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IN THE SUPREME COURT OF THE UNITED STATES

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GREAT LAKES INSURANCE SE, )

Petitioner, )

v. ) No. 22-500

RAIDERS RETREAT REALTY CO., LLC, )

Respondent. )

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Washington, D.C.

Tuesday, October 10, 2023

The above-entitled matter came on for oral argument before the Supreme Court of the United States at 11:34 a.m.

APPEARANCES:

JEFFREY B. WALL, ESQUIRE, Washington, D.C.; on behalf of the Petitioner.

HOWARD J. BASHMAN, ESQUIRE, Fort Washington, Pennsylvania; on behalf of the Respondent.

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P R O C E E D I N G S

(11:34 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 22-500, Great Lakes Insurance versus Raiders Retreat Realty.

Mr. Wall.

ORAL ARGUMENT OF JEFFREY B. WALL

ON BEHALF OF THE PETITIONER

MR. WALL: Mr. Chief Justice, and may it please the Court:

In The Bremen and Carnival, this Court held that forum-selection clauses in maritime contracts are enforceable as a matter of federal law, except in the rare circumstances when they violate federal maritime policy.

Almost all federal courts, including all of the major maritime courts, have taken the same approach for choice-of-law clauses. This Court should do the same for three reasons.

First, logic and consistency. We're here talking about a federal exception to a federal presumption of enforceability. It stands to reason that federal exception would look to federal public policy, not state public policy. Raiders doesn't point to any analogous

1 federal exception. It looks to state public  
2 policy. And it doesn't explain why choice of  
3 law in maritime should be any different from  
4 forum selection in maritime.

5           Second, the consensus approach makes  
6 practical sense for the reasons that this Court  
7 gave in *The Bremen*. Judging choice-of-law  
8 clauses by reference to a uniform body of  
9 federal law accords with ancient concepts of  
10 freedom of contract, and it allows parties to  
11 gauge and price their risks knowing what law  
12 will apply to their contracts. If 50 states may  
13 set aside parties' choices based on their own  
14 public policies, that would be a reference for  
15 uncertainty and forum shopping.

16           Third, the consensus approach is clear  
17 and administrable. On our approach, a federal  
18 court would ask, does a choice-of-law clause  
19 offend federal admiralty policy? The answer to  
20 that question will almost always be no. On  
21 *Raiders'* approach, the Court would ask, what's  
22 the state with the greatest interest in the  
23 dispute? Does that state have a public policy  
24 with respect to the specific question at issue?  
25 And is that public policy fundamental?

1                   So, for instance, you could have a  
2 Florida district court asking whether  
3 Pennsylvania has a fundamental public policy  
4 sufficient to overcome the application of New  
5 York law. The answer to that will almost always  
6 be hazy, and that lack of clarity would disserve  
7 the admiralty world and federal courts.

8                   I welcome the Court's questions.

9                   JUSTICE THOMAS: Mr. Wall, what does  
10 -- what effect does Wilburn Boat have on your  
11 argument?

12                  MR. WALL: So I -- I think you have to  
13 take Wilburn Boat as part of the background law.  
14 Wilburn Boat was a watershed decision, to be  
15 sure, and said state law occupies the space when  
16 there is no well-established rule of admiralty  
17 or no need to create one.

18                  But this Court saw no tension with  
19 Wilburn Boat in *The Bremen* or *Carnival*, where it  
20 said either there's a well-recognized rule in  
21 admiralty or we think we need to create one,  
22 whichever one the Court was doing, when it said  
23 forum-selection clauses are generally  
24 enforceable as a matter of federal law.

25                  So I see no tension between those two

1 things. The question just remains there was The  
2 -- Court in The Bremen perceived either a  
3 recognized rule in admiralty for forum selection  
4 or a need to create one. And so the only  
5 question here is, should we have the same rule  
6 for choice-of-law clauses? I can't think of a  
7 single good reason why you would distinguish  
8 between the two.

9 If anything, I would think it would be  
10 easier on the choice-of-law side because the  
11 forum-selection question can really affect the  
12 parties' practical ability to litigate. The  
13 choice-of-law question is just, once you reach  
14 the forum, what law will the parties apply?

15 It is worth noting, though, that I --  
16 it's not as if, you know, Great Lakes picked out  
17 here South Dakota law or Mongolian law. I mean,  
18 they picked out New York law. That's a common  
19 choice among both marine insurers generally and  
20 --

21 JUSTICE KAVANAUGH: If we --

22 MR. WALL: -- surplus lines insurers.

23 JUSTICE KAVANAUGH: -- if we agree  
24 with you that there's a federal presumption and  
25 that federal law defines the content of the

1 exception -- so assume just for the question  
2 that -- what then is the content of the federal  
3 exception? I think the briefs kind of dance  
4 around with a few different formulations.

5 First of all, the Restatement. Is  
6 that relevant?

7 MR. WALL: So --

8 JUSTICE KAVANAUGH: Particularly  
9 Restatement 187(2)(b). I think you think that's  
10 out altogether, I think.

11 MR. WALL: It -- I -- so I don't think  
12 that's right, Justice Kavanaugh. Just to take a  
13 step back, I think The Bremen did this exactly  
14 right. So, if it's narrow decision day, I mean,  
15 I think it's just --

16 (Laughter.)

17 MR. WALL: -- the Third Circuit kind  
18 of got one little piece of The Bremen wrong.  
19 The Bremen said --

20 JUSTICE KAVANAUGH: Well, assume it's  
21 not -- it -- that we're trying to figure this  
22 out. So -- yeah.

23 MR. WALL: I -- yeah -- it -- I -- so  
24 I'm good with first principles. So The Bremen  
25 says, look, is there fraud in the formation of

1 the contract? Is there a formation problem?

2 JUSTICE KAVANAUGH: Yeah.

3 MR. WALL: Okay. Set that to the  
4 side. No formation problem.

5 Now generally enforceable unless  
6 unreasonable or unjust, and what does that mean?  
7 And The Bremen says -- citing the parallel  
8 section of the Restatement for forum selection,  
9 says two things. One, if it's contrary to  
10 public policy; and, two, it says maybe if  
11 there's no substantial connection to the chosen  
12 law or no reasonable basis for choosing that  
13 law.

14 I think the court of appeals got --

15 JUSTICE KAVANAUGH: So --

16 MR. WALL: -- all of that right.

17 JUSTICE KAVANAUGH: -- so the marine  
18 underwriters' amicus brief, which supports you  
19 but says that's no good, the substantial  
20 connection point, because they say that  
21 oftentimes sophisticated parties in this context  
22 are going to choose a neutral forum to which  
23 neither might have a substantial connection, so  
24 I just want to make sure.

25 And they seem more generally to be --

1 don't do the Restatement, don't just do the  
2 point you made about if the state law offends  
3 federal admin -- admiralty policy, then, okay,  
4 but otherwise, don't do the Restatement. That  
5 seems to be their position. I want to make sure  
6 you're clear on that.

7 MR. WALL: I -- I think it's a little  
8 more nuanced than that, Justice Kavanaugh. What  
9 The Bremen says and what the Restatement says in  
10 that prong is -- and The Bremen cites this, I  
11 think, faithfully -- it says no substantial  
12 connection or no reasonable basis.

13 And what the marine underwriters say  
14 is some courts, in picking that up, have just  
15 done the substantial connection and not looked  
16 to the reasonable basis.

17 As long as you say that even if you're  
18 not connected to New York, though the parties  
19 were here, that that's a perfectly reasonable  
20 law --

21 JUSTICE KAVANAUGH: Okay.

22 MR. WALL: -- for sophisticated  
23 parties to -- to pick in maritime or, frankly,  
24 out of maritime, then I think --

25 JUSTICE KAVANAUGH: And it's "or

1 reasonable basis."

2 MR. WALL: It's "or reasonable basis."  
3 Then it's fine.

4 JUSTICE KAVANAUGH: It's not -- to  
5 pick up last week, it's not "and reasonable  
6 basis."

7 MR. WALL: That's right.

8 JUSTICE KAVANAUGH: Yeah.

9 MR. WALL: And The Bremen got all of  
10 this right. I mean, it -- the only place where  
11 the court of appeals went wrong was it said,  
12 okay, public policy can be one of the things  
13 that makes it unreasonable and unjust. Whose  
14 public policy? We look to the state, which  
15 isn't what The Bremen did. And it doesn't make  
16 a lot of sense.

17 If you think there's a presumption of  
18 enforceability, then federal law cares about  
19 generally having them enforced. When would it  
20 not want that to be true? Well, when it  
21 disserves the purposes of maritime, not when it  
22 disserves one of the 50 states' idiosyncratic  
23 public policies.

24 JUSTICE KAGAN: Well, possibly, except  
25 that's where you get to Justice Thomas's view of

1 -- of -- of, you know, asking you about Wilburn,  
2 because Wilburn seemed to say something  
3 different. Wilburn seemed to say, you know,  
4 even when you're trying to figure out what the  
5 federal law should be in this area, I mean,  
6 federal law often says, well, the states have an  
7 extremely important role to play, and so it  
8 should be a state rule of decision. That's a --  
9 a federal rule that it should be a state rule of  
10 decision.

11 That's essentially what Wilburn said  
12 in the insurance -- maritime insurance context.  
13 And most of your brief seems to be an effort to  
14 run away from that aspect of Wilburn repeated  
15 over and over and over again, which is, when it  
16 comes to maritime insurance, states have long  
17 regulated the area and strongly regulated the  
18 area, and the -- the federal rule is that we  
19 should allow that to continue.

20 MR. WALL: So I -- two things, Justice  
21 Kagan. I understand that argument, and I think  
22 it has more force on the sort of new front-line  
23 position.

24 But, if the Court's accepting that on  
25 the narrow question it granted there is a

1 federal presumption of enforceability and we're  
2 just trying to figure out how to work the  
3 exception, then I think we sort of already  
4 passed Wilburn Boat because we have now a  
5 well-established federal rule. It's a  
6 presumption of enforceability. And we're just  
7 trying to figure out do -- what did The Bremen  
8 mean when it said public policy, what does the  
9 Restatement mean. And we're sort of past  
10 Wilburn Boat.

