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**

## REPLY BRIEF IN SUPPORT OF CERTIORARI


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## RULE 29.6 DISCLOSURE STATEMENT

The Rule 29.6 disclosure statement in the petition for writ of certiorari remains accurate.

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## REPLY BRIEF IN SUPPORT OF CERTIORARI

## INTRODUCTION

This petition presents three separate splits on crucial due-process questions in a case of enormous importance. The Missouri courts upheld the mass trial of 22 plaintiffs' disparate claims *without evaluating* whether consolidation violated due process—contrary to other courts' precedent. It then affirmed a *$1.6 billion* punitive-damages award just for these few plaintiffs, with a ratio far exceeding what other jurisdictions permit. And it did all this without personal jurisdiction over the claims of 15 non-Missouri plaintiffs forum shopping in Missouri, contrary to *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021).

The Court should grant certiorari, or, at a minimum, grant, vacate, and remand in light of *Ford*. Plaintiffs present a version of the facts derived from the trial, Opp. 2-8, but that version was the result of the fundamental due-process violations challenged here. Plaintiffs' lawyers have been unable to prove their case in single-plaintiff trials where the jury is focused on the plaintiff's individual circumstances and Petitioners' individual defenses. *See* Pet. 19; Jef Feeley, *J&J Cleared in Talc-Cancer Trial For Eighth Win This Year*, Bloomberg (Dec. 20, 2019), https://bloom.bg/32Tyyeo. Many courts have rejected plaintiffs' scientific theories as unsound—one reason the non-Missouri plaintiffs sought to try their case in plaintiff-friendly Missouri. *See* Br. Amicus Curiae of Atlantic Legal Foundation 2-6; Pet. App. 56a-57a n.19 (citing cases excluding plaintiffs' expert's testimony as unreliable); *Lanzo* v. *Cyprus Amax Minerals Co.*, 2021 WL 1652746 (N.J. Super. Ct. App. Div. Apr. 28, 2021) (concluding that plaintiffs' expert's testimony did not meet scientific standards and vacating jury verdict).

Plaintiffs depict this case as a one-off, yet they ignore the array of amicus briefs filed in support of certiorari, which urge the Court to provide much-needed guidance. *E.g.*, Br. Amicus Curiae of Chamber of Commerce et al. 21-22 ("Chamber Br."); Br. Amicus Curiae of DRI–The Voice of the Defense Bar 18 ("DRI Br."). The array of counsel on both sides similarly underscores the case's importance. The questions presented here affect over 19,000 talc cases against Petitioners, including thousands in Missouri, and multiple other mass-tort dockets. Without this Court's intervention, plaintiffs' attorneys will use this case as a roadmap to urge courts to clear their COVID-19-related backlogs through mass trials that allow

plaintiffs to paper over the weak science underlying their claims. This petition presents a rare opportunity to address fundamental due-process questions that are cleanly presented, well-litigated, and outcome-determinative in a $2 billion case. This Court has repeatedly stepped in to correct class-action abuses. It should rein in the mass-tort abuses here.

## ARGUMENT

### I. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE A SPLIT ON THE DUE-PROCESS LIMITS OF CONSOLIDATION.

There is disagreement among 12 courts on whether and how due process constrains consolidation. *See* Pet. 11-17. The Court should grant certiorari to resolve that split, which affects mass-tort litigation across the country.

1. Plaintiffs contend there is no split. Yet they concede (at 21) that two cases finding consolidation impermissible did so on due-process grounds. *See In re Fibreboard Corp.*, 893 F.2d 706, 710-711 (5th Cir. 1990); *Gwathmey* v. *United States*, 215 F.2d 148, 156 (5th Cir. 1954). And two others—*Johnson* v. *Celotex Corp.*, 899 F.2d 1281, 1289 (2d Cir. 1990), and *ACandS, Inc.* v. *Godwin*, 667 A.2d 116, 147 (Md. 1995)—weighed the constitutionality of consolidation. Plaintiffs are wrong (at 21) that *Johnson* rejected a role for due process; rather, it found that the trial as conducted satisfied due process, 899 F.2d at 1289—an analysis the Missouri court failed to undertake.

