No. 23-13

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

BRIEF OF *AMICUS CURIAE* PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONER

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INTEREST OF *AMICUS CURIAE*

The Product Liability Advisory Council, Inc. (PLAC) is a nonprofit professional association of corporate members representing a broad cross-section of product manufacturers.[1] PLAC contributes to the improvement and reform of the law, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC's perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred leading product litigation defense attorneys are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed over 1,100 *amicus curiae* briefs on behalf of its members, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

PLAC supports the petition because of the importance of multi-district litigation (MDL) for its members and the negative effects the decision below will have on various MDL practices. PLAC is con-

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[1] The parties' counsel of record received timely notice of PLAC's intent to file this brief. No counsel for a party authored the brief in whole or part. No party or counsel for a party made a monetary contribution intended to fund the preparation or submission of the brief. No person other than PLAC, its members or counsel contributed funds for the brief's preparation or submission. PLAC's corporate members are listed at https://plac.com/PLAC/Membership/Corporate_Membership.aspx.

cerned about the unfair and unbalanced application of preclusion doctrine in this matter and its impact on other current and future MDLs.

PLAC submits this Brief to highlight significant additional consequences of the panel majority's affirmance on other aspects of MDL practice and procedure. Like a large rock thrown into a lake, the application of non-mutual offensive collateral estoppel in a mass tort MDL will create multiple ripples. It will ultimately increase costs and time expenditure for the parties and judiciary at several stages of many large MDLs.

INTRODUCTION AND SUMMARY OF ARGUMENT

Certiorari should be granted because the petition raises issues of exceptional importance for tort litigation and the federal court system, including foreseeable negative effects on multiple aspects of the MDL process that will flow from the decision below.

The federal judiciary relies on MDLs to administer a range of civil cases, including mass torts, antitrust, employment, sales practices, intellectual property, and securities cases.[2] MDLs regularly represent over half of the entire federal civil caseload.[3]

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[2] *See* United States Judicial Panel on Multidistrict Litigation, *MDL Statistics Report - Docket Type Summary*.

[3] Approximately 406,000 cases are pending in 179 MDLs. *See* United States Judicial Panel on Multidistrict Litigation, *Pending MDLs by Actions Pending*. Excluding most prisoner and social security cases, the percentage of federal civil cases in MDLs has ranged between 50% to over 70% in recent years. *See* Lawyers for Civil Justice, *Rules4MDLs*.

The trial court radically departed from established precedent and well-recognized MDL custom by applying non-mutual offensive collateral estoppel to make the results of a handful of unrepresentative bellwether trials binding on the defendant in all pending and future cases in an MDL, despite a previous agreement by the trial court and parties that the trials would only be informative.

If this unorthodox approach is allowed, the decision will create incentives for parties to detour from proven approaches that have fostered efficiency, effectiveness, and even a degree of cooperation across multiple MDLs. The panel's decision is thus a precedent-setting error of exceptional public importance.

As Judge Batchelder recognized, dissenting in relevant part below, the panel's decision "essentially guts the utility of informational bellwether trials." *In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 54 F.4th 912, 944 (6th Cir. 2022) (Batchelder, J., concurring part and dissenting in part). The bellwether process has become one of the most widely used and effective tools at an MDL court's disposal.[4]

No rational MDL defendant would agree to an informational bellwether process when the bellwether process can be *post hoc* re-engineered to bind a defendant, over its objection, to the outcome in a few non-representative cases, while leaving plaintiffs free to continue trying MDL cases with tactics based on information gathered in prior trials.

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[4] Bolch Jud. Inst., *Guidelines and Best Practices for Large and Mass-Tort MDLs* 18 (2d ed. Sept. 2018).

The Court should grant certiorari to address the proper balance between the perceived time-saving for the transferee court and the potential negative impacts on overall MDL practice and procedure.

The panel majority opinion echoed the district court's views that application of offensive collateral estoppel is a matter of discretion. If so, the proper exercise of such discretion requires a far fuller assessment of the potential MDL impact than the majority offered. The panel paid scant attention to the need for a predictable and balanced MDL system.

There exists a sometimes winding but always essential boundary between creative innovation and radical transformation. *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1297 (7th Cir. 1995) (innovative procedure for streamlining the adjudication of mass tort exceeded the permissible bounds of discretion in the management of litigation). Examining how the Sixth Circuit's decision stepped across that boundary will in no way stifle appropriate flexibility, particularly in the work of MDL judges to facilitate the discovery and claims narrowing process.

