No. 18-721

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Federal courts exercising jurisdiction pursuant to 28 U.S.C. § 1332 may certify dispositive state law questions to the relevant state's highest court. Each circuit maintains its own standard, but certification occurs when the federal court encounters an unsettled issue that is important to the state.

The question presented is:

Whether federal courts have discretion in determining whether to seek certification from a state's highest court?

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INTRODUCTION

The parties and lower federal courts agree that the underlying case turns on the application of a tolling rule first announced by the Supreme Court of Texas in *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991). In that case, the Supreme Court of Texas held that "when an attorney commits malpractice in the prosecution or defense of a claim that results in litigation, the statute of limitations on the malpractice claim against the attorney is tolled until all appeals on the underlying claim are exhausted. We join other jurisdictions in adopting this well-reasoned rule." *Id.* Petitioner previously argued that the *Hughes* tolling rule should be expanded to also encompass public adjuster malpractice claims. Pet. for Cert. at 6-7. Petitioner now contends that the Fifth Circuit's standards to determine whether to certify the state law question to the Supreme Court of Texas is in conflict with other circuits. Pet. for Cert. at 21.

This Court should not establish a new standard for federal court certification of state law questions, dictating specific factors the federal courts must consider in deciding whether to make an "*Erie* guess." Petitioner argues that the Fifth Circuit wrongly denied certification on an issue of substantive Texas law, but the Fifth Circuit faithfully applied its certification standard, consistent with this Court's precedent.

In support of his argument, Petitioner asserts that the circuit courts of appeal apply "widely

divergent standards," leading to different rates of certification. Pet. for Cert. at 8. Petitioner further asserts that federal courts should factor state rules into their own procedures. Pet. for Cert. at 16. These arguments at best contain circular reasoning. The state certification rules typically require that the question pertain to a novel or unsettled question, while generally a federal court only certifies questions if unable to reach a conclusion itself. In any event, removing discretion from a federal court's determination of what is clear state law is in conflict with basic concepts of federalism and would lead to a tremendous increase in the volume of appeals based on certification issues.

Finally, some type of national approach — as suggested by Petitioner — is not necessary for the circuit court certification mechanisms. The circuits already use substantially similar standards and establishing a new nationwide standard will not change the underlying state substantive law, which may itself cause any divergence in certification rates among the circuit courts of appeal. Furthermore, requiring more certified questions, which the Petitioner apparently seeks, could potentially bring both the state and federal judiciary to a standstill due to constant federal certification to state courts. This Court should deny review.

STATEMENT OF THE CASE

This lawsuit arises from the denial of a claim for damages under a Standard Flood Insurance Policy that Fidelity National Property and Casualty Company (hereinafter "Fidelity") issued to Petitioner's grandmother, Gracie Reese, for her property located in Galveston, Texas following Hurricane Ike. *Bloom v. Aftermath Pub. Adjusters, Inc.*, 902 F.3d 516, 517 (5th Cir. 2018). Gracie Reese passed away during the pendency of the litigation, and her grandson, Norman Bloom, was appointed as the personal representative of her estate and substituted as Plaintiff. *Id.*

Following Hurricane Ike, Fidelity sent an adjuster to Ms. Reese's home to determine the covered damages. *Id.* She disagreed with Fidelity's assessment and hired Aftermath Public Adjusters (hereinafter "Aftermath") to handle the dispute. *Id.* Michael Bacigalupo, an individual claims adjuster employed by Aftermath, managed Ms. Reese's claim for the company. *Id.* In August 2009, Fidelity issued a written claim denial to Ms. Reese for the additional claimed damages because Ms. Reese did not submit the necessary documents to support her Proof of Loss by the applicable deadline. *Id.*

Fidelity Lawsuit

In August 2010, Ms. Reese sued Fidelity, claiming that the insurance company wrongfully denied her claim for the additional hurricane damages. Fidelity moved for summary judgment

almost four years later, which Ms. Reese did not contest. The United States District Court for the Southern District of Texas – Galveston Division granted Fidelity's motion on September 9, 2014. *Reese v. Fidelity Nat'l Prop. & Cas. Co.*, No. 3:10-MC-7040 (S.D. Tex. September 9, 2014) (hereinafter "*Reese I*").

