No. 17-1695

IN THE

Supreme Court of the United States

CALIFORNIA STATE TEACHERS' RETIREMENT SYSTEM, ET AL.,

Petitioners,

v.

AIDA M. ALVAREZ, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Delaware

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BRIEF IN OPPOSITION

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QUESTION PRESENTED

As pertinent here, claim or issue preclusion comports with due process when (1) "there is 'privity' between [the] party to the second case and a party who is bound by an earlier judgment" and (2) the party to the second action "ha[d] his interests adequately represented by someone with the same interests" in the first action. *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996) (quotation marks omitted). In this case, the courts below found—and Petitioners do not dispute in this Court—that (1) there was privity between Petitioners and the plaintiffs in an earlier action, and (2) Petitioners' interests were adequately represented by those earlier plaintiffs. The question presented is whether the Supreme Court of Delaware, in accordance with the unanimous position of the federal courts of appeals, correctly concluded in light of these unchallenged findings that Petitioners' due process rights were not violated by precluding them from relitigating the identical issue that was actually adjudicated in a previous action.

RULE 29.6 STATEMENT

Pursuant to this Court's Rule 29.6, undersigned counsel states that Walmart Inc. (formerly Wal-Mart Stores, Inc.) has no parent corporation and no other publicly held corporation owns 10% or more of its stock.

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BRIEF IN OPPOSITION

Respondents—Walmart Inc. and current or former directors and officers of Walmart and its subsidiaries—respectfully submit that the petition for a writ of certiorari should be denied.

OPINIONS BELOW

In addition to the opinions cited in the petition (at 3), the order of the United States District Court for the Western District of Arkansas dismissing the predecessor action (App., *infra*, 1a-24a) is unreported but available at 2015 WL 13375767; the opinion of the Eighth Circuit affirming that order (App., *infra*, 25a-51a) is reported at 829 F.3d 983 (2016).

JURISDICTION

The judgment of the Supreme Court of Delaware was entered on January 25, 2018. Justice Alito extended the time for filing the petition for a writ of certiorari to June 22, 2018, and the petition was filed on June 21, 2018. Although Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1257(a), the decision below rests on independent and adequate state grounds.

INTRODUCTION

For decades, appellate courts have unanimously held that a stockholder-plaintiff who brings a derivative action on behalf of a corporation may be precluded from relitigating the issue of demand futility if a court has already decided that demand would not have been futile (and therefore that the corporation, through its board, continues to control the legal claim in issue). Petitioners now ask this Court to re-

ject this unbroken line of authority as inconsistent with the Due Process Clause—which, they assert, permits stockholders to relitigate the issue of demand futility *ad infinitum* until some stockholder, in some court, prevails. That request is as baseless as it sounds.

No court has ever adopted Petitioners' novel reading of the Due Process Clause. In fact, no court had even *speculated* that the Constitution requires potentially infinite relitigation until a Delaware Vice Chancellor posited this view in dicta a couple of years ago. Although the Chancellor in this case urged adoption of that view, the Delaware Supreme Court correctly rejected it—recognizing that a demand futility judgment in a derivative action precludes subsequent stockholders from relitigating the identical issue so long as they were in privity with the stockholders in the first action and those stockholders provided adequate representation. Because Petitioners do not challenge the findings on these established elements of preclusion, the judgment below rests on independent and adequate state grounds.

The court below also correctly concluded that Petitioners' due process rights were not violated by the application of well-settled principles of collateral estoppel. That conclusion does not conflict with any decision of this Court or any other appellate court; on the contrary, every court to have reached the question has decided it the same way. That consistent approach to preclusion is supported by the important policy favoring finality, as well as principles of full faith and credit that undergird the constitutional structure. Further review is unwarranted.

STATEMENT

1. On April 21, 2012, *The New York Times* published an article containing allegations that officials at Wal-Mart de Mexico ("WalMex"), a subsidiary of Walmart, had made improper payments to facilitate expansion in Mexico. Pet. App. 119a. In the ensuing weeks, Walmart stockholders filed eight derivative actions in the Western District of Arkansas and Arkansas state courts, and seven in the Delaware Court of Chancery, each naming Walmart as the real-party-in-interest. Pet. App. 4a; *Cottrell v. Duke*, 829 F.3d 983, 988 n.3 (8th Cir. 2016).

The Arkansas actions were consolidated in federal court, and on May 31, 2012, the Arkansas plaintiffs filed a consolidated complaint alleging claims for breach of fiduciary duty and violations of Sections 14(a) and 29(b) of the Securities Exchange Act of 1934. Pet. App. 60a. Although they thought "long and hard" about making a books-and-records demand under Section 220 of the Delaware General Corporation Law to obtain documents that might support their allegation that it would have been futile to demand that Walmart's board of directors pursue the claims, the Arkansas plaintiffs ultimately determined that a books-and-records demand was unnecessary because "crucial excerpts from a number of key documents underlying the *New York Times* article were available on the article's webpage." Pet. App. 52a, 157a-158a. "[T]hese underlying documents," the Arkansas plaintiffs concluded, "'provided sufficient particularized allegations to surmount the demand futility hurdle.'" Pet. App. 157a.

The Delaware actions, which were consolidated in the Court of Chancery, were based on the same al-

leged breach of fiduciary duty raised by the Arkansas plaintiffs. Pet. App. 4a. Unlike the Arkansas plaintiffs, however, Petitioners sought books and records under Section 220. Pet. App. 6a. In response, Walmart produced more than 3,000 documents, including board and audit committee minutes and materials relating to the underlying WalMex allegations, and board and audit committee minutes and materials relating to Walmart's Foreign Corrupt Practices Act compliance. *Wal-Mart Stores, Inc. v. Indiana Elec. Workers Pension Tr. Fund IBEW*, 95 A.3d 1264, 1269 (Del. 2014). Unsatisfied, Petitioners challenged the adequacy of Walmart's production, and spent nearly three years litigating this issue—during which time Petitioners' derivative action did not proceed. Pet. App. 122a-123a. However, Petitioners never turned up any proverbial smoking gun.

2. Respondents made every effort to litigate these derivative actions—including the often-dispositive issue of demand futility—in Delaware, where Walmart is incorporated. Respondents filed a Motion to Proceed in One Jurisdiction in the Delaware Court of Chancery *and* a Motion to Stay the Entire Action in the Western District of Arkansas. Pet. App. 5a, 91a. After the Chancellor urged the respective courts to "stay in their lanes," the Arkansas court granted the requested stay; but the Eighth Circuit (on the Arkansas plaintiffs' appeal) reversed on the ground that a blanket stay of the Arkansas action was improper because the Arkansas plaintiffs alleged federal disclosure claims not presented in the Delaware action. Pet. App. 7a.

