

**19-8405**  
NO.: 18-17369

IN THE  
**SUPREME COURT OF THE UNITED STATES**  
**WASHINGTON, DISTRICT OF COLUMBIA**

**IRVIN REYES, PETITIONER**

**vs.**

**KAISER PERMANENTE, RESPONDENT**

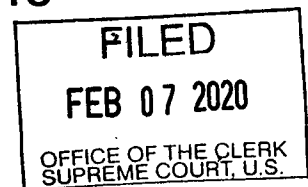
**ORIGINAL**

**ON PETITION FOR A WRIT OF CERTIORARI TO**

**UNITED STATES COURT OF APPEALS**

**FOR THE NINTH CIRCUIT**

**PETITION FOR WRIT OF CERTIORARI**



**IRVIN REYES**

**5135 MACK ROAD, APT. #293**

**SACRAMENTO, CALIFORNIA 95823**

**(916) 271-6621**

### **QUESTION PRESENTED**

- (1) The courts have held that, unless otherwise specified, a dismissal for failure to state a claim under Rule 12(b)(6) is presumed to be both a Judgment on the merits and to be rendered with prejudice, is this true or false?
- (2) A district court's dismissal under Rule 12(b)(6) is, of course with prejudice unless it specifically orders dismissal without prejudice, is this true or false?  
[I]n the absence of a clear statement to the contrary, a dismissal pursuant to Fed Rule Civ. P. 12 (b)(6) is presumed to be with prejudice.
- (3) A dismissal of a civil action with prejudice in civil lower court and not adjudicated, based on res judicata, can same issues be raised in higher court?
- (4) If the lower court decision was based on failure to state a claim, can Petitioner's claim of inadequate representation, pursuant to Fed Rule Civ. P. 12(b)(6) be considered in the Court's ruling on Defendant's motion for judgment on pleadings?
- (5) Petitioner referred to instances in his District Court Complaint, that his attorney "messed up" his civil (lower court) case which this case was dismissed with prejudice by the attorney of record. This reference was made on numerous documents that was submitted with the Petitioner's

District Court complaint. Should the Court have addressed this issue that the Pro Se Petitioner was trying to infer in his complaint (negligence by attorney who represented him in civil lower court case) Do the Pro Se Litigant have right to “Due Process” of law based on actions of legal counsel and since the case was not adjudicated in lower court, does *res judicata* apply in the district court case?

### **OPINION BELOW**

Petitioner respectfully prays that a writ of certiorari issue to review the judgment below.

For cases from **Federal Courts**:

The Opinion of the United States Court of Appeals appears at Appendix A through F and are unpublished.

The opinion of the United States District Court appears at Appendix G through H to the Petition and is unpublished.

For cases from Federal Courts:

1. The date on which the United States Court of Appeals decided my case was October 21, 2019.

2. A timely petition for rehearing was denied by the United States Court of Appeals on February 04, 2020, and a copy of the order denying rehearing appears at Appendix B.

### **LIST OF PARTIES**

All parties appear in the caption of the case on the cover page

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## CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution and the Full Faith and Credit Act and Due Process of Law Clause. 28 U.S. C. § 1738

## STATEMENT OF CASE

Petitioner, in Pro Se, filed a complaint for Civil Case with the United States District Court for the Eastern District of California on March 22, 2018, against Defendant, Kaiser Permanente for relief for Wrongful Termination Violation of Public Policy, Discrimination in Violation of Government Code 12940(a); Gender Discrimination, Government Code 12940(a) and Failure to Accommodate Disability, Government Code 12940 (m). The Petitioner based his claims on the following incidences that occurred while he was an employee with Kaiser Permanente.

Petitioner worked for Kaiser from September 08, 1998 to October 01, 2013. He was terminated by Defendant on October 2013 due to false allegations made by a co-worker. During the investigation of the allegations, the assigned Human Resource Representative failed to verify Petitioner's side of the story or to

interview witnesses that could have disputed the co-worker's story. Although, Petitioner and his Union Representative complained to the Human Resource Representative that she had not considered Petitioner's witnesses, as a result of the Human Resource Representative bias investigation, Petitioner was suspended and terminated. The Human Resource Representative, the person who filed made the allegations and another involved employee were of Asian descent. The Petitioner is of Hispanic descent. The Petitioner filed a Complaint with the Department of Fair Employment and Housing on or about March 07, 2013. He received a Right to Sue Letter issued on March 07, 2013. Petitioner filed a complaint in Superior Court of California County of Sacramento on May 21, 2013, case no.:34-2013-00145176, [Plaintiff was represented by Attorney Gregory A. Thyberg] against Kaiser Foundation Hospitals and Cha Xiong for Discrimination based on sex, national origin and Retaliation. Petitioner also claims that he was discriminated against based on his June 2012 work injury where he suffered a damaged eye [which damaged his vision]. Petitioner also claimed that his termination was retaliation for complaining about Kaiser's negligent removal of his gallbladder in January 2009 and his 2005 sexual harassment lawsuit opposing illegal discrimination. This case of was dismissed by the attorney of record on February 06, 2014, and the Petitioner in turn filed a complaint in the United



