No. 18-528

IN THE
Supreme Court of the United States

ELIAS KIFLE AND ETHIOPIAN REVIEW, INC.,
Petitioners,

v.

JEMAL AHMED,
Respondent.

On Petition For A Writ Of Certiorari To The United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

MARY E. GATELY
Counsel of Record
PAUL D. SCHMITT
DLA PIPER LLP (US)
500 Eighth Street, NW
Washington, DC 20004
(202) 799-4507
mary.gately@dlapiper.com

Counsel for Respondent Jemal Ahmed

QUESTION PRESENTED

In *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989), this Court held that "it is well settled that [Federal Rule of Civil Procedure] 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." Federal district courts make such determinations by applying the factors set forth in Federal Rules of Civil Procedure 19(a) and 19(b), which assess whether the party to be dismissed is a required party, and if so, whether it is indispensable to the litigation. A party must be deemed both required and indispensable to evade dismissal under Rule 19. In the proceedings below, the United States District Court for the Northern District of Georgia dismissed Petitioner Elias Kifle to preserve diversity jurisdiction after determining that he was neither a required nor an indispensable party. Applying an abuse of discretion standard of review, the United States Court of Appeals for the Eleventh Circuit affirmed.

The question presented is:

Did the court of appeals properly apply the widely-accepted "abuse of discretion" standard of review as to the district court's determinations that Petitioner Kifle was neither a required party under Federal Rule of Civil Procedure 19(a), nor an indispensable party under Rule 19(b)?

RULE 29.6 CORPORATE DISCLOSURE STATEMENT

Pursuant to Supreme Court Rule 29.6, Respondent Jemal Ahmed states that he is not a corporate entity.

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PRELIMINARY STATEMENT

The Petition does not merit this Court's review. Petitioners present no important federal question, nor is the issue submitted – *i.e.*, the applicable standard of review for whether a party is required or indispensable under Federal Rules of Civil Procedure 19(a) and 19(b) – the subject of any significant controversy in the courts of appeals. Under well-recognized principles, federal district courts may dismiss or "sever" nondiverse parties under Rule 21 by applying the factors set forth in Rules 19(a) and 19(b). There is nothing particularly novel or controversial about this power, and "it is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." *Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 832 (1989). That is exactly what the district court did below when it relied on the evidentiary record and dismissed Petitioner Kifle, a nondiverse party, to preserve diversity jurisdiction and to restore a fully-litigated defamation judgment in favor of Respondent. Employing a widely-accepted abuse of discretion standard, the court of appeals affirmed the district court's decision, and denied a request for rehearing and rehearing *en banc*.

Petitioners' challenge to the district court and the court of appeals' proper application of the Federal Rules masquerades as an "ideal vehicle" to address an "important issue" upon which the courts of appeals are "badly fractured." Pet. 11, 16. But Petitioners make little attempt to demonstrate that

the issue of whether a party is required and indispensable under Rule 19 is of any great prominence or generates any significant concerns within the federal court system. Further compounding matters, the Petition is a poor vehicle for this Court's review of the question presented, because the decision below is heavily fact-bound, and Petitioners rely on an argument never raised in either the proceedings before the district court or the court of appeals related to joint and several liability. Moreover, there is no appreciable "confusion" as to the relevant standard of review for either Rule 19(a) or Rule 19(b), and any subtle distinctions that might exist among the various Circuits would not have affected the court of appeals' analysis below. For these reasons, the Petition should be denied.

STATEMENT OF THE CASE

This case arises out of the publication by Petitioners Elias Kifle ("Kifle") and Ethiopian Review Inc. ("ER") of unfounded, false, and defamatory statements on their online journal (or "blog"), the Ethiopian Review. The crux of those statements was that Respondent Jemal Ahmed, a private businessman, is purportedly in charge of a vast human trafficking operation.[1] Petitioners published an article on the Ethiopian Review website, naming Respondent as a "human trafficker in Ethiopia" who

[1] Petitioners continue to make unfounded and false allegations about Ahmed. *See, e.g.*, Pet. 6 (stating that Respondent's business interests "have been linked to human rights abuses committed by the Ethiopian military."). As was the case below, Petitioners offer no concrete evidence for any of these irresponsible claims, nor does any exist.

was "in charge of [an] operation" to export "45,000 Ethiopian women per month from the Amhara and Oromo regions of Ethiopia to Saudi Arabia" and place those women, "most of whom are teenage girls, . . . in slave-like conditions, often subjected to beatings and other kinds of abuses." D1 ¶ 19. The article also stated that Respondent was "pillaging and plundering Ethiopia, and selling our women as slaves to Arab countries[.]" D1 ¶ 20. Immediately after learning of the publication, Respondent advised Petitioners that the statements were untrue and demanded that they be removed from the website. Petitioner Kifle not only refused to do so, but further dared Respondent to sue him, and thereafter, republished the article. Given the very serious nature of the charges and Kifle's refusal to remove the defamatory material, Respondent filed this defamation action against both Petitioners, resulting in a verdict below after a damages hearing in which Kifle and Respondent both testified, and a subsequent finding by the court that the relevant statements were false.

Since that time, and continuing through this appeal, Petitioner Kifle has portrayed himself as a persecuted journalist who is somehow striking a blow at the Ethiopian regime. *See, e.g.*, Pet. 5-6. But the conduct implicated here is not "political journalism" or protected free speech. To the contrary, it is garden-variety defamation, which is severely damaging to the reputation of Respondent, a private businessman.

I. Procedural History in the District Court

Respondent filed this defamation action against Petitioners in August 2012. D1. The Complaint alleged that Petitioner Kifle is a citizen of Ethiopia granted permanent legal residence status in the U.S. and domiciled in Georgia, and that Petitioner ER is a Florida corporation with its principal place of business in Georgia. While Kifle mentioned a possible "diversity" issue in a submission styled as a "Motion to Set Aside Default Judgment and Motion of an Injunction Against [Respondent's counsel]" (D11), Kifle only first moved to dismiss for lack of subject matter jurisdiction in May 2015 – almost three years after suit had been filed and almost five months after the district court's entry of its judgment for damages in favor of Respondent.

Throughout the proceedings in the district court, Petitioner Kifle engaged in dilatory tactics and repeatedly refused to comply with the district court's orders. After Petitioners failed to respond to the Complaint, Respondent twice filed motions for default judgment. D8, D9, D10, D23. Those motions were denied, but Kifle was ordered to answer the Complaint. D21. Neither Petitioner filed a proper paragraph-by-paragraph answer to the Complaint, as required by the Federal Rules of Civil Procedure. Indeed, Petitioner ER never filed a response at all. Similarly, Kifle failed to file preliminary disclosures in accordance with the Court's Scheduling Order. D68 at 16-17. Kifle's flouting of the court's orders continued through discovery, when he refused to produce documents or properly answer interrogatories (D43 at 5), despite the district court's

entry of a protective order to ensure the confidentiality of the information he was ordered to provide.[2] D43, D48. Kifle's pattern of willful non-compliance led to the imposition of monetary sanctions and, ultimately, entry of a default judgment against him on December 19, 2014. D70.

