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IN THE SUPREME COURT OF THE UNITED STATES

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LUCKY BRAND DUNGAREES, INC.,)
ET AL.,)

Petitioners,)

v.) No. 18-1086

MARCEL FASHIONS GROUP, INC.,)
Respondent.)

- - - - -

Washington, D.C.

Monday, January 13, 2020

The above-entitled matter came on for
oral argument before the Supreme Court of the
United States at 10:06 a.m.

APPEARANCES:

DALE CENDALI, New York, New York;

on behalf of the Petitioners.

MICHAEL B. KIMBERLY, Washington, D.C.;

on behalf of the Respondent.

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P R O C E E D I N G S

(10:06 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear first this morning in Case 18-1086, Lucky Brand Dungarees versus Marcel Fashions Group.

Ms. Cendali.

ORAL ARGUMENT OF DALE CENDALI

ON BEHALF OF THE PETITIONERS

MS. CENDALI: Mr. Chief Justice, and may it please the Court:

This Court should reverse the Second Circuit because it erred in holding that a defense never previously litigated to judgment can be barred in a case involving new claims.

This Court rejected that idea over a hundred years ago in *Cromwell and Davis*, and as this Court unanimously made clear more recently in *Taylor v. Sturgell*, the preclusive effect of a judgment is determined by two doctrine: Issue preclusion, which forecloses relitigation of issues actually litigated and resolved, and claim preclusion, which forecloses successive litigation of the very same claim.

Applying these long-established principles, the proper rule is a defendant is

1 free to argue any previously unresolved defense
2 it may have to new claims. This rule is right
3 for three reasons:

4 First, it follows from this Court's
5 precedent, including *Cromwell*, *Davis*, and
6 *Taylor*.

7 Second, the rule is easy to administer
8 as courts and litigants are accustomed to
9 applying these bedrock principles of issue and
10 claim preclusion.

11 Third, it's fair and protects due
12 process interests.

13 To be clear, we are not arguing that
14 defenses may never be barred under existing law.
15 Issue preclusion could bar a previously resolved
16 defense. And previously unresolved defenses
17 cannot be raised in the context of a judgment
18 enforcement action or as a claim in an action
19 collaterally attacking a prior judgment.

20 But none of these circumstances are
21 present here, as the Second Circuit held in the
22 first appeal in this case, *Marcel I*. *Marcel* is
23 pursuing new claims as it seeks relief for
24 alleged subsequent infringement. Thus, this
25 Court should reverse as the Second Circuit's

1 novel test precluded a never-resolved defense in
2 an action asserting new claims in conflict with
3 settled and sensible principles of claim and
4 issue preclusion.

5 Moreover, the Second Circuit's new
6 test is a bad idea.

7 JUSTICE GINSBURG: Before we get to
8 that, Ms. Cendali, could you explain why you
9 abandoned the release defense in the first
10 action? You did raise it, and then you dropped
11 it. And it's a bit of a mystery why you did.

12 MS. CENDALI: We don't know exactly
13 why it was abandoned, but it -- the most logical
14 answer is that it would not have been
15 dispositive. The amount in controversy -- the
16 -- the compensatory damages in that case was
17 only \$20,000, and we know that the release would
18 not have applied to use of "Get Lucky," which is
19 what the primary thrust of what the case was
20 about. So it may not have been worth it from a
21 cost-benefit analysis to renew a release to -- a
22 defense that would not have been dispositive of
23 the -- the issues before the court.

24 JUSTICE GINSBURG: How would it have
25 -- it seems strange when that release said,

1 Lucky, you can't use "Get Lucky," but you're
2 continuing to use it. The release said you
3 can't use "Get Lucky." On the other hand, we
4 won't go after you for Lucky Brand. And the
5 first case, as you just said, concentrated on
6 Get Lucky. And the release seemed to me to be
7 no use at all to Lucky as far as Get Lucky is
8 concerned because it agrees that it would stop
9 using "Get Lucky."

10 MS. CENDALI: That's exactly our
11 point, Your Honor. Because the release would
12 not have been helpful with regard to Get Lucky,
13 it -- it -- it -- it wasn't going to be
14 dispositive of the case. And, therefore, it may
15 have not been worth the cost of briefing it
16 again -- again, the compensatory damages were
17 \$20,000 -- if it wasn't going to end the whole
18 case because the release would have only applied
19 to a narrow subset of the trademarks that they
20 were accusing us of using before the court. But
21 --

22 JUSTICE ALITO: I take it from your
23 introductory remarks that you do not agree with
24 the Restatement rule that, although the failure
25 to raise a defense in a prior action generally

1 does not preclude the raising of the defense in
2 a subsequent action, there is an exception where
3 prevailing on the defense in the second action
4 would nullify the initial judgment or impair
5 rights established in the initial action. Do
6 you -- do you reject that rule?

7 MS. CENDALI: No, Your Honor. And --
8 and that's a key point. As I said in my
9 introduction, if this were a judgment
10 enforcement action or if we were trying to
11 collaterally attack the prior judgment, we would
12 be barred.

13 JUSTICE ALITO: Well, I understood you
14 to say that there would be an exception if it
15 was an attack on the judgment, a collateral
16 action attacking the judgment, or if it was the
17 basis of a claim.

18 But this goes further. It says that a
19 defense may be barred in a subsequent action if
20 it would have the effects that I mentioned. So
21 do you agree with that or not?

22 MS. CENDALI: We agree with the
23 Restatement, but, again, it supports us in this
24 case because, to be clear, Marcel is getting and
25 keeping all of the relief it got in the first

1 action. It got the \$300,000. It got the
2 injunction it got. It got the declaration for
3 that period of time.

4 What we're talking about is subsequent
5 conduct presenting new claims where they're
6 trying to get additional relief and a broader
7 injunction, a deprivation of property that we
8 never had a chance to defend with regard to
9 these claims.

10 JUSTICE KAGAN: But suppose the
11 subsequent conduct were identical in all ways to
12 the prior conduct. And I know you think that
13 that's not true, that there are different marks
14 involved, and that the conduct has changed.

15 But suppose that it were identical in
16 all ways. It's just that it's after the prior
17 judgment. So there was no -- there were no
18 damages collected for the subsequent conduct
19 because it hadn't happened yet.

20 In that case, could you have brought
21 the defense?

22 MS. CENDALI: No. And the reason we
23 could -- could not have brought the -- the --
24 the defense is the only thing before the court
25 in the first action, the 2005 action, was the

1 facts and circumstances at that particular
2 period of time.

3 A court could not -- it would be an
4 improper advisory opinion to say: And, well,
5 with regard to future conduct, that would be bad
6 too.

7 The way courts deal with that is via
8 injunctions. In other words, if the court
9 wanted to address and prevent the current
10 conduct, it would have issued an injunction that
11 pertained to the current conduct. Instead, the
12 injunction that it issued was limited to use of
13 Get Lucky or colorable imitations thereof that
14 they -- they tried to make by making a motion
15 for contempt earlier in this case in Marcel I to
16 try to have that injunction read broader, but
17 they were denied.

18 JUSTICE KAGAN: So if -- if I
19 understand what you're saying, in the case of
20 identical subsequent conduct, if it violates the
21 injunction, then you're out of luck?

22 MS. CENDALI: Correct.

23 JUSTICE KAGAN: But if it does not --
24 if there's no injunction or it does not violate
25 the injunction for some way -- in some way, then

1 you can do whatever you want; is that correct?

2 MS. CENDALI: Well, you can do
3 whatever you want subject to the fact you might
4 get -- get sued again. You have to have a --
5 you --

6 JUSTICE KAGAN: No, I'm sorry. I --
7 I --

8 MS. CENDALI: But you wouldn't be
9 precluded.

10 JUSTICE KAGAN: Yes.

11 MS. CENDALI: That -- that -- that is
12 -- that is right. But that's consistent with --
13 with, I think, the very unremarkable proposition
14 that new -- subsequent conduct, subsequent
15 infringing conduct, is a -- is a new claim --

16 JUSTICE ALITO: But that's --

17 MS. CENDALI: -- as -- as you --

18 JUSTICE ALITO: -- inconsistent with
19 the Restatement rule. So you really don't agree
20 with the Restatement rule?

21 MS. CENDALI: Your Honor, perhaps I am
22 not fully understanding it, but -- but my
23 understanding of the Restatement rule is based
24 on the idea of -- of attacking the previous
25 action or upsetting the judgment.

