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 A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF AMICI CURIAE DRI CENTER FOR LAW AND PUBLIC POLICY AND LAWYERS FOR CIVIL JUSTICE IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST[1]

Amicus curiae DRI Center for Law and Public Policy is the policy arm of a 14,000-member international association of defense lawyers who represent individuals, corporations, insurance carriers, and local governments involved in civil litigation. DRI and its Center for Law and Public Policy also work with affiliated state and local defense organizations in every state in the union. Amicus curiae Lawyers for Civil Justice (LCJ) is a national coalition of defense trial lawyer organizations, law firms, and corporations. Working through the Rules Enabling Act process, LCJ often urges proposals to reform aspects of the Federal Rules of Civil Procedure. Amici have long advocated for procedural reforms that: (1) promote balance in the civil justice system; (2) reduce the costs and burdens associated with litigation; and (3) advance predictability and efficiency in litigation.

DRI has deep knowledge of the abuses and problems that currently exist in multidistrict litigation. DRI has published many articles addressing aspects of MDL litigation and the abuses created by the way they sometimes operate. See, e.g., Matt Bash, *Relaxing Federal Court Jurisdiction for MDLs*, 63 No. 7, DRI For the

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[1] Under Rule 37.6, amici certify that no counsel for a party authored this brief in whole or in part and that no person or entity, other than amici, its members, or its counsel, has made a monetary contribution to the preparation or submission of this brief. Petitioner and Respondent were given timely notice of amici's intent to file this amicus curiae brief as required under Rule 37.

Defense 8 (2021); Christopher J. Kaufman, Jason R. Harmon, and Torrey Peterson, *Strategic Considerations: Exposing Meritless Claims in Drug and Medical Device Product Liability MDLs*, 61 No. 9 DRI For the Defense 38 (2019); Shana E. Russo, Jennifer A. Eppensteiner, and Kathy I. Oviedo, *Leading the Flock: Bellwether Selection in Complex Litigation*, 28 No. 3, DRI For the Defense 3 (2020); Jordan Walker & Paul Rosenblatt, *An Examination of the Lack of Uniformity in a Post-MDL Remand, Covid-19 World*, 28 No. 3 DRI For the Defense, 3 (2020). A recent search showed that DRI has published over 170 articles that mention multidistrict litigation or MDLs.

LCJ also has deep knowledge of the abuses and problems that currently exist in multidistrict litigation as shown in the comments it has submitted to the Judicial Conference Advisory Committee on Civil Rules (referred to in this brief as the Advisory Committee). LCJ's analysis has identified problems resulting from ad hoc procedures in MDL proceedings and the need for FRCP amendments to provide the same transparent process and protections in MDLs that the rules provide in all other civil cases.

This litigation presents the Court with consequential questions that implicate the viability of multidistrict litigation proceedings as an effective procedural vehicle to dispose of mass torts. The Sixth Circuit issued a sharply divided and deeply flawed decision permitting a district court overseeing an MDL to apply nonmutual offensive collateral estoppel to make the results of a handful of unrepresentative bellwether trials

binding on every other pending or future case in the MDL.

This brief offers a perspective based on amici's deep understanding of how MDLs operate in the real world. From a constitutional perspective, the decision below is not just wrong, but fundamentally unfair to the point of violating due process. From a practical perspective, the outcome could not be more harmful to litigants in MDLs and to the courts.

The idea behind enactment of the statute creating multidistrict litigation was to allow the parties and the courts to efficiently avoid duplicative discovery and motion practice thereby reducing unnecessary litigation costs. But defense lawyers and their corporate clients have questioned the "ad hoc procedures" commonly employed in MDL proceedings because "they all share the same lack of clarity, uniformity and unpredictability" that the Federal Rules of Civil Procedure are intended to prevent in federal courts. LCJ Request for Rulemaking to the Advisory Committee on Civil Rules: Rules For "All Civil Actions and Proceedings": A Call to Bring Cases Consolidated For Pretrial Proceedings Back Within the Federal Rules of Civil Procedure, August 10, 2017, p. 1. Worse still, "many common practices also cause an unbalanced litigation environment." *Id*.

