No. _____

# In The
# Supreme Court of the United States

PETER DAZA,

*Petitioner,*

v.

STATE OF INDIANA, RUSSELL FOWLER, NINA DANIEL, and VALERIE COCKRUM, in their official and individual capacities,

*Respondents.*

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

## PETITION FOR A WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

1. Is the Seventh Circuit decision, requiring that claims between the parties that occur after the filing of a lawsuit must be filed in a pending lawsuit that has not yet been closed, contrary to the Court's decision of *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, 140 S.Ct. 1589 (2020), which stated that claims occurring after the filing of a lawsuit may be filed in a later lawsuit and not delay the litigation of the first lawsuit?

2. Is the Seventh Circuit decision contrary to the Supreme Court decision of *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (2020) by allowing courts to preclude the litigation of later events between the parties in a later case when the defendant's motion for summary judgment in the first case did not raise the later events, the defendant refused to produce discovery or litigate in the first case the later events, and no party raised any issue about an application to reapply for the job for which the plaintiff was suing to be reinstated?

## PARTIES

The petitioner is Peter Daza, who was the plaintiff-appellant below.

The respondents are the State of Indiana, Russell Fowler, District Deputy Commissioner, in his official and individual capacities, Nina Daniel, District Human Resources Manager, in her official and individual capacities, and Valerie Cockrum, Technical Services Director, in her official and individual capacities, who were the defendants-appellees below.

## RELATED CASES

1. *Daza v. Indiana*, No. 1:17-cv-00316-JMS-MPB, U.S. District Court for the Southern District of Indiana. Judgment entered August 31, 2018.

2. *Daza v. Indiana*, No. 18-3102, U.S. Court of Appeals for the Seventh Circuit. Judgment entered October 24, 2019.

3. *Daza v. Indiana*, No. 1:18-cv-02951, U.S. District Court for the Southern District of Indiana. Judgment entered January 10, 2020.

4. *Daza v. Indiana*, No. 20-1209, U.S. Court of Appeals for the Seventh Circuit, Judgment entered June 23, 2021. Order denying petition for rehearing and rehearing en banc entered July 21, 2021.

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## PETITION FOR WRIT OF CERTIORARI

Petitioner Peter Daza respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the United States Court of Appeals for the Seventh Circuit entered in this case on June 23, 2021.

## OPINIONS BELOW

The June 23, 2021 Opinion of the Court of Appeals is reported at 2 F.4th 681, and it is set out at pages App. 1-8 of the Appendix. The Order denying the petition for rehearing and rehearing en banc is set out at page App. 47. The Order granting the Defendant's Motion for Summary Judgment is located at 432 F.Supp.3d 860, and it is set out at pages App. 11-44 of the Appendix.

This case is the second case between the parties. Related proceedings in the first case between the parties are the following. The Opinion of the Court of Appeals in the first case is reported at *Daza v. Indiana*, 941 F.3d 303 (7th Cir. 2019) (*Daza I*). The Order granting summary judgment in the first case is reported at *Daza v. State*, 331 F.Supp.3d 810 (S.D.Ind. 2018).

## JURISDICTION

The Seventh Circuit filed its Opinion on June 23, 2021. The Seventh Circuit filed its Order denying the

petition for rehearing and rehearing en banc on July 21, 2021. This petition for certiorari is timely in that the petition is filed within 90 days of July 21, 2021. The Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## STATUTORY PROVISION OR RULE INVOLVED

Rule 56(f), Federal Rules of Civil Procedure:

> **(f) Judgment Independent of the Motion.** After giving notice and a reasonable time to respond, the court may:
>
> (1) grant summary judgment for a nonmovant;
>
> (2) grant the motion on grounds not raised by a party; or
>
> (3) consider summary judgment on its own after identifying for the parties material facts that may not be genuinely in dispute.

## STATEMENT OF THE CASE

### A. Background of Decisions

The Supreme Court has held that events occurring after the filing of a court complaint do not need to be included in the first lawsuit, but rather, can be filed in a later lawsuit. *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, 140 S.Ct. 1589, 1596 (2020). The

Seventh Circuit has held in the *Daza* case that all events occurring between the parties before a pending case is closed must be included in the pending case or be lost because of *res judicata*. Pet. App. 6-8. The Seventh Circuit relied on the *Lucky Brand* decision but misinterpreted the Court's decision and created serious problems for parties and courts.

The Seventh Circuit confused the description of the particular facts of the *Lucky Brand* decision stating that the later claim occurred after the "conclusion" of the prior case, with the rule that claim preclusion generally does not bar claims that are predicated on events that occur after the "filing" of the initial complaint in the prior case. *Lucky Brand*, 140 S.Ct. at 1596. The *Daza II* case then stated the rule that claim preclusion does not bar claims that are predicated on events that postdate the "conclusion" of the prior case, requiring the conclusion of pending cases to be delayed by new claims until they can be closed. Pet. App. 7-8.

