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

REPLY BRIEF FOR PETITIONER

MICHAEL JOHN PANGIA
THE LAW OFFICES OF MICHAEL J. PANGIA
1717 N Street, NW
Washington, DC 20036
(202) 955-6450

ADINA H. ROSENBAUM
BRIAN WOLFMAN
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner

April 2008

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases:

Statutes and Rules:

Other Authorities:

REPLY BRIEF FOR PETITIONER

Respondents repeatedly say that Greg Herrick cannot "relitigate" his lawsuit. That point is uncontroverted. But the question is not whether Herrick will be given his second day in court; it is whether Brent Taylor will be given his *first*. Respondents' claims for preclusion require them to mischaracterize Taylor's arguments, ignore the constitutional and common-law limits on privity, and misconstrue the personal right of action provided by the Freedom of Information Act (FOIA). Both due process and accepted preclusion principles forbid binding Taylor to the judgment in Herrick's case.

A. Taylor Is Not in Privity with Herrick.

1. Respondents' chief argument relies on knocking down a straw man. According to respondents, Taylor's opening brief argued that a non-party is bound to the judgment in a case only when there is a legal relationship between the party and non-party, *see, e.g.*, Fairchild Br. 2, 29; Gov't Br. 13, 26, and that argument cannot be reconciled with cases, such as *Montana v. United States*, 440 U.S. 147 (1979), in which preclusion was applied despite the absence of a legal relationship. Respondents' premise is incorrect. Taylor did not argue that a legal relationship is always necessary for preclusion, but that a legal relationship is necessary for *preclusion based on the theory that the non-party was represented by a party to the prior case*. *See, e.g.*, Pet. Br. 8, 15, 19. Taylor openly acknowledged in his opening brief (at 10 n.2, 26) that preclusion can be based on factors besides representation, such as the non-party's control of the first litigation (the circumstance in *Montana*), or the existence of a special statutory remedial scheme that limits successive litigation over a particular subject matter.

But the court below did not hold that a special remedial scheme existed or that Taylor controlled Herrick's case. Nor did it hold that Taylor had induced defendants to believe he would not assert his claim, *see* Fairchild Br. 31, or that Taylor's claim resulted from personal injury to another person, *see* Gov't Br. 23-24, or that Taylor was litigating this case as Herrick's agent on Herrick's behalf. And the court of appeals could not have so held: None of those theories of preclusion even arguably applies here.

Rather, the court of appeals held that Taylor was precluded from litigating his claim because he had been adequately or virtually represented by Herrick in the earlier litigation. *See, e.g.,* Pet. App. 17a. Similarly, the district court held that Taylor had been virtually represented by Herrick. *See id.* at 22a. Respondents themselves argued below that Taylor had been virtually represented by Herrick. *See*, *e.g.*, Fairchild Br. Ct. App. 19; Gov't Br. Ct. App. 12. And the question presented to this Court for review was whether a non-party can be precluded "*under a theory of 'virtual representation*'" when he had no legal relationship to any party to the case and no notice of the case. Pet. i (emphasis added).

2. As Taylor explained in his opening brief (at 9-17), a non-party can only be bound by the judgment in a case under the theory that he was represented by a party to the case if that party had the authority to represent him—that is, if they had a legal relationship under which the party was accountable to the non-party for the conduct of the litigation. *See Richards v. Jefferson County*, 517 U.S. 793, 802 (1996).[1] Taylor and Herrick do not

---

[1]Contrary to the government's claims, the relationships between guardians and wards and trustees and beneficiaries are not "the

(*Footnote continued*)

have such a relationship. Accordingly, although both the district court and court of appeals held that Herrick had "adequately" or "virtually" represented Taylor, respondents do not base their arguments on such representation. *See* Fairchild Br. 40 (claiming that the court of appeals "did not confront . . . an 'adequate representation' case"). Rather, they argue that Taylor and Herrick are in "privity."

Respondents do not assert any recognized form of privity. Instead, they claim Taylor and Herrick are in privity because privity is a flexible, fact-bound, equitable inquiry. But although "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, and although courts examine the facts to determine whether privity exists (as they do whenever they apply the law to the facts), courts do not just set forth the facts and then perform a gut-check to determine whether the non-party should be bound. They apply legal standards. *See, e.g.*, *Tyus v. Schoemehl*, 93 F.3d 449, 455 (8th Cir. 1996) (setting forth categories of privity).

