NO. _____

In the Supreme Court of the United States

GAZUL PRODUCCIONES SL UNIPERSONAL,

Petitioner,

v.

SHEDDF2-FL5 LLC,

Respondents.

On Petition for a Writ of Certiorari to the District Court of Appeal of Florida, Third District

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether a Spanish entity waived service of process when its non-litigation counsel was ordered by the trial judge to appear at a Zoom foreclosure hearing during the Covid-19 pandemic but did not request any affirmative relief nor enter a general appearance?

PARTIES TO THE PROCEEDING

Petitioner GAZUL PRODUCCIONES SL UNIPERSONAL was the defendant-appellant below.

Respondent SHEDDF2-LLC was the plaintiff-appellee below.

CORPORATE DISCLOSURE STATEMENT

Petitioner is 100% owned by Alkazul, S.L., a Spanish company and no public company owns 10% or more of the parent company stock.

STATEMENT OF RELATED PROCEEDINGS

District Court of Appeal of Florida, Third District

Gazul Producciones SL Unipersonal v. SHEDDF2-FL5, LLC, No. 3D22-878 (Feb. 7, 2024)

Circuit Court of the Eleventh Judicial Circuit in and for Miami-Dade County, Florida

SHEDDF2-FL5 LLC v. Music on Wheels LLC et al., No. 2019-35002-CA-01 (May 12, 2022; order denying Petitioner's motion for relief from final deficiency judgment) (Sept. 28, 2021; final deficiency judgment)

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Gazul Producciones SL Unipersonal respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of Florida, Third District.

OPINIONS BELOW

The opinion of the District Court of Appeal of Florida, Third District on rehearing (Pet. App., *infra*, 37a) is not yet published in the Southern Reporter but is available at 2024 WL 468785. The order of the Florida district court of appeal denying rehearing en banc (Pet. App., *infra*, 38a) is unreported. The initial opinion of the Florida court of appeal (Pet. App., *infra*,

1a) is available at 2023 WL 5597315. The written order of the Eleventh Judicial Circuit, Miami-Dade County denying relief from the final deficiency judgment (Pet. App., *infra*, 4a) is unreported. The hearing transcript containing oral rulings of the Miami-Dade County Circuit Court (Pet. App., *infra*, 5a) denying relief from the final deficiency judgment is unreported.

JURISDICTION

The Florida district court of appeal issued its decision on rehearing and an order on rehearing en banc on February 7, 2024. On April 30, 2024, this Court extended Petitioner's deadline to petition for a writ of certiorari to June 6, 2024. Sup. Ct. No. 23A968 This Court has jurisdiction under 28 U.S.C. §1257(a).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment of the U.S. Constitution provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

The Fourteenth Amendment of the U.S. Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * * .

STATEMENT

"Service of process, under longstanding tradition in our system of justice, is fundamental to any procedural imposition on a named defendant." *Murphy Brothers, Inc. v. Michette Pipe Stringing, Inc.*, 526 U.S. 344, 350

(1996). Thus, "[i]n the absence of service of process (or waiver of service) by the defendant, a court ordinarily may not exercise power over a party the complaint names as defendant." *Ibid.*

In this case, the courts below held that Petitioner, a Spanish limited liability company, waived service of process solely based on an attorney's appearance at a public court hearing over Zoom. The attorney sought no affirmative relief (in writing or at the hearing), had not filed a notice of appearance, and informed the trial court that he did not represent Petitioner or any other party as counsel in the litigation.

This blatant due process violation squarely conflicts with decisions of the federal courts of appeals and numerous state courts. Florida's intermediate appellate court affirmed the trial court's ruling without explanation other than citing to three decisions recognizing the well-established rule that a party waives service of process where it enters an appearance and seeks affirmative relief without challenging the trial court's jurisdiction. Petitioner moved for rehearing and rehearing en banc because Petitioner sought no such relief prior to entry of the amended foreclosure judgment. The appellate court denied rehearing and rehearing en banc and reissued its affirmance—except it deleted the references to the three decisions it previously relied upon to justify its ruling.

1. Petitioner Gazul Producciones SL Unipersonal is a Spanish company that represents the interest of Grammy Award-winning Spanish musician Alejandro Sanz.

