No. 21-5095

In the Supreme Court of the United States

MELISSA ELIZABETH LUCIO,

Petitioner,

v.

BOBBY LUMPKIN, Director, Texas Department of Criminal Justice, Correctional Institutions Division,

Respondent.

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

REPLY TO BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I. This Court Should Grant Review To Decide the Narrow Legal Question on Which the Plurality and Concurrence Below Agreed Because That Decision Conflicts with Decisions of Other Circuits on the Same Important Matter.

1. Texas's Brief in Opposition improperly re-writes the decision below and the question presented. In making that argument, Texas abandons the dispositive reasoning it persuaded the Fifth Circuit to adopt. While respondents have the right "'to restate the questions presented,'" that "'does not give them the power to expand those questions'" to issues that were neither briefed nor decided by the court below. *Timbs v. Indiana*, 139 S. Ct. 682, 690 (2019) (quoting *Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 279 n.10 (1993)).

Lucio asks this Court to decide the narrow legal question whether complete-defense cases beginning with *Chambers v. Mississippi*, 410 U.S. 284 (1973), clearly established a rule that can be violated by the arbitrary and disproportionate application of a general evidentiary standard when it infringes a weighty interest of the accused such as explaining why she falsely confessed. Pet. ii. That question regarding the scope of "clearly established Federal law," 28 U.S.C. § 2254(d), is a "straightforward legal question on which lower courts are divided"—at least after the Fifth Circuit's errant misreading of this Court's case law. *McWilliams v. Dunn*, 137 S. Ct. 1790, 1801 (2017) (Alito, J., dissenting).

In the court below, the seven-judge plurality concluded that no clearly established law supported Lucio because this Court "has *never* applied its complete-defense

cases to discretionary evidentiary decisions under rules that are themselves constitutional." App. 24a (emphasis added). The three-judge concurrence was "unable to join" the plurality's alternative rationales, App. 38a, but found "limited reasons to affirm" in the "outcome-determinative" view, *ibid*., that this Court's "caselaw … *does not apply* to a simple, discretionary, even if errant, evidentiary decision by a state court." *Id*. at 39a (emphasis added).

Texas acknowledges in passing that the plurality and concurrence agreed on the reach of this Court's cases. BIO 13 (discussing plurality); BIO 14 (discussing concurrence). A majority of the Fifth Circuit accepted Texas's contention below that this Court's "complete-defense cases have *all* involved *nondiscretionary* rules that *categorically exclude* certain evidence."[1] Appellee's Supp. Br. 38 (emphasis added). The concurrence's conclusion that the distinction between "blanket" exclusionary rules and discretionary rulings was "outcome-determinative," App. 38a, tracked Texas's contention that identifying the clearly established law is a "threshold question [that] can be dispositive." Appellee's Supp. Br. 26.

[1] *See also* ROA.377 ("extension of the Supreme Court's complete-defense precedent to review a trial court's application of a well-established rule of evidence … is barred under *Teague*"); Appellee Panel Br. 28 (no "constitutional law … on the trial court's discretionary application of valid evidentiary rules"); Pet'n for Reh'g 13 (under "existing precedent … right to present a complete defense … concerns state evidentiary rules that categorically prevent the jury from considering *factual* evidence about the crime or the defendant's confession"); Appellee Supp. Br. 13; *id*. at 31, 32, 40 (distinguishing ruling in Lucio's trial from "the categorical rules in *Crane* and *Chambers*").

Most of Texas's brief is devoted to eliding the difference between the plurality's unreasonable-application analysis (which did not secure a majority) and the concurrence's reasoning on the scope of clearly established law. That makes little sense because the plurality's reasoning was skewed by its threshold misreading of this Court's cases. Contrary to the plurality's statement that this Court's cases have "never applied … to discretionary evidentiary decisions," App. 24a, Texas's now acknowledges this Court's complete-defense cases establish a "general principle," BIO 10 (citing *Montana v. Egelhoff*, 518 U.S. 37, 53 (1996) (plurality op.), in which "'erroneous evidentiary rulings can, *in combination*, rise to the level of a due process violation.'" BIO 15 (quoting with added emphasis *Egelhoff*, 518 U.S. at 53)).

