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

REPLY BRIEF

MICHAEL L. STERLING
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, VA 23510
757-446-8600

W. SCOTT HASTINGS
Counsel of Record
THOMAS F. LOOSE
CHRISTOPHER M. BOECK
LOCKE LORD LLP
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201
(214) 740-8000
shastings@lockelord.com

Counsel for Petitioner

March 7, 2013

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

IN THE

Supreme Court of the United States

No. 12-929

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

REPLY BRIEF

"*Atlantic Marine* is a troubling decision. Parties to contracts generally believe they have bargained for certainty and predictability when including a forum selection clause in their contracts. If such clauses are as easily avoided as *Atlantic Marine* suggests, that certainty and predictability will disappear." David Herr and Steve Baicker-McKee, *Law and Motion*, 28 FED. LITIGATOR 6 (Feb. 2013). Atlantic Marine Construction Company, Inc.'s ("Atlantic Marine") Petition presents an excellent opportunity for this Court to resolve the well-developed circuit split regarding enforcement of forum-selection clauses that has been exacerbated by the Fifth Circuit's decision in

this case. *See* Brief of the Chamber of Commerce of the United States of America as *Amicus Curiae* Supporting Petitioner ("Chamber Br.") at 4-6. Continued uncertainty on this issue will needlessly spawn more wasteful litigation about where to litigate.

A. The Parties Agree There Is a Well-Developed Circuit Split

J-Crew Management, Inc. ("J-Crew") acknowledges the circuit split regarding the principal issue raised in Atlantic Marine's Petition – whether a valid forum selection clause designating a federal forum (i) may be enforced under Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. § 1406, or (ii) is merely a factor to consider in the discretionary balancing analysis for convenience transfers under 28 U.S.C. § 1404(a). *See, e.g.*, Opp. at 22 (recognizing "the well-developed disagreement among circuits"). "Since the Supreme Court has not determined the basis for a motion to enforce a forum selection clause (i.e., is the motion to be treated as asserting improper venue under 28 U.S.C. § 1406(a) or seeking convenience under 28 U.S.C. § 1404(a)), and is the motion properly brought under Rule 12(b)1, 3, or 6, the practitioner must check to see if there is controlling law on these issues in the district where the venue motion would be brought." 1 ROBERT L. HAIG, BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §3:34 at 251 (3d ed. 2011). The procedures currently vary from circuit to circuit, resulting in repeated litigation over the enforceability of forum-selection clauses.[1]

[1] J-Crew suggests there is confusion on the rules to apply within the Second and Seventh Circuits. *See* Opp. at 12 n.5 & 14. Atlantic Marine disagrees. The decisions in *TradeComet LLC.com v. Google, Inc.*, 647 F.3d 472 (2d Cir. 2011), and

Confusion over this issue continues to have numerous, material consequences for litigants: "The basis for the motion can affect when the motion may be brought, what materials may be considered, what remedy may be granted, and what law governs the action after any transfer." 1 BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS §3:33 at 241-42. The split in authority also has created opportunities for plaintiffs to shop for a favorable forum to avoid their agreements.[2] *See* Chamber Br. at 16-17. If the Fifth Circuit's decision is upheld, courts should anticipate additional litigation under 28 U.S.C. § 1404(a), as parties take their chances to avoid contractually-chosen forums as a matter of convenience and discretion.[3]

Muzumdar v. Wellness Int'l Netword, Ltd., 438 F.3d 759 (7th Cir. 2006), speak for themselves. Regardless, J-Crew's argument highlights the great uncertainty that exists on how to enforce forum-selection clauses. There is no question that the decisions of the Eighth, Ninth, and Eleventh Circuits are in accord with Atlantic Marine's position.

[2] As *Amicus Curiae* Texas Civil Justice League correctly points out, the opportunities for forum shopping under the Fifth Circuit's decision exist both among the circuit courts following different interpretations of the law, as well as between federal and state courts in Texas. *See* Brief of *Amicus Curiae* Texas Civil Justice League in Support of Petition for Writ of Certiorari at 4-5.

