No. _____

In The
Supreme Court of the United States

SHERWIN A. BROOK,

Petitioner,

vs.

J. LAWRENCE McCORMLEY, et al.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR A WRIT OF CERTIORARI

GERALD D.W. NORTH
Counsel of Record
125 S. Wacker Dr., Suite 1000
Chicago, Illinois 60606
Phone: (831) 224-0007
E-mail: northlaw2@yahoo.com

DENNIS L. HALL
DENNIS L. HALL, ATTORNEY, PLLC
3033 North Central, Suite 810
Phoenix, Arizona 85012
Phone: (480) 596-4045
E-mail: dennis@dlhall.net

Counsel for Petitioner

Dated: April 19, 2021

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTION PRESENTED

A panel of the United States Court of Appeals for the Ninth Circuit unanimously held that a federal district judge, on *de novo* review of a magistrate's report and recommendation under the Federal Magistrates Act, 28 U.S.C. § 631 *et seq*., may refuse to consider a motion to certify questions of state law to a state's supreme court solely because the motion was not first presented to the magistrate. The ruling arises in the context of a long-festering conflict among the circuits over whether a district judge may refuse to consider new arguments in objections to a magistrate's report and recommendation that directly relate to issues that were presented to the magistrate. The Ninth Circuit treated the motion as if it were itself an "argument," even though it simply sought certification of the very state law issues that had been presented to, and addressed by, the magistrate. It ignored this Court's strong policy favoring the use of certification, at almost any stage of litigation, and its own prior decisions imposing an obligation on district judges, and itself, to consider certification even if it feels its interpretation of state law is correct.

The question presented is:

Does 28 U.S.C. § 636(b)(1)(C) allow a district judge, on *de novo* review of objections to a magistrate's report, to refuse to consider a motion to certify an issue of state law that was presented to the magistrate, on the ground that such a motion is itself a "new argument" that was not first presented to the magistrate who, in most, if not all, cases, has no authority under state certification statutes to grant it?

PARTIES TO THE PROCEEDINGS

The parties to the proceedings below were as follows:

Respondent J. Lawrence McCormley ("McCormley") is an Arizona resident and attorney. Respondent Tiffany & Bosco, P.A. (individually and, together with McCormley, "T&B" or "Respondents") is an Arizona professional association in which McCormley is a partner. At all relevant times, T&B offered its legal services in conducting Arizona foreclosures (known as trustee's sales) throughout the U.S.

McCormley and T&B were the defendants and appellees below, as well as in earlier, related litigation in the Northern District of Illinois and Seventh Circuit.

Petitioner Sherwin A. Brook ("Brook" or "Petitioner") is an Illinois resident who is, and, at all relevant times, was, trustee of the David North II Trust ("the Trust"). The Trust owned 100% of the shares of Cortina Financial, Inc. ("Cortina"), an Arizona corporation. Cortina was administratively dissolved in 1998, several years before the attorney-client relationship with T&B began in 2001. Brook was the sole officer and director of Cortina, and, as such, executed multiple legal services agreements with T&B over the course of a 13-year attorney-client relationship.

Brook was the plaintiff and appellant in the proceedings below, but Cortina was the original plaintiff in the earlier action against T&B in the Northern District of Illinois, where Cortina had had its principal

PARTIES TO THE PROCEEDINGS – Continued

place of business. When diversity of jurisdiction was challenged by T&B, Brook was allowed to substitute himself for Cortina in his capacity as trustee of its sole shareholder, the Trust, pursuant to a provision of Arizona's current corporation statute that states that officers, directors, or shareholders may file suit on the claims of a defunct corporation in their own name. The district court in Illinois dismissed the complaint for lack of personal jurisdiction in Illinois, and the Seventh Circuit affirmed. *Brook v. McCormley*, 873 F.3d 549 (7th Cir. 2017).

Brook thereafter re-filed the complaint in the District of Arizona, in his own name, as trustee of Cortina's only shareholder, the Trust, pursuant to the same provision of Arizona's corporation statute relied upon in the Northern District proceeding.

STATEMENT OF RELATED CASES

Brook v. McCormley, *et al*., U.S. Court of Appeals for the Ninth Circuit, No. 19-17289, Judgment entered November 20, 2020

Brook v. McCormley, et al., No. CV-18-01530-PHX-JAS, U.S. District Court for the District of Arizona, Order entered October 15, 2019

Brook v. McCormley, et al., No. CV-18-01530-PHX-JAS (MSD), U.S. District Court for the District of Arizona, Report and Recommendation entered May 21, 2019

STATEMENT OF RELATED CASES – Continued

Brook v. McCormley, et al., No. 16-4255, U.S. Court of Appeals for the Seventh Circuit, Judgment entered October 11, 2017

Brook v. McCormley, et al., Case No. 16 C 7345, U.S. District Court for the Northern District of Illinois, Order entered November 29, 2016

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF APPENDICES

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

Page

TABLE OF AUTHORITIES – Continued

TABLE OF AUTHORITIES – Continued

OPINIONS BELOW

The opinion of the court of appeals, Pet. App. 1a-9a, is unreported. The order of the district court, Pet. App. 10a-13a, is unreported. The report and recommendation of the magistrate, Pet. App. 14a-28a, is unreported.

JURISDICTION

The judgment of the court of appeals was entered on November 20, 2020. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

28 U.S.C. § 636(b) provides, in pertinent part:

> (1) Notwithstanding any provision of law to the contrary –
>
> * * *
>
> (C) the magistrate judge shall file his proposed findings and recommendations under subparagraph (B) with the court and a copy shall forthwith be mailed to all parties.
>
> > Within fourteen days after being served with a copy, any party may serve and file written objections to such proposed findings and recommendations as provided by rules of court. A judge of the court shall make

> a de novo determination of those portions of the report or specified proposed findings or recommendations to which objection is made. A judge of the court may accept, reject, or modify, in whole or in part, the findings or recommendations made by the magistrate judge. The judge may also receive further evidence or recommit the matter to the magistrate judge with instructions.

