COMMENT

Inequality Creates Exceptions: Limiting *United States v. Mendoza* to its Policy Rationale

INTRODUCTION

Joseph, John, and Nina enter the John E. Moss Federal Building in Sacramento, California. They use the escalator to reach the second floor. Due to a malfunction, the escalator unexpectedly jerks, and all three people sustain injuries. Joseph sues the government first and prevails on his negligence claim. John and Nina wait and sue the government after Joseph's successful suit.

If the accident occurred at a privately owned site, John and Nina, in their own lawsuits, could invoke nonmutual offensive issue preclusion against the defendant.[1] This judicially-created doctrine allows a later plaintiff to bar a defendant from relitigating an issue that the defendant lost in a prior lawsuit.[2] However, if the site of the accident is a federal building and the

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[1] *See infra* note 26 and accompanying text (discussing case in which plaintiffs asserted nonmutual offensive issue preclusion against private defendants). Some federal courts follow the *Restatement (Second) of Judgments* and prefer the term "issue preclusion" to the term "collateral estoppel." *See, e.g.*, Robi v. Five Platters, Inc., 838 F.2d 318, 321-22 n.2 (9th Cir. 1988) (preferring terms "issue preclusion" and "claim preclusion" over terms "merger" and "collateral estoppel"). This Comment employs the term "issue preclusion" for purposes of uniformity.

[2] *See* RESTATEMENT (SECOND) OF JUDGMENTS § 29 (1982); *see also id.* reporter's note (collecting cases showing judicial development of nonmutual offensive issue preclusion). In order to operate, section 29 requires that the defendant must have had a full and fair opportunity to litigate the issue in the prior suit. *See id.* § 29.

government is the defendant, it is uncertain whether a court would apply nonmutual offensive issue preclusion.[3]

This uncertainty stems from lower courts' varying interpretations of the Supreme Court's decision in *United States v. Mendoza*.[4] In *Mendoza*, the Supreme Court held that the doctrine of nonmutual offensive issue preclusion does not apply to the United States government.[5] Lower federal courts, however, have disagreed as to the exact meaning of the *Mendoza* holding.[6] Some federal courts have held that *Mendoza* is an absolute rule, barring the use of nonmutual offensive issue preclusion against the federal or state governments without exception.[7] Other courts have read *Mendoza* much more narrowly.[8] These courts have concluded that *Mendoza* is applicable only when the case at bar implicates the special considerations involved when a government litigates in its sovereign capacity.[9]

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[3] *See infra* notes 6-9 and accompanying text (discussing uncertainty as to when courts should apply doctrine of nonmutual offensive issue preclusion against federal government).

[4] 464 U.S. 154 (1984).

[5] *See id.* at 158. Offensive issue preclusion occurs where a plaintiff seeks to estop a defendant from relitigating issues the defendant previously litigated unsuccessfully in another action. *See id.* at 159 n.4.

Courts have not automatically applied *Mendoza* to state governments. *See, e.g.*, State v. United Cook Inlet Drift Ass'n, 895 P.2d 947, 951-52 (Alaska 1995) (holding *Mendoza* rationale inapplicable to state of Alaska). Generally, courts evaluate the facts of the particular case before deciding whether *Mendoza* applies. *See, e.g.*, Benjamin v. Coughlin, 905 F.2d 571, 576 (2d Cir. 1990) (refusing to apply *Mendoza* to state litigation because state had extensively appealed issue in state courts).

[6] *Compare* cases cited *infra* note 7, *with* cases cited *infra* note 8.

[7] *See, e.g.*, National Med. Enters., Inc. v. Sullivan, 916 F.2d 542, 545 (9th Cir. 1990) (characterizing rule against applying nonmutual offensive issue preclusion to government as well-established); Sun Towers, Inc., v. Heckler, 725 F.2d 315, 323 n.8 (5th Cir. 1984) (finding that *Mendoza* applies to all issues, not just constitutional questions).

[8] *See, e.g.*, NLRB v. Donna-Lee Sportswear Co., 836 F.2d 31, 37-38 (1st Cir. 1987) (holding that *Mendoza* rule is not absolute and applies only when policy considerations of *Mendoza* are present); Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 666 F. Supp. 1475, 1478 (D. Colo. 1987) (deciding that *Mendoza* is not absolute rule excluding use of nonmutual offensive issue preclusion against government) *aff'd*, 848 F.2d 200 (th Cir. 1988); Blais v. Bowen, 629 F. Supp. 543, 545 (D. Mass. 1986) (noting that some commentators have called for exceptions to *Mendoza* holding, but finding that *Mendoza* rule applies to facts of case at bar); Constantine v. United States, 14 Cl. Ct. 339, 341-42 (1988) (observing that *Mendoza* rule is not absolute, and rule should only apply when *Mendoza* policy considerations are present).

[9] *See, e.g., Colorado Springs*, 666 F. Supp. at 1478 (limiting *Mendoza* to policy considerations found in *Mendoza* decision); *see also* cases cited *supra* note 8 (discussing cases limiting *Mendoza* holding to policy considerations in *Mendoza* decision).

This Comment suggests that policy considerations should guide the judiciary in determining whether to apply nonmutual offensive issue preclusion against federal or state governments.[10] Part I of this Comment explains the background of nonmutual offensive issue preclusion and its application to cases involving the government.[11] Part I also examines the policy concerns underlying the rule's development and the policy reasons for exempting the government from its purview.[12] Part II addresses the state of the law after the *Mendoza* decision and the divergent views courts have taken in interpreting that decision.[13] Part III proposes a solution modeled after the flexible case-by-case policy approach that some federal courts have utilized.[14]

I. BACKGROUND OF NONMUTUAL OFFENSIVE ISSUE PRECLUSION AND ITS APPLICATION TO THE GOVERNMENT

A. Defining Nonmutual Offensive Issue Preclusion

Issue preclusion is one type of finality doctrine[15] that courts have developed to prevent repetitive litigation[16] and increase judicial efficiency.[17] The issue preclusion doctrine states that the determination of an issue is conclusive in subsequent litigation when: (1) the parties have actually litigated the issue; (2) a court has resolved it in a valid and final judgment; and (3) the

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[10] *See infra* notes 87-99 and accompanying text (discussing rationale for restricting *Mendoza* holding to policy considerations in *Mendoza*).

[11] *See infra* notes 32-33 and accompanying text (discussing background of nonmutual offensive issue preclusion and its relationship to government litigation).

