No. 20-1538

In The
Supreme Court of the United States

ANGELA DEBOSE,

Petitioner,

v.

UNIVERSITY OF SOUTH FLORIDA
BOARD OF TRUSTEES,

Respondent.

**On Petition For Writ Of Certiorari
To The United States Court Of Appeals
For The Eleventh Circuit**

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

RICHARD C. MCCREA, JR.
Counsel of Record
GREENBERG TRAURIG, P.A.
101 E. Kennedy Blvd.
Suite 1900
Tampa, FL 33602
mccrear@gtlaw.com
(813) 318-5723

Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

TABLE OF CONTENTS

APPENDIX

TABLE OF CONTENTS – Continued

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

INTRODUCTION

A writ of certiorari is granted only for "compelling reasons." Supreme Court Rule 10. This is DeBose's second petition for writ of certiorari to this Court ("Second Petition"). Like her first petition, her Second Petition fails to satisfy any of the criteria for Supreme Court review. It does not identify any conflict between the Eleventh Circuit's decision and any decision of this Court. In addition, it does not identify any conflict between the Eleventh Circuit's decision and another court of appeals that would affect the outcome in this case. Consequently, no compelling basis for this Court's review is presented, and DeBose's Second Petition should be denied.

STATEMENT OF THE CASE AND FACTS

Pursuant to Supreme Court Rule 15(2), Respondent presents the following Statement of the Case and Facts:

1. On December 4, 2015, Petitioner Angela DeBose filed Case No. 8:15-cv-02787 against Appellee University of South Florida Board of Trustees in the United States District Court for the Middle District of Florida ("*DeBose I*"). [Respondent's App'x., Doc. 1, R.A. 001-060].

2. On July 6, 2016, on the basis of the allegations in DeBose's Third Amended Complaint, the district court dismissed with prejudice DeBose's breach of

contract claim alleging an oral agreement to extend her employment through 2019. [Respondent's App'x., Doc. 50, R.A. 061-065]. That ruling limited DeBose's breach of contract claim to a claim that USFBOT breached a written contract to extend DeBose's employment through June 30, 2015. [*Id.*].

3. On December 30, 2016, DeBose filed a motion for sanctions against USFBOT on account of the shredding of her departmental personnel file. [Respondent's App'x., Doc. 61, R.A. 066-076]. On February 8, 2017, the magistrate judge issued an Order denying DeBose's motion for sanctions. [Respondent's App'x., Doc. 86, R.A. 077]. The magistrate judge concluded that DeBose had failed to meet her burden to establish bad faith culpability on the part of USFBOT and the requisite prejudice resulting to DeBose. [*Id.*].

4. On March 29, 2017, DeBose filed a second motion for sanctions based upon the shredding of her departmental personnel file. [Respondent's App'x., Doc. 123, R.A. 078-101]. On August 7, 2017, the magistrate judge denied DeBose's second motion for sanctions. [Respondent's App'x., Doc. 144, R.A. 102-112]. The magistrate judge concluded that "[DeBose] simply has failed to produce any sound and credible evidence that [USFBOT] acted with bad faith in the shredding of her departmental personnel file." [*Id.* at R.A. 108]. In reaching that conclusion, the magistrate judge accepted the timeline that DeBose had urged: "In the summer of 2015 Plaintiff's departmental personnel file was shredded." [*Id*. at R.A. 106]. The magistrate judge also concluded that DeBose failed to meet her burden

of establishing that any of the shredded documents were crucial to prove her *prima facie* case. [*Id.* at R.A. 111].

5. On September 29, 2017, the district court granted summary judgment on DeBose's remaining breach of contract claim (a contract extending her employment through June 30, 2015) for two reasons: 1) no written employment agreement was shown to exist; and 2) the undisputed record evidence demonstrated that USFBOT complied with its contractual obligations by providing DeBose with three months' notice of termination. [Respondent's App'x., Doc. 210, R.A. 134-135].

6. On July 30, 2018, DeBose filed another motion seeking sanctions, including entry of a default judgment, based upon the shredding of her departmental personnel file and USFBOT's alleged submission of false affidavits in response to DeBose's motion for sanctions. [Respondent's App'x., Doc. 295, R.A. 140-151]. On August 14, 2018, the magistrate judge issued an Order denying DeBose's motion. [Respondent's App'x., Doc. 311, R.A. 152].

7. The case was tried to a jury over the course of eleven days in September 2018. On September 26, 2018, the jury returned a verdict in favor of DeBose on her retaliation claim. [Respondent's App'x., Doc. 471, R.A. 153-157]. With respect to DeBose's race discrimination claim, the jury found that, while race was a motivating factor in USFBOT's decision to terminate DeBose, USFBOT "would have discharged Ms. DeBose

from employment even if the University of South Florida had not taken Ms. DeBose's race into account." [*Id.* at R.A. 154].

