No. 23-13

In the
Supreme Court of the United States

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

Petitioner,

v.

TRAVIS ABBOTT; JULIE ABBOTT,

Respondents.

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

REPLY BRIEF

PAUL D. CLEMENT
Counsel of Record
C. HARKER RHODES IV*
CHADWICK J. HARPER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioner

August 30, 2023

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REPLY BRIEF

The divided decision below eviscerates a key mechanism for resolving mass-tort litigation and undermines basic due process protections in cases that make up over 40% of the federal courts' civil caseload. The Sixth Circuit panel majority allowed the results of just three early trials to preclude DuPont from litigating duty, breach, and foreseeability across an entire MDL—even though all agreed the bellwether results would not bind future trials, and even though one of the tried cases was picked precisely because it was un-representative. That unprecedented extension of nonmutual offensive collateral estoppel contravenes *Parklane Hosiery Co. v. Shore*, 439 U.S. 322 (1979), and the decisions of other circuits, and creates wholly asymmetrical risks for MDL defendants that will imperil the use of bellwethers to help resolve the federal cases most in need of settlement. The decision below cries out for this Court's review.

Respondents' attempts to defend the decision below, and to recast it as an unremarkable application of existing law, simply blink reality. As Judge Batchelder's dissent and a host of *amici* confirm, the Sixth Circuit's misguided decision raises issues of surpassing importance to MDL litigation nationwide and seriously threatens MDL practice going forward. This Court should grant certiorari.

I. The Decision Below Is Deeply Flawed And Conflicts With Settled Precedent From This Court And Other Circuits.

A. Nonmutual Offensive Collateral Estoppel Cannot Extend the Results of a Few Bellwether Trials to an Entire MDL.

1. The Sixth Circuit's decision to allow the results of a handful of early trials to preclude trial on key issues across an entire MDL misapplies this Court's decision in *Parklane* and splits with other circuits. To start, *Parklane* made crystal clear that its list of scenarios in which nonmutual offensive collateral estoppel could be "unfair to a defendant"—and therefore unavailable—was illustrative, not exhaustive. *Parklane*, 439 U.S. at 330-31. By converting those illustrative examples into the sole "necessary constraints on the use of nonmutual offensive collateral estoppel," App.27, the panel majority plainly erred and broke with other circuits. Pet.19; *see, e.g.*, *Jack Faucett Assocs., Inc. v. Am. Tel. & Tel. Co.*, 744 F.2d 118, 125-26 (D.C. Cir. 1984) (*Parklane*'s examples "do not constitute an exhaustive list").

Respondents cannot defend that fundamental flaw in the Sixth Circuit's analysis—and so they deny reality by claiming that the panel majority "did not rule out" the possibility of additional fairness constraints. BIO.20-21. But the decision below explicitly holds that courts "cannot … create additional rules restricting the use" of nonmutual offensive collateral estoppel beyond "the factors articulated in *Parklane*," App.27, which squarely contradicts *Parklane*'s own holding that applying the

doctrine could be unfair "for other reasons," 439 U.S. at 331.

2. That initial mistake precipitated an even worse one, as the Sixth Circuit went on to approve the application of nonmutual offensive collateral estoppel under circumstances where unfairness to defendants is inevitable: where plaintiffs seek to use a few informational and expressly non-binding bellwethers as the basis for preclusion across all pending and future cases in an entire MDL. As Judge Batchelder observed, that is "something that no other circuit court has … allowed." App.56; *see* Chamber.Amicus.Br.3 (recognizing the panel's "unprecedented" holding). And while respondents try to claim the decision below was neither "unprecedented" nor "novel," BIO.2, 16, they do not (and cannot) cite a single case where nonmutual offensive collateral estoppel has ever before been permitted in these circumstances.

That is for good reason: applying preclusion to an entire MDL based on a handful of expressly non-binding bellwethers is fundamentally unfair. Initially, respondents have no answer to the palpable unfairness of treating trials as binding *ex post* when the district court promised *ex ante* they would not be. Pet.20-22. Respondents do not dispute (and conceded below) that the parties and the court "agreed from the beginning" that "the bellwethers here weren't binding" on the rest of the MDL, but instead intended to "inform the conduct of future trials and potentially settlement." Pet.22 (quoting Resp.CA6.Br.36). An express promise that a trial will be nonbinding should

be more than enough to foreclose making that trial binding via collateral estoppel.[1]

The unfairness of that bait-and-switch is compounded by the massive asymmetric risk inherent in MDLs. Pet.22-24. Under the decision below, no matter how many bellwethers an MDL defendant wins, it cannot assert nonmutual collateral estoppel against other MDL plaintiffs, *see, e.g.*, *Blonder-Tongue Labs., Inc. v. Univ. of Ill. Found.*, 402 U.S. 313, 329 (1971)—but if an MDL defendant loses just a handful of bellwethers (or according to respondents, "just a single case," BIO.25), it faces preclusion across the entire MDL. That heads-I-win-one-trial-tails-I-lose-the-entire-MDL rule creates a "powerfully unfair asymmetry," DRI.Amicus.Br.11, that cannot be squared with *Parklane* or due process.

