No. 23-13

In the Supreme Court of the United States

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

v.

TRAVIS ABBOTT, ET UX., RESPONDENTS.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF OF 3M, BAYER, GLAXOSMITHKLINE, JOHNSON & JOHNSON, TYCO FIRE PRODUCTS, AND MEDTRONIC AS AMICI CURIAE IN SUPPORT OF PETITIONER

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INTEREST OF AMICI CURIAE

Amici curiae[1] 3M, Bayer, GlaxoSmithKline PLC, Johnson & Johnson, Tyco Fire Products LP, and Medtronic PLC are Fortune 500 companies that have litigated cases in multidistrict litigation ("MDLs"). They represent a range of industries, including manufacturing, pharmaceuticals, and medical devices. The plaintiffs' bar has been particularly active in these areas, drawing amici into numerous mass tort litigations. Indeed, amici are defendants in over 75% of pending MDL cases across the country, and MDL cases constitute a majority of private civil cases pending in federal court. As a consequence, the Sixth Circuit's opinion significantly impacts amici.

3M is a multinational company that unlocks the power of people, ideas, and science and reimagines what is possible. With corporate operations in 70 countries, 3M's more than 60,000 products are used in a wide range of industries, including health care, automotive, and manufacturing. 3M's global team uses science to address the opportunities and challenges of its customers, communities, and planet.

Bayer is a multinational pharmaceutical and biotechnology company and one of the largest pharmaceutical companies in the world. Bayer's areas of business include pharmaceuticals, consumer healthcare products, agricultural chemicals, seeds, and biotechnology products. Its products and services are designed to help people and the planet thrive by supporting efforts to master the

[1] In accordance with Rule 37.6, no counsel for any party has authored this brief in whole or in part, and no person or entity, other than amici or their counsel, has made a monetary contribution to the preparation or submission of this brief. Counsel of record received timely notice of the intent to file this brief pursuant to Rule 37.2.

major challenges presented by a growing and aging global population. Throughout the world, the Bayer brand stands for trust, reliability, and quality.

GlaxoSmithKline LLC ("GSK") is a biopharma company with a purpose to unite science, technology, and talent to get ahead of disease together. GSK is dedicated to the development of transformational products for patients with its leading portfolio of vaccines and specialty and general medicines.

For more than 135 years, Johnson & Johnson has aimed to keep people well at every age and every stage of life. Today, as the world's largest, most diversified healthcare products company, Johnson & Johnson is committed to using its reach and size for good. Its more than 150,000 employees worldwide strive to improve access and affordability, create healthier communities, and put a healthy mind, body, and environment within reach of everyone, everywhere.

Tyco Fire Products LP, part of the Johnson Controls family of companies, manufactures and delivers an unmatched range of fire detection and suppression systems, extinguishing agents, sprinkler systems, valves, piping products, fittings, fire-fighting equipment, and services that help its customers save lives and protect property. As an industry leader, Tyco uses its global scale and deep expertise to drive innovation, advance safety and solve the unique challenges of customers throughout the world.

Medtronic PLC is the world's largest medical-technology company. Its products are used in numerous clinical settings, including cardiovascular, neurological, spine, surgical, and diabetes care, transforming the lives of two patients every second. With over 95,000 employees in 150 countries, Medtronic is transforming

healthcare worldwide, improving outcomes, expanding access, and enhancing value in fulfillment of its mission to alleviate pain, restore health, and extend life.

INTRODUCTION AND SUMMARY OF ARGUMENT

The Sixth Circuit's decision further skews an already tilted playing field. With billions of dollars on the line, the court decided that three early defense losses were enough to trigger an automatic loss in every case that follows. Regardless of whether judicial economy favors this result, the Constitution and common law do not.

Worse, under the judicial invention of nonmuutal offensive collateral estoppel, which the Sixth Circuit extended, lower courts can set off this severe result in only one direction. The estoppel is a one-way ratchet. Thus, no matter how many trials the defendant wins, the defendant must either try another case or settle with the remaining plaintiffs. Complete victory is never an option. The merits of the underlying claims are irrelevant. The advantage that the Sixth Circuit has conferred on plaintiffs can never apply to defendants.

