No.

IN THE

Supreme Court of the United States

KIMBERLY MEADOR, AGENT OF INDIVIDUALLY, AND AS GUARDIAN FOR L.M. A MINOR; AMOS STANDARD, ON BEHALF OF INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF SHARI STANDARD, DECEASED; RUSSELL JONES, ON BEHALF OF INDIVIDUALLY, AND ON BEHALF OF THE ESTATE OF SANDRA JONES, DECEASED, PETITIONERS

v.

APPLE, INCORPORATED

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

PETITION FOR WRIT OF CERTIORARI

JOHN F. (JACK) WALKER, III

Martin Walker PC
121 N. Spring Ave
Tyler, TX 75702
(903) 526-1600

GREGORY P. LOVE
Counsel of Record

Love Law Firm, P.C.
107 E. Main St
Henderson, TXs 75652
greg@lovetrialfirm.com
(903) 212-4444

CURRY & TAYLOR ♦ 202-393-4141

QUESTION(S) PRESENTED

1. Has the court of appeals failed to exercise its mandatory diversity jurisdiction under 28 U.S.C. § 1332 by refusing to make an "*Erie* guess" whether Texas courts would hold a smartphone manufacturer liable for the injuries and deaths which ensued after a driver, distracted by her smartphone, collided with another vehicle, especially when Texas law provides a reasonably clear template for making that prediction?

2. Were petitioners denied due process of law or their right of access to the courts when after refusing to make an "*Erie* guess" about whether Texas law would hold respondent liable for its role in causing this accident, the court of appeals refused *sua sponte* to certify this question to the Texas Supreme Court and then denied petitioners' motion to do so?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULES

OTHER AUTHORITIES

OPINIONS BELOW

The published opinion of the Court of Appeals for the Fifth Circuit in *Kimberly Meador et al. v. Apple, Incorporated*, Docket No. 17-40968, filed on December 18, 2018, and reported at 911 F.3d 260 (5th Cir. 2018), affirming the District Court's dismissal with prejudice of petitioners' claims and its denial of their motion for leave to amend their complaint, is set forth in the Appendix hereto (App. 1-12).

The unpublished Order of the United States District Court for the Eastern District of Texas, Tyler Division, Schroeder, J., in *Kimberly Meador et al. v. Apple, Incorporated*, Civil Action No. 6:15-CV-00715-RWS-KNM, decided August 17, 2017, and reported at 2017 WL 3529577 (E.D. Tex. 2017), adopting the Magistrate Judge's report and recommendation, denying petitioners' objections thereto, denying their motion for leave to amend their complaint, and dismissing their complaint with prejudice, is set forth in the Appendix hereto (App. 13-26).

The unpublished Report and Recommendation of the Magistrate Judge for the United States District Court for the Eastern District of Texas, Tyler Division, Mitchell, U.S.M.J., in *Kimberly Meador et al. v. Apple, Incorporated*, Civil Action No. 6:15-CV-00715, decided August 16, 2016, and reported at 2016 WL 7665863 (E.D. Tex. 2016), recommending that respondent's motion to dismiss petitioners' complaint with prejudice be granted, is set forth in the Appendix hereto (App. 27-39).

The unpublished order of the United States Court of Appeals for the Fifth Circuit in *Kimberly Meador et al. v. Apple, Incorporated*, Docket No. 17-40968, filed on January 17, 2019, denying petitioners' timely filed petition for panel rehearing, is set forth in the Appendix hereto (App. 40).

The unpublished order of the United States Court of Appeals for the Fifth Circuit in *Kimberly Meador et al. v. Apple, Incorporated*, Docket No. 17-40968, filed on January 17, 2019, denying petitioners' opposed motion to certify questions to the Texas Supreme Court, is set forth in the Appendix hereto (App. 41).

JURISDICTION

The decision of the Fifth Circuit Court of Appeals affirming the District Court's dismissal of petitioners' claims with prejudice and its denial of their motion to amend their complaint was entered on December 18, 2018; and its order denying petitioners' timely filed petition for panel rehearing was filed on January 17, 2019 (App. 1-12;40).

This petition for writ of certiorari is filed within ninety (90) days of the date the court of appeals denied petitioners' timely filed petition for panel rehearing. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3.

The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED.

United States Constitution, Amendment V:

No person shall...be deprived of life, liberty, or property, without due process of law....

28 U.S. C. § 1332(a)(1):
Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—
(1) citizens of different States;
....

Texas Constitution, Art. 5, § 3-c(a):

QUESTIONS OF STATE LAW CERTIFIED FROM FEDERAL APPELLATE COURT.
(a) The supreme court and the court of criminal appeals have jurisdiction to answer questions of state law certified from a federal appellate court.

Texas Rule of Appellate Procedure 58:

Certification of Questions of Law by United State Courts

58.1. Certification

The Supreme Court of Texas may answer questions of law certified to it by any federal appellate court if the certifying court is presented with determinative questions of Texas law having no controlling Supreme Court precedent. The Supreme Court may decline to answer the questions certified to it.

58.2. Contents of the Certification Order

An order from the certifying court must set forth:

(a) the questions of law to be answered; and

(b) a stipulated statement of all facts relevant to the questions certified, showing fully the nature of the controversy in which the questions arose.

