No. 22-500

In the Supreme Court of the United States

GREAT LAKES INSURANCE SE, PETITIONER,

v.

RAIDERS RETREAT REALTY CO., LLC

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Raiders makes two alternative arguments for why Pennsylvania public policy—not federal public policy—should determine the enforceability of the parties' choice-of-law clause. First, it primarily argues (at 13-35) that the enforceability of maritime choice-of-law clauses is solely a matter of state law, and that federal law has nothing to say on the subject. Second, Raiders contends (at 35-45) that even if the enforceability of such clauses is a matter of federal law, this Court should adopt a federal common law rule that incorporates the public policy of the State with the greatest interest in the matter (in its view, Pennsylvania).

Raiders's first argument is wrong, and radically so. As even the court below recognized, there is an "established federal rule" that choice-of-law clauses in maritime contracts are valid and enforceable, unless they contravene public policy. Pet. App. 8a; see Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 19:6 (6th ed. 2022). No federal court has ever held otherwise. Both before and after *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), federal courts sitting in admiralty have applied a federal presumption that choice-of-law clauses are enforceable. Raiders's contrary argument is irreconcilable with this Court's rulings in *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972), and *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), which hold that a federal presumption of enforceability governs maritime forum-selection clauses.

Perhaps for those reasons, Raiders never said a word about what is now its lead argument until its merits brief. The argument is thus not only wrong but waived, or at least forfeited. At every stage of this case, Raiders has accepted and even embraced the federal presumption of enforceability. The only question between the parties was whether the public-policy exception to that federal presumption turns on *federal* public policy or the policy of the forum *State*. That is the only question the courts below decided, and it is the only question this Court agreed to review. The answer is straightforward: the exception to a *federal* presumption of enforceability should look to *federal* public policy.

Raiders's backup argument is also new and wrong, but at least is responsive to the question presented. Raiders argued below, and the court of appeals accepted, that the federal presumption of enforceability

can be overcome by the public policy of the forum State—here, Pennsylvania. Raiders has abandoned any defense of that rule or reasoning. It now argues that, under the Restatement (Second) of Conflict of Laws, federal law looks to the public policy of the State with the greatest interest in the dispute. But that is the Restatement's test for ordinary interstate disputes. Federal courts widely recognize that the Restatement's general principles must be adapted to the federal maritime context. History, congressional guidance, and the fundamental purposes of maritime law all point toward federal public policy.

ARGUMENT

I. FEDERAL COMMON LAW GOVERNS THE ENFORCEABILITY OF MARITIME CHOICE-OF-LAW CLAUSES

Raiders's lead argument is brand new to this case, and, as far as Great Lakes is aware, to *any* case. Raiders contends that state law, not federal law, governs the enforceability of choice-of-law clauses in marine insurance policies. That new argument has been waived, or at least forfeited, and this Court should not entertain it. But if the Court reaches the argument, it should reject the argument on the merits.

A. Raiders's New Theory Is Waived

Until Raiders filed its merits brief in this Court, no one in this case had ever questioned that federal law presumes the enforceability of maritime choice-of-law clauses—not the district court, not the court of appeals, and, most importantly, not Raiders. The parties' dispute has always been about "*whose* public policy" can override that federal presumption. Pet. Br. 2; see Br. in Opp. 12-13, 15. Raiders's new theory that there is no

federal presumption jettisons the framework it embraced below and is thus "waive[d]." *Perez* v. *Mortgage Bankers Ass'n*, 575 U.S. 92, 107 (2015). At the very least, the theory was "never presented to any lower court" and is "therefore forfeited." *OBB Personenverkehr AG* v. *Sachs*, 577 U.S. 27, 37 (2015).

Raiders invited the district court to begin from the premise that a federal presumption controls. Citing *The Bremen*, Raiders asserted: "[T]he Supreme Court has recognized the *presumptive validity* of forum selection and choice of law clauses included in private contracts." D. Ct. Doc. 20-1, at 14 (Mar. 13, 2020) (emphasis added). Consistent with that assertion, the district court explained that "[u]nder federal maritime choice of law rules, contractual choice of law provisions are generally recognized as valid and enforceable." Pet. App. 27a (citation omitted).

