No. _____

In The
Supreme Court of the United States

ABOLFAZL HOSSEINZADEH,

Petitioner,

v.

BELLEVUE PARK HOMEOWNERS ASSOCIATION, ET AL.,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

Andrew B. Greenlee, Esq.*
Andrew B. Greenlee, P.A.
Attorney for Petitioner
401 E. 1st Street, Unit 261
Sanford, Florida 32772
407-808-6411
andrew@andrewgreenleelaw.com

* *Counsel of Record for Petitioner*

September 12, 2022

QUESTIONS PRESENTED

The questions presented are:

1. Where a federal district court exercises federal question jurisdiction, does state or federal privilege law apply over pendent state law claims?

2. May a party file a second motion for summary judgment after the denial of its initial summary judgment motion, where no additional facts have come to light?

PARTIES TO THE PROCEEDING AND RULE 29.6 STATEMENT

Petitioner Abofazl Hosseinzadeh was the Plaintiff-Appellant in the court below.

Respondents, Bellevue Park Homeowners Association, Adrian Teague, and Jennifer Gonzalez, Association, were the Defendants-Appellees in the court below.

Petitioner is not a corporation and has no parent or publicly held company owning 10% or more of any corporation's stock.

STATEMENT OF RELATED PROCEEDINGS

- *Hosseinzadeh v. Bellevue Park Homeowners Association, et al.*, Case No. 2:18-cv-01385-JCC, (W.D. Wash.), Final Judgment entered on January 12, 2021.

- *Hosseinzadeh v. Bellevue Park Homeowners Association, et al.*, Case No. 21-35111 (9th Cir.), Memorandum Opinion issued February 22, 2022; Order Denying Motion for Rehearing entered May 13, 2022.

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PETITION FOR WRIT OF CERTIORARI

The Petitioner, Abolfazl Hosseinzadeh, respectfully petitions the Court for a writ of certiorari to review the decision of United States Court of Appeals for the Ninth Circuit rendered below.

DECISIONS BELOW

The Western District of Washington entered summary judgment in favor of Respondents in three unpublished orders. App. 8-15; App. 16-33; App. 34-40.

The Ninth Circuit's unpublished Memorandum Opinion is reproduced in the appendix. App. 1-7.

STATEMENT OF JURISDICTION

The district court exercised federal question jurisdiction over Mr. Hosseinzadeh's claims brought under the Fair Housing Act, 42 U.S.C. § 3601, *et seq*., and the Civil Rights Act, 42 U.S.C. § 1982.

The Ninth Circuit, which had jurisdiction pursuant to 28 U.S.C. § 1291, issued its opinion on February 22, 2022, and denied Mr. Hosseinzadeh's timely motion for rehearing on May 13, 2022. App. 41. This Court extended the time to submit this petition until September 10, 2022. This petition is timely.

This Court has jurisdiction to review the decision of the Ninth Circuit Court of Appeals. 28 U.S.C. § 1254.

FEDERAL RULE PROVISIONS INVOLVED

Federal Rule of Evidence 501 provides:

> The common law — as interpreted by United States courts in the light of reason and experience — governs a claim of privilege unless any of the following provides otherwise:
>
> - the United States Constitution;
> - a federal statute; or
> - rules prescribed by the Supreme Court.
>
> But in a civil case, state law governs privilege regarding a claim or defense for which state law supplies the rule of decision.

Fed. R. Evid. 501.

Rule 56 of the Federal Rules of Civil Procedure provides:

> (a) Motion for Summary Judgment or Partial Summary Judgment. A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on

which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion.

(b) Time to File a Motion. Unless a different time is set by local rule or the court orders otherwise, a party may file a motion for summary judgment at any time until 30 days after the close of all discovery.

(c) Procedures.

(1) Supporting Factual Positions. A party asserting that a fact cannot be or is genuinely disputed must support the assertion by:

(A) citing to particular parts of materials in the record, including depositions, documents, electronically stored information, affidavits or declarations, stipulations (including those made for purposes of the motion only), admissions, interrogatory answers, or other materials; or

(B) showing that the materials cited do not establish the absence or presence of a genuine dispute, or that an adverse party cannot produce admissible evidence to support the fact.

