No. 17-1213

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

BRIEF OF *AMICI CURIAE* NATIONAL ASSOCIATION OF MANUFACTURERS, ALLIANCE OF AUTOMOBILE MANUFACTURERS AND AMERICAN TORT REFORM ASSOCIATION IN SUPPORT OF PETITIONER

Philip S. Goldberg
Counsel of Record
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400
pgoldberg@shb.com

April 2, 2018

Of Counsel

Peter C. Tolsdorf
Leland P. Frost
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10 Street, N.W., Suite 700
Washington, D.C. 20001
Counsel for National Association of Manufacturers

John T. Whatley
David Bright
ALLIANCE OF AUTOMOBILE
MANUFACTURERS
803 7th St N.W., Suite 300
Washington, D.C. 20001
Counsel for Alliance of Automobile Manufacturers

H. Sherman Joyce
Lauren S. Jarrell
AMERICAN TORT REFORM
ASSOCIATION
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
Counsel for American Tort Reform Association

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases **Page**

Constitutional Provision

Statute

Rule

Other Authorities

INTEREST OF *AMICI CURIAE*[1]

The National Association of Manufacturers (NAM), the largest manufacturing association in the United States, represents small and large manufacturers in every industrial sector and in all 50 states. Manufacturing employs more than 12 million men and women, contributes $2.25 trillion to the U.S. economy annually, has the largest economic impact of any major sector, and accounts for more than three-quarters of all private-sector research and development in the nation. The NAM is the voice of the manufacturing community and leading advocate for policies that help manufacturers compete in the global economy and create jobs across the United States.

The Alliance of Automobile Manufacturers, Inc. (Alliance), formed in 1999 and incorporated in Delaware, has twelve members: BMW Group, Chrysler Group LLC, Ford Motor Company, General Motors, Jaguar Land Rover, Mazda, Mercedes-Benz USA, Mitsubishi Motors, Porsche Cars North America, Toyota, Volkswagen Group of America, and Volvo Car Corporation. Alliance members are responsible for 77% of all car and light truck sales in the United States. The Alliance's mission is to improve the environment and motor vehicle safety through the development of global standards and the establishment of market-based, cost-effective solutions to meet emerg-

---

[1] Pursuant to Rule 37.6, counsel for *amici* certifies that this brief was not authored in whole or in part by counsel for any party and that no person or entity, other than *amici*, their members, or their counsel made a monetary contribution to the preparation or submission of the brief. The parties have consented to the filing of this brief.

ing challenges associated with the manufacture of new automobiles. The Alliance files *amicus curiae* briefs in cases such as this one that are important to the automobile industry.

The American Tort Reform Association (ATRA) is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues. *Amici* are concerned that failure to identify compromise verdicts and allowing damages-only awards in common law tort claims will improperly prejudice defendants and infringe on their rights to a fair trial under the Seventh Amendment of the Constitution.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

Two issues have long divided the federal judiciary in common law tort litigation: how to assess whether a verdict resulted from an illegal jury compromise and under which narrow set of circumstances is a court allowed to empanel a second jury for a re-trial only on damages. The Court should grant *certiorari* here to provide lower courts with clear uniform guidance so they can uphold a defendant's Seventh Amendment right to a fair trial. Seventh Amendment protections are particularly necessary in cases, such as the one at bar, where liability is doubtful or a close call and the plaintiff is sympathetic and suffering from debilitating injuries.

This particular case involves a tragic car accident. Respondent ran a stop sign and crashed into another vehicle, causing his car to flip over and rendering him a quadriplegic. He sustained life-long injuries, and sued his car's manufacturer under defect-related theories. Rather than issue a proper verdict, the jury's liability award had the hallmarks of an illegal compromise, *i.e.*, where some jurors believe the defendant was not liable for the injuries, but traded their liability votes for a low damages finding. Here, the jury asked if Respondent would be paid for his past medical bills if it did not find General Motors liable. When told no, the jury found the automaker liable on one claim while rejecting every other claim and awarded enough money to cover past, not future, medical expenses, suggesting it was unduly motivated by sympathy for Respondent's financial situation.

