No. 19-

IN THE
Supreme Court of the United States

W&T OFFSHORE, INC.,
Petitioner,

v.

APACHE DEEPWATER, L.L.C.,
Respondent.

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a federal court applying the law of a civil-law jurisdiction should follow the *methodology* that the jurisdiction's highest court would apply—as the First Circuit has held—or whether the federal court should follow the *precedent* of the jurisdiction's highest court—as the Fifth Circuit held below—even though a court in the jurisdiction would not do so.

PARTIES TO THE PROCEEDING

W&T Offshore, Inc., petitioner on review, was the defendant-appellant below.

Apache Deepwater, L.L.C., respondent on review, was the plaintiff-appellee below.

Apache Corporation was a plaintiff in the trial court, but is not a party to this petition.

RULE 29.6 DISCLOSURE STATEMENT

W&T Offshore, Inc. has no parent corporation, and no publicly held company owns 10% or more of W&T's stock.

RELATED PROCEEDINGS

United States Court of Appeals for the Fifth Circuit:

Apache Deepwater, L.L.C. v. *W&T Offshore, Inc.*, No. 17-20599 (5th Cir. July 16, 2019) (reported at 930 F.3d 647), *reh'g denied* (Aug. 13, 2019).

United States District Court for the Southern District of Texas:

Apache Deepwater, LLC v. *W&T Offshore, Inc.*, No. CV H-15-0063 (S.D. Tex. May 31, 2017).

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

OTHER AUTHORITIES:

TABLE OF AUTHORITIES—Continued

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W&T Offshore, Inc. ("W&T") respectfully petitions for a writ of certiorari to review the judgment of the Fifth Circuit in this case.

OPINIONS BELOW

The Fifth Circuit's opinion is reported at 930 F.3d 647. Pet. App. 1a-24a. The District Court's May 31, 2017 opinion denying W&T's motion for entry of judgment, granting Apache Deepwater, L.L.C.'s ("Apache") motion for entry of final judgment, and ordering W&T pay compensatory damages, interest, attorneys' fees, and costs is unreported, but available at 2017 WL 6326141. Pet. App. 25a-46a. The District Court's August 25, 2017 opinion denying W&T's motions for a new trial or remittitur, for judgment as

a matter of law, and to alter or amend the judgment is unreported, but is available at 2017 WL 6326886. Pet. App. 47a-59a. The Fifth Circuit's opinion denying rehearing and rehearing en banc is unreported. *Id.* at 60a-61a.

JURISDICTION

The Fifth Circuit entered judgment on July 16, 2019. W&T's timely petition for rehearing and rehearing en banc was denied on August 13, 2019. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Supremacy Clause, U.S. Const. art. VI, cl. 2, provides:

> This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the land; and the Judges in every state shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

The Tenth Amendment, U.S. Const. amend. X, provides:

> The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

Article 1 of Louisiana's Civil Code, La. Civ. Code Ann. art. 1, provides:

> The sources of law are legislation and custom.

Article 2003 of Louisiana's Civil Code, La. Civ. Code Ann. art. 2003, provides in relevant part:

> An obligee may not recover damages when his own bad faith has caused the obligor's failure to perform or when, at the time of the contract, he has concealed from the obligor facts that he knew or should have known would cause a failure.

INTRODUCTION

Despite the United States' common-law roots, a handful of U.S. jurisdictions maintain civil-law legal systems. These systems differ in fundamental ways from their common-law counterparts. For instance, common-law courts have the power to make new law; civil-law jurisdictions do not. Common-law courts are nearly always bound by precedent; civil-law courts are not. Our system of dual sovereignty allows, and even encourages, States to cultivate these sort of idiosyncratic systems. And *Erie Railroad Co.* v. *Tompkins*, 304 U.S. 64 (1938), requires federal courts called on to apply state substantive law to honor them. This case presents the question of *how* federal courts must do so.

In this case, the Fifth Circuit concluded that *Erie* required a federal court to mechanically apply a state high court's precedent to resolve a question of Louisiana state law, even though Louisiana's civilian methodology would have prevented Louisiana state courts from doing precisely that. *See, e.g.*, *Willis-Knighton Med. Ctr.* v. *Caddo-Shreveport Sales & Use*

Tax Comm'n, 903 So. 2d 1071, 1085 (La. 2005). In doing so, the Fifth Circuit split with the First Circuit over whether a federal court applying state substantive law honors *Erie*'s mandate to apply the "law of the state" by applying the *precedent* or the *methodology* of a civil-law jurisdiction. 304 U.S. at 78.

This Court's precedents interpreting *Erie* make clear that the First Circuit has the better view. *Erie* requires a federal court to apply a civil-law jurisdiction's statutorily prescribed methodology—which is binding—not its precedent, which is not. And the Fifth Circuit's error was of constitutional import. The Fifth Circuit substituted a judge-made federal rule for a statutorily prescribed state-law approach—precisely the sort of federal-common-law lawmaking that *Erie* forbids. And in doing so, the Fifth Circuit effectively created a new rule regarding the substance of Louisiana state law that it had no authority to make.

This Court should intervene. If permitted to stand, the Fifth Circuit's decision will hurt litigants, States, and federalism. It will undercut States' ability to implement and maintain idiosyncratic systems, encourage forum-shopping, and undermine litigants' confidence that cases will be treated similarly regardless of whether they are litigating in state or federal court. And because the two circuits with the largest stake in this issue have already weighed in, there is no need for further percolation. This case offers a rare opportunity to address an important issue concerning the balance of state and federal power. The Court should take it.

