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

PETITIONERS' REPLY BRIEF

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INTRODUCTION

In its brief, Bayer argues that a judgment in a case where a federal court *denied* class certification binds the putative class, both as to whether a class may be certified in another case under different procedural rules and as to a critical aspect of the *merits*—the elements required to state a claim. Bayer posits that the federal court's explanation of why the case was not an appropriate one in which to issue a judgment binding a class was itself a binding determination on the merits of the never-certified class's claims. That through-the-looking-glass proposition cannot be correct.

Bayer's position contradicts governing principles of preclusion law. Bayer's argument fails not only because petitioners were not parties to the final judgment in the prior case, but also because whether West Virginia procedural law allows class certification was not at issue, much less decided, in that case. And Bayer brushes aside this Court's insistence that parties cannot be bound by a judgment unless they have been afforded minimum requisites of due process, including notice, an opportunity to be heard, and the option to be excluded from a damages class action.

Ultimately, Bayer falls back on policy arguments against repetitive litigation that this Court has consistently *rejected* as reasons to bind nonparties to judgments procured in their absence. Bayer's policy arguments ring especially hollow because, in the Class Action Fairness Act, Congress addressed Bayer's concerns in a very different way.

Bayer's insistence that petitioners, who never had a day in court, must "take the bitter with the sweet"

is exactly backwards. *Bayer* successfully argued against certification in the previous case and forestalled any classwide judgment. The consequence of Bayer's strategy was a judgment that binds only the individual plaintiff in the earlier case, not the proposed class members whom Bayer persuaded the court to leave out of that case.

ARGUMENT

I. Bayer's Argument Ignores Fundamental Principles of Preclusion Law.

A. Bayer Disregards *Semtek*'s Adoption of State Preclusion Principles.

Bayer acknowledges that under *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497 (2001), federal courts generally borrow state preclusion law to determine the effect of judgments in diversity cases. *See* Resp. Br. 18. But Bayer's brief makes no attempt to find support in West Virginia's—or any state's—preclusion law. Instead, urging this Court to craft a federal preclusion rule for class certification rulings, Bayer relies on policy arguments and federal decisions—in particular, *In re Bridgestone/Firestone, Inc., Tires Products Liability Litigation*, 333 F.3d 763 (7th Cir. 2003), and *Thorogood v. Sears, Roebuck & Co.*, 624 F.3d 842 (7th Cir. 2010), whose reasoning has been described as "adventurous, to say the least." Stephen Burbank, *Procedure, Politics and Power: The Role of Congress*, 79 NOTRE DAME L. REV. 1677, 1725 n.212 (2004).[1]

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[1] *See also* Charles Wright, Arthur Miller & Edward Cooper, *Federal Practice & Procedure* § 4455 (2d ed. 2010).

Citing a law review article predating *Semtek* by 15 years, Bayer says "the preclusive effect of a federal procedural ruling should be governed by a uniform federal rule of decision." Resp. Br. 18. *Semtek* itself concerned a federal procedural ruling—a federal judge's designation of an involuntary dismissal as "on the merits" under Federal Rule of Civil Procedure 41(b). *See* 531 U.S. at 499, 501-06. The Court rejected a uniform federal preclusion rule, holding that although federal common law determined the preclusive effect of the procedural ruling, state law would be "adopt[ed], as the federally prescribed rule of decision." *Id*. at 508.

It may be, as Bayer argues, that a different rule applies to a merits judgment in a certified federal class action because Rule 23 "'clearly contemplates a uniform federal rule on who is bound by [a class-action] suit.'" Resp. Br. 18 (quoting Ronan E. Degnan, *Federalized Res Judicata*, 85 Yale L.J. 741, 763 (1976)). In *Semtek*'s terms, it may be "incompatible with federal interests," 531 U.S. at 509, not to hold class members bound by a class judgment, assuming they were afforded due process.

