No. 05-___

IN THE

Supreme Court of the United States

Rebecca Bahar et al.,

Petitioners,

v.

Michigan Bell Telephone Company,
d/b/a SBC Michigan.

On Petition for a Writ of Certiorari
to the Michigan Court of Appeals

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Petitioners are customers of respondent telephone company who brought this suit seeking a refund from respondent of phone charges it had imposed illegally. The lower courts held that petitioners' suit was barred as a matter of federal law based on a consent decree in a prior federal suit between respondent and various state officials. Petitioners were not parties to that suit, and it did not purport to resolve claims by individual customers. The state officials moreover resolved the prior suit by settling an array of unrelated disputes with respondent.

The Questions Presented are:

1. Whether, as a matter of federal *res judicata* and due process principles, an individual's suit seeking to vindicate a private interest may ever be extinguished on the ground that the government previously litigated the same claim.

2. Assuming the answer to Question 1 is "yes," whether such a claim may be extinguished when the government in the prior suit pursued its own interests, which were not consistent with those of the individual plaintiffs in the later case.

PARTIES TO THE PROCEEDINGS BELOW

All parties to the proceedings below are parties in this Court. Petitioners (plaintiffs-appellants below) are Rebecca Bahar, Todd Cook, James Ramey, Steve Spiegel, Sherry Kaye, and Dorothy Owen, each on his or her own behalf and on behalf of a plaintiff class, and Dimitrious Economides, Associates, P.C., Summit Hospitality, Inc., and Rycus Floorcovering, Inc., each on its own behalf and on behalf of a plaintiff class.

Respondent Michigan Bell Telephone Company d/b/a SBC Michigan was identified in the pleadings below as Ameritech Michigan. Respondent advised the Michigan Supreme Court that the designation in the caption is correct and petitioners accordingly substitute it here.

RULE 29.6 STATEMENT

The business petitioners have no parent companies or publicly issued stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

CONSTITUTIONAL PROVISIONS

STATUTES

OTHER AUTHORITIES

PETITION FOR A WRIT OF CERTIORARI

Petitioners Rebecca Bahar et al. respectfully petition for a writ of certiorari to review the judgment of the Michigan Court of Appeals in this case.

OPINIONS BELOW

The opinions below are unpublished. The Appendix reproduces the trial court's opinion denying respondent's motion to dismiss on the ground of *res judicata* (23a), the court of appeals' opinion reversing (1a), and the state supreme court's order denying review (113a). The Appendix also reproduces the trial court's opinion ruling for respondent on the merits (10a), the court of appeals' order dismissing petitioners' appeal as moot (111a), and the state supreme court's order denying review (112a).

JURISDICTION

This Court has jurisdiction under 28 U.S.C. 1257, as the judgment is final. The state supreme court issued its order denying review on September 28, 2005. Justice Stevens subsequently extended the time to file a petition for certiorari until February 24, 2006. App. No. 05A546.

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law." The relevant provisions of the Michigan statute underlying petitioners' suit are reproduced in the Appendix at 114a-15a.

STATEMENT OF THE CASE

Petitioners are customers who sued respondent telephone company for a refund of illegal telephone charges. The Michigan Court of Appeals held that petitioners' suit was precluded by the *res judicata* effect of a prior settlement between respondent and certain state officials in federal court.

In that prior lawsuit, respondent challenged the constitutionality of the state statute that prohibited the charges challenged in this case. The state officials and respondent resolved this, and a number of other pending disputes, in a global settlement agreement in which the state officials did not concede that the statute was unconstitutional, but agreed to enforce it only in part (over the objection of the State Attorney General, who attempted to intervene to defend the constitutionality of the statute, but was not permitted to do so). Petitioners were not a party to that suit or to the settlement, and the settlement did not purport to dispose of petitioners' claims. The state court of appeals nonetheless held as a matter of federal law that the prior settlement barred this suit on the theory that the state officials had implicitly acted as not only the representatives of the government but also all of the state's citizenry, and had effectively waived petitioners' claims to a refund of the illegal charges by not providing specifically for the refund in the terms of the settlement agreement. It made no difference to the court of appeals' analysis that the state officials never purported to represent the ratepayers', rather than simply the government's, interests. Indeed, it made no difference that the government officials obviously had different interests from petitioners because the settlement in the case had resolved numerous unrelated disputes.

1. Petitioners are customers of respondent SBC Michigan. In 2003, they brought this putative class action (the *Bahar* action) in Michigan state court. The suit rests on a Michigan statute forbidding telephone providers such as respondent from "impos[ing] on end-users an intrastate subscriber line charge or end-user line charge." Mich. Comp. Laws 484.2310(7).[1] Notwithstanding the statute, respondent imposed such a charge (known as a EUCL) on its Michigan customers. Over the claim period, respondent collected in

[1]The provision was effective until December 31, 2005. Petitioners' suit seeks refunds of the illegally imposed overcharges until that date.

excess of $500 million in illegal charges from millions of customers. Petitioners' state law right to sue for reimbursement of those amounts is unassailable. See *Rinaldo's Constr. Corp.* v. *Michigan Bell*, 559 N.W.2d 647, 653 (Mich. 1997) (statutory limits on phone charges are "part of the contract between the parties"); *Travelers Ins. Co.* v. *Detroit Edison Co.*, 631 N.W.2d 733, 744 (Mich. 2001) (utility customers' private right of action sound in contract).

2. Respondent moved for summary judgment in the *Bahar* action on the basis of *res judicata*. Respondent's motion rested not on a judgment in a suit between it and petitioners, but instead on the settlement of a suit that respondent had previously filed against various Michigan officials in federal court. *Michigan Bell Tel. Co.* v. *Engler*, No. 00-73207 (E.D. Mich.) (the *Engler* action). In the previous action, respondent had challenged as unconstitutional, *inter alia*, two Michigan statutes: (i) the EUCL prohibition; and (ii) another statute (Mich. Comp. Laws 484.2701) which froze respondent's rates for three years. In its complaint in the *Engler* action, respondent asserted that the EUCL prohibition and rate freeze were "facially unconstitutional because they do not provide a mechanism through which telephone service providers may ensure that they receive a just and reasonable rate of return on their investment." Pet. App. 89a.

In the federal *Engler* action, respondent named as defendants the Governor and the three members of the Michigan Public Service Commission, all in their official capacities. Respondent did not sue any of its customers – *i.e.*, the parties who actually paid respondent the EUCL on their monthly bills and who would be entitled to a refund under Michigan law – much less seek certification of a defendant class of the customers. Nor did respondent sue the Attorney General as a putative representative of the state's ratepayers.

