No. 13-307

In The Supreme Court of the United States

DENNIS DEMAREE, *et al.*,

Petitioners,

v.

FULTON COUNTY SCHOOL DISTRICT,

Respondent.

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

REPLY BRIEF FOR PETITIONERS

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INTRODUCTION

In the courts below, respondent argued consistently – and correctly – that the Eleventh Circuit decision in *Hercules Carriers, Inc. v. Claimant State of Florida, Dep't of Transportation,* 768 F.2d 1558 (11th Cir. 1985) establishes a per se rule – the same rule established by *United States v. Mendoza,* 464 U.S. 154 (1984) for the federal government – precluding the use against a state government of offensive nonmutual collateral estoppel. The panel accepted that characterization of *Hercules Carriers*, and, at respondent's urging, applied that *Hercules Carriers* rule to local governments, in this instance to school districts.

In this Court, however, respondent's brief in opposition is grounded on a strikingly different account of *Hercules Carriers* and its application in this case. Respondent now asserts that the Eleventh Circuit actually *permits* use of offensive nonmutual collateral estoppel against state and local governments on a case-by-case basis, barring use of such estoppel against state and local governments only under particular circumstances. *Hercules Carriers*, it claims, establishes a "multifactored" test for deciding when states may, and may not, be subject to such estoppel. (Br.Opp.14). That is not an accurate description of the holding of *Hercules Carriers* or the decision below, and it emphatically is not how respondent characterized the Eleventh Circuit rule in the lower courts.

I. There Is A Multi-Faceted Circuit Conflict Regarding Whether Offensive Nonmutual Collateral Estopel Can Be Applied Against A State Or Local Government

(1) *Hercules Carriers* establishes a per se rule – the same rule applied to the federal government by this Court in *Mendoza* – barring use against a state of offensive nonmutual collateral estoppel.

> We hold that the rationale outlined by the Supreme Court in *Mendoza* for not applying nonmutual collateral estoppel against the government is equally applicable to state governments.... [T]he Supreme Court ... did not differentiate between federal and state governmental interests, nor was there anything to suggest that the concerns expressed by the Supreme Court were peculiar to the federal government.... [I]n each instance the concerns expressed by the Supreme Court are applicable here.

Hercules Carriers, 768 F.2d at 1579.

The court of appeals in the instant case characterized *Hercules Carriers* as applying to states the rule in *Mendoza*. "We have ... held that offensive, nonmutual collateral estoppel does not apply against a state government for many of the same reasons [as in *Mendoza*]. *Hercules*, 768 F.2d at 1579." (Pet.App. 9a). The district court described *Hercules Carriers* in the same way. "In *Hercules Carriers* ... the Eleventh Circuit broadened the bar against nonmutual collateral estoppel to also include state government entities. The court found that the 'policy rationale

behind *Mendoza* applies' to a case involving state government. [768 F.3d] at 1578." (Pet.App. 23a). Other district court decisions in the Eleventh Circuit read *Hercules Carriers* to apply the *Mendoza* rule to state governments. "[N]on-mutual collateral estoppel ... simply does not apply to the States." *In re Employment Discrimination Litigation Against the State of Alabama,* 453 F.Supp.2d 1323, 1330 (M.D.Ala. 2001). "[T]he Eleventh Circuit has squarely held that *Mendoza* applies to the use of nonmutual collateral estoppel against a state. *See Hercules Carriers*...." *Tugz v. Canaveral Port Authority*, 2005 WL 6046066 at *7 (M.D.Fla. Feb. 2, 2005).

In the courts below respondent itself repeatedly insisted that *Hercules Carriers* had applied the *Mendoza* per se rule to states. "This Court extended *Mendoza* to hold that state governments are not subject to offensive, non-mutual collateral estoppel. *Hercules Carriers*...." Brief of Appellee, 7. "This Court decided that offensive-non-mutual collateral estoppel does not apply against a state government for many of the same reasons. *Hercules Carriers*." *Id*. 9. "[E]xcluding a school district from offensive, non-mutual collateral estoppel is based on the same reasoning which supports not applying the doctrine to the federal and state governments" *Id.* 10. Respondent asserted in the district court that "[t]he 11th Circuit extended *Mendoza* to hold that plaintiffs could not use offensive, non-mutual collateral estoppel against a State government. *Hercules Carriers*...." Reply Memorandum of Law in Support of Defendant's Motion for Judgment on the Pleadings, 3.

