**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

# REPLY BRIEF FOR APPELLANT ANTHONY KELLY

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## INTRODUCTION

If Defendants had their way, the Federal Rules of Civil Procedure would require that a complaint perfectly state its legal theory, overturning the fact-based pleading standards enshrined in the Rules over eighty years ago. And if Defendants had their way, plaintiffs whose claims were rejected—summarily and without explanation—in an earlier suit would be forever barred from later litigating any issue that theoretically could have been decided in that suit, even against new parties.

But that's not the law. Federal pleading rules require only a factual showing supporting a plausible claim for relief, and, as the Supreme Court has instructed, they do not require a plaintiff to identify a legal theory. *See Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam). Defendants nowhere contend that Anthony Kelly's complaint was factually deficient in any way. Rather, they hang their argument on just one supposed deficiency: Kelly's incorrect citation to Section 1981—a tiny mistake in stating his legal theory that is irrelevant on a motion to dismiss, and from which he had nothing to gain.

Turning to Defendants' other grievance, under well-established issue-preclusion principles, a second suit is barred only where it raises issues that are identical to those actually decided an earlier suit. Those determinations were made impossible here when, without reasoning, the court in the earlier suit denied Kelly any chance to litigate those issues in the first place. The district court's one-word explanation for denying Kelly's motion to amend in *Kelly I*—that amendment would be "futile"—rules out any

determination that the issues presented in *Kelly II* were actually litigated in *Kelly I* and raises fairness concerns that are at the heart of the issue-preclusion inquiry.

For these reasons and others discussed below, the district court erred by dismissing Kelly's Section 1983 claims. This Court should reverse.[1]

## ARGUMENT

### I. The district court erred by dismissing Kelly's Section 1983 claims.

**A. Federal pleading rules require sufficient facts, not legal theories.** A complaint states a claim when it provides "a short and plain statement of the claim showing that the pleader is entitled to relief." *Johnson v. City of Shelby*, 574 U.S. 10, 11 (2014) (per curiam) (quoting Fed. R. Civ. P. 8(a)). A plaintiff need not recite "detailed factual allegations" at this stage, but rather satisfies the pleading requirements simply by offering enough facts to make a claim "plausible." *ACA Fin. Guar. Corp. v. City of Buena Vista*, 917 F.3d 206, 211-12 (4th Cir. 2019). Kelly's complaint more than satisfied this requirement. It spanned 29 pages and 175 paragraphs and thoroughly detailed the harm Kelly suffered at the hands of Defendants. *See* Opening Br. 16. As noted, Defendants do not contest the complaint's factual sufficiency.[2]

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[1] Defendants concede that "this appeal was timely filed," but nevertheless contend that this Court lacks jurisdiction over this appeal because Kelly "seeks relief from a non-appealable order" issued in *Kelly I*. Resp. Br. 2. The timeliness of the *Kelly I* appeal has no bearing on this Court's appellate jurisdiction over the present appeal (in *Kelly II*), and Defendants cite no authority suggesting otherwise. The premise of Defendants' argument has now evaporated in any event. This Court recently denied Defendants' motion to dismiss the *Kelly I* appeal as untimely and will hear that appeal on its merits. *See* Dkt. 15, No. 20-1083 (4th Cir. May 5, 2020).

[2] Although Defendants never contest the factual adequacy of Kelly's complaint in pleading his Section 1983 claims, they make a handful of assertions about the facts that

Instead, Defendants seek to inject into Rule 8(a) another requirement that does not appear there: that the complaint must perfect the plaintiff's legal theory by correctly citing the statutory authority on which the claims rely. *See* Resp. Br. 12, 19. But the federal rules "mak[e] it clear that it is unnecessary to set out a legal theory" in a complaint. *Johnson*, 574 U.S. at 12 (quoting 5 Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 1219 (3d ed. 2004)). And if a plaintiff may prevail on a motion to dismiss without identifying *any* legal theory in her complaint, *see id.*, it cannot be that Kelly's complaint should be dismissed just because Kelly sometimes (but not always) referenced the wrong statute.

