22-7181 ORIGINAL

No. :_____

In the

Supreme Court of the United States

Kerrin Ann Barrett

Petitioner,

v.

PAE, Incorporated,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITION FOR A WRIT OF CERTIORARI

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Date: March 28, 2023

QUESTION PRESENTED

Whether applying res judicata doctrine to deny separate and distinct claims under Federal whistleblower statutes, including those that have specific administrative timelines, violates the Due Process Clause?

LIST OF PARTIES

Petitioner is Kerrin A. Barrett and was the *pro se* Plaintiff-Appellant in Court of Appeals for the Fourth Circuit. Respondent PAE, Incorporated was the Defendant-Appellee in the Court below.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Kerrin Ann Barrett, *pro se*, respectfully petitions for a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Fourth Circuit, filed on December 29, 2022.

OPINIONS BELOW

The Fourth Circuit affirmed the judgment of the district court (App. A-2), by unpublished per curiam opinion (*Barrett v. PAE Incorporated*, No. 22-1305 (4th Cir. Dec. 29, 2022). The court issued its judgment mandate (App. A-1) on January 20, 2023 (*Barrett v. PAE Incorporated*, No. 22-1305 (4th Cir. Jan. 29, 2023). The District Court's order granting Defendant's Motion for Summary Judgment is unpublished in a "Memorandum Opinion and Order" entered February 16, 2022 (*Barrett v. PAE, INC.*, Civil Action No. 1: 21-cv-00107 (RDA/JFA) (E.D. Va. Feb. 16, 2022)) (App. A-4).

STATEMENT OF JURISDICTION

The Fourth Circuit entered judgment on December 29, 2022. This petition is timely under Rule 13 of the Supreme Court Rules and within the 90 day deadline. The Court has jurisdiction of this appeal under 28 U.S.C. §1254(1).

RELATED PROCEEDINGS

United States District Court (EDVA):
Barrett v. PAE Government Services, Inc., Case No. 19-1394, E.D. Va.,
January 25, 2019; April 9, 2019

United States Court of Appeals (4th Circuit):
Barrett v. PAE Government Services, Inc. 975 F.3d 416 (4th Cir. 2020)

CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment to the U.S. Constitution states in pertinent part:

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

The Fourteenth Amendment to the U.S. Constitution states in pertinent part:

> …nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The False Claims Act (FCA), 31 U.S.C. § 3730(h) states in pertinent part:

> Any employee…shall be entitled to all relief necessary to make that employee…whole, if that employee … is discharged, demoted, suspended, threatened, harassed, or in any other manner discriminated against in the terms and conditions of employment because of lawful acts done by the employee … in furtherance of an action under this section…

The National Defense Authorization Act (NDAA), 41 U.S. Code § 4712 states in pertinent part:

> (1) …A person who believes that the person has been subjected to a reprisal prohibited by subsection (a) may submit a complaint to the Inspector General of the executive agency involved…
>
> (5) …Any person adversely affected or aggrieved by an order issued under paragraph (1) may obtain review of the order's conformance with this subsection, and any regulations issued to carry out this section, in the United States court of appeals for a circuit in which the reprisal is alleged in the order to have occurred.

STATEMENT OF THE CASE

This case presents squarely a question of exceptional importance left unresolved by this Court's prior opinions: whether the Due Process Clause of the Constitution applies to Federal whistleblower civil actions that have been barred by applying *res judicata* and claim preclusion.

In this case, this Court may not avoid the broader constitutional question because there is case precedent (*Lucky Brand Dungarees v. Marcel Fashions Group*, 140 S. Ct. 1589, 206 L. Ed. 2d 893, 590 U.S. (2020)), for allowing separate and distinct claims in a separate action even where a shared a core set of facts exists.

A. Factual and Procedural History

In May 2016, Petitioner was hired by PAE, Incorporated ("PAE") and charged with managing program performance data and reporting on their Corrections System Support Program ("CSSP") in Afghanistan for the U.S. Department of State. Soon after she began working for PAE, Petitioner began raising concerns to PAE management about fraudulent data reporting to the State Department that made it appear PAE was much more effective at building local national capacity than the evidence indicated, a violation of the False Claims Act ("FCA"), 31 U.S.C. § 3730(h) and National Defense Authorization Act ("NDAA"), 41 U.S. Code § 4712. To address the fraud, Petitioner attempted to initiate and implement improved data gathering and reporting procedures. In May 2017, PAE was awarded a new five-year contract, in which Petitioner had proposed adding significant data verification enhancements.