A correct § 2254(d) analysis must "begin by determining the relevant clearly established law." *Yarborough v. Alvarado*, 541 U.S. 652, 660 (2004). "[L]ook[ing] for 'the governing legal principle or principles set forth by the Supreme Court at the time the state court renders its decision,'" *id*. at 661 (quoting *Lockyer v. Andrade*, 538 U.S. 63, 71-72 (2003)), is both a necessary and essential first step. That is because on § 2254(d) review, "[s]tate-court decisions are measured against this Court's precedents," *Cullen v. Pinholster*, 563 U.S. 170, 182 (2011), and that measurement is "'the only question that matters,'" *Harrington v. Richter*, 562 U.S. 86, 102 (2011) (quoting *Andrade*, 538 U.S. at 71).

As Texas duly observes, § 2254(d)(1)'s unreasonable application standard is "'difficult to meet,'" BIO 17 (quoting *White v. Woodall*, 572 U.S. 415, 419 (2014)), when

the federal court begins by *correctly* describing the clearly established principle governing a claim. The standard is *impossible* to meet when a federal court errs and decides the clearly established law "does not apply" at all. App. 38a. Texas attempts in vain to reframe the question presented by the Fifth Circuit's decision as whether the state court "did not unreasonably apply clearly established federal law." BIO i.

In concluding that this Court's cases have never reached fact-specific, discretionary applications of valid evidentiary rules, the majority below refused to acknowledge this Court's holdings on the application of state hearsay rules in *Chambers*, 402 U.S. at 302, and *Green v. Georgia*, 442 U.S. 95 (1979) (per curiam). App. 40a (concurrence) (stating *Chambers* only "concerned a bar to any evidence that ran afoul of the common-law voucher rule"); *id.* at 23a (plurality) (same). But Texas now acknowledges that "[t]his Court's decision in *Chambers* squarely discussed the application of state hearsay rules." BIO 11-12. Texas also acknowledges that *Chambers* and *Crane v. Kentucky*, 476 U.S. 683 (1986), establish a "general principle that is necessarily fact-specific." BIO 10. "AEDPA does not require state and federal courts to wait for some nearly identical factual pattern before a legal rule must be applied." *Panetti v. Quarterman*, 551 U.S. 930, 953 (2007) (quoting *Carey v. Musladin*, 549 U.S. 70, 81 (2006) (Kennedy, J., concurring)). Texas's brief shows the Fifth Circuit erred on the dispositive issue by waiting for something from this Court that it had already established.

2. Lucio's petition identified a lopsided split between the Fifth Circuit (and at least one decision of the Ninth Circuit) and the vast majority of circuits on the question actually decided below. The Fifth Circuit held that no claim involving the application of a valid state evidentiary rule could survive § 2254(d) review because this Court's cases do not cover them. Cases from the other circuits hold that this Court's clearly established law at least covers such claims. Pet. 23-30. Instead of confronting the split on that question, Texas elides the distinction.

Texas's argument rests on this Court's statement that, under the unreasonable application prong, "'[t]he more general the rule, the more leeway state courts have in reaching outcomes in case-by-case determinations.'" BIO 17 (quoting *Yarborough v. Alvarado*, 541 U.S. 652, 664 (2004)). Only by substituting that broad question for the narrow question of whether there is an applicable general rule at all can Texas claim that "cases *upholding* applications of evidentiary rules … present no conflict" with cases that vacated state-court convictions based on applications of state rules that violated due process. BIO 11 (emphasis in original). *See also* BIO 12 ("Cases containing no comparable exclusion[s] pose no 'intra-circuit conflicts.'"), *id.* (quoting Pet. 29).

First, Texas argues that the Fifth Circuit is not in conflict with itself or other circuits. BIO 10. That argument fails because Texas soars over the en banc decision below on clearly established law and suggests an earlier panel decision on the unreasonable application clause in *Kittelson v. Dretke*, 426 F.3d 306 (5th Cir. 2005) (per

curiam), somehow survives *Lucio*. As the dissent recognized, it doesn't.[2] App. 65a. Likewise, there is simply no way to reconcile the Fifth Circuit's holding that no applications of state evidence law are challengeable under the complete-defense cases with a decision that held a State's "'*application* of its evidentiary rules denied [petitioner] her constitutional right to present a defense.'" BIO 10 (quoting with emphasis *Lunbery v. Hornbeak*, 605 F.3d 754, 762 (9th Cir. 2010)).

