

No. 17-1120

In the
Supreme Court of the United States

TMBC, LLC,

PETITIONER,

v.

ROBERT MCKEAGE, ET AL.,

RESPONDENTS.

**On Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit**

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF

Having prevailed below and recently sought an award of more than \$8 million in attorney fees and expenses, respondents understandably do not want this Court to grant review. But they offer no meaningful response to the reasons why certiorari is warranted. The decision below violates the Constitution by applying a Missouri penal statute extraterritorially to regulate conduct occurring entirely in other States. It creates a circuit split by concluding—contrary to the Fourth, Sixth, and Seventh Circuits—that a generic choice-of-law provision subjects contracting parties to the chosen State’s penal laws in every State it does business without incorporating the prohibitions on applying those laws extraterritorially. And it raises important issues that deserve this Court’s attention. If the decision below is left uncorrected, it will transform basic understandings of how our system of federalism is supposed to work and pose grave threats to the hundreds of thousands of individuals and companies that rely on standardized contracts to conduct business in different States. It falls once again to this Court to stop this abuse of the class action procedure and to vindicate the deeply rooted constitutional principles that prohibit States from regulating outside their borders.

I. The Question Presented Implicates Basic Principles Of Constitutional Federalism And Has Divided The Federal Courts.

Respondents contend that this nationwide class action presents only “a state contract law issue.”

Opp. 4. But they did not win tens of millions in treble penalties for a nationwide class based on a state-law *contract* claim. Instead, they prevailed on a *statutory* claim, convincing the Eighth Circuit that a Missouri penal statute (section 484.020) can be projected beyond Missouri’s borders to regulate the practice of law in other States. *See* Pet. App. 4, 7, 11, 32. The Fourth, Sixth, and Seventh Circuits would have reached the opposite conclusion, consistent with the “basic principle of federalism . . . that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422 (2003).

Respondents contend that there is no constitutional problem applying a Missouri penal statute extraterritorially, citing three cases for the proposition that “Missouri can exercise authority over a Missouri citizen’s out-of-state conduct.” Opp. 5–6 (citing *Skiriotes v. Florida*, 313 U.S. 69 (1941); *Allstate Ins. Co. v. Hague*, 449 U.S. 302 (1981); *United States v. Edge Broad. Co.*, 509 U.S. 418 (1993)); *see also id.* at 11, 16–18, 20. They mischaracterize all three cases. In *Skiriotes*, the Court held “that a State may exercise its authority over its citizens *on the high seas*.” 313 U.S. at 77 (emphasis added). Petitioner’s non-Missouri dealerships were not located on the high seas, of course, but in other States with their own statutes regulating the practice of law. *Cf. World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 293 (1980) (“The sovereignty of each State . . . implie[s] a limitation on the sovereignty of all of its sister States . . .”). The plurality opinion in *Hague* did not speak

to “regulating a resident’s out-of-state conduct,” Opp. 6, because the man who had died in an out-of-state motorcycle crash also resided in that other State. *See* 449 U.S. at 305 (plurality opinion). And in *Edge*, it was a *federal* statute that prevented a radio station from advertising a neighboring State’s lottery. *See* 509 U.S. at 433–34. Respondents’ three cases do not empower Missouri to regulate out-of-state conduct just because it happens to involve a Missouri-based company.

This Court’s relevant decisions underscore the grave constitutional concerns raised by using section 484.020 to regulate conduct in other States. As this Court has recognized, “[a] State cannot punish a defendant for conduct that may have been lawful where it occurred.” *Campbell*, 538 U.S. at 421; *accord BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 572–73 (1996). In *Bigelow*, for example, the Court concluded that Virginia could not punish its residents for traveling to New York and engaging in conduct there that was legal under New York law. *Bigelow v. Virginia*, 421 U.S. 809, 822–24 (1975); *see also Sam Francis Found. v. Christies, Inc.*, 784 F.3d 1320 (9th Cir. 2015) (State cannot regulate out-of-state sales involving in-state seller); *Carolina Trucks & Equip., Inc. v. Volvo Trucks of N. Am., Inc.*, 492 F.3d 484, 480–92 (4th Cir. 2007) (refusing to apply statute extraterritorially to regulate residents’ out-of-state purchases).