In the court of appeals, Raiders likewise argued that "*federal admiralty choice-of-law principles* compel the application of Pennsylvania law" in this case. Resp. C.A. Br. 36 (emphasis added); see Resp. C.A. Reply 27 ("Applying the federal admiralty choice-of-law principles that the Supreme Court set forth in *The Bremen*, . . . the district court should have applied Pennsylvania law."). The court adopted Raiders's framework, beginning with the "established federal rule . . . that 'a choice of law provision in a marine insurance contract will be upheld in the absence of evidence that its enforcement would be unreasonable or unjust.'" Pet. App. 8a (alteration omitted) (quoting Schoenbaum § 19:6). The court incorrectly held that the "unreasonable or unjust" exception looks to state policy, but no one disputed the federal presumption of enforceability.

The same was true at the certiorari stage. The presumption is embedded in the 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?" Pet. i (emphasis added). In opposing certiorari, Raiders defended the court of appeals' premise "that well-established maritime choice-of-law principles . . . recognize" the presumption of enforceability. Br. in Opp. 12. Raiders never hinted at the argument it now advances: that state law rather than federal law governs the entire enforceability analysis. This Court "granted review of the question presented on th[e] understanding" that federal common law, not state law, governs maritime choice-of-law clauses, *14 Penn Plaza LLC* v. *Pyett*, 556 U.S. 247, 273 (2009), and Raiders may not reconceive the entire case simply because it no longer likes the argument that it persuaded the court of appeals to adopt.

B. Raiders's New Theory Is Wrong

If this Court considers Raiders's new theory, it should reject it. Raiders's theory is that, under *Wilburn Boat*, state law governs the enforceability of maritime choice-of-law clauses because there is no established federal rule. But both before and after *Wilburn Boat*, federal courts sitting in admiralty have held that choice-of-law clauses are generally enforceable as a matter of federal law. No federal court has ever held that state law governs the enforceability of maritime choice-of-law clauses. Two of this Court's own post-*Wilburn Boat* decisions in *The Bremen* and *Carnival* hold that maritime forum-selection clauses are generally enforceable as a matter of federal law. Raiders offers no reason why maritime choice-of-law clauses should be different.

1. Before *Wilburn Boat*, federal law governed the enforceability of maritime choice-of-law clauses

Raiders incorrectly argues that "pre-*Wilburn Boat* case law" does not supply an "established federal rule" governing the enforceability of maritime choice-of-law clauses. Resp. Br. 20; see *id.* at 20-26. Before *Wilburn Boat*, federal courts applied uniform federal common law to maritime contracts, including choice-of-law clauses. Pet. Br. 16-19; see Chamber Amicus Br. 11-13.

a. Raiders does not address many of the relevant decisions. It is silent on *Watts* v. *Camors*, 115 U.S. 353, 362 (1885), and *Union Fish Co.* v. *Erickson*, 248 U.S. 308, 314 (1919), which explain that maritime law has historically been "uniform throughout the Union," and not "limited in its extent, or controlled in its exercise, by the laws of the several states." *Watts*, 115 U.S. at 362; see Pet. Br. 17. Raiders dismisses (at 21) several other decisions because of their "inclusion in a string-cite"—an obvious non-response. Raiders also omits any mention of *Southern Pacific Co.* v. *Jensen*, 244 U.S. 205, 215 (1917), which held that maritime contracts are governed by a uniform "general maritime law." Raiders's own amici admit that *Jensen* cemented the role of federal common law in maritime-contract disputes. States Amicus Br. 5-6.[1] At the very least, by

[1] The State amici contend (at 3-4) that *Jensen* introduced federal common law to the maritime context and urge the Court to overrule it. Because neither party has argued for overruling *Jensen*, that question is not presented here. See *Ocasio* v. *United States*, 578 U.S. 282, 296 (2016) ("Petitioner does not ask us to overturn *Evans*, and we have no occasion to do so.") (citation omitted). In any event, pre-*Jensen* sources recognized that the Constitution's grant of admiralty jurisdiction was intended to protect the uniformity of maritime law. See, *e.g.*, *Watts*, 115 U.S. at 362. *Jensen* also has given rise

this Court's *Jensen* decision in 1917, federal common law governed maritime contracts.