Rule 17, Fed. R. Civ. P., provides, in pertinent part:

(a) REAL PARTY IN INTEREST.

> (1) *Designation in General.* An action must be prosecuted in the name of the real party in interest. The following may sue in their own names without joining the person for whose benefit the action is brought:
>
> * * *
>
> (E) a trustee of an express trust;
>
> * * *
>
> (G) a party authorized by statute.

A.R.S. § 10-1405 provides, in pertinent part:

> * * *
>
> B. Dissolution of a corporation does not:
>
> * * *

5. Prevent commencement of a proceeding by or against the corporation in its corporate name or any officers, directors or shareholders or affect applicable statutes of limitation.

STATEMENT OF THE CASE

Congress created the magistrate system in 1968 with the enactment of the Federal Magistrates Act. Unlike Article III judges who preside in the federal district and appellate courts, and this Court, magistrate judges are Article I judges. They serve limited terms and are subject to removal for cause. Because their authority stems from Article I, not Article III, Congress explicitly subjected magistrate judges' decision-making to district court scrutiny and control. The Constitution requires that Article III judges retain control over the essential attributes of judicial power and Congress took care to ensure that constitutional separation of powers concerns were taken into account. The availability of mandatory *de novo* review of magistrate judge decisions under 28 U.S.C. § 636(b)(1)(C) is the mechanism that is supposed to ensure that district judges retain ultimate decision-making authority.

In 2018, Petitioner filed this lawsuit in the District of Arizona in his own name, pursuant to Rule 17(a)(1)(E) and (G), Fed. R. Civ. P., and A.R.S. § 10-1405(B)(5), following dismissal of earlier litigation in the Northern District of Illinois for lack of personal

jurisdiction.[1] Respondents moved to dismiss and the case was assigned to a magistrate.

The principal state law issue below was the standing of an officer, director, or shareholder to assert claims of a dissolved Arizona corporation in his or her own name, without assignment of the claims or joinder of the corporation, under A.R.S. § 10-1405(B)(5), a provision of Arizona's current corporation statute relating to dissolution. The magistrate disregarded uniformly contrary Arizona Supreme Court and intermediate Arizona appellate authorities to adopt an interpretation of the Arizona statutory provision that has no support in any decided Arizona case. In doing so, she failed to construe the current statute using the rules of construction mandated by this Court and the Arizona Supreme Court. Although the standing of an officer or director or shareholder to sue under prior iterations of Arizona's corporation statute was well established, the issue has never expressly been decided by any court of

[1] As summarized by the magistrate, *see* Pet. App. 15a-16a, the complaint alleges that in 2014, on the cusp of commencing a trustee's sale of property subject to a deed of trust owned by Cortina, Respondents abruptly terminated a 13 year-long attorney-client relationship, and withdrew from their express undertaking to conduct the sale, an engagement they had entered into just two months before. Respondents claimed that even though their representation relating to the deed of trust began in 2001, and notwithstanding a nearly year-long due diligence review they had conducted before undertaking the trustee's sale, they suddenly had discovered that a "relationship" conflict of interest might exist because of the possibility that litigation resulting from their representation in the sale could lead to the development of law adverse to the interests of their other lender clients.

the State of Arizona under the current statute except in a single, unreported, memorandum decision of the Arizona court of appeals that seems to support Petitioner's interpretation.

The magistrate rejected Petitioner's reliance on A.R.S. § 10-1405(B)(5) based on a facially incorrect analysis of both its history and text. She noted that earlier decisions of Arizona's Supreme Court and intermediate appellate courts, all of which clearly supported Petitioner's position, had been decided at a time when corporate property was deemed to transfer to the shareholders immediately upon dissolution. Because defunct Arizona corporations now retain ownership of their property for a period after dissolution, she concluded that the "underlying justification" for the prior judicial holdings was "gone," Pet. App. 24a. She disregarded, as "confusing," Petitioner's demonstration that the holding in the prior cases – that shareholders had standing to assert the corporation's claims and the dissolved corporation was not a necessary party to lawsuits filed after dissolution – had been codified in every subsequent iteration of Arizona's corporation statute. *Id.*

Petitioner filed objections to the magistrate's report and recommendation, combined with a motion requesting that, if Respondents' motion to dismiss was not denied, the district court certify two questions to the Arizona Supreme Court, *see* Pet. App. 60a-61a, both of which had been presented to, and addressed by, the magistrate in her report and recommendation. The first question for which certification was sought was:

> Does A.R.S. § 10-1405(B)(5) continue the common law rule of *Norton v. Steinfeld*, 36 Ariz. 536, 288 P. 3 (1930), as incorporated in previous iterations of the dissolution statute, and allow shareholders, officers, and directors of a dissolved corporation to assert claims belonging to the dissolved corporation in their own name without joining the dissolved corporation?

Id. at 60a. Discussion by the magistrate of that question had spanned several pages of her report and recommendation, *see* Pet. App. 21a-24a, but the district judge refused to consider certification, stating (Pet. App. 12a, n.3):

> The Court acknowledges that Plaintiff also moves for certification to the Arizona Supreme Court. . . . This motion or argument should have been presented to the Magistrate. The Court will not provide Plaintiff a second bite at the apple. . . . There is no explanation as to why Plaintiff could not bring all arguments before the Magistrate. Therefore, the Court will not consider the novel arguments put forth by Plaintiff. . . .

On appeal, the Ninth Circuit sustained the district judge's refusal to consider certification (Pet. App. 4a):

> Brook relies on *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000), to argue that the district court "failed to exercise *any* discretion in deciding whether to consider Brook's motion for certification to the Arizona Supreme Court." In *Howell*, this Court concluded that

"a district court *has discretion*, *but is not required*, to consider evidence presented for the first time in a party's objection to a magistrate judge's recommendation." *Id*. at 621 (emphasis added).