[3] J-Crew argues Atlantic Marine's Petition should be denied because "this case does not permit the Court to resolve the lingering question as to whether dismissal based upon a forum-selection clause pursuant to Rule 12(b)(6) would be appropriate." Opp. at 12-13. A separate circuit split regarding the application of Rule 12(b)(6) does not diminish the well-developed circuit split regarding the roles of Fed. R. Civ. P. 12(b)(3) and 28 U.S.C. §§ 1404(a) & 1406. That there are circuit splits on other issues involving forum-selection clauses highlights the im-

B. This Case Presents a Good Vehicle to Resolve the Split

Atlantic Marine and J-Crew agree that mandamus is the "generally accepted" way "to correct clearly erroneous denials of motions to transfer venue," given the difficulty of obtaining direct appellate review on the issue. *See* Opp. at 8. The Chamber of Commerce emphasized this point, explaining that "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." *See* Chamber Br. at 7. Without review on mandamus, it is likely that the issues presented in Atlantic Marine's Petition, which have divided the circuit courts, will continue to evade review.

The Fifth Circuit's decision is based on a fully-developed venue record. If Atlantic Marine must wait until the end of the litigation to obtain review of the venue determination, it will be deprived of the contractual benefit for which it negotiated in its contract with J-Crew. A decision on final appeal will not restore Atlantic Marine's lost contractual right, nor will it change the analysis of the purely legal issues.

The Court's resolution of the legal issues presented in Atlantic Marine's Petition will in no way impact the standard for mandamus relief. *C.f.*, Opp. at 8-9. Atlantic Marine petitions for review because the Fifth Circuit's decision is based upon erroneous conclusions of law. The lower courts have no discre-

---

portance for this Court to provide guidance and to begin unwinding and resolving the tangled web of procedures employed today.

tion to determine the law. *See Koon v. United States*, 518 U.S. 81, 100 (1996) (a district court would necessarily abuse its discretion if it based its ruling on an erroneous view of the law). If Atlantic Marine is correct on the substantive legal questions, then the results in the courts below would be patently erroneous and Atlantic Marine's right to mandamus relief would be clear and indisputable.

J-Crew's claim that the existence of a circuit split precludes mandamus relief is wrong. *See* Opp. at 7-8. The right to mandamus relief does not turn on a subjective analysis of whether the governing law is "clear and indisputable." Instead, this Court's precedent shows that review of legal issues in the context of a mandamus proceeding is proper, despite the existence of a circuit split on the controlling issue. *See, e.g., Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 348 (1988) (resolving circuit split in the context of a mandamus proceeding). Circuit court confusion over the meaning of this Court's decision in *Stewart* does not preclude review here. *See, e.g., Cheney v. U.S. District Court for the District of Columbia*, 542 U.S. 367 (2004) (resolving confusion over meaning of Supreme Court precedent on review of a mandamus proceeding); *United States v. Jicarilla Apache Nation*, 131 S.Ct. 2313, 2330-31 (2011) (resolving disputed issue of law then remanding for consideration of the right to mandamus relief in light of the Court's decision).

The Fifth Circuit's decision resulted in a majority opinion and special concurrence that provide focused and detailed analysis of the majority and minority viewpoints regarding the disputed legal question. Consequently, this case presents not only an appro-

priate vehicle for resolution of the growing circuit split, but a rare opportunity.

C. Congress Approves of Contractual Forum Choices

The Fifth Circuit recognized that the majority of circuit courts do not agree with its position. *See* Pet. 5a. The determination of which side of the debate is correct is for the merits stage of this case. However, J-Crew is wrong when it suggests that Congress has weighed in on this issue in the Federal Courts Jurisdiction and Venue Clarification Act of 2011 (the "Clarification Act"). In the Clarification Act, Congress amended the wording of the convenience transfer provision of 28 U.S.C. § 1404(a). Congress made no changes to Rule 12(b)(3) or to 28 U.S.C. § 1406. The changes to Section 1404(a) were intended to abrogate the rule from *Hoffman v. Blaski*, 363 U.S. 335 (1960), that "the transferee court must have personal jurisdiction independent of the defendant's consent" before a Section 1404(a) transfer would be allowed. *See* 17 MOORE'S FEDERAL PRACTICE §111.12[1][c] (3d ed. 2012). *See also* H.R. REP. 112-10, 2011 U.S.C.C.A.N. 576, 580 & n. 17.

J-Crew's selective quotation of H.R. REP. 112-10 is out of context.[4] *See* Opp. at 16 & 21. Congress did not silently resolve the circuit split over the scope of FED. R. CIV. P. 12(b)(3) and 28 U.S.C. § 1406 by overruling the majority position. To the contrary, Congress

[4] J-Crew's quotation on page 21 of its Opposition is misleading. J-Crew states a venue transfer would only be permissible if the parties agreed *and* the convenience factors weighed in favor of transfer. *See* Opp. at 21. Clearly, this is not what Congress wrote or intended. The House Report addressed only "such transfers" – meaning transfers under Section 1404.

expressed its approval for contractual forum-selection clauses. *See* Opp. at 17 ("Judge Haynes correctly noted in her concurrence that the Venue Clarification Act is an expression of congressional intent to encourage forum-selection clauses.").

