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

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BRIEF OF AMICUS CURIAE AMERICAN ASSOCIATION FOR JUSTICE IN SUPPORT OF RESPONDENT

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INTEREST OF AMICUS CURIAE[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those who have been wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions. Throughout its 77-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

AAJ and its members are concerned that adoption of Petitioner's novel theory would rob consumers of state-law protections on the basis of contract provisions imposed by the dominant party.

SUMMARY OF ARGUMENT

1. American courts have always recognized that a forum state's public policy interests may override application and enforcement of conflicting foreign contract law. History warns that a compulsion to enforce foreign contracts despite contrary and compelling state policy interests can produce unsavory outcomes.

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[1] Pursuant to Rule 37.6, amicus affirms that no counsel for any party authored this brief in whole or in part and no person or entity, other than amicus, its members, or its counsel has made a monetary contribution to its preparation or submission.

While Petitioner agrees that a public policy exception is vital, it contends that federal policy is exclusive in the world of maritime contracts, and state policy interests must be relegated to the dustbin. This Court's seminal decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), teaches the opposite: federal admiralty law is paramount, but not exclusive, and courts must apply State law to fill the gaps. Marine insurers, like Petitioner in this case, insert choice-of-law clauses in their policies to select their preferred state law as the gap filler under *Wilburn Boat*. Adopting a federal public policy exception, as Petitioner proposes, would have no effect on this type of clause; federal policy already controls under *Wilburn Boat* without reference to a state-law conflict. Where state law applies under *Wilburn Boat*, the forum state's public policy is the only potential source for a conflict that could invalidate the marine insurer's preference.

2. With nearly 12-million recreational watercraft registered in this country, it would be naïve to suggest that marine insurance policies—and especially the choice-of-law clauses embedded therein— are freely negotiated contracts. They are adhesive contracts, and default enforcement of a marine insurer's preferred state law cannot be harmonized with *Wilburn Boat*. The states have important interests when it comes to insuring their citizens and risks within their borders, and the goal of a uniform federal admiralty law has been subordinated to those state interests for nearly 70 years. That should remain the law, and this Court should affirm the decision below.

ARGUMENT

I. This Court Should Reject Petitioner's Proposal for a "Federal Public Policy" Exception to a Marine Insurer's State Choice-of-Law Clause.

A. The "Forum Public Policy Exception" to Enforcement of Foreign Contracts Is Firmly Settled Law.

Our American courts, both federal and state, have always recognized that a forum may decline to apply the law of a foreign jurisdiction where it conflicts with the forum's public policy. This "forum public policy exception" is the rare doctrine that enjoys virtually unanimous support:

> All the commentators would retain the public policy principle in conflicts to the extent that it is grounded in basic moral conceptions or in ideas of fundamental justice, and we agree. If the foreign law normally applicable violates the strongest moral convictions or appears profoundly unjust at the forum, the law should not be applied.

Monrad G. Paulsen & Michael I. Sovern, *"Public Policy" in the Conflict of Laws*, 56 Colum. L. Rev. 969, 1015 (1956); *see also* Restatement (First) of Conflict of Laws § 612 (1934) ("No action can be maintained upon a cause of action created in another state the enforcement of which is contrary to the strong public policy of the forum.").

On occasion, judicial reluctance to apply the forum public policy exception has produced horrifying results by today's standards. In 1810, the Massachusetts Supreme Court rejected public policy concerns when it permitted the plaintiff to recover on a foreign contract to be paid, in part, with "nine four-foot slaves, of the value of two hundred dollars each, and thirty-seven prime slaves, of the value of two hundred and fifty dollars each." *Greenwood v. Curtis*, 6 Mass. 358, 360–61 (1810). In 1869, the Illinois Supreme Court held that the state's courts "would not enforce a contract for the sale of a slave . . . because it is against public policy," but nonetheless enforced the plaintiff's "note" to collect payment for the sale of an enslaved person, stating "it is not for us, from caprice, or because we may abhor the system of slavery and the sale of human beings, to refuse to lend the aid of the courts for the collection of the money." *Roundtree v. Baker*, 52 Ill. 241, 247 (1869).