(2) Objection That a Fact Is Not Supported by Admissible Evidence. A party may object that the material cited to support or dispute a fact cannot be presented in a form that would be admissible in evidence.

(3) Materials Not Cited. The court need consider only the cited materials, but it may consider other materials in the record.

(4) Affidavits or Declarations. An affidavit or declaration used to support or oppose a motion must be made on personal knowledge, set out facts that would be admissible in evidence, and show that the affiant or declarant is competent to testify on the matters stated.

(d) When Facts Are Unavailable to the Nonmovant. If a nonmovant shows by affidavit or declaration that, for specified reasons, it cannot present facts essential to justify its opposition, the court may:

(1) defer considering the motion or deny it;

(2) allow time to obtain affidavits or declarations or to take discovery; or

(3) issue any other appropriate order.

(e) Failing to Properly Support or Address a Fact. If a party fails to properly support an assertion of fact or fails to properly address another party's assertion of fact as required by Rule 56(c), the court may:

(1) give an opportunity to properly support or address the fact;

(2) consider the fact undisputed for purposes of the motion;

(3) grant summary judgment if the motion and supporting materials — including the facts considered undisputed — show that the movant is entitled to it; or

(4) issue any other appropriate order.

(f) Judgment Independent of the Motion. After giving notice and a reasonable time to respond, the court may:

(1) grant summary judgment for a nonmovant;

(2) grant the motion on grounds not raised by a party;or

(3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

(g) Failing to Grant All the Requested Relief. If the court does not grant all the relief requested by the motion, it may enter an order stating any material fact — including an item of damages or other relief — that is not genuinely in dispute and treating the fact as established in the case.

(h) Affidavit or Declaration Submitted in Bad Faith. If satisfied that an affidavit or declaration under this rule is submitted in bad faith or solely for delay, the court — after notice and a reasonable time to respond — may order the submitting party to pay the other party the reasonable expenses, including attorney's fees, it incurred as a result. An offending party or attorney may also be held in contempt or subjected to other appropriate sanctions.

Fed. R. Civ. P. 56.

STATEMENT OF THE CASE

In 2002, Abolfazl Hosseinzadeh, who was born in Iran and is Muslim, purchased a condominium unit at Bellevue Park, which is managed by Bellevue Park Homeowners Association (the "Association"). App. 17. After purchasing the residence, Mr. Hosseinzadeh became embroiled in a protracted dispute with the Association, which, he claimed, discriminated against him because of his national origin and religion. App. 17.

On March 29, 2016, Mr. Hosseinzadeh was elected to the Association's Board of Directors at a regular annual meeting. App. 6. On January 7, 2017, he held a special meeting of the board at which he was elected president. App. 3.

Several days later, on January 12, 2017, Mr. Hosseinzadeh and another board member went to Wells Fargo Bank and successfully added themselves as signatories on the accounts that the Association held at the bank, as the accounts were still in the name of a board member who was no longer sitting on the board. Mr. Hosseinzadeh never withdrew funds from that account. *Hosseinzadeh v. Bellevue Park Homeowners Association, et al.*, Case No. 2:18-cv-01385-JCC, (W.D. Wash.) (Doc. 143 at 2).

That same day, Mr. Hosseinzadeh reached out to U.S. Bank and tried to add himself as a signatory on the Association's account at the bank. U.S. Bank

did not add Hosseinzadeh as a signatory on the account, and over the next few days, the bank received conflicting communications about who had authority to control the account's funds. These conflicting communications prompted U.S. Bank to place a hold on the funds in the Association's account at the bank. *Id.*

Later that month, Association members, who disputed the validity of the meeting that led to Mr. Hosseinzadeh's election, called for a special homeowners meeting. *Id*. That meeting took place on January 31, 2017, and a new board was elected. *Id.*

While this dispute was brewing, one of the Association members, Respondent Adrian Teague, sent an email to all owners alleging Mr. Hosseinzadeh had "attempted to defraud US Bank" and had committed "criminal activity" in trying to transfer Association funds:

> During one of the invalid board meetings, a member was nominated president and has **attempted to defraud US Bank** by requesting that the association[']s operational funds be transferred out. While I am not an attorney, these attempts to move the association[']s money [are] **tantamount to criminal activity** and they have not been honored by the bank.

