No. 24-769

IN THE

Supreme Court of the United States

JOAN STORMO, AS ASSIGNEE OF PETER T. CLARK,

Petitioner,

v.

STATE NATIONAL INSURANCE COMPANY,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Petitioner purposefully availed herself of the federal forum. Neither in the District Court nor before the First Circuit did Petitioner ever move to certify a question of Massachusetts state law. Instead, in her opening brief to the First Circuit, Petitioner merely raised the possibility of certification should she not prevail before the First Circuit on the merits. Now, after both the District Court and the First Circuit each have independently and correctly interpreted settled Massachusetts state law against Petitioner does Petitioner seek to fault the First Circuit for not *sua sponte* inviting the state's highest court to change settled state law.

The question presented is whether the First Circuit's discretionary denial of Petitioner's belated suggestion for certification of settled state law to the Massachusetts Supreme Judicial Court calls for this Court's supervisory review.

CORPORATE DISCLOSURE STATEMENTS

Pursuant to Rule 29.6 of the Rules of this Court, Respondent states that State National Insurance Company is a private non-governmental corporation and that its parent company is Markel Group Inc., a publicly traded company with a listing on the New York Stock Exchange (NYSE: MKL).

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INTRODUCTION

Petitioner asks this Court to review the First Circuit's application of its vast discretionary power to certify an issue of settled state law to the highest state court. Petitioner makes this request notwithstanding that Petitioner never asked the District Court to certify any question to the state court and relegated to a passing suggestion in a single footnote in her opening brief to the First Circuit the possibility of certification if the First Circuit doubted Petitioner's interpretation of state law. Only now, after both the District Court and the First Circuit each have independently and correctly interpreted settled Massachusetts state law against Petitioner does Petitioner seek to fault the First Circuit for not inviting the state's highest court to change settled state law.

Furthermore, Petitioner's characterization of the majority's denial of her certification suggestion as "discriminatory", in violation of *Erie*, or emblematic of a circuit split rings hollow. Petitioner offers no support for her claim that the First Circuit denied her suggestion to certify a settled state law issue to the Massachusetts highest court solely because she chose to file—and lost—in federal court. Tellingly, Petitioner ignores the relevant factors the court identified when evaluating her claim on the merits: (1) controlling Massachusetts appellate authority resolved her claim; (2) she chose to file her complaint in the District Court and suggested that the court "trailblaze" by creating an exception to settled Massachusetts law; and (3) she only raised certification after losing in the District Court. The First Circuit majority's decision to apply settled Massachusetts law and decline certification were fully within both its obligations and its vast discretion as a federal court sitting in diversity.

Petitioner raises neither a federal question nor makes a cognizable claim that the First Circuit made a procedural departure worthy of this Court's supervisory review. Cloaked in misnomers of "discrimination" and violations of *Erie*, Petitioner is solely asking this Court to correct a perceived error of discretion. Such a request is not appropriate for this Court's discretionary review. As such, this Court should follow its typical course in such cases and deny the Petition.

STATEMENT OF THE CASE

I. Factual Background

This insurance dispute arises out of the claims-made-and-reported lawyers professional liability policy that Respondent, State National Insurance Company ("State National"), issued to the Law Offices of Peter T. Clark, P.C. that was in effect from March 16, 2010 to March 16, 2011 with a retroactive date of March 1, 2002 (the "State National Policy"). Pet. App. 6a.

Peter Clark ("Clark") represented Petitioner, Joan Stormo ("Stormo"), in a failed real estate transaction with KGM in 2004 and 2005. Pet. App. 3a. The real estate transaction failed, in part, due to Clark's conduct and resulted in KGM filing separate lawsuits against Stormo ("KGM/Stormo Action") and Clark ("KGM/Clark Action"). Pet. App. 3a-4a.

On December 9, 2010, Clark reported the KGM/Clark Action to State National, which provided Clark with a defense and settled the KGM/Clark Action on Clark's

behalf under the terms of the State National Policy. Pet. App. 4a. As a result of the defense and settlement of the KMG/Clark Action, the State National Policy's $1 million Limit of Liability was eroded to $305,198.60. Pet. App. 43a.

On October 6, 2014, after State National settled the KGM/Clark Action, Stormo filed a malpractice lawsuit against Clark based on his conduct in connection with the failed real estate transaction that led to the KGM/Stormo Action and KGM/Clark Action ("Malpractice Action"). Pet. App. 43a. There is no dispute that the Malpractice Action was a claim that related to the KGM/Clark Action. Pet. App. 15a.

It is undisputed that Clark initially represented himself in the Malpractice Action and did not report the Malpractice Action to State National until December 1, 2015, fourteen (14) months after the Malpractice Action was filed. Pet. App. 43a. State National disclaimed coverage to Clark for the Malpractice Action based on, *inter alia*, his violation of the State National Policy's notice condition because Clark failed to give "prompt written notice" to State National of the Malpractice Action. Pet. App. 43a. Ultimately, Stormo obtained two monetary judgments against Clark in the Malpractice Action and obtained an assignment of Clark's rights under the State National Policy. Pet. App. 43a-44a.

II. Proceedings Below

On January 7, 2019, Stormo as assignee of Clark, filed her complaint against State National in the United States District Court for the District of Massachusetts

based on diversity jurisdiction alleging, *inter alia*, breach of contract for State National's refusal to defend and indemnify Clark in the Malpractice Action. Pet. App. 44a; RA 25-31.

