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

BRIEF FOR RESPONDENTS-APPELLANTS CARMEN ALVAREZ AND HER COUNSEL

Matthew S. Hellman
Counsel of Record
Benjamin M. Eidelson
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000 – Telephone
(202) 639-6066 – Fax
mhellman@jenner.com

Counsel for Respondents-Appellants

May 22, 2018

CERTIFICATE OF INTERSTED PERSONS

State of Nevada, et al v. LABR, 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; Glen D. Savits
2. Law Firms In Which Respondent-Appellant Attorneys Are Members: Cohen Milstein Sellers & Toll PLLC; Outten & Golden LLP; Green Savits LLC
3. Petitioners-Appellees: Chipotle Mexican Grill, Inc.; Chipotle Services, L.L.C.
4. Counsel for Respondents-Appellants: Jenner & Block LLP (Matthew S. Hellman, Benjamin M. Eidelson)
5. Counsel for Petitioners-Appellees: Messner Reeves LLP (Kendra N. Beckwith, John K. Shunk); Cantey Hanger LLP (Laura Hilton Hallmon, Brian Carl Newby)

/s/ Matthew S. Hellman
Matthew S. Hellman

Counsel for Respondents-Appellants

STATEMENT REGARDING ORAL ARGUMENT

Respondents-Appellants respectfully request oral argument. This case implicates several questions of fundamental importance regarding the injunctive powers and personal jurisdiction of federal district courts. Indeed, in the course of granting a stay pending appeal, the district court observed that "there are serious legal questions involved in th[is] case," and that the decision below "bears consequences for the relationship between the federal government and the American people and for the welfare of anyone seeking to enforce a federal agency's rule under similar circumstances." ROA.5565, 5570. Oral argument will illuminate the positions of the parties and aid the Court in resolving these important issues.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES

STATUTES

RULES

OTHER AUTHORITIES

JURISDICTIONAL STATEMENT

Respondents-Appellants Carmen Alvarez and her Counsel ("Respondents") appeal from the district court's March 19, 2018 order (ROA.4958-84) holding them in contempt, ordering them to withdraw certain allegations in another pending lawsuit, and requiring them to pay attorney's fees incurred by Petitioners-Appellees Chipotle Mexican Grill and Chipotle Services (collectively, "Chipotle") in the contempt proceeding. The district court asserted jurisdiction based on Chipotle's motion for contempt. Respondents timely filed their notice of appeal from the district court's order on March 20, 2018. ROA.4985.

This Court has appellate jurisdiction under 28 U.S.C. § 1291. *See Petroleos Mexicanos v. Crawford Enters., Inc.*, 826 F.2d 392, 398 (5th Cir. 1987) ("[A] contempt decision's finality and appealability is composed of two parts: (1) a finding of contempt, and (2) an appropriate sanction for that contempt."); *Thornton v. Gen. Motors Corp.*, 136 F.3d 450, 453-54 (5th Cir. 1998) (explaining that when a district court imposes both an immediate sanction and an unquantified attorney's fee award, this Court has appellate jurisdiction over both if the issues are "intertwined"). Because the district court's order "grant[s] . . . [or] modif[ies]" an injunction, this Court may exercise jurisdiction under 28 U.S.C. § 1292 as well. 28 U.S.C. § 1292(a)(1); *see In re Seabulk Offshore Ltd.*, 158 F.3d 897, 899 & n.2 (5th Cir. 1998).

STATEMENT OF ISSUES PRESENTED FOR REVIEW

This appeal concerns the district court's extraordinary and concededly unprecedented use of the contempt power to dictate the legal arguments that a stranger to that court may advance in another federal court. Specifically, the appeal presents the following issues:

1. Whether the district court erred in exercising personal jurisdiction over Respondents, who are nonparties to this case, and then holding them in contempt of the preliminary injunction entered in this case, all on the basis of allegations that Respondents made in an unrelated action in the U.S. District Court for the District of New Jersey.
2. Whether the district court erred in ordering Respondents to withdraw their relevant allegations in the New Jersey action.
3. Whether the district court erred in ordering the Respondent attorneys to pay Chipotle's fees in connection with the contempt proceeding below.

STATEMENT OF THE CASE

In *Nevada v. United States Department of Labor*, 218 F. Supp. 3d 520 (E.D. Tex. 2016), the court below preliminary enjoined the Department of Labor (DOL) from implementing or enforcing the "Overtime Rule," a revised definition for a statutory exemption from overtime requirements in the Fair Labor Standards Act (FLSA). It is undisputed that neither Respondents nor Chipotle were parties to that

case. Nonetheless, in the decision below, the district court granted Chipotle's request to hold Respondents in contempt of the *Nevada* injunction because—in an unrelated case against Chipotle in another court in a different circuit—Respondents alleged that the Overtime Rule provided the relevant standards for a private FLSA action. The court reached this result by deeming Respondent Alvarez and all other U.S. workers to be "in privity" with DOL, an unprecedented holding that the district court conceded "bears consequences for the relationship between the federal government and the American people." ROA.5570. Relying solely on this new theory of "privity"—which contravenes decades of settled law—the court punished Ms. Alvarez and her counsel for urging a different court to adopt a legal theory that the court below disliked.

I. The *Nevada* Injunction

The FLSA requires employers to pay their employees overtime, but it exempts certain classes of workers from this protection. *See* 29 U.S.C. § 213(a). One carve-out, known as the "white-collar" exemption, covers employees who are "employed in a bona fide executive, administrative, or professional capacity . . . as such terms are defined and delimited from time to time by regulations of the Secretary [of Labor], subject to the provisions of [the Administrative Procedure Act (APA), 5 U.S.C. §§ 551 *et seq*.]." 29 U.S.C. § 213(a)(1). DOL has defined the white-collar exemption in various ways over nearly a century. *See* ROA.3826-27. In recent years, the

exemption has been defined to cover only employees who both perform certain duties (the "duties test") and earn more than a certain salary (the "salary test"). In May 2016, DOL promulgated a new final rule ("the Overtime Rule") to raise the threshold for the salary test, entitling all qualifying employees who earn less than $47,476 to overtime. *See* Defining and Delimiting the Exemptions for Executive, Administrative, Professional, Outside Sales and Computer Employees, 81 Fed. Reg. 32,391 (May 23, 2016). The Overtime Rule had an effective date of December 1, 2016. *See id*. at 32,391.

In September 2016, a group of States led by Nevada filed suit against DOL and certain DOL officials, alleging that the Overtime Rule was unlawful on various grounds. *See* ROA.50-79. A few weeks later, the States sought a preliminary injunction that would "enjoin the Department from implementing [the Overtime Rule]." ROA.3839.[1] In November 2016, the district court granted that motion, concluding that DOL's interpretation of the white-collar exemption was foreclosed by the statute's text and that the States had adequately demonstrated irreparable harm in the form of compliance costs and likely disruption to "governmental programs

[1] Because several business groups had also challenged the Overtime Rule, the district court consolidated the two cases and treated the business groups' summary judgment motion as an "amicus brief" in support of the States' preliminary injunction motion. ROA.3828.

and services." ROA.3837-40. The court also determined that "[a] nationwide injunction [was] proper in this case." ROA.3842. Accordingly, the court entered the following injunction:

> Therefore, the 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. Neither Chipotle nor Respondents were parties to or participated in any way in the litigation giving rise to that preliminary injunction.[2]

II. The *Alvarez* Action

In June 2017, Respondent Carmen Alvarez, a former Chipotle employee who worked in New Jersey, filed a complaint against Chipotle in the U.S. District Court for the District of New Jersey, seeking compensation for unpaid overtime pursuant to the FLSA's provision for private damages suits. ROA.4070-94; *see* 29 U.S.C. § 216(b). She alleged (through her attorneys, the other Respondents here) that the Overtime Rule provided the relevant definition of the white-collar exemption after

[2] Nine months later, in August 2017, the court entered a final judgment in favor of the State plaintiffs and declared the Overtime Rule "invalid." ROA.4373-74. The appeal of that judgment remains pending in this Court and has been stayed pending the outcome of a new rulemaking. *See* Order, *Nevada v. U.S. Dep't of Labor*, No. 17-41130 (5th Cir. Nov. 6, 2017), Doc. 00514226422. The contempt finding at issue here was predicated solely on an alleged violation of the preliminary injunction. *See* ROA.4968, 4978.

the rule's December 2016 effective date, and that she was not an exempt employee under that definition because she earned less than $47,476 annually. ROA.4075-80 ¶¶ 23, 32, 38. Ms. Alvarez also alleged that she was entitled to overtime under the separate "duties test," which was unaffected by the Overtime Rule. ROA.4082 ¶ 50; *see supra*, at 4. And Ms. Alvarez sought to represent a collective of similarly situated Chipotle workers in New Jersey as well. ROA.4084 ¶ 61; *see* 29 U.S.C. § 216(b).

