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 WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

REPLY BRIEF OF PETITIONER

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INTRODUCTION

Ahmed concedes that the standards of review for Rule 19 vary among the circuits. He could scarcely argue otherwise. In contrast to the "abuse of discretion" standard applied by the Eleventh Circuit to the entirety of the Rule 19 inquiry in the decision below, Pet. App. 4a, the Sixth Circuit reviews Rule 19(b) determinations *de novo*, the D.C. Circuit reviews Rule 19(a)(1)(B)(ii) determinations *de novo*, and the Third Circuit reviews Rule 19(a)(1)(B)(i) determinations *de novo*. Ahmed tries to downplay this circuit split as "exaggerated" by confining it to subsections (b) and (a)(1)(B)(ii) of Rule 19. Opp. 21-28. But Ahmed concedes that the decision below rested on at least subsection (a)(1)(B)(i), Opp. 25-26, and he entirely fails to address the irreconcilable split between the Third Circuit's *de novo* standard for that subsection and the Eleventh Circuit's abuse of discretion analysis. The circuit split is thus clear and directly implicated by this case. Only this Court can resolve the persistent disagreement between the circuits regarding the standard of review for Rule 19.

Ahmed's remaining arguments provide no reason for this Court to decline certiorari. Much of his brief maintains that he should prevail regardless of the standard of review because of supposed joint and several liability between Kifle and ERI. But he has no meaningful response to Georgia's tort reform statute, which explicitly forbids joint liability in tort cases like this defamation action. Ahmed also fails to identify any persuasive reason why this case is not a good vehicle to resolve the clear circuit split, and he does not

argue that the issue would benefit from further consideration by the courts of appeals. Simply put, there is no reason for this Court to stay its hand.

ARGUMENT

I. The Circuit Split Regarding the Standard of Review Under Rule 19 Is Clear and Entrenched

The circuit split on the standard of review for a district court's Rule 19 determinations is indisputable and acknowledged. The Eleventh Circuit, as in the decision below, applies a blanket "abuse of discretion" standard to all aspects of Rule 19. Pet. App. 4a; *see also Laker Airways, Inc. v. British Airways, PLC*, 182 F.3d 843, 847 (11th Cir. 1999). That cannot be reconciled with the Sixth Circuit's "*de novo*" standard for Rule 19(b), nor with the Third or D.C. Circuits' plenary review of various Rule 19(a) determinations. *Alpha Painting & Constr. Co. v. Del. River Port Auth. Of Pa. & N.J.*, 853 F.3d 671, 687 & n.21 (3rd Cir. 2017); *Kickapoo Tribe v. Babbitt*, 43 F.3d 1491, 1495 n.4 (D.C. Cir. 1995); *Keweenaw Bay Indian Community v. Michigan*, 11 F.3d 1341, 1346 (6th Cir. 1993).

Indeed, the Second and Fourth Circuits have both explicitly noted the split of circuit court authority on this issue. *Marvel Characters, Inc. v. Kirby*, 726 F.3d 119, 132 n.3 (2d Cir. 2013) ("The standard of review applicable to Rule 19(b) is apparently the subject of a circuit split."); *Nat'l Union Fire Ins. Co. v. Rite Aid of S.C., Inc.*, 210 F.3d 246, 250 n.7 (4th Cir. 2000) ("The circuits vary greatly in the standard of review to apply to a district court's Rule 19 determination."). And

the split has persisted for many years, so it will resolved only through this Court's intervention. Even Ahmed concedes that the courts of appeals are split over the standard of review under at least subsections (a)(1)(B)(ii) and (b) of Rule 19. Opp. 25-28. That alone warrants certiorari. S. Ct. Rule 10(a).

Ahmed attempts to deflect from this undeniable circuit split by suggesting that the circuit split is not germane to the decision below's Rule 19 analysis. Opp. 25-28. His argument relies on at least three key assumptions. First, Ahmed claims that the decision below rested exclusively on Rule 19(a)(1)(B)(i). Opp. 25-26. Second, Ahmed implies that the circuit split is limited to only subsections (a)(1)(B)(ii) and (b). Opp. 25-29. And third, Ahmed contends that because different subsections of Rule 19 are analyzed separately, the circuit split regarding subsections (a)(1)(B)(ii) and (b) does not extend to subsection (a)(1)(B)(i). Opp. 21. But Ahmed's first two assertions are wrong, and his third only amplifies the case for certiorari here.

