

1 IN THE SUPREME COURT OF THE UNITED STATES

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3 BRENT TAYLOR, :

4 Petitioner :

5 v. : No. 07-371

6 ROBERT A. STURGELL, ACTING :

7 ADMINISTRATOR, FEDERAL :

8 AVIATION ADMINISTRATION, :

9 ET AL. :

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11 Washington, D.C.

12 Wednesday, April 16, 2008

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14 The above-entitled matter came on for oral
15 argument before the Supreme Court of the United States
16 at 11:26 a.m.

17 APPEARANCES:

18 ADINA H. ROSENBAUM, ESQ., Washington, D.C.; on behalf
19 of the Petitioner.

20 DOUGLAS HALLWARD-DRIEMEIER, ESQ., Assistant to the
21 Solicitor General, Department of Justice, Washington,
22 D.C.; on behalf of the Respondent.

23 CATHERINE E. STETSON, ESQ., Washington, D.C.; on behalf
24 of the Respondent, The Fairchild Corporation.

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P R O C E E D I N G S

(11:26 a.m.)

CHIEF JUSTICE ROBERTS: We'll hear argument next in Case 07-371, Taylor versus Sturgell.

Ms. Rosenbaum.

ORAL ARGUMENT OF ADINA ROSENBAUM

ON BEHALF OF THE PETITIONER

MS. ROSENBAUM: Thank you. Mr. Chief Justice, and may it please the Court:

It is a basic principle of American law that a lawsuit does not decide the rights of non-parties. That basic principle has a few narrow exceptions, none of which applies here.

Taylor had no involvement in the prior case. He had no legal relationship with any party to that case. And no party to that case had the legal authority to represent him.

CHIEF JUSTICE ROBERTS: You could have a situation where it is an associational standing case, and an individual is the one that's relied upon give the association standing, in that case is the individual, even though he's not bringing the suit, is he barred by the association's case?

MS. ROSENBAUM: I think that would depend on whether the association in that case had the authority

1 to bring that case on behalf of that individual.

2 In order for a person to be bound on the
3 basis of representation in the prior case, the party to
4 the prior case had to have the authority to bring the
5 case on behalf of that other person. It had to be a
6 representational relationship where the party to the
7 first case is exercising the authority to represent the
8 later case. And there has to be a -- a relationship that
9 exists at the time of the first litigation.

10 Someone can't retroactively be represented
11 during the first litigation.

12 JUSTICE SOUTER: What if you had a case and
13 there's a suspicion of something like that that's here,
14 although the courts below did not so find? What if you
15 had a case in -- like this in which the first litigant
16 said to the second, I brought my case and I lost. I
17 want you to try again for me. And if you do and you
18 win, I will give you a job making use of the fruits of
19 the litigation?

20 Would there be an estoppel in that case?

21 MS. ROSENBAUM: No, not just on those facts.
22 And I do want to emphasize --

23 JUSTICE SOUTER: Why?

24 MS. ROSENBAUM: -- first that is a big shift
25 from what was decided below. What the court held below

1 was that Herrick represented Taylor in the previous
2 case. It did not hold that Taylor was somehow
3 representing Herrick in this case.

4 JUSTICE SOUTER: It held, as I recall,
5 specifically, I think, that there was no collusion
6 found. And the suggestion was that if collusion had
7 been found -- and I was giving you an example of
8 something that I would call collusion at least -- that
9 the result might have been different.

10 MS. ROSENBAUM: Collusion is sort of a
11 pejorative way of saying an agreement. An agreement can
12 be -- can lead to preclusion under certain instances,
13 but for --

14 JUSTICE SOUTER: Well then, why wouldn't my
15 example have done so? In my example the agreement was I
16 lost; please try again for me. And if you win, I'm going
17 to give you a job making use of the fruits of the
18 lawsuit.

19 Would that agreement not have been enough
20 to -- to sustain a preclusion here?

21 MS. ROSENBAUM: No, not without the party to
22 the first case controlling the second case. But this
23 Court does not --

24 JUSTICE SOUTER: Why should that -- why
25 should that matter?

1 MS. ROSENBAUM: Because what's being
2 protected here is the person's right to the opportunity
3 to be heard on their claim. And in that case --

4 JUSTICE GINSBURG: But --

5 MS. ROSENBAUM: -- second claim.

6 JUSTICE GINSBURG: The claim that
7 Justice Souter has posited is not one that the second
8 person would have been -- he was soliciting. He was
9 solicited to be a plaintiff in that second case. That
10 is not the case that is involved here. As far as we
11 know --

12 MS. ROSENBAUM: Exactly.

13 JUSTICE GINSBURG: As far as we know, Taylor
14 didn't even know about the first case. He brings the
15 second case. There is no indication that he was
16 solicited by Herrick. So I don't know why you're even
17 reaching the case where someone -- someone is -- you say
18 has to be controlled, but why are we getting into the
19 details of such a situation when we have no
20 solicitation?

21 MS. ROSENBAUM: Exactly. This Court does
22 not need to decide what sort of solicitation or
23 recruitment or agreement would reasonably --

24 JUSTICE SOUTER: Right. But if we adopted
25 -- as I understand it, if we adopted your theory across

1 the board, it would preclude -- it would preclude a
2 preclusion in the case of my hypothetical, and that's
3 what I want to get at.

4 Should we, by adopting your theory,
5 eliminate the possibility of preclusion in the case that
6 I put to you?

7 And you're saying, I guess: Well, if --
8 even there, there should be no preclusion unless the
9 first party controlled the case in the -- controlled the
10 second case.

11 And my question is: Why?

12 MS. ROSENBAUM: Well, again, that's a
13 question of whether that second party is acting as an
14 agent for the first party and really just trying to
15 relitigate that first party's opportunity to be heard.
16 And if the second party is an agent, then the second
17 party can be precluded.

18 But, again, exactly what would constitute
19 that agency is not something that this Court needs to
20 decide, because the facts here do not demonstrate that
21 Taylor was representing Herrick in this case.

22 JUSTICE SOUTER: Well, do you think that the
23 collusion point was perhaps just ill-phrased here?
24 There was no collusion, certainly, in the sense that
25 there was any kind of secret dealing going on.

1 The second lawsuit, the people involved in
2 it, couldn't Taylor -- couldn't have been more candid, I
3 guess, about what was going on. And so there was no
4 collusion in the sense of concealment or
5 underhandedness.

6 Do you think that is perhaps the reason that
7 the court of appeals found that there was no collusion;
8 and that, therefore, we ought to discount that finding?

9 MS. ROSENBAUM: Well, the -- I think the
10 court of appeals found that there was no collusion
11 because the facts that are in the record about the
12 relationship between Taylor and Herrick do not
13 demonstrate that there was any collusion.

14 JUSTICE ALITO: Well, did the court of
15 appeals actually say there was no collusion, or did it
16 say, we don't need to reach that question?

17 MS. ROSENBAUM: It said that the facts were
18 ambiguous, and it did not need to decide it. But it
19 also specifically said that on the facts before it, that
20 Taylor could have brought an entirely separate,
21 independent case, separate from Herrick. So --

22 JUSTICE ALITO: So these facts do not
23 necessarily show collusion to avoid the preclusive
24 effects of Herrick?

25 MS. ROSENBAUM: Yes.

1 JUSTICE ALITO: We do not need to determine
2 whether they count as tactical maneuvering. They did
3 find that -- they did say there was a close working
4 relationship relative to the successive cases. Didn't
5 they say that?

6 MS. ROSENBAUM: They did say that. But,
7 again, then that just brings up the question of what
8 sort of relationship is necessary for the -- there to be
9 preclusion.

