No. 16-1457

In the Supreme Court of the United States

HANNSTAR DISPLAY CORPORATION,
Petitioner,
v.
SONY ELECTRONICS, INC. AND
SONY COMPUTER ENTERTAINMENT AMERICA, LLC,
Respondents.

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

BRIEF FOR AMICI CURIAE LAW PROFESSORS IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE[1]

The *Amici Curiae* Erwin Chemerinsky, Ellen E. Deason, Scott Dodson, Richard D. Freer, Grace M. Giesel, Andrew Hessick, Edward Imwinkelried, Megan LaBelle, Katharine Traylor Schaffzin, and Jerome Snider ("Amici") are each law professors at various law schools across the country.

Several members of the Amici group have written articles and taught courses focused on the subject matter of this appeal, and all of the Amici share a desire to maintain uniformity in the law. Because uniformity is among the casualties of the legal reasoning adopted by a split panel of the United States Court of Appeals for the Ninth Circuit in the opinion below, Amici submit this brief in support of the petition for a writ of certiorari.

Amici have no stake in the underlying dispute, nor are they concerned about whether Petitioner or Respondents ultimately prevail. But Amici have significant concerns about how the Ninth Circuit's ruling on an important issue of evidentiary privilege law will affect myriad other cases, including those in which the same or similar privilege issue could arise.

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[1] No counsel for a party authored this brief in whole or in part. Neither a party, nor its counsel, nor any other entity other than *amicus curiae* and counsel has made a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties were timely notified of the *amicis*' intent to file this brief under Supreme Court Rule 37.2(a), and all parties consented to the filing of this brief.

SUMMARY OF THE ARGUMENT

The Court should grant the petition for a writ of certiorari because this case presents an issue with the potential to affect every case in which federal jurisdiction is based on diversity of citizenship. Federal Rule of Evidence 501 governs privileges in all federal proceedings and includes a proviso that requires courts choose between applying federal or state privilege law when a civil case involves a claim or defense for which state law supplies the rule of decision. How courts should interpret and apply this proviso is a consequential issue in countless diversity cases, because so many of those cases involve claims based on state law. As such, the *Amici Curiae* respectfully ask the Court to consider the merits of this appeal and clarify the law on this issue.

In the decision below, a split panel of the Ninth Circuit construed and applied Rule 501 in a manner that is in tension with the text, history, and underlying purpose of the state law proviso. The Ninth Circuit's reasoning also creates a situation in which the outcome of diversity cases will turn not on substantive law, but rather on whether the parties are from the same state—as this case vividly illustrates. This is likely to sow confusion among district courts about how to apply Rule 501. It may also cause harm to states' interests, and may provoke forum shopping in future diversity cases.

As an initial matter, the Ninth Circuit's ruling creates uncertainty about the role of state privileges in resolving pivotal evidentiary rulings in diversity cases. This is a civil case for which California law supplies the rule of decision, yet the Ninth Circuit applied federal

privilege law because the evidence at issue *could* relate to federal claims—even though no federal claims are currently asserted. This approach leaves other courts and litigants to question whether Rule 501 applies based on the claims and defenses that parties (1) actually assert; (2) once asserted, but have since dismissed; or (3) have never asserted, but conceivably could.

The Ninth Circuit's decision may also lead other courts to discount the importance of Congress' role in establishing the Federal Rules of Evidence. The judicial branch originally proposed privilege rules to Congress that made no allowance for federal courts to apply state privilege law in diversity cases. The controversy over this proposal was a major factor in Congress' decision to intervene for the first time in the rule-making process. Each stage of the ensuing legislative process, culminating in Rule 501's enactment, shows that Congress intended for federal courts to apply state privilege law in diversity cases such as this one. By failing to attach any significance to these events, the Ninth Circuit laid the groundwork for other courts to do likewise.

The states within and possibly even outside the Ninth Circuit will also be affected by the precedent this case establishes. Namely, each state's respective policy choices in creating privileges will be tossed aside—despite the lack of a federal interest to justify this result. Establishing a privilege involves social value judgments about the proper balance between maintaining confidentiality and allowing disclosure, and states have balanced these factors differently. This case implicates the balance California struck regarding

the disclosure of mediated settlement agreements. The Ninth Circuit discarded California's rule even though the sole claim in the federal proceeding is one for breach of the settlement agreement under California law. Under the court's reasoning, federal district courts will be free to scrap other state privilege rules in future diversity cases with only state law claims.

