No. 22-500

In the Supreme Court of the United States

GREAT LAKES INSURANCE SE, PETITIONER,

v.

RAIDERS RETREAT REALTY CO., LLC,

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

REPLY BRIEF FOR THE PETITIONER

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REPLY BRIEF FOR THE PETITIONER

The decision below creates a circuit split over whether state policy can render unenforceable a choice-of-law provision in a maritime contract. In the Fifth Circuit, the public policy of a single State is irrelevant; what matters is whether the chosen law contravenes the fundamental purposes of *federal* admiralty law. In the Third Circuit, by contrast, a forum State can now dictate whether a choice-of-law clause is enforceable by applying its own *state* policy. The decision below thus hands to the fifty States the power to veto choice-of-law clauses that would otherwise be permitted under federal admiralty law. The Third Circuit's new forum-state-policy test is wrong, and it will inject massive uncertainty into an insurance industry that depends on predictability.

A. The Decision Below Creates A Circuit Split

1. Federal admiralty law governs the enforceability of choice-of-law clauses in maritime contracts. See, *e.g.*, *Great Lakes Reinsurance (UK) PLC* v. *Durham Auctions, Inc.*, 585 F.3d 236, 242-243 (5th Cir. 2009). Under well-established federal maritime principles, a choice-of-law provision is presumptively enforceable.[1] That presumption can be overcome only in narrow circumstances. *Durham*, 585 F.3d at 242-

[1] See, *e.g.*, Pet. App. 8a; *Great Lakes Ins. SE* v. *Wave Cruiser LLC*, 36 F.4th 1346, 1354 (11th Cir. 2022); *Galilea, LLC* v. *AGCS Marine Ins. Co.*, 879 F.3d 1052, 1059 (9th Cir. 2018); *Triton Marine Fuels Ltd., S.A.* v. *M/V PACIFIC CHUKOTKA*, 575 F.3d 409, 413 (4th Cir. 2009); *Durham*, 585 F.3d at 243.

243. Although courts of appeals have differed somewhat in their precise formulations of the test for rendering a choice-of-law provision unenforceable, only the Third Circuit has relied on this Court's opinion in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), to hold that the policy preferences of a forum State can overcome this federal rule of presumptive enforceability.

The decision below conflicts with decisions of the Fifth and Ninth Circuits. See Pet. 13-24. Those courts have enforced comparable or identical choice-of-law clauses in maritime contracts by looking to federal policy rather than forum-state policy. In the Fifth Circuit, a maritime choice-of-law clause is enforceable "unless the state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of *maritime law*." *Durham*, 585 F.3d at 243 (quoting *Stoot* v. *Fluor Drilling Services, Inc.*, 851 F.2d 1514, 1517 (5th Cir. 1988)) (emphasis added). The Ninth Circuit has similarly rejected an expansive reading of *The Bremen* and reasoned that "conflicting [forum] state policy cannot override squarely applicable federal maritime law" under a choice-of-law provision. *Galilea, LLC* v. *AGCS Marine Ins. Co.*, 879 F.3d 1052, 1060 (2018).[2]

The Third Circuit, by contrast, is the first to construe this Court's opinion in *The Bremen* to require assessing whether a choice-of-law clause is "unreasonable or unjust" *under forum-state law*. See Pet.

[2] The Eleventh Circuit has also upheld an identical choice-of-law clause, but the parties there did not dispute whether the clause would be unreasonable under state law. See *Wave Cruiser*, 36 F.4th at 1354.

App. 15a. No other court of appeals has taken this Court's language in *The Bremen*—which upheld a forum-selection clause in an international maritime contract—to mean that an individual State's policies can defeat a choice-of-law provision that is consistent with federal maritime principles.

2. Raiders asserts (at 12-17) that the Third Circuit's extension of *The Bremen* to encompass a forum State's policy preferences does not create a circuit split. That is incorrect.

a. Raiders contends (at 13-15) that no conflict exists with the Fifth Circuit because it applies the same forum-state-policy test that the Third Circuit adopted. The Fifth Circuit, however, takes the opposite approach.

