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. : Brief of Appellant

Utah Supreme Court

IN THE SUPREME COURT OF THE STATE OF UTAH

The Fundamentalist Church of Jesus Christ of Latter-Day Saints, Plaintiffs and Appellee v. Thomas C. Horne; Bruce R. Wisan; Mark Shurtleff; and Hon. Denise Posse Lindberg; et al., Defendants and Appellants	)	CASE NO. 20120158-SC

On Certification from the United States Court of Appeals for the Tenth Circuit
Case Nos. 11-4049, 11-4050, 11-4053, 11-4059,
11-4066, 11-4071, 11-4072 & 11-4076

OPENING BRIEF OF APPELLANTS' SPECIAL FIDUCIARY WISAN AND HONORABLE DENISE POSSE LINDBERG

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

STATUTES

RULE

OTHER AUTHORITIES

STATEMENT REGARDING DETERMINATIVE CONSTITUTIONAL PROVISIONS, STATUTES, ORDINANCES, RULES AND REGULATIONS

There are no constitutional provisions, statutes, ordinances, rules and regulations that are of central importance to the issues presented for review.

STATEMENT OF CERTIFIED QUESTION

Under Utah preclusion law, is the Utah Supreme Court's discretionary review of a petition for extraordinary writ and subsequent dismissal on laches grounds a decision "on the merits" when it is accompanied by a written opinion, such that later adjudication of the same claim is barred?

STATEMENT OF THE CASE

This case presents the issue of whether plaintiff, an unincorporated association of Fundamentalist Church of Jesus Christ of Latter-Day Saints members (hereinafter "FLDS Association"), can relitigate the virtually identical claims that this Court expressly held barred by laches in *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg*, 2010 UT 51, 238 P.3d 1054.

This case arises out of the Utah probate court's reformation of the United Effort Plan Trust ("the Trust"). The Utah probate court (Lindberg, J.) began supervising the Trust more than six years ago after the trustees abandoned the Trust rather than defend allegations that Warren Jeffs, the President of the Corporation of the President of the Fundamentalist Church of Jesus Christ of Latter-Day Saints, Inc. ("COP") and presiding trustee of the Trust, had engaged in

extreme misconduct, including allegations of child sexual abuse. Rather than appeal the state probate court's final reformation judgment, the FLDS Association waited nearly three years before collaterally attacking it, both by filing a §1983 lawsuit in federal district court and subsequently seeking virtually identical relief in a petition for extraordinary writ in this Court.

After the FLDS Association agreed to stay the federal court action and proceed first with the petition for extraordinary writ, this Court held the FLDS Association's constitutional challenge to the reformation of the Trust barred by laches. *Lindberg*, 2010 UT 51, 238 P.3d 1054. The Court explained:

> [M]any individuals have relied upon the district court's final order from over three years ago, and the FLDS Association has given no adequate explanation for its delay in appealing or otherwise petitioning for relief. The FLDS Association has shown a lack of diligence in challenging the modification of the Trust, and this lack of diligence has operated to the detriment of others. The FLDS Association offers no adequate explanation for its delay and no other circumstances exist that might make us otherwise hesitant to apply laches.

Id. ¶35.

Notwithstanding this Court's thorough examination of the issues and detailed factual and legal findings, and notwithstanding the requirements of the federal "Full Faith and Credit" statute, 28 U.S.C. §1738, the district court concluded that res judicata does not apply because this Court did not pay sufficient attention to the "merits" of the FLDS Association's claim in its *Lindberg* decision.

Appellants' Appendix ("Aplt.App.") 62-64. Instead of dismissing the association's attempt to relitigate claims this Court had concluded could not proceed, the district court held that the First Amendment prohibited the Utah probate court from applying Utah law to reform the Trust to protect its intended beneficiaries. To remedy the alleged constitutional violation, the district court issued a preliminary injunction staying all proceedings in the probate court, suspending the Special Fiduciary, and transferring control of the Trust's substantial assets to Jeffs (as President of the COP), the very individual whose improper conduct necessitated the probate action in the first instance.

On appeal, the Tenth Circuit stayed the district court's extraordinary injunction and, subsequently, certified to this Court the question whether "[u]nder Utah preclusion law . . . the Utah Supreme Court's discretionary review of a petition for extraordinary writ and subsequent dismissal on laches grounds [is] a decision 'on the merits' when it is accompanied by a written opinion, such that later adjudication of the same claim is barred." Order Certifying State Law Questions at 8, Doc. No. 01018803969 (10th Cir. Mar. 2, 2012). This Court should answer that question in the affirmative and confirm that its prior decision in *Lindberg* was "on the merits" for purposes of claim and issue preclusion.

STATEMENT OF FACTS

To put this case into context, we discuss the background of the Trust, Jeffs' breach of fiduciary duty and abuse of the Trust, the ensuing probate action to protect the Trust, and the related federal and state proceedings concerning the FLDS Association's collateral attacks on the reformation of the Trust.

Background on the UEP Trust. The Trust was created in 1942 by members of the "Priesthood Work" association. Aplt.App.25, 1221. Through the years, numerous people donated land to the Trust and made improvements on Trust land. Aplt.App.2007. Today, the Trust property consists almost entirely of land and improvements, including over 5,000 acres and 700 homes located in Hildale, Utah; Colorado City, Arizona; and British Columbia, Canada. Aplt.App.26, 5781-5783.

Disputes began to arise about what property rights, if any, individuals who contributed property and/or improvements to the Trust enjoyed. *See Jeffs v. Stubbs*, 970 P.2d 1234 (Utah 1998). In the 1990s, while such litigation was pending, Rulon Jeffs organized a church for his followers (the "FLDS Church"), formed the COP under the Utah Corporation Sole statute, Utah Code Ann. §16-7-6, and designated himself as president of the FLDS Church and "Corporate Sole" of the COP, thus giving himself the power to conduct all church legal affairs. *See* Articles of Incorporation, dated February 6, 1991, filed with the Utah Dep't of

Commerce, https://secure.utah.gov/bes/action; *see also* Aplt.App.25, 241, 245, 5593.

After this Court held that the Trust was a private trust, *Jeffs*, 970 P.2d at 1253, Rulon Jeffs and other trustees in 1998 executed an amended Trust (the "1998 Restatement") that purported to convert the Trust to a charitable trust with the "religious purpose" of providing "for Church members according to their wants and their needs, insofar as their wants are just ...." Aplt.App.243. Apparently intending to eliminate the rights granted private beneficiaries in *Stubbs*, the 1998 Restatement declared that a person who is deemed uncommitted to the FLDS Church may be removed from Trust property without returning any property that person provided to the Trust. *Id.* The 1998 Restatement further stated that the Trust was to be "of perpetual duration," but, in the event of termination, the Trust assets would become property of the COP. Aplt.App.244.

In 2002, Rulon Jeffs died and his son, Warren Jeffs, became Corporate Sole of the COP and president of the Board of Trustees of the Trust. Aplt.App.28.

Abuse of the Trust. There is substantial evidence that while serving as trustee, Warren Jeffs engaged in illegal conduct (polygamy and sexual activity with children) and caused his followers to engage in similar unlawful conduct by commanding and performing "marriages" of young girls to older men who were

already married.[1] *E.g.,* Aplt.App.1981-1983, 3127-3149. Evidence also shows that the Trust was used as a means of punishing those who refused Jeffs' demands to engage in illegal conduct. *E.g.,* Aplt.App.5594. Indeed, a court found that Jeffs tried to evict a family from its home on Trust land within ten minutes after the mother refused to comply with Jeffs' demand that her 15-year-old daughter "marry" an already-married 39-year-old man. *See United Effort Plan Trust v. Holm*, 101 P.3d 641, 643 (Ariz. Ct. App. 2004).

