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 U.S. Court of Appeals for the Third Circuit

BRIEF FOR RESPONDENT

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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?

RULE 29.6 STATEMENT

Raiders Retreat Realty Co., LLC is a single member limited liability company that has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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INTRODUCTION

The answer to the question presented in this case begins and ends with *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955).

In *Wilburn Boat*, this Court held that state law governs maritime insurance disputes unless there is an "established admiralty rule" requiring application of federal law. *Id.* at 314.

This case involves a dispute over the enforceability of a choice-of-law provision in a maritime insurance contract selecting New York law. In the absence of the choice-of-law provision, Pennsylvania insurance law would apply. Under *Wilburn Boat*, unless there is an established federal rule governing the enforceability of such choice-of-law provisions, state law governs their enforceability.

Great Lakes asks the Court to apply a supposed *federal* rule whereby a contractual choice-of-law provision must be enforced unless it conflicts with federal maritime policy. This argument fails for a simple reason: Great Lakes' proposed rule is not an established federal admiralty rule. Great Lakes points to glancing, irrelevant *dicta* in old maritime cases that say nothing about the enforceability of choice-of-law provisions dictating that a particular state's law will apply. Under *Wilburn Boat*'s rigorous standard, those cases do not come close to demonstrating an established federal rule. Consequently, *Wilburn Boat* dictates that state law determines the enforceability of the choice-of-law provision.

In determining the enforceability of choice-of-law provisions, Pennsylvania, in common with nearly every other state, follows the Restatement. The Restatement requires a court to consider the public policy of the state whose law would apply in the absence of the choice-of-law clause—which in this case is Pennsylvania. Therefore, the Third Circuit correctly remanded for consideration of Pennsylvania public policy here. End of case.

Not only does Raiders' position follow from black-letter law, but it makes perfect sense. Given that both parties agree that state substantive law should apply, why apply a bespoke federal choice-of-law rule to choose between one state's law and another's? In the remarkably similar case of *Cassirer* v. *Thyssen-Bornemisza Collect. Found.*, 142 S. Ct. 1502 (2022), this Court held that there was no need for a federal choice-of-law rule in Foreign Sovereign Immunities Act litigation governed by state law. As the Court explained, foreign affairs frequently implicate "uniquely federal interests." *Id.* at 1509. But in the context of litigation where federal law does not "displace[ ] the substantive rule of decision," there is "no greater warrant for federal law to supplant the otherwise applicable choice-of-law rule." *Id.* Identical reasoning applies here. Maritime law frequently implicates federal interests, but the substantive rule of decision in this case is governed by state law, and there is no need to use federal law to decide which state's law applies.

If the Court nevertheless chooses to adopt a federal rule governing the enforceability of choice-of-law clauses in maritime insurance contracts, it

should follow the consensus approach and apply the Restatement's rule. The Restatement generally requires choice-of-law clauses to be enforced, but in limited circumstances it permits consideration of the public policy of the state whose law would otherwise apply. This approach strikes the appropriate balance between predictability, fairness, and respect for local substantive law.

By contrast, Great Lakes' proposed federal common law rule does not make sense. Great Lakes contends that *federal* public policy should be used to decide between applying *New York* law and *Pennsylvania* law. But why would the federal system care whether Pennsylvania or New York law applies? If the federal system cared, then substantive *federal* maritime law would apply. The whole point of using state law—as dictated by *Wilburn Boat*—is that there *isn't* any established federal interest at stake.

Put another way, the question here boils down to whether *Pennsylvania*'s interest in applying its own law to a conflict having numerous, significant connections to Pennsylvania outweighs the insurer's decision to include a choice-of-law provision in this adhesion contract. How else to measure *Pennsylvania*'s interest than to consider *Pennsylvania*'s policy?

Great Lakes complains bitterly that 50 states will apply their own policies to override maritime insurance contracts. But the whole point of *Wilburn Boat* is that, in some cases, states should be permitted to apply their own public policy to override terms of maritime insurance contracts. That is

precisely what state insurance regulation *means*. A choice-of-law provision is one term of an insurance contract. Under *Wilburn Boat*, Pennsylvania has the right to apply state law to determine the enforceability of that term just as it has the right to apply state law to determine the enforceability of every other term of the contract in the absence of any established admiralty rule.

The Third Circuit's judgment is correct and should be affirmed.

STATEMENT

A. Factual Background

Petitioner Great Lakes Insurance SE does not hesitate to pocket as pure profit the premiums paid to insure yachts when no claims for coverage have arisen during the policy period. But, when a claim for coverage is received, it is Great Lakes' practice to scour the policyholder's behavior in the hope of uncovering entirely unrelated, technical violations by the policyholder, so that Great Lakes can deny coverage and avoid paying for claims that it had seemingly agreed to insure.

Whether federal admiralty law or, to the extent applicable, New York law allows Great Lakes to succeed in this offensive practice is the subject of the parties' cross-motions for summary judgment pending, fully briefed, before the district court, which has stayed all further proceedings pending the outcome of this matter. Pennsylvania, where respondent Raiders Retreat Realty Co., LLC is headquartered and the jurisdiction with the greatest interest in this controversy, has enacted statutes and adopted regulations

to deter insurance companies from engaging in this sort of misbehavior and to punish those insurance companies that have nevertheless engaged in it to the detriment of their Pennsylvania-based policyholders.

The question presented arises from a boilerplate choice-of-law provision that Great Lakes inserted into the insurance policy that it issued to Raiders:

> 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.

Pet. App. 4a.

If the body of case law resulting from Great Lakes' efforts to disclaim coverage due to a policyholder's alleged technical violations is any indication, Great Lakes inserts this very same choice-of-law provision into every maritime insurance contract that it issues. The choice-of-law provision is an instance of fine print, not subject to negotiation between the parties, typically contained in an insurance policy contract of adhesion. It certainly was not negotiated in this case.

The dispute before this Court arose as follows. A yacht that Raiders owns became grounded on June 7, 2019, incurring more than $300,000 in damage. Pet. App. 3a. Raiders had insured the yacht, whose hailing port is in Pennsylvania, against such losses with Great Lakes, a marine insurance company headquartered in London, United Kingdom. *Id.*

Raiders promptly submitted to Great Lakes a claim for the loss to the vessel. *Id.* On September 25, 2019, Great Lakes denied coverage of the claim based on its assertion that the yacht's fire suppression systems differed from what the parties had agreed, notwithstanding that the yacht's grounding and the resulting damages and losses were not caused by a fire or any supposed deficiencies in the boat's fire suppression systems. *Id.* In denying the claim, Great Lakes maintained that the supposed discrepancies relating to the yacht's fire suppression system rendered the insurance policy void from its inception. *Id.*

B. Procedural Background

On the same date that Great Lakes denied Raiders' claim for coverage, Great Lakes initiated a declaratory judgment action against Raiders in the U.S. District Court for the Eastern District of Pennsylvania. *Id.*

In response to Great Lakes' declaratory judgment action, Raiders asserted five counterclaims. *Id.* The first two counterclaims were contractual in nature, for breach of contract (Count I) and breach of the implied covenant of good faith and fair dealing (Count II). *Id.*

The remaining three counterclaims sought extra-contractual relief available against insurance companies under Pennsylvania law. Count III alleged breach of fiduciary duty. *Id.* Count IV alleged insurance bad faith pursuant to 42 Pa. Cons. Stat. Ann. §8371. Pet. App. 3a. And Count V alleged a violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. §201-1, *et seq*. Pet. App. 3a.

Raiders—a single-member limited liability company headquartered in Pennsylvania whose owner, Phil Pulley, is domiciled in Pennsylvania—negotiated, purchased, paid for, and received the insurance policy in question in Pennsylvania from a Pennsylvania-licensed insurance agent whose corporate home office is in Pennsylvania. CA3 App.300, 414-15, 659-60.

Great Lakes moved to dismiss Counts III through V of Raiders' counterclaims, arguing that New York law applied and necessitated the dismissal of those counterclaims. Pet. App. 4a. In so arguing, Great Lakes relied on the above-quoted choice-of-law provision contained in the insurance policy that it issued to Raiders.

Raiders argued to the district court, and both Great Lakes and the district court agreed, that substantive federal admiralty law itself contains nothing to preclude Raiders from asserting the three Pennsylvania-law counterclaims at issue.

Because Raiders conceded in the district court that, if New York law applied, then Counts III through V of Raiders' counterclaims, which arose under Pennsylvania law, would be subject to dismissal, the central focus of the district court's ruling on Great Lakes' motion to dismiss was whether the express choice-of-law provision in the insurance policy mandated applying New York law to those counterclaims. Pet. App. 27a-35a.

