No. 12-929

IN THE

Supreme Court of the United States

IN RE: ATLANTIC MARINE CONSTRUCTION COMPANY, INC.

Petitioner,

v.

UNITED STATED DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS, et al.,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF OF *AMICUS CURIAE* AMERICAN SUBCONTRACTORS ASSOCIATION IN SUPPORT OF RESPONDENT J-CREW MANAGEMENT, INC. SEEKING AFFIRMATION OF THE COURT OF APPEALS FOR THE FIFTH CIRCUIT

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QUESTION PRESENTED

The Facts. J-Crew Management, Inc. ("J-Crew"), a Killeen, Texas company with approximately 5 employees, was hired by the Atlantic Marine Construction Company ("Petitioner"), a Virginia contractor doing business across the nation, to perform subcontract work building a child care facility at the Fort Hood military base near Killeen, Texas. The Project was within Texas borders and all Subcontract work was performed in Texas. When the Project ended, Petitioner withheld payment of the last $160,000 due to J-Crew. J-Crew sued in the U.S. district court in the Western District of Texas.

The Law. Forum selection clauses in construction contracts are unenforceable under the laws of *both* Texas and Virginia when the clause requires litigation to proceed in a forum outside the state where the project was located. Under 28 U.S.C. §1406, if venue is laid in the (presumptively) "wrong" court the district court must dismiss or transfer the case. But when venue is not wrong, 28 U.S.C. § 1404 requires the district court to resolve venue disputes by balancing the convenience of parties and witnesses in the interest of justice.

The Venue Dispute. Though Petitioner did not contest venue was otherwise proper under 28 U.S.C. § 1391, it moved to dismiss or transfer relying solely in that regard on the voidable (under Texas law) forum selection clause in its construction contract. Petitioner filed its motion under both 28 U.S.C. § 1406(a) and, alternatively, under 28 U.S. § 1404(a).

The District Court determined that 28 U.S.C. § 1404(a) applied instead of 28 U.S.C. § 1406. After considering the factors therein, and this Court's decision in *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), it declined to transfer the case, noting that if the forum selection clause was enforced J-Crew could not subpoena vital third-party witnesses for either testimony or documents. The 5th Circuit Court of Appeals affirmed, finding there was no clear error in the District Court decision.

Questions Presented. Where venue is otherwise proper under 28 USC § 1391: (1) can parties destroy venue by a private agreement that is void and unenforceable under state law? and (2) as part of the factors relevant to the litigation that district courts balance when resolving venue disputes under 28 U.S.C. § 1404(a), should federal courts consider state law and public policy as relevant to a party's request to enforce (or avoid) a forum selection clause?

TABLE OF CONTENTS

Table of Contents

Page

TABLE OF CITED AUTHORITIES

Page

CASES

Cited Authorities

Cited Authorities

Page

STATUTES

Page

OTHER AUTHORITIES

Cited Authorities

INTERESTS OF THE *AMICUS CURIAE*[1]

The American Subcontractor's Association ("ASA") is the nation's largest trade organization representing the interests of specialty trade contractors (construction subcontractors and material suppliers) in the construction industry. ASA represents approximately 5,000 direct member companies throughout the United States, and indirectly represents the interests of tens of thousands more commercial construction subcontractors, material suppliers, and service companies (collectively "subcontractors") of every size and from every region of the country. ASA members represent the combined interests of both union and non-union companies, and range from the smallest private firms to the nation's largest specialty contractors.

One of ASA's most important responsibilities is to represent the interests of its members in matters before the executive, legislative, and judicial branches of government at both the state and federal level. In the courts, ASA represents its members by submitting *amicus* briefs in state and federal courts on issues of vital concern to the nation's subcontracting community. **This is just such a case**.

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1. In accordance with Supreme Court Rule 37.6, ASA certifies that (a) no counsel for a party authored this brief in whole or in part, (b) no person other than ASA, its members and its counsel have made any monetary contributions intended to fund the preparation or submission of this brief; (c) that the parties have consented to the filing of this brief (blanket consents filed on May 16, 2013 from Petitioner, and May 21, 2013, from Respondent). As this case has been set for oral argument, the 10-day notice requirement of 37.2(a) does not apply.

ASA files this brief to give the Court the benefit of ASA's many years of practical experience and advocacy for just and fair treatment under the law. Affirming the decision below is crucial to furthering the plain language and purpose of 28 U.S.C. §1404(a) and will at the same time give due consideration to constitutional interests by recognizing the public policy of the federal and state governments that have determined that forum selection clauses in construction projects are unenforceable. This recognition is perhaps best reflected by: (a) the federal Miller Act, which requires that construction claims be brought in the state where the Project was located, and (b) the numerous states whose legislatures have determined it is **against the express public policy of the state** to force litigation of a construction dispute outside the state in which the construction project was located.

In contrast, reversing the well-reasoned opinion on appeal will unfairly and unreasonably tie the hands of federal judges from at least *considering* state law when faced with a venue challenge premised solely on a forum selection clause. Reversing the 5th Circuit would also embolden general contractors to **openly defy** the law of many states (and inferred federal policy in the Miller Act) by creating substantial barriers to a subcontractor's right to seek redress in a court near the Project site. Such a result would be detrimental to the legal system and at odds with principles of federalism and the express language of 28 U.S.C. §1404(a) giving federal judicial authority to balance the conveniences of the parties and witnesses, and the interests of justice when resolving venue challenges.

SUMMARY OF ARGUMENT

This amicus curiae brief seeks to inform the Court of the serious consequences of the improvident application of 28 U.S.C. §1406(a) to all contract disputes involving a forum selection clause. In its opinion, the U.S. Court of Appeals of the Fifth Circuit explained that "the core" of *Stewart Organization Inc. v. Ricoh Corp.*, 487 U.S. 22 (1988), "is the directive of Congress that allocation of matters among the federal district courts is not wholly controllable by private contract." *In re: Atlantic Marine Constr. Co., Inc.,* 701 F.3d 736, 743 (5th Cir. 2012).

