No. _____

In the

Supreme Court of the United States

Fucich Contracting, Incorporated; et al.,

Petitioners,

v.

Shread-Kuyrkendall & Associates, Incorporated. et al.,

Respondent.

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

Petition for Writ of Certiorari

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QUESTION PRESENTED

Should a federal court of appeals sitting in diversity be required to issue a reasoned opinion in disposing of a case when that case involves significant and novel issues of state law that provide the rules of decision?

PARTIES TO THE PROCEEDING

Petitioners are Fucich Contracting, Incorporated, ("FCI"); Kathleen Fucich, ("Mrs. Fucich"); and Clayton Fucich, ("Mr. Fucich"), (collectively, the "Fuciches"), who were Plaintiffs-Appellants in the court below. Respondents are Shread-Kuyrkendall & Associates, Incorporated, ("SKA"); St. Bernard Parish, Louisiana, (the "Parish"); XL Specialty Insurance Company, ("XL"); and Travelers Casualty and Surety Company of America, "Travelers"); who were the Defendants-Appellees in the court below.

CORPORATE DISCLOSURE STATEMENT

Fucich Contracting, Incorporated, is not a publicly traded corporation nor does it have any parent corporations.

STATEMENT OF RELATED PROCEEDINGS

1. *Fucich Contracting, Incorporated; Kathleen Fucich; and Clayton Fucich v. Shread-Kuyrkendall & Associates, Incorporated; St. Bernard Parish, Louisiana; XL Specialty Insurance Company; and Travelers Casualty and Surety Company of America*, No. 2:18-CV-2885 in the United States District Court for the Eastern District of Louisiana. Appeal was taken from a final judgment of that court rendered January 11, 2023.

2. *Fucich Contracting, Incorporated; Kathleen Fucich; and Clayton Fucich v. Shread-Kuyrkendall & Associates, Incorporated; St. Bernard Parish, Louisiana; XL Specialty Insurance Company; and Travelers Casualty and Surety Company of America*, No. 23-30087 in the United States Court of Appeals for the Fifth Circuit. Judgment was entered on March 28, 2024.

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Petitioners, Fucich Contracting, Incorporated; Kathleen Fucich; and Clayton Fucich seek a writ of certiorari to review the judgment of the United States Court of Appeals for the Fifth Circuit.

OPINIONS BELOW

The affirmance without opinion of the Court of Appeals is unreported and unpublished. It is reprinted in the Appendix to this Petition. The district court's judgment, including relevant opinions and findings, are reprinted in the Appendix to this Petition.

JURISDICTION

The panel opinion and judgment of the Fifth Circuit were entered on March 28, 2024. This Honorable Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RULE PROVISIONS INVOLVED

Federal Rule of Appellate Procedure 36 provides in pertinent part:

Rule 36. Entry of Judgment; Notice

(a) Entry. A judgment is entered when it is noted on the docket. The clerk must prepare, sign, and enter the judgment:

* * *

(2) if a judgment is rendered without an opinion, as the court instructs.

Fifth Circuit Rule 47.6 provides:

Affirmance Without Opinion. The judgment or order may be affirmed or enforced without opinion when the court determines that an opinion would have no precedential value and that any one or more of the following circumstances exists and is dispositive of a matter submitted for decision: (1) that a judgment of the district court is based on findings of fact that are not clearly erroneous; (2) that the evidence in support of a jury verdict is not insufficient; (3) that the order of an administrative agency is supported by substantial evidence on the record as a whole; (4) in the case of a summary judgment, that no genuine issue of material fact has been properly raised by the appellant; and (5) no reversible error of law appears. In such case, the court may, in its discretion, enter either of the following orders: "AFFIRMED. See 5TH CIR. R. 47.6." or "ENFORCED. See 5TH CIR. R. 47.6."