As this case shows, MDL proceedings have become a dangerous world in which the normal rules of civil procedure are all-too-often ignored. Safeguards designed to ensure a level playing field are not always

given effect. Bellwether trials have been a key mechanism used in MDLs to give the parties potentially valuable information. Armed with illustrative jury verdicts based on real-world trials of representative cases, the parties could then make better informed decisions as to whether to settle or not. But bellwether trials have also contributed to an unbalanced and problematic litigation environment especially when the selection process leads to atypical cases being tried first.

American civil justice depends on fundamental fairness, that is, the parties are entitled as a matter of due process to get a fair shake on an even playing field. But multi-district litigation has been described as the "wild West" because of the normal rules are ignored or don't seem to fit. Courts, encouraged to be creative and flexible, all too often latch on to novel approaches that are fundamentally unfair–all to try to assure speedy settlements before cases are returned to the transferor jurisdictions for trial.

The litigation history here illustrates these problems–and this Court's attention is needed to avoid drastic consequences to DuPont and to the entire MDL process. The idea that 75,000 claims against DuPont can be decided based on a handful of unrepresentative cases by using nonmutual offensive collateral estoppel contrary to the earlier agreement of the district court and the parties is staggering. Such powerful asymmetries have prompted courts to refuse to apply nonmutual offensive collateral estoppel in these circumstances. When nonmutual offense collateral

estoppel is applied in the context of mass torts in an MDL, the disproportionate effect on defendants renders its use a violation of due process regardless of the selection process for bellwether trials. It violates due process for all plaintiffs to retain their right to their day in court, even if hundreds of other plaintiffs have lost at trial, while a defendant can succeed on hundreds of cases but then be bound as to thousands more because it lost a single case tried before an aberrant jury.

The lack of notice of the binding outcome makes the application of nonmutual offense collateral estoppel even more problematic here. The parties and district court judge all agreed that bellwether trials would not be binding, and no effort was made to ensure that the cases selected as bellwethers were representative. An after-the-fact ruling that a few early losses bind the defendant on key liability issues is the antithesis of the rule of law. A federal judge going back on his word in the most consequential way undermines faith in the integrity of the judiciary.

DRI's lawyers and their clients are well-experienced in defending against claims such as those brought against DuPont. That experience compels the conclusion that a corporation defending against a trial that would bind it in thousands of other cases no doubt would have pursued a different trial strategy. For example, a defendant corporation would likely have sought detailed special interrogatories. It would have ensured that the factual predicate for an adverse judgment was revealed to prevent a binding effect in other

cases in which material facts differ. A corporate defendant facing such potentially crushing liability should be able to rely on a federal judge's word about the effect of a judgment. Yet DuPont was never given that opportunity because everyone agreed that the trials were illustrative only–not binding on all the other claims.

If the decision is upheld, it will undermine MDLs as a way to handle mass torts. No defendant will agree to a bellwether trial if it can bind the defendant in thousands of cases, especially when those cases are based on weaker facts. Moreover, if an after-the-fact change of heart is allowed to turn a mock trial held as a bellwether into a binding outcome for all the future cases, no defendant would ever agree to participate. Eliminating bellwether trials threatens to deprive all parties and the courts of a potentially useful and badly needed procedural tool for dealing with litigation arising from claimed mass torts and helping the parties evaluate settlement. Thus, review is needed here.

SUMMARY OF ARGUMENT

Under the decisions below, DuPont will be unable to defend itself by contesting key elements of liability because of the adverse outcome in three nonrepresentative bellwether trials. This would be problematic even if the trial court and parties had agreed that the outcome would bind other future cases. But here, the

trial court and parties agreed that the results would not be binding.

