Chapter 7

Claim & Issue Preclusion

1. General Principles

Rest. (2d) of Judgments

§ 13. Requirement of Finality

The rules of res judicata are applicable only when a final judgment is rendered. However, for purposes of issue preclusion (as distinguished from merger and bar), "final judgment" includes any prior adjudication of an issue in another action that is determined to be sufficiently firm to be accorded conclusive effect.

§ 14. Effective Date of Final Judgment

For purposes of res judicata, the effective date of a final judgment is the date of its rendition, without regard to the date of commencement of the action in which it is rendered or the action in which it is to be given effect.

§ 15. Inconsistent Judgments

When in two actions inconsistent final judgments are rendered, it is the later, not the earlier, judgment that is accorded conclusive effect in a third action under the rules of res judicata.

§ 16. Judgment Based Upon a Judgment That Is Subsequently Reversed

A judgment based on an earlier judgment is not nullified automatically by reason of the setting aside, or reversal on appeal, or other nullification of that earlier judgment; but the later judgment may be set aside, in appropriate proceedings, with provision for any suitable restitution of benefits received under it.

2. Claim Preclusion

Rest. (2d) of Judgments

§ 17. Effects of Former Adjudication—General Rules

A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:

(1) If the judgment is in favor of the plaintiff, the claim is extinguished and merged in the judgment and a new claim may arise on the judgment (see §18);

(2) If the judgment is in favor of the defendant, the claim is extinguished and the judgment bars a subsequent action on that claim (see §19);

§ 18. Judgment for Plaintiff—The General Rule of Merger

When a valid and final personal judgment is rendered in favor of the plaintiff:

(1) The plaintiff cannot thereafter maintain an action on the original claim or any part thereof, although he may be able to maintain an action upon the judgment; and (2) In an action upon the judgment, the defendant cannot avail himself of defenses he might have interposed, or did interpose, in the first action.

§ 19. Judgment for Defendant—The General Rule of Bar

A valid and final personal judgment rendered in favor of the defendant bars another action by the plaintiff on the same claim.

§ 20. Judgment for Defendant—Exceptions to the General Rule of Bar

(1) A personal judgment for the defendant, although valid and final, does not bar another action by the plaintiff on the same claim:

(a) When the judgment is one of dismissal for lack of jurisdiction, for improper venue, or for nonjoinder or misjoinder of parties; or

(b) When the plaintiff agrees to or elects a nonsuit (or voluntary dismissal) without prejudice or the court directs that the plaintiff be nonsuited (or that the action be otherwise dismissed) without prejudice; or

(c) When by statute or rule of court the judgment does not operate as a bar to another action on the same claim, or does not so operate unless the court specifies, and no such specification is made.

(2) A valid and final personal judgment for the defendant, which rests on the prematurity of the action or on the plaintiff's failure to satisfy a precondition to suit, does not bar another action by the plaintiff instituted after the claim has matured, or the precondition has been satisfied, unless a second action is precluded by operation of the substantive law.

§ 21. Judgment for Defendant on His Counterclaim

(1) Where the defendant interposes a counterclaim on which judgment is rendered in his favor, the rules of merger are applicable to the claim stated in the counterclaim, except as stated in Subsection (2).

(2) Where judgment on a counterclaim is rendered in favor of the defendant, but he is unable to obtain full recovery in the action because of the inability of the court to render such a judgment and the unavailability of such devices as removal to another court or consolidation with another action in the same court, the defendant is not precluded from subsequently maintaining an action for the balance due on the claim stated in the counterclaim.

§ 22. Effect of Failure to Interpose Counterclaim

(1) Where the defendant may interpose a claim as a counterclaim but he fails to do so, he is not thereby precluded from subsequently maintaining an action on that claim, except as stated in Subsection (2).

(2) A defendant who may interpose a claim as a counterclaim in an action but fails to do so is precluded, after the rendition of judgment in that action, from maintaining an action on the claim if:

(a) The counterclaim is required to be interposed by a compulsory counterclaim statute or rule of court, or

(b) The relationship between the counterclaim and the plaintiff's claim is such that successful prosecution of the second action would nullify the initial judgment or would impair rights established in the initial action.

§ 23. Judgment for Plaintiff on Defendant's Counterclaim

Where the defendant interposes a claim as a counterclaim and a valid and final judgment is rendered against him on the counterclaim, the rules of bar are applicable to the judgment.

2.1 Judgment on the Merits

Johnson v. Spencer, 950 F.3d 680 (10th Cir. 2020)

HOLMES, Circuit Judge

In 2013, a Wyoming court declared Andrew Johnson actually innocent of crimes for which he was then incarcerated. In 2017, after his release, Mr. Johnson brought suit under 42 U.S.C. § 1983 against the City of Cheyenne, Wyoming ("Cheyenne"), the Estate of Detective George Stanford ("the Estate"), and Officer Alan Spencer alleging that they were responsible for violations of his constitutional rights that contributed to his conviction ("2017 Action"). While incarcerated, however, Mr. Johnson had unsuccessfully brought similar suits against Cheyenne and Detective Stanford in 1991 ("1991 Action") and against Officer Spencer in 1992 ("1992 Action"). The central question on appeal is what effect the judgments against Mr. Johnson in his 1991 and 1992 Actions have on his 2017 Action.

Cheyenne, the Estate, and Officer Spencer each moved the district court under Federal Rule of Civil Procedure 12(b)(6) to dismiss the 2017 Action because its claims are precluded by the judgments in the 1991 and 1992 Actions. The district court granted those motions and denied Mr. Johnson's later motions for reconsideration of and relief from that dismissal. We affirm in part and reverse in part the district court's dismissal of the 2017 Action. More specifically, we affirm the dismissal of the claims against Cheyenne and the Estate because the judgment in the 1991 Action—in which they were the defendants—is entitled to claim-preclusive effect. We reverse, however, the dismissal of the claims against Officer Spencer because the judgment in the 1992 Action—in which he was the defendant—was not on the merits and, thus, is not entitled to claim-preclusive effect.

I. BACKGROUND

A. Factual Background

Late one night in June 1989, Mr. Johnson ran into a female acquaintance at a bar in Cheyenne and returned with her to the apartment that she shared with her boyfriend, who was away at the time. They drank wine and smoked marijuana in her living room, and Mr. Johnson used his driver's license and picture I.D., which were enclosed in a clear plastic sleeve, to separate marijuana leaves from their stems and seeds for the joints that they smoked. Mr. Johnson and his female acquaintance then left her apartment in her car and visited multiple bars in downtown Cheyenne. Mr. Johnson, however, forgot his license and picture I.D. on the coffee table in his acquaintance's living room.

The acquaintance eventually became sick and vomited in her car while Mr. Johnson was driving them to an after-hours club. When Mr. Johnson went inside the club to get some paper towels to clean up her vomit, the acquaintance climbed into the driver's seat and drove herself home. Mr. Johnson returned to find that his acquaintance and her car were gone. He then walked to his home, thirty-five minutes away, and went to sleep.

Later that night, from around 3:00 a.m. to 3:10 a.m., the acquaintance's downstairs neighbor heard aggressively loud, periodic knocking on the door to the stairs leading to the acquaintance's upstairs apartment. Eventually, she heard the door's glass window pane shatter, followed by footsteps crossing the broken glass and walking upstairs to the acquaintance's apartment. The neighbor heard the intruder walking around the acquaintance's apartment and then a woman screaming what sounded like "No, no!" The neighbor immediately called the police. While the neighbor was speaking to the police dispatcher, she heard the intruder walk back down the stairs, over the broken glass, and out of the building, less than ten minutes after breaking into the upstairs apartment.

When Officer Spencer and Officer Phillip Raybuck of the Cheyenne Police Department arrived about a minute later, they found the acquaintance whimpering hysterically in her bathroom with the door ajar. The rest of the apartment was dark. Officer Spencer later testified at trial that, when they asked the acquaintance to come out of the bathroom, she screamed at them, and it took him a moment to realize that she was repeatedly asking, "Is he still here?" The officers searched her apartment and found no one else. They told her that they were the only ones there and she could open the bathroom door. Officer Spencer testified that the acquaintance opened the door some more—revealing that her hair was mussed, her eyes were wet and red, and her robe was half undone—and she repeatedly said, "He hurt me."

According to Mr. Johnson, Officer Spencer must have taken his driver's license and picture I.D. off of the coffee table in the living room and, upon being told by the acquaintance that a man had "hurt" her, showed them to her, "prompting" her "to affirmatively assert Mr. Johnson was that man." Officer Spencer testified that it took him a while to understand what Mr. Johnson allegedly did to the acquaintance because she was still choked up and crying, but that she ultimately led him to believe that Mr. Johnson had sexually assaulted her.

Officer Spencer took the acquaintance to a local hospital where she was medically examined and had a sexual-assault kit performed, resulting in the discovery of seminal fluid. Officer Raybuck then went through the acquaintance's apartment taking photographs of the crime scene. Some of these photographs were provided to Mr. Johnson's trial counsel, but others were not.

Later that morning, Mr. Johnson was awakened by a police officer knocking on his front door. The officer asked him if he had any knowledge about a burglary and sexual assault that had happened during the night. Mr. Johnson denied having any knowledge of the crimes. The officer then arrested him and took him to jail.

Detective Stanford investigated the acquaintance's sexual-assault allegation. He took biological samples from Mr. Johnson pursuant to a warrant and interviewed the acquaintance at least three times. At trial, he testified that the acquaintance called him two days after the sexual assault and told him that she had found Mr. Johnson's eyeglasses in her bedroom—the same eyeglasses, she said, that he had worn at the bars they went to after leaving her apartment on the night she was assaulted. Mr. Johnson claims that his glasses must have been "planted" in the bedroom "by or on behalf of" the acquaintance.

At trial, the acquaintance testified that Mr. Johnson broke into her apartment and raped her. She also testified that Mr. Johnson had his I.D. card when they went barhopping after leaving her apartment because he produced his card to enter one of the bars. The prosecution, as mentioned, introduced testimony from Officer Spencer and Detective Stanford about the driver's license, picture I.D., and eyeglasses that were found in the apartment. An expert witness for the prosecution testified that, based on forensic testing, Mr. Johnson was "among the five percent of the population who could have left the seminal fluid" recovered by the acquaintance's sexual-assault kit. The jury convicted Mr. Johnson of aggravated burglary and first degree sexual assault. The Supreme Court of Wyoming affirmed his conviction.

Mr. Johnson remained imprisoned for twenty-four years. Then, in August 2013, he was declared actually innocent by a Wyoming court after improved DNA testing revealed that the seminal fluid samples in the acquaintance's sexual-assault kit did not match his DNA but, rather, the DNA of the acquaintance's then-boyfriend. According to Mr. Johnson, the Cheyenne Police Department should not have believed the acquaintance and her boyfriend when they told the police that the boyfriend was out of town for work on the night she was sexually assaulted.

B. Procedural Background

1. The 1991 Action

While incarcerated, Mr. Johnson filed at least two federal civil-rights actions in Wyoming federal district court against those he claimed were responsible for his conviction. The first of these actions was a suit he filed in forma pauperis in 1991 against the City of Cheyenne and Detective Stanford, among other parties. Within seven days of the filing of his original complaint, Mr. Johnson also filed a demand

for a jury trial. He then amended his complaint, alleging, inter alia, that Cheyenne had failed to train its officers in proper methods of investigation and that Detective Stanford had violated his constitutional rights during the investigation by, for example, the manner in which the detective interrogated him.

About a month after the defendants answered his amended complaint, Mr. Johnson requested a hearing on the complaint and a jury trial. The district court granted him an evidentiary hearing, but denied him a jury trial. At the hearing, Mr. Johnson objected to the court's denial of a jury trial, but his objection was overruled. Near the end of the hearing, the defendants argued that the case was ripe for summary judgment, and the district court responded that they could move for it. The district court also ordered the parties to submit proposed findings of fact and conclusions of law. But before the district court entered any findings or conclusions, the case was transferred to another district judge, who, in turn, referred the case to a magistrate judge for a new evidentiary hearing. Mr. Johnson, however, did not object to the new hearing. And it appears that he did not renew his request for a jury trial before the new district judge.

At the beginning of the new evidentiary hearing, the magistrate judge denied the defendants' motions for summary judgment, which they had filed after the first evidentiary hearing, because there were genuine disputes of material fact. The magistrate judge indicated that he would be making the relevant findings of fact based on the evidence proffered at the hearing, and Mr. Johnson, again, did not object. The magistrate judge then conducted a bench trial and issued Findings of Fact and Recommendations, advising in the end "that Mr. Johnson's complaint be denied with prejudice." Mr. Johnson filed objections to the magistrate judge's report. The district court overruled his objections and adopted the magistrate judge's recommendations, dismissing Mr. Johnson's claims with prejudice.

Mr. Johnson appealed, and a panel of our court entered an order and judgment affirming the district court's judgment.

2. The 1992 Action

While his 1991 Action was pending, Mr. Johnson filed another federal civil-rights action—this time a 42 U.S.C. § 1983 suit against Officer Spencer. Mr. Johnson alleged that Officer Spencer had violated his due-process rights "by knowingly and willfully giving false testimony at his original jury trial" about the eyeglasses that his acquaintance said that he had worn and she had found in her bedroom. He also moved the district court for leave to proceed in forma pauperis.

Before Officer Spencer filed any responsive document, the district court entered an order sua sponte dismissing the complaint with prejudice as frivolous. The court noted that in the 1991 Action it had "concluded there were no facts justifying the plaintiff's claims that his constitutional rights were violated" with respect to

the trial evidence about his eyeglasses, and that "the present complaint was simply another attempt by him to revisit the same claim that had previously been dismissed." The court reviewed the exhibits submitted with the complaint and determined that they did not "establish even the slightest indication that Officer Spencer had made false, or inconsistent, statements at the trial." The court held that "Plaintiff had made no new argument in his complaint and that the complaint was frivolous and completely devoid of merit." The court then went on to hold that, "even assuming Mr. Johnson's constitutional rights were violated by" Officer Spencer, any error was "harmless" in light of the strong evidence of guilt presented at Mr. Johnson's trial. The court described "the evidence and Officer Spencer's challenged testimony regarding the eyeglasses" as, "at best, extraneous and cumulative." It then "dismissed the complaint with prejudice as frivolous."

On appeal, we affirmed, noting that the district court had "dismissed the action as factually frivolous under 28 U.S.C. § 1915(d)." In doing so, we stated that "Mr. Johnson's lawsuit is based upon an indisputably meritless legal theory because a testifying police officer is entitled to absolute immunity." Thus, "dismissal was appropriate."

3. The 2017 Action

After he was exonerated, Mr. Johnson filed a third federal civil-rights action, i.e., the 2017 Action under § 1983. He alleged that Cheyenne, Detective Stanford, Officer Spencer, and unnamed members of Cheyenne's police department violated his constitutional rights. In particular, he alleged that the defendants suppressed photographs of the crime scene that would have exonerated him, failed to preserve those photographs, fabricated evidence by prompting the acquaintance to identify him as the intruder who broke into her apartment, and, as to Cheyenne, failed to have adequate policies and training for its officers.

In May 2017, Cheyenne and Officer Spencer separately moved to dismiss the complaint, arguing, inter alia, that the claims against them were precluded by the judgments in the 1991 and 1992 Actions, respectively. The Estate later filed its own motion to dismiss, raising, inter alia, claim preclusion with respect to the 1991 Action. The defendants each attached records from the prior proceedings to their motions.

In July 2017, the district court granted all three motions to dismiss. "Although Defendants raised several bases for dismissal of Plaintiff's claims against them," the district court concluded that "res judicata, or claim preclusion, barred Plaintiff's action and was therefore dispositive of Defendants' motions to dismiss." In particular, the district court concluded that both the 1991 and 1992 Actions had resulted in final judgments on the merits against Mr. Johnson, had been between the same parties as the 2017 Action, and had concerned the same transaction as the 2017 Action. The district court rejected Mr. Johnson's argument that *Heck v.*

Humphrey, 512 U.S. 477 (1994)—which held that prisoners may not bring a § 1983 action that calls into question the lawfulness of their conviction until the conviction has been invalidated—implied that the judgments against him in his 1991 and 1992 pre-*Heck* Actions were not entitled to claim-preclusive effect because his underlying conviction had not yet been invalidated. Although Mr. Johnson had yet to respond to the Estate's motion to dismiss, the court granted it, too, "because the res judicata analysis did not differ and was equally dispositive as to Detective Stanford."

II. DISCUSSION

The central question in this appeal is whether the judgments in the prior litigation concerning Mr. Johnson's conviction—i.e., the judgments in the 1991 and 1992 Actions—prevent him from bringing a new lawsuit—i.e., the 2017 Action—against the same defendants after his exoneration. The answer turns on the doctrine of claim preclusion. Claim preclusion "prevents a party from litigating a legal claim that was or could have been the subject of a previously issued final judgment." For claim preclusion to apply, "three elements must exist: (1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." "Even if these three elements are satisfied, there is an exception to the application of claim preclusion where the party resisting it did not have a 'full and fair opportunity to litigate' the claim in the prior action."

We address in Part B whether the judgments in the 1991 and 1992 Actions have claim-preclusive effect on the 2017 Action. We conclude that the judgment in the 1991 Action—in which Detective Stanford and Cheyenne were defendants—has claim-preclusive effect. But we conclude that the judgment in the 1992 Action—in which Officer Spencer was the defendant—does not have claim-preclusive effect because that case was not decided "on the merits." We, thus, do the following: (1) reverse the district court's order granting Officer Spencer's Rule 12(b)(6) motion to dismiss the 2017 Action and remand for further proceedings, and (2) affirm the district court's order granting the Estate's and Cheyenne's Rule 12(b)(6) motions to dismiss the 2017 Action.

B. The Defendants' Rule 12(b)(6) Motions in the 2017 Action

In the following discussion, we address (1) our standard of review, (2) the general framework governing claim-preclusion, and (3) how that law applies to the 1991 and 1992 Actions. We conclude that the district court correctly held that the 1991 Action has claim-preclusive effect on the 2017 Action, but erred in holding that the 1992 Action has such effect. We, thus, affirm in part and reverse in part.

2. Background Principles of Claim Preclusion

Before proceeding further into our de novo review, we pause to frame the applicable claim-preclusion doctrine. "The principle underlying the rule of claim preclusion is that a party who once has had a chance to litigate a claim before an appropriate tribunal usually ought not have another chance to do so." "The preclusive effect of a federal-court judgment is determined by federal common law." We require defendants to prove three elements to prevail on this defense: "(1) a final judgment on the merits in an earlier action; (2) identity of parties or privies in the two suits; and (3) identity of the cause of action in both suits." "In addition, even if these three elements are satisfied, there is an exception to the application of claim preclusion where the party resisting it did not have a 'full and fair opportunity to litigate' the claim in the prior action."

