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CHEVRON CORPORATION

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

CHEVRON CORP.,

Plaintiff,

v.

STEVEN DONZIGER, *et al.*,

Defendant.

CASE NO. 5:12-80237 MISC CRB NC

NOTICE OF SUPPLEMENTAL AUTHORITY AND EVIDENCE

Chevron Corporation respectfully submits for the Court's reference the authority and evidence presented at today's hearing on the pending motions to quash:

1) *Taylor v. Sturgell*, 553 U.S. 880 (2008), addressing "virtual representation," attached as Attachment A; and

2) The January 24, 2011 letter from Yahoo! legal to Bruce Kaplan, counsel for Steven Donziger, responding to Mr. Donziger's subpoena directed at Yahoo! seeking "1) the user profile, as produced by the Yahoo! Account Management Tool; and 2) the dates, times and Internet Protocol ("IP") addresses for logins," attached as Attachment B.

Respectfully submitted,

DATED: January 16, 2013

GIBSON, DUNN & CRUTCHER LLP

By: /s/ *Theodore B. Boutrous*
Theodore B. Boutrous

Attorneys for Plaintiff
CHEVRON CORPORATION

Attachment A

that the vast majority of such claims are asserted in complaints advancing other claims as well, and that all but a handful are dismissed well in advance of trial. Experience also demonstrates that there are in fact rare cases in which a petty tyrant has misused governmental power. Proof that such misuse was arbitrary because unsupported by any conceivable rational basis should suffice to establish a violation of the Equal Protection Clause without requiring its victim also to prove that the tyrant was motivated by a particular variety of class-based animus. When the allegations of a complaint plainly identify "the proverbial needle in a haystack," *ante*, at 2157, a federal court should not misconstrue the Constitution in order to make it even easier to dismiss unmeritorious claims.

* * *

In sum, there is no compelling reason to carve arbitrary public-employment decisions out of the well-established category of equal protection violations when the familiar rational review standard can sufficiently limit these claims to only wholly unjustified employment actions. Accordingly, I respectfully dissent.

Brent TAYLOR, Petitioner,

v.

Robert A. STURGELL, Acting Administrator, Federal Aviation Administration, et al.

No. 07–371.

Argued April 16, 2008.

Decided June 12, 2008.

Background: Following denial by Federal Aviation Administration (FAA) of his Freedom of Information Act (FOIA) request for plans and specifications of vintage aircraft, requester sued to compel disclosure. The United States District Court for the District of Columbia, Ricardo M. Urbina, J., granted summary judgment for FAA, and intervenor aircraft manufacturer, on claim preclusion grounds. The United States Court of Appeals for the District of Columbia Circuit, 490 F.3d 965, affirmed. Certiorari was granted.

Holdings: The United States Supreme Court, Justice Ginsburg, held that:

(1) "adequate representation" exception to rule against nonparty claim preclusion could not serve as basis for broader theory of "virtual representation";

(2) "virtual representation" exception could not be justified on grounds of "close enough" relationship between party and nonparty;

(3) purported "public-law" nature of FOIA suits did not warrant application of "virtual representation" exception;

(4) there is no "virtual representation" exception to general rule against nonparty claim preclusion, abrogating *Tyus v. Schoemehl*, 93 F.3d 449, and *Kourtis v. Cameron*, 419 F.3d 989;

every court that was presented with one. Yet there have been only approximately 150 cases—both in the district courts and the courts of appeals—addressing such claims since *Olech*.

(5) fact issue existed as to whether requester was acting in collusion with requester in preceding FOIA suit that had sought same disclosures; and

(6) on remand, FAA would have burden of proof to show collusion/agency justifying claim preclusion.

Vacated and remanded.

1. Judgment ⚿668(3), 707

In general, one is not bound by judgment in personam in litigation in which he is not designated as party or to which he has not been made party by service of process.

2. Federal Courts ⚿420

Preclusive effect of federal-court judgment is determined by federal common law.

3. Federal Courts ⚿420, 441

United States Supreme Court has ultimate authority to determine and declare uniform federal rules of res judicata for judgments in federal-question cases.

4. Constitutional Law ⚿4012

Federal common law of preclusion is subject to due process limitations. U.S.C.A. Const.Amends. 5, 14.

5. Judgment ⚿584

Under doctrine of claim preclusion, final judgment forecloses successive litigation of very same claim, whether or not relitigation of claim raises same issues as earlier suit.

6. Judgment ⚿713(1)

Issue preclusion bars successive litigation of issue of fact or law actually litigated and resolved in valid court determination essential to prior judgment, even if issue recurs in context of different claim.

7. Judgment ⚿675(1), 677, 681, 707

General rule against nonparty claim preclusion is subject to exceptions, in federal-question cases, where: (1) person agrees to be bound by determination of issues in action between others; (2) there is pre-existing substantive legal relationship between person to be bound and party to judgment, e.g. preceding/succeeding property owners, bailee/bailor, assignee/assignor; (3) nonparty was adequately represented by someone with same interests who was party, as in properly conducted class action or suit brought by trustee, guardian or other fiduciary; (4) nonparty assumed control over litigation; (5) nonparty serves as proxy for party; or (6) special statutory scheme expressly forecloses successive litigation by nonlitigants and is otherwise consistent with due process. U.S.C.A. Const.Amend. 5.

8. Constitutional Law ⚿4012
Judgment ⚿677

"Adequate representation" exception to rule against nonparty claim preclusion could not serve as basis for broader "virtual representation" exception in federal-question case, under which nonparty would be bound by earlier judgment simply because party had had strong incentive to litigate, and because nonparty had hired party's attorney in second suit; "adequate representation" exception, in order to comport with due process, required either special procedures in first suit to protect nonparties' interests, or understanding by concerned parties in first suit that it was brought in representative capacity. U.S.C.A. Const.Amend. 5.

9. Judgment ⚿677

Broad "virtual representation" exception to rule against nonparty claim preclusion could not be justified, in federal-question cases, on ground that any relationship between party and nonparty "close

enough" to bring nonparty within judgment warranted preclusion; fundamental nature of general rule dictated a constrained approach to exceptions, and "close enough" criterion fell short of minimum requirements for "adequate representation" exception to general rule.

10. Judgment ⚿677

Purported "public-law" nature of Freedom of Information Act (FOIA) suits did not warrant application of broad "virtual representation" exception to rule against nonparty claim preclusion; FOIA actions sought grants of relief to individual plaintiffs rather than decrees benefiting public at large, it was for Congress rather than courts to proscribe or confine successive FOIA suits by different requesters, and there was no evidence of vexatious FOIA litigation resulting from application of general rule. 5 U.S.C.A. § 552.

11. Judgment ⚿677

There is no "virtual representation" exception to general rule against nonparty claim preclusion, in federal-question cases; abrogating *Tyus v. Schoemehl*, 93 F.3d 449, and *Kourtis v. Cameron*, 419 F.3d 989.

12. Federal Civil Procedure ⚿2509.8

Fact issue as to whether nonparty to initial, unsuccessful Freedom of Information Act (FOIA) suit acted as party's agent in filing second FOIA suit seeking to compel release of same information, i.e. acted in collusion with party, precluded summary judgment in second action on grounds of claim preclusion. 5 U.S.C.A. § 552(a)(4)(B).

13. Judgment ⚿955

In Freedom of Information Act (FOIA) suit brought by nonparty to earlier FOIA action that had unsuccessfully sought same records, defendant agency had burden of proof to establish collusion/agency basis for claim preclusion; claim preclusion was affirmative defense, and was within general rule that defendant has burden of proof on affirmative defenses. 5 U.S.C.A. § 552(a)(4)(B).

Syllabus *

Greg Herrick, an antique aircraft enthusiast seeking to restore a vintage airplane manufactured by the Fairchild Engine and Airplane Corporation (FEAC), filed a Freedom of Information Act (FOIA) request asking the Federal Aviation Administration (FAA) for copies of technical documents related to the airplane. The FAA denied his request based on FOIA's exemption for trade secrets, see 5 U.S.C. § 552(b)(4). Herrick took an administrative appeal, but when respondent Fairchild, FEAC's successor, objected to the documents' release, the FAA adhered to its original decision. Herrick then filed an unsuccessful FOIA lawsuit to secure the documents. Less than a month after that suit was resolved, petitioner Taylor, Herrick's friend and an antique aircraft enthusiast himself, made a FOIA request for the same documents Herrick had unsuccessfully sued to obtain. When the FAA failed to respond, Taylor filed suit in the U.S. District Court for the District of Columbia. Holding the suit barred by claim preclusion, the District Court granted summary judgment to the FAA and to Fairchild, as intervenor in Taylor's action. The court acknowledged that Taylor was not a party to Herrick's suit, but held that a nonparty may be bound by a judgment if she was "virtually represented" by a party. The D.C. Circuit affirmed, announcing a

* The syllabus constitutes no part of the opinion of the Court but has been prepared by the Reporter of Decisions for the convenience of the reader. See *United States v. Detroit Timber & Lumber Co.*, 200 U.S. 321, 337, 26 S.Ct. 282, 50 L.Ed. 499.

five-factor test for "virtual representation." The first two factors of the D.C. Circuit's test—"identity of interests" and "adequate representation"—are necessary but not sufficient for virtual representation. In addition, at least one of three other factors must be established: "a close relationship between the present party and his putative representative," "substantial participation by the present party in the first case," or "tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." The D.C. Circuit acknowledged the absence of any indication that Taylor participated in, or even had notice of, Herrick's suit. It nonetheless found the "identity of interests," "adequate representation," and "close relationship" factors satisfied because the two men sought release of the same documents, were "close associates," had discussed working together to restore Herrick's plane, and had used the same lawyer to pursue their suits. Because these conditions sufficed to establish virtual representation, the court left open the question whether Taylor had engaged in tactical maneuvering to avoid preclusion.

