No. _____

In The

Supreme Court of the United States

DAMON SIMON; PATRICE SIMON,

Petitioners,

v.

ROCHE DIAGNOSTICS CORPORATION,

Respondent.

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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QUESTIONS PRESENTED

1.

Whether the court of appeals applied an improper standard of review in exercising its discretion when ruling on the Simons' request to certify the dispositive state law question to the Supreme Court of Texas.

2.

Whether the court of appeals abused its discretion in denying the Simons' request to certify the dispositive state law question to the Supreme Court of Texas.

LIST OF PARTIES

The following is a list of all parties to the proceedings in the Court below, as required by Rule 24.1(b) and Rule 29.1 of the Rules of the Supreme Court of the United States.

1. Damon Simon;
2. Patrice Simon;
3. Roche Diagnostics Corporation

RELATED CASES

- *Simon v. Roche Diagnostics Corp*., No. 2020-59691, 133rd Judicial District Court, Harris County Texas. Removed to federal district court October 22, 2020.
- *Simon v. Roche Diagnostics Corp*., No. 4:20-cv-3625, U.S. District Court for the Southern District of Texas, Houston Division. Judgment entered December 4, 2020.
- *Simon v. Roach Diagnostics Corp*., No. 20-20661, U.S. Court of Appeals for the Fifth Circuit. Judgment entered July 6, 2021.

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PETITION FOR WRIT OF CERTIORARI

Petitioners Damon and Patrice Simon petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit in this case.

OPINIONS BELOW

The opinion of the Fifth Circuit Court of Appeals (App. 1-5) is reported at 851 Fed. Appx. 533 (5th Cir. 2021). The opinion of the district court (App. 8-14) is reported at 2020 WL 9457065.

JURISDICTION

The judgment of the Fifth Circuit Court of Appeals was entered on July 6, 2021 (App. 6). The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

RULE INVOLVED

Rule 58 of the Texas Rules of Appellate Procedure, which authorizes federal appellate courts to certify state law questions to the Texas Supreme Court, states:

> **Rule 58. Certification of Questions of Law by United State Courts**
>
> **58.1. Certification**
>
> 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. The Supreme Court may decline to answer the questions certified to it.

58.2. Contents of the Certification Order

An order from the certifying court must set forth:

(a) the questions of law to be answered; and

(b) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.

58.3. Transmission of Certification Order

The clerk of the certifying court must send to the clerk of the Supreme Court of Texas the following:

(a) the certification order under the certifying court's official seal;

(b) a list of the names of all parties to the pending case, giving the address and telephone number, if known, of any party not represented by counsel; and

(c) a list of the names, addresses, and telephone numbers of counsel for each party.

58.4. Transmission of Record

The certifying court should not send the Supreme Court of Texas the record in the

pending case with the certification order. The Supreme Court may later require the original or copies of all or part of the record before the certifying court to be filed with the Supreme Court clerk.

58.5. Fees and Costs

Unless the certifying court orders otherwise in its certification order, the parties must bear equally the fees under Rule 5.

58.6. Notice

If the Supreme Court agrees to answer the questions certified to it, the Court will notify all parties and the certifying court. The Supreme Court clerk must also send a notice to the Attorney General of Texas if:

(a) the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer; and

(b) the State of Texas or an officer, agency, or employee of the state is not a party to the proceeding in the certifying court.

58.7. Briefs and Oral Argument

(a) *Briefs*. The appealing party in the certifying court must file a brief with the Supreme Court clerk within 30 days after the date of the notice. Opposing parties must file an answering brief within 20 days after receiving the opening brief. Briefs must comply with Rule 55 to the

extent its provisions apply. On motion complying with Rule 10.5(b), either before or after the brief is due, the Supreme Court may extend the time to file a brief.

(b) *Oral Argument*. Oral argument may be granted either on a party's request or on the Court's own initiative. Argument is governed by Rule 59.

58.8. Intervention by the State

If the constitutionality of a Texas statute is the subject of a certified question that the Supreme Court has agreed to answer the State of Texas may intervene at any reasonable time for briefing and oral argument (if argument is allowed), on the question of constitutionality.

58.9. Opinion on Certified Questions

If the Supreme Court has agreed to answer a certified question, it will hand down an opinion as in any other case.

58.10. Answering Certified Questions

After all motions for rehearing have been overruled, the Supreme Court clerk must send to the certifying court the written opinion on the certified questions. The opinion must be under the Supreme Court's seal.

TEX. R. APP. P. 58.

STATEMENT OF THE CASE

Damon and Patricia Simon filed a *pro se* petition in Texas state court to recover personal injury damages from Roche Diagnostics Corporation ("Roche") based on Texas' negligence and strict liability law. ROA.18-26. The petition alleges that (1) Roche manufactured CoaguChek XS System and CoaguChek XS Test Strips ("the test strips") to be used at home to test one's International Normalized Ratio ("INR") levels, (2) beginning in 2016 through November 2, 2018 Mr. Simon used the test strips to monitor his INR levels from home, (3) on May 26, 2018 Mr. Simon suffered a stroke that could have been prevented but for inaccurate readings from the test strips, and (4) also on May 26, 2018, Mr. Simon was admitted to the emergency room several hours after he used the test strips where INR levels were measured by a different method which showed low INR levels. ROA.18-26.

