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 FOR *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION SUPPORTING PETITIONER

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INTEREST OF *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation. It represents approximately 300,000 members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus curiae* briefs in cases, like this one, that raise issues of concern to the Nation's business community.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent 63% of the overall U.S. property-casualty insurance market and 73% of the commercial market, including the vast majority of the maritime insurance market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, or their counsel made any monetary contributions intended to fund the preparation or submission of this brief.

This case affects the interests of *amici curiae* because it concerns the enforcement of choice-of-law provisions, which many of their members include in their contracts. While this case involves a choice-of-law provision in a marine insurance contract, it will set an important precedent for the enforcement of choice-of-law provisions in other types of insurance contracts and in commercial contracts more broadly. The court below declined to enforce a choice-of-law provision that sophisticated parties agreed to, thereby putting at risk the legitimate contractual expectations of thousands of parties with similar contract provisions. If permitted to stand, the decision below will undermine the ability of parties to structure their business contracts so that they can select in advance the law under which disputes will be litigated. In addition, the decision below invites uncabined forum shopping.

For all these reasons, and for the reasons set forth in petitioner's brief, *amici* respectfully submit that the decision of the Third Circuit should be reversed.

SUMMARY OF ARGUMENT

The court of appeals' decision not to enforce the parties' choice-of-law provision, and its rationale for doing so, undermine contractual certainty. Choice-of-law provisions rest on fundamental principles of freedom of contract and party autonomy. They are widely used and serve important purposes in business and insurance contracts. Those purposes include reducing uncertainty and achieving predictability about the governing law, mitigating contractual risk, and avoiding costly and time-consuming pretrial litigation over choice-of-law issues.

Choice-of-law provisions in marine insurance policies serve all the vital purposes discussed above, and therefore advance the fundamental objective of U.S.

maritime law—to ensure that maritime commerce is governed by uniform and predictable rules of decision. As a result, lower federal courts have consistently held that choice-of-law provisions in marine insurance policies are presumptively enforceable.

Indeed, choice-of-law provisions are arguably an essential component of marine insurance policies because, after this Court's decision declining to recognize new federal common law rules for marine insurance policies in *Wilburn Boat Co.* v. *Fireman's Fund Insurance Co.*, 348 U.S. 310 (1955), state laws in part govern the field. Those state laws vary substantially, and the differences can matter tremendously. This variance in state legal rules creates risks for parties to marine insurance contracts, and choice-of-law provisions are a mechanism for mitigating those risks and associated costs. By diminishing uncertainty, choice-of-law provisions play an important role in moderating the price of marine insurance and ensuring its availability.

The decision below fosters uncertainty in the maritime sector and other industries because it creates an unreliable regime for the enforcement of choice-of-law provisions. By holding that the public policy of the forum state can render unenforceable the choice of state law in a marine insurance contract—thereby defeating the parties' deliberate agreement that their chosen state law prevails in the event that state laws conflict—the decision leaves parties without any confidence that their choice-of-law provisions will be enforced.

This approach has several detrimental consequences for businesses in the maritime sector and other industries. It will disrupt the delicately balanced risk transfer agreements of existing insurance contracts and set a troubling precedent for the thousands of businesses that have choice-of-law provisions in their contracts.

Accordingly, the court of appeals' rule will prevent businesses and their customers from realizing the substantial efficiencies that can be achieved from limiting uncertainty and litigation costs. More importantly, it may impact both the availability and affordability of marine insurance, to the detriment of consumers and all stakeholders in maritime commerce. This uncertainty and disruption will be exacerbated by forum-shopping, which the decision below promotes.

ARGUMENT

Amici agree with petitioner's analysis demonstrating that the Third Circuit's conclusion that a district court can disregard the choice of state law in a marine insurance contract based on the public policy of the forum state is fundamentally flawed and misapplied this Court's decision in *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1 (1972). *Amici* will not echo petitioner's analysis of those issues, but instead will highlight additional reasons why the decision below should be reversed. These reasons are grounded in the fundamental purposes of federal maritime law, and thus are central considerations in this federal common law analysis. *First*, choice-of-law provisions serve important purposes in business and insurance contracts. *Second*, choice-of-law provisions in marine insurance contracts align with the historical bases and purposes of U.S. maritime law. *Third*, the decision below severely undermines legitimate contractual expectations with respect to choice-of-law provisions in marine insurance contracts and, if left uncorrected, will destabilize maritime commerce.[2]

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[2] *Amici* take no position on the underlying substantive insurance dispute in this litigation.

