No. ____

In the
Supreme Court of the United States

John R. Behrmann and Nancy Behrmann,

Petitioners,

v.

Michael Goldstein, Christie Kennett, John T. Houk, II, Miriam M. Houk, John T. Houk, III, Janet H. Ridgely, Julie L. Houk, Robert Ben Kori & Associates, Congressional District Program, Inc., Charity Admin, Inc., Stellar Advisors, Inc., Stellar Financial, Inc., Stellar Technology Solutions, LLC, Stellar McKim, LLC, McKim Capital, Dana C. Fenton, Todd Thibodeaux, Jonathan M. Gill, Julia Weltmann, Robert H. Taggart and Husch Blackwell LLP,

Respondents.

On Petition for Writ of *Certiorari* to the United States Court of Appeals for the Fourth Circuit

PETITION FOR WRIT OF *CERTIORARI*

DANIEL JOSEPH SCHENDZIELOS
Trial Lawyers & Legal Services of Colorado, LLC
8547 East Arapahoe Road, Suite J534
Greenwood Village, Colorado 80112
(303) 330-1234
denverdaniel@gmail.com
Attorney for Petitioners

LEGAL PRINTERS LLC, Washington DC ● 202-747-2400 ● legalprinters.com

QUESTION PRESENTED

Can the doctrine of collateral estoppel be used "offensively" to bar the pursuit of an assigned claim where the assignor never litigated the claim or appeared before any court in pursuit of the claim prior to its assignment?

PARTIES TO THE PROCEEDING

Petitioners John R. Behrmann and Nancy Behrmann (the "Behrmanns") were the plaintiffs in the case below. The Behrmanns asserted claims both on behalf of themselves and on behalf of assignors who had assigned their claims to the Behrmanns. The Defendants are: Michael Goldstein, an individual; Christie Kennet, an individual; John T. Houk, II, an individual; Miriam M. Houk, an individual; John T. Houk, III, an individual; Janet H. Ridgely, an individual; Julie L. Houk, an individual; Robert Ben Kori & Associates, an entity whose corporate form is unknown; Congressional District Program Inc., a corporation; Charity Admin, Inc., a corporation; Stellar Advisors, Inc., a corporation; Stellar Financial Inc., a corporation; Stellar Technology Solutions, LLC, a limited liability company; Stellar McKim, LLC, a limited liability company; McKim Capital, a corporation; Dana C. Fenton, an individual; Todd Thibodeaux, an individual; Jonathan M. Gill, an individual; Julia Weltmann, an individual; Robert H. Taggart, an individual; and Husch Blackwell LLP, a limited liability partnership.

Pursuant to Supreme Court Rule 29.6, Petitioners certify that: (i) Neither of the Petitioners is a publicly held corporation or other publicly held entity, (ii) neither of the Petitioners is owned by a parent corporation, and (iii) Petitioners have not issued stock.

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

CASES Page

STATUTES

PETITION FOR WRIT OF *CERTIORARI*

Under 28 U.S.C. § 1254(1), Petitioners John R. Behrmann and Nancy Behrmann respectfully petition for a writ of *certiorari* to review the judgment of the United States Court of Appeals for the Fourth Circuit.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Fourth Circuit (**App. A-1**) is unreported. The Opinion of the United States District Court for the Eastern District of Virginia (the "District Court") (**App. A-7**) is unreported.

JURISDICTION

The judgment of the Fourth Circuit was entered on October 4, 2017. (**App. A-6**). The Fourth Circuit's Order denying the petition for rehearing was entered on November 28, 2017. (**App. A-20**). This appeal is timely under Supreme Court Rule 13(1) and 13(3) because it was filed within ninety days of the Fourth Circuit's denial of Petitioners' petition for rehearing. ***Id.*** The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

FEDERAL PROVISIONS INVOLVED

This case involves application of the doctrine of collateral estoppel.

STATEMENT OF THE CASE

This case tests the limits of the doctrine of collateral estoppel. More particularly, this case tests whether the doctrine of collateral estoppel can be used "offensively" to effect the dismissal of assigned claims which, prior to their assignment, were never litigated by their assignors.

