

No. 17-_____

In the
Supreme Court of the United States

TMBC, LLC,

PETITIONER,

v.

ROBERT MCKEAGE, ET AL.,

RESPONDENTS.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit**

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

In a nationwide class action worth tens of millions of dollars, the Eighth Circuit held that a Missouri penal statute regulates the practice of law in other States by requiring that a Missouri lawyer be involved in any retail transaction in any State where a boat dealer charges its customers a fee to help complete basic paperwork necessary to register, title, and insure their boats. It allowed this extraterritorial overreach even though the “Commerce Clause . . . precludes the application of a state statute to commerce that takes place wholly outside of the State’s borders.” *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (quoting *Edgar v. MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion)). According to the Eighth Circuit, a generic choice-of-law provision in the boat dealer’s form contract suffices to project Missouri’s penal statute across state lines and punish the dealer for transactions that are lawful in the States where they occur. The question presented is:

Whether a run-of-the-mill contractual choice-of-law provision authorizes extraterritorial application of one State’s penal statutes to regulate conduct occurring wholly in other States.

**PARTIES TO THE PROCEEDING
AND RULE 29.6 STATEMENT**

Petitioner in this Court, defendant-appellant and cross-appellee below, is TMBC, LLC.

Respondents in this Court, plaintiffs-appellees and cross-appellants below, are Robert McKeage and Janet McKeage, on behalf of themselves and all others similarly situated.

TMBC, LLC's parent company is Tracker Marine Retail, LLC, whose parent company is White River Marine Group, LLC, whose parent company is Bass Pro Group, LLC. No publicly held company owns 10% or more of TMBC, LLC's membership interests.

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PETITION FOR WRIT OF CERTIORARI

Petitioner TMBC, LLC respectfully requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case. The decision below allows respondents to use the class action device to enforce a Missouri penal statute extraterritorially to regulate the practice of law in every State in which petitioner does business. If the Court does not summarily reverse this glaring violation of basic principles of constitutional federalism, it should grant review to consider this case on its merits and to resolve the circuit split created by the Eighth Circuit's decision.

OPINIONS BELOW

The opinion of the Eighth Circuit (Pet. App. 1–23) is reported at 847 F.3d 992. Orders from the district court are unreported. The opinion of the Supreme Court of Missouri (Pet. App. 24–30) is reported at 357 S.W.3d 597.

JURISDICTION

The court of appeals entered its judgment on February 13, 2017. A timely petition for rehearing en banc was denied on November 8, 2017. Pet. App. 33–34. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Commerce Clause of the United States Constitution provides that “Congress shall have Power . . . [t]o regulate Commerce . . . among the several States.” U.S. CONST. art. I, § 8, cl. 3.

The Full Faith and Credit Clause of the United States Constitution provides that “Full Faith and Credit shall be given in each State to the public Acts, Records, and judicial Proceedings of every other State.” U.S. CONST. art. IV, § 1.

Missouri’s unauthorized-practice-of-law statute, codified at MO. REV. STAT. § 484.020, is set forth in the appendix to this petition. Pet. App. 75–76.

STATEMENT

1. Respondents bought a boat, motor, and trailer from petitioner’s dealership within a Bass Pro Shops store in Missouri. Pet. App. 3. Respondents signed a form contract in which they agreed to pay a \$75 “document fee” in return for having petitioner handle certain tasks needed to register, title, finance, and insure their boat. *Id.* at 4. This type of fee is common in the industry, and customers willingly pay for the convenience of having the services performed for them. Services covered by the fee included paying state-mandated filing charges, standing in line at the Department of Motor Vehicles, purchasing credit reports, paying for Federal Express, and helping the customer complete certain basic paperwork.

Dissatisfied with their purchase, respondents brought a nationwide class action in the Circuit

Court for St. Charles County, Missouri. Pet. App. 4. They claimed that petitioner violated Missouri's unauthorized-practice-of-law statute by charging the fee because one of the services petitioner's salespeople performed was writing down customers' names, addresses, and other basic information in blanks on three preprinted forms: the order form, a title application, and a power-of-attorney form. *Id.* The penal statute in question, section 484.020 of the Missouri Revised Statutes, makes it a misdemeanor to "engage in the practice of law or do law business" without a license, creates a private cause of action for seeking "treble the amount which shall have been paid," and imposes a "duty" on the Attorney General of Missouri to sue if a private party fails to do so within two years. Pet. App. 75–76.

