

No. 17-1120

In The
Supreme Court of the United States

—◆—
TMBC, LLC,

Petitioner,

v.

ROBERT MCKEAGE, et al.,

Respondents.

—◆—
**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

—◆—
BRIEF IN OPPOSITION

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TABLE OF CONTENTS

	Page
TABLE OF CONTENTS	i
TABLE OF AUTHORITIES	ii
STATEMENT.....	1
INTRODUCTION & SUMMARY OF THE ARGUMENT	4
REASONS THE PETITION SHOULD BE DENIED	10
I. There is no extraterritorial application of Missouri law in any constitutional sense; rather, there is only the application of Mis- souri law to a Missouri company that con- tractually chose Missouri law, required that its nationwide customers submit to Mis- souri law and venue, and enforced those provisions in this case to remove this class action to Greene County, Missouri	10
II. There is no Circuit split. The cases upon which TMBC relies considered no Federal issues; rather, those Courts only considered different state laws applied to different facts	23
III. The real-world impact of doing what TMBC requests would be to promote wholesale attack on contractual choice-of-law provi- sions, thus eliminating the certainty of law that contractual choice-of-law provi- sions provide	28
CONCLUSION	31

TABLE OF AUTHORITIES

	Page
CASES	
<i>Adams v. Robertson</i> , 117 S. Ct. 1028 (1997)	5, 10
<i>Allstate Insur. Co. v. Hague</i> , 449 U.S. 302 (1981).....	6, 11, 17, 18, 20
<i>AT&T Mobility, L.L.C. v. Concepcion</i> , 563 U.S. 333 (2011).....	29
<i>Boatland, Inc. v. Brunswick Corp.</i> , 558 F.2d 818 (6th Cir. 1977).....	24
<i>Carpenter v. Countrywide Home Loans, Inc.</i> , 250 S.W.3d 697 (Mo. 2008).....	2
<i>Chicago Burlington & Quinney R.R. Co. v. McGuire</i> , 219 U.S. 549 (1911)	7, 14
<i>Clark v. Austin</i> , 101 S.W.2d 977 (Mo. 1937)	21
<i>Cotter v. Lyft</i> , 60 F. Supp. 3d 1059 (N.D. Cal. 2014)	26, 27, 30
<i>Cromeens, Holloman, Sibert, Inc. v. AB Volvo</i> , 349 F.3d 376 (7th Cir. 2003).....	24, 25
<i>Eisel v. Midwest BankCentre</i> , 230 S.W.3d 335 (Mo. banc 2007)	2, 3
<i>Gravquick AIS v. Trimble Nav.</i> , 323 F.3d 1219 (9th Cir. 2003).....	27
<i>Healy v. Beer Institute, et al.</i> , 109 S. Ct. 2491 (1989).....	15, 16
<i>Highway Equipment Co. v. Caterpillar</i> , 908 F.2d 60 (6th Cir. 1990).....	23, 24

TABLE OF AUTHORITIES – Continued

	Page
<i>Hulse v. Criger</i> , 363 Mo. 26 (Mo. 1952)	2
<i>In re First Escrow, Inc.</i> , 840 S.W.2d 839 (Mo. 1992)	2
<i>In re Hess</i> , 406 S.W.3d 37 (Mo. 2013)	21
<i>In re Stormont</i> , 873 S.W.2d 227 (Mo. 1994).....	21
<i>In the Matter of Dyrdaahl</i> , 204 Or. App. 509 (2006)	21
<i>Johnston v. Dir. of Revenue</i> , 305 S.W.3d 465 (Mo. App. 2010).....	21
<i>New Hampshire v. Maine</i> , 532 U.S. 742 (2001)	8, 11, 22
<i>O'Connor v. Uber</i> , 58 F. Supp. 3d 989 (N.D. Cal. 2014)	26, 27
<i>Oppenheimer Fund, Inc. v. Sanders</i> , 437 U.S. 340, 98 S. Ct. 2380, 57 L. Ed. 2d 253 (1978)	4
<i>Planned Parenthood of Kan. v. Nixon</i> , 220 S.W.3d 732 (Mo. 2007)	14, 15
<i>Skiriot v. State of Florida</i> , 61 S. Ct. 924 (1941)	6, 11, 16, 17, 20
<i>State ex rel. Nixon v. Estes</i> , 108 S.W.3d 795 (Mo. App. 2003).....	19, 20
<i>Stolt-Nielsen S.A. v. Animal Feeds Int’l Corp.</i> , 559 U.S. 662 (2010)	29
<i>Strong v. Neth</i> , 267 Neb. 523 (2004)	21
<i>Twin City Pipe Line Co. v. Harding Glass Co.</i> , 283 U.S. 353 (1931)	7, 13, 14

TABLE OF AUTHORITIES – Continued

	Page
<i>United States v. Edge Broad. Co.</i> , 113 S. Ct. 2696 (1993).....	6, 11
<i>Webb v. Webb</i> , 451 U.S. 493 (1981).....	10
<i>Zmuda v. Chesterfield Valley Power Sports, Inc.</i> , 267 S.W.3d 712 (Mo. App. 2008).....	20
 STATUTE	
Missouri’s Merchandising Practices Act.....	19, 20
 RULE	
Mo. Sup. Ct. R. 5.20	21

STATEMENT

On May 23, 2008, Robert and Janet McKeage (“McKeage”) bought a boat from TMBC, and paid “document fees”, pursuant to a standardized contract (used by TMBC nationwide) that contained Missouri choice-of-law and venue provisions. After the McKeages were unsuccessful in resolving the issues involving their defective boat with TMBC, the McKeages filed suit in St. Charles County. The McKeages’ Petition for Damages contained six counts, five of which were class allegations for TMBC’s “document fee” charges. The class allegations included claims of fraud, deceptive practices, and unauthorized law business (“ULB”), all under Missouri law. Petitioner quickly removed Respondents’ class action claims to the Circuit Court of Greene County, Missouri, pursuant to the Greene County, Missouri forum selection clause that is found in the same paragraph of TMBC’s standardized contract as Missouri choice-of-law. Petitioner prevailed on transfer, by arguing that: “All six counts of plaintiffs’ Petition ‘arise from’ the Purchase Agreement.” Case No. 6:12-cv-03157, Dkt. No. 194, at xi-xii.¹

