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 RESPONDENT

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QUESTION PRESENTED

Whether a federal court that has denied class certification may enjoin members of the putative class who were adequately represented in the federal proceedings from seeking to certify the same class in state court.

CORPORATE DISCLOSURE STATEMENT

Bayer Corporation is a wholly owned subsidiary of Bayer AG. No publicly held company owns more than 10% of the stock of Bayer AG.

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INTRODUCTION

This case arises from an attempt by petitioners to relitigate in West Virginia state court certification of the same class denied certification by the federal court overseeing the Baycol multidistrict litigation. Concluding that petitioners were adequately represented in the federal certification proceedings and that they were seeking a different ruling from the West Virginia court on the same issues, the district court enjoined petitioners from seeking certification of the same class in state court, leaving them free to pursue their individual claims. The court of appeals unanimously affirmed, holding that the injunction was authorized by the All Writs Act and the relitigation exception to the Anti-Injunction Act, and that petitioners did not have a due-process right to relitigate class certification.

The decision below is correct and should be affirmed. Petitioners have not been foreclosed from seeking relief on their individual claims, but only from seeking to represent other people through a class action. Whether a class should be certified has been fully and fairly litigated in proceedings that are binding on petitioners and in which petitioners' interests were adequately represented by an identically situated named plaintiff. Procedural due process requires no more.

At bottom, petitioners' position is that class certification is a "heads-I-win, tails-you-lose" proposition. Under their theory, every unnamed plaintiff could relitigate class certification, no matter how large the putative class, no matter how many times certification had already been denied, and no matter how adequately the class members' interests were represented in the prior proceedings. This would

be a world in which defendants could never obtain a final ruling on class certification and would be forced in effect to buy litigation peace by settling. Not surprisingly, these extreme and intolerable results find no support in this Court's precedents or in principles of preclusion law or due process. The courts below did not err in rejecting petitioners' lopsided view of the law.

STATEMENT OF THE CASE

A. Baycol

Baycol is a prescription cholesterol-reducing medicine that Bayer distributed in the U.S. from 1997 to 2001 with approval of the United States Food and Drug Administration. See *In re Baycol Prods. Litig.*, 218 F.R.D. 197, 201 (D. Minn. 2003). Baycol is a "statin," a member of the same family of medications as Lipitor, Zocor, and Crestor.

Like all other statins, Baycol has been associated with muscle aches and pains, as well as more serious side effects such as rhabdomyolysis, a severe breakdown of muscle tissue in which the substances released into the bloodstream may overwhelm the kidneys. Baycol's labeling warned about these and other side effects, including the risk of using another class of drugs, fibrates, concurrently with Baycol. Ultimately, Baycol's label contraindicated concurrent use of Baycol and one fibrate, gemfibrozil, due to the risk of rhabdomyolysis. But Bayer continued to receive reports of rhabdomyolysis in patients who were being prescribed Baycol with gemfibrozil. Bayer voluntarily withdrew Baycol from the market in August 2001.

B. The Baycol MDL

Tens of thousands of lawsuits were filed after the withdrawal of Baycol. See JA 349. The Judicial Panel on Multidistrict Litigation established MDL-1431 in the United States District Court for the District of Minnesota to coordinate discovery and other pretrial matters for federal-court cases. See *In re Baycol Prods. Liab. Litig.*, No. 1431, 2001 WL 34134820, at *1–2 (J.P.M.L. Dec. 18, 2001).

In the ensuing nine years, the district court has issued more than 160 pretrial orders; supervised fact and expert discovery; and ruled on proposed nationwide and statewide classes, generic and case-specific *Daubert* motions, and motions for summary judgment. See, *e.g.*, *In re Baycol*, 218 F.R.D. 197; *In re Baycol Prods. Litig.*, 532 F. Supp. 2d 1029 (D. Minn. 2007). The district court also has worked cooperatively with state courts to coordinate federal and state Baycol litigation through a joint conference, correspondence with other judges, and creation of a coordinated program for depositions of witnesses overseas. See JA 342–48.

From the first year of this litigation, the district court has supervised a settlement program for claimants who suffered rhabdomyolysis, the side effect that led to Baycol's withdrawal from the market. See JA 340–41. To date, Bayer has paid $1.17 billion to resolve 3,144 rhabdomyolysis claims. Bayer has vigorously litigated all other claims, including cases seeking economic recovery for plaintiffs, like petitioners, who benefited from and were not injured by Baycol. Bayer has won defense victories in each of the six Baycol cases tried to a jury. Of the approximately 40,000 plaintiffs who filed Baycol cases (22,500 in federal court and 17,500 in state courts), fewer than 80 still have cases pending.

Bayer has defeated numerous motions for class certification in the MDL and other jurisdictions. See Br. in Opp. 5–6 & n.4.

C. *McCollins* v. *Bayer Corp.*

In addition to managing common-issue discovery, the district court supervised case-specific discovery and motion practice in all MDL cases. In one such case, plaintiff George McCollins sought certification of a class of West Virginia Baycol purchasers, asserting claims for purported economic loss caused by Bayer's alleged breach of warranties and violation of the West Virginia Consumer Credit and Protection Act (WVCCPA), W. Va. Code § 46A-6-101 *et seq*. The case was originally filed in West Virginia state court in August 2001, but was removed on diversity grounds to the United States District Court for the Southern District of West Virginia and transferred to the Baycol MDL. JA 118; Dkt. #1; Dkt. #18.

McCollins did not claim that Baycol had injured him or had not worked as intended to reduce his cholesterol, and he "expressly disclaim[ed] any intent to seek any recovery for personal injuries suffered or which may be suffered by any class member." JA 141–42. McCollins could not have asserted any such claims; his own doctor testified that Baycol not only was "safe and effective in Mr. McCollins," but "was perfect for him." *Id*. at 243, 248.

McCollins nevertheless sought to recover for alleged "economic loss that includes the purchase price of the products," JA 149, on the theory that he and other "Class members were not receiving products of the quality, nature, fitness, or value that has been represented by Defendants," *id*. at 146. Thus, McCollins sought a refund of the amount he had paid for Baycol or statutory damages, even

though the drug had reduced his cholesterol and worked for him exactly as intended.

In November 2006, McCollins moved to remand the case from the MDL to the Southern District of West Virginia. JA 8–11. Bayer cross-moved for denial of class certification and summary judgment on McCollins's individual claims. *Id.* at 16–36. Certification of an economic-loss class was inappropriate, Bayer contended, because to establish liability under West Virginia law, each plaintiff would have to show that Baycol either injured him or did not provide him any health benefits. *Id.* at 24–25. Individual issues of fact therefore predominated, precluding certification under Rule 23(b)(3). *Id.* And as to McCollins's individual claims, Bayer argued it was entitled to summary judgment because the undisputed evidence showed that Baycol had worked for him. *Id.* at 30–34.

In response, McCollins argued that common issues predominated, and that he had made out a viable individual claim, because West Virginia law "does not require a plaintiff to prove that a product did not 'work' or that it caused a personal injury." JA 64. In McCollins's view, it was enough to show that "Baycol was 'a bad product' that 'hurt a lot of people,'" and was therefore "'different from' or 'inferior to' the product for which [he] bargained." *Id.* at 64, 67.

On August 25, 2008, the district court denied McCollins's motion to remand and granted Bayer's motion to deny class certification and enter summary judgment against McCollins. Pet. App. 35a–52a. Turning first to the class-certification issue, the district court assumed without deciding that the requirements of Rule 23(a) were satisfied, *id.* at 41a, but held that "class certification [was] not appropriate because individual issues of fact

predominate[d]," *id.* at 46a. The court rejected McCollins's argument that he could recover simply by showing that he bought an "unsafe" product. Rather, the court held, "[t]o recover under West Virginia law on any of Plaintiff's economic loss claims, . . . Plaintiff must show an actual injury proximately caused by Defendants." *Id.* at 44a.

Under this substantive liability standard, the district court concluded that "[i]ndividual evidence would be necessary as to each member of the putative class to determine whether the individual person benefitted from or was injured by Baycol." Pet. App. 45a. This would require an "in depth review of each plaintiff's medical records," including "examination of the individual's pre-existing conditions, prior statin reactions, the plaintiff's knowledge of the potential side effects associated with statins, and the warnings provided." *Id.* Because "individual issues of fact predominate[d] with respect to whether Baycol benefitted or harmed any particular person," the district court held that McCollins's economic-loss claims were "not appropriate for class certification based on Rule 23(b)(3)." *Id.* at 45a–46a.

As to McCollins's individual claims, the court reiterated that to establish a viable economic-loss claim under West Virginia law, McCollins had to "demonstrate Baycol was 'something other than what he bargained for.'" Pet. App. 50a. This McCollins could not do, because the evidence showed "that Baycol worked for him" and was therefore "exactly what he bargained for." *Id.* at 51a.

Neither McCollins nor any class member appealed the judgment, which became final on September 25, 2008.

D. *Smith* v. *Bayer Corp.*

Five days after the *McCollins* judgment became final, petitioners asked a West Virginia state court to certify the same West Virginia economic-loss class the district court had refused to certify in *McCollins*. JA 177–210. Petitioners had filed their lawsuit in the Circuit Court of Brooke County, West Virginia, in September 2001. *Id.* at 152. The case could not be removed to federal court because two West Virginia defendants were sued. Those defendants were later dismissed, but only after the one-year deadline for removal under 28 U.S.C. § 1446(b). Nor could Bayer remove the case under the Class Action Fairness Act of 2005 (CAFA), because the action was filed before CAFA's effective date. See Pub. L. No. 109-2, § 9, 119 Stat 4, 14 (2005).

