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

BRIEF IN OPPOSITION

NEERU GUPTA*
BRANDON O. MOULARD
NELSON MULLINS RILEY & SCARBOROUGH, LLP
201 17th St., NW
Ste. 1700
Atlanta, GA 30363
(404) 322-6109
nina.gupta@nelsonmullins.com

* *Counsel of Record*
Counsel for Respondent

COCKLE LEGAL BRIEFS (800) 225-6964
WWW.COCKLELEGALBRIEFS.COM

QUESTIONS PRESENTED

(1) Whether the equitable considerations articulated in *United States v. Mendoza* regarding the use of offensive non-mutual collateral estoppel against the federal government may be applicable to other governmental entities.

(2) Whether, given the unique nature of governmental entities, federal courts may apply the equitable considerations articulated in *Mendoza* to bar the use of offensive non-mutual collateral estoppel against such entities.

PARTIES TO THE PROCEEDING

The Petitioners are Dennis Demaree, Megan Humphreys, Allison Jones, Clare Mansell, Mary McCoy, Tim McKinney, Mike Mitchell, Janet Stalling, Ray Splawn, and Sandy Wade.

The Respondent is Fulton County School District.

TABLE OF CONTENTS

TABLE OF CONTENTS – Continued

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES – Continued

STATUTES & RULES

INTRODUCTION

This case involves application of the rarely-used procedural mechanism of offensive non-mutual collateral estoppel against a governmental entity. This Court has previously held that, due to a variety of equitable considerations and other factors, offensive non-mutual collateral estoppel is not available against the federal government. *United States v. Mendoza*, 464 U.S. 154, 162 (1984). Since then, the lower federal courts, as well as state courts, have applied the factors articulated in *Mendoza* in individual cases to determine whether offensive non-mutual collateral estoppel is available against state and local governments. In these cases, the courts have engaged in a case-specific analysis and have reached different conclusions, based upon the facts of the individual cases before them.

Contrary to Petitioners' assertions, no significant circuit split exists regarding the applicability of *Mendoza* to state and local governments. Further, Petitioners contend that, in the federal courts, the availability of offensive non-mutual collateral estoppel based upon a state adjudication should be governed by the law of the state in which the state adjudication originates. This contention, however, yields the same result reached by the Eleventh Circuit Court of Appeals – that the state adjudication has no preclusive effect.

STATEMENT

This case involves a reduction in force (RIF) conducted by Respondent Fulton County School District ("the District") in the spring of 2010 to eliminate several employees. At the time, Petitioners were employed by Respondent as elementary instrumental (band and orchestra) music teachers. For most employees, Respondent utilized a five-step analysis that considered tenure status and performance issues to identify which employees it would include in the RIF. (Petitioners' App. 2a-3a.) Elementary music teachers, however, were not vetted through this five-step analysis; rather, Respondent non-renewed all such teachers because their positions were deemed "non-essential" and described as "programs/functions eliminated." *Id.* at 3a. Another group of employees, Grades 1-3 paraprofessionals, were also deemed "programs/functions eliminated," but were vetted through the five-step analysis. *Id.* Accordingly, some Grades 1-3 paraprofessionals remained employed by Respondent in other positions. *Id.*

One elementary music teacher, Don Lee,[1] challenged his non-renewal through the administrative procedures described in Georgia's Fair Dismissal Act, O.C.G.A. §§ 20-2-940, *et seq*. Aggrieved by two levels of administrative findings, Lee challenged his non-renewal in the Superior Court of Fulton County. *Id*. at 29a. The Superior Court held that Respondent

[1] Lee is not a party to this action.

violated the Equal Protection Clauses of the United States and Georgia Constitutions because it did not apply the five-step analysis when non-renewing Lee's employment. *Lee v. Fulton Cnty. Bd. of Educ.,* Civil Case No. 2010CV193987 (Ga. Sup. Ct. 2011). In doing so, the Superior Court mischaracterized the applicable "rational basis" test and misapplied the burden of proof. (Petitioners' App. 25a-27a).

Petitioners then filed suit against Respondent and, like Lee, alleged that Respondent had violated the Equal Protection Clause when it non-renewed their employment. *Id.* at 16a. Petitioners also alleged that the *Lee* decision collaterally estopped Respondent from arguing against such a claim. *Id.* at 16a-17a. The federal district court disagreed, arguing that equitable consideration of the factors articulated in *Mendoza*, as well as *Hercules Carriers, Inc. v. Claimant of Florida, Department of Transportation, et al.*, 768 F.3d 1558 (11th Cir. 1985) (applying policy concerns identified in *Mendoza* to prevent use of offensive non-mutual collateral estoppel against a state governmental entity), likewise prevented the use of offensive non-mutual collateral estoppel against Respondent in this instance. (Petitioners' App. 22a-24a). The district court further noted that the *Lee* decision did not prevent Respondent from defending against Petitioners' Equal Protection claim in any event. *Id.* at 25a-27a. Specifically, the District Court determined that the equal protection issue was not actually litigated or necessarily decided in the *Lee*

matter, two prerequisites for application of collateral estoppel in the first instance. *Id.*

Petitioners appealed to the Eleventh Circuit Court of Appeals, which affirmed the District Court in all respects. The Eleventh Circuit specifically determined that, under the facts and circumstances of the instant case, the equitable considerations articulated in *Mendoza* and *Hercules Carriers* applied equally to Respondent, such that offensive non-mutual collateral estoppel was not available. *Id.* at 8a-12a.

