No. 20-177

IN THE

Supreme Court of the United States

ALLY FINANCIAL INC.,
Petitioner,

v.

ALBERTA HASKINS, ET AL.,
Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF MISSOURI

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Two petitions and six amicus briefs now urge this Court to decide whether ordinary personal-jurisdiction rules apply when plaintiffs also assert the claims of numerous unnamed class members. Respondents do not contest that the answer is central to the functioning of class actions and the proper allocation of judicial power among the States. Nor do respondents deny that the issue arises regularly and has divided dozens of lower courts. Indeed, the question presented here typifies the wide-reaching federal issues that this Court frequently resolves.

Respondents instead offer objections about jurisdiction and waiver, but neither is an obstacle to this Court's review. Although the intermediate state appellate court rested its decision on a state-law procedural ground, respondents recognized that ruling was dubious, because they specifically urged the state supreme court *not* to rely on that basis and to adjudicate personal jurisdiction instead. Nor was that procedural ground "adequate," for it had not been previously applied in any Missouri decision. Respondents' waiver arguments fall even farther from the mark, as no lower court decision relied on that basis.

Although plenary review is warranted, the Court at minimum should hold Ally's petition for the *Ford* cases—an equitable course of action that respondents do not meaningfully address. The Court may also consider this case in conjunction with the pending petition in *IQVIA*, which raises similar issues. Any of those courses would allow the Court to give full consideration to Ally's due process rights—something no other court has yet done in this case.

ARGUMENT

I. THERE ARE NO JURISDICTIONAL OBSTACLES TO THIS COURT'S REVIEW

A. Respondents emphasize (at 9) that not one of the three state courts below so much as acknowledged Ally's personal jurisdiction objection. But that silence cannot be explained by Ally's supposed failure to raise the issue. On the contrary: Ally's motion before the trial court identified the lack of personal jurisdiction as a principal, independent reason to decertify the nationwide class, and Ally's brief provided detailed supporting argument. *See* Pet. App. 38a-45a. The court thus had more than "a fair opportunity to address the federal question," *Adams* v. *Robertson*, 520 U.S. 83, 87 (1997)—but instead ignored it without explanation, *see* Pet. App. 7a-10a. Ally then raised the argument in petitions for writs of prohibition filed with the Missouri Court of Appeals (Pet. App. 28a-32a) and the Missouri Supreme Court (Pet. App. 18a-22a), but the first was denied on a misplaced procedural ground (Pet. App. 3a-4a) and the second was denied without an opinion at all (Pet. App. 1a). This Court has jurisdiction to consider federal questions that have been presented to the state courts, even where the state courts themselves are silent. *E.g.*, *Chambers* v. *Mississippi*, 410 U.S. 284, 290 n.3 (1973); *Street* v. *New York*, 394 U.S. 576, 585 (1969); *New York ex rel. Bryant* v. *Zimmerman*, 278 U.S. 63, 67 (1928).

B. If respondents mean to argue that the Missouri Supreme Court rested its decision on an independent and adequate state ground, *see*, *e.g.*, *Michigan* v. *Long*, 463 U.S. 1032, 1038 (1983), that argument also fails. Under this Court's modern approach, state-court decisions rejecting federal claims are deemed to rest on federal grounds absent a clear contrary indication. *See*

id. at 1040-1041. For unexplained orders like the one the Missouri Supreme Court entered here, this Court's approach has been to "look through" to the last reasoned opinion issued by a lower state court and adopt a rebuttable presumption that the state supreme court employed the same rationale. *See Wilson* v. *Sellers*, 138 S. Ct. 1188, 1192 (2018). But the look-through presumption can be rebutted "where the lower state court decision is unreasonable" or where the other side made "convincing alternative arguments for affirmance" to the state supreme court. *Id.* at 1196.

Ally can rebut the look-through presumption here; the Missouri Supreme Court's bare writ denial should not be deemed to rest on the suspect procedural ground adopted by the Missouri Court of Appeals.

First, the opinion of the Missouri Court of Appeals was itself unreasonable. *See Wilson*, 138 S. Ct. at 1196. The Court of Appeals denied relief based on its novel, *sua sponte* determination that, as a matter of Missouri law, a writ of prohibition is categorically unavailable to review the denial of a motion to decertify a class. *See* Pet. App. 3a-4a. That opinion is unlikely to have persuaded the Missouri Supreme Court: it articulated no reasoning and cited no authority. And as Ally explained in its petition to this Court (at 8-9), although Missouri allows permissive interlocutory appeals from class certification orders in the first instance, *see* Mo. Stat. Rev. § 512.020(3); Mo. R. Civ. P. 52.08(f), nothing in Missouri law suggests that this process also applies to class *de*certification orders, or suggests that the process would displace writs of prohibition even if it did.

