No. 22–500

In the Supreme Court of the United States

GREAT LAKES INSURANCE SE,

Petitioner,

v.

RAIDERS RETREAT REALTY CO., LLC,

Respondent.

On Petition for Writ of Certiorari to the U.S. Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION TO CERTIORARI

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QUESTION PRESENTED

Great Lakes Insurance SE initiated a declaratory judgment action against its insured, Raiders Retreat Realty Co., LLC, in a Pennsylvania federal district court seeking a declaration that Great Lakes was not responsible to indemnify Raiders for the damages Raiders sustained when a vessel that Raiders owned, and that Great Lakes insured, ran aground. Raiders asserted five counterclaims, including three extra–contractual counterclaims arising under Pennsylvania law. The insurance policy that the parties entered into provided that New York law would apply in the absence of any well–established, entrenched principles and precedents of substantive federal admiralty law. After determining that federal admiralty law did not preclude Raiders' three extra–contractual Pennsylvania law counterclaims, the district court dismissed those counterclaims as barred by the insurance policy's choice of New York law. The question presented is:

Whether an insurance policy's designation of a particular State's law to apply in the absence of any well–established, entrenched principles and precedents of substantive federal admiralty law remains enforceable under this Court's ruling in *M/S Bremen* v. *Zapata Off–Shore Co.*, 407 U.S. 1, 15 (1972), even when applying the designated State's law would contravene a strong public policy of the forum State where the insurance company chose to bring its declaratory judgment action?

RULE 29.6 STATEMENT

Raiders Retreat Realty Co., LLC is a single member limited liability company that has no parent corporation, and no publicly traded corporation owns 10% or more of its stock.

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INTRODUCTION

The Petition for Writ of Certiorari that Great Lakes Insurance SE has filed fundamentally fails to demonstrate that this case is deserving of the Court's review.

Great Lakes has not demonstrated that the Third Circuit's ruling in this case implicates any circuit split. Indeed, the term "circuit split" appears only twice in Great Lake's Petition, three lines from the bottom on page 5 and in footnote 1 on that very same page, but not once anywhere in its Petition does Great Lakes contend that any circuit has issued a ruling in conflict with the Third Circuit's decision in this matter in any similar case. In actuality, the Third Circuit's decision in this case is consistent with earlier rulings from the D.C., the Fifth, and even the Ninth Circuit, properly understood.

Most importantly, the test that the Third Circuit used in this case for evaluating whether to apply a choice of law provision contained in an insurance policy governed by federal admiralty law is *the very same test* that all other federal appellate courts use. Frequently, the parties to an admiralty law action do not dispute the applicability of a contractual choice–of–law provision, and thus the test can be applied without extended discussion. Yet the full test recognizes that the law of the forum State (meaning the jurisdiction in which the action is pending) can on rare occasion overcome the contractually specified choice of law. This may be such a case, depending on what the district court ultimately decides on remand from the Third Circuit's ruling.

One can count on a single hand the number of cases in which federal appellate courts have decided the precise question that confronted the Third Circuit in this case. The Third Circuit followed the approach adopted in the D.C. and Fifth Circuits and recognized that the Ninth Circuit's approach, urged below by Great Lakes, was not to the contrary. One more appeal presenting this same question is now pending in the First Circuit, scheduled for oral argument mere days after this Brief in Opposition is being filed. At this time, however, no circuit split exists on the questions presented necessitating this Court's resolution.

Completely absent from Great Lakes' Petition for Writ of Certiorari is any mention of the Third Circuit's earlier ruling in *AGF Marine Aviation & Transp.* v. *Cassin*, 544 F.3d 255 (3d Cir. 2008). In *AGF Marine*, the Third Circuit held that the identical choice of law provision at issue in this case was enforceable. *See id.* at 261–63, 265–66 & n.9. Two of the three judges who unanimously ruled in favor of Raiders in this case were on the panel, and joined in the unanimous outcome, in *AGF Marine*, including that earlier decision's author. The Third Circuit's decision in this case cited to *AGF Marine*. Under Third Circuit Internal Operating Procedure 9.1, "no subsequent panel overrules the holding in a precedential opinion of a previous panel." 3d Cir. I.O.P. 9.1 (2018). Thus, it is disingenuous for Great Lakes to contend that in this case the Third Circuit held that the insurance policy's choice of law provision was unenforceable.

