

No. 19-4

In the Supreme Court of the United States

JACKSON NATIONAL LIFE INSURANCE COMPANY,
PETITIONER

v.

TAMARIN LINDENBERG, Individually and as Natural
Guardian of Her Minor Children ZTL and SML

*ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT*

REPLY BRIEF FOR THE PETITIONER

DANIEL W. VAN HORN
AMY M. PEPKE
ELIZABETH E. CHANCE
GADSON W. PERRY
BUTLER SNOW LLP
*6075 Poplar Avenue,
Suite 500
Memphis, TN 38119
(901) 680-7200*

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
*580 Massie Road
Charlottesville, VA
22903
(434) 924-3127
dortiz@law.virginia.edu*

ROBERT N. HOCHMAN
SIDLEY AUSTIN LLP
One South Dearborn St.
Chicago, IL 60603
(312) 853-7000

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REPLY BRIEF FOR THE PETITIONER

Lindenberg argues primarily that supposed vehicle problems should inhibit this Court from clarifying the boundaries of federal court discretion not to certify questions of state law to state courts. But she fundamentally mistakes certification's purpose. It protects the sovereign interests of states, not the personal interests of private litigants. What she sees as obstacles to review are, in fact, strong reasons for this Court to grant it.

Neither petitioner's supposed failure to urge certification on the Sixth Circuit nor petitioner's decision at the outset of this case to remove it to federal court can or should undermine the Tennessee Supreme Court's sovereign authority over the meaning of the Tennessee Constitution and statutes. Certification reflects federal court respect for state court authority over state law, especially a state's fundamental charter. When the Sixth Circuit struck down Tennessee's statutory punitive-damages cap based on its own view of the Tennessee Constitution—after the Tennessee Supreme Court had invited it to certify the questions to it—the Sixth Circuit violated the most fundamental feature of “Our Federalism.” *Younger v. Harris*, 401 U.S. 37, 44 (1971).

Contrary to Lindenberg's suggestion, Br. in Opp. (BIO) 21-22, this is no trifling matter. A federal court has refused to apply a duly enacted state law based solely on its own novel view of the Tennessee Constitution. This is a serious and unnecessary

intrusion on the sovereign interests of the state legislature and merits this Court's review.

The supposed absence of a split of authority with respect to this admittedly discretionary decision similarly provides no reason to deny review. Most importantly, Lindenberg can point to no other decision whose rationale would have produced the same outcome. Discretion is not unbounded license, and this Court has previously granted review to clarify how lower courts should exercise discretion and to illuminate its permissible range. See, *e.g.*, *Rita v. United States*, 551 U.S. 338 (2007) (informing how judges should exercise criminal sentencing discretion after sentencing guidelines were deemed advisory); *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999) (informing and applying factors for discretionary decision whether to admit expert testimony). This case powerfully illustrates the need for this Court to guide lower court discretion with respect to this important issue of federal and state relations.

I. Since Certification Protects The States, Not Private Litigants, Forfeiture Does Not Apply

Lindenberg rests both her vehicle, BIO 16-17, and merits arguments, *id.* at 18-20, on what she views as Jackson National and Tennessee's insufficient urging of certification. But there is no obstacle to this Court's review. To the contrary, it is a feature of certification doctrine that the decision whether to certify rests with the federal courts, regardless of the parties' preferences or arguments, because the doctrine reflects federal court respect for their limited authority to make state law. Certification "build[s] a cooperative

judicial federalism,” *Lehman Bros. v. Schein*, 416 U.S. 386, 391 (1974), separate and apart from the parties’ private interests.

The Tennessee Supreme Court, in fact, has underlined certification’s importance to preserving Tennessee’s sovereignty:

[C]ertification * * * protects states’ sovereignty. “To the extent that a federal court applies different legal rules than the state court would have, the state’s sovereignty is diminished [because] the federal court has made state law.” Such an impact on state sovereignty “is no small matter, especially since a federal court’s error may perpetuate itself in state courts until the state’s highest court corrects it.”

Haley v. University of Tenn.-Knoxville, 188 S.W.3d 518, 521 (2006) (citations omitted).

