No. 17-1213

IN THE

Supreme Court of the United States

GENERAL MOTORS, LLC,
Petitioner,

v.

MICHAEL BAVLSIK, ET AL.,
Respondents.

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

RESPONDENTS' BRIEF IN OPPOSITION

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QUESTION PRESENTED

In *Gasoline Products Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931), this Court held that a partial retrial is permissible if "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." In this case, the Eighth Circuit applied this settled rule and concluded that, "[h]aving closely reviewed the record," the "facts are such" that the jury's liability finding and damages award are sufficiently "'distinct and separable' from one another" that the district court did not abuse its discretion in ordering a new trial on damages. App. 23 (quoting *Gasoline Prods.*, 283 U.S. at 500). The question presented is whether, on the facts of this case, the Eighth Circuit's holding is correct.

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INTRODUCTION

In this case, the Eighth Circuit applied what General Motors described below as the "accepted legal standard for granting partial new trials," which has existed "for nearly a hundred years" and which the Eighth Circuit and all "other circuits" have had no trouble applying. Under that standard, a partial retrial is permissible if "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." *Gasoline Prods. Co. v. Champlin Refining Co.*, 283 U.S. 494, 500 (1931). Applying that standard here, the Eighth Circuit held that the jury's liability finding and damages award were sufficiently "distinct and separable" that the district court did not abuse its discretion in ordering a new trial on damages. App. 23.

That factbound holding is unworthy of review. GM's only argument for why damages and liability are inseparable here is that the jury must have resolved a deadlock on liability by compromising on damages. But GM admitted below that there is a settled "case-specific, fact intensive standard by which courts determine the existence of impermissible compromise," assessing the "totality of the circumstances" to determine if the lower court abused its discretion. In this Court, however, GM switches gears and claims that there is actually a split about "presumptions" and "burdens." To the contrary, the circuits apply the same fact-intensive standard. Any discrepancy in how it gets formulated in a particular case is attributable to the abuse-of-discretion standard of review—not any disagreement about the law. In any event, this case would be an especially poor vehicle to consider the fact-specific question presented because, as the Eighth Circuit found and GM does not dispute, GM has waived its principal argument for why the jury compromised.

STATEMENT

1. Facts. As Dr. Michael Bavlsik was driving a group of ten Boy Scouts home from camp one summer morning in 2012, the van he was driving collided with a towed boat and rolled over at a very slow speed. Only Dr. Bavlsik, who was wearing his seat belt, was injured. Because the seat belt lacked basic safety features found in nearly 90% of other vans at that time, he fell well out of his seat when the van turned over. His head hit the roof, and his body crashed down with enough force to break his neck and render him a quadriplegic. As a result, he now has "no motor movement below [his] chest" and "can't move [his] legs, arms, abdomen, [or] toes at all." CA8 J.A. 240. He was (and remains) "the sole support for [his] family," and he fears that he is now a burden on them. *Id.* at 244.

2. Trial. After a three-week trial, the jury deliberated for a few hours and returned a verdict finding GM liable for Dr. Bavlsik's injuries. On the special-verdict form, the jury found that GM was "negligent in the [van's] design" and that this negligence "directly cause[d]" his injuries. CA8 Add. 3–4. The jury found negligence because GM "admitted [that it] conducted no rollover testing," despite well-known safety risks. App. 11. And the jury found causation based on evidence that "testing would have shown the van was not safe during a rollover" and "could have been improved by adding feasible safety features"—used in the vast majority of other vans—that "would have prevented" his injury. App. 12–13. Indeed, when GM later tested the van's seat-belt system, it failed GM's own safety standards, and GM implemented safety features that would have prevented Dr. Bavlsik's injuries.

Given the negligence and causation findings, the jury was required by the instructions and special-verdict form to enter liability. The jury awarded Dr. Bavlsik $1 million

in past damages—nearly double the stipulated amount for past medical expenses ($576,701)—but $0 in future damages. "GM did not object to the jury instructions, the verdict form, or the verdict itself." App. 6–7.