As explained herein, because the decision below does not conflict with the decision of any other circuit,

because the Petition does not present an important and recurring question, and because this case is an unsuitable vehicle for certiorari, the Petition for Writ of Certiorari should be denied.

STATEMENT

A. Factual Background

A yacht that defendant Raiders Retreat Realty Co., LLC owns became grounded on June 7, 2019, incurring more than $300,000 in damage. CA3 App.36, 128. Raiders had insured the yacht, whose hailing port is Pennsylvania, against such losses with plaintiff Great Lakes Insurance SE, a marine insurance company headquartered in London, United Kingdom. CA3 App.286, 375.

Raiders promptly submitted to Great Lakes a coverage claim for the loss to the vessel. CA3 App.128, 286. On September 25, 2019, Great Lakes denied coverage of the claim and initiated this declaratory judgment action in the U.S. District Court for the Eastern District of Pennsylvania. CA3 App.32, 128–29.

Great Lakes rejected coverage based on its assertion that the yacht's fire suppression systems differed from what the parties had supposedly agreed to, even though the yacht's grounding and the damages and losses resulting therefrom were in no way caused by a fire or any supposed deficiencies in the boat's fire suppression systems. CA3 App.41, 286. In denying the claim, Great Lakes maintained that the supposed discrepancies relating to the yacht's fire suppression system rendered the insurance policy void from its inception. CA3 App.41.

In response to Great Lake's declaratory judgment suit, Raiders asserted five compulsory counterclaims under Federal Rule of Civil Procedure 13(a)(1)(A) (describing as compulsory those counterclaims "aris[ing] out of the transaction or occurrence that is the subject matter of the opposing party's claim"). CA3 App.125–38. Raiders' first two counterclaims were contractual in nature, for breach of contract (Count I) and breach of the implied covenant of good faith and fair dealing (Count II). CA3 App.130–33.

The remaining three counterclaims sought extra–contractual relief available against insurance companies under Pennsylvania law. Raiders — a single–member limited liability company head-quartered in Pennsylvania whose individual owner, Phil Pulley, is domiciled in Pennsylvania — negotiated, purchased, paid for, and received the insurance policy in question in Pennsylvania from a Pennsylvania–licensed insurance agent for Great Lakes whose corporate home office is in Pennsylvania. CA3 App.300, 414–15, 659–60. Count III alleged breach of fiduciary duty. CA3 App.133–34. Count IV alleged insurance bad faith pursuant to 42 Pa. Cons. Stat. Ann. §8371. CA3 App.134–37. And Count V alleged violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. §201–1, et seq. CA3 App.137–38.

Great Lakes thereafter filed a Federal Rule of Civil Procedure 12(c) motion to dismiss Counts III through V of Raiders' counterclaims, the counts that sought extra–contractual relief under Pennsylvania law. CA3 App.156. Great Lakes argued that New York law should apply, thus necessitating the dismissal of those counterclaims. CA3 App.158–59. In

so arguing, Great Lakes relied on the choice–of–law provision in the parties' insurance policy, which states:

> It is hereby agreed that any dispute arising hereunder shall be adjudicated according to well established, entrenched principles and precedents of substantive United States Federal Admiralty law and practice but where no such well established, entrenched precedent exists, this insuring agreement is subject to the substantive laws of the State of New York.

CA3 App.113.

The district court agreed with Great Lakes that the above–quoted choice–of–law provision necess-itated the dismissal of Counts III through V of Raiders' counterclaims, which asserted claims for extra–contractual relief under Pennsylvania law, because New York law applied under the choice–of–law provision and those claims were not cognizable under New York law. *See Great Lakes Ins. SE* v. *Raiders Retreat Realty Co., LLC*, 521 F. Supp. 3d 580, 588–89 (E.D. Pa. 2021).

