

No. 07-371

In The
Supreme Court of the United States

—◆—
BRENT TAYLOR,

Petitioner,

v.

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

Respondents.

—◆—
**On Writ Of Certiorari To The
United States Court Of Appeals For
The District Of Columbia Circuit**

—◆—
**BRIEF OF THE STATE OF UTAH
AS AMICUS CURIAE
IN SUPPORT OF RESPONDENTS**

—◆—
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QUESTION PRESENTED

Can a person be bound by a judgment to which he was not a party if his identical interests were adequately represented in the prior action by a party with whom he shares a close, but nonlegal, relationship?

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INTEREST OF THE AMICUS CURIAE

The State of Utah files this brief amicus curiae¹ in support of respondents simply to provide a live example from a category of lawsuits – public law actions – in which a subsequent litigant should be bound by the judgment in a prior case, notwithstanding the lack of a legal relationship between the litigants or a lack of notice. *See* Fed. Respt.’s Br. at 18, 26-33.

Utah is currently defending the fourth in a series of nearly continuous lawsuits that began in 1961.² Each of the four lawsuits attacked Utah’s administration of an oil and gas royalty fund, which federal law requires Utah to administer as trustee for Navajos who reside in San Juan County, Utah. *Pelt v. State of Utah*, 104 F.3d 1534, 1544 (10th Cir. 1996). Each of the four lawsuits, which have been litigated in 39 of the last 47 years, was brought against Utah as the fund’s trustee by San Juan County Navajos, fund beneficiaries whom this Court has already held have no individual, constitutionally-protected property

¹ The brief is submitted by the Utah Attorney General on behalf of the State of Utah, pursuant to Sup. Ct. R. 37.4.

² *Sakezzie v. Utah State Indian Affairs Comm’n*, 198 F. Supp. 218 (D. Utah 1961); *Sakezzie v. Utah State Indian Affairs Comm’n*, 215 F. Supp. 12 (D. Utah 1963); *Jim v. State of Utah*, No. C-21-70 (D. Utah 1970); *Bigman v. Utah Navajo Dev. Council, Inc.*, No. C-77-0031 (D. Utah 1977); *Pelt v. State of Utah*, No. 2:92cv639 (D. Utah 1992).

rights in the royalty fund. *See United States v. Jim*, 409 U.S. 80, 82 (1972).

The first two lawsuits against Utah were prosecuted as class actions; the second was certified as such under Rule 23(b)(2) of the Federal Rules of Civil Procedure, which does not mandate notice to class members or an opt-out provision. The third lawsuit, although necessarily prosecuted by the plaintiff San Juan County Navajos in their capacity as beneficiaries of the royalty fund, was never formally certified as a class action.

The current lawsuit, *Pelt v. State of Utah*, seeks another accounting of the royalty fund's administration all the way back to 1959, when oil and gas royalties were first paid. In this federal suit, certified as a class action under Rule 23(b)(2), Utah has sought to limit the scope of the accounting claim to the years after 1989, the last year addressed in the third accounting action brought by fund beneficiaries. Utah has argued that the claims for an accounting for years before 1989 are barred by res judicata, based on the *Pelt* plaintiffs' "virtual representation" in the three prior lawsuits brought by other fund beneficiaries concerning administration of the trust before that year.

The federal district court concluded that each of the earlier lawsuits involved the same cause of action and resulted in final judgments on the merits, but that the *Pelt* plaintiffs are not bound by the earlier judgments due to lack of privity. With regard to the

third lawsuit, the district court reasoned that there was not “adequate representation,” required by *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989), because there was no “legal relationship or other form of accountability” between the *Pelt* plaintiffs and the prior plaintiffs, although all are co-beneficiaries of the royalty fund. *Pelt v. State of Utah*, 2006 WL 1148818 at *2, *9-14. As a result, Utah must once again account for royalty fund receipts and disbursements made, or not made, nearly fifty years ago. This decision is currently under advisement on interlocutory appeal to the United States Court of Appeals for the Tenth Circuit,³ which has issued an order abating further action pending this Court’s decision in the instant case.

Petitioner Taylor argues the view adopted by the district court in *Pelt*: a non-party to prior litigation can only be precluded from relitigating issues already decided if there is a relationship involving legal accountability between the non-party and the party in the prior action. Petr.’s Br. at 9-19. In Taylor’s view, the public nature of the case does not and cannot alter this requirement. *Id.* at 30-32. And even if due process requires no legal relationship for preclusion, Taylor argues, the later non-party’s claim can never be precluded, consistent with due process strictures,

³ *Pelt v. State of Utah*, Tenth Circuit Nos. 06-4046, 06-4164 (argued March 7, 2007).

unless he or she has had notice of the prior action. *Id.* at 33-36.