This is true. Though Petitioner premises its requested relief on the presumption that venue is improper when a forum selection clause exists, 28 U.S.C. §1404(a) instead reflects Congress' intent that even when a forum selection clause exists federal judges must consider the "convenience of parties and witnesses, in the interests of justice" when deciding a request to transfer an action to another venue. See 28 U.S.C. § 1404(a).

The right of freedom of contract is not unlimited. It has long been the case that the four corners of a contract are subject to judicial review for conformance with applicable law and public policy. As this Court stated over a century ago:

> [T]he right of freedom of contract has been held not to be unlimited in its nature, and when the right to contract or carry on business conflicts with laws declaring the public policy of the State, enacted for the protection of the public health, safety or welfare, the same may

> be valid, notwithstanding they have the effect to curtail or limit the freedom of contract. **It would extend this opinion beyond reasonable limits to make reference to all the cases in this court in which qualifications of the right of freedom of contract have been applied and enforced**.

McLean v. Arkansas, 211 U.S. 539, 545-46 (1909)(emphasis added)

And not all contracts are created equal. Here, considering the factors set forth in 28 U.S.C. §1404(a) is important because enforcement of a forum selection clause in a ***construction contract*** implicates heightened public policy considerations and several layers of both state and federal law. These considerations include numerous state laws that void such clauses in construction contracts.

28 U.S.C. §1404(a) instructs federal judges to consider the "convenience of parties and witnesses, in the interests of justice" when deciding a request to transfer an action to another district or division where it might have been brought. Because private parties cannot contract 'around' the law, whether a contract clause is void or against the public policy of an interested state is, *at minimum*, something federal judges consider when applying the balancing of conveniences test under §1404. Courts have a fundamental duty to determine if a contract interpretation urged by a litigant raises any questions of public policy. If so, the question whether the agreement contravenes public policy "is ultimately one for resolution by the courts." See *W. R. Grace & Co. v. Local Union 759, International Union of the United Rubber, Cork, Linoleum and Plastic Workers of America,* 461 U.S. 757, 766 (1983)(internal

citations omitted)(noting that "**[a]s with <u>any</u> contract**, however, a court may not enforce a collective bargaining agreement that is contrary to public policy.... If the contract as interpreted by [the arbitrator] violates some explicit public policy, **we are obliged to refrain from enforcing it."** (emphasis added)).

Petitioner's position that 28 U.S.C. §1406 should have applied to its request to transfer—with its presumption of improper venue based solely upon a forum selection clause— is misguided given that "issues of contract, including a contract's validity, are nearly always governed by state law." *Stewart,* 487 US 36 (Scalia, dissenting). In that regard approximately 40% of the states have expressly found that forum selection clauses in construction contracts are unenforceable if the project is located within the state and the clause requires litigation outside the state.

These state laws express the widespread and well-defined policy that forum selection clauses in construction contracts implicate greater legal, equitable, and policy concerns than such clauses in other commercial contracts. Petitioner's position, were it to prevail, would hamstring federal judges from considering those laws in the analysis required by 28 U.S.C. §1404(a), and instead wrongly require the federal judiciary to turn a blind eye to these concerns. This would be true even when, as was the case here**, the forum selection clause in question would be void in the state where the Project was performed**. This would unduly damage the efforts of this Court and Congress to minimize significant differences between state and federal courts in resolving disputes. *Cf. Southland Corp. v. Keating*, 465 U.S. 1, (1984) (interpreting Federal Arbitration Act to apply to claims brought in state

courts in order to discourage forum shopping). Such a result is wrong, contravenes state's rights, and is wholly unnecessary.

In contrast, affirming the reasoning of the District Court and the Fifth Circuit will preserve the right of federal judges to, when the original forum is jurisdictionally proper under 28 U.S.C. §1391, grant deference to state law and apply the standards set forth in 28 U.S.C. §1404(a). Where, as here, the state law or interests of justice militate against the enforcement of the clause, venue should not transfer. And, as this Court noted in *Stewart,* analysis under 28 U.S.C. §1404(a) still allows consideration of a forum selection clause as a "significant factor … in the district court's calculus" when weighing the private and public interests in resolving venue challenges. *Stewart*, 487 U.S. at 29.

ARGUMENT

It is beyond dispute that parties cannot privately contract for something illegal or against public policy. See *McLean v. Arkansas*, 211 U.S. at 545-46 ("It would extend this opinion beyond reasonable limits to make reference to all the cases in this court in which qualifications of the right of freedom of contract have been applied and enforced.") Courts have not only the right, but a duty to refuse to enforce a contract clause that violates a strong public policy of the state in which they sit. See *Bremen v. Zapata Off-Shore Co.,* 407 U.S. 1, 15 (1972)(holding that forum-selection clauses in admiralty contracts (which are governed by federal law) are generally enforceable but not if doing so "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision.").

In *Mayeux's A/C & Heating v Famous Constr. Corp.* No.97-0767, 1997 U.S. Dist. LEXIS 14047 (E.D. La. Sept. 10, 1997), the U.S. District Court refused to enforce a forum selection clause in a construction contract for a Project in Louisiana that required litigation in Texas. The Court noted that:

> One of the express exceptions to the enforcement of a contractual forum selection provision recognized by the Supreme Court in *Bremen* is if the clause "would contravene a strong public policy of the forum in which suit is brought, whether declared by statute or by judicial decision." 407 U.S. at 15, 92 S. Ct. at 1916. **Obviously, the clause contravenes a strong public policy of the forum state (and, perhaps, the forum court) in which suit was brought, as expressed in LSA-R.S. 9:2780. The statute nullifies and declares the instant [forum selection] provision void under Louisiana law.**
>
> A closer inspection also leads credence to the argument that the forum selection clause contravenes the policy of this federal forum, as expressed in the Miller Act.

Id. at *7 (emphasis added).