Citing *Bigelow*, the Missouri Supreme Court has held that “its laws do not have extraterritorial effect.” *Planned Parenthood v. Nixon*, 220 S.W.3d 732, 742 (Mo. 2007) (en banc) (per curiam). Missouri has thus

imposed its own limits on extraterritoriality that complement the Constitution's limits. *See* Pet. 14–15 (collecting Missouri cases dating back to 1849); *id.* at 9–10 (collecting this Court's cases dating back to 1881). If there were any doubt on this score, it could be laid to rest by calling for the views of Missouri's Attorney General, who is actively litigating similar issues before this Court. *Cf.* Order, *Missouri v. California*, No. 22O148 (U.S. Apr. 16, 2018).

What is so concerning about the Eighth Circuit's decision is that it disregards both the Constitution and Missouri law, manufacturing its own novel rule focused on the fact that class members' contracts included a Missouri choice-of-law provision. But if that provision incorporates Missouri penal law, it must likewise incorporate Missouri's self-imposed limits on extraterritoriality. The Fourth, Sixth, and Seventh Circuits have so held, and the Eighth Circuit's decision to the contrary creates a split in authority. *Compare Peugeot Motors of Am., Inc. v. E. Auto Distribs., Inc.*, 892 F.2d 355, 358 (4th Cir. 1989); *Highway Equip. Co. v. Caterpillar Inc.*, 908 F.2d 60, 62–63 (6th Cir. 1990); *Cromeens, Holloman, Sibert, Inc. v. AB Volvo*, 349 F.3d 376, 384–86 (7th Cir. 2003), *with* Pet. App. 16–17, 32. This split “raise[s] serious constitutional concerns,” for the Eighth Circuit's novel approach has ignored the state-law limits on extraterritoriality that were imposed in the shadow of the Commerce Clause and the Full Faith and Credit Clause. *Cotter v. Lyft, Inc.*, 60 F. Supp. 3d 1059, 1063–64 (N.D. Cal. 2014).

Respondents argue that the decision below is in line with a decision from the Ninth Circuit. *See* Opp.

27 (citing *Gravquick A/S v. Trimble Navigation Int’l Ltd.*, 323 F.3d 1219 (9th Cir. 2003)). If that is true, it deepens the circuit split and confirms the need for this Court’s intervention. At a minimum, it shows that the lower courts are confused, as several district courts in the Ninth Circuit have since refused to adopt the freewheeling approach that respondents convinced the Eighth Circuit to embrace. *See, e.g., O’Connor v. Uber Techs., Inc.*, 58 F. Supp. 3d 989, 1004–06 (N.D. Cal. 2014); *Lyft*, 60 F. Supp. 3d at 1065–66; *Risinger v. SOC LLC*, 936 F. Supp. 2d 1235, 1249 (D. Nev. 2013); *Taylor v. 1-800-Got-Junk?, LLC*, 632 F. Supp. 2d 1048, 1052–54 (W.D. Wash. 2009).

Like the Eighth Circuit, respondents miss the point in arguing that “there is no constitutional prohibition on parties contractually deciding that a certain state’s law will govern their commercial transaction.” Opp. 5. Respondents have never pleaded a breach-of-contract claim on the class’s behalf. Class members freely agreed to pay a document fee in return for the titling, registration, and other services they received, and there is no dispute that petitioner performed those valuable services. Instead, respondents prevailed on a *statutory* claim that held petitioner strictly liable for conduct occurring in the course of performing its contractual duties—writing customer names and addresses on pre-printed forms. That statutory claim is at war with the parties’ contracts, because it wields Missouri penal law to impose treble penalties on petitioner for doing what the contract requires.

There is thus no reason to fear that taking this case to reverse the Eighth Circuit would “obliterat[e]

parties' right to contract." Opp. 9; *see also id.* at 6–7, 14, 28–31. The opposite is true. Under the Eighth Circuit's approach, respondents have been allowed to apply a state penal statute to regulate conduct occurring entirely in other States and to punish petitioner for performing contractual obligations that were lawful in the States where they were performed. *Cf. N.Y. Life Ins. Co. v. Head*, 234 U.S. 149, 160 (1914) (no state has power to extend the operation of its statutes beyond its borders to destroy freedom of contract). In contrast, under the approach taken by the Fourth, Sixth, and Seventh Circuits, which have held that a choice-of-law provision brings along any state-law limit on extraterritoriality, the parties get just what they bargained for. *See Uber*, 58 F. Supp. 3d at 1005 (“[A] contractual choice of law provision that incorporates California law presumably incorporates *all* of California law—including California’s presumption against extra-territorial application of its law.”). A choice-of-law provision governs the relationship between the parties and the contractual disputes that arise between them. It does not change what regulations apply to conduct occurring within the State. Petitioner and its customers could not have foreseen that a generic choice-of-law provision would project Missouri’s penal statute across state lines to render their contracts illegal.