B. Procedural Background

Great Lakes initiated its declaratory judgment action in the U.S. District Court for the Eastern District of Pennsylvania on September 25, 2019. CA3 App.32. On December 6, 2019, Raiders filed its answer with counterclaims, including the three counterclaims (Counts III through V) whose dismissal is now at issue. CA3 App.116. Count III alleged breach of fiduciary duty. CA3 App.133. Count IV alleged insurance bad faith pursuant to 42 Pa.

Cons. Stat. Ann. §8371. CA3 App.134. And Count V alleged violation of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, 73 Pa. Stat. Ann. §201–1, et seq. CA3 App.137.

On March 3, 2020, Great Lakes filed a motion for judgment on the pleadings seeking the dismissal of Counts III through V of Raiders' counterclaims. CA3 App.156. Great Lakes argued that the insurance policy's choice–of–law provision necessitated the application of New York law, which does not recognize any of the counterclaims in question. CA3 App.158–59.

After extensive briefing, oral argument, and the parties' introduction of evidence at the district court's invitation from outside the pleadings concerning the choice–of–law issue, on February 22, 2021 the district court issued a memorandum opinion and order granting Great Lakes' motion to dismiss Counts III through V of Raiders' counterclaims. *See Great Lakes Ins. SE* v. *Raiders Retreat Realty Co., LLC*, 521 F. Supp. 3d 580 (E.D. Pa. 2021).

On March 8, 2021, Raiders filed a timely motion for reconsideration pursuant to Federal Rule of Civil Procedure 59(e) and Eastern District of Pennsylvania Local Rule of Civil Procedure 7.1(g) in which Raiders sought the reinstatement of Counts III through V of its counterclaims. CA3 App.851. After receiving Great Lakes' brief in opposition to the motion for reconsideration, the district court on March 15, 2021 denied Raiders' motion for reconsideration. CA3 App.5–6, 884.

Raiders timely appealed to the Third Circuit on March 23, 2021 from both the district court's order

dismissing Raiders' counterclaims and from the district court's order denying reconsideration of its dismissal order. CA3 App.1.

Raiders' Third Circuit appeal focused on the district court's ruling that New York law, rather than Pennsylvania law, applies to Counts III through V of the counterclaims that Raiders asserted against Great Lakes. Raiders argued to the district court, and the district court agreed, that substantive federal admiralty law itself contained nothing that precluded Raiders from asserting the three Pennsylvania law counterclaims at issue on appeal.

Because Raiders conceded in the district court that if New York law applied then Counts III through V of Raiders' counterclaims, which arose under Pennsylvania law, would be subject to dismissal, the central focus of the district court's ruling on Great Lakes' motion to dismiss was whether the express choice–of–law provision in the insurance policy at issue mandated applying New York law to those counterclaims. *See Raiders*, 521 F. Supp. 3d at 585–89.

In answering that question in the affirmative, the district court first concluded that "federal maritime choice–of–law principles" recognize "the presumptive validity . . . of a provision in a maritime insurance contract where the chosen forum has a substantial relationship to the parties or the transaction." *Id.* at 588. Such a substantial relationship existed with respect to Great Lakes, the district court concluded, explaining:

> Upon review of the parties' evidence, the Court finds that [Great Lakes] has sufficient contacts

> with New York, to wit: (1) it maintains an agent for service of process in New York, (2) it maintains its trust accounts in New York, and (3) it was admitted as a surplus lines insurer in New York.

Id. at 586.

According to the district court:

> The issue is not, as Raiders contends, whether New York law conflicts with Pennsylvania public policy; the issue is whether the well–established principle that choice–of–law provisions in maritime contracts are presumptively valid must yield to the public policy preferences of the particular state in which the case happens to have been brought.

Id. at 588.