Respondents never argued, much less convinced any court, that filling out a contract requires a law license. Respondents readily admitted that TMBC salesmen are permitted to fill in sales contracts. However, under Missouri law, TMBC was not allowed to charge its customers for doing so, and was not allowed to tell

¹ Although none of the courts below estopped TMBC from arguing that Respondents’ claims did *not* arise from the contract, proper application of judicial estoppel would have halted TMBC’s nearly 10-year scorched earth challenge on these issues.

its customers that its add-on profit center was a government “tax”. Missouri law is very clear that when a company charges a fee for a legal document, the charge places an emphasis on legal drafting as a business; and, when done by a non-lawyer, the conduct in charging such fees constitutes unauthorized law business. *In re First Escrow, Inc.*, 840 S.W.2d 839, 848-49 (Mo. 1992) (holding that one who charges for a contract “for the sale and purchase of [property]” engages in unauthorized law business); *Hulse v. Criger*, 363 Mo. 26, 37, 44-45 (Mo. 1952) (holding that a non-lawyer “mak(ing) a separate charge for completing any standardized forms”, including “contracts of sale”, engages in unauthorized law business); *Carpenter v. Countrywide Home Loans, Inc.*, 250 S.W.3d 697 (Mo. 2008) (citing statute and holding: “the drawing or the procuring of or assisting in the drawing for a valuable consideration of any paper, document or instrument affecting or relating to secular rights” is unauthorized law business); *Eisel v. Midwest BankCentre*, 230 S.W.3d 335, 336-37 (Mo. banc 2007) (holding that document fees charged by Midwest BankCentre for legal documents was unauthorized law business).

In a less-than-candid attempt to reduce damages on Respondents’ class claims, TMBC corporate testified that it charged the “document fees” not only for legal documents, but also for TMBC office furniture, the square footage of its store, employee training, employee salaries, fixtures, equipment, janitorial services, and pens. TMBC admitted that its customers were not told about this deceptive “document” charge, and TMBC’s managers admitted that the company

policy of charging customers a “document fee” (in part) for office furniture and other non-documents was a “fraud”, “lie” and “unethical business practice”. Dkt. No. 194, at x. TMBC admitted the “document fee” was also for legal documents. Thus, despite TMBC’s attempts to reduce damages with its claim that part of the “document fee” was for non-documents, Missouri law provides that if a non-lawyer company makes a “separate charge” for legal documents, the damages for this misconduct are determined based on the entire fee charged. *Eisel*, at 337.

After the Missouri Supreme Court held, in a unanimous decision, that it was an abuse of discretion not to certify the class nationwide, TMBC removed this case to federal court. In the Western District of Missouri, TMBC attempted to defeat the Class’s ability to proceed, by (mis)representing to the Court that it would be impossible to produce copies of its standardized, form contracts (that require Missouri law and Greene County, Missouri venue) in Greene County, Missouri. Dkt. 194, at xv. TMBC claimed that it had no centralized copies of customer contracts, which it claimed were housed only at the individual stores nationwide. Notwithstanding, the district court ordered TMBC to produce the Missouri contracts in Missouri. Respondents then discovered that TMBC’s position on the location of its contracts was false; and instead, that TMBC had a written corporate policy requiring that copies of every contract be sent to TMBC’s mother store in Greene County, Missouri. Dkt. No. 194, at xvi. TMBC’s corporate representative later admitted that TMBC had copies of all customer contracts at its headquarters in Greene County, Missouri. *Id.*

TMBC also had a written corporate policy that every transaction nationwide must be governed by the Missouri contract. Despite TMBC's corporate policy, and documents showing that TMBC sent copies of the Missouri contract to every store location nationwide, TMBC claimed that some stores did not use the contract on every transaction. App. 37. Accordingly, the district court held that it was Respondents' burden to review the files and identify every transaction on which the Missouri contract was used, in a review similar to that utilized in *Oppenheimer Fund, Inc. v. Sanders*, 437 U.S. 340, 345, 98 S. Ct. 2380, 2386, 57 L. Ed. 2d 253 (1978). App. 37-38. Respondents, in a 70-person review of the files (that was monitored by TMBC), identified every transaction governed by Missouri law. App. 44-45, 55-56. The district court provided TMBC the opportunity to object, and TMBC provided no contrary evidence. Only customers whose contracts were entered into in the state of Missouri, and/or whose transactions were controlled by the Missouri contract, are members of this class action. App. 8-10, 44-45, 52-56. The Eighth Circuit fully considered these state law issues and affirmed the district court's decision, reversing the district court only on Respondents' cross-appeal. App. 1-23.



INTRODUCTION & SUMMARY OF THE ARGUMENT

This is a state contract law issue, which has been decided by the Missouri Supreme Court, in a 7-0 decision. The relevant issue in this case is how a Missouri court applies Missouri choice-of-law principles to a

Missouri company that contractually decided that Missouri law would govern its nationwide commercial transactions. App. 28-29. As the Missouri Supreme Court said, “[TMBC]² chose to have its litigation resolved in Missouri, by Missouri courts, applying Missouri law.” App. 27-28. Under Missouri law, the “parties may choose the state whose law will govern,” and thus, “a valid choice of law provision binds the parties.” App. 28-29. Missouri contract and choice-of-law principles provide that Missouri’s unauthorized law business statute applies to TMBC’s illegal document fee, which it charged on the face of its standardized Missouri contracts. This state law issue has been decided.

