11/29/23

No. 23-591

IN THE
SUPREME COURT OF THE UNITED STATES

ALTHEA MILEY, *et al.*,

Petitioner(s)

v.

DEBORAH J. BURNS,
Individually As Corporate Executive and Employee of TMST HOME LOANS, INC. f/k/a THORNBURG MORTGAGE HOMELOANS, INC. as Mortgage Service Provider

TMST HOME LOANS, INC. f/k/a THORNBURG MORTGAGE HOMELOANS, INC. as Mortgage Service Provider

Respondent(s)

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

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PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Eleventh Circuit Court of Appeals; Northern District Court of Georgia; and the Georgia State Courts' adherence to issue preclusion doctrines, departs from the Supreme Court's accepted and usual course of judicial proceedings of res judicata and the well settled Supreme Court res judicata precedents, raising a question of whether the Eleventh Circuit's and the lower courts' processes are consistent with due process?

Whether the Eleventh Circuit Court of Appeals; Northern District Court of Georgia; and the Georgia State Court's operation of Rule 12(b)(6) decisions on res judicata; balanced against the goals of substantive and administrative efficiency; is a mechanism by which meritorious cases are disposed of in view of the relevant policies and mandate of the federal rules to determine actions on their merits; is in effect, denying litigants the opportunity to have their claims adjudicated on the evidences and facts, is a due process violation ?

PARTIES TO THE PROCEEDING

Petitioner Althea Miley is the Plaintiff in the District Court proceedings and Plaintiff -Appellant in the Court of Appeals proceedings. Respondents Deborah J. Burns, Individually and TMST Home Loans, Inc., as Mortgage Servicers were the Defendants in the District Court proceedings and Defendants-Appellees in the Court of Appeals proceedings.

RELATED CASES

- *Althea Miley, et al* v. *Thornburg Mortgage Home Loans Inc. et al,* No. 14-cv-02819.U.S. District Court of Northern Georgia. Judgment entered on September 9, 2014.

- *Althea Miley, et al* v. *Thornburg Mortgage Home Loans Inc. et al,* No. 14-cv-02819.U.S. District Court of Northern Georgia. Judgment entered November 24, 2014.

- *Althea Miley, et al vs* Miley v. *Thornburg Mortgage Home Loans Inc. et al,* No. 14-15630, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered August 21, 2015.

- *Althea Miley, et al vs* Miley v. *Thornburg Mortgage Home Loans Inc. et al,* No. 14-15630, U.S. Court of Appeals for the Eleventh Circuit Enbanc. Judgment entered October 21, 2015.

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- *Althea Miley, et al vs. Deborah J. Burns and TMST Home Loans, Inc., as Mortgage Servicers,* No. 21-CV 00616 U.S. District Court of Northern Georgia. Judgment entered March 30, 2022.

- *Althea Miley, et al vs. Deborah J. Burns and TMST Home Loans, Inc., as Mortgage Servicers* No. 22-11512, U.S. Court of Appeals for the Eleventh Circuit. Judgment entered July 11, 2023.

- *Althea Miley, et al vs. Deborah J. Burns and TMST Home Loans, Inc., as Mortgage Servicers* No. 22-11512, U.S. Court of Appeals for the Eleventh Circuit Enbanc Judgment entered September 6, 2023.

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Althea Miley petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

OPINIONS BELOW

The Eleventh Circuit's opinion is unpublished and reproduced at *Althea Miley, et al vs. Deborah J. Burns and TMST Home Loans, Inc., as Mortgage Servicers* (No. 22-11521 (11th Cir. Jul. 11, 2023) and reproduced at (App. 4, p. 36). The Eleventh Circuit's denial of Petitioner's motion for rehearing and rehearing en banc is reproduced at (App. 6, p. 59). The opinions of the District Court for the Northern District of Georgia are reproduced at (App. 5. p. 42).

JURISDICTION

The Court of Appeals entered judgment on July 11, 2023. (App. 4, p. 36). The court denied a timely petition for motion for rehearing and rehearing en banc on September 6, 2023. (App. 6, p. 59). This Court has jurisdiction under 28 U.S.C. § 1254(1).

