No. ________

In The
Supreme Court of the United States

HAWKEYE GOLD, LLC,

Petitioner,

v.

CHINA NATIONAL MATERIALS INDUSTRY
IMPORT AND EXPORT CORPORATION,
DOING BUSINESS AS SINOMA,

Respondent.

**On Petition For A Writ Of Certiorari
To The United States Court Of Appeals
For The Eighth Circuit**

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Rule 12(b) of the Federal Rules of Civil Procedure identifies four specific defenses, including lack of personal jurisdiction, which are waived if available to a party but omitted from a motion made by that party before answer. *See* Fed. R. Civ. P. 12(h)(1)(A).

The question presented is:

Whether a party waives the defense of lack of personal jurisdiction if available but omitted from its first court filing in a motion to set aside a default.

PARTIES TO THE PROCEEDINGS BELOW

Petitioner Hawkeye Gold, LLC (“Hawkeye Gold”) is a wholly-owned subsidiary of its parent corporation, J.D. Heiskell Holdings, LLC.

Respondent China National Materials Industry Import and Export Corporation d/b/a Sinoma (“Sinoma”) is solely owned by China National Building Material Group Co. Ltd.

RULE 29.6 STATEMENT

Pursuant to this Court’s Rule 29.6, Hawkeye Gold states that J.D. Heiskell Holdings, LLC is its parent corporation and that no publicly held company owns 10% or more of its stock.

RELATED PROCEEDINGS

Hawkeye Gold, LLC v. China Nat’l Materials Indus. Imp. & Exp. Corp., 89 F.4th 1023 (8th Cir. Dec. 19, 2023);

Hawkeye Gold, LLC v. China Nat’l Materials Indus. Imp. & Exp. Corp., No. 4:16-CV-00355-SBJ, 2022 WL 2961897 (S.D. Iowa July 25, 2022).

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PETITION FOR A WRIT OF CERTIORARI

Petitioner respectfully petitions this Court for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

OPINIONS BELOW

The decision of the Eighth Circuit is reported at *Hawkeye Gold, LLC v. China Nat'l Materials Indus. Imp. & Exp. Corp.*, 89 F.4th 1023 (8th Cir. 2023).

JURISDICTION

On December 19, 2023, the Eighth Circuit affirmed the final judgment of the district court (App. 1). On January 24, 2024 the Eighth Circuit entered an order denying the petition for en banc and panel rehearing. This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS INVOLVED

Fed. R. Civ. P. 55.

(a) ENTERING A DEFAULT. When a party against whom a judgment for affirmative relief is sought has failed to plead or otherwise defend, and that failure is shown by

affidavit or otherwise, the clerk must enter the party's default.

(b) ENTERING A DEFAULT JUDGMENT.

(1) *By the Clerk.* If the plaintiff's claim is for a sum certain or a sum that can be made certain by computation, the clerk—on the plaintiff's request, with an affidavit showing the amount due—must enter judgment for that amount and costs against a defendant who has been defaulted for not appearing and who is neither a minor nor an incompetent person.

(2) *By the Court.* In all other cases, the party must apply to the court for a default judgment. A default judgment may be entered against a minor or incompetent person only if represented by a general guardian, conservator, or other like fiduciary who has appeared. If the party against whom a default judgment is sought has appeared personally or by a representative, that party or its representative must be served with written notice of the application at least 7 days before the hearing. The court may conduct hearings or make referrals—preserving any federal statutory right to a jury trial—when, to enter or effectuate judgment, it needs to:

(A) conduct an accounting;

(B) determine the amount of damages;

(C) establish the truth of any allegation by evidence; or

(D) investigate any other matter.

(c) SETTING ASIDE A DEFAULT OR A DEFAULT JUDGMENT. The court may set aside an entry of default for good cause, and it may set aside a final default judgment under Rule 60(b).

(d) JUDGMENT AGAINST THE UNITED STATES. A default judgment may be entered against the United States, its officers, or its agencies only if the claimant establishes a claim or right to relief by evidence that satisfies the court.

Fed. R. Civ. P. 60

(a) CORRECTIONS BASED ON CLERICAL MISTAKES; OVERSIGHTS AND OMISSIONS. The court may correct a clerical mistake or a mistake arising from oversight or omission whenever one is found in a judgment, order, or other part of the record. The court may do so on motion or on its own, with or without notice. But after an appeal has been docketed in the appellate court and while it is pending, such a mistake may be corrected only with the appellate court's leave.

(b) GROUNDS FOR RELIEF FROM A FINAL JUDGMENT, ORDER, OR PROCEEDING. On motion and just terms, the court may relieve a party or its legal representative from a final judgment, order, or proceeding for the following reasons:

(1) mistake, inadvertence, surprise, or excusable neglect;

(2) newly discovered evidence that, with reasonable diligence, could not have been discovered in time to move for a new trial under Rule 59(b);

(3) fraud (whether previously called intrinsic or extrinsic), misrepresentation, or misconduct by an opposing party;

(4) the judgment is void;

(5) the judgment has been satisfied, released, or discharged; it is based on an earlier judgment that has been reversed or vacated; or applying it prospectively is no longer equitable; or

(6) any other reason that justifies relief.

(c) TIMING AND EFFECT OF THE MOTION.

(1) *Timing.* A motion under Rule 60(b) must be made within a reasonable time—and for reasons (1), (2), and (3) no more than a year after the entry of the judgment or order or the date of the proceeding.

(2) *Effect on Finality.* The motion does not affect the judgment's finality or suspend its operation.