On respondents' reading of section 484.020, petitioner needed a coast-to-coast team of licensed Missouri lawyers to sell its boats and fill in the blanks on the three preprinted forms. Having declined to hire such an oddly credentialed salesforce, the argument goes, petitioner must now disgorge the document fee three times over. Pet. App. 4. Respondents further contend that Missouri's penal statute applies extraterritorially to regulate the practice of law in every State where petitioner does business, merely because petitioner's sales contract included the following choice-of-law provision: "THE PARTIES AGREE THAT THIS AGREEMENT SHALL BE GOVERNED BY THE LAWS OF MISSOURI." *Id.* According to respondents, even a non-Missouri customer who made a purchase outside of Missouri can sue under section 484.020 for treble penalties as

long as her contract included a choice-of-law provision selecting Missouri law. *Id.* at 2–3.

Respondents' case was transferred to the Circuit Court for Greene County, Missouri, which denied their request for a nationwide class action and instead certified a class limited to customers who bought their boats in Missouri. Pet. App. 4–5. Rejecting that modest approach, the Supreme Court of Missouri decided on a preliminary basis that the case should proceed as a nationwide class action. *Id.* at 5. “At this preliminary stage of the litigation,” it explained, “[Missouri] courts favor certification [because] the class may be refined as the case progresses.” Pet. App. 30 (citing *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 715 (Mo. 2007) (en banc) (“[C]ourts should err in close cases in favor of certification . . .”)); cf. *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013) (noting the federal-law presumption against preliminary class certification). Performing a choice-of-law analysis, the Missouri court also concluded that no State had a fundamental policy of denying its citizens relief from the unauthorized practice of law. See Pet. App. 28–30. The Missouri court emphasized that “parties may choose the state whose law will govern the interpretation of their contractual rights and duties.” *Id.* at 28. The Missouri court did not, however, address the constitutionality of applying section 484.020 extraterritorially.

2. Once the case was remanded within the state courts and a nationwide class was certified, petitioner removed it to the United States District Court for the Western District of Missouri.

Pet. App. 5. Petitioner invoked diversity jurisdiction under the Class Action Fairness Act of 2005, which permits removal “after the entry of a class certification order.” 28 U.S.C. § 1332(d)(8); *cf. Cunningham Charter Corp. v. Learjet, Inc.*, 592 F.3d 805, 806 (7th Cir. 2010). Because the district court was bound by Federal Rule of Civil Procedure 23, not state-law procedures, and because class-certification orders are “inherently tentative,” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 n.11 (1978), petitioner moved to decertify the nationwide class. *See, e.g., FED. R. CIV. P. 23(c)(1)(C); Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 398–99 (2010).

The district court permitted respondents to conduct class discovery to support their class claims. In a remarkable departure from ordinary procedures, the district court allowed respondents to review more than 130,000 customer files and decide for themselves which ones agreed to the Missouri choice-of-law provision. Pet. App. 6. Respondents’ unilateral file-by-file review yielded a class of roughly 100,000 customers who made purchases at dealerships across the country and, according to respondents, agreed to a form contract with a Missouri choice-of-law provision. *Id.* at 6, 10. There were many problems with this unusual, one-sided procedure. As even the district court recognized, petitioner’s contracts were not uniform but varied store-to-store and customer-to-customer. *See* Order, CM/ECF Doc. 265, at 8, 23. Respondents’ review of the files was rife with errors and included thousands of customers who had not signed a contract or otherwise agreed to a Missouri choice-of-law provision. Nonetheless, the district

court declined to decertify the nationwide class and assumed that customers who did not sign their contracts nonetheless agreed to be bound by Missouri law. Pet. App. 5–6.

