No. 22-500

In the Supreme Court of the United States

GREAT LAKES INSURANCE SE,
Petitioner,
v.
RAIDERS RETREAT REALTY CO., LLC,
Respondent.

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

AMICUS CURIAE BRIEF OF THE STATES OF LOUISIANA, MISSISSIPPI, AND PENNSYLVANIA IN SUPPORT OF RESPONDENT

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INTEREST OF AMICI CURIAE

Amici Curiae are the States of Louisiana, Mississippi, and Pennsylvania.

The Court granted certiorari to decide whether federal admiralty law renders enforceable a choice of law clause in a maritime contract even if the clause contravenes a State's "strong public policy." Although two private parties are litigating the case, *Amici* States' strong public policies hang in the balance. Any State has a significant interest in its public policies. *See Alfred L. Snapp & Son, Inc. v. Puerto Rico, ex rel., Barez*, 458 U.S. 592, 601 (1982) (observing that States have a "sovereign interest[]" in their "power to create and enforce a legal code, both civil and criminal"). But especially where maritime commerce makes up a large portion of the local economy,[1] States have a powerful interest in seeing their strong public policies implemented.

Even States without large maritime industries have a significant interest in ensuring that their policymaking authority retains its privileged place under our constitutional framework. *See S. Pac. Co. v. Jensen*, 244 U.S. 205, 248 (1917) (Pitney, J., dissenting) (explaining that nothing in the Constitution requires state courts in maritime cases

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[1] Louisiana, for example, is "[t]he center of the American domestic maritime industry universe—with 70,780 jobs and $18.2 billion in annual economic impact . . . [and] the #1 state in per capita jobs." *Jones Act Impact on America's Economy*, TRANSPORTATION INSTITUTE (2019), https://transportationinstitute.org/jones-act/contribution-jones-act-shipping/jones-act-shipping-statistics/#la.

to "conform their decisions to those of the United States courts"). Reversing the lower court here would "breathe life" into "dubious" case law that subordinates state interests to the policy preferences of unelected, life-tenured federal judges "without any firm grounding in constitutional text or principle." *Am. Dredging Co. v. Miller*, 510 U.S. 443, 459 (1994) (Stevens, J., concurring) ("*Jensen* and its progeny represent an unwarranted assertion of judicial authority to strike down or confine state legislation . . . .").

Amici States seek to prevent further encroachment on their authority. They also invite the Court to reexamine its *Lochner*-era precedents that empowered the federal judiciary in maritime cases at the expense of the States. *See id.* at 447 n.1. (majority op.) (declining "to overrule *Jensen* in dictum . . . without argument or even invitation").

SUMMARY OF THE ARGUMENT

Great Lakes asserts that "[f]or much of this Nation's history—with little fanfare or debate—maritime law was [] an exclusively federal enclave." Pet. Br. at 1. Supported by its *amici*, Great Lakes contends that this was true from the Founding until the mid-1950s, "[w]hen State law first entered the [maritime] stage following this Court's decision in *Wilburn Boat Co. v. Fireman's Fund Ins. Co.*, 348 U.S. 310 (1955)." Pet. Br. at 1–2; *see Amici Curiae* Br. Chamber of Commerce at 11–12.

Simply put, Great Lakes and its *amici* are wrong. States and their courts played an important and co-

equal role in commercial maritime law until this Court's *Lochner*-era. Courts—state and federal—applied general common law in deciding commercial maritime cases, as they did in other contexts in the pre-*Erie* era. This general common law was not considered federal law, and States and their courts were not bound by federal court precedents. William A. Fletcher, *The General Common Law and Section 34 of the Judiciary Act of 1789: The Example of Marine Insurance*, 97 Harv. L. Rev. 1513, 1557 (1984). In fact, early American marine insurance law in particular was primarily developed in New York state courts, not in federal courts. *Id.*

So, while Great Lakes contends that this Court's decision in *Wilburn Boat* worked a sea-change in maritime law by introducing state public policy into it—*see* Pet. Br. at 2—the real revolution in this Court's maritime federal-state jurisprudence occurred several decades earlier in *Southern Pacific Co v. Jensen*, 244 U.S. 205 (1917). In a 5-4 decision, and over powerful dissents by Justice Holmes and Justice Pitney, *Jensen* changed everything.

