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

REPLY TO BRIEF IN OPPOSITION

Cortney C. Thomas
cort@brownfoxlaw.com
Counsel of Record
Andrew C. Debter
BROWN FOX PLLC
8111 Preston Rd, Ste 300
Dallas, TX 75225
(214) 327-5000

Counsel for Petitioner

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REPLY TO BRIEF IN OPPOSITION

Respondent United States Fire Insurance Company (USF) asks this Court both to ignore a deepening circuit split with severe federalism implications and to look away from what the Fifth Circuit actually decided with its opinion below. USF reframes that decision as a routine contract dispute, a "garden-variety diversity case" requiring no further review. Br. in Opp. 1. But this mischaracterization fails to seriously engage the question presented. Respondent does not dispute that *Erie* imposes limits on the power of federal courts sitting in diversity. Nor could it. This Court has made clear that a federal court is "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." *Day & Zimmermann, Inc.* v. *Challoner*, 423 U. S. 3, 4 (1975). Moreover, USF's characterization cannot be reconciled with the panel's own acknowledgement that the only Texas authorities supporting its holding "seem more like straws in the wind than authority to which this *Erie*-bound court is required to defer." App. 16. A federal court that recognizes it is building on "straws in the wind" is not applying but instead making new state law. That raises grave federalism concerns under the careful balance of state-federal power this Court struck in *Erie*.

Respondent attempts to avoid certiorari by shifting the Court's attention to the underlying facts and to the merits of the contract dispute. But the question presented is not whether Unified gave timely notice (it did). It is whether a federal court exercising

diversity jurisdiction may announce a rule of state law that no court of that state has adopted, displacing unambiguous contract language in the process. That question implicates a real and acknowledged division among the circuits over the permissible scope of *Erie* guesses, and it is squarely presented here.

Respondent's principal arguments do not withstand scrutiny. The circuit split is not, as USF suggests, merely a collection of fact-bound applications of the same principles. It reflects a genuine and entrenched disagreement about the outer limits of federal judicial authority under *Erie*. The characterization of the decision below as a straightforward application of Texas law ignores both the contract's express subjective trigger and the panel's own candid assessment of the state-law support for its holding. And USF's vehicle objections do not survive examination.

I. The circuit conflict is real and important.

Respondent contends there is no circuit split, arguing that the cases Unified cited "simply reflect fact-bound applications of the same *Erie* principles in different situations." Br. in Opp. 12. But the disagreement among the circuits is not about how *Erie* "applies" to particular facts. It is about what *Erie* permits as a structural matter: whether federal courts sitting in diversity may expand state law beyond its existing boundaries, or whether that power belongs exclusively to state courts and legislatures. The petition identified substantial division over the limits *Erie* imposes on federal courts. And Respondent does not deny that many circuits have laid out those limits in emphatic terms.

On one side of the split, at least five circuits have articulated clear limits on federal judicial innovation in state law. The First Circuit has explained that federal courts are to apply state law as it is, not as it "might come to be." *Dayton* v. *Peck, Stow & Wilcox Co.*, 739 F. 2d 690, 694 (CA1 1984); see also *Veilleux* v. *Nat'l Broad. Co.*, 206 F. 3d 92, 131 (CA1 2000) ("[W]e are reluctant to expand this relatively undeveloped [state law] doctrine beyond the narrow categories addressed thus far."). The Third Circuit has said that federalism concerns require federal courts to apply current state law and "leave it undisturbed." *City of Philadelphia* v. *Lead Indus. Ass'n*, 994 F. 2d 112, 123 (CA3 1993). The Fourth Circuit has rejected "wholesale changes" in state law by federal courts. *A & E Supply Co.* v. *Nationwide Mut. Fire Ins. Co.*, 798 F. 2d 669, 678 (CA4 1986). The Seventh Circuit has likewise warned against "bold departures" and "innovative interpretation[s] of state law." *Afram Export Corp.* v. *Metallurgiki Halyps, S.A.*, 772 F. 2d 1358, 1370 (CA7 1985). And the D.C. Circuit has stated in unmistakable terms that it is "decidedly not the business of the federal courts to alter or augment state law." *Tidler* v. *Eli Lilly & Co.*, 851 F. 2d 418, 425 (CADC 1988).

Respondent does not engage with any of these pronouncements or attempt to reconcile them with the approach taken below. That silence is telling.