There is no federal question. Moreover, if there was, TMBC has failed to demonstrate that the Missouri Supreme Court had “a fair opportunity to address the federal question that is sought to be presented here”. *Adams v. Robertson*, 117 S. Ct. 1028, 1029 (1997) (citation omitted). App. 24-30. Notwithstanding this deficiency, there is no Constitutional issue in the matters before the Court, despite the last-ditch, albeit artful, attempt by TMBC to create the appearance of one. Namely, there is no constitutional prohibition on parties contractually deciding that a certain state’s law will govern their commercial transaction. The state of Missouri has a legitimate, and substantial, interest in regulating the conduct of this Missouri company that contractually chose Missouri law. In fact, the state of Missouri can exercise authority over a Missouri citizen’s out-of-state conduct, even

² The Missouri Supreme Court opinion refers to “Bass Pro”, which is the parent company to TMBC.

absent that corporate citizen's contractual choice of Missouri law. *Skiriotes v. State of Florida*, 61 S. Ct. 924 (1941) ("There is nothing novel in the doctrine that a state may exercise its authority over its citizens (outside the state)."); *Allstate Insur. Co. v. Hague*, 449 U.S. 302, 313-14 (1981) (identifying the important state interest in regulating a resident's out-of-state conduct, even absent contractual choice-of-law by that resident); *United States v. Edge Broad. Co.*, 113 S. Ct. 2696 (1993) (North Carolina had authority to regulate its citizens' out-of-state conduct).

Here, this Missouri company contractually decided that these issues would be governed by Missouri law, in a Missouri courtroom. It did so by putting contractual choice of Missouri law and venue provisions into all its nationwide contracts, and by enforcing those provisions against its customers for years. As a practical matter, TMBC closed the courthouse door on its out-of-state customers' claims for years, with its Missouri law and venue provision, and it happily applied those provisions to benefit its pocketbook. Now, TMBC asks this Court to allow it to disavow itself of its promises, because in this instance, the provisions it wrote are less friendly to its bottom line. The request it makes is blatantly result-oriented for the specifics of this case, without regard to the broader implications. The broader consequences of what TMBC requests is the elimination of the corporate control and certainty that comes from choosing one state's law to govern a company's multistate commercial transactions. There is no constitutional prohibition on a company doing so. Quite the opposite of TMBC's assertion, the only constitutional

implication here would arise from doing what TMBC requests, thereby infringing on the parties' right to contract. *Chicago Burlington & Quincy R.R. Co. v. McGuire*, 219 U.S. 549, 566 (1911); *Twin City Pipe Line Co. v. Harding Glass Co.*, 283 U.S. 353, 356 (1931).

TMBC's claim that Missouri is regulating the practice of law in other states is false. There is nothing about applying Missouri law to this Missouri company, pursuant to its own choice of Missouri law, that: regulates what is, or is not, the practice of law in any other state; regulates what is or is not unauthorized business in any other state; determines whether another state's corporate citizen can charge deceptive add-on fees on sales; determines what is or is not a deceptive practice in another state; nor regulates the citizens of any other state. Application of Missouri law in this case only regulates a Missouri company that contractually chose to be regulated by Missouri law. App. 17, 27-28. As the Eighth Circuit explained:

The question here presented is whether a corporation headquartered in Missouri can choose that Missouri law govern its conduct in standard form contracts it used nationwide. There is nothing inherently unconstitutional about enforcing a corporation's choice to have its contractual duties governed by the law of a particular state.

App. 17. TMBC chose Missouri law. TMBC's add-on fees, which it told its customers were "taxes," are a deceptive and illegal profit center under Missouri law. Whether these contractual add-on fees are "unauthorized" or illegal under another state's law is irrelevant.

After bringing claims for deceptive practices and unauthorized law business (“ULB”), the class chose to submit on the law business claim, for TMBC illegally charging customers for the legal documents necessary to transfer title to the boats those customers purchased.³ Moreover, estoppel principles defeat TMBC’s arguments, where it removed this class action from the venue that Respondents chose, by arguing that: “All Six Counts of Plaintiff’s Petition ‘arise from’ the purchase Agreement,” which requires Missouri law. Because TMBC prevailed in arguing that the unauthorized law business claims “arise from” these standardized Missouri contracts, it would be proper to estop it from arguing otherwise. *New Hampshire v. Maine*, 532 U.S. 742 (2001).

There is no split in the Circuit decisions. The only conclusion that one may reasonably extract from the cases TMBC cites as an alleged “Circuit split” is that different Circuits, applying different states’ laws, in different factual situations, reached different results. Indeed, in the cases that TMBC cites, those Courts (applying Illinois, New York and California law, respectively), applied the specific language of the statutes sought to be enforced, but those statutes were clear they did not apply to the facts before those courts. To

³ Under Missouri law, a Missouri company can provide legal documents to customers, but it cannot charge customers for doing so. App. 12-16; 57-58. After extensive litigation, the district court entered judgment against TMBC for \$21.7 million. App. 3, 7. The Judgment reflected illegal fees for a seven (7) year time frame, less than half the time during which TMBC charged these illegal fees. App. 37-38. Because of the statute of limitations, TMBC was immunized from its illegal conduct for a ten-year period.

the contrary here, the Missouri statute at issue, which prevents a Missouri company from charging an add-on fee for legal documents necessary to transfer property, does apply. The Missouri Supreme Court squarely decided the issue in this case. App. 24-30. Furthermore, none of the Circuit decisions that TMBC relies upon considered any federal question. To couch those decisions – which considered no federal question and instead evaluated the application of different state laws to completely different facts – as a “split in the Circuits” is a last-ditch overreach. Constitutional extraterritoriality issues were not before any of those Courts.

