NO. 25-_____

In the Supreme Court of the United States

CHERI POE, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED,

Petitioner,

v.

THE NORTHWESTERN MUTUAL LIFE INSURANCE COMPANY,

Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Last Term, until a settlement on the eve of conference, this Court appeared poised to grant certiorari in *Premium Nutrition v. Montera*, No. 24-999. The petition there asked the Court to clarify, for the first time since *Lehman Brothers v. Schein*, 416 U.S. 386 (1974), the standards for certifying issues of state law to state high courts. This petition presents another opportunity and a sound vehicle to address this vexing problem, framed as two questions for review:

1. When a federal court considers whether to certify a state law issue to a state high court, what factors, including federalism interests, bear on the certification decision?[1]

2. When a party seeks certification, should federal courts explain their rulings?

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[1] A "state law issue" refers, without need for repetition, to substantive state law binding in diversity actions under *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938), and substantive state law implicated under supplemental jurisdiction. *See* 28 U.S.C. § 1367(a).

LIST OF PROCEEDINGS

U.S. Court of Appeals for the Ninth Circuit

No. 23-3124, 23-3243

Cheri Poe, on behalf of herself and all others similarly situated, *Plaintiff - Appellant* v. Northwestern Mutual Life Insurance Company *Defendant - Appellee*

Final Opinion: March 4, 2025

Rehearing Denial: May 6, 2025

U.S. District Court for the Central District of California

No. 8:21-cv-02065-SPG-E

Cheri Poe, on behalf of herself and all others similarly situated, *Plaintiff* v. Northwestern Mutual Life Insurance Company, *Defendant*

Final Judgment: October 23, 2023

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Jordan Elias, *Cooperative Federalism in Class Actions*, 86 TENN. L. REV (2018) 17

Molly Thomas-Jensen, *Certification After Arizonans for Official English v. Arizona: A Survey of Federal Appellate Courts' Practices*, 87 DENV. U. L. REV (2009) 20

Rachel Koehn Breland, *Avoiding Rejection: Studying When and How State Courts Declined Certification Questions*, 92 FORDHAM L. REV (2024) 14

OPINIONS BELOW

The Ninth Circuit's decision is unreported. App.1a-3a. The Ninth Circuit's order denying Poe's petition for rehearing is unreported. App.42a-43a. The district court's order (C.D. Cal.) granting summary judgment for Poe is unreported. App.4a-18a. The district court's orders denying class certification and reconsideration are unreported. App.19a-41a, 44a-53a.

JURISDICTION

The Ninth Circuit entered judgment on March 4, 2025. App.1a-3a. The Ninth Circuit denied Poe's petition for rehearing on May 6, 2025. App.42a-43a. On July 1, 2025, this Court granted a 30-day extension of time to file Poe's petition for certiorari, from August 4, 2025 until September 3, 2025. Sup. Ct. No. 24A1291. The Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

In the lower courts, Poe's single cause of action for breach of contract under California law implicated California Insurance Code sections 10113.71 and 10113.72 ("the Statutes"). App.5a-8a. The Statutes are set forth verbatim below:

Cal. Ins. Code § 10113.71

(a) Each life insurance policy issued or delivered in this state shall contain a provision for a grace period of not less than 60 days from the premium due date. The 60-day grace period shall not run concurrently with the period of paid coverage. The provision shall provide that the policy shall remain in force during the grace period.

(b)

(1) A notice of pending lapse and termination of a life insurance policy shall not be effective unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 for an individual life insurance policy, and a known assignee or other person having an interest in the individual life insurance policy, at least 30 days prior to the effective date of termination if termination is for nonpayment of premium.

(2) This subdivision shall not apply to nonrenewal.

(3) Notice shall be given to the policy owner and to the designee by first-class United States mail within 30 days after a premium is due and unpaid. However, notices made to assignees pursuant to this section may be done electronically with the consent of the assignee.

(c) For purposes of this section, a life insurance policy includes, but is not limited to, an individual life insurance policy and a group life insurance policy, except where otherwise provided.

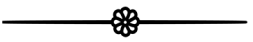
Cal. Ins. Code § 10113.72

(a) An individual life insurance policy shall not be issued or delivered in this state until the applicant has been given the right to designate at least one person, in addition to the applicant, to receive notice of lapse or termination of a policy for nonpayment of premium. The insurer shall provide each applicant with a form to make the designation. That form shall provide the opportunity for the applicant to submit the name, address, and telephone number of at least one person, in addition to the applicant, who is to receive notice of lapse or termination of the policy for nonpayment of premium.

(b) The insurer shall notify the policy owner annually of the right to change the written designation or designate one or more persons. The policy owner may change the designation more often if he or she chooses to do so.

(c) No individual life insurance policy shall lapse or be terminated for nonpayment of premium unless the insurer, at least 30 days prior to the effective date of the lapse or termination, gives notice to the policy owner and to the person or persons designated pursuant to subdivision (a), at the address provided by the policy owner for purposes of receiving

> notice of lapse or termination. Notice shall be given by first-class United States mail within 30 days after a premium is due and unpaid.



INTRODUCTION

The jurisprudence on certifying issues of state law presents not just a circuit split, but incoherence. *Lehman* left the certification standards to judicial development. Over fifty years later, however, percolation has reached a boiling point because consistent and reliable standards have not emerged. The "sound discretion" emphasized in *Lehman*, 416 U.S. at 391, has come to rest as arbitrary and unbounded discretion. Litigants seeking certification make their own *Erie* guess on what will resonate with a circuit panel. Denials of certification, often without explanation, are commonplace. The lack of cogent national standards since *Lehman* is thwarting state courts from providing crucial guidance on the state laws on which federal cases often turn.