Texas Transportation Code - TRANSP § 545.4251. Use of Portable Wireless Communication Device for Electronic Messaging; Offense

(a) In this section:

(1) “Electronic message” means data that is read from or entered into a wireless communication device for the purpose of communicating with another person.
(2) “Wireless communication device” has the meaning assigned by Section 545.425 .

(b) An operator commits an offense if the operator uses a portable wireless communication

device to read, write, or send an electronic message while operating a motor vehicle unless the vehicle is stopped.

To be prosecuted, the behavior must be committed in the presence of or within the view of a peace officer or established by other evidence.

....

(d) Subsection (b) does not apply to:

(1) an operator of an authorized emergency or law enforcement vehicle using a portable wireless communication device while acting in an official capacity; or (2) an operator who is licensed by the Federal Communications Commission while operating a radio frequency device other than a portable wireless communication device.

(e) An offense under this section is a misdemeanor punishable by a fine of at least $25 and not more than $99 unless it is shown on the trial of the offense that the defendant has been previously convicted at least one time of an offense under this section, in which event the offense is punishable by a fine of at least $100 and not more than $200.

(f) Notwithstanding Subsection (e), an offense under this section is a Class A misdemeanor punishable by a fine not to exceed $4,000 and confinement in jail for a term not to exceed one year if it is shown on the trial of the offense that

> the defendant caused the death or serious bodily injury of another person.
> ....

STATEMENT

On April 30, 2013, twenty-one-year-old Ashley Kubiak was operating a 2003 Dodge Ram pickup truck as she drove east on Highway 43 in Henderson, Rusk County, Texas. The roadway ahead of her was straight and unobscured; and Kubiak had with her in her vehicle an iPhone 5, a smartphone designed, manufactured and marketed by respondent Apple, Incorporated ("respondent" or "Apple"). Traveling east directly in front of her vehicle was a 2008 Chevrolet Tahoe driven by Sandra Jones ("Jones"). Jones had two passengers, L. M., Jones' grandchild ("L. M."), and Shari Standard ("Standard").

Both vehicles were traveling at highway speed and eventually Jones slowed her Tahoe down in order to turn left onto County Road 214-D where her parents lived. At the same time, Kubiak received a buzzing notification from her smartphone of an incoming text message. She immediately looked down to read the message and became distracted from the safe operation of her pickup truck as she did so, failing to see that Jones' Tahoe had slowed down in front of her vehicle. Once she looked up from reading the incoming message, she could not avoid colliding with the rear of Jones' Tahoe even as she turned her steering wheel to the right.

Kubiak's truck struck the right rear portion of Jones' Tahoe, pushing Jones' vehicle into the adjacent

oncoming lane of traffic. Immediately thereafter, Jones' Tahoe was struck broadside on the passenger side by a Ford F250 pickup truck traveling west in this oncoming lane. This violent collision between Jones' Tahoe and the F250 pickup truck caused extensive damage to Jones' vehicle. Both Jones and Standard were pinned inside of the Tahoe and died from their injuries at the scene of the accident. L. M. was transported via Life Flight to Children's Hospital in Dallas where he was placed on life support and survived. A seven-year-old who had defeated childhood leukemia, L. M. was rendered paraplegic as a result of this accident. Kubiak was subsequently found guilty by a jury of two counts of criminally negligent homicide, charges which stemmed from her distracted driving while using her smartphone.

By April of 2013, that Kubiak's operation of her vehicle would be dramatically affected by her use of her smartphone while driving was a known fact to commentators and social scientists who have studied the issue. Because texting or speaking on a smartphone while driving slows reaction time much more than driving while drunk, with a driver six times more likely to get into an accident from texting and driving than from drinking and driving, *it is safer to drive drunk than to text and drive.* See Hanes, S.,*Texting While Driving: The New Drunk Driving*, CHRISTIAN SCIENCE MONITOR (11/05/2009); Austin, M., *Texting While Driving: How Dangerous Is It?*, CAR & DRIVER MAGAZINE (June, 2009); Strayer, Drwes and Crouch, *A Comparison of the Cell Phone Driver and the Drunk Driver; Human Factors*: JOURNAL of the HUMAN FACTORS and ERGONOMICS SOCIETY, Vol 48, No. 2 (2006).

Moreover, accumulating scientific evidence over the years before and after this accident has led behavioral psychologists to conclude that texting on a smartphone is *physiologically addictive*, leading users like Kubiak compulsively to interact with their smartphones even while driving, a phenomenon which explains why drivers continue to text and drive even though they understand the risks and dangers involved. See Note, *Killer Cell Phones and Complacent Companies: How Apple Fails to Cure Distracted Driving Fatalities*, 72 U. Miami L. Rev. 880, 890; 895 (2018) citing Worland, J., *Why People Text and Drive Even When They Know It's Dangerous*, TIME (Nov. 6, 2014), http://time.com/3561413/texting-driving-dangerous. ("Dopamine is released in the brain every time an incoming text message lights up on the screen;...this excitement compels people to engage in texting while driving.").

