No. _____

In the
# Supreme Court of the United States

GENERAL MOTORS LLC,

*Petitioner*,

v.

MICHAEL BAVLSIK; KATHLEEN SKELLY,

*Respondents.*

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

## PETITION FOR WRIT OF CERTIORARI


STEPHANIE A. DOUGLAS
JESSICA V. CURRIE
BUSH SEYFERTH & PAIGE PLLC
3001 Big Beaver Rd., Suite 600
Troy, MI 48084
(248) 822-7800
douglas@bsplaw.com

ERIN E. MURPHY
*Counsel of Record*
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
erin.murphy@kirkland.com

*Counsel for Petitioner*


February 23, 2018

## QUESTION PRESENTED

In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931), this Court held that partial retrials comport with the Seventh Amendment only if "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." Applying that constitutional presumption against partial retrials, several circuits have properly held that a court may not grant a damages-only retrial if the evidence suggests that the jury may have rendered a "compromise verdict"—that is, awarded low damages to resolve non-unanimity over liability. In the decision below, by contrast, the Eighth Circuit agreed that "a strong case" had been made that the jury rendered a compromise verdict, but nevertheless concluded that a damages-only retrial was acceptable. In doing so, the court joined a minority of circuits in applying a legal test that improperly inverts the *Gasoline Products* presumption, treating a damages-only retrial as presumptively *permissible* and requiring the party that opposes a partial retrial to "clearly demonstrate" that the jury verdict *was* the result of compromise. That legal test is wrong, and the Eighth Circuit's decision employing it exacerbates a division among the lower courts that this Court should resolve.

The question presented is:

Whether the constitutional presumption against damages-only retrials that this Court recognized in *Gasoline Products* permits a damages-only retrial in the face of a finding that "a strong case" has been made that the jury issued an impermissible compromise verdict.

## PARTIES TO THE PROCEEDING

Petitioner General Motors LLC was defendant in the district court and defendant-appellee/cross-appellant in the court of appeals.

Respondents Michael Bavlsik and Kathleen Skelly were plaintiffs in the district court and plaintiffs-appellants/cross-appellees in the court of appeals.

## CORPORATE DISCLOSURE STATEMENT

General Motors LLC is a Delaware limited liability company whose only member is General Motors Holdings LLC. General Motors Holdings LLC's only member is General Motors Company, a Delaware corporation with its principal place of business in Wayne County, Michigan. General Motors Company owns 100% of General Motors Holdings LLC.

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Constitutional Provisions**



**Statute**



**Rules**

**Other Authorities**

## PETITION FOR WRIT OF CERTIORARI

Nearly a century ago, this Court held that partial retrials comport with the Seventh Amendment only if "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). In the decades since *Gasoline Products*, the lower courts have reached conflicting conclusions regarding the propriety of granting partial retrials limited only to damages, particularly in cases involving suspected "compromise verdicts"—that is, cases where a jury appears to have resolved its disagreement over the defendant's liability by awarding the plaintiff legally inadequate damages. This Court should grant certiorari to resolve the division of authority over this important and recurring constitutional question.

This petition arises out of a products-liability case brought by Michael Bavlsik and his wife, Kathleen Skelly, against General Motors, LLC ("GM"). In 2012, Bavlsik hit his head on the roof of his vehicle after running a stop sign, colliding with another vehicle, and rolling down a roadside embankment, rendering him quadriplegic and financially burdening him and his family for the rest of his life. Respondents brought suit in tort against GM, and the case proceeded to trial. During trial, it became clear that the evidence that GM was at fault for Bavlsik's tragic injuries was exceedingly slim, leading the jury to ask during its deliberations whether Bavlsik would be able to receive some compensation "regardless of our decision." After the court responded that Bavlsik would recover only if

the jury found GM liable, the jury promptly returned a verdict that rejected all of respondents' claims except one. Although the jury found that Bavlsik's vehicle contained *no design defects*, the jury nonetheless inexplicably deemed GM liable for negligently failing to adequately "test" for the very defects that the jury found did not exist. The jury then awarded Bavlsik only $1 million as compensation for *past* damages—even though his quadriplegia necessarily means that he will face substantial future costs—and awarded his wife no loss-of-consortium damages.

To state the obvious, that result bears all the hallmarks of an impermissible compromise verdict. Indeed, respondents themselves admitted in the district court that the odd verdict suggests the jury "may have been compromising." The Eighth Circuit likewise conceded that GM made "a strong case" that the verdict was an impermissible compromise, which all agree requires a full retrial of *both* liability and damages. Nonetheless, the Eighth Circuit refused to grant a full retrial because it was not convinced that the record "clearly demonstrate[d]" that the jury had *in fact* reached a compromise verdict. As a result, despite the court's admission that there was "a strong case" that the jury never actually agreed on liability, the jury's liability finding (or, more likely, non-finding) is now set in stone, and respondents will receive a damages-only retrial that virtually guarantees a much larger monetary award.

