No. _____

In the
Supreme Court of the United States

STATE OF TENNESSEE,
Petitioner,

v.

TAMARIN LINDENBERG, Individually and as Natural Guardian of Her Minor Children ZTL and SML,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court exercising its diversity jurisdiction should certify an important state constitutional issue of first impression to the State's highest court before declaring, on its own, that the state statute violates the state constitution.

PARTIES TO THE PROCEEDINGS

Petitioner, the State of Tennessee, intervened in this action in the district court to defend the constitutionality of the Tennessee statute at issue and was an intervenor-appellee in the court of appeals. In addition to Respondent Tamarin Lindenberg, Jackson National Life Insurance Company was also a party to the proceedings below.

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[1] Jackson National Life Insurance Company is also filing a petition for a writ of certiorari seeking review of the judgement of the Sixth Circuit below. Pursuant to guidance from the clerk's office, the State is not filing an additional appendix with this petition but instead relying on and referencing the appendix filed by Jackson National with its petition. References to "App." are references to the appendix to Jackson's National's petition.

TABLE OF AUTHORITIES

CASES

CONSTITUTION

STATUTES

RULES

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the court of appeals (App. 1a-78a) is reported at 912 F.3d 348 (6th Cir. 2018). The denial of the petition for rehearing en banc and accompanying opinions (App. 170a-198a) are reported at 919 F.3d 992 (6th Cir. 2019). The district court's order granting plaintiff's motion for certification of questions to the Tennessee Supreme Court (App. 101a-126a) is reported at 147 F. Supp. 3d 694 (W.D. Tenn. 2015), and its order certifying questions of state law to the Supreme Court of Tennessee (App. 127a-132a) is unreported. The order of the Supreme Court of Tennessee declining to answer the district court's certified questions (App. 133a-135a) is unreported. The district court's order denying defendant Jackson National Life Insurance Company's motion to dismiss plaintiff's claim for punitive damages (App. 79a-100a) is unreported but may be found at 2014 WL 11332306 (W.D. Tenn. Dec. 9, 2014), and its order on defendant's motion for a judgment of law as to punitive damages (App. 136a-169a) is reported at 304 F. Supp. 3d 711 (W.D. Tenn. 2016).

JURISDICTION

The judgment of the court of appeals was entered on December 21, 2018. On January 4, 2019, petitioner filed a petition for rehearing en banc, which was denied on March 28, 2019. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article I, section 6 of the Tennessee Constitution provides:

> That the right of trial by jury shall remain inviolate, and no religious or political test shall ever be required as a qualification for jurors.

Article II of the Tennessee Constitution, entitled "Distribution of Powers," provides:

> Section 1. The powers of the government shall be divided into three distinct departments: legislative, executive, and judicial.
>
> Section 2. No person or persons belonging to one of these departments shall exercise any of the powers properly belonging to either of the others, except in the cases herein directed or permitted.

Tenn. Code Ann. § 29-39-104 provides, in pertinent part:

> (a) In a civil action in which punitive damages are sought:
>
> * * *
>
> (5) Punitive or exemplary damages shall not exceed an amount equal to the greater of:
>
> (A) Two (2) times the total amount of compensatory damages awarded; or

(B) Five hundred thousand dollars ($500,000).

Rule 23(1) of the Tennessee Supreme Court provides:

> The Supreme Court may, at its discretion, answer questions of law certified to it by the Supreme Court of the United States, a Court of Appeals of the United States, a District Court of the United States in Tennessee, or a United States Bankruptcy Court in Tennessee. This rule may be invoked when the certifying court determines that, in a proceeding before it, there are questions of law of this state which will be determinative of the cause and as to which it appears to the certifying court there is no controlling precedent in the decisions of the Supreme Court of Tennessee.

INTRODUCTION

In the proceedings below, the Sixth Circuit, exercising diversity jurisdiction, faced novel state law questions of paramount importance to the State of Tennessee—questions of first impression about the correct interpretation of the Tennessee Constitution. The Tennessee Supreme Court had expressed its willingness to address the questions; all parties agreed that certification would be appropriate; and the State intervened and advocated for certification.

But in a divided opinion, the court of appeals declined to certify. Instead, it waded into the historical materials and common law foundations of the Tennessee Constitution. And largely on the basis of an ambiguous eighteenth-century North Carolina case that no party had cited, the court declared Tennessee's recently enacted punitive damages cap unconstitutional "because the work of the Tennessee General Assembly [wa]s at odds with the majority's view of the jury trial right guaranteed by the Tennessee Constitution." App. 44a (Larsen, J., dissenting in part).

Other circuits do not so cavalierly interpret state constitutions. Nor do they invalidate state laws on state constitutional grounds without acknowledging the State's sovereign interest in interpreting its own constitution. They certify such questions to the state court and, among other approaches, will only invalidate a state law on state constitutional grounds as an "unavoidable matter of last resort." *Blue Cross & Blue Shield of Ala., Inc. v. Nielsen*, 116 F.3d 1406, 1413 (11th Cir. 1997). In their view, "[f]ederalism and

comity require at least that much deference to state courts on ultrasensitive state law matters." *Id.* The majority below eschewed such deference.

These contradictory approaches to certification exist because this Court "has not announced concrete rules to govern lower federal courts in deciding whether to certify questions." App. 182a (Bush, J., dissenting from denial of rehearing en banc). That silence has forced "each circuit to define [its own] standards for certifying questions." *Id.* at 193a. And, as a result, the majority below—unlike judges and panels in other circuits—was free to "contraven[e] . . . fundamental federalism principles" and decline to certify the state constitutional questions. *Id.* at 191a.

Given the "novelty of the question[s]" and their "importance to [Tennessee]," the "certification requests merited more respectful consideration than they received in the proceedings below." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997). Other circuits have taken heed of that admonishment. The Sixth Circuit has not.

This Court's review is necessary to resolve the division among the circuits regarding the place of the State's interests in the certification inquiry and to correct the panel's disregard of the cooperative judicial federalism that is vital to our dual court system.

The question presented is exceptionally important. State courts are equal participants in our court system and deserve equal respect. That is particularly true when an issue implicates their sovereign authority to interpret their state constitution.