Roche removed the case to federal court based on diversity jurisdiction. ROA.4-7. Roche also filed a Rule 12(b)(6) motion to dismiss arguing that because the petition alleges that Mr. "Simon was injured on May 26, 2018, when he suffered a stroke," and the Simons "did not file suit until September 24, 2020," the "claims are barred by Texas' two-year statute of limitations for personal injury claims." ROA.36. See TEX. CIV. PRAC. & REM. CODE § 16.003. Roche elaborates in its brief in support of the motion to dismiss that "[u]nder normal circumstances, the plaintiffs' claims would have expired two years" after Mr. Simon's stroke "on May 26, 2020, but on July 31, 2020, their filing deadline was

extended to September 15, 2020, by an administrative order of the Texas Supreme Court." ROA.38. See Tex. Sup. Ct., Misc. Docket No. 20-9091 (Jul. 31, 2020). Roche goes on to say that "[d]espite this extension, the plaintiffs' failed to file their Complaint until September 24, 2020," and therefore, the claims are "facially time-barred" by the two-year statute of limitations because the petition was not filed on or before the September 15, 2020 deadline. ROA.38.

In their *pro se* response to the motion to dismiss, the Simons state:

> 1. On May 26, 2018, [Mr.] Simon suffered a stroke and was taken by ambulance to [a hospital]. His INR was taken and the results conflicted with previous results. At the time, there was no reason to suspect Roche['s] CoaguChek device and test strips and was given no indication at the time that the company was at fault. The Plaintiffs received an automated phone call from Roche . . . on November 2, 2018 stating to discontinue use and discard unused test strips and use an alternative method. [Mr.] Simon made a phone call to Roche . . . after the automated message and spoke to a representative. She didn't give any information but asked for the return of the CoaguChek test strips on November 2, 2018 without any more explanation. After researching the internet after the last call, the Plaintiffs discovered the Recalls on the CoaguChek test

> strips. This suit resulted after research of the Recall in November.
>
> 2. [A]lthough the Plaintiff suffered a stroke on May 26, 2018, the Plaintiff was not aware o[f] any negligence until November of 2018. [Mr.] Simon still has th[e] recalled test strips in his possession.
>
> 3. . . . No ER personnel or medical staff stated at the time of the Plaintiff's stay in the hospital as a result of the stroke that his stroke was due to any negligence.
>
> . . . .
>
> 6. . . . The Plaintiff's knowledge or negligence occurred during a Roche . . . phone message that occurred in November of 2018 and internet research in November. According to the Plaintiffs' research, Roche . . . issued the Recall in November 2018. It's not possible for the Plaintiffs to have knowledge before Roche['s] own admission.
>
> 7. [The Simons request that the Court deny the motion to dismiss or] in the alternative give Plaintiffs time to re-plead if needed.

ROA.48-50.

The district court granted Roche's motion to dismiss writing that the Simons' "claims expired on September 15, 2020," and since they "did not file this action until September 24, 2020, the claims are time barred."

App. 14. As for the Simons' argument that the discovery rule results in the statute of limitations accrual date being November 2, 2018, the district court reasoned that under Texas law, "[t]he discovery rule only applies to cases in which 'the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable' . . . , [h]ere, the alleged injury is Mr. Simon's stroke," and the Simons state in their pleadings "that they knew on May 26, 2018 that Mr. Simon had suffered a stroke." (citations omitted). App. 11-12. The district court goes on to explain its reasoning as to why the Texas discovery rule is inapplicable as follows:

> Moreover, even if the discovery rule did apply here, the time period the Plaintiffs have identified—November 2018 when they learned of the recall—still would not be the accrual date. When the discovery rule applies, accrual is delayed until the plaintiff discovers or reasonably could have discovered her injury, not when she discovers the wrongdoing by the defendant. See *Timberlack v. A.H. Robins Co., Inc.*, 727 F.2d 1363, 1365 (5th Cir. 1984) ("[No Texas authority applying the discovery rule] implies that the statutory period should be tolled until the plaintiff learns that the defendant's conduct may have been wrongful.").
>
> Not only that, but if the Court assumes the pleaded facts as true as it must in ruling on a motion to dismiss, Plaintiffs knew that there was a discrepancy between the INR readings that Mr. Simon was allegedly getting from the Test Strips and those when he was

> hospitalized in May of 2018 (See Doc. I, Ex. 4 at 5) ([Hospital personnel] tested [Mr. Simon's] INR in the Emergency Room and told him it was really low and we just looked at each other because he'd tested his INR and it was in range. When we told the ER personnel, they proceeded to tell us what we already knew . . . it wouldn't dip that fast."). Consequently, they clearly had reason to suspect the Test Strip result was faulty at the time. Therefore, the discovery rule is inapplicable; the Plaintiffs' alleged injury accrued at the time of Mr. Simon's stroke in May of 2018.

App. 12-13.

On appeal, the Simons argued that the district court's ruling that the discovery rule does not cause the Simons' claim to accrue on November 2, 2018 is based on an incorrect statement of Texas law; that the district court erred in focusing only on the fact that Mr. Simon knew he suffered a stroke; and that Texas law requires a court to also focus on whether Mr. Simon knew the injury was likely caused by the wrongful acts of another and on the "category" of injury. Aplt. Br. 16, 22, 31-38. In making this argument, the Simons pointed out that since at least 2001 the Supreme Court of Texas has been refining the discovery rule from a "categorical" perspective in an "attempt[] to bring predictability and consistency to discovery rule jurisprudence" with a "focus[] on types of injury, not causes of

action." *Via Net, U.S. v. Tig Ins. Co.*, 211 S.W.3d 310, 314 (Tex. 2006).[1] Aplt. Br. 22, 31-38.

