No. 16-809

In the Supreme Court of the United States

JOSEPH MAZZEI, on Behalf of Himself and All Others Similarly Situated,

Petitioners,

–v–

THE MONEY STORE, TMS MORTGAGE, INC., and HOMEQ SERVICING CORP.,

Respondents.

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

REPLY BRIEF OF PETITIONERS

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In their initial papers, Petitioners demonstrated that the post-verdict decertification mechanism used by the lower courts to undo a $54.8 million jury verdict for the Petitioner-class resulted in an unprecedented end-run around the Seventh Amendment, the Rules Enabling Act, and settled decisions of this and other appellate courts.

In their opposition, Respondents fail to identify any case in which a class was decertified after a jury verdict in its favor, yet still argue that there was "nothing untoward about" the post-verdict decertification and dismissal of the prevailing class's claims. (Opposition Brief "Opp.Br." at 2) Respondents accuse the Petitioners of "misrepresenting the law and the lower court opinions" and "gesturing towards illusory splits with the decisions of this Court and the other circuits." (Opp.Br.3)

However, no amount of window-dressing can obscure the profound Seventh Amendment implications of permitting a judge to reexamine a jury's findings, weighing the trial evidence and the credibility of witnesses, in order to re-determine whether class certification was appropriate. As Respondents themselves concede, that inquiry involves a reassessment of the evidence on the merits under the purported authority of Rule 23:

> The court recognized that the jury verdict in favor of plaintiffs necessarily meant that the jury had found privity with respect to all class members. Pet.App.63a. But the court

> determined that the jury's finding could not be supported by the evidence.

(Opp.Br.6). As Petitioners have shown, this post-verdict Rule 23 merits-inquiry cannot be reconciled with the Seventh Amendment, which prohibits judicial "reexamination" of jury findings other than as set forth under Rules 50 and 59 of the Federal Rules of Civil Procedure.

The Respondents also concede that "decertifying a class because of a failure to prove its case on the merits conflicts with this Court's precedent." (Opp. Br.15) Nevertheless, the Respondents argue that "the district court did no such thing":

> The court did not decertify the class because the class members' claims failed on the merits. It ordered decertification because Rule 23's typicality and predominance requirements could not be met when one element of the case was completely unproven for some class members and undisputed with respect to Class Representative Mazzei and unspecified and unidentifiable others.

(*Id.*) Respondents' argument that typicality and predominance were lacking simply makes no sense after the class has already presented its evidence and after a trial has already been completed. At that point, the central question posed in the class certification inquiry—whether certifying a class "would achieve economies of time, effort, and expense"[1] —has been

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[1] *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 634 (1997) (Breyer, dissenting).

answered. The class has done what it said it would when the court granted certification, presenting "generalized, class-wide proof"[2] to the jury on the substantive issues, including on the question of privity.[3] As this court has repeatedly found, a failure of proof on a substantive issue cannot result in individual issues predominating:

> A failure of proof on the common question of materiality ends the litigation and thus will never cause individual questions of reliance or anything else to overwhelm questions common to the class.

Amgen, Inc. v. Conn. Ret. Plans and Trust Funds, 133 S.Ct. 1184, 1196 (2013); *Tyson Foods*, 136 S.Ct. 1036 (2016) (same).

Here, the jury credited the proof presented by the class in awarding its verdict. At that point, the only remaining factual inquiry for the court to determine was whether (i) the jury's findings were supported by evidence in the record (Rule 50); or (ii) the verdict was against the weight of the evidence (Rule 59). As this Court has held, those questions go to the merits, not class certification:

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[2] *Tyson Foods v. Bouaphakeo*, 136 S.Ct. 1036 (2016).

[3] Respondents claim that decertification was appropriate because the class's purported "failure to prove privity" would "leav[e] intact the claims" of class members whose loans had been originated by the Respondents. This is obviously not true, as the purported failure of proof on the privity issue at trial would cause the class claim to "fail in its entirety, leaving "no remaining individual questions to adjudicate." *Amgen*, 133 S.Ct. at 1196.

