No. 19-2377

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

Anthony Kelly,

Plaintiff-Appellant,

v.

City of Alexandria; Lawrence Schultz; Daniel McMaster; Robert Dube,

Defendants-Appellees.

On Appeal from the United States District Court
for the Eastern District of Virginia at Alexandria
Case No. 1:19-cv-985, Hon. Liam O'Grady

BRIEF FOR APPELLANT ANTHONY KELLY

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February 27, 2020

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

DISCLOSURE STATEMENT

- In civil, agency, bankruptcy, and mandamus cases, a disclosure statement must be filed by **all** parties, with the following exceptions: (1) the United States is not required to file a disclosure statement; (2) an indigent party is not required to file a disclosure statement; and (3) a state or local government is not required to file a disclosure statement in pro se cases. (All parties to the action in the district court are considered parties to a mandamus case.)
- In criminal and post-conviction cases, a corporate defendant must file a disclosure statement.
- In criminal cases, the United States must file a disclosure statement if there was an organizational victim of the alleged criminal activity. (See question 7.)
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- Counsel has a continuing duty to update the disclosure statement.

No. 19-2377 Caption: Anthony Kelly v. City of Alexandria, et al.

Pursuant to FRAP 26.1 and Local Rule 26.1,

Anthony Kelly
(name of party/amicus)

who is Plaintiff-Appellant, makes the following disclosure:
(appellant/appellee/petitioner/respondent/amicus/intervenor)

1. Is party/amicus a publicly held corporation or other publicly held entity? ☐ YES ☑ NO

2. Does party/amicus have any parent corporations? ☐ YES ☒ NO
If yes, identify all parent corporations, including all generations of parent corporations:

3. Is 10% or more of the stock of a party/amicus owned by a publicly held corporation or other publicly held entity? ☐ YES ☑ NO
If yes, identify all such owners:

4. Is there any other publicly held corporation or other publicly held entity that has a direct financial interest in the outcome of the litigation? ☐YES ☑NO
If yes, identify entity and nature of interest:

5. Is party a trade association? (amici curiae do not complete this question) ☐YES ☑NO
If yes, identify any publicly held member whose stock or equity value could be affected substantially by the outcome of the proceeding or whose claims the trade association is pursuing in a representative capacity, or state that there is no such member:

6. Does this case arise out of a bankruptcy proceeding? ☐YES ☑NO
If yes, the debtor, the trustee, or the appellant (if neither the debtor nor the trustee is a party) must list (1) the members of any creditors' committee, (2) each debtor (if not in the caption), and (3) if a debtor is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of the debtor.

7. Is this a criminal case in which there was an organizational victim? ☐YES ☑NO
If yes, the United States, absent good cause shown, must list (1) each organizational victim of the criminal activity and (2) if an organizational victim is a corporation, the parent corporation and any publicly held corporation that owns 10% or more of the stock of victim, to the extent that information can be obtained through due diligence.

Signature: /s/Brian Wolfman Date: 2/27/2020

Counsel for: Anthony Kelly, Plaintiff-Appellant

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JURISDICTIONAL STATEMENT

The district court had subject-matter jurisdiction under 28 U.S.C. § 1331 and 28 U.S.C. § 1343(a)(3). *See* JA 130 (¶ 14).

The district court's November 6, 2019 memorandum opinion and order, granting Defendants' motion to dismiss, disposed of all claims of all parties. JA 217. The notice of appeal was filed on November 29, 2019. JA 218. This Court has jurisdiction under 28 U.S.C. § 1291.

STATEMENT OF THE ISSUE

In an earlier lawsuit (*Kelly I*), after Defendant City of Alexandria moved to dismiss Plaintiff Anthony Kelly's amended complaint, Kelly moved for leave to file a second amended complaint, seeking to add Section 1983 claims against the City and three City officers in their individual capacities. JA 81. The next day, the district court denied leave to allow Kelly's second amended complaint, stating without explanation that the amendment would be "futile." JA 121. After *Kelly I*'s dismissal, Kelly filed a new Section 1983 complaint (*Kelly II*) against Alexandria and the three officers in their individual capacities. *See* JA 127. The district court also dismissed the complaint in *Kelly II*. JA 217.

The issue in this appeal (in *Kelly II*) is whether the district court erred in dismissing Kelly's complaint on the ground that the complaint did not accurately cite a federal statute that establishes rights enforceable under Section 1983, and, alternatively, on issue-preclusion grounds.

STATEMENT OF THE CASE

Plaintiff Anthony Kelly brought the present action (*Kelly II*) under 42 U.S.C. § 1983, maintaining that his statutory and constitutional rights to be free from racial discrimination and harassment were violated and that he had been unlawfully subjected to retaliation for his protected activity. JA 127-28 (¶¶ 1-2). He sued the City of Alexandria, as well as three officials of the Alexandria Fire Department (AFD) in their individual capacities: Robert Dube, Daniel McMaster, and Lawrence Schultz, the Fire Chief, Deputy Fire Chief, and Assistant Fire Chief, respectively. JA 127-28 (¶ 1).

The district court dismissed Kelly's claims. It held that Kelly's complaint failed to accurately cite a federal statute that establishes rights enforceable under Section 1983. JA 216. The court also held that claim preclusion based on an earlier suit (*Kelly I*) barred Kelly's claims against the City, JA 214-15, and that, as to the individual Defendants, issue preclusion from that earlier suit barred Kelly's claims. JA 217.

This section of this brief first summarizes the facts Kelly alleged in support of his discrimination, harassment, and equal-protection claims, JA 127-49 (¶¶ 1-138), which Kelly maintains demonstrate that the district court should not have dismissed his complaint. This Court must take Kelly's factual allegations as true, drawing all reasonable inferences in his favor. *Tobey v. Jones*, 706 F.3d 379, 383 (4th Cir. 2013). This section then describes the procedural histories of *Kelly I* and *Kelly II*.