In fact, in 2008, five years prior to this accident, Apple had already recognized and foreseen the compulsory, addictive and therefore dangerous use of its smartphones by those driving motor vehicles. Among the thousands of patents Apple owns is one which is designed to prevent texting while driving, U.S. Patent No. 8,706,143 (filed Dec. 12, 2008) (issued Apr. 22, 2014) ("the '143 Patent"). The purpose of the '143 Patent----one which excludes others from bringing the same or equivalent solutions to the market----is to provide "lock-out mechanisms [that] disable the ability of a handheld computing device to perform certain functions, such as texting, while one is driving." *Id.* at [57].

Apple expressly recognized when filing for its '143 Patent in 2008 that texting while driving is a pervasive problem and while "new laws are being written to make texting illegal while driving," law enforcement has a limited ability to catch offenders "because the texting device can be used out of sight (e.g., on the driver's lap), thus making texting while driving *even more dangerous*." *Id.* at col. 1.25-9. (emphasis supplied). Because of this widespread occurrence, Apple acknowledged that "it is doubtful that law enforcement will have any significant effect on stopping the practice." *Id.* at col. 1.29-32. Its invention would disable all distracting functions on a driver's phone, leaving him/her unable to "mak[e] or receiv[e] [a] phone call[ ] without a hands-free device." Baron, E., *Apple Has Technology to Stop Texting-and-Driving, but Doesn't: Report*, MERCURY NEWS: SiliconBeat (Sept. 26, 2016) http://www.siliconbeat.com/2016/09/26/113833/.

In one of several embodiments of Apple's '143 Patent, the driver's handheld computing device or smartphone would provide its own lock-out mechanism without implementing any adaptations or additions to the vehicle. '143 Patent at col. 1.41-3. It functions by using a motion analyzer to detect whether the smartphone is moving beyond a certain speed; a scenery analyzer to determine whether the smartphone holder is a driver or passenger in the vehicle; and a lock-out mechanism to disable its functions if the information received by the two analyzers show that the smartphone holder is operating the motor vehicle. *Id.* at col. 1.43-5.

Despite Apple's acknowledged ability well before 2013 to configure Kubiak's smartphone so that it contained this lock-out mechanism, it refused to implement this technology. Its refusal to do so left Kubiak's smartphone without the existing technology which would have prevented her smartphone from receiving any incoming text messages and would have thereby prevented her distracted driving immediately before she collided with the rear of Jones' vehicle.

On July 28, 2015, petitioners Kimberly Meador, individually and as guardian for L. M., a minor; Amos Standard, individually and on behalf of the Estate of Shari Standard; and Russell Jones, individually and on behalf of the Estate of Sandra Jones ("petitioners"), brought this civil action against Apple in the federal district court for the Eastern District of Texas, Tyler Division, asserting claims for strict products liability and negligence (App. 28-29). Positing jurisdiction on diversity of citizenship under 28 U.S.C. § 1332(a)(1), they alleged that Apple's smartphone (the iPhone 5), as designed and marketed, is defective and unreasonably dangerous because Apple failed to configure it, as it was able to do with its '143 Patent, so that it was automatically disabled while its user was driving; or that it failed to warn users like Kubiak of the dangers of operating the device while driving (*Id.*). Petitioners further alleged that these failures caused the accident, deaths and injuries of which they complained (App. 29).

Apple responded by moving to dismiss petitioners' complaint under Fed. R. Civ. P. 12(b)(6) arguing that the alleged facts did not establish that its conduct was the legal cause of petitioners' damages (*Id.*). After briefing these issues, petitioners were

allowed to file their first amended complaint on April 22, 2016, and the parties agreed that Apple's motion would apply to this new pleading (*Id.*). The amended complaint alleged that because she was interacting with respondent's smartphone to check an incoming text message, Kubiak failed to see Jones' vehicle slowing down in front of her to turn left onto County Road 214-D; that she was thereby distracted from the safe operation of her Dodge Ram pickup truck; and that when she looked up, she was unable to avoid colliding with the rear of Jones' vehicle even as she turned her steering wheel to the right, all of this due to her level of distraction caused by respondent's smartphone (App. 28).

Petitioners further alleged that studies before and after this accident in 2013 show that the level of impairment to driving while using a smartphone is at least as profound and dangerous as drunk driving; and that according to David Greenfield, Ph.D., Director of the Center for Internet and Technology Addiction, smartphones are the "world's smallest slot machines" because they affect the brain in similar ways that gambling or drugs act, i.e., dopamine levels in the brain are increased as the user anticipates messages, and this anticipation leads to higher levels of pleasure. Thus immediately before the accident----when Kubiak received a buzzing notification from Apple'ssmartphone of an incoming message and then looked down to read it----she was responding to an unconscious and automatic, neurobiological compulsion to engage in texting while driving at highway speeds.

Moreover, petitioners alleged that as early as 2008 when Apple filed for its '143 Patent for "lock-out

mechanisms [that] disable the ability of a handheld computing device to perform certain functions, such as texting, while one is driving," it knew, foresaw and expressly acknowledged that those who use its smartphone will compulsively interact with it while driving by either sending or receiving texts, e-mails, social media posts and/or other messaging; and that such use would pose an unreasonable risk of harm to themselves and to other drivers on the roadway. Thus petitioners alleged that Kubiak's conduct in looking down to read a text message delivered to Apple's smartphone while traveling at highway speeds "is [under Texas law] a derivative of Apple's conduct (failure to implement its own safer technology to prevent the delivery of messages and notifications of such messages to Kubiak's iPhone while traveling at highway speeds)" (App. 36-37).