STATEMENT

A. Factual Background and District Court Proceedings

In 2011, Tennessee Governor Bill Haslam signed into law the Tennessee Civil Justice Act, legislation that was designed to help the State attract and retain businesses. 2011 Tenn. Pub. Acts, ch. 510, § 10; *see* Press Release (June, 16, 2011); https://tinyurl.com/y2588suo; App. 142a n.4. To provide businesses more certainty about their exposure to risk, the Civil Justice Act established, among other tort reforms, caps on both non-economic and punitive damages. *See* Press Release*, supra.* The cap limits punitive damages to the greater of twice the total amount of compensatory damages or $500,000, with a number of specified exceptions. Tenn. Code Ann. § 29-39-104(a)(5), (7). Before the Act, Tennessee was one of only two states among the twelve States in the Southeast region without a punitive damages cap. *See* Press Release, *supra.*

Respondent Tamarin Lindenberg sued Jackson National Life Insurance Co. in Tennessee state court, seeking payment of a life insurance benefit for the death of her ex-husband and seeking other damages, including punitive damages, based on the company's bad faith in refusing to pay the claim. App. 80a-83a. Jackson National removed the case to federal court. App. 83a. After a trial, the federal jury awarded Lindenberg $350,000 in actual damages, $87,500 in additional damages based on a finding of bad faith, and $3 million in punitive damages. App. 137a.

Jackson National sought judgment as a matter of law, arguing that punitive damages were not available under Tennessee law and that, even if they were, their amount was limited by the cap in § 29-39-104. App. 7a. In response, Lindenberg argued that the punitive damages cap violated the right to trial by jury guaranteed by the Tennessee Constitution and the separation-of-powers doctrine embodied in the Tennessee Constitution. App. 7a-8a.

Lindenberg moved to certify these state constitutional questions—questions of first impression in Tennessee—to the Tennessee Supreme Court. App. 117a, 123a-124a. In support of certification, Lindenberg argued that "the questions of law before the Court have not been answered by the Tennessee Court of Appeals, much less the Tennessee Supreme Court," that "certification would afford the [Tennessee Supreme Court] the opportunity to address a not insubstantial issue under the law of th[e] State," and that "certifying the questions [would] reduce the twin risks of forum shopping and inconsistent outcomes." Lindenberg D.C. Mot. for Certification, ECF 167, at 3-4.

Jackson National responded that the constitutional issues were not ripe for certification because its motion for judgment as a matter of law contesting the availability of punitive damages had not yet been resolved. Jackson National D.C. Resp. to Mot. for Certification, ECF 174, at 4-5. And it disputed the merits of Lindenberg's constitutional claims. *Id.* at 7-13.

The State intervened pursuant to Fed. R. Civ. P. 5.1 to defend the constitutionality of the punitive damages cap. App. 7a, 105a. It agreed with Jackson National that the state constitutional issues were not yet ripe for certification because Jackson National's motion for a judgment as a matter of law was still pending before the district court. Tenn. D.C. Resp. to Certification Mot., ECF 178, at 3. The State noted, however, that if the district court nevertheless determined the questions were dispositive, it should certify them because Lindenberg had raised "two novel questions under the Tennessee Constitution" that "[n]either the Tennessee Supreme Court nor any other court in Tennessee ha[d] ruled on." *Id.* at 5.

The district court granted Lindenberg's motion because it concluded the questions were "determinative of the cause and because there are no Tennessee Supreme Court decisions that control." App. 124a. It certified the following questions to the Tennessee Supreme Court:

> 1. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 violate a plaintiff's right to a trial by jury, as guaranteed in Article I, section 6 of the Tennessee Constitution?
>
> 2. Do the punitive damages caps in civil cases imposed by Tennessee Code Annotated Section 29-39-104 represent an impermissible encroachment by the legislature on the powers

> vested exclusively in the judiciary, thereby violating the separation of powers provisions of the Tennessee Constitution?

App. 131a.

The Tennessee Supreme Court acknowledged that the questions "raise[d] issues of first impression not previously addressed by the appellate courts of Tennessee." App. 134a. But the court explained that "it would be imprudent for it to answer the certified questions concerning the constitutionality of the statutory caps on punitive damages" because at that point in the case "the question of the availability of those damages in the first instance" had not been decided. App. 135a.

The Tennessee Supreme Court added, however, that it would be willing to consider the questions if the antecedent question about the availability of punitive damages were also certified:

> Nothing in this Court's order is intended to suggest any predisposition by the Court with respect to the [Sixth Circuit's] possible certification to this Court of both the question of the availability of the remedy of common law punitive damages in addition to the remedy of the statutory bad faith penalty and the question of the constitutionality of the statutory caps on punitive damages, in the event of an appeal from a final judgment in this case.

App. 135a n.1.

After the Tennessee Supreme Court's response, the district court denied Jackson National's motion for judgment as a matter of law, holding that punitive damages were available in addition to bad faith damages. App. 140a-141a. But it rejected Lindenberg's constitutional arguments and reduced the punitive damages award from $3 million to $700,000 in accordance with the statutory cap. App. 167a-168a.

B. Court of Appeals Proceedings

On appeal, a divided panel of the Sixth Circuit affirmed the availability of punitive damages but reversed the district court and declared that the punitive damages cap violates the Tennessee Constitution. App. 3a. The majority refused to certify the constitutional questions to the Tennessee Supreme Court despite the State's request. The State noted in its brief that the questions "address[ed] important matters of state constitutional law," and that the Tennessee Supreme Court had expressed its willingness to decide the questions. Tenn. Br., ECF 25, at 9 n.2. Because its intervention was limited to defending the constitutionality of the damages cap, the State did not take a position on the other claims. *Id.* at 5.

At oral argument, the other parties also supported certification. To Lindenberg's counsel, Judge Larsen noted that it would be a "pretty extraordinary thing for a federal court to do, strike down a state statute under state constitutional law without hearing from the state courts," and asked whether both the statutory and constitutional questions should be certified to the Tennessee Supreme Court given its express willingness to answer them. Oral Argument at 18:18-19:05,

Lindenberg v. Jackson Nat'l Life Ins. Co., 912 F.3d 348 (6th Cir. 2018) (Nos. 17-6034, 17-6079), http://tinyurl.com/y59uqvnl. Counsel responded that she did "n[o]t object" to certification of the questions and that she thought certification "would be reasonable." *Id.* at 19:06-19:12. Jackson National did not think the court of appeals should reach the constitutional issue but agreed that "of course it would be better to allow the state high court to opine on that question if the court should reach it." *Id.* at 15:20.

