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.
Respondent.

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

BRIEF FOR LAVONNA EDDY AND KATHY LANDER AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

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WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

QUESTION PRESENTED

Can a party be precluded from bringing a claim, under a theory of "virtual representation," and thereby denied the due process right to a day in court, when the party had no legal relationship with any party to the previous litigation and did not receive notice of that litigation?

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INTEREST OF *AMICI CURIAE*

Amici are the petitioners in *Eddy v. Waffle House*, No. 07-495, which is currently pending before this Court.[1] In *Eddy*, amici and others brought an action against a restaurant chain, alleging that they had

[1] Pursuant to Rule 37.3, letters of consent to the filing of this brief have been submitted to the Clerk of the Court. No counsel for a party authored this brief in whole or in part, and no counsel for a party or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amici curiae* or their counsel made a monetary contribution to its preparation or submission.

been denied service on account of their race when they sought to eat a meal at one of the chain's facilities. Before trial, the restaurant chain sought and obtained summary judgment against all plaintiffs but one, Mark Lander, who is the husband of amicus Kathy Lander. Mark Lander's claim was tried to a jury, but the jury found against him and judgment was entered in accordance with that verdict. The court of appeals held that summary judgment was mistakenly granted against amici. The court nonetheless refused to permit amici to return to the district court for further proceedings on the merits of their claim. The court held that, even though amici were not parties to the trial or resolution of the merits of their claims, they were collaterally estopped by the jury verdict and judgment against Mark Lander from further litigating those claims.

The court of appeals in *Eddy* thus agreed with the court of appeals in this case that a nonparty may be bound by a judgment, even in the absence of a representative legal relation with a party to that judgment or actual control of the litigation that resulted in that judgment. Indeed, the court of appeals in *Eddy* held that amici were bound to the judgment reached in their absence, notwithstanding that the district court had mistakenly refused to permit them to be parties to the trial and to submit their claims to the jury. Amici thus have an interest in the question presented in this case whether a broad "virtual representation" preclusion theory that permits preclusion of nonparties in those and similar circumstances is valid.

SUMMARY OF ARGUMENT

A. A long and unbroken line of cases from this Court has regularly reaffirmed the principle that, because each person's right to an opportunity to be heard is at the core of due process, a judgment in a case binds only those who have had such an opportunity—*i.e.*, the parties and the limited category of those in privity with them. The distinguished historical pedigree and consistent recognition of that principle is alone sufficient to establish that, as a matter of due process, someone who has not had an opportunity to be heard cannot be bound.

Other considerations lend further support (if such were needed) to that conclusion. To bind a nonparty to a judgment is equivalent to requiring compulsory intervention by nonparties to protect their rights, contrary to the longstanding recognition that plaintiffs have the privilege to choose if, when, and whether to assert their rights, within applicable procedural requirements. Binding a nonparty on the ground that someone else has adequately litigated a similar claim deprives the nonparty of the chance to make his own litigation choices, and it thus contradicts the interest in personal autonomy that underlies due process. Attempting to determine after the fact whether a nonparty outside the accepted categories of privity was "adequately represented" in a prior proceeding—a necessary condition for binding a nonparty under any view—requires a court to make an exceptionally difficult and ultimately indeterminate judgment; it thus increases the risk of inconsistent results on similar facts and erroneous results when nonparties with meritorious claims are precluded from litigating them. Finally, the key interest in the appearance of justice, and the ability

of litigants and society as a whole to have confidence in the judicial process, is threatened if litigants are given no opportunity to be heard before their claims are denied.

B. There is a limited category of nonparties—those who are in "privity" with a party—who are generally bound by a judgment. The accepted categories of nonparties who may be bound, however, is limited either to those who had legal or consensual representation relationships with a party or those who exercised actual control over the litigation notwithstanding their technical nonparty status. In either case, the nonparty did in fact have an opportunity to be heard, albeit through the nonparty's duly constituted representative or through the party whose conduct was controlled by the nonparty. Moreover, the rule of necessity supports binding the nonparty in those situations, because a failure to do so would ordinarily render resolution of certain disputes impossible or deprive the litigants and society of the enormous benefits of effective representation relationships.

C. Cases in which a nonparty is precluded based on the court of appeals' "virtual representation" theory have none of the features of accepted privity categories that render them acceptable under due process standards. In "virtual representation" cases as understood by the court of appeals, the nonparty has had no opportunity to be heard in the prior litigation, either *in propria persona* or through an authorized representative. The nonparty has had no control over the prior litigation. And no necessity requires substituting highly attenuated, after-the fact notions of "virtual representation" for the actual due process required by the Constitution. Although

the court of appeals' theory is based on the proposition that "adequate representation" is sufficient to substitute for an actual opportunity to be heard, the concept of "adequate representation" as "the touchstone of due process . . . has little to commend it." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). The poorly defined factors ("adequate representation," "close relationship") the court of appeals used in deciding whether petitioner was "virtually represented" in the prior litigation merely underscore the indeterminacy of its analysis and provide no assurance that the nonparty's right to a day in court received any protection in the prior proceeding.