First—and most importantly—the circuit split regarding the standard of review for Rule 19 includes subsection (a)(1)(A)(i). The Third Circuit "undertake[s] plenary review" of whether a party is necessary under Rule 19(a)(1)(B)(i). *Alpha Painting*, 853 F.3d at 687 & n.21. Indeed, the Third Circuit in *Alpha Painting* applied this plenary review to whether the allegedly necessary party has an interest in the action that would necessitate its joinder, *id.* at 687-88, which is precisely the issue Ahmed contends was the focus of the district court's analysis here. Opp. 25-26. Yet, Ahmed has nothing at all to say about *Alpha*

Painting, which directly contradicts his only argument that the circuit split is inapplicable here. Opp. 21-29.

Second, Ahmed is wrong that the decision below rested solely on subsection (a)(1)(B)(i) of Rule 19. The district court specifically addressed subsection (a)(1)(A), analyzing—albeit incorrectly—whether Ahmed could be afforded complete relief in Kifle's absence. Pet. App. 12a-14a. And its analysis of subsection (a)(1)(B) could not have been limited to just prong (i), as a party is necessary under Rule 19 if either subsection (a)(1)(A)(i) or (ii) is met. Fed. R. Civ. P. 19(a)(1)(A). The district court also performed a Rule 19(b) analysis, although the court of appeals did not reach that issue. Pet. App. 4a-6a, 17a-19a.

Finally, Ahmed's argument that different standards of review might apply to different subsections of Rule 19 only strengthens the case for certiorari here. Opp. 21. After all, the circuits are split on that issue as well, with some circuits applying the same standard of review to all Rule 19's subsections and others distinguishing among them. *E.g.*, *Kickapoo*, 43 F.3d at 1495 & n.4 (different standards of review for subsections (a)(2)(ii) and (b)); *Keweenaw Bay*, 11 F.3d at 1346 (different standards of review for subsections (a) and (b)); *Davis v. United States*, 192 F.3d 951, 957 & n.3 (10th Cir. 1999) (single standard of review for all Rule 19 subsections); Pet. App. 4a (same). Even if Ahmed is correct that different standards of review should apply to Rule 19 on a subsection-by-subsection basis, certiorari is necessary to clarify that issue and ensure uniform application of those standards throughout the circuits.

In sum, Ahmed's attempt to carve this case out from the well-established and entrenched circuit split regarding the standard of review for Rule 19 is unavailing. There can be no doubt that the circuit courts are divided on the applicable standard(s) of review, and this case directly presents the issue for resolution by this Court. Certiorari is warranted here.

II. Respondent's Other Arguments Against Certiorari Lack Merit

Ahmed's other arguments need not detain the Court long. Ahmed suggests that the jurisdiction of the lower federal courts is a matter of little import. Opp. 16-19. But the application of Rule 19 to determine when state law claims may be adjudicated in federal court, rather than state court, directly implicates core principles of federalism. After all, the very existence of federal diversity jurisdiction was a matter of intense debate leading up to the ratification of the Constitution, with anti-federalists arguing that it would "utterly annihilate . . . state courts." 3 THE DEBATES IN THE SEVERAL STATE CONVENTIONS ON THE ADOPTION OF THE FEDERAL CONSTITUTION 527-28 (J. Elliot ed., 1901) (quoting George Mason). A Federal Court's ability to retroactively create jurisdiction over state law matters is thus an "awesome power" as to which the availability of meaningful appellate review is essential. *See Newman-Green, Inc. v. Alfonzo-Larrain*, 490 U.S. 826, 839 (1989) (Kennedy, J., joined by Scalia, J., dissenting).[1]

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[1] Ahmed suggests that the "awesome power" referred to in Justice Kennedy's opinion was only an appellate court's ability to

