No. _____

In The
Supreme Court of the United States

NORMAN BLOOM,

Petitioner,

v.

AFTERMATH PUBLIC ADJUSTERS, INCORPORATED; MICHAEL BACIGALUPO,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

This Court holds that when a state has adopted procedures for certification of state law questions, a federal court exercising diversity jurisdiction should certify dispositive state law questions when the state law is not clear or is nonexistent and the issue is significant to the state. There is a dramatic split among the circuits as to what standards they should apply when exercising their discretion to certify a state law question with some circuits focusing on the state certification rules and the others not. The result is that some circuits have a much lower percent of state law questions being certified than other circuits. With the forgoing in mind, the question presented in this petition is:

> Whether the language of a state's certification rule should factor into the federal court's decision to certify a dispositive state law question in a diversity case when state law is not clear or is nonexistent on an issue significant to the state.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Norman Bloom;
2. Aftermath Public Adjusters, Incorporated;
3. Michael Bacigalupo.

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PETITION FOR WRIT OF CERTIORARI

Petitioner Norman Bloom respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the court of appeals (App. 1-7) is reported at 902 F.3d 516 (5th Cir. 2018). The opinion of the district court (App. 8-16) is reported at 2017 WL 6025517.

JURISDICTION

The judgment of the court of appeals was entered on September 4, 2018. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 58 of the Texas Rules of Appellate Procedure, which authorizes federal appellate courts to certify state law questions to the Texas Supreme Court, states:

Rule 58. Certification of Questions of Law by United State Courts

58.1. Certification

The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

58.2. Contents of the Certification Order

An order from the certifying court must set forth:

(a) the questions of law to be answered; and

(b) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.

58.3. Transmission of Certification Order

The clerk of the certifying court must send to the clerk of the Supreme Court of Texas the following:

(a) the certification order under the certifying court's official seal;

(b) a list of the names of all parties to the pending case, giving the address and telephone number, if known, of any party not represented by counsel; and

(c) a list of the names, addresses, and telephone numbers of counsel for each party.

58.4. Transmission of Record

The certifying court should not send the Supreme Court of Texas the record in the pending case with the certification order. The Supreme Court may later require the original or copies of all or part of the record before the certifying court to be filed with the Supreme Court clerk.

58.5. Fees and Costs

Unless the certifying court orders otherwise in its certification order, the parties must bear equally the fees under Rule 5.

58.6. Notice

If the Supreme Court agrees to answer the questions certified to it, the Court will notify all parties and the certifying court. The Supreme Court clerk must also send a notice to the Attorney General of Texas if:

(a) the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer; and

(b) the State of Texas or an officer, agency, or employee of the state is not a party to the proceeding in the certifying court.

58.7. Briefs and Oral Argument

(a) *Briefs*. The appealing party in the certifying court must file a brief with the Supreme Court clerk within 30 days after the date of the notice. Opposing parties must file an answering brief within 20 days after receiving the opening brief. Briefs must comply with Rule 55 to the extent its provisions apply. On motion complying with Rule 10.5(b), either before or after the brief is due, the Supreme Court may extend the time to file a brief.

(b) *Oral Argument*. Oral argument may be granted either on a party's request or on the Court's own initiative. Argument is governed by Rule 59.

58.8. Intervention by the State

If the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer the State of Texas may intervene at any reasonable time for briefing and oral argument (if argument is allowed), on the question of constitutionality.

58.9. Opinion on Certified Questions

If the Supreme Court has agreed to answer a certified question, it will hand down an opinion as in any other case.

58.10. Answering Certified Questions

After all motions for rehearing have been overruled, the Supreme Court clerk must

> send to the certifying court the written opinion on the certified questions. The opinion must be under the Supreme Court's seal.

TEX. R. APP. P. 58.