D. At the very least, due process does not permit a nonparty who had no *possibility* of appearing in the prior litigation to be bound by its judgment. In this case, petitioner was not shown to have known of the existence of the prior litigation while it was ongoing, and he accordingly could not have participated in it. If the opportunity to be heard means anything, it means that a person must have had a chance, at some time and in some way, to be heard before his case is decided against him.

II. For the reasons given above, precluding petitioner under the court of appeals' "virtual representation" theory would deprive him of due process, and the Court should so hold. If there is doubt about that result, however, the Court could also decide this case on nonconstitutional grounds. Petitioner has presented a federal claim, which is governed by the federal law of res judicata. At the very least, the due process questions raised by the court of appeals' judgment are serious and substantial. Accordingly, rather than deciding the due process limits of

preclusion in this case, the Court could resolve this case simply by refusing to expand the federal law of res judicata to permit preclusion of a nonparty who had no legal or consensual representation relationship with a party and who did not exercise actual control over a party's litigation. That result would be dictated not only by the doctrine of constitutional avoidance, but also by the substantial defects in the court of appeals' "virtual representation" theory and the costs that the court of appeals' theory would impose on the judicial system and on individuals seeking to vindicate their legal rights.

ARGUMENT

It is a part of our "deep-rooted historic tradition" that "[a] judgment or decree among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 761-762 (1989). Petitioner was not a party to the proceedings in *Herrick v. Garvey*, 298 F.3d 1184 (10th Cir. 2002), the prior case relied on by the court of appeals to preclude petitioner's claim in this case. Indeed, on the present record, he did not even know of those proceedings. No one in *Herrick* was legally (or actually) required to protect his interests or represent him. There is no evidence that he had the legal right to, or actually did, exercise any control over the *Herrick* litigation. He was thus a "stranger[] to the proceedings" in *Herrick*, and, under long-settled principles of due process and res judicata, he cannot be bound by the judgment in that case. The "virtual representation" theory, as well as the court of appeals' indeterminate multi-factor test for applying it, fundamentally departs from those sound principles and should be rejected.

I. UNDER THE DUE PROCESS CLAUSE, A JUDGMENT BINDS ONLY PARTIES TO THE CASE AND DOES NOT PRECLUDE FUTURE LITIGATION BY A NONPARTY WHO HAD NO LEGAL OR CONSENSUAL REPRESENTATION RELATIONSHIP WITH THE PARTIES AND EXERCISED NO CONTROL OVER THE CASE

A. A Judgment Binds Only Parties And Their Privies And Does Not Bind Non-Parties

1. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in litigation in which he is not designated 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); accord *Baker v. General Motors Corp.*, 522 U.S. 222, 237 n.11 (1998); Martin, 490 U.S. at 761; *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 327 n.7 (1979); *Blonder-Tongue Laboratories, Inc. v. University Foundation*, 402 U.S. 313, 328-329 (1971); *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 110 (1969). That rule is fundamental to our system of justice. "The principle is as old as the law, and is of universal justice, that no one shall be personally bound until he has had his day in court, which means until citation is issued to him, and opportunity to be heard is afforded." *Mason v. Eldred*, 73 U.S. (6 Wall.) 231, 239 (1868).

2. A system of justice could no doubt be imagined in which any given dispute or contested issue, if adequately litigated by a party in one case, would be determined once and for all and could never be litigated again by anyone else. But such a system would be profoundly at odds with root principles of

due process under our system of law. This Court has long recognized that "[t]o hold one bound by the judgment who has not had [an opportunity to be heard] is contrary to the first principles of justice." *Baker v. Baker, Eccles, & Co.*, 242 U.S. 394, 403 (1917); see *Richards*, 517 U.S. at 797 n.4 ("The opportunity to be heard is an essential requisite of due process of law in judicial proceedings."). Just as a court

> may not, consistently with the [Due Process Clause], enforce a judgment against a party named in the proceedings without a hearing or an opportunity to be heard, so it 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.

Postal Telegraph Co. v. City of Newport, 247 U.S. 474, 476 (1918) (citations omitted).

3. That consistent historical understanding of due process is sufficient to establish that one who as a nonparty had no opportunity to be heard cannot be bound by a judgment. Cf. *Pennoyer v. Neff*, 95 U.S. 714, 733 (1877) (due process "mean[s] a course of legal proceedings according to those rules and principles which have been established in our system of jurisprudence for the protection and enforcement of private rights"); *Burnham v. Superior Court*, 495 U.S. 604, 609 (1990) (plurality opinion). Moreover, the due process insistence on each person's own right to be heard in this context itself serves a number of vital interests.