It is time for this procedural Wild West, an affront to federalism itself, to end. To give *Lehman* meaning, when deciding whether to certify a state law issue, federal courts should consider the following factors: (1) whether the state law issue lacks a clear answer based on existing sources of state law; (2) whether the state law issue is recurring or important in other respects; and (3) whether certification advances federalism interests and is consistent with the circumstances of the particular case. In addition, because

the courts of appeals are the last resort in nearly all federal cases, when a party seeks certification, federal courts (usually circuit panels) should give some explanation for their rulings.[2]

STATEMENT OF THE CASE

A. In the Lower Courts, Poe's Breach of Contract Claim Turned on the Proper Interpretation of California Insurance Code Sections 10113.71 and 10113.72.

In contrast to many forms of insurance where policyholders may often change carriers, such as auto or health, life insurance is not lightly cancelled. As the California Supreme Court observed in its only decision construing the Statutes: "Consumers often find it very difficult and costly to replace a policy, including one that has been cancelled because of a missed premium payment." *McHugh v. Protective Life Ins. Co.*, 12 Cal. 5th 213, 223 (2021).

Out of concern for consumers, who frequently face physical and mental challenges as they reach the end of their lives, the California Legislature enacted Sections 10113.71 and 10113.72 of the California

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[2] Poe's arguments for certiorari are reinforced by a timely amicus curiae brief from 15 State Attorneys General filed recently at the petition stage in *Premium Nutrition v. Montera.* The points there remain fresh and apply to this case. *See* Brief for Idaho, et al. as Amici Curiae in Support of Petitioner, No. 24-999 (May 9, 2025), https://www.supremecourt.gov/search.aspx?filename=/docket/docketfiles/html/public/24-999.html.

Insurance Code. Taken together, the Statutes, which became effective on January 1, 2013, "create a single, unified pretermination notice scheme" before life insurers may lawfully terminate a policy for nonpayment of premium. *Id.* at 240. To determine the "breadth of [this] legislative command," the text of course controls. *Bostock v. Clayton Cnty., Georgia*, 590 U.S. 644, 674 (2020).

Section 10113.72 specifies what California life insurers must do before they can terminate a policy for nonpayment of premium. They must first provide policy owners the following:

- notice of "the right to designate at least one person, in addition to the applicant, to receive notice of lapse or termination of a policy for nonpayment of premium" (§ 10113.72(a));
- a "form to make the designation" of "at least one person, in addition to the applicant, who is to receive notice of lapse or termination of the policy for nonpayment of premium" (§ 10113.72(a)); and
- notice "annually of the right to change the written designation or designate one or more persons" to receive notice of a potential lapse in coverage (§ 10113.72(b)).

Section 10113.71 specifies the consequences for an insurer's noncompliance with these notice requirements. If the notices are not given, to protect people holding life insurance policies, Section 10113.71 flatly precludes termination for nonpayment of premium:

> A notice of pending lapse and termination of a life insurance policy shall not be effective

> unless mailed by the insurer to the named policy owner, a designee named pursuant to Section 10113.72 for an individual life insurance policy, and a known assignee or other person having an interest in the individual life insurance policy, at least 30 days prior to the effective date of termination if termination is for nonpayment of premium.

Cal. Ins. Code § 10113.71(b)(1) (emphasis added). As reiterated in a different subsection: "No individual life insurance policy shall lapse or be terminated for nonpayment of premium unless the insurer . . . gives notice to the policy owner and to the person or persons designated pursuant to subdivision (a)." *Id.*, § 10113.72(c).

Giving the Statutes the protective force the California Legislature intended, the California Supreme Court held that life insurers must provide the required notices for all in-force policies, "regardless of when the policies were originally issued." *McHugh*, 12 Cal. 5th at 220. As discussed below, however, *McHugh* did not spawn a body of California precedent on the Statutes due to federal jurisdiction over class actions grounded on diversity of citizenship. The Statutes have been in effect for nearly 13 years, but *McHugh* is the only published California decision interpreting them.

B. The District Court Granted Summary Judgment for Poe and Denied Class Certification.

Poe's is one of multiple suits, nearly all federal class actions, alleging that California life insurers improperly terminated policies for nonpayment of

premium after, as a matter of industry practice, failing to comply with the straightforward notice requirements.

Scott Poe, petitioner's husband, purchased two life insurance policies from respondent Northwestern Mutual Life Insurance Company ("Northwestern Mutual"). App.6a. After diligently paying premiums for over 15 years, he became ill and missed a payment. *Id.* Northwestern Mutual then purported to terminate his policies for nonpayment of premium and refused to provide a claim form for death benefits. App.6a-7a. As the district court observed, this occurred even though Northwestern Mutual, as mandated by the Statutes, "never notified Mr. Poe of his right to designate a third party to receive notice of a pending termination, sent Mr. Poe the mandated form, or provided Mr. Poe with annual reminders." App.6a.

In 2021, petitioner Poe filed a proposed class action on behalf of herself and other Northwestern Mutual beneficiaries. App.7a. By the time of summary judgment, she asserted one cause of action for breach of contract under California law. App.7a-8a. Under Poe's theory of liability, Northwestern Mutual committed a classwide breach by failing to pay death benefits owed to beneficiaries under life insurance policies remaining in force, due to noncompliance with the Statutes, by operation of law. App.9a; *see* Cal. Ins. Code § 10113.71(b)(1); *id.*, § 10113.72(c). Poe did not allege any federal causes of action.