I. CHOICE-OF-LAW PROVISIONS SERVE IMPORTANT PURPOSES IN BUSINESS AND INSURANCE CONTRACTS.

Contractual choice-of-law provisions, which designate the jurisdiction whose law governs the parties' agreement, rest on fundamental principles of freedom of contract and party autonomy. Mo Zhang, *Rethinking Contractual Choice of Law: An Analysis of Relation Syndrome*, 44 Stetson L. Rev. 831, 840 (2015) ("The corollary of party autonomy is the freedom of parties to choose the law applicable to their contract, and the very centerpiece of this doctrine is the parties' intent.") ("Zhang"); John F. Coyle, *A Short History of the Choice-of-Law Clause*, 91 U. Colo. Rev. 1147, 1154 (2020) ("Coyle, *A Short History*"). This Court has long endorsed the importance of party autonomy when addressing choice-of-law issues pertaining to contracts. *Wayman* v. *Southard*, 23 U.S. 1, 48–49 (1825) ("in every forum, a contract is governed by the law with a view to which it was made"); *Pritchard* v. *Norton*, 106 U.S. 124, 136 (1882) ("The law we are in search of . . . is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation.").

Contractual choice-of-law provisions serve many important functions. Their principal purpose is to eliminate uncertainty by specifying in advance a body of law acceptable to both parties, thereby ensuring predictability and uniformity in business contracts. See Restatement (Second) of Conflict of Laws § 187 cmt. (3)(h) (1971) (choice-of-law provisions are designed to achieve "certainty and predictability" in choice of law); William J. Moon, *Contracting out of Public Law*, 55 Harv. J. Legis. 323, 330–31 (2018) (choice-of-law provisions are "the only practical way to achieve predictability in cases involving an interstate element" and

recognize the importance of "the intent of contract signatories"); John F. Coyle, *The Canons of Construction for Choice-of-Law Clauses*, 92 Wash. L. Rev. 631, 633 n.6 (2017) ("The widespread use of choice-of-law clauses serves to reduce legal uncertainty in commercial transactions."); *Yavuz* v. *61 MM, Ltd.*, 465 F.3d 418, 430 (10th Cir. 2006) (choice-of-law provisions reflect "respect for the parties' autonomy and the demands of predictability"). Without predictable and enforceable contract rights, business activity cannot flourish.

In addition, by specifying the applicable law, choice-of-law provisions allow the parties (and courts) to avoid costly and time-consuming pretrial litigation over the question of which law applies. Coyle, *A Short History*, at 1149 ("When a contract contains a choice-of-law clause, it is easier to predict the outcome of a conflicts analysis because the court will typically apply the law chosen by the parties."); cf. *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585, 594 (1991) (forum selection clauses "spar[e] litigants the time and expense of pretrial motions to determine the correct forum and conserv[e] judicial resources that otherwise would be devoted to deciding these motions"). Businesses do not want to spend resources litigating about the law that will govern their litigation.

Choice-of-law provisions also allow parties to limit their business and litigation risks, an issue that is particularly important for insurance contracts. Indeed, it is not surprising that insurers were early adopters of choice-of-law provisions to "mitigate the legal risks associated with doing business in many different states." Coyle, *A Short History*, at 1156–57. Choice-of-law provisions were the only way for nationwide insurance companies to "be governed by a single, uniform law." *Id.* at 1157.

Although choice-of-law provisions play a particularly important role in insurance contracts, they are widely used in contracts of all types. "[C]ompanies frequently agree to choice of law and choice of forum provisions when they enter into contracts," including contracts that "cover a wide range of corporate activities, such as employment and severance agreements, dispute settlement, mergers and asset purchases, financing agreements, and securities transactions." Theodore Eisenberg & Geoffrey Miller, *Ex Ante Choices of Law and Forum: An Empirical Analysis of Corporate Merger Agreements*, 59 Vand. L. Rev. 1975, 1978 (2006); see also Coyle, *A Short History*, at 1181 (choice-of-law provisions "have become standard features in commercial agreements over the past century"); Maral Kilejian & Christianne Edlund, *Enforceability of Choice of Forum and Choice of Law Provisions*, 32 Franchise L.J. 81, 81 (2012) ("Most franchise agreements contain both choice of forum and choice of law clauses").

