No. 24-_____

In The
Supreme Court of the United States

JOAN STORMO,

Petitioner,

v.

STATE NATIONAL INSURANCE CO.,

Respondent.

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

Petition for Writ of Certiorari

ZAHEER A. SAMEE
Counsel of Record
FRISOLI ASSOCIATES, P.C.
25 Burlington Mall Road, Ste 307
Burlington, Massachusetts 01803
Tel: (617) 494-0200
Email: zas@frisolilaw.com

Counsel for Petitioner

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QUESTION PRESENTED

Federal courts sitting in diversity must apply the laws of the relevant state as rules of decision. 28 U.S. Code § 1652. Certification of questions to state supreme courts is an invaluable tool in ascertaining answers to novel or uncertain questions of state law. The First Circuit has adopted a rule, contrary to the majority of circuits, disfavoring certifying questions when requested by a party filing a state law claim in a federal forum. It applied this rule against Petitioner by refusing to certify a question to the Massachusetts SJC.

The question presented is: Does the rule disfavoring certification employed by a minority of circuits violate the *Erie* doctrine and principles of federalism by discriminating against parties filing in federal court based on diversity jurisdiction?

PROCEEDINGS BELOW

Joan Stormo, Assignee of Peter T. Clark v. State National Insurance Co., Docket No. 1:19-cv-10034 (U.S. D. Mass. 2023). Judgment entered August 25, 2023.

Joan Stormo, Assignee of Peter T. Clark v. State National Insurance Co., Docket No. 23-1792 (1st Cir. 2024). Judgment entered September 19, 2024.

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The United States Court of Appeals for the First Circuit's opinion in *Stormo v. State National Ins. Co.*, 116 F.4th 39 (1st Cir. 2024), issued September 19, 2024, is reproduced in the Appendix at 2a.

The unreported opinion and order (2023 WL 5515823) of the District Court reversing its pretrial ruling and granting judgment notwithstanding the verdict in favor of respondent is reproduced at Appx. 40a.

The unpublished bench ruling of the District Court before trial is reproduced at Appx. 56a.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1254(1) to review by writ of certiorari the United States Court of Appeals for the First Circuit's decision and judgment dated September 19, 2024.

Petitioner's request for rehearing en banc was denied by the First Circuit on October 22, 2024.

STATUTES INVOLVED

28 U.S. Code § 1332.
Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States; ….

28 U.S. Code § 1652
State laws as rules of decision

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.

Mass. Gen. Laws, ch. 175, § 112
Payment of losses; regulations

… An insurance company shall not deny insurance coverage to an insured because of failure of an insured to seasonably notify an insurance company of an occurrence, incident, claim or of a suit founded upon an occurrence, incident or claim, which may give rise to liability insured against unless the insurance company has been prejudiced thereby.

INTRODUCTION

The First Circuit has adopted a rule disfavoring certifying questions of state law when requested by a party filing a state law claim in federal court based on diversity jurisdiction. It applied this rule to deny Petitioner's request for certification of an unsettled and important issue of Massachusetts insurance law. The First Circuit's approach implicates more than the mere risk of federal courts incorrectly applying state law. At issue is a rule which systemically discriminates against parties invoking diversity jurisdiction. The First Circuit's approach is also inconsistent with the certification jurisprudence of a majority of circuits which do not disfavor parties filing state law claims in federal court.

"Congress has no power to declare substantive rules of common law applicable in a State" and "no clause in the Constitution purports to confer such power upon the federal courts." *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938); *see also* 28 U.S. Code § 1652. Diversity jurisdiction presumes that federal "judges of the district courts and of the courts of appeals are at least as capable" as state judges in deciding questions of state law. *Lehman Bros. v. Schein*, 416 U.S. 386, 394 (1974) (Rehnquist, J., concurring). A state's law, however, must be "declared by its Legislature in a statute or by its highest court." *Erie*, 304 U.S. at 78. When federal courts confront novel and unsettled questions of state law, certification to state courts, although not obligatory, is especially appropriate, as it will "in the long run save time, energy, and resources and helps to build a cooperative judicial federalism." *Lehman*, 416 U.S. at 390-91. Equally important, "the certification procedure is more likely to

produce the correct determination of state law." *Id.* at 395 (Rehnquist, J., concurring). Recently, this Court was persuaded that a Court of Appeals should have certified a question of state law because, among other things, it raised a "novel issues of state law peculiarly calling for the exercise of judgment by the state courts." *McKesson v. Doe*, 592 U.S. 1, 5 (2020).

Just as in *Lehman Bros.*, in this case the majority failed to heed the "dissenter on the Court of Appeals [who] urged that the court certify the state-law question" to the state supreme court. *Lehamn*, 416 U.S. at 389. While it may be "unthinkable… to prescribe the process by which a district court or a court of appeals should go about researching a point of state law which arises in a diversity case," *Id.* at 394, it should be equally unthinkable for that process to disfavor the party simply for filing in federal court. Yet, that is precisely what the First Circuit has done in this case – openly disfavor certification requested by a party simply for filing in federal instead of state court, rather than focusing solely on correctly applying state law.

"The most reliable guide to the interpretation of state law is the jurisprudence of state's highest court." *Butler v. Balolia*, 736 F.3d 609, 612 (1st Cir. 2013). Instead of listening to the words of the Massachusetts SJC, the First Circuit reached a decision explicitly contrary to the SJC's declarations, an outcome which can only be explained by its disfavoring certifying questions of state law when requested by a party choosing a federal forum, and by replacing substantive state law rules of decision with its own policy preferences.

