NO. 12-929

In the
Supreme Court of the United States

ATLANTIC MARINE CONSTRUCTION COMPANY, INC.,

Petitioner,

v.

UNITED STATES 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

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BRIEF OF PROFESSOR STEPHEN E. SACHS AS *AMICUS CURIAE* IN SUPPORT OF NEITHER PARTY

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INTEREST OF THE *AMICUS CURIAE*[1]

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SUMMARY OF ARGUMENT

The parties in this case defend two sides of a many-sided circuit split. This brief argues that a third view is correct.

If a contract requires suit in a particular forum, and the plaintiff sues somewhere else, how may the defendant raise the issue? Petitioner Atlantic Marine Construction Company suggests a motion under Federal Rule of Civil Procedure 12(b)(3) or 28 U.S.C. § 1406,[2] on the theory that the contract renders venue improper. Pet. Br. 3. Respondent J-Crew Man-

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[1] All parties have consented in writing to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Duke University School of Law provides financial support for activities related to faculty members' research and scholarship, which helped defray the costs of preparing this brief. (The School is not a signatory to the brief, and the views expressed here are those of the *amicus curiae*.) Otherwise, no person or entity other than the *amicus curiae* or his counsel has made a monetary contribution intended to fund the preparation or submission of this brief.

[2] Unless otherwise indicated, all "Rule" references are to the Federal Rules of Civil Procedure, and all statutory references are to Title 28, U.S. Code.

agement, Inc. contends that venue remains proper, and that the defendant's only remedy is a transfer motion under § 1404. Br. in Opp. (BIO) 11.

Both sides are wrong. Forum-selection clauses have no effect on venue, which is defined by statute. While parties can waive their venue objections in advance, they cannot destroy proper venue by private agreement.

At the same time, an exclusive forum-selection clause does more than just inform a court's discretion under § 1404. If the clause is valid and enforceable, it waives the plaintiff's right to sue in an excluded forum, offering the defendant an affirmative defense to liability in that forum and the right to have the suit dismissed.

The Federal Rules already specify the correct method of raising this defense: it must be affirmatively stated in the answer, which the defendant may accompany with an immediate summary judgment motion. See Rules 8(c)(1), 12(b), (a)–(b). Often, as here, the parties' agreement will be incorporated in the complaint. In that case, the defendant may alternatively raise the defense in a pre-answer Rule 12(b)(6) motion to dismiss, or a post-answer Rule 12(c) motion for judgment on the pleadings.

The Rules' default procedures are practical as well as correct. They enable defendants to obtain quick and decisive enforcement of their forum-selection clauses, through the same procedures used to enforce binding prior judgments, settlements, or arbitral awards. And while there may be some practical advantages to treating forum-selection clauses

as if they affected venue, these advantages have been greatly exaggerated—and, in any case, provide no reason to misapply the Federal Rules.

Here, the parties agreed that their disputes "shall be litigated" in state or federal court in Norfolk, Va. J.A. 28. J-Crew violated that agreement by suing in the Western District of Texas. Assuming, as the Court should, that the clause at issue is valid and enforceable, the complaint could have been dismissed by motion under Rule 12(b)(6). Instead, Atlantic Marine made this forum-selection defense under the label of Rule 12(b)(3). That may have been good enough to raise the issue, but the Court should leave such preservation questions to the court of appeals in the first instance. Because that court (and the district court) proceeded on the erroneous assumption that § 1404 was the only available remedy, this Court should identify the correct procedure, vacate the judgment, and remand the case for further proceedings.

ARGUMENT

I. Forum-Selection Clauses Cannot Render Improper a Statutorily Proper Venue.

A. Proper venue is defined by statute.

In ordinary speech, "venue" often serves as a general term for "place" (as in a "wedding venue"). As forum-selection clauses concern the proper *place* of litigation, it may be natural to think—as Atlantic Marine argues, and as a number of the courts of appeals have ruled—that such clauses also determine the proper *venue*.

But that is a mistake. The term "venue," as it appears in the Federal Rules and in Title 28, is a term of art, defined to "refer[] to the geographic specification" by Congress of particular courts "for the litigation of a civil action." § 1390(a). In each case, venue is "statutorily specified," *Leroy* v. *Great W. United Corp.*, 443 U.S. 173, 183 (1979), as proper or improper in a given judicial district regardless of what the parties have agreed.

That conclusion flows directly from the statutory text. Section 1391, the general venue statute, provides that "[a] civil action *may* be brought in" various judicial districts. § 1391(b) (emphasis added). Just as the Federal Rules "regularly use 'may' to confer categorical permission," so do various "federal statutes that establish procedural entitlements" for one party or another. *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1437 (2010). Section 1391's use of "may" falls in the same category. Like other Rules and statutes, it "creates a categorical rule entitling a plaintiff whose suit meets the specified criteria to pursue his claim," *ibid.*—at least insofar as venue is concerned.

A judicial district that Congress has identified as a "proper venue for a civil action," § 1391(a)(2), therefore does not become an "improper venue," Rule 12(b)(3), or a "wrong" venue, § 1406(a), simply because the parties privately agreed to sue somewhere else. Rather, the procedural entitlements conferred by the general venue statute "govern the venue of *all* civil actions brought in district courts of the United States," "[e]xcept as otherwise provided *by law*." § 1391(a)(1) (emphasis added).

Rejecting this reasoning, Atlantic Marine treats any suit filed in the incorrect *place* as having wrong or improper *venue*—emphasizing the plain meanings of "wrong" and "improper." Pet. Br. 15 & n.5. The plain meanings of those adjectives are beside the point, because what matters is the *technical* meaning of "venue." Indeed, reading forum-selection clauses to destroy statutory venue would make a hash of a detailed legislative scheme. For example:

- Forum-selection clauses are particularly helpful in international agreements, when at least one of the parties resides abroad. Cf. *The Bremen* v. *Zapata Off-Shore Co.*, 407 U.S. 1, 13–14 (1972) (describing forum selection as "an indispensable element in international trade, commerce, and contracting"). But Congress has specified that, "for all venue purposes," § 1391(c), a defendant residing outside the United States "may be sued in any judicial district" and should be "disregarded in determining where the action may be brought with respect to other defendants," § 1391(c)(3). If forum-selection clauses change where venue lies, then either § 1391(c) does not really control "for all venue purposes" like it says, or else such clauses are inoperative just when they might be most needed.

