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.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE FEDERAL RESPONDENT

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QUESTION PRESENTED

Whether the final judgment in litigation under the Freedom of Information Act (FOIA), in which the requester unsuccessfully sought disclosure of technical drawings for an antique aircraft that he owned, is binding in a second FOIA suit seeking the same drawings brought by a "close associate" who was asked by the first requester to help restore the plane and who utilized the same attorney and discovery from the first suit.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-21a) is reported at 490 F.3d 965. The opinion of the district court (Pet. App. 22a-36a) is not published in the Federal Supplement, but is available at 2006 WL 279103.

JURISDICTION

The judgment of the court of appeals 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. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATEMENT

This case concerns the preclusive effect of a judgment in an action under the Freedom of Information Act

(FOIA), 5 U.S.C. 552 (2000 & Supp. V 2005), in which the requester sought disclosure of specifications for an antique aircraft that he owned, on a second FOIA suit brought by his "close associate," who was asked to help restore that plane and who utilized the same attorney and discovery from the first suit.

1. In 1997, Greg Herrick, a collector of antique aircraft, submitted a request under FOIA that the Federal Aviation Administration (FAA) make available for reproduction the certification drawings for a 1930s era F-45 aircraft. Pet. App. 24a-25a. Herrick was the owner of a 1936 F-45, one of only two surviving specimens of that vintage aircraft, and wished to obtain the certification drawings in order to restore the plane. *Ibid.*; *Herrick* v. *Garvey*, 200 F. Supp. 2d 1321, 1322-1323 (D. Wyo. 2000), aff'd, 298 F.3d 1184 (10th Cir. 2002). The certification materials were of considerable value to Herrick's project because a plane restored to the original specifications could be certified as airworthy without the need to obtain costly engineering analyses or otherwise demonstrate the aircraft's airworthiness to the FAA. See J.A. 78-79; *Herrick*, 200 F. Supp. 2d at 1327. The drawings had been provided to the FAA's predecessor agency, the Civil Aeronautics Administration, by the plane's manufacturer, Fairchild Engine and Airplane Corporation (FEAC), as required by federal safety regulations. Pet. App. 24a & n.2.

The FAA declined to make the certification drawings public on the ground that they were exempt from FOIA's disclosure requirements. Exemption 4 of FOIA exempts from mandatory public disclosure "trade secrets and commercial or financial information obtained from a person and privileged or confidential." 5 U.S.C. 552(b)(4). Pursuant to Executive Order No. 12,600,

3 C.F.R. 235 (1988), which generally requires federal agencies to give notice to providers of confidential commercial information when the agency determines that such information is responsive to a FOIA request, the FAA informed Herrick that it would disclose the drawings if he obtained the consent of Fairchild Corporation (Fairchild), the successor to FEAC. Fairchild did not give Herrick permission to obtain the materials and objected to disclosure on the ground that the certification drawings were commercially valuable trade secrets. According to Fairchild, although the plane was no longer in production, the drawings retained commercial value precisely because they would be valuable to a person, such as Herrick, who was interested in restoring a vintage aircraft to the FAA's airworthiness standards. C.A. App. A145-A146. The FAA therefore determined that, under Exemption 4, the documents were not subject to disclosure. Pet. App. 24a; *Herrick*, 200 F. Supp. 2d at 1323.

Herrick filed suit in the United States District Court for the District of Wyoming, which, after considering "[v]oluminous materials" provided by the parties and by Fairchild, granted summary judgment in favor of the FAA. *Herrick*, 200 F. Supp. 2d at 1327, 1329. The issues before the district court were whether the drawings fell within Exemption 4, whether Fairchild owned the rights to the drawings, and whether Fairchild waived any claim to protection. *Id.* at 1327-1329. The district court held that the requested drawings "are typical trade secrets customarily not available to the public," and that it did not matter for purposes of Exemption 4 that the plane was no longer in production. *Id.* at 1328. The court further determined that Fairchild was the successor to the entity that provided the drawings, *ibid.*,

and that Fairchild had not waived trade-secret protection for the drawings, *id.* at 1329. The court rejected Herrick's reliance on a 1955 letter in which Fairchild had authorized the FAA to lend out Fairchild airplane drawings. The court noted that the requested documents relating to the F-45 "have not been released previously and have not been disclosed by the FAA," and that Fairchild had "reversed its earlier authorization to disclose materials." *Ibid.*

The United States Court of Appeals for the Tenth Circuit affirmed. *Herrick* v. *Garvey*, 298 F.3d 1184 (2002). Herrick argued on appeal that Fairchild's predecessor in interest had waived any trade-secret protection in 1955 when it authorized disclosure of the drawings and that Fairchild could not rescind the waiver because it was not the proper owner of the drawings. *Id.* at 1190. Fairchild filed an amicus brief supporting the FAA's withholding decision. *Id.* at 1188. The Tenth Circuit determined that the 1955 letter did deprive the documents of trade-secret status, *id*. at 1193-1194, but rejected Herrick's argument that Fairchild was not the owner of the materials for purposes of revoking its consent to disclosure, *id.* at 1193, 1195. In so holding, the court of appeals observed, in a footnote, that it was assuming without deciding—because Herrick had not contested—that a trade secret's status as such could be restored by revoking consent before a document had been disclosed and that such a revocation could be effective even if made after a FOIA request had been lodged. *Id.* at 1194-1195 n.10.

2. Petitioner is the executive director of the Antique Aircraft Association, an association of which Herrick is a member. Petitioner is a "close associate" of Herrick's, whom Herrick had requested to help restore Herrick's

F-45. Pet. App. 2a-3a. Less than one month after the Tenth Circuit's decision in *Herrick*, and one week after the Tenth Circuit's mandate issued, petitioner filed a FOIA request for the same documents that were the subject of the *Herrick* litigation. *Ibid.* In February 2003, petitioner, represented by the same attorney who had represented Herrick, filed suit in the United States District Court for the District of Columbia. *Id.* at 3a. Petitioner's complaint referred to the Tenth Circuit's conclusion in *Herrick* that the documents had lost their "secret" status for the purposes of Exemption 4 as a result of Fairchild's letter to the FAA in 1955, and its holding against Herrick on the ground that he had failed to challenge the proposition that the information could be returned to protected status. J.A. 17. Petitioner's complaint challenged that proposition. *Ibid.* Fairchild intervened as a defendant to protect its trade-secret property interest. Pet. App. 24a n.3.

The district court litigation was stayed so that the FAA could consider petitioner's request, of which the FAA had no record. J.A. 1, 56. In his administrative papers, petitioner again claimed that, in light of the Tenth Circuit's decision, the requested material could not be considered secret. J.A. 43-44. The FAA declined to disclose the records on the ground that they are exempt as trade secrets. J.A. 45-52.

The parties returned to the district court, where petitioner filed a motion for discovery, again framing his case in terms of the *Herrick* litigation. Petitioner set forth in great detail the procedural history of *Herrick*, what the discovery from that litigation demonstrated, and what questions remained. J.A. 25-32; see J.A. 27 ("The docket-like file was obtained through discovery in the *Herrick* FOIA case."); J.A. 28 n.2 ("The plaintiff

learned of these facts also from the discovery in the FOIA case brought by Mr. Herrick."); J.A. 29 n.3 (noting that requested discovery in this case was designed to answer a question raised by "discovery of the corporation" in *Herrick*, with respect to which "[t]he plaintiff tried to subpoena" an individual in *Herrick* unsuccessfully); J.A. 35 ("The FAA files * * * were already produced in the *Herrick* case, but we do not know what has been filed since.").

Petitioner explained that his interest in obtaining the F-45 drawings stemmed from his relationship with Herrick. Petitioner noted that Herrick, who owned one of "only two of the F-45s [that] exist today," was "in the process of repairing the aircraft" and "needed the plans and specifications mainly for the tail assembly." J.A. 28. Petitioner recounted at length that this interest had given rise to Herrick's FOIA request and the unsuccessful litigation in the Tenth Circuit. J.A. 28-32. Petitioner then explained that "Herrick has now requested [petitioner] to assist him with the repair of his aircraft," and, he continued, "[i]n view of the fact that it has already been adjudicated that this material ceased being a secret in 1955, * * * [petitioner] requested that the FAA loan the material to him under the FOIA." J.A. 32; see also J.A. 27 (asserting, based on *Herrick*, that the loss of trade-secret status had "already been adjudicated"); J.A. 34 (relying on "what has been adjudicated").

At various points in petitioner's memorandum, it was unclear whether the brief was written on behalf of petitioner or Herrick. For example, after discussing the Tenth Circuit's decision, the memorandum stated that "Herrick does not agree, of course," with the Tenth Circuit's hypothesis that Fairchild could reassert its interest in the drawings' secrecy. J.A. 31. Elsewhere, the

memorandum chastised the Tenth Circuit for affirming in *Herrick*, asserting that "a remand would have been appropriate in the plaintiff's view." J.A. 32 & n.4.