The response of the U.S. Court of Appeals for the Eighth Circuit to this jury ruling underscores the importance of making sure the lower courts employ the right post-verdict standard of review. While the Eighth Circuit acknowledged that these mixed findings created "confusion," it actually compounded the injustice. *Bavlsik v. General Motors LLC*, 870 F.3d 800, 810-11 (8th Cir. 2017). It refused to label the verdict a "compromise." It then improperly stepped into the role of the jury by choosing to keep the liability portion of the jury's verdict while discarding its low monetary award. It also affirmed the district court's granting of a damages-only re-trial, where the new jury would be blindfolded from the highly questionable liability findings and focused solely on measuring Respondents' severe injuries. The result would undoubtedly be a significantly higher award.

The Court should grant *certiorari*, not only to overturn this ruling, but to resolve the inconsistent approaches that federal courts have taken when faced with such verdicts. First, the Court should clarify that the Eighth Circuit used the wrong standard in refusing to label the verdict a "compromise." When a verdict is indicative of a compromise, the only fair way to proceed is to order a retrial on all issues—not require the defendant to "clearly demonstrate" the verdict resulted from an illegal compromise and order a damages-only re-trial. *Compare Boesing v. Spiess*, 540 F.3d 886, 889 (8th Cir. 2008) *with Collins v. Marriott Int'l, Inc.*, 749 F.3d 951 (11th Cir. 2014).

Second, the Court should clarify under which narrow set of circumstances a damages-only re-trial is permitted under *Gasoline Products Co. v. Champlin Refining Co.,* 283 U.S. 494 (1931). Damages-only retrials in common law tort cases such as the one here considerably favor plaintiffs and should be ruled unconstitutional infringements on a defendant's Seventh Amendment right to a jury trial unless the retrial is on an isolated sub-issue. Liability and damages are not generally "distinct and separable" such that they can be addressed by separate juries. *Id.* For these reasons, and those discussed below, *amici* respectfully urge the Court to grant the Petition.

ARGUMENT

I. The Seventh Amendment Right to Jury Trial Protects Defendants From Jury Compromises Establishing Their Liability and Courts Ordering Damages-Only Re-Trials

The Seventh Amendment provides that "[i]n suits at common law . . . the right of a trial by jury shall be

preserved." U.S. Const. amend. VII. In considering post-verdict motions, federal courts must assess the validity of a jury's verdict and take only those measures needed to ensure that this right is protected for both plaintiffs and defendants. The Court should grant the Petition because the Eighth Circuit's burdensome standard for identifying a compromise verdict is not sufficient for safeguarding the integrity of confusing jury awards. Also, the Court should make clear that lower courts are not to insert themselves into the jury's domain by choosing to keep the liability finding of a jury's verdict and empanel another jury to reassess the first jury's damages findings in a vacuum. Individually, both measures violate a defendant's Seventh Amendment right of have a jury fully and fairly decide its case. Taken together, the result can be the type of injustice that occurred here.

A. The Court Should Provide a Fair, Uniform Standard for When a Verdict Must be Overturned as an Illicit Compromise

Courts have found that compromise verdicts are illegal and cannot be allowed to stand. A compromise verdict results when jurors who do not view a defendant as liable offer to vote for liability in exchange for the other jurors agreeing to a relatively low damage award. Compromise verdicts, therefore, undermine the integrity of verdicts; they represent willful decisions by one or more jurors to surrender an honestly held belief that the plaintiff failed to meet its burden of proof on liability. *See Allen v. United States*, 164 U.S. 492, 501 (1896) ("[T]he verdict must be the verdict of each individual juror, and not a mere acquiescence in the conclusion of his fellows.").

When assessing a mixed or confusing verdict, federal courts have generally agreed that there are three factors they consider when trying to determine if the verdict resulted from an illicit compromise: inadequate damages, a close question on liability, and something odd with jury deliberations, though there may be other factors in a given case. *See*, *e.g.*, *Boesing*, 540 F.3d at 889; *Skinner v. Total Petroleum, Inc.*, 859 F.2d 1439, 1445-46 (10th Cir. 1988). A verdict may be "so grossly inadequate as to compel the conclusion that [it] represented a compromise," but rarely is the issue so clear; it is usually the confluence of these factors that determines whether there has been an illegal compromise. *Nat'l Fire Ins. Co. of Hartford v. Great Lakes Warehouse Corp.*, 261 F.2d 35, 37 (7th Cir. 1958).

