No. 24-1443

IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

ERIE INDEMNITY COMPANY,
Plaintiff-Appellee,

v.

TROY STEPHENSON, CHRISTINA STEPHENSON, and STEVEN BARNETT, in both their individual capacities and in any representative capacities they may have relating to ERIE INSURANCE EXCHANGE,
Defendants-Appellants.

On Appeal from the United States District Court
for the Western District of Pennsylvania, No. 1:22-cv-00093-CRE,
Hon. Cynthia Reed Eddy, United States Magistrate Judge

REPLY BRIEF FOR DEFENDANTS-APPELLANTS

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INTRODUCTION

Plaintiff-Appellee Erie Indemnity Company (Indemnity) filed this lawsuit against Defendants-Appellants Troy Stephenson, Christina Stephenson, and Steven Barnett (the Subscribers) to seek a permanent injunction barring proceedings in *Erie Insurance Exchange v. Erie Indemnity Co.*, No. GD-21-014814 (Pa. Ct. Comm. Pl.) (the State Court Action), a case that the Subscribers brought on behalf of Erie Insurance Exchange (Exchange) to seek relief from Indemnity for fiduciary breaches arising from events occurring in and after December 2019. As the Subscribers' opening brief explains, the district court erred in granting Indemnity a preliminary injunction. Indemnity has shown neither that it is likely to succeed on the merits of its claim to permanent injunctive relief nor that it will suffer irreparable harm absent preliminary relief.

Indemnity's contrary arguments falter at every turn. As for likelihood of success on the merits, Indemnity maintains that it is likely to establish that permanent injunctive relief is proper because it can show that the claims in the State Court Action are barred by either claim or issue preclusion. Indemnity is wrong thrice over.

First, Indemnity's argument that the fiduciary-breach claims in the State Court Action are barred by the claim-preclusive effect of the final judgments in *Beltz v. Erie Indemnity Co.*, No. 1:16-cv-179 (W.D. Pa.), and *Ritz v. Erie Indemnity Co.*, No. 1:17-cv-340 (W.D. Pa.), fails to grapple with the fact that the claims in the State Court Action arise out of conduct that postdates the *Beltz* and *Ritz* judgments and that, accordingly, could not have been challenged in those actions. Under such circumstances, as this Court has repeatedly held, claim preclusion does not apply.

Second, Indemnity's issue-preclusion argument is based on the mistaken contention that *Ritz* establishes that the claim-preclusive effect of the *Beltz* judgment bars the claims in the State Court Action. *Ritz*, however, held that *Beltz* barred claims that sought relief for fiduciary breaches dating from 2007 to 2017. Those claims differ from the claims in the State Court Action, which seek relief for later conduct that had not yet occurred when *Beltz* (or *Ritz*) reached final judgment. And the issue whether the *Beltz* judgment bars claims arising out of post-*Beltz* conduct was not litigated in *Ritz*, let alone decided. Since issue preclusion applies only where an earlier judgment decides a litigated issue that is identical to one presented in a later case, the doctrine does not apply here.

Third, Indemnity incorrectly assumes that permanent injunctive relief is appropriate if it can establish that it has a preclusion defense to the claims in the State Court Action. The Supreme Court, though, has emphasized that parties seeking a federal injunction of state-court proceedings face a formidable hurdle. Such relief, the Court has explained, is available only in the clearest cases and only if a prior federal judgment has actually resolved a particular claim or issue. These requirements are not satisfied here.

As for irreparable harm, Indemnity urges this Court to adopt a categorical rule that any state-court litigant with a federal preclusion defense will suffer irreparable harm absent a federal injunction of state-court proceedings. Such a rule would impugn state courts' competence to properly adjudicate federal defenses, contravene traditional equitable principles, and turn an extraordinary remedy into standard practice.

ARGUMENT

I. Indemnity has not established a likelihood of success on the merits.

This Court must vacate the preliminary injunction entered below unless Indemnity has established a likelihood of success on the merits of its claim that it is entitled to a permanent federal injunction of the State

Court Action. Indemnity argues that it can carry this burden because both claim and issue preclusion bar the claims in the State Court Action. Indemnity is wrong on both counts. Moreover, even if Indemnity's preclusion arguments had merit (and they do not), Indemnity cannot show that the Anti-Injunction Act permits the extraordinary relief it seeks.

A. Indemnity has not established that the claims in the State Court Action are barred by claim preclusion.

1. The doctrine of claim preclusion (or res judicata) bars the plaintiff in a lawsuit that has culminated in a final judgment on the merits from using a second lawsuit to advance causes of action that "could have been brought" in the earlier suit. *Davis v. Wells Fargo*, 824 F.3d 333, 342 (3d Cir. 2016) (quoting *In re Mullarkey*, 536 F.3d 215, 225 (3d Cir. 2008)). This doctrine "avoid[s] piecemeal litigation of claims arising from the same events," *Gen. Elec. Co. v. Deutz AG*, 270 F.3d 144, 157–58 (3d Cir. 2001), by "requir[ing] a plaintiff to present all claims arising out of the same occurrence in a single suit," *Davis*, 824 F.3d at 341 (quoting *Blunt v. Lower Merion Sch. Dist.*, 767 F.3d 247, 277 (3d Cir. 2014)).