STATUTES AND CONSTITUTIONAL PROVISIONS INVOLVED

11 U.S.C. § 362; 11 U.S.C. § 363; 18 U.S.C. § 157 (3); 28 U.S.C. § 1738; 5th Amendment; O.C.G.A. § 9-3-96 FRCP 12(b)(6);

1A J. Moore & B. Ward, Moore's Federal Practice 0.311[2], at 3182 (2d ed. 1983)

A. Benjamin Spencer, *Civil Procedure: A Contemporary Approach* 1017–56 (5th ed. 2018)

Motions to Dismiss for Failure to State a Claim After Iqbal. Federal Judicial Center. March 2011. Retrieve

Thomas E. Willinging: Use of Rule 12(b)(6) in Two Federal District Courts (Federal Judicial Center 1989)

Georgia State University Law Review, Vol. 37, Iss. 2 [2021], Art. 8

Motions to Dismiss for Failure to State a Claim After Iqbal. Federal Judicial Center. March 2011

INTRODUCTION AND STATEMENT OF THE CASE

The U.S. Trustees Program, which serves as the watchdog of all bankruptcy court operations, was one of the first federal agencies to investigate mortgage servicer abuse of homeowners in financial distress.[1]

Allegations arose in the bankruptcy system that mortgage servicers were filing inflated and inaccurate proofs of claim and motions for relief from stay based upon faulty accounting and misrepresentations to the bankruptcy courts. These allegations extended to the

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[1] $25 Billion Mortgage Servicer Settlement: Implications for the U.S. Trustee Program and the Bankruptcy System, February 09, 2012: retrieved from: https://www.justice.gov/sites/default/files/ust/.

mortgage servicers' attorneys, as well as the third-party vendors they retained to provide services with respect to borrowers in bankruptcy.

Petitioner Althea Miley, came to discover, she was a victim of the stated said practices in 2008, which began in 2006 by her mortgage servicer; alleges Deborah J. Burns, a "high managerial agent" of TMST Mortgage Home Loans, Inc., who securitized said loan and made decisions regarding foreclosures within the scope of her employment, used TMST's mortgage servicing capacity to foreclose on the Petitioner's property on September 4, 2007; alleged Burns and others:

(i) misrepresented its standing as a Real-Party-In Interest /Holder-in-Due-Course when TMST foreclosed on property commonly known as 1525 High Haven Court, Atlanta, GA 30329 at a time they are alleged not to have been the beneficial owner of said property alleged to have:

(ii) converted property for her own use and benefit;

(iii) alleged to have concocted, prepared, and provided an alleged authoritative, fabricated, colorable, and illegal Assignment and Deed under Power to justify the foreclosure;

(iv) provided convincing verified attestation by notarization of said alleged fabricated documents which are alleged to have been known to be false or should have been known to be false at the time said attestation were filed in DeKalb County Real Estate records; and

(v) assertions the good-faith duty upon a mortgagee to conduct and exercise fairly a just foreclosure auction under the Power of Sale in the Deed to Secure Debt was not adhered to, resulting in unlawful acts to commit this alleged extrinsic fraud as gravamen.

An action was filed in the Northern District of Georgia, case No. 14-CV- 02819 on September 2, 2014 (Appx -) was brought under O.C.G.A. § 9-3-96, Georgia's statute of limitations "discovery rule," where the applicable limitation period for cancellation of fraudulent deeds was 7-years and did not begin to run until after the plaintiff realized or should have realized that they were harmed by the defendant, relying on *Evans v. Dunkley*, 316 Ga. App. 204 (728 S.E.2d 832) (2012); for foreclosure fraud, allegedly conducted through the bankruptcy court, asserting parallel statutory federal and state-law claims citing violations of the automatic stay after months of working with the Servicer on a Mortgage Forbearance Agreement was blindsided with the foreclosure filing.

As a desperate last resort, Petitioner Miley sought to protect property through the bankruptcy process, which was perverted, and the protection meant to shield debtors from foreclosure was exploited; ended with Plaintiff's subject property being acquired by an alleged TMST insider named Burns.

