No. 19—

IN THE

Supreme Court of the United States

PET, LLC ET AL.,
Petitioners

v.

CBF ASSOCIATES, LLC ET AL.,
Respondents

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

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The United States Constitution guarantees due process of law. This requires a full, fair hearing that "embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938). In order to know the common law claims of an opposing party, litigants rely upon the precedent of the controlling jurisdiction.

Occasionally, courts will overturn their established case law on appeal. This is their prerogative. The ordinary disposition following such a change is remand, as "it is also familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943)

The question presented is:

Whether, when an appellate court overturns its own controlling precedent, constitutional guarantees of due process require remand to the trial court for application of the newly-adopted rule of law.

PARTIES TO THE PROCEEDING

Petitioners PET, LLC, Cianchette Family, LLC, Eric Cianchette, and Peggy Cianchette were Defendants and Appellants below.

Respondents CBF Associates, LLC and Tucker Cianchette were Plaintiffs and Appellees below.

The Maine State Chamber of Commerce and Associated General Contractors of Maine were admitted as *amici curiae* to the Maine Supreme Judicial Court.

RULE 29.6 STATEMENT

Neither PET, LLC nor Cianchette Family, LLC has a parent company nor does any publicly held company have 10% or more of their ownership interest.

RULE 14.1(b)(iii) STATEMENT

Tucker Cianchette et al. v.
Peggy A. Cianchette et al.,
Maine Supreme Judicial Court, Docket CUM-18-252
Opinion issued June 4, 2019. Reconsideration denied June 25, 2019.

Tucker Cianchette et al. v.
Eric L. Cianchette et al.,
Maine Superior Court, Docket PORSC-CV-2016-249
Partial Summary Judgment entered January 21, 2018. Final Judgment entered June 12, 2018.

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Petitioners PET, LLC, Cianchette Family, LLC, Peggy Cianchette, and Eric Cianchette respectfully petition for a writ of certiorari to review the judgment of the Maine Supreme Judicial Court in this case.

OPINIONS BELOW

The order of the Maine Supreme Judicial Court denying reconsideration is unreported. App. 1a. The merits decision of the Maine Supreme Judicial Court is reported at 2019 ME 87, 209 A.3d 745. App. 2a. The trial judgment of the Maine Superior Court is unreported. App. 25a.

JURISDICTION

The Maine Supreme Judicial Court entered its decision on June 4, 2019 and denied a motion for reconsideration on June 25, 2019. This Court's jurisdiction is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the Constitution of the United States provides in relevant part:

"No State shall...deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

The Constitution is the supreme law of the land. This Supreme Court is the ultimate guardian of the rights guaranteed therein. When courts themselves violate constitutional promises, it is incumbent upon this Court to step into the breach. This is particularly true when principles of fundamental fairness are violated. "[P]rocess which is a mere gesture is not 'due process.'" *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 315 (1950). "Whatever disagreement there may be as to the scope of the phrase 'due process of law' there can be no doubt that it embraces the fundamental conception of a fair trial, with opportunity to be heard." *Frank v. Magnum*, 273 U.S. 309, 347 (1915). The instant case requires review to ensure "due process of law" does not become a "mere gesture."

This petition presents a question of fundamental fairness in the American judicial system: when a court overrules its own precedent and adopts a new rule of law, should the court remand the case to the trial court for further proceedings under the newly adopted rule? The Court should grant the petition to provide a clear answer.

The substantive decision below did not implicate any federal issue. Respondents filed suit against petitioners alleging numerous claims – sounding in both tort and contract based on the same acts – under Maine common law. The trial court failed to apply "well-settled" state precedent, turning the case into a highly emotional spectacle before a jury. It resulted in a substantial award, including punitive damages.

On appeal, the Maine Supreme Judicial Court elected to follow the trial court and overturn its precedent *ex post facto*. Importantly, the court below recognized that this change in policy, left unchecked, could erase the distinction between tort and contract law. It therefore adopted a "limiting principle" concurrent with its rejection of the formerly "well-settled" precedent. The decision below is the first time the "limiting principle" has ever appeared in Maine law.

Despite this *ex post facto* change, the court below refused to remand the case. This denied petitioners a fair opportunity "to know the claims of the opposing party and to meet them." *Morgan v. United States*, 304 U.S. 1, 18 (1938). Petitioners were faulted for not advocating at trial for the "limiting principle," despite the fact the Maine Supreme Judicial Court had never before announced the principle. This Court has previously faced a nearly-identical situation: the Missouri Supreme Court changed the law, denied remand, and summarily rejected a post-decision motion. *Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673 (1930). There, the Court granted certiorari and firmly corrected the state court. It should do so again.

STATEMENT OF THE CASE

This petition comes before the Court in a strange procedural posture, highlighting the Maine Supreme Judicial Court's deviation from the norm. No federal issues were raised in the context of the trial or underlying state law appeal. Rather, the constitutional violation arises from the action of the appellate court itself. When questioned, the court

below offered no explanation or reasoning with respect to the Due Process Clause; it simply issued a summary denial.

Accordingly, the facts of the underlying civil case do not materially impact the constitutional question presented. They are intentionally stripped to their undisputed essence.[1] The trial was conducted by jury and no specific findings of fact were made.

1. Background. Petitioners Eric Cianchette (Eric) and Peggy Cianchette (Peggy) are father and stepmother to respondent Tucker Cianchette (Tucker). In 2013, the three parties established petitioner PET, LLC (PET) under the laws of Maine, in order to acquire an automotive dealership, while petitioner Cianchette Family, LLC (CFLLC) acquired the underlying real estate. App. 3a. Peggy and Eric provided the entirety of the capital, and were motivated by a desire to support Tucker and provide him a unique business opportunity. The family's objective was that Tucker would, some day, be able to acquire Peggy and Eric's interest in PET.