11 I -- I take the point more generally  
12 that --

13 JUSTICE KAGAN: I don't really think  
14 so in anything other than a highly technical  
15 way. What Wilburn Boat said is that in crafting  
16 the exceptions to this presumption, you should  
17 take into account that states have long  
18 regulated maritime insurance and that they  
19 should continue to do so.

20 MR. WALL: So I -- I don't think  
21 that's quite right, Justice Kagan. It doesn't  
22 say anything about sort of how you work federal  
23 rules and once you have them in admiralty. It  
24 says, if you have a rule in admiralty, you  
25 follow it or if you need to create one. And we

1 can debate whether The Bremen was recognizing an  
2 acknowledged rule or creating one. I think it's  
3 possible to read the decision either way.

4 And then Wilburn Boat tells you, if  
5 you don't have the federal rule or a need to  
6 create a uniform rule in order to serve the  
7 purposes of admiralty, state law does all the  
8 work there.

9 And you're right, there's a lot of  
10 other sort of language and dicta about the --  
11 the historical role that states have played with  
12 regard to regulating marine insurance, and --  
13 and I'm not sort of here dickering with any of  
14 that, except to say The Bremen and Carnival  
15 didn't see any of that as a barrier to  
16 recognizing or creating a -- a uniform federal  
17 rule for forum selection.

18 I don't take the other side to be  
19 disputing that or saying those decisions should  
20 be overruled. And so the question just is, all  
21 right, we have that rule in admiralty which  
22 applies to forum selection clauses across the  
23 board, all maritime contracts. Doesn't matter  
24 whether they're marine insurance or not.

25 Should we have the same system for a

1 choice-of-law clause when those clauses  
2 typically travel together in maritime contracts  
3 like this one? And I don't really think Wilburn  
4 Boat has much to say on that question.

5 CHIEF JUSTICE ROBERTS: Your -- your  
6 argument, I take it, is that there is an  
7 established federal maritime rule not simply on  
8 choice-of-law provisions but, I don't know, the  
9 -- the uberrimae fidei doctrine, in other words,  
10 that even if your boat runs aground, you know,  
11 if you didn't have the fire extinguisher, you  
12 know, updated, you -- you lose.

13 What if there weren't an established  
14 maritime policy on that specific doctrine?

15 MR. WALL: So a -- a couple of things,  
16 Mr. Chief Justice. I don't know that uberrimae  
17 fidei is the sort of rule that's triggered here  
18 as much as strict enforcement of the warranties.

19 It is true that post-Wilburn Boat,  
20 some of those, like uberrimae fidei or  
21 Navigational Limits, courts have almost  
22 uniformly said are controlled by federal law  
23 because they were well-established rules in  
24 admiralty.

25 Some of the others, like named

1 operator or fire extinguisher, they've left to  
2 state law. That's the substantive state law.

3 So it is true that post-Wilburn Boat  
4 federal law is going to control some of the  
5 contractual provisions. State law will control  
6 others. But I don't think it makes any  
7 difference to our argument, which is that the  
8 question here is about the enforceability of a  
9 choice-of-law clause, and on that, there is a  
10 well-established rule.

11 I mean, we have everything --

12 CHIEF JUSTICE ROBERTS: Well, I wonder  
13 if it --

14 MR. WALL: -- but --

15 CHIEF JUSTICE ROBERTS: I was just  
16 going to say -- and, sorry to interrupt -- but,  
17 I mean, the -- certainly, the argument can be  
18 made -- and I'm -- I think it's the argument of  
19 your friend on the other side -- that Wilburn  
20 Boat is expressly designed to do what you  
21 indicated that it doesn't matter, which is, if  
22 you have a very particular question like how the  
23 insurance policy should be interpreted, and  
24 there's no federal rule. There are general  
25 federal rules about choice of law, you know, if

1 -- but not the particular question there.

2           And on that question, under Wilburn  
3 Boat, you do look to state law.

4           MR. WALL: I -- I agree with that, Mr.  
5 Chief Justice. On the breach of the fire  
6 extinguisher warranty in the policy, that's  
7 going to go to state law. The question is,  
8 which state law? Do we give effect to the  
9 choice-of-law clause?

10           And there is a rule on choice-of-law  
11 clauses in admiralty, and it's as  
12 well-established as it can be absent a  
13 pronouncement from this Court. It goes back to  
14 London Assurance and Kensington in 1897 and  
15 1902.

16           Then you find this Court saying it for  
17 forum selection in Bremen and Carnival. Then  
18 you have virtually every federal court,  
19 including the Fifth and the Ninth Circuits and  
20 all the major maritime district courts, adopting  
21 it for choice of law.

22           It is as well-established in admiralty  
23 as it can be absent a decision of this Court.

24           JUSTICE BARRETT: Did Raiders concede  
25 that below? I mean, it kind of seems that the

1 way this case was litigated is that everyone  
2 assumed and kind of took as a given that there  
3 was this well-established federal rule that  
4 choice-of-law clause -- clauses were  
5 presumptively enforceable, and it has changed  
6 its position now. But, below, am I right that  
7 Raiders took that as a given?

8 MR. WALL: Yes. And -- but that's a  
9 -- I -- it -- it's not just about Raiders,  
10 Justice Barrett. It's just a reflection of the  
11 way these cases are litigated. Every one for  
12 decades has taken it as a given that The Bremen  
13 applies with respect to forum selection and  
14 choice of law.

15 And everybody had been thinking  
16 federal public -- public policy. And then they  
17 made the argument about state public policy, and  
18 in our view, the Third Circuit got that wrong.

19 But everybody had been doing this  
20 within the framework of The -- The Bremen just  
21 for maritime contracts for forum selection for  
22 choice of law, and so everybody thought there  
23 was a federal presumption across the board. And  
24 then it was just, what are the exceptions to the  
25 presumption?

1                   JUSTICE ALITO:  And, Mr. Wall, there's  
2   a -- a wonderful line in your brief.  Now this  
3   is a -- a case about a yacht that ran aground,  
4   and when the claim is filed, your client denies  
5   the claim because you say they didn't do what  
6   they were supposed to do regarding fire  
7   extinguishers.

8                   But there was no fire.  The -- the  
9   absence of fire extinguishers up to your  
10  standards had nothing whatsoever to do with  
11  this.  And so you have this line -- and so to  
12  deny coverage on that ground does seem harsh,  
13  but you say:  Although that denial may seem  
14  harsh to the land-bound, it reflects traditional  
15  maritime principles.

16                   Now, if I were not land-bound, suppose  
17  I -- you know, I -- I spent a lot of time  
18  sailing around the world on ships, it wouldn't  
19  seem harsh to me anymore?

20                   MR. WALL:  It would not if you were a  
21  member of the admiralty bar as I've come to  
22  understand.  Justice Alito, I've always been  
23  worried about this because it struck me as harsh  
24  too when I approached the case.  There is a  
25  different tradition that grew up around the

1 admiralty system and Lloyd's of London.

2 JUSTICE ALITO: Yeah. I know there  
3 are a lot of things about old-time maritime law  
4 that are very harsh. Like, we had a case a few  
5 years ago about maintenance and cure of seamen,  
6 and we had cases and -- we had a case involving  
7 a -- a sailor who got a fractured skull shortly  
8 after leaving port, and then the captain  
9 refused -- made the entire journey, refused to  
10 put the person aboard -- ashore at any port to  
11 get medical treatment, waited until the person  
12 came home.

13 So I -- I mean, I don't know about --

14 MR. WALL: And no punitive damages.  
15 But I -- the reason for this, Justice Alito, is  
16 that you had international insurers located  
17 overseas who had no way of monitoring these  
18 vessels or incentivizing compliance.

19 And so this tradition grew up and it's  
20 very different from what we think of a car  
21 insurance or home insurance, where you pay your  
22 premiums and they process the claims in the  
23 pool. These are sort of specialized policies.

24 And -- and so just to put a little  
25 finer point on it, Great Lakes is a surplus

1 lines insurer. I didn't know what that was  
2 before, but it turns out you go to them when  
3 your other insurers won't take you.

4 So you can't get your boat policy from  
5 Progressive or GEICO, it may be risky, maybe, as  
6 here, the boat is very expensive, you want a big  
7 policy, so it's a sort of -- it's a unique  
8 transaction that others in the market don't do.  
9 There aren't many of them.

10 And they have to price these things,  
11 and they price them by taking into account that  
12 you will have to comply with the warranties,  
13 which is why, here, you can get a million  
14 dollars of coverage on a half-million-dollar  
15 yacht for a premium of about \$9,000 a year.  
16 That's the policy --

17 JUSTICE ALITO: All right.

18 MR. WALL: -- in the record.

19 JUSTICE ALITO: So suppose this --  
20 this choice-of-law clause were modified, and the  
21 phrase, "the substantive laws of the State of  
22 New York" were deleted, and in its place were  
23 put -- was put "the substantive laws of some  
24 fall" -- "some little country that has the most  
25 pro-insurer law you can possibly imagine."

1                   So any claim has to be submitted on a  
2 very long form, and there are specifications  
3 about the font and this -- the spacing of the  
4 letters, and the -- and the claim is to be  
5 rejected if there -- if there are any typos or  
6 any smudges on the claim form, and it has to be  
7 filed within 12 hours of the -- of the incident.  
8 And so the Court is confronted with this  
9 choice-of-law issue.

10                   What would the Court do?

11                   MR. WALL: On the assumption that  
12 there's no other really good reason for  
13 sophisticated parties to pick that law, it's not  
14 going to be enforceable. I mean, and the oddity  
15 of this case is --

16                   JUSTICE ALITO: Base -- based on what  
17 principle?

18                   MR. WALL: On the -- the first of the  
19 two prongs in the Restatement. You would say  
20 they didn't have any substantial connection to  
21 Andorran law or Mongolian law, what have you,  
22 and --

23                   JUSTICE ALITO: Well, let's say that  
24 the insurer --

25                   MR. WALL: -- and there's no

1 reasonable basis --

2 JUSTICE ALITO: -- the insurer is  
3 located in -- in this little country. So  
4 there's a connection.

5 MR. WALL: So, if the insurer is  
6 located in that country, there may well --  
7 they -- there's definitely a substantial  
8 connection to that law, and it -- it's likely  
9 there's a reasonable basis for picking it.

