United States Court of Appeals

FIFTH CIRCUIT
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July 31, 2018

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No. 18-40246 State of Nevada, et al v. LABR
USDC No. 4:16-CV-731

Dear Mr. Hellman,

We have reviewed your electronically filed reply brief and it is sufficient.

You must submit the 7 paper copies of your brief required by 5TH CIR. R. 31.1 within 5 days of the date of this notice pursuant to 5th Cir. ECF Filing Standard E.1.

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No. 18-40246

UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

STATE OF NEVADA; STATE OF TEXAS,
Plaintiffs-Appellees

CHIPOTLE MEXICAN GRILL, INCORPORATED;
CHIPOTLE SERVICES, L.L.C.,
Petitioners-Appellees

v.

UNITED STATES DEPARTMENT OF LABOR,
Defendant

CARMEN ALVAREZ, and her Counsel,
Respondent-Appellant

On Appeal from the United States District Court
for the Eastern District of Texas,
No. 4:16-cv-731

REPLY BRIEF FOR RESPONDENTS-APPELLANTS CARMEN ALVAREZ AND HER COUNSEL

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July 27, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

INTRODUCTION

Chipotle, the States, and their *amici* devote much of their briefing to questions this appeal does not present. This case is not about whether the Overtime Rule exceeded DOL's authority under the FLSA. Nor is this case about the merits of the New Jersey case. The question here is different: Did Respondents' invocation of the Overtime Rule in the New Jersey lawsuit place them in *contempt* of the *Nevada* injunction?

Answering that question requires no "complicated legal gymnastics," States Br. 29, because it is hornbook law that nonparties like Ms. Alvarez and her counsel are not bound by an injunction entered in a suit in which they did not participate. As Judge Wisdom wrote for this Court: "[I]t is not the act described which the decree may forbid, but only that act *when the defendant does it*." *United States v. Hall*, 472 F.2d 261, 264 (5th Cir. 1972) (emphasis added) (quoting the "leading case" of *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930) (Hand, J.)). The central holding of the opinion below—that an injunction entered in a suit against federal defendants nonetheless silently runs against millions of other people in the name of "privity"—marks a staggering and unprecedented departure from that principle. Indeed, over the course of four briefs, Appellees and their *amici* have not identified a single case endorsing their stunningly broad theory of a court's injunctive and contempt powers.

That should come as no surprise. The reality is that government actors are regularly enjoined from enforcing laws and regulations. And those rulings in turn sometimes give rise to questions about whether a private party still has a right to relief under a law the government cannot enforce. Sometimes plaintiffs will prevail on those questions, and sometimes they will not. But filing a lawsuit that raises a disputed legal theory does not make that plaintiff a lawbreaker.

Here, Chipotle and Respondents disagree about the effect the *Nevada* order had on the Overtime Rule, and hence about whether Ms. Alvarez was owed overtime under the FLSA. That dispute goes to the *merits* of Ms. Alvarez's pending case in the U.S. District Court for the District of New Jersey (where the States may seek to intervene or participate as *amici* if they wish). But even if Respondents were wrong about the Overtime Rule, that would not mean they *violated* a court order. If this Court were to embrace the district court's "privity" theory and affirm the contempt finding here—allowing the court below to punish Respondents for advancing a disfavored argument about the *Nevada* order's legal consequences before another federal court—that holding would indeed "bear[ ] consequences for the relationship between the federal government and the American people" that this Court should reject. ROA.5570.

For their part, the States do not even attempt to defend the district court's reasoning, but their alternative theory is just as broad and just as wrong. According

to their new theory, nonparties may be held in contempt whenever they "obstruct" an injunction. States Br. 41-51; *see also* Chipotle Br. 42-44. That argument is forfeited, but in any case it makes a dead letter out of Rule 65(d)(2), which pointedly limits the scope of injunctions to certain classes of nonparties rather than anyone whose conduct might be said to undermine the ultimate objective of an order. And, tellingly, the lone post-Rule 65 case that the States invoke—*United States v. Hall*, 472 F.2d 261 (5th Cir. 1972)—lends their theory no support at all. In reality, *Hall* strongly reaffirmed the general rule that injunctions do not run to nonparties "who merely had notice of the order," and only then recognized a narrow exception for nonparties who act to prevent the *defendant* from complying with the injunction. *Id.* at 264-65. Here, Ms. Alvarez's suit in New Jersey obviously could not obstruct DOL's compliance with the *Nevada* order. This case therefore falls squarely within the rule against applying injunctions to nonparties that *Hall* recognized and has nothing to do with the exception that *Hall* carved out.