The Eight Circuit's decision cannot be reconciled with this Court's precedent or with decisions from other circuits. Under *Gasoline Products*, damages-only retrials are presumptively *impermissible* and

should be allowed only when it "clearly appears" that a retrial limited to damages would *not* present fairness concerns. 283 U.S. at 500. Following that rule, several circuits have appropriately concluded that a damages-only retrial is an impermissible remedy when there is *reason to think* that the jury may have compromised, even if the court cannot say for certain that the jury actually did. As those courts have recognized, that is the sole way to ensure not only that a second jury is not reexamining facts found by the first jury, but also that defendants are not forced to pay damages for conduct that no jury actually found tortious. By contrast, the decision below applies a standard under which a damages-only retrial may be held despite "a strong case" that the jury compromised. In reaching that untenable result, the Eighth Circuit joined a minority of circuits in converting the presumption *against* damages-only retrials into a presumption *in favor* of them.

As this case vividly illustrates, inverting the presumption is no mere foot-fault, as where the presumption lies can make all the difference when imposing a remedy. Indeed, this case plainly would have come out differently in the Third and Eleventh Circuits, which require a full retrial if there are "indications" that a jury "may have rendered a compromise verdict," *Collins v. Marriott Int'l, Inc.*, 749 F.3d 951, 960 (11th Cir. 2014), or where there is "reason to think that the verdict may represent a compromise among jurors," *Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 455 (3d Cir. 2001) (quotation marks omitted). That makes this case an excellent vehicle for this Court to provide much-needed guidance on the standard that courts should apply when deciding

whether a damages-only retrial is consistent with the Constitution.

## OPINIONS BELOW

The Eighth Circuit's opinion is reported at 870 F.3d 800 and reproduced at App.1-24. The district court's opinion is unreported but available at 2016 WL 362512 and reproduced at App.27-55.

## JURISDICTION

The Eighth Circuit issued its opinion on August 31, 2017. GM timely filed a petition for rehearing, which the court denied on October 26, 2017. On January 3, 2018, Justice Gorsuch extended the time for filing this petition to and including February 23, 2018. This Court has jurisdiction under 28 U.S.C. §1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

The Seventh Amendment to the U.S. Constitution provides:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of the common law.

The Fifth Amendment to the U.S. Constitution provides in relevant part:

> No person shall be … deprived of life, liberty, or property, without due process of law.

## STATEMENT OF THE CASE

### A. The District Court Proceedings

1. GM is one of the largest automobile manufacturers in history. GM sells vehicles under a variety of brands—including GMC, Chevrolet, Buick, and Cadillac—to millions of customers in the United States and around the world. Those customers included respondent Michael Bavlsik, a Missouri resident and father of eight who in August 2003 purchased a 2003 Model GMC Savana, a full-size passenger van that can seat 12 passengers. App.2.

Nine years after purchasing the van, in July 2012, Bavlsik was driving two of his sons and eight other passengers home to St. Louis after a trip to northern Minnesota when he ran a stop sign and hit a boat that was hitched to another vehicle. App.3. Bavlsik lost control of the Savana, which skidded to the opposite side of the road and completed a three-quarters roll down a roadside embankment. App.3. Fortunately, none of Bavlsik's passengers sustained injuries during the accident, but Bavlsik himself tragically suffered a spinal injury that rendered him quadriplegic: "He has no motor movement below [his] chest." App.3 Bavlsik's professional life has been impacted, and he will "need to pay for some form of care for the rest of his life." App.4

2. In March 2013, Bavlsik and his wife, Kathleen Skelly, filed a products-liability lawsuit against GM on diversity grounds in federal district court. App.4. They asserted three claims: (1) strict liability, alleging that the Savana's seatbelt system lacked three specific safety features; (2) negligence, based on GM's failure to implement those seatbelt system safety features or

alleged failure to conduct adequate rollover testing of the van to gauge the performance of the seatbelt system; and (3) failure to warn. App.2. Bavlsik sought past and future damages for loss of income, pain and suffering, medical expenses, and punitive damages, and his wife sought past and future damages for loss of consortium. App.4.

The case proceeded to trial, which lasted three weeks. App.4. At trial, there was almost no evidence that the safety features respondents proposed would have prevented Bavlsik's injuries. And approximately two hours into its deliberations, the jury asked the court a question that revealed its own doubts about GM's liability—namely, whether, if the jury included a past damages figure in the damages section of the special verdict form, Bavlsik could receive compensation "regardless of our decision." App.19-20. The district court responded that Bavlsik would receive money for past damages "only if the jury found GM liable." App.19-20.

The jury returned a verdict just two hours later, finding GM not liable on all but one of respondents' claims. The jury rejected respondents' strict-liability claim, which had asserted that the Savana was in a "defective condition unreasonably dangerous" absent three seatbelt safety features. Add.1.[1] The jury also rejected respondents' failure-to-warn claim, finding that the failure to provide warnings about the absence of respondents' alleged safety features or that a driver's head could contact the roof during a rollover did not render the van unreasonably dangerous.

