No. 24-1020

In the

Supreme Court of the United States

UBER TECHNOLOGIES, INC. and RASIER, LLC,
Petitioners,

v.

AMIE DRAMMEH, et al.,
Respondents.

UBER TECHNOLOGIES, INC. and RASIER, LLC,
Petitioners,

v.

JANE DOE,
Respondent.

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

BRIEF OF WASHINGTON LEGAL FOUNDATION AS AMICUS CURIAE SUPPORTING PETITIONERS

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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.

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INTEREST OF AMICUS CURIAE*

Washington Legal Foundation (WLF) is a nonprofit public-interest law firm and policy center dedicated to defending free enterprise, individual rights, limited government, and the rule of law. WLF often appears as amicus curiae before this Court to defend the Constitution's promise of federalism. *See*, *e.g.*, *Sackett v. EPA*, 598 U.S. 651 (2023); *Dart Cherokee Basin Oper. Co. v. Owens*, 574 U.S. 81 (2014).

Consistent with this mission, WLF urges the Court to enforce *Erie*'s foundational principle: State law is the law handed down by a State's highest court—not conjecture by courts or commentators about what the State's high court might decide. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938).

INTRODUCTION

The petition asks a simple but far-reaching question: When a federal court applies state law, must it follow the law as it is, or may it guess what a state court might someday decide? The Ninth Circuit chose the latter. In doing so, it joined a growing number of courts that permit federal judges to act as predictors of state legal evolution rather than as neutral interpreters of existing law. That approach conflicts with core constitutional principles and has produced serious inconsistencies in federal law.

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* No party's counsel authored any part of this brief. No person or entity, other than Washington Legal Foundation and its counsel, paid for the brief's preparation or submission. WLF timely notified all parties of its intent to file this brief

In *Drammeh*, rogue Uber riders murdered Cherno Ceesay, who was using the Uber driver app. Washington law recognizes no special-relationship duty between Uber and independent-contractor drivers who use its app. The district court granted summary judgment for Uber in strict compliance with *Erie*. When the Washington Supreme Court declined certified questions, the Ninth Circuit arrogated to itself the power to forecast state law—announcing a duty it had no authority to create and trampling *Erie*'s explicit command.

Doe was no different. A criminal barred from the Uber platform impersonated a driver and assaulted a rider. California precedent barred any duty, and the district court entered judgment for Uber. With the State's highest court declining to answer certified questions, the Ninth Circuit again donned the cloak of soothsayer, predicting a new duty and reversing on pure speculation. This conjuring act does not merely flout *Erie*; it renders the doctrine meaningless. That's bad enough.

Worse still, it happened in defiance of actual guidance from two state supreme courts. Neither Washington's nor California's high court had stayed silent. But the Ninth Circuit acted as if they had. In both instances, the federal result would not have survived in state court. And this is no isolated error. Again and again, federal courts make one call while state courts, reading the same rulebook, make another. The split is real, and it is constitutionally intolerable.

The time to resolve this conflict is now. Courts are split, the consequences are recurring, and the

stakes are constitutional. This petition presents an ideal opportunity to restore order to an area of doctrine that demands clarity and restraint.

SUMMARY OF ARGUMENT

The petition raises a structural question at the heart of federalism. When a federal court applies state law, is it bound by what the State's highest court has said—or may it cobble together a patchwork of guesses, gleaned from lower court dicta, law review musings, and a weather report on judicial trends? The decisions below endorsed the latter approach. In doing so, they joined the growing ranks of clairvoyant tribunals that empower judges to divine future state-law developments rather than adhere to existing law as declared by the State's highest court.

That position departs from this Court's guidance in *Erie* and its progeny. It undermines litigants' expectations, destabilizes the uniform application of law, and invites judicial overreach into matters reserved for state courts. The *Erie* doctrine preserves balance by requiring federal courts to apply state law as declared, not anticipated.

Erie's lesson is as sharp as it is simple: humility is a judicial virtue. Judges are not lawmakers. Federal courts sitting in diversity are not philosopher kings. They are honor bound to apply law, not to invent it. When judges sit in diversity, they do not imagine what the law could become; they apply what the State's highest court has said it is. Nothing more, nothing less.

The trouble begins when precedent ends. Too many federal courts take the silence of state law as an invitation to speak. That is not interpretation. It is legislation in black robes. It offends *Erie*. It flouts federalism. And it tramples the modesty that should define the judicial role. The judge's task is not to conjure the spirit of a sovereign tribunal but to respect its silence.

