No. ____

In the
Supreme Court of the United States

DAVID W. FOLEY, JR., AND JENNIFER T. FOLEY,
Petitioners,

v.

ORANGE COUNTY, ASIMA AZAM, TIM BOLDIG, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, MITCH GORDON, TARA GOULD, CAROL HOSSFIELD, TERESA JACOBS, RODERICK LOVE, ROCCO RELVINI, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, PHIL SMITH, AND LINDA STEWART,
Respondents.

Application for an Extension of Time
within which to File a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

APPLICATION TO THE HONORABLE JUSTICE CLARENCE THOMAS AS CIRCUIT JUSTICE

To the Honorable Clarence Thomas, as Circuit Justice for the United States Court of Appeals for the Eleventh Circuit:

Petitioners David and Jennifer Foley, pursuant Rules 13.5, 22, 30.2, and 30.3 of the Rules of this Court, request that the time to file their petition for a writ of certiorari be extended sixty days, or until Monday, July 29, 2024.

January 4, 2024, the Court of Appeals issued its opinion (*see* Appendix A).

February 21, 2024, the Court of Appeals denied rehearing (*see* Appendix B).

May 28, 2024, Tuesday, a petition for a writ of certiorari is due to be filed under Rule 13.1 of the Rules of this Court.

Title 28 U.S. Code Section 1257, grants this Court jurisdiction over any timely filed petition for certiorari in this case.

In accordance with Rule 13.5, this application is being filed more than 10 days in advance of the filing date for the petition for a writ of certiorari.

APPEAL TO JUSTICE THOMAS

Justice Thomas, you joined the late Justice Scalia, the Chief Justice, and Justice Alito, in *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection, et al.*, 130 S.Ct. 2592, 2602 (2010), to acknowledge that "[i]f ... a court declares that what was once an established right of private property no longer exists, it has taken that property, no less than if [it] had physically appropriated it." What would you say if a federal court condoned a state's property deprivation *sub silentio* by simply ignoring a due process claimant's clearly asserted property right? Would that not federalize the state's violation of "due process of law" by the federal court's failure to expressly approve the state's property deprivation?

Here, to perfect their due process claim, the Foleys seek summary reversal of the Eleventh Circuit's deliberate (and historic) evasion of Federal Rule of Civil Procedure 52(a)(6), and the clear error standard. Without explanation, or justification, the Eleventh Circuit ignored the dispositive personal property right alleged by the Foleys, found by the district court, and undisputed by respondent Orange County (possession and sale of toucans), and improperly replaced that

personal property right with its own finding of a non-property privilege (building permit).

By changing what the district court correctly found to be the subject of the Foleys' federal claim, the Eleventh Circuit violated Rule 52(a)(6) and the clear error standard, and it disposed of the Foleys' claim without actually adjudicating it. In doing so the Eleventh Circuit deprived the Foleys of their right in Title 42 U.S. Code Section 1983, to a federal court order testing the validity of what they actually claim. This deprivation compounds and federalizes Florida's failure to judicially approve respondents' deprivation of the Foleys' right to sell toucans; the Eleventh Circuit violates Amendment V by joining Florida to silently condone that original deprivation, *see* Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 452 (2022) ("[T]he Due Process of Law Clause requires that the executive secure the judiciary's approval before [or reasonably after] depriving an individual of their rights.").

The petitioners seek a summary reversal and remand so that the Eleventh Circuit can apply the "due process of law" clause of Amendment XIV to the Foleys' claim that respondents have never secured judicial approval for their deprivation of the Foleys' right to possess and sell toucans under Florida law, and in particular under Article IV, Section 9, Florida Constitution, *see* Op. Att'y Gen. Fla. 2002-23 ("[A] County is prohibited by Article IV, section 9, Florida Constitution, and the statutes and administrative rules promulgated thereunder, from enjoining the possession, breeding or sale of non- indigenous exotic birds.").

ESSENTIAL QUESTIONS

There are three essential questions in *Foley et ux v. Orange County, et al*:

I. Whether the "due process of law" clause of Amendment XIV gives a local government the burden to secure state judicial approval for its official deprivation of property, such that, absent approval, res judicata is no bar to a due process claim.

II. Whether Federal Rule of Civil Procedure 52(a)(6) and the clear error standard prevent the Eleventh Circuit from replacing the undisputed property interest found at issue by the District Court (sale of toucans) with its own unelaborated de novo finding of a non-property privilege (building permit).

