No. 12-929

IN THE

Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,
Petitioner,

v.

J-CREW MANAGEMENT, INC.,
Respondent.

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

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* SUPPORTING PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – continued

STATUTES AND RULES

SCHOLARLY AUTHORITIES

TABLE OF AUTHORITIES – continued

OTHER AUTHORITIES

INTERESTS OF *AMICUS CURIAE*[1]

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest business federation, representing more than 300,000 direct members and indirectly representing an underlying membership of more than three million U.S. businesses and professional organizations. Among its members are companies and organizations of every size, in every industry sector, and from every region of the country. The Chamber represents its members' interests by, among other activities, filing briefs in cases implicating issues of concern to the nation's business community.

Many of the Chamber's members and affiliates include forum selection clauses in their business contracts. As a result, the questions presented in this case concerning the enforcement of such clauses significantly affect the interests of the Chamber and its members. By declining to enforce a forum selection clause in an agreement that was negotiated in an arms-length transaction between experienced business entities, the decision below frustrates the legitimate contractual expectations of thousands of businesses with similar contract provisions. If permitted to stand, it will undermine the ability of parties to structure their business contracts so as to select in advance and limit the fora in which disputes

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[1] After timely notification pursuant to Rule 37.2(a), the parties consented to the filing of this brief, and their consent letters are on file with the Clerk. In accordance with Rule 37.6, *amicus* states that no counsel for any party authored this brief in whole or in part, and no person or entity, other than the *amicus*, its members, or its counsel has made any monetary contribution intended to fund the preparation or submission of this brief.

will be litigated. It also will likely discourage businesses from expanding the geographic reach of their operations, for fear of being unable to control and limit their litigation costs. In addition, the decision below invites uncabined forum-shopping because it expands and perpetuates the current lack of federal judicial uniformity in the enforcement of forum selection clauses. For all of these reasons, the Chamber has substantial interests in the Court's review of the decision below.

INTRODUCTION

In *M/S Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 10, 15 (1972), this Court held that forum selection clauses "are prima facie valid" and should be enforced "unless [the party seeking nonenforcement] could clearly show that enforcement would be unreasonable and unjust, or that the clause was invalid for such reasons as fraud or overreaching." See also *id.* at 15 ("the forum clause should control absent a strong showing that it should be set aside").[2] While *Bremen* involved a forum selection clause that was the product of "an arm's-length negotiation by experienced and sophisticated businessmen," *id.* at 12, the Court subsequently relied on its reasoning in *Bremen* to enforce a "nonnegotiated forum-selection clause" in a "form contract" (a cruise ship ticket).

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[2] *Bremen*, 407 U.S. at 10-11, cited with approval this Court's earlier holding in *Nat'l Equip. Rental, Ltd.* v. *Szukhent*, 375 U.S. 311, 315 (1964), in which the Court upheld a farm equipment lease provision in which the Michigan lessee agreed to a New York agent for purposes of service of process. As the Court explained, "[t]he clause was inserted by the petitioner and agreed to by the respondents in order to assure that any litigation under the lease should be conducted in the State of New York." *Id.*

Carnival Cruise Lines, Inc. v. *Shute*, 499 U.S. 585, 593 (1991).

Contrary to these seemingly well-settled principles, the decision below declined to enforce a negotiated forum selection clause between experienced business entities providing that all disputes would be litigated in Virginia. By affirming the denial of petitioner's motions to dismiss or transfer respondent's suit filed – in clear breach of the parties' agreement – in federal district court in Texas, the court below has deepened an already serious conflict among the Circuits and presented this Court with a cleanly presented question that warrants further review.

The court of appeals first held that petitioner's motion to dismiss pursuant to Fed. R. Civ. P. 12(b)(3)[3] and 28 U.S.C. § 1406[4] was not an appropriate procedural mechanism for challenging venue because, in its view, the forum selection clause did not render venue improper in the chosen forum. It then held that the appropriate mechanism was 28 U.S.C. § 1404,[5] which relegates transfer decisions to the discretion of district court judges, based upon their balancing of a variety of practical and equitable factors in addition to the existence of the forum

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[3] Rule 12(b)(3) provides for a motion to dismiss for improper venue.

[4] Section 1406(a) provides that "[t]he district court of a district in which is filed a case laying venue in the wrong division or district shall dismiss, or if it be in the interest of justice, transfer such case to any district or division in which it could have been brought."