STATEMENT OF THE CASE

I. Massachusetts Legal Background - Notice requirements in insurance policies

1. In 1977, Massachusetts enacted a statutory notice-prejudice rule prohibiting insurers from denying coverage for delayed notice of a claim unless the delay caused prejudice. M.G.L. c. 175, § 112. In 1980, the Supreme Judicial Court (SJC) announced as a matter of common law that the statutory notice-prejudice rule applied to all insurance policies. *Johnson Controls, Inc. v. Bowes*, 381 Mass. 278, 49 N.E.2d 185 (1980). *Johnson Controls* involved an occurrence-based insurance policy and was decided before claims-made policies became popular.[1]

2. Only two SJC cases, both decided more than a quarter-century ago, have addressed how the notice-prejudice rule applies to notice requirements in claims-made policies: *Chas. T. Main v. Fireman's Fund Ins. Co.*, 406 Mass. 862, 551 N.E.2d 28 (1990) and *Tenovsky v. Alliance Syndicate, Inc.*, 424 Mass. 678, 677 N.E.2d 1144 (1997).

3. *Chas. T. Main*, taken up sua sponte by the SJC, explained that in a claims-made policy the making and reporting of a claim to the insurer within the policy year determines whether there is coverage in the

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[1] The insurance industry's development of claims-made policies is discussed in *Hartford Fire Ins. Co. v. California*, 509 U.S. 764, 771 (1993). ("Such a policy has the distinct advantage for the insurer that when the policy period ends without a claim having been made, the insurer can be certain that the policy will not expose it to any further liability").

first place. By contrast, in an occurrence policy, coverage is determined by whether the insured event occurred within the policy year; the claim may be made anytime. Insurance policies may contain two types of notice requirements whose purposes "differ sharply." *Chas. T. Main*, 46 Mass. at 864. "One is a requirement that notice of the claim be given to the insurer 'as soon as practicable,'" and this type of notice serves to "permit an insurer to make an investigation of the facts and occurrence regarding liability." *Id.* This type of notice "is almost always found in occurrence policies and frequently is found in claims-made policies." *Id.* The other type of notice "requires reporting of the claim during the term of the policy or within a short period of time" after it expires, and this type of notice "is always found in claims-made policies and is never found in occurrence policies." *Id.* The purpose of this "within the policy year" type of notice requirement is fairness in rate setting such that "rates will fairly reflect the risks taken by the insurer" of a claims-made policy. *Id.* at 864-65. The SJC concluded that the notice-prejudice rule "applies only to the 'as soon as practicable' type of notice and not to the 'within the policy year' type" in a claims-made policy, for otherwise it "would defeat the fundamental concept on which claims-made policies are premised, likely causing such policies to vanish." *Id.* at 865-66.

4. In *Tenovsky*, which reached the SJC by way of further appellate review from the Appeals Court, the claims-made policy required the insured to give "prompt written notice" of a claim, without explicitly stating notice must also be within the policy year; the insured gave notice of a claim more than 60 days after the policy ended. The Appeals Court, misinterpreting the notice language as serving only the investigatory

function of the "as soon as practicable" type of notice, without requiring notice within the policy year, stated that the notice-prejudice rule applied. *Tenovsky v. Alliance Ins. Group*, 40 Mass. App. Ct. 204, 207-08 (1996). The SJC reversed, explaining that a claims-made policy by definition always requires notice within the policy year. It held that the "prompt written notice" requirement in *Tenovsky* must be interpreted as requiring notice within the policy year or no later than 60 days after. *Tenovsky*, 424 Mass. at 681-82.

5. Before Petitioner filed this case, every decision about claims-made notice requirements decided by the Massachusetts appellate courts and the First Circuit involved a failure to comply with the "within the policy year" type of notice requirement. None involved the "as soon as practicable" type of notice requirement at issue here. The closest any Massachusetts court has come to explicitly addressing the precise issue in *Stormo* is the SJC's declaration in *Chas. T. Main's* declaration that the notice-prejudice rule "applies only to the 'as soon as practicable' type of notice and not to the 'within the policy year" type in a claims-made policy. *Chas. T. Main*, 406 Mass. at 865-66.

II. Proceedings Below

A. District Court

Joan Stormo, a citizen of California, filed this diversity action based on 28 U.S. Code § 1332(a)(1) in the U.S. District of Massachusetts in 2019 against the malpractice insurer of her former attorney Peter T. Clark of Massachusetts. The events giving rise to it began unfolding more than 20 years ago when Clark

represented Stormo and her siblings as sellers in a real estate transaction that went off the rails. Clark's legal malpractice spawned three prior lawsuits.

1. In the first lawsuit, commenced in 2004, the would-be buyer of the real estate, KGM Custom Homes, Inc. (KGM), sued Stormo and her siblings in Massachusetts superior court. Clark represented Stormo through trial until 2011 when he withdrew while an appeal was pending. The appeal was ultimately decided in KGM's favor by the SJC in 2014. *K.G.M. Custom Homes, Inc. v. Prosky*, 468 Mass. 248, 10 N.E.3d 117 (2014). Stormo eventually paid KGM more than $1 million as a result of Clark's malpractice. RA 494, 512.[2]

2. The second lawsuit was filed also in Massachusetts superior court in 2010 by KGM against Clark personally. KGM's claim against Clark arose out of the same series of acts forming the basis of its claims against Stormo and her siblings in the first lawsuit. Clark promptly notified his malpractice insurer, State National, and requested coverage. RA 87. State National affirmed coverage, hired counsel to defend Clark (RA 635-36) at a cost of $101,487.87, and settled the claim by paying KGM $595,000. RA 545, 551-52, 635-37 and Appx. 4a. After the settlement, Clark's $1 million policy still had $305,198.60 remaining. RA 1100.

