No. 23-13

In the Supreme Court of the United States

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

v.

TRAVIS ABBOTT and JULIE ABBOTT,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In a unique class-action settlement reached two decades ago, DuPont secured a seven-year delay of the damages claims against it and a broad release of thousands of those claims. In exchange, DuPont promised to abide by the classwide causation findings of a panel of epidemiologists. At DuPont's request, the surviving claims were eventually consolidated in a multi-district litigation, or MDL. When it came time to conduct trials in that MDL, the parties and the district court spent months selecting bellwether candidates to "reflect a representative sampling" of the cases. App-7–8. After two bellwethers and one additional case resulted in verdicts for the plaintiffs, the district court estopped DuPont from relitigating, in a fourth trial, issues it had repeatedly lost. The district court found, and the court of appeals agreed, that the "facts relating to Dupont's negligence were virtually identical across the four trials." App-20.

The question presented is whether, under these circumstances, the district court was foreclosed from exercising its broad discretion under *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), to preclude DuPont from relitigating the same issues solely because the trials took place in an MDL.

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INTRODUCTION

This is a case-specific, factbound dispute over the consequences of a class-action settlement, reached two decades ago, stemming from DuPont's pollution along the Ohio River. Under that "unique" agreement, DuPont secured a broad classwide release in exchange for certain promises. App-2. Among other things, Dupont promised to abide by the findings of a seven-year epidemiological study, during which it enjoyed a reprieve from litigation. And the settlement "limited the legal claims that could be brought against DuPont" to only those consistent with the study's causation determinations. App-2. Many thousands of claims were eliminated as a result. App-7. At DuPont's request, those that remained were consolidated in an MDL and eventually scheduled for trial.

For the initial trials, the parties spent months selecting "a representative sampling of cases" to serve as bellwethers. App-7. After the first two—one selected by each party—resulted in plaintiffs' verdicts, and another non-bellwether did too, the district court exercised its "broad discretion" under this Court's decision in *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), to preclude DuPont from repeatedly relitigating, on parallel facts, several of the issues it had repeatedly lost.

The court of appeals affirmed, applying the factors this Court adopted in *Parklane* and the parallel law of the forum state (Ohio) to the facts. Taking into account the unusual factual similarity among the cases, the vigor with which DuPont had pressed its arguments, the company's opportunity to litigate a full appeal, its close involvement in selecting the initial trials, and their uniform result, the court of appeals concluded that the district court did not abuse its discretion in applying estoppel on these facts.

Seeking a do-over in this Court, Dupont now recasts this unremarkable decision as embodying an "unprecedented" and "novel" "rule." But the decision announces no new rule; it merely applies the established *Parklane* factors to the facts. It was *DuPont* that asked for a novel rule—that collateral estoppel is categorically barred in multi-district litigation. DuPont cannot identify any case endorsing that categorical rule. And, if adopted, it would be a recipe for wasteful, endless relitigation.

Alternatively, DuPont contends that this case presents a "square split" over whether the "unrepresentative" nature of a bellwether trial precludes estoppel. But, as the courts below recognized, the bellwether trials here *did* "reflect a representative sampling of cases," App-7, and the relevant facts *were* "virtually identical across the four cases," App-20. So DuPont's question is not presented here. In any event, there is no split. The claimed split rests on a lone case, *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), that didn't involve collateral estoppel at all. It involved the conceptually distinct device of a "binding bellwether"—a special trial procedure designed *in advance* to bind the parties, including those with no opportunity to participate.

Falling back, DuPont hyperbolically claims that denying review now will spell the end of bellwethers. But defendants continue to pursue MDLs and bellwether trials with vigor, recognizing their capacity for efficiently resolving a massive volume of claims. And the factors that courts weigh for estoppel already adequately safeguard defendants' due-process rights.

The uncommon posture and atypical facts of this case also weigh against certiorari. If this Court concludes that guidance on the role of estoppel in MDLs is needed, it should await a more representative case.

STATEMENT

1. DuPont's contamination of drinking water in the Ohio River Valley. In the 1950s, DuPont began manufacturing Teflon products at a plant on the banks of the Ohio River using the "forever chemical" C-8—a carcinogen that accumulates in the environment and the human body. App-1, 3.[1]

DuPont quickly became aware of C-8's dangerous properties. By the 1960s, it knew that C-8 was toxic to animals and could contaminate groundwater. App-3. In 1988, it internally classified C-8 as a possible human carcinogen. App-3. Around the same time, it learned that the chemical could remain in human blood for years, re-dosing internal organs as it recirculated. App-3. And DuPont's C-8 supplier had warned the company to dispose of C-8 through incineration or secure disposal. App-3.

But for fifty years, DuPont ignored these concerns, discharging vast quantities of C-8 into the air, land, and water surrounding its plant. App-3.

