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 WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

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.

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INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF often participates as an amicus curiae to advocate for rules ensuring that all litigants are treated fairly and justly. For example, WLF cautioned this Court that allowing the limited use of nonmutual offensive collateral estoppel would result in a diminution of litigants' constitutional rights. *See Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979); *see also* Brief of WLF, *Parklane Hosiery Co. v. Shore*, No. 77-1305 (June 15, 1978) (1978 WL 206990).

Additionally, WLF has filed formal comments with the Advisory Committee on Civil Rules stressing the need to reform multidistrict litigation proceedings to ensure fairness and justice for all MDL litigants. *See, e.g.*, Comments to Advisory Committee on Civil Rules, WLF (Sept. 23, 2019). WLF has also published articles by outside experts on the need to ensure that civil litigation—including MDL—proceeds in a just and constitutional manner. *See, e.g.*, Christopher P. Gramlin et al., *Early Assessment of Claims Can Help Reduce the MDL Tax*, WLF Working Paper (Mar. 2020).

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[*] No counsel for any party has authored this brief in whole or in part. No person, other than *amicus* or its counsel, made a monetary contribution to the preparation or submission of this brief. All parties received timely notice of *amicus*'s intent to file this brief under Rule 37.2.

While MDLs were created to "promote the just and efficient conduct" of similar civil actions "pending in different districts," *see* 28 U.S.C. § 1407(a), courts have increasingly focused on achieving efficiency in MDL proceedings at all costs. Often, as here, judicial aspirations for efficiency come at the cost of due process. Indeed, judges presiding over mass tort cases have adopted procedures aimed at avoiding trials on the merits, with an eye toward exacting tremendous pressure—especially on defendants—for global settlement. *See, e.g.*, Judge Joseph R. Goodwin, *Remand: The Final Step in the MDL Process—Sooner Rather than Later*, 89 UMKC L. Rev. 991, 995 (2021) (discussing how modern MDLs have a "singular emphasis on settlement"); *see also, e.g.*, Elizabeth Chamblee Burch, *Judging Multidistrict Litigation*, 90 N.Y.U. L. Rev. 71, 73-74 (2015) (discussing how current MDL practices "entrench repeat players, who are often settlement artists and may be more concerned about pleasing judges, fostering reciprocity among fellow attorneys, and positioning themselves for future appointments than advancing plaintiffs' heterogeneous interests").

If this troubling trend goes unchecked, it will continue to erode fundamental notions of fairness enshrined in the Due Process Clause and spiral many MDLs out of control.

SUMMARY OF ARGUMENT

The Petition raises an issue of exceptional importance: whether bellwether trials should serve as nonbinding data points that can help guide MDLs with differently situated plaintiffs toward resolution;

or, whether bellwether trials should serve as a brute force mechanism to dragoon MDL litigants into settling, regardless of the unique circumstances underpinning each plaintiff's case and the inherent variability of jury trials.

The history and purpose of bellwether trials in mass tort litigation, as well as basic due process considerations, dictate that bellwether trials should be informational and nonbinding. But the decision below casts the history and purpose of bellwethers—as well as defendants' due process rights—aside. It also encourages a troubling trend of judicially invented procedures aimed at avoiding trials on the merits, with an eye toward exacting tremendous pressure—especially on defendants—for global settlement.

More fundamentally, the Sixth Circuit erred in two critical respects.

First, the panel majority ignored settled law establishing that mass torts implicate plaintiff-specific issues. This precludes courts from applying nonmutual offensive collateral estoppel in any toxic tort or products liability case—just as it precludes any such case from being resolved on a class-wide basis. And for good reason. Using the results from a handful of nonrepresentative bellwether trials to resolve claims—that turn on plaintiff-specific facts—across hundreds of heterogeneous cases creates a process that is fundamentally unfair to defendants, and violates the Due Process Clause. It also injects an untenable amount of bias and statistical unreliability

into the MDL process, as it draws inferences from a woefully small sample of cases decided by jurors whose views may not be reflective of their broader communities or where the alleged conduct occurred.

Second, the panel majority breached the clear line this Court has drawn between class actions and MDLs, as its decision turns MDL bellwether trials into *de facto* class actions. This is particularly troubling, as class actions have largely been rejected in mass tort litigation—due to well-founded concerns that they prevent parties from attaining individualized justice.