3. The district court's decision. After post-trial motions, the district court held that GM was entitled to judgment as a matter of law, despite the jury's verdict against it, on the mistaken theory that the jury's decision to decline to impose strict liability precluded its negligence finding. That theory was ultimately abandoned by GM on appeal. As required by Rule 50(c)(1), the court proceeded to conditionally grant the plaintiffs' motion for a new trial on future damages in the event that "the court's granting of defendant's motion for judgment as a matter of law is reversed on appeal." App. 40. The court found that "the award of zero dollars for future health and personal care expenses is shockingly inadequate," and rejected GM's argument that the jury compromised on liability. The court pointed out that "[a] special verdict form was submitted to the jury so it could clearly report its findings regarding liability." *Id.* The court concluded that "there is no question regarding the jury's limited finding of liability," and "[s]ubstantial evidence supports this finding." *Id.* Absent evidence of a deadlock on liability, the court declined to find a compromise.

4. Appeal. On appeal, GM focused mainly on whether it was entitled to judgment as a matter of law.[1] But it also argued that the district court abused its discretion by ordering a new trial on damages and rejecting its compromise-verdict argument. As to this question, both sides

[1] Although GM devoted most of its appellate brief (pages 28–45) to defending the propriety of the district court's judgment-as-a-matter-of-law analysis, "at oral argument GM conceded" error and confined its argument to the sufficiency of the evidence. App. 8–9.

agreed that "the case-specific, fact intensive standard by which courts determine the existence of impermissible compromise" required an assessment of the "totality of the circumstances," which is left to the district court's discretion. GM CA8 Reply 2, 6. And both sides agreed that, given that court's ringside view of the case, it abuses its discretion only if "the record, viewed in its entirety, clearly demonstrates the compromise nature of the verdict." *Id.* at 6. They disagreed only on the answer.

The Eighth Circuit held that "there was legally sufficient evidence to support the jury's liability finding," but not its damages award. App. 8. On the compromise-verdict question, the court explained that the answer was "driven, in large part, by the standard[] of review." App. 2. Although the court noted its belief that GM had made a "strong case" that, were the issue decided on a blank slate, a judge might be able to find a compromise, GM had not established an abuse of discretion. App. 16. The court found that GM had waived any argument that the jury's liability finding was unclear by failing to object to the instructions, special-verdict form, or verdict. *Id.* "Our analysis may have been different," the court explained, "had GM preserved the issue for our review. But GM did not do so, perhaps because making a timely objection to the verdict might have reduced its odds of prevailing. Now the confusion lingers on appeal in a repackaged argument about a compromise verdict. We decline to make [the plaintiffs] pay the price for GM not acting on this perceived error in a timely manner." App. 23.

The court concluded its analysis by applying this Court's decision in *Gasoline Products*: "Having closely reviewed the record," "we are satisfied the issues regarding damages and liability are 'distinct and separable' from one another" such that the district court did not abuse its

discretion by ordering a new trial on damages. *Id.* (quoting *Gasoline Prods.*, 283 U.S. at 500).

GM petitioned for rehearing en banc, claiming a split based on *Gasoline Products*. No judge called for a vote.

REASONS FOR DENYING THE PETITION

I. As GM admitted below, there is an "accepted legal standard for granting partial new trials," and the Eighth Circuit applied it.

A. GM admitted below that there has been an "accepted legal standard for granting partial new trials" since this Court's decision in *Gasoline Products*. GM CA8 Reply 13. That decision holds that a partial new trial is permissible if "it clearly appears that the issue to be retried is so distinct and separable from the others that a trial of it alone may be had without injustice." 283 U.S. at 500. And that is the very standard the Eighth Circuit expressly applied to the facts of this case. App. 23.

In *Gasoline Products*, which involved a counterclaim for breach of an oral contract, the Court held that this standard was not met. It did so because "the question of damages on the counterclaim" turned on determinations as to when the contract was formed, when it was breached, "the duty of respondent to minimize damages," and the "reasonable time for performance." *Id.* at 499–500. Although a jury had found liability, it had not used a special-verdict form, so it was impossible "to say precisely what were the dates of [the] formation and breach of the contract found by the jury, or its terms." *Id.* at 499. For that reason, the Court determined that the question of damages was "so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty, which would amount to a denial of a fair trial." *Id.* at 500.