2. The *Leach* litigation and settlement agreement. In the early 2000s, a West Virginia state court certified a class of individuals impacted by DuPont's C-8. App-4. That class action yielded a "unique" settlement: Among other things, the parties would convene a jointly-selected independent "Science Panel" of epidemiologists to assess whether there was a "Probable Link" between the level of C-8 exposure experienced by the entire class—.05 parts per billion over the course of a year in one of six water districts—and a specified list of human diseases. App-5–7.

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[1] Unless otherwise specified, quotations in this brief omit internal quotation marks, brackets, and citations. Citations to MDL Doc. are to the docket of the MDL, No. 13-md-2433 (S.D. Ohio) and citations to 6th Cir. Doc. are to the docket in the Sixth Circuit, No. 21-3418.

Whether a particular disease received a Probable Link finding was the linchpin of this "*Leach* agreement." The parties defined "Probable Link" to mean that, "based upon the weight of the available scientific evidence, it [was] more likely than not that there [was] a link between exposure to C-8" and the disease among the class members. App-6. For any disease that did *not* receive a "Probable Link" finding, the class agreed that its members would be forever barred from seeking relief. App-6. But for any disease that *did* receive such a finding, class members could bring individual claims against DuPont. App-6. DuPont, for its part, promised not to contest "general causation"—defined by the parties as whether it was "probable that exposure to C-8 is capable of causing" the linked disease for any individual class member—in the resulting cases. App-6.

The Science Panel spent seven years and $24 million studying these questions. App-7, -77. In 2012, it issued Probable Link findings for six diseases, including testicular and kidney cancer. App-7. But as to any other condition—including 50 diseases for which the panel made explicit No Probable Link Findings—all potential claims were extinguished. App-7.

3. The multi-district litigation. Once the Science Panel had completed its work, class members with linked diseases began filing suit. DuPont pushed for an MDL, arguing that the suits all "ar[o]se in the wake of" the *Leach* Agreement, "involve[d] the same core factual allegations regarding DuPont's conduct," and asserted "similar theories of liability." App-79–80. The cases were consolidated in the Southern District of Ohio. App-7.

Once there, the district court and the parties engaged in a "months-long process" to identify a subset of the cases for discovery and a subset of those cases to serve as

bellwether trials. App-7. The court and the parties "intended" their selection to "reflect a representative sampling of cases" and to "provide meaningful information for the broader population of cases." App-7–8. To that end, they exchanged lists of proposed plaintiffs, permitting each side to strike one of the other's selections. App-8. They were left with a list of six bellwether trials.

The first was a case selected by DuPont. The jury in that case found for the plaintiff on state-tort claims related to kidney cancer. App-8; *see Bartlett v. E.I. DuPont de Nemours & Co.*, No. 13-cv-170. The second was a testicular cancer case selected by the plaintiffs. App-8. The plaintiffs won that case, too. App-8; *see Freeman v. E.I. DuPont de Nemours & Co.*, No. 13-cv-1103.

DuPont decided to settle the remaining bellwether cases. App-8. The next trial, the first non-bellwether, *Vigneron v. E.I. DuPont de Nemours & Co.*, No. 13-cv-136, reached yet another plaintiff's verdict. App-8–9. From there, the parties began a trial in *Moody v. E.I. DuPont de Nemours & Co.*, No. 15-cv-803. App-92.

4. Dupont's first appeal. But in the meantime, DuPont decided to appeal the judgment in *Bartlett*.

Its primary argument was that the district court had misinterpreted the *Leach* agreement. App-9. The company had wanted to argue that the *Bartlett* plaintiff's specific level of C-8 exposure was incapable of causing her cancer. *See* App-28–29, 82–85. But the district court held that the *Leach* agreement barred it from doing so: Under the agreement's "unambiguous" text, "the dosage level" that was capable of causing linked diseases was a "general causation issue" that DuPont had "clearly agreed not to contest." Order, MDL Doc. 1679, at 8–9.

On appeal, DuPont argued that this conclusion was "a threshold contract interpretation error" that eliminated

the "critical defense" it wanted to raise in each of the MDL cases. App-9. The parties briefed the issue and completed oral argument before the Sixth Circuit. App-9.

After the oral argument, however—before the Sixth Circuit had the opportunity to issue its decision, and following completion of the plaintiff's case-in-chief in the *Moody* trial—DuPont had a change of heart. App-9. The company decided to settle all the pending cases and asked the Sixth Circuit to dismiss its appeal. App-9.

5. Travis Abbott's trial. But as other *Leach* class members continued to become sick or learned of the connection between their diseases and DuPont's C-8, they too filed suit. App-9.

Travis Abbott was one of those people. Growing up in the vicinity of DuPont's plant, he was exposed to contaminated water for decades and eventually developed testicular cancer—leading to the surgical removal of one of his testicles at age 16, the other one years later, and, eventually, his lymph nodes as well. App-9–10.

When Mr. Abbott and his wife learned that these effects could be the result of DuPont's C-8, they sued. App-10. His case, along with another plaintiff's kidney cancer suit, was scheduled to be the fifth trial in the MDL. App-10. As trial approached, DuPont renewed its attacks on the district court's interpretation of the *Leach* agreement and its attendant evidentiary rulings, reiterating the arguments it had made in each earlier trial and insisting it would bring them to a new Sixth Circuit panel if it did not prevail. App-10, 114.

