No. 22-500

In the Supreme Court of the United States

GREAT LAKES INSURANCE SE, PETITIONER,

v.

RAIDERS RETREAT REALTY CO., LLC

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

BRIEF FOR PETITIONER

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QUESTION PRESENTED

Under federal admiralty law, can a choice-of-law clause in a maritime contract be rendered unenforceable if enforcement is contrary to the "strong public policy" of the State whose law is displaced?

CORPORATE DISCLOSURE STATEMENT

Great Lakes Insurance SE is a corporation organized and existing under the laws of the Federal Republic of Germany, with its office and principal place of business located in the Federal Republic of Germany. Great Lakes Insurance SE is a wholly owned subsidiary of Munchener Ruckversicherungs-Gesellschaft, a company incorporated in Germany with its principal place of business in Germany.

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Great Lakes Reinsurance (UK) PLC v. *Dion*,
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Milanovich v. *Costa Crociere, S.p.A.*,
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Cases—Continued:

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Perzy v. *Intercargo Corp.*, 827 F. Supp. 1365 (N.D. Ill. 1993) 25
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Cases—Continued:

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Swift Spindrift Ltd. v. *Alvada Ins. Inc.*,
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The Oranmore,
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Triton Marine Fuels Ltd., S.A. v. *M/V PACIFIC CHUKOTKA*,
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Cases—Continued:

Union Fish Co. v. *Erickson*,
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Vimar Seguros y Reaseguros, S.A. v. *M/V Sky Reefer*,
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46 U.S.C. App. 1303(8) 32
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Statutes—Continued:

Fla. Stat. § 86.121 41
Ga. Code Ann. § 33-4-6 41

Other authorities:

Alex J. Parks, *The Law and Practice of Marine Insurance and General Average* (1987).....6
Earnest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 Yale L.J. 565 (1921).....30
The Federalist No. 80 (Clinton Rossiter ed., 1961).....1
Harold K. Watson, *A Fifty Year Retrospective on the American Law of Marine Insurance*, 91 Tul. L. Rev. 855 (2017) 6, 40, 41
Michael F. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to The* Wilburn Boat *Problem*, 29 J. Mar. L. & Com. 41 (1998).....38
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Thomas J. Schoenbaum, *Admiralty and Maritime Law* (6th ed. 2022) 6, 9, 15, 17, 26, 34, 40
Thomas R. Beer, *Established Federal Admiralty Rules in Marine Insurance Contracts & the* Wilburn Boat *Case*, 1 U.S.F. Mar. L.J. 149 (1989).....40, 41
Warren T.R. von Bittner, Jr., *The Validity and Effect of Choice of Law Clauses in Marine Insurance Contracts*, 53 Ins. Counsel J. 573 (1986)..... 6, 18, 20, 36, 41

Other authorities—Continued:

William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513 (1984) 17, 35

Willis L.M. Reese, *Power of Parties to Choose Law Governing Their Contract*, 54 Am. Soc'y Int'l L. Proc. 49 (1960) 36

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BRIEF FOR PETITIONER

INTRODUCTION

The Constitution extends the federal "judicial Power" to "all Cases of admiralty and maritime Jurisdiction." U.S. Const. art. III, § 2. In *The Federalist*, Alexander Hamilton explained that even "[t]he most bigoted idolizers of State authority" could not "deny the national judiciary the cognizances of maritime causes." *The Federalist No. 80*, at 478 (Clinton Rossiter ed., 1961). For much of this Nation's history—with little fanfare or debate—maritime law was thus an exclusively federal enclave. Federal courts crafted and applied federal common law to decide maritime contract disputes. As relevant here, from the Founding until the mid-twentieth century, when parties contracted for the application of some other nation's law,

U.S. courts enforced those choice-of-law clauses unless they were contrary to *federal* maritime policy.

State law first entered the stage following this Court's decision in *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). *Wilburn Boat* allowed state law to play a substantive role in maritime cases, by filling the gaps where no federal statute or entrenched federal common law controls. *Wilburn Boat* generated considerable turmoil in the marine industries, which had previously relied on a single, uniform body of federal maritime law. To claw back some of that uniformity and predictability, parties to maritime contracts turned to choice-of-law provisions designating which State's law would fill any gaps in federal maritime law. Commonly, they chose a State with a well-developed maritime jurisprudence, like New York—as the parties did here.

Although the substance of choice-of-law clauses began to shift, their validity did not. *Wilburn Boat* did not disturb the established maritime rule that federal law governs the enforceability of choice-of-law clauses. Raiders accordingly does not dispute that, as a matter of federal common law, choice-of-law clauses in maritime contracts are presumptively enforceable. This case involves the correct federal-common-law test for overriding that presumption. Traditional conflicts principles allow courts to refuse to apply a choice-of-law clause when that clause violates public policy. But when considering a choice-of-law clause in a maritime contract, the key question is *whose* public policy matters—federal policy or the policy of the State where the suit is brought.

The answer should be easy. Maritime law is a federal enclave. The presumption of enforceability is a uniform *federal rule*, and the public-policy exception is

a uniform *federal exception*. It naturally follows that the scope of a federal exception to a federal rule should be defined by *federal policy*. That has been the nearly uniform approach of courts for 200-plus years, until the decision below. Before *Wilburn Boat*, federal courts enforced a choice-of-law provision in a maritime contract unless it violated federal maritime policy. After *Wilburn Boat*, federal courts did the same thing. The substance of choice-of-law provisions changed, as parties often specified which State's law would fill any gaps in federal maritime law. But the test for enforcing choice-of-law provisions remained the same.

That approach is supported by all three of the considerations to which this Court looks in deciding questions of admiralty law: historical "tradition[]," "conformity with parallel statutory schemes," and "policy grounds." *Dutra Grp.* v. *Batterton*, 139 S. Ct. 2275, 2283 (2019). In addition to the history described above, congressional guidance broadly favors the enforcement of choice-of-law clauses in maritime contracts. And enforcing the parties' choice of law furthers the fundamental principles of admiralty law, including uniformity, predictability, and international comity. There is no sound justification for the contrary rule adopted by the court below, which would allow any one of the 50 States' idiosyncratic preferences to defeat the federal presumption of enforceability. This Court should therefore make clear that maritime choice-of-law clauses are enforceable unless they contravene a strong *federal* public policy.

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-15a) is reported at 47 F.4th 225. The opinion of the district court granting Great Lakes's motion for judgment on the pleadings (Pet. App. 19a-35a) is reported at

521 F. Supp. 3d 580. The opinion of the district court denying Raiders's motion to alter or amend the judgment (Pet. App. 16a-18a) is not reported.

JURISDICTION

The judgment of the court of appeals was entered on August 30, 2022. The petition for a writ of certiorari was filed on November 23, 2022, and was granted on March 6, 2023. The jurisdiction of this Court rests on 28 U.S.C. 1254.

CONSTITUTIONAL PROVISION INVOLVED

Article III, Section 2 of the United States Constitution provides, in relevant part:

> The judicial Power shall extend to all Cases, in Law and Equity, arising under this Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority;—to all Cases affecting Ambassadors, other public Ministers and Consuls;—to all Cases of admiralty and maritime Jurisdiction;—to Controversies to which the United States shall be a Party;—to Controversies between two or more States;—between a State and Citizens of another State,—between Citizens of different States,—between Citizens of the same State claiming Lands under Grants of different States, and between a State, or the Citizens thereof, and foreign States, Citizens or Subjects.

STATEMENT

A. Legal Background

1. The Constitution grants federal courts jurisdiction over maritime and admiralty cases. U.S. Const. art. III, § 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction . . . .").

That grant of federal admiralty jurisdiction extends to marine insurance contracts. See *New England Mut. Marine Ins. Co.* v. *Dunham*, 78 U.S. 1 (1870); see also, *e.g.*, *DeLovio* v. *Boit*, 7 F. Cas. 418, 419 (No. 3,776) (C.C.D. Mass. 1815) (Story, J.).

This Court has long recognized that, "by granting federal courts jurisdiction over maritime and admiralty cases, the Constitution implicitly directs federal courts sitting in admiralty to proceed 'in the manner of a common law court.'" *Dutra Grp.* v. *Batterton*, 139 S. Ct. 2275, 2278 (2019) (quoting *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 489-490 (2008)). As a result, "Congress has paramount power to fix and determine the maritime law which shall prevail throughout the country." *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 215 (1914). But "in the absence of some controlling statute, the general maritime law, as accepted by the Federal courts, constitutes part of our national law, applicable to matters within the admiralty and maritime jurisdiction." *Ibid.*

2. Federal common law exclusively governed maritime contracts for nearly two centuries. See, *e.g.*, *Watts* v. *Camors*, 115 U.S. 353, 362 (1885); *Jensen*, 244 U.S. at 215. That changed after *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). In *Wilburn Boat*, the Court created a limited new role for state law in maritime cases. The Court concluded that state law may apply "in the absence of controlling Acts of Congress," where there is neither a "judicially established federal admiralty rule" nor an apparent federal interest in "fashion[ing] an admiralty rule." *Id.* at 314, 319. In other words, state law now fills the gaps in federal admiralty law. But where a federal rule exists—

whether because of a statute, entrenched federal common law, or an overriding federal policy interest—state law still may not displace it.