In 2002, after months of negotiation, the *Engler* parties announced that they had reached a global settlement. The proposed consent decree resolved not only respondent's

claims regarding the two different statutes challenged in respondent's complaint, but also numerous other unrelated disputes between respondent and the State. Pet. App. 116a-22a.

The defendants took care to explain that, although the settlement resolved an array of unrelated disputes between them, the various components of the agreement were integrally related. Thus, the state officials explained that they were agreeing to the settlement of the EUCL challenge in large part in order to secure the phone company's support for three new pieces of telecommunications legislation that respondent was threatening to challenge as unconstitutional. Pet. App. 118a. In exchange, the state officials agreed not to initiate any "enforcement proceeding" under the challenged statutes, so long as respondent reduced its EUCL by fifteen percent. *Id.* 121a. In light of that agreement, respondent dropped its claim that the overall rate structure (including the challenged rate freeze) was unconstitutionally confiscatory. See *id.* 120a.

But respondent also agreed to do *much* more than that in order to induce the state officials' agreement to the settlement. It granted the State a wide array of unrelated concessions. In addition to dismissing its constitutional challenges, respondent also agreed to waive various property tax credits that would have reduced its tax obligation to the State; to dismiss several different challenges to telecommunications interconnection rulings; and to support the constitutionality of several other state statutes, most dealing with broadband telecommunications issues. Pet. App. 119a-21a.

While the proposed settlement was being negotiated, this Court held that an indistinguishable state scheme of rate regulation was constitutional. *Verizon Comms., Inc.* v. *FCC*, 535 U.S. 467 (2002). The state defendants in *Engler* nonetheless determined to continue with negotiation and approval of the agreement and not to defend the statute's constitutionality, no doubt in order to secure the benefit of respondent's many and varied concessions.

The State's Attorney General immediately moved to intervene to oppose the settlement on behalf of the State's ratepayers. The Attorney General sought to argue (1) that the EUCL prohibition should be fully enforced because it is constitutional, and (2) that the state officials selected by respondent to defend against its challenge had no power to enter into an agreement to forgo full enforcement of the law. Respondent opposed intervention on the ground that the Attorney General's participation would disrupt the global settlement of the array of disputes between it and the State. Resp. Opp. Interv. 1, 18 n.18. The district court agreed and refused to permit the Attorney General to intervene on behalf of the ratepayers to defend the constitutionality of the EUCL prohibition. Instead, it permitted her to intervene solely as a legal officer of the State, and only with respect to a single issue – "the constitutionality of Defendants * * * entering into a settlement with Plaintiff that is in direct conflict with the specific terms of a Michigan state statute." Pet. App. 87a. The court held that the defendants could enter into such a settlement and, therefore, entered the consent decree. *Id.* 86a-110a.

Nothing in the decree suggested that the state officials, sued in their official capacities, were acting as representatives of individual rate payers. Nor did the agreement purport to waive the rights of any ratepayer or preclude a ratepayer suit for a refund. For example, although the consent decree called for the continued partial enforcement of the limitation on EUCL fees, the settlement neither provided for a ratepayer refund for fees previously charged above that rate, nor precluded recovery of those excesses by individual ratepayers. Moreover, the parties did not provide notice to ratepayers of the pendency of the action, much less advise them that their rights could be resolved by settlement. Accordingly, in approving the settlement, the district court noted the broad consequences of the settlement for the State given the array of issues it resolved, Pet. App. 104a, 107a, but said nothing to indicate any view that the settlement was intended to, or did,

bind individual ratepayers or preclude petitioners from pursuing individual claims under the state statute.

3. In this case, respondent moved to dismiss petitioners' complaint seeking a refund of the unlawfully imposed EUCL on the basis of *res judicata* in light of the consent decree in the *Engler* action. The trial court recognized that "[f]ederal law governs the preclusive effect of a federal court judgment." Pet. App. 25a. Applying federal law, the court denied the motion to dismiss. Although the court concluded that "the Governor had authority to enter into the settlement agreement" in *Engler*, "[t]hat is not the issue." *Id.* 27a. Instead, the question was whether in so doing, the Governor and the MPSC had "contracted [away] the Plaintiffs' right to their day in court." *Id.* 31a-32a (emphasis in original). The trial court held that they had not. As an initial matter, nothing in the consent decree purported to dispose of the rights of individual ratepayers. Instead, "'[i]n the Settlement Agreement, the MPSC and the Governor contracted away *their* power to act, but nothing more.'" *Ibid*. (citation omitted).

Moreover, the court decided, the consent decree could only affect the rights of petitioners under federal *res judicata* law if the state officials' "representation of [respondent's] ratepayers, the Plaintiffs in this case, was adequate enough to sufficiently bind them." Pet. App. 27a. The trial judge held that it was not. The court explained that, although the Governor "represents the general public," petitioners "have a pecuniary interest in enforcement of [the EUCL prohibition] which is inherently distinguishable from that of the general public." *Id.* 28a. The court found that the state defendants had "bargained away" enforcement of the EUCL "in exchange for other considerations":

> While it is true that [petitioners] may in fact benefit from the additional considerations [in the settlement agreement], the broadband legislation and the presumed increase in the public fisc stemming from Defendant's abandonment of certain property tax cred-

> its, the fact remains that the Governor and the MPSC were concerned with the interests of the general public that were separate and distinct from the purely pecuniary interests of the Plaintiffs.

Ibid.

The trial court also rejected respondent's reliance on the fact that the Attorney General had been permitted to intervene in the *Engler* action. The court found it "perfectly clear" that "the federal court had limited the Attorney General's intervention solely to the issue of the constitutionality of the Governor and MPSC entering into a settlement agreement in direct conflict with a Michigan statute. So the Attorney General was not even allowed to address the underlying constitutionality of the statute itself." Pet. App. 28a.

4. Respondent sought review in the Michigan Court of Appeals. Petitioners again argued that precluding their claims based on the *Engler* consent decree was inconsistent with federal *res judicata* principles and would violate their right to due process under the Fourteenth Amendment.

The court of appeals was unpersuaded. The court recognized that it was required to "apply federal law in deciding whether the doctrine of *res judicata* requires dismissal of this case" (Pet. App. 3a) and that the Fourteenth Amendment limits the application of *res judicata* against a person who was not a party to the prior action (*id.* 7a).

