No. 20-177

In the Supreme Court of the United States

ALLY FINANCIAL, INC.,
Petitioner,

v.

ALBERTA HASKINS, ET AL.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of Missouri

RESPONDENTS' BRIEF IN OPPOSITION

JESSE B. ROCHMAN
MARTIN L. DAESCH
CRAIG W. RICHARDS
ONDERLAW, LLC
110 East Lockwood Ave.
St. Louis, MO 63119
(314) 227-7695
rochman@onderlaw.com

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L St., NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

Counsel for Respondents

November 30, 2020

QUESTIONS PRESENTED

1. Does this Court have jurisdiction under 28 U.S.C. § 1257(a) to review the Missouri Supreme Court's decision summarily declining review of a Missouri Court of Appeals ruling that rested solely on the state-law ground that the petitioner's interlocutory petition was untimely under state law?

2. Having itself initiated suit in Missouri state court, and having conceded jurisdiction in that court for the first three years of litigation, may the petitioner now object to personal jurisdiction on federal constitutional grounds?

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes and rules

Other authorities

INTRODUCTION

This case is about as jurisdictionally and procedurally flawed as a case that comes to this Court can be. No federal constitutional issue was timely presented to, or actually decided by, the Missouri state courts. And it is apparent that the state courts rested their decisions solely on independent and adequate state-law procedural grounds. This Court therefore lacks jurisdiction under 28 U.S.C. § 1257(a), which means that this Court lacks jurisdiction not only to grant plenary review but also to hold and GVR, as Ally urges in the alternative. The petition should be denied.

Even if these serious jurisdictional obstacles could somehow be overcome, this case would still remain a hopelessly defective vehicle. Because the petitioner, Ally Financial, brought this case as a plaintiff in Missouri state court, consented to jurisdiction in Missouri, and then defended this litigation in Missouri for years, Ally both waived and forfeited its right to raise a personal-jurisdiction defense—both as a matter of federal constitutional law and state procedural law.

Ally was not involuntarily brought into Missouri state court. Although it now seeks to object to the forum, Ally chose it by suing the respondents there. Even after the respondents filed class counterclaims, Ally affirmatively consented to jurisdiction in its answer. It did not raise personal jurisdiction as a defense; it did not file a motion to dismiss; and it did not appeal the trial court's decision to certify a class. In fact, Ally litigated for three years without breathing a word about personal jurisdiction. Then, nine months after its opposition to class certification and partial summary judgment proved unsuccessful, Ally switched gears, raising personal jurisdiction as one of

several grounds to decertify the class. The trial court modified the class definitions but declined to decertify. Pet. 7a–10a.

Ally then sought review of this ruling by filing a petition in the Missouri Court of Appeals. But Ally filed its petition too late. Although Missouri law permits interlocutory appeals of orders with respect to class certification, a petition for permission to appeal must be filed within ten days. The Missouri Court of Appeals explicitly rejected Ally's petition solely on state-law procedural grounds: The petition was "due no later than December 5, 2019," but it was "filed December 12, 2019" and was "therefore untimely filed." *Id.* 4a.

Ally next filed a petition in the Missouri Supreme Court. Its lead argument for review was that "[n]o published Missouri decision has yet addressed the scope of Rule 52.08(f)"—the state procedural rule governing interlocutory appeals from class-certification orders—and whether it governs decertification rulings. Mo. Sup. Ct. Pet. 10. Ally asked the Missouri Supreme Court to "grant review to provide the Courts of Appeals with needed guidance on this recurrent issue" of state procedure regarding review of "writ petitions challenging subsequent class orders." *Id.* at 10–11. In a one-line order, the Missouri Supreme Court declined review. Pet. 1a.

On top of all this, the question presented by Ally—whether the Fourteenth Amendment permits a state court to exercise specific jurisdiction with respect to the claims of nonresident absent class members—would not satisfy this Court's traditional criteria for certiorari even if it were squarely presented here. Ally identifies only two intermediate state-court decisions that it says have addressed this question, one of which is three decades old.

