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

PETITIONER'S BRIEF

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QUESTION PRESENTED

Can a non-party be bound by the judgment in a case under the theory that he was "virtually represented" by a party to the case when the non-party had no legal relationship with the party and did not receive notice of the litigation?

PARTIES TO THE PROCEEDINGS

Brent Taylor was the appellant in the court below and is the petitioner in this Court. The Fairchild Corporation and Marion C. Blakey, Administrator, Federal Aviation Administration, were appellees in the court below. Robert A. Sturgell, Acting Administrator, Federal Aviation Administration, has been substituted for Marion C. Blakey, and Mr. Sturgell and the Fairchild Corporation are respondents in this Court.

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The decision of the United States Court of Appeals for the District of Columbia Circuit is reported at 490 F.3d 965 (D.C. Cir. 2007), and is reproduced in the appendix to the petition for a writ of certiorari at 1a. The district court's unreported Memorandum Opinion granting respondents' motions for summary judgment is available at 2006 WL 279103 and is reproduced in the appendix to the petition for a writ of certiorari at 22a.

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).

CONSTITUTIONAL PROVISION INVOLVED

The Fifth Amendment to the United States Constitution states:

No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

STATEMENT OF THE CASE

This case presents the question whether Petitioner Brent Taylor's Freedom of Information Act (FOIA) suit is precluded by the judgment in a prior FOIA case in which Taylor was not a party.

A. Brent Taylor's FOIA Request

FOIA provides any person a statutory right to request and receive records from federal agencies, subject to certain exemptions. *See* 5 U.S.C. §§ 552(a)(3), (b). It also gives requesters the right to seek judicial review when agencies deny their requests. *Id.* § 552(a)(4)(B).

In August 2002, Taylor, the executive director of the Antique Aircraft Association, made a FOIA request to the Federal Aviation Administration (FAA) for records related to a 1930s vintage airplane known as the Fairchild F-45. Three months later, having never received a response from the FAA, he filed an administrative appeal of the constructive denial.

B. Greg Herrick's Litigation

Prior to Taylor's request, Greg Herrick, another member of the Antique Aircraft Association, had made his own FOIA request for records related to the F-45 and had litigated the case up to the Tenth Circuit. *See Herrick v. Garvey*, 298 F.3d 1184 (10th Cir. 2002). Herrick owned an F-45 and stated that he wanted the records in order to restore it. *Id.* at 1188. The FAA argued that the requested records were exempt from disclosure as trade secrets under FOIA Exemption 4, 5 U.S.C. § 552(b)(4). The Tenth Circuit determined that the records stopped being trade secrets in 1955 when the Fairchild Engine and Airplane Company, which had submitted them to the government, gave the government permission to lend them to members of the public. *Herrick*, 298 F.3d at 1194. Nonetheless, the court of appeals affirmed the district court's grant of summary judgment to the government on the ground that the Fairchild Corporation's current refusal to consent to public dissemination of the records "restored" their status as trade secrets. *Id.* at 1195.[1]

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[1]The Court also held that the Fairchild Corporation was the corporate successor to the Fairchild Engine and Airplane Company and was now the owner of any trade secret rights in the records. *Id.* at 1192-93.

The Tenth Circuit recognized that its decision, like that of the district court, rested on two critical legal assumptions: first, that documents that have lost their trade secret status because their owner granted permission for them to be released to the public can have that status restored if the owner revokes that permission; and, second, that whether a record is a trade secret is determined by the facts that exist when the agency makes its final decision whether to release the records, not by the facts that existed when the requester asked for the records. *Id.* at 1194 n.10. According to the court of appeals, Herrick had not challenged either of these legal assumptions on appeal. Unwilling to "overturn the district court's judgment on a point that the plaintiff has failed to challenge on appeal," the court of appeals also "assume[d], without deciding," that the district court's premises were correct. *Id.*

C. Proceedings Below

In February 2003, having received no response from the agency to his own FOIA request or his appeal of its constructive denial, Taylor filed this action in the United States District Court for the District of Columbia. J.A. 14-19. Taylor hired Michael J. Pangia, the lawyer who had represented Herrick in the Tenth Circuit case, to represent him in the administrative appeals process and in court. *Id.* at 19, 22-23.

Taylor and the FAA agreed on a stay to give the agency time to respond to Taylor's FOIA request. The agency eventually denied the request, claiming the requested records contain trade secrets. *Id.* at 38-41. After Taylor administratively appealed the denial, the FAA denied the appeal as well. *Id.* at 42-52. Taylor then filed a motion to allow discovery, seeking information about the extent to which the requested records had been

guarded as trade secrets and whether they had reacquired trade secret status. In describing how the Tenth Circuit's decision in *Herrick v. Garvey* was based on assumptions rather than decisions about critical issues, the motion noted that Herrick had asked Taylor for help fixing his F-45 plane. *Id.* at 32. The court denied the motion for discovery as premature.

The Fairchild Corporation intervened, and both Fairchild and the government moved for summary judgment, arguing, among other things, that Taylor should be precluded from litigating his case because he had been "virtually represented" by Herrick in *Herrick v. Garvey*. Both defendants argued that Taylor was in privity with Herrick, but neither submitted any evidence about the relationship between Herrick and Taylor. In its statement of material facts, however, Fairchild referred to Herrick as a "close associate of Taylor's," J.A. 54, an otherwise unexplained characterization that Taylor did not dispute because he did not believe it had any legal significance. Similarly, both defendants argued that Taylor's case was an attempt by Herrick and Pangia to circumvent the Tenth Circuit's decision in *Herrick v. Garvey*, but neither submitted any evidence that Herrick had directed or asked Taylor to file the FOIA request or lawsuit, or that Pangia had any role in bringing the litigation aside from serving as Taylor's attorney. Further, neither defendant submitted any evidence that Taylor had known about Herrick's case while it was ongoing. Nonetheless, the district court granted defendants' motions, holding that "Herrick was Taylor's 'virtual representative' in *Herrick v. Harvey* [sic] so as to preclude the instant case." Pet. App. 22a.