Ahmed also asserts—without support—that the standard of review for Rule 19 has less "wide-ranging" effects than those in other recent cases where this Court has clarified the standard of appellate review. Opp. 18-19 (discussing *U.S. Bank Nat'l Ass'n ex rel. CWCapital Asset Mgmt. LLC v. Village at Lakeridge, LLC*, 138 S.Ct. 960 (2018) and *McLane Co. v. EEOC*, 137 S. Ct. 1159 (2017)). But Rule 19 applies in all federal civil litigation, often with jurisdictional consequences. *See Republic of Philippines v. Pimentel*, 553 U.S. 851, 872-73 (2008). While the issues at stake in *McLane* and *U.S. Bank* were important in their own right, Rule 19's standard of review certainly has more "wide-ranging" effect than that of the individual statutory regimes at issue in those cases.

On the merits of the Rule 19 issue, Ahmed argues that he should prevail under any standard of review. Opp. 29-35. That would be no argument against certiorari to resolve the circuit split even if he were correct. But it is notable that Ahmed's argument that Kifle was not a required party hinges almost entirely on the assertion that Kifle and ERI are jointly and severally liable. *See id.* Yet there is no colorable argument that Kifle and ERI could be jointly and severally liable under the applicable Georgia law. O.C.G.A. § 51-12-31, 51-12-33(b) ("Damages apportioned by the trier of fact . . . shall not be a joint liability among the persons liable."); *Zaldivar v. Prickett*, 774 S.E.2d 668, 690 (Ga. 2015). Ahmed does not argue that Georgia's

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pass on the issue in the first instance. Opp. 12-13. Not so. Justice Kennedy's opinion makes clear that a "district court['s] . . . power to confer jurisdiction retroactively" raises an equally "grave, brooding question." *Newman-Green*, 490 U.S. at 839-840.

apportionment statute or the Georgia Supreme Court's interpretation of it is consistent with joint and several liability in this case. Instead, his only response are unconvincing citations to cases where joint liability was invoked without considering the effect of Georgia's tort reform statute. *See* Opp. 13-14.

Similarly, Ahmed's only argument that complete relief could be afforded in Kifle's absence under Rule 19(a)(1)(A) is that the district court's sanctions order requiring Kifle to retract the allegedly defamatory article. Opp. 35. But that order was issued without jurisdiction, so it cannot be relied upon to now argue Kifle is not a required party. *See Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 608 (1990); *Earle v. McVeigh*, 91 U.S. 503, 507 (1875) ("[W]ant of jurisdiction makes [a judgment] utterly void and unavailable for any purpose.")

Finally, Ahmed's arguments that this case is a poor vehicle for resolving the circuit split ring hollow. That the district court engaged in fact-finding does not make this a poor vehicle for resolving the standard of review issue, as Ahmed suggests. *See* Opp. 20. Indeed, if only purely legal issues were in play, the standard of review would necessarily be *de novo*, since "[a] district court by definition abuses its discretion when it makes an error of law." *Koon v. United States*, 518 U.S. 81, 100 (1996). Thus, the mix of factual and legal issues this case presents would only help this Court clarify the applicable standard of review. Ahmed's reliance on the district court's trial on damages is also misplaced, as he identifies no reason why those judgments would have any bearing on the Rule 19 analysis. *See* Opp. 19-20.

Finally, Ahmed's suggestion that Petitioners waived the application of Georgia's tort reform statute to the joint and several liability issue is wrong. *See id.* at 19. Ahmed concedes that the district court's Rule 19 analysis was necessary to its exercise of subject matter jurisdiction, *id.* at 1, and arguments against a district court's subject matter-jurisdiction cannot be forfeited or waived. *E.g.*, *Wisconsin Dept. of Corrections v. Schact*, 524 U.S. 381, 389 (1998) ("The presence of the nondiverse party automatically destroys original jurisdiction: No party need assert the defect. No party can waive the defect or consent to jurisdiction."). And in any event, any waiver of that argument is no reason to deny certiorari, as other errors in the district court's analysis also warranted reversal. *See* Pet. 19-23, 25-26. This Court should therefore take up the issue it reserved in *Pimentel*, 553 U.S. at 864, and finally resolve the circuit split regarding the standard of review for Rule 19 determinations.

CONCLUSION

The Court should grant the petition for a writ of certiorari.

Respectfully submitted,

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