Petitioners imply that entry of injunctive relief and money damages followed directly from entry of the default judgment. *See* Pet. 8-9. They fail to mention that the district court held a bench trial to assess damages, and Petitioner Kifle fully participated in that proceeding, even testifying as a witness. Respondent Ahmed appeared and provided unrebutted testimony that he is in no way involved in any alleged human trafficking operation. Respondent also submitted expert testimony demonstrating how Petitioners' defamation had harmed his reputation. Following trial, the district court awarded compensatory and punitive damages, costs and attorneys' fees to Respondent against Petitioners, who were found jointly and severally

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[2] Petitioners absurdly claim that the district court "defeated the entire purpose of the protective order" by allowing Respondent to view confidential case documents Pet. 7-8. The protective order allowed Kifle (then *pro se*) to view confidential documents without extending that same privilege to Respondent; therefore, Respondent asked the court for a clarification. D46. The district court subsequently included Respondent in the list of persons (along with counsel) permitted to view confidential documents. D48. All authorized persons were subject to the condition that documents "shall be maintained as confidential and used only for purposes of this lawsuit. Any document produced herein shall not be disclosed to any persons except [those enumerated in the protective order]." D48 at 2.

liable in the amount of $428,910.00. D92 at 21. Separately, after the district court heard argument on the issue from Petitioners, a default judgment was entered against Petitioner ER on February 6, 2015. *Id.* Petitioner Kifle was further ordered to remove the defamatory material from the website and publish a retraction. *Id.*

Although he removed the defamatory article, Kifle published the retraction in the middle of a separate story that disavowed that retraction and disparaged the district court. In the words of the district court, Kifle's actions made "clear that he [was] not retracting anything." D116 at 5. Accordingly, the district court held Kifle in contempt and awarded Respondent attorneys' fees. *Id.* Kifle has never paid any of the court-ordered sanctions, but he did remove the article and later published a full retraction. D123.

II. Petitioners' Initial Appeals to the Eleventh Circuit and Their Motion in the District Court to Vacate the Judgment

Petitioners filed notices of appeal on February 27, 2015 (D105) and June 26, 2015 (D140). Petitioners also filed with the district court a motion to vacate the judgment and dismiss for lack of subject matter jurisdiction. D139. Respondent opposed the motion, and requested that the court sever Petitioner Kifle from the case to preserve diversity. D145. On July 22, 2015, while the motion to vacate was still being briefed below, the court of appeals requested briefing from the parties as to whether complete diversity existed. After briefing was complete, the court of

appeals remanded to the district court on August 25, 2015, with instructions that, if the district court determined that complete diversity did not exist, it should grant Petitioners' motion to dismiss, vacate the judgment, and dismiss the case for lack of subject matter jurisdiction. Aug. 25, 2015 Letter from the Acting Clerk, 11th Cir. Case No. 15-10975. While the district court considered Petitioners' motion to vacate, on August 31, 2015, Respondent filed a separate motion to sever Petitioner Kifle from the case to preserve diversity should the court find that Kifle was not a diverse party.

On November 18, 2015, the district court granted Petitioners' motion to dismiss, holding that, because Petitioner Kifle and Respondent are both aliens, they are not diverse for purposes of 28 U.S.C. § 1332. D160. While acknowledging Respondent's motion to sever Kifle, the court declined to provide a ruling on that motion, indicating that "this case was remanded only 'for the limited purpose of adjudicating [the] pending motion to vacate and dismiss for lack of subject-matter jurisdiction.'" D160 at 4. Accordingly, the court did not "reach the question of whether Kifle could properly be dismissed from the case in order to preserve subject-matter jurisdiction." *Id.*

Respondent appealed the district court's order dismissing the case. On January 11, 2016, Respondent filed a motion with the Eleventh Circuit to sever Petitioner Kifle to preserve diversity jurisdiction, or in the alternative, to remand to the district court to decide the still-pending motion to sever. On September 1, 2016, the court of appeals granted that motion, "for the limited purpose of

adjudicating Ahmed's [motion] and fully resolving the question of the court's subject-matter jurisdiction over this action." Sept. 1, 2016 Order, 11th Cir. Case No. 15-15604.

III. The District Court Severs Petitioner Kifle and Reinstates the Judgment

On remand, the district court granted Respondent's motion on October 5, 2016 and severed Petitioner Kifle, thus preserving diversity jurisdiction and reinstating the judgment as to Petitioner ER. Pet. App. 7a-19a. In so holding, the district court found that Kifle was neither a required party nor an indispensable party under Fed. R. Civ. P. 19. Pet. App. 19a. As to Rule 19(a), the Court noted that because both Petitioners had defaulted, they were deemed to have admitted the well-pleaded allegations in the complaint regarding Petitioner ER's publication of the false and defamatory statements. Pet. App. 11a-12a. Nevertheless, the district court proceeded to independently assess the evidence regarding Petitioner ER's role in the publication, including but not limited to an affidavit submitted by Petitioner Kifle and pages captured from the Ethiopian Review website and submitted into evidence by Respondent. Pet. App. 12a-14a. The district court indicated that, despite Kifle's claims that Petitioner ER had nothing to do with the website, "the website tells a different story" in that it solicited donations to be sent to Petitioner ER. Pet. App. 13a. The district court also noted that if Petitioner ER had no role in the publication of the defamatory article, it could have so stated; however, at the time the article was removed and the

retraction was published, there was no statement from either Petitioner that ER had nothing to do with the website. This further demonstrated that complete relief could be accorded to Respondent without Petitioner Kifle's presence in the litigation, and that Kifle was not a required party under Rule 19(a)(1)(A). Pet. App. 14a-15a. As for Rule 19(a)(1)(B), the district court held that Kifle was not required because he had no continuing interest in the litigation, and the court rejected Kifle's theory that he should remain a party to defend against a possible attempt by Respondent to pierce the corporate veil and seek damages from Kifle for Petitioner ER's conduct. Pet. App. 15a-16a.

