No. 09-1205

In the Supreme Court of the United States

KEITH SMITH and SHIRLEY SPERLAZZA,
Petitioners,

v.

BAYER CORPORATION,
Respondent.

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

BRIEF FOR PETITIONERS

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QUESTIONS PRESENTED

1. The relitigation exception to the Anti-Injunction Act permits a federal court to enjoin a state-court proceeding on the basis of issue preclusion only when all of its elements are established, including that the state parties against whom the injunction is sought were parties to or in privity with parties to the prior federal litigation and that issues necessary to the resolution of the proceedings are identical. In determining whether issues are identical, courts have also recognized that state courts should have discretion to apply their own procedural rules in a manner different from their federal counterparts. Can the district court's injunction be affirmed when the parties against whom preclusion is invoked were not parties to the prior action or in privity with parties to that action, and the issues presented are not identical?

2. The rule against nonparty preclusion is a fundamental tenet of American jurisprudence. One exception to the rule against nonparty preclusion is that absent members of a class in a properly conducted class action may be subject to preclusion because of the due-process protections afforded absent members once class certification has been granted. When a federal district court denies certification of a statewide class, does it have personal jurisdiction over absent members of the once-proposed class–who, because of the denial, were never afforded all of the due-process protections required had certification been granted–for purposes of enjoining them from seeking certification of a similar class in state court?

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The decision of the United States Court of Appeals for the Eighth Circuit affirming the issuance of a permanent injunction against petitioners is reported at 593 F.3d 716 and is reproduced in the appendix to the petition for writ of certiorari at 1a-19a. The order of the United States District Court for the District of Minnesota granting the permanent injunction has not been officially reported but is available at 2008 WL 7425712 and is reproduced in the appendix to the petition for certiorari at 20a-34a. The prior order of the district court denying certification of a West Virginia class action and granting summary judgment against George McCollins is reported at 265 F.R.D. 453 and is reproduced in the appendix to the petition for certiorari at 35a-52a.

JURISDICTION

Respondent Bayer Corporation filed an expedited motion for a permanent injunction on October 31, 2008, in the United States District Court for the District of Minnesota. Petitioners appeared specially before the district court to contest its personal jurisdiction and the applicability of the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283. On December 9, 2008, the district court issued its order granting the permanent injunction. Pet. App. 20a-34a.

On January 6, 2009, petitioners timely appealed the order to the Eighth Circuit, which had jurisdiction to hear the appeal of the permanent injunction. *See* 28 U.S.C. §§ 1291 & 1292(a)(1). The

Eighth Circuit issued its decision on January 5, 2010, affirming the district court. Pet. App. 1a-19a.

The petition for writ of certiorari was timely filed on April 5, 2010, and was granted by the Court on September 28, 2010. This Court has jurisdiction under 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS, STATUTES, AND RULES

The Fifth Amendment to the United States Constitution provides, in relevant part, that "[n]o person shall . . . be deprived of life, liberty, or property, without due process of law . . . ." U.S. Const. Amend V.

The Anti Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in a State Court except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283.

The All-Writs Act provides, in relevant part, that "[t]he Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." 28 U.S.C. § 1651(a).

Pertinent portions of Federal Rule of Civil Procedure 23 and West Virginia Rule of Civil Procedure 23 are set forth in the appendix to this brief.

STATEMENT OF THE CASE

The underlying cases involve the prescription drug, Cerivistatin, marketed in the United States under the brand name Baycol. Baycol is one of a

class of drugs known as statins. Statins are prescribed to individuals suffering from high cholesterol to lower their lipid levels with the goal of decreasing their risk of cardiac diseases. While other statins have been available on the market since the late 1980's, Baycol was not approved by the FDA until June 1997. It was initially approved in dosages of .02 and .03 mgs, and these dosages were made available on the market in early 1998. Over the next two years, Bayer, as the manufacturer of Baycol, sought and obtained approval from the FDA for the higher dosages of .04 and .08 mgs respectively. *See In re Baycol Prods. Litig.*, 218 F.R.D. 197, 201 (D.Minn. 2003); *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029, 1035 (D.Minn. 2007).

After thirty-one deaths in the United States were linked to Baycol, it was withdrawn from the United States market in August 2001. Adverse event reports suggested a link between Baycol and diseases such as rhabdomyolysis, myalgia, myositis, and myopathy. More than 100 deaths worldwide have been linked to Baycol. Additionally, conservative estimates indicate that adverse event reports and clinical studies revealed injuries in at least another 1,000 cases. *See In re Baycol Prods. Litig.*, 218 F.R.D. at 201-02.

Following Baycol's withdrawal from the market, thousands of lawsuits were filed in state and federal courts alleging product-liability claims as well as other related statutory and common-law claims. Common among the allegations in these lawsuits were factual assertions that Bayer did not adequately test, develop, and study Baycol or disclose all relevant information to the FDA, the medical

community, and the public; and, furthermore, that the warnings actually issued, as well as the advertising and promotional material, were false, misleading, and otherwise inadequate particularly as to the risks and dangers associated with using Baycol in higher dosages and/or in combination with another class of lipid-lowering drugs known as fibrates, especially a drug named gemfibrozil. *See id.*

On September 20, 2001, petitioners, Keith Smith and Shirley Sperlazza,[1] (collectively "Smith") filed a civil action in the Circuit Court of Brooke County, West Virginia, seeking certification of a West Virginia-only class action and asserting state-law product liability and related claims regarding the manufacture, sale, advertisement, warnings, and use of Baycol. *Smith, et al. v. Bayer Corp., et al.*, No. 01-C-191 (1-3) JPM (Cir.Ct. Brooke County, W.Va. Sept. 20, 2001). As set forth in the complaint, Smith sought certification of a class of "all West Virginia residents and others who have ingested Cerivastatin, sold under the trade name 'Baycol' in West Virginia" and requested damages for personal injury, medical monitoring, and economic loss. JA 152-76.

On September 30, 2008, pursuant to the last scheduling order that had been entered in the case, Smith filed a motion seeking certification of an eco-

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[1] Nancy Gandee was also initially a named plaintiff, but she settled her claims in July 2003 and is no longer a proposed representative or member of the putative class in *Smith*. The plaintiffs also originally sued two, non-diverse West Virginia citizens who later were dismissed.

nomic-loss-only class under Rule 23(b)(3) of the West Virginia Rules of Civil Procedure based on state-law claims of fraud, breach of warranties, and violations of the West Virginia Consumer Credit and Protection Act ("WVCCPA"), W.Va.Code § 46A-6-101, *et seq*. JA 177-213. That scheduling order, which had been entered on March 18, 2008, set a class-certification hearing for December 10, 2008.

On October 31, 2008, Bayer filed an expedited motion for a permanent injunction seeking to enjoin the class-certification hearing because the United States District Court for the District of Minnesota[2] had, on August 25, 2008, denied certification of a similar proposed West Virginia economic-loss-only class, under Rule 23(b)(3) of the Federal Rules of Civil Procedure, in the case of *In re Baycol Prods. Litig., McCollins v. Bayer Corp.*, 265 F.R.D. 453 (D.Minn. 2008); Pet. App. 35a-52a. JA 90-93.

Smith–who was not a named plaintiff in *McCollins* and had received no notice of *McCollins* or the motion and order regarding class certification therein–opposed Bayer's motion. Smith appeared specially to contest personal jurisdiction and the propriety of an injunction under the relitigation exception to the Anti-Injunction Act, 28 U.S.C. § 2283, and the All Writs Act, 28 U.S.C. § 1651(a). *See* JA 308-27.

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[2] The district court had been designated by the Judicial Panel for Multidistrict Litigation as the transferee court ("MDL court"), under 28 U.S.C. § 1407, for Baycol cases filed or removed to district courts. *In re Baycol Prods. Liab. Litig.*, 180 F. Supp. 2d 1378 (J.P.M.L Dec. 18, 2001).

Contrary to Bayer's suggestions, Smith had not delayed seeking his own class certification in West Virginia in order to ascertain whether class certification would be granted in *McCollins* or whether respondent would change its stance on settling economic-loss only claims. During the relevant time frame, neither Smith nor his counsel had any knowledge that *McCollins* or any other Baycol case seeking certification of a West Virginia class action was pending before the district court.[3] As to the delay in having the class-certification request decided, at least four different scheduling orders had been entered that set deadlines for class discovery, the filing of memoranda supporting and opposing class certification, and a class-certification hearing. The first three of those scheduling orders had been continued on joint motions to amend the various deadlines because of the need for more discovery and/or other scheduling conflicts.[4]

By order entered on December 9, 2008, the district court granted Bayer's motion for a permanent injunction. *In re Baycol Prods. Litig., Smith v.*

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[3] Counsel for Smith were aware that an MDL Court had been established to handle Baycol litigation pending in federal court because they had one or more individual actions removed to federal court and transferred to the MDL. But none of those cases involved requests for class-action certification, and counsel for Smith were not served with papers in the *McCollins* case.

[4] Class-certification hearings had been set for April 4, 2007, August 29, 2007, August 27, 2008, and December 10, 2008, by scheduling orders entered respectively on or about May 10, 2006, March 8, 2007, September 27, 2007, and March 18, 2008.

Bayer Corp., 2008 WL 7425712 (D.Minn. Dec. 9, 2008) (Davis, C.J.). Pet. App. 20a-34a. On January 6, 2009, Smith timely appealed the ruling to the Eighth Circuit. On January 5, 2010, the Eighth Circuit issued its opinion affirming the district court's grant of the injunction. *In re Baycol Prods. Litig., Smith v. Bayer Corp.*, 593 F.3d 716 (8th Cir. 2010). Pet. App. 1a-18a.

SUMMARY OF ARGUMENT

I. The Anti-Injunction Act, 28 U.S.C. § 2283, is premised upon principles of federalism and comity and prohibits a federal court from enjoining state-court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." This Court has consistently cautioned that proceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court. The exceptions to the Act's prohibition of injunctions were designed to ensure the effectiveness and supremacy of federal law and are to be narrowly construed. Any doubt about whether an injunction should be issued must be resolved against issuing the injunction. Before issuing an injunction the federal court must independently possess both subject-matter jurisdiction and personal jurisdiction because neither the All Writs Act, 28 U.S.C. § 1651(a), nor the Anti-Injunction Act create such jurisdictional prerequisites.