Granting summary judgment for Poe, the district court agreed that Northwestern Mutual breached the insurance contract. App.13a. "As a result of [Northwestern Mutual]'s failure to give the required notices, Mr. Poe's life insurance policies did not lapse." App.11a (citing *Thomas v. State Farm Life Ins. Co.*,

No. 20-55231, 2021 WL 4596286, at *1 (9th Cir. Oct. 6, 2021)). With federal jurisprudence on the Statutes in flux at that time, however, the district court denied class certification and declined to reconsider. App.19a, 44a.

C. Following the Lead Ninth Circuit Decision in *Small v. Allianz*, the Panel Below Refused to Certify An Issue to the California Supreme Court.

Poe appealed the class certification rulings and Northwestern Mutual cross-appealed the grant of summary judgment. App.2a. During appellate briefing, Poe filed a motion to certify an issue of California law concerning the Statutes to the California Supreme Court. App.66a. This was Poe's first opportunity to propose certification because the California Supreme Court does not accept certified questions from trial courts. *See* Cal. R. Ct. 8.548(a). Before the Ninth Circuit could rule on any of this, however, a different Ninth Circuit panel issued *Small v. Allianz Life Ins. Co. of N. Am.*, 122 F.4th 1182 (9th Cir. 2024).

The opinion was broadly written. In *Small*, the Ninth Circuit brushed aside its contrary unreported decision in *Thomas*, *id.* at 1193, and created a new requirement not found in the statutory text. The panel read the Statutes to demand that policy owners and beneficiaries prove "causation" before they could recover for violations. This shifted the focus from the textual inquiry (whether the insurer gave the mandatory notices) to whether the policy owner would have kept the policy in force anyway (known as the "causation" issue). *Id.* at 1193-94. As its expansive discussion reflects, the *Small* panel was aware its

analysis would significantly impact many pending cases, including this one before a different Ninth Circuit panel. *Id.* at 1191-94.

Small acknowledged that its interpretation was only a prediction of how the California Supreme Court might rule. "Because the California Supreme Court has not declared what is required to recover for violations of the Statutes, we must predict how the highest state court would decide the issue using intermediate appellate court decisions, decisions from other jurisdictions, statutes, treatises, and restatements as guidance." *Id.* at 1196 (citation and internal quotation marks omitted). Despite the lack of "authoritative appellate decisions" on the causation issue, however, *Small* declined to certify it to the California Supreme Court. *Id.* at 1193. Giving no weight to federalism interests, the *Small* panel deemed sufficient that "the California Supreme Court would likely adopt the 'causation' theory." *Id* (emphasis added).

Small effectively decided multiple cases involving the Statutes, including Poe's appeal. In an unpublished memorandum, the panel on review here held: "*Small* requires us to affirm the denial of class certification and vacate the summary judgment order as well as the resulting judgment on the merits in favor of Poe." App.3a.

The Ninth Circuit panel below also summarily denied Poe's motion for certification to the California Supreme Court. *Id.* This occurred even though yet another Ninth Circuit panel had recently certified a related issue of interpretation under the Statutes to the California Supreme Court. *Pitt v. Metro. Tower Life Ins. Co.*, 129 F.4th 583 (9th Cir. 2025). In her rehearing petition, Poe identified this development as

further mandating deference to the California Supreme Court concerning the Statutes, but the Ninth Circuit denied rehearing. App.42a-43a.[3]

REASONS FOR GRANTING THE PETITION

I. AFTER A HALF CENTURY OF LAISSEZ FAIRE, THE PROCEDURE FOR CERTIFYING ISSUES OF STATE LAW TO STATE HIGH COURTS CALLS FOR MEANINGFUL STANDARDS.

The questions presented are not just "important" but go to the heart of the constitutional design. Sup. Ct. R. 10(c). "At the highest level," the Framers "'split the atom of sovereignty' itself into one Federal Government and the States." *Seila L. LLC v. Consumer Fin. Prot. Bureau*, 591 U.S. 197, 223 (2020). In the certification context, respect for federalism means "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.) (granting motion to certify).

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[3] In *Small*, this Court denied certiorari, ___ S.Ct. ___, 2025 WL 1787755 (U.S. June 30, 2025), but under different circumstances. There was no motion to certify in *Small*. This made it an imperfect vehicle to address the standards for ruling on such motions. *See Small v. Allianz Life Ins. Co. of N. Am.*, No. 24-1225, Petition for Writs of Certiorari, 2025 WL 1583300, at *16-17 (U.S. May 23, 2025) (discussing joinder filed in lieu of motion to certify).

A. This Court Has Not Stated Clear Criteria.

When *Lehman* was decided over fifty years ago, certification to state courts was a nascent means of clarifying state law implicated in federal cases. So the Court made plain that certification "is open to this Court and to any court of appeals of the United States." *Lehman*, 416 U.S. at 390. Beyond that, the Court said little about how the decision to certify should be made. "[R]esort" to the "certification procedure" is not "obligatory," but it will "in the long run save time, energy, and resources and helps build a cooperative judicial federalism." *Id.* at 390-91.

Then *Lehman* stated, most famously, that "use" of the certification procedure "in a given case rests in the sound discretion of the federal court." *Id.* at 391. The minimalist quality of this directive was underscored by the concurring opinion. Foreshadowing the uncertainty likely to follow, Justice Rehnquist wrote separately to address "the scope of the discretion of federal judges in deciding whether to use such certification procedures." *Id.* at 392. But no other Justice joined the concurrence and elaboration was left for another day.

