No. 11-157

In The Supreme Court of the United States

SCOTT BEASON, LARRY SPENCER, ALLISON SLAPPY, LISA PAYNE, AND MARY AMBRIDGE,

Petitioners,

v.

ROBERT BENTLEY, GOVERNOR OF THE STATE OF ALABAMA, AND COLONEL F. A. "BUBBA" BINGHAM, DIRECTOR OF THE ALABAMA DEPARTMENT OF PUBLIC SAFETY, IN THEIR OFFICIAL CAPACITIES,

Respondents.

On Petition For Writ Of Certiorari To The Supreme Court Of Alabama

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Can the Alabama courts deny Petitioners due process through another "extreme" State interpretation of common law res judicata that defies this Court's unanimous reversals of similar Alabama decisions in *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996) and *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999) and that ignores this Court's unanimous recent holding denouncing the doctrine of "virtual representation" in *Taylor v. Sturgell*, 553 U.S. 880 (2008)?

PARTIES TO THE PROCEEDINGS

Scott Beason, Larry Spencer, Allison Slappy, Lisa Payne, and Mary Ambridge were the Plaintiffs-Appellants in the courts below and are the Petitioners in this Court (collectively, the *Beason* Plaintiffs). Bob Riley, former Governor of the State of Alabama, and Colonel J. Christopher Murphy, former Director of the Alabama Department of Public Safety, in their official capacities, were Defendants-Appellees in the courts below. Robert Bentley, Governor of the State of Alabama, and Colonel F. A. "Bubba" Bingham, Director of the Alabama Department of Public Safety, in their official capacities, have been substituted for their predecessors in office and are Respondents in this Court (collectively, the State Defendants).

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The decision of the Supreme Court of Alabama, which was an affirmance without opinion, has not yet been reported, but it is reproduced in the appendix. (App. to Pet. Cert. 1.) The opinion of the Fifteenth Judicial Circuit Court of Montgomery County, Montgomery, Alabama, is unreported, but it is reproduced in the appendix. (App. 2-18.) The order by the Supreme Court of Alabama on the application for rehearing is not yet reported, but is reproduced in the appendix. (App. 19-20.)

JURISDICTION

The jurisdiction of this Honorable Court is invoked pursuant to 28 U.S.C.S. § 1257(a). This Court's discretion to grant a writ of certiorari is respectfully requested under Rule 10(c) of the Rules of the Supreme Court.

STATUTES INVOLVED: CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution, U.S. Const. amend. XIV, § 1, provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law."

INTRODUCTION

The res judicata doctrine, although it aids judicial economy, closes the courthouse doors to certain parties and therefore must be carefully and judiciously applied lest it run afoul of constitutional guarantees of due process. This Court has repeatedly enforced those guarantees by striking down extreme applications of res judicata, including two previous cases from Alabama, *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999) and *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996). The *Beason* Plaintiffs seek relief in this Court because, notwithstanding these prior decisions, the Alabama courts have once again extended res judicata beyond its constitutional limits and denied the *Beason* Plaintiffs their day in court.

Specifically, the circuit court held and the Alabama Supreme Court affirmed (with no opinion) that res judicata barred the case below because plaintiffs in a prior case were "virtual representatives" for the *Beason* Plaintiffs in the present case. (App. 1-20.) This holding is in direct conflict with no less than three opinions of this Court: *Taylor v. Sturgell*, 553 U.S. 880 (2008); *South Central Bell*, 526 U.S. 160 (1999) and *Richards*, 517 U.S. 793 (1996), the latter two of which directly rebuked Alabama courts for their unconstitutional application of res judicata.

In other words, Alabama has once again used its own eccentric interpretations of res judicata to close the courthouse doors to deserving plaintiffs,

disregarding this Court's binding precedent in the process.

BACKGROUND AND STATEMENT OF THE CASE

1. Amendment 509 to the Alabama Constitution

In 1990, Alabama voters adopted an amendment to the state constitution ("Amendment 509") that established English as the official language of the state, barred any official action in derogation of that principle, required officials to preserve and enhance English as the common language, and provided a cause of action to "any person" to enforce the popular mandate.[1]

The operative portions of Amendment 509 read as follows:

> English is the official language of the state of Alabama. The legislature and officials of the state of Alabama shall take all steps necessary to insure that the role of English as the common language of the state of Alabama is preserved and enhanced. The legislature shall make no law which diminishes or ignores the role of English as the common language of the state of Alabama.

[1] On July 13, 1990, the Alabama voters ratified Amendment 509 with an approval of 88%. (App. 43.)