Breach of Fiduciary Duties/Abandonment of the Trust. In 2004, the Trust, the FLDS Church, and Jeffs were named co-defendants in two tort lawsuits (the "Tort Lawsuits") brought by individuals (the "Tort Plaintiffs") seeking large awards based on allegations that Jeffs used the Trust to coerce illegal activity. Aplt.App.28, 3623-3673. Jeffs subsequently transferred much of the Trust's valuable non-residential property to entities that he controlled, which gave rise to claims for fraudulent transfer. Aplt.App.5159-5190, 5256-5269. Jeffs also gathered and hid the Trust's records. Aplt.App.1984-1985.

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[1] Furthermore, this Court can take judicial notice of the fact that Warren Jeffs was convicted by a jury in Texas for aggravated sexual assault of a child and sexual assault of a child in violation of Texas Penal Code Ann. §§22.011, 22.021, and was sentenced to "confinement for life and twenty years, respectively . . . ." *Jeffs v. State*, No. 03-11-00568-CR, 2012 WL 1068797, at *1 (Texas App. Mar. 29, 2012) (dismissing Jeffs' appeal for want of prosecution).

Jeffs and the other trustees failed to defend the Trust in the Tort Lawsuits. Aplt.App.28. This was a conscious decision by Jeffs, who forbade his followers from becoming involved in the Tort Lawsuits with the instruction: "Answer them nothing and don't give them any testimony or witness." Aplt.App.28, 1990.

Failure to defend the Trust exposed it to default judgments and placed the homes of the people residing upon Trust property at risk. Aplt.App.29, 1093-1095. Rodney Parker and the law firm of Snow Christensen & Martineau (attorneys for the COP and the Trust) withdrew as counsel and filed motions in the Tort Lawsuits stating that: (1) no court had ruled on the character of the 1998 Restatement; (2) occupants of the Trust's lands may have enforceable interests in the property of the Trust; (3) those who lived on Trust property should be given notice, advised to obtain counsel, and given an opportunity to protect their interests; and (4) the state Attorney General should be notified if the Trust is deemed to be a charitable trust. Aplt.App.614-625, 2003-2010.

The Probate Action. After receiving notice of the trustees' breach, the Utah Attorney General on May 26, 2005, filed a petition initiating an *in rem* probate action (the "Probate Action") in the Third District Court of Salt Lake County, Utah (the "probate court") pursuant to the Utah Uniform Trust Code (Utah Code Ann. §75-7-101 *et. seq.*). Aplt.App.565-583. The petition requested multiple remedies, including removal of the trustees, the appointment of a special

fiduciary to administer the Trust, and, if the court deemed it necessary, the reformation of the Trust at the request of an interested party. Aplt.App.582-583. As much of the Trust's property and beneficiaries are located in Arizona, Aplt.App.5782, the Arizona Attorney General also appeared in the Probate Action in support of the petition, Aplt.App.1183-1191, 5847.

Some individual beneficiaries of the Trust (the "Private Beneficiaries") also filed a petition in the Probate Action alleging that the Trust was a private trust and seeking remedies identical to those sought by the Attorneys General. Aplt.App.5198-5217. The Tort Plaintiffs likewise appeared in the Probate Action, asserting that the Trust was private and reserving the right to challenge the validity of the 1998 Restatement. Aplt.App.5218-5244.

Notice of the Probate Action was served in compliance with Utah Code Ann. §75-1-401, including service upon the defaulting trustees and the COP and service by publication on persons believed to assert interests in the assets of the Trust. *See* Aplt.App.5295-5296, 5302-5304, 5324-5431, 5385-5431, 5438-5448, 5450-5504, 5696-5697. Notice was also published in newspapers in states where interested persons were known to be living or conducting activities on Trust property. Aplt.App.5465-5470, 5482-5504, 5696-97. Notice was served upon Rodney Parker (COP's registered agent) from the beginning of the Probate Action,

Aplt.App.5302-5304, 5438, and continually thereafter because Parker filed a request to remain on the official service list, Aplt.App.5904.

After service of notice of the Probate Action, and having received no opposition,[2] the probate court (Himonas, J.) suspended the trustees and appointed Bruce Wisan as a Special Fiduciary on June 22, 2005. Aplt.App.5449, 790-798. The Probate Action was subsequently re-assigned to Judge Lindberg, who invited input from all interested persons and defined a broad class of people who would have standing to propose new trustees, including the COP, the trustees, and all beneficiaries of the Trust (broadly defined as anybody who had donated property, time, talents, or resources). Aplt.App.5473.

The FLDS Association's members knowingly refused to participate in the Probate Action. Aplt.App.28-30. Jeffs told his followers that the Judge and the Special Fiduciary were "of the devil," and instructed them to "continue to answer them nothing." Aplt.App.1994. Jeffs and the other suspended trustees also failed to comply with the probate court's order to provide an accounting and turn over assets and records. Aplt.App.29, 5772. Instead, Jeffs immediately arranged to destroy many documents and to hide others in a vault in Texas. Aplt.App.2000-2001.

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[2] Many interested persons appeared or otherwise communicated with the probate court, but none objected to the suspension of the trustees or the appointment of the Special Fiduciary. *See, e.g.*, Aplt.App.5198, 5218, 5432, 5566, 5577-5602, 5698.

Reformation of the Trust. On December 13, 2005, the probate court issued a 28-page Memorandum Decision addressing a number of significant issues concerning the administration of the Trust. Aplt.App.1567-1596. The court held that the 1998 Restatement was the "operative" trust instrument, and it created a charitable Trust. Aplt.App.1572-1574, ¶¶10-15. The court also found that the suspended trustees "committed serious breaches of trust," Aplt.App.1576, ¶21, demonstrated "unfitness, unwillingness, or persistent failure" to administer the Trust, *id.*, violated their duty of loyalty and the requirement of prudent administration, *id.*, failed to defend against the Tort Lawsuits, Aplt.App.1577, ¶22, and violated court orders requiring an accounting of current Trust administration, *id.*

Because a "fundamental tenet of the COP involves the illegal practice of polygamy," the probate court found that the Trust would "fail if its *sole* purpose was to advance those illegal religious practices." Aplt.App.1581, ¶33 (emphasis in original). The court concluded, however, that the "drafters would have preferred that the Trust survive to accomplish its stated purpose of providing for the needs and 'just wants' of its beneficiaries, rather than fail for want of a lawful purpose." Aplt.App.5282, ¶33. In reaching this conclusion, the court relied on the Utah "Code's broad intent to preserve charitable trusts whenever possible." *Id.*

The probate court also found that allowing the Trust to fail and applying the reversionary clause would place the Trust assets in Jeffs' hands despite his breach of fiduciary duties and use of Trust assets for illegal purposes. Aplt.App.1589, ¶¶51-53. This result, the court found, would be "inequitable." Aplt.App.1590, ¶53 n.26.

Instead, the probate court invoked the "time-honored doctrine of *cy pres*," which allows a court to modify a trust consistent with the settlor's charitable purpose if "a particular charitable purpose becomes unlawful, impracticable, impossible to achieve or wasteful." Aplt.App.1575, ¶19. The court then outlined a framework to reform the Trust, guided by three legal principles: (1) preserving the Trust's general charitable purpose—"caring for needy individuals," Aplt.App.1580, ¶31; (2) removing the Trust's illegal purposes—including "polygamy, bigamy, [and] sexual activity between adults and minors," Aplt.App.1580, ¶¶31, 33; and (3) employing "neutral principles of law" to avoid entangling church and state, Aplt.App.1582-1583, ¶¶35-37.