Moreover, even if Rule 65(d)(2) authorized the court below to enjoin millions of Americans by proxy (and it does not), the actual text of the *Nevada* order did not impose that sweeping and unprecedented result—let alone do so *clearly*, as contempt requires. Appellees are apparently well aware of that problem, because they plead for "deference to the [district] court" and argue that ambiguities in the *Nevada* order should be construed *against* Respondents (States Br. 27). But the law of contempt

requires just the opposite: Unless the court's order made clear that it was enjoining all workers, it cannot support a contempt finding. At a bare minimum, this Court should reverse on the ground that the district court's order that "Defendants are enjoined" from "implementing and enforcing" the Overtime Rule did not unmistakably enjoin the rest of the country from invoking the rule in private litigation.

Finally, even if the injunction had purported to run to Respondents, the district court would still lack personal jurisdiction over them. This Court has upheld the exercise of personal jurisdiction over an out-of-state nonparty only when the nonparty *aided and abetted* an enjoined, in-state defendant. *See Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985). Chipotle asks this Court to endorse a far broader conception of personal jurisdiction, but it points to no support for that theory in any prior case. Moreover, even if the district court *could have* exercised jurisdiction over Respondents by properly serving them with process, Chipotle concedes that the court did not do that.

Appellees' efforts to make this case about the merits of Ms. Alvarez's FLSA suit confirm the fundamental weakness of their position on the actual question presented. Respondents did not disobey any order of the district court, and the decision below should be reversed.

ARGUMENT

I. Under Rule 65, Respondents Are Not Bound By The *Nevada* Injunction.

Chipotle, the States, and the district court all accept—as they must—that an injunction ordinarily has no bearing on a nonparty to the litigation. That principle is as well-settled as any in civil procedure. *See, e.g.*, *Chase Nat'l Bank v. City of Norwalk*, 291 U.S. 431 (1934); *Hall*, 472 F.2d at 264-65; *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930); 11A Charles Alan Wright et al., *Federal Practice & Procedure* § 2956 (2013) ("Wright"). Appellees' burden, therefore, is to bring this case within one of the few narrow exceptions to that rule. Neither of their attempts succeeds.

A. The District Court's Privity Theory Fails.

Chipotle reiterates the district court's analysis, contending that the "general rubric" of "privity" (Br. 28) establishes that (1) every worker in the country was in privity with DOL because the agency "represented" them by defending against the *Nevada* suit, and (2) privity makes Ms. Alvarez a bound nonparty under Rule 65(d)(2). These contentions remain flawed at every step.[1]

[1] The States do not even attempt to defend the district court's privity theory. *See* States Br. 41. And the Chamber of Commerce and the other business groups, tellingly, are unwilling to endorse any part of the court's contempt analysis. *See* Chamber Br. 4.

First, as Respondents have explained, Opening Br. 26-30, Chipotle is just wrong about the scope of Rule 65(d)(2), which by its plain terms reaches only "agents" of parties and "other persons who are in active concert or participation" with those parties or their agents. Fed. R. Civ. P. 65(d)(2). Chipotle still has not offered a *single* case holding that Rule 65(d)(2) could be satisfied merely because a nonparty's interests were "represented" by a party.

Instead, Chipotle answers that courts have interpreted the rule with reference to its common-law background, which is sometimes described in terms of "privity." Br. 28-31. But whatever privity might mean in other contexts, "privity" for the particular purposes of Rule 65 and the law of injunctions is generally "synonymous with the enumeration in Rule 65(d)(2) of nonparties who may be bound." *Harris Cty. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 314 (5th Cir. 1999) (quoting 11A Wright, § 2956); *see also Meza v. Gen. Battery Corp.*, 908 F.2d 1262, 1266 (5th Cir. 1990) (privity is an "elusive and manipulable concept"). And that enumeration in Rule 65(d)(2) expressly requires "active" coordination, rather than passive, unknowing representation—a limitation reflecting the core concern, shared by both the rule and the common law, that while "aiders and abettors" should not be able to help defendants "nullify" an injunction, others "who act independently" are entitled to their own day in court. *Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13-14 (1945); *see* Opening Br. 26-27 & n.6 (collecting numerous cases requiring actual coordination).

Chipotle contends that other cases embrace a broader conception of "privity" under Rule 65(d)(2), but its citations only highlight the chasm that separates this case from all others that have ever found a nonparty to be bound to an injunction. For example, Chipotle relies heavily on *National Spiritual Assembly of Bahá'ís of U.S. Under Hereditary Guardianship, Inc. v. National Spiritual Assembly of Bahá'ís of U.S., Inc.*, 628 F.3d 837 (7th Cir. 2010), which Respondents cited in their opening brief (Br. 28-29), and which states that Rule 65(d)(2) extends to nonparties who are "legally identified with the enjoined party." *Id.* at 849. But the Seventh Circuit took pains to explain that a nonparty could *not* be bound on that theory unless he had "an extremely close identification" with the party and exercised "substantial discretion, control, and influence over … the underlying litigation." *Id.* at 854; *see id.* at 853. So, too, with the *Flowdata* decision that Chipotle repeatedly cites. *See Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 154 F.3d 1345 (Fed. Cir. 1998); Chipotle Br. 30-32. In that case, the Federal Circuit applied the same test as the Seventh Circuit and concluded that a nonparty company president was bound by an injunction against his company because he served as president during his company's litigation and represented his company's interests in that litigation. 154 F.3d at 1352-53. Those cases are nothing like this one, where Ms. Alvarez had no control