Aftermath Lawsuit

Two years later, on September 8, 2016, Ms. Reese, for the first time, brought suit against Aftermath and Mr. Bacigalupo. In Texas state court, she alleged claims of negligence, which has a two-year statute of limitations, as well as for breach of contract, which has a four-year statute of limitations. Aftermath removed the case to the United States District Court for the Southern District of Texas – Galveston Division on diversity grounds. The District Court granted final summary judgment upon Aftermath's motion because Ms. Reese sued Aftermath approximately seven years after her claims accrued, as she was barred by the relevant statutes of limitation. *Reese v. Aftermath Pub. Adjusters, Inc.*, No. 3:16-CV-273, 2017 WL 6025517, at *3-4 (S.D. Tex. December 5, 2017) (hereinafter "*Reese II*"). Mr. Bloom, who by that point had been substituted as Plaintiff, appealed the District Court's entry of final summary judgment to the United States Court of Appeals for the Fifth Circuit. The Fifth Circuit Court of Appeals affirmed the lower court's judgment on September 4, 2018, finding that Texas law was clear that no tolling rule applied to the applicable two-year and four-year statutes of limitation in that instance. *Bloom*, 902 F.3d at 518-

19. Because Texas law was clear and conclusive on the matter, the Court of Appeals did not certify the question to the Supreme Court of Texas, as was requested by Mr. Bloom. *Id*. at 519.

On November 29, 2018, Mr. Bloom filed a Petition for Writ of Certiorari with this Court, asking "[w]hether 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." Pet. for Cert. at i.

REASONS TO DENY THE PETITION

I. The Fifth Circuit Correctly Denied Certification.

In denying certification, the Fifth Circuit relied on a standard consistent with precedent announced by this Court. Because the Fifth Circuit's reasoning and judgment fall squarely in line with this Court's precedent, this Court should not grant review.

A. This Court's Certification Precedent.

In *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), this Court first addressed the issue of state certification procedures, holding that it is within the "sound discretion of the federal court." The Court ultimately found certification appropriate because of the novelty of the question presented, "great unsettlement of [the state's] law," and the distant nature of the suit (the Second Circuit was applying Florida law). *Id.* at 389, 391. Justice Rehnquist, in his concurrence, confirmed that federal courts have "considerable discretion" in deciding whether to certify a question and that it would be "unthinkable" for this Court to prescribe how the lower federal courts make that determination. *Id.* at 394. Even if the state allows certification, the federal court has no obligation to utilize it when the court "believes that it can resolve an issue of state law with materials [it] already [has on] hand." *Id.* at 395.

Twenty years later, in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997), this Court wrote that "novel, unsettled questions of state law" must precipitate federal court use of state certification procedures. Though it noted that certification has its advantages and supported usage in that case, the conclusion primarily turned on constitutional questions regarding a novel state statute. *Id.* at 78-79.

Most recently, this Court addressed certification in *Minnesota Voters Alliance v. Mansky*, 138 S.Ct. 1876, 1882 (2018), which considered whether a Minnesota statute banning political attire in Election Day polling locations violated the Free Speech Clause of the First Amendment. The Court did not seek certification, as was requested by the Minnesota Attorney General, in part because the State did not "suggest a viable alternative that the [state supreme court] might adopt instead." *Id.* at 1891 n.7. Justice Sotomayor disagreed on this point, but founded her concerns on the fact that a state statute was at issue and on constitutional avoidance doctrine. *Id*. at 1895-96 (Sotomayor, J., dissenting).

Both the Federal District Court and the Fifth Circuit had ample direction from the Texas Supreme Court in deciding whether the *Hughes* tolling rule applied to public adjuster malpractice claims. *Bloom*, 902 F.3d at 518-19. This case involves a basic state statute of limitations issue and does not concern constitutional questions. Certification under these circumstances was wholly unnecessary per this

Court's precedent, as the Fifth Circuit correctly exercised its considerable discretion in declining to pursue that avenue.

B. Fifth Circuit Certification Standard.

To assess whether certification of a state law question is appropriate, the Fifth Circuit uses the *Shevin* factors, which examine: "(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: significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court." *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015) (citations and internal quotations omitted) (referring to certification factors announced in *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266, 274–75 (5th Cir. 1976)). All three of these factors point in favor of denying certification.