At bottom, the Sixth Circuit's decision is as egregious as it is novel. If left to stand, the ability of MDLs to produce fair and just results will be even further diminished. Indeed, as Judge Batchelder aptly noted in her dissent, the majority's decision endorses "something that no other circuit court has . . . allowed" and creates 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." Pet. App. 56, 63 (Batchelder, J., dissenting in part). That is precisely why this Court should grant review.

REASONS FOR GRANTING CERTIORARI

Unless this Court grants review, the two core purposes of bellwether trials will be upended—if not eliminated—by the Sixth Circuit.

By way of background, a core purpose of bellwether trials is to help parties evaluate certain claims in an MDL, and the strength of their positions on those

claims. *See* Pet. 20-21. In other words, bellwether trials "allow the parties to test the sufficiency of a select set of claims without litigating all the claims at once." *In re Marriott Int'l, Inc., Customer Data Sec. Breach Litig.*, 2021 WL 3883265, at *3 (D. Md. Aug. 31, 2021). And, by fostering a learning process that permits parties to litigate "major arguments . . . without facing the daunting prospect of resolving every issue in every action," bellwether trials can help facilitate global settlement. *See In re Methyl Tertiary Butyl Ether (MTBE) Prods.*, 2007 WL 1791258, at *1-2 (S.D.N.Y. June 15, 2007).

Another core purpose is to enable the parties "to learn from the experience" of trying the bellwether cases and "reassess their tactics and strategy." Pet. 7, 21 (quoting *In re Cox Enters., Inc. Set-top Cable Television Box Antitrust Litig.*, 835 F.3d 1195, 1208 (10th Cir. 2016)).

Neither purpose demonstrates—or even suggests—that the results from a handful of bellwether trials can establish liability for core issues in mass tort cases. This should come as no surprise, as the core issues in mass tort cases turn on plaintiff-specific facts, which precludes liability from being resolved on a class-wide basis.

Absent this Court's review, the Sixth Circuit's decision will force a sea change in how over 40% of the entire federal docket is litigated, *see* Pet. 34-35, all while trammeling the due process rights of thousands of litigants. The Court should not permit such an

affront to the fairness of the judicial system to go unchecked.

I. DUTY, FORESEEABILITY, AND BREACH ARE PLAINTIFF-SPECIFIC ISSUES THAT ARE INCOMPATIBLE WITH NONMUTUAL OFFENSIVE COLLATERAL ESTOPPEL.

The decision below rewrites black-letter tort law. While courts have historically recognized that issues of duty, breach, and foreseeability turn on facts peculiar to each plaintiff, the panel majority departed from that precedent. Specifically, the majority found that each plaintiff's "individual circumstances" are irrelevant to issues of "duty, breach, and foreseeability," as it held that such issues turn *exclusively* on a defendant's alleged conduct. Pet. App. 20. In so holding, the majority quoted the bellwether jury instructions—while ignoring their plain text. Indeed, the bellwether jury instructions expressly tied determinations of duty, foreseeability, and breach to the position of *each specific bellwether plaintiff*. For example, the *Bartlett* jury instructions stated that:

- A duty exists where "a reasonably prudent person would have foreseen that injury was likely to result to someone *in Mrs. Bartlett's position* from DuPont's conduct"; and

- An act is a proximate cause when a similarly positioned actor "should have foreseen or reasonably anticipated that injury would result from the alleged negligent act" under the circumstances.

See Pet. App. 18-19 (emphasis added) (quoting the *Bartlett* jury instructions). The reason foreseeability was at the heart of the jury instructions for both duty and proximate cause was because of the applicable state law, which provides that a "lack of foreseeability negates both the existence of an underlying duty and the element of proximate cause necessary to establish a prima facie case of negligence." *See, e.g.*, *Duffett v. Abdoo*, 2010 WL 3820127, at *2 (Ohio Ct. App. Sept. 30, 2010) (citation omitted); *see also, e.g.*, *Vadaj v. French*, 89 N.E.3d 73, 77 (Ohio Ct. App. Apr. 13, 2017) ("Similar to the element of duty, the concept of proximate cause is dependent upon the notion of foreseeability."). *Cf. Rolling v. Kings Transfer, Inc.*, 2020 WL 7090195, at *3 (Ohio Ct. App. Dec. 4, 2020); *Stubbs v. Hodge*, 1996 WL 732543, at *2 (Ohio Ct. App. Dec. 19, 1996).