Finally, the Ninth Circuit's decision will incentivize forum shopping and lead to inconsistent outcomes in state and federal court. Generally, state law should control the disposition of state law claims that are in federal court. This principle gives due force to state substantive law and ensures steady application of the law. In the wake of the Ninth Circuit's decision, however, the happenstance of diversity could lead to disparate privilege rulings for the same state law claims. This should be corrected to avoid discrepancies between outcomes in state and federal court and the forum shopping that will incite.

ARGUMENT

I. The Ninth Circuit's decision engenders confusion about how Federal Rule of Evidence 501 applies in diversity cases.

Even though the Ninth Circuit's decision turned on the application of Rule 501, the text of Rule 501 took a back seat in the court's analysis. Importantly, beyond one passing quotation, the court did not engage with Rule 501, or its historical context. An analysis of Rule 501's historical backdrop confirms that Congress meant for state privilege law to apply when a federal court's jurisdiction derives solely from diversity of citizenship. The upshot is that the Ninth Circuit has opened the

door for federal courts hearing diversity cases to disregard state privileges despite Congress' directives and the policy decisions made by the states whose substantive law federal courts are enforcing.

A. The Ninth Circuit's reasoning is in tension with Rule 501's plain text.

The Ninth Circuit's decision creates instability in the law because the court applied Rule 501 in a manner that seems to contradict a plain reading of the provision. Rule 501 states as follows:

> The common law—as interpreted by United States courts in the light of reason and experience—governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> *But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision*.

Fed. R. Evid. 501 (emphasis added). Pursuant to the emphasized proviso, federal courts apply a state's privilege law when that state's law "supplies the rule of decision" for a claim or defense.

In diversity cases involving only state law claims, state law necessarily supplies the rule of decision. This is because, "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Erie R.R.*

Co. v. Tompkins, 304 U.S. 64, 78 (1938). Many courts have therefore recognized that a straightforward reading of Rule 501 requires federal courts to apply state privilege law when jurisdiction is grounded exclusively in diversity. *See, e.g.*, *McInnis v. A.M.F., Inc.*, 765 F.2d 240, 245 (1st Cir. 1985) (reasoning that the "special proviso" in Rule 501 requires "state rules to be applied in diversity actions"); *Samuelson v. Susen*, 576 F.2d 546, 549 (3d Cir. 1978) ("We believe Rule 501 requires a district court exercising diversity jurisdiction to apply the law of privilege which would be applied by the courts of the state in which it sits."); *Union Cnty., Iowa v. Piper Jaffray & Co.*, 525 F.3d 643, 646 (8th Cir. 2008) ("Because this is a diversity case, the determination of whether attorney-client privilege applies is governed by state law."); *Theme Promotions, Inc. v. News Am. Mktg. FSI*, 546 F.3d 991, 1007 (9th Cir. 2008) (stating that "state privilege law must be applied in a diversity action where state law provides the rule of decision"); *Frontier Ref., Inc. v. Gorman-Rupp Co.*, 136 F.3d 695, 699 (10th Cir. 1998) (holding that Rule 501 "provides that state law supplies the rule of decision on privilege in diversity cases"); *Eureka Inv. Corp., N.V. v. Chi. Title Ins. Co.*, 743 F.2d 932, 936 n.3 (D.C. Cir. 1984) ("Jurisdiction in this case being based on diversity, state law supplies the rule of decision on the issue of privilege.").