The first *Shevin* factor is the most important. *Bloom*, 902 F.3d at 519. Here, the specific question as to whether the *Hughes* tolling rule applies to public adjuster malpractice claims is covered by a wide breadth of Supreme Court of Texas precedent.[1]

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[1] *See, e.g., 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, 483-84 (Tex. 1992); *Murphy v. Campbell*, 964 S.W.2d 265, 272 (Tex. 1997); *Apex Towing Co. v. Tolin*, 41 S.W.3d

Because the Fifth Circuit was able to identify "meaningful authority . . . that guide[d] [their] interpretative efforts," certification was unnecessary. *Id.*; *see JCB, Inc. v. Horsburgh & Scott Co.*, 908 F.3d 953, 956 (5th Cir. 2018). Likewise, comity concerns are only marginally relevant here and delay demanded by certification would serve no useful purpose.

Petitioner cites *Wiltz v. Bayer CropScience, Ltd. P'ship*, 645 F.3d 690, 703 (5th Cir. 2011) for the contention that the Fifth Circuit is generally hesitant to certify questions without a compelling justification. Pet. for Cert. at 18. Respondents agree to the extent that the Fifth Circuit is not considered an outlier, but Petitioner failed to note the second part of the Fifth Circuit's reasoning on this point. *Wiltz*, 645 F.3d at 703. The Court continued, stating that certification may be appropriate for "genuinely unsettled matters of state law," but is not warranted when there is a "mere absence of a definitive answer from the state supreme court on a particular question." *Id.* In the most charitable light, this scenario is precisely the thrust of Petitioner's case. No court (until the lower court decisions in this case) has explicitly addressed the *Hughes* tolling rule with respect to public adjuster malpractice claims, nor has the Supreme Court of Texas spoken to the rule in seventeen years, according to Petitioner. For these reasons, he argues that the rule is an unsettled question of state law

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118, 123 (Tex. 2001); *Underklofer v. Vanasek*, 53 S.W.3d 343, 345-46 (Tex. 2001).

worthy of certification. Pet. for Cert. at 22-25. But what Petitioner views as a lack of a definitive answer from the Texas Supreme Court falls squarely within Fifth Circuit jurisprudence in *Wiltz* discouraging certification.

Also in support of the Petition, he shares that public adjusters play a key role in Texas because of regular hurricanes in the state. Pet. for Cert. at 25. It is unclear, though, how the mere existence of public adjuster usage in the state necessitates a state-developed rule specifically identifying the profession in relation to the *Hughes* tolling rule. Petitioner draws no connection between the two concepts and identifies no specific policy concern regarding public adjusters that would invite certification here. *Id.*

The more reasonable interpretation is that the Supreme Court of Texas has made it explicitly clear that the *Hughes* tolling rule applies only to legal malpractice actions. Because the Supreme Court of Texas has already provided a definitive answer establishing this limitation, the analysis as to whether certification is appropriate ends. State courts do not need to specifically identify each type of malpractice claim that cannot invoke tolling under this bright-line rule. *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974) (stating that even when there is doubt, certification is not obligatory). As such, Petitioner's underlying claims did not warrant certification by the Fifth Circuit.

Petitioner's argument that the *Hughes* tolling rule requires more recent review by the Supreme Court of Texas also holds no water. Pet. for Cert. at 24. An alleged seventeen-year gap in direction from the Supreme Court does not equate to a "vacuum" in the jurisprudence, especially in light of the fact that the Supreme Court of Texas opinions on the *Hughes* tolling rule are consistent.[2] The Supreme Court of Texas likely has not reviewed the issue in thorough detail as of late because the matter is clear. As it goes, Petitioner is mistaken in his assertion that the Supreme Court of Texas has not mentioned the *Hughes* tolling rule for seventeen years now. Pet. for Cert. at 24. In 2006, the Supreme Court in *Belt v. Oppenheimer, Blend, Harrison & Tate, Inc.*, 192 S.W.3d 780, 786 (Tex. 2006) cited *Apex Towing* — in the context of the *Hughes* tolling rule — as applying only to legal malpractice claims. Similarly in 2016, the Supreme Court of Texas again confirmed its opinion that *Apex Towing*, in reference to the *Hughes* tolling rule, applies specifically to attorney malpractice claims. *In the Interest of P.M.*, 520 S.W.3d 24, 26 n.5 (Tex. 2016) (per curiam). The Supreme Court of Texas has shown no interest in expanding the *Hughes* tolling rule to encompass more than this type of malpractice claim. To that end, the Fifth Circuit had no apparent reason to seek certification. Every indication from the Supreme Court of Texas shows that it would have answered the question in the same manner as the Fifth Circuit.

