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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 OF CIVIL PROCEDURE AND COMPLEX LITIGATION PROFESSORS AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST

The *amici* submitting this brief teach and write about Civil Procedure and Complex Litigation. We have no financial interest or involvement (except for this brief) in this or any other pending action raising the issues discussed here. Rather, we submit this brief out of concern for the proper development of the law of judgments, due process, and joinder.[1]

SUMMARY OF ARGUMENT

With rare exceptions, a judgment does not bind a nonparty. The law of judgments departs from this principle only in narrowly defined exception that are inapplicable her and are backed by clear and limited justifications. Nonparty preclusion, as applied by the courts below, violates joinder principles and creates a de facto class action without procedural or ethical safeguards. The decision of the Court of Appeals in this case lacks a cogent rationale, relying on a collection of factors that will prove burdensome to apply and that in any event cannot justify a departure from the most basic limits on adjudicatory power, a departure that would run squarely counter to the demands of due process of law.

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[1]All of the parties in this case have consented to the filing of this brief. No counsel for any party to this case authored any part of this brief. Other than the amici on whose behalf this brief is submitted and their counsel, no person or entity made any monetary contribution to the preparation of this brief except that N.Y.U. Law School paid for printing and mailing the brief.

ARGUMENT

I. A Judgment Does Not Bind A Nonparty Except In Several Well-Justified and Clearly Delineated Circumstances That Are Absent Here.

A central tenet of our procedural system is that nonparties cannot be bound by a judgment. *See, e.g.,* South Central Bell Tel. Co. v. Alabama, 526 U.S. 160, 167-68 (1999); Richards v. Jefferson County, 517 U.S. 793, 798 (1996); Martin v. Wilks, 490 U.S. 755, 761 (1989); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110 (1969); Hansberry v. Lee, 311 U.S. 32, 40 (1940); Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 476 (1918); Pennoyer v. Neff, 95 U.S. 714, 733-34 (1878). The rule against binding nonparties is embodied in the law of judgments that applies here, but it has its foundation in the Due Process Clause as well. Binding a nonparty deprives that person of essential due process protections such as the right to appear by counsel, to introduce evidence, to present arguments, and to cross-examine. *See, e.g.,* Armstrong v. Manzo, 380 U.S. 545 (1965). As this Court has said, "Some litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their positions." Blonder-Tongue

Laboratories v. University of Illinois Foundation, 402 U.S. 313, 329 (1971).[2]

The general rule against binding nonparties admits of several exceptions, but for each exception, courts wisely have insisted upon sound justifications and well-drawn lines. A brief survey of the exceptions shows that each is based on a clear and limited rationale, not on a diffuse balancing of factors. Class actions, control of an action by a nonparty, privity, and some legislation creating special proceedings create permissible forms of nonparty preclusion, none of which applies in this case.

1. Class actions offer the broadest exception to the rule against binding nonparties, premised on class certification and adequate representation. Hansberry v. Lee, 311 U.S. 32, 39 (1940). Such a proceeding requires special grounds and special safeguards, including contemporaneous designation as a class action. As this Court has observed, "a prior proceeding, to have binding effect on absent parties, would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the

[2] Although due process concerns strongly support the Petitioner's position that he is not bound by the judgment in an action to which he was not a party, the Court can reverse the decision below without reaching the Constitutional question. This case concerns the preclusive effect of a federal court judgment, deciding a federal question claim, on an action in another federal court. That issue is governed by federal common law. Semtek Int'l Inc. v. Lockheed Martin Corp., 531 U.S. 497, 506-09 (2001). And the federal common law of judgments does not permit nonparty preclusion except in narrowly defined circumstances not applicable to this case.

common issue.'" Richards v. Jefferson County, 517 U.S. 793, 801 (1996). Those requirements are not met when 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 . . . [persons] who were nonparties." *Id.* Part of this brief more fully explains how "virtual representation," as applied by the lower courts in this case, disregards sound limitations on class actions.