1 I think the proper Restatement rule to
2 be helpful here is the Restatement of Judgment
3 Section 18, which makes clear, in a section
4 titled Merger, that defenses that attempt to
5 upset the judgment rendered are barred.

6 JUSTICE ALITO: Well, that's --

7 MS. CENDALI: That's not --

8 JUSTICE ALITO: That's one -- that's
9 one section of the restatement that deals with
10 this problem. And of course, the restatement
11 might not be right. It's not -- you know, we
12 don't have to accept it, but --

13 MS. CENDALI: Well --

14 JUSTICE ALITO: I -- I have a question
15 about interpreting the judgment in the 2005
16 action, which I think we have to do in order to
17 come to grips with this case. It could be
18 interpreted possibly in one of two ways.

19 There is a seeming discrepancy between
20 the final judgment and the injunction. The
21 injunction applies only to "Get Lucky" whereas
22 the -- you can read the judgment to apply to a
23 lot of other brands as well, a lot of other
24 marks as well.

25 So my -- my question is: Is there

1 a -- does the district court's -- the way
2 district court framed the injunction necessarily
3 reflect its interpretation -- let me back up.

4 Does the way the district court framed
5 the injunction necessarily indicate the way it
6 interpreted the -- the -- the -- the jury's
7 verdict or would there be grounds under
8 trademark law for the district court to issue an
9 injunction that is narrower than the jury's
10 verdict?

11 MS. CENDALI: The -- that was
12 discussed in a well-reasoned opinion, obviously
13 not binding on this court, by Judge Leval in
14 Marcel I where he said that because the
15 declaration was phrased in the conjunctive, you
16 couldn't -- it would be sheer speculation to say
17 that that meant that the jury found that it was
18 just use of "Get Lucky" by it's -- use of -- of
19 the word "Lucky," the name on our stores for 30
20 years, was -- was infringing by itself.

21 And we know that from how they tried
22 the case, which is why the -- the district court
23 and everyone understood it is they admit,
24 Respondents admit at pages 9 and 10 of their
25 brief, the focus of the case was not just on the

1 use of "Get Lucky" but on the use of Get Lucky
2 causing confusion with -- because of the
3 commingling of words with "Lucky" with "Get
4 Lucky."

5 JUSTICE ALITO: Well, I understand.

6 MS. CENDALI: That was --

7 JUSTICE ALITO: That was --

8 MS. CENDALI: -- our argument to the
9 jury.

10 JUSTICE ALITO: That's a -- that's a
11 plausible, maybe the best interpretation of the
12 -- the meaning of the box that the jury checked
13 on the verdict sheet. But two things. All that
14 was held, right, in Marcel I, was that there
15 wasn't a -- there wasn't enough to show that the
16 injunction had been violated and, therefore, not
17 enough to hold -- not enough for a contempt
18 holding.

19 Am I right?

20 MS. CENDALI: Well --

21 JUSTICE ALITO: That's what was held.

22 MS. CENDALI: It -- it held that, yes,
23 that the -- that the contempt ruling by the
24 district court in denying contempt to preside it
25 over the case and is in the best position to

1 know what she was intending to enjoin, and knew
2 that the closing argument to the jury was -- I
3 think it was at 852 of the trial transcript, was
4 -- was what is causing confusion is the use of
5 Get Lucky with these other marks.

6 JUSTICE GINSBURG: Can you explain how
7 Lucky -- I take it was represented by other
8 counsel -- allowed that strange question that
9 asked: Get Lucky, Lucky Brand, any other use of
10 the word Lucky, strung them all together and the
11 jury, in order to find that Get Lucky had been
12 used and infringed, would have to answer yes.

13 How did you -- the judge, I assume,
14 informed the attorney of the questions that
15 would be asked on the special verdict sheet,
16 right?

17 MS. CENDALI: I -- I think that they
18 all understood it because it was consistent by
19 grouping them all together like that with the
20 theory that the case was argued. They -- they
21 essentially had two claims. You can't use "Get
22 Lucky," those actual words, and -- and it's also
23 causing confusion to use "Get Lucky" with these
24 other words.

25 So actually that -- that language,

1 that instruction, that grouping was pressed not
2 by Lucky's counsel, but by Marcel's counsel,
3 because that fit their theory of the case. And
4 they should -- they can't now, having pressed
5 that theory of -- of the case, and gotten the
6 language that they wanted, now try to argue that
7 it means something else.

8 But -- but I -- but I -- I also am
9 concerned, though, that we -- we need to get
10 back to the -- the -- with respect, with
11 permission, with the -- the -- the legal issue
12 of the -- the problems with this new test that
13 the Second Circuit has put forth because it is a
14 bad idea. It's a bad idea for at least four
15 reasons:

16 One, it will create uncertainty
17 because you'll never know whether you're going
18 to be excused or not from a claim being
19 released -- from failing to press a defense,
20 forgive me.

21 Second, it's going to lead to new
22 litigation. People are going to feel compelled
23 to press defenses. And I can assure you that
24 district court judges are not enamored of people
25 who come in with a laundry list of affirmative

1 defenses that need to be resolved.

2 And then, even after that happens,
3 then what happens? Then let's say you don't
4 raise a defense. Then there's an ancillary
5 motion practice and proceeding where a judge has
6 to consider what happened in the previous case
7 that they may not have been involved with. It
8 would also then lead to mischief by plaintiffs
9 who might say, let's bring a small case, which
10 arguably this case is, and then bring a bigger
11 case after that.

12 And it's also just fundamentally not
13 fair. It's not symmetrical. It's not
14 even-handed because it lets a plaintiff bring
15 new claims, but it prohibits a defendant from
16 raising all the defenses that they may have to
17 those claims.

18 Just as these new claims did not exist
19 at the time of 2005 action, so too -- and they
20 could not have brought them, well, we really
21 could not have brought the defense to those
22 claims because those claims are new.

23 And -- and I think that was the
24 reasoning of this Court way back in 1877 in
25 *Cromwell*.

1 JUSTICE GORSUCH: Counsel, you raise a
2 point about the lack of symmetry here that would
3 be created. I suppose we could remedy that,
4 couldn't we, and say that if a plaintiff had a
5 claim in time 2 that was available, similar to
6 the one in time 1, just as here, and could have
7 brought a cause of action but forgot to do so in
8 time 1, it should be barred from doing so in
9 time 2.

10 Would that -- would that solve the
11 asymmetry problem?

12 MS. CENDALI: I think, Your Honor, if
13 I'm understanding your correction correctly,
14 what you're really, as I hear it, talking about
15 the ordinary application of claim preclusion,
16 which means that --

17 JUSTICE GORSUCH: Well, no, it's a new
18 claim, you would say, right, because it involves
19 new -- new facts, right, and new infringements
20 but, yeah, there was a cause of action they
21 could have brought, right, you know, a breach of
22 contract claim rather than just a trademark
23 claim, but maybe they shouldn't be allowed to
24 bring that in time 2.

25 MS. CENDALI: Well, that would be a --

1 a -- another let's-litigate-everything rule so
2 that --

3 JUSTICE GORSUCH: It would -- it would
4 be quite an extension of claim -- claim
5 preclusion in another direction but it would at
6 least solve the asymmetry problem.

7 MS. CENDALI: Right, but to no good
8 end. I mean, this -- this was a -- I mean, it
9 really seemed like the court in Marcel II was --
10 was annoyed that prior counsel didn't raise this
11 defense and I can appreciate that.

12 But that doesn't mean that this Court
13 needs to reconfigure the entire law of claim and
14 issue preclusion in this case in this country.
15 But -- and there's no reason to do it, because
16 as the reasons thought in Cromwell in this Court
17 in a very thoughtful opinion by Justice Field in
18 1877, you know, the Court took the time to -- to
19 survey exhaustively all prior law of -- of -- of
20 what we now call issue and claim preclusion.