[12] *See infra* notes 44-52 and accompanying text (discussing policy reasons for exempting federal government from doctrine of nonmutual offensive issue preclusion).

[13] *See* discussion *infra* Part II.A-C (examining divergent views of Second Circuit Court of Appeals, Ninth Circuit Court of Appeals, and District Court of Colorado).

[14] *See* discussion *infra* Part III (explaining policy-based approaches for determining when to apply nonmutual offensive issue preclusion to government litigation).

[15] *See* Colin Hugh Buckley, *Issue Preclusion and Issues of Law: A Doctrinal Framework Based on Rules of Recognition, Jurisdiction, and Legal History*, 24 HOUS. L. REV. 875, 875 (1987). Scholars also recognize res judicata (or claim preclusion) as a finality doctrine. *See id.* Claim preclusion prevents parties from relitigating claims that a court has previously decided in a final judgment. *See id.*

[16] *See* Allen v. McCurry, 449 U.S. 90, 94 (1980) (noting that courts recognize that finality doctrines generally prevent multiple lawsuits and encourage reliance on past judgments).

[17] *See id.* (observing that finality doctrines help conserve judicial resources); *see also* Buckley, *supra* note 15, at 875 (arguing finality doctrines help promote judicial efficiency).

court's resolution of the issue was essential to that judgment.[18] The party asserting issue preclusion bears the burden of showing that the issue was necessarily and actually litigated in the prior action and that its resolution was essential to the outcome.[19] Furthermore, under the doctrine's modern formulation, a party may assert issue preclusion involving issues of both law and fact.[20]

Another modern change to the application of issue preclusion is the demise of the mutuality requirement.[21] This former requirement demanded an identity of parties in the first action and the subsequent action.[22] This identity is no longer required in the application of issue preclusion to either plaintiffs asserting offensive issue preclusion or defendants asserting defensive issue preclusion.[23] Nonmutual defensive issue preclusion permits a

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[18] *See* RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 2, § 27.

[19] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 n.5 (1979); *see also* FLEMING JAMES, JR. ET AL., CIVIL PROCEDURE 608 (4th ed. 1992) (restating requirements found in *Parklane Hosiery*). *Cf.* Teleconnect Co. v. Ensrud, 55 F.3d 357, 362 (8th Cir. 1995) (holding plaintiff had not met burden because state court's conclusions of fact were not necessary and essential to judgment); Commercial Assocs. v. Tilcon Gammino, Inc., 998 F.2d 1092, 1097 (1st Cir. 1993) (holding plaintiff had not met burden of showing that lower court necessarily decided issue in question); Fay v. South Colonie Cent. Sch. Dist., 802 F.2d 21, 30 (2d Cir. 1986) (holding plaintiff had not met burden because lower court's memorandum was too vague to determine which issues lower court had decided); Universal Marine Ins. Co. v. Beacon Ins. Co., 768 F.2d 84, 87-88 (4th Cir. 1985) (holding plaintiff failed to meet burden because lower court refused to reach merits of issue raised in complaint); Howard v. Green, 555 F.2d 178, 182 (8th Cir. 1977) (holding that plaintiff had not met burden because he failed to include issue in chancery court complaint, and chancery court had not ruled on it).

[20] *See* RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 2, § 27; *see also* Buckley, *supra* note 15, at 881 (noting that issue preclusion applies to questions of law as well as questions of fact).

[21] *See* Blonder-Tongue Lab., Inc. v. University of Ill. Found., 402 U.S. 313, 349-50 (1971) (abandoning mutuality requirement); *see also* Bernhard v. Bank of America Nat'l Trust & Sav. Ass'n, 122 P.2d 892, 894-95 (Cal. 1942) (holding mutuality not necessary where liability of defendant asserting issue preclusion is dependent on prior suit between same plaintiff, but different defendant); *cf.* Cromwell v. County of Sac, 94 U.S. 351, 352-53 (1876) (explaining that when mutuality requirement existed, prior judgment estopped same parties from relitigating issues in prior action).

[22] *See* JAMES ET AL., *supra* note 19, at 619. The mutuality rule required that the parties in a subsequent action be the same as in the prior action to have a conclusive determination of previously decided issues. *See id.* If the second action involved even one different party, then neither party could assert issue preclusion. *See id.*

[23] *See Parklane Hosiery*, 439 U.S. at 327-28 (following precedent in *Blonder-Tongue*, Court takes next step of allowing nonmutual offensive, as well as defensive, issue preclusion).

defendant to prevent a plaintiff from relitigating an issue that she unsuccessfully litigated against a different defendant.[24] Conversely, nonmutual offensive issue preclusion allows a plaintiff to prevent a defendant from relitigating an issue he unsuccessfully litigated against a different plaintiff.[25]

B. Policy Reasons Behind Nonmutual Offensive Issue Preclusion

Nonmutual offensive issue preclusion reflects the twin aims of judicial efficiency and fairness to litigants.[26] Nonmutual offensive issue preclusion promotes judicial efficiency by reducing multiple lawsuits,[27] preventing inconsistent decisions,[28] and strengthening reliance on past decisions.[29] To ensure fairness, the touchstone for applying the doctrine is whether the defendant previously had a full and fair opportunity to litigate the issue.[30] When a defendant meets this criterion, a court will generally allow a plaintiff to claim nonmutual offensive issue preclusion.[31]

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[24] *See id.* at 326 n.4.

[25] *See id.* The Supreme Court has approved the use of offensive issue preclusion, provided its application would not be unfair to the defendant. *See id.* at 331.

[26] *See* Tole S.A. v. Miller, 530 F. Supp. 999, 1003 (S.D.N.Y. 1981) (noting policy reasons behind nonmutual offensive issue preclusion).

[27] *See* Allen v. McCurry, 449 U.S. 90, 94 (1980). Commentators have questioned, however, whether offensive issue preclusion actually promotes efficiency. *See* Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 76 (1988) (observing that potential plaintiff can wait to see what happens with lawsuit brought by another plaintiff). If the plaintiff likes the result of previous litigation, she can claim issue preclusion in her lawsuit against the defendant. *See id.* If she does not like it, she can ignore it and claim her day in court because she has not been a party to litigation involving the issue. *See id.*; *see also* James F. Flanagan, *Offensive Collateral Estoppel: Inefficiency and Foolish Consistency*, 1982 ARIZ. ST. L.J. 45, 76 (1982) (claiming doctrine is efficient only with multiple defendants who have all previously litigated and lost on issue).

