No. 23-13

IN THE
Supreme Court of the United States

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

Petitioner,

v.

TRAVIS ABBOTT; JULIE ABBOTT,

Respondents.

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

BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, THE AMERICAN TORT REFORM ASSOCIATION, THE AMERICAN CHEMISTRY COUNCIL, AND BUSINESS ROUNDTABLE IN SUPPORT OF PETITIONER

Brian D. Schmalzbach
Counsel of Record
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-4746
bschmalzbach@mcguirewoods.com

(additional counsel listed on inside cover)

Jennifer B. Dickey
Andrew R. Varcoe
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Counsel for American Tort Reform Association

Aleacia Chinkhota
AMERICAN CHEMISTRY COUNCIL
700 2nd Street, NE
Washington, DC 20002

Counsel for the American Chemistry Council

Liz Dougherty
BUSINESS ROUNDTABLE
1000 Maine Avenue SW
Washington, DC 20024

Counsel for Business Roundtable

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF AMICI CURIAE 1

INTRODUCTION AND SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. The expansion of offensive nonmutual collateral estoppel to mass tort bellwether trials is a question of exceptional importance. 5

A. The lower court's unprecedented contraction of defendants' trial rights violates core constitutional guarantees. 5

B. The lower court's rewriting of collateral estoppel doctrine is fundamentally unfair under *Parklane Hosiery*. 9

II. The lower court's holding threatens the bellwether system that is critical to managing the massive federal MDL docket and controlling litigation costs for American businesses. 11

CONCLUSION 14

TABLE OF AUTHORITIES

Page(s)

Cases

Auchard v. Tennessee Valley Auth.,
2011 WL 444845 (E.D. Tenn. Feb. 1, 2011) 14

Bigelow v. Old Dominion Copper Mining & Smelting Co.,
225 U.S. 111 (1912) 7

Blonder-Tongue Lab'ys, Inc. v. Univ. of Illinois Found.,
402 U.S. 313 (1971) 7

In re Chevron U.S.A., Inc.,
109 F.3d 1016 (5th Cir. 1997) 6, 7, 8, 11, 12, 13

Cimino v. Raymark Indus., Inc.,
151 F.3d 297 (5th Cir. 1998) 8, 11

Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.,
527 U.S. 308 (1999) 6

Heine v. Bd. of Levee Comm'rs,
86 U.S. 655 (1873) 6

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 6

Liu v. SEC,
140 S. Ct. 1936 (2020) 6

In re Methyl Tertiary Butyl Ether (MTBE) Prods.,
2007 WL 1791258 (S.D.N.Y. June 15, 2007) 12

Missouri v. Jenkins,
515 U.S. 70 (1995) 7

Montana v. United States,
440 U.S. 147 (1979) 7

Nations v. Sun Oil Co.,
705 F.2d 742 (5th Cir. 1983) 6

Parklane Hosiery Co. v. Shore,
439 U.S. 322 (1979) 3, 5, 7, 9

Setter v. A.H. Robins Co.,
748 F.2d 1328 (8th Cir. 1984) 9

Other Authorities

4 Newberg on Class Actions § 11:20 (6th ed. 2022) ... 5

Comment, *Privity and Mutuality in the Doctrine of Res Judicata*,
35 Yale L. J. 607 (1926) 7

Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*,
9 Stan. L. Rev. 281 (1957) 8, 10

de Villiers, *Technology Risk and Issue Preclusion: A Legal and Policy Critique*,
9 Cornell J.L. & Pub. Pol'y 523 (2000) 14

Fallon, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323 (2008) 13

Gilles, *Rediscovering the Issue Class in Mass Tort MDLs*, 53 Ga. L. Rev. 1305 (2019) 11

Restatement (First) of Judgments § 93 (1942) 7

Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 Rev. Litig. 691 (2006) 12

U.S. Chamber Institute for Legal Reform, *Trials and Tribulations*, https://bit.ly/ILRLink (Oct. 21, 2019) 3

U.S. Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation* (2021), https://bit.ly/MDLAnalysis2021 12

Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket* (Feb. 19, 2020), https://bit.ly/3hNgCdp 12

INTEREST OF AMICI CURIAE*

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the court. To that end, the Chamber regularly files amicus briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed amicus briefs in cases involving important liability issues.