These rationales are inapplicable where a plaintiff files a second lawsuit to advance claims that are "predicated on events that postdate the filing" of a prior suit that has since reached final judgment, *Morgan*

v. Covington Twp., 648 F.3d 172, 178 (3d Cir. 2011), because the plaintiff could not have presented the later-arising claims in the first lawsuit. This Court has accordingly joined at least "[f]ive other Courts of Appeals" in "adopt[ing] a bright-line rule that [claim preclusion] does not apply" under such circumstances. *Id.* at 177.

This rule defeats Indemnity's contention that the claims in the State Court Action—which are predicated on Indemnity's conduct in and after December 2019—are barred by claim preclusion due to *Beltz* and *Ritz*, both of which reached final judgment prior to December 2019. In arguing otherwise, Indemnity repeatedly asserts that a claim arising out of factual developments that postdate a prior judgment escapes the judgment's preclusive effect only if those developments reflect "a change in 'material operative facts.'" Response Br. 22 (quoting *Huck ex rel. Sea Air Shuttle Corp. v. Dawson*, 106 F.3d 45, 49 (3d Cir. 1997)). Consistent with *Morgan*, though, post-judgment conduct that gives rise to a new legal claim is a material development. Here, Indemnity allegedly collected excessive fees from Exchange on discrete occasions after announcing in 2019 and 2020 that it planned to do so. These actions, which occurred

after *Beltz* and *Ritz* had concluded, provided the basis for new legal claims that could not have been brought in the prior cases.

Attempting to blur *Morgan*'s "bright-line rule," 648 F.3d at 177, Indemnity argues that claims arising out of allegedly unlawful conduct that postdates the judgment in an earlier lawsuit can escape claim preclusion only if the conduct "*differ*[*s*] from the conduct alleged in the original [suit]," Response Br. 31; *see id*. at 33. This qualification appears neither in *Morgan* nor in any of the numerous decisions of this Court and the Supreme Court that reinforce *Morgan*'s holding. *See Lucky Brand Dungarees, Inc. v. Marcel Fashions Grp., Inc.*, 590 U.S. 405, 414 (2020); *Lawlor v. Nat'l Screen Serv. Corp.*, 349 U.S. 322, 327–28 (1955); *Labelle Processing Co. v. Swarrow*, 72 F.3d 308, 313–14 (3d Cir. 1995); *Bd. of Trs. of Trucking Emps. of N. Jersey Welfare Fund, Inc. v. Centra*, 983 F.2d 495, 504–05 (3d Cir. 1992); *Alexander & Alexander, Inc. v. Van Impe*, 787 F.2d 163, 166 (3d Cir. 1986). Rightly so. As the Subscribers have explained, placing such a limitation on *Morgan*'s rule would offer a defendant "carte blanche" to engage in even "flagrantly unlawful" conduct "indefinitely into the future without fear of legal consequence," as long as the conduct resembled the conduct at issue in a suit that had

previously been dismissed for any number of purely procedural reasons. Opening Br. 33.

Indemnity's only answer to the wall of precedent that the Subscribers have cited is to claim that each of the cited cases involved "new material operative facts," Response Br. at 34, or a "change in controlling facts," *id.* at 32, following a prior judgment. Again, though, new conduct that gives rise to new damages *is* a new material fact, even if that conduct resembles earlier conduct that was unsuccessfully challenged in the past.

The decision in *Allegheny International, Inc. v. Allegheny Ludlum Steel Corp.*, 40 F.3d 1416 (3d Cir. 1994), illustrates the point. There, this Court held that the dismissal of a parent company's claim that its subsidiary was liable for certain insurance costs incurred before March 1986 did not bar the parent from later claiming that the subsidiary was liable for insurance costs incurred *after* March 1986. *See* Opening Br. 30–32. The post-1986 claims were not "entirely different" in nature from the previously dismissed claims, and Indemnity identifies no "change in operative facts," Response Br. 33, beyond the accumulation of new

insurance costs that resembled the old ones.[1] *See Allegheny Int'l*, 40 F.3d at 1429 (rejecting the idea that the dismissal of the earlier claims barred the later suit and noting that "[a]lthough the suits involve[d] the same parties, they d[id] not involve the same causes of action" because the later suit sought "reimbursement of expenses [the parent company] had not even incurred at the time that its [earlier] suit was dismissed").