> Any person who is a resident of or doing business in the state of Alabama shall have standing to sue the state of Alabama to enforce this amendment, and the courts of record of the state of Alabama shall have jurisdiction to hear cases brought to enforce this provision. The legislature may provide reasonable and appropriate limitations on the time and manner of suits brought under this amendment.

Ala. Const. art. I, § 36.01. (App. 6-7.)

In response to passage of Amendment 509, the Alabama Department of Public Safety (ADPS) soon determined its multi-language driver's license examination policy violated Amendment 509 and began testing exclusively in English. (App. 45.) In 1992, the ADPS interpretation of Amendment 509's mandate was affirmed by the Alabama Attorney General in an official opinion requested by the Director of ADPS. (C. 100-02.) In 1996, approximately five years after the English-only policy was instituted, it was challenged under Title VI of the Civil Rights Act of 1964, 42 U.S.C.S. § 2000d. This Court ultimately rejected the challenge in *Alexander v. Sandoval*, 532 U.S. 275 (2001).[2] Even though the victory before this Court in

[2] Amendment 509 was challenged under Title VI of the Civil Rights Act of 1964. In *Sandoval v. Hagan*, 7 F. Supp. 2d 1234 (1998), the federal district court held that the English-only policy unlawfully discriminated on the basis of national origin. (C. 142.) That ruling was affirmed by the Eleventh Circuit in *Sandoval v. Hagan*, 197 F.3d 484 (11th Cir. 1999). This Court reversed in *Alexander v. Sandoval*, 532 U.S. 275 (2001), which

(Continued on following page)

Sandoval left Alabama free to return to the English-only testing policy, the Governor continued the multi-language testing policy.[3]

2. The *Cole* litigation

In 2005, a group of Alabama residents brought the first suit against state officials for enforcement of Amendment 509, seeking a return to the policy of giving the driver's license examination exclusively in English. *See Cole v. Riley*, 989 So. 2d 1001 (Ala. 2007). (C. 138-47 ¶ 20.) The *Cole* complaint alleged that permitting driver's license examinations in languages other than English "diminishes or ignores" English as the State's official and common language, in violation of Amendment 509. (C. 146.) The *Cole* plaintiffs further alleged that then-Governor Bob Riley's failure to change the State's multi-language testing policy constituted a continuing breach of his duty to enforce the Alabama Constitution. (C. 144.) The circuit court held, and the Alabama Supreme Court affirmed, that the State's evidence that the multi-language testing policy did not violate Amendment 509 was unrebutted by the *Cole* plaintiffs, thereby resolving the factual

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held that no private right of action exists under Title VI for enforcement of administrative regulations promulgated under § 602. (C. 143-44.)

[3] A multi-language testing policy was instituted by the State after the loss at the district court, and was required to remain in effect during the pending appeal of the *Sandoval* case to avoid an injunction. (C. 105-07.) The multi-language policy was left in place after this Court's ruling in *Sandoval*.

questions presented by the *Cole* case in favor of the defendants.[4] (C. 153.)

In a vigorous dissent joined by three other justices, Justice Murdock argued that the Defendants' testimony and evidence were not "undisputed" by the *Cole* plaintiffs on the question presented by their complaint and, in any event, an issue of fact remained unsettled after *Cole v. Riley*: whether any decision by state officers to adopt a multi-language policy for official state business, beneficial or not, violates the mandates of 509. *Id.* at 1020-22.[5]

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[4] The circuit court in *Cole* also held that Amendment 509 was unlawful, relying on the Eleventh Circuit's determination in *Sandoval v. Hagan* that the English-only testing policy violated Title VI's § 602 disparate impact regulations. (C. 153-54.) The circuit court in *Cole* reached this conclusion even though *Sandoval v. Hagan* had been reversed by this Court in *Alexander v. Sandoval*, 532 U.S. 275 (2001) on the grounds that § 602 creates no private cause of action. (C. 154.)

In other words, the *Cole* circuit court treated as binding precedent a decision on the merits in a case that had been reversed for failure to present any justiciable claims.

[5] Justice Murdock noted:

> . . . a focus on the supposed lack of evidence of the unreasonableness of the State defendants' position misses the mark. The issue for decision in this case is not whether the State's action represents a reasonable attempt to comply with § 36.01; the issue is whether the State's action *actually* does comply with § 36.01. There is ample evidence that it does not. *Id.* at 1022. (emphasis added).