Mandatory intervention. To bind a nonparty to a judgment is equivalent to requiring that the non-

party intervene in the prior action if the nonparty wants to be heard. In many cases, such as the present one, it may have been impossible for the nonparty to intervene or participate as a party in the prior case because of lack of knowledge or for other reasons. See 490 F.3d at 974 (holding that evidence did not show that petitioner even knew of the *Herrick* litigation while it was ongoing); *Eddy v. Waffle House*, 482 F.3d 674, 678-680 (4th Cir. 2007) (finding that persons against whom summary judgment was mistakenly granted are nonetheless bound by the judgment reached after a trial involving others in their absence), pet. for cert. pending, No. 07-495. In such cases, binding the nonparty to the judgment is simply equivalent to denying the nonparty the due process right to be heard.

Even in cases in which the nonparty could have intervened, however,

> [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. . . . 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.

Martin, 490 U.S. at 763 (quoting *Chase National Bank v. Norwalk*, 291 U.S. 431, 441 (1934)); see *Gratiot County State Bank v. Johnson*, 249 U.S. 246, 249-250 (1919). Requiring intervention by nonparties would deprive nonparty plaintiffs of their time-honored and legislatively protected rights to choose, within the limits of established legal requirements, the time and venue of litigation. See *e.g.*, *State Farm Fire & Cas. Co. v. Tashire*, 386 U.S. 523, 536 (1967); *Van Dusen v. Barrack*, 376 U.S. 612, 634 (1964). It

would also be inconsistent with rules governing intervention, which authorize parties to join non-parties in some circumstances see, Fed. R. Civ. Pro. 19, 20, but do not require intervention, see Fed. R. Civ. Pro. 24. See generally *Martin*, 490 U.S. at 765 ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree.").

Personal autonomy. Equally important, the Due Process Clause protects the right of individuals to make their own choices regarding their legal claims, as they can with respect to their other property interests, regardless of whether those choices would be seen by others—or would actually be—the best means of protecting their own interests. See, *e.g.*, *Faretta v. California*, 422 U.S. 806, 834 (1975) (right of self-representation in criminal proceedings). The "central concerns of procedural due process" include not only "the prevention of unjustified or mistaken deprivations," but also "the promotion of participation and dialogue by affected individuals in the decisionmaking process." *Marshall v. Jerrico, Inc.*, 446 U.S. 238, 242 (1980). This Court has recognized that a chose in action is a form of property interest. See *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 807 (1985); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428-429 (1982); *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 312 (1950). It is consistent with that recognition that the owner of the property interest—not some other individual with a similar or even identical interest—have the basic right to determine how and when to assert it.

Risk of error. Precluding nonparties also puts at risk the basic interest in ensuring accuracy in the resolution of legal disputes. If a person is unsuccessful in litigating his own claim, the fault may be attributable to a weak claim, less-than-optimal choices about how to litigate it, or some combination of the two. No court need undertake the difficult inquiry into which was the actual cause of the failure, because our adversary system achieves accuracy by relying on the parties to make their own litigation choices, and it therefore holds them to the consequences of their decisions. But precluding a *nonparty* based on *someone else's* unsuccessful litigation of a similar claim is either arbitrary and mistaken (if the prior party has lost the claim because it was inadequately litigated) or requires a detailed inquiry into the adequacy of the prior litigation. This Court has described such after-the-fact judgments about which of several litigation choices would have produced the most favorable result as "unquantifiable and indeterminate." *United States v. Gonzalez-Lopez*, 126 S. Ct. 2557, 2564 (2006) (quoting *Sullivan v. Louisiana*, 508 U.S. 275, 282 (1993)).[2] Moreover, given a court's own built-in inter-

[2] The question whether a party to a case pursued the best means of litigating a claim introduces far more subjectivity and indeterminacy than the inquiry under *Strickland v. Washington*, 466 U.S. 668 (1984), in cases involving effective assistance of counsel under the Sixth Amendment. The standard under *Strickland* is "reasonableness under prevailing professional norms." *Id*. at 688. That standard takes into account that "there are countless ways to provide effective assistance in any given case" and that "[e]ven the best criminal defense attorneys would not defend a particular client in the same way." *Id*. at 689. When the question is not whether a party had effective assistance, but whether a party's litigation of a case was so favorable to a nonparty's interests that it substitutes for the

est in clearing its own dockets, it may be particularly difficult for a court to make a suitably disinterested judgment when inquiring into the adequacy of a prior party's litigation of a claim now being advanced by a nonparty to the earlier litigation.

Appearance of justice. Finally, a key function of due process is to provide procedures that are and that appear to be fair, thus ensuring confidence in the judicial system and its resolution of disputes. As Justice Frankfurter explained in an oft-quoted passage:

> 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.

