No. 21-1025

In the United States Court of Appeals for the Tenth Circuit

DENVER HOMELESS OUT LOUD, et al., Plaintiffs-Appellees,

v.

DENVER, COLORADO, et al., Defendants-Appellants.

On Appeal from the United States District Court
for the District of Colorado, Case No. 1:20-cv-02985-WJM-SKC
(Hon. William J. Martinez)

MOTION FOR LEAVE TO FILE BRIEF AMICUS CURIAE OF THE INSTITUTE FOR JUSTICE IN SUPPORT OF APPELLEES AND REHEARING

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Fed. R. App. P. 26.1, amicus curiae the Institute for Justice states that it is a 501(c)(3) nonprofit organization. It has no parent corporation and no publicly traded stock. No publicly held corporation owns any part of it.

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MOTION FOR LEAVE TO FILE A BRIEF AS AMICUS CURIAE

In accordance with Fed. R. App. P. 29(b), the Institute for Justice respectfully requests that this Court grant it leave to file a brief as amicus curiae in support of the plaintiffs-appellees' petition for panel or en banc rehearing. *See* Fed. R. App. P. 29(b) (providing that all such non-governmental briefs must be submitted by motion). Counsel for the plaintiffs-appellees do not oppose the filing of our amicus brief; counsel for the defendants-appellants have advised that they take no position on this motion.

1. The Institute for Justice is a nonprofit, public-interest law firm that represents civil-rights plaintiffs across the nation, including within the Tenth Circuit. *See, e.g.*, *Sampson* v. *Buescher*, 625 F.3d 1247 (10th Cir. 2010); *Harjo* v. *City of Albuquerque*, 326 F. Supp. 3d 1145 (D.N.M. 2018); *Holland* v. *Williams*, 457 F. Supp. 3d 979 (D. Colo. 2018); *cf. Frey* v. *Town of Jackson*, No. 20-8021 (10th Cir.) (appearing at oral argument as amicus). Because the panel decision in this case departed from the adversarial process in several important ways, we have a keen interest in the Court's rehearing the case.

2. Our brief, we believe, will aid this Court's decisional process. Whether to grant rehearing is a weighty matter, as shown by the criteria set

forth in Federal Rule of Appellate Procedure 35(a). To assist the Court, our brief is designed to be additive to the plaintiffs' petition in three ways.

First, our brief addresses (at pp. 2-4) the adversarial norms and the due-process implications raised by the panel's sua sponte decision. As noted in Judge Rossman's dissenting opinion, the panel resolved this appeal on an unargued ground and without giving the parties notice and an opportunity to be heard. Our brief offers a broader perspective on why such notice is a critical part of our adversarial process. It also directs the Court to Supreme Court precedent and scholarship on this point.

Second, we explain (at pp. 4-9) that the panel majority appears to have conflated two distinct concepts: claim preclusion and contractual release. Without the benefit of adversarial briefing, the panel assumed that a settlement agreement in different litigation had claim-preclusive effect on the plaintiffs in this case. As detailed in our brief, however, the panel may well have confused claim preclusion with a different defense entirely: contractual release. This error implicates the panel's very power to decide the case as it did. The Supreme Court has "made clear" that the federal courts may raise an unargued defense sua sponte only if that defense "squarely implicate[s] the institutional interests of the judiciary." *Maalouf* v. *Islamic Republic of Iran*,

923 F.3d 1095, 1110 (D.C. Cir. 2019); *see also Wood* v. *Milyard*, 566 U.S. 463, 472 (2012). And while the defense of claim preclusion may potentially implicate such interests, contractual release almost certainly does not. By conflating the two concepts, the panel majority thus may have overstepped its decisionmaking authority. Given the structural importance of this potential error, we believe our amicus brief will be of value to the Court.