Wilburn Boat generated considerable "turmoil" in the marine insurance industry. Alex J. Parks, *The Law and Practice of Marine Insurance and General Average* 13 (1987). Predicting whether federal or state law will apply to any given substantive question—and, if state law applies, which State's law—can be a difficult task. See Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 19:9 (6th ed. 2022); see also Harold K. Watson, *A Fifty Year Retrospective on the American Law of Marine Insurance*, 91 Tul. L. Rev. 855, 856 (2017). In particular, it is not always clear whether a given issue is governed by entrenched federal precedent. For example, the courts of appeals have disagreed about whether the doctrine of *uberrimae fidei*, which imposes an affirmative duty of utmost good faith on the insured to disclose all material facts, is sufficiently entrenched. Compare *Albany Ins. Co.* v. *Anh Thi Kieu*, 927 F.2d 882 (5th Cir. 1991), with *Fireman's Fund Ins. Co.* v. *Great Am. Ins. Co. of N.Y.*, 822 F.3d 620 (2d Cir. 2016). Courts have even disagreed about whether two warranties within a single policy are governed by federal or state law. Compare *Travelers Prop. Casualty Co. of Am.* v. *Ocean Reef Charters LLC*, 996 F.3d 1161 (11th Cir. 2021) (captain-and-crew warranty governed by state law), with *Lexington Ins. Co.* v. *Cooke's Seafood*, 835 F.2d 1364 (11th Cir. 1988) (navigational-limits warranty governed by federal law).

3. To mitigate the uncertainty generated by *Wilburn Boat*, the marine industries have embraced choice-of-law clauses in their contracts. See Warren T.R. von Bittner, Jr., *The Validity and Effect of Choice of Law Clauses in Marine Insurance Contracts*,

53 Ins. Counsel J. 573, 578 (1986). When consistently enforced, those choice-of-law clauses provide a predictable legal framework to govern contracts across the many jurisdictions, both domestic and international, in which maritime companies operate. *Ibid.* In the marine insurance industry in particular, such provisions afford certainty to both insurer and insured—giving the former notice of the risks it is bearing, and the latter notice of the risks from which it is protected.

B. Factual Background

1. Great Lakes is a marine insurance company organized in Germany and headquartered in the United Kingdom. Pet. App. 2a-3a; p. II, *supra*. From 2007 to 2019, Great Lakes insured a yacht owned by Raiders, a Pennsylvania LLC, for up to $550,000. Pet. App. 2a-3a, 21a. As part of the insurance contract, the parties included a choice-of-law clause. *Id.* at 4a, 25a. The clause selects settled federal admiralty law, or in the absence of such law, then New York law. *Ibid.* In full, the clause states:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.

Id. at 25a.

The parties' contract also includes a forum-selection clause providing that "any dispute arising hereunder shall be subject to the exclusive jurisdiction of the Federal courts of the United States of America, in particular, the Federal District court within which [Raiders]

resides or the Federal District court within which [Raiders's] insurance agent resides." D. Ct. Doc. 1, at 82 (Sept. 25, 2019). Raiders resides in the Eastern District of Pennsylvania, and Raiders's insurance agent resides in the Southern District of Florida. *Id.* at 67.

Before Raiders and Great Lakes renewed the policy in 2016, a third party surveyed the yacht's condition. Pet. App. 21a. The survey results included a "Priority 1 recommendation" that Raiders purchase fire extinguishers and store them aboard the yacht. *Ibid.* After Raiders submitted a letter to Great Lakes certifying that it had complied with all of the survey's recommendations, Great Lakes renewed the policy. *Id.* at 21a-22a. The renewed policy included an express warranty that the yacht's fire-extinguishing equipment was "properly installed" and "maintained in good working order," including "the weighing of tanks once a year, certification/tagging and recharging as necessary." *Id.* at 22a.

2. In 2019, Raiders's yacht ran aground near Fort Lauderdale, Florida. No fire occurred and the fire equipment was not used. The yacht sustained significant damage, and Raiders filed a claim under the insurance policy. Pet. App. 22a.

Great Lakes investigated and determined that, at the time of the accident, the yacht's fire extinguishers had not been inspected or recertified, in violation of the policy's express warranty. Pet. App. 22a. Great Lakes further concluded that Raiders had not completed the survey's recommendations, and that Raiders's 2016 letter certifying compliance thus contained a material misrepresentation. *Id.* at 22a-23a. Great Lakes denied Raiders's insurance claim on those two grounds. *Id.* at 23a.

Although that denial may seem harsh to the landbound, it reflects traditional maritime principles. For instance, the doctrine of *uberrimae fidei* requires that an applicant for marine insurance make a complete, truthful disclosure of all material facts, even if not asked. As a result, "any misrepresentation or omission" —even if "inadverten[t]"—"will vitiate the policy." Schoenbaum, *supra*, § 19:14. Then, during the life of a marine insurance policy, maritime law similarly demands "literal performance" or "strict compliance" with warranties. *Id.* § 19:15. "[C]ontrary to the general rule applicable to other kinds of insurance," those doctrines apply even where they have "draconian consequences." *Id.* § 19:14; see *id.* § 19:15. Maritime law's rules of strict enforcement date "back into the early days of marine insurance, when sailing ships in faraway seas were insured in London by underwriters who could get no information except from the shipowners." *Stecker* v. *American Home Fire Assur. Co.*, 84 N.E.2d 797, 799 (N.Y. 1949).

C. Procedural Background

1. Great Lakes sought a declaratory judgment in the Eastern District of Pennsylvania that it was entitled to deny coverage due to Raiders's material misrepresentation and breach of express warranty. Pet. App. 19a-20a. Raiders asserted five counterclaims, including three under Pennsylvania law: (i) breach of fiduciary duty under state common law; (ii) bad-faith liability, in violation of 42 Pa. Cons. Stat. § 8371; and (iii) unfair trade practices, in violation of 73 Pa. Stat. and Cons. Stat. Ann. § 201-1 *et seq.* Pet. App. 20a; see *id.* at 34a & n.5.

Great Lakes moved for judgment on the pleadings with respect to those three Pennsylvania claims, argu-

ing that Pennsylvania law is inapplicable under the policy's choice-of-law clause—which, again, selects federal admiralty law or, alternatively, New York law. Pet. App. 25a-26a. Raiders acknowledged that its Pennsylvania counterclaims are "not cognizable under New York law." *Id.* at 34a. But Raiders argued that the contract's choice-of-law clause should be rejected as unenforceable under "Pennsylvania's 'strong public policy' of punishing insurers who deny coverage in bad faith." *Id.* at 29a.

2. The district court granted Great Lakes's motion for judgment on the pleadings. Pet. App. 19a-35a. It explained that "the public policy of a state where a case was filed cannot override the presumptive validity, under federal maritime choice-of-law principles, of a provision in a marine insurance contract where the chosen forum has a substantial relationship to the parties or the transaction." Pet. App. 32a. The court analyzed this Court's decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 15 (1972), which "considered whether the public policy of the forum where suit was brought—there, federal public policy as supplied by federal maritime law—outweighed the application of the law of other countries." Pet. App. 31a-32a (citation omitted). The district court explained that *The Bremen* considered only federal policy, and did not suggest that a presumptively valid choice-of-law clause "must yield to the public policy preferences of the *particular state* in which the case happens to be brought." *Id.* at 32a (emphasis added).

The district court further emphasized that its holding was "consistent with maritime law's primary purpose: 'to protect and encourage commercial maritime activity . . . by ensuring that uniform rules of conduct are in place.'" Pet. App. 33a (citation omitted). The

court reasoned that "[p]ermitting state public policy to override presumptively valid contractual choice-of-law provisions in marine insurance contracts would frustrate such uniformity." *Ibid.*

3. The court of appeals vacated and remanded. Pet. App. 1a-15a. The court agreed that the choice-of-law clause here requires the application of New York law, and concluded that Raiders had forfeited any argument to the contrary. *Id.* at 8a n.1. But it held that the district court should have "consider[ed] whether Pennsylvania has a strong public policy that would be thwarted by applying New York law." *Id.* at 15a.

The court of appeals reached that conclusion by extending *The Bremen*'s federal-public-policy exception to forum-state policy. Pet. App. 11a-15a. It noted that this Court had applied *The Bremen* to "a dispute over whether Washington State or Florida was the proper forum" for a passenger's suit against a cruise line in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991). Pet. App. 15a. The court of appeals also believed "it altogether reasonable that a 'strong public policy of the forum [state] in which suit is brought' could, as to that policy specifically, render unenforceable the choice of state law in a marine insurance contract." *Ibid.* (alteration in original) (quoting *The Bremen*, 407 U.S. at 15). The court therefore remanded for consideration of whether Pennsylvania has a strong public policy that would bar the enforcement of the choice-of-law clause and the application of New York law here. *Ibid.*

SUMMARY OF ARGUMENT

Federal admiralty law governs the enforceability of choice-of-law clauses in maritime contracts. Under well-established federal maritime principles, a choice-

of-law clause is presumptively enforceable. That presumption can be overcome only in narrow circumstances, including when the parties' chosen law contravenes federal maritime policy.