The Court returned to the subject in *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), where the Ninth Circuit was rebuked for failing to certify an issue of Arizona law. The Court noted that certification, in substance, previously occurred through the awkward device of *Pullman*[4] abstention. *Id.* at 75-76. This doctrine "proved protracted and expensive in practice, for it entailed a full round of litigation in

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[4] *R.R. Comm'n of Tex. v. Pullman Co.,* 312 U.S. 496 (1941).

the state court system before any resumption of proceedings in federal court." *Id.* at 76.

The *Pullman* lineage itself illustrates the value of certifying state law issues. Before today's efficient certification device, federalism interests, as now, dictated that state courts be invited to declare the content of state law in appropriate cases. *Arizonans* emphasized the comparative ease and utility of certification procedures. 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." *Id.*

The response is authoritative not just because it comes directly from a state high court, but because the certification procedure is inherently objective. The state high court need not accept the certification. If it does, it is charged with clarifying a discrete legal issue, not adjudicating a winner on the merits.

In *Arizonans*, the Court did not announce or specify any criteria governing certification, but the gist was unmistakable. Reversing the Ninth Circuit, the Court directed a "more cautious approach" to resolution of state law issues in the federal system. *Id.* at 77. It stressed the need for comity: "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." *Id.* at 79 (citation and internal quotation marks omitted).

Today, "every state except North Carolina allows certifications." Hon. Kenneth F. Ripple & Kari Anne

Gallagher, *Certification Comes of Age: Reflections on the Past, Present, and Future of Cooperative Judicial Federalism*, 95 NOTRE DAME L. REV. 1927, 1930 (2020). State courts are overwhelmingly receptive. A recent study showed, for example, an 80% acceptance rate in the Ninth Circuit and 87% in the Third Circuit. Jason A. Cantone & Carly Giffin, *Certified Questions of State Law: An Empirical Examination of Use in Three U.S. Courts of Appeals*, 53 U. TOL. L. REV. 1, 36 (2021); *see also* Rachel Koehn Breland, *Avoiding Rejection: Studying When and How State Courts Declined Certification Questions*, 92 FORDHAM L. REV. 1429, 1457-62 (2024) (state supreme courts showing similar percentages).

A statistical measure of enthusiasm, however, is not the point. As one state chief judge put it, the certification procedure "has done an enormous amount to bridge the gap between our state and federal court systems." *Expressions Hair Design v. Schneiderman*, 581 U.S. 37, 57 n.4 (2017) (Sotomayor, J., concurring in the judgment) (quoting Honorable Judith Kaye, Chief Judge, New York Court of Appeals). Certification "ensures that the law we apply is genuinely *state* law." *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (*en banc*).

The force of *Lehman*, echoed by *Arizonans*, cannot be denied. When possible, state courts should be given the opportunity to clarify state law at issue in a federal case. The importance of the certification standards is underscored by the growing breadth of federal subject matter jurisdiction since *Lehman* over class actions, as here, seeking to enforce state consumer protection laws.

B. Expanded Federal Jurisdiction Over Class Actions, and Reverse Preemption Under the McCarran-Ferguson Act, Heighten the Importance of Clear Criteria.

Actions seeking certification under Fed. R. Civ. P. 23 constitute a substantial portion of federal district court dockets nationwide. Given the representative nature of class actions, it is vital for district courts and the courts of appeals to decide state law issues in these cases correctly.

The Statutes have been on the books since January 1, 2013, but there is no published California precedent construing them beyond the California Supreme Court's decision in *McHugh*. This is no accident.

Federal class actions consisting of primarily, if not exclusively, state consumer protection claims were not always routine. In 2005, Congress changed this by expanding federal subject matter jurisdiction over class actions. *See* 28 U.S.C. § 1332(d); Pub. L. 109-2, 119 Stat. 4-14. By enacting the Class Action Fairness Act, "Congress enabled defendants to remove to federal court any sizable class action involving minimal diversity of citizenship." *Smith v. Bayer Corp.*, 564 U.S. 299, 317 (2011).

In jurisdictional terms, Poe's was one such case and it was her only practical option. Class actions enable a similarly situated group of people to band together to challenge systematic wrongdoing that would otherwise go unremedied. "'The policy at the very core of the class action mechanism,'" this Court has long recognized, "'is to overcome the problem that small recoveries do not provide the incentive for any individual to bring a solo action prosecuting his or her

rights.'" *Amgen Inc. v. Connecticut Ret. Plans & Tr. Funds*, 568 U.S. 455, 478 (2013) (quoting *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997)).

This principle has heightened force against insurance companies because they possess not just superior power, but superior information. The relationship between insurers and consumers is "often characterized by unequal bargaining power in which the insured must depend on the good faith and performance of the insurer." *Vu v. Prudential Prop. & Cas. Ins. Co.*, 26 Cal.4th 1142, 1151 (2001). So virtually all suits challenging violations of the Statutes have been class actions and therefore subject to federal jurisdiction. *See Lee v. Great Am. Life Ins. Co.*, 745 F.Supp.3d 1006, 1018-21 (C.D. Cal. 2024) (surveying district court orders).