(d) OTHER POWERS TO GRANT RELIEF. This rule does not limit a court's power to:

(1) entertain an independent action to relieve a party from a judgment, order, or proceeding;

(2) grant relief under 28 U.S.C. § 1655 to a defendant who was not personally notified of the action; or

(3) set aside a judgment for fraud on the court.

(e) BILLS AND WRITS ABOLISHED. The following are abolished: bills of review, bills in the nature of bills of

review, and writs of coram nobis, coram vobis, and audita querela.

Fed. R. Civ. P. 12(b) and (g) and (h)

(b) HOW TO PRESENT DEFENSES. Every defense to a claim for relief in any pleading must be asserted in the responsive pleading if one is required. But a party may assert the following defenses by motion:

(1) lack of subject-matter jurisdiction;

(2) lack of personal jurisdiction;

(3) improper venue;

(4) insufficient process;

(5) insufficient service of process;

(6) failure to state a claim upon which relief can be granted; and

(7) failure to join a party under Rule 19.

A motion asserting any of these defenses must be made before pleading if a responsive pleading is allowed. If a pleading sets out a claim for relief that does not require a responsive pleading, an opposing party may assert at trial any defense to that claim. No defense or objection is waived by joining it with one or more other defenses or objections in a responsive pleading or in a motion.

* * *

(g) JOINING MOTIONS.

(1) *Right to Join.* A motion under this rule may be joined with any other motion allowed by this rule.

(2) *Limitation on Further Motions.* Except as provided in Rule 12(h)(2) or (3), a party that makes a motion under this rule must not make another motion under this rule raising a defense or objection that was available to the party but omitted from its earlier motion.

(h) WAIVING AND PRESERVING CERTAIN DEFENSES.

(1) *When Some Are Waived.* A party waives any defense listed in Rule 12(b)(2)–(5) by:

(A) omitting it from a motion in the circumstances described in Rule 12(g)(2); or

(B) failing to either:

(i) make it by motion under this rule; or

(ii) include it in a responsive pleading or in an amendment allowed by Rule 15(a)(1) as a matter of course.

(2) *When to Raise Others.* Failure to state a claim upon which relief can be granted, to join a person required by Rule 19(b), or to state a legal defense to a claim may be raised:

(A) in any pleading allowed or ordered under Rule 7(a);

(B) by a motion under Rule 12(c); or

(C) at trial.

(3) *Lack of Subject-Matter Jurisdiction.* If the court determines at any time that it lacks subject-matter jurisdiction, the court must dismiss the action.

INTRODUCTION

Waiver plays a vital role in civil litigation. It is a vehicle for streamlining disposition of a case and for promoting judicial economy. The Federal Rules of Civil Procedure were amended to bring rigor and clarity to waiver in relation to a party's failure to raise certain defenses in its first court filing. A circuit split of 4-2 on this issue shows confusion remains.

The rule change was designed to keep cases from languishing deep into the trial-progression schedule only to be dismissed based on forum-related defenses like personal jurisdiction. This Court has interpreted court rules to require waiver to be addressed at the outset. *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982) ("*Ins. Corp. of Ireland*") (party must "challenge jurisdiction early in the proceedings").

This petition presents the single question of whether a party waives the defense of lack of personal jurisdiction if available but omitted from its first court filing in a motion to set aside a default. The question is framed in the factual context of the case below in which the defendant entered an appearance and filed

a motion to set aside default. The defendant raised one Rule 12 specified defense, insufficient service of process, but failed to include another Rule 12 defense, lack of personal jurisdiction, and then attempted to resuscitate the omitted defense in a later filed answer and Rule 12 motion.

Rule 12(h)(1) should have decided the question presented in the affirmative for the Eighth Circuit below. But the clear path for waiver envisioned by the rule has encountered roadblocks. Decisions by the Eighth Circuit below, and the Sixth Circuit, have halted the positive progress made by the rule change.

This Court recently decided a special form of waiver based on a state registration requirement, but the guidance is narrow and limited by the plurality opinion of the Court. *See Mallory v. Norfolk Southern Ry. Co*., 600 U.S. 122 (2023) ("*Mallory*"). Waiver addressed in this petition will have a much broader and positive impact on litigants and lower courts.

The federal courts of appeals are confounded on a basic level about whether waiver applies after a party appears. *Compare Greenwich Ins. Co. v. Capsco Industries, Inc.*, 934 F.3d 419, 422 (5th Cir. 2019) ("'Personal jurisdiction . . . is subject to waiver' by making a general appearance.") *with Gray v. O'Brien*, 777 F.2d 864, 865 n.1 (1st Cir. 1985) ("[T]he filing of a general appearance does not constitute waiver.").

The confusion stems from the Court's instruction that "failure to enter a timely objection to personal jurisdiction constitutes, under Rule 12(h)(1), a waiver of

the objection," but also that an "appearance" in a civil case is sufficient itself to establish waiver. *Ins. Corp. of Ireland*, 456 U.S. at 703, 705.

This Court reaffirmed, in a unanimous opinion not long ago, it does not "exalt form over substance" in addressing procedural matters, including motions under Rule 60(b). *Gonzalez v. Crosby*, 545 U.S. 524, 527 n.1 (2005) (ignoring "title" of a motion in favor of its "substance" in a review "under Rule 60(b)(6)").

The foregoing principles collide in the case below. The Eighth Circuit mistakenly exalts form over substance in finding personal jurisdiction was not waived. The Eighth Circuit expands, as noted, a divide in the federal courts of appeals to a 4-2 split.