Ms. Alvarez forthrightly acknowledged the *Nevada* case in her complaint, explaining that, before the Overtime Rule went into effect, "the United States District Court for the Eastern District of Texas preliminarily enjoined the Department of Labor and its officials from 'implementing and enforcing' the Overtime Rule." ROA.4078 ¶ 31. But she contended that, because the *Nevada* court had not vacated the Overtime Rule or stayed its effective date under the APA, the rule itself had still taken effect, according to its terms, on December 1, 2016. *See id.* ¶ 32; *see also* 5 U.S.C. § 705 (granting a reviewing court the power "to postpone the effective date of an agency action" under certain circumstances). Thus, Ms. Alvarez alleged, the FLSA's statutory white-collar exemption began to incorporate the new regulatory definition automatically in December 2016, and Chipotle was obliged to comply with it at that time. *See* ROA.4078-79 ¶¶ 32-33; *see also* 29 U.S.C. § 213(a)(1) (providing that overtime exemptions shall have the meaning "defined and delimited

from time to time by regulations of the Secretary"). And therefore, Ms. Alvarez alleged, the Overtime Rule's new salary threshold furnished the relevant standard in *private suits for damages* under the FLSA, even though *DOL* was enjoined from taking any further actions to enforce or implement the new requirements. ROA.4078 ¶ 33. Chipotle answered that, in its view, the *Nevada* order prevented the Overtime Rule from ever "becom[ing] effective" at all. *See* Answer ¶¶ 22-23, *Alvarez v. Chipotle*, No. 2:17-cv-4095 (D.N.J. July 26, 2017), ECF No. 5.

III. The Contempt Proceeding

Rather than simply leaving that dispute over the merits of Ms. Alvarez's liability theory to the district court in New Jersey, Chipotle turned to the court below—which it evidently deemed a more friendly forum—and asked it to hold Respondents in *contempt* of the *Nevada* injunction. ROA.4043-65. Chipotle did not serve Respondents with a summons or obtain a show-cause order, and it conceded that neither it nor Respondents were parties to the *Nevada* case. Nonetheless, Chipotle claimed that Ms. Alvarez was bound by the *Nevada* injunction because DOL had "represented [her] interests," and that the district court therefore could and should "punish" Ms. Alvarez and her lawyers for invoking the Overtime Rule in their New Jersey FLSA lawsuit. ROA.4044. Respondents countered that the district court lacked personal jurisdiction over them; that the *Nevada* injunction did not bind them under Rule 65(d) of the Federal Rules of Civil Procedure; and that the *Nevada* injunction

said nothing about the filing of private FLSA lawsuits anyway. Respondents also submitted uncontradicted declarations attesting that Ms. Alvarez's attorneys had not in any way coordinated or acted in concert with the federal defendants in the *Nevada* case. ROA.4937, 4940.

At the hearing on Chipotle's contempt motion, the district court repeatedly admonished Respondents for perceived disobedience of its order and flatly rejected their argument that the merits of their lawsuit should be left to the U.S. District Court for the District of New Jersey to resolve. *See, e.g.*, ROA.5390 ("I'm the one that gets to decide that and whether they violated [the injunction] or not, not a judge in New Jersey."); ROA.5396 ("I don't care what the New Jersey Court does."). The court also remarked several times that Respondents "are the only people in the entire country" who doubted whether the *Nevada* injunction "stopped the rule from going into effect, period." ROA.5391; *see* ROA.5392, 5394.

The court ultimately invited Respondents to "come up with some evidence to show that other people" shared their reading of the *Nevada* order and predicted "you'll have a hard time finding any such evidence." ROA.5429-30; *see* ROA.5454 ("I can't wait. I'll wait with bated breath to see the list."). In response, Respondents offered the declarations of three distinguished professors of civil procedure and administrative law whom they had consulted before filing suit—all of whom had concluded that relying on the Overtime Rule in the New Jersey action did *not* run

afoul of the *Nevada* injunction. *See, e.g.*, ROA.4928 (declaration of Professor David Vladeck) ("Having reviewed the preliminary injunction, I informed counsel that it was my view—based on my legal expertise—that the [Overtime] Rule went into effect on December 1, 2016, but that the Department of Labor was enjoined from enforcing the Rule."); *see also* ROA.4930-31 (declaration of Professor Alan Morrison); ROA.4933-34 (declaration of Professor David Marcus).

On March 19, 2018, the district court granted Chipotle's motion and held Respondents in contempt. ROA.4955-57. The court reached that unprecedented result in four steps. First, the court simply ignored Respondents' argument that it lacked personal jurisdiction because the bedrock due-process requirements of *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), were unmet. Second, conceding that a "scarcity of precedent" had "complicated the Court's contempt analysis," the court offered an unheard-of new theory of "privity"—one under which Ms. Alvarez was bound in personam by the *Nevada* injunction because "DOL and agencies like it represent the public at large." ROA.4977. Third, the court found it "wholly unambiguous" that its injunction proscribed the filing of private lawsuits invoking the Overtime Rule—even though the court's order made no mention of private litigation—and dismissed the evidence that others had interpreted the order differently (evidence the court had solicited) as "irrelevant." ROA.4980. And fourth, the court

concluded that, although Chipotle's service of process on Respondents was "imperfect," this defect could be ignored because Respondents had not proven that they were "actually prejudiced." ROA.4967.

Having found Respondents in contempt, the court ordered them to "withdraw their allegations" concerning the Overtime Rule "within seven days." ROA.4982. The court also purported to "affirm" that the *Nevada* injunction "(1) applies to Alvarez and to all proposed plaintiffs similarly situated to her and (2) bars her from enforcing the [Overtime Rule] on behalf of herself and on behalf of all others similarly situated to her." ROA.4982. The court denied Respondents' request that it limit any contempt finding to the attorneys with decisionmaking authority in the New Jersey action and instead imposed the sanction on junior attorneys and local counsel as well, explaining that "a lawyer should know that signing his or her name to a document has consequences." ROA.4981. Finally, after faulting Respondents for allegedly failing to "obey its order[ ]" and "dismiss[ing] the Injunction's bearing on them," the court agreed with Chipotle that the Respondent attorneys should be forced to pay Chipotle's fees for the contempt proceeding as well. ROA.4982-83. Because Respondents "should have known [their position] was unwarranted in fact or law," the court said, their conduct was "reckless" and hence sanctionable under 28 U.S.C. § 1927. ROA.4983.

IV. The Stay Order

On March 20, 2018, the day after the contempt order issued, Respondents moved for a stay pending appeal, reprising their arguments regarding personal jurisdiction, the scope of the court's injunctive authority, and the meaning of the *Nevada* injunction. ROA.4987-5008. Three days later, the district court granted an interim stay pending its consideration of Respondents' stay motion. ROA.5204.

