No. _____

IN THE SUPREME COURT OF THE UNITED STATES

RONALD JARMUTH

Petitioner

v.

THE INTERNATIONAL CLUB HOMEOWNERS ASSOC., INC.

Respondent

On Petition for a Writ of Certiorari to the United State Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF CERTIORARI

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December 18, 2018 *** Counsel of Record**

QUESTIONS PRESENTED

Whether the Court of Appeals and the District Court erred in ignoring all precedents by holding that a federal court may not enjoin a state court order whose relief has a retaliatory or discriminatory effect which violates the Fair Housing Act,

Specifically ---

Whether they ignored this Court's precedents stated

(1) in Mitchum v. Foster 407 U.S. 225 (1972) (that state court Claim Preclusion is inapplicable in federal FHA Retaliation cases) ;

(2) in Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983) (that use of state court process to obtain a retaliatory objective is itself retaliation, subsequently independently actionable in federal court);

(3) in Nevada v. United States, 463 U.S. 110 (1983 (that prior to concluding "claim preclusion" a federal court must verify that the state and federal "causes of action" are

actually identical;

(4) in Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955) (which held that claim preclusion does not apply to any retaliatory transaction which occurred after the close of the prior state court proceedings;

(5) in United States v. Throckmorton, 98 U.S. 61 (1878) (which held that extrinsic fraud by the defendant's attorney in the state court deprives the state court's final order of any claim preclusive effect; and

(6) in Migra v. Warren City School Dist. Bd. of Ed., 465 US 75 which implicated South Carolina precedent stated in Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999) (which holds that permissive claims not litigated in state court have no claim preclusive effect in a later federal court proceeding.

PARTIES TO THE PROCEEDING

The Petitioner, Ronald Jarmuth, ("Jarmuth") was the Plaintiff Pro Se in the District Court and the Appellant Pro Se in the Court of Appeals.

The International Club Homeowners Association, Inc. ("HOA") was the Defendant in the District Court and the Appellee in the Court of Appeals.

The State of South Carolina and the Horry County Court of Common Pleas were "terminated" as parties in the District Court on June 8, 2016 by Jarmuth prior to service of any Summons or Complaint.

The Docket of the case in the Court of Appeals lists only Jarmuth (as Appellant) and the HOA (as Appellee).

The Orders of the Court of Appeals Affirming erroneously added "The State of South Carolina and the Horry County Court of Common Pleas" as "Defendants" in the Appellate case. They were absent from the

caption of the District Court's Order Dismissing.

The Order Affirming erroneously listed the HOA as an "Appellant" when the HOA is the Appellee, having not filed a cross-appeal.

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PETITION FOR A WRIT OF CERITORARI

Petitioner Ronald Jarmuth, respectfully petitions this Court to Grant a writ of certiorari, Vacate the opinion of the Fourth Circuit below, and Remand this case for further proceedings.

I. The District Court ignored this Court's precedent stated in Mitchum v. Foster, 407 U.S. 225 (1972) that a state court order which has an FHA Retaliatory effect creates no Claim Preclusion in subsequent federal FHA Retaliation suits.

II. The District Court ignored this Court's precedent stated in Bill Johnson's Restaurants, Inc. v. NLRB which requires the District Court to recognize that the HOA's use of state court process constitutes FHA Retaliation later independently actionable in federal court.

III. The District Court failed to identify the common transactions and causes of action common to the two cases (there are none).

A. The Court ignored this Court's precedent stated in Nevada v. United States, 463 U.S. 110 (1983,) which requires the District Court to determine whether the "cause of action" in the federal case is the "same cause of action" in the state case

(which they were not) before concluding claim preclusion.

B. The trial and appellate Courts ignored this Court's precedent stated in Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955), which bars claim preclusion for any transactions (FHA retaliation) after the close of state court proceedings.

C. The trial and appellate Courts ignored this Court's precedent stated in Migra v. Warren City School Dist. Bd. of Ed., 465 US 75 (1984) which requires the Court to determine and apply South Carolina notions of claim and issue preclusion, which deny any preclusive effect to permissive claims not litigated in state court.

IV. The District Court ignored this Court's precedent stated in United States v Throckmorton 98 U.S. 61 (1878) which requires the Court to determine whether extrinsic fraud by the Defendant's attorney existed in the state case, which thus deprives the state court final order of any claim preclusive effect.