The district court agreed with Great Lakes that the choice-of-law provision necessitated dismissing Counts III through V of Raiders' counterclaims, because New York law applied under the choice-of-

law provision and those claims were not cognizable under New York law. Pet. App. 34a-35a.

Raiders appealed to the Third Circuit from the district court's dismissal of the three extracontractual Pennsylvania-law counterclaims. In its appellate brief and at oral argument, Great Lakes conceded that, absent a choice-of-law clause, Pennsylvania law would apply to Raiders' counterclaims. Great Lakes CA3 Br. at 34-35; CA3 Oral Arg. Tr. (ECF Doc. 48) at 28. Great Lakes also conceded at the argument of the Third Circuit appeal that Pennsylvania's insurance bad faith statute and Unfair Trade Practices and Consumer Protection Law constitute strong public policies of Pennsylvania. CA3 Oral Arg. Tr. (ECF Doc. 48) at 28.

On appeal, a unanimous three-judge Third Circuit panel vacated the district court's judgment and remanded for further proceedings. Pet. App. 1a-15a. The court of appeals began by recognizing that, in *Wilburn Boat*, 348 U.S. at 320-21, this Court ruled that, when adjudicating a maritime insurance contract dispute, if there is no established rule of federal admiralty law to apply, state law applies. Pet. App. 8a.

The Third Circuit next recognized that "[o]ne 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.' 2 Thomas J. Schoenbaum, Admiralty and Maritime Law §19:6 (6th ed. 2020)." *Id.*

Ultimately, the Third Circuit held:

> [T]he rule that choice-of-law provisions in maritime insurance contracts are presumed enforceable unless "enforcement would be unreasonable or unjust," Schoenbaum, *supra*, §19:6, is identical to *The Bremen*'s rule that forum-selection provisions should be honored unless "enforcement would be unreasonable and unjust," 407 U.S. at 15. Given this overlap—coupled with *The Bremen*'s "strong public policy" exception comprising but one part of the holding's broader "unreasonable and unjust" standard—we consider 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. *See id.*

Id. at 15a.

The Third Circuit vacated the district court's judgment dismissing Raiders' three Pennsylvania-law counterclaims and remanded to permit the district court "to consider whether Pennsylvania has a strong public policy that would be thwarted by applying New York law" to dismiss Raiders' counterclaims. *Id.*

Great Lakes thereafter filed a Petition for Writ of Certiorari, which this Court granted, limited to the second question presented.

SUMMARY OF ARGUMENT

In *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 320-21 (1955), this Court held, when construing the meaning and effect of a maritime insurance contract, that if there is no established rule of federal admiralty law to apply, state law applies. That holding resolves this case.

The courts below and the opposing parties agree that no established rule of federal admiralty law precludes Raiders from maintaining its three extra-contractual Pennsylvania-law counterclaims against Great Lakes. Although Great Lakes' insurance policy contains a boilerplate provision selecting New York law, Pennsylvania's choice-of-law principles do not treat such choice-of-law clauses as sacrosanct but instead weigh them against the public policy of the state whose law would otherwise apply—here, Pennsylvania.

Thus, Raiders' ability to maintain those counterclaims depends on whether ordinary state choice-of-law principles govern in the area of maritime insurance regulation or whether some heretofore unrecognized federal choice-of-law principle, which would cause a state choice-of-law provision contained in a maritime insurance policy to be essentially inviolable as a matter of federal law, applies instead.

Under *Wilburn Boat*, to state the question is to resolve it. Great Lakes has failed to demonstrate the existence of any well-established principles of federal admiralty law that cause a state choice-of-law provision in a maritime insurance contract to be sacrosanct in the absence of any *federal* public policy dictating its non-enforcement. Consequently, under

Wilburn Boat, state law applies to determine the enforceability of the New York choice-of-law provision contained in Great Lakes' policy, and state law necessitates considering the public policy of Pennsylvania—the jurisdiction with the most connections to the parties' dispute—as part of that enforceability inquiry.

Even if the Court holds that federal common law governs the enforceability of choice-of-law clauses in maritime insurance contracts, the result should be the same. The Court should adopt, as a matter of federal common law, the Restatement's approach of considering the public policy of the state whose law would otherwise apply, which in this case is Pennsylvania.

Great Lakes' contrary approach of applying *federal* maritime policy to select between *Pennsylvania* and *New York* insurance law has little to recommend it. If federal maritime policy were relevant here, then federal substantive maritime law would apply. Given that *Wilburn Boat* embraces state regulation of maritime insurance, it naturally follows that states should regulate choice-of-law clauses just as they regulate every other provision of a maritime insurance contract.

Great Lakes' approach would nullify *Wilburn Boat*'s holding that states should be the primary regulators of maritime insurance. Under Great Lakes' approach, insurers could avoid statutory protections for policyholders that exist in the vast majority of states merely by including a boilerplate provision selecting the most insurer-friendly state's law.

Great Lakes' preferred outcome would not promote the goal of uniformity that Great Lakes trumpets repeatedly in its brief. Great Lakes chose New York law in its contract of adhesion, but the next insurance company can choose the law of any other jurisdiction. "Uniformity" in the admiralty context means the same substantive law applies across-the-board. That is far from guaranteed where each insurer can choose the law of whichever state it believes advantages it the most. Nor would uniformity be defeated by affirming the Third Circuit's judgment. Although Great Lakes chose the forum here, the specter of "forum shopping" does little to risk disuniformity, because under the Restatement's approach this case would always present a conflict between New York and Pennsylvania law regardless of whether it had been filed in Philadelphia or (somehow) Sacramento.

Given this Court's hands-off approach to the state law regulation of maritime insurance in *Wilburn Boat*, the only conceivably proper outcome here is that whether an insurance policy's choice-of-law provision is enforceable in an admiralty case governed by state law must produce the same result as in any other insurance dispute governed by state law outside the admiralty context. This outcome will make maritime insurance companies no better off, but also no worse off, than insurance companies doing business throughout the United States outside the admiralty context.

Because the result the Third Circuit reached is the result that *Wilburn Boat* compels, this Court should affirm the judgment of the court of appeals.

ARGUMENT

I. Pennsylvania Law Should Determine The Enforceability Of The Choice-Of-Law Clause, And Under Pennsylvania Law, Courts Consider Pennsylvania Public Policy

In *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 320-21 (1955), this Court held that, when adjudicating a maritime insurance contract dispute, if there is no governing established rule of federal admiralty law, state law applies.

The district court in this case held, and the parties do not dispute, that no established rule of federal admiralty law precludes Raiders from maintaining its three Pennsylvania-law counterclaims against Great Lakes. Thus, the sole question before this Court is whether the insurance policy's choice of New York law precludes those counterclaims or whether the strong public policies of the state having the most significant connection to the parties' dispute—here, Pennsylvania—apply instead to enable those counterclaims to proceed to resolution on their merits.

To decide whether New York law or Pennsylvania law applies, the Court must decide whether the choice-of-law clause is enforceable. And, to decide *that* question, the Court must resolve *whose* law—federal law or state law—governs the enforceability of the choice-of-law clause. Under *Wilburn Boat*'s approach, state law governs the enforceability of the choice-of-law clause. As a result, because Pennsylvania law requires consideration of Pennsylvania public policy in determining the enforceability of a choice-of-law clause, the Third Circuit's decision should be affirmed.

A. Under *Wilburn Boat*, state law applies to determine the enforceability of the choice-of-law clause unless there is established federal law to the contrary

In *Wilburn Boat*, this Court held that, in the absence of a "judicially established federal admiralty rule," state law governs disputes arising under maritime insurance contracts. *Id.* at 314; *see id.* at 319-21. The dispute in *Wilburn Boat* began when the insured's houseboat was destroyed in a fire. *See id.* at 311. The insurer denied coverage "because of alleged breaches" of terms in the maritime insurance contract providing that "the boat could not be sold, transferred, assigned, pledged, hired or chartered, and must be used solely for private pleasure purposes." *Id.*

The validity of those provisions turned on whether Texas law governed the suit, as it was a principle of Texas insurance law that "no breach by the insured of the provisions of a fire insurance policy is a defense to any suit . . . unless the breach contributes to the loss." *Id.* at 312. The lower courts held that Texas law was irrelevant in this federal maritime dispute, and they instead relied on what they viewed as "an established admiralty rule which requires literal fulfillment of every policy warranty so that any breach bars recovery, even though a loss would have happened had the warranty been carried out to the letter." *Id.*; *see id.* at 312-13.

