No. 24-1020

In the Supreme Court of the United States

UBER TECHNOLOGIES, INC. AND RASIER, LLC
PETITIONERS

v.

AMIE DRAMMEH, ET AL.

UBER TECHNOLOGIES, INC., ET AL., PETITIONERS

v.

JANE DOE

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

REPLY BRIEF FOR PETITIONERS

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RULE 29.6 STATEMENT

The corporate-disclosure statement in the petition for a writ of certiorari remains accurate.

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Try as respondents might to change the subject, the petition raises a question of fundamental importance: whether federal courts under *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), can predict evolutions in state law. That question has long divided the courts of appeals and prompted calls for clarity from the bench and the academy. The Ninth Circuit's answer to that question is wrong. And that misunderstanding produced two clearly erroneous decisions that expanded state tort law in extravagant, novel, and policy-laden ways.

Petitioners offer a simple rule grounded in the constitutional limitations on federal-court lawmaking: Because "a federal court's job is to apply the law, not what might later *become* the law," it may not make an *Erie* guess about "what the state supreme court will do next"—no more than it "can guess, in a statutory case, what *Congress* will do next." Stephen E. Sachs, *Life After* Erie 8 (2023), tinyurl.com/mr4x8eue. While the D.C., First, Fourth, and Fifth Circuits follow that rule, the Ninth Circuit joins the Second, Third, Seventh, Eighth, Tenth, and Eleventh Circuits in predicting changes in state law.

Respondents see such predictions as inherent in the enterprise of ascertaining state law. Drammeh Opp. 12; Doe Opp. 7. But their fatalism is unwarranted. *Erie* established that "law * * * does not exist without some definite authority behind it." 304 U.S. at 79 (citation omitted). So when federal courts look to state law for "rules of decision" in a tort case, 28 U.S.C. § 1652, they must identify some positive-law basis for finding a duty of care beyond a mere prediction that some basis for such a duty might exist in the future. This Court did not shut the front door to *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), just to have the same unconstitutional assumption of power sneak through the back door in the form of an *Erie* guess.

The decisions below are particularly egregious examples where the court of appeals embraced predictive changes in state law that the state supreme courts declined to recognize. Washington law has an explicit and discrete list of special relationships—rideshare companies and their users are not among them. And California law is settled that businesses generally have no duty to prevent third-party criminals from taking advantage of their operations. Because

the cases expose the Ninth Circuit's outlier approach, this Court should take this opportunity to provide much-needed guidance on the *Erie* framework.

A. The Conflict Over Predicting Changes In State Law Is Real And Entrenched

Respondents try to downplay an intractable and frequently recurring split as mere semantic disagreement. They insist that courts of appeals often describe themselves as "'predict[ing]' or 'guess[ing]' how the state's highest court would resolve the state law issue before it." Drammeh Opp. 10; accord Doe Opp. 8. But respondents miss the point: There is nothing wrong with predicting (*i.e.*, ascertaining) what state law *currently is*. The question here is whether *Erie* allows federal courts sitting in diversity to "predict *changes* in state law." Pet. i (emphasis added). The Ninth Circuit, like some but unlike others, believes itself free to depart from the rules of existing state law.

1. Respondents do not dispute that the D.C., First, Fourth, and Fifth Circuits all refuse to change existing state law. Pet. 16-19. Those circuits avoid "alter[ing] or expand[ing] the scope of [state] tort law" when ascertaining current state rules of decision. *K&D LLC* v. *Trump Old Post Office LLC*, 951 F.3d 503, 509 (D.C. Cir. 2020) (citation omitted). They have made clear that they have "no basis for even considering the pros and cons of innovative [state-law] theories" and must apply state law as it is, "not as it might come to be." *Dayton* v. *Peck, Stow & Wilcox Co.*, 739 F.2d 690, 694 (1st Cir. 1984). Even when those circuits have described themselves as predicting what the state supreme court would say about a question, they understand that their "task is 'to predict state law'" as it currently stands, "'*not to create or modify it*.'" *Kafi, Inc.* v. *Wells Fargo Bank, N.A.*, 131 F.4th

271, 281 (5th Cir. 2025) (emphasis added; citation omitted); see, *e.g.*, *McKiver* v. *Murphy-Brown, LLC*, 980 F.3d 937, 964 (4th Cir. 2020) (asking whether State "*has* embraced" rule of decision (emphasis added)).