OPINIONS BELOW

a. The unpublished opinion of the United States District Court for the District of South Carolina in Ronald Jarmuth v. The International Club Homeowners Assoc. Inc. in Civil Action No.: 4:16-cv-00242-RBH which was filed on March 27, 2017, Appendix B, App. 3a.

b. The unpublished opinion of that District Ceourt denying reconsideration which was filed March 12, 2018, Appendix D, App. 40a.

c. The one-page unpublished opinion of the Fourth Circuit Court of Appeals in appeal No. 18-1335, affirming the District Court order which was issued on September 13, 2018, Appendix A, App. 1a.

d. The one-page unpublished opinion of the Fourth Circuit Court of Appeals in appeal No. 18-1335 denying reconsideration which was filed on October 23, 2018 Appendix I, App. 80a.

e. That part of the state court's September 10, 2012 Final Order which relates to the federal FHA Retaliation Claim,

Appendix E, App. 49a.

No transcripts exist because no hearing was held at the district or appellate court levels.

JURISDICTION

The district court has jurisdiction pursuant to 28 U.S.C. § 1331 and 28 U.S.C § 1343.

This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

The U.S. Court of Appeals for the Fourth Circuit entered its judgment on October 23, 2018, Appendix I App. 80a. This petition is filed within 90 days of the Fourth Circuit's refusal to reconsider its affirmation of the D~~d~~istrict C~~e~~ourt's order.

STATUTORY PROVISIONS INVOLVED

42 USC §3613 Enforcement by private persons:

> **(a) Civil action. (1)(A) An aggrieved person may commence a civil action in an appropriate United States district court ... to obtain appropriate relief with respect to such discriminatory housing practice or breach.**

42 US Code Sec 3617 Interference, coercion or intimidation:

> **It shall be unlawful to coerce, intimidate, threaten, or interfere with any person ... on account of his having exercised or enjoyed, ... of, any right granted or protected by section 3603, 3604, 3605, or 3606 of this title.**

SC Code §31-21-80:

> **It is unlawful to coerce, intimidate, threaten, or interfere with any person in the exercise of, or on account of his having aided or encouraged any other person in the exercise of, any right granted under this chapter.**

SC Code §31-21-130 Hearing:

> **(M) If, upon all the evidence at the hearing, the panel finds that the respondent has not engaged in any unlawful discriminatory... A prevailing respondent may apply <u>to the commission</u> for an award of reasonable attorney's fees and costs. [underlining added]**

STATEMENT OF THE CASE

I. Introduction

Since 1968 when the *Fair Housing Act* (Title VIII of the *Civil Rights Act of 1968*) was enacted which introduced meaningful federal enforcement mechanisms to bar discrimination and retaliation in housing practices, federal courts have routinely enjoined state court final orders which violate the objectives of the Act. There are literally dozens of these federal cases. Like dozens of plaintiffs before him, Plaintiff / Petitioner Jarmuth asked the federal trial court to enjoin a state court order which the Respondent / Defendant Homeowners' Association ("HOA") obtained. The HOA has admitted the state order was obtained to retaliate against Jarmuth for filing a *Fair Housing Act* Discrimination Complaint.

On March 27, 2017 the federal district court dismissed Jarmuth's federal complaint App. 3a, rejecting the clear language of the Act and forty-nine years of federal precedent, by holding that a federal court is powerless to

enjoin admitted retaliation against Jarmuth because of "claim preclusion" – because the HOA had obtained a state court order which the HOA admitted has a prohibited retaliatory effect.

All acts of FHA Retaliation occurred after the close of the state court case.

II. Proceedings

On August 26, 2009 Jarmuth filed a report of FHA Family Status Discrimination App. 77a with the South Carolina Human Affairs ("SCHA") Commission. The "transaction" was the Respondent HOA's refusal to allow Jarmuth to erect swings [1] for his children.

On October 15, 2009 the HOA paid a $2,500 insurance deductible for legal services related to the SCHA investigation. On April 7, 2009 Jarmuth had already filed an unrelated state court complaint against the HOA alleging financial misconduct by the HOA Board of Directors ("transaction").

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1 **Permitted by the covenants.**

On October 12, 2010 Jarmuth filed a state Magistrate Court complaint against the HOA, asserting he had no obligation toward the HOA because a different HOA was explicitly named in the covenants as "The Association" ("transaction").

