No. _____

In The
Supreme Court of the United States

WILLIAM W. COLE, JR.,

Petitioner,

vs.

LORI PATTON, as Chapter 7 Trustee;
PRN REAL ESTATE AND INVESTMENTS, LTD;
and NANCY ROSSMAN,

Respondents.

On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether This Court Should Grant the Petition in Order to Resolve a Long-Standing and Decisive Split Among the Federal Appellate Courts Regarding the Standards for Certification of State Law Issues to State Courts, Thereby Providing Much Needed Guidance to Federal Courts Regarding Important Matters of State Sovereignty, Federalism and Comity?

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT

Petitioner, William W. Cole, Jr. ("Cole"), filed a voluntary petition ("Petition") under Chapter 7 of the United States Bankruptcy Code. In addition to Respondent Lori Patton, the Chapter 7 Trustee, PRN Real Estate Investments, Ltd. and Nancy A. Rossman were creditors and were also parties to the proceedings below.

1. Anderson, R. Lanier (United States Circuit Judge)
2. Budgen, Leigh Todd (Attorney for Appellee Lori Patton)
3. Budgen Law Group (Law Firm for Appellee Lori Patton)
4. Byron, Paul G. (United States District Judge)
5. Cole, William, W., Jr. (Debtor/Appellant)
6. Cole, Terre (Spouse of Debtor/Appellant)
7. Cole, Therese (Spouse of Debtor/Appellant)
8. D'Aniello, Phil A., Esq. (Attorney for Therese Cole)
9. Elkins, Jeffrey S. (Attorney for Appellees PRN Real Estate & Investments, Ltd. and Nancy Rossman)
10. Fassett, Anthony & Taylor P.A. (Law Firm for Therese Cole)
11. Flentke, Jacob D. (Attorney for Debtor/Appellant)

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT—
Continued

12. Flentke Legal Consulting, PLLC (Law Firm for Debtor/Appellant)
13. Green, James K. (Attorney for Debtor/ Petitioner)
14. Herron, Kenneth D. (Chip), Jr. (Attorney for Debtor/Appellant)
15. Herron Hill Law Group, PLLC (Law Firm for Debtor/Appellant)
16. Jackson, Cynthia C. (United States Bankruptcy Judge)
17. James K. Green, P.A. (Law Firm for Debtor/ Petitioner)
18. Lagoa, Barbara (United States Circuit Judge)
19. Levitt, Peter H. (Attorney for Appellees PRN Real Estate & Investments, Ltd. and Nancy Rossman)
20. Martin, Beverly B. (United States Circuit Judge)
21. McElroy, Jack C. (Attorney for Appellees PRN Real Estate & Investments, Ltd. and Nancy Rossman)
22. Patton, Lori (Chapter 7 Trustee/Appellee)
23. PRN Real Estate & Investments, Ltd. (Creditor/ Appellee)

PARTIES TO PROCEEDINGS BELOW AND CORPORATE DISCLOSURE STATEMENT— Continued

24. Rossman, Nancy (Creditor/Appellee)

25. Shutts & Bowen LLP (Law Firm for Appellees PRN Real Estate & Investments, Ltd. and Nancy Rossman)

26. Timko, James A. (Attorney for Appellees PRN Real Estate & Investments, Ltd. and Nancy Rossman)

27. The following are creditors, who have filed proofs of claim, in the underlying Bankruptcy Case, but which were not active participants in the contested matter on appeal:

    a. Commercial Mortgage Corporation of America, Inc.

    b. CenterState Bank (CSFL) as successor by merger with Gateway Bank

    c. Rossman, Paula

    d. Rossman, Ruth

    e. Valley National Bank (VLY)

Pursuant to Rule 26.1, Federal Rules of Appellate Procedure, Petitioner states that, to the best of the undersigned's knowledge, there are no corporations that are parties to this appeal that have a parent corporation or any publicly held corporation that owns 10% or more of its stock. The stock ticker symbols of the interested parties, to the best of the undersigned's knowledge, are set forth above.

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OPINIONS BELOW

The opinion of the court of appeals (App. 1) is reported at 829 F. Appx. 399 (11th Cir. 2020). The District Court's order sitting in its appellate capacity under 28 U.S.C. § 158(a) in review of a final decision of the Bankruptcy Court is at App. 15. The Bankruptcy Court's Memorandum Decision Sustaining, in Part, Objections to Debtor's Claim of Exemption is unreported and at App. 46.

BASIS OF JURISDICTION

The Eleventh Circuit entered the judgment below on September 29, 2020.

(App. 1). Pursuant to the Miscellaneous Order of the Supreme Court of the United States entered March 19, 2020 (providing that "the deadline to file any petition for a writ of certiorari due on or after the date of this order is extended to 150 days from the date of the lower court judgment"), Appellant's petition for writ of certiorari is currently due on February 26, 2021.

This petition is timely filed.

Jurisdiction is based upon 28 U.S.C. § 1254(1).

STATEMENT OF CASE AND PROCEEDINGS

William W. Cole, Jr. ("Debtor" or "Cole") began this case by filing a voluntary petition under Chapter 7 of

the United States Bankruptcy Code. Cole filed the required schedules ("Schedules") of his assets and liabilities using the official forms. In Schedule A, he listed two parcels of real property, both owned through a trust. The first property is the Debtor's Homestead (the "Homestead" or "Upland Property"), and it is claimed as exempt in Schedule C pursuant to Article X, Section 4(a)(1) of the Florida Constitution. The second property is next to the Homestead, submerged under Lake Minnehaha (the "Submerged Land"). App. 2-3.

