No. _____

In the
Supreme Court of the United States

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

Petitioner,

v.

TRAVIS ABBOTT; JULIE ABBOTT,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

PAUL D. CLEMENT
Counsel of Record
C. HARKER RHODES IV*
CHADWICK J. HARPER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioner

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QUESTION PRESENTED

This case arises from a long-running multi-district litigation ("MDL") in which thousands of plaintiffs claimed injuries from permitted chemical releases from one of petitioner's plants. Some plaintiffs lived near the plant, while others lived tens of miles away; some claimed exposure via discharges to water, others via air emissions; and the claimed dates of exposure varied widely. Because of such differences, these damages claims proceeded in an MDL rather than a class action. As is common in MDLs, a few cases were selected for informational, expressly non-binding "bellwether trials." After three trials resulted in plaintiff verdicts—in cases not designed to be representative of all the MDL cases, and despite the court's assurances that the verdicts would be non-binding—the district court invoked nonmutual offensive collateral estoppel to preclude petitioner from disputing the key issues of duty, breach, and foreseeability here and across the MDL. The Sixth Circuit affirmed in a sharply divided decision, with the panel majority embracing the district court's novel application of nonmutual offensive collateral estoppel to bellwether trials and rejecting any representativeness requirement. Judge Batchelder dissented, explaining that the decision conflicted with other circuits and would spell the end of bellwether trials in MDLs.

The question presented is:

Whether nonmutual offensive collateral estoppel can be applied to make the results of a handful of unrepresentative bellwether trials binding on the defendant in all pending and future cases in an MDL.

PARTIES TO THE PROCEEDING

Petitioner is E.I. du Pont de Nemours & Co. ("DuPont"), now known as EIDP, Inc.

Respondents are Travis and Julie Abbott.

CORPORATE DISCLOSURE STATEMENT

DuPont is a subsidiary of Corteva, Inc., a publicly-owned corporation. Additionally, the Chemours Company, Corteva, Inc., and DuPont de Nemours, Inc. are publicly-owned corporations that are parties to agreements with DuPont that give them a financial interest with respect to claims in this proceeding.

STATEMENT OF RELATED PROCEEDINGS

The following proceedings are directly related to this case within the meaning of Rule 14.1(b)(iii):

- *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, No. 21-3418 (6th Cir.), judgment entered on December 5, 2022; petition for rehearing denied on February 1, 2023.
- *Abbott et al. v. E.I. du Pont de Nemours and Company et al.*, No. 2:17-cv-00998 (S.D. Ohio), judgment entered on April 26, 2021.
- *Swartz et al. v. E.I. du Pont de Nemours and Company et al.*, No. 2:18-cv-00136 (S.D. Ohio), dismissed based on joint stipulation on March 24, 2021.

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PETITION FOR WRIT OF CERTIORARI

The decision below eviscerates a critical tool for resolving mass torts cases and violates basic principles of due process to boot. For more than ten years, DuPont has been litigating an MDL in which thousands of plaintiffs have claimed that they were injured by past authorized discharges of a chemical called C-8 from one of DuPont's plants. While an earlier suit seeking other limited relief proceeded as a class action, plaintiffs' suits for damages are too diverse and individualized for class treatment and were aggregated in an MDL for pre-trial purposes. To assess the strength of plaintiffs' claims and enhance the prospects of a global settlement, the district court followed the well-trod path of allowing the parties to choose a handful of bellwether cases to try first. In approving the parties' selection, the district court did not purport to find those bellwethers representative of the rest of the MDL cases. Moreover, the parties and the court agreed from day one that the bellwether results would not be binding in future trials and were instead designed to inform the parties of the strengths of various claims and defenses and thereby to encourage a global settlement.

After the verdicts came in, however, plaintiffs and the district court changed their tune. Based on plaintiff verdicts in just two bellwether trials—plus a third case hand-picked by plaintiffs under instructions from the court to choose a case involving the most severe alleged injuries—plaintiffs asserted that under principles of non-mutual offensive preclusion, DuPont should be bound in every other pending and future case in the MDL from contesting elements of liability

that the jury had resolved against DuPont in those trials. The district court endorsed that bait-and-switch, foreclosing DuPont from challenging the key elements of duty, breach, and foreseeability in this case and in any of the thousands of other potential suits in the MDL.

In the sharply divided decision below, the Sixth Circuit panel majority affirmed that egregious and consequential error. The panel majority recognized that this Court's pathmarking decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), demands caution where (as here) a court is asked to apply nonmutual offensive collateral estoppel to preclude a defendant from litigating key elements of liability. But despite clear instructions from this Court in *Parklane* that its cautionary examples were merely illustrative, the panel majority treated them as exhaustive (in conflict with numerous courts following this Court's guidance), and so found no obstacle to allowing a handful of unrepresentative bellwether trials to bind the MDL defendant across thousands of potential suits. Judge Batchelder dissented, explaining that the panel majority endorsed "something that no other circuit court has … allowed" and would create asymmetric risks that would make it irrational for any defendant to agree to bellwether trials, meaning that "the age of bellwethers will come to an end." App.56, 63.

This Court should not allow that short-sighted and settlement-frustrating decision to stand without further review. By allowing a few adverse bellwether verdicts to control countless pending and future cases across an entire MDL, the panel majority's decision

departed markedly from established precedent, settled MDL practice, and the demands of fairness and due process. Bellwether trials are designed to aid MDL plaintiffs and defendants in evaluating the strength of their claims and defenses and the potential contours of a global settlement, not to force an MDL defendant who suffers a few early losses to concede liability across the entire MDL—especially when the court has already assured the parties that the bellwether results will be non-binding. The patent unfairness of applying nonmutual offensive collateral estoppel in that context is underscored by its asymmetric results: If the MDL defendant wins its bellwether trials, that outcome cannot bind the remaining MDL plaintiffs, because due process prohibits binding nonparties; but if the MDL defendant loses the first few bellwether trials, then (under the decision below) that outcome governs the whole MDL. That converts bellwethers into an offer that defendants cannot afford to accept, as it renders the bellwethers a one-way class action, with all the downside for the defendant and none of the procedural protections or symmetrical risks to the class entailed in class proceedings. That cannot be reconciled with *Parklane*, due process, or the continued viability of bellwether trials as a vital mechanism for resolving mass torts.