I. Factual background

Plaintiff Anthony Kelly, an African-American man, has worked as an AFD firefighter for over seventeen years, consistently earning excellent performance evaluations. JA 131 (¶ 21). His AFD supervisors recognized him for his commitment

to "advancing the interests of" his colleagues as well as for being "fair and professional." JA 131 (¶¶ 23-24). He was promoted to Battalion Chief in 2015. JA 131 (¶ 22).

As noted, the facts below summarize Kelly's allegations, which are described in considerably greater detail in the *Kelly II* complaint. JA 131-49.

A. Kelly's claims against the individual Defendants

Kelly maintains that three AFD officials—Dube, McMaster, and Schultz—have discriminated against him on the basis of his race and retaliated against him because he advocated on behalf of AFD's minority employees and submitted complaints to the City and the federal Equal Employment Opportunity Commission (EEOC) regarding AFD's noncompliance with city employment policy and federal law. Kelly also maintains that the discrimination and retaliation against him were severe and pervasive, giving rise to hostile-work-environment claims. Defendants' illegalities caused Kelly immediate monetary harm and undermined his opportunities for advancement. *See* JA 138-40, 143 (¶¶ 72-74, 81-82, 108). This section sets out the factual bases for Kelly's discrimination, retaliation, and hostile-work-environment claims, which, Kelly maintains, state claims for violations of both 42 U.S.C. § 1981(a) and the Equal Protection Clause.

1. On numerous occasions, AFD subjected Kelly to harsher discipline than his white colleagues for the same or very similar actions. JA 150 (¶ 146).

For example, Kelly was disciplined more harshly than two white AFD employees for on-the-job vehicle accidents. JA 140 (¶ 88). Schultz and McMaster ordered Kelly to complete a thirty-day driver-improvement program after he was involved in accidents.

JA 139 (¶¶ 80-81). Two white firefighters with similar accident records did not receive such harsh discipline. JA 140 (¶ 88). Participation in the driver-improvement program limited Kelly's ability to earn overtime, adversely affecting his compensation. JA 140 (¶ 82).

McMaster also disciplined Kelly, but not a similarly situated white Battalion Chief, for the exact same conduct. Kelly and the white Battalion Chief both responded to an emergency call and arrived simultaneously on the scene. JA 141 (¶ 96). Despite their concurrent arrival, McMaster disciplined Kelly, but not the white Battalion Chief, for failing to arrive punctually. JA 141 (¶¶ 95-96).

In addition, after speaking up against racial bias in a meeting of Battalion Chiefs, Kelly was disciplined but a white Battalion Chief who did the same was not. At the meeting, Kelly questioned the AFD Chief of Operations about his decision to transfer an African-American firefighter to a different station. JA 132 (¶ 27). Kelly believed the transfer was racially motivated. JA 132 (¶ 28). A white Battalion Chief also objected to the transfer. JA 132 (¶ 30). After the meeting, Kelly received a written reprimand for opposing the transfer and a disciplinary memo was placed in his file stating that he was insubordinate during the meeting. JA 132 (¶¶ 31-32). The white Battalion Chief was not disciplined. JA 132 (¶ 31).

2. Defendants' discriminatory and retaliatory actions have limited Kelly's advancement within AFD. After becoming a Battalion Chief, Kelly expressed interest in AFD's Training Battalion Chief position, and the Deputy Chief of Training encouraged him to apply. JA 138 (¶ 72). Kelly then applied, but Schultz did not select him for the position. JA 138 (¶ 73). When Kelly inquired about why he was not selected,

Schultz claimed that he did not select Kelly because the Deputy Chief of Training did not want to work with him—a false statement because, as noted, the Deputy Chief of Training had supported Kelly's application. *See* JA 138 (¶¶ 72-73). In fact, Schultz did not select Kelly in retaliation for Kelly's advocacy on behalf of members of the Black Fire Service Professionals of Alexandria (BFSPA)—an organization in which Kelly is an officer. JA 132, 139 (¶¶ 26, 74).

3. Kelly's supervisors have undermined his leadership by encouraging his subordinate employees to ignore his orders and by excluding him from key functions of his Battalion Chief position because of his race.

McMaster and Schultz have repeatedly emboldened Kelly's subordinate employees to ignore his orders. After a white subordinate employee posted a sign at AFD that black firefighters found offensive, Kelly informed McMaster that he would ask that employee to take it down. JA 144 (¶ 108). The white employee ignored Kelly's instruction to remove the sign, which constituted insubordination under AFD policy. JA 144 (¶ 108). Despite his knowledge of this insubordination, McMaster refused to discipline the white employee. JA 144 (¶ 108). AFD also received an outside complaint against the same white employee, and Kelly was initially assigned to investigate the complaint. JA 143 (¶ 108). Despite Kelly following all AFD investigatory procedures, Schultz reassigned the investigation to a different employee. JA 143 (¶ 108).

McMaster held a meeting about fire stations and employees under Kelly's command and excluded Kelly but included white, lower-ranked employees. JA 137 (¶ 62). Kelly also learned that Schultz was sharing information about the employees and stations under his command with a white Battalion Chief but not with Kelly. JA 137 (¶¶ 61-62).

4. McMaster also harassed Kelly by encouraging his subordinate employees to denounce him and by acting aggressively towards him.

McMaster tried to convince Kelly's subordinate employees to denounce him in retaliation for Kelly's protected activities, including filing an EEOC complaint and advocating for BFSPA members. JA 142, 144-45 (¶¶ 106, 111). During a meeting, and seemingly without reason, McMaster solicited complaints about Kelly from Kelly's subordinates by directing them to "prepare a statement" about the "bull**** with Anthony." JA 142 (¶ 104). A white Captain at the meeting offered to "fix" the statements so that they were uniformly negative. JA 142 (¶ 105).