The court of appeals affirmed. According to the court, "a nonparty's claim [can be] precluded by a prior

suit based upon a particular form of privity known as 'virtual representation.'" *Id.* at 6a. Under that theory, the court explained, "the party to the prior litigation is treated as the proxy of the nonparty," on the ground that the party adequately represented the non-party, "with the result that the nonparty is barred from raising the same claim." *Id.*

The court noted that "other circuits vary widely in their approach to virtual representation," *id.* at 7a, contrasting, in particular, the Fourth Circuit, which "treats a party as a virtual representative only if the party is 'accountable to the nonparties who file a subsequent suit' and has 'the tacit approval of the court' to act on the nonparty's behalf," *id.* (*quoting Klugh v. United States*, 818 F.2d 294, 300 (4th Cir. 1987)), and the Eighth Circuit, which has identified "several factors to consider" in determining whether a party has virtually represented a non-party, but ultimately holds that "'[d]ue to the equitable and fact-intensive nature of virtual representation, there is no clear test for determining the applicability of the doctrine.'" *Id.* (*quoting Tyus v. Schoemehl*, 93 F.3d 449, 455 (8th Cir. 1996)). The court of appeals then adopted a five-factor test for determining whether a nonparty had been virtually represented by a party to a suit. It held, first, that two factors are necessary for virtual representation: an identity of interests between the party and non-party; and adequate representation of the non-party by the party. In addition, it held that virtual representation requires a showing of at least one of three other factors: a close relationship between the party and the non-party; substantial participation by the non-party in the case; or tactical maneuvering by the non-party to avoid preclusion by the judgment in the case. *Id.* at 8a.

Starting with identity of interests, the court of appeals acknowledged that the district court had erred in stating that Taylor had agreed to help Herrick restore his aircraft. However, it nonetheless found that Taylor and Herrick had an identity of interests because they wanted the same result (access to records) and Herrick had as much incentive as Taylor to achieve it. *Id.* at 9a-10a.

Turning to adequacy of representation, the court noted that the facts in the record did "not show that Taylor had notice of Herrick's lawsuit while it was ongoing," *id.* at 13a, but held that notice was not a necessary condition for virtual representation. In doing so, it acknowledged that it was disagreeing with other circuits that "have treated notice as necessary for a finding of virtual representation." *Id.* at 12a-13a (citing *Perez v. Volvo Car Corp.*, 247 F.3d 303, 312 (1st Cir. 2001), and *Tice v. Am. Airlines, Inc.*, 162 F.3d 966, 973 (7th Cir. 1998)). The court found adequate representation based on Herrick's incentive to litigate zealously and Taylor's hiring of Pangia, the lawyer who had represented Herrick. The court did not undertake an examination of Herrick's and Pangia's conduct during *Herrick v. Garvey* to determine whether, in fact, they had provided Taylor with adequate representation.

With regard to whether Herrick and Taylor had a close relationship, the court noted that "unlike the [Fourth, Fifth, and Sixth Circuits], we do not believe that only a legal relationship may qualify as a close relationship." *Id.* at 15a (citing *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 651-52 (4th Cir. 2005); *Becherer v. Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 424 (6th Cir. 1999) (en banc); and *Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978)). Noting

that Herrick had asked Taylor for help restoring his airplane, that Herrick had given Taylor some information he obtained through discovery in his earlier case, and that Taylor did not oppose the characterization of Herrick as his "close associate," the court held that Taylor and Herrick had a close enough relationship to establish that Herrick had virtually represented Taylor. *Id.* at 15a-16a.

Finally, the court noted that "some forms of tactical maneuvering . . . are probative of collusion or otherwise indicative of privity and therefore should be considered a factor supporting virtual representation." *Id.* at 16a. The court explained, however, that the record did "not necessarily show collusion to avoid preclusive effects of *Herrick*," because Taylor "could have read about *Herrick* and acted on his own to file an identical FOIA request, and passing along documents obtained through discovery is something Herrick might have done even for someone with whom he was not in cahoots." *Id.*

The court did not find that Taylor and Herrick had entered into any agreement or had any discussions about how Herrick's case would be conducted, that they had undertaken any concerted action, or that Taylor had given Herrick authority to represent him. Nonetheless, having found an identity of interests, adequate representation, and a close relationship between the parties, the court held that the requirements for virtual representation were met. Thus, even though Taylor was not a party to Herrick's lawsuit, he was precluded from litigating his own FOIA claim. *Id.*

SUMMARY OF ARGUMENT

The United States has a "deep-rooted historic tradition that everyone should have his own day in court." *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (internal citations omitted). It is a fundamental principle of American jurisprudence, protected by the Constitution's due process guarantee, that a judgment in a lawsuit "does not conclude the rights of strangers to th[e] proceedings." *Id.* (quoting *Martin v. Wilks*, 490 U.S. 755, 762 (1989)).

The court of appeals held that Taylor received his day in court, and all the process he was due, in *Herrick v. Garvey*, a case in which he was not a party and of which had no notice. But although Taylor and Herrick were not strangers in a colloquial sense, Taylor was a stranger to Herrick's case: Taylor and Herrick did not share a relationship that would have made Herrick understand his suit to be on Taylor's behalf, or that would have caused the Tenth Circuit to take care to protect Taylor's interests. *See Richards*, 517 U.S. at 802.

Neither due process nor common-law principles of preclusion permit a non-party to be bound by the judgment in a case on the theory that a party represented his interests unless the party had authority to represent the non-party at the time of the case. For preclusion to apply, the party and non-party must have had a legal relationship during the case under which the party was accountable to the non-party for the conduct of the case. The factors considered in the court of appeals' multifactor test cannot replace the need for such a legal relationship, and the uncertainty caused by the test undermines the finality, predictability, and desire to conserve judicial resources that motivate preclusion doctrine. Moreover, the "public-law" nature of this case does not

justify denying Taylor his day in court; both due process and normal preclusion rules apply in cases against the government.

Even if a legal relationship were not necessary for preclusion, the decision below should be reversed because Taylor did not have notice of *Herrick v. Garvey*. "Th[e] right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950). Although not sufficient for the application of res judicata, in the absence of a legal relationship between a party and non-party notice is a bare necessity for the non-party to be bound, and Herrick's knowledge of his case cannot be imputed to Taylor.

ARGUMENT

I. A Party "Represents" a Non-Party for Purposes of Preclusion Only If There Is a Legal Relationship Between Them Under Which the Party Is Accountable to the Non-Party for the Conduct of the Litigation.

1. "It is a principle of general application in Anglo-American jurisprudence that one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process." *Hansberry v. Lee*, 311 U.S. 32, 40 (1940); *see also Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 846 (1999); *Richards*, 517 U.S. at 798. This general principle that a non-party is not bound by the results of litigation is incorporated in the due process protections of the United States Constitution. Because "[t]he opportunity to be heard is an essential requisite of due process of law in judicial proceedings," *Richards*, 517 U.S. at 797

n.4 (quoting *Postal Tel. Cable Co. v. Newport*, 247 U.S. 464, 476 (1918)), and because non-parties "never had a chance to present their evidence and arguments on the claim," *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971), "[d]ue process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Id.* "It is a violation of due process for a judgment to be binding on a litigant who was not a party or a privy and therefore has never had an opportunity to be heard." *Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n.7 (1979).