At a bare minimum, if bellwether trials can give rise to nonmutual offensive collateral estoppel in the MDL context, they certainly cannot do so absent any finding by the district court that the bellwether cases are in fact representative of the rest of the MDL. Without a finding of representativeness, which will be rare in cases not suited for class treatment, there can

be no assurance that the bellwether verdicts will reliably predict what would happen in other trials, making MDL-wide preclusion inconsistent with due process and basic fairness. The panel majority's contrary conclusion creates a square conflict with the Fifth Circuit and confirms the need for further review.

The decision below is not just profoundly wrong, but immensely consequential. If bellwether trials can give rise to nonmutual offensive collateral estoppel—even when the district court has explicitly represented that they will be non-binding—then bellwethers in MDLs will no longer be a viable option for facilitating the settlement of mass torts, as no rational defendant will be willing to roll the dice on a bellwether trial where the plaintiffs can lose at most one case and the defendant could lose the entire MDL. The result will be to deprive the federal judiciary of a critical tool for resolving the cases most in need of resolution, mass torts that make up a disproportionate share of the federal docket—some 40% or more of the federal civil caseload—and consume a substantial share of the judiciary's limited resources. This Court should grant certiorari to ensure due process and restore an important judicial tool.

OPINIONS BELOW

The Sixth Circuit's decision is reported at 54 F.4th 912 and reproduced at App.1-69. The district court's decision is unreported, but available at 2019 WL 6310731 and reproduced at App.72-142.

JURISDICTION

The Sixth Circuit issued its decision on December 5, 2022, and denied a timely petition for rehearing on February 1, 2023. Justice Kavanaugh extended the

time to file a petition to June 30, 2023. This Court has jurisdiction under 28 U.S.C. §1254(1).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fifth Amendment is reproduced at App.143.

STATEMENT OF THE CASE

A. Factual Background

1. This case is part of a decade-long MDL related to DuPont's past use of perfluorooctanoic acid, sometimes called "C-8," to make fluoropolymers at its Washington Works plant in Parkersburg, West Virginia. As part of its manufacturing process, acting pursuant to validly issued environmental permits, DuPont discharged C-8 from its plant into the Ohio River and the air until its use was phased out in 2013. *See Little Hocking Water Ass'n, Inc. v. E.I. du Pont Nemours & Co.*, 91 F.Supp.3d 940, 947 (S.D. Ohio 2015).

In 2001, a number of plaintiffs filed a class action in West Virginia state court alleging that trace levels of C-8 in their drinking water caused various diseases. *See Leach v. E.I. Du Pont de Nemours & Co.*, 2002 WL 1270121, at *1-3 (W. Va. Cir. Ct. Apr. 10, 2002). In 2005, that class action resulted in a settlement agreement with approximately 80,000 class members known as the "Leach Agreement," which afforded the class non-damages relief including medical monitoring and ongoing water treatment that removes

C-8 from the drinking water. App.4-5; *see* MDL.Dkt.2813-1.[1]

Recognizing that damages actions would implicate individualized issues unsuitable for class treatment, the Leach Agreement allows class members with certain diseases to bring their own individual personal-injury claims. In particular, the agreement established a "Science Panel" of three independent epidemiologists to research the health effects of C-8 exposure and what, if any, link might exist between C-8 exposure and a range of diseases. App.4-5. If the Science Panel determined that it was more likely than not that a particular disease could be caused by C-8 exposure, class members with that disease could bring individual claims against DuPont, and DuPont agreed not to contest general causation (i.e., that exposure to C-8 is capable of causing that disease) while explicitly reserving the right to contest specific causation (i.e., that exposure to C-8 actually caused that disease in a particular individual). App.6. Conversely, if the Science Panel did not find a probable link between a particular disease and C-8 exposure, the Leach Agreement barred class members from suing DuPont on the theory that C-8 exposure had caused that disease. App.6.

2. After seven years of research, the Science Panel found no probable link between C-8 exposure and about 50 diseases, but did find a probable link to six

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[1] Citations to "MDL.Dkt" are to No. 2:13-md-2433 (S.D. Ohio). Other dockets include *Abbott*, No. 2:17-cv-998 ("*Abbott*.Dkt"); *Swartz*, No. 2:18-cv-00136 ("*Swartz*.Dkt"); *Freeman*, No. 2:13-cv-1103 ("*Freeman*.Dkt"); and *Vigneron*, No. 2:13-cv-136 ("*Vigneron*.Dkt").

diseases. App.6-7. Members of the *Leach* class with those six diseases subsequently filed numerous individual suits against DuPont, and the Judicial Panel on Multidistrict Litigation assigned those suits to the MDL here. App.7-8.

Early in the MDL process—when there were only about 80 cases in the MDL—the court instructed the parties to identify and prepare 20 of those cases for discovery, focusing on plaintiffs with the three most serious diseases. *See* MDL.Dkt.194 at 1. The parties then selected six of those 20 cases—three chosen by the plaintiffs' steering committee, and three chosen by DuPont—for "bellwether" trials. Bellwether trials are a common mechanism for seeking to lay the groundwork for the settlement of mass tort claims. Black's Law Dictionary defines a bellwether trial as a "nonbinding trial of a case, or set of cases, on issues representative of the common claims in a larger mass-tort proceeding, held to determine the merits of the claims and the strength of the parties' positions on the issues." *Bellwether trial*, Black's Law Dictionary (11th ed. 2019). As that definition confirms, bellwether trials are non-binding. The "whole purpose of bellwether litigation … is to enable other litigants to learn from the experience and reassess their tactics and strategy (and, hopefully, settle)." *In re Cox Enters., Inc. Set-top Cable Television Box Antitrust Litig.*, 835 F.3d 1195, 1208 (10th Cir. 2016). In this MDL in particular, as respondents acknowledged below, "everyone agreed from the beginning" that "the bellwethers here weren't binding but instead were ordinary trials whose results might inform the conduct of future trials and potentially settlement." Resp.CA6.Br.36; *see, e.g.*, MDL.Dkt.4184 at 3 (district

court order recognizing that rulings in each bellwether case would be "dispositive *only* on the claims before it," and merely "instructive" as to other MDL cases); MDL.Dkt.3973 at 6-7 (same).