Simply put, an "imperfect statement of the legal theory" underlying the claim—such as Kelly's references to Section 1981a when he meant to refer to the rights protected by 1981(a)—"does not countenance dismissal" where the plaintiff's factual showing is sufficient, as it is here. *See Johnson*, 574 U.S. at 11 (brackets omitted).

**B. Kelly was not required to name the correct predicate statute for his Section 1983 claim.** By exaggerating the significance of one missing set of parentheses, Defendants run headlong into decades of this Court's precedent eschewing any requirement that a complaint use "precise or magical words" or "legal labels" to adequately state a claim. *See King v. Rubenstein*, 825 F.3d 206, 222 (4th Cir. 2016) (first

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do not accurately reflect Kelly's pleading. For example, Defendants characterize Kelly's complaint as maintaining that simply being sent to remedial driving school was itself discriminatory. Resp. Br. 4. But Kelly alleges that white co-workers with similar driving records were not similarly disciplined. JA 140 (¶ 88). More could be said about Defendants' factual misstatements, but that is unnecessary because, at the motion-to-dismiss stage, it is the complaint's plausible allegations, and not Defendants' disputes with them, that matter. *See Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 556 (2007).

quoting *Stevenson v. City of Seat Pleasant*, 743 F.3d 411, 418 (4th Cir. 2014); then quoting *Labram v. Havel*, 43 F.3d 918, 920 (4th Cir. 1995)). Of particular importance here, and contrary to Defendants' contentions, *see* Resp. Br. 18-20, legal labels are unnecessary to identify the underlying law or constitutional provision giving rise to a Section 1983 claim. *See King*, 825 F.3d at 222.

In *King*, the district court dismissed a Section 1983 claim alleging injuries suffered when prison officials required him to undergo surgery against his will. 825 F.3d at 212-14. Although the plaintiff's complaint did not expressly identify a Fourteenth Amendment Due Process Clause violation as the underlying constitutional violation driving his Section 1983 claim, this Court held that "[s]imply because [plaintiff] did not specifically label a claim under a due process heading does not mean that he did not raise one" under the facts alleged. *Id.* at 222; *see also Stevenson*, 743 F.3d at 418-19, 420 (complaint sufficiently stated Section 1983 claim for bystander liability—liability against officers who fail to prevent constitutional violations by fellow officers—though the complaint did not expressly use the words "bystander liability"). Here, Kelly *did* identify a predicate statutory authority for his Section 1983 claim, but mistakenly referred to it as "1981a" (instead of "1981" or "1981(a)"). Yet even if Kelly had identified no predicate statutory authority for his Section 1983 claims, the omission of a "legal label" would not be fatal. *See King*, 825 F.3d at 222.

Defendants assert that a handful of decisions stand for the proposition that courts may dismiss complaints that cite Section 1983 but fail to identify a predicate rights-creating statute. Resp. Br. 18-20. But Defendants' characterization of these decisions is simply wrong. Defendants' cases stand for no more than the truism that an official is

not liable under Section 1983 when there is no underlying statutory or constitutional violation; in other words, a plaintiff must (of course) adequately plead facts showing a statutory or constitutional injury to state a claim under Section 1983. *See, e.g.*, *City of Los Angeles v. Heller*, 475 U.S. 796, 799 (1986) (holding a city and its officials could not be held liable under Section 1983 because the police officers did not inflict a constitutional injury); *Waybright v. Frederick County*, 528 F.3d 199, 203 (4th Cir. 2008) (noting officials "cannot be liable under § 1983 without some predicate constitutional injury at the hands of the … state officer") (cleaned up); *Perry v. Hous. Auth. of Charleston*, 664 F.2d 1210, 1217 (4th Cir. 1981) (finding no Section 1983 violation where no enforceable federal statutory right was violated). *But see Dennis v. County of Fairfax*, 55 F.3d 151, 156 (4th Cir. 1995) (noting that Section 1981 rights are enforceable through Section 1983); JA 216 n.3 (district court noting the same). None of these cases remotely suggests that the failure to identify the correct predicate statutory or constitutional provision underlying a Section 1983 claim is fatal where the plaintiff otherwise pleads facts showing an underlying violation. And as we have explained, Defendants do not dispute that Kelly made that factual showing.