On May 1, 2018, six weeks after issuing the contempt order, the court stayed the contempt order pending the resolution of this appeal. *See* ROA.5563-70. The stay order takes a far more tentative view of the issues disputed here than did the contempt order. Whereas the contempt order described the court's legal analysis as "common sense" and the underlying *Nevada* injunction as "wholly unambiguous," ROA.4977-79, the stay order "acknowledges that there are serious legal questions involved" and that "Respondents have made a substantial case on the merits." ROA.5565-66.

The stay order also concluded that the public interest favored a stay. As the court explained, "the primary issue presented on appeal—whether the third-party Respondents are subject to contempt for violating the Court's Injunction against the enactment and enforcement of a federal agency's rule—is serious to both the litigants and to the public at large." ROA.5570. The court went on to observe that "the Contempt Order's privity analysis has real consequences for real people: if other

citizens sue to enforce a federal agency's rule, which has been enjoined, they and their lawyers may also be held in contempt." *Id.* Accordingly, the court recognized that its contempt order "bears consequences for the relationship between the federal government and the American people and for the welfare of anyone seeking to enforce a federal agency's rule under similar circumstances." *Id.* In short, given the contempt order's significance and its undisputed novelty, even the district court agreed that the order should not take effect until reviewed by this Court.[3]

SUMMARY OF ARGUMENT

The district court held Respondents in contempt of its *Nevada* injunction—even though they are total strangers to the *Nevada* litigation—because the court disagrees with claims they advanced in another forum about the legal status of the Overtime Rule. There is no precedent for using the contempt power in this way—that is, as a source of authority to reach across the country and dictate the legal theories an unrelated plaintiff may raise against an unrelated defendant in an unrelated forum. Indeed, with due respect to the district court, its decision defies numerous foundational constraints on the jurisdiction and coercive authority of federal courts. And far from justifying the district court's extraordinary order, the notion that the federal government is somehow in "privity" with tens of millions of Americans—

[3] The *Alvarez* action in New Jersey has also been stayed pending the disposition of this appeal. *See* Order, *Alvarez v. Chipotle*, No. 2:17-cv-4095 (D.N.J. May 8, 2018), ECF No. 37.

such that *each* could be held in contempt by the court below—marks a radical and profoundly troubling departure from settled principles in its own right.

The bottom line in this case is simple: Whether or not Respondents' legal theory in the *Alvarez* case is correct, they are plainly entitled to make arguments in one court about the effect of a foreign court's order without fear of being punished or subjected to coercive mandates by that foreign court. Likewise, the U.S. District Court for the District of New Jersey is surely entitled to supervise and resolve litigation pending before it without another court intervening to police the claims the plaintiff may plead or the arguments she may raise for the New Jersey court's consideration.

More specifically, reversal is warranted for three principal reasons.

First, the district court lacked personal jurisdiction over Respondents. To exercise jurisdiction under the Texas long-arm statute and the Due Process Clause, the district court was required "to conclude, first, that [Respondents] ha[ve] purposefully established 'minimum contacts' with the forum state and, if so, that entertainment of the suit against [Respondents] would not offend 'traditional notions of fair play and substantial justice.'" *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990) (citation omitted). But the district court did not make—and could not have made—either finding. Respondents have no relevant contacts with Texas at all. Nor does it comport with any "traditional notions of fair play and substantial justice" to require

Ms. Alvarez and her lawyers to defend themselves in the Eastern District of Texas for the perceived offense of invoking the Overtime Rule in a private lawsuit against her employer in New Jersey. Accordingly, the court had no authority to hale Respondents before it, much less to issue coercive orders to them. And even if the Court could in principle have exercised personal jurisdiction over Respondents, the failure to serve Respondents with any court-issued process would vitiate that jurisdiction in any event.

Second, the *Nevada* injunction does not bind Respondents under the Federal Rules of Civil Procedure and the fundamental due process principles underlying them. Under Rule 65(d)(2), an injunction "binds *only* the following" enumerated persons: (A) the parties to the case; (B) their "officers, agents, servants, employees, and attorneys"; and (C) "other persons who are in active concert or participation with anyone" in one of the prior two categories. Fed. R. Civ. P. 65(d)(2) (emphasis added). None of these three criteria is met here—and, once again, the district court did not make any finding to the contrary. Most notably, the court made no finding that Respondents actually acted in concert with DOL. Instead, the court reasoned that Respondents are in "privity" with DOL because "the DOL and agencies like it represent the public at large." ROA.4969, 4977. This theory of "privity" has no basis in this Court's cases applying Rule 65(d)(2)—and it has alarming consequences. Under the district court's logic, every nationwide injunction against the

federal government would apparently be binding, in personam, against each of the tens or even hundreds of millions of Americans that the relevant arm of the government purports to serve. And, pursuant to the district court's apparent jurisdictional holding, all of those individuals would automatically be subject to the personal jurisdiction of the issuing court, such that each could be held in contempt and disciplined for perceived noncompliance. The Federal Rules do not give a single district judge that extraordinary power, and for good reason.

Third, in any event, the *Nevada* injunction did not actually prohibit Respondents from pursuing their allegations in New Jersey. As the district court acknowledged, a person can be found in contempt only "when he violates a *definite and specific order* of the court requiring him to perform or refrain from performing a *particular* act or acts." ROA.4978 (quoting *SEC v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 669 (5th Cir. 1981) (emphasis added)). Here, the *Nevada* injunction did not say a word about private damages actions invoking the Overtime Rule, much less "definitely" and "specifically" prohibit them. Nothing in the *Nevada* order put Respondents on notice that they could not advance their own interpretation of that order and its legal consequences (whether correct or incorrect) in another court in a suit against a fellow nonparty. Thus, even apart from its other defects, the district court's order holds Respondents in contempt of a nonexistent prohibition.

For all of these reasons, the contempt order should be reversed. And for similar reasons, detailed below, the award of attorney's fees against the Respondent attorneys should be reversed as well.

STANDARD OF REVIEW

Personal Jurisdiction. "This Court reviews de novo the district court's determination regarding personal jurisdiction." *Trois v. Apple Tree Auction Ctr., Inc.*, 882 F.3d 485, 488 (5th Cir. 2018) (quotation marks omitted).

Contempt. This Court "review[s] contempt findings for abuse of discretion," but that "'review is not perfunctory.'" *Hornbeck Offshore Servs., L.L.C. v. Salazar*, 713 F.3d 787, 792 (5th Cir. 2013) (citation omitted). "Facts found by the district court will be accepted as true unless clearly erroneous, but 'the interpretation of the scope of the injunctive order is a question of law to be determined by the independent judgment of this Court.'" *Id.* (citation and alteration omitted). Likewise, the district court's "underlying conclusions of law" are "reviewed *de novo*." *Am. Airlines, Inc. v. Allied Pilots Ass'n*, 228 F.3d 574, 578 (5th Cir. 2000). And the abuse-of-discretion standard is further counterbalanced by the heightened burden of persuasion in contempt cases: To justify a contempt finding, Chipotle was required to "establish[ ] by *clear and convincing evidence*: 1) that a court order was in effect, 2) that the order required certain conduct by the respondent, and 3) that the respondent failed to comply with the court's order." *Id.* at 581 (quotation marks omitted; emphasis added).

Attorney's Fees. This Court reviews an award of attorney's fees under 28 U.S.C. § 1927 for abuse of discretion as well. *See Travelers Ins. Co. v. St. Jude Hosp. of Kenner, La., Inc.*, 38 F.3d 1414, 1416 (5th Cir. 1994). "A district court abuses its discretion if it awards sanctions based on an erroneous view of the law or on a clearly erroneous assessment of the evidence." *Procter & Gamble Co. v. Amway Corp.*, 280 F.3d 519, 526 (5th Cir. 2002) (quotation marks omitted).