The court of appeals nonetheless held that *res judicata* barred this suit and thus extinguished petitioners' claims against respondent:

> [Petitioners] do not allege that [respondent] breached a legal duty other than the general duty to obey valid statutory provisions. Further, they request the same result sought by the governor and the members of the MPSC in the initial litigation, namely enforcement of the prohibition of EUCL charges set forth in [the statute]. And this provision did not establish a statutory scheme looking towards private enforcement of

> its requirements. Because plaintiffs' legal interests do not differ from those of the defendants in the initial suit, they received adequate representation.

Pet. App. 8a. The court of appeals thus deemed it immaterial that the parties had settled the *Engler* action by compromising their position on an array of disputes that were entirely unrelated to the constitutionality of the EUCL prohibition, as well as that the district court had forbidden the only state official who even purported to represent ratepayers from intervening to defend the statute's constitutionality. *Ibid.*

Petitioners sought leave to appeal in the Michigan Supreme Court, again pressing their claim that, under federal *res judicata* law and the Fourteenth Amendment, the *Engler* consent decree did not extinguish their claims in this case. That court denied leave to appeal. Pet. App. 113a. This petition followed.[2]

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[2] As noted *supra* at 1, the judgment in the case is now final. After the trial court in a separate order granted respondent summary judgment on the ground that the EUCL prohibition is, in fact, unconstitutional (Pet. App. 10a), the court of appeals summarily dismissed petitioners' appeal of that order as moot solely because it had held (in the order at issue here) that the suit must be dismissed on *res judicata* grounds (*id.* 111a); the Michigan Supreme Court subsequently denied review (*id.* 112a). The state appellate courts' mootness ruling follows directly from their judgment in this case and obviously does not give rise to an issue meriting this Court's review, so petitioners do not seek certiorari on that question. Rather, if this Court reverses the court of appeals' *res judicata* holding and remands the case, the merits will once again be before the Michigan courts. Either the court of appeals will reinstate petitioners' appeal of the merits or petitioners will take another appeal of the merits ruling.

Although the question is not before this Court, it bears noting that petitioners are exceeding likely to prevail in those later proceedings on remand. In an interlocutory order in *Engler*, the Sixth Circuit had suggested that respondent's contention that Michigan rate scheme was unconstitutionally confiscatory has merit. *Michi-*

REASONS FOR GRANTING THE WRIT

Petitioners have a constitutionally protected interest in their personal right to sue respondent for a refund of the patently unlawful EUCL charge it imposed. The court of appeals held that right was extinguished by the judgment in a prior suit in which respondent sued various government officials over, *inter alia*, whether the State could prohibit the charge. That holding gives rise to two related questions meriting this Court's review.

First, when, as here, private individuals seek to vindicate *personal* rights (as opposed to some generalized public interest), is the government ever an adequate representative sufficient to foreclose private litigation. Second, assuming the answer to that generalized question is "yes," is preclusion permissible under federal law when, as here, the government in the prior litigation pursued its own interests rather than those of the private parties.

These two questions present this Court with a much needed opportunity to clarify the power of public officials to compromise the private rights of their citizens through litigation and consent decrees in federal court. Given the importance of the issues and the significance of the case by its own terms, review in this Court is warranted. The judgment below extinguishes as a matter of federal law the rights of millions of ratepayers to hundreds of millions of dollars in overcharges that were indisputably illegal under the governing Michigan statute. The decision below moreover creates the deeply troubling prospect of settlements by governmental actors pursuing generalized state interests extinguishing the constitu-

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gan Bell Tel. Co. v. *Engler*, 257 F.3d 587 (2001). But during later proceedings in the case, this Court reached the opposite result in *Verizon Communications, Inc.* v. *FCC*, 535 U.S. 467 (2002), sustaining a rate-setting scheme that the Sixth Circuit has since recognized is "identical" to the Michigan scheme. *Michigan Bell Tel. Co.* v. *Engler*, 72 Fed. Appx. 380, 382 (2003).

tionally protected private rights of individual citizens. Because the case is an ideal vehicle to resolve the question presented, certiorari should be granted.

I. This Court's Guidance Is Needed On The Circumstances In Which Government Litigation May Preclude A Subsequent Private Action.

1. "It is a principle of general application in Anglo-American jurisprudence that 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." *Hansberry* v. *Lee*, 311 U.S. 32, 40 (1940). "The initial presumption that nonparties are not bound by a judgment has been stated in many cases * * *. This presumption draws from the due process right to be heard." 18A WRIGHT & MILLER, FEDERAL PRACTICE & PROCEDURE § 4449 (3d ed. 2004).

This case involves the uncertain scope of a limited exception to that principle. A non-party may, in certain circumstances, be bound to a prior judgment in which she was "represented by a party." RESTATEMENT (SECOND) OF JUDGMENTS § 41(1). For example, absent class members may be bound by a class action judgment in which representation by the class representative was constitutionally adequate. *Id.* § 41(1)(e); see also *Hansberry*, 311 U.S. at 41-42. A judgment in an action by a trustee may similarly bind a beneficiary of the trust. RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(a).

It is similarly settled that, in appropriate circumstances, a judgment in an action involving a governmental official may bind absent private parties. What those appropriate circumstances are, however, is a matter of confusion and dispute. As a leading commentator explains, "A wide array of nonparty preclusion problems arise from * * * the often uncertain divisions between public questions and private rights." WRIGHT & MILLER, *supra*, § 4458. In addition, as this case illustrates,

the content of the "adequate representation" requirement in governmental litigation remains uncertain.

Thus far, this Court has approved the application of *res judicata* on the basis of prior governmental actions when the subsequent suit sought to adjudicate general "public rights" or when the government was an actual representative of the private party. For example, the Court has held that fishermen are bound by a judgment in a suit by a state when they merely sought to vindicate public fishing rights resolved by the prior action, as opposed to private damage claims. *Washington* v. *Washington St. Comm. Passenger Fishing Vessel Ass'n*, 443 U.S. 658, 692 n.32 (1979); see also *City of Tacoma* v. *Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958) (same with respect to private suit to litigate "public rights as citizens of the State" regarding construction of a dam). This Court has also held that Indian Tribes are bound by the outcome of suits by the United States when the government "undertook to represent, and did represent" the Tribes as its ward. *Heckman* v. *United States*, 224 U.S. 413, 445 (1912).