This post-*Erie* jurisprudence has practical and constitutional consequences. It creates uncertainty in civil litigation, especially in class actions and diversity cases. A patchwork regime emerges in which neither state nor federal courts can answer questions with confidence, striking at vertical federalism—the Constitution's structural separation that assigns distinct spheres of power to state and federal judiciaries.

The patchwork that now governs *Erie* mocks the doctrine's dual purpose: first, to deter forum-shopping; second, to ensure identical outcomes in state and federal court. This case is the perfect vehicle for the Court to end the guessing game and reaffirm *Erie*'s constitutional command.

Erie forbids federal judges from playing state supreme court. Where the Constitution and federal statutes are silent, state law rules—by enactment or high-court decree. *Erie*, 304 U.S. at 78. "And whether the law of the State shall be declared by its Legislature in a statute *or by its highest court* in a decision is not a matter for federal concern." *Id.* (emphasis added). Turning federal courts into fortune-tellers erodes federalism's foundations and violates *Erie*'s plain instruction. It transforms neutral

courts into speculative policymakers, accountable to no state and grounded in no text.

This approach does more than distort doctrine. It disturbs the constitutional balance. Federal judges have no mandate to legislate for state citizens to whom they are not accountable. Voters cannot correct federal misstatements of state law. Federal judicial lawmaking distorts the state lawmaking process. To allow such speculation is to authorize judicial usurpation. It is to surrender the limits *Erie* was meant to impose.

The solution is simple, and constitutional: federal courts must apply state law as it is, not as they imagine it might become. Anything else is lawmaking in disguise—and the result is a patchwork of judicial guesswork masquerading as jurisprudence. This case offers the Court the opportunity to restore the clarity *Erie* demands.

ARGUMENT

I. SPECULATION IS NO SUBSTITUTE FOR SETTLED LAW. YET WITHOUT THIS COURT'S CLARITY, THAT'S ALL FEDERAL COURTS WILL HAVE.

This Court's ruling in *Erie* went beyond mending a doctrinal flaw. It revived a core federalism principle: in our Republic, the power to make state law rests with state institutions—not with federal judges acting as reluctant lawgivers. When a federal court applies state law, it must do so not by predicting developments or relying on subordinate state

decisions, but by adhering to the clear holdings of the State's highest court.

A. *Erie* Shut the Door on Federal Overreach. This Court Must Keep It Locked.

Justice Brandeis grounded *Erie* in the Constitution's structural principles of federalism and judicial restraint. He declared, without qualification, that "there is no federal general common law." *Id.* at 78. With that single sentence, the Court overturned *Swift v. Tyson*, 41 U.S. (16 Pet.) 1 (1842), and rejected the failed century-long experiment in federal judicial lawmaking it had enabled.

For Brandeis, *Swift* "invaded rights which . . . are reserved by the Constitution to the several States." *Id.* at 80. *Erie* thus reaffirmed the Constitution's vertical division of authority, holding that only States—not federal judges—may define state law.

Just one year after *Erie*, this Court put the matter bluntly: when Texas law governed, it was "the duty of the federal court to apply the law of Texas as declared by its highest court." *Wichita Royalty Co. v. City Nat'l Bank*, 306 U.S. 103, 107 (1939). No guesswork. No creativity. Just law.

This principle, rooted in federalism, has been repeatedly affirmed by this Court. In *Commissioner v. Estate of Bosch*, 387 U.S. 456, 465 (1967), this Court stated that a federal court "must apply what it finds to be the state law." It instructed that state law is the rule of the road and not subject to debate, or that

"state law as announced by the highest court of the State is to be followed." *Id*.

Bosch emphasized that federal judges are not to substitute their own forecasts for authoritative rulings. *Id*. A federal court is not free to speculate. *Erie* made clear that no constitutional clause enabled federal courts to "declare substantive rules of common law applicable in a state." 304 U.S. at 78.

This federalism principle echoes the Tenth Amendment's reservation to the States all powers not granted to the Union. U.S. Const. amend. X; *Erie*, 304 U.S. at 78. *Erie*'s first objective is to discourage forum-shopping—parties shouldn't navigate the legal system like weathervanes choosing a breeze. *Guar. Tr. Co. v. York*, 326 U.S. 99, 101 (1945). The second aim was to prevent inequitable administration—like cases should have like results, no matter the forum. *Id*. at 104.

