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

REPLY BRIEF FOR PETITIONER

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Respondents agree (as they must) that partial retrials are presumptively unconstitutional 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. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). The decision below is impossible to reconcile with that constitutional rule, as the Eighth Circuit concluded that there was "a strong case" that the jury compromised, Pet.App.16, yet nonetheless determined that petitioner General Motors ("GM") should face a damages-only retrial.

Respondents try to chalk that manifest error up to application of an abuse-of-discretion standard, but that misses the point. The whole problem is that the lower courts are divided on the scope of discretion that district courts possess when deciding whether to grant a partial retrial. While some courts follow *Gasoline Products* and hold that a district court may not grant a damages-only retrial unless liability and damages clearly *are* distinct and separable (which they obviously are not when there is "strong" evidence that the jury compromised on the two), other courts hold that a district court may grant a damages-only retrial unless liability and damages clearly *are not* distinct and separable. By inverting the *Gasoline Products* presumption in the latter manner, the Eighth Circuit exacerbated that division among the lower courts—and in the process further eroded basic Seventh Amendment and due process protections.

Respondents dismiss the division among the lower courts, insisting that there is "remarkable

consensus" on when damages-only retrials are permissible. Opp.10. But respondents reach that conclusion only by ignoring the cases cited in the petition that conflict with the decision below. Indeed, respondents do not even acknowledge, let alone attempt to distinguish, most of them. It is easy to claim "the circuits are all in harmony" when tuning out the discord. Opp.6. Instead of confronting the conflict among the lower courts, respondents double down on the decision below, insisting that the Eighth Circuit "correctly" applied *Gasoline Products* and properly deferred to the district court's determination that the verdict was not a compromise. Opp.12. But it is difficult to see how the Eighth Circuit could have "correctly" concluded that damages are "clearly … distinct and separable" from liability, *Gasoline Prods.*, 283 U.S. at 500, when the court freely admitted there is "a strong case" that some jurors traded a finding on liability for a legally inadequate damages award.

Respondents also downplay the importance of the question presented. But as *amici* attest, this case is immensely consequential both practically and constitutionally, as the reasoning embraced by the Eighth Circuit would allow damages-only retrials despite serious concerns that a jury never actually found anyone liable. Accordingly, the Court should grant certiorari and provide much-needed clarity on this important issue of constitutional law, which has produced discord among the lower courts for decades.

I. Courts of Appeals Are Divided Over When Damages-Only Retrials Comport With The Constitution.

In the nearly 90 years since this Court issued *Gasoline Products*, many lower courts have addressed—and divided over—whether damages-only retrials may proceed notwithstanding evidence that a jury may have rendered a compromise verdict. The conflict in how courts have answered that question is stark, and respondents' efforts to brush the division aside are unavailing.

On one side, several courts have concluded that a full retrial on both liability and damages is required whenever a verdict could reasonably be construed as an impermissible compromise. In *Collins v. Marriott Int'l, Inc.*—a decision respondents never address even though it was the first court of appeals decision discussed in GM's petition (at 3)—the Eleventh Circuit reversed a refusal to grant a full retrial because there were "indications" and "suggest[ions]" that the jury "may" have compromised. 749 F.3d 951, 960-62 (11th Cir. 2014). Likewise, in *Pryer v. C.O. 3 Slavic*—the second decision GM discussed (at 3), which respondents similarly neglect—the Third Circuit reversed a grant of a damages-only retrial because there was "'reason to think'" the jury "'may'" have compromised. 251 F.3d 448, 455-58 (3d Cir. 2001). And in *Skinner v. Total Petroleum, Inc.*—yet another decision discussed by GM (at 17) but ignored by respondents—the Tenth Circuit reversed a refusal to grant a full retrial because it "appear[ed]" as though the jury had compromised. 859 F.2d 1439, 1445-46 (10th Cir. 1988).

