No. 19-

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY OF CANADA, LTD.,

Petitioner,

v.

GEORGE BELL, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the
California Court of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Federal law permits someone to be subject to preclusion when they have exercised "control" over a lawsuit, even if they were not formally a party to it. *Taylor* v. *Sturgell*, 553 U.S. 880, 895 (internal quotation marks omitted). The question presented is whether "control" is assessed based on the totality of the circumstances, as seven courts of appeals have held, or using a rigid two-part test, as four courts of appeals have held.

PARTIES TO THE PROCEEDING

Ford Motor Company of Canada, Ltd., petitioner on review, was the defendant-respondent below.

The following respondents on review were plaintiffs-appellants below:

George Bell, Joshua Chen, Wei Cheung (Wei Cheng), Laurance de Vries, Jason Gabelsberg, Ross Lee, Jeffrey M. Lohman, Christine Nichols, United Food & Commercial Workers Local 588, Estelle Weyl, Michael Wilsker, and W. Scott Young.

RULE 29.6 DISCLOSURE STATEMENT

Ford Motor Company of Canada, Ltd. is a wholly-owned subsidiary of Ford Motor Company, which is a publicly held corporation. As of December 31, 2019, Ford Motor Company has no parent corporation and no publicly held company owns 10% or more of Ford Motor Company's stock.

RELATED PROCEEDINGS

The following proceedings are related to this petition:

California state court proceedings:

- *In re Automobile Antitrust Cases I and II*, Nos. JCCP 4298 / CJC-03-004298 & JCCP 4303 / CJC-03-004303 (Cal. Super. Ct. Jan. 9 & 13, 2012) (orders granting defendants' motions for summary judgment), *aff'd in part & rev'd in part*, No. A134913 (Cal. Ct. App. July 5, 2016) (reported at 204 Cal. Rptr. 3d 330), *petition for review denied*, No. S236604 (Cal. Oct. 19, 2016)
- *In re Automobile Antitrust Cases I and II*, Nos. JCCP 4298 / CJC-03-004298 & JCCP 4303 / CJC-03-004303 (Cal. Super. Ct. July 10, 2012) (order granting in part and denying in part defendants' costs), *appeal dismissed as moot*, No. A136383 (Cal. Ct. App. Jan. 26, 2017)
- *In re Automobile Antitrust Cases I and II*, Nos. JCCP 4298 / CJC-03-004298 & JCCP 4303 / CJC-03-004303 (Cal. Super. Ct. June 16, 2017) (order granting defendant's motion for entry of judgment on ground of claim preclusion), *rev'd*, No. A152295 (Cal. Ct. App. Sept. 25, 2019), *as modified* (Oct. 13, 2019), *petition for review denied*, No. S258963 (Cal. Jan. 2, 2020)
- *In re Automobile Antitrust Cases I and II*, Nos. JCCP 4298 / CJC-03-004298 &

JCCP 4303 / CJC-03-004303 (Cal. Super. Ct. Aug. 22, 2017) (order denying in part and granting in part plaintiffs' motion to tax costs), *aff'd*, No. A152893 (Cal. Ct. App. Sept. 25, 2019)

Federal multi-district litigation (MDL) proceedings:

- *In re New Motor Vehicles Canadian Export Antitrust Litig.*, No. 2:03-md-01532-DBH (D. Me. Apr. 2, 2009) (reported at 609 F. Supp. 2d 104) (order dismissing California plaintiffs' claims)
- *In re New Motor Vehicles Canadian Export Antitrust Litig.*, No. 2:03-md-01532-DBH (D. Me. July 2, 2009) (reported at 632 F. Supp. 2d 42) (granting defendants' joint motion for summary judgment)

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PETITION FOR A WRIT OF CERTIORARI

Ford Motor Company of Canada, Ltd. ("Ford Canada") respectfully petitions for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS BELOW

The California Supreme Court's order denying review is not reported. Pet. App. 52a-53a. The California Court of Appeal's decision and order denying rehearing are not reported. *Id.* at 1a-32a. The California Superior Court's decision is not reported. *Id.* at 33a-51a.

JURISDICTION

The California Supreme Court denied Ford Canada's timely petition for discretionary review on

January 2, 2020. Pet. App. 53a. Justice Kagan extended the time to file a petition for certiorari to May 1, 2020. This Court has jurisdiction under 28 U.S.C. § 1257(a). The California Court of Appeal's "judgment is plainly final on the federal issue," and that issue "is not subject to further review in the state courts." *Cox Broad. Corp.* v. *Cohn*, 420 U.S. 469, 485 (1975).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment, U.S. Const. amend. V, provides:

> No person shall * * * be deprived of life, liberty, or property, without due process of law * * * .