In *Jensen*, "[t]wo decades before *Erie*, the Supreme Court began speaking as if the baseline rules of [maritime common law] have the status of federal rather than state law, and the Court has persisted in that view ever since." Caleb Nelson, *State and Federal Models of the Interaction Between Statutes and Unwritten Law*, 80 U. Chi. L. Rev. 657, 728 (2013). "By shoehorning maritime law into the 'federal' box, *Jensen* created a broad rule of preemption that allows federal courts to preempt state regulatory authority without grounding their decisions in a federal statute

or constitutional provision." Ernest A. Young, *The Last Brooding Omnipresence: Erie Railroad Co. v. Tompkins and the Unconstitutionality of Preemptive Federal Maritime Law*, 43 St. Louis U. L.J. 1349, 1350 (1999). Thus, under *Jensen*, "if a federal judge makes up a rule of admiralty, it almost always does preempt state law even though Congress has never acted at all." *Id*. at 1357.

However, "*Jensen* was questionable when decided, and has become even more tenuous in light of *Erie*'s rejection of diversity jurisdiction as a basis for general common lawmaking." Bradford R. Clark, *Separation of Powers As A Safeguard of Federalism*, 79 Tex. L. Rev. 1321, 1456 (2001). Indeed, Justice Stevens believed *Jensen* to be "just as untrustworthy a guide in an admiralty case today as [*Lochner*] would be in a case under the Due Process Clause." *Am. Dredging Co.*, 510 U.S. at 458 (Stevens, J., concurring).

In short, *Jensen* is a "relic of *Lochner* era overreach" that substitutes federal courts' policy judgments for state legislation. *Portland Pipe Line Corp. v. City of S. Portland*, 288 F. Supp. 3d 321, 447 (D. Me. 2017). *Jensen*'s holding is built on "unfounded assumptions, which crumble[] at the touch of reason." *State of Washington v. W.C. Dawson & Co.*, 264 U.S. 219, 231 (1924) (Brandeis, J., dissenting). This Court should reexamine *Jensen* and its progeny, not further jettison state policy considerations from maritime law by reversing the lower court.

ARGUMENT

I. THE COURT SHOULD REEXAMINE *LOCHNER*-ERA PRECEDENTS THAT SUBORDINATE STATE LAW TO JUDGE-MADE MARITIME COMMON LAW.

A. The Constitution Provides No Textual Basis for Federal Preemptive Maritime Common Lawmaking.

The Constitution does not expressly endow any federal branch of government with maritime lawmaking power. Article III merely creates federal jurisdiction over admiralty and maritime cases. U.S. Const. art. III, § 2 ("The judicial Power shall extend . . . to all Cases of admiralty and maritime Jurisdiction"). There is no textual basis for transforming Article III's grant of jurisdiction into an implied authorization for federal judges to engage in freewheeling, preemptive common lawmaking. And yet, "[t]he federal courts' common lawmaking powers in admiralty have been implied from the jurisdictional grant, and Congress' own lawmaking authority has been implied from that of the courts." Young, *The Last Brooding Omnipresence*, 43 St. Louis U. L.J. at 1351.

In *Jensen*, this Court held that "no [state] legislation is valid if it[,]" in the eyes of a federal judge, "works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Jensen*, 244 U.S. at 216. And so, when the federal judiciary decides cases based on judge-made admiralty rules,

state law is usually displaced. *See* Young, *The Last Brooding Omnipresence*, 43 St. Louis U. L.J. at 1357. That is true even absent any congressional authorization for the rule. *Id.*

Jensen's holding is incompatible with the Constitution's text in several respects.