This Court should grant the petition and resolve the question presented.

STATEMENT OF THE CASE

A. Background—Applicable Federal Rules

Rule 12 specially identifies four defenses (hereinafter "four specified defenses") that a party is found to waive if available but omitted in the first motion filed by a party. Fed. R. Civ. P. 12(h)(1)(A).[1]

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[1] *See* Fed. R. Civ. P 12(h)(1). The four specified defenses "lack of personal jurisdiction over the person, improper venue, insufficiency of process, and insufficiency of service of process (see Rule 12(b)(2)-(5))." Rule 12 notes of advisory committee on rules—1966 Amendment.

The defense of lack of personal jurisdiction is one of the four specified defenses. A failure to raise personal jurisdiction at the beginning of a case results in waiver of the defense.[2] This occurs by operation of two different motions in two separate rules. The first motion is specific to Rule 12. Rule 12(g)(2) identifies "a motion under this rule" (i.e., Rule 12 motion) and provides if any one of the four specified defenses is "omitted" from an "earlier" Rule 12 motion, the specified defense is barred and may not be **included** ("may not be made") in a **second** Rule 12 motion. *See* Fed. R. Civ. P. 12(g)(2).

Rule 12(h)(1)(A) is different. It refers to any type of "motion" and its application does not depend on the filing of a second Rule 12 motion. Waiver is determined under Rule 12(h)(1)(A) by referring to the content of the initial motion filed before answer. The "circumstances" activating Rule 12(h)(1)(A) are those in which one of the four specified defenses is found to be "available to the party," but "omitted" from a "motion" filed before answer by that party. Applying definitional discipline to Rule 12, the "motion" in Rule 12(h)(1)(A) is not referring to a "Rule 12 motion"; indeed, it would render another rule, Fed. R. Civ. P. 12(h)(1)(B)(i), redundant if it did.

This interpretation is consistent with reasoning of the advisory committee in recommending changes to Rule 12(g) and Rule 12(h). The advisory committee

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[2] *Ins. Corp. of Ireland*, 456 U.S. at 705.

notes show it was aware of the difference between a "pre-answer motion" and "a motion under Rule 12" and used the distinction in announcing rule changes. *See* Fed. R. Civ. P. 12 notes of advisory committee on rules—1966 Amendment.

This Court has recognized Rule 12(h)(1) as standalone authority for waiver of the defense of lack of personal jurisdiction. *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (noting "defense of lack of jurisdiction over the person waivable," citing "Fed. R. Civ. P. 12(h)(1)"). It also has made clear waiver must be respected. *Mallory*, 600 U.S. at 145 (Gorsuch, J.) (plurality opinion) (noting "defendant who appears 'specially' to contest jurisdiction preserves his defense, but one who forgets can lose his"); *see also id.* at 154 (Alito, J., concurring) ("[W]aiver . . . should be honored"); *id.* at 147 (Jackson, J., concurring) ("Waiver is thus a critical feature of the personal-jurisdiction analysis.' ").

B. Factual Background

1. Sinoma's Tortious Conduct and Contract

Hawkeye Gold is an Iowa-based seller of livestock feed and brought this action as plaintiff against defendant China National Materials Industry Import and Export Corporation d/b/a Sinoma, a highly sophisticated, multibillion-dollar global enterprise with business operations in 100 countries, including the United States (R.Doc.168-1 at 12, 24); (R.Doc.119-2 at 2). Sinoma purchased livestock feed from Hawkeye Gold (R.Doc.119-2 at 3); (R.Doc.169 at 3).

At relevant times herein, Sinoma represented itself to be a majority-owned Chinese government agency subject to sovereign immunity under the Foreign Sovereign Immunities Act, 28 U.S.C. §§ 1602 *et seq.* ("FSIA") (R.Doc.35 at 8); (R.Doc.87-1 at 4); (R.Doc.93 at 4); (R.Doc.116 at 64). As will be shown below, Sinoma's claim to be a Chinese-government agency subject to FSIA immunity was false and resulted in an extended, unnecessary delay and expense in the case below for more than four years. (*Id.*).

Sinoma purported to establish a subsidiary "corporation" in the United States known as Non-Metals, Inc. ("Non-Metals"), to act as a "buying office" or agent for Sinoma, but in fact discovery showed Non-Metals was nothing more than Sinoma's "alter ego" or "mere instrumentality" (R.Doc.157 at 2); (R.Doc.169-6 at 3 (224:5-225:20)).

On July 10, 2014, Sinoma represented to Hawkeye Gold it had secured "valid" import permits to deliver certain livestock feed destined for China through an arrangement with Non-Metals (R.Doc.157 at 6-7); (R.Doc.168-1 at 50); (Hawkeye Gold 8th Cir. Appellant's Brief at 19-20, 22, 32). This representation also was later proven false (R.Doc.35 at 8).

In August 2014, Sinoma directed Non-Metals not to complete the transaction with Hawkeye Gold and Sinoma then stripped assets from Non-Metals, including siphoning funds from a large Non-Metals deposit account identified for paying Hawkeye Gold, and then thrust Non-Metals into insolvency (R.Doc.168-1 at 54); (R.Doc.144-1 at 6).

2. Hawkeye Gold's Complaint

On June 23, 2016, Hawkeye Gold filed a complaint against Sinoma in the district court alleging a default judgment obtained against Non-Metals "remain[ed] unpaid" and sought payment from Sinoma as a disclosed principal and under other theories (R.Doc.1 at 5).