10 And many people have close relationships but
11 that does not necessarily mean that those people are
12 bound, or expect to be bound, by decisions in each
13 others' cases, particularly --

14 JUSTICE SOUTER: But -- but here the close
15 relationship seems to boil down to this, and you correct
16 me if I'm wrong here because I may be missing some fact.

17 But it is inconceivable to me that any
18 reason for Taylor's participation or Taylor's bringing
19 this lawsuit could be found except the reason of trying
20 to relitigate Herrick's lawsuit so that Taylor would
21 then either get the job or have an easier time
22 fulfilling the job of fixing up the airplane.

23 I can't think of any other reason on the
24 facts as I understand them from the briefs.

25 Is there a -- on the facts of the case, any

1 other possible reason?

2 MS. ROSENBAUM: Yes. For starters, I just
3 want to point out that there was no agreement, or the
4 record does not show and there was no agreement between
5 them to actually work on the plane. But the --

6 JUSTICE SOUTER: Okay. But why else would
7 he be doing -- why else would he have been doing this?
8 What does the record show as another possible
9 explanation for this?

10 MS. ROSENBAUM: Taylor is the executive
11 director of the Antique Aircraft Association, and he is
12 someone who is interested in antique aircrafts and in
13 aviation generally. And after reading Herrick's
14 decision -- his explanation in the motion for discovery
15 for filing his FOIA request is that he read the decision
16 in Herrick, and that he understood it to mean that he
17 was legally entitled to the records. And so he filed a
18 FOIA request --

19 JUSTICE SCALIA: You don't need a reason to
20 file a FOIA request anyway, right? Just the naked
21 curiosity justifies your obtaining the documents, right?
22 I mean this is a lawsuit that does not require a reason
23 except I want the documents. You've got them. I'm
24 entitled to them.

25 MS. ROSENBAUM: Yes. It requires the person

1 to have interest --

2 JUSTICE SCALIA: I mean somebody could have
3 walked in off the street and filed this same lawsuit,
4 right?

5 MS. ROSENBAUM: Anyone who was interested in
6 the records could file a FOIA request for them.

7 JUSTICE SOUTER: But if somebody walked in
8 off the street and began this lawsuit and had absolutely
9 no connection with -- with Herrick, and so on, the issue
10 of preclusion wouldn't come up, or at least it wouldn't
11 come up in the -- in the context that it comes up here.

12 But this isn't somebody who walked in off
13 the street, and the claim is there is a preclusion
14 doctrine because of the relationship between party one
15 and party two. And the fact that anybody who comes in
16 off the street could have asked -- could have made the
17 same request, in effect, is not an answer to the
18 collusion claim, is it?

19 MS. ROSENBAUM: Well, it shows that the
20 problem, if it exists, of there being repeated
21 litigation over the same records is not one that would
22 be solved through preclusion. And Respondents have not
23 shown there actually is a problem with repeated
24 litigation over the same records. And the Department of
25 Justice represents the defendants in all FOIA cases, so

1 they would be able to know if that was a problem that
2 came up again and again. But --

3 CHIEF JUSTICE ROBERTS: What about if it is
4 the executive director of the association, and the suit
5 is brought in the name the association, and they lose.
6 Can he bring suit as, you know, I'm just Joe Blow, but I
7 happen to be the executive director, but I'm bringing
8 this in my own name?

9 MS. ROSENBAUM: The question -- that would
10 then come down to whether or not he controlled the first
11 case, because one of the categories in which people are
12 bound by prior litigation in which they were not
13 themselves parties, is if they had control over the
14 first case and had the full and fair opportunity to
15 litigate in that case.

16 CHIEF JUSTICE ROBERTS: Well, let's say that
17 it is somebody above him, you know, the president of the
18 association, who decides what lawsuits are brought, and
19 he's just the executive director?

20 MS. ROSENBAUM: So if he was not in control
21 of the first case and did not get his opportunity to be
22 heard in that case --

23 CHIEF JUSTICE ROBERTS: Well, he recommended
24 to the president, said we ought to file this lawsuit.
25 The president said okay, and they did, and then they

1 lost. Can he go ahead as an individual?

2 MS. ROSENBAUM: If he was not in control of
3 that first case, yes, he could go ahead as an individual
4 if he was not -- if he is not representing the
5 association in the second case, but is, instead,
6 representing himself.

7 JUSTICE ALITO: And could he continue to
8 solicit other members of the -- or -- the association to
9 file FOIA suits all over the country until they finally
10 got a favorable decision?

11 MS. ROSENBAUM: Well, that would come down
12 to what the definition of "solicit" was and whether
13 those people were acting as agents of that person who is
14 doing the soliciting.

15 But, again, this Court does not need to
16 decide exactly what sort of solicitation would create
17 that agency relationship, because the facts in the
18 record here do not show that that is what happened here.

19 And also FOIA is set up to allow there to be
20 repeated litigation over the same records. Under FOIA,
21 every requester has -- every person has the right to
22 request records. And once they have requested those
23 records and been denied them, they have suffered a
24 concrete and particular injury; and they have the right
25 to seek judicial review of that injury.

1 So that makes this case different from the --
2 the taxpayer standing in quo warranto cases cited --

3 CHIEF JUSTICE ROBERTS: Well, that means
4 your statement implicates very serious questions of
5 standing under Article III, whether Congress can say
6 create the injury by saying you've been denied records
7 and, therefore, you have standing. I think that's -- I
8 wouldn't go ahead assuming that that was correct.

9 JUSTICE SCALIA: Although it is not really
10 just your argument; it is also FOIA, isn't it?

11 MS. ROSENBAUM: That is the way Congress set
12 up FOIA is to -- to give people that statutory
13 entitlement to the records.

14 JUSTICE GINSBURG: And it does cover idle
15 curiosity. I mean, I suppose if anyone in -- in the
16 courtroom were to file a request for the same
17 information, there could be no argument that there would
18 be any kind of preclusion just because it's been heard
19 before.

20 MS. ROSENBAUM: Exactly. And if there were
21 some problem with people -- with there being multiple
22 requests for the same records, that would be a problem
23 for Congress to solve. And Congress has all sorts of
24 creative ways of solving problems when it thinks that
25 they are, in fact, problems.

1 It can channel all litigation into one court
2 or into one court of appeals like it does for patent
3 cases so that -- to more easily create precedent, or it
4 didn't have to create FOIA to create this statutory,
5 individual entitlement to begin with.

6 It could have sent up FOIA more like a qui
7 tam case in which one person did represent the whole
8 public or the government in requesting records.

9 But that's not what Congress did. Congress
10 did give every person the right to records and the right
11 to seek judicial review when they were denied records.
12 And we can disagree about whether that was something
13 Congress should have done, but that is what Congress did
14 and Congress's chosen scheme should not be altered
15 through the back door of preclusion doctrine. And
16 the amorphous factors used by the lower courts to hold
17 Taylor bound also have their problems in terms of
18 judicial efficiency and people coming into court. Those
19 factors do not give guidance either to lower courts or
20 to litigants themselves about who can be bound.

21 I mean, a -- in a threshold area like res
22 judicata, it is particularly important to have clear
23 rules about who can be bound, to move on quickly to the
24 merits of the case, without having to go through a lot
25 of collateral litigation; but the factors used by the

1 court of appeals do not provide those clear rules. And
2 they also don't provide clear rules to litigants about
3 when they will, in fact, be bound by -- when, in fact,
4 they will be bound by a case.

5 JUSTICE SCALIA: What are your clear rules?
6 Give me -- set it forth clearly, what you think it
7 takes. Number one, do -- do you have to know you're
8 going to be bound at the time the first suit is brought?
9 That isn't the requirement, is it?