Here, the Ninth Circuit recognized (twice) that "federal diversity jurisdiction allowed the case to remain in federal court" because it involves only a "state-law breach of contract claim." *Sony Computer Entm't Am., LLC v. HannStar Display Corp.* (*In re TFT-LCD (Flat Panel) Antitrust Litig.*), 835 F.3d 1155, 1158 (9th Cir. 2016); *see id.* (acknowledging that this

action is proceeding "under the court's diversity jurisdiction"). The court also gave lip service to the proviso in Rule 501. *Id.* But the court did not explain how its decision to apply "the federal law of privilege" can be squared with Rule 501's text. *Id.* at 1159. Instead, the court left the text of Rule 501 behind as it analogized this case to another case in which it applied federal privilege law in a suit to enforce a settlement agreement. *See id.* at 1158–59 (discussing *Wilcox v. Arpaio*, 753 F.3d 872 (9th Cir. 2014)). Importantly, however, *Wilcox* involved "both federal and state law claims," so jurisdiction in that case—unlike this case—did not hinge on diversity. *Id.* at 1158 (citing *Wilcox*, 753 F.3d at 876).

Rule 501 plainly states that, in a civil case, in which state law supplies the rule of decision for a claim, "state law governs privilege." FED. R. EVID. 501. This is a civil case, in which California law supplies the rule of decision for the lone breach-of-contract claim, so California law should govern privilege. *See id.* Yet the Ninth Circuit held exactly the opposite, concluding that "the district court erred in applying California privilege law to resolve this dispute." *In re TFT-LCD (Flat Panel) Antitrust Litig.*, 835 F.3d at 1159. This may prompt other courts to deviate from applying Rule 501 as written.

B. The Ninth Circuit gave no weight to Congress' goal of preserving state privilege laws in diversity cases.

That the Ninth Circuit has likely cleared the way for other courts to contravene Congress' intent becomes even more evident when one considers Rule 501's historical context. The Federal Rules of Evidence began

as rules drafted by an Advisory Committee to the federal judiciary, but the provisions ultimately took effect as statutes because Congress intervened. Reviewing the changes Congress made to the initial proposal, and the reasons Congress gave for making those changes, shows that Congress intended for federal courts to respect and apply state privilege law in diversity cases.

The Federal Rules of Evidence trace back to the 1960s when an Advisory Committee of the United States Judicial Conference was appointed to draft a uniform set of evidentiary rules for federal courts. *See* Edward J. Imwinkelried, *The New Wigmore: Evidentiary Privileges* § 4.2.1 (3d ed. 2017) (hereinafter "*The New Wigmore*"). The ensuing process spanned several years and included numerous drafts, concluding with a final draft transmitted to Congress in 1973. *Id.* Article V of the proposed rules "consisted of thirteen rules designed to provide a complete system of privilege law for the federal courts." 23 Charles A. Wright & Kenneth W. Graham, Jr., FED. PRAC. & PROC. EVID. § 5421 (1st ed. 1980) (hereinafter "Wright & Graham"). In other words, the rules would have precluded federal courts from applying any privileges other than those included in Article V, meaning federal courts would not recognize state privilege laws even in diversity cases. *Samuelson*, 576 F.2d at 550.

In describing Congress' reaction to this proposal, commentators have used terms such as "furor," "firestorm," and "controversy." *The New Wigmore* § 4.2.2; Gerald Wetlaufer, *Justifying Secrecy: An Objection to the General Deliberative Privilege*, 65 Ind. L.J. 845, 881 (1990); Wright & Graham § 5421. These

are not exaggerations. Within two days of receiving the draft rules, the Senate approved a resolution to block their implementation. S. Res. 583, 93d Cong. (1973) (enacted). The House of Representatives soon did the same after having identified the proposed federalization of privileges as an issue of "magnitude." H.R. Rep. No. 93-52 at 3 (1973). The debate on the House measure reveals congressional officials' immediate concern about the displacement of state privileges. Some members suggested Congress was powerless to displace state privileges in diversity cases under *Erie*, and others questioned the wisdom of eliminating state privileges in diversity cases even if it was permissible. *See* 119 Cong. Rec. 7644, 7647 (remarks of Representatives Smith, Hutchison, and Dennis).

Concerns about disregarding state law continued to be expressed during hearings on the proposed rules in the House. Representative Dennis, for example, questioned whether "the State's policy should be nullified simply because [a person sues] in Federal court instead of [a] State court," and Judge Henry Friendly testified that state law should be controlling in diversity cases. Special Subcomm. on Reform of Fed. Crim. Laws, H. Comm. on the Judiciary, 93d Cong. 66, 262 (1973); *see also id.* 109, 160, 171-73, 178, 215 (testimony on behalf of several bar organizations emphasizing that federal courts should respect and apply state privileges).