I. The court of appeals adopted a different rule: that a forum State can negate the federal presumption of enforceability by applying *its own* public policy. That rule is contrary to historical tradition, congressional guidance, and the fundamental purposes of maritime law—all of which make clear that the only relevant public policy is *federal* public policy.

A. Throughout this Nation's history, federal policy has governed maritime choice-of-law clauses. From the Founding until the middle of the twentieth century, state law had virtually no role in maritime cases. Instead, maritime contracts were governed by a uniform body of federal admiralty law. Parties to maritime contracts therefore had no need to adopt choice-of-law clauses selecting a particular State's law. Parties did, however, sometimes adopt choice-of-law clauses selecting another country's law, and courts enforced those provisions unless contrary to federal public policy.

In 1955, in *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, this Court allowed state law to play a gap-filling role in admiralty cases. After *Wilburn Boat*, parties began to opt for choice-of-law clauses that selected state law. But federal courts generally continued to apply federal public policy to determine the enforceability of those clauses. Most courts now apply a two-part test, under which choice-of-law clauses are enforceable unless (i) the parties have no substantial relationship to, or reasonable basis for selecting, the chosen law; or (ii) the chosen law violates federal maritime policy.

In the decision below, the Third Circuit became the first court of appeals to hold a maritime choice-of-law clause potentially unenforceable as a matter of *state* public policy. It did so based on a misreading of this Court's decision in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). In fact, *The Bremen* strongly endorsed the enforceability of freely negotiated contractual provisions, subject to the traditional federal-policy exception. It did not once mention the forum State's policy interests.

B. Congressional guidance further supports a federal-common-law rule focused on federal policy. Congress has addressed maritime choice-of-law and forum-selection provisions and has enacted a narrow federal exception to enforcement. A longstanding federal statute provides that vessels transporting passengers may not contractually limit trial rights for personal injury or death. 46 U.S.C. 30527. Congress's declaration of federal policy in that specific circumstance carries a strong negative implication: Congress expects that maritime choice-of-law clauses will otherwise be enforced. That inference is further buttressed by Congress's general embrace of the freedom of contract in various areas under federal control. Congress's pro-contract approach would be jeopardized if 50 States could refuse to enforce choice-of-law clauses whenever they wished to elevate their individual policy preferences over the parties' agreements.

C. The core values of maritime law also counsel against importing state policy into the federal test for enforceability of choice-of-law clauses. Applying a single body of federal public policy, rather than the idiosyncratic policies of the 50 States, best serves maritime law's overarching goal of uniformity. It likewise pro-

vides much-needed predictability for inherently transitory businesses, generating significant cost savings for both businesses and consumers. The predictable enforcement of maritime choice-of-law clauses, subject to a uniform body of federal public policy, also respects international comity by minimizing conflicts with foreign entities or with another nation's laws unless necessary to advance the highest U.S. interests. Conversely, allowing state policy to override freely negotiated contractual terms would encourage gamesmanship and forum-shopping.

II. Applying the correct test, the choice-of-law clause in the insurance contract between Great Lakes and Raiders is enforceable. Raiders did not argue on appeal either (i) that Great Lakes lacked a substantial connection to New York, or a reasonable basis for selecting New York law; or (ii) that the application of New York law here conflicts with any federal maritime policy. Its sole contention was that the application of New York law conflicts with Pennsylvania public policy—a contention that is simply irrelevant under the correct federal test. The court of appeals thus erred in remanding for an assessment of Pennsylvania public policy, and this Court should reverse.

ARGUMENT

The Constitution's grant of admiralty jurisdiction to federal courts "implicitly directs federal courts sitting in admiralty to proceed 'in the manner of a common law court.'" *Dutra Grp.* v. *Batterton*, 139 S. Ct. 2275, 2278 (2019) (quoting *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 489-490 (2008)). Thus, absent a federal statute, courts apply the "general maritime law"—a body of judicially created rules "drawn from state and federal sources," which constitute an "amalgam of traditional common-law rules, modifications of those rules, and

newly created rules." *East River S.S. Corp.* v. *Transamerica Delaval, Inc.*, 476 U.S. 858, 864-865 (1986); see *Air & Liquid Sys. Corp.* v. *DeVries*, 139 S. Ct. 986, 992 (2019) (noting that courts "may examine, among other sources, judicial opinions, legislation, treatises, and scholarly writings").

Exercising that common-law authority, federal courts have established a federal rule that choice-of-law clauses in maritime contracts are presumptively "valid and enforceable." *Great Lakes Reinsurance (UK) PLC* v. *Durham Auctions, Inc.*, 585 F.3d 236, 242-243 (5th Cir. 2009).[1] Also as a matter of federal common law, that presumption of validity can be overcome if enforcement would contravene public policy. See, *e.g.*, *Milanovich* v. *Costa Crociere, S.p.A.*, 954 F.2d 763, 767 (D.C. Cir. 1992). That much is undisputed. The question presented here is *whose* public policy matters under that federal rule: federal maritime policy or a forum State's policy.

As a matter of basic common sense, federal policy should control. This is, after all, a uniform federal rule of enforceability subject to a federal exception. Logically, that exception should also be defined by uniform federal public policy. No principles of maritime law would be served by a federal-common-law rule resting enforceability on the public policy of whichever of the 50 States happens to be the forum for a suit. This Court's doctrinal approach to questions of admiralty law confirms that common-sense conclusion. The

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[1] See, *e.g.*, Pet. App. 8a; *Great Lakes Ins. SE* v. *Wave Cruiser LLC*, 36 F.4th 1346, 1353-1354 (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); *Milanovich* v. *Costa Crociere, S.p.A.*, 954 F.2d 763, 767 (D.C. Cir. 1992); see also Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 19:6 (6th ed. 2022).

Court typically considers historical "tradition[]," "conformity with parallel statutory schemes," and "policy grounds." *Dutra*, 139 S. Ct. at 2283. Here, all three considerations favor allowing only federal public policy to override choice-of-law clauses in maritime contracts.

I. FEDERAL PUBLIC POLICY SHOULD GOVERN THE ENFORCEABLITY OF MARITIME CHOICE-OF-LAW CLAUSES

A. Federal Policy Has Historically Governed Maritime Choice-Of-Law Clauses

For nearly two centuries, the application of state public policy to nullify a maritime choice-of-law clause would have been out of the question. From the Founding until the middle of the twentieth century, maritime contracts were governed by a uniform "general maritime law." *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 215 (1914). State law and state policy thus had no role to play; to the extent maritime contracts had choice-of-law clauses, they selected among different countries' laws. Only after this Court's 1955 decision in *Wilburn Boat*, which held that state law could fill gaps in federal law governing maritime contracts, did parties to maritime contracts begin selecting state law. Courts at that point began confronting the question of whether to enforce clauses choosing a particular State's laws. Adapting general choice-of-law principles to the federal maritime context, courts have overwhelmingly recognized that a conflict with federal policy—not forum-state policy—may prevent enforcement of a choice-of-law clause in a maritime contract.

1. Before *Wilburn Boat*, Maritime Contracts Were Governed Exclusively By Federal Law

From the Founding until this Court's 1955 decision in *Wilburn Boat*, maritime contracts were governed

exclusively by federal statutes and federal common law. Maritime law was thus "uniform throughout the Union," and not "limited in its extent, or controlled in its exercise, by the laws of the several states." *Watts* v. *Camors*, 115 U.S. 353, 362 (1885); see William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1553 (1984) (explaining that early federal courts "consistently decided marine insurance cases as a matter of general common law" rather than "local state law").

In *Watts*, for example, this Court applied federal common law and "equitable principles," rather than a conflicting Louisiana statute, in awarding damages for breach of a maritime contract. 115 U.S. at 361-362. Several decades later, the Court similarly rejected the application of the California statute of frauds to a maritime contract, because otherwise "the uniformity of rules governing such contracts may be destroyed by perhaps conflicting rules of the states." *Union Fish Co.* v. *Erickson*, 248 U.S. 308, 314 (1919). And even when gaps existed in federal marine insurance law, courts did not look to state law. Instead, they often borrowed from English law, recognizing "special reasons for keeping in harmony with the marine insurance laws of England, the great field of this business." *Queen Ins. Co. of Am.* v. *Globe & Rutgers Fire Ins. Co.*, 263 U.S. 487, 493 (1924); see Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 19:6 (6th ed. 2022).

Because maritime contracts were governed by federal law, parties to maritime contracts had no need to adopt choice-of-law clauses selecting a particular State's laws. During that pre-*Wilburn Boat* period, however, parties to maritime contracts did sometimes include choice-of-law clauses selecting among different

countries' laws. Those clauses often specified the maritime law of England, which was well developed and highly regarded. See, *e.g.*, *Aetna Ins. Co.* v. *Sacramento-Stockton S.S. Co.*, 273 F. 55, 60 (9th Cir. 1921) (English law); *The Kensington*, 183 U.S. 263, 269 (1902) (Belgian law); *London Assurance* v. *Companhia de Moagens do Barreiro*, 167 U.S. 149, 161 (1897) (English law); *The Oranmore*, 24 F. 922, 923 (D. Md. 1885) (English law), *aff'd*, 92 F. 396 (C.C.D. Md. 1885); *The Aurora*, 1 F. Cas. 206, 207 (D.S.C. 1800) (No. 95) (Hamburg law).