2. Transaction. In late 2015, Peggy and Eric entered into a purchase and sale agreement with Tucker to permit him the opportunity to acquire their interest in PET, subject to certain conditions. CFLLC and Tucker concurrently entered into a purchase and sale agreement to enable Tucker to buy

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[1] As an intra-family action, the underlying facts remain highly disputed and highly personal. As discussed herein, the emotional nature of the case highlights the error of the court below. Petitioners lacked the ability to object at trial to large portions of the sensational, prejudicial evidence because the legal basis which would support such objections was announced *ex post facto*.

the associated real estate. Tucker subsequently assigned his rights in that contract to respondent CBF Associates, LLC (CBFA). App. 6a.

The transaction ultimately did not close. The matter turned into a highly emotional and hotly contested family dispute. Ultimately, in June 2016, respondents served an eleven count complaint against petitioners, asserting a variety of contract, tort, and equitable claims under Maine law. Respondents included a request for punitive damages and demanded trial by jury.

3. Trial. Respondents' case was filed in the Maine Superior Court. Relevant to the pending petition, the complaint included concurrent tort and contract claims related to the purchase and sale agreement. The tort claim was predicated on an allegation that petitioners did not intend to perform the contract.

Petitioners moved for summary judgment citing a long line of Maine case law best represented by *Shine v. Dodge*, 157 A. 318 (Me. 1931). *Shine* held "it is well settled in this state that the breach of a promise to do something in the future will not support an action of deceit, even though there may have been a preconceived intention not to perform." *Id.* at 319. Approximately three months prior to the filing of the motion for summary judgment, the Maine Supreme Judicial Court cited *Shine* and stated "that a promise to take a future action will not support an action for fraud." *Johnson v. Crane*, 163 A.3d 832, 834 (Me. 2017) (remanded as unripe).

The Superior Court denied the motion, holding that the principle in *Shine* cited by *Johnson* and upon which petitioners relied "was no longer good law." Trial then occurred, with Petitioners

continually objecting to the existence of the tort claim and asserting that *Shine* remained valid Maine law. App. 25a n.2. These objections were overruled.[2] Simultaneous contract and tort claims predicated on the same acts were submitted to the jury, which returned a $5.9 million verdict for respondents, including a $1.5 million punitive award in favor of Tucker against his father Eric. App. 25a.

Motions for remittitur, new trial, and judgment as a matter of law were filed with the Superior Court. These were denied and petitioners timely appealed to the Maine Supreme Judicial Court.

4. Appeal. On appeal, petitioners argued *Shine* remained valid precedent in Maine and controlled. Respondents denied this, arguing both (i) *Shine* was inapplicable to the claim and (ii) even if applicable, *Shine* had been overruled *sub silentio*. The Maine State Chamber of Commerce and Associated General Contractors of Maine filed an *amicus curiae* brief advocating adherence to *Shine*'s "well-settled" rule. App. 11a.

On June 4, 2019, the Maine Supreme Judicial Court[3] released its decision. It acknowledged *Shine*'s

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[2] *See* Tr. 2726:10-15 (trial court acknowledging petitioners had "resisted the argument from the beginning and have certainly noted your objection and I'm not in a position to tell you that I'm supremely confident that you're wrong, but that's been the ruling and remains the ruling").

[3] Prior to oral argument, Senior Associate Justice of the Maine Supreme Judicial Court Donald Alexander recused himself from the case. While participating at oral argument, Chief Justice Leigh Saufley subsequently recused herself. The appeal was thus submitted to five of the seven Justices of the Maine Supreme Judicial Court. App. 2a.

rule concerning "preconceived intentions" had been described as "well-settled." It noted *Shine* was contrary to the Restatement (Second) of Torts. App. 12a. However, it then announced that it was adopting the Restatement and "overruling the contrary rule stated in *Shine*." App. 13a.

Importantly, in order to prevent contract law from drowning in a sea of tort, the Supreme Judicial Court announced a "limiting principle" to the newly-created tort claim derived from §530 of the Restatement (Second) of Torts. App. 15a. This "limiting principle" – and §530 of the Restatement – had never before been cited, promulgated, nor alluded to in any decision of the Maine Supreme Judicial Court. Further, it had not been included by the trial court in its jury charge, nor considered in the weighing of evidence under ME. R. EVID. 403. App. 15a, n.7.

Yet, while the Supreme Judicial Court's decision recognized that the newly-announced rule overturned *Shine* and made new law, it affirmed the judgment of the trial court. The court below inferred that the jury might have still found liability if the trial court had applied the newly-announced rule. App. 16a.

5. Reconsideration. Petitioners timely moved for reconsideration. This motion did not contest the Maine Supreme Judicial Court's overturning of its "well-settled" precedent. Rather, it requested that the judgment be vacated and the case remanded to the trial court on due process grounds. This would provide petitioners fair opportunity at defense of the claims under the newly-adopted rule of law,

including the never-before announced "limiting principle." App. 29a.

The motion for reconsideration also indicated the decision and the trial court judgment stood in direct contradiction with respect to the treatment of punitive damages. As a matter of due process, petitioners requested remand to the trial court to address this inconsistency. App. 45a-46a.

On June 25, 2019, reconsideration was summarily denied without explanation or opinion, stating only:

"The motion to reconsider is DENIED." App. 1a.

This petition followed.

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REASONS FOR GRANTING THE WRIT

This case presents a fundamental question concerning the applicability of the United States Constitution's guarantee of due process to the *ex post facto* overturning of common law. It is a rare occasion when any appellate court overturns its precedent and announces new law. It is rarer still to do so and deny further proceedings when a highly disputed record exists.

The Maine Supreme Judicial Court has run afoul of basic principles of due process and, at a minimum, should be corrected. The court below did not misapply a properly stated rule of law to disputed facts. Rather, it unequivocally failed to follow this Court's well-settled precedent. It compounded this error by summarily rejecting a motion for reconsideration. To date, no opinion has been issued on the federal constitutional question: this Court is the only forum available for petitioners to seek an answer.