Here, the district court made clear that it was exercising its discretion to not address Brook's new arguments. After acknowledging that Brook moved for certification to the Arizona Supreme Court, the district court indicated that Brook's "novel arguments" "should have been presented to the Magistrate." The district court did not want to "provide [Brook] a second bite at the apple," and noted that Brook gave "no explanation as to why [he] could not bring all arguments before the Magistrate." *See Greenhow v. Sec'y of Health & Hum. Servs.*, 863 F.2d 633, 638 (9th Cir. 1988), *overruled on other grounds*, *United States v. Hardesty*, 977 F.2d 1347 (9th Cir. 1992) ("[T]he Magistrates Act was [not] intended to give litigants an opportunity to run one version of their case past the magistrate, then another past the district court."). As a result, the district court concluded that it would "not consider the novel arguments put forth by Plaintiff." This was not an abuse of discretion.

REASONS FOR GRANTING THE WRIT

I. The Circuits are Irreconcilably Divided Over the Scope of *De Novo* Review Required by 28 U.S.C. § 636(b)(1)(C)

The circuits have long been divided on the scope of a district judge's obligatory *de novo* review under 28 U.S.C. §636(b)(1)(C), and whether it extends to arguments presented, for the first time, in objections to the magistrate's report. The question is important because a magistrate has no authority to make a "final and binding" ruling on a dispositive motion. *United States v. Raddatz*, 447 U.S. 667, 673 (1980). To preserve Article III authority, a district judge must retain final decision-making authority. *Id*. at 681-82. Accordingly, the Act requires that a district judge accept, reject, or modify such findings or recommendations. 28 U.S.C. § 636(b)(1); *see also* Rule 72(b)(3), Fed. R. Civ. P.

All of the circuits that have addressed the issue agree that a district judge *may* receive new evidence, or consider new issues, not presented to the magistrate, but they are irreconcilably split on whether a district court is required to consider new arguments related to an issue that *was* raised with the magistrate. The First, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits hold that a party is not entitled to *de novo* review of issues or arguments that were not raised before the magistrate. *See United States v. Rosado-Cancel*, 917 F.3d 66, 69 (1st Cir. 2019); *Paterson-Leitch Co., Inc. v. Mass. Mun. Wholesale Elec. Co.*, 840 F.2d 985, 990-91 (1st Cir. 1988); *Freeman v. County of Bexar*, 142 F.3d 848, 850-53 (5th Cir. 1998); *Cupit v. Whitley*,

28 F.3d 532, 535 n.5 (5th Cir. 1994), *cert. denied*, 513 U.S. 1163 (1995); *Glidden Co. v. Kinsella*, 386 Fed.Appx. 535, 544 n.2 (6th Cir. 2010); *Murr v. United States*, 200 F.3d 895, 902 n.1 (6th Cir. 2000); *United States v. Howell*, 231 F.3d 615, 621-22 (9th Cir. 2000); *Greenhow v. Sec'y of Health & Hum. Servs.*, 863 F.2d 633, 638 (9th Cir. 1988), *overruled on other grounds by United States v. Hardesty*, 977 F.2d 1347, 1348 (9th Cir. 1992) (en banc); *Marshall v. Chater*, 75 F.3d 1421, 1426 (10th Cir. 1996); *Williams v. McNeil*, 557 F.3d 1287, 1291-92 (11th Cir. 2009). These circuits permit, but do not require, a district court to consider arguments first raised in a party's objections to a magistrate's report.

The Fourth Circuit, on the other hand, distinguishes between "issues" and "arguments." Consideration of a newly raised *issue*, like new *evidence*, is left to the informed discretion of a district judge, but a new *argument* in support of a previously-raised *issue* must be considered as part of the district court's obligation to determine *de novo* any issue to which proper objection is made. *See United States v. George*, 971 F.2d 1113, 1118 (4th Cir. 1992); *Samples v. Ballard*, 860 F.3d 266, 271-75 & n.7 (4th Cir. 2017), *cert. denied*, ___ U.S. ___, 138 S. Ct. 979 (2018). As the Fourth Circuit explained in *George*, "*de novo* review entails consideration of an issue as if it had not been decided previously. It follows, therefore, that the party entitled to *de novo* review must be permitted to raise before the court any argument as to that issue that it could have raised before the magistrate." *George, supra*, 971 F.2d at 1118. The Fourth Circuit further noted that "any other conclusion would render the district court's ultimate

decision at least vulnerable to constitutional challenge[,]" citing *Raddatz, supra*, 447 U.S. at 683, where the Court concluded that delegation to a magistrate does not violate Article III, "so long as the ultimate decision is made by the district court." *See George*, *supra*, 971 F.2d at 1118:

> [A]s part of its obligation to determine *de novo* any issue to which proper objection is made, a district court is required to consider all arguments directed to that issue, regardless of whether they were raised before the magistrate. By definition, *de novo* review entails consideration of an issue as if it had not been decided previously. It follows, therefore, that the party entitled to *de novo* review must be permitted to raise before the court any argument as to that issue that it could have raised before the magistrate. The district court cannot artificially limit the scope of its review by resort to ordinary prudential rules, such as waiver, provided that proper objection to the magistrate's proposed finding or conclusion has been made and the appellant's right to *de novo* review by the district court thereby established. Not only is this so as a matter of statutory construction; any other conclusion would render the district court's ultimate decision at least vulnerable to constitutional challenge. *See United States v. Raddatz*, 447 U.S. 667, 683 . . . ; *cf. United States v. Shami*, 754 F.2d 670, 672 (6th Cir. 1985) ("*[D]e novo* review of a magistrate's report is both statutorily and constitutionally required."). . . .