REASONS FOR DENYING THE WRIT

This Court should deny the Petition for a Writ of Certiorari. As an initial matter, the applicability of offensive non-mutual collateral estoppel against governmental entities rarely arises in litigation. Moreover, contrary to Petitioners' assertions otherwise, when the question has arisen, courts have used a consistent approach, such that there is no significant split between the circuits. Finally, Petitioners' own assertion – that the preclusive effect of a state adjudication should be governed by the law of the state in which it originates – yields the same result reached by both the federal district court and the Eleventh Circuit Court of Appeals, such that this case presents no exceptional importance. Accordingly, the Petition for a Writ of Certiorari should be denied.

I. THERE IS NO CIRCUIT SPLIT REGARDING WHETHER NON-MUTUAL COLLATERAL ESTOPPEL MAY BE APPLIED AGAINST A STATE OR LOCAL GOVERNMENT.

A. The Eleventh, Second, Sixth, and Ninth Circuits Each Relies on The Policy Considerations Identified in *Mendoza* and Apply Non-Mutual Collateral Estoppel on a Fact-Specific Basis.

1. Development of non-mutual collateral estoppel in the federal courts.

The Supreme Court first abandoned the mutuality requirement for applying collateral estoppel in federal courts in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29, 91 S. Ct. 1434, 1443, 28 L. Ed. 2d 788 (1971). The *Blonder-Tongue* Court's determination with respect to the necessity of mutuality was limited to cases "where a patentee seeks to relitigate the validity of a patent once a federal court has declared it to be invalid." *Blonder-Tongue Labs., Inc.*, 402 U.S. at 327. However, the Court acknowledged that even its limited discussion implicated the "broader question" of "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." *Id.* at 328. The Court suggested a negative answer to that question. *See id.* at 328-29.

The Court definitively discarded the mutuality requirement in federal courts in *Parklane Hosiery*

Co., Inc. v. Shore, 439 U.S. 322, 330, 99 S. Ct. 645, 651, 58 L. Ed. 2d 552 (1979). There, the Court concluded that the preferable approach to applying non-mutual offensive collateral estoppel in the federal courts is "not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied." *Parklane Hosiery Co., Inc.,* 439 U.S. at 331. The Court articulated the general rule that when application of offensive collateral estoppel would be "unfair to a defendant," the court should not allow its use. *See id*.

Five years after *Parklane Hosiery*, in *United States v. Mendoza*, 464 U.S. 154 (1984), the Supreme Court announced a seemingly categorical prohibition of applying non-mutual offensive collateral estoppel against the federal government. In *Mendoza*, respondent, a Filipino physician who had served in the Philippine Commonwealth Army during World War II, petitioned for naturalization pursuant to the Nationality Act of 1940. 464 U.S. at 155-56. The Immigration and Naturalization Service recommended denial of his application. *Id.* at 157. Respondent then filed suit in federal district court, alleging that he had been deprived of due process of law in violation of the Fifth Amendment. *Id.* at 156-57. The district court granted respondent's petition without deciding the merits of his claim, concluding that the government could not relitigate the due process issue because that question had been decided against the government in an earlier judgment, which had not

been appealed. *Id.* at 157 (citing *In re Naturalization of 68 Filipino War Veterans*, 406 F.Supp. 931 (N.D.Cal. 1975)). The Ninth Circuit affirmed. *Id.* at 158 (citing *Mendoza v. United States*, 672 F.2d 1320, 1322 (9th Cir. 1982)). In a unanimous decision, the Supreme Court reversed, holding that *Parklane Hosiery*'s conditional approval of non-mutual offensive collateral estoppel did not extend to suits against the United States. *See id.* at 162.