As a result, MDL defendants need to win from the get-go. There is no opportunity to test alternative trial strategies or theories. There is no ability to assess whether jury pools or trial judges in other jurisdictions might render a different result. And there is no forum for revealing those plaintiffs with weak or nonexistent claims. Early losses bind the defendant, whereas the plaintiffs—who are inevitably acting in concert through a plaintiffs' steering committee—are always able to fight another day.

To be sure, the decision below has the notional benefit of "promoting judicial economy," *Parklane Hosiery Co. v. Shore*, 439 U.S. 332, 347 (1979), but so would a rule that the defendant always loses. The dynamic created by the

Sixth Circuit's rule makes the extraordinary pressure that already exists for defendants to settle practically insurmountable.

Efficiency is undoubtedly an important value. But it cannot be the only, or even the paramount, value, especially when it handicaps the rights of one side for the benefit of the other. Accordingly, the Court should grant certiorari and reverse for two reasons.

First, *Parklane Hosiery* should not apply to MDLs. A judicial creation of 1970s, *Parklane Hosiery* conflicted with prior precedent, common law practice, and the Seventh Amendment. Even if permitted to stand, *Parklane Hosiery* should not apply in the MDL context, where its effects are enormous and the procedural protections are thin. MDLs exist to advance procedural goals, not to allow the playing field itself to be tilted.

Second, even under *Parklane Hosiery*, the Sixth Circuit's decision fails. As this Court noted, nonmutual offensive collateral estoppel is inappropriate when it is "unfair to a defendant." For a variety of reasons, the Sixth Circuit's decision is fundamentally unfair to defendants, including because it applies estoppel after a tiny sample size of cases (supposedly "nonbinding" bellwether trials, in this case), which are not necessaily predictors of future trial outcomes, and because of the intense one-sided settlement pressures it creates.

ARGUMENT

I. *Parklane Hosiery* Should Not Apply to MDLs.

A. *Parklane Hosiery* has tenuous roots and conflicts with precedent, common law, and the Seventh Amendment.

Until the 1970s, this Court had never applied nonmutual collateral estoppel. *See Parklane Hosiery*, 439 U.S. at 347 (Rehnquist, J., dissenting) ("It was not until 1971 that the doctrine of mutuality was abrogated by this Court in certain limited circumstances."); *see also* Michael J. Waggoner, *Fifty Years of Bernhard v. Bank of America Is Enough: Collateral Estoppel Should Require Mutuality but Res Judicata Should Not*, 12 Rev. Litig. 391, 435-36 (1993); *Effect of a Prior Judgment*, 20 Fed. Prac. & Proc. Deskbook § 107 (2d ed.). The first departure occurred via *Blonder-Tongue Laboratories, Inc. v. University of Illinois Foundation*, 402 U.S. 313 (1971), which applied non-mutual *defensive* collateral estoppel "in certain limited circumstances." *Parklane Hosiery*, 439 U.S. at 347 (Rehnquist, J., dissenting) (citation omitted).

In *Blonder-Tongue*, neither party sought to reject mutuality until the Court *sua sponte* raised the issue at oral argument. Waggoner, *Fifty Years of Bernhard v. Bank of America Is Enough*, 12 Rev. Litig. at 436. Thus, the Court made its decision to jettison mutuality without the benefit of the decisions of the lower courts. *Id.* And the decision is based largely on an unexplained presumption that the first court or jury's verdict on an issue is the correct one. *Id.* In *Blonder-Tongue*, a plaintiff sought to enforce its patent. 402 U.S. at 314-16. But instead, the Court remanded the decision so that the defendant could

plead estoppel based on a prior decision from a different court that the patent was invalid. *Id.* at 327, 350.