Plaintiffs further contend (at 19-21) that there is no split because the Missouri and Alabama decisions bless consolidation without referencing due process.

That is the problem—and the split. Those courts, including the Missouri Supreme Court, have refused to recognize that consolidation raises due process-concerns, while other courts have. *See* Br. Amicus Curiae of Missouri Organization of Defense Lawyers 3-5.

Plaintiffs assert (at 21) that "[m]ost" courts "exclusively apply rules of procedure" when evaluating consolidation. That underscores the split. Plaintiffs concede that some courts *do* evaluate whether consolidation violates due process, while other courts, like Missouri, do not. Plaintiffs cite *Malcolm* v. *National Gypsum Co.*, 995 F.2d 346 (2d Cir. 1993), as a decision based on procedural rules, but the court there explained that although the federal rules permit joint trials, other concerns—including the "paramount concern for a fair and impartial trial," the court's "dedication to individual justice," and the "risks of prejudice and possible" jury confusion—can bar consolidation. *Id.* at 350 (internal quotation marks omitted). "Fairness," "justice," and "prejudice" are due-process values, not procedural rules. *See Lassiter* v. *Dep't of Soc. Servs. of Durham Cty.*, 452 US. 18, 24 (1981) ("fundamental fairness" is due-process concern); *Holden* v. *Hardy*, 169 U.S. 366, 390 (1898) (due process implies "a conformity with * * * principles of justice"); *Estes* v. *Texas*, 381 U.S. 532, 542-543 (1965) (describing "prejudice" as due-process violation). The many other cases evaluating whether consolidation is fair similarly sound in due process. *See* Pet. 14-17.

2. Petitioners are not seeking to displace "traditional state authority." Opp. 14. This Court has long recognized that state procedures can violate due process. *See Santosky* v. *Kramer*, 455 U.S. 745, 755 (1982). Missouri's approach assumes that jury

instructions—no matter their length and complexity—cure all prejudice. But here, reciting five hours of jury instructions was not sufficient to protect Petitioners' constitutional rights. Pet. 11-12. Under any due-process standard, consolidation was improper; the problem is that the Missouri court did not conduct any due-process analysis at all.

Plaintiffs cannot explain away the cookie-cutter compensatory awards, which demonstrate prejudice. They claim the awards are identical because plaintiffs suffered from the same disease. Opp. 16-17. But plaintiffs experienced very different disease trajectories. "[I]t is beyond absurd to suggest that a properly functioning jury could award the same amount to *22* plaintiffs." Chamber Br. 15. And the same-disease hypothesis cannot explain the jury awarding $25 million in pain-and-suffering damages to each plaintiff without a spouse, but $12.5 million to each plaintiff with a spouse and another $12.5 million to the plaintiff's spouse. Pet. 8.

Plaintiffs further assert (at 16) that their expert sufficiently addressed individual causation and injury, but the trial transcript reveals just how little time was spent on that issue—an issue that would have dominated a single-plaintiff trial. *See* Pet. App. 163a-165a (testimony of Dr. Felsher). To the extent plaintiffs argue (at 9, 17) that Petitioners did not press certain issues at trial, that is another example of prejudice; the joint trial meant Petitioners had to shelve many individual-plaintiff arguments. *See* Chamber Br. 9-13. The mass trial violated Petitioners' due-process rights. *See* DRI Br. 9-13 (describing studies finding that multi-plaintiff trials substantially increased likelihood and size of plaintiff verdicts).