The *Smith* complaint asserted personal-injury, medical-monitoring, and economic-loss claims on behalf of all West Virginia residents who had ingested Baycol. JA 152–75. During class discovery, the doctor who treated both petitioners testified that they, like McCollins, experienced no side effects from Baycol and that Baycol reduced their cholesterol. *Id.* at 259, 266.

On September 30, 2008—seven years after filing their complaint—petitioners moved for class certification, asking the West Virginia court to certify an economic-loss class of "[a]ll West Virginia residents who purchased the drug Baycol in West Virginia" with respect to the "consumer protection act claims as set forth in the complaint." JA 184. Petitioners did not seek to certify personal-injury or medical-monitoring claims, thereby narrowing their putative class to overlap with the class denied certification in *McCollins*.

Like McCollins, petitioners asserted that they could recover for economic loss under West Virginia law simply because they bought Baycol, without any individualized showing that the drug injured or did not work as intended for them. JA 186 ("If a consumer was charged for Baycol in West Virginia, then they fall into a group that deserves compensation for the improper charge perpetrated upon them."). Also like McCollins, petitioners argued that certification was appropriate because common issues predominated. *Id.* at 204–09. "[W]ith respect to liability," they claimed, "there are no individual issues." *Id.* at 207.

E. The Proceedings Below

Bayer moved the district court to enjoin petitioners from relitigating certification of a West Virginia economic-loss class. The district court held that the proposed injunction fell within the relitigation exception to the Anti-Injunction Act because (a) the economic-loss class petitioners sought to certify was identical to that denied certification in *McCollins* and presented the same threshold issue of substantive law, Pet. App. 25a–26a; (b) petitioners had not identified any substantive or procedural differences between West Virginia's class-certification rule and the federal rule, *id.* at 25a; (c) the order denying class certification was final, *id.* at 26a–29a; and (d) as unnamed members of the proposed *McCollins* class situated identically to McCollins, petitioners' interests in obtaining certification of a West Virginia economic-loss class were adequately represented in the federal proceedings, *id.* at 29a–32a.

The district court further held that it had personal jurisdiction over petitioners for purposes of enjoining them from relitigating class certification. Pet App. 32a. After concluding that the balance of equities

supported an injunction to protect its final judgment in *McCollins*, the district court enjoined petitioners from "seeking certification of an economic loss class of West Virginia Baycol purchasers." *Id*. at 34a. Nothing in the district court's order hinders petitioners from pursuing their individual claims in West Virginia state court.

The Eighth Circuit unanimously affirmed. Pet. App. 1a–19a. On *de novo* review, the panel held:

- The certification issue presented in *Smith* was identical to that in *McCollins* and was "'enmeshed'" with the same substantive issue of West Virginia law, *id*. at 7a–8a;
- Petitioners' relitigation of class certification "would undermine [the] conclusion of substantive state law properly made by the district court," *id*. at 8a;
- No relevant substantive or procedural difference between the federal standard for class certification and its West Virginia counterpart justified relitigating in state court the *McCollins* predominance holding and denial of class certification, *id*. at 7a–10a; and
- As members of the putative *McCollins* class, petitioners were bound *in personam* by the denial of class certification because any limited due-process interest they had in seeking class certification was protected by the adequate representation of McCollins, their right to appeal the *McCollins* decision, and their ability to pursue their individual claims, *id*. at 13a–15a.

Emphasizing the importance of finality to the just and efficient administration of multidistrict litigation, Pet. App. 12a, the court of appeals held that the district court properly invoked the authority of the All Writs Act and the relitigation exception to the Anti-Injunction Act, and exercised sound discretion in crafting a narrow injunction that protected its judgment in *McCollins*, *id.* at 16a–17a.

SUMMARY OF ARGUMENT

I. The courts below correctly held that the All Writs Act and the relitigation exception to the Anti-Injunction Act authorize the injunction the district court entered to protect its final judgment denying class certification in *McCollins*. Congress has expressly authorized federal courts to protect and effectuate their judgments by enjoining state-court litigation of issues that have been fully and fairly adjudicated in federal court. And the history of the relitigation exception leaves no doubt that it was properly invoked here—when Congress enacted the relitigation exception, it ratified a prior decision of this Court upholding an injunction prohibiting unnamed class members from relitigating in state court issues that had been decided in a prior federal class action.

II. The courts below also correctly concluded that petitioners are collaterally estopped from relitigating class certification. Petitioners seek certification of the same class on the same legal theory that the district court in *McCollins* rejected. Critically, petitioners seek a different ruling from the West Virginia court on a substantive issue of law decided in *McCollins*. That fact alone shows that petitioners are seeking to relitigate the "same issue" and distinguishes all the authorities on which they rely.

Moreover, even as to the procedural aspects of the *McCollins* class-certification ruling, the same issues are presented in *Smith*. The Court should reject petitioners' argument that a different issue is presented simply because the certification issue in *Smith* arises under West Virginia's substantively identical counterpart to Federal Rule 23(b)(3). Because the controlling legal principles are the same under both rules, the same issues are presented. Petitioners' contrary approach, which would allow a party to escape preclusion based on the mere possibility that another court might apply its rule differently, finds no support in the principles or policies of preclusion law and ignores the strong federal policies against duplicative state-court class actions.

III. Petitioners are bound by the denial of class certification as adequately represented members of the putative *McCollins* class. This Court has long treated unnamed members of an uncertified class as parties for a variety of purposes. And just as unnamed class members are entitled to the benefits of a favorable decision on class certification, so they should be bound by an unfavorable one. Otherwise every unnamed class member could relitigate class certification, producing the very multiplicity of actions Rule 23 was designed to avoid.

Petitioners also are bound by the judgment under basic principles of nonparty preclusion. Because petitioners' interests in certifying a West Virginia economic-loss class are identical to McCollins's, and because McCollins litigated the certification issue in a representative capacity on behalf of a class, this case satisfies the criteria the Court has delineated for nonparty preclusion based on adequate representation. Contrary to petitioners' contention, preclusion

does not turn on whether the class was certified. The district court's ruling was a binding and essential determination on a key aspect of a putative class proceeding. And this Court's cases recognized the preclusive effect of class judgments long before Rule 23's formal procedures for class certification were first adopted in 1966. As those cases show, adequate representation is the touchstone of preclusion in class actions.

IV. Precluding petitioners from relitigating class certification does not violate due process. The courts below correctly rejected petitioners' contention that they are not subject to the personal jurisdiction of the district court. And this Court has never held that, as a matter of procedural due process, notice and an opportunity to opt out are necessary to bind unnamed class members even to a judgment on the merits of their claims, let alone to a ruling that prevents them from invoking a particular procedural device.

The appropriate procedural due process analysis balances the individual interests at stake and the risk of an erroneous deprivation of those interests against society's interests in avoiding the cost and burden of the additional procedures petitioners' propose and in preventing serial relitigation of class certification. That balance overwhelmingly favors preclusion. Petitioners' only protected property interest is in their claims themselves, and that interest has not been impaired, much less extinguished, as petitioners remain free to pursue their individual claims. Once an adequate representative has fully and fairly litigated class certification, additional procedures would not increase the probability of a "correct" result, but would only invite gamesmanship and inconsistent results. And society has compelling interests in

achieving litigation finality and avoiding the abusive practices to which petitioners' proposed rule would inevitably give rise.

ARGUMENT

I. CONGRESS EXPRESSLY AUTHORIZED FEDERAL COURTS TO PROTECT AND EFFECTUATE THEIR JUDGMENTS BY ENJOINING DUPLICATIVE STATE-COURT LITIGATION.

Two statutes frame this case: the All Writs Act and the Anti-Injunction Act. Before turning to the specific issues petitioners raise, a brief overview of these statutes may be helpful.

A. The All Writs Act provides courts with the affirmative authority to protect the preclusive effects of their judgments by enjoining duplicative litigation in other courts. Congress provided express statutory authority for such injunctions by empowering federal courts to "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). "This Court has repeatedly recognized the power of a federal court to issue such commands under the All Writs Act as may be necessary or appropriate to effectuate and prevent the frustration of orders it has previously issued in its exercise of jurisdiction otherwise obtained." *United States* v. *N.Y. Tel. Co.*, 434 U.S. 159, 172 (1977).

The All Writs Act does not confer subject-matter jurisdiction. *Syngenta Crop Prot., Inc.* v. *Henson*, 537 U.S. 28, 33 (2002). However, no independent source of subject-matter jurisdiction is necessary to enter a protective injunction; the jurisdiction the court had when it entered the original judgment is enough.

Local Loan Co. v. *Hunt*, 292 U.S. 234, 239 (1934). Here, for example, the district court's subject-matter jurisdiction over the *McCollins* case sufficed to support the injunction. Pet. App. 15a.

Although petitioners were unnamed parties to *McCollins*, the power conferred by the All Writs Act also extends to "persons who, though not parties to the original action," are "in a position to frustrate the implementation of a court order or the proper administration of justice." *N.Y. Tel.*, 434 U.S. at 174; see also *United States* v. *Int'l Bhd. of Teamsters*, 266 F.3d 45, 50 (2d Cir. 2001) (per curiam).