The House subcommittee ultimately struck Article V as proposed and replaced it with Rule 501, including the proviso that privilege "shall be determined in accordance with State law" when "State law supplies

the rule of decision." *Id.* at 156. The subcommittee note accompanying this provision explained that it was "designed to mandate the application of State privilege law in civil actions governed by" *Erie*. *Id.* When the full Judiciary Committee submitted the proposed rules to the House in H.R. 5463, it described the reasons for including the state law proviso as follows:

> The rationale underlying the proviso is that federal law should not supersede that of the States in substantive areas such as privilege absent a compelling reason. The Committee believes that in civil cases in the federal courts where an element of a claim or defense is not grounded upon a federal question, there is no federal interest strong enough to justify departure from State policy.

H.R. Rep. No. 93-650, at 9 (1973); *see* H.R. 5463, 93d Cong. (1973).

After H.R. 5463 passed the House by a sweeping margin of 377 to 13, it was referred to the Senate Committee on the Judiciary. *See* S. Rep. No. 93-1277 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7051. During hearings before the Senate committee, many witnesses focused their remarks on the role of state privileges in federal courts and endorsed the approach taken by the House. *See, e.g.*, S. Comm. on the Judiciary, 93d Cong. 81, 88, 306 (1973). This testimony was apparently well received because the Senate committee included a state law proviso in its version of Rule 501 that was very

similar to the proviso that the House included.[2] The committee's rationale for including this provision aligned with the reasoning expressed in the House:

> [The proviso] reflects the view that in civil cases in the Federal courts, where a claim or defense asserted is not grounded upon a Federal question, there is no Federal interest in the application, or in its resolution, of a uniform law of Federal privilege strong enough to justify departure from State policy.
> . . .
>
> [Thus,] in diversity cases where the litigation in question turns on a substantive question of State law, and is brought in the Federal courts because the parties reside in different States, *the committee believes it is clear that State rules of privilege should apply* unless the proof is directed at a claim or defense for which Federal law supplies the rule of decision (a situation which would not commonly arise).

1974 U.S.C.C.A.N. at 7053, 7059 (emphasis added).

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[2] The Senate revised the language of the proviso in an effort to clarify its scope, particularly as it relates to diversity cases that involve a claim or defense based on federal law. *See* 1974 U.S.C.C.A.N. at 7059. Although Congress ultimately rejected the Senate's version, the Conference Committee's report includes a note explaining that "federal privilege law will apply to evidence relevant to [a] federal claim or defense" that is included in a diversity case. H.R. Conf. Rep. No. 93-1597 (1974), *as reprinted in* 1974 U.S.C.C.A.N. 7098, 7101. This comment is irrelevant here because diversity jurisdiction was the sole basis for the district court's jurisdiction over the plaintiff's state law breach of contract claim. *In re TFT-LCD*, 835 F.3d at 1158.

A Conference Committee was formed to reconcile various differences between the House and Senate versions of the proposed rules. *See* 1974 U.S.C.C.A.N. 7098. As to Rule 501, the Conference Committed concluded as follows: "In civil actions and proceedings, where the rule of decision as to a claim or defense or as to an element of a claim or defense is supplied by state law, the House provision requires that state privilege law apply. The Conference adopts the House provision." *Id.* (emphasis added). Both houses voted to adopt the Conference Committee Report, and the President signed H.R. 5463 into law on January 3, 1975. *See* 11 Weekly Comp. Pres. Doc. 12 (Jan. 6, 1975).