3. The *Beason* litigation

The current litigation was brought in 2008 by a separate group of Alabama residents, unaffiliated with and unrelated to any of the *Cole* plaintiffs, to challenge the constitutionality of the ADPS multi-language driver's license examination policy, given the plain text of Amendment 509. (C. 8-19.) The *Beason* Plaintiffs alleged that multi-language tests do not "preserve and enhance" English as the common language as required by Amendment 509 and that administering tests in languages other than English "diminishes and ignores" the role of English as the common language, effectively removing the motivation for non-native speakers to learn English. (C. 13 ¶ 20, 14 ¶ 25.) Thus, the *Beason* Plaintiffs sought, among other things, to correct the factual shortcomings of the earlier *Cole* litigation.[6]

[6] The *Beason* Plaintiffs contended they could present new and additional evidence and succeed on the merits of the claim where the *Cole* plaintiffs had failed, specifically including expert testimony directly contrary to the factual assertions of the State Defendants in the *Cole* case. (App. 30.) It is not unusual for plaintiffs in later cases to seek to correct evidentiary shortcomings in earlier cases. Provided they are not in privity with earlier plaintiffs, this does not warrant the application of res judicata. *See South Central Bell*, 526 U.S. 164 (res judicata held not properly applied even though the evidence presented to the trial court in the second case was aimed at avoiding and correcting evidentiary deficiencies in the first case brought by unrelated prior plaintiffs).

From early in the litigation, however, the circuit court questioned the right of the *Beason* Plaintiffs to bring their claim. (App. 143-51, 185-92.) In fact, the circuit court seemed predisposed to terminating the *Beason* lawsuit on procedural grounds, going so far as to suggest the res judicata affirmative defense to the State Defendants after they had failed to assert it in their Answer. *Id*. at 185-92. The *Beason* Plaintiffs responded that they had no affiliation with the *Cole* plaintiffs and could not be bound by any decision in the earlier case, and in any event Amendment 509 by its terms allows for multiple suits subject only to "reasonable limitations" enacted by the legislature (none of which had been enacted).[7] (App. 6-7.) Nevertheless, the circuit court promised to "research how to get finality on its own" and encouraged the State to research moving for summary judgment on res judicata grounds.[8] (App. 192.)

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[7] At that hearing, the *Beason* Plaintiffs asked for discovery on the government's reason for changing the ADPS drivers' testing policy from English-only to multi-language, but the court refused, saying the *Beason* case did not present any "factual issues." (App. 188-89.) At the same hearing, the trial court sua sponte asserted that the duly ratified constitutional Amendment may in fact be "overbroad" or "void for vagueness," or the meaning attributed to its terms by the Plaintiffs was not intended by the legislature that drafted it. (App. 190-91.) In any event, the court refused to allow the *Beason* Plaintiffs to litigate the factual issues underlying their claim.

[8] At a second hearing, the trial court suggested a class action to limit future litigation on the issue of multi-language policies under Amendment 509. (App. 150-51.)

The State Defendants, prompted by the circuit court, then moved for summary judgment asserting the res judicata affirmative defense. (C. 128-47.) The *Beason* Plaintiffs filed a brief in opposition to summary judgment on two grounds. First, the *Cole* and *Beason* Plaintiffs are strangers with no legal relationship and that the State Defendants offered no evidence of a special or legal relationship to support the motion. (App. 152-69.) In fact, each *Beason* Plaintiff submitted a sworn affidavit asserting that he has no relationship to any of the *Cole* plaintiffs. (App. 170-84.) Second, the evidence in the *Beason* case would be different than that presented in the prior *Cole* suit. The *Beason* Plaintiffs sought, but the court would not grant, discovery on the factual basis of the res judicata defense. (App. 146-47.) Additionally, the *Beason* Plaintiffs tendered affidavits from two national experts showing the multi-language testing policy does not "preserve and enhance" English as the State's "common" language. (C. 8-16, 241-72.)

Despite the *Beason* Plaintiffs' undisputed and unrebutted evidence on summary judgment and despite the differing evidence in the *Cole* and *Beason* cases, the circuit court granted summary judgment to the State Defendants on grounds that res judicata barred the *Beason* Plaintiffs' claim. (App. 2-18.) In its decision, the court made no findings that any of the *Beason* Plaintiffs were anything other than strangers

to any of the plaintiffs in the *Cole* litigation. In fact, the court expressly found that "[t]he individual plaintiffs named in the *Cole* complaint are not the same individual plaintiffs who are presently before this Court[,]" and that "[t]he *Beason* Plaintiffs have filed affidavits testifying that '[a]ll of the plaintiffs in *Cole* are strangers to' them, that the *Cole* plaintiffs have never 'had an obligation to safeguard [their] legal interests in any form,' or 'been authorized to serve as [their] agent[s],' that the *Cole* plaintiffs never 'had a legal relationship' with them, and finally, that the *Cole* plaintiffs have never 'been legally responsible to [them], or accountable to [them] in any way' or 'possessed the authority to represent [their] legal interests.'" (App. 5-6 ¶¶ 17-18.)