The probate court concluded by inviting "all interested parties to identify any issues relative either to the analysis employed by the Court or the framework discussed above." Aplt.App.1594, ¶63; *see also* Applt.App.1580, ¶32 n.53. The Special Fiduciary provided notice of the reformation process by mail to those who appeared in the case. Aplt.App.6006-6008. The Special Fiduciary also mailed a

written notice to each residence on Trust land informing the residents about the Memorandum Decision and providing an Internet address where it could be viewed. Aplt.App.5903, 2170. Thereafter, the Special Fiduciary sent a second notice to each residence on Trust land discussing the Memorandum Decision and the status of the Trust's planned reformation. Aplt.App.6003-6005.

Notwithstanding such notices, no member of the FLDS Association appeared, provided input, or presented themselves as a possible trustee. Aplt.App.30, 1593, ¶61 n.95. The Special Fiduciary, the Attorneys General, and some members of the Trust's beneficiary class, however, cooperatively prepared a proposed reformed trust declaration in accordance with the framework stated in the Memorandum Decision. Aplt.App.5906-5920, 5925-5971.

On October 25, 2006, the probate court signed the Reformed Declaration of Trust and an accompanying Order formally removing the trustees and certifying the reformation as a final judgment (the "Reformation Judgment"). Aplt.App.838-863, 865-872. No person filed an appeal or other opposition to the Reformation Judgment. Aplt.App.5019-5020.

Reliance on the Reformed Trust. Numerous individuals acted in reliance upon the validity and finality of the Reformation Judgment. The Tort Plaintiffs settled their claims against the Trust for nominal damages, Aplt.App.4573, 4682-4692, and the Fiduciary dissuaded other claimants from pursuing legal claims

against the Trust, Aplt.App.6096, 2176, presumably because Jeffs was no longer in control. Similarly, in light of the removal of Jeffs, the Private Beneficiary Petitioners (and the Tort Plaintiffs) did not pursue their challenges to the 1998 Restatement. Aplt.App.5204, 5208-5209, 5219-5220, 5732, 5739. In addition, other people relied upon the Reformation Judgment in entering into transactions involving Trust property. *See e.g.*, Aplt.App.2048, 2059, 4905-4907, 4919-4922, 4924-4942. (For a more detailed summary of actions taken in reliance upon the Reformation Judgment, *see* Aplt.App.1912-1914).

Collateral Attacks on the Final Reformation Judgment. In the latter half of 2008, two years after entry of the Reformation Judgment, Jeffs and his followers changed tactics. While incarcerated, Jeffs instructed Willie Jessop to lead a coalition of followers, retain legal counsel, and demand "protection of their rights," but to conceal Jeffs' role in the new litigation strategy so the "coalition" would appear as a "group of individuals . . . without bringing in the authorities of the Church." Aplt.App.1995-1996.

Following Jeffs' command, Willie Jessop, Merlin Jessop, and Dan Johnson in 2008 filed a motion in the probate court to block the sale of certain Trust property, which allegedly interfered with their religious practices. Aplt.App.884-885.[3] The probate court rejected movants' challenge on several grounds, including

[3] Members of the FLDS Association supported this motion. Aplt.App.4208-4567.

that the Reformation Judgment was final and that their claims were barred by laches. Aplt.App.874-889. The probate court also found that the movants lacked standing. Aplt.App.885-886. The movants did not appeal this ruling.

The movants subsequently filed a motion to intervene in the probate action, which was similarly denied for lack of standing because the probate court had found the 1998 Restatement created a charitable trust, and beneficiaries do not have standing to raise claims concerning the administration of a charitable trust. Aplt.App.6216. The movants appealed that decision to this Court (Appeal No. 20090691), which appeal is presently stayed. *See infra* p. 20.

Plaintiff also collaterally attacked the Reformation Judgment by filing a complaint in the United States District Court for the District of Utah, Case No. 2:08-cv-772DB (the "Federal Court Action"), Aplt.App.7, 469-502, and a subsequent petition for extraordinary writ in the Utah Supreme Court, Case No. 20090859 (the "Extraordinary Writ Action"), Aplt.App.2717-2804. Plaintiff stayed the Federal Court Action while this Court acted on the Extraordinary Writ Action. Aplt.App.1337-1339.

The Extraordinary Writ Action. The FLDS Association filed a petition for an extraordinary writ pursuant to Rule 65B of the Utah Rules of Civil Procedure and Rule 19 of the Utah Rules of Appellate Procedure. In the petition, the FLDS Association contended, *inter alia*, the reformation of the Trust violated

the First Amendment. The parties filed extensive briefs and submitted over 200 exhibits, including declarations. Consequently, this Court's file in this action consisted of thousands of pages in multiple volumes. In addition, this Court received the entire record of the district court in the Probate Action through March 2010—which consisted of an additional 57 volumes.

On February 17, 2010, this Court heard lengthy oral argument on the FLDS Association's constitutional claims and Appellants' laches defense. Thereafter, on August 27, 2010, this Court entered its written Opinion holding that the FLDS Association's claims were "barred" under the "equitable doctrine of laches." *See Lindberg*, 2010 UT 57, ¶43.

Specifically, the Court explained that laches is a "delay that works a disadvantage to another," consisting of two legal elements: "(1) a party's lack of diligence and (2) an injury resulting from that lack of diligence." *Id.* ¶27 (quotations omitted). With respect to the first factor, this Court found that the FLDS Association's members were aware of the probate court's administration and reformation of the Trust, that the probate court welcomed their participation in the reformation proceedings, that the FLDS Association nevertheless waited three years after the reformation of the Trust before filing its petition, and that the FLDS Association did not explain why it waited so long or why its delay was reasonable. *Id.* ¶30.

Based on these factual findings, this Court concluded:

> Because of the three-year delay in the face of invitations by the district court to participate, and because this delay did not occur under circumstances that might excuse it, such as prompt negotiations aimed at avoiding litigation, or under circumstances that might make us otherwise hesitant to apply the doctrine of laches, the FLDS Association has demonstrated a lack of diligence in filing this petition.

Id. ¶32.

As to the second laches factor, this Court found that the FLDS Association's lack of diligence caused injury to "numerous parties," *id.* ¶43, who relied upon the reformation of the Trust, changed their positions, and made irreversible decisions based upon the unappealed and unchallenged rulings of the district court, *id.* ¶¶33-35. For example, this Court found that the Special Fiduciary had entered into transactions on the assumption of the validity of the reformed Trust that could not be undone. *Id.* ¶33. The Court also found prejudice to the Tort Plaintiffs, who agreed to settle their lawsuits against the Trust only because of the reformation. *Id.* ¶34.

The Court summarized its laches decision as follows:

> In sum, many individuals have relied upon the district court's final order from over three years ago, and the FLDS Association has given no adequate explanation for its delay in appealing or otherwise petitioning for relief. The FLDS Association has shown a lack of diligence in challenging the modification of the Trust, and this lack of diligence has operated to the detriment of others. The FLDS Association offers no adequate explanation for its delay and no other circumstances exist that might make us otherwise hesitant to apply laches.