By contrast, this Court has rejected claims that the judgment in a prior governmental suit precludes a later action that seeks to vindicate personal, private rights. Indeed, under settled law, it "should be presumed that public enforcement actions are *not* intended to foreclose traditional common-law claims or private remedies expressly created by statute." WRIGHT & MILLER, *supra*, § 4458.1 (emphasis added). For example, in *General Telephone Co.* v. *EEOC*, 446 U.S. 318, 333 (1980), the Court held that private parties are not bound to the relief obtained under an EEOC judgment or settlement against the employer. The Court pointed in particular to "the possible differences between the public and private interests involved" (*ibid.*), recognizing that "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination" (*id.* at 326). See also *EEOC* v. *Waffle House, Inc.*, 534 U.S. 279, 296-97 (2002) (reaffirming that EEOC "does not stand in the employee's shoes").

Similarly, in *Lockport* v. *Citizens for Community Action*, 430 U.S. 259 (1977), the Court held that a suit by county residents against an electoral system was not barred by *res judicata* on the basis of the county's own prior suit on the same question. "The District Court properly rejected that defense [of *res judicata*] upon the ground that the plaintiffs had not been parties to the earlier suit and were not in privity with the county of Niagara, which had brought it." *Id.* at 264. See also, *e.g.*, *Martin* v. *Wilks*, 490 U.S. 755 (1989) (white firefighters may bring separate action challenging consent decree entered in suit between city and black firefighters); *Sam Fox Publ'g Co.* v. *United States*, 366 U.S. 683, 689-90 (1961) (private plaintiff is not bound by the outcome of governmental antitrust litigation).

The Court emphasized the distinction between the preclusive effect of prior governmental litigation on suits involving public and private rights in *Richards* v. *Jefferson County*, 517 U.S. 793 (1996). *Jefferson County* recognized a class of cases involving "public action that has only an indirect impact on [private] interests," with respect to which "we may assume 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*. at 803. But the Court continued that "there obviously exists another category of taxpayer cases in which the State may not deprive individual litigants of their own day in court." *Ibid.*

The plaintiffs in *Jefferson County* sought a refund of an assertedly unconstitutional tax. Because the suit involved the plaintiffs' "personal funds" – and was not one "that, under state law, could be brought only on behalf of the public at large" – it fell into the latter category. 517 U.S at 804. Extinguishing such a claim "deprive[s] petitioners of their 'chose in action,' which we have held to be a protected property interest in its own right." *Ibid.* "Thus, we are not persuaded that the nature of petitioners' action permits us to deviate from the traditional rule that an extreme application of

state-law *res judicata* principles violates the Federal Constitution." *Ibid.* The Court notably reserved the question, now presented by this case, "whether public officials are always constitutionally adequate representatives of all persons over whom they have jurisdiction when, as here, the underlying right is personal in nature." 517 U.S. at 802 n.6.

2. Cases like this one involve "delicate questions * * * as to the interplay between public and private rights" and "occupy an uncertain middle ground" between this Court's prior cases. WRIGHT & MILLER, *supra*, § 4458.1. Thus, "[w]hile the principle of claim preclusion by virtue of government representation is settled, the task of determining whether a government officer or agency represents or represented private individuals for *res judicata* purposes in a particular case is often very difficult." *EEOC* v. *U.S. Steel Corp.*, 921 F.2d 489, 494 (CA3 1990). Cf. *Tyus* v. *Schoemehl*, 93 F.3d 449 (CA8 1996) (although possibility of preclusion by "virtual representative" "is generally accepted, courts are sharply divided on how to implement this strand of issue preclusion"). Indeed, as this case illustrates, the courts have had difficulty discerning the dividing line between public and private rights and in deciding when government litigation precludes subsequent private actions.

In this case, for example, the court below concluded that petitioners' claims fell on the "public rights" side of the divide because petitioners did "not allege that defendant breached a legal duty other than the general duty to obey valid statutory provisions." Pet. App. 8a.

Other cases, by contrast, find dispositive whether the government has sought or obtained all the relief that would otherwise be available to the private plaintiff. Thus, courts have found no preclusion when a government agency did not seek individual relief for that person or class of persons,[3] or

[3] See, *e.g.*, *Thomas* v. *Shelton*, 740 F.2d 478, 481 (CA7 1984) (no bar when "[a]ll the government has at stake in its suit is * * * only a fraction of [the individual's] claim"); *Satsky* v. *Paramount*

entered into a consent decree that did not provide such individualized relief.[4] In this case, however, the court of appeals deemed it sufficient that both the private and the government parties sought "enforcement of the prohibition of EUCL charges" at a general level. Pet. App. 8a. It made no difference that the government officials neither sought nor obtained the refunds to which the private individuals would be entitled if their separate suit were allowed. *Ibid*. See also *Southwest Airlines Co.* v. *Texas Int'l Airlines, Inc.*, 546 F.2d 84, 99-100 (CA5 1977) (discussing state court case, cited in notes to the Restatement of Judgments, in which "the court precluded landowners from litigating a nuisance action similar to one prosecuted by the public authorities" even though the "landowners alleged individual harms to their property").

In addition, courts in many cases give great weight in the preclusion analysis to whether the private parties' interests were, in fact, adequately protected by the governmental party in the initial litigation. While courts generally agree that adequate representation is required, see *infra*, there is confusion over what constitutes adequate representation in this context. Thus, for example, the court of appeals in this case accorded no weight to whether the interests of the private and government parties were divergent, holding instead that petitioners received adequate representation so long as they were seeking enforcement of the same provision of law as the governmental entity. As discussed below, however, other courts require proof that the government and private individuals had identi-

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Comm., Inc., 7 F.3d 1464, 1470 (CA10 1993) ("To the extent these claims involve injuries to purely private interests, which the State cannot raise, then the claims are not barred.").

[4] See, *e.g.*, *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40, 66 (CA5 1974) (party not barred when "relief in the consent decree does not encompass an important segment of the plaintiffs' class here"); *Salinas* v. *Roadway Express, Inc.*, 735 F.2d 1574, 1580 (CA5 1984) (no bar when the individuals "were not granted any relief as a result of the decree").

cal, or nearly identical, practical interests and have denied preclusive effect when they do not, even if all the parties are seeking to enforce the same legal obligation. See, *e.g.*, *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Commission*, 842 F.2d 402, 409-10 (CADC 1988).

This case presents an opportunity for this Court to provide much needed clarification in this important area. The questions presented were the sole ground of decision below and were outcome determinative.

II. The Decision Below Is Wrong On The Merits.

Certiorari is further warranted because the decision below was based on an erroneous application of federal law that resulted in the loss, for millions of Michigan citizens, of their constitutionally protected day in court.