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law * * * .

INTRODUCTION

"Public policy," this Court has long recognized, "dictates that there must" someday come "an end of litigation." *Baldwin* v. *Iowa State Traveling Men's Ass'n*, 283 U.S. 522, 525 (1931). For that reason, the common law has developed the twin doctrines of claim and issue preclusion to ensure "the conclusive resolution of disputes" and guard against "the expense and vexation attending multiple lawsuits." *Montana* v. *United States*, 440 U.S. 147, 153 (1979). Due process requires that, for preclusion principles to apply, litigants must have "had a 'full and fair opportunity to litigate' the claims and issues settled in [a] suit." *Taylor* v. *Sturgell*, 553 U.S. 880, 891-893

(2008) (quoting *Montana*, 440 U.S. at 153)). Since *Montana*, this Court has recognized that requirement is satisfied when persons "assume control over litigation," even if they are not technically parties. 440 U.S. at 154; *see also Taylor*, 553 U.S. at 895.

This petition asks the Court to resolve a longstanding split regarding the test for "control." The majority of federal courts of appeals have adopted a straightforward approach, assessing control by examining all the facts and circumstances. Four others take a very different approach, narrowing the lens to two specific elements.

The court below adopted the latter approach, and in so doing revived a nearly twenty-year-old class action. The plaintiffs here originally litigated their California state-law claims for nearly a decade in federal district court through a multidistrict litigation constituted in the District of Maine to hear dozens of similar cases from all over the country. Their counsel participated extensively in the federal action, coordinating legal strategy, conducting discovery, signing onto dispositive motions, and seeking fees in connection with settling defendants.

At the eleventh hour, just as the federal court was poised to rule on summary judgment, the California-based plaintiffs determined they were more likely to prevail in state court. They abruptly withdrew the California claims from the federal action. Petitioner therefore had to restart class certification and summary judgment proceedings in a new venue. In the decision below, the California Court of Appeal held that this result was required by federal law because the plaintiffs' involvement in the federal action—

however extensive—failed to satisfy the two specific elements of the minority approach to control.

There is no need to speculate about whether the lower court's choice of test was dispositive: The split has recreated itself in miniature on the facts of this case. Courts in four other states have also confronted efforts to renew proceedings after dismissal of the federal multidistrict litigation (MDL) action involved here. Two of those state courts, in Arizona and New Mexico, also adopted the minority restrictive test for control, and also found control lacking. Two other state courts, in Tennessee and Wisconsin, adopted the majority approach and found that control existed on these facts.

This case therefore presents a perfect opportunity to resolve this longstanding division about the nature of "control" for purposes of federal preclusion law. And the Court should resolve that question by adopting the totality-of-the-circumstances approach, which better accords with this Court's cases and the common-law roots of preclusion doctrine. As the results in Wisconsin and Tennessee show, adopting that test would mean that preclusion principles apply to the plaintiffs in this case, allowing this litigation to finally reach its end.

The petition should be granted.

STATEMENT

A. Litigation Proliferates Nationwide.

This class action began almost 20 years ago, in 2003, when more than a dozen lawsuits in California were coordinated into a single state proceeding. Plaintiffs—Respondents before this Court—are consumers who purchased motor vehicles from 2001

to 2003. *See* Pet. App. 3a. They allege that during that period, Ford Canada, along with other manufacturers, retailers, and associations, "conspired to keep lower-priced, yet virtually identical, new cars from being exported from Canada to the United States," in violation of state antitrust and unfair competition laws. *Id.* at 2a (internal quotation marks omitted). Their case rests on a novel theory of injury: They contend that the mere *possibility* that additional Canadian vehicles could have entered the U.S. market would have reduced retail prices in *every* consumer motor vehicle transaction throughout the United States during the relevant period. *See id.* at 37a.

Similar actions, raising state and federal claims premised on the same alleged conspiracy and the same novel theory of injury, were filed in state and federal courts all over the country in the early 2000s. *Id.* at 4a.

B. State and Federal Litigation Are Coordinated.

The federal actions against Ford Canada and other manufacturers were consolidated into an MDL proceeding in the District of Maine before Judge Hornby. *Id.* Plaintiffs in the federal MDL then amended their complaint to add state-law antitrust and unfair competition claims. *Id.* at 4a-5a. As a result, plaintiffs in both the federal MDL and in parallel state-court proceedings pressed the same state-law claims against Ford Canada. *See id.* at 34a. As relevant here, two named plaintiffs in the federal MDL asserted antitrust and unfair competition claims under California state law that were identical to the claims pressed by different named

plaintiffs in the consolidated California state court action. *See id.* at 34a.

