No. 22-500

IN THE

Supreme Court of the United States

GREAT LAKES INSURANCE SE,
Petitioner,

v.

RAIDERS RETREAT REALTY CO., LLC,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF OF *AMICI CURIAE* PROFESSORS JOHN F. COYLE AND KERMIT ROOSEVELT III IN SUPPORT OF NEITHER PARTY

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

INTEREST OF THE *AMICI CURIAE*[1]

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Both Professor Coyle and Professor Roosevelt teach and have written extensively about conflicts of laws and have an interest in the sound development of this field.

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[1] No counsel for a party authored this brief in whole or in part, and no such counsel or any party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amici curiae made any monetary contribution to its preparation or submission.

SUMMARY OF ARGUMENT

The fundamental issue raised by this case is what test federal courts should apply to determine the enforceability of a choice-of-law provision in a maritime contract. Respondent invoked admiralty jurisdiction to sue in federal district court in Pennsylvania for breach of a maritime contract. Petitioner alleged counterclaims under Pennsylvania law. The contract provides that disputes shall be adjudicated according to admiralty law or, in the absence of established admiralty principles, New York law.

This Court should hold that the enforceability of that choice-of-law provision, including whether it is unenforceable if contrary to the public policy of the state whose law is displaced, is a question of federal common law. Moreover, this Court should hold that federal common law incorporates the traditional test for enforceability of choice-of-law provisions stated in the Restatement (Second) of Conflict of Laws § 187. Under § 187, the law of a state designated in a contractual choice-of-law clause will apply unless (1) the designated state does not have a substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or (2) applying the law of the designated state would be contrary to a fundamental policy of the state whose law would otherwise apply and that state has a

materially greater interest than does the designated state in the determination of the particular issue.

Even if this Court were to conclude that state law, instead of federal law, dictates the test for the enforceability of a choice-of-law provision in an admiralty contract (be it because federal law adopts state law, *see United States v. Kimbell Foods, Inc.*, 440 U.S. 715 (1979), or because under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), state law applies of its own force, *see Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487 (1941)), § 187 would be the appropriate test because the forum state Pennsylvania has adopted § 187.

The test from *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972) ("*The Bremen*") used by the Third Circuit is inappropriate because that case dealt with the enforceability of a forum-selection clause. A choice-of-law clause serves a different purpose than does a forum-selection clause, and its enforceability accordingly should be evaluated using a different test. The lower court erred in applying the test from *The Bremen* instead of § 187. This Court should vacate and remand with instructions that the lower courts apply § 187 to determine whether Pennsylvania or New York law controls Respondent's counterclaims.

ARGUMENT

The enforceability of a choice-of-law provision in a maritime contract is a question of federal common law. Federal common law should adopt the traditional test regarding the enforceability of choice-of-law provisions stated in the Restatement (Second) of Conflict of Laws § 187. The Third Circuit erred by applying *The Bremen* instead of § 187 because *The Bremen* addresses the enforceability of forum selection clauses. The considerations relevant to whether to enforce a forum-selection clause are different from those that apply to choice-of-law clauses.

I. All Roads Lead to § 187.

Ordinarily, federal courts lack the power to fashion common law regarding the interpretation and enforceability of contracts. Maritime contracts are an exception to that rule. This Court has held that federal common law controls maritime contracts—at least in disputes that are not inherently local. *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 22–23 (2004).

The authority to fashion federal common law relating to maritime contracts "stems from the Constitution's grant of admiralty jurisdiction to federal courts" under U.S. CONST. art. III, § 2, cl. 1. *Kirby*, 543 U.S. at 23. Although a grant of "federal jurisdiction . . . is not in itself a mandate for applying federal law in all circumstances," *United States v.*

Little Lake Misere Co., 412 U.S. 580, 591 (1973), this Court has recognized that the development of a federal body "of maritime law . . . was most certainly intended and referred to when it was declared in [the Constitution] that the judicial power of the United States shall extend 'to all cases of admiralty and maritime jurisdiction,'" *The Lottawanna*, 21 Wall. (88 U.S.) 558, 575 (1874) (quoting U.S. CONST. art. III, § 2, cl. 1); *see Nw. Airlines v. Minnesota*, 322 U.S. 292, 303 (1944) (Jackson, J., concurring) ("[T]his Court [has] interpreted the commerce clause of the Constitution to lift navigable waters out of local controls and into the domain of federal control." (citing *Gibbons v. Ogden*, 9 Wheat. (22 U.S.) 1 (1824) and *United States v. Appalachian Electric Power Co.*, 311 U.S. 377 (1940))).