These commentators apparently agree with the Supreme Court's decision in *Parklane Hosiery*. *See id.* (pointing out fallacy of efficiency rationale based on potential for multiple litigation); Ratliff, *supra*, at 76 (following rationale of Justice Stewart's majority opinion in *Parklane Hosiery*). Justice Stewart asserted that nonmutual offensive issue preclusion encourages plaintiffs to sue separately and invoke offensive issue preclusion, rather than to join a lawsuit. *See Parklane Hosiery*, 439 U.S. at 330 (maintaining that offensive issue preclusion increases total litigation).

[28] *See Allen*, 449 U.S. at 94.

[29] *See id.*

[30] *See Tole*, 530 F. Supp. at 1003.

[31] *See, e.g., Allen*, 449 U.S. at 94-95 (holding that federal courts apply issue preclusion when fairness allows and doctrine's benefits warrant expansion to offensive uses); JAMES ET

C. Application of Issue Preclusion to the Government

The Supreme Court developed the doctrine of issue preclusion and its application to government litigation over the course of several decisions. The Court held that offensive and defensive issue preclusion apply against the government in a civil case where mutuality exists between the parties.[32] The Court also held that nonmutual defensive issue preclusion could apply against the government in some contexts.[33]

The United States Supreme Court granted certiorari in *United States v. Mendoza* to resolve a circuit split as to whether a plaintiff could invoke nonmutual offensive issue preclusion against the federal government.[34] Mendoza was a Filipino national who

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AL., *supra* note 19, at 625 (noting that general rule is that issue preclusion will apply).

[32] *See* Montana v. United States, 440 U.S. 147, 153-54 (1979). The Court held that the government had a full and fair opportunity to litigate the issue against the same party in state court. *See id.* at 151-53. Also, application of issue preclusion would preserve both the adversary's and the judiciary's resources. *See id.* at 153-54. Furthermore, application of issue preclusion against the government increases reliance on judicial action by reducing the likelihood of inconsistent decisions. *See id.*

[33] The Supreme Court first addressed the question of applying nonmutual defensive issue preclusion against the government in *Standefer v. United States*, 447 U.S. 10, 21-22 (1980). In an unanimous opinion authored by Chief Justice Burger, the Court concluded that a party could assert nonmutual defensive issue preclusion against the government, but not in the context of a criminal case. *See id.* at 25. The Court reasoned that unlike civil cases, criminal cases involve special considerations that deprive the government of a full opportunity to litigate. *See id.* at 22-24. These considerations include: 1) limited discovery rights for the prosecution; 2) the prosecution's inability to appeal after an acquittal; and 3) exclusionary evidence rules which apply only in criminal cases. *See id.*; *see also* John Bernard Corr, *Supreme Court Doctrine in the Trenches: The Case of Collateral Estoppel*, 27 WM. & MARY L. REV. 35, 42-43 (1985) (discussing policy considerations involved in criminal cases which Court used to bar application of doctrine against government in criminal cases).

The Court ruled that nonmutual defensive issue preclusion could apply in a civil rights lawsuit under 42 U.S.C. § 1983. *See Allen*, 449 U.S. at 105. In *Allen*, the plaintiff sued the local police department, alleging an unconstitutional search and seizure. *See id.* at 92. A state court had previously found the plaintiff guilty in a criminal proceeding. *See id.* The police argued that issue preclusion barred relitigation of the issues decided at the criminal trial. *See id.* at 93. The Court agreed with the police and noted that state court judgments deserve full faith and credit in federal courts. *See id.* at 95-96. Furthermore, nothing in the legislative history of § 1983 indicated that issue preclusion should not apply to such suits. *See id.* at 99-101.

[34] *See* United States v. Mendoza, 459 U.S. 1169 (1983). The split involved decisions from the Second Circuit and the Ninth Circuit. *See* discussion *infra* Part II.A-C (describing conflicting decisions and their respective holdings). In *Olegario v. United States*, 629 F.2d 204 (2d Cir. 1980), the Second Circuit held that a plaintiff could not assert nonmutual offensive issue preclusion against the federal government. *See id.* at 215. The court reasoned that such application would unfairly force the government to appeal every

claimed a due process violation when he attempted to apply for United States citizenship.[35] During World War II, the United States government had stationed an INS representative in the Philipines.[36] The purpose of the representative was to facilitate the immigration of Filipino war veterans to the United States.[37] In response to the Philipine government's concern that large numbers of Filipinos would immigrate, the Attorney General of the United States removed the INS representative.[38]

Years later, in *In re Naturalization of 68 Filipino War Veterans*,[39] several Filipino war veterans successfully sued the United States, claiming that this decision violated their due process rights.[40] Later still, Mr. Mendoza sued the federal government on the same grounds.[41] The Ninth Circuit, affirming the district court's ruling, allowed Mr. Mendoza to assert nonmutual offensive issue preclusion against the United States, based on the decision in *68 Filipinos*.[42] In reversing the Ninth Circuit, the Supreme Court held that nonmutual offensive issue preclusion does not apply against the government.[43]

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adverse decision, contravening the public interest and wasting government resources. *See id.* The court also concluded that the government's decision not to appeal an adverse decision derives from many considerations. *See id.* These considerations include scarcity of government resources, and the public interest unrelated to the legal issues involved. *See id.* The court reasoned that applying nonmutual offensive issue preclusion here would force the Solicitor General to appeal cases which she otherwise would not. *See id.* Conversely in *Mendoza v. United States*, 672 F.2d 1320 (9th Cir. 1982), *rev'd*, 464 U.S. 154 (1984), the Ninth Circuit held that a plaintiff could assert nonmutual offensive issue preclusion against the federal government. *See id.* at 1329. The court concluded, however, that the government had a full and fair opportunity to litigate the issue in a prior suit. *See id.* at 1328. In reaching this decision, the Ninth Circuit explicitly disregarded the Second Circuit's policy rationale in *Olegario*. *See id.* at 1329.

[35] *See* United States v. Mendoza, 464 U.S. 154, 156-57 (1984).

[36] *See id.* at 156.

[37] *See id.*

[38] *See id.*

[39] 406 F. Supp. 931 (N.D. Cal. 1975).

[40] *See id.*

[41] *See Mendoza*, 464 U.S. at 156.

[42] *See id.* at 157-58.