Indemnity's focus on similarities between factual allegations in the *Beltz* and *Ritz* complaints and factual allegations in the State Court Action, *see* Response Br. 22–23, is therefore misplaced. It is true enough that the factual circumstances that made Indemnity's pre-2019 conduct unlawful have remained largely "unchanged," *id.* at 22, such that Indemnity's decisions in and after 2019 to extract yet more money from Exchange were unlawful for similar reasons. What has changed since

[1] Noting that *Allegheny International* decided an issue of "Pennsylvania law" (which Indemnity agrees applies the same claim-preclusion standards as federal common law, *see* Opening Br. 31 n.4), Indemnity cites *Swift v. Radnor Township*, 983 A.2d 227 (Pa. Commw. Ct. 2009), for the proposition that Pennsylvania courts have applied claim preclusion "in a context like this one." Response Br. 35–36. But *Swift* holds only that claim preclusion bars claims "based on" new "harm" that has since resulted from conduct challenged in an earlier suit. 983 A.2d at 233. That principle has no application here, where the State Court Action involves new acts of misconduct that postdate the *Beltz* and *Ritz* judgments.

Beltz and *Ritz*, however, is that Indemnity has engaged in new actions (new collections of excessive fees) that create new liability.

2. The fact that the claims in the State Court Action arise out of discrete acts of misconduct that postdate the *Beltz* and *Ritz* judgments easily distinguishes this case from the cases on which Indemnity relies. To start, Indemnity invokes *Huck*, where a company (acting through a shareholder) sued a government agency for "continuing to deny" it access to seaplane ramps that had been leased to a rival company. 106 F.3d at 47. Because a court had previously entered final judgment for the agency on the plaintiff company's claim that leasing the ramps to the rival had been unlawful, this Court held that the plaintiff's second suit was barred by claim preclusion. *Id.* In so holding, the Court emphasized that the plaintiff "argue[d] that the same facts that resulted in the earlier judgment"—the agency's decision to lease the ramps to a rival—"caused continued damage."[2] *Id.* at 49. Here, by contrast, the State Court Action

[2] As the Subscribers' opening brief explains, *Huck* "stands for the proposition that new '*harm* that occur[s] after [a] first judgment' regarding a defendant's challenged conduct does not entitle a plaintiff to challenge that conduct anew." Opening Br. 37 (alterations and emphasis in original; quoting *Huck*, 106 F.3d at 50). Indemnity argues that this characterization "misstate[s] the holding from *Huck*" because it reflects the reason *Huck* gave for rejecting the plaintiff's "'*third* argument' on

alleges *new* facts—new, unlawful collections of excessive fees—that created a *new* basis for liability and caused *new*, discrete damage.

Indemnity's reliance on the unpublished decision in *Sims v. Viacom, Inc.*, 544 F. App'x 99 (3d Cir. 2013), *cited in* Response Br. 26, is likewise misplaced. In *Sims*, the plaintiff had pitched the idea for a reality television program to a cable company. 544 F. App'x at 100. After the company started airing a program that allegedly copied the plaintiff's idea, the plaintiff unsuccessfully sued the company two times, once in 2009 and once in 2011. *Id.* After both lawsuits were dismissed, the plaintiff filed a third lawsuit, this time basing his claim to relief on certain 2009 seasons of the defendant's programming. *Id.* at 100–01. This Court held that the claims in the third lawsuit were barred by claim preclusion, rejecting the plaintiff's argument that he could not have raised his claims previously because "the 2009 seasons did not yet exist." *Id.* at 101. Critically, the court found that the plaintiff's factual assertion was wrong: He had filed his amended complaint in the first action and

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appeal." Response Br. 29 (emphasis in original; quoting *Huck*, 106 F.3d at 50). But *Huck* also rejected the plaintiff's "first contention" because it rested on the same, failed argument—that "the same facts that resulted in the earlier judgment ha[d] caused continued damage." 106 F.3d at 49.

had initiated the second action *after* the 2009 seasons had aired. *Id.* at 102. Moreover, the Court explained, because the plaintiff claimed that the defendant had "copied his concept for a reality television show, not for particular episodes," the "gravamen" of his claim remained constant across all three lawsuits. *Id.* Here, in contrast, the Subscribers challenge specific instances in which Indemnity collected excessive fees, and each instance was separate and independently unlawful.

Although Indemnity claims to find support for its view of claim preclusion in the decisions of other circuits, *see* Response Br. 26–27, the law in those circuits is consistent with *Morgan*. *See, e.g.*, *Storey v. Cello Holdings, LLC*, 347 F.3d 370, 384 (2d Cir. 2003) ("Where … facts that have accumulated after [a] first action are enough on their own to sustain [a] second action, the new facts clearly constitute a new 'claim,' and the second action is not barred by *res judicata*."); *Smith v. Potter*, 513 F.3d 781, 783 (7th Cir. 2008) (observing that "[r]es judicata does not bar a suit based on claims that accrue after a previous suit was filed," even if "the unlawful conduct is a practice, repetitive by nature, that happens to continue after the first suit is filed" (citation omitted)); *Hatch v. Boulder Town Council*, 471 F.3d 1142, 1150 (10th Cir. 2006) (approving *Storey*).