Denying the writ would create an unnecessary risk that other state courts may simply turn "due process" into a mere gesture and refuse to offer a rationale for their decision when questioned. Such actions diminish public confidence in the fairness, consistency, and transparency of the American judicial system, undermining the very legitimacy of the courts. *See* Tom R. Tyler, *Procedural Justice, Legitimacy, and the Effective Rule of Law*, 30 CRIME & JUST. 283 (2003) (discussing fair process as foundation of judicial legitimacy).

Yet, due to the posture of this case, it offers the Court a rare opportunity to provide authoritative guidance on the meaning of "due process" in the context of judge-made law. The Maine Supreme Judicial Court has already changed its precedent *ex post facto*; the wisdom of that decision is not subject to review. The Court may therefore examine the role of *stare decisis* from a procedural posture without implicating its own substantive law. This case is the ideal vehicle to clarify constitutional requirements for state courts and bring together numerous holdings into a cohesive theory of a fundamental constitutional guarantee: due process of law.

I. The Maine Supreme Judicial Court Has Violated the Constitution of the United States

A. Due Process Requires Remand When Courts Change the Law

It is a basic principle that, when a new, retroactive rule of law is announced by an appellate court, cases are remanded in order for parties and trial courts to apply the new rule. *See*, *e.g., Lawrence v. Chater*, 516 U.S. 163 (1996) (per curiam) (discussing importance of GVR orders when courts

announce new law); *Griffith v. Kentucky*, 479 U.S. 314, 323 (1987) ("[W]e fulfill our judicial responsibility by instructing lower courts to apply the new rule retroactively to cases not yet final.") The reason for this "familiar appellate procedure" is clear: "where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury." *SEC v. Chenery Corp.*, 318 U.S. 80, 88 (1943).

This process is dictated by the structure of our legal system, particularly in regard to civil actions. When a party files a complaint sounding in tort or contract, it is generally common law – precedent – which governs the claims. *See, e.g., Air & Liquid Sys. Corp. v. Devries*, 139 S.Ct. 986 (2019) (adopting new common law test for maritime tort). In order to "know the claims of the opposing party and…meet them," defendants must know the applicable rules of law. *Morgan*, 304 U.S. at 18. Once the law is known, questions of fact are then resolved by juries. The relevance of any particular fact is wholly dependent upon the applicable law. The latter must be known before trial may proceed on the former.

When the applicable law is changed *ex post facto* and no specific findings of fact were made, appellate courts are faced with a decision. If the record and facts remain disputed, "the appellate court cannot take the place of the jury." *Chenery,* 318 U.S. at 88. Therefore, the reviewing court must remand. These are basic principles of the American system and the petition should be granted to confirm them.

B. The Court Below Has Directly Contradicted This Court's Precedent.

The Court has previously faced a factual scenario nearly identical to the instant case. In 1922, the Missouri Supreme Court construed a rule of law — a particular state statute — in one way, with its precedential force later described as "the settled law of the state." *Brinkerhoff-Faris Trust & Sav. Co.,* 281 U.S. at 678; *see also id.* at 676, n.1 (listing state court decisions adhering to the precedential *Laclede* case).

Several years later, the Missouri court decided to overturn this settled precedent and announce a new rule. However, in doing so, it denied the non-prevailing party a remand despite the *ex post facto* change in law. When due process concerns were raised in a post-decision motion, they were summarily dismissed without opinion. *Id.* at 678. This Court took strong exception.

> If the result [in the instant case] were attained by an exercise of the state's legislative power, the transgression of the due process clause of the Fourteenth Amendment would be obvious.… The violation is nonetheless clear when that result is accomplished by the state judiciary in the course of construing an otherwise valid…state statute. The federal guaranty of due process extends to state action through its judicial, as well as through its legislative, executive, or administrative, branch of government.
>
> It is true that the courts of a state have the supreme power to interpret and declare the written and unwritten laws of the state; that this Court's power to review decisions of state

> courts is limited to their decisions on federal questions; and that the mere fact that a state court has rendered an erroneous decision on a question of state law, or has overruled principles or doctrines established by previous decisions on which a party relied, does not give rise to a claim under the Fourteenth Amendment or otherwise confer appellate jurisdiction on this Court.
>
> But our decision in the case at bar is not based on the ground that there has been a retrospective denial of the existence of any right or a retroactive change in the law of remedies. We are not now concerned with the rights of the plaintiff on the merits.... Our present concern is solely with the question whether the plaintiff has been accorded due process in the primary sense -- whether it has had an opportunity to present its case and be heard in its support. Undoubtedly the state court had the power to construe the statute dealing with the state tax commission, and to reexamine and overrule the *Laclede* case. Neither of these matters raises a federal question; neither is subject to our review. But, while it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a state may not deprive a person of all existing remedies for the enforcement of a right which the state has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

281 U.S. at 679-682 (footnotes and citations omitted).

The major difference between *Brinkerhoff-Faris Trust & Sav. Co.* and the instant case is the nature of the underlying law. The Missouri court had changed its precedent interpreting a statute, while the Maine court below changed its precedent governing common law claims. Yet, this Court has been clear *stare decisis* considerations – and therefore due process implications – are at their apex in both scenarios.[4]

Accordingly, the Court has previously recognized the importance of the question presented. It gave a clear answer. Granting the petition will provide opportunity to reaffirm that settled principles of procedural due process must be enforced by every court in the nation.