[43] *See id.* at 162. The Court explicitly distinguished *Mendoza* from an earlier opinion applying mutual offensive issue preclusion against the government. *See id.* at 163-64. In *Montana v. United States*, 440 U.S. 147 (1984), the Court precluded the government from relitigating in federal court the constitutionality of the State's gross receipt tax on contractors of public construction firms. *See id.* at 162-64. An individual had previously litigated the issue against the State in state court. *See id.* at 151. Because the United States

In support of its holding, the Supreme Court observed that the government is in a unique position when compared to a private litigant.[44] The Court cited geographic breadth of government litigation as one reason for the distinction.[45] In addition, the Court noted that government litigation frequently involves issues of great public importance, such as constitutional issues.[46] Therefore, the application of nonmutual offensive issue preclusion against the government would hinder the development of important legal issues by giving the first lower court decision preclusive effect.[47]

Furthermore, application of issue preclusion against the government would force the Solicitor General to appeal every adverse decision. In addition to the likelihood of prevailing on appeal, the Solicitor General normally considers a variety of factors in deciding whether or not to pursue an appeal.[48] These factors include the government's limited resources and the courts' crowded dockets.[49] In the Court's view, application of issue preclusion here would force the Solicitor General to ignore these other factors.[50] The Solicitor General would have to appeal every adverse decision or forego any further review of the issues involved.[51] Ultimately, the Court held that nonmutual offensive issue preclusion does not apply against the government on the facts of *Mendoza*.[52] By its holding the Supreme Court resolved the circuit split, but the opinion's rationale gave rise to questions concerning its application.

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controlled and financed the individual's litigation, the Court deemed the government a party to the prior action. *See id.* at 155.

[44] *See Mendoza*, 464 U.S. at 159 (citing INS v. Hibi, 414 U.S. 5, 8 (1973) (per curiam)).

[45] *See id.* at 159-60. According to the Court, this results in the government finding itself in many lawsuits with different parties involving the same issues. *See id.* at 160.

[46] *See id.* at 160. The Court makes special reference to issues of public importance as involving constitutional issues, which can only arise when the government is a party. *See id.*

[47] *See id.*

[48] *See id.* at 161.

[49] *See id.*

[50] *See id.*

[51] *See id.*

[52] *See id.* at 162. However, the Court stated that mutual offensive issue preclusion would still apply with equal force against the government. *See id.* at 163-64.

II. THE STATE OF THE LAW — INTERPRETATIONS OF *MENDOZA*

A. The Ninth Circuit Approach: The Absolute Prohibition of Nonmutual Offensive Issue Preclusion Against the Government

Courts disagree on *Mendoza*'s exact meaning and breadth.[53] Some courts limit *Mendoza* to its policy considerations — allowing lower courts to develop issues of great public importance and permitting the Solicitor General broader discretion in determining when to appeal.[54] Meanwhile, other courts read *Mendoza* as an absolute prohibition against applying nonmutual offensive issue preclusion to the government.[55] The Ninth Circuit subscribed to this rigid view of *Mendoza* in *National Medical Enterprises v. Sullivan*.[56]

In *National Medical Enterprises*, the plaintiff health care provider sought Medicare reimbursements, which the defendant Secretary of Health and Human Services refused.[57] The district court granted summary judgment for the plaintiff.[58] On appeal, the plaintiff asserted nonmutual offensive issue preclusion as to issues the government had unsuccessfully litigated in a prior lawsuit.[59] The Ninth Circuit reversed.[60] Before ruling in favor of the Secretary on the merits, the circuit court held that the plaintiff could not assert nonmutual offensive issue preclusion

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[53] *See supra* notes 6-9 and accompanying text (explaining different interpretations of *Mendoza* holding). The language at issue is the following: "We hold, therefore, that nonmutual offensive collateral estoppel simply does not apply against the Government in such a way as to preclude relitigation of issues such as those involved in this case." *Mendoza*, 464 U.S. at 162. The words "in this case" raised doubts as to whether the holding constituted an absolute bar to applying issue preclusion against the federal government. *See supra* note 8 (discussing decisions which hold *Mendoza* rule not absolute, but rather limited to policy concerns).

[54] *See supra* note 8 (discussing decisions limiting *Mendoza* rule to its policy considerations).

[55] *See, e.g.*, United States v. Alexander, 743 F.2d 472, 476 (7th Cir. 1984) (deciding that *Mendoza* holding is absolute); *supra* note 7 (noting cases that have held *Mendoza* to stand for absolute rule against applying nonmutual offensive issue preclusion to federal government).

[56] 916 F.2d 542 (9th Cir. 1990).

[57] *See id.* at 543-44.

[58] *See id.* at 544.

[59] *See id.* at 544-45.

[60] *See id.*

against the government.[61] The court relied on *Mendoza*, referring to it as standing for a well-established rule prohibiting assertion of nonmutual offensive issue preclusion against the federal government.[62]

This absolute view of *Mendoza* is the majority view in the federal courts.[63] These courts reason that the policy justifications of the *Mendoza* holding apply whenever the government litigates.[64] Nevertheless, some circuits apply *Mendoza* more flexibly.[65]

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[61] *See id.*

[62] *See id.* at 545. However, the Ninth Circuit noted that it would allow a private litigant to assert issue preclusion against the government if mutuality existed. *See id.* at 544-45.

The court's reasoning is in line with its prior decision in *Lopez v. Heckler*, 725 F.2d 1489 (9th Cir. 1984), *vacated*, 469 U.S. 1082 (1984). In *Lopez*, plaintiffs brought a class action suit challenging the Secretary of Health and Human Services's policy for terminating social security disability benefits. *See id.* at 1493. The district court granted a preliminary injunction ordering the Secretary to restore the plaintiffs' benefits. *See id.* The Ninth Circuit affirmed in part because the Secretary had terminated some of the plaintiffs' benefits illegally. *See id.* at 1510.

The *Lopez* court interpreted *Mendoza* as creating an absolute rule precluding use of nonmutual offensive issue preclusion against the government. *See id.* at 1497 n.5. *See also* Wildman v. United States, 827 F.2d 1306, 1309 (9th Cir. 1987) (agreeing with government's argument that private litigant may not assert nonmutual offensive issue preclusion against government). According to the *Lopez* court, the government's failure to appeal an adverse decision involving a constitutional question would not preclude relitigation of the same question against a different party. *See Lopez*, 725 F.2d at 1497 n.5. A contrary holding would impose on the government the burden of appealing every holding with which it does not agree. *See id.* Furthermore, it would inhibit the development of important questions of law by making the first final decision on a particular issue binding. *See id.* The court provided this interpretation despite the fact that application of nonmutual offensive issue preclusion was not an issue in *Lopez*. *See id.*

[63] *See, e.g., National Med. Enters.*, 916 F.2d at 545 (9th Cir. 1990) (characterizing rule against applying nonmutual offensive issue preclusion to federal government as well-established); United States v. Alexander, 743 F.2d 472, 476 (7th Cir. 1984) (deciding that *Mendoza* holding is absolute); Sun Towers, Inc. v. Heckler, 725 F.2d 315, 323 n.8 (5th Cir. 1984) (holding *Mendoza* applicable to all issues involved in government litigation).

