No. 19-____

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

PETITION FOR A WRIT OF CERTIORARI

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

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

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

Counsel for Petitioner

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

QUESTION PRESENTED

This diversity case involves state-law claims of age discrimination in employment. Petitioner disputed the applicability of the New York City Human Rights Law ("NYCHRL"); it also argued that any punitive damages must be established by clear and convincing evidence rather than by a preponderance.

Neither issue, of course, presents a federal question for this Court's resolution. But *how* courts proceed in diversity is central to the federal judiciary's work and to the federal-state balance. In particular, whether federal courts certify doubtful or contentious questions of state law has an outsized effect on *Erie*'s aspiration that substantive outcomes—especially substantive legal standards—should not materially differ because a case proceeds in a federal rather than state forum.

The question presented is whether federal courts sitting in diversity should exercise their discretion to certify questions to state high courts when a state's courts are silent or split on outcome-determinative questions that implicate subject-matter jurisdiction, core legal requirements like the standard of proof, or (as here) both.

CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rules 29.6 and 14.1(b)(ii), petitioner Cushman & Wakefield, Inc. states that its parent companies are as follows: C&W Group, Inc. is the immediate parent of and wholly owns Cushman & Wakefield, Inc. C&W Group, Inc. is wholly owned by Cassidy Turley, Inc., which is wholly owned by DTZ Parent, LLC. DTZ Parent, LLC is wholly owned by Casper UK Bidco Limited, which is wholly owned by DTZ US Holdings, LLC. DTZ US Holdings, LLC is wholly owned by DTZ Worldwide Limited, which is wholly owned by DTZ UK Guarantor Limited. DTZ UK Guarantor Limited is wholly owned by Cushman & Wakefield PLC. Cushman & Wakefield PLC is the ultimate parent company of Cushman & Wakefield, Inc., and is a public company. There is no publicly held company that owns 10% or more of Cushman & Wakefield, Inc.'s stock, and none of the other companies other than Cushman & Wakefield PLC is publicly traded.

RELATED PROCEEDINGS

Pursuant to this Court's Rule 14.1(b)(iii), petitioner Cushman & Wakefield, Inc. states that in separate but related proceedings in this case, the district court awarded respondent attorneys' fees, costs, and interest. See *Rinsky* v. *Cushman & Wakefield, Inc.*, No. 16-CV-10403-ADB, 2018 WL 4268890, at *4 (D. Mass. Sept. 5, 2018). That award is subject to a now-pending appeal in the First Circuit in No. 18-1977, *Rinsky* v. *Cushman & Wakefield, Inc.*

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OPINIONS BELOW

The opinion of the court of appeals affirming the district court's judgment (App. A) is reported as *Rinsky* v. *Cushman & Wakefield, Inc.*, 918 F.3d 8 (1st Cir. 2019). The court's order denying rehearing or rehearing *en banc* (App. D) is unreported.

The district court's opinion and order (App. C) denying petitioner's post-trial motions is unreported and available as *Rinsky* v. *Cushman & Wakefield, Inc.*, No. 16-CV-10403-ADB, 2018 WL 1188750 (D. Mass. Mar. 7, 2018).

JURISDICTION

The judgment of the court of appeals was entered on March 8, 2019. The petition for panel or *en banc* rehearing was denied on April 8, 2019. On July 1, 2019, Justice Breyer granted petitioner's timely request for an extension of time to file the petition for a writ of certiorari to and including September 5, 2019. This Court has

jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Relevant statutory provisions are reprinted in an appendix to this petition. App. E.

PRELIMINARY STATEMENT

Federal courts' ability to certify questions to state courts is a valuable tool, as this Court has emphasized several times. But two decades have passed since *Arizonans for Official English* v. *Arizona*, 520 U.S. 43 (1997), when the Court repudiated a Ninth Circuit practice that unduly limited recourse to certification. Certification, however, has only become less predictable. Further guidance from this Court is increasingly needed, and this case illustrates why.

Petitioner disputed the applicability of the New York City Human Rights Law ("NYCHRL"). The New York Court of Appeals has held that whether the NYCHRL applies implicates *subject-matter jurisdiction*. That high court, however, has not yet authoritatively resolved whether the NYCHRL reaches claims of a discrimination plaintiff who, like respondent, unilaterally left New York City and whose whole case amounts to insisting on physically working elsewhere. Lower-court decisions suggest that the NYCHRL should *not* apply under these circumstances.

If the NYCHRL does not reach respondent, a federal court sitting in diversity necessarily violates *Erie* by adjudicating his NYCHRL dispute. The First Circuit recognized this potential problem—yet, instead of certifying to New York's high court, it proceeded to the merits. Likewise with respect to New York's standard for imposing punitive damages: the First Circuit recognized the division among New York courts, but expressly refused to certify a

question central to whether respondent could recover punitive damages *at all*. The result was a decision to adjudicate a case that New York courts likely would have rejected from the outset, using a punitive-damages standard that likely was wrong *even for proper* NYCHRL cases.

Federal courts routinely certify far less consequential matters. It may well be that *too many* cases are certified—but at least some cases, like this one, warrant certification that never comes. Whether to certify a question is a matter of discretion. As with all discretionary decisions undertaken by federal courts, however, "[d]iscretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin* v. *Franklin Capital Corp.*, 546 U.S. 132, 139 (2005). Standards for certification are currently illusory; whether a case is certified depends more on which court and even which panel within a court decides an appeal in a diversity case.

For a device so common in federal practice—and one so central to respecting the federal-state balance envisioned in *Erie*—the lack of meaningful guidance is noteworthy. "The certification issue continues to vex lower federal courts without a good opportunity for the Supreme Court to address it." 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. Wash. L. Rev. 251, 278 (2017).

This case provides such an opportunity for the Court to offer long-needed direction.

STATEMENT

I. FACTUAL BACKGROUND

Petitioner Cushman & Wakefield, Inc. ("C&W") is a New York-based real-estate services firm. See App.,

infra, 2a. C&W employed respondent Yury Rinsky from 1988 until mid-July 2015—first as a systems analyst and later as a software engineer. *Id.* at 3a, 5a. In 2012, Rinsky began working remotely from his home in New Jersey three to four days a week, spending the remainder of the work week in the New York City office. *Id.* at 3a.