Unsurprisingly, then, the out-of-circuit cases that Indemnity cites cast no doubt on *Morgan*'s rule that a prior judgment does not preclude claims that arise out of conduct that postdates the judgment. In two of the three cases, claim preclusion barred claims that depended for their resolution on an assessment of the legal validity of an action that the defendant had previously taken and that the plaintiffs or their representatives had already unsuccessfully challenged. *See Monahan v. N.Y.C. Dep't of Corrs.*, 214 F.3d 275, 289–91 (2d Cir. 2000) (holding that claim preclusion barred challenges to enforcement of a sick-leave policy that had survived a facial challenge by the plaintiffs' representative); *Adams v. City of Indianapolis*, 742 F.3d 720, 735–36 (7th Cir. 2014) (holding that claim preclusion barred challenges to use of a promotion-eligibility list that the plaintiffs had already unsuccessfully challenged).[3] Here, the legality of fees Indemnity announced and collected in and after 2019 does not depend on the legality of the earlier fees at issue in *Beltz* and *Ritz*.[4]

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[3] In *Adams*, moreover, the Seventh Circuit observed that while claim preclusion may be a "close[] question," issue preclusion "certainly" applied because the plaintiffs' prior lawsuit had resolved the issue of the eligibility list's validity in the defendant's favor. 742 F.3d at 736.

[4] This Court's unpublished decision in *Foster v. Denenberg*, 616 F. App'x 472 (3d Cir. 2015) (per curiam), *cited in* Response Br. 21–22, is inapposite for the same reason. In *Foster*, claim preclusion applied

In the third of Indemnity's out-of-circuit cases, *Denver Homeless Out Loud v. Denver*, 32 F.4th 1259 (10th Cir. 2022), the Tenth Circuit vacated a preliminary injunction after concluding that the plaintiffs were "unlikely" to prevail on the merits of their claims because those claims appeared to be covered by a "broad" release provision in a settlement agreement that bound a class that included the plaintiffs. *Id.* at 1268–69; *see id.* at 1272 (noting the release's "far-reaching scope"). Although the court applied claim-preclusion principles to evaluate the release's scope, it emphasized that "settlements 'are of a contractual nature and, as such, their terms may alter the preclusive effects of a judgment.'" *Id.* at 1271 (quoting *In re Young*, 91 F.3d 1367, 1376 (10th Cir. 1996)). The Tenth Circuit's interpretation of a settlement agreement that expressly released the defendants from claims arising out of conduct "which may occur in the future," *id.* at 1274 n.14 (italics omitted), does not bear on whether claim preclusion applies here.

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notwithstanding "new facts occurring after the final judgment" in a prior case because the question whether the new conduct was unlawful depended on the validity of a real-estate transaction that was challenged in the earlier suit. 616 F. App'x at 474–75.

3. Indemnity also raises the policy concern that applying *Morgan*'s bright-line rule will allow plaintiffs to repeatedly bring similar claims challenging similar, repeated instances of actionable misconduct. *See* Response Br. 36. That result, however, follows from the proper application of the claim-preclusion doctrine. The doctrine's purpose is to prevent piecemeal litigation over a given event or occurrence, *see supra* at 4, not to insulate a party that has successfully defended a lawsuit arising out of one event or occurrence from facing lawsuits arising out of other events or occurrences. By contrast, *issue* preclusion protects a prevailing defendant from lawsuits that challenge factually similar future conduct on legal or factual grounds that have already been rejected. *See* Opening Br. 32–33. Were Indemnity to prevail in the State Court Action, for example, by securing a judgment that it had no fiduciary duty to Exchange or that its conduct in and after December 2019 complied with its duties, Indemnity could wield the issue-preclusive effect of that judgment in future litigation brought by the same plaintiffs or their privies, absent a material change in circumstances.[5] Rather than seeking

[5] Indemnity is plainly wrong that the Subscribers' recognition that issue preclusion might apply in such hypothetical circumstances is a "conce[ssion]" that issue preclusion applies here. Response Br. 40.

to prevail on those issues, however, Indemnity has invoked the inapposite doctrine of claim preclusion in an effort to ensure that those open issues remain unresolved. This Court should reject that effort.

B. Indemnity has not established that the claims in the State Court Action are barred by issue preclusion.

Although the district court did not address issue preclusion, Indemnity invokes that doctrine as an alternative basis for affirmance. According to Indemnity, *Ritz* resolved the issue whether the claims in the State Court Action are barred by the claim-preclusive effect of the *Beltz* judgment. Response Br. 40–43. Indemnity is wrong.

A party that has had a full and fair opportunity to litigate an issue that was decided in a prior suit is typically barred from relitigating "the identical issue" in a future case. *Home Depot USA, Inc. v. Lafarge N. Am., Inc.*, 59 F.4th 55, 63 (3d Cir. 2023) (quoting *In re Bestwall LLC*, 47 F.4th 233, 243 (3d Cir. 2022)). Issue preclusion applies where "(1) the issue sought to be precluded is the same as that involved in the prior action; (2) that issue was actually litigated; (3) it was determined by a final and valid judgment; and (4) the determination was essential to the prior judgment." *United States ex rel. Doe v. Heart Sol., PC*, 923 F.3d 308, 316 (3d Cir. 2019) (quoting *In re Graham*, 973 F.2d 1089, 1097 (3d Cir. 1992)). It

is the "party asserting issue preclusion" that "bears the burden of proving its applicability."[6] *Dici v. Pennsylvania*, 91 F.3d 542, 548 (3d Cir. 1996).

