No.

IN THE
Supreme Court of the United States

BRUCE SHEAR,
Petitioner,

v.

MAZ PARTNERS, LP, on behalf of itself
and all others similarly situated,
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

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QUESTIONS PRESENTED

1. When a jury finds in favor of defendant on the sole claim asserted against him, may a district court affirm the verdict but then use "equitable power" to enter a multi-million dollar disgorgement order against the victorious defendant?

2. Faced with a novel and outcome-determinative state law decision issued during a federal diversity trial, should a federal court certify a question of law regarding the interpretation of the decision to avoid making an *Erie*-guess about how the state court might decide the issue?

CORPORATE DISCLOSURE STATEMENT

The caption of the case contains the names of all parties. Acadia Healthcare Co., Inc. has guaranteed payment of the disgorgement judgment against defendant Bruce Shear.

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The jury's verdict form is at Appendix C. The district court's entry of judgment for the Defendants is at Appendix D. The district court's post-trial memorandum order to amend the judgment and to award disgorgement to the class is reported at 265 F. Supp. 3d 109. The First Circuit's opinion is reported at 894 F.3d 419. The First Circuit's denial of rehearing is at Appendix F.

JURISDICTION

Jurisdiction of the district court was invoked under 28 U.S.C. § 1332. The First Circuit entered judgment on July 2, 2018. The First Circuit denied rehearing on July 31, 2018. This Court's jurisdiction is timely invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The Seventh Amendment to the United States Constitution provides "[i]n Suits at common law . . . the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

The Judiciary Act of 1789, 1 Stat. 73, 78, 82 provides, in pertinent part, as follows:

SEC. 11. *And be it further enacted*, That the circuit courts shall have original cognizance, concurrent with the courts of the several States, of all suits of a civil nature . . . in equity . . . .

SEC. 16. *And be it further enacted*, That suits in equity shall not be sustained in either of the courts of the United States, in any case where plain, adequate and complete remedy may be had at law.

Massachusetts Supreme Judicial Court Rule 1:03 provides that a federal court may certify a question of state law to the Supreme Judicial Court where it finds no controlling precedent and where the question may be determinative of the pending cause of action.

STATEMENT

This case primarily concerns the "nuclear weapon" of unlimited federal court equity powers. It arises from an unsuccessful securities class action in which the jury found for Petitioner, Bruce Shear, on the only claim asserted against him. Specifically, the jury found that the plaintiff class had not suffered an economic loss. The district court entered judgment for Shear. In post-trial proceedings, the court affirmed the verdict for Shear, but nevertheless ordered a post-trial $3 million "equitable disgorgement" from Shear to the plaintiff class (the "Disgorgement Order"). The district court did so even though disgorgement was never sought by plaintiff before the jury returned its verdict and the only claim against Shear was fully resolved by the jury's verdict. In issuing the Disgorgement Order, the district court recognized that it created a windfall for the plaintiff class — ironically giving the class a greater recovery than it would have achieved had it actually prevailed on its sole claim against

Shear. Nevertheless, the district court issued the order.

The district court's Disgorgement Order, and the First Circuit Court of Appeals' affirmance of that order, present numerous errors and issues that warrant this Court's review and correction.

In these circumstances, the district court's post-trial Disgorgement Order is exactly the type of "nuclear weapon" that this Court warned against in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999). Given the affirmed jury finding of no injury, the Disgorgement Order also implicates the injury-in-fact standing requirement for federal court subject matter jurisdiction under *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). In other words, this case presents the issue of whether the district court had post-trial jurisdiction to award relief after the jury found that the plaintiff class had not suffered any injury-in-fact. Petitioner has not found a single example where a federal court affirmed a jury verdict for the defendant and nevertheless ordered that defendant to pay "equitable disgorgement" in the absence of adjudicated liability and injury. This case provides the Court with an important opportunity to address the extent of federal equitable power in light of the Seventh Amendment and in the absence of injury-in-fact as determined by an affirmed jury verdict.

The other issue meriting review by this Court arose in the midst of trial when the Massachusetts Supreme Judicial Court issued a seminal corporate law decision. As the district court said at the time: "I

read that case from the Supreme Judicial Court last night. . . . It's dramatic. . . . It's dramatic. I'm not quite yet prepared to say what's left of this case. . . ." What prompted this reaction from the district court was *International Brotherhood of Electrical Workers Local No. 129 Benefit Fund v. Tucci*, 70 N.E.3d 918 (Mass. 2017). In *Tucci*, the court highlighted that "Delaware corporate law principles and those of Massachusetts are not always congruent." *Id.* at 927 n.14. Contrary to Delaware law, it held that directors of a Massachusetts corporation do not owe fiduciary duties directly to shareholders; breach of fiduciary duty claims against Massachusetts directors must be brought *derivatively* rather than as a direct action. The Supreme Judicial Court recognized a narrow exception permitting a direct action against a "controlling shareholder who also is a director [who] proposes and implements a self-interested transaction that is to the detriment of minority shareholders." *Id.* at 926.

As a result of the *Tucci* decision, the district court dismissed the claims against all director defendants except Bruce Shear. Both the district court and the appellate court construed *Tucci* to permit a direct action against Shear. But in doing so, the lower courts continued to rely upon Delaware corporate law even though *Tucci* rejected reliance on Delaware fiduciary standards. Given the freshness of the Massachusetts rule and its express rejection of Delaware precedent, the lower courts should not have construed *Tucci* based on rejected Delaware precedent without certifying the issue to Massachusetts' highest court. Indeed, in the

circumstances presented here, the issue should have been certified to the Supreme Judicial Court to resolve whether the exception applied to the sole remaining director defendant.