2. When a nonparty controls litigation, that nonparty may be bound as a party. This narrow exception applies when "nonparties assume control over litigation in which they have a direct financial or property interest," so that the nonparties have in effect had their day in court and can appropriately be bound by the result. Montana v. United States, 440 U.S. 147, 154-55 (1979); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 111 (1969). In the *Montana* case, the United States was bound by the issue-preclusive effect of a judgment in an action brought by a government contractor because the United States had directed the contractor to file the suit, paid the attorneys, and controlled most of the litigation decisions. 440 U.S. at 155. The *Montana* exception justifies nonparty preclusion in a narrow band of cases where, for example, a liability insurer controlled an insured's defense of a prior case or a corporation controlled litigation involving one if its officers. 18A Wright, Miller & Cooper, Federal Practice and Procedure § 4451 (2d ed. 2002); Restatement (Second) Judgments § 39 cmt. a, illus. 1 & 2.

3. Courts have used the notion of "privity" to treat nonparties as equivalent to parties for purposes of the law of judgments, but they have been careful to limit the doctrine to circumstances in which the legal relationship between a party and a nonparty may warrant treating the nonparty's rights and obligations as derivative from those of the party. For example, when a landowner subject to a judgment affecting the land sells to a new owner, courts conclude that "the estoppel runs with the land, that the grantor can transfer no better right or title than he himself has, and that the grantee takes *cum onere*." Postal Telegraph Cable Co. v. Newport, 247 U.S. 464, 474-75 (1918). Other legal relationships may tie a nonparty's rights to those of a party, such as when a judgment against a partnership binds each partner, or when a guardian litigates on behalf of a ward. See Restatement (Second) Judgments §§ 43-61. In each case, a specific legal relationship between the party and nonparty justifies treating the nonparty as the party's equivalent for purposes of claim preclusion and issue preclusion.

4. Finally, the legislature may, subject to due process limits, modify the law of preclusion so that a single proceeding may bind all interested persons upon notice and an opportunity to be heard. See Richards v. Jefferson County, 517 U.S. 793, 802-05 (1996); Martin v. Wilks, 490 U.S. 755, 762 n. 2, 765-66 (1989)(mentioning bankruptcy and probate proceedings); 42 U.S.C. § 2000e-2(n)(1)(limiting challenges to practices imposed under employment discrimination decrees). In such instances, the legislature has decided that consolidation is necessary; it has enacted appropriate procedural safeguards; and

the statute itself warns those interested that they cannot protect themselves except by participating.

None of these exceptions applies here. Greg Herrick's FOIA action in the District of Wyoming was not a certified class action. There is no suggestion that Brent Taylor controlled Herrick's FOIA litigation; indeed, there is no evidence that he even knew about it while it was proceeding. There is no legal relationship of the sort properly classed as privity that justified making Taylor's rights depend on those of Herrick for purposes of claim preclusion or issue preclusion. Finally, this case does not involve any legislative alteration of the law of judgments. On the contrary, FOIA entitles "any person" to seek the disclosure of government documents by suing in the District of Columbia, where the claimant resides or has his principal place of business, or where the documents are located. 5 U.S.C. § 552(a)(3)(A), (a)(4)(B).[3]

This case is governed by Richards v. Jefferson County, 517 U.S. 793 (1996), which held that someone challenging a state tax cannot consistently with

[3] Although the court below did not rely on this ground, the United States (FAA) relied heavily in its brief on an argument that FOIA was a "public law," and thus a nonparty to a prior judgment could be bound by that judgment. Whatever the merits of that amorphous and untested concept, it has no place here. First, it bears no relationship to the "virtual representation" theory adopted below, since it would bind the entire world to the prior judgment. Second, the interests at stake in the present action are not of the kind that could qualify under such a standard. The right to information under FOIA is a right that Congress vested in the individual seeking the information, who may or may not choose to disclose that information to others once it has been obtained.

