No. 19-13

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

REPLY BRIEF OF PETITIONER

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Associate Solicitor General

JONATHAN DAVID SHAUB
Assistant Solicitor General
Counsel of Record
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 253-5642
jonathan.shaub@ag.tn.gov

Counsel for Petitioner

Becker Gallagher · Cincinnati, OH · Washington, D.C. · 800.890.5001

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The court of appeals declared a Tennessee state statute unconstitutional as a matter of first impression under the Tennessee Constitution. It did so despite the fact that the Tennessee Attorney General requested that the federal court certify the novel state constitutional questions to the Tennessee Supreme Court. And it did so despite the fact that the Tennessee Supreme Court itself invited the Sixth Circuit to certify to it the dispositive state law questions in the case. Respondent cannot identify any other circuit that would treat a State's sovereign interests so cavalierly. Nor can respondent cite any other case in which a federal court has struck down a state law on state constitutional grounds without first seeking input from the State's highest court.

Because this Court has never established standards for certification, the court of appeals was free to ignore the significant federalism interests presented by this case. The panel's refusal to certify—indeed to even *address* the issue despite Judge Larsen's dissent urging certification—contravenes basic principles of our dual judicial system. It illustrates the lack of—and the need for—"concrete rules to govern lower federal courts in deciding whether to certify questions." Pet. App. 182a (Bush, J., dissenting from denial of rehearing en banc).

Respondent counters that the decision below represents an exercise of discretion and thus does not warrant review. All parties agree that certification should be discretionary. But that discretion can be abused. As the court of appeals' dismissive approach to certification below evidences, the danger of abuse is

much higher when there are no standards to guide its exercise. This Court's guidance on certification is past due. And this is "the ideal case in which to begin delineating those standards." Pet. App. 182a (Bush, J., dissenting from denial of rehearing en banc).

One of those standards is relatively uncontroversial. A federal court should not hold a state statute unconstitutional under a novel theory of state constitutional law without first seeking input from the State's highest court. Or, as a leading treatise puts it, only in "exceptional circumstances" should "[a] federal court . . . adjudge a state statute as consistent with or conflicting with the state constitution if the state courts have not addressed the statute's validity." Bryan Garner, Neil M. Gorsuch, Brett M. Kavanaugh, et al., *The Law of Judicial Precedent* § 78, p. 673 (2016). A federal court certainly should not take it upon itself to wade through a "morass of historical stuff," and decide an important state constitutional issue of first impression when the State—in the form of both the Attorney General and the Supreme Court—has requested and invited certification. Oral Argument at 43:15-44:10, *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348 (6th Cir. 2018) (Nos. 17-6034, 17-6079), http://tinyurl.com/y59uqvnl. But the court of appeals was not deterred from doing just that.

Certiorari is warranted to provide federal courts guidance on this important issue and ensure that, going forward, state sovereign interests are afforded more "respectful consideration than they received in the proceedings below." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78 (1997).

I. The Decision Below Is an Affront to Federalism.

Respondent—incorrectly—dismisses the decision below as a "case-specific decision" with only minor implications for federalism and few consequences beyond this case. BIO 8. The decision below, if allowed to stand, establishes a precedent that poses a significant threat to the sovereign interests of States in interpreting their own statutory and constitutional law. Moreover, the decision below undermines federalism by creating two competing—and potentially contradictory— sources of state constitutional law, impairing the "twin aims of the *Erie* rule" to prevent forum-shopping and avoid the "inequitable administration of the laws." *Hanna v. Plummer*, 380 U.S. 460, 468 (1965); *see also* State Pet. 35-37.

The Sixth Circuit's approach to certification, which conflicts with the approaches taken by other circuits, is neither "unremarkable" nor "inevitable" as respondent suggests. BIO 16. It reflects a judgment about a "constitutional question" as "old as the Constitution" itself: "the proper division of authority between the Federal Government and the States." *New York v. United States*, 505 U.S. 144, 149 (1992). And it reflects the wrong judgment.