Despite the lack of identity and privity, the circuit court held that the Alabama doctrine of "virtual representation" extended res judicata to the *Beason* Plaintiffs' claim. The circuit court rejected plaintiffs' arguments that any such holding would defy this Court's prior rebukes of Alabama courts' "extreme applications of state-law res judicata" in *Richards*, 517 U.S. 793 (1996) and *South Central Bell*, 526 U.S. 160 (1999). (App. 15 ¶ 32, 128.) The circuit court distinguished *Richards* and *South Central Bell* as involving "*in personam* litigation as opposed to public issue litigation," which the court apparently perceived the

Beason Plaintiffs' suit to be.[9] (App. 12-14.) Relying only on the complaints in the two cases and the order in the first case, the circuit court summarily held "the *Beason* Complaint presents the same cause of action as did the *Cole* complaint," and "the *Cole* plaintiffs and the *Beason* Plaintiffs have the exact same interest. . . ." (App. 5 ¶ 14, 11 ¶ 15.)

The *Beason* Plaintiffs timely moved the circuit court to alter, amend or vacate its judgment and submitted a brief in support, arguing the circuit court's judgment violated this Court's unanimous repudiation of the "virtual representation" doctrine in *Taylor v. Sturgell*, 553 U.S. 880 (2008). *Id*. (App. 118-42.) Under Alabama law, when the circuit court does not rule on the motion within the time provided by law, the motion is deemed denied and subject to appeal. Ala. R. Civ. P. 59.1. The *Beason* Plaintiffs appealed directly to the Alabama Supreme Court, where once again the plaintiffs argued that applying res judicata would be directly contrary to this Court's binding precedent in *Richards*, *South Central Bell*, and *Taylor*. Despite the existence of such binding precedent, the Alabama Supreme Court affirmed the lower court's decision without opinion. (App. 1.)

[9] The circuit court declared, "[a]ny litigation challenging any policy or practice under Amendment 509 is necessarily a public issue case, which is brought on behalf of the public at large. This is so because no personal interest exists." (App. 14 ¶ 28.) Obviously, concluding that "no personal interest exists" is impossible without a factual inquiry, something the court refused to do. (App. 189.)

Similarly, the Supreme Court denied the *Beason* Plaintiffs' application for rehearing without opinion. (App. 19-20.)

REASONS FOR GRANTING THIS WRIT

I. The extension of res judicata outside constitutional limits deprives the *Beason* Plaintiffs of due process.

The laudable purpose of res judicata is to bring finality to contested matters, but this objective must be balanced against the right of litigants to have their day in court. This Court has often been called upon to protect this right from a variety of extensions of res judicata that carry it well beyond its constitutional limits, including two prior cases from Alabama. This Petition asks the Court to intervene a third time to correct an unconstitutional expansion of res judicata by the courts of Alabama.

This Court has recently reiterated the balance between res judicata and the right of litigants to their day in court:

> 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, 135 L. Ed. 2d 76* (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, 85 L. Ed. 22.* See also, e.g., *Richards*, *517 U.S., at 798, 116 S. Ct. 1761, 135 L. Ed. 2d 76; Martin v. Wilks, 490 U.S. 755, 761, 109 S. Ct. 2180, 104 L. Ed. 2d 835 (1989); Zenith Radio Corp. v. Hazeltine Research, Inc., 395 U.S. 100, 110, 89 S. Ct. 1562, 23 L. Ed. 2d 129 (1969).*

Taylor v. Sturgell, 553 U.S. at 892-93.

Alabama's extension of res judicata outside its constitutional limits deprives plaintiffs of their protected rights of due process under the Fourteenth Amendment to the United States Constitution, and is therefore worthy of the attention of this Court. Certiorari should be granted both to remedy the particular constitutional deprivation in this case and to correct the recalcitrance shown by Alabama courts on this issue.

II. The Alabama courts have again applied an unconstitutional version of res judicata.

As this Court has seen, this is not the first time Alabama courts have barred plaintiffs from their day in court with unconstitutional versions of res judicata. When this Court has found these practices run afoul of federal due process guarantees, the

State has adopted a different version to the same end, and the process has repeated itself. This case presents the third trip from Montgomery to Washington on the same topic. This time, the Alabama courts have cobbled together a different but equally infirm patchwork of discredited principles and legal errors to bar claims entitled to be heard on the merits.

