No. _____

In the Supreme Court of the United States

GREGORY AIME; WOLF VENTURES, INC., D/B/A WOLF ENTERPRISES; AIME CONSULTING, LLC; AIME CONSULTING, INC.,

Petitioners,

v.

JTH TAX, INC., D/B/A LIBERTY TAX SERVICE; SIEMPRETAX+ LLC,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

1. Whether a federal court of appeals in a case based on diversity jurisdiction should certify an issue of state law to the highest court of that state when the federal court is divided on that dispositive state law issue, including whether this Court should remand for the court of appeals to certify an issue of Virginia common law regarding contract formation to Supreme Court of Virginia, as this Court similarly did for unsettled questions of state law in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974).

RULE 14.1(b) STATEMENT

The list of all parties to the proceedings below are as stated in the caption.

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Petitioners, Wolf Ventures, Inc. d/b/a Wolf Enterprises, Aime Consulting, LLC, and Aime Consulting, Inc. are not publicly traded, have no parent companies, and no publicly traded company holds 10% or more of their membership shares.

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Petitioners Gregory Aime, Wolf Ventures, Inc. d/b/a Wolf Enterprises, Aime Consulting, LLC, and Aime Consulting, Inc. (hereafter, collectively, "Aime") respectfully petition for a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, which vacated in part a judgment of $2.7M against Respondents for Respondents' breach of an agreement allowing Aime to repurchase tax preparation franchises.

The Fourth Circuit by divided vote—relying on its own view of unsettled Virginia law and over the persuasive dissent of a panel colleague—held that an agreement between Aime and Respondents JTH Tax, Inc. d/b/a Liberty Tax Service and SiempreTax+, LLC (hereafter, Liberty Tax) to extend the deadline for Aime to repurchase the franchises lacked consideration and, therefore, was unenforceable. The panel majority recognized that Virginia law was not "pellucid" on the critical issue raised, which affects the formation of countless contracts under Virginia law, but did not certify the issue to the Supreme Court of Virginia for the Supreme Court of Virginia to answer.[1]

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[1] As of 2014, forty-nine states, the District of Columbia, Guam, the Northern Mariana Islands, and Puerto Rico have established procedures under which questions of state and local law may be certified to their courts; only the Supreme Court of North Carolina still lacks a certification process. *See* Michael Klotz, Avoiding Inconsistent Interpretations: United States v. Kelly, the Fourth Circuit, and the Need for A Certification Procedure in North Carolina, 49 Wake Forest L. Rev. 1173 (2014).

OPINIONS BELOW

The Fourth Circuit's August 8, 2018 unreported opinion is reproduced in the Appendix (App. 1-24). The district court's February 15, 2017 opinion and order explaining its entry of judgment, after a three day bench trial, in favor of Aime and against Liberty Tax is reported at 236 F.Supp.3d 929 (E.D. Va. 2017) and reproduced in the Appendix (App. 36-56). The district court's November 30, 2018 order on remand from the Fourth Circuit is unreported (App. 57-74).[2]

JURISDICTION

The court of appeals issued its opinion and entered judgment on August 17, 2017. The court of appeals denied Aime's petition for rehearing and rehearing en banc on September 5, 2018. This petition is filed within ninety days of September 5, 2018. This Court possesses jurisdiction pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

This petition is based largely on the principles articulated in the seminal case of *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), and its progeny. The *Erie* court famously did not cite a specific constitutional provision for its holding, but appears to have based its decision on federalism principles and the constitutional structure of our government. *See Guaranty Trust Co.*

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[2] Though not directly relevant to the petition, the trial court's unreported opinion denying a post-trial motion to amend the initial judgment and award attorneys' fees also is included in the Appendix per Rule 14.1(i). (App. 25-35).

v. York, 326 U.S. 99, 109 (1945) (discussing that *Erie* "expressed a policy that touches vitally the proper distribution of judicial power between State and federal courts. In essence, the intent of that decision was to insure 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. The nub of the policy that underlies *Erie R. Co. v. Tompkins* is that for the same transaction the accident of a suit by a non-resident litigant in a federal court instead of in a State court a block away, should not lead to a substantially different result."); *id.* at 111-12 ("Diversity jurisdiction is founded on assurance to non-resident litigants of courts free from susceptibility to potential local bias. . . And so Congress afforded out-of-State litigants another tribunal, not another body of law. The operation of a double system of conflicting laws in the same State is plainly hostile to the reign of law. Certainly, the fortuitous circumstance of residence out of a State of one of the parties to a litigation ought not to give rise to a discrimination against others equally concerned but locally resident.").