Although we have at times "characterized the 'full and fair opportunity to litigate' as a fourth requirement of res judicata," we have since clarified that "the absence of a full and fair opportunity to litigate is more appropriately treated as an exception to the application of claim preclusion when the three referenced requirements are met."

In this case, Mr. Johnson concedes that the district court correctly ruled that the second and third elements of claim preclusion are satisfied here. See Thus, the judgments in the 1991 and 1992 Actions will have claim-preclusive effect against Mr. Johnson so long as they were "on the merits" and he had a "full and fair opportunity to litigate." Although Mr. Johnson argues that the 1992 Action did not provide him with a "full and fair opportunity to litigate," we do not address the merits of that argument because, as explicated below, we agree with his contention that the district court erred in holding that the judgment in that action was "on the merits." The 1992 Action, accordingly, should not have been given claim-preclusive effect. As for the 1991 Action, Mr. Johnson does not argue that the district court erred in concluding that it had entered a judgment "on the merits." Consequently, we take up below solely the question of whether Mr. Johnson had a "full and fair opportunity to litigate" his claims in the 1991 Action. We conclude that he did have such an opportunity. We, thus, affirm that aspect of the district court's claim-preclusion determination.

3. Application

In the following discussion, as indicated, we focus on whether the 1991 Action provided Mr. Johnson with a "full and fair opportunity to litigate" and whether the 1992 Action was adjudicated "on the merits." As to the 1991 Action, we conclude that Mr. Johnson had a "full and fair opportunity to litigate" his claims because the decision to conduct a bench trial that ostensibly deprived him of that opportunity presented a procedural issue that he had a full and fair opportunity to litigate before the district court, but then waived on appeal, even though he could have

fully and fairly litigated it there as well. As to the 1992 Action, in contrast, we conclude that Mr. Johnson correctly contends that the action was not adjudicated "on the merits" because the district court expressly dismissed it as frivolous under the then-applicable 28 U.S.C. § 1915(d). Accordingly, we affirm the district court's dismissal of the claims precluded by the 1991 Action—i.e., those against the Estate and Cheyenne—but reverse its dismissal of the claims ostensibly precluded by the 1992 Action—i.e., those against Officer Spencer.

a. The 1991 Action is entitled to claim-preclusive effect.

The parties dispute whether the 1991 Action is entitled to claim-preclusive effect and, more specifically, whether it constituted a "full and fair opportunity to litigate." Mr. Johnson also argues that, even if the 1991 Action might give rise to claim preclusion, Cheyenne and the Estate have failed to muster legally sufficient proof to establish this. We reject both arguments and, thus, uphold the district court's dismissal of the claims against Cheyenne and the Estate, i.e., the parties to the 1991 Action.

i. The "Full and Fair Opportunity to Litigate" Requirement

The "full and fair opportunity to litigate" inquiry is a "narrow exception" that "applies only where the requirements of due process were not afforded—where a party shows 'a deficiency that would undermine the fundamental fairness of the original proceedings.'" "The fairness of the prior proceeding 'is determined by examining any procedural limitations, the party's incentive to fully litigate the claim, and whether effective litigation was limited by the nature or relationship of the parties.'" Here, Mr. Johnson argues, that the district court's decision in the 1991 Action to convene a bench trial instead of a jury trial was a procedural limitation that denied him a "full and fair opportunity to litigate" his claims. We disagree.

As we mentioned, the procedural limitation at issue here—i.e., the denial of a jury trial—is a matter that Mr. Johnson fully litigated before the district court in the 1991 Action and could have fully challenged on appeal, but failed to do. More specifically, after the district court denied Mr. Johnson's motion for a jury trial and started to conduct an evidentiary hearing on his complaint instead, Mr. Johnson objected to that procedure in court. The district court overruled the objection. After his case was assigned to a new district judge, that judge entered judgment for the defendants following a bench trial held about 10 months after the evidentiary hearing. Mr. Johnson appealed from the district court's judgment. Although he could have challenged the process that the district court afforded him, he failed to do so. The judgment in the 1991 Action then became final; any procedural challenges Mr. Johnson could have raised against it were waived by his failure to present them on appeal.

As the governing authorities make clear, it is enough for full-and-fair-opportunity-to-litigate purposes that the litigant had a full and fair opportunity to contest the procedural obstacle that ostensibly barred meaningful consideration of his claims. Mr. Johnson had that opportunity here. In this regard, our decision in *Hanley v. Four Corners Vacation Properties, Inc.*, is instructive. In *Hanley*, the plaintiffs-appellants argued that a prior state judgment "was void and subject to collateral attack because of the lack of service of process." The defendants-appellees defended the prior judgment on the ground that "the due process issue pertaining to the alleged defect in service of process was fully litigated previously in state court, culminating in a judgment" against the plaintiffs-appellants. The district court "sustained the defense," holding that the prior judgment should be accorded claim-preclusive effect. We affirmed, stating that "it is well settled that where the issue of due process has been litigated and a final judgment entered, the determination of that issue, right or wrong, is res judicata." In reaching that holding, we reasoned that the plaintiffs-appellants' due-process concerns were litigated in state court, where "an adequate remedy was available through the state appellate process." And we concluded that the plaintiffs-appellants "have had their day in court on these issues and a final judgment entered thereon. They cannot relitigate them in federal court."

As in *Hanley*, so too here. Mr. Johnson had a full and fair opportunity to litigate the alleged procedural limitation—i.e., the denial of a jury trial—before the district court in the 1991 Action, and, after the court entered judgment, he had a full and fair opportunity to challenge the court's procedures on appeal before that judgment became final. The fact that he did not present a procedural challenge on appeal does nothing to diminish the opportunity that he had to do so; he simply lost his chance. Like the plaintiffs-appellants in Hanley, Mr. Johnson "had his day in court on this issue and a final judgment entered thereon." The district court, therefore, properly determined that he could not "relitigate" the issue in the 2017 Action.

In sum, it is clear to us that Mr. Johnson cannot escape from the claim-preclusive effect of the 1991 Action based on a procedural argument that was previously litigated and adjudicated in that action and that he had an opportunity to appeal before that judgment became final. Consequently, we reject Mr. Johnson's contention that the 1991 Action did not provide him with a "full and fair opportunity to litigate."

ii. Cheyenne and the Estate carried their burden on the claim-preclusion defense.

Mr. Johnson also contends that, even if the 1991 Action could give rise to claim preclusion, Cheyenne and the Estate have failed to muster legally sufficient proof to establish this. We reject this argument.

Mr. Johnson argues that "even if the 1991 Action could give rise to claim preclusion, appellees failed to prove claim preclusion in their Rule 12(b)(6) motions." As a threshold matter, we note that much of this argument appears based on the fact that the district court relied on facts not included in the complaint, but we have already explained that the district court's judicial notice of its own records was permissible. Further, because Mr. Johnson is only challenging the district court's claim-preclusion ruling with respect to the 1991 Action on the ground that he was not given a "full and fair opportunity to litigate" his claims there, we most appropriately view his current lack-of-proof argument through that limited lens.

That said, we recognize that Mr. Johnson's argument appears to grow out of the lack of clarity in our earlier cases about whether the full-and-fair-opportunity-to-litigate factor should be classified as an "element" of, or an "exception" to, claim preclusion; we have clarified that it is the latter. Mr. Johnson, however, effectively rejects this clarification and suggests that the district court did not properly allocate the burden of proof—specifically, the burden of persuasion—on Cheyenne and the Estate with respect to the fair-and-full-opportunity-to-litigate factor.

It is beyond cavil that claim preclusion is an affirmative defense, as to which the defendant bears the burden of proof. But at least arguably in our precedential decisions, we have effectively allocated to "the party seeking to avoid preclusion" the burden of proof as to the full-and-fair-opportunity-to-litigate exception. Be that as it may, we need not definitively opine here on this burden-of-proof question because the district court, in fact, placed the burden of proof for the full-and-fair-opportunity factor—including the burden of persuasion—on the defendants. Insofar as Mr. Johnson suggests that the court's observation that he "failed to rebut" the defendants' proof demonstrates that the court actually placed the burden of proof on him, we disagree. Instead of treating the full-and-fair-opportunity factor as an exception to preclusion, the district court viewed it as one of "'four' res judicata elements" that the defendants had "the burden of showing." The court, therefore, made its observation that Mr. Johnson did not rebut the defendants' proof in the context of its express statement that it had held the defendants to "the burden of showing that Mr. Johnson had a full and fair opportunity to litigate the claims in the prior suits." Accordingly, Mr. Johnson has no basis to object to the district court's allocation of the burden of proof as to the full-and-fair-opportunity-to-litigate factor because the court allocated the burden as he desired.

In sum, we reject Mr. Johnson's argument that Cheyenne and the Estate have failed to muster legally sufficient proof to establish claim preclusion as to the 1991 Action.

iii. Heck v. Humphrey Redux

Mr. Johnson also returns to an iteration of his *Heck* argument. He argues that, under *Heck*, he could not have brought the claims in his 2017 Action until he was exonerated in 2013 and so the district court erred in deeming those claims precluded by his earlier actions.

Mr. Johnson's argument starts with *Heck*'s teaching that, to determine whether a prisoner's conviction has prevented his § 1983 claim pertaining to that conviction from accruing, courts "must consider whether a judgment in favor of the plaintiff would necessarily imply the invalidity of his conviction or sentence." "If it would, the complaint must be dismissed unless the plaintiff can demonstrate that the conviction or sentence has already been invalidated." Mr. Johnson adds to those principles from *Heck* our statement in *Lenox MacLaren Surgical* that "claim preclusion does not bar subsequent litigation of new claims based on facts the plaintiff did not and could not know when it filed its complaint." Combining *Heck* and *Lenox MacLaren Surgical*, Mr. Johnson reasons that "since invalidation of his conviction was a non-existent fact at the time of his prior actions, he could not have brought his present claims in those prior actions." He, in other words, argues that his claims did not begin accruing until he was exonerated.

But this argument runs into similar problems as those discussed above. Regardless of whether the district court in the 1991 Action should have held—even before *Heck* was decided—that Mr. Johnson's claims were not cognizable under § 1983, the 1991 Action nonetheless adjudicated Mr. Johnson's claims against Detective Stanford and Cheyenne. Following his appeal, the judgment in that case became final, and that final judgment will have claim-preclusive effect on the 2017 Action if the elements of preclusion are met. Because Mr. Johnson concedes that the district court correctly ruled that the second and third elements of claim preclusion are satisfied here, the 1991 Action will have claim-preclusive effect so long as it was "on the merits" and provided a "full and fair opportunity to litigate." But Mr. Johnson does not argue that the district court erred in concluding that the 1991 Action was "on the merits," and we have already rejected his argument that the action did not provide a "full and fair opportunity to litigate." And so the judgment in the 1991 Action has precluded claims like those in the 2017 Action from the time it became final.

The Supreme Court's later opinion in *Heck* did nothing to disturb the parties' reliance on that final judgment: "once suit is barred by res judicata or by statutes of limitation or repose, a new rule cannot reopen the door already closed."

We, thus, reject Mr. Johnson's argument that the claims in the 2017 Action were not precluded by the 1991 Action because they were not cognizable under § 1983 until after he was exonerated.

In sum, we hold that the claims in the 2017 Action against Cheyenne and the Estate are precluded by the 1991 Action. We, thus, affirm the dismissal of those claims.

b. The 1992 Action is not entitled to claim-preclusive effect.

With respect to the 1992 Action, Mr. Johnson primarily disputes the first element of claim preclusion, i.e., whether there was "a final judgment on the merits." We recount the relevant procedural history before agreeing with Mr. Johnson that the 1992 Action was not adjudicated "on the merits" and, therefore, did not have claim-preclusive effect on the 2017 Action. We, thus, reverse the district court's dismissal of the claims against Officer Spencer—the only defendant in the 1992 Action—and remand for further proceedings on those claims. Because we conclude that the 1992 Action was not adjudicated "on the merits," we need not entertain Mr. Johnson's separate argument that the 1992 Action did not afford him a "full and fair opportunity to litigate."

i. Relevant Procedural History

Mr. Johnson's 1992 Action was a § 1983 suit alleging that Officer Spencer violated his due-process rights by providing false testimony about his eyeglasses at his criminal trial. The district court dismissed the complaint sua sponte with prejudice as frivolous, (1) noting that in the 1991 Action it had "concluded there were no facts justifying the plaintiff's claims that his constitutional rights were violated" and (2) holding that "the present complaint was simply another attempt by plaintiff to revisit the same claim that has previously been dismissed." The court reviewed the exhibits that Mr. Johnson had submitted with his complaint and concluded that they did not "establish even the slightest indication that Officer Spencer made false, or inconsistent statements at the trial." The court, in conclusion, observed that Mr. Johnson had "made no new argument in his complaint" and, thus, held that his complaint was "frivolous and completely devoid of merit."

Further, the district court stated that "even assuming Mr. Johnson's constitutional rights were violated by Officer Spencer, it was harmless error." The court held in particular that "no reasonable possibility existed to believe the evidence of Mr. Johnson's eyeglasses might have contributed to his conviction" because there was other evidence—viz., the acquaintance's identification of him, the presence of his driver's license and picture I.D. in her apartment, and the forensic evidence tying him to the seminal fluid preserved in the acquaintance's sexual-assault kit—that had established Mr. Johnson's guilt. The court, thus, concluded that Officer Spencer's trial testimony about Mr. Johnson's eyeglasses "was, at best, extraneous and cumulative." The court then "dismissed the complaint with prejudice as frivolous," noting that Mr. Johnson had filed several related lawsuits, "all of which were frivolous and vexatious in nature." The court subsequently underscored the basis for its action, after noting that it had "come to the attention of the court" that Mr. Johnson's in forma pauperis motion was still pending. The court noted that it

had recently determined that Mr. Johnson "had failed to present a rational argument on the facts or law in support of his clam and that the complaint was frivolous and devoid of merit." "Therefore," the court denied Mr. Johnson's in forma pauperis motion.

On appeal from that judgment, we noted that the district court "dismissed the action as factually frivolous" and affirmed on the ground that "Mr. Johnson's lawsuit is based upon an indisputably meritless legal theory because a testifying police officer is entitled to absolute immunity."

ii. The "On the Merits" Requirement

As mentioned, a successful claim-preclusion defense requires "a final judgment on the merits in the earlier action." Mr. Johnson argues that the 1992 Action was not an adjudication "on the merits" because the suit was dismissed as frivolous. We agree.

The Supreme Court settled this question in *Denton v. Hernandez*. There, the Court addressed "the appropriate inquiry for determining when an in forma pauperis litigant's factual allegations justify a § 1915(d) dismissal for frivolousness." In doing so, the Court stated that "because a § 1915(d) dismissal is not a dismissal on the merits, but rather an exercise of the court's discretion under the in forma pauperis statute, the dismissal does not prejudice the filing of a paid complaint making the same allegations."

In the 1992 Action, the district court expressly relied on the then-existing § 1915(d) in dismissing Mr. Johnson's claim as "frivolous and completely devoid of merit." And so, following Denton, we conclude that the district court's dismissal of the 1992 Action was not "on the merits."

Officer Spencer argues against this straightforward conclusion. He first contends that while it is "generally" true that a § 1915(d) dismissal is not "on the merits" when it is for factual frivolousness, the dismissal here should be deemed "on the merits" for claim-preclusion purposes because the district court additionally determined that Mr. Johnson's claims were not legally meritorious because any error was harmless. We reject this argument. The old § 1915(d) allowed district courts to dismiss a complaint as frivolous when it "lacked an arguable basis either in law or in fact." Although the Court in Denton emphasized that § 1915(d) provided courts with "the unusual power to pierce the veil of the complaint's factual allegations," thereby deviating from the Rule 12(b)(6) standard of largely "accepting without question the truth of the plaintiff's allegations," the Court ultimately drew no distinction between § 1915(d) dismissals for legal frivolity and those for factual frivolity when it stated that "a § 1915(d) dismissal is not a dismissal on the merits." While Denton itself specifically addressed a factually frivolous complaint, its rule that § 1915(d) dismissals are not on the merits contemplated § 1915(d) dismissals generally, i.e., dismissals based on both legal and factual frivolity.

Denton created a simple rule applying to all dismissals for frivolousness under the pre-1996 § 1915(d), regardless of whether the frivolousness was legal or factual, and we apply that rule here. The district court explicitly based its dismissal on § 1915(d). Although the court appended to the end of its order a one-paragraph discussion of the harmlessness of any purported error, that discussion did not transform the dismissal into a merits adjudication. Because the 1992 Action was not adjudicated on the merits, it has no preclusive effect on Mr. Johnson's paid complaint in the 2017 Action.

Officer Spencer also cites *Bell v. Hood* for the proposition that if a court "exercises its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction." But that general proposition in *Bell* does not address whether frivolousness determinations are on the merits, as the very next sentence makes clear. Therefore, we conclude that this proposition in *Bell* does nothing to limit the breadth of *Denton*'s relevant pronouncement.

Relatedly, Officer Spencer relies on the Ninth Circuit's statement that "a dismissal for failure to state a claim under Rule 12(b)(6) is a 'judgment on the merits' to which res judicata applies." But that uncontroversial statement simply has no application here. The district court did not sua sponte dismiss the claim at issue here pursuant to Rule 12(b)(6); it expressly invoked § 1915(d). Stewart's discussion of Rule 12(b)(6) therefore has nothing to contribute to Denton's interpretation of § 1915(d).

Finally, the parties dispute whether an order with two holdings, one "on the merits" and one not, can have claim-preclusive effect. But we need not wade into this dispute. Notwithstanding the district court's discussion of harmlessness, its judgment in the 1992 Action was expressly and solely bottomed on a dismissal under § 1915(d). The court did not purport to rule on the merits, but instead dismissed under § 1915(d) on frivolousness grounds. And *Denton* settles the question that such dismissals are not on the merits. This is not a case where the district court made two holdings—one on the merits and one not—and so the claim-preclusive effects of such a circumstance are not before us.

In sum, because it was not an adjudication on the merits, we conclude that the 1992 Action cannot operate with claim-preclusive effect on the 2017 Action. We, thus, reverse the district court's order dismissing the 2017 Action's claims against Officer Spencer. Because we reverse that order based on the "on the merits" element of claim preclusion, we need not and do not address whether the district court's order was also erroneous because it determined that the 1992 Action provided Mr. Johnson with a "full and fair opportunity to litigate."

III. CONCLUSION

We acknowledge the terrible reality that Mr. Johnson must have faced during the twenty-four years that he was wrongly incarcerated. As the Supreme Court has stated, however, the doctrine of claim preclusion "serves vital public interests beyond any individual judge's ad hoc determination of the equities in a particular case." Thus, for the reasons we have provided, in the 2017 Action, we affirm the dismissal of the claims against the Estate and Cheyenne, but reverse the dismissal of the claims against Officer Spencer and remand for further proceedings consistent with this opinion.

