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No. 07-371

IN THE

# Supreme Court of the United States

BRENT TAYLOR,
*Petitioner*,

v.

ROBERT A. STURGELL, ADMINISTRATOR,
FEDERAL AVIATION ADMINISTRATION, AND
THE FAIRCHILD CORPORATION,
*Respondents.*

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

## BRIEF IN OPPOSITION

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## QUESTION PRESENTED

Whether the D.C. Circuit correctly concluded, based on the particular facts of this case, that petitioner Brent Taylor's Freedom of Information Act lawsuit seeking to compel disclosure of privately-owned aircraft plans was barred by res judicata, because Taylor was in privity with a prior FOIA complainant who lost his lawsuit to obtain the identical plans?

## CORPORATE DISCLOSURE STATEMENT

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

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## BRIEF IN OPPOSITION

## INTRODUCTION

Respondent The Fairchild Corporation respectfully requests that the Court deny the petition for a writ of certiorari seeking review of the decision of the United States Court of Appeals for the District of Columbia Circuit in this case.

## COUNTERSTATEMENT

In 1997, Greg Herrick filed a Freedom of Information Act request with the Federal Aviation Administration seeking disclosure of plans and specifications for the F-45, a 1930s vintage aircraft built by the corporate predecessor of respondent The Fairchild Corporation. Pet. App. 2a. Fairchild had

provided the plans and specifications to the FAA's predecessor agency in order to obtain the "type certificate" required to build, sell, or use the aircraft. J.A. 112.[1]

Today, there are only two F-45s in existence, and Herrick owns one of them. Pet. App. 24a. Herrick sought the plans and specifications from the FAA to restore that airplane. *Id.* at 10a. After consulting with Fairchild, the FAA denied Herrick's request on the ground that the information contained Fairchild trade secrets, and was therefore exempt from FOIA disclosure. *Id.* at 2A. Herrick sued the FAA in the U.S. District Court for Wyoming to compel disclosure. *Id.* The district court granted summary judgment for the FAA, concluding that the agency properly had withheld the documents, and the Tenth Circuit affirmed. *Id.*

About one month after the Tenth Circuit affirmed the Wyoming District Court's judgment against Herrick, Herrick's attorney submitted another FOIA request to the FAA—this time on petitioner Taylor's behalf—seeking the same plans and specifications for the F-45. *Id.* at 2a-3a. Taylor and Herrick are associates; Herrick previously had asked Taylor, an aircraft mechanic, to help restore Herrick's F-45. J.A. 49. The FAA denied Taylor's FOIA request, again on the ground that the information was exempt from disclosure. Pet. App. 3a. Taylor—still represented by Herrick's lawyer—sued the FAA in the U.S. District Court for the District of Columbia. *Id.* at 2a-3a. Fairchild intervened.

The FAA and Fairchild moved for summary judgment, arguing, among other things, that Taylor's suit was barred by res judicata (claim preclusion), as a result of Herrick's prior litigation. *Id.* at 3a The FAA and Fairchild explained that Herrick and Taylor were in privity for preclusion purposes because of the relationship they shared. *Id.* Fairchild pointed

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[1] References to "J.A." are to the Joint Appendix submitted to the D.C. Circuit.

to the apparent "tactical maneuvering" of Herrick and Taylor to avoid the effect of the judgment in Herrick's case. *Id.* And Fairchild also filed a statement of undisputed material facts in which it described Herrick and Taylor as "close associates." *Id.* at 3a. Taylor did not challenge that characterization. *Id.*

The District Court entered summary judgment for the FAA and Fairchild on the ground that Taylor's action was barred by claim preclusion. *Id.* at 22-23a. In finding privity between Herrick and Taylor, the court concluded, based on the facts of this particular action, that the case presented "two individuals * * * who are members of the same antique aircraft association, who keep apprised of each other's litigation, and who successively used the same lawyer to seek identical information regarding an exceedingly rare aircraft that Herrick happens to own and Taylor has agreed to repair." *Id.* at 33a. Taylor appealed.

A unanimous D.C. Circuit panel affirmed, holding that Taylor was Herrick's privy and was therefore bound by the earlier judgment. *Id.* at 1a-2a. The 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." *Id.* at 5a-6a, citing *Richards* v. *Jefferson County*, 517 U.S. 793, 798 (1996). Thus, in some circumstances, a non-party to the original action whose interests were adequately represented in the first action may be barred from later raising the same claim, a form of privity known as "virtual representation." *Id.* at 6a.