Later, at a meeting, McMaster and Schultz accused Kelly of advocating only for African-American firefighters (even though that was untrue). *See* JA 135 (¶ 50). McMaster and Schultz told Kelly they were "tired" of him accusing Dube of racism in the workplace. JA 136 (¶ 52). During the meeting, Schultz banged his hands on the table, rolled up his sleeves, and told Kelly to "Google him." JA 145 (¶ 112). When Kelly later did so, he discovered that, in 2010, fifty-one African-American firefighters in D.C. had filed a race-discrimination lawsuit against Schultz. JA 145, 148 (¶¶ 112, 136). (Schultz's suggestion that Kelly "Google him" implied that Schultz wanted Kelly to know that the previous race-discrimination claims against him had not hindered Schultz's career advancement.) After the meeting, Schultz falsely accused Kelly of the same aggression that Schultz himself had displayed. *See* JA 144 (¶ 109).

5. Kelly experienced retaliation after, acting as a whistleblower, he alerted the City that AFD was not following proper employee-promotion procedures. McMaster then singled out Kelly for exposing AFD's noncompliance and unequal promotion activity.

JA 137 (¶ 60). Kelly's supervisors began to characterize him as a "leaker." JA 137 (¶ 64). Schultz also put a negative memo in Kelly's personnel file describing Kelly as having "lapses in his character and integrity." JA 137 (¶ 65). Kelly alleges that Schultz's issuance of the memo was retaliatory. JA 137 (¶¶ 66-67).

6. Kelly was subjected to AFD's disciplinary-hearing process after Schultz placed the negative memo in Kelly's personnel file concerning Kelly's complaint regarding AFD's noncompliance with employee-promotion procedures. Kelly was granted fewer procedural rights in the disciplinary-hearing process than was a similarly situated white colleague. JA 137 (¶¶ 65, 67). In light of this disparate treatment, Kelly filed a noncompliance report with the City's Human Resources Department, and the City subsequently removed Schultz's memo from Kelly's file. JA 137-38 (¶¶ 65, 67).

7. Kelly was passed over for a job opportunity in retaliation for helping another African-American firefighter write an EEO complaint against AFD. *See* JA 134, 146 (¶¶ 40, 122). Kelly and other firefighters were scheduled to attend a training about serving on AFD's hiring panel. JA 145 (¶ 116). AFD cancelled the training at the last minute because some AFD leaders were trying to remove Kelly from the panel. JA 145-46 (¶¶ 117-19). Kelly later learned that, at an AFD leadership meeting, Schultz asked why Kelly was involved in the hiring panel given "his EEO complaint against the AFD." JA 146 (¶ 122).

B. Kelly's claims against the City

Kelly has on numerous occasions informed the City of the disparate treatment, retaliation, and harassment he has experienced at AFD. *See, e.g.*, JA 135, 137-38, 145,

148 (¶¶ 46, 59, 64, 67, 115, 132). Despite the City's knowledge of Kelly's adverse treatment, Kelly maintains that the City has not taken any action to remedy the disparate treatment, retaliation, and harassment.

1. Kelly filed an EEOC charge against the City before he filed his lawsuit in *Kelly I*. JA 5 (¶ 6). Before filing with the EEOC, Kelly reported AFD's bullying and harassment to a white employee in the Office of Alexandria's City Manager. JA 145 (¶ 115). Despite the City's "zero tolerance" anti-bullying policy, the City did not provide Kelly any relief from the bullying and harassment he reported. JA 145 (¶ 115). And, as noted earlier, when Kelly realized he was receiving fewer procedural rights than his white colleague, he complained to the City's Human Resources Department. *See* JA 137-38 (¶ 67).

2. BFSPA voted "no confidence" in Dube, McMaster, and Schultz in 2019 based on disparate treatment in promotions, investigations, staffing, and assignments between (favored) white firefighters and (disfavored) African-American firefighters. JA 132, 148 (¶¶ 26, 131). The no-confidence vote was also based on the lack of diversity in fire-recruit school and a general decline in the number of minority AFD firefighters. JA 148 (¶ 131). BFSPA sent a letter to the Mayor of Alexandria after the vote, and BFSPA leaders met with the City Manager to discuss their concerns about Dube, McMaster, and Schultz. JA 148 (¶¶ 131-32).[1]

3. Despite multiple reports of racial slurs against and discriminatory treatment of AFD's minority firefighters, supervisors consistently took no action, indicating a City

[1] Shortly after the no-confidence vote, Dube and Schultz left AFD. JA 148-49 (¶¶ 135, 137).

custom or policy of indifference toward race-discrimination complaints. *See* JA 135, 146 (¶¶ 46, 51-52).

4. When Kelly made race-discrimination allegations against Dube within AFD, the Department assigned McMaster to investigate them even though Dube was McMaster's second-level superior. JA 145 (¶ 113). This represented a conflict of interest because AFD Deputy Chiefs are not normally allowed to investigate a racial-discrimination claim against a Fire Chief. JA 145 (¶ 113). Kelly subsequently lost all confidence in the integrity of the investigation. *See* JA 145 (¶ 113). The City did not provide Kelly any relief from the racial discrimination he reported.

II. Procedural background

A proper evaluation of this appeal requires an understanding of two suits, *Kelly I* and *Kelly II*.

A. *Kelly I*

Kelly I began when, in April 2018, Kelly filed an administrative-agency charge alleging that the City of Alexandria had discriminated against him in his employment in violation of Title VII of the Civil Rights Act of 1964. JA 5 (¶ 5). The EEOC later adopted the findings of the City's Office of Human Rights and issued a right-to-sue letter on February 4, 2019, which began the ninety-day period for Kelly to file suit under Title VII. JA 5 (¶ 6), 60; *see* 42 U.S.C. § 2000e-5(f)(1).

Kelly filed his Title VII suit against the City on May 7, 2019, alleging disparate treatment on the basis of race, retaliation for engaging in protected activities, and that the City had created a hostile work environment, all based on the events summarized

above. JA 4-5 (¶ 1); *see supra* at 2-9. The City then moved to dismiss, arguing, among other things, that because Kelly filed his claim more than ninety days after the EEOC issued its right-to-sue letter, Kelly's claims were time-barred. JA 56. The City also argued, as to Kelly's hostile-work-environment claim, that Kelly had not alleged sufficient facts. JA 56. Kelly opposed both arguments. *Kelly I* Opp'n to Mot. to Dismiss at 2-5 (ECF No. 18).