STATEMENT OF THE CASE

After Gracie Reese's home in Galveston, Texas, was damaged during Hurricane Ike in 2008, she hired respondent Aftermath Public Adjusters, Inc. ("Aftermath"), a Texas-licensed public adjusting firm, to assist her to estimate her damages and collect from a standard flood insurance policy she had purchased from Fidelity National Property and Casualty Company ("Fidelity"). App. 2, 8. Respondent Michael Bacigalupo was the licensed public adjuster assigned to the case. App. 2. Reese eventually sued Fidelity to recover under the policy but the court granted Fidelity's motion for summary judgment which argued that she had not timely provided the proper documents required by standard flood policy regulations. App. 2-3, 9.

On September 8, 2016, Reese sued Aftermath and Bacigalupo in a Texas state court in Galveston based on Texas professional negligence law because they had improperly handled her standard flood insurance claim by failing to timely provide the proper documents required by standard flood policy regulations. App. 3. Aftermath and Bacigalupo removed the case to federal district court in Galveston based on diversity of citizenship, 28 U.S.C. § 1332, and defended on the

basis of the two- and four-year Texas statutes of limitations because Reese filed her public adjuster malpractice lawsuit approximately seven years after Fidelity denied the standard flood policy claim. App. 3. Limitations is a bar to the case only if the judicially created *Hughes* tolling rule does not apply to public adjuster professional negligence claims under Texas law. See *Hughes v. Mahoney & Higgins*, 821 S.W.2d (Tex. 1991) (holding that the statute of limitations on a legal malpractice claim is suspended until completion of the litigation from which the malpractice arises). There is no Texas authority answering whether the *Hughes* tolling rule applies to public adjuster professional negligence claims. App. 4-6.

Reese died before the final judgment was entered and her grandson, petitioner Norman Bloom, was substituted as plaintiff. App. 3.

Aftermath and Bacigalupo filed a motion for summary judgment arguing that Bloom's public adjuster malpractice claim was barred by limitations. App. 10. Bloom responded by arguing that the claim was not barred because the limitations period was tolled under the *Hughes* tolling rule during the period that the Fidelity litigation was pending. App. 10, 12. Bloom did not request the federal district court to certify the question of whether the *Hughes* tolling rule applies to public adjuster malpractice claims because the Texas state-law certification rule only allows for certification from federal courts of appeals. See TEX. R. APP. P. 58.1. In making an *Erie* guess, the federal district court concluded that the under Texas law the *Hughes* tolling

rule does not apply to public adjuster professional negligence claims and therefore granted Aftermath and Bacigalupo's motion for summary judgment. App. 1, 12.

On appeal, Bloom argued that under Texas law the *Hughes* tolling rule applies to public adjuster professional negligence claims, and that because the Texas law in this regard had not previously been ruled on by the Texas appellate courts, the issue should be certified to the Texas Supreme Court under Rule 58 of the Texas Rules of Appellate Procedure for a definitive answer. App. 6. Specifically, Bloom requested the court of appeals to certify the following question to the Texas Supreme Court:

> Whether the Texas *Hughes* tolling rule applies to professional negligence claims against public adjusters who practice law pursuant to the Texas Public Adjuster Act.

Aplt. Br. 8, 17.

The court of appeals rejected Bloom's request to certify the question stating that the decision to certify "turns on several factors, the most important of which are 'the closeness of the question and the existence of sufficient sources of state law.' But here Texas law is clear." (citing in a footnote *Swindol v. Aurora Flight Scis. Corp*., 805 F.3d 516, 522 (5th Cir. 2015) and *Williamson v. Elf Aquitaine, Inc.*, 138 F.3d 546, 549 (5th Cir. 1998)). App. 6-7. In concluding that Texas law does not apply the *Hughes* tolling rule to public adjuster malpractice claims, the court of appeals relied on *Apex*

Towing Co. v. Tolin, 41 S.W.3d 118, 119-120 (Tex. 2001), and said of that opinion that "the court described *Hughes* as a 'bright-line rule' that tolls limitations 'when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation[,]" (quoting *Apex Towing*), and from this reasoned that:

> By definition, Bloom's claims cannot implicate the unique relationship that triggers the bright-line rule from *Hughes*. Only Texas has the power to say where lawyering ends and adjusting begins, just as its courts have the sole power to decide *Hughes*'s outer bounds. Accordingly, we reject Bloom's proposed expansion.