3. The FAA and Fairchild each moved for summary judgment on the ground that petitioner was in privity with Herrick with respect to their interest in the F-45 drawings, and that the judgment in *Herrick* barred petitioner from relitigating the Exemption 4 issue in a second suit. The district court granted summary judgment in respondents' favor on that basis. Pet. App. 22a-36a.

The district court observed that petitioner disputed only two of the four requirements for res judicata. Pet. App. 29a. Petitioner did not contest that *Herrick* was a final judgment on the merits rendered by a court of competent jurisdiction. *Ibid.* Petitioner did dispute, however, whether there was "an identity of parties" or "an identity in the cause of action in both suits." *Ibid.* The court held that both requirements were satisfied. *Id.* at 29a-35a.

The district court first held that the claims were the same. The court observed that it was uncontested that petitioner's and Herrick's lawsuits each sought judicial review of the FAA's decision that the same F-45 drawings were subject to FOIA Exemption 4. Pet. App. 29a. The court rejected petitioner's argument that the claims were different simply because petitioner sought to challenge a legal conclusion that had been the basis of the Tenth Circuit's decision, but that Herrick had not contested. *Id.* at 29a-30a.

The court also found that petitioner and Herrick were in "privity" under a theory of "virtual representation." Pet. App. 30a-31a. Applying the analysis enunciated by the Eighth Circuit in *Tyus* v. *Schoemehl*, 93 F.3d 449, 454 (1996), cert. denied, 520 U.S. 1166 (1997),

the district court found that several factors supported that conclusion. See Pet. App. 30a-35a. The court stressed that the interests of Herrick and petitioner were identical: "preservation of the same antique aircraft." *Id.* at 32a. Although petitioner sought to distinguish his interest from that of Herrick, the court held petitioner to his earlier admission that "Herrick 'requested [petitioner] to assist him with the repair of his aircraft' and that Herrick also sought the information in his litigation because Herrick was 'in the process of repairing the aircraft.'" *Id.* at 32a-33a (quoting Pl's Mot. for Disc.); J.A. 28, 32. Considering the summary judgment record, the court stated that the evidence showed Herrick and petitioner were

> two individuals who are quite fond of antique aircrafts and the historical preservation thereof, who are members of the same antique aircraft association, who keep apprised of each other's litigation, and who successively used the same lawyer to seek identical information regarding an exceedingly rare aircraft that Herrick happens to own and [petitioner] has agreed to repair.

Id. at 33a (footnotes omitted). The identity of Herrick and petitioner's interests, coupled with their use of the same counsel, confirmed also that Herrick had been an adequate representative in the first suit. *Ibid.*

The court found that preclusion was especially warranted in light of the fact that Herrick's and petitioner's suits concerned "public law issues" as to which the number of potential plaintiffs was effectively limitless. Pet. App. 34a (quoting *Tyus*, 93 F.3d at 456). In such cases, where a victory by either plaintiff would equally benefit each, failure to apply preclusion would encourage

"fence-sitting" and bringing repetitious claims until one is successful. *Id.* at 34a-35a. The court concluded that the facts of this case illustrated precisely such "deliberate maneuvering." *Id.* at 35a. It noted that "Herrick shared his discovery materials with [petitioner]," and that petitioner had, just a month after the judgment in Herrick's case, tried to pick up where Herrick left off by pursuing an "issue that his own lawyer failed to raise on appeal in Herrick's case." *Id.* at 33a n.6, 34a, 35a.

The district court was so convinced that petitioner's case was "one of deliberate maneuvering to avoid the effects of * * * Herrick's abortive litigation" that he directed petitioner and his counsel to show cause why sanctions should not be imposed upon them under Federal Rule of Civil Procedure 11. Pet. App. 35a-36a. Although the court ultimately decided against imposing sanctions, it admonished counsel that he had come to the "doorstep" of sanctionable behavior. J.A. 95.

3. Petitioner appealed, and the court of appeals unanimously affirmed the holding that res judicata bars this second lawsuit by Herrick's privy. Pet. App. 1a-21a. The court recognized that the doctrine of res judicata requires a balance between "the nonparty's right to due process," *id.* at 8a, and the "deep-rooted historic tradition that everyone should have his own day in court" on the one hand, *ibid.* (quoting *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996)), and the "burden of relitigation," the "possibility of inconsistent results," and the "public interest in judicial economy" on the other, *ibid.* (citing *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979)).

The court held that two necessary, but not sufficient, preconditions must be met before a court could find a second lawsuit barred under the doctrine of virtual rep-

resentation. There must be both an "identity of interests" and "adequate representation." Pet. App. 8a. In addition, the court concluded there must be at least one of the following factors showing "an affirmative link between the later litigant and either the prior party or the prior case": "[1] a close relationship between the present party and his putative representative, or [2] substantial participation by the present party in the first case, or [3] tactical maneuvering on the part of the present party to avoid preclusion by the prior judgment." *Id.* at 8a-9a (citing *Irwin* v. *Mascott*, 370 F.3d 924, 929-930 (9th Cir. 2004)).

The court found each of the necessary prerequisites to be satisfied. Petitioner and Herrick not only "wanted the same result but * * * had substantially the same incentive to achieve it." Pet. App. 9a. The court stressed that petitioner's admission, "that Herrick had asked him to assist with the restoration of Herrick's F-45," demonstrated that "Herrick and [petitioner] had the same motivation to obtain the documents, viz., the restoration of Herrick's F-45." *Id*. at 10a.[1]

The court also held that there had been adequate representation of that common interest in Herrick's lawsuit. Pet. App. 11a-14a. The court declined to treat the presence or absence of notice to petitioner of the prior litigation as dispositive of the representation question, while noting its importance as a consideration. *Id.* at 13a. Here, although the present record was insufficient

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[1] The court of appeals noted that the affidavit petitioner had filed in the district court in connection with his motion to reconsider took issue only with the district court's characterization, Pet. App. 32a-33a, that he had an "*agreement* with Herrick to restore his F-45," but conspicuously did not disavow petitioner's earlier admission that Herrick had "*asked* for his assistance," *id.* at 11a n.* (emphases added).

to show that petitioner had notice of Herrick's litigation at the time it was ongoing, the court found that other indicia sufficiently demonstrated adequate representation. The court first determined that "Herrick had an incentive to litigate zealously and his motives were substantially similar to and seemingly even stronger than [petitioner's]." *Id.* at 14a. In addition, the court observed that "Herrick and [petitioner] used the same attorney to pursue their FOIA claims," a fact that was not itself dispositive, but "in combination with an identity of interest" was "surely relevant." *Ibid.*

The court then held that petitioner and Herrick had "a close working relationship relative to the[ir] successive cases." Pet. App. 17a. The court rejected the notion "that only a legal relationship may qualify as a 'close relationship.'" *Ibid.* Rather, the court held, "[w]hether two individuals have sufficiently close connections that one may act as the virtual representative of the other is a functional, not a formal question." *Ibid.* In this case, the court found that a sufficiently close relationship was established by the fact that

> Herrick and [petitioner] were not merely people who happened to share a common interest and membership in the same organizations, but knew each other quite well: Herrick asked [petitioner] to assist him in restoring his F45, provided information to [petitioner] that Herrick had obtained through discovery, and at summary judgment [petitioner] did not oppose Fairchild's characterization of Herrick as his "close associate."

Ibid.

Additionally, the court noted that there was some evidence of the type of tactical maneuvering that could

be "probative of collusion or otherwise indicative of privity." Pet. App. 16a. Specifically, the court observed that petitioner filed his case "on the heels of" the Tenth Circuit's *Herrick* decision, "with the assistance of the losing party to the prior litigation," which "suggests Herrick and [petitioner] coordinated the filing of [petitioner's] request" and litigation "so that [petitioner] could try where Herrick had failed, to the benefit of both." *Id.* at 16a-17a. Because, however, the court considered there to be some "ambiguity of the facts" as to whether petitioner and Herrick were "in cahoots," and because it was unnecessary to the result, the court did not decide whether the facts constituted tactical maneuvering. *Id.* at 17a.

The court of appeals emphasized the narrow, fact-bound nature of its holding. The court specifically rejected the contention that its holding would preclude distinct FOIA requests by "reporters, public interest organizations, and academics" who might have "similar interests." Pet. App. 17a.

After further determining that *Herrick* was a final judgment on the merits, Pet. App. 18a-19a, and that there was an identity of claims, *id.* at 19a-20a, the court held that, under principles of res judicata, the judgment in *Herrick* barred petitioner's successive lawsuit, *id.* at 21a.

SUMMARY OF ARGUMENT

I. A. The doctrines of res judicata and collateral estoppel, and the related concept of "privity," serve a critical function in the rule of law. Without them, no resolution of disputes could be final, and litigants and the courts would always be subject to vexatious relitigation by disappointed parties or their proxies. The

history of res judicata generally and of privity more specifically has been one of gradual evolution. The few rigid rules of the early common law have given way to the general principles, numerous context-specific rules, and equitable balancing of multiple factors identified in the Restatement (Second) of Judgments. More recently, courts have recognized that to say that two persons are in "privity" is essentially to state a conclusion, and that whether a prior judgment should preclude subsequent litigation by another party is ultimately a determination of what equity, fairness, and concern for preserving judicial resources require in light of the realities of the parties' relationship with respect to the litigation.

