IN THE
SUPREME COURT OF THE UNITED STATES

No. ___

E. I. DU PONT DE NEMOURS & CO.,

Applicant,

v.

TRAVIS ABBOTT; JULIE ABBOTT,

Respondents.

APPLICATION TO THE HON. BRETT M. KAVANAUGH FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

Pursuant to Supreme Court Rule 13(5), E. I. du Pont de Nemours & Co. ("Applicant" or "DuPont"), hereby moves for an extension of time of 30 days, to and including June 1, 2023, for the filing of a petition for a writ of certiorari. Unless an extension is granted, the deadline for filing the petition for certiorari will be May 2, 2023.

In support of this request, Applicant states as follows:

1. The United States Court of Appeals for the Sixth Circuit rendered its decision on December 5, 2022 (Exhibit 1), and denied a timely petition for rehearing on February 1, 2022 (Exhibit 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. This case involves a critically important question for multi-district litigation (MDL) proceedings: whether due process permits a district court overseeing

an MDL to apply nonmutual offensive collateral estoppel to make the results of a handful of bellwether trials binding on every other pending or future case in the MDL, without any determination that the bellwether trials were actually representative of the other cases that the MDL includes. If the decision below is permitted to stand, it will have dramatic consequences for future MDLs, making bellwether trials largely impracticable in light of the massive preclusion risk that such trials would create. The decision below also exemplifies how the MDL process, designed to provide a neutral mechanism for the efficient resolution of pre-trial issues, can be abused to disadvantage defendants in ways that leave them with little choice but to settle rather than face potentially crippling liability.

3. This case is part of a now ten-year-old MDL related to DuPont's past use of perfluorooctanoic acid, known as C8, to make certain fluoropolymers at DuPont's plant in Parkersburg, West Virginia. As part of its manufacturing process, acting under environmental permits, DuPont discharged C8 from that plant into the Ohio River and the air. Plaintiffs later alleged that trace levels of C8 in their drinking water caused various diseases, leading to a class action in West Virginia state court that resulted in a settlement under which class members receive medical monitoring and ongoing water treatment that removes C8 from the drinking water. That settlement also allowed class members with certain diseases to bring their own individual personal-injury claims.

4. Thousands of the state-court class members subsequently filed individual suits, which were assigned to the MDL here. The parties picked six cases

to serve as bellwethers. Of the six bellwethers, one was withdrawn by the plaintiff, three settled, and two were tried to a verdict, both of which resulted in a verdict for the plaintiff. Another case—hand-picked by the plaintiffs after the court instructed them "to choose one of the 'most severely impacted plaintiffs'"—also went to trial and resulted in a verdict for the plaintiff. Ex.1 at 36 (Batchelder, J., dissenting). After those trials, in February 2017, DuPont announced a settlement of all the cases that were pending in the MDL at that time.

5. After that settlement, however, more plaintiffs appeared and filed new cases. Those new cases included the lawsuit here, which alleged that DuPont's release of C8 caused respondent Travis Abbott's testicular cancers. The facts of this case (like many other cases in the MDL) differed significantly from the facts at issue in the initial bellwether trials; for instance, two of the three bellwether trials involved plaintiffs who drank from wells located less than half a mile from DuPont's plant, while Abbott drank intermittently from wells 14 to 56 miles away.

6. The district court nevertheless concluded that based on the results of the three earlier bellwether trials—none of which were selected to be representative of the other MDL cases, and one of which was picked precisely because it was *not* representative—respondents were entitled to summary judgment on the elements of duty, breach, and foreseeability on the basis of nonmutual offensive collateral estoppel. In the district court's view, because DuPont had lost on those issues in three early and unrepresentative bellwether trials—which the district court had explicitly recognized at the time would be "informational and non-binding," Ex.1 at 31

(Batchelder, J., dissenting)—Dupont was precluded from contesting those issues in *any* other cases involved in the MDL, including cases filed well after those bellwether trials occurred. With DuPont foreclosed from challenging those critical elements, the jury awarded Travis Abbott $40 million and his wife Julie Abbott $10 million (with the latter award later reduced to $250,000 under Ohio law). Ex.1 at 8.