The district court again rejected those arguments. Instead, it granted partial summary judgment for the plaintiffs. In a 52-page opinion retracing the history of this litigation, the composition of the *Leach* class, the specific water districts affected, the recurring arguments,

evidence, and rulings, and the close similarity between the cases, the court held that DuPont was collaterally estopped from relitigating the interpretation of the *Leach* agreement or the elements of duty, breach, and foreseeability in the plaintiffs' negligence claims. App-72–142.

That result followed, the court explained, from a careful application of this Court's decision in *Parklane* and Ohio's substantially similar preclusion rules. App-121–42. Among other things, legally indistinguishable issues had already been decided in each of the prior trials—thanks largely to the atypical way the litigation had been framed. App-124–32. In particular, in defining the contours of the class and resolving general causation on a classwide basis, the *Leach* agreement focused the litigation on "DuPont's conduct" towards "the entire communities surrounding its [] plant" rather than on "specific customers of individual water districts." App-131. Given that framing, when the juries in the initial cases had been asked to examine what duties DuPont owed, whether it had breached those duties, and whether the injuries it inflicted could be foreseen, the juries' attention was directed to DuPont's conduct towards the class as a whole. App-130–32.

The district court acknowledged that differences might exist between the cases—such as age or medical history. But those differences were relevant to *specific* causation, and thus would remain available for DuPont to "vigorously litigate[]" in the ensuing trials. App-101, 131. Meanwhile, presiding over multiple trials had led the court to believe that estoppel would yield "substantial trial and pretrial efficiencies." App-113–14; *see* App-134–36.

The joint trial lasted about a month. App-10. In line with its estoppel ruling, the district court prohibited DuPont from eliciting testimony that would violate the

Leach agreement. App-10–11. But DuPont was permitted to present its defense that neither plaintiff's cancer was caused by C-8 exposure, arguing that the C-8 in their bloodstreams had dissipated prior to their diagnoses and detailing potential alternative causes. App-11.

As to the plaintiff whose case was tried along with Mr. Abbott's, the tactic worked: The jury failed to agree on her claims, resulting in a mistrial. App-11. But in Mr. Abbott's case, the jury was unpersuaded. It awarded him and his wife over $40 million in damages. App-11.

6. DuPont's second appeal. DuPont appealed, challenging the district court's decision to apply collateral estoppel. The company's lead argument was that offensive non-mutual collateral estoppel is flatly "[un]available" in "mass tort litigation" because it is unduly "prejudicial" and affects too many individual claims. Br., 6th Cir. Doc. 31, at 19.

Alternatively, DuPont argued that estoppel was "unfair" here because, it claimed, the district court had failed to confirm that the first trials were "representative" and DuPont had received insufficient "notice" that they could have preclusive effect. *Id.* at 22, 24. The company also contended that the results in the initial trials involved too many "outcome-determinative fact differences" to allow for estoppel. *Id.* at 25–33.

7. The Sixth Circuit's opinion. The Sixth Circuit rejected DuPont's arguments.

The court began by dismissing DuPont's novel argument that there was a bar against offensive non-mutual collateral estoppel in mass-tort litigation or MDLs. App-15. Such a rule, the Sixth Circuit explained, would be inconsistent with this Court's decision in *Parklane*, where the Court issued the "clear pronouncement" that "the preferable approach for

dealing with" any "fairness concerns" regarding offensive collateral estoppel wasn't to preclude district courts from applying the doctrine, but to provide them with "broad discretion" in determining whether it was appropriate. App-15 (quoting *Parklane*, 439 U.S. at 331). And DuPont's rule would likewise be inconsistent with the Ohio law that applied in this diversity action. App-15–16. The court thus refused to adopt it.

Instead, the Sixth Circuit worked its way through each of the factors and considerations that Ohio and federal courts have applied to questions of offensive nonmutual collateral estoppel, concluding that each supported the district court's decision. App-17–22.

At the outset, the court observed that the unique "bargained-for exchange" embodied in the *Leach* agreement "inform[ed]" its application of the estoppel factors here. App-23. In exchange for releases from most of the claims class members could assert against it, DuPont had promised "not to contest general causation," creating a "closed subset of possible plaintiffs" with uncommonly similar claims. App-23.

The court then turned to the factors. For starters, it explained, the first three trials had actually decided the identical duty, breach, and foreseeability issues on which the district court granted estoppel. App-17. DuPont had overstated the factual differences among the cases. App-20–21. But whatever differences there were, they were not "legally significant" to the issues on which the court granted estoppel: Because of the *Leach* agreement, "the pertinent factual issues" centered on "*DuPont's* conduct and knowledge in relation to" each of "the *Leach* class members," "not the particulars of [each plaintiff's] individual circumstances." App-17–21.