Utah's experience as a repeat class action defendant involving the same accounting claim provides a graphic example of the burdens of successive litigation on the same public law issues by those with identical interests, but without the formal legal relationship Taylor urges as the *sine qua non* of claim preclusion through "virtual representation." Along with all states, frequent defendants in public law cases, Utah has an important interest in the Court's recognition of virtual representation as a bar to relitigation of public law issues if the later plaintiffs' interests were adequately represented in a prior suit by one with the same interests and a close, though not necessarily legal, relationship.



SUMMARY OF THE ARGUMENT

It is a fixture of this Court's *res judicata* jurisprudence that a litigant who is in privity with a party to earlier litigation is bound by the earlier judgment even though the litigant was not a party in the prior action. Determining whether there is privity between the two litigants is not formulaic; it requires a fact-intensive, functional inquiry. The D.C. Circuit has fashioned an appropriate and workable mode of analysis that asks: Are the interests of the two litigants identical? Was that interest adequately represented by the party in the first action? And is there

an affirmative link between the subsequent litigant and the prior litigant or the prior case?

This approach serves the important goals of *res judicata* – finality and conservation of judicial resources – but also protects the due process rights of subsequent litigants when appropriate. It also recognizes that a strict requirement of legal accountability between the litigants encourages endless relitigation of the same issues and rewards collusive litigants.

Like privity, due process is a flexible concept that varies, depending on the nature of the interests at stake. Less process is due litigants whose public interests, not private rights, are on the line. In that circumstance, mandatory notice to all individuals as a condition of claim preclusion – impossible in many instances – exceeds due process requirements and promotes similar kinds of litigation mischief.

For these reasons, Utah urges the Court to reject the rigid privity test advocated by Petitioner Taylor and to adopt instead the D.C. Circuit’s functional privity analysis.



ARGUMENT

I. THERE IS ALREADY A “PRIVITY” EXCEPTION TO THE GENERAL DUE PROCESS PRINCIPLE THAT EVERYONE SHOULD HAVE HIS OWN DAY IN COURT.

Generally, “one is not bound by a judgment *in personam* in a litigation in which he is not designated

as a party or to which he has not been made a party by service of process,” . . . it being “our ‘deep-rooted historic tradition that everyone should have his own day in court.’” *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999) (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940) and *Martin v. Wilks*, 490 U.S. 755, 762 (1989) (other citations omitted)). Competing with this due process principle is the “fundamental precept of common-law adjudication, embodied in the related doctrines of collateral estoppel and res judicata, . . . that a ‘right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies. . . .’” *Montana v. United States*, 440 U.S. 147, 153 (1979) (quoting *Southern Pac. R. Co. v. United States*, 168 U.S. 1, 48-49 (1897)).

This precept of finality in litigation “preclude[s] parties from contesting matters that they have had a full and fair opportunity to litigate[,] protects their adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions.” *Montana*, 440 U.S. at 153-54. This Court has stressed that “[the] doctrine of res judicata is not a mere matter of practice or procedure inherited from a more technical time than ours. It is a rule of fundamental and substantial justice, ‘of public policy and of private peace,’ which should be cordially regarded and enforced by the courts. . . .” *Federated Dep’t Stores, Inc. v. Moitie*, 452

U.S. 394, 401 (1981) (quoting *Hart Steel Co. v. R.R. Supply Co.*, 244 U.S. 294, 299 (1917)).

In *Nevada v. United States*, 463 U.S. 110 (1983), this Court addressed the scope of finality enforced through the doctrine of res judicata, holding that once a final judgment is entered, the case is final, not only as to the parties, but also as to privies of the parties. *Id.* at 129-30. Both are precluded from relitigating any claim that was or could have been litigated. *Id.*⁴ This Court has, thus, recognized an exception to the general due process rule that everyone should have his own day in court “when it can be said that there is ‘privity’ between a party to the second case and a party who is bound by an earlier judgment.” *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996).