Here, however, the judgment was *not* rendered in a class action, but in a lawsuit the district court did *not* permit to be maintained as a class action. *In re Baycol Prods. Litig.*, 265 F.R.D. 453 (D. Minn. 2008) ("*McCollins*"). The judgment did not comply with Rule 23(c)(3)'s directive that a class-action judgment "include and describe those whom the court finds to be class members" subject to it. The judgment was nothing more than the dismissal of an individual action brought by George McCollins. Under *Semtek,*

state-law principles govern the preclusive effect of such dismissals.

B. *McCollins* Did Not Involve the Same Issue Presented by Petitioners' Case.

Bayer insists that the procedural issue *McCollins* decided—whether *Federal* Rule of Civil Procedure 23 permitted class certification—was the same as the issue in petitioners' action in West Virginia—whether *West Virginia* Rule of Civil Procedure 23 permits certification. Bayer asserts that because the words of the two rules are similar, the question of certification under one is the same as under the other, and any differences in application of the two rules reflect different exercises of discretion under the same standard.

West Virginia's rules are not the same as the federal rules, despite their similar words. Even state and federal rules using "identical language" are legally distinct, with the meaning of state rules determined by state courts—a "proposition ... fundamental to our system of federalism, [and] applicable to procedural as well as substantive rules." *Johnson v. Fankell*, 520 U.S. 911, 916 (1997). The West Virginia Supreme Court has emphasized that its "legal analysis" of West Virginia's Rule 23 does not follow that of the federal courts. *See In re W. Va. Rezulin Litig.*, 585 S.E.2d 52, 61 (W. Va. 2003). Different outcomes regarding class certification under these federal and state rules thus do not reflect varying exercises of discretion under the same rule, but exercises of discretion under *different legal standards*.

McCollins' denial of class certification rested on the court's view that, under Federal Rule 23(b)(3), common issues did not "predominate" over individual issues concerning causation of injury. 269 F.R.D. at

457-58. In *Rezulin*, the West Virginia Supreme Court stated that under *West Virginia* Rule 23(b)(3), "[c]hallenges based on ... causation, or reliance have usually been rejected and will not bar predominance satisfaction because those issues go to the right of a class member to recover, in contrast to underlying common issues of the defendant's liability." 585 S.E.2d at 72 (citation omitted). That court repeatedly rejected the argument that individual causation issues prevented certification of a damages class under West Virginia law. *See id.* at 72, 74.

Rezulin underscores that class certification under West Virginia's rule presents a different legal issue from that decided in *McCollins*: It is governed by different standards under which different facts are determinative. Whether West Virginia procedural law permits a Baycol economic-damages class action "has not yet been litigated, and an injunction to foreclose consideration of that issue is not within the relitigation exception [to the Anti-Injunction Act]." *Chick Kam Choo v. Exxon Corp.*, 486 U.S. 140, 149 (1988).

The denial of class certification was also not essential to the final judgment in *McCollins*. That judgment rested on the district court's holding that the *individual plaintiff* had not made out a claim, which would have led to the same outcome regardless of whether a ruling on certification preceded it. Bayer contends (at 24 n.1) that petitioners waived the argument that the certification ruling was not essential, but petitioners argued below that the certification ruling lacks issue-preclusive effect under West Virginia law, and need not have made every argument that might support that position. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992). Bayer further

argues (at 24) that procedural rulings often have issue-preclusive effect, but the cited examples concern *dismissals for procedural reasons*, where the procedural rulings were essential to the judgments.

Bayer further maintains that even if class certification under state rules is a different issue from certification under federal rules, the certification denial in *McCollins* decided a *substantive* issue common to both cases—namely, that the claims asserted require individualized causation and bodily injury. Bayer's argument contradicts its repeated assertion that petitioners' *individual* actions are not precluded by the federal judgment. If petitioners were bound by the federal court's resolution of this issue of *substantive* West Virginia law, they would be bound whether in a class action or in individual actions.