Petitioner proceeds as though that evolution, which is evident as well in other principles of res judicata, such as the gradual abandonment of the requirement of mutuality, never happened. He contends (Br. 19) that the doctrine of privity can be summarized in a single test: whether, at the time of the first suit, there existed "a legal relationship under which the party [was] legally accountable to the non-party for the conduct of the litigation." That rule, which in practical application would be limited to the historical examples of guardians and trustees, cannot account for the wide variety of circumstances in which the courts, through the time-tested process of common law development, have recognized that the judgment in one suit should preclude relitigation in another.

B. Petitioner rests his argument in favor of a strict test for privity on statements by this Court regarding the importance of an individual's right not to be deprived of his property—which can include a claim for judicial relief—without the opportunity to be heard. But those cases concerned the question when a court can

deprive an individual of valuable private rights as a consequence of litigation as to which the individual was a *stranger*. Where a non-party has a special relationship with a party to litigation, the existence of other factors (short of petitioner's wooden "legally accountable" test) can justify the application of preclusion. If the rule were otherwise, there would be too strong a temptation for disappointed litigants to engage in tactical maneuvering to enable them to get multiple bites at the apple. One factor that especially weighs in favor of a more flexible standard for assessing privity is whether the right at stake is a public right. In that situation, the litigant's individual interest is by definition less directly affected. At the same time, the opportunity for harassment and the imposition of burdensome relitigation on the defendant is increased, because the number of potential plaintiffs may be almost limitless. Moreover, in private litigation a party must plead a relationship to the disputed matter that can reveal a degree of privity just to establish standing. It makes little sense to allow a FOIA litigant to avoid a traditional showing of standing, but then benefit from strict privity requirements that developed in the private context.

C. The courts below carefully considered the relationship between the parties with respect to the litigation and the nature of the interests at stake in determining that it would be fair and equitable to hold petitioner bound to the outcome of the litigation brought by his close associate, Herrick.

Petitioner's attempt to force public right litigation such as FOIA into categories developed for private litigation would, if successful, mean that for all practical purposes the government could never obtain a final judgment in its favor in FOIA cases. Because every

member of the public has standing to seek disclosure under FOIA, potential plaintiffs would never have to demonstrate the kind of personal interest in obtaining the information that would confirm the extent of their relationship to an earlier litigant. Thus, as long as they avoided establishing a formal agency relationship, an unsuccessful litigant could always find another person to bring a further FOIA action as his proxy. Where, as here, the request concerns information that is the alleged property of a third-party, that party too would face the prospect of never-ending litigation.

In this case, Herrick and petitioner shared not just a common or parallel interest in disclosure under FOIA; they had a joint interest that derived from a single, very specific goal: to restore Herrick's antique aircraft. Herrick, the owner of the aircraft, wanted to obtain the technical drawings of the plane in order to facilitate its restoration. Petitioner, whom Herrick had asked to help work on the plane, had not only the same goal of obtaining the technical drawings, but the same motivation: their common project to restore Herrick's plane. Petitioner's interest (and lawsuit) was thus entirely derivative of Herrick's.

The conduct of petitioner's suit reflects the extent to which it was, in practical reality, a continuation of Herrick's FOIA action. Petitioner initiated his FOIA request within a month of Herrick's loss, using the same lawyer, and taking up where Herrick's case left off. Petitioner treated the issues on which Herrick had prevailed as having been "adjudicated," and turned his attention to the issue decided adversely to Herrick. His papers referred freely to the litigation history of *Herrick*, built upon the discovery obtained in that suit, and even, at times, seemingly lost track of whether peti-

tioner or Herrick was the plaintiff in the second suit. The record thus amply supports the court of appeals' conclusion that petitioner and Herrick had "a close working relationship relative to the[ir] successive cases." Pet. App. 17a. This is precisely the type of circumstance in which fairness and equity dictate that the two associates should be held to a single adjudication.

II. Finally, petitioner's appeal to due process fails. Because a member of the public has only an indirect interest in the vindication of a public right, his right to litigate the issue personally has little, if any, weight with respect to the due process balancing analysis under *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). In most circumstances, a member of the public has no standing to bring such a claim in the first place. And in some situations where standing is recognized, the judgment in the first suit seeking to vindicate the right binds all. Here, the court of appeals held that petitioner should be bound by the judgment in *Herrick* in light of the significant relationship he had to that litigation. That judgment does not remotely offend due process.

ARGUMENT

I. THE COURT OF APPEALS CORRECTLY HELD THAT PETITIONER WAS IN PRIVITY WITH HERRICK WITH RESPECT TO THEIR JOINT INTEREST IN OBTAINING DISCLOSURE UNDER FOIA OF FAIRCHILD'S TECHNICAL DRAWINGS IN ORDER TO RESTORE HERRICK'S PLANE

It is a "fundamental precept of common-law adjudication" that a right "determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties or their privies." *Montana* v. *United States*, 440 U.S. 147, 153 (1979)

(quoting *Southern Pac. R.R.* v. *United States*, 168 U.S. 1, 48 (1897)). Thus, under the doctrine of res judicata, "a final judgment on the merits bars further claims by parties or their privies based on the same cause of action." *Ibid.* As the Court has recognized, the doctrine of res judicata serves several important interests. It "protects * * * adversaries from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153-154. See *Parklane Hosiery Co.* v. *Shore*, 439 U.S. 322, 326 (1979) (preclusion serves "the dual purpose of protecting litigants from the burden of relitigating an identical issue with the same party or his privy and of promoting judicial economy by preventing needless litigation"); *Blonder-Tongue Labs., Inc.* v. *University of Ill. Found.*, 402 U.S. 313, 328-329 (1971) (*Blonder-Tongue*) (noting the "misallocation of resources," both for "judicial administration" and parties, that results from relitigation).

Consistent with the significant public purposes that underlie the doctrine, the Court has been mindful of the need to craft rules of preclusion that discourage gamesmanship, so that "repeated litigation" does not take on "the aura of the gaming table," *Blonder-Tongue*, 402 U.S. at 329, with an unsuccessful litigant trying over and over until his luck changes. To that end, the courts have long recognized that "a judgment not only estops those who are actually parties, but also such persons as were represented by those who were or claim under or in privity with them." *Bigelow* v. *Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 128 (1912). Were it otherwise, a party could seek to relitigate an adverse outcome by having his privy bring a second suit.

Concerns regarding coordinated serial litigation are particularly acute in public law cases, where "the number of plaintiffs with standing is potentially limitless." *Tyus* v. *Schoemehl*, 93 F.3d 449, 456 (8th Cir. 1996), cert. denied, 520 U.S. 1166 (1997). In that circumstance, because a win by any particular plaintiff benefits all equally, the courts must take care that the rules of preclusion not "encourage fence-sitting." *Ibid.* Otherwise, "various members of a coordinated group [could] bring separate lawsuits in the hope that one member of the group would eventually be successful, benefiting the entire group," including those who had previously litigated and lost. *Id.* at 457. Thus, as this Court has recognized, "the States have wide latitude to establish procedures * * * to limit the number of judicial proceedings" that can be brought to assert such public rights. *Richards* v. *Jefferson County*, 517 U.S. 793, 803 (1996).[2]

The court of appeals' decision in this case draws a careful line that prevents abusive and repetitious FOIA litigation, while protecting the interest of truly independent requesters in separately litigating their claims. Where records of broad and genuine public concern are at issue, there may be multiple, independent requesters, each of whom, under the court of appeals' test, could seek judicial review of a determination to withhold the

[2] Although the issue here arises in the context of res judicata and a prior judgment, courts would have comparable authority to address similar efforts at earlier steps of the litigation. For example, an effort to bring and dismiss serial lawsuits by different plaintiffs in order to secure a judge perceived to be friendly would not be allowed to circumvent Rule 41. In public law contexts where multiple plaintiffs have standing, such as FOIA or redistricting, it would be possible to locate numerous plaintiffs with standing, but such an effort at judge shopping would surely be policed by an expansive notion of privity. There is no reason not to adopt a similar solution to the problem here.

documents. On the other hand, where, as here, a single individual seeks records of little public interest on account of their peculiar commercial value to that individual, the court of appeals' decision will prevent that individual from relitigating an adverse judgment, in concert with friends and family whose only interest in the issue is derivative, in judicial districts across the country. Under petitioner's argument, such litigation do-overs could never be barred as long as the initial requester each time enlisted a new proxy who had no notice of the prior lawsuits at the time they were pending. Not surprisingly, the doctrine of res judicata does not compel such a result and places a greater value on judicial and governmental resources.