8. On October 29, 2018, USFBOT filed Defendant's Motion for Judgment as a Matter of Law or, in the Alternative, for New Trial. [Respondent's App'x., Doc. 504, R.A. 158-177]. On February 14, 2019, the district court granted that motion, reversing the jury's verdict as to DeBose's retaliation claim. [Respondent's App'x., Doc. 548, R.A. 178-187].

9. On December 31, 2018, DeBose filed Plaintiff's Motion for Sanctions or Alternatively Relief from Judgment, based upon the shredding of her department personnel file and USFBOT's submission of allegedly false affidavits concerning that issue. [Respondent's App'x., Doc. 541, R.A. 188-198]. DeBose did not assert in her post-trial motion that the evidence allegedly spoliated by USFBOT related to her claims that went to trial. Instead, DeBose argued that the allegedly spoliated evidence related to her dismissed breach of contract claims. [*Id*., at R.A. 195] ("[b]ecause of USFBOT's destruction and also because of USFBOT's and Ellucian's misrepresentations, none of DeBose's contract claims survived"). The district court denied DeBose's motion on February 14, 2019, stating: "This Court and the assigned Magistrate Judge have exhaustively addressed on multiple occasions the issues and arguments raised by the instant Motion for Sanctions. Since the outset of this litigation, DeBose has failed to substantiate her allegation against [USFBOT] related to her 'employment contracts,' whether it be in the form of their

concealment, destruction, or breach." [Respondent's App'x., Doc. 548 at R.A. 186].

10. On February 24, 2019, DeBose filed Plaintiff's Motion for New Trial or in the Alternative, Alter or Amend Judgment. [Respondent's App'x., Doc. 551, R.A. 199-219]. That motion included the argument that the district erred in not awarding sanctions or holding an evidentiary hearing concerning the destruction of documents. [*Id*., at R.A. 217]. DeBose's motion was denied on April 24, 2019, with the district court concluding that DeBose's arguments "are either meritless, unsubstantiated, or time-barred." [Respondent's App'x., Doc. 571, R.A. 283].

11. On March 10, 2019, DeBose noticed an appeal to the Eleventh Circuit Court of Appeal. [Respondent's App'x., Doc. 561, R.A. 220-268]. Among the arguments DeBose raised on appeal to the Eleventh Circuit was that the district court erred in not imposing sanctions against USFBOT.

12. On April 27, 2020, the Eleventh Circuit issued its decision, affirming each of the district court's rulings challenged by DeBose. *DeBose v. USF Board of Trustees*, 811 Fed. Appx. 547 (11th Cir. 2020). [Respondent's App'x., Doc. 587, R.A. 312-332].

13. On May 10, 2019, while her appeal was pending before the Eleventh Circuit, DeBose filed an Independent Action for Relief from Judgment to Remedy Fraud on the Court ("Independent Action") in the United States District Court for the Middle District of Florida. That action was assigned Case No.

8:19-cv-1132 ("*DeBose II*"). [Respondent's App'x., Doc. 1, R.A. 284-309].

14. On May 16, 2019, the district court entered an Order in *DeBose II* dismissing DeBose's independent action without prejudice to DeBose's ability to re-file it in *DeBose I*. [Respondent's App'x., Doc. 4, R.A. 310-311]. In pertinent part, the Order stated:

> The crux of Plaintiff's Independent Action is that the court's Second Amended Judgment entered in *DeBose I* . . . – which set aside a jury verdict in DeBose's favor – 'was tainted by the Defendant's fraud.' The Independent Action delineates the alleged fraud, all of which occurred in *DeBose I*. In light of these fraud allegations, the Court concludes that the appropriate course is for Plaintiff to file a motion in *DeBose I* pursuant to Rule 60(b).

15. On February 12, 2020, DeBose filed a Petition for Writ of Certiorari to this Court (Case No. 20-1140). In her petition, DeBose asserted that "USFBOT materially breached DeBose's regular employment contract and an extended contract to 2019-20 year." [Petition for Writ of Certiorari, p. 5]. DeBose also asserted that "Dosal, Wilcox, Mootoo and USFBOT's representatives ordered the destruction of DeBose's personnel files, containing her work projects, awards, recognitions, performance evaluation, leave and attendance records, and her employment contracts. [*Id.*]. This Court denied DeBose's petition on April 19, 2021.