The Simons also argued that, because application of the discovery rule to the category of injury suffered by Mr. Simon has not been addressed by the Supreme Court of Texas, the following question should be certified under Rule 58 of the Texas Rules of Appellate Procedure to the Supreme Court of Texas:

> Whether Mr. Simon's stroke, which could have been prevented but for the defective medical device, is the category of injury to which the Texas discovery rule applies.

Aplt. Br. 25-38.

The Fifth Circuit rejected the Simons' request to certify the question, relying primarily on two twenty-plus year old opinions, *Childs v. Haussecker*, 974

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[1] See, e.g., *Archer v. Tregallas*, 566 S.W.3d 281, 290 (Tex. 2018) ("The determination of whether an injury is inherently undiscoverable is made on a categorical basis rather than on the facts of an individual case."); *Shell Oil Co. v. Ross*, 356 S.W.3d 924, 930 (Tex. 2011) ("The legal question of whether an injury is inherently undiscoverable is determined on a categorical basis."); *BP Am. Prod. Co. v. Marshall*, 342 S.W.3d 59, 65 (Tex. 2011) ("The discovery rule is applied categorically to instances in which 'the nature of the injury incurred is inherently undiscoverable and the evidence of injury is objectively verifiable.' "); *Wagner & Brown, Ltd. v. Horwood*, 58 S.W.3d 732, 735 (Tex. 2001) (" 'Inherently undiscoverable' does not mean that a particular plaintiff did not discovery his or her particular injury within the applicable limitations period. Instead, we determine whether an injury is inherently undiscoverable on a categorical basis because such an approach 'brings predictability and consistency to the jurisprudence.' ").

S.W.2d 31, 37-38 (Tex. 1998) and *Glassock v. Armstrong Cork Co.*, 946 F.2d 1085, 1092 (5th Cir. 1991), without serious discussion of how the category-of-injury concerns reflected in the recent Supreme Court of Texas opinions apply to the type of injury suffered by Mr. Simon, stating:

> In this case, the injury was immediately apparent—Mr. Simon suffered a stroke. Further, given the proximity between the stroke and the perhaps erroneous reading on the Roche device, compounded by the hospital personnel's statement that the levels don't dip that fast, their pleadings indicate that they should have known his stroke was likely caused by the faulty product. Consequently, even under the discovery rule, the date of the injury—May 26, 2028—was the date the statute of limitations began to run.
>
> We see nothing in Texas law that suggests this fact-specific application of the discovery rule merits certification to the state Supreme Court.

App. 4-5. Although the Supreme Court of Texas has recently instructed courts to consider the "categorical basis rather than the facts of an individual case" when deciding whether the discovery rule applies, *Archer*, 566 S.W.3d at 290; see also *Shell Oil Co.*, 356 S.W.3d at 930; *BP Am. Prod. Co.*, 342 S.W.3d at 65; *Wagner & Brown, Ltd.*, 58 S.W.3d at 735, the Fifth Circuit decided the case based on the facts of the Simons' case rather than on the category of the damage suffered. This is the exact opposite of how the recent Supreme Court of

Texas cases—cited and discussed in the Simons' brief on appeal and not mentioned in the Fifth Circuit's opinion—tell courts how to decide. In doing so, the Fifth Circuit states that the Texas rule regarding application of the discovery rule is clear and therefore certification is inappropriate in this case.

REASONS FOR GRANTING THE PETITION

I. Introduction.

Whether a federal court exercising diversity jurisdiction certifies a state law question to a state high court rests "in the sound discretion of the federal court." *Lehman Brothers v. Schein*, 416 U.S. 386, 391 (1974). But discretionary decisions should be made within a range of reasonableness based on defined standards. Moreover, standards should be uniform among the circuit courts. Currently, the standards applied to exercises of discretion as to whether to certify a state law question to a state high court are not uniform among the circuits. This has had the unsurprising consequence of some circuits certifying a higher rate of state law questions than other circuits.[2]

[2] See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. PA. L. REV. 1459, 1549 n. 476 (1997) (stating for example that between 1990 and 1994 the Eleventh Circuit granted 91% of the certification requests it received whereas the Tenth Circuit granted on 31% of the requests it received) (citing Jona Goldschmidt, AMERICAN JUDICATURE SOC'Y, CERTIFICATION OF QUESTIONS OF LAW 28 tbl.5 (1995)).

This case comes from the Fifth Circuit which generally prefers to not certify state law questions.[3] With this preference come the inevitable incorrect state law determinations which are later rejected by state high courts in cases not removed to federal court.[4] In addition to this non-certification preference, one Fifth Circuit Judge has stated that "the tipping point for certification-worthiness eludes mathematical precision; it's wholly subjective, with a patent, eye-of-the-beholder flavor." *Doe v. McKesson*, 945 F.3d 818, 839 (5th Cir. 2019) (Willett, J., concurring in part, dissenting in part), *rev'd*, *McKesson v. Doe*, 592 U.S. ___, 141

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[3] *Wiltz v. Bayer CropScience, Ltd. P'ship*, 645 F.3d 690, 703 (5th Cir. 2011) ("We are 'chary about certifying questions of law absent a compelling reason to do so.' ") (quoting *Jefferson v. Lead Indus. Ass'n, Inc*., 106 F.3d 1245, 1247 (5th Cir. 1997)); *Transcontinental Gas Pipeline Corp. v. Transportation Ins. Co*., 958 F.2d 622, 623 (5th Cir. 1992) ("Certification is not a panacea for resolution of those complex or difficult state law questions which have not been answered by the highest court of the state.").

