No.

In the Supreme Court of the United States

UBER TECHNOLOGIES, INC. AND RASIER, LLC
PETITIONERS

v.

AMIE DRAMMEH, ET AL.

UBER TECHNOLOGIES, INC., ET AL., PETITIONERS

v.

JANE DOE

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether, under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), a federal court must apply existing state law, as the D.C., First, Fourth, and Fifth Circuits hold, or can predict changes in state law, as the Second, Third, Seventh, Eighth, Ninth, Tenth, and Eleventh Circuits hold.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. Petitioners Uber Technologies, Inc. and Rasier, LLC were defendants in the district court and appellees in the court of appeals in No. 22-36038. Petitioners Uber Technologies, Inc., Rasier, LLC, and Rasier CA, LLC, were defendants in the district court and appellees in the court of appeals in No. 22-16562. Rasier, LLC and Rasier CA, LLC are wholly owned subsidiaries of Uber Technologies, Inc., which is a publicly held corporation and not a subsidiary of any entity. Based solely on SEC filings regarding beneficial ownership of the stock of Uber Technologies, Inc., petitioners are unaware of any shareholder who beneficially owns more than 10% of Uber Technologies, Inc.'s outstanding stock.

2. Respondents Amie Drammeh, Yusupha Ceesay, and Maram Ceesay, as the representatives of the estate of Cherno Ceesay, were plaintiffs in the district court and appellants in the court of appeals in No. 22-36038. Respondent Jane Doe was plaintiff in the district court and appellant in the court of appeals in No. 22-16562.

RELATED PROCEEDINGS

United States District Court (W.D. Wash.):

Drammeh v. *Uber Technologies, Inc.*
No. 21-cv-202 (Dec. 19, 2022)

United States District Court (N.D. Cal.):

Doe v. *Uber Technologies, Inc.*
No. 19-cv-3310 (Sept. 15, 2022)

United States Court of Appeals (9th Cir.):

Drammeh v. *Uber Technologies, Inc.*
No. 22-36038 (Aug. 30, 2024)

Doe v. *Uber Technologies, Inc.*
No. 22-16562 (Jan. 13, 2025)

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Uber Technologies, Inc., Rasier, LLC, and Rasier CA, LLC (collectively, Uber) respectfully petition for a writ of certiorari to review the judgments of the Ninth Circuit in these cases. Under this Court's Rule 12.4, Uber is filing a "single petition for a writ of certiorari" because the "judgments * * * sought to be reviewed" are from "the same court and involve identical or closely related questions."

OPINIONS BELOW

In *Drammeh*, the court of appeals' opinion (App., *infra*, 1a-13a) is not reported in the Federal Reporter

but is available at 2024 WL 4003548. The Washington Supreme Court's order declining the request to answer certified questions (App., *infra*, 14a) is not reported. The court of appeals' order certifying questions to the Washington Supreme Court (*id.* at 15a-26a) is reported at 105 F.4th 1138. The district court's order granting Uber's motion for summary judgment (App., *infra*, 27a-44a) is not reported in the Federal Supplement but is available at 2022 WL 4482950.

In *Doe*, the court of appeals' opinion (App., *infra*, 46a-66a) is not reported in the Federal Reporter but is available at 2025 WL 80365. The California Supreme Court's order declining the request to answer certified questions (App., *infra*, 67a) is not reported. The court of appeals' order certifying questions to the California Supreme Court (*id.* at 68a-80a) is reported at 90 F.4th 946. The district court's order granting Uber's motion for summary judgment (App., *infra*, 81a-93a) is not reported in the Federal Supplement but is available at 2022 WL 4281363.

JURISDICTION

In *Drammeh*, the court of appeals entered judgment on August 30, 2024, and denied Uber's petition for rehearing on October 24, 2024 (App., *infra*, 45a). On January 15, 2025, Justice Kagan granted Uber's application to extend the time to file a petition for a writ of certiorari to and including March 21, 2025.

In *Doe*, the court of appeals entered judgment on January 13, 2025, when issuing its amended opinion and denying Uber's petition for rehearing (App., *infra*, 95a).

In both cases, this Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Article III, § 2, of the Constitution provides in pertinent part: "The judicial Power shall extend to * * * Controversies * * * between Citizens of different States."

The Tenth Amendment of the Constitution provides: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people."

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

INTRODUCTION

These cases present a question that federal courts regularly face when state common law does not speak conclusively to a given issue: Is the federal court limited to ascertaining and applying what state law already is, or may the federal court predict how state law might evolve in the future? This Court's decision in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), has been on the books for almost nine decades. But in that time, the Court has provided only "limited guidance" on how federal courts should discern state law. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U. Pa. L. Rev. 1459, 1461 (1997) (Clark).

Left to their own devices, the courts of appeals have fractured into two main camps. Multiple circuits "refuse to predict the future development of state law"

and instead "'apply the law of the forum as they infer it presently to be.'" Clark 1463-1464 (brackets and citation omitted). But some other courts "attempt to 'predict' what rule the highest court of the state would adopt if the question were before it." *Id.* at 1461. Taking up the most extreme position, the Ninth Circuit has rejected other courts' "posture of restraint" in predicting expansions in state law. *Torres* v. *Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1238 n.1 (9th Cir. 1989) (citation omitted).

This split is longstanding, long recognized, and long overdue for resolution by this Court. The circuits that press state law to new horizons have turned *Erie* on its head. In predicting what the state supreme court would do in the absence of state-law support for a party's proposed rule, those circuits have relied on their own judge-made rules to decide cases, even though the Constitution reserves to the States the power "to declare substantive rules of common law." *Erie*, 304 U.S. at 78. They have fallen prey to the same "fallacy" of "'a transcendental body of law'"—this time, state common law that broods in the sky independent of state statutes and state-court decisions. *Id.* at 79 (citation omitted). And worse, they mask federal-court lawmaking with federalism rhetoric that subverts those principles in reality. Scholars across the spectrum have rightly criticized such predictions of "what might later *become* the law." Stephen E. Sachs, *Life After* Erie 8 (2023), tinyurl.com/mr4x8eue; see, *e.g.*, Michael C. Dorf, *Prediction and the Rule of Law*, 42 UCLA L. Rev. 651, 685 (1995) (Dorf).