- The agreement here permits a federal forum, see J.A. 28, but the parties could just as easily have specified a state or foreign court instead. In that case, under Atlantic Marine's view, venue would be improper in every federal judicial district. Pet. Br. 18–19. But Congress enacted a fallback venue statute to guarantee that, "[e]xcept as other-

wise provided by law," § 1391(a), and in any case within the federal courts' personal jurisdiction, venue will always lie in *some* judicial district should there be "no district in which an action may otherwise be brought as provided in this section." § 1391(b)(3); cf. *Brunette Machine Works, Ltd.* v. *Kockum Indus.*, 406 U.S. 706, 710 n.8 (1972) ("Congress does not in general intend to create venue gaps, which take away with one hand what Congress has given by way of jurisdictional grant with the other.").

- When a case is removed from state to federal court, the general venue statute does not apply. See § 1390(c). Instead, the case can typically be removed only to a particular court, "the district court of the United States for the district and division embracing the place where such action is pending." § 1441(a). Suppose, for example, that J-Crew had sued in state court in Bell County, Texas, and that Atlantic Marine had removed to the Western District to enforce its forum-selection agreement there. Because the clause selects a different district, venue would allegedly be improper in the removal court—even though § 1441(a) renders venue automatically proper in the forum designated by statute. *Polizzi* v. *Cowles Magazines, Inc.*, 345 U.S. 663, 665–66 (1953); see also 17 Moore's Federal Practice § 111.36[5][a], at 179 (3d ed. 2013) (Moore).

These results are difficult to square with the framework created by Congress.

By contrast, applying that framework straightforwardly makes the venue analysis here easy. The

parties' contract called for a construction project in the Western District of Texas. See Pet. App. 4a n.10. That project was a "substantial part of the events * * * giving rise to the claim," § 1391(b)(2), so the case "may be brought" in the Western District, § 1391(b), at least as far as venue is concerned. See *Cortez Byrd Chips, Inc.* v. *Bill Harbert Constr. Co.*, 529 U.S. 193, 198 (2000) (noting, in a suit alleging breach of contract, that venue under the substantial-part standard is "clearly proper" in a district "within which the contract was performed").

B. A venue that is proper under § 1391 is not "wrong" under § 1406.

Atlantic Marine does not claim that the venue statutes actually contain some invisible-ink exception for forum-selection clauses. Instead, it tries to shoehorn forum selection into § 1406, which permits dismissal or transfer by a district court "in which is filed a case laying venue in the wrong division or district." § 1406(a). Atlantic Marine contends that "wrong" refers to *any* defect in the forum (*e.g.,* lack of personal jurisdiction), not just whether the suit was filed "contrary to the venue statutes." Pet. Br. 9, 15.

This claim implicates a wholly different circuit split,[3] and in any case it is incorrect. Applying § 1406

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[3] Compare, *e.g., In re Carefirst of Md., Inc.*, 305 F.3d 253, 255–56 (CA4 2002) (accepting this "broad construction" of § 1406(a), though the statute's "language suggests otherwise"), with *Viernow* v. *Euripides Dev. Corp.*, 157 F.3d 785, 793 (CA10 1998) (rejecting this reading as "strained"); see also 17 Moore § 111.02[1][b][ii][B], at 23. Note that *none* of the cases cited at Pet. Br. 15–16 discuss § 1406 in this context.

to every defect in the forum would read "laying venue" out of the statute—as if the text simply referred to any case "filed * * * in the wrong division or district."[4] Instead, this Court has always described § 1406 as specifically addressing *venue*. The section "authorize[s] the transfer of cases, however wrong the plaintiff may have been in filing his case *as to venue*, whether the court in which it was filed had personal jurisdiction over the defendants or not." *Goldlawr, Inc.* v. *Heiman*, 369 U.S. 463, 466 (1962) (emphasis added); see also *ibid.* (§ 1406 designed to prevent injustice resulting from an "erroneous guess" as to facts "upon which *venue provisions* often turn" (emphasis added)); accord *Henderson* v. *United States*, 517 U.S. 654, 667 (1996); *Johnson* v. *Ry. Exp. Agency, Inc.*, 421 U.S. 454, 466 n.12 (1975); Reviser's Note to § 1406, 28 U.S.C. at 803 (Supp. 2. 1949) (§ 1406(a) permits transfer "where venue is improperly laid").

Atlantic Marine's attempt to "blur" venue with other concepts under § 1406 is not just "unfortunate," 14D C. Wright et al., Federal Practice and Procedure: Jurisdiction § 3827, at 579–80 (3d ed. 2007) (Wright); it would also render other statutes mere surplusage. If a case "lay[s] venue in the wrong * * * district" whenever jurisdiction is absent, then Congress would not have needed a separate statute to permit transfers for "want of jurisdiction," see § 1631, or to avoid "'jurisdictional' dismissals" under the Suits in Admi-

[4] Venue was restricted by division, as well as by district, when Congress enacted § 1406. See § 1393 (Supp. 2 1949) (repealed 1988).

ralty Act, see *Henderson*, 517 U.S. at 667 (citing 46 U.S.C. App. § 742 (1994), codified as amended at 46 U.S.C. § 30906(b)). Likewise, if "wrong" and "improper" mean largely the same thing, see Pet. Br. 15 & n.5, and if any defective forum is a "wrong 'venue,'" *ibid.*, then Rule 12(b)(3) would render 12(b)(1) and (2) unnecessary—"lack of subject-matter jurisdiction" and "lack of personal jurisdiction" would both just be species of "improper venue."

Section 1406—like the rest of Title 28, Chapter 87—is about venue, not jurisdiction or other defects. And a case brought where § 1391(b) says it "may be brought" does not "lay[] venue in the wrong division or district." § 1406(a).

C. Parties cannot render a proper venue improper by contract.

Alternatively, Atlantic Marine portrays forum-selection clauses as displacing standard venue analysis through the parties' consent. Pet. Br. 12. That is not how venue works.