John R. Behrmann and Nancy Behrmann (collectively, "the Behrmanns") are creditors of National Heritage Foundation, Inc. ("NHF"), a chapter 11 debtor. Subsequent to the confirmation of NHF's chapter 11 plan, the Behrmanns learned that they had been the victims of a massive fraudulent scheme aimed at duping the Behrmanns and others into contributing millions of dollars to NHF, purportedly for charitable purposes.

The Behrmanns' contributions, and those made by hundreds of others, were diverted. Instead of being used for charitable purposes, they were directed to for-profit, risky investments made to enrich the pockets of NHF's officers and directors. The fraudulent scheme, which stripped the Behrmanns of millions of dollars intended for charity, was perpetrated by NHF's officers and directors working in collaboration with a host of others, including financial advisors, fund managers and lawyers. Each of the Defendants played a role in the fraudulent scheme and was enriched by the scheme at the expense of the Behrmanns and the charities they had intended to benefit.

The Behrmanns' ability to pursue their claims against the Defendants was obfuscated by the NHF bankruptcy case and multiple stay orders entered during the NHF bankruptcy case. While those stay orders were in place, the Behrmanns pursued the claims they were capable of pursuing, including an adversarial proceeding against NHF's officers and directors in the NHF bankruptcy case and a California state court action against the financial advisors who had vigorously promoted NHF to the Behrmanns and advised the Behrmanns to place money with NHF. Both of those actions were dismissed for reasons that were highly unique and specific to the very narrow claims asserted in those proceedings.

When the bankruptcy stays were finally lifted, the Behrmanns asserted much broader and more comprehensive claims against all of the participants and promoters of the fraudulent scheme, to the extent the Behrmanns had become aware of their identities.

The Behrmanns asserted their claims both on behalf of themselves, and as the assignors of claims that had been assigned to them by dozens of assignors (the "Assignors") who had been similarly injured by the NHF fraudulent scheme.

The Behrmanns' claims, together with those of the Assignors, were dismissed by the District Court. The District Court reasoned that the Behrmanns did not hold a claim against *any* of the participants or promoters of the fraudulent scheme because the

Behrmanns' claims -- asserted against a small subset of the perpetrators of the scheme -- had been dismissed in a prior proceeding which was unique to that small subset.

The Bankruptcy Court's unprecedented expansion of the doctrines of collateral estoppel and *res judicata* finds no support in the prior holdings of this Court and impermissibly strips the Behrmanns of any right to pursue claims against the Defendants for perpetrating a massive scheme that defrauded the Behrmanns and Assignors from millions of dollars in charitable contributions.

REASONS FOR GRANTING THE PETITION

Petitioners respectfully request that a writ of *certiorari* be issued to review the Fourth Circuit's Opinion entered on October 4, 2017 (**App. A-1**) and corresponding Judgment (**App. A-5**) affirming the District Court's January 17, 2017 Order (**App. A-18**) dismissing the Behrmanns' claims pursuant to the doctrine of collateral estoppel.

Unless reversed, the lower courts' decisions result in a breathtaking expansion of the doctrine of collateral estoppel to a degree never previously authorized by this Court.

I. BACKGROUND FACTS

A. The NHF Fraudulent Scheme

NHF was a tax-exempt organization that solicited persons and entities nationwide to contribute money and property to NHF to establish "donor-advised funds" ("DAFs") using supposed "foundations" under NHF sponsorship and control. (**App. A-8**). NHF's officers and board of directors included John T. Houk, II, Marian Houk (his wife), John T. Houk, III (his son), Janet Ridgely (his daughter) and Julia L. Houk (his daughter-in-law). Additional officers and directors of NHF included Dana Fenton, Todd Thibodeaux and Jonathan Gill (collectively, the "Houk Defendants"). ***Id.***

These Defendants, along with others, designed and aggressively promoted a fraudulent "charitable giving" program. In overview, funds and property were solicited from contributors using false representations that the contributions would be used exclusively for charitable purposes. ***Id.*** However, the contributions extracted from the Behrmanns -- and scores of others -- were diverted from the intended charitable purposes. Instead, the contributions were re-channeled by Defendants for Defendants' personal opportunities, gain, profit and benefit. ***Id.***

Defendants appealed to charitable-minded contributors by publishing numerous material misrepresentations and by concealing material information. Among other things, this was implemented to induce Petitioners to entrust over $1 million to certain Defendants for the intended and agreed purpose of making future donations to charitable organizations and causes. (**App. A-9**). The contributions were then funneled (without Petitioners' knowledge or consent) to a host of speculative and risky for-profit loans and investments for Defendants' benefit. ***Id.*** The contributions were also used as collateral by some Defendants for commercial bank loans that funded the highly speculative investments that were concealed from Petitioners and the other contributors.

