No. 20-

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

PETITION FOR A WRIT OF CERTIORARI

E. JOSHUA ROSENKRANZ
PETER A. BICKS
LISA T. SIMPSON
NAOMI J. SCOTTEN
EDMUND HIRSCHFELD
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

NEAL KUMAR KATYAL
Counsel of Record
SEAN MAROTTA
KATHERINE B. WELLINGTON
BENJAMIN A. FIELD
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

Counsel for Petitioners

(Additional counsel listed on inside cover)

Additional counsel:

ROBERT M. LOEB
ROBBIE MANHAS
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, N.W.
Washington, D.C. 20005

KRISTINA ALEKSEYEVA
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017

QUESTIONS PRESENTED

1. 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.

2. Whether a punitive-damages award violates due process when it far exceeds a substantial compensatory-damages award, and whether the ratio of punitive to compensatory damages for jointly and severally liable defendants is calculated by assuming that each defendant will pay the entire compensatory award.

3. Whether the "arise out of or relate to" requirement for specific personal jurisdiction can be met by merely showing a "link" in the chain of causation, as the court below held, or whether a heightened showing of relatedness is required, as petitioner in *Ford Motor Co.* v. *Montana Eighth Judicial District Court*, No. 19-368, has argued.

PARTIES TO THE PROCEEDING

Johnson & Johnson and Johnson & Johnson Consumer Inc., petitioners on review, were defendants-appellants below.

Gail L. Ingham, Robert Ingham, Laine Goldman, Carole Williams, Monica Sweat, Gregory Sweat, Robert Packard, Andrea Schwartz-Thomas, Janus Oxford, William Oxford, Stephanie Martin, Ken Martin, Shelia Brooks, Martin Maillard, Krystal Kim, Annette Koman, Allan Koman, Toni Roberts, Marcia Owens, Mitzai Zschiesche, Tracee Baxter, Cecilia Martinez, Olga Salazar, Karen Hawk, Mark Hawk, Pamela Scarpino, Jackie Herbert North, Marvin Walker, and Talmadge Williams, respondents on review, were plaintiffs-appellees below.

RULE 29.6 DISCLOSURE STATEMENT

1. Johnson & Johnson has no parent corporation, and no publicly held company owns 10% or more of Johnson & Johnson's stock.

2. Johnson & Johnson Consumer Inc. is wholly owned by Janssen Pharmaceuticals, Inc. Janssen Pharmaceuticals, Inc. is wholly owned by DePuy Synthes, Inc. DePuy Synthes, Inc. is wholly owned by Johnson & Johnson International. Johnson & Johnson International is wholly owned by Johnson & Johnson, which is a publicly held company.

RELATED PROCEEDINGS

Missouri Court of Appeals for the Eastern District:

Ingham v. *Johnson & Johnson*, No. ED 107476 (Mo. Ct. App. June 23, 2020) (reported at 608 S.W.3d 663), *reh'g and/or transfer to Missouri Supreme Court denied* (July 28, 2020), *application for transfer to Missouri Supreme Court denied* (Nov. 3, 2020).

Circuit Court of the City of St. Louis:

Ingham v. *Johnson & Johnson*, No. 1522-CC10417 (Mo. Cir. Ct., 22d Judicial Cir.)

Ingham v. *Johnson & Johnson*, No. 1522-CC10417-01 (Mo. Cir. Ct., 22d Judicial Cir.)

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

Page

CASES:

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

IN THE
Supreme Court of the United States

No. 20-

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

PETITION FOR A WRIT OF CERTIORARI

Johnson & Johnson and Johnson & Johnson Consumer Inc. respectfully petition for a writ of certiorari to review the judgment of the Missouri Court of Appeals for the Eastern District in this case.

OPINIONS BELOW

The Missouri Court of Appeals' opinion is reported at 608 S.W.3d 663. Pet. App. 1a-106a. The City of St. Louis Circuit Court's orders are unreported. *Id.* at 107a-145a. The Missouri Supreme Court's order denying further review is unreported. *Id.* at 146a-147a.

JURISDICTION

The Missouri Court of Appeals entered judgment on June 23, 2020. Pet. App. 1a-106a. On November 3,

2020, the Missouri Supreme Court denied Petitioners' timely application to transfer. *Id.* at 146a-147a. On March 19, 2020, this Court extended the deadline to petition for a writ of certiorari to 150 days. This Court has jurisdiction under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

INTRODUCTION

This case arises from an over $2 billion judgment against Petitioners Johnson & Johnson (J&J) and Johnson & Johnson Consumer Inc. (JJCI). Petitioners have sold their iconic baby powder to millions of Americans for decades. Over the last several years, however, plaintiffs' lawyers have filed thousands of lawsuits in select jurisdictions alleging—against the vast weight of scientific evidence—that Petitioners' cosmetic talc products are contaminated with asbestos and cause ovarian cancer. Contrary to those claims, federal regulators and respected health organizations have rejected calls for warnings on talc, and comprehensive epidemiological studies tracking tens of thousands of talc users have found no meaningful association between cosmetic talc use and ovarian cancer.

Yet some plaintiffs' lawyers have struck on a winning formula: They first canvass the country for women who were both diagnosed with ovarian cancer and among the millions who used Petitioners' talc products. They then select a jurisdiction where out-of-state plaintiffs can be consolidated with in-state plaintiffs for a single mass trial. They put dozens of

plaintiffs on the stand to discuss their experiences with cancer, and the jury awards billions of dollars in punitive damages supposedly to punish Petitioners. Lawyers can then follow this script and file the same claims with new plaintiffs and seek new outsized awards, over and over again.

This case illustrates the problem. The Missouri court consolidated for trial 22 plaintiffs' disparate claims under 12 States' laws before a single jury—notwithstanding plaintiffs' widely divergent circumstances and injuries, ranging from full remission to lengthy illness and death. Evidencing the prejudicial joinder, the jury found liability as to all 22 plaintiffs and awarded $25 million in compensatory damages to each of the 22 plaintiff families. On top of that, the Missouri Court of Appeals upheld a $1.6 billion punitive award, a figure that for J&J was more than *eleven times* the already staggering compensatories. And the court gave no heed to the fact that 17 plaintiffs brought into this mass trial did not reside in Missouri, did not purchase or use Petitioners' products in Missouri, did not rely on any Missouri advertising in making their purchasing decisions, and were not injured in Missouri. Those rulings infringe Petitioners' fundamental due-process rights.

This Court has insisted that class-action defendants are entitled to "individualized determinations" of injury for each plaintiff. *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 366 (2011). And it has reined in class-action damages abuses. *See, e.g.*, *Comcast Corp.* v. *Behrend*, 569 U.S. 27, 34-36 (2013); *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 514-515 & n.28 (2008). Today, confusion reigns in the lower courts over the due-process boundaries of mass trials—and whether jury

instructions by themselves are a sufficient antidote to the jury confusion and prejudice mass trials cause. The Court should intervene here to curb due-process abuses in mass-tort suits and ensure that state courts give mass-tort defendants the same rights as everyone else.

