No. 07-371

IN THE

Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, AND FAIRCHILD CORPORATION,

Respondents.

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

BRIEF OF *AMICUS CURIAE* AMERICAN DENTAL ASSOCIATION IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Does the doctrine of virtual representation automatically bind an organization or its members to the outcome of another member's prior litigation?

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INTEREST OF THE *AMICUS CURIAE*

The American Dental Association (ADA) is a professional association of dentists committed to advancing the oral health of the public and the interests of its members. With a membership of more than 150,000 dentists, the ADA is the largest dental association in the United States. Given the size and diversity of its membership, the ADA seeks to ensure that the doctrine of "virtual representation" is not construed so that the result in a suit brought by one of its members necessarily binds other members, or the organization itself, in subsequent litigation.

To expand the doctrine of "virtual representation" so broadly would, in effect, create a mandatory intervention rule. The ADA would have to monitor thousands of courts across the country to make sure it intervened each and every time one of its members went to court on an issue of importance to other members. Other national professional associations, like the American Bar Association (ABA) and the American Medical Association (AMA), would face a similar scenario. That state of affairs would, of course, be highly inefficient and impracticable.

The ADA, therefore, respectfully submits that the decision below should either be reversed or carefully limited to the unique facts of the case. The ADA respectfully asks this Court to restrict the scope of the doctrine of virtual representation so that the doctrine does not, in effect, transform a large professional association into a putative class automatically represented by the interests of any one member.[1]

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[1] All parties have consented to this amicus brief as evidenced by the consent letters attached hereto for filing with the Court.

STATEMENT OF FACTS

Petitioner Brent Taylor, executive director of the Antique Aircraft Association (AAA), brought suit in the District Court for the District of Columbia on February 3, 2003, to obtain records he had unsuccessfully requested from the Federal Aviation Administration (FAA) pursuant to the Freedom of Information Act (FOIA), 5 U.S.C. § 552. *Taylor* v. *Blakely*, No. Civ.A. 03-0173 (RMU), 2006 WL 279103, at *1 (D.D.C. Feb. 6, 2006). The records relate to a 1935 vintage airplane, the F-45. *Id.* Greg Herrick, another AAA member, had previously made a separate FOIA request for records related to the airplane a few years earlier. After his request was denied, he appealed unsuccessfully first to the District of Wyoming and then to the Tenth Circuit. See *Herrick* v. *Garvey*, 200 F. Supp. 2d 1321 (D. Wyo. 2000), *aff'd*, 298 F.3d 1184 (10th Cir. 2002).

In the district court here, the FAA and defendant-intervenor Fairchild Corporation, manufacturer of the F-45 aircraft, moved for summary judgment against Taylor. They argued, among other things, that although Taylor was not a party to Herrick's earlier lawsuit, his claims were barred by res judicata. The district court agreed. 2006 WL 279103, at *8. The Court of Appeals affirmed, citing the doctrine of virtual representation. It concluded, on the facts of this case, that the district court's decision was proper because Herrick was Taylor's "virtual representative." *Taylor* v. *Blakely*, 490 F.3d 965, 976-77 (D.C. Cir. 2007). The court acknowledged that

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No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than amicus curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

litigants are not usually bound by prior suits to which they were not parties. However, it held that "a nonparty's claim [can be] precluded by a prior suit based upon a particular form of privity known as 'virtual representation.'" *Id.* at 971. Taylor appealed, and this Court granted certiorari on January 11, 2008.

ARGUMENT

A. If It Affirms, This Court Should Make Clear That The Doctrine of Virtual Representation Does Not Apply Simply Because Litigants In A Second Case Are Members Of *The Same Organization As A Litigant In The First Case.*

As this Court has remarked, the United States 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). However, under the doctrine of res judicata, a judgment on the merits in a prior suit can bar a second suit not only involving the same parties but also those "in privity" with the parties if the cause of action is the same. *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 n. 5, (1979); *Drake* v. *FAA*, 291 F.3d 59, 66 (D.C. Cir. 2002). A party in privity with another, therefore, can be bound to the outcome of another party's "day in court."