In this case, Bayer has advanced, and the courts below relied on, only the third of the Act's excep-

tions, commonly known as the relitigation exception. The relitigation exception is based upon principles of res judicata and collateral estoppel and may be invoked to bar the relitigation of claims and issues actually decided by a federal court in a prior proceeding. Collateral estoppel is the particular preclusion doctrine that has been advanced in this case by Bayer and the courts below.

Even though the preclusion doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) generally are used to bind parties to a prior final judgment on the merits, Smith in this case is in effect being bound by a procedural ruling of the district court denying certification of a similar, proposed class action brought under Rule 23(b)(3) of the Federal Rules of Civil Procedure. Because Smith was not the same party who brought the prior proceeding and was not in privity with him, Smith is not bound by the judgment in that action, and the district court did not have the authority to enjoin him under the relitigation exception.

Collateral estoppel also does not apply because the same issues were not litigated in the prior proceeding, let alone essential to the judgment eventually reached. Federal courts have recognized that state courts must be given the right and discretion to interpret and apply their own procedural rules in a manner different from their federal counterparts, even if the state rules of procedure are modeled after the federal rules of procedure. Accordingly, the district court's decision denying class certification under Federal Rule of Civil Procedure 23(b)(3) cannot be used to collaterally estop a West

Virginia state court from deciding whether the same or similar class may be certified under West Virginia Rule of Civil Procedure 23(b)(3).

II. The limits on preclusion in this case have powerful constitutional underpinnings. There is a deep-rooted historic tradition in this country that everyone is entitled to have his own day in court. It is an often-repeated rule that one is not personally bound by a judgment in a litigation in which he has not been voluntarily designated as a party or been made a party by service of process. Accordingly, while a judgment binds the parties to a lawsuit as to the claims and defenses that were asserted in the lawsuit, as well as to the resolution of all of the issues that were actually litigated and essential to the judgment, it does not conclude the rights of strangers to those proceedings.

The general rule against nonparty preclusion is grounded in the United States Constitution, that limits the circumstances under which judgments have binding effect to those in which due process has been afforded. Notice and an opportunity to be heard are fundamental requirements of due process. Indeed, a right to be heard has little value unless one receives notice reasonably calculated to apprise him of the pendency of the action and afford him an opportunity to appear.

Limited exceptions to the general rule against nonparty preclusion have been adopted in appropriate circumstances. One of the exceptions is that a properly conducted class action may bind absent class members because of the due-process protections that are afforded absent members upon certification of a class. As to class actions governed by

Rule 23(b)(3) of the Federal Rules of Civil Procedure, the due-process protections afforded absent members include reasonable notice, the opportunity to be heard, the opportunity to be excluded or to opt out, and the requirement that named class representatives and class counsel adequately represent the interests of the absent members.

Here, Smith was not a named party to the prior federal proceeding and, due to the denial of class certification, he never received any of the due-process protections afforded absent members in a (b)(3) class action. Decisions of this Court, discussing the due-process protections incorporated in Rule 23, establish that the class-action exception to the rule against nonparty preclusion only applies to properly conducted class actions, not to cases in which class treatment is denied. Because the class-action exception does not apply and no other exceptions have or could have been raised in this case, the decision below violates both due process and preclusion principles.

The Eighth Circuit asserted that protections purportedly afforded Smith by the prior judgment, i.e., adequate representation, the supposed right to appeal the decision denying class certification, and the right to bring an individual action, satisfy due process. Adequate representation is only one of the due-process protections required for Rule 23(b)(3) classes. The suggestion that Smith had a right to appeal the denial of class certification is purely imaginary because he never received notice of the action or the certification ruling. Similarly, the right to bring an individual action is meaningless because of the small amount of economic damages at

issue per person. One of the primary purposes of class actions is to enable litigants who have small damages claims to seek justice through an aggregation device that permits them to combine their individual claims with those of others who have been similarly damaged by the same defendant(s). Denying Smith his right to seek class certification effectively deprives him of the opportunity to assert his state-law claims for relief–claims that are in and of themselves protected-property interests entitled to due-process protections.

ARGUMENT

I. An Injunction Cannot Properly Be Issued on the Basis of Collateral Estoppel Under the Relitigation Exception to the Anti-Injunction Act When Neither the Parties Nor the Issues Are Identical.

A. The Anti-Injunction Act Is Based on Principles of Federalism and Comity and Its Exceptions Must Be Construed Narrowly Against Enjoining State-Court Proceedings.

The doctrines of federalism and comity are well entrenched in our jurisprudence. From the inception of our country, our founding forefathers wisely declined to have the new federal government usurp the entirety of the new nation's governmental functions, recognizing that a vital consideration of comity is a proper respect for state functions and the separate and independent nature of state governments. *See Younger v. Harris*, 401 U.S. 37, 44-45 (1971).

The Anti-Injunction Act, adopted in 1793, is premised on these principles of federalism and comity, recognizing that "from the beginning we have had in this country two essentially separate legal systems . . . . proceed[ing] independently of the other with ultimate review in this Court of the federal questions raised in either system." *Atlantic Coast Line R. Co. v. Brotherhood of Loc. Eng.*, 398 U.S. 281, 286 (1970). Because "[u]nderstandably this dual system was bound to lead to conflicts and frictions[,]" the Anti-Injunction Act was adopted, at least in part, "in order to make the dual system work and 'to prevent needless friction between state and federal courts.'" *Atlantic Coast*, 398 U.S. at 286 (quoting *Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. 4, 9 (1940)). As more recently explained by this Court:

> The Act . . . is a necessary concomitant of the Framers' decision to authorize, and Congress' decision to implement, a dual system of federal and state courts. It represents Congress' considered judgment as to how to balance the tensions inherent in such a system. Prevention of frequent federal court intervention is important to make the dual system work effectively. By generally barring such intervention, the Act forestalls "the inevitable friction between the state and federal courts that ensues from the injunction of state judicial proceedings by a federal court." . . . Due in no small part to the fundamental constitutional independence of the States, Congress adopted a general policy under which state proceedings "should normally be allowed to

> continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court."

Chick Kam Choo v. Exxon Corp., 486 U.S. 140, 146 (1988) (quoting *Vendo Co. v. Lektro-Vend Corp.*, 433 U.S. 623, 630-31 (1977) (plurality opinion); *Atlantic Coast*, 398 U.S. at 287) (internal citations omitted). *Accord Oklahoma Packing Co. v. Oklahoma Gas & Electric Co.*, 309 U.S. at 9; *Kline v. Burke Construction Co.*, 260 U.S. 226, 229-30 (1922).

In recognition of principles of federalism and comity, this Court has acknowledged that parallel actions in federal and state courts seeking to enforce a personal liability are not improper.

> 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 principles of res adjudicata by the court in which the action is still pending in the orderly exercise of its jurisdiction, as it would determine any other question of fact or law arising in the progress of the case. The rule, therefore, has become generally established that where the action first brought is in personam and seeks only a personal judgment, another action for the same cause in another jurisdiction is not precluded. . . .

Kline, 260 U.S. at 230-31 (citations omitted) (distinguishing *in rem* and *in personam* proceedings). Accordingly, the mere existence of a parallel lawsuit in state court that seeks to litigate the same *in personam* action is not in itself sufficient grounds

for the federal court to stay the state proceedings. *Vendo Co.*, 433 U.S. at 642. "[I]nefficient simultaneous litigation in state and federal courts on the same issue" is "one of the costs of our dual court system." *Parsons Steel, Inc. v. First Ala. Bank*, 474 U.S. 518, 524-25 (1986).

The present version of the Anti-Injunction Act absolutely prohibits a federal court from enjoining state-court proceedings "except as expressly authorized by Act of Congress, or where necessary in aid of its jurisdiction, or to protect or effectuate its judgments." 28 U.S.C. § 2283 (1970). *E.g.*, *Atlantic Coast*, 398 U.S. at 286-87; *Chick Kam Choo*, 486 U.S. at 145-46; *Vendo Co.*, 433 U.S. at 630. Because the prohibition against injunctions "in part rests on the fundamental constitutional independence of the States and their courts, the exceptions should not be enlarged by loose statutory construction." *Atlantic Coast*, 398 U.S. at 287. *Accord Chick Kam Choo*, 486 U.S. at 146.

Rather, the exceptions to the Act's prohibition of injunctions were "designed to ensure the effectiveness and supremacy of federal law" and are to be narrowly construed against enjoining state-court proceedings. *Chick Kam Choo*, 486 U.S. at 146. Accordingly, as this Court has cautioned, "[a]ny doubts as to the propriety of a federal injunction against state court proceedings should be resolved in favor of permitting the state courts to proceed in an orderly fashion to finally determine the controversy." *Atlantic Coast*, 398 U.S. at 297. *Accord Vendo Co.*, 433 U.S. at 630-31.

In this case, Bayer has advanced, and the courts below have relied on, only the third of the Act's ex-

ceptions, commonly known as "the relitigation exception." The relitigation exception is based upon principles of res judicata and collateral estoppel. *Chick Kam Choo*, 486 U.S. at 147. But the relitigation exception is narrower than the broadest principles of res judicata because it only applies to claims and issues that have been actually decided by the federal court in the prior proceeding. *Id*. 486 U.S. at 148 (citing *Atlantic Coast*, 398 U.S. at 290); *Weyerhaeuser Co. v. Wyatt*, 505 F.3d 1104, 1109-11 (10th Cir. 2007).