Rinsky planned to retire in Massachusetts, and those plans accelerated in 2014. App., *infra*, 3a. Near the end of that year, Rinsky and his wife bought a house just outside Boston. *Ibid.* Rinsky then took immediate steps to make Massachusetts his permanent home. In March 2015—a few months after buying the Massachusetts house—Rinsky's broker listed the New Jersey home for sale. *Ibid.* Only after listing that home did Rinsky discuss his plans to move to Massachusetts or transfer to C&W's Boston office with Colin Reid, his immediate supervisor (his first such mention to anyone at C&W). *Ibid.*

The witnesses presented conflicting testimony regarding Rinsky's overtures to his supervisors about his intended relocation to C&W's Boston office. Rinsky (who prevailed at trial and who thus benefits from any factual dispute regardless of how hotly contested) recollected that, in his conversation with Reid after the New Jersey house went on the market, Reid said that they could "talk about it later." App., *infra*, 3a. Rinsky next remembers telling Reid of an offer on the New Jersey house; Rinsky again inquired about transferring to the Boston office. *Ibid.* According to Rinsky, Reid offered preliminary approval, but cautioned that Reid needed to check with his own supervisor, Andrew Hamilton. *Ibid.* Rinsky testified that Reid later informed him that Hamilton was agreeable to a transfer. *Id.* at 4a.

It is undisputed that there was no communication

between Rinsky and anyone at C&W regarding his requested transfer from at least April 30, 2015 through May 16, 2015. On May 17, Rinsky emailed Reid: "I will be moving to Boston * * * . I am confident that I can continue to work to the best of my ability remotely. I look forward to sitting down with you and coming up with an arrangement that benefits all involved." App., *infra*, 4a.

Ten days after Rinsky's email to Reid announcing his move to Boston, Hamilton emailed his senior managing director regarding Rinsky's replacement. App., *infra*, 4a. That same week, without details being resolved, Rinsky left C&W's New York office and began working remotely exclusively from his Massachusetts house. *Id.* at 5a. It is undisputed Rinsky never physically returned to work in C&W's New York office at any time after this point.

In the following weeks, senior management exchanged emails about Rinsky's relocation to Boston and the need to find a replacement. App., *infra*, 5a. Hamilton and Reid's supervisor emailed them that "we need to move forward with [Rinsky's] termination as quickly as possible. The position that [Rinsky] fills is located in NYC. Given that he left without notifying his manager or HR [it] is unacceptable and we need to take action * * * ." *Ibid.* A week later, Hamilton and Reid called Rinsky to present him with two options: return to work in the New York office or resign. *Ibid.* Rinsky sent emails of protest to senior management and refused to elect either option, and C&W then terminated his employment. *Ibid.*

II. PROCEEDINGS BELOW

Rinsky sued C&W in Massachusetts Superior Court alleging claims for age discrimination and disability discrimination under Massachusetts law, along with various common-law claims. App., *infra*, 6a. C&W timely

removed to the U.S. District Court for the District of Massachusetts based on diversity jurisdiction. *Id.* at 7a, 45a. The district court ordered briefing on whether Massachusetts or New York law should apply. *Id.* at 7a. C&W argued that New York state law should govern, while Rinsky argued that if any New York law applied, it should include the New York City Human Rights Law, N.Y.C. Admin. Code § 8-101 *et seq.* ("NYCHRL"). App., *infra*, 7a-8a.

The district court concluded that New York law generally applied and, over C&W's objection, that the NYCHRL controlled. App., *infra*, 9a-10a. The district court dismissed Rinsky's common-law claims, leaving the age- and disability-discrimination claims for the jury. *Ibid.* After a five-day trial, the jury found against Rinsky on his disability-discrimination claim, but found that C&W violated the NYCHRL by discriminating against Rinsky because of his age, and awarded $1,275,000 (including $850,000 in punitive damages). *Id.* at 11a, 46a. The district court denied C&W's post-trial motions and entered final judgment, which C&W timely appealed. *Id.* at 68a-69a.

The Court of Appeals for the First Circuit affirmed. App., *infra*, 42a. No case held that the NYCHRL applied to someone like Rinsky, who chose to permanently move to, reside in, and exclusively work from another state at the time of his termination. The court, however, made an *Erie* guess that New York courts would determine that the impact of Rinsky's termination was felt in New York City and thus that the NYCHRL would apply. *Id.* at 16a-19a. The court acknowledged that "the impact requirement 'confines the protections of the NYCHRL to * * * those who work in the city.'" *Id.* at 17a (quoting *Hoffman* v. *Parade Publ'ns*, 933 N.E.2d 744, 747 (N.Y. 2010)). According to the court, though, Rinsky was "continuously employed

in New York City, despite the fact that he worked remotely," and so the NYCHRL applied. *Id.* at 18a (internal quotation marks omitted).

The court also decided not to "seriously consider" certifying a second question: what burden of proof New York law requires for punitive damages under the NYCHRL. App., *infra*, 28a. Despite the lack of on-point guidance from the New York high court and the split in New York lower appellate courts regarding the burden of proof for punitive damages, the court of appeals again chose to make an *Erie* guess that it characterized as an "informed prophecy"—rather than certify the question to the New York Court of Appeals. *Ibid.*

The court of appeals denied C&W's request for rehearing. App., *infra*, 70a-71a.

REASONS FOR GRANTING THE PETITION

Certification is not the exotic corner of federal practice that it was half a century ago. It is now widely available—every State but North Carolina has some form of it—and has become integral to federal courts' efforts to accurately determine and apply state laws. Like many other judicial decisions, certification is properly a discretionary determination. But unlike most other decisions, certification lacks consistent standards to ensure a measure of predictability and avoid arbitrary calls. Certification is important enough to warrant a clearer framework than it has today—one that can more reliably separate the wheat from the chaff in certifying what matters without generating a burdensome deluge of pointless certified questions.

Further guidance is needed. This case provides a vehicle to identify at least some principles to assist federal courts in the exercise of their discretion. When a federal court sitting in diversity risks adjudicating a claim that

state courts likely would rebuff for lack of subject-matter jurisdiction, it should certify to avoid a potentially massive *Erie* violation. And when the federal court then applies a debatable standard for punitive damages, the need for certification is even clearer. By so holding, this Court would articulate general principles underlying certification that vastly transcend the specific circumstances of this case.

I. This Court Should Provide Guidance For Federal Courts To Exercise Sound Discretion Regarding Certifying Questions To State High Courts

This Court has repeatedly endorsed certification. Early on, when few States permitted it and minimal data showed how it functioned, the Court emphasized certification's discretionary nature. Even so, the Court occasionally has reversed when lower courts refused to certify. Certification properly remains discretionary—but courts cannot soundly or predictably exercise that discretion without more guidance than currently exists. This case illustrates how unbounded certification practice has become and why, after decades of silence, the Court should once again afford certification practice a spot on its docket.

A. This Court endorsed certification as an innovation and has reaffirmed its importance

Certification never would have arisen but for this Court's enthusiasm for it in *Clay* v. *Sun Insurance Office Ltd.*, 363 U.S. 207 (1960). In 1945, the Florida Legislature passed a certification statute that lay dormant until this Court noted it in *Clay*. *Id.* at 212. See 17A Charles Alan Wright et al., Federal Practice and Procedure § 4248, pp. 486-487 & nn.7-9 (2007 & Supp. 2019) (further discussing how *Clay* jump-started certification) ("Wright & Miller").