Third, we offer (at pp. 9-12) an outside perspective on the importance of the principle of party presentation. By departing from the issues presented for review, the panel introduced confusion into an already complex area of law. (As Judge Rossman's dissent notes, the panel may even have created a circuit split on a question of class-action practice.) The panel's decisional process also threatened real harm to the neutrality values that undergird our adversarial system. To give just one example, the panel developed unargued defenses for one side, Maj. Op. 17-19, while holding the other to the rigorous rules of party presentation, *id.* 19 n.10. Our brief offers additional examples of this phenomenon and discusses the broader risks posed by sua sponte decisionmaking. *See generally* Stephan Landsman, *Readings on Adversarial Justice: The American Approach to Adjudication* 2 (1988) ("Adversary theory further suggests that neutrality and passivity are essential not only to ensure an evenhanded

consideration of each case, but also to convince society at large that the judicial system is trustworthy.").

3. The course of this appeal also counsels in favor of amicus participation. As noted above, the panel majority ventured beyond the questions presented for review and issued a published opinion on a complex area of federal law without notice to the parties. This departure from ordinary appellate practice brings with it a special risk of error. *Cf. Singleton* v. *Wulff*, 428 U.S. 106, 121 (1976) ("[I]njustice [is] more likely to be caused than avoided by deciding the issue without petitioner's having had an opportunity to be heard."). And because the panel elected to resolve the appeal in a published opinion, any such errors will cause harm for future litigants Circuit-wide. While we take no position on the substance of the plaintiffs' claims in this litigation, we have a keen interest in this Circuit's realigning its practice with the standard adversarial process of the federal courts.

* * *

For these reasons, the Court should grant the Institute for Justice's motion for leave to file the attached amicus brief. If this motion is granted, the Institute for Justice further requests that the accompanying brief be considered filed as of the date of this motion's filing.

Dated: June 14, 2022.

Respectfully submitted,

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IDENTITY AND INTEREST OF AMICUS CURIAE

The Institute for Justice is a nonprofit law firm dedicated to securing greater protection for individual liberty. We represent plaintiffs in civil-rights cases nationwide, including within the Tenth Circuit. Because the panel's decision disrupts the adversarial process in several important ways, we have a keen interest in the Court's rehearing this case.[1]

INTRODUCTION

This appeal was about many things, but—until last month—claim preclusion wasn't one of them. The government defendants did not brief claim preclusion at the preliminary-injunction stage. They didn't raise it in their opening brief on appeal, or in their reply, or at oral argument. Even so (and with no notice to the parties), two-thirds of the panel introduced claim preclusion sua sponte and harnessed that unargued theory to rule for the government. In doing so, the panel broke with the structure of our adversarial process. It deprived the plaintiffs of one of the promises of our justice system—a meaningful opportunity to be heard. It developed unargued defenses for one

[1] No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no person except amicus curiae, its members, or its counsel contributed money intended to fund the preparation or submission of this brief.

side, Maj. Op. 17-19, while holding the other to the rigorous rules of party presentation, *id.* 19 n.10. And on substance, its opinion injected confusion into an already complex area of law. Simply, the panel's decision is a case study in why the federal courts "do not, or should not, sally forth each day looking for wrongs to right." *Greenlaw* v. *United States*, 554 U.S. 237, 244 (2008) (citation omitted). Rehearing is warranted.

ARGUMENT

A. By raising an unargued defense without giving the parties an opportunity to address it, the panel broke with norms of the adversarial system and principles of due process.

One of the promises of our legal system is that parties will have a meaningful "opportunity to be heard." *Postal Tel. Cable Co.* v. *City of Newport*, 247 U.S. 464, 476 (1918). For that reason, federal courts accept as a tenet of the decisional process that judges should not raise case-dispositive issues without—at minimum—giving the parties notice and a chance to respond. This principle finds expression in the Constitution's due-process protections. Practically speaking, it's also sensible; letting parties address new grounds for decision makes it more likely that courts will make informed, correct rulings. *See Greenlaw*, 554 U.S. at 244; *Snider* v. *Melindez*, 199 F.3d 108, 113 (2d Cir. 1999).

