Case No. No. 20-379

IN THE

Supreme Court of the United States

CERTAIN UNDERWRITERS AT LLOYD'S, LONDON Subscribing to Insurance Policy Numbers SS0002114/2730 and SS0002115/2566, Unknown Persons or Business Entities of Unknown Residence

Petitioners,

v.

BRIGHTON COLLECTIBLES, LLC, a Delaware Limited Liability Company,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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COUNTERSTATEMENT OF QUESTIONS PRESENTED

1. Whether the Ninth Circuit's unpublished decision correctly applied California state law in holding that Petitioners/insurers were required to defend Respondent/insured against a third-party claim for violation of a California statute.

2. Whether the Ninth Circuit abused its discretion by declining Petitioners' request to certify proposed questions to the California Supreme Court.

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of this Court's Rules, respondent Brighton Collectibles, LLC ("Brighton"), states that it is a Delaware limited liability company. Brighton Collectibles, Inc., a Delaware corporation, is the sole member of Brighton. No publicly-held company owns 10% or more of Brighton or Brighton Collectibles, Inc.

DATED: October 26, 2020

Respectfully submitted,

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Ninth Circuit Rule 36-3(a) provides:

> "**Not Precedent.** Unpublished dispositions and orders of this Court are not precedent, except when relevant under the doctrine of the law of case or rules of claim preclusion or issue preclusion." (emphasis in original)

INTRODUCTION

This is a state-law, insurance-coverage dispute. Respondent ("Brighton") purchased comprehensive liability insurance from Petitioners ("Lloyd's"). In its unpublished memorandum of decision below ("Memorandum"), a unanimous panel of the Ninth Circuit held that Lloyd's has a duty to defend Brighton against a third-party claim for violation of California's Song-Beverly Credit Card Act (the "Credit Card Act").

This Court's review of the Ninth Circuit's decision is not warranted for many reasons. The decision involves pure questions of state law. There is no allegation that the Ninth Circuit's decision conflicts with a decision from any other federal circuit. The unpublished decision is not precedent and does not concern a matter of widespread importance. Nor is there any plausible claim that the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings" as to warrant review. *See* Sup. Ct. Rule 10(a). Moreover, the central issue for which Lloyd's seeks review was not even briefed by the parties or considered by the Ninth Circuit. Despite Lloyd's conclusory mantra that the Ninth Circuit's ruling violates "Federalism, Abstention, and Comity," at bottom, Lloyd's complaint is that the Ninth Circuit did not correctly interpret and apply California law. That is not a basis for review.

Nor should this Court review the Ninth Circuit's refusal to certify questions to the California Supreme Court. Review is not warranted for many of the same reasons set forth above – no conflict among the circuits, unpublished decision, not a

question of widespread importance, no plausible claim that the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings." In addition, the decision to certify questions is a matter committed to the Court of Appeals' discretion. Whether the Ninth Circuit abused its discretion in applying its own internal rules for certification is not an issue that requires this Court's exercise of its supervisory power.

Accordingly, the Court should deny the petition.

COUNTERSTATEMENT OF THE CASE

A. The Instant Lawsuit

Yeheskel, one of Brighton's customers, filed a putative class action in California state court (the "Yeheskel Action"). Yeheskel accused Brighton of violating the Credit Card Act by collecting "personal identification information" from her and Brighton's other customers, using that information for Brighton's own marketing purposes, and selling the information to third parties. Brighton sought defense and indemnity under liability insurance policies that Lloyd's had sold to Brighton (the "Policies"). The Policies provide coverage for, among other things, claims for damages arising out "oral or written publication of material that violates a person's right of privacy." Lloyd's denied coverage. Brighton sued in state court, seeking a declaration of coverage. Lloyd's removed the case to the Central District of California on the basis of diversity.

B. The District Court's Grant of Summary Judgment

Lloyd's moved for summary judgment. Its principal argument then, as well as before the Ninth Circuit, was that the Yeheskel Action did not allege a claim for invasion of privacy within the meaning of the Policies. Lloyd's argument was based largely on *Folgelstrom v. Lamps Plus, Inc.,* 195 Cal. App. 4th 986, 125 Cal. Rptr. 3d 260 (2011) (APP047[1]).

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[1] "APP-__" refers to the page in Lloyd's Appendix, attached to its Petition.