The American Chemistry Council ("ACC") represents the leading companies engaged in the

---

* Under Rule 37.6, no counsel for a party has authored this brief in whole or in part, and no person other than *amici curiae*, their members, or their counsel made a monetary contribution to fund its preparation or submission. Counsel of record for all parties were timely notified under Rule 37.2 of *amici curiae*'s intent to file this brief.

business of chemistry. ACC members apply the science of chemistry to make innovative products and services that make people's lives better, healthier, and safer. ACC is committed to improved environmental, health and safety performance through Responsible Care ®; common sense advocacy designed to address major public policy issues; and health and environmental research and product testing. ACC members and chemistry companies are among the largest investors in research and development and are advancing products, processes, and technologies to address climate change, enhance air and water quality, and progress toward a more sustainable, circular economy.

Business Roundtable is an association of more than 200 chief executive officers (CEOs) of America's leading companies, representing every sector of the U.S. economy. Business Roundtable CEOs lead U.S.-based companies that account for one in four American jobs and almost a quarter of U.S. GDP. Business Roundtable was founded on the belief that businesses should play an active and effective role in the formulation of public policy, and Business Roundtable members develop and advocate for policies to promote a thriving U.S. economy and expanded opportunity for all. Business Roundtable participates in litigation as *amicus curiae* when important business interests are at stake.

Members of amici and their subsidiaries include a broad array of businesses that have litigated as defendants in MDL proceedings and mass tort litigation. Amici thus are familiar with mass tort

litigation and MDL proceedings generally, both from the perspective of individual defendants in mass litigation proceedings and from a more global perspective across MDLs. *See, e.g.*, U.S. Chamber Institute for Legal Reform, *Trials and Tribulations*, https://bit.ly/ILRLink (Oct. 21, 2019). Amici have a significant interest in this case because the Sixth Circuit's novel expansion of non-mutual offensive collateral estoppel raises an issue of exceptional importance for businesses in MDLs nationwide.

INTRODUCTION AND SUMMARY OF ARGUMENT

Over a vigorous dissent, a Sixth Circuit panel majority approved an unprecedented prohibition on a defendant litigating key issues in a mass-tort MDL based on the nonmutual offensive collateral estoppel consequences of just *three* early trials. App.24-25. That decision ripped the guardrails off offensive collateral estoppel that this Court placed around mass-tort litigation. And the lower court's blessing of that doctrine in the name of administrative efficiency threatens our constitutional traditions and common sense. *See* App.55-56 (Batchelder, J. dissenting) ("The district court's concern for efficiency, while understandable, does not outweigh these overarching due-process concerns.").

This Court's intervention is needed because the divided panel erred on this exceptionally important question and skirted the requirements for fundamental fairness in nonmutual collateral estoppel under *Parklane Hosiery Co. v. Shore*, 439 U.S. 322

(1979). If not corrected, the panel decision will not only distort this significant MDL, but foster an MDL system that tilts the playing field against all defendants. Here, three early trials—less than *one percent* of cases in this MDL—ended in plaintiff verdicts. No court would deny the thousands of other MDL claimants their day in court just because the first few juries found no duty or causation as to the first few plaintiffs. And justly so: estopping the plaintiffs in those other cases because *other* plaintiffs had failed would strip them of foundational constitutional trial rights. But the panel majority saw no problem with stripping a *defendant* of those rights. That approach puts all the risk on mass tort defendants, and pushes all the reward to mass tort claimants.

That approach is not only unfair to MDL defendants—it is bad for MDL management generally. Informational bellwethers are a critical tool for managing the massive MDL docket. They facilitate settlement and reduce litigation costs by helping parties understand the risks and value cases accordingly. But American businesses cannot accept the risk of the "heads I win, tails you lose" rule for bellwethers applied here. The panel majority's shortsighted ruling thus would discourage one of the most important docket-management tools for mass tort litigation. And it would cripple the efficiency of the MDL system by coercing defendants to litigate each case as if binding on every issue forevermore. The Court should grant DuPont's petition and reverse the decision below to ensure that each party in each case gets its day in court.

ARGUMENT

I. The expansion of offensive nonmutual collateral estoppel to mass tort bellwether trials is a question of exceptional importance.

The Sixth Circuit erred on a question of exceptional importance to American businesses by holding that the Constitution permits extending nonmutual offensive collateral estoppel into MDLs. App.22-27. This Court should grant DuPont's petition to halt that unconstitutional expansion of this doctrine. *See generally* 4 Newberg on Class Actions § 11:20 (6th ed. 2022) (citing cases holding that "bellwether trials do not bind the other cases in the pool" absent agreement).

A. The lower court's unprecedented contraction of defendants' trial rights violates core constitutional guarantees.

The Sixth Circuit's novel expansion of offensive nonmutual collateral estoppel invites at least three sorts of widespread constitutional infractions.

