* controls the enforcement of forum clauses in diversity cases." *Manetti-Farrow*, 858 F.2d at 513. Decisions since *Manetti-Farrow* have affirmed the law in the Ninth Circuit, with two recent decisions—*Sun* and *Gemini*—addressing this exact point. *See Jones v. GNC Franchising, Inc.*, 211 F.3d. 495, 497-98 (9th Cir.

2000) (applying *The Bremen* and finding forum-selection provision unenforceable against public policy); *Doe 1 v. AOL LLC*, 552 F.3d 1077, 1083 (9th Cir. 2009) (same); *Sun v. Advanced China Healthcare, Inc.*, 901 F.3d 1081 (9th Cir. 2018) (re-affirming application of *The Bremen* in diversity cases); *Gemini Technologies v. Smith & Wesson Corp.*, 931 F.3d 911 at 917 (9th Cir. 2019) (holding that "*Bremen* is readily harmonized with *Atlantic Marine* because *Bremen* provides guidance regarding the 'extraordinary circumstances' in which a forum selection clause will not control.")

In this case, the Ninth Circuit held that the district court did not abuse its discretion when it followed *The Bremen* factors and controlling Ninth Circuit authority weighing state public policy in the balancing of interests under § 1404. This is consistent with the mandate in *Stewart* that state public policy must be considered as part of the § 1404 interests of justice analysis. As the Ninth Circuit recognized, the "district court here did not rely exclusively on California's public policy to deny transfer, but correctly analyzed it as one of the multiple § 1404(a) factors," and as a result, there was "no error in the district court's consideration of § 925 as part of its transfer analysis" under federal law. Pet. App. 24a-25a.

Petitioner does not challenge and has not sought review of this aspect of the Ninth Circuit's decision. As a result, any inquiry into the question presented by Petitioner is an academic exercise and makes no difference to the result.

D. Ninth Circuit Decision Does Not Implicate A Pressing Matter Of National Importance And It Is Not Controversial

Section 925 is peculiar to California.[4] As recognized by the Ninth Circuit, its decision was narrow, rooted in the peculiarities of § 925 and the factual determination that Waber was not represented in the negotiation of the forum-selection clause and that he voided it before the lawsuit began. While this case has parochial implications and is relevant within the Ninth Circuit, it does not present a matter of national importance that would warrant review by this Court.

In issuing its decision, the Ninth Circuit did exactly what this Court would expect of its Circuits. The Ninth Circuit adhered to the *Erie* doctrine in determining that, by operation of law, there was no forum-selection clause contained in the agreement at the time enforcement was sought. There is nothing controversial about this analysis. The federal courts readily harmonize substantive state laws relating to contract formation, coverage, and voidability, on the one hand, and federal procedural law, which governs the enforceability of an otherwise valid provision, on the other.

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[4] This statute is unique and markedly different in form and substance from the other ouster of venue statutes which Petitioner references in its brief and which it claims are implicated by the Ninth Circuit's decision here. *See* Pet. Br. 21.

The treatises, academic articles, and commentary referenced in the Petition provide no solace to Petitioner's argument that this case is the "ideal vehicle for resolving a constantly recurring choice-of-law question that has divided the Circuits." Pet. Br. 2. None of these deal with the preliminary question of a forum-selection clause that has been voided under state law before the lawsuit begins. None of them take issue with the application of state law to the threshold inquiry of contract formation, coverage, or voidability.[5]

The Ninth Circuit recognized, as do Respondents, that *Stewart* and *Atlantic Marine* did not answer the question posed by the Petition because they presuppose an otherwise valid forum-selection clause. To the extent there is some residual debate, this broader issue is the one that has been the subject of discussion in the Circuits and in the relevant commentary. This question might one day animate the Court's consideration in the context of a case that

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[5] Many of the secondary sources cited by Petitioner pre-date *Atlantic Marine* and discuss a controversy over the correct procedural mechanism for enforcement, which was later resolved in *Atlantic Marine* in which this Court rejected the argument that a forum-selection clause may be enforced under § 1406(a) or Fed. R. Civ. P. 12(b)(3) on the basis of improper venue. To the extent the commentary post-dates *Atlantic Marine*, the articles (a) suffer from the same misreading of *Stewart* that infected Petitioner's argument below and which was roundly dismantled by the Ninth Circuit, and (b) address the downstream question that the Ninth Circuit studiously avoided answering because it was addressing the "upstream" issue of the clause having been voided before the lawsuit began.

is an appropriate vehicle for review. But that is not this case. Moreover, *Manetti-Farrow* and its progeny in the Ninth Circuit stand for the proposition that federal law applies to this analysis. As Wright and Miller point out, on the federal pro-enforcement standard, the Ninth Circuit is in the clear majority and joined in this view by the First, Second, Third, Fourth, Fifth, Sixth, and Eleventh Circuits. 14D Charles Alan Wright, Arthur R. Miller & Richard D. Freer, *Federal Practice and Procedure* § 3803.1 (4th ed. 2022).

The Ninth Circuit Circuit's application of a unique state law to the preliminary question of whether the clause had been voided before the lawsuit began is not of national importance or controversial, and it is decidedly unworthy of review.

E. This Court Recently Denied A Petition Raising A Similar Question Under The Same California Statute

One barometer of the unsuitability of this case for review is that the Court recently passed on and denied a Petition for a Writ of Certiorari in a case that raises a similar legal issue under the same California statute in a similar context. *See Zimmer Biomet Holdings, Inc. v. United States Dist. Court*, 140 S. Ct. 110, 205 L. Ed.2d 36 (2019) (denying petition) (October Term 2019). In *Zimmer Biomet*, like here, a California employee signed an employment agreement containing a foreign forum-selection and choice-of-law provision falling within the ambit of § 925. Zimmer Biomet moved to transfer, relying on the forum-

selection provision. There was no evidence that the provision had been voided before the lawsuit began, but the employee had not been represented by counsel when negotiating the employment agreement. In applying the § 1404(a) analysis, the district court held the forum-selection clause was unenforceable under *The Bremen* standards because it contravened a strong public policy of the forum state—California—as embodied in § 925. Zimmer Biomet filed a writ of mandamus challenging the ruling, which the Ninth Circuit denied. In its decision, the Ninth Circuit affirmed the district court's denial of the motion to transfer, holding that the forum-selection clause was unreasonable under *The Bremen* standards and should not be enforced. The Ninth Circuit also held that the choice of law provision was unenforceable for the same reasons.

Zimmer Biomet filed a Petition for a Writ of Certiorari asserting that the case raised a question of "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." Petition 1-2. Like Petitioner here, Zimmer Biomet argued that there is an "entrenched disagreement" in the "sources of law that can make forum selection clauses unenforceable" and that there is a Circuit split over the question of whether state or federal law public policy considerations determine whether a forum-selection provision is enforceable. The Petition challenged the Ninth Circuit's decision as inconsistent with the requirements of *Atlantic Marine*. Pet. Br. at 7-8; Argument at 9-12. In opposition, the Respondents pointed out that there is no Circuit split concerning a

district court's responsibility to consider state public policy in a § 1404(a) analysis and that the Ninth Circuit decision was entirely consistent with *The Bremen* and *Atlantic Marine*. Opp. 22-25. This Court denied the Petition.

CONCLUSION

For all of the above reasons, this case is not suitable for review. The Petition for a Writ of Certiorari should be denied.

Respectfully submitted,

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