Traditionally, privity between parties exists only when a person not a party to an action is represented by a party and is bound and entitled to the benefits of the resulting judgment as though he were a party. *Restatement (Second) of Judgments* § 41 (1980); see also *Nevada* v. *United States*, 463 U.S. 110, 134-35 (1983). A person can be represented by a party who is, for example, the trustee of an estate or interest of

which the person is a beneficiary; or an official or agency invested by law with authority to represent the person's interests; or the representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member. *Restatement* § 41.

Privity has traditionally been found only in limited circumstances in which the interests of a non-party to the original litigation have been adequately represented by a party accountable to that non-party. *Richards*, 517 U.S. at 798. This Court has found privity in the class action context, for example, see *id.*; *Hansberry* v. *Lee,* 311 U.S. 32, 43 (1940), and when the second party controls the original litigation on behalf of one of the parties to that litigation. *Montana* v. *United States*, 440 U.S. 147, 155 (1979) (holding that government was bound by prior litigation of federal contractor when, among other things, it read and reviewed the complaint, paid the attorney's fees and costs, and directed the course of the litigation).

Here, Taylor and Herrick were not in privity with each other in the traditional sense of the word. Neither was the agent of the other. Nor had they entered into a formal contract of any type. Without privity, res judicata cannot bar Taylor's suit. *Taylor,* 490 F.3d at 970; *Parklane Hosiery*, 439 U.S. at 326 n.5. Upon the suggestion of respondents, however, the Court below considered whether Taylor and Herrick could be considered in privity with one another under the doctrine of virtual representation.

The virtual representation doctrine is "controversial," *Hoblock* v. *Albany County Bar. of Elections*, 422 F.3d 77, 90 (2d Cir. 2005), and the approaches to the doctrine taken by circuit courts vary widely. *Taylor*, 490 F.3d at 971 (discussing

circuit split). Typically, virtual representation is used to expand the reach of privity beyond its traditional scope, binding parties who would not, under standard definitions, be in privity with each other. *Id.*

The doctrine therefore "reflects a tension between competing interests" in fundamental due process fights and judicial efficiency. *Becherer* v. *Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 431 (6th Cir. 1999) (en banc) (Moore, J., concurring). As the Seventh Circuit has stated, the term "virtual representation. . . illustrates the harm that can be done when a catchy phrase is coined [and]... starts being applied to situations far removed from its intended and proper context." *Tice* v. *Am. Airlines, Inc.*, 162 F.3d 966, 970 (7th Cir. 1999); see also *Bittinger* v. *Tecumseh Prods. Co.*, 123 F.3d 877, 881 (6th Cir. 1997); 18A Charles Alan Wright, Arthur R. Miller et al., *Federal Practice and Procedure* § 4456, at 512 (2d ed. 2002) ("Impatience with repetitive litigation of common issues … has enticed some courts to rely on virtual representation in circumstances that go beyond anything that is easily justified"). Indeed, the *Taylor* court noted that virtual representation, unchecked, could sacrifice a litigant's day in court in favor of judicial efficiency: "Too readily to find virtual representation risks infringing upon the nonparty's right to due process of law and departs from our 'deep-rooted historic tradition that everyone should have his own day in court,'" 490 F.3d at 971 (quoting *Richards*, 517 U.S. at 798).

After surveying different approaches taken by its sister circuits, the *Taylor* court devised a two-part virtual representation test largely drawn from the Ninth Circuit's five-factor approach in *Irwin* v.

Mascott, 370 F.3d 924, 930 (2004). First, the court concluded that "identity of interests" and "adequate representation" were necessary prerequisites to virtual representation. In addition, one of three additional factors must be present: 1) a close relationship between the present party and his putative representative, 2) substantial participation by the present party in the first case, or tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment. *Taylor,* 490 F.3d at 971-72.

Although the court ultimately found that Taylor's relationship with Herrick satisfied this new test and barred his claim, it did not base its conclusion on the two men's membership in the AAA. To the contrary, the court stressed the pair's close personal relationship, the fact that they shared an attorney and information gathered during discovery, and may have had an agreement to restore Taylor's F-45 plane:

> [T]he record before us indicates *Herrick and Taylor were not merely people who happened to share a common interest and membership in the same organizations*, but knew each other quite well: Herrick asked Taylor to assist him in restoring his F-45, provided information to Taylor that Herrick had obtained through discovery, and at summary judgment Taylor did not oppose Fairchild's characterization of Herrick as his 'close associate.'