INTRODUCTION

Federal courts are not, nor are they expected to be, experts in state law. But in conferring diversity jurisdiction to federal courts, Congress ensured that a litigant will have a fair and thorough hearing of his state law claims regardless of the court system in which he chooses to proceed. As this Court developed the parameters of diversity jurisdiction, it issued ground rules to achieve this aim along with the seemingly incongruent interest of judicial federalism. The result requires federal courts to do their best in interpreting and applying state law when called upon to do so. But if a federal court is not required to "show its work", how can state courts of last resort, the actual experts in state law, check it?

Meanwhile, courts of appeals have "wide latitude in their decisions of whether or how to write opinions." *Taylor v. McKeithen*, 407 U.S. 191, 194 n.4 (1972). But aside from this limited pronouncement, this Court has never defined the extent of that latitude nor the circumstances under which, in the interests of justice, a reasoned opinion is necessary. These principles create a tension that can disadvantage federal diversity litigants who are supposed to have a parallel and equal federal forum in which to resolve their disputes.

This case therefore presents this Court with the opportunity to bring consonance to an otherwise inharmonious phenomenon of civil procedure. The Fuciches simply ask this Court to require the Fifth Circuit, and courts of appeals generally, to show their

work when considering important and novel matters of state law. Such a requirement would permit diversity litigants a meaningful opportunity to understand a court's ruling and potentially seek additional review if, for example, the court of appeals inadvertently omitted certain facts or procedural history from its analysis. This requirement would likewise assist state courts in developing their positive law by providing specific decisions to adopt or reject.

Certiorari is therefore warranted.

STATEMENT

In this complicated diversity case, the court of appeals passed upon important questions of state contract, construction, and surety law by simply passing over them. The result was an unreviewable decree that leaves the Fuciches forever wondering whether the district court—and the court of appeals—correctly applied state law to a case where the Fuciches were ordered to pay more than a million dollars for errors they did not commit.

I. Factual Exposition.

A. The Project.

On December 22, 2016, FCI and the Parish entered into a public works construction contract for the upgrade of pump station #1 and #4 of the Lake Borgne Basin Levee District ("the Project"). These pumping stations were essential to protect the Parish

and its citizens from an increased risk of flooding occasioned by hurricanes and other large storms. The Parish engaged SKA as the engineer of record, who was solely responsible for the Project's design.

In designing the Project, SKA had one specific engine in mind: the Caterpillar 3512C diesel fired engine. While the Project's engine specifications did not list any discrete engine to be used, the Project's drawings and SKA's representations to Project bidders made crystal clear that the 3512C was the Project's engine.

What's more, the Project's FEMA funding was predicated on use of the 3512C engine. The June 3, 2015 FEMA letter awarding grant funds for the Project required compliance with its attached Record of Environmental Consideration specifically naming Caterpillar as the engine manufacturer.

FCI purchased the 3512C through a purchase order approved by SKA. But attempting to avoid responsibility for its own design, SKA noted on the approval "contractor to verify conformity of outputs to final design."

B. The Rotational Conflict.

All was proceeding well until FCI attempted to install the first engine. For the first time, on October 26, 2017, the parties discovered that the old engines rotated clockwise from the flywheel while the 3512C engine (that everyone agreed would be used for the Project) rotated counterclockwise. The result was that

the Project as designed by SKA was unworkable absent significant modifications.

SKA refused to provide an interpretation of the contract documents and blamed FCI for purchasing the wrong engine. Nevertheless, FCI attempted to find solutions to the rotational conflict and even had meetings to discuss solutions with SKA and the Parish. The prevailing idea was to invert the right-angle gear boxes attached to the engine's drive shaft to make them compatible with the new engines—FCI submitted a cost breakdown to SKA and the Parish to achieve just that. But no party authorized a change order or instructed FCI on what to do until well after litigation commenced. In the meantime, the Parish refused to pay FCI for work it had already completed.

C. The Performance Bond and Subsequent Settlement.

As required by Louisiana's public works laws, FCI and Travelers executed a performance bond in the amount of $5,009,908.00. Travelers issued the bond pursuant to a General Agreement of Indemnity ("GAI") executed by FCI, Mr. Fucich, and Mrs. Fucich. While the bond was generally intended to protect the Parish, one of its principal provisions was that if the Parish failed to pay FCI for work completed or failed to otherwise comply with the contract (like provide an interpretation of the contract documents), the Parish was in default under the bond, and none of Travelers' obligations arose.