On October 24, 2011 the HOA filed a counter-claim App. 53a asserting Jarmuth built a "wall"[2] ("transaction"). The phrases "SCHA", "swing-set", "discrimination", "retaliation", and "investigation" are not in any state claim or counter–claim. No evidence needed to support an FHA Retaliation claim is related to the state court claims. On December 10, 2011 Jarmuth filed the Answer and Counter-Claim App.80a referred to by the federal court orders which has nothing to do with FHA discrimination or retaliation.

On August 8 through 10, 2012 a trial was held before a Special Referee ("SR"). On August 8, 2012 as the trial began the HOA's attorney gave Jarmuth a copy of its October 15, 2009 check without explanation. Towards the end of the trial the HOA President testified

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2 Fences and walls are permitted by the covenants.

that the HOA had paid a $2,500 deductible in connection with the SCHA investigation.

On September 10, 2012 the SR signed an order as written by the HOA's attorney without modification, App. 49a, which ordered Jarmuth to reimburse the HOA the $2,500. Since that time the HOA has filed many state and federal court pleadings -- all of which admit that the $2,500 is directly related to the FHA discrimination matter and none of which deny this is FHA retaliation.

On January 26, 2016 Jarmuth filed an FHA Retaliation Complaint with the US District Court for South Carolina. On February 12, 2016 the Court allowed Jarmuth to proceed with the Amended Complaint App. 60a as actually served. It stated three FHA Retaliation claims: (1) that the HOA demand for its FHA investigation costs is FHA Retaliation per se; (2) that the HOA's use of state court process to collect same is separately actionable FHA retaliation; and (3) that acts of physical intimidation by HOA officers

continuing after the filing of the federal complaint is also FHA retaliation.

The HOA filed a Motion to Dismiss, asserting all issues were or could have been litigated in the state court proceeding. It asserted that Jarmuth could have or did assert all three claims, when Jarmuth answered the HOA's October 24, 2011 counter-claim, App. 53a, about "the wall". The HOA did not point to a single word or transaction related to FHA retaliation prior to the September 10, 2012 state court final order, App. 49a.

The Reports and Recommendations of the Magistrate App. 14a;; the District Court March 27, 2017 final order, App. 3a; and the March 12, 2018 Denial of Reconsideration, App. 40a, likewise never identified how the federal FHA Retaliation claims were or could have been viably litigated in 2011, which was a year *before* the first act of FHA Retaliation occurred. The federal court orders never identified a single transaction related to a state court claim related to FHA Retaliation.

The District Court dismissed because it erroneously held that Jarmuth's FHA Retaliation Claims "were or could have been litigated" at state court, App. 3a. The Court of Appeals affirmed without explanation, App. 1a.

III. HOA Money Demands In State Process

The HOA demands repayment of $2,500 it states it paid with its' June 9, 2010 check #2714 to defend the SCHA FHA discrimination investigation, Federal Complaint ("FC") [3] Exhibit #G. The HOA's 2010 General Ledger ("GL") FC #K identifies this as a payment for legal representation in an unrelated Central Electric easement matter; Central Electric reimbursed the HOA for its legal costs.

The HOA demands Jarmuth repay the $2,500 it states it paid with its' October 15, 2009 Check #2469 FC #F, to defend the 2009 state case. It states this is the HOA's only cost in all litigation with Jarmuth because its' insurance policy #104460344 has one deductible per year

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3 FC: Federal Complaint.

for all claims FC #L. The HOA's 2009 General Ledger FC #J has a notation that this check was actually the SCHA FHA related deductible.

It also shows that the HOA never paid anything at all to litigate with Jarmuth, because it paid a separate $2,500 deductible earlier in the year to defend a suit against it by "The Villas at the International Club HOA" in state court.

In the same state court process the HOA is demanding payment of "fines" awarded by the state court related to "the wall". The HOA claims that at a meeting of its Board of Directors it determined a "wall" covenant violation occurred and imposed fines. The minutes of the related November 10, 2010 Meeting, FC #I, prove neither event ever happened. The HOA's covenants and bylaws prohibit imposition of fines without action "on the minutes". There is no provision to recover costs "to defend" a lawsuit or investigation.

The Orders of the District and Appellate Courts ignored this evidentiary record.

REASONS FOR GRANTING THE PETITION

I. The state court order which has an FHA Retaliatory effect creates no Claim Preclusion in a subsequent federal FHA Retaliation suit to enjoin its enforcement and for damages.