The two cases below illustrate the federalism-destroying effects that are inevitable under the Ninth Circuit's "predict the future" approach to *Erie*. In both cases, plaintiffs pressed novel state-law tort duties

that defy the general principle that a person is not liable for a third party's intentional criminal misconduct. *Drammeh* involves a claim that Uber violated Washington law by failing to prevent riders from committing crimes against drivers, while *Doe* involves a claim that Uber violated California law by failing to prevent assailants who fraudulently pose as drivers from committing crimes against riders. Washington and California both recognize that businesses generally lack any realistic ability to prevent third-party criminals who somehow take advantage of their operations, so their tort law blames the criminals for their actions, not businesses that might arguably, through some attenuated chain of causation, be said to have made it easier for the crime to occur. *Hutchins* v. *1001 Fourth Avenue Associates*, 116 Wash. 2d 217, 236 (1991); *Nola M.* v. *University of Southern California*, 16 Cal. App. 4th 421, 437-438 (1993). Following that settled law, both district courts granted summary judgment to Uber.

The *Erie* analysis did not go off the rails until appeal. Two separate panels certified the issues to the respective state supreme courts, both of which declined the invitations, leaving in place existing state law. Yet both panels recognized novel duties anyway over dissents that criticized the majorities' departure from existing state law to "fashion a new expansive tort liability." App., *infra*, 9a (Bumatay, J., dissenting). Those decisions shed the court's proper "*Erie* role" in deciding the appeals under rules of decision that are backed only by the federal judiciary's say-so—not a legitimate sovereign command of any state lawmaking organ. *Id.* at 62a (Graber, J., dissenting).

This Court should grant review. The deeply entrenched conflict between those circuits that follow existing law and those circuits that understand *Erie* to allow predictive changes to state common law stands no chance of resolving itself without this Court's intervention. And these cases potently illustrate the Ninth Circuit's excesses. This petition is an ideal vehicle for this Court to resolve a question that has caused confusion since *Erie*.

STATEMENT

A. Legal Background

The Constitution extends the "judicial Power" of the United States to "Controversies * * * between Citizens of different States." U.S. Const. Art. III, § 2. The First Congress authorized the federal courts to exercise a measure of this power. Judiciary Act of 1789, ch. 20, § 11, 1 Stat. 78. Congress also provided that "the laws of the several states, except where the constitution, treaties or statutes of the United States shall otherwise require or provide, shall be regarded as rules of decision in trials at common law in the courts of the United States in cases where they apply." § 34, 1 Stat. 92.

At first, this Court interpreted Section 34 (the Rules of Decision Act) to allow federal courts a freer hand in deciding common-law claims in diversity cases. The Court "uniformly professed its disposition * * * to adopt the construction which the Courts of the State have given to" state statutes. *Elmendorf* v. *Taylor*, 23 U.S. (10 Wheat.) 152, 159 (1825). But in *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), the Court held that the Rules of Decision Act governed only "positive statutes of the state, and the construction thereof adopted by the local tribunals," as well as "long established local customs having the force of laws." *Id.*

at 18. Federal courts thus decided for themselves the "true result" under "general principles and doctrines" when presented with claims under the common law or (as in *Swift*) commercial law. *Id.* at 19.

In *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), the Court overruled *Swift* a few years short of its hundredth birthday as "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make us hesitate to correct." *Id.* at 79 (citation omitted). The Court observed that *Swift* had allowed federal courts "to declare rules of decision which Congress was confessedly without power to enact as statutes." *Id.* at 72. And the Court asserted that each State has its own common law and does not share in "a transcendental body of law outside of any particular State." *Id.* at 79 (citation omitted). For those reasons, the Court held that the "law of the State" under the Rules of Decision Act was properly interpreted to encompass common-law decisions from the State's "highest court." *Id.* at 78.

Today, federal district courts have original jurisdiction over civil actions between "citizens of different States" in which the amount in controversy exceeds $75,000. 28 U.S.C. § 1332(a)(1). Congress also recodified the Rules of Decision Act without substantive change at 28 U.S.C. § 1652. See p. 3, *supra*.

B. Facts And Procedural History

Uber is a technology company that developed the smartphone application known as the "Uber App," which connects riders in need of transportation with drivers willing to provide it for a fee. App., *infra*, 29a. Both cases below were brought in diversity and concerned attempts to impose state-law tort duties holding

Uber liable for third-party criminal misconduct against rideshare users (drivers and riders).

1. *Drammeh* v. *Uber Technologies, Inc.*

a. Cherno Ceesay was a driver who used the Uber App in Washington State. Senseless tragedy struck: He picked up two passengers who viciously stabbed him to death in an attempted carjacking. App., *infra*, 28a. Shortly before the attack, the assailants had created an Uber account with a fake name using a prepaid cell phone and a prepaid gift card. *Id.* at 28a-29a. Uber provided the telephone number associated with the account to the police, who tracked the phone and arrested the assailants two days later. *Id.* at 29a.

Respondent representatives of Ceesay's estate (Drammeh, for short) filed a single negligence claim under Washington law in federal court against Uber. App., *infra*, 27a & n.1. Under Washington law, a plaintiff bringing a negligence claim must establish "the existence of a legal duty that the defendant owes the plaintiff." *H.B.H.* v. *State*, 192 Wash. 2d 154, 168 (2018). Washington law does not recognize any general "duty to prevent a third person from intentionally harming another." *Ibid.* But in very limited circumstances, a "special relationship" may exist between the defendant and "the victim that gives the victim a right to protection." *Id.* at 169 (citing Restatement (Second) of Torts § 315 (1965)).

Drammeh argued that Uber had a duty to protect Ceesay from the carjackers because "a special relationship exists between Uber and its drivers." App., *infra*, 35a. Washington law recognizes a narrow set of traditional special relationships, such as "schools and their students, innkeepers and their guests, common carriers and their passengers, and hospitals and their

patients." *H.B.H.*, 192 Wash. 2d at 169. When deciding whether to recognize a new special relationship, the Washington Supreme Court "weighs considerations of logic, common sense, justice, policy, and precedent." *Barlow* v. *State*, 2 Wash. 3d 583, 589 (2024) (citation and quotation marks omitted). But that court has made clear that new special relationships should be exceedingly rare and may be recognized only when "a person is helpless, totally dependent, or under the complete control of someone else for decisions relating to their safety." *Turner* v. *Washington State Department of Social & Health Services*, 198 Wash. 2d 273, 286-287 (2021).

b. The district court granted summary judgment to Uber. App., *infra*, 27a-44a. The court held (as relevant) that Uber did not have a special relationship with Ceesay creating a duty to protect against third-party violence. *Id.* at 35a-38a. In particular, the court expressed "'reticen[ce] to formulate any common-law "special relationship" not previously recognized'" by the Washington courts. *Id.* at 36a (citation omitted). The court observed that "none of the existing special relationships recognized in Washington fit this context." *Ibid.* And the court declined Drammeh's invitation to "venture into 'uncharted waters' and recognize a special relationship between Uber and its drivers." *Id.* at 38a.

c. The Ninth Circuit certified three questions to the Washington Supreme Court. App., *infra*, 15a-26a. One of those questions was whether Washington law recognizes a "special relationship" between a rideshare company and drivers "giving rise to a duty to use reasonable care in matching drivers with riders to protect against riders' foreseeable criminal conduct." *Id.* at 17a.

