

No. 17-556

IN THE
Supreme Court of the United States

CHRISTOPHER RIDGEWAY
AND STONE SURGICAL, LLC,
Petitioners,

v.

STRYKER CORPORATION AND
HOWMEDICA OSTEONICS CORP.,
Respondents.

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

**BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI**

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QUESTIONS PRESENTED FOR REVIEW

1. Whether jurisdiction exists where the issues before the district and circuit courts were questions relating to Michigan common law, not constitutional or federal questions.
2. Whether certiorari is appropriate where the district court and the circuit court properly applied the Restatement test that Petitioners proposed.
3. Whether a circuit split exists where the cases on which Petitioners rely are for various states and rely on that forum state's choice-of-law analysis, not Michigan's state choice-of-law analysis.
4. Whether analysis of common law choice-of-law procedures from various states rises to a level of national importance to dictate a grant of certiorari.

CORPORATE DISCLOSURE STATEMENT

Respondent Stryker Corporation is a publicly traded corporation, which is not a subsidiary or affiliate of a publicly owned corporation. Respondent Howmedica Osteonics Corp. is a wholly owned subsidiary of Respondent Stryker Corporation.

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Respondents adopt Petitioners' statement of the opinions below. However, Respondents further note that during oral argument before the Sixth Circuit, the circuit court addressed the application of Michigan's adoption of the Restatement (Second) Conflict of Laws § 187(2) analysis with respect to Respondents' and Petitioner Ridgeway's contractual choice-of-law provision, and further addressed various items upon which Respondents disagree with Petitioners' interpretation of the events. Accordingly, Respondents provide this Court with a certified transcript of oral argument before the Sixth Circuit. (*See* App. 1, attached hereto).

JURISDICTION

Respondents contest Petitioners' statement of jurisdiction of this Court, and argue that this Court lacks jurisdiction to grant Petitioners' Certiorari Petition as no genuine circuit split exists to merit this Court's review. Lacking jurisdiction, this Court should deny this Petition.

CONSTITUTIONAL OR STATUTES INVOLVED

Respondents contest Petitioners' statement of statutes involved, where Petitioners argue that the Restatement (Second) of Conflict of Laws § 187(2) (the "Restatement") is a statute. The Restatement, however, is neither a federal nor a state statute; rather, it is a treatise proffered by the American Law Institute. *See generally* Restatement of the Law - Conflict of Laws © 1934-2017, American Law Institute. While Michigan has adopted the Restatement (*Chrysler Corp. v. Skyline Indus. Servs., Inc.*, 528 N.W.2d 698, 703 (Mich. 1995) (adopting § 187(2))), it is one of only 23 total states that adopted it with respect to

contractual choice-of-law principles.¹ The issue presented before this Court is the Sixth Circuit’s analysis of Michigan’s common law treatment of the Restatement.

RESPONDENTS’ STATEMENT OF THE CASE

Respondents are medical device companies that develop and manufacture medical devices and technologies. (Appellee Br., 6th Cir. Dkt. 22 at 1.) On or around October 24, 2001, Petitioner Christopher Ridgeway (“Ridgeway”) accepted employment with Howmedica. As a condition of his employment, Ridgeway signed a form “Howmedica Leibinger Inc. d/b/a Stryker Leibinger Employee Non-Compete Agreement” (the “Agreement”). Contained within the Agreement were express Michigan choice-of-law and venue provisions, as well as certain restrictive covenants. (*Id.*) For the duration of Ridgeway’s employment (from October 2001 through September 2013), he served as Respondents’ sales representative in Louisiana, which was also his state of residence. (*Id.* at 2-3.) Ridgeway’s duties and responsibilities also required him to perform certain of his employment responsibilities, under the Agreement, in Michigan. (*Id.* at 24.) This required Ridgeway to: travel to Michigan repeatedly for employment purposes; report to Michigan-based management; and regularly communicate with Michigan-based support teams, which were essential to his ability to perform his duties and responsibilities. (*Id.*) Not only that, Respondents substantially performed their obligations under the Agreement by providing Ridgeway with essential services and information from Michigan by:

¹ Symeon C. Symeonides, *Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey*, 63 AM. J. COMP. L. 299, 351 (Table 2) (2015).

(a) assisting Ridgeway in recruitment and hiring for his territory; (b) sending him product samples and literature for sales calls; and processing sales orders and (c) shipping product to customers and to Ridgeway, based on Ridgeway's sales efforts. (*Id.* at pp. 23-24.)

In September 2013, Respondents learned that Petitioner Ridgeway agreed to become a distributor for a competitor, Biomet, in the same Louisiana territory he previously serviced on behalf of Respondents. (App. Br. at 3.) Respondents discovered that, during his employment, Ridgeway established his company, Petitioner Stone Surgical, LLC, which he used to leverage the distributorship agreement with Biomet for the sale of competing craniomaxillofacial products. (Case No. 13-cv-1066, W.D. Mich. Dkt. 23 at pp. 18-24.) Respondents also learned that Ridgeway, while still representing Respondents' products, was soliciting its customers and employees to move to Biomet. (*Id.*) As a result, Ridgeway was terminated. (*Id.*)

Following his termination, through his company, Stone Surgical, LLC, Ridgeway continued to solicit Respondents' customers on Biomet's behalf. Ridgeway also misappropriated Respondents' trade secret pricing, customer preferences, and supply levels, using it to create competitive bids on Biomet's behalf. (*Id.*)

Based on this and other activity, Respondents filed suit against Ridgeway in the Western District of Michigan, alleging breach of contract, breach of fiduciary duty, and misappropriation of trade secrets under the Michigan Uniform Trade Secrets Act. (Case No. 13-cv-1066, W.D. Mich., Dkt. 1.)

Shortly after Respondents filed suit in Michigan, Ridgeway moved to dismiss Respondents' Complaint, arguing, among other things, that Louisiana law

applied to the dispute. (*Id.* at Dkt. 37-38.) More specifically, Ridgeway argued against the authenticity of the non-compete agreement attached to Stryker's Complaint and, even if Stryker could show that he signed such an agreement, the forum selection clause was unenforceable against him because he lived and worked in Louisiana, and the state had a statute prohibiting forum selection clauses in contracts. (*Id.*) In making his motion, Ridgeway did not argue in favor of application of a § 187(2) analysis or any other conflict of law procedure, simply arguing that the forum-selection clause was unenforceable under Louisiana law. (*See id.*)

In response, Respondents argued that the forum selection clause was enforceable under federal law and, even if it was necessary to apply state law, a Michigan choice-of-law analysis still resulted in the application of Michigan law, pursuant to the state's adoption of the Restatement §§ 187, 188. (W.D. Mich., Dkt. 50-51, at PageID887-893.) Respondents further argued that, the evidence showed that Ridgeway admitted the signature on the Agreement was his, that he sent the fax, in which he wrote: "*Here are signed copies of my offer letter, non-compete agreement, and code of conduct,*" and that Ridgeway simply did not want to admit that he returned his form Agreement signature page. (App. E at 45a.) Finally, Respondents argued that, pursuant to the Court's *Atlantic Marine* decision, courts should honor parties' contractual choice-of-law and venue provisions in "all but the most unusual cases" to serve the interests of justice. (Dkt. 59, citing *Atlantic Marine Constr. Co. v. United States District Court for the Western District of Texas*, 134 S. Ct. 568 (2013).)

Reviewing the evidence, the district court held that Respondents made a prima facie showing that Ridgeway signed the Agreement attached to Stryker's Complaint, and by doing so, Ridgeway consented to the jurisdiction of the Court. (Pet'rs' App. E at 47e.) The district court began by commenting that, under federal law, forum-selection clauses are prima facie valid. (*Id.* at 49a-50a.) But under Sixth Circuit law, the district court stated that when a forum selection clause is the *only* basis for the exercise of personal jurisdiction, the issue is governed by state law rather than federal procedural law. (*Id.* at 50a.) While Ridgeway did not argue that the clause would be unenforceable under Michigan law, he simply argued that Louisiana rather than Michigan law applied. (*Id.*) The district court engaged in a conflict of laws analysis under § 187. (*Id.* at 52a.) After analyzing the provision under the Restatement, the district court held that (a) Louisiana did not have a materially greater interest in the litigation and, (b) application of Michigan law would not be fundamentally contrary to Louisiana public policy. (*Id.* at 52a-53a.) Ultimately, the district court stated that Ridgeway had "not persuaded the Court that Michigan courts would choose to apply Louisiana's procedural provisions over its own" and that the Court could, in fact, exercise jurisdiction over Ridgeway pursuant to the forum selection clause in the Agreement. (*Id.*) Thereafter, Ridgeway did not otherwise raise §187 or argue that Louisiana had a materially greater interest or a fundamental public policy barring application of Michigan law. (*See, e.g.,* Summ. J. Brs. at Dkt. Nos. 119, 327; *see also* Pet'rs' App. C.)

Ridgeway then filed a ten-count counterclaim against Stryker, most of which was based on the argument that Respondents could not demonstrate

that he had signed a non-compete agreement. (Case No. 13-1066, Dkt. 76.) The Counterclaim asserted claims against Stryker for violations of the Louisiana Unfair Trade Practices Act (LUTPA); fraud under Louisiana law; tortious interference under Louisiana law; tortious interference under Michigan law; slander/defamation under Michigan law; fraud under Michigan law; detrimental reliance under Louisiana and Michigan law; abuse of process; attorneys' fees under LUTPA; and civil conspiracy. (*Id.*)

While the Michigan action was pending against Ridgeway, Stone Surgical, LLC, filed a complaint against Respondents in the Eastern District of Louisiana ("Louisiana Litigation") asserting claims similar to those sought by Ridgeway in Michigan. (*See Stone Surgical, LLC v. Stryker, et al.*, No. 13-6315, Dkt. 1 (filed E.D. La. Nov. 1, 2013.) (App. A, at 5a.) Each of Stone Surgical's claims against Respondents was based on Respondents attaching a copy of Ridgeway's non-compete Agreement to their original Complaint in the Michigan litigation, and Ridgeway's arguments disputing the genuineness of the document. (Case No. 13-6315, Dkt. 1.)