App. 9 (emphasis added).

On February 2, 2017, the Director of the Association, Respondent Jennifer Gonzalez, sent an email to the Vice President at U.S. Bank in an effort to unfreeze the Association's account, stating as follows:

> As I mentioned, a homeowner (actually, he is not even a homeowner-he is a representative for a homeowner) has spent the last 6 months or so trying to obtain access to the . . . HOA funds, and was successful at this at Wells Fargo.
>
> We have followed all of the HOA by-laws to create a new, valid board.
>
> Our accounts at US Bank are frozen and our other accounts gone. We have no idea why the account is frozen. We have past due bills and no way to pay them. We have no way to collect HOA dues. This is a continuing nightmare for many people.
>
> What documentation is need[ed] to restore our account and keep Ab and his cohorts from taking our funds? I can have our HOA attorney contact you and provide you with any documentation you require.

> I must say, though, this is a VERY urgent matter for us. We have already lost a lot of money and the longer we don't pay bills, the more fees we incur.

App. 20.

This statement, which falsely suggests that Mr. Hosseinzadeh had embezzled funds belonging to the Association, was emailed to other owners, who then told Mr. Hosseinzadeh's tenant that he had stolen the Association's money from the bank.

Later that day, Ms. Gonzalez emailed two Association members, Respondent Adrian Teague and Marlene Newman, regarding communications with U.S. Bank's Vice President. The email stated:

> [The Vice President at U.S. Bank] told me there was a flurry of emails from Ab to her today. **I let her know that he fraudulently obtained our WF funds** and that we would rather the accounts remain frozen than for her to release any funds to him. She was supposed to review what was going on and get back to me, but she did not.
> . . .
> Ab is making moves, so we need to be as aggressive and on top of it as he is.

See Hosseinzadeh v. Bellevue Park Homeowners Association, et al., Case No. 2:18-cv-01385-JCC, (W.D. Wash.) (Doc. 143 at 3) (emphasis added).

On September 19, 2018, Hosseinzadeh filed a complaint in the United States District Court for the Western District of Washington against Ms. Gonzalez, Mr. Teague, and the Association. *See Hosseinzadeh v. Bellevue Park Homeowners Association, et al.*, Case No. 2:18-cv-01385-JCC, (W.D. Wash.) (Doc. 1). He sued all the defendants for defamation and false light under the law of Washington and specifically cited the emails sent by Teague and Gonzalez. *Id.* at 10-11. He also sued the Association for, *inter alia*, violations of the Fair Housing Act and the Civil Rights Act. *Id.* at 12-14. It was those two federal claims that conferred subject matter jurisdiction on the district court. *Id.* at 1.

Ms. Gonzalez filed a Motion for Summary Judgment on the claims of defamation and false light against her. *Hosseinzadeh v. Bellevue Park Homeowners Association, et al.*, Case No. 2:18-cv-01385-JCC, (W.D. Wash.) (Doc. 45). The district court denied the motion on June 9th, 2020, stating "summary judgment is inappropriate because a genuine dispute of material fact exists as to whether Gonzalez made false statements in the two emails she sent on February 2, 2017." *Hosseinzadeh v. Bellevue Park Homeowners Association, et al.*, Case No. 2:18-cv-01385-JCC, (W.D. Wash.) (Doc. 143).