Indemnity cannot meet its burden here. In *Ritz*, the court considered Exchange subscribers' fiduciary-breach claims arising out of Indemnity's conduct "since 2007 to present," *i.e.*, to 2017. *Ritz v. Erie Indem. Co.*, 2019 WL 438086, at *1 (W.D. Pa. Feb. 4, 2019). The court held that these claims were barred by claim preclusion because of the final judgment in *Beltz*, which, the *Ritz* court explained, also addressed Indemnity's conduct "from 2007 to present." *Id.* Because the *Ritz* plaintiffs' claims simply "propos[ed] a different theory of recovery based upon the same liability causing conduct" that had been at issue in *Beltz*, those claims "could have been brought" in the *Beltz* action. *Id.* at *4.

In contrast to *Ritz*, the State Court Action raises claims based on conduct that postdates the *Beltz* judgment and that could *not* have been

[6] Indemnity is wrong that "the party seeking to avoid preclusion has the burden of showing that 'the situation is *vitally altered* between the time of the first judgment and the second [action].'" Response Br. 41 (alteration and emphasis in original; quoting *Scooper Dooper, Inc. v. Kraftco Corp.*, 494 F.2d 840, 846 (3d Cir. 1974)). In *Scooper Dooper*, it was only after the party invoking issue preclusion had "undoubtedly met its initial burden" of establishing the defense that this Court asked whether "the opposing party" had "set forth countervailing evidence" of changed circumstances. 494 F.2d at 848.

brought in *Beltz*. Indemnity accordingly cannot establish that the issue resolved in *Ritz*—whether the *Beltz* judgment's claim-preclusive effect barred the *Ritz* plaintiffs' claims—is "identical" to the issue whether the *Beltz* judgment bars the claims raised in the State Court Action.

This case thus differs markedly from *Electro-Miniatures Corp. v. Wendon Co.*, 889 F.2d 41 (3d Cir. 1989), *cited in* Response Br. 41. In *Electro-Miniatures*, a manufacturer sued in the District of Connecticut to enjoin a lawsuit that its competitor was pursuing in the District of New Jersey. 889 F.2d at 43. The manufacturer argued that the claim-preclusive effect of a final judgment in an earlier litigation barred the claims that the competitor had raised in the subsequent New Jersey litigation. *Id.* After the District of Connecticut held that the New Jersey claims were not precluded, the manufacturer sought summary judgment in the New Jersey action, arguing that the very same claims that the District of Connecticut had just declined to enjoin were barred by a state-law preclusion doctrine. *Id.* Invoking the issue-preclusive effect of the Connecticut judgment, this Court rejected the manufacturer's argument. *Id.* at 46. *Electro-Miniatures* bears no resemblance to this case, where Indemnity argues that the claims in the State Court Action are barred by

the issue-preclusive effect of *Ritz*'s holding that claim preclusion barred *other* claims arising out of *different* instances of misconduct.

Indemnity notes that some of the conduct that was challenged in *Ritz*—like the conduct challenged in the State Court Action—postdated *Beltz*. Response Br. 42. It does not follow, however, that *Ritz* resolved the issue whether the claim-preclusive effect of the *Beltz* judgment bars fiduciary-breach claims based on post-*Beltz* conduct. That issue was not "actually litigated" in *Ritz, Heart Sol.*, 923 F.3d at 316 (quoting *Graham*, 973 F.2d at 1097)—the plaintiffs did not raise it, and *Ritz* did not decide it. *See Jean Alexander Cosmetics, Inc. v. L'Oreal USA, Inc.*, 458 F.3d 244, 254 (3d Cir. 2006) (noting "the unfairness of giving preclusive effect to a finding that was not 'vigorously litigated' or was not a 'focus of the court's decision'" (quoting *Com. Assocs. v. Tilcon Gammino, Inc.*, 998 F.2d 1092, 1097 (1st Cir. 1993))).

Indemnity's contention that the issue whether the *Beltz* judgment bars fiduciary-breach claims based on post-*Beltz* conduct *was* litigated and decided in *Ritz* rests on the introduction to the *Ritz* plaintiffs' motion for reconsideration, which states that the post-*Beltz* conduct challenged in *Ritz* "could not even have been included" in the *Beltz* complaint. Br. in

Support of Mot. for Recons. at 3, *Ritz v. Erie Indem. Co.*, No. 1:17-cv-00340 (W.D. Pa. Mar. 4, 2019), ECF No. 112, *cited in* Response Br. 42. But the reconsideration motion based no legal argument on this fact; it argued only that *Beltz* had not been decided on the merits, *id.* at 4–5, and that the *Ritz* plaintiffs had advanced a different theory of fiduciary breach than the *Beltz* plaintiffs, *id.* at 5–6. In rejecting the latter argument, the *Ritz* court stated that it had already "considered … and rejected" the argument that *Beltz* involved different "transaction[s] or occurrence[s]" from *Ritz* when granting Indemnity's motion to dismiss. *Ritz v. Erie Indem. Co.*, 2019 WL 2090511, at *2 (W.D. Pa. May 13, 2019). But even Indemnity does not purport to find anything in the briefing on Indemnity's motion to dismiss the *Ritz* action that raises the specific issue of *Beltz*'s claim-preclusive effect on post-*Beltz* conduct. Accordingly, the *Ritz* court's opinion denying reconsideration only confirms that the court did not read the reconsideration motion as introducing that issue.

