2012

The Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Thomas C. Horne; Bruce R. Wisan; Mark Shurtleff; and Hon. Denise Posse Lindberg; et al. : Reply Brief

Utah Supreme Court

No. 20120158

IN THE UTAH SUPREME COURT

FUNDAMENTALIST CHURCH OF JESUS CHRIST OF LATTER DAY SAINTS, an Association of Individuals,

Plaintiff/Appellee,

vs.

THOMAS C. HORNE, BRUCE R. WISAN, MARK L. SHURTLEFF, HONORABLE DENISE P. LINDBERG, and INTERVENORS, et al.,

Defendants/Appellants.

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MARK L. SHURTLEFF'S REPLY BRIEF ON CERTIFIED QUESTION

Utah Attorney General, Mark L. Shurtleff, respectfully submits his reply brief on a certified question of law.

REPLY

I. The Plaintiff Association Has Given No Reason to Deny the Certified Question.

A. The certified question necessarily involves *Lindberg*'s broader factual context.

The Tenth Circuit Court of Appeals certified a question of state preclusion law. That legal question does not ask what this Court meant in

the *Lindberg* decision, nor does it ask for this Court to modify that decision. The question turns, instead, on whether a laches determination, in a procedural context like *Lindberg*, has preclusive effect in subsequent actions.

To exercise its jurisdiction to answer that question, this Court need not examine the case in a vacuum. But by invoking this Court's jurisdiction, the Tenth Circuit has asked the Court to opine on the legal question in the broader context in which the case arises. *See* Order Certifying State Law Questions, No. 11-4049 at pp. 10-11 (discussing *Lindberg* in the context of the certified question). That broader factual context is relevant here, because the very case that likely precludes the Plaintiff Association's claims is the case that must be analyzed to determine the certified question.

This Court's answer to that question has significant import because the federal court is bound to apply Utah preclusion law. A federal court asked to determine whether a claim brought before it is precluded by a previous state court decision must look to the preclusion principles of that rendering state. *Marrese v. Am. Academy of Orthopaedic Surgeons*, 470 U.S. 373, 380 (1985); *Carpenter v. Reed,* 757 F.2d 218, 219 (10th Cir.

1985) (federal courts are required by the full faith and credit clause to give res judicata effect to state judgments to the same extent the state would give such effect).

This Court should reject the Plaintiff Association's attempt to conflate the issue. The question is whether, as a matter of state law, a decision such as *Lindberg*, has res judicata effect in a subsequent case. Stated differently, the Tenth Circuit seeks this Court's guidance to determine whether the Plaintiff Association is barred from raising its constitutional claims in federal court because a prior state court decision holding those claims are barred by laches has preclusive effect. The federal court and this Court do not apply different legal standards to that question. It is undisputed, and in fact well-settled, that the preclusive effect of *Lindberg* – however that issue is framed – is governed by Utah law. And, as the U.S. Supreme Court has emphasized, where it is "crystal clear" that the federal and state court must "follow the same approach" to the same issues then "the issues in the two cases would indeed be the same." *Smith v. Bayer Corp.,* 131 S. Ct. 2368, 2377 (2011).

Moreover, Plaintiff Association's complaint, that asking this Court to determine whether *Lindberg* is entitled to preclusive effect requires this

Court to clarify what it said or meant to say in *Lindberg*, is not new. But when raised in the context of the cases now-stayed before this Court, *see* case nos. 20090691-SC and 20091006-SC, at least one Justice rejected the Plaintiff Association's characterization of the question: "It's not just what did we mean in *Lindberg*? Or what did Justice Durrant and my colleagues mean in *Lindberg*? It's what are the standards and principles for res judicata and finality that apply to the state law question of whether that decision gets preclusive effect." *Oral Argument Transcript* April 12, 2011 (Justice Lee at p. 13); *see also id.* at 25 ("Well no, it's not a question of what this Court meant in *Lindberg* at all.")

To answer the certified question, this Court need not interpret its *Lindberg* decision. But the Court also need not decide the question outside the broader factual and procedural context in which the question came to it.[1]

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[1] A point, that even counsel for the Plaintiff Association apparently concedes. Converse to the Association's claims here, describing this Court's decision in *Gates v. Taylor*, 997 P.2d 903 (Utah 2000) (per curiam), Mr. Parker stated:

> [W]e look to see if the – how the merits were handled in the underlying case. If – how were they addressed, qualitatively, contextually, how were they addressed? And I think if you look at this Court's decisions with regard to laches, including the decisions it cited in

B. The fact of this Court's discretionary review is irrelevant.

Res judicata is premised on the principle that claims and issues "should be adjudicated only once." *Mack v. Utah State Dep't of Commerce*, 2009 UT 47, ¶ 29, 221 P.3d 194. And though the Plaintiff Association raised its constitutional claims before, it nonetheless argues that the fact this Court has already rejected those claims is irrelevant to resolving the same claims (or issues) in federal court. To this end, the Association contends that because the Court possessed discretion to address or not the viability of its claims in *Lindberg* somehow renders that decision meaningless. Such convoluted reasoning defies any attempt at concise summary, but it is worth noting that the Association does not provide any case law to support its theory. Instead, "[i]t is well settled that the doctrine of res judicata is applicable to a judgment in mandamus and prohibition proceedings, that is, that the special [i.e., discretionary] character of these proceedings does not,

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> Lindberg [sic], that that's what you see, the Court qualitatively looking at it, trying to see, how was this addressed?
>
> Now, to me that's the status of Utah law.