Id. ¶35.[4]

The Federal Court Action. The FLDS Association did not seek review of the *Lindberg* decision in the U.S. Supreme Court. Instead, the FLDS Association renewed the Federal Court Action, which, as the federal district court recognized, raised "virtually the same" claims raised in the Extraordinary Writ Action. Aplt.App.34. The defendants in the Federal Court Action raised numerous defenses, including that the federal court lacked jurisdiction to interfere with a state court's administration of a Utah trust and that the federal court was bound, under the doctrine of res judicata, by this Court's finding that plaintiff's claims are barred by laches. Aplt.App.49, 3209-3219.

The federal district court issued a temporary restraining order, Aplt.App.3203-3205, and requested further briefing on the question whether this Court's laches decision in *Lindberg* was binding, Aplt.App.12 (Docket No. 87). In the extensive briefing that followed, the FLDS Association agreed that, if the *Lindberg* decision is "on the merits," then its claims must be dismissed. Aplt.App.56. Plaintiff argued, however, that a dismissal of claims on grounds of

[4] This Court further held that claims that arose "from facts that occurred after the Trust was modified" were not barred by laches. *Lindberg*, 2010 UT 51, ¶¶39, 43. None of those claims were ripe, however, because the allegedly unconstitutional conduct had not occurred and was not imminent. *Id.* ¶41.

laches is not a decision "on the merits" under Utah law, and therefore the *Lindberg* decision is not preclusive in federal court. *Id.*

The Entry of the Preliminary Injunction. Without holding an evidentiary hearing, the federal district court issued a Memorandum Opinion and Order on February 24, 2011, granting the FLDS Association's motion for preliminary injunction and denying the defendants' motions to dismiss. Aplt.App.22-69.

With respect to the issue of res judicata, the district court found that Utah law is not settled on the question whether the dismissal of claims on laches grounds is a decision "on the merits" that is entitled to preclusive effect. Aplt.App.56. Although the court found that there is "no clear precedent from the Utah Supreme Court or any other Utah state court" regarding the matter, *id.*, it declined to certify the question to this Court, as requested by the defendants. Instead, the district court inferred that Utah would likely reject the majority view and would adopt instead a two-tiered approach under which "laches is entitled to preclusive effect in some cases, namely where there is some appropriate attention paid to the merits, and not in others." Aplt.App.62. Because the district court thought this Court in *Lindberg* did not pay appropriate attention to the merits of the FLDS Association's underlying constitutional claims, it declined to accord that decision preclusive effect. Aplt.App.56-64.

The federal district court likewise denied the numerous jurisdictional and procedural bars to injunctive relief advanced by the defendants, including the probate exception to federal court jurisdiction, *Younger* abstention, and the defense that plaintiff's complaint was barred by laches. Aplt.App.49-52. In contrast, the court found that the probate court's reformation of the Trust likely violated the First Amendment. Aplt.App.34-49.

On April 7, 2011, the court entered the preliminary injunction proposed by the FLDS Association, which functionally invalidated the probate court's reformation of the Trust and its administration over the Trust. Aplt.App.70-74. The preliminary injunction order suspended the Special Fiduciary, enjoined administration of the Reformed Trust, ordered the Special Fiduciary to turn over all non-privileged Trust records to the COP, and ordered the Special Fiduciary to turn over all Trust assets to the control of the COP. *Id.* The injunction allowed the COP to administer the Trust property "according to its religious principles," while adding several "additional terms and restrictions." Aplt.App.72-73.

Additional Briefing in the Utah Supreme Court. After the entry of the federal court's Memorandum Opinion and Order, this Court entered an Order in two related cases pending before it.[5] Noting that the federal district court's

[5] The first case, Appeal No. 20090691, is from the probate court's order denying standing to certain FLDS leaders challenging the administration of the reformed Trust. Aplt.App.4701. The second case, Appeal No. 20091006, is from the

analysis of the laches issue "contradicts [the] decision in *Lindberg*," this Court requested supplemental briefing "regarding the preclusive effect of our decision in *Lindberg* and on the implications of that question in these cases." Aplt.App.4702-4703.

After receiving supplemental briefing and hearing oral argument on April 12, 2011, this Court on June 13, 2011 entered an order staying both appeals pending the Tenth Circuit's ruling on the appeal of the federal district court's preliminary injunction order.

The Tenth Circuit Court Stays the Preliminary Injunction. The defendants in the Federal Court Action appealed the preliminary injunction, and Judge Lindberg filed an emergency motion asking to the Tenth Circuit to stay the preliminary injunction pending appeal. Emergency Motion to Stay, Doc. No. 01018621127 (10th Cir. Apr. 13, 2011). Judge Lindberg instructed the Fiduciary not to turn over Trust documents or assets pending appellate review of the preliminary injunction, but to minimize conflict with the federal court, she ordered the Special Fiduciary not to initiate any affirmative action, other than as necessary to protect the assets of the Trust. *Id.* at Attachment E.

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probate court's order disqualifying one of the FLDS Association's law firms, which formerly represented the Trust, from representing parties in actions adverse to the Trust. Aplt.App.4702-03.

Thereafter, the federal district court ordered Judge Lindberg to show cause why she should not be held in contempt. Aplt.App.4951-4952. He also threatened to send U.S. Marshals to ensure her appearance. Notice of Information at 2, Document No. 01018622162 (10th Cir. Apr. 14, 2011). On April 15, 2011, the Tenth Circuit issued a Stay Order, temporarily staying both the Show Cause Order and the Preliminary Injunction. Stay Order, Document No. 01018623246 (10th Cir. Apr. 15, 2011). After additional briefing, the Tenth Circuit ordered that its stay shall remain in effect until dissolved by that court. Order, Doc. No. 01018630078 (10th Cir. Apr. 27, 2011). The stay of the Preliminary Injunction Order has remained in place since that time, and the Trust remains under the administration of the probate court and the Special Fiduciary.

The Tenth Circuit Certifies A State Law Question To The Utah Supreme Court. In addition to briefing the merits of the appeal, the Appellants/Defendants filed motions asking the Tenth Circuit to certify to this Court the question of the preclusive effect under Utah law of a judgment dismissing claims on grounds of laches. *See, e.g.*, Judge Lindberg and Special Fiduciary Wisan's Motion to Certify, Doc. No. 01018686652 (10th Cir., Aug. 1, 2011); Utah Attorney Genera Shurtleff's Motion to Certify, Doc. No. 01018686494 (10th Cir. Aug. 1, 2011). The FLDS Association opposed

certification. Appellee's Mem. In Opp. to Motions to Certify, Doc. No. 01018736082 (10th Cir. Oct. 27, 2010).

On February 23, 2012, the Tenth Circuit granted the motions to certify and, on March 2, 2012, issued a separate order explaining the reasons for granting the motions and stating the specific state law question certified to this Court. On March 16, 2012, this Court issued an order accepting the certification of the state law question.

SUMMARY OF ARGUMENT

This Court should confirm that under Utah law, dismissal of a petition for an extraordinary writ on grounds of laches in a written opinion is a decision "on the merits" such that later adjudication of the same claim is barred.

The doctrine of res judicata is "'premised on the principle that a controversy should be adjudicated only once.'" *Mack v. Utah Dep't of Commerce*, 2009 UT 47, ¶29, 221 P.3d 194 (quoting *Nebeker v. State Tax Comm'n*, 2001 UT 74, ¶23, 34 P.3d 180). The doctrine is intended "to protect litigants from the burden of relitigating an identical issue with the same party or his privy and to promote judicial economy by preventing needless litigation." *Smith v. Smith*, 793 P.2d 407, 409 (Utah Ct. App. 1990).