Petitioner argued that section 484.020 should not apply to transactions beyond Missouri’s borders, and that filling in blanks on preprinted forms did not violate the statute in any event, but the district court disagreed. Pet. App. 6–7. Without allowing petitioner to litigate its individualized defenses, the district court flipped the summary-judgment burden and gave petitioner the burden of showing that individual customers were not part of the class. See Pet. App. 52–56. It then granted summary judgment for respondents on the section 484.020 claim and imposed the Missouri statute’s treble penalty. Pet. App. 6–7. The court ordered petitioner to provide the class with a common fund of \$21,735,754.00, most of which was “statutory interest and treble damages” pursuant to section 484.020. *Id.* at 7. The court awarded class counsel \$2,425,359.42 under a contractual fee-shifting provision, to be paid out of the common fund. *Id.* at 7–8.

Petitioner then appealed, challenging the district court’s extraterritorial application of section 484.020, among other errors. Respondents cross-appealed to seek even more attorneys’ fees. Pet. App. 8.

3. A two-judge panel of the Eighth Circuit issued a per curiam opinion affirming the judgment in relevant part. Pet. App. 23. Judges Wollman and Kelly noted that the opinion “incorporate[d] in large part the views expressed by Judge Bright,” who had died a few months after oral argument. *Id.* at 2 n.1.

The Eighth Circuit led with a stamp of approval for respondents’ nationwide class action, reasoning that extraterritorial application of section 484.020 satisfied Rule 23(b)(3)’s predominance requirement: “[T]he common and predominant issue was whether [petitioner’s] practice of charging a document fee in the standardized contract violated Missouri’s prohibition on unauthorized law business.” Pet. App. 11. The district court was applauded for inventing “an intensive file-by-file review process” under which “*most*[] customers who may have been subject to [petitioner’s] individual defenses were excluded from the class.” *Id.* at 10 (emphasis added); *cf. Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 367 (2011) (“[A] class cannot be certified on the premise that [the defendant] will not be entitled to litigate its statutory defenses to individual claims.”). On the merits, the Eighth Circuit agreed with the district court’s state-law determination that petitioner’s document fee violated section 484.020, even though there was no evidence that filling in basic information on preprinted forms involved legal discretion or that lawyers have ever been used to complete that task. Pet. App. 12–16; *cf. Hargis v. JLB Corp.*, 357 S.W.3d 574, 584–85 (Mo. 2011) (en banc) (rejecting argument that all forms must be prepared by lawyers, because “the key factor . . . is whether preparing the document requires legal judgment or discretion”).

As for petitioner’s objection to extraterritorial application of Missouri’s penal statute, the Eighth Circuit saw “nothing inherently unconstitutional about enforcing a corporation’s choice to have its contractual duties governed by the law of a particular [S]tate.” Pet. App. 17. Having put the Missouri

choice-of-law provision in its form contract, the court held, petitioner subjected itself to section 484.020 in every State where it has a dealership. *Id.* The Eighth Circuit was untroubled by extraterritoriality because “Missouri has not charged [petitioner] with any crimes,” and “the Missouri [A]ttorney [G]eneral [has not] pursued an action against [petitioner] for treble damages.” *Id.* at 16–17.

Petitioner sought rehearing en banc in February 2017. The Eighth Circuit took almost three months to call for a response. After another three months, it ordered supplemental briefing on two questions:

Does the contractual choice-of-law clause at issue in this class action encompass a statutory tort claim under [section] 484.020?

If so, can such a choice-of-law clause overcome any implied geographical limitation Missouri may impose on the application of [section] 484.020[?]

Pet. App. 32. Nearly three months later, in November 2017, the Eighth Circuit denied rehearing en banc without comment. Pet. App. 33–34.

REASONS FOR GRANTING THE PETITION

The Court should grant review to correct the Eighth Circuit’s failure to enforce basic constitutional prohibitions against the extraterritorial application of state law. One State’s penal statute cannot be used to regulate licensed professions in another State, and the parties’ having agreed to a choice-of-law provision to govern their contractual relationship does not change the result. The Court should also grant review because the Eighth Circuit’s decision opens a circuit split on an important, recurring question.