Raiders relies entirely (at 13) on the Fifth Circuit's decision in *Durham*. In Raiders's view, *Durham* held that forum-state policy did not suffice to override a choice-of-law clause—essentially applying the same test as the decision below. That badly misreads *Durham*. In upholding an identical choice-of-law provision, the court of appeals reasoned that the provision was not "unreasonable or unjust" because (i) New York had a "substantial relationship to the parties or the transaction," and (ii) New York law did not "conflict[] with any fundamental purpose *of maritime law*." *Durham*, 585 F.3d at 243-244 (emphasis added). The key analysis thus looked to the policy of federal maritime law, not the policy of the forum State. And the court enforced the choice-of-law provision even though forum-state law had different standards for rendering a policy void. *Id.* at 239-240. It mentioned forum-state policy only in briefly rejecting an argument that "application of New York law would be contrary to fundamental policy of [forum-state] Missis-

sippi." *Id.* at 244. The court remarked that "[a]ssuming, arguendo, that this would be determinative, it has not been shown." *Ibid.*

Even if *Durham* were ambiguous, decisions both before and since clarify the Fifth Circuit's view. *Durham* applied a two-part test previously set forth in *Stoot*, 851 F.2d at 1517, which focuses on federal maritime policy and not forum-state policy. See *ibid.* ("[U]nder admiralty law, where the parties have included a choice of law clause, that state's law will govern unless the state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law.") (citation omitted); see also *Durham*, 585 F.3d at 243. Raiders says (at 14) that *Stoot* is irrelevant because the choice-of-law provision there designated forum-state law. But the court's *test* for assessing such clauses is what matters here.

Since *Durham*, the Fifth Circuit has reiterated in *St. Paul Fire & Marine Ins. Co.* v. *Board of Comm'rs of Port of New Orleans*, 418 Fed. Appx. 305 (2011), that—notwithstanding the single "assuming arguendo" line in *Durham*—forum-state policy is irrelevant under the *Stoot* test. In *St. Paul*, the court of appeals upheld a choice-of-law clause designating New York, even though New York would have allowed a defense that was not as broadly available under forum-state law. *Id.* at 309. Again applying *Stoot*, the court reaffirmed that the appropriate inquiry is whether enforcing the clause would "conflict[] with any fundamental purposes of maritime law"—not whether enforcement would conflict with forum-state policy. *Ibid.* (quoting *Durham*, 585 F.3d at 244).

b. Raiders also attempts (at 15-17) to minimize the conflict between the Third and Ninth Circuits. In

Galilea, 879 F.3d 1052, the Ninth Circuit assessed a contract with a choice-of-law provision like the one here—designating federal maritime law or, absent applicable federal law, New York law—and applied federal arbitration law. *Id.* at 1059-1061. It did so despite the "strong public policy of [forum-state] Montana against enforcement of arbitration agreements" in insurance policies. *Id.* at 1060.

Raiders asserts (at 15-16) that *Galilea* is distinguishable because forum-state policy conflicted with federal law rather than another State's law. But despite that factual distinction, the court of appeals' reasoning directly conflicts with the decision below. The court expressly declined to interpret *The Bremen* to mean that state policy can overcome the federal rule of presumptive enforceability of choice-of-law provisions. *Galilea*, 879 F.3d at 1059-1061. It reasoned that *The Bremen* involved forum-selection clauses, not choice-of-law clauses. *Id.* at 1060. "[M]ore foundationally," the court explained, *The Bremen* involved an international contract designating a foreign forum and thus considered only whether "federal public policy as supplied by federal maritime law [] outweighed the application of the law of other countries." *Ibid.* *Galilea* therefore squarely rejected reading *The Bremen* to allow forum-state policy to supplant a choice-of-law clause that is valid under federal law.

c. Finally, Raiders contends (at 13) that the D.C. Circuit has taken the same position as the Third Circuit because it has applied *The Bremen* to a choice-of-law provision. See *Milanovich* v. *Costa Crociere, S.p.A.*, 954 F.2d 763 (D.C. Cir. 1992). Critically, however, the D.C. Circuit did not endorse the Third Circuit's novel expansion of *The Bremen* to encompass

individual States' policy preferences. Instead, it applied *The Bremen*'s "unreasonable or unjust" test to a contract designating Italian law, finding that enforcing the clause would not undermine federal policy. *Id.* at 767-769. As explained below, applying *The Bremen* to that international context is the broadest appropriate reading of this Court's decision, see pp. 6-8, *supra*, and is not the test the Third Circuit applied here.

B. The Decision Below Is Wrong

1. The Third Circuit misread this Court's decision in *The Bremen*. Under its novel reading, any State can now override the federal presumption of enforceability of maritime choice-of-law clauses if enforcement would contravene a forum State's own policies. *The Bremen* said no such thing.