The court of appeals justified its decision to certify on the ground that the "special relationship" question "presents a critical issue of state law that is unsettled and has important policy ramifications." App., *infra*, 19a. The court acknowledged that Washington precedent identifies only a limited set of relationships that give rise to a duty to protect against third-party criminal activity. *Id.* at 20a. And the court observed that the Washington Supreme Court analogizes to existing special relationships "[w]hen deciding whether to extend the special relationship exception to novel relationships." *Id.* at 21a. Noting Uber's argument that "the Washington Supreme Court has been reluctant to extend the exception in recent cases like *Barlow* and *Turner*," the court of appeals expressed its "belie[f] that the Washington Supreme Court should be the first to answer the question of whether Uber owes a duty of care to its drivers when matching them with riders." *Id.* at 22a.

d. The Washington Supreme Court summarily declined the court of appeals' certification request. App., *infra*, 14a.

e. In a divided decision, the Ninth Circuit reversed the district court's grant of summary judgment to Uber. App., *infra*, 1a-13a.

The majority held that Uber had a special relationship with Ceesay that gave rise to a duty to protect against third-party wrongdoing. App., *infra*, 2a-6a. The majority purported to "predict as best we can what the Washington Supreme Court would do in these circumstances." *Id.* at 3a (brackets omitted) (quoting *Marin Tug & Barge, Inc.* v. *Westport Petroleum, Inc.*, 271 F.3d 825, 830 (9th Cir. 2001)). And it predicted that the Washington Supreme Court, despite declining

review, would "extend the special relationship exception" to cover a "new" relationship: rideshare companies and drivers. *Ibid.* Although all parties agreed that Uber was not Ceesay's employer, the majority concluded that "the relationship between a rideshare company and its drivers is closely analogous to the relationship between employer and employee and the relationship between contractor and subcontractor." *Id.* at 4a. The majority also reasoned that "Uber maintained a requisite level of control in matching drivers with riders, such that Ceesay entrusted and was dependent upon Uber for his safety." *Id.* at 5a.

Judge Bumatay dissented. App., *infra*, 9a-13a. He criticized the majority for "fail[ing] to take the hint" that the "obvious reason" the Washington Supreme Court declined the certification request was that "Washington law does not create a 'special relationship' for a rideshare company to protect its drivers from the criminal conduct of passengers." *Id.* at 9a. As he pointed out, Washington precedent already established that no special relationship exists "between a driver and his passenger." *Id.* at 10a (citing *Lauritzen* v. *Lauritzen*, 74 Wash. App. 432, 440-441 (1994)). Uber similarly does not have "physical custody or control over its drivers," who are not "'vulnerable victims'" but rather "adults who enter an arm's-length contract with Uber to earn a living." *Id.* at 11a-12a. And in his view, "'a significant expansion of [tort] liability should be left to the consideration of the Legislature' if '[c]urrent Washington law does not support the [proposed] liability theory.'" *Id.* at 9a (quoting *Niece* v. *Elmview Group Home*, 131 Wash. 2d 39, 53, 59 (1997)).

f. The court of appeals denied rehearing en banc. App., *infra*, 45a.

2. *Doe* v. *Uber Technologies, Inc.*

a. A third-party criminal predator tricked Jane Doe to get into his car while she was waiting for a driver her boyfriend ordered for her through the Uber App. App., *infra*, 82a. Two months earlier, Uber had banned the criminal from accessing its app. *Ibid.* The driver raped Doe before she escaped and reported her assailant, who was arrested and convicted. *Ibid.*

Doe filed a negligence claim under California law in federal court against Uber. App., *infra*, 81a. California law generally recognizes "no duty to act to protect others from the conduct of third parties." *Brown* v. *USA Taekwondo*, 11 Cal. 5th 204, 214 (2021) (citation omitted). To establish an exception to the "no-duty-to-protect rule," a plaintiff must show either that the defendant had a special relationship with the victim or assailant, or that the defendant's "'entire conduct created a risk of harm'" (called misfeasance). *Id.* at 215 & n.6 (citation omitted). Doe argued that Uber had a special relationship with riders, and also engaged in misfeasance by allowing her boyfriend to make a remote request for a driver and by not retrieving decals from banned drivers. App., *infra*, 48a n.11, 55a-56a.

b. The district court granted summary judgment to Uber. App., *infra*, 81a-93a. Shortly before its decision, the California Court of Appeal had rejected *materially identical* negligence claims, holding that Uber did not have a special relationship with riders and did not engage in misfeasance just because its business "create[d] an opportunity for criminal conduct," particularly considering the "matching system features in the Uber app that, if utilized, can thwart efforts like the fake Uber scheme." *Jane Doe No. 1* v. *Uber Technologies, Inc.*, 79 Cal. App. 5th 410, 423-429 (2022).

The district court considered itself bound to follow *Jane Doe No. 1*. App., *infra*, 90a-92a.

c. The Ninth Circuit certified two questions to the California Supreme Court. App., *infra*, 68a-80a. One of those questions was whether California law recognizes a duty for Uber to protect passengers from "an unauthorized person posing as an Uber driver." *Id.* at 70a.

