

Nos. 19-4 & 19-13

IN THE
Supreme Court of the United States

JACKSON NATIONAL LIFE INSURANCE CO.,
Petitioner,
v.
TAMARIN LINDENBERG,
Respondent.

TENNESSEE,
Petitioner,
v.
TAMARIN LINDENBERG,
Respondent.

On Petitions for Writs of Certiorari
to the United States Court of Appeals
for the Sixth Circuit

BRIEF IN OPPOSITION

Molly A. Glover
Counsel of Record
Charles S. Higgins
William D. Irvine, Jr.
BURCH, PORTER & JOHNSON,
PLLC
130 North Court Avenue
Memphis, TN 38103
(901) 524-5000
mglover@bpjlaw.com

QUESTION PRESENTED

Whether the Sixth Circuit abused its discretion by choosing not to certify three questions of state law to the Tennessee Supreme Court under the unusual circumstances of this case, where no party sought certification of one question and the Tennessee Supreme Court had already declined to answer the others after a certification by the district court.

RELATED PROCEEDINGS

Lindenberg v. Jackson Nat'l Life Ins. Co., Nos. 17-6034 & 17-6079 (6th Cir. Dec. 21, 2018)

Lindenberg v. Jackson Nat'l Life Ins. Co., No. 2:13-cv-02657 (W.D. Tenn. Sept. 28, 2016)

Lindenberg v. Jackson Nat'l Life Ins. Co., No. M2015-02349-SC-R23-CV (Tenn. June 23, 2016)

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STATEMENT OF THE CASE

Petitioners contend that the Sixth Circuit abused its discretion by deciding questions of Tennessee law without certifying them to the Tennessee Supreme Court. The state-law questions arose in the context of protracted and complex litigation based on petitioner Jackson National Life Insurance Company's refusal to pay a life insurance claim.

1. In 2001, respondent Tamarin Lindenberg and her then-husband, Thomas Lindenberg, purchased a \$350,000 insurance policy on Mr. Lindenberg's life from Jackson National. Pet. App. 4a. The policy designated Ms. Lindenberg as the primary beneficiary entitled to receive the full proceeds in the event of Mr. Lindenberg's death, with Mr. Lindenberg's children listed as contingent beneficiaries. *Id.*

In 2005, the couple divorced amicably. Pet. App. 4a. They remained close and continued to co-parent their two minor children. *Id.* 81a. They also agreed—and specified in their marital dissolution agreement—that the insurance policy would remain in force and that Ms. Lindenberg would pay the premiums. *Id.* 4a.

In January 2013, Mr. Lindenberg died unexpectedly. Pet. App. 5a. Ms. Lindenberg filed a claim under the insurance policy and sought expedited processing, explaining that she had recently lost her job and that Mr. Lindenberg's death had created an "immediate need for funds." *Id.* 5a, 81a; *see* ECF No. 183, at 125-26. Although Ms. Lindenberg had been paying the premiums and was still the primary beneficiary, Jackson National refused to pay. Pet. App. 81a.

Instead, Jackson National demanded that Ms. Lindenberg obtain waivers from Mr. Lindenberg's

adult daughter from a previous marriage and from court-appointed guardians for her own children. Pet. App. 5a. That process would have entailed “significant cost,” potentially including hiring attorneys to establish the guardianships. *Id.* 116a. “[N]o contract terms required” Ms. Lindenberg to take these steps. *Id.*

Jackson National never sent Ms. Lindenberg the waiver forms it demanded she complete. Pet. App. 115a. It also never assigned a claims manager to her case. *Id.* Instead, Jackson National closed her file the same day it informed her she would need to secure the waivers. *Id.*

2. Six months after Mr. Lindenberg’s death, Jackson National still refused to pay. Accordingly, in July 2013, Ms. Lindenberg filed suit in Tennessee state court. Pet. App. 83a. Jackson National removed the case to federal district court and sought to interplead Mr. Lindenberg’s adult daughter. *Id.*

Before trial, the district court dismissed Jackson National’s interpleader complaint and ordered it to pay Ms. Lindenberg the policy benefit, finding that it had no valid basis for refusing to pay. Pet. App. 6a. Jackson National ultimately paid the policy benefit in May 2014, a full sixteen months after Mr. Lindenberg’s death. *Id.* 107a.

The district court allowed Ms. Lindenberg to proceed to trial on a claim seeking punitive damages for a common-law breach of contract and a claim under a Tennessee statute authorizing damages for bad-faith refusal to pay an insurance claim. Pet. App. 6a; *see* Tenn. Code Ann. § 56-7-105(a). In so doing, the court rejected Jackson National’s argument that the

Tennessee statute precluded an award of common-law punitive damages. Pet. App. 87a-89a, 99a.

3. After a weeklong trial, a jury found for Ms. Lindenberg and awarded statutory bad-faith damages of \$87,500 and punitive damages of \$3,000,000. Pet. App. 7a, 104a-05a. The district court rejected Jackson National's challenge to the sufficiency of the evidence supporting that verdict. *Id.* 109a-23a. The court explained that the record showed that Jackson National's stated reasons for denying Ms. Lindenberg's claim were "pretextual" and that "requiring [Ms. Lindenberg] to participate in an unnecessary process while having knowledge of the financial burden on her" demonstrated "bad faith." *Id.* 115a-16a.

4. Jackson National asserted that the jury's punitive damages award had to be reduced under a Tennessee statute that caps punitive damages at the greater of \$500,000 or twice the compensatory damages. Pet. App. 7a; *see* Tenn. Code Ann. § 29-39-104. Ms. Lindenberg argued in response that the cap violated the Tennessee Constitution's right to trial by jury and its separation-of-powers provisions. Pet. App. 7a-8a. Tennessee then intervened in the litigation to defend the constitutionality of the cap. *Id.* 7a.

