No. 19-306

In The
Supreme Court of the United States

CUSHMAN & WAKEFIELD, INC.,

Petitioner,

v.

YURY RINSKY,

Respondent.

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

RESPONDENT'S BRIEF IN OPPOSITION

JOHN W. DENNEHY
DENNEHY LAW
127 Main Street, Suite 1
Nashua, NH 03060
(603) 943-7633
jdennehy@dennehylaw.com

MARK D. SZAL
Counsel of Record
SZAL LAW GROUP LLC
6 Liberty Square, #330
Boston, MA 02109
(617) 830-2494
mark@szallawgroup.com

Counsel for Respondent

September 26, 2019

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

QUESTION PRESENTED

Whether the United States Court of Appeals for the First Circuit abused its discretion by not certifying questions of New York state law, *sua sponte*, to the New York Court of Appeals, where the First Circuit's opinion is consistent with established case law and the Petitioner merely seeks to dispute facts that it lost at trial.

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INTRODUCTION

This matter involves a jury verdict in an age discrimination lawsuit tried under the law of New York City. Respondent Yury Rinsky initially filed suit in state court, with Petitioner Cushman & Wakefield, Inc. later removing it to federal court and invoking diversity subject matter jurisdiction. Through trial and appeal, Petitioner never before argued for certification of any state law questions, much less that the longstanding discretionary standard of federal courts to certify questions required this Court's attention. Nonetheless, displeased with the jury's verdict and its affirmance on appeal, Petitioner is essentially asking this Court to review for abuse of discretion the First Circuit's decision not to certify questions to the state court.

It is clear that Petitioner has advanced no compelling reasons for this Court to grant review. The discretion of the lower courts to certify questions to state courts is well settled. As Petitioner concedes, no circuit split exists. Moreover, state law generally governs certification. Importantly in this case, acceptance of a certified question by the New York Court of Appeals is discretionary. Accordingly, even if the court below had certified the questions now identified by Petitioner, it is unlikely they would have been accepted, particularly where this matter was heavily and uniquely fact based, such that no consequential precedent would have been derived as a result of certification. Additionally, the state courts had not been "silent or split" on those questions. Simply, the case at bar did not involve a unique question of law. It is also significant that in deciding questions based on materials available to them,

including analogous case law from New York, the lower courts arrived at the correct decision in each instance Petitioner takes issue with.

Petitioner chose federal jurisdiction, as Respondent initially filed in state court. This should be relevant in the analysis, particularly where Petitioner has attempted to forum shop through a choice of law approach throughout this matter in a quest to foreclose any remedy for Respondent. Petitioner's certification argument is also very late, being raised for the first time with this Court.

Petitioner requested New York law, but now alleges impact in Massachusetts. It never sought a special verdict question on impact. A fact-based issue, the underlying courts found ample facts to support impact in New York. Their analysis is consistent with New York law. Hence, certification was not necessary.

Petitioner places significant reliance on a scholarly proposal to adopt a rule limiting the discretion of federal courts to certify state law questions. Notably, this proposal highlights that this should be done, if at all, through the Rules Enabling Act and this Court's attendant rulemaking power, not through a writ of certiorari.

Petitioner concedes that no circuit split exists, nor is one likely to develop. No compelling reasons for granting a writ of certiorari have been articulated.

The petition should be denied.

STATEMENT

A. FACTUAL BACKGROUND

Yury Rinsky ("Respondent") began working for Cushman & Wakefield, Inc. ("Petitioner") in 1988. See App. at 2a. Respondent's area of expertise was the AS/400 computer system. In 2015, Petitioner started to phase out the AS/400 system. Beginning in 2012, Petitioner told Respondent to work remotely because of a space issue in the New York City office. Between 2012 and 2015, Respondent typically worked remotely three or four days per week, spending one or two days per week in the New York City office. Petitioner did not restrict where Respondent performed remote work, and he reported to the New York City office at all times.