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[2] *Supra* note 1.

The ambiguity Petitioner attempts to inject into *Apex Towing* is also unavailing. Pet. for Cert. at 24-25. He cites a Texas treatise to suggest that the state intermediate appellate courts are split on their application of the *Hughes* tolling rule as to the type of malpractice claim at issue. *Id.* However, he conflates the unrelated distinction discussed in the treatise and the First Court of Appeals of Texas opinion with the issue at hand. *Id.*; 48 TEX. PRAC., *Tex. Lawyer & Jud. Ethics* § 4.3 (2018 ed.); *The Vacek Grp., Inc. v. Clark*, 95 S.W.3d 439, 444 (Tex.App.—Houston [1st Dist.] 2002, no pet.). This First Court of Appeals decision and treatise in no way dispute that the *Hughes* tolling rule applies exclusively to attorney malpractice claims. 48 TEX. PRAC., *Tex. Lawyer & Jud. Ethics* § 4.3 (2018 ed.); *The Vacek Grp., Inc.*, 95 S.W.3d at 443-44. For one, the cited section of the treatise is exclusively dedicated to statute of limitations issues in relation to "Attorney Tort Liability in Texas." 48 TEX. PRAC., *Tex. Lawyer & Jud. Ethics* § 4.3 (2018 ed.). And second, *The Vacek Grp., Inc.* compared the *Hughes* tolling rule between litigation and transactional attorney malpractice claims. 95 S.W.3d at 443. The court did not question the rule in terms of professional malpractice category. *Id.* Finding ambiguity on one issue does not impute that same ambiguity onto independent issues. Because Petitioner's analysis on this point is fundamentally flawed, his argument that an ambiguity exists, necessitating certification, cannot stand.

II. The Supremacy Clause Precludes State Courts From Dictating Federal Court Procedure.

The Supremacy Clause provides that the U.S. Constitution and other federal laws "shall be the supreme law of the land; and the judges in every state shall be bound thereby, anything in the Constitution or laws of any State to the contrary notwithstanding." U.S. CONST. art. VI, cl. 2. Federal court certification of state law questions can be useful in efficiently resolving state law questions, but certification is by no means mandatory when the federal court can reach a satisfactory conclusion using an "*Erie* guess." *See, e.g., Temple v. McCall*, 720 F.3d 301, 307 (5th Cir. 2013); *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577, 588 (6th Cir. 2004); *Pehle v. Farm Bureau Life Ins. Co., Inc.*, 397 F.3d 897, 901-02 (10th Cir. 2005). States cannot dictate to the federal courts when they must seek certification to its highest court because it would conflict with the discretionary standards the federal courts use in making that determination.

Mr. Bloom cites no state rule requiring that a federal court seek certification on a state law question, which is expected because states cannot dictate to a federal court on how it should exercise its procedural discretion. Texas Rule of Appellate Procedure 58.1, which provides when the Supreme Court of Texas will answer certified questions and is cited by Petitioner, does not impose any front-end requirements on federal appellate courts with respect

to certification.[3] The Rule only states the circumstances under which the Supreme Court of Texas may consider a certified question on the back-end and does not require that a federal appellate court certify whenever it faces a question not explicitly addressed by the state court.

Because the Supremacy Clause does not permit state laws that conflict with federal ones, Petitioner's question presented falls on its face. His construction is flatly inconsistent with the relationship between state and federal courts, and so does not present an acceptable question for this Court to review.