As this Court has explained, "personal jurisdiction [and] venue * * * are personal privileges of the defendant" against suit. *Leroy*, 443 U.S. at 180. These privileges, of course, "may be waived by the parties." *Ibid.*; cf. Pet. Br. 11–12. But neither privilege may be *expanded* by the parties, because the scope of each privilege is determined by law. In other words, a party may consent to venue or jurisdiction as a potential defendant, giving up its right to assert certain legally defined privileges later. But that party cannot, as a potential plaintiff, "give up" the fact that venue lies in a given district—any more than it can

"give up," in advance, the district court's personal jurisdiction over a defendant. See *The Bremen*, 407 U.S. at 12 ("No one seriously contends * * * that the forum-selection clause 'ousted' the District Court of jurisdiction * * * ."); cf. Restatement (Second) of Conflict of Laws § 80, cmt. *a* (rev. ed. 1988) ("Private individuals have no power to alter the rules of judicial jurisdiction.").

A party may also waive individual *arguments* about venue. One judge of the court of appeals described the parties as agreeing "that neither will seek to maintain venue" in certain fora. Pet. App. 17a (Haynes, J., concurring in the judgment). But even if venue were J-Crew's burden to "maintain" (it may not be),[5] nothing in the parties' agreement estops J-Crew from "maintain[ing]" venue wherever venue lies. The agreement promises that a dispute "shall be litigated in" Norfolk and consents to jurisdiction and venue there. J.A. 28. It makes no representations about venue in other districts, any more than about personal or subject-matter jurisdiction; and if it had, reliance would have been unreasonable in light of § 1391. Even a contract choosing a particular forum and reciting that venue is improper in every other district would not necessarily make it so. A court is

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[5] There is another circuit split on which party bears the burden of establishing proper or improper venue. Compare, *e.g., Gulf Ins. Co.* v. *Glasbrenner*, 417 F.3d 353, 355 (CA2 2005) (plaintiff's burden), with *In re Peachtree Lane Assocs.*, 150 F.3d 788, 792 (CA7 1998) (defendant's burden); *Myers* v. *Am. Dental Ass'n*, 695 F.2d 716, 724–25 (CA3 1982) (same); see also 2 Moore's Federal Practice § 12.32[4], at 66; 17 *id.* § 110.01[5][c], at 22.

"not bound to accept, as controlling, [the parties'] stipulations as to questions of law," *Sanford's Estate* v. *CIR*, 308 U.S. 39, 51 (1939)—especially when the correct answers to those questions are obvious from the face of the complaint.

Perhaps J-Crew is equitably estopped from *suing* in other courts more generally. See Staring, *Forgotten Equity: The Enforcement of Forum Clauses*, 30 J. Mar. L. & Com. 405 (1999); see also *Dickerson* v. *Colgrove*, 100 U.S. 578, 580 (1879) ("[H]e who by his language or conduct leads another to do what he would not otherwise have done, shall not subject such person to loss or injury by disappointing the expectations upon which he acted."). But that simply proves the point—for estoppel, in that sense, is not a defect in venue, but rather an affirmative defense. See Rule 8(c)(1) ("estoppel").

Again, Atlantic Marine's argument as to venue would work just as well (or poorly) for jurisdiction. This Court has said that the party asserting jurisdiction bears the burden of proof. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332, 342 & n.3 (2006) (subject-matter jurisdiction); *Ins. Corp. of Ireland, Ltd.* v. *Compagnie des Bauxites de Guinee*, 456 U.S. 694, 709 (1982) (personal jurisdiction). A prior agreement not to "maintain" jurisdiction, no matter how obvious the law, does not cause jurisdiction to be absent through a failure of proof. Otherwise, the parties could "oust" the courts' jurisdiction in precisely the way that *The Bremen* rejected. Given that parties cannot strip courts of jurisdiction by contract, they cannot strip judicial districts of statutorily specified venue either.

Forum-selection clauses therefore have no more to do with "venue"—other than in the loose sense of "place"—than they do with personal or subject-matter jurisdiction. Objections based on such clauses fit no better under Rule 12(b)(3) or § 1406 than they do under Rule 12(b)(1) or (2)—that is, not at all.

II. An Enforceable Forum-Selection Clause May Be Raised as an Affirmative Defense.

According to J-Crew, if a forum-selection clause does not destroy proper venue, then the only remedy left for the plaintiff's breach of the clause is a transfer motion under § 1404. BIO 11.[6]

That does not follow. Forum-selection clauses are not an unprovided-for case under the Federal Rules. Rather, the Rules already specify the correct enforcement procedure: a forum-selection clause must be raised as an affirmative defense.

A. The Rules already provide a method for raising forum-selection defenses.

An exclusive forum-selection clause is exactly what it sounds like: a contractual agreement that consents to litigation in a particular forum and relinquishes the parties' right to select any other forum. The exclusive nature of the clause makes it a form of waiver, "the 'intentional relinquishment or abandonment of a known right.'" *Wood* v. *Milyard*, 132 S. Ct. 1826, 1835 (2012) (quoting *Kontrick* v. *Ryan*, 540 U.S. 443, 458 n.13 (2004)). If the clause is valid and

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[6] Or, perhaps, a separate suit for damages. See Pet. App. 25a n.5 (Haynes, J., concurring in the judgment).

enforceable, it serves as a defense to the plaintiff's claim. Specifically, it is an affirmative defense—a reason to deny judgment to the plaintiff that remains valid "even if all the allegations in the complaint are true," Black's Law Dictionary 482 (B. Garner ed., 9th ed. 2009), or that the defendant "cannot raise by a simple denial in the answer," 5 C. Wright & A. Miller, Federal Practice & Procedure: Civil § 1271, at 585 (3d ed. 2004) (Wright & Miller).

Under the general default established by Rule 8, "*any* avoidance or affirmative defense" must be "affirmatively state[d]" in the defendant's answer. Rule 8(c)(1) (emphasis added).[7] This is the standard method for raising defenses under the Rules: except for seven special defenses that may be raised "by motion," "[*e*]*very* defense to a claim for relief * * * must be asserted in the responsive pleading." Rule 12(b) (emphasis added). Were there any doubt, the Rules also provide examples of affirmative defenses, with "waiver" specifically included on the list. Rule 8(c)(1).