Ms. Lindenberg moved to certify the state constitutional questions to the Tennessee Supreme Court. Pet. App. 7a. Jackson National opposed certification, urging the district court to resolve those questions

itself. *Id.* 125a. The court granted Ms. Lindenberg's motion. *Id.* 127a-32a.¹

Seven months later, after full briefing, the Tennessee Supreme Court declined to answer the certified questions. Pet. App. 133a-35a. The court explained that it had not yet addressed the antecedent statutory question whether Tennessee law allows an award of punitive damages for a refusal to pay an insurance claim. *Id.* 135a. It stated that it was unwilling to address the validity of the cap on punitive damages in a case where "the availability of those damages in the first instance has not been and cannot be answered by this Court." *Id.* The court added that its refusal was not "intended to suggest any predisposition" as to how it would respond to a certification by the Sixth Circuit of both the statutory *and* constitutional issues in the case. *Id.* 135a n.1.

No party asked the district court to recertify the constitutional issues together with the antecedent statutory question. Accordingly, the court addressed those issues itself, holding that the punitive damages cap did not violate the Tennessee Constitution. Pet. App. 141a-67a. The court therefore reduced the jury's punitive damages award to \$700,000. *Id.* 167a-68a.

¹ Tennessee had also opposed certification, arguing that it would be premature because the district court had not yet determined that the evidence supported the jury's award of punitive damages exceeding the cap. Pet. App. 124a. But Tennessee stated that certification would be appropriate if the court so determined (as it later did). ECF No. 178, at 4-5.

5. The Sixth Circuit affirmed the jury's award and reversed the reduction. Pet. App. 1a-78a.

a. As relevant here, the Sixth Circuit first upheld the district court's conclusion that Tennessee law does not preclude a punitive damages award for a bad-faith denial of an insurance claim. Pet. App. 12a-19a. The Sixth Circuit relied on a Tennessee Court of Appeals decision holding that an insured is "not statutorily limited" to the bad-faith penalty, and that "[p]unitive damages . . . may be awarded" as well. *Id.* 14a (quoting *Riad v. Erie Ins. Exch.*, 436 S.W.3d 256, 276 (2013)). The court explained that, under Tennessee law, "[a] published opinion of the Tennessee Court of Appeals is 'controlling authority for all purposes.'" *Id.* 15a (quoting Tenn. Sup. Ct. R. 4(G)(2)).

b. The Sixth Circuit next held that sufficient evidence supported the jury's award of bad-faith and punitive damages. Pet. App. 20a-27a. Among other things, the court observed that Jackson National's "refusal to pay had no apparent basis under the law," that the waiver procedure it demanded was "complicated, uncommon, and unnecessary," and that it had "misled [Ms. Lindenberg] about her legal rights." *Id.* 23a-24a, 26a.

c. Finally, the Sixth Circuit agreed with Ms. Lindenberg that applying the punitive damages cap in this case would violate her "right to trial by jury set forth in the Tennessee Constitution." Pet. App. 28a; *see id.* 27a-41a. The court explained that the "historical evidence" showed that "punitive damages awards were part of the right to trial by jury at the time the Tennessee Constitution was adopted." *Id.* 29a. The court also noted that the Missouri Supreme Court had recently held that the similar jury-trial right in that

state’s constitution precluded the application of a punitive damages cap. *Id.* 34a (citing *Lewellen v. Franklin*, 441 S.W.3d 136, 145 (Mo. 2014)).

d. Judge Larsen dissented in relevant part. Pet. App. 43a-78a. She believed that the court should have certified both the statutory and constitutional issues to the Tennessee Supreme Court. *Id.* 45a-48a. She also disagreed with the panel majority’s resolution of those issues on the merits, concluding that the Tennessee bad-faith statute precluded an award of common-law punitive damages and that the damages cap was constitutional. *Id.* 48a-78a.²

6. The Sixth Circuit denied rehearing en banc. Pet. App. 172a.

a. Judge Clay, joined by Judge Stranch (the other member of the panel majority), concurred. Pet. App. 173a-77a; *see id.* 171a. They explained that the decision whether to certify “rests in the sound discretion of the federal court.” *Id.* 173a (quoting *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974)). They emphasized that this discretionary approach recognizes that courts considering certification must “weigh numerous competing considerations” that “cannot be reduced to a checklist or simple mathematical formula.” *Id.*

² Judge Larsen also questioned “whether the contours of Tennessee’s constitutional jury trial right are even relevant in this diversity case.” Pet. App. 57a. She suggested that, under *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938), the jury-trial right could be classified as a procedural guarantee that has no application in federal court. Pet. App. 57a. But she did not resolve that *Erie* question because Jackson National had never disputed that the Tennessee jury-trial right applied. *Id.* 63a-64a.

Judges Clay and Stranch then explained why the “panel properly considered the circumstances of the case” in declining to certify. Pet. App. 177a. They emphasized that “neither party moved for certification” and that the “State as intervenor did so only in a footnote, and only with regard to ‘the constitutional questions.’” *Id.* They added that the “district court had already certified the constitutional questions to the Tennessee Supreme Court” which, “after waiting approximately seven months, declined to answer.” *Id.* And they observed that when the case was argued, it had already been three and a half years since a jury had found for Ms. Lindenberg in December 2014. *Id.*

b. Judge Bush dissented. Pet. App. 178a-94a. He explained that “although neither Ms. Lindenberg nor Jackson National moved [the Sixth Circuit] to certify,” the court “can and does certify questions sua sponte.” *Id.* 190a. Judge Bush concluded that certification would have been appropriate here. *Id.* 192a.

c. Judge Nalbandian, joined by Judges Thapar, Bush, and Larsen, issued a statement regarding the denial of rehearing en banc. Pet. App. 195a-98a; *see id.* 171a. They explained that although they “would have granted rehearing en banc,” the panel’s decision not to certify had limited impact because it affected only this single case: “Nothing prevents future courts—whether another panel from this circuit or one of our district court colleagues—from certifying the same questions to the Tennessee Supreme Court should they arise again.” *Id.* 195a.