For starters, this purportedly implicit, sweeping federal regulatory power is antithetical to the foundational principle that the Constitution grants the government only limited and enumerated powers. "[R]ather than granting general authority to perform all the conceivable functions of government, the Constitution lists, or enumerates, the Federal Government's powers." *Nat'l Fed'n of Indep. Bus. v. Sebelius*, 567 U.S. 519, 534 (2012). And the "enumeration of powers is also a limitation of powers, because '[t]he enumeration presupposes something not enumerated.'" *Id.* (alteration in original) (quoting *Gibbons v. Ogden*, 9 Wheat. 1, 195 (1824)). So *Jensen* got things entirely backwards—thereby swallowing whole the states' traditional police power, "which the Founders denied the National Government and reposed in the States[.]" *United States v. Morrison*, 529 U.S. 598, 618 (2000).

Moreover, as a textual matter, *Jensen*'s jurisdiction-implies-preemptive lawmaking logic cannot be limited to Article III's grant of admiralty jurisdiction. Why, for instance, should Article III's grant of federal jurisdiction over cases "between Citizens of different States" not also empower federal judges to engage in preemptive federal common lawmaking? There is no textual basis for

distinguishing between the two grants of jurisdiction, so what's implied by one ought to be implied by the other.

And yet, this Court has emphatically rejected the notion that federal judges can engage in any common lawmaking—much less lawmaking that casts aside state legislation—in diversity jurisdiction. *See Erie Railroad Co. v. Thompkins*, 304 U.S. 64 (1938). "The core of *Erie*'s holding was that a mere jurisdictional grant—such as the grant of diversity jurisdiction that brought 'common law' cases into the federal courts—does not empower the federal courts to make law on their own." Ernest A. Young, *It's Just Water: Toward the Normalization of Admiralty*, 35 J. Mar. L. & Com. 469, 474 (2004). Accordingly, it is a basic axiom of our federalist system that federal courts sitting in diversity apply state substantive law. *See, e.g.*, *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 437 (2010) (Ginsburg, J., dissenting) (describing *Erie* as a "modern cornerstone[] of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems."). There is no textual hook to support this dramatic difference in power conveyed by Article III's grants of diversity and admiralty jurisdiction to federal courts.

In a similar vein, there is no textual explanation for why judge-made federal law presumptively preempts state law, but Congress' legislation—which is enacted pursuant to *express* lawmaking power under the commerce clause, for instance—presumptively does not. *See Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947) (observing that if

Congress legislates in a "field which the States have traditionally occupied" then the Court will assume "that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress."). "Surely it cannot be that the mere grant of judicial power in admiralty cases, with whatever general authority over the subject-matter can be raised by implication, can, in the absence of legislation, have a greater effect in limiting the legislative powers of the states than that which resulted from the express grant to Congress of an authority to regulate interstate commerce." *Jensen*, 244 U.S. at 228 (Pitney, J., dissenting); *see also W.C. Dawson*, 264 U.S. at 234 (Brandeis, J., dissenting) ("The grant 'of the * * * judicial power * * * to all cases of admiralty and maritime jurisdiction' is surely no broader in terms than the grant of power 'to regulate commerce with foreign nations and among the several states.'").

In sum, *Jensen*'s broad claim to preemptive maritime common lawmaking is at odds with the text and structure of the Constitution.

B. The Framers Did Not Understand Admiralty Jurisdiction to Abrogate State Regulatory Power Over Maritime Commerce.

In the *Lochner*-era, without any serious consideration of the constitutional text or historical evidence, *Jensen* and similar cases declared that the *purpose* of admiralty jurisdiction was to protect maritime commerce and provide uniform laws governing it. Armed with that purpose, this Court

concluded that Article III's jurisdictional grant must also include preemptive common lawmaking power. According to the Court, this power had to exist because it was "essential to the effective operation of the fundamental purposes" of admiralty jurisdiction. *Jensen*, 244 U.S. at 216. The upshot? "[N]o [state] legislation [would be] valid if it . . . works material prejudice to the characteristic features of the general maritime law, or interferes with the proper harmony and uniformity of that law in its international and interstate relations." *Id.*