Texas also contends the Ninth Circuit has sometimes correctly found this Court's complete-defense cases apply to discretionary exclusions based on generally valid evidence rules. *Ibid*. (citing *Lunbery* and *Rose v. Baker*, 789 F. App'x 5 (9th Cir. 2019)). But that only makes the Fifth Circuit's en banc decision more of an outlier for its failure to identify this Court's clearly established precedent.

And Texas fails to discuss—and so must concede—that the Fifth Circuit's holding conflicts with the rule announced in cases from the First, Fourth, and Tenth Circuits that Lucio identified. *See* Pet. 26-27 (discussing *Brown v. Ruane*, 630 F.3d 62, 72 (1st Cir. 2011); *Barbe v. McBride*, 521 F.3d 443, 460 (4th Cir. 2008)); *Dodd v. Trammell*, 753 F.3d 971, 988 (10th Cir. 2013)).

Texas's lack of a consistent theory fails to disprove the circuit split and leads it to rely on casuistic, ad hoc distinctions. Thus, Texas dismisses the conflict between

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[2] Texas's reliance on *Kittelson* once again shows the gulf between Texas's current position and its position below. Texas now cites *Kittelson* to suggest the Fifth Circuit recognized that the general complete-defense principle can be violated by a fact-specific *ruling*. BIO 10. But Texas urged the Fifth Circuit to rehear this case en banc because *Kittelson* illustrated that "the right to present a complete defense … concerns state evidentiary *rules* that *categorically* prevent the jury from considering factual evidence about the crime …." Pet'n Reh'g En Banc 13 (emphasis added).

Kubsch v. Neal, 838 F.3d 845 (7th Cir. 2016) (en banc), and *Fieldman v. Brannon*, 969 F.3d 792 (7th Cir. 2020), and the Fifth Circuit's decision in *Lucio* for the superficial reason that *Kubsch* and *Fieldman* concern a hearsay rule and the exclusion of a defendant's own testimony, respectively.[3] BIO 11-12. But the Fifth Circuit majority refused to acknowledge that *Chambers* included a holding on hearsay, and refused to acknowledge *Green* at all. *Fieldman* concluded clearly established law covered the exclusion of "testimony because the court concluded it was irrelevant." 969 F.3d at 795. Texas fails to explain away the conflict between the Fifth Circuit's holding that there is clearly established law only for categorical exclusionary rules, and *Fieldman*'s holding that *Crane* and *Rock v. Arkansas*, 483 U.S. 44 (1987), clearly establish a rule for a relevancy ruling. *Ibid*. As the *Lucio* concurrence noted, *Rock* concerned a "per se rule," 483 U.S. at 49, about "hypnotically refreshed testimony." App. 40a.

Texas attempts to distinguish the Sixth Circuit's decision in *Ferensic v. Birkett*, 501 F.3d 469 (6th Cir. 2007), on grounds that the exclusion in that case was a discovery sanction. BIO 12. But Texas does not dispute that the Sixth Circuit held this Court's complete-defense precedents clearly applied to that discretionary context, a holding necessarily in conflict with the Fifth Circuit majority below.

Similarly, Texas re-characterizes the decisions from the Ninth Circuit in *Moses v. Payne*, 555 F.3d 742 (9th Cir. 2009), and *Chia v. Cambra*, 360 F.3d 997 (9th Cir.

[3] Although Lucio repeatedly cited on *Kubsch* below, Appellant's Supp. Br. 26, 27, 31, Texas ignored *Kubsch* in its briefing to the en banc court. But when addressing the merits of Lucio's claim before the panel, Texas distinguished *Kubsch* on the grounds that Pinkerman and Villanueva did not provide Lucio an alibi. Appellee's Panel Br. 33-34, 43.

2004), as about only "expert" evidence. BIO 12. Yet Texas must concede *Moses*, like *Lucio*, was based on the conclusion that this Court's cases do not "clearly establish 'a controlling legal standard' for evaluating discretionary decisions to exclude the kind of evidence at issue here." *Moses*, 555 F.3d at 758-59 (quoting *Panetti*, 551 U.S. at 953); App. 40a. And *Chia* was based on the same reading of *Crane* contained in Texas's BIO. 360 F.3d at 1003.