App. 5-6.

REASONS FOR GRANTING THE PETITION

I. The circuit courts apply widely divergent standards as to how a federal court should exercise its discretion in deciding whether to certify a state law question to a state's high court.

A federal court exercising diversity jurisdiction must apply the relevant state substantive law to the case before it. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see also *Wichila Royalty Co. v. Nat'l Bank*, 306 U.S. 103, 107 (1939). In such a case, the federal court must, of course, first determine what the state substantive law is so that it can then apply that law to

the facts thereby reaching the conclusion required by the state law. Generally this is not a complex task because the state law is readily ascertainable. Less often the state law is not clear at all, or worse, nonexistent.[1] Even then, the federal court must determine the state law either by *Erie* guess or certification of the state law question to the state's high court[2] because the plaintiff is entitled to an adjudication of its case regardless of the complexities of determining state law.[3]

Diversity jurisdiction was created so that federal courts can serve as a neutral forum between litigants by minimizing possible unfairness by state courts,

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[1] Compare *Erie*, 304 U.S. at 78 (instructing federal courts to use the state's substantive law as "declared by its legislature in a statute or by its highest court in a decision"), with *Stoner v. N.Y. Life Ins. Co*., 311 U.S. 464, 468-469 (1940) (reversing court that failed to follow Missouri law stated in state court of appeals decision but where no Missouri Supreme Court decision addressed the issue). See also *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1965) ("The State's highest court is the best authority on its own laws.") and *id*. ("If there be no decision by that Court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of the courts of the state.").

[2] All states except for North Carolina have certification procedures. Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN STATE L. REV. 377, 384-385 n. 59 (2010) (citing the state statutes and rules).

[3] *Meredith v. City of Winter Haven*, 320 U.S. 228, 234-235 (1943) (A federal court may not deny the plaintiff the opportunity to assert its rights in federal court rather than state court "merely because the answers of state law are difficult or uncertain or have not yet been given by the highest court of the state.").

judges and juries, against outsiders.[4] Thus in theory, the only motive a plaintiff would have to file a case in federal court or a defendant would have to remove a case to federal court is to ensure a fair forum which might not be available in state court; the motive would never be to shop for a forum that applies a more favorable substantive law because the substantive law applied in either court is identical.[5] However, if federal courts exercising diversity jurisdiction do not scrupulously adhere to state law, the underlying purpose of diversity jurisdiction is turned on its head by building in a motive for the parties to forum shop because once it becomes apparent to the parties that the federal court does not adhere to the state law exactly as the state court would, the substantive outcome can only tilt one way or the other from how it would in state court.[6] A federal court's strict adherence to state law

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[4] *Burford v. Sun Oil Co.*, 319 U.S. 315, 336-337 (1943) (Frankfurter, J., dissenting) ("[T]he basic premise of federal jurisdiction based upon diversity of the parties' citizenship is that the federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts . . . to avoid possible unfairness by state courts, state judges and juries, against outsiders[.]").

[5] See *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) ("The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.").

[6] This point was summarized by the Third Circuit Court of Appeals in 1977:

> A diversity litigant should not be drawn to the federal forum by the prospect of a more favorable outcome than he could expect in state courts. But neither should he

also advances federalism by respecting the state's authority to determine its own laws. See *Erie*, 304 U.S. at 78-79.