Respondents' answer is again to deny reality, asserting that there is no "improperly asymmetric" risk because "[a]ll a defendant has to do to avoid estoppel is to win a single bellwether." BIO.23-24. That ignores the asymmetry, as winning multiple bellwethers gives a defendant no comparable benefit to the risks it faces in losing multiple bellwethers. It also ignores plaintiffs' counsel's ability to drop or settle risky bellwethers. And it ignores both the

[1] While accepting that the district court made express promises that the bellwethers would be non-binding, respondents briefly echo the panel majority's observation that the district court did not explicitly promise it would not invoke nonmutual offensive collateral estoppel. *See* BIO.11. That is pure sophistry. Nonmutual collateral estoppel is just one obvious way that the results could be binding, and if anything a promise that results would be non-binding is broader and covers all preclusion doctrines.

proven reality (and basic math) that failing to win a single bellwether out of the first handful of cases does not mean that defendants have a weak case and deserve to lose thousands of other cases. The defendants in the Roundup litigation lost three cases, and then won the next seven. *See* 3M.Amicus.Br.17. And as a matter of simple math, when the merits are in equipoise there is still a 12.5% chance one party will win the first three cases. If the defendant wins all three, there is zero preclusive effect. If, by contrast, plaintiffs go 3-0, the decision below precludes the defendant from contesting issues across the MDL. That is the very definition of asymmetry, and the kind of odds no defendant can afford to accept.

The unfairness is underscored by the contrast with class actions, where defendants can rely on the procedural protections of Rule 23 and where any decision will bind the entire plaintiff class. Pet.24; *see* 3M.Amicus.Br.8-10. The decision below instead gives MDL defendants all the downside of a class action with none of the accompanying protections—which is particularly inappropriate given that cases are often in MDLs rather than class actions *precisely because* they involve individualized issues and circumstances unfit for resolution in a single stroke. *See* WLF.Amicus.Br.14-18. The Sixth Circuit's decision expands collateral estoppel well beyond its traditional common-law bounds, which demanded mutuality as the guarantee of basic fairness; by demanding neither mutuality nor even *Parklane*'s fairness inquiry, the decision below creates a doctrine that is as indefensible as it is unprecedented. Pet.24-25; *see* Chamber.Amicus.Br.7; 3M.Amicus.Br.5-7.

3. Respondents' various attempts to defend the decision below are unavailing. They claim that *Parklane* forecloses any "rule against estoppel in MDLs," suggesting that only "broad [district-court] discretion" rather than any clear appellate rules can determine when nonmutual offensive collateral estoppel should apply. BIO.20. But *Parklane* itself identified multiple categorical rules and explicitly recognized that "other reasons" could justify comparable rules without ever suggesting that the role for clear appellate guidance in this context was exhausted. 439 U.S. at 331. Alternatively, respondents suggest that the securities class action in *Parklane* itself "presented the same risks as an MDL," but securities fraud litigation is perfectly suited for class-action treatment, which protects against the asymmetric risks presented in MDLs. As noted, many mass tort damages actions end up in MDLs precisely because they involve individualized issues and diverse circumstances that preclude class treatment. Nothing in *Parklane* remotely supports—let alone requires—applying a heads-defendant-wins-one-trial-tails-defendant-loses-the-entire-MDL rule.

Respondents assert that finding nonmutual offensive collateral estoppel improper in the MDL context would produce "troubling consequences," as MDL defendants could opt to "litigate the same issue over and over in potentially thousands of cases." BIO.23. That both assumes that thousands of cases would actually present the "same issue" and ignores that no MDL defendant *wants* to litigate the same issue in thousands of cases, especially if it has a losing hand. All that MDL defendants want is to avoid the stacked deck of an asymmetrical preclusion regime.

Bellwethers are designed to inform settlement, not force it by depriving defendants of defenses across the entire MDL under circumstances where plaintiffs bear no preclusion risk at all.

B. At a Minimum, Nonmutual Offensive Collateral Estoppel Cannot Extend the Results of a Few Bellwether Trials to an Entire MDL Without Any Finding That the Bellwethers Are Representative.