Finally, TMBC’s Petition is blindly result-oriented, without regard to the real-world consequences of the position it takes. The practical reality of what TMBC requests is the obliteration of parties’ right to contract, and the elimination of a company’s ability to choose the law that governs its contract rights. Instead of certainty, the consequence of what TMBC requests is that companies be faced with suits in 50 different states, applying 50 different laws, to a single issue arising out of a form contract that has a uniform choice-of-law provision. Other than its current displeasure (in this specific case) with the effect of the bargain that it forced upon its customers, surely this is not what TMBC, or any like companies, want.

The real question presented is whether, under Missouri contract and choice-of-law principles, a Missouri company’s nationwide contractual choice of Missouri law governs the illegal add-on fees that it charged on the face of that contract. App. 17. This is a Missouri state law issue of contract and choice-of-law interpretation.

It is also an issue appropriately decided in a unanimous decision by the Missouri Supreme Court; and then, by the Eighth Circuit Court of Appeals applying Missouri law. This is not a proper issue for this Court's review. TMBC's heavy reliance on cases that never considered a federal question highlights this.



REASONS THE PETITION SHOULD BE DENIED

- I. There is no extraterritorial application of Missouri law in any constitutional sense; rather, there is only the application of Missouri law to a Missouri company that contractually chose Missouri law, required that its nationwide customers submit to Missouri law and venue, and enforced those provisions in this case to remove this class action to Greene County, Missouri.⁴**

Any time multi-state commercial parties contract for a chosen state's law, there is the expectation of "extraterritorial" application. This is why the parties have expressly chosen the law that will apply – they want certainty of result in their commercial transaction. So, the relevant issue is whether there is extraterritorial application of law in any constitutional sense. And here, there is none. Even absent TMBC's express

⁴ TMBC has failed to demonstrate that the Missouri Supreme Court had "a fair opportunity to address the federal question that is sought to be presented here." *Adams v. Robertson*, 117 S. Ct. 1028, 1029 (1997) (quoting *Webb v. Webb*, 451 U.S. 493, 501 (1981)). TMBC has also failed to meet its burden "to demonstrate that it presented the particular claim at issue here with "fair precision and in due time". *Adams*, at 1030 (quoting cases).

choice of Missouri law, no state has a greater interest in regulating this corporate Missouri resident than Missouri. The law, and Constitution, are clear that Missouri has the right to regulate its citizens' conduct, even absent explicit choice-of-law. *Skiriotes*, at 929; *Hague*, 313-14; *Edge Broadcasting*, at 2707-08.

Applying Missouri law to this Missouri company does not: regulate what is or is not the practice of law in any other state; regulate what is or is not unauthorized business in any other state; determine whether another state's corporate citizen can charge add-on document fees on sales; determine what is or is not a deceptive practice in another state; nor regulate the citizens of any other state. Application of Missouri law in this case only regulates a Missouri company that contractually chose to be regulated by Missouri law in a Missouri court. App. 17. It also ensures that this Missouri company has the ability to manage the conduct of its employees and determine what they can, and cannot, charge in transactions performed on its behalf. Missouri's interest in doing so is obvious. Applying Missouri law to this Missouri company also holds TMBC to the benefit, and detriment, of its bargain; and, properly estops this Missouri company from arguing the opposite of the position it previously took to transfer this nationwide class action to Greene County, Missouri. *New Hampshire*, at 743.

The issue is a state contract issue. The Missouri Supreme Court explained this state contract law issue, as follows:

In this case, there will be no need to engage in a state-by-state choice of law analysis because

[TMBC] conditioned every sale to each putative class member upon acceptance of the Missouri choice of law provision. Each putative class member paid a fee for the document preparation that is the underlying fact supporting the litigation. All of the claims against [TMBC] arise out of the same purchase agreement documents and are by the contract terms to be litigated in Greene County pursuant to the forum selection clause. . . .

App. 28. The district court appropriately held similarly:

[TMBC] also argue(s) that, because Missouri statutes do not apply extraterritorially there is no question of law common to the entire class. The Court does not find this argument persuasive . . . the class is limited to individuals who entered into a contract which had a Missouri law provision . . . the class is limited to claims which arise under Missouri law.

Then, the Eighth Circuit affirmed the district court, explaining:

Missouri makes no attempt to enforce its law extraterritorially. Thus, whether Missouri can control the regulation of law licenses extraterritorially and whether the Missouri Attorney General can enforce §484.020 extraterritorially, are issues not before us. Instead, the question here is whether a corporation headquartered in Missouri can choose that Missouri law govern its conduct in standard form contracts it used nationwide. There is nothing inherently unconstitutional about enforcing a corporation's choice to have its contractual

duties governed by the law of a particular state. On the contrary, “[t]he general rule is that competent persons shall have the utmost liberty of contracting and that their agreements voluntarily and freely made shall be held valid and enforced in the Courts”.

App. 17 (quoting *Twin City Pipe Line*, at 356). Each of these decisions is sound.

There is no extraterritorial application of Missouri law in any constitutional sense of the phrase. Rather, there is only the enforcement of a contractual choice of Missouri law clause that TMBC wrote and enforced against its out-of-state customers for years. There is no constitutional prohibition on parties contractually choosing a state’s law to govern their commercial transaction. TMBC’s Dormant Commerce Clause and Full Faith and Credit arguments fail when one scratches slightly below the surface. The Dormant Commerce Clause limits states from enacting statutes that infringe on commerce and the rights of other states – it does not prevent private parties from choosing a law to govern their contract. Here, no state is imposing its statute onto another state; Missouri is enforcing Missouri law against a Missouri citizen that contractually chose Missouri law.

TMBC’s Full Faith and Credit position is similarly hollow, because again, it is not the state of Missouri imposing its laws on other states. Rather, it is a private Missouri company choosing to be governed by the law of the state of Missouri, in a Missouri courtroom. The state of Missouri is not failing to give credit to another state’s law; it is applying its law, to its own citizen,

where its citizen contractually chose to have that law applied. The Constitution does not give a company the right to enforce choice-of-law to its customers' detriment; and then, to disavow that law whenever it wants.