Pet. 13–14. But neither case actually decides it. If the question recurs as frequently as the petition claims, this Court should have no trouble identifying a less flawed vehicle in the future if a split develops.

STATEMENT

In 2008, respondents Alberta Haskins and David Duncan bought a used 2006 Chevrolet Colorado and obtained financing for their purchase through petitioner Ally. For years, Haskins and Duncan made numerous payments to Ally. After Haskins and Duncan missed some car payments, Ally repossessed their car and sold it at an auction.

1. ***Ally brings this suit in Missouri state court and the respondents file a counterclaim.*** Deeming the proceeds from the auction insufficient, Ally sued Haskins and Duncan in the Missouri Circuit Court of Jefferson County in March 2016, seeking an additional $3,953.81. In March 2017, Haskins and Duncan filed a counterclaim alleging that the notices Ally sent to consumers before and after selling their vehicles contradicted the original consumer-credit contracts and were deficient under the Uniform Commercial Code. Haskins and Duncan filed the counterclaim for themselves and all other individuals whose vehicles Ally had repossessed and sold.

2. ***Ally defends against the counterclaim without contesting personal jurisdiction in Missouri.*** In May 2017, Ally filed an answer to the counterclaim in which it admitted that the circuit court had jurisdiction. Mo. Sup. Ct. Appx. 385 ¶ 4. Although Ally asserted many affirmative defenses directed at the "purported class," none alleged that the circuit court lacked personal jurisdiction. Nor did Ally move to dismiss, either for lack of jurisdiction or for any other reason.

Around the same time, Haskins and Duncan sought class certification and Ally moved for partial summary judgment. The following year, the circuit court certified a nationwide class and a Missouri-only subclass, over Ally's opposition, and denied Ally's motion for partial summary judgment. Once again, Ally did not contest personal jurisdiction. And although Missouri law permits discretionary review of class-certification decisions in the Court of Appeals, Mo. Rev. Stat. § 512.020(3), Ally did not seek appellate review of the class-certification ruling.

3. ***Ally seeks decertification.*** Nearly nine months later, in January 2019, Ally moved to decertify the nationwide class. Pet. 33a. Ally raised a host of arguments supporting its motion for decertification, most of which it had already unsuccessfully raised at class certification. Pet. 36a–37a. Ally also asserted—for the first time after years of litigation—that the state court lacked personal jurisdiction over Ally "with regard to claims by non-Missouri members of the nationwide class." *Id.* at 37a. Ally contended that it was appropriate for the circuit court to consider its request for decertification because the trial court's interlocutory class-certification decision was "inherently tentative" and nonfinal and thus could be revisited at any point in a case "before a decision on the merits." Mo. Sup. Ct. Appx. A1166.

4. ***After two years of litigation, Ally seeks to retract its admission of jurisdiction.*** In March 2019, two years after it first answered the counterclaims, Ally sought leave to amend its answer. Among other things, Ally sought to switch its earlier admission of jurisdiction to a denial and allege the affirmative defense of lack of personal jurisdiction as to "non-resident purported class members." Mo. Sup. Ct. Appx. A1429. In October 2019,

the circuit court permitted Ally to amend its answer. This ruling was issued well after the parties had briefed and argued Ally's decertification motion.

5. ***The trial court modifies the class definitions and denies Ally's motion to decertify the class.*** Shortly thereafter, the circuit court rejected Ally's request to decertify the class, once again finding that the class-certification requirements under Missouri law were satisfied. Pet. 7a–8a. To address any potential res judicata or estoppel problems, the circuit court modified the class definitions to exclude individuals whose claims might be foreclosed by final deficiency judgments or by their failure to disclose their claims in bankruptcy proceedings. *Id.* at 7a–10a. The circuit court filed a separate ruling on the statutes of limitations for the claims of individuals in different states. *Id.* at 11a–13a. Ally contested both orders by filing a petition for a writ of prohibition in the Missouri Court of Appeals for the Eastern District.