It has been nearly a century since *Gasoline Products* was decided and courts have not exhibited any difficulty in applying its holding. In a case like this one, damages and liability are, on their face, entirely separate issues with entirely separate evidence. There is no argument that a jury needs to decide one to decide the other. Instead, GM's argument is that the issues are inextricably linked in this case because the jury must have deadlocked on liability and resolved the deadlock by compromising on damages.

As GM acknowledged below, the circuits assess an argument of this kind based on the "case-specific, fact intensive standard by which courts determine the existence of impermissible compromise." GM CA8 Reply 2. That factbound standard can be reduced to several principles on which the circuits are all in harmony:

1. The district court's determination is reviewed only for an abuse of discretion. As Judge Boudin has summarized, the "appellate decisions show a marked tendency to give great weight to the district court's assessment whether the verdict reflects an improper compromise," and "[t]here are good reasons for this view: the district court has a far better sense of what the jury likely was thinking and also whether there is any injustice in allowing the verdict to stand." *Nichols v. Cadle Co.*, 139 F.3d 59, 63 (1st Cir. 1998).

Every circuit applies an abuse-of-discretion standard, including those on which GM relies for its alleged split. *See Carter v. DecisionOne Corp. Through C.T. Corp. Sys.*, 122 F.3d 997, 1006 (11th Cir. 1997) ("Whether a new trial on damages should be granted is within the sound discretion of the district court."); *Diamond D Enterprises USA, Inc. v. Steinsvaag*, 979 F.2d 14, 18 (2d Cir. 1992) (holding that district judge's rejection of compromise-verdict argument and "grant of a partial new trial [on damages] was well

within his discretion"); *Lucas v. Am. Mfg. Co.*, 630 F.2d 291, 293 (5th Cir. 1980) ("Appellate review . . . is very limited; we may reverse only for abuse of discretion."); *Ajax Hardward Mfg. Corp. v. Indus. Plants Corp.*, 569 F.2d 181, 185 (2d Cir. 1977) (affirming district court's exercise of "discretion in choosing between a partial and a complete new trial"); *Darbrow v. McDade*, 255 F.2d 610, 611 (3d Cir. 1958) ("[W]e cannot say that the district court abused its discretion when it held that the issues of liability and damages were so distinct and separable that a retrial of the issue of damages alone could be had without injustice.").

2. Grossly inadequate damages alone are insufficient to show a compromise; there must be evidence of a deadlock on liability. The circuits have also uniformly recognized (as did GM below) that "[a]n inadequate damages award, standing alone, does not indicate a compromise." *Diamond D*, 979 F.2d at 17; *see* GM CA8 Br. 47 (saying same). That is because, "if inadequate damages [were] the sole test for a compromise, Rule 59(a) would have little or no purpose." *Burger King Corp. v. Mason*, 710 F.2d 1480, 1487 (11th Cir. 1983).

Thus, there "must be other evidence demonstrating that the deficient monetary award resulted from an impermissible compromise"—in other words, evidence showing that the jury was "hopelessly deadlocked" on liability. *Mekdeci By & Through Mekdeci v. Merrell Nat'l Labs.*, 711 F.2d 1510, 1514–15 (11th Cir. 1983); *see also, e.g., Carter v. Chicago Police Officers*, 165 F.3d 1071, 1082 (7th Cir. 1998); *Hadra v. Herman Blum Consulting Eng'rs*, 632 F.2d 1242, 1245–46 (5th Cir. 1980), *cert. denied*, 451 U.S. 912 (1981). And the task of weighing the possible explanations for an inadequate damages award—and thus deciding whether to require "a new trial confined to

damages alone" or a new trial "on all issues"—"is quintessentially a decision committed to the informed discretion of the judge who has conducted the trial and can best estimate the relative possibilities." *Spell v. McDaniel*, 824 F.2d 1380, 1400 (4th Cir. 1987).