10 And it -- it seems to me that we  
11 shouldn't be too unworried about -- too worried  
12 about sort of unfairness because you're talking  
13 about people who can't otherwise get insurance  
14 in the market. There are very few people that  
15 will write the insurance. They're on notice of  
16 the clause, and if we thought that were a  
17 problem from Bremen, then we have Carnival --

18 JUSTICE JACKSON: Can --

19 MR. WALL: -- saying on the  
20 forum-selection side, doesn't matter if it's a  
21 contract of adhesion; we have good rules for  
22 enforcing this across the board.

23 JUSTICE BARRETT: But --

24 JUSTICE JACKSON: Mr. Wall, can --

25 JUSTICE BARRETT: -- wouldn't it --

1                   JUSTICE JACKSON: -- can I just ask  
2     you, because I was a little surprised about your  
3     reliance on The Bremen under the Wilbur --  
4     Wilburn Boat standard. I understand that step 1  
5     is that it has to be an established federal  
6     rule, but I also thought that the rule that  
7     you're -- are asking be recognized as such in  
8     this context has never been laid down by this  
9     Court in the choice-of-law context. The Bremen  
10    was forum selection.

11                   So can you just help me to understand  
12    how we know that there's an established federal  
13    rule in the choice-of-law world?

14                   MR. WALL: Well, there wasn't an  
15    established rule laid down by this Court  
16    pre-Bremen either, Justice Jackson. And what  
17    the Court said in The Bremen was we -- all of  
18    the purposes of maritime -- the need for  
19    uniformity, predictability, a -- facilitating  
20    the free flow of national and international  
21    commerce -- all of those things lead us to say  
22    that forum-selection clauses should be generally  
23    enforceable as a matter of federal law.

24                   So I think, here, you are right  
25    there's no decision from this Court on choice of

1 law, but you have a uniform history in the lower  
2 courts, you have a virtual consensus among all  
3 the present-day courts, all the major maritime  
4 ones, and you already have Bremen and Carnival.

5 So you already know what the rule is  
6 with respect to forum selection, and it's thus,  
7 I think, an even easier question here.

8 JUSTICE JACKSON: You see no  
9 difference between forum selection and choice of  
10 law with respect to these issues?

11 MR. WALL: I do but not in a way that  
12 helps Raiders. I mean, historically, what  
13 courts were skeptical of was forum selection  
14 because they thought you picked the foreign  
15 forum and then forced the parties to go litigate  
16 there, which was effectively trying to deprive  
17 them of their ability to access the forum. But  
18 courts were not so hostile to parties picking  
19 choice of law.

20 And so it seems to me that once you've  
21 done it with respect to forum selection, that  
22 was the harder question historically.

23 JUSTICE JACKSON: But was it harder  
24 with respect to this issue of federal versus  
25 state? I mean, I would think that the

1 forum-selection scenario is easier when you're  
2 talking about picking among states than the  
3 question of federal to state, which is what is  
4 happening in this dynamic with respect to choice  
5 of law.

6 MR. WALL: So I think I disagree with  
7 that, Justice Jackson. I don't see a difference  
8 for Wilburn Boat purposes. And, if anything,  
9 it's less clear to me that the law on forum  
10 selection in admiralty was well-established as  
11 of the time of The Bremen as it is that there's  
12 a well-established rule on choice of law now  
13 that would -- existed both pre- and post-Bremen.  
14 So I -- I think this is an easier case than The  
15 Bremen in sort of both of those -- in both of  
16 those senses.

17 And I do just want to say, Justice  
18 Jackson, I -- I see the problems, and the  
19 Restatement acknowledges and so does The Bremen,  
20 if you pick out some really odd law, right,  
21 that's just designed to mean they have no  
22 remedy. But, here, they picked out a standard  
23 law that gives them remedies. They still have  
24 two claims. They have traditional contract  
25 remedies, breach of contract, breach of the

1 implied duty of good faith and fair dealing.

2           The only thing they don't have are the  
3 more idiosyncratic Pennsylvania claims. But,  
4 again, it's not as if Great Lakes picked out  
5 some law in an effort to -- for it to be unfair.

6           JUSTICE KAGAN: Well, you can call it  
7 --

8           JUSTICE BARRETT: What if it did --

9           JUSTICE KAGAN: -- idiosyncratic, but  
10 what they really are is consumer-protective as  
11 against insurance companies in situations of  
12 this kind. And, you know, we know that there's  
13 no federal substantive principle that conflicts  
14 with those Pennsylvania statutes.

15           So the question is, as between two  
16 state laws, why we should necessarily allow the  
17 New York law to apply when everything about this  
18 case screams Pennsylvania. And I would have  
19 thought that what Wilburn Boats stands for,  
20 again, in its essence, is, you know, when that's  
21 so, it should be the state regulating insurance  
22 that gets to have its way.

23           MR. WALL: So I guess, Justice Kagan,  
24 what I'd say is, if you picked up only Wilburn  
25 Boat, I could understand the other side's

1 argument. If you picked up only Bremen and  
2 Carnival, I think we'd clearly be right.

3 So then the question is, well, which  
4 distinction makes more sense? Distinguishing  
5 between forum selection and choice of law or  
6 distinguishing between maritime insurance and  
7 other maritime contracts?

8 And I think what the other side's  
9 position boils down to -- and maybe I'm wrong --  
10 is that if you have a bill of lading, you're  
11 shipping goods from Europe to the United States,  
12 and you have a shipping contract, you have a  
13 towage into the port contract, you have  
14 employment contracts for the seamen, whether  
15 under Jones Act or otherwise, and you have a  
16 marine insurance contract, I think they're going  
17 to have to acknowledge all the forum-selection  
18 clauses in all the contract generally  
19 enforceable except as against federal public  
20 policy.

21 On the non-marine-insurance contracts,  
22 I think they're going to have to say still the  
23 same test as forum selection, but for the one  
24 choice-of-law -- clause in the one marine  
25 insurance contract, you'd look at Wilburn Boat

1 and say: Ah, well, their state should play a  
2 role. That seems to me not a sensible result.

3 And I guess the -- I want to sort of  
4 broaden the lens. You started by saying this is  
5 a dispute between two state laws. And that is  
6 the way the other side sees it. But I think  
7 that ignores a third set of laws, federal law.

8 And if we're right on the question  
9 that the Court didn't grant, that there's a  
10 federal presumption of enforceability, then  
11 federal law does have something to say here. It  
12 says we want the clauses to be generally  
13 enforced, except fill in the blank. And who  
14 gets to fill in the blank? The federal  
15 sovereign that recognized the presumption --

16 JUSTICE KAGAN: Well, the federal  
17 sovereign --

18 MR. WALL: -- or 50 states?

19 JUSTICE KAGAN: -- may get to fill in  
20 the blank and still say the presumption is  
21 overridden in a case where everything screams  
22 Pennsylvania and Pennsylvania has substantive  
23 law in the area.

24 MR. WALL: Except that the federal  
25 sovereign, that wouldn't be a sensible thing for

1 it to do. And that's never what the Court has  
2 thought, right? The Bremen doesn't say a word  
3 about Florida law. Carnival doesn't say a word  
4 about Florida law. Bisso doesn't say a word  
5 about Florida law. None of these cases talk --  
6 you know, London Assurance came up out of  
7 Pennsylvania. Kensington came up out of  
8 S.D.N.Y. None of these cases looked at state  
9 law.

10 They all, for -- for, you know, dating  
11 130-ish years, have looked at federal public  
12 policy because they've said the federal  
13 sovereign wants them enforced, unless they're  
14 going to defeat the purposes of maritime  
15 jurisdiction, which is the whole system that  
16 this is designed to facilitate in the first  
17 place.

18 JUSTICE BARRETT: What's the daylight  
19 --

20 JUSTICE ALITO: Couldn't admiralty --

21 JUSTICE BARRETT: -- between the first  
22 step of the presumption and then the overcoming  
23 of the presumption? Because I kind of take your  
24 answer to Justice Kagan to be, well, federal law  
25 wants them to be enforced and so, when you think

1 about whether it's against federal public  
2 policy, you say, well, they want it to be  
3 enforced.

4 MR. WALL: Unless the chosen law  
5 deprives the parties of remedies altogether or  
6 forces them to go to a really far forum or  
7 adopts some limitations on liability that  
8 disserve the purposes of admiralty. So courts  
9 don't allow you to pick out a law if your chosen  
10 law says, you know, the shipper or the insurer  
11 can only be liable for \$5 or you effectively  
12 have no claim at all. So, if we deprive you of  
13 remedies or we put limitations in place that  
14 fail to deter negligence, federal courts say  
15 that triggers admiralty policy.

16 But short of that, they're generally  
17 enforceable. So I'll be the first one to say  
18 most of these clauses are going to be  
19 enforceable because the standard clause if you  
20 look across the cases is this one. So, if you  
21 look at Galilea, that's a different insurer. If  
22 you look at Clear Spring, the standard is  
23 entrenched federal admiralty law or, failing  
24 that, New York law. That's the standard clause.

25 JUSTICE BARRETT: But it's possible --

1 JUSTICE KAVANAUGH: You don't --

2 JUSTICE BARRETT: -- then, in Justice  
3 Alito's hypothetical, that federal public  
4 policy, you know, the -- the itty-bitty country  
5 with the super-harsh laws, you would concede  
6 that it's possible that federal public policy  
7 would be --

8 MR. WALL: Yes.

9 JUSTICE BARRETT: Okay.

10 CHIEF JUSTICE ROBERTS: Justice  
11 Thomas, anything further?

12 Justice Alito?

13 JUSTICE ALITO: To what extent, if  
14 any, would a federal -- admiralty court  
15 exercising powers akin to a common law court be  
16 able to adopt a new rule along the lines of  
17 Pennsylvania law as a federal policy?

18 MR. WALL: Justice Alito, you mean  
19 with respect to something like bad faith or  
20 breaching the warranties or something like that?