The question of whether and in what circumstances a federal court should certify a state constitutional issue to the State's highest court is vitally important. *See* State Pet. 27-35. Other circuits have recognized the gravity of such decisions and have adopted standards that expressly take the State's sovereign interests into account. *See* State Pet. 15-24; Jackson

Nat. Pet. 21. The Sixth Circuit has not, nor has this Court ever provided guidance instructing lower courts to consider these important sovereign interests.

Respondent suggests that the conflicting standards adopted by the circuits merely represent fact-specific decisions limited to the circumstances of each particular case. BIO 14-15.[1] But the language chosen by those courts is unmistakably broader. The Eleventh Circuit, for example, has been unequivocal that state constitutional issues relate closely "to the heart of a state's self-government" and that "[f]ederalism and comity *require*" federal courts not "to hold that a state statute violates the state constitution, except as a matter of last resort." *Blue Cross & Blue Shield of Ala., Inc. v. Nielsen*, 116 F.3d 1406, 1413 (11th Cir. 1997) (emphasis added). And the Eleventh Circuit has applied that precedent to certify state law questions in later cases. *See LeFrere v. Quezada*, 582 F.3d 1260, 1268 (11th Cir. 2009); *see also Freeman v. City of Mobile*, 146 F.3d 1292, 1299 & n.5 (11th Cir. 1998) (certifying two questions of Alabama law rather than

[1] Respondent relies largely on cases in which federal courts have resolved state-law questions, including constitutional questions, on the basis of established state law or under a state constitutional provision the State has interpreted as coextensive with a federal constitutional provision. BIO 9-15. Respondent has not—and cannot—cite a case in which a federal court has taken it upon itself to declare a state statute unconstitutional under a novel interpretation of the state constitution without any guidance from the state appellate courts about the issue.

"publish[ing] an opinion and judgment that . . . could interfere with Alabama's constitutional system").[2]

Respondent faults the State for asking for certification in a footnote. BIO 16, 19. But the State's request was unambiguous. After noting that, at that stage of the litigation, the constitutional issues were not yet ripe and before defending the constitutionality of the law on the merits, the State's brief made clear that certification was the appropriate course:

> If [the constitutional questions become ripe], this Court should certify the constitutional questions to the Tennessee Supreme Court pursuant to Tenn. Supp. Ct. R. 23. Both questions address important matters of state constitutional law.

Tenn. Br. at 8-9 & n.2, ECF No. 25.

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[2] Respondent claims the Eleventh Circuit has "addressed unsettled state constitutional issues without certification." BIO 15. But respondent's two cited cases provide no support for such a claim. The first applied *settled* state constitutional law to a straightforward issue and found *no* constitutional violation. *See Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 596 (11th Cir. 2013). The second did not involve a state constitutional question at all; it was a due process challenge based solely on the U.S. Constitution. *See Sultenfuss v. Snow*, 35 F.3d 1494, 1495, 1499 (11th Cir. 1994). Judge Carnes's dissent in *Sultenfuss* noted that a state constitutional issue "lurk[ed] in the shadows," *id.* at 1506, but the approach to certification he advocated in dissent was later adopted in his majority opinion in *Nielsen*, *see* 116 F.3d at 1413. That approach is directly contrary to the Sixth Circuit's approach below.

Moreover, respondent's focus on the actions of the State and other parties in the case is irrelevant. The appropriate question is whether the court applied the correct standard to determine whether to certify the state-law questions in light of the State's request and its sovereign interest in interpreting its own laws and Constitution. *See* 17A Charles Alan Wright et al., *Federal Practice & Procedure* § 4248 (3d ed. 2019) ("Ordinarily a court will order certification on its own motion.").

Accordingly, respondent is incorrect in suggesting that, if this Court granted certiorari, the "briefing would not address state sovereign interests or the other matters" on which the circuits disagree, and is equally incorrect in claiming that "the Court would be required to wade through the record to assess those case-specific considerations" relating to the procedural history here. BIO 17. The briefing would address the issues squarely raised by the disagreement and inconsistencies among the circuits—i.e., what standards should federal courts apply when considering certification of an important state constitutional question of first impression as well as a threshold question of state statutory law.