In any event, Bayer's argument is unavailing for four reasons. First, as petitioners' opening brief explains (at 27-29), procedural rulings on class certification, although informed by considerations of substantive law, are not supposed to resolve the merits of substantive claims. Second, as *Rezulin* states, individual questions of causation and injury do not, under West Virginia law, preclude class certification, so *McCollins*' substantive rulings would not be dispositive of *class certification* under West Virginia law in any event and thus do not support the injunction at issue. Third, petitioners' complaint asserts a substantive claim not asserted in *McCollins*—common-law fraud—and no issues about the merits of that claim or its eligibility for class certification were litigated and decided in *McCollins*, as would be necessary for issue

preclusion regarding that claim. *See State v. Miller*, 459 S.E.2d 114, 120 (W. Va. 1995).[2]

Fourth, the contention that a ruling denying class certification is a binding determination regarding the substantive claims of absent class members is self-contradictory. Denying class certification means that the court has concluded that a merits judgment binding the class would be inappropriate under applicable procedural rules. The suggestion that, in explaining why it would *not* issue a merits judgment binding on the class, the district court actually issued such a judgment cannot be correct.

C. The Recent Decision in *White* Does Not Dispose of This Case.

Bayer claims that *White v. Wyeth*, 2010 WL 5140048 (W. Va. Dec. 17, 2010), demonstrates that class certification under West Virginia law presents the same issue as the federal-law certification issue decided in *McCollins*. Resp. Supp. Br. 3. But nothing in *White* undermines the West Virginia Supreme Court's earlier holdings in *Rezulin* that West Virginia certification standards do not follow the federal rules and that, under West Virginia law, individual questions of causation and injury do not bar certification. *White* says nothing about class certification because no class was certified in *White,* and class certification

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[2] Bayer claims petitioners somehow waived reliance on the common-law fraud claim, but the Eighth Circuit itself recognized that petitioners asserted a fraud claim and considered its impact on preclusion. Pet. App. 10a n.5. The court's assertion that the fraud claim is merely the same right of action framed in terms of a new legal theory is unfounded.

was not the question addressed in *White*. *See* 2010 WL 5140048 at n.4.

White decided issues concerning requirements for stating a claim under West Virginia's Consumer Credit and Protection Act (CCPA). The court held that such claims require the plaintiff to allege some loss (not necessarily physical injury) caused by the defendant's unlawful conduct, and that reliance is *not* necessary to establish causation in cases involving omission or concealment. The court further held that consumers of prescription drugs are categorically ineligible to bring claims under the CCPA.

These merits holdings are quite *unlike* the view of the statute taken by the federal court in *McCollins*. Far from suggesting the appropriateness of preclusion, *White* underscores the incongruity of binding absent class members who had no opportunity to participate or appeal in *McCollins* to the federal court's views of the *merits* of their CCPA claims by ascribing preclusive effect to its class certification ruling.[3]

Moreover, *White* does not detract from the importance of addressing the preclusion issue here. *White*'s holding that prescription drug consumers cannot sue under the CCPA neither affects petitioners' fraud and warranty claims nor suggests that individual issues of causation or loss associated with those claims would

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[3] *White*'s holding that drug purchasers cannot pursue CCPA claims also contradicts Bayer's view that individual issues predominate under the CCPA, because that holding is equally applicable to all class members. Ironically, Bayer could benefit from class treatment of CCPA claims under *White,* if that holding withstands rehearing, because a class action could yield a class-wide merits dismissal of those claims.

bar class certification under West Virginia law. Although *White* would bar the class's CCPA claims, the plaintiffs in *White* intend to seek rehearing of the court's unanticipated ruling that prescription drug consumers are outside the law's protection, and it remains possible that class members will have viable CCPA claims. In any event, whatever the ultimate outcome in *White*, the injunction here precludes petitioners from litigating whether West Virginia law permits certification of a class to pursue their claims—an issue never decided by any court. Deciding the propriety of such an injunction is important regardless of whether the class ultimately has viable CCPA claims.

D. Absent Class Members Were Not Parties to the *McCollins* Judgment.

Bayer's insistence that absent class members were parties to the *McCollins* judgment is untenable. As the leading civil procedure treatise explains, the very point of class certification is to determine whether class members will be bound by the judgment. *See* Wright *et al.*, *Federal Practice & Procedure* § 4455. A ruling that an action may not be maintained as a class action is a decision that the absent class members are not parties bound by the resolution of the case. The judgment in *McCollins*, in other words, was not a judgment in a class action and binds only George McCollins and anyone in privity with him.