As is typical, not all the selected bellwether candidates went to trial. Of the six cases initially chosen, one was withdrawn by the plaintiff and three settled. That left only two bellwether cases, *Bartlett* and *Freeman*, both of which resulted in plaintiff verdicts. Pursuant to the court's instruction, the plaintiffs' steering committee selected the next case for trial, *Vigneron*, which they hand-picked after the court directed them to prioritize "the most severely impacted plaintiffs." MDL.Dkt.4624 at 25. Unsurprisingly, that case also produced a plaintiff verdict. *Vigneron*.Dkt.176.[2]

In February 2017, after those verdicts, DuPont announced a settlement of all the then-pending cases in the MDL designed to bring all pending litigation to a close. App.9.

B. Procedural History

1. After the February 2017 settlement, more plaintiffs appeared and filed new cases that were added to the MDL. Among those new plaintiffs were respondents Travis Abbott and his wife Julie Abbott,

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[2] Although *Vigneron* was not denominated as a bellwether case—and was specifically chosen to be *non*-representative—it was grouped with the two bellwether trials in the preclusion analysis below. None of the decisions below purported to give *Vigneron* separate treatment or preclusive effect independent of the two cases chosen through the bellwether process. For ease of reference, this petition refers to all three cases as "bellwethers." *See* App.50 n.3.

who alleged that C-8 exposure caused Travis to develop testicular cancers. *See Abbott*.Dkt.29. Respondents' case was subsequently set for a joint trial with a case brought by another couple, Angela and Teddy Swartz, who alleged that C-8 exposure caused Angela Swartz to develop kidney cancer. *Swartz*.Dkt.1.

The facts in respondents' and the Swartzes' cases—like many other later-filed cases in the MDL—differed significantly from the facts in the tried cases. In *Freeman* and *Vigneron*, for instance, the plaintiffs asserted DuPont should have known that their C-8 exposure was endangering their health because the C-8 levels in their drinking water exceeded DuPont's own 3-parts-per-billion safe guidance level. *See Freeman*.Dkt.119 at 54; *Vigneron*.Dkt.144 at 49. Respondents' expert, by contrast, testified that the C-8 levels in Travis Abbott's (and Angela Swartz's) water fell well below that threshold. *Abbott*.Dkt.190 at 176. *Freeman* and *Vigneron* involved plaintiffs who alleged that they were exposed to C-8 released through air emissions, *see, e.g.*, *Freeman*.Dkt.119 at 111, 125; *Vigneron*.Dkt.144 at 263, while respondents (and the Swartzes) made no such claim, *see, e.g.*, *Abbott*.Dkt.186 at 218. Perhaps most notably, *Freeman* and *Vigneron* involved plaintiffs who drank water from wells that were only 1,500 feet or less from DuPont's plant, while Travis Abbott's water (and Angela Swartz's) was sourced from wells anywhere from 14 to 56 river miles away. App.60-61.[3] In

[3] In fact, Swartz lived entirely outside the water districts involved in the Leach Agreement, and her exposure allegations

addition, each plaintiff was exposed at different times, and the state of the science changed significantly over the more than half a century at issue.

2. Those stark factual differences, however, did not deter the plaintiffs' steering committee from defying the basic nature of bellwether trials and trying to foreclose DuPont from contesting key issues. In October 2019, the plaintiffs' steering committee sought partial summary judgment arguing that the results of the bellwether trials—which the parties and the court had consistently recognized would be merely "instructive" and not binding in subsequent MDL cases, *see* MDL.Dkt.4184 at 3—should collaterally estop DuPont from challenging the elements of duty and breach in respondents' case and in all the other MDL cases. MDL.Dkt.5274.

The district court granted the motion. App.72. In the district court's view, despite its previous assurances, the verdicts in the three early trials triggered the doctrine of nonmutual offensive collateral estoppel and precluded DuPont from contesting any issues resolved by those verdicts in subsequent MDL cases. App.128-38. Specifically, the district court concluded that those three general negligence verdicts precluded DuPont from disputing the central questions of duty, breach, and foreseeability of injury as to any other plaintiff in the MDL, including thousands of potential future plaintiffs. Despite recognizing that each of the three early verdicts found only that DuPont owed and

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were based primarily on claiming that she "occasionally drank contaminated water when visiting the homes of others and during a one-year part-time job." App.61.

breached "a duty to a particular *Leach* Class member," the court read those verdicts as implicitly extending to "the entire communities surrounding [the] Washington Works plant," concluding that the substantial factual differences involved were "of no legal significance." App.132.

3. Faced with that extraordinary order—which effectively precluded it from mounting a defense based on the results of three earlier non-representative and avowedly non-binding trials—DuPont filed a petition for mandamus in the Sixth Circuit, explaining that the district court's order violated DuPont's due process rights and contradicted the very nature of bellwether trials while eviscerating their practical utility. The Sixth Circuit recognized DuPont's "vigorous and perhaps compelling argument that the district court erred as a matter of law," but denied mandamus relief, concluding that DuPont would have an adequate remedy on direct appeal. Order at 5-6, *In re E.I. DuPont de Nemours & Co. C-8 Personal Injury Litig.*, No. 19-4226 (6th Cir. Jan. 17, 2020), Dkt.23.

Respondents' case then went to trial. With DuPont precluded from contesting the key issues of duty, breach, and foreseeability of injury, the jury awarded Travis Abbott $40 million, and awarded his wife Julie Abbott $10 million for loss of consortium (subsequently reduced to $250,000 under Ohio law). App.11.

4. A sharply divided panel of the Sixth Circuit affirmed. In an opinion by Judge Stranch, joined by Judge Donald, the panel majority held that the district court did not err by relying on the results of three early and unrepresentative trials to preclude DuPont from

contesting key elements of liability in this case and all future MDL cases. App.11-27.

The panel majority did not dispute that the district court invoked nonmutual offensive collateral estoppel without purporting to make any determination that the bellwether cases were actually representative of the thousands of other current and potential cases in the MDL. In the panel majority's view, that "lack of consideration of representativeness" did not prevent the district court from deeming the three early trials binding across the board—and neither did the district court's assurances that they would have "no preclusive effect." App.25. Instead, the panel majority held, the only "constraints on the use of nonmutual offensive collateral estoppel," App.27, were the four specific factors that this Court identified 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" beyond the four identified factors, *id.* at 331-32.

Judge Batchelder dissented in relevant part, concluding that the bait-and-switch here violated due process. That basic guarantee of procedural fairness, she explained, "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." App.50. The district court here instead "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." App.45. That result ran contrary to both common sense and the Constitution, she concluded, as "it is Statistics 101 that a small, unrepresentative sample cannot yield reliable inferences as to a larger group." App.54. Using a few 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." App.46.