Petitioners claimed that Apple's failure to configure Kubiak's smartphone so as to disable it while she was driving despite having the technical capability to do so and despite its knowledge that use of its smartphone while driving at highway speeds creates an unreasonable risk of harm to users and innocent third parties, rendered her smartphone defective in its design, manufacture and marketing within the meaning of Restatement (Second) of Torts, § 402A. As they alleged, these acts of omission or commission by Apple "were a producing cause of the injuries and damages suffered by [petitioners] in that Apple's conduct was a substantial factor in bringing about the injuries suffered, and without which the injuries would not have occurred." For these reasons, petitioners claimed that Apple was liable for its conduct under either strict products liability law of Texas or for negligence.

On August 16, 2016, the Magistrate Judge, Mitchell, J., issued a report recommending that Apple's motion be granted and that petitioners' complaint be dismissed with prejudice (App. 27-39). In this case of "first impression in Texas,"she determined that causation under strict products liability law requires that the product itself be "the producing cause" of a plaintiff's injuries, not the proximate cause, and foreseeability is not a consideration(App. 33). Under negligence law, however, liability depends on whether Apple's allegedly negligent design and production of its smartphone was the proximate cause of a plaintiff's injuries, an inquiry which consists of both cause in fact and foreseeabliity (App. 33-34). Since the inquiry into "producing cause" is conceptually the same as that of cause in fact, the common element to both "producing cause" and proximate cause is cause in fact, i.e., proof that the conduct complained of was "a substantial factor in bringing about the injury, and without which the injury would not have occurred" (App. 33-34 quoting *Ford Motor Co. V. Ledesma*, 242 S.W.3d 32, 46 (Tex. 2007)).

Applying these causation principles, the Magistrate ruled that Apple's conduct in designing and marketing its allegedly defective smartphone "came to rest after the incoming message was delivered to Kubiak's iPhone;" that Kubiak's neglect in failing to safely operate her vehicle when she diverted her attention from the roadway was the "producing cause" or cause in fact of the accident; and that Apple's failure to configure its smartphone to become automatically disabled when its user is driving "did nothing more than create the condition that made Plaintiffs' injuries possible" (App. 36-37). This connection to petitioners'

injuries was too attenuated or remote to assign liability in the circumstances as no reasonable juror would identify Apple's conduct as being actually responsible for the harm petitioners sustained under either a strict liability or negligence principles (App. 37). She therefore recommended that petitioners' complaint be dismissed with prejudice as any further amendment of their complaint would be futile (App. 38-39).

Petitioners objected to the Magistrate's report and recommendation asserting *inter alia* that she overlooked their well pleaded allegations that the technology behind the smartphone is designed to evoke an unconscious and automatic neurobiological response in its users which is tantamont to a compulsion or addiction which causes distracted driving; that Kubiak's neglect in diverting her attention from the roadway was inextricably intertwined with the smartphone's ability to cause drivers compulsively to interact with their phone while driving, making it unreasonably dangerous and therefore defective; and that like one who supplies an automobile or alcohol to one already drunk who then injures others, Apple is derivatively liable for petitioners' injuries (App. 16-17;20-21). They also sought the opportunity to replead their allegations to elaborate upon the science behind a user's compulsive addiction to his/her smartphone and its connection to the epidemic of highway accidents caused by distracted driving (App. 23-24).

Further briefing on the issue of concurrent causation ensued and the matter came before the district court, Schroeder, J., for adoption of the Magistrate's report and recommendation. On August 17, 2017, the district judge overruled petitioners'

objections to the Magistrate's report, adopted all of the Magistrate's findings and rulings, granted Apple's motion to dismiss and denied petitioners' motion to file a second amended complaint (App. 13-26). He ruled that "Kubiak's decision to direct her attention to her iPhone 5 and maintain her attention on her phone instead of the highway is the producing cause of the injury to the Plaintiffs;" that the smartphone merely created a condition which made petitioners' injuries possible; and that the smartphone's design was too far removed from Kubiak's decision to use it while driving to be a legal cause of the accident (App. 15-21;24).

Petitioners appealed and on December 18, 2018, the court of appeals unanimously affirmed the ruling of the district court (App. 1-12). As it reasoned, causation for both strict products liability and negligence depends on whether an alleged cause of an injury may be recognized as a "substantial factor" in bringing about the injury which would not otherwise have occurred (App. 5-6). Under Texas law, this is a practical test of common experience which mandates the weighing of policy considerations (App. 6). Since no Texas case had yet addressed the issue presented here, "we decline to consider [whether a] 'neurobiological compulsion' [can be] a substantial factor under Texas law" in any causation analysis and therefore concluded that Apple's smartphone could not be a cause in fact of the injuries in this case (App.7;9).