This Court ruled that state law should apply. It rejected the argument that there was a need for uniformity of the law governing maritime insurance contracts. The Court observed that the states'

regulatory power "has always been particularly broad in relation to insurance companies and the contracts they make." *Id.* at 314. And it was wary of "judicial creation of admiralty rules to govern marine policy terms and warranties" in light of the fact that "[t]he control of all types of insurance companies and contracts has been primarily a state function since the States came into being." *Id.* at 316; *see id.* at 316-19 (discussing the states' pedigree of regulating insurance and the "difficulties of an attempt to unify insurance law on a nationwide basis, even by Congress").

The Court therefore held that, in the absence of a preexisting, "judicially established federal admiralty rule governing the[ ] warranties," *id.* at 314, this Court would apply state law, as in any other non-admiralty case, rather than create a uniform federal rule. *See id.* at 320-21. And it concluded that there was no such established admiralty rule requiring strict compliance with warranties in marine insurance contracts. *See id.* at 314-16.

Wilburn Boat thus announced a straightforward rule for determining the source of law for disputes over maritime insurance contracts: the relevant rule of decision comes from state law unless there is a well-established, specific federal admiralty rule that governs.

Wilburn Boat's rule applies here. The parties dispute the enforceability of a state choice-of-law provision in a maritime insurance contract. The choice-of-law provision is simply one type of term in a maritime insurance contract—just like the no-transfer and no-commercial-use provisions in the

insurance policy at issue in *Wilburn Boat*. Under *Wilburn Boat*, therefore, the rule for whether a choice-of-law provision in a maritime insurance contract is enforced is drawn from state law—unless there is a well-established federal rule governing the enforceability of choice-of-law provisions in maritime insurance contracts that supplants it.

Great Lakes steadfastly avoids using *Wilburn Boat*'s methodology. Instead, Great Lakes presents its arguments for reversal through the framework of this Court's ruling in *Dutra Group* v. *Batterton*, 139 S. Ct. 2275 (2019)— a case presenting the question whether a mariner injured while working as a deckhand may recover punitive damages on a claim of unseaworthiness. The question presented in *Dutra Group*—involving a well-established federal admiralty law claim and whether a particular form of damages was recoverable thereunder—has nothing to do with maritime insurance. *Wilburn Boat*, not *Dutra*, provides the applicable test here.

B. Great Lakes mischaracterizes *Wilburn Boat*

Great Lakes spins a tale in which *Wilburn Boat* introduced state law into maritime insurance contracts for the first time, and insurers began using choice-of-law provisions thereafter to restore the predictability that *Wilburn Boat* purportedly destroyed. Great Lakes insists that "before *Wilburn Boat*, Maritime Contracts Were Governed Exclusively by Federal law." Pet. Br. at 16-19. "For that nearly 200-year stretch, state law was nowhere to be found." *Id.* at 19. Great Lakes claims that "*Wilburn Boat* essentially introduced state law into federal maritime

cases." *Id.* And so, the theory goes, insurers began using choice-of-law clauses after *Wilburn Boat* in order to restore the pre-*Wilburn Boat* status quo, in which insurers would not be subject to 50 states' laws. Pet. Br. at 19.

These assertions mischaracterize *Wilburn Boat*. The whole premise of *Wilburn Boat* was that maritime insurance contracts were always governed by state law, and so the Court was merely recognizing where the law always stood, not "essentially introduc[ing] state law into federal maritime cases" as Great Lakes incorrectly represents. Pet. Br. at 19.

This Court in *Wilburn Boat* says this over, and over, and over again. *See* 348 U.S. at 316-19. It states that "[t]he whole judicial and legislative history of insurance regulation in the United States warns us against the judicial creation of admiralty rules to govern marine policy terms and warranties." *Id.* at 316. "The control of all types of insurance companies and contracts has been primarily a state function since the States came into being." *Id.* "In 1869, this Court held in *Paul* v. *Virginia*, 8 Wall. 168, that States possessed regulatory power over the insurance business and strongly indicated that the National Government did not have that power." *Id.* "Three years later, it was first authoritatively decided in *Insurance Co.* v. *Dunham*, *supra*, that federal courts could exercise 'jurisdiction' over marine insurance contracts." *Id.* "In 1894, years after the *Dunham* holding, this Court applied the doctrine of *Paul* v. *Virginia* and held that States could regulate marine insurance the same as any other insurance." *Id.* (citing *Hooper* v. *California*, 155 U.S. 648 (1895)).

"Later, the power of States to regulate marine insurance was reaffirmed in *Nutting* v. *Massachusetts*, 183 U.S. 553." *Id.*

As the Court recognized in *Wilburn Boat*, "This constitutional doctrine carrying implications of exclusive state power to regulate all types of insurance contracts remained until 1944 when this Court decided *United States* v. *South-Eastern Underwriters Assn.*, 322 U.S. 533." *Id.* "Thus it is clear that at least until 1944 this court has always treated marine insurance contracts, like all others, as subject to state control." *Id.* "The vast amount of insurance litigation in state courts throughout our history also bears witness that until recently state legislatures and state courts have treated marine insurance as controlled by state law to the same extent as all other insurance." *Id.* The Court also gave a detailed explanation of how "[n]ot only courts, but Congress, insurance companies, and those insured have all acted on the assumption that States can regulate marine insurance." *Id.* at 317-20.

The Court concluded its *Wilburn Boat* opinion with the following summary of its holding: "Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted. **We, like Congress, leave the regulation of marine insurance where it has been—with the States**." *Id.* at 320-21 (emphasis added). Given this reasoning, it is difficult to understand how Great Lakes could claim that "before *Wilburn Boat*, Maritime Contracts

Were Governed Exclusively by Federal law." Pet. Br. at 16.

C. There is no established federal rule governing the enforceability of choice-of-law provisions in maritime insurance contracts

Great Lakes' theory boils down to this: "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." Pet. Br. at 19. Everything in this assertion is wrong. *Wilburn Boat* did not *create* anything (it distilled 200 years of law). In marine insurance, the role of state substantive law is not "gap-filling" (it governs, absent an established federal law to the contrary). And—dispositively for this case—there is no such thing as a "settled federal presumption in favor of enforcing choice-of-law clauses in maritime contracts."

Great Lakes advocates a *federal* rule under which choice-of-law provisions in maritime contracts are enforced unless they conflict with federal maritime policy. According to Great Lakes, this federal rule governing the enforceability of choice-of-law clauses should apply even when the court is choosing between the law of two different *states*: here, New York (the state specified in the choice-of-law clause) and Pennsylvania (the state whose law would apply in the absence of a choice-of-law clause).

To prevail in this case, Great Lakes must demonstrate that its proposed rule is an established federal rule within the meaning of *Wilburn Boat*. It cannot come close to making this showing.

1. There is no pre-*Wilburn Boat* case law demonstrating an established federal rule

Great Lakes first attempts to locate an "established federal rule" in pre-*Wilburn Boat* case law. That attempt fails.

To begin, *Wilburn Boat*'s standard for finding an "established federal rule" is exceptionally high. There, the insurer assembled abundant evidence of an "established federal rule" that warranties in a maritime insurance policy should be strictly enforced. The insurer cited *Hazard's Administrator* v. *New England Marine Ins. Co.*, 8 Pet. 557, 580 (1834), a maritime insurance case which expressly recognized that warranties must be "strictly and literally performed," but this Court in *Wilburn Boat* said that was not good enough because the Court in *Hazard's Administrator* did not explicitly say this was a *federal* rule. *See* 348 U.S. at 315.

The insurer also cited a different Supreme Court case explicitly announcing such a rule in a non-maritime insurance case; two circuit court decision specifically characterizing such a rule as "part of the general admiralty law"; and numerous other appellate decisions applying such a rule. *See id.* The dissent did even better, putting together a massive body of case law endorsing this rule. *See id.* at 325-26 & nn.1-3 (Reed, J., dissenting). Not good enough, said the majority, for the rule to be "judicially established as part of the body of federal admiralty law in this country." *Id.* at 316.

The case law on which Great Lakes relies in its merits brief does not even come close to meeting

Wilburn Boat's standard. In an effort to substantiate an "established federal rule," Great Lakes points to a scattershot of pre-*Wilburn Boat* cases with choice-of-law provisions specifying that a foreign country's law will apply. Pet. Br. at 18. These cases say nothing about the enforceability of choice-of-law provisions specifying that a particular state's law will apply, much less what law should be used to determine the enforceability of such choice-of-law provisions.