Throughout the latter half of 2016 and up to her wrongful termination on January 31, 2018, PAE harassed and intimidated Petitioner by making misleading and vexatious statements and representations regarding Petitioner's attempts to establish standard monitoring and evaluation processes and procedures on CSSP to address the fraudulent data and reporting. As

evidence of the depth of PAE's retaliatory animus against Petitioner, PAE conspired with Arlington County officials to arrest and detain her on a sham "emergency mental health evaluation" in July 2017, two months after contract award, just at the time she was beginning to implement her proposed wide-ranging data verification processes and procedures. Petitioner subsequently went on unpaid annual leave. She received a termination letter at her home in January 2018, effective date January 31, 2018, citing her inability to obtain a secret clearance, now improbable due to her illegal seizure.

B. Judicial Proceedings

On January 29, 2021, Plaintiff timely filed her Complaint in the United States District Court for the Eastern District of Virginia against PAE under the retaliation statute of the Federal False Claims Act ("FCA"), 31 U.S.C. § 3730(h). Three claims were brought against PAE: (1) Retaliation (Count One); (2) Discrimination and Harassment (Count Two); and (3) Interference with Economic Relationships and Activity (Count Three). On March 29, 2021, adhering to the statutory administrative timeline in accordance with Section 828 of the 2013 National Defense Authorization Act, 41 U.S.C. § 4712 et seq. ("NDAA"), Plaintiff filed a First Amended Complaint for Equitable and Monetary Relief and Demand for Jury Trial, adding an additional claim (Count 4) for whistleblower retaliation in violation of the NDAA whistleblower statute. Petitioner claimed wrongful termination charges under both FCA and NDAA.

In accordance with published guidance, on July 12, 2020, Petitioner had timely filed a complaint with the U.S. Department of State's Office of the Inspector General ("OIG") under the contractor and grantee employee whistleblower protection program (41 U.S.C. § 4712). Her complaint against PAE alleged discrimination, reprisals and wrongful termination. On October 21, 2020, the OIG notified Plaintiff that it would not investigate the allegations of her

administrative complaint because she "previously addressed PAE's alleged reprisal [her illegal seizure] in a civil action." No mention was made in the letter of Petitioner's other claims in her complaint. With the NDAA administrative requirement now completed, Petitioner could appeal the OIG's decision in Federal court.

Without acknowledging Petitioner's facts as true (*E. Shore Mkts., Inc. v. J.D. Assocs. Ltd. P'ship*, 213 F.3d 175, 180 (4th Cir. 2000), nor allowing the parties an opportunity for discovery or to present oral argument, the district court judge determined that Petitioner's case was barred based on res judicata and claim preclusion. On February 16, 2022, the District Court entered an Opinion and Order granting Defendant's motion to dismiss on the basis that Virginia's broad doctrine of res judicata barred Barrett's attempts to litigate whistleblower claims against PAE. p. A-4. The court relied heavily on the Defendant's version of the facts and their erroneous application of res judicata despite Petitioner's presentation of clear and convincing arguments.

The court reasoned that res judicata doctrine applied, specifically claim preclusion. Their opinion rested on an overly broad interpretation of res judicata, namely: 1) applying a sweeping transactional approach to res judicata; and 2) assuming all three prongs of Virginia's res judicata doctrine have been met. The court completely ignored this court's decision in *Lucky Brand (Lucky Brand Dungarees v. Marcel Fashions Group*, 140 S. Ct. 1589, 206 L. Ed. 2d 893, 590 U.S. (2020)), and even its own case precedent in *Marshall* (*Marshall v. Marshall*, 523 F. Supp. 3d 802 (E.D. Va. 2021)).

Petitioner appealed to the Fourth Circuit Court of Appeals, invoking the Court's jurisdiction pursuant to 28 U.S.C. §1291. The sole issue presented to the Fourth Circuit was whether the district court's interpretation of res judicata doctrine in Virginia barred Petitioner from litigating new claims under FCA and NDAA whistleblower statutes. p. A-19.

The Fourth Circuit panel, comprising the exact same panel as in her first civil action (*Barrett v. PAE Government Services, Inc.* 975 F.3d 416 (4th Cir. 2020), p. B-1), with Judge Traxler again presiding as senior judge, never examined whether res judicata and claim preclusion actually could be applied to Petitioner's Federal whistleblower case. The panel denied Petitioner's appeal without explanation (p. A-2), thus, impermissibly denying Petitioner equal protection of the law under the Due Process Clause.

The Fifth Amendment reiterates the principle of the rule of law: the judiciary must act in accordance with legal rules and not contrary to them. It requires "procedural due process," which concerns the fairness and lawfulness of decision making methods used by the courts. *Kajla v. US Bank Nat. Ass'n*, 138 S. Ct. 120, 199 L. Ed. 2d 32 (U.S. 2017). In *Barrett v. PAE*, both the fairness and the lawfulness of the decision making by the district and circuit courts may be contrary to the Fifth Amendment.