[1] "Add." refers to the Addendum filed with the Eighth Circuit.

Add.4. And the jury rejected respondents' theory that failure to include the three seatbelt safety features rendered GM "negligent in the design of the plaintiffs' 2003 Savana van." Add.3.

Despite the jury's finding that Bavlsik's van contained *no design defects*, the jury found GM negligent for not "adequately test[ing]" the non-defective seatbelt system, and also found that this negligence "directly cause[d] damage" to Bavlsik. Add.3-4. Yet the jury declined to award Bavlsik *any* future damages, and instead awarded him only $1 million for *past* damages. App.2-3. The jury also declined to award his wife any loss of consortium damages. Add.6.

3. Both parties filed post-trial motions. GM renewed its motion for judgment as a matter of law, contending that respondents' negligent-failure-to-test theory could not stand because the evidence conclusively demonstrated that GM had not designed the Savana's seatbelt system in a defective manner. In the alternative, GM moved for a new trial on the ground that the jury's finding on the failure-to-test theory strongly suggested an improper compromise verdict. Dkt.199 at 9-10.[2] As GM explained, the circumstances of this case, including "the jury's question to the Court" regarding compensation for past damages, indicated "that the jury may have improperly sought to find a way to reimburse [Bavlsik] for past medical expenses" even though it did not actually believe that GM was liable for his injuries. Dkt.199 at 10.

---

[2] "Dkt." refers to docket entries in the district court.

Respondents also moved for a new trial—but only a partial retrial limited to damages—arguing that the jury's award was "glaringly inadequate." Dkt.197 at 1. In the alternative, however, respondents agreed with GM that the district court could "find that this was a compromise verdict," which would necessitate a retrial on both liability and damages. Dkt.197 at 2. In support of the latter argument, respondents observed that "after a few hours of deliberation, the jury sent a note … indicating that, at that point, the jury may not have been unanimous" and "may have been compromising." Dtk.197 at 7-8. As a result, and particularly in light of the jury's inadequate damages award, respondents concluded, "a case can be made that this was a compromise verdict." Dtk.197 at 7.

4. The district court granted GM's renewed motion for judgment as a matter of law, thereby setting aside the sole basis for finding GM liable. The court agreed with GM that "there is insufficient evidence to support a verdict for plaintiffs for negligent design based upon a failure to test." App.34-35. As the court explained, the applicable state tort law in this case "requires a defect in the product to support a claim for negligent failure to test," and—as the jury found in rejecting respondents' defect claims—here there was insufficient evidence of any defect. App.32.

As required by Federal Rule of Civil Procedure 50(c)(1), however, the district court also conditionally ruled on both parties' new trial motions. Even though the court had just concluded that there was insufficient evidence to hold GM liable on a negligent failure-to-test theory, it nonetheless held in the

alternative that it would *preserve* the jury's head-scratching liability finding and grant respondents a partial retrial devoted exclusively to "Bavlsik's future damages" and "Skelly's damages, past and future." App.40. The court summarily "reject[ed] [GM's] and [respondents'] arguments for a new trial based on a compromise verdict" without mentioning the *Gasoline Products* standard or grappling with any of the unusual circumstances surrounding the verdict. App-41. In an abbreviated analysis, the court found no compromise because, in its view, evidence in the record could support the jury's failure-to-test finding—without even discussing (let along considering) the strong evidence of compromise that both parties highlighted. App.40-41. Finding the jury's damages award "unjust," App.38, the court concluded that respondents should receive a damages-only retrial in the event the Eighth Circuit disagreed that GM is entitled to judgment as a matter of law.

### B. Eighth Circuit Proceedings

Respondents appealed the district court's decision to grant judgment as a matter of law to GM, and GM cross-appealed the conditional ruling granting respondents a damages-only retrial.[3] The Eighth Circuit reversed as to the first issue but affirmed as to the second, thereby providing respondents a new trial at which liability will be conclusively presumed, and respondents need only prove the extent of their damages.

---

[3] On appeal, respondents abandoned their argument that the jury may well have rendered a compromise verdict and instead contended only that they should receive a damages-only retrial.

To begin, the court recognized that respondents' negligent-failure-to-test theory—and, in particular, the element of causation—was "hotly contested" at trial, and that the jury's finding on that claim appeared inconsistent with its rejection of the defect claims. Nonetheless, the court ultimately concluded that "there was legally sufficient evidence for a reasonable jury to find GM liable … for failing to conduct adequate testing." App.15.

Turning to the district court's conditional decision to grant a damages-only retrial, the court declared it "generally permissible for a trial court to grant a new trial on damages only." App.16. The "overarching consideration," the court continued, "must be whether the record, viewed in its entirety, clearly demonstrates the compromise nature of the verdict." App.18 (quoting *Boesing v. Spiess*, 540 F.3d 886, 889 (8th Cir. 2008)). "'Several factors' are often probative of whether jurors improperly compromised," such as a "grossly inadequate award of damages," the pattern of jury deliberations, and whether there was "'a close question of liability.'" App.18 The Eighth Circuit addressed each of these factors seriatim.

