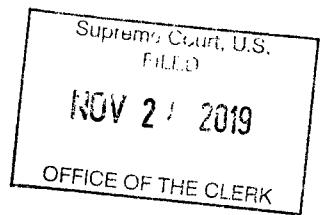


No. 18-968

In the  
Supreme Court of the United States



ANDREW NAJDA; and CHARLES NAJDA,  
*Petitioners,*

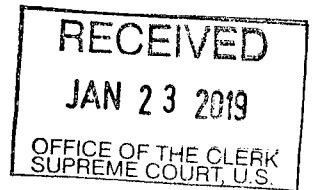
v.

NIKOLAOS PATERAKIS,  
*Respondent.*

On Petition for a Writ of Certiorari  
to the Massachusetts  
Supreme Judicial Court

**PETITION FOR A WRIT OF CERTIORARI**

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**QUESTION PRESENTED**

When a state affords a right of appeal, does a state supreme court denying appellate review, before it, to parties that raise an error of law that is manifestly erroneous state supreme court precedent deny these parties equal protection of the law and due process under the *Fourteenth Amendment* because they do not receive a meaningful opportunity to be heard on appeal?

## **PARTIES TO THE PROCEEDINGS**

The Petitioners, who are the Appellants in the court below, are Andrew Najda and Charles Najda.

The Respondent, who is the Appellee in the court below, is Nikolaos Paterakis.

Because no Petitioner is a corporation, a corporate disclosure statement is not required under Supreme Court Rule 29.6.

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## **PETITION FOR A WRIT OF CERTIORARI**

Petitioners Andrew Najda and Charles Najda (collectively, the “Najdas” and “Petitioners”) respectfully petition for a writ of certiorari to review the order of the Massachusetts Supreme Judicial Court (“SJC”) denying Petitioners’ application for further appellate review in case number FAR-26024.

### **OPINIONS AND ORDERS BELOW**

On June 29, 2018, the SJC denied the Najdas’ application for further appellate review without an opinion (App. 2a). *Paterakis v. Najda*, 480 Mass. 1103 (2018). On July 31, 2018, the Court denied their petition to reconsider the application for further appellate review without an opinion (App. 1a). The summary opinion of the Massachusetts Appeals Court is dated March 29, 2018 (App. 3a). The Massachusetts Trial Court denied the Najdas’ Motion for Judgment Notwithstanding the Verdict or, Alternatively, a New Trial (App. 12a) after it had entered judgment (App. 13a). Preceding this the Trial Court denied Paterakis’s motion for a preliminary injunction (App. 17a).

### **JURISDICTION**

The SJC, the highest court of Massachusetts, denied the Najdas’ application for further appellate review on June 29, 2018 (App. 2a). The Court then denied their petition to reconsider the application for further appellate review on July 31, 2018 (App. 1a). This Court has jurisdiction under 28 U.S.C. § 1257(a).

### **RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS**

The *equal protection clause of the Fourteenth Amendment* and the *due process clause of the Fourteenth Amendment*.

## STATEMENT OF THE CASE

At the state trial court, Petitioners argued that they did not negligently misrepresent their intent, including referencing a SJC case, *Cumis Ins. Soc., Inc. v. BJ's Wholesale Club, Inc.*, 455 Mass. 458 (2009) that contained manifestly erroneous precedent. Nonetheless judgment was entered against them (App. 13a). The Najdas timely appealed. On appeal the Najdas reiterated these arguments and pointed to an error of law that is a manifest error in the SJC's own precedent that is central to their case. On March 29, 2018, the Massachusetts Appeals Court affirmed the trial court's judgment and consistent with vertical stare decisis applied the SJC's manifestly erroneous precedent (*Cumis*) (App. 8a).

The Najdas filed an application for further appellate review with the SJC because the Appeals Court could not provide meaningful review of the clear error in the SJC's own precedent. The SJC denied the Najdas' application for further appellate review on June 29, 2018 (App. 2a). The Najdas explained to the Court both the instance of manifestly erroneous SJC precedent and how they could only receive meaningful review and due process through further appellate review. The Court denied their petition to reconsider the application for further appellate review on July 31, 2018 (App. 1a).

The Najdas now petition this Court for certiorari and request that this Court reverse the SJC's order denying the Najdas' application for further appellate review.