D. The Parties Also Agree There Is a Circuit Split on the Application of Section 1404(a)

J-Crew recognizes there is a circuit split on the burden of proof when forum-selection clauses are analyzed under 28 U.S.C. § 1404(a). *See* Opp. at 19. J-Crew admits the Third and Eleventh Circuits place the burden on the party challenging enforcement of the clauses, whereas the Fifth and Ninth Circuits place the burden on the party seeking to enforce the clause by transfer. *See* Opp. at 19.

The allocation of the burden matters because, under the correct burden, the presumption should be that the contractually-chosen forum is the "convenient" forum for disputes. *See Moses v. Business Card Exp., Inc.*, 929 F.2d 1131, 1139 (6th Cir. 1991); *Heller Fin., Inc. v. Midwhey Powder Co.*, 883 F.2d 1286, 1293 (7th Cir. 1989). A party should not be able to challenge the presumptively convenient forum based on alleged inconveniences that were foreseeable at the time of contracting. *See M/S Bremen v. Zapata Offshore Co.*, 407 U.S. 1, 17-18 (1972). The Fifth Circuit, by contrast, allowed J-Crew to avoid its contract based on factors (such as the location of its subcontractors) that were clearly foreseeable at the time of contracting. *See* Pet. App. 11a; Opp. at 2.

J-Crew identified no inconveniences of a Virginia forum that it could not have foreseen. Accordingly,

proper placement of the burden of proof should have been dispositive of the transfer question.[5]

E. This Case Presents an Issue of National Importance that Should Be Resolved Now

Asking a court to enforce a freely negotiated contract designating the forum for disputes is not an attempt to "forum-shop" (as J-Crew claims). Opp. at 24. Although 25 years may have passed since this Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), the record during that time period is one of wasteful litigation over venue disputes with the result being a widening circuit split over the enforcement of forum-selection clauses. Parties should not be able to avoid their agreements merely on a balancing of convenience factors that were known (or knowable) at the time of contracting.

J-Crew's argument – that review of the issues raised by Atlantic Marine's Petition is not needed because "businesses engaged in interstate commerce have flourished over the past 25 years despite the split in authority" (Opp. at 23) – proves too much. Contracting parties should be free (within the limits

---

[5] In footnote 2, J-Crew argues that Texas "has a strong interest in having local construction disputes decided in Texas." Opp. at 4. The district court correctly dismissed this argument as inapplicable because the construction project was on a federal enclave, which was not subject to the Texas statute J-Crew cites. *See* Pet. App. at 29a-32a (citing *Adams v. Calvert*, 396 S.W.2d 948, 949 (Tex. 1965) (recognizing that Fort Hood is a federal enclave)). Moreover, the parties' contract is hardly local to Texas. It is between parties from Virginia and Texas, regarding work to be performed on a federal enclave, under a contract issued by the Army Corps of Engineers in Alabama, with payment funded from Tennessee.

of *Bremen*) to negotiate a forum in which to resolve disputes. And, the enforcement of those agreements should not vary depending on where the plaintiff chooses to sue. This is not an "extreme case," as J-Crew suggests. *See* Opp. at 25. Instead, this case presents a commonly occurring problem for parties engaged in interstate commerce. The Chamber of Commerce and the Texas Civil Justice League each filed *amicus* briefs in support of Atlantic Marine's Petition, asking the Court to resolve the circuit split. Like Atlantic Marine, the Chamber and the TCJL believe that contracts should be enforced as written.

CONCLUSION

Atlantic Marine Construction Company respectfully prays that this Court grant its Petition for Writ of Certiorari, reverse the decision of the United States Court of Appeals for the Fifth Circuit, and enter an order directing that this case be dismissed or transferred to the United States District Court for the Eastern District of Virginia, Norfolk Division.

Respectfully submitted,

MICHAEL L. STERLING
VANDEVENTER BLACK LLP
500 World Trade Center
Norfolk, VA 23510
757-446-8600

W. SCOTT HASTINGS
Counsel of Record
THOMAS F. LOOSE
CHRISTOPHER M. BOECK
LOCKE LORD LLP
2200 Ross Avenue
Suite 2200
Dallas, Texas 75201
(214) 740-8000
shastings@lockelord.com

Counsel for Petitioner

March 7, 2013