Florida law was also at issue in the Court's next major certification decision, *Lehman Brothers* v. *Schein*, 416 U.S. 386 (1974). Maine had joined Florida in 1964, and between 1969 and 1973, eight other States adopted some certification process. See *id.* at 390 n.7. *Lehman Brothers* therefore could and did extol certification's value more broadly. *Id.* at 391. Certification was still experimental, however; as then-Justice Rehnquist emphasized, the Court wisely chose to "go slowly" in directing certification. *Id.* at 393 (Rehnquist, J., concurring). In particular, the Court committed certification to "the sound judgment of the court making the initial choice." *Id.* at 395; see *id.* at 391 (maj. op.).

Fast forward 45 years to today. All states except North Carolina now have certification procedures. See Wright & Miller § 4248, p. 490 n.22; Gregory L. Acquaviva, *The Certification of Unsettled Questions of State Law to State High Courts: The Third Circuit's Experience,* 115 Penn St. L. Rev. 377, 384-385 (2010). Certification has become relatively common—largely through this Court's embrace, especially in *Clay*; *Lehman Brothers*; *Bellotti* v. *Baird*, 428 U.S. 132, 148 (1976); and finally *Arizonans for Official English* v. *Arizona*, 520 U.S. 43 (1997).

In *Arizonans for Official English*, the Court praised certification's value for accurately ascertaining state law: "Speculation by a federal court about the meaning of a state statute in the absence of prior state court adjudication is particularly gratuitous when . . . the state courts stand willing to address questions of state law on certification from a federal court." 520 U.S. at 79 (quoting *Brockett* v. *Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring)). The Court rejected various limitations on certification that the Ninth Circuit had imposed.

Rather than deciding state-law questions too quickly, "[a] more cautious approach" was in order, given that "certification of novel or unsettled questions of state law for authoritative answers by a State's highest court ∗ ∗ ∗ may save 'time, energy, and resources and hel[p] build a cooperative judicial federalism.'" *Id.* at 77 (quoting *Lehman Bros.*, 416 U.S. at 391). The Court repudiated the need for "unique circumstances" rather than simply "[n]ovel, unsettled questions of state law" for courts to "avail themselves of state certification procedures." *Id.* at 79.

As valuable as it is for endorsing certification and correcting an erroneous refusal to certify, *Arizonans for Official English* was the Court's last significant word on the topic—and it came over 22 years ago. Since then, "studies confirm that the use of certification is increasingly widespread, and the trend seems almost certain to continue." Richard H. Fallon, Jr. et al., Hart and Wechsler's The Federal Courts and The Federal System 1118 & n.12 (7th ed. 2015) ("Hart & Wechsler"). Yet even as certification is more available than ever before, its proper parameters have eluded federal courts.

B. The Circuits have failed to generate meaningful or predictable standards

The decision to certify "rests in the sound discretion of the federal court." *Minn. Voters All.* v. *Mansky*, 138 S. Ct. 1876, 1892 n.7 (2018) (internal quotation marks omitted). But that authority cannot justify arbitrary, blown-by-the-wind outcomes. "Discretion is not whim, and limiting discretion according to legal standards helps promote the basic principle of justice that like cases should be decided alike." *Martin*, 546 U.S. at 139.

Since *Arizonans for Official English*, federal judges have taken polarized positions—some advocating for

almost automatic certification and others (including one on the panel below) disparaging the practice. The vast discretion federal courts have in deciding whether to certify has littered certification's history with widely inconsistent decisions based on dubious consideration of malleable and often vague factors. This inconsistency exists on several planes, reflecting the fundamental lack of meaningful certification standards that warrants this Court's review.

1. First, circuits claim to consider factors that often substantially overlap with factors other circuits claim to consider, but apply these factors in widely disparate ways. For example, at least five circuits appear to consider whether the question for potential certification is outcome determinative.[1] Many circuits look for a lack of controlling state-law precedent.[2]

Beyond these elementary basics, a veneer of uniformity quickly disappears. Some circuits—but not all—purport to evaluate comity considerations and the practical limitations of certification. Compare *Swindol* v. *Aurora Flight Scis. Corp.*, 805 F.3d 516, 522 (5th Cir. 2015) ("our own list of factors guides us in deciding whether to certify a question," including "the degree to which considerations of comity are relevant" and the "practical limitations of the certification process" (internal quotation marks omitted)), with *Anderson Living Tr.* v. *Energen*

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[1] See, *e.g.*, *In re Engage, Inc.*, 544 F.3d 50, 52 (1st Cir. 2008); *In re Microbilt Corp.*, 588 F. App'x 179, 180 n.3 (3d Cir. 2014); *Grattan* v. *Bd. of Sch. Comm'rs of Balt. City*, 805 F.2d 1160, 1164 (4th Cir. 1986); *State Farm Mut. Auto. Ins. Co.* v. *Pate*, 275 F.3d 666, 672 (7th Cir. 2001); *Dial A Car, Inc.* v. *Transp., Inc.*, 132 F.3d 743, 746 (D.C. Cir. 1998).

[2] See, *e.g.*, *In re Engage*, 544 F.3d at 52; *Chauca* v. *Abraham*, 841 F.3d 86, 93 (2d Cir. 2016); *Kulinski* v. *Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997).

Res. Corp., 886 F.3d 826, 839 (10th Cir. 2018) (omitting comity considerations or practical limitations). Some circuits—but not all—say they consider whether the question will likely recur. Compare *State Farm Mut. Auto. Ins. Co.* v. *Pate*, 275 F.3d 666, 672 (7th Cir. 2001) (reasoning that consideration of whether "the issue will likely recur in other cases" helps "insure that federal courts will not overburden state courts with requests for certification"), with *Anderson*, 886 F.3d at 839 (discussing whether to certify without mentioning whether the issue was likely to recur). Further examples abound.

2. The array of sometime-similar, sometime-different factor-based considerations fosters arbitrary and inefficient certification practices. Hairsplitting factual distinctions between certification decisions is always possible, but a fair reading of the cases shows that some circuits would have certified one or both of the state-law questions at issue in this case based on those circuits' certification of less-pressing questions. See, *e.g.*, *Int'l Interests, L.P.* v. *Hardy*, 448 F.3d 303, 309 (5th Cir. 2006) (certifying choice-of-law question where applying Ohio law would have prevented application of state statute providing for a deficiency offset); *Alaska Airlines, Inc.* v. *United Airlines, Inc.*, 902 F.2d 1400, 1402 n.1 (9th Cir. 1990) (certifying choice-of-law-related question without either party's request, and acknowledging that "certification may cause delay"); see also *infra* Parts II.A.3, II.B.1 (discussing additional cases illustrating why other circuits would have certified each question here).