Eight years later, over a dissent from then-Justice Rehnquist, the Supreme Court nevertheless continued down this path by creating nonmutual *offensive* collateral estoppel. The majority based its innovation on little more than the Court's own criticism of mutuality in *Blonder-Tongue* and a single decision by the California Supreme Court. *Parklane Hosiery*, 439 U.S. at 327. The Court did so despite acknowledging two major pitfalls. "First, offensive use of collateral estoppel does not promote judicial economy in the same manner as defensive use does." *Id.* at 329. And second "it may be unfair to a defendant." *Id.* at 330.

The Court's groundbreaking ruling overturned centuries of precedent and departed from common law practice. In 1912, the Court had referred to the mutuality of estoppel as "a principle of general elementary law." *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912); *see also Keokuk & W. R. Co. v. Missouri*, 152 U.S. 301, 317 (1894) ("The operation of an estoppel must be mutual."); *Outram v. Morewood*, 102 Eng. Rep. 630, 633 (1803) ("[E]stoppel *precludes parties and privies* from contending to the contrary [on a] point, or matter of fact, which having been once distinctly put in issue *by them, or by those to whom they are privy* in estate or law, has been, on such issue joined, solemnly found against them." (emphasis added)). And then-Justice Rehnquist's dissent noted that "the development of nonmutual estoppel is a substantial departure from the common law . . . ." *Parklane Hosiery*, 439 U.S. at 350 (Rehnquist, J., dissenting); *see also Standefer v. United States*, 447 U.S. 10, 21 (1980) ("The doctrine of

nonmutual collateral estoppel was unknown to the common law.").

Parklane Hosiery's nonmutual offensive collateral estoppel also conflicts with the Seventh Amendment. *See Parklane Hosiery*, 439 U.S. at 350 (Rehnquist, J., dissenting) (observing that nonmutual offensive collateral estoppel "completely deprives petitioners of their right to have a jury determine contested issues of fact"). Nonmutual collateral estoppel is not just a matter of "common law *qua* common law," but rather of the Constitution, and "no amount of argument that the device provides for more efficiency or more accuracy or is fairer will save it if the degree of invasion of the jury's province is greater than allowed in 1791." *Id.* at 346. The Seventh Amendment, which "preserve[s]" "the right of trial by jury" carries with it the protection against any "procedural" reform that might diminish the right, or in this case, eclipse it entirely. *See id.* at 354-46; U.S. Const. amend. VII. By bypassing the Seventh Amendment's protections, *Parklane Hosiery*'s "procedural reform" tramples substantive Constitutional rights. *Parklane Hosiery*, 439 U.S. at 346 (Rehnquist, J., dissenting).

B. *Parklane Hosiery* should not be applied to MDLs.

Because of *Parklane Hosiery*'s tenuous roots, the decision must be applied with extreme circumspection, if it is to be applied at all. Two features of MDLs make *Parklane Hosiery* particularly ill-suited for application in that context.

1. First, the stakes in MDLs are enormous and the procedural protections thin. "MDLs include the largest tort cases in U.S. history but without the authority of the class-action rule." Abbe R. Gluck and Elizabeth

Chamblee Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. 1, 1 (2021). Far from *Parklane Hosiery*'s "familiar example" of "50 passengers" injured in a railroad collision, MDLs can encompass thousands or even hundreds of thousands of plaintiffs. For example, as of July 2023, the Aqueous Film-Forming Foams Products Liability Litigation, where both 3M and Tyco Fire Products are among the defendants, covers 5,227 claims. U.S. Judicial Panel on Multidistrict Litigation, *MDL Statistics Report - Distribution of Pending MDL Dockets by Actions Pending* (July 17, 2023), https://perma.cc/UT83-LEJB. Johnson & Johnson's talcum powder MDL stands at 37,543 actions. *Id.* And 3M's Combat Arms Earplug products liability litigation, the largest in MDL history, currently includes 257,449 actions. *Id.*

This "aggregation of the cases also means aggregation of the amount at stake." Andrew S. Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. 1643, 1668 (2011). And the astronomical exposure alone can create tremendous settlement pressure. *Cf., e.g.*, *AT&T Mobility LLC v. Concepcion*, 563 U.S. 333, 350 (2011) (noting the "risk of 'in terrorem' settlements that class actions entail"); *Shady Grove Orthopedic Assocs., P.A. v. Allstate Ins.*, 559 U.S. 393, 445 n.3 (2010) (Ginsburg, J., dissenting) (noting that class certification "places pressure on the defendant to settle even unmeritorious claims" because of "'potentially ruinous liability'" (citation omitted)).