21 JUSTICE ALITO: Yes. Well -- yeah.

22 MR. WALL: So --

23 JUSTICE ALITO: -- something that  
24 would cover a situation like this.

25 MR. WALL: -- a federal admiralty

1 court could. The problem is, if you look at the  
2 considerations that this Court put forward in  
3 your opinion for the Court in *Dutra* for how  
4 federal admiralty courts either recognize or  
5 make federal common law in admiralty, I think  
6 they're going to cut away from Pennsylvania  
7 because they cut in favor of enforcing the  
8 warranties, not in favor of sort of, you know,  
9 lax or lenient compliance.

10 But, if the history were different and  
11 if a court thought it served the purposes of  
12 admiralty, of course, it could create a rule  
13 like that. But I -- I -- I -- I want to be  
14 candid and say I -- I think the history of  
15 admiralty and most decisions go the other way on  
16 that.

17 But it -- there's not a federal rule  
18 on the specific issue here. Like, that's  
19 navigational limits, federal. As it's turned  
20 out, fire extinguishers, state. So, I -- you  
21 know, I'm not -- not fighting that that goes to  
22 state law. It's just a question of does the  
23 parties' choice of New York law get to govern  
24 that question.

25 JUSTICE ALITO: Thank you.

1 CHIEF JUSTICE ROBERTS: Justice  
2 Sotomayor?

3 JUSTICE SOTOMAYOR: Why does Wilburn  
4 Boat even apply here or to this question at all?  
5 I'm not sure it does. So --

6 MR. WALL: I'd be perfectly happy with  
7 an opinion that says it doesn't, but in fairness  
8 to -- to Justice Kagan, if you just picked up  
9 Wilburn Boat, it would tell you that if you  
10 don't have an established federal rule or you  
11 don't need to create one, you look to state law.

12 And if you read the opinion, you'd  
13 think, in marine insurance, the bar for that  
14 would be really high. So, if you didn't have  
15 Bremen and Carnival, I think it would be a  
16 harder case whether there would be an on-point  
17 rule here that you could look to.

18 JUSTICE SOTOMAYOR: Well, we limited  
19 it in Kossick and Kirby.

20 MR. WALL: So -- look, I agree. The  
21 Court comes along six years after it in -- in  
22 Kossick, it recognizes a federal rule in  
23 admiralty, it in dicta has some fairly critical  
24 things to say about Wilburn Boat.

25 It seems to side with the concurrence

1 in the dissent. And it seems to sort of  
2 question whether it's right. But I didn't --  
3 you know, we're not biting off the holburn --  
4 holding of -- of -- of Wilburn Boat.

5 I mean, I -- you know, I do think  
6 there are the good reasons to be critical of the  
7 decision. I do think that its historical  
8 discussion does not match up with the history in  
9 -- in admiralty, and I think it was -- it was a  
10 little thin there.

11 And Justice Frankfurter's concurrence  
12 has a lot to recommend it, but, I -- I don't  
13 sort of need to win that to be -- to -- to  
14 prevail here.

15 JUSTICE SOTOMAYOR: Well, I guess then  
16 you need to win the debate that there's an  
17 established presumption of enforceability for  
18 conflict-of-law choices, correct?

19 MR. WALL: Yes, that debate I need to  
20 win.

21 JUSTICE SOTOMAYOR: All right.

22 MR. WALL: And I guess what I would  
23 say is I have everything on my side except a  
24 decision from this Court because I have an -- I  
25 have a sort of unbroken history in the lower

1 courts. I have Bremen and Carnival. And I have  
2 a near consensus in the -- before the federal  
3 courts on federal choice of law.

4 So I have everything except this Court  
5 confirming, yes, the rule for forum selection  
6 applies equally to choice of law, which, by the  
7 way, even the Third Circuit didn't dispute.

8 Again, on sort of narrowest grounds of  
9 decision, the Third Circuit got it right all the  
10 way up until the end, where it said, under the  
11 public policy prong, you look to state rather  
12 than federal. If you just said it's federal  
13 rather than state under The Bremen, period,  
14 we're done.

15 CHIEF JUSTICE ROBERTS: Justice Kagan?

16 JUSTICE KAGAN: So, if the plaintiff  
17 here were an airline company or a railroad or a  
18 trucking concern, probably the Restatement rule  
19 applies, probably Pennsylvania law applies  
20 because of it.

21 Why is this so different?

22 MR. WALL: Well, it may. In some of  
23 those industries, I mean, you have the Federal  
24 Aviation Act. I mean, there are federal  
25 statutes in a lot of those. There is a federal

1 act, I believe, that covers some interstate  
2 trucking. I mean, it's not that all of those  
3 are just sort of left to state law.

4 But I do agree with you that outside  
5 of maritime, you -- the -- the Restatement is  
6 going to run the traditional way because it's  
7 not federal enclave, and it will run as between  
8 the states. And I -- I -- I think, Justice  
9 Kagan, it's fundamental to our position that  
10 maritime is different and has long had a  
11 different set of rules.

12 And this Court has sort of confirmed  
13 again and again and Wilburn Boat says what --  
14 you know, even Wilburn Boat says: Well, but if  
15 there's a recognized federal rule or a need to  
16 create one, no state law. And that's different  
17 about maritime from all of these other areas.

18 So I -- it -- it seems to me, yes,  
19 admiralty is different.

20 CHIEF JUSTICE ROBERTS: Justice  
21 Gorsuch?

22 JUSTICE KAVANAUGH: On --

23 CHIEF JUSTICE ROBERTS: Justice  
24 Kavanaugh?

25 JUSTICE KAVANAUGH: -- on the federal

1 exceptions, again, if we agree with you that the  
2 exceptions are determined by federal law, and I  
3 think you've said then it's just about the  
4 exceptions, well, you don't necessarily need to  
5 be precise to win the case for your client, but  
6 we need to be precise in how we write the  
7 opinion, and so I want to ask two things.

8           One, you don't think that as a matter  
9 of federal policy on exceptions we should look  
10 to which state might have a materially greater  
11 interest than the chosen state in the  
12 determination of the particular issue, correct?

13           MR. WALL: No.

14           JUSTICE KAVANAUGH: Okay. And,  
15 secondly, you've mentioned a couple times if the  
16 chosen state law deprives the insured of  
17 remedies, and I didn't see that in the brief,  
18 but that might be something you're elaborating  
19 on reasonable basis, or where is that coming  
20 from?

21           MR. WALL: No, sorry, I -- I -- I  
22 thought we tried to say it in both of the briefs  
23 but maybe not very clearly. It does not come up  
24 very often because, as I say, the standard  
25 choice is entrenched admiralty law or New York

1 law in the alternative.

2           So these public policy arguments don't  
3 tend to play themselves out because nobody  
4 thinks that New York law is repugnant to federal  
5 law. But, in the cases where it has come up,  
6 where you've picked some -- and there aren't  
7 many of them -- what courts have tended to say  
8 is, if you have limitations on liability that  
9 fail to deter negligence --

10           JUSTICE KAVANAUGH: So say in New York  
11 law, say it just chooses New York law, I just  
12 want to make sure I understand this, and New  
13 York law -- keep going.

14           MR. WALL: New York law is not  
15 repugnant to federal policy because there is no  
16 evidence in this case or any other that it  
17 limits liability of marine insurers in a way  
18 that fails to deter negligence or otherwise  
19 deprives insureds of -- of any remedy.

20           JUSTICE KAVANAUGH: Okay. Any --  
21 remedy?

22           MR. WALL: That's right.

23           JUSTICE KAVANAUGH: Not on the  
24 particular issue in dispute?

25           MR. WALL: Well, I -- I mean, we --

1 again, courts haven't had to confront it in a  
2 case where you had some remedies, but they  
3 didn't allow you to get at it. In all of these  
4 cases, because you have New York law, you have  
5 the standard contract remedies under New York  
6 law.

7           They can claim that Great Lakes is  
8 breaching. They can claim that Great Lakes  
9 breached an implied duty of good faith and fair  
10 dealing. That's typically enough for them to be  
11 able to air these claims in court.

12           So, I mean, again, they picked out New  
13 York law. I mean, this is not a --

14           JUSTICE KAVANAUGH: Yeah.

15           MR. WALL: -- idiosyncratic or weird  
16 law, so it doesn't tend to come up. But, if you  
17 picked out a state's law that didn't allow you a  
18 remedy for your particular claim, I -- it would  
19 come up.

20           I will say, Justice Kavanaugh, I've  
21 read more of these cases than I care to admit,  
22 and I haven't found a single case where that's  
23 true.

24           JUSTICE KAVANAUGH: Okay. Thank you.

25           CHIEF JUSTICE ROBERTS: Justice

1 Barrett?

2 Justice Jackson?

3 Thank you, counsel.

4 Mr. Bashman.

5 ORAL ARGUMENT OF HOWARD J. BASHMAN

6 ON BEHALF OF THE RESPONDENT

7 MR. BASHMAN: Mr. Chief Justice, and  
8 may it please the Court:

9 In this maritime insurance case, the  
10 Court considers whether a state choice-of-law  
11 provision in an insurance policy is subject to  
12 the same fundamental public policy exception  
13 that applies everywhere outside of admiralty or  
14 whether only a strong federal public policy will  
15 suffice to overcome the insurance company's  
16 state choice-of-law clause.

17 The Third Circuit reached the correct  
18 result here for two reasons. First, under  
19 Wilburn Boat, state law applies. As a result,  
20 the fundamental public policy of the state with  
21 the greatest connection to the dispute can  
22 override the contractual choice-of-law  
23 provision, selecting the law of another state.

24 And, second, should this Court see a  
25 need to announce a federal common law rule to

1 govern these circumstances, notwithstanding  
2 Wilburn's Boat -- Wilburn Boat's decision to  
3 leave maritime insurance regulation to the  
4 states and to Congress, which has opted not to  
5 intervene, this Court should adopt Restatement  
6 Second Conflict of Laws, Section 187, as the  
7 federal rule.

8           By contrast, the rule that Great Lakes  
9 urges is neither a judicially established  
10 federal maritime insurance rule, nor is it even  
11 a rules created for the circumstances of this  
12 case. Great Lakes' rule arose in the vertical  
13 choice-of-law scenario involving whether parties  
14 to a non-insurance maritime contract could  
15 replace applicable substantive federal admiralty  
16 law with the state law they preferred instead.

