No. 07-371

IN THE
Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

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

Respondents.

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

PETITIONER'S REPLY

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The question presented here is whether petitioner Brent Taylor may be precluded from litigating his case on the ground that the judgment in an earlier case—litigation of which Taylor had no notice, brought by a plaintiff with whom Taylor had no legal relationship—provided Taylor all the process he was due. In holding Taylor precluded, the D.C. Circuit acknowledged that it was disagreeing with the Fourth, Fifth, and Sixth Circuits as to whether a legal relationship between the party to the first case and the party to the second case is necessary for virtual representation—*see* Pet App. 15a ("Unlike the courts just cited, we do not believe that only a legal relationship may qualify as a 'close relationship.'")—and with the First and Seventh Circuits as to whether notice is necessary for virtual representation—*see* Pet. App. 12a-13a ("[U]nlike the First and Seventh Circuits, which have treated notice as necessary for a finding of virtual representation . . . we see no reason to treat notice as anything more or less than an important consideration."). Neither respondent succeeds in its attempts to downplay these circuit splits or to reconcile the decision below with this Court's precedents.

1. The Fairchild Corporation claims that there is no "relevant" circuit split because courts "examine the facts" in determining whether there is privity, and none of the cases cited in the petition have exactly the same facts as this case. Fairchild Opp. 6. Contrary to Fairchild's depiction of circuit-court case law on virtual representation, however, courts do not just set forth the facts of the case and then perform a gut-check to decide whether the parties are in privity: They follow legal rules. And the legal rule set forth by the D.C. Circuit in the decision below conflicts with the legal rules set forth

in decisions of the First, Fourth, Fifth, Sixth, Seventh, and Eleventh Circuits.

Fairchild does not even attempt to dispute that, in contrast to the decision below, the Fifth Circuit requires "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." *Meza v Gen. Battery Corp.*, 908 F.2d 1262, 1272 (5th Cir. 1990); *see also, e.g., Hardy v. Johns-Manville Sales Co.*, 681 F.2d 334, 340 (5th Cir. 1982); *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (5th Cir. 1978). Indeed, although the petition cited multiple Fifth Circuit cases that conflict with the decision below, Pet. 6-7, Fairchild's brief in opposition fails to mention that circuit at all.

Fairchild does argue that the outcome of this case would have been the same in the Fourth and Sixth Circuits, Fairchild Opp. 7-8, but its assertion that those circuits do not require a legal relationship between the parties to the first and second litigation is wrong. In *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Co.*, 193 F.3d 415, 424 (6th Cir. 1999), the Sixth Circuit, sitting en banc, held that virtual representation requires "'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.'" (emphasis in original) (quoting *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987)). Similarly, the Fourth Circuit holds that "there can be no virtual representation where one of the parties to the first suit was not accountable to the nonparties who filed a subsequent suit." *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 652 (4th Cir. 2005). These statements are not just reflections of the circuits' "hesitan[cy] to embrace the term 'virtual representation' in cases where there is no clear relationship between the

litigants in successive suits," Fairchild Opp. 7; they are statements of law about when virtual representation applies—law that directly conflicts with the decision below. That Fairchild found one case in each of the two circuits in which a panel, without using the term "virtual representation" or discussing the circuits' case law on the doctrine, found plaintiffs in privity with their co-plaintiff relatives does not undermine the circuits' legal requirements for virtual representation.[1]

Fairchild's attempts to reconcile the circuit split over whether notice of the first case is required for a party to the second case to be bound fare no better. It tries to distinguish *Gonzalez v. Banco Central Corp.*, 27 F.3d 751, 761 (1st Cir. 1994), in which the First Circuit held that "virtual representation will not serve to bar a

