No. _____

In the Supreme Court of the United States

BRIDGET ALEX, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF BRANDON ALEX; JASHAWN ALEX; MICHAELLE COHEN; ESTATE OF BRANDON ALEX; DETREASURE COKER,

Petitioners,

v.

T-MOBILE USA, INCORPORATED; T-MOBILE US INCORPORATED, FORMERLY KNOWN AS METROPCS COMMUNICATIONS INCORPORATED; METROPCS MIDWAY RD; DEUTSCHE TELEKOM NORTH AMERICA INCORPORATED; T-SYSTEMS NORTH AMERICA INCORPORATED,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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August 26, 2020

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QUESTIONS PRESENTED

Plaintiffs sued T-Mobile in state court for breach of contract, deceptive trade practices, and gross negligence that led to Brandon Alex's death. T-Mobile removed to the United States District Court for the Northern District of Texas and moved to dismiss, asserting statutory immunity pursuant to dicta in a state case. The district court denied the motions to dismiss but, upon repeated urging, granted T-Mobile's motion for certification under 28 U.S.C. § 1292(b) but noting "it would have preferred to certify the question to the Texas Supreme Court, but is prohibited from doing so." The Fifth Circuit interpreted *dicta* within a Texas tort claims act ("TTCA") case under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), finding, after remand, that Defendants were immune from liability under Tex. Health and Safety Code § 771.053(a).

The first Fifth Circuit Panel did not provide a rationale why it did not certify this important question to the Texas Supreme Court, despite that its interpretation of the *dicta* debatably reforms Tex. Civ. Prac. & Rem.Code § 101 et. seq. (the TTCA) and nullifies §§ 771.053(a) and 772.407 for federal court litigants. Nor did the Fifth Circuit indicate why it appears it did not consider state law precedent, statutory language, or statutory interpretations in making the Erie guesses. Thus, the questions presented are:

1. Whether the Fifth Circuit abused its discretion by refusing to certify the case to the Texas Supreme Court, considering it involves two *Erie*-predictions that

interpret, and potentially invalidate, state statutes and other precedent.

2. Whether the Fifth Circuit abused its discretion in its *Erie*-guesses, in conflict with other circuits, the application of which may arguably rewrite, or expand, the Texas torts claims act and eviscerate other validly enacted state health statutes for future federal court litigants.

LIST OF PARTIES

Petitioners, who were plaintiffs-appellees below, are BRIDGET ALEX, INDIVIDUALLY AND ON BEHALF OF THE ESTATE OF BRANDON ALEX; JASHAWN ALEX; MICHAELLE COHEN; ESTATE OF BRANDON ALEX; DETREASURE COKER.

Respondents, who were Defendants-appellants below, are T-MOBILE USA, INCORPORATED; T-MOBILE US INCORPORATED, FORMERLY KNOWN AS METROPCS COMMUNICATIONS INCORPORATED; METROPCS MIDWAY RD; DEUTSCHE TELEKOM NORTH AMERICA INCORPORATED; T-SYSTEMS NORTH AMERICA INCORPORATED.

STATEMENT OF RELATED PROCEEDINGS

There are no proceedings that are directly related to this case.

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Where federal courts are confronted with application of unclear state law, the courts generally have two primary methods of ascertaining the meaning of the unclear state law: "*Erie*-guess" and certification. This court has commented favorably on certification to state supreme courts and sometimes instructed lower courts to consider certification on remand. See, e.g., *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997); *Lehman Bros. v. Schein*, 416 U.S. 386, 391–92 (1974); see also *Minn. Voters All. v. Mansky*, —— U.S. ——, 138 S.Ct. 1876, 1893 (2018) (Sotomayor, J., dissenting). Further, certification is even more compelling where, as here, the issues involve interpretation of state statutes. Indeed, as Justice Alito observed, while sitting on the United States Court of Appeals for the Third Circuit, a question "involving the interpretation of state statutes ….is one that seems to us to be particularly **inappropriate** for resolution by a federal court." *Michaels v. New Jersey*, 150 F.3d 257, 259 (3d Cir.1998). Commentators have also observed, from a review of federal courts' certification practices, that courts consider many "separate" factors before deciding to certify a question to state courts. Here, the lack of definitive guidance regarding certification of questions of state law to state supreme courts prejudiced Plaintiffs' interests and, without proper guidance, courts will continue to err by failing to certify those questions of state law that, because of their importance (e.g. health and safety) to state citizens, mandate consideration by state supreme courts. Uniformity in certification would be beneficial for federal courts and litigants as it would produce

authoritative law for the lower courts' guidance and improve judicial federalism. This is that vehicle with which to provide the needed guidance.

Further, where courts do not certify a 28 U.S.C. § 1292(b) question to state supreme courts, it has been observed that as a result of this Court not having provided significant recent treatment to the lower courts on the application of *Erie* guesses, federal courts have taken conflicting approaches for their consideration of decisions of a state's highest courts, intermediate courts, statutes, and other extraneous sources. Clarifying the scope of deference that should be given to state law, and other sources, is a matter of nationwide importance in light of the goals of the Tenth Amendment of the United States Constitution and the Rules of Decision Act.

Finally, correspondence from the International Academies of Emergency Dispatch, a nonprofit standard-setting organization promoting safe and effective emergency dispatch and response services worldwide, reveals that the erroneous opinions below and issues in this case are of such importance internationally that this Court should accept it for review. A copy of the Academy's correspondence is provided at App. 71-75.

OPINIONS AND ORDERS BELOW

The Fifth Circuit's initial panel decision is reported at 776 F. App'x 205 (5th Cir. 2019) and reproduced at App. 8. The second Fifth Circuit panel decision, after remand, is reported at 795 Fed. Appx. 290 and reproduced at App. 1. The Fifth Circuit's order denying

rehearing en banc is unpublished and reproduced at App. 63. The district court's decision is reported at 2018 WL 806992, and reproduced at App. 21.

BASIS FOR JURISDICTION

The Fifth Circuit entered its decision on February 27, 2020 and denied the petition for rehearing en banc on April 9, 2020. This Court's jurisdiction is invoked under 28 U.S.C. § 1254.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

U.S. Const. amend. X.

> The Tenth Amendment to the Constitution provides that "[t]he powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States, respectively, or to the people."

Title 28 United States Code, Section 1652

> The Rules of Decision Act, 28 U.S.C. § 1652, provides that "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply."

