CASE NO.: 20-147

IN THE
SUPREME COURT OF
THE UNITED STATES

TIMOTHY B. BROWN,

Petitioner

v.

U.S. BANK NATIONAL ASSOCIATION, et al,

Respondents

On Petition for
A WRIT OF CERTIORARI to the United States Court of Appeals for the Eleventh Circuit

PETITION FOR WRIT OF CERTIORARI

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Petitioner Sui Juris

QUESTIONS PRESENTED

I. Does the Supreme Court's Ruling in *Arizona v. California,* 530 U.S. 392 (2000) empower a District Judge to Raise the issue of res judicata *sua sponte* in a case where the District Judge refers the Case to a Magistrate to determine if *res judicata* applies to the case?

II. If the Supreme Court answers yes to the above question, then Does the Raising of the Issue of res judicate Violate a Pro Se Litigant's Due Process Rights and does such action undermine the Adversary Process of our Legal System?

CERTIFICATE OF INTERESTED PERSONS

PLAINTIFF-PETITIONER DOES NOT HAVE A PARENT CORPORATION AND IS NOT A PUBLICLY HELD CORPORATION.

INTERESTED PARTIES ARE AS FOLLOWS:

BATTEN, SR., TIMOTHY C. -- U.S. DISTRICT JUDGE

BROWN, TIMOTHY B. -- PETITIONER

EBBS, ARTHUR A. -- ATTORNEY FOR RESPONDENTS

EDWARDS, CHRISTOPHER C. -- MAGISTRATE JUDGE FAYETTE COUNTY, GA

GORDON, STUART -- ATTORNEY FOR U.S. BANK, NATIONAL ASSOCIATION

MCCALLA RAYMER LEIBERT PIERCE, LLC -- ATTORNEYS FOR U.S. BANK, N.A.

U.S. BANK, N.A. -- ORIGINAL LENDER -- RESPONDENT

VINEYARD, RUSSELL G. -- U.S. MAGISTRATE JUDGE

WELLS FARGO BANK, N.A. -- ALLEGED HOLDER OF NOTE -- RESPONDENT

WELLS FARGO HOME MORTGAGE -- SERVICER OF MORTGAGE LOAN

WOMBLE BOND DICKINSON (US), LLP -- ATTORNEYS FOR RESPONDENTS

STATEMENT REGARDING ORAL ARGUMENT

Petitioner waives Oral Argument at this time.

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Ebbs, Arthur A. -- Attorney for RESPONDENTS 2

Edwards, Christopher C. -- Magistrate Judge Fayette County, GA 2

Gordon, Stuart -- Attorney for U.S. Bank, National Association 2

McCalla Raymer Leibert Pierce, LLC -- Attorneys for U.S. Bank, N.A. 3

U.S. BANK, N.A. -- Original Lender -- RESPONDENT 3

Vineyard, Russell G. -- U.S. Magistrate Judge 3

Wells Fargo Bank, N.A. -- Alleged holder of note -- RESPONDENT 3

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IN THE

SUPREME COURT OF THE UNITED STATES

PETITION FOR WRIT OF CERTIORARI

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

OPINIONS BELOW

Petitioner Timothy B. Brown on January 3, 2019, filed his lawsuit for Wrongful Foreclosure, Negligence, Conversion, Fraud, and Request for Injunctive Relief. (Appendix, Tab A)

On January 3, 2019, the District Judge signed an Order referring the case to a magistrate judge to determine whether Petitioner's claims are barred by *res judicata*. (Appendix, Tab B)

On July 22, 2019, the Magistrate Judge issued his Final Report and Recommendations. Doc. 10. The Magistrate Judge recommended that Petitioner's Complaint be dismissed as barred by *res judicata* and in the alternative, for failure to state a claim. (Appendix, C)

On August 19, 2019, the District Judge signed his order adopting most of the Magistrate Judge's recommendations. (Appendix, D). The District Judge ruled that Petitioner's claims are barred by *res judicata*, his negligence claim is barred by HAMP, and he should not have been allowed to amend his fraud claim as such claim

is barred by *res judicata*. Petitioner contends that the District Judge erred in each of these rulings.