Bayer acknowledges that *Taylor v. Sturgell*, 553 U.S. 880 (2008), holds that nonparties may not be bound to a judgment merely because the party who obtained it is said, after the fact, to have adequately represented their interests. Rejecting the contrary conclusion of the American Law Institute as errone-

ous, Bayer insists that *Taylor* is inapplicable here merely because Mr. McCollins *sought* to maintain a class action.

McCollins, however, was never *permitted* to pursue his case as a class action. He differed from Herrick, the prior litigant in *Taylor v. Sturgell*, only in that he *said* he wanted to represent a class. But saying it did not make it so. From the standpoint of absent class members, he was as much a stranger as Herrick was to Taylor. Only the certification of a class, with the safeguards of notice and opportunity to be heard or opt out, establishes a judicially created relationship between the representative and the class, without which there can be no basis for preclusion. *See infra* at 13-19.

Bayer argues that a putative class action *is* a class action until a court says it is not. Rule 23, however, says that an action may be maintained as a class action only *if* the court finds the Rule's criteria are satisfied, not that it may be maintained as a class action *until* the court finds the Rule is *not* satisfied. *See* Fed. R. Civ. 23(a) & (b). No court found that McCollins could represent a class, and thus at no time did he do so.

Citing *Devlin v. Scardelletti*, 536 U.S. 1 (2002), and *American Pipe & Construction Co. v. Utah*, 414 U.S. 538 (1974), Bayer contends that absent class members may be treated as "parties" under some circumstances. In fact, both cases indicate that members of a class denied certification are not parties to a judgment obtained by the plaintiff in his individual capacity. *Devlin*'s holding that members of a *certified* class, who are subject to a judgment expressly intended to bind them to a settlement to which they objected, are "par-

ties" for appellate purposes in no way suggests that members of a proposed class that was *denied* certification are parties to a judgment against the individual plaintiff. As Justice Scalia observed (without contradiction from the majority) in dissent in *Devlin*, "[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*"—let alone after certification is denied. 536 U.S. at 16 n.1. Bayer advances exactly that erroneous argument.

American Pipe similarly undermines Bayer's argument. *American Pipe* holds that, for policy reasons, federal statutes of limitations are tolled for absent class members when a putative class action is filed. 414 U.S. at 550-52. The opinion emphasizes that until class certification, would-be class members are merely "passive beneficiaries" of the action's filing and need take no notice of its existence. *Id*. at 552. Moreover, tolling ends when certification is denied because absent class members can no longer benefit from the judgment. *See id.* at 561. *American Pipe* thus contradicts Bayer's theory that a judgment obtained in an action after class certification has been denied has preclusive effect upon the class.

Bayer acknowledges (at 33) that absent class members have been permitted to seek review of orders denying class certification only by intervening. In a footnote (n.6), Bayer says courts (including this one) that allowed or required intervention for that purpose need not have done so because intervention is not necessary to appeal a binding judgment. Bayer's argument simply assumes the conclusion that the judgment would be binding on class members if they

did not intervene. Moreover, Bayer cites *no* decision allowing such an appeal without intervention. Its inability to do so reflects the courts' shared understanding that, absent intervention, class members are not parties to a judgment in an individual action where class certification was denied.

Bayer also observes that class actions predated Rule 23 and its certification mechanism. Because judgments in those actions bound nonparties without certification, Bayer argues, an uncertified class action under Rule 23 must also be a representative action for preclusion purposes.

Bayer overlooks that even before Rule 23, it took more than a plaintiff's assertion that he represented a class to make a judgment binding on absent class members. Before Rule 23 was promulgated, and until it was substantially amended in 1966, an action involving rights that were not common or jointly held, but that only presented common questions of fact or law, was considered a "spurious" class action, and the judgment bound only named parties or intervenors, *not* absent class members. *See* Fed. R. Civ. P. 23, Advisory Comm. Note to 1966 Amendment; *Am. Pipe*, 414 U.S. at 545-46. Class actions based on commonality of issues among individual damages claims did not truly exist under federal procedural rules except as an "invitation to joinder," *id*. at 546, until modern Rule 23(b)(3) classes were invented in 1966. Thus, before Rule 23 assumed its current form, a purported class representative such as McCollins could not have brought a damages action that would bind absent class members, with or without certification.