First, the Missouri appellate court did not even *evaluate* whether consolidating 22 plaintiffs' disparate claims violated Petitioners' due-process rights; it instead said that it "must" presume that jury instructions cured any problems. Pet. App. 14a-16a, 18a-19a. Multiple state and federal courts disagree, holding that courts must evaluate whether consolidation violates due process *despite* the jury instructions.

Second, the Missouri court held that the $1.6 billion punitive award—which far exceeds a 1:1 ratio of punitive to compensatory damages—did not violate Petitioners' due-process rights. *See id.* at 101a-103a. But other state and federal courts would have reduced the award by over a *billion* dollars. In fact, had the case been in Missouri federal court, both the ratio and its compatibility with due process would have been analyzed differently, reducing the punitive award by at least hundreds of millions.

Third, the Missouri court found specific personal jurisdiction over JJCI because of its contract with a third party to bottle one of its talc products in Missouri, concluding that this activity was a "direct link in the production chain of [the product]'s eventual sale to the public." *Id.* at 35a. But the "arise out of or relate to" prong of specific personal jurisdiction requires more than a mere but-for "link" in the chain of causation—as many courts have held. *See* Petition for Writ of Certiorari at 12-16, *Ford Motor Co.* v. *Montana*

Eighth Judicial Dist. Ct., No. 19-368 (U.S. Sept. 18, 2019), *cert. granted*, 140 S. Ct. 917 (2020).

Each issue warrants the Court's attention. That they are presented in a single petition challenging one of the largest verdicts ever in a product-liability case gives the Court an extraordinary opportunity to resolve the most common and troubling due-process questions posed by mass-tort litigation, a gap left open by this Court's precedents. At a minimum, the Court should consider granting, vacating, and remanding this case in light of *Ford*.

STATEMENT

A. Talc Research

Hundreds of millions of Americans have used Petitioners' cosmetic talc products, including Johnson's Baby Powder.[1] Plaintiffs' claim that cosmetic talc products contain asbestos first received attention in the 1970s, when Dr. Arthur Langer claimed to find asbestos in talc samples—a claim he later withdrew as to Johnson's Baby Powder.

Since then, scientists have studied for decades whether there is any link between talc use and ovarian cancer, and the three largest epidemiological studies—tracking the health of tens of thousands of women—have found no meaningful relationship. *See* C.A. Appellants' Appx. A294, A298, A307; Tr. 4689:13-4700:21.[2] The Food and Drug Administration (FDA), National Cancer Institute, and American Cancer

[1] J&J sold cosmetic talc products until 1979, when it transferred those products to subsidiaries, which ultimately became JJCI. *See* Pet. App. 3a, 103a.

[2] "Tr." citations are to the trial transcript.

Society have reached the same conclusion. *See* Pet. App. 91a-92a. And the FDA has repeatedly found that warning labels on cosmetic talc products are scientifically unwarranted. *See id*.

Petitioners have used leading independent laboratories to ensure that their cosmetic talc products were not contaminated with asbestos, and they deny that their products contain asbestos or cause cancer. *See* Tr. 4167:1-10, 5128:17-5144:1, 5157:6-5164:21, 5170:11-5228:10. Petitioners have also conducted thousands of their own tests to ensure there was no asbestos contamination in these products. *See id.* at 5135:23-5138:8. Plaintiffs' lawyers have nevertheless filed thousands of lawsuits across the country alleging that Johnson's Baby Powder causes ovarian cancer.

B. Trial Court Proceedings

This is one such case. Plaintiffs are 22 women who filed suit against Petitioners in the St. Louis City, Missouri Circuit Court alongside eight plaintiffs' spouses. *See* Pet. App. 2a n.1, 3a. All 22 plaintiffs initially alleged that they had used Johnson's Baby Powder and later developed ovarian cancer. *See id.* at 3a-4a. Plaintiffs and their spouses sought relief under 12 different States' laws, asserting product-liability and loss-of-consortium claims. *See id.* They also sought punitive damages. *Id.* at 3a.

Johnson's Baby Powder was always manufactured outside Missouri, and only five plaintiffs even alleged they purchased that product in Missouri. *See id*. at 3a-5a, 30a. Petitioners moved to dismiss for lack of personal jurisdiction the claims of 17 plaintiffs who did not reside in Missouri, did not purchase or use Petitioners' products in Missouri, did not rely on Missouri advertising in making their purchasing

decisions, and were not injured in Missouri (the "non-Missouri plaintiffs"). *See id.* at 4a. The trial court initially denied the motion. *Id.* at 122a-132a.

After *Bristol-Myers Squibb Co.* v. *Superior Court*, 137 S. Ct. 1773 (2017), 15 of the 17 non-Missouri plaintiffs asserted for the first time that they had used Shower-to-Shower Shimmer Effects (Shimmer), a glittery body powder JJCI sold in nominal amounts between 2005 and 2010. *See* Pet. App. 4a-6a & nn.5-6. During part of that period, JJCI contracted with Pharma Tech, a Missouri manufacturing-for-hire company, to mix and package Shimmer and to affix a label JJCI designed in New Jersey. *See id.* at 4a-6a, 33a.

The 15 non-Missouri plaintiffs offered little proof that they had purchased Shimmer. One testified that she had a dream of using Shimmer after her lawyer—post-*Bristol-Myers Squibb*—asked about the product. *Id.* at 157a-158a. The trial court nonetheless accepted the non-Missouri plaintiffs' assertions and found personal jurisdiction over JJCI and J&J, including with respect to the plaintiffs who did not use Shimmer. *Id.* at 6a-7a, 128a-130a.

All 22 plaintiffs asked to have their claims heard together before the same jury. Petitioners objected, explaining that plaintiffs had used different talc products at different levels of intensity for different periods of time in different States. *See id.* at 7a, 11a-12a. Plaintiffs also had dramatically different risk factors for and experiences with cancer. *See id*. Some plaintiffs had a genetic or family predisposition for cancer, while others did not. *See id.* And some plaintiffs experienced remission after treatment, whereas others died after a years-long battle. *See id.* at 11a-12a.

Petitioners explained that consolidation would confuse the jury and prejudice their defense by "blurr[ing] distinctions in the law and defenses applicable to each [p]laintiff's claim," violating their due-process rights. *Id.* at 17a-18a; *see* Appellants' C.A. Br. 82-83. The trial court denied the severance motions. Pet. App. 7a, 142a-144a.

At trial, there was little (if any) evidence that plaintiffs ever used products from Petitioners that contained asbestos. Even though ovarian cancer has numerous established risk factors, *see* Tr. 4720:14-4723:9, plaintiffs' expert opined that each of the 22 plaintiffs' talc use "directly contributed" to her ovarian cancer—using the same language for each. Pet. App. 74a-75a. The expert provided as little as a few words of analysis for each plaintiff. *See id.* at 163a-164a (15 words for Ms. Webb); *id.* at 164a-165a (21 words for Ms. Hillman). And plaintiffs' counsel urged the jury to infer causation from the two things that "all of these women have * * * in common": "[a]ll of them used * * * Johnson & Johnson Baby Powder" and all of them "got cancer." *Id.* at 152a.