In dissent, Justice Pitney protested that there was no historical support for the Court's position. *Id.* at 228 (Pitney, J., dissenting). He explained that he had conducted a "somewhat exhaustive examination" of historical sources, including "Elliot's Debates, Farrand's Records of the Federal Convention, and The Federalist, Nos. 80–83[.]" *Id.* In these sources, he was "unable to find anything even remotely suggesting that the judicial clause was designed to establish the maritime code or any other system of laws for the determination of controversies in the courts by it established, much less any suggestion that the maritime code was to constitute the rule of decision in common-law courts, either Federal or state." *Id.* The *Jensen* majority, apparently unconcerned by the dearth of Founding-era evidence supporting their pronouncement, offered no response to Justice Pitney's historical critique. *Id.* at 207–18.

Justice Pitney was right. Founding-era "evidence indicates quite clearly that the admiralty clause was placed in the Constitution and the federal admiralty courts were subsequently created to assure complete

federal jurisdiction over three specific categories of litigation: prize cases, criminal prosecutions, and cases arising under federal revenue laws." William R. Casto, *The Origins of Federal Admiralty Jurisdiction in an Age of Privateers, Smugglers, and Pirates*, 37 Am. J. Legal Hist. 117, 118 (1993). And, contrary to the central thesis of the *Lochner*-era Court's purposive reasoning in *Jensen*, "the Founding Generation was unconcerned about the need for a national—as opposed to state—admiralty jurisdiction over private civil litigation[]" such as the litigation before the Court in this case. *Id.*

The evidence demonstrating the Founding Generation's lack of concern for admiralty jurisdiction over private civil litigation is extensive.

Start with Federalist Number 80, which Great Lakes cites to support its contention that commercial maritime law was, without controversy, an "exclusively federal enclave" for hundreds of years. Pet Br. at 1. There, Alexander Hamilton wrote that "[t]he most bigoted idolizers of state authority have not thus far shewn a disposition to deny the national judiciary the cognizance of maritime causes. These so generally depend on the law of nations, and so commonly affect the rights of foreigners, that they fall within the considerations which are relative to the public peace." *The Federalist No. 80*, at 478 (Clinton Rossiter ed., 1961).

What Great Lakes fails to mention, however, is that in the very next sentence Hamilton explained that "[t]he most important [maritime cases] are by the present confederation [*i.e.*, the Articles of

Confederation] submitted to federal jurisdiction." *Id.* And, under the Articles of Confederation, "national judicial power was narrowly confined to cases of capture[.]" Casto, *The Origins of Federal Admiralty Jurisdiction*, 37 Am. J. Legal Hist. at 138. So, "Hamilton's analysis expressly excluded ordinary private maritime litigation[]" like the present case. *Id.* This is hardly what one would expect if, as the *Lochner*-era narrative goes, the central purpose animating the framers' conferral of admiralty jurisdiction on the federal courts was protecting maritime commerce by providing federal jurisdiction and a uniform legal framework.

"[T]he general concern of those who opposed the creation of federal courts"—perhaps chief among them, George Mason—was a fear that the new federal courts would "absorb and destroy the judiciaries of the several states." *Id.* at 137 (citing George Mason, The Objections of the Hon. George Mason to the Proposed Federal Constitution (1787), *reprinted in* Pamphlets On The Constitution Of The United States 329–30 (P. Ford ed. 1888)). Thanks to *Jensen*, federal courts do exactly that in admiralty and maritime cases.

