NO.

IN THE
Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

MARION C. BLAKEY, ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, AND FAIRCHILD CORPORATION,

Respondents.

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

PETITION FOR A WRIT OF CERTIORARI

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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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INTRODUCTION

The United States has a "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (citations omitted). It is a fundamental due process principle that people's claims should not be resolved by cases to which they were not parties. Despite this principle, the D.C. Circuit below held that plaintiffs can be precluded from bringing claims based on cases to which they were not parties, even where they had no legal relationship with any party to the prior litigation and had not even received notice of that litigation while it was ongoing.

The D.C. Circuit based its decision on the theory that a party can be precluded from bringing a claim if that party was "virtually represented" by a party to a prior case. Although many courts have used the term "virtual representation," the virtual representation doctrine is controversial, and courts of appeals are deeply divided over how they define the term. As the court below noted, "circuits vary widely in their approach" to virtual representation, Pet. App. 7a, with some placing greater emphasis on the due process rights of the litigants and others on the courts' interests in finality and efficiency.

In adopting a theory of virtual representation and finding it satisfied in this case, the D.C. Circuit placed itself squarely in conflict with six other circuits. First, it is in conflict with four circuits in which virtual representation may apply only where the parties to the first and second lawsuits have an express or implied legal relationship such that the party to the first suit was legally accountable to the party to the second suit for the manner in which the litigation was conducted. Second, it is in conflict with at least two circuits in which virtual representation may apply only where the party to the second lawsuit received notice and an opportunity to participate in the first lawsuit. In light of the division among the circuits and the importance of the due process rights at stake, the petition should be granted.

OPINIONS BELOW

The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 490 F.3d 965 (D.C. Cir. 2007), and is reproduced in the appendix at 1a. The district court's May 12, 2005, Memorandum Opinion granting Respondents' motions for summary judgment is unreported and is reproduced in the appendix at 22a.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2007. Pet. App. 1a. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

Petitioner Brent Taylor brought this action on February 3, 2003, to obtain records he had requested from the Federal Aviation Administration (FAA) under the Freedom of Information Act (FOIA), 5 U.S.C. § 552. The records relate to a 1935 vintage airplane. Greg Herrick, a member of the Antique Airplane Association of which Taylor is executive director, had previously made a separate FOIA request for records related to the airplane and, after his request was denied, had litigated the case up to the Tenth Circuit, where he lost. *See Herrick v. Garvey*, 298 F.3d 1184 (10th Cir. 2002).

In the present action, the FAA and defendant-intervenor Fairchild Corporation moved for summary judgment, arguing, among other things, that although Taylor was not a party to Herrick's earlier lawsuit, his claims were barred by res judicata.

Fairchild accompanied its motion with a statement of material facts that referred to Herrick as a "close associate of Taylor's." Pet. App. 3a. Neither defendant presented any evidence that Taylor had participated in Herrick's lawsuit or even knew about the case while it was ongoing. Nonetheless, the district court held that Taylor's litigation was barred by res judicata. *Id*. at 22a-23a.

The court of appeals affirmed. The court recognized that litigants are not usually bound by prior suits to which they were not parties, but held that "a nonparty's claim [can be] precluded by a prior suit based upon a particular form of privity known as 'virtual representation.'" *Id*. at 6a. Under that theory, "the party to the prior litigation is treated as the proxy of the nonparty," on the ground that the party adequately represented the nonparty, "with the result that the nonparty is barred from raising the same claim." *Id*.

Noting that "other courts vary widely in their approach" to virtual representation, *id*. at 7a, the court of appeals adopted a five-factor test for determining whether a party is the virtual representative of a party in a later suit. It held that it was necessary (1) for the parties to have the same interests and (2) for the party to the first suit to have adequately represented the party to the second suit. In addition, it held that one of three other factors must be present: (3) a close relationship between the parties, (4) substantial participation in the first litigation by the party to the second litigation, or (5) tactical maneuvering on the part of the party to the second litigation to avoid the preclusive effect of the first litigation. *Id*. at 8a.

