No. _____

In The
Supreme Court of the United States

DANIEL FLING,

Petitioner,

v.

UNITED STATES POSTAL SERVICE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The District Of Columbia Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Does the federal common law of claim preclusion bar a party's due-process claim against the United States Government in a United States district court if: (1) a previous and different United States district court barred the individual's non-constitutional claim on the basis of the applicable statute of limitations and dismissed the complaint without addressing the operative facts of that matter; (2) the facts supporting the constitutional claim occurred prior to the first action, overlap the operative facts of the non-constitutional claim, but are not wholly coincident; and (3) the introduction of evidence and litigation of the operative facts supporting the due-process claim would not be impeded by issue preclusion?

PARTIES TO THE PROCEEDING

Petitioner is Daniel Fling, a former letter carrier of the United States Postal Service ("USPS"). USPS, a Respondent, was named the lead defendant in this action, as 39 U.S.C. 401(1) and 409(a) authorize. The lower courts re-ordered the defendants in the caption without explanation.

The other individual Respondents are named solely as employees for the West McLean Branch for USPS. They include: Andrew Martin (Customer Service Supervisor), Federico Bynoe (Carrier Supervisor), and Daniel Grant (Postmaster). "USPS" hereafter refers either to USPS or to USPS and the individual Respondents, as appropriate in the context.

Megan J. Brennan, was the second-named defendant in the action based on her position as Postmaster General of the United States Postal Service. She left that office on March 29, 2019, and is no longer a party to this proceeding.

RELATED CASES

Petitioner-plaintiff filed this case on March 12, 2019, in the United States District Court for the District of Columbia, civil case number 1:19-cv-00693-CJN. The jurisdictional basis for the action was 28 U.S.C. 1331 and 39 U.S.C. 409. The district court entered a memorandum opinion and order on August 7, 2020.

RELATED CASES—Continued

Petitioner-plaintiff filed a notice of appeal on August 18, 2020, to the United States Court of Appeals for the District of Columbia Circuit. The court of appeals assigned the case number 20-5250, and entered an order on December 22, 2020.

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PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully requests a writ of certiorari to review the final order of the United States Court of Appeals for the District of Columbia Circuit.

OPINIONS BELOW

The court of appeals opinion is unpublished. The district court opinion is published as 2020 WL 4569335. Both opinions appear in the Appendix at App. 1 and App. 4, respectively.

JURISDICTION

The District of Columbia Circuit entered the final order on December 22, 2020. This petition is timely under Rule 13.1 of the Court. The Court has jurisdiction under 28 U.S.C. 1254(1).

STATUTORY PROVISION INVOLVED

No statutory provision is involved in this case.

I. STATEMENT

Petitioner commenced this action in the United States District Court for the District of Columbia under, among other listed provisions, 28 U.S.C. 1331 and 39 U.S.C. 409. The United States Court of Appeals for

the District of Columbia Circuit decided or failed to reach important questions of the federal common law of res judicata that this Court has not settled but should settle, namely, (1) the limits, if any, to the occurrence-or-transaction test of claim identity, and (2) the meaning, relevance, and burdens of pleading, presenting, and proving the on-the-merits requirement.

A. SUBSTANTIVE HISTORY

In the early evening of January 10, 2017, Petitioner, a USPS letter carrier, parked his private vehicle in the lot of a multiple-dwelling apartment building. The building was on his postal route and he had come to know many of the resident-customers. Earlier that day, a customer-family with whom he had become friends invited him to dinner; he accepted, and returned to the building after the work day solely to honor his acceptance. After exiting his vehicle and while proceeding to the building, he greeted another postal customer-resident of the building, an adult woman. After exchanging greetings and brief conversation, Petitioner proceeded to the elevator to his friends' apartment.

The following day, the woman whom Petitioner had greeted reported to the landlord her "surprise" in observing Petitioner in his private automobile and civilian clothes and in learning—from Petitioner—that he had friends in the building. The landlord forwarded her report to USPS. USPS had no rule or policy that prohibited letter carriers from befriending and socializing off-duty with postal customers.

On February 18, 2017, USPS held a pre-disciplinary interview ("PDI") of Petitioner. Petitioner confirmed that he visited the building to dine with friends and acknowledged greeting and conversing briefly with the reporting woman. On March 29, 2017, USPS issued and delivered to Petitioner a notice of removal, which retold the narrative, terminated Petitioner for "improper conduct," and ordered Petitioner to leave in thirty days. This exhausted Petitioner's pre-termination due process.

