No. 19-306

IN THE

# Supreme Court of the United States

CUSHMAN & WAKEFIELD, INC.,
*Petitioner*,

v.

YURY RINSKY,
*Respondent.*

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

## REPLY FOR PETITIONER


Aaron M. Streett
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, TX 77002
(713) 229-1855

Andrew D. McCartney
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave. NW
Washington, DC 20004
(202) 639-1303

Evan A. Young
*Counsel of Record*
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Suite 1500
Austin, TX 78701
(512) 322-2506
evan.young@bakerbotts.com

*Counsel for Petitioner*



WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

## RULE 29.6 STATEMENT

The corporate disclosure statement in the petition remains accurate.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Page(s)**

**CASES**

**STATUTES**



**OTHER AUTHORITIES**

IN THE

# Supreme Court of the United States

CUSHMAN & WAKEFIELD, INC.,
*Petitioner*,

v.

YURY RINSKY,
*Respondent.*

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

## REPLY FOR PETITIONER

The brief in opposition illustrates why this case warrants certiorari. Respondent does not dispute the present and growing need for further guidance on certification; the circuits' failure to generate principled standards on their own; or the benefits of accuracy, efficiency, and cooperative federalism that would flow from clear certification principles. See Pet. 2, 7-17. Indeed, respondent *acknowledges* that the Court "may wish to address certification"—but, he hopes, not in *his* case, and perhaps by adopting a rule rather than deciding *any* case. BIO 18. This Court, however, always has addressed certification through resolving cases or controversies, see Pet. 8-10, although those cases have been infrequent.

This case illustrates why the Court should now provide long-needed guidance. Lacking any principled standards for determining when state-law questions deserve certification, the First Circuit adjudicated a claim that state law

likely bars and affirmed a punitive-damages remedy based on a showing that state law likely would deem legally insufficient. This case provides an important opportunity to clarify that courts sitting in diversity should certify when state courts are silent or split on outcome-determinative questions affecting subject-matter jurisdiction or core legal requirements like the standard of proof.

## I. THIS CASE CONCERNS THE NEED FOR PRINCIPLED LEGAL STANDARDS FOR CERTIFICATION

A. Unable to dispute the need for further certification guidance, respondent repeatedly dismisses this case as "fact specific." See, *e.g.*, BIO 13, 15, 16. Respondent even reformulates the question presented to state that "Petitioner merely seeks to dispute facts that it lost at trial." BIO at i. The real question presented is *legal*—it concerns the scope of discretion to certify (or refuse to certify) *other* legal questions. That pure federal-law question asks whether the First Circuit should have certified two questions of New York law: (1) whether the New York City Human Rights Law ("NYCHRL") extends to plaintiffs who work outside New York City before termination of employment and (2) what the NYCHRL's punitive-damages burden of proof is.

Petitioner does not ask this Court to answer those questions of New York law, much less resolve any factual dispute. Petitioner expressly disclaimed any factual challenge, see Pet. 4, and does so again now—petitioner declines to challenge even the many wholly unsupported factual assertions in the brief in opposition (which includes only *one* citation for *one* factual statement asserted, see BIO 3).[1] Petitioner's point is that the First Circuit's

[1] Purely as an example, respondent claims to have bought the

decision constitutes legal error *regardless* of those factual contentions.

In other words, far from seeking to overturn a jury verdict on any factual basis, petitioner's success would inform the legal standards that govern the case. Whatever the ultimate result, it should be because *New York law* requires it, not because of an *Erie* guess that may well generate serious error that certification easily could avoid.

B. Even accepting respondent's assertion (with two Seventh Circuit citations) that fact-specific decisions are unsuitable for certification, BIO 15, respondent's rule would not bar certification here. One cited case centered on interpreting a specific contract—"look[ing] to the particularized language before [the court] and the particularized negotiations between the parties." *Woodbridge Place Apartments* v. *Wash. Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992) ("it is often difficult to discern any generalized principles from [contract-interpretation] cases"). In the second case, the Seventh Circuit stated that "whether ATS is a telephone company [is] fact-laden and particularistic," "may never recur," and "lack[s] broad, general significance." *Diginet, Inc.* v. *W. Union ATS, Inc.*, 958 F.2d 1388, 1395 (7th Cir. 1992). By contrast, questions in that case regarding "a municipality's power to tax users of its public ways, and the question how that power may or may not be curtailed by the Telephone and Telegraph Act," *were* questions "of broad, general significance," were "not

---

Massachusetts home as an "investment property" for rental income, BIO 3, whereas he filed a declaration of homestead on that property less than a month after buying it, averring under penalty of perjury that he owned "and occup[ied] or intend[ed] to occupy the home as my/our principal residence." 1st Cir. App. 1001-1002. Again, however, such factual points matter little to the *legal* questions presented.

fact-laden," and "ordinarily would be eminently suitable for certification." *Ibid.* The court declined to certify for unrelated procedural reasons: Those questions were already before the state supreme court and set for oral argument two weeks later, making it "probably too late to consolidate a certified question in [*Diginet*] with the appeal." *Ibid.*

This case involves questions like those *Diginet* deemed appropriate for certification. They center on how New York courts would construe a major anti-discrimination law for New York City—a law of such importance that the New York Court of Appeals *already has addressed it through certification several times*. See Pet. 28-29 (citing NYCHRL-based certifications).