When an exception to the Anti-Injunction Act applies, the All Writs Act, 28 U.S.C. § 1651(a), provides the positive authority for a federal court to issue an injunction against state-court proceedings. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d 133, 143 (3d Cir. 1998). Both the All Writs Act and the relitigation exception to the Anti-Injunction Act are permissive and non-mandatory in nature. *Bailey v. State Farm Fire and Casualty Co.*, 414 F.3d 1187, 1189 (10th Cir. 2005). Before issuing an injunction the federal court must already independently possess both subject-matter jurisdiction and personal jurisdiction because neither the All Writs Act nor the Anti-Injunction Act creates such jurisdictional prerequisites. *See*, *e.g.*, *Syngenta Crop Protection, Inc. v. Henson*, 537 U.S. 28, 31-34 (2002); *Carlough v. Amchem Prods., Inc.*, 10 F.3d 189, 198 (3d Cir. 1993).

When addressing the relitigation exception, a federal court applies federal common law in determining the preclusive effect of a federal-court judgment. Under federal common law, a federal

court will "usually incorporate the collateral estoppel doctrine of the relevant state unless it is 'incompatible with federal interests[,]' in which case 'a contrary federal rule' may be justified." Pet. App. 6a-7a (quoting *Semtek Int'l Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 509 (2001)).

Under West Virginia law, collateral estoppel requires: (1) the issue previously decided must be identical to the one presently in question; (2) there must have been a final adjudication on the merits in the prior action; (3) the party against whom the doctrine is invoked must have been a party or in privity with a party to the prior action; and (4) the party against whom the doctrine is invoked must have had a full and fair opportunity to litigate the issue in the prior action. *Peters v. Rivers Edge Min., Inc.*, 680 S.E.2d 791, 809 (W.Va. 2009); *State v. Miller*, 459 S.E.2d 114, 120 (W.Va. 1995) (footnote and citations omitted); *Conley v. Spillers*, 301 S.E.2d 216, 220-21 (W.Va. 1983). "[C]ollateral estoppel requires identical issues raised in successive proceedings and requires a determination of the issues by a valid judgment to which such determination was essential to the judgment." *State v. Miller*, 459 S.E.2d at 120; *Peters*, 680 S.E.2d at 808. *Accord* Restatement (Second) of Judgments § 27 ("When an issue of fact or law is actually litigated and determined by a valid and final judgment, and the determination is essential to the judgment, the determination is conclusive in a subsequent action between the parties, whether on the same or a different claim."). Accordingly, for all purposes relevant to this action, the doctrine of collateral estoppel as applied in West Virginia is consistent with

the doctrine as applied under federal common law. *See Taylor v. Sturgell*, 553 U.S. 880, 892 (2008); *Montana v. U.S.*, 440 U.S. 147, 153 (1979) (and cases cited therein).

Notably, in the relevant state-court proceeding, there is no issue of federal law, the effectiveness or supremacy of which must be protected by an injunction. Smith has not pleaded any claim based on federal common or statutory law. Any class-certification hearing held by the West Virginia Circuit Court would involve only issues of West Virginia's substantive law and its procedural law set forth in Rule 23 of the West Virginia Rules of Civil Procedure. Decisions of federal courts applying state substantive law are not binding precedential authority on any state court. *E.g.*, *Johnson v. Fankell*, 520 U.S. 911, 916-17 (1997); *State ex rel. Johnson & Johnson Corp. v. Karl*, 647 S.E.2d 899, 913 n. 18 (W.Va. 2007); *Caperton v. A.T. Massey Coal Co., Inc.*, 690 S.E.2d 322, 356 (W.Va. 2009). And decisions of a federal court interpreting and applying the Federal Rules of Civil Procedure are not binding on a state court interpreting and applying its own Rules of Civil Procedure, even if they are modeled on the Federal Rules. *E.g.*, *Fankell*, 520 U.S. at 916; *J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996); *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146; *Allen v. Stewart Title Guaranty Co.*, No. 06-cv-2426, 2007 WL 916859, at **1-2 (E.D.Pa. March 20, 2007); *In re West Virginia Rezulin Litigation*, 585 S.E.2d 52, 61 (W.Va. 2003).

Accordingly, the reasons for which the exceptions to the Anti-Injunction Act's prohibition of in-

junctions were designed, i.e., to ensure the effectiveness and supremacy of federal law, are not present here. *See Chick Kam Choo*, 486 U.S. at 146.

B. Collateral Estoppel Cannot Properly Be Applied Under the Relitigation Exception to the Anti-Injunction Act in this Case Because Smith Was Not a Party or in Privity with Parties in the *McCollins* Action.

Smith was not a named party in the *McCollins* litigation. Cases estopping named parties from relitigating the denial of class certification are therefore inapplicable here.[5] Moreover, for reasons to be fully explained in part II of this brief, due process considerations do not permit Smith to be deemed a party under the class-action exception to the rule against nonparty preclusion. Accordingly, *In re BridgeStone/Firestone, Inc. Tires Prod. Liab. Litig.*, 333 F.3d 763, 768-69 (7th Cir. 2003), the principal basis for the Eighth Circuit's decision, cannot justify binding Smith to the result in *McCollins*.

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[5] *See Canady v. Allstate Ins. Co.*, 282 F.3d 1005, 1012 & 1015 (8th Cir. 2002) (court noting "ten of the original plaintiffs from *Canady I* filed two new class actions in Missouri state court"); *In re Piper Aircraft Distrib. Sys. Antitrust Litig.*, 551 F.2d 213, 216 & 218-19 (8th Cir. 1977) (upon denial of request for class certification in a Florida state court, the same plaintiff then filed six other proposed class actions in federal district courts); *In re Dalkon Shield Punitive Damages Litig.*, 613 F. Supp. 1112, 1116 (E.D.Va. 1985) (same defendant seeking certification of a class on issue of punitive damages).

C. Collateral Estoppel Cannot Properly Be Applied Under the Relitigation Exception to the Anti-Injunction Act in this Case Because the Issues Presented Are Not Identical to the Issues Decided in the *McCollins* Action.

As to the issues presented, not only has Smith asserted a common-law claim of fraud that was not alleged in *McCollins*, but, more importantly, the West Virginia Circuit Court would be determining class-certification issues under Rule 23 of the West Virginia Rules of Civil Procedure rather than under Rule 23 of the Federal Rules of Civil Procedure which the district court in *McCollins* applied. State courts may exercise their discretion under their own rules of procedure addressing certification of class actions differently than their federal counterparts.[6] *E.g.*, *J.R. Clearwater Inc.*, 93 F.3d at 180; *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146; *Allen*, 2007 WL 916859, at **1-2.

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[6] The Eighth Circuit's decision in *Canady v. Allstate Ins. Co.*, *supra*, does not detract from this point. In *Canady*, the civil action sought to be enjoined had been removed to federal court and, because it was mistakenly believed that subject-matter jurisdiction existed for the removal under the All Writs Act, 28 U.S.C. § 1651(a), the premise of the Eighth Circuit's decision was that the federal rules would apply in the action to be enjoined. *Canady*, 282 F.3d at 1016-17 & 1019. The Eighth Circuit's view that subject-matter jurisdiction existed for the removal under the All Writs Act was incorrect. *See Syngenta Crop Protection,* 537 U.S. at 31-34; *Arkansas Blue Cross and Blue Shield v. Little Rock Cardiology Clinic, P.A.*, 551 F.3d 812, 821-22 (8th Cir. 2009).

As explained by the Fifth Circuit in *J.R. Clearwater*:

> The denial of class certification is "a procedural ruling, collateral to the merits of a litigation. . . . ," *Deposit Guaranty Nat. Bank v. Roper*, 445 U.S. 326, 336 (1980), and the decision as to whether to certify a class lies within the "wide discretion" of the trial court. . . . . While Texas Rule of Civil Procedure 42 is modeled on Rule 23 of the Federal Rules, and federal decisions are viewed as persuasive authority regarding the construction of the Texas class action rule, . . . *a Texas court might well exercise this discretion in a different manner*. It is our considered view that the wide discretion inherent in the decision as to whether or not to certify a class dictates that *each court-or at least each jurisdiction-be free to make its own determination in this regard. . . . This reasoning is particularly applicable when matters of state-federal relations are involved* as in the present case in which an injunction would impinge upon the state court's ability to exercise discretion in the administration of its own docket *contrary to the policies underlying the Anti-Injunction Act*.

93 F.3d at 180 (emphases added; internal citations omitted).

Similarly, the Third Circuit has held that its interpretation of Rule 23 of the Federal Rules of Civil Procedure is not binding on a state court applying its own class-certification rules. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146 ("[O]ur construction of Rule 23

and application to the provisional settlement class is not controlling on the Louisiana court, because it is not bound by our interpretation of Rule 23. Rather, the Louisiana court properly applied . . . the parallel Louisiana class certification rule." (footnote and citation omitted)).

This point has also been recognized by the American Law Institute ("ALI") in its *Principles of the Law of Aggregate Litigation* § 2.11 (2010). The ALI suggests that principles of comity, rather than preclusion, should affect a forum court's discretion as to whether to follow a prior court's denial of class certification when dealing with the same or similar class-certification question.[7] As explained by the ALI in its comments:

> Apart from the further due-process limitations, issue preclusion itself requires that the same issue must have been litigated and determined in the proceeding that produced the adjudication now said to have preclusive effect. The same-issue requirement is relatively strict, calling for litigation and determination

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[7] While petitioners do not agree with the ALI's suggestion that comity considerations support a rebuttable presumption that a state court should follow a federal court's denial of certification, the acknowledgment that comity rather than preclusion should guide a forum court's discretion is more consistent with this Court's pronouncements that under the Anti-Injunction Act "[p]roceedings in state courts should normally be allowed to continue unimpaired by intervention of the lower federal courts, with relief from error, if any, through the state appellate courts and ultimately this Court." *Atlantic Coast Line R. Co.*, 398 U.S. at 286-87 (1970). *Accord Chick Kam Choo*, 486 U.S. at 146-50; *Kline*, 260 U.S. at 229-30.