Based upon express representations that their contributions would only be used for charitable purposes, the Behrmanns established a DAF (called the "Highbourne Foundation") under NHF sponsorship and control, and contributed substantial property to Highbourne Foundation. (**App. A-8**). In connection with the establishment and funding of Highbourne Foundation, the Behrmanns retained and consulted the law firm of Husch & Eppenberger, LLP (n/k/a Husch Blackwell LLP) and its lawyers, Christie Kennett and Michael Goldstein (collectively, the "Husch Defendants"). (**App. A-9**).

However, without Petitioners' knowledge, NHF and the Houk Defendants provided compensation and other financial incentives to the Husch Defendants for drafting and communicating misleading legal memoranda designed to induce Petitioners to establish and contribute to Petitioners' Foundation. ***Id.*** Defendants concealed their unsavory connection from Petitioners who, had they known the full and truthful set of circumstances would not have established Highbourne Foundation under NHF sponsorship and control, and would not have contributed to it.

Based upon Defendants' promises and assurances that Appellants' contributions would *only* be used for charitable purposes, Petitioners contributed over $1 million to Highbourne Foundation between the time that "foundation" was established and NHF's bankruptcy filing on January 29, 2009. During that time, without disclosure to Petitioners, Defendants: (i) pledged Petitioners' contributions as security in respect of NHF's borrowings from one or more commercial lenders, and (ii) funneled Petitioners' contributions into risky, for-profit business ventures that either directly or indirectly benefitted the Houk Defendants. (**App. A-14**).

B. The Behrmanns Pursue a California State Action

In January 2010, Petitioners filed suit in the Superior Court in Santa Barbara (the "California State Action") against financial advisors who had steered Appellants' in establishing a foundation under NHF sponsorship and control, and contributing to it. (**App. A-10**). More particularly, Petitioners alleged that their financial advisors had misled Petitioners in connection with establishing the Highbourne Foundation by failing to disclose that the financial advisors were receiving personal benefits from NHF and the Houk Defendants. Appellants asserted California state law claims against their financial advisors: breach of contract, negligence, negligent misrepresentation, breach of fiduciary duty, civil conspiracy and state law consumer protection violations. ***Id.***

Trial in the California State Action was conducted in April 2012. At the close of Petitioners' case the judge dismissed Petitioners' claims. (**App. A-11**). In making that determination, the California judge focused *exclusively* upon the relationship between Petitioners and the financial advisor who was named as the Defendant in that state court action. The California judge opined that although the financial advisor/Defendant at trial had failed to disclose material facts: (i) the financial advisor did not owe any fiduciary obligations to Petitioners under California law, and (ii) the financial advisor had not breached a contractual obligation owed to Petitioners because the specific financial product "sold" to Petitioners by the financial advisor had performed as expected and intended.

The dismissal of Petitioners' claims in the California State Action was thus based upon the very specific relationship between Petitioners and the financial advisor/Defendants in that case. The dismissal did *not* involve a determination respecting any *other* issues or facts. Indeed, the state court judge in that California State Action expressly acknowledged that the Houk Defendants and the Husch Defendants may have engaged in tortious conduct.

The dismissal of Petitioners' claims in the California State Action was thus based *only* upon the specific relationship between the parties in that state court case. The California state court did *not* rule that Petitioners do not have a claim. Rather, it ruled only that Petitioners do not have a claim against that specific financial advisor because of the specific relationship between the litigants in that proceeding. The state court judge also commented generally that the real fraudfeasors, *i.e.*, the Houk Defendants, should be sitting at the defendants' table.

Moreover, the plaintiffs in the California State Action were the Behrmanns. (**App. A-10**). No assigned claims were asserted in the California State Action, and the Assignors were not parties to the California State Action.