Jone Anti-Fascist Refugee Comm. v. McGrath, 341 U.S. 123, 171-172 (1951) (Frankfurter, J., concurring). If a person with a claim has had the opportunity to be heard in court and to obtain a judicial resolution of the merits of the claim, that person, and

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nonparty's right to be heard on a similar claim, the inquiry would have to be much more exacting. While counsel's choice of one of "countless" effective litigation strategies is sufficient to satisfy *Strickland*, a nonparty's choice of one of many reasonable ways to litigate a case is therefore not sufficient to protect a nonparty's due process rights. Instead, the due process inquiry, if undertaken at all, would have to be much more like the "unquantifiable and indeterminate" inquiry rejected by the Court when a party is denied counsel of choice, see *Gonzalez-Lopez*, 126 S. Ct. at 2564, in which the question would be whether the case was in fact litigated in the way most likely to achieve a sound result.

society at large, should be able to accept the result as fair, even if disappointing. But depriving the claimant of an opportunity to be heard on the ground that someone else, over whom the claimant had no control, had litigated a similar claim would more likely result in bitterness and a sense of injustice on the part of the claimant, as well as a decline in public regard for the fairness of the judicial system.

4. For all of those reasons, "[t]he fundamental requisite of due process of law in judicial proceedings is the opportunity to be heard." *Baker*, 242 U.S. at 394; see *Richards*, 517 U.S. at 798; *Mullane*, 339 U.S. at 314; *Grannis v. Ordean*, 234 U.S. 385, 394 (1914). Because a party to a proceeding has such an opportunity, a party may be bound by the court's resolution of the party's claim.

B. Under Traditional Principles, Petitioner Was Not A Party Nor In Privity With A Party In The Prior Litigation

Petitioner was not a party to Herrick's case, and because he had not been shown to have notice, he had no opportunity to be a party to Herrick's case.[3] It has

[3] Although the district court concluded that petitioner "apparently had notice of Herrick's litigation," the court of appeals correctly held that the facts the district court relied upon "do not show that [petitioner] had notice of Herrick's lawsuit while it was ongoing." 490 F.3d at 974. In reaching its conclusion that petitioner knew of Herrick's litigation, the district court relied on the "shared interest [between petitioner and Herrick] in antique aircraft, their common membership in [an antique aircraft association], their use of the same lawyer for their respective cases, Herrick's sharing with [petitioner] the information he obtained through discovery, and his request that [petitioner] assist in the restoration of his F-45." 490 F.3d at 974. Many of of those facts—petitioner's use of Herrick's lawyer, Herrick's

long been settled, however, that a limited category of nonparties—often referred to as those "in privity with" a party—may be bound by a judgment. In particular, nonparties who have relationships of legal responsibility or of actual control with someone who is a party to a prior proceeding have commonly been found to be in privity with that party, such that the nonparty may be bound by a judgment against the party. The characteristics that define those privity relationships—legal responsibility of one individual for another, actual control by one individual over the other's litigation, and, frequently, the rule of necessity—provide satisfactory substitutes for the nonparty's lack of direct opportunity to be heard. Precluding the nonparty in such a relationship based on a prior judgment against the party therefore satisfies due process. None of those characteristics, however, are present in the relationship between petitioner and Herrick. Accordingly, precluding petitioner because of Herrick's prior litigation violates due process.

a. *Legal responsibility*. At one time, two persons were held to be in privity only if they had a successive interest in the same property. See, *e.g.*, *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 128-129 (1912) ("privity denotes mutual or successive relationship to the same right of property"). That rule thus prevented a grantee of

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sharing of information, and Herrick's request for petitioner's assistance—apparently postdated Herrick's litigation. Especially in light of that discrepancy, the facts relied on by the district court surely do not support any inference of petitioner's knowledge. In any event, there is no reason for this Court to revisit the court of appeals' factbound conclusion that it had not been shown that petitioner knew of Herrick's litigation.

property, for example, from relitigating an issue regarding rights in the property already litigated by the grantor. As this Court explained, "[t]he ground upon which, and upon which alone, a judgment against a prior owner is held conclusive against his successor in interest, is that the estoppel runs with the property, that the grantor can transfer no better right or title than he himself has, and that the grantee takes cum onere." *Postal Telegraph*, 247 U.S. at 474-475. Because the successive owner has never acquired the contested right in property, the successive owner is deprived of no property interest if not permitted to litigate that right, and there can be no due process violation.

As this Court observed in *Richards*, however, "although there are clearly constitutional limits on the 'privity' exception, the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." 517 U.S. at 798. "For example, a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust." *Ibid.*; see *Arizona v. California*, 460 U.S. 605, 626-627 (1983) ("As a fiduciary, the United States had full authority to bring [a previous case] for the Indians and bind them in the litigation."). More generally, "[a] person who is not a party to an action but who is represented by a party is bound by and entitled to the benefits of a judgment as though he were a party." Restatement (Second) of Judgments § 41(1) (1980). That rule applies not only to a ward or beneficiary, but also in other cases in which one person acts after having been invested by law or consent with authority to represent another. *Ibid*.