The district court used a process of selecting cases for the bellwether trials that made sure that the cases would *not* be representative. The parties at first chose 20 cases (out of the 80 then in the MDL) to prepare for discovery. MDL.Dkt.194, at 1. The plaintiffs' steering committee picked three of those and DuPont picked three of those for bellwether trials. Not all went to trial. The plaintiff withdrew one. Three settled. Two were left. But at that point, the district court told the plaintiffs' steering committee to hand-pick "the most severely impacted plaintiffs." MDL.Dkt.4624, at 25. And that case was then tried.[2] Not surprisingly, the plaintiffs prevailed in each of these three trials. After the trials, DuPont settled the then-pending litigation.

But more plaintiffs appeared and filed new cases. Although the plaintiffs in these new cases based their claims on significantly different facts, the district court switched course to hold that the verdicts in the three earlier nonrepresentative trials would bind DuPont on key questions of duty, breach, and foreseeability of injury as to all the other plaintiffs in the MDL, present and future.

Such a bait-and-switch process has no place in a judicial system dedicated to effectuating the rule of

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[2] Although this case was not denominated as a bellwether, it was grouped with the two bellwether trials in the preclusion analysis of the Sixth Circuit. So as Petitioner DuPont does, amici will call all three cases bellwethers.

law. Even children understand the fundamental unfairness of a "heads I win, tails you lose" theory of justice. And they understand the concept of promises. Our civil justice system rests on the promise of a fair playing field where the rules are known in advance. RONALD A. CASS, THE RULE OF LAW IN AMERICA, pp. 4-22 (2001) (rule of law means a "system characterized by fidelity to rules of principled predictability derived from valid authority external to individual government decision makers").

Everyone agreed that the bellwethers would do what they ordinarily do: educate the parties about their cases, their trial strategy, and the likely outcome. Only after the plaintiffs won (no doubt aided by selecting the most egregiously harmed plaintiffs) did they ask the district court to change its position and apply nonmutual offensive collateral estoppel.

Allowing the Sixth Circuit's decision to stand will undermine trust in the evenhanded administration of justice in the federal courts. And equally problematic, it will mean defendants will vigorously oppose participating in MDLs and will virtually never agree to participate in bellwether trials. It will also create multiple perverse incentives for litigation strategy that will increase costs and deprive all parties and the courts of the salutary use of MDLs as they were intended.

ARGUMENT

A. The Sixth Circuit decision deprives DuPont of due process

"In a democracy, citizens and litigants must have confidence in the rule of law, which requires that a judge's decisions must not be–and must not seem to be–arbitrary, based on personal preferences, or unbounded." RUPERT CROSS, PRECEDENT IN ENGLISH LAW 14 (1968). See also BRYAN A. GARNER, ET AL., THE LAW OF JUDICIAL PRECEDENT 21 (2016). The hallmark of our judicial system is that each litigant is provided due process to defend or prosecute their claims and defenses in a fair and neutral system under constitutional, statutory, and rule requirements applied by an unbiased decision maker.

Scholars have expressed concern that MDL procedures are undermining the longstanding principle that litigants have a right to their day in court. See Martin H. Redish & Julie M. Karaba, *One Size Doesn't Fit All: Multidistrict Litigation, Due Process, and the Dangers of Procedural Collectivism*, 95 B.U. L. Rev. 109, 112-113, 115 (2015). Although an MDL is supposed to involve only a temporary transfer of cases for pretrial purposes, the reality shows that this does not always happen. "All players in an MDL, including the judge, face enormous pressures to achieve a global resolution in the transferee district." Redish & Karaba, *supra* at 145. At times, as here, those pressures have led transferee district courts to adopt holdings inconsistent with due process.

By giving binding effect to three unrepresentative bellwether trials, the lower courts have deprived DuPont of due process. The district court and the parties agreed that bellwether trials would not be binding but might yield results that would inform the parties' conduct at future trials and might lead to settlement.