In Mitchum v. Foster, 407 U.S. 225 (1972) this court held

> **A federal court can enjoin proceedings that are pending in a state court when 42 U.S.C. 1983 is involved, since this... (the) law falls within the expressly authorized exception of the Anti-Injunction Statute.**

42 USC §3613 Enforcement by private persons (a) Civil action (1)(A) has such an "expressly authorized" exception for federal courts to enjoin conduct defined by 42 US §3617 Interference, coercion or intimidation which includes conduct which "coerce(s)~~s~~, intimidate(s), or interfere(s)"[4] with Jarmuth because he "exercised or enjoyed, ...~~of,~~ any right granted or protected by Section 3603, 3604, 3605, or 3606 of this title".

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4 **"(s)" added.**

But for Jarmuth having filed a family status discrimination report with the SCHA the HOA would not have paid $2,500 for related legal expenses. But for that payment the state court would have had nothing to award the HOA, illegally or not. But for the state court order written by the HOA's attorney the HOA would not be using state legal process to attempt to collect that money.

The HOA, the district court, and the Court of Appeals do not dispute that this is FHA Retaliation. They assert Jarmuth's federal FHA Retaliation lawsuit should be dismissed [5] because the core issue, FHA Retaliation, was or "could have been litigated in state court", App. 7a (Order p.3). It is not necessary to ask whether the matter was or could have been litigated below. Mitchum op.cit. holds that common law principles of claim preclusion do not apply to prior state court proceedings whose consequence is FHA

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5 **Before any answer is filed or discovery had.**

Retaliation.

Jarmuth raised Mitchum in Jarmuth's April 18, 2017 Motion for Reconsideration (Memo "No Claim Preclusion" pp 5-6); in his May 5, 2017 (p.10) Reply to his Motion for Reconsideration in the District Court, and in the Court of Appeals in his Brief, pp.1,2 and Reply Brief P.10.

The HOA, the District Court, and the Court of Appeals were silent as to Mitchum and its effect on claim preclusion. They all ignored this Court's precedent stated in Mitchum.

Since the only reason stated by the District Court and the Court of Appeals to dismiss Jarmuth's FHA Retaliation suit (before an Answer or discovery) was claim preclusion, this Court should enter a grant, vacate, and remand order (GVR) applying Mitchum without addressing the merits of the case.

II. The Panel and the District Court failed to perform the analysis required by this Court's precedent stated in Bill Johnson's Restaurants, Inc. v. NLRB [6] which required the District Court to determine whether the HOA's state court use of process is itself independently actionable as FHA Retaliation if it (a) lacks a reasonable basis in law stated in the HOA's counter–claim and (b) has a retaliatory intent.

In para's 1a App. 63a, 4d(1) App. 67a, (6) App. 69a and (9) App 70a of his federal complaint Jarmuth asserted the HOA is using state court process to exact a financial cost on Jarmuth for asking the SCHA to investigate Family Status Discrimination by the HOA. Jarmuth asked for injunctive relief and for direct and punitive damages. Clearly this retaliation claim is not the HOA's state court "wall" claim, App. 53a, nor is it transactionaly related to it. The retaliatory transaction is use of state court process for retaliation. The state claim to which the District Court refers is the underlying HOA demand for its non-existent

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6 Bill Johnson's Restaurants, Inc. v. NLRB, 461 U.S. 731 (1983).

state court legal costs, App. 59a para. 74. In dismissing, the District Court and the Court of Appeals ignored the tort of retaliatory use of state court process and effectively held that the HOA use of state court process to retaliate "was litigated or could have been litigated" in state court.

In Bill Johnson this Court stated the precedent that the federal court should perform a two part analysis to determine whether the state court proceeding is federally actionable as retaliation. Bill Johnson clearly recognized that a federal court may act during or after a state court proceeding. A predicate of Bill Johnson is that the state proceeding is not the end of the story.

The Court stated at 740-744 the court may proceed with the federal claim for retaliatory use of state court process only if, after a reasonable inquiry, it finds that (a) the state court process is retaliatory and (b) the HOA claim for SCHA cost reimbursement as stated in the state court complaint has no legal

basis.[7] The District Court and the Court of Appeals did not perform this mandatory analysis.