Respondents then sought a more limited stay of the Arkansas action so that the Court of Chancery

could decide the question of demand futility presented by the parallel Delaware and Arkansas actions. Pet. App. 7a-8a. Respondents' motion specifically alerted the Arkansas court to the Delaware plaintiffs' Section 220 action, and indicated that a motion to dismiss for failure to plead demand futility would be filed in Delaware at the conclusion of that action. Pet. App. 120a. The Arkansas court denied the stay, however, leaving Respondents no choice but to litigate demand futility in Arkansas. Pet. App. 8a.

3. All parties in the Arkansas and Delaware actions were aware that the decision of the first court to decide demand futility would likely have preclusive effect. The Arkansas court said so, *In re Wal-Mart Stores, Inc. S'holder Deriv. Litig.*, 2014 WL 12700619, at *2 (W.D. Ark. June 4, 2014) ("It is likely that the first decision on demand futility will be entitled to collateral estoppel effect"), and Petitioners moved the Delaware Supreme Court to expedite their books-and-records lawsuit because they "face[d] a severe risk that the Arkansas decision will have collateral estoppel effect in Delaware." Pet. App. 8a-9a. Nevertheless, Petitioners made no attempt to participate in the Arkansas proceedings, whether by formally intervening, filing a statement of interest, or participating as amici curiae. Pet. App. 9a.

On March 31, 2015, the Arkansas federal court found that the Arkansas plaintiffs had failed adequately to plead demand futility, and dismissed their action with prejudice. *In re Wal-Mart Stores, Inc. S'holder Deriv. Litig.*, 2015 WL 13375767, at *1 (W.D. Ark. Apr. 3, 2015) (amending March 31, 2015 order); *see also* Pet. App. 10a, 122a. The Eighth Cir-

cuit subsequently affirmed the dismissal. *Cottrell*, 829 F.3d at 997.

4. *After* the Arkansas action was dismissed, Petitioners filed a consolidated complaint in the Delaware Court of Chancery. Pet. App. 123a. Respondents moved to dismiss that complaint on the ground, among others, that Petitioners were collaterally estopped from relitigating the issue of demand futility—which had been decided in Arkansas. Pet. App. 10a, 123a.

a. The Court of Chancery granted the motion to dismiss. Applying Arkansas preclusion law, as all parties agreed it should, Pet. App. 126a, the court held that Petitioners were barred from relitigating the Arkansas court's demand futility finding. The court found that Petitioners were "parties in the prior litigation or . . . in privity with those parties," Pet. App. 127a, agreeing with "[t]he vast majority of other jurisdictions that have decided the issue . . . that privity exists between different stockholder plaintiffs who file separate derivative actions" because "the corporation is the real party in interest" and "the corporation is bound by the results of the first judgment in subsequent litigation, even if the result is to preclude a different stockholder's subsequent derivative claim." Pet. App. 137a-140a. The court acknowledged that its finding of privity-based preclusion was subject to due process constraints, Pet. App. 148a, recognizing that the Constitution required a finding that "the absent parties [were] in fact adequately represented by parties who are present," Pet. App. 149a (quotation marks omitted). The Court of Chancery found the Arkansas plaintiffs adequate because their "interests . . . are aligned" with

Petitioners' and they were not "grossly deficient" in either prosecuting the action or in electing to forego a Section 220 demand. Pet. App. 151a (citing Restatement (Second) of Judgments § 42 & Reporter's Note).

b. On appeal, the Delaware Supreme Court "ha[d] no disagreement with the Court of Chancery's analysis of Arkansas [preclusion] law." Pet. App. 94a. The court also expressed skepticism about Petitioners' attempts to invoke fairness concerns in support of their challenge to the preclusion finding. Petitioners "were warned that the Arkansas court might rule first," yet declined to make any attempt to participate in that action. Pet. App. 97a. In the court's view, "[o]nce the litigation train began going down the Arkansas tracks, it would seem to have been incumbent on [Petitioners] to take steps there to attempt to prevent foreclosure of their action in Delaware." Pet. App. 96a-97a. Nevertheless, the Delaware Supreme Court expressed concern that the Court of Chancery had "conflated" state-law privity analysis with the federal due process analysis, and "did not explicitly address" this Court's decision in *Smith v. Bayer*, 564 U.S. 299 (2011). Pet. App. 100a, 103a. The court concluded that "the importance of the Due Process issue merits closer examination." Pet. App. 103a. It therefore remanded the action for further limited briefing on that issue. Pet. App. 108a.

On remand, the Court of Chancery proposed that the Delaware Supreme Court adopt a new due process "rule" that "no court" had ever before adopted. Pet. App. 59a, 87a-88a. Although the court acknowledged that *all* of the "[c]ourts that have considered

whether a stockholder plaintiff in a second derivative action is barred from re-litigating the issue of demand futility . . . have found that due process is satisfied if the plaintiff in the first action adequately represented the stockholders of the corporation," Pet. App. 57a, it concluded that this "does not mean that a better approach is not worthy of consideration," Pet. App. 58a. Such an approach, the Chancellor said, had been expressed in dicta from *In re EZCORP, Inc. Consulting Agreement Derivative Litigation*, 130 A.3d 934 (Del. Ch. 2016).

EZCORP addressed whether a plaintiff's voluntary dismissal of a derivative action should, as a matter of Delaware state law, be with prejudice "as to the world." *Id.* at 940. After answering that question in the negative, *id.* at 941-42 (citing Court of Chancery Rules 41(a)(1) and 15(aaa)), the court stated in dicta that, as a matter of federal due process, a "judgment [cannot] bind[] the corporation or other stockholders in a derivative action until the action has survived a Rule 23.1 motion to dismiss." *Id.* at 948. This statement was based on a loose analogy to class actions, including the Vice Chancellor's assumption that "[a]s a matter of Delaware law, a stockholder whose litigation efforts are opposed by the corporation does not have authority to sue on behalf of the corporation until there has been a finding of demand excusal or wrongful refusal" because of the "two-fold nature of the derivative suit." *Id.* at 943-44, 948.

