No. 25-724

In the Supreme Court of the United States

UNIFIED LIFE INSURANCE COMPANY,
***Petitioner*,**

v.

UNITED STATES FIRE INSURANCE COMPANY
***Respondent*.**

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

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Whether the Fifth Circuit, exercising diversity jurisdiction, accurately applied Texas's well-settled principles of contract interpretation to a particular set of facts in the insurance context.

LIST OF PARTIES

Pursuant to Supreme Court Rule 14.1(b)(i) and 15.2:

Petitioner

Unified Life Insurance Company

Stock ticker: No publicly traded stock

Respondent

United States Fire Insurance Company

Stock ticker: UFCS

RULE 29.6 STATEMENT

United States Fire Insurance Company, a Delaware corporation, is wholly-owned by Crum & Forster Holdings Corp., a Delaware corporation, which is wholly-owned by Fairfax (US) Inc., a Delaware corporation, which is substantially owned by FFHL Group Ltd., a Canadian company, which is wholly-owned by Fairfax Financial Holdings Limited, a publicly traded Canadian company.

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BRIEF IN OPPOSITION

This is a garden-variety diversity case. Petitioner seeks review of a Fifth Circuit decision applying well-settled Texas principles of contract interpretation to a particular set of facts in the insurance context. Petitioner contends that the Fifth Circuit "created" "new Texas law" (Pet. 1) but that contention rests on a distorted and tendentious reading of the Fifth Circuit decision. The Court of Appeals (per Jones, J.) adhered to Texas law, cited dozens of Texas state-court decisions, and sought "to rule the way the Texas Supreme Court would rule" in deciding the issues before it. App.8.

The Fifth Circuit did not predict a change in Texas law; it simply endeavored to determine how the highest court of Texas would actually rule based on existing precedent. Every circuit recognizes that a federal court may make an "*Erie* guess" (*Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938)) in such circumstances. To be sure, although the Texas Supreme Court has addressed related issues, it has not squarely resolved the precise question presented in this case. But that is a relatively common situation under *Erie,* and a federal court does not create new state law every time it interprets state law in the absence of an on-point state supreme court decision addressing a factually identical situation. Even Petitioner concedes that "federal courts must resolve diversity cases even when state law is unsettled." Pet. 12.

Petitioner's real objection is that the Fifth Circuit decided Texas law incorrectly. But that question is inherently ill-suited for review by this Court, which cannot authoritatively determine state-law questions.

See Murdock v. City of Memphis, 87 U.S. 590 (1874). Thus, this Court "do[es] not normally grant petitions for certiorari solely to review what purports to be an application of state law." *Leavitt v. Jane L.*, 518 U.S. 137, 144 (1996).

Moreover, the Fifth Circuit's interpretation of Texas law was correct. This case involves a provision in a reinsurance contract requiring the ceding company to give prompt notice of claims; the failure to give prompt notice may result in the denial of coverage. These are common provisions in reinsurance contracts. When the timeliness of notice is disputed, federal and state courts, including Texas courts, have measured "promptness" under objective standards of reasonableness. But here, Petitioner Unified Life Insurance Company (Unified) asked the Fifth Circuit to rule that the timeliness of notice is governed solely by its own subjective opinion, even if entirely unreasonable.

The Fifth Circuit properly rejected Unified's creative effort to excuse its failure to give notice of a reinsurance claim for 32 months. Deferring to Texas's well-settled principles of contract interpretation, the Fifth Circuit ruled Unified's contractual obligation to give prompt notice of claims was governed by well-established standards of objective reasonableness.

This case does not involve any important question of federal law or implicate any circuit conflict. And even if there were a circuit split under *Erie* that implicated issues of nationwide importance, this case is not a suitable vehicle for addressing it. The Petition should be denied.

STATEMENT OF THE CASE

I. The parties entered a unique type of reinsurance agreement, structured to notify USF of Unified's expenses and liability risks on a near-monthly basis.