The court also explained that under *Richards*, a finding of privity requires identical interests and adequate representation, as well as some relationship between the litigants in the successive actions. *Id.* at 7a. In other words, "there can be no virtual representation absent an affirmative link between the later litigant and either the prior party or the prior case." *Id.* at 8a-9a. In considering whether Herrick was Taylor's

privy, the court examined [a] the identity of interests between Herrick and Taylor, [b] whether Herrick adequately represented Taylor in the earlier litigation, and [c] whether there was an affirmative link between Herrick and Taylor by virtue of the undisputed "close associat[ion]" between the two. *Id.* at 3a, 8a-18a.

Evaluating the identity of interests between Herrick and Taylor in terms of their incentives to litigate, the court concluded that Herrick and Taylor had the same motive for seeking the plans and specifications: the restoration of Herrick's F-45. *Id.* at 9-11a. The court also observed that Herrick—the owner of the F-45—had at least as strong an incentive to litigate as Taylor, because the restoration of Herrick's airplane hinged on his obtaining the plans and specifications. *Id.* at 10a-11a. The interests of Herrick and Taylor were therefore identical.

Next, the court concluded that Taylor had been adequately represented by Herrick in the prior litigation. *Id.* at 11a-14a. The court again pointed to Herrick's strong incentive to litigate zealously in his own prior suit, finding it "eminently reasonable to believe an individual with a strong incentive to litigate a particular matter, by defending his own interest[,] adequately represents others with the same interest." *Id.* at 14a. Additionally, Taylor's use of Herrick's attorney, though not dispositive on the issue of adequate representation, strongly suggested Taylor's satisfaction with the manner in which Herrick's case was litigated. *Id.*

Last, the court reviewed the relationship between Herrick and Taylor: Herrick had requested Taylor's assistance with the restoration of Herrick's F-45; Herrick and Taylor were working together in Taylor's litigation; and Herrick and Taylor were close associates. *Id.* at 15a-16a. On these facts, the court agreed with the District Court that Herrick and Taylor were in a "close relationship" for the purpose of

determining whether Herrick was Taylor's virtual representative in the prior litigation. *Id.* at 16a.

The D.C. Circuit took pains to emphasize the fact-specific nature of its holding, noting that "[m]atters might look different if Taylor had submitted evidence before summary judgment explaining * * * why their common counsel's representation of Herrick did not adequately represent Taylor's interests, or demonstrating Taylor's relationship with Herrick was in fact nothing more than a shared interest in antique aircraft * * * or showing that Herrick had not suggested or offered to assist with Taylor's claim for the same documents." *Id.* at 18a. In the absence of such evidence, however, the record supported a finding that Herrick and Taylor were in privity. *Id.* The court accordingly affirmed the District Court's judgment. Taylor did not seek rehearing of the panel's unanimous ruling, nor did he seek rehearing *en banc*.

## REASONS FOR DENYING THE WRIT

The petition does not meet any of the established criteria warranting certiorari. *See* Sup. Ct. R. 10. The D.C. Circuit panel did not "enter[] a decision in conflict with the decision of another United States court of appeals on the same important matter." *Id.* R. 10(a). Taylor's protestations about a circuit split are substantially overblown; the result on the facts of this case would have been the same even in the circuits Taylor identifies as presenting purportedly "conflicting" opinions. *See id.* The D.C. Circuit also did not decide "an important federal question in a way that conflicts with relevant decisions of this Court." *See id.* R. 10(c). Nor, most assuredly, is this an issue of national importance. *See id.* The D.C. Circuit merely reviewed and approved the District Court's factbound determination that Taylor was in privity with Herrick. The petition should be denied.

## I. THERE IS NO RELEVANT DIVISION AMONG THE FEDERAL COURTS OF APPEALS.

Taylor maintains that the D.C. Circuit's holding conflicts with various decisions of other courts of appeals, which Taylor asserts tend not to find litigants in privity for purposes of res judicata unless there is a "legal relationship" between them, or unless the litigant against whom preclusion is sought had notice of the prior case. Pet. App. 5-6. Taylor is mistaken. There is no mechanical formula by which courts determine the existence of privity. Rather, a determination that one party was adequately represented by another is made after a "functional inquiry" focusing on case-specific facts and circumstances. *Chase Manhattan Bank, N.A.* v. *Celotex Corp.*, 56 F.3d 343, 346 (2nd Cir. 1995) ("[w]hether there is privity between a party against whom claim preclusion is asserted and a party to prior litigation is a functional inquiry in which the formalities of legal relationships provide clues but not solutions").