The *Mendoza* Court rested its decision on four major policy considerations. First, the federal government is not in a position identical to that of a private litigant as a result of the geographic breadth of government litigation and, more importantly, the nature of the issues that the government litigates, which frequently involve questions of substantial public importance. *See id.* at 159-60. Second, allowing non-mutual collateral estoppel against the government "would substantially thwart the development of important questions of law" by precluding multiple circuits from considering a difficult question and disrupting the Supreme Court's practice of waiting until conflicts arise between the circuits before granting certiorari. *See id.* at 160. Third, the Court recognized that, when deciding whether to appeal an adverse decision, the Solicitor General weighs various factors, such as limited resources and docket overcrowding. *See id.* at 161. Adopting a rule that would allow non-mutual collateral estoppel to be used against the United States would force the Solicitor General to "abandon those prudential concerns and to

appeal every adverse decision in order to avoid foreclosing further review." *Id.* Lastly, the Court acknowledged the necessity of allowing the executive branch flexibility with respect to adopting positions on particular issues and controlling the progress of federal litigation. *See id.* at 161-62.

The *Mendoza* Court did not address whether its holding extended to suits against state or local government defendants. Petitioners assert in their Brief that the Eleventh, Second, Sixth, and Ninth Circuits have taken conflicting approaches to this question, thereby warranting this Court's review. The following discussion, however, illustrates that no such conflict exists. Rather, the courts of appeals in these circuits have invoked the discretionary authority endorsed in *Parklane Hosiery* and analyzed the appropriateness of applying non-mutual collateral estoppel against state governments on a fact-specific basis, guided by practical considerations of fairness and the policy interests discussed in *Mendoza*.

2. Eleventh Circuit.

Hercules Carriers, Inc. v. Claimant State of Florida, Department of Transportation, et al., 768 F.2d 1558 (11th Cir. 1985), represents the Eleventh Circuit's governing published opinion on the use of non-mutual collateral estoppel against a state government. The essential facts of this case are as follows. On May 9, 1980, a ship owned by Hercules Carriers collided with a bridge located in Tampa Bay,

Florida. 768 F.2d at 1562. Soon after the accident, the Department of Professional Regulation, a Florida state administrative agency, initiated proceedings against one of the pilots of the ship to revoke his pilot's license based on his role in the collision. *Id.* at 1578. The Florida Board of Pilot Commissioners ruled that the pilot had not acted negligently and, therefore, could retain his pilot's license. *Id.*

In a separate proceeding before the United States District Court for the Middle District of Florida, Hercules Carriers filed suit against the Florida Department of Transportation pursuant to the Limitation of Liability Act, 46 U.S.C. §§ 183, *et seq.*, seeking exoneration for any damage to the bridge or a declaration that its potential liability could not exceed the value of the ship involved in the collision. *Id.* at 1563. Under the Act, the owner of a ship is liable beyond the value of its ship only if 1.) negligence or "conditions of unseaworthiness" caused the accident giving rise to a claim; and 2.) the shipowner knew or should have known of those negligent acts or conditions of unseaworthiness. *See id.* at 1563-64 (citing *Farrell Lines, Inc. v. Jones*, 530 F.2d 7, 10 (5th Cir. 1976)). A court may deem a ship unseaworthy due to an incompetent crew or faulty equipment. *Id.* at 1563 (citing *Horn v. Cia de Navegacion Fruco, S.A.*, 404 F.2d 422, 431-32 (5th Cir. 1968), *cert. denied*, 394 U.S. 943, 89 S. Ct. 1272, 22 L. Ed. 2d 477 (1969)).

Hercules Carriers argued that the ruling by the Board of Pilot Commissioners collaterally estopped the State of Florida from relitigating the issue of the

pilot's negligence during the trial on Hercules Carriers' liability. *Id*. at 1578. The district court disagreed and found that Hercules Carriers was not entitled to a limitation of its liability. *Id.* at 1563. On appeal, the Eleventh Circuit Court of Appeals affirmed the district court's ruling, holding that "the district court did not err in refusing to collaterally estop the State of Florida from pursuing its negligence claim in a civil proceeding before the federal court." *Id.* at 1578.

In reaching this decision, the Eleventh Circuit eschewed a bright-line rule concerning the use of non-mutual collateral estoppel against a state government litigant in favor of fact-specific holding guided by the equitable considerations identified in *Mendoza*. The court stated, "[T]he policy rationale behind *Mendoza* applies *to the facts of this case*." *Id.* at 1578 (emphasis added). The court reasoned that the Supreme Court in *Mendoza* "did not differentiate between federal governmental interests and state governmental interests, nor was there anything to suggest that the concerns expressed by the Supreme Court were peculiar to the federal government." *Id.* at 1579. The court went on to conclude that concerns about the frequency of litigation involving the state government, the likelihood that such litigation would involve issues of substantial public importance, and the practical considerations underlying the state's decision to appeal adverse decisions all militated against application of non-mutual collateral estoppel against the state government. *Id.*

Moreover, as noted in Petitioner's Brief, the *Hercules Carriers* court held that the circumstances of that particular case presented stronger grounds for not applying non-mutual collateral estoppel than those presented in *Mendoza*:

> In Mendoza, the relevant government agency, the Immigration and Naturalization Service (INS), was a party to both proceedings, and in the second proceeding sought to litigate the identical issue involved in the first proceeding . . . [T]his case involves two wholly separate state agencies with different interests and functions. The distinction is a critical one given the varied interests a governmental body must pursue; if *Mendoza* stands for anything, it must stand for the proposition that a government's agencies in pursuing their stated goals must not be put in the untenable position of collaterally estopping one another when they pursue the same issue for wholly different purposes.

