No. 17-1662

In The
Supreme Court of the United States

ASPEN INSURANCE (UK) LTD and
LLOYD'S SYNDICATE 2003,

Petitioners,

v.

BLACK & VEATCH CORPORATION,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Tenth Circuit**

BRIEF FOR BLACK & VEATCH CORPORATION IN OPPOSITION TO PETITION FOR CERTIORARI

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COUNTERSTATEMENT OF QUESTION PRESENTED

Is the Petitioners' claimed circuit split regarding *Erie*-prediction methodology a real circuit split, or just language from the circuit cases echoing two perfectly consistent aspects of this Court's thoroughly-articulated and well-understood directions on how federal courts should predict state law when required to do so under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938)?

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OTHER AUTHORITIES

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I. SUMMARY

This case required the Tenth Circuit to either certify a novel issue of New York insurance law to the New York Court of Appeals, or predict how New York's high court would rule under the familiar principles of *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938).

Petitioners (collectively Aspen Insurance or Aspen) urged the Tenth Circuit not to certify the question. Supp. App. 11-13. Agreeing with Aspen Insurance's position that certification was not warranted, App. 39a-40a, the Tenth Circuit panel predicted New York law, and, in an extraordinarily thorough and carefully-reasoned decision, reversed the District Court's summary judgment on the insurance coverage issue. App. 8a-42a.

Using the dissenting panel member's comments about *Erie*-prediction as a springboard, Aspen Insurance urges this Court to take certiorari to resolve a supposed circuit split in *Erie*-prediction methodology. According to Aspen Insurance, some circuits defer to state intermediate appellate court decisions unless they find some convincing reason not to do so (the "deference standard"); whereas other circuits consider intermediate opinions alongside other types of evidence to predict how a state supreme court would rule (the "one item of evidence among many standard"). Pet. 9.

There is no such split. The two supposed standards are just different ways of describing the single and consistent methodology articulated by this Court for how federal courts should predict state law when required. As this Court explained in its seminal opinion on *Erie*-prediction methodology, the "deference" standard is a particular application of the "one item of evidence among many" standard, which is the general rule. *West v. American Telephone & Telegraph Company*, 311 U.S. 223, 227 (1940). That is, federal courts consider and give proper weight to all of the available

data in making *Erie* predictions; and in those circumstances where the available data consists of intermediate appellate opinions (and there is no reason to think that the state supreme court would reject these intermediate opinions), a federal court naturally defers to those intermediate opinions. The "deference" scenario is just one *Erie*-prediction scenario, and was mentioned in *West* to emphasize the core principle of *Erie* that federal courts do not presume to make up state law themselves out of whole cloth.

The absence of a true circuit split is further apparent from Aspen Insurance's failure to cite a single case in which a circuit court recognizes a split in *Erie*-prediction methodology. Similarly, a review of the caselaw confirms that cases from all of the circuits routinely use *Erie*-prediction methodology language from both sides of the supposed split, confirming that the "split" is just two ways of describing the same well-settled and well-understood legal process articulated by this Court.

This Court need look no further than this very case to confirm that the supposed split is manufactured and fictitious. The Tenth Circuit's majority opinion here invoked both of Aspen's supposed "standards" of *Erie*-prediction methodology. *See* App. 8a, 32a (acknowledging and applying the *Erie*-prediction rule that federal courts should "follow a decision by an intermediate court unless we find a convincing reason to do otherwise"); and App. 20a-21a, 42a (explaining why the Tenth Circuit predicted that the New York Court of Appeals would not follow the inapposite New York

intermediate appellate decisions, but would instead join the "overwhelming trend among state supreme courts" to find potential coverage under the policy language and circumstances at bar).

There may be certworthy questions regarding *Erie*-prediction methodology that this Court should some day consider. This petition does not present one.

II. OPINIONS BELOW

The Appendix provided by Aspen Insurance omits an important part of the Tenth Circuit's decisional process that is relevant to this Court's certiorari analysis.