Such choice-of-law clauses were generally enforced by U.S. courts unless contrary to *federal* public policy. See, *e.g.*, *London Assurance*, 167 U.S. at 161; *The Oranmore*, 24 F. at 928; see also Warren T.R. von Bittner, Jr., *The Validity and Effect of Choice of Law Clauses in Marine Insurance Contracts*, 53 Ins. Counsel J. 573, 578-579 (1986). In *London Assurance*, for example, this Court upheld a choice-of-law clause selecting English law. 167 U.S. at 161. The Court explained that "it is no injustice to the company to decide its rights according to the principles of law of the country which it has agreed to be bound by, so long as . . . the foreign law is not in any way contrary to *the policy of our own*." *Ibid.* (emphasis added); see, *e.g.*, *Siegelman* v. *Cunard White Star Ltd.*, 221 F.2d 189, 195 (2d Cir. 1955) (Harlan, J.) (upholding a choice-of-law clause selecting English law because "American policy" was not "contrary to England's on this subject").

By contrast, in *The Kensington*, the Court refused to enforce a choice-of-law clause selecting Belgian law because enforcement would contravene "the public policy of the United States." 183 U.S. at 269. The Court reasoned that "neither by comity nor by the will of contracting parties can the public policy *of a country* be

set at naught." *Ibid.* (emphasis added); see, *e.g.*, *Knott* v. *Botany Worsted Mills*, 179 U.S. 69, 77 (1900) (holding unenforceable a choice-of-law clause selecting "the law of the ship's flag" because a federal statute prohibited exculpatory provisions that the chosen law would have allowed).

For that nearly 200-year stretch, state law was nowhere to be found. U.S. courts did not ask whether a choice-of-law clause in a maritime contract might offend the policy of one of the 50 States.

2. After *Wilburn Boat*, Federal Policy Still Governs Choice-Of-Law Clauses

a. In 1955, the Court opened the door for state law to apply in marine insurance contracts. *Wilburn Boat* held that where no settled principle of federal admiralty law exists, and where no specific federal interest requires the creation of a new federal-common-law rule, courts should look to state law. 348 U.S. at 314. Because *Wilburn Boat* essentially introduced state law into federal maritime cases, it elevated the importance of choice-of-law clauses to the maritime industry. See pp. 6-7, *supra*. Now, contracting parties who choose U.S. law also often either select a single State's law or include a backup provision designating which State's law will fill the gaps of federal maritime law—as the parties did here by selecting settled admiralty law or, in the alternative, New York law. Pet. App. 4a.

Although *Wilburn Boat* created a gap-filling role for state substantive law, it did not disturb the settled federal presumption in favor of enforcing choice-of-law clauses in maritime contracts. That presumption still controls as a matter of federal maritime law. See note 1, *supra*. And only months after *Wilburn Boat*, this Court recognized that federal public policy still guides that enforceability inquiry. In *Bisso* v. *Inland*

Waterways Corp., 349 U.S. 85 (1955), the Court considered whether a contractual provision releasing a tugboat owner from liability for negligence was "invalid as against public policy." *Id.* at 86-87. The Court looked to two of its own decisions, which had "announce[d] a rule of public policy against release-from-negligence contracts." *Id.* at 89. That "federal rule" prohibited contractual provisions that would "significantly encourage negligent conduct within the boundaries of the United States." *In re Complaint of Unterweser Reederei, GmbH*, 428 F.2d 888, 908 (5th Cir. 1970) (Wisdom, J., dissenting), *vacated sub nom.*, *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

b. Because *Wilburn Boat* allowed the application of state law when federal maritime law is silent or unsettled, parties to maritime contracts began frequently including choice-of-law clauses to address that possibility. See von Bittner, *supra*, at 573, 578. Faced with a new twist on maritime choice-of-law clauses, federal courts needed to fashion a rule to adjudicate challenges to enforceability when those clauses selected one State's laws but were challenged in another State. Courts largely responded by drawing on existing conflict-of-laws principles—including from the Restatement (Second) of Conflict of Laws and from this Court's decision in *The Bremen*—and modifying them to account for the federal maritime context.

The Restatement, for example, sets out an initial bright-line rule that choice-of-law clauses are enforceable for most matters. See Restatement (Second) of Conflict of Laws § 187(1) (1971) (Restatement). For certain matters, it provides that choice-of-law clauses are presumptively enforceable, and that this presumption can be overcome in only two circumstances: when (i) "the chosen state has no substantial relationship to

the parties or the transaction and there is no other reasonable basis for the parties' choice," or (ii) enforcement "would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue" and whose law would otherwise apply. *Id.* § 187(2). The Restatement, however, draws primarily from "interstate cases" and provides generally applicable principles for domestic conflicts questions. See *id.* § 10, cmt. a. It does not specifically address a federal enclave like maritime law or suggest whether federal or state policy should control in that context. See *id.* § 3, cmt. d (noting that federal-State conflicts "may raise questions of great difficulty as to the precise area of application of State or federal law" and "[t]he solution of such questions is not within the scope of [this] Restatement").

In *The Bremen*, meanwhile, this Court crafted a similar test in the maritime context. The Court addressed a forum-selection clause—which also functioned as a choice-of-law clause—designating the London Court of Justice. 407 U.S. at 2, 13 n.15. The Court embraced a federal presumption of enforceability for forum-selection clauses and emphasized that a party seeking to overcome that presumption of enforceability carries a "heavy burden of proof." *Id.* at 15, 17. It 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 be unreasonable "if enforcement would contravene a strong public policy of the forum in which suit is brought." *Ibid.* As explained below, *The Bremen* makes clear that, in the maritime context, the relevant "forum" is the "*American* forum,"

and the relevant public policy is federal maritime policy. *Id.* at 9 (emphasis added); see pp. 26-28, *infra*.[2]

c. Courts confronting the enforceability of maritime choice-of-law clauses after *Wilburn Boat* drew on those general conflicts principles. For example, in one early decision, a district court extracted a two-part substantial-relationship and public-policy test, relying on both the Restatement and *The Bremen*. See *Hale* v. *Co-Mar Offshore Corp.*, 588 F. Supp. 1212, 1215 & n.4 (W.D. La. 1984). The court explained that, in the maritime context, "the critical inquiry focuses not upon [state] law and policy, but upon maritime law and policy." *Id.* at 1214; see *id.* at 1215. Since then, lower courts have overwhelmingly applied federal policy to determine the enforceability of choice-of-law provisions in maritime contracts—just as they did before *Wilburn Boat*.

The Fifth Circuit, for example, relied on the Restatement and *The Bremen* to uphold a choice-of-law clause in a marine insurance policy identical to the clause challenged here. See *Durham*, 585 F.3d at 244. *Durham* applied *Hale*'s two-part test, which the Fifth Circuit had previously adopted in *Stoot* v. *Fluor Drilling Services, Inc.*, 851 F.2d 1514, 1517 (5th Cir. 1988). Under that test, choice-of-law clauses in maritime contracts are 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 (emphasis

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[2] *The Bremen* and the Restatement differ in that the former looks to the public policy of the forum, whereas the latter looks to the public policy of the jurisdiction whose law would apply in the absence of a choice-of-law clause. As *The Bremen* shows, subtle distinctions about which jurisdiction's public policy might apply are immaterial if the test properly focuses on federal policy. See 407 U.S. at 11. They could, however, matter under Raiders's state-law-focused theory.

added). *Durham* thus upheld the choice-of-law clause there, even though Mississippi (the forum State) had different standards for voiding an insurance policy than New York (the parties' chosen State), because enforcement would not violate a "fundamental purpose of maritime law." *Id.* at 244. The Fifth Circuit has reiterated that test since. See *St. Paul Fire & Marine Ins. Co.* v. *Board of Comm'rs of Port of New Orleans*, 418 Fed. Appx. 305, 309 (2011).

In *Milanovich*, the D.C. Circuit similarly applied the Restatement and *The Bremen* to a choice-of-law clause in a cruise ticket that selected Italian law. 954 F.2d at 766-768. The court first observed, citing the Restatement, that "[u]nder American law, contractual choice-of-law provisions are usually honored." *Id.* at 767. It then went on to apply *The Bremen*, asking whether any strong federal policy justified declining to enforce the clause. *Id.* at 768. The cruise passenger had argued that "a particular policy of the forum"—the United States—"would be contravened by enforcement of the contractual choice-of-law clause" because the application of Italian law would undermine a *federal* statute. *Ibid.* The court found that the statute was inapplicable, and therefore enforced the choice-of law provision because no conflict with U.S. law existed. *Id.* at 768-769.