On top of all this, the petition discusses at length cases involving fact-specific issues that circuits *still* certified and state high courts *still* resolved (including many from the Second Circuit to the New York Court of Appeals). Pet. 24-25, 28-30. Respondent ignores these cases, choosing instead to simply assert that this case is fact specific without pointing to a single analogous case. He proves *petitioner's* point that certification standards are in disarray and require guidance that only this Court can provide.

C. Respondent's remaining fact-based arguments are likewise meritless. Respondent accuses petitioner of forum shopping, quoting *Rain* v. *Rolls-Royce Corp.*, 626 F.3d 372, 379 (7th Cir. 2010). BIO 16-17. But *Rolls-Royce* involved *plaintiffs* who brought their case in federal court rather than Indiana state court, and who then asked the Seventh Circuit to certify a question to the Indiana Supreme Court. 626 F.3d at 378. As the defendant below, petitioner did not choose any initial forum. It removed to federal court understanding that, given diversity

jurisdiction (and respondent's failure to plead a federal claim), *some* state's law would apply. Once it was clear that Massachusetts's choice-of-law rules required applying New York law, petitioner repeatedly argued in the district court that "New York state law should apply, not the NYCHRL." BIO 17 (conceding petitioner raised this argument below); Pet. 24 n.8. And unlike in *Rolls-Royce*, where staying in Indiana state court could have led to the Indiana Supreme Court, staying in Massachusetts state court could *not* have led to the New York Court of Appeals.

There is no *Erie* forum-shopping concern here because petitioner has not sought to apply favorable federal law while eschewing state law. The question always has been which state law applies and what that state law requires.[2] The real *Erie* problem is the inequitable administration of the law. The history of conflicting and inconsistent certification decisions shows that the outcome of this case would have been different in a different circuit and even before a different First Circuit panel.

Finally, respondent asserts that petitioner's request for certification is "very late" because it was "raised for the first time with this Court." BIO 2. This is both wrong and odd. It is wrong because petitioner argued at length for certification of the punitive-damages question in its First Circuit rehearing petition.[3] C&W Petition for Panel

---

[2] If respondent lacks a state-law remedy—a merits question not at issue here—it would simply mean that the choice of law was for a jurisdiction that provided respondent no claim. That outcome was of his own choosing; he could have brought federal age-discrimination claims but did not.

[3] As the petition notes, subject-matter jurisdiction precedes merits, so certifying the punitive-damages question would have allowed the New

or En Banc Rehearing 16-20, *Rinsky* v. *Cushman & Wakefield, Inc.*, No. 18-1302 (1st Cir. Mar. 22, 2019). It is odd because this timing is hardly atypical, as "[t]here is no time limit on when certification may be sought" and courts can and should sometimes certify *sua sponte*. 17A Charles Alan Wright et al., Federal Practice and Procedure § 4248, pp. 509-510 (2007 & Supp. 2019). Respondent's cases do not say otherwise.[4]

Indeed, respondent appears to be seeking a substantive rule for certification that would change current law by "estopping" certification that is not sought at some early time. BIO 16-18. To preserve the judgment below, respondent injects an *additional* potential certification standard—thus implicitly recognizing that legal questions about certification abound and making this case more certworthy, not less.

## II. THE NEW YORK COURT OF APPEALS LIKELY WOULD ACCEPT CERTIFICATION

Respondent attempts to distract from the significance of the certification issue with a "no harm, no foul" strategy—arguing that the New York Court of Appeals probably would have rejected the First Circuit's certification of unsettled, outcome-determinative questions of state law.

---

York Court of Appeals to analyze the subject-matter-jurisdiction question. Pet. 17 & n.4.

[4] In *Minnesota Voters Alliance* v. *Mansky*, 138 S. Ct. 1876, 1892 n.7 (2018), *this* Court declined to certify where the "litigation had been ongoing in the federal courts for over seven years before the State made its certification request in its merits brief before this Court." And in *Stenberg* v. *Carhart*, 530 U.S. 914, 945 (2000), *this* Court denied certification where the State had *never* asked lower federal courts to certify. By contrast, petitioner asked the First Circuit to certify, and it refused.