Respondents implicitly recognize that there are legal standards for binding non-parties by repeatedly citing with approval the Restatement (Second) of Judgments, ch. 4, as this Court did in describing privity in *Richards*, 517 U.S. at 798. *See* Gov't Br. 13, 21, 23, 24, 27; Fairchild

---

only ones that petitioner's rule encompasses." Gov't Br. 21. For example, a representational relationship could also be created by an employment or agency relationship, an agreement that the party would represent the non-party, or the proper certification of a class. *See* Pet. Br. 14, 16; Restatement (Second) of Judgments § 41 (1982) (listing numerous circumstances under which a person is "represented by a party").

Br. 20, 22, 30, 31, 34; *id.* at 36 (noting that *Richards* cited the Restatement "with approval"). The Restatement does not state that preclusion applies whenever a court deems it "fair" or "equitable." Instead, as Fairchild observes (at 20, 34), chapter four of the Restatement contains 30 sections detailing the circumstances under which parties and non-parties can and cannot be bound. Notably, neither respondent demonstrates—or even tries to demonstrate—that the circumstances in any of those 30 sections are present here.

3. The circumstances described in the Restatement under which non-party preclusion may be appropriate fall into three categories: "First, a person who is represented by a party is bound by the judgment in an action involving the representative party." Restatement (Second) of Judgments § 62, cmt. a.

"Second, a person standing in one of a variety of preexisting legal relationships with a party may be bound by a judgment affecting that party." *Id.* The relationships in this second category are substantive legal relationships, such as the relationships between assignors and assignees, *id.* § 55, bailors and bailees, *id.* § 52, and between people having a relationship in which one is vicariously liable for the conduct of the other. *Id.* § 51; *see generally id.* §§ 43-61.[2] This second category is what is traditionally referred to as "privity." *Id.* § 62, cmt. a.[3]

---

[2]This category also includes the relationship between a principal and an agent who is litigating the second case on the principal's behalf, where the principal was a party to the first action.

[3]Lower courts often call the first and third categories "privity" as well, *see, e.g.,* Pet. App. 6a, but this Court has tended not to include them within that rubric. *See Richards*, 517 U.S. at 798; *Montana*, 440 U.S. at 154 n.5. Whether all three categories are referred to as types of "privity" or whether the term is limited to the second

(*Footnote continued*)

Finally, "a person who is not a party to an action may be precluded by the judgment in an action when he is involved with it in a way that falls short of becoming a party but which justly should result in his being denied opportunity to relitigate the matters previously in issue." *Id.* This category includes a non-party controlling litigation, *id.* § 39, agreeing to be bound by litigation, *id.* § 40, or inducing the parties to a case to rely on the expectation that he will be bound by its judgment. *Id.* § 62.

These three categories are not limited to the Restatement. Courts often use similar categories to describe the "categories of non-parties who will be . . . bound by a prior adjudication." *Martin v. Am. Bancorp. Ret. Plan*, 407 F.3d 643, 651-52 (4th Cir. 2005); *see also, e.g., United States v. Vasilakos,* 508 F.3d 401, 406 (6th Cir. 2007) (explaining that non-party preclusion is limited to three circumstances: when a non-party controls the action, when a non-party is a successor-in-interest to a party, and when a non-party's interests were adequately represented by a party); *Tyus*, 93 F.3d at 455 (recognizing same three categories); *Latham v. Wells Fargo Bank, N.A.*, 896 F.2d 979, 983 (5th Cir. 1990) (same); *Am. Forest Council v. Shea*, 172 F. Supp. 2d 24, 31 (D.D.C. 2001) (same) (quoting *Tyus*); 18A C. Wright, A. Miller, & E. Cooper, Federal Practice & Procedure

---

category while the first and third categories are considered non-privity forms of preclusion is irrelevant. In addition, as Taylor pointed out in his opening brief (at 10 n.2), this Court has noted the existence of certain "special remedial scheme[s]" that may "foreclose[] successive litigation by nonlitigants," as long as they are "otherwise consistent with due process." *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989). Those remedial schemes are not types of "privity" and are not at issue in this case. *See Richards*, 517 U.S. at 798; *Montana*, 440 U.S. at 154 n.5.

