No. 07-371

IN THE
Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, *ET AL.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF FOR THE AMERICAN ASSOCIATION FOR JUSTICE AS AMICUS CURIAE SUPPORTING PETITIONER

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INTEREST OF *AMICUS CURIAE*

The American Association for Justice ("AAJ"), formerly the Association of Trial Lawyers of America, respectfully submits this brief as *amicus curiae* in support of Petitioner. This brief is filed with consent of all parties.[1]

AAJ is a voluntary national bar association whose trial lawyer members primarily represent individual plaintiffs in personal injury cases and other civil actions. Throughout its 60-year history, the association has advocated both in courts and in Congress and state legislatures to preserve the protections for ordinary citizens afforded by the fundamental principle in American law that every person is entitled to his or her day in court.

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[1] Letters of consent from both parties are on file with the Author. Pursuant to Rule 37.6, *amicus* states that no counsel for a party authored any part of this brief, nor did any person or entity other than *amicus*, its members, or its counsel make a monetary contribution to its preparation or submission.

SUMMARY OF THE ARGUMENT

The Constitution guarantees every American an opportunity to present their case and to have its merits adjudged fairly. The rule is part of our nation's deep-rooted historic tradition that everyone should have his or her own day in court. Well-recognized common-law rules allow a non-party who is in privity with a party to a suit to be bound by the judgment in that case on the theory that the non-party has had an opportunity to be heard through the privy. But there are similarly well-recognized constitutional limits on the privity exception.

The D.C. Circuit exceeded those limits when it barred Petitioner Brent Taylor from receiving an adjudication of the merits of his suit to compel disclosure of information under the Freedom of Information Act because Greg Herrick had already litigated the issue and lost. Taylor shared no legal or special representational relationship with Herrick, had no notice of Herrick's suit, had no legal duty to participate in Herrick's suit and did not participate. Nevertheless, the Circuit Court held that preclusion by "virtual representation" is justified because Herrick and Taylor had identical interests in obtaining the information; those interests were adequately represented in Herrick's litigation; and Herrick and Taylor were "close associates."

The lower court's holding, based on an intolerably expansive view of privity, is fundamentally unfair to Taylor and violates his right to an adjudication of his individual claim. The privity exception comports with common-law preclusion principles and falls within constitutional

bounds only when it is premised on the assent of the non-party or where the party owes a legal duty of representation to the non-party. A privity exception premised on close association, adequate representation, and identical interests is inconsistent with those principles and exceeds constitutional bounds.

ARGUMENT

I. A Privity Exception Premised on Close Association, Adequate Representation, and Identical Interests Is Inconsistent with Common-Law Preclusion Principles and Exceeds Constitutional Bounds

A. Privity exists only when the non-party assents to representation or is owed a legal duty of representation

Our nation has a "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (internal citations omitted). From this tradition comes a general principle that "one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940). The First Amendment Petition Clause and the Fifth Amendment Due Process Clause support this principle. U.S. Const. amends. I, V; *see Christopher v. Harbury*, 536 U.S. 403, 415 (2002) (recognizing a "a separate and distinct right to seek judicial relief for some wrong"); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985) (recognizing that due

process guarantees an individual who has a "constitutionally recognized property interest" in a "chose in action," an opportunity to present his case and have its merits adjudged fairly); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982) (same).

This Court has long recognized common-law doctrine that permits a non-party who is in "privity" with a party to a suit to be bound by the judgment in the party's case on the theory that the non-party has had an opportunity to be heard through his privy. *See, e.g.*, *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476 (1918); *Southern Pac. R. R. Co. v. United States*, 168 U. S. 1, 48 (1897). A non-party is in "privity" with a party to a suit and may be bound by the judgment when there exists, throughout the course of the litigation, a legal or special representational relationship under which the party is accountable to the non-party for the conduct of the litigation. Restatement (Second) of Judgments § 40-41 (1982); James R. Pielemeier, *Due Process Limitations on the Application of Collateral Estoppel Against Nonparties to Prior Litigatio*n, 63 B.U. L. Rev. 383, 387-89 (1983) (noting as examples of such representational relationships successors in interest or owners of derivative claims); 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 523 (13th ed. 1899) (privity exists where there is "a mutual or successive relationship to the same rights of property"). Under this uncontroversial conception of privity, it is the nature of the party and non-party's relationship to the shared interest that forms the basis of their representational relationship as privies.

Other recognized examples include instances where there is an agreement regarding representation, such as an indemnification agreement; or where a representative is duly appointed, such as in a proceeding involving a guardian or trustee, *Richards*, 517 U.S. at 798; or in a certified class-action proceeding. *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); Restatement (Second) of Judgments § 41 cmt. e. (1982). These examples share a common thread: in each the representational relationship is formed with the non-party's assent or the law imposes on the party a duty to act in the non-party's interest. Similarly, a "person who is not a party to an action but who controls or substantially participates in the control of the presentation on behalf of a party is bound by the determination of issues decided as though he were a party." Restatement (Second) of Judgments § 39 (1982); *see Montana v. United States*, 440 U.S. 147, 155 (1979) (holding that the United States had a sufficient "laboring oar" in a prior litigation to be bound by the judgment and precluded from re-litigating the same issues).