A. The Concept Of Privity Is More Flexible Than Petitioner Acknowledges And Does Not Always Require Legal Accountability Of One Party To The Other

Because principles of preclusion are judicially crafted, they have been revised and refined through the years to further their principal purposes. In *Blonder-Tongue*, for example, the Court recognized that "the court-produced doctrine of mutuality of estoppel [was] undergoing fundamental change in the common-law tradition." 402 U.S. at 327. In that case, the Court abandoned mutuality as a requirement for defensive collateral estoppel against a patentee whose patent had already been declared invalid. *Id.* at 314-315, 328-330, 350. Eight years later, in *Parklane Hosiery*, the Court likewise did away with the categorical rule against offensive nonmutual collateral estoppel, adopting in its place a rule that granted the district courts "broad discretion" as to when estoppel should be recognized in such circumstances. 439 U.S. at 331.

In *Richards*, this Court recognized that the concept of "privity" has likewise evolved from its original narrow origins. The Court noted well-established applications of "privity," such as that a judgment involving "a guardian or trustee may also bind the ward or the beneficiaries of a trust." 517 U.S. at 798. "Moreover," the Court continued, "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Ibid.* The term "privies" has, in fact, been largely abandoned in favor of a more substantive analysis of the types of relationships that give rise to preclusion. See *Montana*, 440 U.S. at 154 n.5. Thus, courts have recognized that the term "privity," while constrained by "constitutional limits," *Richards*, 517 U.S. at 798, "should be flexible enough to acknowledge the realities of the parties' relationships," *Anchor Glass Container Corp.* v. *Buschmeier*, 426 F.3d 872, 879 (7th Cir. 2005) (quoting *Myers* v. *Kim*, 55 Pa. D. & C.4th 93, 101 (Com. Pl. 2001)). The question in this case, then, is whether "the realities of the parties' relationships," *ibid.*, is such that they warrant recognition that the parties are in privity for purposes of their FOIA litigation.

Petitioner maintains that the answer to that question is governed by a categorical rule: there must be "a legal relationship under which the party is legally accountable to the non-party for the conduct of the litigation," Pet. Br. 19, and "the relationship of legal accountability between the party and non-party must exist at the time of the [first] case for the case's judgment to bind the non-party in later cases," *id.* at 14. Petitioner's proposal to define the scope of privity according to narrow (and easily avoidable) legal technicalities cannot be squared with the significant development in the doctrine of privity

that has transpired over the past century or with *Richards*, which specifically embraced that expansion. Petitioner cites, as an example of the requisite legal relationship, "the relationship between a guardian and ward," *ibid.*, but *Richards* specifically cited guardians and trustees as "example[s]" of traditional privity and *then* noted that, "[*m*]*oreover*," the term is "now used" to describe relationships "that would not have come within the traditional definition," 517 U.S. at 798 (emphasis added) (citing 1 Restatement (Second) of Judgments ch. 4, §§ 34 *et seq.* (1982) (Restatement (Second)); 2 *id.* ch. 4, §§ 43 *et seq.*). Thus, it is clear that the Court understood that the more modern application of privity goes beyond relationships such as guardian and ward or trustee and beneficiary, the only ones that petitioner's rule encompasses. The relationship between the owner of an airplane and a person whose derivative interest flows from an intent to restore the very same airplane surely is a strong candidate for inclusion.[3]

While a legal relationship such as that between guardian and ward is one circumstance in which preclusion may apply, the Restatement (Second), which *Richards* embraced, and numerous judicial decisions, including of this Court, demonstrate that such a relationship is not a *necessary* precondition to preclusion in every case. Because "[p]rivity is an 'elusive concept, without any precise definition of general applicability,'" Pet.

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[3] The brief of amici Eddy and Lander (at 15) inverts *Richards*' discussion of these points and thereby gives an inaccurate impression of the Court's analysis. By first quoting *Richards*' recognition of an expanded use of the term "privity" and then the Court's "example" of a guardian or trustee, *ibid.*, amici's treatment of *Richards* could give the mistaken impression that *Richards* gave guardians and trustees as examples of the *more expansive* application that the Court recognized.

App. 5a (quoting *Jefferson Sch. of Soc. Sci.* v. *Subversive Activities Control Bd.*, 331 F.2d 76, 83 (D.C. Cir. 1963)), "there is no clear test for determining" its application, *Tyus*, 93 F.3d at 455. The courts engage in an "equitable and fact-intensive" inquiry, *ibid.*, "on a case-by-case basis," *Gonzalez* v. *Banco Cent. Corp.*, 27 F.3d 751, 761 (1st Cir. 1994), in order to answer "the real (fact-specific) question" whether there was "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). A finding that parties are in privity often "simply expresses a conclusion that preclusion is proper," given the particular facts and circumstances of the parties' relationship with respect to the litigation. 18A Charles Alan Wright et al., *Federal Practice and Procedure* § 4449, at 351 (2d ed. 2002) (*Federal Practice and Procedure*). The determination is ultimately one that calls upon "the trial courts' sense of justice and equity." *Blonder-Tongue*, 402 U.S. at 334. That considerations of equity should come to bear is all the more appropriate where, as here, the party who seeks to avoid preclusion comes seeking equitable relief from the court. See 5 U.S.C. 552(a)(4)(B).

In the area of trusts and estates, preclusion has long been recognized in certain situations in which the party to the first litigation was not legally accountable to the party in the second suit. In the nineteenth century, the "doctrine of representation" was already a "well-recognized exception[]" to the general rule that a decree in equity will not bind the interests of parties not before the court. *Hale* v. *Hale*, 33 N.E. 858, 867 (Ill. 1893). Under that doctrine, where the absent parties and those

before the court "have one common right or one common interest, the operation and protection of which will be for the common benefit of all, and cannot be to the injury of any," the "decree may be held to be binding upon" the absent parties. *Ibid.*; see 18A *Federal Practice and Procedure* § 4461, at 653 ("in the special circumstances that make it proper for a beneficiary to enforce trust interests, it is appropriate to bind the trustee and to bind other beneficiaries as well in the absence of conflicting interests"); *McArthur* v. *Scott*, 113 U.S. 340, 404 (1885) (recognizing the doctrine of "constructive and virtual representation," but holding it inapplicable on the facts of the case).[4] Preclusion in the situation of co-beneficiaries does not, contrary to petitioner's proposed rule, stem from "any fiduciary relation," but from the exact identity of their interests and the necessity of the circumstance. *Stewart* v. *Oneal*, 237 F. 897, 903 (6th Cir. 1916), cert. denied, 243 U.S. 645 (1917).

The courts have similarly recognized the appropriateness of preclusion when two parties, such as family members, may each claim for the same personal injury, and a judgment has been rendered in an action by one. See 2 Restatement (Second) § 48(1), at 27. That rule applies where, for example, a parent or spouse pays for the medical expenses of a child or spouse, and the law permits either the injured party or the person who paid

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[4] In *McArthur*, it was "apparent that there was no real representation of the interests of" the unborn grandchildren of the decedent. 113 U.S. at 404. The living grandchildren, who were alleged to have been representative beneficiaries, had themselves been represented by their parents, acting as guardians ad litem, although the parents' own interests were adverse to their children's. *Id.* at 394. The effect was that those "whose interest it was to set aside the will, in fact controlled both sides of the controversy." *Ibid.*

the expenses to sue to recover for the loss. A suit by either of them bars a second action by the other to recover those expenses. *Ibid.* "In such a situation, an 'eligible' claimant having a substantial identity of interest with the other claimant has had his day in court and can be regarded as having been the representative of the other potential claimant." *Id.* § 48(1), cmt. b, at 29. See 18A *Federal Practice and Procedure* § 4459, at 614. If the rule were otherwise, the incentive would be for spouses to split their claims, since recovery in either suit would, in most cases, be of equal value to the family finances. 2 Restatement (Second) § 48, cmt. a, at 32 (noting that such claims could be "successively attributed to different members of the family, and thus made the subject of successive attempts at their recovery").

In other instances, the courts recognize that preclusion may appropriately be applied based not on any particular relationship between the parties, but on their conduct with respect to litigation that is of common interest to them. This Court's decision in *Montana* v. *United States*, *supra*, reflects that courts will apply preclusion, without a showing of legal accountability between the parties, where a non-party "substantially participates in control" of the first litigation. 1 Restatement (Second) § 39, at 382. In *Montana*, the Court held that a state court judgment against a government contractor upholding the constitutionality of a tax on public contractors was binding upon the United States in a subsequent suit by the government on the ground that the United States had exercised "a sufficient 'laboring oar' in the conduct of the state-court litigation to actuate principles of estoppel." 440 U.S. at 155. The Court did not find that the contractor owed a legal duty to represent the United States' interests in the first litigation.

Nor, contrary to petitioner's suggestion, did the Court rely on a determination that the United States "had a *right* * * * to control the proceedings." Pet. Br. 26 (emphasis added) (quoting *Lovejoy* v. *Murray*, 70 U.S. 1, 19 (1866)). The Court instead relied on the practical reality of the situation—that the United States had, in fact, exercised such control and therefore should not have a second bite at the apple.