A. This Court's binding precedent establishes that the *Beason* Plaintiffs' claim is not barred by res judicata.

It is well known that there are constitutional limits to the application of res judicata. This Court, in *Richards*, held that:

> State courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes. *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 475, 62 L. Ed. 1215, 38 S. Ct. 566 (1918). We have long held, however, that extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is fundamental in character. *Id.* at 476[4] (emphasis added).
>
> > n4 The opportunity to be heard is an essential requisite of due process of law in judicial proceedings. . . . And as a State may not, consistently with the Fourteenth Amendment, enforce a judgment

> against a party named in the proceedings without a hearing . . . , or an opportunity to be heard, so it cannot, without disregarding the requirement of due process, give a conclusive effect to a prior judgment against one who is neither a party nor in privity with a party therein.
>
> The limits on a state's power to develop estoppel rules reflect the general consensus 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.

517 U.S. at 797-98 (citations omitted).

Traditionally, res judicata may be applied if both cases involve the same parties or their privies. In *Richards*, the Court held no such privity existed among the successive plaintiffs for several reasons: first, that the initial plaintiffs "failed to provide petitioners with any notice that a suit was pending which would conclusively resolve their legal rights" (*id.* at 799), implicating the "general rule . . . that 'the law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger.'" *Id.* at 800, n.5 (citations omitted). The Court also found that the "parties in [the first lawsuit] did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind

any county taxpayers who were nonparties." *Id.* at 801.

The same is true of the *Beason* Plaintiffs in the present claim: As with *Richards*, the *Cole* plaintiffs did not litigate that matter on behalf of a class, nor did their complaint assert the interests of nonparties, and nothing from the trial court's order in *Cole* may be read to give any indication that the judgment would be binding on nonparties. (C. 138-55.) "As a result, there is no reason to suppose that the circuit court in [*Cole*] took care to protect the interests of petitioners in the manner suggested in *Hansberry*." *Richards*, 517 U.S. at 802.

B. The Alabama courts misapplied the "public issue" rules of res judicata to bar the *Beason* Plaintiffs' claim.

In this case, the circuit court held that both sets of plaintiffs were merely litigating a "public issue" (as opposed to a private claim) (App. 14 ¶ 27-28) and therefore the identity of the litigants was not as important as the issues they raised. (App. 15 ¶ 32.) Essentially, "identity of interests" was taken to be a legally sufficient substitute for "privity of parties." (App. 11 ¶ 17.)

Admittedly, there are cases where this "identity of interests" may be legally relevant. One such category of cases is certain kinds of taxpayer lawsuits.

But even in the taxpayer context, the preclusion of claims is not automatic. *Richards* outlined the distinction between "public" claims and claims where the plaintiff has a private interest (such as a pecuniary interest):

> Our answer requires us to distinguish between two types of actions brought by taxpayers. In one category are cases in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds, see, e.g., *Massachusetts v. Mellon, 262 U.S. 447, 486-489, 67 L. Ed. 1078, 43 S. Ct. 597 (1923)*, or about other public action that has only an indirect impact on his interests, e.g., *Stromberg v. Board of Ed. of Bratenahl, 64 Ohio St. 2d 98, 413 N.E.2d 1184 (1980)*, *Tallassee v. State ex rel. Brunson, 206 Ala. 169, 89 So. 514 (1921)*. As to this category of cases, 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.
>
> Because the guarantee of due process is not a mere form, however, there obviously exists another category of taxpayer cases in which the State may not deprive individual litigants of their own day in court. By virtue of presenting a federal constitutional challenge to a State's attempt to levy personal funds, petitioners clearly bring an action of this latter type.

517 U.S. at 803.

The circuit court seized on this language to bar the *Beason* claim, relying on an Alabama theory of "adequate representation." The circuit court's application of "adequate representation," however, was little more than the functional equivalent of the "virtual representation" concept rejected in *Taylor v. Sturgell*, 553 U.S. 880 (2008).