Having identified nowhere that a claim-preclusion issue identical to the one presented here was litigated and decided in *Ritz*, Indemnity cannot establish a likelihood of success on its issue-preclusion argument.

C. Indemnity has not established that a federal injunction of state-court proceedings is warranted.

Unable to demonstrate that it is likely to succeed in establishing a valid preclusion defense to the State Court Action, Indemnity necessarily cannot show that it is likely to establish its entitlement to a permanent federal injunction. The Anti-Injunction Act, 28 U.S.C. § 2283, "imposes an absolute ban upon the issuance of a federal injunction against a pending state court proceeding," unless a statutory exception applies. *Mitchum v. Foster*, 407 U.S. 225, 228–29 (1972). Indemnity invokes the relitigation exception, which authorizes injunctions that are "necessary … to protect or effectuate [federal] judgments." 28 U.S.C. § 2283; *see* Response Br. 37. Because Indemnity cannot show that an injunction would satisfy the exception's exacting requirements, it seeks relief that violates the Act's limits "on the power of the federal courts." *Atl. Coast Line R.R. Co. v. Bhd. of Locomotive Eng'rs*, 398 U.S. 281, 286 (1970).

In arguing that its preclusion defenses—if valid—would justify a permanent injunction, Indemnity relies on a statement from a Fifth Circuit opinion that "[t]he test for the relitigation exception is the same test used to determine claim preclusion." Response Br. 20 (alteration in original; quoting *Vasquez v. Bridgestone/Firestone, Inc.*, 325 F.3d 665,

675 (5th Cir. 2003)). But the Supreme Court has since emphasized that "an injunction can issue" under the exception "only if preclusion is clear beyond peradventure." *Smith v. Bayer Corp.*, 564 U.S. 299, 307 (2011). And while Indemnity emphasizes that the exception is "founded in" concepts of claim and issue preclusion, Response Br. 38 (quoting *Choo v. Exxon Corp.*, 486 U.S. 140, 147 (1988)), it cites no precedential authority suggesting that the exception is *coterminous* with run-of-the-mill preclusion principles. *Cf. Smith*, 564 U.S. at 308 (explaining that a court "erred in finding [an] issue precluded, and erred *all the more* in thinking an injunction appropriate" (emphasis added)). Indeed, *Choo* itself explains that the exception is "strict and narrow" and applies only to "claims or issues" that "actually have been [previously] decided by [a] federal court." 486 U.S. at 148.

Indemnity's claim- and issue-preclusion arguments fail even under a straightforward preclusion analysis. Under the Anti-Injunction Act, then, where preclusion must be "clear beyond peradventure," *Smith*, 564 U.S. at 307, Indemnity cannot show that *Beltz* and *Ritz* "actually" decided claims that arose out of conduct that had not yet occurred, and Indemnity

cannot show that *Ritz* "actually" decided a claim-preclusion issue that was never raised in that case.

Notwithstanding *Choo*'s express language, Indemnity argues that because claim preclusion bars claims that *could* have been brought in a prior suit, the relitigation exception can apply even where a prior federal judgment did not "actually" decide the claims raised in a state-court action. *See* Response Br. 38. But "[m]ost circuits that have considered the issue" read *Choo* to establish that the relitigation exception "is more narrowly tailored than the doctrine of [claim preclusion]." *Blanchard 1986, Ltd. v. Park Plantation, LLC*, 553 F.3d 405, 408 n.12 (5th Cir. 2008) (second quoting *Staffer v. Bouchard Transp. Co.*, 878 F.2d 638, 643 (2d Cir. 1989)). While Indemnity attempts to limit *Choo* to *issue*-preclusion cases, Response Br. 38 n.2, *Choo* refers to "*claims* or issues" that have "actually … been decided." 486 U.S. at 148 (emphasis added); *see Jones v. St. Paul Cos.*, 495 F.3d 888, 893 (8th Cir. 2007) (refusing to "ignore" *Choo*'s "references to … 'claims'"). After all, enjoining a state court from hearing a claim that is unresolved by a federal judgment is not "necessary" to "protect or effectuate" the judgment. 28 U.S.C. § 2283.