21 And while he talked about demand
22 instead of claim, he -- he -- he juxtaposed in
23 his opinion for the Court the two types of
24 preclusion that we deal with today: The idea
25 that once you have litigated a case, you

1 can't -- you're foreclosed from raising defenses
2 to undermine that case's resolution, but if it's
3 something that you haven't litigated, that would
4 not foreclose you in a subsequent case involving
5 new claims.

6 JUSTICE KAGAN: Mr. --

7 JUSTICE KAVANAUGH: Just --

8 JUSTICE KAGAN: Could I go back and
9 figure out what's going on between the parties?

10 In your reply brief, you say, even
11 disregarding the facts that these are -- that
12 we're dealing with a different time period,
13 we're actually dealing with a different set of
14 -- of -- of claims.

15 MS. CENDALI: Correct.

16 JUSTICE KAGAN: Because you have
17 stopped using the Get Lucky brand, so that the
18 claims that the Respondent now has against you
19 have nothing to do with Get Lucky.

20 Is that what --

21 MS. CENDALI: That's correct, Justice
22 Kagan.

23 JUSTICE KAGAN: So -- I mean, that
24 would be a kind of narrow and easy way to solve
25 this case if it were true, and if it were not

1 waived in any way, but why did you only bring
2 that to our attention in your -- in -- why did
3 you only make that a central feature of your
4 argument in the reply brief?

5 MS. CENDALI: Because that was sort of
6 to our surprise the -- the focus of their -- I
7 mean, the key thing is that our friends did not
8 defend or cite any cases saying a previous court
9 has ever accepted the thinking of Marcel II
10 whereby a never-litigated defense can be
11 precluded in an action involving new claims.

12 Rather, they focused its brief on
13 saying, well, these are actually old -- old
14 claims. And that's why we addressed it then.
15 We -- the whole predicate of this case, the
16 whole opinion that -- that Marcel II, that is --
17 is -- is based on was the -- the court in Marcel
18 II acknowledging and citing the decision of
19 Judge Leval in Marcel I that this was new claims
20 because it involved a subsequent course of
21 conduct.

22 Once they raised it, we then properly
23 responded it -- to it in reply. And as we said
24 in our reply brief, there's three reasons -- I
25 mean, the key thing is to decide the issue of

1 law, but in terms of the new claim issue, I
2 think this Court can easily dispose of that for
3 three reasons.

4 One, they argued exactly the contrary,
5 arguing that these were new acts, new claims,
6 new circumstances in Marcel I, so if there is an
7 estoppel here, it's judicial estoppel to them in
8 changing their position now, having gotten to
9 court and being here because of that.

10 And then, second, Judge Leval's
11 decision, not binding on this Court, but was
12 clearly right because it stood for the
13 unremarkable proposition that subsequent acts
14 create new claims. And that's also consistent
15 with Asetek in patent law, in this Court's
16 accrual cases like MGM versus Petrella in the
17 copyright context, where each act of
18 infringement is a new claim for accrual
19 purposes.

20 And then, finally, yes, there is the
21 factual point that Your Honors have been asking
22 about, which is when the whole theory admittedly
23 of the first case was about the juxtaposition of
24 -- of Get Lucky, the use of "Get Lucky," and the
25 juxtaposition of Get Lucky with other things

1 causing confusion, in a new case, in a new
2 period of time, not before the court, not the
3 possibly before the court, that admittedly did
4 not use "Get Lucky," that's a very different
5 circumstance.

6 JUSTICE KAVANAUGH: Could they --

7 JUSTICE SOTOMAYOR: Can you tell --
8 I'm sorry.

9 JUSTICE KAVANAUGH: Go ahead. Go
10 ahead.

11 JUSTICE SOTOMAYOR: Can you tell me
12 what the theory is, what you think the 2005
13 settlement -- or 2003 settlement agreement
14 means?

15 MS. CENDALI: Sure.

16 JUSTICE SOTOMAYOR: Can you sort of --
17 I can't tell whether you think it means that
18 Marcel has no claims against Lucky Brand for
19 using Lucky Brand, but you have claims against
20 them for their using Get Lucky?

21 MS. CENDALI: No.

22 JUSTICE SOTOMAYOR: All right. So --

23 MS. CENDALI: It -- it doesn't mean
24 that. What it means is what the district court
25 held it to mean. If -- it's a nice summary of

1 it in its decision granting our motion to
2 dismiss, which led to the appeal in Marcel II.

3 And what it means is that in exchange
4 for \$650,000, my client, Lucky, agreed not to
5 use Get Lucky anymore, but that for any
6 trademarks that it had registered or used prior
7 to the date of the settlement agreement, which
8 would include Lucky Brand, the name of our
9 store, and other kinds of things like -- other
10 enumerated things, any trademarks that used the
11 word "Lucky" prior to that date, all future
12 claims would be extinguished.

13 So, in other words, what that would
14 mean and the benefit of the bargain that we're
15 trying to achieve is, absolutely, we can't use
16 "Get Lucky" anymore. But under the principles
17 of the policy of supporting settlement
18 agreements, we should be allowed the benefit of
19 our bargain and being able to have protection
20 for our house mark and the other pre-May 2001
21 uses and registrations that they had.

22 So the settlement agreement doesn't --
23 it's not an offensive document. They can
24 continue to use their sole registered trademark,
25 "GET LUCKY," to their hearts' content. The

1 issue --

2 JUSTICE SOTOMAYOR: And so you can use
3 "LUCKY BRAND" and any other trademark you had
4 registered as of that date, to your heart's
5 content?

6 MS. CENDALI: Exactly, Your Honor.
7 And it's that benefit of the bargain that we're
8 being deprived of. And Lucky -- I mean Marcel
9 effectively got a partial windfall in -- in the
10 2005 action. Most of that case was about Get
11 Lucky, but if some small piece of it involved
12 one of the released -- released marks, they got
13 -- some of that \$20,000 went for that, but now
14 they're trying to -- to get a perpetual windfall
15 and say that they get to bring, even though they
16 didn't get an injunction, additional new claims
17 when we are foreclosed from bringing a defense
18 that was never fully litigated to judgment and
19 would not be barred by issue preclusion.

20 Your Honor, were you trying to ask a
21 question?

22 JUSTICE KAVANAUGH: Yes, thank you.

23 The other side likens this case to a
24 judgment enforcement action. You've -- you've
25 alluded to that. Just so we're clear, what

1 makes something, in your view, a judgment
2 enforcement action and why doesn't this qualify?

3 MS. CENDALI: What makes something a
4 judgment enforcement action is when they're
5 trying to get the relief they had been
6 previously been awarded. And the relief that
7 they previously were awarded was the \$300,000
8 and the injunction with regard to that we can't
9 use Get Lucky or a colorable invitation --
10 imitation of that.

11 What this action is about is we want
12 more money, we want a -- a broader injunction;
13 we don't want you to use anything with the
14 ordinary English word "Lucky" in it. And --

15 JUSTICE KAGAN: You said before a
16 judgment enforcement action and a collateral
17 attack on a judgment. Do you view those as
18 different things?

19 MS. CENDALI: They're really --
20 technically, they're different, but they go to
21 the same thing. I mean, claim preclusion is all
22 about the concept -- as we -- as we know from
23 Taylor v. Sturgell, is the -- is the modern we
24 use for part of -- of -- of res judicata. And
25 so what -- what that's about is the idea that

1 once the action was decided, nobody can undo it.
2 The plaintiff can't sue again and get additional
3 relief -- may I finish the -- the statement?