That a forum-selection clause offers an affirmative defense does not mean, however, that a defendant must always go to trial to enforce it. When a forum-selection clause raises "no genuine dispute as to any material fact"—say, because its authenticity is undisputed, and the only disagreements involve pure questions of law—the defendant may immediately

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[7] Cf. Black's Law Dictionary, *supra,* at 156, 339 (defining "avoidance," under "confession and avoidance," as "[a] plea in which a defendant admits allegations but pleads additional facts that deprive the admitted facts of an adverse legal effect").

file a motion for summary judgment under Rule 56(a). There is no waiting period for summary judgment motions; the defendant can file one contemporaneously with its answer, if it wishes. See Rule 56(b); cf. Advisory Committee's Notes, 28 U.S.C. app. at 268 (2006).[8]

In many cases (including this one), the defendant will not even need to answer the complaint, because the case can be dismissed by pre-answer motion under Rule 12(b)(6). "A complaint is subject to dismissal for failure to state a claim if the allegations, taken as true, show the plaintiff is not entitled to relief"—such as "when an affirmative defense . . . appears on its face." *Jones* v. *Bock*, 549 U.S. 199, 215 (2007) (internal quotation marks omitted; omission in original). For Rule 12(b)(6) purposes, the complaint's allegations include material "incorporated into the complaint by reference." *Tellabs, Inc.* v. *Makor Issues & Rights, Ltd.*, 551 U.S. 308, 322 (2007). In most contract cases, the parties' agreement is "integral to the claim," and it will be attached to the complaint as an exhibit "whose authenticity is unquestioned"—making it "part of [the] complaint by implication." 5B Wright & Miller § 1357, at 376; *id.* at 186 (Supp. 2013). That permits enforcement of the clause through Rule 12(b)(6), or alternatively through a

[8] Should that motion be denied, nothing in the Federal Rules stops the defendant from filing another summary judgment motion on the merits later on. Courts often accept successive summary judgment motions when there is good cause to do so. See 11 Moore § 56.121[1][b], at 300 & n.5.

Rule 12(c) motion for judgment on the pleadings. See Rule 12(h)(2)(B); 5C Wright & Miller § 1367, at 207.

Thus, while the particular motion filed depends on the contents of the complaint, the Rules leave little doubt about the general approach. A forum-selection clause should be processed in the same manner as any other defense that justifies the denial of relief but that is not specifically listed in Rule 12(b).

Indeed, this is the same procedure that defendants must use to enforce various other rights not to litigate—for example, because they have already settled the plaintiff's claim, or already resolved the issue in arbitration, or even already litigated the claim or issue to judgment in a prior case and won. "Release," "arbitration and award," "res judicata," and "estoppel" are all affirmative defenses under Rule 8(c)(1). Unless these defenses are apparent from the complaint or matters for judicial notice, defendants cannot make them under Rule 12(b)(6) or 12(c) and must resort to summary judgment or trial. Yet the default procedures of the Federal Rules still protect such defendants from unjustified litigation.

In the same way, these default procedures provide parties that have agreed on a particular forum with the full measure of certainty and predictability described by *The Bremen*. See 407 U.S. at 13–14. If the case is filed in the wrong forum, the defendant has a right to have it dismissed, and an adequate procedure under the Federal Rules for enforcing that right.

B. This Court's decisions are best read as treating a forum-selection clause as an affirmative defense.

Treating a forum-selection clause as an affirmative defense is consistent not only with the text of the Rules but also with this Court's jurisprudence. The Court has repeatedly stated that forum-selection clauses can justify dismissal, but it has never suggested that they do so by rendering *venue* improper. The Court did enforce a forum-selection clause in *Carnival Cruise Lines, Inc.* v. *Shute*, 499 U.S. 585 (1991), in which the original motion for summary judgment had asserted a venue defect under § 1406, see *Shute* v. *Carnival Cruise Lines*, 897 F.2d 377, 379, 387 (CA9 1988). But the Court's opinion never mentioned either § 1406 or the word "venue," and it can hardly be read as endorsing that theory.[9]

By contrast, in *Stewart Organization, Inc.* v. *Ricoh Corp.*, the Court approvingly noted the parties' understanding that a § 1406 motion to dismiss "for improper venue" had been "properly denied * * * [,] because respondent apparently does business in the [district]." 487 U.S. 22, 27 n.8 (1988). Atlantic Marine portrays this statement as a mere summary of the

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[9] Likewise, in *Kawasaki Kisen Kaisha Ltd.* v. *Regal-Beloit Corp.*, the Court enforced a forum-selection clause without specifying what motion had been filed in the district court. See 130 S. Ct. 2433, 2440 (2010). The Court's only discussion of venue was in explaining that the statutory venue provisions of the Carmack Amendment, 49 U.S.C. § 11706(d), did not apply to that case. See 130 S. Ct. at 2441–42.

parties' positions, Pet. Br. 23. But the Court's words in *Stewart* carry far more weight than its silence about the proper motion in *Shute*. The *Stewart* Court recognized that statutory venue would lie irrespective of what the parties had agreed.

Moreover, rather than suggesting that forum-selection clauses render venue improper, this Court has traditionally described such clauses as conferring a contractual right to dismissal. Although the petitioner in *The Bremen* had originally "moved to dismiss for lack of jurisdiction," 407 U.S. at 4, the Court rejected any jurisdictional "ouste[r]" theory, see *id.* at 12, and instead framed the issue as one of specific performance of the contract: "The correct approach would have been to enforce the forum clause specifically * * * ." *Id.* at 15.

Similarly, in *Lauro Lines s.r.l.* v. *Chasser*. the Court described the defendant as having a "contractual right to [a particular] forum," 490 U.S. 495, 499 (1989), and as seeking to have its "agreement * * * enforced by the federal courts," *id.* at 501. (The petitioner in *Lauro Lines* had originally filed a motion to dismiss "pursuant to Rules 12(b) and 56." Appendix in No. 88-23, pp. 2–3.) The Court repeated this depiction in *Digital Equipment Corp*. v. *Desktop Direct, Inc.*, where it described the forum-selection clause in *Lauro Lines* as conferring a "contractual right to limit trial to [a particular] forum." 511 U.S. 863, 874 (1994).