Clark's policy was a claims-made policy. RA 417-39. Generally, it covered damages Clark was legally obligated to pay on claims made against him during the policy period and reported to State National no later than 60 days after the policy ended. RA 430. The

[2] Citations to the record appendix for the First Circuit are to page numbers in the form of "RA #."

policy further stated that multiple claims "arising out of a single wrongful act or a series of related wrongful acts" shall be treated as a single claim, and "*whenever made* [emphasis added] shall be considered first made on the date on which the earliest claim… was first made." RA 434. All such related claims are "subject to the same limits of liability and deductible." Appx. 7a. Separate from the requirement of an initial claim being made and reported within the policy year, the policy also stated: "If a CLAIM is made against any INSURED, the INSURED must give prompt written notice to the Company." *Id.*

3. In the third superior court lawsuit, Stormo sued Clark in 2014 for legal malpractice. Appx. 5a. Clark did not immediately notify State National because he thought – wrongly – "there is no coverage available." RA 181-82. His counsel notified State National of Stormo's claim and requested coverage about 13 months after Clark was served. Appx. 5a.

State National conceded that Stormo's claim was related to the 2010 KGM claim – for which State National affirmed coverage – and that both arose "out of a single wrongful act or a series of related wrongful acts." RA 637. Stormo's claim, although made in 2014, was thus a subsequent claim related to the KGM's initial claim. Under the policy it "shall be considered first made on the date on which the earliest claim" was made. RA 434. Yet, in January 2016, State National issued a complete disclaimer of coverage based on the policy's "prior knowledge" exclusion. Appx. 5a, 7a. (The prior knowledge exclusion allows the insurer to deny coverage if it proves the insured had knowledge of a claim before the start of the policy.)

Left without coverage and already in financial distress, RA 539, Clark never offered Stormo more than $1500 to settle. RA 182. Had the $305,198.60 remaining on Clark's 2010 policy been offered by State National as settlement, Stormo would have accepted it – "in a heartbeat" – and avoided the significant risk that she might not prevail at trial. RA 903. But State National's total disclaimer never gave her that option. In 2018, she proceeded to trial against Clark. She obtained a $1 million judgment on a jury verdict. RA 533. She was also awarded more than $1 million in compensatory damages on her claim under the Massachusetts consumer protection law, M.G.L. c. 93A, which the court trebled to more than $3 million. Appx. 6a. Clark's rights under any malpractice policies were assigned to Stormo. *Id.*

4. Petitioner filed this action against State National in 2019 in the U.S. District of Massachusetts for wrongfully denying Clark insurance coverage under the same policy pursuant to which State National affirmed coverage of KGM's earlier related claim. After pretrial skirmishing, including discovery motions and motions for summary judgment, the case proceeded to trial on the issue of coverage in February 2022. Appx. 7a-8a. Not until the month before trial did State National ask the court to rule that it did not need to demonstrate prejudice before denying coverage based on Clark's delay in giving written notice of Stormo's claim. ECF 130 (district court).

Four days before trial, the district court agreed with Stormo that, based upon Massachusetts case law, the notice-prejudice rule applied because Clark's failure to comply with the policy's "prompt written notice" condition violated only the "as soon as

practicable" type of notice described by *Chas. T. Main*. Appx. 57a. The jury was instructed that to deny coverage for late notice, State National must prove the delay caused prejudice. The trial lasted approximately one week. There was zero evidence of prejudice at trial. Appx. 55a. Instead, the main factual issue was whether State National had proved its affirmative defense that the prior knowledge exclusion in the policy applied. Stormo prevailed; a jury awarded her more than $1.1 million in damages. Appx. 8a. State National moved for JNOV. The district court reversed its pretrial ruling about the applicability of the notice-prejudice rule and – despite "considerable sympathy for plaintiff and her family, who have suffered significant financial harm that may never be redressed" – granted JNOV. Appx. 42a-43a. Stormo appealed.

B. The First Circuit Opinion and Dissent

On appeal, all parties and the court agreed that the only type of notice requirement in the policy that Clark violated was the "as soon as practicable" type of notice, not the "within the policy year" type. Therefore, the question was whether Massachusetts' statutory and common-law notice-prejudice rule applies to the "as soon as practicable" type of notice – an issue of first impression under Massachusetts law, but which the SJC did speak to in *Chas. T. Main*. 406 Mass. at 865-66 (statutory notice-prejudice rule "applies only to the 'as soon as practicable' type of notice"). Petitioner requested that, if there is any doubt, the First Circuit certify to the SJC the question of whether the notice-prejudice rule applied. The First Circuit rejected Petition's request to certify, stating "it was Stormo who chose to bring this action in federal court" and "such a plaintiff" is not "well-positioned to seek a change in

decision-makers after striking out with her original pick." Appx. 18a.

The First Circuit affirmed the district court's decision 2 to 1. *Stormo v. State National Ins. Co.*, 116 F.4th 39 (1st Cir. 2024). Appx. 2a. Ignoring the SJC's distinction between different types of notice requirements and its declaration that the notice-prejudice rule "applies only to the 'as soon as practicable' type of notice," *Chas. T. Main*, 406 Mass. at 865-66, the majority concluded that "prejudice is irrelevant." Appx. 18a.