This was the second time in four years that USPS summarily dismissed Petitioner. The first time, Petitioner exhausted the multi-step grievance process and went to arbitration under the applicable collective bargaining agreement. That process took almost two years; USPS managers stood fast, being compensated for their services while Petitioner endured the numerous steps to arbitration while in a non-paid status. When a third-party decision-maker—an arbitrator—reviewed the matter, he reinstated Petitioner.

After this second termination, Petitioner was despondent: he faced another long post-termination process without expectation of settlement or assurance that the union would, once again, undertake the grievance process and incur the expense of arbitration. Not surprisingly, the Union (or Petitioner) missed the brief grievance window,[1] preventing any post-termination process. Petitioner now had a "sullied" employment

[1] The question of the union's role in this was not adjudicated.

record that impaired chances of obtaining employment in the public or private sectors.

B. PROCEDURAL HISTORY

Petitioner commenced an action in the United States District Court for the Eastern District of Virginia ("EDVA") on November 7, 2017, alleging, among other things, a breach-of-contract claim against USPS. EDVA found as a matter of fact that (1) the contract claim had accrued on March 29, 2017, when USPS had delivered the notice of removal to Petitioner, and (2) the six-month statute of limitations had run as of November 7, 2017. The court barred the claim, denied Petitioner's oral request for leave to file a second amended complaint,[2] and dismissed the action.

On March 12, 2019, Petitioner commenced this action in the United States District Court for the District of Columbia ("DDC") alleging a constitutional claim against USPS.[3] On July 17, 2017, USPS moved to dismiss on a number of grounds. The only materials

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[2] The district court noted that "the request was not by motion under Rule 15 containing new allegations" and that "the Court sees no conceivable way for these claims to be adequately pleaded." Memorandum Opinion and Order, April 26, 2018, at 7.

[3] The operative facts of Petitioner's constitutional claim preceded but were not entirely coincident with the operative facts of the first action. The contract claim in the first action began and ended with USPS's decision to remove Petitioner on March 29, 2017; the constitutional claim concerning the absence of pretermination notice of any rule violation began with the PDI of February 28, 2017, and ended with USPS's termination of Petitioner on March 29, 2017.

accompanying the motion were USPS's memorandum in support of its motion and the text of a proposed order. On September 13, 2019, Petitioner filed a motion for summary judgment that included the memorandum in support and in opposition to the motion to dismiss, the text of a proposed order, an affidavit of Petitioner, and a statement of material facts. On November 1, 2019, USPS filed a reply in further support of the motion to dismiss and opposition to plaintiff's motion for summary judgment. With the reply, USPS included as an exhibit a copy of Petitioner's complaint in the EDVA action. On November 27, 2019, Petitioner filed a reply in further support of the motion for summary judgment.

On August 7, 2020, the DDC issued a memorandum opinion and order that granted USPS's motion to dismiss on the ground of res judicata and dismissed the action. On August 18, 2020, Petitioner filed a notice to appeal from the DDC order. On USPS's motion for summary affirmance, the United States Court of Appeals for the District of Columbia ("DC COA") affirmed the DDC order on December 22, 2020.

DDC and DC COA ("lower courts") applied different standards for the government and Petitioner; for USPS, applicable Rules of Civil Procedure ("Rules") were ignored and Petitioner was tasked with disproving each and every element of USPS's affirmative defense. Petitioner's opposition to the motion to dismiss and cross-motion for summary judgment ("Petitioner's Response") addressed USPS's litany of defenses, which included sovereign immunity, res judicata, improper venue, lack of subject matter jurisdiction, lack of

personal jurisdiction, preclusion by sufficient alternative statutory scheme, and qualified immunity. In reply to Petitioner's Response, USPS included evidence, namely, the complaint in the EDVA action, to support its res judicata defense.

In affirming the DDC's dismissal of this action on claim preclusion, the DC COA (1) applied the mechanical claim-identity test that bars a new claim in a second action if it arose from the same occurrence or transaction as the claim in the first action, and (2) held that Petitioner had forfeited the on-the-merits question, which was an element of USPS's affirmative defense, "because [Petitioner] raised the issue only in his reply brief."[4] The DC COA failed to note that Petitioner's reply brief was submitted only after USPS had filed evidence purporting to support its affirmative defense of res judicata.

II. REASONS FOR GRANTING THE PETITION

The questions presented are important but unresolved questions of the federal common law of res judicata, specifically, the relationships between the claim-identity and on-the-merits tests of claim preclusion and the potentially useful role of issue preclusion in the occurrence-or-transaction claim identity-test.

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[4] Petitioner filed the reply brief on November 27, 2019, after USPS had filed the EDVA complaint as evidentiary support of its motion to dismiss.

