

No. 09-1205

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IN THE  
**Supreme Court of the United States**

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KEITH SMITH AND SHIRLEY SPERLAZZA,

*Petitioners,*

*v.*

BAYER CORPORATION,

*Respondent.*

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

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**BRIEF OF STEVEN J. THOROGOOD &  
MARTIN MURRAY AS *AMICI CURIAE*  
IN SUPPORT OF PETITIONERS**

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**INTEREST OF *AMICI CURIAE***

*Amici* Steven J. Thorogood (“Thorogood”) and Martin Murray (“Murray”), submit this brief as *amici curiae* in support of Petitioners, Keith Smith and Shirley Sperlazza (“Petitioners”), before this Court in favor of reversal.<sup>1</sup> Both the *Thorogood*<sup>2</sup> and *Murray*<sup>3</sup> litigations present similar issues of law that are relevant to the adjudication of this case.

Thorogood, originally certified by the United States District Court for the Northern District of Illinois (“Illinois Federal District Court”) to proceed as a 29-jurisdiction class, was reversed and ordered decertified by the Seventh Circuit, upon Federal Rule of Civil Procedure 23(f) review. *Thorogood v. Sears, Roebuck & Co.*, 547 F.3d 742 (7th Cir. 2008) (“*Thorogood I*”). Thereafter, Defendant Sears Roebuck & Co. (“Sears”) mooted Thorogood’s individual claim involuntarily by offer of judgment. *Thorogood v. Sears, Roebuck & Co.*, 595 F.3d 750 (7th Cir. 2010) (“*Thorogood II*”).

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1. No counsel for a party authored this brief in whole or in part, and no such counsel of party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than the *amici curiae*, or their counsel, made a monetary contribution to its preparation or submission. The parties have provided their consent to the filing of this brief, which have been included with Amici’s submission to the Court.

2. *Thorogood v. Sears Roebuck & Co.*, Case No. 6-C-1999 (N.D. Ill.).

3. *Murray v. Sears Roebuck & Co.*, Case No. c-09-5774-cw (N.D.Cal.).

Murray, a California resident, subsequently brought similar, but not identical consumer fraud claims in California, asserting purely California state claims based on California substantive law for a single-state California class of consumers. *Murray v. Sears, Roebuck & Co.*, et al, No. c-09-5744-cw (N.D.Cal.). When the United States District Court for the Northern District of California (“California Federal District Court”) upheld the complaint and permitted the case to proceed, Sears returned to the closed *Thorogood* case, and asked the Illinois Federal District Court to enjoin all absent members of the decertified class from litigating class claims, anywhere. The Illinois Federal District Court denied the requested All Writs Act, 28 U.S.C. § 1651 (“All Writs Act”) injunction, but the Seventh Circuit recently reversed that denial, and ordered the Illinois Federal District Court to enjoin all of the non-noticed members of the decertified class, and their counsel from pursuing their claims as class claims against Sears,<sup>4</sup> anywhere in any court. *Thorogood v. Sears, Roebuck & Co.*, No. 10-2407, 2010 WL 4286367 (7th Cir. Nov. 2, 2010) (“*Thorogood III*”). Thorogood has requested rehearing, and therefore the matter is not yet ripe for petition for *certiorari*; however, Thorogood’s case differs from the case at bar only in certain respects.<sup>5</sup>

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4. The Seventh Circuit permits them to continue their California case as a class claim against the manufacturer Electrolux.

5. Namely, the *Thorogood* decision applies the same bar to a decertified class, which, because of the Rule 23(f) review process, never received notice of pendency or an opportunity to opt out, as opposed to the case at bar, where the class was never certified.

Due to these pending cases, *Amici* counsel wish to supplement Petitioners’ argument to underscore the need for and desirability of a clear direction in the law that will provide bright-line guidance for plaintiffs and defendants alike, and eliminate substantial uncertainty in subsequent litigation.