In addition, Judge Batchelder observed, the panel majority's decision conflicted with decisions from other courts, including the Fifth Circuit's decision in *In re Chevron U.S.A.*, 109 F.3d 1016 (5th Cir. 1997). The decision endorsed "something that no other circuit court has, to my knowledge, allowed." App.56. Judge Batchelder further emphasized that the ruling would have serious practical consequences for pending and future MDLs, as it "essentially guts the utility of informational bellwether trials." App.63. Given the disregard of express assurances that the trials would be non-binding, "it seems that parties can do nothing—other than not conduct bellwethers at all—to prevent an informational bellwether from becoming binding." App.63. As a result, Judge Batchelder predicted, allowing the panel majority's decision to stand would mean "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." App.63.

REASONS FOR GRANTING THE PETITION

The Sixth Circuit's decision below is profoundly mistaken and will have drastic consequences for MDL practice across the country. By authorizing courts to convert informational bellwether trials into binding MDL-wide resolutions with asymmetric risks for defendants—even without any finding that the bellwether cases are representative of the rest of the MDL—the decision below allows an anomalous form of offensive collateral estoppel that violates due process and eliminates bellwethers as a viable option for defendants going forward. Bellwether trials are designed to be non-binding by their very nature and exist to allow the parties to assess the strength of their claims and defenses, test different trial strategies, and (hopefully) reach a basis for a consensual global resolution. Under the panel majority's approach, by contrast, bellwether trials in MDLs are an asymmetric preclusion trap in which a defense verdict carries no consequences for other MDL plaintiffs, while a verdict for individual plaintiffs binds defendants across the entire MDL. That dynamic is fundamentally unfair, forcing defendants to face essentially all the downside risks of a class action with neither the upside ability to bind the entire plaintiff class nor the procedural protections that class treatment requires. Applying nonmutual offensive collateral estoppel to produce that astonishingly one-sided result cannot be squared with *Parklane* or with the constitutional guarantee of due process.

At a bare minimum, nonmutual offensive collateral estoppel cannot apply where (as here) the district court makes no finding that the bellwether

cases are actually representative of the MDL as a whole. Absent a judicial determination that the bellwethers are in fact representative, there is no basis for concluding that the bellwether verdicts are a reliable proxy for the verdicts that would be returned if the other MDL cases went to trial. The panel majority's refusal to require any representativeness finding directly conflicts with contrary Fifth Circuit precedent, opening a circuit split that only this Court can resolve.

The issue is also one of extraordinary importance for MDL practice and for the federal judicial system generally. If the decision below stands, the asymmetric preclusion regime it announces will eliminate bellwether trials as a viable option in MDL proceedings, since no sane defendant will sign up for a heads-I-win-a-single-trial-tails-I-lose-the-entire-MDL regime. Unless this Court grants review, courts and litigants in MDLs across the country will no longer be able to rely on what has until now been a key tool for promoting settlement of the cases in the greatest need of settlement lest they consume a wholly disproportionate amount of federal judicial resources. Given that MDLs today make up some 40% or more of the entire federal civil docket, the baleful practical consequences of the decision below are difficult to overstate. The petition for certiorari should be granted.

I. The Sixth Circuit's Decision Is Seriously Mistaken And Conflicts With Settled Precedent From This Court And Other Circuits.

A. Nonmutual Offensive Collateral Estoppel Cannot Extend the Results of a Few Bellwether Trials to an Entire MDL.

By allowing the district court to apply nonmutual collateral estoppel to make a handful of bellwether trials binding across the entire MDL, the panel majority broke sharply with precedent from this Court and others, standard MDL practice, and the fundamental commands of due process and basic fairness. That serious and consequential error should not be permitted to stand.

1. This Court first permitted the use of nonmutual offensive collateral estoppel—subject to critical limitations—in its pathmarking decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979). There, a shareholder brought a class action against Parklane Hosiery and its officers and directors based on an allegedly false proxy statement. *Id.* at 324. Before that suit went to trial, the SEC filed suit against the same defendants on the same grounds. *Id.* After a 4-day bench trial, the SEC obtained a declaratory judgment finding the proxy statement false. *Id.* at 324-25. The private plaintiff then moved for partial summary judgment against Parklane and its officers and directors, asserting that they were collaterally estopped from relitigating the issues that had been resolved against them in the SEC action. *Id.* at 325. The district court denied the motion on the ground that applying collateral estoppel to the private

action at law based on the SEC's judgment in equity would deny Parklane its Seventh Amendment right to a jury trial, but the Second Circuit reversed, holding that the Seventh Amendment was not implicated. *Id.*

The *Parklane* Court began its analysis with a "threshold question": whether nonmutual offensive collateral estoppel is *ever* permissible. *Id.* at 326. As the Court explained "the common law as it existed in 1791 … permitted collateral estoppel only where there was mutuality of parties," *id.* at 335, meaning that "neither party could use a prior judgment as an estoppel against the other unless both parties were bound by the judgment," *id.* at 326-27. The Court had recently abandoned that rule for *defensive* collateral estoppel in *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), finding that a plaintiff who sued one defendant and lost could be collaterally estopped from asserting the same theory in a new suit against a different defendant. *See Parklane*, 439 U.S. at 327-28.

Unlike *Blonder-Tongue*, however, *Parklane* involved *offensive* collateral estoppel: rather than preclude a plaintiff from asserting a claim lost in a prior action, it sought to preclude a defendant from raising a defense lost in a prior action. *Id.* at 329. As the *Parklane* Court fully appreciated, that distinction made a considerable difference. First, offensive collateral estoppel "does not promote judicial economy in the same manner as defensive use does"; instead of encouraging plaintiffs "to join all potential defendants in the first action," minimizing the number of suits, it "creates precisely the opposite incentive," giving plaintiffs "every incentive to adopt a 'wait and see'

attitude, in the hope that the first action by another plaintiff will result in a favorable judgment." *Id.* at 329-30. As such, the Court recognized, "offensive use of collateral estoppel will likely increase rather than decrease the total amount of litigation." *Id.* at 330.

Second, the Court observed, nonmutual offensive collateral estoppel "may be unfair to a defendant." *Id.* For instance, precluding a defendant based on a prior action may be unfair where the first action involved "small or nominal damages," creating "little incentive to defend vigorously"; where the second action involves "procedural opportunities unavailable in the first action that could readily cause a different result"; or where "the judgment relied upon as a basis for the estoppel is itself inconsistent with one or more previous judgments in favor of the defendant" (e.g., if a railroad "wins the first 25 suits" claiming negligence based on a collision, but "a plaintiff wins in suit 26," "offensive use of collateral estoppel should not be applied so as to allow [future] plaintiffs … automatically to recover"). *Id.* at 330-31 & n.14.

