No. 22-500

In The
Supreme Court of the United States

GREAT LAKES INSURANCE SE,

Petitioner,

v.

RAIDERS RETREAT REALTY CO., LLC,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Third Circuit

BRIEF OF *AMICI CURIAE* THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AND THE INTERNATIONAL GROUP OF P&I CLUBS IN SUPPORT OF PETITIONER

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BRIEF OF *AMICI CURIAE* THE AMERICAN INSTITUTE OF MARINE UNDERWRITERS AND THE INTERNATIONAL GROUP OF P&I CLUBS

The American Institute of Marine Underwriters (AIMU) and the International Group of P&I Clubs (IGP&I) respectfully submit this brief jointly as *amici curiae* in support of Petitioner Great Lakes Insurance SE (GLI), urging the Court to rule in favor of Petitioner to enforce the choice of law clause in the marine insurance contract at issue.[1] The Question Presented in the Petition is of great importance to *amici* and their members, as detailed below.

INTEREST OF *AMICI CURIAE*

Founded in 1898, the American Institute of Marine Underwriters (AIMU) is a not-for-profit trade association representing the U.S. ocean marine insurance industry as an advocate, promoter, source of information, and center for education. *See generally* www.aimu.org. AIMU represents 46 insurance and reinsurance companies licensed to write ocean marine

[1] Counsel for *amici curiae* AIMU and IGP&I authored this brief in its entirety. No counsel for a party authored this brief in whole or in part, and no party or counsel for a party made a monetary contribution intended to fund the preparation or submission of this brief. (While Petitioner is a member of AIMU, it did not contribute to the costs of preparing or filing this brief.) *Amici* have no financial interest in the outcome of this matter and have paid all of the fees and costs for preparation of this brief.

business in the U.S., including yacht and pleasurecraft risks. In 2022, AIMU's member companies underwrote the vast majority of ocean marine insurance business in the U.S., with total premiums written in excess of $ 3.5 billion. AIMU's members provide critical support for the United States ocean marine insurance industry. Without the insurance underwritten by AIMU's members, the entities insured by the United States ocean marine insurance industry, such as Raiders Retreat Realty Co., LLC, would be unable to operate without incurring significant personal risk and cost.

AIMU works in conjunction with the United States government and international groups to monitor and ameliorate the legal environment for the marine insurance industry and the broader maritime industry generally. AIMU is the forum for action on important and timely issues that affect U.S. marine insurers and the maritime community at large.

The IGP&I is an unincorporated association of twelve member protection and indemnity mutual insurance associations (known as P&I Clubs) which, among them, provide marine liability cover for approximately 90% of the world's ocean-going tonnage. *See generally* www.igpandi.org. Through the unique group structure, the member Clubs, while individually competitive, share among themselves their large loss exposures and also share their respective knowledge and expertise on matters relating to shipowners' liabilities and the insurance and reinsurance of such liabilities.

Each member P&I Club is an independent, not-for-profit mutual insurance association, providing cover under the terms of their respective Rules, for its shipowner members against third party liabilities arising out of the use and operation of ships. Each Club is owned by its shipowner members, and its operations and activities are overseen by a board of directors, or committee, elected from the membership. The Clubs cover a wide range of liabilities, including loss of life and personal injury to crew, passengers and others on board, cargo loss and damage, pollution by oil and other hazardous substances, wreck removal, collision, and damage to property. The Clubs also provide a wide range of services to their members including claims handling, loss prevention, and assistance with the response to, and management of, maritime casualties.

The IGP&I itself is also not for profit and has three "core" functions: First, the operation of the claims sharing ("pooling") arrangements between the Clubs and the collective purchase of "at cost" reinsurance to cover the higher value claims under these arrangements; second, it operates as a forum for collecting and exchanging views between the Clubs and their shipowner members on matters relating to shipowners' liabilities, and insurance of such liabilities; and third, it provides a collective industry voice for the purposes of engaging with external stakeholders including intergovernmental maritime organizations, national governments, marine authorities and the shipping and marine insurance/reinsurance industries.

SUMMARY OF THE ARGUMENT

Marine insurers underwrite insurance policies providing coverage to parties located around the globe with respect to vessels and cargoes that travel the world's oceans and other navigable waterways. Marine insurance is, quite literally, a predicate to global trade. The maritime industry cannot function without marine insurance to manage and disperse the many risks involved in maritime trade and commerce. Without marine insurance, vessel owners simply cannot own and operate ships, and their vessels cannot enter ports and cannot transport cargo and passengers around the world.

