No. 20-739

IN THE

Supreme Court of the United States

ISAAC LEVIN,

Petitioner,

v.

KENNETH J. FRANK, INDIVIDUALLY AND AS CORPORATION COUNSEL FOR THE CITY OF BINGHAMTON, NEW YORK, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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COUNTERSTATEMENT OF THE QUESTION PRESENTED FOR REVIEW

1. When a civil action has been correctly dismissed pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, should the Court grant certiorari to address a purely state law issue that was not reached by the courts below?

COUNTERSTATEMENT OF THE RELATED CASES

Pursuant to Rule 14(b)(iii) of the Rules of the Supreme Court of the United States, the following are all proceedings in other courts directly related to the present petition:

- *33 Seminary LLC, et al. v. City of Binghampton* [sic]*, New York, et al.*, No. 17-83, Supreme Court of the United States of America. Petition for writ of certiorari denied on October 2, 2017.

- *33 Seminary LLC v. The City of Binghamton*, No. 15-2646, United States Court of Appeals for the Second Circuit. Judgment entered on November 23, 2016. Rehearing denied on December 7, 2016.

- *33 Seminary LLC, et al. v. The City of Binghamton et al*, Civil Action No. 3:11-CV-01300, United States District Court for the Northern District of New York. Judgment entered on July 28, 2015.

- *33 Seminary LLC, et al. v. City of Binghamton, et al.*, Index No. 2009-001888, Supreme Court of the State of New York, Broome County. Order entered October 19, 2009.

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PRELIMINARY STATEMENT

Respondents, Kenneth J. Frank, Brian Seachrist, and the City of Binghamton (collectively, "respondents"), respectfully submit that Petitioner Isaac Levin ("petitioner") seeks to have the Court address a purely state law matter which the lower courts did not reach due to the dismissal of the action pursuant to Rule 12(b)(6), so that he has failed to present a compelling reason to grant certiorari and his petition must be denied.

COUNTERSTATEMENT OF THE CASE

A. General Background

This is the second of two federal actions relating to a three-story building located at 26 Seminary Avenue in Binghamton, New York (the "Property"). The Property is located in a multi-family residential zoning district and was initially purchased through petitioner's limited liability company, 26 Seminary LLC.[1] At the time of its purchase, the building contained vacant commercial space on the ground floor and residential units above.

Nearly two years after the 26 Seminary LLC purchased the Property, the Binghamton City Council amended the local zoning ordinances by adopting Ordinance 009-009, which required 1.5 off-street parking spaces per unit for multi-unit dwellings within city limits. When petitioner's LLC sought to convert the building to three residential units, by eliminating the first floor

1. On December 6, 2018, petitioner's LLC deeded the property to petitioner individually.

commercial space, with a total of nine bedrooms and *no* off-street parking - - the City of Binghamton denied the site plan approval due to the failure to meet the off-street parking requirements.

B. The First Action

Petitioner's LLC commenced the first action alleging, *inter alia*, that the denial of the site plan approval violated the LLC's constitutional rights arising under the Due Process and Equal Protection Clauses. On July 28, 2015, the district court granted summary judgment against the plaintiffs, including petitioner's LLC. *See generally 33 Seminary LLC v. City of Binghamton*, 120 F. Supp. 3d 223, 231 (N.D.N.Y. 2015) (subsequent history omitted). On November 23, 2016, the Second Circuit affirmed. *See 33 Seminary LLC v. The City of Binghamton*, 670 F. App'x 727 (2d Cir. 2016) (summary order). On October 2, 2017, the petition for a writ of certiorari was denied by this Court. *See 33 Seminary LLC, et al. v. City of Binghampton* [sic], *New York, et al.*, 138 S. Ct. 222 (2017).

C. The Second Action

Having been unsuccessful in his first action, petitioner sought a second bite of the apple by commencing the present action. In his four-count amended complaint, petitioner again alleged, *inter alia*, violations of his rights arising under the Due Process and Equal Protection Clauses. Petitioner also claimed that respondents had committed fraud upon the court, raising and pointing to a 1983 Appendix to the City of Binghamton's Zoning Ordinance ("Appendix A"), which he discovered in an attic

in August 2018.[2] In an effort to circumvent principles of *res judicata*, petitioner claimed that had he and the court been aware of Appendix A, the outcome of the first action would have been different. Based on his interpretation of Appendix A, he argued that the Property should have been grandfathered and not otherwise subject to the off-street parking requirements contained in Ordinance 009-009.

On April 19, 2019, the district court granted respondents' motion to dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, holding that petitioner's constitutional claims were barred by, *inter alia*, *res judicata* and the failure to state a claim upon which relief can be granted. *See* Petition at App'x C. On May 11, 2020, the Second Circuit affirmed (*see* Petition at App'x B), and on July 1, 2020, the Second Circuit denied petitioner's request for rehearing, *see* Petition at App'x A.