BIO 13. This theory fails both empirically and normatively.

A. Respondent claims that the New York Court of Appeals "regularly decline[s] to answer certified questions," BIO 12—but the cited cases show the opposite. In one, the court declined certification because of the "unique posture" that could have mooted the certified questions. *Tunick* v. *Safir*, 731 N.E.2d 597, 598 (N.Y. 2000). However, the court "underscore[d] the great value in New York's certification procedure" as "provid[ing] the requesting court with timely, authoritative answers to open questions of New York law, facilitating the orderly development and fair application of the law and preventing the need for speculation." *Id.* at 599. Far from "regularly" declining to accept certification, *Tunick* noted "this Court's *acceptance of all but a very few of the questions that have been certified to us* by the Circuit Court ∗∗∗." *Ibid.* (emphasis added) (collecting numerous cases).

Unsurprisingly, the other purported examples of refusals to answer certified questions illustrate circumstances wholly absent here—and how rare such refusals are. See *Jacobsen* v. *N.Y.C. Health & Hosps. Corp.*, 11 N.E.3d 159, 165, 169 (N.Y. 2014) (it was "unnecessary" to answer certified question from *New York Appellate Division*" because summary judgment on disability-discrimination claims was "unquestionably foreclose[d]"); *U.S. Underwriters Ins. Co.* v. *City Club Hotel, LLC*, 822 N.E.2d 777, 779 (N.Y. 2004) (accepting one certified question but declining another that was limited to attorneys' fees "in the special circumstances of this case"); *Yesil* v. *Reno*, 705 N.E.2d 655, 656 (N.Y. 1998) (declining certification because the issues involved an "exclusive Federal matter—Immigration and Naturalization"). And given how

frequently the New York Court of Appeals accepts certified questions about the NYCHRL itself, see Pet. 28-29, it is highly unlikely that it would reject the questions here if the First Circuit certified them.

B. State courts' authority to reject certified questions bolsters, rather than undercuts, the call for this Court's guidance. Federal courts can certify significant state-law questions without concern that doing so will unduly burden the state courts. But if a federal court does not certify unsettled, outcome-determinative questions, there is nothing the state can do.[5] The possibility that state courts may reject any given certification hardly means that federal courts need no direction in what they should certify in the first place.

Petitioner, moreover, did not "speculate," BIO 10, regarding whether other circuits would certify the burden-of-proof question—it cited numerous cases establishing this point. Pet. 27-30. As to the choice-of-law question, respondent does not contest that, under New York law, whether the NYCHRL applies implicates subject-matter jurisdiction.[6] Pet. 2, 18, 22. Nor does respondent contest

---

[5] Respondent notes that federal district courts cannot certify directly to the New York Court of Appeals. BIO 17 n.1. That common limit hardly justifies a lack of standards altogether, and petitioner's argument is that *the First Circuit* should have certified questions. Regardless, should the need for certification arise early, district courts can certify under 28 U.S.C. § 1292(b) to federal appellate courts, which can then certify to the state high court. *E.g.*, *Flo & Eddie Inc.* v. *Sirius XM Radio*, 821 F.3d 265 (2d Cir. 2016) (involving such a two-step certification leading to the New York Court of Appeals).

[6] Respondent charges petitioner with arguing that "somehow subject matter jurisdiction that [petitioner] invoked was lacking." BIO 17. Petitioner's argument, however, is that New York courts hold that the lack of a termination decision's impact within New York City deprives

that if the NYCHRL does not extend to him, a federal court sitting in diversity necessarily violates *Erie* by adjudicating his NYCHRL dispute.

Thus, this case involves a threshold state-law issue with broad ramifications for future plaintiffs who work exclusively outside New York City before termination of employment. Pet. 2, 20. Like the NYCHRL issue certified in *Chauca*, both questions here involve "competing policy concerns, the importance of which is far broader than our arriving at a proper resolution of the case at bar." *Chauca* v. *Abraham*, 841 F.3d 86, 94 (2d Cir. 2016) ("*Chauca I*").

## III. This Case Is The Ideal Vehicle To Clarify That Certification Discretion Is Not "Unfettered"

As the rampant inconsistency among federal circuits demonstrates, this case comes at an ideal time—and is an ideal vehicle—to address the proper bounds of certification discretion. The lack of principled standards for certification means not only that circuits issue arbitrary and conflicting decisions but also that circuits fail to recognize when questions deserve certification. This Court could bring greater clarity by holding that courts sitting in diversity should certify when a state's courts are silent or split on outcome-determinative questions that implicate subject-matter jurisdiction or core legal requirements like the standard of proof.