or influence whatsoever over the underlying *Nevada* litigation or the federal defendants in that case.[2] In short, in light of the actual body of case-law, Chipotle's claim that the district court applied "settled privity principles"—including a purported "adequate representation/legal identification exception" to Rule 65(d)(2)—is simply wishful thinking. Br. 3, 37.

Indeed, this Court and others have repeatedly recognized that an injunction running against the government does *not* bar a private litigant from bringing a private action to enforce a statute. *See, e.g.*, *Okpalobi v. Foster*, 244 F.3d 405, 426-27 & n.34 (5th Cir. 2001) (en banc) (because "[a]n injunction enjoins a defendant, not a statute," plaintiffs could not challenge civil-liability provisions of abortion statute in suit against state officials); *Nova Health Sys. v. Gandy*, 416 F.3d 1149, 1158-59 (10th Cir. 2005) (requested injunction against government enforcement of abortion statute would not "prevent [civil damages] lawsuits"); *Hope Clinic v. Ryan*, 249 F.3d 603, 605 (7th Cir. 2001) ("[A]ny potential dispute plaintiffs may have with future private plaintiffs could not be redressed by an injunction running only against public prosecutors. . . . [A]n injunction prohibiting *the world* from filing private suits would be a flagrant violation of both Article III and the due process clause"). If Chipotle's

[2] Even further afield is *ADT LLC v. NorthStar Alarm Services, LLC*, 853 F.3d 1348 (11th Cir. 2017), where one corporation bought another's assets and was held *not* to be bound by an injunction against the prior company under Rule 65(d)(2). *Cf.* Chipotle Br. 10, 27-28, 30-31, 38.

theory about the effect of an injunction against the government were correct, all of these cases would be wrong.

This Court need go no further to reverse the contempt finding: because Ms. Alvarez did not personally participate in the underlying *Nevada* litigation, she is not bound by the court's injunction against the federal defendants under Rule 65(d)(2) and cannot be held in contempt for having supposedly violated it.[3]

Second, even assuming that Rule 65(d)(2) embraces a broader view of privity (and it does not), the connection between Ms. Alvarez and the federal defendants in the *Nevada* suit would be insufficient to give rise to privity under any circumstances—even as a matter of preclusion law. As one scholar (and former Solicitor General of Appellee Texas) recently summarized the law: "Collateral estoppel will not supply a defense if a private plaintiff brings a civil enforcement action against the litigants who persuaded an earlier court to declare [a] statute unconstitutional [in a suit against the government], because the private plaintiff was not a party or [in] privity to that lawsuit." Jonathan F. Mitchell, *The Writ-of-Erasure Fallacy*, 104 Va. L. Rev., at 74-76 & n.270 (collecting cases) (forthcoming 2018), https://ssrn.com/abstract=3158038. In other words, a plaintiff who successfully obtains an injunction

[3] The district court held the Respondent attorneys in contempt solely on the ground that they aided Ms. Alvarez in violating the injunction. *See* ROA.4977. Accordingly, if Ms. Alvarez is not in contempt, the other Respondents cannot be either.

against the government's enforcement of a statute is *not* entitled to the benefit of preclusion as a defendant in a separate suit brought by a private plaintiff.

The district court rested its contrary theory of privity on the preclusion analysis in *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir. 1977). Respondents have explained at length why that case does not support the contempt finding, Opening Br. 30-36, and Chipotle has no real response. *Southwest Airlines* expressly held that a private party would *not* be precluded from (let alone punished for) seeking to relitigate an issue that the government had lost where the plaintiff seeks to "vindicate a breach of duty owed specifically to [her]" or "would recover under a statutory system of remedies that may contemplate enforcement … [by] the affected private parties." 546 F.2d at 100 (internal quotation marks omitted). That describes Ms. Alvarez's FLSA case perfectly. *See* Opening Br. 33-35. Furthermore, *Southwest Airlines* found its preclusion holding compatible with due process in part because the private plaintiffs had "attended the various hearings" and submitted briefs in the prior case, and because denying preclusion "would impose substantial relitigation costs upon Southwest." 546 F.2d at 102. None of that is true here, either. Respondents played no role in the *Nevada* litigation, and Chipotle can hardly complain about the costs of "relitigation" when it did not even bring the first suit.