None of the other circuit court cases Taylor cites arose from facts like those in this case. And none of those cases accordingly supports Taylor's contention that the outcome in this case would have been different if it had been decided by another court of appeals.

### A. Courts Faced with a Privity Question Examine the Facts of Each Case—Not Merely Whether a "Legal Relationship" Exists Between the Parties.

Taylor contends that several other circuits would have reached a different result than the unanimous panel reached in this case because there was no "legal relationship" between Taylor and Herrick. Pet. App. 9-10. That is not correct.

Contrary to Taylor's assertion, while the Eleventh Circuit considers the existence of a legal relationship an important

factor in its virtual representation analysis, *see EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1287 (11th Cir. 2004), such a relationship is not a prerequisite to a finding of privity by virtual representation in all cases. *See, e.g.*, *Gustafson* v. *Johns*, 213 Fed. App'x 872, 876 (11th Cir. 2007) (not reported) (expressly stating that a legal relationship or legal accountability is not an absolute requirement for privity under virtual representation theory); *Jaffree* v. *Wallace*, 837 F.2d 1461, 1467 (11th Cir. 1988) (discussing relevant factors in virtual representation analysis and finding privity in the absence of a legal relationship).

The Fourth and Sixth Circuits, for their part, have been hesitant to embrace the term "virtual representation" in cases where there is no clear relationship between the litigants in successive suits, but they have applied the same principles to preclude claims where the litigants in consecutive cases were, like Herrick and Taylor, much more than "mere strangers" to each other.

For example, in *Eddy* v. *Waffle House, Inc.*, 482 F.3d 674, 680 (4th Cir. 2007), *petition for cert. filed* 76 U.S.L.W. 3212 (U.S. Oct. 11, 2007) (No. 07-495), the Fourth Circuit held that the family members of a party against whom a jury verdict had been entered in a discrimination case were collaterally estopped from pursuing their own claims because the two groups of litigants sought to vindicate the same rights, the cases arose from the same incident, and the litigants were represented by the same attorney. Though not directly discussed by the court as a factor in its privity analysis, the parties also shared a close personal relationship. *Id.* at 676. While the majority did not invoke "virtual representation" by that name in its discussion of estoppel principles, it is the only plausible basis for the preclusion ruling. *See id.* at 684-685 (Michael, J., dissenting) (identifying virtual representation as the basis of the court's holding).

Similarly, in *Saylor* v. *United States.*, 315 F.3d 664, 668 (6th Cir. 2003), the Sixth Circuit observed that "[n]ormally, a judgment is not claim preclusive as to non-parties." But that presumption can be overborne, the court of appeals explained, where (among other things) the subsequent party's interests were "adequately represented" in the first case. *Id.* at 668-669. The *Saylor* court concluded that non-parties were bound by the judgment in an earlier case brought by similarly situated plaintiffs because they had been adequately represented in that first suit: they brought "precisely the same claim," with "not one fact" distinguishing the first suit from the second, and their "interests [we]re identical." *Id.* at 668-669. There was no legal relationship between the two groups of related plaintiffs, nor were they legally accountable to each other. *See id.; see also* 18A Charles Alan Wright *et al.*, Federal Practice and Procedure § 4457 at n.24 (2d ed. 2002) (discussing case in the context of virtual representation). And, just as in this case, had the plaintiffs in the first suit succeeded, plaintiffs in the second suit would have benefited from the result—negating the need for them to bring their own subsequent claim.

Moreover, none of the cases on which Taylor relies is factually similar to this one: none involved two individuals who shared the same narrow objective in litigation, who know each other, who worked together, who used the same attorney in pursuing their claims, and who would have shared the same benefit if either of their suits had been successful. In light of these important distinctions, and because a finding of privity is always a factbound inquiry, none of the cases cited by Taylor supports his assertion that the outcome in this case would have been different had it been decided by some other circuit court of Taylor's choosing.

### B. Whether Notice Of and an Opportunity To Participate in the First Litigation Is Required for Res Judicata Depends on the Factual Circumstances of Each Case.