2.2 Same Claim

Rest. (2d) of Judgments

§ 24. Dimensions of "Claim" for Purposes of Merger or Bar—General Rule Concerning "Splitting"

(1) When a valid and final judgment rendered in an action extinguishes the plaintiff's claim pursuant to the rules of merger or bar (see §§18, 19), the claim extinguished includes all rights of the plaintiff to remedies against the defendant with respect to all or any part of the transaction, or series of connected transactions, out of which the action arose.

(2) What factual grouping constitutes a "transaction", and what groupings constitute a "series", are to be determined pragmatically, giving weight to such considerations as whether the facts are related in time, space, origin, or motivation, whether they form a convenient trial unit, and whether their treatment as a unit conforms to the parties' expectations or business understanding or usage.

The general rule of this Section is exemplified in §25, and is subject to the exceptions stated in §26.

§ 25. Exemplifications of General Rule Concerning Splitting

The rule of §24 applies to extinguish a claim by the plaintiff against the defendant even though the plaintiff is prepared in the second action

(1) To present evidence or grounds or theories of the case not presented in the first action, or

(2) To seek remedies or forms of relief not demanded in the first action.

Hernandez v. Asset Acceptance, LLC, 970 F.Supp.2d 1194 (D. Colo. 2013)

MARCIA S. KRIEGER, Chief Judge.

Ms. Hernandez claims that the Defendant, a debt collection agency, violated the Fair Debt Collection Practice Act (FDCPA), when it failed to communicate to Experian, a credit reporting agency that she disputed a debt she had incurred. Ms. Hernandez allegedly incurred a debt with Xcel Energy and defaulted on the debt. The account was transferred to the Defendant for collection. In May 2011, Ms. Hernandez reviewed a copy of her Experian credit report and saw the Defendant's entry for the Xcel account on the report. On May 5, 2011, she called the Defendant to dispute the account. In June, August, October, and November 2011, the Defendant allegedly failed to communicate to Experian that Ms. Hernandez's Xcel Energy account was disputed. Ms. Hernandez asserts that this "Complaint and Jury Demand only seeks relief for activity that occurred after August 7, 2011." She seeks statutory damages available under the FDCPA, as well as attorney fees and costs.

By way of additional background, the Court notes that on July 1, 2011, Ms. Hernandez initiated Civil Action No. 11-cv-01729 (*Hernandez I*). In that case, Ms. Hernandez claimed that in June 2011, the Defendant violated the FDCPA by failing to report the Xcel Energy account as disputed between May 5, 2011 and July 1, 2011. She alleged violations of the FDCPA. A two-day jury trial was held on September 10, 2012. The jury returned a verdict in favor of the Defendant. Final judgment was entered in *Hernandez I* on September 21, 2012.

As relevant here, the Defendant moved to dismiss Ms. Hernandez's claims in this case under the doctrine of *res judicata,* also referred to as claim preclusion. The matter was referred to the Magistrate Judge, who recommends that the motion be granted. The Magistrate Judge found that Ms. Hernandez's claims must be dismissed because the claims asserted in this case arise from the same transaction, or series of transactions, as the claims asserted in _Hernandez I.

Ms. Hernandez objects to the Magistrate Judge's factual conclusion that her claims in this case arise out of the same transaction as those asserted in *Hernandez I.* Specifically, she argues that her claims here can be proven with evidence of new facts that occurred after *Hernandez I.* She alleges that here, she can rely on pleadings filed in *Hernandez I* to establish that she disputed the account, rather than rely on evidence of the May 5, 2011 phone call. She argues that because *Hernandez I* occurred after the conduct she alleged in that action, her claims in this case rely on independent facts.

"Under *res judicata,* or claim preclusion, a final judgment on the merits of an action precludes the parties or their privies from relitigating issues that were or *could have been raised* in the prior action." Claim preclusion requires a judgment on the merits in an earlier action, identity of the parties in the two suits, and identity of the cause of action in both suits. To determine whether the claims in two suits are identical, it must be determined whether the claims arise out of the same transaction, or series of connected transactions. "A new action will be permitted only where it raises *new and independent claims,* not part of the previous transaction, based on the new facts."

Upon *de novo* review of the Recommendation, the Court reaches the same conclusions articulated in the Recommendation for substantially the same reasons. Contrary to Ms. Hernandez's view, her claims in this action are not independent simply because they allege conduct that occurred after *Hernandez I*. Even if she were to rely on pleadings in that case to establish that she disputed the account, the pleadings depend on the fact of the May 5, 2011 phone call to establish the dispute. The claims here relate to the same disputed account, and they involve separate instances of the same course of conduct by the Defendant — that is, the Defendant's failure to report the account as disputed after the May 5, 2011 phone call. Thus, although the Defendant's conduct in August, October, and November 2011 could have amounted to additional violations of the FDCPA, those violations are not independent from the claims at issue in _Hernandez I.

Finally, the Court sees no reason why Ms. Hernandez could not have moved to amend her complaint in *Hernandez I* to include allegations of the conduct that occurred in August, October, and November 2011. The trial in *Hernandez I* occurred over a year after she filed her complaint in that case. Had she amended her complaint in *Hernandez I,* the jury could have been called upon to determine whether the Defendant's additional communications with Experian constituted violations of the FDCPA. A plaintiff cannot "avoid supplementing his complaint with facts *that are part of the same transaction* asserted in the complaint, in the hope of bringing a new action arising out of the same transaction on some later occasion."

For the forgoing reasons, the Plaintiff's Objections are OVERRULED and the Recommendation is ADOPTED to the extent it recommends that the Plaintiff's claims be dismissed. The Defendant's Motion to Dismiss is GRANTED and the Plaintiff's claims in this case are DISMISSED in their entirety, with prejudice. The Clerk of the Court shall close this case.

Whole Woman's Health v. Hellerstedt, 136 S.Ct. 2292 (2016)

BREYER, J.

In *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 878 (1992), a plurality of the Court concluded that there "exists" an "undue burden" on a woman's right to decide to have an abortion, and consequently a provision of law is constitutionally invalid, if the "*purpose or effect*" of the provision "*is to place a substantial obstacle* in the path of a woman seeking an abortion before the fetus attains viability." (Emphasis added.) The plurality added that "unnecessary health regulations that have the purpose or effect of presenting a substantial obstacle to a woman seeking an abortion impose an undue burden on the right." _Ibid.

We must here decide whether two provisions of Texas' House Bill 2 violate the Federal Constitution as interpreted in *Casey.* The first provision, which we shall call the "admitting-privileges requirement," says that

> a physician performing or inducing an abortion must, on the date the abortion is performed or induced, have active admitting privileges at a hospital that is located not further than 30 miles from the location at which the abortion is performed or induced."

This provision amended Texas law that had previously required an abortion facility to maintain a written protocol "for managing medical emergencies and the transfer of patients requiring further emergency care to a hospital."

The second provision, which we shall call the *"surgical-center requirement,"* says that

> the minimum standards for an abortion facility must be equivalent to the minimum standards adopted under the Texas Health and Safety Code section for ambulatory surgical centers.

We conclude that neither of these provisions confers medical benefits sufficient to justify the burdens upon access that each imposes. Each places a substantial obstacle in the path of women seeking a previability abortion, each constitutes an undue burden on abortion access, and each violates the Federal Constitution. Amdt. 14, § 1.

I

A

In July 2013, the Texas Legislature enacted House Bill 2 (H.B. 2 or Act). In September (before the new law took effect), a group of Texas abortion providers filed an action in Federal District Court seeking facial invalidation of the law's admitting-privileges provision. In late October, the District Court granted the injunction. But three days later, the Fifth Circuit vacated the injunction, thereby permitting the provision to take effect.

The Fifth Circuit subsequently upheld the provision, and set forth its reasons in an opinion released late the following March. In that opinion, the Fifth Circuit pointed to evidence introduced in the District Court the previous October. It noted that Texas had offered evidence designed to show that the admitting-privileges requirement "will reduce the delay in treatment and decrease health risk for abortion patients with critical complications," and that it would "'screen out' untrained or incompetent abortion providers." The opinion also explained that the plaintiffs had not provided sufficient evidence "that abortion practitioners will likely be unable to comply with the privileges requirement." The court said that all "of the major Texas cities, including Austin, Corpus Christi, Dallas, El Paso, Houston, and San Antonio," would "continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges." The *Abbott* plaintiffs did not file a petition for certiorari in this Court.

B

On April 6, one week after the Fifth Circuit's decision, petitioners, a group of abortion providers (many of whom were plaintiffs in the previous lawsuit), filed the present lawsuit in Federal District Court. They sought an injunction preventing enforcement of the admitting-privileges provision as applied to physicians at two abortion facilities, one operated by Whole Woman's Health in McAllen and the other operated by Nova Health Systems in El Paso. They also sought an injunction prohibiting enforcement of the surgical-center provision anywhere in Texas. They claimed that the admitting-privileges provision and the surgical-center provision violated the Constitution's Fourteenth Amendment, as interpreted in _Casey.

The District Court subsequently received stipulations from the parties and depositions from the parties' experts. The court conducted a 4-day bench trial. It heard, among other testimony, the opinions from expert witnesses for both sides. On the basis of the stipulations, depositions, and testimony, that court reached the following conclusions:

1. Of Texas' population of more than 25 million people, "approximately 5.4 million" are "women" of "reproductive age," living within a geographical area of "nearly 280,000 square miles."

2. "In recent years, the number of abortions reported in Texas has stayed fairly consistent at approximately 15-16% of the reported pregnancy rate, for a total number of approximately 60,000-72,000 legal abortions performed annually."

3. Prior to the enactment of H.B. 2, there were more than 40 licensed abortion facilities in Texas, which "number dropped by almost half leading up to and in the wake of enforcement of the admitting-privileges requirement that went into effect in late-October 2013."

4. If the surgical-center provision were allowed to take effect, the number of abortion facilities, after September 1, 2014, would be reduced further, so that "only seven facilities and a potential eighth will exist in Texas."

5. Abortion facilities "will remain only in Houston, Austin, San Antonio, and the Dallas/Fort Worth metropolitan region." These include "one facility in Austin, two in Dallas, one in Fort Worth, two in Houston, and either one or two in San Antonio."

6. "Based on historical data pertaining to Texas's average number of abortions, and assuming perfectly equal distribution among the remaining seven or eight providers, this would result in each facility serving between 7,500 and 10,000 patients per year. Accounting for the seasonal variations in pregnancy rates and a slightly unequal distribution of patients at each clinic, it is foreseeable that over 1,200 women per month could be vying for counseling, appointments, and follow-up visits at some of these facilities."

7. The suggestion "that these seven or eight providers could meet the demand of the entire state stretches credulity."

8. "Between November 1, 2012 and May 1, 2014," that is, before and after enforcement of the admitting-privileges requirement, "the decrease in geographical distribution of abortion facilities" has meant that the number of women of reproductive age living more than 50 miles from a clinic has doubled (from 800,000 to over 1.6 million); those living more than 100 miles has increased by 150% (from 400,000 to 1 million); those living more than 150 miles has increased by more than 350% (from 86,000 to 400,000); and those living more than 200 miles has increased by about 2,800% (from 10,000 to 290,000). After September 2014, should the surgical-center requirement go into effect, the number of women of reproductive age living significant distances from an abortion provider will increase as follows:

2 million women of reproductive age will live more than 50 miles from an abortion provider; 1.3 million will live more than 100 miles from an abortion provider; 900,000 will live more than 150 miles from an abortion provider; and 750,000 more than 200 miles from an abortion provider.

9. The "two requirements erect a particularly high barrier for poor, rural, or disadvantaged women."

10. "The great weight of evidence demonstrates that, before the act's passage, abortion in Texas was extremely safe with particularly low rates of serious complications and virtually no deaths occurring on account of the procedure."

11. "Abortion, as regulated by the State before the enactment of House Bill 2, has been shown to be much safer, in terms of minor and serious complications, than many common medical procedures not subject to such intense regulation and scrutiny."

12. "Additionally, risks are not appreciably lowered for patients who undergo abortions at ambulatory surgical centers as compared to nonsurgical-center facilities."

13. "Women will not obtain better care or experience more frequent positive outcomes at an ambulatory surgical center as compared to a previously licensed facility."

14. "There are 433 licensed ambulatory surgical centers in Texas," of which "336 are apparently either 'grandfathered' or enjoy the benefit of a waiver of some or all" of the surgical-center "requirements."

15. The "cost of coming into compliance" with the surgical-center requirement "for existing clinics is significant," "undisputedly approaching 1 million dollars," and "most likely exceeding 1.5 million dollars," with "some clinics" unable to "comply due to physical size limitations of their sites." The "cost of acquiring land and constructing a new compliant clinic will likely exceed three million dollars."

On the basis of these and other related findings, the District Court determined that the surgical-center requirement "imposes an undue burden on the right of women throughout Texas to seek a previability abortion," and that the "admitting-privileges requirement, in conjunction with the ambulatory-surgical-center requirement, imposes an undue burden on the right of women in the Rio Grande Valley, El Paso, and West Texas to seek a previability abortion." The District Court concluded that the "two provisions" would cause "the closing of almost all abortion clinics

in Texas that were operating legally in the fall of 2013," and thereby create a constitutionally "impermissible obstacle as applied to all women seeking a previability abortion" by "restricting access to previously available legal facilities." On August 29, 2014, the court enjoined the enforcement of the two provisions.

C

On October 2, 2014, at Texas' request, the Court of Appeals stayed the District Court's injunction. Within the next two weeks, this Court vacated the Court of Appeals' stay (in substantial part) thereby leaving in effect the District Court's injunction against enforcement of the surgical-center provision and its injunction against enforcement of the admitting-privileges requirement as applied to the McAllen and El Paso clinics. The Court of Appeals then heard Texas' appeal.

On June 9, 2015, the Court of Appeals reversed the District Court on the merits. With minor exceptions, it found both provisions constitutional and allowed them to take effect. Because the Court of Appeals' decision rests upon alternative grounds and fact-related considerations, we set forth its basic reasoning in some detail. The Court of Appeals concluded:

- The District Court was wrong to hold the admitting-privileges requirement unconstitutional because (except for the clinics in McAllen and El Paso) the providers had not asked them to do so, and principles of res judicata barred relief.
- Because the providers could have brought their constitutional challenge to the surgical-center provision in their earlier lawsuit, principles of res judicata also barred that claim.
- In any event, a state law "regulating previability abortion is constitutional if: (1) it does not have the purpose or effect of placing a substantial obstacle in the path of a woman seeking an abortion of a nonviable fetus; and (2) it is reasonably related to (or designed to further) a legitimate state interest."
- "Both the admitting privileges requirement and" the surgical-center requirement "were rationally related to a legitimate state interest," namely, "raising the standard and quality of care for women seeking abortions and protecting the health and welfare of women seeking abortions."
- The "plaintiffs" failed "to proffer competent evidence contradicting the legislature's statement of a legitimate purpose."
- "The district court erred by substituting its own judgment as to the provisions' effects for that of the legislature, albeit in the name of the undue burden inquiry."

- Holding the provisions unconstitutional on their face is improper because the plaintiffs had failed to show that either of the provisions "imposes an undue burden on a large fraction of women."

- The District Court erred in finding that, if the surgical-center requirement takes effect, there will be too few abortion providers in Texas to meet the demand. That factual determination was based upon the finding of one of plaintiffs' expert witnesses (Dr. Grossman) that abortion providers in Texas "will not be able to go from providing approximately 14,000 abortions annually, as they currently are, to providing the 60,000 to 70,000 abortions that are done each year in Texas once all" of the clinics failing to meet the surgical-center requirement "are forced to close." But Dr. Grossman's opinion is (in the Court of Appeals' view) "*ipse dixit*"; the "record lacks any actual evidence regarding the current or future capacity of the eight clinics"; and there is no "evidence in the record that" the providers that currently meet the surgical-center requirement "are operating at full capacity or that they cannot increase capacity."

For these and related reasons, the Court of Appeals reversed the District Court's holding that the admitting-privileges requirement is unconstitutional and its holding that the surgical-center requirement is unconstitutional. The Court of Appeals upheld in part the District Court's more specific holding that the requirements are unconstitutional as applied to the McAllen facility and Dr. Lynn (a doctor at that facility), but it reversed the District Court's holding that the surgical-center requirement is unconstitutional as applied to the facility in El Paso. In respect to this last claim, the Court of Appeals said that women in El Paso wishing to have an abortion could use abortion providers in nearby New Mexico.

II

Before turning to the constitutional question, we must consider the Court of Appeals' procedural grounds for holding that (but for the challenge to the provisions of H.B. 2 as applied to McAllen and El Paso) petitioners were barred from bringing their constitutional challenges.

A

Claim Preclusion—Admitting-Privileges Requirement

We hold that res judicata neither bars petitioners' challenges to the admitting-privileges requirement nor prevents us from awarding facial relief.

For one thing, to the extent that the Court of Appeals concluded that the principle of res judicata bars any facial challenge to the admitting-privileges requirement, the court misconstrued petitioners' claims. Petitioners did not bring a facial challenge to the admitting-privileges requirement in this case but instead challenged that requirement as applied to the clinics in McAllen and El Paso. The question is whether res judicata bars petitioners' particular as-applied claims. On this point, the Court of Appeals concluded that res judicata was no bar, and we agree.

The doctrine of claim preclusion (the here-relevant aspect of res judicata) prohibits "successive litigation of the very same claim" by the same parties. Petitioners' post-enforcement as-applied challenge is not "the very same claim" as their preenforcement facial challenge. The Restatement of Judgments notes that development of new material facts can mean that a new case and an otherwise similar previous case do not present the same claim. The Courts of Appeals have used similar rules to determine the contours of a new claim for purposes of preclusion. The Restatement adds that, where "important human values—such as the lawfulness of continuing personal disability or restraint—are at stake, even a slight change of circumstances may afford a sufficient basis for concluding that a second action may be brought."

We find this approach persuasive. Imagine a group of prisoners who claim that they are being forced to drink contaminated water. These prisoners file suit against the facility where they are incarcerated. If at first their suit is dismissed because a court does not believe that the harm would be severe enough to be unconstitutional, it would make no sense to prevent the same prisoners from bringing a later suit if time and experience eventually showed that prisoners were dying from contaminated water. Such circumstances would give rise to a new claim that the prisoners' treatment violates the Constitution. Factual developments may show that constitutional harm, which seemed too remote or speculative to afford relief at the time of an earlier suit, was in fact indisputable. In our view, such changed circumstances will give rise to a new constitutional claim. This approach is sensible, and it is consistent with our precedent.