Respondent, who was 63 years old at the time of his termination, planned to retire when he was 66 or 67. He and his wife purchased an investment property in the Boston area in 2014, intending to fix it up and rent it until Respondent's retirement. Respondent requested approval from Petitioner for a transfer to Boston at the end of March 2015 after learning transferring was a possibility. Respondent asked his manager, Colin Reid ("Reid"), but was told that Reid was busy and unable to talk about the request at that time. Respondent spoke with Reid again a few days after receiving an offer on his house. He again asked for approval to transfer to Boston. Reid told him that he approved, especially given the fact that Respondent was already working remotely about half of the time, but that Reid also needed to talk to his manager,

Andrew Hamilton ("Hamilton"). Reid did not explain that any other process or approvals were necessary.

A few days later, Respondent followed up with Reid; he was told that Reid had not spoken with Hamilton yet because everyone was busy. About four days later, Respondent again spoke with Reid, who told him that Hamilton had approved the transfer. Respondent was told that Global CIO Craig Cuyar ("Cuyar") would call to obtain office space for him in Boston. At this point, Respondent understood that his transfer request was approved.

Respondent continued to work business as usual in New York City after learning of the approval of his transfer. Upon learning of the closing date for the sale of his house, Respondent emailed Reid on Sunday, May 17th, informing him that he would be moving to Boston on May 27th. Reid responded, "OK, we will talk on Tuesday." Respondent met with Reid on Tuesday; they discussed logistics concerning the transfer. On May 22nd, Respondent's last day of work in the New York City office, Reid met with Respondent to go over his list of tasks for June. Respondent then made the rounds, saying goodbyes to co-workers before leaving. Respondent closed on the sale of his house on May 25th and moved to the Boston area two days later. During the period between Respondent's May 17th email and his departure for Boston on May 27th, no one ever told Respondent that his transfer was not approved or that he risked termination by moving to Boston.

Even before Respondent left New York City, however, Petitioner was engineering Respondent's termination. Even before Respondent's May 17th email, Hamilton was discussing terminating Respondent. The same day Reid met with Respondent to discuss the logistics of his transfer, he was meeting with Hamilton to discuss terminating Respondent. The next day, Reid solicited Edgardo Felix ("Felix") to replace Respondent. On Respondent's last day in the New York City office, Reid and Hamilton set up a meeting for the following week to discuss the logistics of Respondent's termination. That meeting ultimately resulted in the formulation of a plan on how Petitioner would terminate Respondent.

Unbeknownst to Respondent, on the day he was leaving the New York City office for Boston, Petitioner was putting together a specific plan to (1) replace Respondent with Felix; (2) begin knowledge transfer between Respondent and Felix; (3) process Respondent's transfer and retain him for about nine weeks to cover important work; and (4) then terminate him while "mitigating litigation risks."

Upon arriving in the Boston area and obtaining Internet access, Respondent emailed Reid a day earlier than expected and began to work remotely. Shortly thereafter, an employee of Petitioner emailed Respondent to ask if he still needed his desktop computer in New York City. Copying Reid on the email, Respondent responded saying he would need it when he obtained space in the Boston office in a couple of weeks. Reid

replied to all, copying Hamilton, stating that Respondent "might be getting new equipment in Boston."

During June, Respondent had daily interactions with Reid by email and phone, which were "business as usual." During this time, Respondent worked fourteen-hour days, six days per week. Respondent was invited to participate in a conference call with Reid and Hamilton on June 22nd. During the call, Hamilton angrily told Respondent that he needed to report to New York City the next day, and work in the New York City office five days per week; if he did not, he could either resign or he would be terminated. Respondent was later sent an email with the text of a resignation letter; Respondent refused to resign. After a period of review by Petitioner, Respondent was terminated per a letter from Reid emailed to him on June 14th, which contained numerous false statements.