On August 19, 2019, the Clerk issued the final judgment. (Appendix, E)

On August 30, 2019, Petitioner filed his Motion for New Trial. (Appendix, F)

On September 19, 2019, Petitioner filed his Notice of Appeal. (Appendix, G)

Further, on September 19, 2019, the Court signed its Order denying Petitioner's Motion for New Trial which the District Court took as a Motion for Reconsideration. (Appendix, H)

On April 15, 2020, The Appeals Court for the Eleventh Circuit rendered its decision denying Petitioner's Appeal. (Appendix, I)

Also, on April 15, 2020, the District Clerk issued judgment of dismissal. (Appendix, J)

JURISDICTION

The date on which the United States Court of Appeals decided Petitioner's case was April 15, 2020. (Appendix I and J)

A timely petition for rehearing was denied by the United States Court of Appeals on the following date: May 27, 2020, and a copy of the order denying rehearing appears at Appendix K.

The jurisdiction of this Court is invoked under 28 U. S. C. § 1254(1).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Fifth Amendment to the U.S. Constitution

No person shall ... be deprived of life, liberty, or property, without due process of law.

28 U.S. Code § 1254.Courts of appeals; certiorari; certified questions

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

Federal Rules of Civil Procedure Rule 8. General Rules of Pleading

(c) Affirmative Defenses.

(1) In General. In responding to a pleading, a party must affirmatively state any avoidance or affirmative defense, including:

... res judicata ...

STATEMENT OF THE CASE

On April 15, 2020, the Circuit Court of Appeals for the Eleventh Circuit affirmed the dismissal of Petitioner's case on res judicata grounds. The Appeals Court did not address the other issues raised by Petitioner such as the impropriety of the District Court raising the issue of res judicata sua sponte, the failure of Respondents to raise res judicata in their Motion to Dismiss, how the District Court's action violated Petitioner's due process rights, and the degree to which the Court' activism unbalanced our adversary process. (Appendix D) A summary of the relevant facts follow.

On January 3, 2019, Petitioner filed his lawsuit for Wrongful Foreclosure, Negligence, Conversion, Fraud, and Request for Injunctive Relief. (Appendix A) Petitioner alleged the following facts in support of his Complaint.[1]

1. In response to rapidly deteriorating financial market conditions in the late summer and early fall of 2008, Congress enacted the Emergency Economic Stabilization Act. The centerpiece of the Act was the Troubled Asset Relief Program (TARP), which required the Secretary of the Treasury to "implement a plan" to "minimize foreclosures" and keep troubled mortgage -borrowers in their homes.[2]

2. The Treasury Secretary created the HAMP program to carry out Congress's mandate. HAMP received $50 billion in TARP funds.[3] Mortgage lenders that chose to participate in the HAMP program were eligible to receive allocations of the stimulus funds.

3. Respondent Wells Fargo chose to participate in HAMP. To participate, Respondent Wells Fargo was required to comply with all HAMP program requirements. In exchange for up to $6.4 billion in HAMP funds, Wells Fargo agreed to abide by all "guidelines and procedures issued by the Treasury with respect to [HAMP]" and "any supplemental documentation ...issued by the Treasury,"

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[1] All facts are taken from Petitioner's Complaint unless otherwise noted, except Plaintiff has been changed to Petitioner and Defendant is changed to Respondent.

[2] Wigod v. Wells Fargo Bank, N.A., 673 F.3d 547, 556 (7th Cir. 2012).

[3] Id.

including "Supplemental Directives." See Wells Fargo, Amended and Restated Servicer Participation Agreement, Sec. 1(B).[4]

4. In a Supplemental Directive, the Treasury Secretary required loan servicers participating in HAMP to issue a mortgage modification to any borrower who met all the criteria to qualify. See Supplemental Directive 09-01 (If a borrower meets all qualifying criteria, "the servicer **MUST** offer the modification") (emphasis in original).