True, when determining the existence of a duty, the test is whether a reasonably prudent person would have foreseen that the alleged conduct was likely to injure someone in the plaintiff's *position*—and not whether a reasonably prudent person would have foreseen that the exact plaintiff was likely to be injured by the alleged conduct. But that *positional* test invariably implicates a plaintiff's particular circumstances. Indeed, to determine whether any two plaintiffs in a toxic tort case were similarly positioned (such that they were just as likely to be injured by the defendant's alleged conduct), a court must consider their "location, exposure, timing, and toxicity." *Cf.* Pet. App. 20; Byron G. Stier, *Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 Pepp. L. Rev. 715, 750 & n.175 (2009)

(suggesting that single-accident mass torts, unlike products liability or toxic exposure mass torts, may involve plaintiffs who are very similarly situated). The majority cited no authority in support of its contrary holding. That is because its holding diverges from what other circuit and district courts have consistently held.

Consider *Lloyd's Leasing, Ltd. v. Conoco*, which arose out of an oil tanker spilling "65,500 barrels of crude oil into the waters of the Gulf of Mexico" after it ran aground. 868 F.2d 1447, 1448-50 (5th Cir. 1989). Several types of claimants sought to recover for alleged injuries, including "claimants who suffered damages from oil tracked onto their premises by tourists and beachgoers." *Id.* The district court granted the defendants' motion for summary judgment on those claimants' allegations, finding that "the damage to them was, as a matter of law, not foreseeable" since they were too far removed from the site of the spill. *See id.* The Fifth Circuit affirmed, emphasizing that the shoreline of the Gulf of Mexico was largely undeveloped—including the area near where the tanker ran aground—which meant that the shipowner "had no reason to have anticipated that the oil would probably wash ashore in a heavily populated area [70 miles away] and then be tracked into businesses and homes." *Id.*

Had the claimants been located 1,500 feet from the site of the spill, the rationale of *Lloyd's Leasing* suggests that the harm to the claimants could have been foreseeable. Indeed, other Fifth Circuit decisions re-affirm that, when a lawsuit involves alleged

conduct that spans a broad geographic area, the plaintiffs must prove that it was foreseeable that the alleged conduct would injure someone in their particular location.

This is illustrated by *Garcia v. United States*, where a U.S. Coast Guard vessel patrolling a 17-mile-long channel at midnight "struck and killed Patricia Guadalupe Garcia Cervantes, a Mexican citizen who was attempting to enter the United States illegally by swimming across the Channel." 986 F.3d 513, 519 (5th Cir. 2021). In addressing a negligence claim brought against the United States, the Fifth Circuit performed a foreseeability analysis. *Id.* at 525-30. The Fifth Circuit focused on the risk of collision to the "general class" of persons in Cervantes' position and, citing *Lloyd's Leasing*, found that foreseeability and duty were lacking as: (i) the channel at issue "is 17 miles long and approximately 500 feet wide," meaning that "the Coast Guard patrols of the [channel] cover a route of approximately 34.2 miles," which is "a very large area to cover"; and (ii) "the cited evidence here may show that the Coast Guard might reasonably have anticipated encountering undocumented aliens somewhere in the [channel], but the Coast Guard did not have knowledge to anticipate *where exactly in the [channel]* the undocumented aliens would be swimming." *Id.* (emphasis added); *see also, e.g.*, *In re Oil Spill by the Oil Rig "Deepwater Horizon" in the Gulf of Mexico, on April 20, 2010*, 2011 WL 4829905, at *4-6 (E.D. La. Oct. 12, 2011) (discussing additional Fifth Circuit authority), *aff'd*, 500 F. App'x 355 (5th Cir. 2012).

Similar principles can be found in *Cimino v. Raymark Indus., Inc.*, where the Fifth Circuit addressed causation in the context of an asbestos related mass tort. 151 F.3d 297, 315-17 (5th Cir. 1998). As relevant here, the Fifth Circuit discussed how plaintiffs had to prove that they worked in a particular area of a site where they were "in proximity to some specific item of defendants' asbestos containing product"—as there were differences between the twenty-two sites at issue, differences within the sites at-issue (some of which "covere[d] several square miles"), and differences in the asbestos use at each site at various points in time. *Id.* Under the district court's trial plan, there was no determination that any plaintiff provided individualized proof on these geographic and temporal issues, so the Fifth Circuit held that the trial plan was improper and violated the Seventh Amendment. *Id.* The Fifth Circuit was "aware of no appellate decision approving such a group, rather than individual, determination of cause in a damage suit for personal injuries to individuals at *widely different times and places*." *Id.* (emphasis added).