due process be bound by a previous decision upholding it when: (a) he received no notice of the previous case; and (b) the party challenging the tax in the previous case was not designated a class representative or otherwise designated to represent the interests of nonparties. Indeed, the Court later held that, even when the nonparty knew of the first case and the same lawyer participated in representing both challengers to the tax, the nonparty could not constitutionally be bound. "These circumstances, however, created no special representational relationship between the earlier and later plaintiffs. Nor could these facts have led the later plaintiffs to expect to be precluded, as a matter of res judicata, by the earlier judgment itself, even though they may well have expected that the rule of law announced in . . . [the first case] would bind them in the same way that a decided case binds every citizen." South Central Bell Tel. Co. v. Alabama, 526 U.S. 160, 167-68 (1999).

Even in a case unlike this one, in which a nonparty receives notice of the pending action, procedures must be in place in that action to ensure adequacy of representation and provide fair notice that the nonparty will be bound. A post hoc effort to determine adequacy will not suffice. In the absence of a legal relationship between party and nonparty causing the latter's rights to depend on the former's, that may be accomplished by certifying a class, designating class representatives, and providing other safeguards. But this must be done at the time of the first suit, not by a decision in a second suit that the first suit should retroactively be treated as a class action. *Richards*, 517 U.S. at 801-02.

II. Nonparty Preclusion Violates Joinder Principles and Creates A De Facto Class Action Without The Safeguards of Rule 23.

The Federal Rules of Civil Procedure offer a panoply of options for joining parties to an action. A properly joined party has the right to participate in the action and is bound by the judgment, whether favorable or unfavorable. Each joinder provision entails somewhat different requirements and procedures, crafted to accommodate each type of joinder and to protect the legitimate interests of those joined or not joined. To bind a person who was not properly joined as a party permits an end run around the joinder rules.

As this Court has recognized, the burden of joining those to be bound by an action falls on those who are already parties. The enduring point of *Martin v. Wilks*, 490 U.S. 755 (1989), is that nonparties are not bound by a judgment simply because they could have joined. Intervention, this Court emphasized in *Martin*, is not mandatory. If a party to an action wishes to bind a nonparty, that party must use an appropriate joinder mechanism to make the outsider a party to the action. *Id.* at 763-65. If the nonparty is then joined, it knows that it will be bound; and if it is not joined, it knows that it will not be bound and can safely remain outside the action.

Thus, the white firefighters in *Martin* were free to bring a second suit challenging the consent decree resulting from the first suit even though (a) they had surely been aware of that suit (a publicized class action against their employer) during its pendency, (b) the municipal defendants had contested liability through two trials, (c) the white firefighters

knew that the affirmative action sought by the suit would affect them, and (d) the Birmingham Firefighters Association had appeared and objected to the decree as an *amicus.* Indeed, the dissenters agreed with the majority's holding that the firefighters were not bound by the judgment in the first suit; they argued that the employer was not liable as a matter of substantive law for acts performed in obedience to a court order. *Id.* at 770, 772-73, 789-91.

Alternatively, the defendants might have sought relief against those likely to seek the records in question under FOIA. Perhaps this might have taken the form of a counterclaim against Herrick, naming as additional parties to the counterclaim Taylor and other members of the antique aircraft association. Or it might have had the form of an independent action against them, seeking certification of a defendant class for purposes of a determination that FOIA did not warrant release of the records. It is not clear whether a representative appropriate to protect the interests of such a defendant class could be identified, or whether there might be other reasons to deny certification, but that is precisely the point. Unless a party succeeds in joining a person who is a stranger to the litigation as a named party, or successfully includes him in a class action, that person cannot be bound by the adjudication.

As *Martin* made clear, 490 U.S. at 766-68, questions about the form a class action might have taken cannot serve as the basis for binding nonparties to the result in a prior action. If parties decline to avail themselves of the mechanism the law provides, with its attendant costs and risks, then they lose the advantage of binding the entire class when

the judgment proves favorable to them. *See* Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits, 50 Duke L.J. 381, 459 (2000).