Like any provision that businesses agree to and choose to include in their contracts, businesses want and expect choice-of-law provisions to be enforced. Federal courts recognize the importance of the parties' intent by presumptively enforcing choice-of-law provisions. *E.g.*, *Gray* v. *Am. Express Co.*, 743 F.2d 10, 17 (D.C. Cir. 1984) (enforcing a choice-of-law provision designating New York State law as the governing law because the defendant was a New York corporation and the court found "sufficient basis for deferring to the parties' choice of law"); *Herring Gas Co.* v. *Magee*, 22 F.3d 603, 609 (5th Cir. 1994) (enforcing a choice-of-law provision because it reflected the parties' "justified expectations" and was conducive to the realization of "certainty, predictability and uniformity of result"); *Wise* v. *Zwicker & Assocs., P.C.*, 780 F.3d 710, 715 (6th

Cir. 2015) (enforcing a choice-of-law provision and explaining that § 187 of the Restatement (Second) of Conflicts of Laws "instructs courts to generally respect choice-of-law provisions"). By presumptively enforcing choice-of-law provisions, courts recognize that parties intend to be bound by the terms of their agreement and have a reasonable expectation that any disputes arising from their agreement will be resolved by "the parties' own choice of the applicable law." Zhang at 841 (quotation omitted). Indeed, a primary purpose of choice-of-law provisions is to protect the parties' expectations. *Id.*

Correspondingly, commercial certainty is destabilized when judicial enforcement of choice-of-law provisions is weak or unreliable. In that circumstance, parties cannot have confidence that these mutually agreed provisions will have binding effect. See *Norfolk & W. Ry.* v. *Am. Train Dispatchers Ass'n*, 499 U.S. 117, 130 (1991) ("A contract has no legal force apart from the law that acknowledges its binding character."). When there is uncertainty about the applicable law, businesses may be reluctant to enter into contracts or undertake transactions. Reliable enforcement of choice-of-law provisions therefore is essential to robust business activity, benefitting both businesses and consumers alike.

II. CHOICE-OF-LAW PROVISIONS IN MARINE INSURANCE CONTRACTS ALIGN WITH THE HISTORICAL BASES AND PURPOSES OF U.S. MARITIME LAW.

Choice-of-law provisions in marine insurance contracts serve all the purposes discussed above: protecting reliance interests and mitigating uncertainty, controlling risk, and avoiding extended satellite litigation over the governing law.

This Court's authority to recognize federal common law rules for the interpretation of maritime contracts derives from the Constitution's grant of admiralty jurisdiction to federal courts. See U.S. Const. art. III, § 2, cl. 1 (providing that the federal judicial power shall extend to "all Cases of admiralty and maritime Jurisdiction"). As the Court explained in *Norfolk Southern Railway* v. *Kirby*, 543 U.S. 14, 23 (2004), "the grant of admiralty jurisdiction and the power to make admiralty law are mutually dependent." Thus, this Court has "authority to make decisional law for the interpretation of maritime contracts." *Id.*; see also *S. Pac. Co.* v. *Jensen*, 244 U.S. 205, 215 (1917) ("in the absence of some controlling statute[,] the general maritime law as accepted by the federal courts constitutes part of our national law applicable to matters within the admiralty and maritime jurisdiction").

In performing this task, the Court looks to the fundamental "purpose of the grant" of admiralty and maritime jurisdiction, which is "the protection of maritime commerce." *Exxon Corp.* v. *Cent. Gulf Lines, Inc.*, 500 U.S. 603, 608 (1991) (quoting *Sisson* v. *Ruby*, 497 U.S. 358, 367 (1990)); see *Jerome B. Grubart, Inc.* v. *Great Lakes Dredge & Dock Co.*, 513 U.S. 527, 544 (1995) ("the basic rationale for federal admiralty jurisdiction is protection of maritime commerce through uniform rules of decision") (internal quotation marks omitted). When formulating federal maritime principles, this Court "may examine, among other sources, judicial opinions, legislation, treatises, and scholarly writings." *Air & Liquid Sys. Corp.* v. *DeVries*, 139 S. Ct. 986, 992 (2019).