3. Sinoma's Pre-Answer Motion

On December 9, 2016, after Hawkeye Gold filed a motion for entry of default, the Clerk entered default against Sinoma (R.Doc.12).

On January 20, 2017, Sinoma filed a notice of appearance in the district court (R.Doc.13).

On February 17, 2017, Sinoma filed a motion to set aside entry of default "pursuant to Rules 60(b)(1) and (4)" (hereinafter "Sinoma's motion" or "pre-answer motion") (R.Doc.14 at 1). Sinoma's motion did not cite Rule 55(c), but it invoked defenses listed in Rules 12(b)(4) and (5), arguing Hawkeye Gold had "failed to properly serve [Sinoma]," and requested the district court to set aside the default "due to improper service" (R.Doc.14 at 1; R.Doc.14-1 at 1). Sinoma's motion and brief did not include lack of personal jurisdiction found in Rule 12(b)(2) as a defense (R.Doc.201 at 5).

On March 10, 2017, Sinoma filed a reply brief in support of its pre-answer motion, arguing again that default should be set aside because "service was improper, and . . . improper service is good cause for

setting aside a default judgment" and that Sinoma had a "meritorious defense" (R.Doc.16 at 4-5). Sinoma admitted to the district court its pre-answer "motion" did **not** seek "to dismiss the case" for lack of personal jurisdiction or on any other ground (R.Doc.16 at 3-4). Sinoma also again did not list or identify lack of personal jurisdiction as a defense (R.Doc.16 at 1-7).

In further support of its pre-answer motion, Sinoma filed a declaration dated March 9, 2017, from a "senior executive of Sinoma" who testified he "learned about the existence of th[e] lawsuit" filed by Hawkeye Gold in January 2017 and had "personal knowledge of the contractual dispute" with Hawkeye Gold, and Sinoma merely sought "a chance to defend its interest" (R.Doc.16 at 7).

On March 23, 2017, Sinoma filed a further brief in support of its pre-answer motion stating "[t]his lawsuit's subject matter jurisdiction is governed by . . . 'FSIA' " and demanded Hawkeye Gold "be ordered to serve Sinoma according to . . . FSIA" (R.Doc.20-1 at 1).

On May 3, 2017, the district court entered an order granting Sinoma's motion based on "insufficient" service under the FSIA (R.Doc.23 at 1-5). The district court found "Sinoma has actual notice of the pending lawsuit," but accepted Sinoma's contention it had identified a "meritorious defense" (R.Doc.23 at 3). The district court cited case law authority in the Eighth Circuit stating, "the same factors are typically relevant in deciding whether to set aside entries of default and [vacating] default judgments" (R.Doc.23 at 3).

4. Continuing Misrepresentations

On October 22, 2020, the district court ordered the Clerk of the Court to effectuate service, which was completed, but it also resulted in another Sinoma default (R.Doc.80 at 6); (R.Doc.83-1 at 45); (R.Doc.85).

On March 5, 2021, Sinoma filed a motion to set aside the second default again arguing, "Sinoma is a government-owned entity and . . . FSIA . . . provides heightened protection to Sinoma regarding service of process" (R.Doc.87; 87-1 at 5). Sinoma claimed in the filing it is a "foreign entity that conducts business exclusively in China" (R.Doc.87-1 at 6).[3]

On April 6, 2021, the district court entered an order vacating Sinoma's second default (R.Doc.97 at 1). The district court's decision was based in part on its findings: "**Sinoma . . . has agreed to appear**, thus demonstrating its wish to **defend** the case on the merits" and its representation that Sinoma's "appearance will provide Hawkeye Gold with a full and fair chance to prove its claims" (R.Doc.97 at 4, 6) (emphasis added).

On May 6, 2021, Sinoma filed an answer to the complaint, alleging, again, Hawkeye Gold's "claims are barred by" the FSIA "as Sinoma is an instrumentality of the Chinese government" and purporting to raise lack of personal jurisdiction for the first time (R.Doc.98 at 5).

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[3] Sinoma's contention it does not do business in the United States is manifestly false, even without considering its relationship with Hawkeye Gold, since it has been actively involved in commercial matters, including litigation, in California (Hawkeye Gold's 8th Cir. Reply Brief at 6 n.1).

5. Sinoma Admits to False FSIA Protection

On September 2, 2021, after more than four years of repeatedly demanding Hawkeye Gold serve Sinoma in accordance with the onerous FSIA requirements—and after Hawkeye Gold had filed 15 status reports ordered by the district court to show FSIA compliance—Sinoma "informed" Hawkeye Gold that Sinoma did not have an FSIA defense and would therefore "remove . . . all prior allegations or contentions made relating to the 'FSIA' . . . and [withdraw] its affirmative defense based on the FSIA" (R.Doc.109).

On February 9, 2022, Hawkeye Gold filed the operative second amended complaint, alleging "breach of contract and accompanying misconduct" by Sinoma, including "Sinoma's misrepresentations regarding its status as Chinese [government] instrumentality" and Hawkeye Gold also made claims of alter ego and sought punitive damages (R.Doc.157 at 9-12) (capitalization omitted).[4]

6. Sinoma's Motion to Dismiss for Lack of Personal Jurisdiction

On February 23, 2022, Sinoma filed a motion to dismiss the second amended complaint alleging, among

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[4] Hawkeye Gold retained Professor Daniel Chow, a Yale-educated expert on Chinese law who concluded, among other things, Sinoma had shown "excessive domination and control of Non-Metals" and "Non-Metals was reduced to the role of an instrumentality of Sinoma" (R.Doc.168-1 at 45-46).

other things, the district court "lacks personal jurisdiction over Sinoma" (R.Doc.164 at 1).