Respondents, PRN Real Estate Investments, Ltd. ("PRN") and Nancy A. Rossman ("Rossman") (collectively, the "Creditors"), filed an Objection to Debtor's Claimed Exemptions, objecting in relevant part to Cole's Homestead exemption, joined by Lori Patton, as Chapter 7 Trustee ("Trustee"). App. 3. Trial of the Homestead exemption was held on January 24 and 26, 2017.

The Homestead (or Upland Property), which is above the high water mark, is approximately 0.765 acres;[1] the Submerged Land (which is underneath Lake Minnehaha in Maitland, Florida) is approximately 2.185 acres; and the total size of the "Property" together is approximately 2.96 acres. App. 2.

Importantly, at the time Cole acquired the Property, the title insurance company determined that the

[1] Cole also included a small portion of submerged land in the Upland Property for a boat dock, because he wanted to protect it from Creditors attempting to interfere with his riparian rights. App. 51.

Submerged Land is unmarketable sovereign land because there is a submerged land exception in the title insurance policy, which he contended is an actual title defect because the Submerged Land is unmarketable sovereign land. Cole testified that he had always believed the Submerged Land is sovereign land owned by the State of Florida, consistent with the title policy he received when he purchased the Property. App. 58-59, 66-67.

In May 2015, Mr. and Mrs. Cole, as co-trustees, executed and recorded a special warranty deed conveying—from the trust to the trust—the Property less the Upland Property and a small portion of the Submerged Land containing, primarily, a dock and boathouse. App. 51.

Sara Blanchard ("Blanchard") is the Chief Planner for the City of Maitland. App. 59. She is not an attorney or expert. *Id.* Ms. Blanchard testified that where a property owner attempts to divide a single parcel of real estate into two, the City refers to this partitioning as a "lot split." The City's code requires that a lot split be approved by the City, except where the lot split involves a transfer of small portions of land between adjoining property owners. App. 60.

The Creditors presented the testimony of James Dyer, who, at the time, was an underwriter and title examiner at First American Title Insurance Company. App. 62. He relied on Section 253.141(2) of the Florida Statutes to conclude that the Submerged Land was owned by Cole's trust. App. 63.

Dr. Joe Knetsch, Ph.D. ("Dr. Knetsch"), testified as an expert witness on behalf of Cole. For 28 years, Dr. Knetsch was an historian for the Bureau of Survey & Mapping, Division of State Lands, Florida Department of Environmental Protection. He helped the legal staff determine navigability of Florida water bodies to determine ownership of submerged land. App. 64.

Dr. Knetsch explained that the State of Florida became a state on March 30, 1845, thereby obtaining title to all lands submerged under navigable waters. App. 64. He testified that a number of early maps of the area shows Lake Minnehaha. App. 65. Dr. Knetsch reviewed the first ever County Map for Orange County, Florida, prepared in 1879 by E. R. Trafford (the "Trafford Map"). The Trafford Map shows Lake Minnehaha labeled on the map. *Id.* A map from 1890, prepared at the behest of the Orange County Commission, shows Lake Minnehaha. *Id*. Dr. Knetsch did not find any evidence that Lake Minnehaha had ever disappeared or reappeared. *Id*. Dr. Knetsch examined one particular survey performed by Henry Washington in 1843. The survey does not mention Lake Minnehaha, however, this was not unexpected as the lake did not cross the lines Washington was directed to survey. Dr. Knetsch explained that no one had ever challenged the state's ownership of the submerged land under Lake Minnehaha, so the State has taken no position on the issue. App. 66. Based upon the sum of his research and experience, Dr. Knetsch opined that Lake Minnehaha was likely a navigable water way in 1845 when Florida became a state. Accordingly, he offered that any

submerged land below the ordinary high water mark would be sovereign land owned by the state. He acknowledged, however, that based on the available historical record, it cannot be known for certain whether Lake Minnehaha either existed or was navigable in 1845. App. 66-67.

On April 3, 2019, the Bankruptcy Court rendered a Memorandum Decision Sustaining, in Part, Objections to Debtor's Claim of Exemptions ("Decision"). App. 46. Its Order Sustaining, in Part, Objections to Debtor's Claim of Exemption was entered on April 5, 2019. App. 88.

In the Decision, the Bankruptcy Court declined to determine who owns the Submerged Land (the major issue litigated at trial) based on (a) *Kellogg v. Schreiber (In re Kellogg)*, 197 F.3d 1116 (11th Cir. 1999); (b) "as a matter of equity"; and (c) in deference to the state courts and because the State of Florida had not been joined as a party (an issue never previously raised by the parties or the Bankruptcy Court). App. 75-80. Despite stating that it was not deciding the issue, the Decision determined by default that the Submerged Land was owned by Cole, without making any factual findings or articulating the legal standard used to reach that conclusion. *Id*. The Bankruptcy Court determined that the proceeds from the sale of the Homestead should be allocated on a percentage basis, calculated by comparing the allowed exempt acreage to the total acreage of the property (including submerged land to which Cole did not hold marketable title), without

taking into consideration the respective values of the exempt property and nonexempt property. App. 83-84.