Respondents suggest (at 10, 12-13) that the Missouri Court of Appeals *could* have invoked a supposed requirement that an appeal be "plainly unavailable." But

none of respondents' citations supports that sweeping rule. Missouri courts may issue writs of prohibition in at least three categories of cases, just one of which requires the lack of an "adequate remedy by appeal." *State ex rel. Noranda Aluminum, Inc.* v. *Rains*, 706 S.W.2d 861, 862 (Mo. 1986). A second, more-established category permits the writ to issue "where there is a usurpation of judicial power because the trial court lacks either personal or subject matter jurisdiction." *Id.* This case clearly fits the latter category, and likely fits the former as well, given that no authority permitted Ally to take an interlocutory appeal in these circumstances. Although respondents suggest otherwise (at 12), federal courts would not permit an interlocutory appeal in these circumstances, either. *See Driver* v. *AppleIllinois, LLC*, 739 F.3d 1073, 1076-1077 (7th Cir. 2014).

In any event, the look-through presumption also gives way in light of respondents' arguments to the Missouri Supreme Court. As this Court instructed in *Wilson*, the presumption can be rebutted "on the basis of convincing alternative arguments for affirmance made to the State's highest court." 138 S. Ct. at 1196. Respondents relied exclusively on such alternative arguments, not least their argument that personal jurisdiction exists. In fact, they urged the Missouri Supreme Court *not* to rely on the lower court's procedural determination. *See* Pet. 9; Pet. App. 52a-53a.

Finally, even if the Missouri Supreme Court had adopted the rationale of the Missouri Court of Appeals, that rationale still would not qualify as an "adequate" state ground because it is not "strictly or regularly followed." *Hathorn* v. *Lovorn*, 457 U.S. 255, 262-263 (1982). No party has identified any Missouri case holding that an interlocutory appeal is available in these circumstances, much less holding that the failure to

seek such an appeal dooms any subsequent writ petition. On the contrary, the Missouri courts have long used writs of prohibition to review initial class certification rulings, *e.g.*, *State ex rel. Union Planters Bank, N.A.* v. *Kendrick*, 142 S.W.3d 729, 731 (Mo. 2004); *State ex rel. American Family Mut. Ins. Co.* v. *Clark*, 106 S.W.3d 483, 485 (Mo. 2003), and the permissive-appeal option "d[oes] not deprive [them]" of that authority, *State ex rel. Coca-Cola Co.* v. *Nixon*, 249 S.W.3d 855, 859 (Mo. 2008). Nor can respondents' imagined rule that an appeal must be "plainly unavailable" be found in existing precedent. This case thus falls within the "well settled" rule that "if the independent ground [i]s not a substantial or sufficient one, it will be presumed that the State court based its judgment on the law raising the Federal question, and this court will then take jurisdiction." *Williams* v. *Kaiser*, 323 U.S. 471, 478 (1945) (quotation marks and citation omitted).

C. Separately, respondents argue (at 15-17) that Ally consented to jurisdiction or waived its personal jurisdiction objection through its litigation conduct. That contention is without merit.

Respondents correctly do not assert that the alleged waivers amount to a jurisdictional defect. Waiver cannot be an adequate and independent state ground where it did not form the basis of any actual state-court decision. *See, e.g.*, *Cicenia* v. *La Gay*, 357 U.S. 504, 507 n.2 (1958). And waiver-by-conduct is itself a federal question, not an "independent" state ground. *See, e.g.*, *Brookhart* v. *Janis*, 384 U.S. 1, 4 (1966) ("The question of a waiver of a federally guaranteed constitutional right is, of course, a federal question controlled by federal law."); *Pennsylvania Fire Ins. Co. of Phila.* v. *Gold Issue Mining & Milling Co.*, 243 U.S. 93, 95 (1917) (evaluating Missouri Supreme Court's determination

that a defendant consented to personal jurisdiction).[1] Respondents' waiver contentions therefore could not "prevent this Court from reaching the question presented," as respondents say they might (at 15). Even if viable waiver arguments existed, this Court could follow its ordinary practice of allowing the lower courts to address them in the first instance on remand. *See, e.g.*, *McDonough* v. *Smith*, 139 S. Ct. 2149, 2156 n.3 (2019); *Goodyear Tire & Rubber Co.* v. *Haeger*, 137 S. Ct. 1178, 1190 (2017); *Manuel* v. *City of Joliet*, 137 S. Ct. 911, 922 (2017); *CSX Transp., Inc.* v. *Alabama Dep't of Revenue*, 562 U.S. 277, 284 n.5 (2011).