10 MS. ROSENBAUM: No. There are certain legal
11 relationships that would not require someone to be -- to
12 know even of the case at the first suit. For example, a
13 successor in interest to property can buy the property
14 --

15 JUSTICE SCALIA: Right.

16 MS. ROSENBAUM: -- after the first suit, and
17 yet is nonetheless bound by a --

18 JUSTICE SCALIA: So what are your tests?
19 What are your tests? How are they? How many? Five?
20 Four? It is not a totality of the circumstances test,
21 though, right?

22 MS. ROSENBAUM: No, it's --

23 JUSTICE SCALIA: You have some criteria.
24 What are they?

25 MS. ROSENBAUM: There are an --

1 JUSTICE SCALIA: Agency? Right? There's --

2 MS. ROSENBAUM: Well, agency would fall into
3 a larger category of -- that there are certain Legal
4 relationships that treat people as the same person for
5 res judicata purposes and often for other purposes; and
6 those are substantive relationships created by
7 underlying substantive law.

8 JUSTICE SCALIA: Okay.

9 MS. ROSENBAUM: People can also be bound
10 when they have -- have had their full and fair
11 opportunity to litigate in the prior case, through some
12 involvement in that case. So for example, in Montana
13 versus United States this Court held that the government
14 was bound because it had controlled the contractor who
15 brought the prior case.

16 JUSTICE SCALIA: Okay.

17 MS. ROSENBAUM: And then people can be bound
18 when they were represented in the prior case. And in
19 that case, they did have their opportunity to be heard
20 in the prior case just through a representative.

21 JUSTICE SCALIA: A representative that they
22 agreed to?

23 MS. ROSENBAUM: Exactly. Someone who had
24 the authority --

25 JUSTICE SCALIA: As in a class action, where

1 they have the -- the ability to bow out if they want,
2 right?

3 MS. ROSENBAUM: Well, a class action is a
4 very good example of that representational relationship,
5 and the court of appeals in this case used language that
6 is very similar to the rationales used for class
7 actions, talking about identity of interests and
8 adequacy of representation, but it did not include any
9 of the protections that are inherent in class actions:
10 the factors that need to be looked at to make sure that
11 class treatment is appropriate. The specification of
12 who is and is not in the class.

13 JUSTICE SCALIA: Yes. I mean, and the
14 individual's ability to withdraw from the class, if he
15 doesn't want to be bound by this suit, right?

16 MS. ROSENBAUM: Yes. That --

17 JUSTICE SCALIA: That is crucial.

18 MS. ROSENBAUM: That is crucial in certain
19 class actions.

20 JUSTICE GINSBURG: And the judge's
21 obligation to look out for the class to see, for
22 example, any settlement has to be approved by the judge
23 to make sure that it is fair to the absent class members.

24 MS. ROSENBAUM: Yes. That was absent here
25 also. In this situation, no one understood that first

1 case to be litigating the rights of anyone but
2 Mr. Herrick. Mr. Herrick did not understand that that's
3 what was happening. The Tenth Circuit did not
4 understand that was what was happening, and Taylor did
5 not understand that's what was happening.

6 JUSTICE KENNEDY: If this case had been one
7 in which were notice, before the suit was filed -- or at
8 the outset of the suit, and some encouragement to go
9 ahead with the suit, would that have fit your, I guess,
10 second category of adequate representation, adequate
11 opportunity to have your -- a case heard?

12 MS. ROSENBAUM: The category of having the
13 full and fair opportunity --

14 JUSTICE KENNEDY: Yes.

15 MS. ROSENBAUM: To litigate to the --

16 JUSTICE KENNEDY: From a fair --

17 MS. ROSENBAUM: Case -- no. And --

18 JUSTICE KENNEDY: And that is because?

19 MS. ROSENBAUM: That is because that would
20 basically be setting up a system of mandatory voluntary
21 intervention in a case.

22 JUSTICE KENNEDY: But why doesn't that fit
23 at least the semantic version of the category you gave
24 us?

25 MS. ROSENBAUM: Because that person still is

1 not receiving -- is not fully and fairly litigating that
2 case. They are not involved in that case, under that
3 hypothetical. And they're not in control of that case.

4 Merely knowing about a case, and knowing that
5 one could voluntarily intervene is not enough.

6 And this Court has stated --

7 JUSTICE KENNEDY: So your list of factors is
8 cumulative? They are not independent categories? Your
9 category number 2 then is not a stand-alone category for
10 barring -- for barring the second plaintiff?

11 MS. ROSENBAUM: It can be in certain
12 circumstances. Just because a --

13 JUSTICE GINSBURG: The word that we used to
14 use is "privity." If you are in privity with somebody
15 else, you can -- but that's a pre-existing legal
16 relationship.

17 MS. ROSENBAUM: Yes.

18 JUSTICE GINSBURG: As the beneficiary and
19 the trustee.

20 MS. ROSENBAUM: But --

21 JUSTICE KENNEDY: But -- but that's not
22 what -- that's not what your second category was. I
23 understand privity, but you didn't -- you weren't just
24 trying to restate the concept of privity in your second
25 category, were you?

1 MS. ROSENBAUM: The category talking
2 about --

3 JUSTICE KENNEDY: Yes. Full and fair --

4 MS. ROSENBAUM: -- involvement in prior
5 litigation?

6 JUSTICE KENNEDY: Right. Otherwise you
7 would have just said privity.

8 MS. ROSENBAUM: Well, the problem with the
9 term "privity" is that privity is often used somewhat as
10 a conclusion --

11 JUSTICE KENNEDY: Right.

12 MS. ROSENBAUM: -- to mean that someone is
13 bound by the prior case.

14 JUSTICE KENNEDY: Right.

15 MS. ROSENBAUM: What is generally meant by
16 the privity, or often -- the way the word is often used
17 to mean the -- the substantive legal relationships, but
18 lower courts have sometimes put the control cases in the
19 category of privity. They have sometimes put the
20 adequate representation cases in the category of
21 privity. So just talking about privity, it -- doesn't
22 really give the bounds of -- of who can be bound by
23 litigation --

24 JUSTICE SCALIA: We can use it accurately,
25 bring it back to what it really means --

1 (Laughter.)

2 JUSTICE SCALIA: Can't we?

3 CHIEF JUSTICE ROBERTS: What if you have a
4 situation where a client has retained a law firm to do
5 something and the law firm as part of its normal
6 activity files a FOIA request? They think something
7 useful is going to come up there, and it's denied, and
8 then the law firm on its own, and not as the -- not as
9 retained by the company files a FOIA suit?

10 In that case, is the company bound by the
11 determination in the case? Or can they then file
12 another action?

13 MS. ROSENBAUM: Who would -- if the company
14 filed its own FOIA case, we request on its own behalf --

15 CHIEF JUSTICE ROBERTS: No, the law firm --
16 the law firm files its own FOIA request, and it is
17 denied, and they litigate that, and then they lose, and
18 then the company brings a FOIA action.

19 MS. ROSENBAUM: And the law firm brought it
20 on behalf of the law firm --

21 CHIEF JUSTICE ROBERTS: Right.

22 MS. ROSENBAUM: But the company is bringing
23 it on behalf of the company?

24 CHIEF JUSTICE ROBERTS: Yes.

25 MS. ROSENBAUM: Then they are separate

1 requestors who each have -- should have their own
2 opportunity to be heard on their own FOIA claim.

3 JUSTICE SCALIA: Even if the company is
4 represented by the same law firm?

5 MS. ROSENBAUM: Yes. Even if they're
6 represented by the same law firm.

7 JUSTICE GINSBURG: Which is the case here.
8 It is the same lawyer that's involved?

9 MS. ROSENBAUM: Yes. But --

10 JUSTICE GINSBURG: But in the case of the
11 Chief's hypothetical, of course, it would never come up,
12 if the client then got another lawyer to bring this. But
13 there's no automatic preclusion in that relationship as
14 there is in the traditional relationships.