17           This case, on the other hand, involves  
18 a horizontal choice-of-law inquiry between the  
19 laws of two co-equal states. Both sides agree  
20 that substantive federal admiralty law does not  
21 preclude Raiders' Pennsylvania law  
22 counterclaims. So why should federal public  
23 policy impact or restrict the choice-of-law  
24 analysis in any way?

25           I welcome the Court's questions.

1                   JUSTICE THOMAS: Counsel, you seem to  
2                   rely quite a bit on Wilburn, but we've had  
3                   Kossick and Kirby since then, and you seem to  
4                   shy away from those two cases that seem to  
5                   suggest that we've cut back on Wilburn.

6                   MR. BASHMAN: I -- I don't think that  
7                   in the area involved in this case that I see any  
8                   consensus in the lower federal courts that  
9                   Wilburn Boat has, in fact, been cut back upon.  
10                  So -- so we believe that -- that it fully  
11                  applies to the circumstances of this case, which  
12                  -- which is, again, maritime insurance.

13                  And -- and, in fact, by arguing that  
14                  only federal policy can defeat a maritime  
15                  insurance policy state choice-of-law clause, my  
16                  friend on the other side is not merely seeking  
17                  to evade Wilburn Boat but to affirmatively use  
18                  it to harm policyholders, exactly the opposite  
19                  result of what that case was seeking to achieve.

20                  It's because of the Wilburn Boat  
21                  decision to leave maritime insurance regulation  
22                  to the states that neither this Court nor other  
23                  federal courts have been making federal policy  
24                  relevant to the enforcement of -- of maritime  
25                  insurance terms and conditions.

1           Using the absence of such federal  
2 maritime insurance policy against insurance  
3 policyholders, Great Lakes would leave such  
4 policyholders worse off than if Wilburn --

5           JUSTICE THOMAS: Well --

6           MR. BASHMAN: -- Boat never even was  
7 decided.

8           JUSTICE THOMAS: -- the -- Wilburn was  
9 a little bit different. I mean, you -- you had  
10 two states there. You had Texas and Oklahoma.  
11 It's a -- it's landlocked lake. And I think  
12 Justice Frankfurter pointed out the problem of  
13 taking a case about a houseboat on a -- on a  
14 lake too far and applying it to maritime  
15 shipping would be a problem.

16           And it's -- would seem that Kossick  
17 and Kirby reflects that concern.

18           MR. BASHMAN: Well -- well, again, you  
19 know, my -- my answer is that the core holding  
20 of Wilburn Boat in -- in my understanding of it  
21 has remained good law. And so -- and I think  
22 that, you know, certainly, there was no issue in  
23 Wilburn Boat about whether there were a majority  
24 of justices that supported the majority opinion.  
25 There -- there was.

1                   And -- and so, you know, as -- as much  
2 as some of your separate writings are no doubt  
3 incredibly erudite, you know, I think everybody  
4 recognizes that where you have a majority  
5 opinion that --

6                   JUSTICE KAVANAUGH: But there's --  
7 there's subsequent majority opinions in *The*  
8 *Bremen* and *Carnival*, which I think the other  
9 side highlights as important to the overall  
10 picture here. And since those cases, lower or  
11 federal courts on choice of law have largely  
12 decided that you shouldn't have one being  
13 decided by federal, namely, forum selection, and  
14 choice of law being state law.

15                   So how do you respond to the idea that  
16 the -- when you take Justice Thomas's question  
17 and broaden it out to the present day, you have  
18 a much more nuanced picture?

19                   MR. BASHMAN: Certainly, Justice  
20 Kavanaugh.

21                   To -- to begin with, *The Bremen* and  
22 *Carnival* cases were not insurance cases. They  
23 -- they do not state a judicially entrenched  
24 federal maritime insurance law. So -- so it's  
25 my position to begin with that that's what you

1 need, and that's what Wilburn Boat says that you  
2 need and -- and not some just otherwise  
3 applicable maritime law that applies outside of  
4 insurance.

5           For -- for example, if the first case  
6 that came before this Court were to decide in --  
7 in the non-insurance context when should a  
8 choice-of-law clause be enforceable or not,  
9 that, for purposes of Wilburn Boat, is not a  
10 holding that -- that would necessarily be  
11 applicable in the insurance context. Wilburn  
12 Boat recognized, for lack of a better term, a  
13 sort of insurance exceptionalism where -- where  
14 this Court will defer to the states.

15           The -- the -- also, those two cases  
16 did not involve choice of law. The Bremen  
17 tangentially recognized that choice of forum  
18 might control choice of law. But -- but, as my  
19 friend on the other side has conceded, those --  
20 those are two different things. And if  
21 someone's going to ask me, you know, what's the  
22 difference between choice of law and choice of  
23 forum or forum-selection clause, I mean, I -- I  
24 think that essentially, it's -- it's  
25 self-evident.

1           But, in the insurance context,  
2 forum-selection clauses are even -- are viewed  
3 as even more pernicious. There are numerous  
4 states that don't allow an insurance company to  
5 dictate --

6           JUSTICE KAVANAUGH: Doesn't that hurt  
7 your argument then, though, that -- that despite  
8 that -- and I think you're right on that  
9 point -- The Bremen said forum-selection clauses  
10 are a federal law issue?

11           MR. BASHMAN: It didn't say it was a  
12 federal law issue for purposes of insurance  
13 cases because it wasn't an -- an insurance case.  
14 And -- and so I think that when the insurance  
15 case arises --

16           JUSTICE GORSUCH: Well -- well, why  
17 would that make a difference? That -- what --  
18 let's put the narrative out this way: Wilburn  
19 Boat's about substantive insurance provisions,  
20 okay. Bremen, Carnival, about procedural  
21 issues, where a case is going to be litigated,  
22 how it's going to be litigated. You point out  
23 that the forum-selection clause is a harsher  
24 one, and yet we don't look to state law there.

25           Why -- why -- I'm -- I guess maybe I'm

1 repeating Justice Kavanaugh, but, gosh, what's  
2 -- what's -- what's the point of distinction why  
3 we would maybe listen to forum-selection clauses  
4 in all areas except for maritime insurance?

5 MR. BASHMAN: Well, I -- I -- I think  
6 -- I think the point is that there is no  
7 established federal rule applying in the  
8 maritime insurance context to forum-selection  
9 clauses.

10 JUSTICE GORSUCH: Yeah. But --

11 MR. BASHMAN: So the -- argument would  
12 be open --

13 JUSTICE GORSUCH: But the question --  
14 you -- you --

15 MR. BASHMAN: -- under Wilburn Boat.

16 JUSTICE GORSUCH: Everybody agrees  
17 it's -- you know, fine, it's open. Why would --  
18 why would we say that state law would control  
19 there?

20 MR. BASHMAN: Because the need for  
21 states to protect insurance policyholders in the  
22 insurance context from sharp practices involving  
23 choice-of-forum clauses --

24 JUSTICE GORSUCH: Or one could say we  
25 have very sophisticated entities who are engaged

1 in trade on the high seas. These are bespoke  
2 agreements, this isn't GEICO, and, you know,  
3 they -- they make their choices, they live with  
4 them.

5 MR. BASHMAN: This -- this case is not  
6 -- does not involve a -- a -- a bespoke  
7 agreement. The -- the other side --

8 JUSTICE GORSUCH: Well, I mean, it  
9 also doesn't in -- involve a houseboat in  
10 Oklahoma either, right?

11 MR. BASHMAN: The other side keeps  
12 saying that we agreed to the choice-of-law  
13 provision, which I guess is technically accurate  
14 that we did not cancel the insurance policy  
15 after we received it --

16 JUSTICE GORSUCH: We're talking about  
17 a yacht floating around in the Bahamas. I mean,  
18 we're -- we're -- we're not talking about, you  
19 know, someone's motor home or a -- a floating  
20 houseboat.

21 MR. BASHMAN: But -- but if I could  
22 address the substantive procedure aspect of Your  
23 Honor's question?

24 JUSTICE GORSUCH: Yes, please. Yeah.  
25 I guess that's where -- I'm -- I'm sorry, we got

1 a little --

2 MR. BASHMAN: No, that's okay.

3 JUSTICE GORSUCH: -- side --  
4 sideswiped, but that's what -- that is my  
5 concern. Why -- why would -- why would it make  
6 a difference if -- if you lose in other  
7 procedural areas and all other areas of law, why  
8 would you win in this one?

9 MR. BASHMAN: This Court recognizes  
10 that choice of law is substantive to -- to begin  
11 with. And then, secondly, this -- the issue  
12 presented in this case --

13 JUSTICE GORSUCH: Forum selection is  
14 procedural, but choice of law is substantive?

15 MR. BASHMAN: Right.

16 JUSTICE GORSUCH: Explain that to me.

17 MR. BASHMAN: Which -- which is why  
18 the -- which is why, under the cases that we  
19 cite, it applies in diversity cases. The -- the  
20 federal court follows the state choice-of-law  
21 procedure of -- of the forum state in diversity  
22 cases. This Court ruled that the reason for  
23 that is because choice of law is substantive and  
24 outcome determinative.

25 And -- and so -- so the other side

1 says -- I -- I want to contrast this case with  
2 the -- with a case in which the Great Lakes  
3 Insurance policy says the insured cannot bring  
4 insurance bad-faith claims. It cannot bring  
5 state unfair trade practices claims, which is  
6 what they're saying the work that the New York  
7 choice-of-law provision accomplishes for them.

8 Under Wilburn Boat, where you have  
9 substantive provisions, which is precisely what  
10 Wilburn -- Wilburn Boat involved, you can't sell  
11 the boat, you can't use it for commercial  
12 purposes, this Court recognized that otherwise  
13 applicable law could override those substantive  
14 provisions. Why -- why the outcome should be  
15 different where it's accomplished through a  
16 choice-of-law clause, the -- the other side  
17 never really fully explains.