After briefing and oral argument, the Tenth Circuit ordered the parties to file short supplemental briefs regarding whether the Tenth Circuit should certify the question of New York insurance law to the New York Court of Appeals. Supplemental Appendix 1-2.[1]

Black & Veatch argued that certification was not necessary because the question of law presented by this appeal did not warrant it, but agreed that certification would be appropriate if the Tenth Circuit harbored doubts and therefore did not oppose certification. Supp. App. 14-23, esp. 22.

Aspen Insurance maintained that the Tenth Circuit should not certify the question to the New York

[1] Certification became an option only in the Tenth Circuit. The New York Court of Appeals does not accept certified questions from federal district courts. *See* N.Y. Comp. Code, Rules & Regs., title 22, Rule 500.27(a).

Court of Appeals under any circumstances. Supp. App. 3-13, esp. 11-12 and 13.

Aspen Insurance now seeks certiorari review because the Tenth Circuit followed Aspen's recommendation by not certifying the question, and instead predicted New York law itself – just not the way that Aspen wanted.

III. STATEMENT OF THE CASE

This case involves problems in power plant construction projects that triggered coverage claims in a manuscript commercial general liability insurance policy with a New York choice of law provision. This Court does not need to delve into the details of the projects, the insurance policies or the coverage question to appreciate that Aspen Insurance's claimed basis for certiorari – a supposed circuit split in *Erie*-prediction methodology – is meritless. A brief review of this insurance coverage lawsuit is nonetheless useful because it additionally confirms that the Tenth Circuit predicted the underlying question of state insurance law correctly, and that in any event the state law question is the type of matter this Court does not exercise its certiorari powers to review for correctness.

Black & Veatch was the general contractor on several power plant projects. Deficiencies in the components supplied a subcontractor, and built by that subcontractor and its lower-tier subcontractors, caused some $225 million in damage to the projects, including

damages to portions of the projects that were not defective. App. 3a.

Black & Veatch tendered a claim for property damages as defined in the policy that was substantially less than the full damages sustained. App. 4a. Aspen Insurance had written a manuscript CGL policy that included a standard coverage provision, an exclusion for "Your Work," and an exception to that exclusion for work performed by subcontractors. App. 4a-7a.

To oversimplify the parties' positions relevant to the Tenth Circuit's analysis that Aspen uses for its circuit split argument: Aspen argued that coverage was precluded, and offered several New York intermediate appellate decisions that applied the Your Work exclusion to negate coverage for defective work. Black & Veatch argued that all of the New York intermediate appellate decisions were distinguishable for a variety of reasons, including that they did not involve or apply the subcontractor exception to the Your Work exclusion. Black & Veatch urged the Tenth Circuit to interpret the policy the way the New York Court of Appeals would: from first principles of contract law and insurance law as set forth by the New York Court of Appeals, with due regard for the way the policy was written (including the history of the policy provisions at issue), and by distinguishing the inapposite New York intermediate appellate decisions in favor of truly apposite and far more thorough analyses from other states.

After oral argument, the Tenth Circuit asked the parties whether it should certify the insurance

coverage question to the New York Court of Appeals. Supp. App. 1-2. Black & Veatch was willing, Supp. App. 22; but Aspen Insurance urged the Court not to. Supp. App. 13.

The Tenth Circuit determined that certification was not warranted. App. 39a-40a. The majority agreed with Black & Veatch's analysis that the New York intermediate appellate caselaw was inapposite and distinguishable, and therefore provided no useful data for predicting how the New York Court of Appeals would decide the coverage issue at bar. *E.g.* App. 9a, 32a-41a. The Tenth Circuit predicted New York law by applying relevant principles of New York insurance and contract law, and looking to how other state supreme courts had addressed the precise situation at bar. App. 8a-31a, 42a. The panel majority noted the extent to which the New York Court of Appeals *itself* relies on other authorities besides lower New York court decisions, including apposite decisions from other states, treatises, and law review articles, in these precise circumstances. App. 31a, n.16.