Arguments that were clear and convincing were presented to the Fourth Circuit. To the extent that the Court of Appeals has upheld the lower court ruling without explanation, it has denied Petitioner's right to appeal, elevating an unclear and overreaching doctrine above constitutional rights and simple justice. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchison*, 349 U.S. 133, 136 (1955). Petitioner had neither.

Petitioner now seeks Supreme Court review and reversal of the judgment of the Fourth Circuit.

STATUTORY FRAMEWORK AND CONSTITUTIONAL QUESTIONS

The Fourth Circuit's decision violated Petitioner's Fifth and Fourteenth Amendment rights when they erroneously upheld the district court's application of res judicata doctrine and claim preclusion to the FCA and NDAA claims presented in Petitioner's whistleblower action. "The Due Process Clauses prohibit courts from depriving a person of life, liberty, or property without due process of law." Katz, Emile, *Due Process & The Standing Doctrine* (November 2, 2022).

ARGUMENT

A. Introduction

The misapplication of res judicata doctrine in a separate Federal whistleblower civil action violates both substantive and procedural protections guaranteed by the Due Process Clause. The district court denied the Petitioner her fundamental rights to a jury trial solely on applying an overly broad interpretation of res judicata, by denying the Petitioner due process and the equal protection of the laws guaranteed under the Fifth and Fourteenth Amendments to the United States Constitution and under the Virginia Constitution, Article 11 of the Virginia Declaration of Rights. This petition wades into the expansive and murky waters of res judicata doctrine, in particular as it applies to Federal whistleblower statutes.

For *res judicata* to bar an action in Virginia, all three prongs must be met: (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in two suits. (*Keith v. Aldridge*, 900 F.2d 736 (4th Cir. 1990)). "[I]t is firmly established that the party who asserts the defenses of *res judicata* or collateral estoppel has the burden of proving by a preponderance of the

evidence that the claim or issue is precluded by a prior judgment." *Scales v. Lewis*, 541 S.E.2d 899, 901 (Va. 2001) "...[*R*]*es judicata* "applies... only to claims arising prior to the entry of judgment. It does not bar claims arising subsequent to the entry of judgment and which did not then exist or could not have been sued upon in the prior action." *Alexander & Alexander, Inc. v. VanImpe*, 787 F.2d 163, 166 (3d Cir. 1986), as cited in *Mills v. City of Norfolk,* Civil Action 2:21-cv-185 (E.D. Va. Aug. 18, 2021).

B. The Due Process Clause Permits Distinct and Separate Claims Under Federal Whistleblower Statutes.

Claim preclusion should not apply to claims made under Federal whistleblower statutes that are not identical to previous claims. Longstanding application of res judicata doctrine in case precedent cites "an identity of cause of action" as one of at least three prongs that must be met in order to bar an action. Yet there is confusion in the circuits, even within the Fourth Circuit itself, regarding the interpretation of what exactly constitutes "identity of cause of action."

In dismissing Petitioner's civil action on claim preclusion grounds, the district court ignored its own recent case precedent in *Marshall*, where it denied Defendants' motions to dismiss, applying the following rulings to their decision *Funny Guy, LLC v. Lecego, LLC*, 293 Va. 135, 795 S.E.2d 887, 890 (2017) (citing *Lee v. Spoden*, 290 Va. 235, 776 S.E.2d 798, 803-04 (2015)). The court observed that

> "Under the doctrine of claim preclusion, a final judgment forecloses successive litigation of the *very same claim,* whether or not relitigation of the claim raises the same issues as the earlier suit.'" *Lee*, 776 S.E.2d at 803 (quoting *New Hampshire v. Maine,* 532 U.S. 742, 748, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001) (internal quotations omitted)) [emphasis added]. Rule 1:6 of the Rules of the Supreme Court of Virginia represents the current governing law of claim

preclusion in Virginia. *Id.* at 804. *Marshall v. Marshall*, 523 F. Supp. 3d 802 (E.D. Va. 2021). [emphasis added]

Marshall provides an interpretation of claim preclusion more closely aligned with established res judicata doctrine in that it refers to a final judgment foreclosing litigation of a successive claim only what that claim is the "very same" as in the previous action. This court must provide clarity on this essential identity prong of res judicata doctrine to reign in the increasingly expansive application of the doctrine that is in direct opposition to the Due Process Clause.

Regardless of the blurred line in the sand of the district court's application of claim preclusion, there is no sufficient identity between the causes of action asserted in the current suit and the two civil conspiracy claims against Defendant PAE for Petitioner's illegal seizure in the previous suit. p. B-32. The depth of Defendant's animus against Plaintiff is demonstrated in the egregious retaliatory incident of July 13, 2017, but that is not the claim in this case and, therefore, the *res judicata* bar and claim preclusion does not apply.

