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

It is the 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 parties to that case. And no party to that case had the legal authority to represent him.

CHIEF JUSTICE ROBERTS: When you 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 for the  
7 first case is exercising the authority to represent the  
8 later case. And there has to be 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 a certain  
13 circumstances instances, but for --

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

18 Would that agreement not have been enough  
19 to -- to sustain a collusion here?

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

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

25 MS. ROSENBAUM: Because what's being

1 protected here is the person's right to the opportunity  
2 to be heard on their claim. And in that case --

3 JUSTICE GINSBURG: But --

4 MS. ROSENBAUM: -- second claim.

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

11 MS. ROSENBAUM: Exactly.

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

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

23 JUSTICE SOUTER: Right. But if we adopted  
24 -- as I understand it, if we adopted your theory across  
25 the board, it would preclude -- it would preclude a

1 preclusion in the case of my hypothetical, and that's  
2 what I want to get at.

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

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

10           And my question is: Why?

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

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

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

25           The second lawsuit, the people involved in

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

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

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

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

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

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

24 MS. ROSENBAUM: Yes.

25 JUSTICE ALITO: We do not need to determine



1 whether they count as tactical maneuvering. They did  
2 find -- they did say there was a close working  
3 relationship relative to the successive cases. Didn't  
4 they say that?

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

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

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

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

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

24 Is there a -- on the facts of case, any  
25 other possible reason?

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

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

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

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

23 MS. ROSENBAUM: Yes. It requires the --

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

1 right?

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

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

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

16 MS. ROSENBAUM: Well, it shows that the  
17 problem, if it exists, of there being repeated  
18 litigation over the same records is not one that would  
19 be solved through preclusion. And Respondents have not  
20 shown there actually is a problem with repeated  
21 litigation over the same records. And the Department of  
22 Justice represents the defendants in all FOIA cases, so  
23 they would be able to know if that was a problem that  
24 came up again and again.

25 CHIEF JUSTICE ROBERTS: What about if it is

1 the executive director of the association, and the suit  
2 is brought in the name the association, and they lose.  
3 Can he bring suit as, you know, I'm just Joe Blow, but I  
4 happen to be the executive director, but I'm bringing  
5 this in my own name?

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

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

17 MS. ROSENBAUM: But he was not in control of  
18 the first case and did not get his opportunity to be  
19 heard in that case --

20 CHIEF JUSTICE ROBERTS: But he recommended  
21 to the president, said we ought to file this lawsuit.  
22 The president said okay, and they did, and then they  
23 lost. Can he go ahead as an individual?

24 MS. ROSENBAUM: If he was not in control of  
25 that first case, yes, he could go ahead as an individual

1 if he was not -- if he is not representing the  
2 association in the second case, but is, instead,  
3 representing himself.

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

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

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

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

23 So that makes this case different from the  
24 taxpayer standing in -- cases cited --

25 CHIEF JUSTICE ROBERTS: Well, that means

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

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

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

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

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

22 It can channel all litigation into one court  
23 or into one court of appeals like it does for patent  
24 cases to more easily create precedent, or it didn't have  
25 to create FOIA to create this statutory, individual

1 entitlement to begin with.

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

5           But that's not what Congress did. Congress  
6 did give every person the right to records and the right  
7 to seek judicial review when they were denied records.  
8 And we can disagree about whether that was something  
9 Congress should have done, but that is what Congress did  
10 and Congress's chosen scheme should not be altered  
11 through the back door of preclusion doctrine.

12 The amorphous factors used by the lower courts to hold  
13 Taylor bound also have their problems in terms of  
14 judicial efficiency and people coming into court. Those  
15 factors do not give guidance either to lower courts or  
16 to litigants themselves about who can be bound.

17           I mean, a -- in a threshold area like res  
18 judicata, it is particularly important to have clear  
19 rules about who can be bound, to move on quickly to the  
20 merits of the case, without having to go through a lot  
21 of collateral litigation; but the factors used by the  
22 court of appeals do not provide those clear rules. And  
23 they also don't provide clear rules to litigants about  
24 when they will, in fact, be bound by -- when, in fact,  
25 they will be bound by a case.