At trial, the principal issue was whether State National breached the insurance contract in failing to provide Clark with a defense and indemnity in the Malpractice Action, or if Clark's 14-month delay in reporting the Malpractice Action to State National and/or Clark's knowledge, prior to the inception of the State National Policy, that Stormo would potentially sue Clark for legal malpractice, precluded any recovery under the State National Policy for Stormo's judgments. Pet. App. 44a. On February 14, 2023, the jury returned a verdict in favor of Stormo and awarded judgment against State National for its breach of contract in the amount of $1,106,138.10. Pet. App. 44a.

State National moved, pursuant to Fed. R. Civ. P. 50(b), for Judgment Notwithstanding The Verdict ("JNOV") and a dismissal of the complaint because it was undisputed at trial that Clark's 14-month delay in reporting the Malpractice Action to State National breached the "prompt written notice" requirement of the State National Policy, which foreclosed coverage for Stormo's judgments as a matter of established Massachusetts law, regardless of any prejudice to State National. Pet. App. 44a-45a. Stormo opposed State National's Motion for JNOV on the basis that, in her view, Massachusetts law required State National to demonstrate prejudice. Pet. 16; ECF 222 (district court). Stormo never asked the District Court to certify the notice-prejudice issue to the Massachusetts Supreme Judicial Court ("SJC"). RA 1-1364; ECF 222 (district court).

Applying settled Massachusetts law and the First Circuit's recent decision in *President & Fellows of Harvard Coll. v. Zurich Am. Ins. Co.*, 77 F.4th 33 (1st Cir. 2023) ("*Harvard College*"), the District Court granted State National's Motion for JNOV on the basis that Clark's notice of the Malpractice Action was untimely as a matter of law and State National did not owe coverage for the Malpractice Action. Pet. App. 41a-42a. The District Court reasoned that, when providing notice under a claims-made policy, such as the State National Policy here, evidence of prejudice is "legally irrelevant; all that matters, in this context, is the date that the claim was reported." Pet. App. 54a-55a.

Stormo appealed from the District Court's ruling to the First Circuit, asserting that the District Court had erred in granting State National's Motion for JNOV because, under Massachusetts law, the "no-prejudice rule" only applies to that part of a claims-made policy where the notice provision requires notice be given "within the policy year" or soon thereafter, and that to disclaim coverage under the "prompt" or "as soon as practicable" notice provision found in a claims-made policy's Conditions, an insurer must show prejudice resulting from the untimely notice. Brief for Appellant in No. 23-1792 (CA1), pp9-26. In her opening brief to the First Circuit, Stormo stated briefly in a footnote that the First Circuit should certify the issue to the SJC "if there were any doubt about the matter." Brief for Appellant in No. 23-1792 (CA1), p23, n13. State National argued that the District Court's entry of judgment in its favor should stand based on settled Massachusetts law and that certification to the SJC was unwarranted. Brief for Appellee in No. 23-1792 (CA1), pp24-25. Stormo filed a Reply Brief, in which Stormo did

not request or suggest certification to the SJC. Reply Brief for Appellant in No. 23-1792 (CA1).

In a majority opinion, the First Circuit affirmed the District Court's ruling. Pet. App. 3a. After a *de novo* review, the majority held that settled Massachusetts law was clear that an insurer of a claims-made policy was not required to demonstrate prejudice as a result of violations of the policy's claims notice and reporting provisions regardless of the policy language. Pet. App. 9a; 15a-17a. The majority rejected Stormo's invitation to "trailblaze" and create a novel exception to settled Massachusetts law as outside the role of federal courts sitting in diversity. Pet. App. 17a-18a. The majority also denied Stormo's passing suggestion in a footnote for certification to the SJC because Massachusetts law was settled on the issue, and Stormo had only suggested certification after losing in her chosen federal forum. Pet. App. 17a. One judge, who dissented in part, would have certified the issue to the SJC. Pet. App. 22a. Stormo filed a petition for rehearing and rehearing *en banc*, which was denied without opinion, on October 22, 2024. Pet. App. 39a.

REASONS TO DENY THE PETITION

I. Petitioner has not raised a compelling issue worthy of this Court's discretionary review.

Petitioner's disappointment that the First Circuit did not create an exception to settled Massachusetts law or exercise its discretion to follow her belated suggestion for certification to the SJC—after she lost in the federal forum she chose—does not provide a compelling reason for this Court to exercise its discretionary jurisdiction.

First, Petitioner never asked the District Court to certify the issue to the SJC. RA 1-1364; ECF 222 (district court). Second, Petitioner merely suggested certification in a footnote in her opening brief to the First Circuit if the First Circuit did not agree with her position on the merits. Brief for Appellant in No. 23-1792 (CA1), p29, n13. In *Stroup v. Willcox*, this Court denied a motion to stay a Fourth Circuit judgment pending the filing and disposition of a petition for Writ of Certiorari in this Court for failing to meet the standard for such relief. 549 U.S. 1501 (2006). In the opinion denying the relief, Chief Justice Roberts stated:

> Moreover, Applicants' request is based almost exclusively on the Court of Appeals' failure to certify to the Supreme Court of South Carolina contested questions of state property law. In their initial submission to the Court of Appeals, however, applicants requested that the court rule on the merits of the matter. They merely noted that certification 'is an option for [the] Court if it wants guidance from the South Carolina Supreme Court.'

Id. at 1501-02. Such is precisely the circumstance here. Because Petitioner never properly advocated for certification in the lower courts, her Petition should be denied.

Despite only suggesting certification, Petitioner seeks relief based on the false premise that the First Circuit denied her "request" to certify a settled state law issue to the SJC solely because of the "systemic discrimination" it wields against plaintiffs choosing to file in federal court pursuant to diversity jurisdiction.