Relying on these dicta from *EZCORP*, the Court of Chancery below proposed that the Delaware Supreme Court adopt a new prophylactic rule mandating that an order dismissing a stockholder's deriva-

tive action on demand futility grounds resolves only that stockholder's right to sue on behalf of the corporation, and so should not bind future derivative plaintiffs, Pet. App. 82a—even though it acknowledged that "no court has [adopted the *EZCORP* rule] to date," Pet. App. 59a. The Chancellor then recognized that, unless the Delaware Supreme Court were to adopt this new rule, his previous order had "correctly dismissed plaintiffs' complaint consistent with prevailing authority and should be affirmed." Pet. App. 59a, 88a.

c. The Delaware Supreme Court declined to adopt the *EZCORP* dicta. While recognizing the general rule that one cannot be bound by a judgment to which she was not a party, it emphasized that this Court had identified an exception whereby "a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who [wa]s a party to the suit." Pet. App. 45a (citing *Taylor v. Sturgell*, 553 U.S. 880, 894 (2008)).

The court below considered three "minimum requirements" of adequacy that it drew from *Taylor*: (1) that the interests of the nonparty and the representative be aligned (as also required by state-law privity analysis); (2) that the party understood herself to be acting in a representative capacity or that the court took care to protect nonparties' interests; and (3) sometimes, that the nonparty have notice. Pet. App. 46a. The court found each of these requirements satisfied here. Pet. App. 45a-48a.

The Delaware Supreme Court explained that this conclusion was consistent with the Restatement (Second) of Judgments' admonition that a prior deci-

sion ought not bind a nonparty where the representation in the prior action was grossly deficient or there is a conflict of interest between the party to the prior action and the nonparty. Pet. App. 28-29a (citing *B&B Hardware, Inc. v. Hargis Indus., Inc.*, 135 S. Ct. 1293, 1303 (2015)). Although Petitioners maintained that the Arkansas plaintiffs had been inadequate because they did not pursue a books-and-records demand, this strategic choice "d[id] not rise to the level of constitutional inadequacy" because, among other things, the Arkansas plaintiffs had relied on internal Company documents that were publicly available. Pet. App. 52a-53a. And because both sets of plaintiffs sought to vindicate the same underlying corporate claims, there was no conflict of interest invoking constitutional concerns of the kind articulated in *Hansberry v. Lee*, 311 U.S. 32 (1940). Pet. App. 49a, 54a.

The court also explicitly rejected the state-law assumption on which *EZCORP*'s due process dicta rested—*i.e.*, the notion that until a court rules on demand futility, a stockholder's claim is *individual* in nature. The court explained that this assumption was incorrect as a matter of Delaware law: "'The 'dual' nature of the derivative action does not transform a stockholder's standing to sue on behalf of the corporation into an individual claim belonging to the stockholder," Pet. App. 39a; on the contrary, "[t]he corporation is always the sole owner of the claims," Pet. App. 37a. This fact "highlights a fundamental distinction from class actions, where the named plaintiff initially asserts an individual claim and only acts in a representative capacity after the court certifies that the requirements for class certification are met." Pet. App. 39a. The court concluded that

adopting the *EZCORP* rule would "impair" the "delicate balance" between Delaware interests and the "'stronger national interests that all state and federal courts have in respecting each other's judgments'" under principles of full faith and credit. Pet. App. 55a.

Finding no due process violation, the Delaware Supreme Court affirmed the Court of Chancery's original order dismissing the Delaware action. Pet. App. 55a.

REASONS FOR DENYING THE PETITION

I. THE DELAWARE SUPREME COURT DID NOT DECIDE A FEDERAL QUESTION IN A WAY THAT CONFLICTS WITH THIS COURT'S DECISIONS

The Delaware Supreme Court properly held that Petitioners were collaterally estopped from relitigating the identical issue of demand futility that was previously decided in Arkansas. Petitioners do not challenge this holding under the law of preclusion—nor could they. "The preclusive effect of a federal-court judgment is determined by federal common law," *Taylor*, 553 U.S. at 891, and "[f]or judgments in diversity cases, federal law incorporates the rules of preclusion applied by the State in which the rendering court sits," *id.* at 891 n.4. The Delaware Supreme Court properly applied Arkansas preclusion law, and Petitioners do not challenge in this Court the Delaware courts' state-law findings that "privity" exists between the two sets of plaintiffs and that the Arkansas plaintiffs provided adequate representation. *See* Pet. App. 35a-38a. These unchallenged findings provide independent and adequate state

grounds for the judgment below, and therefore this Court lacks jurisdiction even to consider the question presented.

Petitioners raise only a contrived federal due process challenge to preclusion here. Although the "law of preclusion is, of course, subject to due process limitations," *id.* at 891, "[s]tate courts are generally free to develop their own rules for protecting against the relitigation of common issues or the piecemeal resolution of disputes," *Richards v. Jefferson County*, 517 U.S. 793, 797 (1996). Only "extreme applications of the doctrine of res judicata may be inconsistent with a federal right that is 'fundamental in character.'" *Id.* This is not such an "extreme case."

1. The ordinary rule is 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*, 311 U.S. at 40. But this rule is not absolute, and "there is an exception when it can be said that there is 'privity' between a party to the second case and a party who is bound by an earlier judgment." *Richards*, 517 U.S. at 798. Thus, "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction . . . cannot be disputed in a subsequent suit between the same parties *or their privies*." *Montana v. United States*, 440 U.S. 147, 153 (1979) (emphasis added) (citations omitted).

The Delaware Supreme Court held that Petitioners and the Arkansas plaintiffs were in privity as a matter of Arkansas law, and Petitioners do not chal-

lenge that conclusion. Pet. App. 35a-40a. Privity existed between the two sets of plaintiffs because they both sought to represent Walmart (which owns the claim, and was present and represented in both actions) by calling the question whether the board of directors was able to evaluate a litigation demand (as all stockholders were entitled to do simply by meeting the continuous ownership requirement). *Id.* Consequently, Petitioners' invocation of the rule against "nonparty" preclusion is unavailing: Walmart was a *party* to the Arkansas action, and Petitioners were in privity with the Arkansas plaintiffs. Thus, for purposes of the Due Process Clause, they were *parties* to the first judgment and, accordingly, are bound by it.

Of course, "there are clearly constitutional limits on the 'privity exception.'" *Richards*, 517 U.S. at 798. But Petitioners do not contend that the Delaware Supreme Court's finding of privity contravenes these limits; instead, they read privity out of this Court's precedents (literally ignoring the pertinent parts of *Richards*, *Montana*, and other cases in which this Court has recognized that parties *and* their privies may constitutionally be bound by a judgment), seeking an entirely new constitutional rule that would bind only named stockholders to the decision in each derivative action unless and until some stockholder's action survives a Rule 23.1 motion to dismiss. This kind of one-way ratchet finds no support in our Constitution.