Notwithstanding its own breach, the Parish began communicating with Travelers about resolution of the

rotational conflict to the Fuciches' detriment. While Travelers initially agreed with the Fuciches that they were not at fault, Travelers also leaned on the Fuciches to settle at a loss. This included filing a UCC-1 statement against the Fuciches' property and demanding collateral security in the full amount of the performance bond (more than five million dollars)—a demand Travelers knew the Fuciches could not meet.

The Fuciches resisted settlement, maintaining their position that they had done nothing wrong and should not be held responsible for SKA's error. Travelers then began to threaten using a provision of the GAI it claimed authorized it to settle all of the claims in the litigation, including the Fuciches' affirmative claims, without the Fuciches' permission. Travelers accused FCI of being obstructionist for maintaining its view on liability and taking a settlement position the other parties found unpalatable.

Nevertheless, the parties did reach two partial settlements. But only one was actually enforced—artificially enlarged by the district court to encompass elements that were neither discussed nor intended by the parties when initially confecting the settlement. The other partial settlement, which actually inured to the Fuciches' benefit, was thrown out by the district court.

With trial approaching, Travelers caved. After a failed mediation, Travelers invoked its GAI to settle all claims in the litigation except the Fuciches' claims

against Travelers for bad faith. The district court agreed with Travelers' assessment of the law and the GAI and dismissed these claims, with prejudice.

II. Procedural History and Relevant Rulings Below.

On March 19, 2018 FCI filed suit against SKA for its negligent design of the Project, its failure to issue the necessary change orders to cure the rotational conflict, and its failure to certify payments to FCI. FCI also sued SBPG for breach of contract for its failure to pay FCI its progress payments. Over the next several months, multiple parties filed claims against each other. These claims were filed as original complaints based the district court's diversity jurisdiction, 28 U.S.C. § 1332, and supplemental jurisdiction, 28 U.S.C. § 1367.

The district court made several rulings that the Fuciches challenged on appeal. These included:

- Denying the Fuciches' motion for summary judgment based on application of the Louisiana Contractor Immunity Law ("LCIL") and the language of the project's contract;
- Enforcing and expanding a partial settlement between the parties far outside the terms originally contemplated and agreed upon;
- Refusing to enforce a settlement that would have allowed the Fuciches to complete the work required by the contract;

- Dismissing SKA and the Parish from the suit based on Travelers' purported settlement;
- Excluding the Fuciches' testimony concerning lost profits occasioned by Travelers' bad faith; and
- After a bench trial, finding that Travelers has not committed bad faith.

At least three of these rulings turned on a significant issue of state law: whether the LCIL could be applied to situations like the rotational conflict; whether Travelers could seek indemnity from the Fuciches without a determination of fault under the LCIL; and whether Travelers' acts constituted bad faith.

The Fuciches appealed to the United States Court of Appeals for the Fifth Circuit, raising these issues and others. The Fuciches addressed the legal interplay between the LCIL and Travelers' demand for indemnity for a loss that was not FCI's fault. The Fuciches likewise raised Louisiana's strong public policy in favor of protecting contractors from liability for errors of design as evidenced by Louisiana's codification of principles outlined by this Court in *United States v. Spearin*, 248 U.S. 132 (1918). Although these were questions of state law, they were important ones.

After full briefing and oral argument, the Fifth Circuit issued an opinion, restated here *in extenso*:

> AFFIRMED. Appellants have not identified any reversible error of law in either the district

court's denial of partial summary judgment or the court's judgment following the bench trial. See 5th Cir. R. 47.6.

Being unable to seek rehearing or further consideration from the court of appeals, the Fuciches now petition this Court for review.

REASONS FOR GRANTING THE PETITION

This Court should exercise its supervisory authority to require that a court of appeals considering important questions of state law issue a reasoned opinion.