United States Fire Insurance Company (USF) is an insurance company with significant experience in medical policies. USF has not only written such policies directly but also reinsured other health insurance companies. App.14. In 2014, Unified—an insurance company seeking to enter the market of providing short-term medical policies—approached USF for its experience in the area. App.2. To diversify its own portfolio, USF agreed to reinsure Unified. Reinsurance is often described in overly simplistic terms as "insurance for insurance companies." App.12. But given Unified's specific goal of benefitting from USF's experience in entering the short-term medical market, the parties structured their reinsurance agreement to operate more as a business partnership than a typical arm's-length relationship between an insurer and insured. *Id.* 12 n.2, 14.

Unified and USF entered a "first dollar" quota-share reinsurance treaty (the Quota Share Treaty). App.14.[1] Such an agreement is a rarity in the

[1] "Treaty" reinsurance covers a group of policies, whereas "facultative" reinsurance covers a single policy. App.12 & n.2. In a "quota share" policy, the primary insurer or "ceding" company shares premiums and losses, and thus profits and risks, with the reinsurer, based on a fixed percentage. *Id.* A "first dollar" reinsurance policy covers the first dollar of covered losses, in contrast to an excess policy, which covers losses that exceed a specified amount. App.14.

insurance industry. Under the Quota Share Treaty, Unified had a "claim" with USF for 25% of each dollar Unified spent in claims processing expenses. App.14. These expenses included not only Unified's payment of its customers' short-term medical claims, but also Unified's expenses of handling those claims, litigation costs, and settlements or judgments in claims litigation. App.14.

The Quota Share Treaty required Unified to give prompt notice to USF "of all Claims which, in the opinion of [Unified], may result in a claim hereunder." App.8. The Treaty also required Unified to submit itemized claims on, at least, a monthly basis through what is known as a *Bordereau* report. The purpose of regular claims reporting was to keep USF advised of Unified's expenses and liability risks. App.10-11. This enabled USF to lend its health-insurance experience to Unified while also monitoring its expenses and 25% quota-share obligation for Unified's liability and expenses for claims processing. *See* App.10-11.

II. Unified waited 32 months to notify USF of claims litigation in Montana, and not until after Unified lost summary judgment on class liability and on appeal.

In April 2017, Unified was sued in federal district court in Montana for underpaying customers' short-term medical claims. App.4. Even after Unified started incurring monthly litigation expenses (i.e. reinsurance claims under the Quota Share Treaty), Unified did not give USF notice of those claims or request 25% reimbursement. *See* App.4. The Montana litigation proceeded for years without Unified

apprising USF, not even to obtain the benefit of USF's experience in litigating similar health insurance claims. App.4-6. In the Montana litigation, Unified's customers alleged that its methodology for calculating payment on claims was fundamentally flawed and, on that basis, sought class certification and summary judgment as to liability. App.4-6.

In September 2019, the Montana district court rendered summary judgment against Unified as to liability. App.5. The district court also certified a class action for Unified's similarly situated policyholders. App.5. Rather than notifying USF at this juncture, Unified sought to appeal the class certification to the Ninth Circuit. App.5. It was only after the Ninth Circuit rejected Unified's appeal that Unified first notified USF of the ongoing litigation. App.5-6. Unified finally gave USF notice in December 2019, after years of litigating and losing the Montana district court litigation. App.6.

Although USF sought to assist Unified in obtaining reconsideration of summary judgment, the Montana district court ruled the efforts were too late. App.6. Unified settled the Montana litigation and set up an $8 million fund for class compensation and attorneys' fees. App.6. Given the Montana district court's rulings—that all of USF's efforts to rectify Unified's litigation failures were too late—USF denied the claim because Unified's notice of the claim was, likewise, too late. App.6. Specifically, USF cited the Quota Share Treaty's prompt-notice provision. USF and Unified were unable to resolve whether Unified's delayed notice excused USF from covering Unified's reinsurance claim relating to the Montana litigation,

resulting in the subsequent litigation underlying this proceeding. App.6.

III. Unable to explain its years of delay, Unified has argued it had the right to give unreasonably timed notice, whenever it subjectively decided to do so.

