No. 20-1223

In The
Supreme Court of the United States

JOHNSON & JOHNSON and
JOHNSON & JOHNSON CONSUMER INC.,

Petitioners,

v.

GAIL L. INGHAM, *et al.*,

Respondents.

**On Petition For A Writ Of Certiorari
To The Missouri Court Of Appeals
For The Eastern District**

AMICUS CURIAE BRIEF OF THE FEDERATION OF DEFENSE & CORPORATE COUNSEL IN SUPPORT OF PETITIONERS

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STATEMENT OF INTEREST[1]

The Federation of Defense & Corporate Counsel (FDCC) is a not-for-profit corporation with national and international membership of 1,477 defense and corporate counsel working in private practice or as in-house counsel, and as insurance claims representatives. FDCC members practice in the trial and appellate courts of the United States and of all 50 states. The FDCC's efforts center on affording unfettered access to justice for all while also working to protect and advance the rule of law. Since 1936, its members have established a consistent and strong legacy of representing the interests of civil litigants, including publicly and privately owned businesses, public entities, and individual defendants. The FDCC seeks to assist courts in addressing issues of importance to its membership that concern the fair and predictable administration of justice.

A touchstone of a fair judicial system is one with predictable procedural safeguards to all litigants no matter the court, the state or the judge. This case presents issues of vital interest concerning: (1) the consolidation of the product liability claims of a multitude of personal injury plaintiffs from a variety of states, tried jointly in a single state court action; (2) the

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[1] Pursuant to Rule 37, *Amicus Curiae* certifies that no counsel for a party authored this brief in whole or in part and that no person or entity, other than *amicus*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief. The parties on both sides were timely notified and have given blanket consent to the filing of *amicus* briefs.

predictability of punitive damages awards; and (3) a state court's exercise of personal jurisdiction over claims asserted against an out-of-state defendant, by non-resident plaintiffs, whose claims did not arise out of or relate to in-state marketing, sales or related activities of the defendant.

Given the experience of its members across the United States with similar issues on an annual basis, the FDCC can provide practical insights into the issues of due process and the right to a fair trial associated with the conduct of mass trials; the application of appropriate and consistent standards for the imposition of punitive damages; and the application of appropriate limits on personal jurisdiction after *Bristol-Myers Squibb*. Through its broad membership and nationwide perspective, the FDCC is well-positioned to address the important legal, constitutional and public policy questions posed in this case.

Amicus curiae FDCC supports the positions of Petitioners J&J and JJCI, and urges the Court to grant the petition. In the alternative on the personal jurisdiction issue, the Court should grant, vacate and remand in light of *Ford Motor Co. v. Montana, Eighth Judicial Dist. Ct.*, 2021 WL 1132515 (U.S., Mar. 25, 2021).

SUMMARY OF ARGUMENT

The Missouri Court of Appeals' affirmance of a judgment in excess of $2 billion warrants this Court's review for three due process violations.

First, consolidating multiple distinct plaintiffs' product liability claims into a single trial unduly prejudices defendants to the point of denying them a fair trial. Empirical studies confirm this. The temptation to clear trial dockets severely backlogged by the novel coronavirus pandemic will be strong, yet existing standards do not suffice to ensure fair trials – as this case vividly demonstrates. This Court's correction of the due process failures here is essential.

Likewise, the punitive awards affirmed below demonstrate the damage wrought by the lack of clear and uniform standards. The unpredictable nature of punitive awards, last addressed by this Court eighteen years ago but as yet unresolved, demands resolution.

Finally, the Missouri Court's imposition of personal jurisdiction over JJCI because of its contract with a non-party warrants a grant, vacatur and remand in light of this Court's decision in *Ford Motor Co. v. Montana, Eighth Judicial Dist. Ct.*, 2021 WL 1132515 (U.S., Mar. 25, 2021).