§ 4448, pp. 328-29 (2d ed. 2002) (explaining that "the most obvious justification [for non-party preclusion] is found in cases that extend preclusion to a person who was not a formal party to the first litigation but who participated so extensively as to assume a de facto role as an actual party," but that non-party preclusion is also "found in a variety of rules that extend preclusion to persons who somehow were represented in the first litigation," and that "[i]n some circumstances, persons holding successive interests in the same property or claim can preclude each other").

Indeed, in their briefs to the court of appeals, both respondents set forth categories of privity nearly identical to these. As Fairchild explained: "There are three generally recognized categories of non-parties who will be considered in privity with a party to a prior action and who will therefore be bound by a prior adjudication: (1) a non-party who controls the original action; (2) a successor-in-interest to a prior party; and (3) a non-party whose interests were adequately represented by a party to the original action." Fairchild Br. Ct. App. 12; *see also* Gov't Br. Ct. App. 12 (listing same three categories of privity).

4. The three broad categories of non-party preclusion are not just a random compilation of the results of fact-patterns that happen to have come before courts. They encompass the situations in which a non-party can be found to be in privity with a party consistent with due process.[4] Because "'[t]he opportunity to be heard is an

---

[4]As to Fairchild's suggestion that Taylor might have abandoned his constitutional argument, Fairchild Br. 35-36, Taylor cited the Fifth Amendment's Due Process Clause under the heading "Constitutional Provision Involved" on the first page of his opening brief, discussed the due process guarantees of notice and the opportunity

(*Footnote continued*)

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)), privity must be limited to circumstances in which the non-party's relationship to the prior party or litigation ensures that the non-party received the opportunity to be heard.

Thus, the first category (representation) involves circumstances in which the non-party *did* have the opportunity to be heard, albeit through a representative authorized to speak on his behalf, rather than directly. The second category (successors-in-interest and other legal relationships) involves circumstances in which the legal relationship between the party and non-party justifies treating them as the same legal person for the purposes of the litigation, so that the party's opportunity to be heard counts as the non-party's opportunity to be heard. And the third category involves circumstances in which the non-party's engagement in the case provided him with the "full and fair opportunity to litigate," *Montana*, 440 U.S. at 153, even though he was not a party, or where the non-party effectively waived his right to be heard by, for example, agreeing to be bound by the judgment in the case or behaving in such a way as to be estopped from denying that he should be bound. *See* Restatement (Second) of Judgments §§ 40, 62.

Within these categories, there may be room for dispute over whether a particular relationship justifies pre-

---

to be heard in his summary of the argument (Pet Br. 8-9), and further discussed due process on pages 9, 10, 12, 13, 14, 17, 18, 19, 20, 21, 30, 32, 33, and 34 of his opening brief. In contrast to Fairchild, the government acknowledges (at 44) that Taylor is making a due process argument.

clusion. This Court need not, to resolve this case, adopt the Restatement's view of which particular legal relationships, for example, should lead to preclusion. But a relationship that does not fall within any of these broad categories cannot lead to preclusion (or qualify for the "privity" label) under either the Constitution or common-law preclusion principles.

5. This case does not fall within any of the three categories: Taylor and Herrick have no substantive legal relationship, so it is not within the second category, and it is undisputed that Taylor was not involved in Herrick's litigation, so it is not within the third category. Thus, the only even plausible argument is that this case falls within the first category—that Taylor was represented by Herrick. As Taylor demonstrated in his opening brief (at 9-17), however, the first category requires a legal relationship under which the party is accountable to the non-party for the conduct of the litigation. Because Herrick and Taylor did not have such a relationship, and because none of the other categories of privity even arguably applies, Taylor cannot be bound by the results of Herrick's case.

B. The Court of Appeals' Result Was Wrong.

Respondents repeatedly use conclusory terms—that Taylor and Herrick have a "close working relationship relative to these successive cases," that Taylor is Herrick's "proxy," that Taylor's interests are "derivative," and that they are engaged in "coordinated litigation"—to argue that it is appropriate to hold Taylor bound. Both the law and the facts belie respondents' claims.