ARGUMENT

I. The District Court Lacked Personal Jurisdiction Over Respondents.

A. The Due Process Clause And The Texas Long-Arm Statute Prohibit The Exercise Of Jurisdiction Here.

First, and most fundamentally, the district court lacked personal jurisdiction over Respondents. As this Court has explained, "Federal Rule of Civil Procedure 4(k)(1)(A) provides personal jurisdiction over any defendant who would be subject to personal jurisdiction under the long-arm statute of the state in which the district court sits." *ITL Int'l, Inc. v. Constenla, S.A.*, 669 F.3d 493, 497 (5th Cir. 2012). Here, "[b]ecause Texas's long-arm statute extends personal jurisdiction to the constitutionally permissible limits of due process, the determination of personal jurisdiction compresses into a due process assessment." *Aviles v. Kunkle*, 978 F.2d 201, 204 (5th Cir. 1992) (citations omitted); *see Waffenschmidt v. MacKay*, 763 F.2d 711, 720 (5th Cir. 1985) (applying long-arm statute and due process analysis in a nonparty contempt case). Due process, in turn, "requir[es] federal courts seeking to

exercise personal jurisdiction over nonresident defendants to conclude, first, that the defendant has purposefully established 'minimum contacts' with the forum state and, if so, that entertainment of the suit against the nonresident would not offend 'traditional notions of fair play and substantial justice.'" *Bullion v. Gillespie*, 895 F.2d 213, 216 (5th Cir. 1990) (quoting *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945)).

Neither element of this test is satisfied here. First, Respondents have no relevant contacts with Texas at all—and neither Chipotle nor the district court has suggested that they do. Second, requiring Respondents to defend themselves in the Eastern District of Texas because they made legal arguments about the effect of that court's order in a separate case in New Jersey does not comport with "traditional notions of fair play and substantial justice." *Id.* To the contrary, those traditional notions foreclose any suggestion that litigants who make arguments in one court about the meaning or consequences of a second court's order thereby subject themselves to the second court's jurisdiction. And traditional norms of fair play likewise foreclose the notion that litigation involving the federal government inherently extends a court's personal jurisdiction to the many millions of Americans the government agency purports to serve. As this Court has explained, "[i]n order for an exercise of personal jurisdiction to be consistent with due process, the nonresident defendant must have some minimum contact with the forum *which results from an*

affirmative act on the part of the nonresident." *Holt Oil & Gas Corp. v. Harvey*, 801 F.2d 773, 777 (5th Cir. 1986) (emphasis added). The district court's exercise of personal jurisdiction over Respondents was therefore improper.

The closest the court came to discussing the due process limits on its jurisdiction was its mention of *Waffenschmidt v. MacKay*, 763 F.2d 711 (5th Cir. 1985), in which this Court held that "[n]onparties 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*." *Id.* at 714 (emphasis added); *see* ROA.4962. But the district court made no finding that Respondents "aid[ed] and abet[ted]" any party to the *Nevada* case in violating any order. They did not. *See* ROA.4937, 4940 (Respondents' uncontradicted declarations). Moreover, because this is a contempt proceeding, any contrary finding would need to be supported by "clear and convincing evidence," which is wholly absent here. *Waffenschmidt*, 763 F.2d at 724.

In fact, *Waffenschmidt* underscores that the exercise of jurisdiction here is untenable. *Waffenschmidt* approved the exercise of personal jurisdiction because the nonparties "participated in [a party's] scheme to dissipate the funds" at issue, and thereby "subjected themselves to the jurisdiction" of the district court. *Id*. at 717. The Court explained that this single "contact" with Mississippi—i.e., intentionally "dissipating assets subject to marshalling in that forum"—sufficed to "satisfy the

due process requirements as announced in *International Shoe* and its progeny." *Id.* at 722-23. But unlike the contemnors in *Waffenschmidt*, Respondents have taken no action with any effect on any person or asset in Texas. All they did was file a lawsuit against another nonparty in New Jersey, seeking compensation for work performed in New Jersey. Put another way, the *Waffenschmidt* contemnors could "reasonably anticipate that they would have to justify their actions to the court in Mississippi or suffer contempt remedies." *Id.* at 721; *see Holt Oil*, 801 F.2d at 777 (nonresident's "conduct and connection with the forum state must be such that he should reasonably anticipate being haled into court in the forum state"). But Respondents surely could not anticipate that they would be held accountable to a court in Texas for bringing an independent lawsuit in New Jersey.

Two other aspects of *Waffenschmidt*'s analysis undercut the district court's assertion of jurisdiction here as well. First, *Waffenschmidt* held that one of the three alleged contemnors in that case, a bank, was *beyond* the district court's jurisdiction, precisely because the bank did not knowingly act as the enjoined defendant's "agent." *See* 763 F.2d at 726 ("When the court found that the Bank failed to act as [the defendant's] agent, it could not exercise jurisdiction over the Bank."). Similarly, *Waffenschmidt* explained that the facts presented by the other two contemnors (who were subject to the court's jurisdiction) were "clearly distinguishable" from those of *Heyman v. Kline*, 444 F.2d 65 (2d Cir. 1971)—a case in which, as this Court

put it, "a nonparty assert[ed] an *independent interest* in the subject property and [wa]s *not merely acting on behalf of* the defendant." *Waffenschmidt*, 763 F.2d at 717-18 (emphasis added). This case resembles *Heyman* far more closely than it resembles *Waffenschmidt*: Respondents are not "merely acting on behalf of" DOL, and their interest in prosecuting Ms. Alvarez's FLSA claim is based on Ms. Alvarez's own interests, not DOL's. *Id.* Thus, *Waffenschmidt* is not only distinguishable; it preemptively distinguished itself from cases like this one. And this Court's later case-law has reaffirmed that, under *Waffenschmidt*, a district court has personal jurisdiction to enforce an injunction against a nonparty only if she "(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 v. Ryan*, 960 F.2d 543, 546 (5th Cir. 1992) (emphasis added).

In sum, *Waffenschmidt* held that a genuine principal-agent or aiding-and-abetting relationship with an enjoined party can constitute the contact with the forum required by due process, but that the exercise of jurisdiction over nonparties is improper in the absence of such a relationship. Here, as explained above, the district court found no such relationship (because there is none to find). The court thus lacked personal jurisdiction over Respondents.

B. Respondents Were Not Adequately Served With Process.

Even if the district court could in principle have exercised jurisdiction over Respondents, the failure to properly serve Respondents with process would independently bar such an exercise of jurisdiction here. As this Court has explained, "[t]o acquire jurisdiction over the person, a court must serve on the person a document, 'such as a summons, notice, writ, or order.'" *McGuire v. Sigma Coatings, Inc.*, 48 F.3d 902, 907 (5th Cir. 1995) (citation omitted); *see, e.g.*, *Waffenschmidt*, 763 F.2d at 715 (court issued a show cause order to alleged nonparty contemnors). It is undisputed that Respondents were *not* served with a summons or similar court-issued process (such as a show cause order) here. Rather, as Chipotle itself explained below, the clerk of the district court specifically refused to issue summonses in connection with Chipotle's contempt motion. ROA.4383; *see* ROA.4400. Rather than directing the clerk to do so, the district court elected to simply proceed with the contempt hearing and decide Chipotle's motion without issuing a show-cause order or otherwise ensuring proper service on Respondents. As a result, the court failed to acquire personal jurisdiction.

In the contempt order, the district court reasoned that the failure to serve Respondents with process was immaterial because (1) they had "notice" of the contempt proceeding, and (2) they did not prove "actual[ ] prejudice[ ]" from the concededly "imperfect service." ROA.4967. Even if true, both of those facts are

irrelevant under the governing law. As the Supreme Court has made clear: "Before a federal court may exercise personal jurisdiction over a defendant, 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) (emphasis added); *see* Fed. R. Civ. P. 4(c)(1). Contrary to the district court's assumption, there is no "harmless error" exception to this rule. *See, e.g., Freedom Watch, Inc. v. Org. of the Petroleum Exporting Countries*, 766 F.3d 74, 81 (D.C. Cir. 2014) ("notice … 'cannot by itself validate an otherwise defective service'" (quoting *Grand Entm't Grp. v. Star Media Sales*, 988 F.2d 476, 492 (3d Cir. 1993)).