Many other courts have held that duty and foreseeability implicate individualized geographic or temporal considerations, including when evaluating the applicability of nonmutual offensive collateral estoppel. Take, for example:

- *Dopson-Troutt v. Novartis Pharms., Corp.*, where a district court aptly observed that "the scope of [a defendant's] duty to warn also depends on whether [the defendant] knew the

risks of [the alleged injury] at the time [the particular plaintiff] used [the at-issue drug]," and rejected the application of nonmutual offensive collateral estoppel to plaintiffs who used the drug at other times. 2013 WL 5304059, at *2 (M.D. Fla. Sep. 20, 2013); *see also, e.g.*, *Est. of Van Dyke ex rel. Van Dyke v. GlaxoSmithKline*, 2006 WL 8430904, at *5 (D. Wyo. Nov. 1, 2006) (similar).

- *Herman v. Welland Chem., Ltd.*, where a district court found that the plaintiffs' precise distance from a chemical spill impacted whether a jury could find that they were foreseeable plaintiffs. 580 F. Supp. 823, 827 (M.D. Pa. 1984); *see also, e.g.*, *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 162 (4th Cir. 2000) (noting that a distance of eighteen miles between a plaintiff and the site at-issue may be "too large to infer causation," in contrast to a distance of two-to-four miles).

- *Cotromano v. United Techs. Corp.*, where a district court denied class certification because there was no evidence that the contamination at the defendants' manufacturing plant had spread so much that "*all* property owners in [a] 60-square-mile expanse" were in a "geographic zone of danger." 2018 WL 2047468, at *2-3, *11-12 (S.D. Fla. May 2, 2018); *see also, e.g.*, *Prantil v. Arkema France S.A.*, 2022 WL 1570022, at *1, *31-32 & n.23 (S.D. Tex. May 18, 2022) (similar).

- *Dodge v. Cotter Corp.*, where the Tenth Circuit underscored that, in a toxic tort case, one prerequisite to applying nonmutual offensive collateral estoppel is a prior determination that "the same released contaminants in whatever directions or forms or times amounted to negligent conduct as to each [individual] plaintiff." 203 F.3d 1190, 1198-1200 (10th Cir. 2000). Even if a substance is released in a general area, a defendant should be able to contest whether the "range of its [alleged] conduct and duties" extended to differently situated plaintiffs. *See id.*; *see also, e.g.*, *Lowery v. Enbridge Energy Ltd. P'ship*, 898 N.W.2d 906, 908-09, 913-14, 919-20 (Mich. 2017) (Markman, C.J., concurring) (discussing how, in a toxic tort case, even general causation requires proof that someone in the plaintiff's specific position could have been harmed).

- *Deines v. Atlas Energy Servs., LLC*, where the Colorado Court of Appeals surveyed authority holding that when a "defendant's negligent conduct is separated by substantial time and distance from the accident that caused the plaintiff's injuries" it creates, at a minimum, a question of fact for a jury to resolve. 484 P.3d 798, at ¶¶ 30-32 (Colo. Ct. App. 2021).

At bottom, these cases confirm that Judge Batchelder was right to consider the variances in each plaintiff's location, while the majority was wrong to dismiss those variances as irrelevant. As Judge Batchelder observed, Mr. Abbott grew up and lived

around "Pomeroy, Ohio, which is 56.9 river miles away from DuPont's Washington Works plant," and his water "was sourced from wells ranging anywhere from 14 to 56 miles away from source of C-8 emissions." Pet. App. 60-61 (Batchelder, J., dissenting in part). In contrast, "Freeman and Vigneron drank water sourced from wells much closer to DuPont, only about 1,500 feet away from the Washington Works plant." *Id.* The considerable distance between Mr. Abbott's home and DuPont explains why his own experts conceded that the C8 levels in his water never exceeded DuPont's voluntary safe exposure guideline. *See* Pet. App. 17. Yet the experts of plaintiffs who lived closer to DuPont—such as Freeman and Vigneron—made no such concessions. *Id.*