6. ***The Missouri Court of Appeals denies Ally's petition for interlocutory review as untimely because it was filed one week after the ten-day deadline.*** The Missouri Court of Appeals denied Ally's petition. Pet. 3a–5a. Under Missouri law, only final judgments and certain types of interlocutory orders may be appealed. Mo. Rev. Stat. § 512.020. An order granting or denying class certification may be appealed—provided that the court of appeals, in its discretion, permits such an appeal and that the petition is timely filed. *Id.* § 512.020(3); Mo. Rule 52.08(f). The Court of Appeals construed Ally's petition as a petition seeking permission to appeal an order granting or denying class certification. Pet. 4a. But Ally's petition was untimely. *Id.*; Mo. Rule 52.08(f); *id.* 84.035(a). Under Missouri law, a petition for permission to appeal an order

granting or denying class certification must be filed within ten days of the entry of the underlying order. *Id.* 84.035(a). Ally had filed its petition one week after this ten-day deadline. Pet. 4a.

Having concluded that Ally's petition was "therefore untimely filed" on state-law procedural grounds, *id.*, the Court of Appeals did not find it necessary to address any of Ally's arguments for decertification, including its objection to personal jurisdiction. *Id.*

7. *Ally seeks interlocutory review in the Missouri Supreme Court, contesting the Court of Appeals' ruling on Missouri appellate procedure.* Undeterred, Ally filed another petition for a writ of prohibition, this time in the Missouri Supreme Court.

Ally's first argument to support review by the state high court was that "[n]o published Missouri decision has yet addressed the scope of Rule 52.08(f)"—the state procedural rule governing interlocutory appeals from orders granting or denying class certification—and its application to orders declining to decertify a class. Mo. Sup. Ct. Pet. 10. Ally also asserted that the Missouri Court of Appeals had erred in not exercising its discretion to issue an original remedial writ overturning the circuit court's ruling on decertification. *Id.* Ally asked the Missouri Supreme Court to "grant review to provide the Courts of Appeals with needed guidance on this recurrent issue" regarding the review of "writ petitions challenging subsequent class orders" in the Missouri Court of Appeals. *Id.* at 10–11. After urging the state supreme court to address the scope of appellate review under Rule 52.08(f), Ally again raised the arguments it had raised in the trial court when it sought decertification. *Id.* at 11–17.

Haskins and Duncan opposed Ally's petition, explaining that Ally had failed to show the "extreme necessity" required for the "extraordinary remedy" of the writ of prohibition under Missouri law. *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 384 (Mo. 2018). The respondents argued that Ally was asking the Missouri Supreme Court to address whether the Court of Appeals erred in treating Ally's petition as a petition seeking permission to appeal under Rule 52.08(f), but doing so by seeking an original writ directed at the *circuit court* rather than the Court of Appeals. Opp. to Mo. Sup. Ct. Pet. 19; Mo. Sup. Ct. Pet. 1. In other words, Ally's request that the Missouri Supreme Court address the Court of Appeals' ruling on procedural grounds was not proper before the Missouri Supreme Court. Ally was effectively seeking an advisory opinion on the application of Missouri procedural rules in the state court of appeals. *Id.* (citing *Cope v. Parson*, 570 S.W.3d 579, 586 (Mo. 2019) ("This Court is not authorized to issue advisory opinions.")).

8. ***The Missouri Supreme Court summarily denies review.*** The state high court denied Ally's petition without an opinion. Pet. 1a–2a.

REASONS FOR DENYING THE WRIT

I. This Court lacks jurisdiction over this case.

A. This Court has long made clear that where, as here, "the highest state court has failed to pass upon a federal question, it will be assumed that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). This is why, when a state's appellate courts don't expressly decide a federal question, "the party invoking the Supreme Court's jurisdiction has the high burden of showing that the federal question was in fact properly raised, so that the state high court's failure to deal with it was not for want of proper presentation." Stephen M. Shapiro, et al., *Supreme Court Practice* 3-53 (11th ed. 2019). "If the petitioner discharges this burden, and if the federal question was necessary to a determination of the case and no adequate state ground of decision is apparent, then and then only can the Supreme Court take jurisdiction over the case." *Id.* at 3-54.