Chipotle responds that both the *Nevada* litigation and the New Jersey suit still implicate the "same substantive right" to overtime (Br. 40), in the sense that both suits touch on the validity of the Overtime Rule. But that is just to say the issues in the two suits overlap—which is the fact that sets any preclusion analysis in motion. It does not mean that nonparty preclusion is warranted under the analysis set forth in *Southwest Airlines* (and, for the reasons just given, it is not). Moreover, Chipotle's suggestion closely resembles the argument the Supreme Court rejected in *Taylor v. Sturgell*, 553 U.S. 880 (2008). There, the defendant argued that broad nonparty preclusion rules should apply to FOIA litigation because "the duty to disclose under FOIA is owed to the public generally" and repetitive private suits were seeking to enforce the same "public" right. *Id.* at 902. The Supreme Court rejected that idea, explaining that "a successful FOIA action results in a grant of relief to the individual plaintiff, not a decree benefiting the public at large." *Id.* at 902-03. The same is true here: If Ms. Alvarez prevails in the New Jersey suit, she will obtain personal relief in the form of money damages, not an adjudication of public rights.

Finally, extending *Southwest Airlines* as Chipotle proposes would be particularly inappropriate because the Supreme Court's recent decisions, including *Taylor*, have repudiated "virtual representation" in the name of due process. Opening Br. 31-32. Chipotle concedes that these decisions "reject[ ] . . . the idea of 'virtual representation,'" but insists that Chipotle is relying on "the distinct 'adequate

representation' theory." Br. 39-40 & n.11. This Court has rejected that very distinction, however: "[B]oth from *Southwest Airlines* itself and the succeeding decisions of this circuit, the concept of 'adequate representation' … *refers to* the concept of virtual representation." *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860, 864 (5th Cir. 1985) (emphasis added). Recognizing that "virtual representation" is in tension with due process, this Court had repeatedly declined to extend *Southwest Airlines* even before the Supreme Court's recent decisions. *See id.* at 866 ("[S]ome litigants—those who never appeared in a prior action—may not be collaterally estopped without litigating the issue." (quotation marks omitted)); *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) (stressing "how narrowly the virtual representation theory is applied"). As the Seventh Circuit said in *National Spiritual Assembly*: "Having rejected virtual-representation theory in its traditional res judicata setting, we see no reason why the Supreme Court would view it more favorably in the context of injunctions." 628 F.3d at 857.

* * *

Chipotle aims to minimize the consequences of the district court's privity theory (Br. 42-43), but the district court itself recognized (if belatedly) the historic sweep of its holding. As the court said in staying its order, the new theory "bears consequences for the relationship between the federal government and the American

people" and will affect "anyone seeking to enforce a federal agency's rule under similar circumstances." ROA.5570. Even that is too modest; the theory will attach grave new consequences to every injunction entered against enforcement of a state or federal statute as well. *See supra*, at 8-10. Because the district court's theory contradicts the text of Rule 65, lacks any precedent in the entire history of the law of injunctions, has extraordinary implications, and violates Respondents' due process rights, this Court should reject it.

B. The States' New "Obstruction" Theory Fails As Well.

Appellees' fallback theory for binding Ms. Alvarez to the *Nevada* injunction—mainly championed by the States, and conjured by no party below—can be dealt with more briefly.[4] The States first observe that "[e]arly American courts . . . issued injunctions purporting to bind the world." Br. 44 (internal quotation marks omitted); *see id.* at 43-48 (citing three cases decided between 1901 and 1908). But those cases had been discredited even before the adoption of the Federal Rules of Civil Procedure in 1938. *See Chase Nat'l Bank*, 291 U.S. at 437; *Alemite*, 42 F.3d at 833 (rejecting and narrowing two of the States' cited cases); *see also Hall*, 472 F.2d at 264 (identifying *Alemite* and *Chase National Bank* as the "leading cases" on

[4] Because neither Chipotle nor the States argued this theory below, and failing to consider it would not result in a "miscarriage of justice," the Court should not entertain it at all. *Coastal States Mktg., Inc. v. Hunt*, 694 F.2d 1358, 1364 (5th Cir. 1983).

the issue). "Injunctions purporting to bind the entire world or all those with notice of [their] provisions now are held to be invalid." 11A Wright, § 2956.

Once the States' historical foray is set aside, their theory comes down entirely to this Court's decision in *Hall*. Br. 48-51; *accord* Chipotle Br. 42-44. *Hall*—a decision addressing "[t]he peculiar problems posed by school cases," 472 F.2d at 266—represents the high-water mark for any court's construction of its injunctive powers since the adoption of the Federal Rules. So it is telling that even *Hall* does not remotely support binding Ms. Alvarez to the *Nevada* injunction. As Judge Wisdom explained in *Hall*, the district court was justified in departing from the normal rule there only because Mr. Hall's interference with the desegregation of the defendant school district made it impossible for the original *defendant* to comply with the court's injunction requiring it "to provide [the plaintiff students] with integrated schools." *Id.* at 265. Because Mr. Hall was thwarting the *defendant's* compliance—by "prevent[ing] the normal operation" of a school—his action "imperiled the court's fundamental power to make a binding adjudication between the parties properly before it." *Id.* at 263, 265; *see id.* at 267-68.