The Rules of Decision Act directs that, "[t]he laws of the several states, except where the Constitution or treaties of the United States or Acts of Congress otherwise require or provide, shall be regarded as rules of decision in civil actions in the courts of the United States, in cases where they apply." 28 U. S.C. § 1652.

STATEMENT OF THE CASE

1. Liberty Tax offers tax preparation and filing services to customers through franchise locations throughout the United States. App 4. Aime operated nine separate franchise locations in the New York City area pursuant to franchise agreements with Liberty Tax. *Id.* at 16. Gregory Aime, the principle of the Aime businesses, and his entities were extremely successful; by the end of 2015, Aime ranked seventh among all Liberty Tax franchisees nationwide in net fees generated. JA 465.[3]

In January 2016, the Internal Revenue Service revoked Aime's Electronic Filing Identification Number ("EFIN"), which was required for Aime to file tax returns on behalf of its clients. App. 16. Without the EFIN, the franchises—valuable to Liberty Tax and Aime—could collapse during tax season, when nearly all revenue is generated for the year. *See id.* Liberty Tax would have been within its right to terminate the franchise agreements with Aime due to the revocation of the EFIN, but Liberty Tax chose not to do so. *Id.* at 4-5.

To maintain the ongoing operations of the franchises, Liberty Tax purchased the businesses under a new, superseding contract: a Purchase and Sale Agreement (the "PSA"), which contained a proviso that Aime would have the option to buy back the businesses if Aime had the EFIN restored by May 8, 2016. *Id.* at 17. The PSA provided that Liberty Tax

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[3] A cite to "JA ___" is to the joint appendix filed in the Fourth Circuit.

would be responsible for all expenses and liabilities of the businesses after the PSA was executed on January 21, 2016. *Id.*

Despite its obligation under the PSA to pay all expenses and liabilities of the franchises after January 21, 2016, Liberty Tax failed to pay the telephone bill and other expenses of the franchises at any point. *Id.* at 486-87. Although not required under the PSA to pay ongoing business expenses after January 21, 2016, Aime continued to pay for rent, utilities, a call center, and a central processing center. App. 17.

On April 8, 2016, a district manager for Liberty Tax, Marie Fletcher, met with the CEO of Liberty Tax, John Hewitt, concerning the status of Aime's efforts to have the EFIN restored. *Id.* at 17. Fletcher testified at trial that she informed Hewitt that Aime would not be able to meet the May 8, 2018 deadline in the PSA, but that the EFIN would likely be reinstated by October 2016. *Id.* Hewitt then told Fletcher that he would extend the buyback provision of the PSA until December 31, 2016, and authorized her to inform Aime of that decision. *Id.* at 17-18.

Per Hewitt's instruction, Fletcher informed Gregory Aime in a telephone call of Hewitt's agreement to extend the deadline. *See id.* at 6, 18; JA 503-04. Gregory Aime testified that the extension was important to him because he did not foresee that it would be possible to secure a new EFIN by May 8, 2016. JA 504.

Aime responded to the repurchase extension in a foreseeable way by continuing to support the ongoing expenses of the businesses after the original May 8,

2016 deadline. App. 18. Gregory Aime testified that had he not been promised by Liberty Tax the extension of the deadline to repurchase the franchises until December 31, 2016, he would have ceased financially supporting the businesses immediately after May 8th. *Id.* Liberty Tax accepted Aime's financial support of the franchise after May 8, 2016. *See* App. 44. Gregory Aime also renewed his efforts to secure a new EFIN by the new December 31, 2016 deadline, which he would not have done absent the promise to extend the repurchase deadline. JA 504-06.

On May 18, 2016, Gregory Aime received an e-mail from the IRS indicating that he had resolved the issues surrounding the revocation of the EFIN and that he could reapply, which he did. *Id.* at 801. In September 2016, the IRS activated the new EFIN, and Aime notified Liberty Tax in an attempt to repurchase the franchises. App. 43, JA 96. Yet, Liberty Tax refused to sell the franchises back to Aime. *See* App. at 52 (Aime was "not given the opportunity to repurchase" the franchises).

2. The parties became embroiled in litigation in federal court in a suit first filed by Liberty Tax claiming Aime was operating a competing business in violation of the PSA. The district court possessed jurisdiction pursuant to 28 U.S.C. § 1332 because Gregory Aime and his entities were citizens of New York, whereas the Liberty Tax entities were citizens of Virginia, and the amount in controversy alleged by Liberty Tax exceeded $75,000.