The first prong of the Bill Johnson test is satisfied, because the HOA and the District Court concedes that the demand for FHA legal expenses is a consequence of the SCHA Discrimination investigation.

The second prong is satisfied because:

(a) the HOA counter-claim had no claim for reimbursement of SCHA related legal expenses, App. 53a;

(b) the HOA has never cited to any law or authority entitling it to such reimbursement nor has it argued for an extension of law;

(c) the HOA's Bylaws and Covenants provide only for recovery of costs actually incurred to eliminate a covenant violation after a fair hearing before the HOA Board of Directors on the record. The Bylaws have no

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7 There was no HOA counter-claim for SCHA costs; the HOA's attorney snuck it into the state court final order. There is no basis in law or contract for such a demand.

provision to recover any costs when the HOA is a defendant or respondent;

(d) The demand is illegal per SC Code §31-21-80 and per 42 USC §3617; and

(e) SC Code §31-21-130 (M) provides that a prevailing complainant or respondent - <u>after an SCHA hearing</u> - may recover legal costs only by request to and order of the Commissioner, not a court of law. No SCHA hearing was held and the HOA never applied to the Commission for costs. The HOA never asserted a demand for SCHA costs in its state court counter-claim.

The HOA's attorney wrote the demand for SCHA related costs into the state court final order it submitted to the SR, instead of litigating it, App. 49a. Thus, there is retaliatory intent, no basis in law, and malicious intent.

The Supreme Court is not asked to determine the merits of the case. A GVR should issue, requiring that Jarmuth's claim of FHA Retaliation by use of state process go forward, because it is not barred by claim

preclusion and satisfies the Bill Johnson test.

III. The Court failed to identify the common transactions and causes of action common to the two cases (there are none).

The FHA Retaliatory Claim:

In the HOA's August 26, 2016 Motion to Dismiss the HOA asserted a FRCP Rule 12(b)(6) defense, against one specific claim. On p.2 of its Memo the HOA raised this defense against Jarmuth's

> **"claim is that the Association was awarded attorneys' fees by a Final Order ... in connection with defending a 2009 complaint filed with the South Carolina Human Affairs Commission" ... "This issue was fully litigated and decided by a Final Order "** [8]

Jarmuth explained in his February 12, 2016 Amended Complaint that the specific retaliation "transaction" is that

> **"The IHOA Defendant is demanding that Plaintiff pay the IHOA Defendant the Defendant's cost in obtaining legal assistance to respond to an investigation**

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8 **September 10, 2012.**

> **by the South Carolina Human Affairs Commission," p5 para 4 App. 65a**

the first "transaction" being a series of such demands. The complaint stated that the first such HOA demand for SCHA related costs was made August 8, 2012 App. 67a.

The District Court's February 12, 2016 Magistrate's Order erroneously states:

> **"Plaintiff's retaliation claim here arises in part from a counterclaim or counterclaims raised by Defendant in the previous state actions seeking attorney's fees and a fine."**

This is the only attempt at fact gathering that the District Court made to sustain its conclusion of claim preclusion.

The HOA's October 24, 2011 Counter–Claim identified the "transaction" as an alleged "wall" and said nothing about SCHA, FHA Discrimination, nor the "swing set," App, 28a.

Jarmuth's federal complaint described the second "transaction" as retaliatory use of state court process – that the

> **"IHOA Defendant (is using state court process) to collect the IHOA's housing discrimination investigation costs from Plaintiff, as well as other phony costs which are really retaliation." - para 4d App. 67a.**

Jarmuth never claimed that the "award" was FHA retaliation, the award being conduct by a court. The FHA retaliation asserted is conduct by the HOA. The District Court never explained how the HOA's 2011 counter-claim about a wall made FHA "swing set" related retaliation (beginning in 2012) "available" or "actually litigated" in state court in 2011.

Jarmuth's May 5, 2017 Reply relating to his motion for District Court reconsideration provided copies of the HOA's March 3, 2016 and April 7, 2016 post-trial state court pleadings, as examples of the HOA's FHA Retaliatory use of state court process -- AFTER the close of the state court case -- to illegally attempt to collect the HOA's SCHA related legal costs and to use state court process for that purpose.

The District Court's February 12, 2016

Magistrate Order mentioned the mandatory obligation for a Court to perform the transactional analysis stated by this Court in Nevada v. United States, 463 U.S. 110 (1983). It failed to do so.