Not one of those courts demanded clear-cut proof of juror compromise, or even a finding on that question. Instead, a full retrial was necessitated because the jury *could have* comprised—an approach followed by several other courts as well. *See, e.g.*, *Lucas v. Am. Mfg. Co.*, 630 F.2d 291, 294 (5th Cir. 1980) ("indications that the jury may have rendered a compromise verdict"); *Ajax Hardware Mfg. Corp. v. Indus. Plants Corp.*, 569 F.2d 181, 185 (2d Cir. 1977) ("reasonable possibility of a compromise verdict"). That approach makes eminent sense given the practical problems that a more demanding standard would entail. As respondents themselves stress, "the Federal Rules of Evidence generally prohibit[] courts from inquiring into the jury's deliberative process." Opp.8. Accordingly, requiring a defendant to definitively prove that the jury compromised—a task almost impossible to accomplish—would create far too great a risk of the defendant being deprived both of the right to a fair jury trial and of property without due process of law. Pet.14. The *Gasoline Products* presumption against partial retrials exists to guard against precisely that intolerable result.

The Eighth Circuit has turned that presumption upside down. In its view, a damages-only retrial is permissible unless the defendant "clearly demonstrates" that the jury compromised, and even "strong" evidence of a compromise verdict is not good enough to satisfy that burden. Pet.App.16, 18. In other words, instead of demanding proof that liability and damages are "clearly … distinct and separable," *Gasoline Prods.*, 283 U.S. at 500, the Eighth Circuit demanded proof that liability and damages are clearly *not* distinct and separable. And the Eighth Circuit is

not the only court that has inverted the *Gasoline Products* standard in this manner. *See Carter v. Chi. Police Officers*, 165 F.3d 1071, 1083 (7th Cir. 1998) (embracing "clearly demonstrates" standard); *Phav v. Trueblood, Inc.*, 915 F.2d 764, 767 (1st Cir. 1990) (asking whether "verdict 'could only have been a sympathy or compromise verdict'"); *Spell v. McDaniel*, 824 F.2d 1380, 1400 (4th Cir. 1987) (same). That hardly qualifies as a "remarkable consensus" over the question presented. Opp.10.

Respondents concede that the lower courts use "different formulations" when determining whether evidence of a compromise verdict necessitates a full retrial, but they try to dismiss the "discrepanc[ies]" in outcomes as the product of light-touch, abuse-of-discretion review. Opp.1, 10. That is wishful thinking. Even assuming such a deferential standard should govern where constitutional rights are at stake, *see* Pet.24—a proposition that *Gasoline Products* itself notably did not embrace—that courts are applying abuse-of-discretion review makes little difference if they have wildly divergent views of the scope of a district court's discretion. And that is precisely the problem. As the cases just discussed reveal, some courts find abuse of discretion when a district court grants a partial retrial notwithstanding a verdict that was *arguably* a compromise, while others find abuse of discretion only when a district court grants a partial retrial notwithstanding a verdict that was *obviously* a compromise.

The Third Circuit's *Pryer* decision is illustrative. There, the majority did not resolve the retrial question by simply deferring to the district court's conclusion

that the jury did not compromise. Instead, it reversed because there was at least a "probability" of a compromise verdict, and under a "straightforward" application of *Gasoline Products*, that was enough to necessitate a full retrial. *Pryer*, 251 F.3d at 456, 458. That is the same reasoning other courts on the Third Circuit's side of the split apply. Indeed, when a court reverses a district court's order for a partial retrial because there were "indications" or "suggestions" of compromise, *see, e.g.*, *Collins*, 749 F.3d at 960-62, almost by definition there will have been "indications" or "suggestions" of *no* compromise as well. Yet courts that faithfully follow *Gasoline Products* reverse in such cases anyway. That is because those courts correctly recognize that the question is not whether the jury clearly issued a compromise verdict, but whether there is reason enough to suspect as much such that damages and liability cannot be said to be "clearly … distinct and separable." *Gasoline Prods.*, 283 U.S. at 500. By demanding clear evidence that the jury *did* compromise, the Eighth Circuit turned that rule on its head.