Contrary to the district court's conclusion, courts—including the Supreme Court, *Angel v. Bullington,* 330 U.S. 183, 190 (1947)—have recognized that a prior

adjudication does not need to reach the "ultimate substantive" merits in order to qualify as a decision "on the merits" with preclusive effect. Thus, courts—including this Court, *State v. Cahoon*, 2009 UT 9, ¶41, 203 P.3d 957—have repeatedly applied res judicata to hold that a dismissal of an action on statute of limitations grounds precludes relitigation of the underlying substantive claim even though the court did not reach the "merits" of the substantive claim.

Although this Court has not directly addressed whether laches determinations should have preclusive effect, the logic of applying that doctrine to dismissals on statute of limitations grounds compels extending it to the laches context as well. *A fortiori*, if res judicata applies to the determination that a claim should be barred because it is untimely, it should apply where there are express judicial findings that the plaintiff unduly delayed the filing of its claim and allowing that claim to proceed would cause substantial prejudice to parties that had justifiably relied on the status quo. Indeed, allowing relitigation in such a context would defeat the very purpose of the laches doctrine. Numerous courts have reached the same conclusion, and it is hornbook law that "[t]he same rule [that applies to statute of limitations dismissals] applies to a dismissal on such analogous theories as laches or undue delay in initiating an administrative proceeding." 18A Charles Alan Wright et al., *Federal Practice and Procedure* §4441 (2d ed. 2002).

That this Court dismissed the FLDS Association's claims on laches grounds in context of a petition pursuant to Rule 65B of the Utah Rules of Civil Procedure does not deprive the decision of preclusive effect. Although the decision whether to grant relief on a Rule 65B petition is "left to the sound discretion of the court hearing the petition," *State v. Barrett*, 2005 UT 88, ¶23, 127 P.3d 682, it is "well settled that the doctrine of res judicata is applicable to judgments in mandamus and prohibition proceedings[.]" E.T. Tsai, Annotation, *Judgment Granting or Denying Writ of Mandamus or Prohibition as Res Judicata*, 21 A.L.R. 3d 206, §2 (1968). Thus, in *Gates v. Taylor*, 2000 UT 33, ¶¶1-2 997 P.2d 903 (per curiam), this Court held that where a Utah court denies a petition for extraordinary writ in a written opinion and it "is clear that the matter was decided on the merits," the "petitioners are barred by the doctrine of res judicata from seeking the same relief" from another court in a subsequent action or petition. "Sound policy, principles of judicial economy, and fairness to the parties require that final judgments on the merits be subject only to proper appellate review and not to successive relitigation in new courts." *Id.* ¶3.

That is the case here. After extensive briefing—including submission of affidavits and exhibits—and oral argument, this Court issued a thorough written opinion "hold[ing] that the FLDS Association's claims regarding the district court's modification of the Trust are barred by the equitable doctrine of laches."

Lindberg, 2010 UT 51, ¶¶24-25 & n.13 (citing *Renn v. Utah State Bd. of Pardons*, 904 P.2d 677, 684 (Utah 1995)). In reaching this conclusion, this Court made detailed factual and legal findings both with regard to plaintiff's "lack of diligence" and the "injury [to third-parties] resulting from that lack of diligence." *Id.* ¶27. In short, this Court found that Jeffs and the FLDS Association's members made a strategic and conscious decision not to challenge the reformed Trust, and numerous parties relied on the assumed validity of the reformed Trust. It is thus clear that this Court dismissed the FLDS Association's Rule 65B petition not on discretionary grounds, but because it concluded that it would be inequitable to allow plaintiff to challenge the validity of the reformation of the Trust at this late date.

ARGUMENT

As explained below, this Court's decision that a claim is barred by laches is res judicata to all Utah state courts. And because Utah courts cannot relitigate a laches determination made by this Court, under 28 U.S.C. §1738, federal district courts may not either. *See Carpenter v. Reed*, 757 F.2d 218, 219 (10th Cir. 1985) (federal courts are required to give res judicata effect to state judgment to the extent state courts would give such effect).

I. THE DOCTRINE OF RES JUDICATA PROMOTES JUDICIAL ECONOMY AND PROTECTS LITIGANTS FROM THE BURDEN OF RELITIGATING A CLAIM WITH THE SAME PARTY.

The doctrine of res judicata has two related but distinct branches: claim preclusion and issue preclusion. *Mack*, 2009 UT 47, ¶29, 221 P.3d 194. Claim preclusion bars litigants from relitigating the same claims that were raised in a prior action between the same parties that resulted in a final judgment "on the merits." *See, e.g.*, *Macris & Assocs. v. Neways, Inc.*, 2000 UT 93, ¶19, 16 P.3d 1214; *Copper State Thrift & Loan v. Bruno*, 735 P.2d 387, 389 (Utah Ct. App. 1987). Issue preclusion (also known as collateral estoppel) prevents parties or their privies from relitigating, in a second suit raising different claims, "facts and issues" that "were fully litigated in the first suit." *Macris*, 2000 UT 93, ¶19, 16 P.3d 1214 (quotations omitted); *Copper State Thrift & Loan*, 735 P.2d at 389.

Both branches, however, are "premised on the principle that a controversy should be adjudicated only once." *Mack*, 2009 UT 47, ¶29, 221 P.3d 194 (quoting *Nebeker*, 2001 UT 74, ¶23, 34 P.3d 180). The doctrine of res judicata thus serves "the important judicial policy" of "preventing issues once litigated from being relitigated." *Penrod v. Nu Creation Crème, Inc.*, 669 P.2d 873, 874-75 (Utah 1983). It protects litigants "from the burden of relitigating an identical issue with the same party or his privy" and promotes "judicial economy by preventing needless litigation." *Smith*, 793 P.2d at 409; *see also Plotner v. AT&T Corp.*, 224

F.3d 1161, 1168 (10th Cir. 2000) ("The fundamental policies underlying the doctrine of res judicata ... are finality, judicial economy, preventing repetitive litigation and forum-shopping, and 'the interest in bringing litigation to an end.'"). As the United States Supreme Court has explained, res judicata means that "[o]nce a party has fought out a matter in litigation with the other party, he cannot later renew that duel." *Comm'r v. Sunnen*, 333 U.S. 591, 598 (1948).

II. THE DISMISSAL OF A CLAIM ON GROUNDS OF LACHES IS A DECISION "ON THE MERITS" FOR PURPOSES OF RES JUDICATA EVEN THOUGH IT DOES NOT DECIDE THE "ULTIMATE SUBSTANTIVE ISSUES" OF THE CLAIM.