A. The Court ignored this Court's precedent stated in Nevada v. United States, 463 U.S. 110 (1983) which requires the District Court to determine whether the "cause of action" in the federal case are the "same cause of action" in the state case before concluding claim preclusion (they are not).

In Nevada this Court stated that

> **"To determine the applicability of res judicata to the facts before us, we must decide first if the 'cause of action' which the Government now seeks to assert is the 'same cause of action' that was asserted" -Page 463 U. S. 131 (including) "any other admissible matter which might have been offered ... to sustain or defeat the claim or demand" -Page 463 U. S. 130.**

Neither the HOA nor the District or Appellate Courts performed the mandatory Nevada analysis. None of them ever identified what the "same causes of action" were or

pointed to any common "admissible matter". The HOA's 2011 state court counter-claim, App. 53a, had nothing to do with FHA retaliation or the SCHA investigation, and was about a "wall". The wall-related events predate the FHA retaliation by at least a year. The burden was on the HOA and the courts to do more than state a fact-less assertion of claim preclusion. The District Court's stated no findings of actual facts to sustain its conclusion of law that Jarmuth's federal FHA Retaliation claims were or could have been litigated in state court.

B. The Courts ignored Lawlor v. National Screen Service Corp., 349 U.S. 322 (1955) which bars claim preclusion for any transactions after the close of state court proceedings.

The District Court "rolled" all HOA demands stated after the August 10, 2012 close of state court proceedings for Jarmuth to repay its SCHA investigative costs, and all instances of HOA use of state court process for that purpose made after that same date, into its inclusive conclusion of law. It erroneously

determined that all Jarmuth's federal FHA retaliatory claims "were or could have been litigated in the state case", App. 7a, 38a. Per any and all of Jarmuth's federal pleadings every one of Jarmuth's FHA retaliation claims relate to HOA conduct after August 10, 2012.[9] In Lawlor this Court stated the precedent that --

> **"While the [earlier] judgment precludes recovery on claims arising prior to its entry, it cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case. ... "whether the defendants' conduct be regarded as a series of individual torts or as one continuing tort, the [earlier] judgment does not constitute a bar to the instant suit."**

While not explaining the relevance of the HOA's "wall" counter-claim to FHA Retaliation, the District Court pinned the "end date" of claim preclusive events to the October 11, 2011 the date of the HOA counter–claim, App. 53a.

The District Court must be given the

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9 **The last day of the state trial.**

opportunity through a GVR to reconsider the applicability of claim preclusion to Jarmuth's federal claims arising from HOA conduct after that date.

C. The Courts ignored this Court's precedent stated in Migra v. Warren City School Dist. Bd. of Ed., 465 US 75 (1984) which required the Court to determine and apply South Carolina notions of claim and issue preclusion where non-litigation of Permissive Claims does not implicate later claim preclusion.

> **In Migra this Court wrote that**
>
> **This case raises issues concerning the claim preclusive effect of a state-court judgment in the context of a subsequent (federal) suit, under 42 U. S. C. §§ 1983 (at 77)**

This is the same context as Jarmuth's case.

The Migra court wrote further that:

> **"It is now settled that a federal court must give to a state-court judgment the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered ... Congress has specifically required all federal courts to give preclusive effect to state-court judgments whenever *the courts of the State from which the judgments emerged would do so.*" citing**

> **Allen v. McCurry, 449 U. S. 90 (1980) (italics added).**

The Migra decision went on to state

> **In Union & Planters' Bank v. Memphis, 189 U. S. 71, 75 (1903), this Court held that a federal court "can accord [a state judgment] no greater efficacy" than would the judgment-rendering State. That holding has been adhered to on at least three occasions since that time. Oklahoma Packing Co. v. Oklahoma Gas & Electric Co., 309 U. S. 4, 7-8 (1940); Wright v. Georgia Railroad & Banking Co., 216 U. S. 420, 429 (1910); City of Covington v. First National Bank, 198 U. S. 100, 107-109 (1905).**

In this instant case the District Court failed to identify and apply the applicable South Carolina practice relating to res judicata; the Court of Appeals overlooked this error.

The applicable precedent was stated by the S.C. Supreme Court in Plum Creek Dev. Co. v. City of Conway, 334 S.C. 30, 512 S.E.2d 106 (1999).