[4] As for Fifth Circuit misstatements of state laws, see *Hogan v. Zoanni*, No. 18-0944, 2021 WL 2273721 *11 (Tex. June 4, 2021) (plurality op.) (holding the Texas Defamation Mitigation Act does not bar a plaintiff's entire claim for failure to comply with the act, contrary to the Fifth Circuit holding in *Tubbs v. Nicol*, No. 16-20311, 675 F. App'x 437, 439 (5th Cir. 2017)); *W.S. Ranch Co. v. Kaiser Steel Corp*., 388 F.2d 257, 264-265 n. 11-16 (10th Cir. 1967) (listing cases where the Fifth Circuit got the state law wrong); *United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486-487 n. 5-9 (5th Cir. 1964) (listing more cases). As for other circuits misstating state laws, see Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN STATE L. REV. 377, 397-398 (2010) (listing cases); Johathan Remy Nash, *Examining the Power of Federal Courts to Certify Questions of State Law*, 88 CORNELL L. REV. 1672, 1673 n. 3 (2003) (listing cases).

S. Ct. 48 (2020) (per curiam). Of course rule of law systems strive to eliminate subjectivity as an underlying basis for rulings by adoption of objective standards through which rulings are made, and therefore, subjectively should be removed as much as possible from the certification process in the federal courts.

In this case, the Fifth Circuit refused the Simons' request to certify the dispositive state law question of whether Mr. Simon's stroke is of the category of injuries to which the Texas discovery rule applies, even though the Supreme Court of Texas has not addressed this specific legal question and has recently instructed courts to consider the "categorical basis rather than the facts of an individual case" when deciding whether the discovery rule applies. *Archer*, 566 S.W.3d at 290; see also *Shell Oil Co*., 356 S.W.3d at 930; *BP Am. Prod. Co*., 342 S.W.3d at 65; *Wagner & Brown, Ltd*., 58 S.W.3d at 735. Without stating so, the Fifth Circuit applied its preference of non-certification in exercising its discretion to deny the Simons' request to certify the state law question bolstered by the statement that "[w]e see nothing in Texas law that suggests this fact-specific application of the discovery rule merits certification to the state Supreme Court," App. 5, which is exactly the opposite of what modern Supreme Court of Texas cases say to do when determining whether the discovery rule applies. *Archer*, 566 S.W.3d at 290; see also *Shell Oil Co*., 356 S.W.3d at 930; *BP Am. Prod. Co*., 342 S.W.3d at 65; *Wagner & Brown, Ltd*., 58 S.W.3d at 735.

The Fifth Circuit relied primarily on two twenty-plus year old opinions, *Childs*, 974 S.W.2d at 37-38 and

Glassock, 946 F.2d at 1092, for its conclusion that Texas law does not apply the discovery rule to Ms. Simon's injury, but does not mention the modern Texas cases indicating otherwise, *Archer*, 566 S.W.3d at 290; see also *Shell Oil Co*., 356 S.W.3d at 930; *BP Am. Prod. Co*., 342 S.W.3d at 65; *Wagner & Brown, Ltd*., 58 S.W.3d at 735, even though they were cited and discussed extensively in the Simons' brief on appeal. Aplt's Br. 16, 22, 31-38. The court was making the point that because the relevant Texas law is clear, certification is not necessary; but had the modern Texas cases been considered, the relevant Texas law is not clear at all. In short, the denial of the Simons' request for certification is based on the Fifth Circuit's general preference of non-certification and the subjectivity mentioned by Judge Willett in the *McKesson* case. The Fifth Circuit's analysis of the Texas law relevant to the Simons' case is something akin to: "I believe the state rule is clear and thus the state rule is clear. Certification denied."

The Fifth Circuit's standards applicable to exercises of discretion regarding certification of state law questions is one example of the diversity of approaches, some more rational than others, taken among the circuits. It is no surprise the standards among the circuits are inconsistent, with many allowing for subjectivity to reign, because this Court has not provided clear guidance as to what objective standards should be applied by federal courts exercising discretion whether to certify state law questions. As explained in more detail below, this case presents an ideal vehicle for clarification of the standards to be

applied when determining how a federal court should exercise its discretion whether to certify a state law question to a state high court when deciding a diversity case, thereby removing the inconsistencies among the circuits.

II. United States Supreme Court cases on how courts should go about exercising their discretion whether to certify state law questions to state high courts.