The Supreme Court has made this point time and again. It has repeatedly counseled courts to "accord the parties fair notice and an opportunity to present their positions" before raising issues "on [their] own initiative." *E.g.*, *Day* v. *McDonough*, 547 U.S. 198, 210 (2006). This Court has said much the same thing. *Planned Parenthood of Kan. & Mid-Mo.* v. *Moser*, 747 F.3d 814, 837 (10th Cir. 2014). Commentators have even posited that parties should get rehearing *as of right* when a panel decides matters without notice. Adam A. Milani & Michael R. Smith, *Playing God: A Critical Look at Sua Sponte Decisions by Appellate Courts*, 69 Tenn. L. Rev. 245, 304-07 (2002). Process matters, and part of the appellate process is letting parties be heard.

The panel broke with these teachings at a bedrock level. Denver and its co-defendants did not raise claim preclusion in their brief opposing the plaintiffs' preliminary-injunction motion. Or in their opening appellate brief. Or in their reply. Or at oral argument. The plaintiffs thus had no cause to address the subject. Nor did the panel give them a chance to do so—by, for example, ordering supplemental briefing. Dissenting Op. 2, 12. The panel instead issued a published opinion on a theory of claim preclusion that appeared nowhere in the record or in the briefs before it.

This is not how our adversarial system is meant to work. Making matters worse, the panel also took several analytic shortcuts based on the plaintiffs' failure to "dispute" or "argue" propositions pertaining to claim preclusion.[2] But to state the obvious, the plaintiffs had no reason—or opportunity—to stake out positions on these issues. By all appearances, they were sandbagged. Without notice, the panel introduced a defense not properly before it. It then ruled against the plaintiffs based in part on their failure to anticipate that defense. (That the majority resorted to combing through filings in an as-yet-undecided motion *before the trial court* only spotlights the breakdown of the adversarial process. Dissenting Op. 8.) These errors strongly favor rehearing.

B. The defense the panel introduced sounds in contractual release—not claim preclusion—meaning the panel did not have discretion to raise it sua sponte.

It is also unclear whether the panel even had the power to act as it did. In the panel's view, Denver and its co-defendants had a good claim-preclusion defense based on release terms contained in an earlier settlement agreement. The panel thus raised the defense sua sponte and ruled for the government.

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[2] Maj. Op. 19 n.10 ("[T]he DHOL Plaintiffs have not raised any issues of ambiguity in the *Lyall* settlement agreement as an argument against preclusion . . . ."); *id.* 20 n.11 ("Neither party disputes the *Lyall* settlement agreement is a final judgment . . . ."); *id.* 23 ("They do not argue their counsel was constitutionally deficient or their due process rights were violated.").

As the dissent noted, however, the majority's "claim preclusion" theory more closely resembles a different defense entirely: contractual release. And that distinction matters; whatever discretion the panel may have had to raise claim preclusion, that discretion almost certainly does not extend to a defense like contractual release. This question goes to fundamental aspects of our adversarial process. But without the benefit of briefing, the panel ignored it. Rehearing is warranted on this ground also.

1. In recent decades, the Supreme Court has cabined the circumstances in which federal courts may "depart from the principle of party presentation" and introduce defenses the parties have failed to raise or preserve. *Wood* v. *Milyard*, 566 U.S. 463, 472 (2012). Apart from subject-matter jurisdiction, the courts have only narrow authority to raise defenses on their own motion. In fact, the general rule is that they have no such power. *Id.* at 470. It is only for defenses "founded on concerns broader than those of the parties" that the Supreme Court has recognized a "modest exception." *Id.* at 470, 471. Only when that subset of defenses is implicated may the courts act on their own initiative (and even then, only "when extraordinary circumstances so warrant"). *Id.* at 471, 472 (citation omitted); *see also Maalouf* v. *Islamic Republic of Iran*, 923 F.3d 1095, 1110 (D.C. Cir. 2019) ("[T]he

[Supreme] Court has made clear that the circumstances of a case must squarely implicate the institutional interests of the judiciary for such action to be permissible.").