The Ninth Circuit justified its decision to certify on the ground that, purportedly, "no 'controlling precedent' resolve[d] whether Uber owed [Doe] a duty of care." App., *infra*, 77a. The court recognized that the California Court of Appeal had rejected such a duty in *Jane Doe No. 1* and that the California Supreme Court had declined to review that decision. *Id.* at 75a. But the Ninth Circuit suggested that an intervening decision "call[ed] into question whether th[at] court would decide the issue presented in *Jane Doe No. 1* similarly." *Ibid.* (citing *Kuciemba* v. *Victory Woodworks, Inc.*, 14 Cal. 5th 993 (2023)). Because the case's resolution "will have significant economic and policy impacts on the State of California," the Ninth Circuit asserted that the California Supreme Court should resolve the unsettled issue "'in the first instance.'" *Id.* at 77a-78a (citation omitted).

d. The California Supreme Court summarily declined the court of appeals' certification request. App., *infra*, 67a.

e. In a divided decision, the Ninth Circuit reversed the district court's grant of summary judgment to Uber. App., *infra*, 46a-66a.

The majority held that Uber had a duty to prevent criminal wrongdoing by an assailant posing as an Uber-affiliated driver. App., *infra*, 47a-59a. It invoked

the same circuit precedent as the *Drammeh* majority for the Ninth Circuit's established predictive approach to unsettled questions of state law. *Id.* at 48a (citing *Marin Tug & Barge*, 271 F.3d at 829-830). And bypassing the California Court of Appeal's on-point decision, the majority predicted how "the California Supreme Court would decide this case in the first instance." *Id.* at 53a. In the majority's view, the California Supreme Court would recognize a duty for Uber to protect riders because the risk of fake Uber drivers "would simply not have existed without Uber's" business. *Id.* at 54a-56a.

Judge Graber dissented. App., *infra*, 60a-66a. She would have followed *Jane Doe No. 1*—a decision for which the California Supreme Court declined both direct review of the decision and the certification request that "laid out all the reasons why some of [the panel] had doubts" about the decision. *Id.* at 63a. She criticized the majority for disregarding "principles of federalism" and departing from state-court precedent based on "disagreement with [its] reasoning." *Id.* at 60a, 64a. And she found no support in California Supreme Court precedent for imposing a duty on rideshare companies to protect riders from assailants posing as authorized drivers. *Id.* at 64a. To the contrary, recent California decisions had rejected "liability for organizations that merely provide opportunities for harm caused by third parties, rather than meaningfully create, or contribute to, the risk of harm." *Ibid.*

f. The court of appeals denied rehearing en banc. App., *infra*, 95a.

REASONS FOR GRANTING THE PETITION

The decision below further entrenches a split as to whether federal courts sitting in diversity must apply existing state law or may instead predict future evolutions in state common law. The D.C., First, Fourth, and Fifth Circuits apply state law as it is—not as they believe it should or might someday be. But the Ninth Circuit, along with the Second, Third, Seventh, Eighth, Tenth, and Eleventh Circuits, is willing to impose new state-law liabilities on the theory that it is merely "predicting" what the state supreme court would do in a future case presenting the same issue.

The Ninth Circuit's inventive approach to creating new state law conflicts with the principles that this Court articulated in *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938). There, this Court held that the authority to create new rights and obligations under state law is reserved to the States' lawmaking bodies—their legislatures and their courts. *Id.* at 78-80. Yet the Ninth Circuit has arrogated the power to create *new* rules of decision when existing state law does not support the proponent of a state-law claim. In so doing, the court of appeals strayed from this Court's interpretation of the Rules of Decision Act in *Erie*, as well as the constitutional limits on federal lawmaking authority that animated its overruling of *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842).

These cases shine a stark light on the Ninth Circuit's misguided *Erie* practice. Twice, the court of appeals certified questions to state supreme courts laying out potential justifications for recognizing new state-law tort duties for rideshare companies to prevent third-party criminal misconduct against drivers and riders. Twice, the state supreme courts were content to leave state law where it currently stood. And

twice, divided majorities proceeded heedless of that denial to impose the duties themselves—federal fiat cloaked in the garb of an *Erie* guess—notwithstanding dissents from Judges Bumatay and Graber who warned that the Ninth Circuit was abandoning existing state law.

As these cases show, federal courts routinely are using *Erie* "predictions" to create new rules of decision in defiance of federalism and separation-of-power principles that primarily allocate lawmaking authority to state legislatures, state courts, and Congress. And federal courts are doing so when diversity cases have become more numerous—and high stakes—than at any time in recent history. This is a state of affairs that "no lapse of time" should make this Court "hesitate to correct." *Erie*, 304 U.S. at 79 (citation omitted).

I. The Circuits Disagree About Whether Federal Courts Can Predict Expansions In State Law Under *Erie*

The circuits have been long and intractably divided on what to do under *Erie* when a plaintiff's claim depends on a rule of decision that existing state law does not recognize. Clark 1461-1464. Four circuits adhere to state law as it currently stands. But seven circuits (including the Ninth) purport to step into the shoes of the state supreme court, with full power not only to apply existing state law but to predict expansions.

A. Paying due respect to the forum states in which they sit, the D.C., First, Fourth, and Fifth Circuits all apply state law as it currently stands, without predicting what future course state law may take.

The D.C. Circuit has long adhered to this "modest" approach to discerning state law in diversity cases.

Tidler v. *Eli Lilly & Co.*, 851 F.2d 418, 424 (D.C. Cir. 1988). In *Tidler*, children of women who had ingested synthetic estrogen sued the drug companies that sold the estrogen for harms the plaintiffs suffered in utero. *Ibid.* The plaintiffs could not identify which drug company had manufactured the specific drug they were exposed to and argued that the D.C. Circuit—applying the laws of either the District of Columbia or Maryland—should recognize a theory of liability that did not require a showing of proximate cause. *Id.* at 420-421.

The court of appeals declined to expand the common law in that way. *Tidler*, 851 F.2d at 427. The court noted that neither D.C. nor Maryland courts had abandoned the requirement of proximate cause in similar circumstances, and that Maryland courts were reluctant to create tort theories without the state legislature's blessing. *Id.* at 423-424. Taking its cue from this Court, *Tidler* held that a "federal court in a diversity case is not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Id.* at 424 (quoting *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 4 (1975) (per curiam)). The D.C. Circuit has remained steadfast in refusing "to alter or expand the scope of [state] law." *K&D LLC* v. *Trump Old Post Office LLC*, 951 F.3d 503, 509 (D.C. Cir. 2020) (citation omitted); see, *e.g.*, *Pitt* v. *District of Columbia*, 491 F.3d 494, 507 (D.C. Cir. 2007).