Despite recognizing these problems, the *Parklane* Court ultimately chose "not to preclude the use of offensive collateral estoppel" entirely. *Id.* at 331. Instead, *Parklane* gave district courts "discretion to determine" when that doctrine should apply, subject to a "general rule": that "where, either for the reasons discussed above *or for other reasons*, the application of offensive estoppel would be unfair to a defendant," nonmutual offensive collateral estoppel should not be permitted. *Id.* (emphasis added). Applying that general rule, the Court found no unfairness in holding the defendants in *Parklane* to the results of the SEC

action, and no Seventh Amendment problem. *Id.* at 331-37.

2. The panel majority's reasoning here cannot be reconciled with *Parklane*. As *Parklane* and its "or for other reasons" formulation make crystal clear, its list of ways in which nonmutual offensive collateral estoppel "may be unfair to a defendant" is expressly illustrative, not exhaustive. *Id.* at 330-31. The panel majority, however, took precisely the opposite approach, treating the examples in *Parklane* as the only "necessary constraints on the use of nonmutual offensive collateral estoppel." App.27. After concluding that this case did not fall within any of the specific scenarios described in *Parklane*, it rejected DuPont's "other objections," on the theory that accepting those arguments would impermissibly "impose further rules" beyond those *Parklane* envisioned. App.25. That refusal to countenance the myriad other ways that nonmutual offensive collateral estoppel might be unfair runs headlong into this Court's express instructions in *Parklane* itself, and conflicts with decisions from multiple other courts that have correctly recognized that the *Parklane* examples are not exhaustive. *See, e.g.*, *Bifolck v. Philip Morris USA Inc.*, 936 F.3d 74, 84 (2d Cir. 2019) (considering factors beyond those listed in *Parklane*); *Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 125-26 (D.C. Cir. 1984) (*Parklane*'s examples "do not constitute an exhaustive list"); *Hicks v. Quaker Oats Co.*, 662 F.2d 1158, 1173 n.15 (5th Cir. 1981) (*Parklane* "did not consider its list of factors was exhaustive"). The decision below could be summarily reversed on that basis alone.

That initial mistake, however, led the Sixth Circuit into an even more significant error. After refusing to acknowledge that nonmutual offensive collateral estoppel can be unfair to a defendant in scenarios beyond the precise examples given in *Parklane*, the Sixth Circuit went on to approve nonmutual offensive collateral estoppel in circumstances where the unfairness is inescapable: where plaintiffs seek to use the results of bellwether trials designed to be informational and non-binding to bind the defendant in all of the pending and future cases across the entire MDL. The Sixth Circuit's novel and unprecedented holding that a few early informational trials focused on specific individual plaintiffs can fairly foreclose a defendant from challenging key elements of liability for different plaintiffs in thousands of other cases is seriously incorrect, and would eviscerate the use of bellwethers in MDL proceedings.

The palpable unfairness of giving preclusive effect to a few early and explicitly non-binding bellwethers flows from the very nature of bellwether trials. Bellwether trials are non-binding by definition. *See Bellwether trial*, Black's Law Dictionary (11th ed. 2019) (defining "bellwether trial" as a "nonbinding trial"). Their *raison d'etre* is not to bind parties or definitively resolve issues across the MDL (as in the case of class actions) but to "produce a sufficient number of representative verdicts and settlements to enable the parties and the court to determine the nature and strength of the claims, whether they can be fairly developed and litigated on a group basis, and what range of values the cases may have if resolution is attempted on a group basis." *In re Depuy*

Orthopaedics, Inc., 870 F.3d 345, 348-49 (5th Cir. 2017) (quoting *Manual for Complex Litigation (Fourth)* §22.315 (2004)). That is, "the whole purpose of bellwether litigation … is to enable other litigants to learn from the experience and reassess their tactics and strategy (and, hopefully, settle)," not to conclusively resolve any issues presented in those specific trials for the broader MDL as a whole. *Cox*, 835 F.3d at 1208. And the non-binding nature of bellwether trials is exactly what makes them useful in the MDL context, as it enables the parties to evaluate the strengths of different claims and defenses and different trial strategies (and thereby enhance the prospects of a global settlement) without treating the bellwether cases as potentially dispositive of the entire litigation. *See id.* Even when the results favor one side, they can illustrate certain patterns (*e.g.*, a correspondence between certain kinds of exposure and the amount of jury verdicts) that can facilitate the grouping of plaintiffs for settlement. But whatever their result, they are designed to inform, not bind.

Indeed, courts and commentators routinely agree that bellwether trials are not binding on other cases. *See, e.g.*, *Depuy*, 870 F.3d at 348-49; *Dodge v. Cotter Corp.*, 203 F.3d 1190, 1200 (10th Cir. 2000) (bellwethers do not bind later cases unless the parties "clearly memorialize that agreement"); Jonathan Steinberg, Note, *The False Promise of MDL Bellwether Reform*, 96 N.Y.U. L. Rev. 809, 826 (2021) (recognizing the "general consensus" that bellwethers "can neither bind other parties in the MDL nor wholly resolve their claims"); Melissa J. Whitney, Fed. Jud. Ctr., *Bellwether Trials in MDL Proceedings* 6 (2019), https://perma.cc/2GFH-LY63 ("[I]n general,

bellwether trials do not have a preclusive effect on other cases in an MDL proceeding.").

While parties can agree to deviate from the clear default assumption that bellwethers are non-binding, here the non-binding nature of the bellwether trials was made explicit. As respondents conceded below, the parties and the court "agreed from the beginning" that "the bellwethers here weren't binding but instead were ordinary trials whose results might inform the conduct of future trials and potentially settlement," Resp.CA6.Br.36; *see, e.g.*, MDL.Dkt.4184 at 3 (bellwether rulings were "dispositive *only* on the claims" in each bellwether case, and merely "instructive" for other cases); MDL.Dkt.3973 at 6-7 (same). Applying collateral estoppel after the fact to convert expressly non-binding bellwethers into verdicts that conclusively bind defendants across the entire MDL cannot be reconciled with basic fairness or due process.