The Court's "touchstone" in protecting maritime commerce is "a concern for the uniform meaning of maritime contracts." *Kirby*, 543 U.S. at 28; see also *id.* ("Article III's grant of admiralty jurisdiction must

have referred to a system of law coextensive with, and operating uniformly in, the whole country.") (internal quotation omitted). In particular, this Court has explained that Article III reflects an understanding that state regulation of maritime commerce would undermine federal uniformity:

> It certainly could not have been the intention to place the rules and limits of maritime law under the disposal and regulation of the several States, as that would have defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character affecting the intercourse of the States with each other or with foreign states.

Am. Dredging Co. v. *Miller*, 510 U.S. 443, 451 (1994); see also *Romero* v. *Int'l Terminal Operating Co.*, 358 U.S. 354, 373 (1959) ("[S]tate law must yield to the needs of a uniform federal maritime law when this Court finds inroads on a harmonious system").

As the decision below acknowledged, an "established" rule of federal maritime law is that choice-of-law provisions in marine insurance contracts are presumptively enforceable. Pet. App. 8a.[3] This rule is grounded in the guiding principles of party autonomy and freedom of contract, which prescribe that the

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[3] *See* 2 Thomas J. Schoenbaum, *Admiralty and Maritime Law* § 19:6 (6th ed. 2020) ("[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"); *Great Lakes Ins. SE* v. *Wave Cruiser LLC*, 36 F.4th 1346, 1353–54 (11th Cir. 2022); *Galilea, LLC* v. *AGCS Marine Ins. Co.*, 879 F.3d 1052, 1059 (9th Cir. 2018); *Great Lakes Reinsurance (UK) PLC* v. *Durham Auctions, Inc.*, 585 F.3d 236, 242–43 (5th Cir. 2009); *Triton Marine Fuels Ltd., S.A.* v. *M/V PAC. CHUKOTKA*, 575 F.3d 409, 413 (4th Cir. 2009).

choices of contracting parties generally should be respected and enforced. *Lauritzen* v. *Larsen*, 345 U.S. 571, 588–89 (1953) ("Except as forbidden by some public policy, the tendency of the law is to apply in [maritime] contract matters the law which the parties intended to apply."); *Triton Marine Fuels Ltd., S.A.* v. *M/V PAC. CHUKOTKA*, 575 F.3d 409, 413 (4th Cir. 2009) ("a freely negotiated choice-of-law clause in a maritime contract should be enforced"); *Chan* v. *Soc'y Expeditions, Inc.*, 123 F.3d 1287, 1296–97 (9th Cir. 1997) ("where the parties specify in their contractual agreement which law will apply, admiralty courts will generally give effect to that choice").

This established rule properly recognizes the vital interests that choice-of-law provisions serve. See Section I, *supra*. Choice-of-law provisions allow parties entering into maritime contracts to avoid uncertainty about the applicable law. By designating in advance the law that will apply to their contracts, the parties establish a predictable and uniform understanding as to the legal standards, rights, and remedies that will govern their dealings. Choice-of-law provisions therefore promote and ensure contractual certainty, which is a prerequisite to robust maritime commerce. Without such provisions, maritime contracts can have changeable and varied meanings depending upon the law applied. That uncertainty destabilizes maritime commerce, and particularly insurance markets.

For these reasons, enforcing choice-of-law provisions naturally advances the fundamental purposes of federal maritime law, which include ensuring "uniform rules of decision," *Grubart*, 513 U.S. at 544, and "uniform meaning of maritime contracts," *Kirby*, 543 U.S. at 28. During the early Republic, "[t]he paramount importance to merchants and underwriters that [marine

insurance] rules be clear, settled, and uniform was repeated over and over again" by American jurists. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1563 (1984) ("Fletcher"). "American marine insurance was not a strictly local business," so without adherence to a uniform, nationwide body of governing law, lawsuits over such policies "would have involved choice of law problems that would have increased the complexity of litigation and, at the same time, almost certainly decreased the predictability of its outcome." *Id.*