In *The Bremen*, this Court upheld a forum-selection clause in an international maritime contract designating the London Court of Justice. After emphasizing the importance of "international trade, commerce, and contracting," 407 U.S. at 13-14, the Court explained that forum-selection clauses should be enforced unless "enforcement would be unreasonable and unjust" or "the clause [is] invalid for such reasons as fraud or overreaching." *Id.* at 15. The Court further explained that a clause would also be unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought." *Ibid.*

Even assuming *The Bremen* applies to maritime choice-of-law clauses just as it does to maritime forum-selection clauses, this Court's reasoning reflected the distinctly international concerns that case presented. When the Court created an exception for a "strong public policy of the forum," it was not referring to state law. *The Bremen* was filed in Florida,

and the Court said not one word about Florida law. See 407 U.S. at 5-6. Rather, the Court was referring to the federal policy *of the United States*. *Id*. at 15. That was clear from its analysis of forum law, which involved an assessment of federal admiralty principles and whether those admiralty principles apply "strictly in American waters" or are "controlling in an international commercial agreement." *Id*. at 15-16. Thus, when the Court referred to "a strong public policy of the forum in which suit is brought," it plainly meant *federal maritime policy*, not the public policies of the fifty States.

The Ninth Circuit made exactly this point in *Galilea*. As it explained, *The Bremen* "consider[s] the application of the laws of otherwise equally situated fora in light of the 'concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability.' " *Galilea*, 879 F.3d at 1060 (quoting *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 629 (1985)). The district court here echoed the Ninth Circuit's analysis. See Pet. App. 32a. As both courts recognized, when a U.S. court is deciding whether to enforce a forum-selection clause and send a case overseas, it makes sense to ask whether the clause violates *federal maritime policy*. Nothing in *The Bremen* indicates that a U.S. court applying a choice-of-law clause should consider *forum-state policy*. State policy and federal admiralty policy are not on equal footing, as were the policies of two sovereign nations in *The Bremen*. Even more, allowing each State to fashion its own standard for enforcing choice-of-law provisions would undercut the need for predictability and

uniformity, which *The Bremen* emphasized. See 407 U.S. at 13-14.

The Third Circuit nevertheless took *The Bremen*'s reference to the "policy of the forum" to mean the policy of an individual forum State within the United States. It justified extending *The Bremen* with a reference to this Court's later decision in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), which applied *The Bremen* to the domestic context by holding that a forum-selection clause designating Florida was enforceable in Washington. See Pet. App. 15a. But *Carnival* does not support the Third Circuit's extension—even putting aside that it involved forum-selection clauses, not choice-of-law clauses. First, *Carnival* did not address *The Bremen*'s "strong public policy of the forum" exception at all. *Carnival* considered whether the forum-selection clause was unenforceable under *The Bremen* because "the clause was not the product of negotiation, and enforcement effectively would deprive respondents of their day in court," given the hardship of litigating in Florida. 499 U.S. at 590. Second, *Carnival* was careful not to import *The Bremen* wholesale into a new context, warning that "we must refine the analysis of *The Bremen* to account for the realities of form passage contracts." *Id.* at 593; see *id.* at 594.

2. Raiders offers no sound justification for the Third Circuit's misguided extension of *The Bremen*. It reiterates (at 13) *The Bremen*'s "unreasonable and unjust" language, and simply assumes that a forum State's policy can make a choice-of-law clause "unreasonable or unjust" under federal law. Its brief explanation elsewhere (at 15) is counterintuitive: that in deciding whether forum-state law "would conflict with the fundamental purposes of maritime law," a court

should "consider[] whether applying the designated law would violate a strong public policy of the forum State." Notably, Raiders nowhere relies on *Carnival Cruise*—the sole basis for the Third Circuit's extension of *The Bremen*. Raiders similarly declined to cite that decision below. See Pet. App. 15a.