III. Whether the Eleventh Circuit's refusal on rehearing to correct or justify this erroneous replacement denies the "due process of law" guarantee in Amendment V that the United States shall not deprive a property interest (in a §1983 cause of action) without judicial approval of the challenged deprivation (sale of toucans).

BACKGROUND OF CASE

Florida's Constitution includes a unique separation of powers provision that the Eleventh Circuit has on two occasions in this case obstinately refused to consider – Article IV, Section 9. This provision creates and vests Florida's Fish and Wildlife Conservation Commission (FWC) with all "the regulatory and executive powers of the state with respect to wild animal life and fresh water aquatic life." This provision has been construed by Florida's Courts, its Attorney General, and FWC, to mean that Florida vests in FWC alone all of the state's executive and

regulatory authority over the possession or sale of captive exotic birds. Consequently, Article IV, Section 9, provides the Foleys with a complete defense to respondents' interference with the Foleys' possession and sale of toucans.

The respondents, nevertheless, did enjoin the Foleys' sale of toucans in a local administrative proceeding. However, state court review of that proceeding did not allow the Foleys to raise Article IV, Section 9, as a defense of their right to sell toucans. In that review, Florida's Ninth Circuit Court confirmed that state judicial policy prevented it from considering Article IV, Section 9, as a defense of the Foleys' right to sell birds, *see Foleys v. Orange County*, 08-CA-0005227-0 (Fla. 9th Cir., October 21, 2009) ("Petitioners' assertion that sections of the Orange County Code are unconstitutional is one that can only be made in a separate legal action, not on certiorari. See *Miami-Dade County v. Omnipoint Holdings, Inc.*, 863 So.2d 195 (Fla.2003)."). Consequently, state court review ended without judicial approval of respondents' actions with respect to Article IV, Section 9, Florida Constitution.

The Foleys then sued the respondents in federal court. The Foleys asserted a pendant state law claim for declaratory and injunctive relief; they asked the district court to declare Orange County's regulation of the sale of birds void for conflict with Article IV, Section 9, Florida Constitution. The district court (Judge Dalton) did so declare and enjoined further enforcement, *see Foleys v. Orange County et al*, 6:12-cv-269 (M.D. Fla. August 13, 2013). The Foleys also asserted federal claims pursuant Title 42 U.S. Code Section 1983 in substantive due process, equal protection, compelled speech, commercial speech, and search and seizure. Too, the Foleys

asserted a federal RICO claim in Title 18 U.S. Code Section 1964(a). The district court denied this federal relief, *Id.* On appeal the Eleventh Circuit (Judges Tjoflat, Rosenbaum, and Anderson) "held that the district court lacked federal-question jurisdiction to decide the state law claim, vacated the district court's judgment, and ordered the district court to dismiss the case without prejudice," *see* Appendix A, Appendix page 5, *also Foley v. Orange County*, 638 Fed. Appx. 941 (11th Cir. 2016). Consequently, this federal suit also ended without judicial approval of respondents' actions with respect to Article IV, Section 9, Florida Constitution.

The Foleys then sued the respondents in state court. The Foleys sought declaratory and injunctive relief, and compensatory relief under various tort theories. The Foleys' state court complaint clearly alleged a property interest in toucans and in the sale of toucans, and clearly relied upon Article IV, Section 9, Florida Constitution, to defend those interests. State court, however, in its first order granted the individual defendants immunity from suit pursuant Florida Statute 768.28(9)(a). In a second order state court dismissed all claims against Orange County because the court found "the only 'right' that Plaintiffs claim is Mr. Foley's state-issued permit, which is not a property right," and further found that the Foleys "do not and cannot prove that they were deprived of ... property." Inexplicably, these state court orders do not mention any of the alleged facts dispositive of the Foleys' personal property claim – they do not mention birds, toucans, FWC, or Article IV, Section 9, Florida Constitution. State court refused to correct this oversight on rehearing. Likewise, the appellate court refused to correct

this error on appeal. Consequently, this state suit, like the preceding federal suit and the earlier state court review, ended without judicial approval of respondents' actions with respect to Article IV, Section 9, Florida Constitution.

