No. 22-252

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

REPLY BRIEF OF PETITIONER

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The question presented—whether federal courts sitting in diversity must apply federal, or state, law to resolve the validity of forum-selection clauses—has split the circuits 8-2, recurs constantly, and dictates whether clauses in millions of contracts are valid. This is an ideal case to resolve that acknowledged split. The decision below held that state law governs the validity of forum-selection clauses, meaning that if state law deems forum-selection clauses void, the clauses are always invalid. The Seventh Circuit agrees.

Eight circuits instead hold that federal law governs. Forum-selection clauses in federal courts waive federal procedural rights, and *Erie* dictates that federal courts apply federal procedural rules, not contrary state rules. In these circuits, courts routinely enforce forum-selection clauses, even if state laws purportedly void them. The Ninth Circuit thus acknowledged that the question presented has "divided the commentators and split the circuits." Pet.App.19a n.4 (quotations omitted).

Respondents wrongly portray the Ninth Circuit as merely holding that state law governs a subset of validity challenges, *i.e.*, whether forum-selection clauses are invalid because a state law declares them void. District courts within the Ninth Circuit disagree, instead interpreting the decision below as holding that state law governs all challenges to the validity of forum-selection clauses.

Even under the narrowest reading of the decision below, this Court's intervention is imperative. Otherwise, the Ninth and Seventh Circuits will apply state laws that categorically invalidate forum-selection clauses, while eight other circuits apply federal law and enforce forum-selection clauses despite state anti-forum-selection laws. Undisputedly, courts within the Third, Fifth, Tenth, and Eleventh Circuits—which apply federal law—have upheld forum-selection clauses notwithstanding the exact California law here that purportedly voids them. Confirming that the question presented is outcome-determinative, a New Jersey district court applied federal law to enforce the exact forum-selection clause at issue, notwithstanding invocation of the same California law.

Respondents downplay California's anti-forum-selection law as too "unique," "unusual," "peculiar," and "markedly different" to warrant the Court's attention. But the far-reaching consequences of the decision below would justify review even absent a split. Under the Ninth Circuit's rule, state laws purporting to void forum-selection clauses always prevail. California's law lets employees invalidate forum-selection clauses in their employment contracts at will. California is home to 19 million workers, and forum-selection clauses routinely feature in employment contracts. Other States in the Ninth Circuit have similar anti-forum-selection laws.

By anyone's count, the decision below invites nullification of countless forum-selection clauses in millions of contracts. The decision below also encourages employers in tight labor markets to poach employees, then invoke state anti-forum-selection laws to avoid litigating in agreed-upon jurisdictions that enforce non-compete agreements. This Court should step in to restore certainty to important, ubiquitous contractual arrangements.

I. The Decision Below Exacerbates an 8-2 Circuit Split

The circuits are split 8-2 over what law governs the validity of forum-selection clauses. Challenges to validity encompass whether federal courts may honor forum-selection clauses notwithstanding state law voiding them. Eight circuits apply federal law under *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and virtually always uphold forum-selection clauses. The Seventh and Ninth Circuits instead apply state law, including state laws voiding forum-selection clauses. Pet. 14-15. The decision below and other circuits acknowledge this split, and commentators recognize that the decision below deepens the split. Pet. 16-18.

1. Respondents (at 1-2, 10-12) deny the Ninth Circuit addressed the question presented. But the panel stated: "[T]he question remains as to whether federal or state law governs the validity of a forum-selection clause." Pet.App.18a-19a. The panel observed: "[W]hether state or federal law governs the validity of a forum-selection clause" has "divided the commentators and split the circuits." Pet.App.19a n.4 (quotations omitted). The panel approvingly explained that district courts "have ruled that state law governs the validity of a forum-selection clause just like any other contract clause." Pet.App.19a

(emphasis omitted). Then the panel dove into the conflict: "We hold that the state law applicable here, § 925(b), … determines the threshold question of whether [the] contract contains a *valid* forum-selection clause." Pet.App.19a-20a (emphasis added). Elsewhere, the panel reinforced it was addressing "whether the contract sought to be enforced includes a viable forum-selection clause." Pet.App.21a.

In short, when state laws purport to void forum-selection clauses, the Ninth Circuit applies those state laws and invalidates forum-selection clauses. To the extent other types of challenges fall into the concept of "validity," the logic of the Ninth Circuit's decision would extend to those challenges too.