Texas's rejection of the split between *Lucio* and cases from the First, Second and Third Circuits depends on Texas's mischaracterization of Lucio's claim as based on state-law error. BIO 10-11 (citing *Fortini v. Murphy*, 257 F.3d 39 (1st Cir. 2001), *Savage v. Dist. Attorney*, 116 F. App'x 332 (3d Cir. 2004), and *Scrimo v. Lee*, 935 F.3d 103 (2d Cir. 2019)). If Texas were correct that "*Scrimo* expressly rejected" that the complete-defense rule applies to "complaints about state law *errors* like the one petitioner alleges," BIO 11, the Second Circuit would be in error because, per Texas, "erroneous evidentiary rulings can, in combination, rise to the level of a due process violation." BIO 15 (cleaned up).

Rather than show the circuit split "is illusory," BIO 10-13, or of no help to Ms. Lucio, BIO 13-16, Texas's blithe erasure of the fundamental difference between this case and those of other circuits *reinforces* Ms. Lucio's case for review. Texas unwittingly acknowledges its elision-based argument when it cites *Richardson v. Kornegay*, 3 F.4th 687 (4th Cir. 2021), in support of the argument that the "alleged split cannot help petitioner," BIO 13, while acknowledging *Richardson* is an unreasonable-application case. *Id*. at 14. The same leap gets Texas to *Pittman v. Sec'y Florida Dep't of*

Corr., 871 F.3d 1231 (11th Cir. 2017), which Texas appropriately places in its argument on the contrary-to and unreasonable-application prongs. BIO 20.

In sum, Texas pastes clippings from unreasonable-application cases onto a decision based on a different provision. That inevitably produces inconsistencies. Texas says § 2254(d) permits circuits to apply the general complete-defense principle to a variety of factual settings, *id.* at 10-13, but not to Lucio for broadly contradictory reasons. BIO 19. Although the "general principle is necessarily fact-specific," BIO 10, no federal habeas court could overturn a state court's rejection of a complete-defense claim in a novel factual setting because "[i]t is not unreasonable 'to decline to apply a specific rule that has not been squarely established by this Court.'" *Id.* at 20 (quoting *Richter*, 562 U.S. at 101). And although the general principle was established by *Crane* in 1986, decades before Lucio's case became final on direct appeal, that principle cannot be a basis for habeas relief here because "this Court has never interpreted the complete-defense right to mandate exercising discretion in any particular way."[4] *Id.* at 24.

3. Texas's reliance on inconsistent positions is clearest and dispositive when it seeks to smuggle in the *plurality's* analysis, first in the guise of a holding, BIO 17-23,

[4] Accepting Texas's anti-retroactivity argument would overturn Fifth Circuit holdings that "the application of established general procedural principles in an analogous context is not a new rule barred by *Teague*." *Burdine v. Johnson*, 262 F.3d 336, 343 (5th Cir. 2001) (en banc). Those decisions are in accord with this Court's cases. *Wright v. West*, 505 U.S. 277, 309 (1992) (when "evaluating a myriad of factual contexts, it will be the infrequent case that yields a result so novel that it forges a new rule, one not dictated by precedent") (Kennedy, J., concurring) (endorsed in *Williams v. Taylor*, 529 U.S. 362, 412 (2000)).

then as a series of "vehicle problems." BIO 24-33. But a *majority* of the Fifth Circuit rejected the non-preservation theory that Texas contends presents "vehicle problems." BIO 28-33. The concurrence found Texas "conceded [Lucio's] issue is preserved." App. 38a. Because of that concession, the dissent found the plurality was "mak[ing] procedural arguments on the State's behalf" and "ignoring" this Court's "reminder that [courts] are 'passive instruments of government' that decide 'only questions presented by the parties.'" App. 48a (quoting with alterations *United States v. Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020)).

Those ten Fifth Circuit judges were correct. In the state habeas court, Texas recognized that Lucio supplemented her trial proffer with additional evidence, yet conceded that state law made habeas relief available when a petitioner reasserted a record-based claim based on additional evidence. ROA.10027-28. Unlike the plurality below, *see* BIO 29-30, the prosecutor's office that tried the case never suggested the affidavits of Villanueva and Pinkerman altered the theory Lucio's defense advanced at trial. The proposed findings and conclusions the prosecution submitted to the trial judge thus included no procedural bar based on a lack of contemporaneous objection, or reliance on extra-record evidence. App. 188a.