The Foleys then initiated the present suit in federal court. The gist of the Foleys' claim in Title 42 U.S. Code Section 1983, is that respondents deprived them of their right to sell toucans without first securing judicial approval with respect to Article IV, Section 9, Florida Constitution, and since have deliberately evaded and obstructed the Foleys' pursuit of a state court order testing the validity of respondents' actions with respect to Article IV, Section 9, Florida Constitution. In sum, respondents have denied the Foleys, and caused the Foleys to be denied, the "due process of law" guaranteed by Amendment XIV, *see* Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment,* 108 Va. L. Rev. 447 (2022) ("[T]he Due Process of Law Clause requires that the executive secure the judiciary's approval before [or reasonably after] depriving an individual of their rights," *at* 452; "A government official [in the common law tradition] acted without due process of law if they deprived another of a right without the appropriate authorizing [judicial] writ," *at* 465; "[O]nly judicial actors could issue 'due process of law'," *at* 470).

The district court (Judge Dalton) correctly found as a matter of fact, as it had in the Foleys' first federal suit, that the Foleys' complaint alleges the sale of birds to be the private interest affected by respondents' actions, *see* Appendix C, Appendix

page 14: "This long-running case arises out of the County prohibiting the pro se Plaintiffs from selling birds out of their residential property."

The Eleventh Circuit (Judges Rosenbaum, Grant, and Brasher), however, ignored the district court's finding of fact, and effectively set it aside without finding it clearly erroneous. This violates Federal Rule of Civil Procedure 52(a)(6), and the clear error standard. The Eleventh Circuit replaced the district court's finding with the following erroneous findings that have no support in the record, were never made by the district court, and were never alleged by the Foleys: (1) the Foleys sued respondents "for ordering the Foleys to destroy an aviary they used to maintain and sell a small flock of toucans," *see* Appendix A, Appendix page 3; (2) the respondents did so "because using an aviary for commercial purposes violated the Orange County Code," Appendix A, Appendix page 4; and (3) "state court provided a means for the Foleys to remedy their alleged violations," *see* Appendix A, Appendix page 9.

This conclusion of the Eleventh Circuit – that "state court provided a means for the Foleys to remedy their alleged violations" – might resolve the case on a presumption of correctness, despite the Eleventh Circuit's violation of Rule 52(a)(6), IF the respondents had in *any* court "secure[d] the judiciary's approval before [or reasonably after] depriving [the Foleys] of their right[]" to sell toucans, *see* Max Crema & Lawrence B. Solum, *The Original Meaning of "Due Process of Law" in the Fifth Amendment*, 108 Va. L. Rev. 447, 452 (2022). But no court, in the seventeen exhausting years of this litigation, has tested the validity of the respondents' actions with respect to Article IV, Section 9, Florida Constitution; no court has

approved the respondents' deprivation of the right the district court found at issue in this case – the Foleys' right to sell the toucans they raise.

The Foleys petition the Court for a writ of certiorari granting summary reversal and remand. This will allow the Eleventh Circuit to correct its violation of Rule 52(a)(6) and the clear error standard, and to squarely address the Foleys' claim that respondents have never satisfied their burden in due process to secure judicial approval for their deprivation of the Foleys' right to sell toucans under Florida law, and in particular under Article IV, Section 9, Florida Constitution.

ARGUMENT FOR EXTENSION OF TIME TO FILE PETITION

The time to file a Petition for Writ of Certiorari should be extended for sixty days for the following reasons:

1. ***The Foleys require time to perfect their argument.*** The Foleys challenge the Eleventh Circuit's misapplication of Federal Rule of Civil Procedure 52(a)(6) to the district court order issued October 11, 2022 (*see* Appendix C). Additionally, there is evidence the Eleventh Circuit routinely evades Rule 52(a)(6), *see* Petition in *International Energy Ventures Management LLC v. United Energy Group, Ltd*, 21-1028 (denied May 31, 2022), pages 11 through 22. The Foleys need more time to do the research required to support a meaningful argument that there is a circuit split on the proper application of Rule 52(a)(6), and that regardless the Eleventh Circuit in this case "has so far departed from the accepted and usual course of judicial proceedings ... as to call for an exercise of this Court's supervisory power," Rule 10(a), Rules of the Supreme Court of the United States.

2. ***The Foleys must perfect their argument to find representation.*** The Foleys seek summary reversal and remand. However, if the Court instead grants the petition, the Foleys will need representation to comply with the Court's Rule 28.8 regarding oral argument. A well-drafted petition may be the only way to convince a member of the Supreme Court bar to present this case to the Court. The Foleys require time to perfect their petition.

3. ***The Foleys request time to make up for resources they lack.*** The Foleys proceed *pro se* and seek to recover the income stream produced by their sale of toucans. This income stream was wrongly taken by respondents; the Foleys labor under a hardship respondents created. Respondents, on the other hand, have superior legal resources, are unencumbered by income loss, and persist in their defense of their actions. Extra time will offset the Foleys' burden without prejudice to the respondents.