The Seventh Circuit's misinterpretation arises from facts described in the *Lucky Brand* decision that illustrated one of the reasons for the legal principle followed by the decision. But those descriptive facts for that particular case are not facts required by the legal principle for all cases.

### B. Factual Background of Termination of Employment

In 2015, the State of Indiana terminated the employment of geologist Peter Daza shortly after he

supported his mother's letter to the editor on a political subject. *Daza v. State of Indiana*, 331 F.Supp.3d 810, 829, 834-835 (S.D.Ind. 2018). The State admitted that Daza is a gifted geologist. *Daza I*, Dkt. 50 at 2. The State terminated him based on an allegation that he said something, which he disputed saying and that his supervisor who was also present in the area said he did not hear. *Daza I*, Dkt. 73 at 14-15. The allegation was made by a trainer from the central office three days after the trainer said she heard the alleged statement and after the trainer had not asked Daza about the statement. *Id.*

### C. Procedural Background and Failure to Rehire Two Years After Termination

#### 1. First Lawsuit—Termination—*Daza I*

(Southern District of Indiana Case No. 1:17-cv-00316-JMS-MPB, cited in this section to the Westlaw citations when available, or to Dkt. ___)

Daza complained to the EEOC that his termination was discrimination. Dkt. 1 at 3. The EEOC issued a notice of right to sue within 90 days, and Daza filed the lawsuit against the State for his termination, which is his first case. *Id.*

The State claimed sovereign immunity for some issues when the individuals involved had not been named as defendants. Dkt. 13 at 4. On the deadline for the amendment to pleadings, Daza filed an amended complaint adding the three individuals as defendants.

Dkt. 20. In the three months following the amended complaint, the individuals posted Daza's job position that they had kept open during the litigation, conducted interviews, announced the posting of his position again, conducted more interviews, and hired a younger white replacement in December 2017. Dkt. 73 at 35. Daza's supervisor wanted to rehire Daza, but the State did not do so. *Id.* at 3.

Daza requested discovery relating to the postings and his replacement, but the State refused to produce discovery related to the failure to rehire him. Dkt. 79. The State told the court that the 2017 failure to rehire was not part of the case on the 2015 termination. Dkt. 78 at 14-15. The State told the court that Daza had to file a separate EEOC charge for the failure to rehire. Dkt. 50 at 28-29. Daza moved to compel discovery on the 2017 failure to rehire, but the court failed to compel the discovery and said that the motion for summary judgment would be decided first. Dkt. 79. The State did not produce discovery to Daza or offer evidence to the court on the 2017 failure to rehire. *Id.*

The court granted summary judgment on the 2015 termination and made statements about the 2017 failure to rehire. 331 F.Supp.3d 810, 849-851 (S.D.Ind. 2018). The summary judgment order indicated that Daza needed to file a separate EEOC charge for the failure to rehire. *Id.* The court also stated that there was no evidence that Daza had re-applied for his position and was rejected. *Id.* Before the summary judgment order, neither party nor the court had said anything about the subject of an application by Daza

to be rehired for the job for which he had sued to be rehired. The Seventh Circuit affirmed the summary judgment on the 2015 termination and neither the parties nor the court mentioned the 2017 failure to rehire. *Daza v. Indiana*, 941 F.3d 303 (7th Cir. 2019).

### 2. Second Lawsuit—Failure to Rehire—*Daza II*

(Southern District of Indiana Case No. 1:18-cv-02951-JMS-MPB, cited in this section to Pet. App. or to Dkt. ___)

After the State filed a reply brief in support of its motion for summary judgment in the first case stating that Daza had to file a separate EEOC charge for the failure to rehire, Daza filed a second EEOC charge, this one for the failure to rehire. Dkt. 1 at 4. Daza obtained a notice of right to sue on his second EEOC charge. *Id.* After the summary judgment order in the first case agreed with the State that Daza needed to file a separate EEOC charge, Daza filed his lawsuit on the EEOC charge for the failure to rehire, which is this case before the Court. *Id.*

The State then reversed its position from the first case and stated that the court had already ruled in the first case that the 2017 failure to rehire was part of the first case on the 2015 termination and that the court had held that the 2017 failure to rehire claim failed because of a lack of evidence of an employment application. Dkt. 16; Dkt. 25. The court agreed with the State and held that the case on the 2017 failure to

rehire was barred by the case on the 2015 termination because the court had said in the first case (in dicta on an issue not raised by the parties) that there was no evidence of an application for rehire. Pet. App. 36. The court also said that Daza had mentioned the 2017 failure to rehire in the 2015 termination case. *Id.* In the 2015 termination case, the State had responded to Daza and the court that the 2017 failure to rehire was not part of the 2015 termination case and the State refused to produce discovery on the 2017 failure to rehire in that case.