Taylor next points to cases from the First and Seventh Circuits that he contends require prior notice (at the time of the first litigation) to the party against whom claim preclusion is asserted. Those cases, which involved parties who were mere strangers to each other, are inapposite.

In *Gonzalez* v. *Banco Cent. Corp.*, 27 F.3d 751 (1st Cir. 1994), the court specifically noted that the parties in the first and second actions did not share any "special type of close relationship" with each other. *Id.* at 762 (noting that the litigants were "unrelated lambs purportedly fleeced by the same cadre of unscrupulous sheepherders"). In discussing whether notice was required before a non-party would be bound by prior litigation, the court held that constructive notice was enough to satisfy due process concerns, and that such notice could be implied, among other circumstances, from a close relationship between litigants, or from "tactical manuevering" by litigants. *Id.* at 761.[2]

Indeed, because of the "discretionary character" of the virtual representation doctrine, the court expressly eschewed any rigid standard for its application, and made clear that it would "not conclude that a case falls outside the theory's purview solely because it does not fit snugly into some preconceived niche or mirror some established fact pattern." *Id.* at 762-763.

*Perez* v. *Volvo Car Corp.*, 247 F.3d 303 (1st Cir. 2001) also offers no insight into how the First Circuit would rule on

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[2] Taylor therefore is wrong to suggest that only a "legal relationship" could provide constructive notice under the court's holding in *Gonzalez*.

the facts of this particular case. In *Perez*, the court held that purchasers of one model of automobile were not bound by the judgment in a previous class action in which the certified class included only purchasers of a different model of automobile, even though both models were built by the same manufacturer. *Id.* at 311-312. Those facts are quite a far cry from those here. The *Perez* court simply held that virtual representation cannot be used as a short cut to evade the due process protections applicable in the context of class action litigation, a concern not implicated by this case. *See* Pet. App. 17a-18a (noting that this case's unusual circumstances would limit its prospective effect on other litigants).

Similarly, in *Tice* v. *American Airlines, Inc.*, 162 F.3d 966 (7th Cir. 1998) the Seventh Circuit rejected the use of virtual representation as a substitute for procedural safeguards in the class action context where litigants in successive suits were strangers to each other. *Id.* at 974 (noting the absence of any relationship between the litigants). In fact, the two groups of successive plaintiffs in *Tice* had interests adverse to each other. *See id.* at 973 (noting that "[w]hat helps [one group of plaintiffs] may directly hurt the other").

*Gonzalez*, *Perez*, and *Tice*, in short, are so factually dissimilar from this case that the analysis in each sheds no light on how those courts would have ruled in the instant litigation.

## II. THE DECISION DOES NOT CONFLICT WITH DECISIONS OF THIS COURT.

Taylor also contends that the D.C. Circuit's decision conflicts with this Court's holding in *Richards* because the D.C. Circuit held that notice of the prior litigation is not an absolute requirement in all cases where claim preclusion is asserted.

As Chief Judge Ginsburg notes in his opinion, however, this Court pointedly left open this question in *Richards*. Pet. App. 12a, citing *Richards*, 517 U.S. at 801. In any event, it is not clear on this record whether Taylor did, in fact, have notice of Herrick's earlier litigation while that litigation was pending, *see* Pet. App. 13a-14a, making this case an inappropriate vehicle for resolving that open issue.

Taylor also erroneously argues that under *Richards*, a party cannot be bound by the judgment in an earlier case unless the court in the earlier case took special precautions to ensure that the interests of the absent party were adequately represented. Pet. App. 12-13. As Taylor himself notes, however, this is true only in the absence of "a sufficient relationship between the parties to the first and second litigation." *Id.* at 12. The *Richards* Court noted that the plaintiffs in the second suit were "mere strangers" to the plaintiffs in the first, and thus could not be bound by the judgment in that case unless the first court took precautions to protect their interests. Here, by contrast, the D.C. Circuit specifically found that Herrick and Taylor were close associates who collaborated with each other in bringing successive lawsuits, and that Herrick adequately represented Taylor in the earlier litigation. *Id.* at 14a-16a.

## III. THE D.C. CIRCUIT'S DECISION IS CORRECT.

The D.C. Circuit thoroughly examined and upheld the District Court's determination of privity, and its decision represents a careful and logical application of this Court's precedent to the unusual facts of this case. The case was correctly decided.

## CONCLUSION

For all of the foregoing reasons, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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