1. Taylor and Herrick are not "functionally acting as one."

Despite respondents' repeated use of the phrase "a close working relationship relative to these successive

cases" and Fairchild's contention that Herrick and Taylor are "functionally the same" and were "functionally acting as one," the record facts simply do not support the conclusion that Taylor is Herrick's privy.

Here is the sum-total of the facts in the record on summary judgment relating to Herrick and Taylor's relationship:

1) Herrick and Taylor are both members of the Antique Aircraft Association (Pet. App. 2a; J.A. 15);

2) Herrick and Taylor both made FOIA requests for records about the F-45 (J.A. 20-21, 65);

3) After Herrick's case concluded, Taylor hired the lawyer Herrick had used (*id.* at 19, 22-23);

4) Herrick gave Taylor some unprivileged material Herrick had obtained through discovery (*id.* at 27, 28);

5) At some point before Taylor's motion for discovery (filed 16 months after his FOIA request), Herrick asked Taylor for help fixing his airplane (*id.* at 32);

6) Taylor heard about the *Herrick* decision[5] and discussed it in his administrative appeals, complaint, and motion for discovery, (J.A. at 17, 23, 27-32, 43); and

7) Taylor did not dispute the characterization of Herrick as his "close associate" (*id.* at 54).

Respondents concede that the first two facts are insufficient to bind Taylor to Herrick's litigation. *See* Fair-

---

[5] *See* Opp. Mot. to Def. Mot. to Dismiss and for Summ. J., Dist. Ct. Doc. No. 34, at 6.

child Br. 45-46 (stating that the D.C. Circuit's holding "would not justify preclusion in any of the scenarios presented by the *amici*," which include preclusion based on being interested in the same documents and being members of the same organization); Gov't Br. 18-19 (agreeing that multiple, independent requesters could each seek judicial review). *Richards* makes clear that sharing the same interests as a prior litigant does not lead to preclusion.

Nor does Taylor's hiring of the lawyer Herrick used (the third fact) place the men in privity. In *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 168 (1999), this Court explained that preclusion could not be based on use of the same lawyer, even in combination with an identity of interests. Basing privity on hiring the same lawyer would "inhibit the free choice of attorneys and prevent attorneys from developing an expertise through concentration in certain types of litigation." *Collins v. E.I. Dupont de Nemours & Co.*, 34 F.3d 172, 179 (3d Cir. 1994). Indeed, if there were a preclusion-based rule effectively requiring Taylor to have retained a different lawyer, that lawyer would have been well-advised to consult with Herrick's lawyer to learn what he could about the relevant issues.

Taylor also cannot be bound on the basis that Herrick gave him discovery materials and asked him for help with his plane (facts four and five). Both of those facts involve one-sided actions by Herrick, and a person cannot be denied the right to litigate his own claim because of someone else's unilateral actions.

With regard to the sixth fact, discussing a prior case in letters, pleadings, and motions does not place a plaintiff in privity with any party to that case. Taylor brought up *Herrick v. Garvey* to point out that another court had

already found that the requested records had lost their trade secret status in 1955, but that the previous court's conclusion that the records had regained their trade secret status had been based on Herrick's waiver of potentially dispositive arguments. *See* J.A. 23. Taylor's candor in alerting the court to the *Herrick* decision, and his desire for the court to follow the parts of that decision that were favorable to him, do not establish any relationship between him and Herrick or between him and Herrick's litigation.[6]

That leaves the seventh fact: that Taylor did not dispute the characterization of Herrick as his "close associate." But that term, alone, is meaningless; people have many "close associates" in their lives with whom they are not in privity. And if the term "a close associate of Taylor's" is intended to be equivalent to "a privy of Taylor's," then it is not a fact at all, but rather a legal conclusion that is not justified by the facts in the record.