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

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

11 JUSTICE SCALIA: Right.

12 MS. ROSENBAUM: -- after the first suit, yet  
13 is nonetheless bound by the --

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

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

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

20 MS. ROSENBAUM: There are an --

21 JUSTICE SCALIA: Agency?

22 MS. ROSENBAUM: Well, agency would fall into  
23 a larger category of, that there are certain Legal  
24 relationships that treat people as the same person for  
25 res judicata purposes and often for other purposes; and



1 those are substantive relationships created by  
2 underlying substantive law.

3 JUSTICE SCALIA: Okay.

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

11 JUSTICE SCALIA: Okay.

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

16 JUSTICE SCALIA: A representative that they  
17 agreed to?

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

20 JUSTICE SCALIA: As in a class action, where  
21 they have the -- the ability to bow out if they want,  
22 right?

23 MS. ROSENBAUM: Well, a class action is a  
24 very good example of that representational relationship,  
25 and the court of appeals in this case used language that

1 is very similar to the rationales used for class  
2 actions, talking about identity of interests and  
3 adequacy of representation, but it did not include any  
4 of the protections that are inherent in class actions:  
5 the factors that need to be looked at to make sure that  
6 class treatment is appropriate. The specification of  
7 who is and is not in the class.

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

11 MS. ROSENBAUM: Yes.

12 JUSTICE SCALIA: That is crucial.

13 MS. ROSENBAUM: That is crucial in class  
14 actions.

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

19 MS. ROSENBAUM: Yes. That was absent here  
20 also. In this situation, no one understood that first  
21 case to be litigating the rights of anyone but  
22 Mr. Herrick. Mr. Herrick did not understand that that's  
23 what was happening. The Tenth Circuit did not  
24 understand that was what was happening, and Taylor did  
25 not understand what was happening.

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

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

9 JUSTICE KENNEDY: Yes.

10 MS. ROSENBAUM: To litigate to the --

11 JUSTICE KENNEDY: From a fair --

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

13 JUSTICE KENNEDY: And that is because?

14 MS. ROSENBAUM: That is because that would  
15 basically be setting up a system of mandatory voluntary  
16 intervention.

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

20 MS. ROSENBAUM: Because that person still is  
21 not receiving -- is not fully and fairly litigating that  
22 case. They are not involved in that case, under that  
23 hypothetical. And they're not in control of that case.

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

1 And this Court has stated --

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

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

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

11 MS. ROSENBAUM: Yes.

12 JUSTICE GINSBURG: As the beneficiary and  
13 the trustee.

14 MS. ROSENBAUM: But --

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

20 MS. ROSENBAUM: The category talking  
21 about --

22 JUSTICE KENNEDY: Yes.

23 MS. ROSENBAUM: Full and fair litigation?

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

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

4 JUSTICE KENNEDY: Right.

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

7 JUSTICE KENNEDY: Right.

8 MS. ROSENBAUM: What is generally meant by  
9 the privity, or often -- the way the word is often used  
10 to mean that a substantive legal relationship, but lower  
11 courts have sometimes put the control cases in the  
12 category of privity. They have sometimes put the  
13 adequate representation cases in the category of  
14 privity. So just talking about privity, it -- doesn't  
15 really give the bounds of who would be bound by --

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

18 (Laughter.)

19 JUSTICE SCALIA: Can we?

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

1 retained by the company files a FOIA suit?

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

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

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

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

13 CHIEF JUSTICE ROBERTS: Right.

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

16 CHIEF JUSTICE ROBERTS: Yes.

17 MS. ROSENBAUM: Then they are separate  
18 requestors who each have -- who have their own  
19 opportunity to be heard on their own FOIA claim.

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

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

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

1 MS. ROSENBAUM: Yes. But --

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

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

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

17 MS. ROSENBAUM: The question there would  
18 come down to whether the company was representing the --  
19 whether the law firm in that instance was representing  
20 the company with the authority to be representing the  
21 company. In that --

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

1 difference?

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

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

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

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

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

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

25 So it's clear that the law firm is not



1 representing the company, but the company thinks that  
2 it's a good idea to have this lawsuit and yeah, I'll  
3 bankroll it.

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

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

16 JUSTICE SCALIA: I think you've got to give  
17 that one away.

18 (Laughter.)