In any event, a finding of privity comports with due process so long as the subsequent litigant had notice that she might be bound by the prior litigation

and was adequately represented by the privy. *See Richards*, 517 U.S. at 805 ("Because petitioners received neither notice of, nor sufficient representation in, the [prior] litigation, that adjudication, as a matter of federal due process, may not bind them."). That is because "[t]he fundamental requisite of due process of law is the opportunity to be heard." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950) (quotation marks omitted); *see also LaChance v. Erickson*, 522 U.S. 262, 266 (1998).

Petitioners clearly had actual notice both of the Arkansas action and the fact that the Arkansas plaintiffs would litigate demand futility on behalf of the corporation and thereby *all* its stockholders. Petitioners' counsel monitored the Arkansas action and even had a series of phone calls with the Arkansas plaintiffs in an attempt to convince them to join *their* action. Pet. App. 92a-93a. Ultimately, the two sets of plaintiffs chose not to work together toward the common goal of defeating a Rule 23.1 motion in either forum (apparently because they could not reach an agreement on sharing attorneys' fees, if awarded). Pet. App. 92a-93a. Two days after the Arkansas court issued its order denying Respondents' motion for a limited stay and warning that its demand futility finding would "likely . . . be entitled to collateral estoppel effect," Petitioners moved the Delaware Supreme Court to expedite resolution of their books-and-records action, anticipating that "[i]f the Arkansas district court concludes that demand is not excused, Plaintiffs in the Delaware Derivative Litigation . . . face a severe risk that the Arkansas decision will have collateral estoppel effect in Delaware." Pet. App. 8a-9a n.27.

Notably, however, Petitioners made no effort to "coordinate[], intervene[], or participate[]" in the Arkansas action. Pet. App. 96a. They had several means by which to do so: they could have intervened in the Arkansas action, filed a statement of interest, or participated as amici curiae. Pet. App. 9a. Having declined to do so, Petitioners cannot now be heard to complain that they were denied the "fundamental fairness" that is "the touchstone of due process." *Gagnon v. Scarpelli*, 411 U.S. 778, 790 (1973).

Petitioners' knowing and deliberate decision to stand on the sidelines while the Arkansas court proceeded to judgment constitutes a forfeiture of any due process objection to giving preclusive effect to that judgment. *See Dana v. Morgan*, 232 F. 85, 91 (2d Cir. 1916) (derivative plaintiff's arguments against preclusion did "not lie in his mouth to make" where plaintiff "knew of the pendency of the other suit and he had an opportunity to be heard in it," by intervening or otherwise "inform[ing] the court of anything he deemed important," but he "declined to avail himself of it"); *accord Henik ex rel. LaBranche & Co. v. LaBranche*, 433 F. Supp. 2d 372, 381-82 (S.D.N.Y. 2006); *Hanson v. Odyssey Healthcare, Inc.*, 2007 WL 5186795, at *6 (N.D. Tex. Sept. 21, 2007). This alone is sufficient reason to deny the petition.

It is equally clear that Walmart's interests—and thus the interests Petitioners sought to assert as derivative plaintiffs—were adequately represented in the Arkansas action. The Arkansas plaintiffs were led by investors with extensive experience litigating stockholder derivative cases. *See Cottrell*, 829 F.3d

983; Pet. App. 53a. They had an identical interest in seeking to vindicate the corporation's rights, and they retained "more than a dozen attorneys from several different law firms" to help them do so. Pet. App. 157a; Pet. 53a. Notably, "no contention [wa]s made that they [we]re not experienced counsel." Pet. App. 157a.

Petitioners do not dispute the Court of Chancery's conclusion, left undisturbed by the state supreme court, that the Arkansas plaintiffs' "strategic decision" not to pursue a books-and-records demand did not render them constitutionally inadequate representatives given that "crucial excerpts from a number of key documents underlying the *New York Times* article were available on the article's webpage." Pet. App. 157a. Under these circumstances, it is clear that Petitioners received the "opportunity to be heard" guaranteed by the Due Process Clause by virtue of the adequate representation provided by the Arkansas plaintiffs.

2. Petitioners' contention that applying collateral estoppel here violates the Due Process Clause fails for another, more fundamental, reason: Walmart is the represented party, and the Company and its board of directors were *parties* to both the Arkansas and Delaware actions. They *prevailed* in the first action when the Arkansas district court ruled that control over the corporation's claim remains with the board of directors, and that victory was affirmed on appeal by the Eighth Circuit.

As a matter of state law, the corporation is the real-party-in-interest to a stockholder derivative ac-

tion. As the Delaware Supreme Court noted in this very case, "[t]he corporation is always the sole owner of the claims" in such an action, and "the suit is *always* about the corporation's right to seek redress for alleged harm to the corporation." Pet. App. 37a (emphasis added). This is consistent with a long line of caselaw. *See, e.g.*, *Aronson v. Lewis*, 473 A.2d 805, 811 (Del. 1984); *see also Chauffeurs, Teamsters & Helpers, Local No. 391 v. Terry*, 494 U.S. 558, 589 (1990) (observing that a derivative action allows "shareholders to raise a corporation's claims"). "[I]n such suits the wrong to be redressed is the wrong done to the corporation and as the corporation is a necessary part to the suit, it inevitably follows that there can be but one adjudication on the rights of the corporation." *Dana*, 232 F. at 89. Walmart's right, through its board of directors, to control the claim was vindicated in Arkansas; Petitioners' suggestion that the federal Constitution requires reopening that question in Delaware finds no purchase in the Due Process Clause and, indeed, cannot be reconciled with the "exacting" full faith and credit principles that are essential to our federal structure. *Baker by Thomas v. Gen. Motors Corp.*, 522 U.S. 222, 233 (1998).