Raiders at least addresses *London Assurance* v. *Companhia de Moagens do Barreiro*, 167 U.S. 149, 161 (1897), and *The Kensington*, 183 U.S. 263, 269 (1902), but it misses the point of those decisions. Before *Wilburn Boat*, parties sometimes agreed on choice-of-law clauses selecting a particular *country's* law, and U.S. courts generally enforced those clauses unless contrary to *federal* public policy. Raiders contends (at 21-22) that these cases are irrelevant because they did not involve a choice "between the law of two states." Of course they didn't: choice-of-law clauses selecting state law were rare before *Wilburn Boat*, because federal common law governed maritime contracts. See Pet. Br. 16. The point remains that when courts faced challenges to the enforceability of choice-of-law clauses, they looked to *federal* policy—not the law of the forum State or the State with the greatest interest in the dispute.

Raiders's main argument (at 16-18) is that *Wilburn Boat* says States had historically played an important role in marine insurance. That historical assessment is both dubious and irrelevant. The majority in *Wilburn Boat* did not address *Watts* or even *Jensen*. Instead, it relied primarily on decisions like *Hooper* v. *California*, 155 U.S. 648 (1895), and *Nutting* v. *Massachusetts*, 183 U.S. 553 (1902), which had "approve[d] provisions of state law that require agents and companies to take out licenses and conform to various conditions preliminary to doing business." *Wilburn Boat*, 348 U.S. at 328 (Reed, J., dissenting). Allowing States to have generally applicable business regulations is a far cry from

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to a century's worth of federal case law, see Schoenbaum § 4:4, making the States' request all the more remarkable.

saying that States may dictate the substance of admiralty law. See *id.* at 323 (Frankfurter, J., concurring in the result) ("It cannot be that by this decision the Court means suddenly to jettison the whole past of the admiralty provision of Article III and to renounce requirements for nationwide maritime uniformity . . . in the field of marine insurance.").[2] In any event, *Wilburn Boat* did not address the specific history of enforceability of maritime choice-of-law clauses—which is the only history that Raiders itself deems relevant. See Resp. Br. 20-21. There is plenty of historical evidence that federal courts applied federal law to maritime choice-of-law clauses, and no evidence that they applied state law.

b. Raiders cites just three pre-*Wilburn Boat* cases, all of which are irrelevant or unreasoned. Raiders primarily relies (at 23-24) on *E. Gerli & Co.* v. *Cunard S.S. Co.*, 48 F.2d 115 (2d Cir. 1931). According to Raiders (at 23), *E. Gerli* shows that there was no federal presumption of enforceability because the Second Circuit supposedly "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." That is not what the Second Circuit held. The court (mistakenly) concluded that choice-of-law clauses are unenforceable across the board as a

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[2] For those reasons, the admiralty world has long understood *Wilburn Boat* to have changed the landscape of maritime law. See, *e.g.*, Am. Inst. of Marine Underwriters Amicus Br. 9; Thomas J. Schoenbaum, *Marine Insurance*, 31 J. Mar. L. & Com. 281, 282 (2000) ("*Wilburn Boat* brought to an end the interpretive uniformity of Anglo-American law."); Michael F. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to The* Wilburn Boat *Problem*, 29 J. Mar. L. & Com. 41, 43 (1998) ("Prior to [*Wilburn Boat*], it was . . . generally accepted that the application of substantive federal maritime law typically followed [federal admiralty] jurisdiction.").

matter of *American* policy. See 48 F.2d at 117 ("People cannot by agreement substitute the law of another place[.]"). The court did not reach that conclusion by looking to Italian public policy. It cited no Italian sources (or indeed any sources at all) for its rule. In any event, *E. Gerli* was an outlier even when it was issued, see Ernst Rabel, 2 *The Conflict of Laws: A Comparative Study* 376 (2d ed. 1960), and is no longer good law, see *The Bremen*, 407 U.S. at 15.