Regardless, respondents' waiver arguments are without merit. It is simply not the case that, by suing two individual debtors in Missouri state court, Ally knowingly consented to having the Missouri courts adjudicate the counterclaims of hundreds of thousands of unrelated out-of-State individuals. Respondents' citations (at 15-16) address counterclaims by the *original named defendants*; they say nothing about a previously unforeseeable nationwide class of counterclaimants.

Nor did Ally knowingly acquiesce to the class counterclaims by not objecting to personal jurisdiction in its initial answer or opposition to class certification. Both events predated this Court's pivotal decision in *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773 (2017). And even if Ally could reasonably have been expected to raise its same objections before *Bristol-Myers* issued, doing so in the answer would still have

[1] Although respondents suggest (at 17) that Missouri state courts apply a special forfeiture rule that prevents defendants from raising personal jurisdiction in an amended answer, the federal case they cite applies only federal law. *See Pearlstone* v. *Costco Wholesale Corp.*, No. 4:18-cv-630, 2019 WL 3997316, at *2 (E.D. Mo. Aug. 23, 2019).

been premature. A defense need not be asserted until it is available, *State ex rel. Ballew* v. *Hawkins*, 361 S.W.2d 852, 859 (Mo. Ct. App. 1962); Mo. R. Civ. P. 55.27(f), and a personal jurisdiction objection to the claims of putative class members does not become available until the class is certified, *Cruson* v. *Jackson National Life Ins. Co.*, 954 F.3d 240, 250 (5th Cir. 2020). Until then, "there is no class action but merely the prospect of one; the only action is the suit by the named" counterclaimants. *Police & Fire Ret. Sys. of City of Detroit* v. *IndyMac MBS, Inc.*, 721 F.3d 95, 112 n.22 (2d Cir. 2013); *accord Molock* v. *Whole Foods Mkt. Grp., Inc.*, 952 F.3d 293, 298 (D.C. Cir. 2020). None of this requires the Court to abstain from the weighty federal question that this case presents.

II. THE QUESTION PRESENTED IS UNDENIABLY IMPORTANT

Respondents do not meaningfully dispute that the question presented is both consequential and presented in regularly recurring fact patterns that arise in both state and federal courts. And respondents do not even attempt to square the Missouri courts' exercise of personal jurisdiction over the class counterclaims as consistent with the principles articulated in *Bristol-Myers*. Instead, respondents' principal argument is that the courts' division on the subject, though widespread, has not yet reached the level of state supreme courts or federal courts of appeals.

But the lack of such a split is "n[ot] controlling." Sup. Ct. R. 10. The Court has often granted review in the absence of such a conflict where there are countervailing factors—for example, if the issue recurs frequently, *e.g.*, *City of Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 257 & n.14 (1981); *St. Martin Evangelical*

Lutheran Church v. *South Dakota*, 451 U.S. 772, 780 & n.10 (1981); carries significant financial stakes, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 342 (2011); or answers unsettled questions of "national importance," *e.g.*, *Pharmaceutical Rsch. & Mfrs. of Am.* v. *Walsh*, 538 U.S. 644, 650 (2003). The question presented here, which concerns the proper allocation of power among both state and federal courts, undeniably presents those factors. In addition, there is no clear benefit—and much detriment—in awaiting further "percolation." As another petitioner has noted, class certification decisions are not appealable as of right, and without an immediate appeal, an improperly certified class creates overwhelming pressure to settle rather than continue the case. *See* Pet. 26, *IQVIA Inc.* v. *Mussat*, No. 20-510 (Oct. 16, 2020). And now that Missouri and the Seventh Circuit have opened themselves to nationwide class actions regardless of the connection of unnamed class members' claims to the forum, plaintiffs' lawyers have a tremendous incentive to file there. *See id.* at 27. Where issues arise frequently in trial courts but rarely are reviewed by the courts of appeals, this Court has granted review to resolve disputes among lower state and federal courts. *E.g.*, *Cyan, Inc.* v. *Beaver Cty. Emps. Ret. Fund*, 138 S. Ct. 1061, 1069 & n.1 (2018).