The Court has also explained that the contractual right conferred by a forum-selection clause justifies dismissal rather than transfer to another court. In *Lauro Lines*, the Court noted that a

district court's failure to respect the clause would be reversible error, which may be raised on "appeal after final judgment" just like "a claim that the trial court lacked personal jurisdiction over the defendant." 490 U.S. at 501; see also *id.* at 502–03 (Scalia, J., concurring) (describing the remedy for an erroneously denied motion as "permitting the trial to occur and reversing its outcome"). Because this contractual right can preclude the defendant's liability without necessarily contradicting the plaintiff's complaint, it must be raised as an affirmative defense.[10]

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[10] Some courts of appeals have adopted a similar approach. In *Central Contracting Co.* v. *Maryland Casualty Co.*, the Third Circuit described a forum-selection clause as "merely constitut[ing] a stipulation," whereby "the parties join in asking the court to give effect to their agreement." 367 F.2d 341, 345 (CA3 1966). That case arose on a 12(b)(6) motion, which the Third Circuit properly converted to a motion for summary judgment under Rule 56. See *id.* at 343. The First Circuit then relied on *Central Contracting* when it endorsed the use of a Rule 12(b)(6) motion, see *LFC Lessors, Inc.* v. *Pac. Sewer Maint. Corp.*, 739 F.2d 4, 6–7 (CA1 1984), and it has maintained that rule to this day, see *Rivera* v. *Centro Médico de Turabo, Inc.*, 575 F.3d 10, 15–16 (CA1 2009); *Silva* v. *Encyclopedia Britannica Inc.*, 239 F.3d 385, 387–88 (CA1 2001); cf. *Langley* v. *Prudential Mortg. Capital Co.*, 546 F.3d 365 (CA6 2008) (*per curiam*) (permitting 12(b)(6) or § 1404); 14D Wright § 3803.1, at 112 & n.72 (3d ed. 2007 & Supp. 2013) ("The better view * * * is that a forum selection clause does not render venue improper in an otherwise proper forum and that a valid clause should be enforced by either a Section 1404(a) transfer or a Rule 12(b)(6) motion to dismiss for failure to state a claim.") (citing cases).

C. The affirmative-defense procedure is practical as well as correct.

On a natural reading of the Rules, forum-selection clauses must be raised as affirmative defenses. Surprisingly, few courts and commentators have mounted serious arguments to the contrary. Some have failed to consider the affirmative-defense theory, assuming § 1404 to be the only alternative to a venue approach. See, *e.g.*, Pet. App. 5a. Others have dismissed the theory out of hand based on a misreading of *Stewart*.[11] Most, however, have rejected it for reasons unrelated to the text, preferring to use venue concepts based on an imagined balance of practical costs and benefits—reasons to *call* the issue venue, even if it isn't. See, *e.g., Sucampo Pharms., Inc.* v. *Astellas Pharma, Inc.*, 471 F.3d 544, 549 (CA4 2006); *Argueta* v. *Banco Mexicano, S.A.*, 87 F.3d 320, 324 (CA9 1996); see also Pet. App. 24a (Haynes, J., concurring in the judgment) (searching for "the cleanest way" to enforce the clause); cf. Pet. Br. 17–18.[12]

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[11] See, *e.g., Lipcon* v. *Underwriters at Lloyd's, London*, 148 F.3d 1285, 1290 (CA11 1998) (finding "no significant doctrinal error" in using Rule 12(b)(6), but preferring 12(b)(3) based on the non sequitur that *Stewart* arose under § 1404, a "transfer-of-*venue* statute").

[12] See also, *e.g.,* 17 Moore § 111.04[3][b][i]–[ii], [4][c], at 39–43, 52.3–.6; Davies, *Forum Selection Clauses in Maritime Cases*, 27 Tul. Mar. L.J. 367, 369–72, 375 (2003); Staring, *supra,* at 408; Holt, Note, *A Uniform System for the Enforceability of Forum Selection Clauses in Federal Courts*, 62 Vand. L. Rev. 1913, 1924–25 (2009).

The Rules do set out a number of procedures for handling venue that might be convenient if applied to forum-selection clauses. For example, venue objections:

- may be raised before answering the complaint, see Rule 12(b)(3);
- may rely on evidence outside the complaint, see Rule 12(d);
- are waived if raised too late, see Rule 12(h)(1);
- have contested facts determined by the court, not a jury, see Rule 43(c); and
- result in dismissals that are not "on the merits," Rule 41(b).

Even on their own practical terms, however, these concerns are largely overblown or misguided. And, in any case, they offer no reason to ignore the Federal Rules.

Timing. Treating a forum-selection clause as an affirmative defense may seem like a catch-22. The defendant still has to answer the complaint in the plaintiff's chosen forum, properly stating the defense under Rule 8(c)(1), just to assert its right not to litigate there in the first place.

But this sells the pleading process short. As noted above, the Rules expect just the same of defendants that have already settled the case, completed an arbitration, or litigated the case to judgment and won. See Rule 8(c)(1) (listing "release," "arbitration and award," "res judicata," and "estoppel"). Each of these defenses presents just as much need for certainty and repose as does a forum-selection clause. If

a defendant that has *already settled the case* still has to file an answer and a summary judgment motion, then that is not too much to expect from a defendant that merely claims the contractual right to litigate in a different forum.

In most forum-selection cases, moreover, the agreement is incorporated in the complaint, and the defendant may move to dismiss under Rule 12(b)(6) before filing an answer. Sometimes the parties might have entered into a wholly separate agreement on forum selection, which likely would not be so incorporated. But even if the defendant has to use summary judgment, Rule 56(b) places no limit on how early such a motion may be brought. Given that *Shute* itself arose on a motion for summary judgment, see 499 U.S. at 588, it is hard to portray this procedure as inadequate.

Evidence. On a Rule 12(b)(6) motion, the court assumes the truth of the complaint's well-pleaded allegations, and will not accept other evidence without converting the motion to one for summary judgment under Rule 56. Two courts of appeals have relied on these grounds to find Rule 12(b)(6) inappropriate for forum selection—reasoning that, in order to attack the clause under *The Bremen*'s standards (*e.g.*, for fraud), the plaintiff will usually need to cite evidence outside the complaint. See *Argueta*, 87 F.2d at 324; accord *Sucampo*, 471 F.3d at 549; Pet. Br. 18.