### SUMMARY OF ARGUMENT

The Court’s reaffirmation of *Phillips Petroleum Co. v. Shutts*<sup>6</sup> clear and concise rule of law—that absent class members are bound only after receiving notice of pendency and the opportunity to opt out, and not by mere “adequate representation” alone—is a rare opportunity<sup>7</sup> for the Court to provide a clear and simple roadmap for defendants, plaintiffs and courts, alike, which is easily navigable, with predictable results and reach. In contrast, the Seventh and Eighth Circuit’s current “mere adequacy alone” standard provides neither a clear standard, nor any predictability of application, and exacerbates uncertainty in class action litigation.

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6. 472 U.S. 797 (1985)

7. See Adam Liptak, *Justices Are Long on Words But Short on Guidance*, N.Y. Times, November 17, 2010, at A1, reporting lower courts’ difficulties in discerning clear directions from lengthy multi-author opinions.”

## ARGUMENT

### I. Reaffirming *Shutts*' Plain Directive Will Provide Clarity and a Simple Rule Whose Application and Reach Are Definite and Easy to Follow, Benefiting Defendants, Plaintiffs and the Courts Alike.

While *Amici* certainly share Petitioners' view of the importance of *Shutts*' protections, it is important not to overlook that *Shutts*' rule also provides an essential clarity that gives both litigants and the courts clear direction in making litigation decisions.

Indeed, *Shutts*' rule speaks advantageously to defendants in class actions, providing that defendants need only afford absent class members minimal due process protections in order to bind them to previous judgments, and also details what defendants need *not* do. *See Shutts*, 472 U.S. at 811-12. Of course, as Petitioners acknowledge, the significance of these privileges is that no absent class member will be bound *in personam* without defendants first satisfying absent class members' minimal due process protections:

If the forum State wishes to bind an absent plaintiff concerning a claim for money damages or similar relief at law, it must provide **minimal procedural due process protection. The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation**, whether in person or through counsel.

*Id.* at 811-12 (emphasis added).

By the same token, the drafters of the 1966 iteration of Rule 23 believed in some measure that early certification generally benefited defendants because they could gain a comprehensive preclusion from a subsequent dismissal on the merits. *Shutts*' clarity of direction ensures that defendants may readily choose which approach to take—either to seek the benefits of certifying at an early stage—or attack the particular plaintiff's claim, based on the view that, early dismissal, while not preclusive of later claims, generally discourages other plaintiffs from bringing identical class claims.

In contrast, the Eight Circuit's rule in the case at bar, *In re Baycol Prod. Litig.*, 593 F.3d 716,724 (8th Cir. 2010), and the Seventh Circuit's rule in *In re Bridgestone/Firestone*, 333 F.3d 763, 766 (7th Cir. 2003) and *Thorogood III*<sup>8</sup>—that mere “adequate representation” alone satisfies *Shutts*' due process requirements, without notice and an opportunity to opt out, is a subjective standard, which generates unpredictable outcomes and reach in barring absent class members' claims.

Additionally, the Court should make clear that the appropriate rule applies equally for both a never-noticed

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8. See *Thorogood III*, 2010 WL 4286367 at \*10 (“It is true as we recall that an unnamed class member can be bound by the judgment in a class action suit only if ‘adequately represented by a party who actively participated in the litigation’ *Taylor v. Sturgell*, [553 U.S. 880, 884 (2008)]. But *Thorogood* did participate actively in seeking class certification, and his representation by lawyer Krislov was adequate (it was energetic and pertinacious to a fault).”).

absent member of a (b) (3) uncertified class<sup>9</sup> and a never-noticed absent member of a previously-certified one.<sup>10</sup> Both parties are functionally the same, as neither party has been afforded even minimal due process requirements in either circumstance.

## **II. The “Mere Adequacy” Standard Creates Uncertainty Regarding When Collateral Estoppel Applies, and is Unpredictable in its Scope and Reach.**

Even assuming that the first court evaluates “adequacy” on some satisfying-but-undefined basis, the determination of what claims are subsequently estopped or enjoined has been and is at present completely unpredictable. Initially, the Seventh Circuit’s *Bridgestone/Firestone* foray into the “mere adequacy alone” standard held that reversing the certification of a nationwide consumer class did not preclude class members from bringing subsequent single-state class claims in the state court of their residence, alleging that state’s consumer protection laws.<sup>11</sup>

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9. See *Shelton v. Pargo, Inc.*, 582 F.2d 1298, 1314–15 (4th Cir. 1978) (“a pre-certification dismissal does not legally bind absent class members.”).