Compounding the problem, MDLs lack the protections of Rule 23—the class action rule. Rule 23(a) imposes four "[p]rerequisite[]," "threshold requirements applicable to all class actions": numerosity, commonality, typicality, and adequacy of representation. *Amchem*

Prods., Inc. v. Windsor, 521 U.S. 591, 613 (1997); *cf.* 28 U.S.C. § 1407(a) (joining "civil actions involving one or more common questions of fact . . . for coordinated or consolidated pretrial proceedings" in an MDL). These prerequisites "assure the class cohesion that legitimizes representative action in the first place," and preclude classes when members' claims have factual and legal idiosyncrasies that defeat class unity. *Id.* at 623. Rule 23's rigorous requirements are "grounded in due process." *Taylor v. Sturgell*, 553 U.S. 880, 901 (2008); *Comcast Corp. v. Behrend*, 569 U.S. 27, 33 (2013).

Moreover, certification of classes seeking damages requires that "questions of law or fact common to class members predominate over any questions affecting only individual members." Fed. R. Civ. P. 23(b)(3). And Rule 23(f) adds an additional layer of protection by "permit[ting] an appeal from an order granting or denying class-action certification." These protections exist because class actions circumvent "the usual rule that litigation is conducted by and on behalf of the individual named parties only." *Comcast*, 569 U.S. at 33 (cleaned up); *Taylor*, 553 U.S. at 901 (observing that Rule 23's rigorous requirements are "grounded in due process").

MDLs offer none of these protections, despite courts hearing claims, making legal conclusions, compelling settlement on a mass scale, and (in light of the Sixth Circuit's opinion) imposing liability across thousands of cases based on a limited set of verdicts for the plaintiff. Indeed, MDLs were not originally designed as a forum for trying cases but instead for simply aggregating "pretrial proceedings" in cases that share "one or more common questions of fact . . . pending in different districts." 28 U.S.C. § 1407(a). The concept was that an MDL would resolve *pretrial* issues and the cases would then be

remanded to their jurisdictions of origin for trial. Gluck and Burch, *MDL Revolution,* 96 N.Y.U. L. Rev. at 12 (citing Andrew D. Bradt, *Something Less and Something More: MDL's Roots as a Class Action Alternative*, 165 U. Pa. L. Rev. 1711, 1731-37 (2017)).

But, despite the original intentions for MDLs to be remanded to their home courts for trial, as of 2021, only *1.6%* of MDL cases have been remanded.[2] *See also* Gluck and Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. at 12 ("[An MDL's] formal grounding [is] in individual actions but [a] de facto practice of centralization" is the "reality."). Full resolution by MDL judges has become the norm. *See* Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. at 1669.

As two commentators put it, MDL judges have "resorted to extraordinary procedural exceptionalism to settle cases on a national scale." Gluck and Burch, *MDL Revolution*, 96 N.Y.U. L. Rev. at 12. Consequently, MDLs have sometimes become quasi-class actions, but without the strictures of Rule 23(a) and (b) and without the appellate opportunity afforded by Rule 23(f). Whereas this Court has recognized the need for "rigorous analysis" of class action requirements, *Comcast*, 569 U.S. at 35; *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011), those protections are not afforded when aggregating and litigating disparate cases in an MDL.

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[2] As of 2021, the JPML has, since its inception, centralized 1,056,706 civil actions for pretrial proceedings and remanded a total of 17,357 (or 1.6%) of those. *See* U.S. Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation Under 28 U.S.C. § 1407 Fiscal Year 2021* 3, https://perma.cc/4LGN-ENBE.