Both the United States Constitution and this Court's precedents facilitate the protection of maritime commerce by extending federal jurisdiction over all maritime disputes and ensuring uniformity and consistency in the law governing maritime disputes. Although this Court has left room for the application of state law when there is no established federal maritime rule, leading to circuit splits on fundamental questions of marine insurance law, the Third Circuit's decision below threatens the industry's ability to ensure stability in the underwriting of marine insurance policies through the use of choice of law clauses.

Marine insurance is a business of statistics and averages; insurers can only conduct business where they can accurately predict risks across the broad range of policies of insurance they underwrite. And they can only accurately assess risk if they know, with

a high degree of certainty, what law will control the contracts of insurance they underwrite. Indeed, insurance contracts are routinely drafted specifically to comply with legal requirements in effect in the jurisdiction whose law is specified in the contract. Particularly in an industry as highly regulated as insurance (on both a state-by-state and country-by-country basis), knowing what law will apply is critical to all aspects of the business.

It is largely for this reason that marine insurers require particular certainty that the law chosen by the parties to control their insurance contract will, in fact, control their insurance contract. If insurers issue their insurance policies on the basis of one jurisdiction's applicable law and are then held to different rules of another jurisdiction they could not have anticipated, it will render it impossible for them to assess and price their risks and, ultimately, it will make it impossible for them to continue issuing insurance. And without insurance, maritime commerce would collapse.

Notably, although this case concerns a marine insurance contract, the issue presented by this appeal is actually significantly broader, as the issue presented to the Court is not limited to contracts of marine insurance but instead is stated as: "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 states whose law is displaced." (Emphasis added). In fact, choice of law clauses are widely used in contracts across the entire maritime industry and are a critical part of allowing

and encouraging parties from around the world with disparate legal systems to find a common language for the formation and interpretation of their agreements. Indeed, parties very often choose a "neutral" law and a "neutral" forum for resolution of their disputes precisely because neither party has a substantial relationship to that jurisdiction.

Thus, any "rule" announced by this Court with respect to enforcement of choice of law clauses in maritime contracts should take proper account of longstanding and well-established, industry-wide contracting and dispute resolution practices. *Amici* would also note the broad spectrum of maritime players that will be directly impacted by the Court's ruling in this case, from owners and charterers of vessels, both recreational and commercial; to shippers and carriers of cargoes; to cruise lines and ferry operators and their passengers and crew; to marine insurers and insureds; to ship building and repair yard facilities and their clients; to all players in the offshore energy and construction industry; and so on. Nearly all of these maritime contracts contain choice of law clauses, and a rule that undermines the broad enforceability of such clauses (by allowing the varied policies of individual states to overtake the analysis) would sow great disruption across the entire maritime industry.

The notion that a forum state's public policy could ever override federal maritime choice of law rules is fundamentally contrary to the constitutional preservation of judicial power over "cases of admiralty and maritime jurisdiction" and to all principles of uniformity

and protection of maritime commerce previously espoused by this Court. Nothing in *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*"), which concerned the enforceability of a forum selection clause in a maritime contract, allows for such an outcome. Thus, an analysis of a choice of law provision in a marine insurance contract must begin with federal choice of law rules and cannot be interpreted using state choice of law rules because "[s]tates can no more override such judicial rules validly fashioned than they can override Acts of Congress." *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310, 314 (1955).

The decision below was fundamentally mistaken that *The Bremen* requires federal courts in maritime disputes to apply as many as 50 states' differing public policies to potentially invalidate choice of law clauses. Moreover, regardless of the scope of *The Bremen* as to forum selection clauses, choice of law clauses selecting a specific set of laws *regardless* of the forum are fundamentally different from forum selection clauses. Numerous courts have correctly declined to extend *The Bremen* to undermine uniformity and predictability in maritime contractual disputes, including those involving marine insurance policies. Where, like here, the parties could have directly addressed the subject matter of the dispute with express contractual language, their decision instead to use the convenient shorthand of selecting a specific set of laws that would attain the same result should not be overridden by the courts.

Allowing state "public policy," presumably as articulated in the several states' statutes and regulations,

to undermine an otherwise valid choice of law clause in a maritime contract—and particularly in a marine insurance contract—would disrupt the maritime industry. If so, no insurer could ever be sure of what terms in its policy will be enforced nor of what laws and regulations they must follow in respect of claims handling. Every insurance policy would always be at risk of being interpreted under a body of law never contemplated by the parties and to which the policy was never intended to comply. Even the slim possibility that this result may occur in any given maritime contract will substantially impair commerce across the entire maritime industry.