C. The Behrmanns Pursue a Claim Against NHF for *Post* Petition Tortious Conduct

During the NHF bankruptcy proceeding, Petitioners sought leave to assert claims against NHF and the Houk Defendants based upon misrepresentations made by them *during* the bankruptcy proceeding. *Behrmann v. Nat'l Heritage Found., Inc. (In re Nat'l Heritage Found., Inc.)*, 510 B.R. 526, 534-35 (E.D. Va. 2014). The Bankruptcy Court denied the request for leave, and Petitioners appealed that decision to the United States District Court for the Eastern District of Virginia (the "Virginia District Court Proceeding"). *Id.* at 536.

The Virginia District Court affirmed the Bankruptcy Court's denial, holding that when Petitioners accepted the tax advantages of contributing to their DAF, they surrendered the right to assert any claims arising from the confiscation of such monies during the NHF bankruptcy proceeding. *Id.* at 541.

However, the Virginia District Court did *not* address the issue of whether Petitioners can assert claims for conduct that occurred *prior* to the filing of the NHF bankruptcy petition. Indeed, leave to assert claims based on *pre*-petition bankruptcy conduct *had already been granted by the Bankruptcy Court*. *In re Nat'l Heritage Found., Inc.*, No. 09-10525-BFK, 2013 Bankr. LEXIS 2516, *40 (U.S. Bankr. E.D. Va., June 20, 2013).

Thus, the Virginia District Court decision was limited only to conduct that occurred *during* the NHF bankruptcy proceeding. *Id.* *Never litigated* was the question of whether Petitioners hold claims against Defendants for conducted that occurred *prior* to the NHF bankruptcy filing.

Moreover, the plaintiffs in the Virginia District Court Action were the Behrmanns. 510 B.R. at 526. No assigned claims were asserted in the Virginia District Court Action, and the Assignors were not parties in the Virginia District Court Action.

D. The California Federal Action

On June 28, 2012, Petitioners asserted claims in the United States District Court for the Central District of California (the "California Federal Action") against NHF, the Houk Defendants, the Husch Defendants and others (who had participated in the conspiracy to divert Appellants' contributions to Highbourne Foundation. (**App. A-11**).

The claims were asserted by Petitioners on their own behalf, and also as assignees of the claims that had been assigned to them by the Assignors, who are dozens of Arizona residents also defrauded by NHF and other Defendants (the "Assignors").

The California Federal Action was initially stayed pending the outcome of appeals arising from the NHF bankruptcy proceeding. ***Id;*** *Nat'l Heritage Found., Inc. v. Highbourne Found.*, 760 F.3d 344, 350 (4th Cir. 2014), *cert. denied*, 135 S.Ct. 961 (2015).

On December 8, 2015, after the conclusion of those appeals, the California District Court lifted its stay. On January 22, 2016, Petitioners filed their Second Amended Complaint ("SAC") asserting claims against NHF and other Defendants for: (i) violations of the Racketeer Influenced and Corrupt Organizations Act ("RICO"), 18 U.S.C. §§ 1961-1968; (ii) violations of California's Consumer Legal Remedies Act, Cal. Civ. Code §§ 1750 *et seq.*; (iii) violations of California's Unfair Competition Law, Cal. Bus. & Prof. Code §§ 17200 *et seq.*; (iv) civil conspiracy to commit fraud; (v) negligent misrepresentation; (vi) breach of fiduciary duty; (vii) professional negligence; (viii) imposition of constructive trust; (ix) rescission; (x) violations of Pennsylvania's Unfair Trade Practices and Consumer Protection Law, PA. Stat. §§ 201-1 *et seq.*; and, (xi) violations of Missouri's Merchandising Practices Act, Mo. Rev. Stat. §§ 407.010 *et seq.* (**App. A-12**). On September 29, 2016, the California Federal Action was transferred to the Eastern District of Virginia. ***Id.***

E. The Order Dismissing Petitioners' Claims and the Assignors' Claims

On January 17, 2017, the District Court entered its Order granting dismissing Petitioners' claims, and the claims of the Assignors, and denying Petitioners' request for leave to file an amended complaint. (**App. A-18**). On the same day, the District Court also entered an accompanying Opinion. (**App. A-7**).

In dismissing Petitioners' claims, the District Court relied exclusively upon the doctrine of collateral estoppel. (**App. A-13**). First, regarding the California State Court Proceeding, the District Court determined that because "[t]he California trial court … held that [Petitioners'] injuries were not caused by the split-dollar agreement or any representations made on connection with that agreement" and "the split-dollar program performed as promised by giving [Petitioners] a tax benefit," the California state court decision barred Petitioners from pursuing their claims against NHF, the Houk

Defendants, the Husch Defendants and others (who were not parties to the California State Court Action). (**App. A-14**).