I. Summary Affirmance Here is Contrary to Principles of Diversity Jurisdiction, the *Erie* Doctrine, and Judicial Federalism.

At the outset, the Fuciches note that they approach this Petition somewhat blindly—in the absence of any reasoned opinion from the Fifth Circuit (other than a blanket statement finding no error of law), the Fuciches cannot tell why or how that court came to its conclusion. Did the court evaluate the current state of Louisiana law and find that the district court was correct? Did the court make an *Erie* Guess as to the application of the LCIL to Travelers' indemnity claim against the Fuciches or as to what constitutes a bad faith act by a surety in Louisiana? Did the court find that Louisiana public policy as expressed by the courts of that state did not offer the kind of protections for contractors evident in

Louisiana's legislative enactments? Without answers to any of these questions, the Fuciches cannot raise substantive error to this Court and must rely upon this Court's supervisory authority over the procedures the Fifth Circuit employed in disposing of the Fuciches' appeal.

The Fuciches' request to this Court is simple: remand this matter to the Fifth Circuit for a reasoned opinion on the application of Louisiana law to the facts of this case. While federal courts do not have a direct role in the development of state law, they nevertheless must make choices and determinations about that law when deciding cases within their jurisdiction. This is both to provide litigants with an understanding of how their dispute was resolved and to give states the opportunity to review and correct misapplications of local law.

A. Federal Courts Sitting in Diversity Are Bound to Determine Questions of State Law When Necessary to Resolve Disputes and Render Judgment.

Assuming first that the Fifth Circuit indirectly employed some sort of quasi-abstention doctrine to avoid considering the legal issues in this case, such a result is contrary to this Court's pronouncements and to the Judiciary Act of 1789. 1 Stat. 73 (1789). It is axiomatic that a federal court sitting in diversity must apply the law of the state applicable to the dispute before it. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64, 78 (1938). But this principle necessarily requires federal

courts to, from time to time, determine unresolved issues of state law when a state's legislature or court of last resort has not yet spoken on those issues. *See, e.g., Meredith v. City of Winter Haven*, 320 U.S. 228, 234 (1943); *Commonwealth Tr. Co. of Pittsburgh v. Bradford*, 297 U.S. 613, 618 (1936); *Risty v. Chicago, R.I. & P. Ry. Co.*, 270 U.S. 378, 387 (1926); *McClellan v. Carland*, 217 U.S. 268, 282 (1910).

This Court has made clear that a federal court may not abandon its responsibility to decide unclear issues of state law when it must resolve a dispute before it. Rather, *Erie* places on federal courts "a greater responsibility for determining and applying state laws in all cases within their jurisdiction in which federal law does not govern." *Meredith*, 320 U.S. at 237. This is because Congress, by conferring diversity jurisdiction upon the federal courts, made no exception for cases where the rule of decision is based in state law—clear or unclear. *Id.* at 236. Indeed, this Court has rejected attempts by lower courts to avoid resolving issues of state law. *See, e.g., id.*; *Williams v. Green Bay & W.R. Co.*, 326 U.S. 549, 553 (1946).

The policy underpinning this principle is based on diversity jurisdiction itself: it ensures to litigants a fair, speedy, and complete resolution of their disputes regardless of the court system in which they are brought. *Meredith*, 320 U.S. at 234; Robert L. Jones, *Finishing A Friendly Argument: The Jury and the Historical Origins of Diversity Jurisdiction*, 82 N.Y.U.L. Rev. 997, 1006 (2007). Allowing a federal court to "punt" on an unresolved or unclear state law

rule of decision thwarts the very purpose of diversity jurisdiction.

Here, the Fuciches can only assume that the court of appeals chose not to resolve at least one unclear aspect of Louisiana law. As discussed, *supra*, this case called upon the court of appeals to review, at the very least, the district court's legal conclusions on the applicability of the LCIL, Louisiana public policy against liability for contractors, and acts by a surety constituting bad faith. These conclusions provided the "substantive rules" applicable to this dispute. *Erie*, 304 U.S. at 78. The court of appeals therefore had a duty to express these rules and apply them to the facts of this case. Failure to do so constitutes an error that this Court can rectify by vacating and remanding this case to the court of appeals with instructions to issue a reasoned opinion.