B. Preclusion based on the D.C. Circuit's virtual-representation rule is inconsistent with this Court's own application of the privity exception

Despite this Court having cautioned that when considering exceptions to the general rule of entitlement to individualized adjudication "the burden of justification rests on the exception," *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999), lower federal courts have not consistently held that the existence of a legal or special representational

relationship is a prerequisite to a finding of privity. *Compare Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 651-52 (4th Cir. 2005) (requiring such a relationship) *with Tyus v. Schoemehl*, 93 F.3d 449, 454-55 (8th Cir. 1996) (requiring a "special" but not legal relationship). Of relevance here, some have held that under a modern form of privity known as virtual representation, "a person may be bound by a judgment even though not a party if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *E.g.*, *Aerojet-General Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir.), *cert. denied*, 423 U.S. 908 (1975).[2] This notion changes precedent to preclusion, in violation of the constitutional right to an individualized determination of a particular claim. *See South Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999) (acknowledging that strangers to litigation could not expect to be bound by the judgment in that case, but could expect that the "earlier judgment itself . . . would bind them in the same way that a decided case binds every citizen").

Pushing "virtual representation" even farther beyond constitutional bounds, the D.C. Circuit held that identical interests and adequate representation are necessary conditions for virtual representation, but that a legal relationship is not. Pet. App. 8a. It read *Richards* to permit preclusion based on a "close association" rather than a legal relationship. *Id.* at

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[2] *Askew* is credited with articulating the modern form of preclusion by virtual representation. *Tice v. American Airlines, Inc.*, 162 F.3d 966, 970 (7th Cir. 1998). The cases *Askew* cites for the proposition that identity of interests may support a finding of preclusion are in fact cases where preclusion was based on the shared legal identity of parties. 511 F.2d at 719.

5a-6a. It further held that notice is not a requirement of virtual representation. *Id*. at 13a.

A privity exception premised on a close association runs contrary to common-law preclusion principles, which permit privity only when there is a legal or special representational relationship under which the party is accountable to the non-party for the conduct of the litigation. A close association, which here is based on nothing more than a colloquial association between Herrick and Taylor, who are members of the same organization, Pet. Br. at 2, does not rise to the level of a representational relationship that would support a finding of privity under the common law. In contrast with cases supporting privity where the property interest is mutual or successive, both Herrick and Taylor had a "constitutionally recognized property interest" in their statutory "chose in action" under FOIA. *Shutts*, 472 U.S. at 807. *See* 5 U.S.C. § 552(a)(4)(B) (granting federal district courts jurisdiction to compel disclosure of FOIA-related material); *FEC v. Akins*, 524 U.S. 11, 21 (1998) (recognizing that the inability to obtain information is an injury in fact). And in contrast with cases supporting a finding of privity where the non-party had assented to the party's representation during the course of the litigation, here there was no assent, as Taylor lacked actual or constructive notice of Herrick's suit, and thus could not have participated in or assisted Herrick in prosecuting his separate suit. A separate finding that Herrick and Taylor shared identical interests or that Herrick adequately represented Taylor does not transform the nature of their colloquial relationship into one with a legal character.

This Court's recent decisions in *Richards* and *South Central Bell* support the view that privity is constitutionally sufficient to support preclusion only when it is premised on the assent of the non-party or where the party owes a legal duty of representation to the non-party. In *Richards*, this Court considered a challenge to a county occupation tax on behalf of employees subject to the tax. The Alabama Supreme Court held that the *Richards* plaintiffs' claims were barred by the judgment in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), a prior case challenging the tax which was not brought as a class action, and of which the *Richards* plaintiffs had no notice, because the *Bedingfield* plaintiffs, in the Alabama Supreme Court's view, had adequately represented the interests of the *Richards* plaintiffs.

This Court reversed, holding that the *Richards* plaintiffs were entitled to their day in court even though the *Bedingfield* plaintiffs had lost on the merits of their claim that a state tax was unconstitutional. It reasoned that even assuming "in some class suits adequate representation might cure a lack of notice," res judicata was not appropriate because the *Bedingfield* plaintiffs "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties." *Richards*, 517 U.S. at 801. The Court found "no reason to suppose that the *Bedingfield* court took care to protect the interests of [the *Richards* plaintiffs] in the manner suggested in *Hansberry*," or that "the individual taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers." *Id.* at 802. Thus, it

concluded that a non-party may be bound by the results of a case only if a party to the case "assumed to exercise" the power of representing the non-party. *Id.* at 802 (quoting *Hansberry*, 311 U.S. at 46).