The panel appears to have assumed that claim preclusion is one such "institutional" defense. As the petition (and the dissent) ably describe, that assumption is open to question. *E.g.*, Dissenting Op. 8-12. More fundamentally, though, it is unclear whether the settlement agreement the majority invoked has claim-preclusive force at all. Claim preclusion attaches to judgments. And as the majority elsewhere emphasized, the settlement agreement in *Lyall* v. *City of Denver* was not part of a federal-court judgment. Maj. Op. 15 ("The *Lyall* Final Judgment neither incorporated the agreement's terms nor expressly retained jurisdiction over the agreement."). That means the *Lyall* settlement may not implicate claim preclusion in any way. The "first lesson" of claim preclusion, after all, is that "a private settlement agreement does not give rise to preclusion if it is not transformed into a judgment." 18A Charles Alan Wright et al., *Federal Practice & Procedure* § 4443, at 243 (3d ed. 2017). Rather, "[w]hatever effect it has on the future relationships between the parties derives from its force as a contract, not from res judicata." *Id.*;

Dissenting Op. 5 n.2 ("Maybe the Denver Defendants are relying not on preclusion but on release . . . .").

Granted, in some contexts the line between contractual release and claim preclusion might not much matter. But under *Wood* v. *Milyard*, it could well matter here. A claim-preclusion defense might "implicat[e] values beyond the concerns of the parties"—the courts' interest in the finality of their judgments, perhaps. *Wood*, 566 U.S. at 472 (citation omitted). But the same can't be said of contractual release. "[T]he parties to a contract make laws only for themselves" and their privies. Ian Ayres et al., *Studies in Contract Law* 1 (8th ed. 2012). A release thus does not implicate the sort of "institutional interests of the judiciary" that empowers a federal court to raise the matter sua sponte. *See Maalouf*, 923 F.3d at 1113.

2. Are there answers to the concerns detailed above? Maybe. But the panel majority didn't give any. Perhaps, for instance, the majority thought the district court's approval of the *Lyall* settlement under Rule 23(e) infused the agreement with the claim-preclusive force of a judgment. One treatise suggests (with little authority) that this is the right way to think about class-action settlements. 6 *Newberg on Class Actions* § 18:19 (5th ed. 2011) ("The process by which a class action settlement is approved has the effect of turning the

private settlement into a judicial ruling, a judgment."). Yet that view is hard to square with how Article III courts understand their judgments more broadly; under federal law, "[t]he judge's mere awareness and approval of the terms of the settlement agreement do not suffice to make them part of his order." *Kokkonen* v. *Guardian Life Ins. Co. of Am.*, 511 U.S. 375, 381 (1994). Indeed, the panel elsewhere insisted that the *Lyall* settlement was *not* part of a federal judgment but was a creature of contract law and no concern of the federal courts. Maj. Op. 15-16, 19 n.10.

In this way, the panel's reasoning reduces to a double-headed coin. The *Lyall* settlement agreement is a federal judgment for purposes of precluding the claims of Denver's homeless population. *Id.* 20 n.11 ("Neither party disputes the *Lyall* settlement agreement is a final judgment on the merits for res judicata purposes."). But it's *not* a federal judgment for purposes of, well, having the federal courts enforce it. *Id.* 15-16. Perhaps there is a principled way to defend that result. For its part, though, the panel opinion fails even to acknowledge the tension—much less reckon with it.

3. In a similar vein, the panel appears to have conflated basic distinctions between settlement agreements (which often are not part of court judgments) and consent judgments (which are). For example, the panel cited

Arizona v. *California* as saying that "settlements 'ordinarily support claim preclusion.'" *Id.* 20 n.11 (quoting 530 U.S. 392, 414 (2000)). In truth, however, *Arizona* said that "*consent judgments* ordinarily support claim preclusion." 530 U.S. at 414 (emphasis added; citation omitted). And unlike in *Lyall*, the *Arizona* settlement had not been merely "approved," but "entered as [the court's] final judgment"—meaning it was embodied in a (presumably claim-preclusive) decree. *Id.* at 405.