C. The Maine Supreme Judicial Court Did Not Answer Why It Deviated From Clear Precedent

The normal process of the court below comports with the "familiar appellate procedure" of American courts. For example, when it determined a statutorily-established standard of proof was insufficient to meet constitutional requirements, it overruled the existing law and remanded for further proceedings. See *Guardianship of Sebastien Chamberlain et al.*, 118 A.3d 229 (Me. 2015). The Maine Supreme Judicial Court recognized that

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[4] In interpreting statutes, "'[c]onsiderations of *stare decisis* have special force'" because the legislative branch may always enact a new law. *Kisor v. Wilkie,* 139 S. Ct. 2400, 2422 (2019) (quoting *Patterson v. McLean Credit Union,* 491 U.S. 164, 172-173 (1989)). In dealing with common law principles, "[c]onsiderations of *stare decisis* are at their acme…where reliance interests are involved." *Payne v. Tennessee*, 501 U.S. 808, 828 (1991).

"[a]lthough the facts as stated in the court's judgment may appear compelling, we cannot determine whether the court would have made the same factual findings if it had applied" the new legal standard announced on appeal. *Id.* at 242, n.8 (Saufley, C.J.). The court refused to place itself in the role of factfinder.

Yet, the court below has not clearly explained why it deviated from normal process in the instant case. The decision inferred a jury might find liability had the newly adopted, never before announced *ex post facto* "limiting principle" actually been applied; because of this possibility, it affirmed. App. 16a. But "where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury." *Chenery*, 318 U.S. at 88. In the present case, contravening this "familiar appellate procedure," the court below took the place of the jury. *Id.*

When petitioners made the court aware of its error, squarely setting forth the constitutional infirmity through a motion for reconsideration, no reasoned response was forthcoming. The court did not acknowledge, explain, or in any way address why it deviated from its usual practice, nor did it offer a rationale on how its holding was nevertheless in accord with the Due Process Clause. The sum total of its response was: "The motion to reconsider is DENIED." App. 1a.

In the underlying decision, the Maine Supreme Judicial Court suggested petitioners had failed to preserve their request for a remand by not advocating for the "limiting principle" at the time of

the jury instruction. App. 15a, n.7.[5] But the "limiting principle" was first announced *ex post facto* in the court's decision itself; Restatement (Second) of Torts § 530 had never before been referenced or adopted by the court below. "Due process" is a hollow promise if parties are faulted for failing to predict what new rules of law will be adopted on appeal.

Further, rules of civil procedure and professional conduct require attorneys to present legal arguments in good faith. How can a party defend against claims based on existing precedent, yet simultaneously prepare and present a different case in good faith by predicting a hypothetical, undesired, never before announced change in law arising on appeal? Petitioners asked the court below this very question. App. 36a-41a. They received no answer.

A similar question was asked of the court regarding the punitive damage award. This Court has recognized that passions of juries may impose such damages based upon emotion and prejudice rather than reason and law. *See BMW of North*

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[5] The court below stated it reviewed the jury instructions for "clear error" because the "limiting principle" was not specifically sought by petitioners *a priori* of its *ex post facto* announcement. However, with new law comes new factual questions, which lead parties to consider different evidentiary approaches at trial. These evidentiary due process principles are separate from issues surrounding jury instruction. This Court has noted that courts "cannot be sure that the defendant's rights are protected without giving him a chance to put his evidence in." *Saunders v. Shaw*, 244 U.S. 317, 319 (1917). And litigants cannot know what evidence to put in (or keep out) if they do not know what rules of law govern. *See also infra* Part II.B.iii.

America, Inc. v. Gore, 517 U. S. 559, 587 (1996) (exacting review ensures such awards are based upon an "application of law, rather than a decisionmaker's caprice") (Breyer, J., concurring). The Court has clearly stated that punitive awards must be reviewed *de novo*. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). In the instant case, the decision of the court below stated that the respondents "could not recover for both" the tort claim and the contract claim. App. 11a n.5. State law is clear "[n]o matter how egregious the breach, punitive damages are unavailable under Maine law for breach of contract." *Drinkwater v. Patten Realty Corp,* 563 A.2d 772, 776 (Me. 1989).

Nevertheless, by affirming the trial court's judgment, the Maine Supreme Judicial Court permitted punitive damages to stand on a contract claim in contravention of its own holding in *Drinkwater*. Petitioners highlighted this explicit contradiction via their reconsideration motion, requesting remand. App. 44a. Again, the motion was denied without explanation. Without an opinion, it is unclear whether the court below followed the "mandated" review required by the Due Process Clause. *State Farm Mut. Auto Ins. Co.*, 538 U.S. at 418.

This Court should grant the pending petition and, at the very least, correct the court below. Declining the petition would invite other state judiciaries to change their law *ex post facto*, yet deny remand. This would greatly undermine this Court's efforts to "preserv[e] a jurisprudential system that is not based upon `an arbitrary discretion.'" *Patterson v. McLean Credit Union*, 491 U.S. 164, 172 (1989) (quoting The

Federalist No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton)). Appellate courts cannot replace the role of factfinder, nor can they presume the facts which might be found by a jury. When appellate courts plainly contradict themselves – as here, with respect to punitive damages – they need to address the inconsistency. And, when valid questions are brought forward after a decision, parties deserve more than summary dismissals. They are guaranteed "due process."

II. This Case Offers An Ideal Vehicle To Announce National Rules Of Procedural Due Process

While the Court could summarily correct the court below, the interplay between due process and *stare decisis* is a major area of current public, academic,[6] and judicial[7] consideration. "Adherence to precedent is 'a foundation stone of the rule of law.'" *Kisor v. Wilkie,* 139 S. Ct. 2400, 2422 (2019) (quoting *Michigan* v. *Bay Mills Indian Community*, 572 U. S. 782, 798 (2014)). "But *stare decisis* is 'not

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[6] *See, e.g.,* Max Minzner, *Saving Stare Decisis: Preclusion, Precedent, and Procedural Due Process*, 2010 BYU L. Rev. 597 (2010); Amy C. Barrett, *Stare Decisis and Due Process*, 74 U. Colo. L. Rev. 1011 (2003).