> in the initial proceeding not simply of the same kind of issue concerning the appropriateness of aggregation but, rather, the identical issue. Same-issue status is not present when the aggregation question in the first proceeding arose under a procedural rule of the rendering court and the aggregation question in the subsequent proceeding arises under a procedural rule—albeit, perhaps, an identically phrased rule—that need not be interpreted or applied in identical fashion. Issue preclusion is generally not appropriate in such a situation, for the court in the subsequent proceeding must have the opportunity, if it chooses, to construe its procedural rule differently on the aggregation question, within the ambit afforded by federal constitutional due process. . . .

Principles of the Law of Aggregate Litigation § 2.11, Comment b (2010).

As further stated in the Reporters' Note to Comment b:

> Even in the pre-*Taylor* period, moreover, the approach to issue preclusion in *Bridgestone/Firestone* represented the minority view within the federal circuits, with other courts emphasizing the stringency of the same-issue requirement for issue preclusion. *See J.R. Clearwater Inc. v. Ashland Chem. Co.*, 93 F.3d 176, 180 (5th Cir. 1996); *accord In re Gen. Motors Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 146 (3d Cir. 1998) (citing with approval *Clearwater*). . . .

Principles of the Law of Aggregate Litigation § 2.11, Reporters' Note Comment b (2010).

This Court's opinion in *Chick Kam Choo* strongly supports the principle that a state court should be permitted to apply its own procedural rules governing access to its courts and that the relitigation exception to the Anti-Injunction Act cannot be used to enjoin such state-court proceedings solely on the basis that a federal court had previously applied its own procedural rules to the issue in question. There, this Court rejected the issuance of an injunction under the relitigation exception, reasoning that a Texas state court's application of Texas' *forum non conveniens* principles could not be foreclosed by a federal court's prior decision dismissing the same claims under federal *forum non conveniens* principles:

> [T]he only issue decided by the District Court was that petitioner's claims should be dismissed under the federal *forum non conveniens* doctrine. *Federal forum non conveniens principles simply cannot determine whether Texas courts, which operate under a broad "open-courts" mandate, would consider themselves an appropriate forum for petitioner's lawsuit*. . . . Moreover, the Court of Appeals expressly recognized that the Texas courts would apply a significantly different *forum non conveniens* analysis. . . . *Thus, whether the Texas state courts are an appropriate forum for petitioner's Singapore law claims has not yet been litigated, and an injunction to foreclose consideration of that issue is not within the relitigation exception.*

Chick Kam Choo., 486 U.S. at 148-49 (emphases added).[8]

Recognition that a denial of a class certification is a procedural ruling and that federal and state courts have authority to interpret and apply their own procedural rules independently of one another demonstrates the conundrum posed by the decision below. Indeed, the preclusion doctrines of res judicata (claim preclusion) and collateral estoppel (issue preclusion) typically only apply to substantive rulings in prior actions that have reached final judgment. Although the denial of class certification became subject to appeal when final judgment was issued against George McCollins on his substantive claims for relief (in the same order in which the district court had denied class certification), the only truly substantive ruling essential to the final judgment was that granting summary judgment against Mr. McCollins.

The Eighth Circuit attempted to sidestep the procedural nature of a ruling denying class certification by finding (1) that Smith has not pointed to any significant substantive or procedural differences between the federal and state versions of Rule 23, and (2) that a determination of whether to certify a class under Rule 23 is as much a substantive ruling as a procedural one. Pet. App. 7a-11a. *See also Bridgstone/Firestone*, 333 F.3d at 768 ("De-

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[8] *See also Baker v. General Motors Corp.*, 522 U.S. 222, 232-33)("The Full Faith and Credit Clause does not compel 'a state to substitute the statutes of other states for its own statutes dealing with a subject matter concerning which it is competent to legislate.'" (citation omitted)).

termining the permissible scope of litigation is as much substantive as it is procedural."). But these holdings, like the proverbial "house built upon sand," lack a strong foundation.[9]

First, the cases cited above by Smith do not base their holdings upon actual substantive or procedural distinctions in the language of the respective rules of civil procedure, but upon the power of a state court to construe and apply its rules in a different manner with a different result.[10] That the West Virginia Supreme Court of Appeals applies its version of Rule 23 in a manner different from its federal counterparts is readily demonstrated by contrasting the decisions in the Rezulin MDL proceedings, *In re Rezulin Products Liability Litigation*, 210 F.R.D. 61 (S.D.N.Y. 2002), as well as the District Court's own decision in *McCollins*, Pet. App. 35a-52a, both applying Fed.R.Civ.P. 23 to deny class certification of an economic-loss claim based on breach of express and implied warranties and violation of the WVCCPA involving pharmaceutical products, with the West Virginia Supreme Court of Appeals' decision in *In re West Virginia Rezulin Litigation*, *supra*, reversing a trial court's denial of such a class certification.[11]

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[9] *Matthew* 7:24-27.

[10] *See J.R. Clearwater*, 93 F.3d at 180; *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 146; *Allen*, 2007 WL 916859, at **1-2.

[11] The Eighth Circuit's attempt to refute this argument by contending that the district court's decision in *McCollins* (i.e., that common issues did not predominate on questions of causation) was based on different grounds than the West Virginia

(*Footnote continued*)

Indeed, in *In re West Virignia Rezulin Litigation*, the West Virginia Supreme Court of Appeals emphasized:

> The circuit court, in its order denying class certification, appears to have relied almost exclusively on federal cases interpreting Rule 23 of the Federal Rules of Civil Procedure–and denying class certification–in drug or medical device actions. As we made clear . . . "[a] federal case interpreting a federal counterpart to a West Virginia rule of procedure may be persuasive, but it is not binding or controlling." Our reasoning for this rule is to avoid having our legal analysis of our *Rules* "amount to nothing more than Pavlovian responses to federal decisional law."

In re West Virginia Rezulin Litigation, 585 S.E.2d at 61 (citations omitted).

Second, the district court's conclusion that proof of individual causation of damages is required to ultimately establish proximate cause is not determinative of whether a class action may be permitted under Rule 23 of the West Virginia Rules of

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Supreme Court of Appeals' decision in *In re West Virignia Rezulin Litigation* (i.e., that common issues did predominate on questions of damages) is largely a distinction without significance. *See* Pet. App. 10a n. 4; Pet. App. 25a. The defendants argued in *In re West Virignia Rezulin Litigation*, and the trial court held, that individual issues predominated over common issues on all questions of liability, causation, and damages. *See In re West Virginia Rezulin Litigation*, No.Civ.A. 00-C-1180-H, 2001 WL 1818442 (W.Va.Cir.Ct., Raleigh County, December 13, 2001) (Hutchison, J.).

Civil Procedure. A class action may be permitted under Rule 23(b)(3) of the West Virginia Rules of Civil Procedure if the court concludes that common issues predominate over individual issues enough to make a class action superior, even if individual issues of damages would have to be later decided separately. *See In re West Virginia Rezulin Litigation*, 585 S.E.2d at 72-76.

Third, that a court must be aware of the elements of substantive state-law claims to determine the typicality, common question, and predominance prongs of a Rule 23 analysis does not transform the analysis from a procedural ruling to a substantive one. This Court has consistently held that a party's "right to employ Rule 23 is a procedural right only, ancillary to the litigation of substantive claims." *Deposit Guaranty Nat'l Bank v. Roper*, 445 U.S. 326, 332 (1980). *See also United States Parole Commission v. Geraghty*, 445 U.S. 388, 402 (1980) (a plaintiff seeking class certification presents two separate issues for judicial resolution, the claim on the merits and the procedural claim that he is entitled to represent a class); *Amchem Products, Inc. v. Windsor*, 521 U.S. 591, 613 (1997) ("Rule 23's requirements must be interpreted in keeping with Article III constraints, and with the Rules Enabling Act, which instructs that rules of procedure `shall not abridge, enlarge or modify any substantive right,' 28 U.S.C. § 2072(b)."); *Ortiz v. Fibreboard Corp.*, 527 U.S. 815, 845 (1999) (same). Accordingly, this Court "view[s] the denial of class certification as an example of a procedural ruling, collateral to the merits of a litigation, that is appealable after

the entry of final judgment." *Roper*, 445 U.S. at 336.

The Court has also expressly held that a court in conducting a Rule 23 analysis should not make rulings on the merits of substantive claims: "We find nothing in either the language or history of Rule 23 that gives a court any authority to conduct a preliminary inquiry into the merits of a suit in order to determine whether it may be maintained as a class action." *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78 (1974). A Rule 23 determination is a "rigorous analysis", *General Telephone Co. of the Southwest v. Falcon*, 457 U.S. 147, 161 (1982), that "generally involves considerations that are enmeshed in the factual and legal issues comprising the plaintiff's cause of action." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 469 (1978). But the complex nature of the analysis and its consequential effect on substantive rights do not alter the procedural nature of the Rule 23 determination. *See Shady Grove Orthopedic Associates, P.A. v. Allstate Ins. Co.*, 130 S.Ct. 1431 (2010). Nor does the complex nature of the analysis permit a court to resolve on the merits the substantive claims of a plaintiff.[12] Adopting the approach advanced by

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[12] *See* Fed.R.Civ.P. 23 advisory committee's note to 2003 amendments ("Although an evaluation of the probable outcome on the merits is not properly part of the certification decision, discovery in aid of the certification decision often includes information required to identify the nature of the issues that actually will be presented at trial. In this sense, it is appropriate to conduct controlled discovery into the `merits,' limited to those aspects relevant to making the certification decision on an informed basis."); *Unger v. Amedisys Inc.*,

(*Footnote continued*)

respondent and the courts below would emasculate these principles because a trial court must always be aware of the substantive law and issues in examining class-certification requirements under Rule 23(a) & (b).

II. Both Due Process and Preclusion Principles Are Violated by Binding Absent Class Members to a Decision Denying Class Certification Because They Have Never Received Any Notice or an Opportunity to be Heard or to Opt Out.