At the very least, the Sixth Circuit erred by allowing nonmutual offensive collateral estoppel to preclude DuPont across the entire MDL without any finding that the three early cases were in fact representative of the rest of the MDL. Pet.25-29. Without that minimum backstop, applying nonmutual offensive collateral estoppel across an entire MDL is plainly "unfair to [the] defendant" and endangers due process. *Parklane*, 439 U.S. at 330. As Judge Batchelder recognized, it is "Statistics 101 that a small, unrepresentative sample cannot yield reliable inferences as to a larger group," making it "fundamentally unfair for a small, non-representative sample of bellwether plaintiffs to bind a defendant in thousands of future cases." App.52, 54.

Respondents do not seriously dispute the point. Instead, in a single cursory paragraph, they just claim that no actual finding of representativeness is necessary to protect against that unfairness. BIO.19. But "[t]his litigation is a case in point" for why that finding *is* necessary, *contra* BIO.19: While the process in which the parties engaged to select bellwether cases was certainly "intended" to select "a representative sampling of cases," App.7 (brackets omitted), only two

of the initial batch of six cases actually went to trial, joined by a third that was specifically selected to be *non*-representative and reflect "the 'most severely impacted plaintiffs,'" App.53 (quoting MDL.Dkt.4624 at 25); *see* Pet.8. Unsurprisingly, those three early cases were in fact dramatically different from cases filed later in the MDL by plaintiffs like respondents, which involve, *inter alia*, different alleged exposure mechanisms and durations, different alleged levels of exposure, and different degrees of proximity to the releases (from wells within 1500 feet of DuPont's plant for two of the early plaintiffs, to wells anywhere from 14 to 56 river miles away for respondents). Pet.9-10, 28. Recently-filed MDL cases include individuals even *farther* downriver and with even lower exposure levels. Those massive factual differences—which respondents simply ignore—would have foreclosed any finding of representativeness here, and should likewise have foreclosed MDL-wide preclusion.

Respondents mistakenly deny a conflict between the decision below and *In re Chevron U.S.A., Inc.*, 109 F.3d 1016 (5th Cir. 1997), because that case dealt with binding bellwethers rather than collateral estoppel. BIO.13-16. But as respondents eventually concede in a footnote, *see* BIO.15 n.2, *Chevron* explicitly held that the results of the nonrepresentative trial in that case could not be used "for the purpose of issue or claim preclusion." 109 F.3d at 1017. In any event, as Judge Batchelder explained, the reasoning of *Chevron* is squarely on point and irreconcilable with the majority decision below. App.55; *see* Pet.29-31. If anything, the facts that the district court in *Chevron* gave the parties *ex ante* notice of the proceedings' binding effect and purported to make the results binding on all

parties to the MDL just underscore the unfairness of the asymmetrical bait-and-switch here. Pet.31-32.

II. This Case Is An Ideal Vehicle.

1. Respondents claim that "whether the results of 'unrepresentative bellwether trials' can be made binding in MDL proceedings" is not really presented here, because the process through which bellwethers were selected was meant to "reflect a representative sampling." BIO.12; *see* BIO.12-13, 17. But as is often the case in MDLs, many of the selected cases, including the majority of DuPont's picks, settled out, and the three cases that actually went to trial (and on which preclusion was based) were anything but representative. *See* Pet.9-10, 28; *supra* p.8. Moreover, one of three was specifically chosen to be an *unrepresentative* exemplar of "one of the 'most severely impacted plaintiffs.'" App.53.

Respondents note that case was not formally designated a "bellwether." BIO.12, 17. But they do not dispute that the district court and the Sixth Circuit viewed the adverse results in all three cases as justifying preclusion and gave all three preclusive effect, which underscores the unfairness of giving a designedly unrepresentative case preclusive effect across the MDL. *See* WLF.Amicus.Br.3-4; DRI.Amicus.Br.5, 16.

2. Respondents also focus heavily on the *Leach* Agreement, claiming it makes this case "a one-off" with no relevance to other MDLs. BIO.17-18; *see* BIO.12-13, 16, 22. If that were true, the majority would have emphasized it (and perhaps designated the opinion unpublished), the dissent would have withheld its warning that "the age of bellwethers [has

come] to an end," App.63, and multiple *amici* would have directed their time and resources elsewhere.