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

22 CHIEF JUSTICE ROBERTS: Well, it's a company  
23 --

24 MS. ROSENBAUM: -- control a case.

25 CHIEF JUSTICE ROBERTS: Let's say some

1 group, say, Public Citizen Litigation Group sends a  
2 fundraising thing around saying we think all our members  
3 ought to contribute to a special fund so that we can  
4 bring a lawsuit under FOIA. Are all of those individual  
5 contributors then bound by the result?

6 MS. ROSENBAUM: No.

7 CHIEF JUSTICE ROBERTS: So it make as  
8 difference if it's one company as opposed to 40 donors?

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

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

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

18 But the questions of when someone controls a  
19 prior case are very different from what happened here  
20 where there was no notice of that prior litigation, but  
21 --

22 CHIEF JUSTICE ROBERTS: Well, controls. So  
23 there are three companies, and they each have -- you  
24 know, they can vote. They each have 33-percent control.  
25 Are they each bound, or because they didn't control it

1 none of them are bound?

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

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

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

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

16 CHIEF JUSTICE ROBERTS: Thank you, counsel.

17 MS. ROSENBAUM: Thank you.

18 CHIEF JUSTICE ROBERTS:

19 Mr. Hallward-Driemeier.

20 ORAL ARGUMENT OF DOUGLAS HALLWARD-DRIEMEIER

21 ON BEHALF OF THE RESPONDENT

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

24 Although the precise formulation adopted by  
25 the court of appeals may be somewhat novel, its holding

1 of a finding of privity here is consistent with  
2 well-established principles of res judicata. Where  
3 multiple persons engage in coordinated successive  
4 litigation to vindicate a joint interest with respect to  
5 which a judgment in favor of any of them will benefit  
6 all, then a judgment in the first litigation in which  
7 that interest is adequately represented finds the others  
8 as well.

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

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

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

21 MR. HALLWARD-DRIEMEIER: Well, I think it's  
22 important to start by recognizing that even Petitioner  
23 acknowledges that there can be circumstances in which  
24 Taylor would be bound, even though at the time, at the  
25 end of Herrick's litigation, he had no notice, he had

1 not participated. And that is, on their view and ours  
2 as well, that if Herrick had thereafter created an  
3 agency relationship with Taylor, and Taylor then as  
4 agent went and brought the second FOIA suit --

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

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

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

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

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

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

24 JUSTICE GINSBURG: There was no finding of  
25 that. There was no finding here of agency relationship.

1 There was no finding of collusion. That would be a  
2 different case.

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

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

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

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

15 JUSTICE SCALIA: If he -- if he was his  
16 agent -- and this goes to Justice Ginsburg's line of  
17 inquiry -- suppose in the second case Herrick tells him  
18 I want you to bring a suit on my behalf. He says fine,  
19 I'll do that. He brings that suit. And then Taylor  
20 says, you know, I also want to bring a suit on my own.  
21 And he brings another suit, not as agent for Herrick.

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

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

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

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

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

11 JUSTICE SCALIA: I hope so.

12 MR. HALLWARD-DRIEMEIER: -- because --

13 (Laughter.)

14 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I  
15 think that it proves the point that has been the sort of  
16 underlying concern of many of the questions: What  
17 happens when you're just shy of a true agency  
18 relationship?

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

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

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

3 The Schendel case is 270 U.S. 611. And they  
4 discuss Des Moines Valley at page 619.

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

14 And what happened later, about 10 years  
15 later, was that the United States brought suit to have  
16 declared invalid the title of the person claiming via  
17 the railroad. And the district court actually initially  
18 questioned whether the United States had standing to  
19 bring the case at all. They viewed it as Fairchild's  
20 case. That was the homeowner -- the homesteader, a  
21 little coincidence with this case, which also has a  
22 Fairchild.

23 But the court of appeals specifically said  
24 it wasn't deciding whether the United States had  
25 standing to bring the case in its own name -- the case



1 was litigated by the United States attorney -- they  
2 looked to the purpose that the United States sought to  
3 vindicate. They said that the United States does not  
4 seek to obtain title to this property for itself again.  
5 They are, in a sense, lending their name to allow  
6 Fairchild a second bite at the apple.

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

13 JUSTICE SCALIA: That's a -- it's a standard  
14 privity case. It is privity in reverse. I suppose a  
15 subsequent owner of real estate is in privity with, and  
16 therefore, bound by a judgment concerning the real  
17 estate rendered against the prior owner.

