No. 18-40246

In the
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, JOSEPH SELLERS, MIRIAM NEMETH, JUSTIN SWARTZ, MELISSA STEWART, AND GLEN SAVITS,
Respondents-Appellants

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

CHIPOTLE MEXICAN GRILL, INC. AND CHIPOTLE SERVICES, L.L.C.'S ANSWER BRIEF

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July 6, 2018

CERTIFICATE OF INTERESTED PERSONS

State of Nevada, et al. v. U.S. Dep't of Labor, No. 18-40246

The undersigned counsel of record certifies that the following listed persons and entities as described in the fourth sentence of Rule 28.2.1 have an interest in the outcome of this case. These representations are made in order that the judges of this court may evaluate possible disqualification or recusal.

1. Respondents-Appellants: Carmen Alvarez, Joseph M. Sellers, Justin M. Swartz, Miriam R. Nemeth, Melissa L. Stewart, and Glen D. Savits;

2. Attorney Respondents-Appellants' law firms: Cohen Milstein Sellers & Toll PLCC, Outten & Golden LLP, and Green Savits LLC;

3. Petitioners-Appellees: Chipotle Mexican Grill, Inc., and Chipotle Services, LLC;

4. Respondents-Appellants' Counsel on appeal: Jenner & Block LLP (Matthew S. Hellman and Benjamin M. Eidelson);

5. Respondents-Appellants' Counsel below: Siebman, Burg, Phillips & Smith LLP (Clyde Moody Siebman and Elizabeth Siebman Forrest); and

6. Petitioners-Appellees' Counsel on appeal and below: Messner Reeves LLP (Kendra N. Beckwith and John K. Shunk) and Cantey Hanger LLP (Brian C. Newby and Laura H. Hallmon).

Undersigned counsel further represents that, pursuant to Fed. R. App. P. 26.1(a), Chipotle Services, LLC, is a wholly-owned subsidiary of Chipotle Mexican Grill, Inc. Chipotle Mexican Grill, Inc. is a publically traded company and has no parent company. Pershing Square Capital Management, L.P., is a beneficial holder of 10% or more of Chipotle Mexican Grill, Inc.'s common stock

/s/ Kendra N. Beckwith
Kendra N. Beckwith

Counsel of Record for
Petitioners-Appellees

STATEMENT REGARDING ORAL ARGUMENT

Pursuant to Fed. R. App. P. 34(a) and (f), and 5th Cir. R. 34.2, Petitioners-Appellees respectfully request oral argument. This case concerns an issue of importance: whether private nonparties to an injunction that enjoins implementation and enforcement of a federal agency rule may circumvent it by filing an action to enforce the enjoined rule. Respondents' conduct, if permitted, renders such an injunction a nullity and undermines the very core of the court's authority. Oral argument will therefore clarify the parties' positions in this matter and assist this Court in resolving the issues before it.

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JURISDICTIONAL STATEMENT

Attorney Respondents Joseph Sellers, Miriam Nemeth, Justin Swartz, Melissa Stewart, and Glen Savits, along with their client, Carmen Alvarez (collectively, Respondents), timely appeal from the district court's March 19, 2018 order finding them in contempt of its November 2016 injunction (Injunction) prohibiting nationwide implementation and enforcement of the Final Rule. ROA.4958-84. Below, the district court properly asserted jurisdiction based on Chipotle Mexican Grill, Inc. and Chipotle Services, LLC's (collectively, Chipotle's) motion for contempt.

On appeal, Chipotle agrees this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1291 because the March 19, 2018 order is a "final decision[] of the district courts of the United States." *See Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 398 (5th Cir. 1987) ("As a general rule an adjudication of civil contempt is final and appealable as to a non-party[.]"); *S. Ry. Co. v. Lanham*, 403 F.2d 119, 124 (5th Cir. 1968) (noting "adjudication of civil contempt is final and appealable as to a non-party") (citing *McGrone v. United States*, 307 U.S. 61 (1939)).

Chipotle disagrees that this Court has appellate jurisdiction pursuant to 28 U.S.C. § 1292(a)(1), which permits review of "granted" or "modified" injunctions. Br., 1. No injunction was granted, and the Injunction was not modified. Respondents

are precluded in this contempt proceeding, both below and here, from collaterally attacking or seeking to modify the Injunction. *United States v. Mine Workers of Am.*, 330 U.S. 258, 294-95 (1947). Respondents' efforts to contort this contempt proceeding into an attack on the Injunction, specifically, or the "propriety of even nationwide injunctions," generally, are improper and should be disregarded. Br., 1. Because the Order "merely enforces or interprets a previous injunction," this Court lacks jurisdiction under § 1292(a)(1). *In re Seabulk Offshore, Ltd.*, 158 F.3d 897, 899 (5th Cir. 1998) (internal quotations omitted).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal concerns the district court's inherent authority to hold Respondents in civil contempt. Respondents were "acutely aware" of its Injunction barring an agency rule from taking effect but "disobediently" attempted to enforce the rule anyway. ROA.4982. Respondents' actions, taken despite the Injunction's "plain language, clear construction, and self-evident application" to them, ROA.4982, do not "urg[e] a different court to adopt a legal theory." Br., 3. They directly attack the court's power, obstruct its authority, and render that Injunction a nullity. Specifically, this appeal concerns:

I. Whether the district court properly exercised its contempt power where it was notified Respondents knowingly took action contrary to its Injunction and provided Respondents notice and opportunity to respond to the contempt allegations.

II. Whether the district court abused its discretion in holding Respondents in contempt when it found the Injunction bound Respondents because the Department of Labor (DOL) adequately represented Alvarez's interests in the underlying proceeding, and Respondents violated the Injunction when they filed a lawsuit to enforce the enjoined rule.

III. Whether the court abused its discretion in awarding Chipotle its contempt-related fees when it determined Attorney Respondents recklessly disregarded that the lawsuit was unwarranted in fact or law.

STATEMENT OF THE CASE

In the underlying proceeding, the district court enjoined the Final Rule from "implementation and enforcement" nationwide because it exceeded the DOL's authority. ROA.3839. With notice of that Injunction, Respondents filed a lawsuit to implement and enforce the Final Rule against Chipotle. When the violation was brought to the district court's attention, it exercised its inherent authority to hold Respondents in contempt.

The district court relied on settled privity principles and found that Respondents' nonparty status did not prevent it from exercising its contempt authority. ROA.4983. It determined the DOL had adequately represented Alvarez's interests in the underlying proceeding, thereby binding her to the Injunction. Thus, because Respondents had actual notice of the Injunction, and they acted contrary to it, contempt was "proper" (Order). ROA.4980.

This does not punish Respondents for "urging a different court to adopt a legal theory" or advocacy "in an unrelated case in another court in a different circuit." Br., 2-3. It simply holds Respondents responsible for their unsupported, "willing" decision to "repeatedly and summarily dismiss[] the Injunction's bearing on them" in "disobedience" of the court. ROA.4982. That decision withstands scrutiny and should be affirmed.

A. The DOL controls the EAP exemption's implementation.

The Fair Labor Standards Act (FLSA) imposes on employers an obligation to compensate certain employees with overtime pay. 29 U.S.C. § 207(a)(1). Exempt from this requirement is "any employee employed in a bona fide executive, administrative, or professional capacity"—the "EAP" exemption. 29 U.S.C. § 213(a)(1). The DOL "defines and delimits" the EAP's exemption through regulations found in 29 C.F.R. §§ 541.100, *et seq*.

Those regulations define the exemption's applicability by reference to whether the employee (a) receives a salary of at least $455 per workweek and (b) performs certain duties as their "primary duties." *See* 69 Fed. Reg. 22,122, 22,261-62 (Apr. 23, 2004). The FLSA contains no mechanism allowing an employee to modify or implement new regulations absent DOL rulemaking. Indeed, the DOL already represents those interests, given its mission to "foster, promote, and develop the welfare of the wage earners, job seekers, and retirees[.]" ROA.4056.

B. The DOL attempts to modify the EAP exemption with the Final Rule.

In March 2014, then-President Obama directed the Secretary of Labor to "modernize and streamline" the EAP exemption. ROA.3827 (internal quotations omitted); *see also* 81 Fed. Reg. 32,391, 32,396 (May 23, 2016). The DOL published a Notice of Proposed Rulemaking to revise 29 C.F.R. §§ 541.100, *et seq*. in May 2016. *See generally* 81 Fed. Reg. 32,391. It proposed to "revise[] final regulations

under the FLSA implementing the" EAP exemption to increase the "standard salary level for exempt EAP employees[.]" *Id*. Under that proposal, the salary threshold more than doubled—from $455 to $921 per week, with an automatic updating mechanism to adjust that threshold every three years. *Id*. at 32,403-04. The Final Rule was to become effective on December 1, 2016. *Id*. at 32,399.

In September 2016, the State of Nevada led twenty other states (State Plaintiffs) in filing suit against the DOL to enjoin the Final Rule's implementation and enforcement. ROA.50-79. The State Plaintiffs alleged the Final Rule violated the Constitution, 29 U.S.C. § 213(a)(1), and the Administrative Procedure Act (APA). ROA.53.

In October, the State Plaintiffs filed an Emergency Motion for Preliminary Injunction, requesting that the district court "enjoin the new overtime rule from becoming effective pending a full hearing on the merits and any review by higher courts." ROA.165. The court consolidated this case with another, similar case brought by business groups (Business Plaintiffs). ROA.3828.

The DOL opposed the motion. ROA.998-1059. "[P]reventing the implementation of the [Final Rule] would cause serious harm and disruption," the DOL contended, "[a]nd blocking this particular regulation would have a profoundly harmful impact on the public." ROA.1053. It claimed that "[m]ore than four million workers in Fiscal Year 2017" would fall within the Final Rule's minimum salary

threshold. ROA.1053. The DOL argued that if the Final Rule were enjoined, "[s]ome of these individuals would be denied additional pay to which they" would be entitled if the Final Rule became effective. ROA.1054.