The district court held oral argument on the City's motion to dismiss on July 26, 2019, after which it took the timeliness of Kelly's Title VII claims under advisement. *See* JA 61-62. At the hearing, the court dismissed, without prejudice, Kelly's hostile-work-environment claim as insufficiently pleaded and gave Kelly the opportunity to amend the complaint to plead more facts and reinstate the claim. JA 67, 79-80. At no time did the court suggest that Kelly's other claims—disparate treatment and retaliation—were insufficiently pleaded.

Three days later, on July 29, 2019, Kelly took the opportunity that the court had suggested. He moved for leave to file a second amended complaint, which further described his hostile-work-environment allegations to meet the court's concerns about that claim. *See, e.g.*, JA 84-86, 105-07, 109-10, 113-15 (¶¶ 4-12, 135, 148-50, 168-73, 197, 200-05).

Kelly's proposed second amended complaint also added claims under 42 U.S.C. § 1983 against the City and against Dube, McMaster, and Schultz in their individual capacities. JA 83-84 (¶¶ 1-2). The complaint alleged, consistent with Section 1983's text, that all four defendants, acting under color of law, had violated "the Constitution and laws" of the United States. 42 U.S.C. § 1983; *see* JA 107-08, 111-15 (¶¶ 153-59, 177-93,

200-08). Specifically, the proposed second amended complaint alleged that the facts set out in the complaint, and summarized above (at 2-9), establish that Defendants had violated 42 U.S.C. § 1981a and the Equal Protection Clause. JA 107, 111, 114-15 (¶¶ 154, 178, 201, 207).[2]

The next day, July 30, 2019, the district court granted Defendants' motion to dismiss, holding Kelly's Title VII claims untimely. JA 121. In addition, before receiving an opposition from Defendants to Kelly's motion to amend, the court denied Kelly's motion for leave to file a second amended complaint as "futile," without providing any reasoning. JA 121.[3]

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[2] As explained below (at 15-16), Kelly's allegations make out a violation of 42 U.S.C. § 1981(a). That provision states:

> All persons within the jurisdiction of the United States shall have the same right in every State and Territory to make and enforce contracts, to sue, be parties, give evidence, and to the full and equal benefit of all laws and proceedings for the security of persons and property as is enjoyed by white citizens, and shall be subject to like punishment, pains, penalties, taxes, licenses, and exactions of every kind, and to no other.

With one exception, *see* JA 148 (¶ 136) (citing Section 1981, without the "a"), the complaint mistakenly refers to Section 1981**a**, which concerns the damages available in certain civil-rights actions. Section 1981**(a)**, on the other hand, confers rights enforceable against municipal actors under Section 1983. *See* JA 216 n.3. As explained in section I of the Argument (at 16-17), Kelly's mistaken reference to Section 1981**a** (and not to Section 1981**(a)**) is not a pleading error, let alone one that necessitated dismissal.

[3] Kelly has appealed the district court's decision in *Kelly I*. JA 122 (notice of appeal in *Kelly I*); *see* No. 20-1083 (4th Cir.). Defendants have moved this Court to dismiss that appeal as untimely, and Kelly has opposed. *See* Docs. 7, 11, 12, 13 in No. 20-1083. That motion to dismiss is pending.

B. *Kelly II*

Kelly then filed a new suit against the City and Dube, McMaster, and Schultz in their individual capacities. JA 127. He alleged claims based on disparate treatment on the basis of race, retaliation for engaging in protected activities, and the creation of a hostile work environment, all in violation of 42 U.S.C. § 1983. As already noted, Section 1983 authorizes suits against persons acting under color of law who violate the Constitution and laws of the United States. JA 127-28 (¶¶ 1-3).

Kelly's Section 1983 claims are predicated on violations of 42 U.S.C. § 1981(a) and the Equal Protection Clause. JA 127-28, 154 (¶¶ 1-2, 173-75). (As explained earlier, the complaint refers mistakenly to Section 1981a though it meant to refer to Section 1981(a). *See supra* note 2.) The factual predicates for the suit are summarized above (at 2-9).

Defendants moved to dismiss, arguing both that the complaint did not state violations of Section 1981a (as opposed to Section 1981(a), *see supra* note 2), and was res judicata in light of the decision in *Kelly I*. JA 156.

The district court granted the motion to dismiss. The court held that Kelly failed adequately to plead a Section 1983 claim against all Defendants because he had not accurately cited a federal statute that creates rights enforceable under Section 1983. JA 216. Specifically, the court held that, because the complaint referred to "Section 1981a" (as opposed to Section 1981) as the predicate "law" giving rise to Kelly's Section 1983 claim, Kelly had not stated a Section 1983 claim. JA 216. The district court expressly noted, however, that a complaint citing Section 1981 "will support" a Section 1983 claim. JA 216 n.3. In other words, the court reasoned that to state a Section 1983

claim concerning a violation of the "laws" of the United States, *see* 42 U.S.C. § 1983, a complaint must cite the predicate federal statute accurately. In so holding, the district court did not maintain that Kelly's Section 1983 allegations were *factually* deficient in any way. Nor did the court mention Kelly's equal-protection claims at all. JA 217. (The *Kelly II* complaint expressly and accurately identifies the Equal Protection Clause as a basis for Defendants' Section 1983 liability. JA 154 (¶¶ 173-75).)

The district court also addressed Defendants' res judicata arguments. It held that *Kelly II*'s Section 1983 claims against the City (but not against the individual Defendants) are barred by claim preclusion because the court had issued a judgment on the merits in *Kelly I*, the causes of action against the City in *Kelly I* and *Kelly II* were identical, and the City was a party in both actions. JA 213-15.[4]

As to the individual Defendants, the court held that Kelly's Section 1983 claims are not barred by claim preclusion because those defendants were not parties in *Kelly I*. JA 215. But the court nonetheless held that these claims are barred by issue preclusion. The court reasoned that because it had determined that the proposed second amended complaint was futile in *Kelly I*, the issues raised in *Kelly II* had already been decided on their merits. JA 217.