B. The Anti-Injunction Act provides that "[a] court of the United States may not grant an injunction to stay proceedings in 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. This last exception, commonly referred to as the "relitigation exception," is "founded in the well-recognized concepts of *res judicata* and collateral estoppel," and is "designed to permit a federal court to prevent state litigation of an issue that previously was presented to and decided by the federal court." *Chick Kam Choo* v. *Exxon Corp.*, 486 U.S. 140, 147 (1988).

Along with the other exceptions, the relitigation exception was added to the Anti-Injunction Act in response to this Court's decision in *Toucey* v. *New York Life Insurance Co.*, 314 U.S. 118 (1941). The Court in *Toucey* had held that federal courts lacked authority to enjoin state-court proceedings to protect the *res judicata* effect of their judgments, repudiating a line of earlier cases that had upheld such authority. See *id.* at 143–54 (Reed, J., dissenting). Prominent among the earlier cases recognizing a relitigation exception was *Supreme Tribe of Ben-Hur* v. *Cauble*,

255 U.S. 356 (1921), which had upheld an injunction prohibiting unnamed class members from relitigating in state court claims that had been adjudicated in a prior federal class action. *Id*. at 363–67.

Justice Reed wrote a forceful dissent in *Toucey*, finding no justification for jettisoning the *Ben-Hur* line of cases:

> Th[e] alternative is that a federal judgment entered perhaps after years of expense in money and energy and after the production of thousands of pages of evidence comes to nothing that is final. It is to be only the basis for a plea of *res judicata* which is to be examined by another court, unfamiliar with the record already made, to determine whether the issues were or were not settled by the former adjudication. We, too, desire that the difficulties innate in the federal system of government may be smoothed away without a clash of sovereignties, but we find no cause for alarm in affirming a court which forbids parties bound by its decree to fight the battle over on another day and field.

Toucey, 314 U.S. at 144 (Reed, J., dissenting) (footnote omitted).

Congress responded by amending the Anti-Injunction Act in 1948 to grant federal courts express authority "to enjoin relitigation of cases and controversies fully adjudicated by such courts." H.R. Rep. No. 80-308, at A181–82 (1947). The Reviser's Note made clear that the amendment "served not only to overrule the specific holding of *Toucey*, but to restore 'the basic law as generally understood and interpreted prior to the Toucey decision.'" *Mitchum* v. *Foster*, 407 U.S. 225, 236 (1972) (footnote omitted). This Court has accordingly held that "the criteria to

be applied" in interpreting the exceptions to the Anti-Injunction Act "are those reflected in the Court's decisions prior to *Toucey*." *Id.* at 236–37.

Contrary to petitioners' suggestion, then, this case does not present any danger of "'enlarg[ing]'" the exceptions to the Anti-Injunction Act through "'loose statutory construction.'" Pet. Br. 14. Rather, this case falls squarely within the core of the relitigation exception—an express statutory exception embodying Congress's considered judgment that "federal courts should be authorized to protect their judgments against relitigation in state courts, rather than leave successful federal court litigants to the assertion of collateral estoppel defenses in subsequent state court actions." *Smith* v. *Woosley*, 399 F.3d 428, 432 (2d Cir. 2005).

There can thus be no doubt that Congress contemplated and sanctioned exactly the kind of injunction at issue here, to protect and effectuate the federal court's judgment. And contrary to petitioners' suggestion that the reasons for the relitigation exception apply only in federal-question cases, see Pet. Br. 17–18, a federal court's judgment in a diversity case is undoubtedly part of the "federal law" whose supremacy and effectiveness the relitigation exception is designed to ensure. Even if no substantive question of federal law is presented, the concerns animating the constitutional grant of diversity jurisdiction, such as the potential for local prejudice against out-of-state defendants, are directly implicated when the losing party in a federal diversity action seeks to relitigate the same matters in state court. See generally *Hertz Corp.* v. *Friend*, 130 S. Ct. 1181, 1188, 1191 (2010).

A litigant who seeks to enforce the preclusive effect of a federal judgment also cannot afford to wait for

the state court to rule on the preclusion issue before seeking federal relief. Under *Parsons Steel, Inc.* v. *First Alabama Bank*, 474 U.S. 518 (1986), if the state court rules on the preclusion issue, its judgment on that issue itself becomes preclusive and is entitled to full faith and credit in federal court. *Id.* at 525. If the state court unjustifiably rejected the preclusion defense, its ruling would thus "effectively proscrib[e] a federal court from issuing a subsequent injunction to effectuate its judgment," *Fernández-Vargas* v. *Pfizer*, 522 F.3d 55, 68 (1st Cir. 2008), and "the only federal recourse (in non-removable suits) would be the uncertain prospect of certiorari review" by this Court, *Smith*, 399 F.3d at 432.

II. PETITIONERS SEEK TO RELITIGATE THE SAME ISSUE DECIDED IN *McCOLLINS*.

The doctrine of issue preclusion embodies the "fundamental precept of common-law adjudication" that "a right, question or fact distinctly put in issue and directly determined by a court of competent jurisdiction cannot be disputed in a subsequent suit between the same parties or their privies." *Montana* v. *United States*, 440 U.S. 147, 153 (1979) (internal quotation marks and alterations omitted). This doctrine is "central to the purpose for which civil courts have been established," and protects parties "from the expense and vexation attending multiple lawsuits, conserves judicial resources, and fosters reliance on judicial action by minimizing the possibility of inconsistent decisions." *Id.* at 153–54. Without preclusion, "'an end could never be put to litigation.'" *San Remo Hotel, L.P.* v. *City & County of S.F.*, 545 U.S. 323, 336–37 (2005) (quoting *Hopkins* v. *Lee*, 19 U.S. (6 Wheat.) 109, 114 (1821)).

Petitioners contend that they cannot be precluded from relitigating class certification under federal

common law, which they assert incorporates West Virginia preclusion law under *Semtek International Inc.* v. *Lockheed Martin Corp.*, 531 U.S. 497 (2001), because *McCollins* involved different issues and different parties, and because petitioners did not personally have the opportunity to litigate class certification in *McCollins*.

Not only are petitioners wrong as a matter of West Virginia law, they also ignore the powerful federal interests that support the application of uniform federal preclusion law in this context. Unlike in *Semtek*, where the prior federal judgment rested solely on state-law grounds, *id.* at 506–09, the issue sought to be relitigated here is a federal procedural ruling, and "[t]here are strong federal interests arising from the interdependence of preclusion with federal procedure," 18B Charles Alan Wright, Arthur R. Miller & Edward H. Cooper, *Federal Practice & Procedure* § 4472, at 380 (2d ed. 2002) (Wright & Miller).

Like the preclusive effect of a federal ruling on a question of federal substantive law, the preclusive effect of a federal procedural ruling should be governed by a uniform federal rule of decision. See Stephen B. Burbank, *Interjurisdictional Preclusion, Full Faith and Credit and Federal Common Law: A General Approach*, 71 Cornell L. Rev. 733, 762–63 (1986). That is particularly true for rulings under Rule 23, which "clearly contemplates a uniform federal rule on who is bound by [a class-action] suit." Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 763 (1976). And the federal rule of decision should be informed by the strong federal interests in avoiding needless relitigation of class-certification determinations. See *infra*, 28–30.

A. Petitioners cannot dispute that they seek to certify the same economic-loss class of West Virginia Baycol purchasers on the same legal theory that the district court in *McCollins* rejected. The propriety of such a class was already fully and fairly adjudicated in *McCollins*.

In denying certification of an economic-loss class in *McCollins*, the district court held that to recover for economic loss under West Virginia law, a plaintiff must show that Baycol caused her personal injury or did not work for her. Pet. App. 43a–45a. Accordingly, the court held that individual issues of fact predominated over common issues and that a class action therefore could not be maintained under Rule 23(b)(3). *Id*. at 45a.

Petitioners' motion for class certification in *Smith* seeks a different ruling from the West Virginia court on each of these issues. Directly contrary to the district court's rulings in *McCollins*, petitioners argue that they can recover for economic loss under West Virginia law simply because they bought Baycol, without any individualized showing that Baycol injured or did not work for them. JA 186 ("If a consumer was charged for Baycol in West Virginia, then they fall into a group that deserves compensation for the improper charge perpetrated upon them."). And because petitioners contend that "with respect to liability, there are no individual issues," they assert that common issues predominate and a class can be certified. *Id.* at 207; see also *id*. at 208 ("The proof of the violations of the act will be identical with respect to each class member.").

Petitioners' contention that their class-certification motion in *Smith* presents different issues than those decided in *McCollins* defies both logic and common sense. Without a doubt, petitioners are seeking to

relitigate "what is essentially the same dispute." *Restatement (Second) of Judgments* § 27, cmt. c. (1982).

B. Petitioners seek to relitigate a substantive ruling of law that underpins the denial of class certification in *McCollins*. The *McCollins* court held that under West Virginia law, liability cannot be established as to all members of the putative class through common proof because each class member must show injury. Pet. App. 45a–46a. Petitioners contend that they do not have to prove injury to establish liability. JA 186, 207–08. Petitioners do not and cannot contend that this is a different issue in federal and state court. Instead, they argue that they are entitled to relitigate this substantive legal ruling for two reasons.