REASONS FOR DENYING THE PETITION

POINT I

THERE ARE NO COMPELLING REASONS FOR THE COURT'S INVOLVEMENT

Rule 10 of the Supreme Court provides that "[a] petition for a writ of certiorari will be granted *only for compelling reasons*." (emphasis added). Rule 10 further provides that "[a] petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law."

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2. On August 25, 2018, respondents demolished the building on the Property after it partially collapsed.

The petition should be denied because there are no compelling reasons offered to grant it. Although petitioner claims the Court must intervene "to once and for all settle the conflicts which exist," it is apparent that this case does not involve (1) a conflict among United States courts of appeals; (2) a conflict between a United States court of appeals and a state court of last resort; or (3) a conflict on an important federal question among state courts of last resort. Instead, petitioner asks the Court to step in and define the "application of abandonment to municipality Zoning Codes," *see* Petition, at 8, which is strictly a matter of state law. *See, e.g.*, *Ruhlin v. N.Y. Life Ins. Co.*, 304 U.S. 202, 206 (1938) ("As to questions controlled by state law, however, conflict among circuits is not of itself a reason for granting a writ of certiorari. The conflict may be merely corollary to a permissible difference of opinion in the state courts."). Under our system of federalism, each state is free—within the confines of the U.S. Constitution—to interpret laws as it sees fit. This case is no different.

This case involves a *pro se* party who has failed to grasp the reality that his claims are barred by, *inter alia*, *res judicata* and his failure to state a claim. Although petitioner suggests that this case does not "present an individual grievance of errors," *see* Petition at 8, that is simply incorrect. At bottom, petitioner's argument is that the Second Circuit's affirmance of a dismissal pursuant to Rule 12(b)(6) is wrong. *See, e.g.*, Petition at 2 ("The Second Circuit Court of Appeals blindly affirmed the District Court's erroneous decision."). Such a circumstance is not adequate for the Court's review. *See* Sup. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.");

see also S. Shapiro, K. Geller, T. Bishop, E. Hartnett, & D. Himmelfarb, Supreme Court Practice § 5.12(c)(3), p. 352 (10th ed. 2013) ("[E]rror correction . . . is outside the mainstream of the Court's functions and . . . not among the 'compelling reasons' . . . that govern the grant of certiorari").

Simply put, while petitioner may be unhappy with the outcome, nothing about this case compels the devotion of this Court's valuable time and resources. On this basis alone, the petition for writ of certiorari must be denied.

POINT II

THE COURT SHOULD NOT REACH A QUESTION THAT WAS NOT ADDRESSED BY THE COURT BELOW

The Supreme Court is a "court of review, not of first view." *Cutter v. Wilkinson*, 125 S. Ct. 2113 (2005). Therefore, the Supreme Court generally "does not decide questions not raised *or resolved in the lower court*." *Youakim v. Miller*, 425 U.S. 231, 234 (1976) (emphasis added); *see* 36 C.J.S. Federal Courts § 305 (noting that, as a rule, the Supreme Court will not consider questions not decided by the courts below). This helps "to maintain the integrity of the process of certiorari." *Taylor v. Freeland & Kronz*, 503 U.S. 638, 646 (1992).

Petitioner requests that the Court grant certiorari to address "the application of abandonment to a property which was grandfathered and whether . . . municipal zoning ordinances are applicable." Petition at i (setting forth the question presented); *see id.* at 10 ("The issue of

abandonment is one crucial for the Supreme Court's review . . . ."). Yet, because petitioner's amended complaint was dismissed pursuant to Rule 12(b)(6), the issue he wishes the Court to address was necessarily never reached below. Accordingly, even if petitioner had articulated a "compelling reason" for the Court to grant certiorari—which he has not done—his petition must still be denied. *See Youakim*, 425 U.S. at 234.

POINT III

IN AFFIRMING DISMISSAL, THE COURT OF APPEALS FOR THE SECOND CIRCUIT PROPERLY APPLIED EXISTING PRECEDENT

A. The state law doctrine of *res judicata* barred the second action without exception.

The petition makes only a cursory and passing reference to the district court's dismissal of the majority of petitioner's claims on *res judicata* grounds. *See* Petition at 2 ("erroneous theory of res judicata"). As a result, petitioner has abandoned any argument based on *res judicata.* But to the extent the Court disagrees, respondents offer the following brief analysis.

Res judicata is a procedural device that is governed by state law. *Res judicata*—also known as claim preclusion—"'prevents a party from litigating any issue or defense that *could* have been raised or decided in a previous suit, *even if the issue or defense was not actually raised or decided*.'" *Woods v. Dunlop Tire Corp.*, 972 F.2d 36, 38 (2d Cir. 1992) (emphasis added) (quoting *Clarke v. Frank*, 960 F.2d 1146, 1150 (2d Cir. 1992))); *see Lucky Brand Dungarees, Inc. v.*

Marcel Fashions Grp., Inc., 140 S. Ct. 1589, 1594 (2020); *Grubb v. Public Utils. Comm'n of Ohio*, 281 U.S. 470, 479 (1930). "New legal theories do not amount to a new cause of action so as to defeat the application of the principle of res judicata.'" *In re Teltronics Servs., Inc.*, 762 F.2d 185, 193 (2d Cir. 1985) (citing, *inter alia*, *Chicot County v. Baxter State Bank*, 308 U.S. 371, 375 (1940)).