Ohio's other estoppel factors were met as well: The precluded issues were necessary to the outcomes in each of the prior cases because no finding of negligence could be made without reaching them. App-21. And DuPont had enjoyed ample opportunity to "vigorously contest[]"each of those issues; "the vast size of the MDL" and the extensive filings on each of the "individual case dockets" belied any argument otherwise. App-22.

The Sixth Circuit then explained that the "additional considerations that" this Court articulated in *Parklane* also supported the district court's conclusion. App-14. First, there were no concerns at all that the plaintiffs had adopted a "wait-and-see" attitude, strategically forestalling litigation to see whether another plaintiff would prevail. App-24; *see Parklane*, 439 U.S. at 330–31. Rather, the MDL had given "DuPont a greater measure of power over case scheduling" than in a normal case by enabling the company to hand-select three of the bellwether cases—including the very first one. App-24.

Next, "the MDL structure presented DuPont with 'every incentive'" to defend itself vigorously, App-24 (quoting *Parklane*, 439 U.S. at 332), since the bellwether cases had been selected "to reflect a representative sampling" of the remaining cases and to "inform the[ir] resolution." App-7–8. Nor were there any concerns that the verdicts that had been reached thus far were inconsistent. *See Parklane*, 439 U.S. at 330–31. The district court had waited to invoke estoppel until three different juries had returned plaintiffs' verdicts. App-24. And there was no evidence that *Abbott* afforded the company "procedural opportunities" that had been unavailable in the earlier actions. App-24; *Parklane*, 439 U.S. at 331.

Finally, the court turned to DuPont's remaining fairness concerns. To the extent that DuPont sought a new rule that estoppel requires a formal inquiry into notice and representativeness, the Sixth Circuit declined to adopt one. App-25–26. Such a rule was not grounded in "collateral estoppel case law." App-25–26.

Although DuPont had pointed to the Fifth Circuit's decision in *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), that case involved a different problem. There, the court was concerned that a proposed trial plan for a *binding* bellwether trial—where the parties agreed "in advance" to apply the outcomes of a trial to a "full group of claimants"—could introduce novel "due process concerns" that might require additional safeguards. App-26–27 & n.8. Those concerns were absent here because the trials were not binding bellwethers—a "conceptually separate" device from a trial that is later accorded collateral estoppel effect. App-26.

In any event, DuPont's rules would not have changed the outcome in this case. As to notice, "the record [did] not support DuPont's arguments." App-26. Among other things, the district court did not somehow promise DuPont that "the general assumptions of litigation—including that issue preclusion is possible—would not apply" in this case. App-26. And as to representativeness, the court explained that what makes a trial representative is a "litigation- and fact-specific question." App-25 n.7. The parties to this litigation had "intended" their bellwether selections to "reflect a representative sampling" of the other cases in the MDL, App-7—and had employed some of the "most effective" methods to achieve that end, App-25 n.7 (quoting Eldon E. Fallon et al., *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2349–50, 2364–65 (2008)).

If anything, the Court explained, questions of fairness weighed strongly *in favor* of estoppel. App-23. Thanks to the *Leach* agreement, DuPont had won "benefits and concessions" not available in most cases. App-23. It had exploited those benefits at every turn, including by "mount[ing] multiple challenges" to the district court's interpretation of the agreement and its administration of the MDL. App-23. Once verdict after verdict came in for the plaintiffs, there was "nothing fundamentally unreasonable" about declining to offer the company yet another shot. App-23.

REASONS FOR DENYING THE PETITION

I. This case does not present a circuit split.

A. DuPont asks this Court to grant certiorari to resolve a supposed circuit split over whether the results of "unrepresentative bellwether trials" can be made binding in MDL proceedings. Pet. i. But that question is not presented here. To the contrary, one of the cases was not a bellwether at all and the two bellwethers were specifically chosen to "reflect a representative sampling" of the broader MDL. App-7, 25 n.7, 86.

That "representative sampling" was not difficult to achieve here, for reasons unique to this litigation. As both courts below explained in detail, the cases in this MDL bore an unusual similarity to one another by design. Under the *Leach* agreement, the parties had already agreed to decide causation issues on a classwide basis and framed the remaining issues in the case in ways that focused on DuPont's "conduct and knowledge" towards the class as a whole. App-5–7, 17–21, 23, 77–78, 86.

That made the cases similar from the outset. As the court of appeals explained, the "facts relating to" the issues of duty, foreseeability, and breach were premised

on the same "conduct" and "were virtually identical." App-20–21. There were no "legally significant" factual differences among the cases because "the pertinent factual issues . . . revolved around *DuPont's* conduct and knowledge in relation to" the entire class. App-17–18.

The district court also took steps to ensure that the bellwethers were especially representative of the remaining cases: As part of a "lengthy" process, it "used some of the" "most effective" "mechanisms" to achieve representativeness, having the parties select cases "intended" to be representative, and giving them opportunities to strike one another's selections. App-7–8, 25 & n.7.