First, "estop[ping] a defendant from relitigating the issues which the defendant previously litigated and lost against another plaintiff" raises important due process concerns. *Parklane Hosiery*, 439 U.S. at 329. Those due process concerns arise "based on the lack of fundamental fairness contained in a system that permits the extinguishment of claims or the imposition of liability in nearly 3,000 cases based upon

results" of a handful of bellwether trials. *In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997). That is, "[e]ssential to due process for [all] litigants" in mass tort litigation "is their right to the opportunity for an individual assessment of liability and damages in each case." *Id.* at 1023 (Jones, J., specially concurring).

Moreover, the panel majority's expansion of nonmutual offensive collateral estoppel to this MDL appears to exceed the original equitable powers of federal courts. *See Blonder-Tongue Lab'ys, Inc. v. Univ. of Illinois Found.*, 402 U.S. 313, 334 (1971); *see also Nations v. Sun Oil Co.*, 705 F.2d 742, 744 (5th Cir. 1983) ("Collateral estoppel is an equitable doctrine."). Courts applying those powers must not "depart from all precedent and assume an unregulated power of administering abstract justice at the expense of well-settled principles." *Heine v. Bd. of Levee Comm'rs*, 86 U.S. 655, 658 (1873); *see also Grupo Mexicano de Desarrollo S.A. v. All. Bond Fund, Inc.*, 527 U.S. 308, 327 (1999) (rejecting "relief sought by respondents [that] does not have a basis in the traditional powers of equity courts."); *Liu v. SEC*, 140 S. Ct. 1936, 1954 (2020) (Thomas, J., dissenting) ("[T]he Founders accepted federal equitable powers only because those powers depended on traditional forms."). Departures from that traditional common law baseline likewise suggest a violation of the Due Process Clause. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) ("[T]his Court has not hesitated to find the proceedings violative of due process" when "a party has been deprived of liberty or property without the safeguards of common-law procedure.").

"Until relatively recently," *Parklane Hosiery*, 439 U.S. at 326, it was "a principle of general elementary law that the estoppel of a judgment must be *mutual*." *Bigelow v. Old Dominion Copper Mining & Smelting Co.*, 225 U.S. 111, 127 (1912) (emphasis added); *accord Montana v. United States*, 440 U.S. 147, 153 (1979) (mutuality requirement is a "fundamental precept of common-law adjudication"); Restatement (First) of Judgments § 93 (1942) ("[F]indings [of law or fact] . . . do not, however, affect persons who are not parties or privies to the action and the judgment."). That mutuality principle is "of ancient origin, being found in the Year Books and in the Roman law." Comment, *Privity and Mutuality in the Doctrine of Res Judicata*, 35 Yale L. J. 607, 608 (1926). Further departures from that requirement rest on increasingly shaky constitutional ground. *Missouri v. Jenkins*, 515 U.S. 70, 124 (1995) (Thomas, J., concurring) ("As with any inherent judicial power [], we ought to be reluctant to approve its aggressive or extravagant use, and instead we should exercise it in a manner consistent with our history and traditions.").

Second, even if nonmutual offensive estoppel were *ever* allowed in mass tort cases (*contra* Petition 16-25), due process requires "safeguards designed to ensure that the [non-tried] claims against [the defendant] . . . are determined in a proceeding"—here, the bellwether trial—"that is reasonably calculated to reflect the results that would be obtained if those claims were actually tried." *In re Chevron*, 109 F.3d at 1020. So to have preclusive effect, a bellwether trial or trials must *at least* reflect "a randomly selected,

statistically significant sample" to adequately represent the other claims. *Id.* at 1021; *see also* App.50 (Batchelder, J., dissenting) ("[D]ue process requires an additional safeguard before a court can declare mass-tort preclusion on an issue of liability against a defendant: the court must ensure that the sample of bellwether plaintiffs is reasonably representative of the rest.").

Here, however, the district court made no finding that these three bellwethers were representative of the MDL. App.46 (Batchelder, J., dissenting). To the contrary, one of the bellwethers was cherry-picked by the plaintiffs' steering committee for its *non-representativeness* after the district court ordered that committee to prioritize "the most severely impacted plaintiffs." MDL.Dkt.4624 at 25. That procedure invited the sort of "aberrational judgment" that makes offensive nonmutual collateral estoppel fundamentally unfair. Currie, *Mutuality of Collateral Estoppel: Limits of the Bernhard Doctrine*, 9 Stan. L. Rev. 281, 289 (1957); App.52 ("[I]t is fundamentally unfair for a small, non-representative sample of bellwether plaintiffs to bind a defendant in thousands of future cases.").