Moreover, the possibility that, before Rule 23 existed, a final judgment on the merits in the small

category of cases recognized as proper class actions would bind absent class members hardly suggests that a ruling denying class certification—which as Bayer itself stresses did not even exist before Rule 23—binds absent members of a never-certified class. Practice before Rule 23 was promulgated cannot determine the preclusive effects of procedural rulings for which there was then no analog.

In any event, Bayer does not contest that Rule 23 is currently the sole mechanism for maintaining a federal-court class action. *See Shady Grove Orthopedic Assocs. v. Allstate Ins. Co.*, 130 S. Ct. 1431, 1437-42 (2010). An action not certified under Rule 23 cannot be maintained as a class action, whatever the plaintiff in the case may desire, and absent members of a might-have-been class are not bound by the resolution of a case that was not certified.

II. Binding Absent Class Members to the *McCollins* Judgment Would Deny Them Due Process.

As *Taylor* and *Richards v. Jefferson County,* 517 U.S. 793 (1996), make clear, the rule that judgments bind only parties reflects demands of due process that are not satisfied by a post hoc determination that a litigant adequately represented a later plaintiff's interests. A "properly conducted class action[]" has preclusive effect, *Taylor*, 553 U.S. at 894, because such an action provides protections for absent class members satisfying minimum due-process requirements. *See id.* at 901; *Richards*, 517 U.S. at 801-02. Those requirements, in actions involving substantial individual damages claims, include notice and the rights to be heard and opt out of the class. *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985). The

petitioners undisputedly received none of these protections.

With barely a citation to the Court's opinion, Bayer (at 40) asserts that *Shutts* is not a "procedural due process decision" and that petitioners confuse personal jurisdiction with procedural due process. *Shutts*, however, explains that personal jurisdiction is, fundamentally, a matter of due process. *See* 472 U.S. at 806-08 (discussing *Int'l Shoe Co. v. Washington*, 326 U.S. 310, 319 (1945)). Further, *Shutts* holds that, "to bind an absent plaintiff concerning a claim for money damages or similar relief," a court must "provide minimal procedural due process," including "notice plus an opportunity to be heard and participate in the litigation," and that notice must satisfy the requirements prescribed in the seminal due-process decision *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15 (1950). *Shutts*, 472 U.S. at 811-12. Additionally, the Court held that "at a minimum," due process requires "that an absent plaintiff be provided an opportunity to remove himself from the class." *Id.* at 812.

Bayer maintains that these due-process requirements apply only if absent class members lack minimum contacts with the forum state, which Bayer says is not the case here.[4] To be sure, *Shutts* held that a

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[4] Bayer's premise is that West Virginia class members had forum contacts because the Minnesota federal court that rendered the judgment, as an MDL transferee court, had the same personal jurisdiction as a West Virginia federal court. That premise is, at best, a fiction. At least one court of appeals has held that even if *Shutts*'s protections are limited to class members who lack minimum forum contacts, those protections must be offered by an MDL court that purports to enjoin an action by

(*Footnote continued*)

court *may* exercise personal jurisdiction over absent class members who *lack* forum contacts if it provides them "minimal procedural due process protection." 472 U.S. at 811-12. That holding hardly implies that a court may dispense with minimal due-process protections if a class member *has* forum contacts. After all, minimum contacts with the forum generally permit a court to exercise personal jurisdiction only by providing notice of an action through means comporting with due process. *See, e.g.*, *Mullane*, 339 U.S. at 313-15. In a class action, the coincidence that the action is pending in a state where a class member has minimum contacts cannot justify binding her to the outcome without notice and the opportunity to be heard or opt out when another class member lacking forum contacts would have those due-process entitlements.