What federal courts disagree on is how strong the evidence of these factors must be to label a decision a compromise verdict and order a new trial. Some courts, as the Eighth Circuit here, require a party to "clearly demonstrate" that the verdict was the result of an illicit compromise. *See, e.g., Carter v. Chicago Police Officers*, 165 F.3d 1071, 1079 (7th Cir. 1998) (establishing a "clear weight of the evidence" standard). Other courts have found that such "exceptional" circumstances cannot be required; otherwise, any number of illicit compromise verdicts may be allowed to stand. *Collins*, 749 F.3d at 961. As the Eleventh Circuit has held, the constitutional right to a fair trial is sacrosanct, and a new trial is appropriate whenever "there are indications that the jury may have rendered a compromise verdict." *Id.*; *see also Pryer v. C.O. 3 Slavic*, 251 F.3d 448, 456 (3d Cir. 2001) (applying a "probability" standard to assess whether a "verdict was tainted by compromise"). In this regard,

the compromise verdict is treated the same as the hung jury immediately preceding the compromise.

This Petition illustrates how these differences impact the constitutional rights of tort defendants. First, there was no question in the district court's view that the damages award was "shockingly inadequate." *Bavlsik*, 870 F.3d at 809. This conclusion should have been a strong indication of a compromise verdict. Second, whether liability was a close question should require only that liability was "hotly contested" or the evidence for liability was not strong. *Pryer*, 251 F.3d at 457. The standard should not be that there is no legally sufficient evidence to support the jury's liability finding, as the Eighth Circuit required. *Bavlsik*, 870 F.3d at 805. This standard is associated with a motion for a Judgment as a Matter of Law. *See* Fed. R. Civ. P. 50(a)(1). Third, any oddity in the jury's deliberation, including the nature of questions asked of the judge, should suffice. The speed at which the potential compromise was reached (only four hours in total and two hours after the jury asked if Respondent would recover his stipulated medical expenses regardless of its finding) does not weigh against the existence of a compromise verdict as the Eighth Circuit suggests. *Bavlsik*, 870 F.3d at 810-11. Here, all of the indicia are present; as Petitioners note, even Respondents at one point acknowledged the jury "may have been compromising." Pet., *General Motors LLC v. Bavlsik*, No. 17-1213, at 8 (filed Feb. 23, 2018) (quoting Dkt. 197 at 7-8).

Once the factors are weighed and a court determines that "sufficiently persuasive indicia of a compromise are present . . . then the issues of liability and damages are inseparable and a complete new

trial is necessary." *Mekdeci v. Merrell Nat'l Labs., a Div. of Richardson-Merrell, Inc.*, 711 F.2d 1510, 1514 (11th Cir. 1983). This required solution—a full re-trial—does not permit damages-only re-trials where a court picks sides in the unholy compromise. In this situation, the concern is not that the jury failed to understand the extent of the plaintiff's injuries and another jury is needed to properly assess damages. To the contrary, "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. Steins-vaag*, 979 F.2d 14, 17 (2d Cir. 1992).

"[D]etermining who is harmed by jury compromise requires no speculation, for the defendant is always harmed." Eric L. Muller, *The Hobgoblin of Little Minds? Our Foolish Law of Inconsistent Verdicts*, 111 Harv. L. Rev. 771, 796 (1998). In addition, compromise verdicts undermine public confidence in the effectiveness in the civil justice system, weaken the behavioral message in individual cases, encourage speculative lawsuits, and reduce the impetus to settle or mediate a case rather than go to trial. *See generally* Charles Nesson, *The Evidence or the Event? On Judicial Proof and Acceptability of Verdicts*, 98 Harv. L. Rev. 1357 (1985). Deference to a jury's liability finding must not have priority when there are indications it resulted from improper compromise.

The Court should provide clear, uniform and proper standards for how to address potential compromise verdicts. When the indicia of a compromise verdict exists, courts should be instructed to tread

carefully. If a court concludes the jury's verdict was the result of an illicit compromise, it must order a full re-trial. Otherwise, particularly in close situations, courts should not interfere with the jury's confusing result by ordering a re-trial only on damages in an effort to "fix" the award.

B. The Court Should Clarify that Damages-Only Re-Trials Generally Violate a Defendant's Right to a Fair Trial Even When There Is No Suspected Compromise

The Court should also grant *certiorari* to ensure the Circuits properly apply this Court's ruling in *Gasoline Products* 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." 283 U.S. at 500. As many circuits have found, "[a] straightforward application of the *Gasoline Products* standard" generally bars damages-only re-trials. *Pryer*, 251 F.3d at 458. Like compromise verdicts, damages-only re-trials in tort cases tend to be one-sided against the defendant; they only ensure that plaintiffs will be paid greater sums, not that justice will be achieved.