Because the trials here were in fact representative, this case does not present the question whether "unrepresentative bellwether trials" can be given collateral-estoppel effect. At best, the case instead presents a case-specific dispute about whether the trials here were sufficiently representative. A factbound dispute about whether estoppel should have applied under these circumstances is manifestly uncertworthy. *See* S. Ct. R. 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings or the misapplication of a properly stated rule of law.").

B. To try to make this case-specific dispute seem certworthy, DuPont makes a methodological complaint: Because the Sixth Circuit did not formally demand that the district court make what DuPont calls a "finding" of "representativeness" as part of its collateral-estoppel analysis, DuPont contends that this case implicates a circuit split. But there's no disagreement among the circuits on this score.

1. The Fifth Circuit's decision in *Chevron*, 109 F.3d at 1016—the sole case on which DuPont premises its split—

did not involve collateral estoppel at all. DuPont's effort to suggest a conflict conflates collateral estoppel with a different issue: what rules apply to the "binding bellwether" device—a distinct procedure occasionally employed by MDL courts when constructing a trial plan, under which courts plan *in advance* to conduct a trial that will bind subsequent cases. None of the trials that took place in this case were designed to be binding bellwethers; one was not even a bellwether at all. Stripped of that confusion, the Sixth Circuit's straightforward and factbound application of the *Parklane* factors to this complicated dispute stands without disagreement.

Chevron arose out of a district court's attempt to manage large numbers of claims against Chevron. *Id.* at 1017. Rather than try each case individually, the court proposed binding bellwethers: It would conduct an initial trial with a small set of plaintiffs, and then extrapolate the results to everyone else. *Id.* 1017–19. But the district court in *Chevron* had failed to apply the criteria courts ordinarily use to ensure that binding bellwethers are fair. In particular, since binding bellwethers require parties—including plaintiffs who will have no representation in the bellwether trial—to agree in advance to be bound by their results, courts typically require special safeguards like mutual consent and a statistically representative selection process. *See* Alexandra D. Lahav, *Binding Bellwethers*, 76 Geo. Wash. L. Rev. 576, 609–10 (2008). But the district court in *Chevron* had skipped that last step. As a result, the Fifth Circuit explained that its trial plan was barred. *Chevron*, 109 F.3d. at 1019–20.

DuPont claims that *Chevron* shows that estoppel requires a representativeness finding. But nowhere in its analysis did the Fifth Circuit suggest that the problems it had uncovered concerned estoppel. The court did not

mention this Court's decision in *Parklane* even once—let alone discuss or apply the *Parklane* factors. *See id.* at 1019–21. Nor did it cite a single collateral-estoppel case. *See id.* Instead, the Fifth Circuit was quite clear: The problem with the trial plan was that it lacked one of the "core element[s]" of a binding bellwether—representativeness. *Id.* at 1020. That focus should not be surprising, since in *Chevron* there was no trial—or other, "actually litigated" issue—that *could* be given estoppel effect. *Parklane*, 439 U.S. at 326 n.5.[2]

And the Fifth Circuit is not alone. No decision extends the principles that govern the *ex ante* context of establishing a binding bellwether trial plan to the *ex post* context of applying collateral estoppel. There is no need to; thanks to *Parklane*, courts already possess ample criteria to ensure that estoppel is fair. Instead, the two doctrines have long been viewed as "conceptually separate"—applying at different times, in different circumstances, and with different procedural safeguards. See Zachary B. Savage, Note, *Scaling Up: Implementing Issue Preclusion in Mass Tort Litigation Through Bellwether Trials*, 88 N.Y.U. L. Rev. 439, 456–57 (2013).

2. By contrast with the Fifth Circuit, the decision below isn't about the binding bellwether device—or about how a district court may construct a trial plan at all. It's about how a district court may exercise its discretion to apply the rules of estoppel to a trial that's in the past. There is thus no conflict between the two decisions.

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[2] Thus, when the court said that the results of the trials could no longer be used "for the purpose of issue or claim preclusion," *Chevron*, 109 F.3d at 1017, it was simply explaining that it was barring the court from embarking on a trial plan that would have that effect—not applying the long-established criteria for those doctrines to be used.

Unlike *Chevron*, this case involved an ordinary bellwether process (plus an ordinary, non-bellwether trial). App-7–9. Because there was no automatic guarantee that the results of those trials would have an estoppel effect, the courts below had no occasion to apply the factors the Fifth Circuit considered. They could rely on those this Court articulated in *Parklane*.

And that is precisely what they did. The circumstances of the *Leach* agreement and the atypical framing of the issues here, they explained, meant that the initial trials presented "virtually identical" facts to those that followed, and gave DuPont ample opportunity to contest the relevant legal questions. App-20.

To sidestep the obvious distinction between the cases, DuPont repeatedly mischaracterizes the Sixth Circuit's decision. To hear DuPont tell it, the case adopted a "novel" and "unprecedented" new "rule" that "expan[ds]" collateral estoppel to new "bounds," "departing from settled law" to make "non-mutuality the norm, rather than an exception." *See, e.g.*, Pet. at 20, 23–25. But the Sixth Circuit's decision contains no such "rule." And there is nothing "novel" about it. All the Sixth Circuit did was explain why the ordinary rules of estoppel supported the district court's decision to apply the doctrine under the unusual facts of this case.