Faced with the possibility of simultaneous federal and state litigation, Judge Hornby brokered an arrangement with Judge Kramer of the Superior Court of California designating the federal MDL as the lead action. *See id.* at 23a. The courts entered a Joint Coordination Order on both the California and federal dockets noting the "obvious" potential for "duplication of effort and unnecessary expense" and providing that all discovery and pre-trial litigation would take place in the federal MDL. Joint Coordination Order, ECF No. 110, at 3-4.[1] The order specified that the "[p]arties in the" California state-court cases "and their counsel" were "entitled to participate in discovery in the [federal] MDL Proceeding" and adopted extensive procedures to ensure that participation would be meaningful. *Id.* at 5-10. Other state courts followed the California court's lead and stayed their proceedings in favor of the federal MDL. *See* Pet. App. 27a.

After the federal MDL was designated the "lead" action, counsel for the state and federal plaintiffs entered into a "joint prosecution agreement" to handle the coordinated proceedings. *Id.* Plaintiffs' counsel in the California state-court action held leadership roles in management committees appointed to coordinate the state and federal actions. *See, e.g.*, Pls.' Opp. to Defs.' Mots. for Summary J., ECF No. 854, at 88-92 (listing committee member-

[1] Unless otherwise indicated, all ECF entries refer to the federal MDL docket, *In re: New Motor Vehicles Canadian Export Antitrust Litigation*, No. 2:03-md-01532-DBH (D. Me.).

ships). Although the precise terms of the joint prosecution agreement have not been disclosed to Ford Canada, *see* Pet. App. 23a-24a, subsequent public declarations seeking attorney's fees[2] in the federal MDL have revealed the extensive role that plaintiffs' counsel in the California state-court action played in the federal MDL.

Counsel for the California state-court plaintiffs played a "leading role" in "[e]stablishing an overall strategy for the conduct and settlement" of the federal MDL. Cooper Decl., ECF No. 1132-44, at 1-2. They actively participated in discovery, including defending "several days of the deposition of" the expert witness whose testimony the federal plaintiffs used to support their theory of antitrust injury. Corbitt Decl., ECF No. 1132-50, at 3. And they played a part in "drafting plaintiffs' motions for class certification" and briefs on the "summary judgment and *Daubert* motions" in the federal MDL. Cooper Decl. at 2; *see also* Pls.' Opp. to Defs.' Mots. for Summary Judgment at 92 (listing plaintiffs' counsels' signatures on summary judgment opposition in the federal MDL). Collectively, the California state-court plaintiffs' counsel logged thousands of hours of work in the federal MDL. *See* Cooper Decl. at Ex. B; Corbitt Decl. at Ex. B; *see also* Konopka Decl., ECF No. 1132-43, at Ex. B; Montague Decl., ECF No. 1132-42, at Ex. B; Saveri Decl., ECF No. 1132-47, at Ex. B.

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[2] The fee requests were generated by settlements with some of Ford Canada's co-defendants.

As the California trial court later put it, "[t]he lawyers" in this case "were the lawyers in the federal case, for years." Pet. App. 40a.

C. Plaintiffs Lose In Federal Court.

The District of Maine granted class certification in the federal MDL. *See In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 243 F.R.D. 20, 21-23 (D. Me. 2007). The court certified a nationwide class seeking injunctive relief under federal law and a damages class for each state, including California, under state law. *See id.*

The First Circuit reversed. The court held that plaintiffs lacked standing to seek injunctive relief based on conduct that occurred years in the past. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 522 F.3d 6, 15-16 (1st Cir. 2008). And it vacated the state damages classes, rejecting plaintiffs' "novel and complex" theory of injury. *Id.* at 27. The First Circuit concluded that the plaintiffs' expert in the federal MDL—the very expert whose deposition the California plaintiffs' counsel had defended—failed to offer sufficient testimony to demonstrate injury. *Id.* The court held that it was unclear "*how* the pivotal evidence behind plaintiff[s'] theory" of injury would ever "be established," *id.* at 29, and it remanded for the district court to "reconsider [its] class certification orders." *Id.* at 29-30.