Nonetheless, federal courts should fashion a federal rule only if necessary to protect a federal interest. *Kimbell*, 440 U.S. at 718 (federal courts should not fashion a federal rule if doing so is "unnecessary to protect . . . federal interests"). Where a federal rule is not needed to protect a federal interest, federal common law may incorporate "state law . . . as the federal rule of decision." *Id.* at 728; *see also* Paul J. Mishkin, *The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision*, 105 U. PA. L. REV. 797, 805 (1957) (observing that federal common law will incorporate state law "in an area which is sufficiently close to a national operation to establish

competence in the federal courts to choose the governing law, and yet not so close as clearly to require the application of a single nationwide rule of substance"). In those circumstances, federal law imports the common law of the forum state.

The Court has followed this approach in admiralty cases. Instead of creating federal rules for every question of admiralty law not covered by a federal statute, federal courts have "[d]rawn from state and federal sources" in fashioning "the general maritime law." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864–65 (1986) (footnote omitted); *Wilburn Boat Co. v. Fireman's Fund Insurance Co.*, 348 U.S. 310, 313 (1955) (stating that although maritime contracts fall within admiralty jurisdiction, "it does not follow . . . that every term in every maritime contract can only be controlled by some federally defined admiralty rule. In the field of maritime contracts as in that of maritime torts, the National Government has left much regulatory power in the States.") (footnotes omitted); 2 T. SCHOENBAUM, ADMIRALTY & MARITIME LAW § 11:2, 7 (6th ed. 2018) ("[F]ederal maritime law includes general principles of contract law[.]").

For example, because of the need for uniformity in the interpretation of maritime contracts, the Court has concluded that federal law should generally supply the rules for interpreting those contracts. *Kirby*, 543 U.S. at 27-28; s*ee also S. Pac. Co. v. Jensen*,

244 U.S. 205, 216 (1917) (upholding the creation of a federal rule if adoption of state law "interferes with the proper harmony and uniformity" of the general maritime law "in its international or interstate relations").

Notwithstanding this general rule that federal law governs interpretation of maritime contracts, the Court has recognized that "[a] maritime contract's interpretation may so implicate local interests as to beckon interpretation by state law." *Kirby*, 543 U.S. at 27; *see Kossick v. United Fruit Co.*, 365 U.S. 731, 738 (1961) ("This brings us, then, to the remaining, and what we believe is the controlling, question: whether the alleged contract, though maritime, is maritime and local, in the sense that the application of state law would not disturb the uniformity of maritime law." (internal quotation marks omitted)). In short, state law will apply where a contractual provision involves only purely local concerns not implicating the need for national uniformity. In all other circumstances, a federal rule is appropriate.

A. This Court should adopt § 187 of the Restatement (Second) of Conflict of Laws as a matter of federal common law to resolve maritime choice-of-law issues.

This Court should recognize the test adopted in § 187 of the Restatement (Second) of Conflict of Laws as the federal rule governing enforcement of choice-of-

law clauses in maritime contracts. The need for predictability in admiralty cases, along with the test's extensive history, makes § 187 the best approach to resolve such issues.

1. The core reason for the creation of a uniform federal rule regarding maritime contracts is the "commercial character" of those contracts "affecting the intercourse of the States with each other or with foreign states." *Kirby*, 543 U.S. at 28; *see also id.* at 25 ("[T]he 'fundamental interest giving rise to maritime jurisdiction is "the protection of maritime commerce."'" (quoting *Exxon Corp. v. Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991))). Adopting a single federal rule to determine the enforceability of choice-of-law provisions would create predictability and uniformity, thereby facilitating maritime commerce.

To be sure, adopting a federal rule for resolving choice-of-law disputes in maritime contracts would not determine the actual rights and liabilities of the parties. It would, however, serve the critical function of providing the parties with a consistent means for predicting when a choice-of-law clause will be enforced and, consequently, which state's laws will govern their rights and liabilities when federal law does not. Such predictability is essential for parties drafting maritime contracts; the parties need to know whether and how their contract will be enforced.