STATEMENT

1. Jurisprudentially, Louisiana and Puerto Rico are islands—lone civil-law jurisdictions surrounded by common-law ones. *See Introduction to the Law of the United States* 210 (David S. Clark & Tuğrul Ansay eds., 2d ed. 2002); David C. Indiano, *Federal District Court in Puerto Rico: A Brief Look at the Court and Federal Handling of Commonwealth Civil Law in Diversity Cases*, 13 Case W. Res. J. Int'l L. 231, 231 (1981). In civil-law systems like Louisiana's and Puerto Rico's, judicial decisions are only persuasive authority—not primary sources of law—and *stare decisis* does not apply. *See* Mary Garvey Algero, *The Sources of Law and the Value of Precedent: A Comparative and Empirical Study of a Civil Law State in a Common Law Nation*, 65 La. L. Rev. 775, 798 (2005); Alvin B. Rubin, *Hazards of a Civilian Venturer in Federal Court: Travel and Travail on the Erie Railroad,* 48 La. L. Rev. 1369, 1372 (1988); *Ardoin* v. *Hartford Accident & Indem. Co.*, 360 So. 2d 1331, 1334-36 (La. 1978); *cf. Puerto Rico* v. *Sanchez Valle*, 136 S. Ct. 1863, 1884-85 (2016) (Breyer, J., dissenting) (noting that "common-law principles" do not govern in Puerto Rico (quoting *Valle* v. *American Int'l Ins. Co.*, 8 P.R. Offic. Trans. 735, 736-738 (1979)). Instead, the only "sources of law are legislation and custom." La. Civ. Code Ann. art. 1.

Civil-law judges, unlike their common-law counterparts, do not make law; they merely resolve the controversy before them. *See* Antonin Scalia, *Common-Law Courts in a Civil-Law System: The Role of United States Federal Courts in Interpreting the Constitution and Laws*, *in* A Matter of Interpre-

tation: Federal Courts and the Law 3, 7 (Amy Gutmann ed., 1997); *cf.* P.R. Laws Ann. tit. 31, § 21 ("The distinction of laws into odious or favorable with a view of limiting or extending their provisions, shall not be made by those whose duty it is to interpret them.").[1] The Louisiana Supreme Court has thus explained that treating judicial decisions in a civil-law system as precedent would "misapprehen[d]" the civilian system and "disregard" the rules of interpretation "set forth in * * * the Civil Code." *Ardoin*, 360 So. 2d at 1335.

The closest civil-law jurisdictions come to *stare decisis* is *jurisprudence constante*. That doctrine recognizes that through "a long line of cases following the same reasoning," a rule of law can become so accepted by the courts that it carries "considerable persuasive authority." *Eagle Pipe & Supply, Inc.* v. *Amerada Hess Corp.*, 79 So. 3d 246, 256 (La. 2011) (internal quotation marks omitted); *see also* Algero, *supra*, 65 La. L. Rev. at 799. But even *jurisprudence constante* is only "secondary information," *Ardoin*, 360 So. 2d at 1334; *see also* Pet. App. 11a-12a; it "is not the law," *Willis-Knighton Med. Ctr.*, 903 So. 2d at 1088.

"It is only in cases not covered by legislation that a lawyer or judge may look for solutions" in prior judicial decisions. La. Civ. Code Ann. art. 1, cmt. c. "When a law is clear and unambiguous and its application does not lead to absurd consequences," Louisiana courts must apply it "as written," with "no

[1] All citations to provisions of Puerto Rico's case law and civil code are to the English translations.

further interpretation." La. Civ. Code Ann. art. 9; *see also* P.R. Laws Ann. tit. 31, § 14 ("When a law is clear and free from all ambiguity, the letter of the same shall not be disregarded * * * ."). If a statute is susceptible to different meanings, the civil code provides specific instruction for interpreting its language. La. Civ. Code Ann. arts. 10-12; *see also* P.R. Laws Ann. tit. 31, §§ 14-19. For example, courts are directed to look to other provisions of the Civil Code on the same subject matter. La. Civ. Code Ann. art. 13; P.R. Laws Ann. tit. 31, § 18; *see also Ardoin*, 360 So. 2d at 1334-36. And "[w]hen no rule for a particular situation can be derived from legislation or custom, the court is bound to proceed according to equity," resorting "to justice, reason, and prevailing usages." La. Civ. Code Ann. art. 4; *see also* P.R. Laws Ann. tit. 31, § 7 ("When there is no statute applicable to the case at issue, the court shall decide in accordance with equity * * * .").

2. Louisiana's civil-law system frames the dispute in this case. W&T and Respondent Apache operated three offshore oil and gas wells in the Gulf of Mexico under a joint operating agreement when a dispute arose over the plugging and abandonment of the wells. Pet. App. 2a-3a.

With W&T's approval, Apache initially contracted to use a single intervention vessel for the project, which—according to internal Apache documents—would have cost roughly $56.35 million and had conducted similar plugging-and-abandonment operations without incident before. *See id.* But Apache later changed course. *Id.* at 3a-5a. Over W&T's objections, Apache canceled the contract, incurring a cancellation fee. *See id.* Apache then hired two

different rigs to complete the job at a total cost of $139.9 million—more than twice the original estimate. *Id.* Apache contended it made the switch for environmental reasons and to comply with government regulations; W&T said Apache did so to offset the cost of two rigs that were idle and hemorrhaging money. *Id.* When Apache invoiced W&T for its contractual share—49%—of the costs incurred, W&T paid 49% of the original estimate instead. *Id.* at 5a.