In response, Brighton sought to distinguish *Folgelstrom* on the grounds that: (a) *Folgelstrom* was not an insurance coverage case; (b) it held only that a retailer's collection of data, in violation of the Credit Card Act, did not give rise, without more, to a *common law* claim for invasion of privacy; and (c) the coverage in Lloyd's Policies was not limited to *common law* claims for invasion of privacy. More particularly, Brighton contended that the Policies covered not only common law claims for invasion of privacy, but statutory claims as well, and Yeheskel had alleged such a claim. In support of its argument, Brighton cited *Pineda v. Williams-Sonoma Stores, Inc.,* 51 Cal. 4th 524, 246 P.3d 612 (2011) (APP-31), in which the California Supreme Court made clear that the Credit Card Act's "overriding purpose is . . . to protect the personal privacy of consumers." *Id.* at 534, 246 P.3d at 619 (APP-43). Therefore, so Brighton argued, an alleged violation of the Credit Card Act was, in and of itself, an alleged violation of a *statutory* right of privacy, and Lloyd's was obligated to defend Brighton in the Yeheskel Action.

The District Court found Brighton's position unpersuasive and granted Lloyd's motion for summary judgment.

C. The Ninth Circuit's Memorandum Decision Reversing the Summary Judgment

In an unpublished Memorandum, the Ninth Circuit adopted Brighton's position and reversed the District Court's ruling. The Ninth Circuit pointed out that, under California law, an insurer has a duty to defend unless "there is *no* potential for coverage" and, to trigger this duty, "the insured need only show that

the underlying claim *may* fall within policy coverage." APP-8, *quoting Montrose Chem. Corp., v. Superior Court,* 6 Cal. 4th 287, 295, 300, 861 P.2d 1153, 1157, 1161 (1993) (emphasis in Court of Appeals' Memorandum). The Court of Appeals went on to hold that Lloyd's duty to defend was triggered because: (a) the Policies covered an alleged violation of a right of privacy, (b) the Yeheskel Action alleged a violation of the Credit Card Act, and (c) the California Supreme Court had made clear that the Act's "overriding purpose is . . . to protect the personal privacy of consumers." APP-8, *quoting Pineda*, 51 Cal. 4th at 534, 246 P.3d at 619.

In Footnote 1 to the Memorandum, the Ninth Circuit mentioned that it:

> [D]ecline[d] to reach two issues the parties did not raise in their briefing: (1) whether "civil penalt[ies]" under the Credit Card Act are "damages" within the meaning of Brighton's policies . . . ; and (2) whether the fact that the Credit Card Act proscribes only the collection of customer information, and not its subsequent publication, . . . means the [Class] Action does not implicate the "publication of material" covered by Brighton's policies.

Id. at APP-9 (internal citations omitted). And in fact, neither Lloyd's nor Brighton had previously raised either of these issues in the District Court or the Ninth Circuit.

D. The Ninth Circuit's Summary Orders Denying Lloyd's Petition for Rehearing and Motion for Certification to the California Supreme Court

After the Ninth Circuit issued its Memorandum, reversing the District Court, Lloyd's filed a Petition for Panel and *En Banc* Rehearing and Motion for

Certification to the California Supreme Court ("Petition for Rehearing"). Lloyd's Petition for Rehearing asked the Ninth Circuit to certify three questions to the California Supreme Court.

Brighton opposed Lloyd's request on the ground that it was untimely, because it was first made after the Court of Appeals issued its memorandum reversing the summary judgment. *See Hinojos v. Kohl's Corp.*, 718 F.3d 1098, 1109 (9th Cir. 2013) (losing party's request for certification was untimely, because it was not made during that parties' appellate briefing or oral argument, but a month *after* oral argument, and there was no explanation for the delay); *see also Minnesota Voters Alliance v. Mansky,* – U.S. –, 138 S. Ct. 1876, 1891 n.7 (2018) (declining to certify because "request for certification comes very late in the day").

Brighton also argued that Lloyd's proposed questions did not meet the Ninth Circuit's standards for certification. The Ninth Circuit will exercise its discretion to certify questions only where "[1] [t]he decisions of the California appellate courts provide no controlling precedent regarding the certified question, and [2] the answer to the question will be determinative of this appeal." *Myers v. Phillip Morris Cos., Inc.*, 239 F.3d 1029, 1029 (9th Cir. 2001).

Lloyd's proposed question number 1 was "Does the [California] Credit Card Act recognize a statutory claim for invasion of privacy?" Lloyd's request for certification, as does its instant petition, relied heavily on a supposed conflict between the Ninth Circuit's decision here and its own, previous decision in *Big 5 Sporting Goods v. Zurich Ins. Co.*, 635 Fed.Appx. 351, 353 (9th Cir. 2015) (APP-28),

an unpublished opinion which Lloyd's had never previously cited. In response, Brighton contended that there was no conflict between the Ninth Circuit's decision here and *Big 5*. In *Big 5*, the Court of Appeals found that there was no coverage because the insurance policies in issue in that case expressly excluded coverage for rights of privacy *created by statute*. *Big 5*, 635 Fed.Appx. at 353; APP-29. In the present case, there is no exclusion for rights of privacy created by statute. Therefore, in the present case, unlike *Big 5*, there is coverage. Thus, according to Brighton, there was no need to certify any question to the California Supreme Court to reconcile the decision in the present case with that in *Big 5*.