Mr. Teague filed a Motion for Summary Judgment on July 24, 2020, on the claims of defamation and false light against him. *Hosseinzadeh v. Bellevue Park Homeowners Association, et al.*, Case No. 2:18-cv-01385-JCC, (W.D. Wash.) (Doc. 157). In his motion, Mr. Teague asserted that his communications were subject to the "common-interest" privilege under Washington law, claiming he and the owners, as members of the Association, shared a common organizational or pecuniary interest. *Id.* at 21. He further argued that Mr. Hosseinzadeh had not shown that Teague acted with actual malice in the statements he had made. *Id.*

The Association also moved for summary judgment on all the claims brought against it, arguing, *inter alia*, that the "common interest" privilege under Washington law precluded any liability on the defamation and false light claims. *Hosseinzadeh v. Bellevue Park Homeowners Association, et al.*, Case No. 2:18-cv-01385-JCC, (W.D. Wash.) (Doc. 184 at 23-24).

Although she had already unsuccessfully moved for summary judgment, Ms. Gonzalez filed a request to join in the Association's motion for summary judgment as it pertained to the defamation and false light claims against her. *Hosseinzadeh v. Bellevue Park Homeowners Association, et al.*, Case No. 2:18-cv-01385-JCC, (W.D. Wash.) (Doc. 189 at 3).

In her filing, she devoted several pages to the common interest privilege, which she claimed barred the defamation count, as she and other members of the board shared a "pecuniary interest" in the association. *Id.* She also maintained that her communications furthered a "common organizational interest" in "unfreezing" the funds of the Association. *Id.*

On January 8, 2021, the district court issued an order granting Mr. Teague's motion for summary judgment on the defamation and false light claims. App. 8-9. It found that the email communication was "privileged" under Washington's "common interest" privilege and thus entered summary judgment on the defamation claim. App. 11-12.

Four days later, the district court entered summary judgment in favor of the Association and Ms. Gonzalez. Though the district court treated Ms. Gonzalez's filing as a "motion for summary judgment," App. 16, it declined to consider Mr. Hosseinzadeh's response to her motion, finding it was an "attempt to avoid" the page limit governing his response to the Association's summary judgment motion. App. 23. With regard to the defamation claims, the district court again rested its ruling on the "common interest" privilege arising under Washington law. App. 22.

On appeal, Mr. Hosseinzadeh first argued that the district court abused its discretion in affording Ms. Gonzalez a second attempt to obtain summary judgment after her first attempt had failed. Appellant's Opening Br. at 19-20. He also argued that the common interest privilege was inapplicable because the "common interest doctrine operates as an exception to waiver of an existing privilege, not a privilege in and of itself" and because the email communications had been forwarded to others, including non-owners and Mr. Hosseinzadeh, himself. *Id.* at 22-25.

The Ninth Circuit affirmed the ruling of the district court. With regard to the defamation claims, it ruled that the "claims fail due to the common interest privilege, which is a defense to defamation." App. 3-4 (citing *Valdez-Zontek v. Eastmont Sch. Dist.*, 225 P.3d 339, 347 (Wash. App. 2010)). Mr. Hosseinzadeh now petitions this Court for a writ of certiorari to review that decision.

REASONS FOR GRANTING THE WRIT

This Court should grant this petition and resolve two questions of paramount importance that have confounded the lower courts. The first question presented—whether state or federal privilege law applies to pendent state law claims where a district court exercises federal jurisdiction question jurisdiction—presents a problem this Court has previously recognized but declined to resolve. *See*

Jaffee v. Redmond, 518 U.S. 1, 17 n.15 (1996) (declining to decide "the proper rule in cases . . . in which both the federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law").