Raiders also cites (at 23-25) two state court decisions. Both are poorly reasoned outliers. *F.A. Straus & Co.* v. *Canadian Pacific Railway Co.*, 173 N.E. 564 (N.Y. 1930), looked to state policy to determine the enforceability of a maritime choice-of-law clause after citing *non-maritime* cases that had done so. *Boole* v. *Union Marine Insurance Co.*, 198 P. 416 (Cal. Dist. Ct. App. 1921), gave no explanation for its examination of state law, and ultimately found the choice-of-law clause *enforceable*. Raiders thus combed through a century and a half's worth of cases before *Wilburn Boat* and could not find a single decision that gives any reason why state law rather than federal law should govern the enforceability of a maritime choice-of-law clause.

2. Since *Wilburn Boat*, federal law has governed the enforceability of maritime choice-of-law clauses

If pre-*Wilburn Boat* case law left any uncertainty, subsequent cases—including two decisions of this Court—conclusively establish that federal law governs maritime choice-of-law clauses. Pet. Br. 19-26.

a. Most notably, Raiders's argument is impossible to square with this Court's post-*Wilburn Boat* decisions. In *The Bremen*, the Court considered a maritime forum-selection clause, which also operated as a

choice-of-law clause, see 407 U.S. at 13 n.15, and declared that such clauses "are prima facie valid and should be enforced." *Id.* at 10. The Court did not draw that presumption from any one State's laws. Rather, it concluded that such a presumption is, as a matter of *federal law*, "the correct doctrine to be followed by federal district courts sitting in admiralty." *Ibid.* And in *Carnival*, the Court reiterated that "*federal law* governs the enforceability of . . . forum-selection clause[s]" in maritime contracts. 499 U.S. at 590 (emphasis added).

The Bremen and *Carnival* are fatal to Raiders's argument, so it simply ignores them. Its discussion of those decisions relates only to its alternative argument that, if there is a federal presumption of enforceability, the presumption should be subject to an exception for state public policy. Resp. Br. 30-32; see pp. 13-14, *infra*. On the threshold question of whether there is a federal presumption of enforceability in the first place, Raiders says nothing about *The Bremen* and *Carnival*. After all, what could it say? There is no apparent reason why maritime forum-selection clauses should be generally enforceable as a matter of federal law, but the enforceability of maritime choice-of-law clauses should turn on 50 States' laws. If anything, federal courts were more skeptical historically of forum-selection clauses. See Pet. Br. 30. Raiders has no answer to any of this.

b. Raiders makes the same move with the mountain of lower-court decisions. It ignores that they apply a federal presumption of enforceability, and shifts to discussing its alternative argument—*i.e.*, whether the exception to the federal presumption looks to federal or state public policy. See Resp. Br. 26-28. The vast ma-

jority of courts apply the federal presumption of enforceability subject to an exception for federal policy. Pet. Br. 22-25; see *Clear Spring Prop. & Cas. Co.* v. *Big Toys LLC*, 2023 WL 4637095, at *6 (S.D. Fla. July 20, 2023) (noting the consensus). Two district courts and the Third Circuit in the decision below have applied a federal presumption of enforceability subject to an exception for state policy. Pet. Br. 25-26. But *every court* in the post-*Wilburn Boat* era has started from a federal presumption of enforceability. Raiders's all-state-law theory is literally unprecedented.

c. Having come up empty in maritime law, Raiders turns to the Foreign Sovereign Immunities Act. See Resp. Br. 29-30 (discussing *Cassirer* v. *Thyssen-Bornemisza Collection Found.*, 142 S. Ct. 1502 (2022)). *Cassirer* interpreted the FSIA's provision that when a foreign nation is not entitled to immunity, it "shall be liable in the same manner and to the same extent as a private individual under like circumstances." 28 U.S.C. 1606; see 142 S. Ct. at 1508-1509. None of that statutory interpretation has any relevance here, and Raiders does not contend otherwise.