Relying, in part, upon the Seventh Circuit's decision in *In re BridgeStone/Firestone, Inc. Tires Prod. Liab. Litig.*, *supra*, the Eighth Circuit held that the district court had personal jurisdiction

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401 F.3d 316, 321 (5th Cir. 2005) ("Class certification hearings should not be mini-trials on the merits of the class or individual claims. ... At the same time, however, `[g]oing beyond the pleadings is necessary, as the court must understand the claims, defenses, relevant facts, and applicable substantive law in order to make a meaningful determination of the certification issues.'" (internal citations omitted)); *Gariety v. Grant Thornton, LLP*, 368 F.3d 356, 366 (4th Cir. 2004) ("The analysis of Rule 23 must focus on the requirements of the rule, and if findings made in connection with those requirements overlap findings that will have to be made on the merits, such overlap is only coincidental. The findings made for resolving a class action certification motion serve the court *only* in its determination of whether the requirements of Rule 23 have been demonstrated. . . . The jury or factfinder can be given free hand to find all of the facts required to render a verdict on the merits, and if its finding on any facts differs from a finding made in connection with class action certification, the ultimate factfinder's finding on the merits will govern the judgment.").

over Smith so as to collaterally estop him under the relitigation exception to the Anti-Injunction Act from seeking class certification in a West Virginia state court on the basis of the class-action exception to the rule against nonparty preclusion.

The Eighth Circuit's decision violates both due process and preclusion principles and is inconsistent with precedent of this Court. As the majority rule in the courts of appeals properly recognizes, a federal court's denial of class certification does not, and cannot, preclude absent members of the putative class from pursuing certification in a state court.

A. Notice and an Opportunity to Be Heard Are Essential Prerequisites to Binding a Litigant to a Judgment in a Prior Case.

This Court has "often repeated the general rule that 'one is not bound by a judgment in personam in a litigation in which he is not designated as a party or to which he has not been made a party by service of process.'" *Taylor*, 553 U.S. at 893 (quoting *Hansberry v. Lee*, 311 U.S. 32, 40 (1940)). *See, e.g., Ortiz v. Fibreboard Corp.*, 527 U.S. at 846; *Richards v. Jefferson County*, 517 U.S. 793, 798 (1996); *Martin v. Wilks*, 490 U.S. 755, 761 (1989). "The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor*, 553 U.S. at 892-93 (quoting *Richards*, 517 U.S. at 798 (internal quotation marks omitted)). *Accord Martin*, 490 U.S. at 761-62. "As a consequence, '[a] judgment or decree

among parties to a lawsuit resolves issues as among them, but it does not conclude the rights of strangers to those proceedings.'" *Richards*, 517 U.S. at 798 (quoting *Martin*, 490 U.S. at 762; *Blonder-Tongue Laboratories, Inc. v. University of Ill. Foundation*, 402 U.S. 313, 329 (1971)).

This general rule against nonparty preclusion is grounded in the due-process protections of the United States Constitution because a judgment against one not properly made a party "is not entitled to the full faith and credit which the Constitution . . . prescribe[s] . . . and judicial action enforcing it against the person or property of the absent party is not that due process which the Fifth and Fourteenth Amendments requires. . . ." *Hansberry v. Lee*, 311 U.S. at 40-41 (internal citations omitted). As this Court stated in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 805 (1985), "a judgment issued without proper personal jurisdiction over an absent party is not entitled to full faith and credit elsewhere and thus has no res judicata effect as to that party."

Nonparties to a prior action "may not be collaterally estopped without litigating the issue. They have never had a chance to present their evidence and arguments on the claim. Due process prohibits estopping them despite one or more existing adjudications of the identical issue which stand squarely against their position." *Blonder-Tongue Laboratories, Inc.*, 402 U.S. at 329 (citing *Hansberry*, 311 U.S. at 40). *Accord Parklane Hosiery Co., Inc. v. Shore*, 439 U.S. 322, 327 n. 7 (1979).

Accordingly, "extreme applications of the doctrine of res judicata may be inconsistent with a fed-

eral right that is 'fundamental in character.'" *Richards*, 517 U.S. at 797 (quoting *Postal Telegraph Cable Co. v. Newport*, 247 U.S. 464, 475 (1918). When a judgment purportedly entitled to the binding force and effect of res judicata

> is challenged for want of due process it becomes the duty of this Court to examine the course of procedure in both litigations to ascertain whether the litigant whose rights have thus been adjudicated has been afforded *such notice and opportunity to be heard as are the requisite to the due process which the Constitution proscribes*.

Hansberry, 311 U.S. at 40 (emphasis added; citation omitted).

And as the Court reiterated in *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950):

> "The fundamental requisite of due process of law is the opportunity to be heard." *Grannis v. Ordean*, 234 U.S. 385, 394 [(1914)]. This right to be heard has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.
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> An elementary and fundamental requirement of due process in any proceeding which is to be accorded finality is notice reasonably calculated, under all the circumstances, to apprise interested parties of the pendency of the action and afford them an opportunity to present their objections. . . .

Mullane, 339 U.S. at 314 (citations omitted). *Accord Schroeder v. City of New York*, 371 U.S. 208, 211-12 (1962).

This Court was given an opportunity to address the question of whether a lack of notice could be cured by a finding of adequate representation in *Richards v. Jefferson County*, *supra*. In *Richards*, a group of Alabama taxpayers sought to challenge through a class action the constitutionality of a county's occupation tax. The Alabama Supreme Court found that the proposed class action was barred by the doctrine of res judicata because the plaintiffs had been adequately represented in a prior consolidated adjudication that had unsuccessfully challenged the constitutionality of the tax and that had been brought by three different county taxpayers, the City of Birmingham, and the City's acting finance director. The Alabama Supreme Court held the nonparties bound even though the prior adjudication was not a class action and absolutely no notice had been provided to any nonparties. *Id*. 517 U.S. at 795-96.

This Court was particularly troubled by the lack of any notice since "the right to be heard ensured by the guarantee of due process 'has little reality or worth unless one is informed that the matter is pending and can choose for himself whether to appear or default, acquiesce or contest.'" *Id.* at 799 (quoting *Mullane*, 339 U.S. at 314) (other citations omitted). The Court also acknowledged:

> Of course, mere notice may not suffice to preserve one's right to be heard in a case such as the one before us. The general rule is that "[t]he law does not impose upon any person

> absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger."

Id. at 800 n. 5 (quoting *Chase Nat. Bank v. Norwalk*, 291 U.S. 431, 441 (1934)). *Accord Martin v. Wilks*, 490 U.S. at 763-64 (same; also holding that the Federal Rules of Civil Procedure incorporate the same principle). Indeed, the Court subsequently held that knowledge or awareness of prior litigation by a nonparty, even when represented by the same lawyer who brought the prior action, is not sufficient to trigger res judicata. *South Central Bell Telephone Co. v. Alabama*, 526 U.S. 160, 167-68 (1999). *See also Taylor v. Sturgell*, 553 U.S. at 889-90 & 897-98.

But instead of basing its decision in *Richards* on the lack of notice, this Court proceeded to hold that based upon the facts of the case a finding of adequate representation could not be made, consistent with the dictates of due process, to justify the application of the doctrine of res judicata. The Court explained that for a finding of adequate representation to meet the dictates of due process the prior adjudication "would at least have to be 'so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue.'" *Id.* at 801 (quoting *Hansberry*, 311 U.S. at 43). In *Richards*, such a finding could not be supported because the plaintiffs in the prior adjudication had neither sued on behalf of a class, asserted any claims in their pleadings on behalf of any nonparties, nor obtained

a judgment that purported to bind any nonparties. *Id.* at 801-02.

B. At Least in Rule 23(b)(3) Classes, All of the Due-Process Protections Incorporated into Rule 23 Must Be Provided to Absent Class Members in Order to Bind Them to a Judgment.

Because this Court in *Hansberry*, after its initial discussion of due-process requirements including notice and an opportunity to be heard, acknowledged that a "class" or "representative" suit was a recognized exception to the rule against nonparty preclusion and, in discussing that exception, focused on the importance of adequate representation without further mentioning the necessity of the notice component, *see Hansberry*, 311 U.S. at 41-46, some litigants began arguing that notice might not be an essential requirement in at least some class actions provided the absent members were adequately represented. *See Richards*, 517 U.S. at 801. But the reasonableness of any contention that notice might not be necessary, provided adequate representation exists, has been laid to rest (at least as to Rule 23(b)(3) classes) by subsequent decisions[13] of this Court and the substantial amend-

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[13] The *Hansberry* Court noted that this exception was "to an extent not [then] precisely defined by judicial opinion." *Hansberry*, 311 U.S. at 41. The Court also declared that the provided procedure would at least have to be "so devised and applied as to insure that those present are of the same class as those absent and that the litigation is so conducted as to insure the full and fair consideration of the common issue. . . . We decide only that the procedure and the course of litigation

(*Footnote continued*)

ments, beginning in 1966, to Rule 23 of the Federal Rules of Civil Procedure that expressly incorporate due-process protections, including notice.

Thirty-four years after its decision in *Hansberry*, this Court expressly addressed the due-process protections required under Rule 23, and the importance of notice as a necessary component for Rule 23(b)(3) classes in both *American Pipe & Constr. Co. v. Utah*, 414 U.S. 538 (1974), and *Eisen v. Carlisle & Jacquelin*, *supra*. The Court concluded that Rule 23(c)(2) expressly provides for mandatory, rather than discretionary, notice to each member of a (b)(3) class and that a "court is required to direct to class members 'the best notice practicable under the circumstances including individual notice to all members who can be identified through reasonable effort.'" *Eisen*, 417 U.S. at 173-76 (quoting Fed.R.Civ.P. 23(c)(2)). *Accord American Pipe*, 414 U.S. at 547-48. Moreover, "in Rule 23(b)(3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion." *American Pipe*, 414 U.S. at 548. *Accord Eisen*, 417 U.S. at 173.