It thought that petitioners' causation argument about Apple's liability was a "substantial innovation" in Texas law which under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938) it could not adopt in the absence of more guidance from state cases (App. 2;7-8)). While the most

analogous case might be where purveyors of alcohol were held liable both by case law and statute for the injuries caused third parties by the intoxicated customers they served, the court noted that the development of this liability was fostered by judicial and legislative action over time, a process missing with this proposed liability for smartphone manufacturers (App. 8-9). It therefore could not "say that Texas law would regard a smartphone's effect on a user as a substantial factor in the user's tortious acts" and this issue is "for the state to explore, not us" (App. 9) (footnote omitted). Thus without attempting to make an "*Erie* guess" about how Texas courts would rule on the issue, it concluded that Apple's smartphone could not be a cause in fact of the injuries here (*Id.*).

The court conceded that petitioners may *never* have the opportunity to present and develop such a "novel" claim of causation in Texas state courts since Apple, sued outside of its home state, will remove any Texas suit to federal court based on diversity and then argue that under *Erie*, resort to state case law would prohibit the acceptance of such innovative theories of liability, leaving plaintiffs like petitioners without a meaningful pathway to finally settle their state law claims (App. 11-12). It thought that certification "is perhaps a way out of this bind" but that petitioners had not requested it "and their theory of causation is too great an extension beyond existing Texas law for us to consider *sua sponte* certification" (App. 12).

Petitioners petitioned for panel rehearing, contending that their request to apply Texas' well developed causation principles under its common law to smartphone-induced distracted driving is not a "novel"

claim, only a common sense extension of those established causation principles to a statewide public health crisis which using smartphones while driving has created. In the alternative, petitioners moved to certify these questions to the Texas Supreme Court for resolution.

On January 17, 2019, the court of appeals denied petitioner's petition for panel rehearing as well as their motion to certify questions to Texas' highest court (App. 40;41).

REASONS FOR GRANTING THE PETITION

1. The Court of Appeals Failed to Exercise Its Mandatory Diversity Jurisdiction Under 28 U.S.C. § 1332 When It Refused To Make An "Erie Guess" Whether Texas Courts Would Hold Liable A Smartphone Manufacturer For The Injuries and Deaths Which Ensued After A Driver, Distracted By Her Smartphone, Collided With Another Vehicle, Especially When Texas Law Provides A Reasonably Clear Template For Making That Prediction.

Instead of resorting to reasonably clear Texas decisional law as a reliable platform for making an educated guess under *Erie* whether Texas courts would recognize the neurobiological compulsion associated with the use of smartphones as a substantial factor in causing this collision, the court of appeals cut short its inquiry under 28 U.S.C. § 1332, because there was no Texas case directly on point and it thought that making any "*Erie* guess" about the issue was an "impermissible innovation or extension of state law" (App. 2;9). This

refusal by the court of appeals to address and decide the causation question by applying Texas law is an unwarranted abnegation of its diversity jurisdiction under § 1332, at odds with *Erie's* language and spirit, and a misreading of Texas law.

Its refusal justifiably invokes the Supreme Court's power of superintendence over the federal system in order to provide petitioners with a decision on the merits of their causation argument under Texas law; and the Court should take this opportunity to reaffirm the power and duty of Article III federal courts to make *Erie*-educated guesses about these kinds of issues, especially when state law provides a reasonably clear template for making that prediction and when the likelihood for the development of this precise question in Texas law is virtually nonexistent because of Apple's ability as a non-resident defendant to remove to the federal forum any suit brought against it in Texas courts.

After *Ashcroft v. Iqbal*, 556 U.S. 662, 679 (2009) and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 555-556 (2007), petitioners' complaint must contain enough factual allegations which taken as true state a claim that is plausible on its face. *Id.* If those allegations permit the court to draw the reasonable inference that respondent may----*not* probably----be liable for the misconduct alleged, dismissal is not warranted. *Twombly*, 550 U.S. at 556. Petitioners' first amended complaint meets the *Iqbal-Twombly* standard. After describing the accident which ensued after Kubiak looked down to her smartphone to read an incoming text message, petitioners alleged with reference to specific scientific facts that Apple designed its

smartphone to be akin to a "slot machine," i.e., to evoke a neurobiological response in its users like Kubiak which bypasses judgment so that she would use it compulsively or addictively, even while driving.

Yet it was alleged that Apple, knowing that its smartphone would capture and keep a user's attention even while driving, still designed its smartphone to immediately alert drivers of messages, a feature which evokes a driver's compulsive/addictive behavior to use its smartphone, an event which makes it unreasonably dangerous for the driver and innocent third parties while driving at highway speeds. Apple foresaw this precise danger in 2008 when it pursued a patent for a "lock out" mechanism which disables its smartphone when a user like Kubiak is driving, a patent which prevented competitors from bringing the same or similar solutions to the market and one which Apple could have---but *never*---configured for Kubiak's smartphone by 2013.

Petitioners alleged that Apple was liable under Texas' strict products liability law or for negligence by defectively designing a smartphone which evokes in its users a neurobiological response while, at the same time, failing to configure it with an automatic "lock out" safety feature which disables it while users are driving. Thus when Kubiak became distracted by an incoming text message, compulsively diverting her eyes from the road to Apple's smartphone as she did so, Apple's conduct became inextricably intertwined with Kubiak's conduct such that the distraction created and prolonged by the smartphone became under Texas law a producing, proximate or concurrent cause of the collision, imposing derivative liability on Apple for its

conduct. In this way, petitioners alleged that Kubiak's conduct in reading the text message while driving was entirely dependent upon Apple's defectively designed smartphone and the harmful forces created by this defective design continued up to the time of impact between Kubiak's truck and Jones' vehicle.