The only two cases that Great Lakes discusses beyond mere inclusion in a string-cite are *London Assurance* v. *Companhia de Moagens do Barreiro*, 167 U.S. 149 (1897), and *The Kensington*, 183 U.S. 263 (1902), neither of which move the ball. In *London Assurance*, the contract specified that "the claims were to be adjusted according to the usages of Lloyds," and this Court held that it is "no injustice" to apply that law as long as "the foreign law is not in any way contrary to the policy of our own." 167 U.S. at 160-61. In *The Kensington*, which was not an insurance case (it involved the interpretation of a passenger's ticket), this Court declined to apply Belgian law, as specified on the ticket, based on a view that it would violate American public policy. *See* 183 U.S. at 268-71.

Neither of these cases comes close to supporting the rule advocated by Great Lakes here—namely, that only a strong federal public policy would suffice to override Great Lakes' unilateral choice of New York law in the insurance policy it issued to Raiders. First, both cases say that a foreign choice-of-law provision will not apply if it conflicts with U.S. public policy. Of course that is true. A provision that conflicts with federal admiralty policy would be

preempted, just as a state-law provision that conflicts with federal admiralty policy would be preempted. In *The Kensington*, this Court describes its holding in precisely that manner:

> In the very nature of things, the premise, upon which this decision must rest, is controlling here, unless it be said that a contract, made in a foreign country, to be executed in part in the United States, is more potential to overthrow the public policy, enforced in the courts of the United States, than would be a similar contract, validly made, in one of the States of the Union.

183 U.S. at 270. Nothing in these two cases gives any hint on how to choose between the law of two states (here Pennsylvania and New York), neither of which is preempted.

Second, in both cases, the question was: should this Court apply federal substantive law, or foreign law? This Court applied essentially the same rule that is now recognized as the Restatement's rule for state choice-of-law disputes (*see* Restatement (Second) of Conflict of Laws §187(2)(b) (1971)): to determine whether federal substantive law applies notwithstanding a choice-of-law provision, you apply federal policy. In other words, you apply the policy of the sovereign "which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties." *Id.* cmt. g. That parallels the rule that Raiders advocates here: Pennsylvania public policy is used to decide whether Pennsylvania substantive law applies. Nothing in these cases supports Great Lakes'

mix-and-match approach of applying federal law to choose between Pennsylvania and New York law.

Indeed, the most relevant pre-*Wilburn Boat* case law cuts the other way. Consider *E. Gerli & Co.* v. *Cunard S. S. Co. Ltd.*, 48 F.2d 115 (2d Cir. 1931), a decision by Judge Learned Hand, with Judge Augustus Hand also on the panel and joining in the decision. *E. Gerli* involved a maritime contract that stated it would be "governed by English law." *Id.* at 117. If the "established federal rule" asserted by Great Lakes actually existed, the court would have held that the choice-of-law provision was enforceable unless it conflicted with federal maritime law.

However, the court applied a different rule. The court held that the enforceability of the choice-of-law clause should be determined based on the policy of the jurisdiction where the contract was "drawn and delivered": Italy. *Id.* The court observed: "People cannot by agreement substitute the law of another place; they may of course incorporate any provisions they wish into their agreements—a statute like anything else—and when they do, courts will try to make sense out of the whole, so far as they can." *Id.* "But an agreement is not a contract, except as the law says it shall be, and to try to make it one is to pull on one's bootstraps." *Id.* The court then held that the litigant attacking the clause could not prevail because he had put forth insufficient evidence of Italian law: "*Prima facie*, the agreement is a contract; he who maintains that in a given situation it is not, must prove the law of Italy. The libellant has not proved it, and he must lose." *Id.*; *see also F.A. Straus & Co.* v. *Canadian Pac. R. Co.*, 173 N.E. 564, 567 (N.Y. 1930) (declining to enforce provision of mari-

time contract selecting British law because it violated New York public policy, citing *The Kensington* with approval).

E. Gerli is devastating to Great Lakes' case. First, unlike every case cited by Great Lakes, the court actually dwelt on the question of which jurisdiction's law governs the enforceability of choice-of-law clauses. Second, unlike every case cited by Great Lakes, *E. Gerli* involved a choice of law between two jurisdictions, neither of which was the United States: Italy and England. That parallels the situation here, where the court is choosing between Pennsylvania and New York law. And, Learned Hand—perhaps the single greatest lower-court judge in American history—was completely unaware of Great Lakes' purported "established federal rule" that federal admiralty law uniformly governs the enforceability of choice-of-law clauses in maritime contracts. Instead, he considered the public policy of the sovereign whose law would otherwise apply: Italy. That is exactly the approach advocated by Raiders here.

Similar pre-*Wilburn Boat* law exists in the context of maritime insurance. *Boole* v. *Union Marine Ins. Co.*, 52 Cal. App. 207 (Cal. Ct. App. 1st Dist. 1921), involved a maritime insurance contract reciting that "all claims for loss shall be adjusted according to the English law and practice." *Id.* As in *E. Gerli*, the choice-of-law dispute involved two jurisdictions other than the United States: England and California. *See* 52 Cal. App. at 209 (noting that "English law . . . differs from the California law"). Under Great Lakes' approach, the court should have applied the purported "established federal rule" of deciding the

enforceability of the choice-of-law provision by reference to *federal* policy.

Instead, the court analyzed the enforceability of the choice-of-law provision under California law. The court characterized the insured's contention as follows: "If the court shall conclude that, upon a fair construction of the contracts of insurance, the clauses of the policies referred to exclude the California statute law, it is appellant's contention in the second place that these clauses are void as being in contravention of the domestic policy of the state expressed in the code sections." *Id.* at 209.

The court enforced the choice-of-law provision based on its conclusion that *California law* permitted its enforcement. "We find nothing in our own laws making the provisions of the code defining a constructive total loss, in the case of marine insurance, mandatory upon the parties." *Id.* at 210. "We are not aware of any legislative declaration that would prohibit the parties to such an insurance policy from contracting that the law of England shall govern in the determination of what shall constitute a constructive total loss under such policy." *Id.* "It is the general rule in this state that, except where it is otherwise declared, the provisions of the Civil Code, with respect to the rights and obligations of parties to contracts, are subordinate to the intention of the parties when ascertained in the manner prescribed by the laws relating to the interpretation of contracts." *Id.* at 210-11.

Thus, there simply is no pre-*Wilburn Boat* "established federal rule" applying federal admiralty law to determine the enforceability of choice-of-law

provisions in maritime contracts. To the contrary, courts consistently considered the policy of the jurisdiction whose law would otherwise apply—which is exactly the approach Pennsylvania uses and exactly the approach Raiders advocates for here.

2. There is no post-*Wilburn Boat* case law demonstrating an established federal rule

In its search for an established federal rule, Great Lakes also cites post-*Wilburn Boat* cases, but there are no Supreme Court cases on the issue, and no well-established approach followed by the lower courts. Indeed, only a total of three cases at the federal appellate level have involved disputes over whether to apply a state choice-of-law provision in a maritime insurance policy or the competing law of another state for public policy reasons.

Not surprisingly, all three cases involved Great Lakes. In *Great Lakes Reins. (UK) PLC* v. *Durham Auctions, Inc.*, 585 F.3d 236 (5th Cir. 2009), the Fifth Circuit recognized that the Restatement (Second) of Conflict of Laws provided the governing test and held that the public policy of Mississippi did not suffice under the particular circumstances of that case to overcome the insurance policy's New York choice-of-law provision. *See id.* at 242, 244-45.[1] In Raiders' case, the Third Circuit vacated and remanded for the

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[1] Great Lakes incorrectly maintains that *Stoot* v. *Fluor Drilling Servs., Inc.*, 851 F.2d 1514 (5th Cir. 1988), sets forth the Fifth Circuit's test for when choice-of-law clauses in maritime insurance contracts are enforceable. *Stoot* resolved an indemnity dispute between a drilling rig owner and a catering company. The case did not involve maritime insurance, nor did the case present a choice between the law of two different states.

district court to determine whether Pennsylvania public policy sufficed to overcome the choice-of-law provision. Pet. App. 15a. And in *Great Lakes Ins. SE* v. *Andersson*, 66 F.4th 20 (1st Cir. 2023), the First Circuit held that the choice-of-law provision by its express terms failed to apply to extracontractual Massachusetts law counterclaims for bad faith and the like. *See id.* at 25-28. To the extent there is any historical record worth considering, the score appears to be two courts ruling in favor of the policyholder, and one not reaching the issue.