5. Respondent U.S. Bank accepted more than $20 Billion Dollars in HAMP funds. However, a Federal Judge in Georgia lambasted Respondent U.S. Bank for denying otherwise eligible mortgagors loan modifications.[5] Respondent U.S. Bank agreed to the same terms and conditions for receiving HAMP funds as did Respondent Wells Fargo.

6. On or about September 16, 2005, Petitioner purchased the real property located at 165 Monticello Way, Fayetteville, Fayette County, Georgia, (hereinafter "Subject Property") described legally as:

> All that tract or parcel of land lying and being in Land Lot 197 of the 13th District of Fayette County, Georgia, and being Lot 14, Block C, Unit 1 of

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[4] Available at **https://tinyurl.com/wells-fargo-hamp-agreement.**

[5] "Judge Rips Into U.S. Bank For Taking Bailout Money But Denying Mortgage Modifications," (https://consumerist.com/2011/11/16/judge-rips-into-us-bank-for-taking-bailout-money-but-denying-mortgage-modifications/).

the Dix-Lee'On Corporation Subdivision, as per plat recorded in Plat Book 6, Page 115, Fayette County, Records, and being more particularly described as follows:

Beginning at a point located on the southwesterly side of Monticello Way, 900 feet Southeasterly as measured along the Southwesterly side of Monticello Way, from the intersection of the Southwesterly side of Monticello Way and the Southerly side of the Dix-Lee'On Drive, said point of beginning also being located at the Southeast corner of Lot 13 of said Block, Unit and Subdivision; thence running Southeasterly along the Southwesterly side of Monticello Way, 100 feet to a point at the Northeast corner of Lot 15 of said Block, Unit, Subdivision; thence running Southwesterly along the Northwesterly side of said Lot 15, 249 .4 feet to a point; thence running Northwesterly 180 feet to a point at the Southwest corner of Lot 13 of said Block, Unit and Subdivision; thence running Northeasterly along the Southeasterly side of said Lot 13, 249.8 feet to the Point of Beginning.

7. On that same date, Petitioner borrowed $389,500.00 from Respondent Wells Fargo to finance said purchase and in conjunction with such loan, he executed a Security Deed and Note with Respondent Wells Fargo in the principle amount of $389,500.00 by which Respondent Wells Fargo became Petitioner's mortgagee. A

true and correct copy of Petitioner's Security Deed is attached to his Complaint as **Exhibit B** (Appendix A) and this document is incorporated into this pleading by reference. On April 21, 2015, Respondent Wells Fargo assigned the Security Deed, but not the Note, to Respondent U.S. Bank. Respondent U.S. Bank became the servicer of the Security Deed and thus remained liable for the terms and conditions and duties of the Security Deed.

8. In early 2016, as the result of a worsening economy, Petitioner notified Respondent U.S. Bank and Respondent Wells Fargo that he had suffered a reduction in salary, and he wished to apply for a loan modification under HAMP so that he could keep making his mortgage payments.

9. At the time he made these requests, Petitioner was not behind in his mortgage and was not aware that his mortgage loan had been paid in full.

10. The Respondents responded by telling Petitioner he was ineligible to apply for a loan modification until his mortgage debt was at least 30 days past due. Petitioner relied in good faith on the representations of Respondents and allowed his mortgage to fall into arrears.

11. Once his mortgage debt was at least 30 days past due, Petitioner reapplied for a loan modification. This time, Petitioner's application was accepted, and Petitioner submitted all the required documents including proof of his salary reduction and the fact that he now had two children going off to college.

12. After he submitted his loan modification request, Petitioner received from Respondent Wells Fargo a Notice of Foreclosure Sale scheduled for 90 days after the submission of his loan modification request. Thereafter, Petitioner had a face-to-face meeting with Respondent Wells Fargo at which he was led to believe that his loan modification would be approved. As a result of this assurance, Petitioner took no further efforts to avail himself of any of his other alternatives to foreclosure.