In concluding that "the parties' contractual choice–of–law provision is valid and enforceable," the district court reasoned:

> Permitting state public policy to override presumptively valid contractual choice–of–law provisions in marine insurance contracts would frustrate such uniformity and, with it, the central purpose of maritime law.

Id.

In ruling that New York law applied to Raiders' counterclaims, the district court expressly rejected Raiders' argument that applying this Court's ruling in *M/S Bremen* v. *Zapata Off–Shore Co.*, 407 U.S. 1 (1972), to the choice–of–law dispute would compel the

conclusion that Pennsylvania law, rather than New York law, applied to Raiders' three counterclaims at issue. *See Raiders*, 521 F. Supp. 3d at 587.

Although recognizing that some other courts have applied *M/S Bremen* to resolve domestic choice–of–law disputes between competing States, even though *M/S Bremen* involved a choice–of–forum dispute between two nations, the district court refused to apply *M/S Bremen*'s framework here to resolve whether Pennsylvania or New York law should apply to Raiders' counterclaims. *See Raiders*, 521 F. Supp. 3d at 587. The district court's rejection of Raiders' arguments that *M/S Bremen*'s approach mandated application of Pennsylvania law to the three counterclaims thus resulted in the district court's ruling that New York law applied to bar those counterclaims.

Lastly, in its order of March 15, 2021 denying Raiders' motion for reconsideration, the district court concluded that in requesting reconsideration Raiders had not offered any arguments that were new or different from the arguments that the district court had already considered and rejected in granting Great Lakes' motion to dismiss. CA3 App.5.

On appeal, a unanimous three–judge Third Circuit panel vacated the district court's judgment and remanded for further proceedings. *Great Lakes Ins. SE* v. *Raiders Retreat Realty Co., LLC*, 47 F.4th 225 (3d Cir. 2022) The court of appeals began by recognizing, *see id.* at 229–30, that in *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 320–21 (1955), this Court ruled that, when adjudicating a maritime insurance contract, if there is no estab-

lished rule of federal admiralty law to apply, state law applies.

The Third Circuit next recognized that "[o]ne such established federal rule is that '[a] choice of law provision in a marine insurance contract will be upheld in the absence of evidence that its enforcement would be unreasonable or unjust.' 2 Thomas J. Schoenbaum, Admiralty and Maritime Law §19:6 (6th ed. 2020)." *See Raiders*, 47 F.4th at 230.

Ultimately, the Third Circuit held:

> [T]he rule that choice–of–law provisions in maritime insurance contracts are presumed enforceable unless "enforcement would be unreasonable or unjust," Schoenbaum, *supra*, §19:6, is identical to *The Bremen*'s rule that forum–selection provisions should be honored unless "enforcement would be unreasonable and unjust," 407 U.S. at 15. Given this overlap—coupled with *The Bremen*'s "strong public policy" exception comprising but one part of the holding's broader "unreasonable and unjust" standard—we consider it altogether reasonable that a "strong public policy of the forum [state] in which suit is brought" could, as to that policy specifically, render unenforceable the choice of state law in a marine insurance contract. *See id.*

Id. at 233.

The Third Circuit thus vacated the district court's judgment dismissing Raiders' three Pennsylvania law counterclaims and remanded to permit the district

court "to consider whether Pennsylvania has a strong public policy that would be thwarted by applying New York law," *id.*, to dismiss Raiders' counterclaims.

The Third Circuit's opinion in this case did not acknowledge or suggest that its holding was creating, or would further exacerbate, any circuit split on the question of when a maritime insurance policy's choice–of–law provision is enforceable. Indeed, in its Petition, Great Lakes fails to cite to any federal appellate court ruling that acknowledges the existence of such a circuit split.

Great Lakes did not seek rehearing en banc of the Third Circuit's ruling in this case pursuant to Federal Rule of Appellate Procedure 35(b). That would have been the proper procedure for Great Lakes to argue that the three–judge panel's decision in this case conflicted with the Third Circuit's earlier ruling in *AGF Marine*. *See* Fed. R. App. P. 35(b)(1)(A). In its Brief for Appellee filed in the Third Circuit, at page 15, Great Lakes asserted, citing to *AGF Marine*, that "[t]his exact choice of law clause has already been held valid and enforceable by this Court." Had Great Lakes truly believed that the Third Circuit's holding in this case rendered unenforceable the choice–of–law provision contained in its insurance policy, Great Lakes would have and should have sought en banc review from the Third Circuit before seeking this Court's involvement.