I. Extraterritorial Application Of Missouri’s Penal Statute Raises Grave Constitutional Concerns.

The Constitution imposes strict limits on the extraterritorial application of state law. Under the Court’s dormant Commerce Clause jurisprudence, “a statute that directly controls commerce occurring wholly outside the boundaries of a State exceeds the inherent limits of the enacting State’s authority and is invalid.” *Healy v. Beer Inst.*, 491 U.S. 324, 336 (1989) (citing U.S. CONST. art. I, § 8, cl. 3); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 571–73 (1996); *Edgar v. MITE Corp.*, 457 U.S. 624, 642–43 (1982) (plurality opinion); *Baldwin v. G.A.F. Seelig, Inc.*, 294 U.S. 511, 521 (1935).

Similarly, “[n]o State can legislate except with reference to its own jurisdiction,” as a result of the Full Faith and Credit Clause. *Bonaparte v. Tax Court*, 104 U.S. 592, 594 (1881) (citing U.S. CONST. art. IV, § 1); *see also Sun Oil Co. v. Wortman*, 486

U.S. 717, 722 (1988); *cf. U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 861 (1995) (Thomas, J., dissenting) (“Because powers are reserved to the States ‘respectively,’ it is clear that no State may legislate for another State” (quoting U.S. CONST. amend. X)). Indeed, the Court has specifically held that “the statutes of Missouri [cannot] operate beyond the jurisdiction of that State and . . . destroy freedom of contract [in a sister State] without throwing down the constitutional barriers by which all the States are restricted within the orbits of their lawful authority.” *N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 161 (1914).

Given these settled constraints, the Missouri statute at issue in this case is especially unfit for extraterritorial application. Section 484.020 is a penal statute that regulates the practice of law, and to violate it is to “be guilty of a misdemeanor.” Pet. App. 75–76. Although States enjoy “broad power” to regulate “the practice of professions *within their boundaries*,” they do not have authority to regulate the practice of professions elsewhere. *Goldfarb v. Va. State Bar*, 421 U.S. 773, 792 (1975) (emphasis added).

The Eighth Circuit was undeterred by the constitutional limits on extraterritoriality, brushing them aside with the observation that “a corporation headquartered in Missouri can choose that Missouri law govern its conduct in standard form contracts it used nationwide.” Pet. App. 17. But it cited no Missouri law that authorizes the extraterritorial application of section 484.020. Nor did it provide any justification for exporting a Missouri penal statute as a matter of federal class-action procedure. Private

parties cannot bargain away the constitutional protections that check a State's authority to reach beyond its borders. *See New York v. United States*, 505 U.S. 144, 182 (1992). Nor can they decide for themselves what does or does not constitute the practice of law. The regulation of lawyers is not a private-law matter that can be negotiated by contract; it is a public-law matter that implicates the relationship between the sovereign State and its licensed professions.

To be sure, private parties could enter into a contract that imposes substantive rules similar to those of some distant State's statute, and then sue if that *contractual* obligation were breached. *See Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1066 (N.D. Cal. 2014) (Chhabria, J.). But respondents are bringing no such breach-of-contract claim on behalf of the class. *See* Fifth Am. Class Action Pet. 8–11. By the terms of their contract's choice-of-law provision, the thing “GOVERNED BY THE LAWS OF MISSOURI” is not petitioner or its dealerships in other States, but only “THIS AGREEMENT.” Pet. App. 4. This language evinces no intent to incorporate all of Missouri's penal statutes as private-law rules for the contracting parties, so respondents' decision not to plead breach-of-contract claim on the class's behalf is hardly surprising.

The claim pleaded on the class's behalf, and on which the district court granted summary judgment, is instead a *statutory* claim under section 484.020. *See, e.g.*, Pet. App. 4 (“[Respondents] alleged that [petitioner's] practice of charging a document fee constituted unauthorized law business in violation of

[section] 484.020.”); *id.* at 2–3 (“[T]he district court determined that . . . charging a fee for those documents constituted unauthorized law business in violation of [section] 484.020.”). That statutory claim is at war with the contract that the parties freely signed. There is no dispute that petitioner fulfilled its contractual obligations by providing the services covered by the document fee. Instead, respondents’ theory is that in carrying out those agreed-on obligations, petitioner is liable because it violated Missouri’s penal statute regulating the practice of law. In short, respondents are not seeking to enforce the parties’ contract, but to undermine it by imposing an extra-contractual statutory penalty on petitioner for undertaking tasks that petitioner was contractually obligated to perform.