The two claims against Defendant PAE in the first suit rested exclusively on the company's conspiratorial involvement in Petitioner's illegal seizure and detention on July 13, 2017. (*See* Appendix B.) In contrast, the FCA and NDAA whistleblower claims in the present action both allege a claim of Wrongful Termination and, under the FCA statute, Retaliation, Discrimination and Harassment, and Interference with Economic Relationships and Activity. p. A-25.

The district court argued that Petitioner's case is barred by taking a transactional approach to res judicata. For purposes of *res judicata*, if the later case arises out of the same "nucleus of operative facts," or is based upon the same factual predicate, as the former action,

then the two cases are really the same claim or cause of action. In determining whether the causes of action are the same, a court must compare the substance of the actions, not their form (*Ragsdale v. Rubbermaid, Inc.*, 193 F.3d 1235 (11th Cir. 1999) (Tab 2) (citing *Citibank, N.A. v. Data Lease Financial Corp.*, 904 F. 2d 1498, 1503 (11th Cir. 1990)) (Tab 4).). A transactional approach is followed in making this determination.

Among the factors to be considered in determining whether the facts are so woven together as to constitute a single claim are their relatedness in time, space, origin, or motivation, and whether, taken together, they form a convenient unit for trial purposes. (*Id.*). A similar "transaction" could not exist in Petitioner's case, because the temporality of the Federal retaliation statutes was outside the bounds of the single retaliatory act that was litigated previously, a significant bar to "time, space and origin," and thus cannot form a similar "convenient trial unit" to the first, constitutional, complaint.

Although the district court strictly interpreted *res judicata* as it applied it to the claims in this case, a recent ruling in the Fourth Circuit, *Portuesi*, affirmed that "Collateral estoppel and *res judicata*, respectively, do not apply if the current action is not identical to an issue actually litigated and necessary to the judgment or the current case lacks identity of the cause of action in the prior suit and the later suit." (*Portuesi v. Bank of N.Y. Mellon Tr. Co.* (In re Portuesi), Case No. 19-11275 (Bankr. M.D.N.C. May. 27, 2021))

C. The Issues Presented Were Never Actually Determined in The First Action.

The difference between "claim preclusion" and "issue preclusion" beg for clarity. In its opinion, the district court was careful to use only "claim preclusion," a much more vague - and thus all-encompassing – term than "issue preclusion." According to Black's Law Dictionary,

> "'Res judicata' has been used ...as a general term referring to all of the ways in which one judgment will have a binding effect on another. ... [I]t lumps under a single name two quite different effects of judgments. The first is the effect of foreclosing any litigation of matters that never have been litigated, because of the determination that they should have been advanced in an earlier suit. The second is the effect of foreclosing relitigation of matters that have once been litigated and decided...Professor Allan Vestal has long argued for the use of the names 'claim preclusion' and 'issue preclusion' for these two doctrines [Vestal, *Rationale of Preclusion*, 9 St. Louis U. L.J. 29 (1964)], and this usage is increasingly employed by the courts as it is by Restatement Second of Judgments." Charles Alan Wright, The Law of Federal Courts § 100A, at 722–23 (5th ed. 1994).

The district court's opinion rested on claim preclusion, without mentioning issue preclusion. Nevertheless, the two terms are ambiguous and often used together or interchanged in opinions. *The Terminology of Res Judicata*, 18 Fed. Prac. & Proc. Juris. § 4402 (3d ed.) As evidenced in the district court's opinion, the "determination that ...[matters] should have been advanced in an earlier suit" varies widely among the circuits. The district court acknowledged as much in a footnote, standing firm on its own overly broad interpretation thus:

> Plaintiff raises *Housing Rights Center v. Sterling*, 404 F. Supp. 2d 1179 (C.D. Cal. 2004) to advance a standard for evaluating res judicata which directly clashes with this circuit's precedent: [R]es judicata bars later litigation only when the issues decided in the prior adjudication were identical to issues raised in the present action. Claims are identical if the two suits involve infringement of the

same primary right. *Id.* (internal citation omitted). This Court will not apply precedent which competes with that of this circuit. p. A-13

However, the decision by this very district court in *Marshall* applies to this case, wherein the claims never made in the previous action.

D. No Final Judgment on the Merits for the FCA and NDAA Claims was Made in the First Action.

Moreover, the decision by the district court in *Marshall* also applies to final judgment, which was never made in the previous action. Rather, in its opinion, the court *inferred* that a final judgement was made: "... Because the Court's order granting the motion to dismiss in Barrett I represented a decision on the merits and *is presumed to be with prejudice as no statement to the contrary was made in the opinion*, this Court finds that Barrett I represented a final judgment on the merits." [emphasis added] p. A-11 Inexplicably, no statute was cited for this presumptive inference; rather, the court rested its argument on circuit precedent. The district court erred when it assumed that final judgment from the previous action was made, and second, when it applied that final judgment to Petitioner's whistleblower case.