B. A Reasoned Opinion Would Further Judicial Federalism.

Although counterintuitive, requiring the Fifth Circuit to issue a reasoned opinion on the issues of state law present in this case furthers judicial federalism by giving Louisiana state courts the opportunity to affirm or correct an interpretation thereof. As discussed, *supra*, at § I.A, this Court requires courts sitting in diversity to resolve unclear or novel issues of state law. This authorization is so wide that it includes permitting a federal court to predict whether a state court of last resort will reverse its binding precedent. *See Meredith*, 320 U.S. at 234:

> we are of opinion that the difficulties of ascertaining what the state courts may hereafter determine the state law to be do not in themselves afford a sufficient ground for a federal court to decline to exercise its jurisdiction to decide a case which is properly brought to it for decision).

This principle is on display in the Louisiana Supreme Court's decision in *Shell Oil Co. v. Secretary, Revenue and Taxation*, 96-0929 (La. 11/25/96); 683 So.2d 1204. Faced with an opinion from the Fifth Circuit interpreting state law as to whether oil and gas constituted component parts of land, the Louisiana Supreme Court expressly rejected the Fifth Circuit's finding on state law grounds. *Id.* at 9; 1210. The Louisiana Supreme Court reached a similar result in *Hinchee v. Long Bell Petroleum Co.*, 235 La. 185, 103 So.2d 82 (La. 1958), noting that years of state court jurisprudence had considered and rejected a federal court's pronouncement on state mineral law.

These opinions were arguably necessary in the further development of state law. In both instances, the Louisiana Supreme Court was presented with a potential resolution of an unsettled issue of state law, considered it, and rejected it in favor of a different approach. The federal courts' decisions therefore 1) provided finality for the litigants in the cases before them, and 2) contributed to the further development of Louisiana law.

As discussed, this case concerns unresolved issues of Louisiana law. The Fuciches asked the district

court and the court of appeals to determine the potential applicability of the LCIL, Louisiana public policy, and the law of bad faith to a discrete set of facts. By refusing a reasoned opinion, the court of appeals neither provided satisfactory closure to the Fuciches nor contributed to development of Louisiana law in circumstances capable of repetition.

This Court should therefore remand to the court of appeals with instructions to provide a reasoned opinion for its decision.

II. This Court Should Exercise its Supervisory Authority to Require the Court of Appeals to Issue a Reasoned Opinion.

Circuit courts of appeals are often courts of last resort for diversity cases in the federal system. This Court's Rule 10 does not generally include issues of state law as considerations for grant of a writ of certiorari. *See* Sup. Ct. R. 10. As a result, litigants in a diversity case will have only one opportunity for review of a district court's decision, while cases based on federal question jurisdiction or brought in the state court system could have two.

Further, when this Court does consider questions of state law, it often defers to the court of appeals' determination thereof. *Ragan v. Merchants Transfer & Warehouse Co.*, 337 U.S. 530, 534 (1949); *Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944). For all intents and purposes, the court of appeals is the last stop for most diversity cases.

This Court should therefore exercise its supervisory authority to guide courts of appeals on when, as here, reasoned opinions are necessary. "This Court has supervisory authority over the federal courts, and [it] may use that authority to prescribe rules of evidence and procedure that are binding in those tribunals." *Dickerson v. United States*, 530 U.S. 428, 437 (2000) (citing *Carlisle v. United States*, 517 U.S. 416, 426 (1996)). When a case turns on state law and there is no meaningful opportunity for further review after a court of appeals disposes of it, the court of appeals should, at the very least, articulate the grounds for its decision to provide for further review upon rehearing or otherwise. This Court can, and should, make this requirement explicit to the courts of appeals

CONCLUSION

The Fuciches respectfully submit that this Court should grant *certiorari* to review the judgment of the United States Court of Appeals for the Fifth Circuit.

Respectfully submitted,

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