Third, Seventh Amendment right-to-jury principles are implicated when defendants lose their day in court just because some other jury already decided a different plaintiff's claims based on other evidence. *See, e.g.*, *Cimino v. Raymark Indus., Inc.*, 151 F.3d 297, 319-20 (5th Cir. 1998) (reversing damages judgments extrapolated from earlier bellwethers on Seventh Amendment grounds because

"there was neither any sort of trial determination, let alone a jury determination, nor even any evidence, of damages" specifically for those extrapolated judgments).

B. The lower court's rewriting of collateral estoppel doctrine is fundamentally unfair under *Parklane Hosiery*.

Besides introducing those constitutional defects, the decision below also flouts the "general rule" that nonmutual offensive collateral estoppel is impermissible when it "would be unfair to a defendant." *Parklane Hosiery*, 439 U.S. at 331. And as this Court recognized in *Parklane Hosiery*, that unfairness is present in spades when a mass-tort defendant is precluded from litigating an issue on which different juries could reasonably reach different results. *Id.* at 330 & n.14.

That mass-tort litigation rule makes good sense. On a long enough timeline, mass tort litigation *will* produce inconsistent verdicts. *See, e.g.*, *Setter v. A.H. Robins Co.*, 748 F.2d 1328, 1330 (8th Cir. 1984) (affirming denial of nonmutual offensive collateral estoppel in mass tort litigation given the history of both plaintiff and defense verdicts over 21 trials). But it's not just the fifth or twenty-fifth verdict that might be anomalous. "Professor Currie's familiar example" of mass-tort litigation over railroad collision injuries illustrates the problem. *Parklane Hosiery*, 439 U.S. at 330-31 & n.14. As that example discussed in *Parklane*

Hosiery makes clear, the early verdicts themselves may be aberrational:

> If we are unwilling to treat the judgment against the railroad as res judicata when it is the last of a series, all of which except the last were favorable to the railroad, it must follow that we should also be unwilling to treat an adverse judgment as res judicata even though it was rendered in the first action brought, and is the only one of record. Our aversion to the twenty-sixth judgment as a conclusive adjudication stems largely from the feeling that such a judgment in such a series must be an aberration, but we have no warrant for assuming that the aberrational judgment will not come as the first in the series.

Currie, 9 Stan. L. Rev. at 289.

Indeed, defendants especially risk an "aberrational judgment" in the first few trials when, as here, counsel can push initial "case[s] in which the factors exciting sympathy for the plaintiff are very strong" or where "the opportunity to present an effective defense is subject to maximum handicaps." *Id.* at 288-89. That risk of attaching preclusive effect to an aberrational verdict exemplifies the unfairness that forecloses collateral estoppel here. *See id.* at 287 ("Can it still be said that he ought not to complain if the twenty-five successful outcomes are ignored, and the one aberrational verdict is elevated to the status of objective truth?"). That is why "*Parklane Hosiery*

. . . was plainly hostile to the idea of applying its estoppel doctrine in a setting like the modern MDL, where an individual trial takes place with hundreds or even thousands of claimants waiting in the wings." Gilles, *Rediscovering the Issue Class in Mass Tort MDLs*, 53 Ga. L. Rev. 1305, 1310 (2019).

Constitutional and prudential safeguards therefore prohibit the use of tempting shortcuts for "streamlining litigation proceedings," like those the district court adopted and the Sixth Circuit affirmed. App.108; *contra Cimino*, 151 F.3d at 321 (5th Cir. 1998) (reversing judgments in asbestos "extrapolation cases," based on results of prior bellwether trials, while acknowledging "the asbestos crises" of clogged dockets); *In re Chevron*, 109 F.3d at 1023 (Jones, J., specially concurring) ("Essential to due process for litigants, including both the plaintiffs and Chevron in this non-class action context, is their right to the opportunity for an individual assessment of liability and damages in each case."). Certiorari is necessary to prevent those safeguards from being sacrificed on the altar of purported administrative expediency.

II. The lower court's holding threatens the bellwether system that is critical to managing the massive federal MDL docket and controlling litigation costs for American businesses.

The Sixth Circuit's approach to bellwethers is not just improper; it would discourage one of the most important MDL docket management tools available.

MDLs are a big deal for the federal judiciary. As of 2021, 391,953 actions were pending in MDL proceedings. U.S. Judicial Panel on Multidistrict Litigation, *Statistical Analysis of Multidistrict Litigation* (2021), https://bit.ly/MDLAnalysis2021. Just a year before that, it was 327,204 actions. *Id.* That's over half of the entire federal civil caseload. *See* Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket* (Feb. 19, 2020), https://bit.ly/3hNgCdp.