REASONS FOR DENYING THE PETITION

A. The Decision Below Does Not Conflict With The Decision Of Any Other Circuit

In *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310, 320–21 (1955), this Court held that, when adjudicating a maritime insurance contract, if there is no established rule of federal admiralty law to apply, state law applies. Although the Petition for Writ of Certiorari that Great Lakes has filed expresses considerable dissatisfaction with this Court's *Wilburn Boat* ruling, Great Lakes does not seek this Court's reconsideration or overruling of that decision.

The district court in this case held, and the parties do not dispute, that no established rules of federal admiralty law preclude Raiders from maintaining its three Pennsylvania–law counterclaims against Great Lakes. Thus, the sole question before the district court, and the Third Circuit on appeal, was whether the insurance policy's choice of New York law precluded those counterclaims or whether the strong public policies of the forum State — meaning the Commonwealth of Pennsylvania, in whose federal district court Great Lakes initiated this declaratory judgment action against Raiders — would allow the application of Pennsylvania law to those counter-claims.

In resolving the question presented on appeal, the Third Circuit held that well–established maritime choice–of–law principles, which recognize that "'[a] choice of law provision in a marine insurance contract will be upheld in the absence of evidence that its enforcement would be unreasonable or unjust.'

2 Thomas J. Schoenbaum, Admiralty and Maritime Law §19:6 (6th ed. 2020)," *Raiders*, 47 F.4th at 230, coupled with this Court's recognition in *M/S Bremen*, 407 U.S. at 15, that a choice–of–law provision would apply unless "enforcement would be unreasonable and unjust," dictated that a maritime insurance policy's choice–of–law provision would not be enforced if "enforcement would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." *Raiders*, 47 F.4th at 230.

Great Lakes strenuously maintained in seeking affirmance from the Third Circuit that a maritime insurance contract's choice–of–law provision cannot be denied enforcement no matter how unreasonable or unjust, and no matter whether enforcement would contravene a strong public policy of the forum in which suit was brought (here, Pennsylvania). Yet, to date, no federal appellate court has agreed with Great Lakes' position in this regard.

Indeed, the Third Circuit's ruling in this case is consistent with the D.C. Circuit's ruling in *Milanovich* v. *Costa Crociere, S.p.A.*, 954 F.2d 763, 768 (D.C. Cir. 1992) (applying *M/S Bremen* to a contractual choice–of–law provision), and the Fifth Circuit's ruling in *Great Lakes Reins. (UK) PLC* v. *Durham Auctions, Inc.*, 585 F.3d 236, 243–44 & n.13 (5th Cir. 2009) (concluding no fundamental policy of Mississippi law existed that would suffice to override the insurance policy's choice of New York law).[1]

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[1] In *Great Lakes Ins. SE* v. *Wave Cruiser LLC*, 36 F.4th 1346, 1354 (11th Cir. 2022), the Eleventh Circuit, citing to the Fifth Circuit's ruling in *Durham Auctions*, observed that "[w]e have

Great Lakes, in its Petition, seeks to downplay the importance of the Fifth Circuit's ruling in *Durham Auctions* by asserting, without offering any relevant proof, that that court has since returned to the maritime choice–of–law approach it adopted in *Stoot* v. *Fluor Drilling Servs., Inc.*, 851 F.2d 1514 (5th Cir. 1988).[2] Yet *Stoot*, which from the Table of Authorities in Great Lakes' Petition appears to be cited on more pages than any other case, is of no relevance here. In *Stoot*, no party was arguing that the law of the forum State (meaning the State in which the case was pending) should apply in place of the state law identified in the choice–of–law provision found in the contract between the parties. Rather, in *Stoot*, the case was pending in a Louisiana federal district court, and the parties' choice–of–law provision designated that Louisiana law would apply. *See id.* at 1516–17. *Stoot* did not involve which of two different States' laws should apply, and thus *Stoot* does not conflict with the Third Circuit's ruling in this case.