At the same time, the issue of whether to enforce choice-of-law provisions in maritime contracts is not inherently local. By their nature, disputes about choice-of-law provisions implicate at least two states in every dispute: the state designated in the clause, and the state whose law would otherwise apply. Indeed, some maritime contracts implicate multiple jurisdictions, the laws of any one of which might apply to a future dispute depending on whether a choice-of-law provision is enforced.

2. The Court should adopt § 187 of the Restatement (Second) of Conflict of Laws as the uniform federal common law rule governing choice-of-law provisions in maritime contracts. That section provides:

> (1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
>
> (2) The law of the state chosen by the parties to govern their contractual rights and duties 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

> (a) the chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
>
> (b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, 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.

Thus, under § 187, the law of a state designated in a choice-of-law clause will apply unless either (1) the designated state does not have a "substantial relationship" to the parties or transaction and there is no other "reasonable basis" for the parties' choice, or (2) applying the law of the designated state would be contrary to a fundamental policy of the state whose law would otherwise apply and that state has a materially greater interest in the determination of the particular issue than the designated state.[2]

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[2] Section 187(1), which provides that the law of the state designated in a choice-of-law clause applies "if the particular issue is one which the parties could have resolved by an explicit

This Court should adopt this test from the Second Restatement for at least three reasons.

First, although the Second Restatement was not published until 1971, the test set forth in § 187 long predates that time. The "substantial relationship" test bears a close resemblance to the "reasonable relation" test that appears in the Uniform Commercial Code, which was first published in 1952. U.C.C. § 1-105 (AM. L. INST. 1952). Similarly, the "fundamental policy" requirement can be traced back to judicial decisions from the late nineteenth century. *See* John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. COLO. L. REV. 1147, 1159–61 (2020). In those cases, federal courts refused to uphold choice-of-law clauses in the face of local statutes requiring the application of the forum's law to certain types of disputes. *See, e.g.*, *Fletcher v. N.Y. Life Ins. Co.*, 13 F. 526, 528 (1882) (holding that Missouri state statute took precedence over New York choice-of-law clause); *cf. The Energia*, 56 F. 124, 126 (S.D.N.Y. 1893)

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provision in their agreement," does not apply. The question in this case is whether applying New York law would contravene the public policy of Pennsylvania. That issue is not one the parties may resolve by a provision in their agreement. *See* RESTATEMENT (SECOND) OF CONFLICT OF LAWS §187, cmt. g. Accordingly, § 187(2), not § 187(1), should control. The *amici* take no position as the proper result of application of § 187(2) here.

(holding that a choice-of-law clause could not be upheld for public policy reasons).

In short, the rule laid down in § 187 has been through the crucible of history. Its continued acceptance through many decades teaches that the test is workable and produces sound results.

Second, federal courts regularly apply § 187 as a matter of federal common law, both in suits involving admiralty, *St. Paul Fire & Marine Insurance Co. v. Board of Commissioners*, 418 F. App'x 305, 309 (5th Cir. 2011), and in other contexts*, see, e.g.*, *Consumer Financial Protection Bureau v. CashCall, Inc.*, 35 F.4th 734, 743–44 (9th Cir. 2022) (looking to "the approach outlined in [§ 187 of] the Restatement (Second) of Conflict of Laws as a description of the federal common law rule" (internal quotation marks omitted)) and *Wise v. Zwicker & Associates, P.C.*, 780 F.3d 710, 714-15 (6th Cir. 2015) (applying § 187 to resolve conflicts issues in a suit under the Fair Debt Collection Practices Act). Moreover, federal courts are intimately familiar with § 187, which has been cited in hundreds of federal cases in the past fifty years, including by every federal circuit Court of Appeals.[3]

Third, and closely related, the test set forth in § 187 has been widely embraced by the states.

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3 A search on May 25, 2023, of "restatement /5 conflicts /5 187" in the allfeds database on Westlaw yielded 469 results.

Twenty-six states have expressly or effectively adopted § 187. Many other states and the District of Columbia follow a test that is similar to § 187.[4] Moreover, § 187 is routinely followed "even in states that do not follow the Restatement (Second) in other respects." Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1260 n.96 (1997). Indeed, the authors of a leading treatise on conflict of laws have described § 187 as "one of the Restatement's most successful and popular provisions." HAY ET AL., CONFLICT OF LAWS 75 (5th ed. 2010).