Respondents moved to dismiss the action and, if necessary, transfer venue pursuant to the first-to-file rule. (*Id.* at Dkt. 9.) On August 19, 2014, the Eastern District of Louisiana entered an order finding that the case was substantially related to the Michigan Litigation, dismissing the case, and transferring it to the Western District of Michigan. (*Id.* at Dkt. 36.) The Louisiana Litigation was transferred to the Western District of Michigan the following day (Dkt. 36) and consolidated with the Michigan action against Ridgeway. (Case No. 13-1066, Dkt. 94.)

In February 2016, the matter proceeded to a ten-day jury trial on Respondents' claims against Ridgeway and Petitioners' claims against Respondents. (Case No. 13-cv-1066 Dkt. 764-773.) Prior to the jury deliberations, the district court determined that Michigan law applied to Respondents' claims against Ridgeway, based on the Agreement's express Michigan choice-of-law clause. (Trial Tr., RE773, PageID19945-19947.) Absent any objection from Petitioners, the district court provided jury instructions on Respondents' claims to the jury based on Michigan law. (*Id.*) The jury returned a complete verdict in favor of Respondents and against Petitioners, including rendering a defense verdict for Stryker on Ridgeway's counterclaims and Stone's claims. (Case No. 13-cv-1066, Dkt. 735, 740.)

Thereafter, Petitioners timely filed their notices of appeal in the Sixth Circuit. Petitioners sought appellate review of, among other things, the district court's enforcement of the Agreement's Michigan choice-of-law provision. (Appellant Br., Dkt. 31.) Petitioners argued that Louisiana law should apply to the Agreement, and further argued that the Agreement was not legal under Louisiana law. (*Id.*) In presenting that argument, Petitioners conceded that a federal court exercising diversity jurisdiction must apply the rule of the state in which it sits—here, Michigan—under *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941). (*See id.*) At no time did Petitioners cite or rely upon the circuit court opinions which they now contend causes a circuit split with the 6th Circuit's ruling. (*Compare* App. Br. Dkt. 31 *with* Pet'rs.' Br. at 5-6.)

Because Michigan adopted the Restatement (Second) of Conflict of Laws analysis, the district court and the Sixth Circuit applied Michigan's choice-of-law principles. (*See* Pet'rs.' App. A at 9a; App. C at 30a; App. E at 52a.)

At no point during the proceedings, including now, did Petitioners argue that application of Michigan’s choice-of-law principles was in error. (*See id.*; *see also* Respondents’ App. 1.) In particular, to overturn application of Michigan law, Respondents were required to show that: (a) Louisiana law would otherwise apply if no choice-of-law provision existed; (b) Louisiana had a materially greater interest in the outcome of the lawsuit than Michigan; and (c) enforcing Michigan law would violate a Louisiana fundamental public policy. Restatement (Second) Conflict of Laws §187(2).

After full briefing and extensive oral argument—where Petitioners never contested the applicability of the Restatement test—the Sixth Circuit applied the same analysis and enforced the Agreement’s Michigan choice-of-law clause. In particular, during oral argument, the Sixth Circuit repeatedly asked Petitioners to identify what evidence constituted Louisiana having a “materially greater interest” than Michigan, aside from the fact that it had a statute addressing the use of non-compete agreements. (App. 1.) In response, Petitioners repeatedly argued that because Louisiana had a statute addressing the use of non-compete agreements, it therefore had a fundamental public policy against such agreements and, to that end, had a materially greater interest than Michigan. (*See id.*)

The Sixth Circuit affirmed the district court’s findings and denied Petitioners’ appeal. (*See* Op. at Pet’rs’ App. A; Oral Argument Tr., App. 1). In reaching its decision, the Sixth Circuit analyzed the Restatement’s “materially greater interest” element, and found that Louisiana did not have a materially greater interest than Michigan in the enforcement of the Agreement against Petitioner. *See id.* Failing that element, the Sixth Circuit held that it did not need to

consider the remaining factors. (See Pet'rs' App. A.) Following this decision, the Petitioners timely filed the instant petition for certiorari.

REASONS FOR DENYING THE PETITION

The following is a summary of the primary reasons why this Court should deny the Petition:

1. No jurisdiction exists for this Court to grant Petitioners' Certiorari Petition because the issues before the district and circuit courts were questions relating to Michigan common law, not constitutional or federal questions.

2. The holdings in the lower courts were correct, and no circuit court split exists, where the various cited circuit courts have all applied different states' treatment of the choice-of-law question in a proper and consistent manner.

3. The issues raised in Petitioners' Petition are not of national importance as they involve a unique claim arising out of a unique set of facts.

These and other reasons for denial of the Petition are set forth more fully below.

I. NO JURISDICTION EXISTS TO GRANT THE PETITION.

This Court is a court of limited jurisdiction. "It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or by Congress, must be neither disregarded nor evaded." *Owen Equip. & Erection Co. v. Kroger*, 437 U.S. 365, 374 (1978). To better articulate when the Court's jurisdiction is triggered, Supreme Court Rule 10 and 28 U.S.C. §§1251-1260 were authored. Here, this

Court's jurisdiction is not triggered by §§1251 through 1260, leaving only Supreme Court Rule 10 as a possible avenue.

Indeed, Rule 10 states:

Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:

(a) a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for the exercise of this Court's supervisory power; . . .

(c) . . . a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

This Court should grant review "only when the circumstances of the case satisfy us that the importance of the question involved, the necessity of avoiding conflict, or some matter affecting the interest of this nation demand such exercise." *Camreta v. Greene*, 131

S. Ct. 2020, 2033 (2011) (citing *Forsyth v. City of Hammond*, 17 S. Ct. 665, 669 (1897)).

Here, while Petitioners argue that a circuit split exists, such is not the case, as the issue reviewed by the Sixth Circuit is not a federal question, and because it was not the same as that reviewed by the other circuit courts.

A true or “square” circuit court conflict exists where circuit courts would reach different results given the same set of operative facts.² However, here, the cases cited by Petitioners do not involve the same set of law, let alone the same set of operative facts. In bringing their petition, Petitioners cite nine circuit court opinions, which they argue involve the same issues and create a circuit split. None of the nine cases, however, deals with Michigan’s application of its choice-of-law procedures. Those cases are and show:

- *Cardoni v. Prosperity Bank*, 805 F.3d 573, 585-86 (5th Cir. 2015) (applying Texas choice-of-law principles);
- *Wright-Moore Corp. v. Ricoh Corp.*, 908 F.2d 128 (7th Cir. 1990) (applying Indiana choice-of-law principles);

² Ruth A. Moyer, *Disagreement About Disagreement: The Effect of A Circuit Split or "Other Circuit" Authority on the Availability of Federal Habeas Relief for State Convicts*, 82 U. CIN. L. REV. 831, 865 (2014) (citing Philip Allen Lacovara, *FEDERAL APPELLATE PRACTICE* 648, 675 (2008)); *see also* Michael Duvall, *Resolving Intra-Circuit Splits in the Federal Courts of Appeal*, 3 FED. CTS. L. REV. 17, 19 (2009) (explaining that an intra-circuit split is characterized by courts having reached inconsistent conclusions when presented with the same issue, similar material facts, and the same controlling law).

- *DCS Sanitation Mgmt, Inc. v. Castillo*, 435 F.3d 892, 895 (8th Cir. 2006) (applying Nebraska choice-of law principles);
- *Ruiz v. Affinity Logistics Corp.*, 667 F.3d 1318 (9th Cir. 2012) (applying California choice-of-law principles);
- *Electrical Distributors, Inc. v. SFR, Inc.*, 166 F.3d 1074 (10th Cir. 1999) (applying Utah choice-of-law principles);
- *King v. PA Consulting Group, Inc.* 485 F.3d 577 (10th Cir. 2007) (applying New Jersey choice-of-laws principles);
- *Nordson Corp. v. Plasschaert*, 674 F.2d 1371 (11th Cir. 1982) (applying Georgia choice-of-law principles);
- *Coface Collections North America, Inc. v. Newton*, 430 F. App'x 162 (3d Cir. 2011) (applying Delaware choice-of-law principles); and
- *Barnes Group, Inc. v. C&C Products, Inc.*, 716 F.2d 1023, 1031 (4th Cir. 1993) (applying Ohio choice-of-law principles).

This list shows that none of these circuit courts considered Michigan law, but rather other states' conflict-of-law principles. This, however, does not create jurisdiction for this Court.

It is a well-settled rule that the Court lacks jurisdiction to hear cases involving a disputed judgment based on state law grounds. *See, e.g., Ruhlin v. New York Life Ins. Co.*, 304 U.S. 202, 206 (1938) (“As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a

permissible difference of opinion in the state courts.”).³ Petitioners’ alleged “circuit split” is based entirely on various circuit’s application of state law to specific facts of those cases, involving a private contract. On its face, this does not trigger this Court’s jurisdiction.

Moreover, Petitioners concede that their Petition raises a Michigan state-law issue. (Pet. at 4.) In *Klaxon Co. v. Stentor Elec. Mfg. Co.*, 313 U.S. 487 (1941), this Court held that federal courts, sitting in diversity, are governed by the conflict-of-laws rules of the forum states in which they sit. Importantly, “[a] state has the same freedom to adopt its own rules of Conflict of Laws as it has to adopt any other rules of law. Conflict of Laws rules, when adopted, become as definitely a part of the law as any other branch of the state’s law.” *Int’l Paper Co. v. Ouellette*, 107 S. Ct. 805, 820 (1987) (Brennan, J., dissent). This means that the issue presented to the district and circuit court were uniquely state-court issues, and consideration of how other circuit courts treated other states’ conflict-of-law principles are irrelevant to how Michigan addresses the same question. Thus, without identifying a federal question or a genuine circuit split, this Court lacks jurisdiction to grant Petitioners’ Certiorari Petition.

