No. 22-719

IN THE

Supreme Court of the United States

JESSICA MACKEY,

Petitioner,

v.

AMERICAN MULTI-CINEMA, INC.,

Respondent.

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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

I. Because AMC Patently Misstates Louisiana Summary Judgment Law In Its Question Presented, Petitioner's Application For Certiorari Merits Careful Consideration By This Court

AMC opens its opposition with the following question presented: "Courts applying Louisiana law have *consistently granted Motions for Summary Judgment* determining that deviations up to one and one-half inches in a sidewalk do not present an unreasonable risk of harm." Opp. i (emphasis added). AMC's question presented patently misstates Louisiana law, because five of the seven cases cited in the question presented – *Boyle*, *Reed*, *Chambers*, *Shavers*, and *Williams* – were decided at trial and never discussed summary judgment. Only *Taylor* and *Grote* were decided on summary judgment, and these intermediate state court decisions – one is unpublished – are clearly distinguishable for the reasons discussed in Section III.

Given AMC's blatant misstatement of Louisiana law in its question presented, this Court should carefully consider petitioner's application for certiorari herein.

II. AMC's Failure To Address The Louisiana Supreme Court's "Analytic Framework" In *Broussard* For Evaluating Unreasonable Risk Of Harm Repeats The Fifth Circuit's Error And Illustrates The Circuit Court's Violation Of *Erie*'s Requirement Of Vertical Uniformity

AMC fails to address controlling Louisiana Supreme Court precedent, and the Fifth Circuit fails to even mention it. In her petition's question presented, Mrs.

Mackey explained that under Louisiana law – specifically the Louisiana Supreme Court's landmark decision in *Broussard v. State of Louisiana, ex rel Office of State Buildings*, 113 So. 3d 175 (La. 2013) -- determination of whether an allegedly defective condition presents an unreasonable risk of harm involves analysis of whether the defendant breached a duty owed, a determination the Louisiana Supreme Court referred to as the "analytic framework" for evaluating unreasonable risk of harm. *Id*., at 185. It is "axiomatic" that the question of "breach" is to be decided by the factfinder at trial. *Id.* After providing this context petitioner detailed the Fifth Circuit's numerous errors in affirming summary judgment in favor of AMC. At the heart of the Fifth Circuit's errors was the court's failure to apply, or even mention, the proper "analytic framework" required by *Broussard*.

1. Despite the centrality of *Broussard*'s "analytic framework" to petitioner's charged *Erie* violations by the Fifth Circuit, in its opposition, AMC avoids discussion of the duty or breach elements as applied to its maintenance of the sidewalk involved in petitioner's accident. In fact AMC's brief is silent on the question of breach and only mentions duty once – on the altogether different question (as AMC frames it) of whether the Fifth Circuit fulfilled its "duty to review the entire record." Opp. 13.

2. AMC also does not address *Broussard*'s rationale for classifying the unreasonable risk of harm analysis as a determination of whether a defendant breached a duty owed. As explained in her petition (at 18), *Broussard* sought to correct unintended conflation of the "duty" and "breach" elements in Louisiana's unreasonable risk of harm analysis.

Because the Fifth Circuit did not even mention *Broussard*, and its opinion shows that it was unaware of *Broussard*'s concern with conflation of the elements of duty and breach, the court erroneously believed there was a "legal rule" that height deviations up to 1 ½ inches "generally" do not present an unreasonable risk of harm. App.3a. Despite the importance of *Broussard*'s concern with conflation of duty and breach, AMC's total avoidance of the subject further demonstrates the hollowness of its arguments defending the Fifth Circuit's decision.

3. Similarly, AMC makes no effort to distinguish Professor Galligan's forthcoming law review article (App.17a-31a), which expands on *Broussard*'s concern about judges conflating duty and breach.[1] AMC's careful avoidance of this current and germane scholarly assessment of *Broussard*'s unreasonable risk of harm analysis further undermines AMC's opposition.

III. The Cases Cited By AMC In Support Of The Fifth Circuit's Affirmance Of Summary Judgment Are All Distinguishable, Because They Did Not Consider *Broussard's* "Analytic Framework" For Determining Unreasonable Risk Of Harm

AMC contends that petitioner has contradicted herself on the question of whether *Broussard* ever permits summary judgment on the question of whether an allegedly defective condition presents an unreasonable risk of harm. Opp. 9, 11-12. While *Broussard* was clear that the question of unreasonable risk of harm should be determined by the factfinder at trial,

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[1] Thomas C. Galligan, Jr., *Continued Conflation Confusion in Louisiana Negligence Cases: Duty and Breach*, 97 Tul. L. Rev. (forthcoming).