Because these allegations stated plausible claims for relief, the court of appeals sitting in diversity under 28 U.S.C. § 1332(a)(1), was dutybound to decide the disputed issue of causation by applying Texas law or by predicting how Texas courts would rule on the issue. This Court has repeatedly emphasized that the federal courts have a "virtually unflagging obligation...to exercise [this diversity] jurisdiction given them." *Quackenbush v. Allstate Insurance Co.*, 517 U.S. 706, 716 (1996). *Colorado River Water Conservation District v. United States*, 424 U.S. 800, 821 (1976). *Cohens v. Virginia*, 19 U.S. 264, 403 (1821) (Marshall, Ch. J.). See *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 32;41 (Brennan, J., dissenting) ("Until Congress speaks otherwise, the federal judiciary has no choice but conscientiously to render justice for litigants from different States entitled to have their controversies adjudicated in the federal courts.").

That the court of appeals thought that Texas law is uncertain or lacking on this disputed issue of causation was no reason for it to decline to decide it or to regard it as too innovative to even consider. As the Court wrote in *Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943),

> the difficulties of ascertaining what the state courts may hereafter determine the state law to

> be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision.
>
> The diversity jurisdiction was not conferred for the benefit of the federal courts or to serve their convenience....[I]t has from the first been deemed to be the *duty* of the federal courts, if their jurisdiction is properly invoked, to decide questions of state law whenever necessary to the rendition of judgment.

Id. (emphasis supplied). See *Daily v. Parker*, 152 F.2d 174, 177 (7th Cir. 1945) ("If the state courts have not acted, we are free to take the course which sound judgment demands. In the absence of a state court ruling our duty is tolerably clear. *It is to decide, not avoid, the question.*") (emphasis supplied).

The court of appeals in exercising its *mandatory* diversity jurisdiction over petitioners' state law claims was therefore dutybound to ascertain the import of available state law either through making an "*Erie* guess," i.e., an educated guess that is not binding on Texas courts but is binding in federal courts, or by certifying the question to the state supreme court. This approach allows a federal court to fulfill its duty under § 1332 to hear and decide cases brought on diversity jurisdiction and to respond to changing circumstances that may warrant a changing law. See Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism*, 145 U. Pa. L. Rev. 1459, 1497 (1997).

Especially when existing state court precedents are reasonably clear, when the data which state courts use and to which they typically refer are available, and when the methods about how Texas state courts rule in similar situations is reasonably apparent in the case law, federal courts using this information to predict how a state court would rule are *not* creating new, innovative state law, only predicting how a state court would rule if this case were brought there. In this way, the federal court is fulfilling *Erie's* promise that "the outcome of the litigation in the federal court should be substantially the same, so far as legal rules determine the outcome of a litigation, as it would be if tried in a State court." *Felder v. Casey*, 487 U.S. 131, 151 (1988) quoting *Guaranty Trust Co. York*, 326 U.S. 99, 109 (1945).

This prediction, binding only in federal courts, is professedly apt where Apple transacts business in all states, was not sued in its home state, and removal would almost always make the federal forum the locus for decisionmaking even if petitioners had begun suit in Texas state courts. Thus under our federal regime, there is no realistic opportunity for Texas courts to develop their own case law addressing the kind of causation principles which should or would apply to a smartphone manufacturer because of distracted driving; and this reality, described by the court of appeals in a footnote, provides a persuasive, practical incentive for federal courts to fulfill their duty under § 1332 of making an educated guess of how Texas courts would rule on causation.

Given this jurisdictional imperative, the template is reasonably clear for the court of appeals to

have made an "*Erie* guess" about whether Texas courts would hold Apple liable for the fatalities and injuries which ensued when Kubiak, distracted by its defective smartphone, collided with Jones' vehicle. That template is *El Chico Corp. v. Poole*, 732 S.W.2d 306, 310-315(Tex. 1987), a case which exemplifies the method and reasoning the Texas Supreme Court employed when deciding that alcoholic beverage licensees who sell intoxicating liquor to customers already inebriated should be held causally responsible for the harm those customers then cause innocent third parties.

The *Poole* Court noted that at common law, liability did not attach to such licensees because each customer was responsible for his own actions in consuming alcohol and, even if the sale of alcohol was a proximate cause of intoxication, injury to a third person was an unforeseeable result of that intoxication. *Id.* at 309. But the "circumstances of modern society," i.e., the "carnage inflicted upon innocent victims by drunk drivers"caused many courts to reject the rationale supporting no liability as outdated and unrealistic. *Id.* at 310. Stating that the common law "is not frozen or stagnant, but evolving, and it is the duty of this court to recognize the evolution," the court held that under a negligence analysis, injury to a third person "is no longer unforeseeable in an age when death and destruction occasioned by drunk driving is so tragically frequent." *Id.*

To meet this emergent public health crisis on the highways, the *Poole* Court expanded the duty element of a negligence cause of action to accommodate the common sense fact that alcohol distorts perception, slows reaction time and impairs motor skills, each one

undermining the safe operation of a motor vehicle; and that the risk of injury to others from serving alcohol to one already inebriated whom the licensee knows will probably drive a car "is as readily foreseen as injury resulting from setting loose a live rattlesnake in a shopping mall." *Id.* at 311. That merely selling liquor to an intoxicated person is a crime reinforced the court's expansion of this duty when that intoxicated person is likely to drive. *Id.* at 312-314.

