No. 20-1223

IN THE

Supreme Court of the United States

JOHNSON & JOHNSON
and JOHNSON & JOHNSON CONSUMER, INC.,

Petitioners,

v.

GAIL L. INGHAM, *et al.*,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE MISSOURI COURT OF APPEALS FOR THE EASTERN DISTRICT

BRIEF OF WASHINGTON LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

CORY L. ANDREWS
JOHN M. MASSLON II
WASHINGTON LEGAL FOUNDATION
2009 Massachusetts Avenue, NW
Washington, DC 20036
(202) 588-0302

THEODORE E. YALE
DECHERT LLP
2929 Arch Street
Philadelphia, Pennsylvania 19104
(215) 994-4000

DOUGLAS W. DUNHAM
Counsel of Record
ELLEN P. QUACKENBOS
MATTHEW P. STEINBERG
DECHERT LLP
1095 Avenue of the Americas
New York, New York 10036
(212) 698-3500
douglas.dunham@dechert.com

Counsel for Amicus Curiae

303622

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTION PRESENTED

Amicus curiae addresses only the first half of the second question presented by the Petitioners:

> Whether a punitive-damages award violates due process when it far exceeds a substantial compensatory-damages award.

TABLE OF CONTENTS

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

INTEREST OF *AMICUS CURIAE* 1

SUMMARY OF ARGUMENT 2

REASONS FOR GRANTING CERTIORARI 5

I. REVIEW IS WARRANTED TO PROVIDE MUCH-NEEDED GUIDANCE TO THE LOWER COURTS ON CONSTITUTIONALLY EXCESSIVE PUNITIVE DAMAGES AWARDS. 5

II. A CLEAR 1:1 CAP ON PUNITIVE DAMAGES WHEN COMPENSATORY DAMAGES ARE SUBSTANTIAL WOULD INHIBIT MULTIPLICATIVE PUNITIVE AWARDS AND PROTECT DUE PROCESS RIGHTS. 10

A. The Due Process Clause forbids punitive damages based on harm to nonparties. 12

B. The jury below imposed excessive punitive damages based on harm to nonparties, in violation of the Due Process Clause. 13

III. THE COURT SHOULD SEIZE THIS OPPORTUNITY TO REIN IN PUNITIVE DAMAGES AND ENSURE THAT FUTURE PLAINTIFFS ARE NOT DENIED FULL COMPENSATION. 17

CONCLUSION 20

TABLE OF AUTHORITIES

CASES

BMW of N. Am., Inc. v. Gore,
517 U.S. 559 (1996) 1, 5, 10

Boerner v. Brown & Williamson Tobacco Co.,
394 F.3d 594 (8th Cir. 2005) 5

Cooper Indus., Inc. v. Leatherman Tool Group, Inc.,
532 U.S. 424 (2001) 1

Cote v. Philip Morris USA, Inc.,
985 F.3d 840 (11th Cir. 2021) 11

Exxon Shipping Co. v. Baker,
554 U.S. 471 (2008) 5

Honda Motor Co. v. Oberg,
512 U.S. 415 (1994) 1, 11

In re Actos (Pioglitazone) Prod. Liab. Litig.,
2014 WL 5461859 (W.D. La. Oct. 27, 2014) 9

Ingham v. Johnson & Johnson,
No. ED 107476 (Mo. Ct. App. June 23, 2020) 9

Jurinko v. Med. Protective Co.,
305 F. App'x. 13 (3d Cir. 2008) 5

Lompe v. Sunridge Partners, LLC,
818 F.3d 1041 (10th Cir. 2016) 5

Manor Care, Inc. v. Douglas,
763 S.E.2d 73 (W. Va. 2014) 10

Méndez-Matos v. Mun. of Guaynabo,
557 F.3d 36 (1st Cir. 2009)..... 5

Miller v. Equifax Info. Servs., LLC,
2014 WL 2123560 (D. Or. May 20,
2014) 10

Morgan v. N.Y. Life Ins. Co.,
559 F.3d 425 (6th Cir. 2009) 5

Olson v. Brenntag N. Am., Inc.,
2020 WL 6603580 (N.Y. Sup. Ct.
Nov. 11, 2020)..... 7, 8, 9, 12