Bellwethers in the MDL context are ordinarily binding as between the parties only. The parties and the district court hold these bellwether trials by agreement to help the parties better evaluate the strength or weakness of their positions. The trials also can explore matters of trial strategy that help the parties understand if a jury will likely accept or reject their theories of liability. The purpose is to let the litigants learn more about the likely outcome of the issues raised in the case. See, e.g., Eldon E. Fallon, Jeremy T. Grabill & Robert Pitard Wynne, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2338 (2008); DUKE LAW CTR. FOR JUDICIAL STUDIES, STANDARDS AND BEST PRACTICES FOR LARGE AND MASS–TORT MDLS, 21 (2014); *In re Cox Enterprises, Inc. Set-top Cable Television Box Antitrust Litig.*, 835 F.3d 1195, 1208 (10th Cir. 2016).

But unlike in the ordinary situation, the district court and the plaintiffs completely switched gears to assert that the outcome of the earlier trials collaterally estops DuPont from defending itself against key elements of its alleged liability. For the first time, the plaintiffs argued, and the district court agreed, that nonmutual offensive collateral estoppel would apply to

bar DuPont from defending itself in all the current and future cases filed and transferred to this MDL.

The district court's decision, now upheld by the Sixth Circuit, creates a nightmare for defendants in MDL proceedings. After bellwether trials in a handful of unrepresentative cases led to jury verdicts for the plaintiffs, DuPont was barred from raising its core liability defenses in this and all the remaining lawsuits brought against it. At the time of the estoppel order, about 75,000 potential lawsuits remained.

Under the Sixth Circuit's holding, even if the plaintiffs have already lost 100 bellwether trials, a single loss can forever bind the defendant to that aberrant outcome. And yet, since each plaintiff has a right to pursue his or her own claim, prior losses by the defendant–no matter how many–will not prevent later plaintiffs from having their own day in court. The extreme asymmetry alone violates fundamental fairness.

DRI and LCJ believe that nonmutual offensive collateral estoppel should never be used in the context of MDLs because of this powerfully unfair asymmetry. The plaintiffs can lose case after case, and then win one (with a particularly unfavorable jury or some other aberrant aspect to the trial). See Brainerd Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281, 286-289 (1957).

Defendants already face an uneven playing field because the most basic showing of the basis for a claim is often absent when claims are filed and transferred to an MDL proceeding. See ADVISORY COMMITTEE ON

CIVIL RULES, AGENDA BOOK, NOV. 1, 2018, p. 142, available at https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf. Ensuring representative bellwether cases given these difficulties at the pleading stage is impossible. Neither the court nor defendants can have any idea what the thousands of other claims are like because of the recognized pleading problems. Even lawyers for the plaintiffs often have no real knowledge about the nature of most of the claims filed until late in a settlement claim process. So it is impossible for anyone to say that cases chosen as bellwethers are in any true sense representative.

Currie's seminal article explained why nonmutual offensive collateral estoppel is an "extraordinarily dangerous instrument": when "its extension by merely logical processes of manipulation may produce results which are abhorrent to the sense of justice and to orderly administration of law." *Id*. at 289. Currie drove his point home with an example in which a jury rejects a claim in 25 instances but then in the 26th, finds liability. Currie explained that our natural aversion to the doctrine "stems largely from the feeling that such a judgment in a series must be an aberration but we have no warrant for assuming that the aberrational judgment will not come as the first in the series." *Id*.

In the real world of litigation, insurmountable practical problems arise from treating one case as conclusive so that it binds so many other cases. As every DRI and LCJ member (and lawyer who has ever litigated knows), litigation strategy and outcomes involve many factors:

- the venue
- the jury pool and the jury ultimately selected
- the witnesses called to testify and even the order in which they appear
- the lawyers' skill and persuasiveness in presenting their clients' case
- the theme a lawyer presents in opening and closing statements
- the resources a defendant chooses to spend in defending a case
- the sympathetic or unsympathetic nature of the plaintiff and the severity of the injury
- the strength of the facts connecting the claimed injury to the defendant's conduct or product
- the trial judge's leanings and inclinations about jury trials
- the trial judge's discretionary evidentiary rulings
- the jury instructions
- the verdict form

Countless intangible and hard-to-quantify factors can make an enormous difference to the outcome and, if liability is found, to the damages awarded.