District courts within the Ninth Circuit have interpreted the decision below as holding that state law controls validity questions, full stop: "A federal court, sitting in diversity jurisdiction, applies state law of the forum state when … deciding whether a forum-selection clause is valid." *Dickerson v. Arcadian Infracom, Inc.*, 2022 WL 7048195, at *2 (W.D. Wash. Oct. 12, 2022); *accord Jackson Contractor Grp., Inc. v. Travelers Cas. & Sur. Co. of Am.*, 2022 WL 16541163, at *2 (E.D. Wash. Oct. 28, 2022); *O'Connell v. Celonis, Inc.*, 2022 WL 3591061, at *5 (N.D. Cal. Aug. 22, 2022).

Respondents (at 11) try to cabin the decision below. They quote a footnote in the opinion that disclaimed needing to "decide whether state law would govern validity of a forum selection clause that had not been voided." Pet.App.20a n.6. That footnote is in significant tension with the rest of the opinion. Regardless, even were the Ninth Circuit's decision limited to automatically applying state laws to void forum-selection clauses, review would be warranted. Given the proliferation of state anti-forum-selection laws, the whole ballgame is whether federal or state law governs the validity of forum-selection clauses that state laws purport to void. Pet. 21-22.

Respondents (at 11-12) note that section 925 lets parties unilaterally void forum-selection clauses before litigation begins. But whether state law makes clauses void or just voidable is irrelevant. The issue only arises when one party tries to back out of a contract by arguing that the contract was always invalid. In the Ninth Circuit, state laws purporting to make forum-selection clauses void or voidable invariably doom forum-selection clauses. In eight other circuits, federal-law criteria govern, and usually dictate upholding forum-selection clauses.

Also non-responsive is respondents' citation (at 14) to *Manetti-Farrow v. Gucci,* 858 F.2d 509 (9th Cir. 1988). Regardless how the Ninth Circuit previously applied federal law to forum-selection clauses, today's rule is different, and the Ninth Circuit denied rehearing en banc here. As noted, district courts within the circuit now apply state law to *all* challenges to the validity of forum-selection clauses. *Supra* p. 4.

As to the Seventh Circuit—the other outlier—respondents (at 21) see no "significant tension" between its approach and "other courts of appeals." The Seventh Circuit disagrees: "[T]he majority of federal circuits hold 'that the enforceability of a forum selection clause implicates federal procedure and should therefore be governed by federal law.' We have taken a different approach," and apply state law when assessing the "validity … of a forum selection clause." *Jackson v. Payday Fin., LLC*, 764 F.3d 765, 774 (7th Cir. 2014) (citations omitted). District courts in the Seventh Circuit thus invalidate forum-selection clauses when facing state laws resembling California Labor Code § 925. Pet. 15.

2. Eight circuits instead hold that federal law governs the validity of forum-selection clauses, full stop. Those circuits define "validity" to encompass challenges to forum-selection clauses based on state laws purporting to void them. Within those circuits, courts apply the federal *Bremen* factors and routinely enforce forum-selection clauses even when confronted with California's anti-forum-selection law or its cousins. In these eight circuits, petitioner undisputedly could have enforced the forum-selection clause at issue.

Respondents try to muddy the waters, arguing (at 15) that courts, including the Ninth Circuit, apply federal law to "enforceability" rather than "validity." Similarly, respondents (at 12-13) contend that all circuits "appl[y] state law to determine preliminary issues" involving contract formation.

But all eight circuits on the majority side of the line use "enforceability" and "validity" interchangeably and apply federal law to challenges based on state laws voiding those clauses.[1] True, all circuits conversely apply

[1] *E.g.*, *Martinez v. Bloomberg LP*, 740 F.3d 211, 227 (2d Cir. 2014) (applying *Bremen* factors to determine whether party overcame forum-selection clause's "presumption of enforceability" or proved the clause "invalid"); *Reading Health Sys. v. Bear Stearns & Co.*, 900 F.3d 87, 97 (3d Cir. 2018) (treating "enforceability challenge[s]" and challenges to "valid[ity]" as equivalent and applying federal law to both); *Allen v. Lloyd's of London*, 94 F.3d 923, 928 (4th Cir. 1996) (discussing interchangeably the "presumption of enforceability" and "presumptive validity" of forum-selection clauses); *Barnett v. DynCorp Int'l, LLC*, 831 F.3d 296, 302 (5th Cir. 2016) (federal law applies to all "validity and enforceability" challenges, which the court "treat[s] … as synonyms"); *FranNet, LLC v. Grant*, 2021 WL 5925964, at *2 (W.D. Ky. Dec. 15, 2021) (same within Sixth Circuit); *Postnet Int'l Franchise Corp. v. Wu*, 521 F. Supp. 3d 1087, 1096 (D. Colo. 2021) (applying same standard "to both the enforcement and

state law to threshold contract-formation questions, like whether forum-selection clauses lack consideration or cover given disputes. BIO 12-13, 15, 25. But no circuits on the majority side classify voiding forum-selection clauses on public policy grounds as a threshold contract-formation question. Courts within those circuits describe California's section 925 as raising a "question of the forum provision's 'enforceability'" and hold parties to their bargain. *Pacelli v. Augustus Intel., Inc.*, 459 F. Supp. 3d 597, 617 (S.D.N.Y. 2020) (quotation omitted).