IV. REASONS FOR DENYING THE WRIT

This Court has not addressed the methodology of *Erie* prediction for some time, but that is because this Court clearly and thoroughly explained the methodology in the wake of *Erie*, and there has been no need to revisit the issue. Aspen Insurance certainly cannot offer any real circuit split in *Erie*-prediction

methodology, or other reason for this Court to revisit this area of the law now, in this case.

A. The Tenth Circuit's *Erie* prediction comports with this Court's *Erie*-prediction methodology, as clearly and consistently explained by this Court and the circuits.

1. The Tenth Circuit's *Erie* prediction follows this Court's teachings.

In the immediate aftermath of *Erie*, this Court issued several opinions that provided thoughtful and thorough guidance to federal courts on how to predict state law, when required to do so under *Erie*.

In the first of these cases, *West v. American Telephone & Telegraph Company*, this Court described the *Erie*-prediction process in language from which Aspen Insurance derives both sides of its manufactured circuit split:

> [I]t is the duty of [federal courts] in every case to **ascertain from all the available data** what the state law is and apply it. . . .
>
> Where *an intermediate appellate state court* rests its considered judgment upon the rule of law which it announces, that is a datum for ascertaining state law which *is not to be disregarded by a federal court unless it is convinced by other persuasive data* that the highest court of the state would decide otherwise.

311 U.S. 223, 227 (1940) (emphases added). The first quoted sentence with bolded emphasis is the original articulation of Aspen's supposed "one item of evidence among many standard," which Aspen argues is on one side of a circuit split. The second quoted sentence with italicized emphasis is the original articulation of the supposed "deference standard" on the other side of the claimed split. *See* Pet. 9.

These two "standards" offered by Aspen do not represent a split, but just different ways of describing the single and consistent *Erie*-prediction methodology first articulated by this Court in *West*. The rule of *West* is that federal courts consider all available data in making *Erie* predictions. When there are many available data, including an intermediate appellate decision, that intermediate appellate decision will be one item among many data for the federal court to consider. And when there are no data more persuasive than the intermediate appellate decision, or no other data at all, then that intermediate decision will command deference. *West*, 311 U.S. at 227. Even if the intermediate appellate decision strikes the federal court as wrongly decided, it will control in the absence of any other data suggesting that the state supreme court would decide the issue differently – that is the essence of *Erie*'s directive that federal courts apply state law as it is, and do not substitute their own notions of what the law should be for the law that has been or would be articulated by the state's high court or other organs.

Aspen's supposed "deference" standard is thus not a different rule for *Erie* prediction, but a specific

application of the direction to consider all available data in a situation where the only data, or best data, are intermediate appellate decisions.

Two other Supreme Court cases from the same term applied the presumption of favoring intermediate appellate decisions in the absence of any other persuasive data that would suggest the state supreme court might rule differently. *See Fidelity Union Trust Co. v. Field*, 311 U.S. 169, 177-78 (1940); *Six Companies of California v. Highway District No. 13 of California*, 311 U.S. 180, 188 (1940). These cases did not change or elaborate on the *Erie*-prediction methodology announced in *West*, which is not surprising given they were announced the same day as *West*, which contains the dominant analysis.

The Supreme Court announced one other *Erie*-prediction case that same term which similarly did not elaborate on *West*'s methodology, but merely applied it in a situation where state law was evolving. *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941) (confirming that as state law changes, federal predictions of state law change along with it).

Later that decade, the Supreme Court explained that not all state lower-court precedent is created equal. In *King v. Order of United Commercial Travelers of America*, the Supreme Court contrasted the lesser *Erie*-prediction weight to be given a state trial court-level decision from the greater weight to be given to a decision of an intermediate appellate court. 333 U.S. 153, 160-61 (1948).

In the following decade, the Supreme Court elaborated on the other "data" besides lower state court decisions that federal courts should consider in their *Erie* predictions. *Bernhardt v. Polygraphic Co. of America, Inc.*, 350 U.S. 198, 205 (1956) (considering whether lower state court decisions, state legislative developments, or any other state judicial "dicta, doubts or ambiguities" suggest that state supreme court might overrule prior precedent).