All of the decision makers concerning Respondent's employment were in there 40s, significantly younger than Respondent. Neither Hamilton, a current employee of Petitioner, nor Cuyar, a former employee of Petitioner working in New York City, were called to testify at trial. Respondent's replacement, Felix, was approximately 48 years old at the time of Respondent's termination.

Evidence was also introduced at trial that during the relevant period, another younger employee (Jay Leiser) had sought a transfer to Florida because his wife was starting a dental practice there. Cuyar stated in an email that he wanted to handle the transfer

requests differently. With Leiser, he wanted to address his compensation because Leiser was moving to a state with a lower cost of living; in contrast, he ordered that Respondent be terminated. Later, when Respondent's prospective termination had become a legal issue, Cuyar ordered that no one would be allowed to transfer in order to "eliminate potential employment disputes and litigation." After the dust had settled, however, Leiser was transferred to Florida and currently manages a team in India, while Respondent was terminated.

B. PROCEDURAL BACKGROUND

Respondent filed a Charge of Discrimination with the Massachusetts Commission Against Discrimination, later removing the Charge to Middlesex Superior Court in Massachusetts. Petitioner removed the lawsuit to the District Court, invoking the District Court's diversity jurisdiction. After completion of discovery, Petitioner moved for summary judgment under Massachusetts law, which was denied. Petitioner then demanded that New York law be applied at trial. In its request, Petitioner failed to alert the District Court that in addition to state discrimination laws, the New York City Human Rights Law ("NYCHRL") is available to New York City employees. When alerted to this by Respondent's counsel, and given that it was Petitioner's position throughout the litigation and at trial that Respondent was always an employee of New York City, never permitted to transfer from New York City, and was terminated for "abandoning" his job in New

York City, the District Court applied the NYCHRL to Respondent's age discrimination claim.

Based on the evidence, the jury returned a verdict in favor of Respondent on his age discrimination claim and awarded him $1.275 million in compensatory and punitive damages. In a thorough twenty-two-page decision, the District Court denied Petitioner's motions under Fed. R. Civ. Pro 50(b) and 59, and Petitioner appealed ("First Appeal").

On September 5, 2018, the District Court issued a Memorandum and Order, in which it awarded Respondent $279,365 in attorneys' fees, $6,642.77 in costs, and interest on the back pay portion of the judgment at nine percent between May 27, 2016 and the date of judgment. Petitioner again appealed ("Second Appeal").

On March 8, 2019, the United States Court of Appeals for the First Circuit affirmed in the First Appeal. The court began by addressing Petitioner's argument that the NYCHRL did not apply because Respondent felt the impact of being fired in Massachusetts, where he had moved, not in New York City. Based on a decision of the New York Court of Appeals, and noting as well decisions of the Second Circuit and the Eastern District of New York, the court rejected Petitioner's argument. Notably, no party suggested that the law on this question was uncertain or that the court should certify the question to the New York Court of Appeals. Instead, the issue was the application of that court's precedent to the facts of this case.

Among the other issues raised by Petitioner on appeal was whether "clear and convincing evidence [is] required to award punitive damages under the NYCHRL." No party had suggested that the question should be certified to the New York Court of Appeals. In deciding the question, the court cited both First Circuit and Second Circuit case law stating the task of the federal court was to endeavor to decide how the state court would answer the question. Looking to New York state case law, the court noted that "the road to the decision is well-lit, with sign posts that guide our determination that under the NYCHRL, clear and convincing evidence is not the quantum of proof for punitive damages."

The court then "turn[ed] for resolution of the burden of proof question" to a "New York Court of Appeals decision that is now the touchstone of our understanding for punitive damages under the NYCHRL," *Chauca v. Abraham*, 67 N.Y.S.3d 85 (2017). The court quoted at length directly from the Court of Appeals' opinion. Based on that decision of the state's highest court, the First Circuit concluded that C&W's position "fails under the weight of precedent and logic."

