IN THE
SUPREME COURT OF THE UNITED STATES

No. 22A860

E. I. du Pont de Nemours & Co.,

Applicant,

v.

Travis Abbott, et ux.,

Respondents.

APPLICATION TO THE HON. BRETT M. KAVANAUGH FOR A FURTHER 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), Applicant E.I. du Pont de Nemours & Co. ("Applicant" or "DuPont") hereby moves for a second extension of time of 29 days, to and including June 30, 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 June 1, 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 (First Applic. for Extension, Ex. 1), and denied a timely petition for rehearing on February 1, 2022 (First Applic. for Extension, Ex. 2). This Court has jurisdiction under 28 U.S.C. §1254(1).

2. On March 29, 2023, undersigned counsel Paul D. Clement applied on behalf of DuPont for an initial 30-day extension of time to and including June 1, 2023, for the filing of a petition for a writ of certiorari.

3. On April 3, 2023, Justice Kavanaugh granted that initial application.

4. As explained in that initial application, 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.

5. In the course of this long-running MDL, the district court concluded that based on the results of the three early 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 trials—which the district court had explicitly recognized at the time would be "informational and non-binding," First Applic. for Extension, Ex. 1 at 31 (Batchelder, J., dissenting in relevant part)—DuPont was precluded from contesting those issues in *any* other cases involved in the MDL, including cases filed well after those trials occurred.

6. 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 early 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 the bellwether trials binding across the board. First Applic. for Extension, 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 specific ones 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 ones expressly denoted in *Parklane Hosiery*, *id.* at 331.

7. Judge Batchelder disagreed. Unlike the panel majority, she would have held that "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." First Applic. for Extension, Ex. 1 at 34 (Batchelder, J., dissenting in relevant part). That safeguard was sorely needed here, because the district court used the results of "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. In Judge Batchelder's view, using those three 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 early 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.

8. 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." First Applic. for Extension, Ex. 1 at 42 (Batchelder, J., dissenting in relevant part).

9. As noted in the previous application, undersigned counsel Paul D. Clement was not involved in the proceedings below and 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.

10. While counsel has been working diligently in preparing this petition, Mr. Clement also has substantial argument and briefing obligations between now and the current due date of the petition, including a reply brief in *3M Co. et al. v. Adkins*, No. 22-12812 (11th Cir.); substantial pre-trial briefing and motions practice in *Eyre et al. v. Rosenblum et al.*, 3:22-cv-1862 (D. Or.); a reply to a motion for summary judgment in *United States v. Regeneron Pharmaceuticals, Inc.*, No. 1:20-cv-11217 (D. Mass); and a reply brief in *BMC Software, Inc. v. Int'l Bus. Machs. Corp.*,

No. 22-20463 (5th Cir.). More time is required, commensurate with counsel's other responsibilities, to adequately research and brief the important issues posed by this matter.

WHEREFORE, for the foregoing reasons, Applicant requests that an extension of time to and including June 30, 2023, be granted within which Applicant may file a petition for a writ of certiorari.

Respectfully submitted,

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