Had the Herrick lawsuit been a legitimate class action, it would have differed in procedurally and ethically salient ways. The court would have certified the class only on compliance with rules meant to ensure commonality of interest and impracticality of individual suits. Specification of the class would have informed representatives whom they were representing, and courts and class members who was to be bound. The class representatives, their counsel, and the court itself would have been obligated to protect the interests of absent class members. Class members would have had an opportunity to be heard, would share in the benefits of any favorable judgment, and would be bound by an unfavorable one.[4]

Nonparty preclusion, as applied by the lower courts in this case, retroactively created a de facto class action without the many safeguards of class action procedure. Although the lower courts' opinions fail to specify who is included in the "class" bound by the original judgment against Herrick, the class might include at least those who, like Taylor, shared a similar interest in the F-45 aircraft and were related to Herrick through membership in an antique airplane association. Thus, the Court of Appeals up-

[4] Nonparties to a class or nonclass FOIA action could not obtain its benefits by invoking non-mutual issue preclusion, because such preclusion is not available against the government. United States v. Mendoza, 464 U.S. 154 (1984).

held nonparty preclusion against Taylor based on an ex post finding that Taylor was adequately represented by Herrick and his attorney, noting that "it is eminently reasonable to believe an individual with a strong incentive to litigate a particular matter, by defending his own interest adequately represents others with the same interest." Taylor v. Blakey, 490 F.3d 965, 974 (D.C. Cir. 2007). That statement may echo the rationale supporting class actions, but Herrick's suit was not a class action.

Moreover, adequate representation is *necessary* for a class action but has never been *sufficient*. A finding of adequate representation neither supplants the other requirements for class certification nor renders superfluous all of the procedural and ethical protections built into class representation. "[T]he fact that virtual representation looks like a class action but avoids compliance with Rule 23 is a weakness, not a strength, of the doctrine. … There would be little point in having Rule 23 if courts could ignore its careful structure and create *de facto* class actions at will." Tice v. American Airlines, 162 F.3d 966, 972-73 (7th Cir. 1998).

III. The D.C. Circuit's Use of "Virtual Representation" Relied On A Grab-Bag of Factors Without A Sound Rationale and Would Prove Burdensome in Application.

The Court of Appeals decision in this case was not based on any clear and limited rationale such as those that justify the traditional grounds for binding nonparties. Rather, the court relied on three factors to conclude that, even though Brent Taylor had not

been a party to a previous FOIA action brought by Greg Herrick or was even shown to have had notice of it while it was going on, claim preclusion nevertheless barred his own action. These factors—that Herrick's interest in seeking the aircraft plans in question was at least as great as Taylor's, that both had retained the same lawyer, and that they were in a "close relationship" encompassing membership in aviation associations—the court considered sufficient for nonparty preclusion.

The theory said to justify this result was "virtual representation," a controversial and ill-defined theory of preclusion that lacks a clear and limited justification. With its statement that "[c]ourts now generally hold a nonparty's claim precluded by a prior suit based upon a particular form of privity known as 'virtual representation,'" 490 F.3d at 970, the Court of Appeals gave no hint of the extent to which the theory departs from standard preclusion doctrine.

Although Taylor never asked Herrick to represent him, Herrick never agreed to do so, and the court hearing the first action never commissioned Herrick to do so, the court's theory would treat Herrick as though he had been Taylor's representative all along. The representation is pure fiction.[5] If a theory of "virtual representation" can ever justify claim preclusion of nonparties, it must be a theory

[5] Indeed, outside the law of judgments, "virtual representation" designates the theory under which people like the American colonists who could not vote for Parliament were said to be virtually represented by members elected by others—a theory that the Revolution repudiated.

supported by a genuine rationale, not just the factors described in this case. Some decisions, for example, have held to be bound by "equitable preclusion" one who knew that a prior action involving the same claim was pending, could have joined it, and knew that a party to that prior action relied on it to dispose of the controversy. James, Hazard & Leubsdorf, Civil Procedure 738-39 (5th ed. 2001). But that example (whatever its merits) is not this case.