³ See also Justice John Harlan, *Some Aspects of the Judicial Process in the Supreme Court of the United States*, 33 AUSTL. L.J. 108, 112 (1959) (“[E]ven where a ‘true’ conflict may be said to exist, certiorari will sometimes be denied where it seems likely that the conflict may be resolved as a result of future cases in the Courts of Appeals, or where the impact of the conflict is narrowly confined and is not apt to have continuing future consequences, ... The nub of all these qualifications is that a conflict of decisions may safely be relied on as a ground for certiorari **only in instances where it is clear that the conflict is one that can be effectively resolved only by the prompt action of the supreme court alone.**”) (Emphasis added).

What Petitioners essentially present is their disagreement *with the outcome* of the district court's and circuit court's rulings regarding the enforcement of the Agreement's choice-of-law provision. However, again, this Court does not grant certiorari to "review evidence and discuss specific facts," *United States v. Johnston*, 268 U.S. 220, 227 (1925), or interfere with decisions that depend on interpretation of factual circumstances, *Fed. Trade Comm'n v. Am. Tobacco Co.*, 274 U.S. 543, 544 (1927), and it should not depart from that general practice now.

II. THE HOLDINGS IN THE LOWER COURTS WERE CORRECT AS THOSE COURTS PROPERLY APPLIED THE RESTATEMENT, AND NO DIVIDE EXISTS OVER THE ENFORCEABILITY OF CONTRACTUAL CHOICE-OF-LAW PROVISIONS WITHIN THE CIRCUITS.

It is important to note that Petitioners do not take issue with the lower courts' application of Michigan's choice-of-law rules. Rather, Petitioners misrepresent the Sixth Circuit's analysis, and, ultimately, dispute the outcome. Petitioners' arguments are flawed for two specific reasons. First, Petitioners argue that a circuit split exists based on the incorrect premise that the Sixth Circuit did not embrace the "materially greater interest" analysis required by § 187(2)(b). (Pet. at 5-6.) By doing so, Petitioners selectively parse out portions of the Sixth Circuit opinion, misconstruing the circuit's analysis. Contrary to Petitioners' representations, the circuit primarily focused on its analysis of the "materially greater interest" element. Second, Petitioners argue that because Louisiana limits how non-compete agreements are used (but does not completely abolish them), then enforcing *any* non-compete

(reasonable or not) is void against Louisiana public policy and should not be enforced. (Pet. at 6-8.) Both arguments are incorrect, contravene well-settled circuit court law, and the Sixth Circuit's interpretation of the facts of this case.

A. The Lower Courts Properly Applied the Restatement Analysis to the Agreement's Choice-of-Law Provision.

As a general matter, courts generally defer to parties' contractual choice-of-law clauses because they are presumed to be representative of the parties' express intent. *See, e.g., R.M. Taylor, Inc. v. General Motors Corp.*, 187 F.3d 809, 812 (8th Cir. 1999) (discussing cases); *Kuehn v. Childrens Hosp., Los Angeles*, 119 F.3d 1296, 1301 (7th Cir. 1997) ("Choice of law clauses are common and when reasonable are enforced."). While courts have adopted varying analyses in which to examine the enforceability of choice-of-law clauses, less than a majority of states have adopted the Restatement.⁴ Michigan is one such state.

The Restatement provides, in relevant part:

(2) The law of the state chosen by the parties to govern their contractual rights will be applied, *even if the particular issue is one which the parties **could not have resolved** by an explicit provision in their agreement directed to that issue*, unless either

(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater

⁴ Symeon C. Symeonides, *Choice of Law in the American Courts in 2014: Twenty-Eighth Annual Survey*, 63 AM. J. COMP. L. 299, 351 (Table 2, counting 23 states) (2015).

interest than the chosen state in the determination of the particular issue and which, under the rule of §188, would be the state of the applicable law in the absence of an effective choice of law by the parties.

Restatement (Second) of Conflict of Laws § 187(2) (1971) (emphasis added). In other words, a choice-of-law clause will not apply if the chosen law would be contrary to the fundamental public policy of a state with a materially greater interest than the chosen state, *if* that state would be the one with the most significant relationship on that issue. § 187(2)(b). Thus, as set forth in § 187(2)(b), a court will apply a choice-of-law provision in a contract unless a party can prove each of the following requirements:

- (1) Another state's law would apply under Restatement §188 in the absence of the choice-of-law provision;
- (2) Application of chosen state law would be contrary to a fundamental public policy of another state; **and**
- (3) The other state has a materially greater interest than the chosen state law in determining the issues of the litigation.

See § 187(2)(b), *see also* comment g.

There can be no dispute that the Sixth Circuit engaged in a thorough Restatement analysis with respect to the choice-of-law provision, while focusing on the “materially greater interest” factor. Contrary to Petitioners’ argument, Michigan’s connection to the parties’ contractual relationship was not limited to the fact that it was Stryker’s place of incorporation and principal place of business. (*See* Pet. at 2-3.)

Indeed, Petitioner Ridgeway's entire 12-year employment relationship was with a Michigan-based company, where he served in a managerial position, made multiple trips to Michigan, and accessed and utilized Respondents' trade secrets, housed on Michigan servers. (*See supra*; *see also* Pet'rs' App. A.)

The Sixth Circuit similarly rebuffed Petitioners' proposition that Michigan had a limited interest in enforcing the Agreement, holding that:

While it is true that the state with the most significant relationship to the employment contract and non-compete between Stryker and Ridgeway is Louisiana, it does not necessarily follow that Louisiana's interest is materially greater than that of Michigan. This analysis is distinct from determining which state's law would have applied absent a choice-of-law clause. And Michigan certainly has an interest in "the determination of [this] particular issue." *See id.* Stryker is a Michigan corporation, with its headquarters and management centered there. Michigan has a strong interest in protecting its businesses from unfair competition. Stryker will also suffer economic loss as a result of Ridgeway's breach of the non-compete agreement—something Michigan surely has an interest in protecting Stryker, a Michigan company, from suffering.

* * *

Absent such evidence that Louisiana's interest was not just greater but materially greater, there is no reason to disturb

the parties' choice of Michigan law

We cannot confidently say that the district court should have applied the exception under § 187(2) and disregarded the Michigan choice-of-law clause in favor of applying Louisiana law.

Although Michigan law favors non-competes and Louisiana law severely restricts them, we need not opine on whether these two fundamental policies conflict. ***Determining that Louisiana's interests in determining the validity of the non-compete are not materially greater than Michigan's ends our § 187(2) inquiry.*** The district court properly applied Michigan law, pursuant to the choice-of-law agreement between Ridgeway and Stryker.

(Pet'rs' App. A at 13a-14a (emphasis added, internal citations omitted).)

The Sixth Circuit's Opinion is also borne out of extensive questioning at oral argument regarding what constitutes a "materially greater interest." For example, during oral argument Justice McKeague commented:

But just because a state has a statute that says we favor something or we disfavor something, that alone can't possibly be resulting in their having a materially greater interest.

So, in other words, you're about to say that Louisiana said we don't like non-competes and we really mean it. Okay. We get that. I don't think there's any question about that. That doesn't make it material – that does not mean Louisiana has a materially greater

interest or no national corporation could ever have a uniform non-compete across the country that would bind people to their law when they were doing business in a state like Louisiana, that said we don't like them and we mean it.

. . . . [T]here has to be something more than Louisiana's policy to give them not only a significant interest, which they have, but a materially greater interest than Michigan.

(*See App. 1 at 6a-7a.*)

Petitioners ignore the significance of the modifiers “materially” and “fundamental” in the two-step analysis under the Restatement. As a result, Petitioners conflate the two inquiries in § 187(2) and assume that a state (Louisiana) has a materially greater interest *because* it has a “public policy” that limits (but does not forbid) non-compete agreements. *See id.* The circuit court seized on Petitioners’ faulty reasoning and misinterpretation of the Restatement analysis, an obstacle Petitioners could not overcome in the Sixth Circuit and similarly cannot overcome now. Instead, the Sixth Circuit concentrated on the express, conjunctive language of the Restatement test, and rejected Petitioners’ interpretation. (*See Op. at 8-9*). Indeed, the Court aptly remarked:

[W]e are in a multi-state union here, where you're trying to assess the interests of two different states. And looking at this transaction, there seems to be no question that both states have an interest. [Appellant] happens to think that Louisiana's is greater and it trumps because Louisiana said it's a fundamental policy of that state.

The end result of that argument is exactly contrary to Comment E to 187(2).⁵ It would simply mean that if a state says something is fundamental, that will always trump the otherwise justifiable expectations of the parties.

And I can find no authority that says -- I can find the authority that says what Louisiana thinks about the issue. I get that. I agree with you on that. But I can't find any authority that says it's fundamental to Louisiana, that means that trumps the expectations of Michigan or any other state. Where do I look to find that authority outside of Louisiana law?

(App. 1 at 8a-9a, emphasis added.) Ultimately, Petitioners' counsel was forced to concede that no such authority exists. (*See id.* at 36-37.) Consequently, the language of the Restatement mandates that each factor—materially greater interest and fundamental public policy—be looked at separately, and not as a conjoined equation as proposed by Petitioners.

