No. 07-371

IN THE
Supreme Court of the United States

BRENT TAYLOR,

Petitioner,

v.

ROBERT A. STURGELL, Acting Administrator, Federal Aviation Administration, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF RESPONDENT THE FAIRCHILD CORPORATION

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QUESTION PRESENTED

Petitioner Taylor filed a Freedom of Information Act ("FOIA") lawsuit, seeking the same documents—for the same purpose—that his "close associate," Greg Herrick, had previously and unsuccessfully sought. Applying a functional privity inquiry that looked beyond formal legal relationships and instead examined whether the two litigants shared identical interests, whether Taylor was adequately represented by Herrick, and whether there existed a sufficient "affirmative link" between the two, the District Court and Court of Appeals found that Taylor was Herrick's privy.

The question presented is whether the D.C. Circuit correctly held, based on the record facts, that Taylor was in privity with Herrick so as to be bound by the judgment in Herrick's case.

CORPORATE DISCLOSURE STATEMENT

Respondent The Fairchild Corporation has no parent corporation and no publicly held company owns ten percent or more of The Fairchild Corporation's common stock.

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JURISDICTION

The judgment of the United States Court of Appeals for the District of Columbia Circuit was entered on June 22, 2007. The petition for a writ of certiorari was filed on September 17, 2007, and was granted on January 11, 2008. This Court has jurisdiction under 28 U.S.C. § 1254(1).

INTRODUCTION

This case presents a question courts have confronted for centuries: when should two litigants

be found to be in privity with each other? Petitioner maintains that the question can be resolved by applying a handy universal rule: unless the two shared a "legal relationship"—a phrase variously defined in petitioner's brief as one conferring "authority" or "obligation" or "accountability" on one party vis-a-vis another—no privity can attach.

But petitioner's preferred categorical rule carries with it a number of qualifications, some of which he acknowledges, others not. This Court's prior precedents, for example, force him to qualify his "legal relationship" test to distinguish the circumstances where a second litigant with *no* legal relationship to the first was held barred from pursuing a second suit because it had controlled the first. Petitioner also does not attempt to explain the many cases where a second litigant with no legal relationship to the first was held barred from pursuing a subsequent suit because of inequitable conduct. And petitioner offers in the alternative that perhaps if no legal relationship exists *but* actual notice was evident—or if not evident, could (in certain specified circumstances carefully designed to exclude these facts) be said to have constructively occurred—then a rigid "notice" rule might sometimes suffice.

All of these caveats and provisos suggest that petitioner's categorical solution is ill-tailored to the problem it purports to solve. The D.C. Circuit, like many courts before it, took a different approach—one that acknowledged the functional nature of the privity inquiry. The Court of Appeals articulated a number of settled factors designed to test the bona fides of the party before it, examined the unrebutted facts in evidence relating to each, and concluded that

on these facts, the District Court appropriately had found Taylor to be functionally the same as, and therefore in privity with, an earlier litigant. As with other areas of the law susceptible to a multitude of factual scenarios, the court's flexible, pragmatic approach led to a most sensible result.

Taylor's categorical rule is unnecessary as a constitutional matter; the D.C. Circuit's test adequately ensures that subsequent litigants in preclusion cases receive the process they are due. Taylor's rule also is undesirable as a practical matter; it denies district courts the full range of tools to identify and root out instances where two successive litigants improperly manipulate the docket. The judgment below should be affirmed.

STATEMENT OF THE CASE

1. The Fairchild Company's earliest planes date to another era: the "Golden Age of Aviation" of the 1920s and 1930s. Fairchild's first plane, the FC-1, first flew in 1926. A monoplane with wings that folded for storage, the FC-1 was the first American aircraft to include a fully enclosed cockpit and hydraulic landing gear.[1]

The Great Depression destroyed some aircraft manufacturers, but Fairchild weathered the hard times, and "as the first glimmers of economic hope started in 1934, the company decided that there was a market for a luxury private aircraft that would have an interior to match a first-class auto or

[1] *Fairchild Aviation Corp.*, U.S. Centennial of Flight Commission, *available at* http://www.centennialofflight.gov/essay/Aerospace/Fairchild/Aero25.htm.

airliner."[2] That plane was the F-45, a five-seat monoplane advertised as the "Sedan of the Air."[3]

The F-45 boasted a unique "advanced design whose influence is certain to be reflected in craft of the future." 10th Cir. App. 110, *Herrick* v. *Garvey*, 298 F.3d 1184 (10th Cir. 2002) (No. 01-8011) ("*Herrick II*"). The plane had a "cavernous" cabin with "living room appointments," and, memorably, it sported fabric-covered wings and fuselage.[4]

The prototype F-45 made its debut flight on May 31, 1935, and over the years that followed sixteen were built.[5] But the F-45 never caught on. As the Second World War approached, Fairchild was inundated with military orders for other models, and the F-45 ceased production, never to resume.[6]

2. Before Fairchild could begin commercial production of the F-45, it was required under federal law to apply for and obtain a "type certificate" giving it "the legal right to produce the new type of aircraft." *Herrick II*, 298 F.3d at 1188; *see also* 14 C.F.R. Part 21 (detailing information required in applications). The type-certificate application process requires manufacturers to submit detailed

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[2] Philip Makanna, *Fabulous Fairchild: Golden Age Classic Keeps On Flying*, Air Classics Magazine, Jan. 2006, at 18, *available at* http://findarticles.com/p/articles/mi_qa3901/is_200601/ai_n15971856.

[3] *Id.*

[4] Budd Davison, *Fairchild's Model 45*, Air Progress Magazine, Nov. 1991, at 49, 53, *available at* http://www.airbum.com/pireps/PirepFairchild45.html.

[5] Frank Woodring *et al.*, *Fairchild Aircraft* 21 (2007).

[6] Makanna, *supra* n.2, at 18.

documentation, including "designs, drawings, test reports, and computations necessary to show that the aircraft sought to be certificated satisfies FAA regulations." *United States* v. *S.A. Empresa de Viacao Aerea Rio Grandense (Varig Airlines)*, 467 U.S. 797, 805 (1984) (citations omitted). "If the FAA finds that the proposed aircraft design comports with minimum safety standards, it signifies its approval by issuing a type certificate." *Id.* at 806.

In 1935, Fairchild submitted to the FAA's predecessor, the Civil Aeronautics Administration ("CAA"), its "Application for Approved Type Certificate" for the F-45. *Herrick* v. *Garvey*, 200 F. Supp. 2d 1321, 1324 (D. Wyo. 2000) ("*Herrick I*"). The CAA granted Fairchild the type certificate in April 1936 and thereafter kept on file the documentation Fairchild had submitted. Joint Appendix ("J.A.") 16; *Herrick II*, 298 F.3d at 1188-89.

The F-45 documentation is voluminous. It includes hundreds of blueprints, detailed drawings, and diagrams of the F-45, from the plane's wings and landing gear down to its bolts and hinges. J.A. 78; D.C. Cir. App. A161-A207 (list of drawings on file). "The level of detail in the drawings is extraordinary. For virtually every part of the aircraft, there are numerous drawings and subdrawings that portray the exact specifications of each part." D.C. Cir. App. A215. The F-45 type certificate file also includes engineering analyses and test reports. J.A. 78; *Herrick I*, 200 F. Supp. 2d at 1326. It contains, in sum, all of the "plans, formulae, processes and procedures which were used for the development, quality assurance, and manufacture of the Fairchild F-45 aircraft." J.A. 78.

Fairchild's F-45 certification materials are the company's trade secrets—its confidential plans and processes, representing "the end product of either innovation or substantial effort." *Public Citizen Health Research Group* v. *FDA*, 704 F.2d 1280, 1288 (D.C. Cir. 1983); *see* 5 U.S.C. § 552(b)(4) ("FOIA Exemption 4") (exempting from disclosure under FOIA "trade secrets and commercial or financial information obtained from a person [that is] privileged or confidential").[7] These materials remain commercially valuable today. *See* D.C. Cir. App. A117. For one thing, they have substantial value in the antique-airplane market because they make it much easier to repair the plane and demonstrate to the FAA that it is airworthy. *Id.*; J.A. 78-79. They also "are * * * valuable in the production of replicas for flight." J.A. 79. And they retain additional value for Fairchild because they include formulas, specifications, and engineering data reflecting "years of costly and complex research" and that are "applicable not only to the F-45 aircraft but to other airframes * * * and industrial applications." D.C. Cir. App. A144-145.