In Plum Creek the Court stated that

"Where, after the rendition of a judgment,

> **subsequent events occur, creating a new legal situation or altering the legal rights or relations of the litigants, the [initial] judgment may thereby be precluded from operating as an estoppel." citing Am.Jur.2d Judgments § 567(1994). p.19.**
>
> **"South Carolina courts use various tests in determining whether a claim should have been raised in a prior suit: 1) when there is identity of the subject matter in both cases; 2) where the cases involve the same primary right held by the plaintiff and one primary wrong committed by the defendant; 3) when there is the same evidence in both cases; and recently 4) when the claims arise out of the same transaction or occurrence." citing SC Civil Procedure, pp.649- 50. – fn3 pp.15-16.**

In opposing dismissal Jarmuth argued that his case does not satisfy any of the above four S.C. reasons why claim preclusion could be applied. In opposing dismissal Jarmuth analyzed the fact record and showed that the required fact predicates are absent. The HOA's motions and the District Court's orders jumped to a conclusion of law of claim preclusion, while skipping the predicate factual analysis required by Plum Creek before stating such a

conclusion.

Per the record as it exists below, application of state court notions of claim preclusion does not apply to Jarmuth's federal claims.

Per Migra implicating Plum Creek, the case should be GVR'd to the District Court. That tribunal should ascertain whether any or all of Jarmuth's FHA Retaliation claims arise from HOA or state conduct, or occurrences after the close of the state trial, and whether such conduct or occurrences after the close of the state trial constituted actionable acts of FHA retaliation, to wit: demands for repayment of the HOA's SCHA related legal expenses or HOA use of state court process to collect that money.

IV. The two federal Courts ignored this Court's precedent stated in United States v Throckmorton 98 U.S. 61 (1878) and its progeny, which required the District Court to consider Jarmuth's repeated assertions that the state court order is not entitled to claim preclusion because the portions relevant to the federal case were obtained by extrinsic fraud.

In Jarmuth's pleadings [10] he asserted that the state order was not entitled to claim preclusion because it was obtained by extrinsic fraud and concealment by the HOA's attorney.

This court's precedent stated in Throckmorton required the District Court to consider the evidence presented by Jarmuth in support of this contention. Jarmuth asserted that the HOA's attorneys had repeated those same extrinsic frauds to the federal court.

Instead of considering the issue the District Court ignored (App. 3a, 11a) the issue of extrinsic fraud and its effect on claim preclusion.

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10 **April 18, 2017 Motion for Reconsideration; May 5, 2017 Reply to Motion for Reconsideration; April 13, 2018 Brief in Court of Appeals; April 30, 2018 Appellate Reply Brief; September 21, 2018 Petition for Rehearing.**

In Throckmorton this Court held that federal courts will not afford claim preclusion to prior orders tainted by extrinsic fraud in the prior proceeding, holding that

> **"The frauds for which a bill to set aside a judgment or a decree between the same parties, rendered by a court of competent jurisdiction, will be sustained are those which are extrinsic or collateral to the matter tried ..." Syllabus #2 at Page 98 U.S. 62.**
>
> **"The cases where such relief has been granted are those in which, by fraud or deception practiced on the unsuccessful party, he has been prevented from exhibiting fully his case, by reason of which there has never been a real contest before the court of the subject matter of the suit." Syllabus #3 at Page 98 U.S. 62.**

The HOA never refuted Jarmuth's evidence-based assertions in federal court that

(1) the HOA's attorney "snuck" the award of the HOA's discrimination investigation expense into the state court final order written word for word by the HOA's attorney;

(2) that the second check for which the HOA was awarded recovery was actually the

HOA's legal expense in an electric company easement condemnation action -- having nothing to do with Jarmuth;

(3) that the HOA's attorney lied when she asserted in both federal and state court pleadings that the first check was the HOA's state case legal costs [11]; and

(4) that the HOA's attorney snuck relief into the final order where there was no corresponding claim.

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11 **The HOA's insurance policy provided that because of an earlier case filed against the HOA by another party, the HOA bore no expense in the later case brought by Jarmuth.**

CONCLUSION

The Supreme Court is not asked to determine the merits of this case, but merely to require the District Court to complete the legal and factual analysis which was required but which it failed to do.

For the foregoing reasons, petitioner requests that this Court Grant the petition for certiorari, Vacate the affirmation of the Court of Appeals, and Remand the case to the District Court for further proceedings.

Dated: December 18, 2018

Respectfully submitted,

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