7. A divided panel of the Sixth Circuit affirmed. In an opinion by Judge Stranch, joined by Judge Donald, the panel majority concluded that the district court did not err by relying on the results of three unrepresentative bellwether trials to estop DuPont from challenging the elements of duty, breach, and foreseeability in this case and all future cases in the MDL. In the panel majority's view, the "lack of consideration of representativeness in bellwether selection" did not prevent the district court from making the results of those bellwether trials binding across the board. Ex.1 at 17. Nor, for that matter, did the district court's "alleged promises" that the bellwether trials would have "no preclusive effect." *Id.* Instead, the panel majority held that the only "constraints on the use of nonmutual offensive collateral estoppel," *id.* at 18, were the four specific factors identified by this Court in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979)—despite this Court's explicit instruction in *Parklane Hosiery* itself that offensive estoppel is impermissible whenever it "would be unfair to a defendant," including "for other reasons" than the four that *Parklane Hosiery* identified, *id.* at 331-32.

8. Judge Batchelder dissented. In her view, "due process requires an additional safeguard before a court can declare mass-tort preclusion on an issue of

liability against a defendant: the court must ensure that the sample of bellwether plaintiffs is reasonably representative of the rest." Ex.1 at 34 (Batchelder, J., dissenting). That safeguard was sorely needed here, because the district court "used plaintiff-specific verdicts, based on general verdict forms, from three early trials—as to which the court had told the parties from the outset that they would be informational and non-binding—to preclude DuPont from contesting certain liability issues in thousands of potentially different cases." *Id.* at 31. As Judge Batchelder explained, using the results of those three bellwether trials to foreclose DuPont from contesting key elements of liability in this or any other case in the MDL ran contrary to both common sense and the Constitution. After all, "it is Statistics 101 that a small, unrepresentative sample cannot yield reliable inferences as to a larger group." *Id.* at 37. The district court's use of a handful of bellwether trials to resolve contested issues across the entire MDL, without any consideration of representativeness, was thus "fundamentally unfair to DuPont in violation of due process." *Id.* at 31.

9. The Sixth Circuit's divided decision below is both profoundly mistaken and in serious conflict with decisions from other courts. By authorizing courts to rely on "a handful of informational bellwether trials" to bind "thousands of future cases and without considering whether those cases involve legally divergent facts," the decision below permits "something that no other circuit court has … allowed" and that plainly violates due process. *Id.* at 38; *see, e.g.*, *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) ("[B]efore a trial court may utilize results from a bellwether trial for a purpose that extends beyond the individual cases tried, it must,

prior to any extrapolation, find that the cases tried are representative of the larger group of cases or claims from which they are selected."). That error not only permits serious unfairness in this MDL, but threatens the viability of MDL proceedings generally, since few if any defendants will be willing to roll the dice on a bellwether trial if they face an asymmetric risk that any loss in that trial will be binding on every other case in the MDL. Put simply, if the decision below is permitted to stand, "the age of bellwethers will come to an end, as any residual benefit of conducting one will be outweighed by its now-endorsed preclusive consequences." Ex.1 at 42 (Batchelder, J., dissenting). And given that MDLs make up as much as nearly forty percent of the pending civil caseload in the federal courts, *see* Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 3 (2021), the importance of the issue is undeniable.

10. Applicant's counsel, Paul D. Clement, was not involved in the proceedings below and was only recently retained. As such, Mr. Clement requires additional time to review the record and prior proceedings in this case in order to prepare and file a petition for certiorari that best presents the arguments for this Court's review. Mr. Clement also has substantial argument and briefing obligations between now and the due date of the petition, including oral argument in *In re Aearo Technologies, LLC*, No. 22-2606 (7th Cir.); oral argument in *3M Company v. Baker*, No. 21-12517 (11th Cir.); a petition for writ of certiorari in *ABKCO Music, Inc. v. Sagan*, No.___ (U.S.); a reply brief in *Northstar Wireless, LLC v. FCC*, No. 22-672

(U.S.); and an opening brief in *Ocean State Tactical, LLC v. Rhode Island*, No. 23-1072 (1st Cir.).

WHEREFORE, for the foregoing reasons, Applicant requests that an extension of time to and including June 1, 2023, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

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