After a three day bench trial, the district court ultimately found, *inter alia*, that the offer by Liberty Tax to extend the repurchase deadline to December 31,

2016 was accepted by Aime and that there was a valid, enforceable extension agreement. *See* App. 18. The trial court found the testimony of Fletcher "credible" and "unrebutted." *Id.* The trial court also noted that in pretrial motions, Liberty Tax denied the meeting between Fletcher and Hewitt had occurred and contended that Hewitt never promised to extend the buyback deadline. *Id.* Hewitt did not appear at the trial, and the district court found that Hewitt's course of conduct entitled Aime to a missing witness adverse inference. *Id.* The trial court further found that Hewitt's conduct reflected the fact that he never intended to allow Aime to repurchase its businesses and was essentially stringing it on to keep the franchises operating. *Id.* Fletcher also testified that Liberty Tax offered to pay her litigation expenses in a different case if she would not show up to testify for Aime in this case. *Id.* At trial, Liberty Tax failed to argue lack of consideration, even though it raised the issue earlier. *Id.* at 60, n.2.

The district court entered judgment against Respondents, jointly and severally, in the amount of $2,736,896.17 for actual damages arising from Liberty Tax's breach of contract. *Id.* at 54, 56.

3. On appeal, the Fourth Circuit possessed jurisdiction pursuant to 28 U.S.C. § 1291. Under its unique and unprecedented view of Virginia law, the panel majority found no consideration existed to extend the buyback deadline so that no enforceable agreement existed. It described the consequences of its holding as follows:

> If there was a valid extension, then Liberty Tax wrongfully deprived Aime of the opportunity to

> repurchase his franchises, and he's entitled the profits he would have otherwise enjoyed. But if there was no extension, then Aime could not have bought back his businesses because he didn't [meet the condition to buy them back] by the . . . deadline. App. 8.

The majority declined to find consideration to support the promise from Aime's actions in paying certain expenses and utilities relating to the franchises and call center after May 2016, continuing to pay rent for the franchises beyond the May 8, 2016 deadline in the PSA, or continuing its efforts to secure a new EFIN. *See id.* at 10-11. The majority stated that these could not constitute consideration because "there's no evidence in the record that they were bargained for." *Id.* at 10.

Yet, as persuasively argued by the dissent (App. at 19-23), that is not what Virginia law requires. Virginia law spanning nearly a century has clearly and unmistakably held that where a "promisor receive[s] and accept[s], in exchange for his promise, something which he was not previously entitled to receive," it is "adequate consideration to support the promise," even if it is "but a peppercorn." *Richmond Eng'g & Mfg. Corp. v. Loth*, 115 S.E. 774, 787 (Va. 1923) (internal quotation marks omitted). *See* App. 20, citing *Loth*.

From *Loth* and an unbroken string of other Virginia cases culminating in *United Masonry Inc. of Va. v. Riggs Nat'l Bank*, 357 S.E.2d 509 (Va. 1987), the dissent saw Virginia's rule as: "where the formalities of a contract are present (offer and acceptance), consideration will be found to be present where a promise foreseeably induces the promisee to act to his

detriment and to the benefit of the promisor." App. at 19-20. The dissent further reasoned that the "bargained for exchange is inferred to be present from the foreseeable consequences of the promise since it is to be anticipated that the promise will induce the promisee to act, producing the required consideration to make the agreement an enforceable contract." App. at 22.

The dissent found that there was "ample record evidence" to support the trial court's findings that after May 8, Aime continued to pay for utilities and other services for the businesses, which would not have occurred but for the promise to extend the repurchase period by Liberty Tax. App. at 22. And, because Liberty Tax's promise to extend the repurchase deadline through December 31, 2016 induced these "obvious and foreseeable" actions by Aime, valuable consideration existed such that there was an enforceable contract. App. at 23.

The dissent believed the majority must have viewed the *Loth* to *United Masonry* line of cases as implicitly overruled by more recent Virginia cases declining to adopt promissory estoppel as a stand-alone equitable cause of action in Virginia. App. at 20-21, citing *W.J. Schafer Assocs. v. Cordant, Inc.*, 493 S.E.2d 512, 515-16 (Va. 1997). But, as observed by the dissent, the Virginia Supreme Court in declining to recognize promissory estoppel as an equitable cause of action could not have been overruling the *Loth* to *United Masonry* line of cases because the legal principles announced in those cases are grounded in the common law, not equity. *See* App. at 21-22.