C. The Question Presented Is Important, And This Case Is An Appropriate Vehicle To Address It

1. The decision below would gut the federal rule of presumptive enforceability of maritime choice-of-law clauses and would undermine the federal interest in uniformity—"an overriding value in admiralty law." 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 4:1 (6th ed. 2020). In particular, it risks unsettling the maritime-insurance industry, which relies on the predictable enforcement of contracts, including choice-of-law clauses. The law governing an insurance contract substantially affects the risks and costs of coverage. States vary in substantive law, such as whether the contract is governed by a standard of utmost good faith (*uberrimae fidei*), and procedural law, such as whether a prevailing party may recover attorneys' fees. See, *e.g.*, *Durham*, 585 F.3d 236 (substantive law); *Great Lakes Ins. SE* v. *M&M Private Lending Grp., LLC*, 2020 WL 13379275 (S.D. Fla. Sept. 11, 2020) (attorneys' fees). Under the Third Circuit's approach, a choice-of-law clause might be deemed unenforceable if those substantive or procedural rules differ between the designated State and the forum State. That defeats the basic purpose of choice-of-law provisions, which is to select a stable and predictable set of rules when the parties enter into the contract.

Raiders contends (at 17) that this case does not present an important or recurring question because "[t]he question presented herein appears to have arisen a total of three or four times since 1992." That is incorrect. As those who practice in the maritime-insurance industry are well aware, the enforceability of choice-of-law clauses is typically the first target in any contract dispute.[3] It is true that only some courts of appeals have addressed the question presented—a number that will soon grow, as the question is pending before the First Circuit. See *Great Lakes Ins. SE* v. *Andersson*, No. 21-1648 (1st Cir.); see also *Great Lakes Ins. SE* v. *Andersson*, 544 F. Supp. 3d 196, 202-203 (D. Mass. 2021) (enforcing an identical choice-of-law clause, and citing the district-court decision below). But those courts of appeals have generated "discord in admiralty case law" in district courts nationwide. *Andersson*, 544 F. Supp. 3d at 202.

Raiders also suggests (at 18) that the question presented lacks practical importance because insurers can circumvent the Third Circuit's decision by adding a forum-selection clause designating New York. But parties to a maritime contract should not be required to adopt a *different* forum-selection provision that

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[3] See, *e.g.*, *Stokes* v. *Markel American Ins. Co.*, 595 F. Supp. 3d 274 (D. Del. 2022); *Openwater Safety IV, LLC* v. *Great Lakes Ins. SE*, 435 F. Supp. 3d 1142 (D. Colo. 2020); *Maclean* v. *Travelers Ins. Co.*, 299 F. Supp. 3d 231 (D. Mass. 2017); *Swift Spindrift Ltd.* v. *Alvada Ins. Inc.*, 175 F. Supp. 3d 169 (S.D.N.Y. 2016); *Marine Ins. Co. Ltd.* v. *Cron*, 2014 WL 4982418 (S.D. Tex. 2014); *Great Lakes Reinsurance (UK), PLC* v. *Rosin*, 757 F. Supp. 2d 1244 (S.D. Fla. 2010); *Great Lakes Reinsurance (UK), PLC* v. *Sea Cat I, LLC*, 653 F. Supp. 2d 1193 (W.D. Okla. 2009); *Great Lakes Reinsurance (UK) PLC* v. *Southern Marine Concepts Inc.*, 2009 A.M.C. 1093 (S.D. Tex. 2008).

may be inconvenient or unwarranted, to ensure the enforcement of a presumptively valid choice-of-law provision. In any event, such a forum-selection clause would not be a panacea. That clause might itself be challenged, under reasoning similar to the decision below. Raiders's proposed workaround would thus suffice only for suits filed in the designated forum, and the party seeking to enforce a contract does not always control where a suit is filed.

2. This case is an excellent vehicle for deciding the important question presented. The Third Circuit squarely decided the question, see Pet. App. 15a, and its answer was the sole justification for vacating the district court's correct decision to enforce the choice-of-law clause, see *ibid*. Raiders attempts to manufacture (at 18-19) two vehicle problems, but both are insubstantial.

First, Raiders contends (at 18) that this case is an unsuitable vehicle because the district court has not yet decided on remand whether Pennsylvania has a strong public policy that would bar enforcement of the choice-of-law clause. But any assessment of Pennsylvania public policy does not affect the question presented, which is whether Great Lakes should be required to litigate about Pennsylvania law in the first place.

Second, Raiders contends (at 19) that the case is an unsuitable vehicle because "it is far from certain whether Raiders will ultimately prevail" in its Pennsylvania-law counterclaims. Again, whether Raiders will ultimately prevail under Pennsylvania law is irrelevant. And it is a particular stretch for Raiders to label as a "vehicle problem" the possibility that its own claims might turn out to be meritless even under its preferred law.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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