Federal courts clearly have a duty to enforce state public policy and have used that duty to void forum selection clauses substantively identical to the clause at issue in this dispute. If state law makes a certain forum selection clause void or voidable, this Court ought to clarify that federal judges should consider that fact in deciding whether to enforce a forum selection clause. As

the Fifth Circuit Court of Appeals correctly recognized, 28 U.S.C §1404(a) is the appropriate mechanism for federal district courts to balance public interests against private agreements.

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT 28 U.S.C. § 1404 APPLIED TO PETITIONER'S REQUEST TO TRANSFER VENUE.

Here, the District Court and Fifth Circuit Court of Appeals correctly held that 28 U.S.C. §1404 was the appropriate mechanism by which to weigh a forum selection clause in a private agreement.

In reaching its decision the District Court concluded that the convenience of the litigants and interests of justice militated against transfer to Virginia. While the Court did not focus on the state law public policy ramifications of request to transfer, ASA submits that even if this Court is not inclined to view state law as dispositive of the issue, 28 U.S.C. §1404 grants federal judges the discretion to consider such questions and state public policy as part of a *forum non conveniens* analysis that balances the conveniences to the parties and interests of justice when deciding a party's request that a federal court transfer the case to another venue.

Petitioner argues that 28 U.S.C. §1406(a) and Fed. R. Civ. P. 12(b)(3) controls the venue analysis here. Petitioner is wrong. Those statutes provide mechanisms which presume that a case has been filed in the wrong venue and provide no discretion to a district court judge to conduct a venue analysis.

> The 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.

28 U.S.C. §1406(a) (emphasis added).

Here not even Petitioner argues that the forum selected by J-Crew was wrong under 28 U.S.C. §1391.[2] Instead, Petitioner and its *amici* misguidedly argue that District Courts should essentially turn a blind eye to anything but the language of the parties' contract to ensure "contractual certainty" and shield private agreements from the "unpredictable discretionary decision-making" of federal judges. See Chamber of Commerce, Amicus Brief, Pages 12-13.

But parties cannot privately agree to re-write federal statutes to make venue "wrong." Article III, Section I of the United States Constitution delegates to Congress the authority to promulgate statutes that control where venue lies in the District Courts. U.S. CONST., art. III, §1. Only the U.S. Congress can make "venue" in a federal forum inappropriate. A venue analysis must therefore start with determining whether venue was correct under 28 U.S.C. §1391 before deciding whether the private parties

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2. Here, venue was correct (not "wrong") in the Western District of Texas under 28 U.S.C. § 1391 because the underlying contract was performed in Texas, the project site was in the Western District of Texas, and there was diversity jurisdiction. See *Cortex Byrd Chips, Inc. v. Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000)(venue is "clearly proper" in a District "within which [a] contract was performed" in its entirety).

had (or could) agree to anything different. If venue is jurisdictionally proper under federal law, then any request to change venue must be through 28 U.S.C. § 1404(a).

Under 28 U.S.C. § 1404, the District Court was **not** required to transfer the case to a venue chosen by private contract. The statute makes this clear:

> (a) For 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.**
>
> 28 U.S.C. § 1404(a)(emphasis added).

The last part of the above subsection – "or to any district or division to which all parties have consented" – was added effective January 6, 2012. It clarifies what this Court inferred in *Stewart:* that in the eyes of Congress, forum selection clauses do **not** control the initial venue determinations. They are, instead, a factor that Congress expressly left to federal judges to weigh given the interests of justice.[3]

Because the U.S. Code defines where federal venue is proper and where it is "wrong" and because the Texas court selected by J-Crew was proper under federal law, the Fifth Circuit rightly held there was no clear error in the District Court applying §1404 to the venue dispute.

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3. Atlantic Marine does not claim that §1404 infringes any of its constitutional rights.

II. IT IS UNWISE, UNJUST, AND CONTRADICTS PRINCIPLES OF FEDERALISM TO PERMIT OR REQUIRE FEDERAL JUDGES TO DISREGARD THE LAW AND PUBLIC POLICY OF THE FORUM STATE.

Many states void or otherwise make unenforceable forum selection clauses in construction contracts. The Tenth Amendment affirms the Constitution's basic structure of defining the relationship between national and state governments. U.S. CONST. amend X. As James Madison wrote in *The Federalist* No. 45 "[t]he powers reserved to the several states will extend to all objects, which, in the ordinary course of affairs, concern the lives, liberty, and properties of the people, and the internal order, improvement, and prosperity of the state." THE FEDERALIST No. 45 (James Madison).

State and federal governments play an important role in America's unique system of dual sovereignty. As Justice Kennedy noted in *United States v. Lopez*, federalism was the Framer's "insight … that *freedom was enhanced by the creation of two governments, not one.*" *United States v. Lopez,* 514 U.S. 549, 576 (1995). The right of the states to set their own public policy regarding what is (or is not) an enforceable contract clause is an example of how due consideration from the federal government to state governments can enhance justice.

Here, neither the Constitution nor any federal statute or Rule of Procedure addresses the validity of a forum selection clause. Texas law generally enforces such clauses but specifically addresses **and makes unenforceable** such clauses in a construction contract**.** See TEX. BUS. & COM.

CODE § 272.001. If state law prevents state court judges from enforcing a certain kind of contract clause that fact is, if it is not dispositive, *at minimum* an important consideration that federal judges should consider when resolving venue disputes, particularly where there is no conflicting and overriding federal policy or constitutional interests.[4]

To say otherwise would allow private parties to contract around the public policies of the states where they work. This would distort well-developed principles of federalism and impermissibly separate federal common law from the law of the state where the court is located. Such a result would be contrary to, and raise serious questions under, *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) and its progeny ("Except in matters governed by the Federal Constitution or by Acts of Congress, the law to be applied in any case is the law of the State." *Id.* at 78); See also, *Hanna v. Plumer*, 380 U.S. 460, 467-68 (1965)(*Erie* was "in part a reaction to the equal protection concerns raised by 'forum shopping'" and that any outcome determinative test "cannot be read without reference to the twin aims of the Erie rule: discouragement of forum-

4. In this way, the multitude of state statutes that invalidate forum selection clauses in construction contracts are very different from statutes like the one this Court addressed in *Preston v. Ferrer*, 552 U.S. 346 (2008), which was contrary to and thus preempted by the Federal Arbitration Act. State statutes voiding forum selection clauses do not prevent parties from litigating or arbitrating a dispute when it arises (as the *Preston* statute did, thus implicating the strong federal policy interests favoring arbitration) but merely require, as a matter of public policy, that any dispute resolution occur in the state where the project was located.

shopping and avoidance of inequitable administration of the laws.")