Changed circumstances of this kind are why the claim presented in *Abbott* is not the same claim as petitioners' claim here. The claims in both *Abbott* and the present case involve "important human values." We are concerned with H.B. 2's "effect on women seeking abortions." And that effect has changed dramatically since petitioners filed their first lawsuit. *Abbott* rested on facts and evidence presented to the District Court in October 2013. Petitioners' claim in this case rests in significant part upon later, concrete factual developments. Those developments matter. The *Abbott* plaintiffs brought their facial challenge to the admitting-privileges requirement *prior to its enforcement*—before many abortion clinics had closed and while it was still unclear how many clinics would be affected. Here, petitioners bring an as-applied challenge to the requirement *after its enforcement*—and after a large number of clinics have in fact closed. The post-enforcement consequences

of H.B. 2 were unknowable before it went into effect. The *Abbott* court itself recognized that "later as-applied challenges can always deal with subsequent, concrete constitutional issues." And the Court of Appeals in this case properly decided that new evidence presented by petitioners had given rise to a new claim and that petitioners' as-applied challenges are not precluded.

When individuals claim that a particular statute will produce serious constitutionally relevant adverse consequences before they have occurred—and when the courts doubt their likely occurrence—the factual difference that those adverse consequences *have in fact occurred* can make all the difference. Compare the Fifth Circuit's opinion in the earlier case, *Abbott*, ("All of the major Texas cities continue to have multiple clinics where many physicians will have or obtain hospital admitting privileges"), with the facts found in this case, (the two provisions will leave Texas with seven or eight clinics). The challenge brought in this case and the one in *Abbott* are not the "very same claim," and the doctrine of claim preclusion consequently does not bar a new challenge to the constitutionality of the admitting-privileges requirement. That the litigants in *Abbott* did not seek review in this Court, as the dissent suggests they should have done, does not prevent them from seeking review of new claims that have arisen after *Abbott* was decided. In sum, the Restatement, cases from the Courts of Appeals, our own precedent, and simple logic combine to convince us that res judicata does not bar this claim.

The Court of Appeals also concluded that the award of facial *relief* was precluded by principles of res judicata. The court concluded that the District Court should not have "granted more relief than anyone requested or briefed." But in addition to asking for as-applied relief, petitioners asked for "such other and further relief as the Court may deem just, proper, and equitable." Their evidence and arguments convinced the District Court that the provision was unconstitutional across the board. The Federal Rules of Civil Procedure state that (with an exception not relevant here) a "final judgment should grant the relief to which each party is entitled, even if the party has not demanded that relief in its pleadings." Rule 54(c). And we have held that, if the arguments and evidence show that a statutory provision is unconstitutional on its face, an injunction prohibiting its enforcement is "proper." Nothing prevents this Court from awarding facial relief as the appropriate remedy for petitioners' as-applied claims.

B

Claim Preclusion—Surgical-Center Requirement

The Court of Appeals also held that claim preclusion barred petitioners from contending that the surgical-center requirement is unconstitutional. Although it recognized that petitioners did not bring this claim in *Abbott*, it believed that they should have done so. The court explained that petitioners' constitutional challenge to the surgical-center requirement and the challenge to the admitting-privileges requirement mounted in _Abbott

> arise from the same 'transaction or series of connected transactions.' The challenges involve the same parties and abortion facilities; the challenges are governed by the same legal standards; the provisions at issue were enacted at the same time as part of the same act; the provisions were motivated by a common purpose; the provisions are administered by the same state officials; and the challenges form a convenient trial unit because they rely on a common nucleus of operative facts."

For all these reasons, the Court of Appeals held petitioners' challenge to H.B. 2's surgical-center requirement was precluded.

The Court of Appeals failed, however, to take account of meaningful differences. The surgical-center provision and the admitting-privileges provision are separate, distinct provisions of H.B. 2. They set forth two different, independent requirements with different enforcement dates. This Court has never suggested that challenges to two different statutory provisions that serve two different functions must be brought in a single suit. And lower courts normally treat challenges to distinct regulatory requirements as "separate claims," even when they are part of one overarching "government regulatory scheme."

That approach makes sense. The opposite approach adopted by the Court of Appeals would require treating every statutory enactment as a single transaction which a given party would only be able to challenge one time, in one lawsuit, in order to avoid the effects of claim preclusion. Such a rule would encourage a kitchen-sink approach to any litigation challenging the validity of statutes. That outcome is less than optimal—not only for litigants, but for courts.

There are other good reasons why petitioners should not have had to bring their challenge to the surgical-center provision at the same time they brought their first suit. The statute gave the Texas Department of State Health Services authority to make rules implementing the surgical-center requirement. At the time petitioners filed *Abbott*, that state agency had not yet issued any such rules.

Further, petitioners might well have expected that those rules when issued would contain provisions grandfathering some then-existing abortion facilities and granting full or partial waivers to others. After all, more than three quarters of non-abortion-related surgical centers had benefited from that kind of provision.

Finally, the relevant factual circumstances changed between *Abbott* and the present lawsuit, as we previously described.

For all of these reasons, we hold that the petitioners did not have to bring their challenge to the surgical-center provision when they challenged the admitting-privileges provision in *Abbott*. We accordingly hold that the doctrine of claim preclusion does not prevent them from bringing that challenge now.

2.3 Same Parties

Taylor v. Sturgell, 553 U.S. 880 (2008)

Justice GINSBURG delivered the opinion of the Court.

"It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment *in personam* in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." 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. 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 or Act) accords "any person" a right to request any records held by a federal agency. No reason need be given for a FOIA request, and unless the requested materials fall within one of the Act's enumerated exemptions, the agency must "make the records promptly available" to the requester. If an agency refuses to furnish the requested records, the requester may file suit in federal court and obtain an injunction "ordering the production of any agency records improperly withheld."

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 financial information obtained from a person and privileged or confidential". 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." This broad authorization, Herrick maintained, showed that the F-45 certification records held by the FAA could not be regarded as "secret" or "confidential" within the meaning of § 552(b)(4).

Rejecting Herrick's argument, the District Court granted summary judgment to the FAA. 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. 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.

On appeal, the Tenth Circuit agreed with Herrick that the 1955 letter had stripped the requested documents of trade-secret protection. 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. 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. 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. The Court of Appeals expressed no opinion on the validity of these suppositions.

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 defendant, 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. However, it held that a nonparty may be bound by a judgment if she was "virtually represented" by a party.

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 associates"; 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. The D.C. District Court determined, however, that Herrick ranked as Taylor's virtual representative. Accordingly, the District Court held Taylor's suit, seeking the same documents Herrick had requested, barred by the judgment against Herrick.

The D.C. Circuit affirmed.

We granted certiorari, to resolve the disagreement among the Circuits over the permissibility and scope of preclusion based on "virtual representation."

II

The preclusive effect of a federal-court judgment is determined by federal common law. For judgments in federal-question cases— for example, Herrick's FOIA suit—federal courts participate in developing "uniform federal rules" of res judicata, which this Court has ultimate authority to determine and declare. The federal common law of preclusion is, of course, subject to due process limitations.

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

The preclusive effect of a judgment is defined by claim preclusion and issue preclusion, which are collectively referred to as "res judicata." 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." 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. By "precluding 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, conserve judicial resources, and foster reliance on judicial action by minimizing the possibility of inconsistent decisions."

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." 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."

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.

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.'"

Second, nonparty preclusion may be justified based on a variety of pre-existing "substantive legal relationships" between the person to be bound and a party to the judgment. Qualifying relationships include, but are not limited to, preceding and succeeding owners of property, bailee and bailor, and assignee and assignor. These exceptions originated "as much from the needs of property law as from the values of preclusion by judgment." [1]

1 (n.8 in opinion) The substantive legal relationships justifying preclusion are sometimes collectively referred to as "privity."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. To ward off confusion, we avoid using the term "privity" in this opinion.

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 was a party" to the suit. Representative suits with preclusive effect on nonparties include properly conducted class actions, and suits brought by trustees, guardians, and other fiduciaries.

Fourth, a nonparty is bound by a judgment if she "assumed control" over the litigation in which that judgment was rendered. 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.

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. 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.

Sixth, in certain circumstances a special statutory scheme may "expressly foreclose successive litigation by nonlitigants. . . if the scheme is otherwise consistent with due process." Examples of such schemes include bankruptcy and probate proceedings, and *quo warranto* actions or other suits that, "under the governing law, may be brought only on behalf of the public at large".

"*Quo warranto* is Latin for 'by what warrant' (or authority). A writ of *quo warranto* is a common law remedy which is used to challenge a person's right to hold a public or corporate office. A state may also use a *quo warranto* action to revoke a corporation's charter. When bringing a petition for writ of *quo warranto*, individual members of the public have standing as citizens and taxpayers." Wex Legal Dictionary

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. Some Circuits use the label, but define "virtual representation" so that it is no broader than the recognized exception for adequate representation. 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.

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.

B

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." Courts should make the "close enough" determination, they urge, through a "heavily fact-driven" and "equitable" inquiry. 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. Accordingly, we have endeavored to delineate discrete exceptions that apply in "limited circumstances." Respondents' amorphous balancing test is at odds with the constrained approach to nonparty preclusion our decisions advance.

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; and (2) either the party understood herself to be acting in a representa-

tive capacity or the original court took care to protect the interests of the nonparty. In addition, adequate representation sometimes requires (3) notice of the original suit to the persons alleged to have been represented. 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 "recognize, 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 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."

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.Preclusion doctrine, it should be recalled, is intended to reduce the burden of litigation on courts and parties. "In this area of the law," we agree, "'crisp rules with sharp corners' are preferable to a round-about doctrine of opaque standards."

C

Finally, 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." 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." 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."

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." The opening sentence of FOIA, it is true, states that agencies "shall make information available to the public." Equally true, we have several times said that FOIA vindicates a "public" interest. 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. 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. 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."*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." 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 constraints 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." FOIA does allow "any person" whose request is denied to resort to federal court for review of the agency's determination. 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." 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

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.

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. In these cases, dropping the "virtual representation" label would lead to clearer analysis with little, if any, change in outcomes.

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

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 representation was not "adequate."

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 agent."

Respondents argue here, as they did below, that Taylor's suit is a collusive attempt to relitigate Herrick's action. The D.C. Circuit considered a similar question in addressing the "tactical maneuvering" prong of its virtual representation test. 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." 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.

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.

B

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 shift to the second litigant to submit evidence refuting the charge" of agency. Fairchild justifies this proposed burden-shift on the ground that "it is unlikely an opposing party will have access to direct evidence of collusion."

We reject Fairchild's suggestion. Claim preclusion, like issue preclusion, is an affirmative defense. Ordinarily, it is incumbent on the defendant to plead and prove such a defense, and we have never recognized claim preclusion as an exception to that general rule. We acknowledge that direct evidence justifying nonparty preclusion is often in the hands of plaintiffs rather than defendants. 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.

Lee v. POW! Entertainment, Inc., 468 F.Supp.3d 1220 (C.D. Cal. 2020)

OTIS D. WRIGHT, II, United States District Judge.

I. INTRODUCTION

Defendant POW! Entertainment, Inc., ("POW") filed a motion to dismiss the amended complaint filed by Plaintiff Joan Celia Lee ("JC Lee"). POW argues that JC Lee's amended complaint is barred by the doctrines of res judicata, collateral estoppel, and statute of limitations. For the reasons discussed below, the Court GRANTS POW's Motion to Dismiss.

II. FACTUAL BACKGROUND

A. Present Lawsuit

JC Lee is the daughter and trustee for the estate of comic book author Stan Lee. Stan Lee is responsible for co-creating comic book characters such as Spider-Man, the X-Men, Iron Man, and many others. POW, a Delaware corporation, claims that Stan Lee assigned to it the rights to his intellectual property.

JC Lee seeks to enforce the terms of an agreement made in 1998 (the "1998 Agreement") between Stan Lee and Stan Lee Entertainment, Inc. ("SLEI"). Specifically, JC Lee contends that, under the terms of the 1998 Agreement, Stan Lee assigned full and complete title to his name, likeness, and creator rights to SLEI in perpetuity. As such, JC Lee seeks declaratory and injunctive relief that SLEI, owns the rights to Stan Lee's intellectual property, name, and likeness, and asserts a cause of action against POW for cybersquatting in violation of 15 U.S.C. § 1125(d).

B. Factual Background

After departing from Marvel in August 1998, Stan Lee formed SLEI, to which he allegedly "conveyed clear title to his name, likeness and all creator rights" on October 15, 1998. In January 2001, Stan Lee accused Stan Lee Media, Inc. ("SLMI"), successor-in-interest to SLEI, of being "in complete breach of the salary and benefit provisions, *inter alia,* of the 1998 Agreement so that he was justified in terminating the agreement." Subsequently, due to a lack of operating capital caused by a series of unfortunate events, SLMI filed for Chapter 11 bankruptcy.

Following the bankruptcy filing, in 2001, Stan Lee and others formed POW. JC Lee alleges that the other founders of POW manipulated Stan Lee into transferring ownership of his creator rights and rights to his name and likeness "three years after he divested himself of any further legal interest in those rights" to SLMI per the 1998 Agreement.

When Stan Lee died in November 2018, JC Lee, as his only heir and trustee of his estate, became the successor-in-interest of Stan Lee's alleged obligations relating to the 1998 Agreement. She files suit "to ensure the Lee Trust is able to perform the duties it assumed under Stan Lee's 1998 Agreement and act in accord with the obligations under the Assignment by obtaining a Declaratory Judgment to the effect all rights, title and interest to Stan Lee's Name and likeness and Brand, along with copyrights and trademarks now reside with SLEI in association with the Lee Trust."

C. Prior Litigation

The 1998 Agreement between Stan Lee and SLMI has been the subject of numerous cases in federal courts throughout the country. *See Abadin v. Marvel Entm't, Inc.,*; *Lee v. Marvel Enters., Inc.*; *Stan Lee Media Inc. v. Lee* ("SLM I"); *Stan Lee Media, Inc. v. Walt Disney Co.* ("SLM II"); _Disney Enters., Inc. v. Entm't Theatre Grp.

Notably, in 2010, the Southern District of New York held that the 1998 Agreement was terminated by Stan Lee in 2001 per his correspondence with SLMI indicating that SLMI breached the salary and benefit provisions in the agreement. Furthermore, the court held that the statute of limitations to challenge the termination had lapsed by 2010, and that, even if not expressly terminated, the 1998 Agreement had expired in 2005 pursuant to California Labor Code section 2855a, which limits the duration of personal services contracts to seven years.

In 2012, Judge Wilson of the Central District of California addressed the 1998 Agreement as well. In that action, SLMI sued Stan Lee and others alleging that Stan Lee and Marvel were infringing on the 1998 Agreement because Stan Lee had "assigned all copyrights and trademarks associated with all characters and comic books that he authored, including the iconic characters that he created during his tenure at Marvel" to SLMI. The court granted defendants' motion to dismiss on the grounds that SLMI's claims were barred by res judicata. Tellingly, the court concluded "that there is a compelling public interest in bringing this matter to a close."

In 2013, the District of Colorado cited the aforementioned cases and similarly held that claims to enforce the 1998 Agreement were precluded by collateral estoppel.

Despite the numerous failed attempts to enforce the 1998 Agreement, SLMI allegedly filed suit against Stan Lee's estate and reached a settlement that was adopted by a court, although she fails to provide further details. JC Lee now files this suit to satisfy the estate's obligation under the terms of that settlement to "correct the breach of the agreement" and "remedy the results of the various invalid assignments made by Stan Lee." The Court infers that SLMI has entered into a settlement prompting JC Lee to file this suit for declaratory relief, though neither the substance of the settlement nor the judgment have been provided to the Court.

III. MOTION TO DISMISS

B. Res Judicata

POW moves to dismiss all of JC Lee's claims arguing that her claims are barred by res judicata, also known as claim preclusion. Res judicata bars lawsuits based on "any claims that were raised or could have been raised in a prior action." Res judicata applies to bar a suit where there is "(1) an identity of claims; (2) a final judgment on the merits; and (3) identity or privity between parties."

3. Identity or Privity Between Parties

Third, the parties in the current action must be identical to or in privity with the parties from the prior actions. *Abadin* was filed by SLMI's shareholders derivatively on behalf of SLMI against Marvel Entertainment, Inc. and others. In *SLMI II,* SLMI filed suit against the Walt Disney Corporation and others. In the matter before the Court, JC Lee, in her role as the trustee of Stan Lee's estate, files suit against POW. As the parties are not identical, they must be in privity for res judicata to apply. "Privity may exist if there is substantial identity between parties, that is, when there is sufficient commonality of interest." The Ninth Circuit has stated that "privity is a flexible concept dependent on the particular relationship between the parties." For example, "privity between parties exists when a party is so identified in interest with a party to former litigation that he represents precisely the same right in respect to the subject matter involved."

Here, JC Lee asserts that she was not a party to the prior suits and argues, without support, that she is not in privity with SLMI. However, she concedes that she has "joined forces" with SLMI and is the successor in interest to Stan Lee, the assignor of SLMI's rights per the parties to the 1998 Agreement. Indeed, JC Lee alleges that legal title to Stan Lee's "name and likeness and creator rights" remain with SLMI and files this suit seeking declaratory relief of SLMI's rights. JC Lee seeks to enforce the same contractual provision as in *Abadin* and *SLMI,* making the same argument that by signing the 1998 Agreement, Stan Lee assigned his intellectual property to SLMI, and seeks the same relief. Thus, JC Lee and SLMI are in privity.

Even where parties are in privity, the Court must consider whether the interests of the party absent in the prior action were adequately represented. In *Headwaters Inc.,* the Ninth Circuit considered the notice the nonparty had and the level of protection the district court afforded the nonparty's interests. Here, JC Lee, a nonparty in *Abadin* and *SLMI,* asserts that her interest is to "vindicate and clear title to Stan Lee's intellectual property" as assigned by the 1998 Agreement. As the prior courts considered this very question and JC Lee is no stranger to this dispute, JC Lee's interests were adequately represented. Accordingly, the Court finds the third factor satisfied.

As POW has established all three factors, the Court finds that all claims in this matter are barred by res judicata. Accordingly, the Court GRANTS the motion to dismiss. The Court DIMISSES WITH PREJUDICE all claims in the FAC.

2.4 Exceptions

Rest. (2d) of Judgments

§ 26. Exceptions to the General Rule Concerning Splitting

(1) When any of the following circumstances exists, the general rule of §24 does not apply to extinguish the claim, and part or all of the claim subsists as a possible basis for a second action by the plaintiff against the defendant:

(a) The parties have agreed in terms or in effect that the plaintiff may split his claim, or the defendant has acquiesced therein; or

(b) The court in the first action has expressly reserved the plaintiff's right to maintain the second action; or

(c) The plaintiff was unable to rely on a certain theory of the case or to seek a certain remedy or form of relief in the first action because of the limitations on the subject matter jurisdiction of the courts or restrictions on their authority to entertain multiple theories or demands for multiple remedies or forms of relief in a single action, and the plaintiff desires in the second action to rely on that theory or to seek that remedy or form of relief; or

(d) The judgment in the first action was plainly inconsistent with the fair and equitable implementation of a statutory or constitutional scheme, or it is the sense of the scheme that the plaintiff should be permitted to split his claim; or

(e) For reasons of substantive policy in a case involving a continuing or recurrent wrong, the plaintiff is given an option to sue once for the total harm, both past and prospective, or to sue from time to time for the damages incurred to the date of suit, and chooses the latter course; or

(f) It is clearly and convincingly shown that the policies favoring preclusion of a second action are overcome for an extraordinary reason, such as the apparent invalidity of a continuing restraint or condition having a vital relation to personal liberty or the failure of the prior litigation to yield a coherent disposition of the controversy.