13. At the time he applied for a loan modification pursuant to HAMP, Petitioner was eligible for a loan modification given that he had suffered two financial setbacks and he had sufficient income to pay 31% of his income in mortgage payments. Thus, it was with great distress and agony that Petitioner received notice on the 85th day after his application that his request for a loan modification had been denied.

14. Sometime in September 2016, on the 91st day after his application for HAMP relief, Petitioner received a Notice of Foreclosure Sale dated August 30, 2016 from the law firm of McCalla Raymer Pierce, LLC. The letter was not signed, and it was not clear which, if any, of the Respondents the law firm was representing. The letter stated that the Subject Property would be foreclosed against on the first Tuesday in October 2016.

15. On December 2, 2016, Petitioner filed a Chapter 13 Bankruptcy Petition in the United States Bankruptcy Court for the Northern District of Georgia, Newnan Division which was assigned Case Number 16-12409-WHD. A true and correct copy of the Bankruptcy Docket Sheet is attached hereto as **Exhibit C** (Appendix A).

16. Respondent Wells Fargo and Respondent U.S. Bank were given due notice of Petitioner's bankruptcy filing.

17. In early January 2017, Petitioner received a letter from Premiere Asset Services which advised him that the Subject Property had undergone a change of ownership. The letter did not say who the new owner is but stated that Respondent Wells Fargo was now the "Servicer" of the alleged mortgage debt.

18. Upon further research, Petitioner discovered that a foreclosure sale of the Subject Property is alleged to have taken place on December 6, 2016 at which Respondent U.S. Bank purchased the Subject Property for $247,050.00.

19. If a foreclosure sale took place on the Subject Property on December 6, 2016, said sale is in violation of the Automatic Stay which was then in effect.

20. If a foreclosure sale took place on December 6, 2016, then said sale took place without providing Petitioner the notices and remedies to which he is entitled under the Note, the Security Deed, and Georgia law.

21. If a foreclosure sale took place on December 6, 2016, then said sale is wrongful because there is no mortgage debt outstanding against the Subject Property, the sale is in violation of the Automatic Stay afforded to those who file bankruptcy, and the sale violated the Note, the Security Deed and Georgia law.

22. As a result of Respondents' misconduct, Petitioner has suffered severe emotional and mental anguish and distress which exceeds the minimal jurisdictional limits of the Court and for which Petitioner hereby sues.

23. The conduct of Respondent U.S. Bank in pursuing a wrongful foreclosure is wanton, with malice, reckless, and in total disregard to Petitioner's rights to such a degree that the Court should assess punitive damages against Respondents, jointly and severally, in a sum which exceeds the minimal jurisdictional limits of the Court.

24. The foreclosure sale, if in fact it occurred, has resulted in the taking of Petitioner's home, the Subject Property, which results in damages to Petitioner in a manner that cannot be compensated adequately by money damages even though the loss of the house constitutes damages in excess of $253,000.00; all of such damages for which Petitioner hereby sues for money damages and injunctive relief.

25. On January 3, 2019, the District Judge signed an Order referring the case to a magistrate judge to determine whether Petitioner's claims are barred by *res judicata*. (Appendix B)

26. Petitioner contends that it was error for the District Judge to raise the issue of *res judicata sua sponte* as doing so violated Fed. R. Civ. P. 8 and also violated Petitioner's due process rights.

27. On January 28, 2019, Respondents filed their joint Motion to Dismiss Petitioner's Complaint under Fed.R.Civ.P. 12(b)(6). Respondents did not raise the issue of *res judicata.*

28. Petitioner contends that *res judicata* is an affirmative defense and the failure of Respondents to assert the defense means that they waived it.