[5] Section 1404(a) provides that "[f]or the convenience of parties and witnesses, in the interest of justice, a district court may transfer any civil action to any other district or division where it might have been brought or to any district or division to which all parties have consented."

selection clause. The court of appeals then affirmed the district court's determination under Section 1404's balancing test that petitioner had not satisfied its burden of showing that a transfer was warranted under the totality of the circumstances of this case.

The decision below starkly illustrates that the use of Section 1404 to resolve challenges to lawsuits filed in violation of forum selection clauses, rather than Section 1406 and the standards that this Court announced in *Bremen*, eviscerates the legitimate contractual expectations of parties who relied on such clauses to limit their litigation costs and avoid burdensome pre-trial motions. Forum selection clauses should be enforced as written, not treated as mere factors that are weighed as part of a free-wheeling and inherently unpredictable balancing test. For these reasons, as discussed more fully herein, the Court should grant the petition for certiorari and reverse the decision below.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH CIRCUIT'S DECISION WIDENS A LONGSTANDING CIRCUIT CONFLICT ON THE ENFORCEABILITY OF FORUM SELECTION CLAUSES AND PRESENTS AN APPROPRIATE VEHICLE FOR RESOLVING IT.

As petitioner has shown, there is a well-developed split in the Circuits as to the proper procedural mechanism and substantive standards for addressing challenges to lawsuits that are filed in violation of forum selection clauses. Pet. 12-18. Several courts of appeals (a majority of those that have considered the issue) instruct district courts to entertain such challenges through motions under Section 1406 and

to apply the *Bremen* standards.[6] Other courts of appeals (a minority) limit district courts' review of such challenges to motions under Section 1404, which leaves enforcement of the forum selection clause to the district courts' seemingly boundless discretion.[7] In the decision below, the Fifth Circuit acknowledged this conflict and then widened and deepened it by aligning itself with the minority view. Pet. App. 5a & n.13 ("We agree with [the minority] approach") (citing *Kerobo* and *Jumara*).

This square and acknowledged circuit split is more than sufficient reason to grant certiorari. Moreover, the decision below makes clear that the split is not going to resolve itself or go away. While the trend in recent years had been for courts of appeals to adopt the view that favors enforcement of forum selection clauses (the current majority view), the Fifth Circuit has now expanded and perpetuated the conflict by aligning itself with the older, minority view that subjects the enforcement of forum selection clauses to a multi-factor balancing test. In light of the continuing disagreement among the Circuits, the concurring judge on the panel essentially invited this Court's review by encouraging the parties to file a petition for *certiorari* so that the Court could provide

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[6] *See Union Elec. Co.* v. *Energy Ins. Mut. Ltd.,* 689 F.3d 968, 970-73 (8th Cir. 2012); *TradeComet.com LLC* v. *Google, Inc.,* 647 F.3d 472, 474-78 (2d Cir. 2011); *Slater* v. *Energy Servs. Grp. Int'l, Inc.*, 634 F.3d 1326, 1332-33 (11th Cir. 2011); *Hillis* v. *Heineman*, 626 F.3d 1014, 1016-17 (9th Cir. 2010); *Muzumdar* v. *Wellness Int'l Network, Ltd.*, 438 F.3d 759, 760-62 (7th Cir. 2006).

[7] *See Kerobo* v. *Sw. Clean Fuels, Corp.*, 285 F.3d 531, 535 (6th Cir. 2002), and *Jumara* v. *State Farm Ins. Co.*, 55 F.3d 873, 877-79 (3d Cir. 1995).

"further guidance" on the issue. Pet. App. 25a. The Court should accept that invitation.

"Further guidance" is sorely needed because it is clear that if Atlantic Marine had challenged respondent's attempt to avoid the forum selection clause in any of the Circuits following the majority approach, the clause would have been enforced and this litigation would be proceeding in Virginia. The decision below thus extends and perpetuates the fundamentally inconsistent legal regimes for the enforcement of forum selection clauses that exist in different Circuits. The prospect that parties who enter into forum selection agreements have categorically different contract protections in different Circuits creates significant commercial uncertainty and is intolerable. This is precisely the kind of decision by geography that this Court grants certiorari to prevent.

This case is an appropriate vehicle for resolving this circuit split because the facts governing the issue are straightforward and fully developed in the record. In addition, the question at the crux of the conflict is cleanly presented and outcome determinative in this case. The Court would have the benefit of two thorough but opposing analyses by the panel because even though Judge Haynes' opinion was nominally a concurrence, her analysis "diverge[d]" from that of the majority on the legal question presented by the petition. Pet. App. 14a. By granting the petition, this Court could and should provide meaningful guidance concerning the enforceability of forum selection clauses – an area that it has not addressed in more than two decades.