> [A]n alleged failure of proof as to an element of the plaintiffs' cause of action . . . is properly addressed at trial . . . . The allegation should not be resolved in deciding whether to certify a proposed class.

Amgen, 133 S.Ct. at 1197; *Tyson Foods*, 136 S.Ct. at 1048 (where there is an alleged failure of proof, "courts should engage that question as a matter of summary judgment, not class certification")

Ignoring this well-settled precedent, the Second Circuit establishes a post-verdict procedure unique to class actions, under which the trial court is authorized—in fact duty-bound[4]—to weigh trial evidence presented to a jury to determine again whether the prerequisites for certification have been met. While stating that the trial court should employ a Rule 59-type standard to review factual findings made by the jury, the Second Circuit found that the trial court should "make its own factual findings based on the preponderance of the evidence" on questions of fact "which were not necessarily decided by the jury's verdict" in the same manner "as is usually done when making a determination about class certification." (App.12a)

Respondents do not dispute that this approach to scrutinizing jury verdicts in favor of a class never existed under the common law, nor do they explain

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[4] According to the Second Circuit, the "district court has the affirmative duty of monitoring its class decisions in light of the evidentiary development of the case", and thus "the power to decertify a class after trial [is] . . . not only authorized by Rule 23 but is a corollary." (App.7a-8a) (internal citations and quotations omitted))

how a mechanism which permits a court to review a class verdict and make its own factual conclusions on merits-issues related to certification does not involve a "reexamination" of jury findings prohibited under the Seventh Amendment. *Walker v. N.M. & South. Pac. R.R.*, 17 Sup. Ct. 421, 422 (1897) (the Seventh Amendment "requires that questions of fact . . . be settled by a jury, and that the court shall not assume, directly or indirectly, to take from the jury or to itself such prerogative")

Rule 23 was not intended to undo a jury verdict by decertifying a class and dismissing the action without resort to Rule 50. In giving a losing party the power to use Rule 23 to circumvent the constitutionally-permissible method for overturning a jury verdict contained in Rule 50, the Second Circuit procedure violates not only the Seventh Amendment, but also the Rules Enabling Act. *Amchem Products, Inc. v. Windsor*, 117 S.Ct. 2231, 521 U.S. 591 (1997) (internal quotes omitted) ("Rule 23's requirements must be interpreted in keeping with . . . the Rules Enabling Act, which instructs that rules of procedure shall not abridge, enlarge or modify any substantive right"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality) (the class action device "leaves the parties' legal rights and duties intact and the rules of decision unchanged.")

Respondents argue that the Second Circuit's post-verdict decertification was proper because the court "correctly observed that the effect of post-verdict decertification is the same as the effect of a grant of a new trial." (Opp.Br.10) However, this argu-

ment fails the straight-face test: the grant of a Rule 50 motion after the verdict would have resulted in a new trial for the class in front of another jury, while the Second Circuit's affirmance of decertification after the jury verdict eliminates the class, with no right to a jury trial in any subsequently-instituted actions, and in fact little possibility of individual relief.[5] Indeed, the fact that application of the same Rule 50 standard to the same facts credited by the jury can lead to such widely different post-verdict outcomes (a new trial for the class under a straight Rule 50 analysis, or decertification and dismissal of the class under the hybrid Rule 23/Rule 50 procedure adopted by the Second Circuit) is "inconsistent with the idea of a unitary system of law" and thus "unacceptable." *Ornelas v. U.S.*, 517 U.S. 690, 697 (1996); *Beam Distilling Company v. Georgia*, 501 U.S. 529, 538 (1991) ("the principle that litigants in similar situations should be treated the same [is] . . . a fundamental component of stare decisis and the rule of law generally")

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[5] Underpinning the Second Circuit's determination that post-verdict decertification is the equivalent of a new trial under Rule 50 was a finding that the claims of decertified class members "survive by virtue of *American Pipe* tolling." (App.9a) However, this statement of law is incorrect, since the application of *American Pipe* in a subsequent action depends on state law. "States are free to recognize cross-jurisdictional class action tolling or to reject it." *Chavez v. Dole Food Co.*, 836 F.3d 205, n.18 (3rd Cir. 2016) Many courts have found that *American Pipe* does not apply to suspend the statute of limitations in a subsequent individual action brought in a different jurisdiction. *See Clemens v. DaimlerChrysler Corp.*, 534 F.3d 1017, 1025 (9th Cir. 2008) (*American Pipe* tolling rule does not apply to claims of California residents based on prior class action filed elsewhere).