In short, Fairchild's claim (at 41) that the D.C. Circuit's test is narrow and applies res judicata only where the parties "function as one" is proven wrong by the

---

[6]Similarly, the timing of Taylor's FOIA request, which Respondents emphasize, *see* Gov't Br. 15, 39, 40; Fairchild Br. 40, 45, does not show any relationship between him and Herrick. Taylor explained in his motion for discovery that the *Herrick* decision helped motivate him to file his FOIA request, but the motivation he mentioned was not "his relationship with Herrick." Gov't Br. 6. Rather, it was that hearing that the *Herrick* court had found that the F-45 records had lost their trade secret status in 1955 convinced him that he was legally entitled to the records. *See* J.A. 32 ("In view of the fact that it had already been adjudicated that this material ceased being a secret in 1955 . . . [Taylor] requested that the FAA loan the material to him under the FOIA."). Taylor's legal analysis of the *Herrick* decision does not place him in privity with any party to that decision.

facts of this very case. Respondents claim "flexibility" is a defining characteristic of privity, *see, e.g.*, *id.* at 29; Gov't Br. 19, but flexibility does not mean anything goes, and despite respondents' repeated assertions to the contrary, the record evidence does not support the conclusion that Herrick's litigation fulfilled Taylor's due process rights to notice and the opportunity to be heard.

2. Taylor's interests are not "derivative" of Herrick's, nor is he Herrick's "proxy."

In contending that Taylor is Herrick's privy, respondents rely heavily on the notion that Taylor's interests in the records are "derivative" of Herrick's. *See, e.g.*, Gov't Br. 21; Fairchild Br. 45. That claim is wrong both factually and legally.

First, the evidence does not support respondents' repeated assertions that Taylor requested the records because he was helping Herrick restore his airplane. *See, e.g.,* Gov't Br. 15 (claiming Herrick and Taylor were engaged in a "common project to restore Herrick's plane"); *id.* at 21 (claiming Taylor and Herrick had an "intent to restore the very same airplane"); *id.* at 40 (asserting that Herrick's interest in restoring his plane had "given rise . . . to petitioner's request"); Fairchild Br. 25 ("[B]oth Taylor and Herrick wanted the documents to restore Herrick's plane."). Although there is evidence in the record that Herrick *wanted* Taylor's help with his plane, there is no evidence that Taylor requested the records for that reason or even that he was in fact helping Herrick, as the court of appeals acknowledged. *See* Pet. App. 10a (explaining that "the district court erred in stating at summary judgment that Taylor had agreed to help restore the aircraft").

Even if Taylor did want to help Herrick restore his plane, however, that fact would not be relevant in deter-

mining whether Taylor had a right to litigate his claim. The purpose for which Taylor intends to use records to which he has a statutory right is irrelevant.

The following hypothetical illustrates the point. Suppose A and B have separate contracts with C, and C breaches both of the contracts. A and B both decide to sue C for breach of contract, and each, in his respective lawsuit, claims damages of $10,000. A needs an operation he cannot afford and, if he wins his case, is going to put the $10,000 towards the operation. B knows A and feels bad that A cannot afford the operation. Therefore, if B wins his separate case, he is also going to put the money he receives towards paying for A's operation. Does B's decision to give the money he receives to A place him in privity with A? Of course not. The underlying purpose for which someone uses the remedy to which he is legally entitled does not affect whether that person is in privity with the party to another case.

To be sure, people sometimes have *claims* (rather than motivations) that are derivative of other people's, and the fact that the claim is derivative can be relevant to the preclusion inquiry. *See, e.g.*, Restatement (Second) of Judgments § 48 (discussing preclusion in actions for losses resulting from personal injury to another). But Taylor's claim is not derivative of Herrick's. Taylor did not sue over the FAA's denial of Herrick's FOIA request; he sued over the FAA's denial of his own FOIA request. And Congress has made clear that a FOIA requester's right to records does not depend on his reasons for asking for the records. *See* Electronic Freedom of Information Act Amendments of 1996, Pub. L. No. 104-231, § 2(a)(1), 110 Stat. 3048 (1996) (explaining that FOIA establishes and enables "enforcement of the right of any person to obtain access to [agency] records . . . for

any public or private purpose"). Given that Taylor had his own non-derivative right to the requested records, the purpose for which he was going to use those records does not undermine his right to his own day in court.[7]