ARGUMENT

POINT I

MARINE INSURERS—AND THE MARITIME INDUSTRY AS A WHOLE—DEPEND ON THE ENFORCEMENT OF CHOICE OF LAW CLAUSES IN THEIR MARITIME CONTRACTS.

Article III of the Constitution extends the judicial power of the United States "to all cases of admiralty and maritime jurisdiction." U.S. Const. art. III, § 2. This Court has made clear that "the fundamental interest giving rise to maritime jurisdiction is the protection of maritime commerce." *Norfolk Southern Railway Co. v. Kirby*, 543 U.S. 14, 25 (2004). As the *Kirby* Court further explained:

> Article III's grant of admiralty jurisdiction must have referred to a system of law coextensive with, and operating uniformly in, the whole country. It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated 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.

Id. at 28 (quotation marks omitted).

In the marine insurance world, these principles of "uniformity and consistency" have been undermined in the wake of *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955). In that case, a small houseboat was destroyed by fire, and the insurer denied coverage under the vessel's insurance policy on the basis that the owner had violated certain warranties concerning transfer of the vessel's ownership and use solely for private purposes. The owner sued, contending that Texas insurance law rendered the warranty provisions invalid; the insurer responded that federal maritime law governed and required strict compliance with all warranties irrespective of their relevance to the loss.

This Court ruled that maritime contracts (including marine insurance policies) are governed by federal maritime law; however, "it does not follow . . . that every term in every maritime contract can only be controlled by some federally defined admiralty rule." *Id.*

at 313. In considering what law to apply, the Court determined that it must in every instance ask: "(1) Is there a judicially established federal admiralty rule . . . [and] (2) If not, should we fashion one?" Thus, courts have interpreted *Wilburn Boat* to mean that marine insurance contracts are subject to federal maritime law but, where there is no established principle of federal admiralty law applicable to a particular issue, the court should apply state law. *See*, *e.g.*, *AGF Marine Aviation & Transp. v. Cassin*, 544 F.3d 255, 260 n.4 (3d Cir. 2008).

One example where the *Wilburn Boat* rule has led to a Federal Circuit split concerns the doctrine of *uberrimae fidei*, or utmost good faith. The *uberrimae fidei* doctrine requires the insured to exercise the "highest degree of good faith" in entering a marine insurance contract because "the underwriter often has no practicable means of checking on either the accuracy or the sufficiency of the facts" that the insured furnishes to the insurer before the insurer accepts the risk and sets the policy's conditions and premiums. *Great Lakes Ins. SE v. SEA 21-21 LLC*, 568 F. Supp. 3d 1318, 1323 (S.D. Fla. 2021). The majority of Federal Circuits, including the First, Second, Third, Ninth and Eleventh, have held that *uberrimae fidei* represents a well-established federal admiralty rule and thus is controlling irrespective of conflicting state laws.[2] The Fifth Circuit, on the

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[2] *See*, *e.g.*, *QBE Seguros v. Morales-Vazquez*, 986 F.3d 1 (1st Cir. 2021), *cert. denied sub nom. Morales-Vazquez v. Optima Seguros*, 211 L. Ed. 2d 250 (Nov. 1, 2021); *Puritan Ins. Co. v. Eagle S.S. Co. S.A.*, 779 F.2d 866 (2d Cir. 1985); *AGF Maritime Aviation*

other hand, has held "albeit with some hesitation, that the *uberrimae fidei* doctrine is not 'entrenched federal precedent'" so that, under the Supreme Court's *Wilburn Boat* opinion, state law, rather than federal *uberrimae fidei*, applied.[3]

Similarly, a divergence of outcomes as to substantive issues of marine insurance law has resulted from the application of state law pursuant to *Wilburn Boat*. Examples include the question whether a series of incidents constitutes one or more occurrences;[4] the effect

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& Transp. v. Cassin, 544 F.3d 255, 263 (3d Cir. 2008) (reaffirming ruling in *East Coast Tender Serv., Inc. v. Robert T. Winzinger, Inc.*, 759 F.2d 280 (3d Cir. 1985)); *Certain Lloyd's Underwriters v. Inlet Fisheries Inc.*, 518 F.3d 645 (9th Cir. 2008); *HIH Marine Services Inc. v. Fraser*, 211 F.3d 1359 (11th Cir. 2000).