⁵ § 187(2), Comment e: "Rationale: Prime objectives of contract law are to protect the justified expectations of the parties and to make it possible for them to foretell with accuracy what will be their rights and liabilities under the contract. These objectives may best be attained in multistate transactions by letting the parties choose the law to govern the validity of the contract and the rights created thereby. In this way, certainty and predictability of result are most likely to be secured. Giving parties this power of choice is also consistent with the fact that, in contrast to other areas of the law, persons are free within broad limits to determine the nature of their contractual obligations." Restatement (Second) of Conflict of Laws § 187 (1971), comment (e).

Accordingly, the Sixth Circuit (as well as the district court) properly applied Michigan’s conflict-of-law rules.

B. Even Assuming the Cases on which Petitioners Rely Involved Circuit Court Analysis of Identical Law, Which They Did Not, No Split Exists Between Those Courts.

Petitioners’ second argument also fails. Petitioners wrongly conclude that, because Louisiana *limits* its use of non-competes (*i.e.*, setting forth certain reasonability requirements), which Petitioners argue constitute a fundamental public policy,⁶ then Louisiana has a materially greater interest in any matter in which that policy is implicated. (Pet. at 6.) In essence, Petitioners argue for a disjunctive test under § 187(2), where if Petitioners show a fundamental public policy, then a materially greater interest is automatically found.

This same argument—as discussed above—was expressly rejected by the Sixth Circuit. Indeed, as the Sixth Circuit wrote in *Johnson v. Ventra Group, Inc.*, 191 F.3d 732, 740 (6th Cir. 1999), such a disjunctive test as Petitioners seek to advance would cause:

“[t]he fact . . . that a different result might be achieved if the law of the chosen forum is applied does not suffice to show that the foreign law is repugnant to a fundamental policy of the forum state. If the situation were otherwise, and foreign law could automat-

⁶ Respondents also disagree with Petitioners’ asserted claim as to what a “fundamental public policy” constitutes. Indeed, the Restatement comment (g), states that: [n]o detailed statement can be made of the situations where a ‘fundamental’ public policy of the state of the otherwise applicable law will be found to exist.”

ically be ignored whenever it differed from the law of the forum state, then the entire body of law relating to conflicts would be rendered meaningless.

In support of this argument, Petitioners claim that the circuit decisions they cite followed the analysis they now propose. However, a review of those decisions show that each circuit treated § 187(2) as a conjunctive test. And, identically to the Sixth Circuit, the Fourth, Fifth, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits all performed an identical analysis as the Sixth Circuit did in performing their own Restatement § 187(2) analysis.

For example, in *Barnes Group, Inc. v. C&C Products, Inc.*, 716 F.2d 1023, 1031 (4th Cir. 1993), the Fourth Circuit noted that, where contractual choice-of-law clauses diverge “merely in degree” from the state whose law would otherwise apply, this does not mean that such law impinges a fundamental policy of that state. *Id.* There, the Fourth Circuit considered the enforceability of an Ohio choice-of-law provision to sales agents’ non-compete agreements in the states of Alabama, Louisiana, Maryland, and South Carolina. *Id.* Focusing on the policy element of the Restatement analysis, the court noted that the “reasonableness” test under the laws of South Carolina, Maryland, and Louisiana, was so similar to that of Ohio that those state laws did not have a fundamental public policy contrary to Ohio law and the choice-of-law provision would be enforced. *Id.* at 1031-1032. The only outlier was Alabama, which viewed non-competes, reasonable or not, as void against public policy. *Id.* at 1032. Therefore, because Alabama barred enforcement of non-compete agreements under any circumstances,

the Fourth Circuit held that this overrode the Ohio choice-of-law clause.

The remaining circuit court opinions similarly do not advance Petitioners' position or demonstrate a split. Contrary to Petitioners' argument, the "majority of circuits" did not hold that a "state's fundamental public policy of protecting its citizens' ability to earn a living, and that state's interest in regulating the work that occurred within its borders, greatly outweighed the chosen state's generalized interest in enforcing contracts." (Pet. at 6.) Instead, each appellate court engaged in the forum state's adoption of the Restatement's two-step analysis:⁷

- Fifth Circuit: *Cardoni*, 805 F.3d at 585-86 (rejecting Texas choice-of-law provision in favor of Oklahoma because Oklahoma had materially greater interest as it had more significant relationship with parties and clear fundamental public policy against enforcing non-competition agreements unless dealing with the sale of goodwill or the dissolution of a partnership);
- Seventh Circuit: *Wright-Moore Corp.*, 908 F.2d at 132-33 (rejecting New York choice-of-law clause in franchise agreement because Indiana had materially greater interest with the most contacts in the state and a fundamental public policy against allowing choice-of-law provisions

⁷ Each circuit court acknowledged that no definitive rule exists for when "a 'fundamental' policy of the state of the otherwise applicable law will be found to exist." Restatement § 187, comment g. The courts further recognized that application of one state's law is not necessarily contrary to the fundamental policy of another state merely because it would lead to a different result. *See supra*.

to control Indiana franchises, codified in a statute making them unlawful);

- Eighth Circuit: *DCS Sanitation Mgmt, Inc.*, 435 F.3d at 895-96 (upholding district court decision to apply Nebraska law over Ohio choice-of-law provision because Nebraska had materially greater interest based on substantial relationship to the parties and performance of contract and Nebraska courts “expressly have rejected judicial reformation of non-compete agreements and application of Ohio law would violate a fundamental policy of Nebraska law.”);
- Ninth Circuit: *Ruiz*, 667 F.3d at 1324 (applying California law over chosen Georgia law in trucking company agreements, because California had materially greater interest in outcome of litigation and Georgia law directly conflicted with a fundamental California policy meant to protect workers);
- Tenth Circuit: *Electrical Distributors, Inc.*, 166 F.3d at 1084 (holding that, because Utah had materially greater interest in assessing validity of non-compete prohibiting its resident from competing for period of 7 years, and because it had fundamental policy restricting non-competes subject to certain requirements, Colorado choice-of-law provision could not be enforced);
- Tenth Circuit: *King*, 485 F.3d at 586-87 (application of New Jersey law as specified in non-compete agreement was proper because agreement would be enforceable under either

state’s law and, therefore, did not run contrary to Colorado public policy)⁸;

- Eleventh Circuit: *Nordson Corp.*, 674 F.2d at 1375-76 (honoring Ohio choice-of-law provision in employment agreement because Georgia did not have a materially greater interest and Georgia court would not find it “particularly distasteful” to enforce the agreement).

Likewise, the Third Circuit reasoning is closely aligned with that of the other circuit courts allegedly “split” in their application of the Restatement. In *Coface Collections N. Am., Inc. v. Newton*, 430 F. App’x 162 (3d Cir. 2011), the Third Circuit considered the enforceability of a Delaware choice-of-law clause in a non-compete agreement, where the appellant argued that the contract was unenforceable and Louisiana law should govern the dispute. *Id.* at 163. The circuit court found neither exception applied under § 187(2) to override Delaware law. First, the appellate court found that no state had a “materially greater interest” than Delaware, because Coface was incorporated in Delaware, did business internationally, and, pursuant to Delaware statute, was presumed to have a significant interest in enforcing choice-of-law clauses designating Delaware law to govern. *Id.* at 167-68. While Louisiana had many “geographical contacts” with the Defendant, those contacts did not amount to a *materially* greater interest in determining the effect of the non-compete provision. *Id.* at 168. Because the

⁸ While Petitioners’ correctly note that the Tenth Circuit found that Colorado did have a materially greater interest in the parties’ contractual agreement, because both elements of the Restatement test had not been satisfied (*i.e.*, violation of a fundamental public policy), the New Jersey choice-of-law provision was enforced. (*Cf.* 485 F.3d at 586-589 *with* Pet. at 7 (citing *King*).)

first portion of the test was unsatisfied, the appellate court did not need to reach the question of whether Delaware law violated a fundamental policy in Louisiana. *Id.* Even so, the Third Circuit noted that “the high threshold for establishing such a ‘fundamental policy’ in Louisiana would likely not be met.” *Id.*

So, unlike Petitioners’ argument, the circuit courts are united in their interpretation of the Restatement, and interpret § 187(2) as requiring a two-step analysis. In order to invalidate a contractual choice-of-law provision, all of the circuits found that the movant must show that another state has a materially greater interest in the matter and application of the contractually-chosen law would violate a fundamental public policy of the other state. As no circuit split exists, Petitioner’s Certiorari Petition should be denied.

III. ABSENT A CIRCUIT SPLIT, THERE IS NO FRUSTRATION OF CONFLICT-OF-LAWS PRINCIPLES TO MERIT THE GRANT OF THE PETITION.

As a state-law issue, Petitioners’ Certiorari Petition does not present a conflict that concerns the attention of this Court. Petitioners misrepresent the issue as one that is “guaranteed to recur in commerce” between states with conflicting fundamental public policies against non-compete agreements. (Pet. at 8-10.) Petitioners base their supplication on the false premise that corporations have superior bargaining power over individuals and can “insulate” themselves from public policies of the states that do not house the corporation. (*Id.* at 10-11.) Consequently, Petitioners argue that the perceived misapplication of the Restatement negatively affects interstate commerce and modern employment. *Id.* This argument is not grounded in law or fact and can be easily dismissed.

First, it is well-established that corporations and individuals are treated equally under the law. This Court has stated that “a state has no more power to deny to corporations the equal protection of the law than it has to individual citizens.” *Atchison, T. & S.F.R. Co. v. Matthews*, 174 U.S. 96, 109 (1899). Petitioners’ contention that corporations are somehow protected from a court’s decision to override contractual choice-of-law clauses is not only baseless, but directly contradicted by the authority discussed herein. Moreover, no aspect of the Restatement analysis requires a court to consider a corporation’s interests versus that of an individual. Quite the opposite, the analysis is focused solely on state interests with respect to its citizens (which includes corporations *and* individuals).