3. Only two F-45s are believed to still exist. One of them belongs to Greg Herrick. J.A. 28. Herrick is a self-proclaimed lifelong antique airplane buff: "As a boy growing up in Ottumwa, Iowa, [he] used to go to

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[7] *See also United Techs. Corp.* v. *FAA*, 102 F.3d 688 (2d Cir. 1996) (engine drawings submitted to FAA were confidential under Exemption 4), *cert. denied*, 521 U.S. 1103 (1997); *Boeing Co.* v. *Sierracin Corp.*, 738 P.2d 665 (Wash. 1987) (drawings of airplane window assemblies were protected trade secrets). The age of the materials sought does not remove them from Exemption 4's protections. *Center for Auto Safety* v. *NHTSA*, 93 F. Supp. 2d 1, 16 (D.D.C. 2000).

air shows sponsored by the Antique Airplane Association," and he is now one of "a small group of aircraft collectors who sometimes spend millions of dollars for rare historical planes." Michelle Seaton, *An Air of Greatness*, Showcase Magazine 158, 160-161 (Aug. 2000) (attached as Ex. 1 to Fairchild Corp.'s Mot. for Summ. J. (Jan. 10, 2005)).

In November 1997, Herrick filed a FOIA request with the FAA, seeking the contents of the F-45 type-certificate file. *See Herrick II*, 298 F.3d at 1188. Herrick sought the type-certificate data so that he could repair his F-45 and fly it. *Id.*; J.A. 28.

The FAA "customarily" treats type-certificate materials as trade secrets, "as they typically contain plans, drawings, process specifications, or other information describing a device to be manufactured for commercial profit." J.A. 77. The agency accordingly denied Herrick's FOIA request, stating that the requested materials fell within FOIA Exemption 4 as trade secrets. *Herrick II*, 298 F.3d at 1188. Herrick filed an administrative appeal, but the FAA denied it. The agency stated that it had contacted Fairchild, that the company objected to the release of the documents, and that Exemption 4 continued to apply. *Id.* at 1189.

Herrick then filed suit in the U.S. District Court for the District of Wyoming, employing among other counsel Michael J. Pangia. *Herrick I*, 200 F. Supp. 2d at 1322. Herrick argued before the Wyoming district court that Fairchild no longer owned the type-certificate documents because they had been submitted to the CAA by a predecessor company. He also argued that the documents lost their "trade secret" status in 1955, when Fairchild authorized in

principle a limited release of some documents to requestors for certain purposes—a release that never occurred because no requestors materialized.

The district court rejected Herrick's arguments. It first held that Fairchild still owned the type-certificate documents. *Id.* at 1328. As to Herrick's claim that the documents had lost their FOIA trade-secret status by virtue of a limited release issued over a decade before FOIA was enacted, the court held that even if that were so, Fairchild had restored the documents' protected status by refusing to permit disclosure to Herrick, thereby effectively rescinding the limited release *before* any relevant documents were made public. *Id.* at 1329.[8]

Still represented by Pangia, Herrick appealed to the Tenth Circuit and lost again. *Herrick II*, 298 F.3d at 1195.

4. A week after the Tenth Circuit issued its mandate in *Herrick II*, a new FOIA request for the same F-45 documents was filed by one Brent Taylor. J.A. 20. Taylor is a resident of Ottumwa, Iowa, and the president of the Ottumwa-based Antique Airplane Association. J.A. 32; D.C. Cir. App. A262. He is a mechanic who restores vintage aircraft. J.A. 53. He also knows Herrick "quite well"; the two are "close associate[s]." Pet. App. 4a, 15a; J.A. 54.

Taylor filed his FOIA request with the assistance of Pangia, Herrick's attorney. J.A. 56. The FAA again refused to release the documents, citing the same

[8] *See Davis* v. *Department of Justice*, 968 F.2d 1276, 1280 (D.C. Cir. 1992) (plaintiff seeking to establish waiver of FOIA exemption must "show[ ] that there is a permanent public record of the exact portions he wishes" to receive).

grounds as before. *Id.* at 38. Pangia then filed an administrative appeal on Taylor's behalf. *Id.* at 42. After an introductory paragraph, the appeal letter launched into an attack on *Herrick II*. *Id.* at 43-44.

The FAA rejected the administrative appeal in a detailed letter ruling, J.A. 45-52, and Taylor, still represented by Pangia, filed suit in the U.S. District Court for the District of Columbia. *Id.* at 14.[9] Soon after he filed his complaint, Taylor filed a "Motion to Allow Discovery," seeking documents to support the argument (rejected in *Herrick II*) that Fairchild no longer owned the type-certificate documents. *Id.* at 25, 27. In that motion, Taylor stated that Herrick—who had sought the same documentation in order to repair his aircraft—had asked Taylor to "assist him with the repair of his aircraft." *Id.* at 28, 32.

The Motion to Allow Discovery was a curious submission. Taylor discussed the *Herrick* case at length, alternating between explaining Greg Herrick's views on the case and his own and repeatedly referring to himself as "we." *See*, *e.g.*, *id.* at 32 n.4, 35. He offered you-were-there details from the *Herrick II* oral argument: "The argument in the 10th Circuit was interesting, to say the least." *Id.* at 29. He reported Greg Herrick's views on the *Herrick* judgment, offering that "Mr. Herrick does not agree, of course," with the Tenth Circuit's decision. *Id.* at 31. He asked the court to accept the *Herrick* findings that he deemed favorable while rejecting those with which he disagreed. *Id.* at 32 n.4. And he explicitly

[9] Taylor actually filed suit before the issuance of the FAA's FOIA denial, alleging a constructive denial theory. The suit was temporarily stayed to give the FAA time to consider Taylor's request. J.A. 56.

connected his motivation for filing the FOIA request to the *Herrick* case. *Id.* at 32.

Fairchild, which previously had filed a Tenth Circuit brief in support of the District Court's ruling in *Herrick I*, moved to intervene. Fairchild explained how Taylor and Herrick are "close associates" and "are working together to restore an antique F-45 owned by Herrick." D.C. Cir. App. A74. Because there was no functional difference between Herrick and Taylor, Fairchild argued that Taylor's lawsuit "amounts to a transparent attempt" to "substitut[e] Taylor as the named plaintiff in place of Herrick." *Id.* at A72, A75.

Fairchild and the FAA moved for summary judgment. In a statement of undisputed facts attached to its motion, Fairchild again stated that Taylor and Herrick are "close associate[s]," J.A. 54, a characterization Taylor did not dispute. Pet. App. 3a. Fairchild argued that on the facts presented, Taylor was Herrick's privy and was therefore bound by the judgment in *Herrick*: "Herrick and his counsel are using Taylor to relitigate the same claims that were rejected [in *Herrick II*]. This is the classic example of 'tactical maneuvering designed unfairly to exploit technical nonparty status in order to obtain multiple bites of the litigatory apple.' " D.C. Cir. App. A129 (quoting *Gonzalez* v. *Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994)).[10]

5. The District Court rejected Taylor's motion for discovery and entered summary judgment in favor of Fairchild and the FAA. Pet. App. 22a. The court

[10] Both Fairchild and the FAA also separately argued that Taylor's FOIA action failed on the merits.

agreed with Fairchild and the FAA that under the so-called "virtual representation" branch of privity analysis, Taylor was Herrick's privy. Pet. App. 30a. Emphasizing that privity analysis "'should be applied on a case-by-case basis using a fact-specific inquiry,'" *id.* at 31a (quoting *American Forest Council* v. *Shea*, 172 F. Supp. 2d 24, 31 (D.D.C. 2001)), the court held that the facts presented justified a privity finding because they signaled "deliberate maneuvering to avoid the effects of * * * Herrick's abortive litigation." *Id.* at 35a.

So convinced was the District Court, in fact, that Taylor's follow-up litigation was "unacceptable" and "smack[ed] of forum shopping" that the court ordered Taylor and his counsel to show cause why they should not be sanctioned. *Id.* at 34a-36a. The court eventually decided not to impose sanctions. It emphasized, however, that Taylor and Herrick's lawsuits were "identical," and that Taylor and Pangia had come to the "doorstep" of "an unpleasant rendezvous with Rule 11." J.A. 95.

Taylor appealed, designating *Herrick II* as a "related case." Brief for Plaintiff-Appellant at i, *Taylor* v. *Blakey*, No. 05-5279 (D.C. Cir. June 13, 2006). After conducting a *de novo* review of the District Court's res judicata ruling, *see Ibrahim* v. *District of Columbia*, 463 F.3d 3, 7 (D.C. Cir. 2006), a unanimous D.C. Circuit panel affirmed.

The Court of Appeals, per Chief Judge Ginsburg, explained that "[a]lthough a litigant is not ordinarily bound by the judgment in a prior suit to which he was not a party, 'there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier

judgment.' " Pet. App. 5a (quoting *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996)). Privity in turn is an " 'elusive concept, without any precise definition of general applicability.' " *Id.* (quoting *Jefferson Sch. of Soc. Sci.* v. *Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963)). The concept also has evolved over time; where once "privity" had a very narrow meaning, the term " 'is now used to describe various relationships between litigants that would not have come within the traditional definition of that term.' " Pet. App. 5a-6a (quoting *Richards*, 517 U.S. at 798). One such form of privity is sometimes referred to as "virtual representation"—when " 'in certain limited circumstances, a person, although not a party, has his interests adequately represented by someone with the same interests who is a party,' " such that the party to the prior litigation is "treated as the proxy of the nonparty." *Id.* at 6a (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 n.2 (1989)).[11]

Determining whether two litigants are in privity calls for an " 'equitable and fact-intensive' " inquiry. *Id.* at 7a (quoting *Tyus* v. *Schoemehl*, 93 F.3d 449, 455 (8th Cir. 1996), *cert. denied*, 520 U.S. 1166 (1997)). The Court of Appeals readily acknowledged that any such inquiry must "consider and balance competing interests in due process and efficiency."