Respondents sought to recover on this statutory theory of liability because otherwise the class could not have recovered the millions of dollars in treble penalties that section 484.020 made available as part of its cause of action. *See* Pet. App. 7 (“The district court then awarded treble damages *pursuant to* [section] 484.020. . . . [T]he common fund included . . . \$14,386,180 in *statutory* interest and treble damages.” (emphases added)). Nor would it have been possible for respondents to litigate on behalf of a class, for the class-certification decision depended on the section 484.020 claim. *See id.* at 11 (“[T]he common and predominant issue was whether [petitioner’s] practice of charging a document fee in the standardized contract violated Missouri’s prohibition on unauthorized law business.”). The district court’s decision to award treble penalties similarly turned on its conclusion that section

484.020 is a “penal” statute that “legislatively prescribe[s]” a mandatory treble penalty and does not require “a culpable mental state.” Pet. App. 66. Indeed, the district court rejected contractual defenses to liability, concluding that “success under the unauthorized practice of law statute is not dependent upon the existence of a valid contract[;]” instead, “all that is required is that an entity charged a fee for engaging in unauthorized practice of law.” Pet. App 69.

By pursuing this statutory claim in a nationwide class action, respondents are acting as private attorneys general who seek to enforce section 484.020’s penal requirements extraterritorially, which is to say, unconstitutionally. It is no answer to observe, as the Eighth Circuit did, that “the Missouri [A]ttorney [G]eneral [has not] pursued an action against [petitioner]” under the statute. Pet. App. 17. Using section 484.020 to regulate commerce in other States is a constitutional violation, even if some branches of state government stay on the sidelines. *Cf. BMW*, 517 U.S. at 572 n.17 (“State power may be exercised as much by a jury’s application of a state rule of law in a civil lawsuit as by a statute.”). In any event, the Eighth Circuit’s reading of section 484.020 would have given the Attorney General of Missouri a statutory “duty” to bring his own nationwide class action, but for the fact that respondents sued petitioner within the two-year window. *See* Pet. App. 75–76.

There is simply no basis in law or logic for the Eighth Circuit’s extraordinary conclusion that a bare contractual choice-of-law provision combined with a

class action provides a path around constitutional restrictions on extraterritorial regulation. A choice-of-law provision merely reflects the parties' agreement on what law will govern their contractual rights and duties. It does not, through some odd doctrinal alchemy of federal class-action law, empower the parties to pursue a statutory cause of action that they otherwise could not bring. *See* 28 U.S.C. § 2072(b). The constitutional principle that state statutes cannot be applied extraterritorially to regulate conduct in other States applies regardless of what law private parties might choose to govern their contractual relationship.

II. The Decision Below Conflicts With Those Of Three Other Circuits.

Constitutional constraints should have kept Missouri's penal statute from regulating the practice of law in other States, and that error alone would be egregious enough to "call for an exercise of this Court's supervisory power." SUP. CT. R. 10(a). In straining to justify a different outcome, based on nothing more than a generic choice-of-law provision, the Eighth Circuit has also created a circuit split.

Missouri is well aware of the problems with extraterritoriality, and the State has limited its own statutes accordingly. The Fourth, Sixth, and Seventh Circuits would have honored those boundaries, even in a case involving a choice-of-law provision. The Eighth Circuit ignored them.

The Supreme Court of Missouri has made clear that the State's "laws do not have extraterritorial effect." *Planned Parenthood v. Nixon*, 220 S.W.3d

732, 742 (Mo. 2007) (en banc) (per curiam); *see also Twitchell v. The Missouri*, 12 Mo. 412, 1849 WL 4162, at *3 (Mo. 1849). The state court has held that “a penal statute . . . can have no extraterritorial force,” *Connell v. W. Union Tel. Co.*, 18 S.W. 883, 883 (Mo. 1892) (en banc), because any attempt to do so “would be beyond the power of the legislature of this state,” *Stanley v. Wabash, St. L. & P. Ry.*, 13 S.W. 709, 710 (Mo. 1890). Missouri’s statutes therefore “prescribe the law within its boundaries only, and have no extraterritorial force or effect.” *Rositzky v. Rositzky*, 46 S.W.2d 591, 594 (Mo. 1931).