Relatedly, issue preclusion precludes parties from relitigating issues of law or fact *"actually litigated and essential to a valid final personal judgment in the first action."* [emphasis added] *Rawlings v. Lopez*, 267 Va. 4, 591 S.E.2d 691, 691 (2004). The first court must have "'actually litigated and resolved [the issue] in a valid court determination essential to the prior judgment, even if the issue recurs in the context of a different claim.'" *Lee*, 776 S.E.2d at 803 (quoting *Taylor v. Sturgell*, 553 U.S. 880, 892, 128 S.Ct. 2161, 171 L.Ed.2d 155 (2008) (internal quotations omitted)).

The issues of law and fact in the present case were never "actually litigated" in the previous constitutional case in order to obtain a "valid final personal judgment." Instead, the

litigation focused solely on the events of July 13, 2017, and PAE's conspiratorial role with Arlington County. Petitioner did not have a full and fair opportunity to litigate the issues in her case because she was denied her rights under the Due Process Clause.

E. The District Court's Demand to Join Civil Actions in Order to Serve Judicial Expediency Violates the Due Process Clause, and Procedural Due Process in particular.

Petitioner's current suit involves protections afforded whistleblowers under the FCA and NDAA whistleblower statutes; her previous suit against PAE and co-defendants sought relief under the Fourth Amendment for a singular egregious act. Neither statute could have been joined to the previous action due to procedural rules, and both whistleblower complaints were properly filed.

In her previous Fourth Amendment suit against PAE, Arlington County, and other named Defendants, Petitioner did not have a "full and fair opportunity" to litigate the issues in the current suit due to FCA and NDAA procedural requirements that made it impossible to join the whistleblower and constitutional matters. Res judicata doctrine is primarily intended to prevent claim splitting, but in this instance, the NDAA claims, in particular, were subject to an administrative timeline that fell outside the docketing timeline of the First Action.

Federal whistleblower statutes are subject to procedural guidelines and timelines. The FCA retaliation statute has a three-year timeline, which activated on January 31, 2018, when Petitioner was terminated by PAE. There is no statute that bars a Plaintiff from filing a FCA retaliation suit after being a party in a previous suit against the same party.

The NDAA statute requires whistleblowers to file an administrative claim with the appropriate agency and wait for their determination before proceeding to federal court. Petitioner filed her OIG claim with the State Department over two months before the United

States Court of Appeals for the Fourth Circuit issued their Opinion in favor of PAE. Moreover, the time lag between filing the State Department's OIG claim and their adverse ruling was more than three months and failed to address all claims in the filing. The district court asserts that "She also waited to file her NDAA claim with the DoS OIG until July 12, 2020—over a year after the Court's final judgment in *Barrett I*." p. A- 14. However, on February 12, 2021, Plaintiff submitted *pro se* a Writ of Certiorari to the U.S. Supreme Court appealing the Fourth Circuit's decision on Fourth Amendment grounds. Final judgment in the first action was not decided until the U.S. Supreme Court denied certiorari on May 24, 2021.

The statutory procedures governing FCA retaliation claims are similar to NDAA in that they require initiation of a civil action in federal district court under the strict guidelines of the FCA statute, which must detail allegations of fraudulent activities and the protected conduct Plaintiffs engage in while addressing the fraud (31 U.S.C. § 3730(h)). Thus, Petitioner's FCA claims also could not have been feasibly joined with her civil rights action against both PAE and Arlington County, since Arlington County was not engaging in fraudulent activity.

In explaining its reasoning for dismissing Petitioner's claims, the district court stated that "[u]ltimately, claim preclusion promotes "[j]udicial efficiency and finality" of decisions, citing *In re Microsoft Corp. Antitrust Litig.*, 355 F.3d 322, 325 (4th Cir. 2004). p. A-7. Yet in the same circuit, the Norfolk district court recently affirmed that res judicata did not apply in a similar retaliation case, *Mills v. City of Norfolk*, Civil Action 2:21-cv-185 (E.D. Va. Aug. 18, 2021), which alleged "unlawful retaliation and hostile work environment, respectively, pursuant to § 1981 and § 1983. Both counts are against Norfolk which, at first glance, appear to invoke res judicata. However, res judicata "applies... only to claims arising prior to the entry of judgment. It does not bar claims arising subsequent to the entry of judgment and which did not then exist or

could not have been sued upon in the prior action." *Alexander & Alexander, Inc. v. VanImpe,* 787 F.2d 163, 166 (3d Cir. 1986). [emphasis added]

Petitioner argued that the Fourth Circuit should decide that res judicata doctrine does not apply to *Barrett v. PAE, Inc.* and that the case should be remanded to the district court for resolution of the specific substantive and procedural due process protections advanced by her. p. A-19. The panel instead held that all of Petitioner's due process claims foreclosed as a matter of law under circuit precedent. That incorrectly read this court's earlier cases regarding the application of res judicata doctrine. At minimum, the Fourth Circuit's precedents cannot be read as foreclosing Petitioner's procedural due process challenges, an error which should be corrected by this Court.