On March 9, 2022, Hawkeye Gold filed an opposition arguing Sinoma waived any personal jurisdiction defense (R.Doc.168).

7. Order on Second Amended Complaint

On July 25, 2022, the district court granted Sinoma's motion to dismiss (R.Doc.201 at 24, 27). The district court, after quoting Rules 12(g) and 12(h) of the Federal Rule of Civil Procedure, stated in conclusory fashion: "[G]iven the pleadings within this case, the Court is not convinced Sinoma waived the defense of lack of personal jurisdiction" (R.Doc.201 at 12).

8. Hawkeye Gold's Appeal to the Eighth Circuit

On August 19, 2022, Hawkeye Gold timely appealed to the Eighth Circuit contending the district court erred in failing to find and conclude Sinoma waived lack of personal jurisdiction and specifically argued, in terms of the rules, "[t]he issue is controlled by Rule 12(h)" (Brief at 25).

On December 19, 2023, the Eighth Circuit affirmed the order of the district court granting Sinoma's motion to dismiss (App. 1). On the issue of waiver, the Eighth Circuit did not comment on the fact Sinoma's motion was filed under Rule 60(b) and **not** Rule 55(c). The Eighth Circuit stated, without identifying any supporting case law: "[w]e have never held that a party

waives potential Rule 12(b) defenses by failing to include them in a motion to set aside a default." (App. 7).

The Eighth Circuit concluded, also without explanation, that Hawkeye Gold's argument under one rule, Rule 12(h), somehow caused it to be "contrary to the plain language" of another rule, Rule 12(g)(2). *Id.* The Eighth Court found Rule 12(g)(2) "expressly limits its application to motions made after prior motions 'made under *this rule*,' **meaning** Rule 12 motions." *Id.* (emphasis in italics in original; emphasis in bold added). The Eighth Circuit further concluded: "A motion under Rule 55(c) is not a motion under Rule 12 . . . [It] does not trigger the waiver provisions of Rules 12(g)(2) and 12(h)" and that it "says nothing about defenses being waived if not raised." *Id.*

On January 2, 2024, Hawkeye Gold filed a petition for panel rehearing and for rehearing en banc, noting a "[s]plit" arising in the circuits related to the issue of waiver of personal jurisdiction. On January 24, 2024, the Eighth Circuit denied the petitions.

REASONS FOR GRANTING THE WRIT

This petition presents a single question of whether a party waives the defense of lack of personal jurisdiction if available but omitted from the party's first court filing in a motion to set aside a default.

As will be further discussed below, there is a 4-2 circuit split on the question presented. The Eighth

Circuit acknowledges its opinion below is not uniformly shared by other federal courts of appeals (App. 7-8).[5]

This Court should resolve the question presented.

A. There is a Circuit Split

The Fifth, Seventh, Ninth, and Tenth Circuits answer the question presented in the affirmative.[6] Some of these courts explain a party's action in filing a motion in response to default is a defensive move triggering Rule 12(h) and they also indicate a defendant is found to submit to the district court's jurisdiction in this circumstance.[7] Other courts in this group make clear waiver is established without regard to the label

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[5] The Eighth Circuit does not cite any case law in support of its position, but implicitly acknowledges contrary authority exists, noting its interpretation of Rule 12(h) is not shared by other federal courts of appeals. *Id.* (notably referring to "[m]ost of the cases from other circuits" cited by Hawkeye Gold).

[6] *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir. 1987); *O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1400-01 (7th Cir. 1993); *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106-07 (9th Cir. 2000); *United States v. 51 Pieces of Real Prop. Roswell, N.M.*, 17 F.3d 1306, 1314 (10th Cir. 1994).

[7] *O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1400-01 (7th Cir. 1993); *United States v. 51 Pieces of Real Prop. Roswell, N.M.*, 17 F.3d 1306, 1314 (10th Cir. 1994).

or title of the rule authorizing the motion or whether a final default judgment ultimately is entered.[8]

The Tenth Circuit, for example, has expressly found a "response" to a "motion for default" before final default judgment is a "defensive move that trigger[s] the provisions of Rule 12(h)."[9] The Ninth Circuit has found "[t]he fact that [the] first filing was not dubbed a 'Rule 12' motion is of no significance . . . [because] part[ies] . . . waive[ ] their defense of personal jurisdiction by not raising it in their Rule 55 motion."[10] The Seventh Circuit similarly concludes: "[Defendant's] Motion . . . pursuant to Rule 55(c) . . . was, in essence, a Rule 12 motion . . . [Defendant] waived the issue."[11] Finally, the Fifth Circuit has found an "appearance" is sufficient to waive personal jurisdiction even when defendants "never filed a pleading in the case prior to the entry of default judgment."[12]

On the other side of the court split are the Eighth Circuit below and the Sixth Circuit. The Eighth Circuit

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[8] *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir. 1987); *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1106-07 (9th Cir. 2000).

[9] *United States v. 51 Pieces of Real Prop. Roswell, N.M.*, 17 F.3d 1306, 1314 (10th Cir. 1994).

[10] *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1107 (9th Cir. 2000).

[11] *O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1399-1401 (7th Cir. 1993).

[12] *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir. 1987) ("[O]bjections to personal jurisdiction . . . must be raised . . . timely . . . or they are waived. Fed. R. Civ. P. 12(h)(1) . . . [A] party need not necessarily file an answer . . . to put in an appearance for purposes of Rule 12(h)").

concludes waiver applies **only** to motions labeled by the moving party as a Rule 12 motion, not to a motion authorized by other rules (e.g., Rule 55(c)) in which the four specified defenses are available as a basis for obtaining relief (App. 7).