Had the MDL court required bellwether juries to use detailed verdict forms with special interrogatories, the plaintiff-specific nature of these issues should have been readily apparent. *See* Pet. 12-13. Still, detailed verdict forms with special interrogatories are not a cure-all. *See, e.g.*, Laura J. Hines, *The Dangerous Allure of the Issue Class Action*, 79 Ind. L.J. 567, 574 (2004). As shown above, mass torts involving allegations of toxic exposures (like this case) or defective products will invariably implicate plaintiff-specific issues. Accordingly, even a special interrogatory worded to resolve such issues for all plaintiffs would be improper (absent a multi-faceted evidentiary presentation tailored to each plaintiff), as it would be contrary to settled law. Moreover, it would transform many mass tort cases into *de facto* class actions; and, as discussed below, MDLs are a tool intended to facilitate the "just and efficient conduct" of

individualized claims. *See* 28 U.S.C. § 1407(a). MDLs are not meant to function as another mechanism for litigating claims on a class-wide basis.

II. NONMUTUAL OFFENSIVE COLLATERAL ESTOPPEL IS INCOMPATIBLE WITH MASS TORT CASES.

A. Mass Tort MDLs Are Not Meant To Function As *De Facto* Class Actions.

The Sixth Circuit's decision transforms bellwether trials from an informational tool to assess the merits of a litigation's core claims, and the parties' trial strategies, into a *de facto* class action. The majority's holding thus contravenes longstanding precedent emphasizing the individuality of each mass tort plaintiff's injuries. It also flouts the clear distinction this Court has drawn between class actions—where named plaintiffs bring suits on behalf of a putative class of similarly-situated plaintiffs—and mass torts consolidated into MDLs—where hundreds or thousands of individual plaintiffs bring suits in which they retain their own identity while pretrial issues are resolved together.

For over fifty years, courts have emphasized the importance of distinguishing between MDLs and class actions, based largely on procedural due process requirements. To that end, the advisory notes to the 1966 amendment to Federal Rule of Civil Procedure 23 "caution against certifying class actions involving mass torts." *See Georgine v. Amchem Prods., Inc.*, 83 F.3d 610, 627-28 (3d Cir. 1996). In the context of Rule 23(b)(3), specifically, which governs class actions

where "questions of law or fact common to class members predominate over any questions affecting only individual members," the advisory committee explained how mass torts are "ordinarily not appropriate for" class certification "because of the likelihood that significant questions" as to liability, defenses, and damages "would be present, affecting the individuals in different ways." Fed R. Civ. P. 23 advisory committee's note to 1966 amendment. In these circumstances, a nominal class action would "degenerate in practice into multiple lawsuits separately tried." *Id.*

The thrust of the advisory committee's note is that, in most mass torts, individual issues may outnumber common issues. In those instances, "[n]o single happening or accident occurs to cause similar types of physical harm or property damage," "[n]o one set of operative facts establishes liability," and "[n]o single proximate cause applies equally to each potential class member and each defendant." *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. 389, 396 (S.D.N.Y. 2008) (quoting *In re Am. Med. Sys., Inc.*, 75 F.3d 1069, 1084-85 (6th Cir. 1996)). And separate from a plaintiff's *prima facie* case, "the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case." *Id.* (same).

Thus, in almost all instances, "mass torts cannot qualify for class action treatment because they are unable to satisfy [Rule 23's] standards"—namely "numerosity, commonality, typicality, adequacy of

representation, predominance and superiority." *See, e.g.*, *In re Chinese-Manufactured Drywall Prods. Liab. Litig.*, 2017 WL 5971622, at *14 (E.D. La. Nov. 30, 2017). Indeed, numerous plaintiffs have tried—yet failed—to obtain a class-wide resolution in mass torts because of the highly individualized inquiry necessary for each plaintiff's action, *see, e.g.*, *In re Fibreboard Corp.*, 893 F.2d 706, 707 (5th Cir. 1990), particularly after this Court's class certification decisions in the late 1990s, *see, e.g.*, 12 Bus. & Com. Litig. Fed. Cts. § 128:6 (5th ed.) (discussing the impact of *Amchem Prods., Inc. v. Windsor*, 521 U.S. 591 (1997) and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999) on mass torts); *see also, e.g.*, *In re Fosamax Prods. Liab. Litig.*, 248 F.R.D. at 396 & n.8. Over the past two decades, as "[t]he prospect of certifying nationwide classes or settlement-only classes in mass torts has waned. . . . [the] MDL has ascended as the most important federal procedural device to aggregate (and settle) mass torts." *See, e.g.*, Margaret S. Thomas, *Morphing Case Boundaries in Multidistrict Litigation Settlements*, 63 Emory L.J. 1339, 1346-47 (2013).