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[11] Fairchild agrees with Taylor that the term "virtual representation" is of no real importance in this case. *See* Pet. Br. 18 (citing *Tice* v. *American Airlines, Inc.,* 162 F.3d 966, 971 (7th Cir. 1998), *cert. denied*, 527 U.S. 1036 (1999)). The D.C. Circuit deemed virtual representation "a particular form of privity," Pet. App. 6a, and other courts uniformly have taken the same approach. *See*, *e.g.*, *Pedrina* v. *Chun*, 97 F.3d 1296, 1302 (9th Cir. 1996), *cert. denied*, 520 U.S. 1268 (1997).

Pet. App. 8a. Too lax a test for privity, and a court "risks infringing upon the nonparty's right to due process of law." *Id.* Too rigid a standard, "on the other hand, would expose defendants to the burden of relitigation, raise the possibility of inconsistent results, and compromise the public interest in judicial economy." *Id.*

Bearing these competing interests in mind, the court articulated a flexible privity test: It required a showing of "identity of interests," "adequate representation," and at least one of "a close relationship between the present party and his putative representative, or substantial participation by the present party in the first case, or tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment," any of which if present would supply the necessary "affirmative link between the later litigant and either the prior party or the prior case." *Id.* at 8a. As the court explained, "[d]ecisions finding virtual representation have often applied the factors we adopt today, and the parties generally agree they are appropriate factors to consider." *Id.* at 9a (citing 18A Charles A. Wright *et al., Federal Practice & Procedure* § 4457, at 521-528 (2d ed. 2002) ("Wright & Miller") (collecting cases)).

On the factual record before it, the Court of Appeals affirmed the District Court's privity finding. The court concluded that Taylor and Herrick shared the same incentive to reach the same result, and for the *identical* reason—"viz., the restoration of Herrick's F-45." *Id.* at 10a. "In the absence of any contrary evidence," such as an affidavit, "the district court correctly found their interests were identical." *Id.* (citation omitted). The court further concluded

that Taylor's professed interest in restoring Herrick's F-45 had been adequately represented in *Herrick I* and *II*. Pet. App. 11a. Herrick, the owner of the plane he sought to repair, had every incentive to litigate his claim "zealously," and Taylor's use of the same counsel to press his claim for the same information "strongly suggests satisfaction with the attorney's performance in the prior case." *Id.* at 14a.

The Court of Appeals also found a "close relationship" to exist between the two litigants. It explained that whether a "sufficiently close connection" existed between Herrick and Taylor to treat the two as privies was a "functional, not a formal question." *Id.* at 15a. And "the record before us indicates Herrick and Taylor were not merely people who happened to share a common interest and membership in the same organizations, but knew each other quite well." *Id.* Their close association also had a direct connection with the lawsuits: "Herrick and Taylor had a close working relationship *relative to these successive cases*." *Id.* at 17a (emphasis added). In light of the facts on record, "and the complete lack of any evidence submitted by Taylor in opposition" to summary judgment, the court concluded that Taylor and Herrick were in a "close relationship" for the purpose of determining whether Herrick was Taylor's privy. *Id.* at 16a.

The court also observed that tactical maneuvering—in the sense of collusion to avoid the effects of a judgment—was a relevant factor in privity analysis. *Id.* at 16a. It found that there were facts in the record suggesting just such maneuvering, including the timing of Taylor's FOIA request, which "suggests Herrick and Taylor coordinated the filing,"

and Herrick's assistance in Taylor's lawsuit. *Id.* at 17a. It declined to resolve the "tactical maneuvering" question, however, explaining that it did not need to do so to resolve the case. *Id.*

After cataloguing the record evidence of identical interests, adequate representation, and a "close working relationship relative to these successive cases," and finding "no countervailing evidence," the court concluded that Herrick "served as Taylor's virtual representative in the litigation for the F-45 documents." *Id.*; *see also id.* at 18a (noting that Taylor submitted "no evidence to the contrary").

Taylor and his *amicus* Public Citizen had argued that a privity finding would mean anyone not a "total stranger" to an earlier litigant will be bound by that person's litigation, or that people who "associate with others having similar interests"—like some FOIA requestors—will be bound by their colleagues' litigation. *Id.* at 17a-18a. The Court of Appeals flatly rejected such an expansive reading of its holding, finding that "[t]he facts of this case simply do not implicate those concerns." And underscoring the fact-specific nature of the privity inquiry, the court emphasized that:

> Matters might look different if Taylor had submitted evidence before summary judgment * * * demonstrating Taylor's relationship with Herrick was in fact nothing more than a shared interest in antique aircraft and membership in the same organizations, or showing that Herrick had not suggested or offered to assist with Taylor's claim for the same documents. He did not do so, however, with the result that the record supports

> finding Herrick and Taylor in privity. [*Id.* at 18a.]

On that fact-bound basis, and finding the other requirements for res judicata satisfied, *id.* at 18a-20a, the D.C. Circuit affirmed the judgment of the District Court.

SUMMARY OF ARGUMENT

Petitioner was found to be in privity with Greg Herrick not just because they shared a hobby. He was found to be in privity with Herrick not just because they were members of the same association. He was found to be in privity with Herrick not just because he used the same lawyer, or brought the same claim. He was found to be in privity with Herrick because the D.C. Circuit concluded—in the absence of countervailing evidence—that the two litigants' interests were *identical*, that Taylor's identical interests had been adequately represented in the first case, and that the two shared a close relationship with respect to their successive cases.

This approach to privity is well-suited to the goals of res judicata. The doctrine seeks to achieve "substantial justice," *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 325 (1971) (citation omitted), and substantial justice in this corner of the law cannot be attained by formalistic line-drawing. It instead requires close attention to the facts of particular cases, all the while bearing in mind the crucial question: Is this litigant functionally the same as an earlier litigant whose claim has already been fully and fairly adjudicated? Thus the D.C. Circuit elucidated factors—identical interests, adequate representation, and a close

relationship relative to the litigation—designed to suss out the rare case where a litigant really is a proxy for his predecessor. And recognizing that one party ordinarily should not be bound by a prior judgment rendered against another party, the court pointed throughout its opinion to the utter absence of rebuttal evidence in the face of facts suggesting that in pressing this second action, the two men were functionally acting as one. The court's privity test achieves an appropriate balance between a litigant's interest in pursuing a truly independent claim and the judicial system's interest in finality of judgments.

Taylor, however, urges this Court to impose, across the universe of res judicata law, a categorical "legal relationship" requirement before res judicata may attach—or failing that, a categorical "notice" requirement. These arguments should be rejected. Taylor's proposed "legal relationship" rule contradicts established preclusion precedents. His proposed notice requirement is similarly unsupported and oversimplified; due process allows for imputed or constructive notice in cases where the second litigant is a proxy of the first.

Taylor's proposed rules are not just contrary to established preclusion law. They are, as a practical matter, quite unwise. For they would hamstring the federal courts in rare—but recurring—cases where it is clear that plaintiff recruitment, or some other inequitable collusion, is afoot. Courts at all levels, including this one, recognize that such cases may properly be struck from the docket. They should retain the power to do so where they conclude, on all the evidence, that such an outcome would be just.

The Court of Appeals' decision should be affirmed.

ARGUMENT

I. PRIVITY IS A FUNCTIONAL, FACT-BASED INQUIRY.

1. Res judicata puts to practice a fundamental principle of common-law adjudication: that a "right, question or fact distinctly put in issue, and directly determined by a court of competent jurisdiction * * * cannot be disputed in a subsequent suit between the same parties or their privies." *Southern Pac. R.R.* v. *United States*, 168 U.S. 1, 48-49 (1897); *see Montana* v. *United States*, 440 U.S. 147, 153 (1979). The doctrine has remained a fixture of Anglo-American jurisprudence for centuries because, without it, litigants would be free to undermine " 'the very object for which civil courts have been established, which is to secure the peace and repose of society by the settlement of matters capable of judicial determination.' " *Nevada* v. *United States*, 463 U.S. 110, 129 (1983) (quoting *Southern Pac. R.R.*, 168 U.S. at 49).