States District Court Eastern District of California on March 22, 2018 under jurisdiction 28 U.S.C. § 1291. The District Court entered a Judgment on October 21, 2019 based on “claim preclusion” stating that the Petitioner “could have raised, his claims in his prior California state court action, which involved the same primary rights and parties, or their privies, and resulted in a final judgment on the merits”, see *Migra v. Warren City Sch. Distr. Bd. Of Educ.* 465 U.S. 75, 81 (1984) (to determine the preclusive effect of a state court judgment, federal courts must look at the law of the state in which the judgment was rendered); *San Diego Police Officers’ Assn v. San Diego City Emps.’ Ret. Sys.*, 568 F.3d 725, 734 (9<sup>th</sup> Cir. 2009). The State Court Case was dismissed with prejudice without rendering a judgment on the claims of the Petitioner’s complaint. Pursuant to *Guerrero v. California Department of Corrections and Rehabilitation*, 2018 S.O.S. 5324:

*“In determining the preclusive effect of the judgment in the Federal Action, the trial court erroneously applied the California doctrine of primary rights. He correctly points out that in Semtek Int’l Inc. v. Lockheed Martin Corp 531 U.S.497 (2001). The United States Supreme Court held that federal common law controls the preclusive effect of a federal judgment”*

*“While recognizing that Semtek does not tell us what the rule of decision is when the federal judgment was on a federal request,’ the trial court went on to apply California law because it perceived no federal interest in the application of federal law. On this point, the court erred.*

Under Federal Rule of Civil Procedure 41(b) only has the effect of preventing a re-filing in the same district court in which the case was earlier filed. Federal

common law governs the claim-preclusive effect of a dismissal by a Federal Court sitting in diversity. The District Court **did** abuse its discretion by dismissing Petitioner's complaint without leave to amend because amendment would be futile. The District Court erred in dismissing the Petitioner's case. It is no longer the case that a judgment on the merits is automatically entitled to claim preclusive effect. Thus, the term "operates as adjudication on the merits" does not automatically render a judgment the effect of claim preclusion under Fed R. Civ. Pr. 41(b). Instead adjudication on the merits is merely one that is not dismissed with prejudice. An adjudication upon the merits, under Fed. R. Civ. Pr. 41(b) only has the effect of preventing a "refiling" in the same district court in which the case was earlier filed. To restore the due-process constraints on state preclusion standards—and to deter other courts from using unprecedented preclusion rules to facilitate the class wide adjudication of individualized claims – this court should grant review in this case, *Philip Morris USA v. Williams*, 549 U.S. 346 (2007), *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246 (Fla.2006), due process requires Petitioners to prove every element of their claims before depriving defendants of their property, *Logan v. Zimmerman Brush Co.*, 455 U. S. 422, 433 (1982), requires affording defendants "an opportunity to present every available defense", *Philip Morris USA v. Williams*, 549 U.S. 346,353 (2007).

## **REASONS FOR GRANTING THE PETITION**

**I. THE NINTH CIRCUIT'S APPEALS COURT'S "OPPORTUNITY TO BE HEARD"  
THE COMMON-LAW REQUIREMENTS AND THIS COURT'S DUE PROCESS  
PRECEDENT AND THE ISSUE OF PRECLUSION.**

- A. The requirement that preclusion is not applied to cases filed in lower court that may contain same or similar claims.**
- B. That preclusion does not may violate Fifth Amendment "Due Process" Clause.**

**II. THE QUESTION PRESENTED MAY HAVE FAR REACHING CONSEQUENCES  
FOR PRO SE LITIGANTS WHO HAVE BEEN BARRED FROM DUE PROCESS  
WHEN PRECLUSION IS APPLIED AS AN ISSUE TO DISMISS THEIR CASE.**

**III. JURISDICTION ON WRIT OF CERTIORARI**

**A. Rule 10. Considerations Governing Review on Certiorari. Review on**

**a Writ of Certiorari is not a matter or right, but of judicial discretion.**

**A petition for a Writ of Certiorari will be granted only for compelling**

**reasons. The Petitioner, because he is in Pro Se, has been deprived**

**of his Due Process of Law because the Court of Appeals has decided**

**that his should not be heard and is dismissed because of his prior**

**lower court case, that was dismissed because the Petitioner was**

**negligently represented. The Petitioner was trying to have his case**

**heard in a higher court to assure that his case be heard. The Court of**

Appeals has decided by using a questionable issue [preclusion] to depart from the accepted and usual course of judicial proceedings, to allow the Petitioner Due Process of Law based on the Fifth Amendment.

### CONCLUSION

The Court should grant the Petition for a Writ of Certiorari to allow the Petitioner Due Process of Law based on the Fifth Amendment.

Respectfully submitted,

DATED: 4/29, 2020

  
\_\_\_\_\_  
IRVIN REYES, Petitioner