It is undisputed that approximately 18 months after the trial, Cole and the Trustee agreed to terms for a sale, and the Bankruptcy Court entered an Order Granting Joint Motion and Stipulation Regarding Sale of Homestead property. The Homestead property was sold in or around November 2018, and the net proceeds from the sale are currently being held in trust.

On appeal pursuant to 28 U.S.C. § 158(a), the District Court affirmed the Bankruptcy Court in all respects. App. 15.

Cole then appealed to the Eleventh Circuit and moved to certify the question of apportionment to the Florida Supreme Court. App. 1. The court denied his motion to certify and affirmed the judgment of the bankruptcy court, citing federal case law but no state law. App. 14.

This Court should grant review.

REASONS FOR GRANTING THE PETITION

I. An Entrenched Circuit Split Exists Over the Appropriate Certification Standard and Whether to Consider States' Interests

In *Lehman Brothers v. Schein*, this Court "for the first time expressed its view as to the use of certification procedures by the federal courts." 416 U.S. 386,

395 (1974) (Rehnquist, J., concurring). In *Lehman*, the Court gave a strong endorsement to certification where the process will likely tip the scale in favor of having a state court first address an important, yet unclear question. Given the "novelty of the question and the great unsettlement of Florida law," this Court determined that the Second Circuit should have taken advantage of Florida's certification procedures. *Id*. at 391.

In this case, certification is even more compelling than in *Lehman* because it involves two unsettled but related questions of Florida constitutional law: 1) the correct method for allocating the net proceeds from the voluntary sale of an exempt Florida Homestead when the Homestead is not legally divisible; and 2) the question of how or whether to factor submerged lands that may belong to the State of Florida into this methodology.[2]

Homes and Homesteads are given special protection under the Florida Constitution. "The home has a history of special significance in Florida law." *Osterndorf v. Turner*, 426 So. 2d 539, 541 (Fla. 1982) (chronicling history of Florida provisions protecting Homestead realty from forced sale and establishing Homestead tax exemption); Donna Litman Seiden, "*There's No Place Like Home(stead) in Florida–Should It Stay That Way*?" 18 Nova L. Rev. 801 (1994). The purpose of

[2] As the bankruptcy judge noted, "without a doubt, the issues surrounding the ownership of the Submerged Land are both fascinating and complex." *In re Cole*, No. 6:15-BK-06458-CCJ, 2019 WL 1528105, *11 (Bankr. M.D. Fla. Apr. 4, 2019).

Florida's Homestead provision—to preserve the family's interest in the family home—is a strongly held public policy, and the provision is liberally construed to protect the debtor's property from creditors. *See Snyder v. Davis*, 699 So. 2d 999, 1002 (Fla. 1997); *Olesky v. Nicholas*, 82 So. 2d 510, 512 (Fla. 1955). This construction of the Homestead exemption from forced sale is consistent with "important public policy considerations such as promoting the stability and welfare of the state by encouraging property ownership and the independence of its citizens by preserving a home where a family may live beyond the reaches of economic misfortune." *In re McAtee*, 154 B.R. 346, 347-48 (Bankr. N.D. Fla. 1993).

This Court's precedents against a federal court's interference with state substantive law are well established. "No clause in the Constitution" purports to confer power upon the federal courts "to declare substantive rules of common law applicable in a state." *Erie R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). Under this rule, federal courts may apply but not declare state law, which is what occurred here. Neither the Florida Supreme Court nor Florida's intermediate appellate courts have addressed the correct method for allocating the net proceeds from the sale of an exempt Florida Homestead when the Homestead is not legally divisible.

To animate this fundamental tenet of federalism, the federal courts, when faced with an important and unsettled question of state law, are encouraged to certify that issue to the implicated state's supreme court.

Arizonans for Official English v. Arizona, 520 U.S. 43, 48, 62, 76-79 (1997) ("Federal courts lack competence to rule definitively on the meaning of state legislation"); *Lehman*, 416 U.S. at 391 (noting certification "in the long run save[s] time, energy, and resources and helps build a cooperative judicial federalism").

This Court has not provided any guidance about certification since *Lehman* and scant guidance about certification more generally. *See In re Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984) (*Lehman* "provides no clear standards as to when certification should be used"); Deborah J. Challener, *Distinguishing Certification from Abstention in Diversity Cases: Postponement Versus Abdication of the Duty to Exercise Jurisdiction*, 38 Rutgers L.J. 847, 874 (2007) (noting that this Court "has provided little guidance to the lower courts regarding the circumstances under which certification is appropriate").

As a result, "lower federal courts have had to make their own guidelines." *Lindenberg v. Jackson Nat'l Life Ins. Co.*, 919 F.3d 992, 1002 (6th Cir. 2019) (Bush, J., dissenting from denial of rehearing *en banc*). And those guidelines differ substantially. Although many factors overlap—particularly the requirement that a state law issue be both dispositive and unresolved by state courts—the circuits' tests vary dramatically. *See* Molly Thomas-Jensen, *Certification After Arizonans for Official English v. Arizona: A Survey of Federal Appellate Courts' Practices*, 87 Den. U.L. Rev. 139, 140 (2009) (noting that federal courts' "analytical approach to certification . . . is inconsistent" and certification "analysis

has varied dramatically, from circuit to circuit, and even within circuits"); Challener, *supra*, at 874 (cataloging at least three different approaches taken by the circuits).