Investing legal representatives with the authority to bind those whom they represent within the scope of the representation generally poses no due process problem. In cases involving a representative vested by law or consent with authority to litigate on behalf of another, the represented nonparty *has* had a due process opportunity to be heard and participate in the litigation, albeit through the representative. Moreover, although the representative's actions may preclude the represented person in a future action, "the represented person may have an action against the representative for breach of his duty to conduct the relationship in a faithful, diligent, and prudent way." Restatement, *supra*, § 41 cmt. a. The combination of a represented party's actual participation in the lawsuit through a legally or consensually appointed representative and the residual cause of action against a faithless representative generally provides adequate due process protection for the represented person's property interests.

The rule of necessity also supports holding a represented person bound by litigation undertaken on his behalf by his representative. The rule of necessity is a significant factor in due process analysis. See, *e.g.*, *Mullane*, 339 U.S. at 313-314 ("A construction of the Due Process Clause which would place impossible or impractical obstacles in the way [of a State's vital interests] could not be justified."); see *Jones v. Flowers*, 547 U.S. 220, 234 (2006). In some cases in which a nonparty is bound by the actions taken by his representative, the nonparty's identity or existence could not have been known at the time of the original action. See Jack L. Johnson, *Due or Voodoo Process: Virtual Representation as a Justification for the Preclusion of a Nonparty's Claim*, 68 Tul. L. Rev. 1303, 1310 n. 40 (1994) (citing cases).

In other cases, refusing to recognize a person as representing another would deprive the representation relationship of its many benefits for the parties concerned and for society as a whole. In both circumstances, the rule of necessity supports binding a represented party to the actions taken by a legally or consensually appointed representative.

b. *Actual Control*. Even in cases in which a party is not legally required to represent a nonparty, this Court has held that nonparties may be precluded "when nonparties assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." *Montana v. United States*, 440 U.S. 147, 154 (1979); accord *Zenith Radio* Corp., 395 U.S. at 111; *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262 n.4 (1961). Precluding a nonparty in those circumstances raises little due process problem, for reasons similar to those in the cases involving a representation relationship. A person who actually controls litigation has had the opportunity to be heard and to have his claim decided. Having thus had his day in court by those means, there is no due process objection to precluding him from further litigation of the same claim or the same issues.

c. The key features of the categories of privity described above are not present in this case. In the prior litigation, Herrick had no responsibility, imposed either by law or by consent, to represent petitioner. To the contrary, Herrick was free to conduct the litigation as he wished, with no regard for petitioner's interests or wishes. Similarly, there is no evidence that petitioner, who may well not have known of Herrick's case, exercised any control over Herrick's litigation (or, for that matter, that Herrick

exercised any control over this case). Nor does the rule of necessity provide any support for binding a nonparty to the result in *Herrick*; neither Herrick's claim nor petitioner's would have been impossible to bring or otherwise impractical if, under the ordinary rule, the judgment in *Herrick* is applied only against the parties to that case itself. Accordingly, apart from the court of appeals' "virtual representation" theory, there is no basis for finding that petitioner was in privity with Herrick. The traditional due process justifications for precluding a nonparty based on privity—a relationship of legal or consensual representation or actual control, and the rule of necessity—have no application here.

C. Preclusion Based on "Virtual Representation" Would Violate the Due Process Clause

Petitioner and Herrick, though personally acquainted, had no legal obligation to or control over each other and "are best described as mere 'strangers' to one another." *Richards*, 517 U.S. at 802. Petitioner thus did not have his day in court in the prior litigation in *Herrick*. The court of appeals' "virtual representation" theory, which would bind petitioner to the judgment in *Herrick*, denies him due process, and it should be rejected.

1. Under the "virtual representation" theory adopted by the court of appeals, "some cases of successive litigation involve as a litigant 'a nonparty [to the original action] whose interests were adequately represented by a party to the original action.'" 490 F.3d at 970. The court concluded that "[i]n those cases the party to the prior litigation is treated as the proxy of the nonparty, with the result

that the nonparty is barred from raising the same claim." *Ibid*.