The rule is thus designed to promote "the dual purpose of protecting litigants from the burden of relitigating an identical issue * * * and of promoting judicial economy by preventing needless litigation." *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979). When "the same parties" attempt to relitigate what has already been resolved, *Southern Pac. R.R.*, 168 U.S. at 49, courts promote these twin objectives by applying res judicata to bar the second lawsuit. But those same objectives are equally implicated—and equally threatened—when certain non-parties to the initial litigation attempt to re-try what has already been fairly tried and adjudicated. For example, it would make no sense to let a ward or

trust beneficiary relitigate an action that is already "binding on a guardian or trustee." *Richards*, 517 U.S. at 798. That is why this Court, like the English courts that crafted the doctrine, has always extended res judicata to bar not just the parties who first brought suit but also "their privies." *Southern Pac. R.R.*, 168 U.S. at 49; *see also Blonder-Tongue*, 402 U.S. at 323; *Sunshine Anthracite Coal Co.* v. *Adkins*, 310 U.S. 381, 402 (1940); *Postal Tel. Cable Co.* v. *City of Newport,* 247 U.S. 464, 474 (1918).

2. To refer to a litigant as a "privy," however, is to state a conclusion. Privity "is merely a word used to say that the relationship between one who is a party on the record and another is close enough to include that other within the res judicata." *Bruszewski* v. *United States*, 181 F.2d 419, 423 (3d Cir.) (Goodrich, J., concurring), *cert. denied*, 340 U.S. 865 (1950). Traditionally, a narrow category of formal legal relationships—executor and testator, grantor and grantee, heir and ancestor, to name a few—were the only relationships deemed "close enough" to constitute privity. *See* Simon Greenleaf, *A Treatise on the Law of Evidence* § 523 (13th ed. 1899). But in recent decades the term has been put to broader service. As this Court explained in *Richards*, "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." 517 U.S. at 798 (citing Restatement (Second) of Judgments, ch. 4 ("Restatement")); *see also Chase Nat'l Bank* v. *City of Norwalk*, 291 U.S. 431, 436-437 (1934) (privity doctrine may be used to enjoin "persons not technically agents or employees" from aiding a defendant in performing a prohibited act).

The question whether the relationship between a party and a non-party is "close enough" to bring the second litigant within the judgment—and thus to give rise to privity—has been posed in dozens upon dozens of cases, all presenting their own variations on a number of factual themes. *See Kourtis* v. *Cameron*, 419 F.3d 989, 996 (9th Cir. 2005) (noting that courts have found privity "in an array of disparate circumstances"); Restatement §§ 34-63 (setting forth in 30 sections principles of non-party preclusion); *see also* Wright & Miller § 4449, at 330 (noting "the myriad rules that define the circumstances in which nonparties can be bound"). The sheer number and variety of cases presenting a non-party-preclusion issue have led this Court and the lower courts to resist rigid categorization of circumstances giving rise to preclusion. Instead, this Court and others have emphasized that privity "turns on the facts of particular cases." *Coryell* v. *Phipps*, 317 U.S. 406, 411 (1943); *see Tyus*, 93 F.3d at 455 (characterizing inquiry as "fact-intensive").

This heavily fact-driven inquiry is an equitable one as well. *See Tyus*, 93 F.3d at 455; *Gonzales*, 27 F.3d at 761 (privity is "an equitable theory, [not] a crisp rule with sharp corners and clear factual predicates"). As this Court explained in *Blonder-Tongue*, a case involving the related preclusion doctrine of collateral estoppel, "no one set of facts, no one collection of words or phrases, will provide an automatic formula for proper rulings on estoppel pleas. In the end, [the] decision will necessarily rest on the trial courts' sense of justice and equity." 402 U.S. at 333-334; *cf. Zedner* v. *United States*, 547 U.S. 489, 504 (2006) (observing that doctrine of judicial estoppel "is equitable and thus cannot be reduced to

a precise formula or test"). As it should. After all, " 'the achievement of substantial justice * * * is the measure of the fairness of the rules of res judicata,' " *Blonder-Tongue*, 402 U.S. at 325 (quoting *Bruszewski*, 181 F.2d at 421), and the scenarios that give rise to findings of non-party preclusion have proven to be so diverse as to render fixed requirements both unworkable and unwise. *See Gonzalez*, 27 F.3d at 761 (due to "variegated" cases, privity law is "resistant to * * * a single elegant limiting principle of the 'one size fits all' variety").

3. In an era of crowded dockets and costly litigation, a pragmatic approach to privity permits courts to apply res judicata against parties who—though they lacked a formal legal relationship to the litigants in earlier cases—are relitigating the same case they have effectively already prosecuted (and lost). In *Montana*, for example, a federal contractor brought suit challenging the constitutionality of a Montana tax. 440 U.S. at 151. The United States was not a party to the case, but it financed the litigation and controlled many of the contractor's tactical decisions. *Id.* at 155. The first suit failed; the United States then pursued a separate suit challenging the same tax. *Id.* at 151. This Court held that preclusion barred the second case: the United States may have been a non-party to the first case, but it could not relitigate the matter where it had "exercised control" over the prior litigation. *Id.* at 154-155. The Court emphasized that the same reasons why the common law precludes parties from contesting matters that have been fully and fairly litigated—"protect[ing] their adversaries from the expense and vexation attending multiple lawsuits, conserv[ing] judicial resources, and foster[ing] re-

liance on judicial action by minimizing the possibility of inconsistent decisions"—are "similarly implicated when nonparties assume control over litigation." *Id.* at 153-154; *see also* Restatement § 39.

A pragmatic, case-by-case approach to privity similarly allows courts to identify and weed out lawsuits that functionally relitigate against one entity claims that were already resolved against another—even when the second defendant is legally a separate entity from the first. In *Lubrizol Corp.* v. *Exxon Corp.*, 929 F.2d 960 (3d Cir. 1991), for example, the Third Circuit held that res judicata barred a second action against a wholly-owned subsidiary of a party to the first action. Despite the established principle that parent and subsidiary are legally separate entities, *see Mellon Bank, N.A.* v. *Metro Commc'ns, Inc.*, 945 F.2d 635, 643 (3d Cir. 1991), *cert. denied*, 503 U.S. 937 (1992), the *Lubrizol* court found that for purposes of the dispute at issue in the case, "a close and significant relationship" existed between the two that warranted barring the plaintiff's second action. 929 F.2d at 966.[12]

It was irrelevant that the nonparty in *Montana* lacked a formal legal relationship with its litigation proxy; and it was irrelevant that the subsidiary in *Lubrizol* was legally separate from its parent. What matters under the modern approach to privity is not formalism but fairness and common sense. Consistent with that view, the lower federal appeals courts treat the privity analysis as a "functional" inquiry,

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[12] Other courts have reached the same result when presented with analogous facts. *See*, *e.g.*, *Mars Inc.* v. *Nippon Conlux Kabushiki-Kaisha*, 58 F.3d 616, 618-619 (Fed. Cir. 1995); *In re Teltronics Servs., Inc.*, 762 F.2d 185, 190 (2d Cir. 1985).

one posing the "fact-specific" question "whether there was (or should be implied at law) the kind of link between the earlier and later plaintiffs that justifies binding the second group to the result reached against the first." *Tice* v. *American Airlines, Inc.*, 162 F.3d 966, 971 (7th Cir. 1998), *cert. denied*, 527 U.S. 1036 (1999); *see also Chase Manhattan Bank, N.A.* v. *Celotex Corp.*, 56 F.3d 343, 346 (2d Cir. 1995) (privity analysis is "functional").

By treating privity as a "flexible concept dependent on the particular relationship between the parties in each individual set of cases," *Tahoe-Sierra Pres. Council, Inc.* v. *Tahoe Reg'l Planning Agency*, 322 F.3d 1064, 1081-82 (9th Cir. 2003), the federal courts have retained for themselves an important, if seldom-used, tool: the power to dismiss certain types of vexatious litigation at the outset. As a number of lower federal courts have observed, a "mechanical" approach to preclusion requiring a formal legal relationship between litigants unacceptably "opens the door to countless varieties of manipulation, including claim-splitting, suits by proxy, and forum-shopping." *Gonzalez*, 27 F.3d at 757. Accordingly, in narrow circumstances courts have precluded non-parties whom they perceived as "unfairly * * * exploit[ing] technical nonparty status in order to obtain multiple bites at the litigatory apple." *Id.* at 761.[13]

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[13] *See*, *e.g.*, *Jaffree* v. *Wallace*, 837 F.2d 1461 (11th Cir. 1988); *Petit* v. *City of Chicago*, 766 F. Supp. 607 (N.D. Ill. 1991); *Crane* v. *Commissioner of Dep't of Ag., Food & Natural Res.*, 602 F. Supp. 280 (D. Me. 1985); *Garcia* v. *Wilson*, 820 P.2d 964 (Wash. Ct. App. 1991); *Ramos* v. *Horton*, 456 S.W.2d 565 (Tex. App. 1970).