The only constitutional rights implicated are those that would arise in doing what TMBC requests – infringing on property rights and parties' ability to contract. TMBC, in essence, requests that contractual choice-of-law be extinguished and parties be stricken of their liberty to bargain. The consequence of its request would be that a company could never ensure certainty of result in its multistate transactions. The liberty interest at issue is the right to contract, and encroachment on that interest would occur only in doing what TMBC asks of this Court. *McGuire*, 210 U.S. at 566 (“the right to make contracts is embraced in the conception of liberty as guaranteed by the Constitution”); *Twin City Pipe Line*, at 356 (“The general rule is that competent persons shall have the liberty of contracting.”).

The fact that there is no Constitutional support for TMBC's arguments is why TMBC relies so heavily on cases where state Attorneys General have actively tried to impose their laws on the citizens of other states. For example, TMBC cites *Planned Parenthood of Kan. v. Nixon*, 220 S.W.3d 732 (Mo. 2007), for the proposition that Missouri law cannot be applied “extra-territorially.” This case has nothing to do with a commercial retailer who chose the law that controls its transaction. In *Planned Parenthood*, the issue was whether the Missouri legislature could “regulate commerce outside of Missouri's borders in that it requires

non-Missouri health care providers and others who are engaged in speech and conduct wholly outside Missouri to comply with the Missouri parental consent law.” *Id.*, at 742. The inapplicability of that case, which concerns whether a state may by statute (and absent any contractual choice-of-law) regulate non-Missouri citizens’ out-of-state conduct, is obvious. The cases TMBC cites for “extraterritoriality” principles have nothing to do with whether a state can regulate its own resident who chose its law.

Likewise inapposite is TMBC’s reference to the state of Missouri’s opposition to the state of California imposing its laws onto non-California residents in the state of Missouri. Petition, at 19. Constitutional “extraterritoriality” prohibits state actors from regulating or controlling the non-citizens of other states, thus infringing on the rights of sister states. It has never prevented a state from regulating its own citizen’s conduct, particularly where that citizen contractually chose such regulation.

In *Healy v. Beer Institute, et al.*, 109 S. Ct. 2491 (1989), TMBC cites this Court’s decision, which has: (1) nothing to do with contractual choice-of-law; (2) nothing to do with a company that has chosen to impose its own state’s laws on all its customers; and (3) nothing to do with a company that has expressly chosen to have its out-of-state conduct regulated by the law of its place of business. Instead, in *Healy*, the state of Connecticut was imposing its laws on out-of-state shippers who had not chosen to be subject to Connecticut’s laws. The issue was whether Connecticut could

regulate beer distributors' conduct occurring in other states, pursuant to a Connecticut statute prohibiting distributors from providing discounts in other states. *Id.*, at 2501-04. There is no analogy between *Healy* and this case. Here, Missouri is not reaching outside the state of Missouri to impose its laws on non-citizens. Rather, TMBC, a Missouri company, contractually chose to have its nationwide transactions governed by Missouri law, in a Missouri court. Even absent contractual choice-of-law, Missouri is entitled to regulate this corporate citizen. Where that citizen has contractually chosen Missouri law, Missouri's legitimate interest in applying its law is without rational debate.

Even absent a contractual choice-of-law provision, Missouri has an inherent interest in regulating the conduct of its (corporate) citizens, both in this state and outside it. States routinely govern, censure and sanction the out-of-state conduct of their citizens, and a state's interest in doing so is well-settled in the law. By being a citizen of the state of Missouri, with its headquarters in Missouri, TMBC submits to the laws of Missouri, whether it contractually agrees to Missouri law or not (and here of course, TMBC did contractually agree to Missouri law). A state has a legitimate interest in applying its law to regulate the out-of-state conduct of its citizens, in order to protect both in-state and out-of-state residents, even absent contractual choice-of-law.

This Court has repeatedly affirmed this type of state action. In *Skiriotes v. State of Florida*, 61 S. Ct. 924 (1941), the Court addressed a Florida statute that

prohibited its citizens from using certain divers' equipment, even when outside Florida's territorial waters. The Court explained:

(W)e see no reason why the State of Florida may not likewise govern the conduct of its citizens upon the high seas with respect to matters in which the State has a legitimate interest. . . . There is nothing novel in the doctrine that a State may exercise its authority over its citizens (outside the state's boundaries).

Id., at 929. Likewise, here, “there is nothing novel in the doctrine that [Missouri] may exercise authority over its [corporate] citizen”, particularly where that corporate citizen contractually chose to be governed by Missouri law. Missouri imposes no geographic limit on the regulation of its own citizens, nor should it.

Similarly, in *Allstate Insur. Co. v. Hague*, 449 U.S. 302, 313-14 (1981), this Court applied Minnesota law (absent any choice-of-law) to an accident occurring in Wisconsin, between Wisconsin residents, driving Wisconsin vehicles, and insured by a Wisconsin insurance policy. This Court addressed the important state interests in regulating one's own residents, even where the conduct at issue occurs in another state. *Id.*, at 318-20. There, one party to the litigation became a resident of Minnesota after the accident at issue, and this Court noted that this constituted a state interest which gave Minnesota an interest in the case. *Id.*, at 318-20. This Court explained that on choice-of-law, the question boils down to whether the state has “a significant

contact or significant aggregation of contacts, creating state interests, such that choice of law is neither arbitrary nor fundamentally unfair.” *Id.*, at 313. On this question, TMBC cannot rationally argue arbitrariness nor fundamental unfairness in applying Missouri law to this Missouri company that contractually chose Missouri law.

In fact, even if there was no choice-of-law by the parties, there is no limitation on Missouri’s ability to regulate its own corporate citizen. Here, this interest is exponentially magnified by the fact that TMBC chose to be governed by Missouri law, and the state of Missouri has an inherent interest in its corporate citizens being able to make this choice.

