

No. 24-999

In the

Supreme Court of the United States

PREMIER NUTRITION CORPORATION,
fka Joint Juice, Inc.,
Petitioner,

v.

MARY BETH MONTERA, *Individually and on*
Behalf of All Others Similarly Situated,
Respondent.

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

REPLY BRIEF FOR PETITIONER

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INTRODUCTION

Respondent says that this Court's review is "particularly" unneeded because certifying uncertain state-law questions to state high courts is a "matter of judicial discretion." BIO.16. Actually, that is exactly why review is needed. Decisions committed to judicial discretion need legal guidance at least as much as decisions directed by law. For without such guidance, discretion devolves into arbitrariness.

Unfortunately, arbitrary perfectly describes the pattern of certification decisions among the circuits. This is not a criticism of any particular court. It is the cumulative reality of fifty years of discretionary decisions made without direction from this Court.

Respondent does not seriously dispute that panels apply widely varying approaches to certification decisions, but she says it does not really matter because federal courts are competent to apply state law. That is not what this Petition is about. No one questions federal courts' competence to *apply* state law. The question is how federal courts should proceed when state law is uncertain.

On that question, arbitrary variations abound. As Judge Bush lamented, this Court's lack of guidance has forced lower courts "to make their own guidelines," creating a "lack of predictability." See *Lindenberg v. Jackson Life Ins. Co.*, 919 F.3d 992, 997 (6th Cir. 2019) (Bush, J., dissenting from denial of rehearing en banc).

Notably, Respondent does not dispute the leading grounds for granting certiorari. She does not dispute this Court's decisions in *Shady Grove* and *Bristol-*

Myers have made state-law certification increasingly important. She does not dispute this Court’s lack of guidance since *Lehman*. And she does not dispute *any* of the assertions made in the bipartisan state amicus brief. Respondent instead resorts to mischaracterizations and overstatements in a bid to avoid review of her multi-million-dollar judgment that depends on Ninth Circuit predictions and policy judgments about New York state law. As explained below, none holds up under scrutiny.

All told, no one reviewing the practice in the lower courts would claim it is a model of well-guided discretion. When parties assess whether to seek certification, they have no way of knowing whether a request will be granted. Some panels will arrogate to themselves the authority to decide uncertain questions of state law, even when—as in this case—the panel admits the law is uncertain and the state has an unbroken history of accepting questions when certified. As the state amicus warns, “[u]nguided discretion” is “invi[si]ble arbitrariness.” State.Amicus.13. The Court should grant the Petition.

ARGUMENT

I. Respondent is Wrong That Courts Consistently Take State Interests into Account When Addressing Certification.

Contrary to Respondent’s contention, there *is* a “meaningful difference” in the standards courts of appeals, and different panels within those courts, apply to certification requests. *Cf.* BIO.8-16. Not only is variability present, it is increasing. The many cases

Respondent cites showcase just how muddled the decisions are. Sup. Ct. R. 10(a).

A. Different circuits, and even different panels, take different approaches.

Some circuits have developed frameworks to direct panels' discretion in considering certification. Pet.27-31. But those frameworks vary widely, particularly on the need to consider federalism. *Id.* Other circuits, most notably the Sixth Circuit, have refused to develop a framework at all. Pet.24-27. Panel decisions in the Ninth Circuit, meanwhile, are uniquely "inconsistent," "poorly reasoned," and "inadequately explained." Molly Thomas-Jensen, *Certification After Arizonans for Official English v. Arizona: A Survey of Federal Appellate Courts' Practices*, 87 Denv. U. L. Rev. 139, 163 (2009).

The Court need look no further than the cases Respondent cites, which confirm that the few circuits that have developed frameworks for certification have materially different approaches. Three circuits formally consider federalism interests. *The Real Est. Bar Ass'n For Mass., Inc. v. Nat'l Real Est. Info. Servs.*, 608 F.3d 110, 119 (1st Cir. 2010) ("We have been particularly mindful of federalism concerns."); *Gutierrez v. Smith*, 702 F.3d 103, 117 (2d Cir. 2012) ("Certification is especially important in categories of cases where, unless there is certification, the state courts are substantially deprived of the opportunity to define state law."); *State Farm Mut. Auto. Ins. Co. v. Pate*, 275 F.3d 666, 672 (7th Cir. 2001) ("We also consider whether the issue is of interest to the state supreme court in its development of state law.").