Held:

1. The theory of preclusion by "virtual representation" is disapproved. The preclusive effects of a judgment in a federal-question case decided by a federal court should instead be determined according to the established grounds for nonparty preclusion. Pp. 2171 – 2178.

(a) The preclusive effect of a federal-court judgment is determined by federal common law, subject to due process limitations. Pp. 2171 – 2173.

(1) Extending the preclusive effect of a judgment to a nonparty runs up against the "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County,* 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L.Ed.2d 76 (internal quotation marks omitted). Indicating the strength of that tradition, this Court has often repeated the general rule that "one is not bound by a judgment *in personam* in a litigation in which he is not designated a party or to which he has not been made a party by service of process." *Hansberry v. Lee,* 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22. Pp. 2171 – 2172.

(2) The rule against nonparty preclusion is subject to exceptions, grouped for present purposes into six categories. First, "[a] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the [agreement's] terms." Restatement (Second) of Judgments § 40. Second, nonparty preclusion may be based on a pre-existing substantive legal relationship between the person to be bound and a party to the judgment, *e.g.,* assignee and assignor. Third, "in certain limited circumstances," a nonparty may be bound by a judgment because she was " 'adequately represented by someone with the same interests who [wa]s a party' " to the suit. *Richards,* 517 U.S., at 798, 116 S.Ct. 1761. Fourth, a nonparty is bound by a judgment if she "assume[d] control" over the litigation in which that judgment was rendered. *Montana v. United States,* 440 U.S. 147, 154, 99 S.Ct. 970, 59 L.Ed.2d 210. Fifth, a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. Preclusion is thus in order when a person who did not participate in litigation later brings suit as the designated representative or agent of a person who was a party to the prior adjudication. Sixth, a special statutory scheme otherwise consistent with due process—*e.g.,* bankruptcy proceedings—may "expressly foreclos[e] successive litigation by nonlitigants." *Martin v. Wilks,* 490 U.S. 755, 762, n. 2, 109 S.Ct. 2180, 104 L.Ed.2d 835. Pp. 2171 – 2173.

(b) Reaching beyond these six categories, the D.C. Circuit recognized a broad "virtual representation" exception to the rule against nonparty preclusion. None of the arguments advanced by that court, the FAA, or Fairchild justify such an expansive doctrine. Pp. 2171 – 2173.

(1) The D.C. Circuit purported to ground its doctrine in this Court's statements that, in some circumstances, a person may be bound by a judgment if she was adequately represented by a party to the proceeding yielding that judgment. But the D.C. Circuit's definition of "adequate representation" strayed from the meaning this Court has attributed to that term. In *Richards*, the Alabama Supreme Court had held a tax challenge barred by a judgment upholding the same tax in a suit by different taxpayers. 517 U.S., at 795–797, 116 S.Ct. 1761. This Court reversed, holding that nonparty preclusion was inconsistent with due process where there was no showing (1) that the court in the first suit "took care to protect the interests" of absent parties, or (2) that the parties to the first litigation "understood their suit to be on behalf of absent [parties]," *id.*, at 802, 116 S.Ct. 1761. In holding that representation can be "adequate" for purposes of nonparty preclusion even where these two factors are absent, the D.C. Circuit misapprehended *Richards*. Pp. 2173 – 2174.

(2) Fairchild and the FAA ask this Court to abandon altogether the attempt to delineate discrete grounds and clear rules for nonparty preclusion. Instead, they contend, only an equitable and heavily fact-driven inquiry can account for all of the situations in which nonparty preclusion is appropriate. This argument is rejected. First, respondents' balancing test is at odds with the constrained approach advanced by this Court's decisions, which have endeavored to delineate discrete, limited exceptions to the fundamental rule that a litigant is not bound by a judgment to which she was not a party, see, *e.g.*, *Richards*, 517 U.S., at 798–799, 116 S.Ct. 1761. Second, a party's representation of a nonparty is "adequate" for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned, see *Hansberry*, 311 U.S., at 43, 61 S.Ct. 115, and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the nonparty's interests, see *Richards*, 517 U.S., at 801–802, 116 S.Ct. 1761. Adequate representation may also require (3) notice of the original suit to the persons alleged to have been represented. See *id.*, at 801, 116 S.Ct. 1761. In the class-action context, these limitations are implemented by Federal Rule of Civil Procedure 23's procedural safeguards. But an expansive virtual representation doctrine would recognize a common-law kind of class action shorn of these protections. Third, a diffuse balancing approach to nonparty preclusion would likely complicate the task of district courts faced in the first instance with preclusion questions. Pp. 2174 – 2177.

(3) Finally, the FAA contends that nonparty preclusion should apply more broadly in "public-law" litigation than in "private-law" controversies. First, the FAA points to *Richards'* acknowledgment that when a taxpayer challenges "an alleged misuse of public funds" or "other public action," the suit "has only an indirect impact on [the plaintiff's] interests," 517 U.S., at 803, 116 S.Ct. 1761, and "the States have wide latitude to establish procedures [limiting] the number of judicial proceedings that may be entertained," *ibid.* In contrast to the public-law litigation contemplated in *Richards*, however, a successful FOIA action results in a grant of relief to the individual plaintiff, not a decree benefiting the public at large. Fur-

thermore, *Richards* said only that, for the type of public-law claims there envisioned, States were free to adopt procedures limiting repetitive litigation. While it appears equally evident that *Congress* can adopt such procedures, it hardly follows that *this Court* should proscribe or confine successive FOIA suits by different requesters. Second, the FAA argues that, because the number of plaintiffs in public-law cases is potentially limitless, it is theoretically possible for several persons to coordinate a series of vexatious repetitive lawsuits. But this risk does not justify departing from the usual nonparty preclusion rules. *Stare decisis* will allow courts to dispose of repetitive suits in the same circuit, and even when *stare decisis* is not dispositive, the human inclination not to waste money should discourage suits based on claims or issues already decided. Pp. 2176 – 2178.

2. The remaining question is whether the result reached by the courts below can be justified based on one of the six the established grounds for nonparty preclusion. With one exception, those grounds plainly have no application here. Respondents argue that Taylor's suit is a collusive attempt to relitigate Herrick's claim. That argument justifies a remand to allow the courts below the opportunity to determine whether the fifth ground for nonparty preclusion—preclusion because a nonparty to earlier litigation has brought suit as an agent of a party bound by the prior adjudication—applies to Taylor's suit. But courts should be cautious about finding preclusion on the basis of agency. A mere whiff of "tactical maneuvering" will not suffice; instead, principles of agency law indicate that preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication. Finally, the Court rejects Fairchild's suggestion that Taylor must bear the burden of proving he is not acting as Herrick's agent. Claim preclusion is an affirmative defense for the defendant to plead and prove. Pp. 2178 – 2180.

490 F.3d 965, vacated and remanded.

GINSBURG, J., delivered the opinion for a unanimous Court.

Adina H. Rosenbaum, Washington, DC, for Petitioner.

Douglas Hallward–Driemeier, Washington, DC, for Federal Respondent.

Catherine E. Stetson, for Respondent The Fairchild Corporation

Michael John Pangia, Washington, DC, Adina H. Rosenbaum, Brian Wolfman, Scott L. Nelson, Washington, DC, for Petitioner.

Paul D. Clement, Solicitor General, Jeffrey S. Bucholtz, Acting Assistant Attorney General, Edwin S. Kneedler, Deputy Solicitor General, Douglas Hallward–Driemeier, Assistant to the Solicitor General, Leonard Schaitman, Robert D. Kamenshine, Washington, D.C., for Federal Respondent.

Emily M. Yinger, N. Thomas Connally, Michael M. Smith, Hogan & Hartson LLP, McLean, VA, Catherine E. Stetson, Christopher T. Handman, Dominic F. Perella, Hogan & Hartson LLP, Washington, D.C., for Respondent The Fairchild Corporation.

For U.S. Supreme Court briefs, see:

2008 WL 494946 (Pet.Brief)

2008 WL 782551 (Resp.Brief)

2008 WL 795155 (Resp.Brief)

2008 WL 976392 (Reply.Brief)

Justice GINSBURG delivered the opinion of the Court.