That variation is particularly evident in the different weight circuits give state interests in the certification inquiry. And, as this case demonstrates, those differences are dispositive. Several circuits require that an unresolved state constitutional issue be certified if at all possible, and a number of other circuits would also have undoubtedly certified the state constitutional questions in this case given the importance of those questions to state public policy.

Guidance from this Court is necessary to remedy these differences and to ensure that certification standards incorporate an appropriate respect for States' sovereign interests. Such guidance would be "welcome[d]" by lower courts. *Lindenberg*, 919 F.3d at 1002 (Bush, J., dissenting from denial of rehearing *en banc*).

A. The decision below directly contradicts the requirement adopted by the Ninth Circuit that state constitutional issues be certified if at all possible

The Ninth Circuit applies a test that requires certification of unresolved state constitutional questions if possible. In *Perry v. Schwarzenegger*, the Ninth Circuit held that, in "the absence of controlling authority from the highest court of California on these important [constitutional] questions," it was "compelled" to certify

the question to the California Supreme Court. 628 F.3d 1191, 1196 (9th Cir. 2011). Although it recognized that this Court's statements about certification in *Arizonans for Official English* were *dicta*, the Ninth Circuit held that it was "required" to "request a more definitive statement from the State's highest court" on the constitutional question, "[r]ather than rely on [its] own understanding of th[e] balance of power under the California Constitution." *Id*. at 1197-98 & n.9.

The Ninth Circuit has followed that approach in other cases as well. *See*, *e.g.*, *Int'l Soc'y for Krishna Consciousness of Cal. Inc. v. City of L.A.*, 530 F.3d 768, 773-76 (9th Cir. 2008) (certifying question whether airport was "public forum" under California Constitution); *L.A. Alliance for Survival v. City of L.A.*, 157 F.3d 1162, 1164 (9th Cir. 1998) (certifying the "critical issue of whether the California Constitution's Liberty of Speech Clause grants greater protection to speech" than the First Amendment).

The Eleventh Circuit is a jumble. Some cases hold that "[w]here there is **any doubt** as to the application of state law, a federal court **should certify** the question to the state supreme court." *Colonial Props., Inc. v. Vogue Cleaners, Inc.*, 77 F.3d 384, 387 (11th Cir. 1996) (quoting *Mosher v. Speedstar Div. of AMCA Int'l, Inc.*, 52 F.3d 913, 916-17 (11th Cir. 1995)) (emphasis added). Others, including the panel below, hold that the Eleventh Circuit **may certify** a question to the Florida Supreme Court if "we maintain **more than 'substantial doubt'** as to how the issue before us would be resolved under Florida law." *Toomey v.*

Wachovia Ins. Servs., Inc., 450 F.3d 1225, 1231 (11th Cir. 2006) (emphasis added), And others hold that it is "imperative" that "state constitutional issues . . . be decided by the state supreme court." *Blue Cross & Blue Shield of Ala., Inc. v. Nielsen*, 116 F.3d 1406, 1408, 1413 (11th Cir. 1997). "Given the sensitivity of such matters and how closely they sound to the heart of a state's self-government, a federal court should not purport to hold that a state statute violates the state constitution, except as an unavoidable matter of last resort." *Id.*; *see also LeFrere v. Quezada*, 582 F.3d 1260, 1268 (11th Cir. 2009) (Certification "is especially appropriate in a case . . . where the decisional task involves interpreting the state constitution."); *Estate of McCall ex rel. McCall v. United States*, 642 F.3d 944, 946, 952 (11th Cir. 2011) (certifying "important questions about the interpretation and application of Florida constitutional law" regarding a damages cap). In the decision below, the Eleventh Circuit rejected that approach and applied a directly contrary one. It said it could:

> certify a question to the Florida Supreme Court if "we maintain more than 'substantial doubt' as to how the issue before us would be resolved under Florida law." *Toomey v. Wachovia Ins. Servs., Inc.*, 450 F.3d 1225, 1231 (11th Cir. 2006). In light of the precedent supporting the bankruptcy court's apportionment of the proceeds, however, we do not have substantial doubt as to the correctness of the bankruptcy court's decision. *See id.*

Cole, 829 F. App'x at 404. However, the only precedent cited by the Eleventh Circuit was federal.

Unlike the Ninth Circuit, the Eleventh Circuit did not feel "compelled" or "required" by *Arizonans for Official English* and this Court's repeated emphasis on federalism and comity to certify the state constitutional questions. *Perry*, 628 F.3d at 1196, 1198.

The Eleventh Circuit's approach to unresolved state constitutional questions cannot be reconciled with the Ninth Circuit's approach. That direct contradiction on an important question implicating a State's sovereign prerogative to interpret its own constitution alone warrants this Court's review. It is "a question of importance not heretofore considered by this Court, and one over which the Circuits are divided." *Lehman v. Lycoming Cty. Children's Servs. Agency*, 458 U.S. 502, 507 (1982). Moreover, the circuits' varied approaches to certification in general further illustrate the need for guidance from this Court.