A. THE CONDITION OF ISSUE PRECLUSION RESOLVES THE "ON-THE-MERITS" QUESTION OF CLAIM PRECLUSION

This case provides the Court with a factual scenario that would allow: (1) relaxation of the mechanistic application of the occurrence-or-transaction claim-identity test; (2) construction of an on-the-merits test that does not yet exist; and (3) articulation of issue preclusion with claim preclusion.

Petitioner's position would create an identity-of-claims test that coordinates with a meaningful on-the-merits test. Currently, policy considerations are irrelevant to the claim-identity test; it looks solely to the possibility of alleging an alternative claim in the original action. If the claim could have been alleged, then the interests of the defendant and the courts automatically outweigh plaintiff's interests and require dismissal. It is a one-size-fits-all straightjacket that punishes a client for an attorney's specialization or hyper-focus on a single approach. While it offers simplicity and ease of application while reducing the swollen dockets of overworked courts, it renders the basis for the first action—even if not on the merits—largely irrelevant.

Petitioner submits that the present case enables consideration of a rule that would add an issue-preclusion condition to the occurrence-or-transaction condition of the claim-identity element. This addition—at least for constitutional claims—would ensure a day in court and give meaning to the on-the-merits

element of claim preclusion by requiring that an initial U.S. District Court resolve one or more operative facts of the nucleus of operative facts upon which the claim in the second action is based before precluding the second claim.

The federal common law of res judicata is subject to due process limitations, *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996), and subsumes claim and issue preclusion. Preclusion prevents parties from contesting outcomes and issues they had a full and fair opportunity to litigate. *Montana v. United States*, 440 U.S. 147 (1979). This Court has already observed the hazards of mechanically applying res judicata, stating that it should "be invoked only after careful inquiry" because it "may govern grounds and defenses not previously litigated," "blockade[] unexplored paths that may lead to truth," and "shield[] the fraud and the cheat as well as the honest person." *Brown v. Felsen*, 442 U.S. 127, 132 (1979). A prior action that has been barred on procedural grounds is not, Petitioner respectfully submits, a "previously litigated" matter.

Before adopting the occurrence-or-transaction test for the claim-identity element of claim preclusion, this Court had noted the important role of issue preclusion in claim preclusion: if "a second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered." *Cromwell v. County of Sac*, 94 U.S. 351, 352-53 (1876). Issue preclusion prevents re-litigation

of findings of fact: a "right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction, as a ground of recovery, cannot be disputed in a subsequent suit between the same parties or their privies." *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pacific R. Co. v. United States*, 168 U.S. 1, 48-49 (1911).

This Court recently confirmed that "the strictures of issue preclusion or claim preclusion operate[ ] 'only upon the matter at issue and determined in the original action.'" *Lucky Brand Dungarees, Inc.*, slip op. at 7 (quoting *Davis v. Brown*, 94 U. S. 423, 428 (1877)). The only matter determined in the original action in this matter was the applicability of the statute of limitations to a contract-based claim. If a second claim, not raised in the first action, is not within that statute of limitations, and the operative facts have not been addressed in any way other than to find a date of accrual, then issue preclusion has no role in a second action.

Issue preclusion provides an excellent conceptual basis for linking the occurrence-or-transaction (claim-identity) and on-the-merits elements of claim preclusion: it prevents re-litigation of one or more adversely found facts upon which any claim in a second action would depend, and it avoids the need to revisit already determined facts a second time. If the facts of an initial matter are addressed on the merits—whether as alleged and resolved on a motion to dismiss for failure to state a claim, as found on summary judgment for failure to create an issue of fact in the face of

contrary evidence, or at trial after a jury finds the facts against the claim—the finding is based on the merits. In all of these scenarios, a required condition of issue preclusion would prevent re-litigation of the claim. The adverse findings in the first action would justify dismissal as a matter of law of a new theory of liability based on the same nucleus of facts, one or more of which was insufficiently pleaded, not or improperly presented through evidence, or not accepted by a fact-finder. In this circumstance, claims in the two actions would be identical for claim preclusion purposes because the second claim could not withstand the consequence of issue preclusion: dismissal on one or more elements of the claim as a matter of law.

Issue preclusion could also provide a limit to the claim preclusion exception of *Whole Woman's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016). In *Whole Woman's Health*, this Court held that evidence of enforcement consequences (changed circumstances) caused a post-enforcement as-applied due-process claim—linguistically identical to the pre-enforcement claim and concerned with the very same initial government action—to not be the "very same claim" under the occurrence-or-transaction test. It is unclear how claim preclusion would prevent subsequent actions that challenge the same *initial governmental action* if the consequences of that governmental action—and the evidence generated thereby—continued to develop over time. It could be that enforcement consequences as of the filing of a second complaint or completion of a second trial are

significantly less than the consequences at the later time when challengers might file a third complaint.