In its latest opinion discussing *Erie*-prediction methodology, this Court returned to first principles of *West* to again note that a lower state court decision is not controlling, but merely "a datum" to be used by federal courts in predicting how the current state supreme court would rule. *Commissioner of Internal Revenue v. Estate of Bosch*, 387 U.S. 456, 465 (1967). As a result, this Court emphasized, "federal authority may not be bound even by an intermediate state appellate court ruling." *Id.*

The Tenth Circuit's *Erie* prediction of New York law here comports perfectly with these controlling and fully consistent explanations of *Erie*-prediction methodology. The panel majority gave thorough consideration to every New York intermediate appellate decision offered by Aspen Insurance, and gave them the same weight that the panel predicted the New York Court of Appeals would, had it been deciding this case. The panel chose not to follow these intermediate appellate decisions because they were all inapposite, and the panel distinguished them the way it determined the New York Court of Appeals would. *E.g.*,

App. 9a, 32a-41a. This is the sort of *Erie*-prediction methodology directed by the above Supreme Court cases, including in particular *West* and *Bosch*, which both hold that if a state supreme court would distinguish intermediate appellate decisions as inapposite, then that is what a federal court should do. That is precisely what the Tenth Circuit panel majority correctly did here.[2]

2. The circuits have had no difficulty applying this Court's *Erie*-prediction teachings.

Circuit cases applying this Court's *Erie*-prediction teachings from the above cases naturally discuss and elaborate on this interesting area of the law. The inevitable fact that these circuit decisions discuss this Court's *Erie*-prediction methodology in differing ways does not mean that the circuits disagree with one another.

The most notable circuit case elaborating on *Erie*-prediction methodology is *McKenna v. Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3d Cir. 1980), where the

[2] The fact that the one dissenting panel member interpreted the New York intermediate appellate cases differently does not suggest any problem with the majority's *Erie*-prediction methodology. Rather, the dissent simply shows how judges can and do disagree, and how the disagreement in this context might have merited certification of the issue to the New York Court of Appeals. App. 48a (Briscoe, J., dissenting, urging certification). As noted, the panel asked the parties their position regarding certification: Black & Veatch was willing, but Aspen opposed certification. *See* Supp. App.

Third Circuit canvassed this Court's decisions and other circuit cases interpreting those decisions to describe the breadth of available data:

> [A federal court's *Erie*] prediction cannot be the product of a mere recitation of previously decided cases. *In determining state law, a federal tribunal should be careful to avoid the danger of giving a state court decision a more binding effect than would a court of that state under similar circumstances. Rather, relevant state precedents must be scrutinized with an eye toward the broad policies that informed those adjudications, and to the doctrinal trends which they evince*. . . .
>
> *Of somewhat less importance to a prognostication of what the highest state court will do are decisions of lower state courts* and other federal courts. Such decisions should be accorded proper regard of course, but not conclusive effect. Thus, the Supreme Court has held that *although the decision of a lower state court should be attributed some weight, the decision is not controlling* where the highest court of the State has not spoken on the point. Thus, under some conditions, *federal authority may not be bound even by an intermediate state appellate court ruling*. Additionally, federal courts may consider scholarly treatises, the Restatement of Law, and germane law review articles particularly, it seems, of schools within the state whose law is to be predicted.

622 F.3d at 662-63 (cleaned up, emphases added). This comprehensive summary, endorsed by the Wright &

Miller treatise, reflects the Tenth Circuit's careful and thorough *Erie*-prediction analysis here. App. 8a-42a.

Seventh Circuit Judge Posner has suggested a simpler rubric that cuts to the chase: because state supreme courts generally have the luxury of choosing which cases to take, and provide more thorough and considered analysis than trial courts and intermediate appellate courts do, other state supreme court decisions will usually be better reasoned and therefore deserve careful consideration in an *Erie*-prediction analysis. *Vigortone AG Products, Inc. v. PM AG Products, Inc.*, 316 F.3d 641, 644 (7th Cir. 2002) ("When state law on a question is unclear, which is surely the proper characterization here, the best guess is that the state's highest court, should it ever be presented with the issues, will line up with the majority of the states."). The Tenth Circuit's *Erie* prediction here confirms the wisdom of Judge Posner's observation. *See* App. 29a-31a (discussing trend among state supreme courts as achieving "near unanimity" in their analyses, with 21 state supreme courts rejecting Aspen's position and finding potential coverage under the facts at bar).

