No. 20-1223

In the Supreme Court of the United States

JOHNSON & JOHNSON AND JOHNSON & JOHNSON CONSUMER, INC.,

Petitioners,

v.

GAIL L. INGHAM, ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals for the Eastern District

BRIEF OF *AMICI CURIAE* ABUBAKAR ATIQ DURRANI, M.D., AND CENTER FOR ADVANCED SPINE TECHNOLOGIES, INC. IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Amici write in support of the first question presented in the petition: Whether a court must assess if consolidating multiple plaintiffs for a single trial violates due process, or whether it can presume that jury instructions always cure both jury confusion and prejudice to the defendant.

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STATEMENT OF AMICI CURIAE[1]

Amici are a spine surgeon, Abubakar Atiq Durrani, M.D., and his former medical practice, the Center for Advanced Spine Technologies, Inc. (CAST). They are defendants in a number of medical malpractice actions in both federal and state court in Ohio. In federal court, they have been subjected to two group trials—despite the fact that the individual plaintiffs allege unique injuries—stemming from equally unique surgeries—and claim different damages based on a variety of theories of recovery. In state court, plaintiffs have spent seven years trying to pressure trial judges into scheduling—in plaintiffs' words—"massive group trials" of hundreds of plaintiffs before a single jury. A state court is now planning to conduct group trials to clear the docket backlog created by the Covid-19 pandemic. Dr. Durrani and CAST therefore urge the Court to grant a writ of certiorari on Petitioners' first question and set clear boundaries on group trials.

SUMMARY OF ARGUMENT

Dr. Durrani and CAST call the Court's attention to three reasons why it should grant Johnson & Johnson's petition. First, group trials are not limited to state court dockets or products liability cases targeting multi-national corporations. Petitioners rightly warn that "The Court of Appeals' logic would permit

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[1] No counsel for any party authored this brief in whole or in part, nor did any counsel or party make any monetary contribution intended to fund the preparation or submission of this brief. All parties' counsel of record received timely notice of the intended filing of this brief, and all consented to its filing.

consolidation of dozens or hundreds of plaintiffs with radically different medical conditions and claims arising under dozens of States' laws, so long as the jury was instructed to consider each case individually." That is exactly what has already happened in the litigation against amici in federal court (and what the plaintiffs continue to request in state court).

Second, the Court should be aware that trial courts are scheduling group trials in order to clear the civil litigation backlog created by the Covid-19 pandemic. The Court must act now to set the Due Process boundaries on those trials before the issue becomes prevalent across the country.

Third, the analysis of the court below (and in other group trial cases) creates an essentially unrebuttable presumption that group trials are not prejudicial. Both the court below and the federal trial court in the litigation involving amici[2] concluded that plaintiffs could join their cases for trial if they sued the same defendant and alleged similar (but distinct) injuries. As Petitioners point out, that argument has no logical stopping point; there is nothing that would prevent 20 or 500 plaintiffs from consolidating their slip-and-fall claims against Wal-Mart for a single group trial. After all, Wal-Mart is the common defendant in each case, and all of the plaintiffs had suffered a slip and fall. But surely group trials could never be appropriate under such circumstances.

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[2] *Atwood, et al. v. UC Health, et al.*, S.D. Ohio No. 1:16-cv-00593.

Defendants targeted by group trials are concerned that the evidence from each case will bleed into the others, and that the jury will be unable to treat each case as a separate and distinct action. It is obviously unjust to find a defendant liable based (in whole or in part) on the volume of allegations, or to intentionally set jurors up to be overwhelmed and confused. The question is how to prove that is what happened.

A defendant cannot prove juror confusion through direct evidence, insofar as the Rules of Evidence (state and federal alike) forbid any direct inquiry into a juror's mental process. So defendants are left with two arguments based on inputs (the volume and variety of the evidence) and outputs (jury verdicts that show a lack of individualized attention to the cases). The courts below cut off both arguments.