3. Plaintiffs assert that Petitioners did not preserve their due-process argument. Opp. 18-20. But plaintiffs below acknowledged that Petitioners "claim their due process right to a fair trial was violated" by the "refusal to sever." Respondents' C.A. Br. 72. Petitioners raised that argument in four places and spent 13 pages discussing it, citing this Court's due-process precedent. *See* Appellants' C.A. Br. 4, 64-65, 70, 82-83; *id.* at 70-83 (consolidation "impermissibly sacrificed fairness"); *id.* at 83 (citing *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868 (2009)). And Petitioners asked the Missouri Supreme Court to review whether the "joint trial of 22 plaintiffs" is "inconsistent with * * * due process." Application for Transfer 1. The issue was preserved.

4. Plaintiffs suggest that this question has "[v]anishing [s]ignificance." Opp. 22. Yet as "courts across the country emerge from COVID-19 shutdowns, the temptation to use consolidation as a means to clear backlogged trial dockets will grow." Br. Amicus Curiae of Federation of Defense & Corporate Counsel 4 ("FDCC Br."); *see* Br. Amicus Curiae of Abubakar Atiq Durrani, M.D. et al. 9 (proposed mass malpractice trials in Ohio to address court backlog). If the Court does not intervene, this closely watched trial will inevitably encourage other mass consolidations. There have already been three multi-plaintiff talc trials against Petitioners, and plaintiffs' lawyers will undoubtedly propose mass trials to resolve the 19,000 outstanding talc cases, not to mention similar cases against other defendants. *See* Chamber Br. 22 n.9 (describing 20-plaintiff asbestos trials in West Virginia); Br. Amicus Curiae of the Product Liability Advisory Council, Inc. 8-12 (citing other consolidated trials).

Plaintiffs cite (at 23) a recent Missouri law prohibiting joinder of certain claims, but consolidation and joinder are addressed separately under Missouri law. Plaintiffs' lawyers will undoubtedly argue this law allows mass consolidation for trial. Petitioners have sought to coordinate talc suits where there is a parallel bankruptcy proceeding (Opp. 14), but they have consistently opposed mass trials. This Court should intervene.

## II. THE COURT SHOULD GRANT CERTIORARI TO RESOLVE TWO SPLITS ON PUNITIVE DAMAGES.

### A. The Courts Are Divided Over The Outer Limits Of Punitive Damages When Compensatory Damages Are Substantial.

1. The "real problem" of punitive damages is their "stark unpredictability." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 499 (2008). According to plaintiffs, that problem is illusory, and any variation reflects different levels of reprehensibility. *See* Opp. 29. But in the talc context—as in many other mass torts—there has been a lottery-like inconsistency, with many juries finding for defendants, but a few outliers awarding astronomical punitive damages. *See* Pet. 29-30.

This inconsistency is magnified by the different due-process limits that jurisdictions place on punitive damages. Contrary to plaintiffs' assertion (at 28), many courts limit the punitive-to-compensatory ratio to 1:1 where compensatory damages are high even in cases involving "egregious misconduct" or "serious physical injury." In *Boerner* v. *Brown & Williamson Tobacco Co.*, a cigarette manufacturer "actively

misled consumers about the health risks associated with smoking" their "extremely carcinogenic and extremely addictive" cigarettes "over the course of many years." 394 F.3d 594, 602-603 (8th Cir. 2005). The Eighth Circuit found that conduct "highly reprehensible" but nonetheless limited punitives to a 1:1 ratio based on due-process concerns, citing *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). *Id.* And in *Lompe* v. *Sunridge Partners, LLC*, the plaintiff sued her landlord for acute carbon-monoxide poisoning, leading to "cognitive deficits." 818 F.3d 1041, 1047 (10th Cir. 2016). Invoking *State Farm*, the Tenth Circuit enforced a 1:1 due-process limit, even though "the potential for similar injuries to others was great." *Id.* at 1047, 1064, 1074-75 (internal quotation marks omitted).