REASONS FOR DENYING THE WRIT

Petitioners urge this Court to grant certiorari to resolve a variety of purported conflicts in the circuits’

certification practices. No such conflicts exist. All courts of appeals treat certification as a discretionary procedure guided by a variety of case-specific considerations. The Court has recently and repeatedly denied petitions presenting similar questions about certification—including petitions based on comparable attempts to manufacture circuit splits from the lower courts’ factbound exercises of discretion.³

The Court should deny these petitions too. Indeed, this case’s peculiar procedural history would make it an especially poor vehicle for providing general guidance on certification. Those unusual circumstances, including petitioners’ own failure to properly request certification, also amply justified the Sixth Circuit’s decision to forgo a second certification attempt. And in seeking to paint that case-specific decision as an affront to federalism, petitioners vastly overstate its effect—which, as Judge Nalbandian emphasized, is limited to this particular judgment.

Jackson National separately argues that even if this Court determines that plenary review is not warranted, the Court should hold its petition until the Tennessee Supreme Court issues a decision in a separate case that could bear on the underlying state-law issues. The Court should not entertain Jackson

³ See, e.g., *Bloom v. Aftermath Pub. Adjusters, Inc.*, 139 S. Ct. 1178 (2019) (No. 18-721); *Shear v. MAZ Partners, LP*, 139 S. Ct. 489 (2018) (No. 18-403); *Highland Constr. Mgmt. Servs., LP v. Wells Fargo Bank, N.A.*, 138 S. Ct. 2027 (2018) (No. 17-1298); *Van Houten v. City of Fort Worth*, 137 S. Ct. 600 (2016) (No. 16-586); *Romanoff Equities, Inc. v. United States*, 137 S. Ct. 597 (2016) (No. 16-514); *Nassau Cty. Sheriff’s Dep’t v. Augustin*, 137 S. Ct. 313 (2016) (No. 16-278); *Hemphill v. State Farm Mut. Auto. Ins. Co.*, 136 S. Ct. 1715 (2016) (No. 15-1053).

National’s novel attempt to manipulate the certiorari process to get another bite at the apple on state-law issues that it did not ask (and could not plausibly have asked) the Court to review directly.

I. There is no split among the courts of appeals.

A. All circuits treat certification decisions as case-specific exercises of discretion.

This Court has explained that when a case in federal court turns on “[n]ovel, unsettled questions of state law,” it may be appropriate to certify those questions to the relevant state’s highest court. *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997). But the Court has also emphasized that even when those threshold conditions are present, certification is not “obligatory.” *Lehman Bros. v. Schein*, 416 U.S. 386, 390-91 (1974). Instead, use of the procedure “rests in the sound discretion of the federal court.” *Id.*; see *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1892 n.7 (2018) (same).

Consistent with this Court’s instructions, the courts of appeals uniformly recognize that the decision whether to certify in a particular case requires a discretionary weighing of certification’s “potential benefits” against its “inevitable burdens.” *Valls v. Allstate Ins. Co.*, 919 F.3d 739, 744 (2d Cir. 2019). Those burdens include, among other things, the “costs to the litigants and the state court system,” *Brown v. Argosy Gaming Co.*, 384 F.3d 413, 417 (7th Cir. 2004), as well as the risk of gamesmanship by parties who seek certification “only after having received an adverse decision” in federal court, *Enfield v. A.B. Chance Co.*, 228 F.3d 1245, 1255 (10th Cir. 2000)

(citation omitted). *See* 17A *Moore's Federal Practice* § 124.22[7][c] (3d ed. 2019) (sampling cases reflecting more than a dozen factors weighing for and against certification).

B. Petitioners' asserted circuit splits do not withstand scrutiny.

Petitioners assert that the courts of appeals are split along various lines on the proper approach to certification. Jackson Nat'l Pet. 16-23; Tenn. Pet. 15-27. But petitioners identify no decision recognizing the existence of any of those purported conflicts. And petitioners themselves cannot agree on the bases and contours of their asserted splits. The reason is simple: There are no splits. Petitioners have cherry-picked language from individual panels' explanations for their exercise of discretion, mischaracterizing those case-specific explanations as hard-and-fast rules governing certification in general.

1. Jackson National asserts that the Sixth Circuit alone "require[s]" that a state-law issue be not merely uncertain, but also entirely "new" (in the sense that "*no* court has addressed it") before the court "may consider certification." Pet. 22 (citation omitted). The Sixth Circuit has adopted no such requirement.

Jackson National quotes the Sixth Circuit's observation that certification "is *most appropriate* when the issue is new and state law is unsettled." *Transamerica Ins. Co. v. Duro Bag Mfg. Co.*, 50 F.3d 370, 372 (6th Cir. 1995) (emphasis added). But that does not suggest that certification is permitted *only* in such circumstances. Similarly, Jackson National cites the Sixth Circuit's statement that the court "may" decline to certify if state law provides "well-established

principles to govern’ the outcome.” *Smith v. Joy Techs., Inc.*, 828 F.3d 391, 397 (6th Cir. 2016) (citation omitted). But again, that permissive language does not suggest that courts *must* decline to certify whenever there is relevant intermediate appellate authority—and the Sixth Circuit sometimes certifies despite the existence of guidance from intermediate state courts. *See, e.g., Brown v. Jordan*, 744 Fed. Appx. 918, 920 (6th Cir. 2018).⁴

2. Petitioners also assert that the circuits’ certification practices differ in their treatment of the state’s sovereign interests and other indicia of a question’s importance to the state. Petitioners’ descriptions of those purported conflicts are confusing, inconsistent, and incorrect.