These decisions serve as a stark reminder that our governing principles should not influence courts toward reflexive application and enforcement of foreign contract law. The forum's public policy is always a relevant and important consideration, as this Court expressed in *Griffin v. McCoach*, 313 U.S. 498 (1941), where it applied the public policy exception to a life insurance policy. Instructing that a Texas court should consider whether Texas public policy prohibited enforcement of the New York-issued contract, this Court held:

> It is 'rudimentary' that a state 'will not lend the aid of its courts to enforce a contract founded upon a foreign law

> where to do so would be repugnant to good morals, would lead to disturbance and disorganization of the local municipal law, or, in other words, violate the public policy of the state where the enforcement of the foreign contract is sought.'

Id. at 506 (quoting *Bond v. Hume*, 243 U.S. 15, 21 (1917)).

B. *The Forum's Public Policy Interests Are Not Presumptively Subverted by Inserting a Choice-of-Law Clause into a Maritime Contract.*

Public policy has always reigned supreme over choice-of-law clauses in maritime contracts. *E.g.*, *The Kensington*, 183 U.S. 263, 269 (1902) (choice-of-law clause was "subordinate to and qualified by the doctrine that neither by comity nor by the will of contracting parties can the public policy of a country be set at naught"). Petitioner accepts this black-letter law without debate. Pet. Br. 15. The question presented in this appeal is not whether a forum's public policy interests will invalidate a choice-of-law clause in a maritime contract, but which forum's public policy interests should be considered.

Petitioner's argument that only a federal policy can trump a maritime choice-of-law clause starts from the perspective that such clauses are "presumptively 'valid and enforceable.'" *Id.* That may be the accepted rule today, but it cannot be advanced as a historically entrenched rule of federal admiralty law. As late as 1955, enforcement of an English choice-of-

law clause found on a passenger ticket for the R.M.S. Queen Elizabeth remained the subject of considerable debate:

> [T]here is much doubt that parties can stipulate the law by which the validity of their contract is to be judged. To permit parties to stipulate the law which should govern the validity of their agreement would afford them an artificial device for avoiding the policies of the state which would otherwise regulate the permissibility of their agreement. It may also be said that to give effect to the parties' stipulation would permit them to do a legislative act, for they rather than the governing law would be making their agreement into an enforceable obligation. And it may be further argued that since courts have not always been ready to give effect to the parties' stipulation, no real uniformity is achieved by following their wishes.

Siegelman v. Cunard White Star Ltd., 221 F.2d 189, 195 (2d Cir. 1955). Suffice it to say that federal courts were not "presumptively" enforcing maritime choice-of-law clauses after more than 150 years of developed federal admiralty law.

The Second Circuit issued its *Siegelman* decision just eleven days before the sea change ushered

in by *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), which held that maritime contracts—and specifically, marine insurance policies—were governed by state law absent an entrenched rule of federal admiralty law. *Siegelman* illustrates that, at the time *Wilburn Boat* was decided, there was no judicially-fashioned rule of federal admiralty law requiring courts to presumptively enforce choice-of-law clauses in maritime contracts.

C. A Federal Public Policy Exception to State Choice-of-Law Clauses Has No Effect on Maritime Contracts Under Wilburn Boat.

Before *Wilburn Boat*, "parties to maritime contracts had no need to adopt choice-of-law clauses selecting a particular state's laws" because they would have reasonably expected federal law to control. Pet. Br. 17. As a result, prior to 1955, courts had no cause to address the narrow issue presented here: whether a forum state's public policy interests could invalidate a maritime contract's choice-of-law clause in favor of a foreign state's law.

Petitioner nonetheless relies on several pre-1955 maritime cases concerning international disputes with choice-of-law clauses selecting the law of foreign countries. These decisions do not reasonably support Petitioner's narrative that the forum public policy exception considers only *federal* policy and excludes the forum state's policy interests. First, as Petitioner acknowledges, the pre-*Wilburn Boat* courts were not evaluating whether to apply state law in lieu of the selected foreign country's law, so it is unrealistic to expect that these courts were presented with argument on what state law or policy conflicted

with the international jurisdiction. Second, even after *Wilburn Boat*, it remains logical that courts evaluating maritime conflicts might "consider the application of the laws of otherwise equally situated fora" — i.e., country versus country, and state versus state. *Galilea, LLC v. AGCS Marine Ins. Co.*, 879 F.3d 1052, 1060 (9th Cir. 2018).