Philip Morris USA v. Williams,
549 U.S. 346 (2007) ..... *passim*

Racich v. Celotex Corp.,
887 F.2d 393 (2d Cir. 1989)..... 15

Roby v. McKesson Corp.,
219 P.3d 749 (Cal. 2009) 6

Roginsky v. Richardson-Merrell, Inc.,
378 F.2d 832 (2d Cir. 1967)..... 18

Roth v. Farner-Bocken Co.,
667 N.W.2d 651 (S.D. 2003) 6

Saccameno v. U.S. Bank Nat'l Ass'n,
943 F.3d 1071 (7th Cir. 2019), *cert. denied sub nom. Saccameno v. Ocwen Loan Servicing, LLC*, 140 S. Ct. 2674 (2020) 2, 5, 7

State Farm Mut. Auto. Ins. Co. v. Campbell,
538 U.S. 408 (2003) ..... *passim*

Weinstein v. Prudential Prop. & Cas. Ins. Co.,
233 P.3d 1221 (Idaho 2010)..... 6

Williams v. First Advantage LNS Screening Sols., Inc.,
947 F.3d 735 (11th Cir. 2020) 6

OTHER AUTHORITIES

Jef Feeley *et al.*, *Imerys Talc Units File Bankruptcy as Cancer-Suit Risk Soars (2)*, Bloomberg Law (Feb. 13, 2019), *available at* https://perma.cc/7UGC-45PD..... 16

S. Elizabeth Gibson, *Judicial Management of Mass Tort Bankruptcy Cases*, Fed. Judicial Ctr. (2005) 16

John R. Graham *et al.*, *The Labor Impact of Corporate Bankruptcy*, National Bureau of Economic Research (2019) 16

Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 Va. L. Rev. 1721 (2002) 16, 17

Hironari Momioka, *Punitive Damages Revisited: A Statistical Analysis of How Federal Circuit Courts Decide the Constitutionality of Such Awards*, 65 Clev. St. L. Rev. 379 (2017) 6

Samir D. Parikh, *The New Mass Torts Bargain* (July 12, 2020), *available at* https://ssrn.com/abstract=3649611 17

Eric Sagonowsky, *Johnson & Johnson Tots up a Potential $4B Talc Bill as Tens of Thousands of Lawsuits Pile Up*, Fierce Pharma (Feb. 23, 2021), *available at* https://perma.cc/P4Z8-BTYT 15

Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control*, 52 Fordham L. Rev. 37 (1983) 18

Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 349 (2003) 17

Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. Davis L. Rev. 1613 (2008) 16

Andrew J. Wistrich *et al.*, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Penn. L. Rev. 1251 (2005) 19

U.S. Gov't Accountability Off., GAO-11-819, Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts 2 (2011) 18

INTEREST OF *AMICUS CURIAE*[*]

Washington Legal Foundation is a nonprofit, public-interest law firm and policy center with supporters nationwide. WLF promotes free enterprise, individual rights, limited government, and the rule of law. To that end, WLF regularly appears as *amicus curiae* to address the propriety and permissible size of punitive damages awards. *See, e.g.*, *Philip Morris USA v. Williams*, 549 U.S. 346 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996). WLF also regularly supports litigants' due process right to seek appellate review of excessive or improper punitive damages awards. *See, e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994).

Review is warranted to ensure that lower courts may not pick and choose which of this Court's precedents they will follow. Simply put, the clear refusal of the Missouri courts to stay within this Court's due process limits on punitive damages awards cannot go unchecked. To allow state courts to act in such a cavalier manner would undermine the critical protections the Constitution guarantees to all defendants in civil litigation. It is thus crucial for the

---

[*] Pursuant to Rule 37, no counsel for any party has authored this brief in whole or in part. No person other than *amicus* or its counsel 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.

Court to intervene and remind the Missouri courts that they cannot ignore this Court's decisions in *State Farm* and *Philip Morris*—particularly when the punitive damages awarded are as grossly excessive as those awarded here.

SUMMARY OF ARGUMENT

The Petition raises issues of exceptional importance. While this Court cannot correct every constitutionally excessive punitive damages award, this case offers the Court an ideal opportunity to curb how often such awards occur by establishing a clear 1:1 cap on the ratio of punitive to compensatory damages in instances where compensatory damages are substantial, which is of particular concern in the mass-torts context.

It has been over a decade since this Court last addressed the issue of constitutionally excessive punitive damages. Since then, the due process defects previously identified by this Court—such as a lack of fairness, a lack of consistency, and multiplicative punishment—have only increased in severity. These changes have been fueled by an increase in the size of mass tort actions, coupled with many courts' reluctance to rein in constitutionally excessive punitive damages awards.