Tex. Health and Safety Code Section 771.053(a)

> A service provider of communications service involved in providing 9-1-1 service, a manufacturer of equipment used in providing 9-

> 1-1 service, a developer of software used in providing 9-1-1 service, a third party or other entity involved in providing 9-1-1 service, or an officer, director, or employee of the service provider, manufacturer, developer, third party, or other entity involved in providing 9-1-1 service is not liable for any claim, damage, or loss arising from the provision of 9-1-1 service unless the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct.

Tex. Health and Safety Code Section 772.407

> A service supplier involved in providing 9-1-1 service, a manufacturer of equipment used in providing 9-1-1 service, or an officer or employee of a service supplier involved in providing 9-1-1 service is not liable for any claim, damage, or loss arising from the provision of 9-1-1 service unless the act or omission proximately causing the claim, damage, or loss constitutes gross negligence, recklessness, or intentional misconduct.

The relevant provisions of the Tex. Health and Safety Code are reproduced at App. 66-70.

STATEMENT OF THE CASE

A. Plaintiffs Purchased Services And Products, And Received Representations, From T-Mobile.

Plaintiffs purchased a wireless telephone and services from T-Mobile. R424 T-Mobile promised to provide a wireless device, a satisfactory SIM Card, GPS Card and Receiver with certain attributes, and services that would allow Plaintiffs to connect to 9-1-1 centers and to be located using state of the art location-tracking products and services. R424 T-Mobile never provided most of the promised equipment and services, and Plaintiffs sustained damages. R425

B. The Incident On Which The Lawsuit Is Based - Brandon's Death.

Unbeknownst to Plaintiffs at the time of their purchase of T-Mobile products and services, T-Mobile, through City of Dallas officials, became aware of problems with T-Mobile's products and services long before Brandon's death. R415. In February 2016, WFAA-TV in Dallas reported that the 9-1-1 system is being overloaded by T-Mobile customers and when T-Mobile customers call 9-1-1, their phones repeatedly redial 9-1-1 and the callers do not even know it. R416.

On March 11, 2017, when Brandon rolled off the daybed onto the floor, Ms. Cohen, his babysitter, dialed 9-1-1 from her T-Mobile/MetroPCS wireless device only to be denied any contact with a person or other T-Mobile device or equipment. Making three calls, Ms. Cohen stayed on what turned out to be an unconnected

line for 31 minutes and 35 seconds. R416. The calls never connected to the 9-1-1 center. Because of T-Mobile's software or technology, (or lack thereof), and lack of services, Brandon's location never appeared in Dallas's 9-1-1 call center. R416. Ms. Alex had to speed home from a family funeral she was attending to take Brandon to the hospital. But by the time she got Brandon in front of proper medical authorities it was too late. R416.

C. The City of Dallas Placed Responsibility On T-Mobile For The Negligent Acts And Omissions, Including The Intentional Failure to Provide Products, Software, And Services.

T-Mobile was also aware of readily available products and technology it never provided that would have alleviated these life and death issues. R421. But T-Mobile refused to utilize the readily available technology and products. R417-211.

Dallas's Mayor expressed outrage as T-Mobile's 9-1-1 services and lack of readily available technology resulted in hundreds of unanswered calls and losses from the inability of callers to reach 911 due to T-Mobile's technological issues, "[t]his is unacceptable. This is a matter of life and death for our citizens, and we've got to make sure we fix this." R415.

After Brandon's death, City officials commented, "It is outrageous that T-Mobile still has not resolved the ghost call issue that is putting Dallasites in danger by clogging our 911 system. I'm in full agreement with our city manager that our citizens deserve better. This

issue not only puts paying T-Mobile customers at risk, but it jeopardizes the safety of people throughout our city." R416. Dallas's Mayor said the issue had been known by T-Mobile long before Brandon's death and that he was disappointed T-Mobile did not send personnel to Dallas sooner. R416).

D. The District Court Initially Denied T-Mobile's Plea of Immunity.

T-Mobile moved to dismiss the complaints, arguing that dicta in *City of Dallas v. Sanchez*, 494 S.W.3d 722 (Tex. 2016) provided immunity to T-Mobile from all liability. The district court found that T-Mobile was not immune,

> However, the statutory immunity provided by Section 771.053(a) is not absolute. To overcome T-Mobile's immunity, Plaintiffs must plausibly allege that T-Mobile proximately caused Brandon Alex's death and that T-Mobile's acts or omissions constituted gross negligence, recklessness, or intentional misconduct. *Cook*, 683 F. App'x at 319 (citing Tex. Health & Safety Code § 771.053(a)). Because Plaintiffs have plausibly alleged proximate cause and gross negligence, for the reasons discussed below, the Court does not dismiss their claims on immunity grounds.

App. 25. As to the proximate cause analysis, the district court opined,

> Here, Defendants' 9–1–1 technology simply did not work at all. Brandon Alex suffered a medical catastrophe unrelated to any wrongdoing. His

> babysitter was placed on hold for more than 40 minutes and never connected with any emergency responder. There is no chain of causation to analyze because there are no intervening factors. If Plaintiffs' allegations are proven, Defendants' defective 9–1–1 technology was a substantial—if not the only—factor that prevented Brandon Alex from receiving timely medical aid, and his death was a foreseeable consequence of the defect. Accordingly, Plaintiffs have adequately alleged proximate cause.

App. 30-31. Regarding T-Mobile's contention that *Sanchez* excused it from liability, the district court found,

> Indeed, it is hard to believe that the Texas Supreme Court would hold that delays caused by defects in 9-1-1 technologies are never actionable, as a matter of law, due to the absence of proximate cause. C.f. *Columbia Med. Ctr. of Las Colinas, Inc. v. Hogue*, 271 S.W.3d 238, 246 (Tex. 2008) (considering proximate cause in context of whether an alleged omission delayed proper treatment); *Bustamante v. Ponte*, 529 S.W.3d 447, 456 (Tex. 2017) (same); see also *Dusek v. State*, 978 S.W.2d 129, 133 (Tex. App. 1998) (holding evidence insufficient to support injury-to-child conviction because child's broken leg treated same day as injury and no evidence treatment was delayed or recovery hindered by treatment timing). The Court therefore rejects T-Mobile's argument that, as a matter of law, Plaintiffs cannot establish proximate cause

> because the alleged defects here simply hindered or delayed treatment.

App. 28.

E. The Fifth Circuit's First Panel Order On T-Mobile's Interlocutory Appeal on the *Sanchez* Question.

Following the district court's initial denial of the motions to dismiss, T-Mobile filed a motion to certify for interlocutory appeal the denial of the motions dismiss. R443. The district court eventually granted the motion for certification. R735.