In advancing this "discrimination" presumption, Petitioner ignores the relevant factors that the court identified when evaluating her claim on the merits: (1) controlling Massachusetts appellate authority resolved her claim; (2) she chose to file her complaint in the District Court and requested that the court "trailblaze" by creating an exception to settled Massachusetts law; and (3) she only suggested certification after losing in the District Court. Framing this case as "discrimination" against foreign plaintiffs filing in federal courts in violation of *Erie*, and a purported circuit split, is both false on the merits and a red herring. Rather, Petitioner's discontent with how a federal court exercised its discretion to apply settled Massachusetts law in the forum she chose is not a compelling issue for this Court to exercise its discretionary jurisdiction.

Petitioner's failure to provide a "direct and concise argument amplifying the reasons relied on for allowance of the writ" alone mandate denial. *See* S. Ct. R. 14(h); S. Ct. R. 10. Petitioner raises neither a federal question[1] nor makes a cognizable claim that the First Circuit made a procedural departure worthy of this Court's review.[2]

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1. *See* S. Ct. R. 10(c) ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons . . . (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.").

2. *See* S. Ct. R. 10(a) ("Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition for writ of certiorari will be granted only for compelling reasons . . . (a) a United States court of appeals has entered a decision in conflict with

Masked in misnomers of discrimination and violations of *Erie*, Petitioner is actually asking this Court to correct a perceived error in the First Circuit fulfilling its obligation to apply settled Massachusetts law while exercising its discretion to resolve Petitioner's claim on its own. Such a request is not appropriate for this Court's discretionary review.

"Error correction is . . . outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of *certiorari*." Shapiro, *et al.*, Supreme Court Practice 4.12(c)(3), p. 352 (10th 3d. 2013). Furthermore, "[a]s this Court's Rule 10 informs, '[a] petition for writ of *certiorari* is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.'" *Id.* (quoting S. Ct. R. 10).

A. This Court should deny Petitioner's request to correct perceived errors in the First Circuit's application of settled state law.

Petitioner urges this Court to correct a perceived error in the First Circuit's application of settled Massachusetts law by faulting the factors the majority weighed when exercising its discretion to deny Petitioner's belated suggestion of certification. Petitioner's claim that the First Circuit has a practice of misapplying its discretion

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the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power").

by disfavoring diversity plaintiffs in violation of *Erie* is baseless. To the contrary, the First Circuit's consideration of the factor that Petitioner opposes—whether the party requesting certification chose to litigate in federal court—promotes the objectives of *Erie* by discouraging forum shopping and ensuring the equitable administration of the laws. The First Circuit wholly fulfilled its obligation as a federal court sitting in diversity: it applied controlling Massachusetts law to resolve the dispute, rejected Petitioner's request to depart from that controlling state law, and refused Petitioner's suggestion of certification based on the merits and *Erie* principles by weighing considerations fully within its discretion. Put simply, the First Circuit did exactly what *Erie* requires. Accordingly, the Petition, which seeks to change decision-makers after both the District Court and the First Circuit each independently stated their disagreement with Petitioner's view of settled Massachusetts state law, should be denied.

When federal courts are considering claims before them by virtue of diversity jurisdiction pursuant to 28 U.S.C. § 1332, they look to the relevant state law to supply the substantive rules of decision. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938) ("*Erie*"); 28 U.S. Code § 1652; *Harvard* College, 77 F.4th at 37. The two main objectives of the *Erie* doctrine are (1) to discourage forum shopping; and (2) to avoid inequitable administration of the laws. *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). "Our system of 'cooperative judicial federalism' presumes federal and state courts alike are competent to apply federal and state law." *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) ("*Lehman Bros.*").

Under the *Erie* doctrine, where state law controls and the state's highest court has clearly articulated the law, the federal court must follow it. *See*, *e.g.*, *Comm'r v. Estate of Bosch*, 387 U.S. 456, 465 (1967); *Jones v. Secord*, 684 F.3d 1, 10-11 (1st Cir. 2012) ("*Jones*") ("*Erie* principles require us to apply state law, and there is no indication that the New Hampshire Supreme Court would discern a legally cognizable duty based on the circumstances of this case"); *Kassel v. Gannett Co.*, 875 F.2d 935, 949-50 (1st Cir. 1989) (reversing district court for instructing jury on emotional distress damages where state libel law did not allow it).

Where the highest state court has not enunciated the issue, the federal court makes "an informed prophecy" of what the state court would do in the same situation by ascertaining the rule the state court would most likely follow under the circumstances even if the federal court's independent judgment on the issue might differ. *See Aubee v. Selene Fin. LP*, 56 F. 4th 1, 4 (1st Cir. 2022). In practice, the federal court seeks guidance in analogous court decisions, persuasive adjudications by courts of sister states, learned treatises, and public policy considerations identified in state decisions law. *See id.* (citing *Blinzler v. Marriott Int'l, Inc.*, 81 F.3d 1148, 1151 (1st Cir. 1996)). This principle is well-ingrained in First Circuit jurisprudence.[3]

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3. *See*, *e.g.*, *Lawrence Gen. Hosp. v. Cont'l Cas. Co.*, 90 F. 4th 593 (1st Cir. 2024) ("*Lawrence*") ("The parties agree that Massachusetts law governs the policy, so we endeavor to predict how the Commonwealth's highest court would decide this case, regardless of whether our independent analysis would suggest a different outcome."); *Butler v. Balolia*, 736 F.3d 609, 612-13 (1st Cir. 2013) (federal court sitting in diversity should try to predict how the highest state court would likely decide the question rather than deeming an absence of an on-point opinion from the Washington Supreme Court

In *Harvard College*—a case the First Circuit decided a month before this case and which Petitioner tellingly omits from her Petition—the First Circuit reiterated its longstanding principle that it will not "blaze a new trail" in state law because federal courts are followers in diversity cases and "must apply clear rules of law as those rules have been articulated by the highest court of the relevant state." *Harvard College*, 77 F.4th at 39-40 (citing *Torres-Ronda v. Nationwide Mut. Ins. Co.*, 18 F.4th 80, 84 (1st Cir. 2021)); *see also Kassel v. Gannett Co.*, 875 F.2d 935 (1st Cir. 1989).