Drammeh fails to uncover a single decision where the First, Fourth, Fifth, and D.C. Circuits changed state law. In *Mu* v. *Omni Hotels Management Corp.*, 882 F.3d 1 (1st Cir. 2018), for example, the hotel company "conceded" its special relationship with an invitee that could support a duty to prevent third-party criminal wrongdoing on its property and raised only a fact-intensive foreseeability challenge. *Id.* at 7-8. And in *Novak* v. *Capital Management & Development Corp.*, 452 F.3d 902 (D.C. Cir. 2006), the D.C. Circuit merely applied D.C. law in holding that a night club had a duty to prevent third parties' criminal violence against its customers. *Id.* at 913. Both decisions involved a classic and well-recognized special relationship (businesses and invitees). As a result, those decisions only sharpen the contrast with the decisions below, which imposed never-before-seen duties to protect against third-party criminal wrongdoing in wholly new contexts. See p. 10, *infra*.

2. Respondents also cannot rehabilitate the decisions of the Second, Third, Seventh, Eighth, Tenth, and Eleventh Circuits, all of which interpret *Erie* to allow federal courts to get ahead of state courts with changes to state law. Pet. 19-21. Drammeh does not even try. And Doe's attempts are unavailing.

Doe's spin (Opp. 10) on *McKenna* v. *Ortho Pharmaceutical Corp.*, 622 F.2d 657 (3d Cir. 1980), does not mask that the Third Circuit unapologetically expanded state law on the theory that federal courts should "not mechanically follow [state supreme court]

precedent and blindly apply principles of stare decisis" where they believe that a "state court would adjust its common law to meet changing conditions." *Id.* at 666 (citation omitted). Such an elastic view of state law cannot be squared with circuits that reject rules of decision that have "not been approved by the state whose law is at issue." *Rhodes* v. *E.I. du Pont de Nemours & Co.*, 636 F.3d 88, 96 (4th Cir. 2011).

Doe's treatment (Opp. 9) of *Hollander* v. *Brown*, 457 F.3d 688 (7th Cir. 2006), confirms the genuine disagreement about the authority of federal courts to predict changes in state law. There, the Seventh Circuit acknowledged that courts generally cannot "anticipate changes to state law" but created an exception when the federal court sees "concrete evidence that the state court would adopt that position today." *Id.* at 692. The Seventh Circuit thus is willing to change state law under the right circumstances. That willingness (shared by the Ninth Circuit) conflicts with decisions of the First Circuit, for example, which rejects any "basis *for even considering*" such expansions. *Dayton*, 739 F.2d at 694 (emphasis added).

Doe also touts (Opp. 8-9) *Amparan* v. *Lake Powell Car Rental Cos.*, 882 F.3d 943 (10th Cir. 2018). But while the Tenth Circuit did say there that "it is not a federal court's place to 'expand * * * state law beyond the bounds set by the [highest court of the state],'" it also acknowledged that a court may "'*expand* state law,'" so long as it has "'clear guidance from [the state's] highest court.'" *Id.* at 948 (emphasis added; citation omitted). The Tenth Circuit's willingness to expand state law—even if it sets a high bar—directly conflicts with other circuits' commitment to "apply[ing] the law of the forum as [they] infer it presently to be, not as it might come to be." *Tidler* v. *Eli*

Lilly & Co., 851 F.2d 418, 424 (D.C. Cir. 1988) (citation omitted).

3. The Ninth Circuit self-consciously rejects a "posture of restraint" when determining novel state-law questions. *Torres* v. *Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1238 n.1 (9th Cir. 1989). Respondents argue that the Ninth Circuit has also expressed "hesitat[ion]" to extend the law prematurely. Drammeh Opp. 13; Doe Opp. 11 n.5. But the willingness to expand state law, however hesitantly, proves that the Ninth Circuit takes a different approach to ascertaining state law under *Erie*. Whatever lip service the Ninth Circuit has paid to respecting state law as it exists, its published decisions reflect a longstanding proclivity to change state law while chalking it up to an *Erie* "guess." *E.g.*, *Pacheco* v. *United States*, 220 F.3d 1126, 1131 (9th Cir. 2000); *Paul* v. *Watchtower Bible & Tract Society of New York*, 819 F.2d 875, 879 (9th Cir. 1987). And the Ninth Circuit in truth hardly "hesitates" at all before recognizing and applying novel state-law rules, as the decisions below highlight. See p. 10, *infra*.