This functional approach to privity—which looks behind the case caption and the parties' formal legal relationships—is an important means of advancing "the defendant's interest in avoiding the burdens of twice defending a suit" and "avoid[ing] * * * unnecessary judicial waste." *Arizona* v. *California*, 530 U.S. 392, 412 (2000) (quotation omitted). To be sure, "there are clearly constitutional limits on the 'privity' exception." *Richards*, 517 U.S. at 798. But this Court need not and should not adopt a rigid categorical rule to police those limits. Instead, it should—as it does whenever equity is in play—endorse a test that carefully maps out the metes and bounds that fence the lower courts' analysis. That approach will "prevent preclusion when the relationship between the party and non-party becomes too attenuated," *Southwest Airlines Co.* v. *Texas Int'l Airlines, Inc.* 546 F.2d 84, 95 (5th Cir. 1977), but still promote judicial economy and spare defendants from "the expense and vexation attending multiple lawsuits," *Montana*, 440 U.S. at 153, when the relationship is so close and the parties' interests so aligned that they should be treated as one.

4. The D.C. Circuit in this case took precisely that tack. It explained that privity is resistant to " 'any precise definition of general applicability,' " Pet. App. 5a (quoting *Jefferson Sch.*, 331 F.2d at 83), and that its analysis therefore had to be " 'equitable and fact-intensive.' " *Id.* at 7a (quoting *Tyus*, 93 F.3d at 455). Having acknowledged this settled principle, the court sensibly did not then attempt to articulate a test that would function as a blunt instrument. It instead undertook a number of inquiries—common in the case law, and which the parties "generally agree[d] * * * are appropriate factors to consider,"

Pet. App. 9a—designed to test whether Taylor's interests had already been pressed and protected in Herrick's action. The court required a showing of identical interests, adequate representation, *and* at least one of "a close relationship between the present party and his putative representative, or substantial participation by the present party in the first case, or tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." *Id.* at 8a. And after articulating this demanding test, the Court of Appeals applied it narrowly, with precision and care, reaching only those conclusions firmly supported by the factual record before it.

As to "identical interests," the Court of Appeals did not just require that Taylor have a similar interest as Herrick in the sense that both sought "release of the F-45 documents." Pet. App. 9a. Such an inquiry arguably would be too broad, sweeping up (for example) separate FOIA requesters interested in the same documents for separate purposes. Instead, the court required that Taylor essentially possess *Herrick*'s interest for this particular inquiry to be satisfied, and based on the record facts, the court found that to be so: both Taylor and Herrick wanted the documents to restore Herrick's plane. *See id.* at 10a (pointing to evidence that Taylor and Herrick had "the same motivation to obtain the documents, viz., the restoration of Herrick's F-45"). The court's identity-of-interests inquiry was satisfied on this record because the two shared the exact same interest—Herrick's—not just in obtaining the documents, but "even when viewed in terms of incentives." *Id.* at 17a; *see also Ahng* v. *Allsteel, Inc.*, 96 F.3d 1033, 1037 (7th Cir. 1996) (privity attaches "when there is a practical identity of interests

between the former litigant and the present one"). The Court of Appeals' "identity of interests" inquiry was thus quite constrained. It required a mapping-on of interests that is rare in practice, and that arguably existed here in part because Taylor's right of suit was of a peculiar sort—a non-monetary and universal cause of action bestowed by statute—that made suit-by-proxy possible. *See infra* at 44 (discussing the nature of Taylor's interest).

Second, as to whether the litigants' shared interest in restoring Herrick's plane had been adequately represented once already, the court did not find it sufficient that Herrick had as much incentive as Taylor to litigate his claim "zealously." The court instead found its "adequate representation" inquiry satisfied when an additional fact—Taylor's use of the same attorney—was added to the mix, "strongly suggest[ing] satisfaction with the attorney's performance in the prior case." *Id.* at 14a.

Next, as to "close relationship," the D.C. Circuit did not find it sufficient that Taylor and Herrick merely belonged to the same association and shared an interest in old airplanes. Pet. App. 15a. On the contrary, the court ticked off a list of facts that, taken together, supported the privity finding: "Herrick asked Taylor to assist him in restoring his F-45, provided information to Taylor that Herrick had obtained through discovery, and at summary judgment Taylor did not oppose Fairchild's characterization of Herrick as his 'close associate.'" *Id.* at 15a-16a.

The court emphasized that Taylor and Herrick shared not just a close relationship in the abstract but "a close working relationship relative to these

successive cases." *Id.* at 17a. The court also noted that, though the facts were ambiguous, they suggested collusion to retry Herrick's case: among other things, Taylor had filed his FOIA request "almost immediately" after Herrick's case ended and had used Herrick's lawyer. *Id.* at 16a. In light of all the facts, and Taylor's failure to submit "countervailing evidence," the Court of Appeals found its "close relationship" inquiry to support a finding of privity. *Id.*

The court had by this point made quite clear that it would not have found privity if Taylor and Herrick had merely wanted the same documents, belonged to the same association, and known each other. But if there were any doubt, the court resolved it by explaining that the additional facts recounted above were central to its result: "Matters might look different if Taylor had submitted evidence before summary judgment * * * demonstrating [that his] relationship with Herrick was in fact nothing more than a shared interest in antique aircraft and membership in the same organizations." *Id.* at 18a. But Taylor did no such thing. Matters likewise "might look different" had Taylor submitted evidence refuting the idea that Herrick had "suggested" or offered to help with Taylor's claim. *Id.* Again, he did no such thing. Because all of those unrebutted facts undergirded the court's holding, the case simply "d[id] not implicate" the concern that friends, acquaintances, fellow hobbyists, or members of the FOIA bar would find themselves later to be bound by each other's litigation. *Id.*

5. The D.C. Circuit's opinion thus stands for an appropriately narrow proposition: Where a party opponent in a subsequent litigation musters facts

showing that successive litigants share identical interests, identical incentives, and "a close working relationship relative to the[ ] successive cases," the burden shifts to the second litigant to submit evidence refuting the charge. If the second litigant comes forward with such evidence that his interests are independent or his claim was not adequately pressed by the first, he may proceed. *See Headwaters Inc.* v. *U.S. Forest Serv.*, 399 F.3d 1047, 1050 (9th Cir. 2005) (reversing privity finding because district court failed to give subsequent plaintiffs "an opportunity to demonstrate" that they were not in privity with prior plaintiff). But if he cannot muster that limited rebuttal—as Taylor could not—the game is up.[14]

The approach the D.C. Circuit adopted conforms to this Court's teachings on res judicata. Declining to nail down a "precise definition" of privity, Pet. App. 5a—a task courts for decades appropriately have declined—the Court of Appeals conducted a detailed, record-based, "equitable and fact-intensive" analysis, *Tyus*, 93 F.3d at 455, concluding that on these facts and in this case, preclusion was warranted and was fair. The D.C. Circuit's approach appropriately constrained the privity inquiry while providing

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[14] This approach makes sense whether deemed a burden shift or an adverse inference. As to the former, it is unlikely an opposing party will have access to direct evidence of collusion, and the burden therefore belongs upon the successive litigant to at least deny collusion under oath. *See United States* v. *Fior D'Italia, Inc.*, 536 U.S. 238, 256 n.4 (2002) (noting "the general rule that burdens shift to those with peculiar knowledge of the relevant facts"). As to the latter, "[s]ilence is often evidence of the most persuasive character." *United States ex rel. Bilokumsky* v. *Tod*, 263 U.S. 149, 153-154 (1923) (Brandeis, J.).

sufficient flexibility to capture cases where two parties, though legally separate, are functionally one.

II. TAYLOR'S "LEGAL RELATIONSHIP" THEORY IS AT ODDS WITH THE LAW AND IS NOT REQUIRED BY DUE PROCESS.

Taylor rejects the established notion that privity is a necessarily flexible and fact-driven inquiry. Instead he argues that a "legal relationship" between the parties alleged to be privies must exist in every case of non-party preclusion. Pet. Br. 8. This proposition is demonstrably incorrect as a matter of preclusion law; nor can it be justified by an appeal to due process.

A. The "Legal Relationship" Theory Cannot Be Reconciled With Res Judicata Law.

Taylor asserts that a "relationship of legal accountability" must exist between a non-party and a party to a judgment in order for the non-party to be bound. Pet. Br. 14. Indeed, he goes a step further and asserts that "[b]ecause the non-party's interests must be protected during the party's case, * * * and because the party must have assumed the power of representing the non-party in *that case*, the relationship of legal accountability between the party and non-party must exist at the time of the case." *Id.* (emphasis in original). There are three problems with Taylor's argument. It cannot be squared with existing preclusion law; it is at odds with this Court's cases; and it is contradicted by his own *amici*.

1. Although a legal relationship may in some circumstances be *sufficient* to support a finding of privity, this Court has never held that it is

necessary.[15] For example, in *Montana*, discussed *supra* at 21-22, this Court held that a non-party was precluded from pursuing a second action where it had "exercised control" over a party to the first action. *See Montana*, 440 U.S. at 154-155; *see also* Restatement § 39. And there is no suggestion in *Montana* that the parties had a "legal relationship" forming the basis for the preclusion funding.