Second, as Petitioners note, the use of non-compete agreements is not novel to modern employment practices. (Pet. at 8-9.) Similarly, a federal court’s analysis of state conflict-of-laws principles is not a new, legal concept requiring guidance from this Court. On the contrary, aside from the nine (9) circuit court opinions discussed *supra*, to date, only five (5) other circuit court opinions (aside from the Sixth Circuit opinion at issue) have issued regarding enforcement of choice-of-law clauses in non-compete agreements under the Restatement.⁹ Each of these circuits

⁹ See *Herring Gas Co., Inc. v. Magee*, 22 F.3d 603, 609 (5th Cir. 1994) (honoring Mississippi choice-of-law clause finding Louisiana did not have materially greater interest in enforcement of non-compete agreement); *IBM Corp. v. Bajorek*, 191 F.3d 1033, 1042 (9th Cir. 1999) (enforcing New York choice-of-law provision, and finding that, because New York law did not violate a California fundamental public policy, no need existed to examine which state had a “materially greater interest”); *Ciena Corp. v. Jarrard*, 203 F.3d 312, 324 (4th Cir. 2000) (upholding district court

correctly applied the *Klaxon* rule and, for those states that had adopted the Restatement § 187 test, the circuit properly applied the two-step analysis. Therefore, Petitioners’ prediction that this issue is likely to congest federal courts and frustrate interstate commerce is not supported by the case law to date.

Petitioners seemingly ask this Court to grant the Petition to create a national rule with respect to interpretation of choice-of-law provisions and override a state’s interest in enacting its own laws. Such a proposition has been repeatedly rejected by this Court. *See, e.g., Healy v. Beer Institute*, 491 U.S. 324, 335-336 (1989) (the Constitution has a “special concern ... with the autonomy of the individual States within their respective spheres.” (footnote omitted)). This Court honors the principles of state sovereignty and recognizes that it is not in the Court’s province to legislate. *See Ziglar v. Abbasi*, 137 S. Ct. 1843, 1857 (2017) (“When an issue ‘involves a host of considerations that must be weighed and appraised,’ it should be committed to ‘those who write the laws’ rather than ‘those who interpret them.’”). This is simply not a case

application of Delaware choice of law to non-compete agreement because Delaware had materially greater interest than Maryland); *Hunter Group, Inc. v. Smith*, 9 F. App’x 215 (4th Cir. 2001) (holding Georgia law—rather than chosen Maryland law—applied to determine whether non-compete provisions were enforceable because Georgia had far greater relationship to the employment relationship and the non-compete agreements violated Georgia’s fundamental public policies); *Equifax Services, Inc. v. Hitz*, 905 F.2d 1355 (10th Cir. 1990) (upholding Kansas choice-of-law provision, finding that California did not have materially greater interest in enforcement of non-compete event though it was employee’s state of residence and place of performance under the contract).

in which national interests are implicated to merit review by this Court.

Accordingly, lacking either jurisdiction or a real controversy, this Court should deny the Petitioners' Certiorari Petition.

CONCLUSION

This Court should deny Petitioners' Petition for a Writ of Certiorari as the Court lacks jurisdiction and because no conflict exists among the circuit courts. First, this Court lacks jurisdiction because no circuit split exists because the cases cited involved various circuits applying the state law choice-of-law principles of states other than Michigan. Based on this, Petitioners fail to meet the requirements of Supreme Court Rule 10.

Second, the Sixth Circuit properly applied Michigan's choice-of-law rules, and, even assuming the law between the circuits was identical, no circuit split exists. The Sixth Circuit properly applied Restatement § 187(2). It considered whether Louisiana had a materially greater interest than Michigan in the litigation, and, finding it did not, did not reach the other elements of the analysis. Moreover, that analysis is consistent with the reasoning of the Sixth Circuit's sister circuits, all of which evaluated the facts of their cases in analyzing the questions of whether the non-forum state had a materially greater interest in the litigation and whether application of the forum state's laws violated a fundamental public policy. Equal application with different results does not a circuit split make.

Finally, this is not a case that affects national interests or affects interstate commerce to warrant Supreme Court review. It presents a discrete issue,

involving application of choice-of-law principles in an employment context. For these reasons, Petitioners' petition should be denied.

Respectfully submitted,

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November 13, 2017

APPENDIX

1a

APPENDIX 1

[1] UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

Nos. 16-1434/1654

16-1434

STONE SURGICAL, LLC,
Plaintiff-Appellant,

v.

STRYKER CORPORATION;
HOWMEDICA OSTEONICS CORPORATION,
Defendants-Appellees.

16-1654

STRYKER CORPORATION;
HOWMEDICA OSTEONICS CORPORATION,
Plaintiffs-Appellees,

v.

CHRISTOPHER RIDGEWAY,
Defendant-Appellant.

CERTIFIED TRANSCRIPT of digital audio file of
the Appeal from the United States District Court for
the Western District of Michigan at Grand Rapids,

Nos. 1:13-cv-01066, 1:14-cv-00889, Robert Holmes Bell, District Judge, Argued February 1, 2017, [2] Decided and Filed May 24, 2017, before GIBBONS, ROGERS, and McKEAGUE, Circuit Judges.

PRESENT:

MR. LOUIS LaCOUR, JR.,
Appellant Attorney,

- and -

MR. MICHAEL D. WEXLER,
Appellee Attorney

TRANSCRIBED BY:

CAROLYN J. HAWKES, C.S.R. No. 084-003296.

[3] SPEAKER 1: Case 16-1434, Stone Surgical, LLC, versus Stryker Corporation, et al., and 16-1654, Stryker Corporation versus Christopher Ridgeway.

Mr. LaCour, you may proceed for the Appellant, argument not to exceed 15 minutes per side.

MR. LaCOUR: Thank you. Good morning, Your Honors. Louis LaCour here today on behalf of the Appellant, Christopher Ridgeway. I'd like to reserve three minutes of my time for rebuttal. It's a pleasure to be before the Court today.

Your Honors, the judgment of the District Court in this case suffers from multiple defects, we believe, the most prominent of which are the use of an incorrect body of state law, the lack of a legal basis for the assertion of jurisdiction, and the foreclosure of evidence from the jury that was critical to Mr. Ridgeway's defense and the merits of Mr. Stryker's – of Stryker's claims against him.

Let me tac – let me tackle first the question of choice of law. I think it's perhaps the most involved, so I'd like to discuss that first. First off, it hardly need be said that the use of a correct – in a diversity case, the use of the [4] proper body of state law, there is virtually no other function or issue that could be more fundamental and critical.

In this particular instance, selection of the – of the proper state law reaches to the validity of the non-compete agreement, which, of course, is a central issue in the case; the choice of law to be used; as well as a forum-selection clause that was contained in the – in the agreement that Stryker claims Mr. Ridgeway signed.

It's the law of Michigan that where there is a choice-of-law question, one needs to make resort to the Restatement (Second) of Conflict of Law to resolve the question. And in that respect, Section 187(2)(b) of the Restatement speaks to the very scenario that we have before the Court today.

The starting point ordinarily would be that if there is a contractual choice, the parties ought to use that contractual choice. But there is an important exception to that provision, and it says that if enforcing that contractual choice would be offensive to the fundamental principles of another state – here in this instance Louisiana – and that other state – again, Louisiana – has a [5] materially greater interest in the dispute than does Michigan, then the contractual choice should be set aside and disregarded.

It goes on to say that – I mean, almost unnecessarily, I think, but that absent the choice-of-law contract provision, Louisiana law would be the proper choice in the – in this particular –

JUSTICE GIBBONS: Can I ask a question about that? Does the materially significant analysis, does the fact – does the parties' contract factor into Louisiana's interest versus Michigan's interest in any way?

MR. LaCOUR: I'm – I want to make sure I understand Your Honor's question. Does the fact of the contract?

JUSTICE GIBBONS: In dis – the fact that they agreed upon Michigan, does that factor in to determining which state has a more significant interest?

MR. LaCOUR: Not in terms of materially – materially greater interest. And that's why the – 187(2)(b) says from the outset that ordinarily, we're going to respect the choice of the parties in [6] their contract, but in this particular instance we do have in the State of Louisiana a – a principle – a fundamental principle that – fundamental principles – fundamental policy, I should say, that relates specifically to these kinds of agreements. Title 23, Section 921, which we cite in our brief, speaks to this very clearly.

And the starting point in Louisiana – as opposed to Michigan, the starting point in Louisiana is a non-compete agreement is invalid. It's null and void. There has long been a hostility toward non-compete agreements in that state, dating back to at least 1934, which was when the statute was originally enacted, and it's been amended over the years.

And in that statute it says quite clearly that if an employer attempts in an employment agreement to force upon that employee a choice-of-law provision and a – or a forum-selection cause or even a non-competition obligation, that's going to be considered

null and void unless you can bring yourself within an exception to the statute.

Now, without getting too far down into the [7] weeds, the exception doesn't apply here with – certainly with respect to forum selection and choice of law on the non-compete part of it. That portion of the agreement would be rendered null and void for two reasons.

First, the statute requires that the employer, quote, adequately specify what its business is for purposes of – of –

JUSTICE ROGERS: So a non-compete is okay sometimes?

MR. LaCOUR: In very narrow circumstances. It's not completely banned in –

JUSTICE ROGERS: That – that somewhat lessens the fundamental nature of the policy, doesn't it?

MR. LaCOUR: Only a small degree. And I say that, Your Honor

JUSTICE ROGERS: A small degree lessens it.

MR. LaCOUR: It does.

JUSTICE ROGERS: And I'm wondering how – how there's some materially greater interest.

JUSTICE GIBBONS: He just asked the question I was trying to ask.