At bottom, DuPont's real concern is not that the Sixth Circuit adopted a new rule, but that it *declined* to adopt new rules the company favors: that courts must make a representativeness "finding" before applying estoppel and that collateral estoppel should be prohibited altogether in MDLs. *See* Pet. at 23–24. But no court has taken either view, and DuPont cites none. It is thus *DuPont's* rules that would be an unprecedented change in the law of both estoppel and multi-district litigation.

Because the Sixth Circuit's actual decision implicates no conflict, this case does not warrant this Court's review.

II. This case is a poor vehicle for deciding the question presented.

Even if there were a split on the role of estoppel in MDLs—and there is not—this case presents a poor vehicle to decide the issue. It does not present the problems DuPont zeros in on. And it is unrepresentative of other MDLs.

First, this case does not squarely present the problems of either representativeness or bellwethers. As we have discussed, the parties "intended" the bellwethers below to be representative, even if DuPont now says they did not go far enough. That was not difficult to do since "DuPont's conduct impacted the Plaintiffs in virtually identical ways." App-20. In light of its factual and procedural history, this case does not present the question about the effect of "unrepresentative bellwether trials" that DuPont asks this Court to resolve.

And one of the trials accorded preclusive effect was not a bellwether at all. As a result, even if this Court were inclined to enumerate special rules in the bellwether context, those rules would not decide this case. They would not have precluded the district court from treating the non-bellwether case—or the existence of the non-bellwether case *and* the two bellwethers—as sufficient to warrant estoppel.

And *second*, the case is a one-off. The *Leach* agreement unified the MDL to an unusual degree and meant that, long before the district court's estoppel decision, several key issues had *already* been decided on an MDL-wide basis. Those included the meaning of the *Leach* agreement itself—and an idiosyncratic definition of

general causation and qualifying dose-level water exposure that led the plaintiffs to frame questions of duty, negligence, and foreseeability in terms of DuPont's conduct rather than their individual circumstances. *See* App-5–7, 17–21, 23, 77–78, 86. That makes this case unrepresentative of most MDLs. And it means that any attempt to supply general guidance would require this Court to first disentangle the special role that the *Leach* agreement played in the lower courts' decisions.

What's more, the decision below rested in part on an application of Ohio state law. In a diversity action like this one, state law governs collateral estoppel except where it is incompatible with federal interests. *See Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 508–09 (2001). The Sixth Circuit did not question the compatibility of Ohio and federal law in this context, and simply discussed the two one by one. App-12–27. But the district court found the issue thorny enough to discuss it at length. *See* App-105–21. If this Court were to weigh in on the proper basis for estoppel here, it would have to confront this choice-of-law question itself. And DuPont does not even suggest that this antecedent question is independently certworthy.

Any one of these idiosyncrasies would complicate this Court's attempt to address the question presented. Put together, they make the case a particularly poor platform for weighing in on DuPont's concerns, or for deciding questions that could implicate MDLs generally. And because the federal courts remain crowded with MDLs and bellwethers, this Court should await the emergence of an estoppel issue in one of the many more representative cases if it wishes to supply guidance.

III. The decision below was correct.

Given the weakness of its claimed split and the idiosyncrasies of this case as a vehicle, DuPont spends most of its energy challenging the merits of the decision below. It complains that the Sixth CIrcuit erred by failing to apply collateral estoppel differently in the MDL context than in any other. But DuPont's approach is illogical and unworkable, and the Sixth Circuit was right to reject it.

A. *First*, DuPont calls for requiring courts to make a formal representativeness "finding" before they may apply estoppel in an MDL. That rule has nothing to recommend it. No court has adopted the rule, and it's unclear how it would work in practice. This litigation is a case in point: The courts below found that the initial trials were "intended" to be "representative" and that they presented "virtually identical" facts to those that followed them. App-20. If DuPont's complaint is merely that no formal "finding" accompanied this reasoning, its concern is both academic and case-specific, and a poor basis to extend DuPont's preferred rule to every estoppel case.

B. *Second*, DuPont demands that courts account for "the MDL context," suggesting that estoppel should be barred in MDLs. *See* Pet. at 23. No authority supports such a view, and DuPont barely attempts to identify any.

The best it can do is point to a few cases discussing bellwether trials in general. *See* Pet. at 20–24. But not one of those cases prohibits estoppel in the MDL context. Most of them don't talk about estoppel at all. *See, e.g.*, *In re Depuy Orthopaedics, Inc.*, 870 F.3d 345, 348–49 (5th Cir. 2017) (citing one definition of a bellwether trial without discussion); *In re Cox Enters., Inc. Set-top Cable Television Box Antitrust Litig.*, 835 F.3d 1195, 1208 (10th Cir. 2016) (discussing some of the basic parameters of bellwethers in a case about arbitration waiver). And the

only one that does, the Tenth Circuit's decision in *Dodge v. Cotter Corp.*, 203 F.3d 1190 (10th Cir. 2000), in fact *accepts* that MDL bellwethers can have estoppel effect—it simply holds that one of the *Parklane* factors was missing in the case. *See id.* at 1198 (explaining that "the record copiously establishes three of the four elements," but not the identity of the issues).