Like limitations on federal subject matter jurisdiction, certification protects the authority of state courts, which are not typically represented in federal litigation. See, e.g., 13 Charles Alan Wright et al., *Federal Practice and Procedure* § 3522 (3d ed. 2018) (“A federal court’s entertaining a case that is not within its subject matter jurisdiction * * * is nothing less than an unconstitutional usurpation of state judicial power.”); *Finley v. United States*, 490 U.S. 545, 552-553 (1989) (“Due regard for the rightful independence of state governments . . . requires that [federal courts] scrupulously confine their own jurisdiction to the precise limits which the statute has defined.” (quoting *Healy v. Ratta*, 292 U.S. 263, 270

(1934))). And just as “[s]ubject-matter jurisdiction can never be waived or forfeited” and federal “courts are obligated to consider *sua sponte* issues that the parties have disclaimed or have not presented,” *Gonzalez v. Thaler*, 565 U.S. 134, 141 (2012), so too with certification. As Justices Sotomayor and Breyer have noted, “certification is not an argument subject to forfeiture by the parties. It is a tool of the federal courts that serves to avoid ‘friction-generating error’ where a federal court attempts to construe a statute ‘not yet reviewed by the State’s highest court.’” *Minnesota Voters All. v. Mansky*, 138 S. Ct. 1876, 1895 (2018) (Sotomayor, J., dissenting) (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 78-79 (1997)). That approach not only follows logically but makes good practical sense. Many cases involving state law will present various potential ways to avoid federal court intrusion into state court prerogatives. The reality of the “friction” warranting certification may not become apparent until the federal judges have determined, perhaps as late as drafting an opinion, that it is unavoidable.

Indeed, this Court has required certification of state-law questions “*sua sponte*, even though the parties had not sought such relief and even though the district court and the court of appeals previously had resolved the disputed point of state law.” Stephen M. Shapiro et al., *Supreme Court Practice* ch. 9.4, at 9-12 (11th ed. 2019). It has done so at least eight times.¹

¹ See, e.g., *United States v. Juvenile Male*, 560 U.S. 558, 561 (2010) (per curiam); *Fiore v. White*, 528 U.S. 23, 29 (1999); *Zant v. Stephens*, 456 U.S. 410, 416 (1982) (per curiam); *Elkins v.*

For the same reason, petitioner’s initial removal of the case to federal court does not bar certification. See BIO 18-19. A private litigant cannot deprive the state courts of their sovereign interest in developing state constitutional law. That is especially so when, as here, the removing party is *not* the one who forced the state constitutional question on the federal court. Respondent, not petitioner, asked the Sixth Circuit to declare a duly enacted state statute unconstitutional as a matter of state law. Once again, what respondent sees as an obstacle to review is, in fact, an ideal opportunity to further clarify the circumstances bearing on the propriety of certifying questions of law to state courts.²

Moreno, 435 U.S. 647, 660-662, 668-669 (1978) (per curiam); *Massachusetts v. Feeney*, 429 U.S. 66, 66 (1976) (per curiam); *Dresner v. City of Tallahassee*, 375 U.S. 136, 136 (1963) (per curiam); *Aldrich v. Aldrich*, 375 U.S. 75, 75 (1963) (per curiam); *Clay v. Sun Ins. Office, Ltd.*, 363 U.S. 207 (1960).

² Even if ordinary rules of forfeiture were to apply, they would not bar petitioners’ request for review and certification. As Judge Bush noted, Sixth Circuit law does not ordinarily permit certification when the issue is not “new,” that is, when a court has already decided it. See Pet. App. 183a (Bush, J., dissenting from denial of petition for rehearing en banc). Under Sixth Circuit precedent, then, certification of the statutory bad-faith question, which the Sixth Circuit itself had already decided, see *Heil Co. v. Evanston Ins. Co.*, 690 F.3d 722, 728 (6th Cir. 2012), was inappropriate. The single unpublished decision Lindenberg cites to contest this view, see BIO 11, is not to the contrary. Certification there was appropriate because the intermediate state courts that had considered the issue had reached conflicting results. See *Brown v. Jordan*, 744 Fed. Appx. 918, 920 (6th Cir. 2018) (per curiam). But that is not the case here. Petitioners can hardly be said to have forfeited certification by not making a

II. Respondent's Description Of The Conflict And Discussion Of The Merits Underscore The Need For This Court's Review

Despite protesting that “[t]here are no splits,” *e.g.*, BIO 10, respondent can point to no other circuit that would have decided this case the same way. Rather, she cavils that the Sixth Circuit’s unique “newness” requirement, see Pet. 22-23 (describing Sixth Circuit test); Pet. App. 183a-187a (Bush, J., dissenting from denial of rehearing en banc), may be more a strong presumption than a hard-and-fast rule, BIO 10-11, and argues that most courts of appeals consider factors similar to those that others do, *id.* at 11-14, and, most importantly, that since “certification is a discretionary procedure * * * differences in approach [are] particularly unremarkable,” *id.* at 15-16.