The Court's reliance on the pre- and post-enforcement timeline did not address plaintiff's use of predicted outcomes of enforcement in the second action, evidence that was likely available pre-enforcement. Also, the degree and timing of post-enforcement consequences is uncertain. If issue preclusion were an additional necessary condition for claim preclusion, it could resolve these questions.

In the present case, the question of claim-identity overwhelmed the on-the-merits contention. Petitioner had emphasized that he had never had his day in court: he had not had any opportunity to address the merits of any claim arising from the operative facts of his case. USPS argued, however, that because the constitutional claim could have been made in the first action, the adverse outcome of that action as well as *how* that adverse outcome came to be were irrelevant for purposes of claim preclusion.

B. THE LOWER COURTS RULED IMPLICITLY THAT STATUTE OF LIMITATIONS IS ON THE MERITS

The on-the-merits requirement for claim preclusion confirms and explains the importance of issue preclusion and ensures that a claimant truly has a day in court. Litigants possess a foundational constitutional right to a day in court before rights may be judicially altered. *Richards v. Jefferson County*, 517

U.S. 793, 798 (1996) ("deep-rooted historic tradition that everyone should have his own day in court"); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845-46 (1999) (day-in-court ideal as applicable to class action cases). The meanings of "day-in-court" and "on-the-merits" are, however, uncertain, and the relationship of the two terms is unclear. Their reality seems mostly rhetorical, leaving the relationships between the on-the-merits component of claim preclusion, the mandate of due process, and the day-in-court principle murky.

Rule 41(b) has been used to fill the hole, as in this case. As this Court has noted, however, Rule 41 neither disposes of the "complex question of claim preclusion" nor compels application of res judicata except in the same federal court. *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 506 (2001). In *Semtek*, this Court stated that:

> "judgment on the merits" has been "applied to some judgments . . . *that do not pass upon the substantive merits of a claim and hence do not (in many jurisdictions) entail claim-preclusive effect*. . . . [I]t is no longer true that 'adjudication upon the merits' is synonymous with Rule 41(b)'s term 'on the merits,'" or that a judgment so designated is necessarily entitled to claim-preclusive effect." *Id.* (citations omitted) (emphasis added).

In the present case, the DDC implicitly ruled on undisputed facts that Rule 41—to which USPS referred in its motion to dismiss—satisfied the on-the-merits element of USPS's unpled affirmative defense of res

judicata. The DDC's assertion that Petitioner "conceded" and DC COA's claim that Petitioner "forfeited" this element of USPS's improperly raised affirmative defense, perhaps by not creating an issue of fact or convincing the courts that the law is otherwise, effected a seemingly predetermined outcome. Petitioner submits that the DDC's action constituted reversible error, which the DC COA affirmed.

The courts below ignored USPS's burdens: (1) to plead the affirmative defense of res judicata, as Rule 8(c)(2) provides, and to not use Rule 12(b)(6), which does not provide for res judicata to be raised;[5] (2) to present evidence supporting each and every element of the unpled affirmative defense in a so-called motion to dismiss when the motion is filed, not with a reply to the other party's response; and (3) to modify formally its Rule 12(b)(6) motion into a motion for summary judgment. The lower courts also held that the default is that all elements of an affirmative defense are sufficient as a matter of law in a motion to dismiss unless plaintiff challenges every such element *even though the evidence supporting any elements is missing when the motion was made*.

As for (1) above, USPS ignored and bypassed Rules 8(c)(2) and 12(b)(6) by expeditiously raising the affirmative defense of res judicata[6] in its motion to

[5] Res judicata is not among the defenses of Rule 12(b)(6).

[6] An affirmative defense, unlike a mere defense, is a substantive claim with elements; if each and every element is proven as a matter of fact or law, then the remedy is that the affirmative defense neutralizes any remedy to the claim against which it is

dismiss, along with a number of other contentions—a "kitchen sink" of defenses. With (2), USPS did not provide evidence to support its Rule 12(b)(6) motion until four months later, *after* the filing of Petitioner's Response.[7] For (3), the DDC held that Petitioner, in responding to USPS's cornucopia of defenses, had not challenged *sufficiently* every unpled element of the res judicata and thereby had "conceded" those elements.