It took the trial court more than five hours to instruct the jury on 12 different States' laws. *See id.* at 14a; *see also* Tr. 5872:11-15 (court informing the jury that it would "plow through" hundreds of pages of jury instructions because there were no "other alternatives"). Yet the jury deliberated less than 20 minutes on average for each plaintiff family, rendering *identical* $25 million compensatory awards for each—irrespective of whether the plaintiff was alive or dead, how long she had suffered from cancer, which talc product she used, and whether the plaintiff brought suit individually or with her spouse. *See* Pet. App. 8a.

In total, the jury awarded $550 million in compensatory damages. *See id*.

The jury then awarded $3.15 billion in punitive damages against J&J and $990 million in punitive damages against JJCI—over $4 billion altogether. *Id.* One juror later explained that the award was intended to disgorge Petitioners' nationwide profits from talc sales over the last four decades. *See* C.A. Appellants' Appx. A317-318.

C. Appellate Proceedings

The Missouri Court of Appeals largely affirmed. Pet. App. 105a-106a. The court rejected Petitioners' argument that consolidation violated their due-process rights. It acknowledged the "obvious differences among Plaintiffs' claims," but held that "[a]ny dangers of prejudice arising from joinder were adequately addressed by the trial court's instructions to the jury to consider each Plaintiff's claim separately." *Id.* at 18a-19a.

The court agreed with Petitioners that the trial court lacked jurisdiction over J&J with respect to the non-Missouri plaintiffs. *See id.* at 48a-49a. And it found no jurisdiction at all over the two non-Missouri plaintiffs who did not allege using Shimmer. *See id.* at 40a, 48a-49a. But the court found personal jurisdiction over the claims of the 15 non-Missouri plaintiffs who alleged using Shimmer because "JJCI contracted with Missouri-based Pharma Tech Industries to manufacture, package, and label Shimmer," and "JJCI's activities with Pharma Tech" "represent a direct link in the production chain of Shimmer's eventual sale to the public." *Id.* at 32a-33a, 35a.

The court reduced the damages award based on its personal-jurisdiction rulings, entering judgment

against JJCI for $375 million in compensatory damages, and against J&J and JJCI jointly and severally for $125 million more in compensatory damages. *Id.* at 100a. The court also purported to reduce the punitive damages proportionally, retaining the same punitive-to-compensatory ratios awarded by the jury. *See id.* The court accordingly affirmed a $900 million punitive-damages award against JJCI and a $715.9 million punitive-damages award against J&J. *Id.* at 100a-101a.

The court believed that these awards were "within the limits of punitive damages consistently upheld." *Id.* at 101a-103a. But the court incorrectly assumed that J&J and JJCI would *each* pay the *entire* joint-and-several portion of the compensatory award, and therefore calculated ratios of 5.7:1 for J&J and 1.8:1 for JJCI. *See id.* at 99a-100a & n.27. Had the court instead assumed that Petitioners would each pay half the joint-and-several award, it would have calculated the ratios as 11.5:1 for J&J and 2.1:1 for JJCI.

All told, the court entered judgment against Petitioners for over $2.1 *billion*. But the Missouri Supreme Court denied review. *Id.* at 146a-149a.

REASONS FOR GRANTING THE PETITION

I. THE DECISION BELOW IS IRRECONCILEABLE WITH HOW NUMEROUS STATE AND FEDERAL COURTS ANALYZE DUE-PROCESS RISKS FROM MASS TRIALS.

If the Due Process Clause means anything, it means that a defendant cannot be deprived of billions of dollars without a fair trial. The mass trial of 22 plaintiffs' claims here obscured plaintiffs' individual

circumstances—and Petitioners' individual defenses—through the sheer breadth of testimony and instructions thrown at the jury. Consolidation obviously had that effect because the jury returned 22 identical verdicts for 22 dissimilar plaintiff families and because each plaintiff received awards that far outstripped the compensatory verdicts against Petitioners in single-plaintiff Missouri cases.

At least two courts—the Second and Fifth Circuits—would have vacated this consolidation on due-process grounds. And eight other courts would have rejected the Missouri court's reliance on jury instructions as a panacea for prejudice from mass consolidation, citing due-process concerns of fairness, prejudice, and jury confusion. Only the outlier Alabama Supreme Court embraces the Missouri position, abandoning all constitutional limits and common sense.

A. The Decision Below Is At Odds With Other Courts' Consolidation Standards.

1. Petitioners below explained that a mass trial of 22 plaintiffs' disparate claims under 12 States' laws violated their due-process rights. Pointing to the identical astronomical compensatory awards, Petitioners argued that the *five hours* of jury instructions—instructions so voluminous that the trial court at one point admitted that it was "frankly concerned about losing the jury," Pet. App. 169a—confused rather than clarified the law. *Id.* at 8a-9a. Petitioners explained that the welter of claims and witnesses occasioned by the mass trial deprived them of a fair determination of the individual allegations against them. *See id.* And they directed the court to numerous "scientific studies of jury decisionmaking" showing that in a multi-plaintiff trial of this size, "there is

a substantially greater likelihood that the jury will find defendants liable and will award greater damages to the plaintiffs" and that "jury instructions will not mitigate this unfair prejudice." *Id.* at 172a; *see id.* at 172a-175a.

The Missouri Court of Appeals did not address these serious due-process concerns. The court instead insisted that it "must presume the jury followed the trial court's instruction in reaching its verdict." *Id.* at 14a (citing *Dieser* v. *St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 435 (Mo. 2016)). The court held that because "the trial court instructed the jury to consider each Plaintiff's claim on its own merits" and "in over 140 pages of trial transcript, read the jury instructions for each individual Plaintiff to the jury," Petitioners could not prove prejudice. *Id.*; *see id.* at 18a ("Because we presume the jury followed the trial court's instruction in reaching its verdict, we are not persuaded differences in the law applicable to each Plaintiff's claims rendered the trial court's decision not to sever Plaintiffs' claims an abuse of discretion."); *id.* at 18a-19a ("Any dangers of prejudice arising from joinder were adequately addressed by the trial court's instructions to the jury * * * .").