The district court indicated that it desired to certify this issue directly to the Texas Supreme Court but was prohibited from doing so. R737 ("The Court would have preferred to certify the question to the Texas Supreme Court but is prohibited from doing so. See TEX. R. APP. P. 58.1….").

The Fifth Circuit granted T-Mobile's motion to appeal pursuant to 28 U.S.C. § 1292(b). R743. In accordance with T-Mobile's request for limited certification, a panel of the Fifth Circuit issued an Order, clearly focusing on the limited statement from *Sanchez* that had been alleged to be dictum,

> Thus, the use of property that simply hinders or delays treatment does not actually cause the injury and does not constitute a proximate cause of an injury.

App. 11. The Fifth Circuit Panel remanded the case to the district court, for further proceedings in accordance with the opinion of the court. App. 3.

F. The Fifth Circuit's Second Panel Ruled On The Effect of The Earlier Opinion On Plaintiffs' Claims.

Plaintiffs appealed the district court's final dismissal, after remand, of all claims. The second Fifth Circuit Panel ruled that all of Plaintiffs' claims (e.g. breach of contract, breach of warranty, deceptive trade practices, gross negligence and other claims arising from Brandon's death) should be dismissed on grounds that Defendants were "statutorily" immune under Texas law.

REASONS FOR GRANTING THE PETITION

Despite the district court's recommendation that the interpretation of dicta within a state tort claims case be certified to the Texas State Supreme Court for resolution, the first Fifth Circuit Panel refused to certify the question to the Texas state supreme court. After making an interpretation of the dicta through an Erie prediction, the case was remanded. Upon the district court's final dismissal of the claims, the second Fifth Circuit Panel made another Erie prediction that Defendants were entitled to immunity under a Texas Health and Safety Code statute. But neither the Fifth Circuit nor any court in Texas had ever granted immunity to a private company under the Texas Health and Safety Code statutes for claims in breach of contract, tort or equity.

Likewise, no court in Texas had ever granted immunity to a private company under the TTCA. Instead, decades of precedent consistently applied the applicable TTCA statute only to government entities. Moreover, with regard to the original dicta interpreted by the first Fifth Circuit Panel, Texas courts have for years noted that the applicable TTCA statute was vague confusing, even when applied solely to government entities. Thus, this case involves two questions of Texas law that were better suited for the Texas supreme court.

When federal courts, in effect, prevent state courts from deciding unsettled issues of state law, they violate fundamental principles of federalism and comity. These concerns should have motivated the Fifth Circuit to certify this case to the Texas Supreme Court as it involves major state policy issues that will certainly impact future cases considering the continuing efforts by Congress and the several states to improve 9-1-1 technology and telecommunications services. While all states provide that immunity for 9-1-1 service providers is not applicable where gross negligence, recklessness or intentional misconduct occurs, the Fifth Circuit Opinions, as used by T-Mobile nationwide, endangers all states' legislative enactments providing for civil suits against 9-1-1 equipment and service providers.

Erie remains oft-discussed and debated and this Court has commented on the difficulties with federal courts' Erie analyses. See, e.g. *Hanna v. Plumer*, 380 U.S. 460, 471 (1965) (describing the methodology as "the typical, relatively unguided *Erie* choice…."); *Shady*

Grove Orthopedic Assoc., P.A. v. Allstate Ins. Co., 559 U.S. 393 (2010) (describing methodology as "into Erie's murky waters."). Here, the Fifth Circuit's two *Erie* predictions are in conflict with other circuits. In addition, the Fifth Circuit bypassed or ignored Texas's state interpretive principles when it reconstructed the state statutes that its rulings affected.

I. THE FIFTH CIRCUIT PANELS' DECISIONS TO ANSWER, RATHER THAN CERTIFY, IMPORTANT STATE LAW QUESTIONS CONFLICT WITH APPROACHES BY OTHER CIRCUIT COURTS.

The Estate filed in state court, which would have allowed the Texas Supreme Court ultimately to decide these important state issues. But T-Mobile removed to Federal Court. Later, when T-Mobile asked to certify the unresolved question, the district court noted its desire to certify the issue to the Texas Supreme Court,

> The Court would have preferred to certify the question to the Texas Supreme Court, but is prohibited from doing so. See TEX. R. APP. P. 58.1 ("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.").

App. 19. Petitioners also asked for *en banc* review to enable certification of the interpretive questions to the Texas supreme court. The request was denied.

When determining whether to certify a state law question to the respective state supreme court, lower courts take differing approaches – presumptive certification and averseness to certification. The presumptive approach generally provides,

> Where there is *any doubt* as to the application of state law, a federal court *should* certify the question to the state supreme court to avoid making unnecessary Erie 'guesses' and to offer the state court the opportunity to interpret or change existing law.

Colonial Properties, Inc. v. Vogue Cleaners, Inc., 77 F.3d 384, 387 (11th Cir.1996) (quoting *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913, 916–17 (11th Cir.1995))(emphasis supplied); *See also, Blue Cross and Blue Shield of Ala. v. Nielsen*, 116 F.3d 1406, 1413 (11th Cir.1997) (noting desirability of employing certification in context of sensitive state law issues, and stating, "we have not hesitated to pull it out of our toolbox. In fact, we have employed the certification procedure more than any other circuit, and we make no apologies for having done so."); *Michaels v. State of New Jersey*, 150 F.3d 257, 259 (3d Cir.1998) (preference for certification of unclear state law questions to a state supreme court when a state's statutory scheme so permits.); *Kaiser v. Memorial Blood Ctr. of Minneapolis, Inc.*, 938 F.2d 90, 93-94 (8th Cir. 1991) ("in the absence of controlling precedent in the decisions of the [state supreme court] which would enable this court to reach a sound decision without indulging in speculation or conjecture, we believe the

better practice is to seek a definitive resolution of this state law question[ ] by the [state supreme court]").

On the other hand, courts that show averseness to certification take the position that certification of unsettled state law questions to a state supreme court is the extremely rare exception rather than the rule. See, e.g., *Dibella v. Hopkins*, 403 F.3d 102, 111 (2d Cir. 2005) (noting that certification is appropriate only in "exceptional circumstances"); *Kremen v. Cohen*, 325 F.3d 1035, 1037 (9th Cir. 2003)("[t]he certification procedure is reserved for state law questions that present significant issues, including those with important public policy ramifications, and that have not yet been resolved by the state courts."); *Anderson Living Tr. v. Energen Res. Corp.*, 886 F.3d 826, 839 (10th Cir. 2018) ([t]he federal court has a duty to decide difficult or unsettled questions of state law and will do so if there is a "reasonably clear and principled course…."). And within the averseness approach, there is no guidance for what would constitute an exceptional circumstance. This circuit conflict mandates review of this case.