First, Tennessee asserts (and Jackson National implies) that some circuits do not consider the state’s interests in deciding whether to certify. Tenn. Pet. 24-27; *see* Jackson Nat’l Pet. 21-22. In fact, all circuits—including the Sixth—consider those interests when they are relevant. Just last year, for example, the Sixth Circuit certified a question because it could be “immensely important to a wide spectrum of state government activities.” *Ky. Emps. Ret. Sys. v. Seven Ctys. Servs., Inc.*, 901 F.3d 718, 732 (6th Cir. 2018)

⁴ Jackson National also quotes Judge Bush’s dissent from the denial of rehearing en banc for the proposition that “the Sixth Circuit’s standard bars certification if a prior lower state court ‘has addressed’ the issue.” Pet. 22 (citation omitted). In fact, Judge Bush said the opposite: He argued that Sixth Circuit precedent “fails to provide guidance” in such cases, leaving certification to the discretion of each panel. Pet. App. 183a.

(citation omitted); *see also, e.g., Planned Parenthood Cincinnati Region v. Strickland*, 531 F.3d 406, 411-12 (6th Cir. 2008) (certifying because the state law at issue was “passed pursuant to Ohio’s longstanding power to regulate the practice of medicine within its borders”). Other circuits routinely do the same.⁵

Second, Tennessee asserts that the First, Second, Seventh, and Tenth Circuits “have adopted a certification test that requires the court to consider a State’s sovereign interests as a significant factor in favor of certification.” Pet. 20. To the extent that Tennessee means that those courts treat the presence of such state interests as a factor favoring certification, all

⁵ *See, e.g., In re Engage, Inc.*, 544 F.3d 50, 51, 57 (1st Cir. 2008) (“significant policy ramifications” and “importance”); *Chauca v. Abraham*, 841 F.3d 86, 94 (2d Cir. 2016) (“competing policy concerns” and “importance”); *Wirth v. Aetna U.S. Healthcare*, 137 Fed. Appx. 455, 461 (3d Cir. 2005) (“substantial public importance”); *Bragg v. United States*, 488 Fed. Appx. 672, 676 (4th Cir. 2012) (“exceptional importance for West Virginia”); *In re Katrina Canal Breaches Litig.*, 613 F.3d 504, 509 (5th Cir. 2010) (“important state interests” (citation omitted)); *In re Badger Lines, Inc.*, 140 F.3d 691, 699 (7th Cir. 1998) (“issue of vital public concern”); *Hatfield v. Bishop Clarkson Mem’l Hosp.*, 701 F.2d 1266, 1267 (8th Cir. 1983) (en banc) (“public policy aims”); *Albano v. Shea Homes Ltd. P’ship*, 634 F.3d 524, 526 (9th Cir. 2011) (“important matters of public policy for the State”); *Kan. Judicial Review v. Stout*, 519 F.3d 1107, 1120 (10th Cir. 2008) (“important state policy interests”); *Cont’l Cas. Co. v. Adamo*, 326 F.3d 1181, 1182 (11th Cir. 2003) (“important question of state law”); *Nationwide Mut. Ins. Co. v. Richardson*, 270 F.3d 948, 950 (D.C. Cir. 2001) (“extreme public importance”). It appears that the Federal Circuit has not explicitly discussed the relevance of state interests. But that is not surprising, because the court’s specialized docket seldom gives it occasion to consider certification at all.

other circuits do the same—as we have just explained. And to the extent that Tennessee means to assert that those circuits require *explicit* consideration of the state’s interests in every case, it is incorrect. Those circuits often resolve certification questions based on other considerations, without discussing sovereignty or other state interests.⁶

Third, Tennessee claims that the Third, Fifth, and D.C. Circuits “limit certification to instances in which a state law issue is important and implicates state public policy.” Pet. 22. That is not so. Tennessee cites several decisions illustrating that, like all other circuits, those courts treat the importance of the state-law issue as a factor favoring certification.⁷ It also cites two decisions declining to certify issues that were “neither sufficiently important nor sufficiently difficult to command the attention” of the state supreme court. *Travelers Indem. Co. of Ill. v. DiBartolo*, 171 F.3d 168, 169 n.1 (3d Cir. 1999); see *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 22-24 (D.C. Cir. 2014). That, too, is unsurprising: Any court would be reluctant to burden its state counterpart by certifying a wholly unimportant or easily answerable question.

⁶ See, e.g., *City of Portsmouth v. Schlesinger*, 57 F.3d 12, 18 (1st Cir. 1995); *Baker v. Health Mgmt. Sys., Inc.*, 264 F.3d 144, 154 (2d Cir. 2001); *Daniels v. Fanduel, Inc.*, 884 F.3d 672, 674 (7th Cir. 2018); *Hammock v. United States*, 324 F.3d 1155, 1157 (10th Cir. 2003).

⁷ See *Delta Funding Corp. v. Harris*, 426 F.3d 671, 675 (3d Cir. 2005); *Swindol v. Aurora Flight Scis. Corp.*, 805 F.3d 516, 518, 522 (5th Cir. 2015); *In re Katrina*, 613 F.3d at 509; *Lucas v. United States*, 807 F.2d 414, 418 (5th Cir. 1986); *DeBerry v. First Gov’t Mortg. & Inv’rs Corp.*, 170 F.3d 1105, 1110 (D.C. Cir. 1999).

Contrary to Tennessee’s claim, however, the Third, Fifth, and D.C. Circuits do not require a finding that a question satisfies a particular threshold of public-policy importance before it can be certified. None of the decisions it cites purports to adopt such a rule. To the contrary, the D.C. Circuit’s decision in *Metz* specifically disclaimed the “extreme public importance” standard that Tennessee attributes to that court. 774 F.3d at 24 (citation omitted). And in other cases, all three of these circuits have certified without any discussion of public policy significance. *See, e.g., Plavin v. Grp. Health Inc.*, No. 18-2490, 2019 WL 1965741, at *3 (3d Cir. Apr. 4, 2019); *Puckett v. Rufenacht, Bromagen & Hertz, Inc.*, 903 F.2d 1014, 1021-22 (5th Cir. 1990); *Holmes v. Amerex Rent-A-Car*, 113 F.3d 1285, 1286 (D.C. Cir. 1997).