The first avenue is an appeal to common sense: a juror is a person, and we know that there are limits on how much information a person can process at one time. But the court below dismissed as "unfounded speculation" the idea that jurors could be overwhelmed and confused by listening to evidence from 22 separate cases at once. However, that is far from "unfounded speculation." A reasonable inference is not the same as speculation. A two-hour lecture on a dry subject is hard to follow; how much more so a two- or six-week trial?

The Missouri court next announced an unrebuttable presumption that jurors always understand and follow the jury instructions. In the Court's view, the instructions eliminate any risk of confusions. But it is hard to see how that is true. Trial courts are generally not supposed to comment on the evidence at trial,

beyond ruling on objections. So one can hardly expect the jury instructions on the *law* to help the jurors keep the *facts* straight. And in Petitioner's case, the jury instructions took up 140 pages of the trial transcript; the court below believed that 140 pages of detailed verbal instructions guaranteed that jurors understood what they were doing; experience suggests precisely the opposite.

But if jurors are presumed to follow instructions and not to be overwhelmed by a mountain of evidence, then defendants have only one other avenue to show juror confusion: the verdict. In Petitioner's case, the jury issued identical awards in 22 cases across 12 states' laws after just 5 hours of deliberation. That strongly suggests that the jury did not give the 22 separate actions their due individual attention. But the court below held that Petitioners could read *nothing* into that unusual uniformity after an abbreviated deliberation.

Defendants fare no better with non-uniform verdicts. In the *Atwood* trial involving amici, variations in the damage awards (under only one state's laws) *also* demonstrated that the jurors gave each case proper, individualized attention. In other words, whether the verdicts are the same or different, Plaintiffs propose (and trial courts hold) that both outcomes support their argument. If a jury is presumed to follow instructions (and not be confused) when it renders uniform verdicts *and* when it renders varied verdicts—and, as the court below stated, "[t]he reasoning behind a jury's verdict is not open to inquiry or impeachment for faulty logic"—then a defendant can

never prove juror confusion. And thus, a defendant could never prove prejudice from a group trial.

The court below (and in *Atwood*) also dismissed concerns that a group trial can violate Evidence Rule 403. But when a court joins multiple plaintiffs for trial, it means that as to each plaintiff, the jury will hear evidence that would be inadmissible in a trial solely on that plaintiff's claims. In amici's case, involving individual medical malpractice cases, most of the evidence the jury heard was "other acts" evidence. In a six-plaintiff trial, five-sixths of the medical malpractice evidence is unrelated to each plaintiff.[3] Due Process requires that every civil litigant be given a fair trial. Unfettered use of group trials does the opposite.

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[3] Neither court contemplated the possibility that the jury awarded higher damages in a group trial than it would have given to any individual plaintiff in a single-plaintiff trial. That is, even assuming that all 22 plaintiffs in Petitioners' case suffered *identical* damages, it does not follow that each plaintiff suffered $25 million in damages. The jury may have awarded $25 million per plaintiff in a group trial where it would have contemplated $5 or $10 million in an individual trial.

ARGUMENT

I. The Court should grant certiorari to settle the boundaries of consolidation.

A. Group trials are not unique to rogue state court jurisdictions.

Amici urge the Court to accept the first question presented by Petitioners. Amici write to alert the Court to the increasing prevalence of group trials. Group trial proposals are not limited to product liability or asbestos actions. Nor are they unique to state courts and the vagaries of state civil procedure.

Dr. Durrani and CAST are defendants in hundreds of individual medical malpractice cases. Each plaintiff generally alleges that Dr. Durrani performed an unnecessary surgery. The only commonalities among the plaintiffs are their legal theory and the defendants; otherwise, the plaintiffs have unique injuries, medical histories, courses of treatment, and post-operative outcomes.