In its opinion, the majority neither addressed the State's request for certification nor acknowledged the acquiescence of all parties to certification. It admitted that "the state's appellate courts have not addressed the issue presented," and that Tennessee law requires its courts to "uphold the constitutionality of a statute whenever possible." App. 28a. But it nevertheless concluded that, under its own interpretation of the Tennessee Constitution, the cap on punitive damages violated the right to a jury trial. App. 28a-29a.

Judge Larsen dissented. App. 43a-78a (Larsen, J., concurring in part and dissenting in part). She first took issue with the majority's refusal to certify the state law questions:

> This case presents two uncertain and important questions of state law: one concerning the proper construction of a Tennessee statute; the other concerning the conformity of a different Tennessee statute with the Tennessee Constitution. The Tennessee Supreme Court has signaled its willingness to decide both of these state law questions, and we have a

> mechanism—certification—that allows the Tennessee Supreme Court to decide them. I would take advantage of that mechanism to learn from Tennessee's highest court how it would interpret its statutes and its Constitution.

App. 43a.

Judge Larsen found the questions "ideally suited for certification" because they had not been addressed by the Tennessee Supreme Court; that court "ha[d] expressed its receptiveness to certification; the State [had] urge[d] certification; and neither Lindenberg nor Jackson National object[ed] to certification." App. 45a.

Judge Larsen also disagreed on the merits. The majority's "hasty invalidation of Tennessee's punitive damages cap overlook[ed] critical issues." App. 78a. And the majority "asked the wrong question entirely" and did not interpret the Tennessee Constitution in the way the Tennessee Supreme Court had instructed. App. 70a-77a.

Judge Larsen found "ample reasons to doubt the majority's holding," App. 65a, and, in conclusion, pointed out that "[a]ny reason to question the majority's opinion . . . is also a reason to certify these questions to a willing Tennessee Supreme Court," App. 78a. Quoting from this Court's decision in *Arizonans for Official English*, 520 U.S. at 79, Judge Larsen explained that, "if any federal court decision 'risks friction-generating error,' surely striking down a new state law on novel state-constitutional law grounds would do so." App. 78a. She dissented because the

majority did exactly that and did it "at the expense of comity and our cooperative federalism." App. 78a.

Jackson National and the State both petitioned for rehearing en banc. App. 171a. Jackson National argued, among other things, that the court should have certified both the statutory and constitutional questions to the Tennessee Supreme Court. Jackson National Pet. Reh'g En Banc, ECF 38-1, at 5. The State, consistent with the limited scope of its intervention, argued that, "before invalidating a duly enacted Tennessee statute by 'predict[ing]' how the Tennessee Supreme Court 'would likely' rule," the majority "should have certified these state-law [constitutional] questions to the Tennessee Supreme Court—certification that was expressly anticipated, if not invited, by the state's highest court, that was requested by the State, and that was not objected to by either party." Tenn. Pet. Reh'g En Banc, ECF 37-1, at 6. The State noted that the "constitutional questions are exceptionally important because they concern the validity of the Tennessee legislature's exercise of its power to define a legal remedy for civil actions and to set the punishment for wrongful conduct." *Id.*

The Sixth Circuit denied the petition for rehearing en banc. Four judges would have granted rehearing en banc and certified the questions in furtherance of the court's "commitment to a 'cooperative judicial federalism.'" App. 171a, 195a (Nalbandian, J., statement) (quoting *Arizonans for Official English*, 520 U.S. at 77). Judge Bush joined Judge Nalbandian's statement but also dissented separately. App. 178a-194a (Bush, J., dissenting from denial of rehearing en

banc). He believed the case "highlight[ed] the need" to "clarify and define certification standards to address . . . constitutional federalism considerations." App. 178a. He noted that this Court "has not announced concrete rules to govern lower federal courts in deciding whether to certify questions." App. 182a. In his view, this case "was the ideal case in which to begin delineating those standards." App. 182a.

Judge Bush agreed with Judge Larsen that "all factors seem to point to certification here" and that the panel's decision contravened "fundamental federalism principles." App. 190a-191a. In his view, the Sixth Circuit, in denying rehearing en banc, had "missed an opportunity to address a significant issue that is likely to recur." App. 193a. He also noted that this Court's guidance on certification would be "welcome." App. 193a.

REASONS FOR GRANTING THE PETITION

I. An Entrenched Circuit Split Exists Over the Appropriate Certification Standard and Whether To Consider States' Interests.

In *Lehman Brothers v. Schein*, this Court "for the first time expressed its view as to the use of certification procedures by the federal courts." 416 U.S. 386, 395 (1974) (Rehnquist, J., concurring). The Court noted that certification is not "obligatory," but found it "particularly appropriate" in that case "in view of the novelty of the question and the great unsettlement of Florida law" and to "help[] build cooperative judicial federalism." *Id.* at 391 (majority). Accordingly, the Court vacated the decision below and remanded the case so that the lower court could "reconsider whether the controlling issue of Florida law" should be certified. *Id.* at 391-92.

This Court has not provided any guidance about certification in a diversity case since *Lehman Brothers* and scant guidance about certification more generally. *See* App. 182a (Bush, J., dissenting from denial of rehearing en banc) ("[T]he Supreme Court has not announced concrete rules to govern lower federal courts in deciding whether to certify questions[.]"); *In re Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) (*Lehman Brothers* "provides no clear standards as to when certification should be used."); Deborah J. Challener, *Distinguishing Certification From Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 Rutgers L.J. 847, 874 (2007) (noting this Court "has provided little guidance to the lower courts regarding

the circumstances under which certification is appropriate").

As a result, "lower federal courts have had to make their own guidelines." App. 182a. (Bush, J., dissenting from denial of rehearing en banc). And those guidelines differ substantially. Although many factors overlap—particularly the requirement that a state law issue be both dispositive and unresolved by state courts—the circuits' tests vary dramatically. *See* Molly Thomas-Jensen, *Certification After* Arizonans for Official English v. Arizona*: A Survey of Federal Appellate Courts' Practices*, 87 Den. U.L. Rev. 139, 140 (2009) (noting that federal courts' "analytical approach to certification . . . is inconsistent" and certification "analysis has varied dramatically, from circuit to circuit, and even within circuits"); Challener, *supra*, at 874 (cataloging at least three different approaches taken by the circuits).