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no occasion today to decide whether we would refuse to enforce a choice–of–law clause in a maritime contract if its enforcement would be unreasonable or unjust because neither party argues that here."

[2] The case that Great Lakes cites for the proposition that the Fifth Circuit has abandoned the approach it took in *Durham Auctions*, in favor of returning to the approach taken in *Stoot*, is that court's unpublished, non–precedential opinion in *St. Paul Fire & Marine Ins. Co.* v. *Board of Com'rs of the Port of New Orleans*, 418 F. App'x 305 (5th Cir. 2011). Yet *St. Paul* repeatedly cites with approval to *Durham Auctions*, *see* 418 F. App'x at 309, and a three–judge Fifth Circuit panel would not (and cannot) overturn a published, precedential decision such as *Durham Auctions* by means of an unpublished, non–precedential ruling.

If that were not enough, the choice–of–law test announced in *Stoot*, which Great Lakes appears to favor, acknowledges that "under admiralty law, where the parties have included a choice of law clause, that state's law will govern unless the state has no substantial relationship to the parties or the transaction *or the state's law conflicts with the fundamental purposes of maritime law*." *Stoot*, 851 F.2d at 1517 (emphasis added). As the Schoenbaum treatise and the Third Circuit's ruling in this case both recognize, the "unreasonable and unjust" inquiry, which *Stoot* had no occasion to undertake since only a single State's law was at issue there, properly looks to see whether applying the designated State's law would conflict with the fundamental purposes of maritime law, which includes considering whether applying the designated law would violate a strong public policy of the forum State.[3]

The closest Great Lakes comes to alleging the existence of a real, live circuit split on the questions presented concerns the Ninth Circuit's ruling in *Galilea, LLC* v. *AGCS Marine Ins. Co.*, 879 F.3d 1052 (9th Cir. 2018). The Third Circuit extensively addressed Great Lakes' misplaced reliance on the *Galilea* decision and why that decision was of no relevance here. *See Raiders*, 47 F.4th at 232–33. In *Galilea* the Ninth Circuit held that there was no dispute whether the contractual choice of New York state law should apply over the forum's law of

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[3] The Eleventh Circuit's 2022 ruling in *Wave Cruiser*, 36 F.4th at 1354, which recognized that the Fifth Circuit's decision in *Durham Auctions* remains good law, further refutes Great Lake's contention that the Fifth Circuit has somehow renounced its *Durham Auctions* decision.

Montana since "here there is no gap in federal maritime law to fill with law from *any* state, Montana included, as the [Federal Arbitration Act] supplies the governing arbitration law for maritime transactions" *Galilea*, 879 F.3d at 1060. Thus, *Galilea* simply did not involve the very same question presented here — whether the law of the State designated in the contractual choice–of–law provision should take precedence over the law of the forum State.

In *Galilea*, the insured argued that a Montana state statute should override the Federal Arbitration Act and preclude the parties' choice of arbitration in their maritime insurance contract from being given effect. *See Galilea*, 879 F.3d at 1057. Thus, *Galilea* is itself distinguishable from this case, because no party there was arguing that the forum State's law (meaning the law of Montana) should govern in place of the insurance policy's choice of New York law. *Id.* at 1055.

The Ninth Circuit concluded that the FAA constituted a substantive, entrenched rule of federal admiralty law that applied under the circumstances of that case. *See id.* at 1057–58. *Galilea* thus presented a dispute between giving effect to federal law or to state law, and federal law under the Supremacy Clause, *see* U.S. Const. art. VI, cl. 2, will win that battle every single time. According to the Ninth Circuit, "Montana's law simply does not apply here. So it cannot act, through *The Bremen* or any other avenue, to trump the FAA as an established federal maritime rule." *Galilea*, 879 F.3d at 1061. The Ninth Circuit's ruling in *Galilea* is entirely distin-

guishable from this case and thus does not conflict with the Third Circuit's ruling herein.