USF filed a declaratory judgment action under Texas law to resolve the parties' contractual dispute. App.6. The suit was filed in the U.S. District Court for the Northern District of Texas. App.6. Unified took the position—for the very first time during the Texas litigation—that: (1) under the Quota Share Treaty's prompt-notice provision, it was not required to give notice of a reinsurance claim until it subjectively believed that it had such a claim; and (2) Unified did not believe it was going to incur even $1 in expenses, liability, judgment, or settlement until years into the Montana litigation, after the Ninth Circuit rejected its appeal. App.7.

The Fifth Circuit rejected Unified's position in a well-reasoned published opinion. App.2. The panel below began by recognizing the court's limited function under *Erie*: "Our goal, sitting as an *Erie* court, is to rule the way the Texas Supreme Court would rule on the issue presented." App.8. Quoting and citing dozens of Texas decisions, primarily Texas Supreme Court decisions, the panel then applied Texas principles of contract interpretation to reach its conclusion. App.8-10.

The Court of Appeals began by observing that Texas courts "have long construed provisions requiring an insured to give prompt notice of events

that 'may result in a claim' to require objective reasonableness both as to when the duty arises and how soon to notify the insurer." App. 8. The Fifth Circuit opined that "[h]ere, the question is whether the phrase 'in the opinion of' departs from an objectively determined duty to notify. We hold that the Treaty did not depart from the ordinary rule." App.9.

The Fifth Circuit reasoned that "Texas authority, albeit sparse, suggests that Texas courts would agree that an objective standard controls." *Id*. at 10; *see also id.* at 14-16 (analyzing Texas caselaw). The Fifth Circuit noted that "when faced with similar arguments about an insurance policy's use of the phrase 'in the opinion of,' the Supreme Court of Texas rejected a purely subjective approach." *Id.* at 16 (discussing *United Founders Life Ins. Co. v. Carey*, 363 S.W.2d 236 (Tex. 1962)).

In addition, the Fifth Circuit noted, "the Supreme Court of Texas has 'repeatedly stressed the importance of uniformity "when identical insurance provisions will necessarily be interpreted in various jurisdictions."'" *Id*. at 16 (citations omitted). "Most courts have concluded that prompt notice provisions using 'in the opinion of' clauses still incorporate an objective standard." *Id.* at 16-17. The Fifth Circuit concluded that "[t]he Supreme Court of Texas would likely view these cases as furnishing a consensus that Texas should follow." *Id*. at 19.

Although Unified sought en banc reconsideration in the Fifth Circuit, it did not argue the panel's decision exceeded the court's authority under *Erie*. Unified also did not argue that the panel's decision

conflicted with any prior Fifth Circuit decision. Unified likewise did not assert there was any circuit split under *Erie* justifying en banc review. Instead, Unified presents all those issues and arguments, for the very first time, to this Court.

REASONS TO DENY THE PETITION

I. The Fifth Circuit did not "create" any "new" duty; it followed *Erie* and applied well-settled Texas law to interpret a unique reinsurance agreement.

Unified seeks this Court's review to resolve a purported circuit split under *Erie* about federal courts' authority to create new state-law claims and defenses. The crux of its petition is that the Fifth Circuit did so here by "creating" a "new" duty under Texas law. Even if there were a circuit split under *Erie* (which there is not, *see* Part II, *infra*), this case does not actually present the question Unified seeks to raise, because Unified's description of the decision below is not accurate.

Fairly characterized, the Fifth Circuit's holding is that—applying existing Texas law—the Quota Share Treaty's specific language requires that Unified give USF notice of reinsurance claims promptly, as measured by an objective reasonableness standard, rather than by Unified's sole subjective belief of when it should give such notice. *Erie* requires federal courts to apply state substantive law, which is exactly what the Fifth Circuit did below. *See* WRIGHT & MILLER, 19 FED. PRAC. & PROC. JURIS. § 4507 (3d ed. 2025) ("[T]he federal court must determine issues of state law as it believes the highest court of the state would presently

determine them"). Moreover, "[i]t is often the case that the forum state's highest court has not spoken directly to the particular issue when a federal court is faced with formulating an *Erie* guess." *Id.*

This Court's review would not be warranted even if the Fifth Circuit made a mistake in interpreting Texas law. See S. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of … misapplication of a properly stated rule of law.").