18 JUSTICE KAVANAUGH: Can I -- can I  
19 broaden it out --

20 JUSTICE BARRETT: Mr. Bashman --

21 JUSTICE KAVANAUGH: Oh.

22 JUSTICE BARRETT: -- just one quick  
23 question. I just want to give you a chance to  
24 explain the shift in argument, because below it  
25 seems that you did say that federal law -- there

1 was a presumption of enforceability to the  
2 choice-of-law -- clause. That's what I thought  
3 when we granted cert. And then I was confused  
4 when I started reading your brief and it was all  
5 about Wilburn Boat.

6 MR. BASHMAN: I looked at the cites  
7 that the other side had in its reply brief for  
8 the proposition that -- that we had admitted  
9 that -- that choice-of-law is presumptively  
10 enforceable as a matter of federal law, and none  
11 of those establish any such thing.

12 Raiders' Third Circuit briefs did not  
13 agree that a choice-of-law clause is  
14 presumptively enforceable as a matter of federal  
15 law. The term doesn't even appear in those  
16 briefs.

17 JUSTICE BARRETT: Did you accept it as  
18 a premise, even -- even if you didn't say --  
19 even if you didn't affirmatively make the  
20 argument, you know, these are presumptively  
21 enforceable under federal law? I mean, it seems  
22 to me that was the premise of the QP. It seems  
23 like that was the premise below. It was  
24 certainly the premise of the Third Circuit's  
25 decision.

1           MR. BASHMAN: I -- I push back firmly  
2 on the suggestion that it's the premise of the  
3 QP. The QP says, as -- as a matter of -- I -- I  
4 don't have it at hand, but -- but my  
5 recollection of it is whether state law is -- is  
6 relevant to -- to determining whether a -- a  
7 state choice-of-law provision in -- in a  
8 maritime insurance contract --

9           JUSTICE BARRETT: It says: "[...] can  
10 a choice-of-law clause in a maritime contract be  
11 rendered unenforceable if enforcement is  
12 contrary to the 'strong public policy' of the  
13 state whose law is displaced?" So that kind of  
14 -- "Under federal" -- sorry, I omitted the --  
15 the key first clause. "Under federal admiralty  
16 law, can a choice-of-law clause" -- the rest of  
17 what I said.

18           MR. BASHMAN: Right. They put a lot  
19 of weight on that introductory phrase that Your  
20 Honor omitted. And -- and our answer is Wilburn  
21 Boat is a federal admiralty law case. Our  
22 argument under Wilburn Boat step 2 that's --

23           JUSTICE BARRETT: Well, I -- I thought  
24 your argument was that Wilburn Boat, in fact,  
25 wasn't a federal admiralty case because I don't

1 even take it -- well, I guess I should ask, do  
2 you accept Justice Kagan's premise that Wilburn  
3 Boat adopted state substantive law as the  
4 federal common law rule, or is it your position  
5 that Wilburn Boat said this is a state law  
6 matter and federal law has nothing to say?

7 MR. BASHMAN: I -- I don't know that  
8 there's a whole lot of difference between those  
9 two --

10 JUSTICE BARRETT: I think there's a  
11 difference.

12 MR. BASHMAN: -- positions. But --  
13 but what Wilburn Boat said, as I understand it,  
14 is -- is that if you have a maritime insurance  
15 case, you undertake the inquiry that it  
16 requires, and -- and if there's no -- if -- if  
17 there's no judicially established federal  
18 maritime insurance rule and there's no desire to  
19 create one, then -- then state law applies.

20 And -- and so, so much of the argument  
21 here today is, is there a judicially established  
22 federal maritime insurance law? And --

23 JUSTICE KAVANAUGH: Can I ask -- can I  
24 broaden out the question I was asking, which is  
25 can I broaden out the lens to look at what

1 happened after Wilburn Boat, not necessarily  
2 this Court, but in the industry?

3           So my understanding is Wilburn Boat  
4 was something of a dislocating decision in the  
5 industry, and the -- the response to it, picking  
6 up on Justice Reed's dissent and Justice  
7 Frankfurter's concurrence, by the industry was,  
8 okay, well, we'll use choice-of-law provisions  
9 because, otherwise, there would be all this  
10 uncertainty created by -- by Wilburn Boat. And  
11 choice-of-law provisions started to become  
12 commonplace.

13           You can dispute any of this,  
14 obviously.

15           And then choice-of-law provisions,  
16 particularly following The Bremen, became  
17 accepted as a matter of federal law by federal  
18 courts and that the -- this would be kind of  
19 Wilburn Boat redux if we go back now and say,  
20 oh, no, that whole experiment for the last  
21 couple generations of choice-of-law provisions  
22 is no good.

23           You want to respond to that?

24           MR. BASHMAN: It -- it's not that it's  
25 no good. We -- we -- we freely concede that in

1 most every instance, a choice-of-law provision  
2 contained in a maritime insurance contract will  
3 be effective.

4 We're -- we're -- this -- this case is  
5 being fought over these narrow and  
6 difficult-to-satisfy exceptions.

7 JUSTICE KAVANAUGH: Well, okay. On  
8 that, the big exception is -- is -- is 2(b)  
9 obviously in the Restatement, I think, which  
10 talks about weighing the different interests of  
11 the different states. And I understand the  
12 other side to say no, that shouldn't part -- be  
13 part of the inquiry at all.

14 And you say -- and I understand this  
15 position -- no, that has to be a central part of  
16 the inquiry. That's not a narrow dispute.  
17 That's a big deal, I think, in -- certainly, a  
18 big deal in your case, but I think it's going to  
19 be a big deal in some other cases.

20 MR. BASHMAN: Well, this -- this is  
21 the way --

22 JUSTICE KAVANAUGH: And why would --  
23 and why would we look at that? That's really  
24 designed for interstate disputes, not for  
25 maritime law. So why would we look at that

1 provision of the Restatement at all?

2 MR. BASHMAN: Well, I hate to keep  
3 coming back to Wilburn Boat, but -- but what --  
4 what it says --

5 JUSTICE KAVANAUGH: Keep going.  
6 That's -- it's good for you.

7 MR. BASHMAN: -- is -- is that, you  
8 know, in -- in a maritime insurance dispute, if  
9 -- if there's no established federal maritime  
10 insurance policy as a matter of judicially  
11 established, then -- then you do look to -- to  
12 state law.

13 A -- again, as was alluded to --

14 JUSTICE JACKSON: But, here, I guess  
15 isn't the question whether there is such a  
16 policy here? And I'm not clear on your position  
17 with respect to that. Justice Barrett sort of  
18 tried to ask it, so let me -- let me just put it  
19 out there. Is there a federal policy in your  
20 view related to the enforceability of these  
21 kinds of contracts, provisions?

22 MR. BASHMAN: No, there is not. And  
23 -- and it has not -- it -- it doesn't satisfy  
24 the stringent test that Wilburn Boat recognized  
25 for --

1 JUSTICE JACKSON: Did -- did Wilburn  
2 Boat recognize a test for determining when there  
3 is an established policy, or did it just --

4 MR. BASHMAN: Yes.

5 JUSTICE JACKSON: Oh, it did? Okay.

6 MR. BASHMAN: Yes.

7 JUSTICE JACKSON: So what is that  
8 test?

9 MR. BASHMAN: The -- the -- at a  
10 minimum, it -- it's that the showing in favor of  
11 allowing technical defaults by the policyholder  
12 to result in a forfeiture of coverage, which was  
13 a rather widespread body of law that existed at  
14 the time Wilburn Boat came out, including  
15 earlier decisions of -- of this Court in the  
16 non-maritime-insurance context that -- that  
17 recognized that principle of law, that -- that  
18 all of that was not enough.

19 And -- and what the other side points  
20 to here we respectfully submit is way less than  
21 the type of showing that Wilburn Boat said  
22 wasn't enough, and -- and the reason that is is  
23 I --

24 JUSTICE SOTOMAYOR: I -- I'm sorry,  
25 counselor. You're -- you're, like, jumping the

1 most important step.

2           The issue is whether there's a  
3 presumption of enforceability of a  
4 conflict-of-law choice, not about whether  
5 there's a presumption of enforceability of a  
6 particular terms or substantive terms in a  
7 contract, but the simple question is: Is there  
8 a presumption of enforceability in a  
9 choice-of-law provision?

10           And you seem to say, because we, the  
11 Supreme Court, hasn't said it, there can't be.  
12 But, obviously, Bremen put that to rest because  
13 Bremen found one, whether there had been one  
14 before or not, it announced that it had  
15 preexisted itself.

16           I'm still not sure you made that  
17 presumption below. The Third Circuit seemed to  
18 have made it. Every lower court who's faced the  
19 question has presumed that there's that  
20 presumption.

21           You haven't given me a reason why in  
22 admiralty law there wouldn't be that  
23 presumption. We want uniform -- uniformity in  
24 maritime interpretation. We want people to be  
25 secure in knowing which laws are going to apply,

1 not what the substance of those laws are, but  
2 which law is going to apply. Everything that  
3 moved us to find that presumption in the  
4 forum-selection world seems to apply here.

5 So now tell me why it shouldn't  
6 without getting to the unfairness of the  
7 substantive issues.

8 MR. BASHMAN: Right. So -- so Wilburn  
9 Boat weighed many of those exact same concerns,  
10 including the issue with dis-uniformity, be --  
11 because an insurance policy that contains  
12 certain substantive provisions might be  
13 enforceable in -- in some states that allowed  
14 it.

15 JUSTICE SOTOMAYOR: But that had to do  
16 with the substantive. I'm not talking about  
17 that.

18 MR. BASHMAN: And --

19 JUSTICE SOTOMAYOR: I'm talking about  
20 the choice-of-law versus forum-selection clause.

21 MR. BASHMAN: Well, this -- this case  
22 involves a provision in the insurance policy  
23 that says -- it -- it's a rather lengthy  
24 provision, but it says, if there's no applicable  
25 federal -- admiralty law, then -- then the law

1 of New York will apply.

2 And -- and once you get to that stage,  
3 then -- then you're in the state -- state law  
4 world under Wilburn Boat. And -- and the other  
5 side is saying, well, only strong federal public  
6 policy can overcome that. And let me explain  
7 where that rule comes from.