[1] "It is a principle of general application in Anglo–American jurisprudence that one is not bound by a judgment *in person-*

am 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, 61 S.Ct. 115, 85 L.Ed. 22 (1940). Several exceptions, recognized in this Court's decisions, temper this basic rule. In a class action, for example, a person not named as a party may be bound by a judgment on the merits of the action, if she was adequately represented by a party who actively participated in the litigation. See *id.*, at 41, 61 S.Ct. 115. In this case, we consider for the first time whether there is a "virtual representation" exception to the general rule against precluding nonparties. Adopted by a number of courts, including the courts below in the case now before us, the exception so styled is broader than any we have so far approved.

The virtual representation question we examine in this opinion arises in the following context. Petitioner Brent Taylor filed a lawsuit under the Freedom of Information Act seeking certain documents from the Federal Aviation Administration. Greg Herrick, Taylor's friend, had previously brought an unsuccessful suit seeking the same records. The two men have no legal relationship, and there is no evidence that Taylor controlled, financed, participated in, or even had notice of Herrick's earlier suit. Nevertheless, the D.C. Circuit held Taylor's suit precluded by the judgment against Herrick because, in that court's assessment, Herrick qualified as Taylor's "virtual representative."

We disapprove the doctrine of preclusion by "virtual representation," and hold, based on the record as it now stands, that the judgment against Herrick does not bar Taylor from maintaining this suit.

I

The Freedom of Information Act (FOIA) accords "any person" a right to request any records held by a federal agency. 5 U.S.C. § 552(a)(3)(A) (2006 ed.). No reason need be given for a FOIA request, and unless the requested materials fall within one of the Act's enumerated exemptions, see § 552(a)(3)(E), (b), the agency must "make the records promptly available" to the requester, § 552(a)(3)(A). If an agency refuses to furnish the requested records, the requester may file suit in federal court and obtain an injunction "order[ing] the production of any agency records improperly withheld." § 552(a)(4)(B).

The courts below held the instant FOIA suit barred by the judgment in earlier litigation seeking the same records. Because the lower courts' decisions turned on the connection between the two lawsuits, we begin with a full account of each action.

A

The first suit was filed by Greg Herrick, an antique aircraft enthusiast and the owner of an F–45 airplane, a vintage model manufactured by the Fairchild Engine and Airplane Corporation (FEAC) in the 1930's. In 1997, seeking information that would help him restore his plane to its original condition, Herrick filed a FOIA request asking the Federal Aviation Administration (FAA) for copies of any technical documents about the F–45 contained in the agency's records.

To gain a certificate authorizing the manufacture and sale of the F–45, FEAC had submitted to the FAA's predecessor, the Civil Aeronautics Authority, detailed specifications and other technical data about the plane. Hundreds of pages of documents produced by FEAC in the certification process remain in the FAA's records. The FAA denied Herrick's request, however, upon finding that the documents he sought are subject to FOIA's exemption for "trade secrets and commercial or finan-

cial information obtained from a person and privileged or confidential," 5 U.S.C. § 552(b)(4) (2006 ed.). In an administrative appeal, Herrick urged that FEAC and its successors had waived any trade-secret protection. The FAA thereupon contacted FEAC's corporate successor, respondent Fairchild Corporation (Fairchild). Because Fairchild objected to release of the documents, the agency adhered to its original decision.

Herrick then filed suit in the U.S. District Court for the District of Wyoming. Challenging the FAA's invocation of the trade-secret exemption, Herrick placed heavy weight on a 1955 letter from FEAC to the Civil Aeronautics Authority. The letter authorized the agency to lend any documents in its files to the public "for use in making repairs or replacement parts for aircraft produced by Fairchild." *Herrick v. Garvey,* 298 F.3d 1184, 1193 (C.A.10 2002) (internal quotation marks omitted). This broad authorization, Herrick maintained, showed that the F–45 certification records held by the FAA could not be regarded as "secre[t]" or "confidential" within the meaning of § 552(b)(4).

Rejecting Herrick's argument, the District Court granted summary judgment to the FAA. *Herrick v. Garvey,* 200 F.Supp.2d 1321, 1328–1329 (D.Wyo.2000). The 1955 letter, the court reasoned, did not deprive the F–45 certification documents of trade-secret status, for those documents were never in fact released pursuant to the letter's blanket authorization. See *id.,* at 1329. The court also stated that even if the 1955 letter had waived trade-secret protection, Fairchild had successfully "reversed" the waiver by objecting to the FAA's release of the records to Herrick. *Ibid.*

On appeal, the Tenth Circuit agreed with Herrick that the 1955 letter had stripped the requested documents of trade-secret protection. See *Herrick,* 298 F.3d, at 1194. But the Court of Appeals upheld the District Court's alternative determination—*i.e.,* that Fairchild had restored trade-secret status by objecting to Herrick's FOIA request. *Id.,* at 1195. On that ground, the appeals court affirmed the entry of summary judgment for the FAA.

In so ruling, the Tenth Circuit noted that Herrick had failed to challenge two suppositions underlying the District Court's decision. First, the District Court assumed trade-secret status could be "restored" to documents that had lost protection. *Id.,* at 1194, n. 10. Second, the District Court also assumed that Fairchild had regained trade-secret status for the documents even though the company claimed that status only "*after* Herrick had initiated his request" for the F–45 records. *Ibid.* The Court of Appeals expressed no opinion on the validity of these suppositions. See *id.,* at 1194–1195, n. 10.

B

The Tenth Circuit's decision issued on July 24, 2002. Less than a month later, on August 22, petitioner Brent Taylor—a friend of Herrick's and an antique aircraft enthusiast in his own right—submitted a FOIA request seeking the same documents Herrick had unsuccessfully sued to obtain. When the FAA failed to respond, Taylor filed a complaint in the U.S. District Court for the District of Columbia. Like Herrick, Taylor argued that FEAC's 1955 letter had stripped the records of their trade-secret status. But Taylor also sought to litigate the two issues concerning recapture of protected status that Herrick had failed to raise in his appeal to the Tenth Circuit.

After Fairchild intervened as a defen-

dant,[1] the District Court in D.C. concluded that Taylor's suit was barred by claim preclusion; accordingly, it granted summary judgment to Fairchild and the FAA. The court acknowledged that Taylor was not a party to Herrick's suit. Relying on the Eighth Circuit's decision in *Tyus v. Schoemehl*, 93 F.3d 449 (1996), however, it held that a nonparty may be bound by a judgment if she was "virtually represented" by a party. App. to Pet. for Cert. 30a–31a.

The Eighth Circuit's seven-factor test for virtual representation, adopted by the District Court in Taylor's case, requires an "identity of interests" between the person to be bound and a party to the judgment. See *id.*, at 31a. See also *Tyus*, 93 F.3d, at 455. Six additional factors counsel in favor of virtual representation under the Eighth Circuit's test, but are not prerequisites: (1) a "close relationship" between the present party and a party to the judgment alleged to be preclusive; (2) "participation in the prior litigation" by the present party; (3) the present party's "apparent acquiescence" to the preclusive effect of the judgment; (4) "deliberat[e] maneuver[ing]" to avoid the effect of the judgment; (5) adequate representation of the present party by a party to the prior adjudication; and (6) a suit raising a "public law" rather than a "private law" issue. App. to Pet. for Cert. 31a (citing *Tyus*, 93 F.3d, at 454–456). These factors, the D.C. District Court observed, "constitute a fluid test with imprecise boundaries" and call for "a broad, case-by-case inquiry." App. to Pet. for Cert. 32a.

The record before the District Court in Taylor's suit revealed the following facts about the relationship between Taylor and Herrick: Taylor is the president of the Antique Aircraft Association, an organization to which Herrick belongs; the two men are "close associate[s]," App. 54; Herrick asked Taylor to help restore Herrick's F–45, though they had no contract or agreement for Taylor's participation in the restoration; Taylor was represented by the lawyer who represented Herrick in the earlier litigation; and Herrick apparently gave Taylor documents that Herrick had obtained from the FAA during discovery in his suit.

Fairchild and the FAA conceded that Taylor had not participated in Herrick's suit. App. to Pet. for Cert. 32a. The D.C. District Court determined, however, that Herrick ranked as Taylor's virtual representative because the facts fit each of the other six indicators on the Eighth Circuit's list. See *id.*, at 32a–35a. Accordingly, the District Court held Taylor's suit, seeking the same documents Herrick had requested, barred by the judgment against Herrick. See *id.*, at 35a.

The D.C. Circuit affirmed. It observed, first, that other Circuits "vary widely" in their approaches to virtual representation. *Taylor v. Blakey*, 490 F.3d 965, 971 (2007). In this regard, the D.C. Circuit contrasted the multifactor balancing test applied by the Eighth Circuit and the D.C. District Court with the Fourth Circuit's narrower approach, which "treats a party as a virtual representative only if the party is 'accountable to the nonparties who file a subsequent suit' and has 'the tacit approval of the court' to act on the nonpart[ies'] behalf." *Ibid.* (quoting *Klugh v. United States*, 818 F.2d 294, 300 (C.A.4 1987)).