Although the Court generally disfavors review when a case is in an interlocutory posture, the interlocutory nature of this case should not be an

impediment to review because "there is [an] important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Eugene Gressman et al., *Supreme Court Practice* § 4.18, at 281 (9th ed. 2007). The Fifth Circuit squarely addressed the pertinent legal issue in the context of resolving petitioner's mandamus petition and took a clear position on the mature circuit conflict that merits this Court's review. Pet. App. 4a-5a (acknowledging the division in the Circuits and adopting the minority approach).

Moreover, as a practical matter, mandamus is the most likely vehicle for the question presented to reach this Court. As petitioner demonstrated, mandamus is the only means available for immediate appellate review of the denial of a motion to change the venue of a lawsuit. Pet. 7-8. Appeals of final judgments are unlikely to arise because parties have a strong incentive to settle cases when they are forced to proceed in an inconvenient forum and, for the few cases that are litigated to final judgment, parties are unlikely to appeal venue issues after the proceedings have concluded. Thus, the court of appeals' mandamus ruling is not merely an appropriate vehicle for resolving the well-developed circuit split, it may well present an uncommon opportunity for the Court to do so. Indeed, this Court has routinely granted review in cases raising venue and similar issues by way of mandamus. See, *e.g.*, *Carnegie-Mellon Univ.* v. *Cohill*, 484 U.S. 343, 347-48 (1988) (whether a district court can remand a properly removed case to state court when all federal claims have been eliminated); *Thermtron Prods. Inc.* v. *Hermansdorfer*, 423 U.S. 336, 341-42 (1976) (whether a district court can remand a properly removed

diversity case for reasons not authorized by statute), *abrogated on other grounds by Quackenbush* v. *Allstate Ins. Co.*, 517 U.S. 706 (1996); *Van Dusen* v. *Barrack*, 376 U.S. 612, 614 (1964) (construction and application of Section 1404); *Hoffman* v. *Blaski*, 363 U.S. 335, 337-39 (1960) (same). For all of these reasons, the Court should grant this petition and resolve the circuit conflict now.

II. THE FIFTH CIRCUIT'S DECISION UNDERMINES CONTRACTUAL CERTAINTY AND ENCOURAGES FORUM-SHOPPING.

The Chamber agrees with petitioner's analysis demonstrating that the Fifth Circuit's decision to treat the enforcement of forum selection clauses as a discretionary matter under Section 1404 is fundamentally flawed and misapplied this Court's decision in *Stewart Organization, Inc.* v. *Ricoh Corp.*, 487 U.S. 22 (1988). See Pet. 18, 19-21, 24. The Chamber also agrees that the court of appeals created further circuit disarray by placing the burden on petitioner to prove that a transfer was warranted under Section 1404 and committed further legal error by considering inconvenience to the parties that was foreseeable at the time of contracting. *Id.* at 21-25. The Chamber will not parrot petitioner's analysis of those issues, but instead amplifies additional reasons why the decision below warrants this Court's review. *First*, the decision below severely undermines contractual certainty with respect to forum selection clauses – a result that will discourage many forms of legitimate and beneficial business activity. *Second*, the decision below encourages forum-shopping that serves no useful purpose and creates the kind of unfairness this Court long has discouraged. See *Erie R.R.* v. *Tompkins*, 304 U.S. 64, 74-77 (1938); *Hanna* v. *Plumer*, 380 U.S. 460, 467-68 (1965).

a. Forum selection clauses serve important purposes in many business contracts. As this Court has recognized, forum selection clauses allow both parties to a contract to "eliminat[e] . . . uncertainties" concerning the possible fora of a contract dispute, and thereby eliminate the risk of a highly inconvenient forum, "by agreeing in advance on a forum acceptable to both parties." *Bremen*, 407 U.S. at 13; *Carnival*, 499 U.S. at 593-94 ("a clause establishing *ex ante* the forum for dispute resolution has the salutary effect of dispelling any confusion about where suits arising from the contract must be brought and defended"). Relatedly, by determining the forum in the contract, these clauses allow the parties (and courts) to avoid "cost[ly]" and "time-consuming pretrial motions" on the question of where a dispute should be resolved. *Stewart*, 487 U.S. at 33 (Kennedy, J., concurring); *Carnival*, 499 U.S. at 594 (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"); cf. *Bowen* v. *Massachusetts*, 487 U.S. 879, 930 (1988) (Scalia, J., dissenting) ("Nothing is more wasteful than litigation about where to litigate . . . ."). Because forum selection clauses promote convenience and predictability, they are "a vital part of the agreement" and can "figur[e] prominently" in the negotiation of "monetary terms." *Bremen*, 407 U.S. at 14. This is why this Court views them as presumptively enforceable.