How many licensed Missouri lawyers does it take to sell a boat in the Lone Star State? Under our Constitution and Texas law, the answer is *zero*. Under the Eighth Circuit’s approach, a generic choice-of-law provision has been transformed into a mechanism for evading constitutional limits on state

regulatory authority and, because respondents have packaged their claims as a nationwide class action, Missouri has been empowered to regulate the practice of law in every State in which petitioner does business. This important issue, and the circuit split created by the Eighth Circuit's dangerous decision, is worthy of this Court's review.

II. The Question Presented Is Important And Squarely Presented.

With no meaningful response to the underlying constitutional question, respondents rely heavily on purported obstacles to granting certiorari. None are entitled to any weight.

Respondents first argue that petitioner did not give the Missouri Supreme Court “‘a fair opportunity to address the federal question that is sought to be presented here.’” Opp. 5, 10 n.4 (quoting *Adams v. Robertson*, 520 U.S. 83, 87 (1997) (per curiam)). But this Court has been asked to review the Eighth Circuit's judgment, not the preliminary class-certification ruling. See Pet. 1. Indeed, because petitioner does not seek a writ of certiorari that would run to the Missouri Supreme Court, it is puzzling that respondents would complain about “the rule in reviewing state court judgments under 28 U.S.C. § 1257.” *Adams*, 520 U.S. at 86. This case was removed to federal district court under the Class Action Fairness Act of 2005, and the Eighth Circuit heard an appeal from the federal court's judgment. See Pet. App. 5–8. Petitioner's constitutional objection to the extraterritorial application of section 484.020 was pressed and passed upon in the Eighth

Circuit. *See* Pet. App. 16–17. And certiorari review is being sought as to the Eighth Circuit’s judgment, which explains why “[t]he jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).” Pet. 1.

Section 1257(a) has no bearing on this Court’s jurisdiction here. Nor would that statute have enabled review of the Missouri Supreme Court’s preliminary decision on class certification, due to the “firm final judgment rule” that section 1257(a) puts in place. *Jefferson v. City of Tarrant*, 522 U.S. 75, 81 (1997); *see also* STEPHEN M. SHAPIRO ET AL., SUPREME COURT PRACTICE 170 n.41 (10th ed. 2013). Now that the Eighth Circuit’s judgment is properly subject to review under section 1254(1), this Court can proceed unencumbered by law-of-the-case doctrine. *See Hathorn v. Lovorn*, 457 U.S. 255, 261–62 (1982).

Respondents also argue that the Missouri Supreme Court answered the extraterritoriality question decided by the Eighth Circuit. *See* Opp. 9, 18–19. According to respondents, the Missouri court decided in 2012 that “Missouri does not apply any geographical limitation on application of” section 484.020. *Id.* at 19. But such a constitutionally problematic holding on extraterritoriality appears nowhere in the state court’s class-certification opinion. *See* Pet. App. 24–30. Nor would it make any sense to read that holding into the opinion. As the petition explains, Missouri courts are quick to grant class certification, preferring to err in favor of certification and adjust as the case proceeds. *See* Pet. App. 26–27, 30 (citing *Meyer ex rel. Coplin v. Fluor Corp.*, 220 S.W.3d 712, 715 (Mo. 2007) (en banc)). Moreover, petitioner’s class-certification briefing in

state court did not address constitutional limits on extraterritoriality—as respondents themselves note. *See* Opp. 5, 10 n.4. Little wonder, then, that the Missouri Supreme Court ignored section 484.020’s putative extraterritoriality at what it recognized was a “preliminary stage of the litigation.” Pet. App. 30.

The preliminary ruling is also silent as to the state-law limits on extraterritoriality. *E.g.*, *Planned Parenthood*, 220 S.W.3d at 742. The Missouri Supreme Court cannot be understood as having overruled its own precedent *sub silentio*. *See, e.g.*, *State v. Honeycutt*, 421 S.W.3d 410, 422 (Mo. 2013) (en banc). Instead, it focused on the “policy argument” that “the state where the documents were executed may have a contrary fundamental policy which would supersede the explicit choice of law provision.” Pet. App. 28–29. The state court rejected that argument, finding that petitioner “has not identified any state that has a fundamental policy of denying its citizens relief from the unauthorized practice of law *in another state*.” *Id.* at 29 (emphasis added). But that is a different issue. The question here is not whether a Texan who bought a boat in Missouri can sue under section 484.020 *to regulate conduct in Missouri*, but whether a Texan who bought a boat in Texas can sue under section 484.020 *to regulate conduct in Texas*.