The dissent demonstrates that the true reason the majority refused certification was because petitioner filed this claim in federal court. It noted that *Tenovsky* and every single case cited by the majority either dealt with an occurrence-based policy or a claims-made policy where the insured failed to give notice "within the policy year." Appx. 35a. The dissent correctly recognized that "the facts of *Tenovsky* gave the SJC no reason to even contemplate – let alone adopt – the categorical no-prejudice rule for 'prompt-written notice' provisions that the majority attributes to that decision." Appx. 33a. The dissent canvassed, in addition to Massachusetts precedents, rulings from other state supreme courts, federal courts, and insurance law treatises addressing the issue, almost all of which indicated that the majority was wrong. Appx. 36a-37a. The dissent concluded, "I certainly cannot say, based on the survey, that I am confident the SJC would, as the majority predicts, rule in the insurer's favor." Appx. 38a. Therefore, the dissent "would certify the underlying question of Massachusetts law to the SJC." *Id.*

The First Circuit denied rehearing and rehearing en banc. Appx. 40a.

REASONS FOR GRANTING THE WRIT

I. The First Circuit's double standard for certification violates its constitutional duty under *Erie*.

"*Erie* mandates that a federal court sitting in diversity apply the substantive law of the forum State," and "state law is to be determined in the same manner as a federal court resolves an evolving issue of federal law: 'with the aid of such light as [is] afforded other materials for decision at hand, and in accordance with the applicable principles for determining state law.'" *Salve Regina College v. Russell*, 499 U.S. 225, 226 (1991) (cites omitted). The First Circuit majority's approach to certification violates *Erie* by injecting into the process of ascertaining state law a double standard prejudicial to the equitable administration of the laws. It applied its double standard to Petitioner when denying her request certification request.

As early as 1977, the First Circuit announced reasons why it would frown upon requests to certify questions of state law. Two of those reasons are relevant here:

1. Litigating a state claim in federal court;
2. Requesting certification only after losing.[3]

[3] These two reasons can operate independently of one another; for example, the losing party seeking certification on appeal may or may not have chosen to file in federal court.

"[T]he bar should take notice that one who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification. We do not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort." *Cantwell v. University of Mass.*, 551 F.2d 879, 880 (1st Cir. 1977).[4] As will be demonstrated, however, neither reason serves any legitimate purpose. They both violate the *Erie* doctrine by undermining the equitable administration of the laws and encouraging forum shopping.

Since *Cantwell*, the First Circuit has repeatedly invoked the above reasons, often together, in looking askance at and often denying certification requests. A perfect example is from a recent case in which the First Circuit certified a question, but warned:

> There is one aspect of this case, however, that gives us significant pause. Ken's Foods opted to file this suit, raising purely state-law claims, in federal court. It could have asked the Massachusetts state courts to settle this dispute, but it chose not to do so. We have explained that a party "who chooses the federal courts in diversity actions is in a peculiarly poor position to seek certification," *Cantwell v. Univ. of Mass.*, 551 F.2d 879, 880 (1st Cir. 1977), especially where there is "uncertainty as to

[4] Not surprisingly perhaps, this aversion to parties filing in federal court and seeking certification coincided historically with the zenith of political hostility to diversity jurisdiction. *See* H.R. 9622, 95th Cong. (1978) ("bill to abolish diversity of citizenship as a basis of jurisdiction of Federal district courts"); the bill passed the house, but not the Senate. This hostility still lingers in the certification jurisprudence of some courts of appeal.

> whether Massachusetts courts would recognize [the] cause of action,*"* …. Moreover, Ken's Foods waited until after it lost at summary judgment to request that the district court certify the issue. As Steadfast aptly described, Ken's Foods in essence treated the district court as *"*a no-lose trial run,*"* in which it could have accepted a favorable result, while leaving open its ability to claim that a different court should have decided the issue now that it lost. We do *"*not look favorably, either on trying to take two bites at the cherry by applying to the state court after failing to persuade the federal court, or on duplicating judicial effort.*"* *Cantwell*, 551 F.2d at 880. Waiting until you lose before asking for certification *"*is almost always fatal unless the court sees strong policy reasons to insist on certification itself.*"* …
>
> We reiterate that Ken's Foods' strategy is not good practice, and we continue to discourage it.

Ken's Food, Inc. v. Steadfast Ins. Co., 36 F.4th 37, 44-45 (1st Cir. 2022) (citations omitted). The majority decision below similarly admonished Stormo that a party filing a state law claim in federal court is not *"*well-positioned to seek a change in decision-makers after striking out with her original pick.*"* Appx. 18a.

A. The First Circuit approach to certification imposes a double standard on parties in diversity cases.

The *"*purpose of certification is to ascertain what the state law is, not, when the state court has already said what it is, to afford a party an opportunity to

persuade the court to say something else." *Tarr v. Manchester Ins. Corp.*, 544 F.2d 14, 15 (1st Cir. 1976). This proposition is unassailable, but it must apply to all parties in diversity. Therefore, in federal court a defendant is no more entitled to a whimsical or arbitrary constriction of liability under state law than a plaintiff can expect an adventurous expansion. Certification "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Arizonans for Official English v. Arizona*, 520 U.S. 43, 76 (1997). Stormo never asked the federal court to "blaze a new trail" in state law. Rather, as the dissent noted, "we have come to a fork in the road, and the plaintiff is merely asking us to choose one as-yet untrod state-law path over another." 116 F.4th 58-59. Stormo merely asked the court to follow the path illuminated by the SJC in *Chas. T. Main*.