Indeed, courts within the Third, Fifth, Tenth, and Eleventh Circuits have upheld forum-selection clauses under federal law after rejecting arguments that the state law at issue, California Labor Code § 925, invalidates them. Pet. 15-16. The District of New Jersey even upheld the exact same forum-selection clause in the exact same employment contract at issue. *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). Respondents ignore this mountain of caselaw.

Respondents (at 16-21) try to obfuscate the split by reciting the facts of some cases. Respondents omit the legal rule those cases embraced: federal law always determines the validity of forum-selection clauses, including whether those clauses are valid notwithstanding state anti-forum-selection laws. The landscape in the eight majority-side circuits starkly contrasts with the Ninth and Seventh Circuits:

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validity of the forum-selection clause"); *Krenkel v. Kerzner Int'l Hotels Ltd.*, 579 F.3d 1279, 1281 (11th Cir. 2009) (applying federal law to determine if forum-selection clauses are "valid and enforceable"); *Azima v. RAK Inv. Auth.*, 926 F.3d 870, 874 (D.C. Cir. 2019) (same).

- Second Circuit: "[W]hether a forum selection clause is invalid" is resolved "under *Bremen*." *Martinez*, 740 F.3d at 227. Courts refused to apply state laws that (like California's) would void forum-selection clauses. *NuMSP, LLC v. St. Etienne*, 462 F. Supp. 3d 330, 342 n.13 (S.D.N.Y. 2020) (Louisiana law); *Zeppelin Sys. USA, Inc. v. Pyrolyx USA Ind., LLC*, 2020 WL 1082774, at *4 (S.D.N.Y. Mar. 5, 2020) (Indiana law).
- Third Circuit: Federal law controls whether a forum-selection "clause is invalid." *Reading Health*, 900 F.3d at 97. A Pennsylvania law "categorically render[ing] invalid all" forum-selection clauses in construction contracts was irrelevant. *KNL Constr., Inc. v. Killian Constr. Co.*, 2014 WL 4185769, at *1 (M.D. Pa. Aug. 21, 2014).
- Fourth Circuit: When "a forum selection clause is invoked to change venue, federal law applies." *Albemarle Corp. v. AstraZeneca UK Ltd.*, 628 F.3d 643, 652 (4th Cir. 2010). A Massachusetts law overriding forum-selection clauses in non-compete agreements was irrelevant. *Hilb Grp. of New Eng., LLC v. LePage*, 2022 WL 1538583, at *2 n.2, *4 (E.D. Va. May 16, 2022).
- Fifth Circuit: *Bremen* governs whether a forum-selection clause is "valid and should be enforced." *Int'l Software Sys., Inc. v. Amplicon, Inc.*, 77 F.3d 112, 114 (5th Cir. 1996). Courts reject efforts to invoke California Labor Code § 925 and similar laws, instead applying *Bremen* to uphold forum-selection clauses. *E.g.*, *CyrusOne LLC v. Hsieh*, 2021 WL 2936379, at *5-6 & n.1 (E.D. Tex. July 13, 2021).
- Sixth Circuit: Rather than apply state law "void[ing] out-of-state forum-selection clauses contained in franchise agreements," the Sixth Circuit applies federal

law. *Lakeside Surfaces, Inc. v. Cambria Co., LLC*, 16 F.4th 209, 216 (6th Cir. 2021). True, the court invalidated the forum-selection clause in *Lakeside*. BIO 19-20. But in *Lakeside*, federal law dictated non-enforcement of the forum-selection-clause based on a careful analysis of competing interests and the forum state's strong public policy against enforcement. 16 F.4th at 216, 220. Forum selection clauses have no fighting chance in the Ninth Circuit.

- Tenth Circuit: The Tenth Circuit applies federal law to determine forum selection clauses' validity. *Niemi v. Lasshofer*, 770 F.3d 1331, 1351 (10th Cir. 2014). That rule dictates applying federal law, not state laws that purport to void such clauses (*e.g.*, in franchise agreements). *Postnet*, 521 F. Supp. 3d at 1093-96.
- Eleventh and D.C. Circuits: The federal *Bremen* standard governs whether "a mandatory forum-selection clause is legally valid and enforceable." *Azima*, 926 F.3d at 874-75; *see Krenkel*, 579 F.3d at 1281.