Ms. Alvarez's lawsuit does not obstruct DOL from complying with the *Nevada* injunction. To state the obvious, Ms. Alvarez has no power to make DOL implement or enforce a rule. Accordingly, the States' bare assertion (Br. 51) that

"DOL cannot comply" with its own duty if Respondents proceed "as if the rule was, in fact, implemented" is inexplicable.

Moreover, if *Hall* extended as far as Appellees claim, little if anything would remain of Rule 65(d)(2) or its animating principle. *Every* act by a nonparty that is at odds with the thrust of an injunction can be said to offend the "dignity" of the issuing court (States Br. 48) and in some sense "obstruct[ ]" its purpose (*id.* at 51). The point of Rule 65(d)(2) and the near-century of case-law anticipating and applying it is precisely that such "tarnishing" (*id.* at 51) is *not* enough to bind a nonparty. *See, e.g.*, *Parker v. Ryan*, 960 F.2d 543, 546 (5th Cir. 1992) (ex-wife acting independently could not be bound to injunction meant to preserve tainted assets); *Alemite*, 42 F.2d at 832 (if a court purports to bind a nonparty who acts independently, "the persons enjoined are free to ignore it"). No surprise, then, that neither this Court nor any other has extended *Hall* beyond its unusual facts and its express limits.[5]

[5] *See, e.g.*, *Doctor's Assocs., Inc. v. Reinert & Duree, P.C.*, 191 F.3d 297, 303 n.4 (2d Cir. 1999); *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc.*, 96 F.3d 1390, 1396 (Fed. Cir. 1996); *Herrlein v. Kanakis*, 526 F.2d 252, 255 (7th Cir. 1975); *Dalton v. Meister*, 267 N.W.2d 326, 332 (Wis. 1978); *see also Envtl. Def. Fund, Inc. v. EPA*, 485 F.2d 780, 784 n.2 (D.C. Cir. 1973) (cited in States Br. 51 n.15) (basing injunction on All Writs Act, noting that members of nonparty organizations are parties, and not holding anyone in contempt).

II. Even If An Injunction Could Bind Respondents Under Rule 65, The *Nevada* Order Did Not Clearly Forbid Respondents' Conduct.

Even if Appellees could overcome all of the hurdles above, they still have to contend with another fact fatal to the contempt ruling below: The *Nevada* injunction never purports to enjoin private parties or prohibit private lawsuits. Appellees' fervent wish that the order had prohibited the filing of private actions invoking the Overtime Rule cannot make it so. At the very least, Chipotle failed to prove by "clear and convincing evidence" that the order "specifically" prohibited Respondents' prosecution of the New Jersey case. *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 581 (5th Cir. 2000); Fed. R. Civ. P. 65(d)(1)(B).

Respondents' opening brief explained why the *Nevada* order did not clearly extend to all workers. *See* Opening Br. 37-42. The operative language of the injunction states: "Specifically, Defendants are enjoined from implementing and enforcing the following regulations" (ROA.3843-44). The use of the word "Defendants" does not remotely hint that the district court intended to bind all American workers. Given the conceded novelty of the asserted power to enter such a sweeping injunction, the district court's failure to communicate its intent to exercise that power should dispose of this entire case. And if any more were needed, the court's description of the enjoined actions ("implementing and enforcing") clearly referred to government activities as well. *See Lagos v. United States*, 138 S. Ct. 1684, 1688 (2018) (concluding, from equivalent context clues, that the words "investigations"

and "proceedings" did not encompass "private investigations and civil or bankruptcy litigation"); Opening Br. 38.

With no clear language in the order to point to, Appellees ask this Court to construe ambiguities in their favor and cobble together an implicit prohibition on private suits. States Br. 27-29; Chipotle Br. 46. But injunctions are not *pro se* pleadings; as the Supreme Court has held, "basic fairness requires that those enjoined receive explicit notice of precisely what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974); *see also* Opening Br. 16, 37 (citing additional cases). Nor is the district court's *post hoc* interpretation of its own order entitled to any deference; rather, this Court must decide the question using its own "independent judgment." *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013) (quotation marks omitted).