15 MS. ROSENBAUM: Well, people are not
16 generally precluded because of their lawyers' actions in
17 prior cases. And this Court --

18 CHIEF JUSTICE ROBERTS: But -- I guess to be
19 fair to my hypothetical, it was the company that was
20 paying for what the law firm was doing. It just wasn't
21 the -- the filing of the suit. The law firm went off on
22 its own. Maybe it does it all the time when they have a
23 case, they think this might be helpful and they are
24 filing a FOIA request.

25 MS. ROSENBAUM: The question there would

1 come down to whether the company was representing the --
2 whether the law firm in that instance was representing
3 the company with the authority to be representing the
4 company. In that --

5 CHIEF JUSTICE ROBERTS: Is it purely a
6 formal inquiry? In other words, let's say the company
7 is paying the law firm to represent, but the law firm
8 just files in its own name? Does that make a
9 difference?

10 MS. ROSENBAUM: I think it would go to the
11 underlying agreement between the law firm and the
12 company and whether the company had somehow given the
13 law firm authority to be filing this FOIA request and
14 then filing the lawsuit.

15 JUSTICE GINSBURG: Why isn't that like
16 Montana, where the government was not a party to the
17 case but it was in control of what the contractor was
18 doing?

19 MS. ROSENBAUM: Right. So again, if the
20 company was in control, and I think there would have to
21 be that sort of agreement that it would be represented --

22 JUSTICE SCALIA: I think you'd also say that
23 if the company paid for the suit. The company just --
24 "I don't want to be in control of it. I don't want you
25 to sue in my name, but I think this is a good thing for

1 you to do, so I'll pay for it."

2 MS. ROSENBAUM: I think that could be an
3 indicator that the company was -- that the law firm was
4 representing the company.

5 JUSTICE SCALIA: No. No. The company says,
6 "absolutely I do not want you to represent me." That is
7 in -- in a letter. Okay?

8 So it's clear that the law firm is not
9 representing the company, but the company thinks that
10 it's a good idea to have this lawsuit and yeah, I'll
11 bankroll it.

12 MS. ROSENBAUM: If the law firm does not
13 have the authority to represent the company, then it's
14 hard to see how the company could be bound by a
15 decision in which it was not --

16 JUSTICE GINSBURG: You don't think that
17 somebody who finances -- who solicits a litigation,
18 recruits someone to bring the case, pays for it, and
19 then says, "I recruited a very good law firm, so I can
20 stay out of it. I'm not going to try to -- I don't know
21 anything about the law, I'm not going to try to manage
22 this case." But someone who recruits a firm and pays
23 for it wouldn't be bound.

24 JUSTICE SCALIA: I think you've got to give
25 that one away. You really do.

1 (Laughter.)

2 MS. ROSENBAUM: I think that that's a harder
3 instance. And that really goes back to what it means
4 to --

5 CHIEF JUSTICE ROBERTS: Well, it's a company
6 --

7 MS. ROSENBAUM: -- control a case.

8 CHIEF JUSTICE ROBERTS: Let's say some
9 group, say, Public Citizen Litigation Group sends a
10 fundraising thing around saying we think all our members
11 ought to contribute to a special fund so that we can
12 bring, you know, a lawsuit under FOIA. Are all of those
13 individual contributors then bound by the result?

14 MS. ROSENBAUM: No.

15 CHIEF JUSTICE ROBERTS: Well -- so it makes a
16 difference if it's one company as opposed to 40 donors?

17 MS. ROSENBAUM: Well, again it comes back to
18 whether those people have given the person bringing the
19 case the authority to represent them in that lawsuit.

20 CHIEF JUSTICE ROBERTS: Well, but in the
21 previous hypothetical there was no authority to
22 represent. They just said, "I think this is a good
23 idea, here's the money. Here."

24 MS. ROSENBAUM: Yes, and I still think in
25 that situation there also would not be preclusion.

1 But the questions of when someone controls a
2 prior case are very different from what happened here
3 where there was no notice of that prior litigation, but
4 --

5 CHIEF JUSTICE ROBERTS: Well, controls. So
6 there are three companies, and they each have -- you
7 know, they can vote. They each have 33 percent control.
8 Are they each bound, or because they didn't control it
9 none of them are bound?

10 MS. ROSENBAUM: If they had not given the
11 law firm the authority to represent them in that
12 particular case, then they are not bound.

13 CHIEF JUSTICE ROBERTS: Well, they said,
14 yes, you can represent us, and we're three different
15 companies, and, you know, it's a majority vote as to
16 what you can do.

17 MS. ROSENBAUM: Well, then that is sort of
18 standard representation by a law firm of a company, and
19 those people would be legally represented in that
20 lawsuit, have had their day in court and would be bound
21 by that decision.

22 Unless there are further questions, I would
23 like to reserve the rest of my time.

24 CHIEF JUSTICE ROBERTS: Thank you, counsel.

25 MS. ROSENBAUM: Thank you.

1 CHIEF JUSTICE ROBERTS:

2 Mr. Hallward-Driemeier.

3 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

4 ON BEHALF OF THE RESPONDENT

5 MR. HALLWARD-DRIEMEIER: Mr. Chief Justice,

6 and may it please the Court:

7 Although the precise formulation adopted by
8 the court of appeals may be somewhat novel, its holding
9 of a finding of privity here is consistent with
10 well-established principles of res judicata. Where
11 multiple persons engage in coordinated successive
12 litigation to vindicate a joint interest with respect to
13 which a judgment in favor of any of them will benefit
14 all, then a judgment in the first litigation in which
15 that interest is adequately represented binds the others
16 as well.

17 JUSTICE GINSBURG: Would you explain to me
18 how that could possibly work?

19 I can understand that you're making an
20 argument that the second case, there was a recruitment,
21 there was collusion or whatever. But for all we know
22 from this record, how could Taylor possibly be bound
23 when Herrick's suit is over? Because as far as we know,
24 Taylor never heard of that first case. How can somebody
25 be bound by a litigation in which they had no notice, no

1 opportunity to be heard?

2 So if we freeze the situation at the of case
3 one, how could Taylor possibly be bound?

4 MR. HALLWARD-DRIEMEIER: Well, I think it's
5 important to start by recognizing that even Petitioner
6 acknowledges that there can be circumstances in which
7 Taylor would be bound, even though at the time, at the
8 end of Herrick's litigation, he had no notice, he had
9 not participated. And that is, on their view and ours
10 as well, that if Herrick had thereafter created an
11 agency relationship with Taylor, and Taylor then as
12 agent went and brought the second FOIA suit --

13 JUSTICE GINSBURG: Because he's acting for
14 Herrick who is bound by the first case.

15 MR. HALLWARD-DRIEMEIER: That's right.
16 And -- but all of that can exist or be created after the
17 first litigation is over. And so the absence of notice
18 in the first case --

19 JUSTICE GINSBURG: Because what you're
20 saying is the person who is really in the second case is
21 the same person who was in the first case, and Taylor is
22 simply acting as an agent to give Herrick another
23 chance?

24 MR. HALLWARD-DRIEMEIER: That's -- that's
25 right.

1 JUSTICE GINSBURG: But we're talking about
2 binding Taylor.

3 MR. HALLWARD-DRIEMEIER: Well -- but Taylor
4 in the second suit that he brings as agent to advance
5 the interests of Herrick would be bound. Taylor would
6 be barred. His suit would be --

7 JUSTICE GINSBURG: There was no finding of
8 that. There was no finding here of agency relationship.
9 There was no finding of collusion. That would be a
10 different case.

11 MR. HALLWARD-DRIEMEIER: Well, I don't --
12 the court certainly did not find that there was no
13 collusion. I agree that the court didn't reach --

14 JUSTICE GINSBURG: No. It said it wasn't
15 reaching that question.

16 MR. HALLWARD-DRIEMEIER: It didn't reach the
17 question of what they called "tactical maneuvering."

18 I think that there is a -- a strong argument
19 could be made that Taylor was Herrick's agent; but I
20 don't think that it's critical to find that he was his
21 agent in the very technical sense of the Restatement of
22 Agency.