After discovery of securitization of said loan in 2008; the Petitioner alleged TMST and other parties: (1) fraudulently concealed with deliberate intent mandated material facts; (2) hid and suppressed disclosure of true owners (3) fraudulently acted on its own behalf as the owner by assignment; (4) conveyed the described property as transferred to Thornburg Mortgage Home Loans Inc. by assignment via a fraudulent November 2, 2006 instrument; and (5) published a Power of Sale, as the owner was used as the authority to fraudulently enforce a foreclosure in TMST's name; recorded in the

name; recorded in the Office of the Clerk of Superior Court of DeKalb County, Georgia Records.

The case also included state RICO charges in compliance with the equitable seven (7) year O.C.G.A. § 9-3-96 statute which tolls the statute of limitations for foreclosure fraud.

The District Court in case No. 14-CV- 02819 and the Eleventh Circuit Court case No. 14-15630; pursuant to 28 USC 1367(3); dismissed all claims with prejudice which the courts had original jurisdiction due to the fact that the third petition filed was not subject to an automatic stay.

The Petitioner's Georgia state claims were ruled without prejudice. As expressly provided, the state claims were filed within thirty days into the Superior Court of DeKalb County, GA on or around November 30, 2015, Case No. 15CV12019-8.

Defendant Burns and TMST for over seven years in the Dekalb County Superior Court, from 2015 until the current 2021 filing in the federal district court:

(1) failed to acknowledge the federal case even existed, is doing so now only because in this arena, that stance fails;

(2) falsely asserted and filed a Rule 12(b)(6) motion, an affirmative defense, which provides parties may assert a preclusive based defense based on "failure to state a claim upon which relief can be granted; citied a statute of limitation cause, where under federal diversity common law, the federal district court, the originating court in this on-going case, did not find the case time-barred as per Georgia's

prevailing equitable tolling law, is without merit, as this court would have ruled the state claims with prejudice as well if the statute of limitations was in play; and

(3) misleadingly declared bankruptcy protection for TMST as the mortgage servicer, where such protection is not applicable to servicers.

New evidence presented itself when the original July 31, 2009, secured loan used for the alleged fraudulent purchase of the Petitioner property by alleged TMST insider Burns, was refinanced in 2015.

Research showed, the transaction suggested the sale was not in the ordinary course of business as usual under Debtor-in-Possession 11 U.S.C. § 363 privileges as suggested by the Maryland Bankruptcy Court in response to the Petitioner's fraudulent transfer Adversary Claim-00732 on October 22, 2009.

The 2015 transaction is the root source for the new RICO charges filed in current Case No. 1:21-CV 00616 in the Northern District Court after extensively researching and following the money trail of the initial purchase loan.

The Petitioner stated a cause of mortgage servicing and bankruptcy fraud pursuant to 18 U.S.C. § 157 (3) under Title 11 on March 20, 2021, case No. 21-cv-00616, alleging new culpable actions of the Defendants in this action which were not previously alleged or known in the previous action.

The Defendants filed their trusty Rule 12(b)(6) affirmative defense motion, essentially saying, "even if all of the facts in the complaint are correct, I'm still not liable", citing *res judicata*, collateral estoppel, and the

applicable statutes of limitation which served them very well over the last seven years, due to state courts complicity; vigorously proclaimed the Petitioner's claims were wholly without merit or time-barred as a matter of law and proclaimed res judicata, which bars re-litigating claims previously decided in an earlier action defense, is apparent on the face of the complaint.

The District Court Case No, 21-cv-0616 nor the Eleventh Circuit Panel Case No. No. 22-11512 asserted factual inadequacy in the Complaint, however, ruled a dismissal "with prejudice" without a motion hearing (emphasis added); rather, justified their ruling stating "as a matter of law, citied res judicata constitutionality as to the merits; foreclosed Plaintiffs' right to be heard under the 5th amendment due process of law.

REASONS FOR GRANTING THE PETITION

The issue presented in this case involves claim preclusion where a party may be precluded from ever raising another claim on a prior court's previous decision-making authority in a prior proceeding.