[3] *Albany Ins. Co. v Kieu*, 927 F.2d 882, 889 (5th Cir. 1991), *reh'g en banc den*., 934 F.2d 1263 (5th Cir. 1991), *cert. den.*, 502 U.S. 901 (1991). *See also Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 241 (5th Cir 2009) (acknowledging that the Fifth Circuit "stands alone among the circuits which have considered [this] issue" but declining to reconsider because "it is settled that one panel of this court may not overrule another").

[4] *See*, *e.g.*, *Dicola v. Am. S.S. Owners Mut. Prot. & Indem. Ass'n (In re Prudential Lines Inc.)*, 158 F.3d 65, 80 (2d Cir. 1998) (applying New York "unfortunate event" test); *Exxon Corp. v. St. Paul Fire & Marine Ins. Co.*, 129 F.3d 781, 788 (5th Cir. 1997) (applying Louisiana "effects" test); *Axis Ins. Co. v. Buffalo Marine Servs.*, No. 12-0178, 2013 U.S. Dist. LEXIS 132333, at *17-21, 2013 WL 5231619 (S.D. Tex. Sept. 12, 2013) (applying Texas "causation" test).

of failure of the insured to give prompt notice of loss;[5] and the interpretation of "other insurance" clauses.[6]

The present case is another clear example of where the determination of applicable law may also be determinative of the outcome. Under Pennsylvania law, at least as alleged by the plaintiff in the District Court, an insured may claim under Pennsylvania state law for breach of fiduciary duty, insurance bad faith and violation of the State's unfair trade practices law, whereas under New York law, at least according to the District Court, such claims are not available to the insured. *See* Pet. App. 2a-3a.

Because of these and many other important differences among the insurance laws of the various states, insurers almost invariably include choice of law clauses in their contracts of insurance. This is a critical element of any marine insurer's insurance contract because it establishes certainty and allows the insurer to accurately assess its risk and underwrite and price its insurance products accordingly. Insurance is a business of statistics and averages; insurers can only

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[5] *Compare Big Lift Shipping Co. v. Bellefonte Ins. Co.*, 594 F. Supp. 701, 704 (S.D.N.Y. 1984) (under New York law, insured's compliance with notice provision is condition precedent to insurer's liability and insurer need not show prejudice before it can assert this defense) *with Elevating Boats, Inc. v. Gulf Coast Marine, Inc.*, 766 F.2d 195 (5th Cir. 1985) (noting under applicable Louisiana law, insurer must prove prejudice from failure of insured to give timely notice to avoid liability under policy).

[6] *See Cargill, Inc. v. Commercial Union Ins. Co.*, 889 F.2d 174, 178 (8th Cir. 1989) (discussing differences between Missouri and Minnesota rules where "excess" clauses conflict).

conduct business where they can accurately predict risks across the broad range of policies of insurance they write. And they can only accurately assess risk if they know, with a high degree of certainty, what law will control the contracts of insurance they underwrite. Indeed, insurance contracts—like many other maritime contracts—are often drafted specifically to comply with legal requirements in effect in the jurisdiction whose law is specified in the contract. Similarly, claims-handling practices are commonly conducted in a manner intended to comply with the law specified in the insurance contract. Particularly in an industry as highly regulated as insurance (on a state-by-state and country-by-country basis), *knowing* what law will apply is critical to all aspects of the business. For this reason, the Third Circuit's ruling in this matter is highly detrimental to the marine insurance industry as it interjects uncertainty around a basic premise underlying the insurance contract, *i.e.*, the parties' choice of law.

And moreover, because of the broad scope of the grant of certiorari—*to wit*, "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 states whose law is displaced?"[7]—this Court's consideration of this matter is of great concern not just to marine insurers, but to the entire maritime industry. The Court must bear in mind the broad spectrum of maritime players that will

[7] Emphasis added.

be directly impacted by its ruling in this case, from owners and charterers of vessels; to shippers and carriers of cargoes; to cruise lines and ferry operators and their passengers and crew; to marine insurers and insureds; to ship building and repair yard facilities and their clients; to all players in the offshore construction industry; and so on. Nearly all of these maritime contracts contain choice of law clauses, and a rule that undermines the broad enforceability of such clauses would sow great disruption across the entire maritime industry.