Apache brought suit under Louisiana Law pursuant to the Outer Continental Shelf Lands Act. *See id.*; 43 U.S.C. § 1333(a)(2)(A) (to the extent not inconsistent with federal law, "the civil and criminal laws of each adjacent State * * * are declared to be the law of the United States" for the adjoining portion of the outer Continental Shelf). It alleged that W&T breached its contractual obligation to pay for 49% of the cost of plugging and abandoning the wells. *See* Pet. App. 5a. W&T moved for summary judgment, arguing that the agreement unambiguously required Apache to seek W&T's approval before spending more than $200,000 on well operations. *Id.* at 5a-6a. The District Court concluded that the agreement was ambiguous and denied the motion. *See id.* at 6a-7a.

At trial, the jury concluded that W&T breached the contract, but also that "Apache act[ed] in bad faith, thereby causing W&T to not comply with the contract." *Id.* at 7a, 10a. W&T moved, among other things, for judgment as a matter of law based on the bad-faith finding. *Id.* at 7a-8a, 10a. It explained that under Louisiana Civil Code Article 2003, "[a]n obligee may not recover damages when *his own bad faith has caused the obligor's failure to perform*." *Id.*

at 9a-10a (quoting La. Civ. Code Ann. art. 2003 (emphasis added)). Such provisions requiring a contractual counterparty to act in good faith are common in civil codes. *See* P.R. Laws Ann. tit. 31 § 3375 ("Contracts are perfected by mere consent, and from that time they are binding, not only with regard to the fulfilment of what has been expressly stipulated, but also with regard to all the consequences which, according to their character, are in accordance with good faith, use, and law."); *see also* Código Civil [C.C.] art. 1258 (Spain); Code Civil [C. Civ.] art. 1104 (Fr.). Apache's bad faith in causing W&T not to comply with the contract therefore barred its contractual recovery. *Id.*

The district court denied the motion. *Id.* at 10a-11a. It held that the Louisiana Supreme Court's statement in *Lamar Contractors, Inc.* v. *Kacco, Inc.*, 189 So. 3d 394 (La. 2016) (per curiam), that bad faith bars damages under Article 2003 only if the obligee failed to perform *under the contract*, meant that extra-contractual bad faith from Apache causing W&T's noncompliance could not bar Apache's recovery. Pet. App. 10a-11a; 30a-33a.

In doing so, the District Court did not independently analyze Article 2003. *See id.* at 30a-31a. It instead applied *Lamar*, reasoning that *Erie* required it to defer to the Louisiana Supreme Court's decisions. *Id.* at 30a-33a. Relying on Fifth Circuit precedent, the court concluded that only "[i]n the absence of a final decision" from the Louisiana Supreme Court could it "employ[] Louisiana's civilian methodology." *Id.* at 28a (citing *In re Katrina Canal Breaches Litig.*, 495 F.3d 191, 206 (5th Cir. 2007)).

W&T then moved for a new trial or remittitur, renewed its motion for judgment as a matter of law, and moved to alter or amend the judgment. *Id.* at 47a-48a. W&T argued that the jury's bad-faith finding necessarily meant that the jury had found Apache designed a breach of the agreement. *Id.* at 54a-55a. The district court again rejected W&T's argument, again relying on *Lamar*. *Id.* The District Court conceded that W&T's position appeared to be supported by "an intermediate appellate court decision," but believed that, "[a]s a federal court sitting in diversity * * * even under Louisiana's civil law tradition, *Lamar* would still control." *Id.* at 55a.

3. W&T appealed. It argued, among other things, that the District Court's reliance on a single Louisiana Supreme Court decision was improper under Louisiana's civilian methodology. *Id.* at 11a. W&T explained that the District Court should have employed Louisiana's civil-law approach and focused on the plain language of Article 2003, which does not require a party to breach the contract before its bad faith will bar recovery. *Id.* W&T in the alternative asked to certify the question to the Louisiana Supreme Court. *Id.* at 14a n.26.

The Fifth Circuit rejected these arguments. It held that "[i]n diversity cases where this court must apply Louisiana substantive law, 'we look to the final decisions of the Louisiana Supreme Court.'" *Id.* at 11a (footnote omitted) (quoting *In re Katrina Canal Breaches Litig.*, 495 F.3d at 206)). Recourse to civilian methodology would be appropriate "*only* when the Louisiana Supreme Court has not made a determinative decision." *Id.* at 12a (emphasis added). And because the Fifth Circuit believed that

Lamar had definitively interpreted Article 2003, it would go no further, not even to certify the question to the Louisiana Supreme Court. *Id.* at 12a-14a & n.26. Given that "the Louisiana Supreme Court resolved this issue in *Lamar*," the court concluded that "certification [wa]s unnecessary." *Id.* at 14a n.26.

4. W&T petitioned for rehearing en banc, which the Fifth Circuit denied. *Id.* at 60a-61a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE FIFTH AND FIRST CIRCUITS DISAGREE ON HOW *ERIE* APPLIES TO CIVIL-LAW JURISDICTIONS.

This case concerns a fundamental, and intriguing, question about the meaning of *Erie*. The Fifth Circuit's decision below deepened a split with the First Circuit over how to apply *Erie* to a civil-law jurisdiction. The Fifth Circuit—which includes Louisiana—and the First Circuit—which includes Puerto Rico—disagree as to whether a federal court applying state substantive law employs the *methodology* of a civil-law jurisdiction's highest court, or the *precedent* of the civil-law jurisdiction's highest court. And because the Fifth and First Circuits are home to the Nation's only civil-law jurisdictions, the Court should step in to resolve the confusion, particularly given that this case presents a clean vehicle from which to resolve the split.

1. The First Circuit takes the methodology approach. In *Reyes-Cardona* v. *J.C. Penney Co.*, 694 F.2d 894 (1st Cir. 1982) (Breyer, J.), the court considered a diversity case applying Puerto Rico law.