1. Petitioners argue that the district court should not have decided any substantive issues because *Eisen* v. *Carlisle & Jacquelin*, 417 U.S. 156, 177–78 (1974), forbids consideration of substantive issues at the certification stage. Not so. *Eisen* merely "forbids courts from considering, as part of the certification analysis under Rule 23, which side will ultimately prevail." 5 James Wm. Moore, *Moore's Federal Practice* § 23.84[2], at 23-387 (3d ed. 2010). It does not "prevent any inquiry into substantive issues at the certification stage." *Id*. at 23-387–88. Indeed, it is well settled that "[a] judge must delineate what issues of law exist to determine whether they are common to the class." Pet. App. 8a; see also *Coopers & Lybrand* v. *Livesay*, 437 U.S. 463, 469 (1978) (class certification "involves considerations that are 'enmeshed in the factual and legal issues comprising the plaintiff's cause of action'"); *In re Initial Pub. Offerings Sec. Litig.*, 471 F.3d 24, 41 (2d Cir. 2006).

In denying class certification, the district court in *McCollins* did not "resolve on the merits the substantive claims of a plaintiff." Pet. Br. 28. It simply held that to establish an essential element of his case-in-chief, each plaintiff would have to show that Baycol injured or did not work for him. Petitioners now seek in effect to overturn that substantive ruling in *Smith*.

2. Petitioners and their *amicus* American Association for Justice (AAJ) also dispute the district court's conclusion that each class member would have to present individual evidence of injury to establish liability under West Virginia law. See Pet. App. 10a; AAJ Br. 17–24. This argument is irrelevant: Issue preclusion does not depend on the correctness of the prior decision. *E.g.*, *Allen* v. *McCurry*, 449 U.S. 90, 101 (1980) (rejecting "any argument that Congress intended to allow relitigation of federal issues decided after a full and fair hearing in a state court simply because the state court's decision may have been erroneous"); *Restatement* § 28, cmt. j.

The argument also is wrong: The district court relied on the West Virginia statute and the West Virginia Supreme Court decision AAJ claims the district court ignored. Pet. App. 44a (citing W. Va. Code § 46A-6-106 and *In re W. Va. Rezulin Litig.*, 585 S.E.2d 52 (W. Va. 2003)); see also *Baycol Prod. Litig.*, 218 F.R.D. at 213 (discussing *Rezulin* in denying certification of nationwide economic-loss class).

Rezulin explains that under the West Virginia consumer-fraud statute, a plaintiff must establish a "'loss'"—"held synonymous with a deprivation, detriment and injury." 585 S.E.2d at 74–75. That is wholly consistent with the district court's holding that to establish liability each plaintiff must show either that he was injured by Baycol or that Baycol

did not provide him any health benefits. Pet. App. 43a.

C. Because petitioners seek a different ruling on the same substantive issue of law that was decided in *McCollins*, this Court need go no further to conclude that the "same issue" is presented in *Smith*. But even as to the procedural aspects of the *McCollins* certification ruling, petitioners' certification motion in *Smith* presents the same issues. The predominance inquiry is the same in both jurisdictions because the controlling legal principles are the same. And under the plain language of both Federal Rule 23 and West Virginia Rule 23, a class cannot be certified where, as here, individual issues predominate.

1. Petitioners assert that a class-certification issue arising under a state certification rule necessarily presents a different issue—even if the state rule is identical to Federal Rule 23—because a state court may, in its discretion, "construe and apply its rules in a different manner with a different result." Pet. Br. 25. In support of this proposition, petitioners cite *In re General Motors Corp. Pick-up Truck Fuel Tank Products Liability Litigation*, 134 F.3d 133 (3d Cir. 1998), *J.R. Clearwater Inc.* v. *Ashland Chemical Co.*, 93 F.3d 176 (5th Cir. 1996), and § 2.11 of the ALI's new Principles of the Law of Aggregate Litigation, which in turn relies exclusively on the reasoning of *General Motors* and *J.R. Clearwater*.

None of these authorities supports petitioners' claim that a substantive holding of law made by a federal court in denying class certification can be relitigated in state court. In fact, an earlier draft of the ALI Principles provided that preclusion should apply where, as here, "the initial court denies aggregate treatment on grounds applicable across the two fora." *Principles of the Law of Aggregate*

Litigation § 2.11, cmt. b (Tentative Draft No. 1 Apr. 7, 2008) (ALI Tent. Dr.). The requirements of the WVCCPA are such grounds.

Petitioners' authorities are also unpersuasive on their own terms. Different issues are not presented simply because federal and state courts might arrive at different decisions applying identical class-certification rules. To the contrary, courts have repeatedly held that if "careful examination of the controlling legal principles" in both jurisdictions reveals "that the standards are the same, or that fact findings have the same effect under either standard," then "the same issue is presented by both systems of law." 18 Wright & Miller, *supra* § 4417, at 461–62 & n.65 (collecting cases); see also *id.* § 4425, at 656–57 ("Identity of the issue is established by showing that the same general legal rules govern both cases and that the facts of both cases are indistinguishable as measured by those rules.") (footnote omitted). A party should not be able to "avoid the preclusive effect of a denial of class certification rendered by a federal court . . . by filing suit against the same party in . . . state court and pointing to largely illusory differences between statutes that are designed for essentially identical purposes." *Lee* v. *Criterion Ins. Co.*, 659 F. Supp. 813, 823 (S.D. Ga. 1987).

Petitioners' approach also finds no support in the purposes of preclusion doctrine. Preclusion law is not designed to allow every jurisdiction to apply its own law or procedures to a given dispute. Rather, it is a doctrine of repose—a value that "encompasses both the parties' interest in avoiding the cost and vexation of repetitive litigation and the public's interest in conserving judicial resources." *Univ. of Tenn.* v. *Elliot*, 478 U.S. 788, 798 (1986); see also *Astoria Fed. Sav. & Loan Ass'n* v. *Solimino*, 501 U.S. 104, 107–08

(1991). The core purposes of issue preclusion would be defeated by permitting the sort of jurisdictional hopscotch petitioners propose. A plaintiff "ought not to have unlimited bites at the apple until he can convince a single district court that he qualifies as a class representative." *Van-S-Aviation Corp.* v. *Piper Aircraft Corp. (In re Piper Aircraft Dist. Sys. Antitrust Litig.)*, 551 F.2d 213, 219 (8th Cir. 1977).

2. Contrary to petitioners' claim, Pet. Br. 24, the procedural nature of class certification should not defeat preclusion. Although a procedural ruling generally does not preclude litigation of *the merits of a claim* if the procedural defect is cured in a subsequent suit, the procedural ruling does preclude an attempt to relitigate *the same procedural issue*. See *Ruhrgas AG* v. *Marathon Oil Co.*, 526 U.S. 574, 585 (1999); *Dozier* v. *Ford Motor Co.*, 702 F.2d 1189, 1192–93 (D.C. Cir. 1983) (Scalia, J.). Thus, "[t]he same question of jurisdiction, venue, or party joinder cannot be reopened in a second action." 18 Wright & Miller, *supra* § 4418, at 468; see also 18A Wright & Miller, *supra* § 4435, at 139 (same); *id.* § 4437, at 184–85 ("Dismissal for failure to satisfy a procedural precondition . . . . should preclude relitigation of the same precondition issue."); *Restatement* § 10, cmt. d (personal-jurisdiction rulings preclusive); *id.* § 12 (subject-matter jurisdiction rulings preclusive); *id.* § 20, cmt. b (venue rulings preclusive).[1]

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[1] Petitioners also assert, in passing, that the only "ruling essential to the final judgment was that granting summary judgment against Mr. McCollins." Pet. Br. 24. By this petitioners apparently mean to suggest that the "necessarily decided" requirement for issue preclusion was not met because the class-certification issue was collateral to the merits of McCollins's claims. But petitioners have never before raised this issue, and they did not present it in their petition for certiorari.

This is consistent with *Chick Kam Choo*. The Court there held that the federal and state *forum non conveniens* issues were not the same because Texas courts "operate[d] under a broad 'open-courts' mandate" and would therefore have applied "a significantly different *forum non conveniens* analysis." 486 U.S. at 148–49. The Court did not adopt the rule urged by petitioners here, that preclusion is inappropriate because federal and state courts might apply the same standard differently or because the federal ruling is procedural.

Petitioners have identified no difference in the class-certification standards applied under federal and West Virginia law. Apart from a few minor stylistic differences, the rules themselves are identical. And the West Virginia courts, which generally rely on federal case law under Federal Rule 23 in interpreting West Virginia Rule 23, have not articulated any different legal principles with respect to predominance. Petitioners cite *Rezulin*, but it held only that "a difference in claims over the amount of damages is not sufficient to defeat class certification in an action for a refund" under the WVCCPA.[2] 585 S.E.2d at 75. The proposition that variations in damages do not defeat class certification is ubiquitous

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The argument is therefore waived. *See* Sup. Ct. R. 14.1(a). It is also wrong: A ruling on a procedural issue collateral to the merits of a claim precludes subsequent attempts to relitigate the same procedural issue. *E.g.*, 18A Wright & Miller, *supra* § 4435, at 134.

[2] The *Rezulin* court also concluded that common issues predominated with respect to medical-monitoring claims because such claims do not "rest upon the existence of present and proven physical harm." 585 S.E.2d at 73. Here, no medical-monitoring claims are at issue.

in federal case law interpreting Rule 23[3]—indeed, for that proposition *Rezulin* cited *only federal cases*. *Id.* *Rezulin* therefore does not establish any difference in the controlling legal principles under West Virginia's Rule 23. And the district court in *McCollins* did not base its predominance determination on any questions as to *damages*. It denied certification because individualized evidence was necessary to establish *liability*.