Even beyond that blatant bait-and-switch, the Sixth Circuit's position creates serious asymmetries and unfairness. Allowing bellwether trials to serve as the basis for nonmutual collateral estoppel across the entire MDL creates a massive asymmetric risk to MDL defendants: No matter how successful the MDL defendant is in the bellwether trials, it cannot assert nonmutual collateral estoppel against other MDL plaintiffs, since doing so would violate those plaintiffs' due process right to litigate their own claims. *See, e.g.*, *Blonder-Tongue*, 402 U.S. at 329; *see also* Byron G. Stier, *Another Jackpot (In)justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 Pepp. L. Rev. 715, 743 (2009) (losses by bellwether plaintiffs "will

not result in issue preclusive effects upon other plaintiffs, because those subsequent plaintiffs will not have been parties to the prior action; due process prohibits the application of issue preclusion"). By contrast, if the MDL defendant loses just a handful (or less) of early bellwether trials, the Sixth Circuit's rule would allow every other MDL plaintiff to invoke those losses to preclude the MDL defendant from litigating key issues of liability even in cases presenting markedly different factual circumstances. Such a heads-I-win-a-single-trial-tails-I-lose-the-entire-MDL regime is fundamentally unfair to defendants. Those problems are compounded by the reality that cases are generally selected for bellwether treatment (and a subset often subsequently settles out) for reasons having nothing to do with their typicality and everything to do with facilitating settlement. *See infra* p.27. Still worse, the Sixth Circuit's rule encourages MDL plaintiffs to dismiss cases that the defendant chooses as bellwethers (as occurred here), leading the cases that do go to trial to skew against the defendant.

To be sure, offensive collateral estoppel always raises the risk that a later plaintiff "will be able to rely on a previous judgment against a defendant but will not be bound by that judgment if the defendant wins." *Parklane*, 439 U.S. at 330. In the MDL context, however, the asymmetric risk to the defendant becomes intolerable. Unlike a traditional lawsuit, MDL proceedings involve large groups of pending or potential suits that all assert similar theories of liability against the same defendant(s), and likely threaten massive damages to boot. Forcing an MDL defendant in that context to risk liability to thousands

of potential MDL plaintiffs based on a few bellwether trials—while leaving the other MDL plaintiffs free to disregard the results if the bellwether plaintiffs lose—creates fundamental unfairness that far exceeds anything *Parklane* or due process permits. The contrast with class actions, where both plaintiffs and defendants will be bound across the class, highlights the distinct unfairness of applying non-mutual offensive collateral estoppel in the MDL context. Indeed, in some cases, bellwethers may help inform whether the claims are suitable for class treatment. In that context, to inflict on defendants all the downside risk of a class action without the counterbalancing prospect of binding the class or the procedural protections of Rule 23 is the height of unfairness.

The Sixth Circuit's unprecedented decision also warrants particular skepticism in light of its novel expansion of nonmutual offensive collateral estoppel beyond traditional bounds. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (recognizing that "traditional practice provides a touchstone" for due process analysis). At the time of the Founding and for nearly two centuries thereafter, mutuality was an essential requirement for collateral estoppel. *See, e.g.*, *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912); *Deery v. Cray*, 72 U.S. 795, 803 (1866); *see also Parklane*, 439 U.S. at 337 (recognizing that "there would have been no collateral estoppel in 1791" absent mutuality). While this Court has since allowed for nonmutual offensive collateral estoppel subject to certain express limitations, *Parklane*, 439 U.S. at 327, the Sixth Circuit's novel effort to make non-mutuality the norm, rather than an

exception for circumstances where fairness is guaranteed, calls for "judicial wariness." *Bifolck*, 936 F.3d at 84; *see Missouri v. Jenkins*, 515 U.S. 70, 124 (1995) (Thomas, J., concurring) (judicial power should be exercised "consistent with our history and traditions"). The Sixth Circuit then made matters even worse by applying a particularly aggressive form of collateral estoppel, departing from settled law by giving broad preclusive effect to general negligence verdicts based on plaintiff-specific facts. *See* App.-57-63; *Dodge*, 203 F.3d at 1197-99. The Framers would not recognize either the form of nonmutual collateral estoppel applied in the decision below or the phenomenon of mass torts consuming nearly half the federal civil docket. That is no coincidence.

B. At a Minimum, Nonmutual Offensive Collateral Estoppel Cannot Extend the Results of a Few Bellwether Trials to an Entire MDL Without Any Finding That the Bellwethers Are Representative.

Even if it were possible for a handful of bellwether trials designed to be informational, rather than binding, to trigger nonmutual offensive collateral estoppel across an entire MDL, that outcome would at a bare minimum require a finding that the bellwether cases were in fact representative of the wide range of other cases in the MDL to which preclusion is being applied. Such a finding is not only absolutely necessary, but unlikely given that MDLs often involve cases with too much disparity for class treatment and bellwether cases are typically selected to provide information about a range of different claims. As Judge Batchelder cogently explained in her dissent

below, and the Fifth Circuit has squarely held, making the results of bellwether trials binding in this context without any such representativeness finding is a plain violation of basic fairness and the requirements of due process.

1. Even assuming that there are some circumstances in which bellwether trials in MDLs can give rise to nonmutual offensive collateral estoppel, a representativeness finding would be indispensable. Nonmutual offensive collateral estoppel is unavailable when it would be "unfair to [the] defendant" or violate due process. *Parklane*, 439 U.S. at 331; *see, e.g.*, *Taylor v. Sturgell*, 553 U.S. 880, 891 (2008) (preclusion "is, of course, subject to due process limitations"). In the bellwether context, that bedrock principle requires at the very least that a court not bind the defendant across the entire MDL without first determining that the outcome of the bellwethers provides a fair prediction of what would happen if the other MDL cases went to trial—i.e., that the bellwether cases are actually representative of the rest of the MDL. Without that finding, it is "fundamentally unfair for a small, non-representative sample of bellwether plaintiffs to bind a defendant in thousands of future cases." App.52.

Indeed, without such a finding, giving those bellwethers preclusive effect is wholly arbitrary. After all, as Judge Batchelder explained, "it is Statistics 101 that a small, unrepresentative sample cannot yield reliable inferences as to a larger group." App.54. Absent any finding that the bellwether cases are truly representative of the broader universe of cases included in the MDL, those cases cannot provide a fair

and reliable basis for applying preclusion across that entire universe. On the contrary, using an unreliable sample to foreclose defenses deprives the defendant of its "full and fair opportunity to be heard" and its "constitutional right to have an individual assessment of liability and damages in each case." App.54-55. Allowing a small and potentially skewed sample to control key issues of liability in countless other cases, without any judicial examination of whether that sample is representative, thus fails the basic test of fairness that both *Parklane* and due process require. *See, e.g.*, *Bracy v. Gramley*, 520 U.S. 899, 904 (1997) (due process "clearly requires a fair trial in a fair tribunal").