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[1]As demonstrated by the dissent in the Fourth Circuit case cited by Fairchild, *Eddy v. Waffle House, Inc.*, 482 F.3d 674 (4th Cir. 2007), if that case is viewed as a virtual representation case, it conflicts both with decisions of other circuits and with the Fourth Circuit's own case law. *Id.* at 684 (Michael, J., dissenting). The petition for certiorari in *Eddy* will be circulated to the Court on the same day as the petition in this case. *See* Pet. for Cert., No. 07-495. That the Court has before it, at the same time, two cases from different circuits with different underlying claims presenting similar questions on virtual representation demonstrates the importance of granting certiorari to clarify the scope of the virtual representation doctrine. This case is a better vehicle than *Eddy* for doing so because *Eddy* does not present the question whether virtual representation can apply where the party to the second case received no notice of the first case. In *Eddy*, the precluded plaintiffs had notice of, and in fact testified in, the first suit.

nonparty's claim unless the nonparty has had actual or constructive notice of the earlier litigation," on the basis that *Gonzalez* noted that the parties did not share a special type of close relationship. Fairchild Opp. 9. But that fact is irrelevant to the split. Although the First Circuit found that actual or constructive notice is implicit in an express or implied legal relationship where the party to the first litigation is accountable to the party to the second, *Gonzalez*, 27 F.3d at 761, Herrick and Taylor, like the parties at issue in *Gonzalez*, did not (and do not) have such a relationship. And although the First Circuit found that the existence of actual or constructive notice was implicit in a finding of tactical maneuvering, *id.*, that does not mean, as Fairchild claims, that it held that tactical maneuvering "could provide 'constructive notice.'" Fairchild Opp. 9 n.2. Rather, because a person cannot tactically maneuver to avoid litigation of which he is unaware, that person cannot be found to have tactically maneuvered to avoid litigation unless he has *already* been found to have received notice of the litigation. Thus, a finding of tactical maneuvering *implies* that the court already found that notice was provided; it does not itself *provide* constructive notice.

Similarly, that the previous cases discussed in *Perez v. Volvo Car Corp.*, 247 F.3d 303 (1st Cir. 2001), and *Tice v. American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), were class or group actions does not reconcile their outcomes with the decision below or otherwise undermine their holdings that virtual representation cannot apply unless the party to the second litigation received notice of the first litigation. *See Perez*, 247 F.3d at 312; *Tice*, 162 F.3d at 973. *Perez* and *Tice* were not about the procedural safeguards afforded class members in the class action context; they were about whether people who were *not* members of the class were nonetheless bound by its results. In other words, like

this case, those cases considered when plaintiffs can be precluded from litigating their cases based on prior litigation to which they were not parties, and they concluded that virtual representation requires, at a minimum, that the party to the second case have received notice of the first case.

In short, although Fairchild's statement that whether notice is necessary for virtual representation "depends on the factual circumstances of each case," Fairchild Opp. 9, is currently true in the D.C. Circuit, it is *not* true in either the First or Seventh Circuit. Fairchild's emphasis on the facts of particular cases cannot hide that there is a strong *legal* disagreement between the circuits.

2. Unlike Fairchild, the government does not dispute that the circuits are split over virtual representation. Rather, it claims that this case is not a good vehicle for resolving the splits because it is an example of so-called "public-law" litigation, whereas the cases cited in the petition involved "private-law" claims. Gov't Opp. 13. Contrary to the government's assertion, however, a distinction between "public" and "private" law does not reconcile the conflicting cases. *See NAACP v. Fordice*, 105 F.3d 655, 1996 WL 767432, at *3 (5th Cir. Dec. 23, 1996) (unpublished) (applying the Fifth Circuit's standard test for virtual representation, which requires "an express or implied legal relationship," in a voting-rights case). And although both the government and Fairchild argued to the D.C. Circuit that the supposed public-law nature of this case favored a finding of virtual representation, the D.C. Circuit did not rely on a purported distinction between "public" and "private" law in justifying its ruling, and the legal rule it set forth presumably would apply in both "public" and "private" law cases.

Moreover, the government acknowledges that the Ninth Circuit squarely rejected the "public-law" theory in *Headwaters, Inc. v. United States Forest Service*, 399 F.3d 1047, 1054 (9th Cir. 2005). *See* Gov't Opp. 10 n.2. Thus, the government's purported reconciliation of the disparate circuit precedents itself depends on a legal proposition on which the circuits are split. That the government's attempt to explain away the conflict requires it to dismiss the Ninth Circuit's leading precedent on virtual representation as wrong itself demonstrates why review by this Court is necessary to resolve the disarray among the lower courts.