Thus, this appeal also provides the Court opportunity to clarify under what circumstances lower federal courts should certify novel, significant, and unsettled questions of state law to a state's highest court and avoid making an *Erie*-guess. This case also presents an opportunity to resolve a split among circuits that adopt different approaches to certifying novel questions of law to the states' highest courts.

A. The Merger Details

This case arises from a hedge fund's objection to a 2011 merger between PHC, Inc. ("PHC") and Acadia Healthcare Company, Inc. ("Acadia"). PHC was a small public company that provided substance abuse treatment facilities and services. Petitioner Bruce Shear served as PHC's President. Petitioner, along with PHC's other directors, concluded that a proposed merger with Acadia, a larger, privately-owned behavioral health company, would be in the best interest of PHC's shareholders in the long-term.

PHC had two classes of stock. Class A shares were publicly traded and were entitled to one vote per share. Class B shares were not publicly traded and were entitled to five votes per share. In addition, Class B shareholders appointed four directors and Class A public shareholders appointed two directors. Petitioner owned approximately 4% of PHC's Class A

stock and 93% of PHC's Class B stock, giving him 8% of the total shares outstanding.

Class A and B shareholders received the same merger consideration for their shares — one-quarter share in the surviving Acadia entity for each PHC share. In addition, the Class B shareholders as a group received a $5 million cash payment from Acadia in consideration for giving up their five votes per share and their ability to elect a majority of the directors.

The Proxy that PHC distributed to its shareholders fully disclosed the financial interests of PHC's directors and executives. At trial, the district court ruled as a matter of law that there were no disclosure deficiencies and that the shareholder vote was fully informed.

On May 19, 2011, PHC's Board of Directors (with Petitioner abstaining) unanimously approved the merger and recommended approval by the PHC shareholders. Shareholder approval of the transaction required an absolute two-thirds majority vote of the outstanding: (1) Class A shares, (2) Class B shares, and (3) Class A and B shares together. Neither Petitioner alone, nor together with the board, could approve the merger — the Class A shareholders had veto power over the merger.

A special PHC shareholder meeting was held on October 26, 2011. The shareholders of PHC voted overwhelmingly in favor of the proposed merger with Acadia — 91% of the shares voting approved the merger. The merger was completed on November 1,

2011. PHC's former shareholders saw an eleven-fold increase in the value of their shareholdings within four years of the merger.

B. The Proceedings Below

MAZ Partners LP ("MAZ"), a hedge fund, filed suit directly, not derivatively, against Petitioner and PHC's other directors for alleged breaches of fiduciary duty. MAZ also sued Acadia for aiding and abetting such alleged breaches. Only one claim was asserted against Petitioner — for breach of fiduciary duty as an alleged "controlling shareholder."

MAZ opted not to pursue a preliminary injunction to delay or prevent the merger. Once the merger was consummated, MAZ conceded that any injunctive relief pleaded in its complaint was moot and the only relief it sought was for money damages. (Hr'g Tr. 7:19-25, Civ. No. 11-11049 (Nov. 30, 2011), ECF No. 50.) Indeed, in ruling on summary judgment, the district court noted that MAZ "argues that the equitable defense of unclean hands is inapplicable to this action at law for monetary damages." (Mem. & Order at 33, Civ. No. 11-11049 (Sept. 1, 2016), ECF No. 258.) The district court certified a limited class of Class A shareholders who voted against the merger, abstained, or did not vote — approximately 28% of the total number of former PHC Class A shareholders.

On February 27, 2017, a jury began to hear the case. In the midst of trial, the Massachusetts Supreme Judicial Court decided *International Brotherhood of Electrical Workers Local No. 129*

Benefit Fund v. Tucci, 70 N.E.3d 918 (Mass. 2017). *Tucci* is a groundbreaking case of Massachusetts corporate law. It specifically departed from Delaware corporate law and declared that directors of Massachusetts corporations do not owe fiduciary duties directly to the shareholders. Thus, the new rule announced in *Tucci* is that claims such as those in this case must be brought *derivatively* rather than as a direct action. The Supreme Judicial Court recognized a narrow exception where there is a "controlling shareholder" who is "a director-majority shareholder" and who engineers a corporate action "that affects minority shareholders adversely as compared to the majority shareholders." *Id.* at 926.

The district court recognized that the effect of this decision was "dramatic." It marked Massachusetts' substantial shift away from Delaware corporate fiduciary law, even though the district court had looked to Delaware law for guidance throughout the litigation. Based on the decision, the district court dismissed all claims against the director defendants, except Petitioner.

Rather than certify the question that the First Circuit later admitted to be "intricate, entangled, and in some instances novel," the district court pressed ahead with the trial against Petitioner. It ruled that he was potentially within the "controlling shareholder" exception recognized in *Tucci* even though he was not a "director-majority shareholder that affects minority shareholders adversely."

Thus, the district court submitted the sole claim against Petitioner to the jury, which found in

Petitioner's favor. Specifically, in response to Question No. 3 of the Special Verdict Form, the jury found that the class did not suffer any economic loss as a result of the merger. (App. at 74a.) The district court entered final judgment for Petitioner based upon that verdict on March 15, 2017. (App. at 76a.)