In *Galilea*, the Ninth Circuit applied federal admiralty law. The decision illustrates why it would be illogical – and effectively meaningless – for courts to consider whether federal policy interests invalidate choice-of-law clauses that select the gap-filling state law under *Wilburn Boat*. Federal law and policy continue to have primacy under *Wilburn Boat*, and "the initial inquiry of the courts in interpreting a policy of marine insurance [is] to determine whether there is an established federal maritime law rule." *Id.* at 1058 (quoting *Certain Underwriters at Lloyds, London v. Inlet Fisheries Inc.*, 518 F.3d 645, 649–50 (9th Cir. 2008)). State law only applies "in the absence of a federal statute, a judicially fashioned admiralty rule, or a need for uniformity in admiralty practice." *Id.* (quoting *Suma Fruit Int'l v. Albany Ins. Co.*, 122 F.3d 34, 35 (9th Cir. 1997)). Put simply, there is no valid reason for courts to weigh a conflict between federal policy and a state choice-of-law clause *because the federal policy always controls*. *Id.* at 1060 ("Within federal admiralty jurisdiction, conflicting state policy cannot override squarely applicable federal maritime law.").

In a marine insurance case, the state choice-of-law clause is triggered only when there is a gap in federal admiralty law or policy that needs to be filled.

At that stage, the relevant question is whether the forum state has a public policy interest that creates a sufficient conflict with the selected state law to invalidate the choice-of-law clause. Petitioner's proposed "federal public policy" exception to a state choice-of-law clause is a nullity and should not be adopted.

II. Pursuant to *Wilburn Boat*, This Court Should Adopt a Forum Public Policy Exception That Protects the States' Compelling Interests in Regulating Marine Insurance Coverage for Their Citizens and Risks Within Their Borders.

A. Marine Insurance Policies, as Contracts of Adhesion, Should Not Be Regulated by the Insurer's Preferred Jurisdiction.

Insurance policies, as a general proposition, do not contain choice-of-law clauses because they are frequently unenforceable. *New England Mut. Life Ins. Co. of Bos., Mass. v. Olin*, 114 F.2d 131, 137 (7th Cir. 1940) ("The law is well settled that provisions in contracts for incorporating the laws of a particular state are inoperative, when the law agreed upon is inconsistent with the law of the state in which the contract is actually made."); 2 Couch on Ins. § 24:23 ("A provision that a contract of insurance shall be governed by the law of a given state is void where such an express provision violates a statute of the state of the contract or would, if given force, evade statutory provisions declaring a rule of public policy with reference to contracts made within the jurisdiction, or where the contract stipulation would violate the interests and public policy of the state, since

these cannot be changed by the contract of the parties.").

This rule emanates from the widely accepted truth that insurance policies are contracts of adhesion:

> "Courts [are] apparently well aware of the fact that insurance contracts are sold and not bought, and that they do not result from equal bargaining and that the applicant must merely 'adhere' to the terms of the contract tendered to him by the insurance company." Accordingly, stipulations of applicable law in insurance policies—other than ocean marine and other freely negotiated insurance contracts—have consistently been held invalid unless, in exceptional cases, such invalidation would have resulted in a decision unfavorable to the insured.

Albert A. Ehrenzweig, *Adhesion Contracts in the Conflict of Laws*, 53 Colum. L. Rev. 1072, 1082–83 (1953) (quoting CHARLES CARNAHAN, CONFLICT OF LAWS AND LIFE INSURANCE CONTRACTS 250 (1942))

Professor Ehrenzweig propagated the common misconception that "ocean marine" insurance should be viewed as a "freely negotiated" contract. This myth may have carried over from a time when most vessels were engaged in commercial operations, and marine insurance concerned manuscript policies negotiated by sophisticated parties on both sides of the transaction. But times have changed, and according

to the U.S. Coast Guard, there were "11,770,383 recreational vessels registered by the states in 2022."[2]

Today, a marine insurance policy is no more likely to be the product of negotiation than any other consumer insurance policy.