The panel's insufficient analysis is reflected in the treatment of the district court's changing course after it told the parties that the bellwethers would be informational and non-binding. The opinion failed to properly consider how application of non-mutual offensive collateral estoppel in a mass tort MDL could impact other MDLs going forward. This brief highlights some of the likely and overlooked consequences of the panel majority's decision.

This Court should grant certiorari.

REASONS FOR GRANTING CERTIORARI

I. THE DECISION BELOW WILL IMPACT NEGATIVELY MULTIPLE FEATURES OF EXISTING AND FUTURE MDLS

A. Ripple Effects on the Work of the Judicial Panel on Multidistrict Litigation

The district court's approach will negatively impact the United States Judicial Panel on Multidistrict Litigation ("JPML" or "Panel").[5] While plaintiffs often move to initiate multi-district proceedings, defendants sometimes conclude that pre-trial coordination of multiple cases in one federal court is appropriate, petitioning the JPML themselves. *E.G.*, *In re Zofran (Ondansetron) Prods. Liab. Litig.*, 138 F. Supp. 3d 1381 (J.P.M.L. 2015).[6] In other MDL proceedings, defendants do not oppose coordination, leaving Panel arguments centered on which court is best suited to serve as transferee. *See, e.g.*, *In re Taxotere (Docetaxel) Prods. Liab. Litig.*, 220 F. Supp. 3d 1360, 1361 (J.P.M.L. 2016)("All parties agree that centralization is warranted, but disagree as to the most appropriate transferee district.").

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[5] Congress created the MDL Panel in 1968, *see* 28 U.S.C. §1407, to determine whether civil actions pending in different districts should be transferred to one district for coordinated or consolidated pretrial proceedings, and to select the judge or judges and court assigned to conduct such proceedings. *See* United States Judicial Panel on Multidistrict Litigation, *An Introduction to the United States Judicial Panel on Multidistrict Litigation*.

[6] DuPont did so here, and plaintiffs did not oppose. *In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 939 F. Supp. 2d 1374 (J.P.M.L. 2013).

Facing the prospect of collateral estoppel precluding a full and fair defense of 99.9% of an MDL's eventual cases, it is unlikely any defendant facing multiple claims, including tort or product-based cases, will request the creation of an MDL. Instead, defendants will vigorously oppose MDL petitions, greatly impacting the work of the Panel.

Secondly, the debate about the MDL venue (in cases the JPML finds appropriate for coordination) will, in turn, no longer focus on efficiency-related factors such as location of witnesses and evidence. *See* David F. Herr, *Multidistrict Litigation Manual* § 6:5 (2021) ("The Panel has frequently considered the location of documents and witnesses in selecting a transferee district.").

Instead, the Panel will wrestle with the possible placement of the cases within a circuit that permits the novel, reverse-course, application of collateral estoppel to bellwether case outcomes, as opposed to the majority of candidate courts that recognize the fairness, notice, due process and practical concerns that should prevent its use. *E.G.*, *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997).

Selection of the transferee court could morph from a balancing of convenience factors and judicial availability into a potentially merits-dispositive decision before actual trials on the individual merits of nearly all filed (and to-be-filed) cases of the MDL.

These new considerations will further complicate the Panel's task and divert its focus from pairing an experienced, knowledgeable, motivated, and availa-

ble judge in a convenient location with the particular group of cases.

B. Restrictive Impact on Procedural Innovations Such as Master Pleadings

Once an MDL is created, the potential imprudent application of the collateral estoppel doctrine may skew multiple innovations within the MDL process.

For example, defendants will be incentivized to oppose, or radically alter, the current use of "master pleadings" to the extent they may obscure or delay the recognition of actual differences between cases relevant to preclusion analysis.[7]

Adopting the panel majority's expansive approach to collateral estoppel could make administrative master pleadings unacceptable to defendants as plainly insufficient for proper preclusion analyses.