Every step of this legislative process underscores what Rule 501's plain text provides: When state law supplies the rule of decision, federal courts should apply state rules of privilege. This "approach furthers Congress' goal of preserving the domain of state privilege law in diversity cases by achieving outcome identity between state and federal courts of the forum state." *Samuelson*, 576 F.2d at 550. And the related benefits include "discouraging forum shopping" and "effectuating state substantive rights, laws and policies in controversies where there is no substantial federal interest." *Id.*

The Ninth Circuit did not consider these factors when it declined to apply California privilege law in this diversity case involving only a California claim. *In re TFT-LCD*, 835 F.3d at 1158-59. The panel majority held that the absence of an existing federal claim is inconsequential, but this conclusion is in conflict with Congress' forceful rejection of the notion that privilege law should be federalized. *See id.*; FED. R. EVID. 501;

see also 5-501 WEINSTEIN'S FED. EVID. § 501 App. 01[3][c] (recognizing that the thrust of congressional action on Rule 501 was aimed at protecting state privileges in diversity cases with only state law claims).

In sum, the legislative history of Rule 501 confirms that one of Congress' primary goals was to ensure that "where states have created rights, the federal courts should apply the same rules of law to those rights which the states themselves would apply." *Samuelson*, 576 F.2d at 550. Here, however, the Ninth Circuit cast aside the rule a California court would have applied in resolving the California breach of contract claim. Neither Rule 501, nor its legislative history favor this peculiar result, and just as troubling, the Ninth Circuit's decision will likely lead federal courts hearing future diversity cases to trample on a variety of important policy choices made by the states, as discussed below.

C. The Ninth Circuit failed to consider Rule 501's role in safeguarding states' policy choices when their laws provide the rule of decision.

The Ninth Circuit's ruling threatens states' interests well beyond the scope of this particular case because it enables district courts to cast aside state privilege law in diversity cases even if there is no live federal claim in the case.

Rule 501 "reflect[s] an important Congressional judgment about where to strike the balance between competing state and federal interests in [a] sensitive arena." *Olam v. Cong. Mortg. Co.*, 68 F. Supp. 2d 1110,

1122 (N.D. Cal. 1999). After all, as former members of this Court, members of Congress, and commentators have all recognized, privilege rules implicate important social policy judgments. *See* Testimony of Hon. Arthur H. Goldberg, Rules of Evidence, Special Subcomm. on Reform of Fed. Crim. Laws, H. Comm. on the Judiciary, H.R. Rep., 93 Cong., 1st Sess. 142, 143-144 (1973) (stating that privilege law "is the concern of the public at large"); Cong. Record House of Rep. 12,254 (daily ed. Dec. 18, 1974) (Representative Hungate stating that "rules of privilege reflect a substantive policy choice between competing values"); Ellen E. Deason, *Predictable Mediation Confidentiality in the U.S. Federal System*, 17 OHIO ST. J. ON DISP. RESOL. 239, 284 (2002) (explaining that the decision to create a privilege "represents a policy choice to elevate the confidentiality of certain communications over the importance of the norms expressed in the jurisdiction's substantive rule"); *The New Wigmore* § 1.1 (discussing the social significance of privileges).

In the area of mediation confidentiality, like other areas implicating privileges, states' policy judgments vary. *See, e.g.*, Deason, *supra*, at 248 ("Few, if any, jurisdictions have reached the same policy balance between each of the[] reasons to permit disclosure and the benefits of maintaining mediation confidentiality."). For its part, California has enacted a sweeping "general rule that writings prepared for, in the course of, or pursuant to mediation are inadmissible, except as otherwise provided [by statute]." *Fair v. Bakhtiari*, 147 P.3d 653, 657 (Cal. 2006) (internal quotation omitted and alteration revised). One exception concerns written settlement agreements and includes a requirement that "[t]he agreement provides that it is enforceable or

binding words to that effect." CAL. EVID. CODE § 1123(b).

The terms in § 1123(b) "appear[] to be unique to California" and reflect the state's assessment about how to "enhance the effectiveness of mediation in promoting durable settlements." *Fair*, 147 P.3d at 657-58 & n.6. Like various other privileges, § 1123(b) therefore reflects a value judgment that heightens the importance of which privilege law—federal or state—a federal court should apply. By using state law, the federal court effectuates a state's policy decision; by using federal law, the court nullifies it.