Id. at 975 (emphasis added).

Indeed, the court was careful to limit its holding to the specific facts presented. It was careful to note that different circumstances (for example, a situation where the *only* commonality between the parties was

membership in a given organization) would generate a decidedly different result:

> The record here, as we have noted, contains evidence suggestive of identical interests, adequate representation, and a close relationship and no evidence to the contrary. *Matters might look different if Taylor had submitted evidence* before summary judgment explaining, for example, why their common counsel's representation of Herrick did not adequately represent Taylor's interests, or *demonstrating Taylor's relationship with Herrick was in fact nothing more than a shared interest in antique aircraft and membership in the same organizations*, or showing that Herrick had not suggested or offered to assist with Taylor's claim for the same documents. *He did not do so*, however, with the result that the record supports finding Herrick and Taylor in privity.

Id. at 976-77 (emphasis added).

This Court, if it chooses to clarify the scope of virtual representation, should be careful to make clear that it does not apply based simply on joint membership in an organization.

B. Virtual Representation Cannot Be Derived Merely From Shared Membership In *An Association*.

The ADA's position – that membership alone cannot generate virtual representation – is squarely in line with this Court's prior opinions. For example, in *Richards* v. *Jefferson County*, 517 U.S. at 801, this Court held that, absent a sufficient relationship between the parties to the first and second litigation, parties who neither participated in, nor had the

opportunity to participate in, earlier litigation cannot be bound by that litigation.

The *Richards* Court considered whether a challenge to a county tax was barred by a previous case in which other taxpayers had challenged the same tax. Noting that the parties to the first suit "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," the Court found "no reason to suppose that [the court deciding the first case] took care to protect the interests" of the parties to the second case. Nor did the plaintiffs in the first case understand "their suit to be on behalf of absent county taxpayers." *Id.*; cf. *S. Cent. Bell Tel. Co.* v. *Alabama,* 526 U.S. 160, 168 (1999) (finding no "special representational relationship" between Southern Central Bell Telephone Company and a group of different corporations that brought an earlier suit against the state, despite the fact that Southern Bell was aware of the earlier litigation and shared an attorney with the litigants in the prior suit).

The *Richards* and *Southern Bell* decisions support the ADA's position that neither its rights, nor the rights of its members, to a day in court should be eliminated de facto by a member's earlier litigation. Indeed, this Court has bound an organization to the outcome of a prior member's litigation only when it was plain that the organization directed, controlled and funded the earlier case. See *Montana* v. *United States*, 440 U.S. 147, 152 (1979) (holding that the government's in-depth involvement in the prior litigation of a federal contractor was binding because "although not a party, the United States plainly had

a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel") (citing *Drummond* v. *United States*, 324 U.S. 316, 318 (1945)).

C. Permitting Virtual Representation Based On Membership In The Same Organization Would Deny Members Due Process Rights And Consume Valuable Judicial *Resources.*

The ADA enjoys a large and diverse membership. Neither the Association nor its members expect to cede their day in court based on action by another member. Indeed, if shared membership gave rise to virtual representation, it would transform professional societies into putative standing "classes" without Rule 23 protections. See *Tice*, 162 F.3d at 973. In other words, if mere membership were enough to give rise to virtual representation, any individual member – with any agenda, whether or not aligned with the organization – could, in essence, subject the organization and its other members to a ruling that denied them due process and their day in court. *Id.*

To foreclose the possibility of being unwittingly bound (and having their members bound) by another member's litigation, professional organizations would have to engage in mandatory monitoring of litigation in every court. The *Taylor* court cautioned against this result. 490 F.3d at 971. Such monitoring would unnecessarily consume the resources of professional organizations and courts across the country.

CONCLUSION

The ADA respectfully requests that, in addressing the virtual representation doctrine, this Court clarify that mere membership in an organization does not give rise to virtual representation.

Respectfully submitted,

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