Great Lakes also cites D.C. Circuit and Ninth Circuit decisions, but they do not help its case. *Milanovich* v. *Costa Crociere, S.p.A.*, 954 F.2d 763 (D.C. Cir. 1992), was not an insurance case. Instead, the court enforced a choice-of-law provision on a cruise ticket based on an irrelevant federal statute governing time limits for lawsuits by cruise passengers. *Id.* at 768. *Galilea, LLC* v. *AGCS Marine Ins. Co.*, 879 F.3d 1052 (9th Cir. 2018), involved the application of the strong federal policy favoring arbitration. The court observed: "here there is no gap in federal maritime law to fill with law from *any* state, Montana included, as the FAA supplies the governing arbitration law for maritime transactions." *Id.* at 1059. That holding has no relevance to this case.

Great Lakes' citations to district court cases are similarly unilluminating. Great Lakes cites *Hale v. Co-Mar Offshore Corp.*, 588 F. Supp. 1212, 1215 (W.D. La. 1984) (Pet. Br. at 22), but its discussion of that case does not withstand scrutiny. *Hale* was not an insurance case. Instead, it involved a maritime oil drilling contract that, in the absence of a choice-of-

law provision, would be governed by federal substantive law. The court considered whether an Oklahoma choice-of-law provision would conflict with federal maritime policy *because federal maritime law would apply in the absence of the choice-of-law provision*. *See id.* at 1216 ("As for public policy considerations, the Court must look to those underlying admiralty law because maritime rules of decision would apply in the absence of a choice of Oklahoma law."); *see also Stoot*, 851 F.2d at 1517-18 (considering whether the parties' choice of Louisiana law, in place of federal law, should be honored). Again, this is exactly the approach that Raiders is advocating: look to Pennsylvania policy because Pennsylvania rules of decision would apply in the absence of a choice of New York law.

The remainder of the cases in Great Lakes' lengthy string-cites (Pet. Br. at 24-25) tend to involve glancing statements making general references to federal maritime law without meaningful analysis. These cases do not demonstrate an established federal rule that requires application of federal law to the enforceability of the choice-of-law provision here.

* * *

To sum up, there is no established federal rule—either pre- or post-*Wilburn Boat*—governing the enforceability of choice-of-law clauses in maritime insurance contracts. As such, *Wilburn Boat* dictates that state law governs the enforceability of choice-of-law clauses in maritime insurance contracts.

D. This Court's case law supports Raiders' position that state law should be applied to determine the enforceability of the choice-of-law clause

In addition to *Wilburn Boat*, other case law from this Court supports Raiders' contention that state law should govern the enforceability of the choice-of-law clause.

1. *Cassirer* supports Raiders' position

This Court's decision in *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502 (2022), supports Raiders' approach to apply state choice-of-law rules. In *Cassirer*, this Court considered whether to use federal choice-of-law rules, or instead state choice-of-law rules, in Foreign Sovereign Immunities Act cases raising non-federal claims. *See id.* at 1504. This Court held that state choice-of-law rules should apply.

In reasoning that could be written for this case, the Court explained that it saw "scant justification for federal common lawmaking in this context." *Id.* at 1509. "Judicial creation of federal common law to displace state-created rules must be necessary to protect uniquely federal interests." *Id.* (internal quotations omitted). "Foreign affairs is of course an interest of that kind." *Id.* But "such FSIA suits arise only when a foreign state has lost its broad immunity and become subject to standard-fare legal claims involving property, contract, or the like." *Id.* at 1509. "No one would think federal law displaces the substantive rule of decision in those suits; and we see no greater warrant for federal law to supplant the otherwise applicable choice-of-law rule." *Id.*

Identical reasoning applies here. Maritime law, like foreign affairs, implicates unique federal interests. But it is undisputed that, exactly as in *Cassirer*, state law governs *this* dispute. The parties merely dispute *which* state law applies—Great Lakes claims New York law should apply, while Raiders claims Pennsylvania law should apply. As *Cassirer* persuasively explains, given that federal law does not displace "the substantive rule of decision in those suits," there is "no greater warrant for federal law to supplant the otherwise applicable choice-of-law rule." *Id.*; *see also Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) ("Since state, rather than federal, substantive law is at issue there is no need for a uniform federal [claim preclusion] rule.").

2. *The Bremen* and *Carnival* support Raiders' position

As the Third Circuit correctly held, *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972) (hereinafter *The Bremen*), and *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), also support Raiders' position that Pennsylvania public policy could preclude application of the insurance policy's New York choice-of-law provision to necessitate the dismissal of Raiders' extra-contractual Pennsylvania-law counterclaims in the context of this case.

The Bremen recognized that the forum's public policy can preclude enforcement of a forum selection clause, which also served as a choice-of-law provision, in a dispute between which of two nation's laws to apply. *See M/S Bremen*, 407 U.S. at 13-15 & n.15. *Carnival* then applied *The Bremen* to a forum selection dispute between two states. *See Carnival*,

499 U.S. at 590-95. The public policy principles that this Court recognized in those two cases, combined with this Court's holding in *Wilburn Boat*, comfortably support the conclusion that the Third Circuit properly remanded this case for the district court to determine whether Pennsylvania's public policy suffices to overcome the insurance contract's New York choice-of-law provision with respect to Raiders' three extracontractual counterclaims.[2]

In resolving the question presented on appeal, the Third Circuit held that well-established maritime choice-of-law principles, which recognize 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[,]' 2 Thomas J. Schoenbaum, Admiralty and Maritime Law §19:6 (6th ed. 2020)," coupled with this Court's recognition in *The Bremen*, 407 U.S. at 15, that a choice-of-law provision would apply unless "enforcement would be unreasonable and unjust," dictated that a maritime insurance policy's choice-of-law provision would not be enforced if "enforcement would contravene a strong public policy of the forum

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[2] Great Lakes incorrectly contends, in a footnote, that *The Bremen*'s approach conflicts with the Restatement's approach. *See* Pet. Br. at 22 n.2. *The Bremen* considered a choice-of-law conflict between the laws of two nations. Restatement §187, by contrast, addresses choice-of-law conflicts at the state level. Here, the Third Circuit did not apply *The Bremen* part-and-parcel but rather applied only those relevant principles applicable to a state-level choice-of-law dispute. There is no reason to believe that the Third Circuit's approach would conflict with the Restatement approach where the state with the greatest connection to the controversy differed from the state in which the action is pending.

in which suit is brought, whether declared by statute or by judicial decision." Pet. App. 8a, 10a, 15a.

In short, relying on *The Bremen* and *Carnival Cruise Lines*, and informed by *Wilburn Boat*, the Third Circuit correctly remanded this case for a determination of whether Pennsylvania's strong public policy warrants denying effect to the insurance policy's choice-of-law provision with regard to Raiders' three extra-contractual counterclaims.

E. Under Pennsylvania law, a court should apply Restatement (Second) of Conflict of Laws §187, which in turn requires consideration of Pennsylvania public policy

Because there is no well-established federal admiralty rule on the enforceability of contractual choice-of-law provisions, the forum-state law's rule applies. It is entirely commonplace for federal courts to apply the choice-of-law rules of the forum state—that is the approach in every diversity case. *See Klaxon Co.* v. *Stentor Electric Mfg. Co.*, 313 U.S. 487 (1941). In common with admiralty, diversity jurisdiction also originates from Article Three. *See* U.S. Const. art. III, §2.

Great Lakes chose to file its declaratory-judgment action in the Eastern District of Pennsylvania. Pet. App. 3a. Pennsylvania choice-of-law principles thus apply.

Pennsylvania follows the approach found in Section 187 of the Restatement (Second) of Conflict of Laws. *See Pennsylvania Dep't of Banking* v. *NCAS of Del., LLC*, 948 A.2d 752, 757-58 & n.6 (Pa. 2008);

Chestnut v. *Pediatric Homecare of Am., Inc.*, 617 A.2d 347, 350-51 (Pa. Super. Ct. 1992).

Section 187 provides:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
>
> (a) 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
>
> (b) application of the law of the chosen state 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 which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws §187.

In the terminology of Restatement §187(2), this case involves a "particular issue [that] the parties could not have resolved by an explicit provision in

their agreement directed to that issue." *See* Restatement §187 cmt. g & illus. 9-10. Great Lakes has not contended that a policyholder could agree in advance to release an insurance company from liability for whatever bad faith conduct or unfair trade practices an insurance company might later engage in when adjusting or denying a claim, or that an insurance company would even consider seeking such a waiver in advance. Certainly Raiders did not knowingly and intentionally waive its ability to assert the Pennsylvania-law counterclaims at issue in this case when it purchased insurance coverage from Great Lakes.

As relevant here, Restatement §187 generally deems contractual choice-of-law provisions to be enforceable, with two exceptions. *Id.* §187(2). First, a choice-of-law provision can be disregarded if "the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice." *Id.* §187(2)(a). Second, the provision is unenforceable if "application of the law of the chosen state 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 which . . . would be the state of the applicable law in the absence of an effective choice of law by the parties." *Id.* §187(2)(b).