Mason was, in the eyes of Hamilton, a "most bigoted idolizers of state authority." *The Federalist No. 80*, at 478. But not even Mason protested Article III's provision for admiralty jurisdiction. In fact, he "admit[ted] that [federal courts] ought to have judicial cognizance in all cases affecting ambassadors, foreign ministers and consuls, as well as in cases of maritime jurisdiction." Casto, *The Origins of Federal Admiralty Jurisdiction*, 37 Am. J. Legal Hist. at 137 (quoting 3 The Debates In The Several State Conventions On

The Adoption Of The Federal Constitution 523 (J. Elliot ed. 1830)). But if *Jensen*'s history is correct, Mason's acceptance of Article III's language makes no sense. He emphatically believed "disputes between citizens . . . claiming lands under the grants of different states . . . is the only case in which the federal judiciary ought to have . . . cognizance of disputes between private citizens." *Id.* One would expect Mason to vigorously protest any massive transfer of authority from the state's police power to the federal judiciary, not to actively endorse it. The only explanation is that, like Hamilton, Mason's conception of federal admiralty jurisdiction was limited to "prize cases, criminal prosecutions, and cases arising under federal revenue laws"—not private commercial litigation. *Id.* at 118.

Moreover, at the Virginia Ratification Convention, "[a]lthough [James] Madison and [Edmund] Randolph each urged the creation of federal admiralty courts, neither advocate made any reference whatsoever to the maritime industry, commercial affairs, or private disputes." *Id.* at 138. Further, when Randolph was serving as the first United States Attorney General in 1790, he created a study on the new federal judicial system at the request of the House of Representatives. "[H]is Report includes the clearest and most detailed eighteenth-century explanation of the need for a national admiralty jurisdiction." *Id.* at 119. Randolph explained that "prize cases and criminal prosecutions 'of necessity' should be placed in the exclusive jurisdiction of the national admiralty courts. In contrast 'neither [the enforcement of the revenue laws *nor the resolution of private maritime disputes*] *is of*

necessity appropriated to the admiralty.'" *Id.* at 120–21 (quoting H.R. Rep. 1st Cong., 3d Sess. (Dec. 31, 1790) (emphasis added)).

In short, "[a]s to private disputes"—such as the one at issue here—"Randolph was quite indifferent. As far as he was as he was concerned, a federal forum for the resolution of private maritime disputes was not needed because 'in [these cases], the State Legislature may establish a jurisdiction reaching the vessel itself.'" *Id.* (quoting H.R. Rep. 1st Cong., 3d Sess. (Dec. 31, 1790)).

Thus, there is no evidence for the theory that protecting maritime commerce by providing a uniform legal framework was on the Framers' minds when they were drafting Article III.[2] The historical evidence reveals that, "[w]hen eighteenth century Americans like Edmund Randolph specifically addressed private maritime litigation"—to the degree they addressed it at all—"they casually dismissed private claims as relatively unimportant disputes that could be safely entrusted to the state courts." *Id.* at 154.

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[2] The history of the Judiciary Act of 1789 reflects the same indifference to private commercial maritime disputes. *See* Casto, *The Origins of Federal Admiralty Jurisdiction*, 37 Am. J. Legal Hist. at 139–49. For example, "with one exception, no one in the eighteenth century ever mentioned in rem jurisdiction in the context of allocating admiralty jurisdiction between state and federal courts." *Id.* at 143.

C. Historical Practice Shows Federal Courts Lacked Preemptive Federal Maritime Common Lawmaking Power until *Jensen*.

Historical practice in the century and a half following the Founding demonstrates that Article III conferred no preemptive federal maritime common lawmaking power on the federal courts. Indeed, it's ambiguous as to whether Article III's maritime jurisdictional grant was understood to cover private maritime litigation at all. As discussed, the members of the Founding Generation made almost no mention of it.

Their view is not surprising when put in historical context.

English admiralty courts lacked jurisdiction over otherwise "maritime" contracts that were made on land—and the English common law courts jealously guarded their exclusive jurisdiction over these and other cases. *See* Graydon S. Staring, *The Lingering Influence of Richard II and Lord Coke in the American Admiralty*, 41 J. Mar. L. & Com. 239 (2010); *see also Jensen*, 244 U.S. at 229–30 (Pitney, J., dissenting) ("Blackstone says . . . 'it is no uncommon thing for a plaintiff to feign that a contract, really made at sea, was made at a royal exchange, or other inland place, in order to draw the cognizance of the suit from the courts of admiralty to those of Westminster Hall[]'" (quoting 3 William Blackstone, Commentaries *107)).