[64] *See, e.g., Sun Towers*, 725 F.2d at 323 n.8 (deciding that Supreme Court's rationale in *Mendoza* applies to all issues in federal government litigation).

[65] *See* cases cited *supra* note 8 (listing cases outside Ninth Circuit where courts more flexibly apply *Mendoza* rule).

B. The Second Circuit Approach: Mendoza *Does Not Apply to a State Government When a State Has Had Ample Opportunity to Appeal the Issue*

Unlike the Ninth Circuit, the Second Circuit has declined to apply *Mendoza* strictly.[66] In *Benjamin v. Coughlin*,[67] state prison inmates filed suit against the Commissioner of the New York State Department of Correctional Services.[68] The inmates claimed that a regulation requiring them to submit to weekly haircuts violated their right to free exercise of religion.[69] The Commissioner attempted to invoke *Mendoza* and enforce the regulation despite a prior state court decision declaring it unconstitutional.[70]

The Second Circuit admonished the Commissioner for trying to employ *Mendoza* in this lawsuit and allowed the plaintiffs to assert nonmutual offensive issue preclusion against the Commissioner.[71] Although the *Mendoza* opinion only addressed federal government litigation, the *Benjamin* court did not distinguish *Mendoza* on that basis.[72] Rather, the Second Circuit distinguished *Mendoza* because, in that case, the Solicitor General had not appealed the case on which the Ninth Circuit had relied for issue preclusion.[73] In *Benjamin*, the Commissioner had appealed two prior adverse decisions in state courts involving the same

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[66] *Compare* Collins v. Alaska, 823 F.2d 329, 332 n.4 (9th Cir. 1987) (noting that blanket application of issue preclusion to states could adversely affect development of important questions of law), *with* Benjamin v. Coughlin, 905 F.2d 571 (2d Cir. 1990) (not to applying *Mendoza* to state government when state previously appealed same issue).

[67] 905 F.2d 571 (2d Cir. 1990).

[68] *See id.* at 573.

[69] *See id.* at 573-74.

[70] *See id.* at 575. The district court granted the plaintiffs' request for a preliminary injuction enjoining the enforcement of the haircut requirement. *See id.* at 574. The district court based its decision on the preclusive effect of prior state court decisions concerning the same issue. *See id.*

[71] *See id.* at 576. After ten years of litigation, the defendants had a strong incentive and a fair opportunity to contest the issue fully in the state courts. *See id.* The State should have known that any determination may have a preclusive effect. *See id.* The court observed that the issue percolated through the state courts. *See id.* These state court decisions assured defendants that preclusion was not premature. *See id.* Proper review of the issues had already occurred. *See id.*

[72] *See id.*

[73] *See id.*

issue.[74] Accordingly, the Second Circuit held that because the Commissioner had sufficient opportunity to appeal the prior adverse decisions, the plaintiffs could claim nonmutual offensive issue preclusion.[75]

C. The District Court of Colorado Approach: Mendoza *Is Inapplicable Where Its Policy Rationale Is Absent*

The District Court of Colorado applied *Mendoza* narrowly to exempt some types of government litigation. In *Colorado Springs Production Credit Ass'n v. Farm Credit Administration*,[76] the plaintiff farm credit associations challenged the validity of certain Farm Credit Administration regulations.[77] The regulations required them to transfer some of their funds to financially weaker credit

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[74] *See id.*

[75] *See id.* In the instant case, the defendants appealed two prior judgments on the same issues to the New York Court of Appeals. *See id.*

Like the Second Circuit, the Eleventh Circuit looked to *Mendoza*'s policy rationale in deciding a case involving a state government. *See* Hercules Carriers, Inc. v. Florida Dep't of Transp., 768 F.2d 1558, 1579 (11th Cir. 1985). The Eleventh Circuit ruled that *Mendoza* did apply to state governments. *See id.* The court determined that the policy concerns considered in *Mendoza* applied equally to both the federal and state governments. *See id.* In reaching this conclusion, the court examined the factors that state or federal governments must consider when deciding whether to pursue an appeal. *See id.* These factors include limited government resources and crowded court dockets. *See id.* The court ultimately concluded that policy reasons demanded application of *Mendoza* when those reasons were present. *See id.* The court relied on policy reasons such as the ability of a government litigant to selectively appeal adverse decisions, executive branch department policies, and the development of important legal issues in different judicial forums. *See id.*

In addition to the Second Circuit's holding in *Benjamin*, another federal court has used the *Mendoza* policy justifications to further limit the *Mendoza* rule. *See* Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 666 F. Supp. 1475, 1478 (D. Colo. 1987) (holding that *Mendoza* does not categorically bar plaintiffs from asserting nonmutual offensive issue preclusion against federal government), *aff'd*, 848 F.2d 200 (10th Cir. 1988). The Tenth Circuit itself has never squarely addressed this issue, as it affirmed the district court in this case without opinion. *See* Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 848 F.2d 200 (10th Cir. 1988). However, in *Community Hospital v. Sullivan*, 986 F.2d 357 (10th Cir. 1993), the Tenth Circuit prohibited the plaintiff from asserting nonmutual offensive issue preclusion against the government. *See id.* at 360. The court ruled that the facts and law were substantially different from the prior case on which the plaintiffs relied. *See id.*

[76] 666 F. Supp. 1475 (D. Colo. 1987). In *Colorado Springs*, various farm credit associations brought suit challenging certain regulations the Farm Credit Administration had promulgated pursuant to the Farm Credit Amendments Act of 1985, Pub. L. No. 99-205, § 201, 99 Stat. 1678, 1691. *See Colorado Springs*, 666 F. Supp. at 1476.