[7] Several petitions pending before this Court implicate *stare decisis* with respect to substantive law. *See, e.g.,* Petition for Writ of Certiorari, *Ricks v. Idaho Contractors Bd. et al.,* No. 19-66 (U.S. Jul. 10, 2019); Petition for Writ of Certiorari, *Price et al. v. Chicago, et al.,* No. 18-1516 (U.S. Jun 4, 2019).

Merits cases pending before the court also note the interplay between *stare decisis* and reliance interests. *See, e.g.,* Brief of Amicus Curiae State of Oregon pg. 4*, Ramos v. Louisiana*, No. 18-5924 (U.S. Aug. 23, 2019)("'Overruling precedent is never a small matter.'")(citation omitted).

an inexorable command…'" *Franchise Tax Board of California v. Hyatt,* 139 S. Ct. 1485, 1499 (2019)) (quoting *Pearson* v. *Callahan*, 555 U.S. 223, 233 (2009)). The importance of these questions is plain; they speak to foundational principles of the Constitution. "To avoid an arbitrary discretion in the courts, it is indispensable that they should be bound down by strict rules and precedents, which serve to define and point out their duty in every particular case that comes before them." The Federalist No. 78, p. 490 (H. Lodge ed. 1888) (A. Hamilton).

The Court should grant the petition and use this opportunity to clarify what "due process" means when new judge-made law is announced on appeal, forging its jurisprudence into clear guidance. It is this Court's responsibility to "fashion[] and preserv[e] a jurisprudential system that is not based upon an arbitrary discretion." *Patterson*, 491 U.S. at 172 (internal quotation marks and citation omitted). This case is a perfect opportunity to do so.

A. The Court May Adopt the State-Federal Consensus of Appellate Due Process

The opposite of "arbitrary" is consistency, and "[i]t is to courts...that we ultimately look for the implementation of a regularized, orderly process of dispute settlement." *Boddie v. Connecticut*, 401 U.S. 371, 375 (1969). Appellate courts throughout the United States have settled upon certain predictable procedural practices. When an appeal results in the adoption of a new, fact-dependent rule of law and a disputed record exists, the reviewing court remands the case to the lower courts for further proceedings.

This Court has followed this process when explicitly overturning its own precedent. *See, e.g., Lingle v. Chevron U.S.A. Inc.*, 544 U.S. 528 (2005) (unanimously overturning *Agins v. City of Tiburon*, 447 U.S. 255 (1980) and remanding). This also provides parties an opportunity to seek further review once the new law is applied, giving appellate courts a chance to consider the law incrementally, organically, and holistically. *See, e.g., F.C.C. v. Fox Television Stations, Inc.*, 567 U.S. 239 (2012) ("*Fox II*") ("The case now returns to this Court for decision upon the constitutional question" having been previously remanded on other grounds); *SEC v. Chenery,* 332 U.S. 194 (1947)("*Chenery II*")("This case is here for the second time.…The issue now is whether the Commission's action is proper in light of the principles established in our prior decision.").[8]

The federal circuit courts have mirrored this Court's example in their own jurisprudence. *See, e.g., United States v. Millenium Labs, Inc.,* 2019 U.S. App. LEXIS 13506 (CA1 2019) (remanding after overturning circuit precedent in light of intervening decision of this Court); *Slater v. U.S. Steel Corp.,* 871 F.2d 1174, 1185 (CA11 2017) (en banc) (remanding after *en banc* decision overturned prior circuit precedent); *Harrow Prods., Inc. v. Liberty Mut. Ins.*

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[8] In some cases, this process occurs multiple times. Each subsequent review provides the appellate court the ability to consider questions in the ordinary course with benefit of the lower court's analysis. This ensures the paramount promise of due process is kept. *See, e.g., collectively, United States v. Morgan*, 313 U.S. 409 (1941), *United States v. Morgan*, 307 U.S. 183 (1939), *Morgan v. United States,* 304 U.S. 1 (1938), *Morgan v. United States,* 298 U.S. 468 (1936).

Co., 64 F.3d 1015, 1025–26 (CA6 1995) (vacating a prior panel decision in light of a controlling state-law ruling from the Michigan Supreme Court). State courts routinely follow this process as well. *See, e.g., Daniel v. City of Minneapolis*, 923 N.W.2d 637 (Minn. 2019) (remanding after overturning 30 year old precedent); *Bozman v. Bozman,* 830 A.2d 450 (Md. 2003) (remanding for further proceedings after abrogating common law doctrine); *Daniels v. Peterson,* 615 N.W.2d 14 (Mich. 2000) (remanding after overruling precedent in separate case).

In most circumstances, the court below has followed this settled practice: the appeal is considered, a new rule of law adopted, and the case remanded. When it announced new legal standards governing tort claims, the Maine Supreme Judicial Court remanded for further proceedings applying the new law. *See Maine Eye Care Assoc. v. Gorman*, 890 A.2d 707 (Me. 2006) (announcing new standard of proof in tort action and remanding); *Northeast Harbor Golf Club v. Harris*, 661 A.2d 1146 (Me. 1995) (adopting American Law Institute standard for tort action and remanding). Like this Court's *Chenery* and *Morgan* cases, both *Gorman* and *Harris* returned to the Maine Supreme Judicial Court following further proceedings; additional questions arose when the new law was applied. *See Maine Eye Care Assoc. v. Gorman*, 942 A.2d 707 (Me. 2008); *Northeast Harbor Golf Club v. Harris*, 725 A.2d 1018 (Me. 1999).