3. Differing state standards for certification do not explain these inconsistencies—far from it. First, most States allow for certification of dispositive questions where controlling precedent is absent. See, *e.g.*, Ga. Code

Ann. § 15-2-9; N.Y. Ct. Rules, § 500.27; cf. Wright & Miller § 4248, p. 502. Second, federal courts are inconsistent in their reliance on state standards for certification. Compare, *e.g.*, *World Harvest Church, Inc.* v. *Guideone Mut. Ins. Co.*, 586 F.3d 950, 960-961 (11th Cir. 2009) (certifying without referring to Georgia's certification statute), with *In re Jafari*, 569 F.3d 644, 651 (7th Cir. 2009) (quoting Wisconsin Statute § 821.01 as the basis for its decision not to certify).

Marked differences among the circuits in willingness to certify further establish the fundamental arbitrariness characterizing the status quo. On one extreme, and perhaps too extreme, the Eleventh Circuit states that "[w]here there is any doubt as to the application of state law, a federal court should certify the question ∗ ∗ ∗." *Pendergast* v. *Sprint Nextel Corp.*, 592 F.3d 1119, 1133 (11th Cir. 2010) (internal quotation marks omitted). The Tenth Circuit, by contrast, has stated that "[w]e have a duty to decide questions of state law even if difficult or uncertain." *Anderson*, 886 F.3d at 839 (internal quotation marks omitted). These differing attitudes have real consequences: in one four-year period, for example, the Eleventh Circuit granted 91% of the certification requests it received, while the Tenth Circuit granted only 31%. Bradford R. Clark, *Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After* Erie, 145 U. Pa. L. Rev. 1459, 1549 n.476 (1997).

4. This arbitrariness produces inconsistencies not only among but also within the circuits. Indeed, the First Circuit is not particularly hostile to certification and has certified questions on easier, more fact-bound issues than the choice-of-law/justiciability and burden-of-proof issues here. See, *e.g.*, *Steinmetz* v. *Coyle & Caron, Inc.*, 862 F.3d

128, 141-142 (1st Cir. 2017) (certifying question to resolve applicability of Massachusetts's anti-SLAPP statute without discussing how important or recurring the issue might be). Illustrating how little relevance certification "factors" often have, First Circuit panels sometimes add different factors for potential certification to the same court. Compare *Steinmetz*, 862 F.3d at 142 (certifying after discussing only whether issue was determinative and whether there was controlling precedent), with *Easthampton Sav. Bank* v. *City of Springfield*, 736 F.3d 46, 50-53 (1st Cir. 2013) (certifying after also assessing unbounded "additional factors—including the dollar amounts involved, the likely effects of a decision on future cases, and federalism").

5. The inter-circuit and intra-circuit inconsistencies highlighted above show that the decision whether to certify often rests not on a principled exercise of discretion but rather on the circuit one happens to be in or even the individual judges who comprise the panel. For example, Judge Calabresi has argued strongly in favor of certification: "[F]ederal courts have all too often refused to certify when they can rely on state lower court opinions to define state law. I view this reluctance as both wrong and unjust." *McCarthy* v. *Olin Corp.*, 119 F.3d 148, 157 (2d Cir. 1997) (Calabresi, J., dissenting). Other judges—including one member of the panel below—have expressed open hostility to the very idea of certification. See Bruce M. Selya, *Certified Madness: Ask a Silly Question* . . . , 29 Suffolk U. L. Rev. 677, 685, 689-690 (1995) (stating that certification creates phony cases or controversies for state courts; increases cost and delay for litigants; and is unlikely to afford appreciable benefit to litigants).[3]

[3] The fact that two judges have expressed views in a dissent or in a scholarly article does not, of course, mean that those judges or others

As the foregoing discussion reveals, decisions on whether to certify are inconsistent and wholly unpredictable because lower courts lack any principled, rigorous framework for making such decisions. Where courts act on an ad hoc basis, no clear or traditional "circuit split" is likely to develop. Courts must retain discretion in determining whether to certify, but only this Court's guidance can ensure that "discretion" is not just whim. Given the importance of certification, and the pressing need for further direction, this case warrants inclusion on the docket.

C. Clear principles for certification can only advance the goals of accuracy, efficiency, and cooperative federalism

While their actual approaches to certification vary widely, judges generally appear to favor the availability of certification procedures. See Hart & Wechsler 1118. Some 93% of federal circuit judges, 86% of federal district judges, and 87% of state judges surveyed said "certification improves federal-state comity." *Ibid.* As Judge Calabresi stated, "it is well known that state court judges have expressed both publicly and privately their desire for certification and their irritation with the fact that federal courts often decide interesting and important questions rather than certifying them to the courts that should be deciding them." *McCarthy*, 119 F.3d at 160 (Calabresi, J., dissenting) (footnote omitted).

Moreover, the development of state law can benefit from certification. For example, Massachusetts's choice-of-law rules were developed by a certified question from the First Circuit. See *Bushkin Assocs., Inc.* v. *Raytheon*

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are closed to persuasion when on panels; it simply exemplifies the divergence of views given the lack of guidance.

Co., 473 N.E.2d 662, 668 (Mass. 1985); see also Henry duPont Ridgely, *Avoiding the Thickets of Guesswork: The Delaware Supreme Court and Certified Questions of Corporation Law*, 63 S.M.U. L. Rev. 1127, 1133-1140 (2010) (discussing how certification has improved state courts' ability to resolve important state-law questions). In addition, if certification is underutilized, then parties can insulate themselves from potentially unfavorable state-appellate review by filing in or removing to federal court. See *McCarthy*, 119 F.3d at 157 (Calabresi, J., dissenting) ("Reluctance to certify is wrong because it leads to precisely the kind of forum shopping that [*Erie*] was intended to prevent."). Forum shopping makes it harder for state courts to develop their law, as cases presenting an issue are funneled into federal courts. *Id.* at 158. Properly exercised certification cures that problem by ensuring that state courts answer key state-law questions arising in such cases. *Ibid.* Reliable certification guidelines advance "the twin aims of the *Erie* rule: discouragement of forum-shopping and avoidance of inequitable administration of the laws." *Hanna* v. *Plumer*, 380 U.S. 460, 468 (1965).

Indeed, the failure to certify questions that should be certified can itself burden state courts. "If anything, it is the failure to certify when certification is plausible that burdens state courts" by "put[ting] pressure on the state courts to accept direct appeals in subsequent cases in order to rectify a federal court error and to do this even at times when it might be inconvenient for them to do so." *McCarthy*, 119 F.3d at 160-161 (Calabresi, J., dissenting).