One of the cases cited by the court, Tyus v. Schoemehl, 93 F.3d 449 (8th Cir. 1996), *cert. denied,* 520 U.S. 1166 (1997), has hitherto been regarded as "perhaps the most extreme example of the 'new frontier.'" David L. Shapiro, Preclusion in Civil Actions 94 (2001); *see also* 18A Wright, Miller & Cooper, Federal Practice and Procedure 546-49 (2d ed. 2002) (calling *Tyus* "[a]s broad a statement of virtual representation doctrine as is likely to be made" and criticizing its failure to consider the actual adequacy of representation). *Tyus* represents a departure from usual preclusion principles that this Court should not follow. The present case, moreover, goes further than *Tyus.* In *Tyus*, most of the plaintiffs in the second case as well as their lawyer not only knew of but actually participated in the first suit, from which they withdrew in order to file the second one. Even were the result in *Tyus* sound, preclusion in the present case remains unjustifiable.

The sponginess of the "virtual representation" claim advanced here becomes still clearer when one examines the foundations of the "close relationship" on which the decision below relied. The facts adduced in the opinion are that both Herrick and Taylor were members of an antique aircraft association,

that they shared an interest in preserving antique aircraft, that Herrick asked Taylor to help him restore his F-45 (though there is no evidence of Taylor's response), that after the first suit ended Taylor obtained discovery materials from Herrick, and that Taylor did not make a timely objection (though he did make an untimely one) to a characterization of him as Herrick's "close associate." None of this demonstrates that Taylor authorized Herrick to litigate on his behalf, that Herrick was himself acting as Taylor's agent, that Herrick and Taylor colluded with the purpose of obtaining two bites at the apple, or that any other occurrence made it appropriate to bind Taylor by Herrick's lawsuit. One could say with equal truth that two corporations litigating about a statute are both Business Roundtable members who have many transactions with each other, cooperate in legislative matters, and use the same law firm. Yet such miscellaneous ties have never been thought sufficient to support claim preclusion.

As for the claim of adequate representation, even if that were sufficient in itself, it has not been established here. None of the safeguards to assure adequacy, such as those in Rule 23, was in place. No finding of adequacy was made in the original proceeding, nor was it required, and in the second proceeding the courts in effect created an irrebuttable presumption that a party was properly represented by another party with similar interests and the same lawyer. Arguments are presented in Taylor's action that were not presented in Herrick's action. The fact that the same attorney was involved in both actions cannot suffice in itself to preclude litigation, any more than the eminence of the lawyer or firm involved in a previous action would preclude others

from litigating overlapping issues. South Central Bell Tel. Co., 526 U.S. at 168; 18A Wright, Miller & Cooper, Federal Practice and Procedure 376 n. 14 (2d ed. 2002)(citing cases).

A client in one proceeding may have reasons for not advancing arguments that the client in the second proceeding does not. The client in the second proceeding may have resources and access to information that the client in the first proceeding did not. The interests at stake in the present case are those of the client, not the lawyer. Reliance on use of the same attorney as a basis for nonparty preclusion would simply limit the choice of counsel available to the second plaintiff.

In short, both the D.C. Circuit's appraisal of the factors on which it relied and its conclusion that those factors warrant preclusion fail to articulate any clear or bounded rationale explaining why these particular circumstances justify depriving Taylor of the day in court guaranteed by the law of judgments and the due process clause. Nor does the opinion give any weight to the absence of other factors that courts have considered relevant, in particular, the absence of any showing that Taylor knew of the first suit, had any hand in its conduct, agreed to be bound by its result, or deliberately maneuvered to avoid its effects.

This case illustrates why a leading authority has warned against the dangers of "virtual representation" theories:

> Impatience with repetitive litigation of common issues, however, has enticed some courts to rely on virtual representation in circum-

> stances that go beyond anything that is easily justified. . . . There are enough vagrant decisions on the loose to raise genuine concern that, for want of any developed theory, virtual representation will be used to preclude bothersome litigation that instead should be resolved on the merits.