Moreover, erroneous rulings on, for instance, *Daubert* or preemption are typically multiplied and propagated across a broad MDL docket, and not corrected on appeal. *See, e.g.*, Melissa A. Waters, *Common Law Courts in an Age of Equity Procedure: Redefining Appellate Review for the Mass Tort Era*, 80 N.C. L. Rev. 527, 530 (2002) (noting how MDL judges are innovating the rules that govern mass tort, while "appellate courts are still constrained by the inflexible rules of traditional common law practice, which discourages appellate involvement in the pretrial process in favor of post-trial review upon final judgment"). Although a plaintiff who loses a dispositive motion may appeal the final order, *see* 28 U.S.C. § 1291, a defendant may not. Instead, the defendant must wait until the final decision, which may be years in the future, assuming the case does not settle first (like it usually does). U.S. Chamber of Commerce Institute for Legal Reform, *MDL Imbalance: Why Defendants Need Timely Access to Interlocutory Review* 5 (Apr. 2019), https://perma.cc/3MP4-6LJ2 [hereinafter "MDL Imbalance"].

Defendants may attempt an appeal through other mechanisms, such as 28 U.S.C. § 1292(b), but this depends on both the district court and the appellate court accepting the appeal, which almost never happens in the context of an MDL. *Id.*; Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multidistrict Litigation*, 79 Fordham L. Rev. at 1658. For instance, one 2018 review of 127 MDL dockets found only 15 instances where § 1292(b) certification requests were made and *none* that were granted. MDL Imbalance at 6; *see also* Waters, *Common Law Courts in an Age of Equity Procedure*, 80 N.C. L. Rev. at 530-31 ("Because mass tort litigation almost exclusively emphasizes

pretrial maneuvering and settlement, appellate courts never effectively review many of the most controversial rulings and innovations of mass tort trial judges.").

Most often, the district court refuses to certify issues for appeal in the first place. *See* Pollis, *The Need for Non-Discretionary Interlocutory Appellate Review in Multi-district Litigation*, 79 Fordham L. Rev. at 1658 ("Trial judges['] . . . consistent[] refus[al] to certify legal questions for discretionary review under § 1292(b), render[s] that avenue useless." (internal quotation marks omitted) (citation omitted)). Declining certification allows district courts to insulate their rulings from appellate review and maximize settlement pressure on the parties. *Id*. at 1670. Thus, errors on dispositive issues are seldom corrected, further increasing the pressure on defendants to settle meritless claims.[3]

2. Second, although MDLs comprise individual claimants, the reality is a heavily coordinated effort by sophisticated plaintiffs' attorneys often working together with litigation financiers and claims aggregators.

Third-party litigation funders are typically hedge funds or other financial institutions that invest in lawsuits by advancing money to plaintiffs or law firms to reap a percentage of the settlement or judgment.[4] *See*

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[3] Take, for example, the Vioxx MDL. *See In re Vioxx Prods. Liab. Litig.*, 501 F. Supp. 2d 776 (E.D. La. 2007). In that case, the defendant was unable to appeal an issue that would have been preclusive of more than 10,000 claims. MDL Imbalance at 11. In a case like that, defendants must theoretically continue litigating those claims until they are able to appeal from the final judgment, only after incurring the expense of litigation.

[4] One analysis calculates that the aggregate tort costs in the United States in 2020 totaled $443 billion. U.S. Chamber of Commerce Institute for Legal Reform, *Tort Costs in America: An Empirical Analysis of Costs and Compensation of the U.S. Tort System* 24

U.S. Chamber of Commerce Institute for Legal Reform, *What You Need to Know About Third Party Litigation Funding* (Feb. 7, 2023), https://perma.cc/753K-5LDN. This industry's growth has exploded in the last two decades, and recent estimates say it is a $13 billion industry in the United States alone. *See* Matthew Goldstein and Jessica Silver-Greenberg, *Hedge Funds Look to Profit from Personal-Injury Suits*, New York Times (June 25, 2018), https://perma.cc/9T9G-ZY82; U.S. Chamber of Commerce Institute for Legal Reform, *What You Need to Know About Third Party Litigation Funding*, https://perma.cc/753K-5LDN.