First, the court acknowledged that "both sides agree the damages award is seriously inadequate," and that "the low verdict amount is consistent with a compromise verdict." App.19. However, because "reduced damages are part of the very definition of a compromise verdict," the court found this factor alone "falls short of convincing us" that "the better route was to order a [full] new trial to remedy the inadequate damages problem." App.19. The court next examined the "odd pattern of jury deliberations"—in particular,

the "note the jury submitted two hours into their deliberations asking whether Bavlsik would recover … past medical expenses … regardless of our decision." App.19. Again, the court agreed that "the jury's question … raises the possibility the jurors compromised." App.20. But the court determined the jury's question did not "compel" that conclusion. App.20-21.

Finally, as to whether liability was a "close question," the court had already acknowledged that liability was "hotly contested." App.11. And it acknowledged "the jury's seemingly inconsistent verdict," puzzling over "how could the jury find rollover testing would have led to a better design capable of preventing Bavlsik's injuries if the jury seemingly rejected the only design alternatives the plaintiffs offered?" App.21. Yet the court refused to treat that seeming inconsistency as evidence of *compromise*, reasoning that GM could point to it only to support an argument that the verdict must be rejected as *inconsistent*. App.21-22. The court did not cite any authority for its apparent view that verdict inconsistency is categorically irrelevant to the compromise verdict analysis.

After rejecting each indicia of compromise in isolation, and without considering the totality of the evidence, the Eighth Circuit concluded that it was "not convinced the record so *clearly* demonstrates a compromise verdict that the trial court *abused its discretion* in not recognizing as much." App.23 (emphasis in original). In the court's view, "there were a number of options the trial court could choose from," and "a new trial for Bavlsik's future damages and

Skelly's past and future damages was one of those permissible options." App.23. Accordingly, after acknowledging that GM "ma[de] a strong case" that the jury rendered a compromise verdict, and thus that the jury never actually found GM liable, App.16, the court nonetheless affirmed the grant of a partial retrial in which the second jury will be instructed that GM has already been found liable for Bavlsik's injuries, App.3, 24.

## REASONS FOR GRANTING THE PETITION

The decision below reached the wrong result because the court applied the wrong legal standard. As this Court made clear nearly a century ago, while damages-only retrials are not entirely incompatible with the Constitution, they are presumptively so, and should be allowed only when it is clear that they will not deprive either party of a fair trial. Applying those principles, several circuits have correctly concluded that a damages-only retrial cannot be held consistent with the Constitution if there is reason to suspect that the jury returned a compromise verdict. Instead, consistent with the presumption that *Gasoline Products* establishes, those circuits will allow a damages-only retrial only when it is clear that the jury's verdict was *not* an impermissible compromise.

The Eighth Circuit applied exactly the opposite standard here, treating a damages-only retrial as the presumptively *permissible* remedy, and one that should be allowed absent conclusive evidence that the jury *did* compromise. Indeed, the court affirmed the district court's decision to order a damages-only retrial even though it readily acknowledged that GM made "a strong case" that the verdict was the product of an

impermissible compromise. That gets matters exactly backward, and creates an untenable risk of deprivation of the right to a fair trial on each and every aspect of a case. The Eighth Circuit held that a damages-only retrial could be ordered even though GM had made "a strong case" that the jury *did not actually hold it liable*. That result is impossible to reconcile with this Court's admonition that a damages-only retrial is constitutionally permissible only if it "clearly appears" that "a trial of [damages] alone may be had without injustice." *Gasoline Prods.*, 283 U.S. at 500.

Unfortunately, the Eighth Circuit is not alone in inverting the *Gasoline Products* presumption. Several other circuits likewise have held that a damages-only retrial may be had unless the record "clearly demonstrates" that the jury *did* return a compromise verdict. The decision below thus deepens a division among the lower courts—on an issue that was outcome-determinative in this case. The Court should grant certiorari to resolve that split of authority and confirm that the Constitution cannot tolerate a damages-only retrial when even the plaintiff has conceded that the record supports the conclusion that the jury issued an impermissible compromise verdict.

## I. The Lower Courts Are Divided Over The Standard To Apply When Determining Whether A Damages-Only Retrial Can Be Held Consistent With The Constitution.

This Court held long ago that damages-only retrials are presumptively incompatible with the Constitution, and accordingly may be ordered only when it "clearly appears that the issue to be retried is

so distinct and separable from the others that a trial of it alone may be had without injustice." *Id.* Applying that rule, lower courts have repeatedly recognized that a damages-only retrial cannot be held if the jury reached an impermissible compromise verdict. It could hardly be otherwise, as it would be an obvious violation of both the Seventh Amendment and the Due Process Clause to allow a second jury to award damages for conduct that the first jury did not actually find rendered the defendant liable.