The Seventh Circuit Court of Appeals affirmed the summary judgment on the 2017 failure to rehire on the ground of *res judicata*, stating that Daza was required to have included the 2017 failure to rehire in the 2015 termination case, which was pending when the 2017 failure to rehire occurred. Pet. App. 3. The Seventh Circuit's decision is contrary to the decisions of the Court and other authorities that state that claim preclusion generally does not bar claims that are predicated on events that postdate the filing of the initial complaint. *Lucky Brand*, 140 S.Ct. at 1596.

The Seventh Circuit also cited a decision in which it said that multiple claims in one transaction cannot be split into multiple lawsuits. *Barr v. Board of Trustees of Western Illinois University*, 796 F.3d 837, 840 (7th Cir. 2015). Pet. App. 5-8. That principle does not apply to multiple claims occurring in different transactions, and certainly not to different transactions occurring two years apart. *Id.*

The *Daza II* decision of the Seventh Circuit is also contrary to the decisions of the Court that state that issues not raised in a motion for summary judgment and issues not litigated by the parties cannot be decided by the courts, and when statements are made by the courts on such issues, the issues are not litigated, and the statements are not *res judicata*. Rule 56(f), Federal Rules of Civil Procedure; *United States v. Sineneng-Smith*, *supra*; *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-518 (1993); *Allen v. McCurry*, 449 U.S. 90, 95 (1980).

## REASONS FOR GRANTING THE PETITION

### I. The decision of the Seventh Circuit, requiring that later claims that occur after the filing of a lawsuit must be included in a pending lawsuit between the parties, is contrary to Supreme Court decisions, including *Lucky Brand Dungarees, Inc. v. Marcel Fashions Group, Inc.*, 140 S.Ct. 1589 (2020), and it would delay cases while later events between the parties would be required to be added to the cases until the cases were closed.

In the trademark infringement decision of *Lucky Brand*, the Court held that *res judicata* did not apply to events occurring after the filing of a pending case between the parties. The Court stated that the later events involved different conduct and different trademarks, occurring at different times. 140 S.Ct. at

1595-1596. The Court held that a 2011 Action did not imperil a judgment of a 2005 Action because the lawsuits involved both different conduct and different trademarks. The 2005 Action alleged that Lucky Brand infringed a "Get Lucky" mark. *Id*. The 2011 Action alleged that Lucky Brand committed infringement by using Lucky Brand's own trademarks containing the word "Lucky"—not the "Get Lucky" trademark itself. *Id.* The Court recognized that the 2011 Action challenged different conduct, involving different trademarks. *Id.*

The Court then stated that the two actions also occurred at different times and stated: "Claim preclusion generally 'does not bar claims that are predicated on events that postdate the filing of the initial complaint.'" *Id.*

The full paragraph of the *Lucky Brand* decision discussing the principle of allowing different claims at different times to be in different lawsuits stated as follows:

> Not only that, but the complained-of conduct in the 2011 Action occurred after the conclusion of the 2005 Action. Claim preclusion generally "does not bar claims that are predicated on events that postdate the filing of the initial complaint." *Whole Woman's Health v. Hellerstedt*, 579 U.S. ___, ___, 136 S.Ct. 2292, 2305, 195 L.Ed. 2d 665 (2016) (internal quotation marks omitted); *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 327-328, 75 S.Ct. 865, 99 L.Ed. 1122 (1955) (holding that two

> suits were not "based on the same cause of action," because "[t]he conduct presently complained of was all subsequent to" the prior judgment and it "cannot be given the effect of extinguishing claims which did not even then exist and which could not possibly have been sued upon in the previous case"). This is for good reason: Events that occur after the plaintiff files suit often give rise to new "[m]aterial operative facts" that "in themselves, or taken in conjunction with the antecedent facts," create a new claim to relief. Restatement (Second) § 24, Comment *f*, at 203; 18 J. Moore, D. Coquillette, G. Joseph, G. Vairo, & C. Varner, Federal Practice § 131.22[1], p. 131-55, n. 1 (3d ed. 2019) (citing cases where "[n]ew facts create[d a] new claim").

*Lucky Brand*, 140 S.Ct. at 1596. The decision was explaining some of the many possible reasons for the legal principle regarding claims that postdate the filing of the initial complaint. The first sentence was explaining one of the reasons for the principle to apply in that particular case, not stating the legal principle itself.

However, in Daza's case, the Seventh Circuit concentrated on the Court's first sentence in the above quotation and misinterpreted one of the possible reasons for the legal principle as a legal requirement, changing the legal principle itself.

The Seventh Circuit stated as follows:

> Finally, Daza points out that earlier lawsuits cannot preclude litigation over subsequent events. True enough, but that proposition has

> no bearing on his case. In *Lucky Brand*, the Supreme Court reiterated the well-understood principle that claim preclusion does not prevent parties from bringing a suit involving actions that "occurred after the conclusion" of the previous suit. 140 S.Ct. at 1596. Here, however, Daza's claim for failure to rehire involved events that existed at the time of *Daza I*. Indeed, this is precisely why he was able to raise that argument in opposition to summary judgment. That he was awaiting a right-to-sue letter from the EEOC is of no consequence, because "the requirement to exhaust administrative remedies is no excuse for claim-splitting in this context." *Barr*, 796 F.3d at 840.