ARGUMENT

I. TRIAL CONSOLIDATION REQUIRES APPROPRIATE PROCEDURAL SAFEGUARDS.

"Of all the discretionary rulings that a judge can make concerning the course of a trial, few are as pervasively prejudicial to a product liability defendant as deciding to consolidate cases if they bear little similarity other than that the same product resulted in an alleged injury in each case." James M. Beck, "Little in Common," 53 No. 9 *DRI For the Defense* 28, 29 (Sept. 2011). As set forth below, this case exemplifies many of the ills identified by commentators and courts as resulting from improper consolidation. Further, trial courts employ consolidation as a way to expedite proceedings – and courts nationwide now have pandemic-driven trial backlogs that will induce both fair and unfair efforts to expedite trials for years to come. This Court should take this timely opportunity to address the constitutional challenges at issue and to ensure trial courts properly balance convenience and efficiency against the possibility of prejudice to one or more of the parties.

A. Judicial Economy is Insufficient Justification for Consolidation.

As courts across the country emerge from COVID-19 shutdowns, the temptation to use consolidation as a means to clear backlogged trial dockets will grow. However, the "systematic urge to aggregate litigation must not be allowed to trump our dedication to individual

justice, and we must take care that each individual plaintiff's – and defendant's – cause not be lost in the shadow of a towering mass litigation." *In re: Repetitive Stress Injury Litigation*, 11 F.3d 368, 373 (2d Cir. 1993) (citation omitted). This is because "[t]he benefits of efficiency can never be purchased at the cost of fairness." *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993). Common evidence is the touchstone of beneficial consolidation, and fairness is lost where a court permits the introduction of dissimilar evidence or consolidates dissimilar injury claims – such as a death case from cancer and the claims of a living plaintiff without cancer. Similarly, if one plaintiff's source of exposure is the workplace and another plaintiff's exposure occurred in the home, consolidation is not beneficial, because the dissimilar evidence required for these claims erodes *both* the claimed efficiency of consolidation *and* the fairness that our courts require.

The Manual for Complex Litigation, §11.631 (4th ed.), emphasizes the point when instructing the Federal Judiciary: "Whether consolidation is permissible or desirable depends largely on the amount of common evidence among the cases. Unless common evidence predominates, consolidated trials may confuse the jury rather than promote efficiency." Rather, when determining whether or not a fair trial must yield to convenience and economy, a court must consider:

> [W]hether the specific risks of prejudice and possible confusion [are] overborne by the risk of inconsistent adjudications of common

> factual and legal issues, the burden on parties, witnesses and available judicial resources posed by multiple lawsuits, the length of time required to conclude multiple suits as against a single one and the relative expense to all concerned of the single trial, multiple trial alternatives.

Hendrix v. Raybestos–Manhattan, Inc., 776 F.2d 1492, 1495 (11th Cir. 1985). Here, the record is devoid of any consideration of any factors that permit a court to weigh efficiency versus a fair trial when considering whether to consolidate. In fact, the cases consolidated by the Missouri court here were so dissimilar that the result of trying them together was exactly what empirical research on the subject observed and predicted.

B. This Record Exemplifies How Consolidation of Dissimilar Cases Can Lead to Inconsistent and Prejudicial Results.

The cases consolidated in Missouri – comprised of 22 user plaintiffs and 8 spouse plaintiffs – were far too distinct to try together. The differences included:

1. Different Talc Products allegedly used
2. Different levels of exposure and intensity
3. Different usage periods
4. Exposure and use in different states
5. Different risk factors among plaintiffs
6. Different cancer histories

These cases never could have been filed together, yet they were consolidated and the jury heard only a generic case devoid of plaintiff-specific evidence. Predictably identical verdicts were returned for each plaintiff, despite the myriad of differences in their circumstances. Such mass consolidation is a spectacular due process failure. And it makes courts that impose no serious consolidation standards attractive fora for mass tort plaintiffs.

Courtroom experience with cosmetic talc cases filed against J&J and JJCI is entirely consistent with research findings discussed in more detail below. Petitioners' application to the Court of Appeals in support of transfer revealed that out of 32 cosmetic talc cases tried without consolidation against J&J and JJCI since 2013 – all alleging that defendants' talc powder caused ovarian cancer or mesothelioma – over half resulted in either a defense verdict or a mistrial. These results suggest the virtual impossibility that all 22 cases tried together here would have resulted in a plaintiff's verdict had they been tried separately. But in the Missouri courtroom, aggregation and repetition of the same allegations created an *aura* of truth.