In undertaking its analysis in line with *Wilburn Boat*, the Third Circuit below started with the question whether there was an "established federal rule," finding as follows:

> One such established federal rule is 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 (citing 2 Thomas J. Schoenbaum, Admiralty and Maritime Law § 19:6 (6th ed 2020); *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d at 242-44 (internal quotation marks omitted)).

While it unquestionably *is* firmly established that choice of law provisions are routinely enforced in marine insurance contracts and, indeed, in all maritime contracts, the Third Circuit's precise statement of the "rule" is not uniformly applied. Indeed, other courts

have stated the "rule" quite differently. *See*, *e.g.*, *St. Paul Fire & Marine Ins. Co. v. Board of Commissioners of Port of New Orleans*, 418 Fed. Appx. 305, 309 (5th Cir. 2011) ("The parties' choice of law clause in an admiralty case will govern 'unless the [chosen] state has no substantial relationship to the parties or the transaction or the state's law conflicts with the fundamental purposes of maritime law.'") (quoting *Stoot v. Fluor Drilling Servs., Inc.*, 851 F.2d 1514, 1517 (5th Cir. 1988) (brackets in original)).

A choice of law clause is a contract term like any other. In a similar context involving the enforcement of arbitration clauses, this Court has made clear that "a court must hold a party to its arbitration contract just as the court would to any other kind. But a court may not devise novel rules to favor arbitration over litigation." *Morgan v. Sundance, Inc.*, 142 S. Ct. 1708, 1713 (2022). And while this policy finds support in the Federal Arbitration Act, 9 U.S.C. §§ 1 *et seq.*, "the Supreme Court has made clear that the FAA's policy is based upon the enforcement of contract, rather than a preference for arbitration as an alternative dispute resolution mechanism." *Id*. at 1714 (quoting *National Foundation for Cancer Research v. A.G. Edwards & Sons, Inc.*, 821 F.2d 772, 774 (D.C. Cir. 1987) (internal quotation marks omitted)). In other words, an arbitration clause must be treated the same as any other term of the contract, no better and no worse.

So, too, in the context of choice of law clauses, the strong policy in favor of enforcement of contracts in accordance with their terms must be given primary

effect. There is no principled reason, at least in the context of maritime law, to separately analyze whether enforcement of a choice of law clause would be "unreasonable or unjust." There are already ample mechanisms under basic contract law applicable to maritime contracts to allow a court to assess whether the contract should be reformed or rejected because, for instance, it is unconscionable or was procured by fraud or duress.

Equally, there is no principled reason under U.S. federal maritime law to require that the chosen law bear a "substantial relationship to the parties or the transaction." The cases which espouse this rule generally refer to Restatement (Second) Conflicts of Laws § 187 (1971). *See*, *e.g.*, *St. Paul Fire & Marine*, 418 Fed. Appx. at 309. Section 2(a) of § 187 provides that a choice of law clause will govern unless "the chosen state has no substantial relationship to the parties or the transaction *and there is no other reasonable basis for the parties' choice*." (Emphasis added). Notably, the italicized portion of this Restatement section has generally not been part of the analysis and has not been recounted as part of the "maritime rule" in analyzing whether a choice of law clause should be enforced.

The question whether the parties had a sufficiently "substantial relationship" to the chosen law's jurisdiction—here, New York—was not addressed by the Third Circuit in this matter and is not before this Court. Here, however, is where an ill-considered answer to the broad question raised in the Petition could lead to vast unintended consequences. While

the matter in dispute involves the applicability of the laws of one state or the other in relation to a contract of marine insurance, any "rule" broadly relating to the enforcement of choice of law clauses in maritime contracts will impact a vastly wider constituency. By its very nature, the maritime industry is international, and many maritime contracts involve parties of different nationalities, from different jurisdictions, operating under very different legal regimes and concerning the transportation of goods and people to and from various ports and places around the world.

Over the course of many years, certain jurisdictions have developed an expertise and a reputation for international dispute resolution. Maritime actors commonly choose the law of particular jurisdiction to govern their contracts precisely because the laws of that jurisdiction are well developed, well known, and well regarded. And they often choose those *fora* for dispute resolution precisely *because* none of the parties has any particular relationship to the jurisdiction, such that it can be viewed as neutral. Any "rule" that narrowly requires a "substantial relationship" to the jurisdiction whose law is incorporated into a maritime contract before it can be enforced therefor threatens to disrupt this entire global structure for maritime contracting and dispute resolution.