Pet. App. 7-8.

As a result of misinterpreting the Court's *Lucky Brand* decision, the Seventh Circuit also misinterpreted and changed the meaning of its decision in *Barr v. Board of Trustees of Western Illinois University*, 796 F.3d 837, 840 (7th Cir. 2015). The Seventh Circuit changed the meaning of its *Barr* decision to conform to the Seventh Circuit's new misinterpretation of the legal principle in *Lucky Brand*.

The *Barr* decision involved splitting different claims in the same occurrence into multiple lawsuits. It required the joining in the same lawsuit multiple claims in the same transaction that occurred at the same time. It did not require the joining in the same lawsuit of claims in different transactions that occurred at different times, and certainly not in different

transactions that occurred years apart. *Id.* But the Seventh Circuit cited the *Barr* decision to support its misinterpretation of *Lucky Brand*.

Before the *Lucky Brand* decision, the Seventh Circuit had correctly stated the legal principle that claim preclusion generally does not bar claims that are predicated on events that postdate the filing of the initial complaint. The *Lucky Brand* decision cited, along with other authorities, the Court's decision of *Whole Woman's Health v. Hellerstedt*, 136 S.Ct. 2292, 2305 (2016). On page 2305 of the *Whole Woman's Health* decision cited by *Lucky Brand*, the Court cited, among other authorities, two Seventh Circuit decisions for the principle that *res judicata* does not bar claims that are predicated on events that postdate the filing of the initial complaint. *Ellis v. CCA of Tenn. LLC*, 650 F.3d 640, 652 (7th Cir. 2011); *Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008). The Seventh Circuit's misinterpretation of the *Lucky Brand* decision not only caused the Seventh Circuit to misinterpret its decision in *Barr*, but also to disregard the Seventh Circuit's decisions in *Ellis* and *Potter* that the Court cited in *Whole Woman's Health.*

The decision of *Smith v. Potter*, *supra*, explained in detail the reasons for the rule that events occurring after the court complaint need not be included in the first lawsuit. The Seventh Circuit had explained as follows:

> Even if the dismissal had been with prejudice, the district court would have been mistaken to dismiss the second suit on the ground of *res*

*judicata*. *Res judicata* does not bar a suit based on claims that accrue after a previous suit was filed. *Doe v. Allied-Signal, Inc.*, 985 F.2d 908, 914 (7th Cir. 1993); *Spiegel v. Continental Illinois National Bank*, 790 F.2d 638, 646 (7th Cir. 1986); *Rawe v. Liberty Mutual Fire Ins. Co.*, 462 F.3d 521, 530 (6th Cir. 2006); *Computer Associates Int'l, Inc. v. Altai, Inc.*, 126 F.3d 365, 369-370 (2d Cir. 1997); *Manning v. City of Auburn*, 953 F.2d 1355, 1360 (11th Cir. 1992). It does not matter whether, as in the case of harassment, the unlawful conduct is a practice, repetitive by nature, see *National Railroad Passenger Corp. v. Morgan*, 536 U.S. 101, 117-119, 122 S.Ct. 2061, 153 L.Ed.2d 106 (2002), that happens to continue after the first suit is filed, or whether it is an act, causing discrete, calculable harm, that happens to be repeated. The filing of a suit does not entitle the defendant to continue or repeat the unlawful conduct with immunity from further suit. *Lawlor v. National Screen Service Corp.*, 349 U.S. 322, 328, 75 S.Ct. 865, 99 L.Ed. 1122 (1955).

It is true that some of the alleged harassment that occurred after the plaintiff filed her first suit occurred before she dismissed the suit, and so, the government argues, she could have amended her complaint to add an allegation of that harassment. But as the *Doe* and *Rawe* decisions cited above hold, there is no legal duty to amend rather than bring a fresh suit, especially since a plaintiff has a right to amend her complaint only once without leave of court. Fed.R.Civ.P. 15(a). Suppose that a

> year into the case, with trial about to begin, the plaintiff experienced a fresh act of harassment. The judge might quite understandably not want to allow her to amend her complaint to add the new allegation, because that might require additional discovery and so force postponement of the trial. On the government's view, the judge would have to either allow the amendment, in order to prevent the bar of *res judicata* from cutting off the plaintiff's access to a remedy for the fresh harassment, or deny it and by doing so deny her any remedy. Neither alternative is attractive.

*Smith v. Potter*, 513 F.3d at 783.