Taylor attempts to reconcile this opinion with his argument by contending that the controlling entity in cases like *Montana* actually *is* a "party." *See* Pet. Br. 26. But the *Montana* Court made clear that the non-party in the first case did not morph into a party by virtue of its behind-the-scenes involvement in that case. The Court referred to the United States three times as a "nonpart[y]," *Montana*, 440 U.S. at 154-155, and concluded that "*although not a party*, the United States plainly had a sufficient 'laboring oar' " in the first case "to actuate principles of estoppel." *Id.* at 155 (quoting *Drummond* v. *United States*, 324 U.S. 316, 318 (1945)) (emphasis added). The Restatement is to the same effect. *See* Restatement § 39 ("A person who is not a party to an action" may be bound under the control principle); *id.* § 34 cmt. a ("A person becomes a party to an action by being designated as such and becoming subject to the jurisdiction of the court."). Taylor's "legal relationship" framework cannot be squared with this branch of non-party preclusion law.

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[15] Indeed, in some circumstances it may not even be sufficient—the court still may need to ensure that the second party has identical interests and was adequately represented. *See* Restatement § 42(1)(e).

A non-party also may be precluded by a judgment when (i) he has a claim arising from the transaction at issue in the case, (ii) he induces the defendant to believe he will not assert that claim separately from the current plaintiff, and (iii) his act causes the defendant not to join him to the action. Restatement § 62; *see, e.g.*, *Casa Marie, Inc.* v. *Superior Court*, 988 F.2d 252, 266 (1st Cir. 1993) (panel including Breyer, J., citing Section 62 with approval). This principle, reflected in many cases[16] and cited approvingly by the treatises,[17] does not require a legal relationship between the non-party and a party to the first case in order to justify preclusion. Indeed, Section 62 is quite clear on this point: It notes that non-party preclusion is permissible in several broadly defined circumstances, including (a) where the non-party "stand[s] in one of a variety of pre-existing legal relationships with a party" *and* (b) where the non-party "is involved with [the first case] in a way that falls short of becoming a party but which justly should result in his being denied opportunity to relitigate the matters previously in issue." Restatement § 62 cmt. a. This statement cannot be reconciled with Taylor's claim that in preclusion law, only a legal relationship will do.

Finally, and most important here, courts have found privity to exist among parties who did not share a formal legal relationship in order to avoid "countless varieties of manipulation, including claim-splitting, suits by proxy, and forum-shopping."

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[16] *See* Restatement § 62 Reporter's Note (citing 20 cases that apply Section 62's approach or reach the same result on related grounds).

[17] *See*, *e.g.*, Wright & Miller § 4453, at 427.

Gonzalez, 27 F.3d at 757; *see supra* at 23. This line of cases, like those discussed above, does not require a "legal relationship" between the non-party and a party to the judgment—much less one cemented at the time of the first case, as Taylor urges. Such a temporal requirement would make no sense in plaintiff-recruitment cases, where the collusive action justifying estoppel may well occur after the conclusion of case number one.[18]

2. Taylor makes no attempt to reconcile any of these precedents with his argument. He instead seeks to extract his "legal relationship" theory from a carefully culled handful of this Court's cases. But none of the cases he cites actually announced any such "legal relationship" requirement, and some in fact affirmatively undercut his proposition.

First, Taylor's "legal relationship" argument relies heavily on cases establishing the general proposition that a judgment cannot bind "a litigant who was not a party or a privy." Pet. Br. 9-10, 15 (quoting *Parklane Hosiery Co.*, 439 U.S. at 327 n.7; *Richards*, 517 U.S. at 797; *Hansberry* v. *Lee*, 311 U.S. 32 (1940); and *Blonder-Tongue*, 402 U.S. 313). We have

[18] Petitioner's unsupported the-relationship-had-to-exist-at-the-time-of-the-first-lawsuit rule would lead to absurd results. Imagine, for example, a corporation that unsuccessfully prosecutes a FOIA request. A week after that litigation concludes, the corporation charters a wholly owned subsidiary—controlled and dominated by the parent's directors—which then brings a FOIA action of its own seeking the same documents that its parent sought. Few would dispute that privity would exist and that res judicata should bar such an overt bid for the litigation equivalent of a mulligan. Yet the rigid rule Taylor presses would sanction exactly that outcome.

no quarrel with that proposition. But it only begs the operative question here: what is a "privy"?

Taylor also purports to find a categorical "legal relationship" requirement in *Richards*. But *Richards* makes exactly the opposite point. There, this Court observed that under the classical test for privity, only a handful of well-defined legal relationships once sufficed. As examples of those traditional relationships, this Court explained that "a judgment that is binding on a guardian or trustee may also bind the ward of the beneficiaries of a trust." *Richards*, 517 U.S. at 798. But the Court then emphasized that this strict limitation is no longer good law: "[T]he term 'privity' is now used to describe various relationships between litigants that *would not have come within the traditional definition of that term*." *Id.* (emphasis added).

Taylor concedes that this Court in *Richards* acknowledged that the concept of privity is no longer cabined by the " 'traditional definition of that term.' " Pet. Br. 15 (quoting *Richards*, 517 U.S. at 798). But as Taylor sees things, "[e]ven this expanded concept of privity * * * requires a legal relationship between the party and the non-party." *Id.* The problem is that the only "example[s] of privity" Taylor cites for this proposition are the guardian-ward and trustee-beneficiary relationships this Court used to describe privity as it once was defined—not its modern expanded definition. *Richards*, 517 U.S. at 798.[19]

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[19] One of Taylor's *amici*, attempting to support Taylor's argument about the meaning of *Richards*, resorts to inverting the order of this Court's discussion. *See* Brief for Lavonna Eddy and Kathy Lander as Amici Curiae ("Eddy Br.") 15 (quoting

Taylor also argues that *Richards* "cited to chapter four of the Restatement," and that "Section 41, in that chapter, lists relationships that cause a person to be 'represented by a party' "; thus, he concludes, "common-law preclusion principles forbid the application of res judicata in this case." Pet. Br. 15-16. What Taylor neglects to mention is that Restatement Chapter Four contains *thirty* sections (§§ 34-63), a number of which endorse non-party preclusion in circumstances where a legal relationship is absent. *See*, *e.g.*, Restatement § 39 (control); *id.* § 62 (estoppel by conduct). The Restatement cannot fairly be read as limiting non-party preclusion to "legal representation" scenarios.

Finally, Taylor quotes *South Central Bell Telephone Co.* v. *Alabama*, 526 U.S. 160 (1999), for the proposition that "[t]he party and non-party must share a 'special *representational* relationship.' " Pet. Br. 13 (quoting *South Cent. Bell*, 526 U.S. at 168) (emphasis in petitioner's brief). According to Taylor, this quote established in every case a requirement of a formal, *ex ante* "*legal* relationship." But *South Central Bell* did not employ Taylor's favored term, nor did it engage in any discussion that would suggest a formal legal-relationship requirement of the type he posits. Quite the contrary, in fact: the Court made clear in *South Central Bell* that it was envisioning its unexplained "special representational relationship" as only one among several ways a non-party could be bound. It wrote that "no one claims that there is *'privity' or some other special relationship*" between the party and non-party. 526

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first *Richards'* sentence about expanding notions of privity and then its sentence about "guardian[s] or trustee[s]").

U.S. at 167-168 (emphasis added). And in any event, the *South Central Bell* Court did not purport to disturb the holdings of *Montana* or *Richards*—two cases that similarly cannot be squared with a "legal representation" requirement.

3. The flimsiness of petitioner's "legal relationship" argument is underscored by the fact that his own *amici* contradict it. The Eddy Brief, for example, argues that privity may be found in three disjunctive situations: (i) "legal responsibility of one individual for another," (ii) actual control over another's litigation, or (iii) where "the rule of necessity" counsels in favor of preclusion. Eddy Br. 14. The brief thus recognizes that a "legal relationship" of the sort petitioner posits is not a categorical requirement of non-party preclusion.[20] *See also* Brief of Civil Procedure and Complex Litigation Professors as *Amici Curiae* ("Professors' Br.") 3-5 (arguing that non-parties may be precluded in class actions, control cases, legal-relationship cases, or cases involving a specialized statutory scheme).

B. Due Process Does Not Impose A "Legal Relationship" Requirement.

Taylor's petition for certiorari suggested that his "legal relationship" rule was mandated by the Due Process Clause. *See* Pet. i. On brief now, Taylor shies away from due process, suggesting instead that the question can be resolved as a matter of common-

[20] The Eddy brief also contradicts Taylor's argument (discussed *supra* at 30) that *Montana* is not a non-party preclusion case. And its ill-explained "necessity" category appears broad enough to embrace many instances in which it would be equitable to impose preclusion—thus supporting the notion that privity is a fact-driven, flexible inquiry.

law doctrine. *See*, *e.g.*, Pet. Br. i; Professors' Br. 3 n.2; Eddy Br. 27. To the extent Taylor continues to make a due-process argument, the argument should be rejected.