This "high burden" extends to the procedure required to timely and properly present a federal claim in the state trial and appellate process. "Failure to follow the appellate channels provided by the state is usually fatal to the chances for Supreme Court review" because the petitioner "will be deemed to have waived the federal issue and there will be no basis for the assertion of the Court's jurisdiction." *Id.* at 3-58; *see Beck v. Washington*, 369 U.S. 541, 549–54 (1962). "[I]t rests with each state to prescribe the jurisdiction of its appellate courts, the mode and time of invoking that jurisdiction, and the rules of practice to be applied in its exercise; and the state law and practice in this regard are no less applicable when Federal rights are

in controversy than when the case turns entirely upon questions of local or general law." *John v. Paullin*, 231 U.S. 583, 585 (1913).

The convoluted procedural history of this case is a stark illustration of the importance of imposing this burden on a petitioner, in the petition for a writ of certiorari itself, to demonstrate the timely and proper presentation of a federal issue in the state courts. None of the decisions below—not the trial court order denying decertification (Pet. 7a–10a), nor the Missouri Court of Appeals' order finding Ally's petition to be untimely filed (*id.* at 3a–5a), nor Missouri Supreme Court's denial of review (*id.* at 1a–2a)—addresses the merits of Ally's federal personal-jurisdiction defense. The Missouri Court of Appeals denied interlocutory review exclusively because Ally's petition was untimely filed as a matter of state procedural law, and Ally's lead argument for review in the Missouri Supreme Court objected to the Court of Appeals' decision as a matter of Missouri appellate procedure.

Given all this, it was incumbent on Ally to discuss these points of Missouri law in its petition. *See* S. Ct. R. 14.1(g)(1) (requiring a detailed showing in any petition from a state court "that the federal question was timely and properly raised and that this Court has jurisdiction to review the judgment"); Shapiro, *Supreme Court Practice* 3-19 (explaining that the petitioner is "well advised to discuss the applicable state law" "whenever it will aid in determining the finality of the judgment" and that "[t]his matter should be raised in the petition for certiorari"). Ally's failure to do so is reason alone to deny the petition.

B. Under Missouri law, the right to appeal is conferred by statute. *State ex rel. Anheuser-Busch, LLC v. Moriarty*, 589 S.W.3d 567, 572 (Mo. 2019). A party may

appeal five types of trial-court orders: (1) an "[o]rder granting a new trial"; (2) an "[o]rder refusing to revoke, modify, or change an interlocutory order appointing a receiver or receivers, or dissolving an injunction; (3) an "[o]rder granting or denying class action certification" if the "court of appeals, in its discretion, permits such an appeal"; (4) "[i]nterlocutory judgments in actions of partition which determine the rights of the parties"; and (5) "final judgment in the case or from any special order after final judgment in the cause." Mo. Rev. Stat. § 512.020(1)–(5); *Anheuser-Busch*, 589 S.W.3d at 572. Parties must wait until final judgment is entered before appealing any other interlocutory order. *Id.*

Before a party may appeal a circuit court's class-certification ruling, it must first file a petition in the state court of appeals seeking permission to appeal the ruling and receive such permission. Mo. Rule 52.08(f). The party's petition for permission to appeal the trial court's class-certification ruling must be filed within ten days of the entry of the underlying order. *Id.*; *id.* 84.035(a). If the court of appeals denies the petition for permission to appeal the class-certification ruling, further review of the trial court's ruling "shall be by petition for original remedial writ" filed in the Missouri Supreme Court. *Id.* 84.035(j).