On the other side of the split, the Ninth Circuit has expressly recognized the inter-circuit conflict and staked out a contrary position. In *Torres* v. *Goodyear Tire & Rubber Co.*, 867 F. 2d 1234, 1238 n. 1 (CA9 1989), the court acknowledged that "the rule in other circuits is that the federal courts have limited

discretion in a diversity case 'to adopt untested legal theories brought under the rubric of state law.'" It then identified the Ninth Circuit's contrary position: "For better or for worse, this circuit has not seen fit to assume such a posture of restraint when it comes to deciding novel questions of state law." *Ibid.* (citing *Paul* v. *Watchtower Bible & Tract Soc'y of N.Y.*, 819 F. 2d 875, 879 (CA9 1987)). Respondent dismisses this as merely "one panel accus[ing] another panel of not strictly adhering to *Erie*." Br. in Opp. 13. But *Torres* itself expressly recognized the sharp inter-circuit conflict. 867 F. 2d at 1238 n. 1.

Respondent nevertheless claims that the split *Torres* identifies is somehow illusory just because *Paul* stopped short of deciding the novel state law tort issue. But that ignores that *Paul* analyzed in detail the level of novel state lawmaking appropriate for federal courts to undertake in diversity cases, concluding that "[f]ederal courts are not precluded from affording relief simply because neither the state Supreme Court nor the state legislature has enunciated a clear rule governing a particular type of controversy." *Paul*, 819 F. 2d at 879. Even if initially dicta, that conclusion remains the considered and persistent position of the Ninth Circuit. Indeed, that proposition has been repeatedly cited by subsequent Ninth Circuit panels. See, *e.g.*, *Vernon* v. *City of Los Angeles*, 27 F. 3d 1385, 1391 (CA9 1994); *Hewitt* v. *Joyner*, 940 F. 2d 1561, 1565 (CA9 1991); *Air-Sea Forwarders, Inc.* v. *Air Asia Co., Ltd.*, 880 F. 2d 176, 186 (CA9 1989); *Hal Roach Studios, Inc.* v. *Richard Feiner & Co., Inc.*, 896 F. 2d 1542, 1548 (CA9 1989); *Kohler* v. *Inter-Tel Techs.*, 244 F. 3d 1167, 1171 (CA9 2001). Some have even expressly characterized the position first staked out by

Paul—that federal courts "must" resolve even "novel question[s] of state law"—as the governing "rule" in the Ninth Circuit. *Hal Roach Studios, Inc.*, 896 F. 2d at 1548 ("[W]hen we decide a claim that involves a novel question of state law, it is the rule in this circuit that we must try to predict how the highest state court would decide the issue."); *Kohler*, 244 F. 3d at 1171. District courts in the Ninth Circuit have followed the same approach.[1] The Ninth Circuit's approach to novel state law issues therefore plainly diverges from the majority of circuits. That alone creates a genuine circuit conflict worthy of this Court's review.

Other circuits have taken a similarly broad approach to novel state lawmaking by federal courts. See *Hazen* v. *Pasley*, 768 F. 2d 226, 228–29 (CA8 1985); *Johnson* v. *Honeywell Info. Sys., Inc.*, 955 F. 2d 409, 413 (CA6 1992). Respondent attempts to minimize those cases by arguing that they simply reflect routine *Erie* predictions. Br. in Opp. 13–14. But *Hazen* and *Johnson* confirm that some circuits have in fact exercised a far broader conception of their authority to develop state law.

In *Hazen*, the Eighth Circuit confronted a conceded absence of any state law authority recognizing the asserted claim yet predicted that the Missouri Supreme Court would create a new rule invalidating certain transfers of property as contrary to public policy,

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[1] See *McVay* v. *DXP Enters., Inc.*, 645 F. Supp. 3d 971, 977 (C. D. Cal. 2022) ("Federal courts sitting in diversity, moreover, need not decline altogether to decide an issue of state law squarely presented to them—even when they tread in uncharted legal terrain."); *Estate of Mendez* v. *City of Ceres*, 390 F. Supp. 3d 1189, 1217 (E. D. Cal. 2019); *Specter* v. *Tex. Turbine Conversions, Inc.*, 2021 WL 218720, at *9 (D. Alaska Jan. 21, 2021).