## REASONS FOR GRANTING THE PETITION

This Court determined, multiple times, that the legal principle at stake here deserved consideration when it granted certiorari on related questions. This Court previously held that if a state provides for a right to appeal a litigant must have a meaningful opportunity

to be heard on appeal that comports with the *equal protection clause* and the *due process clause of the Fourteenth Amendment*. *Douglas v. California*, 372 U.S. 353 (1963); *Lindsey v. Normet*, 405 U.S. 56 (1972); *Evitts v. Lucey*, 469 U.S. 387 (1985); *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1 (1987).

This petition is worthy of this Court's consideration because it gives this Court a straightforward opportunity to affirm this legal principle for a broad swath of appellants that are potentially impacted by the following: when a state gives parties the right to appeal they must have a meaningful opportunity to be heard on appeal if they raise an error of law that is a demonstrable fault in a state supreme court's own precedent.

If appellants raising this special class of error are denied further appellate review, before a state's highest court, they are denied a meaningful opportunity to appeal in violation of the *Constitution*. Under the legal principle of vertical stare decisis, an intermediate appeals court is without the requisite power to correct an error of law in the precedent of a state's highest court.

Though the number of appellants raising this special class of error of law is small, this kind of *Fourteenth Amendment* violation – being denied a meaningful opportunity to be heard on appeal – could impact any litigant in the United States. Parties, with a state right to appeal, must have a meaningful opportunity to be heard on appeal no matter if the class of error of law raised is ordinary – correctable by an intermediate appeals court – or is a demonstrable error in state supreme court precedent – requiring a state supreme court to overrule.

Further, the affirmation of these constitutional protections, for appellants raising an error of law that is

also manifestly erroneous state supreme court precedent, can result in erroneous precedent being corrected to the benefit of this democratic republic. This outcome is compatible with a state's highest court's power of general superintendence to correct and prevent errors. *See* M.G.L. Ch. 211, § 3. The correction of manifestly erroneous state supreme court precedent promotes democratic values by bringing the law enforced closer to the collective judgment of a state's elected representatives.

## ARGUMENT

### **I. In Massachusetts an Appeal as of Right Exists Without Limitation as to the Class of Error of Law Raised**

Massachusetts created an appeal as of right from a trial court's judgment to give "a party aggrieved by a final judgment" the opportunity to have an adjudication on the merits of the appeal. M.G.L. Ch. 231, § 113. The legislature did not restrict the right to appeal to parties raising certain classes of error of law. *Id.* No matter the class of error of law raised, a litigant is guaranteed "a meaningful opportunity to be heard on appeal." *Pennzoil Co. v. Texaco, Inc.*, 481 U.S. 1, 18 (1987) (Brennan, J., concurring in the judgment).

### **II. The Najdas Exercised Their Right to Appeal**

The Najdas exercised their right to appeal a trial court judgment of the Massachusetts Superior Court. On appeal, they brought to the Court's attention an error of law, which is central to their case, with respect to the negligent misrepresentation claim. Although the trial court entered judgment against the Najdas on Respondent's negligent misrepresentation claim (App. 16a), the Najdas established that, as a matter of law, alleged statements about their present intent as to future con-

duct were not actionable under a theory of negligent misrepresentation. Notably, the jury rejected Respondent's related fraudulent misrepresentation claim (App. 14a).

Under both theories of recovery – negligent misrepresentation and fraudulent misrepresentation – the Najdas were not liable for alleged statements as to their present intent (of future conduct). Thus it was an error of law for the trial court not to enter judgment for the Najdas on Respondent's negligent misrepresentation claim. Then on appeal, the Appeals Court refused to correct this error of law. The central thesis of its opinion was that the Najdas negligently misrepresented their intent: "never intended to run a legitimate business". *Paterakis v. Najda*, 93 Mass. App. Ct. 1103 (2018) (App. 4a).

### **III. The Najdas Put Forth an Error of Law That Is a Clearly Demonstrable Error in the Massachusetts Supreme Judicial Court's Own Precedent: a Special Class of Error of Law**

The error of law the Najdas identified, with respect to intent and negligent misrepresentation, does not belong to an ordinary class of error of law, which an intermediate appeals court can correct. Rather, it falls into a special class of error: the class of error of law that is a substantive error in Massachusetts Supreme Judicial Court precedent. In their Appeals Court brief and application for further appellate review, the Najdas pointed out that the SJC had mistakenly held in *Cumis* that statements about a person's present intent (of future conduct) can constitute negligent misrepresentation:

false statements of opinion, of conditions to exist in the future ... cannot sustain a claim for negligent misrepresentation ... unless the promisor had no intention to perform the promise at the time it was made.