Passaro v. Virginia, 935 F.3d 243 (4th Cir. 2019)

RICHARDSON, Circuit Judge

Antonio Passaro Jr. is a former Special Agent with the Virginia State Police. He claims that he faced unlawful discrimination based on his mental disability (post-traumatic stress disorder) and national origin (Italian-American). He also claims that he was unlawfully fired in retaliation for filing a complaint with the Equal Employment Opportunity Commission ("EEOC"). This conduct, he claims, violated the Americans with Disabilities Act of 1990 ("ADA") and Title VII of the Civil Rights Act of 1964 ("Title VII"). He has sued the Commonwealth of Virginia and the Virginia Department of State Police (together, "the Commonwealth"), seeking relief that includes compensatory damages, reinstatement, and back pay.

The district court dismissed Passaro's ADA claim, concluding that it was barred by state sovereign immunity. The court then granted summary judgment for the Commonwealth on the Title VII claims, concluding they were barred by the claim-preclusive effect of a state-court judgment upholding the outcome of an administrative grievance Passaro had filed. We affirm the district court's dismissal of the ADA claim because the Commonwealth has not waived its sovereign immunity from that claim. But we reverse the district court's decision that claim preclusion bars Passaro's Title VII claims.

I.

Passaro worked as a Trooper with the Department of State Police until his promotion to Special Agent. In 2008, he transferred to the department's High Tech Crimes Unit, where he investigated child-pornography cases. Starting in 2010, he began receiving disciplinary notices for infractions arising from his alleged failure to follow proper procedures and to manage his caseload. The episode that ultimately led to Passaro's termination was an investigation he conducted in April and May 2012, which the department claims he bungled.

In July 2012, a doctor diagnosed Passaro with post-traumatic stress disorder arising from his frequent exposure to images of child pornography at work. Passaro sought a transfer from High Tech Crimes, which he claims was not granted.

On February 6, 2013, Passaro learned that he was being recommended for demotion from Special Agent back down to Trooper. Two days later, Passaro filed a complaint with the EEOC, asserting that the department had failed to make reasonable accommodations for his post-traumatic stress disorder and had harassed and discriminated against him based on his disability and national origin.

In March 2013, Passaro was fired. He then filed a grievance with Virginia's Office of Employment Dispute Resolution under Virginia Code § 2.2-3003. He claimed that his discipline and termination were unjustified, and also that he had been the victim of discrimination and harassment. The grievance was assigned to a hearing officer, who promptly held a hearing and issued a decision that largely focused on whether Passaro's discipline comported with internal department policies. Despite overturning some of the disciplinary action against Passaro, the hearing officer upheld Passaro's termination.

Passaro sought review of the hearing officer's ruling. He filed administrative appeals, which were denied. Passaro also appealed to a Virginia state court for review of whether the grievance decision was "contradictory to law" under Virginia Code § 2.2-3006(B). The court largely rejected Passaro's arguments but concluded the hearing officer had overlooked certain testimony. On remand, the hearing officer affirmed his earlier decision, and Passaro again filed administrative appeals that were denied. Passaro returned to state court, which this time affirmed. Passaro then appealed to Virginia's intermediate appellate court, which affirmed. His state-court appeals finally concluded in May 2018, when the Virginia Supreme Court declined Passaro's request for rehearing.

In November 2016, while those appeals were ongoing, Passaro brought the instant action in Virginia state court against the Commonwealth. His complaint asserted "unlawful discrimination, harassment and retaliation," as well as improper denials of his "requests for reasonable accommodations." The Commonwealth timely removed the case to federal district court, asserting federal question jurisdiction based on the Title VII claims.

The Commonwealth then moved to dismiss, and the district court granted the motion in part. It dismissed Passaro's ADA claim, which it concluded was barred by state sovereign immunity. It also dismissed Passaro's Title VII claim for national-origin discrimination but gave him leave to replead. Passaro filed an amended complaint, which the Commonwealth answered, asserting numerous defenses including *res judicata.* The parties then consented to have the matter proceed before a magistrate judge for all purposes.

Before the magistrate judge, the Commonwealth sought to stay this action pending final resolution of Passaro's state-court appeals, arguing that the state-court judgment could have preclusive effect on this case. Passaro responded that, while he disagreed that the state-court action would have any preclusive effect, he did not object to a stay. The court granted the stay, which remained in place until May 2018.

After the stay was lifted, the Commonwealth moved for summary judgment, arguing that the state-court proceedings had claim-preclusive effect on Passaro's discrimination and retaliation claims under Title VII. The district court agreed and entered judgment for the Commonwealth.

Passaro timely appeals. He argues that the district court erred in dismissing his ADA claim because the Commonwealth has waived its state sovereign immunity. He also argues that claim preclusion does not bar his Title VII claims, asserting that the Commonwealth also waived this defense and, alternatively, that claim preclusion does not apply.

III.

We reverse the district court's ruling at summary judgment that claim preclusion bars Passaro's Title VII claims. State law governs whether a prior state-court judgment has issue- or claim-preclusive effect on a Title VII action. Under Virginia law, it "is firmly established that the party who asserts the defenses of res judicata or collateral estoppel has the burden of proving by a preponderance of the evidence that the claim or issue is precluded by a prior judgment." Here, the Commonwealth asserts that Passaro could have litigated his claims of discrimination and retaliation through the state grievance process, meaning that the state-court judgment (which affirmed the decision on Passaro's grievance) has claim-preclusive effect barring his Title VII claims in full. We disagree.

Under Virginia's law of claim preclusion, parties "may not relitigate 'the same cause of action or any part thereof which *could* have been litigated in the previous action.'" "While ostensibly a broad proposition, claim preclusion nonetheless is limited by longstanding principles." In this case, the Commonwealth's claim-preclusion defense runs afoul of one such principle: if procedural rules prevented the plaintiff from asserting all his claims for relief in a single case, then claim preclusion does not bar the plaintiff from bringing a second case to seek the relief he could not obtain in the first.

The breadth of claim preclusion has long turned on the plaintiff's ability to seek comprehensive relief in a single action. We see this most clearly in the historical division between law and equity, which often afforded different remedies on the same facts:

> So long as law and equity were administered by separate courts, or by different "sides" of the same court, a first proceeding at law or in equity often could be followed by a second proceeding in equity or at law. A party who lost an action at law on a contract, for instance, might undo the law judgment by securing reformation in a subsequent suit in equity. A court of law, on the other hand, might cheerfully grant a damages remedy after denial of an equitable remedy on discretionary grounds. Much similar duplication of litigation occurred.

Even where an equity court could award incidental legal relief, such as damages, claim preclusion often did not bar a later action at law because it was thought unfair to force a litigant to seek damages in equity where he had no right to a jury trial. Thus, a suit in equity generally lacked preclusive effect on a later action at law "unless the very matter in controversy in the pending action was decided in the prior suit."

These limitations on claim preclusion became outmoded as joinder rules became less restrictive. Today, plaintiffs can usually seek all available relief in a single suit. Reflecting this fact, the modern trend— and the one adopted by the Second Restatement of Judgments—is to expand claim preclusion to cover all claims arising from the same "transaction" underlying the prior action. The Virginia Supreme Court adopted a similar transactional approach in 2006 when it promulgated Rule 1:6, which provides that all claims relating to the "same conduct, transaction or occurrence" fall within the scope of claim preclusion. That holds true "whether or not the legal theory or rights asserted in the second or subsequent action were raised in the prior lawsuit, and regardless of the legal elements or the evidence upon which any claims in the prior proceeding depended, or the particular remedies sought." The rule provides only one narrow exception relating to certain mechanic's lien remedies.

Despite Rule 1:6's sweeping and mostly unqualified language, where joinder remains limited, so does the scope of claim preclusion. Even under Rule 1:6, claim preclusion remains "the stepchild of pleading and joinder rules" and "largely depends on which claims *could* have been brought" in the earlier action. Indeed, Virginia's Supreme Court—whose guidance we must faithfully apply in interpreting the rule—has held that "all of the ordinary caveats to res judicata apply to Rule 1:6's transactional approach."

One well-recognized caveat is that the transactional approach assumes "no formal barriers in the way of a litigant's presenting to a court in one action the entire claim including any theories of recovery *or demands for relief* that might have been available to him under applicable law." "When such formal barriers in fact existed and were operative against a plaintiff in the first action, it is unfair to preclude him from a second action in which he can present those phases of the claim which he was disabled from presenting in the first."

Here, Passaro could not have presented his entire case in one action. Virginia's grievance procedures offer substantive claims that employees cannot pursue in a typical civil action. In particular, the grievance process appears to be the *only* mechanism by which a Virginia state employee can have disciplinary action overturned for violating internal policies of the state agency that employed him. And a Title VII action offers compensatory damages that are unavailable through the grievance process. Virginia's administrative grievance procedures forbid damages awards, instead permitting limited monetary remedies such as back pay and, in

some cases, attorney's fees. Title VII affords compensatory damages for intentional discrimination that represent a distinct form of relief from back pay, and encompass distinct harms such as emotional distress. Thus, neither the grievance process nor a Title VII lawsuit offered a single proceeding where Passaro could litigate all his claims for relief.

Nor can we conclude, at least based on the record before us, that Passaro could have asserted a Title VII claim for money damages as part of the subsequent state-court action appealing the grievance decision. The statutory procedures governing grievance appeals suggest that they cannot feasibly be joined to a Title VII action seeking damages. There is no jury, and the deadlines are too rapid to accommodate a typical civil action: the state court must hold a hearing within 30 days of receiving the grievance record and must then decide the case within 15 days of the hearing. And the Commonwealth conceded at oral argument that there is no basis to believe that, when an employee appeals an administrative grievance decision to state court, he can join a claim for damages to the agency-review action.

Because Passaro could not have sought money damages in the prior suit, claim preclusion does not bar him from seeking money damages in this federal action. And he has done just that: his prayer for relief includes a request for compensatory damages up to the statutory maximum. Thus, the Commonwealth did not meet its burden to establish that claim preclusion barred Passaro's claim in full, and we must reverse the district court's grant of summary judgment to the Commonwealth.

The Commonwealth, like the district court, relies on language in Rule 1:6 stating that claim preclusion applies "regardless of the particular remedies sought" in the prior proceeding. This argument misapprehends the meaning of the quoted text. Rule 1:6 provides that a litigant cannot limit the scope of claim preclusion by choosing to seek only particular remedies in the first action. Yet there is a critical distinction between the remedies *sought* and the remedies *available.* A litigant has no right to split his claim by voluntarily choosing to seek only some of the remedies available to him, but that is not really a choice when it is thrust upon him by procedural rules. Thus, under traditional claim-preclusion principles, a litigant who had to split his claim to preserve his rights may return to court to seek remedies that were unavailable to him in the first proceeding. Virginia's Supreme Court has made clear that Rule 1:6 preserves this and other well-recognized limitations on the scope of claim preclusion.

Ultimately, this result is consistent with basic fairness. If claim preclusion applied in full, then a litigant in Passaro's shoes would face a difficult choice. He would either have to assert all his claims through the grievance proceeding, forgoing his ability to obtain compensatory damages (as well as his right to a jury trial), or rely

solely on a traditional civil action, giving up his right to appeal the police department's grievance decision. The common law does not sanction this result, which lets procedural rules deprive a litigant of his substantive rights. Virginia law, we conclude, follows the common law in this regard.

That does not necessarily mean giving litigants like Passaro a second bite at the apple. If Passaro raised issues about discrimination and retaliation during the grievance process, and those issues were actually decided, then issue preclusion may bar relitigating them. We do not decide the availability or scope of issue preclusion, which is not before us. Moreover, claim preclusion could still conceivably bar Passaro's Title VII action to the extent he seeks remedies (such as reinstatement and back pay) that were available through the grievance process. Because the Commonwealth has not advanced that more limited claim-preclusion argument, we do not address it. We hold merely that claim preclusion does not bar Passaro's Title VII claims *in full*—that is, even for compensatory damages unavailable in the prior suit—which means that the district court erred in dismissing them on that ground.

3. Issue Preclusion

Rest. (2d) of Judgments

§17. Effects of Former Adjudication—General Rules

A valid and final personal judgment is conclusive between the parties, except on appeal or other direct review, to the following extent:

(3) A judgment in favor of either the plaintiff or the defendant is conclusive, in a subsequent action between them on the same or a different claim, with respect to any issue actually litigated and determined if its determination was essential to that judgment (see §27).

§ 27. Issue Preclusion—General Rule

When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim.

§ 28. Exceptions to the General Rule of Issue Preclusion

Although an issue is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, relitigation of the issue in a subsequent action between the parties is not precluded in the following circumstances:

(1) The party against whom preclusion is sought could not, as a matter of law, have obtained review of the judgment in the initial action; or

(2) The issue is one of law and (a) the two actions involve claims that are substantially unrelated, or (b) a new determination is warranted in order to take account of an intervening change in the applicable legal context or otherwise to avoid inequitable administration of the laws; or

(3) A new determination of the issue is warranted by differences in the quality or extensiveness of the procedures followed in the two courts or by factors relating to the allocation of jurisdiction between them; or

(4) The party against whom preclusion is sought had a significantly heavier burden of persuasion with respect to the issue in the initial action than in the subsequent action; the burden has shifted to his adversary; or the adversary has a significantly heavier burden than he had in the first action; or

(5) There is a clear and convincing need for a new determination of the issue (a) because of the potential adverse impact of the determination on the public interest or the interests of persons not themselves parties in the initial action, (b) because it was not sufficiently foreseeable at the time of the initial action that the issue would arise in the context of a subsequent action, or (c) because the party sought to be precluded, as a result of the conduct of his adversary or other special circumstances, did not have an adequate opportunity or incentive to obtain a full and fair adjudication in the initial action.

National Satellite Sports, Inc. v. Eliadis, 253 F.3d 900 (6th Cir. 2001)

RONALD LEE GILMAN, Circuit Judge.

On the night of December 14, 1996, the Melody Lane Lounge, a commercial bar located in Massillon, Ohio, showed the live broadcast of a boxing match between Riddick Bowe and Andrew Golota (the event). National Satellite Sports, Inc. (NSS) had obtained the exclusive right to broadcast the event to commercial establish-

ments in Ohio. Time Warner Entertainment Company, L.P. had obtained the exclusive right to broadcast the event on a pay-per-view basis to its Ohio residential customers. The Melody Lane Lounge, erroneously listed as a residential customer of Time Warner, ordered the event through Time Warner's service.

After learning that the Melody Lane Lounge had shown the event to its patrons on the night in question, NSS brought suit against Eliadis, Inc., the corporate owner of the bar. The suit also named Eliadis's two owners and Time Warner as defendants. NSS alleged that the showing of the event in a commercial establishment through Time Warner's residential service constituted a violation of the Federal Communications Act of 1934, 47 U.S.C. §§ 151-613 (Communications Act), which, among other things, prohibits the unauthorized divulgence of wire or radio communications.

Eliadis and its co-owners reached a prompt settlement with NSS. NSS and Time Warner then filed cross-motions for summary judgment against each other. The district court first granted summary judgment to NSS on the issue of liability, and subsequently entered a final judgment awarding NSS damages, costs, and attorney fees.

Time Warner appeals the district court's rulings, claiming that the court erred in failing to give preclusive effect to an adverse judgment against NSS in prior litigation between the parties on an allegedly controlling issue. We AFFIRM the judgment of the district court.

I. BACKGROUND

A. Factual background

NSS and Time Warner obtained their respective rights to broadcast the event through separate contracts. New Jersey Sports Productions, Inc., d/b/a Main Events (Main Events), produced the event. It granted Pay Per View Networks, Inc., d/b/a Viewer's Choice (Viewer's Choice), the exclusive right to broadcast the event to residential households. Viewer's Choice, in turn, licensed Time Warner to make the telecast of the event available to residential customers in Ohio. Main Events granted Entertainment by J&J, Inc. (EJJ) a separate exclusive right to broadcast the event to commercial establishments. NSS obtained the right to be the commercial distributor of the event's telecast in Ohio from EJJ.

Main Events created a single telecast of the event and sent it to a transmission station. From the transmission station, the signal was sent to two different satellites. Viewer's Choice received the signal from one of the satellites. It decoded the signal, rescrambled it, and sent it to another set of satellites that transmitted the signal to a Time Warner facility in Akron, Ohio. The Akron facility, known as a "head end,"

receives programs via satellite and distributes them to subscribers in the Akron region. Because the event was a pay-per-view program, Time Warner encrypted it at the Akron head end so that only subscribers who had ordered the event would be able to decode and view the program.

NSS received its transmission of the telecast from a chain of distribution that traces back to the second satellite that received the initial signal from Main Events. As a result, the signals that NSS and Time Warner received in their respective Ohio facilities both originated from the same initial transmission sent by Main Events, and neither party disputes the right of the other to receive the signals in Ohio according to their separate contracts. Rather, the dispute centers on Time Warner allowing a commercial establishment to view the event on its residential-customer cable network.

Melody Lane Lounge's account was listed in the individual name of Gust Eliadis, a co-owner of Eliadis, Inc. In February of 1996, Ken Sovacool, a Time Warner employee, serviced Eliadis's cable account. Time Warner concedes that Sovacool should have recognized that the Melody Lane Lounge was a commercial establishment and not a residence. The structure of the building, an exterior identification sign, and neon beer signs in the window made this obvious. Nevertheless, having obtained residential-cable service, the Melody Lane Lounge had the capability to order pay-per-view programs.

Time Warner's account records show that Melody Lane Lounge had ordered one earlier program at the commercial rate. But Melody Lane Lounge ordered the event in question from Time Warner at the residential rate of $39.95. As a commercial establishment, Melody Lane Lounge should have paid NSS for the right to show the event, which would have cost it $987.50.

NSS hired investigators to visit various commercial establishments to monitor whether those showing the event had obtained the right to do so through NSS as the proper distribution channel. An investigator visited the Melody Lane Lounge on the night in question and ultimately determined that it was broadcasting the event through Time Warner's residential pay-per-view system. The Melody Lane Lounge claims that it would not have chosen to show the event had it been required to pay NSS's high commercial rate. Only 23 patrons were in the bar at the time the event was broadcast.

B. Procedural background and prior litigation between the parties

NSS commenced its action in the United States District Court for the Northern District of Ohio in November of 1997. Eliadis, Inc. and its co-owners soon settled with NSS, agreeing to the entry of judgment against them for violating 47 U.S.C. § 605, which is part of the Communications Act, and paying $250 in nominal damages. NSS's claim against Time Warner proceeded.