In applying *Gasoline Products*, lower courts have largely concluded that damages "cannot be submitted to the jury independently of [liability] without confusion and uncertainty." *Pryer*, 251 F.3d at 459 n.3 (quoting *Williams v. Rene*, 72 F.3d 1096, 1101 (3d Cir. 1995)). The second jury cannot set damages without an understanding of the underlying breach. It may give inordinate weight to the prior findings or reexamine evidence. The result will be a "diminishment of any time saved . . . and a genuine risk that

the general issue would be 'redecided' by the subsequent jury." *Smith v. Brown & Williamson Tobacco Corp.*, 174 F.R.D. 90, 96 (W.D. Mo. 1997).

Thus, to be in accordance with *Gasoline Products*, the issue to be retried must be "so distinct and separable from the others that a trial of it alone may be had without injustice." 283 U.S. at 500. Many courts have recognized that this is an appropriately high bar, finding a damages-only trial appropriate "only in those cases where it is plain that the error which has crept into one element of the verdict did not in any way affect the determination of any other issue." *Elcock v. Kmart Corp.*, 233 F.3d 734, 758 (3d Cir. 2000). Otherwise, the injustice of two juries deciding overlapping issues cannot be corrected.

The Court should also grant the Petition because allowing the Eighth Circuit's decision to stand will undermine appropriate decisions in mass tort and class actions rebuffing plaintiffs' motions seeking to bifurcate liability and damages. Numerous courts have cited *Gasoline Products* in refusing to bifurcate these issues, finding that doing so would violate the right to trial by a jury. *See, e.g.*, *Alabama v. Blue Bird Body Co.*, 573 F.2d 309, 318 (5th Cir. 1978) (explaining why under *Gasoline Products* bifurcation of issues for trial are "not the usual course that should be followed"); *Bacon v. Honda of Am. Mfg.*, 205 F.R.D. 466, 489 (S.D. Ohio 2001) (rejecting plaintiffs' bifurcation proposal because the two stages "are not 'so distinct and separable' from one another that they may be considered separately by multiple fact-finders without violating the Seventh Amendment").

While other courts have approved the use of multiple juries in mass or class actions to handle various

aspects of a case, the weight of judicial opinion is against it. Most courts have found that such bifurcations can make a plaintiff's case appear "much stronger" than it is. *See In re Paxil Litig.*, 212 F.R.D. 539, 548 (C.D. Cal. 2003) (quoting *O'Connor v. Boeing N. Am., Inc.*, 197 F.R.D. 404, 415 (C.D. Cal. 2000) and refusing to create a class trial on liability separate from individual damages findings). They can also intrude on the Reexamination Clause of the Seventh Amendment. *See Matter of Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1303 (7th Cir. 1995).

The Manual for Complex Litigation also echoes *Gasoline Products*, instructing that "[g]enerally, when issues are severed for separate trials, they should be tried before the same jury unless they are entirely unrelated." Federal Judicial Center, Manual for Complex Litigation, Fourth, § 11.632 (2004). A well-respected treatise concurs, explaining "the better and preferred practice is to use the same jury for all issues in an action, even though it may hear the issues at different times. This certainly is the safer course for the court to follow." 9A Charles Alan Wright & Arthur R. Miller, Federal Practice and Procedure § 2391 (3d ed. Sept. 2017 update). This is the reason that when courts bifurcate punitive damage trials to make sure certain evidence, including defendant's finances, does not unduly influence or inflate a jury's findings for liability and compensatory damages, the same jury decides each phase. *See, e.g.,* Mo. Rev. Stat. § 510.263(1) ("All actions tried before a jury involving punitive damages . . . shall be conducted in a bifurcated trial before the same jury if requested by any party."). This is a matter of fairness and due process. *See Rivera v. Sassoon*, 39 Cal. App. 4th 1045, 1048 (1995).

The Court should grant the Petition to make clear that the Seventh Amendment does not permit courts to use different juries to decide liability and damages, particularly in common law tort actions. These issues are inextricably interwoven.

II. Federal Courts Should Be Cautioned Against Employing Procedural Mechanisms that Undo Jury Verdicts and Direct Larger Awards

Granting the Petition can also ensure that federal courts do not put their thumbs on the scales of justice in favor of sympathetic plaintiffs. The deference a court must show to a jury's finding dictates that, even when it suspects a damages award is too low, it must leave the verdict intact or order a full re-trial. Empaneling a second jury for the purpose of generating higher damages runs afoul of the Court's longstanding jurisprudence against *additur*. Lower courts sitting in diversity also should not undermine state laws allowing or restricting juries from apportioning damages. Otherwise, federal courts will skew common law tort litigation in favor of sympathetic plaintiffs with severe injuries and force defendants to pay large claims even when they may not have wrongfully caused those injuries.