The Court noted in *Eisen* that the Advisory Committee had explained "that the 'mandatory notice pursuant to subdivision (c)(2) . . . is designed to fulfill requirements of due process to which the class action procedure is of course subject[ ]' [and that] [t]he Committee explicated its incorporation of due process standards by citation to *Mullane* and

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sustained here by the plea of res judicata do not satisfy these requirements." *Id.* at 43-44 (internal citations omitted).

like cases." *Eisen*, 417 U.S. at 173-74. Importantly, the Court expressly rejected an argument "that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23[,]" finding that that "view has little to commend it" in light of the express command of Rule 23. *Id.* at 176-77. *See also Ortiz*, 527 U.S. at 834 n.13; *Amchem Prods.*, 521 U.S. at 617.

In *Phillips Petroleum Co. v. Shutts*, *supra*, this Court again discussed the minimum, procedural due-process protections absent members of a Rule 23(b)(3) class are owed before a forum court may exercise personal jurisdiction over them and bind them:

> The plaintiff must receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. . . . Additionally, we hold that due process requires at a minimum that an absent plaintiff be provided with an opportunity to remove himself from the class by executing and returning an "opt out" or "request for exclusion" form to the court. Finally, the Due Process Clause of course requires that the named plaintiff at all times adequately represent the interests of the absent class members. . . .

Shutts, 472 U.S. at 811-12 (internal citations omitted).

In *Richards*, *supra*, because the prior adjudication had not been a class action and another ground for decision existed, this Court was not required to resolve the question of whether *Hansberry* could

reasonably "be read to leave open the possibility that in some class suits adequate representation might cure a lack of notice." *See Richards*, 517 U.S. at 801. Rather, for the sake of argument, the Court assumed the possibility remained open and proceeded to reject the applicability of res judicata since adequate representation could not be found as discussed above. But, when making that assumption, this Court cast significant doubt as to the reasonableness of any such possibility by its "*but cf.*" citation to *Eisen*, 471 U.S. at 177; *Mullane*, 339 U.S. at 319; and other language in *Hansberry*, 311 U.S. at 40, the precise sections of which discuss the necessity of notice and the opportunity to be heard (and have been quoted above). *See Richards*, 517 U.S. at 801. *See also Taylor v. Sturgell*, 553 U.S. at 901 n. 11 ("*Richards* suggested that notice is required in some representative suits, *e.g.*, class actions seeking monetary relief. . . . But we assumed without deciding that a lack of notice might be overcome in some circumstances.") (internal citations omitted). At the very least, whatever possibility that this Court in *Richards* may have held out that in some types of class actions notice might not be required, this Court's decisions in *Eisen* and *Shutts* establish that notice and an opportunity to be heard or to opt out are required in class actions under Rule 23(b)(3).

In recognition of these principles of due process at least two federal courts of appeals have refused to assert personal jurisdiction over absent members of a proposed class–the certification of which had been denied–for purposes of enjoining or estopping them from seeking class certification in another

court. These courts have concluded that upon the denial of class certification the absent members remain strangers to the litigation over whom no basis existed to assert personal jurisdiction consistent with the requirements of due process. *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.,* 134 F.3d at 141; *In re Bayshore Ford Trucks Sales, Inc.*, 471 F.3d 1233, 1245 (11th Cir. 2006).

The necessity of the due-process protections incorporated in Rule 23 to bind absent class members was also recently stressed by this Court in *Taylor v. Sturgell*, *supra*. There, the Court was faced with the issue of whether a broad doctrine of "virtual representation" was consistent with any of the exceptions it had recognized to the rule against nonparty preclusion.

After reemphasizing the principles that everyone should have his own day in court and that one is not bound by a judgment *in personam* in a litigation in which he has not been made a party by designation or service of process, the Court acknowledged that "the rule against nonparty preclusion is subject to exceptions" and that "[r]epresentative suits with preclusive effect on non parties include *properly conducted class actions . . . .*" *Taylor*, 553 U.S. at 894 (citing *Martin*, 490 U.S. at 762 n. 2; Fed.R.Civ.P.23) (emphasis added). The Court then distinguished the doctrine of virtual representation from the recognized exceptions to the rule against nonparty preclusion, *id.* at 895-906, specifying that "[i]n the class-action context, these limitations are implemented by the procedural safeguards contained in Federal Rule of Civil Procedure 23." *Id.*

at 900-01. Thus, *Taylor* strongly indicates that absent certification pursuant to Rule 23 (or, a state-court rule providing comparable protections), the exception allowing nonparty preclusion based on a "properly conducted class action" is not applicable.

The Court reasoned:

> An expansive doctrine of virtual representation, however, would "recogniz[e], in effect, a common-law kind of class action." *Tice [v. American Airlines, Inc.]*, 162 F.3d [966,] 972 [(7th Cir. 1998)] (internal quotation marks omitted). That is, virtual representation would authorize preclusion based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in *Hansberry, Richards*, and Rule 23. These protections, grounded in due process, could be circumvented were we to approve a virtual representation doctrine that allowed courts to "create *de facto* class actions at will." *Tice*, 162 F.3d, at 973.

Id. at 901.

C. The Eighth Circuit's Decision That the District Court Had Jurisdiction to Bind Smith and the Class He Proposes to Represent to Its Prior Ruling Denying Class Certification Violates Both Due Process and Preclusion Principles.

1. *McCollins* Never Became a Properly Conducted Class Action.

The only exception to the rule against nonparty preclusion advanced below is that applicable where there has been a "properly conducted class action." Neither Bayer nor the courts below relied on or even cited this Court's opinions in *Hansberry* and *Richards* to suggest that adequate representation might cure a lack of notice in some types of class actions. And, in light of the express dictates of Rule 23(c)(2)(B) concerning Rule 23(b)(3) classes and this Court's decisions in *Mullane*, 339 U.S. at 314; *Eisen*, 417 U.S. at 173-77; *Shutts*, 472 U.S. at 805, 807, & 811-12; *Richards*, 517 U.S. at 797-99, 800 n. 5, & 801-02; and *Taylor*, 553 U.S. at 892-94, 900-01 & n. 11, they could not reasonably do so.

Rather, Bayer and the courts below simplistically rely on *Taylor*'s recognition that "properly conducted class actions" may support nonparty preclusion. *See Taylor*, 553 U.S. at 894. This argument entirely misses the point that *Taylor* acknowledged that "properly conducted class actions" are a recognized exception to the rule against nonparty preclusion because of "the procedural safeguards contained in Federal Rule of Civil Procedure 23." *See Id.* at 894 & 901. Adequate representation is only one of the procedural safeguards afforded under Rule 23; the others include rights to notice, an opportunity to be heard or participate in the litigation (whether in person or through counsel), and to opt out or request exclusion. And, again, as to Rule 23(b)(3) classes, this Court in *Eisen* expressly rejected the argument "that adequate representation, rather than notice, is the touchstone of due process in a class action and therefore satisfies Rule 23[,]" finding that that "view has little to commend it" in

light of the express command of Rule 23. *Eisen*, 417 U.S. at 176-77.

The procedural safeguards attending a properly conducted class action are only afforded class members upon certification of a class–the true beginning of a class action. *See id.* 417 U.S. at 173-77; *Shutts*, 472 U.S. at 811-12; Fed.R.Civ.P. 23; W.Va.R.Civ.P. 23. Simply stated, an individual lawsuit requesting class certification does not become a "properly conducted class action" until class certification has been granted in accordance with the requirements set forth in Rule 23. Until that point, all that exists is an individual lawsuit with a plaintiff seeking class-action status and appointment as a class representative. Upon denial of class certification, all that remains is the individual lawsuit, the judgment in which cannot bind absent members of the once-proposed class.

As Rule 23(c)(2) & (3) and the decisions of this Court discussed above make clear, the whole point of the due-process protections afforded absent class members once all of the requirements of Rule 23(a) & (b)(3) have been met for class certification is to justify binding the absent members, who have not chosen to be excluded, to the judgment of the Court. *See also Cooper v. Federal Reserve Bank*, 467 U.S. 867, 874 (1984) (acknowledging in regard to class actions that are certified, "[t]here is of course no dispute that under elementary principles of prior adjudication a judgment on a properly entertained class action is binding on class members in any subsequent litigation"); Restatement (Second) of Judgments § 41(1)(e) ("The representative of a class of persons similarly situated, designated as such

with the approval of the court, of which the person is a member."); Restatement (Second) of Judgments § 41(1)(e), Comment e (explaining that "[i]n a class suit, the representative of the class derives his representative authority from his situation as a member of the affected class, coupled with judicial approval of designation of the action as a class suit and of the representative's status as such"; also acknowledging that under Rule 23 "preliminary notification of other members of the class" may be required for some types of classes).

This Court explained in *American Pipe*, 414 U.S. at 548-49:

> [T]he present Rule provides that in Rule 23(b)(3) actions the judgment shall include all those found to be members of the class who have received notice and who have not requested exclusion. Rule 23(c)(3). Thus, potential class members retain the option to participate in or withdraw from the class action only until a point in the litigation . . . when the suit is allowed to continue as a class action and they are sent notice of their inclusion within the confines of the class. Thereafter they are either nonparties to the suit and ineligible to participate in a recovery or to be bound by a judgment, or else they are full members who must abide by the final judgment, whether favorable or adverse.

(Footnote omitted).

Accordingly, denial of class certification is, fundamentally, a decision that individuals other than the named plaintiffs will not be bound by the judg-

ment in the case. To give the ultimate judgment in the case issue-preclusive effect with respect to the denial of class certification *contradicts* the denial of certification by rendering the judgment binding on absent class members in the absence of any of the procedural protections that are essential to bind nonparties.

The inconsistency of this approach with *Taylor* was recently explained by a California appellate court:

> The protections for absent class members prescribed by rule 23, of course, are afforded after a motion for class certification has been granted, not by the filing of a motion for certification that is denied. Similarly, the concept of a "properly conducted class action" suggests a class action that has been certified, following a hearing in which the named representatives have established they satisfy the requirements of rule 23, and then litigated to judgment or settled, not a individual lawsuit in which a motion for class certification was denied. Literally (and narrowly) read, therefore, *Taylor v. Sturgell*, *supra,* . . . would appear to preclude the use of collateral estoppel to bar absent putative class members from seeking class certification following the denial of a certification motion in an earlier lawsuit . . . .