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

22 MR. HALLWARD-DRIEMEIER: Well --

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

25 MR. HALLWARD-DRIEMEIER: I think what Your

1 Honor is reacting to is the reality of the situation  
2 seems to be that there's a sufficient relationship  
3 between these two that they ought to be barred. But  
4 there is no section of the Restatement (Second) that  
5 specifically governs this case. And Petitioner's view,  
6 which is that somehow the Restatement (Second) has  
7 become codification of res judicata law would not permit  
8 it.

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

15 MR. HALLWARD-DRIEMEIER: Well, Your Honor, I  
16 agree that the Restatement (Second) does not, for  
17 example, state the law which we all know and which  
18 Petitioner concedes is the case, and that is that the  
19 agent who brings the second lawsuit is bound, even if  
20 the agency relationship arose --

21 JUSTICE GINSBURG: Yes, but here --

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

24 JUSTICE GINSBURG: Do you agree with me  
25 about the facts that we're dealing with here? As far as

1 the first case is concerned, no evidence that Taylor  
2 even knew that Herrick was -- Herrick was bringing that  
3 suit?

4 MR. HALLWARD-DRIEMEIER: What the evidence  
5 shows is that Herrick made Taylor aware of the -- of the  
6 outcome of the litigation, but we don't have --

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

10 MR. HALLWARD-DRIEMEIER: There's no evidence  
11 of that.

12 JUSTICE GINSBURG: Okay. And is there any  
13 evidence that Herrick asked Taylor to file a FOIA  
14 request --

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

16 JUSTICE GINSBURG: -- after Herrick lost his  
17 case?

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

23 JUSTICE GINSBURG: But that wasn't my  
24 question.

25 MR. HALLWARD-DRIEMEIER: -- to the

1 restoration of the plane --

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

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

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

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

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

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

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

23 MR. HALLWARD-DRIEMEIER: No, that's right.  
24 What the court of appeals relied on was the fact that  
25 Taylor had made Herrick's interest his own and brought

1 the suit in order to vindicate the exact same interests  
2 that Herrick, himself, had already litigated and lost.  
3 And that was to get the documents to restore Herrick's  
4 plane.

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

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

14 CHIEF JUSTICE ROBERTS: Even if he's the  
15 individual that brought the case with club standing,  
16 associational standing?

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

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

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

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

11 MR. HALLWARD-DRIEMEIER: That -- that's  
12 true. We think that that, in fact, makes FOIA even more  
13 susceptible to this kind of vexatious litigation that  
14 Petitioner seems to think is entirely permissible. And  
15 the courts have held that the --

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

19 MR. HALLWARD-DRIEMEIER: Well, because FOIA  
20 allows --

21 JUSTICE STEVENS: Repeated requests --

22 MR. HALLWARD-DRIEMEIER: -- a number of  
23 defendants --

24 JUSTICE STEVENS: -- but if they're all the  
25 same, wouldn't they say, well, that's the same case we

1 had last week?

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

7 JUSTICE STEVENS: All right.

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

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

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

16 JUSTICE STEVENS: But did any -- defeat the  
17 suit by claiming there was preclusion because of a suit  
18 in another jurisdiction, rather than stare decisis?

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

1 exemption is warranted.

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

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

23 And we think that the U.S. versus Des Moines  
24 Valley Railroad case is an example where, just shy  
25 perhaps of an actual agency relationship, because



1 there's no control in Des Moines Valley, that still the  
2 fact that the second litigant has volunteered to take  
3 their name to, in a sense, take advantage of the fact  
4 they have independent standing --

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

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

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

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

18 JUSTICE SCALIA: Why should we stretch for  
19 that?

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

22 JUSTICE SCALIA: No.

23 MR. HALLWARD-DRIEMEIER: -- think that's one  
24 of the virtues of our argument: That where there is a  
25 document that is of true public interest such that

1 multiple individuals on entirely independent grounds  
2 might well seek it, they would not be barred.