16. On May 12, 2020, almost a year after the dismissal of *DeBose II*, DeBose re-filed her Independent

Action for Relief from Judgment to Remedy Fraud on the Court in *DeBose I* ("Rule 60(d) motion"). [Respondent's App'x., Doc. 588, R.A. 333-370].

17. On June 23, 2020, the district court entered an Order denying DeBose's Rule 60(d) motion. [DeBose App'x A-5].

18. On July 21, 2020, DeBose noticed an appeal to the Eleventh Circuit of the district court's June 23, 2020 Order denying DeBose's Rule 60(d) motion. [Respondent's App'x., Doc. 612, R.A. 371-393].

19. On January 21, 2021, the Eleventh Circuit entered its opinion on DeBose's second appeal. The Eleventh Circuit ruled, *inter alia*, that it did not have jurisdiction to consider the dismissal of DeBose's "Independent Action for Relief from Judgment to Remedy Fraud on the Court" in *DeBose II*. The Eleventh Circuit also ruled that the district court did not abuse its discretion in denying DeBose's Rule 60(d) motion because a plaintiff cannot use an independent action as a vehicle for the relitigation of issues and because DeBose's claimed new evidence of fraud on the court either duplicated existing evidence or could have been previously submitted to the district court. [DeBose App'x A-1, pp. 6-7].[1]

---

[1] DeBose asserts that there is a conflict between two Eleventh Circuit decisions in this case. [Second Petition, pp. 7-8]. However, that argument is specious. The district court dismissed DeBose's 2019 employment contract claim, not because DeBose's purported contract was missing or destroyed, but based upon DeBose's *own* allegations that her 2019 employment contract was

20. On May 4, 2021, DeBose filed her Second Petition.

REASONS FOR DENYING CERTIORARI

I. THE ELEVENTH CIRCUIT DID NOT RULE THAT DEBOSE'S RULE 60(d) ACTION WAS BARRED BY *RES JUDICATA*

DeBose asserts that "[t]he Eleventh Circuit affirmed the District Court's conclusion that Petitioner's Independent action was a continuation or relitigation of the prior case and foreclosed under the doctrine of *res judicata*." [Second Petition, p. 9]. However, that misstates the Eleventh Circuit's ruling. The Eleventh Circuit ruled that the district court did not abuse its discretion in denying DeBose's Rule 60(d) motion because: 1) DeBose had "heavily litigated USFBOT's alleged fraud, shredding of documents, and presenting false affidavits and perjurious testimony" and Rule 60(d) cannot be used for relitigation of issues; 2) DeBose's claimed new evidence of fraud on the court either duplicated existing evidence or could have been

---

verbal, not written. Similarly, summary judgment was entered on DeBose's 2015 contract claim on the alternative ground that the undisputed record evidence showed that USFBOT complied with its contractual obligations regarding notice of termination. Moreover, any purported conflict would be properly addressed through *en banc* review, not certiorari. *See Davis v. United States*, 417 U.S. 333, 340 (1974) (recounting denial of certiorari to review intra-circuit split); *Wisniewski v. United States*, 353 U.S. 901, 902 (1957) (intra-circuit splits are for circuit courts of appeals to resolve internally and do not warrant certiorari).

previously submitted to the district court; and 3) even if DeBose's Rule 60(d) motion did not attempt to relitigate the issues, it failed to "establish anything resembling" an unconscionable plan or scheme by clear and convincing evidence.

To the extent DeBose is attempting to argue that a Rule 60(d) independent action is exempt from the doctrine of *res judicata*, her argument should be rejected. *See Federated Department Stores v. Moites*, 452 U.S. 394, 401-402 (1981) (*res judicata* serves vital public interests; is consistent with public policy which dictates that there should be an end to litigation; is a rule of fundamental and substantial justice; and no principle of law or equity sanctions a rejection of *res judicata*).

In *United States v. Beggerly*, 524 U.S. 38 (1998), this Court emphasized that "[i]ndependent actions must, if Rule 60(b) is to be interpreted as a coherent whole, be reserved for those cases of 'injustices which, in certain instances, are deemed sufficiently gross to demand a departure' from rigid adherences to the doctrine of *res judicata*." *Id.* at 46, *quoting Atlas Glass Co. v. Hartford-Empire Co.*, 322 U.S. 238, 244 (1944). *Id.*

Therefore, while the doctrine of *res judicata* was not applied to bar DeBose's Rule 60(d) independent action, the same policy reasons underlying the doctrine – – promoting finality, avoiding duplicative litigation and preserving limited judicial resources – precluded her independent action, which merely sought to relitigate issues previously decided.