The D.C. Circuit's rule against expanding state law reflects "fundamental principles of comity inherent in our federal system of government." *Tidler*, 851

F.2d at 425. Although tragic circumstances sometimes spur legal change, the "recourse" for plaintiffs "is not to proceed directly to federal court" and "urge the tribunal to adopt [innovative] theories because the equities of the case or fundamental notions of justice require that they recover." *Ibid.* If "state law is inhospitable to [plaintiffs'] claims, then they must face up to that fact before the appropriate authorities—judicial or legislative—of the state"; it is "not the business of the federal courts to alter or augment state law to meet the felt necessities of the case." *Ibid.*

The First Circuit likewise "appl[ies] the law of the forum as [the court] infer[s] it presently to be, not as it might come to be." *Dayton* v. *Peck, Stow & Wilcox Co. (Pexto)*, 739 F.2d 690, 694 (1st Cir. 1984). In its view, federal courts "are in a particularly poor position" to endorse "fundamental policy innovation[s]" by guessing how a State's highest court might react to certain claims or circumstances. *Id.* at 694-695. When state law is "undeveloped," the First Circuit is "reluctant to expand" it to encompass new common-law duties that significantly increase tort liability. *Veilleux* v. *National Broadcasting Co.*, 206 F.3d 92, 131 (1st Cir. 2000).

The same goes for the Fourth Circuit, which has recognized that federal courts' "role in the exercise of [their] diversity jurisdiction is limited." *Rhodes* v. *E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 96 (4th Cir. 2011). They "rule upon state law as it exists and do not surmise or suggest its expansion." *Burris Chemical, Inc.* v. *USX Corp.*, 10 F.3d 243, 247 (4th Cir. 1993). The Fourth Circuit thus "respond[s] conservatively" and declines to interpret state law in a manner

that "has not been approved" by the relevant state authorities. *Knibbs* v. *Momphard*, 30 F.4th 200, 213 (4th Cir. 2022) (citation omitted).

The Fifth Circuit takes a similarly restrained view that federal courts may not "adopt innovative theories of recovery or defense" and must "apply [the] law as it currently exists." *Galindo* v. *Precision American Corp.*, 754 F.2d 1212, 1217 (5th Cir. 1985); accord, *e.g.*, *Jeanty* v. *Big Bubba's Bail Bonds*, 72 F.4th 116, 120 (5th Cir. 2023). If a federal court "differs at all as regards substantive innovation, it is *weaker* instead of stronger than that of [a lower state] court." *Jackson* v. *Johns-Manville Sales Corp.*, 781 F.2d 394, 397 (5th Cir. 1986) (en banc) (emphasis added; citation omitted), abrogated in part on other grounds by *Salve Regina College* v. *Russell*, 499 U.S. 225 (1991). That is why federal courts may certify important and novel state-law questions to state supreme courts: to "offer the state court the opportunity to alter existing law—in effect, to change direction." *Ibid.* But that a state high court declined certification is no "license to change [state] law." *Ibid.* At the end of the day, "[t]he privilege (or duty) of changing the law belongs to the [state] courts or legislature." *Ibid.*

B. Other courts of appeals "veer in the opposite direction." Dorf 703. The Second, Third, Seventh, Eighth, Tenth, and Eleventh Circuits, like the Ninth, will predict what changes a State's highest court might make to existing state law. In the process, they fashion new rules of decision that no court of the State has yet adopted.

The Second Circuit views its task in diversity cases as "predicting on a reasonable basis how the [high state court] would rule if squarely confronted with th[e] issue." *DiBella* v. *Hopkins*, 403 F.3d 102,

111-112 (2d Cir. 2005). In *Michalski* v. *Home Depot, Inc.*, 225 F.3d 113 (2d Cir. 2000), for example, the court of appeals abandoned the "traditional rule" against landowner liability for known or obvious dangers on the theory that the New York Court of Appeals (which had not spoken on the issue) would follow "the modern trend away from the traditional" rule. *Id.* at 119-120.

The Third Circuit allows anticipated changes in state law to overcome even on-point decisions of the state supreme court. In *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3d Cir. 1980), for example, the court fashioned a discovery rule to toll an Ohio statute of limitations, *id.* at 667, even though the Ohio Supreme Court had firmly rejected that rule less than a decade earlier, *id.* at 669 (Higginbotham, J., dissenting). The majority reasoned that the plaintiff, who allegedly became disabled after ingesting a drug, should not "be penalized for [her] choice of the federal court by being deprived of the flexibility that a state court could reasonably be expected to show." *Id.* at 663 (citation omitted). Faced with tragic circumstances, the majority explained that it would "not mechanically follow precedent and blindly apply principles of stare decisis when it appear[ed] that the corresponding state court would adjust its common law to meet changing conditions." *Id.* at 666 (citation omitted). The Third Circuit has continued to "'predict' how a state's high court would rule," despite acknowledging the "'judicial federalism concerns'" with that approach. *Michaels* v. *New Jersey*, 150 F.3d 257, 259 (3d Cir. 1998) (Alito, J.) (citation omitted).

The Seventh Circuit's approach resembles the Third Circuit's. When presented with supposedly "concrete evidence that the state court would adopt [a]

position today," the court of appeals professes to "anticipate changes to state law." *Hollander* v. *Brown*, 457 F.3d 688, 692 (7th Cir. 2006). The Seventh Circuit also has rejected the Fifth Circuit's view that federal courts should conceive of themselves as lower state courts that are bound to apply existing state law. *Jackson*, 781 F.2d at 397. The Seventh Circuit instead self-consciously "assume[s] the perspective of the highest court in th[e] state." *Allstate Insurance Co.* v. *Menards, Inc.*, 285 F.3d 630, 637 (7th Cir. 2002).

The Eighth, Tenth, and Eleventh Circuits likewise fall into the camp that is willing to expand state law. In *Avnet, Inc.* v. *Catalyst Resource Group, LLC*, 791 F.3d 899 (8th Cir. 2015), for example, the Eighth Circuit predicted that the Iowa Supreme Court would adopt the "modern rule" allowing ready assignment of personal guaranties over the more restrictive traditional rule. *Id.* at 902. The Eleventh Circuit similarly sees its role as "forecast[ing] state law" based on a medley of sources in the absence of "explicit [state] case law on an issue." *Guideone Elite Insurance Co.* v. *Old Cutler Presbyterian Church, Inc.*, 420 F.3d 1317, 1326 n.5 (11th Cir. 2005); see, *e.g.*, *SA Palm Beach, LLC* v. *Certain Underwriters at Lloyd's London*, 32 F.4th 1347, 1358 n.5 (11th Cir. 2022) (applying "presumption that state courts will align themselves with the majority position, absent contrary indications"). And taking a slightly more circumspect tack, the Tenth Circuit is "generally reticent to expand state law without clear guidance from the state's highest court." *Amparan* v. *Lake Powell Car Rental Cos.*, 882 F.3d 943, 948 (10th Cir. 2018) (brackets and citation omitted).