4. ***The Foleys made an effort to avoid certiorari.*** The Foleys sought rehearing from the Eleventh Circuit. February 21, 2024, the Eleventh Circuit denied rehearing. The Foleys' petition to this Court is their last resort.

CONCLUSION

For the foregoing reasons, the Foleys respectfully request that time to file a petition for a writ of certiorari be extended sixty days, or until Monday, July 29, 2024.

David W. Foley, Jr.

Jennifer T. Foley

Date: April 26, 2024

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No. ____

In the
Supreme Court of the United States

DAVID W. FOLEY, JR., AND JENNIFER T. FOLEY,
Petitioners,

v.

ORANGE COUNTY, ASIMA AZAM, TIM BOLDIG, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, MITCH GORDON, TARA GOULD, CAROL HOSSFIELD, TERESA JACOBS, RODERICK LOVE, ROCCO RELVINI, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, PHIL SMITH, AND LINDA STEWART,
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Appendix to
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APPLICATION TO THE HONORABLE JUSTICE
CLARENCE THOMAS AS CIRCUIT JUSTICE

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Appendix A

[DO NOT PUBLISH]

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13864

Non-Argument Calendar

DAVID W. FOLEY, JR.,
JENNIFER T. FOLEY,

Plaintiffs-Appellants,

versus

ORANGE COUNTY,
a political subdivision of Florida,
ASIMA M. AZAM,
individually and together, in their
personal capacities,
TIM BOLDIG,
individually and together, in their
personal capacities,
FRED BRUMMER,

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RICHARD CROTTY,
individually and together, in their
personal capacities, et.al.,

Defendants-Appellees.

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:22-cv-00456-RBD-EJK

Before ROSENBAUM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

David Foley, Jr., and Jennifer Foley, proceeding *pro se*, sued Orange County, Florida, Orange County officials, and Orange County employees for ordering the Foleys to destroy an aviary they used to maintain and sell a small flock of toucans on their property. The district court dismissed their complaint on res judicata grounds, denied their request for judicial notice, and denied their motion for leave to amend their complaint. The Foleys appealed. On appeal, the employee defendants moved for Rule 38 sanctions. For the reasons stated below, we affirm the district court and deny the defendants' motion for sanctions.

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I.

Since the early 2000s, the Foleys owned and maintained a small flock of toucans on their property to breed and sell. David Foley held licenses from the Florida Fish and Wildlife Conservation Commission to sell the toucans on his property from 2002 to 2008; but after a private citizen initiated an investigation of the sale of the toucans in 2007, the Orange County Enforcement Board ordered the Foleys to get a permit for their aviary structure, destroy it, or pay a daily fine. David Foley applied for a permit, but a county employee denied the application because using an aviary for commercial purposes violated the Orange County Code. The Foleys were ultimately forced to destroy their aviary and make other accommodations for their toucans. The Orange County Board of Zoning Adjustment, the Board of County Commissioners, and Florida state courts upheld the decision to deny the permit.

The Foleys sued Orange County and 19 individual county employees in their official and individual capacities in federal court, seeking a declaratory judgment that the Orange County land use ordinance is void and alleging violations of the Fourteenth Amendment's Due Process Clause and Equal Protection Clause, First Amendment, and Fourth Amendment. The district court held that Orange County's land use regulations were unlawful and granted summary judgment to the Foleys on that claim but granted summary judgment to Orange County on the other claims. *See Foley v. Orange County*, No. 6:12-cv-269, 2013 WL 4110414, at *14 (M.D. Fla. Aug. 13, 2013). The Foleys appealed, and we held that all the

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Foleys' federal claims had no plausible foundation or were clearly foreclosed by Supreme Court decisions. *See Foley v. Orange County*, 638 F. App'x 941, 945–46 (11th Cir. 2016). Thus, under *Bell v. Hood*, 327 U.S. 678, 682 (1946), we held that the district court lacked federal-question jurisdiction to decide the state law claim, vacated the district court's judgment, and ordered the district court to dismiss the case without prejudice. *See Foley*, 638 F. App'x at 946.

The Foleys again sued those defendants in Florida state court. They alleged state and federal takings and due process claims but later amended their complaint to drop the federal takings claim. The state court dismissed the Foleys' amended complaint with prejudice.