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[7] A unique method to handle one administrative burden in an MDL is for plaintiffs to assemble a "master complaint" reflecting all of plaintiffs' allegations. In some cases, the master complaint is treated by the transferee court as an administrative summary of the plaintiffs' claims. *In re Refrigerant Compressors Antitrust Litig.*, 731 F.3d 586, 590-91 (6th Cir. 2013) (discussing varying treatments of "master complaints"). Other courts have treated the master complaint as an operative pleading that supersedes individual complaints. *E.G.*, *In re Katrina Canal Breaches Litig.*, 309 F. App'x 836, 838 (5th Cir. 2009) ("[The plaintiff's] individual complaint was superseded, and ... any arguments or claims that appear in [the] individual complaint but not in the Master Complaint were waived."); *In re Zimmer Nexgen Knee Implant Prods. Liab. Litig.*, 2012 WL 3582708, at *4 (N.D. Ill. Aug. 16, 2012) (some "MDL courts have entertained motions to dismiss 'master' or 'consolidated' complaints....").

Going forward, separate complaints would need to be presented as operative pleadings in all cases, regardless of administrative burdens, to require plaintiffs to fully articulate the differences among the alleged facts and asserted claims at the outset. This approach would be necessary to ensure that defendants can preserve their ability to raise plaintiff-specific challenges to complaints under Federal Rules of Civil Procedure 8 and 12.[8]

The specter of preclusion will compel defendants to seize every opportunity to document that "the precise issue" in a case was not previously litigated and to attempt to show the unfairness and imprudence of the application of the doctrine given factual and legal differences among claimants.[9] In this way, the majority decision below could limit an innovative means of organizing claims of disparate plaintiffs.

C. Negative Effects on Crucial MDL Discovery Tools

The shadow of non-mutual offensive collateral estoppel hanging over MDLs also will obligate defendants to challenge many of the developed procedures for MDL discovery, and seek broader discovery, earlier in the life cycle of the MDL. Especially in mass tort litigation, that altered approach will be essential

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[8] The panel majority approach may also spark an increase in motion practice under Federal Rule of Civil Procedure 12(e) to attempt to distinguish individual claims, further burdening transferee courts.

[9] *General Elec. Med. Sys. Eur. v. Prometheus Health*, 394 F. App'x 280, 283 (6th Cir. 2010) (must be the identical issue raised and actually litigated in a prior proceeding).

to gather the information needed to select different bellwether cases that are to be not merely informative, but potentially dispositive, of the entire remainder of MDL, and to gather and preserve evidence for early appeal showing that the selected bellwether cases are not sufficiently identical to all of the remaining cases to warrant application of estoppel principles.

For example, Plaintiff Fact Sheets ("PFS") are now a common mechanism for obtaining individual discovery in large MDLs. *See* Margaret S. Williams, et al., *Plaintiff Fact Sheets in Multidistrict Litigation Proceedings: A Guide for Transferee Judges*, at 1 (Fed. Jud. Ctr. 2019) ("[Fact sheets] are commonly ordered in multidistrict litigation (MDL) proceedings consisting of personal injury claims, such as those involving pharmaceuticals, medical devices, and mass disasters."). These are typically party-negotiated, court-approved, standardized forms that seek basic information about plaintiffs' claims, such as what specific injury a plaintiff claims to have sustained from a toxic exposure or use of a product.

Neither the streamlined plaintiff fact sheets suitable to identify cases that should not have been added to the MDL, nor even the typical, more expansive mass tort PFS (designed to provide initial information to the court and parties for the bellwether process and settlement talks), would be sufficient in the new regime created by the Sixth Circuit's unprecedented approach.

The new MDL discovery paradigm will require far more extensive plaintiff fact sheets, or even the tailoring of multiple interrogatories to individual claim-

ants, adding time and costs. Defendants will need in all pertinent MDLs—and be entitled to (if estoppel looms)—the collection of plaintiffs' full records[10] (in personal injury cases) or employment histories (in employment cases), and other key information—all at a relatively earlier stage.

Defendants also will need even more relevant information than is typical to verify the answers provided in the fact sheets, since *accurate* information is essential to help illustrate the relevant differences among the MDL cases and document the impropriety of preclusion.

Plaintiffs, who often cooperate on the drafting of PFS, may now be further incentivized to rely on vague and general allegations of "similarity" so they may select or propose for selection their easiest cases to win, regardless of the representativeness of the matter. The creation of PFS will likely become more contentious and, accordingly, more time-consuming for the transferee court.