This Court stresses that certification "save[s] 'time, energy, and resources.'" *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). Certification "helps build a cooperative judicial federalism." *Lehman Bros.*, 416 U.S. at 391. Federalism concerns are especially weighty—and certification is especially warranted—"when a federal court is asked to invalidate a State's law, for the federal tribunal risks friction-generating error when it 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. And, in a passage that has application to the Fifth Circuit's opinions in this case, this Court called a federal court's "[s]peculation ... about the meaning of a state statute ... particularly gratuitous when ... the state courts stand willing to address questions of state law on certification from a federal court." *Id.*

The Texas Supreme Court was willing to address these novel issues of the interpretation of its *Sanchez* dicta and the effect, if any, of *Sanchez* on the Texas Health and Safety Code statutes.[1] In *Salve Regina College v. Russell*, 499 U.S. 225 (1991) this Court notes, "[o]f course, a question of state law usually can be resolved definitively if the litigation is instituted in state court and is not finally removed to federal court, or if a certification procedure is available and is successfully utilized." *Id.* at 237, n. 4.[2]

This case, which involves important life or death issues, warrants review to provide uniformity on when

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[1] See *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 798 n.9 (Tex. 1992) ("By answering certified questions for those federal appellate courts that are Erie-bound to apply Texas law, we avoid the potential that the federal courts will guess wrongly on unsettled issues, thus contributing to, rather than ameliorating confusion about the state of Texas law. We find such cooperative effort to be in the best interests of an orderly development of our own unique jurisprudence, and to the bar, as well as in the best interests of the litigants we concurrently serve.").

[2] Under Texas law, either this Court or a United States court of appeals may certify a question of Texas law that involves "determinative questions of Texas law having no controlling Supreme Court precedent." Tex. Rule App. Proc. 58.1.

to certify questions to state supreme courts. See, *Growe v. Emison*, 507 U.S. 25, 32 (1993) (noting circumstances in which "principles of federalism and comity dictate" deferring to state courts, such as "when the federal action raises difficult questions of state law bearing on important matters of state policy"); *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting)([W]hen federal courts, in effect, prevent state courts from deciding unsettled issues of state law, they violate fundamental principles of federalism and comity.... Federal courts that refuse to certify end up "mak[ing] important state policy, in contravention of basic federalism principles.").

Various commentators also note that federal courts' efforts to "predict" how a state's highest court would rule "raise judicial federalism concerns." See, e.g. Bradford R. Clark, Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie, 145 U. Pa. L. Rev. 1459, 1564 (1997); Michael C. Dorf, Prediction and the Rule of Law, 42 UCLA L. REV. 651, 700 (1995) (suggesting certification as an alternative to the prediction rule); Ira P. Robbins, The Uniform Certification of Questions of Law Act: A Proposal for Reform, 18 J. LEGIS. 127, 128 (1992) (noting that certification "resolves many of the problems associated with the Erie doctrine"); Appellate Certification of State Law Questions to State Courts, 9 No. 2 FED. LITIGATOR 56, 56 (1994) ("Although federal courts are to decide such questions as state courts would, it is no secret that the tendencies of federal judges and state judges with respect to open questions in certain areas of the law are not always identical."); Barry Friedman, Under the Law of Federal

Jurisdiction: Allocating Cases Between Federal and State Courts, 104 COLUM. L. REV. 1211, 1255-56 (2004) (favoring a "sequencing" of federal and state claims so that each court hears its own case); Jonathan Remy Nash, The Uneasy Case for Transjurisdictional Adjudication, 94 VA. L. REV. 1869, 1879 (2008) (noting that "commentators advocate increased reliance upon, and development of new, transjurisdictional procedural devices").

Commentators also write of many instances where federal courts have made incorrect predictions,[3] and where state supreme courts have repudiated[4] and

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[3] See John L. Watkins, Erie Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do About It, 21 CONN. INS. L.J. 455, 459–60 (2015) (describing how federal courts predict wrongly and how federal judges have admitted that federal courts predict wrongly).

[4] See *id*. at 459; See also *LeFrere v. Quezada*, 588 F.3d 1317, 1318 (11th Cir. 2009) ("'Because of the Shelley decision [by the Alabama Supreme Court], we now know that the Erie-guess we made [twelve years ago in *Lancaster v. Monroe County*, 116 F.3d 1419, 1431 (11th Cir.1997)] is not an accurate statement of Alabama law. We now know that jailers are not entitled to absolute state immunity under Art. I, § 14 of the Alabama Constitution.'"); *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486 (5th Cir. 1964) (Brown, J., concurring)(Judge John R. Brown observed how the state supreme courts of Texas, Alabama, and Florida have repudiated many of the Fifth Circuit's predictions: "And now that we have this remarkable facility of certification, we have not yet 'guessed right' on a single case."); *In re Watts*, 298 F.3d 1077, 1081–83 (9th Cir. 2002) (upon "reexamining our interpretation of [the statute] in light of [the California Court of Appeals decisions], we conclude that, if confronted with the issue, the California Supreme Court would follow the rationale of [these decisions] and not the approach that we adopted in Jones.").

overruled[5] many of the federal courts' predictions. *Erie* predictions, where certification would have been more appropriate, have uniformly created cause for concern.[6]

This Court has not yet provided uniform guidance to lower federal courts in deciding when and how to use certification, which causes continued intra-circuit conflict as to when certification is mandated and reduces predictability for lower courts and litigants. The lack of predictability compels concrete standards to guide the decision-making in recurring situations where lower courts are faced with issues of substantial importance to state residents, especially involving interpretation of state statues.

The Fifth Circuit's initial decision to refuse the district court's recommendation, and its second refusal after remand, to certify this important case to the Texas Supreme Court was inconsistent with the goals of comity and federalism. This is the ideal case in

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[5] 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, 407 (2010) (noting a long history of instances when "federal courts sitting in diversity are later overruled by state high courts.").

[6] See, e.g., *Hakimoglu v. Trump Taj Mahal Assocs*., 70 F.3d 291, 302–03 & n. 11(3d Cir.1995) (Becker, J., dissenting) (collecting instances in which the Third Circuit has erroneously predicted the law of Pennsylvania). "It is not that Third Circuit judges are particularly poor prognosticators. All of the circuits have similar problems in predicting state law accurately." Dolores K. Sloviter, A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 VA. L. REV. 1671, 1680 (1992); see also *id*. at 1680–81 & nn. 52–53 (cataloguing federal court errors in prediction).

which to delineate uniform standards for certification of important state concerns.