Other courts permit ratios above 1:1 for less-egregious conduct in cases involving substantial compensatory damages. *See* Pet. 23-25. In *Seltzer* v. *Morton*, the Montana Supreme Court upheld a 9:1 ratio in a malicious-prosecution case over the authenticity of a watercolor painting. 154 P.3d 561, 612-613, 615 (Mont. 2007). And in *Allstate Insurance Co.* v. *Dodson*, the Arkansas Supreme Court upheld a 2.5:1 ratio in a tortious-interference case with no physical injury. 376 S.W.3d 414, 433-434 (Ark. 2011).

This fundamental disagreement results from different interpretations of this Court's precedent. *Compare Lompe*, 818 F.3d at 1069 (enforcing 1:1 limit because the Court "has defined different standards for punitive awards depending on whether they are combined with substantial or insubstantial compensatory damages"), *with Cote* v. *Philip Morris USA, Inc.*, 985 F.3d 840, 849 (11th Cir. 2021) (dismissing *State*

*Farm*'s remarks about 1:1 limit as "dicta"). This dispute requires the Court's intervention.[1]

2. Plaintiffs claim (at 24-26) that the decision below is correct. Even accepting plaintiffs' mistaken view of the facts—a view that has been scientifically and factually rejected by other courts and juries—a ratio above 1:1 may be constitutional only when "a particularly egregious act has resulted in only a small amount of economic damages." *State Farm,* 538 U.S. at 425 (internal quotation marks omitted). But where a jury awards substantial compensatory damages, a higher ratio is *not* constitutional, *id.*, particularly in aggregate litigation. *See Exxon*, 554 U.S. at 515 n.28 (recognizing that "the constitutional outer limit may well be 1:1" in class action).

Plaintiffs criticize a "one-size-fits-all 1:1 limit," arguing that courts should be free to impose "significant punitive damages in cases of highly reprehensible conduct." Opp. 26, 29. But a 1:1 limit applies where compensatory damages are already significant, allowing for equally significant punitive damages. The jury here awarded each plaintiff $25 million in compensatories—a substantial sum. The Missouri court authorized on top of that a $1.6 billion punitive award, which works out to $80 million *per plaintiff*. Under any permissible test, that is constitutionally excessive. *See* Pet. 28-32.

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[1] Plaintiffs cite (at 30-31) a Missouri law allowing defendants to deduct prior punitive awards arising from "the same conduct." Mo. Rev. Stat. § 510.263(4). That does not erase the due-process injury here, where first-come plaintiffs receive an unconstitutional windfall. And in any event, plaintiffs' lawyers will undoubtedly argue that the next case does not involve the exact "same" conduct.

Plaintiffs contend that "[n]othing prevents a defendant from pointing to past awards as a reason to limit further punitive awards" or "arguing that a large award risks leaving nothing for other victims." Opp. 31. But presenting such arguments to a jury only increases the risk it will punish defendants for harm to non-parties. *See* Br. Amicus Curiae of Washington Legal Foundation 18-19 (citing studies that a jury "tends to anchor [its] analysis" to past punitive awards). This Court should step in to resolve a persistent circuit split on a crucial due-process issue.

### B. There Is A Clear Split Over How To Calculate The Ratio.

Plaintiffs assert (at 32) that there is no split. Yet the Texas Supreme Court stated that the total "joint-and-several compensatory award" is *not* "the proper denominator for calculating the ratio of compensatory to exemplary damages." *Horizon Health Corp.* v. *Acadia Healthcare Co.*, 520 S.W.3d 848, 878-879 (Tex. 2017). And the Eighth Circuit held that "divid[ing] each individual punitive damages award by the entire actual damages award * * * assumes an impossibility." *Grabinski* v. *Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000). The Missouri Supreme Court, and the court below, disagree—leading to at least $350 *million* more in punitive damages. *See* Pet. 26-28.[2] It is difficult to imagine a more straightforward mathematical split.