Most important, *Poole* made selling liquor to an intoxicated patron a cause in fact of an ensuing accident if a jury finds more probably than not that the licensee knows or should know the patron is intoxicated; and the ensuing accident will be deemed to be foreseeable because of "the irrefutable conclusion that furnishing alcohol, consumption of alcohol, and subsequent driving of a vehicle when it is then involved in an accident are all *foreseeable, ordinary links in the chain of causation* leading from the sale to the injury." *Id.* at 314 quoting *Ontiveros v. Borak*, 667 P.2d 200, 207 (Ariz. 1983) (emphasis supplied). Thus "[l]iability is grounded in the public policy behind the law of negligence which dictates [that] every person is responsible for injuries which are the reasonably foreseeable consequences of his act or omission." *Id.* at 315.

Poole's expansion of the duty and cause in fact elements of negligence was fueled by the knowable physiological fact that alcohol impairs the safe operation of a motor vehicle; the public health crisis stemming from the frequent deaths and injuries caused by drunk driving; the inability of static common law concepts of causation and foreseeability to assign liability properly in these emergent new circumstances

of a modern society; and public policy concerns that the law reflect the realities of human behavior on and off the roadway.

These same considerations would have informed any Texas court ruling on Apple's Rule 12(b)(6) motion which contended that it was not the legal cause of this collision; and they should have also informed the court of appeals if it had decided to make an "*Erie* guess" about how state courts would rule on this issue of causation. Specifically, it is *not* a leap of logic or the creation of innovative state law to conclude that, like the knowable physiological fact that alcohol impairs the safe operation of a motor vehicle, the neurobiological compulsion associated with the use of smartphones, as petitioners alleged, leads to the addictive use of the device even while driving, creating the danger of distraction for the driver and the risk of harm to innocent third parties.

In this regard, it has been shown that text use while driving delays reaction time 37% and speaking on a hand-held phone delays reaction time 46% whereas driving under the influence of marijuana delays reaction times by 21% and drinking to the limit slows reaction time by just 13%. A driver is *six* times more likely to get into an accident from texting and driving than from drinking and driving, meaning that *it is safer to drive drunk than to text and drive*. See Hopkins K., *25 Shocking Distracted Driving Statistics*, DISTRACTED DRIVING ACCIDENTS (Jan. 23, 2015), http://distracteddriveraccidents.com/25-shocking-distracted-drivingstatistics/.

Moreover, the death and fatalities resulting from distracted driving surpass those caused by drunk driving. Each year, 1.6 million car crashes, or 64% of all car accidents in the United States annually, occur due to cell phone use while driving, according to the National Safety Council. EDGAR SNYDER & ASSOCS., *Texting and Driving Accident Statistics*, http://www.edgarsnyder.com/car-accident/cause-of-accident/cell-phone-statistics.html (February 28, 2018). Of those accidents, around 330,000 result in injuries or death specifically caused by texting while driving. *Id.* In 2013, over 3,000 people, including Jones and Standard, were killed in cell phone distraction-related accidents. *Id.*

This public health crisis is akin to the one which impelled the *Poole* Court to expand the duty and cause in fact elements of negligence so that "every person is responsible for injuries which are the reasonably foreseeable consequences of his act or omission." 732 S.W.2d at 315. Thus it would not be an innovation of state law, much less an impermissible one, to predict that Texas courts would hold Apple liable for this accident because it created a risk of danger by designing and marketing a defective smartphone without a "lock-out" mechanism to disable it while Kubiak was driving. Her ensuing distraction and the resulting accident were under *Poole* "all foreseeable, ordinary links in the chain of causation leading from the sale to the injury." *Id.* at 314.

Finally, Texas law on concurrent causation is also a reliable indicator of how state courts would most likely assess Apple's responsibility for this accident. When the alleged facts leading up to the injuries

constitute a continuous succession of events so linked together as to make a natural whole, the intervening act (i.e., Kubiak's distraction caused by the smartphone's incoming message) will not relieve Apple of liability if Kubiak's compulsive response to the incoming message was a reasonably foreseeable result of Apple's negligence in failing to configure its smartphone with an automatic "lock out" safety feature which disables it while users are driving. *Stanfield v. Neubaum*, 494 S.W.3d 90,98 (Tex. 2016) citing *Columbia Rio Grande Healthcare, L.P. v. Hawley*, 284 S.W.3d 851, 857 (Tex. 2009). Contrast *Dew v. Crown Derrick Erectors, Inc.*, 208 S.W.3d 448, 450 (Tex. 2006) (superceding cause interrupts causal chain). Because Kubiak's distraction "was...brought into operation by the wrongful acts of [Apple]," see *Stanfield*, 494 S.W.3d at 99, her conduct could not have been an intervening, superceding cause of the accident under Texas law.