This objection proves too much. A plaintiff might need extra-complaint evidence whenever an affirmative defense is asserted under Rule 12(b)(6). Consider a statute of limitations defense: the

defendant might have agreed to waive that defense in an earlier proceeding, see, *e.g., Piper Aircraft Co.* v. *Reyno,* 454 U.S. 235, 242 (1981), and evidence of that waiver would almost always be outside the complaint. Any need for outside evidence is easily handled under Rule 12(d), which provides the parties with a "reasonable opportunity" to develop and present the facts.[13]

Indeed, conversion of a Rule 12(b)(6) motion to summary judgment under Rules 12(d) and 56 is hardly a catastrophe. If there were a true factual dispute over the validity of the clause—say, whether it had been inserted by fraud, or whether the plaintiff's signature on the agreement was forged—then facts will need to be gathered, whether through "jurisdictional discovery" or actual discovery. Calling the forum-selection question "venue" does not make the factual problem go away. Federal courts can and should structure discovery to answer the forum-selection question first, before digging into the merits as a whole. See Rules 16(b), 26(b)(2)(C).

Waiver. A venue defect must be raised in the answer or pre-answer motion or else it is waived.

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[13] Alternatively, if the complaint happens to anticipate an alternative defense (say, by alleging that the forum-selection clause was inserted by fraud), and those allegations are not struck as surplusage, see 5 Wright & Miller § 1276, at 623–24, then taking the allegations as true is obviously the right thing to do on a 12(b)(6) motion. The pleaded fact is plainly in dispute, and it is reasonable for the court to expect affidavits or admissible evidence on the subject before enforcing the clause. See Rule 56(c)(2), (4).

Rule 12(h)(1). By contrast, failure to state a claim—once pleaded in the answer—may be raised by motion for judgment on the pleadings or even "at trial." Rule 12(b), (h)(2)(B)–(C). That might seem inappropriate for forum selection: if a case truly belongs somewhere else, the defendant should not wait for a full-blown trial before pressing the issue. See Pet. Br. 17–18.

That objection misconceives the waiver rule. Defendants waive venue under Rule 12(h)(1)(A) only by filing Rule 12(b) motions on *other* grounds. Nothing stops them from pleading improper venue in the answer and then waiting to press it at trial. See Rule 12(h)(1)(B)(ii). Mislabeling forum selection as venue, then, hardly guarantees a quick resolution.

More importantly, whatever the procedural vehicle used, a defendant's right to raise a waiver defense (including a forum-selection clause) is itself limited by ordinary waiver doctrines. An affirmative defense is waived if not pleaded in the answer. See Rule 8(c)(1); 2 Moore § 8.08[3], at 62. And a defendant can waive defenses by its conduct, as well as by formal omission. See *Democratic Republic of Congo* v. *FG Hemisphere Assocs.*, 508 F.3d 1062, 1064–65 (CADC 2007) (citing cases). For example, when parties have agreed to arbitration but the plaintiff sues anyway, 9 U.S.C. § 3 imposes no time limit on the defendant's motion to compel arbitration. But a defendant that waits too long to file, acting inconsistently with its arbitration right by continuing to litigate in the plaintiff's chosen forum, may be found to have waived that right. 13D Wright § 3569, at 526–28 & nn.83–84 (3d ed. 2007 & Supp. 2013); see also *Moses H. Cone Mem'l Hosp.* v. *Mercury Constr. Corp.*, 460 U.S. 1, 25

(1983) (describing "waiver" and "delay" as "defense[s] to arbitrability"). The same is true of a late-filed forum non conveniens motion. 14D Wright § 3828, at 627 & n.17.

So here. A defendant that waits too long to demand its chosen forum, preferring to litigate in the forum the plaintiff picked, will waive its right to litigate elsewhere. See, *e.g., Frietsch* v. *Refco, Inc.*, 56 F.3d 825, 830–31 (CA7 1995). Courts have long enforced this standard as a matter of equity in the contexts of arbitration or forum non conveniens, even without the hard-and-fast limits of Rule 12(h)(1). Because equitable waiver doctrines continue to apply, it is hard to imagine circumstances in which a defendant could successfully "lie behind the log" and delay the enforcement of a forum-selection clause.

Jury trial. When venue is raised by motion, any facts relevant to the defense are determined by the court, usually on affidavits. See Rule 43(c); 14D Wright § 3826, at 555 & n.20. By contrast, if an affirmative defense presents a genuine dispute of material fact, it cannot be resolved by motion under Rules 12 or 56. If the case is jury-eligible and a party so demands, the issue has to go to the jury. See Rules 38, 39(a). Why should the parties have to endure a jury trial, just to find out where they should *start* the litigation?

This procedure may seem strange. See Pet. Br. 17–18. But every reason supporting jury trials in general also supports such a right here. If the validity and enforceability of a forum-selection clause rests on genuinely disputed facts—say, whether the plaintiff ever signed the agreement in the first

place—then the plaintiff may have a right to have those facts determined by a jury, not a judge. (Under the Federal Arbitration Act, by comparison, "[i]f the making of the arbitration agreement * * * be in issue," then the matter may have to be resolved by jury trial, 9 U.S.C. § 4—even though a crucial goal of arbitration is to obtain speedy process outside the courts.)

Most of the time, of course, there will not be *any* relevant facts in dispute (as here), or the dispute over those facts will not be genuine. In such cases, the clause's validity can be resolved quickly by the court on motion rather than by a jury. And even when there are genuine disputes, the parties would not have to wait for a trial of the whole cause, as a district court can and should order a separate trial under Rule 42(b).

Merits. The most fundamental objection to treating forum-selection clauses as affirmative defenses is that defenses ought to concern the merits, while forum selection concerns only the place of suit. Pet. Br. 18. And theoretical scruples aside, there are practical differences as well. A dismissal based on an affirmative defense, unlike one for venue, typically "operates as an adjudication on the merits." Rule 41(b). But not every plaintiff, having been kicked out for going to the wrong court, should be forever foreclosed from going to the right court.