Rather than directly cite and attempt to distinguish *Loth* and *United Masonry*, the majority cited other cases and merely said: "All told, we see the cases cited by our dissenting colleague as not overruled, but simply incongruous to the facts before us." The majority acknowledged that "Virginia law may not be pellucid on this point," but that it "view[ed] the parties' conduct in [the dissent's cited] cases as amounting to a reciprocal exchange of promises (even if attenuated)," which it viewed as lacking. App. at 12.

The Fourth Circuit opinion therefore creates a serious conflict of authority on the doctrine of consideration under Virginia's common law of contracts. The majority opinion conflicts not only with the dissenting opinion, but also with a federal district court interpretation of Virginia law from within the Fourth Circuit, *see Econo Lodges of America v. Norcross Econo-Lodge, Ltd.*, 764 F. Supp. 396 (W.D. N.C. 1991) (holding detrimental reliance can constitute consideration under Virginia law). It also conflicts with trial courts within the Commonwealth of Virginia. *See Cardinal Bank v. Britt Construction, Inc.*, 68 Va.Cir. 520, 2004 WL 2877385, at *2 (Va. Cir. Ct. 2004) (holding that though promissory estoppel is not recognized in Virginia, "detrimental reliance may serve as the basis for consideration in the case of a lien waiver."). The dissent cited *Cardinal Bank* as support for its view of Virginia law (App. at 23), but the majority did not mention the case.

The Fourth Circuit remanded the case for the trial court to reassess damages. App. 15-16.

On remand, the district court awarded Aime nominal damages of $5,000 for Liberty Tax's breach of

the covenant of good faith and fair dealing and compensatory damages from the breach of contract. *See* App.73.

REASONS FOR GRANTING THE WRIT

Granting certiorari will provide an opportunity to reevaluate the proper allocation of judicial power within our cooperative judicial federalism by ensuring that the determination of state substantive law remains within the appropriate state judicial sphere, and is not encroached impermissibly by federal courts. A federal court of appeals in a case based on diversity jurisdiction should certify a determinative question of state law to the highest court of that state pursuant to that state's certification process when the appellate court has split on that determinative state law issue. Granting certiorari, vacating the judgment below and remanding for consideration of whether the issue should be certified to the Supreme Court of Virginia will allow this Court to take a further step to fulfill the promise of *Erie* by helping ensure that the outcome of litigation in a federal court sitting in diversity should be the same, so far as legal rules determine the outcome of the litigation, as it would be if tried in a state court. Providing that federal courts of appeals should, when divided on a determinative question of state law, certify the question to the appropriate state tribunal would reduce the number of divergent views of state substantive law within the state and federal court systems, thereby curtailing the "operation of a double system of conflicting laws in the same state [which] is plainly hostile to the reign of law." *York*, 326 U.S. at 111.

Here, the Fourth Circuit sharply divided on the question of whether consideration existed to support an agreement to extend the date for Aime to repurchase the franchises, and this division included whether detrimental reliance can constitute consideration under Virginia law. That newly-created conflict regarding what constitutes consideration for a contract impacts such a fundamental concept of Virginia's common law that the conflict cannot be allowed to fester. The opinion creates the "double system of laws" that *Erie* and *York* found prohibited by our Constitution. That divergence cannot stand because it not only undermines the proper role of which court determines or creates state substantive law, but also adversely affects the rights of citizens. This Court should grant certiorari.

The majority's view also was wrong on the merits. Under the majority's view, due to Virginia's recent refusal to adopt promissory estoppel as a cause of action in Virginia, the fact that Aime paid expenses, utilities and rent beyond the original May 8, 2016 repurchase deadline and continued efforts to secure a new EFIN could not constitute consideration because "there's no evidence in the record that they were bargained for." *Id.* at 10.

Under the dissent's view of Virginia law, "where the formalities of a contract are present (offer and acceptance), consideration will be found to be present where a promise foreseeably induces the promisee to act to his detriment and to the benefit of the promisor." App. at 19-20. The dissent further reasoned that the "bargained for exchange is inferred to be present from

the foreseeable consequences of the promise since it is to be anticipated that the promise will induce the promisee to act, producing the required consideration to make the agreement an enforceable contract." App. at 22.