Taylor presented the question whether Taylor's Freedom of Information Act (FOIA) suit against the Federal Aviation Administration (FAA) was precluded by the judgment in a prior FOIA case to which he was not a party. *Id*. The government and the intervening defendant argued that Taylor's claim should be precluded because he had been "virtually represented" by a preceding plaintiff who had submitted a FOIA request to the FAA for the exact information Taylor wanted to obtain, although no evidence purporting to establish any relationship between the two unrelated plaintiffs was offered in support of their argument. *Id.* at 888. The Court of Appeals affirmed the ruling on res judicata grounds, finding that "virtual representation" was a form of privity, and that "the party to the prior litigation is treated as the proxy of the nonparty, with the result that the nonparty is barred from raising the same claim." *Taylor v. Blakey*, 490 F.3d 965, 970 (D.C. Cir. 2007). The Court of Appeals further held that Taylor had been "adequately represented" by and that he had an "identity of interests" (i.e., wanted the same result and had as much incentive to pursue it) with

the preceding plaintiff. *Id.* at 889. The lower federal courts in *Taylor* made no findings that any agreements, discussions, or understandings had occurred between Taylor and the prior plaintiff. Instead, privity was declared to exist on grounds that the two men were colloquially "close associates." *Id.*

This Court unequivocally and unanimously rejected common law "virtual representation" as a basis for applying res judicata, instead substituting six "exceptions" to the due process canon against nonparty preclusion. 553 U.S. at 893-95. Applying those exceptions to the instant case, it is undisputed that four of them have no applicability: (1) the *Beason* Plaintiffs at no time agreed to be bound to the judgment rendered in *Cole*; (2) there was no pre-existing legal relationship between the *Beason* Plaintiffs and the *Cole* plaintiffs; (3) none of the *Beason* Plaintiffs exercised any control over the litigation in *Cole*; and, (4) none of the *Beason* Plaintiffs is attempting to relitigate *Cole* by proxy. (App. 5-6 ¶ 18.)

As a result, the instant Alabama decision depends upon two and only two *Taylor* factors: (1) the limited circumstances in which a nonparty may be bound to an earlier judgment because he was "adequately represented" by someone with the same interests; and, (2) when a "special statutory scheme" expressly forecloses successive litigation by successive parties. 553 U.S. at 893-95. As is more fully shown below, the Alabama courts erred on both counts.

1. The elements of "adequate representation" are not present in this case.

For there to be "adequate representation" of a nonparty, the *Taylor* Court required, "at a minimum," (1) the nonparty's and representative party's interests must be aligned; (2) either the representative party must have understood himself to be acting in a representative capacity or the original court must have taken care to protect the nonparty's interests; and (3) absent other procedural safeguards, the nonparty alleged to have been represented must have had notice of the original suit. *Id.* at 900. These elements are conjunctive; all three are required for adequate representation under *Taylor*.

In this case, the State Defendants argued that the *Cole* and *Beason* Plaintiffs have the same interest because their prayer for relief is the same, and because they have brought suit under the same constitutional amendment. (C. 131.) But, the State Defendants neither claimed nor proved that the *Cole* plaintiffs consciously acted on behalf of any of the *Beason* Plaintiffs, or that the *Beason* Plaintiffs were given notice of the prior suit. Further, there was no evidence presented that the court in *Cole* considered or was even aware of the interests of any future plaintiffs. The State Defendants thus clearly failed to establish the elements of "adequate representation."

In relying on the State Defendants' proffered version of "adequate representation," the circuit court succumbed to a "de facto class action" error expressly disapproved by this Court in *Taylor*:

> An expansive doctrine of virtual representation, however, would "recogniz[e], in effect, a common-law kind of class action." That is, virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and non-parties, 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."

553 U.S. at 901 (citations omitted).

Rather than heeding this Court's disapproval of "de facto class actions," the circuit court instead relied on the Alabama case *Greene v. Jefferson County Comm'n*, 13 So. 3d 901 (Ala. 2008). (App. 9-12.) The Alabama Supreme Court held in *Greene* that "[a] person may be bound by a judgment even though not a party to a suit if one of the parties to the suit is so closely aligned with his interests as to be a virtual representative." 13 So. 3d at 913. But, the two sets of plaintiffs before the court in *Greene* had substantial legal and special relationships, in that both suits were prosecuted as class actions and six of the parties to the later suit had served as class representatives in the earlier suit. *Id.* at 906.

Greene is probably contrary to this Court's decision in *Taylor*. However, even if *Greene* can be read to be consistent with *Taylor*, it is only because of the particular facts in *Greene*. In no way, however, are the

facts in this case comparable to those in the *Greene* case and in no way do they satisfy the "adequate representation" test specified under *Taylor*. Accordingly, the *Taylor* standard was not met.

2. No "special statutory scheme" exists to preclude the *Beason* Plaintiffs' claim.

The other exception to a general bar on nonparty preclusion outlined in *Taylor* arises under the "limited circumstances" in which a "special statutory scheme" expressly forecloses litigation by successive parties. 553 U.S. at 895. Such "special statutory schemes" include bankruptcy, probate, quo warranto, and other suits that can be brought only on behalf of the "public at large." *Id*.