That is not, as petitioners contend, a "distinction without significance." Pet. Br. 26 n.11. Petitioners never contended in their motion for class certification in *Smith*, or at any stage of the proceedings below, that a class could be certified even if each class member was required to establish liability individually. Petitioners' present assertion that a class could be certified in any event, see *id.* at 26–27, conflicts with West Virginia class-certification law that a court may not certify a class when individual issues as to liability predominate, see, *e.g.*, *Perrine* v. *E.I. Du Pont de Nemours & Co.*, 694 S.E.2d 815, 859–60 (W. Va. 2010) (approving trial court's holding that, when considering predominance, "'[c]ourts should particularly focus on the liability issue'").

3. At bottom, petitioners' argument rests on the contention that a denial of class certification can never have preclusive effect because rulings on class certification involve some element of discretion that a subsequent court might exercise in a different fashion. This position represents a fundamental misunderstanding of issue preclusion. A ruling no more loses its preclusive effect merely because it involves some element of discretion than does a

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[3] *See, e.g.*, *Seijas* v. *Republic of Arg.*, 606 F.3d 53, 58 (2d Cir. 2010); *Blackie* v. *Barrack*, 524 F.2d 891, 905 (9th Cir. 1975).

finding of fact merely because it could come out differently if considered anew by a subsequent court. Both types of ruling are reviewed deferentially on appeal because there is room for disagreement about how the trial court should exercise its judgment (in the case of discretionary rulings) or how conflicting evidence should be interpreted (in the case of factual findings). But discretionary rulings, no less than factual findings, are entitled to preclusive effect when they are fully and fairly litigated and essential to a judgment that binds the parties. See, *e.g.*, 18A Wright & Miller, *supra* § 4445, at 305 (interlocutory-injunction rulings preclusive if "it appears that nothing more is involved than an effort to invoke a second discretionary balancing of the same interests"); *id.* § 4447, at 322 ("core concepts of preclusion" prevent multiple applications for discretionary post-judgment relief).

What is more, as this Court has recently made clear, the discretion that inheres in the certification decision is limited and constrained. Rule 23 provides trial courts with discretion in determining whether "the Rule's criteria are met" regarding the predominance of common over individual issues and other requirements. *Shady Grove Orthopedic Assocs.* v. *Allstate Ins. Co.*, 130 S. Ct. 1431, 1438 (2010). But Rule 23 does not give the trial court a free-floating mandate to grant or deny certification on the basis of considerations not comprised within Rule 23's clear terms. See *id.*

Here, the district court determined that individual issues predominated because unnamed class members would have to prove injury on an individual basis to establish their claims. Pet. App. 45a–46a. And if individual issues predominate, a court has no discretion to certify a class under either Federal Rule

23(b)(3) or its West Virginia counterpart. See Fed. R. Civ. P. 23, Adv. Comm. Note; Franklin D. Cleckley, Robin J. Davis & Louis J. Palmer, *Litigation Handbook on West Virginia Rules of Civil Procedure* § 23(b)(3)[2][a], at 553 (3d ed. 2008).

4. For these reasons, application of traditional preclusion principles shows that the same procedural issue is presented in *Smith*. That result is further supported by the strong federal policies underlying Rule 23, the MDL statute, and CAFA.

Rule 23 is designed to avoid duplicative litigation by "establish[ing] a procedure for the adjudication of common questions of law or fact." *Cooper* v. *Fed. Reserve Bank*, 467 U.S. 867, 880–81 (1984) (relying on policies underlying Rule 23 in crafting federal common-law preclusion rules). But if a determination under Rule 23 is treated as a different issue from certification of an identical class under an identical state class-certification rule, as petitioners argue, the same plaintiff or the same plaintiff's lawyer could effectively override every federal denial of class certification by relitigating the issue in other fora until he or she obtained the desired outcome. See, *e.g., Thorogood* v. *Sears, Roebuck & Co.*, No. 10-2407, 2010 WL 4286367, at *6–7 (7th Cir. Nov. 2, 2010), *reh'g denied*, 2010 WL 4890698 (Dec. 2, 2010); *In re Bridgestone/Firestone, Inc., Tires Prods. Liab. Litig.*, 333 F.3d 763, 766–67 (7th Cir. 2003). Adopting petitioners' theory would thus be "tantamount to requiring that every member of the class be permitted" to litigate class certification. *Cooper*, 467 U.S. at 880.

These federal concerns are magnified in the context of multidistrict litigation under 28 U.S.C. § 1407, where "[c]ontrol over the proliferation of cases and coordination of multiple claims is crucial to effective

management of complex litigation." David F. Herr, *Annotated Manual for Complex Litigation* 300 (4th ed. 2010). A federal preclusion rule that would allow relitigation of identical issues finally adjudicated by an MDL court would undermine the court's ability to accomplish the policies of efficiency, fairness, and uniformity underlying the MDL statute. See 15 Wright & Miller, *supra* § 3861, at 358 (the objective of § 1407 is "to assure the just and efficient conduct" of multidistrict actions and to avoid "conflict and duplication") (internal quotation marks omitted).

Finally, the enactment of CAFA reflects Congress's judgment that duplicative state-court class actions serve no useful purpose, harm interstate commerce, and cause an "enormous waste" of party and judicial resources by forcing "multiple judges of different courts [to] spend considerable time adjudicating precisely the same claims asserted on behalf of precisely the same people." S. Rep. No. 109-14, at 23 (2005).[4] The same policies that Congress found

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[4] CAFA was the result of longstanding and widespread concern about "[o]ne of the most troubling problems in the modern class-action arena": "the filing of multiple, competing class actions in state and federal courts all directed toward the same conduct or activities, which are alleged to have caused harm that is multistate, if not national, in scope." 7B Wright & Miller, *supra* § 1798.1, at 231; *see also*, *e.g.*, Martin H. Redish, *The Need for Jurisdictional and Structural Class Action Reform*, [2002] 32 Envtl. L. Rep. (Envtl. Law Inst.) 10984 (Aug. 2002); Victor E. Schwartz, Mark A. Behrens & Leah Lorber, *Federal Courts Should Decide Interstate Class Actions: A Call For Federal Class Action Diversity Jurisdiction Reform*, 37 Harv. J. Legis. 483 (2000).

Congress responded to the numerous calls for reform by establishing an additional basis for federal jurisdiction in class actions in which the matter in controversy exceeds $5,000,000 and diversity exists between any member of the putative class

supported the expansion of federal jurisdiction in CAFA should be weighed here in determining under federal common law whether a federal judgment denying class certification may be relitigated in state court.

For these reasons, "[i]t is incompatible with federal law for states to ignore federal [class-certification] judgments" as petitioners propose. *Bridgestone,* 333 F.3d at 768.

D. Petitioners also suggest that the issues in *Smith* are not the same because, in addition to their statutory fraud claim, they have "asserted a common-law claim of fraud that was not alleged in *McCollins*." Pet. Br. 19. But petitioners did not even mention their common-law fraud claim in their opposition to the injunction below, see JA 308–327, and they have not at any stage of the proceedings developed an argument as to why the presence of that claim matters to the preclusion analysis. The issue is therefore waived. See *Anza* v. *Ideal Steel Supply Corp*., 547 U.S. 451, 461 (2006).

Moreover, the addition of a common-law fraud claim does not present a new issue because common-law fraud, like statutory fraud, requires individual proof of injury that predominates over common

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and a defendant. 28 U.S.C. § 1332(d)(2). These include single-state class actions arising under state law where the defendant's conduct "could be alleged to have injured customers throughout the country or broadly throughout several states." S. Rep. No. 109-14, at 40; *see also id*. at 36 (describing example of "a nationally distributed pharmaceutical product [that] is alleged to have caused injurious side-effects"). Because such cases "involve more people, more money, and more interstate commerce ramifications than any other type of lawsuit," Congress concluded that they "properly belong in federal court." *Id*. at 5.

issues. See, *e.g.*, *Legg* v. *Johnson, Simmerman & Broughton, L.C.*, 576 S.E.2d 532, 539 (W. Va. 2002) (per curiam). Because the common-law fraud claim presents a bar to certification that is "functionally identical" to that presented by the statutory consumer-fraud claim, the predominance issue remains the same. See *Bryan* v. *BellSouth Commc'ns, Inc.*, 492 F.3d 231, 239 (4th Cir. 2007) (upholding injunction because the claim asserted in state court was "functionally identical" to the claim dismissed by the federal court and therefore presented the same issues); *Kidder, Peabody & Co.* v. *Maxus Energy Corp.*, 925 F.2d 556, 565 (2d Cir. 1991) (upholding injunction prohibiting party from relitigating claims, "'no matter how denominated,'" that had already been decided in federal court because they presented the same issues); cf. *Restatement* § 27, cmt. c., ill. 4 (a new theory of liability based on the same facts presents the same issue).

In sum, the issues presented by petitioners' class-certification motion in *Smith* are the same issues the district court decided when it denied class certification in *McCollins*. "The denial of class certification stands as an adjudication of one of the issues litigated." *Deposit Guar. Nat'l Bank* v. *Roper*, 445 U.S. 326, 336 (1980). It should preclude subsequent attempts to relitigate the same issue.

III. AS ADEQUATELY REPRESENTED UNNAMED PARTIES IN *McCOLLINS*, PETITIONERS ARE BOUND BY THE DENIAL OF CLASS CERTIFICATION.