29. On February 11, 2019, Petitioner filed his Response in Opposition to Respondents' Motion to Dismiss.

30. On July 22, 2019, the Magistrate Judge issued his Final Report and Recommendations. The Magistrate Judge recommended that Petitioner's Complaint be dismissed as barred by *res judicata* and in the alternative, for failure to state a claim. (Appendix C)

31. On August 1, 2019, Petitioner filed his objections to the Magistrate Judge's Final Report and Recommendations.

32. Respondents filed their Reply on August 13, 2019.

33. On August 19, 2019, the District Judge signed his order adopting most of the Magistrate Judge's recommendations. (Appendix D) The District Judge ruled that Petitioner's claims are barred by *res judicata*, his negligence claim is barred by

HAMP, and he should not have been allowed to amend his fraud claim as such claim is barred by *res judicata*. Petitioner contends that the District Judge erred in each of these rulings.

34. On August 19, 2019, the Clerk issued the final judgment. (Appendix E)

35. On August 30, 2019, Petitioner filed his Motion for New Trial. (Appendix F)

36. Respondents filed their response in opposition to my Motion for New Trial on September 13, 2019.

37. On September 19, 2019, Petitioner filed his Motion to Stay the judgment of dismissal pending his appeal in which Petitioner sought to stop Respondents from trying to evict him from his home.

38. Also, on September 19, 2019, Petitioner filed his Notice of Appeal. (Appendix G)

39. Further, on September 19, 2019, the Court signed its Order denying Petitioner's Motion for New Trial which the District Court took as a Motion for Reconsideration. (Appendix H)

40. On October 3, 2019 Respondents filed their Response in Opposition to Petitioner's Motion for Stay.

41. Petitioner filed his Reply on October 10, 2019.

42. The District Judge signed its Order denying Petitioner's Motion for Stay on October 18, 2019.

43. The Court of Appeals for the Eleventh Circuit issued its opinion affirming the District Court's Judgment on April 15, 2020. (Appendix I)

44. On that same date, the Clerk issued a Judgment consistent with the Appeals Court's decision. (Appendix J)

45. Thereafter Petitioner filed a Motion for Rehearing.

46. The Appeals Court issued its Order denying Petitioner's Motion for Rehearing on May 27, 2020. ((Appendix J)

ARGUMENT IN SUPPORT OF GRANTING

THE WRIT

RULES OF THE SUPREME COURT

SCOTUS RULE 10

RULE 10. Considerations Governing Review on Certiorari

a) 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; has decided an important federal question in a way that conflicts with a decision by a state court of last resort; or has so far departed from the accepted and usual course

of judicial proceedings, or sanctioned such a departure by a lower court, as to call for an exercise of this Court's supervisory power;

The Eleventh Circuit Court of Appeal's decision in this matter is in conflict with the decisions of other Circuit Courts as well as this Court's decision in *Arizona v. California,* 530 U.S. 392 (2000). Further, if the decision by the Eleventh Circuit Court of Appeals is allowed to remain as is, it will disrupt judicial proceedings and put pro se litigants at a grave disadvantage as well as upend the accepted and usual role of a District Judge.

Certiorari is warranted. The decision of the Court of Appeals poses a serious obstacle to the administration of the law in the Eleventh Circuit. The Eleventh Circuit's decision to allow District Judges to raise the issue of res judicata sua sponte undermines our traditional adversary judicial process and eviscerates Fed.R.Civ.P. 8. Further, the ruling violates the due process rights of litigants, especially pro se litigants.

Moreover, the ruling under review conflicts with this Court's ruling in *Arizona v. California,* 530 U.S. 392 (2000) as well as the decisions of several other circuit courts of appeals. As set forth below, the Eleventh Circuit's ruling impermissibly expands this Court's opinion in Arizona in a way not contemplated by this Court on a matter which destroys national uniformity and strips judges of

their impartiality. Petitioner therefore respectfully petitions for this Court to review the judgment of the Eleventh Circuit Court of Appeals.

I. Does the Supreme Court's Ruling in *Arizona v. California,* 530 U.S. 392 (2000) empower a District Judge to Raise the issue of res judicata *sua sponte* in a case where the District Judge refers the Case to a Magistrate to determine if *res judicata* applies to the case?