Nothing in the *Leach* Agreement changes the analysis or ameliorates the fundamental unfairness here. The *Leach* Agreement was a voluntary agreement arising out of a class action settlement that created a science panel that took one issue—general causation—off the table in these cases, while eliminating claims for some 50 diseases entirely (thereby underscoring the symmetric risks in class proceedings). As to the remaining claims, every issue except general causation remained to be tried in individual lawsuits. As such, no jury was ever asked whether DuPont was negligent as to "entire communities," as respondents imply. BIO.7. Instead, there were only plaintiff-specific general verdicts. In short, the *Leach* Agreement does nothing to cabin the panel majority's holding; instead, it simply highlights the asymmetric risks of nonmutual collateral estoppel in MDLs relative to class actions.

3. Respondents get no further with the various other facts that they claim made preclusion "unusually proper" here. *Contra* BIO.21. The fact that DuPont picked one of the three cases that went to trial hardly moves the needle, particularly when DuPont's other bellwethers were settled out. Pet.8. That DuPont had "every incentive" to vigorously litigate the bellwether trials, BIO.21, is true of every bellwether case, which (wholly apart from any promise-defying preclusive effect) will powerfully inform the settlement dynamic and can result in a sizable verdict on its own. And that the district court "wait[ed] to apply" preclusion until plaintiffs had won all of "three trials," BIO.21, hardly makes it fair to use

those three verdicts to bind as many as *75,000 other cases*. App.55; *cf.* 3M.Amicus.Br.17 (discussing the Roundup litigation, where three massive plaintiff verdicts preceded *seven straight defense victories*).

4. Finally, respondents suggest that the separate Ohio-law analysis below somehow makes this a poor vehicle. BIO.18. But the question here is whether the decision below complies with the *federal* requirements for collateral estoppel and the Due Process Clause of the Fifth Amendment, and respondents never suggest that Ohio law could somehow override federal guarantees or provide an independent basis for the decision below (because it plainly cannot). In short, nothing about this case remotely requires this Court to consider Ohio law. And respondents' suggestion to wait for another case to address these pressing issues would be a serious mistake, BIO.18, given the chilling effect that the decision below will have on future bellwethers, *see* Pet.32-35, and the reality that relatively few MDL cases obtain appellate review, *see* Pet.35; 3M.Amicus.Br.11-12. As Judge Batchelder underscored, given the stakes for a defendant in an MDL, the rational course for defendants is not to keep litigating about the collateral estoppel effects of bellwethers in hopes of producing a perfect vehicle, but to forswear them entirely.

III. The Question Presented Is Exceptionally Important.

As the dissent below and the host of *amici* here confirm, the question presented is critically important. MDLs make up over 40% of the federal civil docket, and bellwethers offer a key mechanism for resolving MDLs quickly and efficiently. Pet.33-35. A

decision that undermines the ability of parties and courts to settle the litigation most in need of settlement, *see* Chamber.Amicus.Br.11-14, readily warrants this Court's attention.

Respondents claim that DuPont's concerns are overblown, BIO.23, but those concerns are hardly DuPont's alone. They are echoed in the dissent and five amicus briefs, reflecting the views of national organizations and defendants that have seen the perils of MDL litigation first-hand. Respondents simply ignore that chorus of concern. Their assurance that MDL defendants have nothing to fear as long as they win at trial, BIO.23-24, borders on absurdity, especially when the same brief asserts that preclusion is "technically permitted … after just a single case," BIO.25. No rational player rolls the dice when a bad result or two means they lose in perpetuity and a positive result means they roll again. Respondents' contention that "ordinary estoppel criteria" alone will suffice to protect MDL defendants' rights, BIO.24-25, flies in the face of both *Parklane*, which supplemented case-specific analysis with categorical rules and specifically noted that "other reasons" could make preclusion "unfair to a defendant," 439 U.S. at 331-32, and the reality of this very case, where the decisions below applied those ordinary criteria to allow preclusion despite its obvious unfairness. Finally, respondents' assertion that preclusion on key issues like duty, breach, and foreseeability does not necessarily "spell certain liability" for an MDL defendant who "can still secure victory on those [issues] that remain," BIO.25, is another non-sequitur. Telling a defendant not to worry about being precluded from contesting thousands of plaintiffs'

cases-in-chief, because certain affirmative defenses may still be in play, is about as far removed from due process as one can get. The decision below cannot be allowed to stand.

CONCLUSION

This Court should grant certiorari.

Respectfully submitted,

PAUL D. CLEMENT
Counsel of Record
C. HARKER RHODES IV*
CHADWICK J. HARPER*
CLEMENT & MURPHY, PLLC
706 Duke Street
Alexandria, VA 22314
(202) 742-8900
paul.clement@clementmurphy.com

*Supervised by principals of the firm who are members of the Virginia bar

Counsel for Petitioner

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