Before the *Lucky Brand* decision, the Seventh Circuit followed the proper legal principle that claim preclusion generally does not bar claims that are predicated on events that postdate the filing of the initial complaint. *Ellis*, *supra; Potter*, *supra.* After the *Lucky Brand* decision, the Seventh Circuit misinterpreted that decision and held that claim preclusion generally does not bar claims that are predicated on events that postdate the conclusion of a pending case. Pet. App. 7. The Supreme Court can correct the matter by stating that its decision in *Lucky Brand* about the prior case having been concluded in that case was merely a description of the facts in that particular case and not part of the requirement for collateral estoppel.

The bad alternatives described in the *Smith* decision were adopted by the new *Daza II* Opinion. In *Daza I*, the State said that the claim of failure to rehire was

not included in *Daza I*, refused to produce evidence of the failure to rehire, failed to offer evidence of the failure to rehire, and did not allow Daza to litigate the claim of failure to rehire. *Daza I*, Dkt. 12 at 3; *Daza I*, Dkt. 50; *Daza I*, Dkt. 68 at 8-12; *Daza I*, Dkt. 72-71; *Daza I*, Dkt. 75; *Daza I*, Dkt. 78 at 14-15; *Daza I*, Dkt. 86 at 55-56, 58. However, in *Daza I*, the district court *sua sponte* suggested the defense of no application for rehire. *Daza I*, Dkt. 86. Then, the State changed its position and argued in *Daza II* that Daza was precluded from litigating the failure to rehire in *Daza II* because of the court's statements in *Daza I* on the failure to rehire. *Daza I*, Dkt. 16.

The new *Daza* Opinion encourages the State and other parties to do the same in other cases or to change and claim that any time a new claim arises, the first case should be delayed and prolonged pending the new administrative and court proceedings on the new claim. The changes brought about by the new *Daza* Opinion are not good alternatives to the rule previously established by the Seventh Circuit and the Supreme Court. The Seventh Circuit's new *Daza* decision breaks from the established decisions of the Supreme Court and the other circuits.

The effect of the Seventh Circuit's misinterpretation of *Lucky Brand* to require the closing of a pending case, instead of the filing of a court complaint, before a party could decide whether to delay a pending lawsuit for new events or file a new lawsuit for new events has had broad effects. Parties and courts are now required

to delay pending lawsuits when new events between the parties occur.

Under the proper principle in *Lucky Brand*, claims from new events need not be immediately alleged in a pending lawsuit before the lawsuit can be adjudicated and closed. Pending lawsuits often help resolve later claims before they are filed in court. Also, in cases of ongoing transactions between the parties, a second transaction may not be the last transaction with disputes between the parties. When the pending lawsuit cannot be litigated to conclusion without the requirement to add any newly occurring claims to that lawsuit, the pending lawsuit can be substantially delayed, or newly occurring claims may be forfeited in order to obtain a decision in the pending lawsuit.

The Seventh Circuit's misinterpretation of *Lucky Brand*, mandating the addition of any new claims between the parties to a pending lawsuit, delays the pending lawsuit, prevents progress in resolving claims in a timely manner, and requires the addition of claims that may not be necessary to be filed after the resolution of the pending lawsuit.

The misinterpretation of *Lucky Brand* also places parties in grave danger for either following the Seventh Circuit decision or losing any new claims from new occurrences. Parties will follow the decisions of the Court at their peril of losing their later claims. The misinterpretation by the Seventh Circuit makes it even more difficult for the parties to understand

that they should not follow the decisions of the Court.

If the parties follow the decisions of the Court that allow parties to proceed with a pending lawsuit and make decisions about a second lawsuit later, the parties can lose their later claims by failing to follow the Seventh Circuit requirement that any new claims from new occurrences must be filed in a pending lawsuit. That is what happened to Daza. In *Daza I*, Daza requested discovery of the State's 2017 failure to rehire him, but the State refused to provide discovery of the 2017 failure to rehire. *Daza I*, Dkt. 79. The State said that the failure to rehire was not included in the pending lawsuit on his termination. *Daza I*, Dkt. 78 at 14-15. The State said that Daza had to file a separate EEOC charge for the failure to rehire. *Daza I*, Dkt. 50 at 28-29. Daza filed a separate EEOC charge for the failure to rehire, and when he obtained a notice of right to sue, he filed his second lawsuit. *Daza II*, Dkt. 1 at p. 4.

The district court made statements about the failure to rehire, even though the issue was not raised in the Defendant's Motion for Summary Judgment, even though the Defendant stated that the failure to rehire was not part of the pending lawsuit, and even though the State did not offer any evidence to justify summary judgment on the failure to rehire. *Daza v. State of Indiana*, 331 F.Supp.3d 810, 850 (S.D.Ind. 2018). The district court's statements were dicta at best. The district court stated that Daza had not made an application for rehire, but no party had mentioned the subject of an

application or even mentioned the word application in their arguments on the Defendant's Motion for Summary Judgment. *Daza I*, Dkt. 50. The Defendant had not claimed that they needed an application to rehire Daza, who had received very good performance reviews during his 22 years of employment with the State, whose supervisor wanted to rehire him, and who was suing in a pending case to be rehired. The State had not claimed that there was any need for Daza to make an application to be rehired. *Id.* On the contrary, the State had claimed that they would not talk to Daza about rehire. *Daza I*, Dkt. 72-71 at p. 3. An application was unnecessary and would have been futile because the State already knew that Daza was requesting to be rehired and was suing to be rehired, and the State had refused to rehire him.