On the other hand, the lack of principled certification standards also means that sometimes questions are certified when they probably should not be. See, *e.g.*, *Kremen* v. *Cohen*, 325 F.3d 1035, 1044 (9th Cir. 2003) (Kozinski, J.,

dissenting from order certifying questions because "[w]e are perfectly capable of answering both questions ourselves, and there is no indication that courts are overrun with lawsuits raising the issue"). State courts have an escape hatch against errant certification, however. "[A] state court that feels overburdened, or that for any other reason does not wish to decide the certified question, is always free to refuse to answer it." *McCarthy*, 119 F.3d at 160 (Calabresi, J., dissenting). State courts have repeatedly exercised that option. Wright & Miller § 4248, p. 505 n.50 (including examples). Currently, the greater risk is failing to ask important questions, rather than asking too many unimportant ones.

II. THIS CASE ILLUSTRATES WHY FURTHER GUIDANCE IS NEEDED

The First Circuit in this case resolved a state-law claim that the state court itself would likely not have recognized. Instead, New York courts would likely have found no subject-matter jurisdiction for respondent's NYCHRL claim. The First Circuit likewise greenlighted the imposition of punitive damages based on a standard that is probably wrong. Rather than risk clear *Erie* violations, the First Circuit should have certified the questions to the New York Court of Appeals.[4] A federal court violates *Erie* if it adjudicates a claim that the state court would have dismissed for substantive reasons, such as its inapplicability to certain kinds of claims, and this Court should grant review to clarify that certification is the superior response. Likewise, the Court could clarify that when an important

[4] Or at least the court should have certified the punitive-damages question, which would have allowed the New York Court of Appeals to jurisdictionally disclaim the NYCHRL's applicability, thus essentially presenting both points.

state-law question—like a burden of proof—is subject to unresolved lower-court debate within the state system, certification is superior to speculation or "prophecy."

A. Certification is superior to adjudication when state courts probably would dismiss the claim

1. New York courts likely would not recognize respondent's NYCHRL claim

Petitioner repeatedly argued that the NYCHRL could not apply to respondent's claims. Certification requires an unresolved, determinative state-law question, and (to put it mildly) it is unclear that New York courts would recognize respondent's NYCHRL claims at all. To the contrary, they likely would find a lack of *subject-matter jurisdiction* over respondent's NYCHRL claims because their impacts were not felt within the city's boundaries. See *Wolf* v. *Imus*, 96 N.Y.S.3d 54, 55 (N.Y. App. Div. 2019) (rejecting subject-matter jurisdiction when plaintiff lived and worked in Florida); *Benham* v. *eCommission Sols., LLC*, 989 N.Y.S.2d 20, 21 (N.Y. App. Div. 2014) (disclaiming subject-matter jurisdiction because "the alleged conduct occurred while plaintiff was physically situated outside of New York").

Impact normally occurs if the employee either lives or works in the city—a more tenuous connection will not do. See *Hoffman*, 933 N.E.2d at 747 (explaining that the impact requirement "confines the protections of the NYCHRL to those who are meant to be protected—those who work in the city"); *Hardwick* v. *Auriemma*, 983 N.Y.S.2d 509, 512 (N.Y. App. Div. 2014) (holding that non-New York City residents cannot avail themselves of the NYCHRL's protections absent an impact within the city's boundaries).

Of course, the very point of respondent's lawsuit was to *escape* working in New York City. The one thing that respondent would *not* do was work in New York City after moving to Massachusetts despite petitioner's refusal to approve his decision to work entirely remotely. The First Circuit understood this and recognized the potential *Erie* violation because, as it saw it, the justiciability of respondent's claim *was* at issue—yet it nevertheless determined to guess whether the NYCHRL applied rather than find out for sure via certification. See App., *infra*, 16a-17a.

The First Circuit acknowledged that before termination, respondent "began to perform his work for the New York City office remotely from his Massachusetts home." App., *infra*, 18a. Yet in the same breath, the court stated that respondent was "continuously employed in New York City." *Ibid.* (internal quotation marks omitted). The court therefore held that the NYCHRL applied. *Id.* at 19a. But this holding greatly oversimplified the NYCHRL, which requires not "continuous employment via remote work," but that the non-resident plaintiff "*work[s]* in the city." *Hoffman*, 933 N.E.2d at 747 (emphasis added).

This case presents a significant expansion of *Hoffman*. Presuming that the First Circuit was confident that the NYCHRL *if applicable* would sustain liability, the court should have certified the antecedent question of whether the NYCHRL *does* apply—*i.e.*, whether respondent's circumstances demonstrated impact in New York City for NYCHRL purposes. *Hoffman* does not address this central question of remote working, and certifying would have allowed the New York Court of Appeals to determine whether the NYCHRL reaches someone who, at his own insistence, only worked remotely when terminated.

Rather than recognize the lack of clarity on this

important question and certify, the First Circuit relied on policy and a *federal*-court decision to conclude that New York state courts could hear respondent's claim. See App., *infra*, 18a-19a. Despite the fact that *respondent* was the one who insisted on leaving New York City, the court worried that a contrary interpretation "would create a significant loophole," allowing an employer to "lull[] employees into working remotely from outside New York City before terminating them," and thus "immunize itself from liability." *Id.* at 18a. Yet this purposivist interpretation of the NYCHRL, unmoored as it is from the New York Court of Appeals' *Hoffman* decision, fails to recognize the certification-worthy question: whether remote working, particularly when demanded by the employee, produces the required impact in New York City that brings a plaintiff within the NYCHRL's scope in the first place.

This Court's decision in *Lehman Brothers* confronted a similar error. There, the Second Circuit leveraged a policy rationale for why Florida law must mean what the majority wished: the reading "would have the prophylactic effect of providing a disincentive to insider trading." 416 U.S. at 389 (internal quotation marks omitted). This Court's response: "And so it would. Yet under the regime of *Erie R. Co.* v. *Tompkins*, a State can make just the opposite her law" at will. *Ibid.* (citation omitted).

Equally so here. New York law provided no settled answer confirming the First Circuit's policy instinct—but this did not dissuade the court from turning to a *federal-court* decision to justify its *Erie* guess. The court leaned heavily on *Wexelberg* v. *Project Brokers LLC*, No. 13 CIV. 7904 LAK MHD, 2014 WL 2624761 (S.D.N.Y. Apr. 28, 2014), an unpublished report and recommendation by a Magistrate Judge. See App., *infra*, 19a. And despite

acknowledging the material difference—that the employer in *Wexelberg* directed the plaintiff to work remotely, whereas here *respondent* sought to relocate—the First Circuit concluded that *Wexelberg* was indistinguishable. *Ibid.*

Worse, the First Circuit's guess was almost certainly wrong. While the First Circuit stated that the NYCHRL should be liberally construed, see App., *infra*, 18a, *Hoffman* held that the NYCHRL's impact requirement "narrow[ed] the class of nonresident plaintiffs who may invoke [the law's] protection." 933 N.E.2d at 747. And *Hoffman* explicitly rejected an interpretation of the NYCHRL that would "expand[] NYCHRL protections" to nonresidents who lack sufficient contacts with the city. *Ibid.* Moreover, *Hoffman* itself shows that New York courts consider the scope of the NYCHRL to be *jurisdictional*. See *id.* at 748 (concluding that plaintiff's age-discrimination claims failed for "want of subject matter jurisdiction").