C. The district court enjoins the Final Rule's enforcement and implementation nationwide.

In November 2016, the district court granted the State Plaintiffs' motion and enjoined the Final Rule's implementation and enforcement nationwide. ROA.3825-44. The court found they had shown a likelihood of success on the merits because the Final Rule likely exceeded the DOL's authority. It observed that while the DOL opposed the injunction because it would "harm the public" and "deny additional pay" to workers who fell within the Final Rule's scope, "the public interest is best served by the injunction." ROA.3841. Cognizant of these workers, the district court observed that if the Final Rule were eventually declared valid, then its injunction "will only delay the regulation's implementation." ROA.3841.

D. Respondents file a lawsuit to enforce the Final Rule against Chipotle.

Over six months after the Final Rule was enjoined, with undisputed notice of the Injunction, Alvarez (a former Chipotle employee) filed a putative collective and class action lawsuit in the United States District Court for the District of New Jersey against Chipotle. ROA.4070-97. Attorney Respondents represented Alvarez. ROA.4094.

Alvarez asserted two claims—one for FLSA violations and one for similar state law violations. ROA.4089-91. As one of two theories supporting those claims, she alleged that Chipotle failed to implement the Final Rule, entitling her to additional pay from December 1, 2016 to date.[1] ROA.4078-79, 4092. Respondents acknowledged the Injunction, but dismissed its applicability. Specifically, they claimed that it enjoined only the DOL and "did not stay the effective date of the Rule or otherwise prevent the Rule from going into effect" (Final Rule Theory). ROA.4078. Because the Injunction "was limited to implementation and enforcement of [the Final Rule] by the [DOL]," they alleged, "it did not affect" their ability as nonparties to bring private causes of action pursuant to 29 U.S.C. § 216(b). ROA.4079.

E. Chipotle moves for contempt against Respondents for violating the Injunction.

On August 1, 2017, Chipotle filed a contempt motion against Respondents, asking the district court to hold them in contempt for seeking to enforce the Final Rule. ROA.4043-65. Chipotle filed the motion only after Respondents refused to withdraw their Final Rule Theory. ROA.4064. Chipotle provided evidence that: Respondents had actual knowledge of the Injunction (demonstrated by their multiple statements to other courts and media); the DOL had adequately represented

[1] This was the second time some Attorney Respondents had asserted this theory in a lawsuit. ROA.4960.n2.

Alvarez's interests in the underlying action (demonstrated by its arguments that the Injunction was "necessary to protect low wage workers who would otherwise be denied additional pay and forced to work long hours"); and that the Final Rule Theory directly violated the Injunction. ROA.4054-4331. Chipotle requested that Respondents be ordered to withdraw that theory and that attorneys' fees and costs be awarded against Attorney Respondents (but not Alvarez). ROA.4063.

Respondents opposed the motion. ROA.4403-25. They claimed that the court lacked jurisdiction over them because, as nonparties, they were not bound by the Injunction. ROA.4408-22. They further claimed that the Injunction "did not specifically restrain private enforcement actions." ROA.4422-24.

At the motion's hearing, the district court initially observed that Respondents "are the only people in the entire country" that the court was aware of that believed the Injunction "didn't grant a national injunction that stopped the rule from going into effect, period." ROA.5391:16-21. Regardless of the propriety of the Injunction, the court continued, "that's the way everybody in the country saw it except for [Respondents] apparently."[2] ROA.5394:19-23. Respondents' counsel asserted that Respondents were "not challenging this Court's authority or this Court's order.

[2] Respondents later conceded that they had "not located reported cases brought by other attorneys that make claims similar to those advanced in the New Jersey case." ROA.4888.

[They were] challenging the procedure that has been used by Chipotle." ROA.5390:15-17.

The district court repeatedly observed that Respondents' Final Rule Theory was problematic because it ignored that "the rule is enjoined. It never went into effect on December 1st, and [Respondents] filed a lawsuit seeking relief under the [Final Rule] that never went into effect." ROA.5434:21-23, 5435:5-11, 5441:9-14, 5453:23-25, 5454:7-11, 5459:16-5460:15. The district court invited the State and Business Plaintiffs' representatives in attendance to comment. Both representatives supported Chipotle's position as consistent with the relief they had previously obtained. ROA.5448:21-5451:17.

F. The district court finds Respondents in contempt.

On March 19, 2018, the district court issued its twenty-seven page Order. ROA.4958-84. It first found that it had personal jurisdiction over Respondents because they had notice of the Injunction and Chipotle had alerted them of the contempt proceedings through sufficient process. ROA.4962-67. It then found that each of the necessary contempt elements were met, specifically that (a) the Injunction was in effect at the time Respondents filed their lawsuit; (b) that the Injunction "was wholly unambiguous," "clearly applied to Respondents," and "prohibited them from enforcing the Final Rule"; and (c) Respondents did not

comply with the Injunction. ROA.4968-80. Thus "contempt [was] proper." ROA.4980.

In determining the Injunction "clearly applied to Respondents," the district court looked to recent Eleventh Circuit precedent concluding that the concept of privity in res judicata was "similar" to the privity necessary to bind a nonparty to an injunction. ROA.4969 (quoting *ADT LLC v. NorthStar Alarm Servs., LLC*, 853 F.3d 1348, 1352 (11th Cir. 2017) (internal quotations omitted)). It then applied well-established preclusion principles articulated in *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir. 1977), and concluded that, because "the DOL adequately represented Alvarez's legal interests in the original injunction proceeding," she was in privity with the DOL and bound by the Injunction. ROA.4975. The district court acknowledged that the "scarcity of precedent" concerning analogous circumstances "complicated [its] contempt analysis but it did not change its result." ROA.4977. And because Attorney Respondents served as Alvarez's counsel with actual notice of the Injunction, they were also bound. ROA.4977.

The district court ordered Respondents to withdraw their Final Rule allegations within seven days. ROA.4982. It further found that Respondents had "recklessly disregarded a duty owed to the Court—the long-standing and elementary duty to obey its orders, including a nationwide injunction." ROA.4983. Respondents

had "amply showed" they were "ready and willing to violate" the Injunction and were "acutely aware" of it. ROA.4982. "[S]uch disobedience," the court held, "mandates coercive action to ensure compliance with" the Injunction. ROA.4982.

It also awarded Chipotle "compensation for fees and expenses tied to this contempt proceeding." ROA.4983. It found those fees were warranted against Attorney Respondents because they "pursued a claim that they should have known was unwarranted in fact or law." ROA.4983. The district court asked Respondents to identify precedent in support of their "unique claim" that the Injunction "only enjoined the DOL's enforcement of the Final Rule but not enforcement of the Final Rule itself." They could not—because no precedent existed. ROA.4983.

The district court stayed the matter pending appeal. ROA.5563-70. Respondents' characterization of that decision as "tak[ing] a far more tentative view of the issues disputed here than did the contempt order[]" is self-serving and without context. Br., 11. The district court did nothing more than apply this Circuit's well-established precedent for staying an order pending an appeal. ROA.5564. This precedent "recognizes that a party presents a substantial case on the merits when there is a lack of precedent to clarify the issues at bar." ROA.5566. The district court observed there was a "dearth of precedent that factually parallels" this matter. ROA.5566. For that reason only, it held the "substantial case" requirement was met. ROA.5566.

SUMMARY OF THE ARGUMENT

Respondents' appeal hinges on their belief that "they are plainly entitled" to enforce a DOL regulation that has been enjoined. Br., 13. Respondents are wrong. That belief is contrary to the Injunction's "plain language, clear construction, and self-evident application" to them and obstructs the Injunction's purpose in "protect[ing] both employees and employers from being subject to different EAP exemptions based on location." ROA.3842, 4977, 4982. The Order should be affirmed for three reasons.

First, the district court properly exercised jurisdiction over Respondents. The Fifth Circuit has long recognized that a district court may obtain jurisdiction over nonparties in a contempt proceeding by one of two "alternative rationales": the first relies on the court's "inherent power" to act where the alleged contemnor knowingly violates an order by which she is bound, and the second relies on traditional notions of personal jurisdiction set forth in *International Shoe Company v. State of Washington*, 326 U.S. 310 (1945). *Waffenschmidt v. MacKay*, 763 F.2d 711, 716-17 (5th Cir. 1985). Demonstration of either is sufficient to exercise jurisdiction. Chipotle demonstrated both here and thus jurisdiction was proper. Further, the record supports the district court's factual determination that Respondents were served with sufficient process to permit them repeated notice and opportunity to

respond to the contempt allegations. Respondents' protestations to the contrary fail, and this determination should also be affirmed.

Second, the Injunction binds Respondents. An injunction binds not only the parties to it but "also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear Co. v. N.L.R.B.*, 324 U.S. 9, 14 (1945). The district court, applying well-established privity principles that defined "the preclusive effect of government litigation," found that the DOL adequately represented Alvarez's interests in the underlying litigation such that she was bound by the Injunction. This finding—based on the fact that "the DOL advocated for legal interests congruent to those in Alvarez's lawsuit" (including the right for additional pay)—was not an abuse of discretion. ROA.4975. Alternatively, Respondents are bound by the Injunction because their actions obstruct the Injunction and "imperil[] the court's fundamental power" to effectively vindicate its nationwide prohibition on the Final Rule's implementation and enforcement. *United States v. Hall*, 472 F.2d 261, 265, 267 (5th Cir. 1972). Respondents' efforts to inject into this appeal the propriety of nationwide injunctions, generally, or the Injunction, specifically, are improper and must be disregarded.

Third, the Injunction barred Respondents from enforcing the Final Rule. Respondents' repeated assertions that filing a lawsuit to enforce the Final Rule against Chipotle is a mere "interpretation of [the Injunction] and its legal

consequences" is illogical. Br., 15. Respondents here, as they repeatedly did below, ignore that there is no Final Rule to enforce. The Injunction plainly prevented the Final Rule from becoming effective. There is no mechanism under the FLSA for Alvarez to enforce an EAP exemption the DOL has not implemented. Nor was the Final Rule "self-executing" as Respondents claim. Br., 38. The district court's conclusion that Respondents' actions violated the Injunction is well-supported and should be affirmed.