Following the First Circuit's ruling, the California plaintiffs came to "believe that they ha[d] a better case for class certification under California procedural rules." *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 609 F. Supp. 2d 104, 106 (D. Me. 2009). Rather than wait for an adverse ruling on the defendants' fully-briefed summary judgment

motion, the two named plaintiffs raising California state-law claims moved to voluntarily withdraw from the federal MDL. *Id.* at 105-106. Ford Canada objected to the California plaintiffs' request for dismissal from the federal MDL after years of proceedings, and only after it became clear that their claims would fail in federal court. *See id.* at 106. The federal MDL court nevertheless granted the motion. *Id.*

Shortly after dismissing the California plaintiffs, the federal MDL court entered judgment for all defendants on all claims, holding "that the plaintiffs [were] unable to prove" their theory of injury. *In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 632 F. Supp. 2d 42, 63 (D. Me. 2009). No one appealed that decision, and the federal proceedings drew to a close.

D. Plaintiffs' Counsel Try Again In State Court.

1. After seeking dismissal from the federal MDL, the same plaintiffs' counsel returned to California state court to litigate the same claims against Ford Canada on behalf of the same putative California class, with a different set of named plaintiffs. Pet. App. 40a-41a. Other plaintiffs' counsel from the federal MDL returned to different state courts in an attempt to restart litigation there. *See id.* at 15a-16a.

The California state court reopened the state proceedings against Ford Canada and certified a class. *See In re Automobile Antitrust Cases I and II*, 204 Cal. Rptr. 3d 330, 338-339, 369 (Ct. App. 2016). Ford Canada then moved for judgment as a matter of law, arguing that plaintiffs' state-court suit was barred by

issue and claim preclusion. Pet. App. 1a. Ford Canada pointed out that the state-court plaintiffs had a full and fair opportunity to litigate their claims related to the alleged conspiracy in the federal MDL. *See id.* at 48a. Ford Canada also argued that issue preclusion applied, and that the state-court plaintiffs were bound by the federal MDL court's finding that they cannot show injury as a result of the alleged conspiracy. *See id.*

The California trial court granted Ford Canada's motion on claim-preclusion grounds. *Id.* As the court explained, "the main purpose of res judicata is to protect not just defendants subject to repeat litigation, but also more generally to inhibit multiple litigation causing vexation and expense to the parties and wasted effort and expense in judicial administration." *Id.* (internal quotation marks, footnote and emphases omitted). The trial court ruled that the California state-court plaintiffs were barred from choosing "to leave a forum where they have a full opportunity to litigate all their claims, have that case go to final judgment, and * * * then engage in further suits on the same cause of action" in California. *Id.*

2. Plaintiffs appealed, and the California Court of Appeal reversed. *Id.* at 28a. The court held that as a matter of federal law, neither issue nor claim preclusion barred plaintiffs' claims. *Id.*[3] The court

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[3] The court determined that California law tracked federal law on this issue. Pet. App. 17a n.7. This Court's practice when a "state-law determination appears to have been premised" on an erroneous determination of federal law is to "vacate the judgment of the state court and remand the case so that the court may reconsider the state-law question free of misapprehensions about the scope of federal law." *Three Affiliated*

acknowledged that under this Court's decision in *Taylor*, a non-party may be precluded from further litigation if it "assume[d] control" over earlier proceedings. 553 U.S. at 895 (quoting *Montana*, 440 U.S. at 154). But the court found that there was insufficient "control" here under a two-part test that it drew from the Restatement (Second) of Judgments, which asks whether a non-party (1) had an "effective choice as to the legal theories and proofs to be advanced on behalf of the party to the action" and (2) had "control over the opportunity to obtain review." Pet. App. 31a (quoting Restatement (Second) of Judgments § 39 cmt. c (1982)).[4]

According to the California Court of Appeal, it was not "persuaded" that "evidence of coordination among counsel establishes the California plaintiffs had effective choice as to the legal theories and proofs to be advanced in the federal proceeding" or "control over whether the federal plaintiffs sought appellate review of the federal court's summary judgment order." *Id.* The court acknowledged that its ruling deepened a split with respect to whether *Taylor*'s "control" test is met under "these circumstances," with courts in Tennessee and Wisconsin finding control under a totality of the circumstances

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Tribes of Fort Berthold Reservation v. *Wold Eng'g, P.C.*, 467 U.S. 138, 152 (1984). Indeed, in the California Supreme Court, Respondents opposed discretionary review on the basis that the decision below involved "federal law," and that this Court would be the "ultimate arbiter" of the issue. Cal. Sup. Ct. Answer to Pet. for Review 26.

[4] The California Court of Appeal adopted this two-part test in a revised opinion following Ford's rehearing petition, which the court denied. *See* Pet. App. 30a-32a.

approach, and courts in Arizona and New Mexico finding no control under the two-part test adopted by the court below. *Id.* at 27a.

The Supreme Court of California denied discretionary review. *Id.* at 52a-53a. This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW DEEPENS A CLEAR SPLIT ON THE TEST FOR "CONTROL" UNDER *TAYLOR*.

