No. 07-371

In the Supreme Court of the United States

BRENT TAYLOR, PETITIONER

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

PAUL D. CLEMENT
Solicitor General
Counsel of Record
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
LEONARD SCHAITMAN
ROBERT D. KAMENSHINE
Attorneys
Department of Justice
Washington, D.C. 20530-0001
(202) 514-2217

QUESTION PRESENTED

Whether, in this case under the Freedom of Information Act, the facts establish that petitioner was "virtually represented" in a prior case, in which his fellow antique airplane club member and "close associate," through the same attorney, unsuccessfully sought disclosure of the same antique airplane plans, such that petitioner's case was validly dismissed under principles of res judicata.

TABLE OF CONTENTS

Page

Opinions below 1
Jurisdiction 1
Statement 1
Argument 8
Conclusion 16

TABLE OF AUTHORITIES

Cases:

Becherer v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415 (6th Cir. 1999) 13
EEOC v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004), cert. denied, 546 U.S. 811 (2005) 14, 15
Gustafson v. *Johns*, 213 Fed. Appx. 872 (11th Cir. 2007) 15
Headwaters, Inc. v. *United States Forest Serv.*, 399 F.3d 1047 (9th Cir. 2005) 10
Herrick v. *Garvey*, 298 F.3d 1184 (10th Cir. 2002) 2
Irwin v. *Mascott*, 370 F.3d 924 (9th Cir. 2004) 6
Martin v. *American Bancorp. Ret. Plan*, 407 F.3d 643 (4th Cir. 2005) 13
Martin v. *Wilks*, 490 U.S. 755 (1989), cert. denied, 492 U.S. 932 (1989) 6, 7, 9
Mullane v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950) 9
NAACP v. *Hunt*, 891 F.2d 1555 (11th Cir. 1990) 14
Nat'l Archives & Records Admin. v. *Favish*, 541 U.S. 157 (2004) 11

Case–Continued: Page

Niere v. *St. Louis County*, 305 F.3d 834 (8th Cir. 2002) 15

Perez v. *Volvo Car Corp.*, 247 F.3d 303 (1st Cir. 2001) . . 13

Pollard v. *Cockrell*, 578 F.2d 1002 (5th Cir. 1978) 13

Richards v. *Jefferson County*, 517 U.S. 793 (1996), cert. denied, 534 U.S. 1019 (2001) . . . . . *passim*

South Cent. Bell Tel. Co. v. *Alabama*, 526 U.S. 160 (1999) 5, 9

Tice v. *American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), cert. denied, 527 U.S. 1036 (1999) 14

Tyus v. *Schoemehl*, 93 F.3d 449 (8th Cir. 1996), cert. denied, 520 U.S. 1166 (1997) 3, 4, 15

United States v. *Johnston*, 268 U.S. 220 (1925) 9

United States Dep't of Justice v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749 (1989) 11

Statute:

Freedom of Information Act, 5 U.S.C. 552 (2000 & Supp. V 2005) :

5 U.S.C. 552(b)(4) 2

Miscellaneous:

18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* (2d ed. 2002) 12

In the Supreme Court of the United States

No. 07-371

BRENT TAYLOR, PETITIONER

v.

ROBERT A. STURGELL, ACTING ADMINISTRATOR, FEDERAL AVIATION ADMINISTRATION, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 490 F.3d 965. The opinion of the district court (Pet. App. 22A-36a) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on June 22, 2007. The petition for a writ of certiorari was filed on September 17, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner, a mechanic who restores vintage aircraft, is the executive director of the Antique Aircraft Association. Pursuant to a claim under the Freedom of Information Act (FOIA), 5 U.S.C. 552 (2000 & Supp. V

2005), he seeks from respondent Federal Aviation Administration (FAA) the plans of an antique F-45 aircraft manufactured by a predecessor of respondent Fairchild Corporation (Fairchild).