It is not a question that is easily settled through the plain text of Federal Rule of Evidence 501. As one court observed, in "cases involving both state and federal claims, a literal reading of [Federal Rule of Evidence] 501 appears to require application of the federal common law of privileges with respect to the federal claims and the state law of privileges with respect to the state claims." *Fitzgerald v. Cassil*, 216 F.R.D. 632, 635 (N.D. Cal. 2003) (quoting 6-26 Moore's Fed. Practice—Civil § 26.47[4]). However, "when the evidence in question is relevant to both the state and federal claims, it would be meaningless to hold the same communication privileged for one set of claims but not for the other." *Id.*

Charles Alan Wright and Kenneth W. Graham, Jr. suggest four different approaches that might be taken in resolving the conundrum: (1) since the state law provision is an exception to a general rule that mandates a federal law of privilege, courts should follow the federal rule when the same evidence is relevant to both a state and federal claim; (2) hold that the state rule of privilege always prevails; (3) apply the rule, state or federal, that

would admit the evidence; (4) or, have no rule and resolve questions of conflicting privileges on an ad hoc basis. 23 Charles Alan Wright & Kenneth W. Graham, Jr., Federal Practice & Procedure: Evidence, § 5434, pp. 859–65.

Most federal appellate courts have adhered to the first approach. *See In re Sealed Case (Med. Records)*, 381 F.3d 1205, 1212–13 (D.C. Cir. 2004)*; Virmani v. Novant Health Inc.*, 259 F.3d 284, 287 n.3 (4th Cir. 2001); *Pearson v. Miller*, 211 F.3d 57, 61 (3d Cir. 2000); *Hancock v. Hobbs*, 967 F.2d 462, 466-67 (11th Cir. 1992); *Hancock v. Dodson*, 958 F.2d 1367, 1373 (6th Cir. 1992); *von Bulow v. von Bulow*, 811 F.2d 136, 140-41 (2d Cir. 1987); *Wm. T. Thompson Co. v. General Nutrition Corp.*, 671 F.2d 100, 103-04 (3d Cir. 1982); *Memorial Hosp. for McHenry County v. Shadur*, 664 F.2d 1058, 1061 n.3 (7th Cir. 1981).

In this case, though, both the district court and the Ninth Circuit applied Washington law in determining whether the "common interest" privilege applied. Had the lower courts applied the federal approach to privilege law, there can be little doubt that they would have reached a different result.

That is because, under federal privilege law, the common interest privilege is viewed as an extension of attorney-client privilege. *See generally In re Sealed Case*, 29 F.3d 715, 719 (D.C. Cir. 1994) ("The common interest privilege protects

communications between a lawyer and two or more clients regarding a matter of common interest.") (citing *In re Auclair*, 961 F.2d 65, 69 (5th Cir.1992) (privilege applies if "persons . . . consult an attorney together as a group with common interests seeking common representation"); 1 Scott N. Stone & Robert K. Taylor, Testimonial Privileges § 1.21, at 1-54 (2d ed. 1993) ("Where the same attorney represents two or more clients having a common interest, confidential communications made by those clients to the common lawyer will be protected from disclosure to third parties."); and 8 John H. Wigmore, Evidence § 2328, at 639 (McNaughton Rev. 1961) ("Where the consultation was held by several clients jointly, the waiver should be joint for joint statements, and neither could waive for the disclosure of the other's statements; yet neither should be able to obstruct the other in the disclosure of the latter's own statements.")); *see also In re Qwest Commc'ns Int'l Inc.*, 450 F.3d 1179, 1195 (10th Cir. 2006) ("[T]he 'joint defense' or 'common interest' doctrine provides an exception to waiver because disclosure advances the representation of the party and the attorney's preparation of the case").

In this case, there was no finding that the attorney-client privilege applied in the first instance. And, as argued below, forwarding the communications to all members of the Association as well as financial institutions and other parties, including Petitioner, would almost certainly have

operated as a waiver of attorney-client privilege if the privilege did attach. Hence, if the courts below had applied federal privilege law, Mr. Hosseinzadeh would have likely prevailed on summary judgment. Yet, instead of applying federal privilege law, it applied a Washington variant of the common interest privilege and held that Mr. Hosseinzadeh could not present the plainly defamatory statements to a jury. This Court should grant this petition as to the first question presented and resolve this issue once and for all.