Rejecting both of these approaches, the D.C. Circuit announced its own five-factor

1. Although Fairchild provided documents to the Wyoming District Court and filed an *amicus* brief in the Tenth Circuit, it was not a party to Herrick's suit. See *Herrick v. Garvey*, 298 F.3d 1184, 1188 (C.A.10 2002); *Herrick v. Garvey*, 200 F.Supp.2d 1321, 1327 (D.Wyo. 2000).

test. The first two factors—"identity of interests" and "adequate representation"—are necessary but not sufficient for virtual representation. 490 F.3d, at 971–972. In addition, at least one of three other factors must be established: "a close relationship between the present party and his putative representative," "substantial participation by the present party in the first case," or "tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." *Id.*, at 972.

Applying this test to the record in Taylor's case, the D.C. Circuit found both of the necessary conditions for virtual representation well met. As to identity of interests, the court emphasized that Taylor and Herrick sought the same result—release of the F–45 documents. Moreover, the D.C. Circuit observed, Herrick owned an F–45 airplane, and therefore had "if anything, a stronger incentive to litigate" than Taylor, who had only a "general interest in public disclosure and the preservation of antique aircraft heritage." *Id.*, at 973 (internal quotation marks omitted).

Turning to adequacy of representation, the D.C. Circuit acknowledged that some other Circuits regard notice of a prior suit as essential to a determination that a nonparty was adequately represented in that suit. See *id.*, at 973–974 (citing *Perez v. Volvo Car Corp.*, 247 F.3d 303, 312 (C.A.1 2001), and *Tice v. American Airlines, Inc.*, 162 F.3d 966, 973 (C.A.7 1998)). Disagreeing with these courts, the D.C. Circuit deemed notice an "important" but not an indispensable element in the adequacy inquiry. The court then concluded that Herrick had adequately represented Taylor even though Taylor had received no notice of Herrick's suit. For this conclusion, the appeals court relied on Herrick's "strong incentive to litigate" and Taylor's later engagement of the same attorney, which indicated to the court Taylor's satisfaction with that attorney's performance in Herrick's case. See 490 F.3d, at 974–975.

The D.C. Circuit also found its "close relationship" criterion met, for Herrick had "asked Taylor to assist him in restoring his F–45" and "provided information to Taylor that Herrick had obtained through discovery"; furthermore, Taylor "did not oppose Fairchild's characterization of Herrick as his 'close associate.' " *Id.*, at 975. Because the three above-described factors sufficed to establish virtual representation under the D.C. Circuit's five-factor test, the appeals court left open the question whether Taylor had engaged in "tactical maneuvering." See *id.*, at 976 (calling the facts bearing on tactical maneuvering "ambigu[ous]").[2]

We granted certiorari, 552 U.S. ——, 128 S.Ct. 977, 169 L.Ed.2d 800 (2008), to resolve the disagreement among the Circuits over the permissibility and scope of preclusion based on "virtual representation."[3]

2. The D.C. Circuit did not discuss the District Court's distinction between public-law and private-law claims.

3. The Ninth Circuit applies a five-factor test similar to the D.C. Circuit's. See *Kourtis v. Cameron*, 419 F.3d 989, 996 (2005). The Fifth, Sixth, and Eleventh Circuits, like the Fourth Circuit, have constrained the reach of virtual representation by requiring, *inter alia*, the existence of a legal relationship between the nonparty to be bound and the putative representative. See *Pollard v. Cockrell*, 578 F.2d 1002, 1008 (C.A.5 1978); *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 424 (C.A.6 1999); *EEOC v. Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1289 (C.A.11 2004). The Seventh Circuit, in contrast, has rejected the doctrine of virtual representation altogether. See *Perry v. Globe Auto Recycling, Inc.*, 227 F.3d 950, 953 (2000).

II

[2–4] The preclusive effect of a federal-court judgment is determined by federal common law. See *Semtek Int'l Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 507–508, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001). For judgments in federal-question cases—for example, Herrick's FOIA suit—federal courts participate in developing "uniform federal rule[s]" of res judicata, which this Court has ultimate authority to determine and declare. *Id.,* at 508, 121 S.Ct. 1021.[4] The federal common law of preclusion is, of course, subject to due process limitations. See *Richards v. Jefferson County,* 517 U.S. 793, 797, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996).

Taylor's case presents an issue of first impression in this sense: Until now, we have never addressed the doctrine of "virtual representation" adopted (in varying forms) by several Circuits and relied upon by the courts below. Our inquiry, however, is guided by well-established precedent regarding the propriety of nonparty preclusion. We review that precedent before taking up directly the issue of virtual representation.

A

[5, 6] The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as "res judicata."[5] Under the doctrine of claim preclusion, a final judgment forecloses "successive litigation of the very same claim, whether or not relitigation of the claim raises the same issues as the earlier suit." *New Hampshire v. Maine,* 532 U.S. 742, 748, 121 S.Ct. 1808, 149 L.Ed.2d 968 (2001). Issue preclusion, in contrast, bars "successive litigation of an issue of fact or law actually litigated and resolved in a valid court determination essential to the prior judgment," even if the issue recurs in the context of a different claim. *Id.,* at 748–749, 121 S.Ct. 1808. By "preclud[ing] parties from contesting matters that they have had a full and fair opportunity to litigate," these two doctrines protect against "the expense and vexation attending multiple lawsuits, conserv[e] judicial resources, and foste[r] reliance on judicial action by minimizing the possibility of inconsistent decisions." *Montana v. United States,* 440 U.S. 147, 153–154, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979).

A person who was not a party to a suit generally has not had a "full and fair opportunity to litigate" the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the "deep-rooted historic tradition that everyone should have his own day in court." *Richards,* 517 U.S., at 798, 116 S.Ct. 1761 (internal quotation marks omitted). Indicating the strength of that tradition, we have often repeated the general rule 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,* 311 U.S., at 40, 61 S.Ct. 115. See also, *e.g., Richards,* 517 U.S., at 798, 116 S.Ct. 1761; *Martin v. Wilks,* 490 U.S. 755, 761, 109 S.Ct. 2180, 104 L.Ed.2d 835 (1989); *Zenith*

4. For judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits. See *Semtek Int'l Inc. v. Lockheed Martin Corp.,* 531 U.S. 497, 508, 121 S.Ct. 1021, 149 L.Ed.2d 32 (2001).

5. These terms have replaced a more confusing lexicon. Claim preclusion describes the rules formerly known as "merger" and "bar," while issue preclusion encompasses the doctrines once known as "collateral estoppel" and "direct estoppel." See *Migra v. Warren City School Dist. Bd. of Ed.,* 465 U.S. 75, 77, n. 1, 104 S.Ct. 892, 79 L.Ed.2d 56 (1984).

Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110, 89 S.Ct. 1562, 23 L.Ed.2d 129 (1969).

B

Though hardly in doubt, the rule against nonparty preclusion is subject to exceptions. For present purposes, the recognized exceptions can be grouped into six categories.[6]

[7] First, "[a] person who agrees to be bound by the determination of issues in an action between others is bound in accordance with the terms of his agreement." 1 Restatement (Second) of Judgments § 40, p. 390 (1980) (hereinafter Restatement). For example, "if separate actions involving the same transaction are brought by different plaintiffs against the same defendant, all the parties to all the actions may agree that the question of the defendant's liability will be definitely determined, one way or the other, in a 'test case.'" D. Shapiro, Civil Procedure: Preclusion in Civil Actions 77–78 (2001) (hereinafter Shapiro). See also *California v. Texas*, 459 U.S. 1096, 1097, 103 S.Ct. 714, 74 L.Ed.2d 944 (1983) (dismissing certain defendants from a suit based on a stipulation "that each of said defendants . . . will be bound by a final judgment of this Court" on a specified issue).[7]

Second, nonparty preclusion may be justified based on a variety of pre-existing "substantive legal relationship[s]" between the person to be bound and a party to the judgment. Shapiro 78. See also *Richards*, 517 U.S., at 798, 116 S.Ct. 1761. Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor. See 2 Restatement §§ 43–44, 52, 55. These exceptions originated "as much from the needs of property law as from the values of preclusion by judgment." 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4448, p. 329 (2d ed.2002) (hereinafter Wright & Miller).[8]

Third, we have confirmed that, "in certain limited circumstances," a nonparty may be bound by a judgment because she was "adequately represented by someone with the same interests who [wa]s a party" to the suit. *Richards*, 517 U.S., at 798, 116 S.Ct. 1761 (internal quotation marks omitted). Representative suits with preclusive effect on nonparties include properly conducted class actions, see *Martin*, 490 U.S., at 762, n. 2, 109 S.Ct. 2180 (citing Fed. Rule Civ. Proc. 23), and suits brought by

6. The established grounds for nonparty preclusion could be organized differently. See, *e.g.*, 1 & 2 Restatement (Second) of Judgments §§ 39–62 (1980) (hereinafter Restatement); D. Shapiro, Civil Procedure: Preclusion in Civil Actions 75–92 (2001); 18A C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 4448, pp. 327–329 (2d ed.2002) (hereinafter Wright & Miller). The list that follows is meant only to provide a framework for our consideration of virtual representation, not to establish a definitive taxonomy.