Against this backdrop, it is no surprise that the legislation authorizing MDLs sought only to coordinate *pretrial* issues—not to resolve issues "common" to a group of disparate plaintiffs at trials. Indeed, as this Court recognized in *Lexecon Inc. v. Milberg Weiss Bershad Hynes & Lerach*, the legislative history of 28 U.S.C. § 1407 confirms that the original intent of the statute was such that § 1407 "affects *only* the pretrial stages in multidistrict litigation." 523 U.S. 26, 39-40 (1998) (emphasis added). That is because "[t]he primary purpose behind

assigning multidistrict litigation to a transferee court is to promote efficiency through the coordination of discovery." *In re Activated Carbon-Based Hunting Clothing Mktg. & Sales Pracs. Litig.*, 840 F. Supp. 2d 1193, 1198 (D. Minn. 2012) (citation omitted) (collecting authority).

In sum, while class actions may proceed to determine issues common to all class members, MDLs are comprised of separate cases brought together for pretrial proceedings that "retain their separate identities.'" *Gelboim v. Bank Am. Corp.*, 574 U.S. 405, 413 (2015). To that end, the global impact of judicial decisions in MDL proceedings is coterminous with an MDL court's mandate to resolve only common pretrial issues, and should not be stretched to such an extreme that a bellwether jury's decision is binding on all other cases in an MDL.

Yet the decision below improperly attempts to "meld [one] action and others in the MDL into a single unit." *See id.* at 414. Thus, this Court should grant the Petition to prevent further distortions to MDL practice and black-letter tort law. This Court should intervene and clarify that "neither MDL centralization nor any other procedural device can 'impose the heavy toll of a diminution of any party's rights.'" *See Home Depot USA, Inc. v. Lafarge N. Am., Inc.*, 59 F.4th 55, 62, 64 (3d Cir. 2023) (citation omitted). This necessarily includes a defendant's right to evaluate the merits of (and defend itself against) each mass tort plaintiff's individualized claims and circumstances—which invariably encompasses issues of duty, breach, foreseeability, and causation.

B. Applying Nonmutual Offensive Collateral Estoppel In Mass Tort Cases Eviscirates Fairness And Due Process.

This "Court [has] explicitly stated that offensive collateral estoppel could not be used in mass tort litigation." *In re Bendectin Prods. Liab. Litig.*, 749 F.2d 300, 305 n.11 (6th Cir. 1984) (citing *Parklane Hosiery*, 439 U.S. at 330 n. 14). And for good reason. "[T]he use of offensive collateral estoppel in mass tort cases such as the present action could well foster behind-the-scenes posturing by both plaintiffs and defendants to advance their 'best' cases to trial first, so as to gain (or avoid) the benefit of issue preclusion as to liability in subsequent cases," which creates an "element of unfairness" that this Court "expressly recognized" in *Parklane Hosiery*. *See, e.g.*, *Liberty Life Ins. Co. v. W. R. Grace & Co.*, 1990 WL 10864882, at *3 (D.S.C. Jan. 12, 1990); *see also, e.g.*, Michael J. Waggoner, *Fifty Years of* Bernard v. Bank of America *Is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not*, 12 Rev. Litig. 391, 413-17 (1993). Indeed, *Parklane Hosiery* held that lower courts should avoid applying nonmutual offensive collateral estoppel where it would encourage "a wait and see attitude" among potential plaintiffs hoping "that the first action by another plaintiff will result in a favorable judgment." 439 U.S. at 330.

Besides creating a "wait and see attitude" that is fundamentally unfair to defendants, applying nonmutual offensive collateral estoppel in mass torts creates a process prone to bias and statistical unreliability—particularly where, as here, only a

handful of nonrepresentative bellwether trials have occurred. *See* Pet. 8 n.2.