2. The Second and Fifth Circuits have rejected mass trials under similar circumstances as a due-process violation.

The Second Circuit's foundational case on mass trials held that "[c]onsiderations of convenience and economy must yield to a paramount concern for a fair and impartial trial." *Johnson* v. *Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990). It tied those concerns to "due process rights." *Id.* at 1289. The Second Circuit applied *Johnson*'s due-process standard in a case

strikingly similar to this one, holding that a mass trial of 48 asbestos cases prejudiced the defendants. *Malcolm* v. *Nat'l Gypsum Co.*, 995 F.2d 346, 349-352 (2d Cir. 1993). Even though the "jury was instructed on several occasions to consider each case separately and each juror was given a notebook for this purpose," that was not enough to prevent prejudice given the "maelstrom of facts, figures, and witnesses." *Id.* The court concluded that because the plaintiffs had been exposed to asbestos at different times under different circumstances, and experienced different disease trajectories, "the sheer breadth of the evidence made [the trial court's] precautions feckless in preventing jury confusion." *Id.* at 351-352. The Second Circuit ordered new trials, explaining that the "systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice," *id.* at 350 (citation omitted), and that the consolidation had "sacrifice[d] basic fairness." *Id.* at 354; *see also In re Repetitive Stress Injury Litig.*, 11 F.3d 368, 373 (2d Cir. 1993) (ordering deconsolidation for similar reasons).[3]

The Fifth Circuit takes a similar approach. It reversed consolidation in a case involving just *two* plaintiffs, explaining that "the *primary* consideration" in evaluating consolidation was "the individual [plaintiff's] Constitutional right to due process." *Gwathmey* v. *United States*, 215 F.2d 148, 156 (5th Cir. 1954). "As between a method of procedure which seriously restricts or prevents" a party "from establishing his claim in order to save time and costs and one which

[3] District courts continue to follow *Malcolm*. *E.g.*, *Weiss* v. *Nat'l Westminster Bank PLC*, 2017 WL 10058916, at *2 (E.D.N.Y. Mar. 31, 2017); *KGK Jewelry LLC* v. *ESDNetwork*, 2014 WL 7333291, at *2 (S.D.N.Y. Dec. 24, 2014).

preserves those fundamental rights," the court held, "the choice is obvious and all reasonable doubt should be resolved in favor of justice." *Id.*

If the Missouri court had applied the Second or Fifth Circuit's standard, it would have severed these cases for trial. *See Dupont* v. *S. Pac. Co.*, 366 F.2d 193, 196 (5th Cir. 1966) (a "trial judge should * * * make sure that the rights of the parties are not prejudiced by the order of consolidation"); *Trevizo* v. *Cloonan*, 2000 WL 33348794, at *2 (W.D. Tex. Nov. 29, 2000) (similar); *cf. In re Fibreboard Corp.*, 893 F.2d 706, 710-711 (5th Cir. 1990) (explaining in the class-action context that aggregation is inappropriate where plaintiffs are "persons claiming different diseases, different exposure periods, and different occupations," given fairness "concerns" that "find expression in defendants' right to due process").

3. At least eight other state and federal courts reject the Missouri Court of Appeals' categorical holding—that it "must" affirm consolidation whenever the jury is instructed to consider each claim separately. These courts instead measure the dangers of consolidation in terms of fundamental fairness, the very thing the Due Process Clause guarantees. *See Lassiter* v. *Dep't of Soc. Servs. of Durham Cty.*, 452 U.S. 18, 24-25 (1981).

The Texas Supreme Court is a paradigmatic example. It has reviewed a 22-plaintiff mass asbestos trial and held that jury instructions, standing alone, could not cure prejudice from consolidation, explaining that a "risk of juror confusion is present in this case even if the trial court were to utilize techniques that have seemed to lessen confusion in other asbestos cases, such as * * * submitting jury issues and instructions

tailored to each plaintiff." *In re Ethyl Corp.*, 975 S.W.2d 606, 615 (Tex. 1998). The court examined "whether the trial will be fair and impartial to all parties," analyzing the date and length of exposure for each plaintiff to determine whether consolidation could be achieved without prejudice. *Id.* at 614-617. The court continues to apply that approach. *See In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 210 (Tex. 2004) (per curiam) (ordering deconsolidation because "significant juror confusion and undue prejudice would result from" a mass trial of 20 toxic-tort plaintiffs).

The Supreme Court of Appeals of West Virginia has likewise disagreed that jury instructions alone can cure unfairness from consolidation. It has acknowledged that "the risks of prejudice and confusion may be reduced by the use of cautionary instructions to the jury." *State ex rel. Appalachian Power Co.* v. *Ranson*, 438 S.E.2d 609, 613 (W. Va. 1993). But it also considered whether "the risk of prejudice in consolidating" three tort actions "outweigh[ed] the considerations of judicial dispatch and economy" because "the tragic nature of [one plaintiff's] death could affect the jury's determination of the [other] cases * * *, especially if the jury believes that recovery in each of the cases is interdependent because of the consolidation." *Id*.

The Iowa Supreme Court concurs. It reversed a lower court that had consolidated cases because it thought that "any dissimilar issues could be remedied by proper jury instructions," explaining that it was error to "conclud[e] these actions could be consolidated without prejudice to" the defendants. *Johnson* v. *Des Moines Metro. Wastewater Reclamation Auth.*, 814

N.W.2d 240, 244, 248-249 (Iowa 2012) (internal quotation marks omitted).

The en banc Fourth Circuit likewise disagreed with a panel's conclusion that "appropriate cautionary instructions" were sufficient to "safeguard" against unfairness from consolidation. *Arnold* v. *E. Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982). The full court held that "convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice." *Arnold* v. *E. Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (en banc). "In the actual proof of the pudding, * * * the fairness required was not possible to attain" from a mass trial. *Id.* at 907.

The Mississippi Supreme Court has reversed a trial court's consolidation of five suits alleging injury from air pollution. *See Vicksburg Chem. Co.* v. *Thornell*, 355 So. 2d 299 (Miss. 1978). As here, the jury had returned identical awards for each household—regardless of the number of plaintiffs in the household, the "different family situations," and the particular injuries suffered. *Id.* at 301-302. The court held that it could not rely on jury instructions to cure prejudice, because "the identical verdicts indicate that the jury did not follow the instructions on damages." *Id.* at 302. And the court continues to evaluate prejudice from consolidation by examining whether a "jury can be expected to reach a fair result under the[] circumstances." *Janssen Pharmaceutica, Inc.* v. *Armond*, 866 So. 2d 1092, 1101 (Miss. 2004).

Finally, at least three other courts apply a multi-factor test to evaluate whether consolidation will prejudice the defendant. *See Cantrell* v. *GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) ("[T]he decision to consolidate is one that must be made thoughtfully, with

specific reference to the [discrete] factors identified * * * ."); *ACandS, Inc.* v. *Godwin*, 667 A.2d 116, 147-149 (Md. 1995); *Minnesota Pers. Injury Asbestos Cases* v. *Keene Corp.*, 481 N.W.2d 24, 26-27 (Minn. 1992). These multi-factor tests are also inconsistent with the Missouri approach, which presumes that jury instructions alone guarantee a fair trial.

The only court to agree with Missouri is the Alabama Supreme Court. In a mass trial of asbestos claims, the defendant argued that "consolidation confused the jury and resulted in a flawed verdict." *Owens-Corning Fiberglass Corp.* v. *Gant*, 662 So. 2d 255, 256 (Ala. 1995). The Alabama Supreme Court disagreed, emphasizing that "the trial judge gave specific instructions in order to eliminate juror confusion." *Id.* But the court never evaluated whether the defendant's right to a fair trial was violated *despite* those instructions. *Id.*

Given this stark divergence, the Court should step in.