For these reasons, and those asserted in the State Plaintiffs' Answer Brief[3], the Order should be affirmed. And, because the Order should be affirmed, Chipotle is entitled to its fees and costs tied to this contempt proceeding.

ARGUMENT

I. THE DISTRICT COURT PROPERLY EXERCISED JURISDICTION OVER RESPONDENTS.

A. Standards of review.

"This Court reviews de novo the district court's determination regarding personal jurisdiction." *Religious Tech. Ctr. v. Liebreich*, 339 F.3d 369, 373 (5th Cir. 2003). A district court's jurisdictional findings of fact, however, are reviewed for clear error. *Lonatro v. United States*, 714 F.3d 866, 869 (5th Cir. 2013).

[3] Chipotle incorporates by reference that brief pursuant to Fed. R. App. P. 28(i).

This Court reviews a district court's determination of effective service solely for an abuse of discretion. *George v. U.S. Dep't of Labor, Occupational Safety & Health Admin.*, 788 F.2d 1115, 1116 (5th Cir. 1986) (per curiam).

B. There are two alternative ways a court obtains jurisdiction in a contempt proceeding.

Respondents contend that the district court lacked jurisdiction over them. Br., 17-21. Their argument assumes that the jurisdictional analysis governing personal jurisdiction over a party in a civil action is the sole method by which jurisdiction could be acquired here. It is not, as *Waffenschmidt* makes clear.

"Courts possess the inherent authority to enforce their own injunctive decrees."[4] *Waffenschmidt*, 763 F.2d at 716. Violation of such a decree "is cognizable in the court which issued the injunction regardless of where the violation occurred." *Id*. (quoting *Stiller v. Hardman*, 324 F.2d 626, 628 (2d Cir. 1963)). The reason is clear: "[t]o submit the question of disobedience to another tribunal, be it a jury or

[4] Respondents' complaint that this issue was for the New Jersey court to resolve is unfounded. Br., 31. Here, Chipotle sought enforcement of the Injunction—not a merits determination of Alvarez's claims. "Enforcement of an injunction through a contempt proceeding *must* occur in the issuing jurisdiction because contempt is an affront to the court issuing the order." *Waffenschmidt*, 763 F.2d at 716 (emphasis added); *see also In re Debs*, 158 U.S. 564, 595 (1895). Chipotle could not dismiss Respondents' Final Rule Theory because under New Jersey precedent, motions to dismiss theories and allegations are improper, and Rule 12(f) motions to strike are "disfavored" and "commonly a waste of everyone's time." *First Aviation Servs., Inc. v. NetJets, Inc.*, Civ. No. 13-2442(KM)(MAH), 2014 WL 3345175, at *2-3 (D.N.J. July 8, 2014).

another court, would operate to deprive the proceeding of half its efficiency." *Debs*, 158 U.S. at 595. *Debs* makes clear what Respondents ignore: a contempt action is an equitable action in which the court "enforce[es] obedience to its orders" rather than the "laws of the land." *Id*. at 596; *see also Walaschek & Assocs., Inc. v. Crow*, 733 F.2d 51, 53 (7th Cir. 1984) ("Contempt proceedings . . . are *sui generis*, neither civil actions nor prosecutions." (citing *Myers v. United States*, 264 U.S. 95, 103 (1924))). Thus "traditional notions of personal jurisdiction" do not necessarily apply, and a court may "hold an enjoined party in contempt, regardless of the state in which the person violates the court's orders." *Waffenschmidt*, 763 F.2d at 716.

Waffenschmidt identifies two "[a]lternative rationales" a court may use to exercise jurisdiction over nonparties for contempt. 763 F.2d at 717. "The first looks to the inherent power of the court to act, and does not rely on traditional in personam jurisdiction analysis. The second analyzes the respondents' actions under *International Shoe* and its progeny to determine whether sufficient minimum contacts exist to exercise jurisdiction over them." *Id*. Because these rationales are "alternative," establishing *either* basis for jurisdiction is sufficient to affirm the Order. Here, Chipotle has established both.

1. Respondents' actions invoked the district court's inherent power to act.

The first basis relies on the court's exclusive power to enforce its orders. *Id*. at 716. "The nationwide scope of an injunction carries with it the concomitant power

of the court to reach out to nonparties who knowingly violate its orders." *Id*. at 717. If a nonparty violates an order, "he is not immune from liability for civil contempt, even though he was not a party on the original decree." *Quinter v. Volkswagen of Am.*, 676 F.2d 969, 973 (3d Cir. 1982). This jurisdiction "is necessary to the proper enforcement and supervision of a court's injunctive authority and offends no precept of due process." *Waffenschmidt*, 763 F.2d at 716. It applies even where the nonparty is "without any other contact with the forum[.]" *S.E.C. v. Homa*, 514 F.3d 661, 675 (7th Cir. 2008).

This "is simply an application of two basic principles that govern the application of in personam jurisdiction": first, that a forum may exercise jurisdiction over a person who "undertakes activity designed to have a purpose and effect in the forum;" and second, that a party has a duty "to obey the order of a United States court directed at them and their activities." *Id*. at 675. Stated simply, where an individual is alleged to knowingly violate a court order, that allegation is sufficient by itself to invoke the court's inherent authority to bring her before the court to answer for her conduct.

While in *Waffenschmidt* the nonparty's conduct involved aiding and abetting a party to an order, a court's inherent authority is not narrowly limited to those circumstances. The law contemplates two categories of nonparties potentially bound by an injunction. The first is, as *Waffenschmidt* recognizes, those "acting in concert

with a bound party[.]" *Nat'l Spiritual Assembly of Baha'is of the United States of Am. Under the Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of the Baha'is of the United States of Am., Inc.*, 628 F.3d 837, 848-49 (7th Cir. 2010). The second is "captured under the general rubric of 'privity.'" *Id*. ("It is generally accepted that an injunction may be enforced against a nonparty in 'privity' with an enjoined party.") (quotations in original). This category includes nonparties who are identified in interest, in privity, or represented by a party. *Regal Knitwear*, 324 U.S. at 14.

For jurisdictional purposes, there is no distinction between these categories. It is long-established that a court has jurisdiction to redress a nonparty's contempt so long as that person "has actual knowledge of a court's order and *either* abets [a party to the order] *or is legally identified with him*." *Quinter*, 676 F.2d at 972 (emphasis added) (holding expert witness was "legally identified" with both plaintiff and plaintiff's attorney, justifying contempt finding); *see Stotler & Co. v. Able*, 870 F.2d 1158, 1164 (7th Cir. 1989) (same principle); *Alemite Mfg. Corp. v. Staff*, 42 F.2d 832, 833 (2d Cir. 1930) (same principle). While *Waffenschmidt*'s facts required this Court to address only "aiding and abetting" conduct, it invites application of the same jurisdictional principles to persons "legally identified" or "in privity" with a party as an extension of the same rationale.

Here, the district court found Respondents had both notice of the Injunction and were in privity with the DOL (as further set forth below). ROA.4962, 4968-77. Those jurisdictional findings find ample support in the record and cannot be reversed on appeal. *See Lonatro*, 714 F.3d at 869. Respondents' complaint that the district court made no aiding and abetting finding is therefore irrelevant—that finding was unnecessary.

Chipotle anticipates that Respondents will argue this rationale is problematic because it turns on whether the order binds the alleged contemnor. Courts have rejected that such a problem exists. "[A] nonparty may properly be held in contempt for violating an injunction *if* the court acquires jurisdiction over the nonparty and gives the nonparty an opportunity to contest whether he is bound by the injunction and is in fact in contempt." *Nat'l Spiritual*, 628 F.3d at 853 (emphasis in original). But "a nonparty with notice cannot be held in contempt *until shown to be in concert or participation.*" *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) (emphasis added). And "*whether* a particular person" is in fact bound by an order "is a decision that may be made only after the person in question is given notice and an opportunity to be heard." *Lake Shore Asset Mgmt. Ltd. v. Commodity Futures Trading Comm'n*, 511 F.3d 762, 767 (7th Cir. 2007) (emphasis in original).

In other words, contempt liability will not attach *until* an alleged contemnor is afforded her due process right to defend herself. But action potentially violative

of a court order with knowledge the order exists is sufficient to invoke the court's jurisdiction to have the alleged contemnor explain her actions. Indeed, nonparties "act at their peril if they disregard the commands of [an] injunction," for once the court determines it has jurisdiction, contempt liability may attach. *Id*. The court's exercise of jurisdiction here was therefore proper.

2. Respondents' actions constitute sufficient minimum contacts under *International Shoe*.

The second basis for jurisdiction relies on traditional notions of personal jurisdiction and due process. Even assuming that it were necessary to address this basis (it is not), "[b]ecause the Texas long-arm statute has been interpreted to extend to the limits of due process," the inquiry is solely whether the exercise of jurisdiction here is consistent with *International Shoe* and its progeny. *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986); *see Waffenschmidt*, 763 F.2d at 717.

Under *International Shoe*, a court has personal jurisdiction where the person has sufficient minimum contacts with the forum "such that the maintenance of the suit does not offend traditional notions of fair play and substantial justice." *Aviles v. Kunkle*, 978 F.2d 201, 204 (5th Cir. 1992) (quoting *Int'l Shoe*, 326 U.S. at 316). For a forum to properly assert specific jurisdiction over a nonresident defendant, the person "must have 'purposefully directed' his activities at the residents of the forum, and the litigation must result from alleged injuries that 'arise out of or relate to' the defendant's activities directed at the forum." *Aviles*, 978 F.2d at 204 (quoting *Burger*

King Corp. v. Rudzewicz, 471 U.S. 462, 474 (1984)). The asserted contacts with the forum must be related to the controversy's subject matter. *Id*.

Waffenschmidt disposes of Respondents' argument that they are immune from jurisdiction because they "have no relevant contacts with Texas at all." Br., 18. *Waffenschmidt* concerned a Mississippi court's exercise of jurisdiction over nonresident, nonparty respondents. This Court concluded that "[t]he jurisdictional issue turns solely on the consequences which [respondents'] acts had in Mississippi." 763 F.2d at 723. The respondents had "purposefully engaged in activity outside Mississippi that would have the foreseeable and intended result" of violating the lower court's order. *Id*. Because "intentionally violating a court's order has a substantial effect on the administration of justice in general, as well as the proper completion of the [underlying] litigation in particular," and "their actions were intentional and the effects substantial," their contact was sufficient to permit the exercise of jurisdiction.[5] *Id*.