In July of 1999, the district court entered summary judgment in favor of NSS, finding that Time Warner had violated § 605. A bench trial on the issue of damages was held several months later. The district court determined that Time Warner was liable for $4,500 in statutory damages. NSS further sought and was awarded attorney fees and costs pursuant to 47 U.S.C. § 605(e)(3)(B)(iii), totaling $26,389.65, in March of 2000. Time Warner appeals the rulings of the district court, raising three alternative arguments.

First, Time Warner contends that the district court erred by failing to give preclusive effect to a separate district court judgment rendered in July of 1998 that arose from a substantially identical claim by NSS against Time Warner. NSS learned that a commercial establishment in Akron, Ohio called Lyndstalder, Inc., d/b/a Coach's Corner, had shown a boxing match between Evander Holyfield and Bobby Czyz that Coach's Corner obtained via residential-cable service from Time Warner in March of 1996. As in the case before us, Time Warner had obtained the exclusive right from the producer to distribute the match to residential customers in Ohio, while NSS received the exclusive license to sell the same program to Ohio's commercial establishments.

NSS commenced an action against Coach's Corner and its owner in the United States District Court for the Northern District of Ohio in August of 1997. When NSS learned of Time Warner's role in providing the broadcast to Coach's Corner, it added Time Warner as a defendant. In that suit, *National Satellite Sports, Inc. v. Lyndstalder, Inc. d/b/a/ Coach's Corner, et al.,* No. 5:97 CV 2039 (N.D.Ohio 1998), NSS alleged that both Coach's Corner and Time Warner had violated 47 U.S.C. § 605. Coach's Corner settled with NSS. Time Warner then filed a motion for summary judgment, alleging that NSS had failed to establish either a contractual or a statutory claim against it.

The district court held a hearing on Time Warner's motion for summary judgment in July of 1998. It issued a bench ruling at that hearing, granting Time Warner's motion for summary judgment on the basis that NSS "failed to state a claim pursuant to the terms of the contracts for distribution at issue in this case as well as 47 U.S.C. § 605." NSS did not appeal. Time Warner argues that the *Coach's Corner* decision precludes NSS from raising the identical § 605 claim in the present case.

II. ANALYSIS

B. NSS is not bound by the decision in Coach's Corner

NSS brought suit in both this case and in the *Coach's Corner* case under 47 U.S.C. § 605. Section 605 defines what constitutes the unauthorized publication or use of electronic communications. It includes such prohibited practices as the divulgence of wire or radio communications by persons authorized to receive them to others who are not so authorized, and the interception of any radio communica-

tion by a person not authorized to receive that communication from the sender. According to § 605, "any person aggrieved by any violation of subsection (a) of this section may bring a civil action in a United States district court or in any other court of competent jurisdiction." Furthermore, the statute directs that "the term 'any person aggrieved' shall include any person with proprietary rights in the intercepted communication by wire or radio, including wholesale or retail distributors of satellite cable programming."

In its motion before the court in *Coach's Corner,* Time Warner argued that it was entitled to summary judgment because NSS was not a "person aggrieved" within the meaning of § 605(d)(6), and could therefore not pursue a claim for an alleged violation of § 605(a). NSS responded by arguing that standing to sue under § 605 is not limited to those who meet the statutory definition of a "person aggrieved."

The district court granted Time Warner's motion for summary judgment in the *Coach's Corner* case. In articulating its reasoning from the bench on July 13, 1998, the court held that NSS had failed to state a claim under *both* the contracts at issue in that case *and* under 47 U.S.C. § 605. The pertinent parts of the *Coach's Corner* ruling were as follows:

> With regard to the ruling, NSS has failed to state a claim pursuant to the terms of the contracts at issue in this case as well as 47 United States Code Section 605.
>
> Paragraph 14(e) of the Television Licensing Agreement provides for the enforcement of unauthorized display of the closed circuit television feed. That also provides that Joe Hand Promotions the licensor of the event could not assert any piracy claim without prior notice.
>
> The agreement provides that a sublicensee NSS has no rights to enforceability, quote, "It being understood that your sublicensee shall have no right to commence or settle any claim or litigation hereunder."
>
> The other relevant agreement is the March 12, 1996 Closed Circuit Television Agreement entered into between the licensor and NSS.
>
> That agreement at paragraph 7 provides that there is no right to a piracy action to be pursued by NSS.
>
> NSS's effort to overcome the language of the contract does not create a material fact for trial.

Time Warner now argues that the district court below should have given preclusive effect to the earlier ruling in *Coach's Corner.* It claims that *Coach's Corner* determined that when a commercial establishment shows a sporting event ordered through a residential-cable service rather than properly paying the fees exacted by the commercial distributor, the distributor does not have standing to sue the authorized residential-service provider under § 605. NSS obviously disagrees.

Our circuit has held that a prior decision shall have preclusive effect on an issue raised in a later case if four elements are met:

> 1. the precise issue raised in the present case must have been raised and actually litigated in the prior proceeding; (2) determination of the issue must have been necessary to the outcome of the prior proceeding; (3) the prior proceeding must have resulted in a final judgment on the merits; and (4) the party against whom estoppel is sought must have had a full and fair opportunity to litigate the issue in the prior proceeding.

In the present case, the district court concluded that Time Warner had failed to establish the second and fourth elements of this test. Because Time Warner and NSS disagree as to whether these four elements were met, an analysis of each is necessary in order to decide if the district court erred by failing to give preclusive effect to the *Coach's Corner* decision.

1. Identity of issues

Time Warner argues that the *Coach's Corner* court was faced with the precise threshold question that the district court encountered in the current case. This question is whether NSS has standing to sue under § 605; in particular, whether NSS had a proprietary interest in the communication that was sent from Time Warner via its authorized residential-cable service to its pay-per-view customers. Time Warner further contends that the bifurcation of the satellite transmission of the Holyfield/Czyz boxing match at issue in *Coach's Corner* was identical to the manner in which the event in question was sent to Time Warner and NSS in Ohio on December 14, 1996.

NSS counters that there is no identity of issues in these two cases. First, it contends that the transmissions at issue in *Coach's Corner* are distinguishable from the ones involved in the present case. Specifically, Time Warner distributed the Holyfield/Czyz boxing match to its residential customers through its Home Box Office (HBO) service, not through a pay-per-view network. The difference is that all residential HBO subscribers had access to view the Holyfield/Czyz match, whereas only the residential customers who ordered the Bowe/Golota event through the pay-per-view network could view the program. Second, NSS argues that the licensing agreements as between Time Warner and NSS were fundamentally different.

We believe that Time Warner's argument is the more persuasive on this "identity of issues" element. Although HBO and pay-per-view are different subscriber services, the key issue in both cases is the same — the consequences of a commercial establishment gaining access to view a boxing match by being inaccurately listed as a residential customer of Time Warner. As a result, Time Warner has satisfied the first element for issue preclusion.

2. Necessary to the outcome of the prior proceeding

The district court held that Time Warner failed to establish that NSS's lack of standing under § 605 was necessary to the grant of summary judgment for Time Warner in *Coach's Corner*. It determined that the *Coach's Corner* decision was instead primarily based on the conclusion that NSS was contractually barred from pursuing an action against Time Warner because of the particular language in the license agreements involved in that case. As such, it held that the alternative ground in *Coach's Corner* for granting Time Warner's motion for summary judgment — namely, that NSS was not a "person aggrieved" under § 605 — was not necessary to that court's judgment.

Time Warner argues that the district court erred in reaching this conclusion. It notes that *Coach's Corner* is a case in which two alternative but independent grounds support the court's ultimate judgment. Time Warner claims that under the "weight of federal authority, a plaintiff is precluded from relitigating an issue actually decided against it in a prior case, even if the court in the prior case rested its judgment on alternative grounds." It cites the Second, Seventh, Ninth, and D.C. Circuits as upholding this general principle of issue preclusion.

This principle of issue preclusion, however, is counterbalanced by courts and commentaries that have adopted the opposite conclusion. For example, the American Law Institute (ALI) endorses NSS's position that "if a judgment of a court of first instance is based on determinations of two issues, either of which standing independently would be sufficient to support the result, the judgment is not conclusive with respect to either issue standing alone." Restatement (Second) of Judgments § 27 cmt. i (1980). Furthermore, one leading commentary describes the Restatement's view as the "new" and "modern" rule. At least four circuits (the Third, Fourth, Eighth, and Tenth) have adopted this modern rule.

The issue is a close one given the policy implications involved. Time Warner argues that by not recognizing *Coach's Corner* as precluding relitigation of whether NSS has standing to sue under § 605, NSS is free to relitigate the same issue again. NSS counters by arguing that because the *Coach's Corner* court decided that NSS was contractually barred from pursuing a claim against Time Warner, NSS had no incentive to appeal that court's secondary decision that NSS failed to state a claim under § 605.

We find NSS's point persuasive because, while it might have won the "battle" over § 605, NSS would almost surely have lost the "war" in being unable to overcome the contractual prohibition on commencing litigation against Time Warner. Furthermore, the district court's oral ruling in *Coach's Corner* transcribes into only a two-paragraph conclusory statement regarding NSS's claim under § 605, which was far overshadowed by the balance of its three-page discussion outlining the contractual obstacles that prevented NSS from suing Time Warner.

This circuit has not decided whether alternative grounds for a judgment are each "necessary to the outcome" for the purposes of issue preclusion in a subsequent case involving only one of the grounds. Based on the actual decision in *Coach's Corner,* we do not find it necessary to fully resolve this issue at the present time. We do hold, however, that where, as in *Coach's Corner,* one ground for the decision is clearly primary and the other only secondary, the secondary ground is not "necessary to the outcome" for the purposes of issue preclusion. *Coach's Corner's* secondary holding that NSS failed to state a claim under § 605 was thus not necessary to the granting of Time Warner's motion for summary judgment.

3. Final judgment on the merits

Although the district court held that the *Coach's Corner* decision was a final judgment on the merits for the purpose of issue preclusion, NSS argues that it was not. In particular, it claims that the court's judgment in *Coach's Corner* was a dismissal of NSS's suit without prejudice for failure to state a claim. This argument is without merit. *Coach's Corner* granted Time Warner's motion for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure. Furthermore, the district court made clear that its judgment was final. It recognized that "both parties will more than likely have a disagreement over everything I say, pretty much, and you can take it up to the Sixth Circuit and they can tell us whether I was right or wrong." Finally, summary judgment is recognized as a final judgment for the purpose of issue preclusion. Time Warner has therefore satisfied this third element for issue preclusion.

4. Full and fair opportunity to litigate

Turning to the final element, Time Warner contends that the district court in *Coach's Corner* granted its motion for summary judgment after full briefing and argument, and that both parties had a sufficient opportunity to litigate the § 605 issue before that court. NSS, however, argues that the district court in *Coach's Corner* primarily focused on the question of whether NSS's license agreement contractually barred it from initiating a suit against Time Warner. It therefore contends that the question of whether NSS had a proprietary right in the communication under § 605 was secondary. The district court agreed with NSS.

We believe that Time Warner has the more persuasive argument on this issue. Nothing in the *Coach's Corner* case prevented either NSS or Time Warner from raising all potential arguments about the applicability of § 605 to the circumstances of their case. Despite the contractual language that was ultimately held to bar NSS from raising a claim against Time Warner in *Coach's Corner,* NSS still had a full and fair opportunity to litigate the claim that it raised under § 605. As such, we conclude that Time Warner has satisfied this final element for issue preclusion.

In sum, we agree with the district court that the second element ("necessary to the outcome") has not been met, but disagree that the fourth element ("full and fair opportunity to litigate") was lacking. But because all four elements must be satisfied before the prior opinion will be given preclusive effect, NSS is not bound by the decision in *Coach's Corner*.

In re Nageleisen, 523 B.R. 522 (Bankr. E.D. Ky. 2014)

TRACEY N. WISE, Bankruptcy Judge.

This matter is before the Court on the Bank of Kentucky's motion for judgment on the pleadings. In this adversary proceeding, the Bank of Kentucky (Plaintiff) seeks a declaratory judgment that two tracts of real property in which Debtor claims a one-half interest are not property of Debtor's estate, but property of a family partnership in which Debtor is a partner. Further, Plaintiff seeks a determination that a judgment debt, owed to Plaintiff on account of a default judgment finding that the Defendants engaged in a series of transactions to defraud the Bank, is non-dischargeable. For the reasons set forth below, the Motion will be denied.

Facts and Procedural History

Prior to Debtor's bankruptcy, Debtor was a member of the Nageleisen Family Limited Partnership (the "Partnership"), a partnership organized under Kentucky law and dissolved on February 4, 2013. During the Partnership's existence, the Partnership received various loans from the Bank of Kentucky, none of which were secured by the pieces of property at issue in this adversary proceeding. In 2013, the Partnership transferred title in the real property located at 10324 Decoursey Pike, Ryland Heights, Kentucky, to Debtor and her husband, Alan Nageleisen. Plaintiff then filed suit against Debtor, Alan Nageleisen, and the Partnership in Kenton County Circuit Court, alleging that the transfer of the Decoursey Pike property was a fraudulent conveyance.

On December 15, 2013, Debtor filed her first Chapter 13 petition in this Court, staying the state-court action. On January 16, 2014, Debtor dismissed that Chapter 13 case on the basis of Plaintiff's representation that it would forbear from seeking judgment in the state-court action and attempt to settle with Debtor and her husband. However, on January 31, 2014, according to the Debtor, Plaintiff permitted a default judgment to be entered in its favor in the state-court action.

The state court found that on January 3, 2013, the Partnership conveyed title to the Decoursey Pike property to Debtor's son, without consideration and for the purpose of defrauding Plaintiff. Specifically, the state court found:

> The Certification of Consideration on the Deed expressly states that the property was worth $90,000, and that it was being conveyed as an alleged "gift" to Kyle Debtor's son and without consideration;
>
> According to the Kenton County PVA, the transfer of 10324 Decoursey from the Family Partnership to Kyle was not an arms-length transaction, because the property was "gifted" to Kyle and was transferred without adequate consideration provided in exchange;
>
> Alan, Barbara, the Family Partnership, and another defendant all engaged in fraud by conveying the real property and improvements located at 10324 Decoursey from the Family Partnership to Kyle without consideration to defraud creditors. Alan, Barbara, the Family Partnership, and another defendant agreed to and did act in concert and participation with one another to transfer the real property and improvements located at 10324 Decoursey Pike to Kyle for the purpose of defrauding BOK;
>
> As a direct and proximate result of the fraudulent transfer and acts of Alan, Barbara, and the Family Partnership, BOK has been damaged in the amount of Ninety Thousand Dollars ($90,000.00), which is the value of the property fraudulently transferred according to the Certification of Consideration completed and filled out by the Defendants, and judgment is hereby entered in favor of BOK and against Alan, Barbara, and the Family Partnership, jointly and severally in the amount of Ninety Thousand Dollars ($90,000.00);
>
> . . .
>
> Alan, Barbara, the Family Partnership, and another defendant all violated KRS §§ 378.010 & 378.020 by transferring 10324 Decoursey without consideration and with the intent to defraud BOK.

The state-court default judgment found that after the Partnership transferred the Decoursey Pike property to Debtor's son, the son transferred the Decoursey Pike property back to the Partnership, which then transferred the property to Debtor and her husband. As a result, the judgment provided:

> Based upon the Complaint and the record before the Court, it is hereby ORDERED, ADJUDGED and DECREED, that the series of transfers from the Family Partnership to Kyle and then from Kyle back to the Family Partnership and then from the Family Partnership to Alan and Barbara were fraudulent and violated KRS §§ 378.010; 378.020; 378.060 and 378.070 and that all of the foregoing transfers are hereby rescinded. Title to 10324 Decoursey shall forthwith be quieted in the name of the Nageleisen Family Limited Partnership and as against Alan R. Nageleisen, Barbara L. Nageleisen, and Kyle Nageleisen, and title to 10324 Decoursey shall forthwith be solely and exclusively vested in the Nageleisen Family Limited Partnership, free, clear and unencumbered of any and all claims, rights, title or interest of Alan R. Nageleisen, Barbara L. Nageleisen, Kyle Nageleisen, and any person or entity claiming thereunder, and that all such interests are hereby terminated.

Accordingly, it quieted title to the Decoursey Pike property in the name of the Partnership. At no time did the Debtor seek to set aside or vacate the January 31, 2014 state-court default judgment.

On June 2, 2014, Debtor filed a Chapter 7 petition. On her schedule of assets, she lists a one-half interest in the Decoursey Pike property. Debtor also lists a one-half interest in a 32-acre farm on 11480 Staffordsburg Road, Independence, Kentucky, "legal title held in name of Nageleisen Family Limited Partnership." Debtor also lists her interest as partner in the Partnership, which she values at $0.

Thereafter, Plaintiff filed this adversary proceeding, seeking determinations that the Decoursey Pike and Staffordsburg Road properties are not property of Debtor's estate, and that Debtor's judgment debt to Plaintiff is nondischargeable under 11 U.S.C. § 523(a)(6). Debtor filed an answer. After that filing, Plaintiff moved for judgment on the pleadings.

After the Court took the matter under submission, Plaintiff and the Chapter 7 Trustee filed a joint motion for emergency relief from stay in Debtor's main bankruptcy case to sell various pieces of property, including the two properties in dispute in this adversary proceeding, at a foreclosure sale scheduled for November 25, 2014. The joint motion provided that proceeds from the sale of those properties would be held in escrow pending further order from this Court upon the resolution of the adversary proceeding. The Court granted the Trustee's motion.

Analysis

A. The Decoursey Pike Property

Plaintiff seeks a declaratory judgment determining that the Decoursey Pike property is not property of the estate. Plaintiff contends in its motion on the pleadings that the state-court judgment which quieted title to the Decoursey Pike property in the partnership precludes Debtor from claiming the Decoursey Pike property as property of the estate.

"In determining whether to accord preclusive effect to a state-court judgment, 'a federal court must give to a state-court judgment the same preclusive effect as would be given to that judgment under the law of the State in which the judgment was rendered.'" Kentucky law on preclusion, therefore, controls the preclusive effect this Court accords to the state-court quiet title judgment.

Kentucky recognizes two kinds of preclusion — claim preclusion (or res judicata) and issue preclusion (or collateral estoppel). "Claim preclusion bars a party from relitigating a previously adjudicated cause of action and entirely bars a new lawsuit on the same cause of action. Issue preclusion bars the parties from relitigating any issue actually litigated and finally decided in an earlier action." Plaintiff does not state, in its motion, upon which theory of preclusion it relies, but the Court

takes Plaintiff to rely on issue preclusion. Plaintiff's cause of action under § 541 was clearly not "previously adjudicated" by the state court in Plaintiff's fraudulent conveyance suit. Rather, at most, the state court's decision on the issue of title to the Decoursey Pike property is preclusive in this § 541 action.