Although a judgment must be "on the 'merits'" to bar subsequent litigation of the same claim between the same parties, it is a "misconception of res judicata to assume that the doctrine does not come into operation if a court has not passed on the 'merits' in the sense of the ultimate substantive issues of a litigation." *Angel,* 330 U.S. at 190. Rather, "[a]n adjudication declining to reach such ultimate substantive issues may bar a second attempt to reach them in another court of the State," because the "'merits' of a claim are disposed of when they are refused enforcement." *Id.*

Thus, if a court says to the plaintiff "'you are too late' or otherwise wraps up a case in a way that indicates that the plaintiff has irrevocably failed," the decision "may be 'on the merits' for purposes of preclusion even though the court did not resolve the merits" of the plaintiff's underlying claim. *Am. Nat'l Bank & Trust Co.*

v. City of Chic., 826 F.2d 1547, 1553 (7th Cir. 1987). For example, numerous state and federal courts have held that the dismissal of a claim as barred by the statute of limitations is a decision "on the merits" that bars relitigation of the claim in the same system of courts.[6] *See, e.g.*, *Murphy v. Klein Tools, Inc.*, 935 F.2d 1127, 1128-29 (10th Cir. 1991) (per curiam) (dismissal based on statute of limitations is a judgment on the merits); *Shoup v. Bell & Howell Co.*, 872 F.2d 1178, 1179 (4th Cir. 1989) ("We hold that the federal district court's dismissal of plaintiffs' Pennsylvania action on statute of limitations grounds is a final judgment on the merits."); *Rose v. Town of Harwich*, 778 F.2d 77, 80 (1st Cir. 1985) (Breyer, J.) ("our survey of recent cases suggests a clear trend toward giving claim-preclusive effect to dismissals based on statutes of limitations") (citing cases); *PRC Harris, Inc. v. Boeing Co.*, 700 F.2d 894, 896 (2d Cir. 1983) ("The longstanding rule in

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[6] If two jurisdictions each provide a cause of action for the same claim, but one jurisdiction applies a longer statute of limitations than the other, the traditional rule is that a dismissal of the claim barred by the shorter statute of limitations may not bar the plaintiff from proceeding with the claim in the jurisdiction with the longer statute of limitations. *See, e.g.*, 18A Wright et al., *supra*, §4441. The rationale for this rule is that a finding "that the action has been brought after the expiration of the statutory period, and, as a matter of law, that remedy is barred" in the first jurisdiction should not bind a court in the second jurisdiction that has decided, as a matter of law, to provide a longer statute of limitations. *See, e.g.*, *Warner v. Buffalo Drydock Co.*, 67 F.2d 540, 543 (2d Cir. 1933). But that rule has no application where, as here, "the second forum would decide independently to apply the same statute of limitations as led to the first dismissal." 18A Wright et al., *supra*, §4441; *cf. Owens v. Okure*, 488 U.S. 235, 245-48 (1988) (§1983 adopts the state statute of limitations for personal injury actions).

this Circuit," is that "a dismissal for failure to comply with the statute of limitations will operate as an adjudication on the merits . . . ."); *Nathan vRowan*, 651 F.2d 1223, 1226 (6th Cir. 1981) (same); *Myers v. Bull*, 599 F.2d 863, 865 (8th Cir. 1979) (per curiam) (same); *Williamson v. Columbia Gas & Elec. Corp.*, 186 F.2d 464, 466-67 & n.6 (3d Cir. 1950) (same); *N. Am. Specialty Ins. Co. v. Bos. Med. Grp.*, 906 A.2d 1042, 1052 (Md. Ct. Spec. App. 2006) (our holding that a statute of limitations dismissal is "an adjudication on the merits under the doctrine of *res judicata*" is "consistent with the majority of state courts to have addressed this issue") (citing cases); *Smith v. Russell Sage Coll.*, 429 N.E.2d 746, 750 (N.Y. 1981) (even if statute of limitations is sometimes viewed as "procedural," a dismissal on statute of limitations grounds is "sufficiently close to the merits for claim preclusion purposes to bar a second action"). In short, "[t]he rules of finality, both statutory and judge made, treat a dismissal on statute-of-limitations grounds the same way they treat a dismissal for failure to state a claim, for failure to prove substantive liability, or for failure to prosecute: as a judgment on the merits." *Plaut v. Spendthrift Farm, Inc.*, 514 U.S. 211, 228 (1995).[7]

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[7] In the Tenth Circuit, the FLDS Association opposed certification on the ground that because it filed suit in federal court rather than state court, this Court's dismissal of its claims on grounds of laches in *Lindberg* has no preclusive effect on the federal litigation notwithstanding whether or not laches would be preclusive of relitigation in Utah courts. Appellee's Mem. In Opp. to Motions to Certify at 16-19, Doc. No. 01018736082 (10th Cir. Oct. 27, 2010). The Tenth Circuit implicitly rejected this argument in certifying the question whether Utah courts accord

In the criminal context, this Court has similarly stated that "collateral estoppel prevents the government from bringing identical charges against a defendant if the original charges were dismissed for violating the statute of limitations." *Cahoon*, 2009 UT 9, ¶14, 203 P.3d 957 (emphasis omitted) (citing *United States v. Oppenheimer*, 242 U.S. 85 (1916)). In so doing, this Court followed *Oppenheimer*, in which the United States Supreme Court applied civil law principles of res judicata to the dismissal of an indictment on statute of limitations grounds and held that "[a] plea of the statute of limitations is a plea to the merits, and however the issue was raised in the former case, after judgment upon it, it could not be reopened in a later prosecution." *Oppenheimer*, 242 U.S. at 87-88 (citation omitted). The Court reasoned that "the 5th Amendment was not intended to do away with what in the civil law is a fundamental principle of justice

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preclusive effect to a dismissal of a petition for extraordinary writ on grounds of laches, and it was right to do so. The "full faith and credit" statute requires federal courts to afford state court judgments the same "full faith and credit" they would have "in the courts of such State." 28 U.S.C. §1738. Thus, if *Lindberg* would bar the FLDS Association from relitigating its constitutional challenge to the reformation of the Trust in Utah state court, it also bars the association's attempt to relitigate the same constitutional claim in federal court. *See, e.g.*, *Jarrett v. Gramling*, 841 F.2d 354, 358 (10th Cir. 1988) (because Oklahoma state court judgment in mandamus action barred plaintiff from bringing a separate §1983 action in state court, it also barred plaintiff from bringing the §1983 action in federal court); *DeVargas v. Montoya*, 796 F.2d 1245, 1249-50 (10th Cir. 1986) (New Mexico state court judgment dismissing plaintiff's §1983 claims on grounds of statute of limitations was "'on the merits' for res judicata purposes" and thus bars plaintiff's attempt to raise same claims in §1983 action in federal court), *overruled on other grounds by Newcomb v. Ingle*, 827 F.2d 675 (10th Cir. 1987).

in order, when a man once has been acquitted on the merits, to enable the government to prosecute him a second time." *Id.* at 88 (citation omitted).

Just as the dismissal of a claim on grounds of statute of limitations is a decision on the merits that bars relitigation of the claim, the same rule applies "to a dismissal on such analogous theories as laches or undue delay in initiating an administrative proceeding." 18A Wright et al., *supra*, §4441. Thus, a number of federal and state courts have recognized that a dismissal on the basis of laches is res judicata. *See, e.g.*, *Smith v. City of Chic.*, 820 F.2d 916, 918-19 (7th Cir. 1987) ("'Dismissals based on laches or the running of a statute of limitations preclude a second action based on the same claim brought in the same system of courts.'"); *Cannon v. Loyola Univ. of Chic.*, 784 F.2d 777, 781 (7th Cir. 1986) ("[t]he disposition of [constitutional] claims on grounds of laches is ". . . a judgment on the merits" for purposes of res judicata); *Murphy v. A/S Sobral*, 187 F. Supp. 163, 164 (S.D.N.Y. 1960) (holding that prior ruling dismissing claim on laches grounds was res judicata); *Day v. Estate of Wiswall*

, 381 P.2d 217, 220 (Ariz. 1963) (according preclusive effect to a California judgment rejecting a probate claim on the basis of laches); *cf. Paxton v. Ward*, 199 F.3d 1197, 1206 & n.3 (10th Cir. 1999) (dismissal on the basis of laches is a decision "on the merits" for purposes of statutory provision that habeas relief generally may not be granted to a claim adjudicated "on the merits" in state court).