Citing *In re Prudential Insurance Co. of America Sales Practice Litigation*, 261 F.3d 355 (3d Cir. 2001), Indemnity claims that this Court has already "affirmed an injunction issued pursuant to the relitigation exception 'even though the precluded claim was not presented' in the prior litigation." Response Br. 38 (quoting *Prudential*, 261 F.3d at 366). Indemnity's contention is misleading. *Prudential* affirmed an injunction of a state-court action in which the plaintiffs attempted to raise claims that had been released pursuant to a settlement in a prior federal class action. 261 F.3d at 367. This Court held that the release was valid "even though the … claim" that had been released by the settlement and was therefore precluded was "not presented" in the class action. *Id.* at 366. The Court's holding did not purport to address the scope of the relitigation exception, and the question whether the exception authorizes an injunction to prevent a state-court plaintiff from litigating a claim that has been expressly released under a federal settlement is irrelevant here.

Finally, Indemnity contends that the Subscribers have waived the argument that not every anticipated preclusion defense triggers the relitigation exception. Response Br. 37. The Subscribers' opposition to Indemnity's preliminary-injunction motion, however, emphasized "the high

burden that must be met" to satisfy the exception, Dist. Ct. No. 58 at 7, explained that an injunction is impermissible unless it is "the only means 'to protect or effectuate [federal] judgments,'" *id.* (quoting *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 525 (1986)), and underscored that "an injunction can issue only if preclusion is clear beyond peradventure," *id.* (quoting *Smith*, 564 U.S. at 307). The Subscribers' briefing easily satisfied the "minimum level of thoroughness" necessary to preserve the argument. *In re Imerys Talc Am., Inc.*, 38 F.4th 361, 372 (3d Cir. 2022) (quoting *In re Ins. Brokerage Antitrust Litig.*, 579 F.3d 241, 262 (3d Cir. 2009)). In any event, "parties cannot forfeit the application of 'controlling law.'" *Kairys v. S. Pines Trucking, Inc.*, 75 F.4th 153, 160 (3d Cir. 2023) (quoting *United States v. Reading Co.*, 289 F.2d 7, 9 (3d Cir. 1961)).

The Subscribers' repeated invocation of the proper legal standard before the district court is not undermined by a statement in the parties' Joint Proposed Conclusions of Law that an injunction is "appropriate where claims or issues would be precluded by standard principles of res judicata." JA205, *cited in* Response Br. 37. Indemnity's effort to read this sentence as conceding that a valid preclusion defense *always* justifies a federal injunction is belied by the cases cited in support of the statement.

See, e.g., *Fernández-Vargas v. Pfizer*, 522 F.3d 55, 68 (1st Cir. 2008) (observing that "a federal court should not lightly undertake the task of deciding whether to enjoin state court proceedings" and requiring "substantial justification" for such an injunction (second quoting *SMA Life Assurance Co. v. Sanchez-Pica*, 960 F.2d 274, 277 (1st Cir. 1992))). Indemnity's reading is further belied by the parties' stipulation that "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed." JA204 (quoting *Atl. Coast Line*, 398 U.S. at 297).

Moreover, because the Anti-Injunction Act restricts "the power of the federal courts," *Atl. Coast Line*, 398 U.S. at 286, a party cannot waive the Act's limitations in the first place. *See* Opening Br. 5 (explaining that the district court "has no jurisdiction to grant the relief that Indemnity seeks"); *cf. Arkansas v. Farm Credit Servs. of Cent. Ark.*, 520 U.S. 821, 823 (1997) (referring to the "jurisdictional bar" created by a statute that, like the Anti-Injunction Act, "restricts the power of federal district courts" to issue injunctions). And even if the limitations were not jurisdictional, the constraints they place on federal power supply

"compelling reasons" to enforce them nonetheless. *Imerys Talc*, 38 F.4th at 373 (explaining that "the waiver rule" is discretionary).

II. Indemnity has not demonstrated that it will suffer irreparable harm absent a preliminary injunction.

Indemnity does not dispute that, even independent of the merits, reversal is required unless it makes a "clear showing" that it is "likely to suffer irreparable harm in the absence of preliminary relief." *Starbucks Corp. v. McKinney*, 144 S. Ct. 1570, 1575 (2024) (second quoting *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008)). Rather than point to any specific harm that it will likely experience if the State Court Action proceeds, Indemnity urges this Court to adopt a categorical rule that a party always suffers irreparable harm if it faces state-court litigation that falls within the Anti-Injunction Act's relitigation exception. Response Br. 44. Indemnity offers no sound basis for its proposed rule.

To begin, Indemnity invokes the wrong standard of review by framing this Court's inquiry as whether the district court "abuse[d] its discretion" in finding that Indemnity has established irreparable harm. *Id.* As the Subscribers have explained without rebuttal, because the district court embraced Indemnity's proposed categorical rule, its holding

on irreparable harm rests on a *legal* conclusion that this Court reviews de novo. Opening Br. 24.