MAZ filed post-trial motions to modify or amend the judgment. At the hearing on the post-trial motions, Petitioner's counsel argued that "even if you have a breach of fiduciary duty, if the plaintiff has not proved economic loss, there is no disgorgement; there is no equitable jurisdiction to award damages; that's the end of that claim." (Hr'g Tr. at 15:4-7, Civ. No. 11-11049 (May 4, 2017).) And, lest there be any doubt, Petitioner restated his "fundamental point . . . that because of the answer to Question 3 . . . that ends the claim, and . . . you do not have equitable jurisdiction to do anything else." (*Id.* at 19:24-20:2.)

Disgorgement was not a remedy pleaded in MAZ's Second Amended Complaint. (Civ. No. 11-11049 (Aug. 31, 2015), ECF No. 177.) Disgorgement was not mentioned as a form of potential relief in the parties' Joint Pretrial Memorandum. (Civ. No. 11-11049 (Jan. 17, 2017), ECF No. 326.) With respect to the Class B cash premium, the only claim for relief sought by plaintiff before the verdict was "damages relating to the unfair treatment of the Class A shareholders as compared to the Class B shareholders reflected in the $5 million Class B Payment." (*Id.* at 10.) In the Joint Pretrial Memorandum, "*Plaintiff propose[d] that damages be levied based on a special verdict to be submitted to*

the jury. The ***jury*** will determine 1) how much of the $5 million Class B Payment was unjustified and due to the Class. . . ." (*Id.* (emphasis added).) Accordingly, the final verdict form explicitly asked the jury to determine: "How much merger consideration, if any, should Class B shareholders have received to compensate them for the enhanced rights that they surrendered in the merger with Acadia?" (App. at 75a.)

In other words, throughout every stage of this litigation leading up to and through trial, MAZ made plain that the issue of the $5 million Class B merger consideration was a question to be determined by the jury and not by the district court. The Special Verdict Form and the jury charge confirm that all liability and damages issues concerning the $5 million Class B merger consideration would be decided by the jury. (App. at 74a-75a.)

Nevertheless, the district court cited its inherent equitable authority to order a $3 million disgorgement to the class. This was recognized as a windfall because, had the class prevailed with the jury, its maximum recovery would have been its 28% *pro rata* share of the $5 million Class B premium — $1.4 million. Thus, the Disgorgement Order gave the class twice what it would have received even if it had won a jury verdict on that claim.

Petitioner timely appealed and asserted numerous errors in the district court's amended judgment and Disgorgement Order. The First Circuit paradoxically affirmed both the district court's post-trial disgorgement award in favor of the plaintiff

class *and* the jury's take-nothing verdict in favor of the defendant. Neither the district court nor the court of appeals cited a single case for the proposition that a federal court may impose personal liability on a prevailing civil defendant and order that prevailing defendant to disgorge funds "in equity" to a defeated plaintiff after both the jury and the court have found the defendant not liable in tort. Petitioner's timely petition for rehearing *en banc* was denied.

REASONS FOR GRANTING THE PETITION

This case lies at the intersection of three constitutional principles that merit review by this Court. The district court's post-trial Disgorgement Order, which also affirmed the jury verdict in favor of Petitioner, is the equitable "nuclear weapon" this Court cautioned against in *Grupo Mexicano de Desarrollo, S.A. v. Alliance Bond Fund, Inc.*, 527 U.S. 308, 332 (1999). Because the district court entered its Disgorgement Order after the jury had determined that the plaintiff class had no injury in fact, there was no jurisdiction supporting the district court's post-trial order under the teaching of *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540 (2016). Finally, the Disgorgement Order — which was based on evidence rejected by the jury in its ruling for Petitioner — violated Petitioner's Seventh Amendment right that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States." U.S. Const. amend. VII. Any one of these principles should have barred the entry of the Disgorgement Order. Taken together, they render the Disgorgement Order a tower of unconstitutionality.

Thus, it should come as no surprise that neither the Petitioner, the Respondent, the district court, nor the First Circuit could find a single case where a district court has done what was done here.

Separately, the Court should review the circumstances requiring certifications of questions of law to a state's highest court. Here, the Massachusetts Supreme Judicial Court — in the midst of the federal trial below — announced a new rule of law: directors of Massachusetts corporations do not owe fiduciary duties directly to shareholders, subject to two exceptions. The court, in making its ruling, expressly and decisively rejected Delaware corporate law, which recognized a fiduciary duty flowing from directors to shareholders. The district court found Petitioner to be within one of the exceptions, relying on Delaware corporate law, which was certainly contrary to the announced approach of the Massachusetts court. In these circumstances the issue concerning the scope of the rule and the newly announced exception should have been certified to the Supreme Judicial Court — especially given the lower courts' reliance on rejected Delaware corporate law to define the scope of the exception. Thus, this case presents the Court with an appropriate and compelling opportunity to define the circumstances under which a federal court should certify a recent, novel, and unsettled issue of state law to a state's highest court.

I. This Court Should Review This Case to Decide the Proper Scope of Federal Court Equitable Power.

By the time of trial, the plaintiff class had one claim against Petitioner — for breach of fiduciary duty as a "controlling shareholder" of PHC. The claim was submitted to the jury. The jury ruled for Petitioner, finding that the plaintiff class had not suffered any injury as a result of Petitioner's conduct.[1] The district court duly entered judgment for Petitioner.