This is important here because many of this country's state legislatures (including those of both Texas and Virginia) have made unenforceable forum-selection clauses similar to the clause Petitioner seeks to enforce. Where 28 U.S.C. § 1406 bars any consideration of those state laws, § 1404 requires district court judges to consider state law (according at least passing deference to federalism interests) and weigh private contract against relevant public policy, when resolving venue disputes.

A. Numerous state legislatures have explicitly found that forum selection clauses in construction contracts are void, voidable, and/or against public policy.

Petitioner (and its *amici*) focus on commercial contracts and gloss over the fact this was a construction contract. That is a mistake. Enforceability of forum selection clauses in construction contracts implicates serious legal and policy concerns that separate construction contracts from other commercial contracts. These concerns can be addressed through the balancing of conveniences analysis under 28 U.S.C. § 1404(a), but would be at risk of being swallowed into the maw of 'other' commercial contracts under the standard Petitioner advances.

Legislatures and governors from across the country ("red" states and "blue") have explicitly recognized construction litigation is different in material respects from other commercial contracts. In those states the forum selection clause this Court is being asked to enforce

would either be: (a) **automatically** void; or (b) voidable and unenforceable. But the legislative branch can only write such laws into existence: it must rely on the courts to decline to enforce a void or illegal contract (or clause) when asked to enforce it. To preclude the federal judiciary from considering the interests of justice and state public policy would by judicial fiat declare irrelevant the sovereign policy determination of almost half of the nation's state legislatures.

This would conflict with established law that if the legislature has spoken on an issue of public policy, courts will give due consideration to the legislative action. As Justice Harlan noted in *Application of Gault,* 387 U.S. 1 (1967)(abrogated in part on other grounds, *Allen v. Illinois*, 478 U.S. 364 (1986)): "It is well settled that the Court must give the widest deference to legislative judgments that concern the character and urgency of the problems with which the State is confronted. Legislatures are, as this Court has often acknowledged, the 'main guardian' of the public interest, and, within their constitutional competence, their understanding of that interest must be accepted as 'well-nigh' conclusive." *Id.,* 387 U.S. at 70 (concurring in part, dissenting in part) (citing *Berman v. Parker*, 348 U.S. 26, 32 (1954)).

The strong public policy against enforceability of forum selection clauses in construction contracts applies in all 50 states, but is most strongly evidenced by the sovereign judgment of the many state legislatures that have directly spoken on the issue. Eighteen states void forum-selection clauses that, like the provision at issue here, require construction disputes to be adjudicated outside of the state where the Project was located.

Another two states allow courts to disregard such clauses if enforcement would be unfair or unreasonable. And two other states make forum selection clauses in construction contracts voidable by the party against who the clause is sought to be enforced.

Texas belongs to this latter group. Like many states, Texas generally enforces forum selection clauses in commercial contracts and makes an exception to that general rule for construction contracts. Texas law provides that:

> If a [construction] contract contains a provision making the contract or any conflict arising under the contract subject to another state's law, litigation in the courts of another state, or arbitration in another state, **that provision is voidable by the party obligated by the contract to perform the construction or repair**.
>
> Tex. Bus. & Com. Code §272.001 (2013) (emphasis added)

Were Texas law applied to the forum selection clause, as ASA believes it should have been, J-Crew's decision to void the clause would be indisputable. Similar results would occur in **all** of the following states, whose legislatures have unequivocally told the judiciary and persons doing business in the state that such clauses in construction contracts are **unenforceable** if the project was located in the state and the contract requires litigation outside the state.

States that void forum selection clauses in construction contracts that force construction participants to litigate in a state other than where the project is located.		
State	Statute	Relevant Provision
1. Arizona	Ariz. Rev. Stat. Ann. § 32-1129.05 (West 2013).	Arizona makes "**void and unenforceable**" construction contract clauses that, when the project is in Arizona, requires litigation outside the state. Such clauses are "**against this state's public policy.**" (emphasis added)
2. California	Cal. Civ. Proc. Code § 410.42 (West 2013)	California makes "**void and unenforceable**" provisions in a construction contract for work in the state if they require a California company to litigate outside the state. (emphasis added)
3. Connecticut	Conn. Gen. Stat. Ann. § 42-158m (West 2013).	Clauses in construction contract for work in the state are "**void and of no effect**" if they requires that disputes be resolved in a state other than Connecticut. (emphasis added)

4. Florida	FLA. STAT. § 47.25 (2012).	Florida makes "**void as a matter of public policy**" provisions in construction contracts for projects in Florida if the clause requires legal action involving a Florida company be brought outside the state. (emphasis added).
5. Illinois	815 ILL. COMP. STAT. 665/10 (2002).	Illinois makes "**void and unenforceable**" forum selection clauses in construction contracts if they requires litigation outside Illinois for in-state projects. Such clauses are "**against public policy.**" (emphasis added)
6. Louisiana	LA. REV. STAT. ANN. § 9:2779 (2012)	When the project is in Louisiana and one of the parties is domiciled in Louisiana, a construction contract clause that requires disputes be litigated outside the state is "**inequitable and against the public policy** of this state" and thus "**null and void and unenforceable.**" (emphasis added)

7. Minnesota	MINN. STAT. ANN. § 337.10 (West 2013)	Minnesota makes "**void and unenforceable**" provisions in a construction contract to be performed in Minnesota if they require litigation in another state. (emphasis added)
8. Montana	MONT. CODE ANN. § 28-2-2116 (2013).	Any provision relating to a construction contract for a project in Montana is "**against the public policy of this state and is void and unenforceable**" if it requires adjudication in another state. (emphasis added)
9. Nevada	NEV. REV. STAT. ANN. § 108.2453 (West)	Any provision in a construction contract for the improvement of property in Nevada is "**contrary to public policy and is void and unenforceable**" if it requires adjudication in another state. (emphasis added)