TMBC’s claim that “the decision below should trouble Missouri” is both counter-intuitive and contrary to the Missouri high court’s unanimous decision in this case. App. 24-30. The decision below is what the state of Missouri requires. This is reflected in the Missouri Supreme Court’s unanimous holding in this case that pursuant to Missouri choice-of-law and contract rules, it would be an abuse of discretion not to apply Missouri law to this Missouri company. App. 30. Therefore, it is settled that Missouri is not interested in allowing its corporate citizen to fleece in-state or out-of-state customers with spurious add-on fees. Instead, as the Missouri Supreme Court made clear, Missouri is interested in allowing its corporate citizen to control choice-of-law and thereby ensure certainty of result. For TMBC, this means taking the bad with the good. App. 28-30. The Missouri Supreme Court has decided

that: one, the choice-of-law clause at issue does encompass a statutory ULB claim; and two, Missouri does not apply any geographical limitation on application of a ULB claim to this Missouri company that expressly chose Missouri law. App. 24-30. Missouri's interest in requiring this result has been decided.

The Missouri high court decision was also no anomaly. Missouri, like most states, has vigorously regulated its citizens' deceptive practices, even where those practices occur (1) out-of-state, and (2) absent any contractual choice of Missouri law. For example, in *State ex rel. Nixon v. Estes*, 108 S.W.3d 795 (Mo. App. 2003), the Missouri appellate court evaluated whether Missouri's Merchandising Practices Act ("MMPA") would apply to claims made against a Missouri defendant by citizens of other states. There, the Missouri defendant argued that the MMPA should not cover out-of-state residents who were harmed by defendant's out-of-state conduct. *Id.*, at 800-01. The Court rejected the argument, explaining that:

[I]t matters not that most of the victims of Estes' illegal merchandising practices were domiciled in states other than Missouri (or) that some of the events in the chain . . . took place in states other than Missouri.

Id., at 801. The Court held that because defendant operated his business from the state of Missouri, Missouri had an interest in regulating, and prohibiting, his conduct. *Id.*, at 801. Likewise here, TMBC is a Missouri company operating from Missouri headquarters; and thus, Missouri has an interest in regulating TMBC's

conduct (contractual choice of Missouri law or not). The Court in *Estes* did so, even absent any contractual choice-of-law. It did so because Missouri citizens submit to the authority of the state of Missouri.

The *Estes* Court's holding also highlights the absence of any geographic limitation on Missouri's regulation of its citizens' deceptive practices. In fact, Missouri courts have analogized an unauthorized law business claim to a deceptive practice claim under the MMPA, holding that a violation of Missouri's unauthorized law business statute is a per se violation of the MMPA. *Zmuda v. Chesterfield Valley Power Sports, Inc.*, 267 S.W.3d 712, 715 (Mo. App. 2008). Therefore, the *Estes* decision demonstrates that Missouri does not apply any geographic limit to regulating its citizens' misconduct, even where there is no contractual choice of Missouri law. Namely, by being a citizen of the state of Missouri, with its principal business operations in Missouri, TMBC submits to Missouri's laws. Missouri has an interest in requiring that its citizens comply with its laws. And, Missouri has an interest in its corporate citizen having the ability to (1) ensure certainty and consistency in its commercial transactions, (2) set the prices its employees can and cannot charge on its transactions, and (3) determine what its employees can and cannot do on its behalf. There is no geographic limitation on application of Missouri law to this Missouri company that contractually chose Missouri law. *Skiriot*, at 929; *Hague*, at 313-14.

Missouri is not alone. States routinely govern, censure and sanction their own citizens' out-of-state

conduct, even where the citizen has not contractually chosen to be governed by its own state's laws. *In the Matter of Dyrdaahl*, 204 Or. App. 509 (2006) ("Oregon must treat 'out-of-state conduct the same as it would treat [in-state] conduct'"); *Strong v. Neth*, 267 Neb. 523 (2004) ("Nebraska is required to give the same effect to this conduct as if the conduct had occurred in Nebraska"); *Johnston v. Dir. of Revenue*, 305 S.W.3d 465, 466 (Mo. App. 2010) ("Missouri's statutory scheme authorizes the Director to suspend Driver's license for a valid Kentucky conviction"). Moreover, the state of Missouri is not even requiring that this Missouri company follow Missouri law when it conducts out-of-state business. Missouri law applies to this Missouri company for its out-of-state conduct expressly because TMBC decided that Missouri law would govern.

There is nothing about application of Missouri law to this Missouri company that regulates the practice of law in Missouri or any other state; nor is there anything about it that regulates any non-Missouri citizen. Rather, only a Missouri company is being regulated, by the law it chose. However, even as it relates directly to unauthorized law business, there is nothing novel about Missouri courts governing the out-of-state conduct of a Missouri citizen. See Mo. Sup. Ct. R. 5.20 (reciprocal discipline for attorney conduct occurring outside the state); *In re Storment*, 873 S.W.2d 227 (Mo. 1994) (imposing discipline for out-of-state conduct); *In re Hess*, 406 S.W.3d 37, 40 (Mo. 2013) (same); *Clark v. Austin*, 101 S.W.2d 977, 985 (Mo. 1937) ("this court has inherent power to . . . disbar attorneys for offenses

committed in the practice of law though not connected with proceedings pending in this court”). This is proper oversight of a Missouri citizen, contractual choice-of-law or not.

Finally, even apart from the lack of merit in TMBC’s arguments, it would be proper to estop TMBC from arguing that Respondents’ ULB claim is not governed by the Missouri choice-of-law clause, because TMBC removed this class action to Greene County, Missouri, based on its argument that all claims (including the ULB claim) “arise from” this standardized contract that requires Missouri law. Dkt. No. 194, at xii. *New Hampshire v. Maine*, 532 U.S. 742, 742-43 (2001) (“Under the judicial estoppel doctrine, where a party assumes a certain position in a legal proceeding and succeeds in maintaining that position, he may not thereafter, simply because his interests have changed, assume a contrary position, especially if it be to the prejudice of the party.”).