The first few cases followed the ordinary course and proceeded to single-plaintiff trials in Butler County, Ohio. Four of the first five Butler County jury trials ended in defense verdicts for Dr. Durrani and CAST.[4] Disappointed in the Butler County juries, the

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[4] *Martin v. Durrani*, 69 N.E.3d 1139 (Ohio App. 2016); *Kranbuhl-McKee v. Durrani*, 12th Dist. Butler No. CA2015-11-191, 2016 WL 4179783 (Ohio App. Aug. 8,. 2016); *Marshall v. Durrani, et al.*, 12th Dist. Butler No. CA2015-07-130 (Ohio App., Jan. 12, 2016); *Shell v. Durrani*, 12th Dist. Butler No. CA2014-11-232, 2015 WL 5786897 (Ohio App. Oct. 5, 2015).

remaining plaintiffs set out for nearby Hamilton County, Ohio, where they found a cooperative trial judge who assigned all of the Durrani-related cases to himself and consolidated them for a single "massive group trial"—which he expected to last sixth months to a year—in front of a single judge and a single jury. *See Sand v. Durrani*, Hamilton County Common Pleas No. A 1506694, General Order on all Dr. Durrani Hamilton County Cases. The Ohio Supreme Court vacated the consolidation order on procedural grounds (finding that the trial judge did not have jurisdiction to assign the cases to himself), but did not reach the merits of the group trial order itself. *State ex rel. Durrani v. Ruehlman*, 147 Ohio St.3d 478, 2016-Ohio-7740, 67 N.E.3d 769 (Ohio 2016).

Several of the Durrani-related cases ended up in federal court in the Southern District of Ohio. There, the plaintiffs succeeded in their bid for group trials. The District Court scheduled six plaintiffs for a joint trial before a single jury, connected by nothing more than the fact that each alleged that Dr. Durrani performed an unnecessary surgery. Order Granting in Part and Denying in Part Motion to Sever, *Atwood v. UC Health*, No. 1:16-cv-00593 (S.D. Ohio Mar. 31, 2018), ECF No. 232. That trial ended—predictably—with more than $5 million awarded to five plaintiffs, including $2.6 million in punitive damages against a solo physician and his now-defunct private practice.[5]

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[5] The sixth plaintiff's claims were barred by the statute of limitations. The evidence related to his time-barred claims was not relevant to any of the other plaintiffs' cases, but the jury was allowed to hear and consider it anyway.

The District Court then conducted a trial of two individual plaintiffs' cases before a single jury, which found *amici* liable in both cases. The District Court scheduled another two-plaintiff trial under the same circumstances—the only commonality is the general theory of the case and the defendants who were sued. The events in the federal court illustrate with perfect clarity why group trials tend to influence juries to favor plaintiffs.

B. Trial courts may use group trials to clear the civil litigation backlog created by the Covid-19 pandemic.

The Covid-19 pandemic effectively ended civil trials across the country more than a year ago. A handful of jurisdictions have kept to relatively normal schedules, and other have experimented with trial by videoconference, but most litigants have simply been in a holding pattern for more than a year while they wait for courts to reopen. The Cuyahoga County, Ohio, Court of Common Pleas (the busiest court of general jurisdiction in Ohio) suspended jury trials from March 16, 2020 to at least April 26, 2021.[6] And the Hamilton County, Ohio, Court of Common Pleas (Ohio's third-busiest court) suspended jury trials from March 13,

[6] The court temporarily permitted civil trials between September 17 and November 18, 2020. However, the court's order required scheduling a trial three weeks in advance, meaning that as a practical matter, the court permitted civil trials for roughly a week.

2020 to March 8, 2021.[7] The District Court for the Southern District of Ohio suspended jury trials from March 12, 2020 to March 31, 2021—and even now, civil trials are permitted only if the court determines that it is "absolutely necessary that the matter go forward as scheduled."[8]

The moratoria on civil trials created an immense backlog. And in the Durrani-related litigation in the Hamilton County, Ohio, Court of Common Pleas, the presiding judge has proposed group trials to help clear the docket—and directed the parties to propose groupings. Orders Regarding Trial Schedule, *Densler v. Durrani* No. A 1706561(Hamilton County Common Pleas Sept. 3, 2020 and Dec. 7, 2020)..