4 CHIEF JUSTICE ROBERTS: Sure.

5 MS. CENDALI: And the -- and the
6 defendant is -- is -- cannot be -- attack a
7 judgment once obtained.

8 CHIEF JUSTICE ROBERTS: Thank you,
9 counsel.

10 Mr. Kimberly.

11 ORAL ARGUMENT OF MICHAEL B. KIMBERLY

12 ON BEHALF OF THE RESPONDENT

13 MR. KIMBERLY: Thank you, Mr. Chief
14 Justice, and may it please the Court:

15 Imagine a dispute between two parties
16 is resolved with a final judgment on the merits.
17 Our position is that in any subsequent lawsuit
18 between the same parties, just as the plaintiff
19 is precluded from raising any claims springing
20 from the same cause of action if those claims
21 were available to it in the prior suit, so too
22 the defendant is precluded from raising any
23 defenses to that cause of action if those
24 defenses were available to it in the prior suit.

25 This rule is fair and symmetrical. It

1 preserves judicial resources by discouraging
2 repeat lawsuits, and it fosters reliance on
3 final judgments.

4 Now, Lucky's response to this, as I
5 understand it over the last 25 minutes and its
6 reply brief, is not really to deny the substance
7 of our rule but, instead, to deny that this case
8 and the prior case involved the same cause of
9 action.

10 But that can't possibly be correct.
11 Indeed, there could be no clearer example of two
12 cases involving the same cause of action than
13 one in which the second suit alleges
14 post-judgment violations of the exact same legal
15 rights that were settled by the final judgment
16 in the first lawsuit, based on a course of
17 conduct that is alleged to be a continuation of
18 the exact same conduct as before.

19 And that's exactly what Marcel alleges
20 here. Now, Lucky says that these allegations
21 are wrong and, in fact, that this case depends
22 on different facts supporting different theories
23 of trademark infringement.

24 And there are two responses to this.
25 The first is that Lucky is ignoring that this is

1 an appeal from a motion to dismiss, meaning the
2 allegations of the complaint have to be taken as
3 true. And at paragraph 25 of the complaint,
4 reproduced at JA 62, and this is one among many
5 such examples, Marcel alleges plaintiffs can be,
6 quote, "Lucky continues to this day to use the
7 Lucky Brand marks in the identical manner that
8 was found to be infringing upon plaintiffs
9 rights and interests in the first action."

10 I don't think the Court has to look
11 further than that. Now, if the Court does feel
12 that it does need to look further than that, I
13 think all it needs to do is look at the
14 judgment.

15 JUSTICE KAGAN: Mr. --

16 CHIEF JUSTICE ROBERTS: Before we --
17 go ahead.

18 Before we do that, it seems to me that
19 -- that perhaps the most serious difficulty with
20 your case that cries out for an answer before
21 getting to the judgment is that it does require
22 counsel to put forth in the first case every
23 conceivable defense that he or she might have.

24 And I can't imagine a rule that would
25 be -- would make sense. In other words, if

1 you've got five defenses and you think three are
2 really good; two, who knows; you still have to
3 put in those other two if you want to ever be
4 able to raise that defense again. And it's a
5 particular problem in this area of the law
6 because you're often dealing with ongoing
7 disputes between two parties.

8 MR. KIMBERLY: Your Honor, that would
9 be true only with respect to subsequent suits
10 involving the same nucleus of operative fact,
11 the same claims. It would not be true with
12 respect to subsequent litigation between the
13 parties on different causes of action.

14 JUSTICE GINSBURG: I don't follow -- I
15 don't follow your argument about same claim
16 because I thought everybody agrees that the
17 claim that Marcel is bringing in the second
18 action is not the same claim. It's a different
19 claim because it involves events that occurred
20 after the judgment, so there's no claim
21 preclusion. There's no claim preclusion in this
22 case. The plaintiff is the one against whom
23 claim preclusion operates.

24 And there, I think all agree, claim
25 preclusion is not an issue. There is this new

1 idea of defense preclusion, but there surely is
2 not claim preclusion. I think we can agree on
3 that.

4 The first action deals with a certain
5 period of time and certain conduct within that
6 period of time. The second action deals with
7 conduct after the first case is over and it is a
8 different claim. I thought that it -- it is
9 clear that there is no claim preclusion in this
10 case.

11 MR. KIMBERLY: Your -- Your Honor, it
12 is clear that there's no claim preclusion in
13 this case but it is not because they are
14 different causes of action. There is no
15 question that if the claims under the assertion
16 of damages, the facts underlying --

17 JUSTICE GINSBURG: The course of
18 action means a claim for relief. A course of
19 action is a claim. And if you take the federal
20 rules, federal rules refer never to cause of
21 action, the expression is claim for relief.

22 MR. KIMBERLY: So call -- call it a
23 claim, call it a cause of action, call it a
24 common nucleus of operative facts. That is, I
25 think, the unit that matters for res judicata

1 purposes.

2 There is no question that if the facts
3 giving rise to these claims had arisen
4 pre-judgment, they would be precluded precisely
5 because they are -- precisely because they do
6 arise from a common nucleus of operative fact.

7 The reason that claim preclusion does
8 not apply in this case and that Marcel may
9 prosecute its post-judgment claims is not
10 because they arise from a different nucleus of
11 operative fact. It's because these claims were
12 unavailable to it --

13 JUSTICE KAGAN: Well, how -- how do
14 they --

15 MR. KIMBERLY: -- in the prior --

16 JUSTICE KAGAN: -- not arise from a
17 different nucleus of operative fact? I mean,
18 there are two problems. One problem is the one
19 that Justice Ginsburg raised, it happened
20 afterwards. The facts of -- are different
21 because it's a different time period. So it's a
22 different transaction or occurrence. It's a
23 different nucleus of operative fact, however you
24 want to phrase the -- the -- the -- the test, it
25 would seem you're no longer in the same world.

1 And then even more than that, even if
2 you said, well, if everything else is identical
3 and only the timing has changed, maybe we can
4 still say it's the same claim. Here everything
5 else is not identical because Lucky has stopped
6 using "Get Lucky."

7 MR. KIMBERLY: Right.

8 JUSTICE KAGAN: It's continuing to use
9 its Lucky Brand and the -- and the -- the
10 reference you made to your complaint says it's
11 continuing to use its Lucky Brand in the same
12 way, but it's not using "Get Lucky."

13 And that was a core part of the
14 operative facts that gave rise to the first
15 claim, isn't it?

16 MR. KIMBERLY: So, yes, as to one
17 bucket of the claims. It was factually relevant
18 to the -- a second bucket of claims and it would
19 be factually relevant in this case. So let
20 me -- and there were a few parts to your point
21 there, and let me take on the first about
22 different time periods.

23 The point here is that this was a
24 continuing course of conduct. So the litigation
25 in 2005 covered a wide range of time, up to the

1 time of the final judgment in May 2010.
2 Liability in this case is alleged to commence
3 the day after the judgment in June 2010.

4 So it isn't as though this is -- this
5 is just a sort of a different point on the
6 spectrum of a continuing course of conduct. So
7 the facts now are no different than were the
8 facts between two different days within the
9 period --

10 JUSTICE GORSUCH: Well --

11 MR. KIMBERLY: -- of time that was --

12 JUSTICE GORSUCH: -- except for the
13 fact, counsel, that if it were identical, you
14 would just go enforce the judgment. But you
15 tried that and failed here. So I guess I'm
16 stuck where Justice Kagan and Justice Ginsburg
17 are in -- in that this looks like a different
18 claim.

19 And I think you've actually, candidly,
20 acknowledged that this is a different claim and
21 it isn't precluded by claim preclusion, it's got
22 to be something else.

23 And the something else you hint at
24 page 20 of your brief, you talk about a
25 defendant who loses in one lawsuit may not raise

1 in a subsequent lawsuit involving the same cause
2 of action.

3 MR. KIMBERLY: Right.

4 JUSTICE GORSUCH: Which I think of as
5 a legal theory, that's how I think of it, at
6 least, as opposed to a claim which involves the
7 facts, a defense that was available in the first
8 lawsuit. Okay?