In a post-trial motion to alter or amend the judgment, MAZ asked the district court to order Petitioner to disgorge his share of the Class B premium notwithstanding that it had lost that issue before the jury. Significantly, MAZ had neither pleaded nor sought disgorgement as a remedy until after the jury had returned its verdict and the district court had already entered judgment for

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[1] Question 6 of the Special Verdict Form asked the jury to decide "[h]ow much merger consideration, if any, should Class B shareholders have received to compensate them for the enhanced rights that they surrendered in the merger with Acadia." (App. at 75a.) It is beyond cavil that both in its instructions to the jury and in its verdict form, the district court recognized that the appropriate amount of Class B premium that Petitioner received in the merger was properly a question of fact for the jury to decide and not an issue reserved in equity for the court. (*Id.*) But the jury's factual determination in response to Question No. 3 of the Special Verdict Form obviated the need for the jury to answer Question No. 6. In any event, the breach of fiduciary duty claim relating to the Class B premium was fully submitted to, and fully resolved by, the jury.

Petitioner. After reviewing MAZ's post-trial motions to modify the judgment, the district court agreed with the jury that MAZ failed to prove its sole claim against Petitioner. (App. at 60a-61a.) Nevertheless, the district court amended its judgment and ordered Petitioner to pay $3 million dollars to the class in "equitable disgorgement" — expressly relying on the expert witness and evidence rejected by the jury in ruling in Petitioner's favor.

Thus, this case presents an opportunity for this Court to consider whether a district court has equitable and subject matter jurisdiction to award post-trial relief when all claims have been resolved in favor of a defendant. The decisions below run counter to the usual rule that judicial remedies are only available after liability is established; they have no independent operation. *See Franklin v. Gwinnett Cty. Pub. Sch.*, 503 U.S. 60, 69 (1992) (The "question whether a litigant has a cause of action is analytically distinct [from] and prior to the question of what relief, if any, a litigant may be entitled to receive.") (internal quotation marks and citation omitted). The jury concluded that MAZ failed to prove its case and that Petitioner bore no tort liability. The district court grossly exceeded its equitable and inherent authority when it both affirmed and effectively disregarded the jury's verdict by entering the Disgorgement Order. The Court should take this opportunity to clarify the proper role of the district court and its use of equitable powers.

A. The Court should review whether equity powers may be used to impose a post-trial remedy against a prevailing defendant.

It is axiomatic that federal courts can neither be given nor exercise authority beyond that permitted by the Constitution. *See, e.g.*, *Sibbach v. Wilson & Co.*, 312 U.S. 1, 9 (1941). Article III of the Constitution, augmented by the necessary and proper clause of Article I, § 8, cl. 18, gives Congress the power to establish a system of federal district and appellate courts and to promulgate procedural rules governing litigation in those courts. The first Congress exercised this power in enacting the Judiciary Act of 1789, codified at 1 Stat. 73. This act conferred on the federal courts jurisdiction over "all suits . . . in equity." *Id.* § 11.

As explained by Justice Scalia in *Grupo Mexicano* and recently echoed by Justice Thomas in his concurrence in *Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018), this Court has never adopted the view that federal courts possess "a freewheeling power to fashion new forms of equitable remedies." Indeed, it has read the courts' equitable jurisdiction as meaningfully constrained by "the body of law which had been transplanted to this country from the English Court of Chancery" in 1789. *Id.* (quoting *Guaranty Trust Co. v. York*, 326 U.S. 99, 105 (1945)); *see also Grupo Mexicano*, 527 U.S. at 318 (federal courts have "authority to administer in equity suits the principles of the system of judicial remedies which had been devised and was being administered by the English Court of Chancery at

the time of the separation of the two countries.") (citation omitted). Thus, "district courts' authority to provide equitable relief . . . must comply with longstanding principles of equity that predate this country's founding." *Trump*, 138 S. Ct. at 2426 (Thomas, J., concurring).

One of these fundamental principles of equity jurisprudence is that "equity follows the law." *See Hedges v. Dixon Cty.*, 150 U.S. 182, 192 (1893). This maxim was characterized as a legal truism, admitting of no dispute, in *Magniac v. Thomson*, 56 U.S. (15 How.) 281, 299 (1853), which places well-defined limits on a court's equity powers and makes clear that where legal rights are involved, equity is subordinate to the law:

> [W]herever the rights or the situation of parties are clearly defined and established by law, equity has no power to change or unsettle those rights or that situation, but in all such instances the maxim *equitas sequiter legem* is strictly applicable.

Id.; *see also INS v. Pangilinan*, 486 U.S. 875, 883 (1988) (quoting *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 122 (1874)) ("A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law. . . .").

This Court's opinion in *Grupo Mexicano* focused on the dangers of a district court's reliance on unbounded equity, just as occurred below. This

Court warned that "[t]o accord a type of relief that has never been available before" would mean that courts were not simply flexible, but effectively omnipotent — a potentially destructive capability it likened to a "nuclear weapon." *Grupo Mexicano*, 527 U.S. at 322, 332. The district court's Disgorgement Order (erroneously endorsed and affirmed by the First Circuit) is literally an unprecedented and unconstitutional overreach of equitable jurisdiction — precisely what this Court warned against in *Grupo Mexicano*.