There is an obvious reason for the lack of authority: A rule against estoppel in MDLs runs headlong into *Parklane* itself. As the Sixth Circuit explained, that case issued a "clear pronouncement": "'[T]he preferable approach for dealing with' the fairness concerns regarding offensive collateral estoppel 'is not to preclude the use'" of the doctrine, "but instead to provide 'broad discretion' to trial courts determining when it applies." App-15 (quoting *Parklane*, 439 U.S. at 331); *see also Blonder-Tongue Lab'ys, Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 327 (1971) (erecting barriers to who may invoke estoppel is "unsound").

DuPont does not bother to reconcile a bar on estoppel in MDLs with *Parklane*'s "clear pronouncement." Instead, it deflects (at 19), insisting that it is the Sixth Circuit's approach that "cannot be reconciled with *Parklane*" because *Parklane* suggested that there could be "other reasons" why estoppel was unfair. But the Sixth Circuit did not rule out that possibility.[3] It simply declined to treat the particular factors DuPont wanted it to adopt—the MDL context, or whether the binding bellwether safeguards had been applied—as necessary indicia of fairness. *See* App-22–27. As the Sixth Circuit explained,

[3] To the contrary, the decision even weighed one consideration—the unique history of the *Leach* agreement—as an additional reason why estoppel could be fair here. *See* App-22–23.

nothing in *Parklane*, or any of "the other case law DuPont cites," supported those particular limitations. App-25–26.

Instead, *Parklane* itself shows why they make no sense. DuPont complains (at 22–24) that applying collateral estoppel to early trials in an MDL creates "massive" risks of cases that threaten "massive damages." But *Parklane* held exactly the opposite. *Parklane* was a securities class action that presented the same risks an MDL does: a large number of plaintiffs, similar theories of liability, and enormous potential damages. *See* 439 U.S. at 324, 332–33. And the preceding suit in *Parklane* offered none of DuPont's preferred features: As an SEC declaratory judgment action, it was in no way representative of the derivative suit to come, nor did the case somehow warn the defendants of the coming estoppel. *See id.* But this Court found no "fundamental unfairness" in applying estoppel in those circumstances; to the contrary, the case "le[d] inescapably to the conclusion" that estoppel was warranted. *Id.* at 333.

What's more, the Sixth Circuit correctly held that the circumstances of this MDL in fact made estoppel unusually proper. Due to its design, plaintiffs could not strategically time their trials; indeed, "the MDL gave DuPont a greater measure of power over case scheduling than in normal cases" by allowing the company to select three bellwether cases, including the very first to be tried. App-24. And because DuPont expected the early trials "to inform the resolution" of the remainder, the company had "every incentive to defend itself vigorously" in them. App-24. The district court was also able to safeguard the fairness of estoppel by waiting to apply the doctrine until three trials had returned consistent plaintiffs' verdicts. App-24.

In addition, the *Leach* agreement reshaped the litigation in atypical ways. It "created a limited, closed subset" of similarly-situated plaintiffs, whose claims it structured to focus on DuPont's "conduct and knowledge" towards the entire group. App-17–21, 23. That backdrop created an unusual "factual identity" in the plaintiffs' negligence claims. App-17–21, 23.

And if DuPont has gripes about the *Leach* agreement's impact on this litigation, it has only itself to blame. It did not have to agree to resolve causation issues on a classwide basis or to structure the remaining litigation to focus on its conduct towards the class as a whole. But it chose to do so because it reaped extraordinary benefits, including a yearslong moratorium on litigation, the dismissal of thousands of claims, and streamlining the litigation of those that remained.

If DuPont didn't like the district court's interpretation of the *Leach* agreement, its first appeal presented the company with a golden opportunity to persuade an appellate court that the issues in these cases should be framed differently—and, if successful, to wipe at least one of the verdicts against it off the map. But for reasons best known to itself, DuPont elected to dismiss that appeal after argument. Even if DuPont now regrets the results, it is not this Court's role to rescue the company from its own litigation strategy. As the Sixth Circuit held below, there is nothing "fundamentally unfair" about holding the company to the consequences of its own choices. App-23.

This Court's ordinary estoppel criteria take care of DuPont's remaining concerns. Asking whether plaintiffs have employed strategic behavior to take advantage of an early case already precludes plaintiffs from steering cases into the bellwether process to guarantee an estoppel effect, s*ee* Pet. at 28–29—as the Sixth Circuit's discussion

of that factor illustrates, *see* App-24. And the requirement that a defendant have a full and fair opportunity to litigate an issue already discourages district courts from conferring preclusive effect on a single trial. *See* Pet. at 23.