A federal court's scrupulously adhering to state law is difficult or impossible in the cases that turn on unclear or nonexistent state law. In those cases, the *Erie* guess allows the federal court to move along and decide the case, but it also gives rise to problems regarding forum shopping and federalism because an *Erie* guess can easily miss the mark of what state law would be if decided by the state high court. Certification of state law to the state's high court pursuant to the state's certification rules eliminates the forum shopping problems by allowing the state high court to state what its law is thereby binding both federal and state courts with the result that the substantive law applied in federal and state court is consistently the same; certification eliminates the federalism problems by allowing the state court to declare its substantive law without the federal court doing so. See *Hanan v. Plumer*, 380 U.S. 460, 468 (1965) (*Erie*'s dual purpose is "discouragement of forum shopping and avoidance of inequitable administration of the laws."). Certification also gives the state court the opportunity to update or

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> be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show.

Becker v. Interstate Prop., 569 F.2d 1203, 1206 (1977).

change its laws to changed societal circumstances, and it promotes efficiency and saves time and money.[7]

Whether certification is available or not, federal courts, in respect of our system of federalism, strive to allow state courts to declare what state law is.[8] And this Court has made clear, that when a state provides for certification federal courts should certify in proper cases,[9] that federal courts have discretion when

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[7] See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997) (Certification "allows a federal court faced with a novel state law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."); *Virginia v. Am. Booksellers Ass'n, Inc*., 484 U.S. 383, 396 (1986) (pointing out that certification "is a method by which we may expeditiously obtain [the] construction" of a state statute.); *Lehman Bros. v. Schein*, 416 U.S. 386, 390-391 (1974); (In the case of unclear or nonexistent state law, certification "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism."); *Bernhadt v. Polygraphic Co. of Am., Inc*. 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring) ("Law does change with times and circumstances, and not merely through legislative reforms.").

[8] See *Lehman Bros*., 416 U.S. at 390 ("[W]hen state law does not make the certification procedure available, a federal court not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law on which the federal rule may turn.") (footnote omitted).

[9] *Arizonans for Official English*, 520 U.S. at 78-79, (criticizing lower federal courts for refusal to certify and noting certification requires no "unique circumstances" but only "unsettled questions of state law"); *Brockett v. Spokane Arcades, Inc*., 472 U.S. 491, 510 (1985) (recommending certification and deeming federal court "speculation," where a state court will answer certified questions, as "particularly gratuitous") (O'Connor, J., concurring). See also *Bellotti v. Baird*, 428 U.S. 132, 150-153 (1976).

deciding whether to certify,[10] but also that a district court's determination of what the state law is, is reviewed on appeal *de novo*.[11]

As for what is a proper case for certification, this Court recognizes that where state law is clear, a federal court should *not* certify the question to the state high court.[12] Conversely, when state law is not clear or

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[10] *Lehman Bros*., 416 U.S. at 390-391 ("We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court.") (footnote omitted); and *id*. at 391 (Rehnquist, J., concurring).

[11] *Salve Regina College v. Russel*, 499 U.S. 225, 239 (1991) ("The obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeals review the state-law determinations of district courts *de novo*.").

[12] *Russell*, 499 U.S. at 237 ("In many diversity cases the controlling issues of state law will have been squarely resolved by the state courts, and a district court's adherence to the settled rule will be indisputably correct."); *Houston v. Hill*, 482 U.S. 451, 471 (1986) ("It would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim. As we have demonstrated, *supra*, at 468-469, this ordinance is neither ambiguous nor obviously susceptible of a limiting construction. A federal court may not properly ask a state court if it would care to rewrite a statute. We therefore see no need in this case to abstain pending certification.") (footnotes omitted); *Bernhardt*, 350 U.S. at 204-205 ("Were the question in doubt or deserving further canvass, we would of course remand the case to the Court of Appeals to pass on this question of Vermont law. But, as we have indicated, there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the

is nonexistent, and it is significant to the state, federal courts *should* certify the state law question to the state's high court.[13] Otherwise this Court has said little about the specific standards that should be applied by a federal court exercising its discretion whether to certify a state law question.[14] In this regard, the circuit

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opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule. We see no reason, therefore, to remand the case to the Court of Appeals to pass on this question of local law.").