> In such a standardized or massproduction agreement, with one-sided control of its terms, when the one party has no real bargaining power, the usual contract rules, based on the idea of 'freedom of contract,' cannot be applied rationally. For such a contract is 'sold not bought.' The one party dictates its provisions; the other has no more choice in fixing those terms than he has about the weather.

Siegelman, 221 F.2d 189, 204 (2d Cir. 1955) (Frank, J., dissenting). *See also* Couch on Ins. § 22:18 ("[P]olicies of insurance are made on printed forms carefully prepared in the light of the insurer's wide experience, by experts employed by the insurer, and in the preparation of which the insured has no voice.").

The states, of course, have legitimate and important interests in regulating marine insurance sold within their borders. Last year, the U.S. Coast Guard reported "4,040 accidents that involved 636 deaths, 2,222 injuries and approximately $63 million dollars

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[2] U.S. COAST GUARD, 2022 RECREATIONAL BOATING STATISTICS 6 (May 25, 2023), https://uscgboating.org/library/accident-statistics/Recreational-Boating-Statistics-2022.pdf (last visited July 27, 2023).

of damage to property as a result of recreational boating accidents." U.S. COAST GUARD, *supra*, at 6. Marine insurance may provide the primary source of restitution or recovery to victims of such bodily injury and property damage. States may exercise their interests by enacting differing regulatory preferences depending on whether their maritime activities are predominantly recreational or commercial. *Ford Motor Co. v. Montana Eighth Jud. Dist. Ct.*, 141 S. Ct. 1017, 1030 (2021) (citations omitted) ("Those States have significant interests at stake—'providing [their] residents with a convenient forum for redressing injuries inflicted by out-of-state actors,' as well as enforcing their own safety regulations.").

There is no compelling reason that choice-of-law provisions should be anathema to all forms of insurance except marine. The efficiency justification, like that found in *Carnival Cruise Lines, Inc. v. Shute*, 499 U.S. 585 (1991), has drawn worthy criticism:

> [I]n *Shute* there was no evidence that cruise lines would actually be forced by competitive pressures to pass on any cost savings accrued from forum clause enforcement to consumers. Yet the Court's opinion argued that such a pass-through "stands to reason" and justified its result. Indeed, there was no evidence that consumers would really prefer forum clause enforcement over an increase in ticket prices of a few pennies. Hence, there may be no net economic gain from enforcing such clauses. Yet

> the Court assumed that such a gain would result from its rule. Shute demonstrates that, with economic efficiency, what you assume is what you get. If one imagines the world to be a perfectly competitive mechanism, in which price is the only relevant preference, then a rule favoring contract enforcement will appear compelling in almost every circumstance.

G. Richard Shell, *Contracts in the Modern Supreme Court*, 81 Cal. L. Rev. 433, 511–13 (1993) (footnotes omitted).

Professor Shell's critique resonates here. There is no evidence that Petitioner or other marine insurers approach prospective policyholders with state choice-of-law options at varying price points. There is no evidence that policyholders could fairly evaluate the practical effects of choosing between Pennsylvania and New York as the controlling state law. And most importantly, there is no evidence that a standardized choice-of-law clause in favor of the insurer's preferred state jurisdiction produces any meaningful cost savings, nor that such savings are passed along to the consumer. State choice of law would appear to add little value where "the breakdown of uniformity has been exaggerated" in the wake of *Wilburn Boat*, and "[t]here has been no change in the uniformity of interpretation with respect to the vast majority of the corpus of marine insurance law." 2 Admiralty & Mar. Law § 19:7 (6th ed.).

B. *Eschewing Uniformity,* Wilburn Boat *Instructs That Federal Courts Should Defer to State Interests in the Sphere of Marine Insurance Where No Federal Admiralty Law or Policy Exists.*

Wilburn Boat is known as a landmark case establishing the rule that marine insurance will be governed by state law where no rule of federal admiralty law applies. But the decision went much further, holding that state regulation was not merely authorized, but preferred.

Marine insurance, according to the Court, was never an exclusively federal concern. The "vast amount of insurance litigation in state courts," revealed that "state legislatures and state courts have treated marine insurance as controlled by state law to the same extent as all other insurance." 348 U.S. at 317.