Following the federalism principles outlined in *Erie*, the First Circuit in *Harvard College* rejected Harvard's request to carve out an exception to established Massachusetts law regarding notice provisions in insurance policies. "Under Massachusetts law, then, an insurer is not required to show prejudice before denying coverage due to an insured's failure to comply with the notice requirement of a claims-made policy." 77 F.4th at 38-39 (citing *Chas. T. Main, Inc. v. Fireman's Fund Ins. Co.*, 551 N.E.2d 28, 29-30 (Mass. 1990) ("*Chas. T. Main*") and *Tenovsky v. All. Syndicate, Inc.*, 677 N.E.2d 1144, 1146 (Mass. 1997) ("*Tenovsky*")).[4] The *Harvard College* court opined "[i]n this instance, the [SJC] has

as dispositive); *Moores v. Greenberg*, 834 F.2d 1105 (1st Cir. 1987) (predicting how Maine's Supreme Court would rule on issue).

4. The *Harvard College* Court also explained the notice-prejudice rule for occurrence-based policies by relying on *Johnson Controls, Inc. v. Bowes*, 409 N.E.2d 185, 188 (Mass. 1980) ("*Johnson Controls*"). *See Harvard College*, 77 F.4th at 37-38 (correctly interpreting *Johnson Controls, Chas. T. Main*, and *Tenovsky* to distinguish notice-prejudice requirements for occurrence-based versus claims-based policies under Massachusetts law).

spoken directly to the critical issue." 77 F.4th at 35 (citing *Chas. T. Main*, 551 N.E.2d at 29-30; *Tenovsky*, 677 N.E.2d at 1145-46). The court further stated: "[w]hat is more, this court—on no fewer than four occasions—has recognized the Massachusetts rule." *Id.*[5] (citations below). Accordingly, the court informed Harvard that if it wanted to alter Massachusetts law, it should have filed suit in Massachusetts state court. *See Harvard College*, 77 F.4th at 39 (quoting *Jones*, 684 F.3d at 11).

Here, the First Circuit maintained this approach and upheld the twin goals of *Erie* by denying Petitioner's request to "blaze a new trail" and find an exception to settled Massachusetts law. The First Circuit instead properly applied the clear rules of Massachusetts law as those rules have been articulated by the SJC. Pet. App. 15a-16a. (citing *Chas. T. Main*, 551 N.E.2d at 29-30; *Tenovsky*, 677 N.E.2d at 1146); *see also* Pet. App. 16a ("the SJC in *Boyle* clearly implied that the insured's 'notice obligations' hinged on whether the policy is a claims-made policy or an occurrence-based policy") (citing *Boyle v. Zurich Am. Ins. Co.*, 36 N.E.3d 1229 (Mass. 2015) ("*Boyle*")).

The requirement that insurers show prejudice prior to disclaiming coverage under occurrence-based policies for untimely notice is settled Massachusetts law. *See* Mass. Gen. Laws. Ann. Ch. 175, § 112 (precludes insurer of certain types of policies from raising late notice as

5. *Gargano v. Liberty Int'l Underwriters, Inc.*, 572 F.3d 45, 49-51 (1st Cir. 2009); *DiLuglio v. New England Ins. Co.*, 959 F.2d 355, 358 (1st Cir. 1992); *Nat'l Union Fire Ins. Co. v. Talcott*, 931 F.2d 166, 167-69 (1st Cir. 1991); *J.I. Corp. v. Fed. Ins. Co.*, 920 F.2d 118, 120 (1st Cir. 1990).

a defense unless lateness prejudiced insurer); *Johnson Controls*, 409 N.E.2d at 188 (extending notice-prejudice rule to certain liability policies not covered by the statute). However, it is also settled Massachusetts law that insurers are not required to show prejudice from untimely notice of claims prior to disclaiming coverage under claims-made policies. *See Chas. T. Main*, 551 N.E.2d at 30 (distinguishing between occurrence-based policies and claims-made policies and holding prejudice for an untimely report under a claims-made policy was "not an appropriate inquiry"); *Tenovsky*, 677 N.E.2d at 1146 (holding insurer not required to show prejudice to disclaim coverage based on insured's late reporting where claims-made policy language required "prompt written notice" of claims).

Even though the State National Policy is a claims-made policy and has the same policy language as *Tenovsky*, Petitioner argued that applying *Chas. T. Main* and distinguishing *Tenovsky* would show that the prejudice requirement under Massachusetts law for untimely notice of a subsequent but related claim turns on the policy language rather than whether the policy is claims-made or occurrence-based. Pet. App. 13a-15a. The court declined Petitioner's invitation to carve out such an exception. As the majority stated:

> [W]e can find no indication that Massachusetts courts have construed *Chas. T. Main* as Stormo proposes, i.e., to treat differences in the wording of the notice requirement as dictating whether the notice-prejudice rule applies. Rather, we find in the case law a simple and consistent focus on whether the insurance policy is a 'claims

> made' or 'occurrence-based' policy, with the latter subject to the notice-prejudice rule and the former exempt.