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[2] Contrary to plaintiffs' suggestion (at 32), *Lewellen* v. *Franklin*, 441 S.W.3d 136 (Mo. 2014), is binding in Missouri. *See* Pet. App. 99a-100a n.27 (calculating "ratios in accordance with the Missouri Supreme Court's approach in *Lewellen*").

Plaintiffs point out (at 32) that in *Horizon Health*, the jury apportioned the damages. But that is irrelevant to the question presented: whether courts can assume that each defendant will pay the entire joint-and-several award and thus use the entire award as its denominator in calculating the punitive-damages ratio when that outcome is *legally impossible*. *See* Pet. 27. Moreover, in *Grabinski*, the jury did not apportion the joint-and-several damages, and the Eighth Circuit split them evenly among the defendants before calculating the ratio—the exact opposite of the Missouri Supreme Court's approach. *See* 203 F.3d at 1026. This Court should intervene to address this fundamental legal disagreement among three high courts.

## III. AT A MINIMUM, THE COURT SHOULD REMAND IN LIGHT OF *FORD*.

1. At a minimum, the Court should vacate the judgment and remand in light of *Ford*. Pet. 32-34; Br. Amicus Curiae of International Association of Defense Counsel 4-13; FDCC Br. 14.

*Ford* explains that a plaintiff's product-liability claims relate to a defendant's forum contacts when a company "serves a market for a product in a State and that product causes injury in the State to one of its residents." 141 S. Ct. at 1022. The non-Missouri plaintiffs here were not injured in Missouri. Pet. App. 29a. And they are engaged in the very type of "forum-shopping—suing in [Missouri] because it [is] thought plaintiff-friendly, even though their cases ha[ve] no tie to the State"—that *Ford* decried. 141 S. Ct. at 1031. The court below should reassess its finding that JJCI's Missouri activities "relate[] to" the non-Missouri plaintiffs' claims, Pet. App. 33a, in light of *Ford*'s place-of-injury and forum-shopping focuses.

2. Plaintiffs' contrary arguments are meritless. Plaintiffs contend (at 34-35) that Petitioners did not preserve a "causation" argument, but Petitioners argued below that a plaintiff's claims do not arise out of or relate to a defendant's forum contacts "where a company * * * happens to engage a third party in connection with some part of the manufacturing or distribution process." Appellants' C.A. Br. 97. Moreover, *Ford* clarifies that the question is whether there is a "close enough" relationship to find jurisdiction, 141 S. Ct. at 1032; Petitioners argued below that there was not. *See* Appellants' C.A. Br. 96-97.

Plaintiffs also contend that JJCI's talc products were "negligent[ly] manufactur[ed]" in Missouri and their claims "arise from" that manufacturing. Opp. 35-36.[3] To the extent plaintiffs propose an alternative basis for jurisdiction under the "arise from" prong—which was not the basis for jurisdiction below—that is further reason for a remand. *Ford* states that the "arise from" prong "asks about causation," but it admonishes that "not * * * anything goes." 141 S. Ct. at 1026-27 & n.3. Plaintiffs also ignore that the only "manufacturing" done in Missouri was by the third party Pharma Tech, which put talc in a bottle and affixed JJCI's pre-approved label. Plaintiffs did not sue Pharma Tech or allege any injury from Pharma Tech's actions. *See* Pet. 33. The Missouri courts should have an opportunity to address plaintiffs' argument in the first instance. *See Ford*, 141 S. Ct. at 1039 (Gorsuch,

[3] Plaintiffs are wrong (at 35 n.30) that *Ford* blessed imputing all third-party contractors' actions to a defendant. *Ford* focused on the actions *Ford itself* took in the forum—selling products to dealers and exhorting the public to buy them. 141 S. Ct. at 1028.

J., concurring in the judgment) (calling on lower courts to "help us face these tangles").

## CONCLUSION

The petition should be granted, or in the alternative, granted, vacated, and remanded in light of *Ford*.

Respectfully submitted,

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