With regard to whether Herrick had adequately represented Taylor, the court noted that notice was "ordinarily a key element of due process," *id*. at 12a, but concluded that it was not a necessary condition of virtual representation, expressly acknowledging that it was parting company with the First and Seventh Circuits. *Id*. at 12a-13a. The court found adequate

representation based on Herrick's and Taylor's similar incentives to litigate and Taylor's use of the same attorney as Herrick. The court also held that Herrick and Taylor had an identity of interests because Herrick had substantially the same incentive as Taylor to receive the records. *Id*. at 9a-14a.

Turning to the close-relationship factor, the court held that a legal relationship between the parties was not necessary for a finding that the party to the first suit had been a virtual representative of the party to the second suit. *Id*. at 15a. The court acknowledged that, on this score, it was disagreeing with the Fourth, Fifth, and Sixth Circuits. *Id*. Noting that Herrick had asked Taylor for help restoring his airplane, that Herrick had given Taylor some information he obtained through discovery in his earlier case, and that Taylor did not oppose the characterization of Herrick as his "close associate," the court held that Taylor and Herrick had a close relationship for the purpose of determining whether Herrick had virtually represented Taylor. *Id*. at 15a-16a.

The court did not find that Taylor and Herrick had entered into any agreement or had any discussions about how the first case would be conducted, that they had undertaken any concerted action, or that they had engaged in any communications about the public availability of the requested records before the first case was concluded. Indeed, the court made no finding that Taylor knew about the first case at all before it was over. Nonetheless, having found an identity of interests, adequate representation, and a close relationship between the parties, the court held that the requirements for virtual representation were met and that, even though Taylor was not a party to Herrick's lawsuit, he was precluded from litigating his own FOIA claim. *Id*. at 17a.

REASONS FOR GRANTING THE WRIT

A. The Federal Circuit Courts Are Split Over Virtual Representation.

This case raises the question of whether and when a party's claims can be barred based on a theory of "virtual representation." The virtual representation doctrine is "controversial," *Hoblock v. Albany County Bd. of Elections*, 422 F.3d 77, 90 (2d Cir. 2005), "reflect[ing] a tension between competing interests" in fundamental due process rights and judicial efficiency. *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 431 (6th Cir.1999) (en banc) (Moore, J., concurring). "Impatience with repetitive litigation of common issues . . . has enticed some courts to rely on virtual representation in circumstances that go beyond anything that is easily justified," 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice and Procedure* § 4456, at 512 (2d ed. 2002), while others express "doubt whether virtual-representation theory adds anything of value to other theories of 'privity.'" *Id*. (citing *Tice v. Am. Airlines, Inc*., 162 F.3d 966, 970-74 (7th Cir. 1998)).

The term "virtual representation" "illustrates the harm that can be done when a catchy phrase is coined [and] . . . starts being applied to situations far removed from its intended and proper context." *Tice*, 162 F.3d at 970; *see also* 18A Wright, Miller & Cooper, at 512-13 ("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."). The courts of appeals vary in their application of virtual representation, and the differences in their tests can determine whether litigants will be provided their own day in court.

The decision below highlights and deepens two conflicts between the federal courts of appeals: a conflict over the type of

relationship necessary to sustain virtual representation, and a conflict over whether notice is necessary for virtual representation to apply. Indeed, had this case arisen in any of at least six other circuits—the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits—the result would have been different, and Taylor would have been able to litigate his claim on the merits.

1. There Is a Division Among the Federal Courts of Appeals Over Whether, for "Virtual Representation" to Apply, There Must Be a Legal Relationship Between the Parties.

The court of appeals acknowledged that its decision directly conflicts with decisions of the Fourth, Fifth, and Sixth Circuits, which hold that "only a legal relationship may qualify as a 'close relationship'" for virtual representation purposes. Pet. App. 16a (citing *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 651-52 (4th Cir. 2005); *Becherer*, 193 F.3d at 424; and *Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978)). Whereas the court below held that a legal relationship was not necessary for virtual representation, the Fourth, Fifth, and Sixth Circuits, as well as the Eleventh Circuit, require the party to the first case to be legally accountable to the party to the second for the conduct of the litigation. In contrast, like the D.C. Circuit, the Eighth and Ninth Circuits use multi-factor tests for virtual representation that do not require the parties to the first and second suits to have a legal relationship.