Congress designed Rule 501 to avoid overriding states' policy choices when their law governs the parties' claims and defenses. Absent a claim or defense grounded on a federal question, Congress found no federal interest strong enough to justify disregarding states' policy decisions. *See supra* Part I.B. Nevertheless, the Ninth Circuit's opinion suggests that a sufficient federal interest exists here because, at one point in the past, the case included federal claims. *In re TFT-LCD*, 835 F.3d at 1158-59. This reasoning is suspect and creates confusion about how to apply Rule 501 properly.

Congress included the state law proviso in Rule 501, in part, because it was concerned about needlessly displacing state policy choices. *See supra* Part I.B. This displacement occurs only if and when the district court actually disregards state law and applies federal law instead. Thus, the critical moment under Rule 501 is when the court must choose between federal and state law to resolve a claim. Here, as the judge dissenting from the Ninth Circuit's decision explained, the district

court was not (and could not have been) called upon to apply federal privilege law because no federal claims were present when the plaintiff moved for summary judgment—the plaintiff had dismissed all claims except the breach of contract claim. *In re TFT-LCD*, 835 F.3d at 1159 (Lynn, J., dissenting). In effect, then, the panel majority concluded that the federal interest in claims the plaintiff *voluntarily dropped* is so strong that it warrants departing from California's privilege rule.

Finally, the damage done to a state's interests when a federal court refuses to apply the state's privilege law is identical whether the case involves only a state law claim from the outset or, conversely, was pared down to only a state claim by the time the federal court decides the privilege issue. Either way, a federal court is refusing to give credence to a state's policies even though that state's laws govern the court's resolution of the merits.

II. The Ninth Circuit's ruling could promote disparate outcomes and forum shopping in future diversity cases.

This Court has long held that the outcome for state law claims should generally be the same before state and federal courts. *See Erie*, 304 U.S. at 78. This principle prevents forum shopping and ensures equitable application of the law. Here, however, the Ninth Circuit's conclusion that state law claims should proceed with different evidentiary privileges in federal and state courts could undermine uniformity in the law, and in turn, prompt forum shopping in future cases.

A. The outcome of a diversity case should generally be the same in federal court as it would be in state court.

This Court has enunciated the general principle that "[e]xcept in matters governed by the Federal Constitution or by acts of Congress, the law to be applied in any case is the law of the state." *Id.* This approach serves two primary aims: "[1] discouragement of forum-shopping and [2] avoidance of inequitable administration of the laws." *Hanna v. Plumer*, 380 U.S. 460, 468 (1965). Federal courts hearing state law claims apply substantive state law "because there can be no other law." *Id.* at 471-72.

This Court has also stated time and again that the outcome of state law claims generally should not vary between state and federal courts. *See, e.g.*, *id.* at 467 (recognizing that it would be "unfair" for the result of litigation to differ materially merely because a suit was brought in federal court); *Byrd v. Blue Ridge Rural Elec. Co-op., Inc.*, 356 U.S. 525, 550 (1958) ("[T]he 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."); *Guar. Trust Co. of N.Y. v. York*, 326 U.S. 99, 109 (1945) ("[I]n 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."). In essence, federal courts sitting in diversity are "only another court of the State" and cannot "substantially affect the enforcement of [a] right as given by the State." *York*, 326 U.S. at 108-09.

To be sure, Congress may require otherwise. For example, substantive state laws will yield to the Federal Rules of Civil Procedure, even if the Rules will change the outcome. *E.g.*, *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 407-08 (2010). This type of departure from state law "is the inevitable (indeed, one might say the intended) result of a uniform system of federal procedure." *Id.* at 416. Congress therefore has the power to implement rules that vary the outcome of state law claims in federal court. *See id.*

But Congress did precisely the opposite when it enacted Rule 501. As discussed above, Congress rejected the initial version of Rule 501, which would have allowed federal courts hearing state law claims to ignore state privilege laws. *See supra* Part I.B. In its place, Congress established a rule that protects, not overrides, state privilege law. *Id.* This manifests Congress' intent that federal courts should respect state privilege laws in diversity actions. *Id.*

Taken together, this Court's pronouncements and Congress' actions confirm that federal courts should avoid departing from state privilege law in cases such as this, which include only state law claims and remain in federal court only because of diversity. *See In re TFT-LCD*, 835 F.3d at 1158-59; *see also York*, 326 U.S. at 109-10 (explaining that federal courts hearing pure diversity cases should act as "only another court of the State" to ensure that the outcome is the "same . . . as it would be if tried in a State court"). The district court adhered to this notion and the principles of federalism infused in Rule 501, but the Ninth Circuit took a different path.