Under the Restatement approach as adopted by Pennsylvania, the judgment of the court of appeals must be affirmed. It cannot seriously be disputed—and, indeed, Great Lakes has previously conceded—that in the absence of the choice-of-law provision in the parties' contract, Pennsylvania law would govern this suit. Raiders—a single-member limited liability

company headquartered in Pennsylvania whose owner, Phil Pulley, is domiciled in Pennsylvania—negotiated, purchased, paid for, and received the insurance policy in question in Pennsylvania from a Pennsylvania-licensed insurance agent whose corporate home office is in Pennsylvania. In addition, the yacht's hailing port is in Pennsylvania.

Although Great Lakes notes that New York has some connection to the case because it maintains an agent for service of process in New York, it maintains its trust accounts in New York, and it was admitted as a surplus lines insurer in New York, it does not contend that New York's (or any other state's) interest in the case is stronger than Pennsylvania's. See Restatement §188; *id.* §6; *see also* Great Lakes CA3 Br. at 34-35 ("GLI will concede that, absent a choice of law clause, Pennsylvania's bad faith statute would apply to the present case under federal admiralty choice of law rules."). Thus, the choice-of-law provision would be ineffective under Pennsylvania law if contrary to Pennsylvania public policy. The Third Circuit properly concluded that the district court should consider that issue in the first instance, and its judgment should be affirmed.

II. Alternatively, If The Court Were To Adopt A Federal Common Law Rule, It Should Apply The Rule Of Restatement (Second) Of Conflict Of Laws §187, Rather Than Petitioner's Contrived Proposed Rule

Even if the Court concludes that federal law should govern the enforceability of choice-of-law clauses in maritime insurance contracts, Raiders should still win this case. If the Court reaches that

conclusion, it should adopt the Restatement's approach, under which a court considers the public policy of the state whose law would otherwise apply absent the choice-of-law clause. Here, that state is Pennsylvania. Hence, even if federal law governs the enforceability of choice-of-law clauses in maritime insurance contracts, the Third Circuit correctly remanded for consideration of Pennsylvania policy.

A. If a federal rule governing the enforceability of choice-of-law clauses in maritime insurance contracts were needed, the Restatement's test strikes the appropriate balance between predictability, fairness, and respect for local substantive law

In *Wilburn Boat*, this Court declined to create a uniform federal-common-law rule governing whether the breach of warranties contained in a maritime insurance contract should vitiate coverage. Instead, this Court held that state law determines the outcome. Since the *Wilburn Boat* decision issued in 1955—nearly 70 years ago—this Court has never created any uniform federal rules to govern on the subject of maritime insurance.

A number of lower court decisions and commentators have understood *Wilburn Boat* to provide that if there is no preexisting federal admiralty rule to apply—which, again, precisely describes this case—then state law applies without any need to consider whether some uniform federal admiralty rule should be adopted. *See Elevating Boats, Inc.* v. *Gulf Coast Marine, Inc.*, 766 F.2d 195, 198-99 (5th Cir. 1985); *Big Lift Shipping Co. (N.A.) Inc.* v. *Bellefonte Ins. Co.*,

594 F. Supp. 701, 704 (S.D.N.Y 1984); *see also* Thomas J. Schoenbaum, Admiralty and Maritime Law §19.6, at 429 (6th ed. 2018) (hereinafter Schoenbaum Treatise) ("There is a presumption against creating a federal admiralty rule in such a case and in favor of the application of state law."); Thomas R. Beer, *Established Federal Admiralty Rules in Marine Insurance Contracts & the* Wilburn Boat *Case*, 1 U.S.F. Mar. L.J. 149, 155-56 (1989) ("As a practical consequence, the policy argument that a new rule should be created for the sake of uniformity in maritime law will, therefore, rarely prove successful.").

Nevertheless, if this Court perceives a need to adopt a federal choice-of-law approach, the Court should adopt Restatement (Second) of Conflict of Laws §187, which, as professors Coyle and Roosevelt demonstrate in their amicus brief, produces the same result that the Third Circuit reached here. Indeed, during the Third Circuit oral argument of this appeal, the judges recognized that a ruling in favor of Raiders would be in accordance with the Restatement approach. CA3 Oral Arg. Tr. (ECF Doc. 48) at 41.

What is the practical difference between applying the Restatement as a matter of federal common law and applying state law? In Pennsylvania, there is none, because Pennsylvania also uses the Restatement. But if the Court adopts the Restatement as a matter of federal common law, then it would apply to admiralty disputes even in those rare states (unlike Pennsylvania) that do not use the Restatement's approach as a matter of state law. The Restatement's test strikes the correct balance between predictability, fairness, and respect for local substantive law.

The Restatement's approach leaves a wide berth within which contractual choice-of-law provisions are given effect. As the Restatement explains, "Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby." Restatement §187 cmt. e.

In limited circumstances, however, courts should not enforce choice-of-law provisions. First, a choice-of-law provision should not be applied when the chosen law has *no* relationship to the dispute: "The forum will not, for example, apply a foreign law which has been chosen by the parties in the spirit of adventure or to provide mental exercise for the judge. Situations of this sort do not arise in practice." *Id.* cmt. f.

Second, in cases where the jurisdiction specified in the choice-of-law clause has *some* interest in the issue, but a materially less interest than the jurisdiction whose law would otherwise apply, courts should consider the public policy of the state whose law would otherwise apply: "The chosen law should not be applied without regard for the interests of the state which would be the state of the applicable law with respect to the particular issue involved in the absence of an effective choice by the parties." *Id.* cmt. g. "The forum will not refrain from applying the chosen law merely because this would lead to a different result than would be obtained under the local law of the state of the otherwise applicable law." *Id.* Instead, the court should consider whether the

out-of-state law violates a *fundamental* policy of the jurisdiction whose law would otherwise apply. *See id.* This approach echoes *The Bremen*'s approach to forum selection clauses, which likewise requires consideration of whether "enforcement would contravene a strong public policy of the forum in which suit is brought." 407 U.S. at 15.

The Restatement's approach has been widely adopted. Many states have expressly adopted the Restatement's approach, while those states which have not nevertheless apply principles that resemble the Restatement's approach. *See* Amicus Br. of Profs. Coyle & Roosevelt at 13 & n.4 (citing, among other things, Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 Md. L. Rev. 1248, 1260 n.96 (1997)).

Federal courts sitting in admiralty have applied the Restatement to decide which state's law to apply in maritime insurance disputes governed by state law under *Wilburn Boat*. *See Durham Auctions*, 585 F.3d at 242; *Littlefield* v. *Acadia Ins. Co.*, 392 F.3d 1, 7 & n.7 (1st Cir. 2004); *American Home Assur. Co.* v. *L&L Marine Serv., Inc.*, 153 F.3d 616, 619 (8th Cir. 1998); *State Trading Corp. of India, Ltd.* v. *Assurance-foreningen Skuld*, 921 F.2d 409, 417 (2d Cir. 1990); *Ahmed* v. *American S.S. Owners Mut. Protection & Indem. Ass'n, Inc.*, 444 F. Supp. 569, 571-72 (N.D. Cal. 1978).[3]

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[3] In admiralty cases not involving maritime insurance, federal appellate courts also routinely apply the Restatement to resolve choice-of-law issues. *See Cooper* v. *Meridian Yachts, Ltd.*, 575 F.3d 1151, 1165-66 (11th Cir. 2009); *Dresdner Bank AG* v. *M/V*

Under the Restatement approach, the Third Circuit properly remanded this case for the district court to determine whether Pennsylvania's public policy sufficed to overcome the insurance contract's New York choice-of-law provision with respect to Raiders' extracontractual counterclaims.

B. The contrived federal common law rule that Great Lakes favors is baseless

If the Court adopts a rule of federal common law, the Restatement's approach is far preferable to the ahistorical, self-contradictory, and illogical rule that Great Lakes proposes.

Under Great Lakes' proposed rule, a choice-of-law provision in a marine insurance contract is "presumptively enforceable," Pet. Br. at 12, though the presumption can be rebutted "when the parties' chosen law contravenes federal maritime policy," *id.*, or when "the parties have no substantial connection to or reasonable basis for the selected law," *id.* at 43.