Erie's rule is grounded in constitutional structure, not policy preferences. Federal judges have neither the mandate nor the expertise to determine the trajectory of state law. Their role is limited to applying the law as it exists, not as it might evolve.

True, in *West v. AT&T*, 311 U.S. 223, 237 (1940), the Court recognized that lower state court rulings are "data" to be considered. But they are not controlling. Only the pronouncement of the State's court of last resort binds the federal judiciary. *See id*. at 240. ("[T]he highest court of the state is the final arbiter of what is state law. When it has spoken, its pronouncement is to be accepted by federal courts as defining state law unless it has later given clear and

persuasive indication that its pronouncement will be modified, limited or restricted."); *see also Bosch,* 387 U.S. at 465 (holding that intermediate appellate decisions are not binding on federal courts); *King v. Order of United Com. Travelers*, 333 U.S. 153, 161 (1947) (holding that unpublished state trial court decisions without precedential weight within the state court system were not binding on federal courts sitting in diversity cases).

So when federal courts impose substantive rules of decision not found through the State's legislative rules or high court precedent, they invade "rights which . . . are reserved by the Constitution to the several States." *Erie*, 304 U.S. at 78.

These are not mere abstractions. In context, they protect federalism by holding that "federal courts lack power to exercise the substantial policymaking discretion necessary to fashion or create rules of decision governing matters within the legislative competence of the states." Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After Erie*, 145 U. Pa. L. Rev. 1459, 1472 (1997).

They preserve litigant expectations. They discourage forum-shopping. They prevent inconsistent application of the law. And they reinforce the legitimacy of both federal and state courts by clarifying the scope of their respective authority.

That humility squares with *Erie*'s "twin aims": keeping parties from gaming the system via forum-shopping and ensuring that like cases are treated alike. *Hanna v. Plumer*, 380 U.S. 460, 467–68 (1965).

When a federal court's view of a State's highest court ruling is based on speculation, it undermines both aims. Parties may seek out favorable predictions. Federal rulings may diverge from settled state doctrine. When they do, uniformity cracks and the credibility of the courts declines.

Here, the outcome hinges on the forum. California trial courts are bound by California Court of Appeal precedent. *See Auto Equity Sales, Inc. v. Superior Court of Santa Clara County*, 57 Cal.2d 450, 455 (1962). That means Uber has no duty. Yet after *Doe*, a federal trial court in California is bound to conclude there is a duty. State trial courts must follow the Court of Appeal. Federal courts must defy it.

Erie does not compel such conflict. Federal courts have tools when state law is unclear. They may abstain. They may certify a question when state procedures allow. But they may not guess. Crossing that line between enforcing and guessing would not just bend *Erie*—it would break it.

B. *Erie* Enforces Judicial Modesty and Deference.

Breaking *Erie* breaks federalism. State-law disputes land every day in the laps of federal judges, whose role is to apply—not invent—the law. Even this Court, when faced with such questions, has called itself an "outsider" because, like many federal judges, its members lack "the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

Otherwise, as the former Chief Judge of the Third Circuit explained, a federal court's "prediction of state law in the absence of a dispositive holding of the state supreme court often verges on the lawmaking function of that state court." Dolores K. Sloviter, *A Federal Judge Views Diversity Jurisdiction Through the Lens of Federalism*, 78 Va. L. Rev. 1671, 1682 (1992). Too often the law that follows "is not found but made." *Id*. at 1681. But that task is legislative by nature and calls for the judgment of lawmakers. *Id*.

When a federal court interprets state law, it must do so with humility, with restraint, and with allegiance to the one institution that speaks with authority—the State's highest court. That's not just a matter of etiquette. It's the law, as *Erie* announced, and this Court has repeated ever since.

C. State Law Means What the State's High Court Says: Nothing Less, Nothing Guessed.

Intermediate appellate court decisions may offer guidance, but the authority of the highest state court remains paramount. The Seventh Circuit has observed that once the State's highest court has spoken, federal courts need not conjecture. *Reiser v. Residential Funding Corp.*, 380 F.3d 1027, 1029 (7th Cir. 2004). "But decisions of intermediate state courts lack similar force; they, too, are just *prognostications*." *Id*. (emphasis added).