[13] See *Arizonans for Official English*, 520 U.S. at 78 ("Given the novelty of the question and its potential importance to the conduct of Arizona's business, plus the views of the Attorney General and those of Article XXVIII's sponsors, the certification requests merited more respectful consideration then they received in the proceedings below."); *Lehman Bros.*, 416 U.S. at 391 ("Here resort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant state. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction."); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (recommending certification and calling federal court "speculation," where a state court will answer certified questions, as "particularly gratuitous").

[14] But see *Am. Booksellers Ass'n, Inc.*, 484 U.S. at 395 (preferring to certify a state law question where "[t]here is no reliable evidence in the record supporting the District Court's holding that the statute reaches up to 25 percent of a typical bookstore, since the two bookstore owners who testified were unfamiliar with the statutory definition of 'harmful to minors.' We cannot tell whether the court's finding was based on an independent determination by the District Judge, as plaintiffs suggest, or the flawed testimony. But even if the holding were based on the former, we cannot discern the evidentiary basis for it. Neither can we rely on the Court of Appeals' construction. That court criticized the basis of the District Court's holding, but gave no alternative basis for its own

courts have developed widely divergent standards as to how a federal court should exercise its discretion to certify a state law question, with scholarly commentators lamenting the current lack of guidance from this Court.[15]

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determination."); *Elkins v. Moreno*, 435 U.S. 647, 672 (1987 (Rehnquist, J., dissenting) (pointing out that certification is not necessary where a court can decide the case without resort to an unclear state law); *Lehman Bros*., 416 U.S. at 392-395 (Rehnquist, J., concurring).

[15] See, e.g., RICHARD H. FALLON JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1118-1119 7th ed. 2015; Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1549 (1997) (Noting that because of the lack of guidance from this Court, "certification patterns vary widely among federal courts and are largely ad hoc" and suggesting that the means of remedying this is for federal courts to employ "a presumption in favor of certification whenever they are called upon to resolve an unsettled question of state law that would entail the exercise of significant policymaking discretion more appropriately left to the states."); Note, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 GEORGE WASH. L. REV. 251, 268 (2017) ("Although the Supreme Court has committed the use of certification to federal courts' discretion, it has not provided a uniform guidance to lower federal courts in deciding whether to use certification. This lack of uniform guidance, combined with idiosyncrasies of various state and federal courts, has led to various practices among the circuits.").

II. The specific and varying standards among the circuit courts, some of which focus on the state certification rules and others which do not, have resulted in some circuits certifying a much lower percent of state law questions than others.

It would seem that a primary factor in the analysis would be the language given by the states in their certification rules, which vary from state to state, but this is not widely the case among the differing approaches taken by the circuit courts, and is most definitely not the case in the Fifth Circuit nor was the Texas certification rule taken into consideration when the Fifth Circuit decided the case. The confusing divergences among the circuit courts regarding the standards as to whether to exercise their discretion to certify a state law question are as follows:

D.C. Circuit: The D.C. Circuit asks whether: (1) the local law is genuinely uncertain with respect to the dispositive question; (2) the case is one of extreme public importance; and (3) there is a discernable path for the court to follow. *Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (C.A. Fed. 2001).

1st Circuit: The First Circuit considers whether: (1) there is controlling precedent; and (2) the question may be determinative of the case. *Nett ex rel. Nell v. Bellucci*, 269 F.3d 1, 8 (1st Cir. 2001).