Id. at 1580. Additionally, the court held that the State had not had a full and fair opportunity to litigate the issue to be estopped, given the disparity in scope between the Board of Pilot Commissioners' and the district court's respective findings concerning the pilot's negligence. *See id.* at 1580-82. This "lack of identity" between the two proceedings underscored "the fundamental unfairness that would result from permitting collateral estoppel in this instance." *Id.* at 1582. Lastly, the court acknowledged the trial court's broad discretion with respect to deciding questions

and concluded that "Hercules has not established that the district court abused its discretion in refusing to apply collateral estoppel in this case." *Id.* (citing *Parklane Hosiery Co.*, 439 U.S. at 331).

The *Hercules Carrier* court did not address the application of the Full Faith and Credit Clause, 28 U.S.C. § 1738, or Georgia state preclusion law. However, as discussed *infra*, this omission is irrelevant, as Georgia law does not recognize non-mutual collateral estoppel.

In the instant case, the Eleventh Circuit echoed the fact-specific analysis applied in *Hercules Carriers* in rejecting Petitioners' argument that the trial court was estopped from litigating their Equal Protection claims. The court concluded, "[E]xcluding a school district from offensive, non-mutual collateral estoppel is based on the same reason in *Hercules* and *Mendoza*." (Petitioners' App. at 10a-11a). First, the application of offensive, non-mutual collateral estoppel against the District in this case "would hinder the court from developing and clarifying essential constitutional law" and "prevent the development of educational policy through litigation." *Id.* at 11a. The court then examined the unique economic realities of public school districts and how application of non-mutual collateral estoppel in this case would impact judicial economy:

> Most importantly, a school district has a limited litigation budget, much more limited than the federal or state government. As a

> result, offensive, non-mutual collateral estoppel would force the school district to spend more on litigation because each claim would have to be utterly exhausted. Furthermore, this kind of claim exhaustion would actually increase the overall litigation, thus exhausting government resources, instead of promoting judicial economy as estoppel is intended to do.

Id. The court also noted that the District faces the risk of litigation outside of its geographical borders because it "regularly contracts with vendors from across the country, sends students and employees outside of its borders, and is regularly in situations in which litigation outside of Fulton County could result." *Id.* at 11a-12a. Finally, the court emphasized that the District must "wear numerous litigation hats ranging from special education to local taxation to procurement." *Id.* at 12a. "As a result, the School District, like the federal and state governments, needs litigation flexibility, so, for example, they are not forced to completely exhaust every administrative hearing, which wastes resources and increases litigation." *Id.*

The Eleventh Circuit's stance on applying non-mutual collateral estoppel to state governments did not rest on an inflexible, mechanical application of the rule announced in *Mendoza*. On the contrary, as reflected in the reasoning undergirding both *Hercules Carriers* and the opinion of the lower court in this case, the Eleventh Circuit has endorsed a

multifactored, case-specific analysis that emphasizes the legal practicalities of the state government litigant and fundamental notions of fairness. As the following will demonstrate, the Eleventh Circuit's treatment of this issue is in harmony with the reasoning adopted by the Second, Sixth, and Ninth Circuits.

3. Second Circuit.

Petitioners' Brief attempts to identify a conflict between the Eleventh Circuit and Second Circuit with respect to their approaches to applying non-mutual collateral estoppel against state governments. The supposed circuit conflict posited by Petitioners is premised on a misreading of *Hercules Carriers* and the Court of Appeals' opinion in this case that erroneously assumes that the Eleventh Circuit has adopted a hard-and-fast rule prohibiting use of non-mutual collateral estoppel against a state government under all circumstances. The foregoing discussion of the Eleventh Circuit's treatment of this issue illustrates that Petitioners' assumption is incorrect.

The Second Circuit's application of non-mutual collateral estoppel against state governments, exemplified in *Benjamin v. Coughlin*, 905 F.2d 571 (2d Cir. 1990), *cert. denied*, 498 U.S. 951 (1990), is fully consistent with the Eleventh Circuit's approach. *Benjamin* concerned a group of Rastafarian inmates who challenged the constitutionality of certain regulations and policies promulgated by the New York State Department of Correctional Services ("DOCS").