Moreover, DeBose was not prejudiced by the district court's ruling in *DeBose II* that DeBose's Rule 60(d) independent action should be re-filed as a Rule 60(d) motion in *DeBose I*. Neither the district court in *DeBose I* nor the Eleventh Circuit ruled that DeBose's subsequent Rule 60(d) motion was time-barred. Instead, the district court in *DeBose I* and the Eleventh Circuit both reached the merits of DeBose's Rule 60(d) motion and found them lacking.

Finally, the Eleventh Circuit did not rule on the district court's dismissal of DeBose's Rule 60(d) independent action in *DeBose II*. Therefore, that ruling should not be reviewed here. *See, e.g. Cutter v. Wilkinson*, 544 U.S. 709, 718 n. 7 (2005) ("[b]ecause these defensive pleas were not addressed by the Court of Appeals, and mindful that we are a court of review, and not of first review, we do not consider them here").

II. THERE IS NO CONFLICT BETWEEN THE CIRCUITS, THE RESOLUTION OF WHICH WOULD AFFECT THE OUTCOME OF THIS CASE

Contrary to DeBose's assertion that there is a conflict among the Circuits regarding the burden of proof required for a Rule 60(b)(3) motion or a Rule 60(d) independent action, the First, Sixth, Ninth, Tenth and D.C. Circuits also apply a "clear and convincing evidence" standard. *See, e.g. Giroux v. Fannie Mae*, 810 F.3d 103, 108 (1st Cir. 2016); *United States v. Church*, 2020 U.S. App. LEXIS 13009, at *4 (6th Cir. Apr. 22,

2020); *Varma v. Nationstar Mortg. LLC*, 840 Fed. Appx. 986 (9th Cir. 2021); *United States v. Pickard*, 814 Fed. Appx. 386, 400 (10th Cir. 2020); *Hope 7 Monroe St. L.P. v. Riaso, LLC*, 743 F.3d 867, 875 (D.C. Cir. 2014).

Moreover, there is no meaningful conflict among the Circuits about the degree of interference with justice required to sustain a Rule 60(d) independent action. Every Circuit, as it must, follows the pronouncement in *Beggerly* that "an independent action should be available only to prevent a grave miscarriage of justice." 524 U.S. at 47. DeBose's argument to the contrary relies upon decisions that pre-date *Beggerly*.

Finally, even assuming *arguendo* that a conflict existed regarding the burden of proof under Rules 60(b)(3) and 60(d)(3), this case is an inappropriate vehicle for addressing such a conflict. None of the cases relied upon by DeBose suggests any confusion regarding whether a litigant can obtain Rule 60(b)(3) or 60(d) relief based on an issue known to the litigant – and repeatedly ruled upon – prior to entry of judgment or based on old evidence combined with new facts that do not substantially alter the picture before the court.

Here, the Eleventh Circuit ruled that the district court did not abuse its discretion in ruling that DeBose could not use Rule 60(d) to relitigate matters that were repeatedly raised and ruled upon before entry of judgment. Therefore, the outcome of this case would be the same even if DeBose's argument about a conflict among the Circuits regarding the applicable burden of proof was correct.

As this Court has explained on numerous occasions, "the oldest and most consistent thread in the federal law of justiciability is that federal courts will not give advisory opinions." *Flast v. Cohen*, 392 U.S. 83, 96 (1968); *see also Mistretta v. United States*, 488 U.S. 361, 355 (1989) (explaining that the Court has consistently "refused to issue advisory opinions"); *North Carolina v. Rice*, 404 U.S. 244, 246 (1971) ("[f]ederal courts are without power to decide questions that cannot affect the rights of litigants in the case before them"). Therefore, certiorari jurisdiction should not be invoked here to issue an advisory opinion on a legal question where the Court's resolution of the question would not alter the result below, regardless of which way the question is answered.

In short, certiorari "jurisdiction was not conferred upon the court merely to give the defeated party in the Circuit Court of Appeals another hearing." *Magnum Import Co. v. Coty*, 262 U.S. 159, 163 (1923) (Taft, C.J.). DeBose's problem is not that the Eleventh Circuit's decision creates real conflict or uncertainty, but that the result was unfavorable for her. There simply is no compelling reason for review and DeBose's Second Petition should be denied.

CONCLUSION

Petitioner has not presented any compelling reason for this Court to grant certiorari. Therefore, Respondent respectfully requests that the Second Petition be denied.

Respectfully submitted,

RICHARD C. MCCREA, JR.
Counsel of Record
GREENBERG TRAURIG, P.A.
101 E. Kennedy Blvd.
Suite 1900
Tampa, FL 33602
mccrear@gtlaw.com
(813) 318-5723