Petitioner's subsequent petition for panel rehearing or rehearing *en banc* was denied. Petitioner's petition to this Court followed. The Second Appeal is still pending with the First Circuit.

REASONS FOR DENYING THE WRIT

I. Petitioner Has Not Met The Standard For Granting A Writ Of Certiorari.

Petitioner presents no issue warranting this Court's review. Petitioner does not argue that there is a conflict among the circuits, and there is none. Petitioner speculates that other courts would have certified the burden of proof question to state courts, but identifies no basis for that speculation. Petitioner merely seeks error correction with respect to the jury's verdict in Respondent's favor, not review of a legal issue.

Similar to certification of questions to a state court, a writ of certiorari is a matter of judicial discretion, not of right. U.S. Sup. Ct. R. 10. "A petition for a writ of certiorari will be granted only for compelling reasons." *Id.* While not "fully measuring the Court's discretion," indication of the character of the reasons the Court considers include "a United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power." *Id.* at 10(a).

Here, Petitioner tacitly admits that there is no conflict among the circuits. No federal question is implicated by this state law discrimination jury verdict.

And Petitioner does not argue that the District Court or First Circuit departed from the accepted and usual course; rather, it concedes that the courts made discretionary rulings consistent with the mandate of this court in *Lehman Bros. v. Schein*, 416 U.S. 386 (1974).

No compelling reasons have been articulated by Petitioner that would support a writ of certiorari, and certainly none as outlined as compelling Rule 10. Additionally, as noted below, the "guidance" Petitioner seeks can more easily and appropriately be accomplished through the Court's rulemaking process should the Court see fit to change the longstanding unfettered discretion of the lower federal courts on questions of certification.

II. The Discretion Of Lower Federal Courts To Determine Whether To Certify Is Well Settled, As Is New York's Discretion To Not Answer Certified Questions.

The District Court and the First Circuit did not abuse discretion for not certifying a question to the New York state court because the issues before them did not involve a disputed or unsettled issue of law. Rather, the issues before them were fact driven and resolved through findings of fact that are consistent with established law. Petitioner merely seeks to reargue disputed facts that it lost at trial. In doing so, it attempts to recast the facts in a manner that ignore the evidence presented at trial.

It has long been well settled that federal courts have "considerable discretion" in deciding whether to certify a question. See *Lehman Bros.*, 416 U.S. at 391. In his concurrence in *Lehman Bros.*, Justice Rehnquist assumed it "would be unthinkable to any of the Members of this Court to prescribe the process by which a district court or a court of appeals should go about researching a point of state law which arises in a diversity case." *Id.* at 394. To that end, a federal court has no obligation to utilize certification when the court "believes it can resolve an issue of state law with materials [it] already [has on] hand." *Id.* at 395.

Under the Rules of Practice for the Court of Appeals of the State of New York, proceedings to review certified questions are also discretionary. See N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27. Upon receipt of a certified question, the Court of Appeals then, "on its own motion, shall examine the merits presented by the certified question, to determine, first, whether to accept the certification." *Id.* at 500.27(d). Pursuant to this Rule, the Court of Appeals has regularly declined to answer certified questions. See, e.g., *Jacobsen v. New York City Health and Hosps. Corp.*, 11 N.E.3d 159, 165 (N.Y. 2014); *U.S. Underwriters Ins. Co. v. City Club Hotel, LLC*, 822 N.E.2d 777, 779 (N.Y. 2004); *Tunick v. Safir*, 731 N.E.2d 597, 599 (N.Y. 2000); *Yesil v. Reno*, 705 N.E.2d 655, 656 (N.Y. 1998).

Here, the lower courts correctly applied their discretion to determine questions of state law with the ample materials at their disposal. Petitioner's argument about how the New York Court of Appeals would

have "likely" ruled had questions been certified to it is specious, particularly where it is unlikely that the court would have even accepted certification of such fact specific and dependent questions which would be unlikely to result in consequential precedent.