MR. LaCOUR: Okay. I – I think the answer to that question, Your Honor, is to understand the [8] history of that statute. And it's not just about being hostile toward – to an agreement – to provisions along these lines. In – in the SWAT 24 case the Louisiana Supreme

Court took some pains to talk about what animates that particular statute.

And there are two things at work. One is the Louisiana legislature's desire to protect its citizens from overreaching in an employment agreement.

JUSTICE McKEAGUE: But just because a state has a statute that says we favor something or we disfavor something, that alone can't possibly be resulting in their having a materially greater interest.

So, in other words, you're about to say that Louisiana said we don't like non-competes and we really mean it. Okay. We get that. I don't think there's any question about that. That doesn't make it material – that does not mean Louisiana has a materially greater interest or no national corporation could ever have a uniform non-compete across the country that would bind people to their law when they were doing business in a state like Louisiana, that said we don't like them and we mean [9] it.

MR. LaCOUR: Well, as I said to Judge Rogers, no, the statute does not completely prohibit it from happening, but –

JUSTICE McKEAGUE: There has to be something more than the fact that they have a statute that except – unless exceptions apply, make it against public interest.

MR. LaCOUR: Well, here's – here's the public interest part. And I was just about to say it to Judge Rogers. There are – there are two things that are animating this particular statute. The first is, as I said, to protect its own citizens –

JUSTICE McKEAGUE: What I'm – what I'm asking you to – to address is not what Louisiana says. We get

that. Something – there has to be something more than Louisiana’s policy to give them not only a significant interest, which they have, but a materially greater interest than Michigan.

So it doesn’t really matter what Louisiana says, I don’t think, in connection with assessing whether their interest is materially greater.

MR. LaCOUR: I understand what you’re saying, Judge. The answer I think to that question is that [10] the test is is there a fundamental policy of the state that’s at issue. Of course, we say that there is. But there’s more here. Because –

JUSTICE McKEAGUE: It’s the fundamental policy of Michigan that’s at issue too. They – they do not disfavor non-competes.

MR. LaCOUR: That I would have – I would have to take issue with, Your Honor. I don’t believe my opponent has cited to any case that says it’s – Michigan’s position on non-competes is fundamental to a principle under Michigan law. And let’s not forget –

JUSTICE McKEAGUE: So – so I’m back to where I was before. Because Louisiana said we don’t like non-competes and we really mean it; i.e., it’s fundamental. And Michigan said non-competes are okay, but they didn’t say and we really mean it, so it’s fundamental. Therefore, definitionally, Louisiana has a materially greater interest.

MR. LaCOUR: Well, I – you know, it’s true –

JUSTICE McKEAGUE: That would mean – that would mean Louisiana always trumped the law of any other state, no matter what one says in a non-compete.

[11] MR. LaCOUR: I don’t think that’s necessarily true. Because I can imagine a situation where there

may be another state that has expressed in very clear terms that allowing broad-ranging non-competes is an essential policy of that state.

But – and let me – let me get to the – to the other point I wanted to make about Louisiana’s policy in this respect. It’s not just about let’s protect a citizen who signs an agreement that really is going to be contrary to his interests.

As – as the Court discussed in SWAT 24, this is about preserving Louisiana’s citizens’ ability to earn a living. Which is important.

Okay? But it goes beyond that. Because, as the Court identified in SWAT 24, it also said that’s important to the State of Louisiana as a matter of public policy because people who cannot earn a living are a burden on the public.

And so the State of Louisiana is saying not only is it a good thing for you, employee, that we protect you in this way, it’s good for the entire State of Louisiana. There is nothing –

JUSTICE McKEAGUE: But, again, we – we are in [12] a multi-state union here, where you’re trying to assess the interests of two different states. And looking at this transaction, there seems to be no question that both states have an interest. You happen to think that Louisiana’s is greater and it trumps because Louisiana said it’s a fundamental policy of that state.

The end result from that argument is exactly contrary to Comment E to 187(2). It would simply mean that if a state says something is fundamental, that will always trump the otherwise justifiable expectations of the parties.

And I can find no authority that says – I can find the authority that says what Louisiana thinks about the issue. I get that. I agree with you on that. But I can't find any authority that says that because Louisiana – Louisiana says it's fundamental to Louisiana, that means that trumps the expectations of Michigan or any other state. Where do I look to to find that authority outside of Louisiana law?

MR. LaCOUR: I don't think it would trump in every instance. I think that –

JUSTICE McKEAGUE: Where do I find the [13] authority for your position outside of Louisiana law?

MR. LaCOUR: Okay. Since we're talking about the Restatement, let me also direct the Court's attention to Comment G under 187, which specifically speaks to a – a policy of a state that is designed as a protection against superior bargaining power. That is exactly the kind of policy that the Restatement anticipates would be a fundamental policy of a state, that ought to be respected in the choice-of-law analysis.

So – but – but to – more directly to your point, Your Honor, in this particular instance not only do we have a state statute that dates back, you know, well over almost a century, but every court in Louisiana to address this issue has repeatedly emphasized and underscored the fundamental nat – so –

JUSTICE McKEAGUE: I'm trying – I'm trying to make the point and get – and to give you a chance to respond to the problem I'm having with your analysis, that what Louisiana says and how seriously they mean it can't trump the outcome of this case. It's simply can't under the Restatement.

[14] So simply give me some authority anywhere that says that because a state says it's really important to us, that trumps another state that might not say it's as important in a case as Louisiana did. Where do I find that?

MR. LaCOUR: The only answer I can give you, Your Honor, is under your test, it would be virtually inconceivable for any state to have a fundamental policy. The only way to determine what that state's policy is is to look at its case law and its statutory law.

JUSTICE McKEAGUE: I'm not – I'm not even coming close to saying that. I want you to assume that it is a fundamental policy of Louisiana. As you're saying. I want you to assume it's existed for a century. I want you to assume they really mean it. All of the things that you've said I'm not questioning.

What I am questioning is how under the Restatement does that alone mean that Louisiana wins, particularly in light of E, that says we are to honor the parties' intentions where possible when they've entered into it freely and voluntarily?

MR. LaCOUR: The answer I would give you, Your Honor, is that is not the only thing that should be considered. The other thing that ought to be considered – and this – 188 gets into this in more detail, but the connection of the parties to the state.

JUSTICE McKEAGUE: Your red light is on. So I just want you to understand what happens when there is a dialogue like this. I've asked you three times what authority, what case I should look at, and every time you've diverted over into something else.

So I just want you to understand that when you sit down, I, as only one judge on the panel, am going to

assume that you have no authority, but you won't admit it. That's – that's what we're sort of bound to do. So you can think about that, and if you've got some authority when you come back, please tell me.

MR. LaCOUR: And before I sit down, I want to clar – the question is – is – I know I'm using up my time, but I'll – I'll –

JUSTICE GIBBONS: I think you're going to – I think you're going to get – I'm about to ask your adversary a question that will reiterate for you what the questioning has been during your time.

[16] MR. LaCOUR: Okay. All right.

JUSTICE GIBBONS: And I think if you'll just listen carefully –

MR. LaCOUR: Fair enough.

JUSTICE GIBBONS: – you'll get it.

MR. LaCOUR: All right. Thank you, Your Honors.

MR. WEXLER: Good morning. May it please the Court. My name is Michael Wexler. I represent the Appellee in this matter.

The appeal taken by the Appellant in this matter should be denied. It should be denied because this case was properly handled by the District Court, and the decision of the jury should stand.

JUSTICE GIBBONS: I don't want to interrupt you at the beginning, but I'm going to.

MR. WEXLER: There's an important question pending. I know this.

JUSTICE GIBBONS: Yeah. The questioning during your adversary's argument dealt with whether two

things could be considered as a part of the materially greater interest analysis.

The first one, which Judge Rogers and I [17] both talked about, was whether the parties' choice of law figured into that or not. And the second question, coming from Judge McKeague, was whether the state's own statement could be factored into that or not. And what's your position on those two things?

MR. WEXLER: The panel has seized on an important point, which shows a flaw in the Appellant's argument. Number one, under 187(1), which is where the starting point is for this analysis, if the parties could and did contract for a choice of law, that should be followed.

JUSTICE GIBBONS: Well, assume, for one reason or another, we don't go with 187. Let's assume we're in (2). Okay?

MR. WEXLER: So then if you look at –

JUSTICE ROGERS: Which is where the District Court was.

MR. WEXLER: Yes. And then if we look at (2), the problem is that the Appellant conflated the test. It's not simply using the magic words fundamental policy. That's one element, is there a fundamental policy. And then, two, the second point is is there a materially greater interest.

[18] So to Judge Gibbons and Judge Rogers I say that the choice of law does matter and what was agreed to by the parties does matter. And to Judge McKeague I say that there is no authority that says fundamental policy trumps, because, as Judge McKeague correctly points out, and as the comment points out, the conflict-of-law analysis would mean

nothing if there was simply a case in any jurisdiction that said this is a fundamental policy.

So Louisiana would trump every other state in the union. If that were the situation, then a national company could never have an agreement that would be enforceable in Louisiana.

JUSTICE McKEAGUE: Well, that's not exactly what Mr. LaCour is saying. He's saying it would trump unless some other state said and this is a fundamental policy the other direction. But he's saying absent that, it would always trump. At least that's what I understand his position to be. So did you find any cases that stand for that proposition?

MR. WEXLER: No, Your Honor. There aren't cases that say simply because you say fundamental policy, those magic words mean that you don't follow the contractually-agreed-upon choice of law. And –

[19] JUSTICE GIBBONS: Did you consider that at all?

MR. WEXLER: I'm sorry, I don't understand your question.

JUSTICE GIBBONS: Did you consider that at all in the materially-greater-interest analysis? Even though it's not the deciding or determinative factor. Or is it inappropriate to consider it?