By contrast, adopting DuPont's special bar on estoppel in MDLs would have troubling consequences. Under DuPont's rule, if a defendant faced hundreds of identical claims, it could secure complete immunity from estoppel simply by persuading the joint panel on multidistrict litigation to initiate MDL proceedings—proceedings that were premised on the very similarity among the underlying cases. Doing so would force litigants to litigate the same issue over and over in potentially thousands of cases, even where the traditional criteria for estoppel were otherwise clearly satisfied. That would rob the courts of an important tool for managing their dockets and risk the possibility that some litigants would simply never get their day in court, enabling defendants to benefit from the sheer number of people their conduct harmed. *See* Lahav, 76 Geo. Wash. L. Rev. at 592–93. The ordinary estoppel factors do a better job of ensuring that estoppel is applied fairly and properly.

IV. DuPont's predictions about the practical effects of the decision below are overblown.

Finally, merits aside, DuPont is wrong that this case poses important questions about the applicability of estoppel to MDLs. The decision below, the company says (at 20–24, and also at 32), promises dire consequences for future MDLs because it foists "asymmetric risks" on defendants such that "[n]o rational defendant will agree to a bellwether process." The company is mistaken.

To begin with, the "risks" of estoppel in the MDL context are not improperly asymmetric. All a defendant has to do to avoid estoppel is to win a single bellwether or

other early trial—which it has a strong incentive to do anyway. Once it does so, that inconsistent result is, under *Parklane*, a powerful argument against estoppel, 439 U.S. at 330–31—one on which courts regularly place "conclusive weight," *Appling v. State Farm Mut. Auto Ins. Co.*, 340 F.3d 769, 776 (9th Cir. 2003); *see also, e.g.*, *Hynix Semiconductor Inc. v. Rambus Inc.*, 2009 WL 292205 (N.D. Cal. Feb. 3, 2009) ("The existence of inconsistent prior judgments is perhaps the single most easily identified factor that suggests strongly that neither should be given preclusive effect.").

Nor will DuPont's predictions come to pass in the absence of review. Following the decisions below, defendants in the Sixth Circuit have continued to embrace the bellwether device, and they show no signs of letting up. *See, e.g.*, *In re: Davol Inc./C.R. Bard Inc. Polypropylene Hernia Mesh Products Liability Litigation*, No. 2:18-md-2846 (S.D. Ohio) (third bellwether trial scheduled for September 2023); *In re Nat'l Prescription Opiate Litig.*, No. 1:17-md-2804 (bellwether process for third party payor and hospital plaintiffs commenced in early 2023); *In re* Flint Water Cases, No. 5:16-cv-10444 (bellwether trials scheduled for 2024).

That is not because these defendants are somehow "[ir]rational." Pet. at 4. Rather, the ordinary estoppel criteria are already carefully calibrated to safeguard defendants' rights. They already require that the issues between the cases be identical, leaving room for defendants to contest the many factual differences that the typical MDL presents. They already require consistent plaintiffs' verdicts. They already pay careful attention to whether defendants had full and fair opportunities to litigate their cases. And they already are attuned to novel procedural opportunities.

And district courts are already careful in applying these criteria to MDLs—as this case exemplifies. Although *Parklane* technically permitted the use of collateral estoppel after just a single case, the district court here waited not only until all the bellwethers had been resolved, but also until after the first *non*-bellwether was completed, too—not to mention until after the court had sat through half of another non-bellwether trial, and until DuPont had withdrawn its *Bartlett* appeal. The court thus gave DuPont *at least* three different chances to create an inconsistent verdict or secure reversal on appeal. Prevailing even once would likely have enabled DuPont to avoid estoppel. *See Appling*, 340 F.3d at 776.

And although *Parklane* did not require that an initial trial be representative in order for it to have preclusive effect, courts regularly exercise their discretion to examine representativeness anyway. The courts below did exactly that: They repeatedly emphasized the "factual identity" of the issues on which the district court granted estoppel. App-20–21, 130–31. And they even noted that the parties had intended the bellwethers to "reflect a representative sampling of cases," employing "effective methods" to ensure that result. App-7–8, 20–21, 25 n.7.

Nor does estoppel spell certain liability, as DuPont supposes. Even when estoppel is granted on one issue, the defendant can still secure victory on those that remain by pressing whatever individual differences are relevant—as the outcome in the case tried with Mr. Abbott's perfectly illustrates. *See* App-11.

And defendants continue to embrace the bellwether device for a deeper reason as well: Both bellwether and non-bellwether trials may have preclusive effect. The decision below is a case in point, since the court treated bellwethers and non-bellwethers in roughly the same way.

But if non-bellwethers may have estoppel effect too, defendants have no reason to opt out of bellwethers.

At bottom, despite DuPont's attempts to shoehorn this case into the problems presented by binding bellwethers or "unrepresentativeness," its concerns aren't really about either. They are about DuPont's disagreement with the district court's estoppel decision—and, perhaps, its regret at how it litigated the case below. But those issues do not warrant this Court's review.

CONCLUSION

This Court should deny the petition for certiorari.

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Respectfully submitted,

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