Similarly, the enforcement of future PFS orders will excessively burden transferee courts. Particularly in mass tort and product-based MDLs, plaintiffs often fail to timely or completely fill out PFS by the original court-ordered deadlines. *See In re Taxotere (Docetaxel) Prod. Liab. Litig.*, 966 F.3d 351, 358 (5th Cir. 2020) (noting the complexity of managing an

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[10] In addition to medical records, comprehensive discovery of the plaintiffs' genetics, dietary, exercise, and recreational habits, and other personal factors could be relevant to causation in a given MDL and crucial to arguing an alternative cause or key contributing factor to an injury, allowing a defendant to further argue against estoppel.

MDL necessitates a standard that gives district courts greater flexibility to dismiss a plaintiff for failing to complete PFS); *see also In re Phenylpropanolamine (PPA) Prods. Liab. Litig.*, 460 F.3d 1217, 1227 (9th Cir. 2006).

The potential added significance of each bellwether selection, and the added importance of showing the differences among MDL claims and individual facts, will require defendants to pursue more vigorously full and accurate responses. This will likely engender additional time extension requests from plaintiffs, multiple meet-and-confer episodes, motions to compel, orders to show cause why cases should not be dismissed, motions to dismiss without prejudice, followed by even more time to respond, and then eventual motions to dismiss with prejudice. *See* Bolch Jud. Inst., *Guidelines and Best Practices for Large and Mass-Tort MDLs* 13-14 (2d ed. Sept. 2018) ("*Best Practices*") (describing various PFS enforcement mechanisms).

Large MDLs often contain cases that do not belong. *See* Nora Freeman Engstrom & Todd Venook, *Harnessing Common Benefit Fees to Promote MDL Integrity*, 101 Tex. L. Rev. 1623, 1624 (2023) (analyzing MDL "tendency to attract patently nonmeritorious claims"). The looming specter of nonmutual offensive collateral estoppel would encourage claimants that ought not be in the MDL to fight these pretrial battles harder to "delay and stay" in the MDL with the hope or expectation they will benefit from a quick application of estoppel that benefits the entire remaining inventory. The fact sheet process, already an important component of effective management of the

litigation if conducted fairly and rigorously, would require even more time and attention from the transferee judge to deal with fact sheet non-compliance directly and promptly, through managing a more contentious, higher-stakes process.[11]

Deposition practice in many MDLs similarly could become more complex and time-consuming. Defendants will assert the need to take more depositions, earlier, in an to attempt to uncover and highlight differences among MDL claimants in order to oppose the imposition of offensive estoppel. Additional third-party and fact witness depositions would become essential to challenge or impeach the attempt of plaintiffs to portray their circumstances more closely to those of a plaintiff who had prevailed in a prior MDL trial.

Expert depositions will broaden in scope, akin to a class action deposition that must cover both certification issues and individual merits issues. Defendants will be forced to explore and document the differences among numerous MDL plaintiffs, and uncover the impact of an expert's opinions not only on individual bellwether candidate plaintiffs, but perhaps on every member of a "community" of plaintiffs, as labeled by the transferee court here. *See In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 2019 WL 6310731, at *25 (S.D. Ohio Nov. 25, 2019).

Defendants will be compelled to advocate that differences in expert witnesses' opinions, and bases for

[11] Certainly the prospect of MDL-wide preclusion could disincentivize some plaintiff counsel from rigorous pre-filing screening of claims.

their opinions, may provide a further foundation to argue that the relevant issues, such as those related to duty, breach, and foreseeability are not nearly identical. *E.G.*, Christopher J. Kaufman & Mayela C. Montenegro, *Defense Strategies for Opposing Plaintiffs' Use of Collateral Estoppel in Mass Tort Product Liability Actions*, 27 Rx for the Defense (DRI Drug & Med. Device Comm. Dec. 30, 2019).

D. Falling Domino Impact on Jury Verdict Forms and Trial

The availability of offensive collateral estoppel in an MDL context will compel defendants to seek detailed special jury verdict forms to avoid ambiguity in the interpretation of a general verdict, and the misuse of such a verdict.

Defendants operating under the Sixth Circuit approach will desire specific, detailed questions to define what issues might be deemed determined, and to avoid the undue impact of negligence "in the air" general findings. *Cf. Adams v. United States*, 2010 WL 4457452, at *3 (D. Idaho Oct. 29, 2010) (21-page Special Verdict Form, jury answering 47 questions).[12] Plaintiffs, on the other hand, will likely fight for general verdict forms, as with the three general negligence verdicts here.