The pertinent facts are similar here. The district court found that Respondents were aware of the Injunction, as they specifically acknowledged it in their pleadings. ROA.4962-63. It found that Respondents' filing of their lawsuit was intentional, as

[5] *Heyman v. Kline*, 444 F.2d 65, 65 (2d Cir. 1971), is factually distinguishable. Respondents have no "independent interest" in the FLSA to enforce, as was salient in *Heyman.* Because only the DOL could implement the Final Rule, the Injunction enjoined Respondents' interest.

evidenced by their multiple media statements and "reckless disregard" of the Injunction. ROA.4980-82. It further found that Respondents' actions "necessarily required enforcing the Final Rule," ROA.4980, which directly obstructed the Injunction's clear mandate prohibiting the Final Rule's enforcement. Respondents' actions thus have a substantial effect on the district court's administration of justice in the underlying action and are sufficient to exercise jurisdiction here.

Respondents' assertion that filing a lawsuit to enforce the Final Rule was not an "affirmative act" strains credibility. Br., 18-19. Due process requires only that the conduct at issue "be such that [the person] should reasonably anticipate being haled into court in the forum state." *Holt Oil*, 801 F.2d at 777. The rule's application is driven by the "quality and nature" of the person's activity. *Hanson v. Denckla*, 357 U.S. 235, 253 (1958). Respondents' knowing violation of the Injunction constitutes an "affirmative act" because Respondents are responsible for their purposeful, nonforum activities' "intended consequences" on the subject matter of the Injunction. *See Red 1 Invs., Inc. v. Amphion Int'l Ltd.*, No. CV-06-279-LRS, 2007 WL 3348594, at *6 (E.D. Wash. Nov. 9, 2007) (recognizing nonparty, nonresident's violation of injunction created sufficient minimum contacts with forum state). And those activities were intended to nullify the Injunction altogether.

The exercise of jurisdiction here is therefore consistent with due process. By willfully disobeying and recklessly disregarding the Injunction, Respondents could

reasonably anticipate they would have to explain their actions to the district court. Any inconvenience to Respondents was immaterial, as only the district court could enforce its Injunction. And it is "significant if not controlling" that permitting the district court to exercise jurisdiction was consistent with its "special interest" in litigating this matter. *Waffenschmidt*, 763 F.2d at 721-22 (observing that "manifest need for a court to protect and enforce its own judgments is beyond doubt"). New Jersey simply "could not assert as strong an interest in ensuring" that the Injunction was enforced. *Id*. at 722. The district court's exercise of jurisdiction was therefore proper.

C. Respondents had adequate notice of and ample opportunity to respond to the contempt allegations.

The purpose of service of process is to provide a person due process, i.e., notice and opportunity to respond. *Matter of Faden*, 96 F.3d 792, 795-96 (5th Cir. 1996) (citing *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The district court detailed—in nearly two pages of findings—the facts establishing that Respondents had adequate notice of the contempt proceeding. ROA.4966-67. It found that on August 21, 2017 Chipotle had repeatedly attempted to serve Respondents with its Motion for Contempt and related filings. It also found that Respondent Swartz "was deliberately fleeing service." ROA.4966. Three days later, after Chipotle's email to Respondents concerning service went unanswered,

Chipotle both emailed and mailed those materials along with the court's notice of hearing to Respondents with a waiver.[6] ROA.4966.

The district court found that these efforts to give Respondents notice of the contempt proceeding were effective. ROA.4967 (specifically noting Sellers's comments to the media that Chipotle's motion was "frivolous" and "legal gymnastics"). It also found that "[a]t each and every step of this contempt proceeding, Chipotle sent notice to Respondents" of the proceeding's developments and, as a result, Respondents were permitted "to repeatedly contest Chipotle's contempt motion through briefs and in a contempt hearing before the Court" (which they attended). ROA.4967.

In light of these facts, the court determined that Chipotle's efforts to serve Respondents, while "imperfect," substantially complied with Federal Rule of Civil Procedure 4 and that Respondents had failed to show any actual prejudice from the imperfect service. ROA.4965, 4967. Because these facts find ample support in the record, the district court did not abuse its discretion in determining process was sufficient. *See George*, 788 F.2d at 1119.

Respondents disagree, arguing that the lack of "court-issued process" (i.e., a summons) is a substantive defect that invalidates the district court's jurisdiction over

[6] Chipotle tried to obtain summonses, but the clerk would not issue them. ROA.4382-84.

them. Br., 23. They (again) fail to identify any actual prejudice from this purported defect. And Respondents' argument fails in light of the adequate notice and multiple opportunities they were given to respond to Chipotle's motion. ROA.4966-67.

Even if this Court disagrees, the Order should still be affirmed. *See Berry v. Brady*, 192 F.3d 504, 507 (5th Cir. 1999) ("This Court may affirm on any basis supported by the record."). Formal service is not required. *Additive Controls & Measurement Sys., Inc. v. Flowdata, Inc*., 154 F.3d 1345, 1355 (Fed. Cir. 1998) ("[I]t is well established that formal service is not required in a contempt proceeding."). Nor is a show cause order. *See Commodity Futures Trading Comm'n v. Premex, Inc.*, 655 F.2d 779, 782 n.2 (7th Cir. 1981) (concluding show cause order unnecessary where alleged respondents "received the [contempt] motion and supporting papers in ample time to prepare for a show cause hearing").

So long as a reasonable opportunity to be heard is afforded, the "exact form" of process in contempt "is not important." *Cooke v. United States*, 267 U.S. 517, 536-37 (1925); *see also Flowdata*, 154 F.3d at 1355. All that is required is "some form of process" that "alert[s] the alleged contemnor of the court's intention to sanction him." *McGuire v. Sigma Coatings, Inc.*, 48 F.3d 902, 907 (5th Cir. 1995). That process may include "a show cause [order] *or similar order or process*" that places the alleged contemnor on notice. *Id*. (emphasis added). Applying these principles, this Court in *Waste Management of Washington, Inc. v. Kattler*, 776 F.3d

336 (5th Cir. 2015), concluded that "a notice of an evidentiary hearing to address" a motion for contempt was sufficient to notify the parties identified therein of a contempt motion. *Id*. at 340 (further concluding it was insufficient to apprise person unnamed in order).

Here, the district court issued an August 2, 2017 order referencing Chipotle's Motion for Contempt and setting a hearing on August 17, 2017 (which Respondents subsequently requested to reset). ROA.4332. Chipotle served that order on Respondents, thereby providing them with a court order placing them on notice of the pending contempt allegations. ROA.4383. Process was therefore sufficient for this additional reason.

The district court's factual findings that Respondents had notice of the contempt proceeding "[a]t each and every step" is supported by the record. ROA.4967. Due process was fulfilled, and the district court properly exercised jurisdiction over Respondents.

II. THE INJUNCTION BINDS RESPONDENTS.

A. Standards of review.

This Court reviews "a finding of contempt for abuse of discretion but not in a perfunctory way." *Test Masters Edu. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 452 (5th Cir. 2015). "Generally, an abuse of discretion only occurs where no reasonable person could take the view adopted by the trial court." *Friends for Am. Free Enter. Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575, 578 (5th Cir. 2002)

(quotation marks omitted). This Court reviews "the district court's factual findings for clear error and its legal conclusions de novo." *Sundown Energy, L.P. v Haller*, 773 F.3d 606, 615 (5th Cir. 2014). Clear error exists "only if the court is left with the definite and firm conviction that a mistake has been committed." *Barto v. Shore Constr., L.L.C.*, 801 F.3d 465, 471 (5th Cir. 2015) (internal quotations omitted).

Further, "[t]he question of whether privity exists is a factual inquiry and this court will not disturb the district court's findings absent a showing of clear error." *Dilworth v. Vance*, 95 F.3d 50, *1 (5th Cir. 1996) (per curiam).

B. Rule 65 extends injunctions to persons in privity with the parties.

Respondents' argument that Rule 65 imposes "textual limitations" on a court's injunctive power that prevented the district court from binding them to the Injunction is contrary to well-established precedent. Br., 25.

Rule 65(d) details three categories of "persons bound" by an injunction: (a) the parties; (b) their "officers, agents, servants, employees, and attorneys;" and (c) "*other persons who are in* active concert *or participation with anyone described*" in the first two categories. Fed. R. Civ. P. 65(d)(2)(A)-(C) (emphasis added). The rule "is derived from the commonlaw [sic] doctrine that a decree of injunction not only binds the parties defendant but also those identified with them in interest, in 'privity' with them, represented by them or subject to their control." *Regal Knitwear*, 324 U.S. at 14 (quotations in original). Indeed, "[t]he rule 'does not really add or detract

from the range of persons that were bound by a decree under basic equity practice and due-process principles applied on the equity side of the federal courts prior to 1938.'" *ADT*, 853 F.3d at 1351-52 (quoting 11A Charles Alan Wright, Arthur R. Miller, *et al*., Federal Practice and Procedure § 2956 (3d ed. 2015)).

The "vitality of this rule" is implemented through Federal Rule of Civil Procedure 71. *Homa*, 514 F.3d at 674. That rule provides that when an "order may be enforced against a nonparty," the enforcement procedure is "the same as for a party." Thus, "Rule 71 was designed to memorialize the common sense rule that courts can enforce their orders against both parties and non-parties." *Westlake N. Prop. Owners Ass'n v. City of Thousand Oaks*, 915 F.2d 1301, 1304 (9th Cir. 1990).

