No. 22-245

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

REPLY BRIEF OF PETITIONER

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ARGUMENT

Respondent Bellevue Park Homeowners Association ("Association") offers several reasons for denying the writ of certiorari. None of the reasons are persuasive.

First, the Association maintains that "Petitioner fails to explain which ground for review under Rule 10 Petitioner is relying upon, and none apply to his argument." Opposition at 3. This argument is misguided.

As an initial matter, the Association does not cite to any authority for the proposition that Mr. Hosseinzadeh was required to "explain which ground for review" under Rule 10 he invoked in support of the petition. That is because there is no such requirement. The express text of Rule 10, which is entitled "Considerations Governing Review on Certiorari," clarifies that it is "neither controlling nor fully measuring the Court's discretion" in determining whether to exercise certiorari review.

Even if Rule 10 provided an exhaustive list of circumstances that justified review, Mr. Hosseinzadeh's petition raises two issues that fall squarely within the categories set forth in the rule. The first question presented—whether state or federal privilege law applies to pendent state law claims in diversity actions—is "an important question of federal law that has not been, but should

be, settled by this Court." Rule 10(c), Rules of the Supreme Court of the United States.

The question is also one in which a "United States court of appeals has entered a decision in conflict with the decision of another United States court of appeals on the same important matter." Rule 10(a), Rules of the Supreme Court of the United States. This Court recognized as much in *Jaffee v. Redmond*, 518 U.S. 1, 17 n.15 (1996), where it noted that "there is disagreement concerning the proper rule in cases such as this in which both federal and state claims are asserted in federal court and relevant evidence would be privileged under state law but not under federal law." Because no party raised that issue in *Jaffe*, this Court declined to decide the issue. *Id.* It has the opportunity to do so now.

Mr. Hosseinzadeh's second question presented—whether a litigant can file a second summary judgment motion for the sole purpose of raising an issue that could have been raised in the first motion for summary judgment—also satisfies both Rule 10(a) and (c). It is "an important question of federal law" insofar as summary judgment is a central feature in most civil litigation, and the question "has not been, but should be, settled by this Court." Rule 10(c), Rules of the Supreme Court of the United States. In addition, the decision of the Ninth Circuit below conflicts with the rule in the Second Circuit, which has opined that "successive motions for summary judgment may be procedurally improper if the arguments in the second motion could

have been raised in the first motion." *Brown v. City of Syracuse*, 673 F.3d 141, 147 n.2 (2d Cir. 2012). Accordingly, since both questions presented fit the criteria set forth under Rule 10, the Court has the authority to decide the questions presented.

On the merits, the Association first argues that "the district court properly allowed Gonzales to join in the [Association's] summary judgment motion as to the state law defamation and false light claims." Opposition at 5. However, Ms. Gonzales is a separate party, and the Association does not explain how it has standing to argue on her behalf. Furthermore, Ms. Gonzales did more than simply "join" in the motion for summary judgment. She offered several pages of argument as to why summary judgment should be granted in her favor, which resulted in the district court treating her submission as an independent motion for summary judgment. App. 16. However, Ms. Gonzales had already moved for summary judgment, and she never explained why she could not have raised the "common interest privilege" in the first motion. This Court should grant this petition and rule that ordinary principles of waiver should preclude a successive motion for summary judgment under these circumstances.

As for the second question presented, the Association first claims that Mr. Hosseinzadeh "fails to recognize the differences between the 'common interest privilege' and the attorney-client privilege." Opposition at 6. In the view of the Association, "the

two doctrines are unrelated." *Id.* While that might be true under Washington privilege law, federal law considers the common interest privilege 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.").

Had the district court followed federal law, a different outcome would have resulted because, as the Association admits, no claim of attorney client privilege was raised below. Opposition at 8. Moreover, by forwarding the communications to all members of the Association as well as financial institutions and other parties, including Petitioner, Respondents would have waived any attorney-client privilege that might have attached if it had been raised.

The Association devotes several pages to the contours of the common interest privilege under Washington law. Opposition at 7-8. However, it ignores the federal authority on this privilege and offers no explanation as to how the state law claims would be subject to summary judgment if federal privilege law applied. *See id.* at 8-9. Finally, though the Association claims that this issue was not preserved, Mr. Hosseinzadeh argued against the application of the common interest privilege in both the district court and on appeal. This Court has the authority to agree with Mr. Hosseinzadeh and rule that the privilege was inapplicable. As such, the Court should reach the merits and reverse the decision below.

CONCLUSION

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

Respectfully submitted on this 4th day of November, 2022.

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