Lower courts agree that a damages-only retrial would be unconstitutional if the first jury issued a compromise verdict, but when evaluating a record for compromise, courts have applied different standards and presumptions. Recognizing that it is nearly impossible to know to a certainty what motivated a jury's verdict, several courts have appropriately recognized that requiring clear proof that the jury *in fact* compromised would be inconsistent with the *Gasoline Products* presumption against single-issue retrials, and would pose too great a risk of violating defendants' constitutional rights. Instead, these courts have refused to permit damages-only retrials unless it is clear that the jury *did not* render a compromise verdict.

For instance, in *Collins v. Marriott Int'l, Inc.*, 749 F.3d 951 (11th Cir. 2014), the Eleventh Circuit explained that "[a] motion for a [complete] new trial … must be granted 'when the issues of liability and damages were tried together and there are *indications* that the jury *may* have rendered a compromise verdict.'" *Id.* at 960 (emphasis added) (quoting *Mekdeci By & Through Mekdeci v. Merrell*

*Nat'l Labs., a Div. of Richardson-Merrell, Inc.*, 711 F.2d 1510, 1513 (11th Cir. 1983)). Applying that standard, the court concluded that a full retrial was warranted when the jury's damages finding was "drastically deficient," "[l]iability was hotly contested by the parties at trial," and the jury "ask[ed] whether it could find liability but award zero damages." *Id.* at 960-62. As to the jury's question, the Eleventh Circuit explained that it "suggests" that "some members of the jury *may* have gone along with a finding of liability only if accompanied by an award of zero damages," *id.* at 962 (emphasis added), but it did not require the defendant to "clearly demonstrate" a compromise verdict.

The Fifth Circuit has applied the same standard, explaining in *Lucas v. Am. Mfg. Co.*, 630 F.2d 291 (5th Cir. 1980), that courts "should grant a new trial on all of the issues rather than one limited solely to the issue of damages" when "the issues of liability and damages were tried together and there are *indications* that the jury *may* have rendered a compromise verdict." *Id.* at 294 (emphasis added); *see also Westbrook v. Gen. Tire & Rubber Co.*, 754 F.2d 1233, 1242 (5th Cir. 1985). The court held a new trial on all issues was required where the jury had returned a damages award that "was less than half of [the plaintiff's] stipulated out-of-pocket losses and reflected no award for pain and suffering," and had returned its verdict on the first day of deliberations after being told that it could either return a verdict quickly or return to deliberate at a later date due to an approaching hurricane. *Lucas*, 630 F.2d at 293. The court did not require proof that the record "clearly demonstrates" that the verdict was in fact a compromise verdict; rather, consistent with

*Gasoline Products*, it was enough that there were "*indications* that the jury *may* have rendered a compromise verdict."

The Third Circuit has used a slightly different formulation, but it too has "steadfastly applied" the *Gasoline Products* standard and has refused to permit a damages-only retrial "where 'there is *reason to think* that the verdict *may* represent a compromise among jurors with different views on whether defendant was liable.'" *Pryer*, 251 F.3d at 455 (emphasis added). In *Pryer*, the court concluded that a damages-only retrial was impermissible because the underlying dispute "involved a 'tangled or complex fact situation,'" "[b]oth sides vigorously contested liability," and the damages award was "not easy to reconcile with the uncontested evidence of injuries." *Id.* at 455, 457. "Simply put," the court concluded, "it is not clearly apparent that the issue of damages is so distinct and separable from the issue of liability that a trial of it alone may be had without injustice." *Id.* at 457 (alterations omitted). Again, the court did not demand "clear proof" that the verdict *was* a compromise; to the contrary, it demanded clear proof that the verdict was *not*.

The Second Circuit likewise has held that "a new trial on damages only is not proper if there is *reason to think* that the verdict *may* represent a compromise among jurors with different views on whether defendant was liable or if for some other reason it *appears* that the error on the damage issue may have affected the determination of liability." *Diamond D Enters. USA, Inc. v. Steinsvaag*, 979 F.2d 14, 17 (2d Cir. 1992) (emphasis added) (quoting 11 Wright & Miller, *Federal Practice and Procedure* §2814 (3d ed.

2017)). Indeed, the Second Circuit has expressly held that a damages-only retrial cannot be had if there are "conflicting inferences from the record," as that means "it cannot be said that there 'clearly' was no relationship between the jury's finding of liability and the inadequate damage award." *Ajax Hardware Mfg. Corp. v. Indus. Plants Corp.*, 569 F.2d 181, 185 (2d Cir. 1977). The Tenth Circuit has taken the same position, finding evidence that "*raise[d] the question* of the reliability of the jury's verdict" sufficient to render a damages-only retrial impermissible. *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1445-46 (10th Cir. 1988) (emphasis added).

The Eighth Circuit took the opposite approach here: It started from the presumption that it is "generally *permissible* for a trial court to grant a new trial on damages only," App.16 (emphasis added), and then demanded clear proof that the verdict *was* a compromise verdict to overcome that presumption. *See, e.g.*, App.18 (the "overarching consideration must be whether the record, viewed in its entirety, clearly demonstrates the compromise nature of the verdict"); App.20-21 (asking whether the jury's question "compel[led]" the conclusion that it rendered a compromise verdict); App.23 (declaring itself "not convinced the record so *clearly* demonstrates a compromise verdict"). In effect, then, the Eighth Circuit inverted the analysis entirely, starting from the wrong presumption and then demanding the wrong showing to overcome it.