It's all well and good to suggest that federal courts follow intermediate appellate courts when the State supreme court is silent. But what happens when

those intermediate courts disagree? The Seventh Circuit was vexed to discover "two lines of cases [that] exist side by side; neither cites, or indicates any awareness of, the other." *Rekhi v. Wildwood Indus., Inc.*, 61 F.3d 1313, 1317 (7th Cir. 1995). When that happens, "a split among those courts makes such treatment impossible." *Id*. at 1319.

Moreover, state intermediate courts are not necessarily better placed to evaluate the law of a state supreme court. For example, in abolishing "heart balm" actions in the state, the North Carolina Court of Appeals invoked nearly every canon of construction: public policy, shifting trends, related cases, other jurisdictions, and even the opinions of the North Carolina Supreme Court itself. *Cannon v. Miller*, 322 S.E.2d 780, 800 (N.C. Ct. App. 1984). It still got it wrong—and the State's high court didn't waste time saying so.

The North Carolina Supreme Court swiftly made short work of the judgment. It reversed in a terse, single-page, eight-line opinion bluntly reminding the Court of Appeals, in no uncertain terms, that it had "acted under a misapprehension of its authority to overrule decisions of the Supreme Court of North Carolina." *Cannon v. Miller*, 327 S.E.2d 888 (N.C. 1985).

If the State's own intermediate appellate court—tasked with applying state law and seated just across the street from the State supreme court—can't get the doctrine right, what hope does a federal judge have? That judge may hail from another federal circuit, have no ties to the State, and lack even basic fluency in the State's caselaw or legal traditions.

Yet the prevalent approach requires the judge to divine what the State's highest court would say, sometimes with no clear path to follow. That's not legal interpretation. It's guesswork. And that is no role for a federal judge.

This Court should grant review and reaffirm what *Erie* has always required: that in our federal system, the only voice that speaks with authority on matters of state law is that of the State's highest court. Only this Court can reaffirm that the *Erie* doctrine is not a heuristic—it is a constitutional command.

II. WHEN FEDERAL COURTS DRIFT FROM *ERIE*, THIS COURT IS THE ONLY BRAKE.

The problem with relying on interpretations of laws other than decisions handed down by the State's highest court is twofold.

First, federal courts without the benefit of guidance from the State's highest court will use an array of tools to ascertain state law. When the method dictates the answer, the judge becomes the lawgiver. This undercuts the twin rationales of *Erie*: discouraging forum-shopping and administering the laws equally.

Second, as multiple judges have noted, federal courts often guess wrong. *See*, *e.g.*, Sloviter, 78 Va. L. Rev. at 1677–78 (cataloging erroneous state law predictions); John R. Brown, *Certification–Federalism in Action*, 7 Cumb. L. Rev. 455, 457 (1977) (same). Here, for example, Washington State has emphasized that special relationships are rare, and

require helplessness, dependence, or complete control. *Turner v. Washington State Department of Soc. & Health Services*, 198 Wash. 2d 273, 286-287 (2021).

But the Ninth Circuit didn't use that framework to evaluate the relationship between Uber and its drivers. These errors not only harm the immediate parties, but also affect future litigants and the broader jurisprudence, which is often ossified by the incorrect guess till rectified. Rectification can take years, sometimes decades.

A. **Lacking Guidance, Federal Courts Pick Sources Freely—at the Cost of State Sovereignty**.

Without a clear directive, federal courts turn to a patchwork of secondary sources to approximate state law. These resources include "the statutory language, pertinent legislative history, the statutory scheme set in historical context, how the statute can be woven into the state law with the least distortion of the total fabric, state decisional law, federal cases which construe the state statute, scholarly works and any other reliable data tending to indicate how the [highest state court would resolve the [issue].]" *Travelers Ins. Co. v. 633 Third Assocs.*, 14 F.3d 114, 119 (2d Cir. 1994).

In the absence of controlling legal authority from the State's highest court, the Third Circuit resorts to familiar tools: "relevant state precedents, analogous decisions, considered dicta, scholarly works, and any other reliable data tending convincingly to show how the highest court in the

state would decide the issue at hand." *McKenna v. Ortho Pharm. Corp.*, 622 F.2d 657, 663 (3d Cir. 1980). *McKenna* spared no effort cataloging interpretive methods, yet the panel's judges could not agree on what state law required.