The need for such a representativeness finding is only heightened by the nature of MDLs and the dynamics of the bellwether selection process. Cases generally find themselves concentrated in an MDL, rather than subject to class proceedings, precisely because they have material factual differences that preclude the findings of commonality and predominance necessary for class certification under Rule 23(b)(3). As a result, there are good reasons to suspect that the initial bellwether results will not be representative. That conclusion is reinforced by the bellwether selection process, which often invites the parties to select their best cases or otherwise identify cases that are not representative. The selection process is further skewed by the reality that cases initially selected for bellwether treatment remain individual cases that often settle. The decision below would make it all but impossible for defendants to settle their selected cases for fear the remaining

bellwether cases would skew in plaintiffs' favor and nonetheless could be binding across the entire MDL.

This case provides a perfect illustration of the unfairness that the Sixth Circuit's rule allows. The district court here based its estoppel ruling on just three early trials, including one where the plaintiffs were specifically instructed to choose "one of the 'most severely impacted plaintiffs'" to prioritize for trial. App.53 (quoting MDL.Dkt.4624 at 25). A number of the cases in the initial pool, including two picked by DuPont, were resolved before going to trial. As to the cases that went to trial, the court made no attempt to determine whether those three cases were actually representative of either the pending cases in the MDL, or the "about 75,000 potential lawsuits [that] remained at the time of the estoppel order" as possible future participants. App.55. Unsurprisingly, those three early cases were in fact dramatically different from the other cases, including later-filed cases brought by plaintiffs like respondents here that involve, *inter alia*, different alleged mechanisms of exposure, different alleged levels of exposure, and different degrees of proximity to the releases at issue (from wells within 1500 feet of DuPont's plant for two of the bellwether plaintiffs, to wells anywhere from 14 to 56 river miles away for respondents). *See supra* pp.9-10.[4] The district court nevertheless "explored

[4] Those problems will only continue to grow as new cases are added to the MDL, particularly as DuPont stopped releasing C-8 by 2013—meaning that in later-filed cases, the time between the last date of exposure and the date of disease onset will continue to grow, but the jury will nevertheless be precluded from considering the impact of that critical temporal factor on duty, breach, and foreseeability.

none of these questions in its estoppel order," instead allowing the plaintiffs to assert estoppel in all pending and future MDL cases on the basis of three early trials chosen by "cherry-pick[ing] faces from the crowd of plaintiffs." App.54. Neither the Constitution nor simple fairness permits that approach. App.52-57.

As noted, the mere fact that two cases are consolidated in the same MDL is no proxy for representativeness. If anything, the fact that cases are in an MDL, and not part of a class action, suggests the opposite. Moreover, the (il)logic of the decision below would permit highly untenable outcomes. If no finding of representativeness is required before a bellwether can give rise to collateral estoppel, a district court would be free to allow plaintiffs to choose their favorite case (or favorite three cases), go to trial, and then make the results binding against the defendant in every other case in the MDL. *See* App.25 (rejecting the "lack of consideration of representativeness in bellwether selection" as a basis for declining to apply nonmutual offensive collateral estoppel). That *reductio ad absurdum* is not far from what happened here, and it is plainly outside the bounds of what *Parklane* and due process allow.

2. The panel majority's decision to allow nonmutual offensive collateral estoppel here without any finding of representativeness is not only wrong, but conflicts with the Fifth Circuit's contrary decision in *In re Chevron U.S.A.*, 109 F.3d 1016 (5th Cir. 1997). Like this case, *Chevron* involved thousands of plaintiffs who claimed that they were injured by alleged environmental contamination. *Id.* at 1017. To resolve those claims, the district court ordered the

selection of a bellwether group of 30 plaintiffs—half picked by the plaintiffs' side, and half picked by Chevron—for a "unitary trial" that would determine whether Chevron was liable with respect to all of the thousands of plaintiffs in the proceeding. *Id.* Chevron sought mandamus, arguing that the district court's trial plan would not produce a representative group of bellwether plaintiffs. *Id.* at 1017-18.

The Fifth Circuit granted mandamus, finding it "clear and indisputable" that the district court's approach violated due process. *Id.* at 1018. As the court explained, the district court's plan—allowing each side to choose its favorite cases—would just produce "fifteen (15) of the 'best' and fifteen (15) of the 'worst' cases contained in the universe of claims involved in this litigation," with "no pretense that the thirty (30) cases selected are representative of the 3,000 member group of plaintiffs." *Id.* at 1019. As a result, any verdicts those cases produced would "lack the requisite level of representativeness so that the results could permit a court to draw sufficiently reliable inferences about the whole that could, in turn, form the basis for a judgment affecting cases other than the selected thirty." *Id.* at 1020.

Due process, the Fifth Circuit held, required more: "[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." *Id.* Absent that representativeness finding, relying on the bellwether trials to determine liability as to the other plaintiffs

would not be "reasonably calculated to reflect the results that would be obtained if those claims were actually tried," and would unfairly "subject[] Chevron to potential liability to 3,000 plaintiffs by a procedure that is completely lacking in the minimal level of reliability necessary for the imposition of such liability." *Id.* "Such a procedure," the court concluded, "is inherently unfair." *Id.* at 1020-21; *see* App.50 (recognizing *Chevron*'s holding that "it contravened 'fundamental fairness' to impose widespread liability against Chevron based on the results of a non-representative sample of plaintiffs").[5]

The panel majority's decision here cannot be reconciled with the Fifth Circuit's decision in *Chevron*—which is why the panel majority barely tried to explain away the conflict, devoting only a sentence to asserting that *Chevron* "involved a proposed trial plan for a *binding* bellwether trial" on all parties rather than a bellwether trial that the district court later sought to make binding (on the defendant alone) through collateral estoppel. App.26. But the fact that this case involved a bait-and-switch and asymmetric risk only exacerbates the due process problem and hardly eliminates the conflict. As Judge Batchelder explained, whether the preclusive effect on the other MDL cases is imposed "by binding bellwether (before trial) or by informational

[5] Judge Jones wrote a separate concurrence, agreeing with the majority that the district court's approach was "fatally flawed," but noting her "serious doubts" that a court could *ever* rely on bellwether trials to "extrapolate findings relevant to and somehow preclusive upon a larger group of cases." *Chevron*, 109 F.3d at 1021 (Jones, J., specially concurring).

bellwether (after trial)," it violates due process to rely on a small sample of cases to determine liability across a much broader universe without any finding that the small sample is representative. App.55. There is no "case support or justification for the claim that binding bellwethers require due-process protections, but potentially binding informational bellwethers do not"—especially when those informational bellwethers should never give rise to preclusion in the MDL context at all. App.55; *see supra* pp.16-25.