Unfortunately, the Eighth Circuit is not alone in getting the analysis backward. In its decision, the court cited favorably to the First Circuit's decision in

*Phav v. Trueblood, Inc.*, 915 F.2d 764 (1st Cir. 1990), which embraced the position that "a second trial limited to damages is entirely proper" unless "the verdict 'could *only* have been a sympathy or compromise verdict.'" *Id.* at 767 (emphasis added). The First Circuit cribbed that standard directly from the Fourth Circuit. *See Spell v. McDaniel*, 824 F.2d 1380, 1400 (4th Cir. 1987). And the Eighth Circuit's own "clearly demonstrates" test has been embraced by the Seventh Circuit. *See Carter v. Chicago Police Officers*, 165 F.3d 1071, 1083 (7th Cir. 1998) (holding that the relevant question is whether the record "clearly demonstrate[s] the compromise character of the verdict").

While these distinctions may sound minor, as a practical matter, they can make all the difference. Indeed, it is the difference between requiring the government to prove that it has a permissible basis for burdening constitutional rights and requiring the challenger to prove that the government does not, or between requiring the regulated to prove that the agency's actions were arbitrary or capricious and requiring the agency to prove that they were not. Simply put, presumptions often dictate the outcome. This is a case a point. There can be no serious dispute that the Eighth Circuit would have reached a different conclusion had it asked whether "there 'clearly' was *no* relationship between the jury's finding of liability and the inadequate damage award," *Ajax Hardware Mfg.*, 569 F.2d at 185 (emphasis added), instead of whether there "clearly" *was* a relationship between the two. After all, the Eighth Circuit itself admitted that there was "a strong case" that the jury had reached an impermissible compromise verdict, and even

*respondents* agreed that the record supported that conclusion. Under the standard applied by other circuits, that would have compelled a different result.

In sum, the lower courts are divided over what standard to apply when deciding whether a damages-only retrial is permissible, and they are divided in a manner that has immense real-world consequences for defendants and their constitutional rights. The Court should grant certiorari to resolve that division.

## II. The Decision Below Is Plainly Wrong.

The Court should also grant certiorari because the Eighth Circuit's decision is plainly wrong. It is hornbook law that "[t]he power to limit a new trial may not be used to deprive a party of the right to a jury trial on the issues in a case." 11 Wright & Miller, §2814. Yet by granting respondents a damages-only retrial despite its considerable doubts that the jury agreed on liability, the Eighth Circuit followed just that verboten path. In doing so, the court not only violated GM's Seventh Amendment rights, but also created a constitutionally intolerable risk that GM's property will be taken without due process of law.

### A. This Court's Precedent Establishes a Clear Constitutional Presumption Against Damages-Only Retrials.

The Seventh Amendment provides in relevant part that "[i]n Suits at common law, … the right of trial by jury shall be preserved." U.S. Const. amend. VII. The Seventh Amendment "preserves the right which existed under the common law when the amendment was adopted." *N.L.R.B. v. Jones & Laughlin Steel Corp.*, 301 U.S. 1, 48 (1937); *see also Balt. & Carolina Line v. Redman*, 295 U.S. 654, 657

(1935). And "at common law there was no practice of setting aside a verdict in part." *Gasoline Prods.*, 283 U.S. at 497. Instead, under the traditional common-law rule that prevailed when the Seventh Amendment was ratified, "[i]f the verdict was erroneous with respect to *any* issue, a new trial was directed as to *all*." *Id.* (emphasis added); *see also id.* at 498 (explaining common-law practice of "set[ting] aside the whole verdict" when the verdict is erroneous as to any issue (quoting *Edie v. East India Co.*, 1 W. Bl. 295, 298 (K.B. 1761)); 3 W. Blackstone, Commentaries *391 ("Granting a new trial … *preserves entire* and renders perfect that most excellent method of decision, which is the glory of the English law. A new trial is a rehearing of the cause before another jury; but with as little prejudice to either party, as if it had *never* been heard before." (emphasis added)).

Over the years, some courts began to deviate from the common-law rule and permit partial retrials. *See Gasoline Products*, 283 U.S. at 497-98 (collecting cases). But other courts hewed closely to common-law custom and concluded that partial retrials violated the Seventh Amendment. *See id.* (same). This Court finally confronted that question in *Gasoline Products*. There, the Court considered the propriety of granting a partial retrial limited to damages in a case involving "errors … with respect to the measure of damages" on a defendant's counterclaim. *Id.* at 496. The Court reversed the First Circuit's holding that "a new trial … restricted … to the determination of damages only" on the defendant's counterclaim was constitutionally sound. *Id.*

In reaching that result, the Court concluded that the Seventh Amendment does not require rigid adherence to the common-law custom mandating a new trial on all issues whenever a verdict contains any error. *Id.* at 498. At the same time, however, the Court placed "an important limitation on the power to grant a partial new trial." 11 Wright & Miller, §2814. It held that a "partial new trial … may not properly be resorted to unless it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods.*, 283 U.S. at 500; *see also id.* at 499 ("[T]he question remains whether the issue of damages is so distinct and independent of the others, arising on the counterclaim, that it can be separately tried."). Applying that exacting standard to the case at hand, the Court concluded that "the question of damages on the counterclaim is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* at 500.