Broussard, 113 So. 3d 175, 183, petitioner did not shy away from the Louisiana Supreme Court's subsequent decision in *Allen v. Lockwood*, 156 So. 3d 650 (La. 2015), which clarified that summary judgment may be proper even on a question involving breach of duty "where the plaintiff is unable to produce factual support for his or her claim that a complained of condition or things is unreasonably dangerous." Pet. 20, *citing Allen*. Of course, the difference in petitioner's case is that she produced substantial factual support demonstrating that the uneven concrete that caused her fall was unreasonably dangerous. Pet. 5-7.

AMC next refers to the cases cited in the Fifth Circuit's opinion below, which allegedly support determination at the summary judgment stage of whether a condition presents an unreasonable risk of harm. Opp. 9. The Fifth Circuit's opinion cited only two cases, *Chambers v. Village of Moreauville*, 85 So. 3d 593 (La. 2012) and *Buchanan v. Wal-Mart Stores, Incorporated*, 834 Fed. Appx. 58 (5th Cir. 2020), the latter of which discussed five Louisiana cases, including *Chambers*. App. 3a. Of these six referenced cases, the four opinions by the Louisiana Supreme Court – *Chambers, Reed, Boyle,* and *White* – involved trial decisions and said nothing about determining unreasonable risk of harm at the summary judgment stage. Further, except *Buchanan*, the other five cases were decided before *Broussard* and thus did not consider *Broussard's* holding that determination of unreasonable risk of harm is a question of breach to be decided by the factfinder at trial. *Broussard*, 113 So. 3d 175, 183, 185. And even the Fifth Circuit's decision in *Buchanan* did not conduct the unreasonable risk of harm analysis within the Louisiana Supreme Court's

"analytic framework" in *Broussard,* i.e., whether Wal-Mart breached a duty owed.[2]

Similarly, none of the other cases cited by AMC (Opp. 10-11) – *Taylor v. Chipotle Mexican Grill*, 263 So. 3d 10 (La. App. 5 Cir. 2018), *Grote v. Federal Insurance Company*, 2016-0474 (La. App. 1 Cir. Dec. 22, 2016), 2016 WL 7407385, and *Lacaze v. Wal-Mart Stores, Inc.*, 20-696, 2022 WL 4227240 (M.D. La. Sept. 13, 2022) – conducted the unreasonable risk of harm analysis within *Broussard's* "analytic framework" of whether the defendant breached a duty owed. Although these three cases were decided on summary judgment, they are further distinguishable, because they involved arguments by the defendants that the allegedly defective conditions at issue were "open and obvious", which is "one factor" under the second element of *Broussard's* four-part risk-utility balancing test.[3] Pet. 16-17. In petitioner's case AMC never argued that the uneven concrete where Mrs. Mackey fell was "open and obvious," and even had AMC done so, facts were in dispute on this issue. Pet. 26.

Further distinguishing each case, in *Taylor* the height differential at the expansion joint was less than the 3/4-7/8 inch height differential here. *Taylor,* 263 So. 3d, at 917. And on appeal one member of the three-judge panel dissented (citing *Broussard*), based on the combination of vertical and horizontal

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[2] As pointed out in her petition (Pet. 13), *Buchanan* is an unpublished opinion and is not considered precedent under Fifth Circuit Rule 47.5.4.

[3] *See Dauzat v. Curnest Guillot Logging, Inc.*, 995 So. 2d 1184 (La. 2008). "The degree to which a danger may be observed by a potential victim is one factor in the determination of whether the condition is unreasonably dangerous." *Id.*, at 1186.

dimensions of the expansion joint, which created a dispute of fact as to whether the condition was unreasonably dangerous.[4] *Taylor*, 263 So. 3d, at 918.

Notably, the opinion of the state appellate panel in *Grote* is not designated for publication. Also, one judge dissented from the panel's decision, because he believed the district judge "impermissibly weighed the evidence and made credibility determinations, which is inappropriate for a summary judgment." *Grote*, *supra*, Pettigrew dissenting, at 1.