B. Section 187 should apply even if federal law adopts state law as controlling on this issue.

Even if this Court were to adopt state law for determining whether choice-of-law provisions in admiralty contracts are enforceable, § 187 would still

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[4] *Litigation, Comparison Table – Choice of Law Rules*, Bloomberg Law, https://www.bloomberglaw.com/product/blaw/document/XCU26KF8000000?criteria_id=2e509ddd3ebb470152f24d6ea61067f0&navCriteriaId=a52c092e88069b5997143c6ea25df928&searchGuid=bb0de1ef-d5d4-4f8b-b031-a141cd6fc2dc&search32=PR3vxFhO1rkAL8IpD2MD-Q%3D%3DLLg7gVUtFmCNCuOHYtq2qH0gVgeqO6Yw2keBmC-Y9GkbwgY4rWLWFjquHvxD7-jS_mS-Wgy5anLglGwmExE3O5o9jQz39bpKHObEIYRdBvE9P3NJAuS2vkWNLRnvEJOoZMLtU6xu0VAEq4g6NMXaGtrglVMDWqFzO7hUo2Yiwxns3hmMnqoXhR1VgqGkR937 (last visited April 20, 2023).

supply the appropriate test in this case because Pennsylvania follows § 187.

When federal common law incorporates state law, the content of federal common law depends on where suit has been filed; the federal court applies the law of the state in which it sits. *Kimbell*, 440 U.S. at 740 (indicating that, when federal common law incorporates state law, the federal courts should apply "the state law in their respective districts"); *see Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001) (adopting, "as the federally prescribed rule of decision, the law that would be applied by state courts in the State in which" the federal court sits).

Here, suit was brought in federal court in Pennsylvania. Accordingly, if the federal rule for the enforcement of choice-of-law provisions incorporates state law, Pennsylvania's law regarding the enforcement of choice-of-law provisions should apply in this case.[5]

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[5] One could go further down the rabbit hole. It is possible to read *Kirby* as saying that state law applies to local disputes not because federal law incorporates state law, but rather because state law applies of its own force. *See Kirby*, 543 U.S. at 27; *cf. Erie*, 304 U.S. at 78. Language in *Wilburn Boat Co.*, supports that view. 348 U.S. at 321 ("We, like Congress, leave the regulation of marine insurance where it has been—with the States."). Adopting that view, however, would not change the

Although the Pennsylvania Supreme Court has not squarely addressed the issue, the intermediate state courts of appeal have held that Pennsylvania follows § 187.[6] No decision of the Pennsylvania Supreme Court suggests that the intermediate courts have erred by doing so. *See Pa. Dep't of Banking v. NCAS of Del., LLC*, 948 A.2d 752, 758 (Pa. 2008) (declining to take issue with litigant's position that § 187 "has been adopted by Pennsylvania courts"). "Where an intermediate appellate state court rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which is not to be disregarded by a federal court unless it is convinced by other persuasive data that the highest court of the state would decide otherwise." *West v. Am. Tel. & Tel. Co.*, 311 U.S. 223, 237 (1940). Accordingly, if federal common law adopts state law

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ultimate conclusion that § 187 should apply. The only difference would be that § 187 would apply because state law says it applies, instead of federal law saying § 187 applies because federal law incorporates state law. *See Boyle v. United Techs. Corp.*, 487 U.S. 500, 507 n.3 (1988) ("If the distinction between displacement of state law and displacement of federal law's incorporation of state law ever makes a practical difference, it at least does not do so in the present case.").

[6] *See Synthes USA Sales, LLC v. Harrison*, 83 A.3d 242, 252 (Pa. Super. Ct. 2013) (applying § 187); *Chestnut v. Pediatric Homecare of Am., Inc.*, 617 A.2d 347, 350-51 (Pa. Super. Ct. 1992) (same); *Schifano v. Schifano*, 471 A.2d 839, 843 & n.5 (Pa. Super. Ct. 1984) (same).

regarding choice-of-law provisions in maritime contracts, § 187 should apply in this case.

II. The test from *The Bremen* should not be used to determine the enforceability of choice-of-law clauses in maritime contracts.

Instead of adopting the test in Restatement § 187, the Third Circuit directed the district court to use the test articulated in *The Bremen* to determine the enforceability of the choice-of-law clause at issue here. *Great Lakes Ins. SE v. Raiders Retreat Realty Co., LLC*, 47 F.4th 225, 233 (3d Cir. 2022). The Third Circuit erred in doing so. The test set forth in *The Bremen* determines the enforceability of forum-selection clauses in maritime contracts under the doctrine of *forum non conveniens*. That test has no bearing on whether to enforce choice-of-law clauses. *The Bremen*'s test should be confined to the forum-selection context in which it was established.