C. Litigants cannot afford for the Court to deny certiorari now and wait for a future term.

If the Court delays addressing this issue even one more term, it will be too late to correct the unfair prejudice caused by group trials—especially when they impact smaller corporate defendants or individuals like Dr. Durrani and CAST. The Court cannot wait until a Covid-induced group trial works its way up the appellate system. To begin with, scheduling a group trial itself tends to force defendants into

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[7] The court temporarily resumed trials between August 3 and October 23, 2020; it is not clear how many civil trials the court held—if any—during that brief window.

[8] The court temporarily permitted jury trials between June 22 and July 23, 2020.

settlement—especially where there is little chance of meaningful appellate review after the trial goes badly. Indeed, two of Dr. Durrani's co-defendants (hospitals where he operated) decided to settle during the *Atwood* group trial.[9]

But suppose a defendant resists the pressure to settle and preserves the group trial challenge for appellate review. That would require a defendant to incur the often enormous expense of a trial (and post-trial motions), then maintain an appeal through one or two more layers of the judiciary before it presents a petition for certiorari to the Court. The reward for a successful appeal at any stage is just a second (expensive) trial.

Candidly, few litigants have the resources for such an undertaking—virtually no small business or individual could do it. Even if another large corporate petitioner returns to the Court in two or three years, it will be far too late for small businesses and individual defendants who cannot afford to keep litigation alive long enough to await this Court's decision.[10] And one wonders whether even comparatively well-heeled

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[9] In the most common multi-plaintiff scenario, class actions, trials are, and settlement is so routine that we have developed separate rules for reviewing settlements and permitting interlocutory appeals. *E.g.*, Fed. R. Civ. P. 23(f).

[10] The jury reached a verdict in the six-plaintiff Atwood trial on October 12, 2018. That verdict is not yet final and appealable. Order Dismissing Appeals, *Atwood v. UC Health*, No. 20-3052 (6th Cir. June 23, 2020), ECF No. 31. It could be another year or more before Dr. Durrani and CAST can appeal the District Court's use of group trials in those cases.

litigants would bother, if the prospect of review appears remote and the reward is another trial. The Court should therefore take the opportunity now to articulate the boundaries around group trials before the trickle becomes a deluge.

II. The Court should state that Due Process requires separate trials for separate actions except where it would be unjust to try them separately.

The Court should set the minimum Due Process requirements for a group trial. The Court should begin with the common sense principle embodied in the state and federal rules of civil procedure: Due Process requires separate trials for separate actions, except where it would unjust to do so.

Both state and federal rules of civil procedure militate *against* joint or consolidated trials, because we rightly presume that joining two unrelated actions would be unduly prejudicial to the defendant. For a similar reason, state and federal rules of evidence tend to exclude evidence of "other acts" when used to prove a person's character and that the person acted in accordance with that character. Fed. R. Evid. 404(b). The rules of civil procedure and evidence reflect the common sense understanding that a mountain of accusations—even if weak or unsubstantiated on their own—provokes a "where there's smoke, there's fire" response. A defendant can be convicted (in the criminal context) or found liable (in civil cases) by the sheer volume of allegations, even if none of the individual cases have merit when considered alone.

State and federal rules of civil procedure limit consolidation to three narrow circumstances. First, Rule 19 commands joinder where the parties *must* be joined in order to fully resolve a dispute. Fed. R. Civ. P. 19(a); Ohio Civ. R. 19(A).

Second, Rule 20 permits trials where plaintiffs assert a joint right to relief, or where plaintiffs' claims arise from the same occurrence or course of conduct, *and* the cases have common questions of law or fact. Fed. R. Civ. P. 20(a); Ohio Civ. R. 20(A). A car accident is the paradigmatic example of a Rule 20 case: If a drunk driver collides with a car carrying three passengers, the passengers could file a joint action because it would not make sense to adjudicate them separately; the drunk driver could not be reckless as to one passenger but not the others.