As for another of the Seventh Amendment problems associated with applying a Rule 59 standard to a post-verdict decertification motion—the fact that decertified class members have no right to a jury trial in a subsequent action—Respondents accuse Petitioners of falsely representing that the Second Circuit believed that decertified class members "would be entitled to a jury trial when pursuing [their] individual claims." (Opp.Br.11) However, it is Respondents who misrepresent the Second Circuit opinion, which twice states that "the right of absent class members to a jury trial is protected, not impaired, by the Rule 23(c)(1)(C) decertification procedure." (App.10a; *See also* App.9a (same)) Moreover, while Respondents assert that it "cannot be true" that providing a new trial without the right to a jury violates the Seventh Amendment (Opp.Br.11), that is precisely what the Constitution requires. Both this Court and federal Courts of Appeals have repeatedly found that the right to a new trial and the right to have issues determined by a jury cannot be separated. See *Slocum v. N.Y. Life Ins. Co.*, 228 U.S. 364, 380 (1913) (under the Seventh Amendment, "when the verdict was set aside, there arose the same right of trial by jury as in the first instance"); *Hetzel v. Prince William Co.*, 523 U.S. 208, 211 (1998), quoting *Kenon v. Gilmer*, 131 U.S. 22, 27-28 (1889) (under the Seventh Amendment, a court cannot reduce the amount of a verdict "without submitting the case to another jury").[6] The Second Circuit procedure—

[6] *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 108 (4th Cir. 1991) (when a jury "reaches a result that is against the clear weight of the evidence, the court may withdraw the case from the jury and order a trial before another jury"); *Pruitt v. Hardware*

which provides no right to a jury trial to decertified class members—is in direct conflict with this bedrock case law interpreting the Seventh Amendment.[7]

Respondents argue that the Petitioners' contention that the Second Circuit violated the Seventh Amendment by assessing the evidence on the post-verdict decertification motion under Rule 59 rather than Rule 50 rests on "the novel assertion that the Seventh Amendment somehow protects a plaintiff's right to a class action." (Opp.Br.12) This is untrue. What Petitioners do assert is simple: since a class has the same Seventh Amendment right as individual litigants to "a jury trial on any legal issues they present," *Ross v. Bernhard*, 396 U.S. 531, 541 (1970), any motion seeking to overturn a jury verdict without granting a new trial must be assessed under the same standard used to evaluate individual verdicts (*i.e.*, Rule 50).

Dealers Mut. Ins. Co., 112 F.2d 140, 143 (5th Cir. 1940) ("According to all the federal cases [a judge] has discretion to grant a new trial before another jury if he thinks the verdict is wrong"; "to grant a new trial decides no one's rights finally, but only submits them to another jury").

[7] Respondents suggests that Rule 59 cannot require that class members' claims be heard by a jury on a retrial because that would mean that "participating in a class action somehow gives plaintiffs broader Seventh Amendment rights than they would have if they had pursued their claims individually from the outset." (Opp.Br.12) However, there is nothing novel about this: whether brought individually or as a class, litigants have "broader Seventh Amendment rights" in any case in which federal jurisdiction exists because of a federal question, the existence of diversity jurisdiction, or jurisdiction under the Class Action Fairness Act ("CAFA"), 28 U.S.C. § 1332(d).

Respondents also claim that the Second Circuit correctly found that the decertification of a class after a jury verdict in its favor should be reviewed under an abuse of discretion standard, because "[t]hat is the standard of review applied by this Court and the Courts of Appeals in reviewing class decertification determinations in general." (Opp.Br.12) However, that is precisely the point—after a jury verdict has been rendered in favor of a class, the class's Seventh Amendment rights limiting reexamination of a jury's findings are triggered, requiring a more stringent appellate standard than "the deference that is the hallmark of abuse-of-discretion review." *Gen. Elec. v. Joiner*, 522 U.S. 136, 143 (1997).[8] Neither Respondents nor the Second Circuit has identified a single case employing an abuse-of-discretion standard of review to a trial court's decision setting aside a jury verdict and dismissing a prevailing parties' claims.