B. The First, Second, Seventh, and Tenth Circuits require a court to consider States' sovereignty interests and favor certification to protect them

Four circuits have adopted a certification test that requires the court to consider a State's sovereign interests as a significant factor in favor of certification. The First Circuit is "particularly mindful" of "[federalism] concerns" in its certification analysis, finding "strong[] reasons" to certify questions when they implicate exclusive state authorities, such as the regulation of the legal profession. *The Real Estate Bar Ass'n for Mass.,*

Inc. v. Nat'l Real Estate Info. Servs., 608 F.3d 110, 119 (1st Cir. 2010). Accordingly, the First Circuit has held that certification is warranted when a determinative but undecided state law issue "deal[s] with strong state interests." *United States v. Howe*, 736 F.3d 1, 5 (1st Cir. 2013).

The Second Circuit has identified "at least six factors that must be considered in deciding whether certification is justified." *Tunick v. Safir*, 209 F.3d 67, 81 (2d Cir. 2000). One of those factors is the "importance of the issue to the state," and another factor looks to "the federalism implications of a decision by the federal courts and in particular whether a decision by the federal judiciary potentially interferes with core matters of state sovereignty." *Id*. Under this test, certification is "particularly appropriate" and "especially desirable" when "the challenged legislation goes to the basic sovereign functions of state government." *Allstate Ins. Co. v. Serio*, 261 F.3d 143, 153-54 (2d Cir. 2001).

The Seventh Circuit, when asked to certify unresolved questions of state law, looks to "whether the case concerns a matter of vital public concern, [whether it] involves an issue likely to recur in other cases, and whether the state supreme court has yet to have an opportunity to illuminate a clear path on the issue." *Zahn v. N.A. Power & Gas, LLC*, 815 F.3d 1082, 1085 (7th Cir. 2016) (internal citations omitted). In this analysis, the Seventh Circuit expressly considers "whether the issue is of interest to the state supreme court in its development of state law." *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001);

see also Stephan v. Rocky Mtn. Chocolate Factory, Inc., 129 F.3d 414, 418 (7th Cir. 1997) (certifying an issue "of significant interest to the Colorado Supreme Court"). Accordingly, the Seventh Circuit has held that certification is warranted when necessary to prevent the State from "los[ing] the ability to develop or restate the principles that it believes should govern the category of cases." *Todd v. Societe BIC, S.A*., 9 F.3d 1216, 1222 (7th Cir. 1993) (*en banc*) (plurality opinion).

The Tenth Circuit will certify a question that is (1) determinative and (2) "sufficiently novel that [the court] feels uncomfortable attempting to decide it without further guidance." *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) (Gorsuch, J.). In applying this unique test, the Tenth Circuit "seek[s] to give meaning and respect to the federal character of our judicial system, recognizing that the judicial policy of a state should be decided when possible by state, not federal, courts." *Id*. Accordingly, when the Tenth Circuit has been confronted with a state constitutional question on which "there is no controlling precedent," it has certified the question to the state's highest court. *Parcell v. Governmental Ethics Comm'n*, 626 F.2d 160, 161 (10th Cir. 1980).

C. The Third, Fifth, and D.C. Circuits require a court to consider the broader policy significance of the state law issue as part of the certification analysis

Another group—comprised of the Third, Fifth, and D.C. Circuits—does not expressly consider state sovereignty in its certification analysis, but, borrowing from abstention doctrines, does limit certification to instances in which a state law issue is important and implicates state public policy.

The Third Circuit initially established factors for certification in a portion of a dissenting opinion in which all three panel judges joined, urging New Jersey to adopt a certification procedure. *See Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 302-03 & n.9 (3d Cir. 1995) (Becker, J., dissenting). Under that test, certification is appropriate when "(1) the issue is one of importance; (2) it may be determinative of the litigation; and (3) state law does not provide controlling precedent." *Id*. at 304. Applying this test, the Third Circuit has declined to certify questions that were "neither sufficiently important nor sufficiently difficult," *Travelers Indem. Co. of Ill. v. DiBartolo*, 171 F.3d 168, 169 n.1 (3d Cir. 1999), but has certified unresolved state law questions that were "of such substantial public importance as to require prompt and definitive resolution by" the state court, *Delta Funding Corp. v. Harris*, 426 F.3d 671, 675 (3d Cir. 2005).

The Fifth Circuit applies a three-factor certification test derived from *Fla. ex rel. Shevin v. Exxon Corp.*,

526 F.2d 266 (5th Cir. 1976), which examines (1) "the closeness of the question and the existence of sufficient sources of state law"; (2) "the degree to which considerations of comity are relevant in light of the particular issue and case to be decided"; and (3) practical considerations, including delay. *Swindol v. Aurora Flight Sciences Corp.*, 805 F.3d 516, 522 (5th Cir. 2015). Applying this test, the Fifth Circuit has concluded that unresolved state law questions presenting significant public policy concerns for the State are "compelling comity interests" that warrant certification. *Id.*; *see also In re Katrina Canal Breaches Litig.*, 613 F.3d 504, 509 (5th Cir. 2010) (finding certification "advisable" because "important state interests are at stake and the state courts have not provided clear guidance on how to proceed"); *Lucas v. United States*, 807 F.2d 414, 418 (5th Cir. 1986) (certifying to the Texas Supreme Court the "important question" of a statutory damages cap's constitutionality under the Texas Constitution because it was "the final arbiter of th[e] issue").