The Foleys then brought this suit against the same defendants in federal court, alleging federal takings and due process claims. The defendants moved to dismiss the complaint on res judicata grounds. The district court agreed and dismissed the federal due process claim because the Foleys had brought the same claim against the same defendants in state court and because the state court dismissed it on the merits. The district court also dismissed the federal takings claim on res judicata grounds because, even though the Foleys dropped that claim in state court, res judicata applies to all claims arising out of the same nucleus of operative facts, and the state takings claim the Foleys pursued was based on the same facts as their federal takings claim. The district court further held that even though the Foleys claimed they "reserved" their takings claim in state court, they made no affirmative

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representation in their state court pleadings to avoid the application of res judicata as required by our precedent. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1309 (11th Cir. 1992). The district court also denied in part the Foleys' motion for judicial notice to the extent the Foleys sought notice of the defendant's motive of any previous filings and denied the Foleys motion for leave to amend their complaint.

On appeal, the Foleys challenge the district court's dismissal of their claims on res judicata grounds, the district court's partial denial of their request for judicial notice, and the district court's denial of their motion to amend their complaint. Additionally, the employee defendants ask us to sanction the Foleys under Federal Rule of Appellate Procedure 38 for submitting arguments on appeal that are devoid of merit.

II.

We review *de novo* the district court's dismissal of the complaint based on res judicata. *See Kizzire v. Baptist Health Sys., Inc.*, 441 F.3d 1306, 1308 (11th Cir. 2006). We review the district court's ruling on a request for judicial notice for an abuse of discretion. *See Lodge v. Kondaur Cap. Corp.*, 750 F.3d 1263, 1273 (11th Cir. 2014). We also review the district court's denial of a motion to amend for an abuse of discretion, "but whether the motion is futile is a question of law that we review *de novo*." *Brooks v. Warden*, 800 F.3d 1295, 1300 (11th Cir. 2015).

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III.

The Foleys first argue that the district court erred in applying the federal res judicata standard instead of the state standard and that under the state standard the state court judgment creates no bar to this case on res judicata grounds.

The Foleys are correct that, "[i]n considering whether to give preclusive effect to state-court judgments under res judicata or collateral estoppel, the federal court applies the rendering state's law of preclusion." *Cmty. State Bank v. Strong*, 651 F.3d 1241, 1263 (11th Cir. 2011). Thus, the district court erred in applying the federal standard instead of the Florida standard. But because the Foleys' claims are still barred by res judicata under Florida law, that error does not require reversal.

A claim is barred by res judicata under Florida law where there is: "(1) identity of the thing sued for; (2) identity of the cause of action; (3) identity of the persons and parties to the action; (4) identity of the quality [or capacity] of the persons for or against whom the claim is made; and (5) the original claim was disposed on the merits." *Lozman v. City of Riviera Beach*, 713 F.3d 1066, 1074 (11th Cir. 2013). And "res judicata bars relitigation in a subsequent cause of action not only of claims raised[] but also claims that could have been raised." *Fla. Dept. of Transp. v. Juliano*, 801 So.2d 101, 107 (Fla. 2001).

The Foleys argue that the state court claims were not disposed of on the merits and that there is no identity of the cause of action. The Foleys say the state court did not dispose of their claims

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on the merits because the state court dismissed their claims (1) for lack of standing and thus for lack of jurisdiction and (2) based on absolute immunity, which is not an adjudication on the merits. We disagree. While the state court discussed the lack of an existing case or controversy, mootness, and ripeness, it made clear that it dismissed each of the Foleys' claims for failure to state a cause of action and dismissed the complaint with prejudice. And while the state court dismissed the claims against the individual defendants based on absolute immunity, it did so with prejudice because none of the Foleys' allegations sufficiently stated a claim against the individual defendants. Our precedent establishes that "dismissal of a complaint with prejudice satisfies the requirement that there be a final judgment on the merits." *Citibank, N.A. v. Data Lease Fin. Corp.*, 904 F.2d 1498, 1501 (11th Cir. 1990). Even more, under Florida law, "[a]n order finally dismissing a complaint for failure to state a cause of action is an adjudication on the merits." *Smith v. St. Vil*, 714 So. 2d 603, 605 (Fla. Dist. Ct. App. 1998). Thus, the district court disposed of the Foleys' claims on the merits.