A. The Court Should Not Allow Damages-Only Re-Trials to Circumvent Its Longstanding Prohibition on *Additur*

Here, the district court and Eighth Circuit both acknowledged that the purpose of ordering a damages-only re-trial was to increase what they called a "shockingly inadequate" award. *Bavlsik*, 870 F.3d at 809. Their decision to use a second jury to add mil-

lions of dollars to the verdict, therefore, is inconsistent with the Court's longstanding jurisprudence against *additur*. *See Dimick v. Schiedt*, 293 U.S. 474, 486 (1935) ("[W]here the verdict is too small, an increase by the court is a bald addition of something which in no sense can be said to be included in the verdict."). This Court should grant the Petition to clarify that a court cannot sidestep this constitutional boundary by deciding the jury's award must be increased and empaneling a second jury to determine exactly how much that increase should be.

In *Dimick*, for example, an auto collision case resulted in verdict of just $500 and the plaintiff moved for a new trial on grounds the verdict was contrary to the weight of the evidence and that it was a compromise verdict. *Id.* at 475-76. The district court ordered a new trial on damages-only, as the Eighth Circuit allowed here, unless the defendant agreed to increase damages to three times those awarded by the jury. *Id.* at 476. The defendant agreed to the increase, and, unlike here, it was the plaintiff who challenged the arrangement. *See id.* The principle behind this Court's ruling against *additur*, though, is the same for both parties.

As the Court explained just four years after *Gasoline Products*, "[w]here the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but in that event, both parties remain entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages." *Id.* at 486. "[H]ere we are dealing with a constitutional provision which has in effect adopted the rules of the common law in respect of trial by ju-

ry as these rules existed in 1791. To effectuate any change in these rules is not to deal with the common law, qua common law, but to alter the Constitution." *Id.* at 487. As a matter of constitutional law, a party must not be compelled to forego its "right to the verdict of a jury and accept an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess." *Dimick*, 293 U.S. at 487; *see also Gasoline Prods.*, 283 U.S. at 497 ("[A]t common law there was no practice of setting aside a verdict in part.").

The Court should grant the Petition to ensure that courts cannot circumvent this longstanding law against *additur* merely by ordering a damages-only re-trial where the result of a higher award is certain. *Additur* violates the Constitution regardless of whether the district court increases the award itself, secures an agreement from the defendant to increase the award, or empanels a second jury to increase the award. The result is the same; the judge improperly intervened and directed a larger award.

B. The Court Should Not Allow Federal Courts to Undermine State Laws Allowing or Restricting Apportionment of Damages

Granting the Petition will also properly guide federal courts, when sitting in diversity, that they should take care not to improperly interfere with state laws allowing or restricting the apportionment of damages. *See Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). Damages-only verdicts can run afoul of measures that state courts and legislatures have adopted for common law tort claims that give juries tools to properly apportion damages based on re-

sponsibility of the parties. These changes have had the effect of reducing compromise verdicts. Where damages cannot be apportioned, the courts must be diligent in identifying potential compromises.

As a general matter, state courts and legislatures have provided juries with the ability to reach decisions consistent with their judgment. For years, contributory negligence, such as Respondent's running a stop sign, provided a defendant with a complete defense to liability. During that time, juries that believed a sympathetic plaintiff shared some responsibility for his or her own injury might nevertheless attribute no fault to the plaintiff and award the plaintiff damages, but less than the amount claimed. *See, e.g., Alibrandi v. Helmsley*, 314 N.Y.S.2d 95, 96-97 (N.Y. Civ. Ct. 1970) (finding that despite a contributory negligence instruction, "the jury would have determined the sum of plaintiff's damages in a substantial amount, deducted a portion equivalent of the degree of his negligence, and returned a verdict for the difference"); Victor E. Schwartz, Comparative Negligence § 22.01[f] (5th ed. 2002) (stating juries were applying "comparative negligence *sub silentio*").