As for *Lacaze,* unlike petitioner here, the plaintiff admitted "she was not looking down at the time of the fall", and videotape showed "she was looking at something in her purse." *Id.*, at 8. Also, in discussing the alleged tripping hazard in *Lacaze*, the district court stressed "the height of the elevation is only one factor of the four-part test, and it is certainly possible that a height differential of 1-1/2 inches or less might, in a different setting, pose an unreasonable risk of harm." *Id.*, at 10, Footnote 4. The facts of petitioner's case present such a "different setting", as the sidewalk expansion joint where she fell was dark from lack of power washing and was obscured by rain (Pet. 26), petitioner was not distracted and was being careful (Pet. 4), and AMC's facility manager had never noticed the uneven expansion joint (Pet. 26). Clearly, considering *Broussard's* holding that the factfinder determines which risks "pose an open and obvious hazard", *Broussard*, 113 So.3d 175, 185, facts are in dispute on whether the defective condition of the

[4] A similar combination of conditions affected the expansion joint where petitioner tripped (Pet. 5, 22), supporting that a dispute of fact exists in petitioner's case as well.

expansion joint was "open and obvious", which precludes summary judgment.[5]

IV. AMC Fails To Distinguish The Cases Cited By Petitioner, Because AMC's Critique Is Based On The Debunked Assertion That Summary Judgment Is Appropriate Based Solely On Sidewalk Deviations Up To One And One Half Inches

In her petition Mrs. Mackey cited numerous cases involving factually similar trip hazards in which summary judgment was denied or judgment was rendered for the personal injury plaintiff at trial. Pet. 26-29. AMC contends these cases are "easily distinguishable" (Opp. 15) then attempts to nitpick facts that allegedly differentiate the cases from "the jurisprudence finding that summary judgment is appropriate for the same issue." Opp. 16. However, as pointed out in Section I, AMC has avoided controlling Louisiana precedent, instead misstating that courts "consistently" grant summary judgment based solely on determining that sidewalk deviations up to one and one-half inches do not present an unreasonable risk of harm. Because petitioner has refuted AMC's alleged summary judgment standard for unreasonable risk of harm, AMC's criticism of the cases cited by petitioner (*Gomes*, *Prince*, *Cline*, *Buchignani*, *McAdams*, *Joseph*, and *Abel*) is totally erroneous.

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[5] The fact that AMC does not attempt to distinguish *Lacaze's* footnote 4 as applied to the smaller height deviation at the expansion joint in petitioner's case suggests that AMC does not disagree with the statement.

V. AMC's Cursory Response To Petitioner's Contention The Fifth Circuit Violated Multiple Summary Judgment Standards Of This Court Supports That Petitioner Created Genuine Issues For Trial

AMC asserts it cannot respond to petitioner's contention that the Fifth Circuit disregarded this Court's precedents applying Fed. R. Civ. P. 56, because petitioner "provides no specific examples of such precedents".[6] Opp. 2. In fact petitioner specifically discussed how the Fifth Circuit ignored this Court's holding in *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133 (2000) that when assessing whether a dispute of material fact exists, the reviewing court "should review all of the evidence in the record." Pet. 21, *citing Reeves*, at 150. AMC later contends it is "impractical and wholly unsupported by the law" to require the appellate court to "address each single piece of evidence in turn in its opinion". Opp. 14. Petitioner never contended the Fifth Circuit was required to address each of her exhibits introduced in opposition to AMC's motion for summary judgment. Instead, petitioner criticized the Fifth Circuit's failure to discuss all but one (a single quote from Mrs. Mackey's deposition) of petitioner's sixteen exhibits or to discuss any of AMC's six exhibits. Pet. 22.

Petitioner also discussed this Court's holding in *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242 (1986) that in ruling on a motion for summary judgment, "[t]he evidence of the non-movant is to be believed, and all justifiable inferences are to be drawn in his favor." *Id.*, at 255. Without addressing this axiomatic holding

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[6] AMC does not even discuss the standard for summary judgment under Fed. R. Civ. P. 56(a).

in *Anderson*, AMC cites to *Tolan v. Cotton*, 572 U.S. 650 (2014) for the proposition this Court only requires that "key evidence be properly acknowledged by the trial court." Opp. 14. In making this argument, AMC selectively quotes from *Tolan*, in which, after summarizing testimony related to the reasonableness of the police officer's conduct, this Court wrote: ". . . these facts lead to the inescapable conclusion that the court below credited the evidence of the party seeking summary judgment and failed properly to acknowledge *key evidence* offered by the party opposing that motion." *Id*, at 679 (emphasis added). Again, the problem here is not that the Fifth Circuit failed to credit petitioner's "key evidence" but that the court failed to credit all but one of her sixteen exhibits.[7]