Finally, Respondents argue that certiorari should not be granted because the district court stated that—if it had not decertified the class—it would have granted the Rule 50 motion because the evidence of privity consisted merely of "background

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[8] As Petitioners demonstrated in their initial papers, even appellate courts reviewing the grant of a new trial after a jury verdict under Rule 59 exercise a closer degree of scrutiny than required under the abuse of discretion standard. (*See* Petition, p. 29 fn. 7) Respondents claim that these cases "make clear that abuse of discretion review applies" is belied by a review of the cited decisions. *See also Butcher v. United States*, 368 F.3d 1290, 1297 (11th Cir. 2004) (Eleventh Circuit says that it "accord[s] less deference to a district court's grant of a new trial than the 'abuse of discretion' standard of review implies.").

testimony" about a "hypothetical borrower." (Opp.Br.14) However, the Second Circuit found that Rule 50 was irrelevant to the question of post-verdict decertification, and thus that it "need not decide whether [Professor] Levitin's generalized testimony was legally insufficient to support a jury finding that class members . . . were in privity." (App.18a, n. 13) Again, that is one of the pivotal issues presented here for review: whether the Seventh Amendment and/or Rules Enabling Act allow a court to bypass Rule 50 in decertifying a class and dismissing the action after a jury verdict in the class's favor.

As for the evidence itself, like the courts below, Respondents merely repeat the mantra that Petitioners offered only general background evidence about privity, ignoring Professor Levitin's testimony that mortgage lenders routinely assigned the right to collect late fees to servicers like Respondents during the class period. Expert evidence of this type is not novel: as this court has stated, "no one denies that an expert might draw a conclusion from a set of observations based on extensive and specialized experience." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 148, 156 (1999) (quotations omitted) ("experts of all kinds tie observations to conclusions through the use of general truths derived from specialized experience"); *See* Fed. R. Evid. 704 (expert testimony not objectionable because it embraces an ultimate issue).

"Jurors are supposed to reach their conclusions on the basis of common sense, common understanding, and fair beliefs, grounded on evidence consisting of direct statements by witnesses or proof of circumstances from which inferences can fairly be drawn."

Schulz v. Pennsylvania Railroad Co., 350 U.S. 523, 526 (1956) Professor Levitin's testimony that late-fee rights were routinely assigned to servicers such as Respondents—buttressed by specific evidence presented by Petitioners that such assignments occurred on the loans of thousands of class members—permitted the jury to logically infer that the right to collect late fees had been assigned to Respondents with respect to each late fee class member.[9] As the court instructed the jury, that was sufficient to establish privity. *See Ocwen Loan Serv. Litig.*, 491 F.3d 638, 645 (7th Cir. 2007) ("If an original mortgagee can be sued under state law for breach of contract, so may the partial assignee if he violates the terms of the part of the mortgage contract that has been assigned to him."); *Martorella v. Deutsche Bank Nat'l Trust Co.*, 2015 U.S. Dist. Lexis 178172, *26 (S.D. Fl. 2015) (same) The fact that the Respondents failed to rebut or counter that proof in any manner made the jury's conclusion not only logical, but virtually inescapable. (*See* cases cited at pp. 34-35 of Petition)

[9] In fact, elsewhere in its opinion, the district court specifically found that testimony from Professor Levitin concerning standard industry practice was sufficient to allow the jury "to infer[] that it was standard mortgage industry practice to accelerate loans at a certain period, and that the defendants followed that practice." (App.59s-60a, n. 6)

CONCLUSION

In sum, the unprecedented post-verdict decertification procedure created by the Second Circuit—and its application in this case—represents a profound departure from the historically-limited role played by trial judges after a jury verdict, and is in conflict with generations of Seventh Amendment jurisprudence. As a result, Petitioners respectfully submit that the petition for a writ of certiorari should be granted.

Respectfully submitted,

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