II. The Eighth Circuit's Decision Is Incorrect.

Respondents' assertion that the Eighth Circuit reached the correct result is equally flawed. As things stand, GM will be forced to endure a damages-only retrial in which a new jury will almost certainly award respondents significantly higher damages, even though both the Eighth Circuit *and respondents themselves* openly acknowledged serious doubts that the first jury even found GM liable. That result is difficult enough to reconcile with the facts, as it is hard to see how a court could reasonably conclude that the

jury's verdict was anything other than an obvious compromise. But that result is impossible to reconcile with the law, as the need for a full retrial should have been plain as soon as the Eighth Circuit found "a strong case" that the jury compromised.

Indeed, respondents readily acknowledge that "[t]he Eighth Circuit … belie[ved] that GM had made a 'strong case' that … a judge might be able to find a compromise" here. Opp.4. And with good reason, as this case presents every compromise-verdict indicator in the book. The jury awarded legally inadequate damages, which alone should have raised a red flag. Pet.10; *see also* Chamber of Commerce Br.8 ("Academic studies of jury behavior have confirmed what the courts have long understood: juries that reach consensus on a defendant's liability ordinarily do not award the plaintiff grossly inadequate damages."). The jury engaged in an "odd pattern of jury deliberations," including asking whether it could award damages to respondents "regardless of our decision" on liability. Pet.10-11; *cf. Collins*, 749 F.3d at 962 (jury's question "whether it could find liability but award zero damages" "suggests" compromise). And liability was "hotly contested" at trial, so the jury could reasonably have been divided (at the very least) over that question. Pet.11; *see also Collins*, 749 F.3d at 961-62 (ordering full retrial when liability was "hotly contested").

The "strong" evidence that the jury issued a compromise verdict should have compelled the conclusion that a damages-only retrial was off the table. After all, *Gasoline Products* is crystal clear that a damages-only retrial is permissible 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." 283 U.S. at 500. And if "a strong case" can be made that the jury resolved its doubts about liability by compromising on damages, then it cannot plausibly be said that this is a case in which liability and damages are "clearly … distinct and separable." *Id.* The Eighth Circuit reached its contrary conclusion only by inverting the presumption and requiring "clear" proof of precisely the opposite proposition.

Respondents insist that the Eighth Circuit's concession should be considered in light of the abuse-of-discretion standard, and that the court did not "err by deferring to the district court." Opp.13. But the problem with the Eighth Circuit's decision is that the court asked the wrong question. Instead of asking whether the district court abused its discretion by declining to order a full retrial notwithstanding the "strong case" that the jury compromised (which it plainly did), the Eighth Circuit asked only whether the district court abused its discretion *by finding that the jury did not compromise*. What the court should have concluded is that the ultimate answer to the question of compromise is largely academic because the very existence of a strong case that the jury compromised is itself enough to necessitate a full retrial. In all events, it is a bit rich for respondents to wrap themselves in deference to the district court when *respondents themselves* affirmatively argued before that court that the jury "may not have been unanimous" and "may have … compromis[ed]." Pet.8 (quoting Dkt.197 at 7-8).

Respondents next suggest that GM somehow waived its constitutional right to a full retrial by failing to object that the verdict was *inconsistent* when it was issued. Opp.12. That argument largely echoes the reasoning of the Eighth Circuit, which deemed itself bound to ignore the obvious compromise between the jury's liability and damages findings because GM did not immediately raise an inconsistent-verdict objection. Pet.App.21-23. At the outset, this line of argument is largely irrelevant, as the Eighth Circuit concluded that GM made "a strong case" of compromise *even without* considering that obvious inconsistency, and that alone should have compelled the conclusion that a full retrial was necessary. That said, any suggestion that GM "waived" the right to rely on the inconsistency in those verdicts is misplaced.

"An inconsistent verdict and a compromise verdict are two different things": The former is the product of juror confusion, while the latter is the product of impermissible juror bargaining. David Herr et al., *Fundamentals of Litigation Practice* §32:4.6 (2017 ed.). That distinction has critical consequences for preservation rules. As the very authority on which the Eighth Circuit relied confirms, it may make sense to require a litigant to raise an inconsistent-verdict objection before the jury is discharged, as the jury could yet resolve that confusion. *Reider v. Philip Morris USA, Inc.*, 793 F.3d 1254, 1259-61 (11th Cir. 2015). But that remedy is "unavailable where a verdict is the result of an unlawful compromise" because the problem there is not confusion; it is an impermissible (and incurable) decision to trade votes on one part of a verdict for another. *Id.* at 1261.