When a federal court declares, like the First Circuit majority, that it disfavors certification of doubtful questions of state law when requested by a party choosing federal court, the consequences are troubling. Such an approach creates a double-standard for certification. The standard is more stringent if the party invoking diversity jurisdiction seeks certification, and less stringent otherwise, depriving the former of an equal chance at availing itself of an important tool for authoritatively determining novel and uncertain questions of state law. The First Circuit's approach undermines the "twin aims of the *Erie* doctrine – discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Suppose if state courts discriminated against parties filing

federal law claims in state court – such an approach would be intolerable under the constitution and principles of federalism. "The *Erie* rule is rooted in part in a realization that it would be unfair for the *character or result* [emphasis added] of a litigation materially to differ because the suit had been brought in a federal court." *Id.* at 467.

Indeed, the majority encourages exactly the type of forum shopping that *Erie* sought to eliminate and the First Circuit has recognized as undesirable: "if we answer the question posed here, every company that the answer favors is likely to file or remove a case to federal court from Massachusetts state court, reducing the odds that the SJC will get to decide this issue. Nor do we doubt that the SJC is more familiar than are we with the nuances of insurance coverage and related regulation under Massachusetts law." *Ins. Co. of the State of Penn. v. Great Northern Ins. Co.*, 787 F.3d 632, 638 (1st Cir. 2015). *See Erie*, 304 U.S. at 74-75 ("*Swift v. Tyson* introduced grave discrimination by non-citizens against citizens. It made rights … vary according to whether enforcement was sought in the state or in the federal court").

Roberge v. Travelers Prop. Cas. Co. of America, 112 F.4th 45 (1st Cir. 2024) – decided barely one month before *Stormo* – is a stark illustration of the unfair prejudice caused by the First Circuit's presumption. Recognizing that "[i]nsurance law is notoriously complex," important state "policy considerations" were implicated, and there was "no controlling precedent on the issue" – all factors present in *Stormo* – the First Circuit certified two insurance law questions to the Rhode Island Supreme Court. *Id.* at 56. Why? Roberge filed in state court.

The majority approach ironically punishes plaintiffs, like Stormo, who file in federal court in the state whose substantive law applies, expecting to benefit from the federal judiciary's greater resources, less crowded dockets, and judicial acumen. It turns upside-down the very purpose of diversity jurisdiction by disadvantaging out-of-state litigants choosing federal court (Stormo is a citizen of California). *Erie*, 304 U.S. at 74 ("Diversity of citizenship jurisdiction was conferred in order to prevent apprehended discrimination in state court against those not citizens of the State").

Among the First Circuit bar, there is a palpable perception of hostility to certification where parties file in federal court to vindicate rights under state law. As one local attorney observed about this case: "The only reason the question was not certified was because the plaintiff elected to file the case in federal court."[5] To be sure, certification is not rejected in every instance where a plaintiff files a state law claim in federal court; sometimes it is granted. But the First Circuit's openly discriminatory rule makes the decision to certify depend on the court's whimsy. *See, e.g., Ken's Food, Inc.*, 36 F.4th at 44-45.

B. The majority's reasoning resurrects "federal common law" abolished by *Erie*.

There is no "constitutional power of federal courts to supplant state law with judge-made rules." *Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 406 (2010). Yet, that is exactly what the majority opinion below has done.

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[5] "Untimely notice thwarts coverage of legal-mal claim," *Massachusetts Lawyers Weekly*, Oct. 2, 2024 (subscription required).

According to the majority, "Massachusetts case law is *most easily* [italics added] read as limiting the prejudice requirement to occurrence-based policies," and that "this reading provides a more administrable rule with clarity for insureds and insurers." Appx. 17a. The majority prefers the "easiest" reading of Massachusetts law. The majority's reading is certainly not the "easiest" in the sense of most reasonable. In fact, it is impossible to logically reconcile the majority's decision with the SJC's declaration that notice-prejudice rule "applies only to the 'as soon as practicable' type of notice," in a claims-made policy. *Chas. T. Main*, 406 Mass. at 865-66. The majority's reading is based on its own preference for a rule it finds more convenient ("easy" and "more administrable"), replacing Massachusetts' statutes and the SJC's considered dicta about insurance policy with its own priority of convenience, without a hint in any Massachusetts statute or precedent that a policy of convenience underlies the notice-prejudice rule. *Cf. Zurich American Ins. v. Medical Properties Trust, Inc.*, 88 F.4th 1029, 1035 (1st Cir. 2023) ("certification mechanism prudently allows us to provide the SJC with an opportunity to apply its law and policy judgments on this important, undecided issue").

The majority's approach is eerily similar to the "federal common law" doctrine discredited by the Supreme Court in *Erie*. *Erie*, 304 U.S. at 78. ("There is no federal general common law…. And no clause in the Constitutions purports to confer such power upon the federal courts"). In fact, the majority effectively created federal common law. It replaced Massachusetts' substantive rules of decision with its own policy preferences, exhuming the long-ago buried "fallacy underlying the rule declared in *Swift v. Tyson*… that

federal courts have the power to use their judgment as to what the rules of common law are." *Erie*, 304 U.S. at 79.