This Court has recognized that the "principle of general application" that non-parties are not bound has narrow exceptions in instances "where the relationship between the parties present and those who are absent is such as legally to entitle the former to stand in judgment for the latter." *Hansberry*, 311 U.S. at 43. Of particular relevance, this Court has recognized an exception in "limited circumstances" in which a non-party to the first case "has his interests adequately represented by someone with the same interests who is a party." *Martin v. Wilks*, 490 U.S. at 762 n.2. In particular, this "adequate representation" exception applies in class or representative cases, *id.* (citing *Hansberry*, 311 U.S. at 41-42, and Fed. R. Civ. P. 23), and when the non-party controls a party's litigation of the case. *Id.* (citing *Montana v. United States*, 440 U.S. 147, 154-55 (1979)).[2]

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[2] The Court has also stated that "where a special remedial scheme exists expressly foreclosing successive litigation by nonlitigants, as for example in bankruptcy or probate, legal proceedings may terminate preexisting rights if the scheme is otherwise consistent with due process." *Id.* The remedial-scheme exception is not at issue in this case.

In its decision below, the D.C. Circuit placed the virtual representation theory it crafted within this rubric of "adequate representation," stating that the idea behind virtual representation "is that some cases of successive litigation involve as a litigant 'a nonparty [to the original action] whose interests were adequately represented by a party the original action.'" Pet. App. 6a (quoting *Tyus*, 93 F.3d at 454, and citing *Martin v. Wilks*, 490 U.S. at 762 n.2). Other courts that have adopted a theory of "virtual representation" have also tended to consider it a form of "adequate representation." *See, e.g., Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d at 651; *Becherer*, 193 F.3d at 423; *Tyus*, 93 F.3d at 454; *Meza v. Gen. Battery Corp.*, 908 F.2d 1262, 1266-67 (5th Cir. 1990); *but see Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 762 (1st Cir. 1994) ("[A]dequacy of representation is not itself a separate and inflexible requirement for engaging principles of virtual representation[.]").

Although this Court has recognized preclusion based on "adequate representation," the fact that a case was adequately litigated does not, alone, bind non-parties to the results. In *Richards v. Jefferson County*, the Court considered whether—outside of the context of class or representative actions and cases in which a non-party controlled the litigation—non-parties could be bound to a judgment on the ground that they had been "adequately represented" by a party to the litigation. 517 U.S. 793. *Richards* was a challenge to a county occupation tax on behalf of employees subject to the tax. The Alabama Supreme Court held that the *Richards* plaintiffs' claims were barred by the judgment in *Bedingfield v. Jefferson County*, 527 So.2d 1270 (Ala. 1988), a prior case challenging the tax, because the *Bedingfield* plaintiffs supposedly had adequately represented the interests of the *Richards* plaintiffs.

This Court reversed. First, the Court pointed out that the *Richards* plaintiffs had not received notice of the *Bedingfield* case, a fact it found troubling because "the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" *Richards*, 517 U.S. at 799 (quoting *Mullane*, 339 U.S. at 314). Even assuming, however, that "in some class suits adequate representation might cure a lack of notice," *id.* at 801—a proposition the Court seemed to find doubtful, *id.*—the Court held that its precedents could not support the application of res judicata under the circumstances of the case.

The Court explained that, under *Hansberry v. Lee*, 311 U.S. 32, "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 conducted as to insure the full and fair consideration of the common issue.'" *Richards*, 517 U.S. at 801 (quoting *Hansberry*, 311 U.S. at 43). Because the *Bedingfield* plaintiffs "did not sue on behalf of a class; their pleadings did not purport to assert any claim against or on behalf of any nonparties; and the judgment they received did not purport to bind any county taxpayers who were nonparties," the Court found "no reason to suppose that the *Bedingfield* court took care to protect the interests of [the *Richards* plaintiffs] in the manner suggested in *Hansberry*," or that "the individual taxpayers in *Bedingfield* understood their suit to be on behalf of absent county taxpayers." *Id.* at 801-02. Accordingly, the Court concluded that it could not find that the *Bedingfield* plaintiffs had represented the *Richards* plaintiffs in a constitutionally adequate manner. *Id.* at 802.

Under *Richards*—and *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160 (1999), which held that *Richards*'s requirements apply even when a non-party knew of the litigation—a non-party may be bound by the results of a case only if a party to the case "assumed to exercise" the power of representing the non-party. *Richards*, 517 U.S. at 802 (quoting *Hansberry*, 311 U.S. at 46). The party and non-party must share a "special *representational* relationship," *S. Cent. Bell Tel. Co.*, 526 at 168 (emphasis added), one that causes the party to recognize that the suit is on behalf of the non-party and, accordingly, to have an obligation to protect the non-party's interests. Absent such a relationship, the non-party and party "are best described as mere 'strangers' to one another," and "due process prevents the former from being bound by the latter's judgment." *Richards*, 517 U.S. at 802 (quoting *Martin v. Wilks*, 490 U.S. at 762).

Here, as in *Richards*, Herrick did not sue on behalf of a class, his pleadings did not purport to be on behalf of Taylor or any other non-parties, and the judgment he received did not purport to bind any non-parties. Moreover, there was no relationship between Herrick and Taylor at any time during Herrick's case (or, for that matter, after Herrick's case), that would have led Herrick to understand his case to be on behalf of Taylor, or that would have caused the Tenth Circuit to protect Taylor's interests in the manner suggested by *Hansberry*. Indeed, the Tenth Circuit assumed without deciding two dispositive legal conclusions on the ground that Herrick had not challenged them on appeal, although doing so failed to protect the interests of non-parties, like Taylor, who might be interested in the records requested by Herrick, but who were not involved in determining Herrick's litigation strategy. Thus, although they were ac-

quainted with each other, Herrick and Taylor were "mere 'strangers'" for the purposes of res judicata, and "due process prevents the former from being bound by the latter's judgment." *Richards*, 517 U.S. at 802 (citation omitted).

2. For it to be said that a party has assumed the power of representing a non-party, and for the party to understand that he is representing the non-party's interests and has an obligation to take care to protect those interests, the party must have authority to represent the non-party. That is, the party and non-party must have a legal relationship under which the party is accountable to the non-party for the conduct of the litigation. *Cf. Nevada v. United States*, 463 U.S. 110, 144 n.16 (1983) (explaining that because the government represented the Pyramid Lake Paiute Tribe in prior litigation, the Tribe's "remedy is against the Government," not third parties). This legal relationship can be a preexisting relationship that provides the party with authority to litigate on the non-party's behalf, such as the relationship between a guardian and ward, or the relationship can be created by an agreement between the party and non-party that the party will represent the non-party in the case. Because the non-party's interests must be protected during the party's case, however, 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 for the case's judgment to bind the non-party in later cases.