In the court of appeals respondent successfully asked the Eleventh Circuit to apply that *Hercules Carriers* per se rule to local governments. "[T]his Court should hold that offensive, non-mutual collateral estoppel does not apply to local governments, like school districts." Brief of Appellee, 11-12; see *id.* 6, 7, 8, 9, 10, 13. The Eleventh Circuit adopted the very rule that respondent sought. "Several district courts in this Circuit have ... extended *Mendoza* and *Hercules* to bar offensive, non-mutual collateral estoppel from applying to local government entities.... We agree." (Pet.App. 10a-11a). The opinion then detailed "all the similarities between federal, state and local governments" in concluding that offensive, nonmutual collateral estoppel should not apply "on the local level." *Id.* 12a. "As for any difference between the nature of the federal government's litigation and of a local government agency's litigation, it is merely a matter of degree, not of kind." (*Id.*). The opinion did not rest on any circumstances particular to this defendant, but instead reasoned that the rationale of *Mendoza* applied generally to "school districts." (*Id.* 11a-12a). The court below explained that the "[m]ost important[ ]" reason for applying *Mendoza* to school boards is that "a school district has a limited litigation budget, much more limited than the federal ... government." (Br.Opp.11a). That, of course, would be true of every state and local government defendant.

But in this Court respondent emphatically disavows the interpretation of *Hercules Carriers* which it advanced in the courts below and which the Eleventh

Circuit – at respondent's urging – applied to local governments, that *Mendoza* precludes federal courts from invoking offensive nonmutual collateral estoppel against a state or local government. The linchpin of respondent's new position, a theme repeated throughout the brief in opposition, is that the Eleventh Circuit actually rejected a rule forbidding use of offensive nonmutual collateral estoppel against state and local governments, and merely assesses on a case-by-case basis the availability of such estoppel (as it would regarding estoppel against a private litigant). Under *Hercules Carriers* and the decision below, respondent now claims, "facts and circumstances may justify the use of offensive non-mutual collateral estoppel against a local or state government." (Br.Opp.23). In *Hercules Carriers,* respondent now contends, "the Eleventh Circuit eschewed a bright-line rule concerning the use of non-mutual collateral estoppel against a state government." (Br.Opp.10). Respondent insists that the holding in *Hercules Carriers* was actually limited to the availability of offensive nonmutual collateral estoppel regarding a particular dispute about a 1980 allision between a vessel and a bridge over Tampa Bay.

That contention is clearly unsound. Neither *Hercules Carriers* nor the Eleventh Circuit decision in the instant case are, as respondent now argues, narrow "fact-specific" holdings. (Br.Opp.5, 8, 12). In *Hercules Carriers* a single fact precluded use of collateral estoppel – the fact that the defendant was a

state agency. In the instant case a single fact precluded use of collateral estoppel – the fact that the defendant was a local government agency. *Hercules Carriers* and the decision below – like this Court's decision in *Mendoza* – are clearly straightforward per se rules barring utilization of offensive nonmutual collateral estoppel against state and local governments.

(2) The Eleventh Circuit rule in *Hercules Carriers* and the instant case is clearly inconsistent with the Second Circuit decision in *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990), which did permit a litigant to invoke offensive nonmutual collateral estoppel against a state. Respondent suggests that the Second Circuit decision in *Benjamin* may have been based in part on New York law. (Br.Opp.16-17). But that contention merely highlights the circuit conflict, because the Eleventh Circuit regards the applicability of *Mendoza* to state and local governments as a question of federal law. The rules in *Benjamin* and *Hercules Carriers* are assuredly not the same.[1] In the Second Circuit use of offensive nonmutual collateral

[1] Respondents note that *Benjamin* required "a finding of 'the identicality of an issue necessarily decided in the prior action' and 'a full and fair opportunity to contest the issue in the prior action.'" (Br.Opp.17) (quoting *Benjamin*). But those are the usual preconditions of collateral estoppel, applicable to private litigants. Respondents note that there had been an appeal of the earlier state court litigation in *Benjamin* (Br.Opp.16); there was also such an appeal in the *Lee* litigation prior to the instant lawsuit.

estoppel against a state is permissible in at least some circumstances; in the Eleventh Circuit it never is.