Begin with bias. By precluding hundreds of cases from being resolved on their own merits after a handful of juries—in one judicial district—find for plaintiffs, it will almost invariably tether the resolution of a mass tort to results drawn from a biased population. That is because the views of a few dozen people are unlikely to be representative of the communities they reside in—or the communities in which the parties to the litigation reside. Employing collateral estoppel in this manner can inject an intolerable amount of bias into even the most localized of mass torts, as "[c]ommunities—even within a single state—can vary dramatically," and a smattering of empaneled juries is unlikely to capture this variation. *See, e.g.*, Elizabeth Chamblee Burch, *Remanding Multidistrict Litigation*, 75 La. L. Rev. 399, 408-09 (2014); Laura G. Dooley, *The Cult of Finality: Rethinking Collateral Estoppel in the Postmodern Age*, 31 Val. U. L. Rev. 43, 58-59 (1996); *see also, e.g.*, Chief Judge Richard A. Posner, *An Economic Approach to the Law of Evidence*, 51 Stan. L. Rev. 1477, 1498 & n.45 (1999). The issue of bias is amplified in MDLs, where bellwether trials typically occur in only the judicial district in which the cases have been aggregated for pretrial proceedings. To be sure, "bellwether trials in the [MDL court's] forum provide the public and the nonparticipating plaintiffs a glimpse into the contested issues"; but, when the resolution of an MDL hinges almost entirely on the outcomes of such bellwethers, and cases are never remanded to transferor courts for trial, it vitiates the

individualized justice and fairness that should be at the forefront of MDL proceedings and "undermine[s] democratic values of communal participation and fact finding by citizens nationwide." *See, e.g.*, Burch, *Remanding Multidistrict Litigation*, *supra*, at 408-09; *see also, e.g.*, Laura G. Dooley, *National Juries for National Cases: Preserving Citizen Participation in Large-Scale Litigation*, 83 N.Y.U. L. Rev. 411, 437, 441 (2008).

As for statistical unreliability, while "[p]ermitting a small sample of cases to go forward on a limited basis, even if the results cannot be reliably extrapolated across cases, can be very useful in case coordination and issue refinement," courts must nevertheless "recognize the limits of an approach that does not use a reliable sample." *See, e.g.*, Alexandra D. Lahav, *The Case for Trial by Formula*, 90 Tex. L. Rev. 571, 631-32 (2012). This is not an illusory issue, particularly in the context of mass torts. Various legal scholars have chronicled how "[e]vidence of verdict variability can [easily] be gleaned from [reviewing] multiple mass tort [cases]" and how "[e]xperimental research on the behavior of juries has also shown variation, even when juries hear the same evidence." *See, e.g.*, Stier, *Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, *supra*, at 726-27; *see also, e.g.*, Peter H. Schuck, *Judicial Avoidance of Juries in Mass Tort Litigation*, 48 DePaul L. Rev. 479, 484 (1999) (noting "the great variability in jury verdicts in mass tort cases"); Waggoner, *Fifty Years of* Bernard v. Bank of America *Is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not*, *supra*, at 413-

17 (same). So too have many judges, including Judge Batchelder and Judge Easterbrook. In her dissent below, Judge Batchelder underscored how it is "Statistics 101 that a small, unrepresentative sample" of cases, like the bellwethers at issue here, "cannot yield reliable inferences as to a larger group." Pet. App. 54 (Batchelder, J., dissenting in part). Likewise, in *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, Judge Easterbrook articulated—for the panel—how "only 'a decentralized process of multiple trials, involving different juries, and different standards of liability, in different jurisdictions' will yield the information needed for accurate evaluation of mass tort claims." 288 F.3d 1012, 1020 (7th Cir. 2002) (citation omitted).

Moreover, even those who advocate for a formulaic resolution of mass tort cases recognize that—to ensure statistical reliability—multiple bellwether trials must be held for each type of plaintiff bringing suit. *See, e.g.*, Lahav, *The Case for Trial by Formula*, *supra*, at 629-33; Michael J. Saks & Peter David Blanck, *Justice Improved: The Unrecognized Benefits of Aggregation and Sampling in the Trial of Mass Torts*, 44 Stan. L. Rev. 815, 833-35, 848-49 (1992). Indeed, one such scholar has discussed how "[e]xperience indicates that mass tort plaintiff populations tend to be characterized by significant variance across numerous relevant variables" and "an uneven distribution," which means that in most mass tort cases "a significant number of trials will need to be held to obtain a valid picture of the population." *See* Alexandra D. Lahav, *A Primer on Bellwether Trials*, 37 Rev. Litig. 185, 188-89, 197 (2018).

Given these issues, other courts have refused to apply nonmutual offensive collateral estoppel in mass tort cases.