Second, regarding the Virginia District Court Action, the District Court noted that "when [Petitioners] accepted the special tax advantages derived from contributing to a DAF, they gave up their right to make any claims based on any alleged confiscation of the DAF's assets, either before or after NHF filed for bankruptcy." (**App. A-15**). The District Court opined that "because [Petitioners] had no right or interest in the DAF's assets following their donation, [Petitioners] cannot now allege they were injured by the loss of those assets once they were donated." ***Id***. In its Opinion, the District Court did not address Petitioners' request for leave to file an amended complaint. Concurrent with its Opinion, the District Court on January 17, 2017 entered a corresponding Order dismissing Petitioners' claims with prejudice. (**App. A-18**).

In its Opinion, the District Court did not address or mention the claims of the Assignors. Instead, the District Court dismissed *all* of Petitioners' claims, including those asserted by Petitioners on behalf of themselves *and* those asserted by Petitioners as assignees. ***Id.***

On October 4, 2017, the Fourth Circuit affirmed in a one paragraph Opinion. (**App. A-3**). Although the District Court's dismissal was based exclusively upon collateral estoppel, the Fourth Circuit panel did not address that issue. Rather, the panel determined that regardless of collateral estoppel, Petitioners' claims are barred by the statute(s) of limitation. The panel wrote: "To the extent that any of their claims are not barred by collateral estoppel, they were filed beyond the applicable statute of limitations." (**App. A-4**). A corresponding Judgment affirming the District Court's dismissal was also entered on October 4, 2017. (**App. A-5**). On November 28, 2017, the Fourth Circuit denied Petitioners' request for a rehearing *en banc*. (**App. A-20**).

II. THE LOWER COURTS ERRED IN APPLYING THE DOCTRINE OF COLLATERAL ESTOPPEL

The elements of the doctrine of collateral estoppel (also known as the doctrine of "issue preclusion") are well known. The doctrine bars the re-litigation of a claim if, in a prior court proceeding, an issue of fact or law was decided that necessarily defeats the claim. *Collins v. Pond Creek Mining Co.*, 468 F.3d 213, 217 (4th Cir. 2006); *Ramsay v. INS*, 14 F.3d 206, 210 (4th Cir. 1994). To prevail on a motion to dismiss based upon the doctrine of collateral estoppel, the moving party must prove that: (1) the issue sought to be precluded is identical to one previously litigated, (2) the issue was actually determined in the prior proceeding, (3) the issue's determination was a critical and necessary part of the decision in the prior proceeding, (4) the prior judgment is final and valid, and (5) the party against whom collateral estoppel is asserted had a full and fair opportunity to litigate the issue. *Id.*

With the respect to the final element of the doctrine, this Court has repeatedly held that the doctrine of collateral estoppel does not apply where the party against whom it is invoked did not have a full and fair opportunity to litigate his claim. *Kremer v. Chemical Constr. Corp.*, 456 U.S. 461, 480-81 (1982); *Allen v. McCurry*, 449 U.S. 90, 95 (1980); *Montana v. United States*, 440 U.S. 147, 153 (1979); *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313, 328-29 (1971).

Initially, the doctrine of collateral estoppel required mutuality of the parties. Beginning with *Blonder-Tongue Laboratories, Inc.*, *supra*, strict mutuality was no longer required. "[T]he Court has eliminated the requirement of mutuality … and has allowed a litigant who was not a party to a federal case to use collateral estoppel 'offensively' in a new federal suit against the party who lost on the decided issue in the first case." *Allen*, 449 U.S. at 94-95.

"But one general limitation the Court has repeatedly recognized is that the concept of collateral estoppel cannot apply when the party against whom the earlier decision is asserted did not have a 'full and fair opportunity' to litigate that issue in the earlier case." *Id.* at 95.

The Assignors in this proceeding did not have a "full and fair opportunity" to litigate their claims. Even if the doctrine of collateral estoppel bars the Behrmanns from pursuing their own claims (which it does not), it certainly cannot bar the Assignors' claims because those assigned claims have never been litigated in any court or at any time.