Nor is there any clear standard for what constitutes a close analogy, thoughtful dicta, or respected authority. Federal judges may reasonably disagree. One judge's careful clue is another's creative fiction. In the end, such judgments lie in the eye of the beholder. It is like preening before a funhouse mirror; what you see depends on where you stand.

Judges are not legislators, yet some have taken it upon themselves to disregard state supreme court rulings based on their own policy preferences. In *McKenna*, 622 F.2d at 662–66, the Third Circuit found that a later Ohio Supreme Court decision weakened the policy rationale of an earlier one—and so refused to follow it.

That kind of judicial freelancing is exactly what *Erie* prohibits. *Erie* decisively closed the door on federal courts crafting their own versions of state law. *Erie* held that the proper function of a federal court was "to ascertain what the state law is, not to predict or speculate on what it might be." 304 U.S. at 78.

Still, federal courts regularly step beyond their bounds to resolve ambiguities in state law, a practice so entrenched it carries a nickname—the "*Erie* guess." The term "guess" says it all. *See Bliss Sequoia Ins. & Risk Advisors, Inc. v. Allied Prop. & Cas. Ins. Co.*, 52 F.4th 417, 425 (9th Cir. 2022) (O'Scannlain, J., dissenting) ("Although federal judges may be tempted

to take an '*Erie* guess,' even the best judges should proceed with caution when filling the void of state law with our intuition of what is 'reasonable.'")

B. Courts Err in Predictions, With Significant Repercussions.

Legal improvisation isn't confined to one circuit. Other circuits have blundered just as badly. Take *Doe*, where the Ninth Circuit boldly predicted that the California Supreme Court would create a duty for Uber to protect riders—because, it said, the risk of impersonators wouldn't exist but for Uber's business model.

That "*Erie* guess" reveals everything wrong with letting federal judges game out state law. The facts were brutal: a predator banned from Uber posed as a driver and raped Jane Doe, and she sued. California law, consistent and longstanding, imposes no duty to protect against third-party crimes—except where a special relationship or misfeasance exists. The district court applied this rule faithfully and granted summary judgment.

In fact, the California Court of Appeal had just rejected nearly identical claims. The district court treated that as binding. Yet the Ninth Circuit sidestepped it, reached for another appellate decision, certified questions, and then, when rebuffed by the state supreme court, made its own prediction—that Uber owed a special duty because its rideshare platform was the "but for" cause of the crime.

So in a single case, the panel followed one intermediate decision, questioned another, ignored

the highest court's silence, and created a duty that could apply to nearly any modern company. That's not law. That's roulette. And it's the *Erie* problem in its purest form.

Federal judges are simply not well situated to predict state law or answer state-law questions of first impression. For egregious cases in which federal courts erred in predicting state law on major questions, *see Enis v. Continental Ill. Nat'l Bank*, 795 F.2d 39, 41 (7th Cir. 1986) (predicting that Illinois Supreme Court would limit manuals to contract-based rights); *Garcia v. Aetna Fin. Co.*, 752 F.2d 488 (10th Cir. 1984) (whether manual created employment contract); *Wakefield v. Northern Telecom, Inc.*, 769 F.2d 109, 112 (2d Cir. 1985) (holding that a duty of good faith and fair dealing can be read into a commissions contract).

This problem wasn't just foreseeable—it was foreseen. Judge Brown, writing from the then Fifth Circuit bench nearly sixty years back, had already sketched the outlines of this *Erie* mess. *See United Servs. Life Ins. Co. v. Delaney*, 328 F.2d 483, 486–87 (5th Cir. 1964) (Brown, J., concurring). He explained that while divergent outcomes from procedural irregularities were problematic, they were at least understandable.

But when federal courts reached inconsistent results by misinterpreting substantive state law, the injustice became indefensible. *Id.* This was no hypothetical problem: "both Texas and Alabama have overruled decisions of this Court, and the score in Florida cases is little short of staggering." *Id.* at 486. Plenty of flawed rulings never made it to this Court—

not because they were right, but because they did not meet the criteria for certiorari. *Id*.

Judge Brown didn't mince words. "[Many Court of Appeals decisions] do not fare so well when they are tested in the place that really counts—the highest, or first-writing court, of the State concerned." *Id*. The real test was whether the Court of Appeals could accurately predict what a state's highest court would say. *Id*. It couldn't. *Id*. Not once. *Id*. ("And now that we have this remarkable facility of certification, we have not yet 'guessed right' on a single case.")