Although the court of appeals characterized its "virtual representation" theory as "not controversial," in fact the theory is mistaken even at that "level of generality." 490 F.3d at 370. The proposition that "adequate representation . . . is the touchstone of due process . . . has little to commend it." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 176 (1974). Due process does not merely guarantee that a person will be "adequately represented"; it entitles a person to have an opportunity to be heard before that person's own claim is decided. The fact that *someone else* has been heard or that *someone else's* similar or even identical claim has been adequately litigated may provide some basis to predict the outcome of later litigation on a particular claim (though genuine factual disputes may easily be decided differently by different decisionmakers, even if they are litigated identically). Due process, however, has never permitted dispensing with an individual's right to be heard on the ground that the court can predict that the claim would be a losing one—even if the prediction could (as is not true in this case) be made with great confidence. See *Coe v. Armour Fertilizer Works*, 237 U.S. 413, 424 (1915) ("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 because he had no adequate defense on the merits."); *Rees v. City of Watertown*, 86 U.S. (19 Wall.) 107, 123 (1873) ("Whether, in fact, the individual . . . is without defense . . . is not important. To assume that he has none, and, therefore, that he is entitled to no day in court, is to assume against him the very point he may wish to contest."). Each

person with a claim has a right to be heard, and the court's decision on the merits of the person's claim must come only after that person—not someone else—has had the chance to exercise the right.

To be sure, this Court has recognized that preclusion may apply "in certain limited circumstances" in which "a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." *Richards*, 517 U.S. at 798 (quoting *Hansberry*, 311 U.S. at 41-42). That recognition, however, does not support the court of appeals' theory. The Court's reference to "certain limited circumstances" in *Richards* and in *Hansberry* was not to cases, such as this one, in which there was an after-the-fact determination that a person's interests had been "adequately represented" because someone else had brought the same claim and lost. Rather, the Court's reference was to the well-developed law of class actions. Binding absent class members may raise significant due process issues, regardless of how well the named class members may have litigated the case. See, *e.g.*, *Philips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). At bottom, however, a valid class action rests on the same foundations as the categories of privity discussed above. By operation of law, and, frequently, with consent, see *id*. at 811-812 (right to opt out), the class representative has a legal obligation to represent the entire class. That obligation is zealously protected by numerous procedural safeguards as the litigation is proceeding. See *ibid*.; Fed. R. Civ. Pro. 23. And the rule of necessity further supports the class action mechanism, since individual litigation of many or most class claims would be impossible or futile. Cf. Fed. R. Civ. Pro. 23(a) (prerequisite to class action that "the class is so numerous that joinder of all

members is impracticable), 23(b). Given those features, it is reasonable to conclude that absent class members have had their day in court through their representative, just as in other cases of privity.

This case, however, lacks all of those features. No law or rule vested Herrick with authority to litigate on behalf of petitioner in the prior litigation, and petitioner never consented to being represented by Herrick. No special procedures or judicial determinations ensured that Herrick would litigate petitioner's claim, as well as his own. There is no serious obstacle, much less an impossibility, to Herrick and petitioner each litigating their own claims. The bases recognized by this Court in *Richards* and *Hansberry* for finding that due process permits absent class members to be bound by a judgment are entirely absent in this case. Cf. *Tice v. American Airlines, Inc.*, 162 F.3d 966, 972 (7th Cir. 1998) ("[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.").

2. The particular multi-factor "virtual representation" inquiry applied by the court of appeals, like the similarly indeterminate inquiries adopted by other courts that have adopted a similar theory, see, *e.g.*, *Tyus v. Schoemehl*, 93 F.3d 449 (1996), demonstrates the conflict with core due process principles. In the court of appeals' view, a nonparty may be precluded by "virtual representation" if a party to the prior case and the nonparty had an "identity of interests" and "adequate representation," and if either (a) there is "a close relationship between the present party and his putative representative," (b) there was "substantial participation by the present party in the first case," or (c) there was "tactical

maneuvering on the part of the present party to avoid preclusion by the prior judgment." 490 F.3d at 972. Yet those factors, individually or as a group, do not establish that the nonparty has had his own day in court. Accordingly, the presence of those factors is insufficient to preclude a nonparty from litigating his claim.

The court of appeals explicated the "identity of interests" factor to include the requirement that the party to the earlier case had "substantially the same incentive" to achieve the desired result as the nonparty. 490 F.3d at 972. The fact that two individuals have the same incentive. however strong, to press a claim establishes only that they both *may* choose to litigate the claim soundly and they *may* choose to litigate it in the same way. Their similarly strong incentive is also entirely consistent with each of them choosing different alternatives from among the perhaps numerous sound ways to litigate their claims. It is also consistent with the regrettable failure of one of them, though possessing a strong incentive, to pursue the litigation of the claim in a reasonably effective way. Accordingly, precluding a nonparty based on an "identity of interests" with a party may easily lead to denying the opportunity to be heard to a nonparty who had a perfectly sound and likely successful claim, and who attempted to vindicate that claim in accord with all applicable procedural requirements. The "identity of interests" factor provides no protection for the nonparty's due process rights.