Oral Argument Transcript April 12, 2011 (Rod Parker at p. 25).

ipso facto, preclude a judgment rendered therein from operating as res judicata in another action or proceedings." E.T. Tsai, Annotation, *Judgment Granting or Denying Writ of Mandamus of Prohibition as Res Judicata*, 21 A.L.R.3d 206, §§ 2-9 (1968 & Cum. Supp.) *Accord State ex rel. Kopchak v. Lime*, 335 N.E.2d 700 (Ohio 1975) (prior order denying petition for writ of mandamus entitled to preclusive effect); *State ex rel. Campo v. Osborn*, 10 A.2d 687 (Conn. 1940) (same); *Kaufman v. Goldman*, 132 N.E.2d 52 (Ill 1956) (same); *Lawrence v. Corbeille*, 178 P. 834 (Idaho 1919) (prior order granting mandamus given preclusive effect).

C. The record provides sufficient facts to allow this Court to decide the certified question.

In a typical case, an appellate court is not a "fact-finder," but appellate courts do routinely comb trial court records for facts that support or undermine a trial court's decision. For example, in the context of summary judgment, the Court routinely examines the record developed below. Namely, the Court considers the record as a whole, and reviews the district court de novo, reciting all facts and fair inferences from the record in the light most favorable to the non-moving party. *Bahr v. Imus*, 2011 UT 19, ¶ 17, 250 P.3d 56 (citing *Shields v. Eli Lilly Co.*, 895 F.2d 1463, 1466

(D.C. Cir. 1990) ("on a paper record, an appellate court is equally well-positioned as a trial judge to assess the evidence at issue.")); *see also Poteet v. White*, 2006 UT 63, ¶¶ 7-8, 147 P.3d 439.

The same is true here, and in *Lindberg* itself. Like a court conducting de novo review of summary judgment, both then as now, this Court has before it thousands of pages comprising the court record in the UEP cases.[2] Moreover, the facts are simply not in dispute.

Plaintiff Association does not dispute (1) that it had notice of the underlying United Effort Trust case, (2) that the Association failed to act for over three years despite that notice, and (3) that third parties suffered actual harm, having changed their positions due to the Association's inaction. The Association's objections come not from those facts, but from the legal

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[2] In the federal court, Judge Benson also did not conduct an evidentiary hearing, but he based his contrary decision on the parties' written submissions alone. Not surprisingly, Plaintiff Association has no problem with the lack of "fact-finding" in that proceeding. This again, reflects a point on which at least one Justice from this Court agrees: "So it's a little odd to be criticizing this Court for making a laches decision without taking evidence where, as Justice Durrant points out, we were simply affirming factual findings and evidence that a trial court in our court – our state court system had taken – it's a little – it rings a little hollow, it seems to me, for you to criticize that, where Judge Benson himself didn't take any evidence on those issues." *Oral Argument Transcript* April 12, 2011 (Justice Lee at p. 20).

import of those facts. But when the parties were then before it, the record contained sufficient information and facts for the *Lindberg* Court to conclude that the Plaintiff Association's constitutional claims were barred by laches. Too, the Court has enough paper record before it now to decide the purely legal question of whether that laches defense, in the same procedural posture, can preclude subsequent litigation. To do so, this Court need not act as a traditional "fact-finder." The Association's converse claim, necessarily fails.[3]

D. The Association's structural limitation argument is not supported at law and it exceeds the scope of the certified question.

The Plaintiff Association's final claim – that the several defendants violated a structural constraint imposed by the First Amendment's Establishment Clause to which laches may never apply – suffers from two, fundamental flaws. *See* Plaintiff Association's Br. pp. 21-24. First, the alleged limits of a laches defense to the Association's Establishment Clause claims find no support in the law. Too, that argument goes the heart of this

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[3] Conceivably, when the petition in *Lindberg* was previously before it, the Plaintiff Association could have moved this Court to supplement the factual record in that original proceeding. *See Oral Argument Transcript*, April 12, 2011 (colloquy between Justice Lee and SG Mitchell at pp. 43-44).

Court's *Lindberg* decision and begs the Court directly reconsider the same.

The Plaintiff Association points to no law to support its claim that laches may never bar a structural violation of the First Amendment. But for a party's unreasonable delay, laches can bar a First Amendment religion claim, as any other. *See Southside Fair Housing Comm'n v. City of New York*, 928 F.2d 1336, 1354-55 (2d Cir. 1991) (laches justified order denying relief to plaintiff claiming establishment clause and excessive entanglement violations). Likewise, laches pertains not simply to bar substantive adjudications, but also to bar preliminary injunctions. *Accord City of Sherrill, N.Y. v. Oneida Indian Nation*, 544 U.S. 197, 217 (2005); *Nat'l Council of Arab Americans v. City of New York*, 331 F. Supp. 2d 258, 265-66 (S.D.N.Y. 2004).

Moreover – and, ironically, as the Plaintiff Association has acknowledged – when a federal court certifies a question of state law that this Court accepts, the Court answers the question presented, but does not resolve the merits. *See In re Kunz*, 2004 UT 71, ¶ 6, 99 P.3d 793. Here, the Association's claim that laches may never apply to a structural constitutional violation, goes not to the heart of that question, but to the propriety of this Court's conclusion *Lindberg* in the first instance. The

claim exceeds the scope of the certified question. It must be ignored.

CONCLUSION

This Court should answer the certified question affirmatively and hold that a laches determination in a procedural context like *Lindberg* has preclusive effect in subsequent cases. The Plaintiff Association's constitutional claims should be barred based on laches.

RESPECTFULLY submitted this 21st day of May, 2012.

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Certificate of Service

I hereby certify that I sent a true and correct copy of **Utah Attorney General Mark L. Shurtleff's Reply Brief on Certified Question of Law From the United States Court of Appeals for the Tenth Circuit** to the following, by United States Mail, postage prepaid, this 21st[h] day of May, 2012:

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