Similar imprecisions pervade the opinion. In reading the *Lyall* settlement agreement broadly, for example, the panel equated it with a "judgment entered in [a] prior action [that] incorporated a settlement . . . ." Maj. Op. 25 n.14 (citation omitted). But elsewhere, the panel pronounced that the judgment in *Lyall* did *not* "incorporate[] the agreement's terms." *Id.* 15; Dissenting Op. 13 n.6. These imprecisions implicate the Court's very power to decide the case as it did: By blurring settlements with judgments, the panel may well have contravened Supreme Court precedent by raising contractual release—seemingly, a parochial defense—on its own motion.

C. The panel majority's decision spotlights the importance of the principle of party presentation.

The panel's errors are important and merit rehearing. At base, our nation's "adversarial system of adjudication" rests on "the principle of party

presentation." *United States* v. *Sineneng-Smith*, 140 S. Ct. 1575, 1579 (2020). This principle aids the courts' truth-seeking function. By establishing the courts as "essentially passive instruments of government," it also sets judges apart as impartial, detached decisionmakers. *Id.* (citation omitted).

The panel's decision is a cautionary tale in the importance of these values. By venturing beyond the parties' arguments, the panel injected uncertainty into basic questions such as, *what is and is not a federal-court judgment?* It appears to have misperceived distinctions between settlement agreements and court orders. It may even have split with other circuits on an important question of class-action practice. Dissenting Op. 14-16. By abandoning the issues presented for review, the panel complicated the law at every turn.

The panel's decisional process also compromised a separate important value: neutrality. By "rely[ing] on the parties to frame the issues for decision," our adversarial system reserves to the courts "the role of neutral arbiter of matters the parties present." *Greenlaw*, 554 U.S. at 243. But when the courts raise unargued defenses, there is a unique risk that they will pick (or will appear to pick) winners and losers based on something other than neutral rules. Here, for instance, the panel majority afforded leniency to the more powerful litigants—the government—by forgiving their "failure" to raise claim

preclusion. Maj. Op. 14. Yet the panel extended no such grace to the homeless plaintiffs. To give just one example, the panel declined to consider whether "further factual development" might alter its claim-preclusion analysis. Why? Because the plaintiffs "did not make such an argument" below—and this Court "ordinarily declines to consider arguments not presented to the district court." *Id.* 19 n.10.

The contrast is stark: The panel developed unargued theories for one side while enforcing party-presentation rules rigorously against the other. By opting to raise only *some* issues sua sponte, moreover, the panel may have put an inadvertent thumb on the scale. In raising the *Lyall* settlement sua sponte, the panel assumed that the agreement's release was fully enforceable. Yet that assumption may well have been misplaced. According to the plaintiffs, Denver materially breached other provisions of the agreement. So under governing law, the city may be foreclosed from invoking the release provisions at all. *See Coors* v. *Sec. Life of Denver Ins. Co.*, 112 P.3d 59, 64 (Colo. 2005) ("[A] party to a contract cannot claim its benefit where he is the first to violate its terms."); Dissenting Op. 17 ("The *Lyall* settlement agreement includes a Colorado choice-of-law provision."). In developing arguments sua sponte, the panel went

just far enough to rule for the government—but not so far as to rule against it.

Respectfully, the plaintiffs—and everyone in this Circuit—deserve better. Circuit-court precedent matters, not just to the parties but to the community at large; appellate opinions affect the rights of litigants in countless cases to come. Respect for the judicial role thus strongly disfavors what the panel did here in "sally[ing] forth" to address matters the appeal did not present and the parties did not brief. *Greenlaw*, 554 U.S. at 244 (citation omitted). Such a practice disserves the litigants. It conflicts with the judge's duty as "neutral arbiter." *Id.* at 243. It raises serious due-process concerns. And it creates a special risk of courts' getting things wrong. Substantive errors combine with process errors to make this case a strong candidate for rehearing.

CONCLUSION

The petition for rehearing should be granted.

Dated: June 14, 2022.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This document complies with Fed. R. App. P. 29(b)(4) because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 2,585 words.

2. This document complies with the typeface requirements of Fed. R. App. P. 29(b)(4) and 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because this document has been prepared in a proportionally spaced typeface using Microsoft Word in 14-point Century Expanded font.

Dated: June 14, 2022.

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