For example, in *Hardy v. Johns-Manville Sales Corp.*, the Fifth Circuit held: "The injustice of applying collateral estoppel in cases involving mass torts is especially obvious." 681 F.2d 334, 346 n.13 (5th Cir. 1982). And subsequently, in *Arnold v. Garlock, Inc.*, the Fifth Circuit held that: "The passage of time has not weakened the teachings of *Hardy*." 278 F.3d 426, 443 (5th Cir. 2001). Indeed, "no matter how creative the procedural avenue, and in spite of the fact that this [mass tort] litigation would benefit from a uniform approach, at almost every turn this circuit has rejected attempts at aggregation and issue preclusion in asbestos cases" due to its judicious "concern that no one be deprived the right to a full and fair opportunity to litigate their claims." *Id.* Both holdings are in accord with Judge Jones' concurrence in *In re Chevron U.S.A., Inc.*, where she expressed "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," and where she rejected a district court's plan to hold binding bellwether trials as an "all-or-nothing" approach that would exert "enormous" settlement pressure on defendants. 109 F.3d 1016, 1021-22 (5th Cir. 1997) (Jones, J., specially concurring).

Similarly, "the Eleventh Circuit has explicitly barred the application of the doctrine of collateral estoppel in products liability cases." *Ramirez v. E.I. Dupont de Nemours & Co.*, 2010 WL 3467655, at *3

(M.D. Fla. Sept. 1, 2010) (citing *Deviner v. Electrolux Motor, AB*, 844 F.2d 769, 774 (11th Cir. 1988), which held that "[t]he doctrine of collateral estoppel . . . should not be extended indiscriminately to tort cases where the factual circumstances in each case differ and no hard and fast legal standard has emerged from the developing case law").

As another example, in *Coburn v. Smithkline Beecham Corp.*, the district court rejected plaintiffs' argument for nonmutual offensive collateral estoppel because: (i) the plaintiffs consumed the at-issue drug at different times; and (ii) even if all the other prerequisites for it had been met, applying collateral estoppel offensively and non-mutually would have been "fundamentally unfair," as it is "contrary to public policy to allow a single jury verdict to brand an entire product defective throughout the country, particularly when there exists a significant and ongoing debate in the scientific and medical community about the issues involved." 174 F. Supp. 2d 1235, 1239-41 (D. Utah 2001). In fact, there is a long history of courts rejecting the applicability of nonmutual offensive collateral estoppel in the context of products liability or toxic exposure mass torts (post-*Parklane Hosiery*). *See, e.g.*, *Miller v. A.H. Robins Co., Inc.*, 565 F. Supp. 24, 26-27 (S.D. Fla. 1983); *Wetherill v. Univ. of Chicago*, 548 F. Supp. 66, 68-70 (N.D. Ill. 1982).

As several legal commentators have observed, Judge Posner's rationale for denying class certification in *Rhone-Poulenc* applies equally to the doctrine of nonmutual offensive collateral estoppel and provides

further support for the doctrine's inapplicability to mass tort cases. Although "[o]ne jury" can "hold the fate of an industry in the palm of its hand . . . in our system of civil justice" it "need not be tolerated when the alternative exists of submitting an issue to *multiple juries* constituting in the aggregate a much larger and more diverse sample of decision-makers." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1300 (7th Cir. 1995) (emphasis added). Though this would not be feasible when individual claims are worth little, it is feasible when "[e]ach plaintiff if successful is apt to receive a judgment in the millions." *Id.* When the stakes are so high, as can be the case in mass tort litigation, "it is not a waste of judicial resources to conduct more than one trial, before more than six jurors, to determine whether a major segment of the international pharmaceutical industry is to follow the asbestos manufacturers into Chapter 11." *Id.*; *see also, e.g.*, Edward D. Cavanagh, *Offensive Non-Mutual Issue Preclusion Revisited*, 38 Rev. Litig. 281, 316-17 (2019); Stier, *Another Jackpot (In)Justice: Verdict Variability and Issue Preclusion in Mass Torts*, *supra*, at 742.

For these reasons, the majority erred when it stated that: "No court has followed the *Bendectin* footnote [regarding the impropriety of nonmutual offensive collateral estoppel in mass tort cases] beyond agreeing that courts should not use offensive collateral estoppel in mass tort cases in ways inconsistent with the *Parklane Hosiery* factors." Pet. App. 15. Such a statement not only ignores practical and statistical considerations, but it also flouts the responsibility of the judiciary to ensure that "[t]he systemic urge to

aggregate litigation" is not "allowed to trump our dedication to individual justice." *See Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993).

CONCLUSION

The Petition should be granted.

Respectfully submitted,

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