In 1975, the Fifth Circuit held that a person could be bound by a prior suit in which he was not a party "if one of the parties to the suit is so closely aligned with his interests as to be his virtual representative." *Aerojet-Gen. Corp. v. Askew*, 511 F.2d 710, 719 (5th Cir. 1975). The circuit quickly made clear, however, that not all relationships can support a finding of virtual representation. In *Pollard v. Cockrell*, it held that "[v]irtual representation demands the existence of an express or implied legal relationship in which parties to the first suit are

accountable to non-parties who file a subsequent suit raising identical issues." 578 F.2d at 1008. As examples of the types of relationships contemplated, the court listed "'estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee.'" *Id*. at 1008-09 (*quoting Southwest Airlines Co. v. Tex. Int'l Airlines*, 546 F.2d 84, 97 (5th Cir. 1977)); *see also, e.g., Meza v. Gen. Battery Corp.*, 908 F.2d 1262, 1272 (5th Cir. 1990) (requiring express or implied legal relationship); *Benson and Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) (same).

The Sixth Circuit subsequently adopted the same standard, requiring a legal relationship between the parties in which the party to the first suit is accountable to the party to the second. *Becherer*, 193 F.3d at 424 (quoting *Benson and Ford*, 833 F.3d at 1175). Similarly, the Fourth Circuit holds that, for virtual representation to apply, the party to the first suit must be accountable to the party to the second. *Martin*, 407 F.3d at 652; *Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987).

In addition, although not cited in the decision below, the Eleventh Circuit, bound by pre-1981 Fifth Circuit cases such as *Pollard*, also recognizes that a legal relationship is necessary for virtual representation, *see Dills v. City of Marietta*, 674 F.2d 1377 (11th Cir. 1982), although it has also employed a four-factor test in which the relationship between the parties is one factor. *See Jaffree v. Wallace*, 837 F.2d 1461, 1467 (11th.Cir. 1988). In *EEOC v. Pemco Aeroplex, Inc.,* 383 F.3d 1280, 1287 (11th Cir. 2004), its most recent published decision on virtual representation, the Eleventh Circuit first concluded that there was no virtual representation under the four-factor test, and then applied the *Dills* standard, noting that "if the party to the prior litigation was not legally accountable to the party in the latter,

then virtual representation cannot be present, regardless of any other factor." 383 F.3d at 1289.[1]

In contrast, the Eighth and Ninth Circuits, like the D.C. Circuit below, do not consider a legal relationship between the parties necessary for virtual representation. In *Tyus v. Schoemehl*, 93 F.3d 449 (8th Cir. 1996), the Eighth Circuit noted that the Fourth and Fifth Circuits require an express or implied legal relationship, but stated that it "agree[d] with those courts that give wider use to virtual representation." 93 F.3d at 454-55. The court explained that virtual representation requires "the existence of some special relationship between the parties justifying preclusion," *id.*, but listed a close relationship between the parties as just one of seven factors to be considered in determining whether that special relationship exists. Moreover,

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[1]Although it does not use the same test as the Fourth, Fifth, Sixth, and Eleventh Circuits, the Seventh Circuit also considers the relationship between the parties dispositive, finding preclusion only if the parties are in privity under a "normal privity analysis." *Tice*, 162 F.3d at 973. In *Tice*, the Seventh Circuit explained that a weakness of virtual representation is that it effectively creates a common-law class action that avoids compliance with Rule 23, and noted that "[t]here would be little point in having Rule 23 if courts could ignore its careful structure and create *de facto* class actions at will." *Id*. at 972-73. Thus, it held that outside the context of a properly certified class action, the parties either must have a formal successor relationship or the party to the second suit must have had notice of the first suit and either participated in or had a legal duty to participate in that suit. *Id.* at 973; *cf. Monfils v. Taylor*, 165 F.3d 511, 521 (7th Cir. 1998) (finding virtual representation where parties had a statutory indemnitor/ indemnitee relationship, and where the bound party had notice of and participated in the first trial).

the Eighth Circuit does not seem to require the close relationship to be one of legal accountability. *Tyus* found that the similarity of claims in the two suits, the fact that there was overlap between some (but not all) of the plaintiffs, and the fact that the attorney in the second case was substituted as counsel in the first case, "suggest[ed], at least partly, that a close relationship exist[ed]" between the parties to the two suits, *id*. at 457, even though none of those factors made the parties to the first litigation accountable to the parties to the second.