B. The Ninth Circuit opened the door for federal courts to reach results contrary to state courts' merely because diversity exists.

A case should not turn on whether the parties are from the same state. Yet, under the Ninth Circuit's decision, that has happened here and is likely to happen in future cases. This Court should therefore take this case to reiterate the principles of federalism that underlie Rule 501 and this Court's precedent concerning diversity cases.

The only claim in this case is a breach of contract claim under California law. *In re TFT-LCD*, 835 F.3d at 1157-58. The plaintiff moved for summary judgment on this claim, attaching a collection of e-mails exchanged with a mediator that allegedly form a binding contract, which the defendant breached by failing to pay the settlement amount. *In re TFT-LCD (Flat Panel) Antitrust Litig.*, No. 3:12-CV-02214, 2013 WL 6326707, at *4 (N.D. Cal. Dec. 3, 2013). After acknowledging that it could "only consider admissible evidence" in ruling on the plaintiff's motion, and without questioning its duty to consult *state privileges* in resolving the *state law claim*, the district court proceeded to analyze the California Evidence Code provisions regarding the confidentiality of mediation communications. *Id.* at *3. "[B]ecause the e-mails do not affirmatively provide that the agreement the parties reached is enforceable or binding," as California Evidence Code § 1123(b) requires, the district court held "the purported settlement agreement is inadmissible." *Id.*

This result conforms to the outcome that a California state court would have reached had it been

deciding the same issue. After all, if the plaintiff had brought its breach of contract claim in California state court, that court would have excluded the e-mails under § 1123(b), leaving the plaintiff without evidence to substantiate the allegedly breached contract. *See* CAL. EVID. CODE § 1123(b); *Fair*, 147 P.3d at 657-59. But merely because the plaintiff brought its claim in federal court, the Ninth Circuit reached a different outcome.

The Ninth Circuit effectively told federal district courts hearing state law claims to apply different laws than state courts even if the only federal claims have been voluntarily dismissed. *See In re TFT-LCD*, 835 F.3d at 1158-59. This reasoning is likely to erode the key benefits of requiring federal courts to apply state law in diversity cases.

First, the Ninth Circuit's ruling encourages both vertical and horizontal forum shopping. Litigants regularly have the option to choose between litigating state law claims in state or federal court. Ensuring that the same substantive law will apply in both forums discourages strategic shopping between them. Under the Ninth Circuit's conclusion here, however, litigants may access dispositive evidence in one forum that would be excluded in the other. The ability to rely on crucial evidence in one court but not the other will likely prompt parties to seek out (or avoid) federal courts. And because the Ninth Circuit has departed from the approach taken by many of its sister circuits, litigants may choose to pursue (or avoid) courts within the Ninth Circuit.

In addition, the Ninth Circuit's decision could lead to inequitable administration of the laws. As this case

demonstrates, the decision between state and federal privilege law can control the outcome of a case. *See In re TFT-LCD*, 835 F.3d at 1158-59; *see also Samuelson*, 576 F.2d at 550 (recognizing that the "outcome determinative" effect of privilege rules was one factor motivating Congress when it enacted Rule 501). If the Ninth Circuit's decision stands, the fortuity of diversity—not the substance of California's law—will resolve the plaintiff's breach of contract claim.

This case vividly illustrates why these principles are so important. After the plaintiff dismissed its federal claims, the defendant moved to dismiss the case for lack of federal court jurisdiction. *See In re TFT-LCD*, 835 F.3d at 1157-58. The district court denied the motion because diversity jurisdiction persisted. *Id.* If the parties were both Californians, the case would have moved to state court and proceeded under California's privilege laws. But the suit continued in federal court because the parties were diverse. In effect, then, the defendant will lose only because it is not Californian.

CONCLUSION

For the foregoing reasons, the Court should grant the petition for a writ of certiorari.

Dated: July 6, 2017.

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