*Cumis Ins. Soc., Inc. v. BJ's Wholesale Club, Inc.*, 455 Mass. 458, 474 (2009) (citing *Brewster Wallcovering Co. v. Blue Mtn. Wallcoverings, Inc.*, 68 Mass. App. Ct. 582, 601 n. 45 (2007)). The SJC made this manifestly erroneous holding by apparently misreading *Brewster* and then wrongly citing *Brewster* for support even though *Brewster* does not hold that a person's statements about his or her own present intent of future conduct can constitute negligent misrepresentation. Rather, *Brewster* only holds that *intentional* misrepresentation can include statements about the future if there is no intent to perform. *Brewster*, 68 Mass. App. Ct. at 601 n. 45.

In *Cumis*, the SJC not only incorrectly used *Brewster* as a citation, to support a holding that *Brewster* does not support, but also came to a conclusion that is indisputably wrong. As a matter of law, a person cannot negligently represent his or her own state of mind (intent). Restatement (Second) of Torts § 530 cmt. b (1977); *City of Warrensburg, Mo. v. RCA Corp.*, 571 F. Supp. 743, 754 (W.D. Mo. 1983) (“there can be no cause of action for negligent misrepresentation of a maker’s own intention”).

Logic dictates that a person cannot negligently misrepresent his or her own intent. “Even if one states an intent to act in a certain manner and is merely uncertain if one intends to act in that manner, the statement is not negligent but deceitful because one knows about the uncertainty of one’s future intent.” *Jacobs Mfg. Co. v. Sam Brown Co.*, 792 F. Supp. 1520, 1528 (W.D. Mo. 1992). The SJC apparently misread *Brewster* to have a holding that it does not have. As such, instructive legal writings, e.g. those cited above, that would have informed the SJC about its misinterpretation of *Brewster* were apparently not reviewed.

The Najdas demonstrated that there is a substantive and manifest error in the SJC’s own precedent –

*Cumis* – to a high degree of certainty. Neither Respondent nor the Appeals Court disputed “that the decision in that case is not well grounded.” *United States v. Nice*, 241 U.S. 591, 601 (1916). This clearly erroneous SJC precedent is at the heart of the Najdas’ case and appeal.

Further, the Najdas provided special justification for overruling the clearly erroneous precedent in their application for further appellate review: the SJC’s significant expansion of the scope of the tort for negligent misrepresentation leads to unjust outcomes: defendants are held liable for statements as to intent that are not actionable while plaintiffs recover unlawful awards of damages for statements that are not actionable. *Hubbard v. United States*, 514 U.S. 695, 716 (1995) (Scalia, J., concurring in part and concurring in the judgment) (“must give reasons ... that go beyond mere demonstration that the overruled opinion was wrong”).

This section of *Cumis* has manifestly flawed reasoning, is inconsistent with the law across multiple jurisdictions, and establishes an unworkable rule (liability for an impossible action: the negligent misrepresentation of intent). These factors support the SJC overruling its precedent. *Janus v. AFSCME, Council 31*, 138 S. Ct. 2448, 2478 (2018) (“factors that should be taken into account in deciding whether to overrule a past decision ... : the quality of [the precedent’s] reasoning, the workability of the rule it established, its consistency with other related decisions”); *Hornbuckle v. Toombs*, 85 U.S. 648, 652-53 (1873) (overruling two prior decisions because they were not “founded on a correct view of the law”); *Guild v. Eager*, 17 Mass. 615, 622 (1822).

However, the question presented in this petition is not whether the manifest error in precedent, described above, must be corrected, but whether the denial of fur-

ther appellate review to the Najdas, who clearly demonstrated a manifest error in the SJC's own precedent and "special justification" to overrule [it]", violated the *equal protection clause* and the *due process clause* of the *Fourteenth Amendment*. *Allied-Bruce Terminix Cos. v. Dobson*, 513 U.S. 265, 283-84 (1995) (O'Connor, J., concurring) (quoting *Arizona v. Rumsey*, 467 U.S. 203, 212 (1984)).

#### **IV. The Najdas Were Denied Meaningful Appellate Review Because the Appeals Court Cannot Correct an Error of Law That Is a Manifest Error in the SJC's Own Precedent**

The Najdas' appeal before the Massachusetts Appeals Court – the state's intermediate appeals court – was not a meaningful appeal. The Appeals Court followed the SJC's precedent in *Cumis*, even though it contains a substantive error, and propagated the error. The Appeals Court held that Petitioners' intent was negligently misrepresented and cited *Cumis* to justify its holding that their intent was negligently misrepresented. *Paterakis v. Najda*, 93 Mass. App. Ct. 1103 (2018) (App. 8a).