8 The case they cited the most in their  
9 cert petition and continue to rely upon in their  
10 merits briefing is a case from the Fifth Circuit  
11 called Stoot, and -- and that case, it -- it --  
12 I -- I suggest looking at it if you haven't  
13 already -- is a non-maritime insurance case  
14 involving a dispute between the owner of an oil  
15 rig and the catering company on the oil rig, and  
16 they have a contract that decided to select  
17 Louisiana law on the issue of indemnification.

18 Under regular -- federal maritime law,  
19 an indemnification provision in a contract would  
20 be enforceable. But, under Louisiana law, a  
21 what's called, I believe, the  
22 anti-indemnification oil field statute of  
23 Louisiana, you cannot enforce an indemnification  
24 provision in -- in a case governed by that  
25 Louisiana law.

1                   And so the issue before the Fifth  
2                   Circuit in Stoot was could the parties replace  
3                   substantive federal admiralty law allowing an  
4                   indemnification claim with a law of Louisiana  
5                   disallowing an indemnification claim. And the  
6                   Fifth Circuit said we have to look at -- at  
7                   federal public policy to decide whether we'll  
8                   allow state law to displace federal law.

9                   I know it's a strange scenario  
10                  because, in -- in many situations, federal law  
11                  necessarily is -- is deemed to be controlling in  
12                  the absence -- even -- even if there is  
13                  conflicting state law, but the Fifth Circuit  
14                  said there's not a strong federal policy, so  
15                  we'll allow the parties to choose the law. And  
16                  -- and they rejected --

17                 JUSTICE KAGAN: And -- and just, you  
18                 know, thinking about Justice Sotomayor's  
19                 question, I take it that you have -- you should  
20                 have no great quarrel with the idea of a federal  
21                 rule of -- that there's a presumption of  
22                 enforceability. Your point is just, well, at  
23                 the next step, the question is, what overrides  
24                 the federal presumption of enforceability?

25                 And your view is that what overrides

1     it, a la the Restatement rule, is when there's a  
2     particular state law where a state has a -- a  
3     vastly superior interest in a dispute and there  
4     is a state substantive law which federal law  
5     does not at all conflict with.

6             MR. BASHMAN:  I -- I agree that's --  
7     that that view resolves the case in -- in our  
8     favor for sure.  I -- I also understand the  
9     other side to be arguing, you know, on the other  
10    hand, if -- if you have a federal presumption,  
11    then maybe only federal policy reasons ought to  
12    be relevant to that.

13            And -- and I think that's, you know,  
14    if you look at their cites that say that somehow  
15    we've conceded that away, you know, those --  
16    those cites don't establish that.

17            And -- and, in fact we're --

18            JUSTICE JACKSON:  But what -- what's  
19    your answer to that question?  I mean, why would  
20    it be the case that we would be in a world in  
21    which state interests or state policy could  
22    override the federal presumption of  
23    enforceability?

24            MR. BASHMAN:  Because this case arises  
25    at -- at the last step of Wilburn Boat where

1 state law controls, which is how they got in --  
2 JUSTICE JACKSON: No, no, no, I'm just  
3 talking about as a matter of theory. Like, as  
4 a -- so setting aside what -- what Wilburn Boat  
5 -- I'm just trying to understand one reason why  
6 it would be that the federal exception -- you'd  
7 have to have federal interests in the exception  
8 is a couple, one is that we have a general rule  
9 and we have an exception and unless you actually  
10 have sort of the same dynamic working, you could  
11 easily see how the exception could swallow the  
12 rule. You'd never have the rule, right, because  
13 the exception is sort of being established on a  
14 different plane. So that's one thing.

15 Another thing is, to the extent we're  
16 talking about federal interests overarching this  
17 entire dynamic, we know, as Justice Sotomayor  
18 says, the federal interests are in uniformity  
19 and predictability and all of those sorts of  
20 things.

21 So, if we have a single federal  
22 spokesperson regarding what is accepted, you're  
23 more likely to advance the interest of  
24 uniformity and predictability, whereas if you  
25 have state interests operating in the exception,

1 you're going to have all of these different  
2 exceptions popping up at different times and  
3 people aren't going to know what they're doing.

4           So I appreciate that there's a world  
5 in which insurance contracts are different and  
6 they're ordinarily run by the states and each  
7 state has a particular interest, consumer  
8 protection, not, or whatever, but if our entire  
9 kind of framing is about ensuring predictability  
10 and uniformity, why would we have a world in  
11 which we would allow different state policy  
12 interests to be driving the exception in this  
13 way?

14           MR. BASHMAN: Well, I have multiple  
15 points to make in response to that.

16           JUSTICE JACKSON: Sorry, that was a  
17 long question.

18           MR. BASHMAN: Sure. First of all,  
19 that -- that's -- Wilburn Boat weighed the --  
20 the federal interest in uniformity and said that  
21 in the maritime insurance area, it did not  
22 outweigh state regulation, which is obviously  
23 what this case involves, as -- as was alluded to  
24 when -- when my friend was up here.

25           Secondly, the type of uniformity

1 that's -- the Great Lakes argues in favor of is  
2 -- is not the sort of uniformity that this Court  
3 ordinarily speaks of in -- in the maritime --  
4 the general maritime law context, where it's  
5 essentially a substantive rule. So, as -- as  
6 was alluded to earlier, under the Dutra Group  
7 case, you can't get punitive damages on an  
8 unseaworthiness claim.

9           This -- this case still allows any  
10 maritime insurer to pick whatever choice of law  
11 to apply -- choice of state law to apply in the  
12 absence of federal law. And -- and, again, that  
13 -- I -- there's no other -- in -- in no other  
14 area of the law is there a choice-of-law  
15 principle that says, yes, state law controls,  
16 but the only thing relevant in deciding whether  
17 the court should enforce that or not is federal  
18 law.

19           This -- this Court, when it decides  
20 admiralty cases, takes a look at the law that  
21 exists out -- outside -- out in the real world  
22 and -- and tries to figure out, you know, what  
23 -- what is a sensible rule of law to apply in  
24 this case? And what I'm telling you is -- is  
25 the rule of law that the other side is seeking

1 is -- is something that in the choice-of-law  
2 area you just don't see anywhere.

3 And I think that's one of the reasons  
4 why the two leading choice-of-law law  
5 professors, even though they filed an amicus  
6 brief at -- at the same time as the other side's  
7 amicus brief in support of neither party, came  
8 out essentially the same way that we're urging  
9 --

10 JUSTICE KAVANAUGH: Well, they did  
11 that -- the Coyle and Roosevelt brief, is that  
12 what you're talking about? They did that as a  
13 matter of federal common law. So they rejected  
14 your premises that -- and they concluded, if --  
15 assuming there's a federal presumption of  
16 enforceability and that the exceptions are  
17 determined by federal common law, they -- they  
18 disagree with you on that.

19 But then I want to ask you about that.  
20 Then they adopt -- they say we should adopt the  
21 Restatement as the federal exceptions. And the  
22 second one of the Restatement, the second  
23 provision, talks about the competing state  
24 interests in the -- in the matter.

25 And the other side says don't do that

1 because that Restatement provision was designed  
2 for interstate disputes, and this is maritime.

3 To me, if we get to this, this will be  
4 really important, what we say about this, so I  
5 want to give you a chance to respond to that.

6 MR. BASHMAN: Right. I -- I think  
7 that's the reason that the law professors are  
8 correct that that Restatement section should be  
9 applied here, which, of course, is an argument  
10 that we also put forth in our brief --

11 JUSTICE KAVANAUGH: Yeah, I agree with  
12 you, it was a backup backup argument's there.

13 MR. BASHMAN: Right.

14 JUSTICE KAVANAUGH: So, yeah.

15 MR. BASHMAN: Is -- is that this case  
16 arises in the setting of -- of a conflict  
17 between the law of -- of two states. And that's  
18 what I referred to earlier as the horizontal  
19 choice-of-law conflict.

20 The other side is trying to turn it  
21 into a vertical choice-of-law conflict. But --  
22 but, if there was some federal policy that  
23 mattered, we don't dispute that that federal  
24 policy would control. That -- that's what  
25 Wilburn Boat says.

1           But -- but, again, the other side is  
2     trying to pick these cases that arose outside of  
3     the maritime insurance context that say that  
4     ordinarily we will enforce a choice-of-law  
5     provision. Again, a showing of a smattering of  
6     federal appellate court decisions that Wilburn  
7     -- Wilburn Boat says is not enough to judicially  
8     establish it to begin with. And -- and they say  
9     let's use that as the main federal rule, and  
10    let's apply it to insurance cases too.

11           Again, if -- if Wilburn Boat were so  
12    easy to evade, you know, it might make you  
13    wonder what -- what's the point of even having  
14    it. But -- but, of course, the other side did  
15    not make that their issue --

16           JUSTICE BARRETT: Mr. Bashman, can I  
17    just clarify one thing about your answer to  
18    Justice Kavanaugh? When -- when you say -- and  
19    you said this in your brief too -- that if  
20    federal policy cared about it, if federal law  
21    cared about it, we would have a rule, are you  
22    talking about -- and I won't even try to say the  
23    Latin name -- the utmost good faith issue, or  
24    are you talking about the choice-of-law issue?  
25    It -- because it kind of sounded to me in -- in

1 your brief and today that you're talking about  
2 the utmost good faith issue, which is different.

3 MR. BASHMAN: So this case -- we --  
4 we've been arguing this case for quite a little  
5 bit now. This case involves whether my client  
6 can maintain certain counterclaims under  
7 Pennsylvania law, and -- and so those are  
8 Pennsylvania law statutory counterclaims.

9 JUSTICE BARRETT: Well, but let me  
10 just say it differently. I understood the  
11 utmost good faith to -- to bear on whether you  
12 could maintain those claims. But putting that  
13 aside, I guess what I'm saying is, what federal  
14 policy are you talking about when you say  
15 federal law doesn't care? Are you talking about  
16 the substance of your claims, that their -- your  
17 counterclaims, or are you talking about the  
18 choice of law?