Pet. App. 15a-16a. The majority cited to numerous Massachusetts cases supporting this determination.[6] Pet. App. 16a. Additionally, the majority noted that the recent *Harvard College* decision "demonstrates that Massachusetts case law is most easily read[7] as limiting the prejudice requirement to occurrence-based policies." Pet. App. 17a. Because the majority agreed that State National was not required to show prejudice before disclaiming coverage under a claims-made policy for a claim reported fourteen (14) months late, it affirmed the District Court's order granting JNOV in favor of State National. Pet. App. 17a-18a.

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6. *Boyle*, 36 N.E.3d at 1236 n.8 (noting that the approach to notice obligations outlined in *Johnson Controls* and its progeny apply to occurrence-based liability policies and different considerations apply to claims-made policies per *Chas T. Main*); *Meadows Constr. Co., LLC v. Westchester Fire Ins. Co.*, 180 N.E.3d 1032 (Mass. App. Ct. 2022) (unpublished table decision) (describing *Chas. T. Main* as holding that insurer not required to show prejudice for late notice in claims-made policy); *Young Men's Christian Ass'n of Greater Worcester v. Nat'l Union Fire Ins. Co. of Pittsburgh*, 843 N.E.2d 722 (Mass. App. Ct. 2006) (unpublished table decision) (citing *Chas. T. Main* for proposition that prejudice is not considered for late notice under a claims-made policy).

7. While Petitioner twists the majority's statement of "most easily read" to somehow mean the court chose convenience over reasonableness, the majority clearly found that established Massachusetts case law on the notice-prejudice issue is straightforward and not susceptible to Petitioner's attempts to misapply it to this case. Pet. 19.

The First Circuit's decision squarely furthered the principles of *Erie*. Sitting in diversity, the First Circuit applied settled Massachusetts state law to determine a state law dispute. The court declined Petitioner's invitation to "blaze a new trail" and carve out an exception to settled Massachusetts law where Massachusetts courts had never ventured.[8] By reviewing the District Court's ruling *de novo* and applying established Massachusetts law set by Massachusetts appellate courts, the majority's decision ensures equitable administration of the laws and discourages forum shopping. Therefore, Petitioner's claims that the First Circuit ran afoul of *Erie*, deferred to the District Court, or took an approach "eerily similar to 'federal common law' doctrine" are baffling.[9]

The majority also acknowledged the Petitioner's suggestion—which Petitioner first made in a brief footnote in her Opening Appellate Brief and never raised before the District Court—that "if there is any doubt about the

8. While the majority merely applied settled Massachusetts law in this matter, it is fully within the purview of federal courts sitting in diversity to predict how the highest state court would rule on an undecided issue of state law and to render a ruling accordingly, without certification. *See*, *e.g.*, *Lawrence*, 90 F. 4th 593.

9. State National objects to Petitioner's characterization of the majority's rationale or opinion as adverse to or in conflict with *Erie* and specifically objects to the notion that the majority forsook substantive state law in favor of creating its own "federal common law," or that the majority deferred to the District Court's ruling in violation of *Salve Regina College v. Russell*, 499 U.S. 225 (1991). Pet. 18-22. Rather, the majority employed a *de novo* review of the issues and expressed no deference for the District Court's ruling. Pet. App. 2a-21a.

matter"[10] then the court should certify the issue of her proposed exception to established Massachusetts law to the SJC. Pet. App. 17a. After providing a thoughtful and detailed analysis supporting its decision to apply settled Massachusetts law and affirm the District Court, the majority denied Petitioner's certification suggestion. Pet. App. 17a-18a.[11]

In rejecting Petitioner's passing suggestion of certification, the majority recognized that it was Petitioner "who chose to bring this action in federal court, asking the district court to find a prejudice requirement where the SJC has not." Pet. App. 17a. The majority further opined:

> '[A] plaintiff who made a deliberate choice to sue in federal court rather than in a Massachusetts state court is not in a position to ask us to blaze a new trail that the Massachusetts courts have not invited' . . . Nor is such a plaintiff well positioned to seek a change in decisionmakers after striking out with her original pick.

Pet. App. 17a.

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10. Brief for Appellant in No. 23-1792 (CA1), p23, n13. Petitioner also suggested certification to the SJC in her Petition for Rehearing and Rehearing En Banc after losing again on appeal, which the First Circuit denied without opinion. Pet. App. 39a.

11. Petitioner relies heavily on the dissent's preference for the issue to be certified to the SJC, but nowhere in his opinion does Chief Judge Barron remotely suggest that the majority's decision was an affront to *Erie*, let alone any abuse of discretion. Pet. App. 22a-38a.

Implicit in the majority's denial of Petitioner's suggestion of certification is the furtherance of the twin goals of *Erie*. The majority (1) prevents forum shopping by not indulging Petitioner's request for a "do-over" in state court after striking out in the federal forum she chose; and (2) ensures equitable administration of the laws by applying settled Massachusetts law in lieu of creating new law. Moreover, Petitioner admits in her Petition that she purposefully initiated her complaint in the District Court rather than state court "expecting to benefit from the federal judiciary's greater resources, less crowded dockets, and judicial acumen." Pet. 18. Having made this election, Petitioner cannot now be heard to fault the judicial acumen of the federal judiciary, after it decided her case against her, by suggesting the First Circuit should have transferred its decision-making authority to the state court. Based on the foregoing and the vast discretion federal courts exert regarding certification to state courts, Petitioner's claim of "discrimination" is both meritless and perplexing. Therefore, the Petition should be denied.