A. Petitioners' Claims Are Not Barred by the California State Court Action

The District Court erred in at least two respects in holding that the doctrine of collateral estoppel bars the litigation of Petitioners' claims because the issues upon which those claims rest were decided in the California State Action. (**App. A-13**).

First, the holding is error because the issues sought to litigated in this case below are not identical to those decided in the California State Action. In the California State Action, Petitioners asserted claims against their investment advisor, Joel Baker, who had created and solicited Petitioners to purchase a proprietary investment tool he called the "Financial Independence Plan" ("FIP"). Petitioners asserted that while he solicited them to purchase the FIP, he misrepresented and failed to disclose his pecuniary relationship with NHF and the Houk Defendants to Petitioners. Thus, the issues in the California State Action were: (i) whether Mr. Baker made misrepresentations to Petitioners, and (ii) whether Petitioners' damages were attributable to those misrepresentations.

The California State Action resulted in the determination of factual issues that have zero bearing upon Petitioners' claims below. First, the

California state court determined that the FIP performed as intended:

> But [Defendant] Mr. Baker sold them a product, basically. And the product worked for its intended purpose. There's no complaint the Behrmanns make about the Financial Independence Plan. It was terrific … It is not Mr. Baker's fault that Dock Houk, the character, the problematic character, gave him an honorarium, a fictitious, made up CPHD that meant nothing …

Next, the California state court determined that the Defendants in the California State Action (who are *not* the Defendants in the case below) did not owe fiduciary obligations to Petitioners:

> The facts, as they came out, revealed that the Behrmanns never relied upon … Mr. Baker for any kind of investment advice in handling the Financial Independence Plan … He never gave them any advice that they relied upon to their detriment. They got the benefit of the product. It performed beautifully … and I'm not persuaded that Mr. Baker had a fiduciary relationship with the Behrmanns. He didn't have a client relationship with them … he basically sold his product to Mr. Garuda who sold it to the Behrmanns.

Lastly, the California state court determined that the Defendants in that case were not responsible for the actions of other persons, including the Houk Defendants and the Husch Defendants:

> The plaintiffs seem to complain that Mr. Baker … should have foreseen that Dock Houk would run into some kind of financial trouble and then take the Behrmanns' foundation money and use it as collateral for a loan … [Mr. Baker] can't be held accountable for that.
>
> …
>
> Now, in terms of Mr. Goldstein and whether Mr. Goldstein represented the parties at the same time, the Behrmanns, Mr. Baker, the charitable foundation, how is Mr. Baker supposed to know that a lawyer has a conflict of interest he's responsible for? He's a layman. It's not his problem.

Never litigated in the California State Action were the following issues:

(i) whether Defendants *other* than Mr. Baker made misrepresentation to Petitioners;

(ii) whether Petitioners hold a claim regarding the funds they contributed to their DAF; and,

(iii) whether Petitioners hold a claim against a person (or group of persons) who diverted those funds from the charitable purpose for which they were contributed.

Indeed, the California state court expressly observed that its holding was limited only to the defendants who were before it. Left open, therefore, is the question of whether *other parties* (including Defendants below) are liable for Petitioners' damages. Accordingly, Appellants' claims against the Defendants in *this* case are not barred by the doctrine of collateral estoppel, because the issues decided in the California State Acton are not identical to those presented below. *Sedlack v. Braswell Services Group*, 134 F.3d 219, 224 (4^{th} Cir. 1998) (doctrine of collateral estoppel only bars successive litigation of issues that are *identical* to those previously decided).

B. Petitioners' Claims Are Not Barred by the Virginia District Court Action

The lower courts similarly erred by employing an overly expansive application of the doctrine of collateral estoppel in respect of the Virginia District Court Action.

The May 4, 2014 Opinion of the Virginia District Court, upon which the lower courts relied, applies only to conduct that occurred *during* the NHF bankruptcy case. At issue in the Virginia

District Court Action was whether Petitioners had the right to pursue claims against Defendants for conduct arising during the NHF bankruptcy case. *Behrmann*, 510 B.R. at 536. The District Court answered that question in the negative, holding that when Petitioners accepted the tax advantages of contributing to the DAF, they relinquished any claim based upon the confiscation of those monies *during* the NHF bankruptcy proceeding. *Id.* at 541.