Similarly, in *Irwin v. Mascott*, the Ninth Circuit held that although a close relationship between the parties supported a finding of virtual representation, such a relationship was not necessary for virtual representation to apply. 370 F.3d 924, 930 (9th Cir. 2004); *see also Headwaters v. U.S. Forest Serv.*, 399 F.3d 1047 (9th Cir. 2005) (withdrawing and superseding prior decision and remanding for consideration of the *Irwin* factors). And in *Gonzales v. Banco Central Corp*., 27 F.3d 751, 762 (1st Cir. 1994), the First Circuit conducted a balancing test for virtual representation that considered whether the parties had a legal relationship, but did not state that whether the parties had such a relationship was dispositive.

None of the facts upon which the D.C. Circuit based its decision demonstrates that Herrick and Taylor had a relationship that made Herrick accountable to Taylor during the course of his litigation for the results of that litigation. Indeed, the facts discussed by the court all relate to Taylor's and Herrick's relationship *after* Herrick's litigation was completed, not to whether they had any relationship while Herrick's lawsuit was ongoing. Because Herrick and Taylor lacked an express or implied legal relationship under which Herrick was accountable to Taylor during the course of his litigation, at least the Fourth, Fifth, Sixth, and Eleventh Circuits would have reached a different conclusion about whether Herrick had virtually

represented Taylor. In those circuits, Taylor would have been permitted to litigate his claims on the merits.

The implications of the division in the circuits over virtual representation go far beyond the FOIA context in which this case arose, deciding, in myriad contexts, whether people who seek to have their rights enforced in court can be barred from obtaining access to the courts and litigating their cases on the merits. As the law currently stands, plaintiffs in some circuits are permitted to litigate the merits of their claims, while plaintiffs in other circuits, who may have the exact same interests and relationship to the parties to a prior case, will have the courtroom door shut before them. The Court should grant review to resolve the conflict among the circuits.

2. There is a Division Among the Federal Courts of Appeals over Whether, for "Virtual Representation" to Apply, the Party to the Second Litigation Must Have Received Notice of and the Opportunity to Participate in the First Litigation.

The court of appeals also acknowledged that its decision conflicts with decisions of the First and Seventh Circuits, "which have treated notice as necessary for a finding of virtual representation." Pet. App. 13a (citing *Perez v. Volvo Car Corp.*, 247 F.3d 303, 312 (1st Cir.2001); *Tice,* 162 F.3d at 973). The court below concluded that Herrick had virtually represented Taylor even though the record did not demonstrate that Taylor had notice of or the opportunity to participate in Herrick's litigation while it was ongoing.

In *Perez*, the First Circuit held that the "the doctrine of virtual representation cannot be used to bar the claim of a person who was not a party to the earlier suit unless that person, at the least, had actual or constructive notice of the earlier suit and, thus, a chance to join it." *Perez*, 247 F.3d at 312. According to the court, notice and an opportunity to join are "a bare

minimum" for virtual representation. *Id*.; *see also Gonzales*, 27 F.3d at 761 ("[V]irtual representation will not serve to bar a nonparty's claim unless the nonparty has had actual or constructive notice of the earlier litigation.").

Under the First Circuit's articulation of the notice requirement, the legal relationship required for virtual representation in the Fourth, Fifth, Sixth, and Eleventh Circuits would satisfy the requirement by providing constructive notice. In *Gonzales*, the First Circuit stated that implicit in an express or implied legal relationship in which the party to the first suit is legally accountable to the party to the second is the existence of constructive notice. 27 F.3d at 761; *see also id*. at 761 n.11 ("[T]he formation of the underlying relationship, in and of itself, embodies what amounts to constructive notice of all ensuing litigation."). Thus, like the First Circuit, the Fourth, Fifth, Sixth, and Eleventh Circuits ensure that the litigant to the second case is at least constructively informed of the first case.