Lindenberg’s arguments ignore that the circuits’ “differences in approach” lock in widely varying degrees of respect for state sovereignty. The Sixth Circuit’s “strong presumption” against certifying not-“new” questions is found nowhere else and, as this case well illustrates, allows courts in the Sixth Circuit to determine novel questions of state law that federal courts elsewhere would leave to the States. And although it is no doubt true that certifying is discretionary and various factors weigh on that decision, guidance from this Court on how to weigh factors and on the range of permissible discretion is

fruitless request for it. This Court has long recognized the ancient maxim “*lex non cogit ad inutilia*.” See, *e.g.*, *Ohio v. Roberts*, 448 U.S. 56, 74 (1980) (“The law does not require the doing of a futile act.”).

both useful and sorely needed. Lower courts themselves have complained for over 30 years that there are “no clear standards as to when certification should be used.” *In re Complaint of McLinn*, 744 F.2d 677, 681 (9th Cir. 1984). *What* courts consider often matters less than *how*.³

Certification is necessarily discretionary. Still, “[d]iscretion there may be, but * * * [d]iscretion without a criterion for its exercise is authorization of arbitrariness.” *Brown v. Allen*, 344 U.S. 443, 496 (1953) (opinion of Frankfurter, J.) (internal citation omitted). “Without [guidance], the courts would be left to a dangerous discretion, and to roam at large in the trackless field of their own imaginations.” 1 James Kent, *Commentaries on American Law* 321 (1826).

Lindenberg complains that the prospect of delay weighs heavily in favor of the decision here. BIO 20-21. But in *McClay v. Airport Mgmt. Servs., LLC*, No. M2019-00511-SC-R23-CV (Tenn. filed Mar. 20, 2019), the related case concerning the constitutionality of Tennessee’s cap on non-economic damages, the Tennessee Supreme Court conducted briefing and held oral argument within six months of receiving certification. See <https://tinyurl.com/y3ak5a32>. There is no reason to believe that any undue delay would have occurred here had the Sixth Circuit presented *both* the statutory and constitutional questions that

³ That petitioner and Tennessee describe the confusion in the lower courts differently does not mean, as Lindenberg suggests, see BIO 10, 11, that no confusion exists. Their compatible descriptions underscore rather the degree of confusion.

the Tennessee Supreme Court had previously indicated it was willing to review.

III. Lindenberg's Remaining Arguments Lack Merit

1. Respondent argues that the Sixth Circuit's striking down of Tennessee's punitive-damages cap after the Tennessee Supreme Court invited it to properly certify all necessary questions is no big deal because, in her view, nothing stops district courts or the Sixth Circuit itself from certifying identical questions in the future. BIO 21-22. But Judge Nalbandian, who suggested this possibility, would himself have certified the state-law questions. Pet. App. 195a (Nalbandian, J., statement concerning denial of petition for rehearing en banc). The fact is that a serious intrusion on Tennessee state sovereignty has *already* happened: a federal court has refused to apply a duly enacted state law because of its speculation about the meaning of the Tennessee constitution. That the intrusion *might* not be repeated cannot undo the "friction-generating error" that has already occurred. *Ibid.* (quoting *Arizonans for Official English v. Arizona*, 520 U.S. 43, 79 (1997)).

There is good reason to believe, moreover, that such intrusion *will* reoccur. Judge Nalbandian's hope to avoid it springs from *Geib v. Amoco Oil Co.*, 29 F.3d 1050 (6th Cir. 1994), in which the Sixth Circuit certified a question to a state court that a panel had previously decided. In *Geib*, however, the Sixth Circuit certified because "a direct conflict [had developed on the question] within the federal court system" and "the competing arguments" were both

“substantial[.]” *Id.* at 1060. Neither circumstance is present here.

Judge Nalbandian’s suggestion is a novel one, moreover, that no circuit, including the Sixth, appears to follow. “A court of appeals panel decision on a question of state law,” a leading treatise notes, “prevents a subsequent panel from certifying that question to the state supreme court, because the only purpose of certifying the question to the state court would be to revisit the prior panel’s decision, which is generally forbidden.” 18 James Wm. Moore et al., *Moore’s Federal Practice* § 134.02(1)(c) (3d ed. 2019). The Sixth Circuit follows this general rule. See *Rutherford v. Columbia Gas*, 575 F.3d 616, 619 (2009) (holding “certification is not warranted because it would arguably be inconsistent with [a prior panel’s] determination not to seek such a certification”); *Lopez v. Wilson*, 355 F.3d 931, 942 (holding certification “would be improper, because [it would] revisit the prior panel’s decision, which we cannot do”), *vacated on other grounds*, 366 F.3d 430 (2004). Other circuits follow it too. See, e.g., *Hughes v. Tobacco Inst., Inc.*, 278 F.3d 417, 425 (5th Cir. 2001) (holding certification is not “a proper avenue to change our binding precedent”) (citation omitted); *Anaconda Minerals Co. v. Stoller Chem. Co.*, 990 F.2d 1175, 1178 (10th Cir. 1993) (similar).