There is no such "special statutory scheme" here. Quite the contrary, not only does Amendment 509 contain no limitations on successive suits, it anticipates that limits, if ever deemed necessary, will be enacted by the legislature in the future.[10] The State Defendants, rather than acknowledge the *Beason* Plaintiffs' constitutional standing or identify any proper legislative limits on successive claims under *Taylor*, argued that in suits against the government where the remedy confers a benefit only to the public, no private interest accrues and a non-participating

[10] The legislature's decision not to enact limitations on successive suits is understandable. Two suits in twenty years is hardly such a deluge as to warrant a legislative response.

nonparty with no legal relationship to a prior suit can be barred from future claims. (C. 134, Defs.' Br. at 47-49.) The circuit court adopted the State Defendants' "public law virtual representation" notion in its ruling, relying upon an excerpt from *Richards*, which states in part:

> As to this category of cases [i.e., public issues suits], 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.

517 U.S. at 803 (brackets added). The circuit court held that "litigation challenging any policy or practice under Amendment 509 is necessarily a public issue case, which is brought on behalf of the public at large," and that "due process protections are diminished in cases, such as this one." (App. 14 ¶¶ 28-29.) With "diminished" due process protections thus applied, the *Beason* Plaintiffs were found to have the same interest as the *Cole* plaintiffs and were precluded from pursuing their action under res judicata principles. (App. 15 ¶ 32.)

The Alabama courts completely ignored this Court's clarification in *Taylor* of the proper standard for nonparty preclusion in so-called "public issue" actions. Specifically, this Court announced in *Taylor*:

> [W]e said in *Richards* only that, for the type of public-law claims there envisioned, states were free to adopt procedures limiting repetitive litigation. *See* 517 U.S. at 803, 116 S. Ct.

> 1761, 135 L. Ed. 2d 76. 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, 135 L. Ed. 2d 76.
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> > . . . n12 Nonparty preclusion in such cases ranks under the sixth exception described above: special statutory schemes that expressly limit subsequent suits. See supra, at ___, 171 L. Ed. 2d, at 170.

553 U.S. at 903.[11] Far from failing to address the potential for multiple similar claims, Amendment 509 explicitly provides that:

> Any person who is a resident of or doing business in the state of Alabama shall have standing to sue the state of Alabama to enforce this amendment, and the courts of record of the state of Alabama shall have jurisdiction to hear *cases* brought to enforce this provision. *The legislature* may provide reasonable and appropriate limitations on

[11] *Richards* also held, in rejecting application of state law res judicata in that case, that the Alabama Court had not found the earlier suit to be of a kind "that, under state law, could only be brought on behalf of the public at large." 517 U.S. at 793. Likewise, Amendment 509 by its own terms does not limit actions for its enforcement to lawsuits on behalf of the public at large, and it in no way limits subsequent suits filed by nonparties requesting precisely the same relief.

> the time and manner of suits brought under this amendment.

Ala. Const. art. I, § 36.01 (emphasis added).

It is therefore clear that Amendment 509 authorized "special statutory schemes" to impose limits on successive suits, but the legislature has not yet exercised its authority to create such limitations. There are no statutes that impose time limits, mandate class actions, or require particularized injury for suits brought under Amendment 509. Ala. Const. art. I, § 36.01.

Essentially, the lack of any "special statutory scheme" to limit suits under Amendment 509 clarifies why the *Beason* Plaintiffs' suit was improperly barred. In the twenty-plus years since Amendment 509 was passed, the Alabama legislature has not acted in any way to limit suits brought under that provision. With no "special statutory scheme" in place to limit the number of suits like *Cole* and *Beason*, this exception in *Taylor* clearly does not apply to preclude the *Beason* Plaintiffs' claim.

C. The Alabama courts' ad hoc collection of impromptu rationalizations creates an unconstitutional version of res judicata.