[4] Plaintiff does not challenge in this appeal that the claims against the City in *Kelly II* are barred by claim preclusion. But as noted earlier (at 11 note 3), Kelly has appealed *Kelly I*. If Kelly obtains the reversal that he seeks in *Kelly I*, the claims against the City would be reinstated.

SUMMARY OF ARGUMENT

Plaintiff Anthony Kelly properly pleaded his Section 1983 claims. For this reason, and because Kelly's Section 1983 claims against Robert Dube, Daniel McMaster, and Lawrence Schultz are not barred by claim preclusion or by issue preclusion, this Court should reverse.

I. Kelly properly pleaded his Section 1983 claims. His detailed factual allegations, taken as true, state valid causes of action, and the district court did not hold otherwise. Rather, the district court dismissed the complaint because it did not accurately cite the federal law that Defendants have been charged with violating. That was error. To survive a motion to dismiss, a complaint need not cite any particular law or legal theory under which relief could be granted, let alone accurately cite the law.

The district court also failed to mention Kelly's equal-protection claims at all in its order dismissing the complaint, although Kelly's complaint accurately cited the basis for these claims. This too was error. Kelly should have a chance to litigate these properly pleaded claims as well.

II.A. Claim preclusion bars successive litigation of the same claim in a subsequent suit, but only when the two suits involve the same parties or their privies. Dube, McMaster, and Schultz, sued in their individual capacities here in *Kelly II*, were never made parties to *Kelly I*. Nor were they in privity with the City (the only defendant in *Kelly I*) because, as this Court has repeatedly held, governmental employees sued in their individual capacities are not in privity with their governmental employers. Therefore, claim preclusion does not bar Kelly from litigating this case against Dube, McMaster, and Schultz.

B. Nor does issue preclusion bar Kelly's suit. Issue preclusion bars a second suit only when its issues are identical to issues that were actually determined in a prior suit. In *Kelly I*, the district court refused to allow Kelly leave to file a second amended complaint to add Section 1983 claims against the City and the individual Defendants—but it stated only that the amendment would be "futile," without any reasoning. Because of this lack of reasoning, it is unclear which issues were actually determined in *Kelly I*. This Court can neither conclude that the issues in *Kelly I* and *Kelly II* are identical nor that the issues had been actually determined in *Kelly I*, so issue preclusion does not bar the current suit against the individual Defendants.

ARGUMENT

Standard of Review

This Court reviews de novo a district court's denial of leave to amend a complaint on the basis of futility, the application of issue and claim preclusion, and a dismissal for failure to state a claim under Rule 12(b)(6). *See Davison v. Randall*, 912 F.3d 666, 690 (4th Cir. 2019) (futility); *Hately v. Watts*, 917 F.3d 770, 777, 781 (4th Cir. 2019) (issue preclusion and failure to state a claim); *Providence Hall Assocs. P'ship v. Wells Fargo Bank, N.A.*, 816 F.3d 273, 276 (4th Cir. 2016) (claim preclusion).

I. Kelly's complaint easily states a sufficient factual basis for relief, and the district court erred in dismissing it for failing to accurately cite a federal statute that creates rights enforceable under Section 1983.

A. To state a claim of racial discrimination in employment under Section 1983, like Kelly's claims here, a plaintiff need not plead facts that would prove a prima facie case of racial discrimination. *See Woods v. City of Greensboro*, 855 F.3d 639, 648 (4th Cir. 2017).

Rather, a complaint states a claim for relief if it pleads facts that allow the court to reasonably infer that the defendant could be liable for the alleged wrongdoing. *Id.* at 647. Kelly was thus not required to recite "detailed factual allegations," but only to allege sufficient "factual matter, accepted as true" to suggest a plausible cause of action. *ACA Fin. Guar. Corp. v. City of Buena Vista*, 917 F.3d 206, 211-12 (4th Cir. 2019); *see also Woods*, 855 F.3d at 648. The *Kelly II* complaint is thorough and detailed, spanning 29 pages and 175 paragraphs. JA 127-55; *see supra* at 2-9 (summarizing complaint's factual allegations). It easily meets these fact-pleading standards, and the district court did not hold otherwise.

B. The district court relied on a different (and erroneous) rationale when it dismissed Kelly's complaint as inadequately pleaded. It held that because Kelly's Section 1983 complaint mistakenly referenced 42 U.S.C. § 1981a instead of 42 U.S.C. § 1981, *see supra* note 2, Kelly had not "alleged a predicate deprivation of rights" and his complaint therefore failed to state a claim under Section 1983. JA 216.

This reasoning runs headlong into the "federal rules," which "effectively abolish the restrictive theory of the pleadings doctrine, making it clear that it is unnecessary to set out a legal theory for the plaintiff's claim for relief." 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219 (3d ed. 2004) (footnote omitted). Put otherwise, an "imperfect statement of the legal theory supporting the claim asserted" is not an adequate ground on which to dismiss a complaint. *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam). Thus, a mistake in identifying the law under which a claim arises is not a pleading error. *See Smith v. Campbell*, 782 F.3d 93, 98-99 (2d Cir. 2015) (reversing the district court's dismissal of a complaint that mistakenly identified

an unlawful-seizure claim as arising under the Fourth Amendment instead of under Section 1983).

In *Johnson v. City of Shelby*, police officers sued their city employer alleging a violation of their due-process rights when they were fired in retaliation for exposing the City's criminal activity. 574 U.S. at 10. The district court dismissed their complaint because it did not explicitly cite 42 U.S.C. § 1983. *Id.* The Supreme Court summarily reversed, *id.* at 11, a rare disposition employed to "correct[] a lower court's demonstrably erroneous application of federal law." *Maryland v. Dyson*, 527 U.S. 465, 467 n* (2013). The Court explained that because the officers had made clear their factual allegations, their complaint should have survived the City's motion to dismiss. *Johnson*, 574 U.S. at 12.