In *Richards*, this Court explained that this privity exception applies “when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party.” *Id.* at 798-99; *see also Martin*, 490 U.S. at 762 n.2 (citing *Hansberry*, 311 U.S. at 41-42, and Fed. R. Civ. P. 23) (“adequate

⁴ The First Circuit Court of Appeals has correctly noted: “Logic suggests that the doctrine can achieve its goals only if its preclusive effects occasionally can reach persons who, technically, were not parties to the original action.” *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 757 (1st Cir. 1994). “The pitfalls of a more mechanical rule are obvious; making party status a *sine qua non* for the operation of res judicata opens the door to countless varieties of manipulation, including claim-splitting, suits by proxy, and forum-shopping.” *Id.*

representation” exception applies in “class” or “representative” suits). The *Richards* court did not define “privity,” but stated that the term “is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.” *Richards*, 517 U.S. at 798 (citing Restatement (Second) of Judgments, ch. 4 (1980) (Parties and Other Persons Affected by Judgments)). Privity, in other words, describes one who is close enough to another to be bound by the other’s judgment. *Bruszewski v. United States*, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950). Privity “turns on the facts of particular cases.” *Coryell v. Phipps*, 317 U.S. 406, 411 (1943). It is a flexible concept that takes many factors into consideration, not a rigid rule, as Petitioner argues.

II. PRIVACY EXISTS WHEN A LATER LITIGANT HAS: (A) INTERESTS IDENTICAL TO THOSE OF A PARTY TO THE PRIOR CASE THAT WERE ADEQUATELY REPRESENTED; AND (B) AN AFFIRMATIVE LINK WITH THE PRIOR PARTY OR THE PRIOR CASE.

In *Taylor*, the D.C. Circuit identified appropriate factors to be analyzed in deciding whether a subsequent litigant is in privity with a party to a prior case. The court observed 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’ . . . [t]he idea [being] that

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.’” *Taylor v. Blakey*, 490 F.3d 965, 970 (D.C. Cir. 2007) (quoting *Tyus v. Schoemehl*, 93 F.3d 449, 454 (8th Cir. 1996)); *see also Martin*, 490 U.S. at 762 n.2 (“in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party”). The *Taylor* Court’s functional approach will work to preclude relitigation, but will also “prevent preclusion when the relationship between the party and non-party becomes too attenuated.” *Southwest Airlines Co. v. Texas Int’l Airlines, Inc.*, 546 F.2d 84, 95 (5th Cir. 1977).

The D.C. Circuit acknowledged that *Richards* requires identical interests and adequate representation as preconditions for virtual representation, but added that “there can be no virtual representation absent an affirmative link between the later litigant and either the prior party or the prior case.” *Taylor*, 490 F.3d at 971-72. This affirmative link must be “a close relationship between the present party and his putative representative, or 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.” *Id.* at 972. The court of appeals recognized that “[t]o find virtual representation under only very narrow circumstances . . . would expose defendants to the burden of relitigation, raise the possibility of inconsistent results, and

compromise the public interest in judicial economy.” *Id.* at 971. The D.C. Circuit’s privity test is a flexible test that appropriately balances the competing concerns of due process with those of finality in litigation. The court of appeals’ decision should be affirmed.

III. LESS PROCESS IS DUE WHEN THE INTERESTS AT STAKE ARE IN THE NATURE OF PUBLIC, NOT PRIVATE, INTERESTS.

The nature of the interests at stake is a significant factor to be considered in determining what process is due. “[D]ue process,’ unlike some legal rules, is not a technical conception with a fixed content unrelated to time, place and circumstances. . . . [D]ue process is flexible and calls for such procedural protections as the particular situation demands.” *Mathews v. Eldridge*, 424 U.S. 319, 334 (1976) (quoting *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961), and *Morrissey v. Brewer*, 408 U.S. 471, 481 (1972)). It is well settled that the process due depends upon the nature of the claimed loss or interest at stake. *See, e.g., Wilkinson v. Austin*, 545 U.S. 209, 225 (2005); *Goldberg v. Kelly*, 397 U.S. 254, 262-63 (1970).

In *Richards*, this Court considered the nature of the interests at stake and distinguished two types of actions (“public” and “private”) brought by taxpayers, i.e., “one category . . . in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds . . . or about other public

action that has only an indirect impact on his interests” and “another category of taxpayer cases in which the [taxpayer is] . . . presenting a federal constitutional challenge to a State’s attempt to levy personal funds.” *Richards*, 517 U.S. at 803.