What no court has *ever* addressed, however, is the question of whether Petitioners hold a claim for confiscation of their monies that occurred *prior* to the filing of NHF's bankruptcy case. Indeed, during the NHF bankruptcy proceedings, the bankruptcy court painstakingly distinguished between such claims in its holding that not only were pre-petition confiscation claims qualitatively different from post-petition claims, but that *Petitioners were permitted to assert pre-petition claims against the Defendants*:

> The [Bankruptcy] Court's August 27, 2012, Memorandum Opinion and Order *granted* the [Plaintiffs] leave to pursue the pre-petition Released claims as against the [Defendants]. Rather than file a relatively simple Complaint alleging that [Defendants] defrauded them into giving NHF money pre-petition, *which they would have been entitled to do*, the [Plaintiffs] chose to file [complaints] which included Exculpated claims.

In re Nat'l Heritage Found., Inc., 2013 Bankr. LEXIS 2516 at *40 (emphasis supplied). Notwithstanding the fact that the Virginia District Court Action was limited *only* to the issue of whether Petitioners could pursue claims for confiscations that occurred during the bankruptcy case, the District Court below determined that the holding in that case should operate to bar *all* claims for confiscation, *including* confiscation that occurred prior to the bankruptcy filing. (**App. A-15**).

This is error because the issue of whether Petitioners hold a claim for *pre*-bankruptcy-petition conduct is *not* identical to the issue of whether Appellants hold a claim for *post*-bankruptcy-petition conduct. The fundamental question of whether Petitioners hold a claim against Defendants for conduct that occurred *prior* to the NHF bankruptcy filing has *never been litigated before any Court at any time*. For this reason alone, the District Court's Opinion was error and must be reversed. *Sedlack*, 134 F.3d at 224.

III. THE LOWER COURTS' UNPRECEDENTED EXPANSION OF THE DOCTRINE OF COLLATERAL ESTOPPEL

This Court has previously endorsed the use of the collateral estoppel doctrine "offensively" to bar a claim asserted by a plaintiff who previously lost on the same claim against a prior, but different, defendant. *Allen*, 449 U.S. at 95. "Offensive" collateral estoppel is the flavor of the doctrine employed here to effect the dismissal of the Behrmanns' claims.

But this Court has *never* endorsed the use of collateral estoppel to bar the claim of a litigant who has *never appeared before any court*. Indeed, this Court has repeatedly admonished that the touchstone of collateral estoppel is that the litigant against whom the doctrine is invoked must have had a "full and fair opportunity" to litigate the claim or issue. *Id.*; *Montana*, *supra*, at 153; *Blonder Tongue Laboratories, Inc.*, *supra*, at 328-29.

The lower courts erred in applying the doctrine of collateral estoppel to dismiss not only the claims asserted by Petitioners on their own behalves, but the claims asserted by Petitioners *as the assignees of third-party claims*.

Here, Petitioners asserted claims for damages they incurred as a result of fraudulent conduct, and other tortious conduct, committed by the Defendants. But Petitioners also asserted those claims on behalf of the Assignors, who are *other parties* who had been similarly defrauded but who *have never appeared before any court in respect of their assigned claims*.

Even if Petitioners' claims were barred by the doctrine of collateral estoppel (which they are not), the Assignors' claims *cannot* be barred by the doctrine because those claims have never been litigated. Indeed, the Assignors have never appeared before any court in respect of their claims.

The Assignors therefore did not have a "full and fair opportunity" to litigate their claims as this Court has repeatedly emphasized. *Allen*, 449 U.S. at 95.

Neither the District Court, nor the Fourth Circuit, addressed this issue in either of the Opinions entered below. The lower courts' rulings constitute an unprecedented expansion of the doctrine of collateral estoppel by barring the claims not only of Petitioners, but of third-party assignors whose claims have never been litigated in any respect.

CONCLUSION

For the foregoing reasons, Petitioners respectfully request that a writ of *certiorari* be issued.

Dated: February 26, 2018

Respectfully submitted,

DANIEL JOSEPH SCHENDZIELOS
Colorado Trial Lawyers
& Legal Services, LLC
8547 East Arapahoe Road, Suite J534
Greenwood Village, Colorado 80112
(303) 831-9400
denverdaniel@gmail.com

Attorneys for Petitioners