[77] *See id.*

associations.[78] The plaintiffs filed for summary judgment, arguing that the regulations violated their constitutional rights under the Fifth and Fourteenth Amendments and that the regulations were promulgated in violation of the Administrative Procedure Act.[79] In sustaining the plaintiffs' motion, the court did not base its decision on constitutional grounds.[80] Instead, the court held that nonmutual offensive issue preclusion barred the government from relitigating these issues, as another federal court had previously decided them adversely to the government.[81]

The District Court of Colorado held that nonmutual offensive issue preclusion was appropriate here for several reasons.[82] Ac-

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[78] *See id.*

[79] *See id.*

[80] *See id.*

[81] *See id.* at 1478-79. The *Colorado Springs* court concluded that the primary issue at bar was the application of nonmutual offensive issue preclusion. *See id.* at 1476. It reflected on the history of issue preclusion and its apparent flexibility until the *Mendoza* decision. *See id.* at 1476-78. The court observed that this flexibility in application is a function of the doctrine's aims. *See id.* at 1477. These aims include reducing multiple lawsuits, increasing judicial economy and efficiency, preventing inconsistent decisions on the same issues, and promoting reliance on judicial decisions. *See id.* After summarizing the policy reasons behind the *Mendoza* decision, the court concluded that the *Mendoza* holding remained uncertain. *See id.* at 1478. The court noted four policy considerations of the *Mendoza* Court: (1) applying the nonmutual offensive issue preclusion doctrine would frustrate development of important questions of law by according precedent to the first determination of an issue; (2) applying the doctrine would force the Supreme Court to grant certiorari to the government before an intercircuit conflict arose; (3) the Solicitor General would have to appeal every adverse decision against the government or face preclusion; and (4) applying the doctrine would confine policy choices of succeeding executive administrations. *See id* at 1477.

Subsequent to the *Colorado Springs* decision, the First Circuit held in *NLRB v. Donna Lee Sportswear Co.*, 836 F.2d 31 (1st Cir. 1987), that *Mendoza* holding is not absolute. *See id.* at 37-38; *accord* Constantine v. United States, 14 Cl. Ct. 339, 341 (1988) (noting that *Mendoza* rule does not categorically bar application of offensive issue preclusion to federal government). The First Circuit determined that the dispute between the garment workers' union and Donna-Lee Sportswear precluded any government interest in the litigation. *See Donna-Lee Sportswear*, 836 F.2d at 38. In finding that the litigation primarily involved an employment agreement between private parties, the court held that none of the policy reasons behind *Mendoza* surfaced. *See id.* at 37-38. The policy reasons from the *Mendoza* opinion, which the court found absent here, included: geographic breadth of government litigation; diversity and numerousness of issues in government litigation; the importance of issues involved in government litigation; the need for development of legal issues in the various circuits before the Supreme Court grants certiorari; and the need to retain the Supreme Court's policy of not granting certiorari to the government until an intercircuit conflict arises. *See id.* The court concluded that NLRB's status as a governmental agency did not automatically mandate application of the *Mendoza* rule. *See id.* at 38.

[82] *See Colorado Springs*, 666 F. Supp. at 1478.

cording to the district court, the Supreme Court intended to limit the *Mendoza* holding to issues of great public importance, such as Mr. Mendoza's due process claim.[83] Conversely, the court found that the controversy at issue presented a discrete question of administrative law.[84] Moreover, although they lacked privity, the plaintiffs at bar were closely related to the former plaintiffs.[85] *Mendoza*, however, involved two distinct, separate plaintiffs with no relation to one another.[86] The district court relied exclusively on these policy justifications to distinguish *Colorado Springs* from *Mendoza*.

D. Commentators' Reactions to Mendoza

In accord with the reasoning of the District Court of Colorado, commentators have argued for a narrow interpretation of *Mendoza*. Many commentators have chastised the Supreme Court for creating in *Mendoza* a special exception to the general rule of issue preclusion for the government.[87] Some have argued that issue preclusion should apply to the government just as it would to a private litigant.[88] These commentators note that not all government relitigation involves interpretation of issues of great public importance.[89]

As these commentators have observed, the problem is how courts should identify which cases implicate the policy justifications behind *Mendoza*.[90] They have argued that when *Mendoza*'s

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[83] *See id.* at 1478-79.

[84] *See id* at 1478.

[85] *See id.*

[86] *See id* at 1479.

[87] *See, e.g.*, A. Leo Levin & Susan M. Leeson, *Issue Preclusion Against the United States Government*, 70 IOWA L. REV. 113, 134 (1984) (arguing against *Mendoza*'s special exception and for application of issue preclusion against government in order to prevent wasteful government relitigation); Note, *Collateral Estoppel and Nonacquiescence: Precluding Government Relitigation in the Pursuit of Litigant Equality*, 99 HARV. L. REV. 847, 860 (1986) [hereinafter *Collateral Estoppel and Nonacquiescence*] (asserting that courts should not follow *Mendoza* blindly, but instead apply issue preclusion against government when it furthers goal of litigant equality).

[88] *See* Allan D. Vestal, *Relitigation by Federal Agencies: Conflict, Concurrence and Synthesis of Judicial Policies*, 55 N.C. L. REV. 123, 177 (1977) (arguing that courts should apply issue preclusion on matters of law against federal government); Levin & Leeson, *supra* note 87, at 134 (noting that *Mendoza* will increase government relitigation).

[89] *See* Levin & Leeson, *supra* note 87, at 128.

[90] *See id.* at 129. The authors comment that the characterization of the legal issues in

policy concerns are absent from a case, courts should subject the government to nonmutual offensive issue preclusion.[91] Applying issue preclusion against the government could thus reduce wasteful relitigation.[92] Other commentators have echoed this view for a different reason.[93] These scholars fear that the government will use *Mendoza* to enforce agency policies in one federal circuit, despite an adverse decision in another circuit.[94]

As the commentators have noted, courts should allow parties to assert nonmutual offensive issue preclusion against the federal government, except in cases involving issues of great public importance.[95] Such issues benefit from the careful consideration that relitigation provides, while relitigation of unimportant issues unnecessarily burdens the courts and private litigants.[96] Furthermore, the Second Circuit's and the District Court of Colorado's interpretations of *Mendoza* have demonstrated that courts can flexibly apply its holding.[97] However, these different interpretations have created confusion among courts as to how they should evaluate and apply *Mendoza*'s policy justifications.[98] The

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question reconciles differences between proponents and opponents of the government's relitigation policy. *See id.* Important issues benefit from percolation, while less important ones do not warrant percolation because they burden the courts. *See id.* Percolation refers to the practice of developing legal principles in the various federal circuits before the Supreme Court grants review. *See id.* at 127-29.