Even assuming arguendo that the state law issue was unsettled, federal courts sitting in diversity exercise vast discretion to adjudicate the issue or to certify it to the highest state court. This Court has repeatedly observed that "[c]ertification is by no means 'obligatory' merely because state law is unsettled; the choice instead rests 'in the sound discretion of the federal court.'" *Mckesson v. Doe*, 592 U.S. 1, 5 (2020) ("*Mckesson*") (quoting *Lehman Bros.* 416 U.S. at 390-91). In practice, federal courts "rarely" use state certification procedures as they can prolong the dispute and increase the parties' expenses. *See Mckesson*, 592 U.S. at 5 (citing *Lehman Bros.*, 416 U.S.

at 394-95 (Rehnquist, J., concurring)). In fact, this Court has only ordered certification in "exceptional instances," which this ordinary insurance dispute does not meet. *See, e.g.*, *Mckesson*[12] and *Lehman Bros.*[13]

In his concurring opinion in *Lehman Bros.*, Justice Rehnquist emphasized the scope of discretion that federal judges have in determining whether to use state certification procedures. 416 U.S. at 392 (Rehnquist, J., concurring). Justice Rehnquist opined: "I assume it would be unthinkable to any of the Members of this Court 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 (Rehnquist, J., concurring). Justice Rehnquist observed that federal

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12. Justice Thomas dissented without opinion. *Mckesson*, 592 U.S. at 6.

13. In *Mckesson*, this Court found certification to the Louisiana Supreme Court of two state law issues to be proper before this Court could evaluate the issue arising under the First Amendment, U.S. Constitution where the Fifth Circuit had split on whether to certify the issues and the outcome of the state law issues would determine whether a constitutional issue even existed. 592 U.S. at 5-6. In *Lehman Bros.*, this Court determined that the Second Circuit should have certified the Florida state law issue to the Florida Supreme Court because of the issue's novelty, the uncertainty of Florida law, and the lack of exposure to Florida law by the federal judges sitting in New York federal court. 416 U.S. at 391. None of these unique circumstances exist here. Federal courts in Massachusetts have correctly applied settled Massachusetts law, and this matter presents no federal or constitutional question to this Court. *See also Minn. Voters All. v. Mansky*, 585 U.S. 1, 22 n.7 (declining state's request for certification despite dissent's agreement because the request "comes very late in the day" and state offered no reason to believe that certification would obviate need to address constitutional question).

courts of appeals and district courts regularly decide cases where federal jurisdiction is based on diversity of citizenship. *See id.* at 393. He noted that this Court has held that a federal court may not remit a diversity plaintiff to state courts due to the difficulty in determining local law. *See id.* (citing *Meredith v. Winter Haven*, 320 U.S. 228 (1943)). Justice Rehnquist opined:

> If a district court or court of appeals believes that it can resolve an issue of state law with available research materials already at hand, and makes the effort to do so, its determination should not be disturbed simply because the certification procedure existed but was not used.

Lehman Bros., 416 U.S. at 395 (Rehnquist, J., concurring). While Justice Rehnquist agreed that state certification procedures can be desirable ways for the federal courts to ascertain an undecided point of state law, he also reiterated that certification involved a federal court's discretion in determining whether to decide the state law issue rather than a concern of impinging on federalism principles.[14] Justice Rehnquist further noted that a party's delay in requesting certification supported the rationale of not disturbing the court of appeals' decision denying certification. *See id.*

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14. "[B]ut in a purely diversity case such as this one, the use of such a procedure is more a question of the considerable discretion of the federal court in going about the decisionmaking process than it is a question of a choice trenching upon the fundamentals of our federal-state jurisprudence." *Id.* at 394 (Rehnquist, J., concurring).

Certification is not required even for difficult and uncertain issues of state law. When considering a difficult state law issue on which the highest state court has not directly spoken, it is axiomatic that federal courts, including the First Circuit, sitting in diversity are free to make their own best guess as to the state law or to certify the issue to the state's highest court. *See Liberty Mut. Ins. Co. v. Metro. Life Ins. Co.*, 260 F.3d 54, 65 (1st Cir. 2001); *Vanhaaren v. State Farm Mut. Auto. Ins. Co.*, 989 F.2d 1, 3 (1st Cir. 1993) citing *Porter v. Nutter*, 913 F.2d 37, 41 n.4 (1st Cir. 1990) (*Bi-Rite Enters., Inc. v. Bruce Miner Co.*, 757 F.2d 440, 443 n.3 (1st Cir. 1985). Appellate courts review certification decisions under an abuse of discretion standard or *sua sponte*. *See Fischer v. Bar Harbor Banking & Trust Co.*, 857 F.2d 4, 7 (1st Cir. 1988), *cert. denied*, 489 U.S. 1018 (1989) ("*Fischer*"); *Trull v. Volkswagen of Am., Inc.*, 187 F.3d 88, 92 (1st Cir. 1999) ("Although we do not criticize the district court for abuse of discretion in its decision declining to certify, we choose to exercise our own discretion and think it preferable to allow the state's highest court to choose its own path"); *Easthampton Sav. Bank v. City of Springfield*, 736 F.3d 46 50n.4 (1st Cir. 2013) (referencing the court's *sua sponte* authority to certify questions of law).

In *Tarr v. Manchester Ins. Corp.*, the court stated that "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." 544 F.2d 14, 15 (1st Cir. 1976) ("*Tarr*"). The *Tarr* court further proclaimed that "the rule of *Erie v. Tompkins*[15] calls on us to apply state law, not, if

15. 304 U.S. 64 (1938).

we can be persuaded to doubt its soundness, to participate in an effort to change it." *Id.* (internal citations omitted). When considering whether certification is appropriate, the First Circuit follows the maxim: "'because of our own obligations to exercise the jurisdiction that we have,' certification is not the right course of action where, despite the absence of controlling precedent, state law is sufficiently clear for us to predict how a state's highest court would decide the question." *Roberge v. Travelers Prop. Cas. Co. of Am.*, 112 F.4th 45, 50-51 (1st Cir. 2024) ("*Roberge*")[16] (quoting *R.I. Truck Ct., LLC v. Daimler Trucks N. Am., LLC*, 92 F.4th 330, 348 (1st Cir. 2024). The Petition, which seeks review of the First Circuit's rejection of Petitioner's "request" for an opportunity to persuade the state court to depart from settled Massachusetts law, thus actually seeks to fault the First Circuit for *following Erie*, not for disregarding it.