MR. WEXLER: It is simply one element to look at a fundamental policy.

JUSTICE GIBBONS: So the answer to both of those things is yes, you can take them into account.

MR. WEXLER: Of course. Because the test is you should look at fundamental policy as an element, but

then you also have to look at materially greater interest in this analysis.

JUSTICE ROGERS: What – what exactly is – determines whether there's a materially greater interest? It can't, as I understand it, be that there's a provision which chooses because that's the assumption then for the whole 187; right? And it can't be whether there's a fundamental policy because this is something which qualifies. It says contrary to a fundamental policy of a state – not a [20] policy, but a state – which has a materially greater interest. So the – what do we look to to determine whether it's materially greater interest?

MR. WEXLER: So you look at numerous factors. For example –

JUSTICE ROGERS: There's a lot of factors.

MR. WEXLER: You do look at a number of factors. For example, where was the contract entered into. Where was the harm felt. Where does a national –

JUSTICE ROGERS: These are all sort of 188 factors then, right?

MR. WEXLER: Yes, Your Honor.

JUSTICE ROGERS: You just look and see are they – are they not just strong, but materially stronger, all of those factors? Is that the idea?

MR. WEXLER: I – I think you look if they are strong, each one separately, and then together you make a decision if it's materially stronger. The – the point is is that a national company – and you look at the – the Court's decisions in Lowry and Marzullo. You look at those decisions and you decide does a national company have an expectation that their agreement should be interpreted under the [21] choice of law that

they've contracted for and uniformly with an employee who signs the agreement.

JUSTICE ROGERS: That's – 187, that's what they're dealing with; right? Or is – is those kinds of contractual agreements.

MR. LaCOUR: Yes. And that's why –

JUSTICE ROGERS: So whether there's such a contractual agreement doesn't tell us very much.

MR. WEXLER: Well, 187(1), which is actually where the Court –

JUSTICE ROGERS: I'm – I'm in 187(2), right?

MR. WEXLER: Yes, but I'd just simply note that 187(1), as this Court noted in the DaimlerChrysler case, that's where your analysis starts. And you say under 187(1) if the parties could have contracted for and did contract for that choice of law, that's where your analysis stops. And I believe the – the decision says no exceptions.

Then what's the problem with the Appellant's argument here is that they look at 188 – I'm sorry, 187(2) and they skip that first point, of course, because that first point is not in their favor. Because the parties did contract for [22] the choice of law being Michigan.

So then when you look at 187(2), you then have to look at all of these factors as to why there's a materially greater interest in Michigan versus Louisiana.

JUSTICE ROGERS: The District Court did that and said there are factors that go both ways. So that means even if it's greater, it's not materially greater.

MR. WEXLER: Correct. And that was the correct –

JUSTICE ROGERS: You just sort of make a pile – we look at a pile of factors and see whether it's material.

MR. WEXLER: Yeah.

JUSTICE ROGERS: Unless there's some court case that controls.

MR. WEXLER: Yes. And in this situation when you look at the various factors, you come to –

JUSTICE ROGERS: A lot of them relate to Louisiana.

MR. WEXLER: Some relate to Louisiana.

JUSTICE ROGERS: The whole – the whole – the whole compliance is in Louisiana, right? Whether [23] you comply with the non-compete. You know, this all takes place – so you either comply with it in Indiana – or Louisiana or you don't comply with it in Louisiana. There's no issue of whether you comply with it in some other state.

MR. WEXLER: Well –

JUSTICE ROGERS: Is that true or not?

MR. WEXLER: That's not exactly true. Because in this situation –

JUSTICE ROGERS: What's not true about it?

MR. WEXLER: – some compliance was in Louisiana. Whether or not, for example, Mr. Ridgeway went to customers he wasn't supposed to go to.

But in the facts of this case, for example, Mr. Ridgeway sent fraudulent bills to Michigan for double-billing purposes and to increase his commissions and to increase his bonuses. So his compliance, for example, with his agreement –

JUSTICE ROGERS: How – was that in violation of the non-compete, to send a bill?

MR. WEXLER: Aspects of it were because he was using conf – confidential information. But let me give you a better example. He removed from the [24] servers that are located in Michigan trade secrets. He removed pricing information, margin information. He then took that information, put it into charts, and he then prepared proposals to customers in which he compared the Stryker pricing –

JUSTICE ROGERS: Is this in the complaints?

MR. WEXLER: I'm sorry, Your Honor?

JUSTICE ROGERS: Is this in the complaints, in the – in the pleadings? Or where are you getting this?

MR. WEXLER: This was – this was at trial. There were actually exhibits that showed where he made a proposal, where he stole information on Michigan servers. So he didn't comply with his agreement by going to Michigan to get that information. He then took that information, then in Louisiana he prepared proposals that he showed our information against information from a competitor that he was now working for.

So in that instance compliance is in both states. So, as I said earlier, there's some compliance issues in Louisiana, some compliance issues in Michigan.

JUSTICE GIBBONS: So the way this comes to us [25] is based on the trial court's charge to the jury that Michigan law controlled in charging the jury about the non-compete in accord with Michigan law, right?

So at the time the District Court made the decision about what jury instruction to give it had heard all the evidence of this type that would bear on the

comparison of the interest between the states. So it was able to make a legal determination that was in part based on the evidence that had been presented at trial.

MR. WEXLER: That's correct.

JUSTICE GIBBONS: Okay.

MR. WEXLER: And I also note that

Mr. Ridgeway, the Appellant, actually waived that issue because there was no objection made to the instructions given to the jury by the Court. They had submitted a set of instructions. The – Stryker had submitted a set of instructions. The judge then came up with a set of instructions. And then there was a conference.

JUSTICE McKEAGUE: I thought that the judge had already ruled in advance of the trial that Michigan law was going to apply.

[26] MR. WEXLER: He did not. He actually said in his opinion – when he initially made a prima fascia – a prima fascia ruling early on in the case that Michigan law would apply, he said it was a prima fascia ruling and then we would deal with it later.

And when he got to that point in the trial when he actually had to give instructions to the jury, the Appellant never objected to the instructions that the Court gave. So, in fact, there's no subject matter jurisdiction by this Court over that because they waived that.

JUSTICE McKEAGUE: Well, you don't have to object again if – if the issue had already been ruled upon. You're saying that it did come up prior to the trial, which law is going to apply; right?

MR. WEXLER: It came up very early on in the case.

JUSTICE McKEAGUE: That's what I mean. So are you – are you essentially saying that that was a conditional ruling at that point?

MR. WEXLER: At that point the judge – I believe his words were is a prima fascia – that – a prima fascia evidence that's presented to come up [27] with the Court's decision that Michigan law would apply, but then the Court indicated that the Court would listen to the testimony, would look at the facts of the case, and then during the trial, made a decision after hearing all of the evidence.

JUSTICE McKEAGUE: So, yes, it was conditional, on the evidence that came in during the trial.

MR. WEXLER: Yes, until the end of the trial.

JUSTICE McKEAGUE: Right. I got it.

MR. WEXLER: There was no indication that –

JUSTICE McKEAGUE: I'll go back and look at that. Thank you.

MR. WEXLER: Yes. So ultimately, the Appellant never objected to the judge's instructions that were presented to the parties that this is the law, these are the charges that will be given to the jury, and no objection was made. Because no objection was made, the issue was not preserved for appeal. So it's not properly before this Court.

Ultimately, as the Court has noted, the judge made the decision to apply Michigan law after hearing all of the testimony, after hearing all of the facts, after coming up with all of the [28] information that shows that Michigan had a materially greater interest in this matter than did Louisiana.

JUSTICE McKEAGUE: Was the issue of what law should apply essentially reargued in the conference settling on the jury instructions?

MR. WEXLER: It was never brought up by the Appellant, Your Honor.

JUSTICE McKEAGUE: I assume that they submitted a proposed instruction that would have instructed the jury that Louisiana law applied, right?

MR. WEXLER: They – they did submit an initial set of instructions that did have a Louisiana-law-based instruction, correct.

JUSTICE McKEAGUE: When you say an initial set, are you talking about at the time of the trial or sometime earlier?

MR. WEXLER: Just prior to the trial, both sides submitted jury instructions.

JUSTICE McKEAGUE: Okay. So – so at that point there are conflicting instructions on choice of law. Now, there was a conference to settle the disputes about the instructions; right?

[29] MR. WEXLER: There was a conference, but that issue wasn't discussed at the conference.

JUSTICE McKEAGUE: So at the conference object – to settle the dispute between conflicting instructions, how did he seize upon one law versus the other if it wasn't even discussed?

MR. WEXLER: The judge had presented a set of instructions that the Court felt were appropriate to give at the conclusion of the trial.

JUSTICE McKEAGUE: Okay. So both sides submit their own. The judge then condensed them into one

and resolves the disputes in his mind and then gives them back to you, right?

MR. WEXLER: Correct.

JUSTICE McKEAGUE: Now, at that point did Ridgeway object to the instruction as to Michigan law?

MR. WEXLER: No. No objection.

JUSTICE GIBBONS: Is there any more general noting in the record? Without regard to specifically discussing the choice-of-law point, was there any discussion of Mr. Ridgeway's preserving his – his continuing to rely on the instructions he submitted, as opposed to those you submitted or [30] those the judge came up with?

MR. WEXLER: No. The – the Appellant did nothing about the issue. As I recall, the instructions were given to us I believe on the Friday when the trial was concluding. The – possibly on Thursday. And then there was a conference I believe late Friday, as I recall. Then closings were scheduled for the beginning of the following week.

And I know in – in the instance of the Appellee that we had certain objections that we preserved by filing objections to the Court's set of instructions, but the Appellant didn't orally or in writing raise any objection to the Court's instructions that the Court intended to give.