Petitioners also contend that they are entitled to relitigate class certification because they were not named parties in *McCollins*. Pet. Br. 18. As adequately represented members of the putative *McCollins* class, however, petitioners are bound by

the judgment denying class certification for two reasons: (A) they should be considered "parties" to the class-certification proceeding for the issues essential to the ruling on class certification; and (B) even if they were not parties, they are bound under principles of nonparty preclusion.

A. Petitioners proceed from the premise that they were not "parties" to the *McCollins* action. But as this Court has explained, unnamed class members "may be parties for some purposes and not for others," because the "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." *Devlin* v. *Scardelletti*, 536 U.S. 1, 9–10 (2002).[5]

Thus, for example, the Court has held that the filing of a putative class action tolls the statute of limitations for all putative class members because "the claimed members of the class [stand] as parties to the suit until and unless they receiv[e] notice thereof and [choose] not to continue" or until class certification is denied. *Am. Pipe & Constr. Co.* v. *Utah*, 414 U.S. 538, 550–56 (1974); see also *Crown, Cork & Seal Co.* v. *Parker*, 462 U.S. 345, 350–51 (1982). A contrary rule, the Court explained, would produce "a needless multiplicity of actions—precisely the situation that Federal Rule of Civil Procedure 23 . . . [was] designed to avoid." *Parker*, 462 U.S. at 351.

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[5] As Justice Stevens observed 30 years ago, this Court has described unnamed members of an uncertified class variously as "parties in interest," *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853); as "interested parties," *Ben-Hur*, 255 U.S. at 366; and as "absent parties," *Hansberry* v. *Lee*, 311 U.S. 32, 42–45 (1940). *See Roper*, 445 U.S. at 343 n.3 (Stevens, J., concurring).

In addition, the Court has held that unnamed class members of an uncertified class may intervene after final judgment to appeal the denial of class certification. *United Airlines, Inc.* v. *McDonald*, 432 U.S. 385, 394–96 (1977). The Court reasoned that although a case is "'stripped of its character as a class action' upon denial of certification," "'it does not follow that the case must be treated as if there never was an action brought on behalf of absent class members.'" *Id.* at 393 (alteration omitted).[6]

These cases show that unnamed class members may be treated as parties, even if a class is never certified, and that their party status in a given procedural context should be determined in light of the "goals of class action litigation," particularly the goal of avoiding an inefficient multiplicity of actions. *Devlin*, 536 U.S. at 11; see also *Am. Pipe*, 414 U.S. at 551 (emphasizing that a "multiplicity of activity" would "frustrate the principal function of a class suit"); *Parker*, 462 U.S. at 350 (emphasizing the "inefficiencies [that] would ensue if *American Pipe*'s tolling rule were limited to permitting putative class members to intervene after the denial of class certification").

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[6] Petitioners argue that unnamed class members may not appeal the denial of class certification unless they first intervene. Pet. Br. 51–52. Even if that were true, it would not follow that unnamed class members are not bound by the outcome of a class proceeding in which their interests were adequately represented. But petitioners' premise is also wrong: *Devlin* strongly suggests that if unnamed class members are bound by the denial of class certification, then they may appeal without intervening. *See* 536 U.S. at 10 ("What is most important to this case is that nonnamed class members are parties to the proceedings in the sense of being bound by the settlement.").

The goals of class-action litigation overwhelmingly favor treating unnamed class members as parties to class-certification proceedings in which they are adequately represented. Otherwise unnamed class members could relitigate class certification *ad infinitum*, producing the very multiplicity of actions Rule 23 is designed to avoid. A class action may be filed on behalf of thousands, or in some nationwide class actions, hundreds of thousands or even millions of putative class members. Under petitioners' view of the law, every one of them would have the right to relitigate the denial of class certification, free and clear of any preclusion defense. There would be no end to litigation.

Petitioners also ignore the fact that unnamed class members *are* treated as parties to the *grant* of class certification: If certification is granted, they are entitled to reap the benefits of that decision by participating in a favorable class judgment. Petitioners thus seek the sort of "'one-way intervention'" the drafters of Rule 23 rejected when they concluded that unnamed class members should not be permitted "to benefit from a favorable judgment without subjecting themselves to the binding effect of an unfavorable one." *Am. Pipe*, 414 U.S. at 547. Petitioners must take the bitter with the sweet. "Just as they receive the fruits of victory, so an adverse decision is conclusive against them." *Bridgestone*, 333 F.3d at 768.

B. Even if unnamed class members are not parties to the class certification decision, they are nonetheless bound under basic principles of nonparty preclusion. As the Court recently explained in *Taylor* v. *Sturgell*, 553 U.S. 880 (2008), "a nonparty may be bound by a judgment because she was adequately represented by someone with the same interests who

was a party to the suit," and "[r]epresentative suits with preclusive effect on nonparties include properly conducted class actions." *Id.* at 894 (internal quotation marks and alterations omitted).

Petitioners do not seriously dispute that they were adequately represented in *McCollins*.[7] Nor could they. As *Taylor* explained, a party's representation of a nonparty is "adequate" for preclusion purposes if (1) "the interests of the nonparty and her representative are aligned"; and (2) "either the party understood herself to be acting in a representative capacity or the original court took care to protect the interests of the nonparty." *Id.* at 900. Both requirements are satisfied here.

First, petitioners' interests are exactly aligned with McCollins's. Like McCollins, they did not suffer any injury from Baycol and in fact benefited from it. Petitioners have "made no attempt to argue that Mr. McCollins' interests conflicted with their interests." Pet. App. 31a. And the district court expressly found that petitioners "were adequately represented" in *McCollins*, observing that "counsel for the *McCollins*

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[7] In a footnote, petitioners suggest that McCollins's representation was "dubious" because he did not appeal and because he did not defeat removal by joining a nondiverse defendant. Pet. Br. 47 n.15. These suggestions are meritless. A decision not to appeal, without more, does not show inadequate representation, particularly where, as here, no attempt has even been made to show that meritorious grounds for appeal existed. *See, e.g., In re Diet Drugs Prods. Liab. Litig.*, 431 F.3d 141, 148 (3d Cir. 2005); *Vines* v. *Univ. of La.*, 398 F.3d 700, 711–12 (5th Cir. 2005). And the idea that failure to engage in abusive joinder shows inadequate representation needs no response.

plaintiffs vigorously argued in favor of class certification before this Court." *Id.* at 32a.[8]

Second, McCollins was acting in a representative capacity when he sought class certification. Moving for class certification is an inherently representative act. And the court also took care to protect the interests of unnamed class members by attending to the procedural requirements of Rule 23 that must be met before a class may be certified. A major function of a class-certification decision is to decide whether using that procedural device serves the interests of all people within the proposed class. "As a conceptual matter and in terms of practice . . . the class-certification determination is made as to the entire proposed class, not as to individual class members." ALI Tent. Dr. § 2.11, Reporter's Note, cmt. c. "It thus is appropriate to treat absent class members as parties for issue-preclusion purposes, if only when the determination said to have issue-preclusive effect is the class-certification determination itself." *Id.*

Petitioners do not dispute that *Taylor*'s two requirements are met, but instead assert that they

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[8] Citing *Chick Kam Choo*, petitioners contend that the district court should not be permitted "to make a *post hoc* judgment" regarding adequate representation. Pet. Br. 47. Petitioners mischaracterize *Chick Kam Choo*, which said only that an injunction must be limited to issues that "actually have been decided by the federal court" and may not encompass additional issues based on "a *post hoc* judgment as to what the order was *intended* to say." 486 U.S. at 148. *Chick Kam Choo* would thus be on point only if the district court had made a *post hoc* judgment as to the propriety of class certification, which it did not. And there is no reason that a court should not be able to make a retrospective assessment of adequacy, particularly where, as here, the certification proceedings and the injunction proceedings were separated by only a matter of months and considered by the same judge.

cannot be bound because certification was denied and *McCollins* therefore never became a "'properly conducted class action.'" Pet. Br. 41. But until the moment when class certification was denied, the *McCollins* case *was* a properly conducted class action. And although the case was "'stripped of its character as a class action' upon denial of certification," "'it does not follow that the case must be treated as if there never was an action brought on behalf of absent class members.'" *McDonald*, 432 U.S. at 393 (alteration omitted). Nothing in *Taylor* exempts class members from being bound to the adjudication of issues that were actually litigated and essential to the judgment that denied certification. And *Taylor* did not say that preclusion turns on whether a class was certified.

Nor *could* the Court have said that preclusion turns on certification. Rule 23's formal class-certification device originated in 1966, but class suits have a much longer pedigree, dating to "the earliest days of English law." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 832 (1999). This Court's decisions recognized the binding effect of class judgments long before there was any such thing as class certification. As early as 1853, the Court recognized that an adequate representative of a class could "represent the entire body, and the decree binds all of them the same as if they were before the court." *Smith* v. *Swormstedt*, 57 U.S. (16 How.) 288, 303 (1853). By the time the Court decided *Hansberry* v. *Lee* in 1940, it could cite a long line of cases standing for the proposition that "the judgment in a 'class' or 'representative' suit, to which some members of the class are parties, may bind members of the class or those represented who were not made parties to it." 311 U.S. 32, 41 (1940) (citing *Smith*, 57 U.S. (16 How.) 288; *Royal Arcanum* v.