Brighton also contended that Lloyd's proposed questions 2 and 3 did not meet the certification requirements either. Those questions were: (2) "Does the [California] Credit Card Act include an element of 'publication' for invasion of privacy?"; and (3) "Does [the California] Credit Card Act intend to provide recovery of civil damages when only civil penalties are described in order to provide a measure of recovery for invasion of a person's privacy?" Although somewhat difficult to follow, these questions appear to paraphrase the issues described in Footnote 1 of the Ninth Circuit's Memorandum – questions which the Ninth Circuit said it was not considering because the parties had not briefed them. APP-9. Brighton contended that these questions were not proper for certification to the California Supreme Court because Lloyd's never raised these issues on appeal and neither party addressed them in its briefs. Similarly, because the parties did not even raise these questions in their briefs, the answers to them could not be

"determinative" of this appeal. *See Delgado v. Rice,* 236 F.3d 548, 549 (9th Cir. 2001) ("it seems evident that the determinative question being certified must be a question pending before this court which this court would be required to answer absent certification"). Brighton also contended that raising these issues now would be unfair to Brighton, which never had the opportunity in the District Court to adduce evidence on them.

The Ninth Circuit issued an Order summarily denying Lloyd's Petition for Rehearing. APP-1. It also summarily denied Lloyd's request for certification.

REASONS FOR DENYING THE WRIT

I. THIS COURT'S REVIEW OF THE NINTH CIRCUIT'S MEMORANDUM DECISION IS NOT WARRANTED FOR MANY REASONS

A. The Ninth Circuit Did Not Decide Any Issue of Federal Law

Absent unusual circumstances not present here, this Court's review is reserved for important issues of federal law. *See* Sup. Ct. R. 10 ("Rule 10"). The Ninth Circuit's decision below did not decide any issues of federal law, important or not. In reaching its decision that coverage existed, the Ninth Circuit applied California rules regarding insurance policy coverage and interpreted a California statute, the Credit Card Act. Review should be denied for this reason alone. See *Runyon v. McCrary,* 427 U.S. 160, 181 (1976) ("We are not disposed to displace the considered judgment of the Court of Appeals on an issue whose resolution is so heavily contingent upon an analysis of state law.").

B. The Ninth Circuit's Decision Did Not Create an Inter-Circuit Split of Authority

Another reason that review is not warranted is that Lloyd's cannot point to any conflict between the Ninth Circuit's ruling and the decision of any other federal Circuit Court of Appeals. *See*, *e.g.*, *Box v. Planned Parenthood of Indiana & Kentucky, Inc.*, 139 S. Ct. 1780, 1782 (2019) (per curiam) ("Only the Seventh Circuit has thus far addressed this kind of law. We follow our ordinary practice of denying petitions insofar as they raise legal issues that have not been considered by additional Courts of Appeals.").

C. The Ninth Circuit's Decision Is Not of Widespread Importance

Yet another reason that review is not warranted is that Lloyd's fails to show that the narrow insurance-coverage issue that the Ninth Circuit decided is of widespread importance. The very paucity of decisions on this issue shows that it is not of such importance. *See Rice v. Sioux City Mem'l Park Cemetery*, 349 U.S. 70, 79 (1955) (" . . . it is very important that we be consistent in not granting the writ of certiorari except in cases involving principles the settlement of which is of importance to the public, as distinguished from that of the parties.").

D. The Ninth Circuit's Decision Is Unpublished and Has No Precedential Value Outside this Litigation

The Ninth Circuit designated its Memorandum opinion in this case as "not appropriate for publication" under Ninth Circuit Rule 36-3. This Rule states that unpublished opinions are "not binding precedent," except in limited circumstances

not relevant here. 9th Cir. R. 36-3(a). Thus, a later panel of the Circuit would be entirely within its rights to decide the same issues in a different fashion. For this reason as well, the Ninth Circuit's Memorandum is a poor candidate for review.