AMC goes on to argue that petitioner does not address the significance of her evidence. Opp. 14. However, AMC's argument depends on an erroneous statement of law, as already discussed in Section I. Thus, it is clear that petitioner's substantial evidence discussed in both her appellate filings and in her petition (Pet. 5-7, 22-27) is more than enough for a reasonable juror to return a verdict in favor of petitioner on the question of unreasonable risk of harm.

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[7] Responding to one example of how the Fifth Circuit failed to give credence to petitioner's evidence on whether the uneven concrete was "open and obvious", AMC falsely states that petitioner "admitted under oath that her view of the joint was unobscured". Opp. 15. In support AMC does not cite to any record evidence but to the district court's Order and Reasons. *Id.* As petitioner has explained already, the record evidence on this issue is disputed, as seen by multiple exhibits contradicting AMC's statement. Pet. 24-26. By failing to credit any of this evidence, the court improperly weighed evidence in favor of AMC.

VI. The Fifth Circuit's Errors In Petitioner's Case Merit Review

AMC argues there is no compelling reason why petitioner's case is appropriate for consideration by this Court. Opp. 6-8. AMC then cites four cases reviewed by this Court involving slip and fall accidents, contending certiorari was granted for "more worthy concerns". *Id.*, at 7. However, at least one of these cases – *Davis v. Virginian Railway Company*, 361 U.S. 354 (1960) – demonstrates why petitioner's case merits review. Although *Davis* involved a FELA claim in which the district court struck the petitioner's evidence at trial and discharged the jury, this Court granted cert and reversed, explaining that the question of negligence should have been submitted to the jury:

> [t]he debatable quality of the issue, the fact that fair-minded men might reach different conclusions, emphasize the appropriateness of leaving the question to the jury. The jury is the tribunal under our legal system to decide that type of issue as well as issues involving controverted evidence. To withdraw that question from the jury is to usurp its functions.

Id., at 356-357 (internal citations omitted).

Petitioner respectfully submits that the concerns for the proper role of the jury in *Davis* support the grant of certiorari here, where the following are true:

a. the Fifth Circuit violated *Erie* by adopting a "legal rule" on unreasonable risk of harm that

conflicts with the Louisiana Supreme Court's controlling precedent in *Broussard*;[8]

b. the Fifth Circuit violated *Erie* by failing to conduct the four-factor risk utility balancing test required by *Broussard* for determining unreasonable risk of harm;[9]

c. the Fifth Circuit violated *Erie* by ignoring *Broussard's* "analytic framework" for determining unreasonable risk of harm, when it granted summary judgment on the question of whether AMC breached a duty owed to petitioner, which is a question to be determined by the factfinder at trial;[10] and

d. the Fifth Circuit violated this Court's summary judgment precedents, when the court failed to consider virtually all of petitioner's substantial evidence introduced in opposition to summary

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[8] AMC cannot salvage the Fifth Circuit's "legal rule" (Opp. 12-13), because the cases referenced in the Fifth Circuit's decision never conducted the unreasonable risk of harm analysis within *Broussard's* analytic framework of whether the defendant breached a duty owed.

[9] AMC concedes that the Fifth Circuit did not conduct the analysis "step-by-step" in this case but suggests the Fifth Circuit's citation to an earlier unpublished opinion in *Buchanan v. Wal-Mart Stores, Incorporated*, 834 Fed. Appx. 58 (2020) was sufficient to satisfy the court's obligation on *de novo* review. Opp. 12. However, review of *Buchanan* shows that the panel in that case did not conduct the four-factor risk utility balancing test either.

[10] AMC has never explained why the Fifth Circuit's decision below should be excepted from *Broussard's* "analytic framework" for determining whether its uneven sidewalk presented an unreasonable risk of harm.

judgment, failed to credit petitioner's evidence, and weighed other evidence in favor of AMC.

The combination of the above errors by the Fifth Circuit effectively deprived petitioner of the right to trial by jury under the Seventh Amendment and the vertical uniformity required by *Erie*.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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