Other courts likewise have upheld preclusion in the situation analogous to *Montana*, but where the party who lost the *first* case seeks to litigate a second time, through a proxy. See Restatement of Judgments § 85(2), at 402-403 (1942) (noting that preclusion applies where the second of two lawsuits is litigated on "account" of a party to the first). Where, for example, an association of milk producers lost its challenge to a federal regulation, and then financed a new suit by a nonmember plaintiff to advance their common claim, the district court denied a preliminary injunction on the ground that the suit was likely barred by res judicata. *Crane* v. *Commissioner of Dep't of Agric., Food & Rural Res.*, 602 F. Supp. 280 (D. Me. 1985). Similarly, where a father had brought suit under 42 U.S.C. 1983 on behalf of three of his children to challenge the prevalence of religion in the public schools, the judgment in the first case was held to bar a second suit brought by him (as counsel) on behalf of the same plaintiffs in addition to the children's mother and two more siblings to challenge the same activities, where court filings "demonstrated the inextricable linkage between" the two actions. *Jaffree* v. *Wallace*, 837 F.2d 1461, 1463, 1467-1469 & n.19 (11th Cir. 1988). See *Gustafson* v. *Johns*, 213 Fed. Appx. 872, 874, 877 (11th Cir. 2007) (per curiam) (judgment in action challenging constitutionality of redistrict-

ing held binding in second litigation where members of the committee coordinating litigation on behalf of a political party were the "driving forces" behind both suits, including recruiting the second plaintiffs, raising funds, and making litigation decisions). In all those cases, the courts correctly perceived that the second suit was derivative of the first and so could not be pursued as if the first suit never happened.

As the above discussion demonstrates, the common law doctrines of res judicata and collateral estoppel have developed in a manner that allows them to respond to the realities of litigation. That discussion further demonstrates that the common law recognizes preclusion in a variety of circumstances beyond petitioner's proposed categorical rule (Pet. Br. 14) that preclusion should apply only where there is "a legal relationship under which the party is accountable to the non-party for the conduct of the litigation."

B. Where Litigants Who Share A Common Interest Engage In Coordinated Litigation To Achieve Their Common Goal, Especially One That Concerns A Public Right, Principles of Privity Properly Bar The Second Suit

Where multiple individuals share "one common right or one common interest, the operation and protection of which will be for the common benefit of all, and cannot be to the injury of any," *Hale*, 33 N.E. at 867, the identity of interests and heightened threat of repetitive litigation make it appropriate to apply a more flexible standard for finding privity. Where those interests have been adequately represented in one litigation, the parties should not be permitted to engage in coordinated relitigation of the issue in successive suits. The "doctrine of representation" among co-beneficiaries, *ibid.*,

and the rule regarding alternative claims among family members,[5] reflect rules of preclusion that the courts have developed for such circumstances in the private law context. Yet, as numerous courts and commentators have recognized, preclusion on those grounds "is more readily found in public law cases," which affect individual interests only indirectly. 18A *Federal Practice and Procedure* § 4457, at 548.[6] In such circumstances, each individual's interest is reduced, whereas the threat of vexatious relitigation is heightened due to the large number of potential claimants. *Ibid.* Preclusion is appropriately applied in such cases where a party to one suit and a nonparty collaborate to bring a second action.

1. Where numerous individuals seek to vindicate a public right through coordinated successive litigation, it is appropriate to hold them each to the judgment in the first suit. In *Richards*, this Court made clear that, where private rights are at stake, the mere fact that one's interests have been adequately represented in earlier litigation is not a sufficient basis for applying preclusion against a non-party who was a "mere 'stranger[]'" to the first suit, 517 U.S. at 802, 803 (quoting *Martin* v. *Wilks*, 490 U.S. 755, 762 (1989)). But where there is a special relationship between the parties, such as when they seek collaboratively to avoid the effects of an adverse judgment, they are not "mere 'strangers,'" *ibid.* (quoting *Wilks*, 490 U.S. at 762), and

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[5] See 2 Restatement (Second) § 48(1), at 27.

[6] See Robert G. Bone, *Rethinking the "Day In Court" Ideal and Nonparty Preclusion*, 67 N.Y.U. L. Rev. 193, 229 (1992) (although "controversial," "[p]reclusion can seem quite attractive in public law cases * * * especially if there is no reason to doubt the vigor of advocacy in the first suit").

preclusion is appropriate, especially where the rights at issue are public in nature.

"Concerns of judicial economy and cost to defendants * * * are particularly important" in the public law context. *Tyus*, 93 F.3d at 456. Because, in that context, "if the plaintiff wins, by definition everyone benefits," the risk of repetitive litigation is heightened, and the asymmetry of results creates special concerns. *Ibid.* "Holding preclusion inapplicable in this context would encourage fence-sitting, because nonparties would benefit if the plaintiffs were successful but would not be penalized if the plaintiffs lost." *Ibid.* In the absence of preclusion, a would-be plaintiff is encouraged to wait, and bring a second lawsuit if the first is unsuccessful. Moreover, just as the non-party would benefit in a public law context from another's win in the first suit, the losing plaintiff in the first litigation will benefit equally with all others from a win in a second or subsequent suit. Thus, an unsuccessful litigant has an incentive to try again, using another plaintiff as his proxy. Because "the number of plaintiffs with standing is potentially limitless" in public right cases, *ibid.*, a coordinated group of plaintiffs could engage in a never-ending stream of litigation. One member of the public could litigate his claim to the highest court, "and then his next door neighbor in the same paving district might bring a similar suit, go through the same formula, and so on, until all the inhabitants of that district had their turn in court." *State ex rel. Sullivan* v. *School Dist. No. 1*, 50 P.2d 252, 253 (Mont. 1935).

At the same time that the threat of vexatious litigation is heightened in cases concerning a public right, the individual plaintiff's interest in controlling the litigation is reduced precisely because of the public nature of the right at issue. The Court recognized as much in *Rich-*

ards, which involved successive suits by different taxpayers challenging the constitutionality of a county tax. The county argued that "in cases raising a public issue of this kind, the people may properly be regarded as the real party in interest and thus that [the second set of taxpayers] received all the process they were due in the [first] action." 517 U.S. at 803. In response, the Court "distinguish[ed] between two types of actions brought by taxpayers." *Ibid.* The type involved in *Richards* presented "a federal constitutional challenge to a State's attempt to levy personal funds." *Ibid.* With respect to such a claim, concerning the litigant's own property, "the State may not deprive individual litigants of their own day in court." *Ibid.* The other category consisted of those cases "in which the taxpayer is using that status to entitle him to complain about an alleged misuse of public funds, or about other public action that has only an indirect impact on his interests." *Ibid.* (citation omitted). As to that category, the Court "assume[d] that the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all." *Ibid.*[7]

Petitioner contends to the contrary (Pet. Br. 30) that *Richards* established the opposite rule—that "there is no * * * public-law relaxation of the rules of privity." He bases that conclusion on his assertion (*ibid.*) that "*Richards* itself was a 'public-law' case: a constitutional challenge to a county tax." See *Headwaters Inc.* v.

[7] As we demonstrate below, see pp. 44-48, *infra*, with respect to suits to vindicate public rights, the United States or a State may, consistent with the Due Process Clause, make a single suit on behalf of the public binding as to all. The doctrine of preclusion crafted by the court of appeals is far more limited in scope.

USFS, 399 F.3d 1047 (9th Cir. 2005) (same). But petitioner's use of the phrase "public-law" is very different from *Richards*'. Petitioner relies on a definition of the phrase as encompassing any suit within the general "body of law dealing with the relations between private individuals and the government." Pet. Br. 30 (quoting *Black's Law Dictionary* 1244 (7th ed. 1999)). *Richards*, on the other hand, used the term "public" actions more narrowly, to mean litigation that has "only an indirect impact on [the litigant's] interests." 517 U.S. at 803. Thus, *Richards* cited a taxpayer suit "alleg[ing] misuse of public funds," *ibid.* (citing *Massachusetts* v. *Mellon*, 262 U.S. 447, 486-489 (1923)), an action challenging the dissolution of a school district, *ibid.* (citing *Stromberg* v. *Board of Educ.*, 413 N.E.2d 1184 (Ohio 1980)), and a citizen suit in the nature of *quo warranto* seeking the dissolution of a corporate municipality, *ibid.* (citing *Town of Tallassee* v. *State ex rel. Brunson*, 89 So. 514 (Ala. 1921) (*Tallassee*)). The Court distinguished such suits, in which the plaintiff "merely acts for and on behalf of the public generally," from those that "seek the assertion or protection of any private right." *Tallassee*, 89 So. at 516; see *Richards*, 517 U.S. at 803 (citing distinction in *Tallassee* between "public" and "private" actions). The tax claim in *Richards* was, the Court made clear, of the "private" sort, as it concerned the "State's attempt to levy *personal funds*." *Ibid.* (emphasis added).[8]

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[8] The rights at issue in the suit brought by amici Eddy and Lander, *Eddy* v. *Waffle House, Inc.*, 482 F.3d 674 (4th Cir. 2007), petition for cert. pending, No. 07-495 (filed Oct. 11, 2007), would also qualify as "private" rights under *Richards* rubric. *Eddy* is a civil rights case alleging that the defendant restaurant discriminated against the plaintiffs in providing public accommodations. Their individual claims

2. For the reasons just discussed, many lower courts, including the district court in this case, have distinguished, for purposes of finding privity, between suits that involve individualized claims and those in which "the plaintiff alleges a right shared in common with the public." Pet. App. 34a (citing *Tyus*, 93 F.3d at 457). See also *Richards*, 517 U.S. at 803; *Gustafson*, 213 Fed. Appx. at 876; *EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1289 (11th Cir. 2004), cert. denied, 546 U.S. 811 (2005); *Niere* v. *St. Louis County*, 305 F.3d 834, 837-838 (8th Cir. 2002). When public rights are at issue, preclusion is appropriate if there is (1) an "identity of interests" between the party sought to be precluded and the party to the prior litigation, (2) "adequate representation" of that interest in the earlier suit, and (3) some special relationship suggesting coordination between the present party and the prior party with respect to the litigation. Pet. App. 7a-8a; *Tyus*, 93 F.3d at 455.[9]

Those factors ensure that preclusion is applied only where it is fair to the party against whom it is applied and in circumstances that further the underlying pur-

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for damages, which are not shared by members of the public generally, qualify as "private" for purposes of *Richards*' distinction.