Rule 65(d)(2)(C) "contemplate[s] two categories of nonparties potentially bound by an injunction" as previously discussed. *Nat'l Spiritual*, 628 F.3d at 848. The first includes parties who aid and abet a party bound by the injunction, and the second, "'captured under the general rubric of privity'[,] includes 'nonparty successors in interest' and nonparties 'otherwise legally identified with the enjoined party.'" *ADT*, 853 F.3d at 1352 (quoting *Nat'l Spiritual*, 628 F.3d at 848-49). This is because "as a codification rather than a limitation of courts' common-law powers," Rule 65(d) "cannot be read to restrict the inherent power of a court to protect its ability to render a binding judgment." *Hall*, 472 F.2d at 267. Stated

simply, Rule 65(d)(2)(C)'s reference to "participation with anyone" should be read broadly to encompass a court's common law authority.[7]

Respondents attempt to distinguish this authority by characterizing *Regal Knitwear* as an "out-of-context quotation of the Supreme Court's description of Rule 65(d)'s historical origins." Br., 25. Not so. In *Regal Knitwear*, the Supreme Court addressed a circuit split concerning whether an enforcement order could properly extend to a respondent's "successors and assigns" such that nonparties could be held liable. 324 U.S. at 10-11. Given Rule 65's scope and the common law before it, the Supreme Court concluded that extension of the order was not *per se* improper. *Id*. at 16.

Therefore, in discussing Rule 65, the Supreme Court did not merely offer a recitation of its "historical origins." Br., 25. It confirmed the longstanding principle that identity of interests—i.e., privity—justifies injunctive relief against non-parties. Numerous courts have since relied on *Regal Knitwear* for this very proposition. *See, e.g., Nat'l Spiritual*, 628 F.3d at 849; *Harris Cty., Tex. v. CarMax Auto Superstores Inc.*, 177 F.3d 306, 314 (5th Cir. 1999); *Wash. Metro. Area Transit Comm'n v. Reliable Limousine Serv., LLC*, 985 F. Supp. 2d 23, 30-31 (D.D.C. 2013).

[7] Respondents' insistence that Rule 65 permits the Injunction to bind only the DOL is therefore incorrect. *See Hall*, 472 F.2d at 267 ("Courts have continued to issue in rem injunctions notwithstanding Rule 65(d), since they possessed the power to do so at common law and since Rule 65(d) was intended to embody rather than limit their common law powers.").

Here, Respondents' efforts to narrowly read Rule 65(d)(2)(C) to exclude those identified in interest or privity with an enjoined party fail. The district court correctly identified and applied these principles. It cited *Regal Knitwear* and proceeded to analyze whether Respondents were in privity with the DOL. ROA.4968-77. Thus any citation to Rule 65(d)'s enumerated categories was unnecessary; by citing *Regal Knitwear*, it cited the source of authority codified in Rule 65 for binding Respondents. Accordingly, Respondents cannot use Rule 65 to reverse the Order.

C. The Injunction binds Respondents because they are in privity with the DOL.

1. Detailed factual findings and well-established legal principles support this determination.

The district court found the Injunction bound Respondents because they were in privity with the DOL. ROA.4977. These findings are amply supported in the record and should not be disturbed on appeal. *See Royal Ins. Co. of Am. v. Quinn-L Capital Corp.*, 960 F.2d 1286, 1297-98 (5th Cir. 1992) (privity); *Flowdata*, 154 F.3d at 1352-53 (legal interest). Because the court applied the correct legal standard, no basis exists to reverse its determination that the Injunction binds Respondents.

Privity "'represents a legal conclusion that the relationship between the one who is a party on the record and the non-party is sufficiently close' to bind the nonparty to the injunction." *ADT*, 853 F.3d at 1352 (quoting *Sw. Airlines*, 546 F.2d at 95). The concept of privity has evolved and expanded over time. *Nat'l Spiritual*,

628 F.3d at 849. The term "is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Richards v. Jefferson Cty., Ala.*, 517 U.S. 793, 798 (1996). Privity "is ultimately bounded by due process[.]" *Nat'l Spiritual*, 628 F.3d at 849 (noting privity is "seen as a descriptive term for designating those with a sufficiently close identity of interests to justify application of nonparty claim preclusion") (internal quotations omitted); *see also Taylor v. Sturgell*, 553 U.S. 880, 894 n.8 (2008). Because "[a] similar requirement governs when res judicata may bind a nonparty to a prior judgment," *ADT*, 853 F.3d at 1352, claim preclusion jurisprudence is instructive.

That jurisprudence does "not always require one to have been a party to a judgment in order to be bound by it." *Richards*, 517 U.S. at 798. The general principle that a nonparty is not bound by a judgment "is subject to exceptions" including where the nonparty "was adequately represented by someone with the same interests who [wa]s a party to the suit." *Taylor*, 553 U.S. at 893-94 (identifying six exceptions) (internal quotations omitted) (alterations in original); *see also Richards*, 517 U.S. at 798; *Benson & Ford, Inc. v. Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987).

Due process principles prevent preclusion where the relationship becomes too attenuated. *Sw. Airlines*, 546 F.2d at 95; *see also Nat'l Spiritual*, 628 F.3d at 849. To

that end, "federal courts will bind a non-party whose interests were represented adequately by a party in the original suit." *Sw. Airlines,* 546 F.2d at 95.

Similarly, a nonparty who is "legally identified" with a party may also be bound by an injunction. *Flowdata,* 154 F.3d at 1351. This occurs where the nonparty is "so identified in interest with those named in the decree that it would be reasonable to conclude that [his] rights and interests have been represented and adjudicated in the original injunction proceeding."[8] *Id.* at 1352 (internal quotations omitted) (alterations in original); *cf. Chase Nat'l Bank v. City of Norwalk, Ohio*, 291 U.S. 431, 437 (1934) (excluding from injunction's purview persons "whose rights have not been adjudged according to law").

It is "clear" that "governments may represent private interests in litigation[.]" *Sw. Airlines,* 546 F.2d at 98. This principle has applied to preclude a citizen-taxpayer from challenging tramway fares where the city adequately represented the taxpayer's interests and lost on the issue. *Berman v. Denver Tramway Corp.*, 197 F.2d 946, 951 (10th Cir. 1952).[9] It has applied to preclude parents from enforcing a state law once

[8] Respondents correctly recognize the distinction between privity and identification in interest here is one without a difference. (Br., 26 n.5.)

[9] *Berman* cites *In re Engelhard & Sons Co.*, 231 U.S. 646 (1914). 197 F.2d at 951. There, the Supreme Court denied a private party's intervention request in a suit between a city and local telephone company because the city would adequately represent the party's interests. *Sw. Airlines,* 546 F.2d at 98 n.52. It is notable here because it "den[ies] a day in court both to members of the public and to private persons with pecuniary interests in the dispute." *Id.*

their school board failed to achieve enforcement. *Battle v. Cherry*, 339 F. Supp. 186, 191 (N.D. Ga. 1972). And, most notably, it has applied to preclude private actors from attempting to enforce a previously enjoined ordinance because a government entity adequately represented those actors' interests in attempting to enforce the same ordinance. *Sw. Airlines*, 546 F.2d at 102.

Southwest Airlines "refine[d] the preclusive effect of government litigation." *Id*. at 99. In so doing, this Court noted that "an agency's authority to maintain or defend litigation . . . should be construed as preempting the otherwise available opportunity of the individual or members of the public to prosecute . . . ." *Id.* (internal quotations omitted) (omissions in original). This Court held that, consequently, "a private party must show more than a special pecuniary interest when attempting to vindicate the breach of a public duty already litigated by a government agency." *Id.* at 100. Because the private parties in *Southwest Airlines* claimed only a breach "of the general duty to obey valid ordinances[,]" requested the same remedy as the governmental agency had requested, and because the statute did not provide for private enforcement, this Court concluded that the relationship between the private parties and city was "close enough to preclude relitigation"—i.e., the parties were in privity. *Id*. at 98, 100. The fact that the private parties' pecuniary interests differed from the city's was "legally immaterial[.]" *Id*. at 102. The appropriate inquiry was

into "the congruence of the legal interests of the parties and non-parties not to their financial stake in the litigation." *Id*.

The district court, applying these principles, and *Southwest Airlines* specifically, properly asked "whether the DOL adequately represented Respondents." ROA.4970. It answered in the affirmative, concluding that "[t]he DOL adequately represented the interests of employees like Alvarez when advocating for the validity and enforceability of the Final Rule in the original injunction proceeding." ROA.4974. It found that the DOL and Alvarez were in privity because the DOL (a) "declared that it represented the rights of employees like Alvarez in the original" proceeding; (b) opposed the injunction on the grounds that it would have "a profoundly harmful impact on…[m]ore than *four million workers*" by depriving them of the Final Rule's benefits; and (c) "advocated for legal interests congruent to those in Alvarez's lawsuit" concerning the Final Rule's validity and enforceability. ROA.4974-75 (emphasis in original). And it further found that the Injunction bound Attorney Respondents "since they served as Alvarez's attorneys with actual notice of the Injunction." ROA.4977.

After finding the parties in privity, the court went on to address the similarity in interests between Alvarez and the DOL. It acknowledged that *Southwest Airlines*'s preclusion doctrine may not apply where the nonparty's interests differed from those the governmental entity attempted to enforce in the original action.

ROA.4976 (citing *Sw. Airlines*, 546 F.2d at 99; *Rodriguez v. E. Tex. Motor Freight*, 505 F.2d 40, 66 (5th Cir. 1974)). This could occur, for example, where the nonparty asserted that additional "legal duties owed specifically to them, not just to the general public[]" had been breached, or where the nonparty "claimed remedies distinct from the relief imposed in the government litigation." ROA.4976 (quoting *Sw. Airlines*, 546 F.2d at 99).

The district court rejected that such a scenario existed here. It concluded that the FLSA's purpose was to protect workers' general welfare, and that "common sense rather than complex legal analysis" demonstrated that "the DOL already represented their cause of action in the original injunction proceeding."[10] ROA.4977.

Thus, the Order is not, as Respondents claim, "as far-fetched as it was far-reaching." Br., 26. The district court applied well-established legal standards and analogous precedent to its factual findings, which the record supports. And it correctly recognized that enjoining the Final Rule's implementation meant there was no Final Rule for Respondents to enforce.[11] Respondents may not now, on appeal, undo what the district court found below: that the DOL and Alvarez were in privity

[10] The DOL's status as a defendant, rather than as a plaintiff, in the underlying action is irrelevant. Br., 35-36. By virtue of the State Plaintiffs' challenge, the DOL was forced to defend the Final Rule's enforceability. ROA.998-1059. That is sufficient to invoke the adequate representation exception.