In district court, Texas responded to Lucio's explicit reliance on *Crane*, *Chambers*, and the same extra-record evidence she relies on now, ROA.161, by conceding that "Lucio raised *this claim* in state habeas proceedings." ROA.374 (emphasis added). Before the Fifth Circuit, Texas's opposition to a certificate of appealability reaffirmed that "Lucio raised her complete-defense claim in state habeas proceedings,

and the [Court of Criminal Appeals] rejected her claim on the merits." Amended Resp. Opp. Mot. COA 43. The panel correctly found Texas had "not argued, either below or on appeal, that Lucio defaulted her complete defense claim on state law grounds." App. 80a. So, the panel concluded the "State forfeited any argument that Lucio defaulted her claim." App. 80a-81a.[5] Texas did not challenge that ruling in its petition for rehearing en banc.[6] So when Texas asserts that "[t]here is no doubt that the claim petitioner presented in state court was adjudicated on the merits," and simultaneously claims "petitioner did not fairly present a cognizable federal claim in state court," BIO 28, it is taking novel and inconsistent positions.

In addition, the plurality's/Texas's shifting-sands theory misrepresents the facts. First, Dr. Pinkerman did not distinguish the opinions in his post-conviction affidavit from his intended trial testimony. *Contra* BIO 5, 30-31 (citing ROA.8975). Dr. Pinkerman stated that at trial "he was *prepared to testify* regarding research related to false confessions and Ms. Lucio's psychological characteristics which increase the likelihood of false confession." ROA.8975-76 (emphasis added).

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[5] Before the panel, Texas did not argue that Ms. Lucio's claim was novel. Texas invited judicial intervention by arguing that "if Lucio now contends" something novel, those contentions would be barred. Appellee Br. 17-18. The panel demurred. App. 80a-81a. The plurality intervened on rehearing. *See* App. 55a-57a.

[6] The first appearance of the "disclaimer" theory that the plurality stressed was in a footnote in the State's brief to the Fifth Circuit en banc where Texas mused that Footnote 36 in Lucio's state habeas petition "seems to disclaim reliance on *Crane*." Appellee Supp. Br. 20 n.5. That footnote merely distinguished Lucio's earlier direct appeal claim which concerned the *voluntariness*, not the credibility of her supposed confession—a distinction made in *Crane* itself. *See* 476 U.S. at 688.

As to Ms. Villanueva, Texas claims the trial court held a hearing to determine whether Villanueva was qualified to determine the veracity of a statement based upon body language because the defense claimed she is "qualified as an expert body-language interpreter." BIO 4. Defense counsel attempted to present Ms. Villanueva as an expert "as to the [CPS] records she received and reviewed," ROA.4688, and who, like Dr. Pinkerman, was trained to conduct clinical interviews that include consideration of "patterns of behavior" the subject presented, including body language. ROA.4694. Based on her training and observations, Ms. Villanueva would discuss women who suffer abuse from men and how this abuse would cause the female victim to "weaken" under pressure. *See* Pet. 12. Villanueva testified she *would not* opine on whether Lucio's statements were true based solely on her body language. ROA.4696. Texas is confusing Ms. Villanueva's excluded testimony with the admitted testimony of Ranger Escalon.[7] *See* Pet. 10 (quoting ROA.4409-10).

[7] Texas agrees federal courts can grant relief under the Due Process Clause when a "'trial judge's error is so extreme that it constitutes a denial of fundamental fairness.'" BIO 9 (quoting ROA.556-57). Texas law attempts to achieve fundamental fairness through "the common law doctrine called 'fighting fire with fire' or curative admissibility … [that] permits a party to respond to improper evidence by introducing improper evidence." 1 Steven Goode et al. *Texas Practice Series: Guide to the Texas Rules of Evidence* § 402.2 (4th ed.) (citing examples). Lucio's defense counsel invoked the doctrine in support of Villanueva countering Escalon. ROA.4686.