In any event, Appellees' close readings of the *Nevada* order fail to join issue with the actual question in this contempt proceeding. Specifically, Appellees argue at length that the district court's order should be read as *depriving the Overtime Rule of effect*. *See* States Br. 27-39; Chipotle Br. 47-53. But that is not the question here. *Even if* Appellees were correct about the effect of the *Nevada* order on the Overtime Rule (*but see* Opening Br. 38-39), it *still* would not follow that the court entered an injunction against litigation by all U.S. workers, let alone that the court did so unambiguously. This distinction is critical—and Appellees repeatedly obscure it. The

States, for example, say that "[t]he preliminary injunction squarely prevented the rule from taking effect and, *consequently*, barred anyone and everyone from enforcing it." States Br. 28 (emphasis added). That is a blatant *non sequitur*. If, hypothetically, the Overtime Rule never took effect, then the relevant FLSA exemption, 29 U.S.C. § 213(a)(1), continued to incorporate the prior regulatory definition. That would mean the New Jersey lawsuit is (in relevant part) *unmeritorious*. It would not mean that Respondents *violated* any clear or specific command of the *Nevada* court by the act of filing Ms. Alvarez's complaint. *See* Opening Br. 39-41.

Appellees do nothing to close this gap. Instead, they say that the issue is at least close enough that Respondents should have asked for advance permission to invoke the Overtime Rule (States Br. 40). With due respect for the district court, however, the law imposes no such obligation. As noted, the beneficiary of an order, not an alleged contemnor, bears the risk of ambiguity. *See*, *e.g.*, *Schmidt*, 414 U.S. at 476.[6] Because no party sought clarification or modification of the injunction, it

[6] The States' discussion (Br. 39-41) of *McComb v. Jacksonville Paper Co.*, 336 U.S. 187 (1949), is a red herring. There, the injunction "[b]y its terms … enjoined any practices which were violations of" the FLSA, and the defendant employer proceeded to violate the FLSA (and hence the injunction). 336 U.S. at 192. Here, by contrast, the *Nevada* order did *not* enjoin Respondents from relying on the Overtime Rule in a private suit, let alone do so clearly.

therefore falls to Chipotle to show "by clear and convincing evidence" that the *existing* order clearly forbade Respondents' appeal to the Overtime Rule in New Jersey. *Am. Airlines, Inc.*, 228 F.3d at 581. That is impossible to do.

Finally, as with the "privity" theory, Appellees' own principal authorities underscore how far out of the mainstream their contempt petition is. *Southwest Airlines* and *Hall* are particularly instructive. In both, the district courts entered clear and specific injunctions barring the nonparties at issue from taking particular actions. The injunction at the heart of *Southwest Airlines*, for example, barred the specific airline plaintiffs "from relitigating … the validity of [the ordinance]" in state court. *Southwest Airlines*, 546 F.2d at 89. Likewise in *Hall*, the school district did not simply seek to hold Mr. Hall in contempt of the underlying injunction requiring it to desegregate; rather, it obtained a new and broader injunction encompassing him and his activities. *Hall*, 472 F.2d at 263-64. When Mr. Hall continued to interfere, he was found in contempt of *that* injunction; he was not held to have violated an implicit prohibition in an injunction that, by its terms, addressed only the original defendant.

Here, unlike in those cases, neither Chipotle nor the States even *tried* to obtain a specific injunction barring Respondents from prosecuting the New Jersey case. That is no doubt because such an "antisuit" injunction would have been plainly improper in this case, on jurisdictional and other grounds. *See* Opening Br. 31; *see also, e.g.*, *United States v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen &*

Helpers of Am., AFL-CIO, 266 F.3d 45, 50 (2d Cir. 2001) (injunction requires personal jurisdiction).[7] But that only confirms that Chipotle's extraordinary procedural gambit here must fail. If Chipotle could not even have obtained a valid injunction specifically prohibiting Respondents' prosecution of the New Jersey case (and it could not), Chipotle surely cannot procure the same result by skipping that step and accusing Respondents of "contempt" of an earlier injunction, entered only against DOL, that made no mention of Respondents or their activities at all.

Accordingly, at a minimum, this Court should reverse the contempt finding here on the ground that the *Nevada* order enjoining the "Defendants" in that case from "implementing and enforcing" the Overtime Rule did not clearly and specifically enjoin the rest of the country from invoking the rule in private litigation.

III. The District Court Lacked Personal Jurisdiction.

Finally, the district court lacked personal jurisdiction over Respondents, and so the court could neither issue orders to them nor hale them before it to defend themselves against a charge of contempt. Chipotle's contrary theory of personal jurisdiction is as lacking in precedent as is Chipotle's related theory of Rule 65(d)(2),

[7] Likewise, insofar as any portion of the opinion below could be read to newly bar the New Jersey suit, that directive cannot stand. *See* Opening Br. 36. In fact, however, Appellees *deny* that the opinion below granted them any new injunctive relief. States Br. 1; Chipotle Br. 1-2.

discussed above. And Chipotle's request that this Court simply overlook the district court's failure to properly serve Respondents is contrary to controlling law.