We also disagree with the Foleys' argument that there was no identity of the causes of action in state court and federal court. In their complaint, the Foleys acknowledged that the defendants and the incidents here are the same as those in the state court case. Indeed, the Foleys raised the same federal due process claim in state court that they now raise in federal court. And while the Foleys dropped their federal takings claim in state court to pursue their state takings claim, res judicata bars relitigation of any claims that could have been raised in the previous action. *See Fla. Dept. of*

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Transp., 801 So.2d at 107. There is no serious dispute that the Foleys could not have raised their federal takings claim in state court—they did, even if they later decided to abandon it. And even though the Foleys now argue they "reserved" their federal takings claim in state court, we agree with the district court that they made no affirmative representation in their state court pleadings as required by our precedent to avoid the application of res judicata. *See Fields*, 953 F.2d at 1309. Thus, under res judicata, the Foleys are barred from now raising a claim they declined to pursue in state court.

The Foleys separately argue, citing *Laskar v. Peterson*, 771 F.3d 1291, 1300 (11th Cir. 2014), that the state court decision created a new intervening fact on which their federal due process claim now relies. In *Laskar* the state court's denial of a means available to remedy an alleged constitutional violation was the basis of the later due process claim in federal court. It was unclear whether the state court dismissed a mandamus request without considering the merits and thus whether there was a means available to Laskar to remedy the alleged constitutional violation. *See id.* at 1301. Here, however, the state court provided a means for the Foleys to remedy their alleged violations and dismissed their complaint on the merits, so this argument fails.

The Foleys next argue that the district court erred in denying their request for judicial notice of the defendants' inconsistent positions in state and federal court. It is appropriate for a court to take judicial notice of a fact that is both not subject to reasonable

dispute and is either (1) "generally known within the trial court's territorial jurisdiction" or (2) "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." Fed. R. Evid. 201(b). "Indisputability is a prerequisite" for a court to take judicial notice. *United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994). The district court did not abuse its discretion in declining to take judicial notice of the defendants' intent in state court because the parties' intentions were subject to reasonable debate, as illustrated by the parties' briefs, and because the accuracy of the defendants' motive cannot be determined without being reasonably questioned. Thus, the district court did not abuse its discretion in denying in part the Foleys' request for judicial notice.

Finally, the Foleys argue that the district court erred in denying as futile their motion for leave to amend their complaint to add a new count for declaratory relief as to whether the Fourteenth Amendment recognizes a legitimate claim of entitlement to a state-issued license to sell birds. The Foleys argue that the district court incorrectly concluded that the state court already rejected the argument. A district court is justified in denying leave to amend due to futility "when the complaint as amended is still subject to dismissal." *Hall v. United Ins. Co. of Am.*, 367 F.3d 1255, 1262–63 (11th Cir. 2004). We agree with the defendants that the district court did not err in denying the Foleys' motion for leave to amend because the Foleys could have raised that claim in their state court complaint. Thus, that claim would be barred by res judicata if the Foleys were allowed to add it to their complaint, so the district court's denial of their motion for leave to amend was justified by futility.

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IV.

The employee defendants ask us to impose sanctions under Federal Rule of Appellate Procedure 38, arguing that the Foleys raised frivolous claims in the face of clearly established law demonstrating that their claims were barred by res judicata. "Rule 38 sanctions are appropriately imposed against appellants who raise clearly frivolous claims in the face of established law and clear facts." *Parker v. Am. Traffic Sols., Inc.*, 835 F.3d 1363, 1371 (11th Cir. 2016). Under Rule 38, "a claim is clearly frivolous if it is utterly devoid of merit." *Id.* As explained above, the Foleys are correct that the district court erroneously applied the federal res judicata test instead of the Florida test. Thus, even though this error does not require us to reverse, it shows that the Foleys' arguments were not utterly devoid of merit. Therefore, we deny the employee defendants' motion for sanctions.

V.

For the reasons stated above, we **AFFIRM** the district court's grant of the defendants' motions to dismiss, denial of the Foleys' request for judicial notice, and denial of the Foleys' motion for leave to amend. We **DENY** the employee defendants' motion for Rule 38 sanctions.

Appendix B

In the

United States Court of Appeals

For the Eleventh Circuit

No. 22-13864

DAVID W. FOLEY, JR.,
JENNIFER T. FOLEY,

Plaintiffs-Appellants,

versus

ORANGE COUNTY,
a political subdivision of Florida,
ASIMA M. AZAM,
individually and together, in their
personal capacities,
TIM BOLDIG,
individually and together, in their
personal capacities,
FRED BRUMMER,
RICHARD CROTTY,
individually and together, in their
personal capacities, et.al.,

Defendants-Appellees.

Appendix B

Appeal from the United States District Court
for the Middle District of Florida
D.C. Docket No. 6:22-cv-00456-RBD-EJK

Before ROSENBAUM, GRANT, and BRASHER, Circuit Judges.