Forum selection clauses also allow parties to limit the fora in which they can be sued, which this Court has recognized can reduce their potential litigation costs. *Carnival*, 499 U.S. at 593-94 (finding that cruise line had an interest in "limiting the fora in which it potentially could be subject to suit" and that

the cost "savings that the cruise line enjoys by limiting the fora in which it may be sued" can be passed on to passengers); *Bremen*, 407 U.S. at 12-13 (finding that parties to an international ship towing contract had "compelling reasons" to negotiate a forum selection clause in order to avoid the potential for litigation "in any jurisdiction in which an accident might occur" along the towing route).

This benefit of forum selection clauses is particularly important to small businesses, especially when they seek to expand their geographical scope of operations. Small businesses have a particularly vital interest in "keep[ing] the cost of potential disputes at a minimum," including by limiting the fora in which they litigate disputes and by "bring[ing] a lawsuit or defend[ing themselves] as close to home as possible." Trippe S. Fried, *Maintaining the Home Court Advantage: Forum Shopping and the Small Business Client*, 6 Transactions: Tenn. J. Bus. L. 419, 419 (2005). Forum selection clauses are therefore an essential tool for small businesses to control and limit their litigation costs. *Id.* at 434 (encouraging small business to use "written agreements with vendors and customers" that include forum selection clauses).

The concurring Circuit Judge properly recognized that petitioner Atlantic Marine is a prime example of a company that "conduct[s] business throughout a broad geographical area" and, therefore, "rel[ies] on forum-selection clauses to ensure that [it] can anticipate business costs and avoid litigation in a plethora of possible venues." Pet. App. 24a. Atlantic Marine is "a family owned and operated" general contractor that is certified by the Small Business Administration as an 8(a) contractor. See Atlantic Marine Construction Co., *Who We Are*, http://amccinc.com/WhoWeAre.aspx (last visited Feb. 21, 2013).

Although it is headquartered in Virginia Beach, Virginia, it has "completed successful projects from . . . Virginia to California for various branches of the Armed Services." *Id.* As in the instant sub-contract, Atlantic Marine negotiates and relies upon forum selection clauses in its agreements. It is thus the prototypical entity that requires a predictable rule of enforcement of forum selection clauses to allow it to operate interstate.

Because of their benefits to parties, forum selection clauses are widely used in contracts of all types, by businesses large and small. See *Burger King Corp.* v. *Rudzewicz*, 471 U.S. 462, 472 n.14 (1985) ("particularly in the commercial context, parties frequently stipulate in advance to submit their controversies for resolution within a particular jurisdiction"); 14D Charles Alan Wright, *Federal Practice and Procedure: Jurisdiction* § 3803.1, at 50 (3d ed. 2007) (forum selection clauses "appear in contracts of every description" and "are being used with greater frequency"); 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) ("companies 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"); 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, which usually have a connection with the

franchisor's home state"); Scott J. Burnham, *Contractual Relations In Small Business: Do The Benefits Of A Custom-Made Contract Outweigh The Costs?*, 7 J. Small & Emerging Bus. L. 425, 429 (2003) (choice of forum clauses "[i]ncreasingly" are included in small business contracts).

Like any provision that businesses agree to and choose to put in their contracts, businesses want forum selection clauses to be enforced. Such clauses are included in contracts to create certainty about the venue of potential litigation, and such certainty is often a prerequisite to the transaction or relationship going forward. Cf. *Scherk* v. *Alberto-Culver Co.*, 417 U.S. 506, 516 (1974) ("A contractual provision specifying in advance the forum in which disputes shall be litigated and the law to be applied is, therefore, an almost indispensable precondition to achievement of the orderliness and predictability essential to any international business transaction.") (addressing international arbitration clause). As a result, commercial certainty is destabilized when judicial enforcement is lacking or unreliable, such that parties have no way of knowing whether their forum agreement 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."). Without predictable and enforceable contract rights, business activity cannot flourish.