II. THE FIFTH CIRCUIT PANELS' ERIE "METHODOLGY" CONFLICTS WITH OTHER CIRCUITS AND CONSTITUTES ABUSE OF THEIR PROPER ROLE AS A COURT OF REVIEW IN A DIVERSITY ACTION.

A. The Fifth Circuit's *Erie* Prediction Approach to State Court Proceedings and Statutes Conflicts With That Of Other Circuits.

In predicting state law, when required to do so under *Erie*, lower courts take differing approaches, ranging from unconstrained rulings about what the state law should be to deferential attempts to predict how that court would rule in a case of first impression.

Within these distinct approaches, federal courts also have conflicting views as to the types of state rules federal courts should follow, as well as which state institutions are authoritative sources of those rules. These different approaches – the "federal all-in prediction" and the "state-limited prediction" models create confusion in deciding when and whether to apply state law precedent as well as what weight should be accorded to various state law: According to the state-limited prediction model,

> A district court's assessment of how the highest state court would resolve a state law question should, in the absence of controlling state

> authority "look to existing state law without predicting potential changes in that law."

Ticknor v. Choice Hotels International, Inc., 265 F.3d 931, 939 (9th Cir. 2001), cert. denied, 534 U.S. 1133 (2002)); *Winn-Dixie Stores, Inc. v. Dolgencorp, LLC*, 881 F.3d 835, 848 (11th Cir. 2018) ("State law is what the state appellate courts say it is, and we are bound to apply a decision of a state appellate court about state law even if we think the decision is wrong."); *Assicurazioni Generali, S.p.A. v. Neil*, 160 F.3d 997, 1002–03 (4th Cir.1998) ("only if the decision of a state's intermediate court cannot be reconciled with state statutes, or decisions of the state's highest court, or both, may a federal court sitting in diversity refuse to follow it"); *Ward v. Utah*, 398 F.3d 1239, 1248 (10th Cir. 2005) (holding that the court must "interpret state laws according to state rules of statutory construction" and looking to state law to determine the governing rules*)*.

The Third, Sixth and Seventh Circuits have adopted a nuanced version of the state-limited prediction model, which is not followed by other circuits, that when faced "with two opposing, yet equally plausible interpretations of state law, . . . for reasons of federalism and comity, 'we generally choose the interpretation which restricts liability, rather than the more expansive interpretation which creates substantially more liability.'"[7]

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[7] *Home Valu, Inc. v. Pep Boys*, 213 F.3d 960, 965 (7th Cir. 2000); *Werwinski v. Ford Motor Co.*, 286 F.3d 661, 671 (3d Cir.2002)("even if we were torn between two competing yet sensible interpretations of Pennsylvania law … we should opt for

On the other hand, the conflicting federal all-in prediction model employed by some circuit courts provides that it will utilize,

> decisions of state intermediate appellate courts, of federal courts interpreting that state's law, and of other state supreme courts that have addressed the issue," as well as to "analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the state would decide the issue at hand.[8]

Thus, unlike the circuits that have adopted the state-limited prediction model, these other circuits are less constrained by state precedent. Other courts have expanded the federal all-in prediction model even more, to include giving federal courts the ability effectively to create new state law based on trends or broad policy arguments,

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the interpretation that restricts liability, rather than expands it…."); *Combs v. Int'l Ins. Co.*, 354 F.3d 568, 577 (6th Cir. 2004) ("[w]hen given a choice between an interpretation of [state] law which reasonably restricts liability, and one which greatly expands liability, we should choose the narrower and more reasonable path.").

[8] *Koppers Co. v. Aetna Cas. & Sur. Co.*, 98 F.3d 1440, 1445 (3d Cir. 1996)); *Paz v. Brush Engineered Materials, Inc.*, 555 F.3d 383, 392 (5th Cir. 2009); *Pisciotta v. Old National Bancorp*, 499 F.3d 629, 635 (7th Cir. 2007); *Giles v. Gen. Motors Acceptance Corp.*, 494 F.3d 865, 872 (9th Cir. 2007); *Progressive Casualty Insurance Co. v. Engemann*, 268 F.3d 985, 988 (10th Cir. 2001); and *Leon's Bakery, Inc. v. Grinnell Corp.*, 990 F.2d 44, 48 (2d Cir. 1993).

> federal courts predicting state law should look to "broad policies" and "doctrinal trends" reflected in precedents, treaties, American Law Institute Restatements of the Law, and law review articles (particularly those published by in-state law schools).

See, e.g. McKenna v. Ortho Pharm. Corp., 622 F.2d 657, 662-63 (3d Cir. 1980). Additionally, many courts express the view that state supreme court decisions may be ignored if "there are strongly persuasive reasons for the federal court's belief that the state's highest court would no longer adhere to its own decision."[9]

Further, those circuits that defer to state law precedent provide no consistent hierarchy of state-law sources or a decision tree for selecting among state precedents. This case and its concomitant issues invoke federalism and comity concerns and warrants review to resolve the conflict in the methodology and sources for and application of state law in predicting state law, where necessary.

Indeed, the Fifth Circuit's "analysis" below took an even more extreme approach in predicting Texas state law, affording no deference to the meaning or force of the applicable Texas statutes or state law rulings. The Fifth Circuit's opinion is also vague about whether it concluded that state law actually exists on the certified question but is not clear, or that state law does not yet exist on the certified question. Also lacking from the

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[9] C. WRIGHT, A.MILLER, AND E. COOPER, 19 FEDERAL PRACTICE AND PROCEDURE §4507 at 1089).

Fifth Circuit's opinion is any indication as which state institutions are authoritative sources for its Eric prediction.

In addition, the Fifth Circuit panels appear to have given no consideration to the decades of judicial confusion in Texas regarding the language applicable to the certified question. Nor did the Fifth Circuit panels give any weight to the Texas Legislature's decisions to implement statutes that would have allowed Plaintiffs' underlying causes of actions to proceed against a private company.

B. The Fifth Circuit Panels' Refusal to Give Deference To State Precedent During Its *Erie* Prediction Did Not Follow This Court's Teachings Or The Principles of Federalism And Comity.