Third, Rule 23 permits a class action where the class shares common questions of law or fact *and* the class meets one of the Rule 23(b) requirements: The common questions are so common that different outcomes in different individual cases would be logically or legally incompatible (23(B)(1)(A)), the outcome of one case will, as a practical matter, determine the others (23(b)(1)(B)), the defendant's conduct can be (or should be) enjoined as to the class as a whole (23(b)(2)), or the common questions predominate over individual questions *and* class treatment is the superior means for "fairly and efficiently" resolving the litigation (23(b)(3)). Fed. R. Civ. P. 23; Ohio Civ. R. 23.

Rules 19, 20, and 23 are the only situations where the Civil Rules contemplate that more than one case will be tried together.

The rules on joinder codify common sense: separate actions arising from separate events should receive separate trials, giving sides get a fair chance to state their case, untainted by irrelevant outside influences. Separate actions should be joined for trial *only if* it would be unjust to try them separately.[11]

III. The lower courts' approach makes it impossible for a defendant to show it was prejudiced by a group trial, defying the common sense rules of civil procedure.

The decision below—and that of the District Court in *Atwood*—reverses the common sense rules. Both courts allowed joint trials on the most ephemeral of justifications: the plaintiffs sued the same defendants, alleging the same type of injury. *See* Pet. App. 11a-12a. The trial court in *Atwood* applied that rule: six medical malpractice patients with admittedly unique injuries, "clinical conditions, histories, physical examinations, [and] prior treatments" could be grouped together for trial solely because they sued the same defendants, alleging that Dr. Durrani performed an unnecessary surgery on each one. *Atwood*, Docs. 232, 812, S.D. Ohio No. 1:16-cv-00593.

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[11] Rule 42 both permits consolidation for trial where cases involve a common question of law or fact—like joiner in Rule 19—and permits the court to set claims or issues for separate trials. Fed. R. Civ. P. 42; Ohio Civ. R. 42. But Rule 42 depends on a proper, just joinder of issues in the first place.

Petitioners are correct: There is no logical stopping point to the lower courts' approach. If twenty plaintiffs with unique histories, injuries, and damages can be joined for trial because they were treated by the same physician (at different times, for different injuries), then *any* group of plaintiffs could request a joint trial against a common defendant. Under the lower courts' logic, every person who allegedly slipped on a puddle of water in a Wal-Mart could request one group trial--the are all suing the same defendant (Wal-Mart) for the same type of claim (a slip-and-fall in the defendant's stores).[12] But one readily understands that such a trial would be manifestly unjust; Mr. Harlan's fall in Kentucky has absolutely nothing to do with Mr. Reed's fall in Kentucky or Mr. Chase's fall in Ohio. Due Process guarantees a fair trial: a separate trial for a separate action.

A. The lower courts effectively held that a defendant cannot rely on the type or volume of trial evidence to show prejudice from a group trial.

The court below (and the Durrani plaintiffs) dismissed as "unfounded speculation" the idea that jurors could be overwhelmed and confused by the trial evidence. But it is hardly "speculation" to conclude that jurors might struggle to take in six weeks of trial testimony and argument on 22 separate cases involving 12 states' laws—armed with nothing more than the notes they could jot down over the course of trial. It is

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[12] Applying the Missouri court's logic, they would not even have to occur in the same store or state.

hard to imagine that a case would require a six-week trial, and yet be so open-and-shut as to merit just five hours of deliberation. And it is just as hard to imagine that these concerns are mere speculation.

It is true that a party could never "prove" that the jurors were overwhelmed; a defendant could not poll the jurors after to trial to ask if they felt confused. Even if it could, jurors cannot impeach their own verdict with post-trial statements. A juror cannot testify about "effect of anything on that juror's or another juror's vote; or any juror's mental processes concerning the verdict or indictment," other than "*extraneous* prejudicial information" or "an *outside* influence." Fed. R. Evid. 606(b) (emphasis added); Ohio R. Evid. 606(B). *See Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 865, 197 L. Ed. 2d 107 (2017) (noting that all states have some variation of the "no impeachment" rule). It is not "unfounded speculation" that jurors could get confused by and lost in a veritable mountain of evidence, most of which is unrelated to each particular plaintiff's case. That is simply the same common sense and everyday experience we instruct jurors to apply in their deliberations.[13]