The decision below fosters commercial uncertainty because it creates an unreliable regime for the enforcement of forum selection clauses. Unlike the Circuits that permit challenges to lawsuits filed in violation of forum selection clauses to be brought under Section 1406, and that presumptively enforce those clauses pursuant to the *Bremen* standards, the

Fifth Circuit has now held that such challenges must be brought under Section 1404. Section 1404, however, is not a suitable or effective means of enforcing forum selection clauses because it is merely a transfer mechanism subject to unpredictable discretionary decision-making, as occurred in this case. The statute permits, but does not require, district courts to order venue transfers in certain circumstances. See 28 U.S.C. § 1404(a) ("a district court *may* transfer") (emphasis added). Because Section 1404 leaves enforcement of forum selection clauses in individual cases to the option of district court judges,[8] it cannot provide the certainty that contracting parties require in order to enter into business transactions. A discretionary approach, by its nature, undermines rather than promotes contractual certainty.

In addition, Section 1404 neither mentions forum selection clauses nor sets a standard that requires that they be presumptively enforced – or even considered. Instead, it directs district courts to consider "the convenience of parties and witnesses," and "the interest of justice." District courts therefore employ various balancing tests to resolve Section 1404 motions that focus primarily on the convenience factors that Congress identified in the statute, and only consider the existence of a forum selection clause as a factor that is weighed against many others. See *Stewart*, 487 U.S. at 29 ("A motion to transfer under § 1404(a) thus calls on the district court to weigh in the balance a number of case-specific factors"). The

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[8] *See Stewart*, 487 U.S. at 29 ("Section 1404(a) is intended to place discretion in the district court to adjudicate motions for transfer according to an 'individualized, case-by-case consideration of convenience and fairness.'") (quoting *Van Dusen*, 376 U.S. at 622).

district court here, for example, listed eight private and public interest factors that it considered relevant under Section 1404, although it emphasized that these factors were "nonexhaustive." Pet. App. 35a-36a & n.2. The court did identify the forum selection clause as a "factor," but emphasized that it was "only one" factor and "not entitled to dispositive weight." *Id.* at 36a, 39a.

The use of balancing tests under Section 1404, like the use of discretion itself, wholly eviscerates the purpose and contractual certainty of forum selection clauses. Under Section 1404, parties cannot predict with any confidence whether the forum selection clause in their case will be enforced. This is true notwithstanding this Court's statement in *Stewart*, 487 U.S. at 29, that the presence of a forum selection clause "will be a significant factor that figures centrally in the district court's [Section 1404] calculus." Under a regime where forum selection clauses are merely one "factor" that district courts consider as part of a balancing test that embraces a seemingly endless number of factors, business organizations simply cannot rely on their enforcement. In this regard, although the district court below claimed to have considered the parties' forum selection clause, it did not enforce it and, as the concurring Circuit Judge observed, there is "no practical difference between this district court opinion and that of a district court that was assessing this same case without a forum-selection clause." Pet. App. 24a.

The decision below therefore creates a regime in which forum selection clauses are not enforced as a matter of course according to their terms, like other contract provisions. Instead, enforcement is subject "to the vicissitudes of virtually unfettered judicial

discretion." Pet. App. 25a. If permitted to stand, this ruling will have several detrimental consequences for the business community and for business activity. It will frustrate the legitimate contractual expectations of the thousands of businesses that have similar clauses in their contracts. No matter what forum these businesses have chosen in their contracts, they now face the prospect that the Fifth Circuit will allow a lawsuit to be litigated there, in violation of the parties' agreement. They also face the prospect of costly and time-consuming pre-trial motion practice on venue issues in the Fifth Circuit – something that their forum selection clause was designed to avoid, and would prevent in a majority of Circuits.

The greater economic harms, however, will arise with respect to future transactions. If forum selection clauses are not reliably enforced in the Fifth Circuit (and the Third and Sixth Circuits), then businesses will not be able to structure their contracts so as to select in advance and limit the fora in which disputes can be litigated. This will prevent them and their customers from realizing the substantial efficiencies that can be achieved from limiting litigation costs. More importantly, it might discourage certain transactions and forms of businesses activity altogether. If businesses, particu-larly small businesses, cannot control and limit their litigation costs through forum selection clauses, they likely will become reluctant to pursue particular transactions or business strategies, such as expanding the geographic reach of their operations. In this regard, Atlantic Marine is pursuing review in this case because the decision below has substantial consequences for its business model (and undoubtedly that of other government contractors that contract

with multiple subcontractors from different states to perform the government's work).

b. The current lack of federal uniformity in enforcement of forum selection clauses, exacerbated by the decision below, plainly invites forum-shopping. Plaintiffs who want to evade forum selection clauses can find a favorable reception in the Third, Fifth, and Sixth Circuits, which will evaluate a challenge to their maneuver under a multi-factor balancing test that focuses largely on convenience factors, and that relegates the parties' contractual agreement to just one factor in the mix. Accordingly, any plaintiff who can find a basis under 28 U.S.C. § 1391 for venue in these Circuits will be drawn to them, regardless of what they contractually agreed to. And businesses in all Circuits can be victims of this tactic, since it can be pursued regardless of where the defendant is located or incorporated.