The First Circuit concluded that a federal court complies with its *Erie* obligations in a civil-law jurisdiction by applying the civilian-law *methodology*—that is, by first consulting the "civil law sources" that "constitute the basis of [Puerto Rico's] own law"—even where there is a *precedent* from the jurisdiction's supreme court "that might be read as" applicable. *Id.* at 896-897.

Other First Circuit cases bear out this approach. In *Republic Security Corp.* v. *Puerto Rico Aqueduct & Sewer Authority*, 674 F.2d 952 (1st Cir. 1982) (Breyer, J.), the First Circuit applied Puerto Rico law by following the civilian method: starting with the language of the code, and then consulting the opinions of civil-law "commentators." *Id.* at 954-955. The court considered previous judicial interpretations only when they were "authoritative[]"—among other things, the interpretation had persisted for decades, was corroborated by multiple civil-law treatises, and was consistent with decisions from civil-law courts in Spain and Cuba. *See id.* at 958. The First Circuit also rejected the plaintiff's attempt to analogize to "common law doctrines," explaining that "[i]n interpreting the Civil Code of Puerto Rico, * * * authoritative commentaries on analogous provisions of the Spanish Civil Code are more persuasive than common law analogies, which are inapplicable but for purposes of comparative analysis." *Id.*; *see also Ayuso-Morales* v. *Secretary of Health & Human Servs.*, 677 F.2d 146 (1st Cir. 1982) (Breyer, J.) (applying civil-law methodology to determine whether plaintiff qualified as a "widow" or "concubine" under Puerto Rico law). The First Circuit, in short, employs the civilian-law methodol-

ogy and rejects common-law appeals to judicial precedent.

2. The Fifth Circuit below took the opposite approach. It mechanically applied a previous Louisiana Supreme Court case as precedent, even though if the Louisiana Supreme Court had heard the case itself, its civil-law methodology would have prevented it from doing precisely that. *Compare* Pet. App. 11a (explaining that "[t]his court must apply Louisiana substantive law" by looking "to the final decisions of the Louisiana Supreme Court." (internal quotation marks omitted)), *with Holland* v. *Buckley*, 305 So. 2d 113, 119-120 (La. 1974) ("In a jurisdiction such as Louisiana which applies civilian theories of legal method, prior judicial decisions do not represent law * * * ."), *and Ardoin*, 360 So. 2d at 1334 ("[T]he notion of Stare decisis, derived as it is from the common law, should not be thought controlling in this state."); *see also supra*, pp. 5-7.

The decision below reflects the Fifth Circuit's longstanding view. In a string of recent cases, the Fifth Circuit has affirmed that only "[i]n the absence of a final decision by the Louisiana Supreme Court" does the court "employ Louisiana's civilian methodology." *In re Katrina Canal Breaches Litig.*, 495 F.3d at 206; *see also Boyett* v. *Redland Ins. Co.*, 741 F.3d 604, 607 (5th Cir. 2014) ("To determine the forum state's law, we look first to the final decisions of * * * the Louisiana Supreme Court.").

3. The Fifth Circuit thus stands in irreconcilable conflict with the First Circuit on when and how to apply a civil-law jurisdiction's civil methodology in the face of a relevant high court decision. And resolving such a split is a "well-established ground

for granting certiorari." Stephen M. Shapiro et al., *Supreme Court Practice* 241 (10th ed. 2013).

II. THE DECISION BELOW IS WRONG.

The First Circuit has it right: *Erie* requires a federal court to apply a civil-law jurisdiction's methodology, not its precedent. The Fifth Circuit's contrary approach below resulted from a misunderstanding of a federal court's obligations under *Erie*—it is to decide a case as the State's highest court would, including its adherence (or lack thereof) to precedent. As applied to a civil-law jurisdiction like Louisiana, the Fifth Circuit's case-over-methodology approach substituted a judge-made federal rule for a statutorily prescribed state-law approach—precisely the sort of federal-common-law lawmaking that *Erie* forbids.

Moreover, nothing in federal law gave the Fifth Circuit the authority to replace Louisiana's declaration that judicial precedent "is not the law," *Willis-Knighton Med. Ctr.*, 903 So. 2d at 1088, with a federal rule that Louisiana Supreme Court decisions *are* the law. The Fifth Circuit's decision below therefore not only misapprehends *Erie*, it also runs afoul of the Supremacy Clause.

A. The Decision Below Is At Odds With *Erie* And Its Progeny, As Well As With The Values Underlying The Doctrine.

1. Before this Court's 1938 decision in *Erie*, the common law had been "conceived as a 'brooding omnipresence' of Reason." *Guaranty Tr. Co. of N.Y.* v. *York*, 326 U.S. 99, 102 (1945). Under *Swift* v. *Tyson*, 41 U.S. (16 Pet.) 1 (1842), "decisions were merely *evidence*" of what this omnipresent law was; they were "not themselves * * * controlling formula-

tions" of it. *York*, 326 U.S. at 102 (emphasis added). As a result, "federal courts deemed themselves free to ascertain what Reason, and therefore Law, required" in each case. *Id.*

Federal courts did so "wholly independent of authoritatively declared State law, even in cases where" the entire "basis for relief was created by State authority and could not be created by federal authority and the case got into a federal court merely because" of diversity jurisdiction. *Id.* That meant the application of the same state law would "vary according to whether enforcement was sought in the state or in the federal court." *Hanna* v. *Plumer*, 380 U.S. 460, 467 (1965). And that led to unseemly "forum-shopping" in diversity-eligible cases, where plaintiffs would file in federal or state court and defendants would remove cases from state court depending on whether they preferred the state or federal interpretation of state law. *Id.*

Erie changed all that. Overturning *Swift*, *Erie* not only rejected "[t]he concept of a federal general common law." *Salve Regina Coll.* v. *Russell*, 499 U.S. 225, 226 (1991). It also "overruled a particular way of looking at [the] law," *York*, 326 U.S. at 101, that saw law "(to use Justice Holmes' phrase) as a 'brooding omnipresence in the sky.' " *Salve Regina Coll.*, 499 U.S. at 226 (quoting *Southern Pac. Co.* v. *Jensen*, 244 U.S. 205, 222 (1917) (Holmes, J., dissenting)). *Erie* declared that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the *law of the state*." 304 U.S. at 78 (emphasis added).