4. Respondents twist scholarly commentary to argue that every circuit predicts changes in state law. Drammeh Opp. 13-16; Doe Opp. 7 & n.3. But respondents again conflate predicting the present contours of state law with predicting *changes* or *expansions* in state law. See p. 3, *supra*. Academics across the spectrum have recognized that the courts of appeals have taken varying approaches to predicting changes in state law. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism after* Erie, 145 U. Pa. L. Rev. 1459, 1461-1464 (1997) (Clark); Michael C. Dorf, *Prediction and the*

Rule of Law, 42 UCLA L. Rev. 651, 701-705 (1995) (Dorf). This conflict will not go away on its own.

B. The Ninth Circuit's Approach Conflicts With *Erie*

Respondents do not dispute that the court of appeals violated the Rules of Decision Act and the Constitution if its decisions rest on predictive changes to state law. Cf. Drammeh Opp. 17; Doe Opp. 14-15. Because *Erie* establishes that only state courts have authority to expand state law by judicial decision, this Court should grant review and reverse.

The Rules of Decision Act requires the application of state law as it exists today—not the prediction of how it may evolve tomorrow. This Court made clear that federal courts are "not free to engraft onto those state rules exceptions or modifications which may commend themselves to the federal court, but which have not commended themselves to the State in which the federal court sits." *Day & Zimmermann, Inc.* v. *Challoner*, 423 U.S. 3, 4 (1975) (per curiam).

The Ninth Circuit's approach to predicting changes in state law also conflicts with the constitutional holding in *Erie*. There, this Court held that "no clause in the Constitution" empowers federal courts to "declare substantive rules of common law applicable in a State." 304 U.S. at 78. Federal courts therefore may not gaze into a crystal ball and guess what a state supreme court might do "in some future litigation." *Hicks* v. *Feiock*, 485 U.S. 624, 630 n.3 (1988) (citation omitted). Respondents never face up to federal courts' lack of power to supply rules of decision that have not yet gained recognition in state court. Pet. 25-27.

Nor can respondents' glancing treatment of this Court's post-*Erie* decisions sustain the Ninth Circuit's

approach. Both stress (Drammeh Opp. 16; Doe Opp. 6) that federal courts have a duty to decide state-law issues even when "the highest court of the state had not answered them, the answers were difficult, and the character of the answers which the highest state courts might ultimately give remained uncertain." *Meredith* v. *Winter Haven*, 320 U.S. 228, 237 (1943). But that response ducks the question in this case.

Petitioners agree that, once the state supreme courts declined certification, the court of appeals had to resolve the questions itself. But both panels violated *Erie* by treating the certification declinations as open invitations to announce new tort duties that the courts of the respective States had never recognized (and, in California, had affirmatively rejected) among their existing rules of decision. Pet. 26-27; Dorf 703-705. Petitioners' position ensures parity in the sense that federal courts must apply the same rules of decision that state courts presently do, even if an asymmetry exists in the sense that state courts (but not federal courts) *also* can tap into a reservoir of lawmaking authority. Pet. 28-29; cf. Doe Opp. 12.

Doe alone attempts (Opp. 15-16) to locate support for the Ninth Circuit's approach in various soundbites from this Court's decisions. In *West* v. *American Telephone & Telegraph Co.*, 311 U.S. 223 (1940), this Court cautioned that federal courts should follow decisions of state intermediate appellate courts unless they are persuaded "that the highest court of the state would decide otherwise." *Id.* at 237. And in *King* v. *Order of United Commercial Travelers of America*, 333 U.S. 153 (1948), the Court held that nonprecedential state trial-court decisions did not bind a court of appeals in "mak[ing] its own determination of what the

Supreme Court of South Carolina would probably rule in a similar case." *Id.* at 161.

Doe fundamentally misunderstands the constitutional limitation that governs these cases. *Erie* did not ban predictive language in judicial opinions, so long as the federal court is trying to ascertain "rules of decision that have already been adopted by appropriate agents of the state." Clark 1497; see, *e.g.*, *Bernhardt* v. *Polygraphic Co. of America*, 350 U.S. 198, 204-205 (1956). Doe's word-games approach to *Erie* ignores that "[t]he Constitution deals with substance, not shadows." *Cummings* v. *Missouri*, 71 U.S. (4 Wall.) 277, 325 (1867).