In the MDL context, plaintiffs already have a "priceless strategic advantage." They can pick the time and place to sue, collaborate with large numbers of similarly situated plaintiffs which will help them

prevail but will not bind other plaintiffs, move first on cases with sympathetic plaintiffs, and choose an inconvenient forum where it will be difficult to present the most effective defense. Currie, 9 Stan. L.Rev. at 288.

The ability of plaintiffs to collaborate is exponentially increased in the context of MDL proceedings where thousands of claims are handled under the aegis of a plaintiffs' steering committee. This advantage is increased more if a court allows the use of nonmutual offensive collateral estoppel offensively. Jack Ratcliff, *Offensive Collateral Estoppel and the Option Effect*, 67 Tex. L. Rev. 63, 74-77 (1988). The rule adopted by the Sixth Circuit here creates serious practical problems:

> The defendant must still try a first case in which he defends, in effect, against all plaintiffs. If he loses on a critical issue, he loses to all plaintiffs. If he wins, he defeats one plaintiff and earns the right to take on the others one by one.

Ratcliff, 67 Tex. L. Rev. at 78. The process also provides "a windfall advantage to those plaintiffs who can sit out the first trial and await its outcome before deciding whether to claim the result of the common fact dispute." *Id*.

These practical problems mean that corporations and their lawyers seeking to defend against alleged mass torts are forced to face often well-financed and well-organized plaintiffs' groups to defend against thousands of claims. Even worse, in mass tort MDLs, many weak or meritless suits are filed:

> There seems to be fairly widespread agreement [that] . . . a significant number of claimants ultimately (often at the settlement stage) turn out to have unsupportable claims, either because the claimant did not use the product involved, or because the claimant had not suffered the adverse consequence in suit, or because the pertinent statute of limitations had run before the claimant filed suit.

ADVISORY COMMITTEE ON CIVIL RULES, AGENDA BOOK, NOV. 1, 2018, p. 142, available at https://www.uscourts.gov/sites/default/files/2018-11_civil_rules_agenda_book_0.pdf. Yet under the Sixth Circuit decision, a single adverse outcome in a trial can bind a defendant in the thousands of later-filed lawsuits.

It is no answer to say that the defendant can point to the factual differences to resist the problem created by nonmutual offensive collateral estoppel. The procedural history here shows that is not a solution. In this case, since DuPont did not know that the trials might be binding, the parties used general verdicts. The district court then used those general verdicts to collaterally estop DuPont as to all the future cases. It did so by ignoring factual distinctions about the exposure level, DuPont's knowledge, and other key aspects that a jury would likely consider in finding or rejecting liability.

To subject defendants in mass tort cases to this kind of powerful asymmetry, particularly with no constitutional safeguards, and no notice of the binding effect of a bellwether, is fundamentally unfair. The fundamental unfairness based on asymmetry is

exacerbated when, as here, the bellwethers were the antithesis of a representative sampling. As DuPont points out, the cases that the district court relied on included only three bellwether trials, one of which was explicitly chosen to include "the most severely impacted plaintiffs." MDL.Dkt.4724, at 25 cited in Petition for Certiorari, at 7-8.