Like the officers' complaint in *Johnson*, Kelly's complaint contained ample factual material to support his claims, and, as noted, the district court did not hold otherwise. The reference to Section 1981a instead of Section 1981 in Kelly's complaint was obviously a mistake, which the district court itself acknowledged. *See* JA 216 n.3 (indicating that a violation of the rights conferred by Section 1981 would be a proper predicate for liability against a municipality and municipal officials under Section 1983). The "1981a" mistake has no effect on whether Kelly's complaint may withstand a motion to dismiss. As *Johnson* explained, plaintiffs need not include a legal theory in their complaint at all to survive a Rule 12(b)(6) motion. 574 U.S. at 12 (citing Wright & Miller, *supra*, § 1219). Because Kelly's detailed factual allegations constituted an "adequate statement of [his] claim[s]," the mistaken reference to Section 1981a cannot serve as the basis for the complaint's dismissal. *Id.* This Court should therefore reverse.

C. The district court's decision should be reversed for another, independent reason as to Kelly's claims that Defendants violated the Equal Protection Clause. In dismissing the complaint, the district court did not even discuss those claims. Those claims are pleaded in the complaint, *see* JA 154 (¶¶ 173-75), and no one disputes that equal-protection claims are enforceable under Section 1983. *See* 42 U.S.C. § 1983 (authorizing suit based on the "deprivation of any rights, privileges, or immunities secured by the Constitution"). In *Grimsley v. Luttrell*, No. 91-7225, 1993 WL 53150, at *1 (4th Cir. Mar. 2, 1993), an inmate brought a Section 1983 suit against a prison official for sexual harassment and physical abuse. *Id.* The district court dismissed the case after determining that the inmate could not establish the claims by a preponderance of the evidence, but the record indicated that the district court had not considered the physical-abuse claim. *Id.* Because it appeared "that the district court overlooked this claim," this Court vacated and remanded so that the claim could be considered. *Id.* at *1-2. Similarly, this Court should reverse and remand for the district court to consider the equal-protection claims.

II. Neither claim preclusion nor issue preclusion bars Kelly from bringing this Section 1983 suit against the individual Defendants.

Claim preclusion and issue preclusion, "collectively referred to as 'res judicata,'" are distinct doctrines that govern the preclusive effect of a prior judgment. *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008). Res judicata sometimes refers to claim preclusion only, *see United States v. Tohono O'Odham Nation*, 563 U.S. 307, 315 (2011), while issue preclusion is sometimes called collateral estoppel, *see Taylor*, 553 U.S. at 892 n.5. To avoid confusion, this brief uses the terms "claim preclusion" and "issue preclusion."

A. Claim preclusion does not bar Kelly from suing the individual Defendants because they were not parties in *Kelly I* and were not in privity with the City.

Claim preclusion may foreclose litigation of a plaintiff's claim in successive suits regardless of whether the two cases involve the same issues. *Taylor*, 553 U.S. at 892. But claim preclusion—the district court's basis for dismissing the *Kelly II* claims against the City—applies only when there is "(1) a final judgment on the merits in a prior suit; (2) an identity of the cause of action in both the earlier and the later suit; and (3) *an identity of parties or their privies in the two suits*." *Pueschel v. United States*, 369 F.3d 345, 354-55 (4th Cir. 2004) (emphasis added). As the district court correctly ruled (JA 215), the third factor is missing here with respect to the individual Defendants.

Although the City is a party in both *Kelly I* and *Kelly II*, Dube, McMaster, and Schultz were not parties to *Kelly I*. Kelly tried to add them as parties to *Kelly I* in his proposed second amended complaint, but the district court's refusal to allow Kelly to file that complaint means that they never became parties.

Nor are the individual Defendants in privity with the City. This Court held in *Andrews v. Daw*, 201 F.3d 521, 525-26 (4th Cir. 2000), and reaffirmed in *Brooks v. Arthur*, 626 F.3d 194, 201-02 (4th Cir. 2010), that governmental employees named as defendants in their individual capacities in a later Section 1983 suit are not in privity with their governmental employers named in an earlier Section 1983 suit. *Cf.* Restatement (Second) of Judgments § 36(2) (Am. Law Inst. 1982) ("A party appearing in an action in one capacity, individual or representative, is not thereby bound by or entitled to the benefits of the rules of res judicata in a subsequent action in which he appears in another capacity.").

As this Court has explained, *see Daw*, 201 F.3d at 525, privity is lacking because of two key legal distinctions between suing the City itself (or, the equivalent, suing city officers in their official capacities), *see Monell v. Dep't of Soc. Servs.*, 436 U.S. 658, 690 (1978), and suing city officers for individual liability (as Kelly is doing here). First, when suing the governmental entity or its employees in their official capacities, plaintiffs recover damages from the public treasury, rather than from the individual officers' pockets. *See Daw*, 201 F.3d at 525. Second, plaintiffs must meet a different standard of causation when suing a city or its officers in their official capacities (that the city is a "moving force" behind the deprivation of a federal right, *see Monell*, 436 U.S. at 694) than when suing them individually (simply that the officer acting under color of law caused the deprivation of a federal right). *See Daw*, 201 F.3d at 525 (quoting *Kentucky v. Graham*, 473 U.S. 159, 165 (1985)).

In sum, because the individual Defendants were not in privity with the City, claim preclusion does not bar the *Kelly II* suit against them.

B. Issue preclusion does not bar Kelly's suit against the individual Defendants because the issues in *Kelly II* are not "identical" to the issues in *Kelly I* nor were they "actually determined" in *Kelly I*.

The district court held that Kelly's claims against the three individual Defendants—who were not parties to *Kelly I*—were barred by non-mutual issue preclusion. "Issue preclusion … bars 'successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment,' even if the issue recurs in the context of a different claim." *Taylor v. Sturgell*, 553 U.S. 880, 892 (2008)

(quoting *New Hampshire v. Maine*, 532 U.S. 742, 748-49 (2001)). The party asserting the defense of issue preclusion must show:

> (1) that the issue sought to be precluded is identical to one previously litigated (element one);
>
> (2) that the issue was actually determined in the prior proceeding (element two);
>
> (3) that the issue's determination was a critical and necessary part of the decision in the prior proceeding (element three);
>
> (4) that the prior judgment is final and valid (element four); and
>
> (5) that the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue in the previous forum (element five).