To be sure, some courts have excused technical deficiencies in the *contents* of a summons. *See, e.g.*, *Sanderford v. Prudential Ins. Co. of Am.*, 902 F.2d 897, 900 (11th Cir. 1990) ("The only information omitted from the summons was the return date for the responsive pleading"). *But see Wells v. Ali*, 304 F. App'x 292, 295 (5th Cir. 2008) ("The requirements of Rule 4 [regarding service of a summons] are phrased in plainly mandatory language."). But neither Chipotle nor the district court has identified *any* case, let alone a case of this Court, permitting an order to stand against a person who was served with no court-issued process at all. Accordingly,

even if the district court could in theory have exercised personal jurisdiction here, it nonetheless failed to acquire jurisdiction over Respondents in fact.[4]

II. Respondents Were Not Bound By The *Nevada* Injunction.

A. The District Court Lacks Authority To Bind Respondents Under Rule 65(d)(2).

Federal courts do not have free-wheeling authority to bind people with injunctions. Rather, Rule 65(d)(2), entitled "*Persons Bound*," determines who may be bound by an injunctive order. Fed. R. Civ. P. 65(d)(2); *see Waffenschmidt*, 763 F.2d at 717; *see also Regal Knitwear Co. v. NLRB*, 324 U.S. 9, 13-14 (1945) (explaining that language in a court's order "of course may not enlarge its scope beyond that defined by the Federal Rules of Civil Procedure"). According to that rule, an injunction "binds *only* the following" enumerated persons: (A) the parties to the case; (B) their "officers, agents, servants, employees, and attorneys"; and (C) "other persons who are in active concert or participation with anyone" in one of the prior two categories. Fed. R. Civ. P. 65(d)(2) (emphasis added). Unless Respondents fall into one

[4] This Court has sometimes identified procedural defects in contempt orders, vacated them on that basis, and then proceeded to explain why they were unwarranted on the merits as well. *See Test Masters Educ. Servs., Inc. v. Robin Singh Educ. Servs., Inc.*, 799 F.3d 437, 456 (5th Cir. 2015); *Waste Mgmt. of Wash., Inc. v. Kattler*, 776 F.3d 336, 341 (5th Cir. 2015). In keeping with that approach, and in order to avoid any possible further proceedings below, Respondents respectfully suggest that, if the Court accepts Respondents' service-of-process argument, the Court should proceed to resolve Respondents' lead personal-jurisdiction argument or their merits arguments as well.

of those three sets, they cannot be in contempt of the *Nevada* injunction, because the order does not bind them in the first place.

None of these three criteria is met here—and the district court did not make any finding otherwise, let alone under the applicable clear-and-convincing standard. Respondents were not parties to the *Nevada* case, under subparagraph (A). They are not "agents" of a party to that case, under subparagraph (B). And they have not acted "in active concert or participation with" a party to that case, under subparagraph (C). *See supra*, at 19. That should have been the end of the matter.

The district court circumvented this straightforward logic in two steps. First, the court omitted any mention of Rule 65(d)(2)'s textual limitations in addressing whether Ms. Alvarez was bound by the *Nevada* injunction. Instead, it relied exclusively on an open-ended concept of "privity," which it drew from an out-of-context quotation of the Supreme Court's description of Rule 65(d)'s historical origins. *See* ROA.4969; *Regal Knitwear*, 324 U.S. at 14 (explaining that Rule 65(d) "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"). Second, the court then reasoned that Respondents are in "privity" with DOL because "DOL adequately represented [Respondents]" in the *Nevada* case. ROA.4974. That was so, the court

thought, because DOL argued in *Nevada* that the Overtime Rule would benefit millions of workers nationwide, and because it is "common knowledge among citizens that the DOL and agencies like it represent the public at large." ROA.4974, 4977. The court thus deemed DOL's purported "representation" of Ms. Alvarez sufficient to bind Respondents under Rule 65(d)(2) and hold them in contempt—even though DOL had not purported to litigate any claims belonging to Ms. Alvarez, and even though Respondents never in any way interacted with DOL in connection with either the *Nevada* litigation or their own lawsuit in New Jersey.[5]

This theory is as far-fetched as it is far-reaching. First of all, a vast body of case-law from the Supreme Court and this Court makes clear that a nonparty may be held in contempt under Rule 65(d)(2) only if she actually *acts in concert with* an enjoined party (as the text of the rule reflects). *See, e.g.*, *Zenith Radio Corp. v. Hazeltine Research, Inc.*, 395 U.S. 100, 112 (1969) ("a nonparty with notice cannot be held in contempt until shown to be in concert or participation"); *Golden State Bottling Co. v. NLRB*, 414 U.S. 168, 180 (1973) (a "relationship of dependence" between a nonparty and an enjoined party is a "requisite" for binding a nonparty);

[5] Below, Chipotle disavowed the "privity" theory on which the district court ultimately relied, contending instead that Ms. Alvarez is "identif[ied] in interest" with DOL. ROA.4445; *see* ROA.4968 n.5. Both formulations rest on the same purported "representation" of Ms. Alvarez's interests by DOL, and both fail for the same reasons.

Travelhost, Inc. v. Blandford, 68 F.3d 958, 962 (5th Cir. 1995) ("[Actions] by persons not participating with [the defendant] could not be in violation of a valid injunction entered by the district court."); *Parker*, 960 F.2d at 546 ("if a nonparty is not merely acting on behalf of the defendant, then rule 65(d) does not authorize jurisdiction over the party" (quotation marks omitted)); *Waffenschmidt*, 763 F.2d at 718 (same); *see also Whitcraft v. Brown*, 570 F.3d 268, 272 (5th Cir. 2009) ("[G]ood faith is relevant to whether a non-party knowingly aided or abetted another in violating a court order.").[6]

In addition to matching the rule's text, this longstanding interpretation of the rule also gives effect to the balance the rule was designed to strike. As the Supreme Court has explained, Rule 65(d) aims to ensure "that defendants may not nullify a decree by carrying out prohibited acts through aiders and abettors." *Regal Knitwear*,

[6] The law in other circuits is to the same effect. *See, e.g.*, *NBA Props., Inc. v. Gold*, 895 F.2d 30, 33 (1st Cir. 1990) (Breyer, J.) (explaining that nonparties cannot be in "'active concert or participation with'" parties if they are "legally separate persons" and "took no positive action 'aiding or abetting' [the parties]"); *Sheet Metal Contractors Ass'n of N. N.J. v. Sheet Metal Workers' Int'l Ass'n*, 157 F.3d 78, 83 (2d Cir. 1998) (explaining that Rule 65(d)(2)'s "'in active concert' language prevents non-parties from assisting [a] *party* to evade an order"); *Indep. Fed'n of Flight Attendants v. Cooper*, 134 F.3d 917, 920 (8th Cir. 1998) (reversing contempt finding because there was no evidence that the purported contemnor "acted in concert with [the enjoined party] to help her violate the district court's preliminary injunction"); *Reliance Ins. Co. v. Mast Const. Co.*, 84 F.3d 372, 377 (10th Cir. 1996) (explaining that Rule 65(d)(2) "encompasses those situations where a nonparty with actual notice aids or abets a named defendant or his privy in violating the order").

324 U.S. at 14. Just as important, however, the rule prohibits "injunctions so broad as to make punishable the conduct of persons who act independently and whose rights have not been adjudged according to law." *Golden State Bottling Co.*, 414 U.S. at 180 (quotation marks and alterations omitted). When (as here) a nonparty is not even alleged to be acting on behalf of any enjoined party, the interest in protecting a judgment from circumvention by a party does not apply at all, and the interest in protecting the rights of nonparties applies with full force.