3. Finally, Tennessee asserts that the Ninth and Eleventh Circuits require certification of state constitutional questions. Pet. 17-20. But the decisions Tennessee cites do not support that characterization.

For example, Tennessee relies most heavily on *Blue Cross & Blue Shield of Alabama, Inc. v. Nielsen*, 116 F.3d 1406 (11th Cir. 1997), quoting the court as holding that “it is ‘imperative’ that ‘state constitutional issues . . . be decided by the state supreme court.’” Pet. 17 (citation omitted). In fact, the court stated only that it was “imperative that any state constitutional law issues *in this case* be decided by the state supreme court.” *Nielsen*, 116 F.3d at 1413 (emphasis added). Similarly, in *Perry v. Schwarzenegger*, 628 F.3d 1191 (9th Cir. 2011), the court stated that it felt “compelled” to certify under the extraordinary circumstances of that case—which involved “the constitutionality of excluding same-sex couples from the institution of

marriage in California.” *Id.* at 1193, 1196. The court did not suggest—much less hold—that certification would be “compelled” in every case involving a question of state constitutional law.

In other cases, moreover, both the Ninth and Eleventh Circuits have addressed unsettled state constitutional issues without certification. In *Acton v. Vernonia School District 47J*, 66 F.3d 217 (9th Cir. 1995), for example, the Ninth Circuit declined to certify the question whether a school drug-testing program “violate[d] the Oregon Constitution” despite a dissent “strongly disagree[ing] with the majority’s refusal to allow the Oregon Supreme Court” to decide the issue. *Id.* at 218 (Reinhardt, J., dissenting); *see also, e.g., First Resort, Inc. v. Herrera*, 860 F.3d 1263, 1279-81 (9th Cir. 2017); *Atheists of Fla., Inc. v. City of Lakeland*, 713 F.3d 577, 595-96 (11th Cir. 2013); *Sultenfuss v. Snow*, 35 F.3d 1494, 1505-06 (11th Cir. 1994) (Carnes, J., dissenting).

C. Even if there were some variation in the circuits’ discretionary certification practices, that would not establish a split warranting this Court’s review.

This is not the typical case where a party seeking certiorari asserts that the courts of appeals are divided on the meaning of a statute or some other question of federal law. *Cf.* Sup. Ct. R. 10. Everyone agrees that certification is a discretionary procedure. *See* Jackson Nat’l Pet. 5, 34; Tenn. Pet. 15. Even if the circuits were exercising that discretion somewhat differently, such variation would not necessarily warrant this Court’s intervention. Courts of appeals “have significant authority to fashion rules to govern their own

procedures.” *Cardinal Chem. Co. v. Morton Int’l Inc.*, 508 U.S. 83, 99 (1993). And differences in approach would be particularly unremarkable in a discretionary realm like this one. Indeed, this Court has emphasized that “some variation” in the application of discretionary standards is “inevitable.” *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 405 (1990).

II. This unusual case would be a poor vehicle for considering the question presented.

Even if it made sense for this Court to give additional guidance on certification, this case’s unique procedural history would make it a very poor vehicle in which to do so.

1. In concurring in the denial of rehearing en banc, the panel majority explained that it decided not to certify based on the particular “circumstances of the case.” Pet. App. 177a. Those circumstances are unusual, if not unique. Jackson removed this case from state court and opposed certification in the district court. *Id.* 83a, 125a. In the Sixth Circuit, “neither party moved for certification.” *Id.* 177a. The state, as intervenor, “did so only in a footnote, and only with regard to ‘the constitutional questions.’” *Id.* But “the district court had already certified the constitutional questions to the Tennessee Supreme Court,” and that court had declined to answer them without the antecedent statutory question. *Id.*; *see id.* 135a. That certification had caused seven months of delay without advancing the litigation, and a total of “[t]hree and a half years” had elapsed between the jury’s verdict and argument in the Sixth Circuit. *Id.* 177a.

Petitioners have not identified any decision, by any court, concluding that certification was warranted

in comparable circumstances. In fact, they have not cited any decision even *considering* comparable circumstances: Petitioners rely on some fifty-odd certification decisions, but not one of them involved a previously rejected certification request—much less the full panoply of procedural wrinkles at issue here.

If this Court were to grant certiorari, much of the parties' briefing would not address state sovereign interests or the other matters on which petitioners contend the circuits are divided. Instead, briefing would focus on issues enmeshed in this case's particular history—including whether petitioners have forfeited the certification issue, equitable considerations related to delay and gamesmanship, and the significance of the Tennessee Supreme Court's refusal to entertain an earlier certification in this very case. The Court would be required to wade through the record to assess those case-specific considerations. And a decision turning on such idiosyncrasies would be unlikely to provide useful guidance for future cases.

2. Tennessee asserts that this case is an "ideal" vehicle because it would allow the Court to articulate potentially distinct certification standards for (a) statutory and constitutional questions, and (b) issues on which there is and is not intermediate state appellate precedent. Pet. 37-38. But Tennessee has it backwards: The presence of multiple, interdependent state-law issues is another vice, not a virtue.

Contrary to Tennessee's suggestion, the only question presented here is whether *both* the statutory and constitutional issues should have been certified together. The Tennessee Supreme Court made clear it would not consider the constitutional questions without the statutory question. Pet. App. 134a-35a. And no

party suggests that the statutory question warrants certification by itself. As a result, this case would present no occasion for the Court to separately consider whether each of the questions should have been certified. Instead, the Court would have to decide whether the entire package of state-law questions warranted certification. That is yet another quirk that further distinguishes this from a typical case.