B. The Missouri-Alabama Rule Denies Due Process.

"It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process." *Caperton* v. *A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (alterations and internal quotation marks omitted). By cavalierly treating the jury instructions as a cure-all, the Missouri court ignored how a mass trial of dissimilar claims can confuse a jury and deprive defendants of their constitutional fair-trial right.

"[D]ue process requires that" aggregation "not be used to diminish the substantive rights of any party to the litigation." *Stonebridge Life Ins. Co.* v. *Pitts*, 236 S.W.3d 201, 205 (Tex. 2007) (per curiam).

"Aggregating claims can dramatically alter substantive tort jurisprudence" by "removing individual considerations from the adversarial process." *Sw. Refin. Co.* v. *Bernal*, 22 S.W.3d 425, 438 (Tex. 2000); *see also Hall* v. *Hall*, 138 S. Ct. 1118, 1128 (2018) ("[C]onsolidation could not prejudice rights to which the parties would have been due had consolidation never occurred.").

Mass trials obscure difficult causation questions because jurors are asked to "assimilate vast amounts of information" and individual cases are "lost in the shadow of a towering mass litigation." *Malcolm*, 995 F.2d at 350 (citation omitted). Mass trials also risk creating a "perfect plaintiff" who is "pieced together for litigation" from "the most dramatic" features of individual cases. *Broussard* v. *Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998).

Those fears were realized here. The jury was confronted with 22 different plaintiffs with dramatically different cancer-risk profiles, prognoses, and talc use. The mass trial papered over these differences, allowing the jury to overlook significant weaknesses in individual plaintiffs' claims—and to infer causation from the number of plaintiffs before it. For example, if Ms. Ingham's case had proceeded individually, the jury would have heard about her year with cancer, how she went into full remission, and how she spent the next 32 years cancer-free. *See* Tr. 4741:16-25. That would not have been a $25-million-plus-punitives case. Or if Ms. Walker's case had proceeded individually, the jury would have heard about her BRCA gene mutation, which increases the risk of ovarian cancer 20 to 60 times. *See id.* at 4709:3-8, 4744:4-21. That would not have been a $25 million-plus-

punitives case, either. Consolidating these cases with Ms. Packard's, however, allowed plaintiffs' lawyers to present Ms. Packard's videotaped deathbed testimony as she succumbed to her 10-year battle with cancer and conflate Ms. Ingham and Ms. Walker's experiences with Ms. Packard's. *See id.* at 2207:10-16.

There is good reason to think that consolidation made the difference here: Other single-plaintiff trials against Petitioners have resulted in defense jury verdicts, mistrials, and, in Missouri, several far-smaller compensatory-damages awards. *See, e.g.*, *Forrest* v. *Johnson & Johnson*, No. 1522-CC00419-02 (Mo. Cir. Ct. Dec. 20, 2019) (defense verdict in single-plaintiff Missouri trial); *Swann* v. *Johnson & Johnson*, No. 1422-CC09326-01 (Mo. Cir. Ct. Mar. 3, 2017) (same). It is implausible that separate trials would have resulted in liability as to each of 22 plaintiffs, with the same $25 million verdict for each. In these circumstances, consolidation deprived Petitioners of their due-process rights.

Worse still, there is no logical stopping point to the Missouri-Alabama approach. If this case did not warrant severance, no case will. The Court of Appeals' logic would permit 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 no way to assure a fair trial. And the problem is not limited to these cases: Mass consolidation generally has been a "spectacular" due-process "failure." Mark H. Reeves, *Makes Sense to Me: How Moderate, Targeted Federal Tort Reform Legislation Could Solve the Nation's Asbestos Litigation Crisis*, 56 Vand. L. Rev. 1949, 1968 (2003); *id.*

(consolidation "substantially abridges the due process rights of defendants by prejudicing and confusing juries and by frequently forcing settlements that preclude jury trials altogether"); *see also* Carter G. Phillips et al., *Rescuing Multidistrict Litigation from the Altar of Expediency*, 1997 B.Y.U. L. Rev. 821, 836 (1997) (similar).

This Court has already recognized the dangers of aggregate litigation in the class-action context, warning that an "elephantine mass of asbestos cases * * * defies customary judicial administration." *Ortiz* v. *Fibreboard Corp.*, 527 U.S. 815, 821 (1999); *see Amchem Prod., Inc.* v. *Windsor*, 521 U.S. 591, 625 (1997) ("caution" is called for in aggregation "when individual stakes are high and disparities among class members great"). The Court has accordingly set standards to assure that a defendant receives "individualized determinations of each" plaintiff's claims and an opportunity to "litigate its * * * defenses to individual claims." *Wal-Mart*, 564 U.S. at 366-367.

This case offers the Court the chance to do the same for mass torts. The many jurisdictions that disagree with the Missouri-Alabama approach appropriately protect defendants' constitutional rights. They recognize a truth articulated by this Court long ago that "there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored." *Bruton* v. *United States*, 391 U.S. 123, 135 (1968). Due process requires careful analysis of whether a jury can realistically be expected to fairly adjudicate consolidated claims, not

Panglossian reliance on jury instructions. This Court should step in.

II. THIS CASE EXACERBATES TWO CLEAR SPLITS OVER PUNITIVE DAMAGES.

The state and federal courts are also deeply divided over whether due process permits a punitive-damages award that far exceeds substantial compensatory damages. This Court stated in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), that "[w]hen compensatory damages are substantial," "a lesser ratio" of punitive damages, "perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425; *see also Exxon*, 554 U.S. at 514-515. Yet many lower courts treat that statement about the "outermost limit" of due process as meaningless dicta, holding instead that *any* single-digit ratio is permissible. And some courts do not hold even that line.

That is not all. The state and federal courts are further split over *how* to calculate the ratio of punitive to compensatory damages in cases like this one where the defendants are jointly and severally liable—leading to different conclusions about whether a punitive award is constitutional. As this petition starkly illustrates, whether a defendant is subject to millions or even billions of dollars in punitive damages greatly depends on the courthouse in which a case is brought. Over a decade after *State Farm*, this Court should make clear the case means what it says.

A. The State And Federal Courts Are Divided Over The Due-Process Limits On Punitive Damages.

The state and federal courts are intractably split over whether due process permits a punitive-damages award that far exceeds substantial compensatory damages.

1. Five state and federal courts have invoked *State Farm* to limit punitives at or near a 1:1 ratio in cases where compensatory damages are substantial, including Missouri's own federal authority, the Eighth Circuit.

In *Lompe* v. *Sunridge Partners, LLC*, 818 F.3d 1041 (10th Cir. 2016), the Tenth Circuit held that due process concerns required it to reduce an 11.5:1 ratio to 1:1. *See id.* at 1073-75. The court explained that "[b]ecause we have concluded that the amount of the compensatory damages * * * is substantial, an award of punitive damages equal to the compensatory award * * * may represent the outermost limit of the due process guarantee." *Id.* at 1073.