The Ninth Circuit is among the six circuits that disagree with the Fourth Circuit's position, *see McNeil*, *supra*, 557 F.3d at 1291-92 (collecting cases from circuits that reject *George*),[2] but here, it took the matter a step further. The district judge refused to consider whether to certify interpretation of Arizona's corporate dissolution statute to the Arizona Supreme Court, solely because the "motion or argument" was not presented to the magistrate. The Ninth Circuit affirmed, treating the motion for certification as though it presented a "novel argument," even though the issue of interpretation of the statute, which was the very subject of the motion to certify, had, in fact, been presented to the magistrate. The court of appeals, like the district

---

[2] The other circuits do not appear to have addressed the issue. The Second Circuit declined to address it in *Suk Jonn Ryu v. Hope Bancorp, Inc.*, 18-2954 (L), p.3, n.2 (2d Cir. Aug. 30, 2019) ("We have not yet decided whether [failure to raise an argument until objections to a magistrate's report and recommendation] results in forfeiture or waiver, and we decline to decide the issue now because we conclude that Ryu's arguments fail on the merits."). The Third, Seventh, Eighth, D.C. and Federal Circuits also seem not to have addressed it, though district courts in some or all of those circuits have done so. *See*, *e.g.*, *Mawson v. Pittston City Police Dep't*, Civil Action No. 3:16-400 (M.D. Pa. Oct. 15, 2020) ("[I]t does not appear that the Third Circuit has addressed the issue. . . . [But here], . . . Defendants have not submitted . . . a new legal theory but, instead, are merely providing additional statutorily [sic] authority for an argument they made all along. . . ."); *Hackett v. Standard Insurance Company*, CIV. 06-5040-JLV, p.9 (D.S.D. Apr. 14, 2010) ("(While the Eighth Circuit Court of Appeals does not appear to have addressed this particular issue, the court aligns itself with *United States v. Howell*, 231 F.3d 615 (9th Cir. 2000).").

judge, criticized Petitioner for not seeking certification from the magistrate, ignoring that she could not have granted it, and that the need for certification only became apparent when she adopted an interpretation of the statute that is completely unsupported by any Arizona decision; is contrary to a seminal Arizona Supreme Court decision based on the common law, as well as another Arizona Supreme Court decision, and an intermediate appellate decision, under an early iteration of the statute; is contrary to an intermediate Arizona appellate decision, and an exhaustive opinion by the U.S. Bankruptcy Court for the District of Arizona, interpreting the very 1976 statutory revision upon which she incorrectly relied in concluding that all of the earlier decisions were "outdated;" and was made without any effort to construe the plain meaning of the current statute's language using the rules of construction mandated by both this Court and the Arizona Supreme Court.

II. The Decision Below Conflicts with this Court's Policy Favoring Certification to Determine the Meaning of State Statutes

This Court has supported the use of certification by the federal courts ever since its decision in *Clay v. Sun Ins. Office*, 363 U.S. 207, 212 n.3 (1960). This Court itself employs certification to determine the meaning of state statutes, and does so even where the lower federal courts have concurred in their statutory construction. *See*, *e.g.*, *Elkins v. Moreno*, 435 U.S. 647, 662 n.16 (1978) (declining deference to construction of state law made by a district court and court of

appeals); *Virginia v. Am. Booksellers Ass'n*, 484 U.S. 383, 395-97 (1988) (certifying construction of state statute notwithstanding concurrence of both lower federal courts in challenged interpretation). It employs certification at almost any stage of a case. *Compare Lehman Brothers v. Schein*, 416 U.S. 386, 393-95 (1974) (remanding for consideration of a request for certification first made in a petition for rehearing in the court of appeals) *with Minn. Voters Alliance v. Mansky, supra*, 585 U.S. ___, 138 S. Ct. 1876, 1892 n.7 (2018) (denying a request for certification that came "very late in the day," in merits briefing in this Court, following seven years of litigation). So does the Ninth Circuit. *See Albano v. Shea Homes Limited Partnership*, 634 F.3d 524, 540 (9th Cir. 2011); *Torres v. Goodyear Tire & Rubber Co.*, 867 F.2d 1234, 1239 (9th Cir. 1989).

This Court has strongly encouraged the use of certification by the lower federal courts, *see*, *e.g.*, *Fiore v. White*, 528 U.S. 23 (1999); *Zant v. Stephens*, 456 U.S. 410, 416-17 (1982), and has criticized such courts when they have failed to employ it. *See*, *e.g.*, *Bellotti v. Baird*, 428 U.S. 132, 150-53 (1976) (district court should have certified questions). In her concurring opinion in *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985), former Justice O'Connor noted that "[s]peculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous" where, as here, "the state courts stand willing to address questions of state law on certification from a federal court." And in her unanimous opinion for the Court in *Arizonans for Official English v. Arizona*, 520 U.S. 43, 62, 76-79 (1997), the late Justice Ginsburg sharply criticized both the

district court and the Ninth Circuit for declining certification simply because they thought their interpretation of Arizona's constitution was correct.

Following on the heels of *Arizonans for Official English*, the Ninth Circuit, in *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist.*, 294 F.3d 1085, 1086 (9th Cir. 2002), held that even though it believed that the Washington state law at issue in the case was clear, "no published decision of either the Washington Supreme Court or the Washington appellate courts has yet construed [the involved] statute," and, therefore, "we have an obligation to consider whether novel state-law questions should be certified." *See also Kremen v. Cohen*, 325 F.3d 1035, 1038 (9th Cir. 2003). But here, the district court refused to even consider certification solely because it deemed the request for certification to be a "novel" argument and the Ninth Circuit held that refusal was not an abuse of discretion.

But a motion for certification is not an argument. It simply asks that the state-law arguments be addressed by the most authoritative source of guidance on them – the state's supreme court. Treating a motion for certification as if it, itself, was an "argument" is simply not a tenable proposition. As Justice Sotomayor has noted, "certification is not an argument subject to forfeiture by the parties. It is a tool of the federal courts that serves to avoid 'friction-generating error' where a federal court attempts to construe a statute 'not yet reviewed by the State's highest court (citation omitted).'" *Minn. Voters Alliance, supra*, 585 U.S. ___, 138 S. Ct. at 1895 (Sotomayor, J., dissenting). Moreover, treating a certification motion as if it were an

"argument" that is somehow distinct from the "issue" it seeks to have certified raises a potential constitutional issue – the same constitutional issue that arises whenever a district judge refuses to consider a new argument on *de novo* review even though it bears directly on an issue that was presented to the magistrate below. That is the very essence of the extant split amongst the circuits.