A recent decision on which the district court relied helpfully crystallizes the very narrow circumstances in which a nonparty may be bound and held in contempt under Rule 65(d)(2). *See Nat'l Spiritual Assembly of Baha'is of U.S. Under Hereditary Guardianship, Inc. v. Nat'l Spiritual Assembly of Baha'is of U.S., Inc.*, 628 F.3d 837, 849 (7th Cir. 2010); ROA.4969-70. As the Seventh Circuit explained in that case, setting aside special rules for corporate successors-in-interest, a nonparty may be bound only in two circumstances: if she is an "aider[] and abettor[]," or if she is "legally identified with the enjoined party." 628 F.3d at 853. As to the latter category, the court repeatedly "emphasiz[ed] that due process requires an *extremely close identification*." *Id.* at 854 (emphasis added). When a party seeks to bind a "nonparty 'key employee'" of an enjoined entity, for example, due process will be satisfied only if the employee "had substantial discretion, control, and influence over the enjoined organization—both in general and with respect to its participation in

the underlying litigation." *Id.*; *see id.* at 853 (requiring "such significant control over the organization *and* the underlying litigation that it is fair to say that the nonparty had his day in court when the injunction was issued"). Under this demanding test, even a *high-ranking official of the Department of Labor* would not be bound by the *Nevada* injunction unless he or she personally exercised control over the *Nevada* litigation. Surely, then, Respondents, a private citizen and her counsel, cannot be bound either.

In addition to contravening settled law, the district court's proposed expansion of Rule 65(d)(2) would have staggering consequences. Every nationwide injunction against the federal government would apparently operate as an injunction against each of the tens or even hundreds of millions of people (and, often, corporate entities) that the relevant agency purports to serve—such that each of those nonparties could be held in contempt and disciplined for noncompliance with what the court believes to be the thrust of its order. This Court should not lightly embrace a legal theory that effectively empowers a single district judge to enjoin—and then potentially hold in contempt—tens of millions of nonparties throughout the country. *Cf. Int'l Union, United Mine Workers v. Bagwell*, 512 U.S. 821, 831 (1994) (explaining that the contempt power is "uniquely … liable to abuse" because "[c]ontumacy often strikes at the most vulnerable and human qualities of a judge's temperament" (internal quotation marks and alterations omitted)). These consequences of the district

court's theory are particularly remarkable set against the backdrop of the ongoing debate over the propriety of even nationwide injunctions that bind *only* the federal government.[7] Whether or not it is sometimes proper for a district court to enjoin the government's enforcement of a policy in all places and all cases, the new breed of injunction contemplated by the district court's order makes those controversial injunctions appear tame by comparison. Finally, and perhaps most troubling, threatening millions of people (and their lawyers) with contempt will chill the assertion of novel arguments to vindicate legitimate claims and impede the development of the law. *Cf. United States v. Mendoza*, 464 U.S. 154, 160 (1984) (rejecting a preclusion rule that "would substantially thwart the development of important questions of law by freezing the first final decision rendered on a particular legal issue"). For all of these reasons, in addition to being foreclosed by Rule 65(d)(2) and its longstanding judicial construction, the district court's theory is profoundly ill-advised.

B. The Governmental Preclusion Cases Cited By The District Court Are Irrelevant.

To support its theory that Ms. Alvarez is in "privity" with DOL, the district court appealed to decades-old cases concerning the scope of the claim-preclusive

[7] *See, e.g.*, Jeff Sessions, *Nationwide Injunctions Are a Threat to Our Constitutional Order*, National Review (Mar. 10, 2018), https://goo.gl/hQx1rD; Samuel L. Bray, *Multiple Chancellors: Reforming the National Injunction*, 131 Harv. L. Rev. 417 (2017).

effect of a judgment, and particularly to *Southwest Airlines Co. v. Texas International Airlines, Inc.*, 546 F.2d 84 (5th Cir. 1977). This reasoning wholly fails to justify the district court's contempt finding. First of all, preclusion is relevant only as a potential *defense in the Alvarez action*—a matter for the U.S. District Court for the District of New Jersey to resolve. The court below had no right to wrest that issue from the hands of the New Jersey court and decide a perceived preclusion question itself—much less through the expedient of punishing Respondents for asserting their claims at all. *See, e.g.*, *In re Jimmy John's Overtime Litig.*, 877 F.3d 756, 766 (7th Cir. 2017) ("the potential effect of one suit on [another] does not justify an injunction," because a preclusion defense in the second suit offers a "less drastic means" of addressing the same concern (internal quotation marks omitted)); *see also* 18 Charles Alan Wright et al., *Federal Practice and Procedure* § 4405.1, Westlaw (3d ed., updated Apr. 2018) (explaining that a court may bar litigation in another forum to protect the preclusive effect of its own judgment only when "defensive assertion of res judicata [is] found inadequate").

Even if preclusion law furnished the relevant standards here, however, the district court's preclusion theory also fails on its own terms. First, the Supreme Court has "rejected … unanimously" the "theory of 'virtual representation' based on 'identity of interests and some kind of relationship between parties and nonparties.'" *Smith v. Bayer Corp.*, 564 U.S. 299, 315 (2011) (citation omitted). And while the

district court noted the Supreme Court's statement that preclusion may apply when a nonparty was "adequately represented" in a prior suit, the court omitted the portion of the same sentence explaining that this is so only "in certain limited circumstances"—such as a "properly conducted class action" or a suit brought by a trustee. *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008) (internal quotation marks omitted); ROA.4970. The Supreme Court stressed this limitation again in *Smith*, explaining that nothing less than a duly certified class action would have the effect described in *Taylor*. *See Smith*, 564 U.S. at 312-16; *see also id.* at 312-13 ("A court's judgment binds only the parties to a suit, subject to a handful of discrete and limited exceptions. The importance of this rule and the narrowness of its exceptions go hand in hand." (citation omitted)). Indeed, long before *Taylor* and *Smith*, this Court emphasized that any "virtual representation" theory must be kept within "strict confines." *Benson & Ford, Inc. v. Wanda Petrol. Co.*, 833 F.2d 1172, 1175 (5th Cir. 1987) (quotation marks omitted). As an example of just "how narrowly" that preclusion theory had been construed, this Court pointed to *Freeman v. Lester Coggins Trucking, Inc.*, 771 F.2d 860 (5th Cir. 1985), which held that the same person was entitled to relitigate the same defendant's negligence for the same accident through the same lawyer so long as he was acting as a representative of a different family member in each case. *Benson & Ford*, 833 F.2d at 1175.