A federal court exercising diversity jurisdiction must apply the relevant state substantive law to the case before it. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); see also *Wichila Royalty Co. v. Nat'l Bank*, 306 U.S. 103, 107 (1939). In such a case, the federal court must first determine what state substantive law is so that it can then apply that law to the facts thereby reaching the conclusion required by state law. Generally this is not a complex task because state law is readily ascertainable. Less often state law is not clear at all, or worse, nonexistent.[5] Even then, the federal

[5] Compare *Erie*, 304 U.S. at 78 (instructing federal courts to use the state's substantive law as "declared by its legislature in a statute or by its highest court in a decision"), with *Stoner v. N.Y. Life Ins. Co.*, 311 U.S. 464, 468-469 (1940) (reversing court that failed to follow Missouri law stated in state court of appeals decision but where no Missouri Supreme Court decision addressed the issue). See also *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1965) ("The State's highest court is the best authority on its own laws.") and *id*. ("If there be no decision by that Court then federal authorities must apply what they find to be the state law after giving 'proper regard' to relevant rulings of the courts of the state.").

court must determine state law either by *Erie* guess or certification of the state law question to the state's high court[6] because the plaintiff is entitled to an adjudication of its case regardless of the complexities of determining state law.[7]

Diversity jurisdiction was created for federal courts to serve as a neutral forum between litigants by minimizing possible unfairness by state courts, judges and juries, against outsiders.[8] Thus in theory, the only motive a plaintiff would have to file a case in federal court or a defendant would have to remove a case to federal court is to insure a fair forum which might not be available in state court; the motive would never be to shop for a forum that applies a more favorable substantive law because the substantive law applied in

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[6] All states except for North Carolina have certification procedures. Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN STATE L. REV. 377, 384-385 n. 59 (2010) (citing the state statutes and rules).

[7] *Meredith v. City of Winter Haven*, 320 U.S. 228, 234-235 (1943) (A federal court may not deny the plaintiff the opportunity to assert its rights in federal court rather than state court "merely because the answers of state law are difficult or uncertain or have not yet been given by the highest court of the state.").

[8] *Burford v. Sun Oil Co*., 319 U.S. 315, 336-337 (1943) (Frankfurter, J., dissenting) ("[T]he basic premise of federal jurisdiction based upon diversity of the parties' citizenship is that the federal courts should afford remedies which are coextensive with rights created by state law and enforceable in state courts . . . to avoid possible unfairness by state courts, state judges and juries, against outsiders[.]").

either court is identical.[9] However, if federal courts exercising diversity jurisdiction do not adhere to state law, the underlying purpose of diversity jurisdiction is turned on its head by building in a motive for parties to forum shop because once it becomes apparent a federal court does not adhere to state law exactly as the state court would, the substantive outcome can only tilt one way or the other from how it would in state court.[10] A federal court's strict adherence to state law also advances federalism by respecting the states' authority to determine their laws. See *Erie*, 304 U.S. at 78-79.

A federal court's adhering to state law is difficult or impossible in cases that turn on unclear or nonexistent state law. In those cases, the *Erie* guess allows federal courts to move along and decide diversity cases before them, but it also gives rise to problems regarding forum shopping and federalism because an *Erie* guess can easily miss the mark of what state law would

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[9] See *Guaranty Trust Co. v. York*, 326 U.S. 99, 109 (1945) ("The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away should not lead to a substantially different result.").

[10] This point was summarized by the Third Circuit Court of Appeals in 1977:

> A diversity litigant should not be drawn to the federal forum by the prospect of a more favorable outcome than he could expect in state courts. But neither should he be penalized for his choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show.

Becker v. Interstate Prop., 569 F.2d 1203, 1206 (1977).

be if decided by the state high court. Certification of state law to a state's high court pursuant to the state's certification rules eliminates the forum shopping problems by allowing the state high court to state what its law is thereby binding both federal and state courts with the result that the substantive law applied in federal and state court is consistently the same; certification eliminates the federalism problems by allowing the state court to declare its substantive law without the federal court doing so. See *Hanan v. Plumer*, 380 U.S. 460, 468 (1965) (*Erie's* dual purpose is "discouragement of forum shopping and avoidance of inequitable administration of the laws."). Certification also gives state courts the opportunity to update or change their laws to changed societal circumstances, and it promotes efficiency and saves time and money.[11]

Whether certification is available or not, federal courts, in respect of our system of federalism, strive to

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[11] See *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997) (Certification "allows a federal court faced with a novel state law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response."); *Virginia v. Am. Booksellers Ass'n, Inc*., 484 U.S. 383, 396 (1986) (pointing out that certification "is a method by which we may expeditiously obtain [the] construction" of a state statute); *Lehman Bros. v. Schein*, 416 U.S. 386, 390-391 (1974); (In the case of unclear or nonexistent state law, certification "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism."); *Bernhadt v. Polygraphic Co. of Am., Inc*., 350 U.S. 198, 209 (1956) (Frankfurter, J., concurring) ("Law does change with times and circumstances, and not merely through legislative reforms.").

allow state courts to declare what state law is.[12] And this Court has made clear that when a state provides for certification, federal courts should certify in proper cases,[13] federal courts have discretion when deciding whether to certify,[14] but also that a district court's determination of what the state law is (that is, where state certification rules allow for certification by district courts—Texas does not), is reviewed on appeal *de novo*.[15]

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[12] See *Lehman Bros*., 416 U.S. at 390 ("[W]hen state law does not make the certification procedure available, a federal court not infrequently will stay its hand, remitting the parties to the state court to resolve the controlling state law on which the federal rule may turn.") (footnote omitted).