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

13           JUSTICE BREYER: That sounds like --

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

19           MR. HALLWARD-DRIEMEIER: Well, the rule is a  
20 broader rule. And we've pointed out that it has in  
21 common with the rule with respect to co-beneficiaries  
22 that existed since the 1800s at the very latest, the  
23 rule as stated in section 48 of the Restatement, which  
24 is an example, a counter-example, Justice Ginsburg, to  
25 your question about whether it always had to be a

1 pre-existing legal relationship, because section 48  
2 deals with a particular situation where there are  
3 multiple individuals who can claim for personal injury  
4 of one of them. And the section is stated in terms of  
5 another person, not a family member. And the commentary  
6 to this section makes clear that although most  
7 situations where it would apply would be family members,  
8 it also applies to -- and I want to quote it: "A de  
9 facto connection may sometimes suffice as well as a  
10 formally valid one."

11 So the law of --

12 JUSTICE GINSBURG: I'm not sure what the  
13 hypothetical is. I mean it is certainly not the case  
14 that -- let's say you have a whole busload of people who  
15 get injured in the same accident. Plaintiff one sues  
16 and loses. Two sues and loses. Three is not precluded.  
17 Four is not precluded.

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

23 JUSTICE GINSBURG: And if all that has been  
24 proved, the problem is that the D.C. Circuit said:  
25 We're not going to look into what they call strategic

1 whatever.

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

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

8 And it is not the fact, as Petitioner would  
9 argue, that every time another person has an individual,  
10 standing right to sue under a statute, that it means  
11 that that person necessarily gets to relitigate where a  
12 person with whom they have a close relationship such as  
13 this has already litigated and lost.

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

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

18 MR. HALLWARD-DRIEMEIER: Well --

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

24 MR. HALLWARD-DRIEMEIER: Well, Your Honor,  
25 it is interesting that the restatement with respect to

1 the third category in the reply brief -- they called it  
2 the third category of control perhaps. It is described  
3 in the restatement in comment to section 62 as where the  
4 person falls short of becoming a party but which justly  
5 should result in his being denied an opportunity to  
6 relitigate.

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

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

14 Thank you, Your Honor.

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

17 ORAL ARGUMENT CATHERINE E. STETSON

18 ON BEHALF OF THE RESPONDENT

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

21 Justice Scalia, I'd like to begin with the  
22 question that you posed earlier regarding privity and  
23 what it really means, because that's what has given  
24 rise, I think, to all of these vexing hypotheticals and  
25 to your concern about this being nothing more than a

1 completely freewheeling, totality-of-the circumstances  
2 test.

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

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

12           In 1942, when the first restatement was  
13 issued, "privity" was defined as control, or successor  
14 in interest, or representation.

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

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

25           The inquiries are: What are the

1 relationships between these two litigants, these two  
2 serial litigants, and how have they conducted themselves  
3 in this litigation?

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

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

11           JUSTICE GINSBURG: There was no showing that  
12 Herrick ever asked Taylor -- well, there is a showing  
13 that they're interested in rebuilding this plane or  
14 restoring the plane. But we don't have -- and the D.C.  
15 Circuit said it was not relevant to its analysis. Yes,  
16 I would totally agree with you if we have a recruiting  
17 situation, if we have a financing situation. But the  
18 D.C. Circuit said: Well, that's irrelevant.

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

1 Mr. Herrick to Mr. Taylor to assist in the repair of his  
2 plane.

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

8 The first full paragraph on joint appendix  
9 32 begins: "Mr. Herrick has now requested Mr. Taylor to  
10 assist in the repair of his plane."

11 Now, Mr. Herrick, you can see from the first  
12 exhibit to Fairchild's summary judgment motion in  
13 district court, page 161, Mr. Herrick has six full-time  
14 mechanics. He lives in Jackson Hole. His mechanics  
15 work in Minneapolis. He doesn't need Mr. Taylor, who  
16 lives in Iowa, to actually, physically assist with the  
17 repair of his plane.

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

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

25 You've raised a good circumstantial



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

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

11 If you look at joint appendix 17-A, the  
12 conclusion on close relationship was predicated on,  
13 among other things, the critical fact of the request  
14 from Mr. Herrick to Mr. Taylor to repair the plane.  
15 That is what made --

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

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

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

1 JUSTICE SOUTER: What did it --

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

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

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

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

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

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

24 JUSTICE SCALIA: What -- what the opinion  
25 said is to review the bidding. There is record evidence

1 that: One, Taylor and Herrick had identical interests;  
2 two, Taylor's interest was adequately represented in  
3 Herrick; three, Herrick and Taylor had a close working  
4 relationship relative to these successive cases.