Indeed, the "case-specific" characteristics here make this case *more* appropriate as a vehicle to address certification. None of the "unique" circumstances identified by respondent would prevent the Court from articulating general principles to guide discretion in future cases. To the contrary, they provide this Court the opportunity to comment on the variety of different factors that may be relevant to certification, including

(1) the presence of both state statutory and constitutional questions; (2) the Tennessee Supreme Court's invitation to certify the state-law questions; (3) the agreement of all parties that certification would be appropriate; and (4) the existence of intermediate-appellate-court authority on the statutory state-law question. State Pet. 38-40.

Respondent raises mostly procedural arguments as reason for this Court not to grant certiorari. But respondent informed the court of appeals that certification would be "reasonable" and that she had no objection to certification. Oral Argument at 19:00-19:12. Moreover, the court of appeals did not rely on any of these procedural arguments in denying certification. Accordingly, none of those considerations would be relevant to this Court's review of the court of appeals' exercise of its discretion in this case.

II. The Decision Below Has Enormous Significance.

The question here is thus squarely one of federalism and of the proper approach of a federal court confronted with a novel state-law question. This Court has never addressed that question, casting federal courts adrift to answer it in whatever manner they wish—or to decline to address it at all, as the court of appeals did below.

The presence of these fundamental issues of federalism and comity between state and federal courts belies respondent's extraordinary claim that the State's interest in this case is limited to "the validity of a single damages award in litigation between two private parties." BIO 22. The State's interest in this case

could not be more profound or fundamental; it arises out of Tennessee's sovereign interest in its Constitution and laws and the fact that a federal court took it upon itself to declare a duly enacted state statute unconstitutional solely on novel *state* constitutional grounds without ever considering the State's interest. For that very reason—concern for state sovereignty in this context—a number of other States have urged this Court to provide guidance on these issues. Amicus Br. of Ohio, et al. 4-12.

States have a vital interest in the standard federal courts apply when deciding whether to certify state-law questions. Some circuits strongly favor certification of important, unsettled questions of state law. *See Tunick v. Safir*, 209 F.3d 67, 76 (2d Cir. 2000) (Calabresi, J.) (noting federal courts are "singularly unsuited to answer" certain fundamental questions of state law). And others hold certification of state constitutional questions to be "imperative" or "required." *Nielsen*, 116 F.3d at 1413; *Perry v. Schwarzenegger*, 628 F.3d 1191, 1198 (9th Cir. 2011). The Sixth Circuit has chosen a different course; it enforces no presumption against its courts resolving fundamental state-law questions of first impression and allows a panel or district court to take up a such questions if it so chooses, no matter the State's interests.

Exercising that authority, the panel below declared Tennessee's punitive damages cap unconstitutional. Respondent brazenly suggests that decision has no real consequence beyond this case. BIO 21-22. But precedent casts doubt on the accuracy of Judge

Nalbandian's comment that a future panel or district court could certify the precise issue decided below consistent with its obligation to abide by the decision of a previous panel. *See Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (6th Cir. 2009); *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 425 (5th Cir. 2001); Pet. App. 195a. In any event, even if Judge Nalbandian were correct as a theoretical matter, it strains credulity to suggest a district court or subsequent panel, confronted with the same state-law issues decided below, would be more likely to certify the question than to follow the Sixth Circuit's existing, precedential decision.

Moreover, respondent provides no evidence to support the rosy projection that this constitutional issue "will inevitably arise in many cases" and that the Tennessee Supreme Court will have "ample opportunities" to correct the decision below if it so chooses. BIO 22. Certainly, cases *could* arise in state court that allow it to address the issue. But there are a significant number of contingencies on which that would depend, including (1) the lack of any basis for federal jurisdiction, (2) a jury award of punitive damages, (3) an award of punitive damages that is both sufficiently large to implicate the cap and also upheld by the judge, (4) no statutory bars to the recovery, and (5) litigants willing to pursue the case as far as possible rather than settle given the existing Sixth Circuit precedent.

The party who would benefit from the Sixth Circuit's ruling would undoubtedly do everything possible to prevent the issue from going to the state court. In the meantime, until the opportunity to

address the issue presents itself, the governing interpretation of the Tennessee Constitution's guarantee of a right to trial by jury—established by a federal court—may be directly contrary to what the Tennessee Supreme Court would have decided.