That variation is particularly evident in the different weight circuits give state interests in the certification inquiry. And, as this case demonstrates, those differences are dispositive. Several circuits require that an unresolved state constitutional issue be certified if at all possible, and a number of other circuits would have undoubtedly certified the state constitutional questions in this case given the importance of those questions to state public policy.

Guidance from this Court is necessary to remedy these differences and to ensure that certification standards incorporate an appropriate respect for States' sovereign interests. Such guidance would be

"welcome[d]" by lower courts. App. 193a (Bush, J., dissenting from denial of rehearing en banc).

A. The decision below directly contradicts the requirement adopted by the Ninth and Eleventh Circuits that state constitutional issues be certified if at all possible.

Recognizing a State's sovereign interest in interpreting its constitution, at least two circuits have held that unsettled state constitutional questions should be certified to the State's highest court if possible. The Sixth Circuit does not follow that deferential approach.

The Eleventh Circuit has concluded that it is "imperative" that "state constitutional issues . . . be decided by the state supreme court." *Blue Cross & Blue Shield of Ala., Inc. v. Nielsen*, 116 F.3d 1406, 1408, 1413 (11th Cir. 1997). "Given the sensitivity of such matters and how closely they sound to the heart of a state's self-government, a federal court should not purport to hold that a state statute violates the state constitution, except as an unavoidable matter of last resort." *Id.*; *see also LeFrere v. Quezada*, 582 F.3d 1260, 1268 (11th Cir. 2009) (Certification "is especially appropriate in a case . . . where the decisional task involves interpreting the state constitution."); *Estate of McCall ex rel. McCall v. United States*, 642 F.3d 944, 946, 952 (11th Cir. 2011) (certifying "important questions about the interpretation and application of Florida constitutional law" regarding a damages cap).

The Ninth Circuit similarly applies a test that requires certification of unresolved state constitutional questions if possible. In *Perry v. Schwarzenegger*, the Ninth Circuit held that, in "the absence of controlling authority from the highest court of California on these important [constitutional] questions," it was "compelled" to certify the question to the California Supreme Court. 628 F.3d 1191, 1196 (9th Cir. 2011). Although it recognized that this Court's statements about certification in *Arizonans for Official English* were dicta, the Ninth Circuit held that it was "required" to "request a more definitive statement from the State's highest court" on the constitutional question, "[r]ather than rely on [its] own understanding of th[e] balance of power under the California Constitution." *Id.* at 1197-98 & n.9.

The Ninth Circuit has followed that approach in other cases as well. *See, e.g.*, *Int'l Soc'y for Krishna Consciousness of Cal. Inc. v. City of L.A.*, 530 F.3d 768, 773–76 (9th Cir. 2008) (certifying question whether airport was "public forum" under California Constitution); *L.A. Alliance for Survival v. City of L.A.,* 157 F.3d 1162, 1164 (9th Cir. 1998) (certifying the "critical issue of whether the California Constitution's Liberty of Speech Clause grants greater protection to speech" than the First Amendment).

In the decision below, the Sixth Circuit rejected the approach of those two circuits and applied a directly contrary one. The Sixth Circuit recognized that Tennessee courts "have not addressed the [state constitutional] issue presented," and that Tennessee law requires a court "to uphold the constitutionality of

a statute wherever possible." App. 28a. But despite the existence of important questions of state constitutional law and the Tennessee Attorney General's request for certification of those questions, the majority decided to "predict how the [Tennessee Supreme Court] would rule" on the state constitutional question rather than ask it directly. App. 28a. And the majority then "predicted" that the statutory cap on punitive damages violates the Tennessee Constitution. App. 28a-29a.

Unlike the Eleventh Circuit, the Sixth Circuit did not understand it to be "imperative" to give the State the opportunity to interpret its own constitution. *Nielsen*, 116 F.3d at 1408, 1413. Nor did the Sixth Circuit invalidate the cap on punitive damages only as "an unavoidable matter of last resort." *Id.* at 1413. Instead, it "elect[ed] to decide the state law questions on its own." App. 43a (Larsen, J., dissenting in part). And unlike the Ninth Circuit, the Sixth Circuit did not feel "compelled" or "required" by *Arizonans for Official English* and this Court's repeated emphasis on federalism and comity to certify the state constitutional questions. *Perry*, 628 F.3d at 1196, 1198. To the contrary, it "str[uck] down a new state law on novel state-constitutional law grounds . . . at the expense of comity and our cooperative federalism." App. 78a (Larsen, J., dissenting in part).

The Sixth Circuit's approach to unresolved state constitutional questions cannot be reconciled with the approaches of the Ninth and Eleventh Circuits. That direct contradiction on an important question implicating a State's sovereign prerogative to interpret

its own constitution alone warrants this Court's review. It is "a question of importance not heretofore considered by this Court, and one over which the Circuits are divided." *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 507 (1982). Moreover, the circuits' varied approaches to certification in general further illustrate the need for guidance from this Court.

B. The First, Second, Seventh, and Tenth Circuits require a court to consider States' sovereignty interests and favor certification to protect them.

Four circuits have adopted a certification test that requires the court to consider a State's sovereign interests as a significant factor in favor of certification. The First Circuit is "particularly mindful" of "[federalism] concerns" in its certification analysis, finding "strong[] reasons" to certify questions when they implicate exclusive state authorities, such as the regulation of the legal profession. *The Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 119 (1st Cir. 2010). Accordingly, the First Circuit has held that certification is warranted when a determinative but undecided state law issue "deal[s] with strong state interests." *United States v. Howe*, 736 F.3d 1, 5 (1st Cir. 2013).

The Second Circuit has identified "at least six factors that must be considered in deciding whether certification is justified." *See Tunick v. Safir*, 209 F.3d 67, 81 (2d Cir. 2000). One of those factors is the "importance of the issue to the state," and another factor looks to "the federalism implications of a decision

by the federal courts and in particular whether a decision by the federal judiciary potentially interferes with core matters of state sovereignty." *Id.* Under this test, certification is "particularly appropriate" and "especially desirable" when "the challenged legislation goes to the basic sovereign functions of state government." *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 153-54 (2d Cir. 2001).