Respondents' insinuations that Taylor is Herrick's "proxy" fail for similar reasons. As Taylor noted in his opening brief (at 23 n.4) and above (at 4 n.2), non-parties can be precluded if they are bringing a second lawsuit as undisclosed agents for parties to a prior case. The facts in the record, however, do not demonstrate that Taylor is Herrick's agent. Accordingly, and although the relationship between a principal and proxy is an agency relationship, *see* Black's Law Dictionary 1241 (7th ed. 1999) (defining proxy as one "who is authorized to act as a substitute for another"); *cf.* Restatement of Judgments § 85(2), cmt. b (1942) (explaining that "on [a prior litigant's] account" means that the prior litigant "is represented by another"), respondents seem to use the word "proxy" to mean something less than an agent; they imply that Herrick "enlisted" Taylor to bring this case in some unspecified way that did not create an agency relationship but still somehow suffices to bind Taylor. Gov't Br. 19; *see id.* at 43-44. However, even if Taylor had

---

[7]FOIA's standing requirements highlight this point. The government is incorrect in its assertion (at 14) that FOIA litigants are allowed to "avoid a traditional showing of standing." Like all other federal court litigants, FOIA complainants must establish that they suffered an injury in fact: They must show that they "sought and were denied specific agency records." *Public Citizen v. U.S. Dep't of Justice*, 491 U.S. 440, 449 (1989). It is precisely *because* a FOIA complainant's claims are not derivative of other requesters' claims that this showing of standing will not "confirm the extent of [a complainant's] relationship to an earlier litigant." Gov't Br. 15. The injuries that establish a FOIA complainant's standing are his own, not injuries suffered by other complainants.

wanted to help Herrick, that motivation would be irrelevant, as long as he was not acting as Herrick's agent: When a person has an individual legal claim, his personal motivation for pursuing that claim cannot deny him his due process right to the opportunity to be heard.

Moreover, even if there were an amorphous non-agent "proxy" category of preclusion, respondents' claim would still fail on the facts, which do not demonstrate that Herrick enlisted or otherwise put Taylor up to filing this case. As the D.C. Circuit noted, Taylor could have "acted on his own to file an identical FOIA request." Pet. App. 17a. This Court should not affirm a holding that Herrick represented Taylor in *Herrick v. Garvey*—and distort preclusion doctrine principles designed to address situations where litigants were represented in prior cases—based on unproven insinuations that Taylor is representing Herrick here.

3. Respondents have the burden of proof.

Finally, Fairchild falls back on the fact that Taylor did not submit evidence rebutting Fairchild's mere *accusations* that he was Herrick's proxy. *See, e.g.*, Fairchild Br. 28. But the burden of proof was on respondents. *See, e.g.*, *Adams v. Kinder-Morgan, Inc.*, 340 F.3d 1083, 1093, 1094 (10th Cir. 2003); *Browning v. Levy*, 283 F.3d 761, 772 (6th Cir. 2002); *Gonzalez v. Banco Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994); 18 Wright, Miller, & Cooper § 4405, p. 83 ("Once properly raised, a party asserting preclusion must carry the burden of establishing all necessary elements."); Fed. R. Civ. P. 8(c) (designating res judicata an affirmative defense). Taylor cannot be denied his day in court for not meeting a burden he did not have.

C. There Is No FOIA Exception to Due Process or Preclusion Principles.

Unable to demonstrate that Taylor and Herrick had a relationship sufficient to establish that they were in privity, respondents suggest that such a relationship is not necessary in FOIA cases. Respondents' argument is foreclosed by *Richards*.

In *Richards*, this Court distinguished between two types of taxpayer cases, and whether they are labeled two types of "public-law" cases or whether they are labeled "public-law" and "private-law" cases is irrelevant. The critical point is that this case, like *Richards*, does not fall into the type of case where expanded notions of preclusion are permissible. On the one hand are 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." 517 U.S. at 803. In those cases, the taxpayer has not suffered a personal injury, and states can deny him standing altogether, or, if they choose, grant standing but apply more stringent standards of preclusion than would be permissible in cases where a litigant's personal rights are at issue. On the other hand are cases in which the plaintiff *has* suffered a personal injury. As to the former category of cases, "States have wide latitude to establish procedures . . . to limit the number of judicial proceedings that may be entertained." *Id.* But as to the second category—a category that includes both *Richards* and this case—"the State may not deprive individual litigants of their own day in court." *Id.*