Indeed, the Restatement clearly contemplates this very notion, even specifically highlighting the maritime industry as an obvious example where the "substantial relationship" requirement, by itself, is too narrow:

> The parties to a multistate contract may have a reasonable basis for choosing a state with which the contract has no substantial relationship. For example, when contracting in countries whose legal systems are strange to them as well as relatively immature, the parties should be able to choose a law on the ground that they know it well and that it is sufficiently developed. For only in this way can they be sure of knowing accurately the extent of their rights and duties under the contract. *So parties to a contract for the transportation of goods by sea between two countries with relatively undeveloped legal systems should be permitted to submit their contract to some well-known and highly elaborated commercial law.*

Restatement (Second) Conflicts of Laws § 187, cmt. f (emphasis added). *See Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 243-44 (5th Cir. 2009) (citing Restatement (Second) of Conflict of Laws § 187(2) and noting that defendant had made no showing that there was not a "reasonable basis for the choice of New York law to govern its marine insurance policy. . . .").

In short, any "rule" announced by this Court with respect to enforcement of choice of law clauses in maritime contracts must take proper account of longstanding and well-established, industry-wide contracting and dispute resolution practices—not just in marine insurance contracts but all maritime contracts.

POINT II

STATE LAW AND THE PUBLIC POLICY UNDERLYING STATE LAW SHOULD NOT DISPLACE THE PARTIES' CHOICE OF FEDERAL ADMIRALTY LAW OR, ABSENT THAT LAW, THE LAW OF A CONTRACTUALLY SPECIFIED STATE.

The Third Circuit erred in concluding that this Court's decision in *The Bremen*[8] applies to contractual choice of law provisions like the one here, subjecting maritime contracts to any number of varying state public policies based solely on the forum in which a lawsuit is brought. *The Bremen* addressed the separate issue of forum selection clauses, which raises distinctly different concerns from the parties' choice of law regardless of the forum. Although the forum can at times affect the law a court applies, the parties' contractual choice in maritime transactions to choose a particular law *regardless* of the forum should be respected by the courts—and nothing this Court held in *The Bremen* supports the Third Circuit's contrary conclusion. *See Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052, 1060 (9th Cir. 2018) (court did not extend *The Bremen* to an arbitration or choice of law clause in a maritime contract); *see also Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d at 239 (denying insured's request to invalidate choice of law clause under *The Bremen*); *St. Paul Fire & Marine*, 418 Fed. Appx. at 309 (same). While *The Bremen* decision was limited

[8] *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972).

to forum selection clauses, as set forth below, that decision's respect for the need for predictability in maritime transactions supports the proposition that there is no room for state law or state public policies to override the application of federal admiralty law.

This proposition is supported by the following points: 1) forum selection clauses and choice of law clauses may overlap, but they are not the same; 2) allowing the forum state's public policies to displace the application of the parties' contractually chosen choice of law is improper and will erode the reach and development of federal admiralty law; and 3) allowing the public policies of 50 states to override the parties' contractually chosen law, depending solely on the forum, is contrary to federal maritime public policy and will severely impact the entire maritime industry by making it impossible for marine insurers to effectively underwrite their policies and other marine actors to manage their contractual risks.

A. There is an Important Distinction between Forum Selection Provisions and Choice of Law Provisions, which the Third Circuit Failed to Address.

Forum selection clauses and choice of law clauses are not the same, and they should be analyzed accordingly. The Third Circuit conflated these issues. In so doing, the Third Circuit extended its (mistaken) view of this Court's holding in *The Bremen* in deciding that the law of the forum state could be applied, in place of

the law chosen by the parties in their contract, based solely on whatever public policy the forum state has enacted. However, to the extent that *The Bremen* decision addressed the applicable law, it was within the context of forum selection. This Court had no need to address the enforcement of parties' express contractual choice of law in that case.

Here, by contrast, rather than filing suit in a neutral forum or a forum that was favorable to GLI, GLI—knowing that there would be a presumption of enforceability of its New York choice of law provision—brought suit in a concededly convenient forum, the insured's home state. Forum selection is simply not at issue in this case; the only issue before the Court is the enforceability of the choice of law provision in the parties' contract, regardless of the forum.

In that regard, the decision below, if upheld, would result in significant additional expense and delay, while increasing the uncertainty the parties sought to avoid through the choice of law clause in their contract. While inconvenience of the forum typically can be determined at the outset of a case before any determination on the merits, whether a particular feature of the chosen state's law (as compared to the forum state's law) is repugnant to the public policy of the forum state will often require some level of analysis of the merits, leading to uncertainty even during the early stages of litigation. That will inevitably lead to greater expense and impediments to resolving cases, and uncertainty for insurers in underwriting and pricing their policies.