9 So I wonder, well, you know, that's a
10 little asymmetrical, right? The defense -- the
11 defendant loses a defense. Why wouldn't the
12 plaintiff also lose the cause of action and --
13 and wouldn't we then be inviting the same sorts
14 of inefficiencies that the Chief Justice was
15 speaking of earlier requiring a plaintiff to
16 bring every cause of action in a \$20,000 lawsuit
17 involving a different set of facts that it might
18 bring in a very similar --

19 MR. KIMBERLY: Right.

20 JUSTICE GORSUCH: -- cause of action
21 later in time 2.

22 MR. KIMBERLY: I want to be sure to
23 come back to Justice Kagan's question.

24 JUSTICE GORSUCH: I think we're asking
25 the same sort of thing from --

1 MR. KIMBERLY: Well, let -- let me
2 answer just first as to this -- this question
3 about, well, maybe you wouldn't want to litigate
4 all your defenses in a case involving a small
5 amount in controversy. That may be true, the --

6 JUSTICE GORSUCH: So -- and the same
7 thing's true for a plaintiff, though. You might
8 not want to bring all your causes of action in a
9 first lawsuit. You might -- might keep it
10 simple one. It's a small lawsuit. You might
11 throw in more causes of action in a later
12 lawsuit and it involves more money, for example,
13 right?

14 MR. KIMBERLY: Well, that's exactly
15 right. But claim -- claim preclusion recognized
16 that --

17 JUSTICE GORSUCH: Wouldn't want that
18 to be barred. That would be a bad thing if that
19 were barred, right?

20 MR. KIMBERLY: If -- if a plaintiff
21 were barred from raising claims arising from a
22 common nucleus of --

23 JUSTICE GORSUCH: Bringing a new cause
24 of action, a new legal theory in time 2 for
25 similar but different later --

1 MR. KIMBERLY: No, of course, Your
2 Honor, but, of course --

3 JUSTICE GORSUCH: You wouldn't want
4 that to be barred.

5 MR. KIMBERLY: I have to resist that
6 the -- these -- these claims don't concern a
7 common nucleus of operative fact. And so let me
8 get to that in my -- in the second part of my
9 answer to your question, Justice Kagan.

10 There were two categories of claims in
11 this case. There were claims concerning Lucky's
12 use of "Get Lucky" and there were claims
13 concerning the likelihood of confusion between
14 the "LUCKY BRAND" marks and Marcel's "GET LUCKY"
15 mark.

16 The claims concerning Get Lucky were
17 the claim about the settlement agreement which
18 had -- which was supposed to prevent Lucky from
19 continuing to use Get Lucky and trademark
20 infringement. As to those claims, they were
21 resolved interlocutorily by the court -- the
22 district court sanctions order.

23 That order granted partial summary
24 judgment on each of Marcel's claims insofar as
25 Lucky was using the designation Get Lucky in

1 direct violation of the settlement agreement and
2 Marcel's trademark rights.

3 The trial in the case took place more
4 than a year after that. And the focus of the
5 trial was then whether the Get Lucky marks and
6 the Lucky Brand -- the Lucky brand marks and the
7 Get Lucky marks were confusingly similar. That
8 was the only issue as to liability that was left
9 in the case after the district court entered
10 partial summary judgment.

11 And I would say at the same time that
12 the Court entered partial summary judgment, it
13 entered the permanent injunction on the use of
14 Get Lucky. The permanent injunction concerned
15 only the use of Get Lucky, which is why, Justice
16 Gorsuch, we could not have brought this as a
17 judgment enforcement action.

18 JUSTICE BREYER: Couldn't have brought
19 it, but I don't -- I don't understand what our
20 -- we're supposed to decide. I thought that we
21 took this case because, assuming that the law is
22 what it seems to have always been, that, where A
23 sues B, and the suit's over, then A sues B again
24 for identical conduct which took place after the
25 suit was over.

1 I thought in 1961, in Al Sacks'
2 procedure class -- and things may have changed
3 --

4 (Laughter.)

5 JUSTICE BREYER: -- that I learned the
6 second suit is a new suit and therefore people
7 can raise claims that they are not collaterally
8 estopped on.

9 JUSTICE GINSBURG: And that --

10 JUSTICE BREYER: Because that -- isn't
11 that right?

12 JUSTICE GINSBURG: -- issue
13 preclusion.

14 JUSTICE BREYER: Is that right? What?

15 I mean, I thought Justice Ginsburg
16 said exactly that. And she said that and it
17 took her about a minute and it took Al Sacks, I
18 think, about an hour.

19 (Laughter.)

20 JUSTICE BREYER: But -- but there we
21 are. And you started by saying that, so I
22 thought well, I agree with that. But I thought
23 -- I thought that the case was about the Second
24 Circuit trying to have a new rule that even if
25 the facts are just -- even if the law is just

1 what I said it was and just what she said it
2 was, sometimes a defense is precluded when it
3 wasn't raised before, if, A, same parties, same
4 -- adjudicated before, it could have been
5 asserted before, and the district court
6 concludes that preclusion is appropriate because
7 efficiency concerns outweigh any unfairness to
8 the party.

9 So I thought we were here to decide
10 whether that was the law, and I thought that
11 they are the only ones to have ever said that
12 and I don't know where they got it from. And I
13 couldn't -- my law clerk couldn't find any case
14 that ever said that. And he couldn't find
15 that the -- the -- that the restatement ever
16 said that.

17 So where have I been wrong? I mean, I
18 mean, I guess it could become the law, but --
19 but I haven't heard anyone argue that it should
20 be. I haven't heard anyone defending the Second
21 Circuit. I haven't read anyone who defended the
22 Second Circuit. Okay, you get my point.

23 MR. KIMBERLY: Yes. And -- and --
24 and, Your Honor --

25 (Laughter.)

1 MR. KIMBERLY: -- the -- I guess what
2 I would say is I think the Second Circuit's test
3 is exactly right in every particular except that
4 --

5 JUSTICE BREYER: I'm sure you do. But
6 --

7 (Laughter.)

8 MR. KIMBERLY: -- except that it could
9 have been more clear, I think that the first
10 case and second case have to involve the same --
11 a common nucleus of operative fact such that the
12 claims raised in the second --

13 JUSTICE BREYER: I am not interested
14 so much in that as I am in where did that come
15 from? Are you the first person to have made
16 that up, and you convinced the Second Circuit,
17 or are there others who have -- in the history
18 of the law have said it and -- which would help
19 me?

20 MR. KIMBERLY: Your Honor, we -- we
21 recite them at length in our brief. The idea
22 that -- that claim preclusion has a mirror image
23 that applies to preclude --

24 JUSTICE BREYER: Oh, yes, yes --

25 MR. KIMBERLY: -- defendants from

1 raising --

2 JUSTICE BREYER: -- that's true.

3 MR. KIMBERLY: Defenses is very well
4 settled.

5 JUSTICE BREYER: That's not my point.
6 My point is I just read you what you what they
7 said, and that was in a case where there wasn't
8 claim preclusion. They're talking about cases
9 where there isn't claim -- I thought. If they
10 are talking about cases where there is claim
11 preclusion, I don't know what the point -- I --
12 I have to go back to the whole thing, but I
13 thought that's what I read you was talking about
14 cases where there isn't claim preclusion.

15 MR. KIMBERLY: Well, defense --

16 JUSTICE BREYER: Am I right or not?

17 MR. KIMBERLY: I think defense
18 preclusion could only apply in a circumstance
19 where claim preclusion didn't because if claim
20 preclusion applied, of course the case wouldn't
21 --

22 JUSTICE BREYER: So I am right.

23 MR. KIMBERLY: -- get off the ground.

24 JUSTICE BREYER: It applies only in a
25 case where there is not claim preclusion.

1 That's what we're talking about.

2 MR. KIMBERLY: But -- but --

3 JUSTICE BREYER: Right. Now, then
4 give me the authority that says in a case where
5 there was no claim preclusion, no claim
6 preclusion.