The court of appeals explicated the factor of "adequate representation" as largely overlapping the "identity of interests" factor, relying in large part on Herrick's "incentive to litigate zealously" to find that

petitioner was "adequately represented" by Herrick. 490 F.3d at 974.[4] The only additional fact the court added to the "adequate representation" calculus was the fact that "Herrick and [petitioner] used the same attorney to pursue their FOIA claims." *Ibid*. But that additional fact adds nothing. Although use of the same attorney who had litigated an earlier case could, as the court of appeals stated, represent "satisfaction with the attorney's performance in the prior case," *id*. at 975, a person may retain an attorney with experience in litigating a particular type of claim for a wide variety of reasons, such as a desire to save money on attorney preparation, a lack of legal sophistication or ability to gauge the attorney's past performance, or even an attorney's promise to litigate a new case differently than a prior one. Indeed, given that the unfavorable result in *Herrick* appears to have turned on Herrick's failure to challenge important issues on appeal, see *Herrick*, 298 F.3d at 1194, it is very unlikely that petitioner retained Herrick's attorney out of *satisfaction* with his prior performance, or out of a desire that the attorney retroactively be recognized as his repre-

[4] It is telling that the court of appeals found that the fact that the nonparty "might have changed the strategy or tactics of counsel in the first case . . . does not necessarily demonstrate the representation was inadequate." 490 F.3d at 974 n. *. As support, the court of appeals cited this Court's statement in *Strickland v. Washington*, 466 U.S. 668, 688-690 (1984). As explained above, see n. 2, *supra*, the *Strickland* standard, while adequately protective of a defendant's right to effective assistance of counsel, is far too relaxed to protect a person's right to the opportunity to be heard. Indeed, the court of appeals' reliance on *Strickland* underlines the impermissible presupposition of the virtual representation theory: that due process requires only that each *claim*, not each *person*, have the opportunity to be heard.

sentative in the prior case. Without such a retroactive appointment, however, petitioner remains entirely *un*represented—not "virtually represented"—in the prior case.

The only other factor the court found present was that of a "close relationship" between Herrick and petitioner. The record in this case does not permit further explication of the precise nature and incidents of that relationship and whether it satisfied the court of appeals' own requirement that "a close association for res judicata purposes is a relationship like that between family members or business partners." 490 F.3d at 975. The law may indeed clothe business partners in specific and limited circumstances with the legal authority to bind the partnership and, thus, each other. See Restatement (Second) of Judgments § 60 (1980). But that effect occurs only *after* the partners have made a free choice to enter into the partnership relationship, with all of its legal incidents. Here, petitioner *never* entered into a legal relationship with Herrick that clothed Herrick with authority to bind petitioner. As for family members, since the welcome demise of the era when married women could not make their own enforceable contracts, see *Canal Bank v. Partee*, 99 U.S. (9 Otto) 325, 331 (1878), competent adult family members ordinarily do *not* have the right to incur obligations or make binding commitments on behalf of each other, unless specific consent has been given to do so. More generally, one person's decision to associate with another—even to form a "close association"—does not lessen in any way the due process rights that each possesses in a judicial proceeding.[5]

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[5] In concluding there was a "close association" between petitioner and Herrick, the court of appeals relied not only on

The court of appeals did not suggest that either of its other two factors was present in this case. But those factors in any event would provide no support for binding a nonparty to a judgment in a prior case. One of the court of appeals' factors is "substantial participation by the present party in the first case." 490 F.3d at 972. Insofar as "substantial participation" means participation as a party or actual control of the prior litigation, it is indeed sufficient to satisfy due process under settled principles. See pp. __-__, *supra*. But participation by a nonparty in some other way—as a witness, a spectator, a sympathetic friend of a litigant, an interested bystander, etc.—carries with it no right to be heard or to obtain judicial resolution of the validity of the nonparty's own claim. Accordingly, regardless of whether it is combined with other factors or present alone, such nonparty participation does not substitute for the nonparty's due process right to present his own claim in the future.

The court of appeals' other factor—"tactical maneuvering," 490 F.3d at 972—has at times been referred

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the bare characterization of "close association," but also on the facts that "Herrick asked [petitioner] to assist him in restoring his F-45 [and] provided information to [petitioner] that Herrick had obtained through discovery." 490 F.3d at 975. Neither fact is of consequence. Even individuals engaged in a common enterprise may have distinct legal rights to press and distinct ideas about how, whether, and when to do so. And Herrick's decision, presumably *after* his own case was completed, to share information with petitioner in no way suggests that, while Herrick's litigation was ongoing, Herrick had any basis in law or consent to represent petitioner. In short, neither fact could provide any support to the only conclusion that matter s for due process purposes: that petitioner somehow had his own day in court in the course of the *Herrick* case.

to as supporting a finding of privity. See, *e.g.*, *Gonzalez v. Banco Central*, 27 F.3d 751, 761 (1st Cir. 1994); *Tyus,* 93 F.3d at 457. There may well be particular instances in which the "tactical maneuvering" engaged in by a nonparty demonstrates either actual control by the nonparty over the prior case or the nonparty's consent to be represented by the party in the prior case. "Tactical maneuvering" that consists simply in a nonparty's exercise of his right not to intervene in a case does not provide any basis to bind a nonparty to the judgment in that case.