And the reason we had the instructions ahead of time was so that we could look at these instructions and make objections if we felt anything was appropriate. But the Appellant did nothing, either orally or in writing. Consequently, this entire issue is not something that is even appealable at this juncture because they did nothing.

JUSTICE ROGERS: He says in his reply brief [31] that they argued for application of Louisiana law in the motion for partial summary judgment and the motion to dismiss for lack of personal jurisdiction and again in his trial brief. Is that not accurate or it doesn't matter?

MR. WEXLER: But – those things were done, but, as – as the law requires, if you look at the Ortiz decision by the Supreme Court, which was upheld – or which was followed actually before this Court in the Hill decision –

JUSTICE ROGERS: Or are you saying it doesn't matter because that's not enough –

MR. WEXLER: No.

JUSTICE ROGERS: – not that he didn't do it?

MR. WEXLER: He didn't do it.

JUSTICE ROGERS: Wait a minute. He says he did these three things. He did do those –

JUSTICE GIBBONS: Yet he did those three things.

JUSTICE ROGERS: You're not saying –

JUSTICE GIBBONS: You aren't saying he did what he needed to do.

MR. WEXLER: Right. I'm saying he did these things that Judge Rogers points out, but what I'm [32] saying is is that he didn't do enough because when he actually got –

JUSTICE ROGERS: Because those aren't enough.

MR. WEXLER: Exactly. Because when the Court had – when the Court came up with the seven instructions that the Court intended to use, they never objected. Now –

JUSTICE McKEAGUE: Well, where we're – we're – we're now being diverted into something. And the diversion is into whether what he did was enough. He thinks it is; you think it isn't. And what do we look to then to determine whether the specific context within which he contended that Louisiana applies in these earlier proceedings is sufficient to preserve it so that you don't have to renew your objection on that particular point? What do you say we look at?

MR. WEXLER: I make two points. And I see my time's up. May I briefly conclude and answer your question?

JUSTICE GIBBONS: Go ahead and answer it.

MR. WEXLER: First, what you look at is what was done when the set of jury instructions were given by the Court to both parties and were [33] objections made to those instructions to preserve the issue.

Second, though, most importantly, it's, quite frankly, irrelevant because even if it was properly preserved and even if it's properly brought before this Court, it makes no difference because the parties contracted for the proper choice of law, 187(1) dictates that it should be followed, and Louisiana does not have a materially greater interest in having its law applied over the law of Michigan, which the Court applied, so –

JUSTICE McKEAGUE: My question to you, very succinctly, is what do we look to to determine if it was waived by virtue of not having raised it again at the charging conference? Is there a case you want us to look at for that?

MR. WEXLER: Not – not a – well, sure. As to a case, there's the Hill decision by this Court and then the Ortiz case, but most –

JUSTICE McKEAGUE: Okay. Hill and Ortiz. I got it.

MR. WEXLER: And then look at the record. There's no objections made.

JUSTICE McKEAGUE: That's what I need. Thank [34] you.

JUSTICE GIBBONS: I just – is Ortiz the – Ortiz the case that I was on the panel for in this Court and we got it wrong? I was thinking it was about – (inaudible). Well, I – I think –

MR. WEXLER: This panel's never been wrong.

JUSTICE GIBBONS: I don't think it – I don't think it relates to how one preserves an objection to jury instructions. I think, if it's the same case, it relates to the issue of whether it's – it is – it relates to the issue of the record on the summary judgment motion versus the record at trial and failure – making motions at trial, you know, for directed verdict or – you know, with that – and what – what one relies on at what point in time. And that is – is that – am I thinking of the wrong case?

MR. WEXLER: Ortiz did deal with summary judgment and whether you need to make a Rule 50 objection.

JUSTICE GIBBONS: Yes. Thank you.

MR. WEXLER: Right. That – that –

JUSTICE GIBBONS: It's not – it doesn't – it doesn't deal with the sufficiency of earlier [35] objections to also – or submission of jury instructions to constitute an objection to the jury instruction. Of course, I'm not – I'm not sure that this really comes to us as a question

of the objection to the jury instructions, now that I'm looking back at the Appellant's brief.

MR. WEXLER: Honestly, that issue doesn't matter. Because, as I said, unless there's a materially greater interest and a fundamental policy. And the Court made that decision with all of the evidence in front of it.

JUSTICE McKEAGUE: It matters a lot if you're wrong on materially.

MR. WEXLER: Not on materiality, but I'm saying the issue of preservation, I – I don't believe it's properly before this panel. But even if it is, the test then is you look at 187(1). It was contracted for and the choice of law was made.

And then even if you get to 187(2), it's – the – the choice of law is still proper because there isn't a fundamental policy such as non-competes are never enforced. As – as Judge Rogers pointed out, they're enforced sometimes.

JUSTICE ROGERS: You're saying in the – we [36] don't need to get into whether it was waived because you win on the issue anyway.

MR. WEXLER: Exactly.

JUSTICE ROGERS: Thank you.

JUSTICE GIBBONS: Okay.

MR. WEXLER: Thank you.

JUSTICE GIBBONS: All right. We'll hear from you, Mr. LaCour.

MR. LaCOUR: Just a few points to make. First off, Judge McKeague, I hope you didn't think I was being evasive in your questioning earlier. I was trying to

answer it as best I could. I – let me offer this to – to Your Honor. When we talk about the materially-greater-interest question –

JUSTICE McKEAGUE: Do you want me to summarize the question again?

MR. LaCOUR: It might be helpful.

JUSTICE McKEAGUE: All right. Your argument is that this is a fundamental policy of the State of Louisiana in connection with non-compete clauses, so, therefore, the interest of Louisiana is materially greater than Michigan. That's what I synthesize your argument to mean. Is that – do I have it right?

[37] MR. LaCOUR: That's pretty close, Your Honor.

JUSTICE McKEAGUE: Okay. Now – pretty close is good enough at this point.

MR. LaCOUR: Yeah, yeah.

JUSTICE McKEAGUE: So do you have a case that says that?

MR. LaCOUR: Specifically, no, I don't think that I – I have a case that says that alone gets you over the hump.

JUSTICE McKEAGUE: Okay. That is all that I was trying to find out.

MR. LaCOUR: Okay. But let me add to the –

JUSTICE McKEAGUE: Thank you.

MR. LaCOUR: – materially-greater-interest equation the Restatement – and this really ties in to 188, which talks about absent a choice of law, would another state have an interest in the case.

Section 196 of the Restatement talks about contractor rendition of services. And it says very plainly setting aside a choice-of-law question or choice-of-law issue, the place of performance of a contract is almost always going to be the appropriate forum to litigate that particular question.

[38] JUSTICE McKEAGUE: But isn't that juxtaposed by the comments to 187 that says the agreement of the parties is almost always going to control?

MR. LaCOUR: Well –

JUSTICE McKEAGUE: It – I mean, it's just one – it's just a different way of looking at it.

MR. LaCOUR: I understand. And, Your Honor –

JUSTICE McKEAGUE: You're citing a section that doesn't apply because there is an agreement of the parties.

MR. LaCOUR: I suppose the difficulty is – at least that I – that I'm having is the question of materially greater interest, to my mind, is – is weighing – the weighing in balance and one state has more than the other. It doesn't have to be overwhelming. It doesn't have to be completely lopsided. One has to have the greater interest in the dispute. And I say –

JUSTICE McKEAGUE: I wouldn't say materially greater means 51/49.

MR. LaCOUR: Unfortunately, I don't have a case that quantifies it. But my point is – is only that when you add up all of the different pieces in this puzzle, and that is, the statute, which we've [39] talked about, and we talk about the, you know, Section 196, which says the place of performance is paramount, and we look at all of the things that happened in Louisiana, he lives

there, he – he had his customers there, he visited hospitals there, he visited patients there – surgeons there, received the product there, he made his sales call there, had his team there, over and over, and when we look at – at Michigan, I mean, the connection to Michigan really is well, that is where they are for sure, and we look at well, what – what is Michigan –

JUSTICE McKEAGUE: Well, that's where all of the harm is going to accrue if he violates the clause.

MR. LaCOUR: But the case law has said that – I mean, that is always going to be the case. And that isn't sufficient really. In fact, in a juris – in a jurisdictional analysis, that's not sufficient to confirm jurisdiction. I mean, that's what this Court has said in its earlier decisions. Something more, some purposeful availment is required.

And so, you know, this is – I don't [40] contend that this is a black-and-white choice, Your Honor. Obviously, it's not. But when you weigh – weigh the competing interests in the balance, to my view, it's overwhelming in Louisiana's favor.

I am out of time. I thank you for your attention.

JUSTICE GIBBONS: We thank you both for your arguments.

MR. LaCOUR: Thank you.

JUSTICE GIBBONS: And we'll consider the case carefully. It's an interesting case. And we don't often get the opportunity to revisit things like this that in – you know, with some complexity that we learned a long time ago in law school, so it's been very interesting to prepare for the case.

MR. LaCOUR: I didn't even get a chance to talk about Wong. Because I know the two of you were on

that panel, and that has some interesting questions as well. I'm done.

JUSTICE GIBBONS: Another day or for our consideration afterwards. All right. Thank you. (WHEREUPON, which were all of the proceedings had in the above-entitled cause.)

[41] STATE OF ILLINOIS

SS:

COUNTY OF BOONE

I, CAROLYN J. HAWKES, a Certified Shorthand Reporter of the State of Illinois, do hereby certify that I reported in shorthand the proceedings had of the digital audio file aforesaid and that the foregoing is a true, complete, and correct transcript of the proceedings of said digital audio file as appears from my stenographic notes, so taken and transcribed under my personal direction.

/s/ Carolyn Hawkes

Certified Shorthand Reporter

CAROLYN J. HAWKES, C.S.R., No. 084-003296