Previously, another member of the Antique Aircraft Association, Greg Herrick, failed to secure those same plans in a FOIA case in the Tenth Circuit. See *Herrick* v. *Garvey*, 298 F.3d 1184 (2002). Herrick was the owner of an F-45 aircraft and a "close associate" of petitioner. Pet. App. 2a-3a. To that end, Herrick filed a FOIA request with the FAA seeking the plans and specifications of the F-45. *Id.* at 2a. The FAA, after consulting Fairchild, determined that the documents contained trade secrets and thus, under Exemption 4 of the FOIA, were not subject to disclosure. *Ibid.*; see 5 U.S.C. 552(b)(4). Herrick filed suit. After the United States District Court for the District of Wyoming granted summary judgment in favor of the FAA, the Tenth Circuit affirmed. *Ibid.* The Tenth Circuit determined that a letter by Fairchild's predecessor authorizing disclosure deprived the documents of trade secret status. *Ibid.* But that court went on to hold that, because Herrick had not challenged on appeal the district court's assumption that Fairchild's subsequent letter revoking that authorization was effective, the court of appeals too would assume that letter's effectiveness. *Ibid.*

2. About a month after the *Herrick* decision, petitioner, who had planned to help Herrick restore his aircraft, filed a FOIA request for the same documents that Herrick had unsuccessfully sought. Pet. App. 2a. After not receiving a response from the FAA, petitioner, represented by the same attorney who had represented Herrick, continued to seek release of the plans. *Ibid.* Ultimately, the FAA again withheld the material under

Exemption 4. *Id.* at 3a. Petitioner, who was still represented by Herrick's attorney and was given access to Herrick's discovery materials from the previous lawsuit, *id.* at 34a, filed suit in district court. *Id.* at 3a. Fairchild intervened as a defendant. *Ibid.*

The district court granted summary judgment in favor of the FAA and Fairchild. The court held that res judicata barred petitioner's claim because Herrick had already litigated to a final judgment that same claim in another court. Specifically, the court held that there was "(1) an identity of parties in both suits; (2) a judgment rendered by a court of competent jurisdiction; (3) a final judgment on the merits; and (4) an identity of the cause of action in both suits." Pet. App. 29a. With respect to the identity of parties prong, the court found that Herrick and petitioner were in privity because "Herrick was [petitioner]'s 'virtual representative' in *Herrick* v. *Harvey*." *Id.* at 22a.

In reaching that conclusion, the court applied a multi-factor test enunciated by the Eighth Circuit in *Tyus* v. *Schoemehl*, 93 F.3d 449, 454 (1996), cert. denied, 520 U.S. 1166 (1997). Pet. App. 30a-35a (considering identity of the interest between the two parties, the close relationship of prior and present parties, participation in prior litigation, apparent acquiescence, deliberate maneuvering to avoid the effects of the first action, adequacy of representation in terms of incentive to litigate, and the private or public nature of the case) (citing *Tyus*, 93 F.3d at 454). Considering those factors, the court stated that the evidence showed Herrick and petitioner were

> two individuals who are quite fond of antique aircrafts and the historic preservation thereof, who are members of the same antique preservation associa-

> tion, who keep apprised of each other's litigation, and who successively used the same lawyer to seek identical information regarding an exceedingly rare aircraft that Herrick happens to own and [petitioner] has agreed to repair.

Id. at 33a. The court concluded that those "facts, coupled with [petitioner's] total failure to present a scintilla of evidence in his favor, firmly establish an identity of interests, a close relationship between the parties, and [petitioner's] apparent acquiescence in Herrick's litigation" sufficient to preclude relitigation. *Ibid.*

Finally, the court noted that "[a]pplication of the doctrine of virtual representation is particularly appropriate for public law issues" such as this one because "in public law cases, the number of plaintiffs with standing is potentially limitless." Pet. App. 34a (quoting *Tyus*, 93 F.3d at 456). While recognizing that "the number of antique aircraft enthusiasts or individuals seeking information on the F-45 may not be limitless," the court noted that

> [h]ad Herrick won his case, [petitioner] no doubt would have benefitted; after all, [petitioner] has already stated that Herrick shared his discovery materials with [petitioner]. * * * [N]ow that Herrick has lost, [petitioner] is attempting to try again with the same request in this court. If [petitioner] loses here * * * [,] fellow antique aircraft enthusiasts cannot simply file their own FOIA requests for the same information *ad infinitum* until they get the relief they want.

Id. at 34a-35a. The court concluded, in light of "Herrick's request for [petitioner] to assist him with the aircraft and the close alignment of Herrick's and [peti-

tioner's] interests," that "the instant case is one of deliberate maneuvering." *Id.* at 35a.