At the end of its opinion, however, the *Cassirer* Court noted that, even absent Section 1606, there would be "scant justification for federal common lawmaking," because there is no federal interest in displacing state choice-of-law rules once a foreign nation is amenable to suit. 142 S. Ct. at 1509-1510. By contrast, this Court has long recognized the strong federal interest in facilitating maritime commerce through uniform federal rules. See Pet. Br. 34-35. Even *Wilburn Boat*—the height of this Court's application of state law to maritime contracts—held that state law is applicable only absent an established federal rule or the need to fashion a federal rule. 348 U.S. at 314. And

of course *The Bremen* and *Carnival* squarely hold that federal common law governs the enforceability of maritime forum-selection clauses. Against that backdrop, the interest in federal common lawmaking here is clear. And as a matter of federal common law, maritime choice-of-law clauses are enforceable, subject to an exception for public policy. The question here is simply whose public policy matters.

II. THE FEDERAL PRESUMPTION OF ENFORCEABILITY CAN BE OVERCOME ONLY BY FEDERAL PUBLIC POLICY

On the actual question presented, Raiders abandons the position that it has taken throughout this litigation and that the court of appeals adopted. Below, Raiders argued that "applying New York law would contravene the strong public policy of the *forum [state]* in which suit is brought." Resp. C.A. Br. 13 (emphasis added). The court of appeals agreed and held that "a 'strong public policy of the forum [state] in which suit is brought' could . . . render unenforceable the choice of state law in a marine insurance contract." Pet. App. 15a (alteration in original). Raiders makes no effort to defend that rule. Indeed, it expressly rejects it. Invoking the Restatement, Raiders proposes a new test that "does not look to forum-state policy; it looks to the policy of the state with the greatest connection to the dispute." Resp. Br. 52; see *id.* at 36.[3]

Raiders's new effort to pull in state law fares no better than the old. As almost all federal courts recognize,

[3] Raiders insists (at 31 n.2) that there is no daylight between its new approach and its previous focus on the forum State, but the theories converge only where the forum State is also the State with the greatest interest in the dispute.

the Restatement's guidance for ordinary interstate disputes cannot be mechanically applied here. Instead, it must be modified to account for the federal maritime context. Historical tradition, congressional guidance, and the fundamental purposes of maritime law all point toward a federal public-policy exception. See *Dutra Grp.* v. *Batterton*, 139 S. Ct. 2275, 2283 (2019). Raiders tries to downplay the advantages of the majority rule, but does not put forward historical or congressional support for its own proposal, or explain how a state-policy-focused rule would advance the purposes of maritime law. Raiders simply asserts that its proposed rule has been adopted by some courts and "makes sense." Resp. Br. 39, 45. But even those contentions are wrong: applying federal policy is both the near-consensus and the common-sense approach.

A. The Prevailing Rule In Federal Courts Supports Applying Federal Policy

1. For the last 50 years, courts confronting the enforceability of maritime choice-of-law clauses have generally looked to either of two sources: *The Bremen* or the Restatement. In *The Bremen*, this Court held that a forum-selection clause—which also functioned as a choice-of-law clause—was enforceable as a matter of federal law unless "enforcement would be unreasonable and unjust." 407 U.S. at 13 n.15, 15. The Court gave as an example of unreasonableness "if enforcement would contravene a strong public policy of the forum in which suit is brought." *Id.* at 15. The Court made clear that the relevant "forum" in the maritime context is the "*American* forum" and the relevant public policy is federal maritime policy. *Id.* at 9 (emphasis added). In *Carnival*, the Court applied *The Bremen* to

a forum dispute between two States, but still considered only federal policy. 499 U.S. at 595-597; see Pet. Br. 28-29.

Raiders makes the same mistaken move as the court of appeals: it seizes on *The Bremen*'s language about the "public policy of the forum in which suit is brought," and it *assumes* that the relevant forum here is the State. Resp. Br. 30-31. Raiders does not address that *The Bremen* was responding to arguments framed solely in terms of federal policy, discussed only federal policy, and cited case law involving only federal policy. See Pet. Br. 26-28. For those reasons, several courts applying *The Bremen* have held that what matters is federal maritime policy, not the policy of the forum State. See, *e.g.*, *Galilea, LLC* v. *AGCS Marine Ins. Co.*, 879 F.3d 1052, 1060 (9th Cir. 2018). Only the court below and two outlier district courts have mistakenly read *The Bremen* to support a state-policy rather than a federal-policy exception to the federal presumption of enforceability. Pet. Br. 25-26.