III. The Importance of the Issue Presented is Underscored by the Ninth Circuit's Inexplicable Failure to Correctly Ascertain and Apply State Law

Interpretation of the Arizona statute by the magistrate was uninformed by any published decision of Arizona's Supreme Court or its appellate courts construing it. On analysis, it was demonstrably wrong; so wrong, in fact, that it highlights why the refusal to certify was an abuse of discretion. The magistrate concluded that a long-standing Arizona common law and statutory rule – that officers, directors, and shareholders of a defunct corporation have standing to sue on the corporation's claims in their own name as real parties in interest – was no longer valid, based on a plain misunderstanding of a 1976 revision to Arizona's corporation statute. In affirming, the Ninth Circuit shrugged off (1) over 90 years of Arizona common and statutory law, including two decisions of the Arizona Supreme Court and an intermediate Arizona appellate decision, all of which it disregarded as "outdated" because of the 1976 statutory revision; (2) a

later intermediate Arizona appellate decision, as well as an exhaustive analysis of the 1976 revision by the former Chief Bankruptcy Judge for the District of Arizona, both of which concluded that the common law rule had, in fact, been codified in the 1976 statute; (3) the legislative history of a later statutory revision in 1996 that carried the by-then codified rule forward from the 1976 statute; (4) the only (albeit unreported) Arizona appellate decision to specifically address the current statute; and (5) the plain language of the current statute The court of appeals thereby flouted its obligation, as a federal court exercising derivative diversity jurisdiction, to ascertain and apply the laws of a state, as determined by the courts of that state, rather than as construed – or, in this case, completely misconstrued – by a federal court.

The magistrate's misinterpretation might not have survived beyond the district court level had the district court not treated "arguments" as if they were "issues;" had it not conflated "an argument" and "a motion for certification;" and had it not employed the term "novel arguments" as if it were a talisman that allowed it avoid the *de novo* review it was supposed to provide.

A. Pre-1976 Arizona Law Indisputably Allowed a Shareholder to Sue on a Defunct Arizona Corporation's Claims

From 1930 to 1976, Arizona law was clear and unequivocal on the right of a shareholder to sue on the claims of a dissolved corporation. In *Norton v. Steinfeld*,

36 Ariz. 536, 545-46, 288 P. 3 (1930), the Arizona Supreme Court decided that shareholders could substitute as plaintiffs for a dissolved corporation, as Brook did for Cortina, holding that shareholders are "proper parties" to bring a suit and that "an amendment substituting the real parties in interest, the stockholders, as plaintiffs may be made." The decision was driven, in part, by the fact that a dissolved corporation did not, at the time, have standing to sue in its own name, and, in part, by the fact that, at the time, a dissolved corporation's property passed directly to its shareholders upon dissolution.

Norton was decided at common law. A statutory right to bring suit by a dissolved corporation in its own name "first appeared in the Arizona Code of 1939." *Thomas v. Harper*, 14 Ariz. App. 140, 141, 481 P.2d 510, 511 (Ariz. App. 1971). The 1939 statute, later numbered A.R.S. § 10-365(B), stated: "A dissolved corporation shall continue in existence for the purpose of filing a civil action. . . ." In 1947, the statute was further amended to allow suit against a dissolved corporation. The following year, in *Bates v. Mitchell*, 67 Ariz. 151, 155, 192 P.2d 720, 722-23 (1948), the Arizona Supreme Court addressed another case where a shareholder had sued on behalf of a defunct corporation. The Court noted the "general rule" at common law that dissolved corporations could not sue or be sued but held that, in Arizona, the general rule "has now been definitely abrogated by the addition of Section 53-309, Chapter 109, Session Laws 1947, Regular Session, permitting suits *by and against* dissolved corporations." (Emphasis

supplied). *Bates* makes clear that even though a dissolved Arizona corporation could, by 1947, sue and be sued in its own name, the common law right of shareholders to sue had not been abrogated.

The *Thomas* case, cited above, was decided in 1971 under a 1954 version of the same statute. Shareholders in a dissolved Arizona corporation sued to collect on a note owned by the corporation. The appellant, like T&B, claimed the corporation was a necessary or indispensable party in the absence of an assignment by the corporation to the shareholders and that the shareholders were improper parties. The Court of Appeals rejected the argument – *i.e.*, the very same argument that Respondents advanced below – noting that "[p]rior to [the 1939 enactment of the predecessor to A.R.S. § 10-365(B)] it was held that the stockholders of a defunct corporation were entitled to bring an action which previously belonged to the corporation[,]" citing *Norton*. The Court then held that "[a] defunct corporation is a proper party under A.R.S. § 10-365, subsec. B, but is not a necessary or indispensable party where there exist no debts on the part of the corporation." *Id.* *Thomas* thus confirmed that the common law rule had survived the passage of statutes allowing a dissolved corporation to sue and be sued in its own name.

B. The 1976 Revision Did Not Abrogate the Standing of a Shareholder to Sue

Norton, *Bates*, and *Thomas* reflect the state of the law in Arizona when the state's corporation statute

was comprehensively revised in 1975. *See Neis v. Heinsohn/Phoenix, Inc.*, 129 Ariz. 96, 99 n.3, 628 P.2d 979, 982 (Ct. App. 1981); Cocanower and Hay, The New Arizona Business Corporation Act, 17 Ariz. L. R. 557 (1975). Under the revised statutory scheme, which became effective in 1976, corporate property no longer passed immediately to shareholders upon dissolution. Both the magistrate and the Ninth Circuit accepted an argument advanced by Respondents that, after 1976, there was no longer any rationale for allowing shareholders to sue on a defunct corporation's claims, and concluded that *Norton* and *Thomas* were no longer good law. *See* Pet. App. 23a-24a and 6a-7a.