The district court further held that the "equity and good conscience" factors under Rule 19(b) weighed in favor of the action proceeding without Petitioner Kifle. Pet. App. 16a-17a. Specifically, the Court noted that Petitioner ER would not be held responsible for Kifle's conduct because the award could be adjusted "so that it only reflects Defendant Ethiopian Review's own liability." Pet App. 17a. The district court also took note of this Court's ruling in *Newman-Green* that when there is joint and several liability, it "cannot be argued" that a severed defendant is indispensable. Pet. App. 17a. The district court found that a judgment in Kifle's absence would be adequate, and that dismissing the suit would leave Respondent without a remedy. Pet. App. 17a-18a. Finally, the district court rejected any "pragmatic considerations" offered by Petitioners, including that any tactical advantage was gained by Kifle's presence, or that dismissal of Kifle would somehow "reignite the entire lawsuit." Pet. App. 18a.

Consequently, the district court dismissed Kifle from the suit and reinstated the judgment as to ER. Pet. App. 19a.

IV. Petitioners Appeal Kifle's Dismissal

Petitioners appealed the district court's dismissal of Petitioner Kifle on November 4, 2016. D180. The court of appeals heard oral argument on March 9, 2018 and issued its ruling on March 19, 2018, in which it affirmed *per curiam* the district court's determination that Kifle was neither required nor indispensable under Rule 19. Applying an abuse of discretion standard as to both Rule 19(a) and Rule 19(b), the court of appeals held that the district court properly found that (1) by defaulting, Petitioners admitted the well-pled allegations in the complaint (Pet. App. 4a); (2) based on the evidentiary record, Petitioner ER was co-responsible with Kifle for the posting of the defamatory content (Pet. App. 4a-5a); (3) "[b]ecause defendant ER was the corporate vehicle through which the website was funded and operated . . . Kifle was not a required or indispensable party and thus could be severed under Rule 21" (Pet. App. 5a); (4) complete relief could be afforded to Ahmed in the form of money damages because ER was jointly and severely liable (*id.*); and (5) there was no showing of prejudice to either Kifle or ER resulting from Kifle's severance (*id.*). Finally, relying on *Newman-Green*, the court of appeals held that because Petitioners were jointly and severally liable, "it cannot be argued that [Kifle] was indispensable to the suit." Pet. App. 6a (quoting *Newman-Green*, 490 U.S. at 838).

The court of appeals denied Petitioners' Petition for Panel Rehearing and Rehearing en Banc on May 25, 2018 (Pet. App. 20a-23a), and noted that no Judge in regular active service had requested that the Court be polled on the issue. Pet. App. 23a.

V. Additional Proceedings in the District Court

While the appeal was pending, on January 13, 2017, Petitioner ER filed a motion to vacate the default judgment on a variety of grounds. D185. The district court granted that motion in part on July 7, 2017, but only to adjust the damages award to reflect conduct for which Petitioner ER was responsible. Accordingly, the Court held that the punitive damages award of $50,000 would be reduced by half, and it directed Respondent to file an affidavit providing an account of attorneys' fees incurred as a result of Petitioner ER's conduct. D195. Respondent provided the affidavit to the district court on July 27, 2018. D208. On August 17, 2018, the Court amended the judgment and ruled that Petitioner ER was liable for the amount of $145,210.00 in compensatory damages, $25,000 in punitive damages, and $105,752 in reasonable attorneys' fees. D211.

VI. Misstatements of Law and Fact in the Petition

As discussed below, the Petition is riddled with erroneous characterizations of both the applicable law and the evidentiary record.

A. Misstatements of Law

First, in an attempt to exaggerate the level of scrutiny that must be given to a district court's power to dismiss a non-diverse party under Rules 19 and 21, Petitioners repeatedly rely on a snippet of language in *Newman-Green* to suggest that these powers should be "exercised sparingly." *See* Pet. at i, 3, 16, 26. But in *Newman-Green*, the Court acknowledged that "it is well settled that Rule 21 invests *district courts* with authority to allow a dispensable nondiverse party to be dropped at any time, even after judgment has been rendered." 490 U.S. at 832 (emphasis added). The question in *Newman-Green*, therefore, was whether "the policies informing Rule 21 may apply equally to *the courts of appeals*" and thus "whether a court of appeals may do what a district court can do and dismiss a dispensable nondiverse party itself, or whether a court of appeals must remand the case to the district court, leaving it to the district court's discretion to dismiss the party?" *Id.* at 832-33 (emphasis added). As to that question, the Court held that "the courts of appeals have the authority to dismiss a dispensable nondiverse party," but emphasized "that such authority should be exercised sparingly." *Id.* at 837. At no point did the Court hold that district courts had to exercise their Rule 21 or Rule 19 powers "sparingly." Thus, the "awesome power" described by Justice Kennedy in his dissent, *see* Pet. App. 16 (quoting *Newman-Green*, 490 U.S. at 839 (Kennedy, J., dissenting)), is not at issue here, because the court of appeals rendered no independent decision under

Rule 19; it simply affirmed the ruling of the district court.[3]

Second, Petitioners claim that the district court's Rule 19 determination was in error because joint and several liability has been "abolished" in Georgia. Pet. 24. As an initial matter, the issue is irrelevant, as Petitioner never raised it in the district court or the court of appeals, and therefore waived it. *See Sprietsma v. Mercury Marine, a Div. of Brunswick Corp.*, 537 U.S. 51, 56 n.4 (2002) (holding that because argument that federal maritime law governed the case "was not raised below, it is waived."); *Bath Iron Works Corp. v. Dir., Office of Workers' Comp. Programs, U.S. Dep't of Labor*, 506 U.S. 153, 162, n.12 (1993) ("Petitioners did not raise the issue below and the Court of Appeals considered it waived. We do as well.") (internal citations omitted).

In any event, well after passage of Georgia's Tort Reform Act of 2005, in *Lyons v. O'Quinn*, 607 F. App'x 931 (11th Cir. 2015), the Eleventh Circuit reversed a finding of indispensability under Rule 19 by applying Georgia joint and severability law, noting this Court's "binding, bright-line rule" that "where joint tortfeasors may be jointly and severally liable, neither tortfeasor is an indispensable party." 607 F. App'x at 934 (citing *Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 7 (1990)). Further, post-2005 examples of Georgia applying joint and several liability are legion. *See, e.g.*, *Chaney v. Harrison &*

[3] As discussed below, *see infra* at 23-24, Petitioners also err as to the First Circuit's standard of review for Rule 19(a) determinations.

Lynam, LLC, 708 S.E.2d 672, 681–82 (Ga. Ct. App. 2011) ("[I]t is well settled that it is not required that all joint tortfeasors be joined together in an action against one, their liability being joint and several.") (citation and internal quotation marks omitted); *Brewer v. Insight Tech., Inc.*, 689 S.E.2d 330, 337 (Ga. Ct. App. 2009) ("Where parties are joint tortfeasors, they are jointly and severally liable for the full amount of the plaintiff's damages."); *Axcan Scandipharm, Inc. v. Schwan's Home Serv., Inc.*, 681 S.E.2d 631, 634 (Ga. Ct. App. 2009) (holding that it "has always been true that where concert of action appears, a joint tortfeasor relation is presented and all joint tortfeasors are jointly and severally liable for the full amount of plaintiff's damage.").