3. The court of appeals unanimously affirmed, holding that res judicata barred petitioner's lawsuit. Pet. App. 3a, 21a. The court agreed with the district court's determination that Herrick had virtually represented petitioner in the previous lawsuit. *Id.* at 5a-18a. It explained that this Court in *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996), and *South Central Bell Telephone Co.* v. *Alabama*, 526 U.S. 160, 167-168 (1999), has "suggest[ed] both that identical interests and adequate representation are necessary conditions for virtual representation, and that there must be some relationship between the litigant and his putative proxy." Pet. App. 7a. The court did not, however, "read *Richards* to hold a nonparty was adequately represented only if special procedures were followed or the party to the prior suit understood it was representing the nonparty." *Ibid.* The court explained that, although "those circumstances tend to support a finding of adequate representation, * * * there is no reason to believe they are the only circumstances in which res judicata is consistent with due process." *Ibid.*

The court of appeals adopted a multi-factor test to determine when a finding of virtual representation is appropriate. Pet. App. 7a. Specifically, the court held that a finding of virtual representation requires a showing of both identity of interests and adequate representation, in addition to a showing of at least one of the following factors: "a close relationship between the present party and his putative representative, or 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 8a (cit-

ing *Irwin* v. *Mascott*, 370 F.3d 924, 930 (9th Cir. 2004)). The court in this case made clear that "there can be no virtual representation absent an affirmative link between the later litigant and either the prior party or the prior case." *Id*. at 8a-9a.

Applying those factors, the court of appeals held that a finding of virtual representation was warranted in this case. First, the court found "identity of interests" because petitioner "seeks the same result as did Herrick," and "had substantially the same incentive to achieve it." Pet. App. 9a. Indeed, petitioner "concede[d] he share[d] Herrick's interest in the preservation of antique aircraft as a general matter," and "admitted * * * that Herrick had asked him to assist with the restoration of Herrick's F-45." *Id*. at 10a.

The court next held that petitioner had been adequately represented in Herrick's lawsuit. Pet. App. 11a. The court noted that, while "[n]otice is ordinarily a key element of due process," a subsequent litigant's notice of the prior litigation while it was ongoing "is neither a sufficient nor a necessary condition of adequate representation." *Id*. at 12a (citing *Richards*, 517 U.S. at 799-800). Acknowledging that other courts have held that notice is required for a finding of virtual representation in some cases, the court explained that "[t]o deem notice sufficient would in effect transform permissive into mandatory intervention in judicial proceedings, a step the Supreme Court rejected in *Wilks*." *Ibid*. (citing *Martin* v. *Wilks*, 490 U.S. 755, 762-763 (1989)). The court likewise declined to deem notice necessary to virtual representation in all cases because, if notice were a condition precedent, "a close associate of the prior party, with identical interests, could relitigate a claim that was zealously but unsuccessfully tried to judgment

and that, even if he had received notice of and intervened in the prior case, would have proceeded in the same way." *Ibid.* (stating that this Court "pointedly left open" that question in *Richards*, 517 U.S. at 801). Noting that the record was insufficient to show that petitioner had notice of Herrick's lawsuit while it was ongoing, the court "turn[ed] to other indicia * * * to determine whether [petitioner] was adequately represented by Herrick." *Id.* at 13a-14a. Specifically, the court relied on two factors: first, "Herrick had an incentive to litigate zealously and his motives were substantially similar to and seemingly even stronger than [petitioner's], and [s]econd, Herrick and [petitioner] used the same attorney to pursue their FOIA claims." *Id.* at 14a.

The court then held that petitioner and Herrick share a "close relationship" such that a finding of virtual representation was warranted. Pet. App. 15a-16a. The court rejected the notion "that only a legal relationship may qualify as a 'close relationship.'" *Id.* at 15a (citation omitted). Rather, the court held that "[w]hether two individuals have sufficiently close connections that one may act as the virtual representative of the other is a functional, not a formal question." *Ibid.* In this case, the court pointed to facts demonstrating that

> Herrick and [petitioner] were not merely people who happened to share a common interest and membership in the same organizations, but knew each other quite well: Herrick asked [petitioner] to assist him in restoring his F-45, provided information to [petitioner] that Herrick had obtained through discovery, and at summary judgment [petitioner] did not oppose Fairchild's characterization of Herrick as his "close associate."