A. *Waffenschmidt* Bars Personal Jurisdiction Here.

As the parties appear to agree, this Court's decision in *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985), identifies the limits of personal jurisdiction in nonparty contempt cases. *See* Chipotle Br. 15. This Court's holding was unmistakable: "Nonparties who reside outside the territorial jurisdiction of a district court may be subject to that court's jurisdiction if, with actual notice of the court's order, they *actively aid and abet a party in violating that order*." 763 F.2d at 714 (emphasis added). Thus, "[w]hen the court found that the Bank failed to act as [the defendant's] agent, it could not exercise jurisdiction over the Bank." *Id.* at 726. And this Court has since reaffirmed the same rule: A court may exercise personal jurisdiction only if a nonparty "(1) knew about the injunction against [a party] and (2) *acted as [the party's] agent or aided and abetted him for the purpose of advancing his interest*." *Parker*, 960 F.2d at 546 (emphasis added).

Chipotle cites *no* case exercising personal jurisdiction over an out-of-forum nonparty based on any other theory. *Cf.* Chipotle Br. 18-20 (citing cases not involving personal jurisdiction); *see also Parker*, 960 F.2d at 546 (holding that there is no personal jurisdiction over a spouse with an "independent interest" in property). Thus, Chipotle's theory of contempt based on "privity" or "adequate representation"

requires not only a sea-change in the interpretation of Rule 65(d)(2), *see supra* § I.A, but an upheaval in the law of personal jurisdiction as well. Indeed, Chipotle's theory may be even *more* radical in the context of personal jurisdiction, because any exercise of personal jurisdiction based on alleged "representation" of one person by another would contradict the rule that "[t]he unilateral activity of those who claim some relationship with a nonresident," such as DOL here, "cannot satisfy the requirement of contact with the forum state." *Stuart v. Spademan*, 772 F.2d 1185, 1190 (5th Cir. 1985); *see* Opening Br. 18-19.

Chipotle nonetheless claims (Br. 15-23) that *Waffenschmidt*'s "two part analysis"—encompassing both "the inherent powers of a court" and "traditional in personam jurisdiction," 763 F.2d at 721—supports the exercise of jurisdiction here. It is wrong on both counts.

First, *Waffenschmidt*'s "inherent power" analysis rested entirely on the concern that "nonparty aiders and abettors" could "frustrate the orders of the district court" by helping the in-forum *defendant* dissipate assets. *Id.* at 717. If that reasoning extends beyond aiders-and-abettors at all, it would only be to cases such as *Hall*—where a nonparty's action similarly interferes with an in-forum *defendant's* compliance, thus implicating the court's "inherent power … to render a binding judgment" between the parties. *Id.* at 716 (quoting *Hall*, 472 F.2d at 267). As explained above, this case is fundamentally different. *Supra* § I.B.

Second, *Waffenschmidt*'s minimum-contacts analysis—an inquiry this Court treated as essential to determining whether jurisdiction "satisfies due process"—confirms the error of Chipotle's position. 763 F.2d at 722. As Respondents have explained, *Waffenschmidt* relied on the fact that nonparties "purposefully … dissipate[ed] assets subject to marshalling" in the forum state to find a sufficient in-forum contact. *Id.* at 722-23; *see* Opening Br. 19-21. Chipotle's claim that Ms. Alvarez's filing of an independent suit against a fellow nonparty in New Jersey has a comparable effect on Texas is hard to take seriously.

In fact, Chipotle's theory of personal jurisdiction—whether cast as a claim about "inherent power" or "minimum contacts"—saps the doctrine of all meaning. The point of personal jurisdiction is that a court sometimes *lacks* the power to issue and enforce orders with respect to certain people. *See, e.g.*, *Bristol-Myers Squibb Co. v. Superior Court of Cal.*, 137 S. Ct. 1773, 1781 (2017) (due process limits on personal jurisdiction "divest … [a court] of its power to render a valid judgment"). But if anyone who knowingly violates a court's order *ipso facto* subjects herself to that court's jurisdiction (Chipotle Br. 23-24), a court can bootstrap jurisdiction over anyone simply by ordering her to do something (and alerting her to the fact). That cannot be right.

Finally, it bears noting that the consequences of finding personal jurisdiction here would be even more dramatic than those of binding Respondents under Rule

65(d)(2), because such an expansion of personal jurisdiction would apply equally to every state court. The Court should not lightly hold—apparently for the first time ever—that each state and federal court can exercise coercive power over anyone in the country if it concludes that her interests were "adequately represented" by an in-forum defendant.

B. The Failure To Serve Respondents With Process Is Fatal.

Chipotle concedes that Respondents were not served with any summons or other court-issued process, but it insists that—unless *Respondents* prove prejudice—the district court somehow acquired jurisdiction over them anyway. Br. 23-26. That is not the law.