III. The Sixth Circuit did not abuse its discretion.

As this case comes to the Court, the question is not whether certification was the optimal path at the Sixth Circuit, nor whether it is the optimal path now. Instead, the only question is whether, under the particular circumstances of this case, the Sixth Circuit abused its discretion in declining to certify. It did not.

A. The circumstances of this case amply justified the Sixth Circuit’s decision not to certify.

In addition to making this case a poor vehicle, the unusual procedural history of this litigation confirms that the Sixth Circuit acted well within its discretion in electing against a second certification attempt.

1. To begin, Jackson National is “in a peculiarly poor position to seek certification” because it chose a federal forum when it removed this suit from the Tennessee state court where Ms. Lindenberg filed it. *Metz v. BAE Sys. Tech. Sols. & Servs. Inc.*, 774 F.3d 18, 24 (D.C. Cir. 2014) (citation omitted); *see* Pet. App. 83a. In so doing, Jackson National deliberately deprived the Tennessee courts of the opportunity to determine how Tennessee law applies here. And since then, Jackson National has enjoyed the benefits of litigating in its preferred forum—including a vastly

lower interest rate on a judgment that has now gone unpaid for years.⁸ Courts regularly deny certification requests from such parties, emphasizing the “amazing irony” in their selective preference for state-court adjudication. *Smigiel v. Aetna Cas. & Sur. Co.*, 785 F.2d 922, 924 (11th Cir. 1986); *see also, e.g., Tersigni v. Wyeth*, 817 F.3d 364, 369 n.6 (1st Cir. 2016).

2. Furthermore, petitioners failed to ask the Sixth Circuit panel to do what they now insist it should have done. Petitioners now echo Judge Larsen’s argument that the panel should have certified both the statutory and constitutional questions to the Tennessee Supreme Court. But Jackson National did not request certification in its Sixth Circuit brief. Tennessee did so only in a single, conclusory footnote, and only with respect to the constitutional questions—indeed, it presupposed that the Sixth Circuit would decide the statutory questions itself. Tenn. C.A. Br. 9 & n.2. This Court has recognized that a court may decline a “request for certification” that “comes very late in the day.” *Minn. Voters All. v. Mansky*, 138 S. Ct. 1876, 1892 n.7 (2018). All the more so if a proper request never comes at all.⁹

⁸ The district court determined Ms. Lindenberg was entitled to post-judgment interest reflecting an annual rate of 0.6%. ECF No. 241; *see* 28 U.S.C. § 1961(a). Had the judgment been entered in Tennessee court, the rate would have been 5.5%. *See* Tenn. State Courts, *Tennessee Judgment Interest Rates* (July 2019), <https://www.tncourts.gov/node/1232344>.

⁹ Neither Tennessee’s conclusory footnote nor Jackson National’s passing reference to certification at oral argument was sufficient to preserve the issue. *See Henricks v. Pickaway Corr. Inst.*, 782 F.3d 744, 752 n.3 (6th Cir. 2015) (an issue is forfeited if it is raised “for the first time at oral argument”); *United*

Of course, after the panel issued its decision, Jackson National and Tennessee vociferously urged certification in seeking rehearing en banc and in their petitions for certiorari. But courts are rightly skeptical of parties who extol the virtues of state court adjudication only in the wake of an adverse federal judgment. Indeed, “[t]hat fact alone” justifies a conclusion “that certification is inappropriate.” *Enfield v. A.B. Chance Co.*, 228 F.3d 1245, 1255 (10th Cir. 2000); *see also, e.g., Thompson v. Paul*, 547 F.3d 1055, 1065 (9th Cir. 2008); *Perkins v. Clark Equip. Co.*, 823 F.2d 207, 209-10 (8th Cir. 1987).

3. Finally, a second certification attempt by the Sixth Circuit would have further delayed this already prolonged litigation. This Court has praised early resort to certification, which can “save ‘time, energy, and resources.’” *Arizonans for Official English v. Arizona*, 520 U.S. 43, 77 (1997) (citation omitted). But certification can also “increase[], at times enormously, the expenses incurred by the parties” and yield “unjustifiably burdensome” delays. *Valls v. Allstate Ins. Co.*, 919 F.3d 739, 742-43 (2d Cir. 2019). And certification can be especially “inefficient and wasteful” when federal courts and parties have already invested substantial “time, energy, and resources” in litigating the state-law issues. *Boyd Rosene & Assocs. v. Kan. Mun. Gas Agency*, 178 F.3d 1363, 1365 (10th Cir. 1999).

The Sixth Circuit reasonably determined that a second certification attempt ran that risk here. The first certification process had already consumed seven

States v. Johnson, 440 F.3d 832, 846 (6th Cir. 2006) (same for an issue “limited to [a] single footnote”).

months before the Tennessee Supreme Court declined to answer the certified questions. Pet. App. 177a. A second certification attempt would have required another comparable delay—which could have stretched even longer had the Tennessee Supreme Court accepted the certification.

B. The Sixth Circuit’s case-specific decision neither undermines Tennessee’s sovereign interests nor encourages forum shopping.

Petitioners assert that the Sixth Circuit’s withholding of certification undermined Tennessee’s sovereign interests and created a risk of forum shopping. Neither concern has merit.

1. Tennessee asserts that the Sixth Circuit “usurped the Tennessee Supreme Court’s sovereign authority to interpret the Tennessee Constitution” and “invalidate[d]” the state’s punitive damages cap. Pet. 31-32. That greatly overstates the effect of the Sixth Circuit’s decision.

Where, as here, a federal court sitting in diversity addresses a state-law issue, it “write[s] in faint and disappearing ink.” *LeFrere v. Quezada*, 582 F.3d 1260, 1262 (11th Cir. 2009) (citation omitted). Once the state supreme court resolves the issue, the precedential effect of any contrary federal decision “vanishes like the proverbial bat in daylight, only faster.” *Id.* (citation omitted). The Tennessee Supreme Court will thus have the last word on the meaning of Tennessee law, and Tennessee state courts are “not bound by the Sixth Circuit’s opinion” in the meantime. *Smith v. Hi-Speed, Inc.*, 536 S.W.3d 458, 478 (Tenn. Ct. App. 2016).