The need for a legal relationship between the party and the non-party against whom preclusion is invoked is reflected in common-law preclusion principles. Even when it has not relied expressly on the Constitution's

due process guarantees, the Court has emphasized the "deep-rooted historic tradition that everyone should have his own day in court," *Martin v. Wilks*, 490 U.S. at 762 (quoting 18 C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4449, p. 417 (1st ed. 1981)), and rejected the application of res judicata where "plaintiffs had not been parties to the earlier suit and were not in privity" with the party that brought it. *Lockport v. Citizens for Community Action at the Local Level, Inc.*, 430 U.S. 259, 264 n.7 (1977). Traditionally, privity "denote[d] a mutual or successive relationship to the same rights of property." 1 Simon Greenleaf, *A Treatise on the Law of Evidence* § 523 (13th ed. 1899); *see also Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 128-29 (1912). A privy, within the "generally accepted rule," was narrowly limited to "one who claims an interest in the subject-matter affected by the judgment *through or under* one of the parties, *i.e.*, either by inheritance, succession or purchase." Comment, *Privity & Mutuality in the Doctrine of Res Judicata*, 35 Yale L.J. 607, 608 (1926) (emphasis in original).

In *Richards*, this Court noted that "the term 'privity' is now used to describe various relationships between litigants that would not have come within the traditional definition of that term." *Richards*, 517 U.S. at 798. Even this expanded concept of privity, however, requires a legal relationship between the party and non-party for the non-party to be bound under the theory that he was adequately represented in the first suit. As examples of privity, *Richards* explained that "a judgment that is binding on a guardian or trustee may also bind the ward or the beneficiaries of a trust," and, as support for the notion that privity had expanded beyond its traditional terms, it cited to chapter four of the Restatement (Second) of Judgments, entitled "Parties and Other Persons

Affected by Judgments." Section 41, in that chapter, lists relationships that cause a person to be "represented by a party," all of which are relationships that, before or at the initiation of the first litigation, "confer on the representative the requisite authority, and generally the exclusive authority, to participate as a party on behalf of the represented person." Restatement (Second) of Judgments § 41, & cmt. a (1982). The "close associate" relationship between Herrick and Taylor is a far cry from these preexisting representational relationships, and, thus, like due process, common-law preclusion principles forbid the application of res judicata in this case.

3. Among the persons listed as representatives by the Restatement is "the representative of a class of persons similarly situated, designated as such with the approval of the court, of which the person is a member." *Id.* § 41(1)(e). The class action—the prototypical case in which adequate representation serves as the basis for res judicata—provides useful principles defining the type of relationship necessary for res judicata based on adequate representation outside of the class action context as well. The relationship between class representatives and absent class members is a legal one under which the class representatives have legal duties to the absent class members. The judicial process through which that relationship is created provides the class representatives legal authority to represent the absent class members. And the relationship exists at the time of the class action litigation so that both the class representatives and the court itself can take steps to protect the interests of the absent class members.

Class actions may bind absent class members, but, before they do, they must provide class members with specific protections upfront. *See Hansberry*, 311 U.S at

43 (requiring procedures "devised and applied" to protect absent class members); Fed. R. Civ. P. 23(a) & (b) (setting forth prerequisites of numerosity, commonality, typicality, and adequacy of representation, and requiring that a class action fit within one of three class-action categories that define the types of cases in which class treatment is appropriate). In class actions, the court, along with the class representatives and their lawyers, have a duty to protect the interests of the absent class members. *See, e.g.*, *Reynolds v. Beneficial Nat'l Bank*, 288 F.3d 277, 279-80 (7th Cir. 2002); *In re Gen. Motors Corp. Pick-up Truck Fuel Tank Prods. Liab. Litig.*, 55 F.3d 768, 784-85, 805 (3d Cir. 1995). This Court, lower courts, and rules committees have all spent significant time determining the requirements for certifying classes and litigating and settling class cases. *See, e.g.*, *Devlin v. Scardelletti*, 536 U.S. 1 (2002); *Ortiz*, 527 U.S. 815; *Amchem Prods., Inc v. Windsor*, 521 U.S. 591 (1997); *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *East Texas Motor Freight Sys., Inc. v. Rodriguez*, 431 U.S. 395 (1977); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974); Fed. R. Civ. P. 23; Adv. Comm. Notes to Fed. R. Civ. P. 23, 39 F.R.D. 98-107 (1966). Those requirements and the due process principles enshrined in them would be undermined if non-parties could be bound as though they were part of a properly certified class action when they had no legal relationship to the parties in the binding litigation at the time of that litigation. As the Seventh Circuit has pointed out, "[t]here would be little point in having Rule 23 if courts could ignore its careful structure and create *de facto* class actions at will." *Tice*, 162 F.3d at 973. Respondents should not be permitted to turn Greg Herrick's case, which was not a class action, into a de facto class action without any of the upfront protections provided to absent class members.

4. The limits on the circumstances in which non-parties can be bound to a judgment based on their representation by parties to the action call into question whether the term "virtual representation" is useful in determining whether such representation took place. As noted above, in *Richards*, the Court provided the examples of judgments that bind guardians and trustees also binding wards and beneficiaries, and cited to the Restatement (Second) of Judgments, Ch. 4, in describing the term "privity." *Richards*, 517 U.S. at 798. Other courts have placed similar relationships within the rubric of "virtual representation." *See Pollard*, 578 F.2d at 1008-09 (explaining that the types of relationships contemplated as qualifying for virtual representation are "estate beneficiaries bound by administrators, presidents and sole stockholders by their companies, parent corporations by their subsidiaries, and a trust beneficiary by the trustee") (quoting *S.W. Airlines Co. v. Tex. Int'l Airlines*, 546 F.2d 84, 97 (5th Cir. 1977)).

If the time-honored term "privity" is used to describe such relationships, there is no need for an additional term also reflecting the conclusion that a party and a non-party have a relationship sufficient to bind the non-party to the results of the case. *See Tice*, 162 F.3d at 971 ("The difficult question here is to decide what an idea of 'virtual' representation legitimately can add to the law of preclusion that is not already captured by a flexible inquiry into what used to be called 'privity.'"). The term "virtual representation," as used by the D.C. Circuit and other lower courts, has provided no additional analytical force, but has led to the undermining of non-parties' due process rights and common-law preclusion principles. Whether the Court adopts the term "virtual representation," however, or whether it stays with the term "privity," there are "limits on the . . . exception," *Richards*,

517 U.S. at 798, and non-parties to a case cannot be precluded based on the theory that they were adequately represented by a party to the case if they did not have a relationship of legal accountability with that party.