Where a valid state law exists, federal courts under *Erie* have a duty to accept it and its policy choices.[10] Any further scrutiny of states' policy interests by federal courts sitting in diversity actions—and not reviewing the constitutionality of the state law—is in tension with Erie and the Rules of Decisions Act. One commentator notes that when federal courts predict a new cause of action or defense, they are essentially "declar[ing] substantive rules of common law applicable

[10] "The laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U.S.C. § 1652 (2012); see also *Erie*, 304 U.S. at 78–79.

in a State" and unconstitutionally usurping a power reserved to the states.[11]

Texas authorities make clear that the issue before the Panel (i.e. the *Sanchez* language upon which T-Mobile sought an interpretation) involves an important but unsettled state law interpretive concern: "For four decades, Texas jurists have repeatedly expressed concerns about the difficulty of discerning the Legislature's intended meaning behind the words 'condition or use' as they appear in the ... Tort Claims Act." *Abutahoun v. Dow Chem. Co.*, 463 S.W.3d 42, 49 (Tex.2015) (citing *Tex. Dep't of Crim. Justice v. Miller*, 51 S.W.3d 583, 590–91 (Tex.2001) (Hecht, J., concurring) (recounting multiple instances when the court repeatedly urged the Legislature to give guidance on how to interpret the "use-of-property standard" in the Tort Claims Act, to no avail)); see also *Lowe v. Texas Tech University*, 540 S.W.2d 297, 301-02 (Tex.1976) ("The purpose of this concurring opinion is to encourage the Legislature to take another look at the Tort Claims Act, and to express more clearly its intent...."); *State v. San Miguel*, 981 S.W.2d 342, 346 (Tex. App.–Houston [14th Dist.] 1998), rev'd on other grounds, 2 S.W.3d 249 (Tex.1999) ("Determining whether the particular object that caused the injury falls into the category of 'use or condition of property' is often a difficult task.").

More importantly, however, what is clear is that the Fifth Circuit's rulings ignore state court precedents

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[11] See Bradford R. Clark, Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie, 145 U. PA. L. REV. 1459, 1508 (1997) (quoting *Erie*, 304 U.S. at 78).

predicting that the Texas Supreme Court would rule differently [than the Fifth Circuit did] in cases involving private companies. *Sanchez*, the case on which Section 1292(b) certification was granted, is a tort claims act governmental immunity case. *Sanchez*, 494 S.W.3d at 724 ("[t]he issue in this Rule 91a dismissal proceeding is whether the Texas Tort Claims Act[12] waives the City's immunity from suit….").

In other words, *Sanchez* did not address the determination of private companies' liability under the Health and Safety Statutes. Nor did *Sanchez* address the circumstances under which "services" can be delivered in a reckless or grossly negligent manner. A Texas Supreme Court opinion confirms that analyzing "use of property" by a governmental entity under the TTCA is antithetical to and irrelevant to claims against private companies such as T-Mobile. *Harris County v. Annab*, 2018 WL 2168484, at *4 (Tex. May 11, 2018) (holding that "[i]n a different case, these allegations could have some relevance to a claim against a private employer. But Harris County is not a private employer. It is immune from suits such as Annab's suit unless the Legislature waives its immunity. The Legislature has chosen to waive the county's governmental immunity only in limited circumstances.").

Further, precedent also reflects that, for private companies, even a slight delay in fulfilling a legal duty

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[12] *Lowe v. Texas Tech University*, 540 S.W.2d 297 (Tex. 1976)([t]he statute provided for waiver of governmental immunity in three general areas: use of publicly owned automobiles, premises defects, and injuries arising out of conditions or use of property).

constitutes proximate cause. *Del Lago Partners, Inc. v. Smith*, 307 S.W.3d 762, 774 (Tex.2010)(the jury also could have reasonably determined that Del Lago's bar and front-desk personnel moved too slowly to notify security after the fight broke out, and that this delay was a proximate cause of Smith's injuries).

And if additional argument were needed, an intermediate appellate court ruling confirms that the 9-1-1 portion of the Tort Claims Act applies to public agencies, not private companies. See, *City of Dayton v. Gates*, 126 S.W.3d 288, 293 (Tex. App.—Beaumont 2004, no pet.) (while section 101.021 of the Tort Claims Act creates liability in specified circumstances, section § 101.062 applies to a claim against a **public agency** that arises from an action of an employee of the public agency or a volunteer under direction of the public agency and that involves providing 9–1–1 service or responding to a 9–1–1 emergency call.).

It was not the role of the Fifth Circuit to convert limited governmental immunity to absolute private immunity.

C. The Fifth Circuit's Erie *Guess* Methodology Did Not Follow The Fifth Circuit's Teachings.

Having decided to venture an Erie guess, the Fifth Circuit Panel was obligated to follow Fifth Circuit precedent, which provides that where a statute controls, the first and last stop is the statutory text. *Weatherly v. Pershing, L.L.C.*, 945 F.3d 915, 921 (5th Cir. 2019) ("our first stop (and usually our last) is the statutory text"). "Text is the alpha and omega of the

interpretive process." *Id.* (quoting *United States v. Maturino*, 887 F.3d 716, 723 (5th Cir. 2018)). Its own precedent "demands 'unswerving fidelity to statutory language,' meaning we take lawmakers at their word and presume they meant what they said." *Id.* (quoting *Reed v. Taylor*, 923 F.3d 411, 415 (5th Cir. 2019)). The Fifth Circuit defers to the statutes at issue "unless convinced by other persuasive data that the [Supreme Court of Texas] would decide otherwise. *Cerda v. 2004–EQR1 L.L.C.*, 612 F.3d 781, 794 (5th Cir. 2010) (citing *Mem'l Hermann Healthcare Sys. Inc. v. Eurocopter Deutschland, GmbH*, 524 F.3d 676, 678 (5th Cir. 2008)).

This Court provides, "the starting point in every case involving construction of a statute is the language itself." *Greyhound Corp. v. Mt. Hood Stages, Inc.*, 437 U.S. 322, 330 (1978). It is "a cardinal principle of statutory construction" that "a statute ought, upon the whole, to be so construed that, if it can be prevented, no clause, sentence, or word shall be superfluous, void, or insignificant." *Duncan v. Walker*, 533 U.S. 167, 174 (2001)(emphasis supplied); see *United States v. Menasche*, 348 U.S. 528, 538–539 (1955) ("It is our duty 'to give effect, if possible, to every clause and word of a statute.) Courts should be "reluctant to treat statutory terms as surplusage in any setting," Duncan, 533 U.S., at 174. Under Texas precedent, a court may not impose its own judicial meaning on a statute by adding words not contained in the statute's language. See *Lippincott v. Whisenhunt*, 462 S.W.3d 507, 508 (Tex. 2015); *Janvey v. Golf Channel, Inc.*, 487 S.W.3d 560, 572 (Tex. 2016) (reviewing a certified question and explaining that the Court's "primary objective in

construing a statute is to ascertain and effectuate the Legislature's intent without unduly restricting or expanding the statute's scope").