1. Here, as in the common-law context, Taylor cherry-picks broad statements from this Court without acknowledging their limitations. He points out, for example, that "because non-parties 'never had a chance to present their evidence and arguments on the claim, [due] process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." Pet. Br. 10 (internal citation omitted) (quoting *Blonder-Tongue*, 402 U.S. at 325). Not given such prominent billing is *Richards*' caveat to that statement: "Of course, these principles do not always require one to have been a party to a judgment in order to be bound by it. Most notably, there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." 517 U.S. at 798. The constitutional question, like the common-law question, thus boils down to privity's permissible scope.

The answer to that question, in turn, is informed by *Richards*. *Richards* was decided as a due-process case, not a common-law preclusion case, *see* 517 U.S. at 802, and yet as discussed above, *Richards* both suggested that privity had expanded beyond formal legal relationships *and* cited with approval portions of the Restatement that permit non-party preclusion absent legal relationships. *Richards*, 517 U.S. at 798; *see supra* at 33-34. Thus, while "there are clearly constitutional limits on the 'privity' excep-

tion," *id.*, the *Richards* Court did not consider a categorical "legal relationship" requirement to be among them.

2. Nor would such a requirement make sense in the larger context of due-process jurisprudence. Much like the privity inquiry itself, any inquiry into what satisfies due process in a particular case is "flexible"; it calls only " 'for such procedural protections as the particular situation demands.' " *Wilkinson* v. *Austin*, 545 U.S. 209, 225 (2005) (quoting *Morrissey* v. *Brewer*, 408 U.S. 471, 481 (1972)). And just as with privity analysis, this Court "generally ha[s] declined to establish rigid rules" governing the due process inquiry. *Id.*; *see also Cafeteria & Rest. Workers Union* v. *McElroy*, 367 U.S. 886, 895 (1961) ("The very nature of due process negates any concept of inflexible procedures universally applicable to every imaginable situation"). As a result, the process that is due is influenced by the nature of the loss claimed. *See Goldberg* v. *Kelly*, 397 U.S. 254, 262-263 (1970); *Joint Anti-Fascist Refugee Comm.* v. *McGrath*, 341 U.S. 123, 168 (1951) (Frankfurter, J., concurring).

Taylor's proposed categorical "legal representation" requirement is a poor fit with this settled conception of due process as flexible and informed by the situation at hand. In some cases, due-process balancing might well require the conclusion that the nonparty should not be bound absent a formal legal relationship with a party to the earlier case. But the due-process balancing in which courts regularly engage need not call for such a requirement in *all* cases (nor, conversely, may a formal legal relationship *alone* necessarily satisfy due process).

Where, for example, a plaintiff controlled a previous case that resolved the same issues, or where a court receives unrebutted evidence of plaintiff recruitment or suit-by-proxy, or where a defendant detrimentally relied on a non-party's behavior, the court acts within constitutional bounds if it examines the non-party's interest and concludes that it is outweighed by the "vital public interests" served by res judicata, *Federated Dep't Stores, Inc.* v. *Moitie*, 452 U.S. 394, 401 (1981), even absent a "legal relationship."

3. Taylor's contrary argument relies heavily on the notion that non-party preclusion must be based on "adequate representation." Pet. Br. 11-12. He looks to two Supreme Court cases that have discussed adequate representation—*Hansberry* and *Richards*—and asserts their proposition that "a prior proceeding, to have binding effect on absent parties, would at least have to be so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue." Pet. Br. 12 (quoting *Richards*, 517 U.S. at 801) (quotation marks omitted). From that principle, in turn, Taylor jumps to the notion that a "legal relationship" must be required to impose non-party preclusion in every case.

The trouble with Taylor's argument is the trouble with his conception of due process generally: He treats the doctrine as if the process requirements applicable to one sort of case are uncritically transferable to others. But that is not how it works. *See Cafeteria & Rest. Workers*, 367 U.S. at 895; *Goldberg*, 397 U.S. at 262-263. *Hansberry* and *Richards* speak to the process that is due in one type

of case—one where there is no little or no connection between the parties and non-parties except for their similar claims. *See Hansberry*, 311 U.S. at 44-45 (noting absence of connection and sharp divergence of interests between the two sets of parties); *Richards*, 517 U.S. at 800-802 (no apparent connection between the two sets of plaintiffs and partially divergent interests); *Wilks*, 490 U.S. 755 (no apparent connection between the two sets of parties). In that circumstance, a court may sensibly refuse to preclude a non-party absent evidence that well-defined procedures were used in the first case to protect the non-party's interests.

But it does not follow from *Hansberry* and *Richards* that the same requirements apply across the board. In other sorts of cases where non-party preclusion traditionally has been applied—for instance, cases of apparent authority,[21] or cases where the non-party is acting as the collusive proxy of an earlier litigant—the concerns identified by *Hansberry* (involving two sets of litigants with *diametrically opposed* interests) and *Richards* (where the two sets of litigants had no apparent connection to each other) have no resonance. And there is no suggestion in either case that the Court silently declared other well-established lines of res judicata law unconstitutional. On the contrary, *Richards* acknowledged that pure adequate-representation cases are but one species of non-party preclusion law: the Court wrote that (i) traditional property-based notions of privity constitute one exception to the "only parties are bound" rule; (ii), modern, expanded notions of privity

[21] *See Fleming* v. *Cooper*, 284 S.W.2d 857 (Ark. 1955); Wright & Miller § 4453, at 424-426.

constitute another such exception; and (iii) "*in addition*, '[w]e have recognized an exception to the general rule when * * * a person, although not a party, has his interests adequately represented.' " *Richards*, 517 U.S. at 798 (quoting *Martin*, 490 U.S. at 762 n.2). *Richards* should be taken at its word; the protections it imposed should not be imported and applied far afield from the particular circumstances in play there.

It is one thing, in short, to say the Due Process Clause requires full class-action protections when unrelated parties are to be estopped on the basis of "adequate representation" alone. It would be quite another to require those same protections in a case where the party and non-party have identical interests, know each other "quite well," share an attorney, give each other access to discovery materials, refer to one another in their pleadings, enjoy a "close working relationship relative to the[ ] successive cases," Pet. App. 17a, and engage in timing and tactics that suggest coordinated filing designed to "exploit technical nonparty status in order to obtain multiple bites of the litigatory apple.' " *Gonzalez*, 27 F.3d at 761. The factual differences between this case on the one hand, and *Hansberry* and *Richards* on the other, are stark. And when it comes to due process, facts matter. *See Cafeteria & Rest. Workers*, 367 U.S. at 895. The D.C. Circuit's decision below was motivated by, and limited to, the peculiar facts presented. It did not confront the very different facts of an "adequate representation" case, and for that reason it does not threaten to turn Herrick's case into a "de facto class action." Pet. Br. 17. Taylor's due process argument should be rejected.

III. TAYLOR'S "NOTICE" THEORY ALSO IS WITHOUT BASIS.

In a few pages at the close of his brief, Taylor argues in the alternative that even if "legal relationship" is not a categorical requirement of non-party preclusion, actual notice of the first case must be. Pet. Br. 33-36.[22] But that, too, is wrong.

The general proposition undergirding Taylor's argument is that notice and a "right to be heard is '[t]he fundamental requisite of due process.' " Pet. Br. 33 (quoting *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950)). The D.C. Circuit readily acknowledged as much, Pet. App. 12a (citing *Richards*, 517 U.S. at 799-800), and this "requisite of due process" is borne out by the D.C. Circuit's fact-specific, equitable test for privity itself. The Court of Appeals declared that privity attaches where two parties are united by the same interest, their interests were adequately represented in the first litigation, and the two parties share a particularly close relationship with respect to the second litigation or collude to relitigate the first lawsuit. *See supra* at 13-16. The D.C. Circuit's test, in short, applies res judicata only where—as a practical matter—the two parties function as one.

And where two parties are so closely aligned that they are treated as one and the same, no separate inquiry into notice is needed. Thus, if a trustee unsuccessfully brings suit, his trustor is barred from

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[22] By arguing that an acceptable substitute exists for the "legal relationship" requirement on which he spends the bulk of his brief, Taylor goes far toward accepting *respondents*' position on privity: *i.e.*, that there is more than one way to test for it.

relitigating the claim—regardless of whether the trustor received actual notice of the first lawsuit. Where the parties share a close relationship unified by a common litigation goal, the second party effectively receives "constructive notice of all ensuing litigation." *Gonzalez*, 27 F.3d at 761 n.11.