In 2009, Gazul and a related entity, Music on Wheels LLC, together borrowed around $2.5 million

from TotalBank, a Florida-based bank. Music on Wheels borrowed another $1 million in 2014. The debts were secured by mortgages executed by Gazul. Those mortgages created a lien on certain real property located in Miami-Dade County, Florida.

In 2016, Gazul and Music on Wheels consolidated these debts with a new loan from TotalBank of roughly $3.5 million, and they executed a new promissory note for $7 million. Another related entity, Alja Productions, Inc., held a guaranty for the new $7 million loan. Gazul modified its previous mortgages to secure the new consolidated loan. The new loan was also secured by personal property held by Gazul and Music on Wheels.

In December 2017, TotalBank assigned all of its rights under the various promissory notes and mortgages to Respondent SHEDDF2-FL5, LLC. Around the same time, Gazul and Music on Wheels were alleged to have defaulted on the 2016 note.

2. In November 2019, Respondent filed suit in Miami-Dade County Circuit Court against Gazul, Music on Wheels, and Alja to recover damages for breach of the 2016 note and guaranty, and to foreclose on the real and personal property that secured the loan.

Respondent filed a summons showing that service on Gazul would be at its principal place of business in Madrid, Spain, but in-stead, Respondent attempted to serve Gazul at the Miami home of Juan Gervas. The return of service listed Mr. Gervas as Gazul's manager. Mr. Gervas was not and never has been listed with the Florida Secretary of State as Gazul's registered agent or manager, much less as a person authorized to accept service on behalf of Gazul. Mr. Gervas was not even affiliated with Gazul at the time Respondent

attempted to effect service on Gazul through him. Months later, Gazul deeded the property at issue to Respondent. Respondent however proceeded to acquire a foreclosure judgment anyway.

On September 8, 2020, during the COVID-19 pandemic, the trial court entered a default final judgment of foreclosure. Apparently because no sale date was set on the initial judgment, the trial court set a virtual hearing over Zoom for September 22, 2020. Zoom is a popular videoconferencing platform that allows users to join a virtual meeting through audio, video, and chat features.

At that point in time, no one had filed a notice of appearance on behalf of Gazul. However, because Respondent added attorney Sergio Pagliery to the electronic service list, the trial court summoned Mr. Pagliery to appear at the hearing. Mr. Pagliery was not retained to represent Gazul or any other party in the litigation. Nor was Mr. Pagliery aware of the fact that he had been added to the court's electronic service list by Respondent's counsel. Respondent's counsel and Mr. Pagliery, a client representative for Gazul, previously attempted to negotiate resolution of the alleged debts before entry of the foreclosure judgment.

Because the trial court directed Mr. Pagliery to attend the hearing, he logged onto the Zoom platform. During the hearing, the trial court asked Mr. Pagliery if he had any objection to the entry of a foreclosure judgment against Gazul. Mr. Pagliery responded that he had no objection because he had not appeared in the case and was not counsel of record for any defendant. Mr. Pagliery never conceded that Respondent had

properly served Gazul, nor did he waive service on behalf of Gazul.

Roughly one month after the hearing, the trial court entered an amended foreclosure judgment setting a sale date. In its amended foreclosure judgment, the trial court wrote: "At the September 12, 2020 hearing, Sergio Pagliery, Esq. appeared for the defendants and did not object to a sale date being set by this Court when asked."

3. On January 7, 2021, just over two months after the trial court entered its amended final judgment of foreclosure, an attorney for Gazul entered a special appearance expressly preserving Gazul's service objections. That was the first time any attorney had appeared on behalf of Gazul. That same day, Gazul moved to quash the purported service of process on Gazul via Mr. Gervas. The motion also sought to vacate the defaults against Gazul because of the service objections. Pet. App., *infra*, 40a. Expressly through its special appearance, Gazul also submitted a joinder to its co-defendants' vacatur motion. The trial court never ruled on any of those motions.

4. In the ensuing months, Respondent moved for a deficiency judgment to recover the outstanding balance on the 2016 loan that was not covered by the sale of Gazul's property. Gazul did not participate in the proceedings related to the deficiency judgment because there too, Gazul was not served. The trial court eventually entered a final deficiency judgment against Gazul, Music on Wheels, and Alja, jointly and severally.