Great Lakes' proposed test plucks one-half of the Restatement's test, and then mangles the second half of the Restatement's test. Great Lakes suggests that a choice-of-law provision is unenforceable when "the parties have no substantial connection to or reasonable basis for the selected law." *Id.* This portion of the test echoes the Restatement and makes sense—otherwise an unscrupulous insurer could choose Wyoming law, or Mongolian law, if it favors

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Olympia Voyager, 446 F.3d 1377, 1381-83 (11th Cir. 2006); *Flores* v. *American Seafoods Co.*, 335 F.3d 904, 916 (9th Cir. 2003) (quoting *Chan* v. *Society Exped., Inc.*, 123 F.3d 1287, 1296-97 (9th Cir. 1997)).

the insurer, even if the case has zero connection to Wyoming or Mongolia.

However, even this portion of Great Lakes' test lacks any historical grounding. Certainly none of the old pre-*Wilburn Boat* cases that Great Lakes cites endorses it—demonstrating that there's nothing resembling an established federal rule on this issue. Great Lakes traces this element of its test only as far back as the "early" 1984 district court decision in *Hale* v. *Co-Mar Offshore Corp.*, 588 F. Supp. 1212 (W.D. La. 1984)—which, like most cases on which Great Lakes relies—does not involve *a maritime insurance contract*. Pet. Br. at 22. A district court decision decided decades after *Wilburn Boat*, in a case having nothing to do with maritime insurance, does not establish a "tradition" in any relevant sense. What is really happening here is that Great Lakes is inventing a rule to supplant state law that, it thinks, makes sense—precisely the approach that *Wilburn Boat* rejects.

The second part of Great Lakes' proposed rule mangles the Restatement. The Restatement says that you use the public policy of the state whose law would otherwise apply to determine whether to strike the choice-of-law provision. Restatement (Second) of Conflict of Laws §187(2)(b). Great Lakes alters this rule so that you consider *federal* policy to determine whether *Pennsylvania* law applies instead of *New York* law.

What does this even mean? The whole premise of applying state law is that federal law does not care about the issue. Otherwise, substantive *federal admiralty law* would apply.

Put another way, Great Lakes' position works like this: "Apply New York law unless New York law conflicts with federal policy, in which case apply Pennsylvania law." This is an extremely strange rule. If there is a sufficiently strong federal policy at stake to override New York law, that federal policy would dictate the applicable legal standard. Federal law would not enforce federal admiralty policy by applying *Pennsylvania* law.

More generally, federal admiralty law always preempts state law if the state law conflicts with federal policy, with or without a choice-of-law provision. If New York insurance law conflicted with federal admiralty law, it would never apply—even if the contract was negotiated in New York and sold to a New York resident, New York law would be displaced. The enforceability of a choice-of-law provision does not become relevant unless we assume that either state's law complies with federal policy—in which case it makes no sense to look at federal policy in deciding whether to enforce the choice-of-law provision.

Contrary to Great Lakes' suggestion, no "congressional policy" supports this baffling rule. The lone federal statute Great Lakes cites for the proposition that Congress is loath to restrict choice-of-law provisions in admiralty contracts, 46 U.S.C. §30527 (formerly codified at 46 U.S.C. §30509 and, before that, at 46 App. U.S.C. §183c), is of dubious relevance, because it has nothing to do with maritime insurance whatsoever.

Rather, the provision declares void as against public policy any contractual provision that limits the

liability of a cruise ship company for personal injury or death if the ship stops at a U.S. port. *See* John F. Coyle, *Cruise Contracts, Public Policy, and Foreign Forum Selection Clauses*, 75 Univ. Miami L. Rev. 1087, 1089 (2021). As Professor Coyle's article makes clear, cruise ship companies, headquartered outside of the United States, had sought to invoke the protections of the Athens Convention to limit their liability for personal injury or death to passengers. *See id.* The statute has nothing to say about whether the law of one state or another should apply to any particular controversy. Instead, it deals with a matter of international concern and, by invoking public policy, declares that United States federal law will take precedence over the contrary law of another nation.

Great Lakes also cites statutes that have nothing to do with insurance, much less maritime insurance, such as the Federal Arbitration Act. Unrelated provisions that generally favor the enforcement of unrelated contracts shed no light on the narrow question of whether federal law or state law should govern the enforceability of choice-of-law provisions in maritime insurance contracts.

Moreover, Great Lakes' "enclave" metaphor, whereby once the border into admiralty jurisdiction is crossed only federal law principles can apply, falters from the outset due to *Wilburn Boat*, in which this Court held that state law and state regulation will continue to govern the outcome of maritime insurance disputes in the absence of any controlling federal admiralty rule. The parties here agree that no controlling federal admiralty rule governs whether Raiders can maintain its three extracontractual

Pennsylvania-law counterclaims, and thus this case arises in the zone where, under *Wilburn Boat*, state law provides the relevant rule of decision.

Great Lakes' "enclave" metaphor is also faulty because admiralty law is not some fully formed body of law in the sense that one might conceive of the law of Massachusetts or of Great Britain. *See* Schoenbaum Treatise §4:1, at 253-54; *id.* §4.4, at 269 ("the general maritime law is not a complete legal system; there are numerous gaps that must be filled either by the federal judiciary, in making up new rules of law, or by the application of state law").

Consequently, this Court has recognized that admiralty law frequently allows for the application of state law, not just in the area of maritime insurance. *See Yamaha Motor Corp.* v. *Calhoun*, 516 U.S. 199, 206 (1996); *American Dredging Co.* v. *Miller*, 510 U.S. 443, 450-53 (1994); *see also* Schoenbaum Treatise §4.4, at 270-75 (discussing the many instances where admiralty applies state law).

Nor is it unusual for state law to operate in tandem with federal law. Article III conceived of diversity jurisdiction alongside admiralty jurisdiction, and yet this Court has ruled that state law applies to govern the outcome of diversity cases, including the application of state (rather than federal) choice-of-law principles. *See Klaxon Co.*, *supra*. This Court has also held that state statutes of limitations govern most federal statutory causes of action where Congress has not expressly provided any statute of limitations. *See DelCostello* v. *International Brotherhood of Teamsters*, 462 U.S. 151, 158 (1983). And, in actual federal enclaves, state

law provides the substantive federal criminal law under the Assimilative Crimes Act, 18 U.S.C. §13.

In sum, Great Lakes' proposed rule has nothing to recommend it other than that it is the only way to achieve the result Great Lakes seeks here.

III. Raiders' Position Is Good Policy

In addition to being dictated by black-letter principles of federal maritime law, Raiders' approach makes sense. Great Lakes' policy arguments, by contrast, miss the mark.

A. It makes sense to consider Pennsylvania public policy in determining whether to enforce the choice-of-law clause

In a world where maritime insurance contracts are generally governed by state law, it makes sense that state law would govern the enforceability of the choice-of-law clause, and it makes sense that a court would consider the public policy of the state whose law would otherwise apply in deciding that enforceability question.

As *Wilburn Boat* recognized, states have long been the exclusive source of authority over maritime insurance. In that capacity, many states have established substantive rules that are used to interpret insurance contracts and, in some cases, override their plain language. *Wilburn Boat* also recognized that insurance contracts are not just garden-variety contracts and that they implicate a host of policy considerations that call out for special rules and, often, special protections for the insured. Congress had been unwilling or unable to craft comprehensive federal regulation of that industry, so this Court

acknowledged that insurance regulation—in the maritime context as in every other—should be left to the states.

Thus, there is nothing unusual about a state applying its own public policy to override a provision of a maritime insurance contract. That is exactly the outcome that *Wilburn Boat* endorsed.

Indeed, *Wilburn Boat* would be meaningless unless states could, in appropriate cases, apply their own public policies to overturn choice-of-law provisions. The whole reason that states regulate the content of insurance policies is to ensure that unscrupulous insurers do not insert small print into their policies that harm local policyholders. *Wilburn Boat* endorses this type of regulation. It would defeat the purpose of state regulation if insurers could avoid those state insurance laws by inserting more small print specifying that some other state's law applies. That is why Pennsylvania declines to enforce choice-of-law provisions in certain cases—to ensure that Pennsylvania can protect its citizens from small print when contrary to Pennsylvania's strong public policy.

So of course you would use Pennsylvania public policy to determine the enforceability of a choice-of-law provision. The whole point of striking the choice-of-law provision is to ensure that a local resident is protected by Pennsylvania law reflecting Pennsylvania public policy. True, as Great Lakes emphasizes, admiralty law is usually federal law. But, in this specific case, it is undisputed that under *Wilburn Boat*, Pennsylvania law would otherwise apply if the choice-of-law provision were stricken. Under that

premise, it is perfectly natural to consider Pennsylvania public policy.