[91] *See Collateral Estoppel and Nonacquiescence*, *supra* note 87, at 861 (arguing that courts should apply *Mendoza* only when government has strong justifications for exemption from nonmutual offensive issue preclusion).

[92] *See* Levin & Leeson, *supra* note 87, at 133.

[93] *See, e.g., Collateral Estoppel and Nonacquiescence*, *supra* note 87, at 860 (asserting that judiciary should apply issue preclusion against government when it furthers goal of litigant equality).

[94] *See, e.g., id.* at 852-53. *Collateral Estoppel and Nonacquiescence* acknowledges the special situation of the government as a litigant. *See id.* However, it offers litigant equality as the test to consider when determining whether or not to apply nonmutual offensive issue preclusion against the government. *See id.* at 861. Litigant equality seeks to foster the notion that litigation involves two adversaries with equal legal footing. *See id.* at 852-53. If courts follow *Mendoza* absolutely, federal agencies will litigate controversies where a private plaintiff seeks the same relief awarded to another plaintiff in a prior case. *See id.* at 847.

[95] *See id.* at 860 (arguing that courts should flexibly apply *Mendoza* after they have considered plaintiffs' circumstances and federal government's situation).

[96] *See* Levin & Leeson, *supra* note 87, at 128.

[97] *See supra* Part II.B-C (discussing Second Circuit's and District Court of Colorado's flexible approaches to applying *Mendoza*).

[98] *See supra* Part II.A-C (discussing federal courts' different interpretations of *Mendoza*'s meaning and policy justifications).

solution is for the judiciary to use certain policy guidelines to determine which issues are sufficiently important to permit government relitigation.[99]

III. THE PROPOSED SOLUTION — APPLYING THE *MENDOZA* POLICY JUSTIFICATIONS

This Comment proposes that courts employ a two-part policy test to determine when *Mendoza* applies. This test will help provide uniformity in applying *Mendoza* and deny application of nonmutual offensive issue preclusion against the government when *Mendoza*'s policy concerns are implicated.[100] The test is modeled after the Second Circuit and District Court of Colorado approaches.[101] The rule of *Mendoza*, barring application of nonmutual offensive issue preclusion against the government, should not apply when the following policy considerations are present:

1. The case presents no issue of great public importance that requires development within the various circuits through government litigation.[102]
2. The government has insufficient interest in maintaining discretion concerning appeals to outweigh the policies supporting nonmutual offensive issue preclusion.[103]

The trial judge should have discretion in determining what weight a *Mendoza* policy concern should have, should such a concern exist.[104]

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[99] *See Collateral Estoppel and Nonacquiescence*, *supra* note 87, at 860-61 (explaining guidelines such as nature of issue, litigant equality, fairness, and efficiency); *see also* discussion *infra* Part III (explaining policy-based guidelines for courts to consider in cases involving federal government).

[100] *See* Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 666 F. Supp. 1475, 1478 (D. Colo. 1987) (asserting that Supreme Court did not mean for *Mendoza* to make litigation more costly and rule of issue preclusion more difficult to apply), *aff'd*, 848 F.2d 200 (10th Cir. 1988); *see also Collateral Estoppel and Nonacquiescence*, *supra* note 87, at 861 (asserting that courts should apply issue preclusion against government when application furthers goal of litigant equality).

[101] *See* discussion *supra* Part II.C (explaining District Court of Colorado Approach).

[102] *See supra* notes 95-97 and accompanying text (discussing reasons for limiting percolation to important federal policy issues).

[103] *See infra* notes 118-21 and accompanying text (discussing inapplicability of *Mendoza* where appeal will not severely tax government resources and government litigators can readily estimate cost of appeal).

[104] *See, e.g.*, Parklane Hosiery Co. v. Shore, 439 U.S. 322, 331 (1979) (concluding prefer-

The first part of the test is based on the unique role of the government as a party to litigation.[105] Government litigation may often involve issues of great public importance.[106] These issues benefit from development within the circuits before the Supreme Court makes a final determination.[107] Therefore, *Mendoza* should apply, and the courts should allow the federal government to relitigate such issues.[108] When issues of great public importance are clearly not present in a case, applying *Mendoza* as an absolute rule encourages wasteful government relitigation.[109] Furthermore, in the absence of such issues, prohibiting nonmutual offensive issue preclusion provides the government with an unfair advantage over a private litigant.[110]

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able approach is to allow trial judge discretion in applying offensive collateral estoppel); *accord* Jack Faucett Assocs., Inc. v. American Tel. & Tel. Co., 744 F.2d 118, 124 (D.C. Cir. 1984) (noting equitable nature of offensive issue preclusion requires that trial judge exercise discretion in determining if application is unfair to defendant); *see also supra* notes 8, 95-99 and accompanying text (discussing discretion of trial judges in applying offensive issue preclusion and flexible approaches to *Mendoza*'s holding).

[105] *See* United States v. Mendoza, 464 U.S. 154, 159-60 (1984) (noting that federal government is in different position than private litigant). The Court cited the following factors: geographic breadth of government litigation, the number of cases that the government litigates, and important public issues involved in government litigation. *See id.*

[106] *See* Levin & Leeson, *supra* note 87, at 133 (explaining Professor Vestal's view that courts should apply preclusion against government, except for issues involving constitutional law); Vestal, *supra* note 88, at 178 (arguing that courts should apply nonmutual offensive issue preclusion against federal government except when unique governmental issues are involved); *Collateral Estoppel and Nonacquiescence*, *supra* note 87, at 860 (asserting that courts should not apply offensive issue preclusion against government when case contains constitutional law issues or other issues of important public policy).

[107] *See* Corr, *supra* note 33, at 47 (arguing that *Mendoza* should not apply to suits involving issues of sufficient public importance); *see also Collateral Estoppel and Nonacquiescence*, *supra* note 87, at 860-61 (asserting that courts should not apply offensive issue preclusion against government when issue may benefit from percolation through various appellate circuits).

[108] *See supra* notes 105-07 (noting that courts should allow federal government to relitigate issues of public importance).

[109] *See* Vestal, *supra* note 88, at 175-76 (arguing that courts should apply nonmutual offensive issue preclusion against federal government to reduce wasteful government relitigation); *see also* Levin & Leeson, *supra* note 87, at 128-29 (noting inappropriate government relitigation of unimportant issues due to *Mendoza*).