Respondents' confusion does show, however, that language in decisions like *Meredith* and *West* may have "inadvertently sowed the seeds of the predictive approach." Clark 1496. To the extent that such stray language has misled some courts of appeals, this Court is in the best position to correct that misimpression. Review is warranted to ensure proper respect for *Erie*'s constitutional rule that federal courts cannot create their own rules of decision in diversity cases and to remedy the "judicial federalism concerns" created by an overly aggressive predictive approach. *Michaels* v. *New Jersey*, 150 F.3d 257, 259 (3d Cir. 1998) (Alito, J.) (quoting Clark 1564).

Some courts of appeals have prolonged "an unconstitutional assumption of powers by courts of the United States which no lapse of time or respectable array of opinion should make [this Court] hesitate to correct." *Erie*, 304 U.S. at 79 (citation omitted). The predict-changes-to-state-law approach violates the Constitution—and this Court should say so.

C. These Cases Together Form An Ideal Vehicle

1. Respondents argue that these cases do not implicate the question presented because the court of appeals faithfully applied "existing state law" in divining duties to prevent third-party crimes against rideshare users. Doe Opp. 13-14; Drammeh Opp. 19. That blinks reality. The *Drammeh* panel candidly "recognize[d] a new special relationship" between rideshare companies and drivers, thereby "extending the exception" to the well-established rule that defendants are not liable for third-party wrongdoing. Pet. App. 3a, 21a-22a. The *Doe* panel similarly recognized a new duty by modifying the settled default "rule that generally one owes no duty to control the conduct of another." *Id.* at 65a (Graber, J., dissenting) (quoting *Kuciemba* v. *Victory Woodworks, Inc.*, 14 Cal. 5th 993, 1017 (2023)); see *id.* at 53a-54a (majority opinion).

Because each decision rests on innovations to existing state law, both cases are stark examples of federal courts "predict[ing] changes in state law." Pet. i. A single petition was a superior vehicle to challenge the Ninth Circuit's doubled-down departure from the proper *Erie* framework and demonstrates that petitioners do not seek error correction of any state-law issues. Cf. Drammeh Opp. 19. Although respondents fret that this Court would supposedly become enmeshed in "the parameters of state negligence law" (Doe Opp. 21), respondents even now have not identified any existing decision in Washington or California that has recognized a novel duty to prevent third-party crimes against rideshare users. The Ninth Circuit's decisions here have no plausible grounding in existing state tort precedent; they can be defended

only if the federal court was free to predict a new rule of decision under state law.

2. Respondents cannot obscure the importance of the question presented. They do not deny that, more and more, federal courts have predicted the future course of state law, "undermin[ing] litigants' expectations, destabiliz[ing] the uniform application of law," and encroaching on "matters reserved for state courts." WLF Br. 3; see Pet. 29-32. They maintain, however, that the certification process "obviates" any such concerns. Drammeh Opp. 14.

As respondents' own authority acknowledges, certification is no panacea: It "fails * * * if no one asks for it, if the federal court deems it unnecessary, or the state court declines the proffered invitation to elucidate." Geri J. Yonover, *A Kinder, Gentler* Erie*: Reining in the Use of Certification*, 47 Ark. L. Rev. 305, 318 (1994); see WLF Br. 22. These cases prove the point. The Ninth Circuit certified questions in both cases and, when the state supreme courts declined to answer, proceeded to "fashion a new expansive tort liability" that neither State had ever adopted. Pet. App. 9a (Bumatay, J., dissenting); see *id.* at 65a-66a (Graber, J., dissenting).

If a federal court could usurp state lawmaking authority whenever a state court declined to exercise those powers itself, then there would be *no* effective limit to federal power. *Erie* rejected *Swift*'s usurpation of state sovereignty after "nearly a century." 304 U.S. at 77. This Court certainly did not license a new "adverse-possession theory" of legislating from the federal bench. Cf. *NLRB* v. *Noel Canning*, 573 U.S. 513, 570 (2014) (Scalia, J., concurring in the judgment).

3. Respondents urge this Court to look the other way because the panels did not publish their opinions. *E.g.*, Drammeh Opp. 8. But the panels' decisions not to publish only confirms the Ninth Circuit's entrenched stance on predicting changes in state law. Pet. App. 3a (quoting *Marin Tug & Barge, Inc.* v. *Westport Petroleum, Inc.*, 271 F.3d 825, 830 (9th Cir. 2001)); *id.* at 48a (same). Plus, both panels recognized the "profound implications" that their decisions would have for rideshare users and "the gig economy more generally." Pet. App. 24a-25a, 72a. This Court's review is needed now more than ever.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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