Post-*Erie*, "federal courts, in diversity cases" must apply "the same substantive law as would control if

the suit were brought in the courts of the state where the federal court sits." *United States* v. *Standard Oil Co. of Cal.*, 332 U.S. 301, 307 (1947). This rule ensures "that, in all cases where a federal court is exercising jurisdiction solely because of the diversity of citizenship of the parties, 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." *York,* 326 U.S. at 109. After years of federal courts usurping States' power to interpret their own law, *Erie* reaffirmed "the autonomy and independence of the states," by making clear that "[a]ny interference" with the legislative action of the State is "an invasion of the authority of the state, and, to that extent, a denial of its independence." 304 U.S. at 78-79 (internal quotation marks omitted). *Erie* thus sought to restore "the proper distribution of judicial power between State and federal courts." *York,* 326 U.S. at 109.

2. The Fifth Circuit's decision below is contrary to these foundational principles. The court correctly recognized that it had an obligation under *Erie* to "apply Louisiana substantive law." Pet. App. 11a. But the Fifth Circuit went astray when it concluded that Louisiana's substantive law required it to "employ Louisiana's civilian methodology," "only when the Louisiana Supreme Court has not made a determinative decision." *Id.* at 11a-12a (internal quotation marks omitted). The Fifth Circuit did not explain why it believed itself required to obey a single Louisiana Supreme Court case even when the Louisiana state courts are not so constrained. *See id.* at 11a-14a.

That is because there is no explanation to give. Under *Erie*, a federal court's obligation mirrors a state court's obligation under state law. After all, for *Erie* purposes, a federal court is "in effect, only another court of the State." *York*, 326 U.S. at 108. A federal court must therefore "apply the entire body of substantive law governing an identical action in the state courts." *Ruhlin* v. *New York Life Ins. Co.*, 304 U.S. 202, 209 (1938). And federal courts have a "responsibility [to] determin[e] and apply[] state laws" "in accordance with the applicable principles" the State itself uses. *Meredith* v. *City of Winter Haven*, 320 U.S. 228, 237-238 (1943).

3. The Fifth Circuit's error is rooted in its attempt to apply this Court's *Erie* cases from common-law jurisdictions to Louisiana's civil-law system. For common-law jurisdictions, this Court has stated that "state law as announced by the highest court of the State is to be followed," because "the State's highest court is the best authority on its own law." *Commissioner* v. *Estate of Bosch*, 387 U.S. 456, 465 (1967) (concerning New York and Connecticut law). Indeed, as to common-law jurisdictions, the Court has held that "[n]either this Court nor any other federal tribunal has any authority to place a construction on a state statute different from the one rendered by the highest court of the State," and thus the interpretation of a state statute by the State's supreme court was "binding on federal courts." *Johnson* v. *Fankell*, 520 U.S. 911, 916 (1997).

That rule makes sense in common-law systems. *Stare decisis* makes it so what a state supreme court has done in the past is a good, if not foolproof, indicator of what it is likely to do going forward. In com-

mon-law systems, "judicial decisions [are] the principal and most authoritative evidence, that [can] be given, of the existence of such a custom as shall form a part of the common law." *Gamble* v. *United States*, 139 S. Ct. 1960, 1983 (2019) (Thomas, J., concurring) (quoting 1 William Blackstone, *Commentaries on the Laws of England* 69 (1765) (alterations altered)).

But this Court's cases mandate a different approach when applying the law of *civil-law* systems. There, the federal court's obligation mirrors a state court's obligation under the State's civil law. Thus, a federal court applying Louisiana law should follow Louisiana's statutorily prescribed process for reaching its decision: (1) "[S]earch[] through the code itself," (2) "refer in turn to the acts of the legislature, local governments, and other legislative and administrative bodies," and (3) only after "having explored the legislative and administrative sources of standards of proper conduct," "turn next to the experience of the judiciary in the interpretation and application of these standards to actual situations." *Ardoin*, 360 So. 2d at 1334; *see also* La. Civ. Code Ann. arts. 1-4.

This methodology—not the Louisiana Supreme Court's decisions—is the "substantive law" of Louisiana that would "govern[] an identical action in the state courts." *Ruhlin*, 304 U.S. at 209. The Louisiana Supreme Court itself has recognized that relying on the "language contained in a judicial opinion" to divine the content of Louisiana law "ignores the first principles of our law," "misapprehen[ds]" the "civilian nature" of Louisiana's system, and evidences "a disregard" of the code's rules for interpretation. *Ardoin*, 360 So. 2d at 1335-36. The Fifth Circuit erred in giving dispositive weight to a single Louisi-

ana Supreme Court decision, just as a Louisiana state court would have erred in doing the same. *See, e.g.*, *id.* at 1334-36, 1340.