Accordingly, "[a] party claiming that the jury rendered a compromise verdict" does not need to object while the jury is still present, but rather "m[ay] object to the verdict in a motion for a new trial 'no later than 28 days after the entry of judgment.'" *Id.* at 1260; *see also* Stephen E. Arthur et al., *Federal Trial Handbook Civil* §75:22 (4th ed. 2017) (same).

That is precisely what GM did here. Far from pursuing a "lie-in-wait" strategy, Opp.15, GM asserted its compromise-verdict argument at its first opportunity; and as respondents themselves emphasize, GM asked both the district court and the Eighth Circuit to apply the "accepted legal standard" when doing so—*viz.*, the standard established by *Gasoline Products*. Opp.1, 5, 10. Both courts having failed to apply that standard, it falls to this Court to resolve the circuit split that the Eighth Circuit deepened by failing to adhere to this Court's precedent.

III. The Question Presented Is Of Far-Reaching Importance, And This Is An Excellent Vehicle For Resolving It.

Respondents fare no better with their efforts to downplay the importance of the question presented. Indeed, those efforts are difficult to square with the several *amici* urging this Court to grant the petition, as well as with the fact that this Court deemed the same question sufficiently important to warrant calling for the views of the Solicitor General just a few short Terms ago. *See* Pet.25-26.

At any rate, it is no surprise that respondents seek to dissuade the Court from resolving the evident confusion in the lower courts, as plaintiffs are the principal beneficiaries of that confusion. As

petitioner's *amici* highlight, the decision below (and others like it) is most threatening to defendants—and particularly to "deep-pocketed" ones: "[B]usiness organizations … will bear a disproportionate share of the burdens that flow from a permissive approach to damages-only retrials in the face of evidence of improper compromise," both "because compromise verdicts are more likely when corporate defendants are sued by individual plaintiffs and because juries render higher compensatory awards against corporations than other classes of defendants." Chamber of Commerce Br.18; *see also* Nat'l Ass'n of Mfrs. et al. Br.2 (expressing "concern[] that failure to identify compromise verdicts and allowing damages-only awards in common law tort claims will improperly prejudice defendants").

Moreover, questions regarding the propriety of partial retrials do not "arise[], at most, only a few times a decade" in the lower courts. Opp.14. Quite the opposite: Such questions arise all the time in civil litigation and in cases involving virtually every area of the law. *See* Pet.26-27. Respondents contend otherwise only by mischaracterizing the question presented in exceedingly narrowly terms, contending that this case presents a "category of one" dispute about cases where "the losing party made a 'strong case' for a compromise and might have prevailed had it preserved its primary argument or the district court exercised its discretion to reach a different conclusion." Opp.15. Needless to say, that is not the question GM has asked this Court to review.

Respondents lastly claim that this is a poor vehicle for resolving the question presented because "GM has waived its lead argument for why there was a

compromise." Opp.15. But as already explained, *supra* pp.9-10, that argument rests on a mistaken premise and in all events is irrelevant. Indeed, respondents' belief that so much turns on whether the Court may consider but one of the many indicators of jury compromise only underscores their failure to grasp the core holding of *Gasoline Products*. The question is not whether there is clear evidence that the jury compromised; it is whether there is clear evidence that the jury *did not*. If the Eighth Circuit had asked *that* question, there is simply no way it could have reached the conclusion it reached *even if* it refused to consider the verdict inconsistency. That makes this case an ideal vehicle for resolving the persistent confusion about the standard for considering partial retrial requests, as that issue is undeniably outcome-determinative—and undeniably critical to the preservation of core constitutional rights.

CONCLUSION

The Court should grant the petition.

Respectfully submitted,

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