The elements of offensive issue preclusion (that is, issue preclusion asserted by a plaintiff) in Kentucky, as recently recapitulated by the district court, are as follows:

> An earlier case only bars subsequent litigation over issues that (1) are the same as the issues now presented, (2) were actually litigated, (3) were actually decided, and (4) were necessary to the prior court's judgment. Before issue preclusion will stick against a current defendant who lost earlier two further elements must be met: (5) the defendant must have had a "realistically full and fair opportunity to litigate the issue," and (6) preclusion must be consistent with "principles of justice and fairness."

In order for Plaintiff to satisfy the first element of issue preclusion — identity of issues — Plaintiff must show that the state court's decision quieting legal title to the Decoursey Pike property in the Partnership answers whether the estate has any interest in the property under § 541. Plaintiff cannot make that showing, because the property interests encompassed by § 541 are not limited to legal title.

Section 541 states that the bankruptcy estate is comprised of "all legal or equitable interests of the debtor in property as of the commencement of the case." Possessory interests are among the property interests included. And, as this Court has recently held, the possessory interest in property of a debtor who lacks legal title to that property is property of the estate.

"Possessory interest refers to the right of an individual to occupy a piece of land or possess a piece of property. A person with a possessory interest does not own the property, but the person has some present right to control it such as a lease." Wex Legal Dictionary

The state-court judgment, while preclusively quieting legal title to the Decoursey Pike property in the Partnership, did not address any possessory interest that Debtor — whose schedules indicate she resides at the property — may have. Therefore, the issue the state court decided is not identical to the issue of whether the estate has an interest under § 541 in the Decoursey Pike property. Plaintiff is not entitled to judgment on the pleadings on this count.

C. Nondischargeability of the Money Judgment

Finally, Plaintiff seeks a determination that the $90,000 judgment debt created in the state-court action is nondischargeable under § 523(a)(6) of the Code because it is a debt for a willful and malicious injury. Plaintiff contends that the judgment was for Debtor's intentionally fraudulent conveyance of the Decoursey Pike property, that the state court's determination that Debtor transferred the Decoursey Pike property with intent to defraud creditors has issue-preclusive effect in this proceeding, and that the state court's finding that Debtor intended to defraud creditors satisfies the willfulness and malice elements of § 523(a)(6).

Section § 523(a)(6) excepts from discharge "any debt for willful and malicious injury by the debtor to another entity or to the property of another entity." 11 U.S.C. § 523(a)(6). To prevail on its motion for judgment on the pleadings on this count of Plaintiff's complaint, Plaintiff must show it is clearly entitled to judgment on the following questions: (1) that Debtor owes Plaintiff a debt, (2) that Debtor willfully and maliciously injured Plaintiff or its property, and (3) that the debt owed to Plaintiff is for that willful and malicious injury.

The state-court judgment plainly created a debt in favor of Plaintiff. The parties dispute, however, whether the judgment contains a finding of willful and malicious injury entitled to preclusive effect in this adversary proceeding. Plaintiff argues that the state court's findings that Debtor conveyed the Decoursey Pike property to her son with the intent to defraud Plaintiff, and that the conveyance injured Plaintiff, add up to a finding that Debtor willfully and maliciously injured Plaintiff. Further, Plaintiff argues that these findings of the state court have issue-preclusive effect. Debtor disputes this.

As reviewed above, issue preclusion under Kentucky law principally requires that the issue on which preclusion is sought and the issue addressed in the prior case are the same, that the issue was actually litigated in the prior case, actually decided in the prior case, and necessary to the prior court's judgment. The requirement that the issue be necessary to the judgment presents an obstacle to preclusion in this case.

Plaintiff argues that the state court's finding of fraudulent intent is tantamount to a finding of willful and malicious injury. Assuming this *arguendo,* the state court's finding of fraudulent intent must have been necessary to its judgment. It was not. The state court found that Debtor's transfer of the Decoursey Pike property to her son was a fraudulent conveyance on two alternate theories. It first found that Debtor conveyed the Decoursey Pike property without consideration, in violation of Ky. Rev. Stat. § 378.020, which voids constructively fraudulent transfers. It then found that Debtor conveyed the Decoursey Pike property with the intent to defraud creditors in violation of and Ky. Rev. Stat. § 378.010, which voids intentionally fraudulent transfers. Finally the Court found that Plaintiff was damaged by "the fraudulent transfer and acts" of the Debtor in the amount of $90,000 — the value of the transferred property — and entered judgment in that amount.

Nothing in the state court's judgment supports a conclusion that the court's finding of fraudulent intent was necessary to its money judgment in Plaintiff's favor. The judgment states that it results from the Debtor's fraudulent transfer of the property. The court's finding that Debtor conveyed the property without consideration in violation of § 378.020 was sufficient to support the court's finding that the conveyance was a fraudulent transfer, and thereby sufficient to support the mon-

ey judgment. No particular reference to Debtor's fraudulent intent is to be found in the court's money judgment. Further, the damages the court awarded were compensatory, not punitive, blocking an inference that a finding of bad intent was necessary to the damages award.

Though the state court's alternative finding of fraudulent intent was logically unnecessary to its judgment, not all courts agree on whether alternative findings are necessary in the sense required for issue preclusion. Many jurisdictions, following the Second Restatement of Judgments, never treat alternative findings as preclusive. The Second Restatement reasons that alternative findings may not be as carefully considered as findings solely necessary to a court's judgment, and that losing parties will lack incentive to appeal erroneous alternative findings when a judgment is supported by correct alternative findings, teaches that alternative findings. Other jurisdictions, however, follow the First Restatement of Judgments, which recommended giving preclusive effect to alternative findings, so long as "either alone would have been sufficient to support the judgment."

While many jurisdictions have adopted one of the all-or-nothing approaches of the Restatements, a number of jurisdictions have attempted to craft hybrid approaches that are sensitive to the concerns animating the Second Restatement's rule, but that give preclusive effect to alternative findings when those concerns are allayed. The Sixth Circuit, for example, will not give preclusive effect to a federal judgment's alternative finding if that finding is secondary to an alternative ground that is "clearly primary." The Second Circuit, while generally following the First Restatement, has held that exceptions from that rule are appropriate where there is a real "concern that an issue not essential to the prior judgment may not have been afforded careful deliberation and analysis." Wright and Miller "suggest that preclusion should arise from alternative findings only if a second court can determine without extended inquiry that a particular finding reflects a careful process of decision."

As explained above, the preclusive effect a Kentucky court's alternative findings receive is a question of Kentucky law. The Kentucky courts have not addressed this question. "As a federal court faced with resolving an undecided question of state law, this Court 'must make the best prediction, even in the absence of direct state precedent, of what the Kentucky Supreme Court would do if it were confronted with the question.'"

This Court concludes that were it faced with the issue, the Kentucky Supreme Court would at least decline to give preclusive effect to an alternative finding when that finding is conclusory and the court's other finding is supported by an expressed factual basis. In describing certain findings as "conclusory," the Court uses the term in its technical sense, to denote "expressing a factual inference without expressing the fundamental facts on which the inference is based."

First, declining to give preclusive effect to conclusory alternative findings is consistent with Section 27 of the Second Restatement, on which the Kentucky Supreme Court relied in crafting state law on issue preclusion. Second, what can be gleaned from Kentucky cases suggests that Kentucky would not give preclusive effect to a conclusory finding that is alternative to a non-conclusory finding. Kentucky declines to apply issue preclusion offensively where the party to be bound "lacked incentive to litigate in the prior action or appeal an adverse decision." This will usually be the case of conclusory alternative findings, because a party will lack incentive to litigate or appeal a conclusory finding where an alternative finding is supported by underlying factual findings and is sufficient to support a judgment.

The Court need not predict whether Kentucky would go farther and adopt the Second Restatement's rule because here, the judgment at issue contains alternative findings, only one of which is conclusory.

The state court's judgment awarding damages for Debtor's fraudulent conveyance rested on two legal theories — constructive fraud and actual fraud. The former rested soundly on the finding that the Decoursey Pike property was "gifted" to Debtor's son without consideration. This is all that is required for a finding of a fraudulent transfer under Ky. Rev. Stat. § 378.020. The latter rested on a bare assertion of fraudulent intent, without expressly setting forth facts which support this finding. In the absence of the soundly supported finding of constructive fraud, the state court might have been reluctant to enter, without hearing evidence, a default judgment that found fraudulent intent in such a cursory fashion. However, because the finding of constructive fraud was factually supported, further review of the finding of fraudulent intent may have seemed unnecessary. Likewise, Debtor lacked incentive to appeal the court's finding of fraudulent intent, since the factually supported finding of a constructively fraudulent transfer was sufficient to support the court's judgment. In these circumstances, it would be both unfair and imprudent to give the state court's finding of fraudulent intent preclusive effect in this proceeding.

Accordingly, the Court holds that the state court's finding of fraudulent intent was not necessary to the state court's judgment under Kentucky law, and that finding will not be given preclusive effect. As a result, it is unnecessary to consider whether other elements of Kentucky's test for issue preclusion are met. Plaintiff is not entitled to judgment on the pleadings on the question of willful and malicious injury, and therefore not entitled to judgment on the pleadings on the nondischargeability count of its complaint.

Janjua v. Neufeld, 933 F.3d 1061 (9th Cir. 2019)

A. Wallace Tashima, Circuit Judge

In this case we address, as a matter of first impression in our Circuit, the standard for determining whether an issue was "actually litigated" in a previous adjudication for purposes of issue preclusion, also known as collateral estoppel. We hold that an issue was actually litigated only if it was raised, contested, and submitted for determination in the prior adjudication.

Khalil Janjua ("Janjua"), a noncitizen, was granted asylum in the United States. Shortly thereafter, he applied for adjustment of status, which was denied on the ground that he was inadmissible under 8 U.S.C. § 1182(a)(3)(B)(i) for having supported a Tier III terrorist organization. To be eligible for asylum, an applicant must not be inadmissible under § 1182(a)(3)(B). Adjustment of status imposes the same requirements. Janjua thus argues that because he was granted asylum —and therefore was necessarily *not* found inadmissible on account of terrorism-related activities under § 1182(a)(3)(B)(i) —issue preclusion bars the government from now denying his adjustment of status application on that ground. The question of whether Janjua was inadmissible on terrorism-related grounds was never raised, contested, or submitted for determination at Janjua's asylum proceeding. Janjua's work for the relevant organization, however, was discussed at length. Assuming without deciding that issue preclusion applies in adjustment of status proceedings, the central question before us is whether the issue of terrorism-related inadmissibility was actually litigated at Janjua's asylum proceeding for purposes of issue preclusion. Because that issue was not raised, contested, or submitted for determination at Janjua's asylum proceeding, it was not actually litigated. Issue preclusion does not bar the government from disputing that issue in Janjua's adjustment of status proceeding. We therefore affirm.

BACKGROUND

I. Factual Background

Janjua is a native and citizen of Pakistan. As a Muhajir[2] living in Pakistan, Janjua joined the Muhajir Qaumi Movement ("MQM"), a political group. Janjua worked on behalf of the MQM, "attending meetings, organizing rallies, distributing flyers," and advocating for the group's message during elections. As a result of his affiliation with and work for the MQM, Janjua was arrested and beaten by the police and by members of the opposition party numerous times while in Pakistan. Janjua eventually fled Pakistan in July 1998, entering the United States without inspection in Arizona on January 17, 1999.

2 (n.1 in opinion) "Muhajir" refers to those people who are or are descended from Muslim immigrants from India to Pakistan."

II. Procedural Background

In November 1999, Janjua applied for asylum with the legacy Immigration and Naturalization Service. In January 2000, Janjua's application was rejected, and the government served Janjua with a Notice to Appear ("NTA") in removal proceedings, charging him with inadmissibility under 8 U.S.C. § 1182(a)(6)(A)(i), as an alien present in the United States without having been admitted or paroled. The NTA did not charge him with inadmissibility under any terrorism-related inadmissibility grounds.

Janjua conceded removability, but submitted applications for asylum, withholding of removal, and relief under Article 3 of the Convention Against Torture ("CAT") predicated on his fear of persecution on the basis of his membership in the MQM. At Janjua's merits hearing, the immigration judge ("IJ") admitted into evidence Janjua's written statement regarding his participation in MQM activities and meetings, and Janjua testified at length about what he did as a member of the MQM and the abuse he suffered as a result of his membership. At one point, the government attorney focused on the MQM's reputation for violence, noting that "the Country Reports on Pakistan put out by the Department of State for the United States Government suggests that the MQM has demonstrated its willingness to use violence and intimidation to further its objectives" and asking whether Janjua had ever "used violence and intimidation to further the goals of the MQM," to which Janjua responded, "Never." Neither Janjua's written statement nor his oral testimony discussed whether Janjua collected funds or donations on behalf of the MQM, although he did at one point briefly discuss the annual donation his father would make to the MQM. At no point in the hearing was the issue of whether MQM would qualify as a terrorist organization ever raised or discussed. Then, as remains the case today, asylum was prohibited if an applicant was inadmissible for engaging in terrorist activity, which included knowingly providing material support to or soliciting funds on behalf of a designated terrorist organization.

The IJ denied Janjua's applications for asylum, withholding of removal, and protection under CAT, but the Board of Immigration Appeals ("BIA") reversed and remanded on the issue of Janjua's credibility. On remand, the IJ eventually granted Janjua's application for asylum in April 2007, without a written opinion. By that time, Congress had expanded terrorism-related inadmissibility to also cover so-called Tier III terrorist organizations, "groups of two or more individuals, whether organized or not, which engage in, or has a subgroup which engages in" certain terrorist activities.

In December 2008, Janjua filed a Form I-485, applying for adjustment of status to permanent residency pursuant to 8 U.S.C. § 1159. After waiting years without adjudication of his application, Janjua filed a petition for a writ of mandamus in the United States District Court for the Northern District of California, alleging un-

lawful delay by the government and asking the court compel the United States Citizenship and Immigration Service ("USCIS") adjudicate his adjustment of status application. USCIS responded by requesting additional evidence from Janjua regarding his activities with MQM, which he provided.

USCIS denied Janjua's application on August 2, 2016, on the ground that he was inadmissible under § 1182(a)(3)(B)(i)(I) because he "afforded material support to" and "solicited funds" for MQM. which qualified as a Tier III terrorist organization. Thus, USCIS concluded that Janjua was inadmissible under § 1182(a)(3)(B)(i)(I)—and therefore barred from receiving adjustment of status—because he had engaged in terrorist activity by supporting the MQM.

Following this, Janjua amended his complaint to challenge USCIS' denial of his application. Because the same terrorism-related grounds for inadmissibility that bar asylum also bar adjustment of status, Janjua argued that issue preclusion prevented the government from raising terrorism-related inadmissibility in the adjustment of status proceedings because the IJ had necessarily concluded that Janjua was not inadmissible on these grounds when he granted Janjua asylum. Janjua moved for summary judgment on the same basis. The government filed a cross-motion for summary judgment, arguing that issue preclusion did not apply to Janjua's adjustment application and, even if it did, the issue was not identical, previously litigated, or decided.

On July 6, 2017, the district court denied Janjua's motion and granted the government's. The district court first held that issue preclusion does apply in adjustment of status proceedings governed by the Immigration and Nationality Act ("INA"). The district court agreed with the government, however, that the elements of issue preclusion were not met here because the issue had not been "actually litigated" in Janjua's asylum proceedings because it was not explicitly raised and contested. Accordingly, the district court granted the government's motion for summary judgment.[3] Janjua timely appealed.

DISCUSSION

Issue preclusion, also known as collateral estoppel, "bars the relitigation of issues actually adjudicated in previous litigation." For issue preclusion to apply, four conditions must be met: "(1) the issue at stake was identical in both proceedings; (2) the issue was actually litigated and decided in the prior proceedings; (3) there was a full and fair opportunity to litigate the issue; and (4) the issue was necessary to decide the merits." Here, the central question is whether Janjua's inadmissibility for supporting a Tier III terrorist organization was actually litigated in the prior adjudication.[4] Assuming without deciding that issue preclusion applies in immi-

3 (n.2 in opinion) The court further explained that the only remaining issue was whether USCIS had acted arbitrarily or capriciously in recognizing the MQM as a Tier III terrorist organization, which Janjua had not contested and therefore waived.

4 (n.3 in opinion) Janjua does not dispute that he aided MQM, nor does he appear to dispute MQM's characterization by USCIS as a Tier III terrorist organization.

gration adjustment of status proceedings, we hold that Janjua's inadmissibility on terrorism-related grounds was not actually litigated, because the issue was not in fact raised, contested, or submitted to the IJ for determination in Janjua's asylum proceeding.

Unlike claim preclusion, also known as res judicata, issue preclusion requires that an issue must have been "actually and necessarily determined by a court of competent jurisdiction" to be conclusive in a subsequent suit. Thus, issue preclusion does not apply to those issues that could have been raised, but were not: "the judgment in the prior action operates as an estoppel, not as to matters which might have been litigated and determined, but 'only as to those matters in issue or points *controverted,* upon the determination of which the finding or verdict was rendered.'"

Accordingly, when applying issue preclusion, we have consistently looked to the record of the prior proceeding to determine whether an issue was in fact raised, contested, and submitted for determination. *See Oyeniran,* 672 F.3d at 804, 806 (explaining that the question of whether petitioner's father was tortured in Nigeria was "actually litigated" because petitioner presented evidence on the issue, the IJ specifically found so, and the government challenged that claim "at every stage of the administrative proceedings"); *Disimone v. Browner,* 121 F.3d 1262, 1268 (9th Cir. 1997) (explaining that the issue was actually litigated, even though the prior court did not explicitly address it in its decision, because the parties had raised and contested the issue and the district court had necessarily decided the issue by reaching its decision).

Thus, consistent with the Restatement (Second) of Judgments and our sister circuits, we hold that an issue is actually litigated when an issue is raised, contested, and submitted for determination. Under this standard, neither an issue that could have, but was not, asserted (such as an affirmative defense) nor an issue that was raised but admitted was "actually litigated."

Janjua argues, however, that an issue should be considered actually litigated if it was *implicitly* raised or if the parties had a full and fair opportunity to raise it. But such a standard would conflate the separate requirements that an issue be "actually decided in the prior proceedings" and "necessary to decide the merits." Issues that are necessarily decided include all issues that must have been decided for a judgment to stand—when asylum is granted, the IJ necessarily decides that none of the grounds for inadmissibility that automatically bar relief applies—regardless of whether they were explicitly raised or contested. Even if an issue is not explicitly raised, if it is necessary to the ultimate determination, it is "necessarily decided." But if an issue is actually litigated if it was implicitly raised, the requirement of actually litigated is rendered meaningless.