18A Wright, Miller & Cooper, Federal Practice and Procedure 512-513 (2d ed. 2002); *see also* David L. Shapiro, Preclusion in Civil Actions 97 (2001). As this Court has said, "'Simple justice' is achieved when a complex body of law developed over a period of years is evenhandedly applied. The doctrine of res judicata serves vital public interests beyond any individual judge's ad hoc determinations of the equities in a particular case." Federated Dept. Stores v. Moitie, 452 U.S. 394, 401 (1981).

Not only does the D.C. Circuit's version of "virtual representation" lack any sound rationale, its amorphousness would create new problems. The variety of "virtual representation" in question here would invite long and burdensome proceedings to determine whether its requirements had been met. Parties could seek discovery into such matters as what someone knew about a previous suit, what connections existed between him and a party to that suit, and how his interests might differ from those of that party. Then parties could dispute how the various factors sometimes considered relevant should be balanced in the particular case. That would lay the foundations for appeals as to whether a particular agglomeration of factors warranted preclusion.

The effects of the doctrine would reach back to complicate proceedings in the forum in which the

first suit was brought. Thus, a party to the first suit might contend that one who would or might be bound by the result should be joined if possible under Fed. R. Civ. P. 19(a)(1)(B)(i), or that if she could not be joined the suit should be dismissed under Rule 19(b), or that the suit should be transferred to another district so that she could be joined. Adjudicating such assertions would take time and money.

The potentially bound party would also be burdened. Some such parties might find it necessary to protect their interests by looking for and monitoring suits that might later be held to bind them. Successful intervention in such suits might be costly or inconvenient, particularly if they were pending in distant venues or if the intervenor raised new issues or sought additional discovery. Someone who decided not to intervene but to bring a separate suit would be well advised to hold aloof from the parties in the first suit, to retain a different lawyer who might have to be paid to educate himself, and to obtain information through expensive discovery procedures rather than by asking a party to the first suit for it. *See* Howard M. Erichson, Informal Aggregation: Procedural and Ethical Implications of Coordination Among Counsel in Related Lawsuits, 50 Duke L.J. 381, 458 (2000) (criticizing "virtual representation" theory as discouraging cooperation among counsel).[6]

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[6]In an analogous situation, this Court stressed another disadvantage of expanding preclusion doctrine. In holding that nonmutual issue preclusion could not be applied against the United States, the Court said that such preclusion "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue. Allowing only one final

(*Footnote continued*)

If the Executive Branch believes that multiple actions involving FOIA requests for the same records create a real problem that cannot be resolved through proper use of existing procedural techniques, it should ask Congress to consider appropriate means of allowing a single FOIA action to bind all those who seek such records. Congress could then conduct an inquiry into whether there is indeed such a problem, whether it wished to impair or nullify the individual rights now conferred on those seeking records, and whether and in what form of proceeding adequate safeguards can be established to ensure constitutionally adequate representation, notice, and opportunity to be heard. But the Respondents may not turn an ordinary federal civil action into such a proceeding by contending, after judgment has been entered, that common interests, the same lawyer, and connection through the antique aircraft community made the first plaintiff an unwitting representative of the second.

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CONCLUSION

The theory of "virtual representation," as applied by the courts below, does violence to well-established principles of joinder, preclusion, and due process. Whatever the merits of petitioner's FOIA claim, Congress has entitled him to litigate it him-

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adjudication would deprive this Court of the benefit it receives from permitting several courts of appeals to explore a difficult question before this Court grants certiorari for certiorari." United States v. Mendoza, 464 U.S. 154, 159 (1984).

self, without being bound by a proceeding of which he received no notice, and in which no one was designated to speak for him. The factors present in this case, or any grab-bag of factors without a sound and circumscribed rationale, cannot justify a departure from the essential principle that a judgment does not bind a nonparty. The due process protections afforded to parties or class members – and denied to nonparties and non-class members – should not be so lightly disregarded. The judgment below should therefore be reversed.

Respectfully submitted,

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