Klaxon Co. v. *Stentor Electric Manufacturing Co.*, 313 U.S. 487, 496 (1941) confirms the Fifth Circuit's error. In *Klaxon*, the Court held that *Erie* requires a federal court to apply the methodology that a state court in the same jurisdiction would use to answer a choice-of-law question. *See id.* This was so because "[o]therwise the accident of diversity of citizenship would constantly disturb equal administration of justice in coordinate state and federal courts sitting side by side." *Id.* The Court explained that allowing federal courts to apply their own rules for resolving conflicts issues "would do violence to the principle of uniformity within a state upon which the [*Erie*] decision is based." *Id.* Given that "our federal system * * * leaves to a state, within the limits permitted by the Constitution, the right to pursue local policies diverging from those of its neighbors," the Court concluded that "[i]t is not for the federal courts to thwart such local policies by enforcing an independent 'general law' of conflict of laws." *Id.* States were therefore "free to determine" their own conflicts of law methodologies, and "the proper function of the * * * federal court is to ascertain what the state law is, not what it ought to be." *Id.* at 497.

So too here. Just as a State is "free to determine whether a given matter is to be governed by the law of the forum or some other law," civil-law jurisdictions are "free to determine" the methodology to be used when applying their law, including the relative weight to be accorded to prior decisions of their highest court. *Id.* Contrary to *Klaxon*, the Fifth

Circuit's rule allows a federal-judge-made presumption about how to best determine the content of a State's law—namely, that "the State's highest court is the best authority on its own law," *Estate of Bosch*, 387 U.S. at 465—to apply even when the State's code and its highest court say the opposite: "[P]rior judicial decisions do not represent law." *Holland*, 305 So. 2d at 119-120; *see also* La. Civ. Code. Ann. art. 1.

The Fifth Circuit's decision puts the federal court in the position not of "ascertain[ing] what the state law is," but rather stating "what it ought to be." *Klaxon*, 313 U.S. at 497. In doing so, the Fifth Circuit took a step back to *Swift*.[2] It also effectively foisted precedent and common-law reasoning on Louisiana against its will, thereby undermining Louisiana's "right to pursue local policies diverging from those of its" common-law "neighbors." *Id.* at 496. The Court should not allow the Fifth Circuit's decision to stand.

B. The Fifth Circuit's Error Is Of Constitutional Dimension.

The Fifth Circuit's disregard of Louisiana's civilian methodology not only violates *Erie*. It also runs up against the Supremacy Clause.

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[2] The Fifth Circuit's approach might have been wrong even under *Swift*. Although *Swift* "allowed federal courts sitting in diversity cases to disregard state *decisional* law, it was never thought that *state statutes* * * * were similarly to be disregarded." *Byrd* v. *Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525, 539 (1958) (emphases added). The Fifth Circuit thus did what even *Swift* did not allow; it disregarded Louisiana's statutorily prescribed methodology.

1. The Supremacy Clause makes the "Constitution," "Laws," and "Treaties" of the United States "the supreme Law of the Land." U.S. Const. art. VI, cl. 2. The Supremacy Clause makes it so "[a]s long as" the federal government "is acting within the powers granted it under the Constitution," it "may impose its will on the States." *Gregory* v. *Ashcroft*, 501 U.S. 452, 460 (1991). Aside from the "limitations imposed by the Supremacy Clause," however, "States possess sovereignty concurrent with that of the Federal Government." *Tafflin* v. *Levitt*, 493 U.S. 455, 458 (1990). The powers "reserved to the States," U.S. Const. amend. X, are thus "substantial." *Wyeth* v. *Levine*, 555 U.S. 555, 584-585 (2009) (Thomas, J., concurring in the judgment) (" '[T]he powers delegated by the proposed constitution to the federal government, are few and defined' and '[t]hose which are to remain in the state governments, are numerous and indefinite.' " (quoting *The Federalist* No. 45, at 237-238 (James Madison) (Max Beloff ed., 2d ed. 1987))).

From the beginning, this Court's *Erie* jurisprudence has not only attempted to police "the proper distribution of judicial power between State and federal courts." *York*, 326 U.S. at 109. It also ensured that federal courts are not overstepping their authority and "invad[ing] rights * * * reserved by the Constitution to the several states." *Erie*, 304 U.S. at 80.

That concern is evident in *Erie* itself. The Court there explained that the federal-common-law approach from the *Swift* v. *Tyson* era was "an unconstitutional assumption of powers by the Courts of the United States." *Erie*, 304 U.S. at 79 (internal quota-

tion marks omitted). After all, "no clause in the Constitution purports to confer such a power upon the federal courts." *Id.* at 78. Nor could Congress have given the federal courts the power to do so because Congress itself lacks the "power to declare substantive rules of common law applicable in a state." *Id.* Accordingly, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Id.* And by engaging in federal-common-law lawmaking, federal courts had thus "invaded rights * * * reserved by the Constitution to the several states." *Id.* at 80.

Later cases have only underscored the constitutional problems federal courts cause when they attempt to substitute state law for judge-made federal rules that neither Congress nor the constitution authorized. For instance, *Hanna* explained that "neither Congress nor the federal courts can, under the guise of formulating rules of decision for federal courts, fashion rules which are not supported by a grant of federal authority contained in Article I or some other section of the Constitution; in such areas state law must govern because there can be no other law." 380 U.S. at 471-472; *cf. INS* v. *Chadha*, 462 U.S. 919, 951 (1983) ("Art. I, §§ 1, 7 represents the Framers' decision that the legislative power of the Federal government be exercised in accord with a single * * * procedure."). In *Shady Grove Orthopedic Associates, P.A.* v. *Allstate Insurance Co.*, a four-justice plurality suggested that this limitation on the power of the federal courts derives from the Supremacy Clause. *See* 559 U.S. 393, 416 (2010) (plurality op.) ("For where neither *the Constitution*, a *treaty*, nor a *statute* provides the rule of decision or author-

izes a federal court to supply one, 'state law must govern because there can be no other law.'" (emphases added) (quoting *Hanna*, 380 U.S. at 471-472, and citing Bradford R. Clark, *Erie's Constitutional Source*, 95 Cal. L. Rev. 1289, 1302, 1311 (2007)).