These investments are then used to recruit claims. "Claim aggregators" or "lead generators" secure as many plaintiffs as possible, often with minimal vetting. *See* Roy Strom, *Camp Lejeune Ads Surge Amid "Wild West" of Legal Finance, Tech*, Bloomberg Law (Jan. 30, 2023), https://perma.cc/Z4P2-KR7D. The claim aggregators spend huge sums of money recruiting via direct phone calls, television ads or infomercials, posts on social media, websites, or emails. Samir D. Parikh, *Opaque Capital and Mass Tort Financing*, 133 Yale L.J. Forum (forthcoming 2023) (manuscript at 19 (citation omitted)) (available at https://perma.cc/G8CJ-Q7QJ). For example, claim aggregators have spent over $145 million in television and social media advertising for the Marine Corps Base Camp Lejeune water contamination litigation. Strom, *Camp Lejeune Ads Surge Amid "Wild*

(Nov. 2022), https://perma.cc/E4JK-KFLJ. Of that amount, only 53% goes towards compensating claimants. *Id.* And the remaining 47% goes towards payment of legal costs and insurance.

West" of Legal Finance, Tech, Bloomberg Law, https://perma.cc/Z4P2-KR7D.

These claims are then sold to law firms who strategically leverage the size of the claim groups. *See id.* Claim size is often used to determine leadership positions among plaintiffs' attorneys in an MDL, allowing those plaintiffs' attorneys a greater opportunity to steer the litigation. Parikh, *Opaque Capital and Mass Tort Financing*, 133 Yale L.J. Forum (forthcoming 2023) (manuscript at 17-18). Moreover, "repeat players" are favored in MDL leadership positions. Elizabeth Chamblee Burch, *Monopolies in Multidistrict Litigation*, 70 Vand. L. Rev. 67, 80 (2017) (finding that over 60% of available plaintiffs' leadership positions in MDLs were held by repeat players). A larger claim size also provides plaintiffs' attorneys with greater bargaining power for settlement.

These bloated claim numbers are especially problematic because a significant percentage of the stockpiled cases lacks merit. The MDL Subcommittee to the Advisory Committee on Civil Rules notes that 20-30%, or perhaps as many as 40-50%, of MDL claims involve "unsupportable claims." Report of the MDL Subcommittee of the Advisory Committee on Civil Rules to the Standing Committee on Rules of Practice and Procedure in Committee on Rules of Practice and Procedure Agenda Book at 142-43 (Nov. 1, 2018), https://perma.cc/9KMS-MWJY; *see also* Product Liability Advisory Council, Comment to the Advisory Committee on Civil Rules and Its MDL Subcommittee, https://perma.cc/4FQT-4S2V. In the Vioxx painkiller litigation, for instance, after a $4.85 billion settlement, it was revealed that nearly one-third of plaintiffs who had filed claims were ineligible for relief. Sara Randazzo and Jacob Bunge, *Inside the Mass-Tort Machine That Powers Thousands of Roundup Lawsuits*,

Wall Street Journal (Nov. 25, 2019), https://perma.cc/NSX5-XEGQ.

Regardless, because the interests of MDL plaintiffs are fundamentally advanced in a coordinated effort, the *Parklane Hosiery* rule is inappropriate in the MDL context. Early losses bind only the defendants, but not the plaintiffs' steering committee and its team of financiers and aggregators, which collectively can choose to shift or refine trial strategies or simply live to litigate another day. Because the one-way ratchet of *Parklane Hosiery* further skews an already lopsided playing field—binding one side but not the other—the Court should grant certiorari and hold that *Parklane Hosiery* does not apply to MDLs.