B. Misstatements of Fact

Petitioners omit or misrepresent key portions of the evidentiary record and the proceedings below. First, the Petition states that the default judgment was the result of "Kifle's refusal to turn over the identities of his sources to Ahmed" (Pet. 8), thus conveying the impression that the judgment resulted from persecution of a journalist. In its ruling severing Kifle from the litigation, the district court addressed these same concerns and dismissed them as baseless:

> Defendants grossly mischaracterize the default judgments in this case as being "entered as a result of a journalist's attempt to protect his sources from harassment." . . . Default was entered against Defendant Ethiopian Review

> because it never filed any kind of responsive pleading. The Magistrate Judge recommended entering default against Defendant Kifle because he willfully refused to comply with discovery orders, in spite of the protective order entered to ensure the confidentiality of any information he provided.

Pet. App. 18a (internal citations to the record omitted).

Second, the district court's Rule 19 ruling did not simply rely on "the bare, unsupported allegations of Ahmed's Complaint – allegedly deemed admitted through Petitioners' default." Pet. 9. As discussed above, among other things, the district court made a determination, based on the evidentiary record, that Petitioner ER was the same entity that operated the website and could provide relief to Respondent if Petitioner Kifle were to be dismissed.[4] *See supra* at 8-9.

Third, as discussed above (*supra* at 5), Petitioners attempt to portray the final judgment below as solely resulting from default judgments against Petitioners. Pet. 8-9. Petitioners

[4] The district court reaffirmed its ruling when it addressed Petitioners' motion to vacate the judgment. *See* D195 at 5 (noting that ER "admits that the Court has already rejected its argument that it has no control over the www.EthiopianReview.com website . . . The principle piece of evidence relied on by the Court was the fact that the website itself says donations to support the website should be sent to [ER]."

conveniently omit the fact that the district court held a bench trial to assess damages, that Petitioner Kifle fully participated in that proceeding, and that both fact and expert testimony were presented to demonstrate that the defamatory statements were false and harmed Respondent's reputation.

REASONS FOR DENYING THE PETITION

I. This Case Does Not Present a Matter of Importance for the Court's Review.

The Petition should be denied because this case does not present a matter of importance requiring the Court's intervention. Petitioners have made little attempt to demonstrate that the issue of whether a party is required and indispensable under Rule 19 is of any great prominence or generates any significant problems within the federal courts. *See* S. Ct. Rule 10. Petitioners' argument largely rests on a notion that Rule 19 authority "should be exercised sparingly[,]" Pet. 16 (quoting *Newman-Green*, 490 U.S. at 837), but as discussed above, this is a distortion of the Court's holding in *Newman-Green*, and there is otherwise no foundation for this argument. *See supra* at 12-13.

Rule 19's standard of review is not magically transformed into a matter of importance, as Petitioners contend, simply because federal jurisdiction is implicated in some way. *See* Pet. 16-17. As Petitioners admit, the dismissal of a diversity-destroying party is a recognized exception to the time-of-filing rule, which otherwise requires that diversity jurisdiction be established at the outset of a case. *See* Pet. 2-3. It is beyond dispute that federal

courts have the power to dismiss non-diverse defendants to preserve subject matter jurisdiction. *Newman-Green*, 490 U.S. at 827, 832. Given this deeply-rooted principle, there is no need to for the Court to intervene to provide "clarity and uniformity on the rules bearing on jurisdiction." Pet. 16. The litany of decisions offered by Petitioners in support of their argument (Pet. 16-17) are irrelevant; most of them involved improper attempts to expand jurisdiction, and none addressed an established means of preserving jurisdiction previously recognized by this Court, such as *Newman-Green*'s holding that federal courts may dismiss non-diverse parties to preserve diversity jurisdiction. *See Ex Parte McCardle*, 74 U.S. 506, 514 (1868) (no federal jurisdiction after passage of jurisdictional-stripping statute by Congress); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94 (1998) (rejecting theory of "hypothetical jurisdiction"); *Grupo Dataflux v. Atlas Global Grp., L.P.*, 541 U.S. 567, 582 (2004) (post-filing change in domicile was not a legitimate exception to time-of-filing rule and could not cure diversity jurisdiction); *Merrill Lynch, Pierce, Fenner & Smith Inc. v. Manning*, 136 S. Ct. 1562, 1578 (2016) (noting "the importance of clarity in jurisdictional statutes" regarding the scope of a jurisdiction provision in the Securities Exchange Act) (Thomas, J., concurring); *Michigan v. Long*, 463 U.S. 1032, 1037-39 (1983) (addressing the question of the Court's jurisdiction where independent and adequate state law grounds underlay the judgment); *Lapides v. Bd. of Regents of Univ. Sys. of Ga.*, 535 U.S. 613, 621 (2002) (rejecting Georgia's argument that it had not waived federal jurisdiction by removing case to federal court).

Petitioners also argue that "[i]n recent years, this Court has repeatedly granted certiorari to resolve circuit splits regarding the applicable standard of review." Pet. 15a. First, as discussed below (*infra* at 21-29), there is no appreciable "split" on the standard of review in this case. Moreover, the two cases Petitioners cite involved issues of significantly greater and wide-ranging importance than the issue presented here. To wit, *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S. Ct. 960 (2018) addressed the standard of review for determinations under the U.S. Bankruptcy Code as to whether someone qualifies as an "insider" of a debtor, and thus necessarily implicated the need for uniform application of bankruptcy law. 138 S. Ct. at 963. The Court also addressed how standards of review for mixed questions of law and fact are applied *generally*. *Id.* at 967. No such wide-ranging federal statutory scheme or legal principle is at issue here. The circumstances in *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017), are also readily distinguishable. There, the issue was the standard of review for a district court's decision to enforce or quash a subpoena issued by the Equal Employment Opportunity Commission to obtain evidence that was relevant to a pending investigation of gender discrimination. 137 S. Ct. at 1164. As the petitioner in *McLane* noted, the appropriate standard of review for this issue was "critical to the proper resolution of tens of thousands of charges the EEOC processes every year." Petition for Writ of Certiorari, *McLane Co. v. EEOC* (No. 15-1248), at 29. Again, Petitioners in this case do not point to any comparable wide-ranging impact. Moreover, the decision of the Ninth Circuit in *McLane* stood "alone" against "[a]lmost

every Court of Appeals[,]" which had all reviewed the issue for abuse of discretion. 137 S. Ct. at 1167. In contrast, the Eleventh Circuit's decision here is in harmony with the overwhelming majority of Circuits. *See infra* at 21-29.