Green, 237 U.S. 531 (1915); *Hartford Life Ins. Co.* v. *Ibs*, 237 U.S. 662 (1915); *Hartford Life Ins. Co.* v. *Barber*, 245 U.S. 146 (1917); and *Ben-Hur*, 255 U.S. 356).

These cases refute any notion that class certification is indispensable to the binding effect of a class judgment. Cf. *Roper*, 445 U.S. at 326 n.3 (Stevens, J., concurring) ("since the concept of 'absent parties' was developed long before anyone conceived of certification orders," their status should not "depend on compliance with a procedural requirement that was first created in 1966"). To the contrary, adequate representation is and always has been the touchstone of preclusion in class suits. See Geoffrey C. Hazard, Jr., John L. Gedid & Stephen Sowle, *An Historical Analysis of the Binding Effect of Class Suits*, 146 U. Pa. L. Rev. 1848, 1855 (1998) (the "two basic concepts" that historically justified the preclusive effect of class judgments were "identity of interest among the class members" and "adequate representation").

Petitioners also argue that notice is necessary to the binding effect of a class judgment. The Court in *Taylor* noted that due process may "sometimes" require notice of the original suit to the persons alleged to have been represented. 553 U.S. at 900. As explained below, see *infra*, Part IV, this is not one of those times. And apart from the requirements of due process, preclusion law itself does not require notice to bind a nonparty to the outcome of a representative suit. *E.g.*, *Restatement* § 41(2) ("A person represented by a party to an action is bound by the judgment even though the person himself does not have notice of the action, is not served with process, or is not subject to service of process."); *Nevada* v. *United States*, 463 U.S. 110, 144 n.16 (1983) (a represented party is

"given adequate notice and a full and fair opportunity to be heard" through its representative).

Nor does preclusion in this context rest on the "virtual representation" theory *Taylor* disapproved. See *Bridgestone*, 333 F.3d at 769 ("Holding the absent class members to the outcome is no more an exercise in virtual representation than it is to hold them to a decision on the merits."). *Taylor* was not a class suit: The prior party there "ha[d] not purported to sue in a representative capacity." 553 U.S. at 905. *Taylor* thus poses no bar to precluding unnamed class members from relitigating class certification. To the contrary, petitioners' "theory that before certification class members cannot be thought to have been adequately represented" is "inconsistent with the Court's opinion in *Taylor* and the cases cited in it." *Thorogood*, 2010 WL 4286367, at *12.

For the same reasons, the ALI's view that precluding unnamed class members from relitigating class certification "would approach the kind of 'virtual representation' disallowed under current law" rests on a serious misinterpretation of *Taylor*. *Principles of the Law of Aggregate Litigation*, § 2.11, cmt. b (2010). Before *Taylor*, the ALI recognized that "[a] mere cosmetic change in the proposed class representative . . . should not defeat same-party status where the class for which certification is now being sought is the same as the one for which class certification was previously denied." ALI Tent. Dr. § 2.11, cmt. c. Nothing in *Taylor* is to the contrary.

IV. PETITIONERS DO NOT HAVE A DUE-PROCESS RIGHT TO RELITIGATE CLASS CERTIFICATION.

Finally, relying on *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797 (1985), petitioners contend that they

were not subject to the *McCollins* court's jurisdiction because they did not receive notice and an opportunity to opt out. Petitioners' constitutional argument blends two strands of due-process doctrine: personal jurisdiction and procedural due process. These doctrines are distinct and should be analyzed separately. See *Adams* v. *Robertson*, 520 U.S. 83, 88–89 (1997) (per curiam). Neither is a barrier to precluding petitioners from relitigating class certification.

A. Petitioners' reliance on *Shutts* is misplaced. *Shutts* concerned only the requirements for a state court to exercise personal jurisdiction over nonresident unnamed class members who lack minimum contacts with the forum. See 472 U.S. at 806 (question presented was whether "Kansas ha[d] exceeded its jurisdictional reach and thereby violated the due process rights of the absent plaintiffs," who had "no prelitigation contact" with the state). If the court whose judgment is to be accorded preclusive effect already has personal jurisdiction over the unnamed class members, "*Shutts* is inapposite." *SEC* v. *Drexel Burnham Lambert Group, Inc. (In re Drexel Burnham Lambert Group, Inc.)*, 960 F.2d 285, 292 (2d Cir. 1992).[9]

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[9] *See also Findley* v. *Falise (In re Joint E. & S. Dist. Asbestos Litig.)*, 78 F.3d 764, 778 (2d Cir. 1996) ("the *Shutts* holding as to what due process requires where a court lacks personal jurisdiction over some class members does not apply where the court has an independent basis for jurisdiction"); *Martin* v. *Drummond Co.*, 663 So. 2d 937, 941 (Ala. 1995) (*Shutts* "pertains when the plaintiff class members do not have such contacts with the forum state as would support an exercise of *in personam* jurisdiction over a defendant"); Henry Paul Monaghan, *Antisuit Injunctions and Preclusion Against Absent Nonresident Class Members*, 98 Colum. L. Rev. 1148, 1168 (1998) ("*Shutts* did *not* address the very different issue of

Here, there is no question that the district court had personal jurisdiction over petitioners. Unlike state courts, federal courts, as an arm of the federal sovereign, can assert nationwide jurisdiction over any resident of the United States. See *Miss. Publ'g Corp.* v. *Murphree*, 326 U.S. 438, 442 (1946); *Robertson* v. *R.R. Labor Bd.*, 268 U.S. 619, 622 (1925); Tobias Barrington Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. Pa. L. Rev. 2035, 2113 (2008). And the relevant question in this multidistrict litigation is not whether a federal court in Minnesota can exercise personal jurisdiction over petitioners, but whether a federal court in West Virginia can. See, *e.g.*, *In re "Agent Orange" Prod. Liab. Litig.*, 818 F.2d 145, 163 (2d Cir. 1987) ("'[T]he transferee judge has all the jurisdiction . . . that the transferor judge would have had in the absence of transfer.'"). There is no doubt that a West Virginia court can exercise personal jurisdiction over West Virginia residents. Cf. *Burnham* v. *Superior Ct.*, 495 U.S. 604 (1990) (plurality opinion).

B. Even if *Shutts* were a procedural due process decision—and it is not—it would not support petitioners' argument that notice and the opportunity to opt out are required, as a matter of constitutional law, to bind unnamed class members to a judgment denying class certification. *Shutts* and the other cases on which petitioners rely concerned the requirements to bind absent parties to a judgment *on the merits of their claims*, not the very different question presented here of what due process requires to bind unnamed class members to a ruling on the procedural issue of

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whether the Due Process Clause guarantees to class members an independent substantive right to opt out.").

class certification, which does not dispose of anyone's claims on the merits.

Even as to judgments on the merits of unnamed class members' claims, moreover, this Court has not "laid to rest" that due process requires notice and an opportunity to opt out. Pet. Br. 35. Petitioners rely on *Richards* v. *Jefferson County*, 517 U.S. 793 (1996), and *South Central Bell Telephone Co.* v. *Alabama*, 526 U.S. 160 (1999). But neither case involved a class action—the parties to the prior actions "did not sue on behalf of a class," and "their pleadings did not purport to assert any claim against or on behalf of nonparties." *Richards*, 517 U.S. at 801; see also *S. Cent. Bell*, 526 U.S. at 167–68. The same is true of *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U.S. 306 (1950), which involved a judicial settlement of accounts in a common trust fund, not a class action. See David L. Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 937 n.61 (1998) ("*Mullane* itself was not in form a class action."). And *Eisen* and *American Pipe* both concerned only Rule 23; neither decided any constitutional question.

This Court has never addressed the procedural due process requirements to bind unnamed class members to adjudications on the merits.[10] To the extent that the Court has broached the question, however, it has focused on adequate representation, not notice or a right to opt out. As the Court explained in *Hansberry*, "[i]t is familiar doctrine of

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[10] The Court has granted certiorari on the question twice in cases arising under Rule 23(b)(1) and (b)(2) and a similar state-court rule, but both times dismissed the writ as improvidently granted. *See Adams*, 520 U.S. 83; *Ticor Title Ins. Co.* v. *Brown*, 511 U.S. 117 (1994) (per curiam).

the federal courts that members of a class not present as parties to the litigation may be bound by the judgment where they are in fact adequately represented by parties who are present," and a court "is justified in saying that there has been a failure of due process only in those cases where it cannot be said that the procedure adopted, fairly insures the protection of the interests of absent parties who are to be bound by it." 311 U.S. at 42–43; see also *Ben-Hur*, 255 U.S. at 363; *Smith*, 57 U.S. (16 How.) at 303.

Following this Court's guidance, the drafters of Rule 23 proceeded on the assumption that notice and a right to opt out are not invariably required to bind unnamed class members. These rights are not provided in (b)(1) and (b)(2) class actions—even though there, unlike here, the judgment extinguishes the class members' claims on the merits. Lower courts have held that this presents no due-process problem. *E.g.*, *Alexander* v. *Aero Lodge No. 735*, 565 F.2d 1364, 1373–74 (6th Cir. 1977); *Wetzel* v. *Liberty Mut. Ins. Co.*, 508 F.2d 239, 254–57 (3d Cir. 1975).

Many distinguished scholars also believe that notice and an opportunity to opt out are not constitutionally mandated for merits adjudications, even in (b)(3) class actions, if the class members are adequately represented. *E.g.*, Shapiro, *supra*, at 958–59 ("[T]he constitutional propriety of class action treatment, and the binding effect of a judgment on the members of the class, turns on the issue of adequate representation."); Diane P. Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L.J. 597, 621 (1987) ("as long as the plaintiff adequately represents the class," notice and opt-out rights "are no longer constitutionally compelled").