Procedural due process protections include "notice and an opportunity to be heard in an orderly proceeding before a tribunal having jurisdiction of a matter." Mark A. Evans, *Procedural Due Process: Florida's Uniform Administrative Procedure Act,* 21 U. Miami L.Rev. 145 (1966). This court has explained that "[p]rocedural due process rules are meant to protect persons not from the deprivation, but from the mistaken or unjustified deprivation of life, liberty, or property." *Carey v. Piphus*, 435 U.S. 247, 259 (1978). In Petitioner's case, the district court's broad interpretation of res judicata and claim preclusion was both mistaken and unjustified.

The lower courts are inconsistent in applying procedural due process to claims of res judicata. In its ruling on *Passaro v. Virginia*, 935 F.3d 243 (4th Cir. 2019), the Fourth Circuit addressed disparate avenues for employees to seek legal redress, affirming that differences in procedural rules should not bar claims. The Court concluded that Passaro could not have "asserted a Title VII claim for money damages as part of the subsequent state-court action appealing the grievance decision. The statutory procedures governing grievance appeals suggest

that they cannot feasibly be joined to a Title VII action seeking damages." *Id.* Similarly, Petitioner could not have feasibly joined to her civil rights action the NDAA action because, similar to *Passaro*, there is no jury and the deadlines are too rapid to accommodate a typical civil action in federal district court; the OIG must review the complaint and decide the case within 210 days (41 U.S.C. § 4712 et seq.).

As further evidence of the circuit split on res judicata and its impact on procedural due process, in a Ninth Circuit case, (*Garity v. APWU Nat. Labor Organization*, 828 F.3d 848 (2016)), [reversing the district court's order dismissing Garity's ADA claims on issue preclusion grounds, and remanded for further proceedings as to her discrimination and retaliation claims] the Court observed that the purpose of the claim preclusion doctrine is to avoid successive litigation when all of a Petitioner's claims derive from a common factual core and can be efficiently and effectively tried together; but implicit in the doctrine is the assumption that the *plaintiff actually had the chance to be heard on all of her claims in the first proceeding.* [emphasis added].

Petitioner was denied the chance to be heard in both proceedings through misapplication of the Fourth Circuit's own case precedent and, thus infringing upon her due process rights under the Constitution.

F. A Shared Core Set of Facts is Not a Bar to Subsequent Litigation.

The district court dismissed Petitioner's claims under res judicata and claim preclusion, stating that "Plaintiff's claims in Barrett II are inextricably intertwined with precisely the same series of events described in Barrett I." p. A-13. The court erred in its judgment here.

The current suit differs markedly in terms of the facts surrounding the previous case, which addressed actions taken by PAE to effect Petitioner's illegal seizure on July 13, 2017, and

seeks redress for entirely different wrongs, which occurred well before July 13, 2017, and ended with her wrongful termination more than six (6) months after the civil conspiracy claims in the first suit.

Due process is served by allowing a shared core set of facts. The centrality of PAE's argument, and the concurring district court ruling, rests primarily on the alignment of facts in this case and Petitioner's previous civil action against PAE. p. A-13. While some of the facts are the same, the courts, including the Fourth Circuit in *Passaro*, have been clear that this in and of itself is not a bar to a subsequent civil action based on different claims.

This court's recent decision in *Lucky Brand* addressing the issue of "defense preclusion" in *res judicata* doctrine, is particularly applicable to the district court's assertion that Petitioner's claims are barred because they share "a common nucleus of facts" with her previous civil action. As Justice Sotomayor wrote, "[b]ecause the parties agree that, at a minimum, the preclusion of such a defense in this context requires that the two suits share the same claim to relief—and because we find that the two suits here did not—Lucky Brand was not barred from raising its defense in the later action." The court held that "[b]ecause Marcel's 2011 Action challenged different conduct—and raised different claims—from the 2005 Action, Marcel cannot preclude Lucky Brand from raising new defenses."

The court further explained, "[p]ut simply, the two suits here were grounded on different conduct, involving different marks, occurring at different times. They thus did not share a "common nucleus of operative facts." (Restatement (Second) §24, Comment b, at 199.) Similarly, Petitioner's claims in her two civil actions against PAE are also grounded on different conduct, occurring at different times.