The preclusive bar unjustly silences litigants, undercutting its fundamental focus on fairness and violating due process protections. Claimants are stripped of their day in court in ways that violate the bedrock principle of fundamental fairness.

This proceeding involves a question of exceptional importance as to law protection under the 5th Amendment federal due process clause, justice, and raises issues of important systemic consequences under a Rule 12(b)(6) motion preclusive effect on res judicata, which as a result, has created an obscure, flexible

pretrial procedural device which is easily manipulated by lawyers.

In this context, the Eleventh Circuit Court of Appeals and the Northern District Court of Georgia circuit courts have advanced different *res judicata* grounds, none of which are consistent with the current holdings of the standards affirmed by the Supreme Court of Georgia and well-settled United States claim and issue preclusions precedents; is arbitrary with the United States Supreme Court's over one hundred years of time-tested federal principles of res judicata. *See Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.,* 140 S. Ct. 1589 (2020).

I. The Eleventh Circuit's Decision Reflects Review of the Distinct Elements of Collateral Estoppel and Res judicata Doctrines and the Distinct Element of Each Doctrine Is Not in Line with Well-Settled Supreme Court Precedents.

According to the Georgia State University Law Review, Vol. 37, Iss. 2 [2021], Art. 8, Georgia courts often confuse and intertwine the use of the terms "collateral estoppel" and "res judicata" and the distinct elements of each doctrine citing, *Waggaman v. Franklin Life Ins. Co.*, 458 S.E.2d 826, 827 (Ga. 1995) applying an issue preclusion analysis but referring to it as "res judicata" throughout the opinion).

The court in *Oglethorpe, LLC v. Henderson,* 783 S.E.2d 187, 191 (Ga. Ct. App. 2016) opined "the law of res judicata and collateral estoppel is somewhat confusing, primarily due to our failure to clearly and consistently distinguish the two separate doctrines."

The U.S. Supreme Court defined the term res judicata as encompassing both claim and issue preclusion, states, "the preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as 'res judicata." *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008).

According to A. Benjamin Spencer, *Civil Procedure: A Contemporary Approach* 1017–56 (5th ed. 2018), most hornbooks, black letter law treatises, and law school civil procedure casebooks, separate the concepts and list res judicata as synonymous with claim preclusion and collateral estoppel as synonymous with issue preclusion.

A. The Circuit and District Court's Decision to Imbed the Two Statutes is Inconsistent to Meet the Materiality Standard for Disputes Over Facts Applicable to a Factfinder.

The Eleventh Circuit Court of Appeals in *Winschel v. Comm'r of Soc. Sec.*, 631 F.3d 1176, 1178 (11th Cir. 2011), is on record stating, they must determine whether a decision is supported by substantial evidence, based on the proper legal standards; and factual findings are conclusive if supported by substantial evidence. *See Lewis v. Barnhart*, 285 F.3d 1329, 1330 (11th Cir. 2002); and in *Moore v. Barnhart*, 405 F.3d 1208, 1211 (11th Cir. 2005) declaring substantial evidence is less than preponderance, but such relevant evidence as a reasonable person would accept as adequate to support a conclusion.

Petitioner Miley avows, in this case, a direct estoppel occurred when the defendant won a judgment which was not based on the merits of the case under a Rule 12(b)(6) motion based on *res judicata* (also known as the doctrine

of claim preclusion which bars re-litigating claims previously decided in an earlier action) if the defense is apparent on the face of the complaint. *Brody v. Hankin*, 299 F.Supp.2d 454, 458 (E.D.Pa. 2004) (citing *Rycoline Prod's v. C & W Unlimited*, 109 F.3d 883, 886 (3d Cir. 1997)); accord *Bethel v. Jendoco Const. Corp.*, 570 F.2d. 1168, 1174 n. 10 (3d Cir. 1978).

The same rule applies when the motion is premised on a statute of limitations defense. *Rycoline Prod's*, 109 F.3d at 886.