Ibid.[1]

The court thus concluded that Herrick had been petitioner's virtual representative in the previous lawsuit. It emphasized the fact-bound, limited nature of that holding, however, specifically noting that the links between petitioner and Herrick were so strong that they "simply do not implicate * * * concerns" (Pet. App. 18a) as to the use of FOIA generally by "reporters, public interest organizations, and academics, who are likely to associate with others having similar interests." Pet. App. 17a.

After further holding that *Herrick* was a final judgment on the merits, Pet. App. 18a-19a, and that there was an identity of claims, *id.* at 19a-20a, the court held that res judicata barred petitioner's lawsuit.

ARGUMENT

Petitioner argues (Pet. 12-14) that the court of appeals departed from this Court's precedent when it held that the doctrine of virtual representation applied in this case. He also argues (Pet. 5-12) that certiorari is warranted because the circuits are split over the proper way

---

[1] Additionally, the court noted that there was some evidence of "tactical maneuvering" in this case. Pet. App. 16a. Specifically, the court observed that petitioner filed his case "on the heels of a court decision affirming the government's position with the assistance of the losing party to the prior litigation," which "suggests Herrick and [petitioner] coordinated the filing of [petitioner's] request—and the litigation that would almost certainly follow—so that [petitioner] could try where Herrick had failed, to the benefit of both." *Id.* at 16a-17a. The court agreed with petitioner, however, that "these facts do not necessarily show collusion to avoid the preclusive effects of *Herrick.*" *Id.* at 17a. Given "the ambiguity of the facts," the court did not treat the evidence suggesting collusion as dispositive of the virtual representation issue in this case. *Ibid.*

to apply the virtual representation doctrine. Petitioner's contentions lack merit and do not warrant this Court's review.

1. Petitioner asserts (Pet. 12-14) that the court of appeals' holding that Herrick was petitioner's virtual representative in the previous litigation is "wrong on the merits." Pet. 12. That fact-bound argument does not warrant this Court's review. See *United States* v. *Johnston*, 268 U.S. 220, 227 (1925) ("We do not grant a certiorari to review evidence and discuss specific facts."). At any rate, there is no merit to petitioner's contention. And, contrary to petitioner's contentions, the court of appeals' decision is fully consistent with this Court's holdings in *Richards* v. *Jefferson County*, 517 U.S. 793 (1996), and *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950).

In *Richards*, a case involving successive suits by different taxpayers challenging the constitutionality of a state tax statute, this Court acknowledged that a person need not necessarily be a party to a judgment to be bound by it "when, in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party." 517 U.S. at 798 (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989)). The Court ultimately held that the taxpayers' suit was not barred by a previous taxpayer lawsuit challenging the same tax. *Id.* at 802. Explaining that, because the two sets of litigants were "best described as mere 'strangers' to one another," the Court could not conclude that the prior litigants "provided representation sufficient to make up for the fact that petitioners neither participated in, * * * nor had the opportunity to participate in," the prior lawsuit. *Ibid.*; see also *South Central Bell*, 526 U.S. at 167-

168 (declining to hold that the petitioner's lawsuit was barred by res judicata where, as in *Richards*, petitioner and the prior litigants were "strangers," and "no one claim[ed] that there [was] 'privity' or some other special relationship between the two sets of plaintiffs"). In so holding, moreover, the Court in *Richards* expressly distinguished between private-law claims, such as the "challenge to a State's attempt to levy personal funds" involved in that case, and public-law claims, such as challenges to "public action that ha[ve] only an indirect impact on [the litigants'] interests." *Id*. at 803. As to the latter category, this Court "assume[d] that the States have wide latitude to establish procedures * * * to limit the number of judicial proceedings that may be entertained."[2] *Ibid*.

a. Correctly recognizing that *Richards* did not hold that "a nonparty was adequately represented only if special procedures were followed or the party to the prior suit understood it was representing the nonparty," Pet. App. 20a-21a, the court of appeals held that Herrick had "adequately represented" petitioner in his previous lawsuit. That determination was based on petitioner's "close relationship" with Herrick, *id.* at 15a, and was consistent with this Court's decision in *Richards*, 517 U.S. at 798. Unlike the litigants in *Richards* and