The Sixth Circuit has done the same. It ordered a punitive damages award remitted to an amount "not to exceed the amount of compensatory damages" of $6 million. *Morgan* v. *New York Life Ins. Co.*, 559 F.3d 425, 443 (6th Cir. 2009). And it has remitted punitive damages to match compensatories based on the "scenario described in *State Farm*, where the plaintiff has received a substantial compensatory-damages award, and a ratio of 1:1 or something near to it is an appropriate result." *Bach* v. *First Union Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007). The Third Circuit and South Dakota Supreme Court take a similar approach. *See Jurinko* v. *Med. Protective Co.*, 305 F.

App'x 13, 30 (3d Cir. 2008) ("[T]he Supreme Court's statement"—capping the ratio at 1:1 when compensatory damages are substantial—"instructs the outcome here."); *Roth* v. *Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003) (finding "a punitive damages award at or near the amount of compensatory damages" appropriate "where there [i]s a substantial compensatory damage award" (citation omitted)).

The Eighth Circuit—which includes the Missouri federal courts—has largely followed suit. *See Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (setting 1:1 ratio as the limit in case involving $4 million in compensatory damages for cancer claims against cigarette manufacturer, even after finding the manufacturer "exhibited a callous disregard for the adverse health consequences of smoking"); *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (remitting punitive-damages award to an amount equal to the $600,000 compensatory-damages award). The court has approved of ratios above 1:1 in intentional-tort cases. *See Ondrisek* v. *Hoffman*, 698 F.3d 1020, 1029-31 (8th Cir. 2012) (repeated battery of children by a religious cult leader); *see also Lee ex rel. Lee* v. *Borders*, 764 F.3d 966, 975-976 (8th Cir. 2014) (sexual assault at facility for developmentally disabled individuals). But even then, the court has rejected ratios above 4:1, citing *State Farm*. *See Ondrisek*, 698 F.3d at 1031 (remitting 10:1 ratio to 4:1); *Lee*, 764 F.3d at 976 (permitting 3:1 ratio).

2. Other state and federal courts treat a 10:1 ratio as the limit, paying lip service to *State Farm*'s warning that "few awards exceeding a single-digit ratio * * * will satisfy due process," while ignoring *State*

Farm's separate statement that when a jury awards substantial compensatory damages, a 1:1 ratio "can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

The Ninth Circuit maintains that a 4:1 ratio is "a good proxy for the limits of constitutionality" where "there are significant economic damages" but the misconduct "is not particularly egregious." *Planned Parenthood of Columbia/Willamette Inc.* v. *Am. Coal. of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005); *see also Ramirez* v. *TransUnion LLC*, 951 F.3d 1008, 1037 (9th Cir. 2020) (permitting 4:1 ratio). It has held that "a single-digit ratio greater than 4 to 1 might be constitutional," however, where the economic damages are significant and the misconduct is "more egregious." *Planned Parenthood*, 422 F.3d at 962-963 (ultimately approving 9:1 ratio).

The Eleventh Circuit dismissed this Court's statement in *State Farm* that a 1:1 ratio "can reach the outermost limit of the due process guarantee" as "dicta." *Cote* v. *Philip Morris USA, Inc.*, 985 F.3d 840, 849 (11th Cir. 2021) (upholding 3.3:1 ratio). And other state high courts rubber-stamp punitive damages below the 10:1 threshold. *See, e.g.*, *Seltzer* v. *Morton*, 154 P.3d 561, 612-613, 615 (Mont. 2007) (reducing ratio from 18.2:1 to 9:1 because "a single-digit ratio, although not compulsory, is more likely to comport with due process"); *Manor Care, Inc.* v. *Douglas*, 763 S.E.2d 73, 103, 105 (W. Va. 2014) (approving $32-million punitive-damages award seven times the compensatory award because "ratio statements by the United States Supreme Court[] do not represent strict standards" but rather "merely provide a guide"); *Union Pac. R.R. Co.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004)

(holding that $25-million punitive-damages award five times the compensatory award satisfied due process because it was not "breathtaking").

3. Some state courts eschew even the single-digit limit. The Oregon Supreme Court has affirmed a $79.5 million punitive award that was 97 times the compensatory award, reasoning that "two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio." *Williams* v. *Philip Morris Inc.*, 127 P.3d 1165, 1181-82 (Or. 2006), *adhered to on reconsideration*, 176 P.3d 1255 (2008). And below, the Missouri Court of Appeals affirmed an 11.5:1 ratio against J&J.

The Court should resolve this disagreement. If this case had been tried under Eighth or Tenth Circuit precedent, J&J's punitive damages would have been limited to $62.5 million and JJCI's punitive damages would have been limited to $437.5 million (a 1:1 ratio). If this case had been tried in the Ninth Circuit, J&J's punitive damages would have been limited to $562.5 million (a 9:1 ratio), while JJCI's damages would have remained $900 million (a 2.1:1 ratio). But because this case was tried in the plaintiff-friendly Missouri courts, J&J's punitive damages were $715.9 million (an 11.5:1 ratio), and JJCI's punitive damages were $900 million (a 2.1:1 ratio). The lower-court split means that Petitioners were subject to *over $1 billion* in additional liability. Permitting this kind of disparity—and subjecting defendants to this kind of ten-figure unpredictability—violates due process.

B. The State And Federal Courts Are Divided Over How To Calculate The Ratio Of Punitive To Compensatory Damages.

This case also presents a straightforward split with the Missouri Supreme Court on one side and the Eighth Circuit and Texas Supreme Court on the other over how to calculate the ratio of punitive to compensatory damages in cases involving joint-and-several liability. This issue, while seemingly technical, has a dramatic impact: The Missouri Supreme Court's approach halves the ratio where two defendants are jointly and severally liable, permitting awards exceeding a 10:1 ratio and increasing the damages here by at least $350 million.

Joint and several liability measures the harm that defendants *collectively* cause. *See Honeycutt* v. *United States*, 137 S. Ct. 1626, 1631 (2017). Punitive damages, however, are assessed individually. To determine the ratio of punitive to compensatory damages for each defendant, the Missouri Supreme Court assumes the legal impossibility that each defendant will pay the *entire* joint-and-several compensatory award. *Contra id.* ("[T]he plaintiff" can "recover only once for the full amount.").

In *Lewellen* v. *Franklin*, 441 S.W.3d 136 (Mo. 2014), for example, two defendants were jointly and severally liable for $25,000 in compensatory damages. The Missouri Supreme Court assumed that each defendant would pay the full $25,000 and calculated the ratios as 40:1 and 22:1, respectively. *See id.* at 147. If the court had assumed that each defendant would pay half the compensatory award, it would have calculated the ratios as 80:1 and 44:1. The Missouri Supreme Court's approach meant it did not have to

justify the true 80:1 and 44:1 ratios—or reduce the punitive damages to a ratio that comports with due process. The Missouri Court of Appeals applied the same method here, citing *Lewellen*. *See* Pet. App. 99a-100a n.27.