The outcome that Great Lakes seeks would diminish the very state regulation of insurance companies that *Wilburn Boat* sought to maintain. Although a maritime insurance company surely may decide what state's law will govern the construction and application of an insurance policy in the absence of any established federal admiralty rule, insurance companies doing business in Pennsylvania should not be permitted to contract out of that Commonwealth's insurance bad faith and unfair trade practices law.

Nearly every state in the nation offers an insurance bad faith cause of action, New York being a notable exception.[4] Numerous states also have similar unfair trade practices and consumer protection laws.[5] Insurance companies have extensive experience operating in an environment where their conduct can give rise to liability under such provisions. Yet, according to Great Lakes, federal admiralty choice-of-law principles should allow a maritime insurer to contract out from this sort of widespread state regulation. That outcome would nullify *Wilburn Boat*'s admonition that state law

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[4] *See* 50 State Insurance and Bad Faith Quick Reference Guide of the International Association of Defense Counsel, noting that as of 2014 only three states did not recognize a cause-of-action for first party insurance bad faith claims. (available online at: https://bit.ly/50StateInsBadFaithGuide).

[5] *See* Consumer Protection In The States: A 50-State Evaluation Of Unfair And Deceptive Practices Laws (National Consumer Law Center, Inc. 2018) (available online at: https://bit.ly/50StateUnfairDeceptivePracticesLaws).

remains the primary source of maritime insurance regulation.

B. Great Lakes' policy arguments are unpersuasive

Great Lakes offers a host of policy arguments against state regulation, but *Wilburn Boat* largely considered and rejected those same policy arguments. The insurer in *Wilburn Boat* similarly argued that a need for uniformity required applying a federal admiralty rule of decision rather than looking to state law. The Court rejected those policy arguments, offering a paean to states' applying local insurance law to their own citizens. That is all that Pennsylvania seeks to do here.

Part I.C of Great Lakes' brief can be summarized as: *Wilburn Boat* is bad because it subjects insurers to 50 different state laws, and the "core values of maritime law," as set forth in other, non-*Wilburn Boat*, non-insurance cases, support giving insurers a way around *Wilburn Boat*. However, *Wilburn Boat* is binding precedent that itself establishes the "core values of maritime law" in the area of maritime insurance.

According to Great Lakes, *Wilburn Boat* created a huge problem for maritime insurers that needed to be solved, and the way to solve that problem is to supercharge choice-of-law provisions contained in maritime insurance contracts, a result that neither *Wilburn Boat* nor any subsequent decision of this Court has authorized.

Unless the Court intends to overrule *Wilburn Boat*, an outcome that Great Lakes does not advocate

and that the question presented does not contemplate, then this Court is bound by its rationale that a uniform federal rule is unnecessary, and 50 state laws should apply because of states' historic role and expertise in regulating insurance companies. As such, the "core values of maritime law" do not establish that state-by-state regulation of maritime insurance is bad.[6]

Congress is free to overturn *Wilburn Boat* if it wishes, either in general or as applied to choice-of-law provisions. Indeed, in *Wilburn Boat*, the Court observed:

> Congress has not taken over the regulation of marine insurance contracts and has not dealt with the effect of marine insurance warranties at all; hence there is no possible question here of conflict between state law and any federal statute . . . .
>
> Under our present system of diverse state regulations, which is as old as the Union, the insurance business has become one of the great enterprises of the Nation. Congress has been exceedingly cautious about disturbing this system, even as to marine insurance where congressional power is undoubted.

Wilburn Boat, 348 U.S. at 314, 320-21.

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[6] A leading admiralty law authority cited throughout Great Lakes' brief refutes the contention that *Wilburn Boat* has produced widespread, consequential disuniformity. *See* Schoenbaum Treatise §19:7, at 434 ("In fact, the breakdown of uniformity has been exaggerated. There has been no change in the uniformity of interpretation with respect to the vast majority of the corpus of marine insurance law.").

Nearly 70 years later, Congress still has not overturned *Wilburn Boat*. Great Lakes' concerns about a pressing emergency if this Court permits state-by-state regulation of maritime insurance are hard to take seriously.

In any event, Great Lakes' public policy concerns fail on their own terms. Domestically, trucks and trains are used to ship finished products to customers and raw materials to manufacturers throughout the nation. State insurance law applies to insurance companies who insure such shipments and carriers without any untoward consequences. And, of course, state insurance laws apply to passenger vehicles as well. Great Lakes' argument that maritime insurers have some greater need for certainty or uniformity than insurers of automobiles or trucks or trains, which regularly traverse the nation, rings hollow. Indeed, nationwide commerce continues unimpeded on a daily basis without any negative consequences even though any one of 50 states' insurance laws may apply to any given claim arising from our nation's roads or rails.

Great Lakes cites the value of uniformity, but since the insurance company decides which state's law to designate in a choice-of-law provision, making choice-of-law provisions sacrosanct does not guarantee uniformity unless every insurance company would necessarily adopt the same state's law. No such showing appears on this record. Furthermore, this is not the sort of uniformity that admiralty law concerns itself with. The point of admiralty law uniformity is that the same substantive law principles would apply across-the-board, rather than

being dependent on which state's law an insurance company chooses.

Great Lakes also cites the value of predictability. But an insurance company will know, at the time it sells a policy, which state's law will apply. Insurance disputes are not like other types of maritime disputes where the choice of law is governed by whatever jurisdiction happened to be the location of an accident; choice of law is determined largely by the facts surrounding the formation of the contract, which are known at the time the policy is sold. Here, for example, Great Lakes knowingly sold this policy to a Pennsylvania resident, through a Pennsylvania broker, to insure a boat whose hailing port was located in Pennsylvania, so the possibility of having Pennsylvania law apply here comes as no surprise to Great Lakes.

Moreover, even under Raiders' proposed rule, choice-of-law provisions will often be enforced. Under the Restatement, if New York and Pennsylvania had a similar interest in the insurance policy, the choice-of-law provision would be enforced. Even if Pennsylvania had a significantly greater interest, the policy would be enforced as long as New York's insurance law did not contravene Pennsylvania's strong public policy.

Great Lakes expresses concern about international comity. Pet. Br. at 38-40. However, it is unlikely that applying Pennsylvania law rather than New York law will implicate foreign policy concerns. More generally, the Restatement does not advocate invalidating choice-of-law provisions willy-nilly based on local policy concerns. Instead, under the Restate-

ment's approach, a state may invalidate a choice-of-law provision in favor of its own law only when it has a materially greater interest than the chosen state in the determination of the particular issue. In other cases, where foreign countries have a greater interest in the issue, the choice-of-law provision should be respected. Thus, the Restatement's rule respects foreign nations' legitimate interests and will not lead to international friction.

Great Lakes repeatedly suggests that absent a uniform admiralty rule that looks to federal policy when determining whether to enforce a choice-of-law provision, parties will find themselves subject to the policy whims of whatever state happens to be the forum for the suit. But there is nothing to that prediction, because the generally applicable state law test (in common with the Restatement approach) does not look to forum-state policy; it looks to the policy of the state with the greatest connection to the dispute.

In this case, therefore, Great Lakes suggests that the court of appeals viewed Pennsylvania policy as relevant only because Great Lakes brought its declaratory-judgment action in Pennsylvania. But that is wrong. In the vast majority of states that follow the Restatement's test, Pennsylvania policy would be the only relevant policy, because Pennsylvania law would be the applicable substantive law absent the choice-of-law provision. That is because nearly every aspect of this suit has a Pennsylvania focus (aside, of course, from the fact that Great Lakes has some presence in New York that has nothing to do with Raiders). Indeed, if this case had been brought in New York rather than Pennsylvania, New York would apply the Restatement approach, *see*

Welsbach Elec. Corp. v. *MasTech N. Am., Inc.*, 859 N.E.2d 498, 500-01 (N.Y. 2006) (citing Restatement (Second) of Conflict of Laws §187(2)), so the analysis would be identical: the court would consider Pennsylvania public policy.

For these reasons, affirming the Third Circuit's judgment would not lead to disuniformity or forum shopping, because regardless of where suit was filed, under those very same traditional choice-of-law rules, this dispute necessarily boils down to determining whether New York or Pennsylvania law applies to govern the availability of Raiders' extracontractual counterclaims.

Finally, the best evidence that Great Lakes' predictions of chaos are unfounded is that it has long been standard for federal courts sitting in diversity to apply state-law conflicts-of-law principles to determine the enforceability of choice-of-law provisions in parties' agreements. No chaos has ensued, and Great Lakes points to no reason that taking this same approach in admiralty cases—that is, the approach mandated by *Wilburn Boat*—would be any more unmanageable.

CONCLUSION

For the foregoing reasons, the Third Circuit's judgment should be affirmed.

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JULY 2023