That legal conclusion—that satisfying the relitigation exception *per se* establishes irreparable harm—is untenable.[7] Indemnity's chief rationale is that the beneficiary of a federal judgment risks "wasteful, duplicative litigation of matters already decided in its favor" if it is subject to state-court claims that are supposedly precluded by the judgment. Response Br. 44; *see id.* at 47 (referencing unspecified costs and resources Indemnity will expend absent preliminary relief). But "litigation expense, even substantial and unrecoupable cost, does not constitute irreparable injury." *Renegotiation Bd. v. Bannercroft Clothing Co.*, 415 U.S. 1, 24 (1974). Indemnity responds that costs incurred in "relitigation" are "not the same as expense in traditional litigation," Response Br. 46, but it offers no argument in support of this *ipse dixit*.

[7] Contrary to Indemnity's suggestion, *see* Response Br. 45, the fact that this Court, in a case that did not mention the Anti-Injunction Act, held *permanent* injunctive relief to be "a proper remedy under the circumstances of th[at] case" without expressly analyzing irreparable harm, *Gambocz v. Yelencsics*, 468 F.2d 837, 842 (3d Cir. 1972), does not imply that this Court has embraced Indemnity's categorical rule.

What is more, *any* party asserting a preclusion defense to a pending litigation—state or federal—runs the risk of litigating matters that it contends were "already decided in its favor," *id.* at 44, or of losing the "assurance" of a prior judgment's "finality," *id.* at 45, if that defense is rejected. But a defendant is not generally entitled to put an immediate halt to *federal* proceedings if its preclusion defense is rejected. *See Bell Atl.-Pa., Inc. v. Pa. Pub. Util. Comm'n*, 273 F.3d 337, 344 (3d Cir. 2001) (explaining that the denial of a motion to dismiss on preclusion grounds is not immediately appealable). There is no reason, then, why the risk that a *state* court might reject a valid preclusion defense creates irreparable harm that automatically justifies preliminary relief.

Indemnity purports to find such a reason in the Anti-Injunction Act itself, claiming that the statute confers a "right" on prevailing parties "to have the preclusive effect of a federal judgment determined by a federal court." Response Br. 50. But the Act states a *limit* on federal power, subject only to "strict and narrow" exceptions. *Choo*, 486 U.S. at 148. And as the Supreme Court has recognized, it does not displace the principle that "[d]eciding whether and how prior litigation has preclusive effect is usually the bailiwick of the *second* court (here, the [state court])." *Smith*,

564 U.S. at 307; *cf. D'Amico v. CBS Corp.*, 297 F.3d 287, 294 (3d Cir. 2002) (recognizing that a court generally lacks authority to dictate the preclusive effect of its own rulings). While Indemnity believes that the preclusive effect of the judgment in a prior suit is best addressed by the court that issued the judgment, Response Br. 52, this Court has expressly rejected that conclusion, *Gen. Elec.*, 270 F.3d at 158.

Indemnity worries that declining to embrace a categorical rule on irreparable harm would "obliterate the relitigation exception," Response Br. 44, and "revive" the regime that governed prior to the exception's enactment, when federal courts lacked power to halt state-court litigation that threatened their judgments, *id.* at 50. But Indemnity offers no reason to construe the relitigation exception to *require* a finding of irreparable harm *every time* the defendant in a pending state-court action holds a federal preclusion defense. *See Choo*, 486 U.S. at 151 ("Of course, the fact that an injunction *may* issue under the Anti-Injunction Act does not mean that it *must* issue."). Rather, requiring the proponent of preliminary relief to make a case-specific showing of "irreparable harm for which there is no adequate remedy at law" is more consistent with "traditional equitable requirements" and the "extraordinary" nature of a

federal injunction of state-court proceedings. *Zurich Am. Ins. Co. v. Superior Ct.*, 326 F.3d 816, 825 (7th Cir. 2003); *see Fernández-Vargas*, 522 F.3d at 68 (requiring the party seeking an injunction pursuant to the relitigation exception to establish "substantial justification" for such relief (quoting *SMA Life Assurance*, 960 F.2d at 277)).

Finally, to the extent that Indemnity attempts to make a case-specific showing of irreparable harm by pointing to the history of this litigation, Response Br. 52–54, it presents an argument that it did not raise in the district court and that did not form the basis for the district court's grant of a preliminary injunction. In any event, Indemnity's gripes about the Subscribers' litigation choices do not come close to establishing a likelihood of irreparable harm. Indemnity chiefly complains that the Subscribers opposed its motion to consolidate the improperly removed State Court Action with this action. *Id.* at 53. If anything, though, Indemnity's meritless effort to use consolidation to manufacture federal jurisdiction over the State Court Action underscores that *Indemnity* is engaged in "an endless game of whack-a-mole," *id.* at 1, to avoid answering the Subscribers' claims in the state court where they were properly brought. This Court should put an end to Indemnity's delays

and free Pennsylvania's courts to initiate proceedings in the case that has now languished on the docket without progress for nearly three years.

CONCLUSION

This Court should reverse and vacate the preliminary injunction entered by the district court.

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing Reply Brief for Defendants-Appellants with the Clerk of Court for the United States Court of Appeals for the Third Circuit on July 26, 2024, using the Appellate Electronic Filing system. I certify that all participants in this case are registered CM/ECF users who have consented to electronic service and that service will be accomplished by the CM/ECF system.

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