Finally, the Ninth Circuit has likewise held that the enforceability of choice-of-law clauses turns on federal maritime policy. In *Galilea, LLC* v. *AGCS Marine Ins. Co.*, 879 F.3d 1052 (9th Cir. 2018), the court of appeals upheld a choice-of-law clause materially identical to the one here, in the face of a challenge under Montana policy. *Id.* at 1059-1061. Reasoning that "[w]ithin federal admiralty jurisdiction, conflicting state policy cannot override squarely applicable federal maritime law," the

court explained that "Montana's law simply does not apply" to render the choice-of-law clause unenforceable. *Id.* at 1060-1061. The court noted that "*The Bremen* considered whether the public policy of the forum where suit was brought—there, *federal public policy as supplied by federal maritime law*—outweighed the application of the law of other countries." *Id.* at 1060 (emphasis added). By contrast, extending *The Bremen* to invalidate a choice-of-law provision "because of a conflict with a forum *state's* public policy . . . would distort the basic, gap-filling principles underlying federal maritime law's limited recognition of state insurance law." *Ibid.* (emphasis in original).

District courts in other circuits also hold that federal maritime policy, not state policy, governs the enforceability of maritime choice-of-law clauses. Notably, courts in the Southern District of New York and the Southern District of Florida—the districts with by far the largest admiralty dockets outside the Fifth Circuit—have adopted the Fifth Circuit's *Stoot* test. See *Swift Spindrift Ltd.* v. *Alvada Ins. Inc.*, 175 F. Supp. 3d 169 (S.D.N.Y. 2016); *American S.S. Owners Mut. Prot. & Indem. Ass'n* v. *Henderson*, 2013 WL 1245451 (S.D.N.Y. Mar. 26, 2013); *Thomas* v. *NASL Corp.*, 2000 WL 1725011 (S.D.N.Y. Nov. 20, 2000); *Farrell Lines Inc.* v. *Columbus Cello-Poly Corp.*, 32 F. Supp. 2d 118 (S.D.N.Y. 1997), *aff'd*, 161 F.3d 115 (2d Cir. 1998); *Great Lakes Reinsurance (UK), PLC* v. *Rosin*, 757 F. Supp. 2d 1244 (S.D. Fla. 2010); see also *Great Lakes Ins. SE* v. *Lassiter*, 2022 WL 1288741 (S.D. Fla. Apr. 29, 2022) (explaining that "most, if not all, precedent evaluates whether the chosen 'state's law conflicts with the fundamental purposes of *maritime law*'") (emphasis in original). Many district courts with smaller admiralty dockets have also applied that test.

See *Crown Bay Marina, L.P.* v. *Reef Transp., LLC*, 2020 WL 6120153 (D.V.I. Oct. 16, 2020); *Maclean* v. *Travelers Ins. Co.*, 299 F. Supp. 3d 231 (D. Mass. 2017); *Apex Maritime Co.* v. *Furniture, Inc.*, 2013 WL 2444151 (E.D.N.Y. June 5, 2013); *Zepsa Indus., Inc.* v. *Kimble*, 2008 WL 4891115 (W.D.N.C. Nov. 11, 2008); *Cashman Equip. Corp.* v. *Kimmins Contracting Corp.*, 2004 WL 32961 (D. Mass. Jan. 5, 2004); *Perzy* v. *Intercargo Corp.*, 827 F. Supp. 1365 (N.D. Ill. 1993).

A few district courts have held choice-of-law provisions enforceable under both federal maritime policy and state policy, without determining which would control in the event of a conflict. See *Marine Ins. Co.* v. *Cron*, 2014 WL 4982418, at *3 (S.D. Tex. Oct. 6, 2014) (Enforcement of the choice-of-law clause would not "be contrary to the fundamental principles of general maritime law" or the "fundamental purposes of Texas insurance law."); *Great Lakes Reinsurance (UK) PLC* v. *Dion*, 2009 WL 5174372, at *2 (S.D. Cal. Dec. 18, 2009) ("[T]he parties have not identified any fundamental policy of either California or admiralty law that conflicts with New York law."); *Oran* v. *Fair Wind Sailing, Inc.*, 2009 WL 4349321, at *7 (D.V.I. Nov. 23, 2009) ("[E]nforcement of the choice of law clause does not offend the public policy of the Virgin Islands or courts sitting in admiralty jurisdiction.").

As far as petitioner is aware, only two district courts have clearly relied on forum-state policy in deciding whether to enforce a choice-of-law provision, and even then have concluded that state policy did not overcome the presumption of enforceability. See *Deep Sea Fin., LLC* v. *British Marine Luxembourg, S.A.*, 2010 WL 3603794 (S.D. Ga. May 13, 2010); *Great Lakes Reinsurance (UK), PLC* v. *Sea Cat I, LLC*, 653 F. Supp. 2d 1193 (W.D. Okla. 2009). That pair of outliers, whose analysis

of state law did not affect the outcome anyway, should not detract from 250 years of maritime practice in this country. The strong historical consensus remains that federal policy should govern the enforceability of choice-of-law clauses in this federal enclave.

3. The Decision Below Departs From The Historical Consensus

In the decision below, the court of appeals correctly recognized the "established federal rule" that a "choice of law provision in a marine insurance contract will be upheld in the absence of evidence that its enforcement would be unreasonable or unjust." Pet. App. 8a (quoting Schoenbaum, *supra*, § 19:6). The court nevertheless concluded that, under *The Bremen* and *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), a choice-of-law clause is "unreasonable or unjust" if it contravenes *state* policy. Pet. App. 15a. The Third Circuit is now the only court of appeals to have interpreted *The Bremen* to mean that state rather than federal policy can render a maritime choice-of-law clause unreasonable. Neither *The Bremen* nor *Carnival* supports that novel view.

a. *The Bremen* held presumptively enforceable a forum-selection clause in a marine insurance contract that designated an English forum. 407 U.S. at 2. In doing so, this Court explained that a forum-selection clause would be unenforceable "if enforcement would contravene a strong public policy of the forum in which suit is brought." *Id.* at 15. *The Bremen*'s public-policy exception most naturally refers to the federal policy of the "American forum." *Id.* at 9. Several aspects of the decision make that clear—all of which the court of appeals overlooked.

First, in support of its public-policy exception, *The Bremen* cited *Boyd* v. *Grand Trunk W. R.R. Co.*,

338 U.S. 263 (1949). See *The Bremen*, 407 U.S. at 15. *Boyd* held that a forum-selection clause was invalid because it violated a federal statute, the Federal Employers' Liability Act. 338 U.S. at 266. The Court did not mention state law or state public policy. *Boyd* illustrates that the relevant "statute[s] or [] judicial decision[s]" courts should consult in determining public policy are federal. *The Bremen*, 407 U.S. at 15.

Second, *The Bremen* considered only federal policy—not forum-state policy—in deciding that the forum-selection clause there was presumptively enforceable. The court of appeals in *The Bremen* had held that enforcing the forum-selection clause "would be contrary to the public policy of the forum" (the United States) because the parties' chosen forum (England) would allow a release-from-liability clause, which U.S. policy forbids. 407 U.S. at 15 (citing *Bisso*, 349 U.S. 85). This Court disagreed, explaining that the public-policy considerations it had outlined in *Bisso* applied "strictly in American waters" and were "not controlling in an international commercial agreement." *Id.* at 15-16. In drawing that line, the Court looked to *federal* interests, such as the need for certainty and predictability in maritime contracts and the reality of "expanding international trade." *Id.* at 13-15. Although the case was filed in Florida, see *id.* at 3-5, the Court said not one word about Florida law or policy.

Third, the parties in *The Bremen* framed their arguments solely in terms of federal public policy, so the Court could not have reasonably intended anything else. Indeed, the question presented stated: "Is a forum, designated by contract for resolution of disputes by parties of equal bargaining power, per se invalid as a violation of any legitimate *public policy of the United States*?" Pet. Br. 2, *The Bremen*, *supra* (No. 71-322)

(emphasis added). The petitioner argued that, in light of "compelling considerations of international commercial relations" and the centrality of "uniformity and comity in international law," federal policy favored enforcing the choice-of-law clause. *Id.* at 11, 30. The respondents countered that enforcement would violate "United States public policy" under *Bisso*, and that "neither comity nor the will of the parties can set at naught the public policy of the United States." Resp. Br. 29-30, 47, *The Bremen*, *supra* (No. 71-322). Nowhere did anyone so much as hint that the Court might apply forum-state policy.

At bottom, *The Bremen* embraced "a more hospitable attitude toward forum-selection clauses," whereby "such clauses are prima facie valid and should be enforced unless enforcement is shown by the resisting party to be 'unreasonable' under the circumstances." 407 U.S. at 10. The court below twisted *The Bremen*'s favorable approach to forum-selection clauses into an unfavorable approach to choice-of-law clauses, under which any one of the 50 States' idiosyncratic policies can override the parties' contractual agreement. It did so by adding a critical word to *The Bremen*, and finding that it is "altogether reasonable that a 'strong public policy of the forum [state] in which suit is brought' could, as to that policy specifically, render unenforceable the choice of state law in a marine insurance contract." Pet. App. 15a (alteration in original) (quoting *The Bremen*, 407 U.S. at 15). But *The Bremen* did not use the term "forum *state*"—and the court of appeals' casual insertion of the word "state" broke from centuries of maritime practice.

b. Nor does this Court's decision in *Carnival* support the decision below. *Carnival* did not address *The Bremen*'s "policy of the forum" exception at all, and

turned on federal policy regardless. In *Carnival*, the Court extended *The Bremen*'s pro-contract framework to "form passage contracts" and held enforceable a cruise ticket's forum-selection clause designating Florida. 499 U.S. at 587-588, 593, 595. The plaintiffs had sued the cruise line in Washington for injuries sustained while on the cruise ship. *Id.* at 588. They argued that the forum-selection clause was unreasonable because it "was not the product of negotiation, and enforcement effectively would deprive [them] of their day in court," given the hardship of litigating in Florida. *Id.* at 590. The Court nevertheless held the clause enforceable under *The Bremen*'s test, finding that enforcement would not violate federal law or policy. *Id.* at 593-597.