The Eighth Circuit has rejected that approach. It holds that "divid[ing] each individual punitive damages award by the entire actual damages award * * * assumes an impossibility"—that "each defendant will ultimately pay the full compensatory damages award." *Grabinski* v. *Blue Springs Ford Sales, Inc.*, 203 F.3d 1024, 1026 (8th Cir. 2000). The Eighth Circuit accordingly determines each defendant's share of the compensatory damages before calculating the punitive-to-compensatory ratio. *See id.*

The Texas Supreme Court agrees. It holds 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); *see also Olson* v. *Brenntag N. Am., Inc.*, 132 N.Y.S.3d 741 (N.Y. Sup. Ct. 2020) (Table) (restating *Grabinski*'s concern that dividing individual punitive awards by the total joint-and-several compensatory award "is logically impossible" and remitting a punitive-damages award from a 12:1 ratio to a 7:1 ratio in a talc case against Petitioners).

Applying the Eighth Circuit and Texas Supreme Court's approach here results in very different ratios. J&J would be liable for $715 million in punitive damages and $62.5 million in compensatory damages—half of the joint-and-several compensatory award—for a ratio of 11.5:1. JJCI would be liable for $900 million in punitive damages and $437.5 million in compensatory damages—$375 million in individual damages

plus $62.5 million of the joint-and-several portion of the compensatory award—for a ratio of 2.1:1.

Those revised ratios would lead to a revised result. The Missouri Court of Appeals emphasized—quoting *State Farm*—that "[f]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" in *any* case, let alone one with such substantial damages. Pet. App. 99a. If the court had properly calculated the ratios, and had reduced the ratio for J&J to 5.7:1—half of the 11.5:1 ratio as properly calculated—it would have cut J&J's punitive-damages award by $350 million. This Court's intervention is needed to address this recurring issue, which is important to defendants generally and to J&J in this case.

C. The Decision Below Is Divorced From This Court's Precedent And Long-Standing Due-Process Principles.

The decision below is wrong, for three reasons.

First, "[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996). That is why *State Farm* held that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" "[w]hen compensatory damages are substantial." 538 U.S. at 425.

But *State Farm* did not "reduce[ ] the inconsistency or unpredictability of punitive damages awards." Laura J. Hines & N. William Hines, *Constitutional*

Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma, 66 Hastings L.J. 1257, 1257, 1284 (2015) (surveying 507 punitive-damages awards handed down since *State Farm*). And so this Court drew a firmer line in *Exxon*, mandating a 1:1 ratio in a maritime case involving a $500 million compensatory award. *See* 554 U.S. at 514-515. That line should apply equally here.

To be sure, *Exxon* was a maritime case. But *Exxon*'s concerns about predictability and fairness are not unique to maritime law. *See* Jill Wieber Lens, *Procedural Due Process and Predictable Punitive Damage Awards*, 2012 B.Y.U. L. Rev. 1, 25 (2012). *Exxon* identified "[t]he real problem" as "the stark unpredictability of punitive damage awards" in general. *Id.* at 7 (quoting *Exxon*, 554 U.S. at 499). And the Court's solution—a 1:1 ratio—was based on the median ratio of *state* court awards, not federal maritime cases. *See id.* at 25-26. The due-process problem with inconsistent punitive awards is the same within and without maritime law; so should be the solution.

This unpredictability is magnified in the mass-tort context, where plaintiffs may file thousands of cases and juries may return verdicts ranging from a complete defense victory, only modest compensatory damages, or—as here—billions in punitives. *See, e.g.*, *Swann*, No. 1422-CC09326-01 (defense verdict); *Giannecchini* v. *Johnson & Johnson*, No. 1422-CC9012-02 (Mo. Cir. Ct. Nov. 16, 2016) ($2.6 million compensatory award to a single plaintiff), *vacated on appeal for lack of personal jurisdiction*, No. ED105443 (Mo. Ct. App. June 18, 2019); Pet. App. 100a ($500 million compensatory award to 20 plaintiffs). Permitting unlimited punitive damages in every one of these

cases makes it impossible for defendants to predict their potential liability. And it incentivizes plaintiffs' lawyers to file thousands of lawsuits in the hopes of hitting the punitives jackpot. The mass-tort context calls out for the Court to enforce the 1:1 ratio *State Farm* identified and *Exxon* adopted.

Second, large punitive awards create a significant risk that the jury is punishing hypothetical harm to non-parties—as was almost certainly the case here. *See supra* p. 9 (juror's explanation that award was meant to divest Petitioners of all profits from talc sales nationwide for past 40 years). The "increasingly common phenomenon" illustrated by this case, where individual punitive awards "are in essence assessed on a putative 'classwide' basis for harms actually or potentially inflicted upon numerous individuals," Catherine M. Sharkey, *Punitive Damages As Societal Damages*, 113 Yale L.J. 347, 352 (2003), poses significant due-process concerns requiring this Court's attention.

This problem is particularly acute in mass torts that produce multiple punitive awards. Judge Friendly recognized that punitive damages—as first conceived—were typically awarded where "the number of plaintiffs will be few" and "they will join, or can be forced to join, in a single trial." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838-839 (2d Cir. 1967). A single jury would thus consider the reprehensibility of the defendant's conduct and assess whether (and how much) punitive damages were necessary to meet the State's punishment and deterrence goals. *See Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 19 (1991). Here, by contrast, Petitioners face thousands of lawsuits and potentially thousands of juries, creating a

real risk each jury will "double count" damages and punish Petitioners for all of their allegedly wrongful conduct in each one of thousands of cases. *State Farm*, 538 U.S. at 423 (quoting *Gore*, 517 U.S. at 593 (Breyer, J., concurring)). Yet the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties" because a defendant "has no opportunity to defend against" such a charge. *Philip Morris USA* v. *Williams*, 549 U.S. 346, 353 (2007).

That principle has a long historical pedigree. As the South Carolina Supreme Court explained in 1901, "punitive damages go to the plaintiff, not as a fine or penalty for a public wrong, but in vindication of a private right which has been willfully invaded." *Watts* v. *S. Bound R.R. Co.*, 38 S.E. 240, 242 (S.C. 1901). Other early American cases similarly conceptualized punitive awards "as punishment only for the legal wrong that is actually before the court." Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages As Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 622-629 (2003). Enforcing a 1:1 ratio of punitive to compensatory damages lessens the risk that a jury will punish the defendant for harm to non-parties and will tether punitive damages to their traditional aims.

Third, punitive awards that are many multiples of compensatory damages can harm plaintiffs, too. Large awards divert resources that might otherwise be available for future plaintiffs seeking compensatory damages. That risk is hardly theoretical; asbestos litigation has bankrupted over 100 companies, leaving them unable to compensate plaintiffs whose injuries come later in time. *See* U.S. Gov't

Accountability Off., GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 2 (2011). And the risk is greater when plaintiffs allege injuries, like those here, that may not manifest until decades after an alleged exposure. Imposing a 1:1 ratio hedges against these harmful-to-plaintiffs possibilities.

Just like *State Farm*, "this case is neither close nor difficult." 538 U.S. at 418. But it *is* immensely important—requiring Petitioners to pay over a billion dollars in punitive damages to just 20 plaintiffs, and setting a dangerous standard for mass-tort litigation across the country. The Court should grant certiorari.