III. The District Court And First Circuit Properly Exercised Their Broad Discretion, Where The Decision And Opinion Conform With Existing Law.

Petitioner takes issue with the lower courts not seeking to certify two questions to state court, *sua sponte*. The questions are as follows: (a) whether the NYCHRL applied in this factual circumstance; and (b) what burden of proof New York law required for punitive damages under the NYCHRL.

With respect to the first question, the District Court properly found that the NYCHRL applied and the First Circuit properly affirmed. No certification of this question was necessary or appropriate, and in fact was not even sought by Petitioner.

This is because the law is clear that under the NYCHRL, physical residence outside of New York City at the time of termination does not preclude a claim under the law or support a conclusion that the impact of termination was not felt in New York City. In fact, "a plaintiff's residence 'is irrelevant to the impact analysis.'" *Robles v. Cox & Co.*, 841 F. Supp. 2d 615, 624 (E.D.N.Y. 2012), citing *Hoffman v. Parade Publications*, 15 N.Y.3d 285, 290 (2010).

Additionally, helpful precedent was available to the lower courts to analogize the facts of Respondent's case. Specifically, the First Circuit found "instructive" *Wexelberg v. Project Brokers LLC*, No. 13 Civ. 7904, 2014 WL 2624761 (S.D.N.Y. 2014), which presented a similar factual scenario and engendered the same concerns of victimization, and found it distinguishable from other precedent involving employees stationed out of state.

With respect to the second question, the failure to certify the question was essentially rendered moot by the decision in *Chauca v. Abraham*, 30 N.Y.S.3d 325 (2017). In *Chauca*, the New York Court of Appeals confirmed that the District Court's jury instruction on punitive damages was correct, and made certain that the "clear and convincing" standard of proof sought by Petitioner at trial was contrary to the intent of the NYCHRL. Hence, this is not an issue that needs to be addressed by this Court.

Importantly, not only did the lower court have the discretion to determine questions of state law, they did it correctly in each instance that Petitioner highlights. Accordingly, certification in this matter would have led to the same result, and, therefore, does not warrant a writ of certiorari.

IV. The Fact-Based Determination Requested By Petitioner Would Not Provide Any Meaningful Future Guidance.

As the Seventh Circuit has aptly noted, "fact specific, particularized decisions that lack broad, general significance are not suitable for certification to a state's highest court." *Woodbridge Place Apartments v. Washington Square Capital, Inc.*, 965 F.2d 1429, 1434 (7th Cir. 1992), citing *Diginet, Inc. v. Western Union ATS, Inc.*, 958 F.2d 1388, 1395 (7th Cir. 1992). Even the rule proposed by Petitioner's chief support for modification of discretionary certification provides that certification would not be required for questions of law arising from "a heavily fact-specific case such that the state court would not properly declare a consequential rule of law." See Frank Chang, Note, *You Have Not Because You Ask Not: Why Federal Courts Do Not Certify Questions of State Law to State Courts*, 85 Geo. L. Rev. 251, 278 (2017).

Here, Petitioner's certification argument is a thinly veiled attempt to ask this Court to overturn a fact-driven age discrimination jury verdict. While arguing throughout that granting certiorari will provide "guidance," Petitioner utterly fails to present how a ruling in this matter would affect future discretionary rulings in the circuits. Even if implemented, the rule advocated for in the law review article upon which Petitioner chiefly relies would not have resulted in certification. That is because the question of whether the NYCHRL applied to Petitioner where he (a) worked for a company in New York City for twenty-seven years,

(b) worked remotely for the New York City office of the company for several weeks after being duped into moving to Boston, and (c) then was fired for failing to return to the New York City office, is precisely the kind of fact-specific circumstance unlikely to result in consequential precedent. Similarly here, the Court's review for abuse of discretion will not provide any meaningful guidance to courts going forward in applying the *Lehman Bros.* discretionary certification standard.