According to the Eighth Circuit, even if the substantive basis for a motion to set aside entry of default is one of the four specified defenses listed in Rule 12 (e.g., insufficient service of process), waiver will not be found if the motion is **not** labeled or titled a Rule 12 motion. The Eighth Circuit stated: "A motion under Rule 55(c) is not a motion under Rule 12" (App. 7). Also, unlike the federal courts of appeals on the other side of the split, the Eighth Circuit finds a motion to set aside entry of default, even if based on one of the four Rule 12 specified defenses, "does not trigger the waiver provisions of Rules 12(g)(2) and 12(h)" (App. 7).[13]

The Sixth Circuit is in accord with the Eighth Circuit. The Sixth Circuit strongly tips the scale against waiver. For example, the Sixth Circuit finds a defendant which raises by pre-answer motion one of the specified defenses, insufficiency of service of process, does not waive another specified defense, lack of personal jurisdiction, even though it was omitted from the

[13] *Hawkeye Gold, LLC. v. China National Materials Industry Import and Export Corp.*, 89 F.4th 1023, 1030 (8th Cir. 2023) (App. 7) ("A motion under Rule 55(c) is not a motion under Rule 12").

defendant's original motion.[14] The Sixth Circuit also has ruled waiver of personal jurisdiction is not found when a defendant files a motion to transfer, specifically stating such motion is not a "Rule 12 motion."[15]

The Sixth Circuit also takes the opposite view of the courts of appeals on the other side of the split by concluding a motion to vacate default is not the type of motion indicating a defendant is submitting to the jurisdiction of the district court.[16]

Even though this Court has not disavowed or clarified its earlier pronouncement that waiver may be established by "appearance,"[17] the Sixth Circuit has

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[14] *Blessing v. Chandrasekhar*, 988 F.3d 889, 895-96 (6th Cir. 2021), *reaffirming Friedman v. Estate of Presser*, 929 F.2d 1151, 1157 n.7 (6th Cir. 1991) (noting defendant's "response to plaintiffs' motion to stay" which only "specifically contested . . . insufficiency of service of process" did not mean defendant had "waived . . . personal jurisdiction defense") (citation omitted).

[15] *Means v. US Conference of Catholic Bishops*, 836 F.3d 643, 648-49 (6th Cir. 2016) ("[D]efendants' motion to transfer venue was not a Rule 12 motion").

[16] *Gerber v. Riordan*, 649 F.3d 514, 520 (6th Cir. 2011) ("'[D]efects in personal jurisdiction are not waived by default when a party fails . . . to respond . . . until after the default judgment was entered.' . . . [M]oving to vacate a default judgment is not an indication that a defendant is submitting to the jurisdiction of the district court for disposition of a suit's merits").

[17] *Ins. Corp. of Ireland*, 456 U.S. at 703 ("[A]n individual may submit to the jurisdiction of the court by appearance"); *Mallory*, 600 U.S. at 145 ("A defendant who **appears** 'specially' to contest jurisdiction preserves his defense, but one who forgets can lose his") (emphasis added).

decided the matter on its own,[18] holding an entry of appearance is not sufficient to find waiver.[19] The Sixth Circuit also has concluded, even recognizing the four specified defenses, a bright-line rule for waiver should not be applied to Rule 12.[20]

B. The Eighth Circuit Decision is Wrong

1. Rules and Precedent are Misapplied

The Eighth Circuit's decision below[21] is inconsistent with this Court's jurisprudence on waiver in the circumstance where a party fails to raise specified defenses in its first court filing.[22]

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[18] The Sixth Circuit, respectfully, is not authorized to make such a determination. *Mallory*, 600 U.S. at 136 ("[A] lower court 'should follow the case which directly controls, leaving to this Court the prerogative of overruling its own decisions' ").

[19] *Blessing v. Chandrasekhar*, 988 F.3d 889, 895, 897, 900 (6th Cir. 2021) ("The source of . . . confusion arose . . . about the point at which the defendants had waived personal jurisdiction . . . Read in context, *Gerber* did not establish a bright line rule that a notice of appearance of counsel waives personal jurisdiction . . . The district court correctly determined that a notice of appearance does not by itself waive personal jurisdiction. Then, as required by *Gerber*, the district court undertook a fact-specific inquiry into [defendant's] litigation conduct").

[20] *Blessing v. Chandrasekhar*, 988 F.3d 889, 898 (6th Cir. 2021) ("A bright line rule is also inconsistent with Rule 12").

[21] *Hawkeye Gold, LLC v. China National Materials Industry Import and Export Corporation*, 89 F.4th 1023 (8th Cir. 2023).

[22] *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (citing Fed. R. Civ. P. 12(h)(1)); *Ins. Corp. of Ireland*, 456 U.S. at 705 (same).

The relevant facts before the Eighth Circuit relating to waiver of Sinoma's defense of lack of personal jurisdiction are narrow, few and undisputed. Hawkeye Gold initiated this action by filing a complaint (R.Doc.1). After Sinoma failed to respond, Hawkeye Gold moved for entry of default (R.Doc.10). An entry of default against Sinoma was thereafter filed (R.Doc.12).