[11] Indeed, had the Final Rule *become* effective, Respondents would certainly not have hesitated to claim benefit from the DOL's representation.

"when she asserted the validity and enforceability of the Final Rule via her lawsuit to recover overtime wages based on the criteria in the Final Rule." ROA.4975.

Accordingly, the district court's determination that the Injunction bound Respondents should be affirmed.

2. Respondents' contrary arguments fail.

Respondents list numerous purported errors in the district court's analysis, each of which fail under close examination. Br., 24-36.

First, the above-cited authority plainly belies Respondents' assertion that a nonparty may be held in contempt only where it aids and abets an enjoined party. Br., 26, 27 n.6. As detailed above, the Supreme Court and this Court (among other circuits) recognize that a nonparty may be held in contempt for *either* aiding and abetting an enjoined party *or* for being in privity with the enjoined party and violating a court order, a reality Respondents acknowledge later in their brief. Br., 28 (citing *Nat'l Spiritual*, 628 F.3d at 849). Respondents cannot graft error into the district court's analysis by simply ignoring the second category.

Respondents' related assertion that limiting contempt to aiding and abetting scenarios "gives effect to the balance the rule was designed to strike[]" is equally unmeritorious. Br., 27. Respondents' argument is premised on the assumption that Alvarez's "'rights have not been adjudged according to law.'" Br., 28 (quoting *Golden State Bottling Co., Inc. v. N.L.R.B.*, 414 U.S. 168, 180 (1973)). The district

court correctly recognized here that Alvarez's right—the ability to benefit from the Final Rule—was directly "adjudged according to law," as was her right to "additional pay" under it. ROA.4969. Indeed, the DOL's participation bound not only itself, but also its constituents—employees like Alvarez. *See City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 340-41 (1958) (binding nonparties to judgment where "they, in their common rights as citizens of the State, were represented by the State in those proceedings").

The appropriate balance is therefore struck. The Order preserves the appropriate policy concerns of providing Alvarez her day in court with preventing Respondents from enforcing the Final Rule. And this balance properly preserves Chipotle's right to the Injunction's protection, specifically, and the orderly administration of justice, generally.

Second, Respondents' claim that *National Spiritual* confines the adequate representation/legal identification exception to circumstances in which there is an "extremely close identification" falls short in two respects. Br., 28-29. Initially, Respondents' cited excerpt concerns when a "key officer, employee, or shareholder of an enjoined corporation may be personally bound by an injunction after the corporation dissolves[.]" *Nat'l Spiritual*, 628 F.3d at 854. That is an entirely distinct basis for binding a nonparty to an injunction than what is at issue here. *Id.*; *see also Taylor*, 553 U.S. at 894 (defining distinct category for pre-existing substantive legal

relationships like those described in *National Spiritual*). Further, Respondents' argument ignores that the district court's factual findings demonstrate the identity of interests here were "extremely close"—such that "[t]he DOL declared it represented the rights of employees like Alvarez." ROA.4974.

Third, Respondents' efforts to distinguish *Southwest Airlines* as "decades-old" and inapplicable because it is "relevant only as a potential defense in the Alvarez action" ignores *ADT*. Br., 30-31 (emphasis omitted). Just over a year ago the Eleventh Circuit recognized *Southwest Airlines*'s viability and found analogous the above-cited preclusion authorities in resolving whether a nonparty may be held in contempt of an injunction. *ADT*, 853 F.3d at 1352. And again, the issue here—whether Respondents violated the Injunction—is unrelated to Chipotle's merits defense to the New Jersey lawsuit.

Respondents' efforts to further distinguish *Southwest Airlines* by repeating the same pecuniary interest argument this Court has already rejected are also unconvincing. Br., 33-35. Respondents' argument amounts to nothing more than an contention that Alvarez's pecuniary damages differ from the DOL's such that *Rodriguez*, rather than *Southwest Airlines*, should apply. This contention is untrue.

The FLSA's purpose is to "maintain a minimum standard of living" and the "general well-being of workers[.]" 29 U.S.C. § 202(a); *see also* 29 U.S.C. § 203(e)(1) (broadly defining employee). It accomplishes this purpose by imposing

substantive overtime obligations on employers under 29 U.S.C. § 207. Section 216(b) (private enforcement) and § 216(c) (agency enforcement) both provide for enforcement of that same substantive right. Thus, the fact that "Alvarez's rights were never asserted against Chipotle by any governmental entity" does not mean that the DOL's interests diverged from Alvarez's. Br., 36. Rather, because the Final Rule directly implicated § 207, Alvarez's substantive right to overtime on that theory was necessarily asserted and resolved.

The district court expressly recognized this fact when it observed "that enjoining the Final Rule would deny additional pay[]" to workers like Alvarez. ROA.3841. Admittedly, if Alvarez sues to enforce § 207 and prevails, she is entitled to "a reasonable attorney's fee"—a right extinguished if the Secretary sues on her behalf. 29 U.S.C. § 216(b), (c). But Attorney Respondents' interest in seeking fees cannot demonstrate the distinct, individual pecuniary interests necessary to make *Rodriguez* analogous here. *See Sw. Airlines*, 546 F.2d at 98.

Fourth, Respondents' assertion that the Supreme Court has "rejected . . . unanimously" the district court's preclusion theory is simply wrong. Br., 31 (internal quotations omitted) (omission in original). Respondents cite *Smith v. Bayer Corporation*, 564 U.S. 299, 315 (2011), claiming it rejects the "theory of virtual representation based on identity of interests and some kind of relationship between parties and nonparties." Br., 31 (internal quotations omitted). However, the district

court did not apply a "virtual representation" theory; it applied the distinct "adequate representation" theory.[12] ROA.4975 ("Since the DOL *adequately represented* Alvarez's legal interests in the original injunction proceeding, Alvarez was in privity with the DOL . . . .") (emphasis added).

Smith rejects solely the idea of "virtual representation" and leaves untouched the "adequate representation" exception *Taylor* and its progeny recognized. *Smith*, 564 U.S. at 315-16. *Taylor* makes clear the distinction between the "adequate representation theory," which it recognized among the "six established categories" of exceptions, and the "virtual representation" exception, which it rejects. 553 U.S. at 895-96.

Thus, while the case law surrounding virtual representation is "cloudy, the proposition that governments may represent private interests in litigation," as was applied here, "is clear[]" and remains valid. *Sw. Airlines*, 546 F.2d at 98*; see Nevada v. United States*, 463 U.S. 110, 135 (1983) (affirming well-established doctrine that once government invoked courts' jurisdiction on behalf of its "wards," those wards

[12] A meaningful distinction exists between the two theories. For example, a defendant's allegations that one group of plaintiffs merely "collaborated" with a second, separately-represented group of plaintiffs was a virtual representation theory insufficient to support preclusion. *See Spikes v. Hamilton Farm Golf Club, LLC*, Civ. No. 13-3669, 2016 WL 885048, at *5 (D.N.J. Mar. 8, 2016). But corrections officers were bound to accept the sick leave policy agreed to by the bargaining representative of their union under a theory of adequate representation. *See Monahan v. N.Y. City Dep't of Corr.*, 214 F.3d 275, 288 (2d Cir. 2000).

cannot "be permitted to relitigate the question"); *E.E.O.C. v. U.S. Steel Corp.*, 921 F.2d 489, 494 (3d Cir. 1990) ("Well established precedent also holds that the judgment in an action in which a government agency or officer represents private individuals is binding on those individuals."); *Carpenter v. Webre*, Civ. No. 17-808, 2018 WL 1453201, at *20 (E.D. La. Mar. 23, 2018) (noting relationship between state, acting on public's behalf, and plaintiff, a member of the public, was "'close enough to preclude relitigation'") (quoting *Sw. Airlines*, 546 F.2d at 98). The district court did not err in applying it.

Finally, Respondents speculate that affirming the Order will have "staggering consequences" for "tens of millions of nonparties throughout the country" because it will empower a single judge to enjoin these individuals' conduct. Br., 29. Respondents' argument ignores that Respondents were "the only people in the entire country who don't think" the Final Rule was enjoined from *any* implementation and enforcement—negating the existence of those alleged "millions of nonparties." ROA.5391:16-21. It also ignores that nationwide injunctions enjoining agency regulations are appropriate when the court finds an agency action must be set aside under the APA, as the district court did here. *See* 5 U.S.C. § 706(2) (granting court authority to "set aside agency action"); *Earth Island Inst. v. Ruthenbeck*, 490 F.3d 687, 699 (9th Cir. 2007), *rev'd in part on other grounds*, 555 U.S. 488 (2009) (precluding nationwide enforcement and implementation of agency action); *Nat'l*

Mining Ass'n v. U.S. Army Corp. of Eng'rs, 145 F.3d 1399, 1409-10 (D.C. Cir. 1998).

Thus, if millions of nonparties attempted to circumvent an order enjoining an agency action from becoming effective, contempt would be the appropriate remedy to preserve that injunction's efficacy. But more than likely, "common sense rather than complex legal analysis" would inform those "millions" that they should not do what Respondents did here—disregard the Injunction entirely. ROA.4977.

D. Alternatively, binding Respondents to the Injunction is necessary for the Injunction's effective vindication.

This Court may affirm on any ground supported by the record. *Berry*, 192 F.3d at 507. Because third parties "in a position to upset the court's adjudication" and "imperil[] the court's fundamental power to make a binding adjudication between the parties properly before it" are bound by an injunction, the Order should be affirmed. *Hall*, 472 F.2d at 265.