Neither the district court nor the First Circuit cited a single case where a federal court has done what was done here. There is, however, a case expressly refusing such relief. In *National Railroad Passenger Corp. v. Veolia Transportation Services, Inc.,* 886 F. Supp. 2d 14 (D.D.C. 2012), the district court refused to award post-trial disgorgement against a prevailing defendant. There, a plaintiff who similarly lost before a jury on a claim for aiding and abetting a breach of fiduciary duty subsequently sought post-trial disgorgement. Contrary to the outcome below, the *Veolia* court firmly denied plaintiff's request for a second bite at a remedy, holding as the first and primary basis that "the jury's finding on causation closes the door to disgorgement." *Id.* at 18. The First Circuit overlooked the principal teaching of *Veolia* — the jury verdict on causation closed the disgorgement door. The First Circuit's attempt to distinguish this case from *Veolia* alone merits review by this Court because it creates a clear conflict in the federal jurisprudence on this point, and the First Circuit

opinion is a green light for other courts to proceed with similarly improper post-trial "equitable" relief.

The Disgorgement Order here also runs afoul of the requirement that a plaintiff suffer injury in fact in order to satisfy federal court jurisdiction. This Court has established that the "irreducible constitutional minimum" of standing must include "an injury in fact." *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1547 (2016) (quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992)).

> Since they are not mere pleading requirements but rather an indispensable part of the plaintiff's case, each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation.

Lujan, 504 U.S. at 561.

At the final stage of a case, the facts on which a party relies to establish standing "must be supported adequately by the evidence adduced at trial." *Id.* (citation omitted). Here, the jury's affirmed finding of no injury effectively denied the plaintiff class any standing to continue with the litigation and deprived the district court of jurisdiction to award the post-trial relief. The party invoking federal jurisdiction bears the burden of establishing the standing requirements. *Id.* Plaintiff failed to prove any injury in fact, and that should have ended

the litigation. As Petitioner argued to the district court: “even if you have a breach of fiduciary duty, if the plaintiff has not proved economic loss, there is no disgorgement; there is no equitable jurisdiction to award damages; that’s the end of that claim.” (Hr’g Tr. 15:4-7.)

The pretrial asset seizure that this Court rejected in *Grupo Mexicano* was characterized as well beyond federal judiciary equity powers. 527 U.S. at 332-33. But here, the district court’s Disgorgement Order is actually an even greater overreach of equitable authority than what was challenged in *Grupo Mexicano.* The district court in this case imposed a post-trial seizure against the property of a prevailing defendant, and further ordered that it be paid to the same plaintiff class who failed to prove its cause of action at trial and who had no injury in fact. This unprecedented exercise of equitable authority should not be permitted to stand. To allow otherwise “would confer on the judiciary discretionary power to disregard the considered limitations of the law it is charged with enforcing.” *United States v. Payner*, 447 U.S. 727, 737 (1980).

B. The Disgorgement Order was not equitable relief.

This Court’s decision in *Great–West Life & Annuity Insurance Co. v. Knudson*, 534 U.S. 204 (2002) explained the critical distinctions between equitable and legal remedies. The monetary relief sought in that case — reimbursement of insurance funds previously paid to a beneficiary, who had later

recovered other funds in a settlement reached with a third-party tortfeasor — was held not to fall within the broad scope of "equitable relief" authorized under the ERISA statute. This Court rejected the plaintiff insurance company's efforts to characterize the relief sought as equitable, rather than legal, and distinguished between "restitution at law" and "restitution in equity."

In *Great-West*, this Court held that a remedy is purely legal, and not equitable, when the plaintiff seeks "to obtain a judgment imposing a merely personal liability upon the defendant to pay a sum of money." *Id.* at 213, citing Restatement of Restitution § 160, cmt. a, at 641-42 (1937). In short, a remedy is legal when a plaintiff seeks money damages for a loss he alleges he suffered. By contrast, equitable restitution is limited to what was "traditionally available in equity," namely "*the return of identifiable funds (or property) belonging to the plaintiff and held by the defendant*." *Id.* at 216 (emphasis added).

In this case, the funds subject to the district court's Disgorgement Order were never paid by MAZ or the class; the funds were never the property of any member of the plaintiff class in the first place. The Class B consideration was paid by *Acadia* to all Class B shareholders per the terms of the Merger Agreement. The district court plainly imposed personal liability on Petitioner and required him to pay a substitutionary sum of money cloaked as an "equitable" remedy in lieu of jury-repudiated legal damages.

In all respects, *Great-West* teaches that MAZ sought legal, and not equitable, damages at trial. Nothing in the district court's order resembles the characteristics of equitable relief delineated by this Court in *Great-West.* Thus, this case presents a prime opportunity for this Court to hold that calling relief equitable does not make it so.

C. The Disgorgement Order deprived Shear of his right to a jury trial.

When this case was submitted to the jury on special interrogatories, there were two questions directly related to the Class B premium. First, the jury was asked to rule whether "the class suffered an economic loss . . . ?" Second, if the jury had found that there was an economic loss, the jury was then asked to determine: "How much merger consideration, if any, should Class B shareholders have received to compensate them for the enhanced rights that they surrendered in the merger with Acadia?" In other words, the issue was put directly to the jury as to how much Shear and the other Class B shareholders should have received for a premium.

The jury found no economic loss and, therefore, never reached the second question because a predicate for answering the second question was the finding of economic loss, i.e., injury in fact. Once the jury rendered its verdict, the claim challenging the Class B premium as a breach of fiduciary duty by an alleged "controlling shareholder" — Petitioner — was fully adjudicated. Indeed, nowhere in the amended pleadings or in the joint pretrial statement

did plaintiff state or reserve any other claim relating to the Class B premium. Once the jury had spoken, there was nothing left to the claim. And there were no additional facts that could be examined and found by the district court.