Nor, indeed, are the federal courts. As Judge Nalbandian emphasized, “[n]othing prevents future

courts—whether another panel from this circuit or one of our district court colleagues—from certifying the same questions to the Tennessee Supreme Court should they arise again.” Pet. App. 198a. The Sixth Circuit’s decision thus determines only the validity of the damages award in this particular case.

Tennessee’s interest in the validity of a single damages award in litigation between two private parties is not remotely comparable to the sovereign interests present in the certification decisions on which it relies, Pet. 4-5, 29-34, most of which involved suits seeking declaratory or injunctive relief that would bind the state itself or otherwise have broad statewide effect. *See Arizonans*, 520 U.S. at 50-51; *Perry v. Schwarzenegger*, 628 F.3d 1191, 1194 (9th Cir. 2011); *Blue Cross & Blue Shield of Ala., Inc. v. Nielsen*, 116 F.3d 1406, 1409 (11th Cir. 1997).

2. For similar reasons, petitioners err in asserting that the Sixth Circuit’s decision will create a material risk of forum shopping. Precisely because any future federal court would be free to certify the state-law questions again, prospective plaintiffs cannot assume that the panel’s decision in this case will govern other cases filed in federal court. And because Tennessee’s cap on punitive damages applies to a broad range of state-law claims, it will inevitably arise in many cases where the parties are not diverse and there is no other basis for invoking federal jurisdiction. The Tennessee Supreme Court will thus have ample opportunities to provide a definitive statement of Tennessee law.

C. Jackson National’s proposed certification rules lack merit.

Jackson National urges this Court to announce four novel rules governing certification. Pet. 31-36. But the discretionary nature of certification means that, like other similar matters, it cannot be reduced to a formula. And the specific rules Jackson National proposes are both gerrymandered and unhelpful.

1. Broad discretionary standards are appropriate where courts must assess and weigh “multifarious, fleeting, special, narrow facts that utterly resist generalization.” *Pierce v. Underwood*, 487 U.S. 552, 561-62 (1988) (citation omitted). In such circumstances, “no single formula or rule will fit all cases.” *Animal Sci. Prods., Inc. v. Hebei Welcome Pharm. Co.*, 138 S. Ct. 1865, 1873-74 (2018). Instead, courts should be afforded “flexibility” to approach each case “in the manner that most sensibly accommodates a range of concerns and values.” *Carnegie-Mellon Univ. v. Cohill*, 484 U.S. 343, 350 (1988).

Certification decisions fit squarely within that traditional discretionary realm. Courts deciding whether to certify must “weigh numerous competing considerations.” Pet. App. 173a. “These multifarious considerations cannot be reduced to a checklist or simple mathematical formula.” *Id.* Certification is thus a paradigmatic example of the sort of procedural matter that should be left to the discretion of the “judges of the district courts and the courts of appeals,” who are in the “best position” to determine the procedure that “will best facilitate the fair and efficient disposition of each case,” *Pearson v. Callahan*, 555 U.S. 223, 242 (2009).

Broad discretion in the realm of certification also fosters comity and cooperative federalism by allowing federal courts to develop their own relationships with their state counterparts, accounting for each state court's differing docket, rules, and attitudes regarding certification. *See, e.g., Kremen v. Cohen*, 325 F.3d 1035, 1051-52 (9th Cir. 2003) (Kozinski, J., dissenting) (describing the special certification considerations created by the California Supreme Court's caseload and other unique circumstances).

Petitioners thus draw exactly the wrong inference from this Court's longstanding decision not to provide more prescriptive "guidance about certification." Tenn. Pet. 15; *see* Jackson Nat'l Pet. 31. The Court's hands-off approach reflects not (as petitioners suggest) decades-long neglect of an area in need of clear rules, but "sensible respect" for the discretion of the lower courts in choosing "how to go about deciding cases where federal jurisdiction is based on diversity of citizenship, cases which they see and decide far more often" than this Court. *Lehman Bros. v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring).

2. Even if the Court were inclined to provide additional guidance in this area, it should reject Jackson National's proposed quartet of rules to "promote consistency in the certification procedure," Pet. 31. Those rules are carefully gerrymandered to fit Jackson National's view of this case.¹⁰ And they ignore

¹⁰ Jackson National proposes, for example, that when "a federal court has a state statutory question that presents a threshold question that could, depending on how it is resolved, raise a substantial state constitutional question, certification of the statutory and constitutional questions is appropriate." Pet. 32-33.

many of the practical, equitable, and other case-specific factors that courts have long considered when making certification decisions.

Jackson National’s bespoke rules are also too vague to “promote consistency” in a meaningful way. They contain undefined exceptions for “exceptional” or “rare circumstances.” Pet. 31-32. They would also require courts to assess such subjective criteria as whether the state supreme court has expressed “interest” in the issue and whether the issue would “generate at least serious discussion” among state justices. *Id.* Such rules would add only analytical overhead to certification decisions, not clarity.

IV. The Court should reject Jackson National’s alternative request to hold this case pending the Tennessee Supreme Court’s decision in *McClay*.

Jackson National briefly asserts that even if the Court concludes that this case does not warrant plenary review, it should nonetheless hold Jackson National’s petition until the Tennessee Supreme Court issues a decision in *McClay v. Airport Management Services, LLC*, No. M2019-00511-SC-R23-CV, and then remand so that the Sixth Circuit can consider *McClay*’s effect on the underlying state-law issues. Pet. 36-38. The Court should reject that novel attempt to manipulate its certiorari docket.