Johnson v. GlaxoSmithKline, Inc., 83 Cal. Rptr.3d 607, 618 n. 8 (Ct.App.2nd Dist. 2008) (emphases added).

Similary, the ALI has explained that applying preclusive effect to the denial of class certification

would be akin to recognizing a form of "virtual representation" over nonparties currently disallowed by this Court:

> The choice of comity rather than preclusion as the focus of this Section stems from the difficulties associated with the latter with respect to a denial of class certification. The major difficulty arises from the recognition that, as to such a denial, the prospective absent class members have become neither parties to the proposed class action nor persons with any attributes of party status (such as the capacity to be bound thereby, as in a duly certified class action). Nor is there any guarantee that prospective absent class members even would be aware of the court's determination of their ability to assert claims as a class action. The notion that absent class members could be bound in an issue-preclusion sense with respect to the seeking of certification in another court, even for the same proposed class action, runs afoul of existing precedents that confine to certain narrowly defined categories the situations in which preclusion can be extended to reach nonparties. Issue preclusion arising from a denial of class certification as to would-be absent class members would approach the kind of "virtual representation" disallowed under current law.

Principles of the Law of Aggregate Litigation § 2.11, Comment b (2010).

As further explained in the Reporters' Note to the ALI Comment, none of the exceptions recognized by this Court to nonparty preclusion "extend

generally to the situation of a would-be absent class member with respect to a denial of class certification"; thus,

> Informed by the *Taylor* Court's analysis of the outer bounds for nonparty preclusion, this Section rejects the *Bridgestone/Firestone* court's pre-*Taylor* view of the issue-preclusive effect that may properly flow from a denial of class certification. Even in the pre-*Taylor* period, moreover, the approach to issue preclusion in *Bridgestone/Firestone* represented the minority view within the federal circuits . . . .

Principles of the Law of Aggregate Litigation § 2.11, Reporters' Note Comment b (2010) (citations omitted).

Bayer's argument that the Eighth Circuit's judgment below also is not inconsistent with the pre-*Taylor* decisions of the Third Circuit in *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, *supra*, and the Eleventh Circuit in *In re Bayshore Ford Trucks Sales, Inc.*, *supra*, which constituted the majority view, is a red herring because neither of those courts held that their relevant holdings, based upon due process and lack of personal jurisdiction, were solely dependent upon a finding of inadequate representation, or the absence of a finding of adequate representation, as opposed to any other basis for denying a class action under Fed.R.Civ.P. 23.[14]

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[14] *See In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, 134 F.3d at 139 & 141 (noting that certification of settlement class had been overturned due to

(*Footnote continued*)

Furthermore, it must be stressed in this case that the district court never made an express finding of adequate representation in its decision denying class certification in *McCollins*, rather it merely presumed adequate representation existed for purposes of its discussion. The district court should not be permitted, when addressing the motion for an injunction, to make a *post hoc* judgment as to such a critical issue.[15] *See Chick Kam Choo*, 486 U.S. at 148 (cautioning that a district court is not permitted to render a *post hoc* judgment as to what an earlier order should have said). The district court's order also did not purport to bind all absent members to its decision denying certification. *See*

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failure of district court to make any of the findings required under Rule 23, including adequacy of representation, but only expressing doubt as to district court's ability to find commonality, typicality, and predominance requirements; not basing its finding of lack of personal jurisdiction on any precise reason for denial of class treatment); *In re Bayshore Ford Trucks Sales, Inc.*,471 F.3d at 1245 (although inadequate representation was reason for denial of class treatment by district court, appellate court did not base its finding of lack of personal jurisdiction on this particular reason for denial of class treatment; also citing *In re General Motors Corp. Pick-Up Truck Fuel Tank Prod. Liab. Litig.*, as support for holding).

[15] The finding of adequate representation is also rather dubious in this case because George McCollins failed to appeal either the summary judgment granted against his individual claims or the denial of class certification. Moreover, in light of the significant difference in how West Virginia and federal courts interpret and apply their own class-action rules, the decision of counsel to file the action in a manner that did not destroy diversity of citizenship and prevent removal is questionable.

Richards, 517 U.S. at 801-02; *Hansberry*, 311 U.S. at 41-43.

In short, because the denial of certification meant that *McCollins* never became a properly conducted class action, the class-action exception to the rule against nonparty preclusion does not apply to this action. Thus, collateral estoppel cannot be utilized, consistent with either due process or the common-law principles of preclusion, to bar Smith from seeking certification of a West Virginia class action. Accordingly, affirming the decision of the Eighth Circuit in this case would require this Court to "'recogniz[e], in effect, a common-law kind of class action[ ]' . . . based on identity of interests and some kind of relationship between parties and nonparties, shorn of the procedural protections prescribed in" Rule 23 and precedent of this Court, similar to the "virtual representation doctrine that allowed courts to 'create *de facto* class actions at will[ ]'" that was recently rejected by this Court in *Taylor*, 553 U.S. at 901 (citations omitted).

2. The Purported Protections Afforded Smith Are Inadequate to Satisfy Due Process.

Holding that Smith should be treated the same as George McCollins and that he has been accorded all necessary due-process protections, the Eighth Circuit adopted the reasoning of the Seventh Circuit in *Bridgestone/Firestone*. There, the court held that its prior reversal of the certification of a nationwide class action, *see In re Bridgestone/Firestone, Inc. Tires Prod. Liab. Litig.*, 288 F.3d 1012 (7th Cir. 2002), *cert. denied*, 537 U.S. 1105 (2003), could not be used to estop absent class

members from seeking certification of statewide classes in state courts. *Bridgestone/Firestone*, 333 F.3d at 766. But the court then held that absent class members *could* be estopped under the Anti-Injunction Act's relitigation exception from seeking certification of nationwide classes for the same claims in state courts, provided that they had been adequately represented by the named litigants and class counsel. *Id.* 333 F.3d at 766-69.

The reasoning supporting this latter holding is unpersuasive,[16] and the Eighth Circuit's reliance upon it in this case is misplaced. The Seventh Circuit reasoned principally that "unnamed class members have the status of parties for many purposes and are bound by the decision whether or not the court otherwise would have had personal jurisdiction over them." *Id.* at 768. To support this proposition, the Seventh Circuit cited two decisions of this Court, *Devlin v. Scardelletti*, 536 U.S. 1 (2002), and *Shutts*.

Because this Court acknowledged in *Devlin* that "[n]onnamed class members . . . may be parties for some reasons and not for others" and that they have the right to appeal certain class decisions without first intervening to obtain party status, *Devlin*, 536 U.S. at 7-10, the Seventh Circuit reasoned that absent class members could have sought a writ of certiorari from its adverse ruling denying class certification and, therefore, should be bound

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[16] The Seventh Circuit has again followed this faulty reasoning in *Thorogood v. Sears, Roebuck & Co.*, ___ F.3d ____, 2010 WL 4286367 (7th Cir. Nov. 2, 2010) (Posner, J.).

by that ruling. *Bridgestone/Firestone*, 333 F.3d at 768. The Seventh Circuit reasoned that any other approach would result in a "heads-I-win, tails-you-lose situation." *Id.* at 767. The Eighth Circuit adopted that same reasoning in this case. Pet. App. 11a. While this reasoning may be sound in cases where class certification has been granted and absent class members have been given notice of the class action and declined to opt out, it makes no sense when class certification has been denied and no notice has ever been provided to the absent members.

How are citizens in West Virginia even to know that there is a case seeking certification of a West Virginia class in a district court in Minnesota if they are never afforded notice? And, if they have no knowledge of the case, how are they supposed to appeal the district court's denial of class certification? In that situation, as this Court explained in *Mullane*, 339 U.S. at 314; *Schroader*, 371 U.S. at 211-12; and *Richards*, 517 U.S. at 799, any opportunity to be heard or ability to seek review is purely imaginary. Under these circumstances, an absent member of the class is not being prevented from getting "two bites at the apple" but is being robbed of his entitlement to a single bite. Nothing in *Devlin*, supports that draconian result or otherwise suggests that absent would-be class members are considered parties (or to be in privity with parties) in cases where certification is denied and the absentees are never even accorded notice.

Devlin stands for the narrow proposition that nonnamed class members who object to a class settlement at a fairness hearing have the right to ap-

peal the approval of the settlement without first intervening in the action for the very reason that they will be bound by the settlement despite their objections. *Devlin*, 536 U.S. at 10-11. In carving out this limited exception, the Court acknowledged the general rule that "'only parties to a lawsuit, or those that properly become parties, may appeal an adverse judgment.'" *Id.* at 7 (quoting *Marino v. Ortiz*, 484 U.S. 301, 304 (1988) (*per curiam*)). But, as Justice Scalia observed in dissent, "[n]ot even petitioner, however, is willing to advance *the novel and surely erroneous argument that a nonnamed class member is a party to the class-action litigation before the class is certified*." *Id.* 536 U.S. at 16 n. 1 (emphasis added).

Consistent with that view (and in tension with *Bridgestone/Firestone*), the Seventh Circuit has held that a nonnamed class member is *not* a party for purposes of appealing a denial of class certification or dismissal of claims in an uncertified class action unless he intervenes. *See Wrightsell v. Cook County, Ill.*, 599 F.3d 781, 784-85 (7th Cir. 2010) ("But before certification, a class member who . . . would like to appeal the denial of certification must ask the district court for permission to intervene in the case and must do so within the statutory deadline for filing a notice of appeal."); *Daniels v. Bursey*, 430 F.3d 424, 428 (7th Cir. 2005) ("Because the class was not certified, Koresko and Schmier have no capacity to appeal just because they are members of a putative class."); *Larson v. JPMorgan Chase & Co.*, 530 F.3d 578 (7th Cir. 2008) (where named representative loses certification motion and summary judgment motion and determines not to

appeal, absent class member must promptly intervene if he desires to appeal).