3. Whether there is evidence of deadlock is a case-specific and fact-intensive inquiry. "Given that Rule 606(b)(1) of the Federal Rules of Evidence generally prohibits courts from inquiring into the jury's deliberative process," courts ascertain whether there is sufficient evidence of a deadlock "by looking at the totality of the circumstances." *Reider v. Phillip Morris USA, Inc.*, 793 F.3d 1254, 1260 (11th Cir. 2015). This is a highly factbound inquiry that requires, as the Eighth Circuit noted below, "'good reason to believe that the inadequacy of the damages awarded was induced by unsatisfactory proof of liability and was a compromise.'" App. 17 (quoting *Haug v. Grimm*, 251 F.2d 523, 528 (8th Cir. 1958)).

In one case, for example, an approaching hurricane caused the district judge to instruct the jury to "reach a verdict within fifteen minutes," and the Fifth Circuit found that these were "extraordinary circumstances" that amounted to an abuse of discretion. *Lucas*, 630 F.2d at 293. In another case, "the jury took four days to reach a verdict," during which time it said that it was "hopelessly deadlocked" on liability, and the jury even "attempted to qualify its verdict." *Mekdeci*, 711 F.2d at 1515. The Eleventh Circuit held that, under "these unique circumstances," the district court had not abused its discretion by finding an impermissible compromise. *Id.* In still another case, a juror flat-out admitted that "the jury's conflict on the liability issue had caused it to reach an incomprehensible damage award." *Yarbrough v. Sturm, Ruger & Co.*, 964 F.2d 376, 378 (5th Cir. 1992).

As GM put it below, "because courts determine the existence of compromise on an individualized basis from the unique facts and circumstances of each case, the holdings of other cases are not dispositive." CA8 GM Reply 3. Still, two additional principles have emerged:

4. Short deliberations cut against a finding that the jury was deadlocked on liability. Courts have found that, when a jury deliberates for just a few hours after a long trial, as it did here, "[i]t obviously was not deadlocked." *Burger King*, 710 F.2d at 1488; *see, e.g.*, *Phav v. Trueblood, Inc.*, 915 F.2d 764, 768–69 (1st Cir. 1990) (holding that district court did not abuse its discretion in finding no compromise verdict where jury deliberations lasted only an afternoon even though damages were inadequate); *Gries v. Zimmer, Inc.*, 940 F.2d 652, 1991 WL 137243, at *10–11 (4th Cir. 1991) (finding no compromise verdict when, "after a seven-day trial, the jury debated only three and one-half hours" and "gave no indication of being deadlocked or confused as to liability," and "the evidence on liability, even now weighing the evidence and the credibility of the witnesses, was sufficient to preserve the possibility that a compromise verdict was not rendered").

5. The jury's answers on a special-verdict form will not be considered as evidence of a compromise if the defendant failed to object. Finally, although the issue rarely arises, courts will "not consider the jury's answers" on a verdict form "as evidence of its confusion on liability" if, as here, the defendant did not object to the form or instructions below. *Phav*, 915 F.2d at 769; *see Carter*, 165 F.3d at 1082 ("Carter's argument that the jury's verdict resulted from impermissible compromise is substantially undermined by our conclusions that Carter waived her objection to the District Court's failure to instruct the jury

on the definition of proximate cause and that the jury's verdict was consistent."). "To decide otherwise would countenance 'agreeable acquiescence to perceivable error as a weapon of appellate advocacy,'" *Phav*, 915 F.2d at 769, rewarding one party's strategic decision not to object "because making a timely objection" would "have reduced its odds of prevailing," App. 23.

B. Having failed below to persuade the court of appeals that it should win under the "accepted legal standard," GM now takes a different tack. It contends (at 3–4, 13–14) that there is actually a "split of authority" on "the standard that courts should apply when deciding whether a damages-only retrial" may be permitted if one party is claiming there was a compromise verdict, and that courts "have applied different standards and presumptions."