In fact, this dismissal issue is a red herring. A court can always issue a dismissal without prejudice if it chooses. See *ibid.* ("Unless the dismissal order states otherwise, * * * ."). Moreover, for purposes of the Civil Rules, an "adjudication on the merits" un-

der Rule 41 means only that the plaintiff cannot "return[] later, to the *same* court, with the same underlying claim." *Semtek Int'l Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497, 505 (2001) (emphasis added). Whether that is "sufficient" to bar the claim in *other* courts does not depend on Rule 41, but on the ordinarily applicable doctrines of preclusion—which might differ based on the forum State or the circumstances of the case, "by direction of *this* Court." *Id.* at 506–07.[14]

More generally, there is nothing strange about viewing forum selection as a defense to liability *in a particular court*. One may have a substantive right—even a nonwaivable right—"to impose liability" on another, without having a similar right to "suit in all competent courts." *CompuCredit Corp.* v. *Greenwood*, 132 S. Ct. 665, 671 (2012) (emphasis omitted). Like venue or personal jurisdiction, forum selection is a

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[14] For example, "[a]t common law dismissal on a ground not going to the merits was not ordinarily a bar to a subsequent action on the same claim." *Costello* v. *United States*, 365 U.S. 265, 285 (1961) (addressing dismissals based on preconditions to suit). A forum-selection dismissal, like a dismissal for forum non conveniens, arguably "'den[ies] audience to a case on the merits,'" deciding only "that the merits should be adjudicated elsewhere." *Sinochem Int'l* v. *Malaysia Int'l Shipping*, 549 U.S. 422, 432 (2007) (alteration in original; quoting *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999)). On the other hand, if a defendant has already "been put to the trouble of preparing his defense," then barring future actions by the plaintiff may be appropriate. See *Costello*, 265 U.S. at 287; accord Restatement (Second) of Judgments § 20, cmt. *n* (1982) (noting that "estoppel or laches" may bar a second suit when "it would be plainly unfair to subject the defendant to a second action").

good defense in some districts but not others. But unlike those defenses, it is has not been given a special status under Rule 12(b).

* * *

Even if it were more convenient to treat forum selection the way we treat personal jurisdiction or venue, the only lawful method of doing so is to amend the Federal Rules. The Court, acting under § 2072, could always add a new Rule 12(b)(8) defense—"violation of a forum-selection clause"—which could be raised by pre-answer motion, subject to waiver under Rule 12(h), and included among the non-merits grounds in Rule 41(b).

No matter how efficient, however, "such a result 'must be obtained by the process of amending the Federal Rules, and not by judicial interpretation.'" *Jones*, 549 U.S. at 217 (quoting *Leatherman* v. *Tarrant Cnty. Narcotics Intelligence & Coordination Unit*, 507 U.S. 163, 168 (1993)). Amendments to the Rules require various procedural formalities, designed to secure important substantive interests. See §§ 2073–2074. Courts should not leapfrog this process by skipping over the statutory text and mislabeling forum-selection clauses as "venue." The Rules treat such clauses, by default, as affirmative defenses; and until that changes, "federal courts and litigants must rely on summary judgment and control of discovery to weed out unmeritorious claims sooner rather than later." *Leatherman*, 507 U.S. at 168–69.

III. The Court Should Assume that the Clause Is Enforceable, Identify the Correct Procedure, Vacate the Judgment, and Leave Remaining Issues To Be Addressed on Remand.

Atlantic Marine and J-Crew agreed that a dispute like this one "shall be litigated" in Norfolk, Va. J.A. 28. The contractual provision embodying that agreement was attached to and incorporated in J-Crew's complaint. J.A. 7–39. If the clause is valid and enforceable, then the complaint on its face revealed a reason why the court in which it was filed (namely, the U.S. District Court for the Western District of Texas) should not grant relief. In other words, the complaint "fail[ed] to state a claim upon which relief can be granted," and could have been dismissed under Rule 12(b)(6).

The facts of this case, however, raise two complications that the Court may wish to avoid.

First, the case arises under state law, and there is much uncertainty over which body of law governs the enforcement of forum-selection clauses under *Erie R.R. Co.* v. *Tompkins*, 304 U.S. 64 (1938). Because the case may be decided without resolving that question, the Court should assume, without deciding, that the clause is valid and enforceable under the relevant body of law.

Second, Atlantic Marine made its Rule 12(b) motion under the label of venue, not failure to state a claim. Whether that was adequate to preserve the issue should be left to the court of appeals to decide in the first instance. That court issued its judgment

on the erroneous assumption that § 1404 transfer was the only available remedy. Pet. App. 5a. The judgment should therefore be vacated and the case remanded for further proceedings.

A. The Court should assume, without deciding, that the clause at issue here is valid and enforceable.

Atlantic Marine assumes that the enforcement of a forum-selection clause in federal court (even in a diversity case) is governed by federal law, and in particular by the standards enunciated in *The Bremen*. See Pet. Br. 5, 13, 17. That is a controversial position, and the Court need not adopt it here.

Most private contracts containing forum-selection clauses are governed by state law. The Court has never decided whether the enforcement of a forum-selection clause on a state-law claim is likewise a matter of state contract law, cf. *Stewart*, 487 U.S. at 38–41 (Scalia, J., dissenting)—and, if so, of which State, see Mullenix, *Another Choice of Forum, Another Choice of Law: Consensual Adjudicatory Procedure in Federal Court*, 57 Fordham L. Rev. 291, 332–39 (1988)—or whether it is so "essential" to the federal courts as to require a federal answer, cf. *Byrd* v. *Blue Ridge Rural Elec. Coop.*, 356 U.S. 525, 537 (1958).[15] This *Erie* question

[15] In *Ferens* v. *John Deere Co.*, a parenthetical dictum described *Stewart* as "holding that federal law determines the validity of a forum selection clause." 494 U.S. 516, 526 (1990). That dictum must be understood in context, namely as explaining how § 1404 effectively "pre-empt[s] state law" by enabling transfers among federal courts that would be impossible in a state

needs answering regardless of the procedural device employed, contra Pet. Br. 18 n.6, and it has produced yet another split among the courts of appeals.[16] The Court has also never expressly stated whether, if federal law applies, the relevant standards are those identified in *The Bremen* and *Shute*—which were both admiralty cases and which limited their analysis accordingly. See *Shute*, 499 U.S. at 590 ("[T]his is a case in admiralty, and federal law governs the enforceability of the forum-selection clause we scrutinize."); *The Bremen*, 407 U.S. at 10 ("We believe this is the correct doctrine to be followed by federal district courts sitting in admiralty.").

Here, J-Crew asserts claims solely under Texas

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system. 494 U.S. at 526. *Stewart* deliberately sidestepped the *Erie* issue, because the case happened to arise on a § 1404 motion, which applies a different legal standard under which the clause is merely one more fact to consider. See 487 U.S. at 28–29. Even a clause that is wholly unenforceable under the relevant law—say, because that law requires special formalities, like the signatures of seven witnesses in red ink—might still be a "significant factor" in the § 1404 analysis if it adequately reflects "the parties' private expression of their venue preferences," *id.* at 29–30. Likewise, even a clause that is fully binding on the parties might not justify § 1404 transfer if the relevant public-interest factors counsel against it. See *id.* at 30–31; Pet. Br. 25. Because § 1404 applies the same multifactor analysis to federal- and state-law claims, *Stewart* did not need to answer the *Erie* question, and so it did not. See 487 U.S. at 26 n.3.