Under the Missouri Constitution, the state court of appeals and state supreme court are not authorized to issue the extraordinary remedy of an original remedial writ except in narrow circumstances when an appeal or other remedy is plainly unavailable. *State ex rel. K-Mart Corp. v. Holliger*, 986 S.W.2d 165, 169 (Mo. 1999); Mo. Rule 84.22(a). One type of remedial writ is a writ of prohibition, which, the Missouri Supreme Court has directed, is to be

"used with great caution and forbearance and only in cases of extreme necessity." *State ex rel. Peters-Baker v. Round*, 561 S.W.3d 380, 384 (Mo. 2018). "The essential function of prohibition is to correct or prevent inferior courts and agencies from acting without or in excess of their [authority or] jurisdiction." *Id.* Therefore, if a party "has an adequate remedy by appeal, prohibition will be denied." *Anheuser-Busch*, 589 S.W.3d at 572.

C. In light of these principles of Missouri law, it should be apparent that Ally has not discharged—and cannot discharge—its burden to show jurisdiction in this Court. Even setting aside Ally's initial concession of jurisdiction and failure to seek dismissal based on personal jurisdiction, Ally's attempt to appeal the decertification order was defective from the start. Ally filed a petition for a writ of prohibition in the Court of Appeals, the court reasonably treated that petition as seeking permission to appeal the circuit court's order on the propriety of class certification, *see* Mo. Rev. Stat. § 512.020(3), and Ally itself sought review of that procedural issue in the Missouri Supreme Court, citing the need for "guidance on this recurrent issue" concerning "writ petitions challenging subsequent class orders." Mo. Sup. Ct. Pet. 10–11.

Nowhere in its briefing to the Missouri Supreme Court or to this Court has Ally even suggested that Missouri's courts have applied its principles of appellate procedure in a way that discriminates against federal constitutional claims in general or Ally's defense in particular. And it is "beyond doubt" that "state courts are free to apply nondiscriminatory pleading rules that foreclose issues not timely raised." 16B Wright & Miller, *Federal Practice & Procedure* § 4023 (3d ed.); *see McKinney v. Parsons*, 423 U.S. 960, 961 (1975) (explaining that a petition for

certiorari was denied because the state-court appeal presenting a federal issue was "dismissed when petitioner's appellate brief was untimely filed," indicating that "the judgment below rested upon an adequate state ground").

In passing, Ally refers to the Court of Appeals' decision as "unprecedented," claiming that "no Missouri authority establishes that this permissive appeal mechanism applies to orders denying decertification motions." Pet. 8. But, as Ally argued to the Missouri Supreme Court, Missouri's Rule 52.08(f) mirrors Federal Rule of Civil Procedure 23(f). Under that federal rule, orders like the trial court's order here, which modified the class definitions while declining to decertify the class (*see* Pet. App. 8a–10a), would indeed be subject to appeal—provided, of course, that a petition for permission to appeal was timely filed. *See Matz v. Household Int'l Tax Reduction Inv. Plan*, 687 F.3d 824, 826 (7th Cir. 2012) (holding that "an order materially altering a previous order granting or denying class certification is within the scope of Rule 23(f) even if it doesn't alter the previous order to the extent of changing a grant into a denial or a denial into a grant"). Ally's problem is simply that it filed its petition too late, not that the statutory path was plainly inapplicable.

Ally nevertheless suggests that the Missouri courts should have issued an extraordinary writ of prohibition. Pet. 8. But this ignores the clear line of Missouri precedent, discussed above, which holds that the state appellate courts are authorized to issue original remedial writs only in narrow circumstances, when no other appeal or remedy is available. *State ex rel. Peters-Baker*, 561 S.W.3d at 384; *see also* Mo. Rule 84.22(a) ("No original remedial writ shall be issued . . . in any case wherein adequate relief can be afforded by an appeal or by application for such writ to a

lower court."); *Holliger*, 986 S.W.2d at 169 ("The general rule is that, if a court is entitled to exercise discretion in the matter before it, a writ of prohibition cannot prevent or control the manner of its exercise, so long as the exercise is within the jurisdiction of the court."); *State ex rel. Norfolk & W. Ry. Co. v. Dowd*, 448 S.W.2d 1, 3–4 (Mo. 1969).