As to the latter category, where “personal funds” were involved, this Court held that the privity exception to the general due process rule did not apply. *Id.* In those actions not involving personal property rights, however, this Court assumed that the States “have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all.” *Id.*; see also 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4457, at 548 (2d ed. 2002) (noting virtual representation is more readily found in public law cases, because “[r]esolution of public issues has only an indirect impact on individual interests, and there is a potentially limitless supply of plaintiffs.”). Less process is, thus, due when the interests at stake are not constitutionally-protected rights or are in the nature of public interests.

Like class action plaintiffs in decades-long institutional reform cases, the *Pelt* plaintiffs have identical interests in the outcome of their trust action. This Court has, however, already determined that the class members have no individual or collective, constitutionally-protected property rights in the fund. *United States v. Jim*, 409 U.S. 80, 82-83 (1972). The class members share a close relationship in that they

are all beneficiaries of the same fund, each with the same undivided, equitable interest in the fund. Further, because no beneficiary has a constitutionally-protected property right in the fund, no individual remedy favoring one beneficiary over another can be obtained. The only remedy obtainable is one that benefits all members of the class, so their interests are perfectly aligned. As a result, all past, present, and future fund beneficiaries share the same incentive to litigate. This guarantees that their interests will be closely aligned and that virtual representation will satisfy due process concerns. *See Tyus*, 93 F.3d at 454.

The un rebutted facts in *Taylor* demonstrate a similar alignment of interests. The D.C. Circuit determined that they showed Herrick and Taylor are more than just two people with a fondness for old airplanes who happened to want release of the same documents and belong to the same association. *Taylor*, 490 F.3d at 972-73, 975. The court of appeals concluded Herrick was Taylor's virtual representative in the prior litigation because the two have identical interests, with the same incentive to litigate, and they are "close associate[s,]" in a "close relationship." *Id.* at 974-75.

When, as in *Taylor* and in Utah's royalty fund litigation, the litigants do not hold individual (or even collective) property rights, their interests are public interests. In such actions, "due process concerns are lessened" and "courts have 'wide latitude to establish procedures . . . to limit the number of

judicial proceedings. . . .” *Tyus*, 93 F.3d at 456 (quoting *Richards*, 517 U.S. at 794).

IV. A LEGAL RELATIONSHIP BETWEEN PRIOR AND LATER LITIGANTS IS NOT ALWAYS REQUIRED BY DUE PROCESS BEFORE PRECLUSION CAN APPLY.

The *Taylor* court concluded that a relationship need not be a “legal relationship” to qualify as a “close relationship” for res judicata privity purposes: “Whether two individuals have sufficiently close connections that one may act as the virtual representative of the other is a functional, not a formal question.” *Taylor*, 490 F.3d at 975. The court of appeals’ holding comports with this Court’s observation in *Richards* that “the term ‘privity’ is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.” *Richards*, 517 U.S. at 798. It is also consistent with the rule adopted by the Second Circuit: “Whether there is privity between a party against whom claim preclusion is asserted and a party to prior litigation is a functional inquiry in which the formalities of legal relationships provide clues but not solutions.” *Chase Manhattan Bank, N.A. v. Celotex Corp.*, 56 F.3d 343, 346 (2nd Cir. 1995).

Likewise, though the Eleventh Circuit considers the existence of a legal relationship as one factor in its virtual representation analysis, see *E.E.O.C. v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1287 (11th Cir.

2004), it does not consider a legal relationship an absolute requirement in all cases. *See, e.g., Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (discussing relevant factors in virtual representation analysis and finding privity in the absence of a legal relationship). More recently, in *Gustafson v. Johns*, 213 Fed. Appx. 872, 876 (11th Cir. 2007), the Eleventh Circuit noted that this Court, in *Richards*, had “distinguished between private causes of action and ‘other public action that has only an indirect impact on [a plaintiff’s] interests.’” *Id.* Relying upon this distinction between public law and private law cases, the Eleventh Circuit held that, in cases when public law interests are at stake, a plaintiff need not have legal accountability to a plaintiff in a subsequent lawsuit for virtual representation to apply. *Id.*

States are involved in an endless array of public interest lawsuits, such as taxpayer lawsuits, lawsuits by prison inmates challenging prison conditions, lawsuits by mental hospital patients challenging hospital conditions, and lawsuits challenging states’ child and family services programs. In these public interest lawsuits, prior litigants have no relationship of legal accountability to subsequent litigants. Some of these lawsuits are prosecuted as class actions, while others are not. In many instances, it is impossible to know who all potential class members are now or who class members may be in the future. For instance, in the context of an institutional reform lawsuit, it is impossible to know who will be a future inmate or mental hospital patient.