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[13] The Sixth Circuit's pattern jury instructions direct the jury to "consider only the evidence in the case" and "use your common sense in weighing the evidence. Consider the evidence in light of your everyday experience with people and events." Sixth Cir. Pattern Jury Instruction 1.05(1). The Eighth Circuit likewise provides that jurors may "consider the evidence in light of your own observations and experiences," and directs them to "come to a just verdict based only on the evidence, your common sense, and the law [given in the jury instructions.]" Eighth Cir. Pattern Civil Jury Instruction 1.03. And Ohio directs jurors to "use the tests of

Consider the *Atwood* trial. Jurors listened to 11 days of testimony and argument spread out over a month. Minute Entries, *Atwood v. UC Health*, No. 1:16-cv-00593 (S.D. Ohio Sept. 7 and Oct. 9, 2018), ECF Nos. 703, 749. They heard a day of jury instructions. *Id.*, 749. The jurors had only their own notes to reference—no written argument or summary from the parties to rely upon. Disputed fact questions—unique to each of the six cases—were front and center. And the jury used just two days to deliberate on six separate cases. *Id.*, 751, 754. It is highly likely that the jurors could be overwhelmed by the volume of evidence and the different steams of argument they had to track.

Perhaps sensing that the presumption of perfect juror memory does not stand up to common experience, the lower courts layered on another effectively unrebuttable presumption: the presumption of perfect juror compliance. The lower courts presume that the jurors followed all of the instructions. Like the presumption of perfect memory, this presumption also defies common sense and common experience. In the case below, the court assumed that *because* the trial court read the jury 140 pages of instructions, the jurors were surely able to follow them. But who among us has ever retained an 8-hour lecture—much less one where quite literally every sentence is of critical importance? It is likely that 140 pages of instructions proved *impossible* to retain and follow by even the most attentive juror.

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truthfulness that you use in your daily lives." 1 CV Ohio Jury Instructions 305.05.

The lower courts added yet another layer of prejudice by ignoring the fact that in an individual trial for any one of the plaintiffs, the jury would not hear evidence related to the other plaintiffs. Evidence Rule 404(b) (or its state analogues) would forbid it. We generally do not allow civil plaintiffs to try a defendant by a volume of unrelated allegations; plaintiffs should not be permitted to make an end run around the rules of evidence by consolidating unrelated cases for trial.

B. The lower courts effectively held that a defendant cannot rely on the trial verdict to show prejudice from a group trial.

If a defendant cannot rely on the trial evidence to show that jurors struggled with a group trial, then they must turn to the verdict. But the lower courts shut that door as well. In Petitioner's case, the trial court applied an unrebuttable presumption that the jury followed instructions, and forbade any inquiry into how and why the jury might have fashioned a particular award. So Petitioners were not allowed to read anything into the strange fact that 22 cases with admittedly unique "genetic dispositions, family histories, previous diagnoses, ages when they developed ovarian cancer, types of ovarian cancer, and durations and frequencies of talc use," analyzed against 12 different states' laws somehow yielded 22 *identical* outcomes.

In *Atwood*, the court pinched defendants from the other side. There, the jury returned somewhat varied

damage awards to the six plaintiffs.[14] And according to the district court, the *variations* in the jury verdicts demonstrated that each plaintiff received individualized consideration. But if a defendant cannot show prejudice through a series of identical verdicts *or* differentiated verdicts, *and* "[t]he reasoning behind a jury's verdict is not open to inquiry or impeachment for faulty logic" anyway, then it is practically impossible for a defendant to show that he was prejudiced by being subjected to a group trial. Suffice it to say, neither Due Process nor the rules of civil procedure are meant to render a trial court's consolidation decision utterly unreviewable.

CONCLUSION

Jurors are instructed to weigh the evidence against common sense and their everyday experiences. The Court should do the same: group trials of unrelated actions can be unduly prejudicial to defendants. The Court should grant the writ of certiorari and clearly explain the Due Process limits of group trials.

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[14] Including finding that one plaintiff's claims were barred by the statute of limitations.

Respectfully submitted,

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