Section 484.020 is territorially bound, then, as a matter of Missouri law. In several circuits, that would spell the end of this nationwide class action: The form contract’s choice-of-law provision would simultaneously incorporate both section 484.020 *and* Missouri’s limits on extraterritoriality.

For example, the Fourth Circuit held that New York statutes governing motor-vehicle franchises and distributors did “not apply to [a] contract between two parties outside the [S]tate of New York.” *Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355, 358 (4th Cir. 1989). Although the parties had included a New York choice-of-law provision in their contract, the New York statutes could not be applied extraterritorially due to their “explicit geographical limitations.” *Id.*

Similarly, the Sixth Circuit held that the Illinois Franchise Disclosure Act (“IFDA”) did not apply to a heavy-equipment dealer in Ohio, despite an Illinois choice-of-law provision in the agreement, because the statutory text did “not indicate any intention by the

legislature to extend the statute to franchises located outside Illinois.” *Highway Equip. Co. v. Caterpillar Inc.*, 908 F.2d 60, 62–63 (6th Cir. 1990). In that case, as in this one, the limits on extraterritoriality were set by the State’s highest court. *See id.* at 63 (“[A]t the time the IFDA was enacted, the Illinois Supreme Court had stated that it would not give extraterritorial effect to Illinois statutes unless the legislature expressly directed it to do so.” (citing *Graham v. Gen. U.S. Grant Post No. 2665*, *V.F.W.*, 248 N.E.2d 657, 660 (Ill. 1969))).

The Seventh Circuit reached the same conclusion in refusing extraterritorial application of the IFDA to franchisees in Texas, Maine, Montana, and New York. *See Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 384–85 (7th Cir. 2003). The Seventh Circuit agreed with its sister circuits “that a [S]tate’s territorial limitations apply even when that [S]tate’s law is selected for application by a choice-of-law provision,” because if “Illinois law applies, then we must look to the law of Illinois to determine the scope of application.” *Id.* at 385–86.

In sharp contrast, the Eighth Circuit does not force plaintiffs to take the bitter with the sweet. After finding that petitioner chose “Missouri law [to] govern its conduct in standard form contracts it used nationwide,” the decision below gave respondents the benefit of section 484.020 without the limits on extraterritoriality that have been imposed by the Supreme Court of Missouri. *See* Pet. App. 16–17. As suggested by its unusual request for supplemental briefing, the Eighth Circuit appears to have concluded that the “choice-of-law clause overc[a]me

any implied geographical limitation Missouri may impose on the application of [section] 484.020.” Pet. App. 32. The result is a circuit split worthy of resolution in this Court. *See* SUP. CT. R. 10(a).

III. The Question Presented Is Important.

The real-world impact of the decision below will be broadly felt, and not just in the seven States within the Eighth Circuit. If left uncorrected, its practical implications will pose a threat to any company that relies on standardized contracts and does business across state lines.

Enterprising plaintiffs’ lawyers should have no trouble finding a widely used form contract with a generic choice-of-law provision. *See, e.g.,* RUSSELL J. WEINTRAUB, COMMENTARY ON THE CONFLICT OF LAWS § 7.3C, at 494 (5th ed. 2006) (noting that choice-of-law provisions are “becoming ubiquitous boilerplate in commercial contracts”). They can then scour the chosen State’s statute books for an idiosyncratic prohibition that has not been observed in the rest of the country. Upon finding a *malum prohibitum* of this kind, they can wield it extraterritorially by bringing a nationwide class action in the name of a client who happens to live in the Eighth Circuit.

Consider an example that could affect millions of Americans who use their phones to hail rides through Uber or Lyft. All of the drivers for those companies have agreed to form contracts containing California choice-of-law provisions. Does this mean that drivers in the other forty-nine States can invoke the California Labor Code, rather than a home-state statute that is not quite so worker friendly?