Though it can correct most errors of law, the Appeals Court lacks the requisite power to correct an error of law that is a demonstrable and manifest error in SJC precedent like the error in *Cumis* described above. This special class of error of law is not correctable by an intermediate appeals court. Under the doctrine of vertical stare decisis, the Appeals Court must follow findings of law made by the SJC. Black's Law Dictionary 1537 (10th ed. 2014) (defining "vertical stare decisis" as "the doctrine that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction").

For the class of litigants raising an error of law that is a manifest error in SJC precedent, “as a practical matter, appeal is foreclosed, no matter how meritorious their case may be” if only the Appeals Court hears their appeal. *Lindsey v. Normet*, 405 U.S. 56, 79 (1972). The Najdas did not receive meaningful appellate review for the error of law they raised that is a demonstrable error in the SJC’s own precedent.

#### **V. The Najdas Were Denied Meaningful Appellate Review Because the SJC Refused to Grant Them Further Appellate Review**

Since Massachusetts affords a right of appeal, without exception as to the class of error raised, litigants, including the class of litigants raising a demonstrable error of law in the SJC’s own precedent, which includes the Najdas, cannot be limited to a hearing before a Court that is powerless to correct the error they have raised on appeal. Unable to obtain meaningful appellate review before the Appeals Court, the Najdas filed an application for further appellate review to the SJC.

For the class of litigants raising a demonstrable and manifest error of law in SJC precedent to have a meaningful opportunity to be heard on appeal – a chance to have the error of law and the error in precedent corrected – their appeal must be heard by the SJC. The allowance of the Najdas’ application was a necessity to make their appeal more than a meaningless ritual as to the error of law in the SJC’s own precedent they raised. *Evitts v. Lucey*, 469 U.S. 387, 394 (1985) (quoting *Douglas v. California*, 372 U.S. 353, 358 (1963)) (“a State that afforded a right of appeal to make that appeal more than a ‘meaningless ritual’”).

“Since [Massachusetts] has created an appeal as of right from the trial court’s judgment, it cannot infringe

on this right to appeal in a manner inconsistent with due process or equal protection.” *Pennzoil*, 481 U.S. at 22 (citing *Evitts*, 469 U.S. at 393)). Yet, the SJC violated the *equal protection clause* and the *due process clause* of the *Fourteenth Amendment* when it denied the Najdas a meaningful opportunity to be heard on appeal as to the manifest error of law in the SJC’s own precedent that is a crucial error of law in their case. Since these constitutional protections were in force, in this instance, the SJC could not exercise its discretion to deny the Najdas’ application for further appellate review.

#### **VI. The Denial of Further Appellate Review to Parties Raising a Demonstrable and Manifest Error of Law in the SJC’s Own Precedent Violates the *Equal Protection Clause***

Equal protection concerns are involved because the Najdas – representative of the class of litigants raising a demonstrable and manifest error of law in SJC precedent – were treated “differently for purposes of offering them a meaningful appeal.” *Evitts*, 469 U.S. at 405.

The Najdas were denied meaningful appellate review when the SJC denied further appellate review. In contrast, the class of litigants raising conventional errors of law, which the Appeals Court is capable of correcting, receive meaningful appellate review because the resolution of their errors does not require the SJC to correct its own precedent. There is a distinct disparity in treatment between these classes of appellants during the appellate process in Massachusetts.

In this instance, the law establishing the right to appeal, M.G.L. Ch. 231, § 113, was not applied consistently across all classes of litigants. The discrimination

against the Najdas – the class of appellants raising a demonstrable error of law in SJC precedent – is arbitrary and illogical. *Lindsey*, 405 U.S. at 79 (“The discrimination against the class of FED appellants is arbitrary and irrational, and ... violates the Equal Protection Clause”). The SJC’s denial of the Najdas’ application for further appellate review violates the *equal protection clause of the Fourteenth Amendment*.

## **VII. The Denial of Further Appellate Review to Parties Raising a Demonstrable and Manifest Error of Law in the SJC’s Own Precedent Violates the *Due Process Clause***

Due process concerns are involved because Massachusetts “set up a system of appeals as of right”, but when the SJC denied further appellate review, it denied the Najdas “a fair opportunity to obtain an adjudication on the merits of their appeal.” *Evitts*, 469 U.S. at 405.