In its decision, the court elaborated upon its explanation of its interpretation of *res judicata*:

> To start, claims to relief may be the same for the purposes of claim preclusion if, among other things, "'a different judgment in the second action would impair or destroy rights or interests established by the judgment entered in the first action.'" Wright & Miller §4407. ...If, in either situation, a different outcome in the second action "would nullify the initial judgment or would impair rights established in the initial action," preclusion principles would be at play. (Re-statement (Second) §22(b), at 185; Wright & Miller §4414.)

A judgment in favor of Petitioner in the current suit would not impair or destroy rights or interests established by the previous judgment entered in the Fourth Circuit on appeal because that opinion upheld the lower court's dismissal of PAE from the suit, which alleged PAE's conspiratorial involvement in Petitioner's illegal seizure, a completely different claim. Thus, a judgment in favor of the Plaintiff would not threaten the validity of the judgment in the first suit, and, therefore, the district court's ruling that *res judicata* applies to this suit is incorrect.

In a much earlier decision, *Baltimore S.S. Co. v. Philips* (1926), 274 U.S. 316, 71 L Ed 1069, 47 S Ct 600, the court held that the number and variety of facts alleged by a party in separate suits do not establish more than one cause of action, so long as their result, whether they be considered severally or in combination, is the violation of but one right by a single legal wrong. In Petitioner's FCA and NDAA suit, different wrongs are alleged than in the first suit– discrimination and harassment, interference with economic relationships and activity, and wrongful termination– with the facts leading up to those wrongs demonstrating the depth of PAE's animus against her, resulting in violations of more than one right.

Based on this court's rulings, the same facts from one case may be pled in another case when a new claim has been made. The four counts in Petitioner's FAC are separate and distinct from the two counts of civil conspiracy alleged against Defendant PAE in the prior litigation. Although some of the facts in both civil actions are the same, the result establishes a violation of entirely separate, different legal wrongs. As such, the application of *res judicata* doctrine is barred in this case.

REASONS FOR GRANTING THE PETITION

A. The Expansion and Muddied Waters of Res Judicata and Claim Preclusion Is Inconsistent with Fundamental Principles of the Due Process Clause

The expansiveness and vagueness of res judicata doctrine impedes due process generally, and whistleblowing particularly, and must be reigned in. This case is of national importance because the doctrine of res judicata has expanded well beyond its original intent, obstructing the constitutional protections of due process. R. Jason Richards, *Richards v. Jefferson County: The Supreme Court Stems the Crimson Tide of Res Judicata*, 38 Santa Clara L. Rev. 691 (1998). "The law never acts by stealth; *it condemns no one unheard.*" *Moredock v. Kirby*, 118 F. 180, 185 (C.C.W.D.Ky. 1902) [emphasis added].

The legal question presented by this case is straightforward: does the Due Process Clause of the Constitution apply in any respect to the Federal whistleblower statutes? The effect of the decision by the court of appeals was to answer this question in the negative, which foreclosed any attempts to challenge the circuit's overly broad interpretation of res judicata. It is this doctrine, established through litigation in which only the broadest scope of res judicata doctrine was argued and considered, that Petitioner seeks to challenge as a matter of procedural and substantive due process.

Precedents governing employment law, with its many overlapping and intersecting statutes, should guide the adjudication of whistleblower cases. Applied to whistleblower cases, these precedents demand that res judicata doctrine can no longer be justified based on an expansive interpretation of the original doctrine of res judicata. Courts must justify their use of res judicata and claim preclusion by identifying issues that are identical to a previous action, supported by clear and convincing facts. To hold otherwise preempts constitutional due process rights to a fair trial.

The notion of due process dates back to the Magna Carta in 1215, in which King John promised that "[n]o free man shall be taken or imprisoned or disseized or exiled or in any way destroyed, nor will we go upon him nor send upon him, except by the lawful judgment of his peers or by the law of the land." W. McKechnie, *Magna Carta: A Commentary on the Great Charter of King John* (Glasgow, 2d rev. ed. 1914); J. Holt, Magna Carta (1965). Due Process is "that which comports with the deepest notions of what is fair and right and just." *Solesbee v. Balkcom*, 339 U.S. 9, 16 (1950). Due process is violated if a practice or rule "offends some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934).

More than 40 years ago, Justice Blackmun warned of the potential danger that the doctrine of res judicata poses to these traditional notions: "[B]ecause res judicata may govern grounds and defenses not previously litigated.., it blockades unexplored paths that may lead to truth. For the sake of repose, res judicata shields the fraud and the cheat as well as the honest person. Therefore, it is to be invoked only after careful inquiry." *Brown v. Felsen*, 442 U.S. 127, 131 (1979).