That is why it is "familiar appellate procedure that where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made,

the appellate court cannot take the place of the jury." *Chenery,* 318 U.S. at 88. New laws require new trials. New trials may reveal unforeseen legal questions after application of the appellate court's decision. This routine appellate process of American courts ensures those discrete, unforeseen questions, squarely presented, are answered in the ordinary course, thereby "preserving a jurisprudential system that is not based upon an arbitrary discretion." *Patterson*, 491 U.S. at 172 (quotation marks omitted). This Court can and should place its imprimatur on this consensus practice by granting this petition.

B. This Case Will Allow the Court to Integrate Its Procedural Due Process Jurisprudence

"At its core, the right to due process reflects a fundamental value in our American constitutional system." *Boddie,* 401 U.S. at 374. The "central meaning of procedural due process" is the "right to notice and an opportunity to be heard...at a meaningful time and in a meaningful manner." *Fuentes v. Shevin*, 407 U.S. 67, 80 (1972). These basic principles have been highlighted by the Court in recent years through various doctrines and decisions. The instant case provides an opportunity to weave these strings together into a cohesive tapestry of procedural due process, incorporating everything from precedent to punitive damages to the role of judicially-adopted rules.

i. Due Process, *Stare Decisis*, and *Ex Post Facto* Judicial Decisions. As noted, the Maine Supreme Judicial Court has already overturned its "well-settled" precedent. The question for this Court is: what now?

The centrality of precedent in our constitutional order has been described countless times by the Framers, this Court, and grade school civics teachers[9] alike. "Adherence to precedent must then be the rule rather than the exception if litigants are to have faith in the even-handed administration of justice in the courts." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 33-34 (Yale Univ. Press 1928) (1921). This rule provides predictability in dispute resolution, as lower courts must follow the law as announced by the courts above them. *See, e.g., Eulitt v. Maine,* 386 F.3d 344, 349 (CA1 2004)("Until a court of appeals revokes a binding precedent, a district court within the circuit is hard put to ignore that precedent unless it has unmistakably been cast into disrepute by supervening authority.") These are basic jurisprudential principles and are the essence of due process in the American system. "It is to courts...that we ultimately look for the implementation of a regularized, orderly process of dispute settlement." *Boddie,* 401 U.S. at 375.

Nevertheless, there will be times when precedent must give way to other considerations. Sometimes this is a contested development. *Hyatt,* 139 S. Ct. 1485 (5-4 decision). Other times, it is widely-accepted. *Lingle*, 544 U.S. 528 (9-0 decision). Whatever reasons support the change, overturning prior cases leads to the pronouncement of new rules of law.

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[9] For a discussion on the role of the Court and its precedent in modern American civic education, see Tom Donnelly, *Popular Constitutionalism, Civic Education, and the Stories We Tell Our Children*, 118 Yale L.J. 948 (2009).

"[E]x-post facto laws ... are contrary to the first principles of the social compact, and to every principle of social legislation." The Federalist No. 44, at 282 (James Madison) (C. Rossiter ed., 1961). The Constitution explicitly prohibits Congress and the states from adopting *ex post facto* criminal laws, and prevents states from impairing contracts in the civil arena. U.S. CONST. art I, §§9, 10. "The specific prohibition on *ex post facto* laws is only one aspect of the broader constitutional protection against arbitrary changes in the law." *Lynce v. Mathis,* 519 U.S. 433, 440 (1997). The judiciary is similarly constrained in enacting such arbitrary changes.

"We have observed...that limitations on *ex post facto* judicial decision making are inherent in the notion of due process." *Rogers v. Tennessee*, 532 U.S. 451, 456 (2001). The dissenters in *Rogers*, rather than opposing the principle cited by the majority, believed the Court had not gone far enough. "Under accepted norms of judicial process [at the time of the Framers], an *ex post facto* law (in the sense of a judicial holding, not that a prior decision was erroneous, but that the prior valid law is hereby retroactively changed) was simply not an option for the courts." *Rogers*, 532 U.S. at 477 (Scalia, J., dissenting); *see also Id.* at 481 (Breyer, J., dissenting)("[T]he Due Process Clause asks us to consider the basic fairness or unfairness of retroactive application of the...change in the law."). "Retroactivity is generally disfavored in the law…in accordance with 'fundamental notions of justice' that have been recognized throughout history." *Eastern Enterprises v. Apfel*, 524 U.S. 498, 532 (1998) (internal citations omitted).

However, the question presented – and therefore the petition – does not contest whether courts may change the rules after-the-fact. Rather, it asks what process is due a party following such an *ex post facto* change on appeal. In other words, how can retroactivity of judge-made law be harmonized with "fundamental notions of justice?" *Ibid.* The consensus answer is to return the matter to the trial courts through a remand, giving parties fair notice of the new law and a chance to meet it.

ii. Due Process and Fair Notice in Tort Law. These due process considerations – after *stare decisis* gives way to the pronouncement of a new *ex post facto* rule of common law – culminate in principles of "fair notice." *See Rogers*, 532 U.S. at 460 (describing constitutional interests of "fundamental fairness (through notice and fair warning) and the prevention of the arbitrary and vindictive use of the laws.").

"A fundamental principle in our legal system is that laws which regulate persons or entities must give fair notice of conduct that is forbidden or required." *Fox II*, 567 U.S. at 253. The Court has generally affirmed this principle in cases presenting criminal, quasi-criminal, and regulatory claims. The instant case offers an ideal opportunity to confirm this "fundamental principle" is applicable to the world of private regulation: tort law.[10]

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[10] This Court, acting as a common-law court in a maritime tort case last Term, has acknowledged the importance of giving parties fair notice of and the opportunity to address newly-adopted law. *See Devries*, 139 S.Ct. at 991 (affirming remand of case after adoption of new legal test); *Id.* at 998 (Gorsuch, J., dissenting) (discussing virtue of traditional tort rule affording parties "fair notice of their legal duties").