Carnival does not stand for the proposition that state policy is relevant to the enforcement of maritime choice-of-law clauses (or forum-selection clauses). If anything, *Carnival* stands for the opposite: in determining whether to enforce the forum-selection clause there, the Court considered only federal interests and whether the clause violated a federal statute, 46 U.S.C. App. 183c, or contravened "Congress' intended goal in enacting" that statute. 499 U.S. at 596; see *id.* at 595-597. Indeed, even though the dissent would have held that the forum-selection clause was unenforceable, it would have done so "under traditional principles of federal admiralty law" and the federal statute. *Id.* at 598 (Stevens, J., dissenting). Notably, just as *The Bremen* said nothing about Florida law, *Carnival* did not look to Washington law.

c. Even if *The Bremen* or *Carnival* could be interpreted to allow a forum State's public policy to override a maritime forum-selection clause, that interpretation should not be extended to maritime choice-of-law

clauses. Before *The Bremen*, forum-selection clauses had "historically not been favored by American courts." 407 U.S. at 9. In contrast, there is a long history of U.S. courts' enforcing choice-of-law clauses. See, *e.g.*, *London Assurance*, 167 U.S. at 160-161; Earnest G. Lorenzen, *Validity and Effects of Contracts in the Conflict of Laws*, 30 Yale L.J. 565, 566 (1921) ("The federal courts have generally applied the law of the state or country intended by the parties."); see also p. 18, *supra*. Judge Hand's opinion in *Wood & Selick* v. *Compagnie Generale Transatlantique*, 43 F.2d 941 (2d Cir. 1930), exemplifies U.S. courts' historically divergent approaches toward choice-of-law and forum-selection clauses. In that case, the Second Circuit declined to enforce a maritime forum-selection clause requiring that disputes be brought in France, but nevertheless endeavored to apply French statutory law under a parallel choice-of-law clause. *Id.* at 942-943.

That friendlier approach to choice-of-law clauses may have reflected a distinction between practical access to courts and the substantive legal rules that apply there. A forum-selection clause "represents an attempt by the parties to insure that the action will be brought in a forum that is convenient for them." Restatement § 80, cmt. a. The chosen forum may affect parties' practical ability to litigate, particularly in earlier eras with less reliable transportation. But a choice-of-law clause selects the governing law and therefore affects the underlying meaning of a contract. Indeed, a choice-of-law provision often selects which jurisdiction's default rules will govern on matters that the parties could otherwise have spelled out expressly, which is all the more reason to respect the parties' choice of law. See Restatement § 187(1). Accordingly, even as-

suming that state policy could override maritime parties' choice of forum, state policy should not override those parties' choice of law. Only federal admiralty policy should be able to do that.

B. Congressional Judgments Support Applying Federal Policy

This Court should adhere to the "overwhelming historical evidence" unless necessary "to maintain uniformity with Congress's clearly expressed policies." *Dutra*, 139 S. Ct. at 2284. Here, no congressional actions support a departure from maritime history. To the contrary, "Congress has decided to allow parties engaged in international maritime commerce to structure their contracts, to a large extent, as they see fit." *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, 561 U.S. 89, 111 (2010). It has drawn limits on choice-of-law and forum-selection clauses sparingly, suggesting that parties should be bound to their contractual agreements unless specific federal interests are at play.

1. Congress has recognized that maritime contracts often include choice-of-law and forum-selection clauses and has adopted a general federal policy of permitting those provisions, with one exception. That exception appears in 46 U.S.C. 30527, which identifies a narrow category of cases in which such provisions are "void" under federal policy: when they limit "the right . . . to a trial by court of competent jurisdiction" for personal injury or death on a passenger-carrying vessel. 46 U.S.C. 30527(a)(1)(B), (a)(2). That legislative judgment carries a strong negative implication: in other circumstances, parties to maritime contracts may choose the forum and substantive law that will govern their disputes. See, *e.g.*, *Key Tronic Corp.* v. *United States*, 511 U.S. 809, 818-819 (1994) (Where

Congress "included two express provisions for fee awards" but did not include a similar provision elsewhere, its "omissions strongly suggest a deliberate decision not to authorize such awards.").

Previous versions of Section 30527 underscore the point. From 1936 to 2006, the predecessor statute provided that any provision in a maritime contract "purporting . . . to lessen, weaken, or avoid the right of any claimant to a trial by court of competent jurisdiction" for wrongful injury or death was not only "null and void" but also "*against public policy*." 46 U.S.C. App. 183c (1996) (emphasis added); see *Moore* v. *American Scantic Line, Inc.*, 30 F. Supp. 843, 846 (S.D.N.Y. 1939) (noting that "a public policy has been inaugurated by law, by Congress in the passage of" Section 183c). Congress's declaration of "public policy" shows that it understands its role to make legislative judgments limiting the enforceability of maritime forum-selection and choice-of-law clauses.

This Court has accordingly looked to Section 30527 and similar federal statutes to discern the boundaries of federal public policy and the enforceability of maritime contracts. In *Carnival*, for example, the Court considered both the text of former Section 183c and "Congress' intended goal in enacting [Section] 183c." 499 U.S. at 595-596. Because the forum-selection clause there did not contravene the federal policy in Section 183c, the Court enforced the parties' choice of forum. *Id.* at 596-597. Similarly, in *Vimar Seguros y Reaseguros, S.A.* v. *M/V Sky Reefer*, 515 U.S. 528 (1995), the Court looked to the Carriage of Goods by Sea Act (COGSA), then enacted at 46 U.S.C. App. 1303(8), to assess the enforceability of a foreign arbitration clause in a maritime bill of lading. 515 U.S. at 534-536. The Court held that COGSA did not invalidate

the foreign arbitration clause because enforcement would not violate the text of COGSA and would in fact "support [] the goals" of the "international convention on which COGSA is modeled." *Id.* at 534-536. In short, this Court has consistently looked to federal law in determining the enforceability of maritime contracts, and it has correctly acknowledged that Congress favors enforcing parties' choices, subject to limited statutory boundaries.

2. Congress also favors the enforcement of contracts in other areas subject to federal regulation and control. For example, the Federal Arbitration Act, which expressly applies to maritime contracts, see 9 U.S.C. 2, "is at bottom a policy guaranteeing the enforcement of private contractual arrangements." *Mitsubishi Motors Corp.* v. *Soler Chrysler-Plymouth, Inc.*, 473 U.S. 614, 625 (1985). "The preeminent concern of Congress in passing the Act was to enforce private agreements into which parties had entered." *Dean Witter Reynolds, Inc.* v. *Byrd*, 470 U.S. 213, 221 (1985). Similarly, one of the "fundamental policies" of the National Labor Relations Act is "freedom of contract." *H.K. Porter Co.* v. *NLRB*, 397 U.S. 99, 108 (1970); see *Silgan Containers Corp.* v. *Sheet Metal Workers Int'l Ass'n*, 820 F.3d 366, 370 (8th Cir. 2016) ("Freedom of contract is the 'fundamental principle' of federal labor law.") (citation omitted).

Because Congress has adopted a general policy of respecting contracting parties' freedom of choice—subject to narrow exceptions—States should not be free to blue-pencil maritime contracts for their own policy reasons. Cf. *Viking River Cruises, Inc.* v. *Moriana*, 142 S. Ct. 1906, 1923 (2022) (rejecting a rule that would permit state law to "unduly circumscribe[] the freedom of parties to determine 'the issues subject to

arbitration' and 'the rules by which they will arbitrate'") (citation omitted). That would hinder rather than advance Congress's repeated preference for contractual freedom.

C. Applying State Policies To Override Choice-Of-Law Clauses Would Undermine The Core Values Of Maritime Law

"[P]olicy grounds" and the fundamental purposes of maritime law also favor enforcing maritime choice-of-law clauses. *Dutra*, 139 S. Ct. at 2283. Allowing an individual State's policies to override freely negotiated maritime contracts would conflict with well-recognized maritime values, including uniformity, predictability, and international comity. It would also encourage gamesmanship and forum-shopping.