7. The Restatement observes that a nonparty may be bound not only by express or implied agreement, but also through conduct inducing reliance by others. See 2 Restatement § 62. See also 18A Wright & Miller § 4453, pp. 425–429. We have never had occasion to consider this ground for nonparty preclusion, and we express no view on it here.

8. The substantive legal relationships justifying preclusion are sometimes collectively referred to as "privity." See, *e.g.*, *Richards v. Jefferson County*, 517 U.S. 793, 798, 116 S.Ct. 1761, 135 L.Ed.2d 76 (1996); 2 Restatement § 62, Comment *a*. The term "privity," however, has also come to be used more broadly, as a way to express the conclusion that nonparty preclusion is appropriate on any ground. See 18A Wright & Miller § 4449, pp. 351–353, and n. 33 (collecting cases). To ward off confusion, we avoid using the term "privity" in this opinion.

trustees, guardians, and other fiduciaries, see *Sea–Land Services, Inc. v. Gaudet*, 414 U.S. 573, 593, 94 S.Ct. 806, 39 L.Ed.2d 9 (1974). See also 1 Restatement § 41.

Fourth, a nonparty is bound by a judgment if she "assume[d] control" over the litigation in which that judgment was rendered. *Montana*, 440 U.S., at 154, 99 S.Ct. 970. See also *Schnell v. Peter Eckrich & Sons, Inc.*, 365 U.S. 260, 262, n. 4, 81 S.Ct. 557, 5 L.Ed.2d 546 (1961); 1 Restatement § 39. Because such a person has had "the opportunity to present proofs and argument," he has already "had his day in court" even though he was not a formal party to the litigation. *Id.*, Comment *a*, p. 382.

Fifth, a party bound by a judgment may not avoid its preclusive force by relitigating through a proxy. Preclusion is thus in order when a person who did not participate in a litigation later brings suit as the designated representative of a person who was a party to the prior adjudication. See *Chicago, R.I. & P.R. Co. v. Schendel*, 270 U.S. 611, 620, 623, 46 S.Ct. 420, 70 L.Ed. 757 (1926); 18A Wright & Miller § 4454, pp. 433–434. And although our decisions have not addressed the issue directly, it also seems clear that preclusion is appropriate when a nonparty later brings suit as an agent for a party who is bound by a judgment. See *id.*, § 4449, p. 335.

Sixth, in certain circumstances a special statutory scheme may "expressly foreclos[e] successive litigation by nonlitigants . . . if the scheme is otherwise consistent with due process." *Martin*, 490 U.S., at 762, n. 2, 109 S.Ct. 2180. Examples of such schemes include bankruptcy and probate proceedings, see *ibid.*, and *quo warranto* actions or other suits that, "under [the governing] law, [may] be brought only on behalf of the public at large," *Richards*, 517 U.S., at 804, 116 S.Ct. 1761.

III

Reaching beyond these six established categories, some lower courts have recognized a "virtual representation" exception to the rule against nonparty preclusion. Decisions of these courts, however, have been far from consistent. See 18A Wright & Miller § 4457, p. 513 (virtual representation lacks a "clear or coherent theory"; decisions applying it have "an episodic quality"). Some Circuits use the label, but define "virtual representation" so that it is no broader than the recognized exception for adequate representation. See, *e.g.*, *Becherer v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415, 423, 427 (C.A.6 1999). But other courts, including the Eighth, Ninth, and D.C. Circuits, apply multifactor tests for virtual representation that permit nonparty preclusion in cases that do not fit within any of the established exceptions. See *supra*, at 2168 – 2170, and n. 3.

The D.C. Circuit, the FAA, and Fairchild have presented three arguments in support of an expansive doctrine of virtual representation. We find none of them persuasive.

A

[8] The D.C. Circuit purported to ground its virtual representation doctrine in this Court's decisions stating that, in some circumstances, a person may be bound by a judgment if she was adequately represented by a party to the proceeding yielding that judgment. See 490 F.3d, at 970–971. But the D.C. Circuit's definition of "adequate representation" strayed from the meaning our decisions have attributed to that term.

In *Richards*, we reviewed a decision by the Alabama Supreme Court holding that a challenge to a tax was barred by a judgment upholding the same tax in a suit

filed by different taxpayers. 517 U.S., at 795–797, 116 S.Ct. 1761. The plaintiffs in the first suit "did not sue on behalf of a class," their complaint "did not purport to assert any claim against or on behalf of any nonparties," and the judgment "did not purport to bind" nonparties. *Id.,* at 801, 116 S.Ct. 1761. There was no indication, we emphasized, that the court in the first suit "took care to protect the interests" of absent parties, or that the parties to that litigation "understood their suit to be on behalf of absent [parties]." *Id.,* at 802, 116 S.Ct. 1761. In these circumstances, we held, the application of claim preclusion was inconsistent with "the due process of law guaranteed by the Fourteenth Amendment." *Id.,* at 797, 116 S.Ct. 1761.

The D.C. Circuit stated, without elaboration, that it did not "read *Richards* to hold a nonparty ... adequately represented only if special procedures were followed [to protect the nonparty] or the party to the prior suit understood it was representing the nonparty." 490 F.3d, at 971. As the D.C. Circuit saw this case, Herrick adequately represented Taylor for two principal reasons: Herrick had a strong incentive to litigate; and Taylor later hired Herrick's lawyer, suggesting Taylor's "satisfaction with the attorney's performance in the prior case." *Id.,* at 975.

The D.C. Circuit misapprehended *Richards*. As just recounted, our holding that the Alabama Supreme Court's application of res judicata to nonparties violated due process turned on the lack of either special procedures to protect the nonparties' interests or an understanding by the concerned parties that the first suit was brought in a representative capacity. See *Richards,* 517 U.S., at 801–802, 116 S.Ct. 1761. *Richards* thus established that representation is "adequate" for purposes of nonparty preclusion only if (at a minimum) one of these two circumstances is present.

We restated *Richards'* core holding in *South Central Bell Telephone Co. v. Alabama,* 526 U.S. 160, 119 S.Ct. 1180, 143 L.Ed.2d 258 (1999). In that case, as in *Richards,* the Alabama courts had held that a judgment rejecting a challenge to a tax by one group of taxpayers barred a subsequent suit by a different taxpayer. See 526 U.S., at 164–165, 119 S.Ct. 1180. In *South Central Bell,* however, the nonparty had notice of the original suit and engaged one of the lawyers earlier employed by the original plaintiffs. See *id.,* at 167–168, 119 S.Ct. 1180. Under the D.C. Circuit's decision in Taylor's case, these factors apparently would have sufficed to establish adequate representation. See 490 F.3d, at 973–975. Yet *South Central Bell* held that the application of res judicata in that case violated due process. Our inquiry came to an end when we determined that the original plaintiffs had not understood themselves to be acting in a representative capacity and that there had been no special procedures to safeguard the interests of absentees. See 526 U.S., at 168, 119 S.Ct. 1180.

Our decisions recognizing that a nonparty may be bound by a judgment if she was adequately represented by a party to the earlier suit thus provide no support for the D.C. Circuit's broad theory of virtual representation.

B

[9] Fairchild and the FAA do not argue that the D.C. Circuit's virtual representation doctrine fits within any of the recognized grounds for nonparty preclusion. Rather, they ask us to abandon the attempt to delineate discrete grounds and clear rules altogether. Preclusion is in order, they contend, whenever "the relationship between a party and a non-party

is 'close enough' to bring the second litigant within the judgment." Brief for Respondent Fairchild 20. See also Brief for Respondent FAA 22–24. Courts should make the "close enough" determination, they urge, through a "heavily fact-driven" and "equitable" inquiry. Brief for Respondent Fairchild 20. See also Brief for Respondent FAA 22 ("there is no clear test" for nonparty preclusion; rather, an "equitable and fact-intensive" inquiry is demanded (internal quotation marks omitted)). Only this sort of diffuse balancing, Fairchild and the FAA argue, can account for all of the situations in which nonparty preclusion is appropriate.

We reject this argument for three reasons. First, our decisions emphasize the fundamental nature of the general rule that a litigant is not bound by a judgment to which she was not a party. See, *e.g.*, *Richards*, 517 U.S., at 798–799, 116 S.Ct. 1761; *Martin*, 490 U.S., at 761–762, 109 S.Ct. 2180. Accordingly, we have endeavored to delineate discrete exceptions that apply in "limited circumstances." *Id.*, at 762, n. 2, 109 S.Ct. 2180. Respondents' amorphous balancing test is at odds with the constrained approach to nonparty preclusion our decisions advance.