Even Taylor grudgingly concedes that, with certain relationships, "notice of the lawsuit can be imputed" to a later litigant. Pet. Br. 35. He hedges that concession, of course, insisting that imputation of notice is proper only "when someone has a legal relationship with another person." *Id.* But we have already demonstrated how this Court and others have refused to confine privity to strict "legal" relationships. *See supra* at 29-35. Under Taylor's circular reasoning, it would be impossible to extend privity to non-legal relationships because constitutionally adequate notice could be imputed to the parties only if they first shared a legal relationship. That is not a rule this Court should endorse; not only is it illogical, but it would leave courts powerless to identify and pretermit collusive second (and third, and fourth) lawsuits pressing identical interests for identical reasons. *See* Pet. App. 12a; *see also supra* at 23; *Gonzales*, 27 F.3d at 761 ("actual or constructive notice" is "implicit" in tactical maneuvering scenario).

Imputing notice to a subsequent litigant who fails to rebut evidence of a "close relationship" relative to the first case is particularly appropriate where—as here—the litigant's interest is not in his livelihood, or his personal property, or his civil rights, or in money damages, but in a non-monetary "informational" cause of action bestowed by statute on

every citizen of the United States.[23] This Court has long recognized that property interests are not all of a kind. *Goldberg*, 397 U.S. at 263-264; *see also Sniadach* v. *Family Fin. Corp. of Bay View*, 395 U.S. 337, 340 (1969). A court in a preclusion case therefore quite reasonably may consider the nature of the right together with other facts and conclude that process was satisfied by imputed notice. Taylor's categorical notice rule should be rejected in favor of the D.C. Circuit's careful and limited case-by-case approach, which properly acknowledged notice as an important factor in the privity inquiry.

IV. POLICY CONSIDERATIONS FAVOR AFFIRMANCE.

1. The D.C. Circuit's privity test has two clear advantages over the rule (or rules) Taylor has proposed. First, it does not impose categorical directives across the spectrum of res-judicata law. To do so would be both unprecedented and ill-advised given the proven diversity and unpredictability of the

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[23] Taylor's FOIA right is not, as Taylor and some of his *amici* suggest, a "chose in action." Pet. Br. 32; Eddy Br 10. Choses in action are legal claims that involve the right to recover money or tangible goods; they are transferable and assignable. *See Black's Law Dictionary* 258 (8th ed. 2004) (defining "chose in action" as "[a] proprietary right in personam, such as a debt owed by another person, a share in a joint-stock company, or a claim for damages in tort"); *Blagge* v. *Balch*, 162 U.S. 439, 459 (1896) (noting that a claim was "transferable and transmissible like other property of the nature of choses in action"); 12 U.S.C. § 632 (defining "property" to include, inter alia, "gold, silver, currency, * * * [and] choses in action"). Taylor's statutory right of suit bears little resemblance to such interests. It is not an "in personam" right, it does not carry with it potential damages, and it is not transferable—anyone to whom it might be transferred already possesses it.

fact patterns in this area of law; far better to adopt, as the Court of Appeals did here, a flexible test that can be applied on a case-by-case basis. Trial courts are naturally equipped to gather and declare the facts giving rise to privity, and because they review res judicata decisions *de novo*, *see* Pet. App. 5a, courts of appeal for their part can ensure that litigants are not too hastily denied their day in court.

Second, the D.C. Circuit's test provides district courts with the tools they need to reject plaintiff recruitment, suit-by-proxy, and other inequitable litigation conduct in those rare cases when problems arise. Taylor's theory, by contrast (and perhaps by design), would render it impossible to kick such suits out of court: Estoppel-by-conduct cases would not necessarily meet Taylor's requirements, and efforts to dismiss plaintiff-recruitment cases would often founder on the legal-relationship requirement or the notice requirement or both.

Indeed, Taylor's rule would be particularly troublesome in "public law" cases such as this one, involving universal rights of suit. In private-law cases, an alert defendant may be able to join in one action all potential plaintiffs and thus obviate the potential for successive suits. Not so in this context. In cases involving FOIA and similar public rights, potential plaintiffs include the entire adult population of the United States. A defendant or intervenor such as Fairchild thus may be called on in case after successive case to protect from disclosure confidential commercial documentation it was required by federal law to file.[24] Preclusion law must have

[24] If one plaintiff loses an action such as this, moreover, it can recruit another, and another, and another—until just one

sufficient room for play in the joints to accommodate these circumstances, and district courts must be permitted to identify and dispose of such claims when there has been untoward manipulation of the courts—and no evidence is offered to countermand that suspicion.

2. Taylor and his *amici* offer several arguments about the purported perils of the D.C. Circuit's test, but none has merit. They argue that it could preclude successive litigants just because they "share[ ] a hobby," Pet. Br. 21, or because they share membership in the same association, *see* Professors' Br. 10, or because they are members of the FOIA bar who often work together and whose separate groups happen to seek the same documents, *see* Brief of *Amici Curiae* The National Security Archive *et al.* 4. But as another of petitioner's own *amici* correctly points out, those concerns are unfounded: "the court was careful to limit its holding to the specific facts presented" and "it did not base its conclusion on the two men's membership in the [same association]." Brief of *Amicus Curiae* American Dental Association 6. The "specific facts presented" included not just associational membership and shared interest in the documents, but *identical* (and indeed derivative) interests, identical motivation, use of the same counsel and discovery materials, suspicious timing, accusations of suit-by-proxy, and failure to rebut those accusations. The D.C. Circuit's holding thus would not justify preclusion in any of the scenarios

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plaintiff *wins*, at which point Fairchild's documents become the public's. There are no do-overs on the defense side.

presented by the *amici*.[25] *Cf. Burnham* v. *Superior Court*, 495 U.S. 604, 613 n.2 (1990) (plurality op.) (noting that the bases on which a judgment relies are not dicta).

Taylor and his *amici* also argue that the D.C. Circuit's test essentially requires widespread mandatory intervention. *See* Pet. Br. 29; Eddy Br. 8-9. That is simply not so. The D.C. Circuit fashioned a test that will affect only the rare successive plaintiff with interests so indistinguishable from the first that he can properly be deemed a proxy. And in the situations where the D.C. Circuit's test is most likely to be of use—instances of plaintiff recruitment or other *post hoc* collusion—the successive plaintiff may not have known about the first case at all. To speak of a "mandatory intervention" requirement in that context makes no sense.

Taylor also argues that the D.C. Circuit's approach would encourage "races to the courthouse, as people try to make sure that their case is the one resolving their rights." Pet. Br. 29. That too is incorrect, for

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[25] This includes *Eddy* v. *Waffle House*, No. 07-495. The *Eddy* petitioners sued Waffle House for violation of their civil rights, were *improperly dismissed* from the case, and subsequently were held precluded by a jury verdict adverse to another plaintiff whose suit had proceeded to trial. Eddy Br. 2. That sort of "whipsawing placed appellants in an untenable position," and as a result the privity doctrine "cannot be galvanized to preclude [them] from maintaining their suit." *Gonzalez*, 27 F.3d at 763. This Court repeatedly has observed that the doctrine has sufficient equitable flexibility to preserve the claims of plaintiffs wrongly pretermitted from a proceeding; those plaintiffs never got a first bite at the "litigatory apple," and thus are not asking for seconds. *See Montana*, 440 U.S. at 155; *Blonder-Tongue*, 402 U.S. at 333-334; *Commissioner* v. *Sunnen*, 333 U.S. 591, 599 (1948).

the reasons just discussed. The D.C. Circuit's test would not ensnare mere friends or colleagues; nor would it threaten victims of mass torts with preclusion for electing to sue separately; nor would it adversely affect civil-rights plaintiffs like the *Eddy* petitioners. It is much more narrowly drawn, and was much more exactingly applied, than that.

Finally, *amici* argue that the D.C. Circuit's test would create new pleading burdens in the federal courts, with defendants often seeking judgment and discovery before judgment on non-party-preclusion grounds and the courts forced to sort out the facts. *See* Professors' Br. 16. But the court's functional test hardly threatens to inundate the district courts with widespread non-party-preclusion pleading. And even the position Taylor presses here requires the threshold resolution of preclusion issues in certain narrow circumstances—for example, whether two successive plaintiffs have a "legal relationship," when they developed such a relationship, when the second plaintiff received notice of the first suit, and so forth.

* * *

Res judicata is "a rule of fundamental and substantial justice, of public policy and private peace." *Hart Steel Co.* v. *Railroad Supply Co.*, 244 U.S. 294, 299 (1917). Its application "is central to the purpose for which civil courts have been established, the conclusive resolution of disputes within their jurisdictions." *Montana*, 440 U.S. at 153. And its careful use when the equities demand it—in addition to conserving judicial resources often tested to their limits—relieves defendants from the needless "expense and vexation" of defending the

same suit again and again. *Id.* As the party with business interests at stake in this case—and which now has been hauled into five courts by two confederates pressing identical claims for identical reasons—Fairchild can speak with authority to the "expense and vexation" attending such claims. *Id.*

CONCLUSION

For the foregoing reasons, the judgment below should be affirmed.

Respectfully submitted,

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