The outcome before the Appeals Court was predetermined. The issue of whether intent could be negligently misrepresented was not addressed in a meaningful manner before the Appeals Court. Instead, arbitrary – wrong as a matter of law – SJC precedent was applied to affirm the trial court’s fundamentally flawed judgment. Therefore, the Najdas did not receive due process as to this error before the Appeals Court.

Further, the SJC denying the Najdas’ application for further appellate review of the trial court’s monetary judgment, which could be used to take away property, “violated due process principles because it decided the appeal in a way that was arbitrary with respect to the issues involved.” *Evitts*, 469 U.S. at 404. The SJC’s denial of the Najdas’ application for further appellate review violates the *due process clause of the Fourteenth Amendment*.

**VIII. Democratic Values Are Strengthened When the Right to a Meaningful Appeal for Parties Raising Demonstrably Erroneous State Supreme Court Precedent Is Protected Because Manifestly Erroneous Precedent Is Corrected**

Once brought to the SJC's attention through an appeal, manifestly erroneous SJC precedent should not be allowed to live on and infect additional cases. "A palpable mistake, violating justice, reason, and law, must be corrected." *McDowell v. Oyer*, 21 Pa. 417, 423 (1853).

Affirming equal protection and due process for parties with a state right to appeal that raise an error of law that is a demonstrable and manifest error of law in the precedent of a state's highest court can result in erroneous precedent being corrected to the benefit of this democratic republic. The correction of demonstrably erroneous precedent promotes democratic values by bringing the law enforced closer to the collective judgment of a state's elected representatives.

**IX. This Case Is an Excellent Vehicle for Addressing the Question Presented**

Although the set of appellants that raise an error of law on appeal that is a demonstrable and manifest error in state supreme court precedent is small, the procedural problem of being denied a meaningful opportunity to be heard on appeal, when state law guarantees that right, could theoretically impact any litigant in the United States. The wide breadth of litigants potentially impacted means the constitutional issues raised in this petition are important and worthy of review. The question of whether litigants, who are guaranteed a right to appeal, can have their right made to be a meaningless

ritual because of the class of error they raise should be answered.

Having to demonstrate that there is a manifest error of law in a state supreme court's own precedent with a high degree of certainty, as the Najdas did, is a sound screening criteria. And there are other reasons for concluding that enforcing the right to appeal for those raising this special class of error "will not open any '[state supreme court] error' floodgates." *Henderson v. United States*, 568 U.S. 266, 278 (2013). Clearly erroneous state supreme court precedent impacting an appeal is the exception not the rule. Some appellants will not discover this class of error even if it impacts their appeal because extensive research is often required. Finally, a state's highest court will often exercise its superintendence powers *sua sponte* when made aware of a manifest error in its own precedent.

These safeguards mean that litigants, who are guaranteed a right to appeal by state law, can be given the opportunity for state supreme court review without overwhelming the dockets of a state's highest court. This case offers this Court a roadmap for balancing constitutional protections for litigants, who have a state right to appeal and demonstrate a special class of error, and the institutional concerns of the judiciary, which has limited resources.

The question presented can be addressed in isolation without this Court needing to comment on the underlying merits of the Najdas' appeal and to delve into the facts of the case. For these reasons this case is an excellent vehicle for addressing the question presented.

## CONCLUSION

“[The Najdas] cannot, consistent with due process and equal protection, be arbitrarily denied the right to a meaningful opportunity to be heard on appeal.” *Pennzoil*, 481 U.S. at 18. Yet, they were. The Najdas, as a practical matter, were “denied meaningful access to the appellate system because of” the special class of error they had raised. *Evitts*, 469 U.S. at 406.

Their meritorious arguments with regard to the error of law that is a manifest error in the SJC’s own precedent, and is central to their case, were not heard by an appellate court with the requisite power to correct the manifest error in SJC precedent. To ensure the equal application of state law without discrimination against the class of litigants raising the special class of error that is a demonstrable error of law in SJC precedent and to ensure a fair opportunity to obtain an adjudication on the merits consistent with due process, the SJC should have granted the Najdas’ application for further appellate review. Given the constitutional safeguards of the *Fourteenth Amendment*, the required relief is for the Najdas to receive further appellate review before the SJC.

The petition for a writ of certiorari should be granted.

Respectfully submitted,

Andrew Najda  
*pro se*

Charles Najda  
*pro se*

January 18, 2019