In the case presented, respondents sued petitioners in tort under a "fraud" theory based upon the latter's intentions, inextricably tied to a breach of contract claim. The Maine Supreme Judicial Court had long held to the rule enunciated in *Shine* that "it is well settled in this state that the breach of a promise to do something in the future will not support an action of deceit, even though there may have been a preconceived intention not to perform." 157 A. at 319. Federal courts applying Maine law had relied upon the precedent in recent years. *See, e.g., Packgen v. BP Exploration & Prod., Inc.*, 957 F.Supp.2d 58, 85-87 n.83 (D. Me 2013); *Weaver v. New England Mut. Life Ins. Co.*, 52 F. Supp. 2d 127. 133 (D. Me. 1999). And, in 2017, in the midst of the present litigation, the Maine Supreme Judicial Court cited this "well-settled" principle of *Shine* once again. *Johnson,* 163 A.3d at 834. There was no reason for petitioners to believe *Shine* anything but binding Maine precedent.[11]

The trial court jumped the gun and declared *Shine* dead letter. However, that holding was adopted *ex post facto* by the Maine Supreme Judicial Court. But the latter court went further than the trial court, announcing a new "limiting" rule in its decision. Petitioners had no "fair notice" of this rule,

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[11] *Compare* App. 13a (Jabar, J.) ("Although our adoption of the Restatement's rule has not been explicit, we have cited it with approval on several occasions.") *with Johnson*, 163 A.3d at 834 (Jabar, J.) (noting trial court dismissed count because it "did not satisfy the rule articulated in *Shine*…that a promise to take a future action will not support an action for fraud."). *See also Weaver,* 52 F. Supp. 2d at 133 ("This Court will not infer that *Shine* has been overruled *sub silentio* by the references to section 525 of the Restatement.")

as the court below had never – not even in *dicta* – cited to the section of the Restatement describing this "limiting principle."

This Court has generally placed its "fair notice" jurisprudence within procedural due process principles; parties must know the applicable legal standards in advance of trial, if not earlier.[12] "The Due Process Clause prohibits a State from punishing an individual without first providing that individual with 'an opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet,* 405 U.S. 56, 66 (1972)). Presenting every available defense requires a "fair hearing" which "embraces not only the right to present evidence, but also a reasonable opportunity to know the claims of the opposing party and to meet them." *Morgan,* 304 U.S. at 18.

The "limiting principle" adopted by the Maine Supreme Judicial Court operates to constrain the newly-created tort announced in the decision below. Petitioners have not had the opportunity to avail themselves of this "limiting principle" – a defense – because it was announced *ex post facto.* The Court should grant the petition to make clear that the due process requirement of "fair notice" applies not only to the legal elements establishing liability in tort, but also to those elements which might offer a basis for defense. *Morgan*'s holding – parties must have an opportunity "to know the claims…and to meet

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[12] The Court has indicated "notice pleading" must give defendants fair notice of the claims and facts alleged, "demand[ing] more than an unadorned, the-defendant-unlawfully-harmed-me accusation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

them" – is hollow if a defendant does not receive fair notice upon what grounds the claims may be met.

iii. Due Process and Judicial Rules. Further, the instant case offers an ideal vehicle to develop the logical inference from *Morgan* and other cases. While the Court has often discussed the requirement to allow parties to submit evidence[13] in their defense, the inverse is also true. Not only must parties have an opportunity to **present** evidence, but they must also have the right to **prevent** evidence that is unduly prejudicial or irrelevant under the applicable rule of law. This is particularly true when a jury is empaneled as the factfinder. As the Court has stated, "well-established rules of evidence permit trial judges to exclude evidence if its probative value is outweighed by certain other factors such as unfair prejudice, confusion of the issues, or potential to mislead the jury." *Holmes v. South Carolina*, 547 U.S. 319, 326 (2006) (citing*, inter alia*, FED. R. EVID. 403).[14]

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[13] *See Fuentes,* 407 U.S. at 81 ("When a person has an opportunity to speak up in his own defense, and when the State must listen to what he has to say, substantively unfair and simply mistaken deprivations of property interests can be prevented."); *Saunders*, 244 U.S. at 319 (the Court "[could not] be sure that the defendant's rights [were] protected without giving him a chance to put his evidence in" so it reversed); *Boswell's Lessee v. Otis*, 50 U.S. (How. 9) 336, 350 (1850) ("No principle is more vital to the administration of justice, than that no man shall be condemned in his person or property without notice, and an opportunity to make his defence.").

[14] For simplicity, citations will be made to applicable federal rules, as "[m]ore than forty states mimic the Federal Rules of Evidence." Scott Dodson, *The Gravitational Force of Federal Law*, 164 U. PA. L. REV. 703, 719 (2016); *see also Id.* at 709

The Committee Notes to FED. R. EVID. 403 explain "`[u]nfair prejudice' within its context means an undue tendency to suggest decision on an improper basis, commonly, though not necessarily, an emotional one." Advisory Committee's Notes on FED. R. EVID. 403, 28 U. S. C. App., p. 860; *see also Old Chief v. United States*, 519 U.S. 172 (1997). In order for a party to invoke the protections of FED. R. EVID. 403 or other evidentiary rules, an objection to the proffered evidence must be made. Counsel must ground that objection on a good faith belief that it is "warranted by existing law" or based upon some other non-frivolous argument for changing the law. FED. R. CIV. P. 11(b)(2); *see also* MODEL RULES OF PROF'L CONDUCT R. 3.1.