Collins v. Pond Creek Mining Co., 468 F.3d 213, 217 (4th Cir. 2006) (quotation marks omitted; line breaks added for clarity) (quoting *Sedlack v. Braswell Servs. Grp., Inc.*, 134 F.3d 219, 224 (4th Cir. 1998)); *see also* Restatement (Second) of Judgments § 27 (Am. Law Inst. 1982); *id.* § 29 (special precautions for applying non-mutual issue preclusion).

The issue-preclusion defense here fails the first two elements: the issues in *Kelly II* are not identical to those in *Kelly I*, and the issues in *Kelly II* were not actually determined in *Kelly I*.

1. No identity of issues. When the party asserting issue preclusion cannot eliminate ambiguity as to whether a particular issue was previously determined, the court must conclude that the issues in both suits are not identical and reject issue

preclusion. *See Russell v. Place*, 94 U.S. 606, 608 (1876); *O'Reilly v. Cty. Bd. of Appeals*, 900 F.2d 789, 792 (4th Cir. 1990).

The district court's decision in *Kelly I* not to allow Kelly to file his proposed second amended complaint, JA 121, was insufficient to have issue-preclusive effect in *Kelly II*. The district court's opinion in *Kelly I* establishes no basis to believe that it decided the same issues presented in *Kelly II*. The unelaborated, one-word rejection of the amendment as "futile," JA 121, is, on its face, different from the issues in *Kelly II*—which concern whether Kelly has been subjected to unlawful disparate treatment, retaliation, and a hostile work environment. Defendants' recent opposition to Kelly's motion to hold the briefing schedule in abeyance makes the same point, arguing that "the two appeals involve different sets of issues." Opp'n to Appellant's Mot. to Hold Briefing Schedule in Abeyance at 4, *Kelly v. City of Alexandria* (*Kelly II*), No. 19-2377 (4th Cir. filed Feb. 12, 2020) (Doc. 20).[5]

In sum, because the district court denied Kelly leave to file a second amended complaint without reasoning, this Court "cannot say with any degree of certainty that

[5] As Defendants further explained in their opposition:

> *Kelly I* concerned Kelly's Title VII claims and their untimeliness, whereas *Kelly II* concerns Kelly's putative section "1983a" [sic] and Fourteenth Amendment claims and their res judicata bar and collateral estoppel bar as to the individual firefighters. Whether Kelly's putative section 1983a [sic] and Fourteenth Amendment claims are sufficiently pleaded is squarely before the Court in this appeal but not in *Kelly I*.

Opp'n to Appellant's Mot. to Hold Briefing Schedule in Abeyance at 4, *Kelly v. City of Alexandria* (*Kelly II*), No. 19-2377 (4th Cir. filed Feb. 12, 2020) (Doc. 20).

[the *Kelly I* court] decided the identical issue raised" in *Kelly II*, it should therefore allow *Kelly II* to proceed. *See O'Reilly*, 900 F.2d at 792.

2. Issues not actually determined. By disposing of the proposed second amended complaint as "futile," the *Kelly I* court did not actually determine the issues in *Kelly II*. When a court denies leave to file an amended complaint on futility grounds, it determines that there is one or more reasons that the amendment would "not withstand [a] motion to dismiss." *Perkins v. United States*, 55 F.3d 910, 917 (4th Cir. 1995) (citing *Glick v. Koenig*, 766 F.2d 265, 268-69 (7th Cir. 1985)).

But for a merits decision to have issue-preclusive effect as "actually determined," the prior court must have delineated the precise basis for its decision, leaving nothing to conjecture about what it determined. *See Kennedy v. Mendoza-Martinez*, 372 U.S. 144, 157-58 (1963); *Russell v. Place*, 94 U.S. 606, 609-10 (1876); *O'Reilly v. Cty. Bd. of Appeals*, 900 F.2d 789, 792 (4th Cir. 1990); *see also* Restatement (Second) of Judgments § 27 (Am. Law Inst. 1982). As the leading treatise puts it, "if there is no *showing* as to the issues that were actually decided [in case one], there is no issue preclusion" in case two. 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4420 (3d ed. 2016) (emphasis added).

The case law supports a finding that the "actually determined" element is lacking here. In *Russell v. Place*, 94 U.S. at 606-07, the Supreme Court considered a patent-infringement action against Place for a patent on which Russell prevailed and received damages in a previous infringement action. Although receiving damages for patent infringement is a decision on the merits, the earlier decision did not "disclose the nature of the infringement for which damages were recovered." *Id.* at 609. Thus, lack of

novelty and prior use, for example, were not actually determined, and Place was not precluded from asserting them as defenses in the second action. *Id.* at 607-09. Similarly, here, a futility determination without reasoning, like any other decision without explanation, is insufficient for the parties to know which issues were actually determined. Thus, the bare-bones futility determination in *Kelly I* cannot be said to have actually determined the various discrimination issues in *Kelly II*.

This Court and other federal courts have consistently applied the principles enunciated in *Russell* in holding that, to preclude subsequent litigation of an issue, an earlier decision must have explained the basis of its decision unambiguously so as to establish what it actually determined.

In *C.B. Marchant Co. v. Eastern Foods, Inc.*, 756 F.2d 317, 318-19 (4th Cir. 1985), Marchant sued to collect debts Eastern Foods owed it as a result of a de facto merger with a company (B & B) in debt to Marchant. Marchant claimed that it need not litigate the de facto merger question because the issue whether Eastern had de facto merged with B & B had already been decided by a jury in a prior action. *Id.* at 319. Though the earlier jury had decided Eastern's liability for B & B's debts, the jury had been instructed that the liability could be based on *either* a de facto merger *or* a contractual merger, and its verdict did not state the basis for liability. *Id.* Because this Court could only conjecture as to the basis for the jury's verdict, it held that the issue of Eastern's de facto merger with B & B was not actually and necessarily determined in the first case, so it rejected Marchant's plea for issue preclusion in the second case. *Id.* Similarly, this Court can only conjecture as to the basis for the *Kelly I* court's futility determination and so should reject Defendants' plea for issue preclusion.