In sum, while *Gasoline Products* did not preserve the common-law rule and hold damages-only retrials wholly unconstitutional, it recognized the very real risk that such trials may violate the Seventh Amendment and deprive parties of the "fair trial" that the Constitution demands. The Court therefore established a constitutional presumption *against* partial retrials that can be overcome only when it "clearly appears" that the question of damages is "so distinct and separable" from liability "that a trial of [damages] alone may be had without injustice." *Id.*

### B. The Eighth Circuit's Presumption *in Favor* of Damages-Only Retrials Cannot Be Reconciled with *Gasoline Products* or the Constitution.

The Eighth Circuit's conclusion that damages-only retrials may proceed notwithstanding strong evidence of a compromise verdict is irreconcilable with *Gasoline Products* and the Seventh Amendment. "An impermissible 'compromise verdict' results when a jury, unable to agree on the issue of liability, compromises that disagreement by awarding a party inadequate damages." 35B C.J.S. *Federal Civil Procedure* §973 (2018). A compromise verdict thus necessarily demands a damages-only retrial. *See* App.17 (acknowledging that compromise verdicts "necessitate a new trial on all claims and issues"). After all, if there is evidence that a jury compromised its disagreement on liability by awarding inadequate damages, then it cannot be said that it "clearly appears" that liability and damages are "so distinct and separable" that a trial on damages alone "may be had without injustice." *Gasoline Prods.*, 283 U.S. at 500. To the contrary, the two are inextricably intertwined.

More fundamentally, if the jury compromised on liability, then a damages-only retrial obviously cannot proceed, since a defendant cannot be forced to pay damages for conduct for which it has not been found liable. If anything, then, the concerns with damages-only trials are even greater when there are indicia that the jury may have returned a compromise verdict, as allowing a damages-only retrial to proceed when it is not even clear that the first jury found the defendant

liable risks inflicting not one, but two, constitutional violations. *A fortiori*, the presumption that *Gasoline Products* establishes applies with full force to compromise verdict cases: A damages-only retrial cannot be ordered "unless it clearly appears that" the jury did *not* return a compromise verdict. *Id.* Accordingly, before ordering a damages-only retrial, it is incumbent on the court to assure itself that the jury did *not* issue a compromise verdict—not the other way around.

Here, however, rather than presume partial retrials to be constitutionally *impermissible*, the Eighth Circuit stated that "[i]t is generally *permissible* for a trial court to grant a new trial on damages only." App.16 (emphasis added). Even worse, the court permitted a damages-only retrial to proceed even as it admitted that GM had made "a strong case" that the jury rendered a compromise verdict, App.15-16—indeed, a case so strong that respondents themselves acknowledged before the district court that the jury may well have issued a compromise verdict. As the Eighth Circuit acknowledged, the jury's low damages award and its unusual question as to whether Bavlsik could receive damages "regardless of our decision" raised serious concerns that the jury had compromised on liability. App.19-21. And notwithstanding the Eighth Circuit's apparent view that it had to ignore the jury's "seemingly inconsistent" findings of no defect, App.21, there can be no serious dispute that liability was "hotly contested."

Those facts should have made this an easy case for the Eighth Circuit—and plainly would have made it an easy case for the circuits that correctly apply the

*Gasoline Products* presumption to compromise verdict cases. *See, e.g.*, *Collins*, 749 F.3d at 961 (ordering new trial on both liability and damages when jury issued low damages award, liability was "hotly contested," and jury asked "whether it could find liability but award zero damages"). Indeed, when a court readily concedes that there is "a strong case" that a jury rendered an impermissible compromise verdict—and thus "strong" evidence that jury members traded their disagreement over liability by awarding a plaintiff inadequate damages—it simply cannot be said that damages and liability are so "clearly … distinct and separable" that a damages-only retrial may proceed "without injustice." *Gasoline Products*, 283 U.S. at 500. To the contrary, the only thing that can "clearly" be said under those circumstances is that a damages-only retrial risks violating not just the Seventh Amendment, but the Due Process Clause as well.