C. Of the courts of appeals that allow state-law expansion by prediction, the Ninth Circuit has perched itself at the extreme end of the spectrum. The court has openly departed from the restraint that some other courts of appeals show when presented with novel state-law theories. Absent state-law authority, the Ninth Circuit "predict[s] as best [it] can what the [state] [s]upreme [c]ourt would do" if presented with the case. *Marin Tug & Barge, Inc.* v. *Westport Petroleum, Inc.*, 271 F.3d 825, 830 (9th Cir. 2001) (citation omitted). And the court does not proceed with caution "simply because neither the state Supreme Court nor the state legislature has enunciated a clear rule governing a particular type of controversy." *Paul* v. *Watchtower Bible & Tract Society of New York*, 819 F.2d 875, 879 (9th Cir. 1987). Acknowledging its break with courts of appeals that claim only "limited discretion in a diversity case 'to adopt untested legal theories brought under the rubric of state law,'" the Ninth Circuit "[f]or better or for worse * * * has not seen fit to assume such a posture of restraint." *Torres* v. *Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1238 n.1 (9th Cir. 1989) (citation omitted).

The Ninth Circuit's track record of deciding state-law questions bears out its muscular vision of federal-court authority. In the absence of state-law authority supporting a claim, the court of appeals prizes "flexibility" and "common sense" in analogizing to or extrapolating from other legal concepts, *Pacheco* v. *United States*, 220 F.3d 1126, 1131 (9th Cir. 2000), even over objections that the court should stick to "[state] law as it currently stands," *id.* at 1134 (Graber, J., dissenting). The court has not hesitated, for example, to cast aside two "on point" decisions from

the California Court of Appeal to impose a duty to defend that no California court had recognized even when the California Supreme Court declined a certification request. *In re K F Dairies, Inc.*, 224 F.3d 922, 925 & n.3 (9th Cir. 2000). That approach starkly contrasts with those circuits that treat such state-high-court denials as a reminder not "to alter existing law or to change direction." *E.g.*, *Jackson*, 781 F.2d at 397.

The Ninth Circuit's unrestrained approach to guessing state common law under *Erie* was on full display in these cases. The district courts ruled in Uber's favor in both cases because existing Washington and California precedent rejected respondents' attempted novel expansions of tort-law duty to stop third-party criminal misdeeds. Even the court of appeals noted the absence of existing state-law support for respondents' claims. App., *infra*, 21a, 77a-78a. In *Drammeh*, it certified the question whether to recognize a "*new* special relationship" that would impose a duty for rideshare companies to protect drivers from imposter riders. *Id.* at 21a (emphasis added). And in *Doe*, it certified the question whether to overrule state appellate precedent and to create a new duty for rideshare companies to prevent crimes by "imposter driver[s]." *Id.* at 70a, 77a. Yet the Washington Supreme Court and California Supreme Court declined to accept certification, which should have been the first "hint" that the state courts were unwilling to "fashion a new expansive tort liability * * * with broad-ranging consequences." *Id.* at 9a (Bumatay, J., dissenting); see *id.* at 63a (Graber, J., dissenting).

Undeterred by the certification denials, the panel majorities proceeded to craft new legal duties based entirely on "[p]redict[ion]" rather than the current state of Washington and California law. App., *infra*,

3a-4a; *id.* at 54a-56a. Never mind that the Washington Supreme Court has rejected recent "invitation[s] to broaden" the list of special relationships and instructed that "a significant expansion of [tort] liability should be left to the consideration of the Legislature." *Id.* at 9a (Bumatay, J., dissenting) (first quoting *Barlow* v. *State*, 2 Wash. 3d 583, 592 (2024); then quoting *Niece* v. *Elmview Group Home*, 131 Wash. 2d 39, 53 (1997)). And never mind that "existing state appellate court precedent" established that no duty existed under California law in a case (*Jane Doe No. 1*) with almost identical facts. *Id.* at 63a (Graber, J., dissenting). In imposing on rideshare companies a duty to prevent third-party crimes against drivers and riders, the Ninth Circuit decided the appeals under its *own* rules of decision rather than state-law rules of decision.

The decisions below are irreconcilable with the approach shared by the D.C., First, Fourth, and Fifth Circuits. Applying published circuit precedent in *Marin Tug & Barge*, the Ninth Circuit in both cases viewed itself as a surrogate for the state supreme court with full authority to make new state law. App., *infra*, 3a, 48a. But those other circuits repeatedly have refused to "alter or augment state law to meet the felt necessities of the case," *Tidler*, 851 F.2d at 425, even though state supreme courts possess those powers. See also pp. 16-19, *supra*. These cases thus would have come out the other way in those circuits that apply only existing state law.

II. The Ninth Circuit's Approach Conflicts With This Court's Cases

A. *Erie* provides the framework to resolve the question presented. There, the Court interpreted the Rules of Decision Act, which provides that "[t]he laws

of the several States * * * shall be regarded as rules of decision" in diversity cases. 304 U.S. at 71 (citation omitted); see 28 U.S.C. § 1652 (current codification). The Court held that the "laws of the several States" included state-court decisions applying state common law. 304 U.S. at 79. As a result, federal courts have a statutory duty to follow the decisions of a State's "highest court." *Id.* at 80.

This Court justified overruling its contrary interpretation of the Rules of Decision Act in *Swift* because allowing federal courts to continue making rules of decision for diversity cases would violate the Constitution. *Erie*, 304 U.S. at 77-78. The Court explained that it was "not a matter of federal concern" whether a State made its law through "its Legislature" or "its highest court." *Id.* at 78. But it certainly was a matter of federal concern whether *federal* courts were making state law. Because "Congress has no power to declare substantive rules of common law" under state law, federal courts necessarily could not wield that power in exercising the diversity jurisdiction granted by Congress. *Ibid.* Federal courts' assertion of such lawmaking power thus was "an unconstitutional assumption of powers" that the Court did not "hesitate to correct." *Id.* at 79 (citation omitted).