Worse, the trial court here purported to apply the laws of 12 different states. The jury instructions took over 5 hours to read – a torrent of complex information nearly unendurable and likely indecipherable for most people. In the end, despite the divergent facts underlying each plaintiff's claim, the jury awarded identical amounts to every plaintiff. Consistent with the research cited below, the conclusion seems inescapable

that the equal damages awarded by this jury across the board "amounted to the jury throwing up its hands" at the prospect of sorting out the individual plaintiffs' claims. *Malcolm v. Natl. Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993).

This conclusion, that consolidation of divergent claims deprives defendants of their due process right to a fair jury trial, is supported by empirical evidence.

C. Empirical Data Demonstrates That Consolidated Trials Unfairly Prejudice Defendants.

Research on the effects of consolidation demonstrates that consolidated trials of multiple plaintiffs result in jury confusion and prejudice to defendants. In one study, "135 jury-eligible adults were randomly assigned to one of five aggregations of plaintiffs involving one, two, four, six and ten claimants. Jurors were shown a five to six hour trial involving claims of different repetitive stress injuries by each plaintiff." Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damages Awards and Cognitive Processing of Evidence*, 865 J. Applied Psy. 909 (2000). The study showed that "jurors' ability to understand the evidence was significantly affected by the number of plaintiffs in the trial" in a variety of ways. *Id.* at 915. The authors concluded that "an increase in information load had a significant impact on verdicts and information processing," which made it more likely

that the plaintiffs would prevail. *Id.* at 916. The study also found that damages awarded were higher in the consolidated trials than in the individual trials. "The jury may simply resolve the confusion by considering all the evidence to pertain to all the plaintiffs' claims, even when it is relevant to only one plaintiff's case." *Bailey v. N. Tr. Co*., 196 F.R.D. 513, 518 (N.D. Ill. 2000).

Similarly, other research demonstrates that consolidating trials of multiple plaintiffs substantially increases the likelihood of plaintiff-favorable verdicts. One recent review found "data suggests that consolidated trial settings created administrative and jury biases that result in artificially inflated frequency of plaintiff's verdicts at abnormally large amounts." Peggy Ableman, et al., *The Consolidation Effect: New York City Asbestos Verdicts, Due Process and Judicial Efficiency*, 14 Mealey's Asbestos Bankr. Rep. 1 (April 2015). The author found juries were significantly more likely to render verdicts in favor of plaintiffs in consolidated trials than in individual trials, and further determined consolidated trial verdicts were *substantially* higher (250% higher per plaintiff than in individual trials). *Id.* at 2. *See also* Patrick M. Hanlon & Anne Smetak, *Asbestos Changes*, 62 NYU Ann. Surv. Am. L. 525, 574 (2007) ("finding that consolidated trials significantly improve outcomes for plaintiffs."); Michelle J. White, *Why the Asbestos Genie Won't Stay in the Bankruptcy Bottle*, 70 U. Cin. L. Rev. 1319, 1337 (2002) (concluding that consolidated trials notably increase plaintiffs' chance of winning versus individual trials on the same evidence).

A common retort to concerns over consolidation is that appropriate jury instructions can cure any potential problems. The folly of that argument is front and center here, as five hours of jury instructions did nothing to cure the unfairness that consolidation wrought; instead, it was exacerbated. But even in less extreme consolidated trials, the argument is a non-sequitur. It's a bit like saying an appellate court should be able to digest 5 briefs from each litigant if we just make enough rules – but instead of experienced jurists, we will ask this of everyday citizens.

Coupled with the often complicated scientific evidence in product liability cases like the ones here, consolidation makes a hard job for the jury even harder.

The verdict in this lawsuit was emblematic of what the empirical research on consolidated trials predicts. The jury was unable to distinguish among the plaintiffs and did not try, instead rendering identical compensatory and punitive damages awards despite the plaintiffs' vast differences in age, medical history, exposure, injury and condition. Despite having been instructed to treat each plaintiff separately, the jury did what Professors Horowitz & Bordens identified as "chunking" of individual claims, which results in "similar awards for all members of the group." Horowitz & Bordens, *supra*, 865 J. Applied Psy. at 916.

Consolidating multiple plaintiffs into a single case deprived J&J and JJCI of a fair trial. Consolidated trials visit similar unfair prejudice on product manufacturers nationwide.