23 JUSTICE SCALIA: If he -- if he was his
24 agent -- and this goes to Justice Ginsburg's line of
25 inquiry -- suppose in the second case Herrick tells him

1 I want you to bring this -- a suit on my behalf. He says
2 fine, I'll do that. He brings that suit. And then
3 Taylor says, you know, I also want to bring a suit on my
4 own. And he brings another suit, not as agent for
5 Herrick.

6 I suppose he could do that, couldn't he?
7 The first would be thrown out because it's Herrick's
8 second suit. But the -- Taylor's own suit would remain
9 Taylor's own suit, wouldn't it?

10 MR. HALLWARD-DRIEMEIER: No. No, Taylor --

11 JUSTICE SCALIA: So long as there's no more
12 collusion or anything else, he's --

13 MR. HALLWARD-DRIEMEIER: If Taylor brought
14 the second suit in his own name and it was found to be
15 barred by res judicata, a third suit in Taylor's own
16 name would likewise be barred.

17 And there's a case that I think illustrates
18 this point perhaps better than any of those we cited in
19 our -- on our brief, unfortunately. But I think it's
20 helpful --

21 JUSTICE SCALIA: I hope so.

22 MR. HALLWARD-DRIEMEIER: -- because --

23 (Laughter.)

24 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I
25 think that it proves the point that has been the sort of

1 underlying concern of many of the questions: What
2 happens when you're just shy of a true agency
3 relationship?

4 And the case is United States versus Des
5 Moines Valley Railroad. It's an Eighth Circuit case, 84
6 F.40 from 1897. But importantly, this Court quoted it
7 at length in the Chicago, Rock Island and Pacific
8 Railroad versus Schendel case --

9 CHIEF JUSTICE ROBERTS: Did you make your
10 friend on the other side aware that you'd be --

11 MR. HALLWARD-DRIEMEIER: Yes. Yes, I did,
12 Your Honor.

13 The Schendel case is 270 U.S. 611. And it --
14 and they discuss Des Moines Valley at page 619.

15 And what had happened in Des Moines Valley
16 was that the United States had granted some land to the
17 State of Iowa, which in turn passed to the railroad,
18 which in turn sold to one claimant. There was another
19 person who claimed directly from the United States as a
20 homesteader. There had been litigation between the
21 person claiming via the railroad and the homesteader as
22 to who had title to the land. And the judgment in State
23 court was adverse to the homesteader.

24 And what happened later, about 10 years
25 later, was that the United States brought suit to have

1 declared invalid the title of the person claiming via
2 the railroad. And the district court actually initially
3 questioned whether the United States had standing to
4 bring the case at all. They viewed it as Fairchild's
5 case. That was the homeowner -- the homesteader, a
6 little coincidence with this case, which also has a
7 Fairchild.

8 But the court of appeals specifically said
9 it wasn't deciding whether the United States had
10 standing to bring the case in its own name -- the case
11 was litigated by the United States attorney -- they
12 looked to the purpose that the United States sought to
13 vindicate. They said that the United States does not
14 seek to obtain title to this property for itself again.
15 They are, in a sense, lending their name to allow
16 Fairchild a second bite at the apple.

17 Now, there was no control that Fairchild had
18 over the United States. Fairchild didn't direct the
19 United States attorney who was representing the United
20 States. But the United States had taken up the interest
21 of Fairchild, taking advantage of the fact that it had
22 standing to sue itself to try to get Fairchild --

23 JUSTICE SCALIA: That's a -- it's a standard
24 privity case. It is privity in reverse. I suppose a
25 subsequent owner of real estate is in privity with, and

1 therefore, bound by a judgment concerning the real
2 estate rendered against the prior owner.

3 But it's probably also true that when
4 there's a suit by a later owner, the prior owner cannot
5 then bring in court a claim based upon the same -- the
6 same matters that the subsequent owner relied on.

7 MR. HALLWARD-DRIEMEIER: Well --

8 JUSTICE SCALIA: It's up privity instead of
9 down privity. Wouldn't that --

10 MR. HALLWARD-DRIEMEIER: I think what Your
11 Honor is reacting to is the reality of the situation
12 seems to be that there's a sufficient relationship
13 between these two that they ought to be barred. But
14 there is no section of the Restatement (Second) that
15 specifically governs this case. And Petitioner's view,
16 which is that somehow the Restatement (Second) has
17 become codification of res judicata law would not permit
18 it. But in fact --

19 JUSTICE GINSBURG: There is in the -- in the
20 Restatement of Judgments, as far as I know, all of the
21 examples involve a representational relationship that
22 existed at the time of the first litigation. There's
23 nothing in the Restatement that suggests that preclusion
24 would be proper here.

25 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I

1 agree that the Restatement (Second) does not, for
2 example, state the law which we all know and which
3 Petitioner concedes is the case, and that is that the
4 agent who brings the second lawsuit is bound, even if
5 the agency relationship arose --

6 JUSTICE GINSBURG: Yes, but here --

7 MR. HALLWARD-DRIEMEIER: -- after the first
8 relation was concluded.

9 JUSTICE GINSBURG: Do you agree with me
10 about the facts that we're dealing with here? As far as
11 the first case is concerned, no evidence that Taylor
12 even knew that Herrick was -- Herrick was bringing that
13 suit?

14 MR. HALLWARD-DRIEMEIER: The -- what the
15 evidence shows is that Herrick made Taylor aware of
16 the -- of the outcome of the litigation, but we don't
17 have evidence about --

18

19 JUSTICE GINSBURG: But -- and while the
20 litigation is ongoing, Taylor doesn't know about it,
21 right?

22 MR. HALLWARD-DRIEMEIER: There's no evidence
23 about that.

24 JUSTICE GINSBURG: Okay. And is there any
25 evidence that Herrick asked Taylor to file a FOIA

1 request --

2 MR. HALLWARD-DRIEMEIER: Well, the --

3 JUSTICE GINSBURG: -- after Herrick lost his
4 case?

5 MR. HALLWARD-DRIEMEIER: The evidence is
6 that Herrick asked Taylor to help him fix the plane, the
7 plane and its restoration being the object of Herrick's
8 own FOIA case. Taylor, in order to get those documents,
9 which were essential --

10 JUSTICE GINSBURG: But that wasn't my
11 question.

12 MR. HALLWARD-DRIEMEIER: -- to the
13 restoration of the plane --

14 JUSTICE GINSBURG: My question,
15 Mr. Hallward-Driemeier, is: Did -- did Herrick ask
16 Taylor to file that FOIA suit? And I think your answer
17 is no. There's no evidence of that.

18 MR. HALLWARD-DRIEMEIER: There is no
19 evidence that Herrick asked Taylor specifically to file
20 the --

21 JUSTICE GINSBURG: Is there any evidence
22 that Herrick financed the litigation?

23 MR. HALLWARD-DRIEMEIER: The -- there is no
24 specific evidence of that. The counsel on the other
25 side --

1 JUSTICE GINSBURG: Is there any evidence
2 that Herrick called any of the shots in that litigation?

3 MR. HALLWARD-DRIEMEIER: Well, counsel on
4 the other side filed an affidavit that said -- it was
5 very carefully crafted, I think -- that there was no
6 attorney-client relationship with Herrick with respect
7 to this --

8 JUSTICE GINSBURG: In any case, the decision
9 that we're reviewing didn't find any of those things.

10 MR. HALLWARD-DRIEMEIER: No, that's right.
11 What the court of appeals relied on was the fact that
12 Taylor had made Herrick's interest his own and brought
13 the suit in order to vindicate the exact same interests
14 that Herrick, himself, had already litigated and lost.
15 And that was to get the documents to restore Herrick's
16 plane.