The First Circuit is transparent that two of the factors it considers are: (1) whether the party requesting certification initiated jurisdiction in the federal court; and (2) whether the request for certification is first being made after the requesting party lost. *See Fischer*, 857

16. Petitioner's claim that the First Circuit certified issues to the Rhode Island Supreme Court in *Roberge* because the plaintiff filed in state court is baseless. Pet. 17. Nowhere in the opinion does the court indicate that either party requested certification or that the filing party was a factor. *See Roberge*, 112 F.4th at 48 ("Now on appeal to us, both parties read Rhode Island insurance law very differently and argue it undeniably requires their preferred outcome. For our part, we don't view the issues or the law nearly as cut-and-dry as the parties do. In fact, as we see it, today's appeal would require us to answer complex questions of Rhode Island insurance law regarding UM/UIM coverage—questions upon which the Rhode Island Supreme Court has not had a chance to opine.").

F.2d at 8 (denying certification where issue to be certified not properly before court and requesting plaintiff chose federal forum) (quoting *Cantwell v. Univ. of Mass.*, 551 F.2d 879, 880 (1st Cir. 1977) ("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."). Despite Petitioner's framing of these factors as a bright-line rule applied to "discriminate" against the federal-filing losing party in violation of *Erie*, weighing these factors actually accomplishes the opposite by avoiding forum shopping and duplicative judicial effort. Moreover, the First Circuit's philosophy of dodging efforts to create new state law respects *Erie's* federalism and the equitable administration of the laws. Such an exercise in discretion does not violate *Erie*, but thoroughly advances its objectives.

It is reasonable for a federal court sitting in diversity to consider whether the party requesting certification is the one that purposefully availed itself of federal jurisdiction either by original filing or removal. Since an aim of *Erie* is to avoid forum shopping, as the petitioner repeatedly posits,[17] the First Circuit accomplishes this goal by rebuffing a losing party's request for certification, *i.e.*, to shop for a new forum in state court after striking out in the party's chosen federal court. Additionally, the First Circuit's disapproval of certification in such instances furthers the second *Erie* goal of equitable administration of the laws because the First Circuit applies the state law as it currently stands, as it did here. In short, the First Circuit appropriately stays in its lane by respecting the

17. Pet. 14, 16-17.

comity of the courts and adhering to *Erie* principles. This exercise of discretion is neither "discriminatory" nor any departure from the usual course of judicial proceedings. By sharp contrast, it *is* the usual course of judicial proceedings.

Moreover, as Petitioner concedes,[18] there are instances, *inter alia*, where the First Circuit has granted certification requests to a losing filing party, denied certification requests to a non-filing party, or decided to certify an issue *sua sponte*. A review of First Circuit cases weighing certification reveals a variety of factors and outcomes.[19] Why? Because whether the First Circuit certifies an issue to state court is a matter of *discretion* based on the consideration of multiple factors and a *de novo* review of the lower court rulings. Petitioner therefore shows no practice of "systemic discrimination" against the filing parties. In fact, none of the First Circuit cases Petitioner cites in her Petition support her proposition that the First Circuit "discriminates" against filing parties:

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18. Pet. 14-15.

19. *See, e.g., Boston Car. Co. v. Acura Auto. Div., American Honda Motor Co.*, 971 F.2d 811, 813-14, 817 n.3 (1st Cir. 1992) (denying Boston Car's request for certification after it lost in the district court even though it had filed in state court and Acura had removed the case to the district court based on diversity jurisdiction because not only should the practice of certification after an adverse judgment be discouraged, but also Boston Car advanced no compelling reason for certification, where there was no split in authority, the statute at issue provided sufficient guidance for the court, and the question was not particularly close); *Castagnaro v. Bank of N.Y. Mellon*, 772 F.3d 734,736 (1st Cir. 2014) ("Though we are generally reluctant to [certify issue of state law] when a party requests certification for the first time on appeal . . . that delay alone does not tie our hands.") (internal citations removed).

- ***Butler v. Balolia*, 736 F.3d 609 (1st Cir. 2013)**[20]
  Issue of certification not before the court.

- ***Cantwell v. Univ. of Mass.*, 551 F.2d 879 (1st Cir. 1977)**[21]
  First Circuit declined the plaintiff's request for certification to the SJC because the plaintiff was seeking a change to the law, which was not an appropriate basis for certification. The court also noted that it does not look favorably on a losing party trying to obtain a "do-over" with the state court after losing in the chosen federal court as it duplicates judicial effort.

- ***Ken's Foods, Inc. v. Steadfast Ins. Co.*, 36 F.4th 37 (1st Cir. 2022)**[22]
  First Circuit granted a federal-filing losing party's request for certification after weighing the following factors: (1) there were no SJC or appellate decisions on point; (2) other states had ruled both ways on the issue; (3) the treatises provided conflicting insight; and (4) there were policy rationales to support either position. *See id.* at 41-44. Even though the losing party's choice to file in federal court raising purely state law claims and to request certification only after losing at the summary judgment stage gave the court "significant pause," it decided the aforementioned factors warranted certification. *See id.* at 44-45.

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20. Pet. 4.