[13] *Arizonans for Official English*, 520 U.S. at 78-79, (criticizing lower federal courts for refusal to certify and noting certification requires no "unique circumstances" but only "unsettled questions of state law"); *Brockett v. Spokane Arcades, Inc*., 472 U.S. 491, 510 (1985) (recommending certification and deeming federal court "speculation," where a state court will answer certified questions, as "particularly gratuitous") (O'Connor, J., concurring). See also *Bellotti v. Baird*, 428 U.S. 132, 150-153 (1976).

[14] *Lehman Bros*., 416 U.S. at 390-391 ("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.") (footnote omitted); and *id*. at 391 (Rehnquist, J., concurring).

[15] *Salve Regina College v. Russel*, 499 U.S. 225, 239 (1991) ("The obligation of responsible appellate review and the principles of a cooperative judicial federalism underlying *Erie* require that courts of appeals review the state-law determinations of district courts *de novo*.").

As for what is a proper case for certification, this Court recognizes that where state law is clear, a federal court should not certify the question to the state high court.[16] Conversely, when state law is not clear or is nonexistent, and it is significant to the state, federal courts should certify the state law question to the state's high court.[17] Otherwise this Court has said little

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[16] *Russell*, 499 U.S. at 237 ("In many diversity cases the controlling issues of state law will have been squarely resolved by the state courts, and a district court's adherence to the settled rule will be indisputably correct."); *Houston v. Hill*, 482 U.S. 451, 471 (1986) ("It would be manifestly inappropriate to certify a question in a case where, as here, there is no uncertain question of state law whose resolution might affect the pending federal claim. As we have demonstrated, *supra*, at 468-469, this ordinance is neither ambiguous nor obviously susceptible of a limiting construction. A federal court may not properly ask a state court if it would care to rewrite a statute. We therefore see no need in this case to abstain pending certification.") (footnotes omitted); *Bernhardt*, 350 U.S. at 204-205 ("Were the question in doubt or deserving further canvass, we would of course remand the case to the Court of Appeals to pass on this question of Vermont law. But, as we have indicated, there appears to be no confusion in the Vermont decisions, no developing line of authorities that casts a shadow over the established ones, no dicta, doubts or ambiguities in the opinions of Vermont judges on the question, no legislative development that promises to undermine the judicial rule. We see no reason, therefore, to remand the case to the Court of Appeals to pass on this question of local law.").

[17] See *McKesson*, 141 S. Ct. at 51 (making clear that certification is proper when the answer to a state law question may cancel the need to answer another complex constitutional question); *Arizonans for Official English*, 520 U.S. at 78 ("Given the novelty of the question and its potential importance to the conduct of Arizon's business, plus the views of the Attorney General and those of Article XXVIII's sponsors, the certification requests merited more respectful consideration then they received in the proceedings below."); *Lehman Bros.*, 416 U.S. at 391 ("Here resort to

about the specific standards that should be applied by a federal court exercising its discretion whether to certify a state law question.[18] In this regard, the circuit courts have developed divergent standards as to how federal courts should exercise their discretion to certify state law questions, with commentators lamenting the lack of guidance from this Court.[19]

[certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law, Florida being a distant state. When federal judges in New York attempt to predict uncertain Florida law, they act, as we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction."); *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (recommending certification and calling federal court "speculation," where a state court will answer certified questions, as "particularly gratuitous").

[18] But see *Am. Booksellers Ass'n, Inc.*, 484 U.S. at 395 (preferring to certify a state law question where "[t]here is no reliable evidence in the record supporting the District Court's holding that the statute reaches up to 25 percent of a typical bookstore, since the two bookstore owners who testified were unfamiliar with the statutory definition of 'harmful to minors.' We cannot tell whether the court's finding was based on an independent determination by the District Judge, as plaintiffs suggest, or the flawed testimony. But even if the holding were based on the former, we cannot discern the evidentiary basis for it. Neither can we rely on the Court of Appeals' construction. That court criticized the basis of the District Court's holding, but gave no alternative basis for its own determination."); *Elkins v. Moreno*, 435 U.S. 647, 672 (1987 (Rehnquist, J., dissenting) (pointing out that certification is not necessary where a court can decide the case without resort to an unclear state law); *Lehman Bros.*, 416 U.S. at 392-395 (Rehnquist, J., concurring).

[19] See, e.g., RICHARD H. FALLON JR. ET AL., HART AND WECHSLER'S THE FEDERAL COURTS AND THE FEDERAL SYSTEM 1118-1119 7th ed. 2015; Bradford R. Clark, *Ascertaining the Laws*

III. The different standards among the circuits of how to exercise discretion as to whether state law questions should be certified to state high courts.

The divergence standards among the circuit courts as to how to exercise the discretion to certify state law questions to state high courts are as follows:

D.C. Circuit: The D.C. Circuit asks whether: (1) the local law is genuinely uncertain with respect to the dispositive question; (2) the case is one of extreme public importance; and (3) there is a discernable path for the court to follow. *Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (D.C. Cir. 2001). See also *K&D LLC v. Trump Old Post Office LLC*, 951 F.3d 503, 510 (D.C. Cir. 2020).

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of the Several States: Positivism and Judicial Federalism After Erie, 145 U. PA. L. REV. 1459, 1549 (1997) (Noting that because of the lack of guidance from this Court, "certification patterns vary widely among federal courts and are largely ad hoc" and suggesting that the means of remedying this is for federal courts to employ "a presumption in favor of certification whenever they are called upon to resolve an unsettled question of state law that would entail the exercise of significant policymaking discretion more appropriately left to the states."); Note, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 GEORGE WASH. L. REV. 251, 268 (2017) ("Although the Supreme Court has committed the use of certification to federal courts' discretion, it has not provided a uniform guidance to lower federal courts in deciding whether to use certification. This lack of uniform guidance, combined with idiosyncrasies of various state and federal courts, has led to various practices among the circuits.").