7 MR. KIMBERLY: I -- I -- I think -- I
8 don't -- I don't have a case to point you
9 particular to that point, but I -- I should say
10 that the reason that claim preclusion doesn't
11 apply in the second case has to be not that it
12 is a new claim, but that the claim was simply
13 unavailable in the first --

14 JUSTICE ALITO: But isn't -- -

15 MR. KIMBERLY: -- in the first case.

16 JUSTICE ALITO: Isn't there a body of
17 law that says that the fact that the facts are
18 different is not necessarily dispositive of this
19 issue? So that if you have a series of lawsuits
20 about exactly the same thing, let's say failure
21 to pay under an installment contract or failure
22 to pay rent and it comes up month after month,
23 the failure to raise the defense in one of those
24 prior actions can bar the raising of a defense
25 in the later actions. So --

1 MR. KIMBERLY: That is precisely
2 right.

3 JUSTICE ALITO: -- the fact that it's
4 a different period of time is not necessarily
5 dispositive if -- unless we reject that body of
6 law.

7 MR. KIMBERLY: That's right, Your
8 Honor. And the reason is straightforward. In
9 the first suit, where the -- where the landlord
10 sues the tenant on the meaning and -- and
11 enforceability of the contract and it results in
12 a final judgment that settles the landlord's
13 right -- landlord's rights under that contract,
14 the landlord ought to be entitled to rely on
15 that contract --

16 JUSTICE BREYER: All I would want --

17 MR. KIMBERLY: -- on that judgment.

18 JUSTICE BREYER: -- is a couple of
19 cases that I should read -- I don't read every
20 case in the brief. Don't tell anyone I said
21 that.

22 (Laughter.)

23 JUSTICE BREYER: But the -- the -- the
24 -- what cases should I read to say that where
25 you bring an identical --

1 MR. KIMBERLY: Right. So I would
2 start with City of Beloit. This is a case from
3 1968. It predates the Davis case, on which my
4 friend on the other side relies, and it -- it
5 stands for exactly this proposition. It does so
6 in the context of a series of negotiable
7 instruments, but there was an initial suit that
8 settled the parties' rights on when later
9 negotiable instruments came due, the plaintiffs
10 sued again, the defendant raised a new defense,
11 and this Court said in City of Beloit that that
12 defense was precluded.

13 JUSTICE SOTOMAYOR: But that was
14 because it was all from the same issue.

15 MR. KIMBERLY: That --

16 JUSTICE SOTOMAYOR: Meaning that a --
17 but we have a contrary case that says when it
18 was two different issues, then you don't have
19 it.

20 MR. KIMBERLY: Not issues, Your Honor.
21 I think causes of action. And I think that's
22 exact --

23 JUSTICE SOTOMAYOR: No, no, no. Now
24 you're trying to confuse things. Beloit
25 involved bonds that were -- that came from the

1 same issuing body at the same time.

2 MR. KIMBERLY: That was Davis as well,
3 Your Honor. Davis and -- and Beloit --

4 JUSTICE SOTOMAYOR: Davis, but it was
5 different bonds, not -- from the same issue.

6 MR. KIMBERLY: It was the same bonds
7 from the same issue, Your Honor.

8 JUSTICE SOTOMAYOR: But, we got two
9 different outcomes, then.

10 MR. KIMBERLY: And -- and for reasons
11 unclear to me, the Court said in Davis when
12 you're suing on two different negotiable
13 instruments, you're suing on two different
14 causes of action. The City -- the Court in
15 Beloit, in City of Beloit, said, well, when
16 you're suing on two different --

17 JUSTICE SOTOMAYOR: All right.

18 MR. KIMBERLY: -- negotiable
19 instruments --

20 JUSTICE SOTOMAYOR: So let me take it
21 to this case. You sued in 2005 for their use of
22 Get Lucky with Lucky Brands. In 2011, you're
23 suing simply for using Lucky Brands. To the
24 extent that the case turned in 2005 in the
25 combined confusion of the use of Get Lucky with

1 Lucky Brands --

2 MR. KIMBERLY: Um-hum.

3 JUSTICE SOTOMAYOR: -- because I read
4 your complaint and it's always in the
5 conjunctive, both of them together, but now
6 it's, in my mind, a different cause of action
7 because you're saying it's the use of Lucky
8 Brands without --

9 MR. KIMBERLY: Right.

10 JUSTICE SOTOMAYOR: -- Get Lucky.

11 MR. KIMBERLY: So this -- this is the
12 completion of my answer to Justice Kagan's
13 original question, and it's this: To understand
14 what was at issue in the first case, I think
15 you're right, Your Honor, you have to look at
16 the complaints. And, in particular, what I
17 would do is look at the -- the counts of the
18 complaints that were reduced to judgment.

19 So I'd point the Court to paragraph 2
20 on JA 206. This is where -- this is reading the
21 final judgment. That paragraph reads: "Ally's"
22 -- oh, and let me pause and first say, of
23 course, there was Lucky's complaint and Marcel's
24 counter-complaints. There were two complaints.
25 To understand what the suit was about, what the

1 nucleus of relevant facts there was, you have to
2 look at both.

3 As to Lucky's claims against Marcel,
4 the jury found as follows, and this is reduced
5 to the final judgment. It says: "Ally's use of
6 GET LUCKY as licensed from Marcel Fashion
7 constitutes willful infringement of Lucky Brand
8 Parties' trademarks," pursuant to Lucky Brand's
9 first, second, and sixth claims."

10 This is the jury saying we agree with
11 Lucky that the marks are confusingly similar.
12 The second half of that paragraph then explains
13 that Marcel is not liable because its mark is
14 the senior mark.

15 So now what did Lucky allege in its
16 first, second, and sixth claims? And it's
17 crystal clear. This is docket 77-2 in the
18 district court docket in this case.

19 The focus of all of these claims was a
20 confusing similarity between the two marks. And
21 so I'll just read as one example the sixth claim
22 for relief. This is paragraph 99 of Lucky's
23 operative complaint. It says that Marcel and
24 its licensees' use of marks confusingly similar
25 to the Lucky family of marks has caused and

1 continues to cause confusion as to the source of
2 Marcel's and its licensees' products; in turn,
3 permitting them to pass off their products to
4 the general public as those originating --

5 JUSTICE SOTOMAYOR: So why did you end
6 up both with a preliminary injunction and a
7 permanent final injunction that only enjoined
8 them from using Get Lucky?

9 MR. KIMBERLY: We --

10 JUSTICE SOTOMAYOR: I know you --
11 there is certainly loose language in the final
12 judgment making it unclear what it was aimed at.

13 MR. KIMBERLY: Right.

14 JUSTICE SOTOMAYOR: Except for the
15 permanent injunction. It seems almost natural
16 to me that if the intent was to challenge and if
17 the district court understood you to be
18 challenging the Lucky Brand --

19 MR. KIMBERLY: Right.

20 JUSTICE SOTOMAYOR: -- trademarks,
21 that it would have enjoined the use of all of
22 it.

23 MR. KIMBERLY: And -- and the answer
24 is that the permanent -- the only permanent
25 injunction in this case was the permanent

1 injunction that was entered into
2 interlocutorily, one year before the trial in
3 this case. It was the injunction entered as a
4 sanction because Lucky had misrepresented to the
5 court in Marcel that it was no longer using Get
6 Lucky.

7 JUSTICE SOTOMAYOR: But I don't see
8 the language in the final judgment. The only
9 thing you ended up with is an injunction against
10 the use of Get Lucky.

11 MR. KIMBERLY: And we are not here
12 enforcing the injunction. I want to be very
13 clear about that. We are here enforcing --

14 JUST GORSUCH: And --

15 MR. KIMBERLY: -- the --

16 JUSTICE GORSUCH: -- just to be clear
17 about that, I'm sorry to interrupt, but you --
18 you're not enforcing the injunction and you're
19 not seeking to enforce the final judgment in the
20 first suit either?

21 MR. KIMBERLY: In -- only in the sense
22 that one would seek to enforce a declaratory
23 judgment are we doing so. We are -- we are
24 seeking to enforce the rights and interests that
25 were settled by the --

1 JUSTICE GORSUCH: This is not a
2 judgment enforcement action, counsel, is it?

3 MR. KIMBERLY: I -- I would not call
4 it a judgment enforcement action --

5 JUSTICE GORSUCH: Okay. All right.

6 MR. KIMBERLY: -- in the sense that a
7 claim is reduced to judgment and they're not
8 paying on the judgment. That's right.