Hall is instructive. It addresses the "question [of] whether a district court has power to punish for criminal contempt a person who, though neither a party nor bearing any legal relationship to a party, violates a court order designed to protect the court's judgment[.]" *Id*. at 262. There, the lower court issued an order requiring the school board to complete school desegregation. *Id*. After the order was issued, one of the high schools to be desegregated developed "racial unrest and violence," apparently as a result of interference from "outsiders." *Id*. at 263. The superintendent

obtained an order enjoining the school's students and "other persons acting independently or in concert with them and having notice of this order" from certain disruptive behaviors and restricted school access to limited categories of individuals. *Id*. That order provided that anyone with notice of it would be held in contempt, retained future jurisdiction as necessary to enforce the judgment, and required it be served on Eric Hall—a nonparty "outsider." *Id*. at 263-64.

Hall violated the order and was found guilty of criminal contempt. *Id*. at 264. On appeal, he claimed that "a court of equity has no power to punish for contempt a nonparty acting solely in pursuit of his own interests." *Id*. at 264-65. This Court rejected that argument.

This Court observed that the "integrity of a court's power to render a binding judgment in a case over which it has jurisdiction" were at stake. *Id*. at 265. Hall's conduct, "if unrestrained, could have upset the court's ability to bind the parties" in the underlying case "in which it unquestionably had jurisdiction." *Id*. This Court observed that "court orders in school cases, affecting as they do large numbers of people, necessarily depend on the cooperation of the entire community for their implementation[,]" and are "particularly vulnerable to disruption by an undefinable class of persons who are neither parties nor acting at the instigation of parties." *Id*. at 266. Accordingly, "courts have jurisdiction to punish for contempt in order to protect their ability to render judgment[.]" *Id*. at 265.

Here, the same rationale applies. The district court had "authority to enjoin the Final Rule on a nationwide basis and decide[d] that it [was] appropriate" to do so. ROA.3843. The purpose of the nationwide scope was to "protect[] both employees and employers from being subject to different EAP exemptions based on location." ROA.3842. The Injunction further stated that the Final Rule "is hereby enjoined" and that "Defendants are enjoined from implementing and enforcing" the Final Rule "pending further order of this Court." ROA.3843-44. Thus, like in *Hall*, the Injunction prohibited certain conduct (the Final Rule's implementation and enforcement) and the district court had jurisdiction to enforce the Injunction.

And again, as in *Hall*, Respondents' actions here imperil the district court's ability to make that Injunction effective. While the Injunction is silent as to their identity, Respondents, as members of the "undefinable class" of potential disrupters to the Injunction, must still comply with it. *Hall*, 472 F.2d at 266. If Respondents were allowed to self-implement and enforce the Final Rule against Chipotle, the court's fundamental power to make the Injunction binding would be obstructed, rendering the Injunction a nullity. In other words, Respondents would effectively be permitted to do what the DOL was expressly forbidden from doing, gutting the Injunction's effectiveness and the very core of the district court's authority.

By directly challenging the district court's authority, Respondents placed themselves within the class of people against whom the Injunction may be enforced.

For this additional reason, the district court's conclusion that the Injunction binds Respondents may be affirmed.

E. Respondents' untimely attack on the Injunction's propriety should be disregarded.

Respondents challenge the Injunction's propriety, characterizing it as a "new breed" arising "against the backdrop" of an "ongoing debate" over nationwide injunctions. Br., 30. Their aim is clear: if the Injunction was impermissible, so too is the Order.

Respondents are precluded from making this challenge. It is a "long-standing rule that a contempt proceeding does not open to reconsideration the legal or factual basis of the order alleged to have been disobeyed and thus become a retrial of the original controversy." *Maggio v. Zeitz*, 333 U.S. 56, 69 (1948); *Nat'l Spiritual*, 638 F.3d at 846 (noting "contempt proceeding" is improper place for collateral attack). Orders, once issued, must be followed "until [] reversed by orderly and proper proceedings" and "disobedience of them is contempt of [the court's] lawful authority, to be punished." *Mine Workers of Am.*, 330 U.S. at 293-94 (internal quotations omitted). Alvarez could have sought to intervene in the underlying action if she objected to the Injunction. *See, e.g.*, *Trans World Airlines, Inc. v. Mattox*, 712 F. Supp. 99, 104 (W.D. Tex. 1989) (permitting nonparties' intervention given interest affected by injunction); *see generally* Fed. R. Civ. P. 24. Her failure to do so leaves her unable to collaterally attack the Injunction now.

Moreover, Respondents waived this argument. ROA.5390:15-16 (making clear Respondents were "not challenging this Court's authority or this Court's order"). They cannot raise it now for the first time on appeal. *See United States ex rel. Vavra v. Kellogg Brown & Root, Inc.*, 848 F.3d 366, 376-77 (5th Cir. 2017).

III. THE INJUNCTION DEFINITIVELY BARRED RESPONDENTS FROM ENFORCING THE FINAL RULE.

A. Standards of review.

This Court exercises its "independent judgment" in reviewing the scope of an injunction. *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013). That review is not as rigid as Respondents suggest. Br., 37. "[A] district court is entitled to a degree of flexibility in vindicating its authority against actions that, while not expressly prohibited, nonetheless violate the reasonably understood terms of the order." *Hornbeck,* 713 F.3d at 792.

B. The Injunction prohibited any enforcement and implementation of the Final Rule.

To support a contempt finding, the injunction must delineate "definite and specific" mandates requiring a party to "refrain from performing" particular acts. *S.E.C. v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 669 (5th Cir. 1981). The order must be "clear in what conduct [is] mandated and prohibited" but need not "spell out in detail the means in which [the] order must be effectuated." *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578-79 (5th Cir. 2000).

Recognizing that there is "little precedent on interpreting injunctions," the district court looked to "bedrock canons of statutory interpretation" to interpret the Injunction. ROA.4978. Citing the twin principles that (a) the statutory text "is the starting part" of that inquiry and (b) that inquiry is "complete" when the statute's words are unambiguous, the district court concluded that the Injunction was "wholly unambiguous" and "prohibited Respondents from suing to enforce the Final Rule." ROA.4978-79 (citing *Desert Palace, Inc. v. Costa*, 539 U.S. 90, 98 (2003)). That analysis should be affirmed.

In full, the Injunction stated that the district court "ha[d] authority to enjoin the Final Rule on a nationwide basis and decide[d] that it [was] appropriate in this case." ROA.3843. It further stated:

> [T]he Department's Final Rule described at 81 Fed. Reg. 32,391 is hereby enjoined. Specifically, Defendants are enjoined from implementing and enforcing the following regulations as amended by 81 Fed. Reg. 32,391; 29 C.F.R. §§ 541.100, 541.200, 541.204, 541.300, 541.400, 541.600, 541.602, 541.604, 541.605 and 541.607 pending further order of this Court.

ROA.3843-44. The Injunction plainly grants relief "nationwide" because "the scope of the alleged irreparable injury extends nationwide." ROA.3842. The Injunction therefore "protects both employees and employers from being subject to different EAP exemptions based on location." ROA.3842.

It is hard to envision a clearer prohibition on Respondents' actions. "Enjoin" means to "prohibit someone from performing a particular action," "implement" means to "put into effect," and "enforce" means to "compel observance of or compliance with a law, rule, or obligation." *Enjoin*, *Implement*, *Enforce*, New. Oxford Am. Dictionary, 574, 576, 873 (3d ed. 2010). In other words, the Injunction prohibited Respondents from putting into effect and compelling compliance with the Final Rule.

And while the Injunction did not state it enjoined private citizens from implementing or enforcing the Final Rule, that language was unnecessary to do so. The "order must be clear, [but] a court 'need not anticipate every action to be taken in response to its order . . . ." *Hornbeck*, 713 F.3d at 792 (quoting *Am. Airlines*, 228 F.3d at 578). The order must only "state its terms specifically" and "describe in reasonable detail" the restrained acts. Fed. R. Civ. P. 65(d)(1)(B), (C). "[A] district court is entitled to a degree of flexibility in vindicating its authority against actions that, while not expressly prohibited, nonetheless violate the reasonably understood terms of the order." *Hornbeck*, 713 F.3d at 792.

The fact that the Final Rule was enjoined from implementation is by itself sufficient to place Alvarez on notice that her lawsuit violated the Injunction. She was further on notice that her lawsuit was barred because the district court expressly recognized that by granting the Injunction, it would "deny additional pay" to workers

who fell within the Final Rule's scope—the remedy she seeks in New Jersey. ROA.3841. Absent the DOL's implementation, there simply is no Final Rule to enforce. *Nat. Res. Def. Council, Inc. v. E.P.A.*, 683 F.2d 752, 762 (3d Cir. 1982) ("[W]ithout an effective date a rule would be a nullity because it would never require adherence.").

Moreover, "the sheer dearth of parties so confused by" the Injunction demonstrates that the Injunction was reasonably understood to prohibit the filing of any action to implement or enforce the Final Rule. ROA.4978. Indeed, Respondents "are the only people" who claim that the Injunction "didn't grant a national injunction that stopped the [Final Rule] from going into effect, period." ROA.5391:16-21. Respondents' reliance on affidavits from their "experts in civil procedure and administrative law" to bolster their position fails. Br., 40. The district court found that evidence incredible and unpersuasive, findings that cannot be undone on appeal. *See Perez v. Bruister*, 823 F.3d 250, 269 (5th Cir. 2016) ("As with any testimony, [an appellate court] does not reweigh evidence and must defer to the trial court's assessment of the credibility of witnesses.").

C. Respondents' contrary arguments fail.

Respondents continue to insist that the Injunction did not clearly prohibit their conduct, contending instead that it enjoined solely the DOL's implementation and

enforcement of the Final Rule. Br., 37-42. Respondents' arguments here suffer the same fate as they did below.

First, Respondents' claim that "it was not even clear that the [Injunction] stopped the [Final] Rule from taking legal effect" borders on the absurd. Br., 38. The Injunction's application was "self-evident." ROA.4982. And nationwide injunctions enjoining agency regulations are appropriate when the court finds an agency action must be set aside under the APA—as the Injunction's plain language orders here. *See Earth Island*, 490 F.3d at 699; *Nat'l Mining*, 145 F.3d at 1409-10.