17 JUSTICE GINSBURG: So if another member of
18 the club, let's say another member of the aviation
19 association who's interested in antique planes, just
20 files a FOIA request, would that person be precluded who
21 is -- who knows that Herrick brought a suit and lost?
22 He's just a member of the club. He doesn't want to help
23 Herrick restore the plane.

24 MR. HALLWARD-DRIEMEIER: No, that person is
25 not barred. And --

1 CHIEF JUSTICE ROBERTS: Even if he's the
2 individual that brought the case with club standing?
3 Associational standing?

4 MR. HALLWARD-DRIEMEIER: I think in -- Your
5 Honor's first question to opposing counsel was such
6 that, yes, I think that if that was the individual whose
7 interest was relied upon to give an association
8 standing, that it would bind the individual whose name
9 and interest was relied on. And this is in some ways
10 the reverse situation where --

11 JUSTICE GINSBURG: But my question was just
12 a member of the association, whether --

13 MR. HALLWARD-DRIEMEIER: No, the court of
14 appeals was clear that just a common membership in an
15 association or just a common interest would not be
16 enough. They -- they distinguished the situation of a
17 common interest in a -- in the same objective --

18 JUSTICE GINSBURG: But why does there have
19 to be any interest? Going back to a question I think
20 Justice Scalia asked, we're dealing with a most unusual
21 statute. You don't have to have any reason for a FOIA
22 request.

23 MR. HALLWARD-DRIEMEIER: That -- that's
24 true. We think that that, in fact, makes FOIA even more
25 susceptible to the kind of vexatious litigation that

1 Petitioner seems to think is entirely permissible. And
2 the courts of appeals have held that the --

3 JUSTICE STEVENS: Let me ask a general
4 question here. Why isn't the defense of stare decisis
5 adequate to take care of all your problems?

6 MR. HALLWARD-DRIEMEIER: Well, because FOIA
7 allows claims to be brought in from --

8 JUSTICE STEVENS: Repeated requests --

9 MR. HALLWARD-DRIEMEIER: -- a number of
10 different venues --

11 JUSTICE STEVENS: -- but if they're all the
12 same, wouldn't they say, well, that's the same case we
13 had last week?

14 MR. HALLWARD-DRIEMEIER: Well, FOIA allows
15 the case to be brought in a number of different venues.
16 It can be brought in the venue of the -- where the
17 requestor lives, where the documents are located, or in
18 the District of Columbia.

19 JUSTICE STEVENS: All right.

20 MR. HALLWARD-DRIEMEIER: And so a person
21 such as Herrick could ask for assistance on his project,
22 the project of rebuilding the plane, of people scattered
23 throughout the country.

24 JUSTICE STEVENS: Correct, and he's the one
25 who raised the suit.

1 MR. HALLWARD-DRIEMEIER: And they could
2 maintain it throughout the country.

3 JUSTICE STEVENS: But is it any easier to
4 defeat the suit by claiming there was preclusion because
5 of a suit in another jurisdiction, rather than stare
6 decisis?

7 MR. HALLWARD-DRIEMEIER: Well, Your Honor,
8 the fact is that in FOIA, especially an exemption 4
9 case, there are special burdens on the government. The
10 government has the burden of proving that the exemption
11 is warranted. So the plaintiff can just sort of lob
12 anything in there. The government bears the burden of
13 persuading the court in each case that the exemption is
14 warranted.

15 Fairchild, a private party that wants to
16 protect its own property interests in the trade secret,
17 is forced to go around the country litigating this over
18 and over and over again as well. And the courts that
19 have considered the question recognize that the
20 public-right nature of the interest is one that makes
21 application of the rule particularly appropriate because
22 both the interests of the individual litigant, the
23 plaintiff, is reduced, but also the opportunity for
24 vexatious relitigation is increased multiple times
25 because of the almost infinite number of potential

1 plaintiffs.

2 This case was decided by the lower courts on
3 the basis of the relationship between Herrick and
4 Taylor. It was the fact that Taylor had taken up
5 Herrick's own interest. There was the interest in the
6 project. The project was the restoration of the plane.
7 Herrick owned the plane. Herrick had brought suit based
8 on that interest and lost. He asked Taylor to help him
9 in that project. Taylor then brings the suit to get the
10 same documents for the same purpose.

11 And we think that the U.S. versus Des Moines
12 Valley Railroad case is an example where, just shy
13 perhaps of an actual agency relationship, because
14 there's no control in Des Moines Valley, that still the
15 fact that the second litigant has volunteered to take
16 their name to, in a sense, take advantage of the fact
17 they have independent standing --

18 JUSTICE SCALIA: Counsel, you have described
19 for us a thousand-headed monster of litigation, and your
20 proposal for a solution is to cut off one eyebrow.

21 You're going to solve just the case of, you
22 know, two people building an airplane. You agree,
23 anybody else in the association can file a lawsuit.
24 Anybody else in the United States can file a lawsuit,
25 even if they're not in the association.

1 It seems to me that, you know, in order to
2 cut off an eyebrow, I'm not -- I'm not willing to make a
3 whole lot of incursion upon our traditional rules of
4 who's bound by a lawsuit.

5 MR. HALLWARD-DRIEMEIER: Well, Your Honor --

6 JUSTICE SCALIA: Why should we stretch for
7 that?

8 MR. HALLWARD-DRIEMEIER: We are not
9 advocating a broad rule. We, in fact --

10 JUSTICE SCALIA: No.

11 MR. HALLWARD-DRIEMEIER: -- think that's one
12 of the virtues of our argument: That where there is a
13 document that is of true public interest such that
14 multiple individuals on entirely independent grounds
15 might well seek it, they would not be barred.

16 But where a document has commercial value
17 like this one does to Mr. Herrick, so that he can
18 restore his plane without going to the incredible
19 expense of developing another manner to prove to the FAA
20 the airworthiness of this case, there is that
21 commercial value that gives him the incentive to try to
22 relitigate over and over again. And on Petitioner's
23 view, as long as he stops just shy of an agency
24 relationship, he can do that throughout the country.
25 And this is --

1 JUSTICE BREYER: That sounds like --

2 CHIEF JUSTICE ROBERTS: Is this an approach
3 that only applies in FOIA cases? I would assume in
4 every other case you have the normal Article III
5 requirements of injury, which limits exactly who can
6 sue.

7 MR. HALLWARD-DRIEMEIER: Well, the rule is a
8 broader rule. And we've pointed out that it has in
9 common with the rule with respect to co-beneficiaries
10 that existed since the 1800s at the very latest, the
11 rule as stated in section 48 of the Restatement, which
12 is an example, a counter-example, Justice Ginsburg, to
13 your question about whether it always had to be a
14 pre-existing legal relationship, because section 48
15 deals with a particular situation where there are
16 multiple individuals who can claim for personal injury
17 of one of them. And the section is stated in terms of
18 another person, not a family member. And the commentary
19 to this section makes clear that although most
20 situations where it would apply would be family members,
21 it also applies to -- and I want to -- I want to quote
22 it: "A de facto connection may sometimes suffice as well
23 as a formally valid one."

24 So the law of res judicata --

25 JUSTICE GINSBURG: I'm not sure what the

1 hypothetical is. I mean it is certainly not the case
2 that -- let's say you have a whole busload of people who
3 get injured in the same accident. Plaintiff One sues
4 and loses. Two sues and loses. Three is not precluded.
5 Four is not precluded.

6 MR. HALLWARD-DRIEMEIER: But it recognizes
7 there could be a close-enough relationship between the
8 two such that the purposes of the rule would be
9 satisfied, but there is no legal, familial relationship.
10 And --

11 JUSTICE GINSBURG: Yes, but I know -- if all
12 that has been proved, the problem is that the D.C.
13 Circuit said: We're not going to look into what they
14 call strategic whatever.