III. No Circuit Split Exists Necessitating This Court's Review.

A. Petitioner Shows No True Discrepancy Among the Circuit Courts of Appeal on Certification.

Petitioner cites no case law or recent legal commentary supporting his argument that the circuit courts of appeal are substantively split on the issue of state certification. In Petitioner's own estimation, only two of the circuits place heavy weight on the language of a state's certification rule in making their

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[3] **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.

own decision. Pet. for Cert. at 16-21. For the Third Circuit, one of the two Petitioner mentions, he cites only to a law review article (Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN. ST. L. REV. 377 (2010)). The article is not binding authority and does not stand for the proposition that the Third Circuit is led by state rules any more than limiting their inquiries to the list of question categories proffered by the state high courts.[4] To that end, the Third Circuit certification procedures appear substantially similar to those used in the other circuit courts of appeal.

In reference to the Ninth Circuit, Petitioner also claims that the court "focuses on the specific language of the state's certification rules." Pet. for Cert. at 19. This is a peculiar argument, in that all parties and courts in the state and federal judiciary must follow the relevant procedural rules in seeking their requested action. Respondents (and seemingly Petitioner) do not argue that federal courts should submit questions to the state high courts that are outside the ambit of the state rules, which was what concerned Judge Gould in his concurrence to *Fields v.*

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[4] "According to the Third Circuit's Local Appellate Rule § 110.1, where the procedures of a state high court provide for certification and the question of state law 'will control the outcome of a case,' the Third Circuit may . . . certify a question to any state high court--not just those state high courts within its jurisdiction." Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN. ST. L. REV. at 388.

Legacy Health Sys., 413 F.3d 943, 961 (9th Cir. 2005) and was cited by Petitioner. He merely regretted that the substantive state law issue could not be certified because the Oregon Supreme Court would accept only a limited list of federal court questions. *Id. Kunz v. Utah Power & Light Co.*, 871 F.2d 85, 88 (9th Cir. 1989) — also cited by Petitioner — likewise does not hold that state rules may dictate how federal courts decide whether certification is needed beyond noting that the state high court had "discretionary authority" to accept or reject the certified question. *Id.*

As demonstrated in Petitioner's survey, no genuine disparity exists among the circuit certification standards. Pet. for Cert. 16-21. The analysis is limited, but Petitioner apparently believes that these two circuits follow the correct path in certifying questions and that the Fifth Circuit is an outlier. *Id.* Nevertheless, these courts are largely aligned and do not have a conflict that should allow for this Court's review.

B. Alternatively, Any Discrepancy Among the Circuit Courts of Appeal Does Not Disrupt the Twin Objectives of Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938).

Erie R.R. Co. v. Tompkins, 304 U.S. 64 (1938) and its progeny seek to accomplish two main objectives — to prevent forum shopping and inequitable administration of the law. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965); *see also* Pet. for Cert. at 11. "Inequitable administration of the law"

refers to "vertical uniformity in diversity cases, so that with respect to substantive law[,] a case filed in federal court will be handled the same way as it would be in the courts of the state where the federal court sits." *Carlson v. FedEx Ground Package Sys., Inc.*, 787 F.3d 1313, 1326 (11th Cir. 2015).

Petitioner never directly addresses how to implement his own question presented: "[w]hether 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." Pet. for Cert. at i. Instead, he argues irrelevant issues in the Petition that fail to link faithful application of *Erie* doctrine to an alleged divergence in federal certification rates.

First, he asserts that the federal circuit courts of appeal have "widely divergent standards" to determine whether certification to the given state court is needed. Pet. for Cert. at 8. He then argues that these divergent standards lead to different certification rates. Pet. for Cert. at 16. And finally, he claims that the Fifth Circuit standard for certification conflicts with that of other circuits, leading to an incorrect result in this case. Pet. for Cert. at 21. Overall, the Petition seems more concerned with variation of certification rates and less about how current federal certification standards disrupt the twin objectives of *Erie* doctrine or any other problem that may arise from this supposed variation.

1. *Varied certification rules do not promote forum shopping.*

Defendants do not remove cases to federal court on diversity to avoid application of state substantive law and cannot reasonably predict whether the federal court will seek certification. Nor is it reasonable to suggest that Defendants choose the location where they will be subject to personal jurisdiction based on a circuit court's certification standard for state law questions. In that vein, Petitioner's assertion that the Fifth Circuit certification standard leads to forum shopping because "an *Erie* guess can easily miss the mark of what state law would be if decided by the state high court" provides little clarity on how forum shopping is at issue here. Pet. for Cert. at 11. The parties and lower courts in this litigation have all agreed that state substantive law applies as to tolling of the statutes of limitation, so forum shopping is not a real concern under these circumstances. The Supreme Court of Texas has been clear in its interpretation of the *Hughes* tolling rule and no indication from Texas state courts shows that they are conflicted on the issue of whether the rule applies to more than legal malpractice claims.