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class members who lack contacts with the state where the MDL court sits. *See In re GM Corp. Pick-Up Truck Fuel Tank Prods. Liab. Litig.*, 134 F.3d 133, 141 (3d Cir. 1998).

Bayer also states that the due process clause does not limit the territorial jurisdiction of federal courts as it does state courts, and that Congress can therefore authorize national service of federal-court process regardless of a party's forum contacts. This Court has reserved opinion on whether due process limits the territorial scope of jurisdiction that Congress may authorize. *See Asahi Metal Indus. Co. v. Super. Ct.*, 480 U.S. 102, 113 n.* (1987). It remains unclear whether due process constrains the geographic extent of federal-court personal jurisdiction, particularly in diversity cases. *See* Robert Lusardi, *Nationwide Service of Process: Due Process Limitations on the Power of the Sovereign*, 33 Vill. L. Rev. 1 (1988). Here, the point is irrelevant because Congress has not authorized nationwide service of process in diversity cases. Moreover, even if Congress could dispense with forum contacts in federal diversity cases, it could not eliminate the requirements of notice and opportunity to be heard that lie at the heart of *Shutts*.

Thus, read sensibly, *Shutts* means that what determines whether a court may exercise personal jurisdiction over absent members of a personal-damages class is the same regardless of where they reside: It must provide them with due process. *See* Brian Wolfman & Alan Morrison, *What the Shutts Opt-Out Right Is and What It Ought to Be*, 74 U.M.K.C. L. Rev. 730, 733 (2006).[5]

Ortiz v. Fibreboard Corp., 527 U.S. 815 (1999), confirms that *Shutts* is not limited to concerns about territorial limits of personal jurisdiction. *Ortiz* explains that opt-out rights stem from "our deep-rooted historic tradition that everyone should have his own day in court," and that "[t]he inherent tension between representative suits and the day-in-court ideal is only magnified if applied to damages claims gathered in a mandatory class" where "[t]he legal rights of absent class members … are resolved regardless of either their consent, or, in a class with objectors, their express wish to the contrary." *Id.* at 846-47. Although *Ortiz* neither addresses personal jurisdiction nor mentions "minimum contacts," it states that "we raised the flag on *this issue of due process* more than a decade ago in" *Shutts*. *Id.* at 847 (emphasis added).

That due process directs *Shutts*'s holding cannot seriously be disputed. Thus, Bayer (at 41-42) claims that, even if *Shutts* is about due process, it addresses

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[5] Even Bayer's sources agree that *Shutts* "is, in fact, about more than just personal jurisdiction" and that attempts to limit it to that issue are "ultimately unsustainable." Tobias Wolff, *Federal Jurisdiction and Due Process in the Era of the Nationwide Class Action*, 156 U. Pa. L. Rev. 2035, 2080 (2008).

only the requirements for binding absent parties to a judgment on the merits, not "a ruling on the procedural issue of class certification, which does not dispose of anyone's claims on the merits." *Shutts* does not draw that distinction. It states requirements for "bind[ing] an absent plaintiff concerning a claim for money damages," 472 U.S. at 811, and *McCollins* certainly concerned a claim for money damages. Moreover, Bayer's distinction is illusory here because the lower courts held that *McCollins* binds the class with respect to the merits of their state-law claims. As the Eighth Circuit stated, "to reach the question of class certification, the district court ... decided a substantive issue of West Virginia law as to what a former Baycol user suing Bayer must prove under the WVCCPA." Pet. App. 7a. The Eighth Circuit upheld the injunction because it found that "[c]ertification under the state rule would undermine this conclusion of *substantive state law* properly made by the district court." *Id*. 8a (emphasis added). It is that holding of substantive state law that Bayer contends is binding on the class. Thus, Bayer's procedure-merits distinction—even if it were supported by *Shutts*—does not support the result Bayer seeks.

Bayer, therefore, must argue (at 42) that due process does not require notice and opt-out rights even to bind the class on the merits if the class was adequately represented in *McCollins*. Leaving aside the dubiousness of a post hoc determination that representation was adequate, *Shutts* addresses this point directly:

> The plaintiff *must* receive notice plus an opportunity to be heard and participate in the litigation, whether in person or through counsel. The

> notice *must* be the best practicable, "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."