10. New York	N.Y. GEN. BUS. LAW § 757 (McKinney 2013).	New York makes "**void and unenforceable**" any provision in a construction contract (contracts with material suppliers excluded) that requires dispute resolution in another state. (emphasis added)
11. North Carolina	N.C. GEN. STAT. § 22B-2 (West 2012).	In North Carolina any provision in a contract for the improvement of real property in North Carolina is "**void and against public policy**" if it requires dispute resolution outside North Carolina. (emphasis added)
12. Ohio	OHIO REV. CODE ANN. § 4113.62 (West 2013).	Ohio makes "**void and unenforceable as against public policy**" any provision of a construction contract for an improvement to property in Ohio if it requires dispute resolution outside Ohio. (emphasis added).

13. Oregon	Or. Rev. Stat. Ann. § 701.640 (West 2013)	Oregon makes "**void and unenforceable**" any provision in a construction contract if the project is in state and the provision requires dispute resolution outside Oregon. (emphasis added)
14. Pennsylvania	73 Pa. Stat. Ann. § 514 (West 2013).	Forum selection clauses "**shall be unenforceable**" in a construction contract if the project is in Pennsylvania and the clause requires dispute resolution in another state. (emphasis added)
15. Tennessee	Tenn. Code Ann. § 66-11-208 (West 2013).	Any provision in a construction contract for the improvement of real property in Tennessee is "**void and unenforceable and against public policy**" if the project is entirely within Tennessee and the clause mandates dispute resolution in a different state. (emphasis added).

16. Utah	UTAH CODE ANN. § 13-8-3 (West 2012).	In Utah any forum selection provision in a construction contract performed in Utah is "**void and unenforceable as against the public policy**" if it requires disputes be resolved outside the state and one of the parties is domiciled in Utah. (emphasis added)
17. Virginia	VA. CODE ANN. § 8.01-262.1 (West 2012)	Any construction contract provision mandating that litigation be brought outside the Commonwealth "**shall be unenforceable**" if the project was in the Commonwealth and the clause requires legal action involving a Virginia company be brought outside the state. (emphasis added)
18. Wisconsin	WIS. STAT. ANN. § 779.135 (West 2013)	Forum selection clauses in construction contracts for the improvement of land in Wisconsin "**are void**" if they dispute resolution to occur in another state. (emphasis added)

Forum selection clauses that require litigation of construction disputes outside the state where the project was located offend the law not only in Texas (where J-Crew brought suit) but Virginia (Atlantic Marine's chosen 'forum'). Va. Code Ann. § 8.01-262.1(A)(West 2012) provides that:

> **§ 8.01-262.1. Place for bringing action under a contract related to construction.**
>
> A. Where a party whose principal place of business is in the Commonwealth enters into a contract … for the construction [of an improvement] … physically located in the Commonwealth, any …. provision in the contract mandating that [a cause of] action be brought in a location outside the Commonwealth **shall be unenforceable.**
>
> (emphasis added)

In addition to the states listed above, four other states make forum selection clauses unenforceable in certain instances. Those states are:

States that make unenforceable certain forum selection clauses.		
1. Nebraska	Neb. Rev. Stat. § 25-415 (2012).	Forum selection clauses may be disregarded for a number of reasons, including but not limited to whether enforcing the clause would "be unfair or unreasonable."

2. Rhode Island	R.I. GEN. LAWS ANN. § 6-34.1-1 (West 2012)	In Rhode Island construction contract provisions for improvements in the state are "**voidable by the party that is obligated by the contract to perform the construction or repair**" if the provision requires adjudication outside the state. (emphasis added).
3. South Carolina	S.C. CODE ANN. § 15-7-120 (2012).	Contract provisions requiring litigation outside the state do not preclude litigation in South Carolina with respect to a cause of action that is otherwise triable in the state. (emphasis added).
4. Texas	TEX. BUS. & COM. CODE ANN. § 272.001 (West 2013)	Construction contracts for improvements to real property located in Texas are "**voidable by the party obligated by the contract to perform the construction or repair**" if the contract requires litigation in another state. (emphasis added).

While the aforementioned states generally enforce forum selection clauses in commercial contracts, 90% of them have made an explicit determination that forum

selection provisions in construction contracts are unique and inequitable to the point of violating public policy.[5] Those determinations are of manifest importance and consideration for federal courts resolving venue challenges.

B. The use of forum selection clauses implicates important policy considerations unique to construction disputes and legitimate considerations under 28 U.S.C. § 1404(a).

When a state legislature has determined that a contract clause offends the policy of the state, it turns logic on its head to argue, as Petitioner does, that the clause is presumptively enforceable and the burden is on J-Crew to prove the clause is unreasonable. The legislature has *already made* the policy decision that the clause is void and it is not the burden of a party to prove this or anything further on a case-by-case basis.

It is no surprise that so many legislatures have invalidated forum selection clauses in construction contracts. Construction disputes in general are more complex and document intensive than typical contract or other litigation. It is not unusual for construction litigation to involve voluminous documents including but not limited to architectural plans, architectural and engineering specifications, shop drawings, warranties,

5. It is revealing that not one **construction** industry trade group has weighed in on the side of Atlantic Marine in this dispute, despite there being no shortage of such groups aligned with the interests of general contractors and owners. This silence is deafening and perhaps indicates the widespread industry understanding of the prevalence of statutory exemptions that void forum selection clauses in construction contracts.

daily reports from numerous trades, meeting minutes, field reports, construction reports, weather records, bid documents, bids, employment records, payroll records, site photographs, Critical Path Method ("CPM) schedules, "bar chart" schedules, and schedule updates, not to mention emails and other correspondence. Construction projects also generally involve numerous third-parties who are key witnesses in any dispute—from architects, engineers, owner, construction managers, prime contractors, other trade subcontractors, lower tier "sub-subcontractors," suppliers, lower tier suppliers, laborers, schedulers, estimators, and layers of different independent experts including scheduling experts, claims consultants, designers, forensic accountants, and other construction trades.