As DuPont also points out, the later-filed cases differed significantly from the facts in the tried cases. Petition for Certiorari, at 9. But the Sixth Circuit rejected DuPont's argument by analyzing whether the issues were distinct at such a high level of generality, that nonmutual offensive collateral estoppel would almost inevitably apply. See *Abbott v. E.I. du Pont de Nemours & Co.*, 54 F.4th 912, 925 (6th Cir. 2022). The Sixth Circuit said, "[t]he key concept appliable here is that DuPont's conduct impacted the Plaintiffs in virtually identical ways–contamination of their water supplies with a carcinogen." *Id.*

This Court has recognized that analyzing similarity at such a high level of generality obscures material differences that would yield a different outcome. *City of Escondido, Cal. v. Emmons*, 139 S.Ct. 500, 503 (2019). That same unwillingness to obscure material factual differences that a jury would likely consider in determining whether DuPont is liable should have been applied here. As DuPont argued below, the water district, location, exposure, timing, and toxicity are all legally significant factors that a jury would consider–and when they are not the same–should block use of

collateral estoppel. *B & B Hardware, Inc. v. Hargis Industries, Inc*., 575 U.S. 138 (2015).

Amici's members, who regularly defend corporations in the mass tort context, know that personal injury litigation is a high-risk endeavor. Courts and scholars have characterized juries as unpredictable and have sought solutions that would make verdicts more predictable or cabin the outcome in some fashion. See, e.g., Franklin Strier, *Making Jury Trials More Truthful*, 30 U.C. Davis L. Rev. 95, 163 and n. 270 (1996); Russel Myles & Kelly Reese, *Arbitration: Avoiding the Runaway Jury*, 23 Am. J. Trial Advoc. 129, 142-143 (1999). This Court has recognized the unpredictability of juries in various contexts over the years. See, e.g., *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499-500 (2008) ("real problem, it seems, is the stark unpredictability of punitive awards"); *Consolidated Rail Corp. v. Gottshall*, 512 U.S. 532, 546-547 (1994) ("cause of action for negligent infliction of emotional distress holds out the very real possibility of nearly infinite and unpredictable liability for defendants"). The plaintiffs' bar has itself focused on litigation strategy based on overcoming rational thinking to encourage jurors to base verdicts on an engaging emotional story. See, e.g., Robert F. DiCello, *Plaintiffs Litigation in the 21st Century: The Fall of Atticus and the Rise of Brain Science*, 2018 Annual American Association for Justice Papers 8 (2018). And because the requirement for a unanimous twelve-person jury verdict has been replaced with smaller juries and non-unanimous verdicts, jury verdicts have become less predictable. See, e.g., Michael

J. Saks, *The Smaller the Jury, the Greater the Unpredictability*, 79 Judicature 263 (1996); Alisa Smith & Michael J. Saks, *The Case for Overturning* Williams v. Florida *and the Six-Person Jury: History, Law, and Empirical Evidence*, 60 Fla. L. Rev. 441, 458 (2008). Studies of damage awards from comparable cases involving recovery for pain and suffering also show that the unbridled discretion of juries leads to unpredictable outcomes. Hillel J. Bavli & Reagan Mozer, *The Effects of Comparable-Case Guidance on Awards for Pain and Suffering*, 37 Yale L. & Policy Rev. 405 (2019).

Yet those engaged in litigation often praise jurors for their collective wisdom. And it continues to be a foundational aspect of the American civil justice system. The role of the jury writ large is not at issue. But the effect of one or a handful verdicts issued by juries in unrepresentative cases is at issue. And applying the outcome of three unrepresentative suits to all current and future cases brought against DuPont violates due process.

B. The Sixth Circuit decision undermines faith in the availability of evenhanded justice in MDLs by upholding a district court's after-the-fact switch about whether bellwether cases would be illustrative, not binding

The fundamental unfairness here is made worse by the district court judge going back on his word. Justice Cardozo analyzed the judicial process through looking at "logic, and history, and custom, and utility,

and the accepted standards of right conduct" as "the forces which singly or in combination shape the progress of the law." BENJAMIN N. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 112 (1921). But whatever the lens you use to describe the rule of law (formalism, utilitarianism, pragmatism, moral theory, natural law, or rights theory), a district judge's going back on a promise to litigants that the results of bellwethers would be informational, not binding, transgresses it. See generally Rodney J. Blackman, *There is There There: Defending the Defenseless With Procedural Natural Law*, 37 Arizona L. Rev. 285, 294-298 (1995); Gerald B. Wetlaufer, *Systems of Belief in Modern American Law: A View from Century's End*, 49 American Univ. L. Rev. 1 (1999). As one retired associate judge of the New York State Court of Appeals explained:

> Everyone will agree with the simple proposition that a judge's decision should be fair. The notion is imbedded in our Western culture. Even very young children have the idea of fairness.