The Court's decisions since *Erie* support the conclusion that federal courts should apply existing law instead of predicting changes in law. In *Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198 (1956), for example, a plaintiff relied on a 1910 decision from the Vermont Supreme Court that either party may revoke an arbitration agreement at any time before the arbitrator publishes the award. *Id.* at 204. This Court followed existing Vermont law, which had not been undermined by any "later authority from the Vermont

courts," *ibid.*, bypassing Justice Frankfurter's proposal to remand the case for the Second Circuit to predict whether the current Vermont Supreme Court would abandon its "old law," *id.* at 209 (concurring opinion). And in *Challoner*, the Court admonished federal courts not to "engraft onto th[e] state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." 423 U.S. at 4.

B. Despite establishing the fundamental principle that the Constitution assigns the power to make new rules of decision for diversity cases exclusively to state lawmaking bodies, this Court "has not endorsed any particular method" for ascertaining state law in the face of uncertainty. Dorf 705. The Court has stated only that federal courts should draw on "the materials for decision at hand, and in accordance with the applicable principles for determining state law." *Salve Regina College*, 499 U.S. at 227 (quoting *Meredith* v. *Winter Haven*, 320 U.S. 228, 238 (1943)).

The Court should grant review and make clear that the Ninth Circuit's approach to making law via prediction is incompatible with the Rules of Decision Act. The "predictive theory of law has been everywhere discredited as a theory of adjudication—except in its application to state law under the *Erie* doctrine." Stephen E. Sachs, *Finding Law*, 107 Cal. L. Rev. 527, 559 (2019) (Sachs) (quoting George Rutherglen, *Reconstructing* Erie: *A Comment on the Perils of Legal Positivism*, 10 Const. Comment 285, 293 (1993) (Rutherglen)). When state law has not recognized a novel duty, a prediction about what a state court might do is not itself the law, so the asserted duty is not one of the "rules of decision" under state law. 28 U.S.C.

§ 1652. A federal court that creates a new claim (even when couched as a prediction of state law) has decided a diversity case under a "*federal* rule of decision" rather than a state one—precisely what this Court condemned in *Erie*. *Milwaukee* v. *Illinois*, 451 U.S. 304, 312-313 (1981) (emphasis added) (citing *Erie*, 304 U.S. at 78); see Clark 1504-1505.

The Ninth Circuit's approach to making new state law also violates the Constitution. In *Erie*, the Court held that Congress lacks constitutional authority to "declare substantive rules of common law applicable in a State" and that "no clause in the Constitution purports to confer such a power upon the federal courts." 304 U.S. at 78. But the Ninth Circuit's assertion of a freewheeling power to accept novel state-law theories resurrects the constitutional defect of the *Swift* regime: Federal courts are making law in diversity cases that Congress could not make by statute. *Ibid.*; see Clark 1501. The proper course, adopted by the D.C., First, Fourth, and Fifth Circuits, is to apply only recognized state rules of decisions, thereby ensuring a diversity case is decided "according to the existing sovereign commands of the state." Clark 1541. Only that rule respects the "necessarily modest role" for "lawmaking" by federal courts "under a Constitution that vests the federal government's 'legislative Powers' in Congress and reserves most other regulatory authority to the States" under the Tenth Amendment. *Rodriguez* v. *Federal Deposit Insurance Corp.*, 589 U.S. 132, 136 (2020).

In addition, this Court's decisions foreclose the Ninth Circuit's repeated treatment of state-high-court denials of review as invitations to alter existing law. *E.g.*, *K F Dairies*, 224 F.3d at 925 n.3. This Court has

held that federal courts cannot ignore existing appellate precedent based on "conjecture" that a state supreme court "will at some later time modify [a] rule," no matter how "desirable [the federal court] may believe it to be, and even though [the court] may think that the state Supreme Court may establish a different rule in some future litigation." *Hicks* v. *Feiock*, 485 U.S. 624, 630 n.3 (1988) (quoting *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223, 237-238 (1940)). That reasoning confirms that a federal court must ascertain what state law *is* and cannot predict what state law *might become* in a future case when a state supreme court confronts the same issue. The Ninth Circuit in published decisions like *K F Dairies* has deviated from this "solid wall of Supreme Court" authority "concerning [federal courts'] *Erie* role." App., *infra*, 61a-62a (Graber, J., dissenting).

The Ninth Circuit has reasoned that, unless federal courts have authority to make new state law, "litigants seeking to protect their rights in federal courts by availing themselves of our diversity jurisdiction would face an inhospitable forum" as compared to state court. *Paul*, 819 F.2d at 879. But any asymmetry between federal and state forums stems from *Erie*'s holding that state courts can do something that federal courts cannot in our constitutional system: make new rules of decision under state law. 304 U.S. at 78. The decision embraces a "constitutional disparity * * * between the powers of state and federal courts to make law on behalf of their respective sovereigns." Clark 1484. As the Court explained shortly after *Erie*, the role played by federal courts "is *more modest* than that of state courts, particularly in the freedom to create new common-law liabilities." *United States* v. *Standard Oil Co.*, 332 U.S. 301, 313

(1947) (emphasis added). A restrained focus on existing state law is thus an intended feature, not a bug, of *Erie*.

These cases also are straightforward under the proper *Erie* framework. In *Drammeh*, the Ninth Circuit itself admitted that respondents' claim required "extending the exception" to the rule that defendants have no duty to prevent third-party wrongdoing before deciding to recognize a "new special relationship" between rideshare companies and drivers. App., *infra*, 3a, 21a-22a. And in *Doe*, the court created a new duty to prevent crimes by imposter drivers, subject only to the court's own weighing of an eclectic mix of factors such as "moral blame" and the "policy of preventing future harm." *Id.* at 57a-58a (citation omitted). State constitutions can vest such "open-ended lawmaking powers" in their courts to expand the limited common-law duty to protect against third-party wrongdoing. *Northwest Airlines, Inc.* v. *Transport Workers*, 451 U.S. 77, 95 (1981); see Sachs 577. But the Rules of Decision Act, interpreted within constitutional constraints, forbids federal courts to do the same.

III. The Question Presented Is Important And Recurring

A. The question presented concerns an issue of timeless importance to federalism: "the proper distribution of judicial power between State and federal courts." *Guaranty Trust Co.* v. *York*, 326 U.S. 99, 109 (1945). But this Court's intervention has only become more urgent. In recent years, federal courts have increasingly been "called upon in a wide range of substantive areas to predict state law in cases where the common law or specific questions of statutory interpretation are unsettled." Dolores K. Sloviter, *A Federal*

Judge Views Diversity Jurisdiction Through the Lens of Federalism, 78 Va. L. Rev. 1671, 1677 (1992) (Sloviter).