The dissent recognized that "[a]s was the case in *Tenovsky*, the inquiry into whether the insurer needs to show prejudice here necessarily hinges on the function – rather than the formal language – of the notice provision that the insured has violated." Appx. 30a-31a (Barron, J. Dissenting). The irony is that the SJC actually did state, albeit in dicta more than 30 years ago, what the law is or likely will be by declaring that the notice-prejudice rule "applies only to the 'as soon as practicable' type of notice," in a claims-made policy. *Chas. T. Main*, 406 Mass. at 865-66. The only explanation for the First Circuit's largely ignoring the SJC's pronouncement is its hostility to certification requests from plaintiff's filing in federal court and its preference for its own judge-made rules over state law. The majority did exactly what this Court stated federal courts cannot do: "declare substantive rules of common law applicable in a State" based on its own independent judgment of what they should be. *Erie*, 304 U.S. at 78-79.

C. Disfavoring certification requests by the losing party amounts to deference to the district court's determination of state law in violation of the *Erie* doctrine.

The First Circuit's approach disfavors certification of an outcome-determinative question of state law whenever requested by the appellant. (A party who already persuaded the District Court that its proposed answer to a doubtful question of state law is correct would obviously have no reason to seek certification or

appeal the decision.) But to disfavor certification simply because the district court decided an outcome-determinative state law issue against a party is equivalent to "appellate deference to the district court's determination of state law," which "is inconsistent with the principles underlying" *Erie*. *Salve Regina*, 499 U.S. at 234.

Take the instant case. Days before trial, the district court adopted Petitioner's position that Massachusetts law required application of the notice-prejudice rule to the "as soon as practicable" requirement of a claims-made insurance policy. Appx. 56a. Had the court not reversed itself after trial, *id.* at 40a, State National could have appealed and requested certification of that question. To be consistent, the First Circuit would have to apply a rule disfavoring certification requests from the losing party, State National. So, regardless of how the lower court answers the state law question, the First Circuit's presumption against certification if requested by the appellant makes it more likely that the district court's determination of state law will be affirmed – in effect, it operates as a rule of deference. This Court has declared that such deference violates the *Erie* doctrine. *Ibid.*

There might be good reasons to deny a request for certification where, for example, a party opposed certification in the district court, lost, only to switch gears and urge certification on appeal. That situation, however, lends itself to application of principles of judicial estoppel or waiver in order to prevent a party from gaming the system. That is nothing like the situation in which Petitioner found herself. The First Circuit stated Petitioner is not "well-positioned to seek a change in decision-makers after striking out

with her original pick"– conveniently ignoring the fact that she "struck out," only after prevailing at a jury trial and only because the district court suddenly reversed its pretrial ruling about the notice-prejudice rule. Before trial, Stormo persuaded the district court that Massachusetts' notice-prejudice rule applied to the "prompt" or "as soon as practicable" type of notice in claims-made policies. Appx. 56a. After trial, the district court suddenly reversed itself, without even a hint from any intervening Massachusetts court decision, for only Massachusetts courts can declare Massachusetts law. *Id.* at 40a. As shown by the dissent below, the First Circuit applies its presumption disfavoring certification no matter how dubious its resolution of unsettled questions of state law. Therefore, it effectively deferred to the district court on a legal question. In doing so, the First Circuit has "so far departed from the accepted and usual course of judicial proceedings… as to call for an exercise of this Court's supervisory power." S. Ct. R. 10(a).

But that is not all. The First Circuit's double standard conflicts with certification standards used by the majority of circuits.

II. The First Circuit's double standard is inconsistent with the certification approach of most circuits, which do not handicap parties filing in federal court.

How would Stormo fare had she filed her action in another circuit? The decision to certify a question of state law is largely discretionary, but at least one stark division exists: a minority of circuits discriminates against parties choosing to file in federal court by employing a presumption against certification.

However the circuits formulate their standards for certifying questions of state law, the need for uniformity in one respect cannot be doubted: no court should discriminate against parties for invoking diversity jurisdiction. Stormo would certainly fare better in the majority of circuits which do not employ a rule disfavoring parties like her.

A. Most circuits do not disfavor certification simply because a party asserted a state law claim in federal court.

Nothing in the certification jurisprudence of the Second, Third, Sixth, Seventh, Ninth, Tenth, Eleventh, or Federal Circuits suggests they would disfavor certification simply because a party filed a state claim in federal court. Avoiding any double standard, these circuits are more likely to give "meaning and respect to the federal character of our judicial system, recognizing that the judicial policy of a state should be decided when possible by state, not federal, courts." *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (Gorsuch, J.).

Second Circuit. *Loomis v. Ace American Ins. Co.*, 91 F.4th 565, 581-82 (2d Cir. 2024).

Third Circuit. *Zanetich v. Walmart Stores East, Inc.*, __ F.4th __ (3rd Cir. 2024), 2024 WL 5037171.

Sixth Circuit. *Lindenberg v. Jackson Nat'l life Ins. Co.*, 919 F.3d 992 (6th Cir. 2019).[6]

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[6] Although the Sixth Circuit does not use a double standard for certification, *Lindenberg* provides a sad illustration of the mischief caused by failing to certify. The Tennessee Supreme Court declined to answer certified questions from the District Court, because the questions were not determinative, but suggested

Seventh Circuit. *Cutchin v. Robertson*, 96 F.3d 1012, 1013 (7th Cir. 2021) (question certified in case where plaintiff filed diversity action and lost on summary judgment below).