472 U.S. at 812 (emphasis added) (quoting *Mullane* and citing *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 174-75 (1974)). Bayer chides petitioners for relying on *Mullane* and *Eisen*, noting that *Mullane* was not a class action and that *Eisen* addressed Rule 23. But *Shutts* was a class action, and it cited *Mullane* and *Eisen* to support its holding that notice and an opportunity to be heard are due-process protections required to bind absentees. Moreover, although *Eisen* addresses Rule 23, the decision indicates that Rule 23 incorporates *Mullane*'s due-process standard. *Eisen*, 417 U.S. at 173-75 (discussing *Mullane* and quoting Advisory Comm. Note to Amendments to Rule 23, stating that mandatory notice is "designed to fulfill requirements of due process to which the class action procedure is of course subject").

Bayer also posits that because due process does not require individual notice and opt-out rights for Rule 23(b)(1) and (b)(2) class actions, due process must not require notice and opt-out rights in *any* class action. But the rationale for dispensing with notice and opt-out rights in (b)(1) and (b)(2) class actions is that judgments on the types of claims falling within those subdivisions necessarily affect the rights of absent persons even if the claims are pursued individually. That rationale does not apply to damages claims like those at issue here. Thus, the same courts whose decisions Bayer cites (at 43) for the proposition that notice and opt-out rights are not required in (b)(1)

and (b)(2) cases also hold that those procedures *are* required in (b)(3) cases. *See In re Diet Drugs*, 282 F.3d 220, 230 (3d Cir. 2002); *In re Telectronics Pacing Sys., Inc.*, 221 F.3d 870, 881 (6th Cir. 2000). More importantly, Bayer's position contradicts both *Shutts* and *Ortiz*, which state that notice and opt-out rights are constitutional prerequisites to binding non-parties to a class action "wholly or predominately for money damages." *Ortiz*, 527 U.S. at 848 n.24 (quoting *Shutts*, 472 U.S. at 811 n.3).[6]

III. Bayer's Policy Arguments Are Unavailing.

Bayer's argument reduces to a plea that the Court create a special rule governing the preclusive effect of class-certification denials to ward off the specter of repeated attempts to certify classes that a federal court has declined to certify under Rule 23. This Court, however, has not allowed concerns about repetitive, "vexatious" litigation to "justif[y] departure from the usual rules governing nonparty preclusion."

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[6] Citing two law review articles, Bayer says some scholars believe notice and opt-out rights are not required to bind absent class members in (b)(3)-type class actions. The first, however, *agrees* with petitioners that *Shutts* requires these protections; the author just disagrees with *Shutts*. *See* David Shapiro, *Class Actions: The Class as Party and Client*, 73 Notre Dame L. Rev. 913, 954 (1998). The second article also agrees with petitioners' reading of *Shutts*. The excerpt Bayer quotes—"'as long as the plaintiff adequately represents the class,' notice and opt-out rights 'are no longer constitutionally compelled,'" Resp. Br. 43—misrepresents the author's view. The author is discussing what she refers to as "purely representational actions." Diane Wood, *Adjudicatory Jurisdiction and Class Actions*, 62 Ind. L.J. 597, 621 (1987). That category, she explains, includes mostly (b)(1) and (b)(2) cases, not (b)(3) cases, which would typically be what she calls "quasi-representational." *Id*. at 600; *see id.* at 604-05.

Taylor, 553 U.S. at 903; *see Richards*, 517 U.S. at 804-05.

Bayer also ignores that Congress has adopted a *different* policy to counter perceived "abuses" that may be implicated when litigants attempt to maintain a class action under state procedural rules after a federal court denies certification of a parallel class. In the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 ("CAFA"), Congress addressed such concerns not by prescribing enhanced preclusive effect for federal certification rulings, but by adopting new jurisdictional provisions effectively subjecting most large class actions to federal certification standards.