Subsequently, in *South Central Bell*, this Court held that a non-party could not be bound by a judgment in a prior suit even if the non-party knew of the prior litigation. The party and non-party must share a "special representational relationship," 526 U.S. at 168, that causes the party to recognize that the suit is on behalf of the non-party and, accordingly, to have an obligation to protect the non-party's interests. Absent such a relationship, the non-party and party "are best described as mere 'strangers' to one another"; and consistent with due process, the non-party "cannot be bound by the earlier judgment." *Id.* at 168.

Here, as in *Richards* and *South Central Bell*, Herrick "did not sue on behalf of a class; [his] pleadings did not purport to assert any claim against or on behalf of any nonparties; [] the judgment [issued] did not purport to bind any…[] nonparties"; and the district court and Tenth Circuit entertaining Herrick's suit did not "make any special effort 'to protect the interests of'" nonparties. *South Cent. Bell Tel. Co.*, 526 U.S. at 167 (quoting *Richards*, 517 U.S. at 801-02). Taylor exercised no control over Herrick's suit, nor could he have: he had no actual or constructive notice of Herrick's suit during its pendency. Thus, just like the plaintiffs in *Richards* and *South Central Bell*, Taylor has no legal or special representational relationship with Herrick, such that he may be bound by the judgment in Herrick's case.

C. Preclusion based on the D.C. Circuit's virtual-representation rule is inconsistent with the Constitution

1. This Court recognized in *Richards* that "there are clearly constitutional limits on the 'privity' exception." 517 U.S. at 798. Those limits are set by the Constitution. *Blonder-Tongue Lab., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971) ("Due process prohibits estopping [non-parties] despite one or more existing adjudications of the identical issue which stands squarely against their position."); *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979) ("It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard."); *Postal Tel. Cable Co.*, 247 U.S. at 476 ("a state . . . cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.").

The Constitution affords every person with a claim an opportunity to be heard. *Richards*, 517 U.S. at 797. Because this

> right . . . has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest[,] . . . [a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the

> circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections.

Mullane v. Cent. Hanover Bank & Trust Co., 339 U.S. 306, 314 (1950).

The holding of the court below, that the judgment in Herrick's case has preclusive effect against Taylor, was fundamentally unfair to him and violated his constitutional rights. The privity exception falls within constitutional bounds only when it is premised on the assent of the non-party or where the party owes a legal duty of representation to the non-party. *See South Cent. Bell Tel. Co.* 526 U.S. at 168; *Richards*, 517 U.S. at 802. In such instances, the non-party has had an opportunity to be heard in the first litigation. But the privity exception posited by the D.C. Circuit, premised on close association, adequate representation, and identical interests, exceeds constitutional bounds because it denies the non-party his *individual* due process right to be heard on the merits of his own claim. *See Boddie v. Connecticut*, 401 U.S. 371, 380 (1971) (recognizing that the right is an individual one). Specifically, such an exception denies the non-party his right to individual participation, adversarial justice, self, determination, and litigation autonomy, principles which Justice Frankfurter discussed in *Joint Anti-Fascist Refugee Committee v. McGrath*:

> No better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and

> opportunity to meet it. Nor has a better way been found for generating the feeling, so important to a popular government, that justice has been done.

341 U.S. 123, 171-72 (1951) (Frankfurter, J., concurring). This Court has adhered to these principles in holding that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934). "Unless duly summoned to appear in a legal proceeding, a person not a privy may rest assured that a judgment recovered therein will not affect his legal rights." *Id.* These principles also warrant holding that a close association between a non-party and party is constitutionally insufficient to allow a judgment to stand against the non-party, as that party has never had an opportunity to be heard.

2. In considering the merits of Herrick's suit, the Tenth Circuit assumed two dispositive legal conclusions because Herrick failed to challenge them on appeal. *Herrick v. Garvey*, 298 F.3d 1184, 1194 n.10 (10th Cir. 2002). Taylor has a right to an opportunity to litigate the merits of those legal conclusions, which speak directly to whether the documents he seeks are protected as trade secrets and thus not subject to disclosure under FOIA.

Whether Taylor will succeed on the merits of his claim is not material to whether he has a right to an adjudication of the merits of his claim. "To one who protests against the taking of his property without due process of law, it is no answer to say

that in his particular case due process of law would have led to the same result." *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915). This is true regardless of one's opinion of the weight of the interest at stake. *Board of Regents v. Roth*, 408 U.S. 564, 569-71 (1972) (noting that the nature, not weight, of the interest at stake determines whether due process requirements apply).

Congress, in enacting FOIA, permitted each aggrieved individual to bring suit. These are "legitimate expectations worthy of protection by the Due Process Clause . . .[as they] stem from . . . the language of statutes." *Kentucky Dept. of Corr. v. Thompson*, 490 U.S. 454, 471 (1989) (Marshall, J., dissenting) (citing *Vitek v. Jones*, 445 U.S. 480 (1980)). Accordingly, Taylor, a legal stranger to Herrick, is due his opportunity to be heard on the merits of his own FOIA claim.

CONCLUSION

For the foregoing reasons, Amicus urges this Court to reverse the decision of the Court of Appeals for the District of Columbia Circuit.

Respectfully submitted,

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