Ninth Circuit. *High Country Paving, Inc. v. United Fire & Casualty Co.*, 14 F.4th 976, 978 (9th Cir. 2021) (granting certification request by party removing from state to federal court)

Tenth Circuit. *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (Gorsuch, J.). The Tenth Circuit is notable because, in a diversity case in which a plaintiff originally filed in state court but lost below, it chose to certify the following questions: "(1) whether Colorado's notice-prejudice rule applies to claims-made liability insurance policies, and (2) if so, whether the rule applies to both types of notice requirements –

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that the Sixth Circuit certify appropriate questions concerning the validity of Tennessee's statutory cap on punitive damages. En banc, the Sixth Circuit refused to do so over two vigorous dissents, and invalidated the Tennessee statute under the state constitution. Barely three months after this Court denied certiorari in *Lindenberg*, the Tennessee Supreme Court answered a closely related certified question by upholding the constitutionality of a statutory cap on noneconomic damages; in doing so, it expressed disagreement Sixth Circuit's arguments in *Lindenberg*, adding: the "Sixth Circuit majority, however, chose not to certify such questions to this Court…. We simply point out that the procedure for certifying questions of state law to this Court is designed to promote judicial efficiency and comity, and to protect this State's sovereignty." *McClay v. Airport Mgmt. Services, LLC*, 596 S.W.3d 686, 693 n. 6 (Tenn. 2020). Ever since, the Tennessee state courts continue to reduce punitive damages pursuant to its statutory cap, *see, e.g., Boren v. Hill Boren, P.C.*, 2023 WL 3375623 at n. 4 (Tenn. App. 2023) ("specific amounts of awarded punitive damages were later remitted to fall within the statutory cap"), even though the Sixth Circuit courts presumably still apply its contrary holding in *Lindenberg*.

that is, both the prompt notice and date-certain requirements – in those policies." *Craft v. Phila. Indem. Ins. Co.*, 560 F. Appx. 710, 715 (10th Cir. 2014). The Colorado Supreme Court answered by reframing the questions into a single narrower one in an opinion echoing the analysis of the SJC in *Chas. T. Main*, strongly implying that the First Circuit *Stormo* majority opinion is wrong. *Craft v. Phila. Indem. Ins. Co.*, 343 P.3d 951, 953-58 (Colo. 2015) ("notice-prejudice rule does not apply to a date-certain notice requirement in a claims-made insurance policy" but recognizing that "excusing late notice and applying a prejudice requirement make sense in the context of a prompt notice requirement"). The Tenth Circuit also has not hesitated to certify questions of insurance law even when a plaintiff chose to file in federal court and lost below. *See, e.g., Greystone Construction, Inc. v. National Fire & Marine Ins. Co.*, 661 F.3d 1272 (2011) ("We sought to certify the question before us to the Colorado Supreme Court, which declined to consider the issue").

Eleventh Circuit. *NBIS Constr. & Transport Ins. Servs., Inc. v. Liebherr-America, Inc.*, 93 F.4th 1304, 1314 (11th Cir. 2024) (certifying doubtful question concerning Florida's economic loss rule). *See also Royal Ins. Co. of America v. Whitaker Contracting Corp.*, 242 F.3d 1035 (11th Cir. 2001) (plaintiff filed diversity action, lost, and appealed, question certified).

Federal Circuit. *Rogers v. United States*, 814 F.3d 1299, 1307-10 (Fed. Cir. 2016) ("Appellants were the ones to suggest that we certify the question to the Florida Supreme Court if there is any doubt as to Florida law" and the "Florida Supreme Court has now answered").

There is little doubt that Stormo's certification request would not have received short shrift had she been before any of the above circuits.

B. A minority of circuits handicap diversity litigants who seek certification.

The Fourth, Fifth, Eighth, and D.C. circuits, like the First Circuit, frown upon parties invoking diversity jurisdiction. Some cite a federal practice treatise for the openly discriminatory proposition that a federal court "should be slow to honor a request for certification for a party who chose to invoke federal jurisdiction." 17A Charles Alan Wright, Arthur R. Miller et al., Fed. Prac. & Proc. Juris. § 4248 (3d ed. 2017 update). *See, e.g., Thompson v. Ciox Health, LLC*, 52 F.3d 171, 173 (4th Cir. 2022) ("plaintiffs chose to file suit in a federal forum, and they never asked the district court to certify any questions to the state courts"); *Johnson v. Teva Pharmaceuticals USA, Inc.*, 758 F.3d 605, 614 (5th Cir. 2014) (quoting treatise); *Smith v. Seeco, Inc.*, 922 F.3d 406, 412 (8th Cir. 2019) (quoting treatise); *Metz v. Bae Systems Tech. Solutions & Services*, Inc., 774 F.3d 18, 24 (D.C. Cir. 2014) (quoting treatise).

This Court is vested "not only with the authority to correct errors of substantive law, but to prescribe the method by which those courts go about deciding the cases before them." *Lehman Bros.*, 416 U.S. at 393 (Rehnquist, J., concurring). The use of a presumption against certification violates a doctrine which is "one of the modern cornerstones of our federalism, expressing policies that profoundly touch the allocation of judicial power between the state and federal systems." *Hanna*, 380 U.S. at 474 (Harlan, J., concurring).

III. This case is an ideal opportunity for preventing systemic discrimination against diversity litigants.

This case is an excellent vehicle for ending discrimination against diversity litigants through the use of a double standard for certification of questions of state law because of the conspicuous role it played below. As highlighted by the dissent, every legitimate factor the court might use in deciding whether to certify a question weighs in favor of certification.