D. At The Very Least, A Nonparty Who Was Denied The Opportunity To Participate In A Prior Case Cannot Be Bound To The Judgment In That Case

For the reasons given above, the Due Process Clause does not permit binding a nonparty to a judgment, where no party to the case had a legal or consensual obligation to represent the interests of the nonparty and where the nonparty did not exercise actual control over the case. This case, however, presents an extreme example of a case in which the nonparty cannot be bound. Even if a nonparty who could have, but did not, participate in a prior case could somehow be bound by the judgment, it surely is the case that a nonparty like petitioner, who had no knowledge of the prior case and thus no possibility of participating in it, could not be bound by its outcome. If the opportunity to be heard means anything, it means that an individual must have had a chance, at some time and in some way, to be heard before his case is decided against him.[6]

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[6] Even more extreme is *Eddy v. Waffle House*, 482 F.3d at 678, in which amici were *precluded* from participating in a trial

II. ALTERNATIVELY, THE COURT COULD DECIDE THAT THE NONCONSTITUTIONAL FEDERAL LAW OF RES JUDICATA SHOULD NOT BE EXPANDED TO PERMIT PRECLUSION OF PETITIONER

The due process issue is squarely presented by this case. As discussed above, the analysis is clear, and the court of appeals' holding so far departs from settled principles of due process that this Court should reverse on the ground that binding petitioner to the judgment in the prior litigation would violate the Due Process Clause. Indeed, the Court has long recognized the close connection between the Due Process Clause and the law of res judicata, see *Eisen*, 417 U.S. at 173-174, 176-177, and the merits of this case warrant resolving it on due process grounds.

If the Court has any doubt about that result, however, the Court could also decide the case on nonconstitutional grounds. Because petitioner's FOIA claim was brought under federal law, it is governed by federal principles of res judicata. *Blonder-Tongue*, 402 U.S. at 325 n.12. If there is any doubt about the constitutionality of binding petitioner to the judgment in *Herrick*, the court of appeals should nonetheless hold that the *non*constitutional federal law of res judicata should not be expanded to permit binding a nonparty in the circumstances present here.

1. If the Court believes that the due process question in this case is not entirely clear, principles

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by a mistaken grant of summary judgment and then held to be nonetheless bound to the judgment reached in their absence. See pp. __-__, *infra*.

of constitutional avoidance would nonetheless require reversal of the court of appeals' decision, albeit on nonconstitutional grounds. For the reasons given above, the court of appeals' ruling, and the "virtual representation" theory underlying it, at the very least raises serious due process questions. Such questions could be avoided by rejecting the expansion of the federal common law of res judicata law that would be required by the court of appeals' decision. That would permit Congress and the States, subject to any later due process challenge in court, to determine whether and in what particular circumstances such expansion would be desirable. Accordingly, the canon of constitutional avoidance dictates that, if this Court does not resolve this case on constitutional grounds, it should hold that, as a matter of the federal common law of res judicata, a nonparty is not bound by a judgment if the nonparty did not have a legal or consensual representative relationship with a party and did not exercise actual control over the litigation that resulted in the judgment.

2. Moreover, even aside from the doctrine of constitutional avoidance, the court of appeals' "virtual representation" theory is unsound. It requires a court to apply an indeterminate, multifactor test to decide whether a nonparty can be bound to a judgment. See pp. 11-12, *supra*. The factors that comprise that test are either poorly defined ("close relationship," "substantial participation"), too reliant on incentives to litigate and insufficiently attentive to the actual conduct of the past litigation ("identity of interests" and "adequate representation"), or both. See pp. 21-26, *supra*. The indeterminacy of the test invites inconsistent results, and it opens the door for courts to penalize disfavored claims or claimants and to give undue weight to the courts' own interests in

clearing their dockets. See pp. 11-12, *supra*. Indeed, the very indeterminacy of the test threatens to create a regime in which individuals in effect are required to intervene in litigation to protect against being bound by a judgment, notwithstanding (a) the long-recognized privilege of a plaintiff to choose the venue and timing of a suit, (b) the rejection of a notion of compulsory intervention in federal law, and (c) the person's own preference to avoid litigation altogether and first seek some other resolution of a potential legal claim. See pp. 9-10, *supra*. The federal law of res judicata should not be expanded so broadly, in the face of those very considerable costs.

CONCLUSION

The judgement of the court of appeals should be reversed.

Respectfully submitted,

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February 27, 2008