II. This Case Is Not a Proper Vehicle to Address the Question Presented.

Nor is this case is an "ideal" or "unusually clean" vehicle for addressing the standard of review under Rule 19(a) and 19(b).[5] Pet. 16, 18. Importantly, Petitioners' underlying argument is heavily based on a theory that joint and several liability was not permitted under Georgia law. Pet. App. 24-25. Respondent disputes the merits of this argument (*see supra* at 13-14), but in any event, the issue is irrelevant, as Petitioner never raised it in the district court or the court of appeals, and therefore waived it.

Further, Petitioners wrongly assert that "the only judgments in this case are default judgments" and that "there are no rulings on the merits[.]" Pet. App. 18. This is a distortion of the record. The district court awarded Ahmed monetary and injunctive relief only after a bench trial was held on the issue of damages, and Petitioner Kifle fully participated in that bench trial. Pet. App. 3a. The implication that

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[5] Petitioners cling to Judge Wilson's comment at oral argument in the court of appeals suggesting that the standard of review "could be dispositive." Pet. 17. But as Petitioners admit, Judge Wilson made clear that he was "speaking for myself[.]" Pet. 18. Moreover, Petitioners raised the standard of review in their Petition for Panel Rehearing and Rehearing en Banc (at 4), and the panel denied that petition. Pet. App. 20a-21a.

liability is purely based on the default judgments is simply false.

Indeed, contrary to Petitioners' argument, the district court's Rule 19 determination was deeply rooted in the evidentiary record, and is thus fact-bound. In finding that Petitioner ER was the same entity that operated the website (and thus could be held jointly and severally liable), the district court considered evidence submitted by both sides, including but not limited to (1) Petitioner Kifle's affidavit, (2) pages captured from the Ethiopian Review website, (3) the factual circumstances surrounding the posting of a court-ordered retraction, and (4) financial records submitted by Kifle purportedly showing that he had paid web-hosting fees. Pet. App. 12a-16a. Notably, the district court made a credibility determination regarding Kifle's affidavit, indicating that it was "contradicted by the record" and relied on a "bald contention" that ER did not control the website. Pet. App. 12a-13a. The court of appeals referred to much of this evidence in its affirmance of the district court's holding that "ER was co-responsible with Kifle for the posting of the defamatory content in question." Pet. App. 4a-5a. Any consideration as to whether the applicable standard of review was dispositive to the outcome would have to engage with this evidence and the findings drawn from it.

Finally, as discussed further below (*infra* at 29-35), even were a different standard of review applied, it would not be dispositive to the outcome, and thus would not afford Petitioners relief. In short, the Petition is simply not an appropriate vehicle for

"resolution" of the standard of review for Rule 19(a) or 19(b).

III. There Is No "Circuit Split" Requiring Intervention by This Court.

Petitioners exaggerate a purported "circuit split" and claim that "[t]he Courts of Appeals are badly fractured" regarding the standard of review for Rule 19 determinations. Pet. 11. By conflating the typically separate standards of review employed for Rule 19(a) and 19(b), Petitioners paint a picture of "confusion" arising from this "split." This approach fails because, as this Court has previously held, the Rule 19(a) and Rule 19(b) analyses are conducted separately. *See Temple v. Synthes Corp., Ltd.*, 498 U.S. 5, 8 (1990) ("Here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied."). Thus, Rule 19(a)'s and 19(b)'s standards of review should be independently analyzed. Once such analysis is performed, it is clear that the "convoluted" landscape that Petitioners describe simply does not exist.[6] To

[6] Petitioners also describe the alleged conflict between the Circuits as "longstanding." Pet. 11-12. But one of the cases on which Petitioners rely, *Walsh v. Centeio*, 692 F.2d 1239, 1241 (9th Cir. 1982), is nearly 40 years old and predates the significant development in the law over that period. As for *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 250 n.7 (4th Cir. 2000), the court's dicta that "[t]he circuits vary greatly" is irrelevant, because the court later held in *Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005) that Rule 19(a) determinations are reviewed for abuse of discretion. Finally, *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 126 n.3 (2d Cir. 2013) only addresses the jurisprudence of the Second, Fourth, and Sixth Circuits.

the contrary, there is overwhelming consensus, if not near unanimity, among the courts of appeals as to the standards of review at issue. And regardless of the legal landscape, any disagreement, if any, among the Circuits has no bearing on the merits of this case.

A. The Overwhelming Majority of Circuits Have Held that "Abuse of Discretion" Is the Proper Standard of Review under Rule 19(a).

First, there is no "confusion" or "intractable division" as to the applicable standard of review under Rule 19(a) *in general*, as the overwhelming majority of Circuits that have ruled on the issue are in accord. Eight courts of appeals (the First, Second, Fourth, Fifth, Sixth, Ninth, Tenth, and Eleventh Circuits) have squarely held that review of a Rule 19(a) determination is subject to an abuse of discretion standard – the same standard applied by the Eleventh Circuit below.[7] *See Jiménez v. Rodríguez-Pagán*, 597 F.3d 18, 24 (1st Cir. 2010) ("We review a district court's Rule 19 determinations for abuse of discretion.") (citation omitted); *MasterCard Int'l Inc. v. Visa Int'l Serv. Ass'n, Inc.*, 471 F.3d 377, 385 (2d Cir. 2006) ("We review the district court's failure to join a party under Rule 19 only for abuse of discretion."); *Am. Gen. Life & Acc. Ins. Co. v. Wood*, 429 F.3d 83, 92 (4th Cir. 2005) (Rule 19(a) determinations reviewed for abuse of

[7] As Petitioners concede, the Seventh Circuit has "expressly declin[ed] to adopt an ultimate standard of review for Rule 19 determinations." Pet. 15 (citing *In re Veluchamy*, 879 F.3d 808, 819 (7th Cir. 2018) and *Askew v. Sheriff of Cook Cty., Ill.*, 568 F.3d 632, 634 (7th Cir. 2009)).