To require a legal relationship between prior and subsequent litigants and notice to absent class members would be to open the door to endless litigation. Where public interests are at stake, res judicata rules should not encourage “fence sitting” or allow the bringing of repeat, “separate lawsuits in the hope that one member of the group would eventually be successful, benefitting the entire group.” *Tyus*, 93 F.3d at 457. The failure to apply preclusion protection in this context, where “nonparties would benefit if the plaintiffs were successful but would not be penalized if the plaintiffs lost . . . entails a significant cost to the judicial system and ‘discourage[s] the principles and policies [sic] the doctrine of res judicata was designed to promote.’” *Id.* at 456-57 (quoting *Petit v. City of Chicago*, 766 F. Supp. 607, 613 (N.D.Ill.1991)).

V. NOTICE IS NOT AN ABSOLUTE DUE PROCESS REQUIREMENT.

As the *Taylor* court recognized, while “[n]otice is ordinarily a key element of due process . . . it is neither a sufficient nor a necessary condition of adequate representation.” 490 F.3d at 973 (internal citation omitted). If it were, the court of appeals observed, a nonparty “with identical interests, could relitigate a claim that was zealously but unsuccessfully tried to judgment . . . even if [had the nonparty] received notice of and intervened in the prior case, [he] would have proceeded in the same way.” *Id.* at 973-74.

Notice is not an absolute due process prerequisite in a class action certified under Rule 23(b)(2) in order for res judicata to apply. *Brown v. Ticor Title Ins. Co.*, 982 F.2d 386, 392 (9th Cir. 1992), *cert. dismissed*, 511 U.S. 117 (1994); *E.E.O.C. v. Gen. Tele. Co.*, 599 F.2d 322, 324 (9th Cir. 1979), *aff'd*, 446 U.S. 318 (1980); *Johnson v. Gen. Motors Corp.*, 598 F.2d 432, 433, 434 (5th Cir. 1979); *accord Norris v. Slothouber*, 718 F.2d 1116 (D.C. Cir. 1983) (*per curiam*). Class actions, like Utah's royalty fund litigation, that do not involve protected interests are certified under Rule 23(b)(2). "When an action is certified under Rule 23(b)(2), . . . absent class members are not required to receive notice or to have the opportunity to opt-out of the suit." *E.E.O.C.*, 599 F.2d at 334. In a Rule 23(b)(2) class action, "[d]ue process requires only that the class members be adequately represented." *Id.*; *see also Crawford v. Honig*, 37 F.3d 485, 487 (9th Cir. 1994); *Besinga v. United States*, 923 F.2d 133, 137 (9th Cir. 1991). As these cases show, notice is not an absolute due process requirement when no constitutionally-protected property rights are at stake.

In contrast, when constitutionally-protected individual property rights are at stake, the process required to bind absent class members includes adequate notice to absent class members, adequate representation, and an opportunity for the members

to opt out of the suit. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 808, 812-14 (1985).⁵

In Utah's decades of royalty fund litigation, only one prior lawsuit was not certified as a class action, *Bigman v. Utah Navajo Dev. Council, Inc.*, though it was prosecuted as one.⁶ See note 2, *supra*. But in all these cases, there was no possible personal recovery or individual benefit obtainable by the named San Juan County Navajo plaintiffs. Instead, all were necessarily aimed at benefitting the San Juan County Navajo class as a whole. And just as in most institutional reform class actions litigated under Rule 23(b)(2), notice to future class members – who are unknown and unknowable – is not only unnecessary to satisfy due process, it is impossible.



⁵ The procedural protections required to bind class members have been required by this Court only when the class members' claims were "wholly or predominately for money judgments." *Ortiz*, 527 U.S. at 848 (quoting *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811, n.3 (1985)). This Court has not extended the same procedural protections to cases where no individual, protected property rights are at stake.

⁶ In *Jackson v. Hayakawa*, 605 F.2d 1121 (9th Cir. 1979), *cert. denied*, 445 U.S. 952 (1980), the Ninth Circuit reviewed the res judicata effect of a case that was "treated by the trial court as a class action" but was never certified. The Court stated that to not consider the case as a class action "would elevate form over substance." *Id.* at 1126, n.7. *But see Headwaters, Inc. v. U.S. Forest Serv.*, 399 F.3d 1047, 1056, n.8 (9th Cir. 2005) (noting "it is not clear that *Jackson* is still good law after *Richards*").

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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