Sections 771.053(a) and 772.407 are unambiguous - a consumer can bring a civil claim against a telecommunications company providing products or rendering 9-1-1 services that is grossly negligent, reckless or intentional, while proximately causing damage or injury. When the language of a statute is unambiguous, "judicial inquiry is complete, except 'in rare and exceptional circumstances.' " *Rubin v. U.S.*, 449 U.S. 424, 430 (1981) (citations omitted).

Notwithstanding the unambiguous language of sections 771.053(a) and 772.407, the Fifth Circuit, relying on its *Erie* guesses, abused its discretion when it concluded it had discretion to grant blanket immunity on claims of breach of contract and warranties, gross negligence, violation of the Texas Deceptive Practices Act, and strict liability. The Fifth Circuit should have also considered that virtually every other state in the country has determined that telecommunications' providers do not have absolute immunity. See, Section III and fn13 *infra*.

III. THE FIFTH CIRCUIT'S DECISIONS PRESENT A SERIOUS AND WIDESPREAD THREAT TO INDIVIDUAL AND GOVERNMENTAL 911 USERS AND CONGRESS' GOALS TO PROMOTE AND ENHANCE PUBLIC SAFETY THROUGH USE OF 911 AND TO UPGRADE 9-1-1 CAPABILITIES AND RELATED FUNCTIONS.

The purpose of the Wireless Communications and Public Safety Act of 1999 (as amended, 47 U.S.C. § 615a) (the "911 Act") is to improve public safety by encouraging and facilitating the prompt deployment of a nationwide, seamless communications infrastructure for emergency services. *Nuvio Corp. v. FCC*, 473 F.3d 302, 303, 304 (D.C.Cir.2007).

In 1987, the Texas Legislature adopted Chapter 771 of the Texas Health and Safety Code ("the statute"), creating a statewide 9-1-1 emergency communications system and charging the Commission with the administration of the system in Texas. *See* Tex. Health & Safety Code Ann. §§ 771.001-.110. Pursuant to its legislative power, Texas maintained an avenue by which a consumer or government entity could bring a civil claim against a telecommunications provider that proximately causes damages from providing 9-1-1 services or products in a grossly negligent manner, recklessly or with intentional misconduct. See, Sections 771.053(a) and 772.407. Texas is not alone in holding 9-1-1 equipment and service providers liable in certain instances. Most states allow civil damage suits and criminal prosecutions against 9-1-1 providers

for willful or wanton misconduct.[13] Some states,

[13] *See generally* Ala. Code § 11-9-89 (Supp. 2000) (willful or wanton misconduct); Alaska Stat. § 29.35.133(a) (Michie 2000) (intentional acts of misconduct or gross negligence); Ariz. Rev. Stat. Ann. § 12-713(A) (West Supp. 2001) (acted knowingly or failure to act created unreasonable risk of bodily injury with a high probability that substantial harm would result); Ark. Code. Ann. § 12-10-317(a)(3) (Michie 1999) (not liable for any failure of equipment or procedure); Colo. Rev. Stat. Ann. § 29-11-105 (West Supp. 2001) (intentionally caused by or resulted from gross negligence); Conn. Gen. Stat. Ann. § 28-30(g) (West Supp. 2001) (wanton, reckless or malicious); Fla. Stat. Ann. § 365.171(14) (West Supp. 2001) (acting with malicious purpose or in a wanton and willful manner); Ga. Code Ann. § 46-5-135 (1992) (willful or wanton misconduct); Idaho Code § 31-4812(2) (Michie 1994) (act with malice or criminal intent, or commit reckless, willful and wanton conduct); 50 Ill. Comp. Stat. Ann. 750/15.1 (West Supp. 2001) (willful or wanton misconduct); Ind. Code Ann. § 36-8-16.5-46 (West Supp. 2000) (willful or wanton misconduct); Iowa Code Ann. § 34A.7(6) (West 1995) (willful and wanton negligence); Kan. Stat. Ann. § 12-5308 (Supp. 2000) (shall not be liable for any form of damages resulting from total or partial failure of any transmission); Ky. Rev. Stat. Ann. § 65.7637 (Michie Supp. 2000) (negligence, or wanton or willful misconduct, or bad faith); 2001 La. Sess. Law Serv. Act 507 (H.B. 436) (West) (willful or wanton misconduct or gross negligence); Md. Code Ann., [9-1-1 Service Carriers] § 18-106(b) (Supp. 2000) (nothing in this subtitle shall be interpreted to extend any liability to a 9-1-1 carrier); Mich. Comp. Laws Ann. § 484.1604 (West Supp. 2001) (a criminal act or gross negligence or willful and wanton misconduct); Minn. Stat. Ann. § 403.14 (West Supp. 2001) (willful or wanton misconduct); 2001 Miss. Laws Ch. 569, H.B. 469(10) (entitled to receive the limitations of liability as provided to the state, or any agency or local government of the state); Mo. Ann. Stat. § 190.307(1) (West Supp. 2001) (willful and wanton misconduct or gross negligence); Neb. Rev. Stat. Ann. § 86-1009 (Michie 1999) (failure to use reasonable care or for intentional acts); Nev. Rev. Stat. Ann. 707.500(1)(c) (Michie Supp. 1999) (good faith); N.J. Stat. Ann. § 52:17C-10(d) (West 2001) (malicious purpose or a wanton and willful disregard for the safety of persons

Kentucky and Oregon, for example, add "bad faith" to the list of conduct that allows liability.[14] Colorado, Michigan, and Missouri are among states providing liability upon a mere showing of "gross negligence."[15] Nebraska imposes liability if an emergency provider simply fails to use "reasonable care" and states such as