19 MR. BASHMAN: I'm -- I -- I guess, to  
20 answer that directly, what -- what the other  
21 side's position is, is that there's generally no  
22 federal policy that would support overcoming a  
23 choice-of-law provision in the maritime  
24 insurance context. And, again, I'd lay that at  
25 the feet of Wilburn Boat, which said we're not

1 going to create federal policy by --

2 JUSTICE BARRETT: So you are -- I  
3 don't want to derail you totally from Justice  
4 Kavanaugh. So your answer to me is that you are  
5 talking about federal law not caring, not having  
6 any federal policy with respect to choice of  
7 law?

8 MR. BASHMAN: Correct.

9 CHIEF JUSTICE ROBERTS: Thank you,  
10 counsel.

11 Justice Thomas, anything further?

12 JUSTICE THOMAS: Just a short  
13 question, Mr. Bashman, to satisfy my curiosity.  
14 Were they able to salvage those twin 12-V 71s?

15 (Laughter.)

16 MR. BASHMAN: I -- I -- you know, it's  
17 a little bit outside of the record that's in  
18 front of this Court, but -- but I -- I think  
19 that what happened was the boat was taking on  
20 water and -- and may have been run aground to  
21 avoid sinking it so that it could be salvaged  
22 more easily, and -- and the boat is repaired now  
23 and -- and is back in -- in working order.

24 JUSTICE THOMAS: Okay.

25 CHIEF JUSTICE ROBERTS: Justice Alito?

1 Justice Sotomayor?

2 Justice Kagan?

3 Justice Gorsuch?

4 Justice Kavanaugh?

5 JUSTICE KAVANAUGH: Just one thing.

6 When you say federal maritime law doesn't care,  
7 federal law doesn't care about the choice of  
8 law, I mean, I think federal maritime law, as  
9 reflected in decisions of this Court, does care  
10 about predictability and certainty.

11 And if that's true, then that doesn't  
12 defeat your argument on this point, but I think  
13 it's in tension with your argument that as a  
14 matter of federal common law, we should weigh  
15 each state's competing interest in the matter.

16 MR. BASHMAN: A -- again, I think that  
17 you understand our position on that point, which  
18 is that the other side's approach does not --

19 JUSTICE KAVANAUGH: Wilburn.

20 MR. BASHMAN: -- does not dictate --

21 (Laughter.)

22 MR. BASHMAN: -- well, does not  
23 dictate the type of uniformity that this Court's  
24 decisions talk about --

25 JUSTICE KAVANAUGH: Yeah, uniform --

1           MR. BASHMAN:  -- which is a  
2           substantive --

3           JUSTICE KAVANAUGH:  I'm going to end  
4           it real quick, but uniformity's different from  
5           predictability and certainty.  I think that's  
6           important to keep in mind.

7           MR. BASHMAN:  Right.  And I -- I'm  
8           saying that uniformity is different than  
9           predictability and certainty and -- and that,  
10          again, Wilburn Boat, you know, weighed those  
11          concerns.

12          JUSTICE KAVANAUGH:  Thank you.

13          CHIEF JUSTICE ROBERTS:  Justice  
14          Barrett?

15          Justice Jackson?

16          JUSTICE JACKSON:  Wouldn't the  
17          argument that we should adopt the Restatement as  
18          the federal common law -- isn't that in tension  
19          with the point that you're just making, that the  
20          federal law really doesn't care about the choice  
21          of law?  In other words, I -- I thought that --  
22          I thought your point was that federal law is  
23          sort of agnostic about whether it's New York law  
24          that applies or Pennsylvania law that applies,  
25          right?  That that's the sort of original

1 starting point.

2 MR. BASHMAN: Right.

3 JUSTICE JACKSON: Which is why we go  
4 in the contract to New York, because that's  
5 their opening paragraph. If federal law doesn't  
6 care about this, then you make it New York.

7 MR. BASHMAN: Right. We have --

8 JUSTICE JACKSON: But then -- but then  
9 we have federal law caring about the fact that  
10 you've made that contractual provision and  
11 saying you have to enforce, unless, et cetera,  
12 et cetera. So why isn't that the federal policy  
13 that is sort of driving this?

14 MR. BASHMAN: So -- so, to answer the  
15 -- the first part of your question, we -- we  
16 have the adoption of the Restatement as our  
17 fallback argument under what I'll refer to as  
18 step 2 of Wilburn Boat, which is, if -- if this  
19 Court sees a need to announce a uniform federal  
20 rule, Wilburn Boat made clear that ordinarily  
21 that would not be done but, rather, that it  
22 should be left to -- to Congress.

23 And -- and I can't say it enough. You  
24 know, Congress is across the street and has  
25 plenary power to overturn Wilburn Boat, and 70

1 years have gone by and it has chosen not to do  
2 so.

3 JUSTICE JACKSON: Thank you.

4 CHIEF JUSTICE ROBERTS: Thank you,  
5 counsel.

6 Rebuttal, Mr. Wall.

7 REBUTTAL ARGUMENT OF JEFFREY B. WALL

8 ON BEHALF OF THE PETITIONER

9 MR. WALL: Just a handful of points.  
10 Justice Thomas, to your central  
11 question, the boat is available for sale online  
12 if you have a half million dollars.

13 (Laughter.)

14 MR. WALL: And as best I can tell from  
15 the pictures, the engines were salvaged. So --  
16 so don't worry.

17 Justice Barrett, at page 12 of the Op,  
18 they recite the well-established maritime  
19 principle that these choice-of-law clauses are  
20 generally valid unless unreasonable or unjust.  
21 And then it's all a debate at the cert stage, as  
22 it was in the lower courts, about when the sort  
23 of general validity or presumption can be  
24 overcome.

25 The presumption was never at issue in

1 the case. I think, you know, we can go back and  
2 forth on the quotes from the brief. I feel good  
3 about them, but I think, reading the briefs in  
4 context, that was never at issue in the case as  
5 it -- and the Court did not grant the broader  
6 first QP in the petition. It only granted the  
7 narrower second QP on how to work the except --  
8 exception.

9           If the Court agrees that there is a  
10 presumption, set aside, Justice Kagan, Bremen  
11 and Wilburn Boat. And if you were just asking,  
12 well, how would it work, if you had no  
13 choice-of-law clause in the contract, you'd  
14 apply federal choice-of-law rules. That's this  
15 Court's decision in Lauritzen, all federal.  
16 It's not diversity, it's not Klaxon, you don't  
17 look to state law. There's a federal  
18 choice-of-law test in admiralty.

19           All right. We put the choice-of-law  
20 clause in the contract, what now? We have a  
21 presumption. Well, it wouldn't be much of a  
22 presumption if federal law goes if 50 states  
23 could just set it aside. That's Justice  
24 Jackson's point.

25           And even looking at the facts of this

1 case, it seems to have a fairly international  
2 flavor. You have a German insurer. You have an  
3 insured in Pennsylvania that designates an agent  
4 in the contract in Florida, and the boat can  
5 travel up and down the Eastern Seaboard and the  
6 Bahamas, nowhere else. That's the navigational  
7 limit.

8 That sure triggers some interests of  
9 Pennsylvania, but it doesn't seem like the only  
10 state in play, and more importantly, it seems  
11 like the sort of national and international  
12 thing that triggers the broader purposes of  
13 maritime.

14 But even if you didn't buy all of  
15 that, we do have The Bremen. The best reading  
16 of The Bremen is that public policy is federal  
17 public policy, not state public policy.

18 Mr. Bashman agrees that forum-  
19 selection clauses are even more pernicious. If  
20 that's right, then having adopted the rule with  
21 respect to The Bremen, it seems to me easier on  
22 the choice-of-law side to say you should have  
23 exactly the same rule.

24 Then the move is, but it's an  
25 insurance case. But we don't do that for forum-

1 selection clauses. We don't have The Bremen  
2 test for all maritime contracts that aren't  
3 marine insurance. Every bill of lading, every  
4 towage contract, every employment contract, we  
5 have The Bremen test across the board, so why  
6 would we distinguish on the choice-of-law side  
7 and have The Bremen test for non-insurance  
8 maritime contracts but The Bremen looking to  
9 state policy for marine insurance contracts?

10 I think all of that should make the  
11 Court skeptical of Wilburn Boat, but even if you  
12 don't approach it through the lens of Kossick  
13 and Kirby and Dutra, you could simply say, we  
14 cleared the high bar in Wilburn Boat and Bremen  
15 and for exactly the same reasons, we clear it  
16 again here, because there is a tradeoff in this  
17 contract.

18 It has a forum-selection clause that  
19 is a favorable forum for the plaintiffs. They  
20 get to sue in Pennsylvania. It picks out a  
21 neutral law, a German company picked the U.S.  
22 state to which it had the most ties, where it  
23 has its American trust accounts, where it's  
24 designated as a -- a surplus lines insurer, and  
25 where it has its agent for service of process.

1           It picked a stable, well-developed  
2 body of both commercial and maritime law, the  
3 state where it has the most substantial  
4 connections which ex ante we should not think  
5 would be unfair to the policyholder at all.

6           Why not treat those clauses as a  
7 package? They should be generally enforceable  
8 as a matter of federal law unless they offend  
9 federal public policy.

10           They don't here, Justice Kavanaugh.  
11 There's no argument that they do. So, although  
12 I tried to articulate the limits earlier, I  
13 don't think the Court needs to -- to get into  
14 them or to catalogue them here. All you have to  
15 say is that for the same reasons as *The Bremen*,  
16 it serves federal interests in maritime.

17           It gives you uniformity so that you  
18 know that your clause will be enforced without  
19 having to try to figure out 50 states' laws. It  
20 allows the insured a price in a predictable way  
21 which lowers the premium for the insured.

22           That's not just speculation. You look  
23 at the policy here. It's a pretty reasonable  
24 premium for what is a pretty substantial policy,  
25 but it comes with limits, limits that they

1       agreed to when they were renewing the policy  
2       back in 2016, including the fire extinguisher,  
3       and it gives an administrable test for courts.

4                 All of this, as The Bremen said,  
5       accords with ancient principles of freedom of  
6       contract.  It's the right answer in federal  
7       admiralty.

8                 CHIEF JUSTICE ROBERTS:  Thank you,  
9       counsel.

10                The case is submitted.

11                (Whereupon, at 12:45 p.m., the case  
12       was submitted.)

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