The Seventh Circuit also requires evidence of notice (and more) before a judgment can bind a nonparty. In *Tice*, the court held that unless a properly certified class action or formal successor relationship is involved, "there should be some indication not only that the second party was aware that the first litigation was going on and that the earlier litigation would resolve its claims . . . but also that the second party either had participated or had a legal duty to participate." 162 F.3d at 973.

On the other hand, as noted by the D.C. Circuit, Pet. App. 13a-14a, its decision that notice is not necessary for virtual representation is consistent with the Eighth Circuit's decision in *Niere v. St. Louis County*, 305 F.3d 834 (8th Cir. 2002). There, applying Missouri law, the court held that the plaintiffs had been virtually represented by the plaintiffs in a prior lawsuit, although they had not known about that lawsuit and lacked even constructive notice.

Neither the First, the Seventh, nor any other circuit considers notice and an opportunity to join the first litigation sufficient for preclusion to apply. *Cf. Richards*, 517 U.S. at 800 n.5. The First Circuit requires, in addition, a balancing of the equities. *Gonzales,* 27 F.3d at 761. The Seventh requires the party to the second suit to have participated in or had a legal duty to participate in the first suit. *Tice*, 162 F.3d at 973. Yet, contrary to the D.C. Circuit below, both circuits recognize that notice and the opportunity to participate are bare necessities for someone to be bound by a judgment. Because Taylor did not have notice of Herrick's lawsuit while it was ongoing, his case would have been decided differently in a circuit in which notice of the prior litigation is necessary for res judicata to apply.

B. The Decision Below Is at Odds with This Court's Precedents.

Certiorari is also warranted because the decision below is wrong on the merits, deprives Taylor of due process, and will cause future plaintiffs, in a variety of cases, to lose their constitutional right to a day in court.

1. In *Richards v. Jefferson County*, 517 U.S. at 801, this Court held that, absent a sufficient relationship between the parties to the first and second litigation, parties who neither participated in, nor had the opportunity to participate in, earlier litigation cannot be bound by that litigation. In *Richards*, the Court considered whether a challenge to a county tax was barred by a previous case in which other taxpayers had challenged the same tax. Noting that the parties to the first suit "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties," *id.*, the Court found "no reason to suppose that [the court deciding the first case] took care to protect the interests" of the parties to the second case or that the plaintiffs in the first case "understood their suit to be on behalf of absent

county taxpayers." Because the parties to the two suits were "mere 'strangers'" to each other, *id*. (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)), the Court held that due process prevented the party to the second suit from being bound by the prior litigation. *Id*.; *see also S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999) (holding that plaintiffs in the second case were "strangers" to plaintiffs in the first case and therefore that, "for the reasons [] explained in *Richards*, they cannot be bound by the earlier judgment").

The court of appeals stated that it did not read *Richards* to require that special procedures be followed in the first suit or that the party to the first suit have understood it was representing the nonparty, Pet. App. 7a, and found Herrick's and Taylor's relationship sufficient to support virtual representation. *Id*. at 16a-17a. However, like in *Richards* and *South Central Bell*, Herrick and Taylor are strangers in a legal sense, albeit not in a colloquial one. Herrick is not legally accountable to Taylor for the results of the first litigation, and their relationship would not have led Taylor to expect to be precluded by Herrick's lawsuit. *See South Central Bell*, 526 U.S. at 168. And the record contains no evidence about Taylor's and Herrick's relationship during the course of Herrick's litigation, when, according to the court below, Herrick had been virtually representing Taylor. Because Herrick and Taylor do not share a "special *representational* relationship," *id*. (emphasis added), due process prevents Taylor from being bound by Herrick's litigation.

2. The decision below also deprives Taylor of due process by holding him bound by a judgment when he had no notice of the litigation. This Court has recognized that the "right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Accordingly, an "elementary and fundamental requirement of due process in any

proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections." *Id*. Nonetheless, the court of appeals held that notice was unnecessary for virtual representation and barred Taylor from litigating his claim even though he had not received notice of the prior litigation and did not have a relationship with Herrick such that Herrick's knowledge of the lawsuit constituted constructive notice of Taylor.

CONCLUSION

The petition for a writ of certiorari should be granted.

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