Resisting this reading of our precedents, respondents call up three decisions they view as supportive of the approach they espouse. Fairchild quotes our statement in *Coryell v. Phipps*, 317 U.S. 406, 411, 63 S.Ct. 291, 87 L.Ed. 363 (1943), that privity "turns on the facts of particular cases." See Brief for Respondent Fairchild 20. That observation, however, scarcely implies that privity is governed by a diffuse balancing test.[9] Fairchild also cites *Blonder–Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 334, 91 S.Ct. 1434, 28 L.Ed.2d 788 (1971), which stated that estoppel questions turn on "the trial courts' sense of justice and equity." See Brief for Respondent Fairchild 20. This passing statement, however, was not made with nonparty preclusion in mind; it appeared in a discussion recognizing district courts' discretion to *limit* the use of issue preclusion against persons who *were* parties to a judgment. See *Blonder–Tongue*, 402 U.S., at 334, 91 S.Ct. 1434.

The FAA relies on *United States v. Des Moines Valley R. Co.*, 84 F. 40 (C.A.8 1897), an opinion we quoted with approval in *Schendel*, 270 U.S., at 619–620, 46 S.Ct. 420. *Des Moines Valley* was a quiet title action in which the named plaintiff was the United States. The Government, however, had "no interest in the land" and had "simply permitted [the landowner] to use its name as the nominal plaintiff." 84 F., at 42. The suit was therefore barred, the appeals court held, by an earlier judgment against the landowner. As the court explained: "[W]here the government lends its name as a plaintiff ... to enable one private person to maintain a suit against another," the government is "subject to the same defenses which exist ... against the real party in interest." *Id.*, at 43. *Des Moines Valley*, the FAA contended at oral argument, demonstrates that it is sometimes appropriate to bind a nonparty in circumstances that do not fit within any of the established grounds for nonparty preclusion. See Tr. of Oral Arg. 31–33. Properly understood, however, *Des Moines Valley* is simply an application of the fifth basis for nonparty preclusion described above: A party may not use a

9. Moreover, *Coryell* interpreted the term "privity" not in the context of res judicata, but as used in a statute governing shipowner liability. See *Coryell v. Phipps*, 317 U.S. 406, 407–408, and n. 1, 63 S.Ct. 291, 87 L.Ed. 363 (1943). And we made the statement Fairchild quotes in explaining why it was appropriate to defer to the findings of the lower courts, not as a comment on the substantive rules of privity. See *id.*, at 411, 63 S.Ct. 291.

representative or agent to relitigate an adverse judgment. See *supra*, at 2172 – 2173.[10] We thus find no support in our precedents for the lax approach to nonparty preclusion advocated by respondents.

Our second reason for rejecting a broad doctrine of virtual representation rests on the limitations attending nonparty preclusion based on adequate representation. A party's representation of a nonparty is "adequate" for preclusion purposes only if, at a minimum: (1) the interests of the nonparty and her representative are aligned, see *Hansberry*, 311 U.S., at 43, 61 S.Ct. 115; and (2) either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty, see *Richards*, 517 U.S., at 801–802, 116 S.Ct. 1761; *supra*, at 2173 – 2174. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented, see *Richards*, 517 U.S., at 801, 116 S.Ct. 1761.[11] In the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23.

An expansive doctrine of virtual representation, however, would "recogniz[e], in effect, a common-law kind of class action." *Tice*, 162 F.3d, at 972 (internal quotation marks omitted). That is, virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in *Hansberry*, *Richards*, and Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to "create *de facto* class actions at will." *Tice*, 162 F.3d, at 973.

Third, a diffuse balancing approach to nonparty preclusion would likely create more headaches than it relieves. Most obviously, it could significantly complicate the task of district courts faced in the first instance with preclusion questions. An all-things-considered balancing approach might spark wide-ranging, time-consuming, and expensive discovery tracking factors potentially relevant under seven- or five-prong tests. And after the relevant facts are established, district judges would be called upon to evaluate them under a standard that provides no firm guidance. See *Tyus*, 93 F.3d, at 455 (conceding that "there is no clear test for determining the applicability of" the virtual representation doctrine announced in that case). Preclusion doctrine, it should be recalled, is in-

10. The FAA urges that there was no agency relationship between the landowner and the United States because the landowner did not control the U.S. Attorney's conduct of the suit. See Tr. of Oral Arg. 33. That point is debatable. See *United States v. Des Moines Valley R. Co.*, 84 F. 40, 42–43 (C.A.8 1897) (the United States was only a "nominal plaintiff"; it merely "len[t]" its name to the landowner). But even if the FAA is correct about agency, the United States plainly litigated as the landowner's designated representative. See *id.*, at 42 ("The bill does not attempt to conceal the fact that . . . its real purpose is to champion the cause of [the landowner] . . . ."). See also *Chicago, R.I. & P.R. Co. v. Schendel*, 270 U.S. 611, 618–620, 46 S.Ct. 420, 70 L.Ed. 757 (1926) (classifying *Des Moines Valley* with other cases of preclusion based on representation).

11. *Richards* suggested that notice is required in some representative suits, *e.g.*, class actions seeking monetary relief. See 517 U.S., at 801, 116 S.Ct. 1761 (citing *Hansberry v. Lee*, 311 U.S. 32, 40, 61 S.Ct. 115, 85 L.Ed. 22 (1940), *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177, 94 S.Ct. 2140, 40 L.Ed.2d 732 (1974), and *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 319, 70 S.Ct. 652, 94 L.Ed. 865 (1950)). But we assumed without deciding that a lack of notice might be overcome in some circumstances. See *Richards*, 517 U.S., at 801, 116 S.Ct. 1761.

tended to reduce the burden of litigation on courts and parties. Cf. *Montana*, 440 U.S., at 153–154, 99 S.Ct. 970. "In this area of the law," we agree, " 'crisp rules with sharp corners' are preferable to a round-about doctrine of opaque standards." *Bittinger v. Tecumseh Products Co.*, 123 F.3d 877, 881 (C.A.6 1997).

C

[10] Finally, relying on the Eighth Circuit's decision in *Tyus*, 93 F.3d, at 456, the FAA maintains that nonparty preclusion should apply more broadly in "public-law" litigation than in "private-law" controversies. To support this position, the FAA offers two arguments. First, the FAA urges, our decision in *Richards* acknowledges that, in certain cases, the plaintiff has a reduced interest in controlling the litigation "because of the public nature of the right at issue." Brief for Respondent FAA 28. When a taxpayer challenges "an alleged misuse of public funds" or "other public action," we observed in *Richards*, the suit "has only an indirect impact on [the plaintiff's] interests." 517 U.S., at 803, 116 S.Ct. 1761. In actions of this character, the Court said, "we may assume that the States have wide latitude to establish procedures . . . to limit the number of judicial proceedings that may be entertained." *Ibid.*

Taylor's FOIA action falls within the category described in *Richards*, the FAA contends, because "the duty to disclose under FOIA is owed to the public generally." See Brief for Respondent FAA 34. The opening sentence of FOIA, it is true, states that agencies "shall make [information] available to the public." 5 U.S.C. § 552(a) (2006 ed.). Equally true, we have several times said that FOIA vindicates a "public" interest. *E.g., National Archives and Records Admin. v. Favish*, 541 U.S. 157, 172, 124 S.Ct. 1570, 158 L.Ed.2d 319 (2004). The Act, however, instructs agencies receiving FOIA requests to make the information available not to the public at large, but rather to the "person" making the request. § 552(a)(3)(A). See also § 552(a)(3)(B) ("In making any record available *to a person* under this paragraph, an agency shall provide the record in any [readily reproducible] form or format requested *by the person* . . . ." (emphasis added)); Brief for National Security Archive et al. as *Amici Curiae* 10 ("Government agencies do not systematically make released records available to the general public."). Thus, in contrast to the public-law litigation contemplated in *Richards*, a successful FOIA action results in a grant of relief to the individual plaintiff, not a decree benefiting the public at large.

Furthermore, we said in *Richards* only that, for the type of public-law claims there envisioned, States are free to adopt procedures limiting repetitive litigation. See 517 U.S., at 803, 116 S.Ct. 1761. In this regard, we referred to instances in which the first judgment foreclosed successive litigation by other plaintiffs because, "under state law, [the suit] could be brought only on behalf of the public at large." *Id.*, at 804, 116 S.Ct. 1761.[12] *Richards* spoke of state legislation, but it appears equally evident that *Congress*, in providing for actions vindicating a public interest, may "limit the number of judicial proceedings that may be entertained." *Id.*, at 803, 116 S.Ct. 1761. It hardly follows, however, that *this Court* should proscribe or confine successive FOIA suits by different requesters. Indeed, Congress' provision for FOIA suits with no statutory constraint on successive actions counsels against judicial imposition of con-

12. Nonparty preclusion in such cases ranks under the sixth exception described above: special statutory schemes that expressly limit subsequent suits. See *supra*, at 2173.

straints through extraordinary application of the common law of preclusion.