[9] Although the court of appeals did not expressly address the significance of the fact that this case involves a public right, the court's opinion makes repeated reference to the fact that the claims at issue here were for disclosure under FOIA, and specifically notes that, under FOIA, "every individual has the right to receive nonexempt government information." Pet. App. 17a. Likewise, the court specifically noted that the right at issue was one that allowed petitioner to "try where Herrick had failed, to the benefit of both." *Ibid.* In any event, the public nature of the rights at issue were central to the district court's reasoning, *id.* at 34a-35a, and to the government's arguments on appeal, Gov't C.A. Br. 24-27, and thus are preserved for consideration by this Court.

poses of res judicata and collateral estoppel. As *Wilks* observed, this Court has recognized the preclusive effect of litigation, even as to "the rights of strangers," in certain circumstances where the stranger's interests were "adequately represented by someone with the same interests who is a party." 490 U.S. at 762 & n.2. The test applied by the court of appeals in this case requires not only identity of interests and adequate representation, but also evidence of a connection between the former and present parties with respect to the litigation, which ensures that preclusion under the court of appeals' rule applies only to those who are *not* "strangers." *Id.* at 762. The parties to the present and former litigation must not only seek "the same result," they must have "substantially the same incentive to achieve it." Pet. App. 9a. Moreover, and critically, there must be "an affirmative link between the later litigant and either the prior party or the prior case," such as "a close working relationship relative to the[] successive cases," "substantial participation by the present party in the first case," or "tactical maneuvering" to avoid the preclusive effect of the prior judgment. *Id.* at 8a-9a, 17a.

Petitioner contends that even those who satisfy the court of appeals' test are "strangers" for purposes of preclusion doctrines. According to petitioner, (1) only a "legal relationship under which the party was accountable to the non-party for the conduct of the [first] litigation" could be a sufficiently close association, Pet. Br. 21, (2) only bringing a second suit as the "undisclosed agent[]" of the first litigant could qualify as tactical maneuvering, *id.* at 23 n.4, and (3) only "control" over the initial litigation could warrant preclusion on the ground of substantial participation, *id.* at 27. But petitioner's narrow construction of what constitutes privity is incon-

sistent with the wide variety of circumstances, described above, in which privity is recognized in the absence of a "legal relationship" or "agency" in any technical sense. In particular, it ignores the potential for abuse when the second litigation is derivative of the earlier litigation, as is the case here. Nor does it recognize the significant differences between litigation involving public and private rights. Rather, as noted, petitioner stakes his argument on the assertion that "there is no * * * public-law relaxation of the rules of privity." *Id.* at 30.

As discussed above, however, see pp. 28-31, *supra*, the courts *have* recognized a public-law relaxation, and for good reason. The traditional requirements to show standing in private litigation themselves expose and weed out efforts at duplicative litigation. In most private law contexts, a second plaintiff might well have to show some legal relationship with the first litigant in order to establish standing to bring a second suit. In a case like this, for example, it would have to be clear that petitioner's interest in the litigation flowed from an agreement to restore Herrick's airplane, which in turn would establish a relationship sufficient for privity. By pleading sufficient facts to show standing, petitioner would plead himself out of court. In the public law context, however, because each citizen has standing to sue, a friend or associate can serve as proxy in a further round of litigation without needing first to establish any legal relationship with the initial party. Courts can develop rules for privity in the public-law context that are sufficiently flexible to eliminate suits that would be barred in an analogous private-law suit.

C. The Lower Courts Properly Held That, In Light Of Herrick And Petitioner's Close Working Relationship With Respect To The FOIA Litigation, The Judgment In *Herrick* Should Be Binding

1. Because the right of disclosure under FOIA is a public right, a more flexible standard for establishing privity is appropriate

Petitioner contends (Pet. Br. 30-32) that a requester's right to seek documents under FOIA is an "*individual* right[]" and that his claim is a private law claim under *Richards*' public/private dichotomy. That assertion does not withstand scrutiny. Unlike the plaintiff's right in *Richards* to hold onto his money, 517 U.S. at 803, the information that a FOIA litigant seeks to have disclosed "belongs to [the] citizens," *National Archives & Records Admin.* v. *Favish*, 541 U.S. 157, 172 (2004). Although a person denied records is deemed to have suffered a sufficient personal injury to satisfy Article III standing, see 5 U.S.C. 552(a)(4)(B); cf. *FEC* v. *Akins*, 524 U.S. 11, 21 (1998), it is clear that the duty to disclose under FOIA is owed to the public generally. FOIA states "that official information shall be made available 'to the public.'" *EPA* v. *Mink*, 410 U.S. 73, 79 (1973) (quoting 5 U.S.C. 552(a)).[10] Thus, this Court has recognized that the statute "create[s] a judicially enforceable *public right* to secure such information." *Id.* at 80 (emphasis added). Consistent with the statute's

[10] Section 552(a) provides that "[e]ach agency shall make available to the public information as follows": (1) publication of certain materials in the Federal Register, (2) making certain other materials available for inspection and copying or by computer telecommunications, or (3) in response to an individual request, as in this case. See 5 U.S.C. 552(a)(1)-(3) (2000 & Supp. V 2005).

"public" character, "disclosure does not depend on the identity of the requester." *Favish*, 541 U.S. at 172. "Nor does the Act, by its terms, permit inquiry into particularized needs of the individual seeking the information, although such an inquiry would ordinarily be made of a private litigant." *Mink*, 410 U.S. at 86. "The Act's sole concern is what must be made public or not made public." Kenneth Culp Davis, *The Information Act: A Preliminary Analysis*, 34 U. Chi. L. Rev. 761, 765 (1967). The fact that both petitioner and Herrick appear to have private pecuniary motives for their requests does not convert their motivations into private rights, in light of the obvious purpose and operation of FOIA.[11]

Moreover, a victory by one FOIA litigant, even one with private, pecuniary motivations, is, in fact, a vindication of the *public* right to disclosure. "As a general rule, if the information is subject to disclosure, it belongs to all." *Favish*, 541 U.S. at 172. "[O]nce there is disclosure, the information belongs to the general public." *Id.* at 174. Thus, "once [an agency] is required to disclose records to one member of the public, the FOIA requires it to release the same records to any other citizen who

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[11] As amici National Security Archive et al. note (Br. 12), where one requester seeks disclosure of documents that contain the requester's own private information and a third-party also seeks disclosure of the same documents, the two requesters would not stand on equal footing. See *United States Dep't of Justice* v. *Julian*, 486 U.S. 1, 13-14 (1988) (holding that, under Exemption 5, a federal prisoner could invoke FOIA to gain access to his presentence report, but that requests by third parties could be denied to protect the inmate's privacy interests). But the rule adopted below would not recognize privity in those circumstances. Obviously, in such a situation, a requester against whom the privacy interest would bar disclosure would not be an adequate representative of one as to whom the privacy interest would not preclude disclosure.

requests them." *News-Press* v. *United States DHS*, 489 F.3d 1173, 1187 (11th Cir. 2007). And, where there is reason to believe that a document is "likely to become the subject of subsequent requests," an agency is required to make the document available to the public electronically. 5 U.S.C. 552(a)(2)(D).

The public nature of the right under FOIA, together with its minimal standing requirement, creates particularly fertile ground for vexatious litigation by disappointed litigants and demonstrate why petitioner's proposed standard would provide no protection against such burdensome relitigation. For example, whereas a rule of preclusion against a party's agent in a subsequent suit might be effective to cut off some duplicative litigation in the private law context, it would be entirely ineffectual against serial FOIA litigation. In a typical private law context, with a typical requirement to show standing, petitioner would likely have had to demonstrate that he had a contract with Herrick to restore the plane in order to prove a sufficient personal stake to sue for disclosure of the F-45 drawings. Under FOIA, on the other hand, petitioner was able to assert his FOIA claim without any such showing. If only agents in a narrow, technical sense were precluded from bringing a further suit, Herrick could litigate his claim over and over again in this context, in every federal judicial district in the country, simply by asking different collaborators to assist him, but without going so far as to establish an agency relationship with them.