The Seventh Circuit, when asked to certify unresolved questions of state law, looks to "whether the case concerns a matter of vital public concern, [whether it] involves an issue likely to recur in other cases, and whether the state supreme court has yet to have an opportunity to illuminate a clear path on the issue." *Zahn v. N.A. Power & Gas, LLC*, 815 F.3d 1082, 1085 (7th Cir. 2016) (cleaned up). In this analysis, the Seventh Circuit expressly considers "whether the issue is of interest to the state supreme court in its development of state law." *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001); *see also Stephan v. Rocky Mtn. Chocolate Factory, Inc.*, 129 F.3d 414, 418 (7th Cir. 1997) (certifying an issue "of significant interest to the Colorado Supreme Court"). Accordingly, the Seventh Circuit has held certification is warranted when necessary to prevent the State from "los[ing] the ability to develop or restate the principles that it believes should govern the category of cases." *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (en banc) (plurality opinion).

The Tenth Circuit will certify a question that is (1) determinative and (2) "sufficiently novel that [the court] feels uncomfortable attempting to decide it

without further guidance." *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (Gorsuch, J.). In applying this unique test, the Tenth Circuit "seek[s] to give meaning and respect to the federal character of our judicial system, recognizing that the judicial policy of a state should be decided when possible by state, not federal, courts." *Id.* Accordingly, when the Tenth Circuit has been confronted with a state constitutional question on which "there is no controlling precedent," it has certified the question to the state's highest court. *Parcell v. Governmental Ethics Comm'n*, 626 F.2d 160, 161 (10th Cir. 1980).

C. The Third, Fifth, and D.C. Circuits require a court to consider the broader policy significance of the state law issue as part of the certification analysis.

Another group—comprised of the Third, Fifth, and D.C. Circuits—does not expressly consider state sovereignty in its certification analysis, but, borrowing from abstention doctrines, does limit certification to instances in which a state law issue is important and implicates state public policy.

The Third Circuit initially established factors for certification in a portion of a dissenting opinion in which all three panel judges joined urging New Jersey to adopt a certification procedure. *See Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 302-03 & n.9 (3d Cir. 1995) (Becker, J., dissenting). Under that test, certification is appropriate when "(1) the issue is one of importance; (2) it may be determinative of the litigation; and (3) state law does not provide controlling precedent." *Id.* at 304. Applying this test, the Third

Circuit has declined to certify questions that were "neither sufficiently important nor sufficiently difficult," *Travelers Indem. Co. of Ill. v. DiBartolo*, 171 F.3d 168, 169 n.1 (3d Cir. 1999), but has certified unresolved state law questions that were "of such substantial public importance as to require prompt and definitive resolution by" the state court, *Delta Funding Corp. v. Harris*, 426 F.3d 671, 675 (3d Cir. 2005).

The Fifth Circuit applies a three-factor certification test derived from *Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976), which examines (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 considerations, including delay. *Swindol v. Aurora Flight Sciences Corp.*, 805 F.3d 516, 522 (5th Cir. 2015). Applying this test, the Fifth Circuit has concluded that unresolved state law questions presenting significant public policy concerns for the State are "compelling comity interests" that warrant certification. *Id.*; *see also In re Katrina Canal Breaches Litig.*, 613 F.3d 504, 509 (5th Cir. 2010) (finding certification "advisable" because "important state interests are at stake and the state courts have not provided clear guidance on how to proceed"); *Lucas v. United States*, 807 F.2d 414, 418 (5th Cir. 1986) (certifying the "important question" of a statutory damages cap's constitutionality under the Texas Constitution to the state supreme court because it was "the final arbiter of th[e] issue").

In deciding whether to certify a question, the D.C. Circuit asks (1) whether the law is "genuinely uncertain" and (2) "whether the case is one of extreme public importance." *Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (D.C. Cir. 2001) (cleaned up). Accordingly, the D.C. Circuit has certified a question when its resolution would "have significant effects" within the District of Columbia, *DeBerry v. First Gov't Mortg. & Inv'rs Corp.*, 170 F.3d 1105, 1110 (D.C. Cir. 1999), but has declined to certify when the party seeking certification had not argued that the question was "one of substantial interest to the District," *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014).

D. The Fourth, Sixth, Eighth, and Federal Circuits do not require consideration of state sovereignty or whether an issue implicates important state policies.

Four circuits, including the Sixth, have adopted a more malleable certification inquiry. Unlike other circuits, these circuits have not incorporated into the certification standard the inquiries into state sovereign interests or the importance of a question to state public policy that derive from abstention doctrines. *See* Challener, *supra*, at 882-84.[2] In these circuits, each

[2] Although Challener also puts the Eleventh Circuit in this category, the Eleventh Circuit has treated state constitutional claims differently, requiring their certification if at all possible. *See Nielsen*, 116 F.3d at 1413; *LeFrere*, 582 F.3d at 1268. Thus, even if the Eleventh Circuit's approach to statutory and common law issues more closely reflects the approach of these circuits, its

judge and panel has considerable license but very little guidance on when to certify. *See* App. 182a (Bush, J., dissenting from denial of rehearing en banc) (noting the Sixth Circuit's standard "do[es] nothing to narrow the discretion left" to each judge and panel).

The only factor the Fourth Circuit has adopted in its certification inquiry is the uncertainty of state law. The court, for example, certified a question to the Virginia Supreme Court without further analysis because, after reviewing state law, it "remain[ed] uncertain as to whether Virginia would permit" a particular type of veil-piercing claim. *C.F. Trust, Inc. v. First Flight Ltd. P'ship*, 306 F.3d 126, 141 (4th Cir. 2002). Similarly, in *Langley v. Pierce*, because the parties had admitted that there was "no controlling precedent in South Carolina law that addresses the exact controversy," a panel certified the question. 993 F.2d 36, 37 (4th Cir. 1993).

Although it has fewer relevant decisions, the Federal Circuit appears to take a similar approach, noting the "desirability" of certifying questions "if the question of the state's law is in doubt," but denying certification if state law is settled—without inquiry into other factors. *Toews v. United States*, 376 F.3d 1371, 1380-81 (Fed. Cir. 2004); *see also Klamath Irrigation Dist. v. United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008) (certification appropriate where the court "discerns an absence of controlling [state] precedent"); *Chevy Chase Land Co. v. United States,*

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approach to state constitutional issues requires consideration of the State's sovereign interest in interpreting its own constitution.