1. "The fundamental interest giving rise to maritime jurisdiction is 'the protection of maritime commerce.'" *Sisson* v. *Ruby*, 497 U.S. 358, 367 (1990) (quoting *Foremost Ins. Co.* v. *Richardson*, 457 U.S. 668, 674 (1982)). As this Court has recognized, that fundamental interest "can be fully vindicated only if *all* operators of vessels on navigable waters," even pleasure boats, "are subject to uniform rules of conduct." *Foremost Ins.*, 457 U.S. at 675 (emphasis in original). The "need for uniformity" is therefore "an overriding value in admiralty law." Schoenbaum, *supra*, § 4:1 (emphasis omitted); see *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 544 (1995) ("[T]he basic rationale for federal admiralty jurisdiction is protection of maritime commerce through uniform rules of decision.") (internal quotation marks omitted).

Dating back to the early 1800s, American courts "repeated over and over again" the "paramount importance to merchants and underwriters that rules be

clear, settled, and uniform." Fletcher, *supra*, at 1563. This Court has repeatedly expressed its "concern for the uniform meaning of maritime contracts," reasoning that admiralty law should "operat[e] uniformly in[] the whole country," in order to achieve "the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states." *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 28 (2004) (quoting *American Dredging Co.* v. *Miller*, 510 U.S. 443, 451 (1994)). Congress, too, has been in "persistent pursuit of 'uniformity in the exercise of admiralty jurisdiction.'" *Dutra*, 139 S. Ct. at 2278 (quoting *Miles* v. *Apex Marine Corp.*, 498 U.S. 19, 26 (1990)).

Allowing the public policy of a forum State to override contractual choice-of-law provisions would defeat the overarching goal of uniformity in maritime law. The same contractual provision might be consistent with the public policy of one State, but contravene the public policy of another—meaning that the controlling legal rules would depend on where the suit is filed. Worse still, States do not share a uniform view on which policies are so fundamental that they can negate a choice-of-law clause, leading to further variability even among States with identical policies. See Restatement § 187, cmt. g ("No detailed statement can be made of the situations where a 'fundamental' policy of the state of the otherwise applicable law will be found to exist.").[3] The result would be the opposite of uniform: a supposed federal presumption of enforceability that is subject to 50 sets of exceptions.

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[3] Compare, *e.g.*, *Cherry, Bekaert & Holland* v. *Brown*, 582 So. 2d 502, 507 (Ala. 1991) (Alabama policy against covenants not to compete is fundamental), with *Intermetro Indus. Corp.* v. *Kent*, 2007 WL

2. Holding the parties to their bargained-for choice of law would also promote the core maritime values of certainty and predictability. Such certainty is "an indispensable element in international trade, commerce, and contracting." *The Bremen*, 407 U.S. at 13-14. Courts should thus "give effect to the legitimate expectations of the parties, manifested in their freely negotiated agreement." *Id.* at 12. Parties negotiate contracts in view of the applicable substantive law, making the consistent enforcement of choice-of-law clauses vital to "eliminate all uncertainty as to the nature" of any contractual dispute. *Id.* at 13 n.15; see Willis L.M. Reese, *Power of Parties to Choose Law Governing Their Contract*, 54 Am. Soc'y Int'l L. Proc. 49, 51 (1960) (Choice-of-law clauses are "the only practical device for bringing certainty and predictability into the area of multi-state contracts."). That is especially true of marine insurance contracts, which "unlike inland insurance contracts, are to a considerable degree open to negotiation and are frequently tailor made" by parties "dealing at arm's length." Von Bittner, *supra*, at 574-575.

In addressing forum-selection clauses, this Court has explained that "[i]n all but the most unusual cases . . . 'the interest of justice' is served by holding parties to their bargain." *Atlantic Marine Constr. Co.* v. *U.S. Dist. Ct. for the W. Dist. of Tex.*, 571 U.S. 49, 66 (2013). A forum-selection clause "may have figured centrally in the parties' negotiations," "affected how they set

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518345, at *4 (M.D. Pa. Feb. 12, 2007) (Texas policy against covenants not to compete is not fundamental); compare *Cottman Transmission Sys., LLC* v. *Kershner*, 536 F. Supp. 2d 543, 550-551 (E.D. Pa. 2008) (Florida franchise law is not fundamental but Virginia franchise law is), with *Wright-Moore Corp.* v. *Ricoh Corp.*, 908 F.2d 128, 133 (7th Cir. 1990) (Indiana franchise law is fundamental).

monetary and other contractual terms," or even been "a critical factor in their agreement to do business together in the first place." *Ibid.* Enforcing the clause thus "protects [the parties'] legitimate expectations and furthers vital interests of the justice system." *Id.* at 63 (quoting *Stewart Org., Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 33 (1988) (Kennedy, J., concurring)). That same reasoning applies at least as strongly to choice-of-law clauses, which determine the substantive law governing the contract. See *Phillips* v. *Audio Active Ltd.*, 494 F.3d 378, 384 (2d Cir. 2007) ("Largely for the reasons we hold parties to their contractual promises to litigate in a specified forum, federal courts give substantial weight to choice of law provisions."); see also Restatement § 187, cmt. e (noting that enforcement of choice-of-law provisions promotes the "[p]rime objectives of contract law").

By advancing the twin goals of uniformity and predictability, choice-of-law clauses generate considerable cost savings, particularly in a marine insurance industry that can "traverse the waters of many jurisdictions." *The Bremen*, 407 U.S. at 13. First, the insurer can more accurately assess the costs and risks of coverage, which vary based on the applicable legal framework. Second, the dependable application of a uniform body of federal law allows the insurer to issue similar policies throughout the United States. It also allows the insurer to limit the different laws to which it is subject, which is of "special interest" to a marine industry that moves through "many locales." *Carnival*, 499 U.S. at 593. Third, the resulting legal certainty reduces the insurer's litigation risk and legal costs. Similar to the forum-selection clause in *Carnival*, a choice-of-law clause "has the salutary effect of dispelling any confusion about" what law applies, "sparing litigants the

time and expense of pretrial motions to determine" the applicable legal rules and "conserving judicial resources that otherwise would be devoted to deciding those motions." *Id.* at 593-594.

Those benefits do not just inure to insurers. The cost savings are shared with the insured entity in the form of lower premiums. See *Carnival*, 499 U.S. at 594. Ultimately, those savings are passed on to consumers of "goods that are transported by sea—goods that are insured under marine policies, carried on insured vessels, and handled by workers whose health and safety are covered by marine insurance." Michael F. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to The* Wilburn Boat *Problem*, 29 J. Mar. L. & Com. 41, 45 (1998).

3. The federal interests in a uniform body of maritime law and in predictable, enforceable maritime contracts also advance a third core value of maritime law: international comity. This Court has recognized that forum-selection and choice-of-law provisions are especially important in international contracts, because subjecting foreign entities to "the dicey atmosphere of . . . a legal no-man's-land would surely damage the fabric of international commerce and trade, and imperil the willingness and ability of businessmen to enter into international commercial agreements." *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 517 (1974). Such provisions are "an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction." *Id.* at 516. That is why *The Bremen* took a strongly pro-contract view, emphasizing that "businesses once essentially local now operate in world markets" and "present-day commercial realities and expanding international trade" demand predictability. 407 U.S. at 12, 15.

This case is a fitting example. Great Lakes is a German company headquartered in the United Kingdom. Pet. App. 3a; see p. II, *supra*. Raiders is a Pennsylvania company. Pet. App. 3a. Raiders's yacht has its home port in Pennsylvania, Br. in Opp. 3; the yacht's insurance policy covered navigation along "East Coast USA, Florida and the Bahamas," D. Ct. Doc. 1, at 68 (Sept. 25, 2019); and the yacht ran aground when sailing near Florida, Pet. App. 22a. Although Raiders bargained for a convenient *forum*—the State in which it or its agent is located—Great Lakes bargained for familiar and predictable *legal rules*. D. Ct. Doc. 1, at 82. The parties thus selected U.S. federal maritime law or, in its absence, the well-established body of New York maritime law. Pet. App. 4a, 25a. Subjecting Great Lakes to the policy whims of Pennsylvania or any of the other 49 States whose laws it never agreed to would seriously undercut international comity.

Moreover, Raiders's state-policy theory would apply even to contracts selecting *another nation's* law. Allowing an individual State's policies to override a foreign country's laws risks "disparag[ing] the authority or competence of international forums for dispute resolution," which is "out of keeping with . . . contemporary principles of international comity and commercial practice." *Vimar Seguros*, 515 U.S. at 537. "[C]oncerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes" therefore counsel in favor of "enforc[ing] . . . parties' agreement[s]." *Mitsubishi Motors Corp.*, 473 U.S. at 629. And to the extent U.S. courts declare a contractual provision unenforceable because of disagreement with another country's public-policy choices, that

should be done in a uniform way at the federal level. Federal policy interests may be sufficiently weighty to override concerns about international comity. But in this distinctly national and international maritime context, States should not have free rein to declare another nation's law too unfair to apply.

4. Finally, enforcing sophisticated parties' agreements about the substantive law governing their contracts discourages gamesmanship and forum-shopping. If a forum State's policy could override the parties' chosen substantive law, parties could wriggle out of unfavorable contractual provisions by suing in a State with more favorable public policy (assuming no forum-selection clause, or assuming that the dissatisfied party succeeds in nullifying such a clause as well). That "would invite unseemly and mutually destructive jockeying by the parties to secure tactical litigation advantages." *Scherk*, 417 U.S. at 516-517.