The FAA next argues that "the threat of vexatious litigation is heightened" in public-law cases because "the number of plaintiffs with standing is potentially limitless." Brief for Respondent FAA 28 (internal quotation marks omitted). FOIA does allow "any person" whose request is denied to resort to federal court for review of the agency's determination. 5 U.S.C. § 552(a)(3)(A), (4)(B) (2006 ed.). Thus it is theoretically possible that several persons could coordinate to mount a series of repetitive lawsuits.

But we are not convinced that this risk justifies departure from the usual rules governing nonparty preclusion. First, *stare decisis* will allow courts swiftly to dispose of repetitive suits brought in the same circuit. Second, even when *stare decisis* is not dispositive, "the human tendency not to waste money will deter the bringing of suits based on claims or issues that have already been adversely determined against others." Shapiro 97. This intuition seems to be borne out by experience: The FAA has not called our attention to any instances of abusive FOIA suits in the Circuits that reject the virtual-representation theory respondents advocate here.

IV

[11] For the foregoing reasons, we disapprove the theory of virtual representation on which the decision below rested. The preclusive effects of a judgment in a federal-question case decided by a federal court should instead be determined according to the established grounds for nonparty preclusion described in this opinion. See Part II–B, *supra*.

Although references to "virtual representation" have proliferated in the lower courts, our decision is unlikely to occasion any great shift in actual practice. Many opinions use the term "virtual representation" in reaching results at least arguably defensible on established grounds. See 18A Wright & Miller § 4457, pp. 535–539, and n. 38 (collecting cases). In these cases, dropping the "virtual representation" label would lead to clearer analysis with little, if any, change in outcomes. See *Tice*, 162 F.3d, at 971. ("[T]he term 'virtual representation' has cast more shadows than light on the problem [of nonparty preclusion].").

In some cases, however, lower courts have relied on virtual representation to extend nonparty preclusion beyond the latter doctrine's proper bounds. We now turn back to Taylor's action to determine whether his suit is such a case, or whether the result reached by the courts below can be justified on one of the recognized grounds for nonparty preclusion.

A

[12] It is uncontested that four of the six grounds for nonparty preclusion have no application here: There is no indication that Taylor agreed to be bound by Herrick's litigation, that Taylor and Herrick have any legal relationship, that Taylor exercised any control over Herrick's suit, or that this suit implicates any special statutory scheme limiting relitigation. Neither the FAA nor Fairchild contends otherwise.

It is equally clear that preclusion cannot be justified on the theory that Taylor was adequately represented in Herrick's suit. Nothing in the record indicates that Herrick understood himself to be suing on Taylor's behalf, that Taylor even knew of Herrick's suit, or that the Wyoming District Court took special care to protect Taylor's interests. Under our pathmarking precedent, therefore, Herrick's repre-

sentation was not "adequate." See *Richards,* 517 U.S., at 801–802, 116 S.Ct. 1761.

That leaves only the fifth category: preclusion because a nonparty to an earlier litigation has brought suit as a representative or agent of a party who is bound by the prior adjudication. Taylor is not Herrick's legal representative and he has not purported to sue in a representative capacity. He concedes, however, that preclusion would be appropriate if respondents could demonstrate that he is acting as Herrick's "undisclosed agen[t]." Brief for Petitioner 23, n. 4. See also *id.,* at 24, n. 5.

Respondents argue here, as they did below, that Taylor's suit is a collusive attempt to relitigate Herrick's action. See Brief for Respondent Fairchild 32, and n. 18; Brief for Respondent FAA 18–19, 33, 39. The D.C. Circuit considered a similar question in addressing the "tactical maneuvering" prong of its virtual representation test. See 490 F.3d, at 976. The Court of Appeals did not, however, treat the issue as one of agency, and it expressly declined to reach any definitive conclusions due to "the ambiguity of the facts." *Ibid.* We therefore remand to give the courts below an opportunity to determine whether Taylor, in pursuing the instant FOIA suit, is acting as Herrick's agent. Taylor concedes that such a remand is appropriate. See Tr. of Oral Arg. 56–57.

We have never defined the showing required to establish that a nonparty to a prior adjudication has become a litigating agent for a party to the earlier case. Because the issue has not been briefed in any detail, we do not discuss the matter elaboratively here. We note, however, that courts should be cautious about finding preclusion on this basis. A mere whiff of "tactical maneuvering" will not suffice; instead, principles of agency law are suggestive. They indicate that preclusion is appropriate only if the putative agent's conduct of the suit is subject to the control of the party who is bound by the prior adjudication. See 1 Restatement (Second) of Agency § 14, p. 60 (1957) ("A principal has the right to control the conduct of the agent with respect to matters entrusted to him.").[13]

B

[13] On remand, Fairchild suggests, Taylor should bear the burden of proving he is not acting as Herrick's agent. When a defendant points to evidence establishing a close relationship between successive litigants, Fairchild maintains, "the burden [should] shif[t] to the second litigant to submit evidence refuting the charge" of agency. Brief for Respondent Fairchild 27–28. Fairchild justifies this proposed burden-shift on the ground that "it is unlikely an opposing party will have access to direct evidence of collusion." *Id.,* at 28, n. 14.

We reject Fairchild's suggestion. Claim preclusion, like issue preclusion, is an affirmative defense. See Fed. Rule Civ. Proc. 8(c); *Blonder–Tongue,* 402 U.S., at 350, 91 S.Ct. 1434. Ordinarily, it is incumbent on

13. Our decision in *Montana v. United States,* 440 U.S. 147, 99 S.Ct. 970, 59 L.Ed.2d 210 (1979), also suggests a "control" test for agency. In that case, we held that the United States was barred from bringing a suit because it had controlled a prior unsuccessful action filed by a federal contractor. See *id.,* at 155, 99 S.Ct. 970. We see no reason why preclusion based on a lesser showing would have been appropriate if the order of the two actions had been switched—that is, if the United States had brought the first suit itself, and then sought to relitigate the same claim through the contractor. See *Schendel,* 270 U.S., at 618, 46 S.Ct. 420 ("[I]f, in legal contemplation, there is identity of parties" when two suits are brought in one order, "there must be like identity" when the order is reversed.).

the defendant to plead and prove such a defense, see *Jones v. Bock*, 549 U.S. 199, 204, 127 S.Ct. 910, 166 L.Ed.2d 798 (2007), and we have never recognized claim preclusion as an exception to that general rule, see 18 Wright & Miller § 4405, p. 83 ("[A] party asserting preclusion must carry the burden of establishing all necessary elements."). We acknowledge that direct evidence justifying nonparty preclusion is often in the hands of plaintiffs rather than defendants. See, *e.g.*, *Montana*, 440 U.S., at 155, 99 S.Ct. 970 (listing evidence of control over a prior suit). But "[v]ery often one must plead and prove matters as to which his adversary has superior access to the proof." 2 K. Broun, McCormick on Evidence § 337, p. 475 (6th ed.2006). In these situations, targeted interrogatories or deposition questions can reduce the information disparity. We see no greater cause here than in other matters of affirmative defense to disturb the traditional allocation of the proof burden.

* * *

For the reasons stated, the judgment of the United States Court of Appeals for the District of Columbia Circuit is vacated, and the case is remanded for further proceedings consistent with this opinion.

It is so ordered.

REPUBLIC OF The PHILIPPINES, et al., Petitioners,

v.

Jerry S. PIMENTEL, Temporary Administrator of the Estate of Mariano J. Pimentel, Deceased, et al.

No. 06–1204.

Argued March 17, 2008.

Decided June 12, 2008.

Background: Holder of assets transferred to Panamanian company by then-President of Republic of the Philippines brought interpleader action, seeking to resolve conflicting claims to assets. Following remand, 309 F.3d 1143, the United States District Court for the District of Hawaiji, Manuel L. Real, J., awarded funds to class of human rights victims. Appeal was taken. The United States Court of Appeals for the Ninth Circuit, 464 F.3d 885, affirmed. Certiorari was granted.

Holding: The United States Supreme Court, Justice Kennedy, held that action could not proceed without Republic of the Philippines and good-government commission created by the Republic as parties.

Reversed and remanded.

Justice Stevens filed opinion concurring in part and dissenting in part.

Justice Souter filed opinion concurring in part and dissenting in part.

1. Federal Civil Procedure ⚿1747, 1824

A court with proper jurisdiction may consider sua sponte the absence of a required person and dismiss for failure to join. Fed.Rules Civ.Proc.Rule 19(b), 28 U.S.C.A.

2. Federal Civil Procedure ⚿1747

Decision whether to dismiss case for nonjoinder of a person who should be joined if feasible must be based on factors

Attachment B

DO YOU YAHOO!? fax message

date: January 24, 2011

to: Bruce S. Kaplan, Esq.
Friedman Kaplan Seiler & Adelman LLP

fax#: 212-833-1250/973-877-6452

Re: *In re Chevron Corporation*
(Internal Reference No. 169381)

from: Svetlana Shatnenko
Paralegal II
408-349-1099

pages: __7__ (including coversheet)

COMMENTS: Originals will follow via U.S. Mail. Please contact me if you have any questions. Thank you.