Moreover, as petitioner notes, the Fifth Circuit's approach itself promotes forum shopping because it presents the opportunity for plaintiffs to control the law that will govern a dispute, even if they are ultimately unsuccessful in controlling the forum. Pet. 20-21. Although many contracts contain choice of law provisions, the background rule is that when a case is transferred pursuant to Section 1404, the applicable law transfers as well. See *Van Dusen*, 376 U.S. at 639 ("[T]he transferee district court must be obligated to apply the state law that would have been applied if there had been no change of venue. A change of venue under § 1404(a) generally should be, with respect to state law, but a change of courtrooms."); Pet. 20-21. Thus, even when a federal district court in the Fifth Circuit or one of the minority Circuits transfers a case pursuant to Section 1404 that was filed in violation of a forum selection clause, the

plaintiff can still "benefit from the choice-of-law rules of the initial forum." Ryan T. Holt, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 Vand. L. Rev. 1913, 1931 (2009); see also *id.* (the plaintiff can thereby gain "a benefit that was not bargained for," even if the forum selection clause is enforced).

In contrast, when a forum selection clause is enforced through a Rule 1406 dismissal or transfer, the choice of law rules of the new forum will govern. *Id.* at 1931-32; Pet. 21. This choice of law implication is another substantive inconsistency spawned by the lack of a uniform federal procedure to address this venue issue. And it provides yet another basis for litigants to ignore forum selection clauses and engage in forum-shopping with all of the inherent inequality that conduct entails. *Erie*, 304 U.S. at 74-77; *Hanna*, 380 U.S. at 467-68.

III. THE FIFTH CIRCUIT'S DECISION POSES AN ISSUE OF FUNDAMENTAL IMPORTANCE.

The court of appeals' ruling that the enforceability of forum selection clauses is at the discretion of district court judges presents a recurring and "important question" of federal law that warrants this Court's review. See Sup. Ct. R. 10(c).

The implications of the issues raised in this case are enormous. As noted, forum selection clauses are widely used by many types of businesses in many types of contracts. See *supra* at 11-12. Because of "the ever-increasing use of forum selection clauses in contracts," the "determination of clause enforcement affects a growing universe of litigants." Holt, *supra*, at 1917.

Moreover, this case and the cases that generated the circuit split all show that circumvention of forum selection clauses is a common and recurring problem. As petitioner showed, such circumvention is frequently successful in those jurisdictions that leave to the discretion of district court judges whether to enforce such clauses based on a multi-factor balancing test. Pet. 25 & n.7 (citing decisions in which district courts have declined to enforce forum selection clauses as a matter of discretion). This problem will only become worse now that the Fifth Circuit has joined the other Circuits that leave the enforcement of forum selection clauses to the election of district court judges, thereby providing potential evaders of such clauses with another set of district court forums in which their harmful strategy faces a reasonable chance of success.[9] It is therefore vital that this Court grant review to protect the reasonable commercial expectations of parties who enter into forum selection clauses and to foreclose the injurious forum shopping that is invited by the current lack of federal uniformity.

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[9] Since the Fifth Circuit issued the decision below, district courts in that Circuit already have relied upon it to deny transfer of cases that were filed by plaintiffs in violation of contractual forum selection clauses. *See, e.*g, *Vasquez* v. *El Paso II Enters., LLC*, No. EP-12-CV-303, 2012 WL 6160986 (W.D. Tex. Dec. 11, 2012); *Shawn Massey Farm Equip., Inc.* v. *CLAAS of Am., Inc.*, No. 4:12-CV-300, 2012 WL 7004153 (E.D. Tex. Dec. 19, 2012) (recommendation of magistrate judge).

CONCLUSION

For these reasons, and those stated by petitioner, the Chamber urges the Court to grant the petition for certiorari and reverse the decision below.

Respectfully submitted,

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