Rather than grapple with these problems, the Eighth Circuit apparently felt bound to defer to the district court's decision to deny a full retrial based on a compromise verdict, even though the district court did not consider any indicia of compromise in its analysis. App.23 But, even assuming deference is warranted on this constitutionally-grounded inquiry, *see, e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431-35 (2001) (applying *de novo* review instead of abuse-of-discretion review to constitutional issue),[4] once again, that just reveals

[4] Federal Rule of Civil Procedure 59(a)—the procedural device that allows parties to seek partial retrials—"was written in the light of the *Gasoline Products* case" and reflects the constitutional limitations on partial retrials. 11 Wright & Miller,

that the Eighth Circuit asked the wrong question. What matters is not whether it is clear that the verdict *is* a compromise verdict, but whether it is clear that the verdict *is not* a compromise verdict. Had the Eighth Circuit asked the right question, it could not possibly have deferred to the district court, as it was not plausibly within the district court's discretion to conclude on this record that the jury "clearly" did *not* return a compromise verdict.

In short, the Eighth Circuit reached the wrong result because it asked the wrong question. Under a straightforward application of *Gasoline Products* and the test employed by several other circuits, this case would have come out the other way.

## III. This Case Is An Ideal Vehicle To Resolve A Frequently Recurring And Exceptionally Important Constitutional Issue.

This case in an excellent vehicle for the Court to resolve the disagreement over the standard for determining whether a damages-only retrial is consistent with the Constitution. This Court has recently expressed interest in the question of when the Constitution permits partial retrials, calling for the views of the Solicitor General in a case in which a court of appeals had "ruled that a partial retrial 'is

---

§2814. While Rule 59(a) provides that a "court may, on motion, grant a new trial on all or some of the issues," Fed. R. Civ. P. 59(a), the Advisory Committee Notes to that rule make clear that the propriety of partial retrials is governed by *Gasoline Products* and the constitutional rights that it protects. *See* Advisory Committee Notes on Fed. R. Civ. P. 59 (1937) ("For partial new trials which are permissible under *Subdivision (a)*, see *Gasoline Products* ….").

appropriate where separate trials would not constitute a clear and indisputable infringement of the constitutional right to a fair trial." *See* Conditional Cross Pet. for Cert. at 7, *Cisco Systems, Inc. v. Commil USA, LLC*, No. 13-1044 (U.S. Feb. 27, 2014). Although the Solicitor General acknowledged that "[t]hat formulation … would seem to permit a partial retrial more readily than the *Gasoline Products* standard," he recommended denying certiorari in that case in large part because it did not "appear that the court's erroneous statement affected the outcome" of the case. Br. for the United States as Amicus Curiae at 22-23, *Commil*, No. 13-1044 (U.S. Oct. 16, 2014); *see also id.* at 6.

The opposite is true here. The only reason the Eighth Circuit refused to grant GM a full retrial on both liability and damages was because it did not think that "a strong case" that the jury compromised was enough; instead, the court demanded that GM "*clearly* demonstrate[]" that the jury did in fact return a compromise verdict. App.23. Had the Eighth Circuit properly applied *Gasoline Products* and the tests applied by those circuits that correctly treat damages-only retrials as presumptively impermissible, there can be no serious dispute that GM would have avoided a partial retrial limited to damages. This is thus plainly a case in which the legal standard was outcome-determinative.

Abridging any litigant's constitutional rights is cause enough for concern, but the question presented has impacts far beyond this case. Federal courts may encounter suspected compromise verdicts in *any* civil jury trial involving virtually *any* area of the law,

including products-liability cases like this one, *see Lucas*, 630 F.2d 291; *Phav*, 915 F.2d 764; §1983 actions, *see Pryer*, 251 F.3d 448; breach-of-contract cases, *see Diamond D*, 979 F.2d 14; *Ajax Hardware*, 569 F.2d 181; Title VII actions, *see Skinner*, 859 F.2d 1439; employment-law cases, *see Great Coastal Exp., Inc. v. Int'l Bhd. of Teamsters, Chauffeurs, Warehousemen and Helpers of Am.*, 511 F.2d 839 (4th Cir. 1975); premises-liability cases, *see Collins*, 749 F.3d 951; and more. It is thus indisputable that the question presented by this case recurs frequently—and that the answer to that question has profound practical effects for litigants.

Indeed, under the standard embraced by the Eighth Circuit and some of its sister circuits, a jury may be conclusively presumed to have found a defendant liable even when there is "strong" evidence that it did not actually do so. That creates an intolerable risk that defendants will be saddled with massive damages awards without ever having been found liable for the plaintiff's injuries. That result cannot be reconciled with this Court's admonishment that "the purpose of the jury trial in [civil] cases" is "to assure a fair and equitable resolution." *Colgrove v. Battin*, 413 U.S. 149, 157 (1973). The Court should grant certiorari and resolve the division among the lower courts that the decision below deepens.

## CONCLUSION

For the foregoing reasons, this Court should grant the petition for certiorari.

Respectfully submitted,

STEPHANIE A. DOUGLAS
JESSICA V. CURRIE
BUSH SEYFERTH & PAIGE PLLC
3001 Big Beaver Rd., Suite 600
Troy, MI 48084
(248) 822-7800
douglas@bsplaw.com

ERIN E. MURPHY
*Counsel of Record*
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
erin.murphy@kirkland.com

*Counsel for Petitioner*

February 23, 2018