Many state law issues are not inherently familiar. If federal law is exotic and esoteric, state law is salt of the earth. State law presents, as in Poe's case, the interplay of California statutory and common law on causation, as California courts interpret it, in breach of contract cases. Except when sitting in diversity, federal courts do not regularly encounter these problems. As discussed above, however, in its lead decision in *Small v. Allianz*, the Ninth Circuit shunned certification to the California Supreme Court. This disregarded that comity is at an apex when the state law question involves statutory interpretation: "Federal courts lack competence to rule definitively on the meaning of state legislation." *Arizonans*, 520 U.S. at 48.

Increasing availability of certification, under clearer standards, provides an efficient way to ascertain state law directly from the source with no possibility of getting it wrong. The open tenor of *Lehman* made

sense over fifty years ago, but especially with the expansion of diversity jurisdiction, it does not make sense today. As diversity jurisdiction evolves, so must judicial approaches ensuring state law is accurately ascertained in federal cases.

The new primacy of Rule 23 in the consumer protection space was reinforced five years later by *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393 (2010). The Court held, as a matter of federal supremacy, that Rule 23 displaces conflicting state procedural laws limiting class certification. *Id.* at 399-401 (plurality opinion of Scalia, J.). Although eluding quantification, if any effect, *Shady Grove* increased the number of federal class actions involving state law claims heard under diversity jurisdiction. Federal courts now consider "the bulk of class actions alleging state-law violations from misleading advertising, bait-and-switch schemes, hidden fees and interest-rate hikes, underpayment of employees, and consumer warranty and privacy breaches." Jordan Elias, *Cooperative Federalism in Class Actions*, 86 TENN. L. REV. 1, 5 (2018).

But Poe's case is not just any diversity action. In consumer protection suits against insurers, as here, state law has unique importance because insurance companies are regulated almost exclusively by the states. In 1945, nullifying *United States v. South-Eastern Underwriters Assn.*, 322 U.S. 533 (1944), Congress enacted the McCarran-Ferguson Act. It provided that "the activities of insurance companies in dealing with their policyholders would remain subject to state regulation." *Sec. & Exch. Comm'n v. Nat'l Sec., Inc.*, 393 U.S. 453, 459 (1969). This is sometimes called "reverse preemption." *Seneca Ins.*

Co., Inc. v. Strange Land, Inc., 862 F.3d 835, 844 n.3 (9th Cir. 2017); *see also Humana Inc. v. Forsyth*, 525 U.S. 299, 306-07 (1999) (discussing historic backdrop).

Poe's sole cause of action for breach of contract arises under state law; there are no claims she could assert against Northwestern Mutual under federal law; and the forum is federal. Although the Ninth Circuit should reconsider certification on remand, given this alignment, certification warrants close consideration. When federal courts are charged with giving meaning to state law arising infrequently in state court, as in the line of cases involving the Statutes, it is paramount to get state law right.

II. WHEN DECIDING CERTIFICATION, THE FEDERAL CIRCUITS FOLLOW UNPREDICTABLE AND INCONSISTENT APPROACHES.

The "conflict" in the circuits further supports certiorari. Sup. Ct. R. 10(a). The split is deep and wide. As Poe's experience illustrates, whether a state law issue is certified depends on not just the particular circuit, but the particular panel. As distilled by a Sixth Circuit judge, without "concrete rules to govern lower federal courts in deciding whether to certify questions, those lower federal courts have had to make their own guidelines." *Lindenberg v. Jackson Life Ins. Co.*, 919 F.3d 992, 997 (6th Cir. 2019) (Bush, J., dissenting from denial of rehearing en banc). Only this Court can bring coherence.

A. The Ninth Circuit Gives Varying Rationales for Certification and Systemically Declines to Explain Denials.

As a large circuit home to the most populous state, the Ninth Circuit is no stranger to certification requests, especially to the California Supreme Court. The Ninth Circuit's varying practices, on display in this case and *Small* to deny certification, illustrate the need for this Court's intervention.

When certifying an issue of state law, either *sua sponte* or at a party's request, the Ninth Circuit issues a published order. *See, e.g., Bearden v. City of Ocean Shores*, 103 F.4th 585 (9th Cir. 2024); *Doe v. Uber Techs., Inc.*, 90 F.4th 946 (9th Cir. 2024); *New England Country Foods, LLC v. Vanlaw Food Prods., Inc.*, 87 F.4th 1016 (9th Cir. 2023). This practice frequently results in *two* published decisions in the same appeal. *See, e.g., Kuciemba v. Victory Woodworks, Inc.*, 31 F.4th 1268 (9th Cir. 2022), *certified question answered,* 14 Cal. 5th 993 (2023), *opinion on merits*, 74 F.4th 1039 (9th Cir. 2023).

The Ninth Circuit's published orders may give the impression that certification is freely granted, but denials are published only anecdotally. *See, e.g., Hodsdon v. Mars, Inc.*, 891 F.3d 857, 865 n.7 (9th Cir. 2018). The more common practice is summary denial, as occurred here, in a memorandum disposition. *See, e.g., Social Life Network v. LGH Invs., LLC*, No. 22-55774, 2023 WL 3641791, at *2 n.1 (9th Cir. May 25, 2023) (declining to certify to California Supreme Court on theory that statutory text was "sufficiently clear" to resolve issue).