(3) Respondent does not seriously dispute the existence of a circuit conflict as to whether in federal court the applicability of *Mendoza* to state and local government is a question of federal or a question of state law. Respondent acknowledges that the Eleventh Circuit decision in *Hercules Carriers* (and in the instant case) is based solely on the court of appeals' interpretation of *Mendoza*, not on "Georgia preclusion law." (Br.Opp.12). On the other hand, "the Sixth and Ninth Circuits ... view the application of non-mutual collateral estoppel as an issue governed by state law." (Br.Opp.18; see *id.* 18 ("the Ninth Circuit initially looked to state law to answer th[e] question [in *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004)]"), 21 ("the Sixth Circuit first looked to state law [in *Chambers v. Ohio Dep't of Human Servs.,* 145 F.3d 793 (6th Cir. 1998)]")).

The Ninth Circuit decision in *Coeur D'Alene* adopted, with regard to litigation involving Idaho state agencies, a per se bar to offensive nonmutual collateral estoppel; the Sixth Circuit in *Chambers* adopted the same rule regarding claims against Ohio state agencies. (Pet. 15-18). Those prohibitions are necessarily different from the rule applied by the Second Circuit in *Benjamin* permitting use of offensive nonmutual collateral estoppel against states.

Respondent asserts that in *State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.,* 425 F.3d 708 (9th Cir. 2005), the Ninth Circuit did not "announce[ ] a bright-line proscription against applying non-mutual collateral estoppel against the state." (Br. Opp.20). To the contrary, the Ninth Circuit adopted just such a per se rule. "*Mendoza*'s rationale applies with equal force to [the defendant']s attempt to assert nonmuutal defensive collateral estoppel against ... a state agency." 425 F.3d at 714. That Ninth Circuit decision correctly described both *Coeur D'Alene Tribe* and *Hercules* as having adopted per se rules. *Id.* Respondent also asserts that the Sixth Circuit in *Chambers* did not "fashion a rule that state government defendants are inexorably excluded from the preclusive effect of a prior state court judgment.... [T]he Sixth Circuit ... rested [its] determination on ... the particular circumstances of the case[ ] at hand." (Br.Opp.22). To the contrary, there is nothing whatever in the decision in *Chambers* that grounds on any "particular circumstances" of that case the Sixth Circuit's conclusion that offensive nonmutual collateral estoppel may not be invoked against an Ohio state agency. The Sixth Circuit simply concluded that collateral estoppel is unavailable because Ohio courts "would not use offensive non-mutual issue preclusion against the state." 145 F.3d at 801 n.14.

On the other hand, because the Ninth and Sixth Circuits regard this issue as controlled by state preclusion law, those circuits would permit utilization of offensive nonmutual collateral estoppel against a

state or local government in a case arising in Alaska or Kentucky, respectively, because those states have rejected the *Mendoza* rule. (Pet. 19-20). That result, of course, would be different than the rule applied by the Eleventh Circuit in *Hercules Carriers* and in the instant case.

II. The Questions Presented Are Important

The availability of offensive nonmutual collateral estoppel is a matter of recurring importance in civil litigation. 18A Wright & Miller, Federal Practice & Procedure § 4464 (2d ed. 2013). This Court has repeatedly granted review to address that issue in a variety of contexts. The availability vel non of such collateral estoppel against the federal government was of sufficient moment in *Mendoza* to warrant review by this Court. Whether collateral estoppel can be utilized in this manner against state and local governments is equally important, particularly where – as here – a federal court has chosen to disregard the prior decision of a state court. In arrogating to itself the authority to determine the preclusive effect of the earlier related Georgia judicial decision, the Fifth Circuit violated the command of the Full Faith and Credit Act, 28 U.S.C. § 1738, which protects "the comity between state and federal courts that has been recognized as a bulwark of the federal system." *Allen v. McCurry,* 449 U.S. 90, 96 (1980).

III. This Case Presents An Excellent Vehicle For Resolving The Questions Presented

(1) Respondent predicts that it would prevail on the merits if certiorari were granted and this Court were to decide, as a matter of *federal* preclusion aw, whether *Mendoza* bars the use against state and local governments of offensive nonmutual collateral estoppel. (Br.Opp.28). Respondent argues that, because it expects to prevail on the merits of that federal law issue, there would be no point in granting review; "the end result is the same." (*Id*.). But the purpose of this Court's discretionary review is to resolve conflicts such as that between the Eleventh and Second Circuits; review is not limited to cases in which the Court intends to reverse the decision below.