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[12] Judge Batchelder, dissenting in part below, noted that in *Adams*, the court informed the parties that the bellwether trial would have preclusive effect, selected a representative sample of plaintiffs, and used the special verdict form to avoid ambiguity on the specific issues being decided. *See In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th at 943 (Batchelder, J., concurring part and dissenting in part).

Absent highly detailed verdict questions, it will often be impossible to clarify what the jury was deciding as mass tort and product-based MDL claims typically assert multiple theories of recovery.[13]

E. Adverse Impact on a Transferee Court's Access to Triable Cases

Yet another likely negative impact of the decision below on MDL procedure will involve so-called *Lexecon* rights.

Under *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26, 40 (1998), a transferee court generally may conduct trials only of cases originally filed in that court and may not transfer cases to itself from other districts for trial. Often, some subset of the cases pending in an MDL proceeding will qualify for trial in the transferee court, but that subset, even in a large MDL, may not be representative of the entire MDL case pool. Thus, trials of cases selected from that local subset may be of limited value as bellwethers and not the best expenditure of the parties' and court's limited resources.

Accordingly, many transferee courts request that parties sign "*Lexecon* waivers"— i.e., waivers of their right to object to trial before the MDL court. *Lexecon*

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[13] The Third Master Long Form Complaint in *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, for example, contained 14 separate causes of action; the "negligence" count alone included theories of negligent design, formulation, testing (pre- and post-regulatory approval), marketing and promotion, and failure to warn. Third Am. Master Long Form Compl., *In re Testosterone Replacement Therapy Prods. Liab. Litig.*, No. 1:14-cv-01748 (Doc. 1074) (N.D. Ill. Nov. 24, 2015).

waivers require parties to divest themselves of fundamental protections of personal jurisdiction and venue, thus transferee judges must carefully ensure that the waivers are truly voluntary and their scope clear and unambiguous. *See In re Depuy Orthopaedics, Inc.,* 870 F.3d 345, 351 (5th Cir. 2017); 15 C. Wright & A. Miller, Fed. Prac. & Proc. Juris. § 3866.2 (4th ed. 2021).

If faced with the potential application of nonmutual offensive collateral estoppel, defendants will be even more reluctant to waive their rights, so as to help stave off preclusion and to add another arrow to their quiver challenging the unrepresentativeness of bellwethers and unfairness of any application of preclusion.

The *post hoc* decision below to fabricate preclusive effects came after bellwether selection, but in some MDLs, the absence of waivers from both parties could seriously undermine this common feature of MDL practice. *See* Eldon E. Fallon et. al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2354 (2008) (absent consent, "the universe of cases amenable to trial in an MDL is extremely limited in both number and applicable law").

II. THE DECISION WILL IMPAIR AN EFFICIENT APPEAL PROCESS IN MDLS

Outside of the nuts and bolts of MDL procedures, the decision below has serious consequences for many future MDL litigants given that appellate review of pretrial orders often must wait until after completion of bellwether trials.

Defendants will be incentivized to seek more interlocutory appeals, noting the increased stakes and potential dispositive consequences of a few early trial verdicts.

While some MDL courts have continued with the litigation and even follow-on trials pending appeal, if the case(s) on appeal have potential preclusive effect, the MDLs may grind to a halt pending review of the first verdict(s). *Compare In re DePuy Orthopaedics, Inc. Pinnacle Hip Implant Prods. Liab. Litig.*, 2016 WL 10707019 (N.D. Tex. July 5, 2016) (denying stay of bellwether trials pending appeal), *with Greco v. Nat'l Football League*, 116 F. Supp. 3d 744, 761 (N.D. Tex. 2015) (granting stay of additional bellwether trials when pending appeal "would potentially necessitate retrial").

Moreover, defendants will be forced to appeal all aspects of the early bellwethers, with little to no possibility of individual case settlement. Here, the transferee court ostensibly sought to impose blame on the defendant for having settled an informational bellwether case during the pendency of an appeal. *In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 2019 WL 6310731, at *26 (DuPont "simply settled the only remaining bellwether cases, leaving no such cases outstanding. These facts are further reasons to apply collateral estoppel, when no bellwether cases remain unresolved."). Outside of the context of improper application of preclusion principles, settle-

ment typically is viewed as a positive development, is not uncommon in MDLs, and has been encouraged.[14]

As recognized by the Manual for Complex Litigation, the purpose of bellwether trials is to enable the parties and the court to determine the nature and strength of the claims, and what range of values the cases may have if resolution is attempted on a group basis. *Manual for Complex Litigation* § 22.315 (4th).