So the Ninth Circuit did not take the cue a generation ago to follow a "more cautious approach" respecting "limitations" when denying certification. *Arizonans*, 520 U.S. at 48, 77. By failing to treat a denial of certification with equal decisional dignity, the Ninth Circuit's practice is discriminatory on its face. This disparate treatment has also drawn scholarly criticism. "More than any other circuit . . . the Ninth Circuit's approach to [certification] has been inconsistent and poorly reasoned." Molly Thomas-Jensen, *Certification After Arizonans for Official English v. Arizona: A Survey of Federal Appellate Courts' Practices*, 87 DENV. U. L. REV. 139, 163 (2009). This includes the Ninth Circuit's "unpublished" and "inadequately explained" certification rulings. *Id.*

Parsing the Ninth Circuit's published orders certifying state law issues yields no consistent standards. Some decisions recite a four-factor test: "In deciding whether to exercise our discretion, we consider: (1) whether the question presents important public policy ramifications yet unresolved by the state court; (2) whether the issue is new, substantial, and of broad application; (3) the state court's caseload; and (4) the spirit of comity and federalism." *Glacier Bear Retreat, LLC v. Dusek*, 107 F.4th 1049, 1052-53 (9th Cir. 2024) (internal quotation marks omitted). And some Ninth Circuit decisions wrestle with the federalism implications of certifying an issue of state law. *Id.* at 1053 (declining to "depriv[e] the Montana Supreme Court of the opportunity to develop the issue in the first instance"). But other Ninth Circuit panels do not address federalism implications. *See, e.g., French Laundry Partners, LP v. Hartford Fire Ins. Co.*, 58 F.4th 1305, 1305-08 (9th Cir. 2023); *Or.*

Clinic, PC v. Fireman's Fund Ins. Co., 64 F.4th 1143, 1145 (9th Cir. 2023).

The Ninth Circuit's approach to certification is all over the map. The following rationale, where a state law issue was certified, could have been written for the sequence of events in this case: "By assuming the answer to an important and novel state-law question, our Court would inadvertently infringe the sovereign power of a state in denying the state's courts an opportunity first to answer the question." *Yamashita v. LG Chem, Ltd.*, 48 F.4th 993, 1002 (9th Cir. 2022). The panel there could have had *Small* in mind: "[S]hould a future case arise in the Ninth Circuit, it is almost certain that our Court will simply cite back to its first case to consider the issue, without even considering certification." *Id.* Judge Miller (who sat on the panel below), dissented from certification in *Yamashita* on the basis that "no party in this case requested certification"—a factor he deemed "highly relevant." *Id.* at 1004.

Here, though, Poe's certification request was not relevant to the panel at all. App.3a.

On the other hand, had the *Yamashita* panel decided Poe's motion for certification, the majority's rationale (deferring to the state court) and the dissent's rationale (giving weight to a request for certification) suggest Poe's motion would have been granted. This is random and arbitrary adjudication. It is not a standard fostering the predictability necessary a half century after *Lehman*'s minimalist holding.

B. Five Circuits Account for Federalism Interests in the Certification Calculus.

By contrast, the First, Second, Seventh, Eleventh, and the District of Columbia Circuits are on the right track. Their decisions provide analytical guidance for more cogent national standards giving effect to *Lehman*.

The First Circuit has certified state law issues that are "important," "complex," and "outcome-determinative." *Plourde v. Sorin Grp. USA, Inc.*, 23 F.4th 29, 37 (1st Cir. 2022). When deciding whether to certify, the First Circuit is "particularly mindful" of the "interests of federalism." *The Real Estate Bar Ass'n for Mass., Inc. v. Nat'l Real Estate Info. Servs.*, 608 F.3d 110, 119 (1st Cir. 2010). Of increasing importance in many federal cases, especially class actions, the First Circuit has certified state law questions likely to arise only in federal court. *See, e.g., Ins. Co. of Penn. v. Great N. Ins. Co.*, 787 F.3d 632, 638 (1st Cir. 2015). Failing to do so, the court recognized, would promote forum shopping and "reduc[e] the odds that the [state supreme court] will get to decide [the] issue." *Id.*

The Second Circuit has identified "at least six factors that must be considered in deciding whether certification is justified." *Tunick v. Safir*, 209 F.3d 67, 81 (2d Cir. 2000). Those factors include not only "the absence of authoritative state court interpretations of the state statute," and "the importance of the issue to the state and the likelihood that the question will recur," but also "the federalism implications of a decision by the federal courts and in particular whether a decision by the federal judiciary potentially interferes with core matters of state sovereignty." *Id.* The Second Circuit has repeatedly recognized that

"[i]f a question of state law is arising primarily" in federal court, "it may be particularly important to certify in order to ensure that state courts are not 'substantially deprived of the opportunity to define state law.'" *10012 Holdings, Inc. v. Sentinel Ins. Co., Ltd.*, 21 F.4th 216, 224 (2d Cir. 2021); *see also Gutierrez v. Smith*, 702 F.3d 103, 116 (2d Cir. 2012) (collecting cases).

Likewise, the Seventh Circuit looks to "whether the case concerns a matter of vital public concern, [whether it] involves an issue likely to recur in other cases, and whether the state supreme court has yet to have an opportunity to illuminate a clear path on the issue." *Zahn v. N.A. Power & Gas, LLC*, 815 F.3d 1082, 1085 (7th Cir. 2016). The Seventh Circuit considers "whether the issue is of interest to the state supreme court in its development of state law." *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001). Certification gives the state court "the ability to develop or restate the principles that it believes should govern the category of cases." *Todd*, 9 F.3d at 1222. Hence, as Poe urged the Ninth Circuit to do here, the Seventh Circuit has certified state law issues that "arise often in federal cases but rarely in state cases." *Carver v. Sheriff of LaSalle Cnty., Ill.*, 243 F.3d 379, 386 (7th Cir. 2001).