2. Properly applied, the Restatement leads to the same place. Section 187 begins with the general rule that the parties' choice of law will be honored "if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue." Restatement § 187(1). But even if the parties could not have resolved the particular issue contractually, their choice of law will still be honored except in two circumstances. *Id.* § 187(2). First, the choice-of-law clause will not be enforced 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, it will not be enforced 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." *Id.* § 187(2)(b).

Raiders's argument rests on Section 187(2). Raiders does not dispute the parties had a "reasonable basis" to choose New York law under Section 187(2)(a), including because of Great Lakes's "substantial relationship" to the state. See Pet. Br. 43-44. But Raiders argues that the contract's choice-of-law clause is unenforceable under Section 187(2)(b) because "application of the law of [New York] would be contrary to a fundamental policy of [Pennsylvania]," which has "a materially greater interest" in this dispute and would otherwise be "the applicable law." Restatement § 187(2)(b); see Resp. Br. 34-35, 38-39.

The basic problem with Raiders's approach is that the Restatement addresses traditional "interstate cases." Restatement § 10, cmt. a. It specifically disclaims addressing a federal enclave like maritime law, including whether federal or state policy should control in that context. See *id.* § 3, cmt. d (noting that federal-state conflicts "may raise questions of great difficulty as to the precise area of application of State or federal law" and "such questions [are] not within the scope of the Restatement"); see also *id.* § 2, cmt. c ("Federal-State conflicts . . . are not dealt with directly in the Restatement."). Even Raiders acknowledges that the Restatement "addresses choice-of-law conflicts at the state level." Resp. Br. 31 n.2.

Raiders wrongly assumes that Section 187 should be applied mechanically in the maritime context. For Raiders, this is simply a dispute between two States'

laws, and federal law does not "care whether Pennsylvania or New York law applies." Resp. Br. 3. But what federal admiralty law *does* care about is that choice-of-law clauses are presumptively enforceable. Permitting state policy to override that federal presumption would leave States free to undermine the presumption as they wish. The whole point of the presumption is to ensure that maritime choice-of-law clauses are generally enforceable unless doing so would impair the proper functioning of the admiralty system. See *The Bremen*, 407 U.S. at 13-15. There is no similar federal interest in the ordinary interstate disputes that the Restatement is intended to address, which is why the Restatement must be adapted for the maritime context.

Put another way, by treating this as an ordinary dispute between the laws of two States (New York and Pennsylvania), Raiders ignores the entire body of federal maritime law and policy, developed over centuries by courts sitting in admiralty. The very question here is whether a maritime choice-of-law clause should be judged by reference to that body of federal policy or instead to the same bodies of state policy that apply to other types of contracts and choice-of-law clauses. Raiders does not make any effort to answer that question. Just as Raiders wrongly assumes that *The Bremen*'s reference to "forum" meant the state forum rather than the federal one, Raiders wrongly assumes that the Restatement's general principles for interstate conflicts should be plopped onto a federal enclave like maritime.

Courts to confront the question have disagreed with Raiders's approach. Federal courts have repeatedly held that, just as *The Bremen* looks to federal policy, Section 187 must be adapted to look to federal policy.

In *Hale* v. *Co-Mar Offshore Corp.*, for instance, the district court recited the principles in Section 187(2), but held that the relevant "public policy considerations" are those "underlying admiralty law." 588 F. Supp. 1212, 1215 & n.4 (W.D. La. 1984). The Fifth Circuit then adopted that same test in *Stoot* v. *Fluor Drilling Services, Inc.*, asking whether the chosen law "conflicts with the fundamental purposes of maritime law." 851 F.2d 1514, 1517 (1988); see Pet. Br. 22-25 (tracing development of the test).