In deciding whether to certify a question, the D.C. Circuit asks (1) whether the law is "genuinely uncertain" and (2) "whether the case is one of extreme public importance." *Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (D.C. Cir. 2001) (citations omitted). Accordingly, the D.C. Circuit has certified a question when its resolution would "have significant effects" within the District of Columbia, *DeBerry v. First Gov't Mortg. & Inv'rs Corp.*, 170 F.3d 1105, 1110 (D.C. Cir. 1999), but has declined to certify when the party seeking certification had not argued that the question was

"one of substantial interest to the District," *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014).

D. The Fourth, Sixth, Eighth, Eleventh, and Federal Circuits do not require consideration of state sovereignty or whether an issue implicates important state policies

Five circuits, including the Eleventh, have adopted a more malleable certification inquiry. Unlike other circuits, these circuits have not incorporated into the certification standard the inquiries into state sovereign interests or the importance of a question to state public policy that derive from abstention doctrines. *See* Challener, *supra*, at 882-84. In these circuits, each judge or judicial panel has considerable license but very little guidance on when to certify. *Lindenberg*, 919 F.3d at 1002 (6th Cir. 2019) (Bush, J., dissenting from denial of rehearing *en banc*) (noting that the Sixth Circuit's standard "do[es] nothing to narrow the discretion left" to each judge and panel).

The only factor the Fourth Circuit has adopted in its certification inquiry is the uncertainty of state law. The court, for example, certified a question to the Virginia Supreme Court without further analysis because, after reviewing state law, it "remain[ed] uncertain as to whether Virginia would permit" a particular type of veil-piercing claim. *C.F. Trust, Inc. v. First Flight Ltd. P'ship*, 306 F.3d 126, 141 (4th Cir. 2002). Similarly, in

Langley v. Pierce, because the parties had admitted that there was "no controlling precedent in South Carolina law that addresses the exact controversy," a panel certified the question. 993 F.2d 36, 37 (4th Cir. 1993).

Although it has fewer relevant decisions, the Federal Circuit appears to take a similar approach, noting the "desirability" of certifying questions "if the question of the state's law is in doubt," but denying certification if state law is settled—without inquiry into other factors. *Toews v. United States*, 376 F.3d 1371, 1380-81 (Fed. Cir. 2004); *see also Klamath Irrigation Dist. v. United States*, 532 F.3d 1376, 1377 (Fed. Cir. 2008) (certification appropriate where the court "discerns an absence of controlling [state] precedent"); *Chevy Chase Land Co. v. United States*, 158 F.3d 574, 575-76 (Fed. Cir. 1998) (certifying "complicated issues of Maryland property law upon which th[e] court discern[ed] an absence of applicable and dispositive Maryland law").

The Sixth Circuit has adopted the same basic inquiry. *See Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) ("Resort to the certification procedure is most appropriate when the question is new and state law is unsettled."). As a result, judges and panels within the Sixth Circuit maintain—and exercise—the discretion to decline to certify questions, including questions of first impression within the State, without any consideration of a State's sovereign interests or the importance of the issue to state public policy. *See*, *e.g.*, *Smith v. Joy Techs., Inc.*, 828 F.3d 391, 397 (6th Cir. 2016) (declining certification of

unsettled state law question implicating significant public policy interests); *Pennington v. State Farm Mut. Auto. Ins. Co*., 553 F.3d 447, 450 (6th Cir. 2009) (declining to "trouble the Kentucky Supreme Court" despite recognizing it was an issue "of first impression").

The Eighth Circuit also regards the uncertainty of state law as dispositive, even though it has recognized that uncertainty alone is not sufficient grounds for a federal court to abstain. *See Guillard v. Niagara Mach. & Tool Works*, 488 F.2d 20, 24-25 (8th Cir. 1973). Like the Sixth Circuit, the Eighth Circuit does not expressly consider state sovereignty interests or the importance of the issue to state public policy as part of its certification inquiry. *See Kulinski v. Medtronic Bio-Medicus, Inc*., 112 F.3d 368, 372 (8th Cir. 1997). In individual cases, the court has considered whether the state law question is already pending in state court or involves competing public policies. *See*, *e.g.*, *Hatfield v. Bishop Clarkson Mem'l Hosp*., 701 F.2d 1266, 1268 (8th Cir. 1983) (*en banc*).

The latitude provided by these circuits' minimal standards allows panels—including the Eleventh Circuit panel here—to certify only if there is "substantial doubt" as to how the issue would be resolved under state law and to disregard States' sovereign interests in making their own law and establishing their own policy. App. 11. Other circuits, however, require consideration of those important interests. Certiorari is warranted to resolve this conflict.

II. The Decision Below Ignores Fundamental Principles of State Sovereignty and Federalism

In failing to consider the State's sovereign interests and this Court's commitment to cooperative judicial federalism, the decision below seriously undermines those important principles. This Court should grant review to remedy that failure.

"Few public interests have a higher claim upon the discretion of a federal chancellor than the avoidance of needless friction with state policies[.]" *R.R. Comm'n of Texas v. Pullman Co*., 312 U.S. 496, 500 (1941). Abstention doctrines formerly protected the "rightful independence of the state governments," *id*. at 501 (citations omitted), but often "proved protracted and expensive in practice," *Arizonans for Official English*, 520 U.S. at 76.