Early federal courts avoided this problem by "consistently decid[ing] marine insurance cases as a matter of general common law," rather than "local state law." *Id.* at 1553. Such "general maritime law," this Court later observed, "constitutes an integral part of the Federal law under art. 3, § 2, of the Constitution," with preemptive effect. *Jensen*, 244 U.S. at 212. "[W]hen the Constitution was adopted," the Court explained, "plac[ing] the rules and limits of maritime law under the disposal and regulation of the several States" would have "defeated the uniformity and consistency at which the Constitution aimed on all subjects of a commercial character." *Id.* at 215 (quoting *The Lottawanna*, 88 U.S. 558, 575 (1874)).

But modern U.S. maritime law does not ensure such uniformity, raising the very choice-of-law problems that concerned early American jurists, merchants, and underwriters. Despite the history, see Fletcher at 1538–54, this Court in *Wilburn Boat Co.* v. *Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955), refused to recognize new federal common law rules governing marine insurance policies, instead leaving that task to the states where a federal rule is not already established. See *Wilburn Boat*, 348 U.S. at 321. As a result, state

laws governing marine insurance vary substantially on both substantive and procedural matters. See *id.* at 320 (noting "our present system of diverse state regulations"). For example, with respect to the question of whether "strict and literal performance of warranties" is a prerequisite to recovery by an insured, the Court noted that "some state legislatures have adopted one kind of new rule and some another." *Id.* As a result, under *Wilburn Boat*, enforceable choice-of-law provisions are an important and even essential component of marine insurance contracts.

The diversity and variation among state law pose significant risks for parties to marine insurance contracts, which relate to mobile vessels that can traverse multiple jurisdictions. These differences can matter tremendously and even be outcome-determinative. See Warren T.R. Von Bittner Jr., *The Validity and Effect of Choice of Law Clauses in Marine Insurance Contracts*, 53 Ins. Counsel J. 573, 573 (1986) ("Von Bittner") (after *Wilburn Boat*, the specific state law that governs a marine insurance contract can determine "the amount of recovery, the type of recovery, or even whether there will be a recovery under the policy at all"). For example, the variation in enforcement of marine insurance policy warranties that this Court acknowledged in *Wilburn Boat* can be outcome-determinative in coverage disputes—and is a central issue in this case. Relatedly, the states differ in their adherence to the marine insurance doctrine of *uberrimae fidei*, or "utmost good faith." This doctrine imposes a strict duty on insureds to accurately represent and disclose material facts, and the breach of this duty results in the policy becoming void. See Thomas J. Schoenbaum, *Marine Insurance*, 31 J. Mar. L. & Com. 281, 283 (2000) (the major areas of divergence in state insurance law that affect marine insurance contracts

concern "the duty of utmost good faith, comprising the law relating to misrepresentation, non-disclosure, and concealment" and "express and implied warranties").

Another important variation—also pivotal in this case—is that some states recognize causes of action for bad faith breach of contract and breach of fiduciary duty (*e.g.*, Pennsylvania), and some states do not (*e.g.*, New York). The possibility of litigating bad faith insurance claims is a significant concern for marine insurance companies, as is the potential for costly liability. A further example of outcome-determinative state law variation is that maritime contracts often contain "knock-for-knock" indemnity provisions, under which the parties mutually agree to bear certain of their own losses, even when the other party was negligent. Such provisions, which effectively exempt parties from liability for their own negligence, "have been regularly upheld under maritime law." Joseph G. Grasso & Elisabeth A. Pimentel, *Interpretation and Enforceability of Indemnity Provisions in Maritime Contracts: We Really Do Have to Ask, Is It Salty Enough*, 24 U.S.F. Mar. L.J. 375, 390 (2011). Some states, however, disallow such indemnity provisions as a matter of public policy.