The end result of what TMBC chose, and required of its customers, was that all of its nationwide transactions would be evaluated as if they took place at TMBC’s mother store in Greene County, Missouri. All such transactions would be governed by Missouri law, and all such disputes resolved in a Greene County, Missouri courtroom. Therefore, the clear intent is to give TMBC, and TMBC customers, all the benefits and detriments of Missouri law and Greene County venue. The unanimous decisions reached in this case have properly enforced that clear intent. This is, and always

has been, a state law issue, and it is a state law issue that has been properly decided.

II. There is no Circuit split. The cases upon which TMBC relies considered no Federal issues; rather, those Courts only considered different state laws applied to different facts.

The absence of any split of authority is plainly evident from the fact that the cases that TMBC cites did not address (1) the issues before this Court, nor (2) a federal question. The issues in TMBC's alleged "Circuit split" were issues applying California, New York and Illinois choice-of-law and contract rules, respectively, not Missouri choice-of-law and contract rules. Moreover, the cases cited by TMBC for an alleged "Circuit split" did not address any federal or constitutional question. Rather, those cases applied those different state contract and choice-of-law rules to completely different factual situations. Indeed, in the cases TMBC cites, the statutes at issue were clear that they did not apply to the factual situation presented. Thus, it is not surprising that different courts, applying different conflict-of-law rules to different statutes, reached different results. TMBC's attempt to claim this is a Circuit split is a stretch.

For example, the Sixth Circuit did not even consider constitutional concerns with extraterritoriality in *Highway Equipment Co. v. Caterpillar*, 908 F.2d 60 (6th Cir. 1990). Instead, the only legal analysis was

what Illinois' choice-of-law rules required. In fact, highlighting the reality that TMBC is requesting that this Court review what are solely state law issues, the *Caterpillar* Court distinguished its opinion in *Boatland, Inc. v. Brunswick Corp.*, 558 F.2d 818 (6th Cir. 1977), where the Sixth Circuit applied a Wisconsin statute "extra-territorially". *Caterpillar*, at 63. The *Caterpillar* Court explained that Boatland "is inapposite because we were concerned in that case with Wisconsin, not Illinois, principles of statutory construction." *Id.*, at 63. Here, the concerns are Missouri legal principles, and *Caterpillar* is similarly inapposite. Moreover, in deciding that the Illinois statute was not covered by the choice-of-law clause, the *Caterpillar* Court noted that there was a specific contract provision that was contrary to the statutory language sought to be applied extraterritorially. The Court noted that the Illinois statute sought to be applied (1) conflicted with specific contractual language, and (2) was clear it did not apply to dealerships located outside the state. *Id.*, at 63-64.

The same analysis was performed in *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376 (7th Cir. 2003), where the Court also evaluated the Illinois Franchise Dealers Act. Much like the *Caterpillar* Court, the *Volvo* Court cited approvingly the district court decision, explaining:

(T)he IFDA did not apply because by its own terms it was limited in application to franchises located within the State of Illinois, and none of the franchises here were in Illinois. The court also declined to apply the IFDA

because to do so would allow a general choice-of-law provision to trump a specific contradictory term of a bargained-for-contract between sophisticated parties. . . . The plain language of the Illinois law that the Samsung dealers seek to apply excludes those same dealers from its coverage because they are located outside of Illinois.

Id., at 384. The *Volvo* Court continued:

If [dealers] insist (as they must, because the contract chooses Illinois law) that Illinois law applies, then we must look to the law of Illinois to determine the scope of applications. The IFDA limits its scope to franchises located within the state, and the Samsung dealers may not claim its protections.

Id., at 386. Subsequent discussion by the *Volvo* Court addressed state choice-of-law rules, and whether the non-drafters of the contract had additional rights that could not be waived by contract.

If anything, these cases highlight that TMBC is asking this Court to rule on what is clearly a state law matter. There were no federal nor constitutional questions raised in the cases TMBC cites for a “Circuit split,” just as there are no such legitimate issues here. The cases that TMBC misconstrues do not represent a split. They represent the application of differing state choice-of-law and contract rules, to the specific facts before those courts. None of those cases had constitutional underpinnings nor analysis.

TMBC's reliance on two cases out of the Northern District of California, *Cotter v. Lyft*, 60 F. Supp. 3d 1059 (N.D. Cal. 2014) and *O'Connor v. Uber*, 58 F. Supp. 3d 989 (N.D. Cal. 2014), fair no better. Again, those district courts did not evaluate constitutional extra-territoriality principles, because no such issues were implicated. Instead, those cases applied California choice-of-law principles, in light of a California statute that was explicit it did "not apply to employees who work exclusively in another state." *Cotter*, at 1061. In fact, the *Cotter* Court explained, "Therefore, regardless of the connection between Lyft and California, Lyft drivers who worked in other states cannot bring claims under California's wage and hour statutes." *Id.*, at 1061. Moreover, the *Cotter* Court explained that the plaintiffs were "conflat(ing) statutory claims that exist independent of the contract with claims that arise from the agreement itself." *Id.*, at 1064. In other words, under California's choice-of-law rules, the choice-of-law provision was not broad enough to encompass the claims being asserted; and, the law that plaintiffs attempted to apply was explicit that it did not provide any protection for the out-of-state plaintiffs, particularly where application of California law would be against the interests of some of those out-of-state individuals. *Id.*, at 1061. Contrarily, here, the Missouri Supreme Court has decided that this choice-of-law provision *does* encompass a ULB claim against this Missouri company; and, that Respondents' ULB claims do *arise from* the agreement. App. 24-30. Indeed, this should not be in dispute, where TMBC judicially admitted that the ULB claims "arise from" the Purchase Agreement, in transferring venue to Greene County. *Infra*, at 1.