[2] In *Headwaters, Inc.* v. *United States Forest Service*, 399 F.3d 1047 (9th Cir. 2005), a challenge by environmental organizations to timber sales, the court "reject[ed] the invitation to craft a 'public right' exception to the due process requirement of adequate representation." *Id*. at 1054. But it did so by misconstruing *Richards*. The court went on to state that "*Richards* itself involved a question that pertained to all taxpayers, and the public nature of that question did not lead the Supreme Court to create an exception to its adequate representation holding." *Ibid*. Thus, *Headwaters* ignored the distinction that this Court expressly drew between the two categories of taxpayer lawsuits.

South Central Bell, petitioner and Herrick were not "mere 'strangers'." *Richards*, 517 U.S. at 802. Rather, the district court and court of appeals both found that petitioner and Herrick had a close relationship, were working together to restore a vintage aircraft for which they each sought plans under FOIA, and had shared discovery materials. As petitioner points out (Pet. 13; Pet. App. 13a), the court of appeals noted that the record did not reflect that petitioner had actual notice of Herrick's lawsuit as it was ongoing. Nonetheless, petitioner errs in contending that a finding of privity in this case runs counter to this Court's emphasis on notice in *Mullane*. Pet. 13-14. In *Richards*, this Court expressly "le[ft] open the possibility" that in some cases, "adequate representation might cure a lack of notice," and, as the court of appeals held, this is just such a case. 517 U.S. at 801.

b. Moreover, this case involves a public-law issue, whereas *Richards* and *Mullane* involved the vindication of private interests. Here, although petitioner and Herrick each was personally interested in the public disclosure of the plans to the F-45, their respective FOIA actions necessarily were predicated on the *public's* general interest in receiving information. As this Court has emphasized, "[a] person requesting the information needs no preconceived idea of the uses the data might serve. The information *belongs to citizens* to do with as they choose. * * * [T]he disclosure does not depend on the identity of the requester. As a general rule, if the information is subject to disclosure, it belongs to all." *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 171-172 (2004) (emphasis added); *United States Dep't of Justice* v. *Reporters Comm. for Freedom of the Press*, 489 U.S. 749, 773 (1989) (FOIA "focuses on the

citizens' right to be informed about 'what their government is up to'") (citation omitted).

This Court recognized in *Richards* that, in a public-law context, courts have greater latitude to preclude relitigation of claims. See *Richards*, 517 U.S. at 803 (noting that "wide latitude" to establish preclusion procedures in public-law cases is appropriate). Concerns with respect to judicial economy and the high cost of relitigating potentially unlimited claims—concerns that are implicated most often in public-law cases, in which there are many potential plaintiffs seeking the same benefit for the public generally—make preclusion in the instant case particularly appropriate. See 18A Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 4457, at 548 (2d ed. 2002) ("Virtual representation is more readily found in public law cases," because "[r]esolution of public issues has only an indirect impact on individual interests, and there is a potentially limitless supply of plaintiffs."). Because any number of individuals have standing to sue under FOIA, a holding that preclusion does not apply in this case would allow numerous associated plaintiffs to file successive FOIA requests seeking a second bite at the apple, even though the Tenth Circuit has already held that the requested plans are protected by trade secret status.[3] Therefore, the court of appeals' finding of privity was particularly appropriate in the instant case, especially in light of the

[3] Of course, as the court of appeals made clear, the requirement that the plaintiffs have, *inter alia*, a "close relationship" provides a limiting principle to the virtual representation doctrine, even in public-law cases. Thus, the court of appeals' decision would not interfere with the use of FOIA as a general matter by "reporters, public interest organizations, and academics, who are likely to associate with others having similar interests." Pet. App. 17a.

strong record evidence of a close relationship between petitioner and Herrick. The court of appeals' narrow, fact-bound decision in this public-law case is thus fully consistent with *Richards*; that this Court has not found privity in the context of a different, private-law case is of no consequence.

2. Petitioner argues (Pet. 5-12) that certiorari is warranted because the courts of appeals are divided on the proper way to apply the doctrine of virtual representation. He argues that a number of circuits require proof of notice, a legal relationship, or both before a finding of virtual representation is appropriate. This case, however, is not an appropriate vehicle for addressing any variations in the court of appeals' approaches.