One of the challenged regulations required inmates to submit to a mandatory haircut upon entry into a DOCS correctional facility. *Benjamin v. Coughlin*, 708 F.Supp. 570, 571 (S.D.N.Y. 1989). Plaintiffs asserted that the mandated haircut violated their First Amendment right to free exercise of religion and Fourteenth Amendment right to equal protection. *Id.* The district court permanently enjoined enforcement of the mandatory haircut policy. *Id.* at 574. The court concluded that the State was collaterally estopped from religating the constitutionality of the policy based on two earlier state court cases that had adjudicated the issue. *Id.* at 573. The court further held that even if preclusion did not apply, the policy in question failed to pass constitutional muster. *Id.* at 574.

On appeal to the Second Circuit Court of Appeals, the State argued that the district court's application of non-mutual collateral estoppel was improper, urging the Court to extend the holding in *Mendoza*. *Benjamin*, 905 F.2d at 575-76. The Second Circuit, however, upheld the trial court's application of non-mutual collateral estoppel, concluding that the policy considerations identified by the Supreme Court in *Mendoza* did not apply to the particular circumstances of the case at hand. *See id.* at 576. In *Mendoza*, the Solicitor General had declined to appeal a previous adverse ruling; whereas, in *Benjamin*, the State had appealed the earlier state court judgments to New York's highest court. *Id.* The court stated that "avoidance of premature estoppel and

assurance of an opportunity for the government to consider the administrative concerns that weigh against initiation of the appellate process" represented the salient policy interests discussed in *Mendoza*. *Id.* These policy concerns, according to the Second Circuit, were not present *in this specific case* because the underlying dispute had "percolated through the state courts and was decided by the New York Court of Appeal during the pendency of the case at bar." *Id.* The court elaborated,

> Decisions by several state courts assured defendants that preclusion was not premature, that proper review of the issues occurred prior to application of preclusion principles, and that the DOCS had the opportunity to consider appeal of the state court decisions in light of the pending federal action.

Id. Additionally, the court found "'substantial overlaps' of evidence and arguments" between the district court and state court proceedings. *Id.* at 576 (citations omitted).

Contrary to Petitioners' assertion, the Second Circuit did not rely entirely on federal law in conducting its preclusion analysis. The court first noted, "In determining the preclusive effect given a state court judgment under 28 U.S.C. § 1738 (1982), a federal court must 'give that judgment the same effect that it would have in the courts of the state under state law.'" *Id.* at 575 (citations omitted). The court then relied on a state court opinion for the proposition that "[a]pplication of the doctrine of collateral estoppel

requires 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.'" *Id.* at 576 (citing *Halyalkar v. Bd. of Regents*, 72 N.Y.2d 261, 266, 527 N.E.2d 1222, 1224 (1988)). The Second Circuit also looked to the *Restatement* and state law in emphasizing the importance of the "substantial overlap of evidence and argument" between the state and federal proceedings. *Id.* (citing *Restatement (Second) of Judgments* § 27 comment c (1982); *Koch v. Consolidated Edison Co. of New York*, 62 N.Y.2d 548, 554 n. 2 & 555 n. 4, 468 N.E.2d 1, 4 nn. 2 & 4, *cert. denied*, 469 U.S. 1210, 105 S. Ct. 1177, 84 L. Ed. 2d 326 (1985)).

While the *Benjamin* court's outcome differed from that reached by *Hercules Carriers*, its rationale was in line with the Eleventh Circuit's method of analysis. The *Benjamin* opinion provides no basis upon which to conclude that the factors considered by Second Circuit would necessarily compel application of non-mutual collateral estoppel against the state under different facts. For instance, the opinion does not address how the Second Circuit would have ruled if the prior cases had not been appealed up to the state's highest court, or if the state and federal proceedings differed in scope with respect to the scope of evidence and arguments presented. Instead, like the Eleventh Circuit, the Second Circuit seemingly adopted a more flexible approach based on considerations of fairness under the specific facts of the case under review.

4. Sixth and Ninth Circuits.

Petitioners contend that the Sixth and Ninth Circuits differ from the Eleventh and Second Circuits insofar as they view the application of non-mutual collateral estoppel as an issue governed by state law. Petitioners rely on two cases for this proposition: *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674 (9th Cir. 2004), and *Chambers v. Ohio Department of Human Services*, 145 F.3d 793 (6th Cir. 1998). Neither case, however, espoused a stance on this issue that is inconsistent with the reasoning used by the Eleventh or Second Circuits.