However, after the district court stated that Daza had not presented evidence that he made an application for rehire, the State contradicted its position that the failure to rehire was not a part of the pending termination lawsuit and stated that the failure to rehire was decided by the district court's comments in *Daza I* that Daza had not presented evidence that he made an application for rehire. *Daza II*, Dkt. 16; *Daza II*, Dkt. 25.

In *Daza II*, the district court agreed with its previous statements that Daza had not made an application to be rehired and agreed with the State's changed position that Daza had not made an application to be rehired. Pet. App. 36. The district court ruled that Daza was barred from litigating his 2017 failure to rehire

claim because the court said it had been litigated in his 2015 termination lawsuit, where the parties had not mentioned the subject of application or apply or reapply. *Id.*

The Seventh Circuit misinterpreted the *Lucky Brand* decision and stated that Daza was required to litigate the 2017 failure to rehire in the 2015 termination lawsuit. *Id.*

The procedures are confusing, even for parties and courts that try to follow. The confusion has been increased by misinterpretation of the *Lucky Brand* decision and has placed parties in peril and courts in difficult positions to attempt to determine whether to follow the Court's decisions or the new decision interpreting the Supreme Court decisions.

It is important for the Supreme Court to correct the misinterpretation of its decision in *Lucky Brand.* The Petitioner Daza has attempted to correct the decision of the Court of Appeals through a petition for rehearing by either the panel or by an en banc consideration, but the Court of Appeals declined to rehear the case by either method. Pet. App. 9.

The result of the new *Daza II* decision is that it delays the resolution of claims already filed while post-filing claims are litigated, or if the post-filing claims are not added to the pending claims, it bars the litigation of the post-filing claims. Both results of the *Daza II* decision are bad. The delay of the resolution of the pending claims is bad, as is the barring of

the post-filing claims when not filed with pending claims.

Court procedures that cause systematic delays of court cases have been recognized by the Court as important matters for the Court to correct. That is true even when the delays have been caused by the different treatment by state courts of litigation on the delay of discovery pending a motion to dismiss as provided by one federal statute. See, *Pivotal Software, Inc. v. Superior Court of California*, Supreme Court No. 20-1541, cert. granted, 141 S.Ct. 2884 (July 2, 2021).

The delays of pending litigation by the required filing of all post-filing claims in the pending litigation applies to all areas of the law. The new interpretation of the *Lucky Brand* decision especially affects all parties who have continuing relationships in commerce, employment, governmental relationships, and all other areas. See, e.g., *Lucky Brand*, 140 S.Ct. at 1596.

## II. The Seventh Circuit decision is contrary to the Supreme Court decision of *United States v. Sineneng-Smith*, 140 S.Ct. 1575 (2020) by allowing courts to preclude the litigation of later events between the parties in a later case when the defendant's motion for summary judgment in the first case did not raise the later events, the defendant refused to produce discovery or litigate the later events in the first case, and no party raised any issue about an application to reapply for the job for which the plaintiff was suing to be reinstated.

Daza was denied notice of the issues and evidence, an opportunity to respond, and a full and fair opportunity to litigate the failure to rehire in *Daza I* when the State said that the failure to rehire was not included in *Daza I*. *Daza I*, Dkt. 78 at 14-15. The State refused to produce any discovery on the failure to rehire in *Daza I*. *Daza I*, Dkt. 79. The Supreme Court and the Court of Appeals had stated that a transaction that occurred after the court complaint was not required to be included in the first lawsuit. *Lucky Brand*, *supra*, *Ellis*, *supra; Potter*, *supra*. In the Order on Summary Judgment, the district court made *sua sponte* speculative statements in dicta in *Daza I* about the failure to rehire. *Daza I*, 331 F.Supp.3d at 850. The court repeated its *sua sponte* statements from *Daza I* in *Daza II* before the court allowed any discovery in *Daza II*. *Id.*; Pet. App. 11-44.

The procedure used in *Daza I* and approved by the decision of *Daza II* violates the procedures set forth in Rule 56(f) that require notice and a reasonable opportunity to respond before the court can grant summary judgment independent of the motion.

The procedure used in *Daza I* and approved by the decision of *Daza II* are also contrary to the principle of party presentation recently affirmed in *United States v. Sineneng-Smith*, *supra.* In the *Sineneng-Smith* case, the district court at least allowed *amici* notice of the issue and an opportunity to respond to the issue raised by the court. In the case of *Daza I*, the court did not allow discovery of the failure to rehire before the summary judgment and no one in the case raised any issue of an application for rehire for his old job for which he was suing to be reinstated before the summary judgment was entered. *Daza I*, Dkt. 50; *Daza I*, Dkt. 73; *Daza I*, Dkt. 78; *Daza I*, Dkt. 79; *Daza I*, Dkt. 81.