Indeed, federal courts in other circuits may feel compelled to follow the Sixth Circuit’s interpretation of Tennessee law, which would compound Tennessee’s injury. See, e.g., *Abex Corp. v. Maryland Cas. Co.*, 790 F.2d 119, 125-126 (D.C. Cir. 1986) (“[W]e will defer to

the local circuit’s view of the law of a state in its jurisdiction when that circuit has made a reasoned inquiry into state law, unless * * * we are certain that the pertinent circuit has *clearly misread* state law. * * * [S]uch a clear misreading of state law will rarely occur.”); *Mellon Bank, N.A. v. Ternisky*, 999 F.2d 791, 796 (4th Cir. 1993) (deferring to the Third Circuit’s interpretation of Pennsylvania law).

It is true that *if* Tennessee courts are presented with the issue *and* differ from the Sixth Circuit, then federal courts *may* feel free to certify the question to the Tennessee Supreme Court. See *Eads v. Morgan*, 298 F. Supp. 2d 698, 707 (N.D. Ohio 2003). But that only underscores the forum-shopping concerns that Lindenberg dismisses. BIO 22. To paraphrase respondent, “[p]recisely because any future federal court would [*not*] be free to certify the state-law questions again, prospective plaintiffs [*would*] assume that the panel’s decision [*would*] govern other cases filed in federal court.” *Ibid.*

2. Lindenberg argues against Jackson National’s proposed test—indeed, *any* proposed test—because certification “cannot be reduced to a formula.” BIO 23. Jackson National’s test, however, allows lower federal courts ample discretion while providing much needed guidance. Its two primary factors point to certification whenever the state supreme court has “previously made clear that an unresolved question of state law merits its review,” Pet. 31, or the federal court concludes, “after examining the state supreme court’s standards for accepting review within the state’s own court system[,] that the issue would be among those to

generate at least serious discussion among the state justices regarding whether to accept review,” *id.* at 32. These two factors encourage the federal court to consider whether the state supreme court would grant discretionary review on the same issue from its own court system. That is hardly formulaic and allows, as respondent thinks important, “federal courts to develop their own relationships with their state counterparts, accounting for each state court’s differing docket, rules, and attitudes regarding certification” and certiorari. BIO 24. The two remaining factors counsel special concern for state constitutional issues and deference to requests for certification from state executive officials, who speak for the interests of the state in determining its own law. That these commonsensical, uncontroversial factors fit this case shows not that they are “gerrymandered,” *ibid.*, but how egregiously the Sixth Circuit erred.

3. Lindenberg finally argues that this Court should not hold the case with an eye towards possibly GVRing in light of the Tennessee Supreme Court’s upcoming decision in *McClay v. Airport Mgmt. Servs., LLC*, No. M2019-00511-SC-R23-CV. She believes that that decision can have no bearing on the federal question—whether to certify or not. BIO 26-29. That is mistaken. The Tennessee Supreme Court sees such a close relationship between the two cases, in fact, that it asked at oral argument in *McClay* “what should [we] do with [*Lindenberg*]”? “[R]epudiate it[,] overturn it”? “[Should] we consider that [*Lindenberg* is currently before the Supreme Court]?” Oral Argument at 45:09-

46:14, *McClay*, available at <https://tinyurl.com/ue8xbxn>. The Tennessee Supreme Court could also discuss several factors relevant to the federal issue of whether the federal courts should certify the state law questions in this case. It could, for example, discuss the importance of Tennessee courts deciding state constitutional issues, indicate its own interest in deciding the issues in this case, and state that it will usually hear state-law issues when certain state executive officers ask it to. Its decision could, moreover, bear on more traditional certification issues, like uncertainty and importance, that go directly to whether the issues in this case would “generate at least serious discussion among the state justices regarding whether to accept review.” Pet. 32. In short, the decision in *McClay* could speak in multiple ways to the federal question of whether to certify, not just to the underlying state-law issues.

CONCLUSION

For the foregoing reasons and those stated in the petition for a writ of certiorari, the petition should be granted or this Court should hold and consider granting, vacating, and remanding in light of *McClay*.

Respectfully submitted.

DANIEL W. VAN HORN
AMY M. PEPKE
ELIZABETH E. CHANCE
GADSON W. PERRY
BUTLER SNOW LLP
*6075 Poplar Avenue,
Suite 500
Memphis, TN 38119
(901) 680-7200*

DANIEL R. ORTIZ
Counsel of Record
UNIVERSITY OF VIRGINIA
SCHOOL OF LAW
SUPREME COURT
LITIGATION CLINIC
*580 Massie Road
Charlottesville, VA
22903
(434) 924-3127
dortiz@law.virginia.edu*

ROBERT N. HOCHMAN
SIDLEY AUSTIN LLP
*One South Dearborn St.
Chicago, IL 60603
(312) 853-7000*

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