The instant case presents an opportunity for the Court to discuss the role of procedural and evidentiary rules in the context of the Due Process Clause. "'The aim of the requirement of due process is not to exclude presumptively false evidence, but to prevent fundamental unfairness in the use of evidence, whether true or false.'" *Colorado v. Connelly*, 479 U.S. 157, 167 (1986)(quoting *Lisenba v. California,* 314 U.S. 219, 236 (1941)). Petitioners, at trial, objected to the tort itself, and thus the entirety of its evidence, as both unduly prejudicial and irrelevant under *Shine*. This was overruled. *See* n.2 *supra*. Petitioners did not offer a non-frivolous argument for excluding evidence based upon a change in the law because they did not believe the law needed to be changed; *Shine* was a

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(discussing "replica" states mirroring federal civil procedure). Maine is among the jurisdictions following federal rules.

longstanding and appropriate rule. If fair notice of the new tort and *ex post facto* "limiting principle" had been provided, petitioners could have based evidentiary objections on that principle.

Additionally, under modern rules, evidence is only relevant if it makes a fact "of consequence" in resolving the action more or less probable. FED. R. EVID. 401. An objection based on relevance requires foreknowledge of what legal elements will resolve the action. That foreknowledge is impossible when an appellate court overturns its precedent – or announces new standards – after trial.

Granting the petition will enable the Court to reassert that cases must be returned to trial courts for fair application of the procedural rules of courts following a change in law. This ensures parties have an opportunity "to know the claims of the opposing party and to meet them" by knowing what facts must be found by the jury to resolve the claim. *Morgan,* 304 U.S. at 18. Because "where the correctness of the lower court's decision depends upon a determination of fact which only a jury could make but which has not been made, the appellate court cannot take the place of the jury." *Chenery*, 318 U.S. at 88.

iv. Due Process and Punitive Damages. The due process violation arising due to the *ex post facto* change in law in the instant case is particularly acute when it comes to the punitive damage award. Such awards are permitted in the United States, but only if they are based upon "application of law, rather than a decisionmaker's caprice." *Gore,* 517 U.S. at 587 (Breyer, J., concurring).

This Court has often counseled caution in these scenarios, as "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994); *see also TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). The *Oberg* Court was "confronted with the question of what procedures are necessary to ensure that punitive damages are not imposed in an arbitrary manner." 512 U.S. at 420. "Oregon's deviation from established common-law procedures" was determined to violate the Due Process Clause, so this Court reversed. *Id.* at 421.

In the case presented, the Maine Supreme Judicial Court's deviation from established *appellate* procedures raises the same concern. Petitioners, via their motion for reconsideration, requested review by the court below of the punitive damage award in light of the decision. To this day, the merits decision, the judgment of the trial court, and other state-law precedent all stand in direct contradiction to each other. *See* App. 44a.

The Maine Supreme Judicial Court's summary refusal to acknowledge, distinguish, or address this legal inconsistency raises the specter that the punitive damages are imposed on some basis other than law. This Court has "mandated appellate courts to conduct *de novo* review of a trial court's application" of standards related to punitive damage awards. *State Farm Mut. Auto. Ins. Co.,* 538 U.S. at 418.

In the instant case, the trial court's application of punitive damages was made without reference to the "limiting principle" of the tort claim because the principle had never been previously announced. The

mandated *de novo* review has not yet occurred because (i) the trial court did not apply the principle in the first instance and (ii) the appellate court did not have specific findings of fact before it. Further, the evidentiary record was created untethered from the "limiting principle," as the latter did not exist in Maine at the time of trial.

Neither the parties nor the trial court had an opportunity to consider the Maine Supreme Judicial Court's *ex post facto* holding that plaintiffs "could not recover" concurrently in contract and tort. Petitioners could not advance this argument on appeal in the first instance as it was the appeal itself that defined the new tort and its limits. Petitioners instead relied jointly upon the longstanding rules of *Shine* and *Drinkwater*. The former stated the tort did not exist; the latter holds punitive damages unavailable without a grounding tort.

This case presents an ideal vehicle for the Court to explicitly announce a rule that commentators have inferred from its recent decisions. "Although the Supreme Court has not squarely addressed the question, *Fox* and *Christopher* leave no doubt that a defendant is entitled to fair notice of conduct that can give rise to punitive damages liability." Theodore J. Boutrous, Jr. & Blaine H. Evanson, *The Enduring and Universal Principle of "Fair Notice,"* 86 S. Cal. L. Rev. 193, 200 (2013)(citing *Fox II,* 567 U.S. 539 and *Christopher v. SmithKline Beecham Corp.*, 567 U.S. 142 (2012)). The Court should therefore grant the petition and explicitly confirm that punitive damages, prior to their imposition, require fair notice. The Court can then explain that

a remand to the trial courts is one means to provide notice following an *ex post facto* change in law.

v. Due Process and the States. Finally, granting the petition will give the Court the opportunity to assert the primacy of due process for every court in the nation. This Court sits at the head of the federal judicial branch and will occasionally exercise its supervisory power. SUP. CT. R. 10(a). It does not similarly supervise state courts; its authority thereover exists solely when federal questions arise. But "[t]he federal guaranty of due process extends to state action through its judicial as well as through its legislative, executive, or administrative branch of government." *Brinkerhoff-Faris Trust & Sav. Co.*, 281 U.S. at 679. "[W]hile it is for the state courts to determine the adjective as well as the substantive law of the state, they must, in so doing, accord the parties due process of law." *Id.* at 682.

"Due process of law" touches upon numerous aspects of the American judicial system. It includes reliance – at the trial level – on precedents of controlling courts and acknowledges that *ex post facto* judicial decisions create significant danger. It means "fair notice" must be given to litigants, in particular to have a fair opportunity to know the applicable legal standards and to meet the claims of the opposing party through foreseeable rules of evidence. It means punitive damages may exist, but they must be guarded zealously against arbitrary and emotional application. And all these promises are made to every American, applicable to the states through the Fourteenth Amendment.

This petition is an opportunity to make all of this clear by answering the question presented: whether, when a state appellate court overturns its own controlling precedent, Constitutional guarantees of due process require remand to the trial court for application of the newly-adopted rule of law. The Court should use this opportunity to answer "yes."

CONCLUSION

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

Respectfully submitted,

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