Petitioner Miley contends, a form of issue preclusion, direct estoppel, arose when the Defendants was granted a judgment NOT on the merits. The Eleventh Circuit states direct estoppel prevents untried claims dismissed on pre-trial motions from being litigated in an appeal. *See DuChateau v. Camp, Dresser & McKee, Inc.*, 713 F.3d 1298 (11th Cir. 2013).

II. The purpose of the Rule 12(b)(6) is to allow the court to eliminate actions that are fatally flawed in their legal premise and destined to fail, and thus spare the litigants the burdens of unnecessary pretrial and trial activity." *Advanced Cardiovascular Sys., Inc. v. SciMed Life Sys.*, 988 F.2d 1157, 1160 (Fed. Cir. 1993), reh'g en ban denied.

Under the federal intramural standard, Rule 12(b)(6) dismissals are decisions on the merits, and thus capable of generating claim preclusion. *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 399 n.3 (1981).

Hence, Rule 12(b)(6) dismissals meet the requirements of a decisions on the merits and is used as a tool in support to dismiss the case.

Rule 12(b)(6) allows a court to dismiss a complaint before the development of the proceeding. The problem is when and how a rule 12(b)(6) motion is granted. The Eleventh Circuit Court of Appeals adjudication of Petitioner's cause of action is without proper grounds or Procedure.

A. There are inconsistent prior decisions on the issue in the second lawsuit which allowed the defendant a more favorable procedural outcome than the first lawsuit.

The record confirms, in originating case CAFN 14-CV-02819 (App.1, App.7); the district court, ruling as to Georgia statues, did not rule the case was in violation of the statute of limitations, is the alleged Rule 12(b)(6) statute of limitations fabrication.

The Defendants has pulled-off the entirety of this case; with full complicity of the state courts; and now the federal courts, without question from said courts as to the merits of their issue preclusion claim; ruled in favor of the Defendants; to dismiss the Petitioner's case, has once again applied a res judicata judgment on this preclusive misrepresentation without question.

In *Parklane Hosiery Co. v Shore*, 439 US 322, 329-30 (1979), the Supreme Court advised lower courts against applying issue preclusion based on a judgment

that "is itself inconsistent with one or more previous judgments in favor of the defendant."

It has been said that a Rule 12(b)(6) motion is rarely granted[2]; the Northern District Court of Georgia grants Rule 12(b)(6) motion often and the Eleventh Circuit Court of Appeals has affirmed a considerable number of cases granting Rule 12(b)(6) defenses, specifically and most often to pro se filers.

Given the number of appeals the Northern District Court of Georgia Rule 12(b)(6) decisions under this rule and the differing standards applied by this and other courts, it is evident that this legal procedure misapplication is not uncommon, and, as in this case, can have a devastating impact on an otherwise valid case.

B. The Eleventh Circuit's decisions add to an existing circuit split is of exceptional importance regarding the proper standard of appellate review on res judicata matters.

The Eleventh Circuit's adherence to various judicial interpretations of issue reclusion doctrines as to what issues are precluded; actually litigated; and determined is facially inconsistent; confusing; and departs from the majority of the Supreme Court's accepted and usual course of judicial proceedings of res judicata.

The Eleventh Circuit's and North Georgia District Court actions adds to a split regarding the proper standard addressing important various judicial

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[2] Thomas E. Willinging: Use of Rule 12(b)(6) in Two Federal District Courts (Federal Judicial Center 1989).

interpretations of what issues are precluded due to obscure, flexible procedures, which are easily manipulated by lawyers for a desired outcome, impedes the justice the Federal Rules originally sought.

In *United States v. Shenberg,* 89 F.3d 1461 (11th Cir.1996), the court explained that, although "courts generally refer to the estoppel principles as collateral estoppel," "in the context of a retrial, the term 'collateral estoppel' is a misnomer, and the term 'direct estoppel' more appropriately characterizes the application of estoppel principles. But our analysis "remains the same, whether we refer to the application of estoppel principles as 'direct' or 'collateral.'

The Eleventh Circuit Court is on record stating res judicata comes in two forms: claim preclusion (traditional res judicata) and issue preclusion also known as (collateral estoppel) declaring "the term 'res judicata' in its broadest sense encompasses collateral estoppel, in a narrower sense these two phrases do carry different although related meanings." See *Cmty. State Bank v. Strong,* 651 F.3d 1241, 1263 (11th Cir. 2011).