The plaintiffs’ bar actually attempted nationwide class actions on this theory. Fortunately for Virginia riders who do not relish paying California rates, Judges Chhabria and Chen rejected extraterritorial application of the California Labor Code, despite the choice-of-law provisions. See *Cotter*, 60 F. Supp. 3d at 1061–66; *O’Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 1003–07 (N.D. Cal. 2014). Their sound reasoning echoes that of the Fourth, Sixth, and Seventh Circuits: “[A] contractual choice of law provision that incorporates California law presumably incorporates *all* of California law—including California’s presumption against extraterritorial application of its law.” *Uber*, 58 F. Supp. 3d at 1005; see also *Lyft*, 60 F. Supp. 3d at 1063 (“The opposite conclusion would raise serious constitutional concerns.”). But if the next of these nationwide class actions proceeds under Eighth Circuit law, then drivers across the country could start collecting California’s minimum wage, while their riders anxiously await Uber’s fleet of autonomous vehicles.

The Eighth Circuit’s decision also threatens to generate friction between the States. See *BMW*, 517 U.S. at 572 (noting relevant “principles of state sovereignty and comity”). State regulations and licensing requirements are ubiquitous, but they are territorially limited and cannot be adjusted by private agreement. See *United States v. Lupton*, 620 F.3d 790, 800 (7th Cir. 2010) (“Parties cannot contract around definitions provided in criminal statutes . . .”). Suppose a 16-year-old tourist buys a rod and reel at a bait shop in Texas, where she signs a sales contract with a Missouri choice-of-law provision. Without obtaining a fishing license, our

young angler heads for the nearest lake and drops a line in the water. This is permissible because it happens in Texas, where people under the age of 17 do not need a license to fish. *See* 31 TEX. ADMIN. CODE § 53.2(d)(2).

It makes no difference that Missouri's youth exemption runs out at the age of 15. *See* MO. CODE REGS. ANN. tit. 3, § 10-5.205(1)(D). No sane official would say that the Missouri choice-of-law provision in her sales contract subjects the 16-year-old to punishment under the Missouri regulation for her unlicensed fishing in Texas. Balancing conservation goals for Texas's waters against the inconvenience of licensing children who fish in them is a matter of concern for Texas alone. Missouri simply has no say when it comes to another State's fish.

Even Missouri would likely concede as much, were the Court to call for the views of the Attorney General of Missouri. *See Rhine v. Deaton*, 558 U.S. 811 (2009). After all, Missouri is leading a coalition of thirteen States that recently invoked the Court's original jurisdiction to complain that "California offends the sovereignty of other egg-producing States by projecting its enforcement authority into their borders." Brief in Support of Mot. for Leave to File Bill of Compl. at 9, *Missouri v. California*, No. 22O148 (U.S. Dec. 4, 2017). If Missouri's borders keep California law out, they should also keep Missouri law in. *Cf. United States v. Am. Diversified Def., Inc.*, 702 F. Supp. 1551, 1558 (N.D. Ala. 1988) ("Sauce for the goose should be sauce for the gander, even where the gander is the sovereign."). The decision below should trouble Missouri, insofar as a

federal court has turned a choice-of-law provision into a mechanism for using a Missouri statute to penalize extraterritorial conduct that was expressly authorized by the State in which it occurred. *See, e.g.*, MD. TRANSP. CODE § 15-311.1 (allowing dealers like petitioner to fill out title-application forms for a fee).

This case reached the federal courts because of Congress's response to state courts that were "impos[ing] their view of the law on other States and bind[ing] the rights of the residents of those States," among other "[a]buses in class actions." Class Action Fairness Act of 2005, § 2(a)(4), Pub. L. No. 109-2, 119 Stat. 4, 5. In an ironic twist, the Eighth Circuit has committed a similar sin by projecting Missouri's penal statute across state lines through a nationwide class action. Given the guile of the plaintiffs' bar and the ubiquity of form contracts with choice-of-law provisions, this latest feat of class-action abuse will surely inspire copycats unless this Court intervenes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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