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

7 MS. STETSON: The discussion that precedes  
8 the reviewing of the bidding references with respect to  
9 the close-relationship finding the request from  
10 Mr. Herrick to Mr. Taylor to assist in the repair of his  
11 plane, the request that is featured in joint appendix 32  
12 as the preceding factor to the filing of the FOIA  
13 action.

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

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

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

24 MS. STETSON: Well, it depends on -- it  
25 depends on a couple of things, Mr. Chief Justice, but

1 the first thing it depends on is a finding that the  
2 interests of the association and of the members is  
3 identical. Not just common, not just --

4 CHIEF JUSTICE ROBERTS: Association standing  
5 cases we talk about germane, right?

6 MS. STETSON: Right.

7 CHIEF JUSTICE ROBERTS: Is that enough?

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

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

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

24 But at the point where a disappointed FOIA  
25 requestor comes into court and asks to be heard on the

1 same claim representing somebody else's interest, on its  
2 face, at joint appendix 32, that's the point where the  
3 judicial doctrine of res judicata kicks in.

4 That's --

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

8 MS. STETSON: That is right. That is  
9 absolutely right. The reason that Mr. Taylor is barred  
10 is not just because he's asking for these same  
11 documents. These are incredibly unusual documents; they  
12 don't have great public appeal; but the reason he's  
13 barred is because Mr. Herrick requested his assistance  
14 in the repair of the airplane. Mr. Taylor sought the  
15 same documents for exactly the same reason to be used to  
16 exactly the same end purpose. That should -- I think --  
17 give the Petitioner a great deal of comfort in this  
18 regard.

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

25 CHIEF JUSTICE ROBERTS: Thank you,

1 Ms. Stetson.

2 Ms. Rosenbaum, four minutes.

3 REBUTTAL ARGUMENT OF ADINA H. ROSENBAUM,

4 ON BEHALF OF THE PETITIONER

5 MS. ROSENBAUM: Thank you.

6 First, I want to address the two cases  
7 brought up by the government. In Des Moines Valley  
8 Railroad that was someone who had the right to the land  
9 because of a grant from the government. In that case,  
10 specifically, the Court pointed out that the  
11 government -- that Congress had passed a law that had  
12 the government give up all interest, that showed that  
13 the government had given up all interests in the land.  
14 And in the Rock Island Railroad case, that had to do  
15 with a beneficiary and the administrator of an estate.

16 These are legal relationships that give rise  
17 to privity, and that's exactly the point. There are  
18 relationships that do give rise to privity, but the  
19 relationship between Taylor and Herrick is not one of  
20 them.

21 The government also pointed out that FOIA  
22 requestors can bring suit in different venues, and that  
23 is the case. They can bring it in the District of  
24 Columbia, where the records are, or where they are. But  
25 as they pointed out, that is the way that FOIA is set

1 up. Congress allowed requestors to bring suits in  
2 different places, and that's not the way Congress needed  
3 to establish FOIA. It could have made one place the  
4 sole venue for bringing suit under FOIA but it did not.  
5 And --

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

12 MS. ROSENBAUM: So they bring --

13 CHIEF JUSTICE ROBERTS: Separate -- separate  
14 suits, separate requests, separate suits. They just  
15 want to double their chances of getting the documents,  
16 but they agree to split. They think they're going to  
17 make a hundred dollars off of this and agree to split it  
18 50-50, regardless of who wins.

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

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

9           JUSTICE GINSBURG: Ms. Stetson said that the  
10 district court unlike the court of appeals, did find  
11 collusion, and she referred to a page that I didn't  
12 check.

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

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

22           As I understand, the court of appeals didn't  
23 think an agreement was necessary. So regardless of what  
24 the district court said, al thought that was an issue  
25 that was litigated, it was not passed on by the court of



1 appeals.

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

5 And the problem - the problem with the  
6 factors looked at by the lower courts, with -- basing  
7 privity on just amorphous facts and basically just  
8 having courts check their gut about whether or not that  
9 relationship is sufficient, is that it ends up with  
10 people being found in privity when they did not actually  
11 have their right to be heard, the way Taylor did not  
12 here. Instead, privity should be based on underlying  
13 rationales that protect the litigant's right to be heard  
14 and ensure that they do have their day in court.

15 Unless there are any further questions.

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

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

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