II. The Factors in the Lower Courts' "Virtual Representation" Tests Do Not Replace the Need for a Legal Relationship.

A. The Five Factors in the D.C. Circuit's Test Do Not Ensure the Special Representational Relationship Necessary for the Application of Res Judicata.

The court below set forth a test that requires the consideration of five factors for determining whether a non-party is bound under a theory of virtual representation: identity of interests; adequate representation; a "close" (although not necessarily legal) relationship between the party and non-party; tactical maneuvering; and substantial participation. None of these factors replaces the need for the party and non-party to have a legal relationship under which the party is legally accountable to the non-party for the conduct of the litigation.

1. Identity of interests and adequate representation

The court below held that identity of interests and adequate representation were necessary, but not sufficient, for "virtual representation." Pet. App. 8a. That much of the lower court's analysis was correct: *Richards* establishes that these two factors cannot support preclusion absent a sufficient relationship between the party and non-party. As *Richards* held, when a non-party and party are "best described as mere 'strangers' to one another . . . due process prevents the former from being

bound by the latter's judgment." 517 U.S. at 802 (quoting *Martin v. Wilks*, 490 U.S. at 762).[3]

2. A close non-legal relationship

The court of appeals went astray in holding that a close, non-legal relationship (together with identity of interests and adequate representation) supports preclusion. It does not. People who have a close, non-legal relationship are not, of course, strangers in the colloquial sense. But, in *Richards*, this Court was not using the word "strangers" colloquially. Under *Richards*, a party and non-party are strangers if "there is no reason to suppose that the . . . court took care to protect the interests of [the non-parties] in the manner suggested in *Hansberry*," and there is no "reason to suppose that the

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[3] The D.C. Circuit's discussion of the adequacy of representation underscores why identity of interests and adequacy of representation, without a representational relationship of legal accountability, are not sufficient. The court held that Herrick had adequately represented Taylor because Herrick had "an incentive to litigate zealously and his motives were substantially similar to and seemingly even stronger than Taylor's" and because Taylor hired Herrick's lawyer, which, according to the court, "suggests satisfaction with the attorney's performance in the prior case." Pet. App. 14a. But neither of these factors looks at whether Herrick in fact provided Taylor with adequate representation. Herrick could have a strong incentive to litigate, but nonetheless not do so adequately. And Taylor's hiring of Herrick's lawyer just demonstrates that Taylor thought that the lawyer was the best one to litigate his case after the lawyer had *already* litigated Herrick's case. *Cf. S. Cent. Bell Tel. Co.*, 526 U.S. at 168 (refusing to distinguish *Richards* on ground that one of the lawyers for the plaintiffs in the second case had also represented the plaintiffs in the first case); *Collins v. E.I. Dupont de Nemours & Co.*, 34 F.3d 172, 178 (3d Cir. 1994) ("The fact that the plaintiff's attorney took part in a prior, similar action is irrelevant unless there is evidence that the plaintiff was, through his or her attorney, actually participating in the prior suit.").

[party] understood [its] suit to be on behalf of" the non-party. 517 U.S. at 802. And, under *Richards*, if the party and non-party are strangers under that definition, due process does not permit the non-party to be bound by the results of the litigation. *Id.*

In short, the word "stranger" in *Richards* describes a *conclusion* that the parties do not have a relationship sufficient to support preclusion. *See S. Cent. Bell Tel. Co.*, 526 U.S. at 167-68 ("[N]o one claims that there is 'privity' or some other special relationship between the two sets of plaintiffs. *Hence*, the Case Two plaintiffs here are 'strangers' to Case One[.]") (emphasis added); *Litchfield v. Crane*, 123 U.S. 549, 551-52 (1887) ("She was neither a party to the suit, nor in privity with those who were parties; *consequently* she was in law a stranger to the proceedings, and in no way bound thereby.") (emphasis added). The use of the word "stranger" in the Court's preclusion jurisprudence does not warrant a court asking whether the non-party knew, or was friends with, or shared a hobby with, or otherwise had a relationship with a party, short of a relationship recognized by law.

That a party and non-party have a close relationship is irrelevant unless that relationship is one that would cause the party to understand his suit to be on behalf of the non-party—that is, unless that relationship is a legal relationship under which the party was accountable to the non-party for the conduct of the litigation. It is not part of the normal expectation of "close" friends, relatives, or "associates" that they will litigate on behalf of one another, absent some agreement or legal relationship that both creates authority to do so and protects the non-party by imposing an obligation on the litigating party to look after the non-party's interest in the litiga-

tion. Best friends, for example, are "close associates" by any definition, but it would come as a great surprise to most of us to be told that we are bound by the outcomes of cases litigated by our best friends—especially litigation conducted without our knowledge. To say, as the court of appeals did, that a non-party and a party were "close associates" says nothing about whether the party had the power or the duty to represent the non-party's interests in the litigation, especially where, as here, there are no details about the nature of the close association. Accordingly, a finding that a party and non-party are "close associates" does not support the application of res judicata.

3. Tactical maneuvering

The court of appeals also stated that a non-party's tactical maneuvering to avoid preclusion, in conjunction with an identity of interests and adequate representation, supports a finding of virtual representation. Again, the court of appeals confused a legal conclusion with the facts necessary to support that conclusion. A non-party cannot be said to have engaged in improper tactical maneuvering to avoid the results of a case unless, for some reason, that non-party *already had a representational relationship* with a party to that case that would otherwise support preclusion. If the non-party did not have such a relationship with a party, then the non-party's attempt to avoid being bound by litigation in which he was not represented is not improper tactical maneuvering; it is just his effort to exercise his own right to be heard.

In support of its holding that a non-party's efforts to avoid being bound weigh in favor of preclusion of the non-party's claims, the court of appeals cited *Tyus v. Schoemehl*, 93 F.3d at 457, and *Pedrina v. Chun*, 97 F.3d 1296, 1299, 1302 (9th Cir. 1996), two cases in which par-

ties to litigation filed new litigation, on the same issue as the first litigation, along with additional, new plaintiffs. Pet. App. 16a. The courts held that all of the plaintiffs in the second set of cases were bound by the first set of cases, including the plaintiffs who had not been parties to the first cases. *Tyus*, 93 F.3d at 457-58; *Pedrina*, 97 F.3d at 1302. Rather than demonstrating why "tactical maneuvering" should weigh in favor of preclusion, however, these cases demonstrate the unfairness of basing preclusion on attempts to avoid the effects of adverse judgments. The only people who can be said to be engaging in improper tactical maneuvering in cases in which parties to a first case file a second case along with additional, new plaintiffs are the parties to the first case who are trying to avoid the result of that case by filing a second one. Because they have already litigated the case, those parties are properly held bound. But the only thing the *new* plaintiffs themselves are doing is filing a lawsuit on a topic they have never litigated before; there is nothing improper about that. Those new plaintiffs should not be precluded from receiving their first bite at the apple because of other people's improper tactical maneuvering.[4]