Contractually choosing a particular jurisdiction for its neutrality or convenience of the parties therefore does not equate to the parties contractually agreeing to apply certain substantive laws. For example, as GLI has noted in its briefing and as noted in Point I *supra*, courts nationally have differed on the application of the admiralty doctrine *uberrimae fidei*, necessitating the use of a contractual choice of law clause to ensure the parties' contractual intent is enforced. *See Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 886 (5th Cir. 1991); *Fireman's Fund Ins. Co. v. Great American Ins. Co. of New York*, 822 F.3d 620 (2d Cir. 2016); *Durham Auctions*, *supra*; *Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc.*, 518 F.3d 645 (9th Cir. 2008); *Steelmet, Inc. v. Caribe Towing Corp*., 747 F.2d 689 (11th Cir. 1984).

B. The Forum State's Public Policies Should Not Displace the Parties' Contractual Choice of Law.

The Third Circuit's misplaced application of *The Bremen* to contractual choice of law clauses would effectively allow the district courts to override the application of federal admiralty law in cases involving marine insurance. *Wilburn Boat* opened a narrow channel in which state law can be applied in marine insurance cases, directing the application of federal admiralty law, rather than state law, when there is "entrenched" federal admiralty law on the issue at hand. Where there is no "entrenched" rule, *Wilburn Boat* directed courts to consider whether to fashion new rules

of federal admiralty law. *Wilburn Boat* noted that state law could be applied in a limited capacity to fill any gaps left by the absence of an "entrenched" federal rule. *See also Galilea*, 879 F.3d at 1060 (applying *Wilburn Boat* and holding "[b]ut here we encounter an unequal, hierarchical relationship between federal maritime law and state law; again, state law governs disputes arising under marine insurance contracts only in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice.") (internal quotations and citations omitted).

Thus, an analysis of a choice of law provision in a marine insurance contract must begin with federal choice of law rules and cannot be interpreted using state choice of law rules, because "[s]tates can no more override such judicial rules validly fashioned than they can override Acts of Congress." *Wilburn Boat*, 348 U.S. at 314.

Despite *Wilburn Boat*'s holding that federal admiralty law applies in cases involving marine insurance contracts, that case opened a door for courts to apply state law in admiralty cases. But nothing in *Wilburn Boat* contemplated that states' differing public policies could effectively turn admiralty law into a Byzantine patchwork of rules governing parties' contractual relationships dependent on where a lawsuit happens to be filed, even when the parties have contractually agreed on terms to provide certainty as to the governing legal principles. This has resulted in courts following the path of least resistance to apply state laws even when, arguably, admiralty law is already established and

"entrenched" or where uniformity would be highly desirable.

For example, in *Albany Ins. Co. v. Anh Thi Kieu*, 927 F.2d 882, 886 (5th Cir. 1991), the court held that the doctrine of *uberrimae fidei* was not an entrenched principle of federal admiralty law even though the doctrine had existed in U.S. federal admiralty law taken from English common law since 1828. As courts nationally have become more comfortable applying state law to federal admiralty law matters, state law has not only filled in gaps left by the absence of an entrenched rule but has actually encroached on existing "entrenched" admiralty law principles because the boundaries between state law and federal admiralty law have been blurred. The Third Circuit's decision below, if upheld, would accelerate the erosion of federal admiralty law—not only by providing that the forum state can apply its own state laws to disputes involving marine insurance contracts, but that it can override the best tool that parties have to ensure the contract is interpreted in the manner intended at the time the contract is signed. The best tool is, of course, a choice of law provision, which from practice and experience is known in the industry to be employed in the majority of maritime contracts. This Court should not let that beneficial commercial practice be nullified in the manner contemplated by the Third Circuit.

For similar reasons as those noted in Point I of the Argument, *supra* (uniformity and predictability are essential to the marine insurance industry), if the Third Circuit decision stands, the outcome of the

same contractual dispute could vary across the country depending on where suit is filed, leading to great uncertainty for parties in the maritime industry (despite the use of choice of law clauses). This would have a significant negative impact on those parties (including *amici*'s members).