This Court could have sought to advance uniformity by inviting the adoption and expansion of federal admiralty law. Instead, the Court recognized and protected the states' interests in regulating marine insurance by issuing a broad pronouncement cautioning the judiciary against usurping this state function: "The 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 Court was not concerned with "diverse state regulations" and observed that Congress had not "disturb[ed] this system," despite the power to inter-

vene and create a uniform admiralty law. *Id.* at 320-21.

Petitioner and its amici advance uniformity as the primary impetus for a proposed rule that would wholly disregard a forum state's public policy in favor of federal policy. That rule cannot be harmonized with *Wilburn Boat*, which instructs that the goal of uniformity in federal admiralty law must yield to state interests in regulating marine insurance. *Wilburn Boat*, moreover, establishes a federal policy of deference to compelling state interests—corroborated by Congress's decision to remain silent—in the sphere of marine insurance. Petitioner's proposal to ignore policy conflicts between two states with potentially controlling law is incompatible with the continuing vitality of *Wilburn Boat*.

C. Courts Have Correctly Applied The Bremen *and the Restatement to Determine Whether the Forum State's Public Policy Invalidates a Marine Insurer's Choice of State Law.*

In the ruling below, the Third Circuit correctly held that the forum public policy exception applied to forum selection clauses in *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 13 (1972), should extend to a marine insurer's choice-of-law clause. Pennsylvania was the forum state, and Pennsylvania law was most likely to serve as the gap filler for federal admiralty law but for the insurer's New York choice-of-law clause. The Third Circuit reversed and remanded, instructing the district court to "consider whether Pennsylvania has a strong public policy that would be thwarted by applying New York law," which would

invalidate the New York choice-of-law clause. 47 F.4th at 233.

The forum public policy exception applied in *The Bremen* and below is virtually identical with the public policy exception found in the Restatement (Second) of Choice of Law § 187(2) (Am. L. Inst. 1988). As Petitioner notes, the Restatement does not look to the forum state's public policy, but instead to public policy of the jurisdiction whose law would apply in the absence of a choice-of-law clause. This merely corrects for the possibility that the alternate governing law may not come from the forum state.

The Third Circuit was not an outlier; several other courts have correctly applied *The Bremen* and the Restatement to consider conflicts between the two states that would supply the gap-filler law in lieu of federal admiralty law. *See, e.g.*, *Great Lakes Ins. SE v. Lassiter*, No. 21-21452-CIV, 2022 WL 1288741, at *8 (S.D. Fla. Apr. 29, 2022) (finding Florida policy did not conflict with New York choice-of-law clause); *Marine Ins. Co. v. Cron*, No. 3:13-CV-00437, 2014 WL 4982418, at *4 (S.D. Tex. Oct. 6, 2014) (finding Texas policy did not conflict with New York choice-of-law clause); *Great Lakes Reinsurance (UK) PLC v. Durham Auctions, Inc.*, 585 F.3d 236, 244 (5th Cir. 2009) (finding Mississippi public policy did not conflict with New York choice-of-law clause); *Oran v. Fair Wind Sailing, Inc.*, No. 08-0034, 2009 WL 4349321, at *7 (D.V.I. Nov. 23, 2009) (finding Virgin Islands policy did not conflict with Michigan choice-of-law clause); *Deep Sea Fin., LLC v. British Marine Luxembourg, S.A.*, No. CV-409-022, 2010 WL 3603794 (S.D. Ga. May 13, 2010) (finding Georgia

policy conflict was insufficient to invalidate Mexican choice-of-law clause); *Great Lakes Reinsurance (UK), PLC v. Sea Cat I, LLC*, 653 F. Supp. 2d 1193 (W.D. Okla. 2009) (finding no conflict between Oklahoma policy and New York choice-of-law clause).

The rule applied in these cases, adopted from *The Bremen* and the Restatement, is consistent with federal admiralty precedent, including *Wilburn Boat*'s stated policy to respect and promote compelling state interests in the regulation of marine insurance. This Court should adopt this rule and affirm the Third Circuit's decision below.

CONCLUSION

For the foregoing reasons, AAJ urges this Court to affirm the decision below.

Respectfully submitted,

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