Petitioners insist that "[a] shareholder plaintiff seeking to plead demand futility is not representing the corporation or other shareholders; it is trying to establish its own right to control the litigation, *to the exclusion of* the corporation's board and other stockholders." Pet. 18. But the Delaware Supreme Court decisively rejected this argument as a matter of *state law*, holding that "[t]he 'dual' nature of the derivative action does not transform a stockholder's stand-

ing to sue on behalf of the corporation into an individual claim belonging to the stockholder." Pet. App. 39a. "At the start of the derivative suit, the stockholder-derivative plaintiff only has standing, as a matter of equity, to set in motion the judicial machinery on the corporation's behalf." Pet. App. 38a (citing *Schoon v. Smith*, 953 A.2d 196, 202 (Del. 2008); *Dana*, 232 F. at 90). There is no individual right to have that machinery lead to any particular outcome, or to have it set in motion repeatedly or in any particular forum. *See id.* This pronouncement on the limited scope of stockholders' rights in a derivative action under Delaware law is binding, and this Court lacks jurisdiction to review it. *See Huddleston v. Dwyer*, 322 U.S. 232, 237 (1944); 28 U.S.C. § 1257(a).

The Delaware Supreme Court's ruling on this question of state law is also fatal to Petitioners' due process claim. As this Court recently recognized, "*no* process is due if one is not deprived of 'life, liberty, or property.'" *Kerry v. Din*, 135 S. Ct. 2128, 2132 (2015) (plurality). The only property right at issue here is the "chose in action." *See United States v. Cent. Bank of Denver*, 843 F.2d 1300, 1304 (10th Cir. 1988) ("[A] chose in action is a property right, often described as intangible property.") (quotation marks omitted). And because that property right belongs to the corporation under state law, Petitioners were not deprived of due process when the Delaware Supreme Court precluded them from attempting to relitigate whether control of that claim rested with the corporation's board or its stockholders. If anything, it would violate the rights of the corporation and its board of directors to force them to relitigate demand

futility in Delaware after having prevailed on that very issue in Arkansas.

3. To support their unprecedented due process argument, Petitioners invoke this Court's decisions in *Taylor v. Sturgell*, 553 U.S. 880 (2008), and *Smith v. Bayer*, 564 U.S. 299 (2011). Pet. 14-19. But those cases had nothing to do with the due process theory Petitioners advance here, and they have no application to stockholder derivative actions.

First, neither *Taylor* nor *Smith* addressed the limits imposed on preclusion by due process. Rather, these cases simply outlined nonexhaustive categories to guide federal courts in applying nonparty preclusion under federal common law, *see Taylor*, 553 U.S. at 891, and the relitigation exception to the Anti-Injunction Act, *Smith*, 564 U.S. at 306-07. In fact, the *Smith* court expressly stated that "we do not consider Smith's argument . . . that the District Court's action violated the Due Process Clause." *Id.* at 308 n.7. To be sure, the Court articulated guideposts for the application of preclusion in federal cases that are *sufficient*—but not *necessary*—to satisfy due process. That is because in both *Taylor* and *Smith*, this Court exercised its supervisory authority over litigation in federal court. The Court has no such authority in cases arising from state courts. *See Dickerson v. United States*, 530 U.S. 428, 438 (2000).

While *Taylor* described six recognized "exceptions" to "the rule against nonparty preclusion," it also emphasized that "[t]he list . . . is meant only to provide a framework," and "not to establish a definitive taxonomy." *Taylor*, 553 U.S. at 893 & n.6. The

Court expressly did not do away with the traditional conception of privity. *Id.* at 894 n.8 ("The substantive legal relationships justifying preclusion are sometimes collectively referred to as 'privity'"). And the Court has since reiterated that it "regularly turns to the Restatement (Second) of Judgments for a statement of the ordinary elements of issue preclusion." *B&B Hardware*, 135 S. Ct. at 1303. Petitioners do not dispute that they are collaterally estopped from relitigating demand futility under the Restatement provisions applied by the court below. *Compare* Pet. App. 33a-34a (discussing relevant Restatement provisions and commentary), *with* Pet. 18 (citing only commentary to a different, inapposite Restatement provision).

In any event, this case falls comfortably within *Taylor*'s third category, which recognizes that "in certain limited circumstances, a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who was a party to the suit." *Id.* at 894 (quotation marks and alterations omitted). The Delaware Supreme Court expressly so held below. Pet. App. 45a-48a. Successive stockholder derivative suits are analogous to long-recognized examples of representative actions like those brought by successive "trustees, guardians, and other fiduciaries" proceeding on another's behalf. Pet. App. 20a-21a; *Arduini v. Hart*, 774 F.3d 622, 634 n.11 (9th Cir. 2014); *In re Sonus Networks, Inc. S'holder Deriv. Litig.*, 499 F.3d 47, 64 & n.10 (1st Cir. 2007); Restatement (Second) of Judgments § 41; *cf. Ark. Dep't of Human Servs. v. Dearman*, 40 Ark. App. 63, 68 (1992).

Second, neither *Taylor* nor *Smith* involved derivative claims, a distinction with which Petitioners and their amici fail to grapple. In *Taylor*, two men who "ha[d] no legal relationship" each brought an action to obtain documents from the government under FOIA, 553 U.S. at 885—actions that, if successful, would "result[] in a grant of relief to the individual plaintiff" only. *Id.* at 903. The Court held that the second individual could not be precluded under the doctrine of "virtual representation." *Smith* involved two putative class actions against the defendant, one in federal court and one in state court; after the federal court denied class certification, it enjoined the state court proceedings on the ground that its order had preclusive effect in the state action. 564 U.S. at 302-04. The Court held that the class members in the second case were not bound by the first ruling because they were not parties. In both cases, therefore, the question was whether a stranger to the first litigation could have his *individual* rights extinguished.

In derivative actions, stockholders' individual rights are never at issue—as the Delaware Supreme Court expressly held *as a matter of state law*. Pet. App. 36a-39a. Petitioners' invocation of *Taylor* fails for this reason alone, as a leading treatise explains:

> [B]ecause in derivative litigation the substantive claim belongs to the corporation, the fact that different shareholders may bring the two actions does not preclude res judicata effect for the judgment in the prior action. This structural fact about derivative litiga-

> tion makes irrelevant questions of "virtual representation," that is, the representation by a party of a nonparty outside the context of a class action.

Deborah A. DeMott, *Shareholder Derivative Actions: Law and Practice* § 4:19 (2017).

This distinguishing feature of derivative actions also renders *Smith* inapposite. Petitioners' argument rests on the suggestion that a derivative action is indistinguishable from a class action, including requiring a form of *ex ante* judicial approval similar to class certification under Rule 23. *See* Pet. 26; *see also* Brief Amicus Curiae of the Council of Institutional Investors in Support of Petitioners at 12. As this Court has noted, the class device "aggregat[es]" the individual claims of individual class members, *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591, 617 (1997), and is an "exception to the usual rule that litigation is conducted by and on behalf of the individual named parties only," *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 348 (2011) (quotation marks omitted). The due process concerns regarding the binding effect of a judgment on *absent persons* animate the safeguards in Federal Rule 23 and its state analogues.