E. The Ninth Circuit Did Not Depart from the Accepted and Usual Course of Judicial Proceedings

As set forth in Rule 10, review may be warranted where the lower court has "so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." Review for this reason is typically limited to situations where there is a substantial question about the constitutionality or integrity of a court's procedures. *See*, *e.g.*, *Hollingsworth v. Perry*, 558 U.S. 183, 196 (2010) (reviewing district court rules that permit broadcasting of high profile trial without standards or guidelines in place, contrary to federal statutes and the policy of the Judicial Conference of the United States); *Nguyen v. United States*, 539 U.S. 69, 73–74 (2003) (granting writ of certiorari raising the question of whether judgment was invalid due to participation of non-Article III judge on panel). Lloyd's does not, and cannot, plausibly claim that there was anything remotely irregular about the Ninth Circuit's procedures that requires this Court to invoke its supervisory power. Lloyd's merely contends that the Ninth Circuit's ruling is wrong – a circumstance that, in itself, is not an adequate basis for seeking the Court's review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error

consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

F. Lloyd's Did Not Raise in the Court Below, and the Ninth Circuit Did Not Decide, the Principal Issue for Which Lloyd's Seeks Review

The principal issue for which Lloyd's seeks review appears to be whether there can be an "actionable claim with recoverable civil damages for invasion of privacy" under the Credit Card Act. Petition, at i (Question No. 1). Although the issue, as phrased, is somewhat murky, it appears to be a reformulation of the first issue in Footnote 1 of the Ninth Circuit's Memorandum – "whether 'civil penalt[ies]' under the Credit Card Act are 'damages' within the meaning of Brighton's policies" (APP-9)– an issue which the Court of Appeals declined to consider because the parties had not briefed it. The issue is not appropriate for review by this Court for the same reason that the Ninth Circuit refused to address it; it was not raised by either party with the District Court or in the briefing before the Ninth Circuit. *See Nat'l Collegiate Athletic Ass'n v. Smith,* 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below"); *Adickes v. S. H. Kress & Co.*, 398 U.S. 144, 148 n.2 (1970) ("Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them").

G. The Ninth Circuit Did Not Violate the Doctrines of Federalism, Abstention, or Comity

Nor can Lloyd's obtain review by claiming that the Ninth Circuit violated "federalism, abstention, and comity." None of these doctrines are implicated here. The Ninth Circuit did nothing more than apply existing California law in a diversity case, something the court was required to do. Lloyd's contention that the Ninth Circuit "created new substantive rights . . . involving actionable 'no harm' claims for invasion of privacy under California's *Song–Beverly* Credit Card Act," is both vague and unwarranted. The Memorandum does not contain a single statement that could plausibly be construed as creating "no harm claims for invasion of privacy." The Ninth Circuit did not decide, either expressly or impliedly, any issue concerning the elements of a claim under the Credit Card Act. The Ninth Circuit merely followed existing California Supreme Court precedent establishing that the purpose of the Credit Card Act is to protect consumer privacy, and the Ninth Circuit interpreted Lloyd's Policies in light of that precedent. There was no "federalism, abstention, [or] comity" involved.

II. THIS COURT'S REVIEW OF THE NINTH CIRCUIT'S SUMMARY ORDER DENYING CERTIFICATION IS ALSO UNWARRANTED FOR MANY REASONS

Nor should this Court review the Ninth Circuit's refusal to certify questions to the California Supreme Court. Review is not warranted for many of the same reasons set forth above – no conflict among the circuits, unpublished decision, not a

question of widespread importance, no plausible claim that the Ninth Circuit "has so far departed from the accepted and usual course of judicial proceedings." In addition, Lloyd's contention that the Ninth Circuit somehow violated Lloyd's "substantive due process" rights by denying certification is ridiculous. Substantive due process protects "fundamental rights and liberties which are, objectively, deeply rooted in this Nation's history and tradition." *Washington v. Glucksberg*, 521 U.S. 702, 720–21 (1997). A litigant does not have a fundamental right to have a Circuit Court of Appeals certify its proposed questions to a state Supreme Court. The decision to grant certification is committed to the Court of Appeals' discretion. *See Lehman Bros. v. Schein,* 416 U.S. 386, 390-91 (1974) ("We do not suggest that where there is doubt as to local law and where the certification procedure is available, resort to it is obligatory. It does, of course, in the long run save time, energy, and resources and helps build a cooperative judicial federalism. Its use in a given case rests in the sound discretion of the federal court."). Here, as discussed above, there were good and valid reasons for the Ninth Circuit to exercise its discretion to deny certification. Lloyd's did not even raise the issue of certification until after the appeal had already been decided. Lloyd's has not come close to showing that compelling circumstances exist that would warrant review of the Ninth Circuit's decision.

CONCLUSION

For all the aforementioned reasons, the Court should deny Lloyd's Petition for Writ of Certiorari.

DATED: October 26, 2020

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