Likewise, prior to the ratification, States had their own admiralty courts with similar jurisdictional limitations. "The jurisdiction of Connecticut's

admiralty courts was limited to cases involving privateers, trading with the enemy, the exportation of embargoed goods, and the enforcement of the state's import taxes." *See* Casto, *The Origins of Federal Admiralty Jurisdiction*, 37 Am. J. Legal Hist. at 127. Maryland's admiralty courts' jurisdiction was similarly limited. *Id.* at 128 n.57. So, "[w]hen private maritime claims arose" in these states, "the parties evidently took their disputes to the common law courts." *Id.* at 127.

In light of this history, many believed that federal admiralty jurisdiction was similarly limited. As one scholar noted in *Jensen*'s immediate aftermath, "[i]n earlier days the federal courts were chiefly engaged in establishing the admiralty jurisdiction on broad lines, and in freeing themselves from the limitations which in England resulted from the long and jealous conflicts between the common law courts and the admiralty." John Gorham Palfrey, *The Common Law Courts and the Law of the Sea*, 36 Harv. L. Rev. 777, 777 (1923). For instance, when Joseph Story departed from English admiralty limitations and held in the 1815 Massachusetts circuit court case *De Lovio v. Boit*, 7 F. Cas. 418 (C.C.D. Mass. 1815) (No. 3776), "that the concurrent admiralty jurisdiction of the federal courts extended to disputes involving maritime contracts, including marine insurance cases[,]" it caused great controversy. Fletcher, *The General Common Law and Section 34*, 97 Harv. L. Rev. at 1551. Story's "expansion of federal jurisdiction" allowed "parties of nondiverse citizenship [to] bring into the federal admiralty forum claims that would otherwise have been confined to state forums because of lack of

diversity." *Id.* *De Lovio* was met with vehement protest. For example, Justice William Johnson of the Supreme Court condemned "this silent and stealing progress of the Admiralty in acquiring jurisdiction to which it has no pretensions." *Ramsay v. Allegre*, 25 U.S. (12 Wheat.) 611, 614 (6th Cir. 1827) (Johnson, J., concurring).

In any event, Justice Story's expansion of admiralty remained mere circuit court precedent for decades. It was not until 1870, in *New England Mut. Marine Ins. Co. v. Dunham*, that the Supreme Court determined that maritime contracts fell under admiralty jurisdiction. 78 U.S. (11 Wall.) 1 (1870). In the meantime, it appears that the vast majority of maritime contract cases litigated in federal courts were brought pursuant to diversity jurisdiction, not admiralty jurisdiction, suggesting a widespread view that admiralty jurisdiction did not extend to such contracts. *See* Fletcher, *The General Common Law and Section 34*, 97 Harv. L. Rev. at 1538 ("Fifty-three diversity cases involving marine insurance law were decided by the United States Supreme Court between 1803 and 1840."). Therefore, based on this historical evidence and practice, it's not apparent that Article III admiralty jurisdiction was originally understood to extend to private commercial litigation—and marine insurance disputes in particular—at all.

Regardless, whether sitting in diversity or admiralty, federal courts never understood themselves to possess preemptive federal maritime common lawmaking power. In fact, federal courts didn't consider the common law they were applying to be *federal*. *Id.* at 1554. Rather, courts—state and

federal—applied *general* common law, as they did in other contexts in the pre-*Erie* era. As Chief Justice Marshall explained, "[a] case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law admiralty and maritime, as it has existed for ages, is applied by our courts to the cases as they arise." *American Ins. Co. v. Canter*, 26 U.S. (1 Pet.) 511, 545 (1828). So, "federal courts were always conscious in marine insurance cases that they were developing and administering a system of general common law that they shared with the state courts. No court, federal or state, was the necessarily authoritative expositor of what the common law rule on a particular point was or should be." Fletcher, *The General Common Law and Section 34*, 97 Harv. L. Rev. at 1539.