Under this Court's precedents and the appellate decisions cited above, this suit is not precluded by the judgment in *Engler*. Obviously, that judgment does not by its terms bind petitioners, who were not parties to the case. The parties to *Engler* did not provide ratepayers with notice of the proceedings at all, much less advise the ratepayers that their rights could be compromised by the settlement. The federal district court, which was only adjudicating the rights of respondent and the state officials, similarly took no steps to ensure that ratepayers participated in the litigation. To the contrary, by its terms, the consent decree only purports to restrict the state officials themselves from pursuing an "enforcement proceeding" against respondent. Pet. App. 121a. Nothing in the agreement attempts to "bind persons not parties to the suit." *Smith* v. *Illinois Bell Tel. Co.*, 270 U.S. 587, 592 (1926).

Nor are petitioners bound by the *Engler* judgment on the theory that the state officials in that case effectively represented them. First, because of the inherent divergence of interests between government and private litigants, government litigation should never preclude individual actions to enforce private rights. Second, even if government litigation may, in

some cases, preclude individual enforcement of private rights, it cannot do so when, as here, the government pursued interests inconsistent with the private individuals'.

A. Government Litigation May Never Preclude Individual Enforcement Of Private Rights.

The lower court decision is fundamentally flawed in its assumption that government officials may provide legally adequate representation of petitioners' private interests.

Although a private party's suit may in certain circumstances be precluded by a judgment in an action brought by "[a]n official or agency invested by law with authority to represent the person's interests" (RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(2)), that principle does not apply when there is "a substantial divergence of interest" between the government and individual in the two actions (*id.* § 42(1)(d)). See *id.* § 41 cmt. a ("the judgment is not binding on the represented person as against the opposing party in the circumstances set forth in § 42"). "Where it appears that there is in fact a substantial divergence of interest between them, assurance is lacking that the representative will effectively protect the interest of the [later plaintiff]." *Id.* § 42 cmt. e.[5]

A government's interest in litigation necessarily diverges from an individual's interest in vindicating her own, private rights. The government will make choices regarding what cases to pursue, and how aggressively to pursue them, based on its assessment of its own institutional interests. The many factors it will consider include the prospect of creating long-term precedent, the desire to resolve broader disputes with the opposing party, and its own resource constraints, particularly

[5] The principle is similar to the rule, reflecting due process principles, that a class action judgment does not bind class members if the class representative had conflicting interests from the rest of the class. *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815 (1999); *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591 (1997).

when it (unlike a private party) has no direct financial stake in the outcome of the litigation.

The Solicitor General recently made this point in No. 04-1615, *Vines* v. *University of Louisiana at Monroe*, in response to this Court's order calling for the views of the government. The question in *Vines* was whether a judgment against the EEOC in an action under the Age Discrimination in Employment Act binds private parties in a previously filed state-law age discrimination suit. The Solicitor General explained that, under the statutory scheme and traditional preclusion principles, the private parties were not bound. Regarding the latter, the government emphasized that, although the EEOC and private parties may litigate discrimination claims arising from the same facts, their interests are distinct. The government explained that "the EEOC's decision not to appeal the judgment [against it] is illustrative":

> In making that decision, the EEOC considered whether it would be in the *public's* interest to appeal, not whether it would be in *petitioners'* interests to appeal. In addition, the prospect of obtaining an adverse precedent in the court of appeals would obviously weigh more heavily in the EEOC's calculus than in an individual's decision to appeal.

No. 04-1615, Br. for the United States 11 (emphases in original), cert. denied, 126 S. Ct. 1019 (2005).

The federal courts of appeals have repeatedly held that a judgment in a governmental action is preclusive of a later suit to vindicate private rights, if ever, only when it is clear that the government in the prior suit vigorously pursued the interests of the private parties. The D.C. Circuit, for example, has consistently adhered to the principle that a judgment in an action by a governmental actor does not preclude a private suit on the same question if the government pursued a distinct set of interests in any significant respect. In *Democratic Central Committee of the District of Columbia* v. *Washington Metropolitan Area Transit Commission*, 842 F.2d 402 (1988), for

example, farepayers challenged rates charged by a regulated transit provider (Transit). Those rates had been sustained in a prior action between Transit and the relevant Public Utility Commission (PUC). Applying "venerable principles of issue preclusion" – including that "[w]ith but few exceptions * * * issue preclusion cannot be asserted against a non-party to a prior proceeding" and that "[t]he party invoking the prior judgment as a barrier to relitigation has the burden of establishing that the conditions for preclusion have been satisfied" (*id.* at 409 (citations omitted)) – the D.C. Circuit held that the farepayers' suit was not precluded by the prior judgment. The court explained that the farepayers were "not identical to, or in privity with, the parties to the earlier litigation," which included only Transit and the PUC. *Ibid.* And although the court recognized that "a nonparty may under certain conditions be bound when 'an official or agency invested by law with authority to represent the person's interests' was a party to the first proceeding," it concluded that this "proposition can have no bearing here." *Ibid.* (quoting RESTATEMENT (SECOND) OF JUDGMENTS § 41(1)(d)). "PUC's representation of the public interest was not *exclusively* for farepayers and the many battles fought by citizens against fare increases for Transit illustrate that the Commission's representation of them was clearly *less than the advocacy of private parties*." *Id.* at 409-10 (emphases added). The farepayers' rights could not "be frustrated by a prior proceeding in which the farepayers had no meaningful voice." *Id.* at 410.

In support of its decision, the D.C. Circuit relied on its prior ruling in *Consumers Union* v. *Consumer Product Safety Commission*, 590 F.2d 1209 (1978), rev'd on other grounds, 445 U.S. 375 (1980). There the court held that a governmental action regarding the disclosure of documents did not preclude a subsequent private FOIA action. The court reasoned that the agency's interests were "not congruent" with those of private parties. *Id.* at 1218. "The agency is concerned with conserving the time and energy of its personnel, and with avoiding establishment of a precedent that in the future might

support mandatory divulgence of information it would prefer to keep confidential; the requesters simply want the information." *Ibid.* That circumstance failed to "justify departure from "the rule, articulated in the milieu of antitrust enforcement, that 'just as the Government is not bound by * * * litigation to which it is a stranger, so private parties, similarly situated, are not bound by government litigation.'" *Ibid.* (quoting *Sam Fox Publ'g Co.* v. *United States*, 366 U.S. 683, 690 (1961) (alteration in *Consumers Union*)).