Choice-of-law provisions in marine insurance contracts are a critical mechanism for both insurers and insureds to mitigate the risks and costs of coverage that are associated with this divergence in state legal rules. See Von Bittner at 573 (noting that since *Wilburn Boat*, the selection of state law to govern a marine insurance policy "has become important"). These provisions allow the parties to avoid the unpredictability of 50 different state legal regimes by specifying the law that applies to their policy. When parties agree to the governing law, they can better evaluate and gauge their rights, obligations, and remedies in the event of losses and disputes. By contrast, "[i]n the absence of

predictability and uniformity, both insurers and the parties who depend on marine insurance are unable to order their affairs with confidence as to what risks they are bearing." Michael F. Sturley, *Restating the Law of Marine Insurance: A Workable Solution to the Wilburn Boat Problem*, 29 J. Mar. L. & Com. 41, 45 (1998) ("Sturley").

Because choice-of-law provisions serve these important purposes, they often figure prominently in contract negotiations and are an essential element of the resulting bargain. See Von Bittner at 574–75 (marine insurance contracts "are to a considerable degree open to negotiation and are frequently tailor made"). In particular, the parties' agreement on choice-of-law may be inextricably intertwined with their negotiations on premiums and other provisions of the insurance contract. Cf. *Bremen*, 407 U.S. at 13 n.15, 14 (forum-selection clauses—which are often adopted with the understanding that the forum will "apply its own law"—are "a vital part of the agreement" as a whole and can "figur[e] prominently" in the negotiation of "monetary terms").

For this reason, choice-of-law provisions are essential to ensuring that marine insurance rates are reasonable and affordable. The "costs of insurance increase" when the governing law is uncertain because "underwriters must charge a higher premium in light of the uncertainty." Sturley at 45. By mitigating this uncertainty, choice-of-law provisions play an important role in moderating the price of marine insurance. This ultimately benefits consumers, "who purchase goods that are transported by sea—goods that are insured under marine policies, carried on insured vessels, and handled by workers whose health and safety are covered by marine insurance." *Id.*

For all these reasons, the established rule that choice-of-law provisions in marine insurance contracts are presumptively enforceable aligns with the vital purposes of U.S. maritime law and promotes maritime commerce.

III. THE COURT OF APPEALS' DECISION UNDERMINES CONTRACTUAL CERTAINTY AND ENCOURAGES FORUM SHOPPING.

The court of appeals' decision creates a vast exception to the rule of presumptive enforcement of choice-of-law provisions in marine insurance contracts—one that significantly undermines the rule. The court of appeals held that a public policy of the forum state "could, as to that policy specifically, render unenforceable the choice of state law in a marine insurance contract." Pet. App. 15a. Accordingly, the court of appeals remanded the case so that the district court could consider "whether Pennsylvania has a strong public policy that would be thwarted by applying New York law." *Id.* By holding that a district court can disregard the choice of state law in a marine insurance contract based on the public policy of the forum state, the court of appeals not only misapplied this Court's decision in *Bremen*, 407 U.S. 1 (as petitioners amply demonstrate), but wholly ignored the purposes and role of such provisions.[4]

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[4] The court of appeals properly did not hold that a public policy of the forum state can render unenforceable the parties' primary choice of *federal maritime law* in a choice-of-law provision, which was the parties' choice here. Pet. App. 4a (specifying "well established, entrenched principles and precedents of substantive United States Federal Admiralty law," but "where no such well established, entrenched precedent exists," specifying New York law). As the court of appeals properly recognized, established federal maritime law, where it exists, preempts state law. *Id.* at 8a (citing *Wilburn Boat*, 348 U.S. 310).

As shown, in light of *Wilburn Boat*, the substantive and procedural rules that govern marine insurance policies and disputes are in part a matter of state law, which varies considerably among the 50 states. See *Wilburn Boat*, 348 U.S. at 320 (state public policies are "diverse," with some states "adopt[ing] one kind of new rule and some another"). Widespread use of choice-of-law provisions is a response to the uncertainty and risk that this patchwork creates, enabling the parties to mitigate this uncertainty. Without them, the parties lack predictability about the risks that are covered because policy claims can arise in multiple jurisdictions due to the mobility of marine vessels.

The court of appeals' ruling wholly defeats the purposes of these choice-of-law provisions. Parties utilize them because state laws are varied and often conflict, and they want their chosen state's law to prevail in the event of a conflict. Under the court of appeals' approach, however, the forum state's law will likely prevail in the event of a conflict. This completely negates the parties' deliberate choice. The decision below thus creates an unreliable regime for the enforcement of choice-of-law provisions, ensuring commercial uncertainty. If choice-of-law provisions can be rendered unenforceable whenever the public policy of the forum state conflicts with the parties' chosen law, then the parties cannot predict with any confidence the law that will govern their contract.