This Court forcefully reaffirmed this principle last year in *Hately v. Watts*, 917 F.3d 770, 774 (4th Cir. 2019). There, Watts obtained Hately's email password and snooped through his inbox. *Id.* The court dismissed Hately's first lawsuit, holding that he "failed to sufficiently allege how he sustained any injury to person or property by reason of a violation of the [Virginia Computer Crimes Act]." *Id.* at 774-75 (brackets in original). Hately then filed a second suit against Watts alleging the same legal violations but including more factual detail in his complaint. *Id.* at 775. This Court decided that the second lawsuit was not barred by issue preclusion. *Id.* at 779-80 (applying Virginia law, but relying on this Court's federal-preclusion law in declining "to apply issue preclusive effect to prior court dispositions subject to multiple interpretations").

Though the court in Hately's first case gave a reason for its dismissal—that Hately did not allege Watts's unlawful actions injured him—ambiguity remained about whether the dismissal was because the categories of damages Hately alleged were not legally actionable *or* because Hately failed to describe the allegations with sufficient specificity in his complaint. *Id.* at 778-79. This Court held that because it was unclear what issues the prior court actually decided, the decision in Hately's first case did not have issue-preclusive effect in the second case. *See id.*[6]

[6] This Court's decisions in *C.B. Marchant* and *Hately* are representative of how this Court and lower courts in this Circuit rule on issue preclusion when the exact reasoning and issue actually decided in the first case are ambiguous. *See, e.g.*, *Bd. of Cty. Supervisors v. Scottish & York Ins. Servs.*, 763 F.2d 176, 179 (4th Cir. 1985) (unclear which of six theories formed the basis of a jury's liability finding, so none could have preclusive effect); *United States v. Modanlo*, 493 B.R. 469, 476 (D. Md. 2013) (denying issue preclusion because "[t]he record simply does not indicate whether, if at all, the Bankruptcy Court considered and resolved" the issue. The court refused to "distill special findings" from the decision's "general, essentially form language." (citing *Bd. of*

Mitchell v. Humana Hospital-Shoals, 942 F.2d 1581, 1582 (11th Cir. 1991), relied on heavily by this Court in *Hately*, 917 F.3d at 779, concerned a hospital employee who sued her employer after she resigned, claiming that she had been constructively discharged in violation of Title VII. Because a state court had already denied her unemployment benefits, the district court reasoned that the state court had also already decided that she lacked just cause to resign, so she could not have been constructively discharged. *Mitchell*, 942 F.2d at 1582. Thus, the district court held her Title VII constructive-discharge claim issue-precluded. *Id.* at 1583. On appeal, however, the Eleventh Circuit noted that the state court's decision did not give reasons for denying her unemployment benefits. *Id.* The Eleventh Circuit observed that the state court could have denied Mitchell unemployment benefits because she lacked just cause to resign *or* because she was unavailable for work since resigning. *Id.* Because the state court could have relied on either reason to deny Mitchell unemployment benefits, the Eleventh

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Cty. Supervisors, 763 F.2d at 179)); *United States v. Fletcher*, No. 502-cv-493-H3, 2005 WL 5290464, at *3 (E.D.N.C. Apr. 12, 2005) ("denying the use of collateral estoppel on the issue of damages where the jury returned a general verdict"), *aff'd*, 205 F. App'x 155 (4th Cir. 2006); *In re Ponos*, No. 12-04309-8-ATS, 2013 WL 5681067, at *5 (Bankr. E.D.N.C. Oct. 18, 2013) (denying issue preclusion because the lower court's order "contain[ed] several ambiguities that ma[de] it impossible for this court to ascertain which claims for relief were actually litigated"); *In re Webb*, No. 08-bk-743, 2009 WL 1139548, at *6 (Bankr. N.D. W. Va. Mar. 31, 2009) (denying issue preclusion because the "complaint contained five separate causes of action," but the previous decision "d[id] not indicate upon which facts or causes of action the default judgment [wa]s based"); *In re Grimm*, 168 B.R. 102, 112 (Bankr. E.D. Va. 1994) (denying issue preclusion because it was unclear whether the issue was actually determined).

Circuit could not "be certain" what had been actually determined. *Id.* at 1584. Without this certainty, the court rejected the employer's issue-preclusion defense. *Id.* at 1584.

In the cases discussed above, the first tribunals' decisions provided insufficient reasoning for their merits determinations to demonstrate whether an issue was "actually determined." If issue preclusion could not operate in these cases, it certainly cannot operate in *Kelly II*. The *Kelly I* court gave *no* reasoning for denying Kelly's second amended complaint as futile, which leaves open the possibility that any of a large number of issues were the basis for the district court's one-word reference to futility. This Court cannot then conjecture about what was actually decided as part of *Kelly I*'s one-word futility determination, making it impossible to determine whether the issues in *Kelly II* were actually decided in *Kelly I*. For that reason, none of the claims alleged in *Kelly II* are issue-precluded.

CONCLUSION

The district court's decision should be reversed and remanded for proceedings on the merits.

Respectfully submitted,*

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REQUEST FOR ORAL ARGUMENT

Appellant requests oral argument, which would significantly aid this Court's decisional process. Oral argument would allow this Court, among other things, to determine whether a futility determination has issue-preclusive effect on subsequently filed suits. Moreover, this Court may need to reinforce the factual- and legal-pleading requirements, and oral argument would allow the Court to more fully do so.

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 7,019 words, as calculated by Word 2016, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Circuit Rule 32(a)(1). This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in 14-point Garamond, a proportionally spaced typeface.

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February 27, 2020

CERTIFICATE OF SERVICE

I certify that on February 27, 2020, I electronically filed this Brief of Appellant Anthony Kelly using the CM/ECF System, which will send notice of the filing to the following registered CM/ECF users: counsel for Defendants-Appellees' Michelle Gambino (gambinom@gtlaw.com), Laura Metcoff Klaus (klausl@gtlaw.com), and Michael A. Hass (hassm@gtlaw.com).

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