Defendants' attempt (at 18-20) to distinguish *Johnson*, 574 U.S. 10, and *Smith v. Campbell*, 782 F.3d 93 (2d Cir. 2015), from this case because the plaintiffs there failed to invoke Section 1983, not the predicate violation, is beside the point. *See King*, 825 F.3d at 222; *Stevenson*, 743 F.3d at 418-19. There is no functional difference between mis-citing the predicate rights-creating provision (as here) and omitting the vehicle through which a party brings claims under that provision (as in *Johnson* and *Smith*). In both situations, the plaintiff has simply not named a statute that is a component of his legal

theory, but, as already shown, that is not necessary to meet federal pleading standards. *See Johnson*, 574 U.S. at 11.

**C. Kelly's Section 1983 claims are preserved, and his references to Section 1981a were harmless mistakes.** Defendants' contention (at 14) that Kelly improperly asks this Court to "fashion new claims" that he did not present to the district court badly misunderstands Kelly's argument. Kelly maintains that his complaint *always* sufficiently pleaded his workplace-discrimination claims under Section 1981. His complaint contained ample factual material to establish the basis for Section 1983 claims under 42 U.S.C. § 1981, which as noted above (at 2-3) is all that is necessary to survive a motion to dismiss.

That Kelly did not explicitly acknowledge below that his references to Section 1981a were a mistake is irrelevant because his complaint speaks for itself: It is clear that Kelly was referencing rights that are protected by Section 1981 as the predicate statute supporting his Section 1983 claims in Counts I, II, and III of his complaint. JA 149-53 (¶¶ 143-72). Nor did Kelly "double[] down" on his mis-citation to Section 1981a in his opposition to Defendant's motion to dismiss, as Defendants contend (at 15). Quite the contrary, Kelly properly affirmed "Section 1981 as the predicate" statute for his Section 1983 claim and correctly referenced Section 1981 several times as the relevant rights-creating statute. *See* Opp'n to Mot. to Dismiss (*Kelly II*), Dkt. 13, at 6-7. (Indeed, even Kelly's complaint referred to Section 1981 at one point. JA 148 (¶ 136).)

What's more, Kelly's opposition to Defendants' motion to dismiss correctly cited precedents that say an employee can use Section 1981 to sue for race discrimination in employment. Opp'n to Mot. to Dismiss (*Kelly II*), Dkt. 13, at 7. It is clear, therefore, that

the reference to Section 1981a in Kelly's complaint was a mistake and that Kelly always intended to cite a federal statute that gives rise to enforceable rights—here, Section 1981—as the predicate for his statute-based Section 1983 claims.

Defendants' argument (at 15-20) that Kelly knowingly and purposefully invoked Section 1981a instead of Section 1981 defies common sense. Kelly stood to gain nothing from naming "1981a" instead of "1981" or "1981(a)"—and this case demonstrates that his mistake cost him a dismissal, albeit an erroneous one. Regardless, the Section 1981a references in Kelly's complaint should not prevent the district court from hearing the merits of his claim. Even if Kelly's attorney *had* intentionally (though wrongly) cited Section 1981a, believing it to be the rights-conferring statute on which she wanted her client to rely, "[t]he federal rules, and the decisions construing them, evince a belief that when a party has a valid claim, he should recover on it regardless of his counsel's failure to perceive the true basis of the claim at the pleading stage." 5 Wright & Miller § 1219.