But the common law rule had not gone away. Instead, it had been codified in the 1976 statute. Thus, § 10-105 of the statute provided that any action by a dissolved corporation "*may* be prosecuted . . . in its corporate name[,]" but that "[t]he shareholders, directors and officers *shall* have power to take such . . . action . . . to protect such . . . claim." (Emphasis supplied). The Ninth Circuit made no effort to construe this provision, or reconcile it with its view that the common law rule had disappeared, and no such interpretation should have been necessary because the Arizona Court of Appeals had already provided it in *Goldfield Mines, Inc. v. Hand*, 147 Ariz. 498, 503, 711 P.2d 637, 642 (Ariz. App. 1985), where it noted that § 10-105 of the 1976 statute " . . . gave the directors and officers . . . the power to make . . . filings [on behalf of the company]. . . ." But the Ninth Circuit ignored *Goldfield*, and completely misconstrued the analysis in *North v. City of Bullhead* (*In re North*), No. 2:03-bk-15266-RJH (D. Ariz. Bkr.,

March 28, 2007), reproduced at Pet. App. 40a-59a, which contains an extensive examination of the history of the Arizona statutory scheme by Judge Haines, who later served as Chief Bankruptcy Judge for the District of Arizona. Judge Haines explained that, even after 1976, *Thomas* remained valid authority that shareholders could sue on a dissolved corporation's claims without joining the corporation. In fact, he concluded that was *Thomas*' "direct holding," Pet. App. 50a, that "[t]he holding in *Thomas* is entirely in accord with the theme of the 1976 statutes . . . ," *id.*, and that the *Thomas* holding was "adopted in A.R.S. § 10-105, which became effective in 1976." (Pet. App. 51a-52a):

> The Court concludes that, at least after 1976, *Thomas v. Harper* does not stand for the proposition that the assets of the recently dissolved corporation are automatically transferred to the shareholders. Instead, *Thomas* merely stands for the proposition that the shareholders, by virtue of their ownership in the corporation, will be the eventual owners of any remaining corporate assets after the corporation is liquidated and the corporate liabilities are paid. *Thomas also stood for the proposition that the shareholders, under the 1954 statutes, could sue on a promissory note of the dissolved corporation and it was not an indispensable party. This idea was later adopted in A.R.S. § 10-105, which became effective in 1976*. (Emphasis supplied).

Indeed, as Judge Haines noted, "[t]his specific grant of power to the shareholders in the 1976 statutes resolves

the only issue decided in *Thomas*." Pet. App. 49a-50a.[3] In other words, far from "repealing" *Norton* and *Thomas*, the 1976 act codified their holding that shareholders may sue on the claims of a defunct Arizona corporation in their own name, without joining the corporation.

Notwithstanding the foregoing authorities, the magistrate and Ninth Circuit accepted Respondents' argument that, because the assets of a dissolved corporation no longer passed automatically to the shareholders, "the underlying justification for the *Norton* and *Thomas* holdings is gone[,]" Pet. App. 24a, 6a-7a, and therefore the rule must be gone too. As is apparent from the foregoing, that reasoning was based on a faulty predicate, because the original motivation for the common law rule was that, in the absence of a statute, a dissolved corporation lacked existence and could not sue in its own name.

But even if the sole underlying justification for the common law rule had been the immediate devolution of a dissolved corporation's property to its shareholders, the Ninth Circuit's reasoning still would have been fallacious. The fact that the original reason for a rule of law might no longer pertain cannot alone

---

[3] Petitioner has not included the opinions of the district court or court of appeals affirming Judge Haines' opinion in his Appendix because, except for a comment by the Ninth Circuit that Judge Haines' statutory review was "thorough," they focus exclusively on whether the assets of the dissolved corporation were properly excluded from the shareholder's bankruptcy estate rather than whether the dissolved corporation was an indispensable party.

give rise to an implied repeal. Other reasons may have led the legislature to give continued life to provisions in what the Ninth Circuit called "now outdated Arizona statutes," Pet. App. 6a, and to holdings in what the magistrate called "case law that applies outdated statutory law." Pet. App. 23a. Continuing to allow shareholders to sue provides for the situation where a dissolved corporation does not have the funds to pursue its claims and the shareholders are reluctant to infuse additional capital that might be subject to creditor claims. Allowing "any" shareholder to sue means that consensus is not necessary, thus providing for the situation where one shareholder sees merit in pursuing the claims while another does not, or where a deadlock might prevent a defunct company from timely pursuing its claims. Including "officers" and "directors," who ordinarily do not have a direct economic claim on a corporation's assets, creates the possibility that they might act on behalf of minority shareholders whose interests, standing alone, might be inadequate to justify the expense.

Be that as it may, whether it made sense to the magistrate and Ninth Circuit or not, it is plain that the Arizona legislature did not intend to abrogate the common law rule and, just as the common law standing of shareholders to sue had survived the enactment of a statutory right for the corporation to sue in its own name in 1939, it survived the enactment of procedures that delayed the passage of title to corporate assets to shareholders in 1976. In each case, the standing of shareholders to sue on the corporation's claims in their

own name, without joining the corporation, had been preserved.

C. The 1996 Revision Preserved the Standing of a Shareholder to Sue

The last major revision of Arizona's corporation law occurred in 1994 and became effective in 1996. That is the statute that applied in the case below. The revision was based on the 1984 Revised Model Business Corporation Act ("MBCA"). Thirty-two of the thirty-four states that adopted the MBCA adopted this provision: "Dissolution of a corporation does not: . . . (f) Prevent commencement of a proceeding by . . . the corporation in its corporate name[.]" MBCA, Chapter 14, Dissolution, Section 14.05, Effect of Dissolution, American Bar Foundation. Arizona was one of only two that did not. It added two phrases not found in the MBCA:

> B. Dissolution of a corporation does not: . . .
> 5. Prevent commencement of a proceeding by . . . the corporation in its corporate name *or any officers, directors or shareholders or affect applicable statutes of limitations*.