Further, the standard urged by Janjua—that an issue is actually litigated if it was implicitly raised—would expand the province of issue preclusion and encroach upon the province of claim preclusion. Both claim preclusion and issue preclusion are meant to preserve judicial resources, minimize inconsistent decisions, and prevent superfluous suits. But one of the key distinctions between claim preclusion and issue preclusion is that the former bars relitigation of any and all matters that were or could have been raised at that adjudication, while the latter precludes relitigation of only those issues that were "actually and necessarily determined," *i.e.,* those that were raised, contested, submitted for determination, and determined. The standard urged by Janjua would allow much broader preclusion, including of issues implicitly—but not in fact—raised. And precluding an issue that was not actually litigated— *i.e.,* not raised, contested. and submitted for determination—does not conserve judicial resources or facilitate reliance on the earlier judgment because resources were not expended on the issue in the first place. To the extent that Janjua argues that the issue should be foreclosed because it was *implied* or *ought* to have been raised by the government, that is precisely the sort of preclusion reserved for *claim* preclusion, not issue preclusion.

Janjua also makes the alternative—and ultimately unpersuasive—argument that an issue was "actually litigated" so long as there was a "fair opportunity" to litigate the issue. But our precedent clearly lays out "actually litigated" and a "full and fair opportunity" to litigate as separate requirements, each of which must be met for issue preclusion to apply. And although we have at least once characterized the necessity that a party have had a "full and fair" opportunity to litigate the issue as part of the "actually litigated" consideration, this was not to say that an issue was actually litigated *so long as* there was a full and fair opportunity to do so; rather, we explained that issue preclusion is "inappropriate where the parties have not had a full and fair opportunity to litigate the merits of an issue." A full and fair opportunity was (and remains) a necessary condition for issue preclusion, but we never suggested that it was *sufficient* to satisfy the actually litigated requirement. We have since clarified that the full and fair opportunity requirement is a separate step of the issue preclusion analysis. We reject Janjua's proposed rule because it conflates two distinct elements of the issue preclusion test.

Having determined that an issue was actually litigated if it was raised, contested, and submitted for determination by the parties, we now turn to the question of whether Janjua's terrorism-related inadmissibility was actually litigated here. Neither the question of whether MQM qualifies as a terrorist organization nor whether Janjua engaged in terrorist activity and was inadmissible as a result was raised, contested, or submitted for determination in Janjua's asylum proceedings.

To be sure, Janjua's membership in and work for the MQM were discussed at length at the merits hearing, including whether he had ever used violence or intimidation to further the organization's goals. Yet, these topics were explored for their relevance to Janjua's purported basis for persecution; no one raised, or even

hinted at, these topics as potential grounds for inadmissibility under § 1182(a)(3)(B)(i). Neither party ever addressed whether the MQM was a Tier III terrorist group—this category did not exist at the time of the merits hearing, and no further argument was presented to the IJ after the statutory amendment. And neither party addressed whether Janjua's support for the MQM would make him inadmissible—which makes sense for the same reasons. While Janjua's work for the MQM was addressed in the asylum proceedings, the specific issue of whether he was inadmissible based on that work was not raised, contested, or submitted for determination. It was not actually litigated in Janjua's asylum proceeding, and issue preclusion does not apply.

Janjua's reliance on *Paulo v. Holder,* 669 F.3d 911 (9th Cir. 2011), is misplaced. There, the petitioner's eligibility for INA § 212(c) relief from removal was raised, contested, and submitted for determination in the first proceeding; in the second, the government advanced a new *argument* as to why he was ineligible. Issue preclusion applied because "the fact that a particular *argument* against Paulo's eligibility was not made by the government and not addressed by the district court does not mean that the *issue* of Paulo's eligibility for § 212(c) relief was not decided." Here, however, the government's challenge to Janjua's admissibility in the adjustment of status proceeding is not merely a new *argument;* rather, the *issue* of terrorism-related inadmissibility was never disputed in the asylum proceeding. Thus, it was not actually litigated and issue preclusion cannot apply.

CONCLUSION

For the foregoing reasons, we hold that an issue is "actually litigated" for purposes of issue preclusion when it is raised, contested by the parties, and submitted for determination in the prior proceeding. Because the issue of whether Janjua was inadmissible on terrorism-related grounds was not raised, contested, and submitted for determination at his asylum proceeding, it was not actually litigated. Issue preclusion does not apply.

3.1 Non-Mutual Issue Preclusion

Rest. (2d) of Judgments

§29. Issue Preclusion in Subsequent Litigation with Others

A party precluded from relitigating an issue with an opposing party, in accordance with §§27 and 28, is also precluded from doing so with another person unless the fact that he lacked full and fair opportunity to litigate the issue in the first action or other circumstances justify affording him an opportunity to relitigate the issue. The circumstances to which considerations should be given include those enumerated in §28 and also whether:

(1) Treating the issue as conclusively determined would be incompatible with an applicable scheme of administering the remedies in the actions involved;

2. The forum in the second action affords the party against whom preclusion is asserted procedural opportunities in the presentation and determination of the issue that were not available in the first action and could likely result in the issue being differently determined;

(3) The person seeking to invoke favorable preclusion, or to avoid unfavorable preclusion, could have effected joinder in the first action between himself and his present adversary;

(4) The determination relied on as preclusive was itself inconsistent with another determination of the same issue;

(5) The prior determination may have been affected by relationships among the parties to the first action that are not present in the subsequent action, or apparently was based on a compromise verdict or finding;

(6) Treating the issue as conclusively determined may complicate determination of issues in the subsequent action or prejudice the interests of another party thereto;

(7) The issue is one of law and treating it as conclusively determined would inappropriately foreclose opportunity for obtaining reconsideration of the legal rule upon which it was based;

(8) Other compelling circumstances make it appropriate that the party be permitted to relitigate the issue.

Parklane Hosiery v. Shore, 439 U.S. 322 (1979)

Justice Stewart delivered the opinion of the Court.

This case presents the question whether a party who has had issues of fact adjudicated adversely to it in an equitable action may be collaterally estopped from relitigating the same issues before a jury in a subsequent legal action brought against it by a new party.

The respondent brought this stockholder's class action against the petitioners in a Federal District Court. The complaint alleged that the petitioners, Parklane Hosiery Co., Inc. (Parklane), and 13 of its officers, directors, and stockholders, had issued a materially false and misleading proxy statement in connection with a merger. The proxy statement, according to the complaint, had violated §§ 14 (a), 10 (b), and 20 (a) of the Securities Exchange Act of 1934, as well as various rules and regulations promulgated by the Securities and Exchange Commission (SEC). The complaint sought damages, rescission of the merger, and recovery of costs.

Before this action came to trial, the SEC filed suit against the same defendants in the Federal District Court, alleging that the proxy statement that had been issued by Parklane was materially false and misleading in essentially the same respects as those that had ben alleged in the respondent's complaint. Injunctive relief was requested. After a 4-day trial, the District Court found that the proxy statement was materially false and misleading in the respects alleged, and entered a declaratory judgment to that effect. The Court of Appeals for the Second Circuit affirmed this judgment.

The respondent in the present case then moved for partial summary judgment against the petitioners, asserting that the petitioners were collaterally estopped from relitigating the issues that had been resolved against them in the action brought by the SEC.[5] The District Court denied the motion on the ground that such an application of collateral estoppel would deny the petitioners their Seventh Amendment right to a jury trial. The Court of Appeals for the Second Circuit reversed, holding that a party who has had issues of fact determined against him after a full and fair opportunity to litigate in a nonjury trial is collaterally estopped from obtaining a subsequent jury trial of these same issues of fact. The appellate court concluded that "the Seventh Amendment preserves the right to jury trial only with respect to issues of fact, and once those issues have been fully and fairly adjudicated in a prior proceeding, nothing remains for trial, either with or without a jury." Because of an intercircuit conflict, we granted certiorari.

5 (n. 2 in Opinion) A private plaintiff in an action under the proxy rules is not entitled to relief simply by demonstrating that the proxy solicitation was materially false and misleading. The plaintiff must also show that he was injured and prove damages. Since the SEC action was limited to a determination of whether the proxy statement contained materially false and misleading information, the respondent conceded that he would still have to prove these other elements of his prima facie case in the private action. The petitioners' right to a jury trial on those remaining issues is not contested.

I

The threshold question to be considered is whether, quite apart from the right to a jury trial under the Seventh Amendment, the petitioners can be precluded from relitigating facts resolved adversely to them in a prior equitable proceeding with another party under the general law of collateral estoppel. Specifically, we must determine whether a litigant who was not a party to a prior judgment may nevertheless use that judgment "offensively" to prevent a defendant from relitigating issues resolved in the earlier proceeding.[6]

A

Collateral estoppel, like the related doctrine of res judicata,[7] has the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation. Until relatively recently, however, the scope of collateral estoppel was limited by the doctrine of mutuality of parties. Under this mutuality doctrine, neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment. Based on the premise that it is somehow unfair to allow a party to use a prior judgment when he himself would not be so bound,[8] the mutuality requirement provided a party who had litigated and lost in a previous action an opportunity to relitigate identical issues with new parties.

By failing to recognize the obvious difference in position between a party who has never litigated an issue and one who has fully litigated and lost, the mutuality requirement was criticized almost from its inception. Recognizing the validity of this criticism, the Court in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation* abandoned the mutuality requirement, at least in cases where a patentee seeks to relitigate the validity of a patent after a federal court in a previous lawsuit has already declared it invalid. The "broader question" before the Court, however, was "whether it is any longer tenable to afford a litigant more than one full and fair opportunity for judicial resolution of the same issue." The Court strongly suggested a negative answer to that question:

> In any lawsuit where a defendant, because of the mutuality principle, is forced to present a complete defense on the merits to a claim which the plaintiff has fully litigated and lost in a prior action, there is an arguable misallocation of resources. To the extent the defendant in the second suit may not win by asserting, without contradiction, that the plaintiff had fully and fairly, but unsuccessfully, litigated the same claim in the prior suit, the defendant's time and money are diverted from alternative uses—productive or otherwise—to relitigation of a decided issue. And, still assuming that the issue was resolved correctly in the first suit, there is reason to be concerned about the plaintiff's allocation of resources. Permitting repeated litigation of the same issue as long as the supply of unrelated defendants holds out reflects either the aura of the gaming table or 'a lack of discipline and of disinterestedness on the part of the lower courts, hardly a worthy or wise basis for fashioning rules of proce-

6 (n.4 in Opinion) In this context, offensive use of collateral estoppel occurs when the plaintiff seeks to foreclose the defendant from litigating an issue the defendant has previously litigated unsuccessfully in an action with another party. Defensive use occurs when a defendant seeks to prevent a plaintiff from asserting a claim the plaintiff has previously litigated and lost against another defendant.

7 (n.5 in Opinion) Under the doctrine of res judicata, a judgment on the merits in a prior suit bars a second suit involving the same parties or their privies based on the same cause of action. Under the doctrine of collateral estoppel, on the other hand, the second action is upon a different cause of action and the judgment in the prior suit precludes relitigation of issues actually litigated and necessary to the outcome of the first action.

8 (n. 7 in Opinion) It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never has an opportunity to be heard.

> dure.' Although neither judges, the parties, nor the adversary system performs perfectly in all cases, the requirement of determining whether the party against whom an estoppel is asserted had a full and fair opportunity to litigate is a most significant safeguard.

B

The *Blonder-Tongue* case involved defensive use of collateral estoppel—a plaintiff was estopped from asserting a claim that the plaintiff had previously litigated and lost against another defendant. The present case, by contrast, involves offensive use of collateral estoppel—a plaintiff is seeking to estop a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff. In both the offensive and defensive use situations, the party against whom estoppel is asserted has litigated and lost in an earlier action. Nevertheless, several reasons have been advanced why the two situations should be treated differently.

First, offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does. Defensive use of collateral estoppel precludes a plaintiff from relitigating identical issues by merely "switching adversaries." Thus defensive collateral estoppel gives a plaintiff a strong incentive to join all potential defendants in the first action if possible. Offensive use of collateral estoppel, on the other hand, creates precisely the opposite incentive. Since a plaintiff will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins, the plaintiff has every incentive to adopt a "wait and see" attitude, in the hope that the first action by another plaintiff will result in a favorable judgment. Thus offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation, since potential plaintiffs will have everything to gain and nothing to lose by not intervening in the first action.

A second argument against offensive use of collateral estoppel is that it may be unfair to a defendant. If a defendant in the first action is sued for small or nominal damages, he may have little incentive to defend vigorously, particularly if future suits are not foreseeable. Allowing offensive collateral estoppel may also be unfair to a defendant if the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant.[9] Still another situation where it might be unfair to apply offensive estoppel is where the second action affords the defendant procedural opportunities unavailable in the first action that could readily cause a different result.[10]

9 (n. 14 in Opinion) In Professor Currie's familiar example, a railroad collision injures 50 passengers all of whom bring separate actions against the railroad. After the railroad wins the first 25 suits, a plaintiff wins in suit 26. Professor Currie argues that offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover.

10 (n.15 in Opinion) If, for example, the defendant in the first action was forced to defend in an inconvenient forum and therefore was unable to engage in full scale discovery or call witnesses, application of offensive collateral estoppel may be unwarranted. Indeed, differences in available procedures may sometimes justify not allowing a prior judgment to have estoppel effect in a subsequent action even between the same parties, or where defensive estoppel is asserted against a plaintiff who has litigated and lost. The problem of unfairness is particularly acute in cases of offensive estoppel, however, because the defendant against whom estoppel is asserted typically will not have chosen the forum in the first action.

C

We have concluded that the preferable approach for dealing with these problems in the federal courts is not to preclude the use of offensive collateral estoppel, but to grant trial courts broad discretion to determine when it should be applied. The general rule should be that in cases where a plaintiff could easily have joined in the earlier action or where, either for the reasons discussed above or for other reasons, the application of offensive estoppel would be unfair to a defendant, a trial judge should not allow the use of offensive collateral estoppel.

In the present case, however, none of the circumstances that might justify reluctance to allow the offensive use of collateral estoppel is present. The application of offensive collateral estoppel will not here reward a private plaintiff who could have joined in the previous action, since the respondent probably could not have joined in the injunctive action brought by the SEC even had he so desired. Similarly, there is no unfairness to the petitioners in applying offensive collateral estoppel in this case. First, in light of the serious allegations made in the SEC's complaint against the petitioners, as well as the foreseeability of subsequent private suits that typically follow a successful Government judgment, the petitioners had every incentive to litigate the SEC lawsuit fully and vigorously. Second, the judgment in the SEC action was not inconsistent with any previous decision. Finally, there will in the respondent's action be no procedural opportunities available to the petitioners that were unavailable in the first action of a kind that might be likely to cause a different result.

We conclude, therefore, that none of the considerations that would justify a refusal to allow the use of offensive collateral estoppel is present in this case. Since the petitioners received a "full and fair" opportunity to litigate their claims in the SEC action, the contemporary law of collateral estoppel leads inescapably to the conclusion that the petitioners are collaterally estopped from relitigating the question of whether the proxy statement was materially false and misleading.

4. Review Questions

Question 1

Peggy is fired from her job at the Sterling Cooper advertising agency (located in the State of Hudson). Her boss, Don told her the reason for her firing was poor performance, but Peggy believes the real reason was her refusal to have an affair with Don, who made repeated and unwelcome advances.

Peggy sues Sterling Cooper in Hudson state court, asserting a claim for wrongful discharge. Sterling Cooper moves to dismiss on the grounds that Hudson law does not recognize a claim for wrongful discharge, except where the plaintiff was employed under a contract requiring cause for termination. The court, finding that complaint did not allege that Peggy had such an employment contract, granted the motion to dismiss with prejudice.

Peggy then brings another suit, this time in Hudson federal court, against both Sterling Cooper and Don, asserting claims for employment discrimination under Title VII (a federal statute). In her new complaint, Peggy alleges that she was fired because she rejected Don's unwanted sexual advances. In the federal suit, Peggy seeks damages for emotional distress, punitive damages, and attorney fees (as permitted under Title VII).

Does claim preclusion apply to the claim against Sterling Cooper? To the claim against Don?

Question 2

Sterling Cooper recently gained a new client, Elke Corp., which manufactures a line of gardening and lawn care equipment. To celebrate, the agency holds an office party, at which several employees, including Ken and Lois, consume excessive quantities of liquor. Ken urges Lois to take an Elke riding lawn mower for a spin around the office. Lois passes out and loses control of the mower, driving it into another Sterling Cooper employee, Guy, whose foot is shredded into mulch-sized bits by the mower's blades. Trudy, a guest at the party, is splattered with blood and bits of flesh from Guy's foot, and is terribly distraught. The mower finally comes to a stop when it collides into a wall. Lois is thrown from the mower, breaking her leg in the fall.

Under Hudson state law, a claim by an employee for injuries sustained in the course of employment as a result of a fellow employee's negligence is within the exclusive jurisdiction of the state Workers' Compensation Claims Board. The workers' compensation statute bars any claim by the employee against the employer or fellow employees for negligence, but does not bar claims against third parties who may be responsible (in whole or in part) for the employee's injuries. Claimants before the Board may recover actual damages to compensate for the cost of medical treatment for their injuries, but may not recover damages for emotional distress or punitive damages. Proceedings before the Board are relatively informal; there is no pre-hearing discovery process, and the Board may consider evidence that would not be admissible in court under the Hudson Rules of Evidence.

Guy brings a workers' compensation claim for the injury to his foot. Sterling Cooper defends against the workers' compensation claim on two grounds:

- Guy negligently failed to move out of the way from the approaching mower.

- The accident was the fault of Elke, which designed the mower without an adequate safety device to prevent operation by an unconscious driver, and failed to warn against operating the mower indoors or while intoxicated.

The Workers' Compensation Claims Board makes the following findings of fact & conclusions of law:

- Guy was injured while attending a work-related function at Sterling Cooper's office.
- The proximate cause of Guy's injury was the operation of a riding mower in the office by another Sterling Cooper employee, who was intoxicated.
- Guy could not have anticipated that Lois would drive the mower over his foot, and could not readily have moved out of the way in time to avoid the accident.
- While an injured employee's contributory negligence may provide an employer with a defense to a claim under the worker's compensation statute, Guy was not negligent in connection with the accident.
- The mower was not defective in its design.
- The mower did not include any warning against operation indoors or while intoxicated.
- As a matter of law, neither a design defect nor the absence of a warning against unsafe operation provides a defense against an employer's liability for on-the-job injuries to its employee under the workers' compensation statute.

Based on these findings, the Board granted Guy's claim. Sterling Cooper appeals the Board's decision to the Hudson Court of Appeals, which affirms the Board's ruling. Under Hudson law, when a decision by the Board has been affirmed on appeal, the Board's decision has the same preclusive effect as a court judgment.

Guy then files a lawsuit in Hudson federal court against Elke Corp. (which has jurisdiction based on diversity of citizenship), alleging that a design defect and lack of a warning against operation of the mower indoors or while intoxicated were responsible for his injury.

May Elke rely on the decision of the Workers' Compensation Claims Board to preclude Guy from asserting that the mower's design was defective?

May Guy rely on the decision of the Workers' Compensation Claims Board to preclude Elke from disputing that there was no warning against operating the mower indoors or while intoxicated?