Thus, it is recognized that the bellwether process in an appropriate MDL requires obtaining a sufficient number of outcomes to provide even non-binding guidance. *Best Practices* at 18. In designing a trial-selection protocol, the transferee judge is advised to select sufficient cases that are representative of the entire claimant pool (or of specified categories in that pool.

It is understood that many bellwethers resolve themselves.[15] In addition to settlement, plaintiffs have the unilateral power to dismiss cases they do not want to try as a bellwether.[16] Others may be

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[14] Defendant appealed the third Vioxx bellwether verdict to the Fifth Circuit Court of Appeals. The parties settled and the appeal was dismissed. *See* Fallon et. al., 82 Tul. L. Rev. at 2336 (discussing *Barnett v. Merck & Co.*, No. 07-30897 (5th Cir. Apr. 18, 2008) (entry of dismissal)).

[15] *E.G., In re Gen. Motors LLC Ignition Switch Litig.*, 2016 WL 1441804, at *5 (S.D.N.Y. Apr. 12, 2016) (after second of six scheduled bellwether trials, third case settled and then fourth bellwether trial was voluntarily dismissed with prejudice).

[16] Although there may be appropriate reasons for dismissing a test case, there are instances in which plaintiffs do so to manipulate the bellwether process. Plaintiffs may dismiss what they view as weak cases (which apparently occurred here), including

dismissed based on transferee court pre-trial rulings. *E.G.*, *In re Taxotere (Docetaxel) Prod. Liab. Litig.*, 2021 WL 2042212, at *1 (E.D. La. May 21, 2021) (dismissal of claims of the plaintiff selected to be the fourth bellwether).

Recognizing this, it is important that the judges select a larger pool of cases, anticipating that some, indeed many, will resolve at a variety of points in the bellwether litigation process. *Best Practices* at 18. It is not unusual for MDL courts to designate one or more rounds of additional cases for potential bellwether treatment. *E.G.*, *In re Cook Med., Inc., IVC Filters Mktg., Sales Pracs. & Prods. Liab. Litig.*, No. 1:14-ml-2570-RLY-TAB (S.D. Ind. Oct. 26, 2020) (ECF No. 14602) (outlining procedures for selecting more bellwether cases after dismissal of three initial bellwether cases).

This Court should take the opportunity to reinforce the notion that even a settlement during appeal saves important judicial resources, and, significantly, bellwethers need not be litigated to final appellate decision to have a positive impact on the MDL itself. Such cases can still provide important data points that help the parties better understand the inventory of cases.

Hypothetically, for example, settlement of a weak bellwether case for relatively low consideration despite a plaintiff verdict is clearly a positive part of

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cases selected or suggested by defendants or even randomly selected cases that plaintiffs do not favor. Such strategic behavior likely may increase if plaintiffs believe they can garner preclusive effect from the first few bellwethers.

the resolution process. Settlement teaches not only what a defendant is willing to pay given the verdict below, but also what a plaintiff is willing to accept in light of potential weaknesses in the case.

The panel majority failed to internalize the Manual for Complex Litigation's notion that bellwether trials are meant 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, and what range of values the cases may have. *See Manual for Complex Litigation* at § 22.315 (emphasis added).

III. THE DECISION UNDERMINES MDL SETTLEMENT RESOLUTIONS

A. Undercutting Important Elements of Cooperation

While typically tenaciously litigated, MDLs also operate by consent and cooperation in many respects. Litigants, as noted, must waive their right to remand for the MDL judge to be able to dispose of their cases at trial. Some jurisdictions allow litigants, by consent, to file cases directly in the MDL court, by way of further example. Plaintiff fact sheet terms, again, are sometimes agreed to in meet-and-confer sessions. Transferee judges describe their own relationships with lead counsel as unusually collaborative.[17]

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[17] In *In re Zantac (Ranitidine) Prod. Liab. Litig.*, 2022 WL 17752381, at *2 (S.D. Fla. Dec. 19, 2022), the parties agreed to a database administered by a private litigation services company to assist the court with its administration of the MDL.