Second, the narrow theory of governmental preclusion applied in cases such as *Southwest Airlines* has no relevance here. Although governments sometimes "may represent private interests in litigation, precluding relitigation," *Southwest Airlines*, 546 F.2d at 98, that rule has always been limited to suits involving only common public rights. *See, e.g.*, *City of Tacoma v. Taxpayers of Tacoma*, 357 U.S. 320, 341 (1958) (unsuccessful state litigation to protect state-owned fishery resources was preclusive of citizens' successive litigation to protect those same resources). The rule does not operate to extinguish personal causes of actions for damages, such as are at issue here.[8]

Indeed, *Southwest Airlines* itself clearly explains the critical distinctions. In that case, the City of Dallas tried to enforce a local ordinance and ban Southwest Airlines from an airfield, but a federal court issued a declaratory judgment affirming the airline's right to remain. *Southwest Airlines*, 546 F.2d at 87-88. Other airlines then brought their own action seeking to bar Southwest's use of the airfield based on the same ordinance. *Id.* at 88. This Court enumerated three facts that together made it appropriate to preclude the second suit: (1) the airlines "d[id] not claim a

[8] In fact, extending the governmental preclusion theory to personal monetary claims would violate the well-established due process rights of those whose claims are extinguished, at least absent special procedural protections not present here. *See Taylor*, 553 U.S. at 897-98; *Richards v. Jefferson Cty.*, 517 U.S. 793, 803-05 (1996); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 811-12 (1985).

breach of legal duty by Southwest, apart from the alleged violation of the general duty to obey valid ordinances"; (2) they "request[ed] the same remedy denied" the government; and (3) the ordinance at issue "d[id] not establish a statutory scheme looking toward private enforcement." *Id*. at 100. As *Southwest Airlines* took pains to explain, however, the law *does* grant "[p]ermission to relitigate" to "the private plaintiff who would vindicate a breach of duty owed specifically to the plaintiff or who would recover under a statutory system of remedies that may contemplate enforcement of private interests both by a public agency and the affected private parties." *Id.* (internal quotation marks and alteration omitted). Thus, as an example of claims that are not precluded, the Court pointed to private employment discrimination suits under Title VII, which seek remedies for an employer's breach of "distinct legal duties owed individual employees." *Id.* at 98 (discussing *Rodriguez v. E. Tex. Motor Freight*, 505 F.2d 40, 65-66 (5th Cir. 1974), *vacated on other grounds*, 431 U.S. 395 (1977)).

Respondents' FLSA action is the opposite of *Southwest Airlines* in every respect this Court deemed relevant. Respondent Alvarez undeniably aims to vindicate a duty owed by Chipotle specifically to her; she seeks money damages never sought by the government; and she does so pursuant to a statutory scheme that specifically authorizes enforcement by private parties. *See* 29 U.S.C. § 216(b) ("Any employer who violates the provisions of section 206 or section 207 of this title shall be liable

to the employee or employees affected").[9] As *Southwest Airlines* recognized, such claims are not precluded by governmental litigation. 546 F.2d at 100; *see, e.g.*, *Sam Fox Publ'g Co. v. United States*, 366 U.S. 683, 689 (1961) (holding that "a person whose private interests coincide with the public interest in government antitrust litigation is nonetheless not bound by the eventuality of such litigation," because antitrust laws permit "private suits for injunctive relief or for treble damages"); *see also Benson & Ford*, 833 F.2d at 1176 (explaining that *Southwest Airlines* is irrelevant when a later-in-time plaintiff "pursues only its own cause of action to which it has a legal right"). Thus, even if preclusion law provided the relevant standards here, controlling principles of preclusion law make clear that the New Jersey action would not be precluded by the *Nevada* litigation anyway.

Finally, the district court's reliance on governmental preclusion is particularly odd because the government was the *defendant* in *Nevada*, and Chipotle was not a

[9] The district court appears to have thought that the FLSA protects only common public rights because—in legislative findings justifying the statute under the Commerce Clause—Congress described the law as promoting the "general well-being of workers." 29 U.S.C. § 202(a); *see* ROA.4976. Those findings are irrelevant. Indeed, the employment discrimination laws distinguished in *Southwest Airlines* have broad social objectives as well. *See Griggs v. Duke Power Co.*, 401 U.S. 424, 429 (1971) (the "objective of Congress in the enactment of Title VII … was to achieve equality of employment opportunities"). All that matters is that the FLSA, like Title VII, achieves its aims in part by creating enforceable legal duties owed by employers to their employees, rather than simply imposing compliance obligations owed to the government or the public at large.

party to the case at all. Precisely because Nevada and other States obtained a preemptive nationwide injunction against DOL enforcement of the Overtime Rule, DOL never initiated any litigation in its enforcement capacity on behalf of or against Ms. Alvarez, Chipotle, or anyone else. Unlike *Southwest Airlines* and similar cases, therefore, this case involves no attempt by "private parties [to] … relitigate to enforce an ordinance after the public body fails in its attempt to enforce the same ordinance." *Benson & Ford*, 833 F.2d at 1176 (describing *Southwest Airlines*). The logic of those cases plainly could not apply where, as here, Ms. Alvarez's rights were never asserted against Chipotle by any governmental entity in the first place.

For all of these reasons, the district court had no authority to bind Respondents to the *Nevada* injunction under Rule 65(d)(2), and Respondents cannot be held in contempt of that injunction. Likewise, the court had no authority to "affirm" in the decision below that the *Nevada* injunction "(1) applies to Alvarez and to all proposed plaintiffs similarly situated to her and (2) bars her from enforcing the Final Rule on behalf of herself and on behalf of all others similarly situated to her." ROA.4982. Aside from the fact that the preliminary injunction at issue has long since been superseded, *see supra*, at 5 n.2, the district court has no more power to bind Ms. Alvarez (or the millions of other employees "similarly situated" to her) today than it had when it entered the preliminary injunction in the first place.

III. The *Nevada* Injunction Did Not Clearly Bar The Filing Of Private Lawsuits.

Even if the *Nevada* injunction somehow bound Respondents under Rule 65(d)(2), Respondents *still* could not be in contempt of that order unless they "violate[d] a definite and specific" instruction embodied in it. *SEC v. First Fin. Grp. of Tex., Inc.*, 659 F.2d 660, 669 (5th Cir. 1981). This requirement flows from Rule 65(d)(1), which requires "[e]very order granting an injunction" to "state its terms specifically" and "describe in reasonable detail … the act or acts restrained or required." Fed. R. Civ. P. 65(d)(1). As the Supreme Court has explained: "Since an injunctive order prohibits conduct under threat of judicial punishment, basic fairness requires that those enjoined receive *explicit* notice of *precisely* what conduct is outlawed." *Schmidt v. Lessard*, 414 U.S. 473, 476 (1974) (emphasis added); *see also NBA Props., Inc. v. Gold*, 895 F.2d 30, 32 (1st Cir. 1990) (Breyer, J.) (stressing the "unbroken lines of authority that caution us to read court decrees to mean rather precisely what they say," and explaining that "we must read any ambiguities or omissions in such a court order as redounding to the benefit of the person charged with contempt" (internal quotation marks and alteration omitted)). Importantly, the district court is entitled to no deference with respect to its interpretation of the *Nevada* injunction under this standard. *See Hornbeck Offshore Servs.*, 713 F.3d at 792. What matters is not what the district court had in mind, but what third parties would definitely have understood the order to specifically prohibit.

Judged by that standard, the *Nevada* injunction did not bar Respondents from advancing their own legal claims based on the Overtime Rule. Indeed, it was not even clear that the *Nevada* order stopped the Overtime Rule from taking legal effect. To be sure, the court's order stated that it "enjoin[ed]" the Overtime Rule. ROA.3843. But, as the Supreme Court has explained, injunctions by definition run to people or other actors, not to rules or similar enactments. *See Nken v. Holder*, 556 U.S. 418, 428-29 (2009) (explaining that an injunction "is directed at someone, and governs that party's conduct," whereas a stay "temporarily suspend[s]" the underlying "order or judgment in question"). Thus, in keeping with the nature of injunctions, the *Nevada* court clarified in the very next sentence of its order that, "*[s]pecifically, Defendants* [i.e., DOL and its officials] are enjoined from *implementing and enforcing*" the Overtime Rule. ROA.3843 (emphasis added). It was not unreasonable for Respondents to interpret that sentence as reflecting the district court's recognition that the nature and proper function of an injunction is to bar some action by some actor, rather than to stay or vacate a legal enactment. In fact, another district court recently cited the *Nevada* injunction as a paradigm of an order barring a party's *enforcement* of a legal rule, and distinguished this form of remedy from depriving an enactment itself of its self-executing legal effects. *See Owen v. City of Portland*, 236 F. Supp. 3d 1288, 1297-98 (D. Or. 2017); *see also League of Women*

Voters of the U.S. v. Newby, 838 F.3d 1, 15 (D.C. Cir. 2016) (explaining that a "preliminary injunction did not vacate the [agency regulations], but merely prohibits [the agency] from giving them effect").