If permitted to stand, this evisceration of choice-of law provisions will have several detrimental consequences for maritime commerce and the business community in general. It will unsettle the reliance interests and legitimate contractual expectations of parties to existing marine insurance contracts. Specifically, it will disrupt the delicately balanced risk transfer agreements of existing insurance contracts, which

were priced under the assumption that the choice-of-law provisions included in the contracts would be enforced. It also will serve as a troubling precedent for other businesses that have choice-of-law provisions in their contracts. No matter what state's law the parties have chosen in their contracts, they will now face the prospect that courts in the Third Circuit (and any Circuits that choose to join it) will decide a dispute under some other state's law, in derogation of the parties' mutual agreement. The parties will also face the prospect of costly and time-consuming pretrial litigation on choice-of-law issues—precisely what the choice-of-law provision was designed to avoid.

The greater economic harms, however, will arise with respect to future transactions. If choice-of-law provisions are not reliably enforced, then businesses will not be able to structure their contracts to select in advance the law under which disputes are litigated. This will prevent them and their customers from realizing the substantial efficiencies that can be achieved by limiting litigation risks and costs. More importantly, certain transactions and business activity will be discouraged altogether. If businesses cannot control and limit their litigation risks and costs through choice-of-law provisions, they might conclude that certain transactions or business strategies simply are not viable. And, of course, all these consequences will harm consumers by depriving them of vendors and service providers, or by driving up the costs of goods and services.

These future economic harms will be particularly acute in the insurance industry, and especially the marine insurance industry. Insurers are principally concerned with minimizing risk, and that concern drives numerous business decisions: the insurance markets

that they are willing to participate in, the underwriting decisions that they make, and the premiums that they charge. Such business decisions lack a dependable foundation when insurers cannot reliably specify in advance the law that will govern their policies. Correspondingly, insurers' costs of doing business will rise exponentially if they face a world in which a variety of disparate laws can be unpredictably applied to their policies, rendering their choice-of-law provisions merely aspirational. As a result, the availability and affordability of insurance would be significantly impacted—all to the detriment of consumers and maritime commerce.

Indeed, the resulting impacts on maritime commerce could be severe. Marine insurance "is an integral part of virtually every maritime transaction, and maritime commerce is a vital part of the nation's economy." Sturley at 45. Such insurance is a critical mechanism for maritime businesses to limit their risk in a business environment in which hazards abound—due to the perils and vicissitudes of travel by water and the activities associated with it. Significant changes in insurance availability and affordability would have far-reaching effects and be detrimental to all stakeholders in maritime commerce.

This uncertainty and disruption will be exacerbated by forum-shopping, which the decision below promotes, to the extent that parties are not constrained by forum selection clauses. By adopting a rule that permits a party to evade a freely chosen choice-of-law provision in a marine insurance contract based on the public policy of the forum state, the court of appeals' decision openly invites litigants to weigh and compare potential forums based on differences in their substantive insurance law. See Von Bittner at 578 (noting that in the absence of an enforceable choice-of-law clause,

alternative sources of law for a marine insurance policy may include "the domicile of the assured, the domicile of the insurance company, the place where the contract was made or delivered, the place of performance, and the forum"). This Court has long recognized that such forum-shopping serves no useful purpose and creates unfairness. *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 74–77 (1938); *Hanna* v. *Plumer*, 380 U.S. 460, 467–68 (1965).

Unfairness is a palpable risk here because the decision below creates an incentive for litigants to disregard their contractual bargain and instead shop for jurisdictions that have insurance rules that favor their claims, with the very real possibility that litigants will be drawn to some jurisdictions and away from others. Such a regime is precisely what choice-of-law provisions are designed to avoid. See Coyle, *A Short History*, at 1149 (the use of choice-of-law provisions "curtails the ability of judges to engineer the selection of the law of their home jurisdictions"). The decision below therefore would create unmanageable uncertainty in the insurance industry and beyond.

CONCLUSION

For the foregoing reasons, the decision of the Third Circuit should be reversed.

Respectfully submitted,

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