The Tenth Circuit unquestionably performed its *Erie* prediction correctly and in accordance with this Court's teachings to determine a common law insurance contract interpretation issue the way the New York Court of Appeals would have. The New York intermediate appellate decisions that Aspen Insurance argues should command deference here are all inapposite because they do not consider the subcontractor

exception to the "Your Work" exclusion to coverage. App. 9a, 31a-39a. The panel therefore distinguished these intermediate cases because that is what the New York Court of Appeals would do in this situation. App. 33a, n.18. Given the dearth of truly apposite intermediate appellate decisions from New York, the panel majority properly looked to other authorities, including apposite decisions from other states, treatises, and law review articles – again, because that is what the New York Court of Appeals would do. App. 31a, n.16 (citing six New York Court of Appeals cases in which the high court looked beyond New York intermediate appellate decisions when interpreting insurance policies).[3]

The Tenth Circuit decision thus comports perfectly both with this Court's teachings on *Erie* prediction, and also later circuit courts' elaboration of those teachings.

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[3] The New York Court of Appeals' willingness to consider authority beyond its own intermediate appellate courts is one of the factors that makes the New York Court of Appeals a leading and highly respected state supreme court, and one of the reasons parties often choose New York law in their contracts and insurance policies. By contrast, decisions by the busy Appellate Divisions of the New York Supreme Court are often quite summary. *See*, *e.g.*, App. 37a (noting that one of the intermediate decisions offered by Aspen Insurance, *Baker Residential Limited Partnership v. Travelers Insurance Co.*, 10 A.D.3d 586, 782 N.Y.S.2d 249 (App.Div. 2004), is a mere two paragraphs / five sentences long). Certainly none of the inapposite and distinguishable intermediate appellate decisions that Aspen cited below undertook the sort of extraordinary and detailed analysis that the Tenth Circuit, channeling the New York Court of Appeals, did here.

B. The circuits have not developed any split regarding *Erie*-prediction methodology.

1. Aspen Insurance's supposed circuit split consists of minor textual variation in circuit court descriptions of this Court's *Erie*-prediction methodology.

By expounding on this Court's teachings from 1940 through 1967, *McKenna*, *Vigortone*, and other similar circuit cases have naturally generated some detailed discussions of *Erie*-prediction methodology. Any sufficiently rich text can be deconstructed, which is what Aspen Insurance attempts to do here. But like so much academic textual deconstruction, Aspen fails in its attempt to tease a circuit split out of ordinary linguistic variation in text.

The most compelling evidence that there is no circuit split in *Erie*-prediction methodology is that Aspen Insurance fails to cite a single circuit case recognizing any split. This one fact dispositively confirms that the proffered basis for Aspen's certiorari petition is meritless.

Instead of any actual federal or other caselaw recognizing a circuit split, Aspen Insurance offers two secondary sources: a Corpus Juris Secundum entry on *Erie* prediction, and a law review article.

The C.J.S. entry describes two "views" on the role of state intermediate appellate decisions: some federal courts defer to these intermediate decisions; while

others give these decisions proper weight, but do not treat them as binding. Pet. 6-8, citing 36 C.J.S. Federal Courts § 201. Close reading of the C.J.S. entry, however, confirms that there are not actually two differing views, as in two distinct approaches to *Erie* prediction. Rather, the entry describes the same two situations that this Court described in *West* back in 1940: If the only data are intermediate appellate decisions, these decisions should command deference (unless there is some reason to think the state supreme court would not rule the same way); but where there are other data suggesting the state supreme court would take a different path, a federal court gives the intermediate decisions proper weight, but is not bound by them, and considers the other data as well in predicting how the state supreme court would rule.