1st Circuit: The First Circuit considers whether: (1) there is controlling precedent; and (2) the question may be determinative of the case. *Nett ex rel. Nell v. Bellucci*, 269 F.3d 1, 8 (1st Cir. 2001); see also *Casco Inc. v. John Deere Constr. & Forestry Co.*, 990 F.3d 1, 12 (1st Cir. 2021) ("A federal court sitting in diversity may certify an open question of Puerto Rico law to the territory's highest court, or it may undertake its prediction when the course the Puerto Rico courts would take is reasonably clear.") (quotation marks and brackets omitted).

2nd Circuit: The Second Circuit generally treats certification as an "exceptional procedure," see *McGrath v. Toys "R" Us, Inc.*, 356 F.3d 246, 250 (2d Cir. 2004), and more specifically considers: (1) the absence of authoritative state court interpretations; (2) the importance of the issue to the state and whether the question implicates issues of public policy; (3) the capacity of certification to resolve the litigation, *Morris v. Schroder Cap. Mgmt. Intern.*, 445 F.3d 525, 531 (2d Cir. 2006), and (4) whether the state law question is determinative of the case, *Ajdler v. Province of Mendoza*, 890 F.3d 95 (2d Cir. 2018). See also *53rd Street, LLC v. Bank Nat'l Ass'n*, 2021 WL 3412063 (2d Cir. 2021) (stating that certification is proper to avoid "abstention," where failure to certify will substantially deprive state

courts of the opportunity to define state law, or where all parties request certification).

3rd Circuit: The Third Circuit focuses on the language of the particular state's certification rules when deciding whether to certify a state law question. See generally Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience*, 115 PENN STATE L. REV. 377 (2010).

4th Circuit: The Fourth Circuit will certify "[o]nly if the available state law is clearly insufficient" to show what "the state would do if confronted with the same fact pattern." *Roe v. Doe*, 28 F.3d 404, 407 (4th Cir. 1994). See also *Passaro v. Virginia*, 935 F.3d 252-253 (4th Cir. 2019) the majority would not certify where "[n]either party ha[d] requested certification," whereas the dissenting judge would have certified because he "was not entirely certain that we have reach the conclusion anticipated by the Virginia court[.]").

5th Circuit:[20] The Fifth Circuit applies three factors when determining to certify: (1) the

[20] This standard was not applied by to the Simons' case. Rather, as discussed throughout this petition, the Fifth Circuit's general preference of non-certification and the subjectivity mentioned by Judge Willett in declaring the Texas rule of law in reliance on two twenty-plus year old cases without discussing the

closeness of the question and the existence of sufficient sources of state law; (2) the degree to which considerations of comity are relevant in light of the particular issue and case to be decided; and (3) practical limitations of the certification process, such as significant delay and possible inability to frame the issue so as to produce a helpful response on the part of the state court. *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015).

6th Circuit: The Sixth Circuit asks whether the state law question is new, the state law is unsettled, *In re Century Offshore Mun. Corp*., 119 F.3d 409, 415 (6th Cir. 1997), the party seeking certification did so timely, and places importance on the language of the state's certification rule, *In re Amazon.com, Inc*., 942 F.3d 297, 300-302 (6th Cir. 2019).

7th Circuit: "Certification is appropriate in a case where the question to be certified is outcome determinative, where it concerns an important issue of public concern, where the state supreme court has not yet provided clear guidance on the matter, and where the issue is likely to recur. We also take into account the state supreme court's particular interest in the development of

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relevant modern Supreme Court of Texas cases were the standards applied.

state law and the likelihood that the result of the decision in a particular case will exclusively affect the citizens of that state." *Cutchin v. Robertson*, 986 F.3d 1012, 1028-1029 (7th Cir. 2021) (citations omitted).

8th Circuit: The Eighth Circuit states that whether to certify is a matter of discretion, *Wirtz v. Specialized Loan Serv.*, LLC, 987 F.3d 1156, 1159 note 2 (8th Cir. 2021), and in exercising that discretion considers whether there is an absence of controlling state high court precedent requiring speculation or conjecture, *Kulinski v. Medtronic Bio Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997).

9th Circuit: The Ninth Circuit certifies a state law question after considering "(1) whether the question presents important public policy ramifications yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) the spirit of comity and federalism." *Murray v. BEJ Mins., LLC*, 924 F.3d 1070, 1072 (9th Cir. 2019) (en banc) (quotation marks omitted). It also focuses on the specific language of the state's certification rules. See, e.g., *Fields v. Legacy Health Sys.*, 413 F.3d 943, 961 (9th Cir. 2005) (Gould, J., concurring) ("It is further regrettable that we cannot properly tender the remedy clause issue to the Oregon Supreme

Court for its decision, because the Oregon Supreme Court has been explicit in setting its certification guidelines, and under those standards this issue may not now be certified."); *Kunz v. Utah Power & Light Co*., 871 F.2d 85, 88 (9th Cir. 1989) (basing its certification decision largely on the language of the state's certification rule).