Erie and its progeny have thus rejected the idea that federal courts are "free to ascertain what * * * Law" requires where such a rule "could not be created by federal authority and the case got into a federal court merely because" of diversity jurisdiction. *York*, 326 U.S. at 102; *see also Hanna*, 380 U.S. at 474-475 (Harlan, J., concurring) (*Erie* recognized that federalism "is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers").

Sanctioning the Fifth Circuit's decision would allow a federal court's "judge-made rule[]" that the Louisiana Supreme Court's decisions represent the law of the State to displace Louisiana's substantive law to the contrary, even though "neither the Constitution, a treaty, nor a statute * * * authorizes a federal court to supply" such a rule. *Shady Grove Orthopedic Assocs.*, 559 U.S. at 416 (plurality op.). The Fifth Circuit thus lacked constitutional or statutory authority to create a federal method for ascertaining what Louisiana state law is that displaced Louisiana's own statutorily mandated method for doing so. *See Hanna*, 380 U.S. at 471-472; *supra* pp. 5-7; *see also Stewart Org., Inc.* v. *Ricoh Corp.*, 487 U.S. 22, 38 (1988) (Scalia, J., dissenting) ("[W]hile interpreting and applying substantive law is the essence of the 'judicial Power' created under Article III of the Constitution, that power does not encompass the

making of substantive law."); Clark, *supra*, 95 Cal. L. Rev. at 1311 ("[T]he negative implication of the Supremacy Clause precludes federal courts from displacing substantive state law."). And this error represented "an invasion of the authority of the state, and, to that extent, a denial of its independence." *Erie*, 304 U.S. at 79. The Court should step in to not only fix the Fifth Circuit's error, but also to protect Louisiana's independence.

III. THIS CASE IS AN IDEAL VEHICLE TO RESOLVE THIS IMPORTANT QUESTION.

This case presents a rare opportunity to address an important issue concerning the distribution of power in our federal system. And allowing the decision below to stand will have a host of negative consequences—for individual litigants, for States, and for federalism. This Court should step in.

1. The question presented is important because its effects are wide-reaching. More than 7.7 million people live in civil-law systems located within the jurisdiction of the federal courts. *See* U.S. Census Bureau, *Annual Estimates of the Resident Population for the United States, Regions, States, and Puerto Rico: April 1, 2010 to July 1, 2018 (NST-EST2018-01)* (released Dec. 2018)[3] (as of 2018, over 4.6 million people live in Louisiana, and another 3.1 million live in Puerto Rico). And Puerto Rico alone has a larger population than 22 States. *See id.*

This case is also about more than the application and interpretation of civil codes. The question has

[3] *Available at* https://tinyurl.com/y3aq8xnb.

the potential to affect how federal courts apply other state-specific methodologies, including methods of statutory and contract interpretation. *See* Abbe R. Gluck, *Intersystemic Statutory Interpretation: Methodology as "Law" and the* Erie *Doctrine*, 120 Yale L.J. 1898 (2011); *cf. Exxon Corp.* v. *Eagerton*, 462 U.S. 176, 181 n.3 (1983) ("[T]he weight to be given to the legislative history of an Alabama statute is a matter of Alabama law to be determined by the Supreme Court of Alabama."); *Ward* v. *Utah*, 398 F.3d 1239, 1248 (10th Cir. 2005) ("We interpret state laws according to state rules of statutory construction, and therefore interpret this statute based on its plain language." (internal citations omitted)); *AM Int'l, Inc.* v. *Graphic Mgmt. Assocs., Inc.*, 44 F.3d 572, 576 (7th Cir. 1995) (applying Illinois parol evidence rule to interpret contract). And it implicates the broader issues of state and territorial sovereignty. *Cf. Williams* v. *Lee*, 358 U.S. 217, 218 (1959) (granting certiorari to resolve "important question" regarding tribal sovereignty).

Nor can certifying questions to the highest court in a civil-law jurisdiction adequately address the issue. Certification is a discretionary remedy, and one that courts invoke sparingly so as not to dictate a state court's caseload. *See Lehman Bros.* v. *Schein*, 416 U.S. 386, 389-391 (1974); *Minnesota Voters All.* v. *Mansky*, 138 S. Ct. 1876, 1891 n.7 (2018). It would be inappropriate to rely on it to determine the substance of a civil-law jurisdiction's law in run-of-the-mill cases, based only on "mere difficulty in ascertaining local law." *Lehman Bros.*, 416 U.S. at 390.

If anything, the effect of the Fifth Circuit's misguided approach on the court's certification practice

is yet another reason why review should be granted. Until the question presented here is resolved, courts will continue to erroneously decline to certify questions to civil-law jurisdictions' highest courts. Even though certification is appropriate when a federal court encounters "unsettled questions of state law," *Arizonans for Official English* v. *Arizona*, 520 U.S. 43, 79 (1997), courts following the Fifth Circuit's approach would not view the law as "unsettled" where a state supreme court has previously addressed an issue. *See id.* To those courts, certification would be—as the Fifth Circuit put it below—"unnecessary," because the jurisdiction' highest court has spoken. Pet. App. 14a n.26. Accordingly, until this Court clarifies how federal courts are to approach high-court decisions from civil-law jurisdictions, even courts otherwise inclined to certify questions will incorrectly conclude that certification is inappropriate.