That is not so. As just explained, there is remarkable consensus among the circuits on the correct approach for reviewing a district court's compromise-verdict determination. Although they sometimes use slightly different formulations, the differences are attributable to the deferential standard of review rather than any disagreement on the law. Thus, when an appellate court is reviewing a district court's determination that the jury did not compromise, it will occasionally frame the question (as it did in this case, and GM agreed) as being "whether the record, viewed in its entirety, clearly demonstrates the compromise nature of the verdict." App. 18; *see* GM CA8 Reply 6 (quoting same); *see also, e.g.*, *Boesing v. Spiess*, 540 F.3d 886, 889 (8th Cir. 2008); *Carter*, 165 F.3d at 1083; *Shugart v. Cent. Rural Elec. Co-op.*, 110 F.3d 1501, 1506 n.7 (10th Cir. 1997); *Luria Bros. & Co. v. Pielet Bros. Scrap Iron & Metal, Inc.*, 600 F.2d 103, 115 (7th Cir. 1979); *Maher v. Isthmian Steamship Co.*, 253 F.2d 414, 419 (2d Cir. 1958). The court will frame the question this way, however, only

because a clear demonstration is needed to show *an abuse of discretion*—not because there is any lack of consensus on the right legal standard. Indeed, each of the three cases cited by GM (at 17–18) uses such a formulation because the district court had found that there was no compromise, and this finding was entitled to significant deference. *See Phav*, 915 F.2d at 769; *Carter*, 165 F.3d at 1083; *Spell*, 824 F.2d at 1400.

Moreover, GM fails to acknowledge that the Eighth Circuit's decision below applies the very standard that GM now urges. GM says that, in its view (at 17), the correct rule under *Gasoline Products* is that a "damages-only retrial cannot be held consistent with the Constitution if there is reason to suspect that the jury returned a compromise verdict." But the Eighth Circuit said the same thing: "While it is true a retrial on only damages is sometimes proper, it is inappropriate 'where there is good reason to believe that the inadequacy of the damages awarded was induced by unsatisfactory proof of liability and was a compromise.'" App. 17. And the Eighth Circuit expressly applied *Gasoline Products* and concluded that "the issues regarding damages and liability are 'distinct and separable' from one another" such that the district court did not abuse its discretion by ordering a new trial on damages. App. 23 (quoting *Gasoline Prods.*, 283 U.S. at 500).

Simply put, there is neither a split to resolve nor any legal error to correct. There is instead a widely accepted approach for reviewing a district court's determination in a case like this one, and the Eighth Circuit followed it. This Court "rarely grant[s]" certiorari to review the asserted "misapplication of a properly stated rule of law." S. Ct. R. 10.

II. The court of appeals correctly held that liability and damages were sufficiently "distinct and separable" such that the district court did not abuse its discretion in ordering a new trial on damages.

The Eighth Circuit's factbound, case-specific application of the settled legal standard was correct. In its petition, GM does not challenge the court's holding that the jury's liability finding is supported by sufficient evidence. Nor does GM dispute that the jury's damages award, unlike the liability finding, is not supported by the evidence. Nor does GM take issue with the Eighth Circuit's finding that GM has waived any objection "to the jury instructions, the verdict form, or the verdict itself," and thus cannot rely on any "perceived error" in the jury's liability findings to support its compromise-verdict argument. App. 6–7. And GM makes no claim that, apart from its compromise-verdict argument, damages and liability in this case are too intertwined to permit a new trial on damages under *Gasoline Products*, or that the new trial will cause "confusion and uncertainty, which would amount to a denial of a fair trial." *Gasoline Prods.*, 283 U.S. at 500.

That leaves GM with virtually nothing to support its claim that the district court abused its discretion. There is not one communication from the jury saying that it was deadlocked or struggling to reach a verdict—just a single note asking about the meaning of the stipulation for past medical expenses ($576,701.00). But this note, on its own, does not demonstrate deadlock on liability, let alone that "the trial court abused its discretion in not recognizing as much." App. 23. The jury awarded almost double the stipulated amount, including past damages for pain and suffering. Add. 5. On these facts, the Eighth Circuit cor-

rectly concluded that, "[a]lthough GM makes a strong case, we are unable to say the trial court abused its considerable discretion and committed reversible error" in rejecting GM's argument. App. 16.