To be sure, some courts—such as the Seventh Circuit—have sought to ensure that defendants' due process rights are not violated by excessive punitive damages awards. *See Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1090 (7th Cir. 2019) (holding that a 1:1 ratio is required where compensatory

damages are substantial, in accordance with *State Farm*), *cert. denied sub nom. Saccameno v. Ocwen Loan Servicing, LLC*, 140 S. Ct. 2674 (2020). But other courts of appeals have taken diverging approaches. Standing alone, this inconsistency among the lower federal courts warrants this Court's intervention. And given the added layer of inconsistency among—and even within—state court systems, this Court's review is imperative.

Multiplicative punishment in mass tort cases is of particular concern, as is the related issue of punishing a defendant's conduct toward non-parties. Here, the record reveals that the jury calculated its multi-billion dollar punitive damages award by multiplying Petitioners' annual profits from cosmetic talc by the number of years Petitioners purportedly sold it while knowing it contained asbestos, thereby punishing Petitioners for a whole range of nationwide conduct, not just the harm to the Respondents. In other words, the jury spoke with the "voice of the world" in reaching the multi-billion dollar figure, just as trial counsel for Respondents asked it to do.

But there are over 25,000 plaintiffs left in the world with active lawsuits against Petitioners arising from the same alleged misconduct. And there is nothing to stop them from imploring a jury to award punitive damages of a similarly global scope. This danger is hardly unique to this case; it is a constant threat whenever a subset of plaintiffs seeks punitive damages for far-reaching or long-running conduct allegedly affecting hundreds or thousands of persons

not before the court. This is a recurring pattern in the ever-expanding world of mass torts.

Nor is it only Petitioners' due process rights that are harmed. Constitutionally excessive punitive damages awards reduce the pool of funds available for all plaintiffs who have yet to see their day in court. This creates a "tragedy of the commons," by which early plaintiffs are incentivized to consume a defendant's limited resources immediately, maximizing their own recovery, but depleting the resources available to compensate future plaintiffs. Yet the Due Process Clause does not permit a few early plaintiffs to receive not only full compensation for their injures, but also a windfall in punitive damages—at the expense of a far greater number of similarly situated plaintiffs who have not yet had their day in court.

To address these constitutional and public-policy concerns, this Court should grant review and impose a 1:1 cap on the ratio of punitive to compensatory damages when compensatory damages are substantial. Such a rule would both prevent defendants from being punished repeatedly for the same conduct and ensure greater fairness in recovery across large groups of plaintiffs.

The interests of due process, fairness, and stare decisis were all undermined in this case. WLF joins with Petitioners in urging this Court to grant the Petition.

REASONS FOR GRANTING CERTIORARI

I. REVIEW IS WARRANTED TO PROVIDE MUCH-NEEDED GUIDANCE TO THE LOWER COURTS ON CONSTITUTIONALLY EXCESSIVE PUNITIVE DAMAGES AWARDS.

The Due Process Clause limits the amount of punitive damages a jury may award in a civil case. *See, e.g.*, *State Farm*, 538 U.S. at 416–17; *BMW*, 517 U.S. at 562. For nearly three decades, this Court has repeatedly acknowledged that a reasonable ratio of punitive to compensatory damages is necessary to protect a defendant's due process rights. As the Court admonished in *State Farm,* "[w]hen compensatory damages are substantial," a 1:1 ratio of punitive to compensatory damages is likely at the "outermost limit" of what due process permits. 538 U.S. at 425. And in *Exxon Shipping Co. v. Baker*, this Court adopted a bright-line rule that a 1:1 ratio is a "fair upper limit" in maritime tort cases, as such a cap was the only practical solution for curbing constitutionally excessive punitive damages awards. 554 U.S. 471, 513 & n.27 (2008).

Following this guidance, some courts of appeals have reduced the ratio of punitive to compensatory damages to 1:1 in cases where the compensatory damages were substantial. *See e.g.*, *Saccameno*, 943 F.3d at 1090; *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1069, 1073 (10th Cir. 2016); *Méndez-Matos v. Mun. of Guaynabo*, 557 F.3d 36, 55–56 (1st Cir. 2009); *Morgan v. N.Y. Life Ins. Co.*, 559 F.3d 425, 443 (6th Cir. 2009); *Jurinko v. Med. Protective Co.*, 305 F. App'x. 13, 28, 30 (3d Cir. 2008); *Boerner v. Brown &*

Williamson Tobacco Co., 394 F.3d 594, 603 (8th Cir. 2005).

Several state courts of last resort have done so as well. *See, e.g.*, *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P.3d 1221, 1262 (Idaho 2010); *Roby v. McKesson Corp*., 219 P.3d 749, 770 (Cal. 2009); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003).