Virginia law for nearly a century has been clear that where a "promisor receive[s] and accept[s], in exchange for his promise, something which he was not previously entitled to receive," it is "adequate consideration to support the promise," even if it is "but a peppercorn." *Loth*, 115 S.E. at 787 (internal quotation marks omitted). In *Loth*, the defendant hired a general contractor to construct a building, but the general contractor became insolvent. The subcontractors were reluctant to go forward with the work until they were paid. The defendant sent them a letter in which he promised to pay all that was owed to the subcontractors. The subcontractors brought suit for nonpayment of the entire amount, and defendant defended on the ground that his promise lacked consideration. The Supreme Court of Virginia found consideration in that the promise reasonably induced the subcontractors to provide labor and material, and defendant received their labor and materials, without a mechanics' lien. There was no evidence cited in *Loth* that providing labor and materials without mechanics' liens was bargained for. Yet, the Supreme Court of Virginia still found consideration existed because the subcontractors reasonably and foreseeably changed their position to their detriment and to the defendant's benefit based on the defendant's promise.

That understanding of the common law requirements for consideration has continued unabated. *See. e.g.*, *United Masonry Inc. of Va. v. Riggs Nat'l Bank*, 357 S.E.2d 509, 513-14 (Va. 1987) ("Sufficient consideration exists if the promisee is induced . . . to do something that he is not legally bound to do or refrains from doing anything he has a legal right to do, or if the promisee acts in reliance upon the waiver to his detriment"); *Dulany Foods, Inc. v. Ayers*, 260 S.E.2d 196, 200-201 (Va. 1979) ("Ample authority sustains the view that such a promise [of an employer to pay severance pay to employees] amounts to an offer, which, if accepted by performance of the service, fulfills the legal requirements of a contract"); *Brewer v. First Nat'l Bank of Danville*, 120 S.E.2d 273, 279-80 (Va. 1961) (Where a party, "relying in part on the promise of the corporation to pay her the weekly salary for life, gave up her positions as president and director of the corporation" and sold her stock at a fraction of the value, the party had an enforceable contract for the payment of her weekly salary); *Twohy v. Harris*, 72 S.E.2d 329, 335-36 (Va. 1952) (Where an employer promised an employee stock if the employee stayed with the company, and the employee remained with the company and performed his services for seven years, "[i]t is well settled that a contract made under such circumstances is supported by valuable consideration"); *Looney v. Belcher*, 192 S.E. 891, 893 (Va. 1937) (Where a bank customer refrained from withdrawing his funds upon a guaranty of the bank officers to protect him against any loss, "[t]here can be no question about the presence of a consideration sufficient to support the guaranty bond . . . ."). No Virginia court has suggested or implied that these cases have been overruled. They remain good law.

The majority acknowledged that "Virginia law may not be pellucid on this point." It should not have taken an *Erie*-guess regarding the impact of Virginia's refusal to adopt promissory estoppel as a stand-alone equitable cause of action on its common law contract formation doctrines. That is for Virginia courts, and Virginia courts alone, to decide.

"When federal judges [outside Virginia] attempt to predict uncertain [Virginia] law, they act ... as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction." *Lehman Bros.*, 416 U.S. at 391. Under *Lehman Bros.*, federal courts should not predict what a state court will likely do, without any state guidance, because "a State can make just the opposite [determination of what the federal court predicts] her law" to be. *Id*. at 389.

There can be no question that certification to the Supreme Court of Virginia is warranted here. The issue of whether consideration existed to extend the repurchase period is outcome determinative in this case. The issue is of vital public concern to Virginia, as it affects the formation and enforcement of countless contracts within the Commonwealth, and is likely to recur. Yet, the Fourth Circuit did not allow Virginia courts to resolve the issue; instead it created a serious conflict within Virginia's common law. Proper respect for state courts as the expositors of state substantive law should counsel restraint by federal courts in announcing new state law principles.

The Court should grant certiorari to resolve whether, and under what circumstances, federal courts of appeal should certify issues of state law dispositive to the outcome of a case based on diversity jurisdiction

when the appellate court is divided on those issues. Given the clear and compelling circumstances presented by this case, Petitioners respectfully suggest that the proper course here would be for the Court to grant certiorari, vacate the Fourth Circuit's judgment and remand either for consideration of whether the issue should be certified to the Supreme Court of Virginia or with instructions for the Fourth Circuit to certify the controlling issue of Virginia law to the Supreme Court of Virginia.

CONCLUSION

For the foregoing reasons, Petitioners urge the Court to grant a writ of certiorari in this case on both questions presented.

Respectfully submitted,

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