In short, the panel majority's decision to allow a handful of bellwether trials to control key issues of liability across a broad swath of other cases, without any finding of representativeness, is seriously mistaken and creates a square conflict with the Fifth Circuit. This Court should not allow that error to remain uncorrected or that conflict to remain unresolved.

II. The Question Presented Is Exceptionally Important.

The panel majority's error below not only conflicts with decisions of this Court and other circuits, but also eliminates the viability of a critical tool for facilitating settlements in the cases most in need of settlement. As Judge Batchelder recognized, by offering defendants a heads-I-win-a-single-trial-tails-I-lose-the-entire-MDL coin flip, the panel majority's decision "essentially guts the utility of informational bellwether trials." App.63. No rational defendant will agree to a bellwether process with those kind of asymmetric risks, depriving courts of one of their most effective tools for resolving mass torts that today constitute some 40% of the federal civil docket. Those

exceptionally important consequences readily warrant this Court's review.

At its core, the decision below turns bellwether trials into a massive and asymmetric preclusion risk for MDL defendants. If the MDL defendant wins, the outcome will bind only the bellwether plaintiffs, with every other MDL plaintiff able to fight another day with the lessons learned from the bellwether defeats; if the MDL defendant loses, the decision below means that the defendant will be saddled with issue preclusion from the loss across the MDL, exposing the MDL defendant to potentially overwhelming liability. For MDL defendants, that asymmetric risk makes bellwether trials a game where the only winning move is not to play. If nonmutual offensive collateral estoppel applies even when bellwether trials involve general negligence verdicts in unrepresentative cases that are explicitly designated as non-binding, then an MDL defendant "can do nothing—other than not conduct bellwethers at all—to prevent an informational bellwether from becoming binding." App.63. And because no rational MDL defendant can agree to bellwether trials where a win achieves almost nothing and a loss sacrifices everything, allowing the decision below to stand will mean that "the age of bellwethers will come to an end." App.63.

That would be a significant loss not only (or even principally) for defendants, but for the entire federal court system. As courts and commentators have recognized, informational bellwethers have "achieved general acceptance by both bench and bar" as an important tool for resolving complex MDLs, as they can often "provide a basis for enhancing prospects of

settlement" by supplying "information on the value of the cases as reflected by the jury verdicts." *Chevron*, 109 F.3d at 1019; *see, e.g.*, Bloch Judicial Inst., Duke L. Sch., *Guidelines and Best Practices for Large and Mass-Tort MDLs* 18 (Sept. 2018), https://perma.cc/EX84-6FHC. For that very reason, "most MDL courts regularly engage in bellwethers in appropriate cases." 4 William B. Rubenstein, *Newberg on Class Actions* §11:11 (5th ed. 2019). The decision below threatens to sweep all that away. Indeed, by ignoring the district court's express representation that the bellwethers here would be non-binding, the decision below makes it impossible for defendants to agree to bellwethers even under the most promising of circumstances and ensures that for MDL defendants, "any residual benefit of conducting [a bellwether] will be outweighed by its now-endorsed preclusive consequences." App.63.

Those serious negative consequences would warrant review under any circumstances—and the fact that they threaten MDLs in particular makes them even more compelling. Though once considered "an obscure, technical device," MDL proceedings have since become "the centerpiece of nationwide mass tort litigation," affecting an overwhelming number of federal civil cases. Andrew D. Bradt, *The Long Arm of Multidistrict Litigation*, 59 Wm. & Mary L. Rev. 1165, 1168 (2018). MDLs today represent some *40%* of the *entire federal civil caseload*, including tens of thousands of pending cases. Abbe R. Gluck & Elizabeth Chamblee Burch, *MDL Revolution*, 96

N.Y.U. L. Rev. 1, 3 (2021).[6] The six largest MDLs involve over 10,000 separate pending actions each, while the single largest includes more than 250,000. JPML, *MDL Statistics Report: Distribution of Pending MDL Dockets by Actions Pending* (June 15, 2023), https://perma.cc/N3P6-VZS2. The decision below thus eliminates a critical settlement tool for the cases most in need of settlement, i.e., the cases that will consume a disproportionate amount of federal judicial resources if they cannot be settled. That potential impact on a full two-fifths of the federal civil caseload readily warrants this Court's attention.

More broadly, granting further review in this case would afford this Court an opportunity to reaffirm that MDL proceedings must provide defendants with the fundamental protections of due process. As commentators have noted, because relatively few MDL cases obtain appellate review, "little decisional law has developed to guide MDL judges and litigants, or to make MDL procedure consistent across districts." Gluck & Burch, *supra*, at 20. As a result, unfortunately, MDL procedure in many cases "involves something of a cross between the Wild West, twentieth-century political smoke-filled rooms, and the *Godfather* movies." Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural*

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[6] In fact, the numbers are even more striking: if prisoner cases and social security disability cases are counted separately, MDLs represent *73%* of the remaining federal civil cases. Press Release, Lawyers for Civil Justice, *73% of Federal Civil Cases Are in MDLs as of Fiscal Year 2022* (Apr. 27, 2023), *available at* https://perma.cc/9MJB-SDNV.

Collectivism, 95 B.U. L. Rev. 109, 111 (2015). Granting review here would allow this Court to clarify the basic rules governing MDLs and confirm that they are legal proceedings governed by due process, rather than "some kind of judicial border country, where the rules are few and the law rarely makes an appearance." *In re Nat'l Prescription Opiate Litig.*, 956 F.3d 838, 844 (6th Cir. 2020).

In short, the decision below contravenes the requirements of due process, departs from this Court's and other courts' decisions, and threatens to upend a significant fraction of the federal judicial caseload. Further review is plainly warranted.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
C. HARKER RHODES IV*
CHADWICK J. HARPER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioner

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