The Seventh Amendment provides that "[i]n Suits at common law . . . the right of a trial by jury shall be preserved." U.S. Const. amend. VII. This Court has stated that "[m]aintenance of the jury as a fact-finding body is of such importance and occupies so firm a place in our history and jurisprudence that any seeming curtailment of the right to a jury trial should be scrutinized with the utmost care." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935). Moreover, the Seventh Amendment also provides that "no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

When a party demands a jury trial (as MAZ did in this case), a jury trial must be granted on all issues so demanded unless the court, on motion or on its own, finds that on some or all of those issues there is no federal right to a jury trial. *See* Fed. R. Civ. P. 39(a)(2). There was no motion from either party, nor was there any pre-verdict ruling from the district court, to reserve for the court's equitable judgment the issue of the $5 million Class B merger consideration as an element of MAZ's claim, which was manifestly one for monetary damages. Considering both prongs of this Court's Seventh Amendment inquiry, this was a legal claim for damages to which a right to trial by jury attached. Thus, the case was properly entrusted to the jury to

decide; Petitioner had a constitutional right to a jury trial to determine his liability on MAZ's legal claims. *Tull v. United States*, 481 U.S. 412, 425 (1987).

Here, the district court fully accepted the jury's verdict and entered judgment on it. In ruling on plaintiff's post-trial motions, the district court again fully embraced the jury's verdict. The district court then crossed the constitutional border when it entered the Disgorgement Order because that order (and specifically the amount of that order) was based on the very facts rejected by the jury in reaching its verdict. The district court used the calculations of plaintiff's damages expert in fashioning the amount of the disgorgement. Specifically, plaintiff's damages expert testified that a Class B premium of "a high end of $1.82 million" would be defensible. Or, as the district court stated: "MAZ's own expert suggested that a $1.82 million Class B premium may have been defensible. (App. at 62a.) The difference between that amount and $5 million -- $3.18 million -- was unjustified." But these were the very facts rejected by the jury when it found that the plaintiff class had not suffered any economic loss. In other words, the district court reexamined facts reviewed by the jury and came to a different conclusion.

It was not within the ambit of the district court's jurisdiction or discretion to reform in equity the jury's considered verdict. Nowhere in the record is there any suggestion that the parties requested, or the district court empaneled, an "advisory" jury on this issue. Even a cursory review of the jury charge, the special verdict form, and the district court's initial entry of judgment for the defendants reveals

that this was a matter that the jury decided. In affirming the verdict, the district court was not at liberty to reexamine those facts.

In his dissenting opinion in *Tull*, Justice Scalia observed that he could "recall no precedent for judgment of civil liability by jury but assessment of amount by the court." 481 U.S. at 428. It logically follows that a judgment of *no* civil liability by a jury cannot possibly support the assessment of *any* amount of damages by a court. The district court's improvident post-verdict exercise of equity power and Disgorgement Order in this case subverted Petitioner's constitutional right to a jury trial under the Seventh Amendment and should be reviewed on this ground, as well.

II. This Court Should Review This Case to Clarify When a Federal Court Should Certify Unsettled Questions of State Law Instead of Making an *Erie*-Guess.

The very day after the Massachusetts Supreme Judicial Court decided *Tucci*, the district court took the bench and announced: "I read that case from the Supreme Judicial Court last night. . . . It's dramatic. . . . It's dramatic." (Trial Tr., 6-4 (Mar. 7, 2017).) Continuing, the court observed: "I think, in general, it was somewhat of a wake-up call, which is Massachusetts is different than Delaware and that we don't necessarily always follow Delaware." (*Id.* at 6-4.) And, the district court noted that *Tucci* "really upends the way we've all been thinking about this case. . . . But it is clear that the law is unsettled at this point. It's just unsettled. These fabulous appeal

points, there may be certified questions going back to the [Supreme Judicial Court]." (*Id.* at 6-6–6-8.)[2]

The issue that was ultimately presented and decided by the lower federal courts was whether Shear — with his 8% shareholdings and 19% voting power — could be a "controlling shareholder" within the exception announced in *Tucci*. Shear argued that the relevant exception that might permit a direct action against him is limited to a circumstance where "a controlling shareholder who also is a director proposes and implements a self-interested transaction that is to the detriment of minority shareholders." *Tucci*, 70 N.E.3d at 926. The First Circuit, in its opinion, recognized that the Massachusetts court "has expressed a concern for the protection of minority shareholders when a director 'is dominating in influence or in character.'" (App. at 14a.) What both the district court and the First Circuit failed to acknowledge is that the Class A shareholders were not the minority; they were the majority.

But where both courts went astray first was not in their final conclusion as to the scope of the *Tucci* exception. Rather, it was the route which they took to reach their conclusions. Both relied on Delaware law, even though *Tucci* itself was premised on a resounding and decisive rejection of Delaware precedent on these issues. In fact, the First Circuit went so far as to declare that the "sockdolager, we think, is that Massachusetts courts often look to

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[2] In response, counsel for Shear stated: "That occurred to us too, yes." (Trial Tr., 6-8 (Mar. 7, 2017).)