The D.C. Circuit cited *Tyus* and *Pedrina* for the proposition that some forms of tactical maneuvering are "indicative of privity." Pet. App. 16a. If the parties and the newly added plaintiffs indeed had a relationship at

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[4] The newly added plaintiffs could be bound if they were litigating the case as undisclosed agents of the parties to the first case. In that situation, however, the proper basis for binding them would not be that they would be deemed to have been "represented" by the first parties because of their "maneuvering" to avoid the effect of the judgment. Rather, they would be bound because the principals for whom they were agents would be bound.

the time of the first litigation that supports the application of res judicata—a legal relationship in which the parties to the first suit were accountable to the newly added plaintiffs for the conduct of the first litigation—then the newly added plaintiffs should be bound by the judgment in the first case. But the finding of preclusion should be based on the relationship between the plaintiffs in the first and second cases, not on any attempts by the newly added plaintiffs to avoid the preclusive effects of a judgment in a case to which they were not parties.

In any event, even if tactical maneuvering to avoid the preclusive effects of a lawsuit could support preclusion, there was no tactical maneuvering here. For tactical maneuvering to be even arguably relevant to whether Herrick was representing Taylor during the course of Herrick's lawsuit, it would have to have happened before or during that lawsuit.[5] Later behavior cannot affect whether representation was occurring at the time of Herrick's litigation. There is no evidence in the record, however, of any agreement between Taylor and Herrick with regard to the first lawsuit or the underlying records, or even of any communications between Taylor and Herrick concerning the lawsuit or records before the conclusion of Herrick's suit. Moreover, there is no record evidence indicating that Taylor even knew of the

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[5] Facts related to Taylor's and Herrick's actions after Herrick's litigation was concluded would be relevant if the question presented was whether Taylor was acting as Herrick's agent in this case. But the question here is not whether Taylor is representing Herrick in this case, but whether Herrick represented Taylor in *Herrick v. Garvey*. And even looking at Taylor's and Herrick's actions after *Herrick v. Garvey* was decided, there is no evidence that Taylor was acting as Herrick's agent in bringing this case, and neither lower court purported to find that he was.

first suit until after it was over. Under these circumstances, Taylor cannot be found to have engaged in improper tactical maneuvering to avoid the judgment in the first suit while that suit was ongoing; and if he was not bound by the judgment when it was entered, he was within his rights to try to avoid its effect by filing a new lawsuit, in one of the few places that had venue (none of which was in the Tenth Circuit, *see* 5 U.S.C. § 552(a)(4)(B)).

4. Substantial participation

Finally, without explaining what would constitute "substantial participation," the court of appeals held that substantial participation by a non-party in a suit, in combination with identity of interests and adequate representation, supports preclusion. Because Taylor did not participate in Herrick's case at all, let alone substantially, Taylor would not be bound by Herrick's litigation even if a non-party's substantial participation in a case justified binding that non-party to the results of the case. Indeed, because the lower courts did not find any such participation, let alone base their preclusion holdings on it, the Court need not reach the question whether substantial participation can justify preclusion and, if so, what type or degree of participation is necessary.

Even so, it is useful to consider the substantial participation factor because it is illustrative of the extent to which the "virtual representation" theory adopted by the lower court exceeds the proper bounds of preclusion. Contrary to the court of appeals' assertions, participation in litigation in a capacity other than as a party is not sufficient to give rise to preclusion. *See Bigelow*, 225 U.S. at 126 ("Nor would assistance in the defense of the suit, because of interest in the decision as a judicial precedent which might influence the decision in his own

case, create an estoppel as to Bigelow."); *see also Litchfield v. Crane*, 123 U.S. at 550 (non-party's payment of part of party's expenses did not bind the non-party); *Stryker v. Crane*, 123 U.S. 527, 540 (1887) (non-party's submission of a brief did not bind the non-party); 18A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure § 4451, pp. 376-81 (2d ed. 2002) ("[I]t is not enough that the nonparty supplied an attorney or is represented by the same law firm; . . . helped to finance the litigation; appeared as an amicus curiae; testified as a witness; undertook some limited presentation to the court; or otherwise participated in a limited way." (citing cases)).

To be sure, this Court has held that non-parties can be collaterally estopped when they "assume control over litigation in which they have a direct financial or proprietary interest and then seek to redetermine issues previously resolved." *Montana*, 440 U.S. at 154. Thus, in *Montana*, the Court held the United States bound by prior litigation undertaken by a government contractor, where the United States required the first suit to be filed, reviewed and approved the complaint, paid the attorneys' fees and costs, directed the appeal to the state supreme court, submitted an amicus brief, directed the filing of a notice of appeal to the Supreme Court, and effectuated abandonment of that appeal. *Id.* at 155. *Montana* reflects the longstanding recognition that "the term parties . . . includes all who are directly interested in the subject-matter, and had a right to make defence, or to control the proceedings; and to appeal from the judgment. This right involves, also, the right to adduce testimony, and to cross-examine the witnesses adduced on the other side." *Lovejoy v. Murray*, 70 U.S. 1, 18 (1865) (quoting 1 Greenleaf on Evidence §§ 522-23). The flipside of the principle, however, is equally important:

"Persons not having these rights are strangers to the cause." *Id.*

The theory behind preclusion based on control is that the non-party controlling the litigation was not just "represented" by a party, but was effectively a party because it had its "full and fair opportunity to litigate." *Montana*, 440 U.S. at 153; *see* Restatement (Second) of Judgments § 39 cmt. a ("A person who assumes control of litigation on behalf on another has the opportunity to present proofs and argument on the issues litigated. Given this opportunity, he has had his day in court and should be concluded by the result."). Unlike control over a case, participation in a case—even if it is substantial—does not provide a non-party with a full and fair opportunity to litigate. A non-party's participation in a case does not give any party to the case authority to represent him, guarantee that he will have all his arguments heard, ensure that either the party or the court will protect his interests, or provide him the right to appeal the court's determination. For example, even if Taylor had somehow participated in Herrick's litigation, the Tenth Circuit presumably still would have assumed without deciding the resolution of the legal issues that Herrick did not raise on appeal, even though doing so did not protect Taylor's interests in the requested records. And even if Taylor had wanted to ensure that those issues were preserved on appeal, he would not have been able to do so, because he did not control the litigation. Participation as a non-party, without the ability to control the direction of the litigation, and without a relationship of legal accountability with a party to the case, cannot replace the right to have one's day in court.