158 F.3d 574, 575-76 (Fed. Cir. 1998) (certifying "complicated issues of Maryland property law upon which th[e] court discern[ed] an absence of applicable and dispositive Maryland law").

The Sixth Circuit has adopted the same basic inquiry. *See Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) ("Resort to the certification procedure is most appropriate when the question is new and state law is unsettled."). As a result, judges and panels within the Sixth Circuit maintain—and exercise—the discretion to decline to certify questions, including questions of first impression within the State, without any consideration of a State's sovereign interests or the importance of the issue to state public policy. *See, e.g.*, *Smith v. Joy Techs., Inc.*, 828 F.3d 391, 397 (6th Cir. 2016) (declining certification of unsettled state law question implicating significant public policy interests); *Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009) (declining to "trouble the Kentucky Supreme Court" despite recognizing it was an issue "of first impression").

As Judge Bush recognized, "because [the Sixth Circuit] has no guidelines for certification beyond suggesting that it is appropriate for novel and unsettled questions of state law, the panel [in this case] could disregard the availability of the certification procedure." App. 191a. He favored en banc review to incorporate the kind of respect for state sovereignty that other circuits have adopted, including a "presumption in favor of certification where the panel

is facing an unclear issue of state constitutional law." App. 192a.

The Eighth Circuit also regards the uncertainty of state law as dispositive, even though it has recognized that uncertainty alone is not sufficient grounds for a federal court to abstain in a diversity case. *See Guillard v. Niagara Mach. & Tool Works*, 488 F.2d 20, 24-25 (8th Cir. 1973). Like the Sixth Circuit, the Eighth Circuit does not expressly consider state sovereignty interests or the importance of the issue to state public policy as part of its certification inquiry. *See Kulinski v. MedtronicBio-Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997). In individual cases, the court has looked to whether the state law question is already pending in state court or involves competing public policies. *See, e.g.*, *Hatfield v. Bishop Clarkson Mem'l Hosp.*, 701 F.2d 1266, 1268 (8th Cir. 1983) (en banc).

The latitude provided by these circuits' minimal standards allows panels—including the one below—to disregard States' sovereign interests in making their own law and establishing their own policy. Other circuits, however, require consideration of those important interests. Certiorari is warranted to resolve that discrepancy.

II. The Decision Below Ignores Fundamental Principles of State Sovereignty and Federalism.

In failing to consider the State's sovereign interests and this Court's commitment to cooperative judicial federalism, the decision below seriously undermines

those important principles. This Court should grant review to remedy that failure.

"Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies[.]" *R.R. Comm'n of Texas v. Pullman Co.*, 312 U.S. 496, 500 (1941). Abstention doctrines formerly protected the "rightful independence of the state governments," *id.* at 501 (cleaned up), but often "proved protracted and expensive in practice," *Arizonans for Official English*, 520 U.S. at 76.

Certification has developed over the past fifty years as a more efficient alternative that continues to protect—and respect—States' interests in interpreting their own law. *Id.* "Abstention is a blunt instrument," but "[c]ertification offers a more precise tool" to "'help build a cooperative judicial federalism.'" *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1156-57 (2017) (Sotomayor, J., concurring) (quoting *Lehman Brothers*, 416 U.S. at 391).

Certification serves two vitally important federalism interests—interests that are substantially undermined by the Sixth Circuit's approach. First, it avoids the "friction-generating error" that occurs when a federal court "endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English*, 520 U.S. at 79. The danger of such friction-generating error is at its zenith when the federal court endeavors to construe a novel state *constitutional* issue on which the State's highest court has not opined. *See* App. 71a (Larsen, J., dissenting in part).

Certifying such questions to the state courts ensures that federal courts do not "diminish the power of state judiciaries" and "minimize[s] the risk of unnecessary interference with the autonomy and independence of the states." App. 177a (Bush, J., dissenting from denial of rehearing en banc). For that reason, "federal courts should refrain whenever possible from deciding novel or difficult state-law questions." *Knick v. Twp. of Scott*, No. 17-647 (June 21, 2019) (Kagan, J., dissenting), slip op. at 15.

Second, certification prevents "forum-shopping" between federal and state courts, one of the evils this Court sought to remedy in *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938). *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965). As Judge Calabresi has suggested, the Sixth Circuit's approach to certification "leads to precisely the kind of forum shopping that *Erie* . . . was intended to prevent" and can "prevent state courts from deciding unsettled issues of state law, [in] violat[ion] [of] fundamental principles of federalism and comity." *McCarthy v. Olin Corp.*, 119 F.3d 148, 157-58 (2d Cir. 1997) (Calabresi, J., dissenting).

A. The Sixth Circuit's approach undermines a State's sovereign authority to interpret its own constitution.

This Court has long valued the "deeper policy derived from our federalism" that issues implicating States' "sovereign prerogative" and other "aspect[s] of sovereignty" should be addressed first by state courts. *La. Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959). And this Court has made clear that "our

federalism" requires federal courts not to "unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). State courts are "the 'ultimate expositors of state law,'" and, "[f]or that reason, this Court has promoted practices of certification and abstention to put difficult state-law issues in state judges' hands." *Knick*, *supra*, (Kagan, J., dissenting), slip op. at 15 (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

Few issues implicate the State's sovereign prerogative more directly than the interpretation of its constitution. "The Constitution of Tennessee is the product of the sovereign will of Tennessee's citizens"; it "embodies fundamental values and articulates Tennesseans' common aspirations for constitutional government and the rule of law." *Estate of Bell v. Shelby Cty. Health Care Corp.*, 318 S.W.3d 823, 835 (Tenn. 2010). Certification here would have "place[d] the construction of the Tennessee Constitution in the hands of those entrusted with the document's safekeeping." App. 56a (Larsen, J., dissenting in part).

Federal courts sitting in diversity should not—as the court did below—exercise the authority to declare a state law invalid under the state constitution unless it follows directly from existing state constitutional law. Declaring a duly enacted statute unconstitutional "is the gravest and most delicate duty" that a court is called on to perform. *Blodgett v. Holden*, 275 U.S. 142, 147-48 (1927) (Holmes, J., statement). Federal courts must perform that delicate duty when necessary with respect to the federal Constitution. *Id.* But when a state constitutional question is one of first

impression—as all acknowledge the constitutional questions here are—the state's highest court should be given an opportunity to address it. Only that court has the sovereign authority to interpret its state constitution definitely.