Most recently, the D.C. Circuit held that a suit by a group of private individuals (CCAGP) challenging a county voting system was not precluded by a consent decree in a prior governmental action. *Cleveland County Ass'n for Gov't by the People* v. *Cleveland County Bd. of Commrs.*, 142 F.3d 468 (1998) (per curiam). The court began from the premise that, generally, "[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." *Id.* at 473 (quoting *Wilks*, 490 U.S. at 762). There is a "limited" exception in which the plaintiff "has his interests adequately represented by someone with the same interests who is a party." *Id.* at 474 (quoting *Wilks*, 490 U.S. at 762). The court held that the prior action did not have preclusive effect because the interests of the government and the private plaintiffs were "divergent":

> The Board, in negotiating the consent decree, was seeking to resolve a dispute over what had been challenged as an unlawful method of electing its members. It can therefore be presumed that the peaceful resolution of the dispute – and the preservation of the commissioners' positions, to the extent possible – were not insignificant considerations. The CCAGP, by contrast, is not motivated by the need to save the Board from protracted litigation; indeed, it seeks an election plan devised free from that constraint. The interests of the Board and the CCAGP cannot therefore be deemed to have been aligned such that the

> CCAGP is precluded from challenging the consent decree.

Ibid. Under a broader rule of preclusion, the D.C. Circuit recognized, "consent decrees to which the government was a party would be immune from challenge regardless of their effect on individual rights." *Ibid.* The court "decline[d] to reach such a conclusion." *Ibid.*

Other circuits similarly permit the preclusion of private rights on the basis of a prior governmental action, if ever, only if it is clear that the government would have pursued the private party's interest as aggressively as the individual would have himself. Thus, in *Thomas* v. *Shelton*, 740 F.2d 478 (1984) (Posner, J.), the Seventh Circuit held that a private plaintiff's claim for damages was not precluded by the judgment on an identical claim by the United States seeking reimbursement of medical expenses it had paid the plaintiff. The fact that the government's financial interest in recouping the expenses would be less than the plaintiff's own interest in a full recovery was sufficient to prohibit the application of *res judicata*. "All the government has at stake in its suit is [the private plaintiff's] medical expenses. As they are only a fraction of [the plaintiff's] claim, there can be no assurance that the government would fight as hard to prove its claim as [the plaintiff] would to prove his." *Id.* at 481-82. See also *Jones* v. *Bates*, 127 F.3d 839, 848 (CA9 1997) ("[D]ue process requires both that the prior litigation of the issue have been motivated by the same underlying purposes, and that the original party have had an incentive and opportunity to litigate the issue in the manner best suited to furthering those common underlying purposes."); *Comite de Apoyo a los Trabajadores Agricolas* v. *U.S. Dep't of Labor*, 995 F.2d 510, 514 (CA4 1993) (employees' suit against Department of Labor regarding proper prevailing wage would not bind nonparty employers, because Department's interest was in proper computation of rate whereas employers' interest was in lowest possible rate); *Riddle* v. *Cerro Wire & Cable Group*, 902 F.2d 918, 922-23 (CA11 1990) (private suit not precluded by prior liti-

gation brought by EEOC because, whereas government was interested in "broad remedial steps to eradicate discrimination," private plaintiff "is primarily interested in securing specific personal relief").

Also illustrative is *In re Exxon Valdez*, 270 F.3d 1215, 1227-28 (CA9 2001), which held that a private suit by fishermen for economic damages was not precluded by prior governmental litigation. The court of appeals distinguished its prior decision in *Alaska Sport Fishing Ass'n* v. *Exxon Corp.*, 34 F.3d 769 (1994), in which that court had held precluded on the basis of prior governmental litigation a suit in which fishermen "did not claim any damages to any property they owned or economic interests, just to the ferae naturae, the natural resource of fish in the wild." The court of appeals held that a contrary result was compelled when "plaintiffs sued to vindicate harm to their private land and their ability to fish commercially and fish for subsistence." 270 F.3d at 1228.

As these cases illustrate, the litigation interests of governments and government officials necessarily and substantially diverge from the interests of private citizens seeking to enforce private rights. Whether the government *ever* is an adequate representative in such a case – given its inherent tendency to represent its own interests and those of the broader public generally when they compete with the pecuniary interests of individual citizens – is a question that this Court has expressly reserved. Certiorari should be granted in this case to decide that question and to hold that under federal preclusion principles, government litigation may never extinguish an individual's "chose in action" to recover for a violation of a private right.

B. Preclusion Is Unavailable When State Officials Pursue The State's, And Not The Individuals', Litigation Interests.

Even if this Court were, however, to hold that government litigation may, in some circumstances, preclude subse-

quent individual suits to enforce private rights, the state court erred in this case in concluding that such preclusion was appropriate, given the uncontroverted record demonstrating that the state officials pursued solely the State's, and not the individual ratepayers', interests in this case.

1. The state defendants in this case did not represent the interests of petitioners in anything resembling the manner in which they would have represented themselves. Petitioners have a single, clear interest: fully enforcing the statutory provision that prohibits respondent from imposing a EUCL. Respondent has charged petitioners more than $500 million in fees that are flatly prohibited by a state statute. That is the basis for this suit.

The interests of the state defendants in *Engler* were very different. They had distinct and conflicting interests that undermined their defense of the EUCL prohibition in several respects, each more substantial than the last. The conflict was not between the interests of different groups of Michigan ratepayers. Rather, the defendants were inevitably called on to sacrifice the interest of all the ratepayers in not paying the EUCL to other state interests that could be secured in a global settlement. Indeed, there is no indication that the *Engler* defendants were, in fact, concerned with the interests of ratepayers at all, as the consent decree does not provide ratepayers with any reimbursement of the illegally imposed EUCL.

Most simply, with no direct financial interest in the determination of the EUCL statute's constitutionality, the state defendants were far less willing to incur the time and expense of litigating respondent's suit. The settlement thus embodies the state officials' express determination that

> continued litigation * * * will certainly involve * * * substantial fees and expenses for counsel and expert witnesses * * *, and that it is in their best interest to resolve [the litigation] to redirect their efforts and resources toward investment, innovation and enhancement of telecommunications services in the

> State of Michigan for the benefit of Michigan consumers and the reduction of intrastate residential and business end user charges, rather than on litigation, and to avoid further expenditure of scarce state resources defending * * * [the litigation].

Pet. App. 117a-18a.