After entry of default, Sinoma filed an appearance (R.Doc.13). Approximately one month later, Sinoma filed a pre-answer motion under "Rule 60(b)" seeking to set aside the entry of default based on defenses of alleged "improper service" invoking the defense language of Rule 12(b)(4) and (5) (two of the four specified defenses) (R.Doc.14 at 1). Sinoma did not raise the defense of lack of personal jurisdiction found in Rule 12(b)(2) in Sinoma's pre-answer motion (R.Doc.14).[23]

The record before the district court shows Sinoma had decided to waive the defense of lack of personal jurisdiction at that time and used that decision as leverage to convince the district court to vacate a default judgment (R.Doc.14, 20-1). The district court specifically found: "Sinoma . . . agreed to appear, . . . demonstrating its wish to defend the case on the merits" (R.Doc.97 at 4, 6). The district court further found Sinoma represented its appearance in the case would

[23] Sinoma repeatedly argued Hawkeye Gold's service of process was insufficient because Sinoma is a sovereign government agency entitled to protection under FSIA (R.Doc.20-1 at 1). After more than four years, Sinoma admitted its claim to FSIA protection and defense was false and unavailing (R.Doc.112).

provide "Hawkeye Gold with a full and fair chance to prove its claims" (R.Doc.97 at 4, 6).

On appeal, the Eighth Circuit affirmed the district court's order, finding Sinoma did not waive its lack of personal jurisdiction defense because the motion is **not** labeled or titled a Rule 12 motion, specifically stating: "A motion under Rule 55(c) is not a motion under Rule 12" and a motion to set aside entry of default, even if based on one of the four Rule 12 specified defenses, "does not trigger the waiver provisions of Rules 12(g)(2) and 12(h)" (App. 7). The Eighth Circuit's analysis, respectfully, is in error.

As an initial matter, it is undisputed Sinoma's motion cites Rule 60(b), not Rule 55(c), as governing authority.[24] The Eighth Circuit ignored Sinoma's citation and declared Sinoma's motion to be a Rule 55(c) motion instead.[25] Once having transformed the motion, the Eighth Circuit then held Sinoma's "motion under Rule 55(c) is not a motion under Rule 12."[26]

The Eighth Circuit exalts form over substance by giving undue prominence to titles and rule numbers in Sinoma's motion to reach a result rather than evaluate the actual relief sought by Sinoma in defense.

Substantively, it is undisputed Sinoma raised improper service of process in defense in its first court

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[24] R.Doc.14 at 1-7; R.Doc.16 at 4-5.

[25] (App. 7).

[26] (App. 8) ("We simply conclude that Sinoma's motion to set aside the default was not a Rule 12 motion, and therefore Sinoma preserved its personal jurisdiction defense . . . ").

filing when moving to set aside default. This is one of the four specified defenses which, if raised, must include all other applicable Rule 12 specified defenses, and any omitted defense is barred and may not be **included** ("may not be made") in a later Rule 12 motion. *See* Fed. R. Civ. P. 12(g)(2).

Rule 12(h)(1) provides independent and more precise application to this case. It alone should have dictated the result to the Eighth Circuit. By this separate rule, Rule 12(h)(1), Sinoma was required to raise lack of personal jurisdiction in defense in its first "motion" regardless of the title or other substantive content included in Sinoma's motion and, if not, as occurred here, the defense is waived. Fed. R. Civ. P. 12(h)(1)(A). Review of this Court's jurisprudence also should have led the Eighth Circuit to this end.[27] But it did not. The Eighth Circuit's decision was in error.

2. Dicta Does Not Alter Split Results

Cognizant of the further entrenched circuit divide it caused by its decision below,[28] the Eighth Circuit attempts to camouflage the split with dicta, stating it expresses "no view" whether waiver of default under "Rule 55(c)" also applies to "final default *judgment* under Rule 60(b)" (App. 8) (emphasis in original). This

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[27] *Ruhrgas AG v. Marathon Oil Co.*, 526 U.S. 574, 584 (1999) (citing Fed. R. Civ. P. 12(h)(1)); *Ins. Corp. of Ireland*, 456 U.S. at 705 (same).

[28] (App. 7-8) (acknowledging there are "cases from other circuits" cited by Hawkeye Gold that do not support the Eighth Circuit's view).

addendum is not only peripheral to the single issue raised in this petition, but, respectfully, it appears to be inconsistent with the remainder of the Eighth Circuit's opinion.

First, Rule 55(c) applies both to "entry of default" and "default judgments." *In re Chinese Manufactured Drywall Products*, 742 F.3d 576, 594 (5th Cir. 2014) ("Rules 55(c) and 60(b) allow a district court to set aside an entry of default or default judgment for 'good cause.'"). Second, applying the Eighth Circuit's other reasoning, "Rule 60(b)," like Rule 55(c), **also** is "not a Rule 12 motion" (App. 7). Third, like entry of default under Rule 55(c), there is "nothing about defenses being waived if not raised" in the language of Rule 60(b).

In any event, the split identified in this petition does not depend on the artificial distinction between default and default judgment. The majority identified by Hawkeye Gold shows waiver is to be determined **before** a court considers whether to vacate any final default judgment.[29] These courts also make clear the decision on waiver does not turn on the existence of a final default judgment.[30] In other words, the presence

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[29] *Broadcast Music, Inc. v. M.T.S. Enterprises, Inc.*, 811 F.2d 278, 281 (5th Cir. 1987) (default judgment factors are not considered until after, and only as a "consequence" of, the court first finding waiver).