discretion); *Fed. Ins. Co. v. Singing River Health Sys.*, 850 F.3d 187, 194 (5th Cir. 2017) (Rule 19(a) decision reviewed for abuse of discretion);[8] *U.S. v. City of Detroit*, 712 F.3d 925, 948 (6th Cir. 2013) ("Ordinarily, a district court ruling on whether [a] party is necessary to an action under Rule 19(a) is reviewed for abuse of discretion") (citation omitted); *Walsh v. Centeio*, 692 F.2d 1239, 1243 n.4 (9th Cir. 1982) ("the trial court's determination under Rule 19(a) . . . should not be reversed absent abuse of discretion.");[9] *N. Arapaho Tribe v. Harnsberger*, 697 F.3d 1272, 1277 (10th Cir. 2012) ("A district court's decision that a party is a required party under Rule 19(a) . . . is reviewed for an abuse of discretion."); *Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 847 (11th Cir. 1999) (Rule 19 determinations reviewed for abuse of discretion).[10]

Petitioners argue that the First, Second, Third, Eighth, and Tenth Circuits differ from the remainder of Circuits in that they favor a *de novo* standard of review for *legal* questions underpinning Rule 19(a) determinations. Pet. 13-14. But the First Circuit's ruling in *Bacardi Int'l Ltd. v. Suarez & Co.*, 719 F.3d 1 (2013), cited by Petitioners, says no such thing; instead, it plainly states that "[t]he court's Rule 19 determination is reviewed for abuse of discretion"

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[8] *See also HS Resources, Inc. v. Wingate*, 327 F.3d 432, 438 (5th Cir. 2003) (holding that Rule 19 decisions are generally subject to abuse of discretion standard).

[9] *See also Alto v. Black*, 738 F.3d 1111, 1125 (9th Cir. 2013) (reviewing denial of Rule 19 motion for abuse of discretion).

[10] Petitioners do not address the law of the Fourth, Fifth, or Ninth Circuits.

and "[a]n error of law is an abuse of discretion." *Bacardi*, 719 F.3d at 8-9, *cert. denied*, 571 U.S. 1024 (2013); *see also Maldonado-Vinas v. Nat'l W. Life Ins. Co.*, 862 F.3d 118, 121 (1st Cir. 2017) ("We review both Rule 19(a) and Rule 19(b) determinations under an abuse of discretion standard."). Additionally, the Second Circuit equates an abuse of discretion under Rule 19 with an error of law. *See MasterCard Int'l Inc.*, 471 F.3d at 385 ("A district court abuses or exceeds the discretion accorded to it [under Rule 19] when . . . its decision rests on an error of law (such as application of the wrong legal principle)[.]") (citation and internal quotation marks omitted).

While the Third, Eighth, and Tenth Circuits favor some form of *de novo* (referred to as "plenary" by the Third Circuit) review under Rule 19(a), those courts have made clear that such review is limited to questions of law – not other aspects of the Rule 19(a) determination. *See Huber v. Taylor*, 532 F.3d 237, 247 (3d Cir. 2008) ("To the extent a district court's Rule 19(a) determination is premised on a conclusion of law, this court's review is plenary"); *Gwartz v. Jefferson Mem'l Hosp. Ass'n*, 23 F.3d 1426, 1428 (8th Cir. 1994) ("We review de novo any conclusions of law informing the district court's Rule 19(a) determination."); *N. Arapaho Tribe*, 697 F.3d at 1277 ("Legal conclusions underlying the district court's Rule 19 determinations are reviewed de novo.").

Moreover, to the extent that these Circuits adopt *de novo* review for legal questions, that is unremarkable, as federal appellate courts "traditionally" review questions of law *de novo* in any event. *Highmark Inc. v. Allcare Health Mgmt. Sys.,*

Inc., 572 U.S. 559, 563 (2014). In this case, the only "questions of law" addressed by the district court in its Rule 19(a) analysis – namely, whether a defendant is deemed to admit well-pled allegations when it defaults (*see* Pet. App. 11a-12a), and whether a party can be considered "required" under Rule 19(a) when it is jointly and severally liable with a remaining party (*see* Pet. App. 15a) – *were* reviewed by the court of appeals. *See* Pet. App. 4a ("[W]e conclude that the district court correctly noted that by defaulting both ER and Kifle are deemed to have admitted the well-pled allegations in the complaint." (citing *Giovanno v. Fabec*, 804 F.3d 1361, 1366 (11th Cir. 2015)); Pet. App. 5a ("[C]omplete relief in the form of money damages can be afforded to Ahmed from ER, which was found jointly and severely liable for defamation in the district court.").

Petitioners' attempt to distinguish the D.C. Circuit's standard of review also fails. As Petitioners readily admit, while "the D.C. Circuit carves out Rule 19(a)(1)(B)(ii) for *de novo* review[,]" it "does not appear to have explicitly articulated any standard of review to other portions of Rule 19(a)." Pet. 13. In other words, the only section of Rule 19(a) for which there is any appreciable "split" (if at all) is 19(a)(1)(B)(ii), which evaluates whether a party may claim an "interest" in the litigation that would leave it "subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations because of the interest." Fed. R. Civ. P. 19(a)(1)(B)(ii). Importantly, the district court's analysis of whether Petitioner Kifle satisfied Rule 19(a)(1)(B)'s "interest" requirement focused on the alternative factor set forth under Rule 19(a)(1)(B)(i),

which assesses whether disposing of the action in the absence of a particular party would "as a practical matter impair or impede the person's ability to protect the interest[.]" The analysis was not rooted in Rule 19(a)(1)(B)(ii) at all. *See* Pet. App. 15a-16a. Nor did the court of appeals base its decision on the Rule 19(a)(1)(B)(ii) factors either. *See* Pet. App. 5a. Simply put, applying the D.C. Circuit's outlier standard of review under 19(a)(1)(B)(ii) would have had no impact on the result. Accordingly, any "split" among the courts of appeals as to Rule 19(a)'s standard of review – to the extent such a split even exists – would not be dispositive of the outcome of this litigation, and this Court's intervention to clarify that standard is unnecessary.

B. Ten of Eleven Circuits Have Held that "Abuse of Discretion" Is the Proper Standard of Review under Rule 19(b).

Petitioners' representation of the "split" as to Rule 19(b) is similarly flawed. As an initial matter, once a party is deemed to not be required under Rule 19(a), there is no need to even consider whether that party is indispensable under Rule 19(b). *See Temple*, 498 U.S. at 8 ("Here, no inquiry under Rule 19(b) is necessary, because the threshold requirements of Rule 19(a) have not been satisfied."). To the extent any "split" exists as to Rule 19(b), it need not be addressed here.