CAFA amended 28 U.S.C. § 1332 to provide federal jurisdiction over class actions involving minimal diversity of citizenship if the class has at least 100 members and the aggregate amount in controversy exceeds $5 million. 28 U.S.C. § 1332(d)(2), (5) & (6). CAFA also liberalized removal jurisdiction over such actions. *See* 28 U.S.C. § 1453(b). Thus, CAFA gives each defendant in a class action meeting its jurisdictional requirements the option to choose a federal forum, except where local interests predominate. *See* 28 U.S.C. §§ 1332(d)(3) & (4).

One of the reasons for these provisions was to allow application of federal procedural standards to class actions meeting CAFA's jurisdictional criteria. CAFA's backers asserted that state courts were too "permissive" in interpreting their rules to allow class actions where federal standards would not. The Senate Report noted that "[s]ome state courts with this permissive attitude have even certified classes that federal courts had already found uncertifiable." S. Rep. No. 109-14, at 22 (Feb. 28, 2005). CAFA's

solution was to channel class actions into federal courts, where federal rules would govern certification. *See id*. at 6-7, 54; *see also Shady Grove*, 130 S. Ct. at 1437-38. Class actions filed in or removed to federal court under CAFA will also potentially be subject to multi-district litigation procedures, meaning that, in cases arising out of common facts, federal class-certification standards often will be applied by the same judge.

Thus, Congress has already addressed the perceived problem that concerns Bayer:

> [CAFA] will functionally prevent many state certifications where the action is deemed sufficiently "interstate" by expanding the federal courts' minimal diversity and removal jurisdiction. Hence, Congress, in effect, produced largely the same result as the court in *Bridgestone/Firestone II*. The difference is that the result of CAFA is most likely within congressional power, whereas the Seventh Circuit's decision was not within the federal courts' power.

Timothy Kerr, *Cleaning Up One Mess to Create Another: Duplicative Class Actions, Federal Courts' Injunctive Power, and the Class Action Fairness Act of 2005*, 29 Hamline L. Rev. 218, 235 (2006).

Importantly, CAFA limits federalization of class actions by permitting some class actions to proceed in state courts: cases of primarily single-state concern, *see* 28 U.S.C. §§ 1332(d)(3)-(4); cases not meeting CAFA's size, amount-in-controversy, and diversity requirements, *see id.* at 1332(d)(2), (5) & (6); and cases filed before CAFA's effective date, *see* Pub. L. No. 109-2, § 9. Given Congress's choice about how to address the issue of application of differing state and

federal procedural standards to class actions, and the limits on the solution Congress selected, the courts should not attempt to address the same concerns on an ad hoc basis by expanding preclusion beyond its traditional reach (and the limits due process has long been thought to impose on it).[7]

CAFA aside, Bayer's fears are overstated. This case threatens no truly repetitive litigation: Whether a class may be certified under West Virginia law *has never been litigated*. And although absent members of the class petitioners seek to represent will not be *precluded* if the state courts deny certification of petitioners' action, the stare decisis effect of such a determination within the West Virginia court system would protect Bayer from infinite repeat attempts. *See Taylor*, 553 U.S. at 903-04. The absence of a problem of sufficient scope to justify the distortion of preclusion principles Bayer seeks is demonstrated by the small number of cases in which the preclusive effect of a federal court's denial of class certification has been litigated—a number that is unlikely to multiply significantly in light of CAFA.

Bayer's contention that its interest in avoiding litigation outweighs the interest of class members in what it calls a purely procedural question gives far too little weight to the importance of the class action device in facilitating the vindication of substantive claims. It also ignores that Bayer seeks to preclude the class on the substantive issue of the elements of a

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[7] Federal judicial rulemakers also "considered and abandoned proposals to preclude the certification of a class … after negative decisions on those questions by a federal court." Burbank, *supra*, 79 Notre Dame L. Rev. at 1697 n.85.

claim for relief, as well as on class certification. Bayer's policy arguments cannot overcome the due-process protections to which class members are entitled or the countervailing policy, expressed in the Anti-Injunction Act, against any interference with state-court proceedings that is not genuinely necessary to protect a federal judgment.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted,

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