2nd Circuit: The Second Circuit generally treats certification as an "exceptional procedure, *see McGrath v. Toys "R" Us, Inc.*, 356 F.3d 246, 250 (2d Cir. 2004), and more specifically "considers, *inter alia*, three main issues": (1) the absence of authoritative state court interpretations; (2) the importance of the issue to the state and whether the question implicates issues of public policy; and (3) the capacity of certification to resolve the litigation. *Morris v. Schroder Cap. Mgmt. Intern.*, 445 F.3d 525, 531 (2d Cir. 2006). See also *Ajdler v. Province of Mendoza*, 890 F.3d 95 (2d Cir. 2018) (adding the consideration of whether the state law question is determinative of the case).

3rd Circuit: The Third Circuit focuses on the language of the particular state's certification rules when deciding whether to certify a state law question. See generally Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN STATE L. REV. 377 (2010).

4th Circuit: The Fourth Circuit asks generally whether the state law question is novel and determinative of the dispute. *Grattan v. Bd. of Sch. Com'rs of Baltimore City*, 805 F.2d 1160, 1164 (4th Cir. 1986).

5th Circuit: The Fifth Circuit is generally "chary about certifying questions of law absent a compelling reason to do so," *Wiltz v. Bayer CropScience, Ltd. P'ship*, 645 F.3d 690, 703 (5th Cir. 2011) (quoting *Jefferson v. Lead Indus. Ass'n, Inc.*, 106 F.3d 1245, 1247 (5th Cir. 1997)); *Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co.*, 958 F.2d 622, 623 (5th Cir. 1992) ("Certification is not a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state."), and specifically applies the following "*Shevin* factors": (1) the closeness of the question and the existence of sufficient sources of state law; (2) the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; and (3) practical limitations of the certification process, such as significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court. *Swindol*, 805 F.3d at 522 (quoting *Williamson*, 138 F.3d at 549); *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274-275 (5th Cir. 1976).

6th Circuit: The Sixth Circuit asks whether: (1) the question is new; and (2) the state law is unsettled. *In re Century Offshore Mun. Corp.*, 119 F.3d 409, 415 (6th Cir. 1997).

7th Circuit: The Seventh Circuit asks whether: (1) the case concerns a matter of vital public concern; (2) the issue will likely recur in other cases; (3) resolution of the question to be certified is outcome determinative of the case; and (4) the state supreme court has yet had an opportunity to illuminate a clear path on the issue. *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 671 (7th Cir. 2001) (citing *In re Badger Lines, Ins.*, 140 F.3d 691, 698-699 (7th Cir. 1988). See also *United States v. Franklin*, 895 F.3d 954, 961 (7th Cir. 2018).

8th Circuit: The Eighth Circuit considers whether there is an absence of controlling state high court precedent requiring speculation or conjecture. *Kulinski v. Medtronic Bio Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997).

9th Circuit: The Ninth Circuit certifies "state law questions that present significant issues that have not yet been resolved by the state courts," *Kremen v. Cohen*, 325 F.3d 1035, 1037-1038 (9th Cir. 2003), and focuses on the specific language of the state's certification rules, see, e.g., *Fields v. Legacy Health Sys.*, 413 F.3d 943, 961 (9th Cir. 2005) (Gould, J., concurring) ("It is further regrettable that we cannot properly tender the remedy clause issue to the Oregon Supreme Court for its decision, because the Oregon Supreme Court has been explicit in

setting its certification guidelines, and under those standards this issue may not now be certified."); and *Kunz v. Utah Power & Light Co*., 871 F.2d 85, 88 (9th Cir. 1989) (basing its certification decision largely on the language of the state's certification rule).

10th Circuit: The Tenth Circuit states generally that certification is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law even if difficult or uncertain. *Anderson Living Trust v. Energen Res. Corp*., 886 F.3d 826, 839 (10th Cir. 2018); *Society of Lloyd's v. Reinhart*, 402 F.3d 982, 1002 (10th Cir. 2005) (deciding not to certify state law question where there was no state decision on the precise question but also there was "no unusual difficulty in deciding the state law question or a likelihood that [the party's] theory of liability would be adopted by the Utah courts").