10th Circuit: "The standards we apply in determining whether to grant a motion for certification stem from both state and federal law." *Morgan v. Baker Hughes, Inc*., 947 F.3d 1251, 1258 (10th Cir. 2020).Under state law the language of a state's certification rule is important. "Under our own jurisprudence, we will not certify every arguably unsettled question of state law that comes across our desks. If a reasonably clear and principled course is available, we follow it ourselves. Certification is appropriate, however, if the question before us (1) may be determinative of the case at hand and (2) is sufficiently novel that we feel uncomfortable attempting to decide it without further guidance. Throughout this inquiry, we are mindful that the judicial policy of a state should be decided when possible by state, not federal, courts." *Id*. (citations and quotation marks omitted).

11th Circuit: "We have said that when substantial doubt exists about the answer to a

> material state law question upon which the case turns, a federal court should certify that question to the state supreme court in order to avoid making unnecessary state law guesses and to offer the state court the opportunity to explicate state law. But we have also said that we must exercise discretion and restraint in deciding to certify questions to state courts. Among the considerations that inform our decision, the most important are the closeness of the question and the existence of sufficient sources of state law—statutes, judicial decisions, attorney general's opinions—to allow a principled rather than conjectural conclusion." *Matamoros v. Broward Sheriff's Office*, 2 F.4th 1329, 1335 note 4 (11th Cir. 2021) (citations, quotation marks and brackets omitted).

IV. The standards applied by the Fifth Circuit in exercising its discretion to deny the Simons' request to certify the controlling state law question in this case.

The preference of not certifying state law questions applied by the Fifth Circuit, *Wiltz*, 645 F.3d at 703; *Jefferson*, 106 F.3d at 1247; *Transcontinental Gas Pipeline Corp*., 958 F.2d at 623, has the feel of a legal presumption against certification.[21] In respect of

[21] The panel that decided the Simons' case treated the preference of non-certification as the appropriated standard to be

states' authority to declare their own laws, the preference (presumption) should be that certification *is* in order unless other factors weigh against certification. State high courts should be given the opportunity to decide whether to answer hard state law questions. *Arizonans for Official English*, 520 U.S. at 78; *Lehman Bros.*, 416 U.S. at 391; *Brockett v. Spokane Arcades, Inc.*, 472 U.S. at 510. A preference in favor of certification would give state high courts this opportunity; the Fifth Circuit's preference against certification takes this opportunity away from the state high courts thus taking from the state high courts their right to declare state law.

Some circuits take into consideration the specific language of state certification rules when deciding whether to certify state law questions. A preference of non-certification discounts from what states have explicitly said in their certification rules as to when they would like to be given the opportunity to make state law determinations. See, e.g., TEX. R. APP. P. 58.1. To avoid discounting states' explicit desires regarding certification thereby giving proper respect to the states' role, focus on the language of state certification rules should be part of the standards applied to the discretionary call to certify or not. Federal courts should not, through a preference of non-certification fail to effectuate state preferences reflected in the text of state certification rules. And there is no burden imposed on the

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applied which is evident because it did not mention the three factors stated in other Fifth Circuit opinions regarding whether to certify. See *Swindol*, 805 F.3d at 522.

state high courts by a preference of certification in accordance with the specific text of state certification rules because state high courts can simply deny requests for certification or the state rule making authorities can change the language of the states' certification rules if they prefer less involvement in federal court determinations of state substantive law. See TEX. R. APP. P. 58.1 ("The Supreme Court [of Texas] may decline to answer the questions certified to it.").

As for the specific decision by the panel to reject the Simons' request that the controlling state law question be certified to the Supreme Court of Texas, the opinion does not mention the three factors—closeness of the question and the sources of state law; comity; practical limitations of certification—normally applied by the Fifth Circuit in certification decisions, *Swindol*, 805 F.3d at 522, but instead relies on its general preference of non-certification and subjectivity declaring it is clear that the Texas discovery rule does not apply to Mr. Simon's injury. This declaration smacks of subjectivity because the court's analysis relies on two twenty-plus year old opinions, *Childs*, 974 S.W.2d at 37-38 and *Glassock*, 946 F.2d at 1092, but does not mention the modern Texas cases indicating otherwise, *Archer*, 566 S.W.3d at 290; see also *Shell Oil Co.*, 356 S.W.3d at 930; *BP Am. Prod. Co.*, 342 S.W.3d at 65; *Wagner & Brown, Ltd.*, 58 S.W.3d at 735, even though they were cited and discussed extensively in the Simons' brief on appeal. Aplt's Br. 16, 22, 31-38. Additionally, the modern cases instruct courts to

consider the "categorical basis rather than the facts of an individual case" when deciding whether the discovery rule applies, whereas the Fifth Circuit stated that "[w]e see nothing in Texas law that suggests this fact-specific application of the discovery rule merits certification to the state Supreme Court," App. 5, which is exactly the opposite of what modern Supreme Court of Texas cases say to do when determining whether the discovery rule applies.

In sum, this case provides the ideal vehicle for determining or clarifying what standards should be applied by federal court exercising their discretion in a diversity case to determine whether a substantive state law question should be certified to a state's high court. Addressing this issue would bring uniformity to the certification practices among the circuits and would insure that the states' roll in our system of declaring their own laws is preserved.

CONCLUSION

For the reasons stated herein, Petitioners request this Court to grant this petition.

Respectfully submitted,

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