Delaware law in analyzing corporate issues." (App. at 14a.) As an abstract statement, that may or may not be true. But with respect to *Tucci* and the issues in this case, it now was most certainly in error. Instead, the lower courts should have followed the district court's initial reaction to *Tucci*: "These fabulous appeal points, there may be certified questions going back to the [Supreme Judicial Court]." (Trial Tr., 6-8 (Mar. 7, 2017).)

The courts below were wrong in both their reading and application of the *Tucci* exception. But the district court's and First Circuit's improper interpretations of the Supreme Judicial Court's decision in *Tucci* is not why this Court should grant certiorari. Rather, this Court should review this case because both of these federal courts violated foundational principles of federalism when they each failed to certify novel issues of Massachusetts state law on matters of significant policy importance. As the First Circuit has said in the past: "[C]ertification is particularly appropriate here since the answers to these questions may hinge on policy judgments best left to the Massachusetts court and will certainly have implications beyond these parties." *In re Engage, Inc.*, 544 F.3d 50, 52-53 (1st Cir. 2008). That statement applies with even greater force in this case because the lower courts were required to make an "*Erie*-guess" about how the state's highest court might resolve the issue.

This case is proof that the "*Erie*-guess" creates serious constitutional concerns and flies in the face of this Court's concern for judicial federalism pronounced in *Erie Railroad Co. v. Tompkins*, 304

U.S. 64, 78 (1938). *See* Bradford R. Clark, Ascertaining the Laws of the Several States: Positivism and Judicial Federalism After *Erie*, 145 U. Pa. L. Rev. 1459, 1471-72 (1997). As this Court indicated in *Erie*, there is no federal common law, and "no clause in the Constitution purports to confer … power upon the federal courts" to "declare substantive rules of common law applicable in a state." *Erie*, 304 U.S. at 78. Federal courts cannot implement policy preferences by creating new common law that is properly the domain of state courts. *See* Clark, *supra*, at 1472. Thus, when federal courts "declare" substantive rules of decision that are not ascertainable through state legislative rules or judicial precedent, they are "invad[ing] rights which … are reserved by the Constitution to the several States." *Erie*, 304 U.S. at 80.

The necessity of making an "*Erie*-guess" was greatly reduced, however, when many states began to pass statutes and high court rules allowing federal courts to certify unsettled questions of state law to the state's highest court. The original Uniform Certification of Questions of Law Act ("UCQL") was promulgated by the Uniform Law Commissioners in 1967, was amended in 1990, and was further revised in 1995. The UCQL serves a fundamental principle: that any jurisdiction's own courts should always rule upon a point of that jurisdiction's common law. Massachusetts adopted the UCQL as the Uniform Certification of Questions of Law Rule, which provides that:

> [The Supreme Judicial Court] may answer questions of law certified to it

> by the Supreme Court of the United States, a Court of Appeals of the United States, or of the District of Columbia, or a United States District Court, or the highest appellate court of any other state when requested by the certifying court if there are involved in any proceeding before it questions of law of this state which may be determinative of the cause then pending in the certifying court . . . .

Mass. S.J.C.R. 1:03.

This Court has repeatedly recognized the benefits of certification. *See, e.g., Clay v. Sun Ins. Office Ltd.*, 363 U.S. 207, 212 (1960) (citing *Allegheny Cty. v. Frank Mashuda Co.*, 360 U.S. 185, 189 (1959) ("[W]e have frequently deemed it appropriate, where a federal constitutional question might be mooted thereby, to secure an authoritative state court's determination of an unresolved question of its local law.")); *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974) ("[R]esort to [certification] would seem particularly appropriate in view of the novelty of the question and the great unsettlement of Florida law … we have referred to ourselves on this Court in matters of state law, as 'outsiders' lacking the common exposure to local law which comes from sitting in the jurisdiction.").

In *Arizonans for Official English v. Arizona*, 520 U.S. 43 (1997), this Court reiterated the rationale for certification and essentially created a presumption in favor of certifying novel or unsettled

state law legal issues. As Justice Ginsburg explained: "Federal courts lack competence to rule definitively on the meaning of state legislation … [and] … certification procedure … allows a federal court faced with a novel state-law question to put the question directly to the State's highest court." *Id.* at 48, 76. Allowing state courts to decide unsettled or novel questions of state law promotes federalism because, when a federal court chooses to decide "a novel state [law question] not yet reviewed by the State's highest court," it "risks friction-generating error." *Id.* at 78-79. As a practical matter, the certification procedure adopted by most states' high courts "allows a federal court faced with a novel state-law question to put the question directly to the State's highest court, reducing the delay, cutting the cost, and increasing the assurance of gaining an authoritative response." *Id.* at 76. "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." *Brockett v. Spokane Arcades, Inc.*, 472 U.S. 491, 510 (1985) (O'Connor, J., concurring).

A. There is a split among the circuits regarding certification.

This Court has endorsed the use of certification procedures when available, and it has stated that the decision on whether to certify is one of discretion. *Lehman Bros.*, 416 U.S. at 390-391 (1974) (certification "not obligatory" and matter of discretion, but helps build a "cooperative judicial

federalism"). But the Court has not provided clear guidance to the federal courts on the factors to be considered in exercising their discretion. There is no Federal Rule of Appellate Procedure governing certification. This has resulted in different circuits adopting non-uniform procedural gateways to its application.