Another circuit treats federalism as a salutary byproduct of certification but not always a direct consideration. *NBIS Constr. & Transp. Ins. Servs., Inc. v. Liebherr-Am., Inc.*, 93 F.4th 1304, 1314 (11th Cir. 2024) (“When faced with substantial doubt on a dispositive state law issue, our better option is to certify the question to the state supreme court. Certification serves interests of federalism and comity.” (cleaned up)).

And other circuits consider the public importance of an issue, but they do not formally consider a state’s interest in shaping its law. *K&D LLC v. Trump Old Post Off. LLC*, 951 F.3d 503, 510 (D.C. Cir. 2020) (“Cork did not argue that this ‘case is one of extreme public importance,’ a traditional element of our certification analysis.”); see *Zanetich v. Wal-Mart Stores E., Inc.*, 123 F.4th 128, 150 (3d Cir. 2024) (declining to certify where the issue was not one of “general public importance”).

Respondent says that these differences are “semantic” because public importance and federalism interests refer to the same thing. BIO.13. Even a cursory review of the differing approaches disproves Respondent’s characterization. The public-importance circuits consider the absence of state-court decisions to weigh *against* certification, taking it as a sign that the issue is unimportant. But courts considering judicial federalism consider such absence a factor *favoring* certification because it emphasizes the need for state courts to shape their laws. Pet.33. In the wake of this Court’s decisions in *Shady Grove* and *Bristol-Myers*, that is a significant divide that has

grown, and will only continue to grow, more significant.

Beyond her “semantic” differences argument, Respondent also paints the circuits as agreeing uniformly to leave panels free to consider, or not consider, a range of factors. BIO.11, 14-16.

Although that standardless approach is true of some circuits—like the Sixth and the Tenth—it certainly isn’t true of them all. Several circuits have recognized the need for guidance and have developed frameworks to constrain judicial discretion. Pet.27-31. In particular, some circuits treat federalism concerns as more than something that “may be relevant in particular cases,” BIO.12; they “must be considered” by a court in deciding whether to certify. *Tunick v. Safir*, 209 F.3d 67, 81 (2d Cir. 2000); *Gutierrez*, 702 F.3d at 117 (“Failure to certify, however, *requires* more than the simple fact that the state court will have other opportunities to speak to the issues.” (emphasis added)).

If, however, a standardless approach held sway in all circuits, that would only underscore the need for this Court’s supervisory intervention. As the Court said two hundred years ago, “[w]hen [courts] are said to exercise a discretion, it is a mere legal discretion, a discretion to be exercised in discerning the course prescribed by law; and, when that is discerned, it is the duty of the Court to follow it.” *Osborn v. Bank of U.S.*, 22 U.S. 738, 866 (1824). If, then, no circuit consistently follows an established legal framework for certification, certification is governed by will and whim, not law. See Pet.35. And this Court’s need to supply the law would be clear.

B. Ninth Circuit practice is particularly uneven.

The Brief in Opposition also confirms that the Ninth Circuit is uniquely standardless.

First, Respondent notes that Ninth Circuit panels have certified questions in several cases since 2023, BIO.10, but those cases only prove that certification in the Ninth Circuit is not governed by any consistent approach. Of the fifteen cases, just three applied the four-factor test that Respondent claims is the governing Ninth Circuit standard. *See* BIO.9 (*Glacier Bear Retreat, LLC v. Dusek*, 107 F.4th 1049 (9th Cir. 2024); *North River Insurance Co. v. James River Insurance Co.*, 116 F.4th 855 (9th Cir. 2024); *Cassirer v. Thyssen-Bornemisza Collection Foundation*, 69 F.4th 554 (9th Cir. 2023)).