[110] *See* Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 666 F. Supp. 1475, 1479 (D. Colo. 1987) (arguing that *Mendoza* was not meant to inconvenience private litigants or to create inequality between government and private litigants), *aff'd*, 848 F.2d 200 (10th Cir. 1988); Vestal, *supra* note 88, at 177 (commenting on federal government's manipulation of its litigation through forum selection and selective appeals); *Collateral Estoppel and Nonacquiescence*, *supra* note 87, at 861 (asserting that determination of whether or not

When the United States litigates a case that does not involve an issue of great public importance, the *Mendoza* reasoning becomes inapplicable.[111] For example, if one negligent act of the government injures three people, they may sue separately.[112] Once the government loses to the first plaintiff, the court should apply nonmutual offensive issue preclusion against the government in the two later cases.[113] The later plaintiffs should benefit from the doctrine of nonmutual offensive issue preclusion, just as they would if their adversary were another private party.[114]

Some may argue that courts should apply *Mendoza* without exception.[115] This would give different circuits a chance to rule on an issue before the Supreme Court makes a final decision.[116] However, the possibility of courts developing important public policy principles in cases where there is no issue of great public importance is negligible.[117]

The cases to which *Mendoza* is inapplicable also involve a lesser need for the government to retain flexibility in determining when to appeal.[118] This lesser need forms the cornerstone of the second part of the test. When the government litigates a

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to apply offensive issue preclusion against government should depend on facts of case and fairness to private litigants).

[111] *See infra* notes 112-14 and accompanying text (discussing inapplicability of *Mendoza* holding when government litigates as private party).

[112] *See supra* text accompanying notes 1-3 (explaining hypothetical situation of private individuals injured on federal government property).

[113] *See supra* notes 95-99 and accompanying text (explaining that application of nonmutual offensive issue preclusion is appropriate when policy considerations of *Mendoza* are absent).

[114] *See* Parklane Hosiery Co. v. Shore, 439 U.S. 322, 326 (1979) (explaining that issue preclusion serves two functions: protecting litigants from relitigation and promoting judicial economy); *see also* RESTATEMENT (SECOND) OF JUDGMENTS, *supra* note 2, § 29 (allowing issue preclusion in subsequent litigation with other parties, and explaining its limitations).

[115] *See, e.g.*, Lopez v. Heckler, 725 F.2d 1489, 1497 n.5 (9th Cir. 1984) (holding that *Mendoza* is absolute rule).

[116] *See, e.g., id.* (observing that *Mendoza* court intended to allow government to relitigate same issue in different forums so first final decision would not be determinative of issue).

[117] *See supra* notes 109-14 and accompanying text (arguing no need for percolation of non-public policy issues).

[118] *See Collateral Estoppel and Nonacquiescence*, *supra* note 87, at 852-53 (noting that government litigators are actually in better position to estimate costs of foregoing appeal due to greater resources and information access than private litigants); *see also* Vestal, *supra* note 88, at 177 (observing that federal government manipulates litigation to optimize outcome by selecting adversaries and forums for appellate litigation).

case not involving an issue of great public importance and loses, the resources required for appeal do not justify prohibiting nonmutual offensive issue preclusion.[119] Some argue that forcing the government to appeal every adverse decision is not justified because of the large amount of government litigation.[120] In deciding whether to appeal a case, however, the government can weigh the repercussions as would a private party.[121]

Some assert that for reasons of efficiency and ease of application, an absolute rule prohibiting application of nonmutual offensive issue preclusion against the government is preferable.[122] This argument neglects to consider the traditional discretion of the trial judge in deciding when to allow a party to assert issue preclusion.[123] It also discounts instances where prohibiting a private litigant from asserting nonmutual offensive issue preclusion against the government gives the government an unfair advantage.[124] The judiciary can remedy this unfair advantage by not making *Mendoza* an absolute bar.[125]

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[119] *See* Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 666 F. Supp. 1475, 1478 (D. Colo. 1987) (observing that *Mendoza* is not applicable to situations where appeal will not excessively tax government resources), *aff'd*, 848 F.2d 200 (10th Cir. 1988).

[120] *See, e.g.*, Sun Towers, Inc. v. Heckler, 725 F.2d 315, 323 (5th Cir. 1984) (reiterating *Mendoza* court's concern about forcing government to appeal all adverse decisions if courts apply nonmutual offensive issue preclusion against government).

[121] *See supra* note 118 and accompanying text (asserting government officials can better weigh costs of appeal than private litigants).

[122] *See Sun Towers*, 725 F.2d at 323 n.8 (concluding plaintiff could not assert nonmutual offensive issue preclusion against federal government because *Mendoza* applied to all issues involving government litigation); *see also supra* notes 7, 55-64 and accompanying text (discussing cases which hold *Mendoza* rule is absolute).

[123] *See supra* note 104 and accompanying text (discussing traditional discretion of trial judges to allow or prohibit issue preclusion).

[124] *See supra* notes 110-14 and accompanying text (discussing possibility of government receiving unfair advantage over private litigants from blanket application of *Mendoza* holding).

[125] *See* Colorado Springs Prod. Credit Ass'n v. Farm Credit Admin., 666 F. Supp. 1475, 1479 (D. Colo. 1987) (noting that *Mendoza* did not intend to weaken principle of litigant equality), *aff'd*, 848 F.2d 200 (10th Cir. 1988); Vestal, *supra* note 93, at 174 (noting that one factor controlling case law of issue preclusion is goal of equal treatment to all litigants); *Collateral Estoppel and Nonacquiescence*, *supra* note 92, at 848 (concluding that courts should have discretion to apply nonmutual offensive issue preclusion against government to promote litigant equality).

CONCLUSION

If the courts construe *Mendoza* as absolutely barring litigants from using nonmutual offensive issue preclusion against the government, private litigants may suffer an unfair disadvantage.[126] This disadvantage is justified by the unique policy concerns involving some government litigation — allowing lower courts to further develop issues of great public importance and providing broader discretion to the Solicitor General in deciding whether to appeal cases involving such issues.[127] When these policy concerns are absent, however, courts should allow litigants to use nonmutual offensive issue preclusion against both federal and state governments.[128]

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[126] *See supra* notes 110-14, 124 and accompanying text (discussing unfair advantage to government from applying *Mendoza* in all situations).

[127] *See* United States v. Mendoza, 464 U.S. 154, 159-63 (1984); *see also supra* notes 53-58, 84, 115 and accompanying text (explaining policy justifications for *Mendoza* holding).

[128] *See supra* notes 91-94 and accompanying text (explaining inapplicability of *Mendoza* holding when policy justifications behind *Mendoza* are absent).