Specifically, the cases that petitioner claims conflict with the court of appeals' decision are distinguishable because they involve private-law claims, while, as discussed above, the instant case involves public-law claims. See *Perez* v. *Volvo Car Corp.*, 247 F.3d 303, 312 (1st Cir. 2001) (suit brought by car owners alleging fraud and a scheme to inflate car prices artificially not precluded by prior suit brought by car owners in a different state); *Martin* v. *American Bancorp. Retirement Plan*, 407 F.3d 643, 651-652 (4th Cir. 2005) (ERISA suit brought by retirement plan beneficiaries alleging they were owed additional benefits not precluded by prior suit brought by different group of beneficiaries); *Pollard* v. *Cockrell*, 578 F.2d 1002, 1008-1009 (5th Cir. 1978) (constitutional challenge to law regulating massage parlors brought by patrons seeking to preserve their own rights to attend those establishments not precluded by prior suit brought by massage parlor owners); *Becherer* v. *Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 193 F.3d 415, 424 (6th Cir. 1999) (en banc) (inves-

tors' breach-of-contract suit against real estate developer not precluded by prior breach-of-contract action brought by different group of investors); *Tice* v. *American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998), cert. denied, 527 U.S. 1036 (1999) (pilots' age-discrimination claim challenging airline's retirement policy not precluded by prior age-discrimination suit brought by different group of litigants challenging airline's hiring policy); *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280 (11th Cir. 2004) (Title VII enforcement action charging employer with racial discrimination not precluded by prior private discrimination suit).

Unlike in those cases, a finding of privity on a virtual representation theory in the instant case—without requiring a further showing of notice or a legal relationship, as discussed above—is appropriate and consistent with this Court's precedent. See *Richards*, 517 U.S. at 803. Indeed, a number of courts have recognized the distinction between public and private interests in cases involving virtual representation. For instance, in *NAACP* v. *Hunt*, 891 F.2d 1555 (1990), the Eleventh Circuit held that a finding of res judicata on a virtual representation theory was appropriate in a public interest case involving a state legislator's constitutional challenge to flying the confederate flag above the Alabama state capitol dome. The court held that the NAACP had virtually represented the state legislator in a prior suit on the same issue, even though they did not have a legal relationship. The court explained that the interest of the state legislator "was so closely aligned to the NAACP's interests in the original suit that he was their virtual representative." *Id.* at 1561.

Subsequently, in *Pemco Aeroplex, Inc.*, a private-law case, the Eleventh Circuit expressly distinguished *Hunt*

on the ground that it "involved a general public law issue that affected the plaintiffs' private interests only indirectly, unlike the alleged racial harassment" in *Pemco Aeroplex*. 383 F.3d at 1289. Moreover, the court pointed out that in *Richards*, this Court "explicitly distinguished between such generalized public law challenges and more individualized cases." *Ibid.*;[4] see also *Gustafson* v. *Johns*, 213 Fed. Appx. 872, 876 (11th Cir. 2007) (holding that district court's determination that, in a public-law case, a plaintiff in a subsequent lawsuit need not have a legal relationship with a plaintiff in a prior lawsuit for virtual representation to apply "is consistent with United States Supreme Court and this Circuit's case law"); see also *Niere* v. *St. Louis County*, 305 F.3d 834, 837-838 (8th Cir. 2002) ("Virtual representation applies where litigation is public in nature and the plaintiffs barred by res judicata had common interests with the actual litigants."); *Tyus*, 93 F.3d at 454-456 (noting that the doctrine of virtual representation is more appropriately applied in a public-law case). Accordingly, the court of appeals' decision in the instant public-law case does not conflict with the cases that petitioner cites, all of which involve the vindication of private interests.

---

[4] Thus, for the same reasons, there is no merit to petitioner's contention (Pet. 9-10) that the court of appeals' decision in the instant case conflicts with *Pemco Aeroplex*.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

PAUL D. CLEMENT
Solicitor General
JEFFREY S. BUCHOLTZ
Acting Assistant Attorney General
LEONARD SCHAITMAN
ROBERT D. KAMENSHINE
Attorneys

DECEMBER 2007