Some circuits have shown support for certification where there is an absence of controlling precedent or where the state law on an issue is unsettled. *See, e.g.*, *Puckett v. Rufenacht, Bromagen & Hertz, Inc.*, 903 F.2d 1014 (5th Cir. 1990); *Holmes v. Amerex Rent-A-Car*, 113 F.3d 1285 (D.C. Cir. 1997); *Hatfield ex rel. Hatfield v. Bishop Clarkson Mem'l Hosp.*, 701 F.2d 1266 (8th Cir. 1983). The circuit to most enthusiastically embrace certification is certainly the Second Circuit, which issued 138 certification orders to the New York Court of Appeals between 1986 (when the Court of Appeals first began accepting certified questions) and the end of 2015. *See* Practice Handbook on Certification of State Law Questions by the United States Court of Appeal for the Second Circuit to the New York State Court of Appeals at 2, App. A, (3d ed. 2016), http://www.ca2.uscourts.gov/docs/Third Edition of Certification Handbook.pdf.

Other circuits take a more limited, or more pragmatic, approach. *See, e.g.*, *Pino v. United States*, 507 F.3d 1233, 1236 (10th Cir. 2007) ("While we apply judgment and restraint before certifying, however, we will nonetheless employ the device in circumstances where the question before us (1) may be determinative of the case at hand and (2) is

sufficiently novel that we feel uncomfortable attempting to decide it without further guidance."); *Perry v. Schwarzenegger*, 628 F.3d 1191, 1196 (9th Cir. 2011) (Ninth Circuit will certify an issue if "compelled" to seek an authoritative guidance on a matter of state law to avoid a federal constitutional issue); *Escareno v. Noltina Crucible & Refractory Corp.*, 139 F.3d 1456, 1461 (11th Cir. 1998) (the court will "exercise discretion and restraint in deciding to certify questions to state courts").

B. Federal courts should certify significant and dispositive issues of state law.

Federal courts that refuse to certify end up "mak[ing] important state policy, in contravention of basic federalism principles." *Hakimoglu v. Trump Taj Mahal Assocs.*, 70 F.3d 291, 302 (3d Cir. 1995) (Becker, J., dissenting). The different approaches that the various federal courts have adopted toward the issue of certification necessarily have an impact on the substantive rights of citizens in different jurisdictions across the country, and provide the states different degrees of freedom and authority to interpret and decide for themselves novel matters presented under their own laws. This presents an inherent tension with the core teaching of *Erie*, which held that unwarranted intrusions by federal courts into questions of state law are unconstitutional. In the absence of clear, definitive guidance from this Court, the federal district courts and courts of appeal will continue to apply different standards with regard to certification of issues to the states' highest courts — this ultimately undermines

foundational concepts of federalism and state sovereignty.

It is equally important not to lose sight of the fact that a federal court's misapplication of state law risks depriving a litigant of his substantive rights, usually without any clear recourse. "In such a situation, the party who lost in federal court has been unjustly denied her state-law rights, and often has been left with no means of effective redress." *McCarthy v. Olin Corp.*, 119 F.3d 148, 159 (2d Cir. 1997) (Calabresi, J., dissenting). This is a cautionary sentiment with which Petitioner identifies all too personally. Had either the district court or the court of appeals sought clarification and guidance regarding the scope of *Tucci*'s proper application to MAZ's claims against Petitioner, it is likely that there would not have been an improvident disgorgement award to appeal to this Court.

In that same dissent, Judge Calabresi also observed that federal courts' reluctance to certify leads to precisely the kind of forum shopping that *Erie* was intended to prevent. *Id.* at 157 (citing *Hanna v. Plumer*, 380 U.S. 460, 468 (1965) (one of the aims of the *Erie* decision was "discouragement of forum-shopping")).

> This is especially so in situations where there is some law in the intermediate state courts, but no definitive holding by the state's highest tribunal. In such cases, and in the absence of certification, the party that is favored by the lower court decisions will almost

> invariably seek federal jurisdiction. It will do this in order to prevent the state's highest court from reaching the issue, in the expectation that the federal court—unlike the state's highest court—will feel virtually bound to follow the decisions of the intermediate state courts.

Id. at 157-58.

These are all valid and compelling reasons for this Court to encourage greater use of the certification mechanisms available to the federal courts. The easiest standard for this Court to adopt is to require certification when an unresolved issue of state law is outcome determinative. This standard promotes federalism and state sovereignty and protects the substantive rights of litigants. If state courts feel overburdened by too many certified questions, or for any other reason do not wish to decide a particular certified question, they are always free to refuse to answer a certified question. *Id.* at 160, citing, *inter alia*, Ira P. Robbins, The Uniform Certification of Questions of Law Act: A Proposal for Reform, 18 J. Legis. 127, 137 (1992) ("[T]he ultimate power to accept or reject a certified question rests exclusively in the discretion of the answering court. Th[is] procedural safeguard[ ] more than protect[s] the answering court from a surfeit of certification cases because as a practical matter that court completely controls its docket and may reject certified-question cases if the number becomes overwhelming. The answering court need not even

offer a reason for declining to answer . . . .") (footnotes omitted).

The Court should take this case to clarify the standards under which a lower federal court should seek certification of issues of state law under *Erie*. Here, there was a novel Massachusetts law decision that departed from established corporate law in Delaware. The lower courts in construing the scope of the decision relied on the very Delaware corporate law that the Massachusetts court had rejected. The issue is important for all public Massachusetts corporations. In such circumstances, this Court should create a strong presumption in favor of certification. This case presents an ideal opportunity to consider this issue, an issue that is important and essential to maintaining due deference for the role of substantive state law in our federal system of government.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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