In order for a court to obtain jurisdiction, "the procedural requirement of service of summons must be satisfied." *Omni Capital Int'l, Ltd. v. Rudolf Wolff & Co., Ltd.*, 484 U.S. 97, 104 (1987); *see* Fed R. Civ. P. 4, 71; Opening Br. 22-24. This Court has specifically held that a district court fails to acquire jurisdiction when it does not observe this "fundamental rule of civil procedure." *Maiz v. Virani*, 311 F.3d 334, 340 (5th Cir. 2002). Contrary to Chipotle's assumption, therefore, courts are "not at liberty to ignore" the requirements of the Federal Rules "in order to obtain 'optimal' policy results." *Carlisle v. United States*, 517 U.S. 416, 430 (1996); *see Eberhart v. United States*, 546 U.S. 12, 19 (2005) (the rules "assure relief to a party

properly raising them"); *Wells v. Ali*, 304 F. App'x 292, 295 (5th Cir. 2008) ("Rule 4 … [is] phrased in plainly mandatory language.").

None of the cases Chipotle cites (Br. 25-26) says anything different. In *McGuire v. Sigma Coatings, Inc.*, 48 F.3d 902 (5th Cir. 1995), this Court confirmed that "[t]o acquire jurisdiction over the person, a *court* must serve on the person a document, 'such as a summons, notice, writ, or order.'" *Id.* at 907 (emphasis added). That "formal notice of contemplated action … is part of the due process limitations on federal courts' jurisdiction"—and thus "[a]ctual notice of the litigation does not satisfy the requirement of proper service of a summons." *Id.*; *see also id.* at 907 n.12 (explaining that *Waffenschmidt* "noted the importance, for jurisdictional purposes, of a show cause order directed specifically to the [nonparty contemnors]"). Chipotle's other principal authority, *Waste Management of Washington, Inc. v. Kattler*, 776 F.3d 336 (5th Cir. 2015), held only that a notice of hearing was sufficient process for a contemnor who was the *defendant* in the case, and thus already subject to the court's jurisdiction. *Id.* at 340; *see I.A.M. Nat'l Pension Fund v. Wakefield Indus.*, 699 F.2d 1254, 1260 (D.C. Cir. 1983) (informal service "may" be sufficient "when made on a party," but is not "sufficient for one who has not been brought in as a party").[8]

[8] Chipotle's out-of-circuit cases are irrelevant for similar reasons. *See CFTC v. Premex, Inc.*, 655 F.2d 779, 782 n.2 (7th Cir. 1981) (contemnors were defendants);

The service-of-process issue in this case is not difficult. The rules require formal service of court-issued process. Here, the court *refused* to issue such process. *See* Chipotle Br. 23 n.6. It makes no sense to say the requirement has been satisfied anyway.

IV. The Fee Award Should Be Reversed.

The error of the district court's fee award follows *a fortiori* from the strength of Respondents' position on the merits of this appeal. Chipotle cannot reasonably ask this Court or the district court to create new legal rules and then sanction Respondents for failing to anticipate them. That contradiction is made vivid by the district court's stay order: If there is "a lack of precedent to clarify the issues at bar" (ROA.5566), what controlling law did Respondents "recklessly disregard[ ]" (ROA.4983)?

Two additional points about the fee award bear noting. First, Chipotle's suggestion (Br. 53-54) that the district court awarded fees as a freestanding contempt sanction, apart from 28 U.S.C. § 1927, has no basis in the opinion below. Second, Chipotle has identified no case (and Respondents have found none) in which a party or attorney was sanctioned by one court for actions taken in a *different* case before

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Flowdata, 154 F.3d at 1355 (contemnor had "continuity of identity" with defendant). In addition, *Flowdata* misread the treatise on which it relied. *Compare Flowdata*, 154 F.3d at 1355, *with* 11A Wright, § 2956 (stating that formal service of an *injunction* is unnecessary for a nonparty to be *bound under Rule 65(d)*—not that formal service is unnecessary to a later contempt proceeding for violating the injunction).

a *different* court. If Chipotle believes the New Jersey lawsuit was brought in "bad faith" and exceeds the bounds of "legitimate advocacy," *Edwards v. Gen. Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998), it should tell that to the court actually presiding over that case.

CONCLUSION

For the foregoing reasons, this Court should reverse the district court's order in its entirety.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 27, 2018, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Fifth Circuit by using the CM/ECF system. I certify that service on opposing counsel will be accomplished by the CM/ECF system.

/s/ Matthew S. Hellman
Matthew S. Hellman

CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fifth Circuit Rule 32.2 because this brief contains 6,492 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and Fifth Circuit Rule 32.2.

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, Times New Roman 14-point.

/s/ Matthew S. Hellman
Matthew S. Hellman