Ally did not even attempt to properly avail itself of the statutory path to interlocutory review. Nor has it shown that it is foreclosed from seeking future review of its federal defense. Mo. Rev. Stat. § 512.020(5) ("[A] failure to appeal from any action or decision of the court before final judgment shall not prejudice the right of the party so failing to have the action of the trial court reviewed on an appeal taken from the final judgment in this case."); *see, e.g.*, *Lucas Subway Midmo v. Mandatory Poster*, 524 S.W.3d 116 (Mo. Ct. App. 2017) (reviewing class certification after summary judgment). To the contrary, Ally contended below that it was appropriate for the circuit court to consider its decertification request precisely because the trial court's interlocutory class-certification decision was "inherently tentative" and could be revisited at any point in a case "before a decision on the merits."

D. "A petition for certiorari must demonstrate to this Court that it has jurisdiction to review the judgment." *Johnson v. California*, 541 U.S. 428, 431 (2004). Apart from a cursory discussion of the procedural history (at 8–9), the petition makes only two drive-by attempts to demonstrate jurisdiction under 28 U.S.C. § 1257(a). Pet. 1, 9 n.7. Neither is sufficient. Ally's jurisdictional statement does no more than cite a one-sentence footnote in *Madruga v. Superior Court*, 346 U.S. 556, 557 n.1 (1954), stating that "[t]he State Supreme Court's judgment

finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257." But *Madruga* illustrates precisely what's lacking here: a decision by the state's highest court that indisputably disposed of a federal issue that had been properly preserved and timely presented in that court as required by state law. *See Madruga v. Super. Ct. in & for San Diego Cty.*, 251 P.2d 1 (Cal. 1952).

In similarly conclusory fashion, Ally's petition asserts that "[t]he Missouri courts have definitively rejected Ally's federal due process claim" and that this Court has "reviewed personal-jurisdiction issues in similar postures." Pet. 9 n.7. But none of the cases cited involve remotely "similar postures." Every one of Ally's cases involved state-court decisions squarely rejecting federal personal-jurisdiction defenses that were properly and timely preserved in compliance with state procedural rules. None involved state-law procedural defects that foreclosed consideration of the merits below.[1]

[1] Ally cites *Calder v. Jones*, 465 U.S. 783 (1984), as an example of a case "where the state supreme court denied review rather than rendering a decision on the merits." Pet. 9 n.7. But *Calder* found jurisdiction proper under 28 U.S.C. § 1257 because "the judgment of the California appellate court" squarely addressed the federal due-process issue and the state's high court had denied "[a] timely petition" from that judgment. *Id.* at 787 & n.8. Here, by contrast, the state appellate court was unable to reach the merits because of an antecedent state-law procedural defect.

II. Even if there were jurisdiction in this Court, this case would be a hopelessly flawed vehicle because Ally itself initiated this litigation in Missouri state court and conceded jurisdiction there.

Even if the jurisdictional defects could be overcome, the additional vehicle problems here—stemming from Ally's affirmative consent to jurisdiction in Missouri and its waiver and forfeiture of any personal-jurisdiction defense over several years of litigation—would likely prevent this Court from reaching the question presented.

The petition purports to present the question whether state courts may exercise personal jurisdiction, consistent with the Fourteenth Amendment, over an "out-of-state *defendant*" facing class litigation. Pet. i. But it was Ally that instituted this action in the Missouri state courts *as a plaintiff* and thereby voluntarily submitted itself to the trial court's exercise of personal jurisdiction. As this Court recently recognized in a similar procedural context, "the filing of counterclaims that included class-action allegations against [a plaintiff] did not create a new 'civil action' with a new 'plaintiff' and a new 'defendant.'" *Home Depot USA, Inc. v. Jackson*, 139 S. Ct. 1743, 1750 (2019). This Court has long recognized that a plaintiff that institutes an action in state court consents to personal jurisdiction there, including jurisdiction over potential counterclaims in that same state court. *See Adam v. Saenger*, 303 U.S. 59, 67–68 (1938) ("There is nothing in the Fourteenth Amendment to prevent a state from adopting a procedure by which a judgment *in personam* may be rendered in a cross-action against a plaintiff in its courts. . . . It is the price which the state may exact as the condition of opening its courts to the plaintiff."); *see also Freeman v. Bee Mach. Co.*, 319 U.S. 448, 454 (1943); *Merchs. Heat & Light Co. v.*

J.B. Clow & Sons, 204 U.S. 286, 289–90 (1907). At the very least, this unique procedural posture presents an antecedent question that may make it impossible to address the question presented as it is framed. Ally's petition does not even identify this preliminary hurdle, let alone seek to overcome it, and does not even suggest that the lower courts have considered or diverged over this issue.