Music on Wheels and Alja, both of whom had not objected to service of process, separately appealed the trial court's final deficiency judgment.[1]

As for Gazul, its counsel appeared and moved for relief from the deficiency judgment due to insufficient service of process. Pet. App., *infra*, 40a. Gazul explained: (a) that Respondent's attempted service on Mr. Gervas was improper; (b) that Mr. Pagliery was not—and had never been—Gazul's attorney in the case; (c) that Mr. Pagliery attended the Zoom hearing on the motion for foreclosure judgment only because he was directed by the trial court to do so; and (d) that Mr. Pagliery did not object to entry of the foreclosure judgment because he had not appeared in the case and was not counsel of record for any defendant. Gazul included with its motion a declaration for Mr. Pagliery attesting to these facts.

The trial court held a hearing on Gazul's motion to set aside the deficiency judgment. At the hearing, the trial court found on the record that Respondent "has not shown that [it] served a person authorized to be served." Pet. App., *infra*, 25a. There was "no record evidence," the trial court explained, to conclude that Mr. Gervas "was the right person to be served." *Ibid.* However, the trial court ultimately held that Mr. Pagliery's involuntary appearance at the September 12, 2020, Zoom hearing, together with his lack of objection

[1] The Florida district court of appeal later rejected Music on Wheels and Alja's appeal and summarily affirmed the final deficiency judgment as to those to defendants. *See Music on Wheels, LLC v. SHEDDF2-FL5*, 2023 WL 2998430 (Fla. Dist. Ct. App. Apr. 19, 2023).

to service at that hearing, amounted to a waiver of service of process on Gazul. *Id.* at 26a.

The trial court subsequently issued a two-paragraph order denying Gazul's motion "for the reasons set forth in the transcript of the hearing." Pet. App., *infra*, 4a.

5. Gazul appealed. Gazul raised its service objections on appeal. Respondent did not, however, cross-appeal or otherwise challenge on appeal the trial court's finding that Gazul was not properly served.

The Third District Court of Appeal affirmed in a one-paragraph *per curiam* opinion that simply stated "Affirmed" and included a string cite to three Florida cases. Pet. App., *infra*, 1a.

Gazul moved for rehearing and rehearing en banc. The appellate court denied the motion and substituted its *per curiam* opinion with one that simply stated "Affirmed," but without citation to any cases. Pet. App., *infra*, 36a (opinion on motion for rehearing); *id.* at 38a (order denying rehearing en banc).

This petition follows.[2]

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[2] Because the Florida district court of appeal affirmed without a written opinion, the Florida Supreme Court lacks jurisdiction to hear this case. *See* Fla. Const., Art. V, §3(b)(3); *Wells v. State*, 132 So. 3d 1110, 1112–13 (Fla. 2014); *see also Ibanez v. Fla. Dep't of Bus. & Pro. Regul., Bd. of Accountancy*, 512 U.S. 136, 142 (1993); *Palmore v. Sidoti*, 466 U.S. 429, 431 (1984).

REASONS FOR GRANTING THE PETITION

Certiorari should be granted for two reasons.

First, the decision below conflicts with basic due process principles. That conflict is squarely at odds with decisions of the federal courts of appeals and state appellate courts that have addressed issues regarding waiver of service of process due to attorney conduct. The decision below is so at odds with these elementary due process cases that certiorari is needed to clarify the law in this area. The decisions below are inexplicable and leave no remedy for a Spanish-based defendant in the Florida Supreme Court because the intermediate state court issued a decision without a written opinion. At a minimum, this Court should summarily reverse the decision below.

Second, the question presented was squarely adjudicated below. The trial court found, and Respondent did not challenge, that Gazul was not properly served. The only dispute before this Court to resolve is whether the involuntary appearance at a hearing over Zoom by an attorney not retained to represent a defendant in court and seeking no relief can amount to waiver of service of process. It cannot.

A. The Decision Below Conflicts With Basic Due Process Principles

1. The Decision Below Conflicts With Rulings Of The Federal Courts Of Appeals

The Florida appellate court's decision conflicts with rulings from nearly every federal court of appeals.