II. The Sixth Circuit's Decision Conflicts with *Parklane Hosiery*.

Even if *Parklane Hosiery* were to apply to MDLs, the underlying decision should be reversed. *Parklane Hosiery*, as the Sixth Circuit recognized, enumerated instances in which nonmutual offensive collateral estoppel should not be applied. *In re E. I. du Pont de Nemours & Co. C-8 Pers. Inj. Litig.*, 54 F.4th 912, 922 (6th Cir. 2022) (citing *Parklane Hosiery*, 439 U.S. at 330-31). The Court expressed the "general rule" that "a trial judge should not allow the use of offensive collateral estoppel" when "for other reasons, the application of offensive estoppel would be unfair to a defendant." *Parklane Hosiery*, 439 U.S. at 331; *see also Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 125 (D.C. Cir. 1984) (collecting cases). "[A]llowing plaintiffs to cherry-pick favorable decisions to preclude issues in an ongoing or subsequent litigation raises serious fairness concerns." *Syverson v. Int'l Bus. Machines Corp.*, 472 F.3d 1072, 1080

(9th Cir. 2007) (rejecting the doctrine's application in a putative collective action); *see also Jack Faucett Assocs.*, 744 F.2d at 124 (noting, in a class action, that the doctrine of nonmutual, offensive collateral estoppel is "detailed, difficult, and potentially dangerous"). This is to say nothing of the unfairness of the Sixth Circuit using what were supposed to be nonbinding bellwethers to apply nonmutual offensive collateral estoppel. *See In re E.I. du Pont Nemours and Company C-8 Personal Injury Litigation*, 54 F.4th at 938 (Batchelder, J., dissenting). The Sixth Circuit's decision is fundamentally unfair and should be reversed.

First, the Sixth Circuit decided, without giving any prior notice, that just three plaintiff victories were sufficient to estop defendant in future litigation. This places immense pressure on defendants to succeed in the earliest cases and gives no guidance as to when defendants are clear from the threat of nonmutual offensive collateral estoppel. The decision also is premised on a dubious notion that three early trials—with two plaintiffs being picked by the plaintiffs' steering committee—are a reliable predictor of future litigation outcomes. *See generally* Byron G. Stier, *Another Jackpot (In)justice: Verdict Variability and Issue Preclusion in Mass Torts*, 36 Pepp. L. Rev. 715, 741 (2009).

A miniscule handful of early verdicts is not indicative of future jury verdicts either way. For one thing, different decisionmakers will consider the same facts and evidence differently. And further, almost by definition, MDLs contain plaintiffs with distinct factual scenarios; whereas if common issues predominated, there would likely be a class.

Reflecting the likelihood of disparate results, one study presented 1,042 individuals with the same evidence

and arguments summarized from asbestos products liability cases as if they were members of a jury. Shari Seidman Diamond, et al., *Juror Judgments About Liability and Damages: Sources of Variability and Ways to Increase Consistency*, 48 DePaul L. Rev. 301, 304 (1998). Fifty-one percent of the "jurors" favored a verdict for the plaintiff. *Id.* at 305.

Bayer's Roundup litigation provides a useful real-world example of how early decisions are not predictors of subsequent trials. Early in the litigation, three juries (including in one MDL bellwether) entered verdicts for plaintiffs. A 2018 verdict awarded plaintiff almost $300 million in damages, and two others awarded $86.7 million and $20 million, respectively. Mari Gaines, *Roundup Lawsuit Update July 2023*, Forbes (May 23, 2023), https://perma.cc/9622-DS8W. But as of May 2023, Bayer proceeded to win seven consecutive trials. Ronald V. Miller, Jr., *Monsanto Roundup Lawsuit Update*, Lawsuit Information Center (Aug. 2, 2023), https://perma.cc/LR7Y-2HEZ.

Application of the Sixth Circuit's erroneous decision would not have given Bayer a chance to prevail in these trials. Instead, application of nonmutual offensive collateral estoppel would have bound Bayer by the initial verdicts, providing plaintiffs a windfall worth billions of dollars.