Nevertheless, some courts have properly cabined the role of state law after *Wilburn Boat*, most notably the Fifth Circuit in *GLI v. Durham Auctions*.[9] In *Durham Auctions*, the dispute centered on whether a marine insurance policy was void due to the insured's misrepresentation of the vessel's value and loss history, among other facts. The court enforced the choice of law provision in the policy, which provided for the application of New York law if there was no entrenched federal admiralty law on point. In the decision below, however, the Third Circuit attempted to distinguish *Durham Auctions*. *See* Pet. App. 12a. But instead, it mischaracterized the Fifth Circuit's holding in *Durham Auctions*, where the Fifth Circuit merely discussed "arguendo" whether New York law would violate the forum state's public policy. 585 F.3d at 244.

Rather, the Fifth Circuit's decision in *Durham Auctions* stands for the overriding principle that the forum state's law cannot override the contract's choice of law clause where the "rule" in dispute would have been enforceable if included directly in the contract. *See id.* at 245 (the insured "has not shown that

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[9] *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236 (5th Cir. 2009).

the policy could not have validly expressly provided that the obligation to disclose extended to known facts material to the risk whether or not specifically inquired about by the insurer"). For example, a party can contract for the application of New York law in the same way that it can write into a policy a specific principle of New York law. Applied in the present case, by choosing New York law, the parties agreed that the policy would be void in the event of a failure to satisfy certain conditions, even if that failure was not the proximate cause of the accident. The insurance contract could simply have stated that principle. However, the parties can instead choose to incorporate the set of laws that apply to their contract through a choice of law provision. This aspect of *Durham Auctions* should be adopted from a legal and federal maritime public policy perspective, consistent with *Wilburn Boat*, to harmonize the existing strands of case law—all consistent with this Court's decision in *The Bremen*.

C. Federal Public Policy Supports the Enforceability of Choice of Law Provisions.

In the decision below, the Third Circuit failed to take into account important policy considerations relating to federal admiralty law, as enunciated by this Court in *The Bremen*. Despite this Court's theoretical consideration of the "unreasonable, unfair, or unjust under the circumstances" test in *The Bremen*, this Court articulated certain practical considerations, namely that, absent such "gravely difficult and

inconvenient" circumstances, "there [was] no basis for concluding that it would be unfair, unjust, or unreasonable to hold that party to his bargain." *Bremen*, 407 U.S. at 17-18. The Court extolled the importance of contractual certainty in maritime contracts: "At the very least, the [agreed-upon contractual provision] was an effort to eliminate all uncertainty as to the nature, location, and outlook of the forum in which these companies of differing nationalities might find themselves." *Id.* at 13 n.15. That is what the parties tried to do in this case through the choice of law provision in the insurance policy, which was "an effort to eliminate all uncertainty" of risks that can otherwise be proactively, contractually agreed upon. A sudden 180° turn away from the presumptive enforceability of choice of law provisions in favor of varied and unpredictable state laws would result in unpredictable risk, and therefore inaccurate underwriting, ultimately leading to potentially uninsurable risks in the maritime industry.

The Third Circuit also overlooked the greater federal public policy this Court articulated in *The Bremen*, namely that: parties need to be able to "conduct their negotiations" prior to entering into a relationship, resulting in a contract "freely entered into between two competent parties," to avoid "much uncertainty and possibly great inconvenience to both parties . . . if a suit [arises]." *Id.* at 13-14. While that was stated in the context of a chosen forum rather than a chosen law, those same considerations are of critical importance, and perhaps more so, in this dispute. By its nature, the

maritime industry is global, and the marine insurance industry supports the entire maritime industry (without insurance, the maritime industry simply could not function). Thus, by creating an insurance contract at the outset of the relationship between insurer and insured, the marine insurers can "fix[ ] the monetary terms, with the consequences of the [contract provisions] figuring prominently in their calculations." *Id.* at 14.

In *The Bremen*, this Court noted the economic underpinnings of this jurisprudence, that "the expansion of American business and industry will hardly be encouraged if, notwithstanding solemn contracts, we insist on a parochial concept that all disputes must be resolved under our laws and in our courts." *Id.* at 9. Since 1972, when *The Bremen* decision was issued, commerce has become increasingly global. Any confusion in a legal regime that varies across 50 states discourages maritime businesses, including foreign businesses, from developing a market in the U.S., including the important marine insurance market.

CONCLUSION

For the above reasons, AIMU and the IGP&I respectfully request that the Court rule in Petitioner GLI's favor and vacate the judgment below.

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