15 We're going to take it just as it is, with
16 none of -- no showing that these two are in cahoots.

17 MR. HALLWARD-DRIEMEIER: They didn't need to
18 because of the fact that Taylor had voluntarily taken up
19 Herrick's interests to get a second bite at the
20 litigatory apple, as the First Circuit put it.

21 The -- and it is not the fact, as Petitioner
22 would argue, that every time another person has an
23 individual, standing right to sue under a statute, that
24 it means that that person necessarily gets to relitigate
25 where a person with whom they have a close relationship

1 such as this has already litigated and lost.

2 And so, getting back to Your Honor's
3 question --

4 JUSTICE SCALIA: It is sort of a
5 totality-of-the-circumstances test in every case, right?

6 MR. HALLWARD-DRIEMEIER: Well --

7 JUSTICE SCALIA: We look at the whole thing,
8 and we say, you know, close enough relationship. It is
9 not close enough; close enough. You need a better rule
10 than that for something that, you know, is a threshold
11 issue in a case.

12 MR. HALLWARD-DRIEMEIER: Well, Your Honor,
13 it is interesting that the restatement with respect to
14 the third category in the reply brief -- they called it
15 the third category of control perhaps. It is described
16 in the restatement in comment to section 62 as where the
17 person falls short of becoming a party but which justly
18 should result in his being denied an opportunity to
19 relitigate.

20 JUSTICE SCALIA: That's just as bad. You're
21 absolutely right. That's just as bad.

22 MR. HALLWARD-DRIEMEIER: That is the nature
23 -- that is the nature of res judicata principles. That
24 it is not: Can you avoid this by avoiding the legal
25 technicalities? It is the substance of the relationship

1 that counts.

2 Thank you, Your Honor.

3 CHIEF JUSTICE ROBERTS: Thank you, counsel.

4 Ms. Stetson.

5 ORAL ARGUMENT CATHERINE E. STETSON

6 ON BEHALF OF THE RESPONDENT

7 MS. STETSON: Mr. Chief Justice, and may it
8 please the Court:

9 Justice Scalia, I'd like to begin with the
10 question that you posed earlier regarding privity and
11 what it really means, because that's what has given
12 rise, I think, to all of these vexing hypotheticals and
13 to your concern about this being nothing more than a
14 completely freewheeling, totality-of-the circumstances
15 test.

16 The problem, I think, that you're
17 confronting is that you don't have the usual place that
18 you point your foot whenever you try to develop a
19 categorical rule. You don't have a statutory text. You
20 don't have a constitutional text.

21 This is a Federal common-law issue; and, as
22 this Court unanimously acknowledged in 1996, what our
23 notions are of privity are changing, and they continue
24 to change.

25 In 1942, when the first restatement was

1 issued, "privity" was defined as control, or successor
2 in interest, or representation.

3 In 1982, when the second restatement was
4 issued, "privity" was defined generally as
5 representation, legal relationships, or that section 62
6 category that Mr. Hallward-Driemeier just mentioned,
7 which we can call "shenanigans."

8 The notion of privity is underpinned in
9 every single one of those contexts by a couple of basic
10 inquiries, and this is what -- this is what makes
11 it something much more confined than a freewheeling,
12 totality-of-the-circumstances test.

13 The inquiries are: What are the
14 relationships between these two litigants, these two
15 serial litigants, and how have they conducted themselves
16 in this litigation?

17 And this in turn, I think, gets to the
18 dialogue that, Justice Souter, you were having with my
19 colleagues. Your first question was -- posited the
20 situation where one plaintiff sues and loses and comes
21 to another and says: Please try again for me.

22 That is precisely this case. And we don't
23 have to get into --

24 JUSTICE GINSBURG: There was no showing that
25 Herrick ever asked Taylor -- well, there is a showing

1 that they're interested in rebuilding this plane or
2 restoring the plane. But we don't have -- and the D.C.
3 Circuit said it was not relevant to its analysis. Yes,
4 I would totally agree with you if we have a recruiting
5 situation, if we have a financing situation. But the
6 D.C. Circuit said: Well, that's irrelevant.

7 MS. STETSON: I agree with you the D.C.
8 Circuit didn't find collusion, looking at Petitioner's
9 appendix 17-A at two things: The timing of the suit and
10 the sharing of discovery. But we don't need to get into
11 the evidence of collusion because what the D.C. Circuit
12 concluded as a predicate finding for its close-
13 relationship holding was that there was a request from
14 Mr. Herrick to Mr. Taylor to assist in the repair of his
15 plane.

16 And you can see this play out very tellingly
17 at joint appendix 31 to 32. If you look there, this is
18 the motion to allow discovery. Joint appendix 31 is
19 where Mr. Taylor relays at length the Tenth Circuit
20 argument and the Tenth Circuit ruling.

21 The first full paragraph on joint appendix
22 32 begins: "Mr. -- Mr. Herrick has now requested Mr.
23 Taylor to assist in the repair of his plane."

24 Now, Mr. Herrick, you can see from the first
25 exhibit to Fairchild's summary judgment motion in

1 district court, page 161, Mr. Herrick has six full-time
2 mechanics. He lives in Jackson Hole. His mechanics
3 work in Minneapolis. He doesn't need Mr. Taylor, who
4 lives in Iowa, to actually, physically assist with the
5 repair of his plane.

6 What he needs is someone with whom he
7 doesn't have an extant employment relationship, who
8 lives in a different circuit, to get those documents.

9 JUSTICE SOUTER: Look, I concede we can all
10 see where you're going, but isn't the problem this: In
11 effect, you're asking us to infer a finding of fact, and
12 we're not the trial court.

13 You've raised a good circumstantial
14 suspicion case; but, either -- either because it wasn't
15 raised by your predecessor counsel as well or because
16 the -- for some reason the district court just would not
17 buy it, that's the -- the conclusion that you want us to
18 draw isn't before us. And I don't see that we're the
19 appropriate court to draw it.

20 MS. STETSON: Two responses, Your Honor:
21 The first is that conclusion was precisely the
22 conclusion that was drawn by the D.C. Circuit on the
23 close-relationship point.

24 If you look at joint appendix 17-A, the
25 conclusion on close relationship was predicated on,

1 among other things, the critical fact of the request
2 from Mr. Herrick to Mr. Taylor to repair the plane.
3 That is what made --

4 JUSTICE SOUTER: Okay. But at no point did
5 the D.C. Circuit or the district court, as I understand
6 it, say that request, in effect, was a request to
7 relitigate this matter so that we both, the owner of the
8 plane and the repairer of the plane, would have what I
9 was seeking in my first lawsuit.

10 They never actually crossed the line and
11 drew that conclusion; did they?

12 MS. STETSON: The district court, in fact,
13 held precisely that.

14 JUSTICE SOUTER: What did it say, I mean --

15 MS. STETSON: In joint appendix 35-A -- in
16 Petitioner's appendix 35-A the district court concluded
17 as a factual finding that there was deliberate
18 maneuvering based on two things. Identical interests --

19 JUSTICE GINSBURG: That's out of the case
20 because the court of appeals said: We do not need to
21 determine whether they count as tactical maneuvering.
22 We do not do so.

23 MS. STETSON: Well, I'm going to resist you
24 slightly, Justice Ginsburg. I'm not sure that that is
25 the case. It is very curious. Because what the --

1 JUSTICE GINSBURG: It could be remanded. It
2 could be remanded with instructions that the collusion
3 question is still open. Prove it. It hasn't been
4 proved.

5 MS. STETSON: What the district court found
6 constituted collusion was identical interests and the
7 request. What the D.C. circuit found did not constitute
8 collusion was the timing of the FOIA action and the
9 sharing of discovery.