(Emphasis supplied). The Arizona version was drafted by the Corporate Code Revision Committee of the State Bar of Arizona's Business Law Section. The Committee's comments state:

> While the Model Business Corporation Act promulgated by the American Bar Association Business Law Section in 1984 served as the basis for the new Arizona statute, *the Arizona*

> *Constitution and other considerations required the Arizona Act vary from the Model Act in certain respects*.

Arizona Business Corporation Act, Drafting Committee Comments, Final Version, p.6 (April 17, 1995) (Emphasis supplied). *See* Ariz. Const., Article XIV, § 13.

Thus, the language of the MBCA was intentionally altered to make the new statute consistent with extant Arizona law – including *Norton, Bates, and Thomas*. Adding the phrase "or any officers, directors or shareholders" did so by again incorporating the common law rule, previously codified in former § 10-105, in new § 10-1405(B)(5), which provides:

> Dissolution of a corporation does not . . . [p]revent commencement of a proceeding by . . . the corporation in its corporate name or any officers, directors or shareholders. . . .

No reported Arizona appellate decision specifically addresses the new provision but in *Coleman v. New York Merchs. Protective Co*., No. 1-CACV 09-0411, 2010 WL 2602051 (Ariz. Ct. App. June 29, 2010), an unreported memorandum decision reproduced at Pet. App. 29a-39a, the Arizona Court of Appeals seemingly confirmed that *Thomas'* holding remains valid. In *Coleman*, the sole officer and director of a defunct Arizona corporation signed the contract at issue in that case "as director of Secure [Opportunities Group, Inc.]," just as Brook signed for Cortina Financial, Inc. as its only officer and director; Merchants "entered into an agreement with Secure . . . ," just as T&B entered into an

agreement with Cortina; Secure "was in the process of dissolving at the time [it] entered into the contract with Merchants[,]" whereas here, Cortina had already dissolved some three years before Brook first engaged T&B on its behalf; Secure "was defunct when Merchants breached the contract with Coleman and when Coleman filed his complaint[,]" as was Cortina here. On these facts, the Arizona court of appeals held (Pet. App. 38a):

> There was sufficient evidence for the trier of fact to conclude that Coleman was a real party in interest under *Rule 17(a)*. *See A.R.S. § 10-1405(B)(5)* (2004) ("Dissolution of a corporation does not . . . [p]revent commencement of a proceeding by or against the corporation in its corporate name or any officers, directors or shareholders . . ."); *Thomas v. Harper, 14 Ariz. App. 140, 141, 481 P.2d 510, 511 (1971)* (holding that under former Arizona statute giving dissolved corporation right to sue, plaintiffs who were stockholders of a defunct corporation could bring an action to collect on a promissory note of the corporation because on dissolution, legal title to property of the corporation passes to stockholders). The trial court did not err in denying Merchants' request to dismiss the action. . . .[4]

[4] In their answering brief below, Respondents claimed, and the court of appeals agreed, that *Coleman* was non-citable because it was issued before January 1, 2015. *See* Rule 111(c)(1)(C), Ariz. Sup. Ct. Rules. But the magistrate considered *Coleman*, *see* Pet. App. 23a, and her consideration of it was not objected to by Respondents in the district court. To the contrary,

The Ninth Circuit sought to dismiss *Coleman* by characterizing it as an *alter ego* case, Pet. App. 6a, but its theory cannot explain why the Arizona court of appeals would have cited, and relied upon, § 10-1405(B)(5) and *Thomas* if that were true. Surely, the mere fact that Coleman was Secure's sole employee and thus personally had to do the work is no different than the fact that Brook was Cortina's sole officer and personally had to perform everything required of Cortina under its contract with Respondents.

Section 10-1405(B)(5) thus reflects Arizona law as it was after 1939, when Arizona's statutory law allowed a dissolved corporation to sue and its common law allowed shareholders to do so, and after 1976, when its revised statutory law provided for both and, in this, the statute became coterminous with the common law. Compare *City of Phoenix v. Glenayre Elecs., Inc.*, 242 Ariz. 139, 145 ¶ 24, 393 P.3d 919, 925 (2017).

Moreover, an Arizona statute is "not deemed to repeal the common law by implication. . . ." *Tucson Gas & Electric Co. v. Schantz*, 5 Ariz. App. 511, 515, 428 P.2d 686 (App. 1967). Absent manifest legislative intent, Arizona statutes are construed to be consistent with

---

they sought to rely upon it. In these circumstances, any objection they may have had to its citation should be deemed waived. *See Flaten v. Secretary of Health Human Servs.*, 44 F.3d 1453, 1458 (9th Cir. 1995) ("Because the Secretary did not object to the magistrate judge's recommendation on the specific grounds that the judge had accepted a vacated finding as undisputed fact, . . . we deem that the Secretary has waived that argument for purposes of this appeal.").

the common law. *United Bank v. Mesa N. O. Nelson Co.*, 121 Ariz. 438, 442, 590 P.2d 1384 (1979) ("Statutes should be construed consistent with the common law . . . and where the Legislature has not clearly manifested its intent to repeal the common law rule, it will not be abrogated."). And where, as here, the legislature took concrete and conspicuous steps to incorporate the common law, there is no basis for a suggestion that it intended to repeal it.