The state defendants moreover were never solely concerned with defending the constitutionality of the EUCL prohibition, for the complaint against which they were defending – and the claims that they settled – did not merely challenge the EUCL statute. Rather, respondent also asserted, for example, that the rate-freeze statute was unconstitutional. In negotiating a settlement of those claims, the state officials were inevitably in the position of trading off one provision over the other, or both against broader interests. The settlement itself recognized that the parties to *Engler* treated the rate freeze and EUCL provisions as inextricably intertwined for settlement purposes. They were able to settle respondent's dual challenges to the state statutes only because, as a consequence, respondent's rates (and the charges to petitioners in this case) would remain high enough to satisfy respondent's view of a reasonable rate of return. Pet. App. 109a.

Third, and more troubling still, the conflicts impeding the state defendants' aggressive defense of the EUCL prohibition ran substantially deeper because the settlement discussions in the *Engler* action spanned far more broadly than merely the claims set out in respondent's complaint. The complicated negotiations involved numerous issues and spanned months. Ultimately, the State accepted a meager fifteen-percent reduction in the EUCL – rather than defending the State's rate-setting methodology after this Court sustained an indistinguishable state scheme (see *supra* at 8-9 n.2) – because respondent was willing to shower the State with numerous other concessions. The state officials thus traded off the EUCL and rate-freeze provisions against the wide-ranging concessions respondent was willing to offer. Ultimately, the state officials

gave up their own enforcement power over two statutes of direct pecuniary interest to ratepayers in favor of agreements by respondent to contribute to the state treasury and to support other state priorities. The *Engler* defendants were obviously conflicted in their defense of the EUCL provision as a consequence.

Respondent specifically gave the State no fewer than five distinct, significant concessions in exchange for its forbearance from enforcing the EUCL statute. None of these would have caused petitioners to compromise their defense of that statute and their right to a refund. First, respondent agreed not to seek certain property tax credits under Michigan law regarding unrelated telecommunications maintenance fees. Pet. App. 121a, ¶ 3(c). The trial court in this case properly recognized that in securing this concession the state defendants were concerned with an "increase in the public fisc," not the "distinct" interests of ratepayers. *Id.* 13a.

Second, respondent in the settlement agreed to withdraw its appeals of not one, not two, but three different rulings of the state Public Service Commission. Pet. App. 120a, ¶ 3(d). Those rulings were entirely unrelated to the EUCL. Rather, they challenged rulings adverse to respondent regarding various interconnection disputes with other carriers. Yet, the defendant Public Service Commissioners in *Engler* had a substantial interest in securing those concessions on behalf of their agency, an interest that had nothing to do with ratepayers' interests in a refund of the unlawful charges imposed by respondent.

Third, respondent agreed to "support the constitutionality" of legislation known as the "Metropolitan Extension Telecommunication, Rights-of-Way Oversight Act." Pet. App. 120a, ¶ 3(e). This legislation was unrelated to the EUCL. It provided for fees on telecommunications providers to fund deployment of high-speed broadband internet connections.

Fourth, respondent also agreed to "support the constitutionality" of legislation known as the "Michigan Broadband Development Authority Act." Pet. App. 120a, ¶ 3(f). This legislation is unrelated to the EUCL. It instead involves, and respondent in the settlement agreement expressly agreed to support, "the ability of the Michigan Broadband Authority to issue bonds, loans and financing." *Ibid*.

Fifth, respondent agreed to "support the constitutionality" of a separate bill "relating to tax credits for broadband investment." Pet. App. 120a, ¶ 3(g). This bill similarly had nothing to do with the EUCL. Notably, these concessions by respondent with respect to telecommunications legislation were very significant to the state defendants in *Engler*, who in the settlement expressly acknowledged their desire "to further enhance broadband deployment and high speed Internet access, which are expected to create new jobs and increase additional economic output" if the State could overcome "potential challenges to the implementation of [those measures] by [respondent]." *Id.* 118a.

It was precisely these manifest conflicts of interest that led the Attorney General to seek to intervene in the *Engler* case as a defendant "to assert the interest of ratepayers." Br. of A.G. 8. The Attorney General explained that, in her capacity as counsel to the state defendants, she had refused to approve the settlement because it was contrary to the ratepayers' interests. Supp. Br. of A.G. 5-6. When the defendants nonetheless announced their intention to agree to the settlement despite her objections, she immediately moved to intervene "on behalf of the people of the State of Michigan, and in the public interest." *Id.* at 6. The Attorney General explained that the settlement would be "detrimental to the interest of the majority of citizens of this state who are customers of [SBC] Michigan." Br. of A.G. 3. The state defendants were not, the Attorney General explained, representing "the ratepayers' interest in rates that are just, reasonable and affordable." *Id.* at 7.

The Attorney General was denied that right, however, although importantly *not* because the state defendants were aggressively pursuing the interests of the ratepayers. Rather, the district court in *Engler* concluded, *inter alia*, that the state defendants had a significant interest in "obtaining [respondent's] agreement not to challenge the Governor's 2002 broadband enactments which may potentially create new jobs in Michigan." Pet. App. 104a.

Respondent itself was quite frank in the *Engler* proceedings in acknowledging that the state defendants had traded off state interests that went well beyond the dispute over the EUCL provision. Respondent opposed the Attorney General's participation in the case precisely because it could derail the parties' global resolution of not merely the EUCL challenge but numerous "other matters." Resp. Opp. Interv. 1. Respondent explained that "the settlement at issue encompasses not only this litigation, *but also several other important public policy issues*, including the recently enacted legislation designed to advance the deployment of broadband (i.e., high-speed internet) and other telecommunications." *Id.* at 18 n.18 (emphasis added). Respondent emphasized that on these various other issues the settlement "include[d] concessions from [it] which will inure to the benefit of the state." *Ibid.*

2. The court of appeals' holding that the state defendants in *Engler* did, in fact, adequately represent petitioners' interests as a matter of federal law is irreconcilable with the precedents of this Court and the federal courts of appeals. See *supra* Part II(A). This is not a circumstance that permits departure from the bedrock principle that an individual is not bound by a judgment to which he is not a party. *Hansberry*, 311 U.S. at 40.

In this case, there could be no adequate government representation of private interests because of the "substantial divergence" in the interests between the parties in the two suits. RESTATEMENT (SECOND) OF JUDGMENTS § 42(1)(d)). There is indeed no genuine argument that the *Engler* defendants pur-

sued the case "exclusively" for petitioners. *Democratic Cent. Comm.*, 842 F.2d at 409-10.