The plaintiffs in *Coeur D'Alene Tribe v. Hammond*, several Indian tribes located in Idaho, filed suit against the Idaho State Tax Commissioners in federal district court seeking an injunction against enforcement of an Idaho state tax on motor fuel delivered by distributors to tribally-owned gas stations for sale on Indian reservations. 384 F.3d 674, 678 (9th Cir. 2004). The tribes argued that the incidence of the tax unlawfully fell on the tribes despite there having been no congressional abrogation of the tribes' sovereign immunity pursuant to the Hayden-Cartwright Act. *Id.* at 679. The district court held that the incidence of the tax fell on the tribes without a waiver of their sovereign immunity and granted summary judgment for plaintiffs. *Id.*

The Commissioners appealed to the Ninth Circuit, and the tribes cross-appealed. *Id*. The Ninth Circuit was tasked with considering two issues on

appeal: 1.) Did the legal incidence of the fuel tax fall on Indian retailers? 2.) If the incidence of the tax fell on Indian retailers, did the Hayden-Cartwright Act waive the tribes' sovereign immunity so as to permit assessment of the tax? *See id.* In their cross-appeal, the tribes argued that the State was collaterally estopped from relitigating the question of whether the Hayden-Cartwright Act waived their sovereign immunity because the Idaho Supreme Court previously decided that question in the tribes' favor in *Goodman Oil Company v. Idaho State Tax Commissioners*, 136 Idaho 53, 28 P.3d 996 (2001), *cert. denied*, 534 U.S. 1129, 122 S. Ct. 1068, 151 L. Ed. 2d 971 (2002). *Id.*

After initially determining that the legal incidence of the tax fell on the tribes, the court addressed the preclusive effect of the 2001 Idaho Supreme Court ruling. Petitioners correctly note that the Ninth Circuit initially looked to state law to answer this question: "We ask whether the state of Idaho would give preclusive effect to the ruling against the Commission in *Goodman Oil*." *Id.* at 688. The court, however, failed to locate any state law governing the issue of whether non-mutual offensive collateral estoppel may be applied against a state litigant on a question of law. *Id.* at 689. Accordingly, the court turned to other authorities, namely, the *Restatement (Second) of Judgments* and *Mendoza*. *Id.* Although the Ninth Circuit characterized *Mendoza* to be applicable by "analogy," the policy considerations identified in *Mendoza* clearly animated the court's conclusion

that collateral estoppel was inappropriate in this case:

> The same considerations that counsel against applying non-mutual offensive collateral estoppel against the United States government on questions of law apply to precluding the Idaho Tax Commission from relitigating the issue whether the Hayden-Cartwright Act applies to Indian reservations. This state agency might be called on to litigate often and in multiple fora against diverse litigants about questions of law with broad import. Rather than risk that an important legal issue is inadequately considered because of the "freezing effect" against which the *Mendoza* court warned, we consider anew the question whether the Hayden-Cartwright Act has authorized the state of Idaho to tax tribal retailers on the motor fuel delivered to the Tribes' reservations.

Id. at 690. A subsequent Ninth Circuit case cited both *Coeur D'Alene Tribe of Idaho* and *Hercules Carriers* to support reliance on the *Mendoza* factors in declining to collaterally estop another Idaho state agency. *See State of Idaho Potato Comm'n v. G & T Terminal Packaging, Inc.*, 425 F.3d 708, 713-14 (9th Cir. 2005). In that case, the Ninth Circuit neither discussed the impact of state law or the question of non-mutual collateral estoppel, nor announced a bright-line proscription against applying non-mutual collateral estoppel against the state. *See generally, id.*

In *Chambers,* the Sixth Circuit considered whether the Ohio Department of Human Services had applied incorrect criteria in determining eligibility to receive benefits under the Medicare Catastrophic Coverage Act of 1988 ("MCCA"). *Chambers v. Ohio Dep't of Human Servs*., 145 F.3d 793, 794 (6th Cir. 1998). Plaintiffs argued that the State could not relitigate this issue because two Ohio appellate decisions determined that the eligibility factors used by the State did not comply with the plain language of the MCCA. 145 F.3d at 801 n. 14. The court disagreed. Like the Ninth Circuit in *Coeur D'Alene Tribe of Idaho*, in a footnote, the Sixth Circuit first looked to state law, but found no authority governing application of non-mutual collateral estoppel. *See id.* The court then considered the import of *Mendoza*, ultimately concluding that the policy considerations expressed by the Supreme Court applied to the facts of this case:

> Although the *Mendoza* rationale has not been definitively extended to apply to state governments, there is support for that proposition. *See Hercules Carriers, Inc. v. Florida*, 768 F.2d 1558, 1579 (11th Cir. 1985) (applying *Mendoza* to state governments); *see also Milton S. Kronheim & Co. v. District of Columbia*, 91 F.3d 193, 205 (D.C.Cir.1996) (Silberman, J.), *cert. denied*, 520 U.S. 1186, 117 S.Ct. 1468, 137 L.Ed.2d 681 (1997). The same considerations set forth in *Mendoza* with respect to the federal government may apply to state governments. The Mendoza

> rationale provides further support for our conclusion that the use of offensive non-mutual issue preclusion is not appropriate *in this case*. While Ohio law is silent in this respect, given its restrictive views on mutuality, we anticipate that the Ohio Supreme Court would not use offensive non-mutual issue preclusion against the state.