PER CURIAM:

The Petition for Panel Rehearing filed by David Foley, Jr., and Jennifer Foley is DENIED.

Appendix C

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
ORLANDO DIVISION

DAVID W. FOLEY, JR.; and
JENNIFER T. FOLEY,

Plaintiffs,

v. Case No. 6:22-cv-456-RBD-EJK

ORANGE COUNTY; ASIMA AZAM; TIM BOLDIG; FRED BRUMMER; RICHARD CROTTY; FRANK DETOMA; MILDRED FERNANDEZ; MITCH GORDON; TARA GOULD; CAROL HOSSFIELD; TERESA JACOBS; RODERICK LOVE; ROCCO RELVINI; SCOTT RICHMAN; JOE ROBERTS; MARCUS ROBINSON; TIFFANY RUSSELL; BILL SEGAL; PHIL SMITH; and LINDA STEWART,

Defendants.

ORDER

Before the Court are motions to dismiss filed by Orange County and various officials and employees as well as related motions for judicial notice. (Docs. 33–36, 38, 44.) At a hearing, the Court orally ruled on the motions; this Order memorializes the Court's pronouncements. (*See* Doc. 66.)

This long-running case arises out of the County prohibiting the *pro se* Plaintiffs from selling birds out of their residential property more than a decade

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ago. (Doc. 1.) Plaintiffs acknowledge that they previously brought federal and then state litigation against these same Defendants for these same claims; nevertheless, Plaintiffs again assert claims for unconstitutional takings and due process violations. (*See id.*) So the Official Defendants (Doc. 35), the Employee Defendants (Doc. 36), and the County (Doc. 38) each moved to dismiss the Complaint with prejudice on the basis of res judicata;[1] Plaintiffs opposed (Docs. 58–60).

For res judicata to bar a case: "(1) the prior decision must have been rendered by a court of competent jurisdiction; (2) there must have been a final judgment on the merits; (3) both cases must involve the same parties or their privies; and (4) both cases must involve the same causes of action." *Lobo v. Celebrity Cruises, Inc.*, 704 F.3d 882, 892 (11th Cir. 2013). Res judicata may be considered on a motion to dismiss "where the existence of the defense can be determined from the face of the complaint." *Solis v. Glob. Acceptance Credit Co.*, 601 F. App'x 767, 771 (11th Cir. 2015).

Here, these same Plaintiffs sued the same Defendants for takings and due process claims in state court in 2016. (*Compare* Doc. 33-1, pp. 8–11, 20, *with* Doc. 1, pp. 8–10, 28, 31.) There is no serious question that the state court is competent and

[1] Given the nature of the motions to dismiss, the County (Doc. 33) and the Employee Defendants (Doc. 34) also sought judicial notice of various court filings from the prior litigation. Plaintiffs then sought their own judicial notice (Doc. 44). These motions are due to be granted only to the extent that the Court takes notice of the fact of the underlying court filings. *See* Fed. R. Evid. 201. Plaintiffs' motion is due to be denied in part to the extent it asks the Court to take note of the "motive of" certain briefs. *See United States v. Jones*, 29 F.3d 1549, 1553 (11th Cir. 1994).

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entered a final judgment and that both cases involve the same parties, as Plaintiffs acknowledge. (*See* Doc. 1, ¶ 10(a)–(b); Doc. 33-4.) So the only factor for discussion is whether the cases involve the same causes of action.

In the state court litigation, Plaintiffs' original complaint asserted a takings claim under both the Florida and U.S. Constitutions as well as a denial of due process. (Doc. 33-1, p. 20 (Count Two).) In an amended complaint, Plaintiffs dropped the federal takings claim and proceeded only under Florida law; they also separated out the due process claim into a separate count. (Doc. 34-10, pp. 16–17 (Count Four), 22–23 (Count Seven).) The state court later dismissed the amended complaint with prejudice, explicitly rejecting both the takings and the due process claims. (Doc. 33-4, p. 3.)