Certification has developed over the past fifty years as a more efficient alternative that continues to protect—and respect—States' interests in interpreting their own law. *Id*. "Abstention is a blunt instrument," but "[c]ertification offers a more precise tool" to "'help build a cooperative judicial federalism.'" *Expressions Hair Design v. Schneiderman*, 137 S. Ct. 1144, 1156-57 (2017) (Sotomayor, J., concurring) (quoting *Lehman*, 416 U.S. at 391).

Certification serves two vitally important federalism interests—interests that are substantially undermined by the Eleventh Circuit's approach. First, it avoids the "friction-generating error" that occurs when

a federal court "endeavors to construe a novel state Act not yet reviewed by the State's highest court." *Arizonans for Official English*, 520 U.S. at 79. The danger of such friction-generating error is at its zenith when the federal court endeavors to construe a novel state constitutional issue on which the State's highest court has not opined. *Lindenberg*, 919 F.3d at 1002 (Larsen, J., dissenting in part).

Certifying such questions to the state courts ensures that federal courts do not "diminish the power of state judiciaries" and "minimize[s] the risk of unnecessary interference with the autonomy and independence of the states." *Id.* (Bush, J., dissenting from denial of rehearing *en banc*). For that reason, "federal courts should refrain whenever possible from deciding novel or difficult state-law questions." *Knick v. Twp. of Scott*, 139 S. Ct. 2162, 2188 (2019) (Kagan, J., dissenting).

Second, certification prevents "forum shopping" between federal and state courts, one of the evils this Court sought to remedy in *Erie*. *See Hanna v. Plumer*, 380 U.S. 460, 468 (1965). As Judge Calabresi has suggested, the Sixth Circuit's approach to certification—like the Eleventh Circuit's similar approach—"leads to precisely the kind of forum shopping that *Erie* . . . was intended to prevent" and can "prevent state courts from deciding unsettled issues of state law, [in] violat[ion] [of] fundamental principles of federalism and comity." *McCarthy v. Olin Corp.*, 119 F.3d 148, 157-58 (2d Cir. 1997) (Calabresi, J., dissenting).

A. The Eleventh Circuit's approach undermines a State's sovereign authority to interpret its own constitution

This Court has long valued the "deeper policy derived from our federalism" that issues implicating States' "sovereign prerogative" and other "aspect[s] of sovereignty" should be addressed first by state courts. *Louisiana Power & Light Co. v. City of Thibodaux*, 360 U.S. 25, 28 (1959). And this Court has made clear that "our federalism" requires federal courts not to "unduly interfere with the legitimate activities of the States." *Younger v. Harris*, 401 U.S. 37, 44 (1971). State courts are "the 'ultimate expositors of state law,'" and, "[f]or that reason, this Court has promoted practices of certification and abstention to put difficult state-law issues in state judges' hands." *Knick*, 139 S. Ct. at 2188 (Kagan, J., dissenting) (quoting *Mullaney v. Wilbur*, 421 U.S. 684, 691 (1975)).

Few issues implicate the State's sovereign prerogative more directly than the interpretation of its constitution. "Florida's state courts are bound under federalist principles to give primacy to our state Constitution and to give independent legal import to every phrase and clause contained therein." *Traylor v. State*, 596 So. 2d 957, 962 (Fla. 1992). Certification here would have placed the construction and application of the Florida Constitution in the hands of those entrusted with the document's safekeeping.

The Eleventh Circuit disregarded these principles and usurped the Florida Supreme Court's sovereign

authority to interpret the Florida Constitution. That approach is inconsistent with any number of this Court's cases that caution federal courts against such interference in state constitutional interpretation. In *Kaiser Steel Corp. v. W.S. Ranch Co*., for example, this Court granted certiorari, vacated the Tenth Circuit's decision interpreting the New Mexico Constitution, and remanded the case with instructions that it be stayed pending the resolution of the issue by the state courts. 391 U.S. 593, 594 (1968). Justice Brennan concurred, reiterating his view that abstention should be limited to "special circumstances," but concluding that the state constitutional issue presented "one of the narrowly limited special circumstances which justify the invocation of the judge-made doctrine of abstention." *Id.* at 594-95 (Brennan, J., concurring) (citations omitted). Similarly, in *City of Meridian v. Southern Bell Telephone & Telegraph Company*, this Court vacated the decision below and directed the lower courts to stay their hand and let the state court resolve the state constitutional issue. 358 U.S. 639, 640-41 (1959).

The "basic idea" of doctrines such as abstention and certification "is to discourage federal courts from intruding on sensitive and complicated issues of state law without giving state courts a chance to review, and perhaps resolve, the matter first." Jeffrey S. Sutton, *51 Imperfect Solutions: States and the Making of American Constitutional Law* 197 (2018). And, when certification of a novel state constitutional issue is not appropriate for other reasons, courts have declined "to venture unguided into . . . state constitutional law,"

and instead decided the case on other grounds. *RAR, Inc. v. Turner Diesel, Ltd.*, 107 F.3d 1272, 1277 (7th Cir. 1997).