The *O'Connor* Court addressed the same issues as *Cotter*, and held that the statute did not apply for the same reasons as the *Cotter* Court found. The *O'Connor* Court also identified the relevant case authority from the Ninth Circuit, where the Ninth Circuit held that under California choice-of-law rules, a California statute did apply “extraterritorially” where (1) the contract contained a choice-of-law clause, (2) the type of claim at issue was governed by that choice-of-law clause, and (3) the statute being applied did not explicitly preempt the claims being made. See *O'Connor*, at 1004 (quoting *Gravquick AIS v. Trimble Nav.*, 323 F.3d 1219, 1223 (9th Cir. 2003)). In *Gravquick*, the Ninth Circuit held that the California statute did apply to regulate California distributors who chose to be regulated by California law. *Id.*, at 1224-25. The *Gravquick* Court did so, because there is no constitutional prohibition on a state’s citizen choosing its state law to govern its multistate transactions.

The same rationale as *Gravquick* prevails here. This case is, and has always been, a Missouri state law issue relating to Missouri choice-of-law, and Missouri contract principles. The Missouri Supreme Court decided, in a 7-0 decision, that Missouri’s unauthorized business statute does apply to this Missouri company’s unauthorized charge on the face of its contracts which require Missouri law. App. 24-30. The Eighth Circuit, applying Missouri law, held the same (App. 3-4, 12-17), and did so after requesting additional briefing on this Missouri state contract law issue. App. 32-34.

There is no actual split between the Circuits. In this case, the Courts that have thoroughly reviewed

this issue, in this case’s nearly ten-year lifespan – the Missouri Supreme Court, the U.S. District Court, and the Eighth Circuit – have ruled correctly. TMBC should be required to abide by the contractual choice-of-law and venue provision that it wrote.

III. The real-world impact of doing what TMBC requests would be to promote wholesale attack on contractual choice-of-law provisions, thus eliminating the certainty of law that contractual choice-of-law provisions provide.

The real question is whether a Missouri company, that contractually chose Missouri law and venue, is allowed to disavow itself of the contractual promises it made, because it realized that, in this specific instance, its contractual promises no longer pad its pocketbook.⁵ The answer to this question from the Courts below has properly been: “No, a Missouri company cannot disavow itself of the obligations of its choice of Missouri law.” These decisions – from the Missouri Supreme Court, the United States District Court, and the Eighth Circuit – have all been correct in ruling this state contract and choice-of-law issue. TMBC’s final attempt to make this case something it is not should not be appeased. The broad implications of TMBC’s request are good for no one – not companies nor individuals.

The reality of what TMBC requests is the undoing of the parties’ right to contract, and the elimination of

⁵ Moreover, here, the question includes whether this Missouri company is allowed to do this about-face, after it successfully argued on venue transfer in this case that the Class’s unauthorized law business claim “arise(s) from the Purchase Agreement.”

a company's ability to choose the law that governs its transactions. If this Missouri company is not required to stand by its choice of Missouri law, then choice-of-law provisions across the country will be under attack. Nationwide, parties to commercial contracts will be left in choice-of-law limbo, floundering to figure out what law controls their contracted-for bargains.

TMBC's comment that this will proliferate action based on the alleged "guile of the plaintiffs' bar" is a thinly-veiled attempt to appeal to personal prejudices, but the comment has no relevance to the issues before this Court. The fact is that, today, very few corporate sales contracts contain choice of one state's law, without an accompanying arbitration provision and/or class action waiver. (TMBC has acted in kind, by modifying its contract in 2013. App. 38.) Thus, it is a rare situation that this state law issue could arise in the nationwide class action context that TMBC envisions. See *AT&T Mobility, LLC v. Concepcion*, 563 U.S. 333 (2011); *Stolt-Nielson S.A. v. Animal Feeds Int'l Corp.*, 559 U.S. 662 (2010). TMBC has eliminated this potential for itself, as have most other corporations. Furthermore, to the extent that contracts continue to contain choice-of-law provisions (without class waivers or arbitration mandates), certainty of law and result is what the contract drafter has bargained to receive, and should receive (whether in a class action context or not).

TMBC now requests, one last time, that certainty of law be eliminated in favor of 50 different laws applying to a single legal issue that arises on the face of

the adhesion contract that (1) it wrote, and (2) requires a single state's law. TMBC's position is a transparently result-oriented request, based only on the outcome for itself in this case. Surely, the real-world effect of its request is not what TMBC, or any other corporate actor, actually wants. In reality, if TMBC's request were granted, the impact would be wholesale defeat of choice-of-law provisions in favor of attacks in every state, under 50 different laws, on a single contractual issue, despite an express contractual choice-of-law clause. The actual "sea-change" runs in the opposite direction of TMBC's argument. If TMBC got what it requested, even where choice-of-law is contractually made, parties would be free to attack the choice-of-law under the local laws of all 50 states in which the contracts are entered. Corporate certainty in commercial transactions would be obliterated.

Finally, TMBC's example of the 16-year-old angler is not on point. The contractual choice-of-law provision at issue does not govern where a 16-year-old gets to fish. Instead, it governs all issues *arising out of* the contract that TMBC authored and required its customers to sign, including the document fee that TMBC charged on the front page of its contract. Indeed, there should be no dispute about this, given TMBC's victorious position early in the proceedings that all counts of the class Petition, including the class's statutory unauthorized law business claim, "*arise from*" this Missouri contract. As the *Cotter* Court (that TMBC cites) explains, TMBC is "conflat(ing) (matters) that exist independent of the contract with claims that arise from the

agreement itself.” *Cotter*, at 1064. The rulings below have no impact on where a child can fish.



CONCLUSION

TMBC’s Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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