Future corrections often provide cold comfort for the parties bound by the earlier proceedings. *See*, *e.g.*, *DeWeerth v. Baldinger*, 38 F.3d 1266, 1272-75 (2d Cir. 1994) (incorrect *Erie* guess, later rejected by the state's high court, still fails to trigger Rule 60(b) relief). Even an earlier correction rarely helps those already misjudged, leaving them trapped in a Dickensian legal morass.

Indeed, Florida's notorious *Green* litigation proves that mishandled certification can turn clarity into chaos. In an American *Jarndyce v. Jarndyce*, the Court of Appeals had to overturn itself two years after its initial decision, prompting another round of trials and litigation. *See Green v. American Tobacco Co.*, 304 F.2d 70, 72 (5th Cir. 1962) (certifying question of state law); *Green v. American Tobacco Co.*, 154 So. 2d 169, 170 (Fla. 1962) (answering question); *Green v. American Tobacco Co.*, 325 F.2d 673, 675 (5th Cir. 1963) (ignoring answer); *McLeod v. W.S. Merrell Co.*, 174 So. 2d 736, 739 (Fla. 1965) (stating that *Green* applied Florida law incorrectly); *Green v. American Tobacco Co.*, 391 F.2d 97 (5th Cir. 1968) (applying

Florida law as stated in *McLeod*), *rev'd on reh'g*, 409 F.2d 1166 (5th Cir. 1969) (per curiam).

As Judge Brown wryly noted, "he who had lost now won, and he who had won now lost"—proof that federal guessing breeds judicial roulette, not law. *Delaney*, 328 F.2d at 486–87.

But misapplication of state law by federal courts does more than cloud clarity. It upsets the constitutional balance of our federalism. The institutional concerns Judge Brown identified in his concurrence have not vanished. If anything, the mischief he flagged grows greater.

III. REVIEW IS NEEDED TO PREVENT FEDERAL COURTS FROM CREATING STATE LAW.

Trying to predict how a state court might rule is bad enough. Imposing that prediction on the parties to a dispute in federal court is much worse. It's lawmaking in disguise. And it's not the federal courts' role. That duty rests with state courts—answerable to the State's citizens. Stretching that boundary distorts federalism. And when federal judges create rules of decision that no state court adopted, they don't just cross a line. They obliterate it.

Federal courts lack authority to make state law. That is not a suggestion. It is a structural limitation. The Constitution, through Article III, does not vest federal judges with plenary lawmaking power over the States. Congress could not confer that power if it tried. "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." *Day & Zimmermann, Inc. v. Challoner*, 423 U.S. 3, 4 (1975). A federal court has no license to modify or supplement state law, much less to invent doctrines the State has never embraced. The Ninth Circuit cannot impose rules for special relationships that state law does not recognize. *Erie*, 304 U.S. at 78.

Erie was more than doctrinal cleanup. It was a constitutional reset. Federal courts sitting in diversity must apply law as declared by a State's highest court—not what they think the court might someday say. *Erie* condemned *Swift*'s practice of filling state-law gaps with federal common law, but *Swift*'s spirit haunts us still in "predictions."

Look no further than this case. Rather than apply settled doctrine, the Ninth Circuit chose to predict. It created duties no state court had adopted. That is not a federal judicial function. It is a state lawmaking usurpation. As Judge Sloviter explained: "When federal judges make state law—and we do, by whatever euphemism one chooses to call it—we are undertaking an inherent state court function." 78 Va. L. Rev. at 1683.

The distance between federal courts and the States whose laws they interpret is not incidental. It is essential to our federal structure. However able they may be, federal appellate judges are not accountable to the people of the State whose laws they apply. They are not elected by state voters. They are not always steeped in the local history, culture, and values that inform how a State's common law evolves. That distance matters.

Judge Sloviter said it plainly. Federal judges "not selected under the state's system and not answerable to its constituency" perform a fundamentally state court role when they create state law. 78 Va. L. Rev. at 1683–8. Yet by predicting rather than applying state law, federal judges assume the role of state lawmakers.

That's not harmless error. That's a structural failure. The constitutional concern is not academic—it's practical. The problem is compounded since the State's citizens cannot fix errors. *See* Diarmuid F. O'Scannlain, *Politicians in Robes: The Separation of Powers and the Problem of Judicial Legislation*, 101 Va. L. Rev. Online 31, 46 (2015). State judges typically answer to the people. Federal courts do not.

