No. 13-1479

IN THE
Supreme Court of the United States

AMJAD HOSSAIN KHAN,
Petitioner,

v.

NAYEEM MEHTAB CHOWDHURY,
Respondent.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

REPLY BRIEF FOR PETITIONER

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Petitioner asks this Court to resolve a long-standing circuit conflict on whether an appellate court should review general civil verdicts, premised in part on legally invalid claims, for harmless error. In response, Respondent contends that review is unnecessary, because this Court and the courts of appeals each apply the identical harmless error rule, with any differences in the legal standards being entirely "semantic[]." Resp. Br. 1.

Respondent is incorrect. The circuit split is real. The circuits apply five distinct rules, four of which are directly contrary to this Court's case law. Indeed, as the Petition explained, several judges have expressly acknowledged the existence of this circuit split. *See* Pet. 9, 13 (citing *Loesel v. City of Frankenmuth*, 692 F.3d 452, 467 (6th Cir. 2012), *cert. denied*, 133 S. Ct. 878 (2013); *Davis v. Rennie*, 264 F.3d 86, 105 (1st Cir. 2001); *Hurley v. Atl. City Police Dep't*, 174 F.3d 95, 136-37 & n.4 (3d Cir. 1999) (Cowen, J., dissenting); *Kern v. Levolor Lorentzen, Inc.*, 899 F.2d 772, 790 (9th Cir. 1990) (Kozinski, J., dissenting)). Strikingly, although the Petition described these authorities repeatedly and in detail, Respondent's brief does not even cite them.

Further, the Second Circuit's decision conflicts with this Court's precedent. Respondent asserts that this Court's decisions apply the same harmless-error rule as the Second Circuit below. But Respondent does not identify *any* specific portion of *any* Supreme Court case applying the Second Circuit's harmless error rule. Indeed, the Second Circuit itself

characterized its harmless error as a "gloss" on this Court's case law. Pet. App. 14a. And that was an understatement at best: the Second Circuit's harmless-error rule was not a "gloss" on this Court's rule, but a completely different rule.

Respondent further suggests that this case is a bad vehicle because, in his view, there was no possibility that the error affect the jury's deliberations. But it is undisputed in this case that the jury returned a single award of $1.5 million against *both* Petitioner *and* WBH, without distinguishing between them. Pet. App. 41a. And it is undisputed that District Court committed legal error in submitting Petitioner's claim against WBH to the jury. Pet. 4. Respondent maintains that this error was not "substantive[]" and that it did not affect the "evidence presented at the trial," Resp. Br. 8, but these contentions simply reflect the very type of harmless-error analysis that this Court and four circuits have rejected.

All twelve geographic circuits have weighed on the question presented. The conflict is entrenched, the issue is recurring, and the time for percolation has ended. This Court should grant certiorari.

ARGUMENT

A. The Circuits Are In Conflict.

As the Petition explained, the circuits are divided five ways on whether, and to what extent, general verdicts tainted by invalid claims should be reviewed for harmless error. The Sixth, Eighth, Eleventh, and D.C. Circuits apply a rule of automatic reversal; the

Third and Tenth Circuits reverse only when it has "absolute certainty" that the error was harmless; the First, Second, Fourth, and Fifth Circuits require "reasonable" or "sufficient" certainty; the Seventh Circuit requires the losing party to show the *presence* of harmful error; and the Ninth Circuit applies its own, *sui generis* four-factor test. Pet. 9-13. Remarkably, despite this disarray, Respondent nonetheless contends that all the circuits apply the identical rule. Resp. Br. 10. They do not.

Respondent contends that the Sixth, Eighth, Eleventh, and D.C. Circuits each apply the Second Circuit's harmless error rule. But a review of case law from those circuits suggests otherwise. In *Loesel*, the Sixth Circuit concluded that one legal theory submitted to the jury was factually unsupported, and therefore reversed and remanded or a new trial. 692 F.3d at 468. According to Respondent, this occurred because the Sixth Circuit "could not conclude that the jury based its decision on the remaining theory as opposed to the factually insufficient one." Resp. Br. 11. True – and the Sixth Circuit did not even *try* to reach such a conclusion. Rather, having identified an invalid claim, the Sixth Circuit applied what it characterized as the "longstanding civil general verdict rule," and reversed. 692 F.3d at 468 (quotation marks omitted). It did not even attempt to reconstruct how the jury would have reacted if the trial judge had not committed legal error. That is the essence of an automatic-reversal rule.