But class-action procedures are not required in stockholder-derivative actions, where ownership of corporate stock and adequate representation protect the due process interests of the corporation and all of its stockholders. *See Arduini*, 774 F.3d at 638; *Sonus Networks*, 499 F.3d at 64. There are no absent persons in derivative litigation—the corporation, which

owns the claim, is always a named (and represented) party. Pet. App. 37a. This "fundamental distinction from class actions," Pet. App. 39a, renders Petitioners' invocation of *Smith*—and, indeed, their entire due process theory—fallacious.

II. THE DELAWARE SUPREME COURT'S DECISION DOES NOT CONFLICT WITH THE DECISION OF ANY OTHER APPELLATE COURT

Consistent with this Court's clear guidance concerning the due process constraints on preclusion, every court to decide whether a finding that demand was not futile has preclusive effect in future derivative actions when the elements of preclusion are otherwise met has answered "yes." Petitioners' speculation that this unanimity among lower courts somehow indicates "confusion" (Pet. 19-23) has no basis in law or fact.

1. As the Delaware Supreme Court acknowledged, "[t]hree federal circuit courts have already addressed" the preclusive effect of demand futility rulings, and "each arrived at the same conclusion: the Due Process rights of subsequent derivative plaintiffs are protected, and dismissal based on issue preclusion is appropriate, when their interests were aligned with and were adequately represented by the prior plaintiffs." Pet. App. 24a-25a. Not a single appellate case has *ever* held otherwise.

a. In *Arduini v. Hart*, 774 F.3d 622 (9th Cir. 2014), two stockholder derivative actions were brought against International Game Technology ("IGT") alleging financial misrepresentations. *Id.* at 625. The district court dismissed the first action for

failure to plead demand futility, and the Ninth Circuit affirmed. *See id.* at 626. Subsequently, a securities fraud class action stemming from the same alleged misrepresentations survived a motion to dismiss. *Id.* at 626–27. Arduini attempted to leverage this second order to show demand futility in his own derivative action, but the district court found him precluded by the first demand futility order. *Id.* at 627-28.

Arduini appealed, asserting that he could not be bound by the earlier judgment because "'shareholders who fail to establish their representative capacity can only act on their own behalf.'" *Id.* at 633. Like Petitioners, Arduini contended that "initially shareholders assert 'only their individual claim to obtain equitable authority to sue,' and that if an action is dismissed for failure to establish demand futility, 'plaintiffs never attained the status as a representative of the corporation and its shareholders.'" *Id.*

The Ninth Circuit disagreed. It recognized that whether stockholders are in privity is a question of state substantive law and, applying Nevada law, concluded that "shareholders bringing derivative suits are in privity for the purposes of issue preclusion" because "the shareholders are acting on behalf of the corporation and its shareholders and the underlying issue of demand futility is the same regardless of which shareholder brings suit." *Id.* at 634.

Like Petitioners, Arduini argued that precluding him from relitigating demand futility violated *Taylor*. But because the stockholders were in privity under state law, the Ninth Circuit concluded that

"*Taylor v. Sturgell* is inapposite." *Id.* at 637. As the court observed, "the *Taylor* plaintiff and the plaintiff in the first suit had no legal relationship with each other," whereas "[h]ere, both Arduini and the [first] plaintiffs were acting in a representative capacity as shareholders on behalf of IGT." *Id.* at 637-38. The court went on to explain that it is the due process rights of the *corporation* that are at issue—and the corporation's rights are protected so long as representation is adequate. *See id.* at 634.

b. *Arduini* built upon the earlier decision in *In re Sonus Networks, Inc. Shareholder Derivative Ligitation*, 499 F.3d 47 (1st Cir. 2007). There, stockholders filed derivative actions in state and federal court alleging claims arising out of Sonus's allegedly improper accounting practices. *Id.* at 53. The state-court action was dismissed for failure to adequately plead demand futility, *id.* at 54-55, after which the federal action was dismissed on preclusion grounds, *id.* at 56.

The First Circuit affirmed. Looking to state privity law, the court noted that "[u]nder Massachusetts law, a derivative suit is prosecuted 'in the right of a . . . corporation,'" such that "the corporation is bound by the results of the suit in subsequent litigation, even if different shareholders prosecute the suits." *Id.* at 64.

Like the Ninth Circuit, the First Circuit concluded that this "structural fact" concerning the nature of derivative actions distinguished the case from *Taylor*. *Id.* at 64 n.10. Because the corporation is the real-party-in-interest in both actions, the "questions

of 'virtual representation'" identified in *Taylor*, which stemmed from "the representation by a party of a nonparty outside the context of a class action," are simply "irrelevant." *Id.* (quoting Deborah A. DeMott, *Shareholder Derivative Actions* § 4:19).

The First Circuit was unpersuaded by the argument, repeated by Petitioners here, that "the state court judgment did not adjudicate the corporation's rights, but only the question of whether the state court plaintiffs should be permitted to bring suit on behalf of the corporation." *Id.* at 64. The court emphasized that the question "whether demand on the board of directors would have been futile . . . would have been the same no matter which shareholder served as the nominal plaintiff." *Id.*

The First Circuit acknowledged that "[p]recluding the suit of a litigant who has not been adequately represented in the earlier suit would raise serious due process concerns." *Id.* at 65. But it concluded that all that was necessary "to bind the corporation" was for the corporation to have been "adequately represented." *Id.* at 64. A plaintiff meets this standard so long as she is not "'so grossly deficient as to be apparent to the opposing party.'" *Id.* (quoting Restatement (Second) of Judgments § 42(1)(e), cmt. f); *Taylor*, 553 U.S. at 893-95.

c. The Sixth Circuit reached the same conclusion in *Nathan v. Rowan*, 651 F.2d 1223 (6th Cir. 1981). The court explained that the second stockholder-plaintiff was bound by the judgment in the first action (which had been dismissed on statute of limitations, not demand futility, grounds) because "in

shareholder derivative actions arising under Fed. R. Civ. P. 23.1, parties and their privies include the corporation and all nonparty shareholders," and "the constitutional requirements of due process" were satisfied because the first stockholder-plaintiff "provided adequate and fair representation." *Id.* at 1226-27.