Most of the cases granting certification applied a different standard. They began, and essentially ended, with the state court’s test for accepting certified questions: whether (1) the question “could determine the outcome of a matter pending in [this] court,” and (2) “[t]here is no controlling precedent” in the decisions of the state’s highest court. *Pitt v. Metro. Tower Life Ins. Co.*, 129 F.4th 583, 584-88 (9th Cir. 2025); *Bearden v. City of Ocean Shores*, 103 F.4th 585, 588 (9th Cir. 2024); *Doe v. Uber Techs., Inc.*, 90 F.4th 946, 949 (9th Cir. 2024); *New England Country Foods, LLC v. Vanlaw Food Prods., Inc.*, 87 F.4th 1016, 1019 (9th Cir. 2023); *French Laundry Partners, LP v. Hartford Fire Ins. Co.*, 58 F.4th 1305, 1305-08 (9th Cir. 2023); *Or. Clinic, PC v. Fireman’s Fund Ins. Co.*, 64 F.4th 1143, 1145 (9th Cir. 2023); *Estate of Wheeler v. Garrison Prop. & Cas. Ins. Co.*, 80 F.4th 1006, 1011

(9th Cir. 2023); *Johnson v. Torres*, 122 F.4th 1140, 1148-1154 (9th Cir. 2024) (extensively assessing the first two factors then briefly discussing public policy implications); *Drammeh v. Uber Techs., Inc.*, 105 F.4th 1138, 1143 (9th Cir. 2024); *Cruz v. City of Spokane*, 66 F.4th 1193, 1198 (9th Cir. 2023) (same); *Nwauzor v. GEO Grp., Inc.*, 62 F.4th 509, 517 (9th Cir. 2023) (same); *Ward v. Safeco Ins. Co. of Am.*, 58 F.4th 1301, 1304 (9th Cir. 2023) (same).

Had the panel in this case applied that test, certification would unquestionably have been granted: this case involved (1) “determinative questions of New York law” (2) “for which no controlling precedent of the Court of Appeals exists.” 22 N.Y.C.R.R. § 500.27. Indeed, the panel expressly acknowledged the lack of controlling precedent and relied on legislative history to make a New York policy judgment. *See* Pet.35a n.11.

Second, the Brief in Opposition confirms that the Ninth Circuit’s habit of issuing inadequately explained decisions is truly unique. Respondent cites cases where other circuits denied a certification request without many words because the state law was clear, the requester had forfeited the right to seek certification, or both. *See* BIO.15-16. But Respondent cites no case where another circuit did what the Ninth Circuit panel did here: deny a request for certification solely on the basis that it had the discretion to do so.

The Ninth Circuit’s problem, in short, is not statistical frequency; it is statistical arbitrariness. Because there is no controlling guidance from this Court, panels can choose whichever standard they like, or apply no standard at all—the very situation

this Court’s “supervisory power” exists to correct. Sup. Ct. R. 10(a); *see Cupp v. Naughten*, 414 U.S. 141, 146 (1973) (noting the “supervisory power” to require lower courts to “follow procedures deemed desirable from the viewpoint of sound judicial practice although in no-wise commanded by statute or by the Constitution”).

What the Court set in motion 50 years ago is now primed for its further guidance. Parties and states should not have to wonder under what standard a request for certification will be considered.

II. Requiring Federal Courts to Consider Federalism in the Certification Analysis Is Proper and Respects State Interests.

Respondent’s attacks on a standard that would require federal courts to consider federalism interests are incorrect, confusing, and contrary to this Court’s precedent. Such a standard would not “exclude consideration of all interests other than the states’.” BIO.16-17. And federalism interests are not cherry-picked “factors . . . chosen by Premier to direct the outcome of this specific case.” BIO.16-17. Across a wide range of doctrinal contexts, this Court has consistently developed standards that “respect . . . state sovereignty” and “keep the two sovereigns from stepping on each other’s toes.” State.Amicus.5 (collecting examples, including “abstention doctrines” and various “federalism canons”); Pet.22. Respondent identifies no reason why certification should be different, when its whole purpose is to “help build a cooperative judicial federalism.” *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974).

This Court should therefore direct lower courts to consider federalism interests before denying a properly asserted certification request. The certification standard will remain a discretionary one. If state law is “clear,” certification will be unnecessary BIO.17. And, of course, the standard will allow courts to take “equitable” considerations into account, including “the costs and delay of certification” and “the prior positions taken by the parties in the litigation.” *Id.* But federalism interests must be considered. This is consistent with how federalism canons operate. *See* State.Amicus.5 (canons require courts to make a “presumption” in favor of federalism, while still leaving flexibility if an authority offers a “clear statement” to the contrary). And requiring consideration ensures that “[u]nguided discretion” does not “invite[] arbitrariness.” State.Amicus.13.

Finally, Respondent’s suggestion that Premier selected its four factors solely to advance its self-interest is nonsense. The factors are facially neutral and supported by a bipartisan state amicus coalition. They also say nothing of *how* the New York Court of Appeals would have answered any certified questions.