DC COA re-characterized the concession as a forfeiture, without discussing why an *affirmative* defense raised by motion without contemporaneous evidence is conceded. USPS's reference to Rule 41 did not constitute "proof" as a matter of law. See, e.g., *Gomez v. Toledo*, 446 U.S. 635, 639-41 (1980); in fact, proof is irrelevant on an undisputed fact. DC COA affirmed DDC's burden-shifting, leaving Petitioner "to disprove" every element of USPS's affirmative defense, factually or legally:

> The district court properly determined that appellant's argument that his prior case in the Eastern District of Virginia ["EDVA"] was not a final judgment on the merits was forfeited because he raised the issue only in his reply brief, Bd. of Regents of Univ. of

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asserted. *Sloan Valve Co. v. Zurn Industries Inc.*, 712 F. Supp. 2d 743, 749 (N.D. Ill. 2010).

[7] USPS did not move for summary judgment. On November 21, 2019, four months after filing its Rule 12(b)(6) motion and in response to Petitioner's cross-motion, USPS submitted as an exhibit the First Amended Complaint in the EDVA action. USPS relied on Petitioner's inclusion in his motion of the EDVA memorandum opinion and order dated April 26, 2018.

> Washington v. EPA, 86 F.3d 1214, 1221 (D.C. 1996), and did not adequately develop the argument, Davis Broad, Inc. v. F.C.C., 63 App'x 526, 527 (D.C. Cir. 2003).

The cases to which the DC COA cited reveal the peculiar and unfair treatment accorded USPS's affirmative defense. An affirmative defense is a claim, not a given. In the cases cited, however, the given was an already-existent administrative decision.

The challengers forfeited a specific *fact-based* contention in undoing an administrative decision when they had the burden of proving that decision was arbitrary or capricious. DC COA's citations, however, (1) equate USPS's assertion of an affirmative defense—made by an inappropriate motion to dismiss—to an administrative agency's reasoned decision; and (2) imposed on Petitioner the burden of challenging in the first instance each and every *factual* element of an affirmative defense—not even judicially found to be satisfied—just as the burden rested on the challengers of an administrative decision to raise arguments to undo that decision *in the first instance*.[8] These case

[8] In *Bd. of Regents of Univ. of Washington v. EPA*, 86 F.3d 1214, 1221 (D.C. 1996), the petitioner, potentially responsible for clean-up costs, challenged EPA's decision to add a particular waste site to the National Priorities List. A laundry list of factors could or should be used in the decision. Petitioner addressed various factors, but one such factor—whether EPA had made "an independent identification and delineation of on-site wetlands"—was addressed only in petitioner's reply brief. This deprived EPA of the opportunity to respond (as a matter of fact or law) to that particular factor. *Id*.

citations alone reveal the lower courts' efforts and eagerness to prevent Petitioner's constitutional claim from seeing the light of the courtroom day.

In addition to favorable disregard of procedural rules to benefit USPS while straining to lay procedural mines for Petitioner, the lower courts imposed on Petitioner, *sub silentio*, a strict rule of diction requiring incantation of formulaic terminology. Petitioner had argued that EDVA prevented Petitioner from having a "day in court"—not having had an opportunity to have the facts of his claim heard—yet the lower courts implicitly considered this assertion unrelated to the question whether EDVA had ruled "on the merits" of the facts of such claim.

In effect, the DDC and DC COA treated Petitioner's opposition as a default and granted the equivalent of a default judgment under Rule 55(b) to USPS on its affirmative defense. DDC held the motion papers for over eight months and simply could have requested additional development of the on-the-merits question—one of law only—or could have explicitly decided that question. Instead, it "punted," avoiding any

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In the second, non-precedential case, *Davis Broadcasting, Inc. v. FCC*, 63 F. App'x 526, 527 (D.C. Cir. 2003) ("*Davis*"), the petitioner challenged the FCC's decision not to hold an evidentiary hearing before approving an assignment of radio licenses from one competitor to another, claiming that the parties had acted improperly in the assignment. One footnoted claim referred to "indirect and unauthorized transfer of control" pre-assignment; the court found that the petitioner had waived it and FCC, anyway, had "adequately explained and fully justified."

commitment on the legal question by claiming that Petitioner had "conceded" it.

Petitioner submits that DDC's attempt to dodge the question necessarily constituted an implicit holding that USPS had complied with all of the elements of its affirmative defense of claim preclusion. Petitioner seeks an opportunity to present his claim without an apparent double standard that ensures victory for an agency of the United States Government that blatantly ignores the very document upon which its establishment rests.

CONCLUSION

Petitioner respectfully requests that this Court grant his petition for a writ of certiorari or grant such other relief as it deems appropriate.

Respectfully submitted,

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