The Second Circuit's affirmance after its *de novo* review was entirely correct. First, petitioner's claims in the second action were identical to those raised in the first action. Those claims were also adjudicated on the merits. *See 33 Seminary LLC v. City of Binghamton*, 120 F. Supp. 3d 223, 231 (N.D.N.Y. 2015), *aff'd sub nom. 33 Seminary LLC v. The City of Binghamton*, 670 F. App'x 727 (2d Cir. 2016); *see also Weston Funding Corp. v. Lafayette Towers, Inc.*, 550 F.2d 710, 715 (2d Cir. 1977) (concluding that summary judgment is a judgment on the merits for purposes of *res judicata*). Second, all of the parties in the second action were either named in the first action or in privity with the parties named in the first action. *See, e.g.*, *In re Teltronics Servs., Inc.*, 762 F.2d 185, 191 (2d Cir. 1985); *see also Allen v. McCurry*, 449 U.S. 90, 94 (1980) ("Under res judicata, a final judgment on the merits of an action precludes the parties *or their privies* from relitigating issues that were or could have been raised in that action." (emphasis added)).

The fact that petitioner's claims were centered on his discovery of Appendix A does not change the outcome because claim preclusion "applies even if the litigant is prepared to present different evidence . . . in the second action." *Geiger v. Foley Hoag LLP Retirement Plan*, 521 F.3d 60, 66 (1st Cir. 2008); *see also Saylor v. United*

States, 315 F.3d 664, 668 (6th Cir. 2003) ("The fact that . . . new evidence might change the outcome of the case does not affect application of claim preclusion doctrine"); *Torres v. Shalala*, 48 F.3d 887, 894 (5th Cir. 1995) ("If simply submitting new evidence rendered a prior decision factually distinct, *res judicata* would cease to exist"). Further, petitioner did not plausibly allege that Appendix A—*which is a matter of public record*— "was either fraudulently concealed or . . . could not have been discovered with due diligence," as is required to prevent the application of r*es judicata*. *Saud v. Bank of N.Y.*, 929 F.2d 916, 920 (2d Cir. 1991).

Accordingly, the doctrine of *res judicata* applies to petitioner's claims in this action and the Second Circuit properly affirmed the district court's dismissal of them on that basis. Petitioner has failed to demonstrate a conflict between the circuits, departure from the course of judicial proceedings, or any other compelling reason for this Court to exercise its discretion and grant review.

B. Even though petitioner has abandoned his fraud upon the court claim, it was nonetheless properly dismissed due to his failure to state a claim upon which relief can be granted.

At the outset, the petition for a writ of certiorari does not address the dismissal of the second claim in petitioner's amended complaint, i.e., fraud upon the court. As a result, that argument, too, must be considered abandoned. To the extent the Court disagrees, respondents offer the following analysis for consideration.

"'[F]raud upon the court' . . . is limited to fraud which seriously affects the integrity of the normal process of adjudication." *Gleason v. Jandrucko*, 860 F.2d 556, 559 (2d Cir. 1988) (citing *Kupferman v. Consolidated Research & Mfg. Corp.*, 459 F.2d 1072, 1078 (2d Cir. 1972)). Allegations that the other party disputed his version of the law and facts is not sufficient to state a claim for fraud upon the court. *See King v. First Am. Investigations, Inc.*, 287 F.3d 91, 96 (2d Cir. 2002) (citing *Weldon v. United States*, 225 F.3d 647 (2d Cir. 2000)).

Petitioner's fraud upon the court claim was based on his discovery of Appendix A in an attic in August 2018. Setting aside the fact that Appendix A is not evidence, but rather law, the four corners of the amended complaint did not contain any allegations that plausibly suggested fraud upon the court, including that respondents intentionally lied "'about issues that are central to the truth-finding process.'" *Giarrizzo v. Holder*, No. 07-CV-0801 (MAD), 2012 WL 12991205, at *2 (N.D.N.Y. Jan. 5, 2012) (quoting *Shah v. Eclipsys Corp.*, No. 08-CV-2528 (JFB), 2010 WL 2710618, at *14 (E.D.N.Y. July 7, 2010)). The import of Appendix A was not central to the truth-finding process; petitioner merely disagreed with the interpretation advocated by respondents. Neither petitioner's disagreement nor his own lack of diligence in uncovering Appendix A was sufficient to state a claim for a fraud upon the court.

Simply stated, the allegations in the amended complaint were not adequate to state a claim for fraud upon the court. Accordingly, and consistent with existing precedent, petitioner's claim was correctly dismissed by the lower courts. *See Ashcroft v. Iqbal*, 556 U.S. 662,

678 (2009); *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007).

CONCLUSION

Petitioner has not shown a compelling reason for the Court to grant certiorari. Respondents respectfully request that the petition be denied.

DATED: December 22, 2020

Respectfully submitted,

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