Indeed, there are particularly compelling reasons for this Court to treat a dismissal on grounds of laches as a decision "on the merits" for purposes of res judicata. To dismiss a claim on laches, the court must find that the plaintiff showed a lack of diligence in bringing the claim, and the plaintiff's lack of diligence harmed the defendants or third parties. *Lindberg*, 2010 UT 51, ¶27, 238 P.3d 1054; *see also infra* pp. 35-37. To hold this dismissal is not "on the merits"—and thus the dilatory plaintiff may raise the claim in a second action notwithstanding the harm that causes to others—would directly undermine the interest in repose that the doctrine of laches is designed to protect. *Cf. Rose*, 778 F.2d at 81 (holding that a Massachusetts state court dismissal of an eminent domain action on statute of limitations grounds is a decision "'on the merits'" because allowing "a once-tardy plaintiff" to bring a second action "would directly undercut the policy underlying the limitations provision").

The federal district court in this case recognized "the essential fairness in the view that at some point litigation over a particular controversy must come to an end." Aplt.App.58. It nevertheless held that the dismissal of claims on grounds of laches is "entitled to preclusive effect" only if the court making the laches finding paid "appropriate attention" to the underlying merits of the claims. Aplt.App.60. That holding finds no support in precedent or logic and should be rejected by this Court.

Although the district court correctly stated that the Arizona Supreme Court in *Day*, 381 P.2d at 220, applied res judicata to a finding of laches made "'after a consideration of the circumstances and merits of a suit,'" Aplt.App.60, it is clear from the *Day* opinion that the laches decision was based not on the court's evaluation of the "merits" of plaintiff's underlying claim of legal entitlement to a portion of her stepmother's estate, but rather on the "merits" of the application of the doctrine of laches to the particular facts of that case. *See Day*, 381 P.2d at 220 (noting that the prior court had entered a judgment that "plaintiff take nothing" by reason of the doctrine of laches because the "separate and community interests" she sought to reach had been "intermingled" over the years in which she had delayed filing suit, and it "would now be inequitable to segregate and evaluate such interest[s] separately") (quotations omitted). The decision is thus fully consistent with the majority rule that a judgment holding claims barred by laches is a "judgment on the merits" for purposes of res judicata.[8]

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[8] Although there is language in *Johnson v. City of Loma Linda*, 5 P.3d 874, 884 (Cal. 2000), that a judgment on grounds of laches is not a judgment "on the merits" for purposes of res judicata because the "defense of laches has nothing to do with the merits of the cause against which it is asserted," the context in which that statement was made is entirely distinguishable from the issues before this Court. Johnson was an assistant city manager who alleged he was fired for opposing sexual discrimination by another city employee. *Id.* at 877. After the city personnel board rejected his grievance and found his job was eliminated for economic reasons, he filed suit raising several causes of action. The California Supreme Court held that Johnson's challenge to the personnel board decision was barred by laches, so the board's finding that he was discharged for

More fundamentally, if courts were to relax principles of res judicata whenever they thought a litigant had a strong claim on the merits, the doctrine "would fail to serve its purposes of promoting judicial economy and repose." *Rose*, 778 F.2d at 82 (holding that a state court's dismissal of an eminent domain action on statute of limitations grounds barred plaintiff from asserting the same claim in federal court under the Taking Clause notwithstanding plaintiff's argument that "he has a meritorious claim" and it is therefore "unfair to deny him relief."). Even if a court might think "a fairer result might be achieved" in some "individual instances," the "litigation of stale claims and the resulting uncertainty would mean injustice or hardship" most of the time. *Id.* "For this reason, the Supreme Court has instructed [courts] not to stray from traditional principles of res judicata by making any 'ad hoc determination of the equities in a particular case.'" *Id.* (quoting *Federated Dep't Stores, Inc. v. Moitie*, 452 U.S. 394, 401 (1981)).

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nondiscriminatory reasons was final under state law and binding on his claim under the state Fair Employment and Housing Act. *Id.* at 880, 884. But the board's finding was not binding on Johnson's claim under Title VII of the federal Civil Rights Act of 1964, because under governing United States Supreme Court precedent, "Title VII claims are not precluded by administrative decisions that have not been judicially reviewed on their merits." *Id.* at 882. Because the court held that Johnson's challenge to the personnel board findings were barred by laches, it did not review the board's findings "on the merits" and thus its judgment did not bar litigation of the Title VII claim. *Id.* at 884.

III. A UTAH COURT'S DENIAL OF A PETITION FOR EXTRAORDINARY WRIT UNDER RULE 65B IS RES JUDICATA IF IT AFFIRMATIVELY APPEARS THAT THE DENIAL WAS INTENDED TO BE ON THE MERITS.

When this Court denies a petition for extraordinary writ under Rule 65B on the merits, the denial of the writ is entitled to the same preclusive effect as the disposition on the merits of any other case pending before the Court. Rule 65B of the Utah Rules of Civil Procedure permits a person "to petition the court for extraordinary relief" if "no other plain, speedy and adequate remedy is available." Utah R. Civ. P. 65B(a). The court may grant the petitioner any of the remedies that were available under the common law writs, such as certiorari, mandamus, quo warranto, prohibition, or habeas corpus. *Renn*, 904 P.2d at 682-83 & n.3. Although the decision whether to grant relief on a Rule 65B petition is "left to the sound discretion of the court hearing the petition," *Barrett*, 2005 UT 127, ¶23, P.3d 682, it is "well settled that the doctrine of res judicata is applicable to judgments in mandamus and prohibition proceedings," 21 A.L.R. 3d 206, §2. In other words, "the special character of these proceedings does not, ipso facto, preclude a judgment rendered therein from operating as res judicata in another action or proceeding." *Id.* "All that is required is careful attention to the nature of the initial proceeding and the basis of decision." 18A Wright, Miller, et al., *supra*, §4445.

If the court denies a Rule 65B petition without opinion under circumstances that are "consistent with the view [that the] court merely refused to exercise its original jurisdiction, or . . . was of the opinion [that] an extraordinary writ was not a proper remedy," the denial of the writ is "not res judicata" and does not bar the petitioner's attempt to litigate the issues in a subsequent action. *Kennecott Copper Corp. v. Salt Lake Cnty.*, 575 P.2d 705, 708 (Utah 1978); *see also* 21 A.L.R. 3d 206, §18 ("In a number of cases the courts have held or recognized the rule to the effect that a judgment denying a writ of prohibition without written opinion is not res judicata unless the sole possible ground of the denial was that the court acted on the merits, or unless it affirmatively appears that such denial was intended to be on the merits.").

If, however, a court denies a petition for extraordinary writ on the merits, then "a right, question, or fact distinctly put in issue" in the petition and "directly determined" by the court "cannot be disputed in subsequent actions between the same parties or their privies." *Meagher Cnty. Newlan Creek Water Dist. v. Walter*, 547 P.2d 850, 853 (Mont. 1976); *see also, e.g., Ramirez-Pabon v. Bd. of Personnel*, 254 F.2d 1, 4 (1st Cir. 1958) (it is "a clearly correct application of the settled doctrine of res judicata" to hold that a "plaintiff cannot maintain a second suit on the same cause of action" when the question was presented to the court in a mandamus petition and "decided against her" on the merits); *City of Elmhurst v.*

Kegerreis, 64 N.E.2d 450, 455 (Ill. 1945) (where the "question was determined in the mandamus suit adversely to the contention of the appellant in this suit," res judicata prevents it from being relitigated in a subsequent proceeding); *State ex rel. Hamilton v. Cohn*, 95 P.2d 38, 41 (Wash. 1939) ("an adjudication made in a mandamus proceeding would bar a new proceeding under the same rule that would apply when a judgment of a court of record is set up as a bar to a new suit or action").