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or property); N.C. Gen. Stat. § 62A-31 (2000) (wanton or willful misconduct); Ohio Rev. Code Ann. § 4931.49(C) (Anderson Supp. 2000) (no liability for telephone company or installer); Okla. Stat. Ann. tit. 63, § 2817(B) (West Supp. 2001) (gross negligence, recklessness, or intentional misconduct); Or. Rev. Stat. § 401.515(1) (1999) (willful misconduct, gross negligence or bad faith); Pa. Stat. Ann. tit. 35, § 7021.1 (West Supp. 2001) (local governmental immunity); R.I. Gen. Laws § 39-21.1-1(b)(10) (1997) (willful or wanton acts of misconduct); S.C. Code Ann. § 23-47-70(C) (West Supp. 2000) (reckless, willful, or wanton conduct); S.D. Codified Laws § 34-45-17 (Michie 1994) (willful or wanton negligence or intentional acts); Tenn. Code Ann. § 7-86-319 (1998) (duty no greater than non-commercial mobile radio service provider); Tex. Health & Safety Code Ann. § 771.053(a) (Vernon Supp. 2001) (gross negligence, recklessness, or intentional misconduct); Utah Code Ann. § 69-2-8(2) (2000) (intentionally caused by or resulting from gross negligence); Vt. Stat. Ann. tit. 30, § 7060 (2000) (gross negligence or an intentional tort); Va. Code Ann. § 56-484.18(B) (Michie Supp. 2001) (gross negligence or willful misconduct); Wash. Rev. Code Ann. § 38.52.550(2) (West Supp. 2001) (gross negligence or wanton or willful misconduct); W. Va. Code Ann. § 24-6-8 (Michie 1999) (willful or wanton misconduct); Wis. Stat. Ann. § 146.70(7) (West Supp. 2000) (no liability to any person who uses an emergency number system).

[14] *See* Ky. Rev. Stat. Ann. § 65.7637 (Michie Supp. 2000); Or. Rev. Stat. § 401.515(1) (1999).

[15] *See* Alaska Stat. § 29.35.133(a) (Michie 2000); Colo. Rev. Stat. Ann. § 29-11-105 (West Supp. 2001); 2001 La. Sess. Law Serv. Act 507 (H.B. 436) (West); Mich. Comp. Laws. Ann. § 484.1604 (West Supp. 2001); Mo. Ann. Stat. § 190.307(1) (West Supp. 2001).

South Carolina and Texas only require "recklessness" before a court can impose liability.[16]

A statement from one of the 9-1-1 Act sponsors demonstrates the importance of having accurate and reliable 9-1-1 service:

> "The rule in America ought to be simple. If one is on a highway, a byway, bike path or a duck blind in Louisiana where someone calls 9-1-1, they ought to get help. S. 800 will provide that help."

145 Cong. Rec. H9858, 9859 (daily ed. Oct. 12, 1999) (statement of Rep. Tauzin). Congress left open the right of the States to impose civil liability on providers such as Defendants. Texas Health and Safety Code makes clear that it is the State of Texas's public policy that a party may not insulate itself from damages caused by grossly negligent or reckless conduct.

As further evidence of the importance of this Court deciding these vital issues, the Court should consider the public policy implications noted by the Chairman and the Chief Enforcement Officer of the Federal Communications Commission (the "FCC") during the FCCs investigation of a 9-1-1 power outage.[17]

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[16] *See* Neb. Rev. Stat. Ann. § 86-1009 (Michie 1999); S.C. Code Ann. § 23-47-70(C) (West Supp. 2000); ex. Health & Safety Code Ann. § 771.053(a) (Vernon Supp. 2001).

[17] The FCC Press Release can be found at https://apps.fcc.gov/edocs_public/attachmatch/DOC-332853A1.pdf (last visited 8-4-20)

> Americans need to be confident that the service they use to reach first responders is reliable and accessible in their time of need," said Chairman Tom Wheeler. "Providers have a responsibility to ensure that Americans can use 9-1-1 to call for help any time. When a company fails to live up to its obligations, it will be held accountable.

Id. (emphasis supplied). Indeed, the Fifth Circuit opinions, if allowed to stand, would certainly allow providers to argue that it is now virtually impossible for any 9-1-1 individual or government user to sue a provider.

Relevant to the underlying issue, the International Academies of Emergency Dispatch, (the "Academy") notes that this controversy is of substantial consequence to the Academy and every American citizen, because the issues bear directly on the health and safety of every American who will ever use 9-1-1 services and technology. The Academy is the world's foremost standard setting and certification organization for emergency communications, with over 58,000 members. Its medical, fire, police, and nurse triage protocols are used in over 3,500 communications centers, 46 countries and 24 languages and dialects. App. 72. The Academy was created as a standard-setting organization in the field of emergency 9-1-1 dispatch and response. It has occupied two roles in the 9-1-1 environment: one as a membership-driven association for the professional recognition of dispatchers, and the other as an organization that develops and maintains dispatch protocols and curriculum for use in effectively responding to

emergency calls for help (e.g. 9-1-1 calls) by providing state-of-the-art protocols that assist in the most appropriate allocation of an emergency communication center's resources. *Id*.

The Academy concludes that cases like this one has far-reaching consequences for public and personal safety,

> [G]iving immunity to the mobile providers will take the science of dispatching back to the "stone age." Providers of mobile services must be held to perform their emergency services with reasonableness based on the industry standards of care and practice.
>
> ***
>
> The Academy believes that a mobile provider delivering accurate location services in a 9-1-1 situation is the standard of care and practice in today's technological world.

App. 73-74.

Likewise, the Fifth Circuit opinions, as interpreted by telecommunications' providers are irreconcilable with the approach used by virtually every state legislature to ensure that the civil courts remain open for those injured by egregious conduct or omissions by 9-1-1 telecommunications providers. If the opinions below are used as T-Mobile argues, the 9-1-1 system will create a license for telecommunications providers to relax on their equipment and service standards, thereby providing inferior, outdated and harmful

equipment and services to citizens, without fear of reprisal.

And as feared by the Academy, and Petitioners, failure to review this case will have a chilling effect upon those individuals and governmental users that seek only to hold telecommunications companies accountable for breach of contract, gross negligence and/or egregious conduct in connection with one of the most vulnerable times in a person's life – the 9-1-1 call. The Academy framed the issue precisely when it stated,

> Should blanket immunity be applied to mobile providers in this case, and in others like it, it becomes hard to imagine a case where immunity would never apply. By setting this precedent, mobile providers of 9-1-1 services will never be subject to the risk of liability, and therefore shall have no incentive for advancing their technology, or promptly fixing issues which arise. In such a scenario, mobile providers can advertise and do whatever they want without the fear of accountability or reprisal, and people will continue to die unnecessarily. 9-1-1 emergency dispatchers will also be put at occupational and legal risk when routine information they must rely on is flawed or missing.

App. 74. Because the Fifth Circuit has sanctioned a departure by a lower court from the accepted and usual course of judicial proceedings, this case warrants review.

CONCLUSION

The Court should grant this petition.

Respectfully submitted,

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