Moreover, Florida has been the pioneer of certification. *Clay v. Sun Ins. Office, Ltd*., 363 U.S. 207, 212 (1960). *See also* 17A Charles Alan Wright *et al*., Federal Practice and Procedure § 4248, pp. 486-87 & nn.7-9 (2007 & Supp. 2019) (discussing how *Clay* jumpstarted certification); Richard Alan Chase, *A State Court's Refusal to Answer Certified Questions: Are Inferences Permitted*?, 66 St. John's L. Rev. 407, 415 (1992) ("A federal court demonstrates respect for state sovereignty when it certifies a question to the state's highest court and defers to its judgment on unresolved issues of state law.").

The Eleventh Circuit's cavalier approach to certification directly contradicts this Court's repeated emphasis on the cooperative judicial federalism at the core of our dual court system. If "speculation by a federal court about the meaning of a state statute in the absence of prior state adjudication is particularly gratuitous" when the state court is willing to address the question, *Arizonans for Official English*, 520 U.S. at 79 (internal quotation marks omitted), then speculation about the meaning of the state **constitution** in such circumstances is fatally gratuitous. A state constitutional question is "one in which state governments have the highest interest"; it should "be decided in the first instance by state courts." *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978).

B. The Eleventh Circuit's approach encourages forum shopping in contravention of *Erie*

The "scheme of our Constitution envisions an allocation of law-making functions between state and federal legislative processes which is undercut if the federal judiciary can make substantive law affecting state affairs beyond the bounds of congressional legislative powers." *Hanna*, 380 U.S. at 474-75 (Black, J., concurring). This division of law-making functions is enforced by *Erie*, which requires federal courts sitting in diversity[3] to apply state substantive law. *Id*. at 465 (majority opinion). And one of the principal aims of *Erie* was "discouragement of forum-shopping" between state and federal courts in order to take advantage of more favorable law. *Id*. at 468.

The Eleventh Circuit's approach has the opposite effect, however. As this case demonstrates, the failure to certify a question to the state courts can deprive the

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[3] "Certification is especially important in categories of cases where, unless there is certification, the state courts are substantially deprived of the opportunity to define state law. **This problem is present, for example, when certain state law questions only arise in disputes governed exclusively by federal law, such as bankruptcy**. . . ." *Gutierrez v. Smith*, 702 F.3d 103, 116-17 (2d Cir. 2012) (emphasis added) (citing *In re Peaslee*, 547 F.3d 177, 183-84 (2d Cir. 2008) (certifying a question of state law in a bankruptcy case, and noting that although the answer would be relevant to a "profusion of cases percolating through the federal courts," so far "the issue in [that] case [had] not been addressed by any court of the State of New York, let alone the Court of Appeals")). *See also Swink v. Sunwest Bank (In re Fingado)*, 955 F.2d 31, 33 (10th Cir. 1992).

State of its ability to provide an authoritative interpretation of its own law, or, in this case, its own constitution. *McCarthy*, 119 F.3d at 157-59 (Calabresi, J., dissenting), and *Todd*, 9 F.3d at 1222.

The creation of the possibility for such forum shopping is particularly egregious when the federal court applies a method of inquiry derived solely from federal law to hold a state law unconstitutional under the state constitution. *Lindenberg*, 919 F.3d at 1002 (Larsen, J., dissenting in part) (questioning "whether the majority has asked the wrong question entirely").

III. This Case Is an Ideal Vehicle for Providing Guidance About Certification

This case presents an ideal opportunity to address certification and to resolve the division among the circuits over the appropriate weight to give States' interests in the inquiry.

First, the case involves two state constitutional questions, one involving Homestead law and the other the ownership of submerged land, which the bankruptcy court stated was "both fascinating and complex." *In re Cole*, 2019 WL 1528105, *11. The certification of state constitutional questions arises less frequently than statutory questions but presents vitally important matters of federalism and state sovereignty.

Second, the constitutional questions at issue are indisputably dispositive of this case and unresolved by the Florida Supreme Court.

Granting certiorari would allow this Court to address an exceptionally important issue, one vital to give "meaning and respect to the federal character of our judicial system" and to ensure that "the judicial policy of a state [is] decided when possible by state, not federal, courts." *Pino*, 507 F.3d at 1236 (Gorsuch, J.). This question will undoubtedly recur, because there are at least 305 Florida appellate cases addressing Homestead exemptions from forced sale and many multiples of that number in Florida trial courts.

For a device so common in federal practice—and one so central to respecting the federal-state balance envisioned in *Erie*—the lack of meaningful guidance is noteworthy. "The certification issue continues to vex lower federal courts without a good opportunity for the Supreme Court to address it." Frank Chang, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 Geo. Wash. L. Rev. 251, 278 (2017).

CONCLUSION

For the reasons set forth herein, a writ of certiorari should issue to review the decision of the United States Court of Appeals for the Eleventh Circuit and, ultimately, to vacate and reverse the decision below in favor of Cole or, alternatively, order certification to the

Florida Supreme Court regarding the questions whether the net proceeds from the sale of an exempt Florida Homestead that cannot be legally subdivided should be allocated in a manner that takes into consideration the respective values of the exempt portion of the property and the nonexempt portion of the property, as the court did in *O'Brien v. Heggen*, 505 F.2d 1001, 1004 (8th Cir. 1983); or whether the proceeds should be allocated based on a simple percentage of the exempt acreage to the total acreage of the property, without taking into consideration the respective values of the exempt portion and nonexempt portion of the property; or how or whether to factor submerged lands that may belong to the State of Florida into this methodology.

Respectfully submitted,

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DATED: February 18, 2021