So the due process claim is easily resolved: it was brought in state court and rejected, so it is barred. The takings claim, though slightly more nuanced, is barred too, as res judicata applies not only to the "precise legal theory," but to *all* claims arising out of the same nucleus of operative facts.[2] *Lobo*, 704 F.3d at 893 (cleaned up); *see Wesch v. Folsom*, 6 F.3d 1465, 1471 (11th Cir. 1993). Here, it is undisputed that the state takings claim Plaintiffs pursued to final judgment is based on the

[2] Though Plaintiffs assert that they "reserved" their federal takings claim (*see* Doc. 1, ¶ 11(c)), they made no such affirmative reservation in the state court pleading (*see* Doc. 33-10, pp. 16–17), which is required to avoid the application of res judicata. *See Fields v. Sarasota Manatee Airport Auth.*, 953 F.2d 1299, 1309 (11th Cir. 1992) (citing *Jennings v. Caddo Parish Sch. Bd.*, 531 F.2d 1331 (5th Cir. 1976)).

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exact same facts as the federal takings claim they pursue here—a conclusion underscored by the fact that Plaintiffs originally brought both claims together in their initial complaint. Indeed, Plaintiffs freely admit that the underlying "incidents" of the state case and this case are the same. (Doc. 1, ¶ 10(b).) As both cases involve causes of action that arise out of the same nucleus of operative facts, all four elements of res judicata are met, and this case is due to be dismissed. *See Lobo*, 704 F.3d at 893.

Accordingly, it is **ORDERED AND ADJUDGED**:

1. Defendants' motions for judicial notice (Docs. 33, 34) are **GRANTED**.
2. Plaintiffs' motion for judicial notice (Doc. 44) is **GRANTED IN PART AND DENIED IN PART**. It is **GRANTED** insofar as the Court takes judicial notice of the existence of the underlying court filings; it is **DENIED** insofar as Plaintiffs ask the Court to take notice of the motive of any filings and in all other respects.
3. Defendants' motions to dismiss (Docs. 35, 36, 38) are **GRANTED**.
4. Plaintiffs' Complaint (Doc. 1) is **DISMISSED WITH PREJUDICE**.
5. The Clerk is **DIRECTED** to close the file. All deadlines are terminated and all pending motions (including Plaintiffs' appeal of a ruling by the U.S. Magistrate Judge concerning discovery (Doc. 67)) are denied as moot.

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DONE AND ORDERED in Chambers in Orlando, Florida, on October 11, 2022.

ROY B. DALTON JR.
United States District Judge

Copies:
Pro se Plaintiffs David W. Foley, Jr. and Jennifer T. Foley

No. ____

In the
Supreme Court of the United States

DAVID W. FOLEY, JR., AND JENNIFER T. FOLEY,
Petitioners,

v.

ORANGE COUNTY, ASIMA AZAM, TIM BOLDIG, FRED BRUMMER, RICHARD CROTTY, FRANK DETOMA, MILDRED FERNANDEZ, MITCH GORDON, TARA GOULD, CAROL HOSSFIELD, TERESA JACOBS, RODERICK LOVE, ROCCO RELVINI, SCOTT RICHMAN, JOE ROBERTS, MARCUS ROBINSON, TIFFANY RUSSELL, BILL SEGAL, PHIL SMITH, AND LINDA STEWART,
Respondents.

Application for an Extension of Time
within which to File a Petition for a Writ of Certiorari to the
United States Court of Appeals for the Eleventh Circuit

APPLICATION TO THE HONORABLE JUSTICE
CLARENCE THOMAS AS CIRCUIT JUSTICE

PROOF OF SERVICE

DAVID AND JENNIFER FOLEY, in accordance with Rule 29.5(c), of the Rules of this Court, and Title 28 U.S. Code Section 1746, certify that on April 26, 2024, they caused a single copy of the foregoing Application for an Extension of Time and Appendix to be served through the United States Postal Service by first-class mail, postage prepaid, and by electronic mail, to all parties separately represented in this proceeding and required to be served, as follows:

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DAVID AND JENNIFER FOLEY DECLARE under penalty of perjury that the foregoing is true and correct.

Executed on: April 26, 2024

David W. Foley, Jr.,
1015 N. Solandra Dr., Orlando FL

Jennifer T. Foley
1015 N. Solandra Dr., Orlando FL

VERIFICATION OF INFORMATION PROVIDED HEREIN

STATE OF FLORIDA COUNTY OF ORANGE

Sworn to (or affirmed) and subscribed before me by means of physical presence this 26th day of April, 2024, by DAVID W. FOLEY, JR., and JENNIFER T. FOLEY who produced a driver's license as identification, regarding the attached instrument described as Proof of Service and to whose signatures this notarization applies.

Signature of Notary Public

Bradley Smith
Name of Notary Public

BRADLEY SMITH
Notary Public, State of Florida
Commission# HH 259155
My comm. expires April 28, 2026

My commission expires: Apr 28 2026