Id. (emphasis in original). At least one subsequent district court decision in the Sixth Circuit cited *Chambers* for the proposition that a state government litigant, given its unique position, ordinarily, though not inevitably, should be exempted from non-mutual offensive collateral estoppel. *See Clayworth v. Bonta*, 295 F.Supp.2d 1110, 1121 (E.D. Cal. 2003), *rev'd on other grounds,* 140 Fed.Appx. 677 (9th Cir. 2005).

Like *Hercules Carriers* and *Benjamin*, neither *Coeur D'Alene Tribe of Idaho* nor *Chambers* applied *Mendoza* to fashion a rule that state government defendants are inexorably excluded from or subject to the preclusive effect of a prior state court judgment. Although initially looking to guidance from state law authorities, both the Sixth and Ninth Circuits ultimately rested their determinations on an application of the *Mendoza* rationale to the particular circumstances of the cases at hand. This discretionary approach is in harmony with the method of analysis employed by the Eleventh and Second Circuits, and follows the Supreme Court's historical emphasis on practical fairness as the touchstone for applying non-mutual collateral estoppel. *See, e.g., Parklane Hosiery*

Co., Inc., 439 U.S. at 331-32. As such, the cases cited by Petitioners in their Brief do not demonstrate an inter-circuit conflict warranting this Court's review.

II. THIS CASE PRESENTS NO SIGNIFICANT ISSUES OF FEDERALISM.

Similarly, Petitioners' concerns regarding issues of federalism are built on the same straw man of a "rigid rule" mandated by *Mendoza*. As explained above, no court has adopted a rigid prohibition against the use of offensive non-mutual collateral estoppel against state or local governments. Instead, they have engaged in a case-specific analysis of whether the *Mendoza* factors apply to each case at hand. Even in the instant case, the Eleventh Circuit made clear that the case *at hand* mitigated against the use of offensive non-mutual collateral estoppel, in part because the litigation involved constitutional interpretation. (Petitioners' App. at 11a.) The Eleventh Circuit left open the possibility, then, that another set of facts and circumstances may justify the use of offensive non-mutual collateral estoppel against a local or state government.

Petitioners' stated concerns regarding forum shopping between state and federal courts are likewise unavailing. As an initial matter, no federal court may hear a case without a basis for federal jurisdiction in the first instance. Moreover, litigants routinely select forums in the hopes of achieving the best outcome possible. Some litigants may choose to file

claims in state courts to gain advantage, while their opponents may seek to remove those same matters to federal courts (assuming there is a basis for federal jurisdiction) to gain similar advantage. Petitioners' theoretical (and, as yet, unrealized) concerns regarding forum shopping simply do not raise any important questions about the proper relationship between state and federal courts.

Similarly, Petitioners' assertions that federal courts are ill-equipped to make decisions affecting state and local agencies likewise ring hollow. In fact, federal courts *routinely* make substantive and significant decisions directly affecting state and local agencies. In fact, Petitioners themselves sought out a federal court to make such a decision that would *profoundly* affect a local governmental agency. Petitioners cannot credibly claim, with one breath, that federal courts should decide to prevent a governmental entity from forwarding a defense and then claim, in the next breath, that the federal courts have no right to make such a decision at all. In sum, the decision below is in keeping with the usual relationship between courts and creates no tension therein.

III. THE DECISION BELOW LACKS EXCEPTIONAL IMPORTANCE AS THE ULTIMATE OUTCOME WOULD BE UNCHANGED.

This matter lacks exceptional practical importance, as even a wholesale adoption of Petitioners' position would have no practical effect on the

ultimate outcome of this matter. In their Petition for a Writ of Certiorari, Petitioners make no argument that the Eleventh Circuit's decision (or the federal district court decision) regarding their equal protection claim was incorrectly decided. Rather, the only issue they raise is whether offensive non-mutual collateral estoppel prevented Respondent from substantively litigating the equal protection claim. Specifically, Petitioners argue that the *Lee* decision should be given the same preclusive effect it would enjoy in other Georgia state courts.

Assuming *arguendo* that the Eleventh Circuit should have given the *Lee* decision the same preclusive effect it would have had in other Georgia state courts, Petitioners still cannot prevail on their central mission to use that decision against Respondent in the instant case. As Petitioners note, 28 U.S.C. § 1738 requires only that federal courts give state court decisions the same "full faith and credit" they would have in the state from which they originate. In Georgia courts, however, it is well established that collateral estoppel is available *only* when mutual identity of parties or their privies exists. O.C.G.A. § 9-12-40; *Wickliffe v. Wickliffe Co., Inc.*, 227 Ga. App. 432 (1998). Accordingly, the *Lee* decision has no preclusive effect against Respondent in this matter.