The law review article similarly mischaracterizes these two *Erie*-prediction situations as though they were two distinct approaches, when they are in fact two applications of a single rule. Pet. 9, citing Benjamin C. Glassman, "Making State Law in Federal Court," 41 Gonzaga Law Review 237 (2005). Aspen Insurance describes Glassman's article as reviewing how the circuits have failed to agree upon a "consistent approach" to *Erie*-prediction methodology. *Id.*, citing Glassman at 263. But on close reading, what Glassman describes as a failure to agree on a consistent approach amounts to mere textual differences in how various circuit court decisions have described the methodology. For example, Glassman's article quotes a 2002 Ninth Circuit decision as mentioning "treatises" as data that

may be considered; and then quotes a 2003 Ninth Circuit decision reciting the same formulation but substituting the phrase "decisions from other jurisdictions" for "treatises." *Id*. at 263, citing *Vasquez v. North County Transit Dist*., 292 F.3d 1049, 1054 (9th Cir. 2002) and *Gravquick A/S v. Trimble Navigation Int'l Ltd*., 323 F.3d 1219, 1222 (9th Cir. 2003). Of course, most treatises consist of collections of decisions from various jurisdictions, and a summary of the rule that emerges from these decisions. The two Ninth Circuit cases are thus saying the same thing in slightly different ways. Other aspects of Glassman's analysis similarly confirm that he is engaging in textual deconstruction by highlighting different ways of saying the same thing, rather than identifying any true inconsistency in the circuits' approach to *Erie* prediction.

And in any event, neither Glassman nor the C.J.S. entry suggests there is anything like a real circuit split in *Erie*-prediction methodology.

2. Because Aspen Insurance's supposed circuit split is based on mere textual variation, all circuits are on both sides of the supposed split.

Another way to confirm the falsity of Aspen Insurance's purported circuit split is by showing that all the circuits have cases on both sides of the supposed split. They do.

Aspen Insurance asserts that the Second, Fourth, Fifth, Sixth, Seventh and Eleventh Circuits supposedly apply a "deference standard," in which a federal court defers to a state's intermediate appellate decisions unless it is convinced the state supreme court would rule otherwise. Pet. 6-7. And the First, Third, Ninth and now Tenth Circuits supposedly apply a "one item of evidence among many standard," in which state intermediate appellate decisions are considered along with other data. Pet. 7-8.

As noted, both supposed standards were articulated in this Court's seminal *Erie*-prediction opinion of *West*, 311 U.S. at 227; and *West* confirms that the supposed "deference" standard is really just one potential application of the more general rule that federal courts must "ascertain from *all the available data* what the state law is." *Id.* As a result, caselaw can be found in all of the circuits that discuss both of Aspen's supposed "standards."

This case provides a dispositive example. Aspen Insurance asserts that the Tenth Circuit joined the "one item of evidence among many" standard because it did not defer to the New York intermediate appellate decisions that Aspen offered. Pet. 8. But the Tenth Circuit also acknowledged and applied the so-called "deference standard." App. 8a ("we follow a decision by an intermediate court unless we find a convincing reason to do otherwise"); 32a ("a decision by an intermediate court should be followed by the Federal court, absent convincing evidence that the highest court would decide otherwise"). The Tenth Circuit gave the

intermediate appellate decisions proper consideration, but it did not defer to these decisions because it found a convincing reason not to: because they are all inapposite, and the New York Court of Appeals would not prefer, *e.g.*, an inapposite two-paragraph intermediate appellate court decision to the truly apposite and better reasoned analyses of other state supreme courts and treatises.