"The state courts[,]" in turn, "regarded the decisions of the federal courts in marine insurance cases in the same way the federal courts themselves did—as decisions under the general law of marine insurance that the federal and state courts jointly administered." *Id.* at 1549. Additionally, "it was clear that the state courts were under no legal compulsion to follow the decisions of the United States Supreme Court[.]" *Id.* at 1574. This is illustrated by the fact that, prior to *Jensen*, there does not appear to be any "instance in which [this] Court heard an appeal of a maritime issue from a state court, or where a maritime rule preempted a state law specifically directed to maritime activity." Young, *It's Just Water*, 35 J. Mar. L. & Com. at 484.

Rather, this Court "had no more legal authority over the Supreme Court of Pennsylvania than did, say, the Supreme Court of New York." Fletcher, *The General Common Law and Section 34*, 97 Harv. L. Rev. at 1575. In fact, the Supreme Court of New York enjoyed great influence in marine insurance cases. "American marine insurance law was, at the outset, developed primarily in the state courts of New York. For a period of seven years—from 1800 through 1806—the New York Supreme Court decided an average of almost twenty marine insurance cases a year, far more than in any other single category of litigation." *Id.* at 1557. So, "[t]hroughout the first quarter of the nineteenth century, all states deciding marine insurance cases continued to give great deference to the decisions of New York." *Id.* at 1570.

In sum, virtually no one considered the common law that federal courts applied and developed in pre-*Jensen* maritime cases to be "'federal' in the sense of providing a basis for Supreme Court review of state court decisions applying it, or for purposes of preempting state law under the Supremacy Clause Young." *It's Just Water*, 35 J. Mar. L. & Com. at 483. Indeed, in the early nineteenth century, the New York Supreme Court's marine insurance caselaw was more persuasive than this Court's. Fletcher, *The General Common Law and Section 34*, 97 Harv. L. Rev. at 1570. So, based on this historical consensus, "neither Article III nor the first Judiciary Act can be read as delegating [preemptive] substantive lawmaking powers to the federal courts in maritime cases[.]" Young, *It's Just Water*, 35 J. Mar. L. & Com. at 483.

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At bottom, there is a lack of evidence for the sweeping power that *Jensen* transferred from the States to the federal courts. If anything, this Court ought to reexamine *Jensen* and its progeny to restore the state maritime regulatory authority that existed before *Jensen*, not further eliminate state public policy considerations from maritime law.

II. LACK OF UNIFORMITY IS A FEATURE, NOT A FLAW, OF FEDERALISM.

Urging this Court to ignore state public policy, Great Lakes dismisses individual States' particular policy concerns as "idiosyncratic preferences" that threaten to disrupt a uniform legal framework for maritime commerce. Pet. Br. at 3. However, "[u]niformity is not any more important in maritime commerce than it is in interstate or international financial transactions, interstate trucking, or air commerce." Young, *The Last Brooding Omnipresence*, 43 St. Louis U. L.J. at 1363. Notably, this Court recently reaffirmed the power of the States to enact policies even when those policies implicate national markets and potentially undermine uniformity. *Nat'l Pork Producers Council v. Ross*, 143 S. Ct. 1142, 1160 (2023). If there are areas of maritime law where complete national uniformity really is necessary—including insurance—Congress can legislate pursuant to its commerce clause power. *See id.* ("If, as petitioners insist, California's law really does threaten

a 'massive' disruption of the pork industry . . . they are free to petition Congress to intervene.").

In the meantime, this Court should allow the States to serve as laboratories of democracy, enacting policies to protect their citizens and industries as they deem best. *See, e.g.*, *New State Ice Co. v. Liebmann*, 285 U.S. 262, 311 (1932). The ability of each State to respond to unique problems with unique solutions is a feature, not a flaw, of our federalist system.

CONCLUSION

The decision of the Third Circuit should be affirmed.

Respectfully submitted,

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