Besides the long list of documents, witnesses and third-parties involved in any given construction dispute, in a contractor-subcontractor dispute, like the one here, there is a much greater concern about the potential disparity between financial capability, size, and sophistication of the parties. From the air-conditioned comfort of academe, it may be tempting to argue that forum selection clauses in all commercial contracts are arms-length transactions and negotiated agreements between sophisticated entities, no different than, say a contract between Halliburton and BP. But the real world of construction contracting is very different.

Subcontractors may be skilled in their specialty trades. But they are not typically "big players" and as a general rule lack the financial wherewithal of multimillion dollar general contractors. Subcontractors are typically locally owned family run businesses. Being incorporated

does not imbue one with the financial wherewithal or legal sophistication of a multi-million dollar general contractor with a national presence.

The construction sector also differs from most of the rest of the commercial economy in that when a subcontract is entered into there is only one buyer (the general contractor) for the Project and many sellers (subcontractors). This is because subcontractors typically bid a job before the prime contract is awarded but the prime contractor will not award (aka "negotiate") the subcontract until *after* it has been selected by the owner.

The general contractor thus enjoys a monopsony regarding the work. In economics, a monopsony exists where there is only one buyer and many sellers, and the buyer dictates the terms of the transaction.[6] As the only buyer of the subcontract services for the Project, the general contractor has the power to dictate subcontract terms, including terms that may be inefficient, legally unenforceable (as Petitioner did here in including a forum selection clause that that was unenforceable under Texas law) or against public policy.

Census Data confirms ASA's experience about the massive disparity in size and power of the national

6. In contrast, in a monopoly there is only one seller so the seller dictates the terms of sale. For a general discussion of monopsonies in different markets, see e.g., Alan Manning, Monopsony in Motion: Imperfect Competition in Labour Markets, Princeton Univ. Press; S.E. Atkinson and Joe Kerkvliet, *Dual Measures of Monopoly and Monopsony Power: An Application to Regulated Electric Utilities*, 71 The Review of Economics and Statistics, no. 2, 1989, 250–257.

contractors and small local subcontractors and specialty trades. The last available Census Data information (from 2007) reveals that for every construction company that made more than $10 Million annually there were **14.3** construction companies making less than $500,000 in gross revenue. See U.S. Census Bureau, at "*Selected Statistics for Establishments by Value of Business Done Size Class: 2007.*"[7] And though only 3.8% of the contractors in the business made over $10 Million annually, they dominate the market, holding originated contracts for over 60% of the nation's construction work compared to the 4.7% held by the smaller companies. Id.

These larger construction companies (those making over $10 Million annually) subcontracted out a whopping 76.5% of the total construction work to others. In contrast, the smaller companies subcontracted out only 1.27% of their work. *Id.* The plain conclusion is what happened here is not unusual: the largest general contractors bid projects across the country, winning ("originating") contracts nationally and then subcontracting much of the actual work to subcontractors, who are generally located near the project.

Given the realities of the market, the financial and economic leverage of general contractors to dictate inequitable contract terms is a much larger public policy concern than is present in other economic transactions. The typical practice is that general contractors, using their leverage as the party with a monopsony over the

7. http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=ECN_2007_US_23SG03&prodType=table

Project, dictate the subcontract form that subcontractors must use. Thus, if the subcontract has a forum selection clause, the "selected" forum will inevitably be the "home court" for the general contractor.

It is also far more prevalent in the industry that the general contractor will travel into foreign states to perform its work (and will, once there, subcontract with local subcontractors). Since general contractors typically "hold" for some period of time the money paid by owners for subcontract work, it is subcontractors who typically must pay their own bills (payroll, home office rental, field rental, equipment rental, etc.) and 'finance' the project, only to later "chase" the general contractor to recover monies they have already advanced. Many owners hold retainage of 5-10%, further decreasing necessary cash flow to subcontractors.

When the reality of the slanted terms of a proprietary subcontract form are added to the financial strains and demands of complex construction litigation, the costs to litigate construction disputes can be prohibitively expensive to smaller family-owned companies. If a forum selection clause is added to the mix—with the venue changed to one where witnesses and documents are unavailable—the impact will again disproportionately fall on the party with the least bargaining power (typically the subcontractor).

In this way, forum selection clauses in construction contracts can inequitably chill a litigant's ability to pursue or obtain justice. If Petitioner succeeds in this appeal, the facts presented to this Court represent a dilemma that would not be unusual. Petitioner is a general contractor with revenues well in excess of $10 Million annually.

(See http://www.manta.com/c/mmdrljs/atlantic-marine-construction-company-inc showing $40 Million in gross sales, attached hereto as Appendix 1.) It proclaims on its own website that it routinely travels throughout the United States to perform work. See generally *www.amccinc.com.* Here, it went to Texas to bid a multi-million dollar job. It won the job, then subcontracted (using its form subcontract) most of the work to small local companies, including J-Crew (5 employees). Petitioner withheld a significant final payment to J-Crew and when it was sued for that payment it asked the federal court to enforce a forum selection clause ***that was unenforceable*** in the state where the Project was located.

Thus, the same contractor who had no problem traveling across state borders for a multimillion dollar payday, then claimed (while it was *still* in Texas wrapping up the work) that the District Court should enforce a voidable clause in the Subcontract because it would be too burdensome for it to *stay* in the state to litigate! If its request was granted, the case would have been subsequently transferred to a court that lacked subpoena power over witnesses and documents vital to the subcontractor's case.

A multitude of state legislatures have expressly determined that this type of hardship—the creation of barriers to litigation that fall heaviest on those least able to financially sustain it—would be so common in construction dispute as to make forum selection clauses in construction contracts unenforceable and even against public policy. This is correct: the additional burdens can often be *prohibitive* and effectively deprive a subcontractor of its day in court and/or leverage it to heavily discount, if not abandon, even the most worthy of claims.