Since the 1970s, states have systematically reduced the incentive for juries to enter such compromise verdicts by abandoning contributory negligence as a complete defense and instructing juries to allocate fault in proportion to a party's share of the responsibility for the injuries. Tolerance for such compromise verdicts has been rejected, as all but four states have a version of comparative fault. *See Coleman v. Soccer Ass'n of Columbia*, 69 A.3d 1149, 1161 (Md. 2013) (citing 2 Dan B. Dobbs, Paul T. Hayden & Ellen M. Bublick, The Law of Torts, § 220 at 771-72

(2d ed. 2011)). Allowing a damages-only trial in cases where apportionment of damages is allowed undermines this progress and eliminates the right of a defendant to have its liability apportioned based on fault. The second jury will not be able to view the fault-based evidence. *See Castano v. Am. Tobaccco Co.*, 84 F.3d 734, 751 (5th Cir. 1996) (finding that "[s]evering a defendant's conduct from comparative negligence" runs afoul of the Seventh Amendment).

Where allocation of fault is not allowed, the dynamics for a compromise verdict have not lessened. Cases, as here, where auto manufacturers are sued for allegedly not designing vehicles to adequately protect occupants in crashes can provide such an example. In these situations, most states still allow juries to consider the comparative fault of the driver, though some courts do not. These courts separate responsibility for the collision from the strict product liability claims. *See* Mary E. Murphy, *Comparative Negligence of Driver as Defense to Enhanced Injury, Crashworthiness, or Second Collision Claim*, 69 A.L.R.5th 625 (Originally published 1999). Missouri follows this minority approach. *See, e.g.*, *Gerow v. Mitch Crawford Holiday Motors,* 987 S.W.2d 359, 363 (Mo. Ct. App. 1999). Federal courts should be sensitized to the need to be on the look-out for compromise verdicts in these particular types of cases.

In either situation, undoing only the jury's assessment of damages will fuel deep-pocket jurisprudence, where a defendant is held liable for a person's harm not because it has engaged in wrongdoing, but because the plaintiff is sympathetic and the judge or jury wants that person to receive some compensation. Deep-pocket jurisprudence is regularly the hid-

den foundation for product liability claims in automobile cases. *See* Victor E. Schwartz, Phil Goldberg & Christopher E. Appel, *Deep Pocket Jurisprudence: Where Tort Law Should Draw the Line*, 70 Okla. L. Rev. 359, 398-404 (2018). To justify recovery, the victim alleges the manufacturer failed to design a car that would protect against or mitigate injury in the event of such a collision. The design defect theory may be highly speculative, but is supported by the plaintiff's "experts." Courts allow novel or unsubstantiated opinions to facilitate recovery, and the automobile manufacturer ends up paying the bills.

Imposing liability based on a defendant's ability to pay a sympathetic plaintiff's medical expenses and other losses rather than its responsibility for an injury undermines the pursuit of justice. It also forces manufacturers, such as Petitioner, to re-design products based on faulty conclusions, which could have major, negative impacts on public safety. Often appellate courts are needed to identify and stop such trial court rulings. As dispassionate reviewers of the facts and law, they must reverse decisions where judges and juries grant recoveries that impede, not facilitate, the even-handed pursuit of justice. The Eighth Circuit's approach to compromise verdicts and damages-only re-trials is one such situation.

This Court, by setting forth proper standards on compromise verdicts and prohibiting damages-only re-trials in tort cases absent specific circumstances, can make sure that a half-hearted finding of liability does not lead to full-throated damages.

CONCLUSION

For the foregoing reasons, *amici curiae* respectfully request that this Court grant the Petition for a Writ of Certiorari.

Respectfully submitted,

Philip S. Goldberg
Counsel of Record
Cary Silverman
SHOOK, HARDY & BACON L.L.P.
1155 F Street, N.W., Suite 200
Washington, D.C. 20004
(202) 783-8400
pgoldberg@shb.com
Counsel for Amici Curiae

Of Counsel
Peter C. Tolsdorf
Leland P. Frost
MANUFACTURERS' CENTER
FOR LEGAL ACTION
733 10 Street, N.W., Suite 700
Washington, D.C. 20001
Counsel for National Association of Manufacturers

John T. Whatley
David Bright
ALLIANCE OF AUTOMOBILE
MANUFACTURERS
803 7th St N.W., Suite 300
Washington, D.C. 20001

Counsel for Alliance of Automobile Manufacturers

H. Sherman Joyce
Lauren S. Jarrell
AMERICAN TORT REFORM ASSOCIATION
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
Counsel for American Tort Reform Association

Dated: April 2, 2018