Stewart F. Hancock, Jr., *Meeting the Needs: Fairness, Morality, Creativity and Common Sense*, 68 Albany L. Rev. 81, 86 (2004) (citation omitted).

Litigants and nonlitigants alike value promises and rightly expect those who make promises to keep them. The law of contracts is based on this human truth. Yet here, after promising litigants that bellwether trials would not be binding, a district court reversed itself to hold that three nonrepresentative jury trials bind DuPont in the 75,000 remaining claims.

This cannot be squared with fundamental fairness. And it severely undermines the institutional integrity of the courts.

Plaintiffs argue that the common law has never required notice that a trial result will collaterally estop a different outcome in a future trial. Response Brief of Plaintiffs-Appellees for Sixth Circuit, at 34. But as DuPont ably argues, this Court has limited the use of nonmutual offensive collateral estoppel "because it may be unfair to a defendant." *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 330. (1979). This Court explicitly warned that sometimes, "either for the reasons discussed above or for other reasons, the application of nonmutual offensive collateral estoppel should not be permitted." *Id*. at 331. As one scholar warned in the related class action context, letting future plaintiffs benefit from a plaintiff win is "capricious–certainly unfair to the defendant, but also to those early plaintiffs, if any, unable to reap the benefits of a later triumph." Lawrence C. George, *Sweet Uses of Adversity:* Parklane Hosiery *and the Collateral Class Action*, 32 Stan. L. Rev. 655, 675 (1980).

Not only has this Court cautioned against the use of nonmutual offensive collateral estoppel, but countless courts and scholars have recognized that bellwether trials ordinarily only bind the parties. See Petition for Certiorari, pp. 20-22. Given this backdrop, the district court's unprecedented about-face on whether the bellwether trials here would bind DuPont was fundamentally unfair and violated DuPont's right to due process.

C. The Sixth Circuit decision will destroy the utility of bellwether trials and undermine the viability of MDLs as a tool for disposing of mass torts in a fair and efficient way

Equally problematic as the harm to DuPont is the almost certain demise of bellwether trials as a tool to facilitate settlements in the MDL context. At the end of 2021, MDL cases constituted about 62.26% of the pending civil caseload in federal courts.[3] See https://www.jpml.uscourts.gov/sites/jpml/files/JPML%20FY%202021%20Report.pdf. According to the Judicial Panel on Multidistrict Litigation, at the end of 2021, there were 391,953 actions pending in 148 MDLs in 45 transferee district courts. *Id.* Thus, the Sixth Circuit's ruling is extraordinarily consequential.

MDLs were originally conceived to coordinate pretrial proceedings and thus avoid unnecessary duplication and reduce costs. Since their creation, they have become a process that leads almost inevitably to settlements. One recent study estimated that "96% of the individual actions consolidated in MDLs were terminated by the MDL transferee judges." DUKE LAW CTR. FOR JUDICIAL STUDIES, STANDARDS AND BEST PRACTICES FOR LARGE AND MASS–TORT MDLS, 21 (2014), p. vii. And this process has often been viewed as helpful since it allows the federal courts to deal with a massive

[3] This estimate is based on comparing the total civil cases, which was 629,588 according to the Administrative Office of U.S. Courts data, with the JPML data on the number of cases in MDLs. These figures are as of January 2023.

number of lawsuits in a truncated manner. According to the Bolch Judicial Institute, "[t]he emergence of the MDL process as an effective case-dispositive engine achieved through global settlements has made it the preferred vehicle to dispose of mass torts." *Id*. at p. viii.