[16] Compare, *e.g., Albemarle Corp.* v. *AstraZeneca UK Ltd.*, 628 F.3d 643, 650 (CA4 2010) (federal law), with *IFC Credit Corp.* v. *United Bus. & Indus. Fed. Credit Union*, 512 F.3d 989, 991 (CA7 2008) (state law).

law. J.A. 9–14. Unlike in *Stewart*, there is no federal statute or rule to apply. Fortunately, however, the Court need not "wade into *Erie*'s murky waters" yet. *Shady Grove*, 130 S. Ct. at 1437. The district court found the forum-selection clause to be consistent with Texas contract law, see Pet. App. 31a, and J-Crew chose not to contest that determination in the court of appeals, see Response to Petition for Writ of Mandamus in No. 12-50826 (CA5), pp. 10–13, or in its brief in opposition. (J-Crew claimed that Texas has "a strong interest in having local construction disputes decided [there]," and cited the state statute the district court found inapplicable, but it declined to argue that Texas law actually forbids enforcement. BIO 4 n.2 (citing Tex. Bus. & Com. Code § 272.001). Nor did J-Crew argue that the clause was invalid or unenforceable under federal standards. See BIO 10–11. Under this Court's Rule 15.2, J-Crew has forfeited any argument that the clause is unenforceable.

For the purposes of this case, then, the Court may assume that the clause is valid and enforceable, whether or not federal courts should generally apply *The Bremen*'s standards to state-law claims—or even to federal claims outside admiralty.

B. The Court should leave all preservation issues for the court of appeals in the first instance.

As noted above, Atlantic Marine framed its motion to dismiss under Rule 12(b)(3) rather than 12(b)(6). J-Crew accordingly argues that a 12(b)(6) theory—and, presumably, the affirmative-defense procedure more generally—is "not properly before the

Court on the merits." BIO 2 n.1; see *id.* at 12–13 & n.6. Because the label of the motion does not always control, these preservation issues should be left for the court of appeals to decide in the first instance.

Atlantic Marine's Rule 12(b) motion to dismiss argued that J-Crew's suit violates a valid and enforceable forum-selection clause. J.A. 48–50. The substance of those arguments would be the same regardless of which 12(b) label they bore. When enforcing forum-selection clauses in motions to dismiss, appellate courts are not always "bound by the label employed below"—especially given the confused state of the law. *Lambert* v. *Kysar*, 983 F.2d 1110, 1112 n.1 (CA1 1993). The court of appeals had previously held that, "[a]s a general matter, the caption on a pleading does not constrain the court's treatment of a pleading," and it has applied this principle to construe motions without regard to their captions. *N. Alamo Water Supply Corp.* v. *City of San Juan*, 90 F.3d 910, 918 (CA5 1996) (*per curiam*) (Rule 59(e) motion).[17] It could equally have chosen to do so here.

The court of appeals did not consider this possibility, in part because it "agree[d]" with the district court that "when a forum-selection clause designates a specific federal forum * * * , a motion to transfer under § 1404(a) is the proper procedural

[17] Cf. 5C Wright & Miller § 1378, at 380 ("In accordance with the basic philosophy of the federal rules, the general attitude of the courts has been that a Rule 12(e) motion need not be filed under a technically correct label for it to be considered as one by the court.").

mechanism for enforcing the clause." Pet. App. 5a. But if Atlantic Marine would be entitled to dismissal, this Court may vacate a judgment founded on an "erroneous view to the contrary." *United States* v. *Jicarilla Apache Nation*, 131 S. Ct. 2313, 2330–31 (2011). The court of appeals may then decide, on a correct view of the law, whether to look past the caption and engage the substance of Atlantic Marine's original motion. As this is a Court of "review, not of first view," *FCC* v. *Fox Television Stations, Inc.*, 556 U.S. 502, 529 (2009) (internal quotation marks omitted), it is enough for this Court to identify the proper procedure, vacate the judgment, and remand the case to the court of appeals.[18]

Atlantic Marine has not relied on the affirmative-defense procedure in its brief to this Court. See Pet. Br. 17–18. Yet the Court may still frame the legal issues properly, whether or not that framing is urged by the parties. "When an issue or claim is properly before the court, the court is not limited to the particular legal theories advanced by the parties, but rather retains the independent power to identify and apply the proper construction of governing law." *Kamen* v. *Kemper Fin. Servs., Inc.*, 500 U.S. 90, 99 (1991). And when an argument falls squarely within the Question Presented and is hardly

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[18] That court may also consider, *e.g.,* whether this relabeling is appropriate on a petition for mandamus, see *Cheney* v. *U.S. Dist. Ct.*, 542 U.S. 367, 380–81 (2004), or whether any error in the district court could be adequately remedied on appeal, see *Lauro Lines*, 490 U.S. at 501.

"foreign to the parties," *Teague* v. *Lane*, 489 U.S. 288, 300 (1989) (plurality opinion), it is no barrier that the argument is presented only by an *amicus curiae*. See *id.*; see also, *e.g., Humana Inc.* v. *Forsyth*, 525 U.S. 299, 309–10 (1999).

If possible, the Court should correctly resolve the multidirectional circuit split that necessitated the grant of certiorari. If the Court is reluctant to discuss the affirmative-defense procedure, *amicus* respectfully urges that the Court make that reluctance explicit. An opinion that does no more than find Rule 12(b)(3) or § 1406 motions inappropriate, without explicitly clarifying what other procedures might still be available, will at best leave portions of the many-sided split in place. At worst, it may be misunderstood as endorsing § 1404—or a separate suit for damages—as the only available means of relief.[19]

[19] Because Atlantic Marine requested dismissal, not just transfer, the Court should reach these issues regardless of how it resolves the second Question Presented. No matter how favorable the burden of proof, limiting the remedy to § 1404 effectively rewards a plaintiff's breach of contract. Pet. Br. 20.

CONCLUSION

The judgment of the court of appeals should be vacated and the case remanded for further proceedings.

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