[30] *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1108 (9th Cir. 2000) (adopting Seventh Circuit view in *O'Brien* in rejecting "'timing of post-default pleadings,'" thus negating any distinction based on type of default involved).

or absence of a final default judgment is not a factor on the question of waiver.[31]

Finally, if cases discussing waiver after a default judgment are considered, the split is even wider and more pronounced in favor of the majority view with at least one more circuit, the Eleventh Circuit, joining the majority's ranks. *In re Worldwide Web Sys., Inc.*, 328 F.3d 1291, 1300 (11th Cir. 2003) ("We . . . conclude that when a party asserts a Rule 60(b) challenge to a default judgment, absent [exceptions not applicable] . . . challenges under Rule 60(b)(4) on insufficient service of process grounds are waived if not squarely raised.") (citing *Swaim v. Moltan Co.*, 73 F.3d 711, 718 (7th Cir. 1996) ("A motion to vacate under Rule 60(b) for lack of jurisdiction is essentially equivalent to a Rule 12(b)(2) motion to dismiss for lack of jurisdiction.")).[32]

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[31] *O'Brien v. R.J. O'Brien & Assocs., Inc.*, 998 F.2d 1394, 1400-01 (7th Cir. 1993) (waiver found for failure to raise defense in **initial** motion to vacate); *United States v. 51 Pieces of Real Prop. Roswell, N.M.*, 17 F.3d 1306, 1314 (10th Cir. 1994) (waiver on personal jurisdiction found due to failure to make objection in first response before motion to dismiss filed).

[32] Sinoma argued below, without formal service, it lacked official notice of this case even though it had a copy of the complaint. (R.Doc.14). Sinoma's argument has been squarely rejected. *Boston Telecomm. Grp., Inc. v. Deloitte Touche Tohmatsu*, 249 F. App'x 534, 536 (9th Cir. 2007).

C. This is a Good Vehicle for Resolving the Important Issue Presented and the Split

1. Bright-line Rule is Needed

This case presents an excellent opportunity and vehicle for this Court to promote litigation efficiency and advance judicial economy. This Court will be able to set the record straight on a fundamental and important issue of civil procedure involving waiver. The Court's action will avoid an enormous and unnecessary amount of time and expense in lower courts addressing fights over the proper forum, which Rule 12(h) was designed to address. The Eighth Circuit's opinion below, respectfully, if allowed to be cemented into precedent, will needlessly and exponentially expand misapplication of basic court rules on waiver used every day in the lower courts.

A reminder to lower courts to strictly apply waiver under Rule 12(h)(1)(A) is not unfair to litigants. It is the opposite. This rule invokes only **four** specified defenses. A bright-line rule on waiver relating to these four specified defenses brings upfront in the case all major forum-determinative issues that should, indeed, truly must, be resolved at the outset of the litigation. This rule is uniquely beneficial to everyone in the judicial process—all litigants, the judiciary, and counsel. The rule also is not hard to follow and, once clarified by this Court, it should be easy to apply. A defendant is in full control of its own destiny in this circumstance.

It should be noted there is no real advantage to a defendant in presenting forum-ending defenses one at

a time. Like other litigants, it only means the defendant will expend unnecessary time and expense while forum issues dither, which is especially regretful if the case has been filed in the wrong venue. But even if a defendant benefits in some way from delay, there is great strain and expense on the judicial system when a defendant proceeds in piecemeal fashion.

A defendant has not lost any rights by strict application of this procedure. A defendant always has the option of not appearing in a case and retaining its personal jurisdiction defense for a later court action. *Ins. Corp. of Ireland*, 456 U.S. at 706 ("A defendant is always free to ignore the judicial proceedings, risk a default judgment, and then challenge that judgment on jurisdictional grounds in a collateral proceeding.").

A different result is necessary if the defendant attempts to **partially** appear. *Am. Ass'n of Naturopathic Physicians v. Hayhurst*, 227 F.3d 1104, 1107 (9th Cir. 2000) ("[D]efendant remains free to challenge personal jurisdiction after a default judgment . . . **until** the defendant . . . squander[s] that opportunity by failing to raise it.") (emphasis added).

Rule 12(h) was designed to fix this problem. Unfortunately, if it was ever clear, it is no longer, and there is serious need for reinforcement by this Court of basic tenets of waiver in relation to court filings made at the outset of a case. The Eighth Circuit below and Sixth Circuit decisions reveal the problem persists. And only this Court can fix **that** problem.

2. The Issue is Framed for Resolution

This is a manageable case. It also is a proverbially clean case because the operative facts are undisputed, the legal issue is narrow, and the matter is presented to the Court under a limited docket due to the absence of a trial record. Further percolation also is unnecessary and, indeed, would be problematic.

The most recent decisions in the federal courts of appeals addressing waiver of personal jurisdiction in the context of this case, as shown by the Eighth Circuit below and the Sixth Circuit, respectfully, reveal there are courts that still misapprehend Rule 12(h)(1) and have inadvertently looked past guidance provided by this Court on this subject.

Issues of default, personal jurisdiction, and waiver based on failure of a party to properly include specified defenses in its initial court filings are—literally—present every day in the lower courts. The recent precedents from the Eighth Circuit below and Sixth Circuit, if not promptly turned back, will cause confusion and have immediate, negative consequences to orderly progression of cases in the lower courts.

Failing to reinvigorate the practice of strictly applying waiver rules in the lower courts in this circumstance also will add inestimable time and expense to already significant costs and burdens placed on the judiciary and parties involved in civil litigation today.

A clear directive from this Court is the only real path to eliminate the 4-2 circuit split and abate enduring

waiver issues from festering and clogging lower courts with wasteful proceedings.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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