The defendants' interest in defending the EUCL provision was nowhere near as strong as petitioners', as only petitioners had a direct pecuniary interest in the outcome. Because "there can be no assurance that the government would fight as hard" (*Thomas*, 740 F.2d at 481-82), there can be no preclusion. The defendants indeed expressly determined to end the suit in order to devote their time and resources to other matters. This "concern[] with conserving the time and energy of [their] personnel" (*Consumers Union*, 590 F.2d at 1218) renders their interests non-congruent with petitioners. In declining to pursue their defense of the constitutionality of the EUCL prohibition, the defendants moreover no doubt were concerned with the prospect of "establish[ing] a precedent" (*ibid.*) that would govern later Michigan legislation. See also Br. for the United States, No. 04-1615, *Vines* v. *Univ. of La. at Monroe* 11 (EEOC suit under ADEA does not preclude previously filed state suit because, *inter alia*, EEOC in litigating is concerned with creating "an adverse precedent").

The grounds for rejecting a *res judicata* defense here are furthermore *much* stronger than in any of the cases previously considered by this Court or the federal courts of appeals. The *Engler* defendants' conflict of interest is patent and demonstrated on the uncontested record, not theoretical. The *Engler* defendants avowedly compromised their defense of the EUCL statute in favor of other state interests that are of no direct concern to petitioners. The global settlement to which they agreed resolved respondent's challenge to the rate-freeze statute, as well as to an array of other unrelated disputes between respondent and the State. Among other things, the defendants secured a provision that enhanced the state treasury through greater property tax revenues, and eliminated anticipated challenges by respondent to broadband legislation that was of great importance to the State. Because petitioners are "not motivated" by the same concerns, their interests and

those of the *Engler* defendants cannot "be deemed to have been aligned." *Cleveland County Ass'n*, 142 F.3d at 474.

3. The court of appeals held to the contrary that petitioners' "legal interests do not differ from those of the defendants in the initial suit" because petitioners in this case "request the same result" as did the state defendants in *Engler*, "namely enforcement of the prohibition of EUCL charges." Pet. App. 8a. This conclusion is wrong. First, while both parties sought enforcement of the EUCL provision in a general sense, only the private parties sought a refund of the illegal overcharges. Moreover, the question for purposes of federal *res judicata* and due process law is not the "relief" that is "requested," but rather whether the party in the prior action aggressively pursued the interests of the party whose claim is to be extinguished. For example, the EEOC in Title VII cases regularly seeks the same relief as would a private plaintiff (for example, an end to discrimination), yet this Court has held that plaintiff is not bound by the judgment in the government's suit. *General Tel. Co.*, *supra*. The reason is that "[w]hen the EEOC acts, albeit at the behest of and for the benefit of specific individuals, it acts also to vindicate the public interest in preventing employment discrimination." 446 U.S. at 326.

On the court of appeals' contrary view, a representative in a prior action – whether a state official or a class representative – will *always* be constitutionally adequate so long as she nominally requested the same relief as the non-party would have. The court of appeals, accepting that view, thus deemed it immaterial as a matter of law that the state defendants in *Engler* manifestly did not defend the EUCL provision as petitioners would have.

The court of appeals' only remaining basis for its decision was that petitioners' claim is that respondent violated a "general duty to obey valid statutory provisions," as distinct from "a statutory scheme looking towards private enforcement of its requirements." Pet. App. 8a. That holding directly conflicts with this Court's ruling in *Jefferson County*.

The plaintiffs in that case similarly sought to vindicate a "general duty" not to impose an unlawful tax. The only relevant point is that respondents have a private right of action under Michigan law to recover the unlawful EUCL charges; the court of appeals did not contend otherwise. See RESTATEMENT (SECOND) OF JUDGMENTS § 41 cmt. d ("a statutory system of remedies may contemplate enforcement of private interests both by a public agency and the affected private parties"). Petitioners are not suing on behalf of the "public at large," but instead bring this suit for reimbursement by respondent of their own "personal funds." Moreover, the statute exists for the obvious protection of petitioners: they, not the State, pay the EUCL; and state law gives the right to recover the overcharges to petitioners, not the State. That private right of action is constitutionally protected but has been extinguished by the court of appeals' ruling. Innumerable private claims call on defendants to "obey valid statutory provisions," and it has never previously been suggested that such claims have lesser constitutional status as a consequence.

The distinction between public and private rights also explains why the court of appeals in this case erred in arguing that its decision followed from the Fifth Circuit's decision in *Southwest Airlines Co.* v. *Texas International Airlines, Inc.*, 546 F.2d 84 (1977). The critical factor in *Southwest*, entirely missing from this case, was the Fifth Circuit's "finding that the competitors had not suffered any 'private legal wrong.'" WRIGHT & MILLER, *supra*, § 4458.1. This case – in which petitioners are pursuing their own private, pecuniary interests – is very different.

But in any event, the court of appeals' point in this case about the "general" nature of the EUCL statute (and its reliance on the *Southwest* decision) establishes, at most, the ability of state officials to litigate the statute's constitutionality, with binding consequences for private parties, *in the absence of a conflict of interest.* On this ground alone, the Fifth Circuit would reach the opposite result on the facts of this case because, unlike in *Southwest*, the defendants in *Engler* had

competing interests. In *Southwest*, preclusion attached because the private plaintiffs' "legal interests *precisely coincide[d]* with those of the cities and the regional airport board." 546 F.2d at 102 (emphasis added). By contrast, in *Rodriguez* v. *East Texas Motor Freight*, 505 F.2d 40 (1974), the Fifth Circuit court held that a private Title VII suit was not barred by a consent decree in a prior action brought by the federal government because the parties' interests diverged. The court found it significant that in the prior action, the "the Government protect[ed] general economic interests in addition to the rights of minorities; private plaintiffs represent only the interests of minority group members." *Id.* at 66. Further, "[w]hile the Government may be willing to compromise in order to gain prompt, and perhaps nationwide, relief, private plaintiffs, more concerned with full compensation for class members, may be willing to hold out for full restitution." *Ibid.* See also *Battle* v. *Liberty Nat'l Life Ins. Co.*, 493 F.2d 39, 53 (CA5 1974) (no preclusion because "[w]hile the government's consent decree entered into in 1954 may have proscribed particular conduct and satisfied the public's interest, it may not have gone far enough to prevent further injury to the private plaintiffs").

In this case, this Court does not need to reach the question whether petitioners would be bound if the Governor and members of the Public Service Commission in *Engler* had litigated respondent's duty to eliminate the EUCL without pursuing other state interests in that litigation. That simply is not what occurred. Whether as a matter of *res judicata* or the right to due process, petitioners' claims are not precluded by the judgment in *Engler* because the defendants in that case were pursuing interests other than petitioners, and were indeed compromising the interests of ratepayers to further those other interests.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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