Bellwether trials have "achieved general acceptance by both bench and bar" to avoid hundreds or thousands of trials in mass tort MDLs by facilitating settlement evaluation. *In re Chevron*, 109 F.3d at 1019. That model envisions juries resolving "a small number of selected [bellwethers] to give the parties a sense of how the legal and factual issues play out in different cases." Sherman, *Segmenting Aggregate Litigation: Initiatives and Impediments for Reshaping the Trial Process*, 25 Rev. Litig. 691, 696 (2006). Bellwethers "allo[w] a court and jury to give the major arguments of both parties due consideration without facing the daunting prospect of resolving every issue in every action." *In re Methyl Tertiary Butyl Ether (MTBE) Prods.*, 2007 WL 1791258, at *2 (S.D.N.Y. June 15, 2007).

Bellwethers, when conducted properly, thus are critical to facilitating settlement of sprawling mass tort litigation. *See id.* ("[R]esolution of these [crucial] issues [in bellwether trials] often facilitates settlement of the remaining claims."). By litigating a handful of claims that are representative of the "large[r] group of claimants," bellwethers "provide a

basis for enhancing prospects of settlement." *In re Chevron*, 109 F.3d at 1019. "By selecting for trial a handful of cases that represent a cross-section of all the various actions filed in the MDL, the object is to establish non-binding benchmark parameters that will help guide the parties in the settlement process." *Rediscovering the Issue Class*, 53 Ga. L. Rev. at 1311. But *guiding* the parties, by giving them data to inform their settlement positions and strategies, is fundamentally different from *binding* the parties.

Most appellate courts have thus been deeply "skeptical" of treating bellwether trials as preclusive, "recogniz[ing] that the results of bellwether trials are not properly binding on related claimants unless those claimants expressly agree to be bound by the bellwether proceedings." Fallon, *Bellwether Trials in Multidistrict Litigation*, 82 Tul. L. Rev. 2323, 2331 n.27 (2008). There is "good reason" for that skepticism. *Id.* at 231. If courts could retroactively make informational bellwethers preclusive, the bellwether model would be finished. Even ostensibly informational bellwethers would be subject to the flip of a switch, in the name of a court's claimed interest in administrative efficiency, making preclusive what was once informational. Defendants would have no incentive to participate in such a bellwether scheme.

American businesses (the typical mass tort defendants) would bear the brunt of the Sixth Circuit's new preclusive regime. Had the informational bellwethers here ended with defense verdicts—say, a finding of no duty—no court would retroactively decide that those bellwethers foreclose other MDL

claims. *See, e.g.*, *Auchard v. Tennessee Valley Auth.*, 2011 WL 444845, at *2 (E.D. Tenn. Feb. 1, 2011) ("The Court recognizes that bellwether trials must bind only those persons who take part in the trial in order to assure that each Plaintiff is afforded his or her constitutional rights."). Thus, the panel's expansion of nonmutual collateral estoppel would threaten American businesses with ruinous liability, but with none of the party-neutral benefits achieved from informational bellwethers. *See, e.g.*, de Villiers, *Technology Risk and Issue Preclusion: A Legal and Policy Critique*, 9 Cornell J.L. & Pub. Pol'y 523, 524 (2000) ("Liberal application of collateral estoppel in product liability . . . has been criticized for putting the survival of entire industries at risk based on a single, possibly erroneous, judgment."). The lower court's unleashing of offensive collateral estoppel thus is neither constitutional nor good MDL management.

CONCLUSION

This Court should grant DuPont's petition, reverse the Sixth Circuit's unconstitutional, unprecedented, and unwise expansion of nonmutual offensive collateral estoppel, and remand for a trial including the improperly estopped issues.

Respectfully submitted,

Jennifer B. Dickey
Andrew R. Varcoe
U.S. CHAMBER LITIGATION CENTER
1615 H Street, NW
Washington, DC 20062

Counsel for the Chamber of Commerce of the United States of America

Brian D. Schmalzbach
Counsel of Record
MCGUIREWOODS LLP
800 East Canal Street
Richmond, VA 23219
(804) 775-4746
bschmalzbach@mcguirewoods.com

Counsel for Amici Curiae

H. Sherman Joyce
Lauren Sheets Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, NW
Suite 400
Washington, DC 20036

Counsel for American Tort Reform Association

Aleacia Chinkhota
AMERICAN CHEMISTRY COUNCIL
700 2nd Street, NE
Washington, DC 20002

Counsel for the American Chemistry Council

Liz Dougherty
BUSINESS ROUNDTABLE
1000 Maine Avenue SW
Washington, DC 20024

Counsel for Business Roundtable

AUGUST 4, 2023