B. The Court of Appeals' Virtual Representation Test Does Not Advance the Purposes of Res Judicata.

In addition to violating the rights of non-parties, the D.C. Circuit's test for virtual representation runs counter to the purposes of res judicata. Res judicata "encourages reliance on judicial decisions, bars vexatious litigation, and frees the courts to resolve other disputes." *Brown v. Felsen*, 442 U.S. 127, 131 (1979). But a multi-factor test in which virtual representation can be based on an undefined "close relationship" neither conserves judicial resources nor promotes certainty.

A test with factors as ill-defined as in the D.C. Circuit's test below is likely to increase "vexatious litigation" over the application of preclusion doctrine to non-parties. Instead of providing a clear rule under which courts can determine, with little effort, whether someone is bound by the results of earlier litigation, the virtual-representation test adopted by the D.C. Circuit requires courts to expend resources on determining whether res judicata applies. As the Sixth Circuit has explained, the "'virtual representation' standard converts the traditional doctrine of res judicata from a relatively clear set of rules to a vague principle relying on balancing the equities as a result of a close inspection and analysis of the relationship between the parties in each individual case." *Bittinger v. Tecumseh Prods. Co.*, 123 F.3d 877, 881 (1997). It "increases the burden on judges, who must apply its multi-factored balancing test to the facts of each case." *Id.*

The factual nature of the D.C. Circuit's test also undermines predictability. Because of the lack of clear rules on what constitutes a relationship close enough to sustain preclusion, non-parties will not be certain about

whether their "relationships" with "associates" are sufficiently "close" to bind them to the results of litigation. Accordingly, a non-party who wants to make sure that he has the opportunity to be heard will be required to intervene in litigation brought by acquaintances (assuming he has notice of the litigation), even if the acquaintance is litigating in a foreign forum, and even though "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Martin v. Wilks*, 490 U.S. at 763 (quoting *Chase Nat'l Bank v. Norwalk*, 291 U.S. 431, 441 (1934)). A test that does not provide certainty about who is and is not bound by litigation also encourages races to the courthouse, as people try to make sure that their case is the one resolving their rights. Particularly in the context of FOIA, in which litigation is preceded by an administrative process, such races could lead to litigation in cases that otherwise might have been resolved informally. In contrast, a test requiring a legal relationship creates certainty in non-parties about when they will (and will not) be bound by judgments; non-parties will be able to rest assured that they will not be bound by acquaintances' litigation when they did not give those acquaintances legal authority to represent them.

A clear rule requiring a legal relationship between a party and non-party also helps ensure both fair application of preclusion principles and public perception that those principles are being applied equitably. *See* Antonin Scalia, *The Rule of Law as a Law of Rules*, 56 U. Chi. L. Rev. 1175, 1178 (1989) (explaining how clear legal rules help further "the appearance of equal treatment"). Although a goal of res judicata is to reduce "vexatious litigation," *Brown*, 442 U.S. at 131, res judicata cannot act as a bar to all cases judges find vexing. Judges understandably may be annoyed if forced to hear a case on

an issue that has been litigated before. Clear rules about preclusion help guarantee both that judges do not subconsciously translate their annoyance with specific issues or parties into a finding that the parties' claims are precluded and that precluded parties do not perceive judges as being motivated by irrelevant considerations when they hold them bound by cases to which they were not parties.

C. The Nature of the Claim on the Merits Does Not Alter the Need for a Legal Relationship Between the Party and Non-party.

Contrary to the district court's assertion, Pet. App. 34a, and the government's contention in its brief in opposition to the petition for certiorari, Gov't Br. Opp. 12, the "public-law" nature of the underlying action does not make virtual representation "particularly appropriate" in this case. As *Richards* makes clear, there is no public-law exception to due process or public-law relaxation of the rules of privity.

Richards itself was a "public-law" case: a constitutional challenge to a county tax. *See* Black's Law Dictionary 1244 (7th ed. 1999) (defining public law as "[t]he body of law dealing with the relations between private individuals and the government, and with the structure and operation of the government itself").[6] Nonetheless,

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[6] In its brief in opposition, the government sought to distinguish *Richards* by claiming that, unlike this case, *Richards* did not involve a public-law issue. Gov't Br. Opp. 11. The government did not explain what definitions of public and private law it was using that would enable it to consider a challenge to a government tax "private" but a challenge to the government's withholding of records to which a person is statutorily entitled "public." The government's unsupported assertion that *Richards* involved a private-law issue demonstrates the malleability of the private-law/public-law distinc-

(*Footnote continued*)

the Court rejected the defendants' argument that "the character of their action renders the usual constitutional protections inapplicable." 517 U.S. at 802-03. Although the defendants had contended 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 [plaintiffs] received all the process they were due in the [previous] action," *id.* at 803, the Court found that the case was one in which the government "may not deprive individual litigants of their own day in court." *Id.*

Richards did recognize a category of taxpayer cases in which state courts have "wide latitude to establish procedures . . . to limit the number of judicial proceedings." *Id.* In such cases—those in which the taxpayer is complaining about general misuse of public funds or some other action that only indirectly affects him—not only may states limit successive suits, but they may deny plaintiffs standing altogether. *Id.* Because of federal standing requirements, *see, e.g., Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992), such cases are ones that federal courts generally do not even entertain. *See generally, e.g., DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332 (2006); *Massachusetts v. Mellon*, 262 U.S. 447, 486-89 (1923).

Like other federal court cases, and like *Richards* itself, this case is not a "public action that has only an indirect impact on [a party's] interests." *Richards*, 517 U.S. at 803. Although the purpose of FOIA is to provide the public with information, Congress accomplished that purpose by giving FOIA requesters *individual* rights to the records they request. Each person denied records

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tion and the uselessness of those categories for determining how much process a person is due.

has suffered a personal injury, and, after exhausting the administrative process, has standing to seek judicial review of the decision in federal court. *See* 5 U.S.C. § 552(a)(4)(B); *see also FEC v. Akins*, 524 U.S. 11, 21 (1998) (describing inability to obtain information as a concrete and particular injury in fact). Accordingly, like *Richards*, this case is of the type in which the government "may not deprive individual litigants of their own day in court." *Richards*, 517 U.S. at 803. To deprive Taylor of his day in court based on Herrick's action would be to deprive him of his "'chose in action,' which [this Court has] held to be a protected property interest in its own right." *Id.* at 804 (citing *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982); *Shutts*, 472 U.S. at 812; *Hansberry*, 311 U.S. at 37).