Rule 12 of the Federal Rules of Civil Procedure establishes that certain defenses—including the

defenses of "lack of personal jurisdiction" and "insufficient service of process"—are waived if not raised in a party's first responsive pleading or consolidated in a pre-pleading motion under Rule 12(b). *See* Fed. R. Civ. P. 12(b)(2)–(5), (h)(1); *compare id. with* Fla. R. Civ. P. 1.140(b)(2)–(5), (h)(1) (providing the same). Rule 12, however, does not provide an exclusive list of grounds upon which a defendant can waive those defenses.

Consequently, the courts of appeals have held that a defendant's litigation conduct can lead to waiver of defenses like personal jurisdiction and insufficient service of process. *See, e.g.*, *Rice v. Nova Biomedical Corp.*, 38 F.3d 909, 915 (7th Cir.1994) ("fiduciary shield" defense to personal jurisdiction found to be waived where defendant failed to make evidentiary arguments of any sort and declined to renew issue when invited to do so by court); *Cont'l Bank, N.A. v. Meyer*, 10 F.3d 1293, 1296–97 (7th Cir.1993) (affirming district court's explicit finding that defendants' conduct during litigation amounted to waiver of personal jurisdiction defense); *Yeldell v. Tutt*, 913 F.2d 533, 539 (8th Cir. 1990) (finding waiver where defendants failed to raise personal jurisdiction defense in motion, raised issue for first time in answer, and then failed to pursue the issue any further); *Datskow v. Teledyn, Inc.*, 899 F.2d 1298, 1303 (2d Cir. 1990) (finding that the defendant waived the defense of defect service of process by attending a conference with a magistrate and scheduling discovery and motion practice without mentioning the defect of service, which could have been cured within the limitations period had the defendant complained).

The courts of appeals have generally adopted an approach that when a defendant leads a plaintiff to

believe that service is adequate, the defense is ultimately waived. *See, e.g.*, *Blachy v. Butcher*, 221 F.3d 896, 910-11 (6th Cir. 2000); *Trs. of Cent. Laborers' Welfare Fund v. Lowery*, 924 F.2d 731, 732–33 (7th Cir. 1991). As the Sixth Circuit recently explained, in federal court a "defendant may waive her defense if the district court, after considering all of the relevant circumstances, determines that the defendant's litigation conduct gave the plaintiff a reasonable expectation that the defendant intended to defend the suit on the merits or the conduct caused the court to go to some effort that would be wasted if personal jurisdiction is later found lacking." *Blessing v. Chandrasekhar*, 988 F.3d 889, 900 (6th Cir. 2021) (alterations adopted; citations and internal quotation marks omitted).

The standard followed by the federal courts of appeals cannot support the decisions below.

2. The Decision Below Conflicts With Rulings Of State Courts

The decision below conflicts as well with decisions of the state appellate courts.

Several state courts have held that an attorney's actual knowledge of a case—absent service—is insufficient to effectuate a waiver of service of process. California courts, for example, "instruct that obligation to serve a party with process is not coextensive with merely providing the party with *notice* of the proceeding. Even undisputed *actual* notice of a proceeding does not substitute for proper service of the petition or complaint." *Abers v. Rohrs*, 217 Cal. App. 4th 1199 (2013); *Honda Motor Co. v. Superior Court*, 10 Cal. App. 4th 1043, 1049 (1992) ("The fact that the person served 'got the word' is irrelevant"). Other states are in

accord. *See, e.g.*, *IMC Const. Co. v. Mitchell*, 879 S.E.2d 105, 109 (Ga. Ct. App. 2023) ("'[I]t matters not that [the defendant] may have received notice of the suit. Service in the manner prescribed is necessary.'").

Several courts also follow the rule that parties who have made a voluntary entry appearance in court in the *absence* of service of process do not manifest a waiver of service of process. *See, e.g.*, *Bayview Loan Servicing, LLC v. Zelyakovsky*, 163 N.Y.S.3d 166, 169 (App. Div. 2022) (appearances at informal settlement conferences "does 'not constitute active litigation of the action or participation in the action on the merits'"); *Summers v. Wasdin*, 788 S.E.2d 573, 576 (Ga. Ct. App. 2016) (defendants made general appearance before trial court at hearing on plaintiff's request for a temporary restraining order, as would have waived right to service of process and triggered running of 30–day period to answer complaint); *Stone & Land Livestock Co. v. HBE, LLP*, 962 N.W.2d 903, 909 (Neb. 2011) ("A party's awareness of a lawsuit and its disclosure that it has chosen attorneys to represent it in that lawsuit does not, in our view, demonstrate an intention to waive service of process. A party can be aware of a lawsuit and still insist on service of process. Further, a party's attorneys might take no action in a lawsuit other than contending that service was not perfected.").

