IN THE SUPREME COURT OF THE UNITED STATES

- - - - - - - - - - - - - - - - - - - - x

BRENT TAYLOR, :

Petitioner :

v. : No. 07-371

ROBERT A. STURGELL, ACTING :

ADMINISTRATOR, FEDERAL :

AVIATION ADMINISTRATION, :

ET AL. :

- - - - - - - - - - - - - - - - - - - - x

Washington, D.C.

Wednesday, April 16, 2008

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

APPEARANCES:

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

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

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

C O N T E N T S

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

to bring that case on behalf of that individual.

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

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

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

Would there be an estoppel in that case?

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

JUSTICE SOUTER: Why?

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

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

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

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

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

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

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

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

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

JUSTICE GINSBURG: But --

MS. ROSENBAUM: -- second claim.

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

MS. ROSENBAUM: Exactly.

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

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

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

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

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

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

And my question is: Why?

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

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

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

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

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

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

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

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

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

MS. ROSENBAUM: Yes.

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

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

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

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

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

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

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

other possible reason?

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

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

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

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

MS. ROSENBAUM: Yes. It requires the person

to have interest --

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

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

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

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

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

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

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

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

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

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

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

lost. Can he go ahead as an individual?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: Right.

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

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

MS. ROSENBAUM: No, it's --

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

MS. ROSENBAUM: There are an --

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

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

JUSTICE SCALIA: Okay.

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

JUSTICE SCALIA: Okay.

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

JUSTICE SCALIA: A representative that they agreed to?

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

JUSTICE SCALIA: As in a class action, where

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

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

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

MS. ROSENBAUM: Yes. That --

JUSTICE SCALIA: That is crucial.

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

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

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

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

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

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

JUSTICE KENNEDY: Yes.

MS. ROSENBAUM: To litigate to the --

JUSTICE KENNEDY: From a fair --

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

JUSTICE KENNEDY: And that is because?

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

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

MS. ROSENBAUM: Because that person still is

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

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

And this Court has stated --

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

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

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

MS. ROSENBAUM: Yes.

JUSTICE GINSBURG: As the beneficiary and the trustee.

MS. ROSENBAUM: But --

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

MS. ROSENBAUM: The category talking about --

JUSTICE KENNEDY: Yes. Full and fair --

MS. ROSENBAUM: -- involvement in prior litigation?

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

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

JUSTICE KENNEDY: Right.

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

JUSTICE KENNEDY: Right.

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

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

(Laughter.)

JUSTICE SCALIA: Can't we?

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Right.

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

CHIEF JUSTICE ROBERTS: Yes.

MS. ROSENBAUM: Then they are separate

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

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

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

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

MS. ROSENBAUM: Yes. But --

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

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

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

MS. ROSENBAUM: The question there would

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

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

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

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

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

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

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

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

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

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

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

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

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

(Laughter.)

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

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

MS. ROSENBAUM: -- control a case.

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

MS. ROSENBAUM: No.

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

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

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

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

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

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

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, counsel.

MS. ROSENBAUM: Thank you.

CHIEF JUSTICE ROBERTS:

Mr. Hallward-Driemeier.

ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

ON BEHALF OF THE RESPONDENT

MR. HALLWARD-DRIEMEIER: Mr. Chief Justice, and may it please the Court:

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

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

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

opportunity to be heard?

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE SCALIA: I hope so.

MR. HALLWARD-DRIEMEIER: -- because --

(Laughter.)

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MR. HALLWARD-DRIEMEIER: Well --

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

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

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

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

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

JUSTICE GINSBURG: Yes, but here --

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

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

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

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

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

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

request --

MR. HALLWARD-DRIEMEIER: Well, the --

JUSTICE GINSBURG: -- after Herrick lost his case?

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

JUSTICE GINSBURG: But that wasn't my question.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

JUSTICE STEVENS: Repeated requests --

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

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

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

JUSTICE STEVENS: All right.

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

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

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

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

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

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

plaintiffs.

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

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

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

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

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

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

JUSTICE SCALIA: Why should we stretch for that?

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

JUSTICE SCALIA: No.

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

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

JUSTICE BREYER: That sounds like --

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

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

So the law of res judicata --

JUSTICE GINSBURG: I'm not sure what the

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

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

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

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

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

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

such as this has already litigated and lost.

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

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

MR. HALLWARD-DRIEMEIER: Well --

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

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

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

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

that counts.

Thank you, Your Honor.

CHIEF JUSTICE ROBERTS: Thank you, counsel.

Ms. Stetson.

ORAL ARGUMENT CATHERINE E. STETSON

ON BEHALF OF THE RESPONDENT

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

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

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

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

In 1942, when the first restatement was

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

MS. STETSON: Right.

CHIEF JUSTICE ROBERTS: Is that enough?

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

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

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

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

And that's what --

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

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

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

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

CHIEF JUSTICE ROBERTS: Thank you, Ms. Stetson.

Ms. Rosenbaum, four minutes.

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

MS. ROSENBAUM: Thank you.

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

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

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

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

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

get?

MS. ROSENBAUM: So they bring --

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

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

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

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

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

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

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

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

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

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

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

Unless there are any further questions.

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

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