There is a deep and well-established conflict over the test for non-party "control" under *Taylor*. Seven circuits apply a totality of the circumstances approach to determine whether "control" has been established and preclusion applies. Four others apply a strict, two-part test that examines whether a non-party has (1) "effective choice as to the legal theories and proofs" and (2) "control over the opportunity to obtain review." Restatement (Second) of Judgments § 39 cmt. c (1982). The choice between these tests is outcome-determinative here, as demonstrated by the divergent rulings of the five courts that have examined whether non-party state-court plaintiffs are precluded from litigating state-law claims against Ford Canada following the dismissal of the federal MDL. Given this clear split, and its importance to the resolution of this case, the Court's intervention is warranted.

A. There Is A Clear Split Among Eleven Circuits.

The Court should grant certiorari to address the seven-to-four split among the federal circuits with respect to the legal test for "control" under *Taylor*.

Seven courts of appeals have adopted a totality-of-the-circumstances approach to evaluating "control." Under that approach, which is described in Wright & Miller, "[t]he measure of control by a nonparty that justifies preclusion cannot be defined rigidly." 18A Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, Federal Practice & Procedure: Jurisdiction § 4451 (3d ed. Apr. 2020 update). Instead, "[t]he question is essentially a matter of fact, to be determined by looking for that measure of 'practical control' that makes it fair to impose preclusion." *Id.* (footnotes omitted). Control exists, at a minimum, when "the relationship between the nonparty and a party was such that the nonparty had the same practical opportunity to control the course of the proceedings that would be available to a party." *Id.*

The First, Second, Ninth, Tenth, Eleventh, D.C., and Federal Circuits ascribe to this totality-of-the-circumstances approach. The First Circuit holds that "there is no bright-line test for gauging substantial control. The inquiry must be case-specific * * * and fact patterns are almost endlessly variable." *Gonzalez* v. *Banco Cent. Corp.*, 27 F.3d 751, 759 (1st Cir. 1994). The Second Circuit agrees, applying a "totality of the circumstances approach to the control theory of privity." *Conte* v. *Justice*, 996 F.2d 1398, 1402-03 (2d Cir. 1993) (citing *Watts* v. *Swiss Bank Corp.*, 265 N.E.2d 739 (N.Y. 1970)); *see also Chase Manhattan Bank, N.A.* v. *Celotex Corp.*, 56 F.3d 343, 345-346 & n.1 (2d Cir. 1995) (holding that federal and New York standards are the same).

The Ninth Circuit has likewise adopted the totality-of-the-circumstances approach. *See United States* v. *Bhatia*, 545 F.3d 757, 759-760 (9th Cir. 2008) (quoting 18A Wright & Miller § 4451, at 373 (2d ed.

2002)). Both the Tenth and Eleventh Circuits similarly consider non-exclusive "indicia of the exercise of control," citing this Court's decision in *Montana*. *Ponderosa Dev. Corp.* v. *Bjordahl*, 787 F.2d 533, 536-537 (10th Cir. 1986); *accord EEOC* v. *Pemco Aeroplex, Inc.*, 383 F.3d 1280, 1290 (11th Cir. 2004) (listing at least seven relevant factors). The D.C. Circuit takes a variety of "factors into consideration" when examining control. *Gulf Power Co.* v. *FCC*, 669 F.3d 320, 323-324 (D.C. Cir. 2012); *see also United States* v. *Rashed*, 234 F.3d 1280, 1282-83 (D.C. Cir. 2000) (quoting 18 Wright & Miller § 4451, at 428 (1981)). And the Federal Circuit applies a totality-of-the-circumstances approach. *See Wi-Fi One, LLC* v. *Broadcom Corp.*, 887 F.3d 1329, 1336 (Fed. Cir. 2018) (citing 18A Wright & Miller § 4451, at 356 (3d ed. 2017)).

In stark contrast, four federal circuits have adopted a two-part test for examining control drawn from the Restatement (Second) of Judgments. That test asks whether the non-party had (1) "effective choice as to the legal theories and proofs" and (2) "control over the opportunity to obtain review." Restatement (Second) of Judgments § 39 cmt. c (1982). The Third, Fourth, Fifth, and Sixth Circuits each apply this rigid test, requiring both elements to be met to find "control" under *Taylor*, regardless of other circumstances that may be present. *See Marshak* v. *Treadwell*, 240 F.3d 184, 195-196 (3d Cir. 2001); *Virginia Hosp. Ass'n* v. *Baliles*, 830 F.2d 1308, 1313 (4th Cir. 1987); *Benson & Ford, Inc.* v. *Wanda Petroleum Co.*, 833 F.2d 1172, 1174 (5th Cir. 1987);

Becherer v. *Merrill Lynch, Pierce, Fenner, & Smith, Inc.*, 193 F.3d 415, 423 (6th Cir. 1999) (en banc).[5]

In short, there is a clear split among eleven courts of appeals on an important issue of federal law. Further percolation is unnecessary; nearly every circuit has taken sides on this issue.[6] The Court's intervention is plainly warranted.