The heads-I-win-a-single-trial-tails-I-lose-the-MDL import of the decision below threatens this valuable attribute of MDLs. The entire tone of some MDLs could shift, engendering increased costs and time expenditure for the parties and the courts.

B. Undermining Potential Arm's Length Global Settlements

One inarguably important aspect of necessary cooperation in an MDL is the parties' work on possible overall settlement. The proposition that non-binding bellwethers may provide a basis for enhancing prospects of settlement in the suitable MDL setting is generally accepted. *E.G.*, Laura E. Ellsworth, et al., *Bellwether Trials*, 2 Bus. & Corn. Litig. Fed. Cts. § 14:47, at n.1 (4th ed. ABA Sect. Litig. 2020).

Bellwether trials in the proper setting may provide useful information to the parties regarding the likely range of outcomes of other cases at trial, and inform settlement analysis. *See* Lawrence G. Cetrulo, 2 *Toxic Torts Litig. Guide* § 14:52 (2022-2023) (bellwethers help promote a global settlement or, at least, expedite settlement of other individual cases).

In addition to providing material, non-binding information about the cases, properly utilized bellwethers can serve as mini-labs for testing various theories and defenses in a trial setting; such theories and themes often change as the initial trials progress. This is another way in which the results need not be binding on all other claimants in order to be constructive for the appropriate MDL process.

Bellwethers can suggest answers to litigants' major internal queries such as: How well would this

theory be accepted by the jury? How credible and persuasive are the experts, and how do they perform in the crucible of trial? It is recognized that guidance on these types of questions can have more impact on overall settlement than the amount of any individual verdict, and it is in the analysis of those lessons learned that settlement values will be reached, if settlement is to occur. *Best Practices* at 18.

With bellwethers turned into potential MDL terminators, however, the parties cannot afford to test, experiment, or investigate potential theories or approaches that may generate crucial additional information for any broad settlement discussions: the stakes are too high to experiment.

While the panel majority seemed untroubled by the unrepresentativeness of the bellwether cases, the general verdict forms, and important differences among the MDL cases, the impact of the decision on settlement prospects cannot be underestimated.

The transferee court acknowledged that applying collateral estoppel in an MDL *before* most or all bellwether cases are tried would not promote judicial economy, insofar as a global settlement could be frustrated. *In re E. I. du Pont de Nemours & Co. C-8 Pers. Injury Litig.*, 2019 WL 6310731, at *26.

This analysis was incomplete: a risk of applying non-mutual offensive collateral estoppel in an MDL based on a few bellwether cases would harm judicial economy and frustrate global settlement chances, regardless of any particular remaining bellwether lineup. The unfair application of preclusion may make it less costly and more rational for a defendant

to litigate and try aggressively every remaining aspect of every MDL case.

Under the new regime, unlimited wins by defendants may be informational, but a few early wins by plaintiffs threaten to preclude further litigation of vast aspects of all the MDL claims. This grants early bellwethers undue weight and threatens defendants with massive liability—or the loss of an opportunity to present a full and fair defense—after just a few cases, not even selected for their representative quality.[18] Such a result approaches the "large adverse impact based on a small sample" problem that has troubled the courts in the class action context — except that the procedure adopted below lacked the procedural protections of Rule 23 (and lacked the counterbalancing prospect of binding the class).

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[18] The novel approach here also ignores that, commonly, early MDL results are not duplicated. For example, in litigation alleging cancer from exposure to a weed killer, the first federal court trial and first two state court trials resulted in plaintiff verdicts, upheld on appeal. Defendant then won seven verdicts in a row. *See* Cara Salvatore, *Monsanto Wins Roundup Trial Brought by Gardener*, Law360, May 23, 2023. In lawsuits alleging hearing loss from earplugs, the first bellwether trial resulted in an award to a group of three plaintiffs. The results of the bellwethers then became mixed, with the defendant winning six of the next 16 trials. *In re 3M Combat Arms Earplug Prod. Liab. Litig.*, 2022 WL 17853203, at *3 (N.D. Fla. Dec. 22, 2022). In bellwether trials alleging that the manufacturer of pain reliever Vioxx failed to warn of an increased risk of heart attacks and strokes, after a plaintiff won a $51 million award, later remitted, several trials resulted in defense verdicts. *See* Fallon et al., 82 Tul. L. Rev. at 2335-2336.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

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