Thus, petitioners' suggestion that in the class-action context due process always requires notice and an opportunity to opt out is badly mistaken.

C. The Court should instead apply first principles of due process. "Because the requirements of due process are flexible and call for such procedural protections as the particular situation demands," the Court has "declined to establish rigid rules and instead ha[s] embraced a framework to evaluate the sufficiency of particular procedures." *Wilkinson* v. *Austin*, 545 U.S. 209, 224 (2005) (internal quotation marks and alteration omitted).

Under that framework, the Court weighs (1) the nature and weight of the private interests affected; (2) the risk of an erroneous deprivation of those interests and the value, if any, of additional procedures; and (3) the governmental interest in avoiding the costs and burdens of additional procedures. *Mathews* v. *Eldridge*, 424 U.S. 319, 335 (1976). The balance here is not a close call: Society's interest in avoiding serial relitigation of class certification far outweighs any burden on petitioners' property interests.

1. "The first inquiry in every due process challenge is whether the plaintiff has been deprived of a protected interest in 'property' or 'liberty.'" *Am. Mfrs. Mut. Ins. Co.* v. *Sullivan*, 526 U.S. 40, 59 (1999). The answer here is no.

Petitioners do not argue that they have a protected property interest in the opportunity to seek class certification or in class certification itself. And for good reason: That "would be an entitlement to nothing but procedure," which "can[not] be the basis for a property interest." *Town of Castle Rock* v. *Gonzales*, 545 U.S. 748, 764 (2005); see also *id.* at

771–72 (Souter, J., concurring). Litigants "have no constitutionally recognized prelitigation entitlement or expectation" that particular procedures will be available to adjudicate their claims, as evidenced by the fact that changes in a jurisdiction's procedural rules, "unlike changes in the jurisdiction's liability rules, generally do not provoke retroactivity analysis when applied to litigants whose liability-related conduct took place under the old regime." Wolff, *supra*, at 2104. Petitioners have no protected property interest in invoking a procedural device for aggregating their claims. Cf. *U.S. Parole Comm'n* v. *Geraghty*, 445 U.S. 388, 402 & n.8 (1980) (apart from the possible situation in which the entire class is an indispensable party, making class certification necessary to assert one's individual claim, a "'legally cognizable interest'" "rarely ever exists with respect to the class certification claim").

The only protected property interest petitioners can claim is in their causes of action themselves. *Logan* v. *Zimmerman Brush Co.*, 455 U.S. 422, 428 (1982) (recognizing that "a cause of action is a species of property" protected by the due-process clause). But petitioners' individual claims are untouched; they remain free to bring them at any time. "This fact clearly dilutes any conceivable negative impact" on petitioners' protected property interests. Martin H. Redish, *The Need for Jurisdictional and Structural Class Action Reform*, [2002] 32 Envtl. L. Rep. (Envtl. Law Inst.) 10984, 10986 (Aug. 2002); see also Wolff, *supra*, at 2045 (denial of class certification merely "den[ies] one particular remedial avenue to the members of a class" and thus "entails a lesser alteration in legal position or status than does the final adjudication of the merits of an absentee's underlying claim"); cf. *Shady* Grove, 130 S. Ct. at

1443 (plurality opinion) (class certification "has no bearing" on substantive legal rights).

Petitioners assert that without an opportunity to seek class certification they will have "no effective means to seek redress for [their] damages" because their individual claims are too small to pursue outside of a class action. Pet. Br. 55. But petitioners cite no authority for the novel proposition that a claimant is deprived of his property interest in a claim simply because he chooses not to pursue it. Cf. *Lujan* v. *G&G Fire Sprinklers, Inc.*, 532 U.S. 189, 197 (2001) (hardships in collecting on a claim do not deprive a plaintiff of his property interest).

Moreover, denial of class certification does not leave petitioners without any meaningful avenue of redress. If petitioners' claims were meritorious, they could recover statutory damages of $200 per unlawful transaction,[11] attorney's fees,[12] and potentially punitive damages.[13] In such circumstances, courts have repeatedly recognized that individual claims are a viable alternative to class certification.[14] In addition, West Virginia has alternative aggregate-litigation procedures under which petitioners could seek to have their claims joined with those of other

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[11] W. Va. Code § 46A-6-106; *Credit Acceptance Corp.* v. *Long*, No. 2:10-cv-00003, 2010 WL 3809837, at *5–6 (S.D. W. Va. Sept. 22, 2010).

[12] W. Va. Code § 46A-5-104; *Hawkins* v. *Ford Motor Co.*, 566 S.E.2d 624, 632 & n.4 (W. Va. 2002).

[13] *See*, *e.g.*, *Muzelak* v. *King Chevrolet, Inc.*, 368 S.E.2d 710, 714–15 (W. Va. 1988).

[14] *See*, *e.g.*, *Allison* v. *Citgo Petroleum Corp.*, 151 F.3d 402, 420 (5th Cir. 1998); *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996); *Andrews* v. *AT&T Co.*, 95 F.3d 1014, 1025 (11th Cir. 1996).

similarly situated plaintiffs in a single "mass litigation" proceeding, thereby reaping many of the same economies a class action provides.[15]

Any burden on petitioners' protected property interests is therefore slight, if it exists at all.

2. Nor would additional procedures reduce the risk of an erroneous deprivation of whatever protected interest petitioners might have in class certification. Whether viewed as the right to have notice and opt out of the first action or the right to relitigate the issue in a second action, the additional procedures petitioners seek would not increase the probability of an "accurate" decision. To the contrary, petitioners' proposed new due-process right to relitigate class certification would only increase the prospect of ultimately obtaining an anomalous result by "increas[ing] the number of throws of the litigation dice." *Thorogood*, 2010 WL 4286367, at *6–7; see also *Bridgestone*, 333 F.3d at 766–67. This would simply invite gamesmanship and inconsistent results. Once an adequate representative has fully and fairly litigated the issue, any marginal gains from additional procedures are negligible.

3. On the other side of the scales, the government's interests in avoiding the burdens of implementing additional procedures and in preventing serial relitigation of class certification are overwhelming. And if there were a due-process right to relitigate class certification, these burdens would fall on the states as well as the federal government.

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[15] *See* W. Va. Tr. Ct. R. 26.06 (procedures for referring cases to a "Mass Litigation Panel"); *id.* R. 26.04(a)(4) (economic-loss claims eligible for mass-litigation referral).

Under petitioners' proposal, notice would have to issue to the entire class for a decision denying certification to be binding. Publication of notice would delay proceedings for months and cost the putative class representative tens of thousands of dollars. Implementation of a system to track any opt-outs would cost the court and the parties significant additional time and money. And the process could well produce the "needless multiplicity of actions" that Rule 23 was "designed to avoid." *Parker*, 462 U.S. at 351.

Petitioners do not suggest that these procedures are desirable or workable. They simply assert, in the absence of these procedures, a new due-process right to relitigate class certification endlessly. Such a right would eviscerate the interests in finality underlying preclusion law. After each denial of class certification, nothing would prevent a new plaintiff from seeking certification of the same proposed class in successive courts—those courts would be constitutionally prohibited from giving preclusive effect to prior rulings denying class certification.

The government interest in precluding relitigation of class certification is high. "[D]uplication in the class action context can be exponentially more problematic than duplication in the event of parallel single party suits, because of the unique and heroic efforts invariably required to resolve such suits." Redish, *supra*, at 10985. Certification decisions dramatically change the stakes of litigation. Accordingly, if class counsel can obtain unlimited attempts at class certification by the simple expedient of changing the named plaintiff in the caption of the complaint, they can use class-action litigation "for *in terrorem* strategic effect":

> Where a federal court has refused to certify a class action, permitting another court, state or federal, subsequently to certify essentially the same class under the same governing substantive and procedural standards effectively enables plaintiffs' lawyers to use the class action device as a means of legalized blackmail. A defendant is aware that its success in opposing class certification in 1, 2, or even 50 different courts would not preclude a 51st court from granting certification. The defendant thus must face the possibility of a constant stream of harassing filings. Hence, defendants are effectively forced to 'buy' litigation peace, even where such payments are wholly undeserved, by settling.

Id.

Society undoubtedly has a compelling interest in preventing this type of "asymmetric system in which class counsel can win but never lose." *Bridgestone*, 333 F.3d at 767. And the interest is not just in protecting defendants from litigation harassment. Another frequently noted form of class-action abuse occurs when defendants collude with class counsel to settle the case at a bargain-basement price, with generous fees for class counsel, at the expense of the class members. See, *e.g.*, Samuel Issacharoff & Richard A. Nagareda, *Class Settlements Under Attack*, 156 U. Pa. L. Rev. 1649, 1660–68 (2008). In this situation, both the defendant and class counsel have an incentive to search for the "anomalous court" that will certify a class action, see *id.* at 1664, and it may well be unnamed class members themselves who wish to seek an injunction to halt the state-court litigation, see Wolff, *supra*, at 2073.

The government has an acute interest in preventing these sorts of abuses of the class-action device. That interest weighs dispositively in the due-process balance. And holding that petitioners have a constitutional right to relitigate class certification would not only prevent the sort of injunctive relief at issue here, but also would foreclose a legislative solution to these very serious problems. That is the only result that would be "draconian." Pet. Br. 50.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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