V. Petitioner Should Be Estopped From Arguing For Certification Where It Invoked Federal Subject Matter Jurisdiction And Never Previously Sought Certification.

Although not a primary factor, this Court is "entitled to take into account whether the request for certification to the state court came from the party who chose federal jurisdiction in the first place." See *Rain v. Rolls-Royce Corp.*, 626 F.3d 372, 379 (7th Cir. 2010). As the Seventh Circuit has noted, "it's not a proper alternative to proceeding in the first instance in state court to sue in federal court but ask that the suit be stayed to permit certifying the interpretive issue to the state court, thus asking that the suit be split between two courts." *Id.*, citing *Doe v. City of Chicago*, 360 F.3d 667, 672 (7th Cir. 2004).

Here, Petitioner's fast and loose jurisdictional posture throughout this matter is particularly illustrative of why a party's choice of federal jurisdiction should

factor into the certification analysis. Here, Respondent initially filed in Massachusetts state court. Petitioner, invoking the District Court's diversity subject matter jurisdiction, removed to federal court. Petitioner moved for summary judgment under Massachusetts law. When that motion was denied, Petitioner made the argument that New York law should apply. In doing so, Petitioner argued that New York state law should apply, not the NYCHRL, despite the fact that Respondent had worked only in New York City and no other part of New York state for twenty-seven years. After losing at trial, Petitioner changed course again, arguing that somehow subject matter jurisdiction that it invoked was lacking.[1]

It is particularly ironic in this instance that Petitioner invokes *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), which, among other things, sought to prevent forum shopping and inequitable administration of the law. Petitioner's attempt at all times has been to forum shop under a choice of law guise in an attempt to foreclose any remedy for Respondent. Where it chose to invoke federal subject matter jurisdiction, Petitioner cannot be heard to complain of the federal courts

[1] Adding to the problematic nature of Petitioner's approach to trial is that New York Court of Appeals Rules of Practice do not appear to permit a federal District Court to certify questions. Rather, the Rules only permit the "Supreme Court of the United States, any United States Court of Appeals, or a court of last resort of any other state" to certify questions. N.Y. Comp. Codes R. & Regs. tit. 22, § 500.27.

making discretionary certification determinations pursuant to longstanding precedent from this Court.

Petitioner's certification request also comes "very late in the day," never having raised certification with the lower courts. See *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1891 (2018); see also *Stenberg v. Carhart*, 530 U.S. 914, 945, 120 S.Ct. 2597, 147 L.Ed.2d 743 (2000) (noting, in denying certification, that the State had never asked the lower federal courts to certify).

VI. The Guidance Sought By Petitioner Can Be Provided Without Granting Certiorari.

Through the Rules Enabling Act, the Court has "the power to prescribe general rules of practice and procedure and rules of evidence for cases in the United States district courts." 28 U.S.C. § 2702(a).

The relief that Petitioner seeks appears to be implementation of a rule rather than a decision of this Court forming precedent. The primary support for Petitioner's request for certiorari in fact, a 2017 student-written law review article, proposes a rule that would limit a federal court's discretion to certify questions. Chang, 85 Geo. L. Rev. at 278. As suggested by the author, the Court could adopt a rule concerning certification "through the appropriate rule making committees." *Id.*

In the event that the Court at some point may wish to address certification, it can do so far more easily within its rulemaking powers, leaving its docket to

address important federal questions and circumstances where actual conflicts exist within the Circuits.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

JOHN W. DENNEHY
DENNEHY LAW
127 Main Street, Suite 1
Nashua, NH 03060
(603) 943-7633
jdennehy@dennehylaw.com

MARK D. SZAL
Counsel of Record
SZAL LAW GROUP LLC
6 Liberty Square, #330
Boston, MA 02109
(617) 830-2494
mark@szallawgroup.com

Counsel for Respondent

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