Whatever formulations and expressions the circuit may use, common factors that all circuits consider in deciding whether to certify include:

- outcome-determinative nature of the question
- judicial economy
- degree of uncertainty in the law (whether due to conflicting authorities, novelty or "closeness" of the question, or existence of competing policies)
- "importance" of the issue (e.g., whether it implicates state public policy or a constitutional or statutory provision, likelihood of recurrence, and number of persons affected)
- state supreme court's certification criteria.

Every one of these factors in this case weighs in favor of certification.

First, the question Petitioner requested be certified is outcome-determinative. It is a pure question of state law, namely whether the notice-prejudice rule applies to the "as soon as practicable" type of notice in a claims-made insurance policy. If the answer is yes, Stormo prevails; otherwise she loses. The case was already tried. There are no factual disputes.

Second, answering the question will serve judicial economy in the long run. An authoritative, definitive answer to this question from the SJC will provide reliable guidance to both litigants and courts. Insurance companies and insureds will know when denial of coverage is proper for untimely notice in claims-made policies, obviating future litigation of the issue. In the short term, although a detour to the SJC is necessary, this is inherent in the certification process. It is a small price to pay given that the SJC's answer will definitively determine the correct outcome without further drawn-out proceedings.

Third the answer to the question is not certain. Neither the SJC, nor any Massachusetts appellate court, has addressed it in a case with facts squarely raising the precise issue. It is as an issue of first impression. It is "a fork in the road" – not a new trail – and Stormo is merely asking the court "to choose one as-yet untrod state-law path over another." Appx. 38a (Barron, J. Dissenting). As the dissent noted, every insurance law treatise, including those relied upon by the SJC in earlier cases, plus rulings from other state supreme courts "only cast further doubt on the soundness of the majority's approach, because those precedents suggest that a 'prompt-written' notice provision is subject to the notice-prejudice rule when it appears alongside a claims-made policy's express 'within-policy-period' notice provision. Indeed, one of those decisions expressly relied on *Chas. T. Main* in so holding." Appx. 36a.

Fourth, the question is important. Certification is especially appropriate if resolution requires addressing "novel issues of state law peculiarly calling for the exercise of judgment by the state courts." *McKesson*,

592 U.S. at 5. Significantly, in Massachusetts the notice-prejudice rule was first enacted by the legislature. M.G.L. c. 175, § 112. The SJC applied the rule to all types of insurance policies, acknowledging that "our reform of the notice requirement constitutes 'a drastic or radical incursion upon existing law.'" *Johnson Controls*, 381 Mass. at 282-83. The majority below failed to give due deference to public policy reflected in both the SJC's decisions and Massachusetts' statutes. *Chas. T. Main* was a case taken up sua sponte by the SJC that established a policy-driven holding about the notice-prejudice rule. By contrast, *Tenovsky* was simply an error-correcting decision reversing the Appeals Court, 40 Mass. App. Ct. 204. Between the SJC's 1997 *Tenovsky* decision and the district court's JNOV decision in 2023, Massachusetts courts, the First Circuit, and the U.S. District of Massachusetts cited *Tenovsky* only 13 times. By contrast, *Chas. T. Main*, (which stated that the notice-prejudice rule "applies only to the 'as soon as practicable' type of notice and not to the 'within the policy year' type," 406 Mass. at 865-66.) was cited 25 times. The question will inevitably arise again given the pervasive nature of insurance in the economy and the vast numbers of policyholders who purchase claims-made policies every year.

Finally, like 49 states, the District of Columbia, and three territories, the SJC has a procedure for answering certified questions. Its Rule 1:03 allows the court to "answer questions of law certified to it" by the U.S. Supreme Court, courts of appeal, and district courts, as well as other state supreme courts. It has answered certified questions at least 44 times in the last 25 years. There is no reason to think it would refuse to answer the question raised in this case.

In short, it is difficult to see how anything but the First Circuit's double standard and policy preferences underlay the majority's refusal to certify.

IV. This case is exceptionally important because the issues raised and erroneous decision below affect a vast number litigants across the country.

Hardly any sector of the economy is unaffected by insurance, which is mainly regulated by the states. In the insurance context, the consequence of a federal court incorrectly deciding a coverage issue "can have profound practical implications beyond the immediate case because insurance policies are typically written on common forms. A mistaken determination in one case may thus be repeated many times over in being applied as persuasive precedent to other claims." J.L. Watkins, Erie *Denied: How Federal Courts Decide Insurance Coverage Cases Differently and What to Do about It*, 21 Conn. Ins. L. J 455, 457 (2015).

Of the 104,254 diversity cases filed in the 12 months preceding September 30, 2024, 12,333 involved insurance – the largest number in any specific nature of suit category besides "other" catchall categories. But the importance of this case extends beyond insurance. Of the 290,896 civil cases filed in U.S. District Courts during the same period, 35% were based on diversity jurisdiction.[7] There should be no double standard for litigants who file state law claims in federal court, no matter what type of case.

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[7] Table C-2 U.S. District Courts – Civil Cases Commenced by Basis of Jurisdiction and Nature of Suit During the 12 Month Periods Ending September 30, 2023 and 2024.

CONCLUSION

For the reasons stated, the Court should grant this petition. In the alternative, the Court should summarily reverse and remand for certification to the SJC.

Respectfully submitted,

ZAHEER A. SAMEE
Counsel of Record
FRISOLI ASSOCIATES, P.C.
25 Burlington Mall Road, Ste 307
Burlington, Massachusetts 01803
Tel: (617) 494-0200
Email: zas@frisolilaw.com

Counsel for Petitioner

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