2. Other appellate courts have consistently found stockholders to be precluded by decisions in prior derivative actions brought by other stockholders, albeit without expressly addressing the due process implications of preclusion. For example, in *Dana*, a stockholder sought to assert derivative claims that had already been litigated to final judgment in a prior action. 232 F. at 88. The Second Circuit dismissed the case. As it explained, "[t]he cause of action was the same" in both suits, and "[t]he right of the plaintiff to sue is . . . a right to sue for the wrong alleged to have been done to the defendant corporation." *Id.* at 88-89. More than a century ago, "[t]he principle certainly [could]not at th[at] late day be successfully challenged that every member of a corporation is so far privy in interest in a suit against the corporation that he is bound by the judgment against it." *Id.* at 90. The Court thus concluded: "[T]he corporation whose interest [plaintiff] seeks to represent in this suit was a party to that action and is concluded by it and that concludes him." *Id.* at 91; *accord Goldman v. Northrop Corp.*, 603 F.2d 106, 109 (9th Cir. 1979) (precluding derivative suit of subsequent stockholder where first derivative suit had been settled, because "[t]he parties [we]re the same, although represented by different shareholders"). So, too, here.

3. In addition to the unanimous line of appellate decisions stretching from *Dana* through the decision below, an unbroken string of trial-level cases holds that a prior demand futility order binds other stockholders in subsequent derivative actions. Like the Delaware Supreme Court's decision below, these decisions have relied on two core insights.

First, the corporation is the sole real-party-in-interest in both actions, such that no issue of nonparty preclusion arises. *E.g.*, *In re MGM Mirage Derivative Litig.*, 2014 WL 2960449, at *6 (D. Nev. June 30, 2014) ("[T]he real plaintiff in both actions is MGM because a shareholder in a derivative action steps into the corporation's shoes and sues on behalf of the company."); *LeBoyer v. Greenspan*, 2007 WL 4287646, at *3 (C.D. Cal. June 13, 2007) (similar).

Second, preclusion does not offend due process so long as the stockholder litigating demand futility in the first action was not inadequate. *E.g.*, *In re Bed Bath & Beyond Inc. Deriv. Litig.*, 2007 WL 4165389, at *8 (D. N.J. Nov. 19, 2007) ("The Court does not find that the plaintiff in the state court action was inadequately represented to the detriment of the nonparty shareholders in this action; therefore, privity between the plaintiffs exists and the prior decision has preclusive effect on this action."); *Hanson*, 2007 WL 5186795, at *6 (finding preclusion where "nothing suggests that the state court plaintiffs did anything short of vigorously litigating the issue of demand futility"); *Henik*, 433 F.Supp.2d at 381-82 (similar).

Many other cases are in accord, recognizing the preclusive effect of prior actions that did not survive a Rule 23.1 motion. *See, e.g.*, *Harben v. Dillard*, 2010 WL 3893980, at *6 (E.D. Ark. Sept. 30, 2010) ("Collateral estoppel prevents the issue of pre-suit demand futility from being relitigated."); *Liken v. Shaffer*, 64 F.Supp. 432, 443 (N.D. Iowa Jan. 26, 1946) (similar).

Although not all of these cases explicitly addressed due process, they illustrate more than a century of unbroken practice precluding stockholders from relitigating judgments in derivative actions, even when those actions did not survive a Rule 23.1 motion to dismiss. "[T]hat a procedure is so old as to have become customary and well known in the community is of great weight in determining whether it conforms to due process." *Anderson Nat'l Bank v. Luckett*, 321 U.S. 233, 244 (1944); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("traditional practice provides a touchstone for constitutional analysis"). History and precedent confirm that due process is satisfied here; Petitioners' novel contention to the contrary is meritless.

4. Petitioners suggest that "[o]ther courts have properly declined to apply preclusion where—as here—a subsequent derivative complaint raises new allegations." Pet. 22. But *every* case cited by Petitioners involved a decision made under the substantive law of preclusion (particularly the identity-of-issue requirement), *not* because applying preclusion in such circumstances would violate due process. *See Bansbach v. Zinn*, 1 N.Y.3d 1, 11 (2003) ("In short, there being no identity of issue, *Lichtenberg* does not

estop plaintiff from litigating the futility of demand."); *Freedman v. Redstone*, 753 F.3d 416, 425 (3d Cir. 2014) ("We find that Freedman has failed to carry his burden to show that the issue here is identical with the issue that the New York Supreme Court decided in *In re: Viacom*."); *Johnston v. Box*, 453 Mass. 569, 577 (2009) (rejecting the "conten[tion] that the doctrine of collateral estoppel bars Johnston from further litigating the issue of demand futility" where "[t]h[e] issue [addressed in the prior action] is different from the one we must address"). In contrast, there is no dispute in *this* case that the issue Petitioners sought to relitigate in Delaware (demand futility as to the claims asserted) is identical to the issue actually and necessarily decided in Arkansas. The few cases cited by Petitioners thus do not present any conflict and are irrelevant to the question presented in the petition.

III. PETITIONERS' PROPOSAL IS CONTRARY TO PUBLIC POLICY

As summarized above, Petitioners' suggestion that the Constitution requires potentially unending relitigation has no basis in history or constitutional tradition. It would also make bad policy.

1. Petitioners ask the Court to create a new constitutional right from whole cloth through an interpretation of the Due Process Clause that contains no limiting principle. If adopted, Petitioners' rule would invite endless litigation to the detriment of corporations, directors and officers, and stockholders alike. *Cf. King v. VeriFone Holdings, Inc.*, 12 A.3d 1140, 1150 (Del. 2011) ("[I]t is wasteful . . . to have a regime that could require a corporation to litigate re-

peatedly the issue of demand futility."). Even if one court decides that demand would not have been futile, a stockholder would be free (indeed, constitutionally entitled) to ask another court to reach the opposite conclusion. And if the second court also decides that demand would not have been futile, then a stockholder could ask a third court to disagree. And so on.

Petitioners and their amici contend that the undeniably adverse effects of duplicative litigation by successive stockholders will "be mitigated by the doctrine of *stare decisis* and the 'human tendency not to waste money.'" Pet. 5 (quoting *Taylor*, 553 U.S. at 903-04); Brief of Civil Procedure and Constitutional Law Professors as Amici Curiae in Support of the Petition at 9. Of course, the facts of this case prove the opposite: Petitioners are unwilling to accede to the Arkansas judgment. Moreover, as their amici (and the Delaware Supreme Court) have acknowledged, "the reality of our nationwide economy . . . [is] that derivative suits will regularly, perhaps even inevitably, be brought in multiple judicial venues at the same time." Brief Amicus Curiae of the Council of Institutional Investors in Support of Petitioners at 15; *see also* Pet. App. 4a.