II. This Case Is an Excellent Vehicle to Resolve the Question Presented.

Ms. Lucio's petition presents a uniquely clean vehicle to answer the legal question presented. Judge Southwick's concurring opinion, which announced the narrowest grounds for the en banc majority below, addressed the question of clearly established federal law alone.

Texas contends it would surely prevail if this Court were to reach the "contrary to" or "unreasonable application" analysis under § 2254(d)(1), or the merits of the claim *de novo*. BIO 16-23, 24-28. But Texas vastly overstates its case. Seven judges of the court below faithfully applied this Court's precedent and determined that Lucio satisfied the unreasonable application prong and proved a violation of due process. App. 48a. The three concurring and seven dissenting judges agreed the exclusion of Dr. Pinkerman was "the key evidentiary ruling at trial" because it was a "factual imperative that jurors hear" the testimony casting doubt on the supposed confession. App. 37a. The concurring judges also shared the dissent's view that "if jurors had only heard" the excluded testimony, it "could have impacted the verdict." App. 38a.

Judge Southwick was correct that the exclusions of Ms. Villanueva and Dr. Pinkerman were harmful. Dr. Pinkerman would have explained that Ms. Lucio's lifetime of abuse and exploitation relates to issues other than "self-defense from domestic abuse." BIO 25. At trial, Texas "exploited Melissa's symptoms of trauma … repeatedly eliciting descriptions of [her] calm and detached demeanor after Mariah's death" as evidence of guilt. Amicus Br. of Former Prosecutors, et al., 10. Using psychological research available at the time of trial, Pinkerman would have explained that

"[w]omen who have suffered multiple forms of trauma, like Melissa, are apt to suffer more severe mental health symptoms," including "[d]issociation, avoidance, and emotional numbing." *Id*. at 9; ROA.8975-76. He would have given the jury an empirically valid basis for finding "Melissa's acceptance of the interrogators' suggestions was entirely consistent with the reactions of trauma victims" who respond to "perceived danger with feelings of 'indifference, emotional detachment, and profound passivity.'" *Id*. at 13.

Texas also suggests Lucio is seeking to impose the rule that "evidentiary rules must yield *whenever* evidence has 'persuasive assurances of trustworthiness.'" BIO 15 (quoting Pet. 30-31) (emphasis added). That is a red herring. "In petitioner's telling," *ibid*., establishing a complete-defense violation requires the defendant to show "the exclusion of 'critical,' 'trustworthy' evidence 'directly affecting the ascertainment of guilt' based on 'mechanistic[]' application of an otherwise valid rule of evidence." Pet. 22 (quoting *Chambers*, 410 U.S. at 302). Lucio acknowledges that under this Court's cases, a due process violation occurs only upon a showing that "the exclusion of reliable evidence 'infringe[s] upon a weighty interest of the accused' *and* is 'arbitrary or disproportionate to the purposes [the rules of evidence] are designed to serve.'" Pet. 22 (quoting *United States v. Scheffer*, 523 U.S. 303, 308 (1998) (in turn quoting *Rock*, 483 U.S. at 56)) (emphasis added).

Even if this Court allowed Texas's reframing to create vehicle problems, that includes the assertion that "[t]here is no doubt" Lucio's claim was adjudicated on the merits. BIO 28. Not so. The unanimous Fifth Circuit panel correctly held that "Lucio

… rebutted the presumption of adjudication." App. 82a. Several of the dissenting judges en banc agreed she did. App. 48a. As the Fifth Circuit panel found, the state habeas court's findings and conclusions "address state evidentiary standards and assert that Lucio's claim was redundant of her direct appeal argument. But Lucio explicitly framed her argument as a constitutional claim distinct from what she argued on direct appeal." App. 82a. The state habeas court concluded that the trial court "did not abuse its discretion in excluding the testimony" in question. App. 188a. As the panel found, that conclusion did not require the trial judge to have been correct under state law,[8] much less adjudicate the elements of the complete-defense rule listed above. *See Johnson v. Williams*, 568 U.S. 289, 303 (2013).

CONCLUSION

This Court should grant certiorari to resolve this important question.

Respectfully submitted,

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[8] *See Landon v. Jean-Paul Budinger, Inc.*, 724 S.W.2d 931, 936 (Tex. App.—Austin 1987).