Not surprisingly, then, other federal courts have declined to apply the NYCHRL to claims by nonresidents whose physical place of employment was not New York City. See, *e.g.*, *Robles* v. *Cox & Co.*, 841 F. Supp. 2d 615, 624 (E.D.N.Y. 2012) (NYCHRL did not protect New York City resident who worked outside the city); *Wahlstrom* v. *Metro-North Commuter R.R. Co.*, 89 F. Supp. 2d 506, 527 (S.D.N.Y. 2000) ("courts in this District * * * have held that the NYCHRL only applies where the actual impact of the discriminatory conduct or decision is felt within the five boroughs").

2. The First Circuit should have certified to avoid serious Erie *problems*

a. Certification serves *Erie* purposes by ensuring federal courts accurately apply state law. To that end, *Erie*

"drastically limited the power of federal district courts to entertain suits in diversity cases that could not be brought in the respective State courts * * *." *Angel* v. *Bullington*, 330 U.S. 183, 192 (1947). A State's choosing to label a claim's limitation as a matter of "subject-matter jurisdiction"—as New York courts have done for the NYCHRL—strongly signals its intent to confine that claim. See *Shady Grove Orthopedic Assocs., P.A.* v. *Allstate Ins. Co.*, 559 U.S. 393, 418-419 (2010) (Stevens, J., concurring in part) (explaining how federal courts must be sensitive to state procedures that are inextricably linked with substantive policy).

Here, New York's limitation is not procedural; it uses the subject-matter-jurisdiction label to reflect that the NYCHRL can apply only to a narrow set of claims. At a minimum, *Erie* precludes recovery in federal court on a claim that a state court would dismiss for such substantive reasons. See, *e.g.*, *Gasperini* v. *Ctr. for Humanities, Inc.*, 518 U.S. 415, 426 (1996) ("Federal diversity jurisdiction provides an alternative forum for the adjudication of state-created rights, but it does not carry with it generation of rules of substantive law."). A federal court must therefore dismiss a state-law claim like respondent's.

Indeed, some lower-court cases applying both "door-

closing" statutes[5] and screening statutes[6] suggest a state court's lack of subject-matter jurisdiction over a claim may deprive a *federal* court even of subject-matter jurisdiction under *Erie*. This possibility makes certification *more* important here because certification would avoid the potential constitutional problem of a federal court exercising Article III power without subject-matter jurisdiction.[7]

But even setting that possibility aside, failure to certify rather than dismiss still risked a serious *Erie* problem: adjudicating a claim on the merits that New York would refuse to entertain because of the lack of sufficient New York City impact. Awarding respondent relief on a barred

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[5] Door-closing statutes are state statutes that limit the ability of state courts to hear certain claims. Under the Rules of Decision Act, federal courts generally must follow these state statutes, as they limit jurisdiction over state claims—on which the federal court's diversity jurisdiction is based. Hart & Wechsler 631-632; *Proctor & Schwartz, Inc.* v. *Rollins*, 634 F.2d 738, 739-740 & n.3 (4th Cir. 1980); see also *Tele. & Data Sys., Inc.* v. *Am. Cellular Network Corp.*, 966 F.2d 696, 699-700 (D.C. Cir. 1992) (explaining that the door-closing statute created jurisdictional limits); *Landmark Health Sols., LLC* v. *Not for Profit Hosp. Corp.*, 950 F. Supp. 2d 130, 134-135 (D.D.C. 2013) (discussing how a plaintiff's failure to comply with the District of Columbia's door-closing statute is "a jurisdictional bar" that can deprive the federal court of subject-matter jurisdiction to hear the claim).

[6] Screening statutes require some precondition to filing a lawsuit in state court. Hart & Wechsler 633-634. Most courts have followed the First Circuit's lead in requiring federal litigants to abide by the strictures of these statutes, as they often implicate important state policies. *Ibid.* (citing *Feinstein* v. *Mass. Gen. Hosp.*, 643 F.2d 880 (1st Cir. 1981)).

[7] The amount-in-controversy and complete-diversity requirements for subject-matter jurisdiction under 28 U.S.C. § 1332 were, of course, satisfied—but justiciability, and thus subject-matter jurisdiction, requires more (*e.g.*, standing).

state-law claim violates *Erie* on a fundamental level—*any* award the federal court makes must be wrong because the state court would never have heard the claim at all.

b. The First Circuit was aware of the potential *Erie* violation yet proceeded anyway. Not only did the panel grapple with whether the district court had jurisdiction and whether the NYCHRL claim was justiciable, App., *infra*, 15a-17a, it explicitly discussed whether to certify the punitive-damages question and opted to make "an informed prophecy" rather than to "seriously consider certifying the question." *Id.* at 28a. Of course, had the First Circuit simply certified the punitive-damages question, the New York Court of Appeals could have answered that punitive damages could not be awarded because the NYCHRL was inapplicable given the lack of subject-matter jurisdiction. See *supra* p. 17 n.4.[8]

3. Other courts—and other panels—would likely have certified the NYCHRL question

The First Circuit's failure to certify here is at odds with its previous statement that questions should be certified

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[8] Oddly, the First Circuit determined that "any challenge to the decision to apply the NYCHRL as a result of [the district court's] choice of law analysis is waived." App., *infra*, 13a. Not so. The specific issue to be certified implicates "subject-matter jurisdiction, [which,] because it involves a court's power to hear a case, can never be forfeited or waived." *United States* v. *Cotton*, 535 U.S. 625, 630 (2002). Even aside from that, petitioner repeatedly objected to the NYCHRL's applicability. *E.g.*, App., *infra*, 7a-8a; C&W Pretrial Memorandum at 6-8, *Rinsky* v. *Cushman & Wakefield, Inc.*, No. 16-10403 (D. Mass. Mar. 24, 2017), ECF No. 28 (arguing that New York state law—which did not provide for punitive damages—applied); C&W Supplemental Trial Brief in Support of the Application of New York Law at 4-6 (Apr. 6, 2017), ECF No. 45 (same); C&W Motion for Judgment As a Matter of Law at 5 n.5 (Apr. 18, 2017), ECF No. 61 (same).

when the "course that the state court would take is not reasonably clear," which includes "when a case presents a close and difficult legal issue." *Easthampton*, 736 F.3d at 51 (internal quotation marks omitted). Other courts—even other panels of the same court—would have certified the question of whether the NYCHRL applies.