Furthermore, if the *Nevada* court intended to delay even the automatic legal effects of the Overtime Rule that are triggered by the FLSA's self-executing language, *see* 29 U.S.C. § 213(a)(1), the traditional means of doing so would have been to *stay* the rule under 5 U.S.C. § 705. *See, e.g., Texas v. U.S. EPA*, 829 F.3d 405, 435 (5th Cir. 2016) (staying a rule under § 705); *see also Abbott Labs. v. Gardner*, 387 U.S. 136, 156 (1967) (explaining proper procedure). But the court did not even cite § 705, much less indicate that it intended to invoke the special authority that statute confers. Thus, there were ample grounds to doubt that the *Nevada* order rendered the Overtime Rule itself legally inoperative.

Even if it were unambiguous that the injunction deprived the Overtime Rule of effect, however, that still would not be the same thing as unambiguously restraining would-be litigants, in personam, from making arguments or pursuing claims (whether meritorious or not) in other courts. It is indisputable that the text of the order did not "specifically" address private FLSA lawsuits, Fed. R. Civ. P. 65(d)(1)—and nonparties could therefore very reasonably fail to grasp that they were personally restrained from pursuing such a suit. *Cf. Hornbeck Offshore Servs.*, 713 F.3d at 793 (agency was not in contempt for reinstating an enjoined policy without

first obtaining a remand from the district court, because "[f]or [the agency] to have been in contempt, the injunction would have had to include an express or clearly inferrable obligation to petition for a remand"). Reading the order not to bar private suits is particularly natural in light of the "deep-rooted historic tradition" that "[a] judgment or decree among parties to a lawsuit … does not conclude the rights of strangers to those proceedings." *Martin v. Wilks*, 490 U.S. 755, 762 (1989). Furthermore, the evidence solicited by the district court demonstrates that three experts in civil procedure and administrative law did not understand the *Nevada* injunction to proscribe private lawsuits—no doubt in part because of that same deep-rooted tradition. *See* ROA.4926-34. The views of these scholars do not determine the order's meaning, but they further confirm that the order did not unambiguously cover Respondents' action or put them on fair notice that it was prohibited. *See, e.g.*, *Waste Mgmt. of Wash., Inc. v. Kattler*, 776 F.3d 336, 343 (5th Cir. 2015) (party did not "violate a definite and specific order of the court" in light of "the degree of confusion surrounding wh[at] the district court ordered"). Accordingly, even if the *Nevada* order were best read to suspend the effectiveness of the Overtime Rule—and hence to undercut the *merit* of the New Jersey action—there would still be no basis for

reading into the order a specific mandate that Respondents could not press a different, or even faulty, interpretation of that order against a fellow nonparty in another court.[10]

The district court suggested that its order clearly proscribed private lawsuits in part because it was framed as a "nationwide injunction." *See* ROA.4978 ("The Court's Order explained that it enjoined the Final Rule on a 'nationwide basis.'); ROA.4980 (similar); ROA.4983 (faulting Respondents for failing to "obey … a nationwide injunction"). But giving an injunction "nationwide" effect simply means that the enjoined parties (here, DOL and its officials) are required to comply with the order in all places and with regard to all persons—rather than only in certain judicial districts, or only with regard to the plaintiffs who brought the case. *See, e.g.*, *Texas v. United States*, 809 F.3d 134, 188 & n.211 (5th Cir. 2015), *aff'd by an equally divided Court*, 136 S. Ct. 2271 (2016). Making an injunction "nationwide" has never before meant expanding the set of *enjoined actors* to encompass millions

[10] The absence of clarity in the *Nevada* injunction is particularly problematic here for another reason. If the court had clearly indicated that it was asserting the authority to adjudicate and restrict Ms. Alvarez's personal rights—in a proceeding to which she was not a party—she could have sought to intervene in the *Nevada* case, either in the district court or on appeal, to protect those rights. It is no surprise that she did not, however, because the court below gave no indication (and background principles indicate it had no authority) to enjoin her from doing anything. It would be deeply unfair to now hold Ms. Alvarez in contempt of an order whose legal merits she had no realistic opportunity to litigate in the first place.

of strangers to the case throughout the entire country. Accordingly, the use of this language in the *Nevada* injunction certainly did not signal the intent that the district court now ascribes to it.

In sum, even if the district court had jurisdiction over Respondents, and even if Respondents were bound under Rule 65(d)(2), the fact remains that the *Nevada* injunction did not clearly proscribe the actions Respondents took. Reversal is warranted on this ground as well.

IV. The Award Of Attorney's Fees Should Be Reversed.

Finally, the district court also erred in ordering the Respondent attorneys to pay Chipotle's "fees and expenses tied to this contempt proceeding" under 28 U.S.C. § 1927. ROA.4983; *see* 28 U.S.C. § 1927 ("Any attorney … who so multiplies the proceedings in any case unreasonably and vexatiously may be required by the court to satisfy personally the excess costs, expenses, and attorneys' fees reasonably incurred because of such conduct."). The court based this order on a legal conclusion that Respondents "recklessly disregarded a duty owed to the Court—the long-standing and elementary duty to obey its orders." ROA.4983. As explained above, however, Respondents did *not* disobey any orders of the district court, and in fact the district court had no authority to issue any orders to them in the first place. *See supra*, at 24-42. Accordingly, the predicate for the fee award was legally erroneous, and the award cannot stand. Moreover, the district court lacked personal jurisdiction

to subject any of the Respondents to a fee award under § 1927, just as it lacked personal jurisdiction to hold them in contempt in the first place. *See supra*, at 17-24.

In any event, the fee award is independently defective on at least two additional grounds. *First*, the district court's finding of "bad faith, improper motive, or reckless disregard"—an indispensable predicate for a fee award under § 1927—is wholly unsupported. ROA.4982. The court cited no record evidence at all in support of that finding, and 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. *See* ROA.4937. Indeed, the district court itself has now acknowledged that Respondents have made a "substantial case on the merits" of their position in the contempt proceeding. ROA.5566. The court's earlier finding that Respondents "recklessly disregarded" a "long-standing and elementary duty" (ROA.4983) cannot be squared with its concession that Respondents may well be vindicated in their argument that they have done nothing wrong. *See Procter & Gamble Co.*, 280 F.3d at 525 ("Section 1927 only authorizes shifting fees that are associated with 'the persistent prosecution of a meritless claim.'" (citation omitted)); *see also Travelers Ins. Co.*, 38 F.3d at 1416 ("[I]n order not to dampen the legitimate zeal of an attorney in representing his client, § 1927 is strictly construed.").

Second, the district court improperly based its fee award *in this case* on the purported unreasonableness and vexatiousness of Respondents' conduct *in the New*

Jersey action. *See* ROA.4983 (asserting that Respondents acted unreasonably by "su[ing] to enforce the [Overtime] Rule" in New Jersey). Under the statute, the reasonableness of Respondents' choices in the New Jersey action is a matter solely for the U.S. District Court for the District of New Jersey. *See* 28 U.S.C. § 1927 (a person who acts unreasonably "in any case" may be required to pay fees by "the court," i.e., the court in that case). Thus, a fee award in this case could be justified only by a finding that Respondents acted unreasonably and vexatiously in the course of *defending the contempt proceeding*. The court made no such finding at all—nor could it have done so.

CONCLUSION

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

Dated: May 22, 2018

Respectfully submitted,

/s/ Matthew S. Hellman
Matthew S. Hellman
Counsel of Record
Benjamin M. Eidelson
JENNER & BLOCK LLP
1099 New York Ave. NW, Suite 900
Washington, DC 20001
(202) 639-6000 – Telephone
(202) 639-6066 – Fax
mhellman@jenner.com

CERTIFICATE OF SERVICE

I hereby certify that on May 22, 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 10,811 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