If this Court grants Petitioner's request it will effectively write 28 U.S.C. § 1404(a) out of the U.S. Code if a dispute involves a forum selection clause. This would unduly tie the hands of the courts to consider the law and public policy of the state where the work was performed. That would be wrong and unnecessary because state law ought to apply to the venue dispute here and even if it was not dispositive, the plain language of 28 U.S.C. § 1404(a) authorizes federal judges to consider, but *not* blindly enforce, forum selection clauses when resolving venue disputes.

C. The Federal Miller Act evidences the U.S. Congress' decision that resolution of construction disputes should occur in the state where the Project was located.

Though no federal statute or Rule of Procedure addresses the validity (or invalidity) of forum selection clauses, Congress has expressed its preference that litigation of construction disputes occur in the state where the project was located. 40 U.S.C. §§ 3131-3134 (2013)[8] (the "Miller Act") requires general contractors to provide payment bonds on federal construction contracts exceeding $150,000. Because mechanic's lien laws do not apply to federal property, payment bonds serve as a lien substitute and payment security to subcontractors. Under the Miller Act:

8. Formerly codified at 40 U.S.C. §270(a)—270(d).

> (3) Venue.— A civil action brought under this subsection **must** be brought—
>
> **(A)** in the name of the United States for the use of the person bringing the action; and
>
> **(B)** in the United States District Court for any district **in which the contract was to be performed and executed**, regardless of the amount in controversy.
>
> 40 U.S.C. § 3133(b)(3)(emphasis added)

The Miller Act thus requires claimants to sue in a district court where the construction was performed and executed without regard for what its contract might say or the amount in controversy. In *United States for the use and benefit of Vermont Marble Co. v Roscoe-Ajax Constr. Co.* 246 F Supp. 439 (N.D. Cal. 1965), the U.S. District Court for the Northern District of California (Southern Division) addressed a dispute arising under the former version of the Miller Act. It noted that the "[j]urisdictional provision of Miller Act … requiring every suit to be brought in United States District Court for any district in which the contract was to be performed and executed, 'and not elsewhere,' ***prohibited change of venue to another district contractually agreed upon by parties.***" *Id.* (emphasis added).

Though the "and not elsewhere" language in the Miller Act has since been changed, leaving open the possibility that forum selection clauses may be enforceable in Miller Act claims, the Congressional mandate that venue for such

suits lie in the place where the project was performed remains. Courts have recognized that the venue provisions of the Miller Act "facilitate[] subpoenaing of essential witnesses who participated in work at contract site." See e.g., *United States for use and benefit of Essex Machine Works, Inc. v Rondout Marine, Inc.*, 312 F Supp. 846 (SD NY 1970). Federal law embodied within the Miller Act thus reflects the same public policy concerns that underlie the state statutes that invalidate forum selection clauses in construction contracts.

D. Other *Amici* ignore the distinctions between types of commercial contracts and relevant state law that recognizes those distinctions.

It is not uncommon for large national contractors to bid on projects far away from their home offices. It is a reality of modern construction that national contractors rarely rely on their own labor force to do the vast majority of the work. Instead, they commonly "contract out" much (if not all) of the work to specialty trade contractors who typically are local and employ skilled workers near the project site.

Large projects can easily involve dozens of businesses and hundreds of different people brought together in a specific location. "Contracting-out" work to subcontractors saves general contractors the need to specialize in a narrow trade that they could not perform as competently or cost-efficiently as the subcontractor. The owner obtains both higher quality *and* lower cost from an arrangement where the subcontractors are performing the actual work. At the same time the general contractor is able to focus its construction expertise by coordinating the work performed by subcontractors.

Even if a general contractor could perform the work itself, the significant expense and hassle of shipping to a far away project the equipment, materials, and, most importantly, labor makes it more prudent to 'subcontract' the work to local companies. Large contractors thus benefit tremendously in hiring subcontractors to perform the actual construction. And subcontractors benefit from working with general contractors who not only have the management skills to run and coordinate large complex projects and the many people and trades involved in them, but who have the financial means and bonding capacity (to post the Miller Act performance and payment bonds necessary for the project) to contract for large-scale projects that the subcontractor otherwise could not compete for.

But most subcontractors and general contractors do not enjoy equal footing in negotiating contracts. Far from an ideal free-market, subcontractors are commonly presented with "take-it-or-leave-it" contracts prepared by the general contractor's lawyers. In the real world, subcontractors have little practical opportunity to negotiate contractual provisions, and really only directly control the price at which they bid the work. Forum-selection clauses in construction subcontracts are not typically the product of "negotiated" agreement—if that term has any meaning at all. Rather, subcontractors are often left with the choice of accepting boilerplate terms in a subcontract form provided by the general contractor or losing the subcontract to a local competitor. In the best of times this is little of a choice. And in difficult economic times, there is really no choice at all for a company needing work to stay alive.

The fact that forum selection clauses are "widely used in contracts of all types, by businesses large and small," *Chamber of Commerce, Amicus Brief,* Page 10, illustrates the extent to which forum selection clauses have become part of the extensive boilerplate in commercial agreements. But the idea that such clauses are "a vital part of the agreement," can "figure prominently" in contract negotiation (as the Chamber argues), and support a presumption that each party "has been compensated by the bargain for any inconvenience it might suffer by resort to [the selected] forum," (Pet. App. 23a-24a) may be appealing in a vacuum but is misplaced when raised in a construction dispute.

For the reasons discussed above, subcontractors typically have little leverage to negotiate the boilerplate terms of such contracts, particularly those that do not have a direct impact on the work. Like many subcontractors J-Crew is best described as a "mom-and-pop" company, with only 5 employees. In contrast, Petitioner is a $40 Million Company with approximately 40 employees. See attached Appendix 1.