10. See *Smith v. Shawnee Library Sys.*, 60 F.3d 317, 321 (7th Cir. 1995) (“summary judgment was granted before notification was made” and “class certification was void because no notice was ever given to the absent members of [the] certified class.”).

11. *In re Bridgestone/Firestone, Inc.*, 333 F.3d 763, 766 (7th Cir. 2003) (“The only classes that had been certified had national scope .... the only *judgment* that could be protected or

(Cont’d)

In the case at bar, the Eighth Circuit relies on *Bridgestone Firestone* to enjoin never-certified absent class members from pursuing their class claims, but it does so without providing any rationale or guidance for expanding that preclusion to further bar all single-state claims, even when those claims involve procedural distinctions (which the Eight Circuit does not address). *In re Baycol Prod. Litig.*, 593 F.3d at 723.

The dilemma is nicely exemplified by the Seventh Circuit’s Rule 23(f) reversal of the 29-jurisdiction class in *Thorogood* (presumed to be permitted by *Bridgestone/Firestone*, to pursue subsequent single-state class actions) after Murray, an absent California resident, reasonably filed a California state case for a single-state California class, asserting only California law claims.

After the California Federal District Court denied defendants’ motion to strike class allegations rejecting a plea of collateral estoppel, *Murray v. Sears, Roebuck & Co.*, et al, No. c-09-5744-cw, Dkt. No. 120 (N.D.Cal.) (order denying motion to strike class allegations), Sears returned to the closed *Thorogood* case in the Illinois Federal District Court—seeking an All Writs Act injunction. The Seventh Circuit surprisingly reversed

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(Cont’d)

effectuated is one concerning such classes .... The district court had not certified, and our opinion thus did not address, any statewide class.”; *see also Id.* at 769 (recognizing that when only “one vital issue was litigated and resolved on a class-wide basis: whether a *national* class is tenable” only the adjudication of that specific issue could have a preclusive effect.) (emphasis in the original).

the Illinois Federal District Court’s denial, and ordered that the never-noticed but decertified class be enjoined from pursuing *any* of their claims against Sears. *Thorogood III*, at 4.<sup>12</sup>

Further displaying the dilemma created by the current ambiguity of the law, the Seventh Circuit effectively directed how litigation is to proceed in the California Federal Court—a district court subject to the Ninth Circuit’s purview—without indicating what parties are to do if the district court has a different view of how the case should proceed, despite even its own holding that “one court of appeals need not automatically follow the decision of another[.]” *Brotherhood of Maint. of Way Employees v. Burlington N. R.R Co.*, 24 F.3d 937, 939 (7th Cir. 1994).<sup>13</sup>

The benefits of a clear directive from this Court are thus self-evident, and would undoubtedly obviate this nascent type of cross-circuit management conflict. *See*

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12. Exacerbating this confusion is the fact that since Murray’s California complaint also asserted claims against the manufacturer, an additional defendant, the Seventh Circuit ruled that the enjoined parties and counsel could proceed ahead against the manufacturer.

13. *See also Grider v. Keystone Health Plan Cent., Inc.*, 500 F.3d 322, 329 (3rd Cir. 2007) (holding that “each court is free to proceed in its own way and in its own time, without reference to the proceedings in the other court .... Whenever a judgment is rendered in one of the courts and pleaded in the other, the effect of that judgment is to be determined by the application of the principle of res judicata (or collateral estoppel) by the court in which the action is still pending”) (internal citation omitted).

*Negrete v. Allizanz Life Ins. Co. of North America*, 532 F.3d 1091 (9th Cir. 2008) (refusing an injunction under the All Writs Acts and recognizing the “lack of cases in which the All Writs Act has been used to enjoin” federal courts).

### CONCLUSION

Reaffirming *Shutts*’ clear and simple directive and further elaborating on the collateral estoppel effect of court judgments would not only protect absent class members’ fundamental due process rights, it would allow clear direction, easily complied with and predictable in their reach—beneficially simplifying an aspect of modern complex class litigation. The Court should reaffirm *Shutts*’ clear declaration of the law and reverse the Eighth Circuit’s decision below.

Respectfully Submitted,

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