relying not on existing precedent but on generalized concerns about impropriety. 768 F. 2d at 228–29. Similarly, in *Johnson*, the Sixth Circuit adopted a defense the Michigan Supreme Court had never addressed, relying on "common sense" and a "dearth of Michigan case law to the contrary" to treat the absence of contrary authority as permission to extend state law doctrine. 955 F. 2d at 412–13.[2]

Overall, Respondent's treatment of *Hazen* and *Johnson* misses the point. The split does not depend on whether those courts applied an entirely new *category* of state substantive law, just as it does not depend on whether they involved the identical type of contract or cause of action presented here. Rather, the question is whether federal courts have authority to extend state law doctrines into novel, unrecognized territory when state authorities have not done so. Many circuits answer that question cautiously, refusing to move beyond clear state guidance. Others are more willing to do so. The Fifth Circuit's decision below falls in the latter camp and departs from its prior restrained approach. It is thus not merely another contract case but another concrete example of the acknowledged, growing circuit conflict the petition identifies.

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[2] But see *Combs* v. *Int'l Ins. Co.*, 354 F. 3d 568, 597 (CA6 2004); *State Auto Prop. & Cas. Ins. Co.* v. *Hargis*, 785 F. 3d 189, 195 (CA6 2015).

II. The Fifth Circuit's sweeping rule amounts to a new state law duty that cannot be displaced by contract.

Respondent's core contention is that the Fifth Circuit simply applied "well-settled Texas principles of contract interpretation" to the facts of this case. Br. in Opp. 1. That framing requires ignoring the contract language actually at issue and disregarding the panel's own characterization of its state law support. The issue was not whether "prompt" ordinarily carries an objective component. The relevant issue was whether the parties had displaced the ordinary rule by expressly agreeing that notice would be triggered only when, "in the opinion of" Unified, a claim might result. The Fifth Circuit held that they had not, and then added an objective standard that the contract itself does not contain. App. 9, 19. What results from the breadth of that holding (and the stark contrary language it nullified) is a novel state law duty for reinsurance that no conceivable contract language could alter.

Start with the contract. The Treaty did not contain a generic "prompt-notice" provision, as Respondent contends. It required Unified to notify USF of claims "which, in the opinion of [Unified], may result in a Claim hereunder." App. 8. The phrase "in the opinion of" is a deliberate modification of what would otherwise be a standard objective trigger. That is why USF's assertion that *Tex. Glass & Paint Co.* v. *Fid. & Deposit Co. of Md.*, 244 S. W. 113, 115 (Tex. Comm'n App. 1922)—a case that involved only the term "prompt" without any similar subjective language—"rejected" Unified's position is incorrect.

Br. in Opp. 9. Such a straw man obscures the issue beyond recognition and in a manner even the panel below did not contend. See App. 8 (stating that "this *would* be a straightforward case" absent the subjective language (emphasis added)). Respondent treats the notice provision as though the only operative term is "promptly," while rendering the subjective qualifier superfluous. That approach violates the very Texas contract interpretation principles on which Respondent (Br. in Opp. 10) and the decision below (App. 9–10) each relies, including the rule that courts must "give effect to all the provisions of the contract so that none will be rendered meaningless," *Pathfinder Oil & Gas, Inc.* v. *Great W. Drilling, Ltd.*, 574 S. W. 3d 882, 889 (Tex. 2019), and that courts "may neither rewrite the parties' contract nor add to its language" for the sake of achieving preferred results. *Am. Mfrs. Mut. Ins. Co.* v. *Schaefer*, 124 S. W. 3d 154, 162 (Tex. 2003). As a matter of interpretation, the panel's holding simply cannot be squared with those principles. Neither the panel nor USF ever even attempted to set forth an affirmative reading of what the words "in the opinion of" mean.

Perhaps most revealing is what the panel said about its own reasoning. The Fifth Circuit did not identify a Texas case holding that an express "in the opinion of" notice trigger is overridden by an objective duty arising sooner than the party's actual opinion. To the contrary, it tellingly acknowledged the state law support was "sparse" (App. 10), characterized the only two relevant Texas cases as "straws in the wind" (App. 16), and relied heavily on an interest in "uniformity" with other jurisdictions to justify its result. App. 16–19. That methodology is the hallmark of law

creation, not law application. When a federal court must resort to nationwide policy considerations to fill gaps in state law, it has crossed the line that *Erie* drew between prediction and innovation.