Likewise, in *Friedman & Friedman, Ltd. v. Tim*

McCandless, Inc., 606 F.3d 494 (8th Cir. 2010), the Eighth Circuit concluded that "the verdict form did not differentiate between damages for each of [the plaintiff's] two claims," and based on that finding, concluded that reversal was mandatory: "The rule in this circuit is clear that when one of two theories has erroneously been submitted to the jury, a general verdict cannot stand." *Id.* at 502 (internal quotation marks omitted). Respondent asserts that the Eighth Circuit "analyzed . . . the verdict sheet" before reversing. Resp. Br. 11. That is correct – the Eighth Circuit analyzed the verdict sheet to determine *whether the jury returned a general verdict*. 606 F.3d at 502. But once it made that finding, it applied its rule of automatic reversal without conducting any further harmless-error inquiry. Thus, *Friedman & Friedman* stands in sharp contrast to *Ondrisek v. Hoffman*, 698 F.3d 1020 (8th Cir. 2012), *cert. denied*, 138 S. Ct. 1820 (2013). As Respondent correctly states, the Eighth Circuit affirmed in that case based on its finding that "the jury form provided for separate liability verdicts." Resp. Br. 11. Thus, the Eighth Circuit affirmed based on its finding that the jury *did not return a general verdict at all*. 698 F.3d at 1026. The rule in the Eighth Circuit is therefore clear – *if* there is a general verdict partially premised on an invalid claim, *then* the court will automatically reverse. That is the rule rejected by the court below.

The Eleventh and D.C. Circuits apply the same automatic-reversal rule as the Sixth and Eighth Circuits. *See Maccabees Mut. Life Ins. Co. v. Morton*, 941 F.2d 1181, 1184 (11th Cir. 1991) ("[T]his court must affirm that all three theories were

properly submitted to the jury to sustain the court below" (quotation marks omitted)); *N. Am. Graphite Corp. v. Allan*, 184 F.2d 387, 389 (D.C. Cir. 1950) ("[S]ince there was a verdict without specification as to which of the two counts it rested upon plaintiff must be able to show that it was proper to submit both counts to the jury; that is to say, failure to support either would lead to reversal"). Respondent notes that those courts analyzed *whether* the jury returned a general verdict premised in part on an invalid claim. Resp. Br. 12. Of course – to apply the general-verdict rule, a court must determine whether there was in fact a general verdict. But those circuits hold that when there *is* a general verdict premised in part on an invalid claim, *then* the court must reverse without conducting any additional harmless-error review. And *that* is the rule that conflicts with the Second Circuit's decision here.

Finally, Respondent barely even attempts to address the four-way circuit conflict among the courts that do apply harmless error review. Rather, Respondent makes the conclusory assertion that each court uses "its own linguistic approach" and that the conflict is not "meaningful," without citing a single case on any side of the four-way split. Resp. Br. 12. Given the paucity of Respondent's argument, we refer the Court to the petition, which makes plain that the circuit split is longstanding, genuine, and warrants this Court's review. Pet. 10-13.

B. The Second Circuit's Opinion Conflicts With This Court's Case Law

In addition to conflicting with cases from eight

circuits, the Second Circuit's opinion conflicts with a century of opinions of this Court. As the Petition explained, this Court has held for over a century that when a verdict is partially premised on an invalid claim, the verdict cannot stand. Pet. 6-8.

Respondent contends that this Court's cases apply the same harmless-error analysis as the Second Circuit. Resp. Br. 6-8. But Respondent makes the same error as he made with his analysis of the circuit split – he conflates the analysis of whether there *was* a general verdict premised on an invalid claim with whether, if the jury *did* return a general verdict, the court should review for harmless error. For instance, Respondent characterizes *Maryland v. Baldwin*, 112 U.S. 490 (1884), as holding that "[r]emand is required only where the trial court has erred in its presentation of the charge or the improper admission of evidence." Resp. Br. 6-7. That is indeed a paraphrase of a portion of this Court's opinion: "If, therefore, upon any one issue error was committed, either in the admission of evidence or in the charge of the court, the verdict cannot be upheld, for it may be that by that evidence the jury were controlled under the instructions given." 112 U.S. at 493. Thus, the Court held that *if* the jury returned a general verdict premised in part on an invalid claim, *then* "the verdict cannot be upheld" – with no further analysis required by the appellate court. That rule is inconsistent with the Second Circuit's application of "a harmless error gloss onto the basic principle." Pet. App. 14a (quotation marks omitted). In the Second Circuit's view, *after* determining that a general verdict was

premised in part on an invalid claim, the appellate court should *still* affirm so long as it was "sufficiently confident that the verdict was not influenced by an error in the jury charge." *Id.* (quotation marks omitted). That principle finds no support in *Baldwin*.

For the same reason, the Second Circuit's decision conflicts with numerous subsequent Supreme Court cases applying the general verdict rule. Pet. 7-8 (citing *City of Columbia v. Omni Outdoor Adver. Inc.*, 499 U.S. 365, 384 (1991); *Sunkist Growers, Inc. v. Winckler & Smith Citrus Prods. Co.*, 370 U.S. 19, 29-30 (1962); *United N.Y. & N.J. Sandy Hook Pilots Ass'n v. Halecki*, 358 U.S. 613, 619 (1959); *Wilmington Star Mining Co. v. Fulton*, 205 U.S. 60, 78 (1907); *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 482 n.3 (2008)). Respondent does not cite *Wilmington*; with regard to the remaining cases, Respondent simply states that in each case, the Court found that a legally invalid theory had been submitted to the jury. Resp. Br. 7-8. Of course, this is true; if no legally invalid theory had been submitted to the jury, there would have been no basis for reversal. But in each case, once the Court identified a legally invalid theory, it directed that the District Court hold a new trial. That is the essence of what the Second Circuit characterized as "the so-called general verdict rule," Pet. App. 14a, and it is the rule the Second Circuit rejected.