But in fact, the Fifth Circuit correctly interpreted Texas law. In Texas insurance law, prompt-notice provisions—as governed by an objective reasonableness standard—are far from "new." In *Texas Glass & Paint Co. v. Fidelity & Deposit Company of Maryland*, 244 S.W. 113 (Tex. Comm'n App. 1922), Texas adopted the general rule that the promptness of notice of insurance claims will typically be measured under a standard of objective reasonableness. *Id.* at 115. Unified's position—that promptness is governed solely by its own subjective opinion—was rejected in *Texas Glass*. *See id.* (ruling that notice of claims "should not be left solely to the judgment or discretion of the assured"). Indeed, no Texas court has ever construed any prompt-notice provision—in any insurance contract in any context—as leaving the issue of timely notice solely to the insured's unfettered discretion.

Instead of "creating" a "new" duty, the Fifth Circuit predicted the Texas Supreme Court would rule that the long-recognized reasonableness standard applied to the prompt-notice provision in the Quota

Share Treaty. The Fifth Circuit outlined the following principles of contract interpretation in Texas courts:

(1) the primary goal of contract construction is to effectuate the parties' intent;

(2) courts determine, objectively, what an ordinary person using those words would understand them to mean;

(3) courts must consider the entire writing to harmonize and give effect to all the provisions of the contract so that none will be rendered meaningless;

(4) the evident intent of the parties is not only derived from the words used and their context, but also from the subject-matter to which they relate, and the matters naturally or usually incident thereto;

(5) Texas courts focus on the language the parties chose and "may neither rewrite the parties' contract nor add to its language" for the sake of achieving preferred results; and

(6) in the insurance context, the Texas Supreme Court urges maintaining uniformity with other jurisdictions in interpreting "identical" or "very similar" policy provisions.[2]

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[2] App.9–10 (citing *Monroe Guar. Ins. Co. v. BITCO Gen. Ins. Corp.*, 640 S.W.3d 195, 198–99 (Tex. 2022); *Pathfinder Oil & Gas, Inc. v. Great W. Drilling, Ltd.*, 574 S.W.3d 882, 889 (Tex. 2019); *URI, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 764 (Tex. 2018); *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015); *Zurich Am. Ins. Co. v. Nokia, Inc.*, 268 S.W.3d 487, 496–97 (Tex. 2008) ; *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003); *Trinity Universal Ins. Co. v. Cowan*, 945 S.W.2d 819, 824 (Tex. 1997); *State Farm Mut. Auto. Ins. Co. v.*

After outlining Texas rules for interpreting contracts, the Fifth Circuit rejected Unified's proposed interpretation of the prompt-notice provision. First, while noting the decisions were not so on-point as to be *Erie*-bound to follow them, the Fifth Circuit identified only two Texas cases addressing similar policy language regarding the "opinion" of the insured: *United Founders Life Ins. Co. v. Carey*, 363 S.W.2d 236 (Tex. 1962), and *Stonewall Ins. Co. v. Modern Expl., Inc.*, 757 S.W.2d 432 (Tex. App.—Dallas 1988, no writ). The Fifth Circuit noted that, in both cases, Texas courts adopted an objective reasonableness standard, which supported USF's interpretation rather than Unified's view. App.16 ("In short, when faced with similar arguments about an insurance policy's use of the phrase 'in the opinion of,' the Supreme Court of Texas rejected a purely subjective approach."). Stated differently, there is no authority in Texas law that supports Unified's position.

Second, applying the Texas principle of maintaining uniformity in interpreting insurance contracts, the Fifth Circuit surveyed decisions from other jurisdictions that analyzed similar contract language (referring to the "opinion" or "judgment" of the insured). None of these cases supported Unified's position that contractual language "in the opinion of" created a purely subjective standard for the prompt notice of claims. In sum, the Fifth Circuit: (1) followed Texas's general presumption that—unless the parties clearly agree to the contrary—a prompt notice

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Pan Am. Ins. Co., 437 S.W.2d 542, 544 (Tex. 1969); *Brown v. Palatine Ins. Co.*, 89 Tex. 590, 35 S.W. 1060, 1061 (1896).

provision will typically be governed by an objective reasonability standard; and (2) adhering to Texas's insurance-law principles to construe policies in accordance with other jurisdictions' decisions, the language "in the opinion" was insufficient to manifest the parties' intent to create a purely subjective standard giving Unified sole unfettered discretion as to when to give notice of claims.