According to the government, FOIA cases are in the first category because "the duty to disclose under FOIA is owed to the public generally," Gov't Br. 34, and, there-

fore, FOIA litigants have only an "indirect interest" in their claims. *Id.* at 16. As Taylor explained in his opening brief (at 31-32), however, Congress sought to ensure the public's access to records by providing every FOIA requester with a *personal right* to the requested records. *See* 5 U.S.C. § 552(a)(3)(A)(iii) (providing that records shall be made available to a "person"); *id.* § 552(a)(4)(B) (explaining that when an agency improperly withholds records, it is withholding them "from the complainant").[8] As this Court has held, when someone is denied records to which he is statutorily entitled, he has suffered a "concrete" and "particular" injury in fact. *FEC v. Akins*, 524 U.S. 11, 21 (1998); *see also Public Citizen*, 491 U.S. at 449 (failure to receive records under FOIA is a "distinct injury"); *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 373-74 (1982) (injury to statutorily created right to information is "specific injury").

Moreover, the government's claim that a FOIA case is "akin to a taxpayer's right to bring an action *quo warranto* on behalf of the public at large," Gov't Br. 46, is patently wrong. "A quo warranto proceeding is a public proceeding in the name of the State, a necessary party." *Corprew v. Tallapoosa County*, 241 Ala. 492, 494 (1941) (cited in *Richards*, 517 U.S. at 804); *see also* 65 Am. Jur. 2d *Quo Warranto* § 79. Taylor, however, did not file this claim as a relator on behalf of the state; quite the contrary, the government is the defendant here, not the plaintiff, and the injury about which Taylor is complaining is not the public's, but his own. *See* 5 U.S.C.

---

[8] That FOIA's right to records is individual is highlighted by the fact that, as amici National Security Archive *et al.* point out (at 10), FOIA requesters who receive records from the government are under no obligation to disseminate them or otherwise share them with other requesters.

§ 552(a)(4)(B) (enabling court to "order the production of any agency records improperly withheld *from the complainant*") (emphasis added). And even the government concedes that, unlike in quo warranto cases, in which one action is binding on the whole public, there can be multiple FOIA lawsuits over the same records. Gov't Br. 38.

In short, unlike in the quo warranto and taxpayer standing cases cited in *Richards*, there is nothing "indirect" about the impact of a FOIA denial on a requester. Taylor did not sue over a diffuse injury suffered by the public at large, but over a concrete and particular injury he himself suffered when he was denied information to which he was legally entitled. That other people are also legally entitled to those records and "might make the same complaint after unsuccessfully demanding disclosure . . . does not lessen [his] asserted injury." *Public Citizen*, 491 U.S. at 449-50.

FOIA's standing requirements, which the government claims weigh in favor of treating FOIA cases as though no individual rights were at stake, demonstrate that FOIA requesters suffer direct injuries when their requests are denied. Contrary to the government's assertions that in a "traditional private suit[]" Taylor would need to show a relationship with Herrick to demonstrate he had standing, Gov't Br. 45, and that relationship would "stymie" the suit, *id.*, a private litigant with a direct legal interest in receiving documents from a defendant would *not* need to demonstrate his relationship with anyone else to show standing. For example, if Taylor and Fairchild entered into a contract under which Fairchild agreed to give Taylor all records in its possession about the F-45, and Fairchild breached that contract, Taylor would not need to demonstrate his relationship with Herrick or anyone else to sue Fairchild. He

would have standing because he would be the injured party. And he would remain an injured party, with standing to sue, and with the due process right to his own day in court, even if Fairchild entered into similar agreements with thousands or millions of other people. Similarly, here, the reason Taylor does not need to show that he has a relationship with Herrick (or anyone else) to have standing is because he is suing over his own injury. As in the hypothetical, he has suffered the direct injury of being denied records to which he is legally entitled. The only difference is that his entitlement comes from statute rather than from contract.