In any event, the consensus as to the standard of review for Rule 19(b) is near unanimous. Ten of the eleven Circuits that have ruled on the issue agree

that an abuse of discretion standard applies.[11] *See Maldonado-Vinas*, 862 F.3d at 121 (First Circuit reviews "Rule 19(b) determinations under an abuse of discretion standard."); *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 132 (2d Cir. 2013) ("Because of the flexible nature of Rule 19(b) analysis, we review a district court's decision under that rule for abuse of discretion.") (citation and internal quotation marks omitted), *cert. denied*, 135 S. Ct. 42 (2014); *Huber*, 532 F.3d at 247 (Third Circuit "reviews for abuse of discretion a district court's Rule 19(b) determination that a party is indispensable and that dismissal is required because the party's joinder would destroy subject matter jurisdiction."); *Am. Gen. Life*, 429 F.3d at 92 (Fourth Circuit subjects Rule 19(b) determination to abuse of discretion); *HS Resources,* 327 F.3d at 438 (Fifth Circuit reviews Rule 19 decision under an abuse-of-discretion standard.); *Two Shields v. Wilkinson*, 790 F.3d 791, 797–98 (8th Cir. 2015) ("[W]e review the district court's Rule 19(b) decision to dismiss for failure to join an indispensable party under a deferential abuse of discretion standard.") (citation omitted), *cert. denied*, 136 S. Ct. 695 (2015); *Alto*, 738 F.3d at 1125 (Ninth Circuit "review[s] the district court's denial of the . . . Rule 19 motion for abuse of discretion[.]"); *N. Arapaho Tribe*, 697 F.3d at 1277 (Tenth Circuit reviews indispensability under Rule 19(b) for abuse of discretion); *Laker Airways*, 182 F.3d at 847 (Eleventh Circuit subjects Rule 19 determinations subject to abuse of discretion); *Kickapoo Tribe of Indians of Kickapoo Reservation in Kansas v. Babbitt*, 43 F.3d

[11] Once again, Petitioners do not address the law of the Fourth, Fifth, or Ninth Circuits.

1491, 1495 (D.C. Cir. 1995) ("We review the district court's determination that Kansas was not an indispensable party under Rule 19(b) for abuse of discretion.").[12]

To be certain, the Sixth Circuit applies a "*de novo*" standard to decisions "on whether a party is indispensable under 19(b)[.]" *U.S. v. City of Detroit*, 712 F.3d 925, 948 (2013) (citing *Keweenaw Bay Indian Cmty. v. Michigan*, 11 F.3d 1341, 1346 (6th Cir.1993)). But that distinction is of no import here, because the court of appeals made clear that its reasoning hinged on whether Rule 19(a) had been satisfied. *See* Pet. App. 5a ("This appeal really turns on Kifle and ER's challenge of the district court's finding that Kifle is not a required party under Fed. R. Civ. P. 19(a)."). Given that decision, there is simply no need to resolve a "split" driven by one outlier jurisdiction as to the standard of review under Rule 19(b).

Nor, for the reasons discussed above (*supra* at 24-25), can Petitioners rely on certain Circuits' adoption of *de novo* review of questions of law underlying Rule 19(b) determinations, as Petitioners also attempt to do with regard to Rule 19(a). *See, e.g., Am. Trucking Ass'n, Inc. v. New York State Thruway Auth.*, 795 F.3d 351, 356 (2d Cir. 2015); *Alto*, 738 F.3d at 1125; *N. Arapaho Tribe v. Harnsberger*, 697 F.3d at 1277; *Nanko Shipping, USA v. Alcoa, Inc.*, 850 F.3d 461, 465 (D.C. Cir. 2017). The only question of law below pertaining to Rule 19(b) was the effect of joint and

[12] As noted above, *see supra* at 22 n.7, the Seventh Circuit has not adopted a standard of review for Rule 19 determinations.

several liability. Relying on this Court's holding in *Newman-Green*, both the district court and the court of appeals rightly held that because Petitioners were jointly and severally liable, "it cannot be argued that [one defendant] was indispensable to the suit." Pet. App. 5a-6a (quoting *Newman-Green*, 490 U.S. at 838; *see also* Pet. App. 17a. In light of *Newman-Green*, this ends the indispensability analysis and thus moots any question that a different standard of review under Rule 19(b) would have affected the outcome.

In short, the dramatic "circuit split" described by Petitioners does not exist, and no intervention is warranted or necessary to "resolve" any minor discrepancies that may exist among the Circuits regarding the standard of review under Rule 19(a) or Rule 19(b).

IV. The District Court's Rule 19 Determination Was Proper under Any Standard of Review.

Finally, this Court's intervention is unnecessary because regardless of the standard of review, the district court's Rule 19(a) and 19(b) determinations were fully supported by the record. Petitioners argue that the ruling below "did not address numerous problems with the District Court's analysis[.]" Pet. 18-19. But none of the purported "problems" constitute grounds for holding that Petitioner Kifle was a required and indispensable party. Indeed, a review of the various issues raised by Petitioners only further reinforces how fact-bound the district court's ruling was.

As an initial matter, to avoid dismissal as a party under Rule 21, Petitioner Kifle had to be deemed both "required" under Rule 19(a) and "indispensable" under Rule 19(b). As this Court held in *Newman-Green*, when all defendants are jointly and severally liable, "it cannot be argued that [the party to be dismissed] was indispensable to the suit." 490 U.S. at 838. The district court relied on the holding in *Newman-Green* in dismissing Kifle (Pet. App. 17a), and the court of appeals affirmed on that basis (Pet. App. 5a-6a). And as discussed above (*supra* at 13), any argument that joint and several liability did not apply was waived. By definition, that ends the analysis, as Kifle cannot be deemed "indispensable" regardless of the other factual circumstances of the case.

Moreover, Petitioners' arguments as to supposed "errors" lack merit. None of these issues would have been decided differently even had a *de novo* standard of review applied. First, Petitioners complain that "the District Court's order faulted Kifle . . . for 'only' mentioning the lack of diversity jurisdiction in his original pleading." Pet. 19 (citing Pet. App. 10a). But it is irrelevant when Petitioner Kifle first raised diversity jurisdiction, as "it is well settled that Rule 21 invests district courts with authority to allow a dispensable nondiverse party to be dropped *at any time*, even after judgment has been rendered." *Newman-Green*, 490 U.S. at 832 (emphasis added). Thus, Petitioners' concerns regarding "the District Court's own independent obligation to confirm its subject-matter jurisdiction" (Pet. 19) are misplaced.

Second, Petitioners attack the district court's holding that the expiration of the statute of limitations weighed in favor of Petitioner Kifle's dismissal under Rule 19(b). Pet. 19 (citing Pet. App. 18a). Petitioners fail to mention the reason for the district court's reliance on the statute of limitations – *i.e.*, "[d]ismissing the suit at this point would leave Plaintiff without an adequate remedy, as the statute of limitations for libel in Georgia is one year." Pet. App. 18a. The lack of an adequate remedy is plainly one of the "equity and good conscience" factors that courts must consider under Rule 19(b). *See* Fed. R. Civ. P. 19(b)(4) ("The factors for the court to consider include: . . . whether the plaintiff would have an adequate remedy if the action were dismissed for nonjoinder."). The Rule does not contemplate counterfactual scenarios such as the one Petitioners offer – *i.e.*, whether "Ahmed could have timely brought a state court action" had he been aware of the alleged jurisdictional defect. Pet. 19.