A. The alternative to principled standards is the status quo—which respondent aptly describes as "the longstanding *unfettered* discretion of the lower federal courts." BIO 11 (emphasis added). But surely *Lehman*

---

the state courts of subject-matter jurisdiction to hear a *NYCHRL* claim.

*Brothers* v. *Schein*, 416 U.S. 386 (1974), and *Arizonans for Official English* v. *Arizona*, 520 U.S. 43 (1997), did not intend standardless, capricious discretion. Respondent overreads then-Justice Rehnquist's *Lehman Brothers* concurrence as approving unfettered discretion. BIO 12. The statement that respondent quotes makes the point that the mere availability of certification does not require its use in every case. Petitioner readily agrees. But the concurrence also declares that "[s]tate certification procedures are a very desirable means by which a federal court may ascertain an undecided point of state law * * * ." 416 U.S. at 394 (Rehnquist, J., concurring). Exactly so.

B. The nature of the uncertified questions demonstrates why this case is an excellent vehicle to provide standards. The First Circuit declined to certify unresolved, outcome-determinative questions that implicate subject-matter jurisdiction. Contrary to respondent's contention, it is far from "clear" that "physical residence outside of New York City at the time of termination does not preclude a [NYCHRL] claim." BIO 13. Tellingly, respondent's support for this assertion comes from a *federal*-court case, not any New York state decision. Worse, that federal case, *Robles* v. *Cox & Co.*, 841 F. Supp. 2d 615 (E.D.N.Y. 2012), does not even properly quote *Hoffman* v. *Parade Publications*, 933 N.E.2d 744 (N.Y. 2010), but incorrectly attributes to *Hoffman* the proposition that a plaintiff's residence is irrelevant to the impact analysis. Compare *Hoffman*, 933 N.E.2d at 747, with *Robles*, 841 F. Supp. 2d at 624. This only further underscores that the New York Court of Appeals has *not* addressed whether impact is felt when the plaintiff was working entirely remotely prior to termination (the situation here).

Contrary to respondent's conclusory assertion, BIO

14, the First Circuit did not correctly analyze either state-law question. Respondent does not even attempt to distinguish the New York state cases (see Pet. 18) that indicate a lack of state subject-matter jurisdiction here. As to the second question, respondent oddly claims that the First Circuit's "failure to certify" the punitive-damages question was "essentially rendered moot" by the New York Court of Appeals' decision in *Chauca* v. *Abraham*, 89 N.E.3d 475 (N.Y. 2017) ("*Chauca II*"). BIO 14. But the First Circuit's 2019 failure to certify as to *the burden of proof* was hardly rendered "moot" by the New York Court of Appeals' 2017 decision that addressed *liability*. See Pet. 28. Respondent's conclusory discussion reflects that he cannot meaningfully argue that *Chauca II* governs the punitive-damages question here.

Respondent says that the Court's review would not "provide any meaningful guidance to courts going forward in applying the *Lehman Bros.* discretionary certification standard." BIO 16. To the contrary, the Court could provide further guidance on certification, as it did in *Arizonans for Official English*. The history of certification—which shows courts acting in wildly inconsistent fashion absent principled standards—is the primary reason this Court should revisit certification to clarify the boundaries of federal-court discretion.[7]

Finally, respondent emphasizes the apparent lack of a circuit "split." BIO 1, 2. But that is because, as even respondent acknowledges, BIO 2, a formal circuit split is unlikely to ever develop in an arena characterized by "unfettered discretion." But that should not thwart this Court's

[7] Frank Chang's law-review article is illuminating, but respondent is wrong (BIO 18) to regard it as the "primary support" for petitioner's argument.

review. As the petition illustrated and the BIO failed to rebut, the circuits likely would have generated different responses *to this certification question*—some circuits almost certainly would have certified it based on established practices. See Pet. 24-25, 28-30. No less than a formal circuit split, such predictable inconsistency of outcomes undermines the uniformity of federal law. The Court should seize this valuable chance to provide important guidance on the continuing problem of arbitrary certification decisions.

## CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

Aaron M. Streett
BAKER BOTTS L.L.P.
910 Louisiana St.
Houston, TX 77002
(713) 229-1855

Andrew D. McCartney
BAKER BOTTS L.L.P.
1299 Pennsylvania Ave. NW
Washington, DC 20004
(202) 639-1303

Evan A. Young
*Counsel of Record*
BAKER BOTTS L.L.P.
98 San Jacinto Blvd.
Suite 1500
Austin, TX 78701
(512) 322-2506
evan.young@bakerbotts.com

*Counsel for Petitioner*

October 2019