Petitioner's argument (Pet. Br. 33-36) that, in the absence of a legal relationship, notice of the first litigation at the time it occurs is an absolute prerequisite to preclusion is similarly flawed. Under such a rule, Herrick could relitigate his FOIA loss endlessly, as long as

each new proxy he chose was unaware of his earlier failed attempts. But when the second litigation is essentially derivative of the first—indeed, where the lack of success of the earlier litigation is the sine qua non of the second suit—contemporaneous notice of the first suit is beside the point. For these reasons, and because a FOIA litigant requests relief—an injunction—that is equitable in nature, see 5 U.S.C. 552(a)(4)(B), preclusion principles should be applied in a manner that takes account of these special attributes of FOIA and litigation under it.

The court of appeals' holding prevents such vexatious relitigation by a single person or coordinated group. But that holding does not, contrary to the suggestion of amici National Security Archive et al. (Br. 14-15), threaten to preclude independent requests by "FOIA requesters from public interest, academic or journalism perspectives" simply because they might utilize a common attorney, or participated in "list serves, newsletters, conferences" or the like at which cases are discussed. The court of appeals specifically disclaimed application of its ruling to such circumstances. Pet. App. 18a (noting that "shared interest in antique aircraft," "membership in the same organizations," and representation by a common lawyer would not warrant preclusion without the further evidence of a close relationship that was present here).[12]

Instead, the court of appeals' rule draws the proper distinction. It allows separate requests by independent

[12] The concerns of amicus American Dental Association (ADA) are misplaced for similar reasons. See ADA Amicus Br. 1 (concern that "the result in a suit brought by one of [an association's] members necessarily binds other members, or the organization itself, in subsequent litigation").

scholars, news organizations, and the like to be made and even litigated separately, thus ensuring that litigation concerning documents that are truly of significance to the public's ability to monitor its government could go forward. On the other hand, where a single individual desires to obtain documents (ones, in this case, that had not been requested in at least 40 years) for his own commercial reasons, because he does not want to pay to obtain the information on the market, the court of appeals' rule bars that requester from getting a second bite via proxies. The inequities and potential for abuse are palpably acute in a suit like this. Where, as here, such information is assertedly the property of another private party that submitted it to a government agency, the private party that owns the information would, if it wished to protect its secrecy and the value of its asset, be forced to intervene and participate in repeated litigation along with the government.

2. In light of the "close working relationship" between petitioner and Herrick with respect to the FOIA litigation, the judgment in Herrick's suit is binding here

Petitioner was anything but the classic "stranger" that this Court has held may not generally be bound by another's prior adverse judgment. Pet. Br. 20-21. Rather, he was a "close associate" whom Herrick had asked to help restore Herrick's plane. And it was that common interest that gave rise to both Herrick's and petitioner's FOIA requests to obtain copies of Fairchild's technical drawings for the plane. Petitioner's interest is in every sense derivative of Herrick's. It is Herrick's airplane that is the source of both Herrick's direct and petitioner's less direct interest in the lawsuit. Moreover, petitioner's FOIA claim was initiated less

than a month after the loss in Herrick's suit, used the same lawyer and discovery from the first action, and explicitly invoked and sought to build upon what had assertedly already been "adjudicated" in Herrick's case. See p. 6, *supra*. This case therefore is a classic example of "exploit[ing] technical nonparty status in order to obtain multiple bites of the litigatory apple." *Gonzalez*, 27 F.3d at 761. Given both the nature of the interest at stake and the extent of the relationship between Herrick and petitioner, the lower courts were correct to hold that petitioner was bound by the judgment in the first FOIA suit.

Petitioner acknowledges that he could properly be bound by the judgment in Herrick's FOIA suit if he was acting as Herrick's "undisclosed agent[]" in bringing the second FOIA action. See Pet. Br. 23 n.4, 24 n.5. That concession is significant because it demonstrates petitioner's recognition that res judicata may, in certain circumstances, apply even absent a legal obligation on the part of the first litigant to represent the second litigant's interests, or contemporaneous notice of the first litigation. Preclusion is appropriate, even when those elements are lacking, if, in the language of the first Restatement of Judgments, the second litigant is acting on "account" of the first. Restatement of Judgments § 85(2), at 402-403. Although the lower courts did not analyze Herrick and petitioner's relationship in the technical terms of agency law, they did undertake a careful assessment of "the real (fact-specific) question" whether there was "the kind of link between the earlier and later plaintiffs that justifies binding the second [plaintiff] to the result reached against the first." *Tice*, 162 F.3d at 971. After examining the reality of their relationship, the courts concluded that petitioner and Herrick "had a

close working relationship relative to these successive cases," Pet. App. 17a, that warranted a finding of privity. That conclusion is amply supported by the record below.

The record reveals that Herrick and petitioner had not merely a parallel or common interest, but a joint interest in obtaining release of the F-45 technical drawings: "the restoration of Herrick's F-45." Pet. App. 10a. Petitioner's motion for discovery candidly noted that Herrick owned one of "only two of the F-45s [that] exist today" and was "in the process of repairing the aircraft," and that Herrick "needed the plans and specifications" to assist in the restoration. J.A. 28. That interest had, in turn, given rise to Herrick's FOIA request, J.A. 28-32, and, in turn, to petitioner's request. After recounting Herrick's FOIA litigation, *ibid.*, petitioner explained that "Herrick has now requested [petitioner] to assist him with the repair of his aircraft," J.A. 32, and that petitioner had therefore "requested that the FAA loan the material to him under the FOIA." *Ibid.* The admissions in petitioner's court filing demonstrated that "Herrick and [petitioner] had *the same motivation* to obtain the documents, viz., the restoration of Herrick's F-45." Pet. App. 10a (emphasis added). In light of the fact that petitioner's FOIA claim is expressly premised on the fact that "Herrick had asked [petitioner] to assist him with the repair of his aircraft," *ibid.*, it should not matter if Herrick has not as explicitly asked petitioner to assist him in the repair of his FOIA lawsuit.

Herrick and petitioner's common interest in obtaining the F-45 drawings gave rise to a "close working relationship" with respect to the litigation itself. Pet. App. 17a. Petitioner "filed his FOIA request for the F-45 documents almost immediately after the Tenth Circuit

decided *Herrick*," *id.* at 16a, and did so using "the same lawyer" Herrick used, *id.* at 13a. Moreover, Herrick "shar[ed] with [petitioner] the information he obtained through discovery," *ibid.*, and petitioner's Motion for Discovery in the present litigation reflects the view that this is simply a continuation of the earlier suit. See J.A. 27-32 (referring repeatedly and in great detail to the *Herrick* discovery and procedural history). At times, the motion even suggests that it is written on behalf of Herrick, J.A. 31 ("Mr. Herrick does not agree" with the Tenth Circuit's analysis); J.A. 32 ("a remand [in *Herrick*] would have been more appropriate in the plaintiff's view"), or Herrick and petitioner together, J.A. 35-36 ("*We* would like to see any updates on what has been entered in the records" since discovery in *Herrick*.) (emphasis added). Petitioner's treatment of the issue decided by the Tenth Circuit in Herrick's favor as something that "has already been adjudicated," J.A. 32, while attacking the portion of the Tenth Circuit's decision adverse to Herrick, demonstrates the extent to which petitioner's suit was simply a continuation of Herrick's, but in a different court with the benefit of a trial run and the hope of obtaining a better result.

It is of no consequence that Herrick had only requested petitioner to help restore the plane and there was not a formal "agreement" between the two, Pet. App. 11a n.*, or that court of appeals felt unable to determine whether Herrick and petitioner specifically coordinated on petitioner's filing of a second FOIA suit when Herrick's failed, *id.* at 17a.[13] The "realities of the

[13] It is noteworthy, however, that the district court did feel comfortable "conclud[ing] that the instant case is one of deliberate maneuvering to avoid the effect of Herrick's abortive litigation." Pet. App. 35a. Indeed, the district court was so convinced of deliberate maneuvering

parties' relationships," *Anchor Glass Container Corp.*, 426 F.3d at 879 (quoting *Myers*, 55 Pa. D. & C. 4th at 101), were that Herrick and petitioner had a shared interest in restoring the plane, and, hence, a shared purpose for obtaining the technical drawings (and, apparently, of obtaining the drawings without paying Fairchild for them). Petitioner's FOIA request was thus in furtherance of what by that time was their shared goal, "the restoration of Herrick's F-45," Pet. App. 10a, just as Herrick's FOIA request had been, and indeed petitioner invoked and sought to build upon the judgment in Herrick's case in pursuit of their shared goal. For these reasons, and because Herrick and petitioner were concededly "close associate[s]," *id.* at 15a, the preclusive effect of the judgment in Herrick's suit properly applies to petitioner as well.