The Eleventh Circuit has evinced similar respect for state sovereignty. "When we have substantial doubt about the answer to a dispositive question of state law," the court holds, "we 'should certify that question to the state supreme court'." *Cordero v. Transamerica Annuity Serv. Corp.*, 34 F.4th 994, 999 (11th Cir. 2022) (collecting cases). Taking heed of

"federalism concerns," certification gives "the state court the opportunity to explicate state law." *Id.*

The D.C. Circuit has also given federalism interests some sway. The focus there is the clarity of the issue and importance to the state forum. Under D.C. Circuit precedent, the court asks whether the law is "genuinely uncertain" and "whether the case is one of extreme public importance." *Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (D.C. Cir. 2001). The D.C. Circuit has certified when the answer would have "significant effects" within the District of Columbia. *DeBerry v. First Gov't Mortg. & Inv'rs Corp.*, 170 F.3d 1105, 1110 (D.C. Cir. 1999). It has declined when the question is not "of substantial interest to the District." *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014); *see also K&D LLC v. Trump Old Post Off. LLC*, 951 F.3d 503, 510 (D.C. Cir. 2020) ("Cork did not argue that this 'case is one of extreme public importance,' a traditional element of our certification analysis.").

Taken together, the considerations followed in these circuits support the three factors that Poe proposes to guide federal courts. But, in light of the discord in other circuits, the law is anything but uniform.

C. Four Circuits Decide Certification Case by Case Without Discernable Standards.

The Fourth, Sixth, Eighth, and Tenth Circuit have not developed clear guidelines governing when to certify an issue of state law. These circuits recognize that a federal court has discretion to certify where state law is uncertain but do not provide a framework for exercising discretion under *Lehman*.

In the Fourth Circuit, certification turns primarily, if not entirely, on the clarity of state law. In one case, the court cited the "sparsity of governing state law" as reason to certify. *Shears v. Ethicon, Inc.*, 64 F.4th 556, 563 (4th Cir. 2023). To the same effect, the Fourth Circuit has certified where state law was "uncertain." *C.F. Trust, Inc. v. First Flight Ltd. P'ship*, 306 F.3d 126, 141 (4th Cir. 2002).

The Sixth Circuit has cited various considerations depending on the case. *See, e.g., Pennington v. State Farm Mut. Auto. Ins. Co.*, 553 F.3d 447, 450 (6th Cir. 2009) (denying certification because state law sources provided "sufficient guidance to allow us to make a clear and principled decision"). But the Sixth Circuit stands out for separate, and conflicting, opinions on when to certify. One judge lamented the absence of standards leaving lower courts without "direction" and "predictability." *Lindenberg*, 919 F.3d at 997 (Bush, J., dissenting from denial of rehearing en banc). In the same case, however, another judge described Sixth Circuit law as "trusting panels to exercise their experience, discretion, and best judgment to determine when certification is appropriate" and, on this basis, there should not be "criteria for certification to state courts." *Id.* at 993 (Clay, J., concurring in the denial of rehearing en banc). According to yet another Sixth Circuit judge, certification may properly be denied even when the facts implicate "uncertain and important questions of state law." *Lindenberg v. Jackson Nat. Life Ins. Co.*, 912 F.3d 348, 370 (6th Cir. 2018) (Larsen, J., concurring in part).

Like the Fourth Circuit, the Eighth Circuit also treats uncertain state law as the predominant factor. *See, e.g.*, *Anderson v. Hess Corp.*, 649 F.3d 891, 895

(8th Cir. 2011). The Eighth Circuit has not identified other criteria a panel must consider as part of its certification inquiry. *See Kulinski v. MedtronicBio-Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997). A reference to "cooperative judicial federalism" decades ago, in an en banc decision, planted a seed that did not grow. *Hatfield v. Bishop Clarkson Mem'l Hosp.*, 701 F.2d 1266, 1268 (8th Cir. 1983) (*en banc*).

On when to certify issues of state law, the Tenth Circuit asks whether existing state law provides "a reasonably clear and principled course" for resolving the issue. *Monarch Casino & Resort, Inc. v. Affiliated FM Ins. Co.*, 85 F.4th 1034, 1038 (10th Cir. 2023). Creating a presumption against certification, however, the Tenth Circuit held that certification "is not to be routinely invoked whenever a federal court is presented with an unsettled question of state law." *Id.* As elsewhere, the panel's whims and predilections control. Some panels consider federalism interests while others do not. *Compare Pino*, 507 F.3d at 1236 (Gorsuch, J.) *with Monarch*, 85 F.4th at 1038.[5]

D. Two Circuits Openly Disfavor Certification Even When State Court Precedent, as Here, Is Lacking.

The Third Circuit has been explicit on the "considerations our court should take into account when deciding if certification is appropriate," but its

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[5] Due to its unique subject matter jurisdiction, the Federal Circuit has rarely confronted the questions presented here but its view aligns with the circuits just discussed. *See Toews v. United States*, 376 F.3d 1371, 1380-81 (Fed. Cir. 2004) (favoring certification, without greater specificity, when there is "real doubt about the state's law").

standards take insufficient heed of states' interest in developing their own controlling precedent. *United States v. Defreitas*, 29 F.4th 135, 141 (3d Cir. 2022).