In the end, petitioners' allegations do not invoke "an impermissible innovation or extension of state law," as the court of appeals surmised, but a common sense application of existing Texas law already exemplified by *Poole*. Apple has created a clearly preventable public health and safety crisis on Texas roadways caused by distracted driving and its failure to make its smartphone safe for users while driving has, in turn, caused harm to innocent third parties. Under *Poole's* reasoning, Texas law would hold it liable for "all foreseeable, ordinary links in the chain of causation leading from the sale to the injury," and the court of appeals, exercising its mandatory diversity jurisdiction under 28 U.S.C. § 1332(a)(a), should have so predicted.

2. Petitioners Were Denied Due Process Of Law Or Their Right Of Access To The Courts When After Refusing To Make An "*Erie* Guess" About Whether Texas Law Would Hold Respondent Liable For Its Role In Causing This Accident, The Court of Appeals Refused *Sua Sponte* To Certify This Question To The Texas Supreme Court And Then Denied Petitioners' Motion To Do So.

The unfairness of dismissing petitioners' claims under Texas law is compounded by the court of appeals' refusal either *sua sponte* or on motion of petitioners to certify the question of causation to the Texas Supreme Court for resolution. The difficulty in ascertaining uncertain state law is no excuse for not certifying the question; in fact, it is one of the best reasons for doing so. *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) ("[R]esort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of [state] law.").

Moreover, certification is especially apt where the likelihood that Texas courts will address this causation question is virtually nonexistent because of respondent's ability as a non-resident defendant to remove to the federal forum any suit brought against it in Texas courts, leaving this precise question undeveloped under Texas law and providing Apple with the argument that applying static, less innovative Texas law would not provide petitioners relief in any event. Certification, as the court of appeals observed in a footnote, "is perhaps a way out of this bind" (App. 12). Yet having acknowledged that certification could furnish petitioners with the opportunity to present their "innovative" claims to the Texas Supreme Court,

decided not to do so *sua sponte* and then denied petitioners' motion to certify contained in their petition for rehearing.

The Court in *Lehman Bros. v. Schein*, 416 U.S. at 390-391, and *Clay v. Sun Insurance Office Ltd.*, 363 U.S. 207, 212 (1960), has instructed lower federal courts to employ certification in circumstances like these where it would save time, energy and resources and "build a cooperative judicial federalism." The court of appeals' decision not to do so either *sua sponte* or upon petitioners' motion is inexplicable and unfair. If the court of appeals thought petitioners' theory of liability was an impermissible innovation of Texas causation law, it should have let the Texas Supreme Court decide whether it was truly an "innovation" or just the common sense application of *Poole's* well developed causation principles to the emergent public safety crisis in Texas caused by smartphone-induced distracted driving.

It is egregiously unfair to declare petitioners' argument "impermissible" and then deny them a hearing before the very tribunal which should have the last word on this assessment. See *Amberboy v. Societe de Banque Privee*, 831 S.W.2d 793, 800 n. 9 (Tex. 1992) (Doggett, J., concurring and dissenting) ("By answering certified questions for those federal appellate courts that are *Erie*-bound to apply Texas law, we avoid the potential that the federal courts will guess wrongly on unsettled issues, thus contributing to, rather than ameliorating confusion about the state of Texas law. We find such cooperative effort to be in the best interests of an orderly development of our own unique jurisprudence...."). In addition, in *Schein*, petitioner's

motion for certification was made, like here, in its petition for rehearing and this event was not regarded as a reason for denying relief. The same result should apply here.

While petitioners acknowledge that the decision to certify rests in the sound discretion of the federal court, see *Schein*, 416 U.S. at 391, they submit that on this record the inexplicable refusal by the court of appeals to certify to the Texas Supreme Court this causation question implicating important public health and safety issues for all Texans is an egregiously unfair abuse of discretion tantamount to a denial of substantive due process. The substantive component of the Due Process Clause "bars ... arbitrary, wrongful government actions 'regardless of the fairness of the procedures used to implement them.'" *Zinermon v. Burch*, 494 U.S. 113, 125 (1990) quoting *Daniels v. Williams*, 474 U.S. 327, 331 (1986). See also *Collins v. Harker Heights*, 503 U.S. 115, 125 (1992). In addition, the court of appeals' refusal to certify has denied petitioners their fundamental right of access to the courts in order to resolve this important causation issue. *Christopher v. Harbury*, 536 U.S. 403, 415 n.12 (2002).

CONCLUSION

For all the reasons identified herein, a writ of certiorari should issue to the Fifth Circuit Court of Appeals in order to review and vacate its decision affirming the decision of the District Court which dismissed petitioners' complaint with prejudice; and the Court should order that this matter be certified to the Texas Supreme Court for resolution or be remanded to

the District Court for the amendment of petitioners' complaint, further discovery and an eventual trial; or this Court should provide petitioners with such other relief as is fair and just in the circumstances of this case.

Respectfully submitted,

Gregory P. Love
Counsel of Record
Love Law Firm, P.C.
107 E. Main Street
Henderson, Texas 75652
(903) 212-4444
greg@lovetrialfirm.com

John F. (Jack) Walker, III
Martin Walker PC
121 N. Spring Avenue
Tyler, Texas 75702
(903) 526-1600
jwalker@martinwalkerlaw.com