Since then, the overwhelming majority of federal courts—including those in the major maritime districts—have agreed that federal maritime policy, not state policy, governs the enforceability of maritime choice-of-law clauses. Pet Br. 22-25; *Clear Spring Prop. & Cas. Co.*, 2023 WL 4637095, at *5. Only two outlier district courts have held otherwise. Pet. Br. 25. They did not rely on the Restatement, and in turn Raiders does not rely on them. Raiders does cite (at 39 & n.3) several cases that have invoked the Restatement, but those cases either applied federal maritime policy, see *Great Lakes Reinsurance (UK) PLC* v. *Durham Auctions, Inc.*, 585 F.3d 236, 242-244 (5th Cir. 2009), or did not involve the enforceability of a choice-of-law clause.[4]

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[4] Most of Raiders's cases cite Restatement § 188, which addresses the choice of law absent a valid contractual provision. See *Dresdner Bank AG* v. *M/V OLYMPIA VOYAGER*, 446 F.3d 1377, 1381 (11th Cir. 2006); *Littlefield* v. *Acadia Ins. Co.*, 392 F.3d 1, 7 & n.7 (1st Cir. 2004); *State Trading Corp. of India, Ltd.* v. *Assuranceforeningen Skuld*, 921 F.2d 409, 417 (2d Cir. 1990); *American Home Assurance Co.* v. *L&L Marine Serv., Inc.*, 153 F.3d 616, 618-620 (8th Cir. 1998); *Ahmed* v. *American S.S. Owners Mut. Prot. & Indem. Ass'n*, 444 F. Supp. 569, 571-572 (N.D. Cal. 1978). Raiders's other case, *Cooper* v.

B. Congressional Judgments Support Applying Federal Policy

Raiders similarly does not identify any support from Congress for applying state public policy. Raiders does not dispute that 46 U.S.C. 30527 sets forth only a narrow exception to the general rule that maritime choice-of-law clauses are enforceable. Raiders argues (at 42) that Section 30527 "has nothing to do with maritime insurance whatsoever," but that is the point. Congress has concluded that injured cruise ship passengers may set aside their choice-of-law clauses, but it has made no such allowance for yacht owners like Raiders who are seeking insurance coverage for damage to their vessels. Raiders also criticizes (at 43) Great Lakes for citing non-maritime federal statutes "that generally favor the enforcement of unrelated contracts," but those statutes underscore Congress's general policy of respecting contracting parties' freedom of choice.

C. The Core Values Of Maritime Law Support Applying Federal Policy

Applying federal policy also advances the fundamental purposes of maritime law, including uniformity and predictability. Raiders's contrary arguments do not hold up to scrutiny.

1. Raiders first argues (at 48-49) that *Wilburn Boat* "rejected" the importance of uniformity and "this Court is bound by its rationale that a uniform federal rule is unnecessary." To be sure, *Wilburn Boat* held that state law may fill the gaps when there is no established federal maritime rule and no need to develop a

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Meridian Yachts, Ltd., 575 F.3d 1151 (11th Cir. 2009), cites Restatement § 136, which applies "where the parties have not taken steps to present the court with relevant foreign law." *Id.* at 1165.

federal rule. Pet. Br. 19. But that only means States may step in when there is no need for federal uniformity; the Court did not reject the value of uniformity altogether. Since *Wilburn Boat*, this Court has repeatedly emphasized that admiralty law should "operat[e] uniformly in[] the whole country," in order to achieve "the uniformity and consistency at which the Constitution aimed." *Norfolk S. Ry. Co.* v. *Kirby*, 543 U.S. 14, 28 (2004); see Pet. Br. 34-35.

Raiders next argues (at 50) that looking to federal maritime policy would not "guarantee uniformity unless every insurance company would necessarily adopt the same state's law." Of course parties may choose different States' laws in their contracts. What matters is that those choices should be set aside only when contrary to *federal maritime policy*. If courts apply that single, uniform body of federal law—rather than 50 States' public policies—parties will know in advance whether their choice-of-law clauses are enforceable. See New England Legal Found. Amicus Br. 13-16. Here, the parties selected settled maritime law or in the alternative New York law. That is a common choice because New York has a well-developed body of law for marine insurance contracts. See Pet. Br. 44. If choosing New York law as a gap-filler does not offend federal policy, Great Lakes and Raiders will know that their clause is enforceable across the country, without the need to consider and litigate how 49 other States feel about applying New York law. By contrast, allowing State policy to override the federal presumption of enforceability would result in "contracts with identical choice-of-law provisions [being] interpreted inconsistently," which would "undermine the uniformity of general maritime law." *Clear Spring Prop. & Cas. Co.*, 2023 WL 4637095, at *6 (quoting *Kirby*, 543 U.S. at 28).