Cases from all the other circuits can similarly be found that acknowledge and apply the opposite "standard" from the one Aspen Insurance ascribes to them. The following chart lists the circuits, the side of the supposed "split" that Aspen places them on, and then offers a sample case that could be used to put each circuit on the other side of the supposed split:

Circuit	"Deference" standard	"One item among many" standard
First	*CPC Int'l, Inc. v. Northbrook Excess & Surplus Ins. Co.*, 962 F.2d 77, 91 (1st Cir. 1992)	**Pet. 8**, citing *In re Montreal, Maine & Atlantic Ry. Co.*, 888 F.3d 1, 8 (1st Cir. 2018)
Second	**Pet. 7**, citing *Mayes v. Summit Entertainment Corp.*, 287 F. Supp. 3d 200, 207 (E.D.N.Y. 2018)	*Michalski v. Home Depot, Inc.*, 225 F.3d 113, 116 (2d Cir. 2000) (quoting *West* for both "standards")

Third	*Illinois Nat. Ins. Co. v. Wyndham Worldwide Operations, Inc.*, 653 F.3d 225, 231 (3d Cir. 2011)	**Pet. 8**, citing *Illinois Nat'l Ins. Co. v. Wyndham Worldwide Operations, Inc.*, 653 F.3d 225, 231 (3d Cir. 2011)
Fourth	**Pet. 7**, citing *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1003 (4th Cir. 1998)	*Bocook v. Ashland Oil, Inc.*, 819 F. Supp. 530, 534 (S.D.W.Va. 1993)
Fifth	**Pet. 7**, citing *Guilbeau v. Hess Corp.*, 854 F.3d 310, 312 (5th Cir. 2017)	*Putman v. Erie City Mfg. Co.*, 338 F.2d 911, 917 (5th Cir. 1964)
Sixth	**Pet. 7**, citing *Yates v. Ortho-McNeil-Janssen Pharmaceuticals, Inc.*, 808 F.3d 281, 289 (6th Cir. 2015)	*In re Darvocet, Darvon, & Propoxyphene Prod. Liab. Litig.*, 756 F.3d 917, 937 (6th Cir. 2014)
Seventh	**Pet. 7**, citing *Community Bank of Trenton v. Schnuck Markets, Inc.*, 887 F.3d 803, 816 (7th Cir. 2018)	*Gillam v. J. C. Penney Co.*, 341 F.2d 457, 463 (7th Cir. 1965); *In re Crane*, 487 B.R. 906, 909 (C.D. Ill.), *aff'd*, 742 F.3d 702 (7th Cir. 2013)
Eighth	*B.B. v. Cont'l Ins. Co.*, 8 F.3d 1288, 1291 (8th Cir. 1993)	*B.B. v. Cont'l Ins. Co.*, 8 F.3d 1288, 1291 (8th Cir. 1993)

Ninth	*In re Watts*, 298 F.3d 1077, 1082 (9th Cir. 2002)	**Pet. 8**, citing *Glendale Assocs., Ltd. v. N.L.R.B.*, 347 F.3d 1145, 1154 (9th Cir. 2003)
Tenth	*Black & Veatch Corporation v. Aspen Insurance (UK) Ltd.*, 882 F.3d 952, 967 (10th Cir. 2018)	**Pet. 8**, citing *Black & Veatch Corporation v. Aspen Insurance (UK) Ltd.*, 882 F.3d 952, 967 n.18 (10th Cir. 2018)
Eleventh	**Pet. 6**, citing *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835, 848 (11th Cir. 2018)	*Bravo v. United States*, 577 F.3d 1324, 1326 (11th Cir. 2009)

The fact that cases can easily be found that would place each circuit on both sides of Aspen Insurance's supposed split is no surprise, since the non-split is based on two sentences in this Court's controlling decision in *West* that describe aspects of a single *Erie*-prediction process. And indeed, some cases, like the Second Circuit decision in *Michalski*, go directly to the source and quote this Court's opinion in *West* for both of Aspen's so-called "standards."

It is also worth noting that this is not the first time a litigant has tried to manufacture a faux circuit split from the language of *West*. This Court denied a similar certiorari petition in *Blue Springs Ford Sales, Inc. v. Grabinski*, No. 99-2029, *cert. denied*, 531 U.S. 825 (2000).

There may be certworthy issues concerning *Erie*-prediction methodology that this Court may wish to take up some day, such as the *stare decisis* value that should attach to a circuit court *Erie* prediction of state law. But the issue of how federal courts predict state law is well-settled, well-understood, and perfectly consistent across the circuits.

V. CONCLUSION

For the foregoing reasons, the petition for writ of certiorari should be denied.

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