Great Lakes has failed to identify any decision from another circuit with which the Third Circuit's ruling in this case conflicts. Rather, as demonstrated above, every circuit applies the very same legal test that the Third Circuit applied in this case. Moreover, Great Lakes cannot point to any federal appellate court whose precedent would produce a different outcome in this case than the one the Third Circuit reached. As a result, the Petition for Writ of Certiorari should be denied.[4]

B. The Petition Does Not Present An Important And Recurring Question

The question presented herein appears to have arisen a total of three or four times since 1992, depending on whether one counts the Ninth Circuit's ruling in *Galilea*, which as demonstrated above is wholly distinguishable and did not address or resolve that question. And none of those decisions resulted in a conflict necessitating this Court's resolution.

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[4] To be sure, in *Great Lakes Ins. SE* v. *Andersson*, 544 F. Supp. 3d 196, 202 (D. Mass. 2021),the district judge noted that "there is discord in admiralty case law about whether to consider the forum state's public policy when a contractual choice of law provision calls for the application of a third state's substantive law." Yet, with the exception of citing the Ninth Circuit's distinguishable ruling in *Galilea*, the *Andersson* opinion only cited to federal district court decisions as examples of the supposed "discord." *See Andersson*, 544 F. Supp. 3d at 202. This Court, of course, does not grant review to resolve disagreements among individual federal district court judges. The First Circuit is scheduled to hear oral argument in the insured's appeal in *Andersson* on January 11, 2023, just days after this Brief in Opposition is being filed.

Great Lakes and the other maritime insurers who currently employ the choice–of–law provision at issue in this case have the ability going forward to avoid the effect of the Third Circuit's ruling in this case, should they wish to do so. All they would need to do is include a contractual forum selection clause that authorized the insurer to initiate suit in New York State seeking declaratory relief, and required the insured to likewise file any suit involving the insurance policy in the federal or state courts of New York State. Such a forum selection clause would entirely avoid the potential of having the forum State's strong public policy override the contractually designated choice–of–law, since both would require application of New York law.

C. This Case Is An Unsuitable Vehicle For Certiorari

This case is an unsuitable vehicle for certiorari for several reasons.

First, the district court has yet to consider or resolve on remand from the Third Circuit whether Raiders will or will not be allowed to pursue its three extra–contractual Pennsylvania law counterclaims against Great Lakes under the choice–of–law test that the Third Circuit instructed the district court to apply. The insurance policy's choice of New York law will not have been rendered inapplicable to those counterclaims unless and until the district court, on remand from the Third Circuit's decision in this case, holds that a strong public policy of Pennsylvania requires reinstatement of Raiders' three counterclaims. Whether that ultimately happens or not in this case remains to be seen.

And, second, the ultimate viability of Raiders' Pennsylvania law counterclaims against Great Lakes, even if they are reinstated at this juncture, depends on a ruling that Great Lakes improperly denied coverage for the yacht grounding that gives rise to this dispute. Under the Third Circuit's holding in *AGF Marine*, 544 F.3d at 261–63, which held that the very same choice–of–law provision at issue in this case is enforceable and further held that the doctrine of *uberrimae fidei* constitutes entrenched federal admiralty law, it is far from certain whether Raiders will ultimately prevail in the declaratory judgment action that Great Lakes has initiated to seek a declaration that the insurance policy at issue herein was void from its inception. If Raiders ultimately fails to establish that insurance coverage exists here for its losses, then Raiders will, as a consequence thereof, be unable to prevail on any of its three extra–contractual Pennsylvania law counterclaims.

In short, it is far from certain that the Third Circuit's ruling in this case will allow Raiders to in fact pursue or prevail on its three Pennsylvania law counterclaims against Great Lakes. Consequently, this case is a poor vehicle for certiorari.

CONCLUSION

The Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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