The legal experience, sophistication, and resources of Petitioner as compared to J-Crew belies the suggestion that such parties can as a matter of course be presumed to "negotiate" on an even playing field. All negotiations are colored by the realities of the economic situation. By necessity subcontractors looking for work from a general contractor must confine their focus to ensuring the subcontract scope of work reflects what they bid as they vie for the limited jobs available at any given time in their geographical area. In contrast, national contractors exercise absolute discretion in where they bid and work.

If a state is too remote or too inconvenient to travel to the general contractor simply will not bid the project.

Petitioner's choice to bid on a project in Texas, and to travel into that state to work was much more of a free "choice" than J-Crew's acceptance of Petitioner's boilerplate subcontract terms. Petitioner was not too inconvenienced by the distance to go into the heart of Texas to work. In that light, requiring it to adjudicate in Texas is not unduly "prejudicial." Petitioner's complaints about the burdens of traveling to Texas to litigate are specious given that it boasts on its website that it has "completed successful projects from . . . Virginia to California for various branches of the Armed Services," and "conduct[s] business throughout a broad geographical area," *See* Petitioner's website, "Who We Are" tab, http://amccinc.com/WhoWeAre.aspx (last visited August, 8, 2013), attached hereto as Appendix 2.

Atlantic Marine is rightfully proud of its financial strength and its successful completion of work across the entire country. But in that respect, it is very different from the local subcontractors it employed on the Project. It is also no different than most national general contractors who, like Petitioner did here, work across the country, routinely disregarding the law and public policy of many states where they work by inserting void or voidable boilerplate forum selection clauses in their subcontracts, and who rely on local subcontractors to perform the bulk of their work. It is disingenuous to suggest it would be an undue hardship for Petitioner (or any similarly situated general contractor) to litigate in a state it freely traveled into to work.

The only real injustice that could arise would be if the Fifth Circuit was reversed. The reversal Petitioner seeks would compel federal courts to disregard: (1) the law of the state where the Project was located, and (2) the legitimate policy concerns those laws were designed to address. Reversal would also mean that a small Texas-based subcontractor (and many other similarly situated subcontractors ensnared by such a decision) would be forced to travel across the country to litigate claims for payment in states where they never worked, and before courts lacking subpoena power over important witnesses and documents. In such a fashion, the reversal Petitioner seeks would create an injustice that the doctrine of *forum non conveniens*, codified by Congress in 28 U.S.C. § 1404, was created to avoid.

CONCLUSION

The judgment of the U.S. Court of Appeals for the Fifth Circuit was correct. It should be affirmed.

Respectfully submitted,

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APPENDIX

APPENDIX A — ATLANTIC MARINE CONSTRUCTION COMPANY INC., COMPANY PROFILE PAGE

U.S. - Virginia Beach, VA – Building & Construction - Heavy Construction, NEC - Virginia Beach Marine Contractors - Atlantic Marine Construction Company Inc.

Company Profile Page

Atlantic Marine Construction Company Inc.

Amc
3465 Chandler Creek Road
Virginia Beach, VA 23453-2885 map

Ads

Company Information Complete data available on 85M companies. Learn More.

www.hoovers.com/business_info

About Atlantic Marine Construction Company Inc.
Phone: (757) 362-0023
Website: www.amccinc.com

Top 5 Marine Contractors near Virginia Beach, Virginia

1. Waterfront Marine Construction
2. Lynnhaven Dock Corp.
3. Early Marine Inc.

4. Lynnhaven Salvage Inc.
5. Flint Construction CO
See All Marine Contractors

More Details for Atlantic Marine Construction Company Inc.

Atlantic Marine Construction Company Inc. in Virginia Beach, VA is a private company categorized under Marine Contractors. Our records show it was established in 1993 and incorporated in Virginia. Current estimates show this company has an annual revenue of $40,000,000 and employs a staff of approximately 40.

Company Contacts

Bruce Exum, Jr.

Business Categories

Marine Contractors in Virginia Beach, VA
Heavy Construction
Other Heavy and Civil Engineering Construction

Atlantic Marine Construction Company Inc. Business Information

Atlantic Marine Construction Company Inc. also does business as Amc.

Appendix A

Business Information

Location Type	Single Location
State of Incorporation	Virginia
Annual Revenue Estimate	$40,000,000
8IC Code	1629, Heavy Construction, NEC
Employees	40 40 * *
NAICB Code	237990, Other Heavy and Civil Engineering Construction
Years in Business	20

Explore companies like – *Atlantic Marine Construction Inc.*

APPENDIX B — AMC COMPANIES, MISSION STATEMENT

AMC Companies
Atlantic Marine Construction Company, Inc.

Who We Are

Mission Statement • Our People

Atlantic Marine Construction Company, Inc. (AMC) is a multi-state licensed, Class A, General Contractor. We are a certified SBA 8(a) contractor, as recognized by the SBA, and a registered Woman Owned Business (WBE).

The company was founded in 1985, and incorporated as Atlantic Marine Construction in 1992. As a family owned and operated business we constantly strive to provide quality services with a tireless commitment to our customers. The founding family members are the active managers of the corporation's day to day operations.

We have completed successful projects from the Virginia to California for various branches of the Armed Services. Current and recent customers include the U.S. Department of Defense, the U.S. Department of Veterans Affairs, the U.S. Navy, the U.S. Army, the U.S. Air Force, and the U.S. Marine Corps.

We have continually exceeded our customer's expectations. Our professional staff has extensive experience in all aspects of construction. Our staff is as committed to our customer's needs and requirements as are the company's

owners. It is this type of commitment that has allowed this company to grow successfully and achieve goals beyond expectations.

"Outstanding in every respect …"

"…particularly impressed with their promptness and attention to detail."

… these are but a few of the many very affirmative comments addressed to us concerning our performance and workmanship.

To consistently obtain "exceeding expectations" results we work diligently to provide our customers with the strongest team possible to accomplish all that is requested of us. To that end, we seek principled, professional people who personally exercise honesty and integrity, and integrate them our team as employees, contractors and partners. The effect of this philosophy has been strong relationships with our customers and overwhelming growth and success for our company.

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Site by Marathon Consulting