The district court's *sua sponte* statements in *Daza I*, affirmed by the Opinion in this case, denied Daza notice of the issues and evidence, an opportunity to respond, and a fair and full opportunity to litigate the failure to rehire claim. If an employer shows an independent nondiscriminatory reason for the adverse action, an employee must be given a full and fair opportunity to offer evidence that the reason was a pretext. *St. Mary's Honor Center v. Hicks*, 509 U.S. 502, 507-518 (1993); *Texas Dept. of Community Affairs v. Burdine*, 450 U.S. 248, 255-256 (1981); *McDonnell Douglas Corp. v. Green*, 411 U.S. 792, 805 (1973). In

*Daza I*, the employer offered no independent, non-discriminatory reason, and Daza was not given an opportunity to obtain evidence from the employer and present the evidence that the reason was a pretext.

The failure to provide a full and fair opportunity to litigate in the earlier case also violates the principle of *res judicata*. One general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a full and fair opportunity to litigate that issue in the earlier case. *Allen v. McCurry*, 449 U.S. 90, 95 (1980).

Of course, the United States Courts are also bound by the due process requirements of the Fifth Amendment to the Constitution of notice and opportunity to respond. *United States v. James Daniel Good Real Property*, 510 U.S. 43, 46, 53 (1993) (individuals must receive notice and an opportunity to be heard, and courts may not dismiss a forfeiture action for noncompliance with internal timing requirements). The court failed to provide Constitutional due process to Daza in addition to the court's violation of Rule 56(f), violation of the principle of party presentation reaffirmed in *Sineneng-Smith*, violation of the principle of a full and fair opportunity to prove pretext, and the full and fair opportunity to be heard before the doctrine of *res judicata* could be imposed against him.

There is no dispute that the parties and the court did not make any statements about a lack of an application for rehire or re-applying before the summary

judgment order. The district court made statements in dicta about Daza not presenting evidence that he reapplied for his old position for which he was suing to be reinstated. *Daza* I, 331 F.Supp.3d at 850. The Seventh Circuit repeated the district court statements of dicta in affirming the district court. Pet. App. 6-7. In addition to the subject of re-applying not being mentioned by anyone before the summary judgment order, it is not the burden of the nonmoving party, Daza, to present evidence on an issue not raised in the motion for summary judgment. The district court and Seventh Circuit procedures are in error in both regards.

After the Defendant State claimed immunities in *Daza I*, Daza filed an amended complaint adding the individuals as defendants in September 2017. *Daza I*, Dkt. 13 at 4; *Daza I*, Dkt. 20.

Shortly thereafter, the defendants posted a vacancy announcement for Daza's old job of geologist that they had been holding open for more than a year during the proceedings. *Daza I*, Dkt. 27; *Daza I*, Dkt. 28; *Daza I*, Dkt. 29; *Daza I*, Dkt. 33; *Daza I*, Dkt. 72-69 at 1.

In December 2017, the defendants hired a younger, less-experienced person to replace Daza. *Daza I*, Dkt. 72-71 at 3.

In March 2018, the defendants filed a motion for summary judgment in the termination case. *Daza I*, Dkt. 50.

Daza requested discovery of the evidence of the failure to rehire, but the defendants refused to produce discovery of the failure to rehire. *Daza I*, Dkt. 68; *Daza I*, Dkt. 75; *Daza I*, Dkt. 78 at 14-15.

In May 2018, Daza responded to the motion for summary judgment and mentioned the fact that Daza had been replaced by a younger, less-experienced person, but the defendants would not produce evidence on the failure to rehire. *Daza I*, Dkt. 73 at 12.

In June 2018, the defendants filed a reply affirmatively stating that the failure to rehire claim was not in the case of *Daza I*, and that the court could not consider the failure to rehire. *Daza I*, Dkt. 78 at 12-14.

In August 2018, the district court granted summary judgment on the 2015 termination, but the court made *sua sponte* speculative statements about a possible defense that there was no evidence that Daza applied to be rehired, even though none of the parties had raised an issue, argued, or even mentioned any application, lack of application, or a requirement of an application for Daza to be rehired when he had repeatedly requested to be rehired. *Daza v. State of Indiana*, 331 F.Supp.3d 810, 846, 849-850 (S.D.Ind. 2018). The district court also stated that Daza had not filed an EEOC charge on the failure to rehire. *Id.*

After the defendants said that Daza had not yet filed an EEOC charge on the failure to rehire, Daza filed an EEOC charge and was issued a notice of right to sue. *Daza II*, Dkt. 1 at 4. After the district court agreed with the defendants and stated that Daza

needed a separate EEOC charge for the failure to rehire, Daza filed his lawsuit (*Daza II*) on his second EEOC charge and notice of right to sue. *Id.*