Only this Court can stop dueling holdings that arbitrarily render the same forum-selection clauses enforceable in some venues but not others.

II. No Barriers Impede Review of This Important Question

The consequences of the decision below cry out for immediate review. Forum-selection clauses are ubiquitous, including in millions of employment contracts affected by California's anti-forum-selection law. Pet. 4, 20. Whether state or federal law governs the validity of forum-selection clauses arises in dozens of cases each year. The question presented is demonstrably outcome-determinative. Courts applying the federal standard routinely uphold forum-selection clauses, while courts in the Ninth and Seventh Circuits routinely invalidate them under state anti-forum-selection laws.

1. Respondents downplay the decision as presenting "parochial implications" based on "peculiar[ities]" of California law that "markedly differ[]" from other States' laws. BIO 25 & n.4. What those differences are, respondents do not say. California's law mirrors dozens of state laws voiding forum-selection-clauses. Pet. 21. Washington, for example, "void[s]" any "provision in a noncompetition covenant" that "requires the employee … to adjudicate a noncompetition covenant outside of [that] state." Wash. Rev. Code § 49.62.050(1). Oregon "void[s]" clauses that "require[] any litigation … arising from … construction contract[s] to be conducted in another state." Or. Rev. Stat. § 701.640(1)(a), (2).

California's law may be singular only in its breadth. By purporting to render voidable most forum-selection clauses in employment contracts, section 925 applies to the majority of California's labor force, which includes over 19 million people in some of the nation's largest commercial centers. Pet. 20. Employers need predictability and uniformity. But under the decision below, employers that rely on forum-selection clauses run the risk that courts will allow California employees to nullify them, while employees in other major business centers, like New York, must follow them. Pet. 20-22.

2. Respondents' vehicle objections are illusory. Respondents (at 22-23) say petitioner "did not raise the precise question presented below" by focusing on *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), and only now raising a circuit split. But petitioner at every stage has argued federal law controls. *E.g.*, Pet.App.60a (in district court: federal law "leaves no room for the operation of state laws which purport to void forum selection clauses"); CA9 Appellant Br. 22 ("[t]he forum-selection clause [was] valid" under federal law). The petition still features *Stewart*, Pet. 24-25, and telling this Court about

a circuit split is not a new argument. Anyway, petitioner's en banc petition sought review of "whether federal or state law controls the validity inquiry" because "[t]he circuits are split." CA9 En Banc Pet. 5, 7.

Respondents (at 23-24) claim the Ninth Circuit "alternative[ly]" held that the district court properly denied petitioner's motion to transfer under 28 U.S.C. § 1404(a) based on "the public policy of California." But the validity of the forum-selection clause and transfer analysis are inherently entwined, such that this Court's reversal on the question presented necessarily dictates reassessment of the transfer analysis. Under *Atlantic Marine Construction Company, Inc. v. United States District Court*, the validity of a forum-selection clause dictates whether to grant a transfer motion. 571 U.S. 49, 63 (2013). If the clause is valid, district courts must transfer in "all but the most exceptional cases." *Id.* Only if the forum-selection clause is invalid do district courts weigh "traditional" section 1404 factors, including state public policy, "convenience," and "the plaintiff's choice of forum." *See* Pet.App.23a. Thus, the Ninth Circuit approved the district court's transfer analysis only for a case "not involving a forum-selection clause." Pet.App.26a. Had the Ninth Circuit applied federal law and upheld the forum-selection clause, *Atlantic Marine* would have required a different analysis that virtually guaranteed transfer. 571 U.S. at 62-63.

Respondents (at 27-29) are incorrect that this Court recently denied a similar petition. *Zimmer Biomet Holdings, Inc. v. United States District Court*, 140 S. Ct. 110 (2019), involved a two-sentence Ninth Circuit order denying mandamus of a district court's refusal to transfer a class action. The question presented was what weight district courts should give to state public policy when deciding whether to transfer venue. *Zimmer* did not involve what law governs the validity of forum-selection clauses. Hence, the Ninth Circuit below believed it had not yet resolved whether federal or state law governs the validity of forum-selection clauses. Pet.App.19a.

3. As to the merits, all agree that under *Erie*, federal courts apply state substantive law and federal procedural law. Respondents portray whether to apply state anti-forum-selection laws as a substantive state-law question, without explaining why. BIO 25. But federal law controls the validity of forum-selection clauses because whether parties validly waive their rights to challenge a preselected federal forum involves federal procedural questions. Pet. 23-24. Holding parties to their contracts also protects against States dictating the availability of federal forums. The decision below threatens millions of routine forum-selection clauses that eight other circuits would enforce. Only this Court can correct the disuniformity among the circuits on this dispositive question.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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