III. MISSOURI'S EXPANSIVE PERSONAL-JURISDICTION THEORY RAISES THE SAME QUESTION PRESENTED IN *FORD*.

Finally, the Missouri Court of Appeals held that Pharma Tech affixing a label JJCI designed in New Jersey to bottles filled in Missouri was sufficient for Plaintiffs' claims to arise out of or relate to JJCI's supposed Missouri contacts. According to the court below, JJCI's contract with Pharma Tech was "a direct link in the production chain of Shimmer's eventual sale to the public." Pet. App. 35a. That holding broke from the federal courts of appeals that require the defendant's in-state conduct be a proximate cause, not just a but-for cause, of a plaintiff's claims. *See, e.g.*, *Harlow* v. *Children's Hosp.*, 432 F.3d 50, 61 (1st Cir. 2005); *Beydoun* v. *Wataniya Rests. Holding, Q.S.C.*, 768 F.3d 499, 507-508 (6th Cir. 2004). And it presents the same question this Court is considering in *Ford*—but on facts that more compellingly demonstrate the error in the bare-causation approach.

Under a proximate-cause standard—or indeed, any notion of relatedness beyond a bare but-for test—the "operative facts" of the non-Missouri plaintiffs' claims did not arise out of or relate to Pharma Tech's bottling conduct. *Beydoun*, 768 F.3d at 507 (citation omitted). Plaintiffs assert that talc contains asbestos and asbestos causes cancer. To the extent plaintiffs claim that the talc in Shimmer should have been mined differently, the mining did not occur in Missouri. To the extent plaintiffs claim that the talc in Shimmer should have been tested differently, the testing did not occur in Missouri. And to the extent plaintiffs claim that JJCI should have warned of talc's supposed dangers, Shimmer's label was designed in New Jersey, not Missouri. *See* Pet. App. 3a, 33a. Pharma Tech is a third party that had nothing to do with these activities and was not even named in this lawsuit. Plaintiffs' suit did not challenge any decision or substantive action Pharma Tech took in Missouri—much less a decision or action meeting the "arise out of or relate to" requirement.

This Court granted review in *Ford* to determine whether a proximate-cause standard, or some other test, applies to the arise-out-of-or-relate-to prong of specific personal jurisdiction. *See* Petition for Writ of Certiorari at i, *Ford*, No. 19-368 (petition granted Jan. 17, 2020). This petition presents the same question, *on even starker facts*. The Missouri court found personal jurisdiction over the claims of plaintiffs who did not reside in Missouri, did not purchase or use Petitioners' products in Missouri, did not rely on any Missouri advertising in making their purchasing decisions, and were not injured in Missouri. The only connection to Missouri is a *third party* that bottled Shimmer in Missouri—and the operative facts of the non-

Missouri plaintiffs' claims do not arise from that activity. It violated JJCI's due-process rights to subject it "to the coercive power of a State" with no "legitimate interest in the claims in question." *Bristol-Myers Squibb*, 137 S. Ct. at 1780. The Court should therefore at the very least hold the petition and then consider granting, vacating, and remanding in light of *Ford*.

IV. THIS PETITION IS AN IDEAL VEHICLE TO CONSIDER THESE IMPORTANT, INTERLOCKING DUE-PROCESS QUESTIONS.

This case is a stark illustration of the problems posed by mass litigation—and the reasons why the Court should grant review.

The jury's award was one of the largest ever in a product-liability case[4]—and the largest jury verdict in the country in 2018.[5] The enormous "economic interests at stake," both for Petitioners and for other manufacturers facing mass-tort claims, is a significant reason to grant certiorari. *Mobil Oil Expl. & Producing Se., Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 214-215 (1991); *see* Stephen M. Shapiro et al., *Supreme Court Practice* § 4.13, at 269-270 (10th ed. 2013).

Moreover, this case is merely one of *thousands* filed across the country. The questions presented here will continue to recur in nearly identical suits both inside and outside Missouri. Each will pose similar

---

[4] *See* Margaret Cronin Fisk, *Why Johnson & Johnson May Not Have to Pay Its $4.7 Billion Court Verdict*, Bloomberg (Jan. 9, 2019), https://bloom.bg/3iQmPEl.

[5] *See Top 100 Verdicts of 2018*, Nat'l L.J., June 2019, at 32, *available at* https://bit.ly/2YfEThA.

questions about personal jurisdiction, consolidation, and punitive damages; indeed, plaintiffs' lawyers' success here has emboldened them to try the same tactics again. *See, e.g.*, *Forrest*, No. 1522-CC00419-02 (Mo. Cir. Ct.) (multi-plaintiff trial). The "enormous potential liability" facing Petitioners "is a strong factor in deciding whether to grant certiorari." *Fidelity Fed. Bank & Tr.* v. *Kehoe*, 547 U.S. 1051, 1051 (2006) (Scalia, J., concurring in denial of certiorari).

The questions posed here are also broadly applicable. Whether dozens of tort plaintiffs may proceed to trial before the same jury—and under what circumstances—is a crucial question for both state and federal courts, which must ensure that multi-plaintiff trials comply with due process. Whether a punitive award may far exceed a substantial compensatory award is a significant constitutional question that courts will continue to face. And whether personal jurisdiction exists when a defendant's in-state actions have no substantive connection to a plaintiff's claims is an issue this Court has already granted certiorari to consider.

This petition is an ideal vehicle to address these important issues. All three questions were raised and passed on below by two courts, and this Court routinely grants review of cases arising from intermediate state courts. *E.g.*, *Cyan, Inc.* v. *Beaver Cty. Emps. Ret. Fund*, 137 S. Ct. 2325 (2017); *Murr* v. *Wisconsin*, 136 S. Ct. 890 (2017). And all three questions are outcome determinative, requiring dismissal, retrial, or remittitur.

In short, if any case merits review, this is it. The Court has repeatedly sought to curb abuses in class-

action litigation; it should do the same for mass-tort litigation. It should grant certiorari.

CONCLUSION

The petition should be granted. Alternatively, the petition should be held for *Ford* and disposed of as appropriate in light of the Court's decision.

Respectfully submitted,

E. JOSHUA ROSENKRANZ
PETER A. BICKS
LISA T. SIMPSON
NAOMI J. SCOTTEN
EDMUND HIRSCHFELD
ORRICK, HERRINGTON & SUTCLIFFE LLP
51 West 52nd Street
New York, NY 10019

ROBERT M. LOEB
ROBBIE MANHAS
ORRICK, HERRINGTON & SUTCLIFFE LLP
1152 15th Street, N.W.
Washington, D.C. 20005

NEAL KUMAR KATYAL
Counsel of Record
SEAN MAROTTA
KATHERINE B. WELLINGTON
BENJAMIN A. FIELD
HOGAN LOVELLS US LLP
555 Thirteenth Street, N.W.
Washington, D.C. 20004
(202) 637-5600
neal.katyal@hoganlovells.com

KRISTINA ALEKSEYEVA
HOGAN LOVELLS US LLP
390 Madison Avenue
New York, NY 10017

Counsel for Petitioners

MARCH 2021