3. The Florida Decisions The Florida Appellate Court Initially Relied Upon Do Not Alter These Well Accepted Principles in U.S. Courts.

Florida does not establish a different rule for due process, not that it could. The Florida appellate court cited three decisions: *Starks v. Howard*, 611 So. 2d 52,

53 (Fla. Dist. Ct. App. 1992); *Laura M. Watson, P.A. v. Stewart Tilghman Fox & Bianchi, P.A.*, 162 So. 3d 102, 106 (Fla. Dist. Ct. App. 2014); *Parra v. Raskin*, 647 So. 2d 1010, 1011 (Fla. Dist. Ct. App. 1994).

None of the three decisions initially cited by the Florida appellate court support a waiver of service of process under the undisputed facts of this case. In *Starks v. Howard*, a Florida appellate court reversed an order granting a motion to dismiss based on a lack of service of process because the respondent appeared in court and admitted to paternity in a paternity suit before later contesting jurisdiction. 611 So. 2d at 53–54 ("The Respondent submitted to the jurisdiction of the court when he admitted paternity at the October 1990 hearing."). In *Laura M. Watson, P.A.*, the Florida appellate court held that a garnishee bank waived objections to service of a writ of garnishment where the bank submitted an answer to the writ and demanded payment of its attorneys' fees under a garnishment statute. 162 So. 3d at 104, 106. In *Parra*, a Florida appellate court affirmed a foreclosure judgment because the defendant did not challenge service of process in its pre-answer motion to dismiss. *Parra*, 647 So. 2d at 1011.

The Florida appellate court removed any reference to any of those three cited decisions in its amended opinion denying rehearing. That court noticeably cited to no decision—in Florida or elsewhere—that would eschew fundamental due process rights under the facts at issue in this case. There is no such authority. Certiorari should be granted, and this injustice remedied.

B. This Case Is An Ideal Vehicle To Address An Important Issue On Service Of Process

This case presents a clean vehicle to decide the question presented.

It is undisputed that Gazul—a limited liability company located in Spain—was not served. The trial court found that Respondent's purported service upon Juan Gervas at his home in Miami was legally invalid because Mr. Gervas was not and had never been listed with the Florida Secretary of State as Gazul's registered agent, manager, or as a person authorized to accept service on behalf of Gazul. Pet. App., *infra*, 12a. Nor was Mr. Gervas even affiliated with Gazul when Respondent attempted to effectuate service on Gazul through him. That finding was not appealed by Respondent, raised by Respondent in its briefing below, or disturbed by Florida appellate court. Consequently, the trial court's judgment is void as a matter of due process and Florida law. *See Sewell v. Colee*, 132 So. 3d 1186, 1188 (Fla. Dist. Ct. App. 2014).

It is also undisputed that, although no one had filed a notice of appearance on behalf of Gazul: (i) Respondent added Sergio Pagliery, an attorney who was not representing Gazul in this matter, to the electronic service list; (ii) Mr. Pagliery was summoned by the trial court to appear for a virtual hearing over Zoom; (iii) Mr. Pagliery logged into the Zoom platform; and (iv) Mr. Pagliery, who did not and has never represented Gazul or any other party as counsel in this litigation, informed the trial court that he did not represent Gazul in the litigation and could not take a position on rescheduling the sale date because he had not been

retained for the litigation and had not filed a notice of appearance.

It is likewise undisputed that, after Gazul learned that a default final judgment in foreclosure was entered, Gazul filed a limited notice of appearance and a contemporaneous motion to attack service of process and the trial court's jurisdiction over it. Gazul later filed a motion to set aside the deficiency judgment based on insufficient service of process—the denial of which is the subject of this appeal.

The question presented was therefore squarely adjudicated below. That question turns on whether a foreign defendant waives service of process where an attorney it did not retain to represent it in litigation appears at a Zoom hearing and does not request affirmative relief. The answer must be no.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. In the alternative, the Court should summarily reverse the decision below.

Respectfully submitted,

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