First, by its terms, *The Bremen* does not apply to the enforcement of choice-of-law provisions. Rather, *The Bremen* addresses the different question of when a forum-selection clause should be given effect.

Although they are sometimes grouped together, forum-selection clauses and choice-of-law clauses are separate and distinct provisions that serve different purposes. A contractually valid forum-selection clause mandating litigation in a different forum

provides a compelling reason for a federal court to decline to exercise jurisdiction over an action. The federal court may dismiss or transfer the action in favor of requiring the dispute to be litigated in the chosen forum. *See Atlantic Marine Constr. Co. v. U.S. Dist. Ct. for the W. Dist. of Tex.*, 571 U.S. 49, 63 (2013).

In contrast, a choice-of-law provision does not provide a basis to dismiss an action on the ground that another forum would be more convenient—or for any other reason. Instead, a choice-of-law provision simply designates the body of substantive law under which a suit will be adjudicated.

To be sure, *The Bremen* recognized that one consequence of enforcing a forum-selection clause may be that the law of the designated forum will apply. *See* 407 U.S. at 14 n.15. But the Court did not purport to establish a test for the enforcement of choice-of-law provisions. Indeed, the contract at issue in *The Bremen* did not even contain a choice-of-law clause. *Id.*

Second, *The Bremen* should not be extended to choice-of-law clauses because the considerations relevant to whether to enforce a forum-selection clause do not apply to choice-of-law clauses.

Although a court ordinarily will not disturb a plaintiff's choice of forum, a forum-selection clause changes the calculus. A forum-selection clause

"represents the parties' agreement as to the most proper forum." *Atlantic Marine*, 571 U.S. at 63 (quoting *Stewart Org., Inc. v. Ricoh Corp.*, 487 U.S. 22, 31 (1988)). Designating a forum creates certainty for the parties about where they will be litigating, the procedures that will control litigation, and the logistics and costs for producing evidence and witnesses. It may also prevent duplicative litigation in other forums. Thus, the "enforcement of valid forum-selection clauses, bargained for by the parties, protects their legitimate expectations" with respect to these issues. *Id.* (internal quotation marks omitted).

Enforcement of a forum-selection clause asserted in admiralty also implicates the interests of the federal courts themselves. Among other things, enforcing a clause designating a court other than the one in which suit is brought may affect the distribution of work in the federal judiciary. *See, e.g.*, *id.* at 62 n.6.

The enforcement of choice-of-law clauses implicates none of these considerations. Enforcing a choice-of-law clause results only in a court applying one body of law instead of another. It does not result in the court declining to exercise jurisdiction, and it does not force parties to bear the costs of litigating in another forum. Nor does the enforcement of a choice-of-law clause affect the distribution of work in the judicial system. Instead, enforcing a choice-of-law provision simply determines the law that the forum

court must apply. If a choice-of-law provision is enforced, the same law applies no matter which court hears the suit.[7]

In short, the considerations that led to the adoption of the test in *The Bremen* for determining the enforcement of forum-selection clauses have no bearing on the decision of whether to enforce a choice-of-law clause. Accordingly, contrary to the Third Circuit's holding, the test laid down in *The Bremen* should not determine the enforceability of choice-of-law clauses in maritime contracts. Instead, § 187 of the Restatement (Second) of Conflict of Laws, which was designed specifically to account for the interests at stake in the enforcement of choice-of-law provisions, is the appropriate test to apply.

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[7] The public policy analysis prescribed by *The Bremen* is also inapt for determining the enforceability of choice-of-law clauses because that analysis focuses solely on the public policy of "the forum in which suit is brought." 407 U.S. at 15. Regardless of whether *The Bremen* was correct to focus solely on the interest of the forum state in determining whether to enforce a forum-selection clause, that forum-centric approach is inappropriate for determining the enforceability of choice-of-law clauses because, by definition, at least two states have an interest in the determination of which state's law applies. The first state is the one designated in the clause. The second state is the one whose law would otherwise apply. A test for enforceability that focuses solely on the public policy of the forum ignores the interests of other states.

CONCLUSION

The Court should vacate the judgment of the Third Circuit with instructions to apply § 187 to determine the enforceability of the choice-of-law clause.

Respectfully submitted,

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