II. THIS COURT HAS STAYED SILENT ON PUNITIVE DAMAGES TOO LONG.

As evidenced by the history of punitive damages precedent from this Court, state court punitive damage awards are particularly vulnerable to due process violations. Chief among those violations is the persistent unpredictability of civil punishment across states. This Court has not addressed this problem in the eighteen years since *State Farm v. Campbell*, 538 U.S. 408 (2003). It should do so here, particularly in light of Johnson and Johnson's demonstration of the different treatment these punitive awards would have had from state to state, or circuit to circuit.

In the decade preceding *State Farm*, this Court began to acknowledge the effect that punitive damages were having on civil litigation in the United States. In *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991), the Court observed that it was incumbent upon courts to control states' power to impose discretionary punishment through jury verdicts. "In *Haslip*, in upholding a punitive damages award [the court] concluded that an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety." *State Farm*, 538 U.S. at 425, citing *Haslip*, 499 U.S. at 23-24. Two years later in *TXO Prod. Corp. v. Alliance Res. Corp*., 509 U.S. 443 (1993), this Court held that the substantive due process guarantee of the due process clause prohibits the award of grossly excessive punitive damages awards. As the Court explained in *BMW v. Gore*, 517 U.S. 559 (1996), the due process clause requires 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." 517 U.S. at 574.

Gore was followed seven years later by *State Farm*. Reviewing a Utah jury verdict awarding the plaintiff $2.6 million in compensatory damages and $145 million in punitive damages – roughly a 56:1 ratio – this Court held that the punitive damages award violated the due process clause. In doing so, the Court reiterated its "concerns over the imprecise manner in which punitive damages systems are administered." 538 U.S. at 417.

Thus, in addition to the *Gore* "guideposts," *State Farm* supplied some clearer limits on punitive damages:

- Where compensatory damages are substantial in the context of a particular case, punitive damages should not exceed that amount;
- Higher awards are only appropriate in cases where the plaintiff has *not* received a substantial award of compensatory damages and/or the defendant's conduct is extremely reprehensible compared with that in most punitive-damages cases (a conclusion that courts should, by definition, rarely reach);
- The evidence supporting punitive damages must be specific to the injury suffered by the complaining plaintiff only (not others); and

- A jury may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred.

Nevertheless, the imprecision lamented in *State Farm* lives on, as the Petition demonstrates. Worse, while the Petition rightly focuses on published case law illustrating splits among state and federal courts on punitive damages limitations, FDCC members' experience is that state courts often affirm in *unpublished decisions* punitive damages awards that could never survive in the sunlight. Considering the near-impossibility of gaining state high-court review in such situations, there is no practical remedy for such lawlessness – other than holdings from this Court so clear that lower courts cannot hide from them.

The guideposts and limitations established in *Gore* and *State Farm* for evaluating the constitutionality of punitive damages *may* have kept "the stark unpredictability of punitive awards" (*Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2003)) from getting worse. But nearly 20 years later, our judicial system is no *closer* to the constitutional goal of making civil punishment reasonably predictable. It is time, FDCC respectfully submits, for this Court to establish more specific constraints, to finally reach that goal.

III. THE PERSONAL JURISDICTION QUESTION PRESENTED BY THIS CASE AND THE *FORD* DECISION.

The Missouri Court of Appeals' finding of personal jurisdiction over JJCI for purposes of 17 *non-Missouri plaintiffs'* claims was based on a Missouri contractor packaging a product called Shimmer, and attaching a label designed by JCCI in New Jersey. None of the plaintiffs' claims here arose out of or related to Pharma Tech's conduct, under any meaningful test of relatedness. And the "bare fact that [a defendant] contracted with [an instate] distributor is not enough to establish personal jurisdiction in the state." *Bristol-Myers Squibb Co. v. Superior Court of California*, 137 S.Ct. 1773, 1783 (2017).

This continues to be true after *Ford Motor Co. v. Montana Eighth Judicial District Court* (U.S., Mar. 25, 2021, No. 19-368), 2021 WL 1132515. The FDCC agrees with Petitioners that this Court should, at minimum, grant certiorari on the personal jurisdiction holding below, vacate it, and remand in light of *Ford*.

CONCLUSION

For all the foregoing reasons, the FDCC urges this Court to grant the petition, for plenary review on the trial-consolidation and punitive damages issues. At minimum, the Court should grant, vacate and remand on the personal jurisdiction issue.

Respectfully submitted,

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