Moreover, it is far from certain that this Court, if it concluded that preclusion is governed by federal preclusion law, would hold that *Mendoza* bars application to state and local governments of offensive nonmutual collateral estoppel. A number of state courts have concluded, unlike the Eleventh Circuit, that the rationale of *Mendoza* does not apply to state defendants. For example, one key factor in this Court's decision in *Mendoza* was that the federal government "is a party to a far greater number of cases on a nationwide basis than even the most litigious private entity; in 1982 the United States was a party to more than 75,000 of the 206,193 filings in the United States District Courts." 464 U.S. at 159-60. That clearly is not true of local governments such as the school district in the instant case; in the last

five years, there have been only eight (officially and unofficially) reported state and federal decisions (including the decision in the instant case) in which the Fulton County School District was a party.[2] Although there doubtless were some additional unreported cases, the limited litigation engaged in by a local school board obviously does not remotely resemble the problem created for the Department of Justice by the tens of thousands of suits brought each year against the federal government.

(2) In the alternative, respondent predicts that if this Court holds that the preclusion issue in this case is controlled by *state* law, it will ultimately prevail on remand; respondent asserts that Georgia law limits collateral estoppel to parties and their privies. (Br.Opp.25-27). But Georgia preclusion law on this issue is muddled. The decision on which respondent relies is from the Georgia Court of Appeals, the state's intermediate court, not the Georgia Supreme Court. *Wickliffe v. Wickliffe Co., Inc.*, 227 Ga.App. 432, 489 S.E.2d 153 (1998). Prior to that decision the state

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[2] *Fulton County School District v. Hersh*, 320 Ga.App. 808, 740 S.E.2d 760 (2013); *Fulton County Bd. of Educ. v. D.R.H.,* 2013 WL 6085242 (Ga.App. Nov. 20, 2013); *Gibbs-Matthews v. Fulton County School Dist.,*429 Fed.Appx. 892 (11th Cir. 2011); *Weatherby v. Fulton County School System,* 2013 WL 5350813 (N.D.Ga. Sept. 23, 2013); *Collins v. Fulton County School Dist.,* 2012 WL 7802745 (N.D.Ga. Dec. 26, 2012); *K.A. ex rel. K.A. v. Fulton County School Dist.,* 2012 WL 4403778 (N.D.Ga. Sept. 21, 2012); *Long v. Fulton County School Dist.,* 807 F.Supp.2d 1274 (N.D.Ga. 2011).

Court of Appeals had repeatedly rejected a mutuality requirement. See 227 Ga.App. at 434, 489 S.E.2d at 155 ("recent case law in this Court is unsettled as to such issue"). In *Wickliffe* the Court of Appeals repeated its disapproval of requiring mutuality, explaining that such a requirement "allows parties to relitigate issues they have already litigated and lost, straining judicial resources and creating the possibility of inconsistent results." 227 Ga.App. at 434-35, 489 S.E.2d at 156. It urged the Georgia Supreme Court to reject any mutuality requirement "when it does directly address this issue" *id.*, and predicted that the state Supreme Court would do so. 227 Ga.App. at 435, 489 S.E.2d at 156 ("the Supreme Court has cited sections of the Second Restatement of Judgments dealing with collateral estoppel approvingly, ... and the Second Restatement does not require mutuality...."). In the interim, the Court of Appeals announced that it would apply a mutuality requirement. But in the period since the decision in *Wickliffe*, the Georgia Supreme Court has not decided a case in which mutuality was absent, so this state law issue remains in the limbo created by *Wickliffe*.

If this Court holds that the availability of offensive nonmutual collateral estoppel against state and local government is, under 28 U.S.C. § 1738, governed by state law, on remand the courts below can and should certify to the Georgia Supreme Court the state law questions posed by this case. See Ga. Code Ann. § 15-2-9. By so doing the federal courts can obtain a

definitive resolution from that Georgia court both of the mutuality issue raised by *Wickliffe* and of the availability under Georgia law of offensive nonmutual collateral estoppel against state and local governments. It would be inconsistent with the spirit of the Full Faith and Credit Act for this Court to deny review based on its own speculation as to how the Georgia Supreme Court would resolve those disputed questions of state preclusion law.

CONCLUSION

For the above reasons, a writ of certiorari should issue to review the judgment and opinion of the Court of Appeals for the Eleventh Circuit.

Respectfully submitted,

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