Utah courts follow this rule as well. In *Gates v. Taylor*, 2000 UT 33, ¶¶1-2, 997 P.2d 903, this Court held that where a Utah court denies a petition for extraordinary writ in a written opinion that "is clear that the matter was decided on the merits," the "petitioners are barred by the doctrine of res judicata from seeking the same relief" from another court in a subsequent petition. "Sound policy, principles of judicial economy, and fairness to the parties require that final judgments on the merits be subject only to proper appellate review and not to successive relitigation in new courts." *Id.* ¶3; *see also Burleigh v. Turner*, 388 P.2d 412, 414 (Utah 1964) (denial of a Rule 65B petition for writ of habeas corpus "is res judicata as to [a] subsequent proceeding" for habeas corpus relief). "When a court of competent jurisdiction has adjudicated directly upon a particular matter, the same point is not open to inquiry in a subsequent action for the same cause and

between the same parties." *Gates*, 2000 UT 33, ¶3, 997 P.2d 903 (alterations and quotations omitted).

IV. BECAUSE THIS COURT HELD THAT THE FLDS ASSOCIATION'S CHALLENGE TO THE MODIFICATION OF THE UEP TRUST IS BARRED BY LACHES, THE DISMISSAL OF THE RULE 65B PETITION IS A DECISION ON THE MERITS THAT IS RES JUDICATA IN A SUBSEQUENT ACTION.

As noted, in *Lindberg*, after extensive briefing (including submission of affidavits and exhibits) and argument, this Court adjudicated directly upon the question whether the FLDS Association's challenge to the modification of the UEP Trust is barred by laches. In a detailed and thorough 45 paragraph written opinion, this Court dismissed the FLDS Association's petition, "hold[ing] that the FLDS Association's claims regarding the district court's modification of the Trust are barred by the equitable doctrine of laches." *Lindberg*, 2010 UT 51, ¶¶24-25 & n.13, 238 P.3d 1054 (quoting *Renn*, 904 P.2d at 684).

In so holding the FLDS Association's claims barred by laches, this Court applied the same laches test that is applicable to claims commenced in Utah courts under other jurisdictional grants. *Lindberg*, 2010 UT 51, ¶¶27-29, 238 P.3d 1054 (citing *Angelos v. First Interstate Bank*, 671 P.2d 772, 777 (Utah 1983) (action filed in district court by orthodontist to recover against bank for wrongful acceptance of patients' checks bearing forged endorsements), and *Papanikolas Bros. Enters. v. Sugarhouse Shopping Ctr. Assocs.*, 535 P.2d 1256, 1260 (Utah

1975) (action filed in district court to enforce a restrictive covenant)). That laches test "has two elements: (1) a party's lack of diligence and (2) an injury resulting from that lack of diligence." *Lindberg*, 2010 UT 51, ¶27, 238 P.3d 1054.

With respect to the first element, the Court found that "the FLDS Association has demonstrated a lack of diligence in filing this petition" because it delayed filing suit for three years, "despite assurances by the [district] court that participation" in the litigation to modify the Trust "was welcome." *Id.* ¶¶30, 32. Furthermore, "this delay did not occur under circumstances that might excuse it, such as prompt negotiations aimed at avoiding litigation," as occurred in *Paponikolas Bros. Id.* ¶32.

The Court also found the second element of the laches test met because the "lack of diligence has caused injury to those who relied on the Trust's modification during the FLDS Association's delay." *Id.* ¶33. Specifically, the Special Fiduciary "has made choices over the years, many expressly approved by Judge Lindberg, that cannot be undone." *Id.* (quotations omitted). "Other interested persons, including Trust Participants who are not members of the Petitioner association, have also made irreversible decisions and changed their positions based on [the] unappealed and heretofore unchallenged final orders" of the district court. *Id.* (quotations omitted). Finally, the FLDS Association's delay in filing the petition injured the "Original Interested Individuals, whose looming default judgments led

to the district court's reformation of the Trust." *Id.* ¶34. The FLDS Association's delay "caused the Individuals to change positions on their own claims," and any relief "granted the FLDS Association would operate against the interests of the Original Interested Individuals." *Id.* Because both prongs of the laches test were met, this Court "dismiss[ed] the FLDS Association's Trust modification claims pursuant to the doctrine of laches."[9] *Id.* ¶35.

In sum, it is clear from the Court's opinion that the FLDS Association's challenge to the reformation of the UEP Trust was dismissed because it is barred by laches, and not because the Court declined to exercise its discretion to grant relief under Rule 65B. The Court's laches finding is therefore res judicata and bars the FLDS Association's attempt to relitigate its challenge to the reformation of the Trust in a subsequent action.[10]

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[9] Because the Court held that the FLDS Association's claims are barred by laches, it "decline[d] to reach the merits of [the Association's] claims." *Lindberg*, 2010 UT 51, ¶43, 238 P.3d 1054. As noted above, however, a decision dismissing a claim on grounds of laches (like a finding that a claim is barred by the statute of limitations) is a decision "on the merits" for purposes of res judicata, even though it does not address the "merits" of the plaintiff's underlying claim. *See supra* Section III.

[10] Of course, this does not mean that *Lindberg* categorically precludes the FLDS Association from raising any claim related to administration of the Trust. This Court's decision made clear that while the FLDS Association may not challenge the reformation of the Trust, its claims that certain Trust beneficiaries may be denied a share of Trust property based on their religious beliefs are not barred by laches. Although this Court held that these claims were not ripe because such conduct had not occurred, plaintiff may raise them if the Trust property is

CONCLUSION

This Court should confirm that under Utah law, dismissal of a petition for an extraordinary writ on grounds of laches in a written opinion is a decision "on the merits" such that later adjudication of the same claim is barred. Accordingly, this Court should further confirm that its decision in *Fundamentalist Church of Jesus Christ of Latter-Day Saints v. Lindberg*, 2010 UT 51, 238 P.3d 1054, was on the merits and that no party or privity of any party can relitigate any claim that was or could have been raised in that matter.

RULE 24(a)(11) STATEMENT

No addendum is necessary under Rule 24(a)(11) of the Utah Rules of Appellate Procedure.

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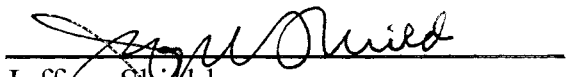
distributed in the future in an unconstitutional manner. *Lindberg*, 2010 UT 51, ¶¶ 39-40, 238 P.3d 1054.

Respectfully submitted,



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CERTIFICATE OF COMPLIANCE WITH RULE 24(f)(1)

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1. This brief complies with the type-volume limitation of Utah R. App. P.24(f)(1) because this brief contains 10,037 words, excluding the parts of the brief exempted by Utah R. App. P.24(f)(1)(B).

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Dated: April 20, 2012

Jeffrey L. Shields

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of April 2012, I caused two (2) true and correct copies of the foregoing **OPENING BRIEF OF APPELLANTS BRUCE R. WISAN AND DENISE POSSE LINDBERG** to be filed and served via U.S. first-class, postage fully pre-paid, mail upon the following:

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