II. If the Supreme Court answers yes to the above question, then Does the Raising of the Issue of res judicate Violate a Pro Se Litigant's Due Process Rights and does such action undermine the Adversary Process of our Legal System?

Fed.R.Civ.P. 8 lists res judicata as an affirmative defense which "must" be raised by a party. Fed.R.Civ.P. 8 provides in relevant part:

> (c) Affirmative Defenses.
>
> (1) In General. In responding to a pleading, **a party must affirmatively state** any avoidance or affirmative defense, including (emphasis added):
>
> ... res judicata

With all due respect to the District Judge, he is not a party to the action and thus it was improper for the District Judge to raise the issue of *res judicata.* "[A]

judge does well to respect the limitation of the role of his office ... The judge, circumscribed by his station and its duties, will echo Holmes and remind himself that he is not God or even the legislature."[6] Holmes through Freund offers good advice and a guiding principle which will avoid the type of miscarriage of justice which took place in the Court below.

Rule 8 says clearly that res judicata is an affirmative defense which must be raised by a party in its first responsive pleading. How can it be that a Federal judge who is charged with enforcing the rules of civil procedure should himself violate such rules? Is the rule maker not subject to the rules? Or, are we faced with a God?

A. Appellees were required to raise the affirmative defense of *res judicata* in their Motion to Dismiss and in not raising the defense they waived it.

Res judicata is an affirmative defense which must be pled, and may be waived, by the defendant. *Louisville N.R. Co. v. M/V Bayou Lacombe*, 597 F.2d 469, 471 n. 1 (5th Cir. 1979) ("Res judicata is an affirmative defense.) "That defense was waived when the defendant failed to raise it below.")" *Norfolk Southern Corp. v. Chevron, U.S.A,* 371 F.3d 1285, 1289 (11th Cir. 2004). Clearly, it was error for the District Judge to dismiss Petitioner's Complaint on the basis of *res judicata* since that affirmative defense was waived by the Respondents. In affirming the District

[6] Freund, Paul A. "On Law and Justice." Belknap Press of Harvard University Press, Cambridge, 1968. P71.

Judge's error, the Eleventh Circuit has sent a shock wave through litigation in the Eleventh Circuit which this Court is being asked to correct.

B. The District Judge's raising of the issue of res judicata violated Petitioner's due process rights and shows unacceptable bias.

[A]n impartial decisionmaker is an essential right in civil proceedings ... *Goldberg v. Kelly,* 397 U.S. 254, 271 (1970). Impartiality preserves both the "appearance and reality of fairness . . . by ensuring that no person will be deprived of his interests in the absence of a proceeding in which he may present his case with assurance that the arbiter is not predisposed to find against him." *Schweiker v. McClure,* 456 U.S. 188, 195 (1982). Sometimes, to ensure an impartial tribunal, the Due Process Clause requires a judge to recuse himself from a case. *Caperton v. A. T. Massey Coal Co., Inc.,* 556 U.S. 868 (2009).

The District Judge left his role as judge and became an advocate which put the pro se Petitioner at a serious disadvantage which violated Petitioner's due process rights and even if the District Judge did not intend to, he showed bias against Petitioner which rises to a constitutional level, *Caperton.* This Honorable Court is asked to avenge this violation by reversing the decision dismissing Petitioner's Complaint on *res judicata* grounds.

In (B)(1) of Respondents' Brief, they argue that this Court has crafted a rule which allowed the trial judge below to raise the issue of res judicata *sua sponte.*

Respondents cite *Arizona v. California,* 530 U.S. 392 (2000) to support their argument. In *Arizona,* this Court wrote:

> Judicial initiative of this sort might be appropriate in special circumstances. Most notably, "if a court is on notice that it has previously decided the issue presented, **the court may dismiss the action sua sponte,** even though the defense has not been raised. This result is fully consistent with the policies underlying res judicata: it is not based solely on the defendant's interest in avoiding the burdens of twice defending a suit but is also based on the avoidance of unnecessary judicial waste. *Arizona v. California,* 530 U.S. 392, 412 (2000) (emphasis added, internal citation omitted).