11th Circuit: The Eleventh Circuit states: "Where there is doubt in the interpretation of state law, a federal court may certify the question to the state supreme court to avoid making unnecessary *Erie* guesses and to offer the state court the opportunity to interpret or change existing law." *Union Planters Bank, NA v. New York*, 436 F.3d 1305, 1306 (11th Cir. 2006) (quoting *Tobin v. Mich. Mut.*

Ins. Co., 398 F.3d 1267, 1274 (11th Cir. 2005)).

The divergence in standards among the circuit courts has the unsurprising consequence of some circuits certifying requests in a much higher percentage of cases than others. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1549 n. 476 (1997) (stating for example that between 1990 and 1994 the Eleventh Circuit granted 91% of the certification requests it received whereas the Tenth Circuit granted on 31% of the requests it received) (citing Jona Goldschmidt, AMERICAN JUDICATURE SOC'Y, CERTIFICATION OF QUESTIONS OF LAW 28 tbl.5 (1995)).

III. The Fifth Circuit standards as to whether to certify a state law question conflict with other circuit standards and the standards applied to this case resulted in the dispositive law issue not being certified to the Texas Supreme Court whereas it would have been if other circuit standards had been applied.

In this case, the Fifth Circuit Court of Appeals confidently takes the position that "here Texas law is clear" that the *Hughes* tolling rule does not apply to public adjuster malpractice claims. App. 6-7. However, there are many instances where the federal courts making an *Erie* guess confidently got the state law

wrong.[16] More importantly, the Fifth Circuit's confidence in this case is not supported by the Texas appellate opinions on the subject, or by the key case cited in the opinion, *Apex Towing*. And the language of Rule 58 of the Texas Rules of Appellate Procedure (the state's certification rule) clearly provides for certification of the state law question presented in this case. Also, the standards applied by the Fifth Circuit in deciding not to certify the issue (1) are contrary to this Court's holdings that when a state has adopted procedures for certification of state law questions, a federal court should exercise its discretion to certify dispositive state law questions when the state law is not clear or is nonexistent and the issue is significant to the state; and (2) conflict with the standards that would have been applied had this issue been presented in other circuit courts.

In 1991, the Texas Supreme Court adopted the *Hughes* tolling rule, which tolls the statute of limitations on a legal malpractice claim until all appeals on the underlying claim are exhausted "when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation." *Hughes v. Mahaney &*

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[16] See, e.g., *W.S. Ranch Co. v. Kaiser Steel Corp*., 388 F.2d 257, 264-265 nn. 11-16 (10th Cir. 1967) (listing cases); *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486-487 nn. 5-9 (5th Cir. 1964) (listing cases); Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN STATE L. REV. 377, 397-398 (2010) (listing cases); Johathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1673 n. 3 (2003) (listing cases).

Higgins, 821 S.W.2d 154, 157 (Tex. 1991). Over the next decade, the Texas Supreme Court issued 11 decisions addressing *Hughes*:

- Six decisions, like *Hughes*, held that the tolling rule applied to the attorney-malpractice suit at issue. *Aduddel v. Parkhill*, 821 S.W.2d 158, 159 (Tex. 1991); *Gulf Coast Inv. Corp. v. Brown*, 821 S.W.2d 159, 160 (Tex. 1991) (per curiam); *Sanchez v. Hastings*, 898 S.W.2d 287, 288 (Tex. 1995) (per curiam); *Am. Centennial Ins. Co. v. Canal Ins. Co.*, 843 S.W.2d 480, 483-484 (Tex. 1992); *Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 123 (Tex. 2001); *Underkofler v. Vanasek*, 53 S.W.3d 243, 345-346 (Tex. 2001).

- One decision clarified that *Hughes* does not toll limitations in a suit for accountant malpractice. *Murphy v. Campbell*, 964 S.W.2d 265, 272 (Tex. 1997).