B. This Case Is An Excellent Vehicle To Resolve This Split.

This case is an excellent vehicle to resolve the split, which is outcome-determinative. Five state courts have now considered the precise issue here: whether the non-party state-court plaintiffs exercised suffi-

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[5] A similar conflict exists among the States regarding *state* preclusion law. *Compare, e.g.*, *Watts*, 265 N.E.2d at 743 (New York Court of Appeals holding "no single fact is determinative" of control "but all the circumstances must be considered"), *with State* v. *Lemmer*, 736 N.W.2d 650, 661 (Minn. 2007) (adopting the Restatement's two-part test). As the decision below exemplifies, many States consider their preclusion law coextensive with federal principles, meaning this Court's decision will provide needed guidance to state courts too. *See, e.g.*, Pet. App. 17a n.7 (finding no difference between California law and federal law); *Lemmer*, 736 N.W.2d at 661 (citing Fifth Circuit precedent as persuasive authority for adopting the Restatement's two-part test).

[6] There is an independent split with respect to whether the "control" test applies to both claim preclusion and issue preclusion. *Compare Gonzalez*, 27 F.3d at 756-757 (First Circuit holding that it does), *with Avondale Shipyards, Inc.* v. *Insured Lloyd's*, 786 F.2d 1265, 1272 (5th Cir. 1986) (holding that it does not). Because Ford Canada urges both issue and claim preclusion, and the court below found the absence of control sufficient to dispose of both, Pet. App. 28a, that conflict is not implicated by this petition.

cient "control" over the federal MDL to be precluded from raising their antitrust and consumer protection claims in later state-court proceedings. The test for "control" adopted by those courts has dictated the outcome of that question, demonstrating the need for this Court's intervention.

Two courts—in Tennessee and Wisconsin—have concluded that the "control" requirement is met under the circumstances here. In *Johnson* v. *General Motors Corp.*, 574 S.W.3d 347 (Tenn. Ct. App. 2018), the Tennessee court examined a number of factors, including that the plaintiffs' attorneys in the state-court proceeding were "part of the group of plaintiffs whose attorneys collaboratively made strategic and procedural decisions pursuant to their joint prosecution agreement." *Id.* at 354-355. It found control in part based on that collaboration. *See id.* at 355. In *Rasmussen* v. *General Motors Co.*, a Wisconsin court rejected state plaintiffs' argument that the two-part Restatement test applied, and instead examined the overall level of "input" of state plaintiffs in the federal MDL. Pet. App. 73a. It too found control on the ground that the state-court plaintiffs "had seemingly significant strategic" influence over "case strategy, arguments presented to the federal court, and the decision not to appeal." *Id.*

In contrast, three courts—in California, Arizona, and New Mexico—have applied the Restatement's two-part test, and found no control under the facts here. In the decision below, the California Court of Appeal held that neither requirement was met. *See id.* at 31a. The Arizona and New Mexico courts focused on the second prong of the two-part test, and found no "control" after concluding there was no evidence the non-party state-court plaintiffs had

"control over the opportunity to obtain review." *Id.* at 83a (quoting Restatement (Second) of Judgments § 39 cmt. c (1982)); *see id.* at 100a.

The divergent outcomes among five state courts on the same facts demonstrate that the legal standard adopted by the court below is outcome-determinative. And it counsels in favor of granting certiorari here: Whether a non-party plaintiff has exercised "control" sufficient to preclude relitigation of the same claims in a different forum should not be a matter of geography. This Court should grant certiorari.

II. THE DECISION BELOW IS WRONG.

This Court should vacate the decision below, which adopted the wrong legal test for "control." There is no basis for limiting that test to the two factors described in the Restatement, which do not reflect the full range of factual circumstances relevant to determining whether a non-party exercised sufficient influence over prior litigation. This Court should instead adopt the majority approach, which looks to the totality of the circumstances when evaluating "control."