The Sixth Circuit disregarded these principles and usurped the Tennessee Supreme Court's sovereign authority to interpret the Tennessee Constitution. Predictably, that approach is inconsistent with any number of this Court's cases that caution federal courts against such interference in state constitutional interpretation. In *Kaiser Steel Corp. v. W.S. Ranch Co.*, for example, this Court granted certiorari, vacated the Tenth Circuit's decision interpreting the New Mexico Constitution, and remanded the case with instructions that it be stayed pending the resolution of the issue by the state courts. 391 U.S. 593, 594 (1968). Justice Brennan concurred, reiterating his view that abstention should be limited to "special circumstances," but concluding that the state constitutional issue presented "one of the narrowly limited special circumstances which justify the invocation of the judge-made doctrine of abstention." *Id.* at 594-95 (Brennan, J., concurring) (cleaned up). Similarly, in *City of Meridian v. Southern Bell Telephone & Telegraph Co.*, this Court again vacated the decision below and directed the lower courts to stay their hand and let the state court resolve the state constitutional issue. 358 U.S. 639, 640-41 (1959).

The "basic idea" of doctrines such as abstention and certification "is to discourage federal courts from intruding on sensitive and complicated issues of state

law without giving state courts a chance to review, and perhaps resolve, the matter first." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 197 (2018). Other circuits, recognizing that state constitutional interpretation involves "ultrasensitive" issues at the core of a State's sovereign authority, have concluded that certification is not only appropriate in such circumstances, but "imperative" or "required" by "[f]ederalism and comity." *See Nielsen*, 116 F.3d at 1413; *Perry*, 628 F.3d at 1198. And, when certification of a novel state constitutional issue is not appropriate for other reasons, courts have declined "to venture unguided into . . . state constitutional law," and instead decided the case on other grounds. *RAR, Inc. v. Turner Diesel, Ltd.*,107 F.3d 1272, 1277 (7th Cir. 1997).

Moreover, the Tennessee Supreme Court has also acknowledged the benefits of—and advocated for—certification. "[T]he certification procedure protects states' sovereignty." *Haley v. Univ. of Tenn.-Knoxville*, 188 S.W.3d 518, 521 (Tenn. 2006). If a federal court "applies different legal rules than the state court would have, the state's sovereignty is diminished [because] the federal court has made state law." *Id.* (alteration in original). "Such an impact on state sovereignty is no small matter[.]" *Id.*

The majority below turned a blind eye to the State's sovereign interests. It chose instead to "speculat[e] about the meaning of a state statute" and then invalidate it based "on an equally speculative construction of the state constitution," despite the fact that "the Tennessee Supreme Court 'st[ood] willing to

address' the[] novel issues" and that all parties agreed that certification would be appropriate. App. 46a (Larsen, J., dissenting in part).

That decision directly contradicts this Court's repeated emphasis on the cooperative judicial federalism at the core of our dual court system. If "speculation by a federal court about the meaning of a state statute in the absence of prior state adjudication is particularly gratuitous" when the state court is willing to address the question, *Arizonans for Official English,* 520 U.S. at 79 (internal quotation marks omitted), then speculation about the meaning of the state *constitution* in such circumstances is fatally gratuitous. A state constitutional question is "one in which state governments have the highest interest"; it should "be decided in the first instance by state courts." *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978).

The majority nevertheless expressly, gratuitously, and fatally speculated about the meaning of the Tennessee Constitution. It presumed to "anticipate" and "predict" what the Tennessee Supreme Court would do. App. 28a. And its constitutional reasoning principally rested on a one-paragraph 1797 North Carolina decision that does not appear to have ever been cited by a Tennessee court and does not address the issue in this case. App. 29a-30a; *see* App. 76a (Larsen, J., dissenting in part).

Indeed, Judge Stranch admitted at oral argument that the judges on the panel were "all struggling" because the state constitutional issue involved a "morass of historical stuff," and required understanding the state of Tennessee law at the time

the Tennessee Constitution was drafted and how the Tennessee Constitution's right to a trial by jury accounts for early common law cases, including, potentially, the North Carolina case. Oral argument, *supra*, at 43:15-44:38. Yet the panel eschewed certification, the very means designed to avoid such interpretive struggles—and "predict[ions]."

The Tennessee Supreme Court is the body charged with sorting through the "historical morass" and deciding how to interpret the Tennessee Constitution. But the majority decided to take that upon itself—a "pretty extraordinary thing for a federal court to do, strike down a state statute under state constitutional law without hearing from the state courts." Oral Argument, *supra*, at 18:18.

Judge Bush remarked that it was "unusual" for the panel to have invalidated a state statute on state constitutional grounds and characterized the panel's decision as "in tension" with the approach this Court has counseled in similar cases. App. 188a. Both are substantial understatements. The panel's act of invalidating a state statute on novel state constitutional grounds without first attempting to certify the question is, as far as the State can determine, not just unusual, but unprecedented. And the panel's decision is not merely "in tension" with this Court's precedents; it willfully ignores the cooperative judicial federalism this Court has repeatedly endorsed.

B. The Sixth Circuit's approach encourages forum-shopping in contravention of *Erie*.

The "scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers." *Hanna*, 380 U.S. at 474-75 (Black, J., concurring). This division of law-making functions is enforced by *Erie*, which requires federal courts sitting in diversity to apply state substantive law. *Id.* at 465 (majority). And one of the principal aims of *Erie* was "discouragement of forum-shopping" between state and federal courts in order to take advantage of more favorable law. *Id.* at 468.

The Sixth Circuit's approach has the opposite effect, however. As this case demonstrates, the failure to certify a question to the state courts can deprive the State of its ability to provide an authoritative interpretation of its own law, or, in this case, its own constitution. *See* App. 184a-187a (Bush, J., dissenting from denial of rehearing en banc) (quoting from *McCarthy*, 119 F.3d at 157-59 (Calabresi, J., dissenting), and *Todd*, 9 F.3d at 1222).