9 But as Justice Alito was explaining,
10 the restatement -- restatement recognizes that
11 really there are two categories of subsequent
12 cases. There can be subsequent cases where the
13 parties are seeking to actually enforce the
14 judgment and one where they are simply seeking
15 to seek further enforcement of the rights and
16 interests settled by and underlying the final
17 judgment in the prior case.

18 JUSTICE KAGAN: Well, how -- how does
19 this undermine the prior judgment?

20 MR. KIMBERLY: The prior -- it -- it
21 undermines the rights and interests settled by
22 the final -- the final judgment from the 2005
23 action.

24 JUSTICE ALITO: What were those --
25 what was that -- what was those rights?

1 MR. KIMBERLY: The --

2 JUSTICE ALITO: Was it a right for the
3 -- right to have them not use any brand that
4 contains -- what right was established?

5 MR. KIMBERLY: It was the 12 marks.
6 It was the parties' relationship to one another
7 with respect to the 12 Lucky Brand marks and the
8 one Marcel Fashions' mark that were at issue in
9 the case. And the jury's determination that
10 Lucky's use of those marks -- that those marks
11 were confusingly similar to Marcel's mark and,
12 therefore, that Lucky's use of those marks was
13 infringement on a reverse confusion theory of
14 liability.

15 JUSTICE ALITO: Each and every one of
16 them?

17 MR. KIMBERLY: Of the 12 marks, yes.

18 JUSTICE ALITO: Each and every one of
19 the 12. Then -- then I come back to this
20 question that I asked opposing counsel. Why --
21 how can you account for the discrepancy between
22 that understanding of the judgment and the
23 injunction? Why is the injunction so much
24 narrower than that?

25 MR. KIMBERLY: Well, rhe -- again, I

1 -- the injunction was entered by the district
2 court as a sanction. This final judgment --

3 JUSTICE GINSBURG: And why didn't you
4 ask for an injunction? If you say --

5 MR. KIMBERLY: Well, we --

6 JUSTICE GINSBURG: -- that what was --
7 what was infringing was not simply Get Lucky,
8 but Lucky Brand --

9 MR. KIMBERLY: Um-hum.

10 JUSTICE GINSBURG: -- anything with
11 using the word "Lucky," you should have asked
12 for an injunction.

13 MR. KIMBERLY: And, Your Honor, this
14 was an issue that came up after the jury entered
15 its verdict. The -- the final judgment that you
16 see is a jointly stipulated final judgment that
17 the parties negotiated.

18 In the course of that negotiation,
19 counsel for Marcel suggested that we ought to
20 enter a permanent injunction against Lucky's use
21 of the Get Lucky marks. It was clear that that
22 negotiation wasn't going to result in an
23 agreement.

24 And Marcel then agreed to drop the
25 issue. But what this Court said in Lawlor is

1 that a party's decision not to pursue a
2 permanent injunction in the face of a judgment
3 in its favor cannot operate as effectively a
4 license for the party -- the -- the -- the
5 losing defendant to continue on with what it was
6 doing before without any risk of being --

7 JUSTICE SOTOMAYOR: Point me to
8 language --

9 MR. KIMBERLY: -- sued again.

10 JUSTICE SOTOMAYOR: -- in the final
11 judgment that says you can't -- with an -- with
12 or without an injunction, you can't use Lucky
13 Brand?

14 MR. KIMBERLY: It -- it's -- as I was
15 saying, paragraph 2 where --

16 JUSTICE SOTOMAYOR: Give me a -- where
17 are you in the Joint Appendix?

18 MR. KIMBERLY: JA 206. And I will
19 read it one more time. It says, "Ally's use of
20 Get Lucky" -- and ally is Marcel's licensee --
21 "Ally's use of GET LUCKY as licensed from Marcel
22 Fashions, constitutes willful infringement of
23 Lucky Brand parties," and then the list of the
24 12 marks at issue, "pursuant to Lucky Brand
25 parties' first, second, and sixth claims."

1 The first, second, and sixth claims
2 allege, just as I read to the Court earlier,
3 this is paragraph 74, paragraph 79, paragraph 99
4 of Lucky's complaint, where Lucky alleges
5 exactly the theory of confusion that I just
6 described that --

7 JUSTICE GORSUCH: But -- but all the
8 judgment is reduced to is concerns "GET LUCKY."
9 That's it.

10 MR. KIMBERLY: No, that's incorrect.

11 JUSTICE GORSUCH: Okay. I mean, I'm
12 lucking at -- okay, okay, I suppose I'm -- what
13 am I misreading here? "GET LUCKY" is -- is
14 capitalized and referenced three times in that
15 paragraph.

16 MR. KIMBERLY: Which paragraph are you
17 talking about?

18 JUSTICE GORSUCH: The one you were
19 just reading us, counsel.

20 MR. KIMBERLY: Well, but that's --
21 that's the -- that's the explanation of why
22 Marcel isn't liable because the "GET LUCKY"
23 mark, although it's confusingly similar to
24 Marcel's marks, the "GET LUCKY" mark is the
25 senior mark.

1 So the second half of that paragraph
2 simply explains why, despite the confusing
3 similarity between the marks --

4 JUSTICE GORSUCH: All right.

5 MR. KIMBERLY: -- Marcel is not --

6 JUSTICE GORSUCH: If you were right,
7 why didn't you just go seek a judgment
8 enforcement action? Why didn't you go back to
9 the court and say this defies your judgment,
10 Your Honor?

11 MR. KIMBERLY: Because a -- we -- we
12 take this judgment in this respect to take
13 basically the form of a declaratory judgment.
14 One doesn't get to return to a court upon
15 obtaining a declaratory judgment attempting to
16 convert it into a injunction.

17 JUSTICE GINSBURG: Well, you can apply
18 at the foot of a declaratory judgment for
19 further relief. Declaratory judgment is a nice
20 action. You're really going to deal with your
21 adversary and you're going to get the
22 declaration, but a declaratory judgment --
23 judgment can be followed up.

24 MR. KIMBERLY: It can. And more
25 typically, Your Honor, it's followed up by the

1 filing of a new lawsuit that alleges that
2 despite the declaration of rights, the defendant
3 has continued on with whatever it is the
4 declaratory judgment said they didn't have a
5 right to do. That's --

6 JUSTICE GINSBURG: Would you --

7 MR. KIMBERLY: -- precisely what we
8 have done.

9 JUSTICE GINSBURG: -- explain one
10 other aspect of this to me? I thought that this
11 settlement agreement, 2003 settlement agreement,
12 said Marcel, you can go after Lucky. Lucky has
13 undertaken not to use Get Lucky anymore. Get
14 Lucky is off the table.

15 MR. KIMBERLY: Right.

16 JUSTICE GINSBURG: On the other hand,
17 Marcel is releasing Lucky of liability for using
18 Lucky Brand.

19 MR. KIMBERLY: Right.

20 JUSTICE GINSBURG: So Lucky Brand is
21 Lucky's trademark and Marcel says it's not going
22 to go after use of Lucky Brand. And then we get
23 in this post-settlement where Marcel is saying,
24 yes, we're going to go after Lucky Brand, even
25 though in the settlement we said we wouldn't.

1 MR. KIMBERLY: And -- and, Your Honor,
2 the -- the explanation for this is twofold. The
3 first is Marcel became aware that Lucky was
4 violating the terms of the settlement agreement
5 and that it was continuing to use the Get Lucky
6 designation.

7 And two examples of this after the
8 settlement agreement appear on page 8 of our red
9 brief. Its theory then became -- and this is
10 where, Justice Kagan, you raised the potential
11 factual distinctions between the cases. They're
12 not actually distinctions.

13 Our theory became, one, if you're
14 going to -- first, Lucky sued Marcel on the
15 basis that was also released in the 2003 suit.
16 Lucky -- Marcel then filed counterclaims and
17 part of the theory of the counterclaims was if
18 you're mixing the two marks together then the
19 facts that underlie the settlement before are no
20 longer true, and, indeed, the public may now be
21 confused into thinking that Get Lucky, in fact,
22 belongs to Lucky Brand. We would make those
23 same factual arguments in this case.