The amicus curiae briefs in this case and in *IQVIA* underscore that billions of dollars in liability, as well as defendants' interest in procedural certainty and the states' interests in self-governance, turn on whether the courts will apply ordinary personal jurisdiction principles to class actions. Because Missouri and the Seventh Circuit have refused to do so, this Court's review is needed.

III. A HOLD AT MINIMUM IS WARRANTED

At minimum, the Court should hold Ally's petition for the Court's upcoming decision in the *Ford* cases.

This case will likely meet the Court's traditional criteria for a grant of certiorari, vacatur, and remand (GVR) in light of *Ford*. GVRs are an important mechanism for improving the fairness and accuracy of judicial outcomes, *Lawrence ex rel. Lawrence* v. *Chater*, 516 U.S. 163, 168 (1996), particularly when the court below has issued only an "ambiguous summary disposition[]," *id.* at 170. When "intervening developments … reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration," and a redetermination could control the outcome of the litigation, a GVR order may be appropriate. *Id.* at 167-168.

Here, "the equities clearly favor a GVR order." *Stutson* v. *United States*, 516 U.S. 193, 196 (1996). Ally has received no written ruling to date regarding its personal jurisdiction objection, despite having presented it to three state courts. Yet Ally faces a counterclaimant class that seeks billions of dollars in statutory damages on behalf of a plainly impermissible nationwide class that is not alleged to have suffered actual injury from Ally's alleged technical deviations from the Uniform Commercial Code. *See* Pet. 3 & n.2, 6; *cf. TransUnion LLC* v. *Ramirez*, No. 20-297, 2020 WL 7366280 (U.S. Dec. 16, 2020) (granting certiorari to decide whether "no injury" class actions are permissible in federal court). To the extent that this Court's *Ford* decision will shed light on personal jurisdiction in a manner relevant to this case, it will constitute an intervening development justifying a GVR.

Respondents suggest (at 19) that their jurisdictional and waiver arguments should also prevent a GVR. But a GVR does not suggest that the Court has necessarily considered and rejected such objections. *See, e.g.*, *Adams* v. *Alabama*, 136 S. Ct. 1796, 1797 (2016) (Thomas, J., concurring). A principal benefit of the GVR mechanism is that it avoids a binding legal opinion, *see Lawrence*, 516 U.S. at 168, leaving the Court free to issue GVR orders even when respondents have raised jurisdictional objections, *see, e.g.*, *Bentley* v. *Oklahoma*, No. 19-5417, 2020 WL 3865246, at *1 (U.S. July 9, 2020); *Johnson* v. *Louisiana*, 140 S. Ct. 2715, 2715 (2020); *Wolfe* v. *Virginia*, 139 S. Ct. 790, 790 (2019); *Hankston* v. *Texas*, 138 S. Ct. 2706, 2706 (2018); *Kaushal* v. *Indiana*, 138 S. Ct. 2567, 2567 (2018). In fact, this Court has issued GVRs specifically *because* it lacked confidence in its jurisdiction. *See Capital Cities Media, Inc.* v. *Toole*, 466 U.S. 378, 378 (1984) (issuing a GVR for the state supreme court to clarify the basis for its decision).

Respondents next assert (at 19-20) that the Court's disposition of the *Ford* cases is unlikely to be relevant because those cases "concern[] purely individual litigation." But developments in one area invariably affect the other. And there is good reason to expect the *Ford* decision to elucidate the "relatedness" requirement and in particular the scope of *Bristol-Myers*—a case that counsel to the *Ford* respondents acknowledged was "most on point" in *Ford*, Tr. 41, No. 19-368 (Oct. 7, 2020), and which was mentioned at the *Ford* oral argument some twenty different times, *see generally id.*

Finally, it does not matter whether *Ford* will address the jurisdictional and procedural questions that respondents purport to identify here. As explained above, those questions are not barriers to even plenary

review, and they certainly are not a reason to abstain from a more flexible GVR grant. By holding this petition, the Court can ensure that the weighty federal question presented receives serious treatment from a court for the first time in this case.

CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the petition should be held pending the Court's decision in *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, No. 19-368, and *Ford Motor Co.* v. *Bandemer*, No. 19-369, then disposed of as appropriate in light of the decisions in those cases. The Court may also wish to consider the petition in conjunction with *IQVIA Inc.* v. *Mussat*, No. 20-510, which presents similar issues.

Respectfully submitted.

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