Finally, the circuit court ran through a litany of factors that supposedly warranted a bar on future litigation: "the *Beason* Complaint presents the same cause of action as did the *Cole* complaint" (App. 5 ¶ 14); the complaints contain the same "prayer for

relief" (*id*.); "the *Cole* plaintiffs and the *Beason* Plaintiffs have the exact same interest" (App. 11 ¶ 15); in furtherance of their same interests, the *Cole* and *Beason* Plaintiffs sued the same defendants (App. 11 ¶ 16); and the motivations of the plaintiffs are irrelevant. (*Id.* at ¶ 17). Even this "kitchen sink" approach, though, is legally insufficient and indeed was expressly rejected by this Court in *South Central Bell.*

In *South Central Bell*, 526 U.S. 160 (1999), this Court was presented with a decision in which Alabama held plaintiffs' claim was precluded even though they were not parties to nor were they represented by the parties to any prior case before the court, and had not received notice from any prior parties that their cause was being litigated. The Alabama circuit court in *South Central Bell* distinguished *Richards* on two grounds: (1) the *South Central Bell* plaintiffs' had "notice" of the prior suit and, (2) the *South Central Bell* plaintiffs were "adequately represented" by the former plaintiffs by virtue of a laundry list of supposedly relevant factors: "the *Reynolds* action and this action arise out of the same nucleus of operative facts"; the plaintiffs' "basic" claim was "addressed and decided" in the prior suit; "there is no conflict between the interests of the *Reynolds* taxpayers and the Taxpayers in this action"; and "Petitioners were represented by the same attorney." *Id.* at 160.

This Court found none of the circuit court's reasons persuasive, and in fact, held there was no basis for Alabama's failure to follow this Court's controlling precedents on res judicata. 526 U.S. at 167. In its unanimous opinion, this Court held that *South*

Central Bell was indistinguishable from *Richards* in that the first plaintiffs "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any non-parties; and the judgment they received did not purport to bind any . . . taxpayers who were nonparties." *Id.* Furthermore, the original plaintiffs "did not understand their suit to be on behalf of the different taxpayers involved in Case Two, nor did the Case One court make any special effort to protect the interests of the Case Two plaintiffs." *Id.* Notwithstanding that the Case Two plaintiffs in *South Central Bell* were aware of the earlier litigation and even hired one of the lawyers who had represented the prior plaintiffs, this Court held those circumstances "created no special relationship between the earlier and later plaintiffs," even though the later plaintiffs "may well have expected that the rule of law announced in [the earlier case] would bind them in the same way that a decided case binds every citizen." *Id.* at 168.[12] This Court reminded the State of Alabama that "the Fourteenth Amendment forbade this 'extreme' application of state-law preclusion principles, *because the plaintiffs in case Two were 'strangers' to the earlier judgment*" (*id.*) (emphasis added), whatever other rationalizations might have seemed pertinent to the State court.

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[12] The only "law of the case" in *Cole* was that the evidence offered by the plaintiffs on summary judgment did not establish a genuine issue of material fact that the State's actions had violated Amendment 509.

The *Beason* circuit court might well have been reading from the *South Central Bell* circuit court's discredited decision when it ruled against the *Beason* Plaintiffs in this case, since all of the same arguments justifying preclusion from that case were raised by the circuit court sua sponte in hearings in this case. (App. 143-51, 185-92.) To further the parallel, the Alabama Supreme Court affirmed the circuit court in *South Central Bell* without opinion, just as it did in this case. See *South Central Bell Telephone Co. v. Alabama*, 711 So. 2d 1005 (Ala. 1998).

Evidently, neither *Richards* nor *South Central Bell* were sufficient to deliver the message to the Alabama courts that the doctrine of res judicata is limited by the due process clause.

CONCLUSION

The State of Alabama has been challenged and rebuked in two unanimous decisions from this Court invalidating their aberrant approaches to res judicata. *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999); *Richards v. Jefferson County, Alabama*, 517 U.S. 793 (1996). A third case, the recent unanimous *Taylor v. Sturgell* decision, expressly disapproved of the doctrine of "virtual representation." 553 U.S. 880 (2008). Yet, these discredited notions were employed to bar the *Beason* Plaintiffs from their day in court.

If res judicata is applied to this case on the premise that the *Beason* Plaintiffs were "virtually

represented" by the *Cole* plaintiffs, not only will it frustrate the public purpose of Amendment 509 and nullify the Amendment's intended enforcement mechanism, it will constitute an affront to the authority of this Court and the supremacy of the United States Constitution. As this Court observed in *Richards*:

> While it is for the state courts to determine the adjective as well as the substantive law of the State, they must, in so doing, accord the parties due process of law. Whether acting through its judiciary or through its legislature, a State may not deprive a person of all existing remedies for the enforcement of a right, which the State has no power to destroy, unless there is, or was, afforded to him some real opportunity to protect it.

Id. at 804 (*citing Brinkerhoff-Faris Trust & Sav. Co. v. Hill*, 281 U.S. 673, 681-82, 74 L. Ed. 1107, 50 S. Ct. 451 (1930)).

For the foregoing reasons, the petition for writ of certiorari should be granted.

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