Raiders asserts (at 51) that its approach is predictable because "an insurance company will know, at the time it sells a policy, which state's law will apply." But it will rarely be knowable which State will have the "materially great[est] interest" in any future dispute. Here, the insured, broker, and hailing port were in Pennsylvania. That will not always be true. Even assuming it is, the enforceability of the choice-of-law clause will still depend on a complex analysis. Under Raiders's theory, a court will have to decide whether the insured's home State has a materially greater interest in the dispute than the parties' chosen law; whether that State has a public policy on the specific issue (*e.g.*, the strictness of warranties or the insured's duty of disclosure); and finally whether the State's public policy is strong enough to displace the parties' choice. Insurers would need to repeat that analysis for every policy they sell—and the countless issues that could arise under each policy. The notion that Raiders's theory produces anything approaching predictability is laughable.

2. Raiders's main argument (at 45-48) is not that its approach serves the purposes of maritime law, but that it "makes sense." Making sense is a good thing—if only Raiders's proposal did. Raiders starts from the premise that there is no federal presumption of enforceability and indeed no established body of federal maritime law. "In a world where maritime insurance contracts are generally governed by state law," Raiders says, the enforceability of a choice-of-law clause should be governed by state law, too. Resp. Br. 45. Raiders is just back to ignoring *The Bremen* and *Carnival*, and rewriting the question presented. The ques-

tion here is whether a uniform *federal* rule of enforceability should be subject to a uniform *federal* exception. Raiders never explains why that does not make sense.

Raiders says (at 46) that *Wilburn Boat* would be "meaningless" unless States can apply their own public policies to void maritime choice-of-law clauses. That is plainly untrue. *The Bremen* and *Carnival* hold that federal maritime policy governs the enforceability of forum-selection clauses, and virtually all federal courts apply the same rule to choice-of-law clauses. Yet *Wilburn Boat* is alive and well. First, allowing States to fill gaps in substantive admiralty law in no way implies that parties cannot contract for which law will govern their arrangements. Second, States can continue to regulate, and enforce their regulations against, marine insurers. The question here is about contractual disputes between insurers and insureds.

Raiders argues (at 41) that applying federal policy will mean choice-of-law clauses are always enforced, because if federal law "care[s] about the issue . . . substantive *federal admiralty law* would apply." Raiders is assuming that all choice-of-law clauses operate like the one in this case, which selected federal admiralty law in the first instance and New York law only as a backup. Of course, selecting federal admiralty law to govern a maritime contract will not contravene federal admiralty policy. But the federal policy exception plays an important role when parties select a different substantive law to govern their maritime contracts. For instance, courts have long refused to enforce choice-of-law clauses when doing so would violate the federal admiralty policy of deterring negligence by restricting limitation-of-liability clauses. See, *e.g.*, *Mitseaah Yacht, LLC* v. *Thunderbolt Marine, Inc.*, 2016 WL 1276447, at *5, *9 (S.D. Ga. Mar. 30, 2016)

(choice of Georgia law unenforceable if it "would frustrate national interests"); *The Kensington*, 183 U.S. at 269; *Knott* v. *Botany Worsted Mills*, 179 U.S. 69, 77 (1900).

To be sure, in the modern era when parties choose settled admiralty law or familiar state maritime law (like New York's), the exception for federal maritime policy will not be triggered often. Maritime choice-of-law clauses will be generally enforceable, as maritime forum-selection clauses are. That is a good thing, for the admiralty world and for courts. Parties will usually be able to choose the substantive law that they want—and courts will usually give effect to that choice. In that sense, both the decision below and Raiders's new theories here are solutions in search of a problem. The rule that governs virtually everywhere outside the Third Circuit is working and this Court should adopt it: maritime choice-of-law clauses are enforceable unless they violate federal public policy.

CONCLUSION

For the foregoing reasons and those in petitioner's opening brief, this Court should reverse the judgment below.

Respectfully submitted.

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