Another First Circuit panel, for example, recently certified questions regarding the scope of arbitration agreements under state law—which, of course, affects a court's ability to adjudicate a claim. See *GGNSC Admin. Servs., LLC* v. *Schrader*, 917 F.3d 20, 23 (1st Cir. 2019) ("Because the Agreement's enforceability as to Schrader's claims turns on important issues of state law, including statutory interpretation, common law, and matters of policy, we think it best to certify questions to the SJC."); see also *City of Portsmouth* v. *Schlesinger*, 57 F.3d 12, 18 (1st Cir. 1995) (certifying narrow, case-specific statute-of-limitations question to New Hampshire Supreme Court); *Keeton* v. *Hustler Magazine, Inc.*, 828 F.2d 64, 67 (1st Cir. 1987) (mem.) (certifying a statute-of-limitations choice-of-law question to the New Hampshire Supreme Court).

Other circuits would have certified the question as well. See, *e.g.*, *Auto-Owners Ins. Co.* v. *Se. Floating Docks, Inc.*, 632 F.3d 1195, 1197 (11th Cir. 2011) (certifying a choice-of-law-related issue because it was "unable to find definitive answers in clearly established Florida law, either case law or statutory"); *Progressive Gulf Ins. Co.* v. *Faehnrich*, 627 F.3d 1137, 1140 (9th Cir. 2010) (certifying a choice-of-law-related question to the Nevada Supreme Court even though the question was arguably fact-specific and at least one Nevada Supreme Court case suggested an answer); *Menendez* v. *Perishable Distribs., Inc.*, 744 F.2d 1551, 1553 (11th Cir. 1984) (asking the Georgia Supreme

Court which state's law should govern given specific provisions of an insurance contract).

Rather than certify a dispositive, unsettled question about whether *Hoffman* can be extended to the context of remote working and whether a state court would have had the power to proceed at all, the First Circuit made a guess—and it likely guessed wrongly. Certification would have given the New York Court of Appeals an opportunity to apply *Hoffman* in a context that could guide numerous future disputes involving adverse employment decisions over those who work remotely.

B. Certification is superior to adjudication when a State's highest court has not resolved lower-court division about important state-law questions

1. The division among New York courts about the burden of proof for punitive damages warranted certification

The court of appeals charged past the issue of whether punitive damages needed to be proven by showing clear-and-convincing evidence or simply by a preponderance of the evidence. App., *infra*, 28a. Despite noting the possibility of certifying this question to the New York Court of Appeals, the First Circuit again chose to make an *Erie* guess that it characterized as an "informed prophecy"—rather than "seriously consider certifying the question." *Ibid.*

But serious consideration was warranted. First, as the panel implicitly acknowledged, there is apparently no state-law jurisprudence addressing the burden of proof under the NYCHRL (or whether it differs from New York's general standard). See App., *infra*, 28a. Second, in the court's own words, "New York's highest court has not

addressed the split" among lower New York courts on "the appropriate burden of proof for punitive damages generally." *Id.* at 27a. Quoting an opinion by then-Judge Sotomayor, the First Circuit conceded that "[t]he federal and state court cases on the question are mired in a morass of ambiguity." *Ibid.* (quoting *Greenbaum* v. *Svenska Handelsbanken, N.Y.*, 979 F. Supp. 973, 981-982 (S.D.N.Y. 1997)).

The First Circuit used the stark *absence* of state law on the precise question to *justify* its refusal to certify: "Were the issue before us the question of the appropriate burden of proof for punitive damages generally, we might seriously consider certifying the question to New York's highest court." App., *infra*, 28a. However, because the standard for punitive damages under the NYCHRL was purportedly a "narrower" issue—albeit one lacking on-point guidance from state law—the court opted for "informed prophecy." *Ibid.*

This choice again highlights the need for guidance from this Court. The court of appeals (App., *infra*, 28a) quoted a 2013 decision stating that "a federal court sitting in diversity ∗∗∗ should endeavor to predict how [the state's highest court] would likely decide the question." *Butler* v. *Balolia*, 736 F.3d 609, 613 (1st Cir. 2013). But while some amount of prediction is inherent in any *Erie* endeavor, other circuits prefer certification over guesswork when a State's lower courts are divided. For example, the Second Circuit has held that "[w]here there is no definitive state court authority on an issue, and the lower state courts are split in their approach, certification of the question to the state's highest court is appropriate." *Krohn* v. *N.Y.C. Police Dep't*, 341 F.3d 177, 182 (2d Cir. 2003). "Certification," as the Seventh Circuit put it, "is an

alternative to prognostication." *Todd* v. *Societe BIC, S.A.*, 9 F.3d 1216, 1222 (7th Cir. 1993). The Eighth Circuit found certification to the Minnesota Supreme Court appropriate "[i]n the absence of controlling precedent in the decisions of [that court]" such that the Eighth Circuit could not "reach a sound decision without indulging in speculation or conjecture." *Kulinski* v. *Medtronic Bio-Medicus, Inc.*, 112 F.3d 368, 372 (8th Cir. 1997). Other circuits' avoidance of speculation or conjecture contrast sharply with the First Circuit's embrace of "prophecy."

In addition to the First Circuit's *Butler* decision, the court relied heavily on the New York Court of Appeal's decision in *Chauca* v. *Abraham*, 89 N.E.3d 475 (N.Y. 2017) ("*Chauca II*")—itself the result of a certified question. But the court of appeals did not assert that *Chauca II* controls the burden-of-proof question. See App., *infra*, 29a-31a. And for good reason. In *Chauca II*, the New York Court of Appeals addressed the *liability* standard for determining punitive damages under the NYCHRL. 89 N.E.3d at 481. The phrase "burden of proof" does not even appear in the opinion. Instead of recognizing that *Chauca II* was not on point, the First Circuit made a prophetic leap and inferred that because *Chauca II* announced a liability standard less demanding than Title VII's standard, the NYCHRL's burden-of-proof standard must likewise be less than clear and convincing evidence. App., *infra*, 30a-31a.

Other federal courts would have certified this question. The Second Circuit certainly would have—as demonstrated by the numerous NYCHRL questions it has certified to the New York Court of Appeals. See *Makinen* v. *City of New York*, 857 F.3d 491, 497 (2d Cir. 2017) (whether NYCHRL "preclude[s] a plaintiff from bringing a

disability discrimination claim based solely on a perception of untreated alcoholism"); *Chauca* v. *Abraham*, 841 F.3d 86, 95 (2d Cir. 2016) ("*Chauca I*") (about NYCHRL's proper liability standard for punitive damages); *Zakrzewska* v. *New Sch.*, 574 F.3d 24, 28 (2d Cir. 2009) (about affirmative defenses in NYCHRL sexual-harassment and retaliation claims); *Krohn*, 341 F.3d at 179 (availability of punitive damages from City itself in gender-based employment-discrimination NYCHRL claim).