Nor is that all. If this Court were to grant certiorari, it would also have to confront yet another messy set of antecedent legal questions about the effect of Ally's (1) concession of jurisdiction in its first responsive pleading to the class counterclaims; (2) waiver by continuing to defend the litigation without raising a jurisdictional objection for three years; and (3) belated attempt to retract its concession only after arguing its decertification motion. Each one presents threshold questions, under both state procedural law and federal constitutional law, that would likely prevent this Court from reaching the question presented. For starters, personal jurisdiction is a waivable affirmative defense. *State ex rel. Norfolk S. Ry. Co. v. Dolan*, 512 S.W.3d 41, 46 (2017) ("[B]ecause personal jurisdiction is an individual right, a defendant may waive jurisdictional objections by consenting to personal jurisdiction"); *CJG v. Mo. Dep't of Soc. Servs.*, 219 S.W.3d 244, 248–49 (Mo. 2007) ("By participating on the merits of the case during this lengthy period, the [defendant] voluntarily subjected himself to the jurisdiction of the court, thereby waiving any objection based upon lack of personal jurisdiction."). And Missouri Rule 55.27(g) requires that personal jurisdiction be raised as an affirmative defense in the initial responsive pleading or a motion filed *before* the initial responsive pleading. *Worley v. Worley*, 19 S.W.3d 127, 129 (Mo. 2000); *Barron v. Abbott Labs., Inc.*, 529 S.W.3d 795, 797 n.2 (Mo. 2017). That did not happen here. To the

contrary, Ally admitted that jurisdiction was proper and only sought to retract that admission after the Missouri courts began to rule against Ally on key issues. But the Missouri courts hold that an admission of personal jurisdiction is irrevocable and cannot be undone by an amendment to the pleadings. *Pearlstone v. Costco Wholesale Corp.,* 2019 WL 3997316, at *2 (E.D. Mo. 2019). To grant Ally's petition and skip over these threshold problems of waiver and forfeiture, even though the respondents properly raised them in the court below, would reward Ally for seeking a procedurally defective appeal that made it unnecessary to address these other defects.

III. In any event, review is unwarranted under this Court's traditional criteria.

The petition's jurisdictional and procedural flaws are many, and they should be dispositive. But even if they did not exist, this case would still be unsuitable for review under this Court's traditional criteria for certiorari. Ally does not even claim that the state supreme courts are divided over the extent to which the Fourteenth Amendment may impose limits on state-court jurisdiction over absent class members' claims. In fact, Ally's petition does not identify a single decision by *any* state supreme court that even addresses that question.

Instead, the petition (at 13–14) cites two intermediate state-court decisions as evidence that the issue arises frequently in state courts. But neither one of the two cited cases addresses the question either. The Maryland Court of Special Appeals, in *Stisser v. SP Bancorp, Inc.*, 174 A.3d 405 (Md. Ct. Spec. App. 2017), found no need to address the jurisdictional relevance, if any, of absent class members under the Fourteenth Amendment. Instead, the court found specific personal jurisdiction lacking because

the Texas defendant there hadn't transacted any relevant business in Maryland or otherwise purposefully availed itself of the privilege of doing business in Maryland. *Id.* at 427–35. Its only contact with the state was forming a subsidiary there. Given the total lack of relevant Maryland contacts, the court did not discuss the claims of absent class members and expressly found that it did "not need to examine" the impact of *Bristol-Myers Squibb Co. v. Superior Court of California, San Francisco County*, 137 S.Ct. 1773 (2017). *Id.* at 421 n.8.