Petitioner contends that Arizona does not apply here because the District Judge did not dismiss the case sua sponte. Instead, the District Judge in his order referring the case to a magistrate stated that the claims in the present lawsuit seems "similar" to claims in a previous case. (Appendix B). This referral of the matter to the magistrate does not avoid "unnecessary judicial waste" because the same procedure and judicial expenditures occur the same as if the Respondents had raised the issue of res judicata as they were obligated to do. In addition, it is undisputed that there were claims raised in Petitioner's second lawsuit which were not raised in the first one. Consequently, the rule cited above would have permitted the Trial

Judge to dismiss any claims litigated in Petitioner's previous lawsuit, but the District Judge could not raise res judicata sua sponte on issues not previously litigated. As this Court notes in *Arizona,* "Where no judicial resources have been spent on the resolution of a question, trial courts must be eroding the principle of party presentation so basic to our system of adjudication." *Arizona v. California,* 530 U.S. 392, 412-13 (2000). The District Judge in raising the issue of res judicata sua sponte on all of Petitioner's claims eroded "the principle of party presentation so basic to our system of adjudication," *id.* In affirming the District Court's error, the Eleventh Circuit has compounded this error.

Respondents also claim that they were not required to raise res judicata in their motion to dismiss because a motion to dismiss is not a responsive pleading. That argument seems illogical because why else would Respondents file a motion to dismiss except in response to Petitioner's lawsuit. Respondents make their argument without pointing out in what way Petitioner's argument to the contrary is flawed. Thus, with the indulgence of the Court Petitioner incorporates that argument here by reference as if fully set forth herein. In addition, Petitioner cites Fed.R.Civ.P. 8 which talks about "responding to a pleading." The Rule is not limited as to the type of pleading nor does it make the "responsive pleading" distinction made by Respondents. A Motion to Dismiss is clearly responding to a pleading (Petitioner's Complaint) and as such the Motion to Dismiss was required to raise the issue of res

judicata. The defense of res judicata must be raised in the first pleading in response to a complaint whether that response is in the form of an answer or a motion to dismiss, or the issue is waived. *In re Air Crash Disaster,* 879 F. Supp. 1196 (N.D. Ga. 1994). Respondents did not raise the issue of res judicata in their Motion to Dismiss and failing to do so they waived their right to do so later.

Consequently, the panel's decision represents an impermissible departure from established law where this Court has held that a district judge may dismiss a complaint sua sponte but otherwise may not raise the issue of res judicata because res judicata is an affirmative defense which must be raised by the parties to the lawsuit. The distinction between the two is critical. The panel's decision misapplies the rule of this Court's decision in *Arizona v. California,* 530 U.S. 392, 412 (2000) and in so doing violates Petitioner's due process rights by expanding judicial activism in a way not contemplated by this Court.

Finally, the panel's decision departs from the Eleventh Circuit Court's own bright-line rule that "this Court typically does not raise claims or defenses on behalf of those who appear before it." See *U.S. v. Burkhalter,* 966 F. Supp. 1223, 1225 n. 4 (S.D.Ga. 1997) ("It is not the province of this Court to raise issues on behalf of litigants before it"); see also *GJR Investments, Inc. v. County of Escambia, Fla.,* 132 F.3d 1359, 1369 (11th Cir. 1998) ("legal parameters of a given dispute are framed

by the positions advanced by the adversaries, and may not be expanded sua sponte by the trial judge") (internal quotes and cite omitted).

Accordingly, this Honorable Court should grant the petition for certiorari to ensure consistent and adequate enforcement of Federal law and procedure.

CONCLUSION

For the above reasons, Petitioner respectfully requests that this petition for a writ of certiorari be granted to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted this 30th day of July 2020,

Timothy B. Brown
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Fayetteville, GA
Zip code exempt [30214]
Without the United States Corporation
770-827-6458
PETITIONER Pro Per/Sui Juris