The Restatement does not provide any explanation for the two factors that it selected to demonstrate "control," and there is none. Indeed, the Reporter's Note recognized that, when the Restatement was adopted, the "issue of what constitutes control ha[d] not often been carefully examined." Restatement (Second) of Judgments § 39, Reporter's Note cmt. c (1982). And it states that the "inference of control may be drawn from the concurrence of several" circumstances, *id.*, without explaining how that conclusion is consistent with the rigid two-part test

for control espoused by the Restatement's text, *see id.* § 39 cmt. c (describing two "[e]lements of control").

Nor do the circuit court decisions adopting the Restatement's two-part test explain why that test is appropriate. In *Marshak*, the Third Circuit describes the Restatement's analysis of control as "aptly stated," but it does not analyze whether a different test is more consistent with evaluating preclusion. 240 F.3d at 195-196. In *Virginia Hospital Association*, the Fourth Circuit cites the Restatement as espousing the position of "leading commentators," yet it fails to explain why a rigid two-part test is the correct approach. 830 F.2d at 1313. The Fifth Circuit likewise adopted the Restatement's test without analysis, *see Benson*, 833 F.2d at 1174, and the en banc Sixth Circuit in turn simply relied on the Fifth Circuit's decision, *see Becherer*, 193 F.3d at 423. The decision below similarly fails to explain why it applied the Restatement's two-part test, rather than examining other circumstances that bear on the issue of control. *See* Pet. App. 31a.

Given the variety of arrangements that can constitute control, the majority's totality-of-the-circumstances approach is the better standard. As Wright & Miller explains, "control" is "essentially a matter of fact," and the "measure of control by a nonparty that justifies preclusion cannot be defined rigidly." 18A Wright & Miller § 4451 (3d ed. Apr. 2020 update). Instead, the "fact patterns are almost endlessly variable." *Gonzalez*, 27 F.3d at 759; *see Conte*, 996 F.2d at 1402 (holding that "[d]ue in large part to the general nature of litigation * * * no single factor is determinative upon the issue of control"). A non-party's participation in earlier litigation "may be overt or covert, and the evidence of it may be direct

or circumstantial." *Gonzalez*, 27 F.3d at 759. The "critical judgment" whether a non-party has exercised sufficient control thus "cannot be based on isolated facts," but "must consider the totality of the circumstances." *Id.*

The inquiry therefore should not be limited to the two factors identified by the Restatement, but should include any factors that may be relevant. Such an approach is consistent with this Court's decision in *Montana*, where the Court "listed several indicia of the exercise of control sufficient" to find preclusion "against a nonparty." *Ponderosa Dev. Corp.*, 787 F.2d at 536; *see Montana*, 440 U.S. at 155 (describing factors demonstrating control). Indeed, *Montana* cited with approval the New York Court of Appeal's decision in *Watts*—one of the most influential published opinions on the subject of control—which held that "no single fact is determinative," meaning "all the circumstances must be considered." 265 N.E.2d at 743-744. A practical approach also better accords with the common-law roots of preclusion doctrine. *See Montana*, 440 U.S. at 153 (referring to preclusion as "[a] fundamental precept of common-law adjudication"). The "common-law tradition" "calls for case-by-case analysis," and is ill served by "bright-line rules." *Campbell* v. *Acuff-Rose Music, Inc.*, 510 U.S. 569, 577 (1994); *see also Bhd. of R.R. Trainmen* v. *Jacksonville Terminal Co.*, 394 U.S. 369, 388 (1969).

Taylor is instructive. There, the court rejected "virtual representation," an "amorphous" concept that had no relationship to any of the "established categories" of non-party preclusion. 553 U.S. at 895, 898. In so doing, it provided guidance on the analytically distinct question presented here: how to determine the existence of one of the "established

categories" of relationships that *Taylor* recognized and approved. This guidance favors the majority approach. The *Taylor* Court looked to the entire "record" for any "indication" whether one of those established categories—including "control"—existed. *Id.* at 904-905. And, unlike with virtual representation, there is no danger that courts will lack any "standard" to "provide[ ] * * * firm guidance" in evaluating the record. *Id.* at 901. The concept has benefitted from frequent litigation in other contexts, including agency and corporate law. *See id.* at 906 (recognizing "principles of agency law are suggestive" when determining whether a "suit is subject to the control" of a non-party). In those contexts, courts look to all the circumstances to determine whether control exists. Restatement (Third) of Agency § 1.01 cmt. f(1) (2006) ("Control is a concept that embraces a wide spectrum of meanings * * * ."); *Rochester Tel. Corp.* v. *United States*, 307 U.S. 125, 145 (1939) (rejecting "artificial tests of control" in corporate context, and holding control "is an issue of fact to be determined by the special circumstances of each case").