Respondents' removal of this case to federal court does not invoke forum shopping concerns and Petitioner does not argue that diversity jurisdiction is inappropriate as a general matter in this case. Other than a vague suggestion that Respondents removed the case with the expectation that the federal courts

would distort Texas law with respect to the *Hughes* tolling rule, Petitioner makes no argument for how forum shopping is at issue.

2. *Varied certification rules do not promote inequitable administration of the laws.*

As mentioned above, the second *Erie* objective is to avoid inequitable administration of the law in diversity cases, meaning that the federal court exercising diversity jurisdiction should apply state substantive law in the same manner as the state high court would. *Carlson,* 787 F.3d at 1326.

Here, both the United States District Court for the Southern District of Texas and the Fifth Circuit ruled in adherence to the bright-line rule adopted by the Supreme Court of Texas in *Hughes v. Mahaney & Higgins*, 821 S.W.2d 154, 157 (Tex. 1991) and adhered to in subsequent cases.[5] *Reese II,* 2017 WL 6025517, at *3-4; *Bloom*, 902 F.3d at 518-19. Petitioner does not point to even one case decided in Texas that conflicts with the idea that the *Hughes* tolling rule applies exclusively to attorney malpractice claims. He cites *The Vacek Grp., Inc.* in an attempt to instill some ambiguity, but the case does not address the issue of whether the *Hughes* tolling rule applies to more than attorney malpractice claims, and in fact confirms that the rule only applies as such. Pet. for Cert. at 25; *The Vacek Grp., Inc.,* 95 S.W.3d at 443 ("The supreme court has restated the *Hughes* tolling rule on

[5] *Supra* note 1.

numerous occasions, each time stating that the rule is invoked when the alleged malpractice is committed by an attorney during the prosecution or defense of a claim that results in litigation."). Because the lower federal courts faithfully applied the Texas bright-line rule in this litigation, no issue regarding inequitable administration of the law should cause concern for this Court.

IV. A Uniform Approach to State Certification is Not Necessary or Feasible.

Petitioner seeks review by this Court partly because the circuit courts of appeal apply "widely divergent standards" as to certification. Pet. for Cert. at 8. However, this approach is inconsistent with the concept of certification and would bring the federal and state high courts to a standstill.

As noted previously, this Court affords the lower federal courts a considerable amount of discretion in deciding whether to certify a question to a state's highest court. *Lehman Bros.*, 416 U.S. at 394 (Rehnquist, J., concurring). The lower federal courts naturally will certify at different rates because this determination must be made on a case-by-case and state-by-state basis. Even if this Court adopts a uniform approach toward to federal certification standards, there would still be a disparity because this Court would not be changing substantive state

law in the process.[6] Petitioner states without basis, however, that another circuit court would have certified the question, unlike the Fifth Circuit. Pet. for Cert. at 21. But his argument falls short, as he does not cite even one circuit-level standard that would have allowed for certification. Petitioner's own survey indicates that the circuit courts generally will not certify a question unless the issue is unsettled or there is a lack of authority from the state's highest court. Pet. for Cert. at 16-21. Petitioner also does not suggest any rule that would be appropriate for the circuits to adopt for certification, so it is unclear what he is seeking here.

Furthermore, requiring federal courts to certify questions whenever state law does not explicitly address an issue would undercut diversity jurisdiction. The already-overburdened lower federal courts would need to delay ordinary business to accommodate this new requirement when they presumably are equipped to reach the correct answer themselves. *See Lehman Bros.*, 416 U.S. at 394 (Rehnquist, J., concurring). State high courts would be overwhelmed with the new load of certified questions to dispose of in addition to their regular dockets.

Accordingly, this Court should reject a nationwide approach for circuit-level certification because it would accomplish no discernible objective

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[6] Respondents note that this is to the extent that the state substantive law does not conflict with the U.S. Constitution or other federal laws and regulations.

and would cause major administrative problems in both the state and federal court systems.

CONCLUSION

The Petition should be denied.

January 7, 2019

Respectfully submitted,

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