The effects are real. Courts have wrongly predicted state law in matters ranging from immunity to punitive damages, to insurance coverage. *See*, *e.g.*, *Am. States Ins. Co. v. Capital Assocs. of Jackson Cnty., Inc.*, 392 F.3d 939 (7th Cir. 2004); *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 912 F.3d 348 (6th Cir. 2018); *Lancaster v. Monroe Cnty.*, 116 F.3d 1419, 1425 (11th Cir. 1997). These decisions remain binding even when no state court has ever endorsed them. And the public is left bound by "state law" that no state court announced, no state legislator ever considered, and no state citizen ever approved.

All this also undermines the political process. Once a federal appellate court blunders on state law, the damage is locked in. "A federal court's erroneous application of state law cannot be corrected, because a state supreme court . . . has no power to review federal judgments." *See* Daniel J. Meador,

Transformation of the American Judiciary, 46 Ala. L. Rev. 763, 768 (1995). The result is binding precedent built on a foundation the State never laid. The only mechanism for the state judiciary to correct a federal misstatement is in a future matter if and when the same issue finally arises in state court. *See Scott v. Bank One Trust Co.*, 577 N.E.2d 1077, 1080 (Ohio 1991). Until then, the mistaken prediction operates as de facto law.

Voters cannot correct federal misstatements of state law. Federal judicial lawmaking distorts the state lawmaking process. As Judge O'Scannlain noted, "Our preference for liberty and self-rule is undermined when the courtroom is opened as an alternative venue for lawmaking." 101 Va. L. Rev. Online 31, 34 (2015).

So when a federal court misreads the trajectory of a state's jurisprudence—as it inevitably will from time to time—it warps the development of that law. It also deprives litigants of the benefits of decisions by accountable judges steeped in state policy and precedent. These mistakes aren't harmless. They skew reliance, disrupt markets, and wreck doctrinal clarity—long before the state court can fix them.

For example, the Third Circuit predicted Pennsylvania would adopt the Restatement (Third) of Torts in *Berrier v. Simplicity Mfg., Inc.*, 563 F.3d 38 (3d Cir. 2009). It didn't, outcomes diverged, and litigants suffered. *DeWeerth*, 836 F.2d 103, similarly proves the point. A federal misguess denied recovery for stolen art. State law later said otherwise. But *Erie* guesses don't get do-overs. The First Circuit misread Mississippi law on privity in *Mason v. Am. Emery*

Wheel Works, 241 F.2d 906 (1st Cir. 1957). Mississippi moved on; federal courts did not. The result? Legal confusion and divergent outcomes. The decision in *Bliss Sequoia*, 52 F.4th 417, reflects the intricate nature of insurance law and the potential for divergent outcomes when federal courts interpret state statutes.

These cases demonstrate the perils of federal courts predicting state law: they create legal uncertainty, undermine state courts, and deliver unequal justice.

Certification is no panacea. In theory, it provides a check. In practice, it is far from perfect. Certification is unavailable in many districts, inconsistently used in others, and (as here) often declined by state courts. The panels below attempted certification. They failed. So they attempted to fill a perceived gap. They guessed.

Comity demands respect for the States' authority to define their own laws. In *Pullman*, *Younger*, and *Burford*, for instance, the Court declined to rule on federal questions entangled with unresolved issues of state law, given the "special competence" of state courts and the risks of "tentative" federal decisions. *See Railroad Comm'n v. Pullman Co.*, 312 U.S. 496, 500 (1941); *Younger v. Harris*, 401 U.S. 37, 44 (1971); *Burford v. Sun Oil Co.*, 319 U.S. 315, 327 (1943). The logic is the same here. Even when abstention isn't available, structural concerns remain.

The Second Circuit's Jon O. Newman captured it well: "One distinct shortcoming of diversity

jurisdiction is the interruption of the orderly development and authoritative exposition of state law occasioned by sporadic federal court adjudications." *Factors Etc., Inc. v. Pro Arts, Inc.*, 652 F.2d 278, 281 (2d Cir. 1981).

This Court should not tolerate the continued distortion of state law. *Erie* closed the door. Yet federal courts keep prying it open. They do so in good faith. But good faith does not confer jurisdiction. And guesswork is not adjudication.

CONCLUSION

This Court should grant the petition.

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