Nor can the panel's holding be fairly characterized as a kind of "clear statement" rule under which parties remain free to contract for subjective notice triggers so long as they use sufficiently explicit language, as Respondent suggests. See Br. in Opp. 11. The Treaty stated that notice was required of claims "which, in the opinion of [Unified], may result in a Claim hereunder." App. 8. It is difficult to imagine how parties could more clearly vest notice discretion in the ceding company's own judgment. If this language is insufficient to create a subjective trigger, then as a practical matter no language will suffice, and the panel's holding amounts to a categorical rule that subjective notice triggers are unenforceable in Texas reinsurance contracts. That is why the decision is properly understood as imposing a new state law duty, not simply choosing among two plausible readings of an ambiguous clause.

By holding that the Treaty called for objectively reasonable notice timing and thereby overriding expressly subjective contract language to the contrary, the decision below imposed a new state law duty that parties to insurance contracts must provide for such notice and cannot bargain otherwise.

III. This case is a sound vehicle.

Respondent raises various vehicle objections, none of which should prevent review.

First, Respondent argues that the Court would need to resolve the correctness of the Fifth Circuit's state

law ruling before reaching the *Erie* question. Br. in Opp. 14–15. Not so. Unified does not ask this Court to determine the correct interpretation of the Treaty under Texas law. It asks whether a federal court may announce a state law rule that no Texas court has recognized, based on authority that the panel below itself describes as "straws in the wind." That question is independent of whether the panel's ultimate interpretation happens to be correct. The *Erie* issue concerns the permissible *scope* of federal courts sitting in diversity, not the accuracy of any particular state law prediction. This Court need not decide definitively what Texas would do. It could merely decide that the Fifth Circuit exceeded the permissible bounds of prediction when it announced an objective notice-trigger rule not grounded in existing Texas authority and contrary to the contract's plain text.

Second, Respondent contends that the real issue is whether the Fifth Circuit should have certified the question to the Texas Supreme Court. Br. in Opp. 15–16. But, as Respondent itself acknowledges, certification is not "obligatory" where state law is uncertain. *Lehman Bros.* v. *Schein*, 416 U. S. 386, 391 (1974). And certification is not the only remedy for preventing *Erie* overreach. The more fundamental point is that, because of the federalism concerns inherent in *Erie*, federal courts should exercise restraint in how far they extend state law when making predictive rulings. The problem is not that the Fifth Circuit resolved an unsettled question of Texas law. See *Meredith* v. *City of Winter Haven*, 320 U. S. 228, 237–38 (1943). The problem is that the panel's resolution was so expansive, and so weakly grounded

in existing Texas authority, that it amounted to innovative state lawmaking rather than modest prediction.

Third, Respondent argues the case lacks nationwide importance because it involves a single reinsurance treaty. Br. in Opp. 15. But the panel's holding is not limited to this treaty. By ruling that "in the opinion of" language does not create a subjective notice trigger, the Fifth Circuit announced a principle that could well govern the interpretation of thousands of reinsurance agreements containing substantially identical provisions. The reinsurance industry depends on predictable enforcement of negotiated contract terms, and the decision below introduces significant uncertainty about whether courts in the Fifth Circuit will honor subjective triggers that sophisticated parties have bargained for.

Fourth, Respondent argues that Unified failed to raise its *Erie* argument in the courts below. Br. in Opp. 16–17. But before the Fifth Circuit issued its opinion, Unified had no occasion to argue that the court was exceeding its *Erie* authority, because the *Erie* problem arose from the court's own action. Unified could not have predicted that the Fifth Circuit would characterize its own state law support as "straws in the wind" and nonetheless proceed to announce such a broad new rule. A party cannot waive an objection to judicial action that has not yet occurred. Moreover, Unified consistently argued that USF's interpretation rewrote the Treaty and departed from Texas law. The constitutional dimension of that departure became clear only after the panel revealed the full scope of its holding.

CONCLUSION

The petition asks the Court to resolve an important and recurring federal question: how far federal courts may go in "predicting" state law before prediction becomes lawmaking. Respondent offers no limiting principle. In USF's view, once a federal court invokes contract interpretation and says it is trying to predict state law, *Erie* imposes no meaningful constraint. That cannot be right. The Court should grant the petition.

Cortney C. Thomas
Counsel of Record
Andrew C. Debter
BROWN FOX PLLC
8111 Preston Rd, Ste 300
Dallas, TX 75225
cort@brownfoxlaw.com
andrew@brownfoxlaw.com
(214) 327-5000

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Counsels for Petitioner