Respondents posit that FOIA requesters are due less process because their legal entitlement is to documents rather than to money damages, civil rights, or the right to alienate property. Fairchild Br. 42-43; Gov't Br. 45-46. They provide no rationale, however, for why a statutory right to records is deserving of less protection than any other statutory right. And Taylor was not just denied documents, but his "cause of action," which, in and of itself, "is a species of property protected by the . . . Due Process Clause." *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982); *see also Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

In any event, the cases respondents cite about due process requirements depending on the nature of the interest are all off point. Those cases discussed what *procedures* fulfill due process requirements. *See, e.g.*, *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005); *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *Goldberg v. Kelly*, 397 U.S. 254, 260 (1970); *Cafeteria & Rest. Workers Union v. McElroy*, 367 U.S. 886, 895 (1961). But there is no flexibility in whether a litigant must receive a full and fair opportunity to litigate his claim. *See Mullane*, 339 U.S.

at 313-14. The question here is not about the sufficiency of the *type* of notice and opportunity to be heard Taylor received. Taylor received no notice or opportunity to be heard at all.

To be sure, FOIA gives anyone who has exhausted his administrative remedies the right to judicial review, which can lead to multiple cases over similar records. The possibility of multiple cases, however, does not justify denying each of the injured parties his opportunity to be heard on his own claim. In *Richards*, numerous people had standing to sue over the constitutionality of the county tax at issue, but, nonetheless, the Court rejected the defendants' argument that "the character of their action renders the usual constitutional protections inapplicable." *Richards*, 517 U.S. at 802-03.

Further, despite the government's sky-is-falling predictions (at 43) that applying normal constitutional protections to FOIA cases would lead to "no end to FOIA litigation," respondents have not demonstrated a pattern of successive requesters filing suit over the same records. And even if there were such a pattern, the law already has methods of handling successive lawsuits over the same issue: stare decisis, or, in some cases, sanctions for litigation that has no reasonable basis in law or fact. *See* Fed. R. Civ. P. 11(c). Litigation is expensive, and FOIA requesters are not going to file suit if they know they will lose. But the fact that the rule of law announced in a case may apply to a later litigant does not justify finding that litigant "in privity" with a party to the case, or binding him to its judgment without such a finding. *See Richards*, 517 U.S. at 805; *see also S. Cent. Bell Tel. Co.*, 526 U.S. at 168.

In the end, respondents' argument comes down to a complaint that they should not have to defend multiple

requesters' suits for similar records. They insist, however, that their approach would "affect only the rare successive plaintiff," Fairchild Br. 46, demonstrating that preclusion is not the solution to repeated litigation over the same records. Moreover, in contending their approach would preclude few cases, respondents accept that FOIA allows for multiple requests and lawsuits over the same records. *See id.*; Gov't Br. 38. As the government points out (at 47), Congress could have chosen not to provide all requesters with a statutory entitlement to records and established a statutory scheme under which only one lawsuit could be brought over any given set of records. *See* 31 U.S.C. § 3730(b)(5) (permitting only one qui tam action on a set of facts); *cf.* 33 U.S.C. § 1319(g)(6)(A)(ii) (citizen suits under Federal Water Pollution Control Act Amendments of 1972 barred by prior actions by state). But Congress did not set up such a scheme. Instead, it gave "any person" the right to non-exempt requested records, 5 U.S.C. § 552(a)(3)(A)(iii), and it gave any requester the right to seek judicial review. *Id.* § 552(a)(4)(B). Although "the legislature may elect not to confer a property interest," once that interest is created, its deprivation "must be analyzed in constitutional terms." *Logan*, 455 U.S. at 432 (internal citations omitted). Respondents' gripe with Congress's chosen statutory scheme does not justify denying FOIA requesters their right to their own day in court.

CONCLUSION

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

Respectfully submitted,

MICHAEL JOHN PANGIA
THE LAW OFFICES OF
MICHAEL J. PANGIA
1717 N Street, NW
Washington, DC 20036
(202) 955-6450

ADINA H. ROSENBAUM
BRIAN WOLFMAN
Counsel of Record
SCOTT L. NELSON
PUBLIC CITIZEN LITIGATION
GROUP
1600 20th Street, NW
Washington, DC 20009
(202) 588-1000

Counsel for Petitioner

April 2008