Respondent also appears to argue that Petitioner has the burden to identify a specific error in the jury *charge*, rather than establish that an invalid theory

was submitted to the jury. Pet. 6-8. But even if that were correct, Petitioner has met that burden: as the Petition explained, the District Court gave incorrect instructions with regard to WBH's liability. Pet. 19. In response, Respondent maintains that these incorrect instructions do not mandate reversal because "No evidence presented at the trial would have been excluded. The jury charge would not be substantively different." Resp. Br. 8. That is simply false. If the Court had correctly dismissed the ATS claim, then the jury would presumably not have heard any evidence related to WBH's liability, as such evidence would have been entirely irrelevant. Further, the jury charge certainly would have been *different*; the jury would not have been instructed to return a single compensatory damage award against both Petitioner and WBH. Pet. 18-19. Thus, contrary to Respondent's contention, the procedural posture of this case is indistinguishable from *Baldwin* and its progeny. Respondent's contention that the error in the jury instructions was insufficiently "substantive[]" in light of the "evidence presented at the trial," Resp. Br. 8, is nothing more than the type of harmless error review that *Baldwin* and its progeny rejected.

Respondent notes that the jury imposed punitive damages on Petitioner but not on WBH. According to Respondent, this "evinc[es] the jury's understanding that the individual and the corporation were not the same," therefore establishing that the error was harmless. Resp. Br. 9. Again, however, this is the very type of speculation about a jury's motives that the general

verdict rule forbids. Perhaps the jury found that WBH was *less* culpable than Petitioner, but still *somewhat* culpable, and thus imposed a portion of the compensatory damages on WBH. Perhaps the jury (mistakenly) thought that WBH would pay the compensatory damages award, and imposed punitive damages on Petitioner but not on WBH to ensure that Petitioner would at least pay something out of pocket. It is impossible to know; that is why Petitioner should have a new trial before a correctly-instructed jury.

Indeed, this case illustrates the reason that this Court's general verdict rule makes perfect sense. This Court refuses to apply harmless-error when it is excessively difficult to assess the effect of the error, a condition that is met in the context of general verdicts. Pet. 8 (citing *Vasquez v. Hillery*, 474 U.S. 254, 263 (1986), and *United States v. Gonzalez-Lopez*, 548 U.S. 140, 149 n.4 (2006)). Respondent's sole response is that *Vasquez* and *Gonzalez-Lopez* are criminal cases, and this case is a civil case. Resp. Br. 9-10. But the principle applies equally to civil cases; for instance, *Batson* violations require automatic reversal regardless of whether they occur in a civil or criminal case. *See J.E.B. v. Alabama ex rel. T.B.*, 511 U.S. 127, 146 (1994) (reversing jury verdict in civil case on *Batson* grounds); *id.* at 159 (Scalia, J., dissenting) (arguing in favor of harmless-error review). Indeed, in *Loesel*, the Sixth Circuit expressly applied a *more* protective harmless-error rule in civil cases than in criminal cases. 692 F.3d at 467. In any event, all of this Court's cases applying the general verdict rule *were* civil cases, and the

Court did not hesitate to apply its rule of automatic reversal.

In sum, the Second Circuit's "gloss" on this Court's general verdict rule is, in fact, fundamentally inconsistent with this Court's case law. This Court should grant certiorari to re-affirm its prior holdings.

C. The Issue Is Important And There Are No Vehicle Problems.

Respondent states that this issue does not recur with sufficient frequency to justify this Court's review: "The small number of cases in which the court must address the harmless error is [sic] prevents this issue from being one of widespread significance. There are few instances in which the reversal of a general verdict on multiple claims is controversial." Resp. Br. 13. This is an implausible assertion given that *every* regional circuit has addressed this issue, and it has the potential to arise in *every* civil case involving multiple causes of action. As the Petition explained, this question easily meets the criteria for this Court's review. Pet. 13-14.

Further, this case is a perfect vehicle. The Second Circuit expressly recited and applied the very harmless-error rule that Petitioner challenges in this petition. Pet. 14-15. Respondent states in passing in his "Statement of the Case" that Petitioner did not object to the specific jury charge in the District Court. Resp. Br. 3. But he does not contend that this raises a vehicle problem, and rightfully so. Petitioner was not obligated to request special interrogatories in the District Court. Indeed, this Court unanimously rejected that contention in the

criminal context in *Black v. United States*, 561 U.S. 465 (2010). In any event, it is undisputed that the Second Circuit passed on the question presented, and the question is therefore properly before the Court. *See Lebron v. National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (court may consider issue "so long as it has been passed upon" by lower court) (quotation marks omitted).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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