D. The Plain Language of § 10-1405(B)(5) Should have been Dispositive

More fundamentally, however, the Ninth Circuit's decision reflects a woeful failure to follow rudimentary rules that apply in construing a statute. This Court has observed that the "starting point" for interpreting a statute is "the language of the statute itself." *Gwaltney of Smithfield, Ltd. v. Chesapeake Bay Found., Inc.*, 484 U.S. 49, 56 (1987) (Citation omitted). So too, the Arizona Supreme Court has opined that, under " 'fundamental principles of statutory construction, . . . the best and most reliable index of a statute's meaning is its language and, when the language is clear and unequivocal, it is determinative of the statute's construction.' " *State v. Aguilar*, 209 Ariz. 40, 48 ¶26, 97 P.3d 865, 873 (2004), quoting *Janson v. Christensen*, 167 Ariz. 470, 471, 808 P.2d 1222, 1223 (1991); *see also State v. Sepahi*, 206 Ariz. 321, 324 ¶16, 78 P.3d 732, 735 (2003); *State v. Mangum*, 214 Ariz. 165, 169 ¶12, 150 P.3d 252, 256 (App. 2007).

Here, the statutory language could, in the abstract, lend itself to two possible constructions and both were articulated by the parties below. On the one hand, the provision could be read: "Dissolution of a corporation does not . . . [p]revent commencement of a proceeding by . . . the corporation in its corporate name or [**commencement of a proceeding by**] any officers, directors or shareholders. That was Respondents' reading. On the other hand, it could be read: Dissolution of a corporation does not . . . [p]revent commencement of a proceeding by . . . the corporation in its corporate name or [**in the name of**] any officers, directors or shareholders. . . ." That was Petitioner's reading. But two rules of grammar – the rule of the last antecedent and the rule that "or" is generally treated as a disjunctive – dictate that only Petitioner's construction can be correct.

Under the rule of the last antecedent, a phrase ordinarily is deemed to modify only the noun or phrase it immediately follows. Indeed, in *Barnhart v. Thomas*, 540 U.S. 20, 26-27 (2003) (Scalia, J.), this Court reversed the Court of Appeals for the Third Circuit because its statutory interpretation failed to apply this principle, stating that under "the grammatical 'rule of the last antecedent,' . . . a . . . clause or phrase . . . should ordinarily be read as modifying only the noun or phrase that it immediately follows. . . ." (Citation omitted). Similarly, in *Lockhart v. United States*, 577 U.S. ___, 136 S. Ct. 958, 963 (2016) (Sotomayor, J.), this Court reversed the Second Circuit Court of Appeals for the same reason. At issue was a federal criminal

statute imposing a mandatory minimum sentence on a person convicted of possession of child pornography, if that person had a prior conviction "under the laws of any State relating to aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward." *Id*. at 962. The question was whether the phrase, "involving a minor or ward," applied to all three predicate crimes or only the last one. *Id*. Invoking the last antecedent rule, the Court concluded that the phrase modified "only the phrase that it immediately follows," *i.e*., " 'abusive sexual conduct.' " *Id*. at 963. The last antecedent rule is followed by Arizona's Supreme Court as a tool of statutory interpretation and thus informs the reading of any Arizona statute. *See Phoenix Control Sys., Inc. v. Ins. Co. of N. Am*., 165 Ariz. 31, 34, 796 P.2d 463, 466 (1990) (en banc).

Furthermore, in normal English usage, "or" is a disjunctive, indicating a choice between "a" or "b." *Chavez v. Department of Health and Human Services*, 103 F.3d 849, 850 n.1 (9th Cir. 1996). In *Chavez*, called upon to address the interpretation of the word "or" in a federal regulation, the Ninth Circuit acknowledged that the word "or" is usually deemed "[a] 'disjunctive' particle used to express an alternative or to give a choice of one among two or more things[,]" citing Black's Law Dictionary 1990 (6th ed. 1990), but concluded that, in the relevant context, it was, in fact, a conjunctive. Here, "or" cannot be a conjunctive because that would mean that suit by a defunct corporation requires the joinder of any officers, directors, and shareholders, and there is no indication that such an

unusual and onerous joinder requirement was intended. Moreover, in Arizona jurisprudence, "[t]he word 'or' generally means '[a] disjunctive particle used to express an alternative or to give a choice of one among two or more things.' " *State v. Bowsher*, 225 Ariz. 586, 587 ¶7, 242 P.3d 1055, 1057 (Ariz. 2010) (Citations omitted).

Applying these two established rules of grammar, use of the word "or" in § 10-1405(B)(5) indicates that "by the corporation [in its corporate name] **or** any officers, directors **or** shareholders" is meant to give "a choice of one among two or more things," and the phrase "or any officers, directors or shareholders" modifies the phrase it immediately follows – *i.e.*, "by the corporation in its corporate name," not the more remote antecedent phrase, "commencement of a proceeding."

Because the statutory language is thus clear and unequivocal, when analyzed using standard tools of construction, there should have been no need for the court of appeals to consider any other factor. *Zamora v. Reinstein*, 185 Ariz. 272, 275, 915 P.2d 1227, 1230 (1996). But, if it still harbored any doubt, it should have certified the question, instead of speculating about the statute's proper interpretation.

CONCLUSION

This case presents an ideal vehicle for deciding the important question presented in this petition. The district court and Ninth Circuit's abuse of discretion in refusing to consider certification because it was not first sought from the magistrate is stark, and the resulting misconstruction of the Arizona statute in question is plain. Review is thus warranted.

For the foregoing reasons, this Court should grant the petition for writ of certiorari and address the issue presented. Alternatively, it should issue a GVR order requiring that the Ninth Circuit certify the issue to the Arizona Supreme Court.

Respectfully submitted,

GERALD D.W. NORTH
Counsel of Record
125 S. Wacker Dr., Suite 1000
Chicago, Illinois 60606
Phone: (831) 224-0007
E-mail: northlaw2@yahoo.com

DENNIS L. HALL
DENNIS L. HALL, ATTORNEY, PLLC
3033 North Central, Suite 810
Phoenix, Arizona 85012
Phone: (480) 596-4045
E-mail: dennis@dlhall.net

Counsel for Petitioner

Dated: April 19, 2021