Daza appealed the summary judgment in *Daza I* and explained in his brief on appeal that the failure to rehire was not part of *Daza I*, because the defendants and the district court stated that he had not yet filed an EEOC charge. *Daza I* Appeal Dkt. 24 at 21-22. In the appeal of *Daza I*, Daza stated that the failure to rehire was a separate case. *Daza I*, Appeal Dkt. 24, Brief of Appellant at 23-24. The defendants did not dispute Daza's statements in the defendant's Brief of Appellees. *Daza I*, Appeal Dkt. 32 at 17-18, Brief of Appellees. The court of appeals affirmed the district court's summary judgment on Daza's termination and did not mention the failure to rehire. *Daza I* Appeal Dkt. 45; *Daza v. State of Indiana*, 941 F.3d 303 (7th Cir. 2019) (*Daza I*).

In *Daza II*, the defendants changed their position from *Daza I* and argued that the district court's *sua sponte* speculative statements about the possible defense of no evidence of an application on the failure to rehire were *res judicata* on the claims in *Daza II*. The district court granted the defendants leave to file an early motion for summary judgment on the *res judicata* legal issues of the failure to rehire before authorization for discovery was granted. *Daza II*, Dkt. 22. Before discovery, the defendants filed an early motion for summary judgment based on *res judicata*, and they also offered a conclusory affidavit of a person who had not been listed as a witness by anyone, stating that

unknown persons considered only persons who made an application, but the person did not state any requirement for an application or who said what when or where. *Daza I*, Dkt. 17; *Daza I*, Dkt. 21; *Daza I*, Dkt. 22; *Daza I*, Dkt. 23-1; *Daza I*, Dkt. 58; *Daza I*, Dkt. 59. Daza cited evidence that he had repeatedly requested to be rehired, no one had claimed that he had to submit a reapplication for the job that he had held for 22 years, and the defendants had agreed that he was a gifted geologist. *Daza II*, Dkt. 27.

In *Daza II*, the district court held that its *sua sponte* statements in *Daza I* about no evidence of an application for the failure to rehire were *res judicata* on the claims in *Daza II*. Pet. App. 28-36. The district court also credited the conclusory affidavit. Pet. App. 36-40.

In *Daza II*, the court of appeals affirmed the district court decision on the basis of claim preclusion because of the district court's *sua sponte* statements in *Daza I* about no evidence of an application for the failure to rehire. Pet. App. 6-7. The court of appeals did not mention the conclusory affidavit.

In *Daza I*, Daza had no notice of any requirement for him to reapply for the job that he had held for 22 years, in which the defendants agreed he was a gifted geologist and for which he had made multiple requests to be rehired. He had no opportunity to respond to an unraised defense of no application. The defendants stated that the failure to rehire was not in *Daza I*. The defendants refused to produce evidence in *Daza I* on

the failure to rehire claim. In *Daza II*, the court granted the defendants leave to file an early motion for summary judgment on the *res judicata* legal issues of the failure to rehire before authorization for discovery was granted. *Daza II*, Dkt. 22. The court entered summary judgment before any initial discovery conference and before any Case Management Plan approved the beginning of discovery. *Daza II*, Dkt. 39. In *Daza II*, the court of appeals Opinion only affirmed the district court on the basis of claim preclusion because of the district court's *sua sponte* statements in *Daza I*. Pet. App. 8.

The Opinion in this case should be reconsidered and the case should be remanded to the district court.

## CONCLUSION

Before the *Lucky Brand* decision, the Seventh Circuit followed the proper legal principle that claim preclusion generally does not bar claims that are predicated on events that postdate the filing of the initial complaint. *Ellis*, *supra; Potter*, *supra.* After the *Lucky Brand* decision, the Seventh Circuit misinterpreted that decision and held that claim preclusion generally does not bar claims that are predicated on events that postdate the conclusion of a pending case. Pet. App. 7. That requires pending cases to remain open for the litigation of later claims that arise between the parties before the conclusion of the case. It precludes claims that are not included in any pending case that has not

yet been closed. The Seventh Circuit has denied the petition for rehearing and denied the petition for rehearing en banc. Pet. App. 47. Only the Supreme Court can clarify its decision in *Lucky Brand* to state that its statement in *Lucky Brand* that the action in that case occurred after the conclusion of the prior case was merely a description of the facts in that particular case and not part of the requirement for collateral estoppel.

The Court should grant the petition for a writ of certiorari and reverse the decision of the Seventh Circuit Court of Appeals. In the alternative, the Court should vacate the judgment through summary disposition and remand the case to the United States Court of Appeals for the Seventh Circuit for further consideration in light of the decisions of *Lucky Brands Dungarees, Inc. v. Marcel Fashions Group, Inc.*, *supra*, and *United States v. Sineneng-Smith*, *supra*.

Respectfully submitted,

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