Plaintiffs seeking punitive damages will inevitably take advantage of the Sixth Circuit's state constitutional ruling by suing in federal court whenever possible. See *Todd*, 9 F.3d at 1222 ("If the federal court treats the plaintiff more favorably than the state tribunal would, then the plaintiff always files in federal court[.]"). Subsequent Sixth Circuit panels

will likely follow the precedent established by the panel below of not certifying the question[3] and will be bound by the panel's interpretation of the Tennessee Constitution absent an intervening decision by the state appellate courts. "Certification," on the other hand, would "ensure[] that the law [the federal court] appl[ies] is genuinely *state* law." *Id.*

The creation of the possibility for such forum shopping is particularly egregious when the federal court applies a method of inquiry derived from federal law to hold a state law unconstitutional under the state constitution, as the majority did below. *See* App. 70a-78a (Larsen, J., dissenting in part) (questioning "whether the majority has asked the wrong question entirely"). The Tennessee Supreme Court has mandated that state courts "resolve any reasonable doubt in favor of the legislative action," when interpreting the Tennessee Constitution. *Helms v. Tenn. Dep't of Safety*, 987 S.W.2d 545, 549 (Tenn. 1999). And this Court has indicated it will presume a state statute "conforms with the State constitution" when state courts "have made no contrary determination." *Cohen v. Beneficial Indus. Loan Corp.*, 337 U.S. 541, 547 (1949).

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[3] Judge Nalbandian's statement on the denial of rehearing en banc recognizes that a subsequent Sixth Circuit panel will not be bound by the panel's decision not to certify the questions to the Tennessee Supreme Court. App. 178a. He notes that other circuits have adopted a different approach, further highlighting the need for clarity from this Court about the contours of certification.

The majority instead "has[tily] invalidat[ed]" the damages cap, a decision Judge Larsen deemed "doubly unnecessary" given the potential for certification and existing Sixth Circuit precedent and "doubly dubious." App. 56aa, 78a. As a result, there is substantial "reason to believe the Tennessee Supreme Court would reach a different outcome," App. 191a n.7 (Bush, J., dissenting from denial of rehearing en banc), and, accordingly, additional reason for plaintiffs seeking uncapped punitive damages to flock to federal court.

III. This Case Is an Ideal Vehicle for Providing Guidance About Certification.

This case presents an ideal opportunity to address certification and to resolve the division among the circuits over the appropriate weight to give States' interests in the inquiry. As Judge Larsen noted, the "questions are ideally suited for certification. Tennessee's highest court has expressed its receptiveness to certification; the State urges certification; and neither Lindenberg nor Jackson National objects to certification." App. 45a (Larsen, J., dissenting in part).

First, the case involves two state constitutional questions, the questions that the State has intervened to address, and an antecedent statutory question about whether common law punitive damages are available in addition to statutory bad faith damages under Tennessee law. Parties have petitioned this Court for review of the Sixth Circuit's certification decision on the constitutional questions and statutory question. Having both of these types of questions at issue will allow the Court to address whether lower courts should

treat constitutional questions differently from questions of statutory construction, as some circuits have, and what factors a court should look to in addressing each type of question. Importantly, the certification of state constitutional questions arises less frequently, but presents vitally important questions of federalism and state sovereignty. If this Court decides to resolve the division among the circuits about the appropriate standard for certification in a future case, it may not have a vehicle that allows it to address the certification of state constitutional questions, particularly in concert with the certification of a statutory question.

Second, both the constitutional questions and the statutory question at issue are indisputably dispositive of this case and unresolved by the Tennessee Supreme Court, a fact attested to by that court itself. And the Tennessee Supreme Court has indicated its willingness to address all the questions if certified. Those factors—often disputed in a certification analysis—present no obstacles to review here.

Moreover, there is a difference in posture as matter of state law between the constitutional questions and the question of statutory construction: No appellate court in Tennessee has addressed the constitutional questions, but an intermediate appellate court has spoken to the statutory question. This difference in posture squarely presents this Court with a virtually unique opportunity to opine on the weight an intermediate state appellate ruling should be given in the decision whether to certify.

Third, this is not a case in which one party opposed certification or the party requesting certification did so only after receiving an adverse decision. *See, e.g. Armijo v. Ex Cam, Inc.*, 843 F.2d 406, 407 (10th Cir. 1988) (denying certification where the plaintiff "did not request certification until after the district court made a decision unfavorable to her"). The plaintiff, who filed this action in state court, requested certification in the district court after removal. App. 117a, 123a. And in the court of appeals the State requested certification and all parties agreed that certification would be appropriate. App. 45a (Larsen, J., dissenting in part). Thus, the case involves a pure question of law and does not involve fact-specific balancing of potential hardship to one party against the federalism interests furthered by certification. Moreover, the State has intervened to advocate for certification and defend the constitutionality of state law, a fact this Court and courts of appeals have pointed to as favoring certification. *See, e.g.*, *Arizonans for Official English*, 520 U.S. at 76-79 (admonishing that the state attorney general's requests for certification "merited more respectful consideration than they received in the proceedings below"); *Serio*, 261 F.3d at 153.

Granting certiorari would allow this Court to address an exceptionally important issue, one vital to give "meaning and respect to the federal character of our judicial system" and to ensure that "the judicial policy of a state [is] decided when possible by state, not federal, courts." *Pino*, 507 F.3d at 1236 (Gorsuch, J.). This question will undoubtedly recur, particularly if States sever their analyses of their state constitutions from this Court's analysis of the federal Constitution.

See Sutton, *supra*, at 174-78. This case presents an ideal vehicle to resolve it and to provide federal courts guidance on certification.[4]

CONCLUSION

The petition for a writ of certiorari should be granted.

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[4] As Jackson National notes in its petition, the Tennessee Supreme Court has recently accepted a certified question from the Middle District of Tennessee about the constitutionality of the non-economic damages cap in Tenn. Code Ann. § 29-39-102. *See* June 19, 2019 Order, *McClay v. Airport Mgmt. Servs., LLC,* No. M2019-00511-SC-R23-CV (Tenn.) (case history available at https://tinyurl.com/y4yc4fyk). The Tennessee Supreme Court will hold oral arguments in *McClay* soon, and its decision will likely provide guidance on the scope of the right to trial by jury guaranteed by the Tennessee Constitution. The State has no objection to Jackson National's request that this Court hold these petitions pending resolution of *McClay* and, if appropriate, grant the petitions, vacate the decision below, and remand the case for consideration of *McClay*. If the Court chooses that route, it should also instruct the court of appeals on remand to consider whether certification would be appropriate if the decision in *McClay* does not control the outcome in this case.

Respectfully submitted,

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