In the decision below, the California Court of Appeal applied the wrong test. Instead of examining the totality of the circumstances, the court looked only to the two factors identified by the Restatement, concluding that there was insufficient evidence that the California state-court plaintiffs "had effective choice as to the legal theories and proofs to be advanced in the federal proceeding" or the ability to control the litigation. Pet. App. 31a. It therefore overlooked factors that other courts have found relevant to the issue of control under the circumstances here, including that state plaintiffs' counsel

entered "into a confidential Joint Prosecution Agreement between the state and federal plaintiffs' attorneys, which was designed to protect the interests of all plaintiffs, state and federal"; participated "in strategic decisions regarding the claims, theories, discovery, and hiring of experts"; appeared "in the federal action on behalf of [state plaintiffs]"; and signed "on to the opposition to the summary judgment motion that ended the federal action." *Johnson*, 574 S.W.3d at 355.

By failing to fully consider all relevant indicia of control, the court below reached the wrong result.[7] Under the totality of the circumstances, the California state plaintiffs had sufficient control over the federal MDL and are therefore subject to preclusion. This Court should grant certiorari and vacate the contrary ruling below.

III. THE QUESTION PRESENTED IS IMPORTANT.

The question presented is critically important, for three reasons.

First, the totality of the circumstances test adopted by seven circuits imposes an important check on gamesmanship by litigants. Here, many of the same

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[7] It makes no difference that the federal MDL court erroneously believed its judgment would have no preclusive effect on the California plaintiffs. *See In re New Motor Vehicles Canadian Exp. Antitrust Litig.*, 609 F. Supp. 3d at 106 & n.5. It cited no authority supporting that assumption, *id.*, and in any event the decision was not that court's to make, *see Smith* v. *Bayer Corp.*, 564 U.S. 299, 307 (2011) ("After all, a court does not usually get to dictate to other courts the preclusion consequences of its own judgment." (internal quotation marks omitted)).

plaintiffs' counsel litigated California state law claims against Ford Canada in a federal MDL for *almost a decade*. When it became clear that those claims were unlikely to succeed in federal court, plaintiffs' counsel withdrew from the federal MDL, and then proceeded to litigate the *very same claims* in California state court. Following their loss in the federal MDL, many of the same plaintiffs' counsel similarly returned to other state courts for a second bite at the apple.

The totality of the circumstances test for "control" allows courts to take into account this kind of gamesmanship—and other similar litigation tactics—when determining whether preclusion applies. *See supra* pp. 16 (finding control under these facts). The rigid two-part test espoused by the court below, in contrast, does not allow courts to consider strategic maneuvering by plaintiffs' counsel when evaluating preclusion. *See supra* pp. 16-17 (finding two-part test is not met in follow-on state-court litigation). As the First Circuit has emphasized, a non-party's participation in earlier litigation "may be overt or covert, and the evidence of it may be direct or circumstantial." *Gonzalez*, 27 F.3d at 759. Courts should accordingly be afforded discretion to make the "critical judgment" whether a non-party's involvement in prior litigation qualifies as "control" under *Taylor*. *Id.*

Second, the two-part test for control adopted by four courts of appeals, in addition to the court below, is a particularly poor fit in the context of increasingly common multi-district litigation. It may be difficult to demonstrate that any individual plaintiff has "effective choice as to the legal theories and proofs" presented, or control over an appeal, Restatement

(Second) of Judgments § 39 cmt. c (1982), in a multi-district litigation where dozens of plaintiffs' counsel represent scores of named plaintiffs, and litigation choices are made by committees. Yet there may be other factors—including a joint prosecution agreements, participation in the development of case strategy, and direct involvement in the briefing process—that are relevant to whether a non-party exercised control over earlier litigation. Courts should have the ability to consider these indicia of control, particularly in the context of complex proceedings.

Third, the diverging tests for "control" adopted by eleven courts of appeals, as well as numerous state courts, facilitate forum shopping. The decision below will embolden plaintiffs' counsel who lose in one forum to try again—with different named plaintiffs—in another forum that applies the Restatement's two-part test for "control." The likelihood of forum shopping will increase in situations involving complex litigation, where that two-part test is less likely to apply, increasing "the expense and vexation attending multiple lawsuits," the waste of "judicial resources," and the "possibility of inconsistent decisions." *Taylor*, 553 U.S. at 892 (quoting *Montana*, 440 U.S. at 153-154). Such a result is fundamentally inconsistent with the development of "uniform federal rules" of preclusion, "which this Court has ultimate authority to determine and declare." *Id.* at 891 (internal quotation marks and alteration omitted). This Court should exercise that authority here and grant certiorari.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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