In any event, the government's whole public/private-law distinction rests on a misreading of *Richards v. Jefferson County*, 517 U.S. 793 (1996). In *Richards*, a challenge to a county tax, the Court rejected the defendants' argument that "in cases raising a public issue of this kind, the people may properly be regarded as the real party in interest and thus that petitioners received all the process they were due." *Id.* at 803. Although the defendants had asserted that "the character of their action render[ed] the usual constitutional protections inapplicable," *id.* at 802-03, the Court found that the case was one "in which the State may not deprive individual litigants of their own day in court." *Id.* at 803.

As the government notes, *Richards* did recognize a category of taxpayer cases in which states could limit the number of judicial proceedings. *Id.* Such cases—those in which the taxpayer is complaining about general misuse of public funds or some other action that only indirectly affects him—are too abstract to be protected by due process requirements. State courts can deny standing altogether to taxpayers bringing such cases, which, because of Article III requirements, are not even entertained in federal courts. *See generally*

DaimlerChrysler Corp. v. Cuno, 126 S. Ct. 1854 (2006). However, like *Richards* itself, this case is not in that category. Although the purpose of the Freedom of Information Act (FOIA) is to provide the public with information, under FOIA, each person denied records has suffered a personal injury and, after exhausting the administrative process, has standing to sue. *See* 5 U.S.C. § 552(a)(4)(B); *see also FEC v. Akins*, 524 U.S. 11, 21 (1998) (describing inability to obtain information as a "concrete and particular" "injury in fact").

3. Respondents' other attempts to reconcile the opinion below with this Court's precedents are similarly unavailing.

a. Both respondents claim that the decision below is consistent with *Richards* because the litigants in *Richards* were "mere 'strangers.'" *Richards*, 517 U.S. at 802. However, although Herrick and Taylor are acquainted with each other, they have no legal relationship with each other. As in *Richards*, there is no reason to suppose that the *Herrick* court "took care to protect the interests of petitioner[] in the manner suggested in *Hansberry* [*v. Lee*, 311 U.S. 32 (1940)]. Nor is there any reason to suppose that [Herrick] understood" his suit to be on behalf of Taylor. *Id.* at 802.[2] Herrick and Taylor lack the "special representational relationship" necessary for a finding of privity under this Court's case law. *S. Cent. Bell Tel. Co. v. Alabama*, 526 U.S. 160, 168 (1999). And if the Court had left open the question of what sort of relationship would allow a litigant to be bound by prior litigation to which

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[2]Fairchild incorrectly claims that the D.C. Circuit found that Herrick and Taylor "collaborated with each other in bringing successive lawsuits." Fairchild Opp. 11. The D.C. Circuit made no such finding.

he was not a party, the need to answer that question would, alone, justify granting review.

b. Respondents also claim that the decision below can be reconciled with the notice requirement in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950), because, in their view, *Richards* left open the possibility that notice was not necessary in virtual representation cases. Fairchild Opp. 11; Gov't Opp. 11. What *Richards* said, however, was that "even assuming our opinion in *Hansberry* may be read to leave open the possibility that in some class suits adequate representation may cure a lack of notice, but cf.. . . *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S., at 39 . . . it may not be read to permit the application of res judicata here," where the taxpayers in 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." *Richards*, 517 U.S. at 801. Here, as in *Richards*, the first litigation was not a class action and did not purport to be one.

Further, by its use of "but cf.," the Court in *Richards* demonstrated its recognition that reading *Hansberry* to leave open the possibility that adequate representation could cure a lack of notice in some class suits potentially conflicts with *Mullane*. Neither respondent addresses that conflict.

Finally, if *Richards* did leave open the question whether notice is necessary in virtual representation cases, then this Court should grant the petition to answer the question *Richards* did not answer, and that has divided the lower courts: Can a party can be precluded from bringing a claim under a theory of virtual

representation when the party received no notice of the prior litigation?

In sum, the courts of appeals are split, those splits are case-dispositive, and the case presents important due process questions about when a litigant can be denied the right to a day in court. This Court should grant review.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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