Kelly does not dispute (of course) the maxim that appellate courts generally do not consider claims not raised below. *See* Resp. Br. 14. But the decisions that Defendants cite for this proposition have nothing to do with the situation here. In each, the plaintiff did not allege enough *facts* to survive a motion to dismiss. *See Beaudett v. City of Hampton*, 775 F.2d 1274, 1277-78 (4th Cir. 1985) (pro se complaint that only briefly set out ambiguous facts did not "detour the district court from resolving that which the litigant himself has shown to be his real concern"); *Deabreu v. Novastar Home Mortg., Inc.*, 536 F. App'x 373, 375 (4th Cir. 2013) (per curiam) (district court properly dismissed plaintiff's claims, which "failed to allege facts supporting a federal cause of action"

(referencing *Deabreu v. Novastar Home Mortg., Inc.*, No. DKC 11-3692, 2012 WL 2000689, at *2 (D. Md. June 4, 2012))); *Small v. Endicott*, 998 F.2d 411, 417-18 (7th Cir. 1993) (court dismissed plaintiff's claims involving a legal theory with no factual basis and where plaintiff attempted to refer to a judicial opinion as the basis of a claim instead of writing out the facts himself). Once again, Defendants nowhere dispute the factual sufficiency of Kelly's complaint.

The cases Defendants cite (at 14) for the proposition that "appellate courts shall not consider arguments [not] passed on below" are no more relevant. In *NASA v. Nelson,* 562 U.S. 134, 147 n.10 (2011), the Supreme Court passed on an issue not raised below because it did not have the "benefit of briefing by the parties." Here, the Section 1983 claims were present in the complaint and briefed on the motion to dismiss. *See generally* Opp'n to Mot. to Dismiss (*Kelly II*), Dkt. 13. In *Singleton v. Wulff*, 428 U.S. 106, 120 (1976), the Supreme Court noted that the "petitioner ha[d] never been heard in any way on the merits of the case." But here the parties have been heard on the pleading-sufficiency arguments.

**D. Kelly's equal-protection claim should proceed as well.** Even on the district court's mistaken view that plaintiffs' complaints must accurately cite the statutes under which they seek relief, Kelly's equal-protection claim was properly pleaded. Count IV incorporated by reference the substantial factual allegations made throughout the complaint, JA 154 (¶ 173), and Defendants do not contest their adequacy. Although Count IV mistakenly refers to "Section 1981a" as a "predicate statute," JA 154 (¶ 174), it also correctly references Section 1983. And most importantly, it does exactly what the district court maintained that Kelly failed to do on his Section 1981-based claims: He

accurately named the underlying constitutional provision—the Equal Protection Clause—that is the "predicate" for his Count IV claim. JA 154 (¶ 174). Count IV thus included everything the district court said (erroneously) was deficient in Kelly's other Section 1983 claims.

Defendants also argue that Count IV was properly dismissed because this Court does not recognize direct actions against municipalities or their agents for constitutional violations. Resp. Br. 21-22. Defendants' understanding of this Court's decisions is accurate, but irrelevant. Kelly never pleaded a claim directly under the Fourteenth Amendment. Rather, he sought to brings his claim through Section 1983, JA 154 (¶ 174), and it is indisputable 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"); *Price v. City of Charlotte*, 93 F.3d 1241, 1245 (4th Cir. 1996) (referencing *Carey v. Piphus*, 435 U.S. 247, 253 (1978)). And even assuming (counterfactually) that Kelly had failed to rely on Section 1983 in his complaint, *Johnson* makes clear the omission would not have been fatal on a motion to dismiss. 574 U.S. at 11. Kelly's equal-protection claim was both factually sufficient and adequately pleaded to survive a motion to dismiss, and the district court erred in dismissing it.

## II. Issue preclusion does not bar Kelly's suit against the individual Defendants.

The common-law doctrine of issue preclusion is based on the principle that "orderliness and reasonable time saving in judicial administration" weigh against allowing a party to bring an issue to trial twice "unless some overriding consideration

of fairness to a litigant dictates a different result." *See Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 324-25 (1971) (quoting *Bruszewski v. United States*, 181 F.2d 419, 421 (3d Cir. 1950)). Over the years, these general principles of fairness and efficiency have been the backbone of issue-preclusion doctrine, informing the multi-prong test developed for when courts should apply it. *See* 18 Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4416 (3d ed. Supp. Apr. 2020). The two prongs relevant here are the "identity of the issues" and "actually determined" prongs. *See id.* Application of either prong bars the defensive nonmutual use of issue preclusion that Defendants seek. *See id.*