Recent Supreme Court decisions have begun to reverse the unbridled expansion of the state's powers under the Constitution An expansion that tends to favor the few over the interests of the many. The continued expansion of res judicata doctrine over the past decades now well exceeds the limits of governmental authority, undermining the original intent of the Constitutional protections of liberty without due process of law. This now expansive interpretation of the doctrine no longer fully protects individuals and their constitutional rights; rather, it serves a small minority of often deep-pocketed defendants whose sole objective is to preserve their bottom line, and their power, at all costs. Nowhere more true than in actions brought by whistleblowers.

B. The Quagmire of The Application of Res Judicata Doctrine Across the Circuits Demands Clarification, in Particular, on its Application to Federal Whistleblower Cases

In the majority of circuits, the application of res judicata, and its related notions of claim preclusion and issue preclusion, now encompasses every conceivable claim that "could have been" or "should have been" made (See *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 398 (1981)) in a prior action. The Fourth Circuit has been particularly zealous in its application of res judicata, expanding the doctrine's reach well beyond its original intent in the majority of cases it decides where a previous action is related. The lack of clear guidelines and definitions is the key contributing factor to this continued expansion, although many legal experts have tried to clarify terminology, to wit:

> The distinction between claim preclusion and issue preclusion can seem problematic. "One difficulty is that courts use 'res judicata' for two different concepts. Some use it to mean claim preclusion. Others employ res judicata in a general sense, to encompass both claim and issue preclusion...For ease of

understanding, I will refer to claim or issue preclusion, not to res judicata."

Weaver Corp. v. Kidde, Inc., 701 F. Supp. 61, 63–64 (S.D. N.Y. 1988), as cited in *The Terminology of Res Judicata*, 18 Fed. Prac. & Proc. Juris. § 4402 (3d ed.).

The notion of "identity" in res judicata application is central to the confusion regarding which claims may be brought in a subsequent action, directly impacting due process. In the district court's opinion, the court found that Petitioner's "case share[s] the same identity of the cause of action in Barrett I" (p. A-15) based on a shared set of core operative facts and by challenging the statutes' administrative timelines. The court's reasoning falls in the grey zone of what exactly is meant by "identity."

Other circuits have also applied a similarly vague and broad interpretation of this res judicata prong. The First Circuit found that res judicata applies when there is "sufficient identity between the causes of action asserted in the earlier and later suits." (*Apparel Art Intern. v. Amertex Enterprises*, 48 F.3d 576, 583 (1st Cir. 1995) ("*Gonzalez*, 27 F.3d at 755; *Kale*, 924 F.2d at 1165")) However, the phase "sufficient identity" blurs the line between "similar" and "identical." It is another example of the ever expanding universe of res judicata. The definition of "an identity of the cause of action" demands clear articulation under due process.

Federal whistleblower procedures, rights and remedies are too significant to conclude that a much broader and more sweeping interpretation of *res judicata* can swallow them up and dispose of them in a transactional approach that deprives whistleblowers of federally protected rights in the workplace. Whistleblowers are critical to ensure government accountability and that taxpayer money is spent in accordance with the law, and that programs are efficiently and effectively managed to provide the widest benefit possible for the public good.

The Fourth Circuit has all but invited this court to clarify the question of whether the Due Process Clause applies to Federal whistleblower cases in some respect, or as the circuit would have it, does not apply in any respect. This court should accept the invitation and correct the central error below, which has afflicted the law of the circuit, and others, for decades: the misapplication of this court's longstanding approach to determining the correct application of res judicata doctrine under the Constitution.

The question of how the Due Process Clause should apply to the doctrine of res judicata and its related notions of claim preclusion and issue preclusion, especially with regard to Federal whistleblower cases, has divided the lower courts. The broad scope of the circuit's ruling also threatens to predetermine many other cases before the courts, especially in complex civil actions, where many Federal and state statutes overlap and intersect. The Fourth Circuit has all but invited this court to examine the issue. This court should do so.

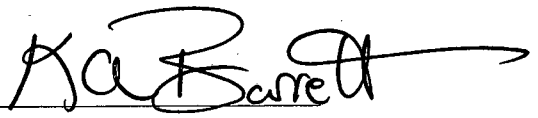
CONCLUSION

Petitioner respectfully asks this Court to grant this petition for certiorari and review the decision of the court of appeals to address the important constitutional question of whether a Federal whistleblower's claims can be dismissed, without a fair hearing, enabling employers to retaliate against their employees without due process. In doing so, petitioner asks this Court to follow the precedents set by this very court, and to recognize a right for employees to file suit when claims are separate and distinct from previous actions, and administrative timelines prevent joining with a previous action.

For the foregoing reasons, this petition for a writ of certiorari should be granted. The judgment below should be reversed.

Dated: March 29, 2023

Respectfully submitted,

By: 

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