21. Pet. 14-15.

22. Pet. 14-15.

- ***Tarr v. Manchester* 544 F.2d 14 (1st Cir. 1976)**[23]
  First Circuit denied the party's request to overrule the New Hampshire Supreme Court or recertify an issue where the requesting party had failed to follow state court procedure for the issue already certified by the district court.

- ***Ins. Co. of Pa. v. Great Northern Ins. Co.*, 787 F.3d 632 (1st Cir. 2015)**[24]
  First Circuit certified an unsettled issue of insurance law to the SJC despite neither party requesting certification.

- ***Roberge v. Travelers Prop. Cas. Co. of Am.*, 112 F.4th 45 (1st Cir. 2024)**[25]
  First Circuit certified novel issue of UIM/UM law to the Rhode Island Supreme Court without noting if either party requested certification.

- ***Zurich Am. Ins. Co. v. Med. Props. Trust, Inc.*, 88 F.4th 1029 (1st Cir. 2023)**[26]
  First Circuit certified a novel issue of Massachusetts insurance law to the SJC because there was no existing SJC case law pointing to a clear answer and deciding the answer required policy judgments. The court does not discuss whether either party requested certification.

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23. Pet. 16.

24. Pet. 17.

25. Pet. 17.

26. Pet. 19.

These examples demonstrate that the First Circuit properly exercises its discretion and weighs various factors when determining whether to certify an issue of state law to the highest state court and belie Petitioner's conjecture to the contrary. Such practice is precisely what the First Circuit did in this case. Even though the First Circuit considered that Petitioner only suggested certification after she lost in the district court she chose—and then only in a footnote in her Opening Appellate Brief no less—the court ultimately declined to certify any question because the SJC had already ruled on the issue, and Petitioner was asking the court for an opportunity to persuade the SJC to depart from settled law. Pet. App. 17a-18a.

B. This case is not the proper vehicle for Petitioner's claim of "systemic discrimination."

Petitioner's assertion that the First Circuit solely denied her request for certification because she filed in federal court is wholly without support and illustrates why this case is not the proper vehicle for her claim of "systemic discrimination."

Not only does Petitioner completely disregard the majority's nearly 4,000-word *de novo* analysis of the controlling Massachusetts law preceding its certification discussion, but Petitioner also completely misrepresents the sentiments expressed by the dissent. In no way does the dissent "demonstrate[] that the true reason the majority refused certification was because petitioner filed this claim in federal court." Pet. 26. It is clear from the majority and dissenting opinions that the panel disagreed on the interpretation of the state law, and that the

dissent would have granted certification.[27]However, the dissent never implies that the majority's decision to deny certification hinged on Petitioner filing in federal court, as Petitioner erroneously speculates. Pet. App. 22a-38a.

The dissent also does not remotely suggest that the majority abused any discretion, acted in a "discriminatory" manner, deferred to the District Court, or affronted *Erie*. The panel's divergence in the outcome is a routine and integral aspect of appellate jurisprudence. It does not raise a federal question or show a departure so far from accepted judicial proceedings meriting this Court's supervision. Rather, Petitioner is blatantly appealing to this Court to correct what she perceives as the First Circuit's error in exercising its vast discretion to decide on its own how settled Massachusetts law applies to this case. Such a request is not proper for this Court's discretionary review. Because there is no compelling reason for this court to exercise jurisdiction, the Petition should be denied.

C. There is no circuit split and Petitioner overstates the degree and practical significance of any difference among the circuits' approaches to exercising their discretion.

Petitioner's attempt to create an illusory "circuit split" because the circuits may weigh factors differently when exercising their discretionary power to certify an issue

27. The majority viewed petitioner's interpretation of Massachusetts law as an attempt to trailblaze already established law whereas the dissent viewed petitioner's interpretation of Massachusetts law as unchartered. Pet. App. 17a-18a; Pet. App. 37a-38a.

of state law is unavailing. Petitioner has not shown, and cannot show, that the circuit courts are reaching different results on the same legal issue. Rather, each of the courts, in the exercise of its discretion, is merely weighing various relevant factors in individual and different cases to decide whether to certify or not certify an issue of state law.[28] Federal courts routinely exercise discretion in many other respects in civil cases, *i.e.*, managing court calendars, setting pretrial deadlines pursuant to Fed. R. Civ. P. 16, or in admitting and excluding evidence at trial, all of which can affect the outcome of a civil case in federal court. None of those similar exercises of discretion runs afoul of the objectives of *Erie*. Accordingly, the Petition should be denied.

D. No other factors warrant *Certiorari*.

As discussed above, none of the "compelling reasons" warranting review on a writ of *certiorari*, S. Ct. R. 10, are present here. There is no split in authority among the federal courts of appeal on the same important matter. The First Circuit has not "so far departed from the accepted and usual course of judicial proceedings" such as to call for an exercise of this Court's supervisory power. S. Ct. Rule 10(a). No state court of last resort has decided an important federal question that conflicts with the decision of the First Circuit. S. Ct. Rule 10(b). The First Circuit

28. Petitioner's attempt to find fault in the majority's application of settled Massachusetts law based on how the Colorado Supreme Court answered a certified issue of novel Colorado insurance law is unconvincing where Colorado and Massachusetts are separate states, the Tenth Circuit found certification warranted because the Colorado state law issue was novel, and the plaintiff had originally filed in state court. Pet. 24-25.

has not decided an important federal question in a way that conflicts with relevant decisions of this Court. S. Ct. Rule 10(c). Petitioner consequently fails to identify any "compelling reason" to warrant granting *certiorari* in this matter.

CONCLUSION

For the foregoing reasons, Petitioner's Petition for Writ of *Certiorari* should be denied.

Respectfully submitted,

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