701 First Avenue
Sunnyvale, CA 94089
Compliance Fax: 408-349-7941
Phone: 408-349-3300
www.yahoo.com

YAHOO!

January 24, 2011

Via Facsimile and U.S. Mail
212-833-1250

Bruce S. Kaplan, Esq.
Friedman Kaplan Seiler & Adelman LLP
1633 Broadway, 46th Floor
New York, NY 10019-6708

Re: ***In re Chevron Corporation***
United States District Court for the Northern District of California (Pending in Southern District of New York), Case # 10-MC-0002
(Internal Reference No.169381)

Dear Mr. Kaplan:

Pursuant to the Subpoena issued in the above-referenced matter on January 3, 2011, Yahoo! Inc. ("Yahoo!") conducted a diligent search for information accessible on Yahoo!'s systems relating to the user specified in the Subpoena. Our response is made in accordance with state and federal law, including the Stored Communications Act, and does not include any contents of communication or otherwise protected information. *See* 18 U.S.C. § 2701 *et seq.*

Enclosed is the following information regarding the user account specified in the Subpoena, including any previously existing information: 1) the user profile, as produced by the Yahoo! Account Management Tool; and 2) the dates, times and Internet Protocol ("IP") addresses for logins. A declaration authenticating these records also is enclosed.

To the extent any document provided herein contains information that exceeds the scope of your request, is protected from disclosure, or is otherwise not subject to production, we have redacted such information or removed such data fields. Yahoo! may not require or verify user information because it offers many of its user services for free.

Yahoo! requests reimbursement in the amount of $75.00 for the reasonable costs incurred in processing your request, including searching for records, reproduction and delivery costs. Please forward payment to Yahoo! Custodian of Records, 701 First Avenue, Sunnyvale, CA 94089. Please write the Internal Reference number (listed above) on your check. The federal tax ID number for Yahoo! is [redacted].

By this response, Yahoo! does not waive any objection to further proceedings in this matter.

Please contact me if you have any questions.

Sincerely,

Svetlana Shatnenko
Paralegal II
408-349-1099

Enclosures

701 first avenue
sunnyvale, ca 94089
phone 408 349 3300 fax 408 349 3301

UNITED STATES DISTRICT COURT

NORTHERN DISTRICT OF CALIFORNIA

In re Chevron Corporation	Case No. 10-MC-0002 **DECLARATION OF SVETLANA SHATNENKO** (pending in Southern District of New York)

I, Svetlana Shatnenko, declare:

1. I am a Custodian of Records for Yahoo! Inc. ("Yahoo!"), located in Sunnyvale, California. I am authorized to submit this declaration on behalf of Yahoo!. I make this declaration pursuant to the Federal Rules of Evidence Rule 902(11) and in response to a Subpoena dated January 3, 2011. I have personal knowledge of the following facts, except as noted, and could testify competently thereto if called as a witness.

2. Attached hereto are true and correct copies of 3 pages of the following data pertaining to the Yahoo! ID identified in the Subpoena: 1) the user profile, as produced by the Yahoo! Account Management Tool; and 2) the dates, times and Internet Protocol ("IP") addresses for logins. Yahoo!'s servers record this data automatically at the time, or reasonably soon after, it is entered or transmitted, and this data is kept in the course of this regularly conducted activity and was made by regularly conducted activity as a regular practice. Yahoo! may not require or verify user information because it offers many of its user services for free.

3. Pursuant to the Federal Stored Communications Act, 18 U.S.C. §§2701, et seq., we have redacted information, including removing certain data fields, that exceeds the scope of this request, is protected from disclosure or is otherwise not subject to production.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct.

DATED: January 24, 2011

Svetlana Shatnenko

YAHOO! ACCOUNT MANAGEMENT TOOL

Login Name:	**documents2010@ymail.com**
GUID:	**5H3QSY4HBFIX4NV5D75J7EQNM4**
Yahoo Mail Name:	**documents2010@ymail.com**
Registration IP address:	**67.243.11.39**
Account Created (reg):	**Sun Jan 03 20:38:14 2010 GMT**
Other Identities:	**documents2010@ymail.com (Yahoo! Mail)**
Full Name	**Mr Not Applicable**
Address1:	
Address2:	
City:	
State, territory or province:	
Country:	**United States**
Zip/Postal Code:	**94583**
Phone:	
Time Zone:	
Birthday:	[redacted]
Gender:	**Male**
Occupation:	
Business Name:	
Business Address:	
Business City:	
Business State:	
Business Country:	**us**
Business Zip:	
Business Phone:	
Business Email:	
Additional IP Addresses:	**Sun Jan 03 20:38:14 2010 GMT 67.243.11.39**
Account Status:	**Active**

Search for	documents2010@ymail.com
Date Range	07-Jan-2010 00:00:00 / 05-Jan-2011 23:59:59
Total Results	18

Yahoo ID	IP Address	Login Time
documents2010@ymail.com	67.243.11.39	Tue 15:41:31 (GMT) 27-Apr-2010
documents2010@ymail.com	69.204.232.104	Mon 19:23:10 (GMT) 15-Mar-2010
documents2010@ymail.com	69.204.232.104	Thu 18:11:37 (GMT) 11-Mar-2010
documents2010@ymail.com	69.204.232.104	Mon 15:24:40 (GMT) 08-Mar-2010
documents2010@ymail.com	67.243.11.39	Mon 00:25:05 (GMT) 08-Mar-2010
documents2010@ymail.com	67.243.11.39	Wed 22:13:40 (GMT) 03-Mar-2010
documents2010@ymail.com	69.204.232.104	Thu 18:01:04 (GMT) 04-Feb-2010
documents2010@ymail.com	67.243.11.39	Mon 12:48:09 (GMT) 25-Jan-2010
documents2010@ymail.com	67.243.11.39	Fri 15:38:23 (GMT) 22-Jan-2010
documents2010@ymail.com	69.204.232.104	Thu 21:54:46 (GMT) 21-Jan-2010
documents2010@ymail.com	69.204.232.104	Thu 19:17:30 (GMT) 21-Jan-2010
documents2010@ymail.com	67.243.11.39	Wed 05:31:13 (GMT) 20-Jan-2010
documents2010@ymail.com	69.204.232.104	Sat 21:09:29 (GMT) 16-Jan-2010
documents2010@ymail.com	69.204.232.104	Wed 20:12:13 (GMT) 13-Jan-2010
documents2010@ymail.com	69.204.232.104	Wed 18:30:33 (GMT) 13-Jan-2010
documents2010@ymail.com	69.204.232.104	Wed 18:20:55 (GMT) 13-Jan-2010
documents2010@ymail.com	69.204.232.104	Mon 23:41:20 (GMT) 11-Jan-2010
documents2010@ymail.com	24.129.41.67	Sat 14:03:28 (GMT) 09-Jan-2010

Search for	documents2010@ymail.com
Date Range	07-Dec-2009 00:00:00 / 05-Dec-2010 23:59:59
Total Results	22

Yahoo ID	IP Address	Login Time
documents2010@ymail.c	67.243.11.39	Tue 15:41:31 (GMT) 27-Apr-2010
documents2010@ymail.c	69.204.232.104	Mon 19:23:10 (GMT) 15-Mar-2010
documents2010@ymail.c	69.204.232.104	Thu 18:11:37 (GMT) 11-Mar-2010
documents2010@ymail.c	69.204.232.104	Mon 15:24:40 (GMT) 08-Mar-2010
documents2010@ymail.c	67.243.11.39	Mon 00:25:05 (GMT) 08-Mar-2010
documents2010@ymail.c	67.243.11.39	Wed 22:13:40 (GMT) 03-Mar-2010
documents2010@ymail.c	69.204.232.104	Thu 18:01:04 (GMT) 04-Feb-2010
documents2010@ymail.c	67.243.11.39	Mon 12:48:09 (GMT) 25-Jan-2010
documents2010@ymail.c	67.243.11.39	Fri 15:38:23 (GMT) 22-Jan-2010
documents2010@ymail.c	69.204.232.104	Thu 21:54:46 (GMT) 21-Jan-2010
documents2010@ymail.c	69.204.232.104	Thu 19:17:30 (GMT) 21-Jan-2010
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documents2010@ymail.c	69.204.232.104	Wed 18:30:33 (GMT) 13-Jan-2010
documents2010@ymail.c	69.204.232.104	Wed 18:20:55 (GMT) 13-Jan-2010
documents2010@ymail.c	69.204.232.104	Mon 23:41:20 (GMT) 11-Jan-2010
documents2010@ymail.c	24.129.41.67	Sat 14:03:28 (GMT) 09-Jan-2010
documents2010@ymail.c	69.204.232.104	Wed 20:05:57 (GMT) 06-Jan-2010
documents2010@ymail.c	67.243.11.39	Wed 18:48:43 (GMT) 06-Jan-2010
documents2010@ymail.c	69.204.232.104	Tue 14:25:47 (GMT) 05-Jan-2010
documents2010@ymail.c	67.243.11.39	Sun 23:48:18 (GMT) 03-Jan-2010