Defendants argue that the single word grounding the district court's denial of Kelly's motion for leave to file an amended complaint—"futile"—had two sweeping effects. First, they assert that it satisfied the "identity of the issues" prong of issue preclusion by "express[ing] the Court's reasoning" so a subsequent court could discern what issues were determined and, thus, what issues should be precluded. Resp. Br. 27. Second, they maintain that it satisfied the "actually determined" prong of issue preclusion because courts need not articulate reasoning for denying a plaintiff leave to amend a complaint, as long as their reasons are clear. Resp. Br. 29; *see also id.* at 26. As explained below and in our opening brief, the word "futile" did neither of these things. Finally, Defendants' fairness and efficiency arguments do not square with the law.

**A. No identity of issues.** In denying leave to file an amended complaint on futility grounds, a court determines that there is some reason that the amendment would not survive a motion to dismiss for failure to state a claim. *See Katyle v. Penn Nat'l Gaming, Inc.*, 637 F.3d 462, 471 (4th Cir. 2011). As Defendants correctly note, if the district

court's reason is clear, the district court need not articulate it further to deny leave to amend. Resp. Br. 26.

But regardless of the appropriate basis for approving a request to amend, the district court's reasons here were not nearly clear enough to trigger issue preclusion. Unlike the court in *Bond v. United States*, 742 F. App'x 735, 737 (4th Cir. 2018), it is impossible to discern from the court's opinion what defect or defects in Kelly's second amended complaint it found to render the amendment futile. Defendants cite *Bond* to argue that here, as there, the district court's reasoning was clear even without articulation. Resp. Br. 29 (citing *Bond*, 742 F. App'x at 737). But *Bond* actually demonstrates that the "reasoning" bar is much higher. There, this Court held that a sparsely articulated opinion dismissing a second amended complaint nevertheless rested on sufficient reasoning because it expressly relied on (and thus effectively incorporated) more in-depth reasoning that the district court had articulated when dismissing the first amended complaint: that "the complaint failed to state claims for relief," "jurisdiction was lacking over Bond's claims against Defendants," "Bond lacked standing," "qualified immunity barred Bond's constitutional claims," and Bond "fail[ed] to exhaust administrative remedies." *Bond*, 742 F. App'x at 737. Because futility findings, by their nature, can hinge on different reasons, the district court's set of previously articulated reasons is what allowed this Court to conclude that the district court had properly dismissed the second amended complaint as futile. *See id.*

Here, the district court never spelled out the reasoning behind its futility determination. Thus, unlike in *Bond*, it is impossible to know what issues it decided in coming to its conclusion. *See Bond*, 742 F. App'x at 737. Without knowing what issues

the district court decided, it is impossible to know if the issues it decided in *Kelly I* include the same ones to be litigated against the individual Defendants in *Kelly II*. More is needed for issue preclusion. *Cf. King v. Rubenstein*, 825 F.3d 206, 225 (4th Cir. 2016) (holding that an unreasoned futility finding does not support a dismissal with prejudice); *Matrix Capital Mgmt. Fund, LP v. BearingPoint, Inc.*, 576 F.3d 172, 195-96 (4th Cir. 2009) (finding that not all possible issues were determined by district court's futility finding).

**B. Issue not actually determined.** Defendants are wrong that all that is required for an issue to have preclusive effect as "actually determined" is for a court to issue a ruling on the merits. Resp. Br. 29. As explained in our opening brief (at 23-27), a merits decision does not have issue-preclusive effect as "actually determined" unless the prior court articulated the precise reason for its decision. *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 cmt. e (Am. Law Inst. 1982) (noting that when it is difficult to determine whether an issue was actually determined, "policy considerations … weigh strongly in favor of nonpreclusion"). Though a court may write an opinion that omits its reasoning, thus leaving readers to speculate about what it actually determined, more than speculation is needed for a subsequent court to grant issue-preclusive effect to any issues as actually determined. *See Russell*, 94 U.S. at 609.