Parties would often have an array of options for forum-shopping. Following *Wilburn Boat*, many important aspects of maritime contract law have been relegated to the States, at least in some circuits. See, *e.g.*, Harold K. Watson, *A Fifty Year Retrospective on the American Law of Marine Insurance*, 91 Tul. L. Rev. 855, 858 (2017) (state law may govern contractual interpretation, notice provisions, punitive damages, and agency); Schoenbaum, *supra*, § 19:9 (*uberrimae fidei*, prejudgment interest, attorney's fees, and warranties); Thomas R. Beer, *Established Federal Admiralty Rules in Marine Insurance Contracts & the* Wilburn Boat *Case*, 1 U.S.F. Mar. L.J. 149, 165-167 (1989) (notice provisions, attorney's fees, treble damages against insurers, bad-faith refusals, and agency relationships). And among the States, there is a "wide divergence in results as to substantive issues of marine insurance

law." Watson, *supra*, at 858. As a result, the choice of state law "could determine the amount of recovery, the type of recovery, or even whether there will be a recovery under the policy at all." Von Bittner, *supra*, at 573.

To take one example, courts have held that state law governs the availability of attorney's fees in maritime cases, see, *e.g.*, *Great Lakes Ins. SE* v. *M&M Private Lending Grp., LLC*, 2020 WL 13379275 (S.D. Fla. Sept. 11, 2020), and States have adopted vastly different approaches to fees. In Georgia, a policyholder may recover attorney's fees only when the insurer refuses to pay "in bad faith." Ga. Code Ann. § 33-4-6. Florida, meanwhile, has a "one-way" statute, under which a prevailing policyholder is automatically entitled to attorney's fees, with some exceptions irrelevant here. Fla. Stat. § 86.121. In Arizona, fees are available to the prevailing party, whether the policyholder or the insurer, at the discretion of the court. Ariz. Rev. Stat. Ann. § 12-341.01(A). And in Alabama, "absent a contractual provision to the contrary, the insured may not recover its attorneys' fees from the insurer if the fees were incurred in a declaratory judgment action to determine coverage under a liability policy." *Prime Ins. Syndicate, Inc.* v. *B.J. Handley Trucking, Inc.*, 363 F.3d 1089, 1093 (11th Cir. 2004). Any one of those States might deem another State's fees policy to violate its own public policy, and substitute its preferred rule instead.

As another example, state law also determines whether the failure to give prompt notice of a loss can bar coverage under a marine insurance policy's "notice of loss" provision. See Beer, *supra*, at 169-170. Some States require a showing of "prejudice before an insurer may defeat coverage due to late notice of a claim." *St. Paul Fire & Marine Ins. Co.*, 418 Fed.

Appx. at 309-310 (applying Louisiana law); see *Healy Tibbitts Constr. Co.* v. *Foremost Ins. Co.*, 482 F. Supp. 830, 835 (N.D. Cal. 1979) (requiring "substantial prejudice" under California law) (citation omitted). In New York, by contrast, "the insurer need not show that it was prejudiced" by a failure to comply with a notice-of-loss provision because "[t]he giving of the required notice affords the insurer an opportunity to protect itself, and is a condition precedent to liability." *Big Lift Shipping Co. (N.A.) Inc.* v. *Bellefonte Ins. Co.*, 594 F. Supp. 701, 704 (S.D.N.Y. 1984). Again, one State might reject a choice-of-law clause if the chosen State follows a different approach to notice-of-loss provisions.

The upshot is that if this Court were to allow state policy preferences to negate maritime choice-of-law clauses, parties would have incentives to bring claims in a friendly forum and seek to strike the choice-of-law clauses that they agreed to. See *Atlantic Marine*, 571 U.S. at 65 (rejecting rule that would "encourage gamesmanship" and "multiply opportunities for forum shopping") (citation omitted). That gamesmanship would further frustrate admiralty's fundamental principles of uniformity, predictability, and international comity.

II. THE CHOICE-OF-LAW CLAUSE HERE IS ENFORCEABLE

Under the correct test, the choice-of-law clause in the insurance contract between Great Lakes and Raiders is enforceable, and the court of appeals' remand for consideration of Pennsylvania policy was incorrect. Again, federal law imposes a presumption in favor of enforcing choice-of-law clauses in maritime contracts, and a party seeking to overcome that presumption carries a "heavy burden of proof." *The Bremen*, 407 U.S.

at 17. The presumption can be overcome in two circumstances: (i) when the parties have no substantial connection to or reasonable basis for the selected law, or (ii) when the selected law conflicts with federal policy. See *Durham* 585 F.3d at 244. Neither applies here.

A. First, Raiders does not contest that it and Great Lakes had a substantial connection to or a reasonable basis for choosing New York law. As the Restatement explains, courts almost never strike down a choice-of-law clause as unenforceable on that ground. Restatement § 187, cmt. f. Indeed, this Court in *The Bremen* suggested that "parties to a freely negotiated private international commercial agreement" might agree to any inconvenient forum (or law), so long as they "contemplated the claimed inconvenience." *The Bremen*, 407 U.S. at 16.

In any event, Great Lakes has a substantial connection to New York law. The district court identified at least three points of contact between Great Lakes and New York: "(1) [Great Lakes] maintains an agent for service of process in New York, (2) it maintains its trust accounts in New York, and (3) it was admitted as a surplus lines insurer in New York." Pet. App. 28a. Several other courts have likewise found that "New York has a sufficient substantial relationship with Great Lakes to allow application of New York law." *Id.* at 28a-29a (quoting *Rosin*, 757 F. Supp. 2d at 1251); see *Durham*, 585 F.3d at 242; *Great Lakes Reinsurance (UK) PLC* v. *S. Marine Concepts Inc.*, 2008 WL 6523861, at *2 (S.D. Tex. Oct. 21, 2008).

In addition, Great Lakes and Raiders had a reasonable basis for selecting New York. Great Lakes, Raiders, and Raiders's insurance agent are all located in different places—with Great Lakes organized and head-

quartered overseas. They could have reasonably chosen New York for its well-established maritime law. See Restatement § 187, cmt. f (noting that "parties to a multistate contract may have a reasonable basis for choosing" a State with "well-known and highly elaborated commercial law"). In fact, marine insurers often select New York law to fill the gaps of federal maritime law, given New York's "substantive laws and precedents dealing with maritime insurance contracts." *Sea Cat I, LLC*, 653 F. Supp. 2d at 1199; see, *e.g.*, *Great Lakes Ins. SE* v. *Aarvik*, 2019 WL 201258, at *3 (S.D. Fla. Jan. 15, 2019) ("Courts routinely apply the choice of law clause specifying admiralty law or New York law in marine insurance policies issued by Great Lakes.").

B. Second, the application of New York law to Raiders's counterclaims does not conflict with any federal maritime policy. Raiders acknowledged as much in the court of appeals—which is why the parties litigated the New York gap-filling portion of the choice-of-law clause in the first place. See Pet. App. 25a; see also Resp. C.A. Br. 24-25 (contending that state law applies to the relevant claims because "no governing principles of federal admiralty law exist"). In this Court, too, Raiders has never raised any federal policy objections, and has agreed that "the sole question" is "whether the strong public policies of the forum State" could negate the selection of New York law. Br. in Opp. 12.[4]

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[4] In the district court, Raiders belatedly argued that "New York law conflicts with the federal maritime doctrine of *uberrimae fidei*, or 'utmost good faith,' and therefore should not apply to Raiders' bad faith claim." Pet. App. 34a n.4. The court did "not consider this argument" because Raiders first raised it in a reply filed "in contravention of [the court's] policies and procedures." *Ibid.* In any

That concession is correct. Federal law is silent on Raiders's common-law claim for breach of fiduciary duty, and Raiders has never identified any relevant federal policy. And as to Raiders's two statutory claims, there is no federal statute that mirrors Pennsylvania's, nor any other federal maritime principle that tracks Pennsylvania's statutory law.

* * *

Raiders and Great Lakes freely negotiated a contract. They chose federal law or, as a backup, New York law to govern any disputes. Raiders may seek any available remedy under those two bodies of law. Indeed, Great Lakes did not challenge, and the district court's order left in place, two of Raiders's claims—for breach of contract and breach of the implied covenant of good faith and fair dealing—that may be cognizable under either federal or New York law. See Pet. App. 20a, 34a-35a. But Raiders may not avoid its contractual agreement to submit to New York law merely because it might have additional claims under Pennsylvania law. No federal maritime policy authorizes, let alone requires, such blatant evasion of maritime contracts.

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event, both New York law and federal maritime law recognize the same doctrine of *uberrimae fidei*, so no conflict exists. See *In re Balfour MacLaine Int'l, Ltd.*, 85 F.3d 68, 80 (2d Cir. 1996) ("Under New York law, the doctrine of utmost good faith applies to contracts and risks that are 'marine' in nature . . . ."); *Fireman's Fund Ins. Co.*, 822 F.3d at 633 ("Under federal law, a marine insurance contract is subject to 'the federal maritime doctrine of *uberrimae fide*, or utmost good faith.'") (citation omitted).

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment below.

Respectfully submitted.

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