That the "public-law" nature of this case does not permit deviation from normal due process principles does not mean that requesters may sensibly (or ethically) file suit seeking the same documents forever. FOIA requesters, like all other litigants, are bound by the stare decisis effects of prior court decisions, and, at a certain point, litigating over records that have been litigated over before becomes futile, and even frivolous. But a "court's freedom to rely on prior precedent in rejecting a litigant's claims does not afford it similar freedom to bind a litigant to a prior judgment to which he was not a party." *Richards*, 517 U.S. at 805. It is precedent, rather than preclusion, that binds non-parties, in "public-law" cases, as in all others.

III. At the Very Least, in the Absence of a Legal Relationship Between a Party and Non-Party, Notice Is Required for a Non-Party to Be Bound by the Judgment in a Case.

As discussed above, a non-party should not be bound by the judgment in a case without a relationship of legal accountability with a party to that case. Even if such a relationship were not necessary for preclusion, however, Taylor would not be bound by *Herrick v. Garvey* because he did not receive notice of it. Notice is not, of course, sufficient for preclusion. *See, e.g., S. Cent. Bell Tel. Co.*, 526 U.S. at 168 (explaining that case could not be distinguished from *Richards* based on plaintiffs' awareness of prior litigation); *Martin v. Wilks*, 490 U.S. at 765 ("Joinder as a party, rather than knowledge of a lawsuit and an opportunity to intervene, is the method by which potential parties are subjected to the jurisdiction of the court and bound by a judgment or decree."). Absent a legal relationship entitling a party to the case to represent a non-party, however, notice is *necessary* to bind the non-party to the judgment in the case.

The right to be heard is "[t]he fundamental requisite of due process." *Mullane*, 339 U.S. at 314 (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)). As this Court has recognized, however, "[t]his right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest." *Id.*; *see also, e.g., Richards*, 517 U.S. at 799 (quoting *Mullane*); *Greene v. Lindsay*, 456 U.S. 444, 449 (1982) (same). Accordingly, "[a]n elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all circumstances to apprise interested parties of the pendency of

the action and afford them an opportunity to present their objections." *Mullane*, 339 U.S. at 314; *see also, e.g., Jones v. Flowers*, 547 U.S. 220, 226 (2006) (quoting *Mullane*); *Peralta v. Heights Med. Ctr.*, 485 U.S. 80, 84 (1988) (same).[7]

In its decision below, the D.C. Circuit stated that *Richards* left open the question whether notice is necessary for virtual representation. Pet. App. 12a. What *Richards* said, however, was that "[e]ven assuming that our opinion in *Hansberry* may be read to leave open the possibility that in some *class suits* adequate representation might cure a lack of notice, *but cf.* [*Hansberry*, 311 U.S.] at 40 . . . *Mullane*, [339 U.S. at 319], . . . it may not be read to permit the application of res judicata here." *Richards*, 517 U.S. at 801 (emphasis added). As the "but cf." citations demonstrate, the Court was skeptical that *Hansberry* could be so read, and rightly so: *Hansberry* itself recognized the importance of notice to due process, 311 U.S. at 40 (describing "notice and opportunity to be heard" as being "requisite to the due process which the Constitution prescribes"), and *Mullane* and its progeny confirm that notice is an "elementary and fundamental requirement." *Mullane*, 339 U.S. at 314; *see also, e.g.*, *Tulsa Prof'l Collection Servs., Inc. v. Pope*, 485 U.S. 478,

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[7] The need for a person to have received notice of a case (and more) if that person is to be bound by the case's judgment is underscored where, as here, the case was litigated in a forum that did not have personal jurisdiction over that person. *Cf. Shutts*, 472 U.S. at 811-12 (explaining that "absent plaintiffs as well as absent defendants are entitled to some protection from the jurisdiction of a forum State which seeks to adjudicate their claims," but that, in the context of class actions for monetary damages, receipt of notice and the opportunity to opt out constitute "consent to jurisdiction").

484 (1988); *Mennonite Bd. of Missions v. Adams*, 462 U.S. 791, 795 (1983); *Greene*, 456 U.S. at 449.

In any event, the issue assumed for the sake of argument in *Richards* was not that adequate representation *in general* might sometimes replace the need for notice, but that adequate representation might replace the need for notice in some *class* suits. In class action litigation, extra protections are provided, upfront, to protect the interests of absent class members. The class representatives understand themselves to have undertaken to represent the absent class members; the court takes special care to protect the interests of the class members in the "manner suggested in *Hansberry*," *Richards*, 517 U.S. at 802; and the class certification process (including whatever notice is required in determining who is in the class) creates a legal relationship between the class representatives and absent class members under which the class representatives are accountable to the absent class members for the conduct of the litigation. *See supra* pp. 16-17 (describing class action protections). None of those factors is present here.

Outside of the class action context, when someone has a legal relationship with another person that provides that person with authority to represent him in a lawsuit, notice of the lawsuit can be imputed to the first person. *See Gonzalez*, 27 F.3d at 761 n. 11 ("[T]he formation of the underlying relationship, in and of itself, embodies what amounts to constructive notice of all ensuing litigation."); *see also Curtis, Collins & Holbrook Co. v. United States*, 262 U.S. 215, 222 (1923) ("The general rule is that a principal is charged with the knowledge of the agent acquired by the agent in the course of the principal's business."); Restatement (Third) of Agency § 5.03 (2006).

Here, however, Herrick and Taylor did not have the kind of relationship such that notice can be imputed to Taylor. Taylor's and Herrick's sharing an interest in aviation history, joining the same club, and knowing each other did not provide Herrick with authority to receive notice on behalf of Taylor. And the other events in their relationship contained in the record—Herrick's provision of discovery documents to Taylor, his request that Taylor help him with his aircraft, and Taylor's hiring of Herrick's lawyer—all took place *after* Herrick's litigation was over, and therefore cannot possibly establish that Taylor had the opportunity to "choose for himself whether to appear or default, acquiesce or contest" in the earlier litigation. *Mullane*, 339 U.S. at 314.

That Herrick and Taylor did not share a representational relationship under which Herrick's knowledge can be imputed to Taylor underscores the problem with deeming Taylor and Herrick's relationship sufficiently close to bind Taylor to the results of Herrick's litigation: Just as notice to Herrick does not count as notice to Taylor, Herrick's opportunity to be heard cannot count as Taylor's opportunity to be heard. Because Taylor did not have a legal relationship with Herrick under which Herrick was accountable to Taylor for the conduct of the Tenth Circuit case, Taylor was a "mere stranger" to that litigation, and Taylor cannot be bound by the Tenth Circuit's judgment.

CONCLUSION

The decision below should be reversed and the case remanded for further proceedings on the merits of petitioner's FOIA claim.

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