Owen v. City of Portland, 236 F. Supp. 3d 1288, 1297-98 (D. Or. 2017), lends no credence to Respondents' assertion that the Injunction barred only the DOL's enforcement of the Final Rule. Br., 38-39. There, the court cited the Injunction as an *example* of an order enjoining "the *implementation* or *enforcement*" of an agency regulation. *Id*. at 1297 (emphasis in original) (characterizing Injunction as "granting emergency preliminary injunctive relief and enjoining the [DOL] from implementing and enforcing certain regulations pending further order of the court"); *see also League of Women Voters of the U.S. v. Newby*, 838 F.3d 1, 15 (D.C. Cir. 2015) (declining to consider ability to vacate agency rule).

Respondents' assertion that the Final Rule was "self-executing" against Chipotle lacks legal and factual credibility in light of § 216's enforcement scheme. Br., 38. Taking that argument to its logical conclusion, every employer subject to

the FLSA was required to implement a rule the district court had found to be preliminarily in excess of the DOL's authority and that was enjoined from implementation and enforcement. ROA.3839. Permitting an agency regulation to "self-execute" in that fashion runs counter to centuries-old precedent establishing the judicial review process. *Marbury v. Madison*, 5.U.S. 137, 177 (1803) ("It is emphatically the province and duty of the judicial department to say what the law is."); *see also Bowen v. Mich. Acad. of Family Physicians*, 476 U.S. 667, 673 n.3 (1986) (summarizing Supreme Court case law and related secondary sources describing necessity of judicial review).

But not only does Respondents' argument bely logic and constitutional principles, it opens the floodgates of litigation against employers in a manner clearly contrary to the Injunction's purpose. ROA.5454:16-19. Under these circumstances, Respondents' assertion that the Injunction's use of the term "nationwide" means anything other than what it says—that the Final Rule shall not be implemented or enforced anywhere in the country—lacks credibility. Br., 41-42.

Second, Respondents' argument that the Injunction was technically deficient because it did not cite 5 U.S.C. § 705 fails. Br., 39-41. Initially, this argument should be rejected as an impermissible collateral attack on the Injunction. *See* section II.E, *supra*. Moreover, the argument relies on form but ignores substance; specifically that § 705 provides that "the court to which a case may be taken on appeal . . . may

issue all necessary and appropriate process to postpone the effective date of an agency action . . . pending conclusion of the review proceedings." Thus, because the district court, in the Injunction, cited 5 U.S.C. § 702 (judicial review of agency actions) as a basis for its jurisdiction, determined that the Final Rule was a reviewable agency action, and enjoined the Final Rule's enforcement (i.e., postponed its effective date), it complied with § 705's substance. Citation to anything additional was unnecessary to apprise Respondents of the Injunction's scope.

Third, their assertion that the Injunction was not the "same thing as unambiguously restraining would-be litigants, in personam, from making arguments or pursuing claims (whether meritorious or not) in other courts" strains credulity. Br., 39. The FLSA does not provide a separate set of regulations for private enforcement. As pertinent here, 29 U.S.C. § 207 provides the source of Alvarez's purported entitlement to overtime. *See* 81 Fed. Reg. 32,391 (attempting to increase the threshold exemption for overtime). Either private litigants or the DOL may enforce that provision, but no *additional* provision exists for private litigants to separately enforce. 29 U.S.C. § 216(b) & (c). Thus, by enjoining the Final Rule's *implementation* and enforcement, ROA.4977-79, any effort to "mak[e] arguments or pursu[e] claims" related to it were necessarily enjoined as well. Br., 39. There was simply nothing to enforce. *Nat. Res.*, 683 F.2d at 762.

Accordingly, because the district court did not abuse its discretion in finding that, at the time Respondents filed their lawsuit, (a) the Injunction was in effect; (b) it prohibited Respondents from implementing or enforcing the Final Rule, including via lawsuit in New Jersey; and (c) Respondents did not comply with the Injunction, this Court should affirm the Order. *See United States v. City of Jackson, Miss.*, 359 F.3d 727, 731 (5th Cir. 2004).

IV. CHIPOTLE IS ENTITLED TO ITS FEES FROM ATTORNEY RESPONDENTS.

A. Standards of review.

This Court reviews an assessment of monetary sanctions for contempt for an abuse of discretion. *Am. Airlines*, 228 F.3d at 578. This Court "reviews the district court's award of sanctions under § 1927 for abuse of discretion." *Gonzalez v. Fresenius Med. Care N. Am.*, 689 F.3d 470, 479 (5th Cir. 2012); *see also Edwards v. Gen. Motors Corp.*, 153 F.3d 242, 246 (5th Cir. 1998). So long as the district court's decision is within the realm of reason, there is no abuse of discretion. *See Friends for Am. Free Enter. Ass'n.*, 284 F.3d at 578.

B. The district court properly awarded Chipotle its fees and costs.

Initially, the fee and costs award should be affirmed because the court properly found Attorney Respondents in contempt of the Injunction. The district court enjoyed "broad discretion" in fashioning the appropriate remedy for Respondents' civil contempt. *In re Gen. Motors Corp.*, 61 F.3d 256, 259 (4th Cir.

1995). Civil contempt may be used to award compensatory damages to "a party who has suffered unnecessary injuries or costs because of contemptuous conduct." *Travelhost, Inc. v. Blandford*, 68 F.3d 958, 962 (5th Cir. 1995). Those damages include "the cost of bringing the violation to the attention of the court" and may include an award of fees to that party. *Cook v. Ochsner Found. Hosp.*, 559 F.2d 270, 272 (5th Cir. 1977).

The district court, applying these well-settled principles, awarded Chipotle "compensation for fees and expenses tied to this contempt proceeding." ROA.4983. It found Respondents "repeatedly and summarily dismissed the Injunction's bearing on them and on their clients" by disregarding "the Injunction's plain language, clear construction, and self-evident application to their causes of action." ROA.4982. Respondents' arguments to the contrary fail, and the award should be affirmed.

C. The district court also properly sanctioned Attorney Respondents under 28 U.S.C. § 1927.

Attorney Respondents' contention that the district court erred in relying on 28 U.S.C. § 1927, which provides for fees and costs when an attorney "unreasonably and vexatiously" multiples a case's proceedings, to award fees against them personally fails. Br., 42-44.

First, the Order's factual findings bely Respondents' claim that the district court's bad faith findings are "wholly unsupported" because "the only evidence in the record demonstrates that Respondents acted entirely in good faith and conducted

extensive due diligence before bringing the New Jersey action." Br., 43. The record is replete with evidence of Attorney Respondents' unreasonable actions. To wit, in addition to the detailed findings previously discussed, the district court specifically found in connection with the fee award that Attorney Respondents' actions were: (a) "in direct violation" of the Injunction; (b) in "reckless[] disregard[]" of the "duty owed to the Court" to comply with it; (c) taken in pursuit of "a claim that they should have known was unwarranted in fact or law"; and (d) unsupported by any precedent "because none exists." ROA.4983. These findings are supported by the record.

Second, Respondents' bald assertion that the district court could not award sanctions under § 1927 because Respondents' contemptuous conduct occurred in the New Jersey lawsuit, rather than in the Eastern District, is legally and factually infirm. Br., 42-43. Federal courts have "inherent power to impose a wide range of sanctions upon parties for abusive litigation" in "cases in which a litigant has engaged in bad-faith conduct or willful disobedience of a court's orders." *Grochocinski v. Mayer Brown Rowe & Maw, LLP*, 719 F.3d 785, 799 (7th Cir. 2013) (internal quotations omitted). When an attorney engages in unreasonable and vexatious conduct multiplying the proceedings "in any case," (i.e., regardless of the forum) a basis for a fee award exists. 28 U.S.C. § 1927; *see Edwards*, 153 F.3d at 246-47 (permitting sanctions where actions are both "unreasonable" and "vexatious"). Attorney Respondents' conduct obstructed the Injunction in the Eastern District, unreasonably

and vexatiously multiplying the Eastern District proceedings. That reality, accompanied by the court's findings under this standard, is more than ample to support affirming the award. *See Edwards*, 153 F.3d at 247. The district court did not abuse its discretion by awarding fees against Attorney Respondents.

D. Good faith is irrelevant.

Whether or not Attorney Respondents acted in "good faith" after "extensive due diligence" is irrelevant under any standard. Br., 43; *see Chao v. Transocean Offshore, Inc.*, 276 F.3d 725, 728 (5th Cir. 2002) ("Good faith is not a defense to civil contempt; the question is whether the alleged contemnor complied with the court's order."); *Ridder v. City of Springfield*, 109 F.3d 288, 298 (6th Cir. 1997) ("Fees may be assessed [under § 1927] without a finding of bad faith, at least when an attorney knows or reasonably should know that a claim pursued is frivolous, or that his or her litigation tactics will needlessly obstruct the litigation of nonfrivolous claims.") (internal quotations omitted). And the district court categorically found Respondents' evidence of good faith and due diligence incredible. ROA.4979-80.

Attorney Respondents' efforts to characterize the district court's stay order as a "concession that Respondents may well be vindicated in their argument that they [did] nothing wrong" is as bold as it is inaccurate. Br., 43. A motion to stay pending appeal requires consideration of "whether the movant has made a showing of likelihood of success on the merits[.]" *Ruiz v. Estelle*, 650 F.2d 555, 565 (5th Cir.

1981). In the context of addressing that issue, the district court's statement followed its conclusion that such a showing is met simply "when there is a lack of precedent." ROA.5566. Given the "dearth of precedent that factually parallels" this matter, the district court noted, Respondents "made a substantial case on the merits." ROA.5566. It is a far reach to take the district court's observation that a factual scenario is one of first impression and transform it into a "concession" that Respondents will be "vindicated." Br., 43.

CONCLUSION

For the reasons set forth above, Chipotle respectfully requests that this Court affirm the Order and hold Respondents in contempt.

Dated: July 6, 2018

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 6, 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 all counsel of record will be accomplished by the CM/ECF system.

/s/ Kendra N. Beckwith
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CERTIFICATE OF COMPLIANCE

This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and 5th Cir. R. 32.2 because this brief contains 12,990 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f) and 5th Cir. R. 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 the brief has been prepared in a proportionally spaced typeface using Microsoft Word 2013, Times New Roman 14-point font.

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