Identifying nearly identical principles of contract interpretation as those enumerated above, Unified asserts that the Fifth Circuit reached the wrong result. Unified's petition does little to explain how, under the Texas authorities on which it relied, the Fifth Circuit erred in its analysis. Instead, Unified merely asserts the lower court erred and seeks to shoehorn the supposed error into a purported circuit split by stating, without explanation, that the Fifth Circuit "created" a "new" duty. Because the Fifth Circuit merely applied Texas contract-interpretation principles to a novel context, the Fifth Circuit adhered to *Erie*'s requirement to apply state substantive law.

II. There is no clear split or conflict among circuits under *Erie*.

Unified fails in attempting to identify a supposed circuit split under *Erie*. According to Unified, some circuits have ruled they may recognize novel state law claims and defenses, while others have declined to do so. But the authorities Unified cites do not support this proposition; nor do they support any discernible conflict or disagreement among the circuit courts under *Erie*. They simply reflect fact-bound applications of the same *Erie* principles in different situations. That is not a genuine circuit conflict.

The cases cited in the Petition do not support Unified's argument. For example, Unified cites to a footnote in *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234 (CA9 1989), to argue that the Ninth Circuit has supposedly recognized "untested legal theories" under state law in a diversity case. In *Torres*, one panel accused another panel of not strictly adhering to *Erie*. *Id.* at 1238 n.1 (citing *Paul v. Watchtower Bible & Tract Society,* 819 F.2d 875, 879 (CA9 1987)). But in *Paul*, the panel expressly declined to recognize a new cause of action of "shunning" under Washington law, ruling instead that any such claim would be defeated by Washington's well-settled constitutional right of religious freedom, so that there was no need to decide the issue of state law on which Unified is focused. *Paul*, 819 F.2d at 879 ("[W]e need not decide here whether Washington courts would ultimately rule that Paul has set forth a prima facie claim").

The Eighth Circuit likewise took no discernable position under *Erie* in *Hazen v. Pasley*, 768 F.2d 226 (CA8 1985). In *Hazen*, the Eighth Circuit addressed whether a Missouri state-law conversion claim (i.e. "wrongful dominion") could be sustained based on a public policy challenge to a prisoner's gift to a law enforcement officer. *Id.* at 228–29. Although the Missouri Supreme Court and legislature had not specifically addressed the issue, the Eighth Circuit felt sufficiently certain that such gifts would contravene the public policy of the state of Missouri. *Id.* Although Unified claims the Eighth Circuit recognized a "novel state law implied cause of action," that was simply not the issue presented in *Hazen*. Pet.7.

Citing *Johnson v. Honeywell Information Systems, Inc.*, Unified argues that the Sixth Circuit created a new employment-law defense under Michigan law. *See* 955 F.2d 409 (CA6 1992). It didn't. In *Johnson*, the Sixth Circuit addressed whether, under Michigan law, "just cause" for terminating one's employment could include information the employer acquired after the employee was discharged. *Id.* at 412–14. The Sixth Circuit analyzed Michigan state-court decisions and answered the question in the affirmative. *Id.* Just cause for termination and the after-acquired-evidence defense were not "new" defenses under Michigan law. *See id.*

In sum, there is no clear split or conflict among the circuits under *Erie* about federal courts' power to recognize new state-law claims or defenses. Because a non-existent circuit split is Unified's only reason for review (other than mere error correction), the Court should deny certiorari.

III. This case is an inapt vehicle to resolve the question presented or any conflict among the circuit courts.

Even if there were a split or conflict among circuit courts to be addressed by granting certiorari, the facts and procedural history make this case a poor vehicle for answering the question presented. First, to reach the question presented, the Court would need to resolve the threshold question of whether the Fifth Circuit erred in applying Texas law. If the Fifth Circuit did not actually create a new duty under Texas insurance law, this case would not provide much meaningful guidance to circuits as to when they exceeded their authority under *Erie*. As to this

threshold error-correction inquiry, Unified does not address any part of the Fifth Circuit's reasoning under the numerous Texas-court decisions it cited. If this Court determines the question presented should be resolved, a more apt case for answering the question would involve a court clearly recognizing a new state-law claim or defense. That simply did not happen here.