The Third Circuit weighs whether state law is "unclear," its "importance," and whether an answer will "control an issue in the case." *Id.* at 141. The Third Circuit has also cited the amorphous consideration whether an issue is important to the "public." *Delta Funding Corp. v. Harris*, 426 F.3d 671, 675 (3d Cir. 2005); *see also Samsung Fire & Marine Ins. Co. (U.S. Branch) v. RI Settlement Tr.*, No. 23-1988, 2024 WL 4921644, at *4 (3d Cir. Aug. 12, 2024). In contrast to other circuits, however, the Third Circuit has viewed the absence of state precedent as *disfavoring* certification because, under this view, this indicates the issue is not important to the state. *See, e.g., Zanetich v. Wal-Mart Stores E., Inc.*, 123 F.4th 128, 150 (3d Cir. 2024).

The Fifth Circuit applies a three-factor test making sense as far as it goes, but also disfavoring certification of novel questions of state law. The Fifth Circuit considers: (1) "the closeness of the question and the existence of sufficient sources of state law"; (2) "the degree to which considerations of comity are relevant"; and (3) practical limitations, including delay. *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015); *see also Fla. ex rel. Shevin v. Exxon Corp.*, 526 F.2d 266 (5th Cir. 1976). Like the Third Circuit, however, the Fifth Circuit ties importance for certification purposes to the number of state court decisions. Under this view, a paucity of state precedent suggests a lack of importance and cuts against certification. *See, e.g., Sanders v. Boeing Co.*, 68 F.4th 977, 983 (5th Cir.2023).

III. THERE ARE WORKABLE PREREQUISITES TO GUIDE LOWER COURTS ON HOW TO EXERCISE THEIR DISCRETION ON CERTIFICATION.

In light of the wide variation in circuit standards, the Court should grant certiorari to ensure, as at other crossroads of federalism, the "proper division of authority between the Federal Government and the States." *New York v. United States*, 505 U.S. 144, 149 (1992) (Tenth Amendment).

Rather than impeding more detailed guidance, the "sound discretion" touchstone, *Lehman*, 416 U.S. at 391, is reason to provide it. The fact that certification is discretionary "does not mean that no legal standard governs that discretion. A motion to a court's discretion is a motion, not to its inclination, but to its judgment; and its judgment is to be guided by sound legal principles." *Nken v. Holder*, 556 U.S. 418, 434 (2009) (cleaned up and citation omitted).

When deciding whether to certify a state law issue, federal courts should consider the following factors: (1) whether the state law issue lacks a clear answer based on existing sources of state law; (2) whether the state law issue is recurring or important in other respects; and (3) whether certification advances federalism interests and is consistent with the circumstances of the particular case. These considerations are not new. Lack of clarity and importance have long been central, just not specifically enumerated. *See Lehman*, 416 U.S. at 391; *Arizonans*, 520 U.S. at 77.

Federalism interests include, without limitation, whether the state's appellate courts have had, or may have, an opportunity to address the state law issue. The circumstances of each case include, without

limitation, delay and broader judicial economy. There is no exhaustive list, but it is time for consistent criteria across the circuits.

Having left *Pullman* long behind, certification is a "precise tool" for obtaining controlling guidance on state law. *Expressions Hair Design*, 581 U.S. at 57 (Sotomayor, J., concurring in the judgment). More exact prerequisites, as Poe proposes, will foster greater respect for a state's sovereign power to declare its own law and greater predictability for litigants.

Any certification order must be faithful to the state's certification procedures, but the factors proposed here do not clash with those procedures. This Court has encouraged more use of certification while respecting the particularities of state certification law. *See Lehman*, 416 U.S. at 390-91 & n.7 (Florida); *Arizonans*, 520 U.S. at 79 n.31 (Arizona). Lower federal courts are as capable of doing the same.[6]

IV. WHEN DECIDING WHETHER TO CERTIFY A STATE LAW ISSUE, FEDERAL COURTS SHOULD PROVIDE SOME EXPLANATION FOR THEIR RULINGS.

As appears above, the federal circuits again splinter on the quantum of explanation for granting or denying certification—sometimes a lot, sometimes none. Guidance is also called for on this issue.

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[6] State certification rules tend to coalesce around two primary considerations. Both are consistent with the three factors urged by Poe: (1) whether controlling precedent is lacking; and (2) whether addressing the state law issue could be outcome-determinative. *See, e.g.,* Ariz. Rev. Stat. § 12-1861; Cal. R. Ct. 8.548(a); Colo. R. App. P. 21.1(a); Ind. R. App. P. 64; N.Y. Ct. App. R. 500.27.

The Ninth Circuit's practice of publishing detailed orders when *granting* certification illustrates that providing some explanation is no burden. To further the judiciary's credibility, and to develop a body of law on federalism considerations, a certification denial calls for no less explication than a grant.

A rule calling for some explanation, either expressly or in context, strikes a fair balance. By analogy, a "concise but clear explanation," a flexible standard, could be required for rulings on whether to certify a state law issue. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983) (attorney fee awards).

The need for an explanation is even greater when the issuing court is a federal circuit panel. In contrast to district court rulings, where there is one appeal of right, all except a tiny percentage of federal court actions end, if appealed, at the courts of appeals. When deciding a potentially pivotal ruling on certification, the court at the end of the line should give some explanation.

The certification process is like a vintage sports car. It was timeless when created and remains valuable today, but it needs maintenance. This case presents a good vehicle for a tune-up.[7]

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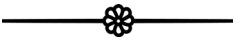
[7] On the questions presented, this case is a more straightforward vehicle than *Premium Nutrition* because it does not involve, as there, when a federal court should certify an issue to a state court outside the circuit. Extra-circuit certifications are more exceptional and may implicate additional or different federalism considerations. In any event, given the record here, that issue is for the next case.



CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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