It should also review the second question presented. A number of federal courts have held that parties do not get multiple bites at the summary judgment apple, reasoning that it "sets bad precedent to allow parties to file serial motions for summary judgment" because repetitive motion practice undermines both the Court's and the parties' interests in efficiency and finality. *Woodson v. Aspen Power, L.L.C.*, No. 9:12-CV-135, 2014 WL 11512251, at *2 (E.D. Tex. July 3, 2014); *see also KTAQ of Dallas, LLC v. Simons*, No. 3:12-CV-4102-L, 2013 WL 5567146, at *7 (N.D. Tex. Oct. 8, 2013); *Wootten v. Commonwealth of Virginia*, 6:14-CV-00013, 2016 WL 4742336, at *1 (W.D. Va. Sept. 12, 2016) ("The Court will accordingly exercise its discretion to decline to hear successive summary judgment motions"). "Courts routinely deny such motions on those grounds." *Wootten*, 6:14-CV-00013, 2016 WL 4742336, at *3.

This is especially the case where the arguments in the second motion could have been raised in the first motion. *See Brown v. City of Syracuse*, 673 F.3d 141, 147 n.2 (2d Cir. 2012) ("[S]uccessive motions for summary judgment may be procedurally improper if the arguments in the second motion could have been raised in the first motion"). "In sum," as the *Wooten* Court explained, "a party who fails to present his strongest case in the first instance generally has no right to raise new theories or arguments in a motion to reconsider. So it is here with the successive summary judgment motion." *Wootten*, 6:14-CV-00013, 2016 WL 4742336, at *3.

The Ninth Circuit, by contrast, has taken a more permissive approach to successive summary judgment motions. *Hoffman v. Tonnemacher*, 593 F.3d 908, 911 (9th Cir. 2010) ("the denial of summary judgment does not preclude a contrary later grant of summary judgment"). Some other circuit courts of appeals have also adopted a similar approach. *See Whitford v. Boglino*, 63 F.3d 527, 530 (7th Cir.1995) ("[T]he denial of summary judgment has no res judicata effect, and the district court may, in its discretion, allow a party to renew a previously denied summary judgment motion or file successive motions, particularly if good reasons exist."); *see also Lexicon, Inc. v. Safeco Ins. Co. of Am., Inc.*, 436 F.3d 662, 670 n.6 (6th Cir. 2006); *Sira v. Morton*, 380 F.3d 57, 68 (2d Cir. 2004); *Enlow v. Tishomingo County*, 962 F.2d 501, 506-07 (5th Cir. 1992).

This Court should resolve this conflict and hold that where a party had the opportunity to raise an argument in its first summary judgment motion, it should not be permitted to raise that argument in a successive motion for summary judgment. This rule would not only this serve the interest in judicial economy, it would also limit the arbitrary relief from ordinary principles of waiver. *Narducci v. Moore*, 572 F.3d 313, 324 (7th Cir. 2009) (no abuse of discretion in declining to consider arguments waived by not including them in first motion for summary judgment).

If the district court had applied that rule to this case, it would not have entertained Respondent Gonzalez's successive summary judgment motion.[1] That is because Ms. Gonzalez had a fair opportunity to raise the common interest privilege in her first motion. Having waived the issue, she should not have received a second chance at obtaining summary judgment. Accordingly, this Court should grant this petition and hold that litigants are precluded from raising any arguments in a second motion for summary judgment could have been raised in the first motion.

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[1] Although the filing was described as a joinder notice, it contained an affirmative request for relief and set forth legal argument in support of Ms. Gonzalez's claim of common interest privilege. Moreover, the district court treated the filing as a "motion" and granted summary judgment in favor of Ms. Gonzalez on that basis. App. 16.

CONCLUSION

Based on the foregoing, this Court should grant this petition and review the decision below.

Respectfully submitted on this 12th day of September, 2022.

Andrew B. Greenlee, Esq.*
Andrew B. Greenlee, P.A.
Attorney for Petitioner
401 E. 1st Street, Unit 261
Sanford, Florida 32772
407-808-6411
andrew@andrewgreenleelaw.com

* *Counsel of Record for Petitioner*