The only other state-court case cited in the petition is a three-decades-old decision of the California Court of Appeal for the Third District, *Osborne v. Subaru of America, Inc.*, 243 Cal. Rptr. 815 (Cal. Ct. App. 1988), which likewise did not address the question. To the contrary, *Osborne* specifically declined to do so because the defendants hadn't raised it. *Id.* at 819 ("Since defendants have not raised the issue, we shall assume for purposes of argument that the courts of this state have personal jurisdiction to adjudicate the claims of nonresident plaintiffs."). Ally's partial quotation, suggesting the opposite, is misleading.

In the absence of any split among the state courts under the Fourteenth Amendment, Ally points to the *federal* courts' decisions concerning the jurisdictional relevance, under the Fifth Amendment, of the claims of absent class members in Rule 23 class actions. But the federal circuits aren't divided on that question either. Only the Seventh Circuit—in an opinion by Judge Wood, joined by then-Judge (now Justice) Barrett and Judge Kanne—has reached the issue. It rejected the suggestion that, in federal court, "each unnamed member of the class must separately establish specific personal jurisdiction over a defendant." *Mussat v. IQVIA, Inc.*, 953 F.3d 441, 447 (7th

Cir. 2020). Relying on this Court's precedents, the Seventh Circuit explained that "absent class members are not full parties to the case for many purposes," including subject-matter jurisdiction and venue. *Id.* The Seventh Circuit could identify "no reason why personal jurisdiction should be treated any differently from subject-matter jurisdiction and venue: the named representatives must be able to demonstrate either general or specific personal jurisdiction, but the unnamed class members are not required to do so." *Id.* And the D.C. Circuit, for its part, declined to reach this question as premature where no class had yet been certified, reasoning that "prior to class certification putative class members are not parties to the action." *Molock v. Whole Foods Mkt. Grp.*, 952 F.3d 293, 296 (D.C. Cir. 2020). Given the absence of any federal circuit split, not to mention the lack of jurisdiction in this Court, there is no basis for the petition's suggestion (at 4 n.3) that this petition should be considered in tandem with *Mussat* or *Molock*.

IV. There is no legitimate basis to hold this petition.

As a backstop, Ally asks this Court to hold this petition with a view to a GVR pending its disposition in *Ford Motor Co. v. Montana Eighth Judicial District Court* (No. 19-368) and *Ford Motor Co. v. Bandemer* (No. 19-369). But this Court lacks the power to grant this petition—whether for plenary review or for a GVR—absent jurisdiction under 28 U.S.C. § 1257(a). Besides, the Court's disposition of the *Ford* cases is unlikely to have any bearing on this case. The question in the *Ford* cases concerns purely individual litigation: "whether a Minnesotan and a Montanan injured in Minnesota and Montana can access courts in Minnesota and Montana to be heard on claims against the company that regularly marketed

and sold, in Minnesota and Montana, the product that caused their injuries." Br. for Respondents at 1, in Nos. 19-368 & 19-369 (U.S. Mar. 30, 2020). No matter how the *Ford* cases are decided, they are unlikely to have anything to say about the messy set of antecedent jurisdictional and procedural questions identified above, let alone about whether the Fourteenth Amendment requires unnamed class members to demonstrate personal jurisdiction in state court to the same degree as the named class representatives.

CONCLUSION

This petition for a writ of certiorari should be denied.

Respectfully submitted,

DEEPAK GUPTA
Counsel of Record
JONATHAN E. TAYLOR
GUPTA WESSLER PLLC
1900 L St., NW, Suite 312
Washington, DC 20036
(202) 888-1741
deepak@guptawessler.com

JESSE B. ROCHMAN
MARTIN L. DAESCH
CRAIG W. RICHARDS
ONDERLAW, LLC
110 East Lockwood Ave.
St. Louis, MO 63119
(314) 227-7695
rochman@onderlaw.com

Counsel for Respondents

November 30, 2020