Georgia courts in the past often used its ever-expanding definition of privity to allow parties to prevail on what should have been an issue preclusion defense. *See, Lilly v. Heard,* 761 S.E.2d 46, 50–51 (Ga. 2014), finding privity between the two parties for the purpose of issue preclusion based solely on the parties' common interest.

In Georgia, two lines of cases established slightly different standards for determining whether the doctrine of res judicata applied. One line of Georgia cases required "an identity of cause of action" between the first

and second cases. The other line of cases focused more broadly on the similarity of "subject matter" between the cases.

C. The majority of Courts in other circuits confronted with similar circumstances agree, issue preclusion does not bar a causes of action.

Issue preclusion prevents relitigating of previously decided issues; does not apply to an issue which could not have been raised in the previous lawsuit; and prior litigation by the same parties on a different cause of action has a collateral estoppel effect only as to those issues litigated and determined in the prior action.

Apart from res judicata only bar claims that could have been brought or were brought in a previous action; is not this case in this instant, as Petitioner Miley never had her day in court; Petitioner has not had an opportunity to litigate the post-judgment motions or issue of fraud in the initial action or in any subsequent action.

Courts follow the concept that a Petitioner must have a fair and full opportunity to litigate claim presented and lost on the merit.

In *Jacob v. New York*,315 U.S. 752, 752-53 (1942), the Court stated: "The right of jury trial in civil cases at common law is a basic and fundamental feature of our system of federal jurisprudence which is protected by the Seventh Amendment. A right so fundamental and sacred to the citizen, whether guaranteed by the Constitution or provided by statute, should be jealously guarded by the courts."

In *Simler v. Conner*, 372 U.S. 221, 22 (1963) and *Byrd v. Blue Ridge Rural Electric Cooperative, Inc.*, 356 U.S. 525, 537-539 (1958) held: strong federal policy in favor of juries requires jury trials in diversity cases, regardless of state practice).

D. 28 U.S.C. § 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State from which the judgments emerged.

In *Coen v. CDC Software Corp.*, 816 S.E.2d 670 (June, 2018), the Georgia Supreme Court in 2018 clarified and standardized the two competing lines of res judicate cases. The Supreme Court granted *certiorari* to consider the *res judicata* issue where the trial court dismissed the plaintiff's second action based on *res judicata* and failure to state a claim. The Court of Appeals then affirmed on *res judicata* grounds, holding that "both actions arose from the underlying circumstances as such, the two actions concerned the same subject matter as in this case.

As applied in *Coen*, the Court rejected the applicability of *res judicata* because the facts necessary to Coen's first contract claim were separate and distinct from those alleged in the second defamation case; determined as in this case, the two suits were based on different wrongs; different sets of operative facts; and the suits contained different causes of action, therefore the second suit was not barred by res judicata.

As a court sitting in diversity, the federal common law requires the Eleventh Circuit Court of Appeals to

adopt Georgia preclusion laws as the federally prescribed rule of decision in this case. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508 (2001).

A federal court must apply the rules of preclusion of the state in which the prior judgment was rendered. *See Kremer v. Chem. Constr. Corp.*, 456 U.S. 461, 481-82 (1982); *Sullivan v. Gagnier*, 225 F.3d 161, 166 (2d Cir. 2000). 28 U.S.C. § 1738 requires federal courts to give the same preclusive effect to state court judgments that those judgments would be given in the courts of the State.

Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard. *See Blonder-Tongue Laboratories v. University of Illinois Foundation* 402 U.S. 313 (1971).

The Georgia courts' decisions will mean the Petitioner and a large number of private case Plaintiffs in Georgia will not enjoy the right to jury trial.

III. Res Judicata, a Product of Common Law, Elements and Procedures Vary Between State and Federal Courts; Between Courts in Different States; and Between Courts Within a Single Jurisdiction.