GM now tries to use the Eighth Circuit's charitable language against it, seizing on its use of the phrase "strong case." But GM ignores the context in which the court used this phrase: while explaining that GM could not surmount the deferential standard of review. GM also ignores its own shifting, sandbagging position—and the waiver holding in the decision below—and tries to claim, with emphasis, that "the jury found that Bavlsik's vehicle contained *no design defects*." Pet. 2. That argument, however, is neither correct nor preserved.

There is therefore no "injustice" in declining to give GM a do-over on liability. *Gasoline Prods.*, 283 U.S. at 500. Exactly the opposite: GM never objected to the instructions, the verdict form, or the verdict, "perhaps because making a timely objection to the verdict might have reduced its odds of prevailing." App. 23. But now that it has lost its primary argument on appeal—that it was entitled to judgment as a matter of law—GM wants to rewind and start over. The court of appeals rightly said no, because that would make the plaintiffs "pay the price for GM not acting on [the] perceived error in a timely manner," forcing them to prove liability twice before they could obtain compensation. *Id.* Nothing in the Seventh Amendment or due process requires a different result.

Nor did the Eighth Circuit err by deferring to the district court under the abuse-of-discretion standard. As this Court has explained in an analogous context, "appellate review for abuse of discretion is [not only] reconcilable with the Seventh Amendment," it makes good sense: "Trial judges have the unique opportunity to consider the

evidence in the living courtroom context . . . while appellate judges see only the cold paper record." *Gasperini v. Ctr. for Humanities, Inc.,* 518 U.S. 415, 435, 438 (1996) (citations omitted); *see also Fairmount Glass Works v. Cub Fork Coal Co.*, 287 U.S. 474, 485 (1933) ("Appellate courts should be slow to impute to juries a disregard of their duties, and to trial courts a want of diligence or perspicacity in appraising the jury's conduct."). Hence the longstanding rule that appellate courts "must give the benefit of every doubt to the judgment of the trial judge." *Gasperini,* 518 U.S. at 435. That rule carries particular force in the compromise-verdict context, where the inquiry is into the jury's state of mind. The Eighth Circuit made no misstep in heeding this rule.

III. The question presented arises infrequently and is unworthy of this Court's review, and this case would be a poor vehicle to review it in any event.

Even apart from the correctness of the decision below and the lack of any circuit conflict, the petition should be denied for three additional reasons. *First*, the question presented is one that arises, at most, only a few times a decade. Appellate courts simply do not confront many cases in which (1) a jury's damages award is plainly unsupported by the trial evidence, so it cannot be sustained; (2) the jury's liability finding is supported by the evidence; and (3) the district court concludes that the jury had not compromised its verdict to break a deadlock on liability.[2]

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[2] Our research reveals only a handful of cases that have confronted the scenario here: where the liability finding is supported by the record but the damages award is not, and the district court found no compromise and ordered a retrial on damages. Indeed, in the 87 years since *Gasoline Products* was decided, only 75 reported federal appellate decisions even include the words "compromise verdict" and "damages" in the same paragraph—less than one a year.

Second, the factbound, case-specific nature of the question presented makes it especially unworthy of this Court's time and attention. By its terms, GM directs the question at the scenario in which, not only are the above criteria met, but the court of appeals then makes the statement that 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. That is a category of one. The question is not well-suited to this Court's review, and its answer would be exceedingly unlikely to provide any useful guidance to anyone.

Finally, this case would be an especially poor vehicle through which to lay down a rule governing compromise-verdict cases. As already noted, the Eighth Circuit concluded that GM has waived its lead argument for why there was a compromise—a finding that GM does not contest here. And that waiver does not just weaken GM's case for a compromise, but in fact complicates the analysis because it creates competing concerns on the other side, stemming from the "injustice" of allowing a defendant to lie in wait instead of raising a timely objection. *Gasoline Prods.*, 283 U.S. at 500. GM's lie-in-wait strategy is exemplified by the fact that only after the Eighth Circuit issued its decision did GM try to recast its position as grounded in *Gasoline Products*—a case it did not rely on in its opening Eighth Circuit brief and cited just once in its reply (for the proposition that partial retrials are *permissible*). This Court should not grant review of a case that will have no effect on the law more broadly only to give GM a bailout from the consequences of its own strategic decisions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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