The decision at issue today threatens the viability of MDL proceedings in general, and bellwether trials in particular. If the Sixth Circuit decision is left to stand, no defendant will be able to rely on agreement by all parties and the judge that the outcome of bellwethers will not be binding. And if bellwethers will perhaps bind thousands of cases–even those not yet filed–defendants will resist MDLs and refuse to agree to bellwether trials at all costs. The downside risk of an aberrant result will be too strong to offset any perceived informational benefit that a defendant facing multiple mass tort claims is likely to get from such trials.

The bellwether selection process, uniquely subject to gamesmanship, will become even more problematic if the loss of a handful of test cases will forever bind the defendant on key elements needed to establish liability. When selected by the parties, bellwether trials tend to include outliers: the very strongest and very weakest cases. DAVID F. KERR, ANN. MANUAL COMPLEX LITIGATION, MAY 2023 UPDATE, SECTION 13.15. This lack of representativeness should vitiate their use to bind defendants on liability in all the later-tried cases.

The Fifth Circuit explained why this is so in *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1019-1022 (5th Cir.

1997). A bellwether trial cannot accurately suggest the value of cases when the results are based on an unrepresentative sample. According to the Fifth Circuit, "the sample must be a randomly selected one of sufficient size so as to achieve statistical significance to the desired level of confidence in the result obtained." *Id*. at 1019. In other words, the parties will not have confidence in the outcome of unrepresentative test cases. To make the outcome sufficiently valid to inspire confidence, "[s]uch samples are selected by the application of the science of inferential statistics. *Id*. The Fifth Circuit recognized that "a lack of fundamental fairness contained in a system that permits the extinguishment of claims or the imposition of liability in nearly 3,000 cases based upon results of a trial of a non-representative sample of plaintiffs." *Id*. at 1020. In the Fifth Circuit's view, "the elements of basic fairness contained in our historical understanding of both procedural and substantive due process therefore dictate" that the sample of plaintiffs tried must be a "randomly selected, statistically significant sample." *Id*. at 1021.

It has always been difficult to select the cases to try as bellwethers in the context of MDLs. See DUKE LAW CTR. FOR JUDICIAL STUDIES, STANDARDS AND BEST PRACTICES FOR LARGE AND MASS–TORT MDLS, 21 (2014), pp. 18-28. Scholars and attorneys do not agree on whether random selection or selection of cases by the parties with various procedural protections works better. *Id*. Courts have struggled to deal with these problems in the bellwether selection process. See, e.g., *In re Repetitive Stress Injury Litigation*, 11 F.3d 368,

373-374 (2d Cir. 1993); *In re FEMA Trailer Formaldahyde Prods. Liab. Litig*., 628 F.3d 157, 163-164 (5th Cir. 2010). Still, when the outcome of these test trials helped the parties achieve global settlement, the near impossibility of ever achieving a truly representative sample was less of an issue. Here, when a handful of unrepresentative bellwether trials will bind the defendant in thousands of future cases, the question is central to viability of the process.

Amici–and any lawyer defending corporations against mass tort allegations–will be forced to advise their clients against agreeing to participate in multidistrict litigation proceedings. They will inevitably oppose any bellwether trial because of the risk that an after-the-fact decision will bind their client in thousands of dissimilar future cases. And if any case is tried, far from streamlining discovery and reducing litigation costs, those defending will need to engage in far more discovery to protect against aberrant cases and aberrant results. In those that go to trial, those defending will need to pull out all the stops and plan their trial strategy both to try to narrow the potential risk of nonmutual offense collateral estoppel and to avoid any possibility of a loss. It is not an overstatement to say that the viability of bellwethers and the viability of MDLs as a ways to dispose of mass torts through settlement will be seriously undermined. Thus, certiorari is in order.

CONCLUSION

Wherefore amici curiae DRI Center for Law and Public Policy and Lawyers for Civil Justice request this Court to grant certiorari.

Respectfully submitted,

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