In *Wickliffe*, the Georgia Court of Appeals considered the preclusive effect of a prior adjudication to determine whether an individual was responsible for indemnifying a corporation. The essential facts are as follows. A company, The Wickliffe Company (TWC),

acquired the assets of a second company, AAWC, through a purchase agreement. That purchase agreement required AAWC to indemnify TWC for all costs and expenses in defending against any claim that AAWC had not paid its obligations. Wickliffe was also a party to the purchase agreement. However, the agreement did not require Wickliffe to indemnify TWC.

Prior to the purchase agreement, two individuals sued AAWC and TWC for unpaid compensation. The individuals obtained a jury verdict against both AAWC and TWC. TWC then reached a settlement with the two individuals for $110,000, though AAWC did not. The two individuals then sued Wickliffe in federal court to collect on their judgment against AAWC, asserting that Wickliffe, as AAWC's sole shareholder, was responsible for the judgment. The federal court determined that Wickliffe had abused the corporate form and allowed the individuals to collect directly from Wickliffe.

TWC then filed suit against Wickliffe, demanding that he indemnify it for the $110,000 it paid to the two individuals. TWC moved for summary judgment, which the trial court granted. Specifically, the trial court relied on the previous adjudication that Wickliffe had abused the corporate form, determined that it had preclusive effect on the issue, and held that Wickliffe was therefore liable to TWC. Wickliffe then appealed.

The Georgia Court of Appeals reversed the grant of summary judgment, holding that collateral estoppel was not available to TWC, as it was not a party to the previous litigation between AAWC and the two individuals. The court acknowledged that "the modern trend in applying the doctrines of res judicata and collateral estoppel is to confine the privity requirement to the party against whom the plea is asserted." *Wickliffe*, 227 Ga. App. at 434 (citations omitted). Nevertheless, the court noted that Georgia's Supreme Court had consistently held that identity of parties or their privies is an essential element to the application of collateral estoppel. *Id.* Accordingly, the Georgia Court of Appeals held that, in no uncertain terms, collateral estoppel (at least in Georgia) requires identity of parties or their privies. *Id.* Since *Wickliffe*, a multitude of cases have affirmed the central requirement for use of collateral estoppel in Georgia courts – identity of parties or their privies. *See, e.g., Old Republic Nat'l Title Ins. Co. v. Hartford Accident & Indemnity Co.*, 2013 WL 1943427, at * 7 (N.D. Ga. May 9, 2013); *In re Houser*, 458 B.R. 771, 777 (N.D. Ga. 2011); *In re Selmonosky*, 204 B.R. 820, 826 (N.D. Ga. 1996); *Morgan Cnty. Bd. of Tax Assessors v. Vantage Prods. Corp.*, 748 S.E.2d 468, 470 (Ga. App. 2013); *Ruth v. Hermann*, 291 Ga. App. 399, 400-401 (2008); *Jones v. Bd. of Pub. Safety*, 253 Ga. App. 339, 340-41 (2002); *Smith v. Nasserazad*, 247 Ga. App. 457, 458 (2001); *Elliott v. McDaniel*, 236 Ga. App. 845, 846 (1999); *Macko, et al. v. City of Lawrenceville, et al.*, 231 Ga. App. 671, 672 (1998).

Petitioners do not and cannot contend that there is identity of parties or their privies between this matter and the *Lee* matter. Given this clear legal authority, then, Petitioners cannot change the ultimate outcome of the underlying litigation. Under any set of circumstances, whether it be application of the *Mendoza* test or application of Georgia's requirement of identity of parties or their privies, Petitioners cannot use the *Lee* decision against Respondent. Under any set of circumstances, then, the federal district court and the Eleventh Circuit Court of Appeals were entitled to reach the merits of Petitioners' equal protection claim and hold that no equal protection violation occurred – a holding that Petitioners do not challenge in their Petition for a Writ of Certiorari, and that, accordingly, cannot be disturbed.[2]

In essence, then, Petitioners' objection to the lower courts' decisions and rationale for seeking a writ of certiorari are much ado about nothing. Regardless of whether the lower courts should have applied the *Mendoza* factors or Georgia's own standards for collateral estoppel, the end result is the same: the *Lee* decision would have no preclusive effect on the parties to this litigation. Given this, there is no exceptional practical importance – or *any* practical importance – in this matter. At the end of the day,

[2] Notably, Petitioners did not file their original claim in Georgia's state courts, presumably because non-mutual collateral estoppel would clearly have been unavailable to them.

any reviewing court would still be free to reach the merits of Petitioners' equal protection argument, merits that have already been substantively reviewed and rejected.

CONCLUSION

This Court should deny the Petition for a Writ of Certiorari.

Respectfully submitted,

NEERU GUPTA*
BRANDON O. MOULARD
NELSON MULLINS RILEY & SCARBOROUGH, LLP
201 17th St., NW
Ste. 1700
Atlanta, GA 30363
(404) 322-6109
nina.gupta@nelsonmullins.com

* *Counsel of Record*
Counsel for Respondent