Of course, permitting a nonnamed class member to intervene and appeal a ruling that would not otherwise bind him is quite different from holding that he will be bound even if he chooses not to intervene. Even if the nonnamed class member had knowledge of the prior ruling, the latter holding would violate the time-honored principle that "[t]he law does not impose upon any person absolutely entitled to a hearing the burden of voluntary intervention in a suit to which he is a stranger." *Richards*, 517 U.S. at 800 n. 5 (quoting *Chase Nat. Bank v. Norwalk*, 291 U.S. at 441); *Martin v. Wilks*, 490 U.S. at 763-64.

In *American Pipe*, 414 U.S. at 551-52, this Court held that the filing of a putative class action tolls the statute of limitations as to all absent class members who timely sought to intervene upon denial of class certification regardless of whether they initially relied upon the commencement of the action or were even aware that such a suit existed.[17] Relying upon its holding in *American Pipe*, the Court in *Devlin*, 536 U.S. at 10, noted that nonnamed class members are "parties in the sense that the filing of an action on behalf of the class tolls a statute of limitations against them." Impor-

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[17] Subsequently, in *Crown, Cork & Seal Co., Inc. v. Parker*, 462 U.S. 345 (1983), this Court expressly extended *American Pipe* to nonnamed class members who filed individual actions upon denial of certification rather than motions to intervene.

tantly, however, *American Pipe* explained that pending a trial court's certification decision,

> potential class members are mere passive beneficiaries of the action brought in their behalf. Not until the existence and limits of the class have been established and notice of membership has been sent does a class member have any duty to take note of the suit or to exercise any responsibility with respect to it in order to profit from the eventual outcome of the case.

American Pipe, 414 U.S. at 552.

That absent class members may in certain circumstances receive some benefits of party status before class certification does not justify binding them as if they were actual parties in other circumstances when reasonable due-process protections have not been afforded them. *Devlin* acknowledged that "[n]onnamed class members . . . may be parties for some purposes and not for others" in explaining its rejection of the Seventh Circuit's suggestion in *In re Navigant Consulting, Inc., Securities Litig.*, 275 F.3d 616, 619 (7th Cir. 2001), that nonnamed class members cannot have it both ways, similar to the "heads I win, tails you lose" one proffered in *Bridgestone/Firestone* and relied upon by the Eighth Circuit below. *See Devlin*, 536 U.S. at 9-10 ("[t]he label 'party' does not indicate an absolute characteristic, but rather a conclusion about the applicability of various procedural rules that may differ based on context"). This Court also rejected a similar argument in *Taylor*, 553 U.S. at 903-04, that had been raised in support of a "pub-

lic-law" exception to the rule against nonparty preclusion.

As for *Shutts*, this Court's recognition that absent class members in a Rule 23(b)(3) class action can be bound as parties when the minimum due-process rights are afforded them upon class certification hardly supports the view that they can be bound to a denial of class certification when they have *not* received those protections. Stated otherwise, a recognition that absent class members are not entitled to the full panoply of due-process rights afforded defendants for personal-jurisdiction purposes does not detract from the importance of those minimum due-process protections to which they are entitled. The significance of the rights to receive notice, appear, opt out, and be adequately represented that are afforded class members upon certification cannot be overstated. *See Shutts*, 472 U.S. at 811-12. Far from supporting preclusion, *Shutts* affirmatively forecloses it where its due-process conditions have not been satisfied.

It is no answer, moreover, to say (as the Seventh and Eighth Circuits have) that notice and opt-out rights do not accrue unless certification is granted. *See Bridgestone/Firestone*, 333 F.3d at 769; Pet. App. 14a. This circular reasoning begs the question. Indeed, it is the very fact that such rights are not afforded unless certification is granted that means a denial of class certification cannot, consistent with due process, be given binding effect on nonparty members of a never-certified class.

Finally, any suggestion that an individual suffers no harm by being deprived of the opportunity to seek certification of a statewide class in state

court because of the availability of an individual lawsuit also misses the mark. This Court, as well as countless others, has recognized that the primary, beneficent purpose of Rule 23 is "vindication of 'the rights of groups of people who individually would be without effective strength to bring their opponents into court at all'" due to the small monetary sums at issue as damages for each individual. *E.g.*, *Amchem Prods.,* 521 U.S. at 617 (quoting Kaplan, Prefatory Note 497). Here, if deprived of the opportunity to seek class certification, Smith will suffer irreparable harm because he will have no effective means to seek redress for his damages.

This Court has previously acknowledged that a state-law claim for relief is a property interest that is entitled to due-process protections. *See Shutts*, 472 U.S. at 807 ("a chose in action is a constitutionally recognized property interest possessed by each of the [absent class-action] plaintiffs"); *Mullane*, 339 U.S. at 313 & 315 (recognizing a cause of action to be a species of property protected by the due-process clause). When dealing with such protected property interests, this Court has held that courts are prohibited from denying potential litigants use of established adjudicatory procedures, when such an action would be "the equivalent of denying them an opportunity to be heard upon their claimed right[s]." *Boddie v. Connecticut*, 401 U.S. 371, 380 (1971); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 429-30 (1982). For all practical purposes, depriving Smith of the right to seek class certification under Rule 23 of the West Virginia Rules of Civil Procedure is equivalent to denying

him an opportunity to be heard upon his claimed rights.

In stark contrast, the alleged irreparable harm that respondent will be required to endure if Smith prevails is that of being forced to deal with the repetitious litigation of defending the West Virginia class action. But what presents the greatest threat of repetitious litigation and potential inconsistent judgments: dealing with one West Virginia class action or thousands of individual lawsuits brought in courts across all of West Virginia?[18] While the answer would otherwise appear obvious, respondent knows that those thousands of individual lawsuits can never economically and efficiently be brought due to the small amount of individual damages at issue. In any event, even if individual lawsuits would be economically feasible, depriving Smith of his right to utilize a rule of procedure that has been adopted by the State of West Virginia on the basis of the outcome of litigation to which he was a stranger is still a denial of due process.

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[18] If certified, a class action will not only protect Smith's rights but provide Bayer with a binding resolution of the claims of all class members who do not opt out. Bayer may prefer not to face those claims on the merits at all, but the injustice of precluding parties who have had no day in court outweighs any harm to Bayer from having to contest the litigation.

CONCLUSION

For all of the foregoing reasons, the Court should reverse the judgment of the court of appeals.

Respectfully submitted,

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APPENDIX

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Constitutional Provisions, Statutes, and Rules

Rule 23 of the Federal Rules of Civil Procedure provides, in pertinent part:

> **(a) Prerequisites.** One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
>
> **(1)** the class is so numerous that joinder of all members is impracticable;
>
> **(2)** there are questions of law or fact common to the class;
>
> **(3)** the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
>
> **(4)** the representative parties will fairly and adequately protect the interests of the class.
>
> **(b) Types of Class Actions.** A class action may be maintained if Rule 23(a) is satisfied and if:
>
> ***
>
> **(3)** the court finds that the questions of law or fact common to class members predominate over any questions affecting only individual members, and that a class action is superior to other available methods for fairly and efficiently adjudicating the controversy. The matters pertinent to these findings include:
>
> **(A)** the class members' interests in individually controlling the prosecution or defense of separate actions;

(B) the extent and nature of any litigation concerning the controversy already begun by or against class members;

(C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; and

(D) the likely difficulties in managing a class action.

(c) Certification Order; Notice to Class Members; Judgment; Issues Classes; Subclasses.

***

(2) ***Notice.***

(A) *For (b)(1) or (b)(2) Classes.* For any class certified under Rule 23(b)(1) or (b)(2), the court may direct appropriate notice to the class.

(B) *For (b)(3) Classes.* For any class certified under Rule 23(b)(3), the court must direct to class members the best notice that is practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice must clearly and concisely state in plain, easily understood language:

(i) the nature of the action;

(ii) the definition of the class certified;

(iii) the class claims, issues, or defenses;

(iv) that a class member may enter an appearance through an attorney if the member so desires;

(v) that the court will exclude from the class any member who requests exclusion;

(vi) the time and manner for requesting exclusion; and

(vii) the binding effect of a class judgment on members under Rule 23(c)(3).

(3) ***Judgment.*** Whether or not favorable to the class, the judgment in a class action must:

(A) for any class certified under Rule 23(b)(1) or (b)(2), include and describe those whom the court finds to be class members; and

(B) for any class certified under Rule 23(b)(3), include and specify or describe those to whom the Rule 23(c)(2) notice was directed, who have not requested exclusion, and whom the court finds to be class members.

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Rule 23 of the West Virginia Rules of Civil Procedure provides, in pertinent part:

(a) Prerequisites to a Class Action. One or more members of a class may sue or be sued as representative parties on behalf of all only if (1) the class is so numerous that joinder of all members is impracticable, (2) there are questions of law or fact common to the class, (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class, and (4) the representative parties will fairly and adequately protect the interests of the class.

(b) Class Actions Maintainable. An action may be maintained as a class action if the pre-

requisites of subdivision (a) are satisfied, and in addition:

***

(3) The court finds that the questions of law or fact common to the members of the class predominate over any questions affecting only individual members, and that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. The matters pertinent to the findings include: (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions; (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class; (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum; (D) the difficulties likely to be encountered in the management of a class action.

(c) Determination By Order Whether Class Action to be Maintained; Notice; Judgment; Actions Conducted Partially as Class Actions.

***

(2) In any class action maintained under subdivision (b)(3), the court shall direct to the members of the class the best notice practicable under the circumstances, including individual notice to all members who can be identified through reasonable effort. The notice shall advise each member that (A) the court will exclude the member from the class if the

member so requests by a specified date; (B) the judgment, whether favorable or not, will include all members who do not request exclusion; and (C) any member who does not request exclusion may, if the member desires, enter an appearance through counsel.

(3) The judgment in an action maintained as a class action under subdivision (b)(1) or (b)(2), whether or not favorable to the class, shall include and describe those whom the court finds to be members of the class. The judgment in an action maintained as a class action under subdivision (b)(3), whether or not favorable to the class, shall include and specify or describe those to whom the notice provided in subdivision (c)(2) was directed, and who have not requested exclusion, and whom the court finds to be members of the class.

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