Third, Petitioners argue that the district court's ruling improperly relied on Petitioners' admissions resulting from the default judgments. Pet. 19-20 (citing Pet. App. 12a-13a). Petitioners argue that those admissions "have no bearing on an inquiry into whether the default judgment itself is void for lack of subject-matter jurisdiction." Pet. 20 (citation omitted). Whether the judgment was "void" for lack of subject-matter jurisdiction at some point was not the issue below; rather, this appeal concerns whether the district court properly dismissed Kifle to *preserve* the judgment.

More importantly, the district court's finding of dispensability was not simply based on the complaint's allegations, as accepted and deemed true by virtue of the default judgments. Rather, the district court *independently* assessed the evidentiary record and found that Petitioner ER had a role in operating the website. *See supra* at 8-9. Consequently, there was no risk that subject matter jurisdiction was improperly conferred through "action by the parties" (*i.e.*, default or some other sanction), which this Court warned against in *Ins. Corp. of Ireland, Ltd. v. Compagnie des Bauxites de Guinee*, 456 U.S. 694, 702 (1982). Diversity jurisdiction was rightly conferred after Petitioner Kifle was dismissed under Rule 19 based on the evidence in the record.

Fourth, Petitioners argue that the district court did not properly account for the equitable relief requested by Respondent in holding that it could accord complete relief among the parties under Rule 19(a)(1)(A) and that the judgment would be adequate in Kifle's absence. Pet. 21. But here, the equitable relief that Respondent sought – removal of the defamatory article and a retraction on the website – had already been performed when the district court rendered its Rule 19 determination. Pet. App. 14a-15a. Thus, there is no need for Kifle to remain in the litigation to provide equitable relief. Petitioners' reliance on Justice Rehnquist's dissent on denial of certiorari in *Carpenters 46 N. Cal. Counties Joint Apprenticeship & Training Comm. v. Eldredge*, 459 U.S. 917, 921 (1982), and the Eleventh Circuit's opinion in *Focus on the Family v. Pinellas Suncoast Transit Auth.*, 344 F.3d 1263, 1280 (11th Cir. 2003), is misplaced, because in both cases, the relief

requested was prospective in nature. Here, the relief is not prospective at all since Respondent Ahmed has already obtained the equitable relief he sought. Pet. App. 14a-15a.

Fifth, the district court did not "ignore[] the pragmatic considerations" under Rule 19 in holding that Respondent could pursue his damages award without Kifle in the litigation. The fact that Petitioners are jointly and severally liable renders Ahmed fully capable of pursuing that award against ER. *See Temple*, 498 U.S. at 7 ("The Advisory Committee Notes to Rule 19(a) explicitly state that 'a tortfeasor with the usual 'joint-and-several' liability is merely a permissive party to an action against another with like liability.'"). Petitioners claim that Respondent will be unable to collect against ER because it "has been dissolved for years and has no assets." Pet. 22. But Respondent is not required to accept the "fact" of ER's penury simply on Petitioners' say-so. No enforcement proceeding has yet been filed, and consequently no discovery in aid of enforcement has been conducted regarding ER's assets. Thus, the specter raised by Petitioners as to "follow-on litigation" involving "piercing the corporate veil" is purely speculative. *See* Pet. 22.

Sixth, Petitioners attempt to conjure up an "interest" under Rule 19(b) by arguing that the district court ignored Kifle's "fundamental interest in protecting his own free expression." Pet. 23. Petitioners imply that the purpose of Respondent's suit is to "silence political speech by journalists like Kifle." Pet. 23. But the First Amendment is not an absolute defense to a cause of action for defamation,

and particularly not in cases involving private individuals such as Respondent. *See, e.g., Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc.*, 425 U.S. 748, 777 (1976) ("[E]ven with respect to expression at the core of the First Amendment, the Constitution does not provide absolute protection for false factual statements that cause private injury."); *Nevada Comm'n on Ethics v. Carrigan*, 564 U.S. 117, 122 (2011) (libel laws "are not thought to violate 'the freedom of speech' to which the First Amendment refers because such laws existed in 1791 and have been in place ever since."). None of the landmark First Amendment rulings cited by Petitioners – *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), *McCutcheon v. FEC*, 572 U.S. 185 (2014), and *De Jonge v. Oregon*, 299 U.S. 353, 365 (1937) – involved an application of Rule 19, and therefore lend no support for Petitioners' theory that "free expression" is a legitimate "interest" to be considered under Rule 19(b). Indeed, Petitioners do not cite a single case in which First Amendment concerns were accepted or even evaluated for purposes of Rule 19(b) analysis. Recognizing such an "interest" would open the floodgates to any number of such interests being considered valid under Rule 19.

Finally, Petitioners claim that the district court's reliance on joint and several liability "was no basis for concluding that Kifle was dispensable" because (1) joint and several liability was purportedly not an available remedy for Ahmed's claims, and (2) Kifle's presence was required due to Ahmed's request for injunctive relief. Pet. 24-25. Both arguments are easily dispensed. Petitioners waived any challenge to joint and several liability (*supra* at 13), and in any

event, it is not the case that Georgia has completely "abolished" joint and several liability, as both Georgia federal and state courts still apply it and hold that jointly and severally liable tortfeasors are not required to be joined as parties, even after passage of the Tort Reform Act of 2005. *See supra* at 13-14.

As for Petitioners' argument that "Kifle's presence was required based on Ahmed's requests for injunctive relief directed to Kifle" (Pet. 25), that is simply a rehash of the flawed argument that complete equitable relief cannot be accorded in the absence of Kifle. *See supra* at 32-33. The equitable relief in question – removal of the defamatory article and publication of a retraction – has already occurred. Thus, it matters not whether the granting of this relief "is now impossible[.]" Pet. 26. Of course, should either Petitioner decide to continue their defamatory campaign of unsupported and scandalous statements concerning Respondent, such a campaign would create a fresh cause of action, and Respondent may take all measures necessary to enforce his rights in the appropriate forum. Until such time, no additional equitable relief is necessary.

CONCLUSION

For the reasons set forth above, the Petition should be denied.

Respectfully submitted,

MARY E. GATELY
Counsel of Record
PAUL D. SCHMITT
DLA PIPER LLP (US)
500 Eighth Street, NW
Washington, DC 20004
(202) 799-4507
mary.gately@dlapiper.com

Counsel for Respondent

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