24 JUSTICE KAGAN: Mr. -- can I -- can I
25 go back to the law for a second? Because here's

1 where I really think we are in this case.
2 Second Circuit issues this decision. And as
3 Justice Breyer said, this decision -- we've
4 never really seen anything like this because the
5 Second Circuit said that there was defense
6 preclusion even in the context of new claims.

7 You admitted that yourself, that the
8 Second Circuit wasn't clear enough about the
9 fact that it couldn't be a new claim. That's
10 because the Second Circuit never said it had to
11 be a new claim.

12 So the Second Circuit's ruling --

13 MR. KIMBERLY: It did hold there were
14 the same thing.

15 JUSTICE KAGAN: -- excuse me, goes far
16 beyond that and applies to new claims. So now
17 you think, well, that's got to be wrong. So we
18 have to limit it to old claims.

19 So I'll just -- you know, we'll say
20 that this is the old claim. It's the same
21 transaction or occurrence. But if it were the
22 same transaction or occurrence, you couldn't
23 bring your second suit.

24 Now then you say, yes, you can,
25 because I can bring a second suit even if it is

1 the same transaction or occurrence because I
2 didn't have the opportunity to bring it before.

3 MR. KIMBERLY: Right.

4 JUSTICE KAGAN: But nobody's ever
5 heard of that. The reason that you can bring a
6 second suit is because this is a different
7 transaction or occurrence.

8 MR. KIMBERLY: Your Honor, in fact,
9 the arguments that you just described were at
10 the heart of our arguments in the first case.
11 And if I would, I -- I'd point the Court just to
12 two footnotes from the court's -- the Second
13 Circuit's decision in this case. It's footnote
14 7 at appendix page -- petition appendix page 18
15 to 19, where the court says that this action and
16 the prior action "surround related transactions
17 or occurrences." It's saying that this is the
18 same cause of action.

19 Footnote 10 on page --

20 JUSTICE GINSBURG: It said related.
21 Related isn't the same.

22 MR. KIMBERLY: Your Honor, that is, in
23 fact, a statement -- the -- the statement from
24 restatement section 24 is connected, but I think
25 related and connected are substantively the

1 same. And the court then at paragraph -- excuse
2 me, on petition appendix 21, in footnote 10 --
3 may I finish? -- explains why its decision in
4 the first case -- in the first appeal and in
5 this appeal are consistent.

6 And it says, Your Honor, exactly what
7 you just said, that the reason that the claims
8 here are permitted is because they weren't
9 available in the first suit, not because they
10 are different claims in the sense that they
11 arise from a different nucleus of operative
12 fact, because they can't.

13 The allegations here is it's a
14 continuing course of conduct. And the only
15 reason they were permissible is because, that in
16 fact, they were unavailable. That is clear on
17 the face of the opinion and I -- we think
18 applying that opinion requires affirmance.

19 Thank you.

20 CHIEF JUSTICE ROBERTS: Thank you,
21 counsel.

22 Five minutes, Ms. Cendali.

23 REBUTTAL ARGUMENT OF DALE CENDALI

24 ON BEHALF OF THE PETITIONERS

25 MS. CENDALI: Thank you.

1 Two series of points, one relating to
2 the question presented on the rule of law, the
3 new rule of law, and one relating to the new
4 claim argument.

5 One of the striking things about
6 Marcel's argument is that there was no defense
7 of the basic principle, as Justice Breyer was
8 saying, that -- that you can have a new -- in
9 the case where there is a new claim, a
10 previously unlitigated, unresolved defense can
11 be excluded.

12 JUSTICE BREYER: But he says -- he
13 points correctly to two cases. One was the one
14 Justice Alito mentioned, the landlord case, and
15 the other was the Bond case and in both cases --
16 you understand. You probably read those cases.

17 MS. CENDALI: Right. And so
18 let's talk --

19 JUSTICE BREYER: What's your answer to
20 that?

21 MS. CENDALI: Right. But let's -- but
22 let's -- let's talk about that. First, it
23 shouldn't be forgotten at page 17 of their
24 brief, they say that a preclusion of a defense
25 requires that the causes of action be the same.

1 That's basic civil procedure. I learned that in
2 professor Arthur Miller's class.

3 The case that they cited then was City
4 of Beloit. City of Beloit, as Justice Sotomayor
5 said, is our case, because that was a case when
6 there was a judgment that the city had to pay,
7 it then brought a suit in equity to try to get
8 from out of that judgment. That is not a case
9 involving the facts here of a new claim.

10 And, moreover, to the extent that
11 there's loose remarks going in that direction in
12 that case, that was specifically dealt with by
13 the majority opinion in Cromwell, which surveyed
14 all the law up to that point and, specifically,
15 while it didn't cite City of Beloit by name, it
16 specifically explained away Henderson v.
17 Henderson, which was the main case City of
18 Beloit relied on saying Henderson v. Henderson
19 was also a collateral attack case and doesn't
20 rely on it.

21 Later that term in another opinion by
22 Justice Field, Rogers v. -- excuse me, Davis
23 v. Brown, City of Beloit, excuse me, and
24 Cromwell was only cited by the defense, which is
25 telling.

1 JUSTICE BREYER: What about the --
2 what about the rent?

3 MS. CENDALI: The rent?

4 JUSTICE BREYER: The -- the landlord
5 sues the tenant for rent on a lease and wins.
6 And then later on, the tenant doesn't pay again,
7 so he -- okay, he, sues him again on the lease
8 and this time the defendant wants to say the
9 lease is invalid and the court said no, you
10 can't, because you should have said that before.

11
12 MS. CENDALI: Because to the extent
13 that that case is -- is a new claim, they should
14 be able to bring that. There's an ongoing
15 course of -- of conduct then -- then -- and you
16 were made whole from the first nonpayment --

17 JUSTICE BREYER: So that isn't the
18 question, because everybody agrees it's a new
19 course of conduct. But this was a defense. And
20 they said you can't raise the defense. And then
21 Wright and Miller is a little worried about
22 that. They say, well, this is a question about
23 estoppel. And -- so -- so that seemed like a
24 point on his side. What about those cases?

25 MS. CENDALI: Well, it -- well, none

1 of the cases, none of the cases cited in their
2 brief, are on -- these facts. With regard to
3 the rent case, if it's -- if it means what was
4 just said, then it's just wrong and not
5 consistent with law. And --

6 JUSTICE SOTOMAYOR: Counsel, let's
7 assume that they had actually litigated, you had
8 actually litigated whether the use of Lucky
9 Brand trademarks, without the use of Get Lucky,
10 was an infringement on the superior GET LUCKY
11 mark. Let's assume the Court had said it's an
12 infringement for you to do that. No permanent
13 injunction. We're just going to give damages.

14 Then there's now a new lawsuit that
15 says you're continuing, after the old one, to
16 use the Lucky Brand trademarks in the same way.
17 That's how they are pitching this to us, okay?
18 Now you should be precluded because you had a
19 full and fair opportunity to raise the
20 settlement agreement as your right to use the
21 Lucky Brands. You didn't. Why should you raise
22 it now? That -- I think that that's the case
23 that they say this is.

24 MS. CENDALI: Right.

25 JUSTICE SOTOMAYOR: And assuming that

1 were the case, you had a full and fair
2 opportunity to litigate your use of Lucky Brands
3 without Get Lucky, and the jury found that your
4 use was an infringement, how could you then
5 defend this case?

6 MS. CENDALI: May I answer?

7 CHIEF JUSTICE ROBERTS: Yes.

8 MS. CENDALI: Well, you would defend
9 it because the case sought subsequent relief for
10 subsequent infringements where you would be
11 allowed to present new defenses to that
12 different period of time. In the absence of a
13 forward-looking injunction, it's a -- a new
14 case. Future facts could not have been before
15 the court. And that's the answer.

16 CHIEF JUSTICE ROBERTS: Thank you,
17 counsel. The case is submitted.

18 (Whereupon, at 11:07 a.m., the case
19 was submitted.)

20

21

22

23

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