Second, the Sixth Circuit's decision is unfair because it deprives the defendant of the opportunity to use early trials, and bellwether trials, to calibrate trial strategy. Bellwether trials are "meant to help the parties gather information, value the cases, test legal theories, and, ultimately, reach a global settlement with minimal costs." *In re E. I. du Pont Nemours and Company C-8 Personal Injury Litigation*, 54 F.4th at 938 (Batchelder, J.,

dissenting). But the Sixth Circuit's opinion eliminates this opportunity by precluding defendants from refining their tactics and themes in subsequent litigation. Whereas the plaintiff can "test legal theories" and pursue alternative strategies, the defendant cannot.

Third, nonmutual offensive collateral estoppel cannot escape the fundamental unfairness that it benefits only plaintiffs and never defendants, no matter how many verdicts defendants may win. *See* Waggoner, *Fifty Years of Bernard v. Bank of America Is Enough*, 12 Rev. Litig. at 408; *see also Parklane Hosiery*, 439 U.S. at 327 n.7. If defendants choose litigation over settlement, they simply must continue the Sisyphean task of defending trial after trial (and hope that they do not accumulate enough losses for a court to choose to apply nonmutual offensive collateral estoppel).

"[T]he use of non-mutual, offensive issue preclusion might leave the defendant being pecked to death by ducks. One plaintiff could sue and lose; another could sue and lose; and another and another until one finally prevailed; then everyone else would ride on that single success." *Premier Elec. Const. Co. v. Nat'l Elec. Contractors Ass'n, Inc.*, 814 F.2d 358, 363 (7th Cir. 1987). And "[a]s a matter of probabilities," defendants are unlikely to maintain such a winning streak. *Exposing the Extortion Gap: An Economic Analysis of the Rules of Collateral Estoppel*, 105 Harv. L. Rev. 1940, 1958 (1992). To illustrate, even "a defendant with a fifty-fifty chance of prevailing at trial has only a 1 in 32 chance of winning five such trials." *Id.* at 1958 n.42. The pressure is on the defendants to win every lawsuit, particularly early-on. This is especially daunting for MDL defendants. Products liability

MDLs can include thousands or hundreds of thousands of plaintiffs. Defendants will not win all of them.[5]

The risk of collateral estoppel creates immense pressure for defendants to settle. Since defendants may not use nonmutual offensive collateral estoppel, defendants are faced with a choice between voluminous, costly litigation (that now carries the risk of estoppel), or settlement. This is no choice at all. Defendants are already settling unmeritorious claims because of the high volume and heavy burden of MDLs. For example, in the Xarelto litigation, Bayer and Johnson & Johnson won the first six trials. *See* NBC News, *Xarelto Suits: Bayer and Janssen Agree to $775 Million Settlement Over Blood Thinner* (Mar, 26, 2019), https://perma.cc/6M3V-J4B5. Nevertheless, the defendants decided to settle the case for $775 million dollars. They did not admit fault as part of the settlement and maintained throughout that the suits were meritless. *See* Tina Bellon, *Bayer, J&J Settle U.S. Xarelto Litigation for $775 Million*, Reuters (Mar. 25, 2019), https://perma.cc/F2G8-XM6E. If armed with nonmutual offensive collateral estoppel, plaintiffs would have an even bigger advantage in settlement—imposing even more pressure on defendants to settle meritless claims.

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[5] *Parklane Hosiery* acknowledged the threat of applying offensive nonmutual collateral estoppel where there have been "inconsistent" verdicts but provided no guidance as to how that threat affects application of the doctrine. 439 U.S. at 330. There, the Court cited a hypothetical railroad collision with 50 separate actions against the railroad. *Id.* at 330 n.14. If the railroad won the first 25 suits and a plaintiff won suit 26, "offensive use of collateral estoppel should not be applied so as to allow plaintiffs 27 through 50 automatically to recover." *Id.* Even if this guidance were binding on lower courts, it would not be of any assistance. Asking defendants to win 25 consecutive lawsuits is unreasonable.

The Sixth Circuit's application of the already questionable doctrine established in *Parklane Hosiery* has serious and far-reaching consequences. The decision is wrong, and only this Court can correct it. Especially considering the paucity of MDL appeals, *see supra*, immediate review is necessary.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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