1. In *McClay*, the Tennessee Supreme Court is considering whether Tennessee’s statutory cap on noneconomic damages violates the Tennessee Constitution. *See* Jackson Nat’l Pet. 36-37. The Tennessee Supreme Court heard oral argument on September 4, 2019. As Jackson National acknowledges, it “cannot

know or reliably predict when the Tennessee Supreme Court will rule.” Pet. 38. But there is no indication that a decision is forthcoming soon, and in some recent cases the court has taken a year or more after argument to issue a decision. *See, e.g., State v. Miller*, No. E2016-01779-SC-R11-CD (one year); *Cotten v. Wilson*, No. M2016-02402-SC-R11-CV (thirteen months); *State v. Hall*, No. M2015-02402-SC-R11-CD (one year).

Jackson National does not contend that the Tennessee Supreme Court’s decision in *McClay* will have any bearing on the question on which petitioners seek this Court’s review—whether the Sixth Circuit applied the proper approach to certification. Instead, Jackson National maintains that *McClay*’s resolution of related (but not identical) questions of Tennessee law may shed light on the underlying state-law issues in this case. Pet. 36-37. Petitioners did not seek this Court’s review of those state-law questions, nor could they plausibly have done so. *See Sup. Ct. R. 10*. Jackson National nonetheless asserts that the Court should hold its petition and then give it another chance to litigate those issues in the Sixth Circuit if the decision in *McClay* supports its position.

2. Jackson National cites no case in which this Court has acceded to such a request. It purports to rely on three cases where the Court “used the GVR process to account for recent state court decisions.” Pet. 37. But in each case, the relevant state-court decision had issued *before* this Court resolved the case in the ordinary course. Even then, two of those orders prompted dissents from Justices who argued that the GVRs were inappropriate because “this Court’s function, generally speaking, is not to correct federal courts’ misapplications of state law.” *Thomas v. Am. Home*

Prods., Inc., 519 U.S. 913, 916 (1996) (Rehnquist, C.J., dissenting, joined by Breyer, J.); *see Lords Landing Vill. Condo. Council of Unit Owners v. Cont'l Ins. Co.*, 520 U.S. 893, 897-98 (1997) (same).¹¹

What Jackson National seeks here goes much further. It asks this Court to depart from its ordinary certiorari procedures by holding this case indefinitely so that Jackson National can potentially take advantage of a *future* state-court decision. Jackson National cites no prior case in which this Court has done that. And in a wide variety of contexts, the Court has rejected requests to hold petitions pending decisions by other courts in unrelated litigation. *See, e.g., Jones v. Chatman*, 136 S. Ct. 570 (2015) (No. 14-1312); *Lucas v. Humphrey*, 136 S. Ct. 135 (2015) (No. 14-1498); *Saffran v. Johnson & Johnson*, 134 S. Ct. 1023 (2014) (No. 13-405); *Nokia Inc. v. Int'l Trade Comm'n*, 571 U.S. 969 (2013) (No. 12-1352); *R.J. Reynolds Tobacco Co. v. Clay*, 568 U.S. 1027 (2012) (No. 12-272); *Hilao v. Revelstoke Inv. Corp.*, 556 U.S. 1182 (2009) (No. 08-1019).¹²

¹¹ Jackson National's third case is not even remotely analogous to this one. It involved an intervening decision that raised doubts about whether the Arizona Supreme Court would adhere to the interpretation of *federal* law reflected in an earlier state-court decision this Court was reviewing on the merits. *See Arizona v. Gant*, 540 U.S. 963 (2003) (per curiam).

¹² Although Jackson National does not cite it, the Stern & Gressman treatise states that the Court may defer consideration of a petition "until an imminent state court decision is rendered on a controlling issue of state law." Stephen M. Shapiro et al., *Supreme Court Practice* § 5.9 (11th ed. 2019). But the treatise cites no such case, and it may simply refer to the very different

3. This Court should reject Jackson National’s novel request. The purpose of the certiorari procedure is to identify questions of federal law that warrant a definitive resolution by this Court. If the Court determines that the question presented in these petitions does not satisfy that standard, it should simply deny them. It would be both inequitable and unwise to allow a party like Jackson National to artificially prolong the certiorari process in the hopes of securing a second bite at the apple on state-law issues that all agree do not warrant this Court’s attention in their own right.

Allowing such a delay tactic would be especially unfair to a party like Ms. Lindenberg, who has a strong interest in obtaining finality on a jury verdict rendered nearly five years ago. And it would be particularly inappropriate to reward such tactics through the GVR procedure, which this Court has emphasized should not be used to facilitate “an unfair or manipulative litigation strategy,” *Lawrence v. Chater*, 516 U.S. 163, 168 (1996) (per curiam).

For institutional reasons, too, the Court should not open the door to a new strategy of using its docket as a parking lot in every diversity case where a party believes that a pending state case might result in a

circumstance where a forthcoming state decision will control the federal question presented in the petition. In *Webster v. United States*, No. 18-7572 (Oct. 7, 2019), for example, the Court appears to have granted the parties’ request to defer consideration of the petition pending a decision of the Wisconsin Supreme Court that resolved the Armed Career Criminal Act question presented in the petition. Here, in contrast, *McClay* will have no bearing on the question presented—and unlike the respondent in *Webster*, Ms. Lindenberg opposes any further delay.

favorable decision at some point in the future—or, for that matter, any case in which a party can plausibly argue that *any* pending development might eventually warrant a GVR. Blessing Jackson National’s novel request would encourage a steady stream of long-shot petitions for certiorari, cluttering the Court’s docket and frustrating the judicial system’s interest in finality.

CONCLUSION

For the foregoing reasons, the petitions for writs of certiorari should be denied.

Respectfully submitted,

Molly A. Glover
Counsel of Record
Charles S. Higgins
William D. Irvine, Jr.
BURCH, PORTER & JOHNSON,
PLLC
130 North Court Avenue
Memphis, TN 38103
(901) 524-5000
mglover@bpjlaw.com

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