But Defendants ask this Court to do exactly what *Russell* says it may not: speculate about what the district court actually determined in *Kelly I*. *See* Resp. Br. 29-30. And that speculation is particularly problematic here given the sequence of events leading up to the court's decision in *Kelly I*.

These events began on Friday, July 26, 2019 when the district court held a hearing on the City's motion to dismiss in *Kelly I*. *See* JA 61-62. At the hearing, the district court took under advisement the parties' arguments about the timeliness of Kelly's Title VII claims and separately opined that Kelly's hostile-work-environment claims were insufficiently pleaded. JA 79-80. It then explicitly gave Kelly the opportunity to amend his complaint to replead those claims with more detail. JA 79-80. The court was mum, however, on Kelly's other claims—disparate treatment and retaliation—suggesting that it considered them sufficiently pleaded.

Kelly then did exactly what the district court suggested, drafting a second amended complaint and moving for leave to file it the next business day, Monday, July 29. JA 81. The proposed second amended complaint further described Kelly's hostile-work-environment allegations in response to the court's concerns about that claim, *see, e.g.*, JA 84-86 (¶¶ 4-12), 105-07 (¶¶ 135, 148-50), 109-10 (¶¶ 168-73), 113-15 (¶¶ 197, 200-05), and 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 very next day, July 30, the district court issued an order granting Defendants' motion to dismiss, including three pages describing why the court viewed Kelly's Title VII claims against the City as untimely and one clause denying Kelly's motion for leave to file a second amended complaint as "futile," without any reasoning. JA 118-21.[3]

[3] The district court issued its decision in *Kelly I* only hours after Kelly moved for leave to file his second amended complaint. The ECF notifications in this case indicate that Kelly filed his motion for leave to file a second amended complaint at 11:46 pm on July 29, and the district court issued its order at 11:30 am on July 30.

Given what the district court said at the July 26 hearing, it is *possible* that the court decided the hostile-work-environment claims were still insufficient and thus futile. But to attribute to the district court an overnight, unprompted change-of-heart from noting no defects with Kelly's disparate-treatment and retaliation claims to finding that they were so defective as to be futile, especially given that Kelly asserted these claims against three new individual defendants and under new legal theories, strains logic. This scenario is conceivable, but that is all that it is; this Court is left to speculate as to the reasons the district court used the lone word "futile" in denying Kelly's second amended complaint. And as the case law demonstrates, *see* Opening Br. 23-27, in the issue-preclusion realm, a court must provide reasoning before anyone can legitimately discern what it "actually determined."

Defendants cite cases for the proposition that courts may, without reasoning, deny leave to amend a complaint as futile. Resp. Br. 26-27, 29. But they cite no case demonstrating that a bare statement that amendment would be "futile" can nonmutually preclude litigation of any issues in a subsequent case. In those circumstances, although the previous judgment exists, it cannot have issue-preclusive effect.

Defendants argue that the district court's futility finding determined all "alternative bases upon which the district court denied Kelly's Motion to Amend," Resp. Br. 31-32, and say that the cases we cite in our opening brief are distinguishable. But their attempts to distinguish our cases fail because each stands for the proposition that to have preclusive effect, the reasons for a court's judgment must be clear and unambiguous. *See* Opening Br. 23-27.

Take *Hately*, for example. The first court resolved Hately's claim by saying that Hately "failed to sufficiently allege how he sustained any injury to person or property by reason of a violation of the Virginia Computer Crimes Act." *Hately v. Watts*, 917 F.3d 770, 778 (4th Cir. 2019) (quoting *Hately v. Watts*, No. 1:116-cv-01143 (GBL/MSN), 2017 WL 2274326, *3 (E.D. Va. May 23, 2017)). In other words, Hately's complaint failed to state a claim—effectively, a futility finding. *See Katyle*, 637 F.3d at 471 ("Futility is apparent if the proposed amended complaint fails to state a claim"); Resp. Br. 27. This Court held that because the first *Hately* finding failed to specify whether the dismissal was because Hately's claim was not legally actionable or because Hately did not describe his claim thoroughly enough in his complaint, it should not preclude subsequent litigation. *See Hately*, 917 F.3d at 778-79. *Kelly I* leaves ambiguity as to potential alternative bases for its holding, as the first *Hately* court did. There was no issue preclusion in *Hately*, and there should not be here either.