III. Answering the Question Presented Will Have Lasting Significance.

Respondent never disputes that the Petition raises “an important question of federal law.” Sup. Ct. R. 10(c). Nor does Respondent dispute that this Court has not addressed the standards governing certification “for over 50 years.” Pet.21. And most tellingly, Respondent does not dispute that this Court’s decisions in *Shady Grove* and *Bristol-Myers* “have made certification more necessary than ever” by locking some

“state-law class actions . . . *exclusively* in foreign federal courts.” Pet.22.

Nevertheless, Respondent insists that the Court indefinitely leave lower courts to their own unguided discretion. Respondent’s approach is wrong for this case, and it is wrong for other cases.

First, as the bipartisan state amicus powerfully explains, a direction to consider federalism is needed. “[C]ertification keeps federal courts from intruding on policy and lawmaking decisions that the Constitution leaves to the states.” State.Amicus.1. Look no further than what the Ninth Circuit panel did below: it disregarded New York’s prerogative and took it upon itself to answer sensitive issues of state policy—not even pausing to consider its place when it found itself sifting through New York legislative history.

Second, states’ ability to participate in shaping their laws is doubly damaged by the status quo. Important questions of state law remain locked in faraway federal courts with no way for state courts to weigh in. And state Attorneys General and other officials remain in the dark while these questions get resolved in foreign federal courts.

Next, Respondent suggests that certification is unnecessary because the statutes at issue “are regularly interpreted by New York state courts.” BIO.19 (citing cases). No one disputes that New York courts have had opportunity to address its General Business Law. The question is instead whether New York courts—and state courts generally—should have the chance to answer unaddressed questions of state law. And even the Ninth Circuit admitted New York courts hadn’t addressed critical questions under the General Business

Law. *See* Pet.33a (“We know of no New York caselaw that resolves this question and federal courts have applied these statutes inconsistently.”).

Moreover, Respondent ignores that because of the combined effect of *Shady Grove and Bristol-Myers*, New York state class actions are overwhelmingly being filed in federal courts. Pet.9 n.3, 13 n.6. Indeed, only two of the numerous state-court cases Respondent cites dealt with a putative class.

Respondent’s assertion that New York courts are not technically bound by federal decisions, BIO.17-18, is thus cold comfort. The reality is that *most* state-law class claims are litigated exclusively in federal court and thus certification presents the only viable way to “ensure[] that the law [federal courts] apply is genuinely *state* law.” *Todd v. Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993) (*en banc*). Granting the Petition is a critical step in protecting state law from growing federal court encroachment.

IV. This Case Is an Ideal Vehicle to Articulate the Standards Governing Certification.

Respondent does not raise any vehicle concerns, and rightly so. As explained in the Petition, this case presents an excellent—and long overdue—vehicle through which to cement federalism’s role in the certification analysis. Pet.32-34.¹

¹Respondent resorts to simplistic nose counting when she contends that certification implicated only “four” out of “fifteen issues raised by Premier” on appeal. BIO.5-6. That is the wrong measure. If the New York Court of Appeals ruled for Premier on the first question—regarding substantiated statements—Premier would have been entitled to judgment as a matter of law. Pet.11a-12a. If the court ruled for Premier on the second

At most, Respondent argues that further review is unnecessary because the Ninth Circuit’s denial of certification was right on the merits. BIO.18-20. But as Premier explained above, none of Respondent’s rationales hold water. The Ninth Circuit did not apply “unequivocal” New York law: it interpreted unsettled New York law, and it resorted to legislative history and policy arguments in so doing. Nor did the panel cite a single factor supporting its denial of certification. It simply declared *ipse dixit* that denial fell within its discretion.

To be sure, this Court reviews “judgments,” not “opinions,” BIO.18, but a lack of reasoning can *support* Court intervention when “clear guidance” is “necessary,” and there is no indication the lower court applied any discernable legal standard. *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). That is precisely the case here.

CONCLUSION

The petition for a writ of certiorari should be granted.

question—regarding purchaser-specific proof of causation—the class would have been decertified. Pet.19a-22a. And if the court ruled for Premier on the third question—regarding how statutory damages are counted—the judgment would be reduced to a fraction of what was awarded. Pet.32a-37a. Any suggestion that certification was ancillary to this case is meritless.

Respectfully submitted,

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