Although the majority of jurisdictions confronted with similar circumstances agree, issue preclusion does not bar a causes of action, a publicized federal examination demonstrates while spouting the federal

a claim on res judicata grounds after a 12(b)(6) dismissal on limitations grounds in a previous case filed by the plaintiff);

(2) *Heil v. Wells Fargo Bank, N.A., 298 F. App'x 703, 705–07 (**10**th Cir. 2008)* (affirming dismissal on limitations grounds);

(2) *Frazile v. EMC Mortg. Corp.*, 382 F. App'x 833, 838–39 (**11th** Cir. 2010) (approving 12(b)(6) dismissal of some, but not all, on limitations grounds) to name a few.

CONCLUSION

The wholesale dismissal of claims via res judicata claims and issue preclusive flaunts the process the Court has put in place to promote justice and fairness.

As per this Court, the Eleventh Circuit uses procedures which are "out of step with this court and has published several of its orders denying permission to file a second or successive petition; determining that *all* future litigants, (including those on direct appeal) are bound to the holdings of these orders unless and until an en banc Eleventh Circuit or this Court says otherwise.

As noted by this Court, in *Michael St. Hubert v. United States,* 590 U. S. ____ (2020); the Eleventh Circuit as well as other circuits as shown by federal the 2011 publication and examples; use procedures which are contrary to the U.S. Supreme Court's adopted binding res judicata claims and issue preclusive precedent decisions.

Federal courts differ as to whether res judicata is a substantive or procedural issue.[4] Some federal courts hold that state rules of res judicata create substantive rights so that the applicable state law controls.[5]

Others view the federal law of res judicata should be used, either under the rationale that res judicata is merely procedural or that countervailing federal policies justify the use of federal res judicata law in diversity actions. See *Aerojet-General Corp. v. Askew*, 511 F.2d 710 (5th Cir. 1975).

The instant case is an important example of how easily dispositive motions can be used without justification to end-run the Federal Rules of Civil Procedure by exploiting the uncertainty and vagueness, when the appellate courts utilize differing standards; has created a nationwide-circuit split in the line of attack regarding res judicata.

It is vital that this Court clarify the proper standard of assessment and evaluation for the transformation of res judicata dispositive motion judgments for the Petitioner and future litigants.

The Supreme Court should therefore grant this petition for writ of certiorari in order to articulate the standard of appellate review for motions in res judicata to correct the Eleventh Circuit's and other circuits erroneous holding in this case and other cases.

For the foregoing reasons, the Court should grant a writ of certiorari.

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[4] 1A J. Moore & B. Ward, Moore's Federal Practice \ 0.311[2], at 3182 (2d ed. 1983) (stating that state rules of claim preclusion and federal rules of issue preclusion should control).

[5] *Gasbarra v.* Park-*Ohio Indus.*, 655 F.2d 119 (7th Cir. 1981).

rules, nationwide circuit actions are contrary and inconsistent with their quoted position on issue and claims cited provisions cases challenging financial instruments.

As shown below, the federal research showed this problem is nationwide as to certain cases; finding:

A. Courts in every circuit have dismissed homeowners' claims affirming 12(b)(6) on res judicata grounds after a 12(b)(6) dismissal on limitations grounds as in this case filed by the Petitioner in Georgia.

According to a Federal Judicial Center publication in a 2011 study which excluded pro *se* filers; [3] whose mission was to conduct and stimulate research and development for the improvement of judicial administration; found cases challenging **financial instruments**; citied limitations and res judicata in the category of cases including foreclosure, truth in lending, consumer credit, and "other real property.

These cases had an 89% adjusted probability of a written judicial opinion or order disposing of the merits was granted under Federal Rule of Civil Procedure 12(b)(6), unrelated to Twombly and Iqbal, was dismissed in all circuit court of appeal and state district courts citing as examples:

(1) *Taggart v. Chase Bank USA, N.A.*, 375 F. App'x 266, 268–69 (**3d** Cir. 2010) (affirming dismissal of

[3] Motions to Dismiss for Failure to State a Claim After Iqbal. Federal Judicial Center. March 2011. Retrieved from https://www.uscourts.gov/sites/default/files/motioniqbal_1.pdf