**C. The fairness implications of Defendants' arguments.** Defendants acknowledge that "[t]he essential inquiry on issue preclusion is one of fairness, *i.e.* whether it would be fair to foreclose litigation on a particular issue because of a ruling in a prior proceeding." Resp. Br. 25. As indicated earlier (at 2, 10), we agree with Defendants that fairness is at the heart of issue-preclusion doctrine. But we disagree strenuously with Defendants' view of what is fair.

Fairness considerations—as reflected in the "identity of issues" and "actually determined" inquiries discussed above—are especially important here because the issue preclusion that the three individual Defendants seek is *nonmutual*—that is, the individual Defendants have never been subject to suit on Kelly's claims. Kelly has never had the

opportunity to litigate against them, because, although Kelly asked, the district court did not allow them to become parties to the earlier suit. JA 121. Though nonmutual preclusion is today a recognized part of the federal res judicata landscape, *see, e.g.*, *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313 (1971), it is equally recognized, *see* Restatement (Second) of Judgments § 29, that nonmutual preclusion risks undermining the "deep-rooted historic tradition that everyone should have his own day in court," *Taylor v. Sturgell*, 553 U.S. 880, 892-93 (2008) (quoting *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996)); *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (quoting 18 Wright & Miller § 4449). It therefore must be approached with "great caution." *Ritter v. Mount St. Mary's Coll.*, 814 F.2d 986 (4th Cir. 1987). To protect these interests, defensive nonmutual preclusion is permitted only if the plaintiff had a fair chance to litigate the issues that would be precluded. *See, e.g.*, *United States v. Ruhbayan*, 325 F.3d 197, 204 (4th Cir. 2003). The issues Defendants seek to preclude are the merits of Kelly's Section 1983 claims. Resp. Br. 29-30.

Whether a plaintiff had a fair chance to litigate an issue is a searching, issue-specific inquiry. *See Blonder-Tongue*, 402 U.S. at 333-34. For example, "appropriate inquires" in a patent-law case would include whether the district-court opinion "indicate[s] that the prior case was one of those relatively rare instances where the courts wholly failed to grasp the technical subject matter and issues in suit; and whether without fault of his own the patentee was deprived of crucial evidence or witnesses in the first litigation." *Id.* at 333. In *Ritter*, 814 F.2d at 994, the plaintiff's "opportunity to present her side of the case" was protected when "[she] conducted extensive discovery of the job statuses and salaries of her colleagues, and she presented a vigorous argument to the trial court

in the Title VII suit." *Id.* (footnote omitted). By contrast, the government did not have a fair opportunity to litigate when the defendant proffered "false exculpatory evidence" in the first trial. *Ruhbayan*, 325 F.3d at 204.

Here, no searching inquiry is needed. Kelly was not given *any* chance to litigate the merits of his Section 1983 claims. The entire record that Defendants would use to preclude Kelly's statutory and constitutional rights is a motion for leave to file an amended complaint and a one-word, unreasoned ruling on that motion. Kelly had no opportunity to respond to even a motion to dismiss on the merits.

Defendants say (at 33-34) that issue preclusion serves the important role of "protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation." *United States v. County of Arlington*, 669 F.2d 925, 935 (4th Cir. 1982) (quoting *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 326 (1979)). Both considerations weigh against precluding Kelly's Section 1983 claims. Because the preclusion Defendants seek is nonmutual, they were never parties to the earlier suit and would not bear the burden of "relitigating" anything. And, as explained, the merits of Kelly's Section 1983 claims have never been litigated against any defendant.

## CONCLUSION

The judgment of the district court should be reversed and the case remanded for proceedings on the merits.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

This reply brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) because it contains 5,071 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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## CERTIFICATE OF SERVICE

I certify that on May 11, 2020, I electronically filed this Reply Brief for 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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