2. This case is also a good vehicle to resolve the question presented. In this case, the methodology question is case-dispositive: W&T's liability depends on the interpretation of Article 2003. *See id.* at 11a-14a. That interpretation, in turn, depends in large part on whether the Court applies the Article's plain language or the Louisiana Supreme Court's decision in *Lamar*. *See id.*

Moreover, this Court does not get very many opportunities to consider the question because Louisiana and Puerto Rico are the only remaining civil-law jurisdictions in the United States. *See supra* p. 5. The courts of appeals covering these two jurisdictions have already spoken, and they have taken divergent approaches. *See supra* pp. 11-13 (discussing ap-

proach of Fifth Circuit, which includes Louisiana, and First Circuit, which includes Puerto Rico). Moreover, 37 years have passed between the First Circuit's decisions applying the civilian methodology approach and the Fifth Circuit's decision below. *Compare* Pet. App. 11a-14a, *with Reyes-Cardona*, 694 F.2d 894 (decided 1982). Waiting for another circuit to weigh in—which would require the happenstance of another court applying Louisiana or Puerto Rico law—could mean that the Fifth Circuit is left to misapply Louisiana's civil law for decades or more. The Court should decide the question now. *Cf. Puerto Rico* v. *Franklin California Tax-Free Tr.*, 136 S. Ct. 1938 (2016) (resolving issue affecting one territory); *Royal* v. *Murphy*, 138 S. Ct. 2026 (2018) (granting certiorari to resolve an issue affecting tribal sovereignty).

3. Allowing the Fifth Circuit's rule to stand will have negative consequences for litigants, States, and our federal system. For one, it will undermine *Erie*'s "twin aims": the "discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna*, 380 U.S. at 468. Under the Fifth Circuit's rule, a plaintiff whose position is supported by a single case could avoid the civil code's clear language simply by bringing suit in federal court. This would impermissibly allow "the accident of diversity of citizenship" to "disturb equal administration of justice in coordinate state and federal courts sitting side by side." *Klaxon*, 313 U.S. at 496.

Leaving the decision below undisturbed will also undermine many of the benefits that our system of dual sovereignty provides. For instance, it may dissuade States from adopting and maintaining

distinctive state-law methodologies. *See, e.g.*, Gluck, *supra*, 120 Yale L.J. at 1919 (noting Oregon's rejection of substantive canons of construction unless court has first examined the text and legislative history). That in turn will discourage States from engaging in their "long recognized * * * role * * * as laboratories for devising solutions to difficult legal problems." *Oregon* v. *Ice*, 555 U.S. 160, 171 (2009). It will also make it less likely in the future "that a single courageous State may, if its citizens choose," try out other "novel" jurisprudential approaches. *Arizona State Legislature* v. *Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2673 (2015) (citation omitted). If federal courts refuse to honor such "innovation and experimentation," there will be less space for States to be "sensitive to the diverse needs of a heterogeneous society," and fewer incentives for "those who seek a voice in shaping the destiny of their own times" to shape the law "without having to rely solely upon the political processes that control a remote central power." *Bond* v. *United States*, 564 U.S. 211, 221 (2011) (internal quotation marks omitted).

Beyond the federalism consequences, allowing the Fifth Circuit's rule to stand will harm individual litigants. Because Louisiana is the most populous civil-law jurisdiction in the United States, correcting the Fifth Circuit's error is particularly important. Unsurprisingly, federal courts in the Fifth Circuit are regularly called on to apply Louisiana state law—whether because of diversity citizenship, a contractual choice-of-law provision, or, as here, a federal statute. *See, e.g.*, *CRU Shreveport, LLC* v. *United Nat'l Ins. Co.*, No. 5:18-CV-00751, 2019 WL 5295589, at *3 (W.D. La. Oct. 18, 2019) (applying

Louisiana law because of diversity citizenship); *Middleton* v. *GEICO Ins. Co.*, No. 19-09116, 2019 WL 5190997, at *2 (E.D. La. Oct. 15, 2019) (same); *Popeyes, Inc.* v. *YCALWB, Inc.*, No. CIV.A. 87-4041, 1988 WL 125458, at *1 (E.D. La. Nov. 21, 1988) (applying Louisiana law because of contractual provision); *Tana Expl. Co.* v. *Implicit Oil & Gas, L.P.*, No. CV H-13-334, 2015 WL 13697932, at *2 (S.D. Tex. Mar. 30, 2015) (applying Louisiana law under the Outer Continental Shelf Lands Act). As courts in the Fifth Circuit continue to apply Louisiana Supreme Court precedent instead of the State's civilian methodology, the gulf between the version of Louisiana law applied in Louisiana courts and federal courts will only widen, making it even more likely that cases tried "a block away," will nevertheless end with "a substantially different result." *York*, 326 U.S. at 109.

Leaving this question unanswered will also be troubling for citizens of Puerto Rico. Claims brought under Puerto Rico law are also heard in federal courts in the Fifth Circuit. *See In re Vioxx Prods. Liab. Litig.*, 522 F. Supp. 2d 799, 806-807, 809-811 (E.D. La. 2007) (applying Puerto Rico law); *Metromedia Steakhouses Co.* v. *BMJ Foods Puerto Rico, Inc.*, No. 3:07-CV-2042-D, 2008 WL 794533, at *1, *4, *6 (N.D. Tex. Mar. 26, 2008) (concluding venue was appropriate in suit involving violation of Puerto Rico law). Under the rule adopted below, federal courts in the Fifth Circuit will be able to ignore the clear language of Puerto Rico's civil code, just as they may ignore the clear language of Louisiana's.

In the end, this case comes down to the unfairness of a system in which the substantive law applied

would "vary" depending on the forum and "the privilege of selecting the court in which the right should be determined was conferred upon" one of two opposing parties. *Hanna*, 380 U.S. at 467. That unfairness was one that *Erie* sought to end. *See id.* at 467-468; *see also Erie*, 304 U.S. at 74-75 & n.9. Failing to correct the Fifth Circuit's approach below would undo what *Erie* accomplished. The Court should grant the writ and reverse.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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