More fundamentally, the decision below establishes precedent—apparently the first of its kind—that allows a federal court to take it upon itself to declare a state statute unconstitutional on state constitutional grounds without allowing the state court to weigh in and without explaining why certification would not be a more appropriate course. The panel below did so despite the fact that no party opposed certification and the Tennessee Supreme Court had invited certification.

The State has a substantial interest in ensuring that federal courts do not approach certification—particularly of state constitutional questions—with such indifference. Other States share that interest. That interest—and the lack of any standards to protect it—warrants this Court's intervention.

III. Federal Courts Lack Meaningful Standards To Guide Certification Decisions.

Respondent contends that this Court's review is not warranted because "[a]ll circuits treat certification decisions as case-specific exercises of discretion." BIO 9. But that argument misses the point. It is well settled that the decision whether to certify a state-law question lies within the "sound discretion" of the court. *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). Rather, the problem is disagreement among the courts

of appeals about the legal standard that should guide that discretion.

Respondent urges that any differences in approach among the lower courts should be chalked up to the discretionary nature of the certification decision. BIO 16. But the fact that a decision is discretionary "does not mean that no legal standard governs [that] discretion" or that varying approaches are tolerable. *Martin v. Franklin Capital Corp.*, 546 U.S. 132, 139 (2005); *see also Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975). An exercise of discretion requires the exercise of judgment, not whim, and "'judgment is to be guided by sound legal principles.'" *Martin*, 546 U.S. at 139 (quoting *United States v. Burr*, 25 F. Cas. 30, 35 (CC Va. 1807) (Marshall, C.J.)). As this Court has explained, "limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be treated alike." *Id.*[3]

The lower courts' varying approaches are not, as respondent suggests, merely the product of properly exercised discretion. They are evidence that this Court has not provided meaningful standards to guide and inform the lower courts in the exercise of their discretion. The upshot is that "like cases" are not being

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[3] Respondent contends, selectively quoting *Cooter & Gell v. Hartmax Corp.*, 496 U.S. 384, 405 (1990), that "'some variation' in the application of discretionary standards is 'inevitable.'" BIO 16. What this Court actually said in *Cooter & Gell*, however, is that "some variation *in the application of a standard based on reasonableness* is inevitable." 496 U.S. at 405 (emphasis added). The variance in the standard itself is neither inevitable nor desirable.

"treated alike," in contravention of basic principles of justice and federalism. *Id.*; *see also* Pet. App. 182a (Bush, J., dissenting from denial of rehearing en banc).

This Court has granted review in other cases to establish standards to guide discretionary decisions by lower federal courts. *See, e.g.*, *Martin*, 546 U.S. at 141 (articulating standards to guide discretionary award of attorney fees); *Albemarle Paper Co.*, 422 U.S. at 416 (articulating standards to guide discretionary award of backpay); *Western Pac. R. Corp. v. Western Pac. R. Co.*, 345 U.S. 247, 260 (1953) (recognizing "certain fundamental requirements" that "should be observed by the Courts of Appeals" in exercising their discretionary power to grant en banc review); *Gulf Oil Corp. v. Gilbert*, 330 U.S. 501, 508-09 (1947) (identifying factors to guide discretionary doctrine of forum non conveniens).

The need for meaningful standards to guide and limit discretion is especially compelling here, given the important federalism and comity interests that certification is intended to promote. This Court should grant review to make clear that federal courts must consider and give appropriate weight to those interests as part of their discretionary certification decision. "[R]esponsibility lies with this Court to define" the appropriate standards and "insure their observance." *Western Pac. R. Co.*, 345 U.S. at 260.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

HERBERT H. SLATERY III
Attorney General and Reporter
State of Tennessee

ANDRÉE S. BLUMSTEIN
Solicitor General

SARAH K. CAMPBELL
Associate Solicitor General

JONATHAN DAVID SHAUB
Assistant Solicitor General
Counsel of Record
Office of the Attorney General
P.O. Box 20207
Nashville, TN 37202
(615) 253-5642
jonathan.shaub@ag.tn.gov

Counsel for Petitioner