- Four decisions vacated the court of appeals' judgment, remanding for reconsideration of the limitations issue in light of the 2001 *Apex Towing* and *Underkofler* decisions, the last two opinions of the Texas Supreme Court to substantively address *Hughes*. *Eiland v. Turpin, Smith, Dyer, Saxe & McDonald*, 46 S.W.3d 872 (Tex. 2001) (per curiam); *Parsons v. Turley*, 46 S.W.3d 873 (Tex. 2001) (per curiam); *Nunez v. Caldarola*, 48 S.W.3d 174 (Tex. 2001) (per curiam); *Brents v. Haynes*

> *& Boone*, 52 S.W.3d 733 (Tex. 2001) (per curiam).

In *Apex Towing*, the Texas Supreme Court held that *Hughes* established a "bright-line rule" that should be "clear[ly] and strict[ly] appli[ed]," without reference to the policies underlying the rule. 41 S.W.3d at 120, 122. But today, the parameters of *Hughes* are not clear and the Texas Supreme Court has said nothing about the tolling rule in the last 17 years. That vacuum has been filled by courts and academicians struggling to define *Hughes*'s outer limits.

Some courts have maintained strict adherence to *Apex Towing*. For instance, the Texas Fourteenth Court of Appeals "[f]ollow[ed] the bright-line approach set forth in *Apex Towing Co*.," and "limit[ed] [its] inquiry to determining whether the malpractice is alleged to have occurred 'in the prosecution of defense of a claim that results in litigation.'" *J.M.K.6, Inc. v. Gregg & Gregg, P.C.*, 192 S.W.3d 189 (Tex. App.—Houston [14th Dist.] 2006, no pet.).

The *J.M.K.6* court's limited inquiry was faithful to *Hughes* and consistent with other appellate court decisions describing its tolling rule as "narrow." See, e.g., *Burnap v. Linnartz*, 914 S.W.2d 142, 147 (Tex. App.—San Antonio 1995, writ denied); *Hoover v. Gregory*, 835 S.W.2d 668, 675 (Tex. App.—Dallas 1992, writ denied). Yet the Texas Practice Series instructs Texas lawyers not to interpret *Hughes* narrowly because "*Apex Towing* has restored *Hughes* to a decision of great breadth and significance." 48 TEX. PRAC., Tex. *Lawyer & Jud.*

Ethics § 4:3 (2018 ed.). In light of that "great breadth," Texas lawyers are told, the *J.M.K.6* court's analysis of the *Hughes* rule "is not entirely satisfactory," and its interpretation of *Apex Towing* is "incorrect." *Id*.

These differing conclusions reinforce the Texas First Court of Appeals' determination that *Apex Towing* "created further ambiguity" as to whether *Hughes* tolling applies to cases where no adversarial proceeding was ever conducted. See *The Vacek Grp., Inc. v. Clark*, 95 S.W.3d 439, 444 (Tex. App.—Houston [1st Dist.] 2002, no pet.). The Fifth Circuit Court of Appeals in this case relied heavily on *Apex Towing* for its conclusion that Texas law is clear that the *Hughes* tolling rule does not apply to public adjuster malpractice claims. Yet the *Apex Towing* case, according to the First Court of Appeals and a leading Texas treatises relied on by Texas judges and lawyers disagrees on the very point at issue in this case; namely, whether *Hughes* is "narrow" (meaning it would not apply beyond lawyer malpractice) or "great in breadth" (meaning it would apply beyond lawyer malpractice). Texas judicially created the *Hughes* tolling rule as a matter of policy. The issue is of great importance to Texas because of the many hurricanes that devastate millions of Texans and the major role that public adjusters play in resolving standard insurance flood claims. The Texas Supreme Court should be allowed to decide this important policy question and would have depending on which circuit court the issue had presented to. Because the circuit courts are divided on this important

procedural point, this case presents the ideal vehicle for this Court to resolve the divide.

CONCLUSION

For the reasons stated herein, Petitioner requests this Court to grant this petition.

Respectfully submitted,

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