Second, the specific contract dispute in this case presents no issue of nationwide importance. This case turns on the interpretation of a single, bespoke reinsurance treaty and the particular facts surrounding when notice became reasonably required under that agreement; not on any generally applicable federal or recurring commercial standard. The questions Unified tries to frame as sweeping are, in reality, intensely contract- and context-dependent of what this particular treaty required, given the various aspects of the agreement that make it an extraordinarily rare type of insurance contract. This kind of dispute does not present a repeatable issue capable of generating uniform national guidance; it is the opposite—a one-off disagreement about how established principles apply to a unique contract and a unique claims timeline. While Unified attempts to identify different outcomes in other cases, those differences reflect different contract language and different factual records.

Third, instead of highlighting a conflict among circuits under *Erie*, Unified's authorities simply reflect variation in exercising discretion to certify questions to state courts. *See Torres*, 867 F.2d at 1238 n.1 (certifying a question to state court and chiding the *Paul* panel for not doing the same). The ultimate

legal issue presented here concerns the circumstances under which federal courts must certify questions to state courts; specifically, when a "novel" ruling is "too novel" that the federal court is constitutionally powerless to do anything but certify the question for state-court resolution. This matter, however, has already been squarely resolved against Unified in *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) (explaining that mere doubt about how a state court would rule does not justify certification, and ruling certification is not "obligatory" and instead "rests in the sound discretion of the federal court."). As to any circuit conflict regarding state-law certification, Unified provides no explanation of that conflict or proposed rule to resolve any such conflict. Lastly, because Unified implicitly asks the Court to reconsider standards for certifying state-law questions, granting review would require this Court to address additional threshold questions of waiver or error preservation, given that Unified never asked the Fifth Circuit to certify any question to the Texas Supreme Court and, to date, has not asked this Court for such relief.

Fourth, by raising its *Erie* issue and arguments for the first time in this Court, Unified has not developed the record to make this case cert-worthy. In the courts below, Unified treated the interpretive dispute in this case as one that could be easily resolved by reference to well-settled principles of Texas contract law. Unified argued as much in the district court and in the Fifth Circuit, both before the panel and in its petition for en banc reconsideration. It was not until its petition in this Court that Unified argued the panel created an entirely new duty under Texas law,

exceeded its authority under *Erie*, or decided this issue contrary to other Fifth Circuit decisions applying *Erie*. Unified asks this Court to be the very first to opine on those issues in this case. But this Court is "a court of review, not of first view." *Cutter v. Wilkinson*, 544 U.S. 709, 718 n.7 (2005). Absent "exceptional" circumstances, *Duignan v. United States*, 274 U.S. 195, 200 (1927), this Court will not consider a question "without the benefit of thorough lower court opinions to guide [its] analysis of the merits," *Zivotofsky v. Clinton*, 566 U.S. 189, 201 (2012). Without any lower court decisions addressing the question presented in this case, the Court should deny certiorari.

CONCLUSION

The Fifth Circuit's decision does not reflect any *Erie* overreach or federal court "creation" of "new" Texas law. The court straightforwardly applied well-settled Texas contract-interpretation principles to a single reinsurance treaty and deferred to an equally settled proposition that "prompt" notice is measured by objective reasonableness—not whatever an insured later claims it subjectively "opined." Nor has Unified identified a genuine, outcome-determinative circuit conflict warranting this Court's intervention. And in any event, this case is a particularly poor vehicle for addressing any issues of significance: Unified did not present its *Erie* theory to the lower courts, offers little beyond error-correction dressed as a split, and asks this Court to decide a purported nationwide question on an undeveloped record and arguments raised for the first time at the cert stage. The Court should

therefore deny Unified's petition for writ of certiorari.

Respectfully submitted.

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