Despite all of the foregoing evidence and the court of appeals' specific recognition that "Herrick and [petitioner] had a close working relationship relative to these successive cases," Pet. App. 17a, petitioner clings to the fact that "neither lower court purported to find" that petitioner "was acting as Herrick's agent in bringing this case," Br. 24 n.5. But the courts have recognized privity in similar situations in numerous cases without making a specific finding of "agency." See, *e.g.*, *Gustafson*, 213 Fed. Appx. at 874, 877 (second redistricting

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on the part of petitioner that he admonished petitioner's counsel that he had come close "to the brink of an unpleasant rendezvous with Rule 11." J.A. 95. Although the court of appeals did not find it necessary to resolve definitively whether there had been manipulation, the court acknowledged that the record evidence "suggests Herrick and [petitioner] coordinated the filing of [petitioner's] request * * * so that [petitioner] could try where Herrick had failed, to the benefit of both." Pet. App. 17a.

challenge barred by first where committee coordinating litigation on behalf of political party was the "driving force[]" behind both suits, including recruiting the second plaintiffs, raising funds, and making litigation decisions); *Tyus*, 93 F.3d at 456-457 (second challenge to aldermanic district boundaries barred where several plaintiffs who were parties to prior adjudication, "[i]n an effort to circumvent trial strategy disagreements," filed a second suit with the same lawyer, "simply adding new plaintiffs" who shared "a special commonality of interests"); *Jaffree*, 837 F.2d at 1463, 1467-1469 & n.19 (wife and minor children precluded where father had brought prior suit under Section 1983 on behalf of three other children to challenge the prevalence of religion in the public schools, where court filings "demonstrated the inextricable linkage between" the two actions); *Petit* v. *City of Chicago*, 766 F. Supp. 607, 610, 612-613 (N.D. Ill. 1991) (second suit by white police officers to challenge promotional examination barred where certain plaintiffs were parties to prior litigation and had, after motion to dismiss without prejudice was denied, filed second suit, with same counsel, that added additional white officer plaintiffs); *Crane*, 602 F. Supp. at 286-288, 293-294 (preclusion where milk producer was recruited as plaintiff because it was not a formal member of the association that had litigated and lost).

Moreover, as previously discussed, if a formal agency relationship were required to establish preclusion, there would, in effect, be no end to FOIA litigation. Because no individualized interest in the documents needs to be established to make a FOIA request or proceed to court, an individual wishing access to another person's valuable documents that are in the government's possession could force the government and owner of the property to de-

fend repeated FOIA lawsuits, as long as the individual steered clear of creating an agency relationship with the serial requesters.

The demanding standard adopted by the court of appeals, which was amply satisfied here, prevents such litigation gamesmanship and attendant waste of resources without, as a general matter, interfering with the use of FOIA by "reporters, public interest organizations, and academics, who are likely to associate with others having similar interests," but who pursue independent requests under FOIA. Pet. App. 17a.

II. THE COURT OF APPEALS DID NOT DEPRIVE PETITIONER OF DUE PROCESS BY HOLDING THAT LITIGATION OF HIS FOIA CLAIM WAS BARRED BY THE JUDGMENT AGAINST HERRICK

Petitioner contends (Pet. Br. 13-14) that, despite his and Herrick's "close working relationship relative to the[ir] successive cases," Pet. App. 17a, it would be a violation of due process to treat the judgment in Herrick's suit as binding on petitioner. For the reasons discussed above, the court of appeals properly concluded that petitioner and Herrick were in privity, and that the judgment against Herrick therefore also binds petitioner. Even assuming, as petitioner contends, that his relationship with Herrick did not satisfy the highly technical requirements for privity that petitioner proposes, it would not violate petitioner's due process rights to hold that the judgment in Herrick's own suit to vindicate the public interest under FOIA bars petitioner from relitigating that claim.

The requirements of procedural due process depend upon an assessment of the nature of the private and governmental interests at stake and a balancing of those

interests. See *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). The critical fact with respect to that balancing in this case, discussed above, see pp. 34-38, *supra*, is that a claim under FOIA is one to vindicate the public interest in disclosure, not any private interest. As the Court recognized in *Richards*, due process does not protect one's right to sue on behalf of the public interest in the same manner it protects the right to sue on behalf of one's own property interest. 517 U.S. at 803. And especially when the principles of standing applicable to traditional private suits would stymie a suit like this, due process does not demand a more favorable rule than less traditional public suits with less individualized interests at stake.

It is true, as petitioner states (Pet. Br. 31-32), that FOIA deems each person who is denied access to requested records to have suffered a sufficient personal injury that he has standing to sue. See 5 U.S.C. 552(a)(4)(B); cf. *Akins*, 524 U.S. at 21 (inability to obtain information pursuant to statutory scheme is a "concrete and particular" "injury in fact" that satisfies Article III standing). But plaintiff is incorrect to argue that every interest sufficient to confer standing is a "chose in action" and "protected property interest in its own right" as to which the full panoply of due process rights attaches. Pet. Br. 32 (quoting *Richards*, 517 U.S. at 804).

Richards and the cases it relied upon in the discussion cited by petitioner involved personal claims that had value. In *Richards* itself, the claim was to prevent the county from taking the plaintiffs' money through taxation. 517 U.S. at 803. In *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422 (1982), the claim was one under a state discrimination law "which presumably [could] be surrendered for value." *Id.* at 431. *Phillips Petroleum*

Co. v. *Shutts*, 472 U.S. 797 (1985), concerned claims for royalties from gas leases. *Id.* at 800-801. And in *Hansberry* v. *Lee*, 311 U.S. 32 (1940), it was a homeowner's right to alienate his property. *Id.* at 37-38. None of those cases concerned a statutorily created right to bring suit to further a public right, such as the right to have information made available to the public under FOIA. That right, as discussed above, see pp. 34-38, *supra*, is akin to a taxpayer's right to bring an action *quo warranto* on behalf of the public at large, as to which, *Richards* assumed, "the States have wide latitude to establish procedures not only to limit the number of judicial proceedings that may be entertained but also to determine whether to accord a taxpayer any standing at all." 517 U.S. at 803.

As *Richards* indicated, it is well-established that the judgment in a *quo warranto* action brought by one taxpayer on behalf of the public is binding on all taxpayers. See, *e.g.*, *Hodgkins* v. *Sansom*, 135 S.W.2d 759 (Tex. Civ. App. 1939) (taxpayer challenge to school bond election because of board member's alleged disqualification barred by judgment on identical claim in prior taxpayer suit); *Sullivan*, 50 P.2d at 253-254 (same); *Tallassee*, 89 So. at 516-517 (*quo warranto* action to annul town's incorporation barred by prior judgment in similar action by different taxpayer); *ibid.* (citing cases to similar effect from Texas, Illinois, Nebraska, Virginia, and California). Indeed, the preclusive effect of a *quo warranto* proceeding on similar taxpayer suits raising the same claim has been the rule since the English common law. Blackstone explained that "[a] writ of *quo warranto* is in the nature of a writ of right for the king, again[s]t him who claims or u[s]urps any office, franchi[s]e, or liberty, to inquire by what authority he [s]upports his claim, in

order to determine the right." 3 William Blackstone, *Commentaries* *262. "The judgment on a writ of quo warranto," he continued, "(being in the nature of a writ of right) is *final and conclu[s]ive even again[s]t the crown*." *Id.* at *263 (emphasis added).

As petitioner notes (Pet. Br. 31), a true taxpayer-standing case does not generally satisfy Article III's requirements for standing. See *DaimlerChrysler Corp.* v. *Cuno*, 547 U.S. 332 (2006) (state taxpayers lacked Article III standing to bring a Commerce Clause challenge to a State's award of a franchise tax credit to a manufacturer). But that does not mean that there are no "public rights" under federal law as to which less demanding standards of due process would apply. Notably, several federal statutory schemes contemplate that one individual's right to litigate can be displaced as a result of litigation by another. See, *e.g.*, 42 U.S.C. 2000e-2(n)(1)(B)(ii) (barring challenge to a civil rights judgment or order "by a person whose interests were adequately represented by another person who had previously challenged the judgment or order on the same legal grounds and with a similar factual situation"); cf. 33 U.S.C. 1319(g)(6)(A)(ii) (citizen suit under Federal Water Pollution Control Act Amendments of 1972 barred by action brought by State); 31 U.S.C. 3730(b)(5) (first-filed qui tam suit bars further qui tam suits based on the same facts). Those statutes create no constitutional difficulty and presumably Congress could constitutionally mandate that for at least most FOIA exceptions, but cf. note 11, *supra*, the first final judgment in a FOIA case as to certain documents is preclusive as to all. It certainly does not create even a serious question for the courts to adopt rules with as much flexibility as

the one adopted below to weed out duplicative FOIA litigation.

Because petitioner's right to bring an action under FOIA to compel public disclosure of documents in the government's files is a suit to vindicate the public's right to information, it would transgress no limitations of the Due Process Clause to hold that another suit by an adequate representative to vindicate the same public right bars relitigation of the claim, even in the absence of the type of legal relationship that petitioner believes is required by privity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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