Moreover, additional examples of courts certifying questions where the issue was not more complicated or important than the burden-of-proof question here show that other courts would have certified this question. See, *e.g.*, *Shaps* v. *Provident Life & Accident Ins. Co.*, 244 F.3d 876, 878 (11th Cir. 2001) (certifying the question whether a burden of proof was part of state substantive law or part of state choice-of-law rules, even without complete absence of guiding state law on the precise question); *Ortega* v. *IBP, Inc.*, No. CIV.A. 92-2351-KHV, 1994 WL 373887, at *6 (D. Kan. July 1, 1994) (noting a certified question to the Kansas Supreme Court regarding whether a plaintiff alleging wrongful discharge under Kansas law was required to prove that claim by clear and convincing evidence), *aff'd sub nom. Tovar* v. *IBP, Inc.*, 86 F.3d 1167 (10th Cir. 1996); *Polston* v. *Boomershine Pontiac-GMC Truck, Inc.*, 952 F.2d 1304, 1310 (11th Cir. 1992) (certifying question to Georgia Supreme Court regarding "the burden of proof on each party in a crashworthiness or enhanced injury case under Georgia law").

Polston is particularly instructive, as the Eleventh Circuit there reasoned that the "split in authority emphasizes the need for certification" and that the question "involves issues of public policy that are appropriately answered

only by the Supreme Court of Georgia." 952 F.2d at 1310. This is exactly the situation here. Not only is there a split in authority on the burden of proof for punitive damages generally—a split that has remained unresolved for over two decades, see App., *infra*, 28a—but the competing policy issues should also be weighed by New York's highest court. As the Second Circuit put it, "[t]he standard by which claims for punitive damages under the NYCHRL are evaluated is plainly an issue involving competing policy concerns, the importance of which is far broader than our arriving at a proper resolution of the case at bar." *Chauca I*, 841 F.3d at 94; see also *Makinen*, 857 F.3d at 493 (certifying because "we cannot predict with confidence how the New York Court of Appeals would reconcile the broad, remedial purpose of the NYCHRL with the specific language of [a provision of the NYCHRL]").

2. The First Circuit's guess was outcome-determinative and likely wrong

The choice of a mere preponderance standard here was outcome-determinative—a higher standard would require reversing the district court's judgment.[9] The First Circuit likely guessed wrongly about New York law, further confirming that it should have certified before taking the path it chose.

The New York Court of Appeals would likely have applied a clear-and-convincing-evidence standard here. While lower courts have not been unanimous, numerous decisions from the First and Second Departments—the

[9] This Court has recognized the critical importance of ensuring correct burden-of-proof standards. "Where the burden of proof lies on a given issue is, of course, rarely without consequence and frequently may be dispositive to the outcome of the litigation or application." *Lavine* v. *Milne*, 424 U.S. 577, 585 (1976).

two intermediate appellate courts that share jurisdiction over the five boroughs of New York City,[10] which is where NYCHRL impact must be felt—have implicitly or explicitly endorsed a clear-and-convincing-evidence standard for punitive damages outside of the NYCHRL context. See, *e.g.*, *Gomez* v. *Cabatic*, 70 N.Y.S.3d 19, 25-26 (N.Y. App. Div. 2018) (trial court did not err where it instructed the jury on punitive damages that the standard was "clear and convincing evidence" and that it was insufficient "to find that there is a preponderance of the evidence in the plaintiff's favor"); *Munoz* v. *Puretz*, 753 N.Y.S.2d 463, 466 (N.Y. App. Div. 2003) ("to recover punitive damages, a plaintiff must show" wrongful conduct "by 'clear, unequivocal and convincing evidence'" (quoting *Sladick* v. *Hudson Gen. Corp.*, 641 N.Y.S.2d 270, 271 (N.Y. App. Div. 1996))).[11]

Moreover, the New York Court of Appeals has stated that "[punitive damages] ∗ ∗ ∗ may only be awarded for exceptional misconduct which transgresses mere negligence ∗ ∗ ∗ . Accordingly, there must be some heightened standard for such an award." *Chauca II*, 89 N.E.3d at 479 (internal citation and quotation marks omitted) (brackets original). Whether the policy of liberally construing the NYCHRL, see *id.* at 477, overcomes the policy limitations on punitive damages such that a mere preponderance standard of proof applies is a question "involving

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[10] See NYCourts.gov, The Courts, Appellate Courts, Appellate Divisions, available at https://www.nycourts.gov/courts/appellatedivisions.shtml (last accessed September 2, 2019).

[11] See also, *e.g.*, *Chiara* v. *Dernago*, 11 N.Y.S.3d 96, 99 (N.Y. App. Div. 2015); *CDR Créances S.A.S.* v. *Cohen*, 880 N.Y.S.2d 251, 253 (N.Y. App. Div. 2009); *Randi A.J.* v. *Long Island Surgi-Ctr.*, 842 N.Y.S.2d 558, 568 (N.Y. App. Div. 2007).

competing policy concerns [that is] best resolved by the New York Court of Appeals." *Chauca I*, 841 F.3d at 94 (internal quotation marks omitted).

III. This Case Presents An Ideal Vehicle

This case is an ideal vehicle to clarify how certification discretion should be exercised. Ruling for petitioner would provide it relief by requiring certification of the controlling jurisdictional and punitive-damages questions to the New York Court of Appeals and, if necessary, granting petitioner a new trial under proper law and at least the correct burden of proof for punitive damages.

Moreover, this case presents a unique opportunity for the Court to address certification. As one analysis notes:

> [I]t is unlikely that a case that decisively turns on the interpretation of a state law and involves the lower court's declination to certify a question to a state supreme court will reach the Supreme Court. The certification issue continues to vex lower federal courts without a good opportunity for the Supreme Court to address it.

Chang, 85 Geo. Wash. L. Rev. at 277-278 (suggesting a federal rule for certification).

This case readily satisfies that high standard. It turns on whether the NYCHRL applies (with its provision for punitive damages as an added unresolved issue) and the court below refused to certify despite significant *Erie* questions. The court instead based its incorrect answers on speculation. In short, this case is a prime example of why methodological guidance from this Court is needed—even a modicum of principled direction from this Court likely would have prevented the erroneous failure to certify below. Meaningful standards governing certification

of claims, moreover, are unlikely to develop on their own, given certification's discretionary nature and the malleable factors that courts claim to weigh.

Finally, both certification issues—*and only those certification issues*—are clearly presented here. Petitioner argued throughout that a clear-and-convincing evidence standard should apply to punitive damages. See App., *infra*, 25a-27a. And petitioner argued against and objected to the application of the NYCHRL. *Id.* at 7a-8a, 10a; *supra* pp. 21-24 & n.8. It is axiomatic that, under *Erie,* a federal diversity court should not entertain a claim for relief which would be barred by the relevant state court.

Twenty-two years have passed since *Arizonans for Official English*, which addressed certification in a more unusual context (the challenge to a state constitutional provision). But certification in typical diversity cases—when federal courts are empowered to declare a State's law—warrants guidance as well, so that the exercise of discretion is less a matter of whim and more a matter of law.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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

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

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

Counsel for Petitioner

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