Courts have long worked to develop administrable procedures to deal with multiplicative litigation. Preclusion doctrines, in particular, find constitutional footing in the Full Faith and Credit Clause—a command which Petitioners entirely ignore. The unanimous approach of precluding subsequent stockholders asserting demand futility where the first stockholder is in privity and adequately repre-

sents the corporation's interests strikes a fair and workable balance between providing ample opportunity for challenging board control of corporate claims and ensuring repose and finality.

2. The due process safeguard is not serial litigation; rather, preclusion appropriately supplants relitigation so long as there was adequate representation in the first action. *Hansberry*, 311 U.S. at 42-43; *see also, e.g.*, *Martin v. Wilks*, 490 U.S. 755, 762 n.2 (1989); *Richards*, 517 U.S. at 798-800; *Sonus Networks*, 499 F.3d at 64-66; Restatement (Second) of Judgments § 42 & Reporter's Note (referencing *Hansberry* and stating that the adequate representations "provisions of this section are thus closely related to, if indeed they are not particularized expressions of, the requirements of due process"); Pet. App. 69a.

Ultimately, the Delaware Supreme Court concluded that the Arkansas plaintiffs "were adequate representatives" because there was no conflict or "misalignment of interests" and because "the quality of their representation was not grossly deficient." Pet. App. 50a. Petitioners make the bare assertion, in a footnote, that their interests were not aligned with the Arkansas plaintiffs' because the two groups were competing for control of the corporate claim. Pet. 18 n.5. This argument is entirely circular: If accepted, it would mean that collateral estoppel *never* applies to subsequent derivative actions. More substantively, as the First Circuit has explained, demand futility does not "concern[] some issue peculiar to the [earlier] plaintiffs or the adequacy of their representation," but rather "is an issue that would

have been the same no matter which shareholder served as nominal plaintiff." *Sonus Networks*, 499 F.3d at 64. Petitioners have no response.

3. Petitioners criticize the Arkansas plaintiffs' strategic decision not to make a books-and-records demand under Section 220 of the Delaware General Corporation Law. Pet. 26-27. But there is no *constitutional requirement* to resort to books-and-records procedures; rather, "[s]tockholders of Delaware corporations enjoy [only] a qualified common law and statutory right to inspect the corporation's books and records." *Saito v. McKesson HBOC, Inc.*, 806 A.2d 113, 116 (Del. 2002). Nor is resort to Section 220 even a prerequisite to pursuit of derivative claims *as a matter of Delaware law*. *E.g.*, *King*, 12 A.3d at 1151. If a Section 220 demand is not required by state law, how could it be required by the Due Process Clause? Petitioners have no answer.

Petitioners and their amici contend that the Delaware Supreme Court's decision will somehow "foster a race to the bottom" in which fast-filer plaintiffs will file *pro forma* complaints pleading "shoddy claims" merely to be "first." Brief Amicus Curiae of the Council of Institutional Investors in Support of Petitioners at 15-18; *see also* Pet. 26. But there is no "fast-filer" problem in *this* case: The Arkansas case proceeded to judgment first only because the Delaware plaintiffs spent years litigating an overly expansive Section 220 action, including a failed motion for an order of civil contempt that was itself both futile and fruitless.

To the extent they raise policy concerns, fast-filer problems can and should be addressed by *legislative* solutions, or provisions in corporate charters, not by judicially invented prophylactic constitutional rules to protect nonexistent rights. *See Montejo v. Louisiana*, 556 U.S. 778, 789, 793 (2009). These are ultimately questions of state policy, and states are free to experiment with tools aimed at garnering the proper factual support for pleading demand futility prior to instituting a derivative suit, as the Delaware Supreme Court has recognized in this context. *See King*, 12 A.3d at 1151. Such measures would largely avoid the slippery slope of "counterproductive gamesmanship" Petitioners and amici identify with regard to fast-filers. Pet. 26.

With respect to judicially administrable policy, the Delaware Supreme Court recognized that full faith and credit "implicates principles of comity," and these fundamental principles mandate that state policy choices "'must yield to the stronger national interests that all state and federal courts have in respecting each other's judgments.'" Pet. App. 23a & n.81 (quoting *Pyott v. La. Mun. Police Empls.' Ret. Sys.*, 74 A.3d 612, 616 (Del. 2013)). This Court has repeatedly held that there is "no roving 'public policy exception' to the full faith and credit due *judgments*." *Baker*, 522 U.S. at 233; *see also Estin v. Estin*, 334 U.S. 541, 545-46 (1948). Petitioners' insistence that due process prohibits preclusion unless litigants use the "tools at hand" prior to instituting suit improperly seeks to have this Court elevate a Delaware policy to a constitutional imperative—an unsupportable proposition.

4. In this case, Respondents made every effort to have demand futility decided *in Delaware*, both before and after Petitioners initiated their Section 220 action. Pet. App. 7a, 91a. It was *Petitioners* who chose not to participate in Arkansas and waited until after the Arkansas court issued a demand futility ruling even to file their consolidated complaint in Delaware, and thus any "depriv[ation] of the ability to litigate their painstakingly developed complaint on the merits" was of their own making. Pet. 27.

Petitioners' wait-and-see approach underscores the correctness of the traditional notion, reflected in the preclusion doctrines, that only a single full and fair opportunity to litigate a particular question is required. *Montana*, 440 U.S. at 153. Repose "is essential to the maintenance of social order," because "judicial tribunals would not be invoked for the vindication of rights of person and property if, as between parties and their privies, conclusiveness did not attend the judgments of such tribunals." *So. Pac. R.R. Co. v. United States*, 168 U.S. 1, 49 (1897). Allowing relitigation of precisely the same issue by another stockholder whose individual traits have *no* bearing on the question of whether the board is capable of controlling the corporate claim would therefore run counter to the "purpose for which civil courts have been established, the conclusive resolution of disputes," *Montana*, 440 U.S. at 153, and contravene the long-established notion that "there can be but one adjudication on the rights of the corporation," *Dana*, 232 F. at 89.

Walmart's rights were adjudicated when the Arkansas court determined that control of the corporate

claims would remain with Walmart's board; there is no cause to relitigate that issue in Delaware. There is simply no constitutional right to a second bite at the same apple.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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