Diversity cases not only are on the rise, but also have growing monetary stakes that outpace cases in state court. See Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. Chi. L. Rev. 2101, 2105 (2019) (Zambrano). Between 2019 and 2023, the number of diversity cases has climbed 47% and now accounts for over 45% of the federal docket. Admin. Off. of the U.S. Courts, *U.S. District Courts—Judicial Business 2023*, tinyurl.com/4jd7wnpd. The average damages award in federal court also has spiked from $544,000 in 1980 to $1.4 million in 2015, while those in state court have flatlined at $5,000 or less, as one would expect based on the amount-in-controversy requirement of $75,000 for a federal diversity case. Zambrano 2107, 2141-2143. And the "number of diversity cases" alone "understates their significance" because high-stakes class actions "represent[ing] millions of state-law claims" have proliferated in federal court under the Class Action Fairness Act of 2005. *Id.* at 2132 (emphasis omitted).

The approach of predicting what state law *might* become unleashes "federal court law-making at its worst: not only are federal courts *making* law in a context where *Erie* unequivocally told them not to, but they are doing so under the guise of complying with *Erie*'s insistence that federalism requires deference to state authority." Laura E. Little, Erie*'s Unintended Consequence: Federal Courts Creating State Law*, 52 Akron L. Rev. 275, 284 (2018). Because any disagreement with existing law can be recast as a "prediction" of future law, that approach to *Erie* restrains lawmaking by federal courts "only when federal judges have

been inclined to be restrained anyway." Rutherglen 294. Nowhere is this danger more apparent than in "the largest and most complex cases," which invariably invite "innovative arguments, appeals, and creative legal strategies" for which there often is no state authority prohibiting the defendant's conduct. Zambrano 2178. As a result, federal courts that are willing to expand law through predictions can make common-law rules in ways that are "largely bereft of any state law moorings." Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. Rev. 600, 600 (2020); see *id.* at 621-622.

The predictive approach also has serious ramifications for litigants and society. Federal judges have been the first to admit that they often "get state law wrong because [they] don't know state law and are not the ultimate decisionmakers on it." Guido Calabresi, *Federal and State Courts: Restoring a Workable Balance*, 78 N.Y.U. L. Rev. 1293, 1300 (2003) (Calabresi). That is especially true in the tort arena, which frequently involves balancing competing societal interests and so requires careful attention "to the nuances of that state's history, policies, and local issues." Sloviter 1682.

Moreover, federal judges' attempts to guess state law facilitates forum shopping. Wrong predictions are "only imperfectly subject to correction," as federal litigants "cannot appeal the decision to the state supreme court." L. Lynn Hogue, *Law in a Parallel Universe:* Erie*'s Betrayal, Diversity Jurisdiction, Georgia Conflict of Laws Questions in Contracts Cases in the Eleventh Circuit, and Certification Reform*, 11 Ga. St. U. L. Rev. 531, 532 (1995) (first quote) (Hogue); Sloviter 1681 (second quote). The result is two "separate and distinct bodies of state law—true state law

enforced in state court and an ersatz federal version of state law enforced in federal court." Hogue 532. Laying the Ninth Circuit's decision in *Doe* alongside the California Court of Appeal's decision in *Jane Doe No. 1* underscores this point. "Inevitably, this leads to considerable forum shopping of just the sort that *Erie* sought to avoid." Calabresi 1300.

B. These cases reflect the harms from the predictive approach on steroids. The Ninth Circuit became the first court in the country—state or federal—to impose a duty to protect rideshare users against criminal misdeeds of third parties. It did so despite the overwhelming consensus in state tort law that businesses typically are not liable for unaffiliated criminals who merely take advantage of the defendant's service in some way to perpetrate their crime. And it did so twice, for two different States. Although the court of appeals sought to justify its decisions as anticipating what the state supreme courts might do, make no mistake: These newfound duties are the Ninth Circuit's alone.

Left to stand, the decisions below have the potential to reverberate across not only California and Washington, but also the entire Ninth Circuit. The court of appeals itself observed that these cases have "profound implications" for "rideshare drivers and the gig economy more generally." App., *infra*, 24a-25a, 72a; see *id.* at 78a (noting hundreds of federal-court cases against Uber raising the same issue as *Doe*). Divided majorities in both cases created "massive expansion[s] of tort liability [that] will have rippling effects across [the] economy." *Id.* at 12a (Bumatay, J., dissenting). These new duties could hamper businesses' ability to grow and to continue to serve "high crime" areas where historically disadvantaged groups live and work—the reason that state courts are hesitant

to impute criminal misconduct to third parties. *Nola M.* v. *University of Southern California*, 16 Cal. App. 4th 421, 437-438 (1993); *Hutchins* v. *1001 Fourth Avenue Associates*, 116 Wash. 2d 217, 236 (1991). And under the predictive approach, nothing prevents the Ninth Circuit from exporting its decisions to other States whose supreme courts have not yet directly addressed whether to recognize duties to prevent third-party criminal conduct against rideshare drivers and riders.

IV. This Petition Is An Ideal Vehicle

The time is ripe for this Court's review because further percolation will not resolve the entrenched *Erie* conflict between federal courts that apply only existing state law in diversity cases and those that try to predict its future contours. In *Drammeh* and *Doe*, the Ninth Circuit was bound by circuit precedent to hazard a "predict[ion]" whether the state supreme court would eventually recognize a new rule of decision under state law. App., *infra*, 3a (quoting *Marin Tug & Barge*, 271 F.3d at 830); *id.* at 48a (same). And in both cases, the Ninth Circuit declined the opportunity to revisit its approach to *Erie* en banc. *Id.* at 45a, 95a. That one-two punch reinforces that the Ninth Circuit's deviation from *Erie* is a pattern, not an isolated misstep.

These cases also offer an ideal vehicle to address the question presented. Both involve novel theories under state law that Uber has duties to prevent misdeeds by assailants posing as riders or drivers. Recognizing the lack of authority for those duties, the Ninth Circuit certified the state-law questions to the respective state supreme courts, which did not accept the invitation to extend state law. But the Ninth Circuit stepped into that lawmaking void and fashioned

new "state" rules of decisions that neither State had ever adopted. A pair of cases will rarely bring a question presented into such sharp relief.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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March 21, 2025