Respondents also allude to judicial estoppel, suggesting that petitioner’s arguments are precluded because petitioner used the form contract’s forum-selection clause to transfer this case between state courts in Missouri, from St. Charles County to Greene County. They concede that “none of the

courts below estopped [petitioner] from arguing that [r]espondents' claims did not arise from the contract." Opp. 1 n.1 (emphasis omitted). One reason no lower court addressed the argument is that respondents did not preserve it. Judicial estoppel calls for a showing that a party took two clearly inconsistent positions, persuaded a court to accept its first position, and would derive an unfair advantage if not estopped. *See New Hampshire v. Maine*, 532 U.S. 742, 750–51 (2001). Respondents did not adequately brief these issues before the Eighth Circuit, settling instead for a perfunctory assertion that "[p]rinciples of judicial estoppel prohibit [petitioner's] argument." C.A. Appellees' Br. 48. And they do no better before this Court, offering only conclusory statements that neither preserve their judicial-estoppel argument nor justify denying review. *See* Opp. 1 n.1, 8, 11, 22.

Even if respondents had preserved their estoppel argument, the argument is meritless. Judicial estoppel depends on a court's having "accept[ed] [the] party's earlier position," *New Hampshire*, 532 U.S. at 750–51, and respondents cannot show that the state court in St. Charles County held that all of their claims arose from the contract. Petitioner moved to transfer venue early in this litigation, while the respondents were still pressing an individualized rescission claim in their own name based on alleged defects in the boat they purchased. *See* Class Action Pet., CM/ECF Doc. 1-4, at 30 (claiming "Rescission/Revocation"); Pls.' Dismissal, CM/ECF Doc. 368 (dismissing claim). Because that claim was related to "'service, repair, and/or maintenance' of the boat," there was no doubt that this Missouri-law *contract* claim justified a venue transfer. Sugg. in

Supp. Mot. to Transfer Venue at 4–5, No. 0911-CV00606 (Cir. Ct. St. Charles Cnty., Mo. Mar. 11, 2009).

The state court granted petitioner’s venue-transfer motion in a two-sentence handwritten order that did not make any findings of fact or conclusions of law. *See* Order Granting Mot. to Transfer Venue, No. 0911-CV00606 (Cir. Ct. St. Charles Cnty., Mo. Apr. 14, 2009). It reasonably could have concluded that only the rescission claim arose from the contract. That is all the more likely in light of the federal court’s later conclusion that respondents’ statutory claims under section 484.020 were “not dependent upon the existence of a valid contract.” Pet. App. 69.

“[J]udicial estoppel is a powerful weapon” that should be applied “both narrowly and cautiously.” *Vehicle Mkt. Research, Inc. v. Mitchell Int’l, Inc.*, 767 F.3d 987, 993 (10th Cir. 2014) (internal quotation marks omitted). Applying that doctrine here would be especially inappropriate because when the venue-transfer motion was filed, respondents’ class definition was limited to “[c]ustomers who purchased or leased from [petitioner] *in the State of Missouri*.” Class Action Pet., CM/ECF Doc. 1-4, at 24 (emphasis added). There was no doubt at the time that section 484.020 applied to the disputed transactions. It was not until the third amended class action petition, filed long after the venue transfer, that respondents were allowed to reach beyond Missouri’s borders through a nationwide class action. *See* Third Am. Class Action Pet., CM/ECF Doc. 1-4, at 91.

* * *

If Missouri decides that writing a customer's name and address on an order form to complete a retail sale occurring within its borders requires the services of a Missouri-licensed lawyer, this Court can do little more than shake its head in amazement. But when a federal court ignores both federal- and state-law prohibitions on extraterritoriality to project a Missouri penal statute outside of Missouri's borders to regulate conduct occurring entirely in other States, this Court should not hesitate to step in and restore constitutional order. Especially when the lower court's decision creates a circuit split on an important, recurring issue of practical importance, the Court should grant review to stop this abuse of the class action procedure and to enforce the Constitution's fundamental restraints on extraterritorial regulation.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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