10 So they're operating on the collusion front
11 on two completely parallel paths. But on the --

12 JUSTICE SCALIA: What -- what the opinion
13 said is to review the bidding. There is record evidence
14 that: One, Taylor and Herrick had identical interests --
15 yes, that's true; two, Taylor's interest was adequately
16 represented in Herrick -- well, that's fine; three,
17 Herrick and Taylor had a close working relationship
18 relative to these successive cases.

19 And that's enough. That's enough to show
20 collusion.

21 MS. STETSON: The discussion that precedes
22 the reviewing of the bidding references with respect to
23 the close-relationship finding the request from
24 Mr. Herrick to Mr. Taylor to assist in the repair of his
25 plane, the request that is featured in joint appendix 32

1 as the preceding factor to the filing of the FOIA
2 action.

3 And I grant you, that does make this case
4 quite unique. It does make it quite similar to the 1897
5 case from the the Eighth Circuit, and I think it is
6 quite telling that we haven't found another analogue.

7 That doesn't mean that this doesn't fall
8 well within the wheelhouse of privity cases that this
9 Court is quite comfortable with.

10 CHIEF JUSTICE ROBERTS: Well, what about the
11 associational cases: The association brings a suit in
12 the interests of the members? Are those members bound?

13 MS. STETSON: Well, it depends on -- it
14 depends on a couple of things, Mr. Chief Justice, but
15 the first thing it depends on is a finding that the
16 interests of the association and of the members is
17 identical. Not just common, not just --

18 CHIEF JUSTICE ROBERTS: Well, in our
19 association standing cases we talk about germane,
20 right?

21 MS. STETSON: Right.

22 CHIEF JUSTICE ROBERTS: Is that enough?

23 MS. STETSON: I think -- I think the
24 interests need to -- to be identical. I'm not sure that
25 it's enough just to have a common cause.

1 The interests were found in this case to be
2 identical because one was literally factually derivative
3 of the other. And I want to make a point clear about
4 the difference between FOIA standing such as it is, and
5 the interest that's being represented in this case.

6 The fact that Mr. Taylor, after learning of
7 Mr. Herrick's defeat, decided to perfect his FOIA right
8 and sue in Federal court gave him standing. That was
9 all it gave him. What it did not do is give him a free
10 pass from a res judicata inquiry. And Justice Scalia
11 and Justice Ginsburg, to your points about FOIA not
12 requiring a motive, that's absolutely right at the
13 agency level.

14 But at the point where a disappointed FOIA
15 requestor comes into court and asks to be heard on the
16 same claim representing somebody else's interest, on its
17 face, at joint appendix 32, that's the point where the
18 judicial doctrine of res judicata kicks in.

19 And that's what --

20 JUSTICE GINSBURG: Anyone -- anyone in this
21 audience, and anyone in the association would be a
22 proper FOIA plaintiff; is that right?

23 MS. STETSON: That is right. That is
24 absolutely right. The reason that Mr. Taylor is barred
25 is not just because he's asking for these same

1 documents. These are incredibly unusual documents; they
2 don't have great public appeal; but the reason he's
3 barred is because Mr. Herrick requested his assistance
4 in the repair of the airplane. Mr. Taylor sought the
5 same documents for exactly the same reason to be used to
6 exactly the same end purpose. That should -- I think --
7 give the Petitioner a great deal of comfort in this
8 regard.

9 We are not advocating nor is the government,
10 a privity rule that is going to result in the widespread
11 preclusion of FOIA plaintiffs who seeks the same
12 documents for independent reasons; but when someone
13 comes to the Court pressing someone else's interests,
14 that is a square privity issue, and he should be barred.

15 CHIEF JUSTICE ROBERTS: Thank you,
16 Ms. Stetson.

17 Ms. Rosenbaum, four minutes.

18 REBUTTAL ARGUMENT OF ADINA H. ROSENBAUM,
19 ON BEHALF OF THE PETITIONER

20 MS. ROSENBAUM: Thank you.

21 First, I want to address the two cases
22 brought up by the government. In Des Moines Valley
23 Railroad that was someone who had the right to the land
24 because of a grant from the government. In that case,
25 specifically, the Court pointed out that the

1 government -- that Congress had passed a law that had
2 the government give up all interest -- that showed that
3 the government had given up all interest in the land.
4 And in the Rock Island Railroad case, that had to do
5 with a beneficiary and the administrator of an estate.

6 And these are legal relationships that give
7 rise to privity, and that's exactly the point. There are
8 relationships that do give rise to privity, but the
9 relationship between Taylor and Herrick is not one of
10 them.

11 The government also pointed out that FOIA
12 requestors can bring suit in different venues, and that
13 is the case. They can bring it in the District of
14 Columbia, where the records are, or where they are. But
15 as I pointed out, that is the way that FOIA is set
16 up. Congress allowed requestors to bring suits in
17 different places, and that's not the way Congress needed
18 to establish FOIA. It could have made one place the
19 sole venue for bringing suit under FOIA but it did not.
20 And then finally I --

21 CHIEF JUSTICE ROBERTS: What if two people
22 get together who want the same documents for the same
23 purpose, which is they think they're going to make money
24 off of it. And they say which ever gets it we'll share
25 with the other and we'll split the money we're going to

1 get?

2 MS. ROSENBAUM: So they bring --

3 CHIEF JUSTICE ROBERTS: Separate -- separate
4 suits, separate requests, separate suits. They just
5 want to double their chances of getting the documents,
6 but they agree to split. They think they're going to
7 make a hundred dollars off of this and agree to split it
8 50-50, regardless of who wins.

9 MS. ROSENBAUM: I think what would have to
10 be looked at there is control or representation. But
11 again, the facts here do not show that there is any
12 agreement between Taylor and Herrick to -- there's no
13 agreement either to repair the plane, but more
14 specifically, there are no agreements to bring this
15 lawsuit.

16 So this Court does not need to reach the
17 question of exactly what sort of agreement would lead to
18 preclusion, and the problem with the lower court's
19 decision here is that they did just look at a grab bag
20 of amorphous factors to hold Taylor bound. They talked
21 about a close relationship without it being the sort of
22 relationship under which one party is representing the
23 other or under which they have a legal relationship.

24 JUSTICE GINSBURG: Ms. Stetson said that the
25 district court unlike the court of appeals, did find

1 collusion, and she referred to a page that I didn't
2 check.

3 MS. ROSENBAUM: The district court did think
4 that there was tactical maneuvering happening here. But
5 the court of appeals specifically said that the district
6 court had erred in concluding that there had been an
7 agreement between them.

8 CHIEF JUSTICE ROBERTS: Do you think we need
9 to remand this for consideration of whether or not there
10 was an agreement, if we conclude that what we see from
11 the court of appeals opinion isn't enough?

12 As I understand, the court of appeals didn't
13 think an agreement was necessary. So regardless of what
14 the district court said, and that was an issue that was
15 litigated, and was not passed on by the court of appeals.

16 MS. ROSENBAUM: Yes. This Court could remand
17 it and then the district court would have the discretion
18 to allow the case to go forward as it saw fit.

19 And the problem - the problem with the
20 factors looked at by the lower courts, with -- basing
21 privity on just amorphous facts and basically just
22 having courts check their gut about whether or not that
23 relationship is sufficient, is that it ends up with
24 people being found in privity when they did not actually
25 have their right to be heard, the way Taylor did not

1 here. And instead, privity should be based on underlying
2 rationales that protect the litigants' rights to be heard
3 and ensure that they do have their day in court.

4 Unless there are any further questions.

5 CHIEF JUSTICE ROBERTS: Thank you,
6 Ms. Rosenbaum. The case is submitted.

7 (Whereupon at 12:26 p.m., the case in the
8 above-entitled matter was submitted.)

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