At the same time, many federal and state courts have simply ignored or flouted this Court's holdings on the due process limitations on punitive damages awards. *See, e.g.*, Hironari Momioka, *Punitive Damages Revisited: A Statistical Analysis of How Federal Circuit Courts Decide the Constitutionality of Such Awards*, 65 Clev. St. L. Rev. 379, 400 (2017) ("[N]either *Philip Morris* nor *Exxon* changed the attitudes of lower federal circuit courts toward the ratio of punitive to compensatory damages."). For federal courts, this trend is reflected in the Eleventh Circuit's decision in *Williams v. First Advantage LNS Screening Sols., Inc.*, 947 F.3d 735 (11th Cir. 2020), which involved a 13:1 ratio ($3.3 million in punitive damages versus $250,000 in compensatory damages). *Id.* at 755. In determining the maximum permissible ratio, the Eleventh Circuit looked to other circuits for guidance. It confronted a stark circuit split. "Of the seventeen out-of-circuit cases in which the damages ratio was comparable to the ratio in this case (between approximately 10:1 and 15:1), the punitive damages award was affirmed in eight cases and vacated in nine." *Id.* at 759–60.

These disparate outcomes led the Eleventh Circuit to complain that this Court's imprecise punitive damages case law invited it to "throw up [its] hands in frustration." *Williams*, 947 F.3d at 762. Ultimately, it concluded that it was "prudent to err on the side of endorsing an amount that might seem a bit excessive—and indeed might be more than what we would have imposed had we been jurors—so long as it is not a grossly excessive amount." *Id.* at 767. Distinguishing *Saccameno*, in which the Seventh Circuit reduced punitive damages to a 1:1 ratio, the Eleventh Circuit instead held that the constitutionally permissible ratio could not exceed 4:1. *Id.*

Among state courts, this same trend is seen in the decision below, as well as another tort case in which the plaintiffs alleged that Petitioners knew their talc products contained asbestos: *Olson v. Brenntag N. Am., Inc.*, 2020 WL 6603580 (N.Y. Sup. Ct. Nov. 11, 2020). In *Olson*, the court considered the constitutionality of a $325 million award against Petitioners, comprised of a substantial $25 million in compensatory damages and a staggering $300 million in punitive damages. *See* 2020 WL 6603580 at *1. While the court reduced both the punitive and compensatory awards, the reduced punitive award was still a massive $105 million, seven times greater than the reduced compensatory award of $15 million. *Id.* at *49. *Olson* also acknowledged this Court's admonition in *State Farm* that "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Id.* at *47–49 (quoting *State Farm*, 538 U.S. at 425). Even so, the court refused to heed this admonition, dismissing

it as "dicta" and not "binding." *Id.* at *48. The court went on to hold that "the maximum constitutionally sustainable ratio of punitive to compensatory damages in this case is 7:1." *Id.* at *49.

Here, the Missouri Court of Appeals upheld a 5.7:1 ratio for Johnson & Johnson ($715.9 million in punitive damages versus $125 million in compensatory damages) and a 1.8:1 ratio for Johnson & Johnson Consumer, Inc. ($900 million in punitive damages versus $500 million in compensatory damages).[1] Pet. App. 100a–01a. Like the *Olson* court, the Missouri Court of Appeals noted this Court's warning that "'[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Id.* (quoting *State Farm*, 538 U.S. at 425). Yet the court upheld the enormous punitive damages award anyway.

The court acknowledged that the award was "significantly larger" than the criminal fines that could have been imposed for the same conduct. Pet. App. at 104a. Yet "[b]ecause Defendants are large, multi-billion dollar corporations," the court reasoned,

---

[1] This brief does not address whether the Missouri Court of Appeals "incorrectly assumed that J&J and JJCI would each pay the entire joint-and-several portion of the compensatory award" and therefore calculated punitive to compensatory ratios that were too low. Pet. at 9–10. Instead, this brief relies on the lower set of ratios—5.7:1 for J&J and 1.8:1 for JJCI—as they still exceed the outer limits of what is permissible under the Due Process Clause, especially in light of the clearly substantial compensatory damages awarded in this case. *See id.*; *State Farm*, 538 U.S. at 425.

"a large amount of punitive damages is necessary to have a deterrent effect in this case." *Id.* at 102a. The court also acknowledged—but did not consider—Petitioners' argument that the jury's multi-billion dollar "punitive damages award impermissibly punished J&J for injuries to 'nonparties.'" *Id.* at 95a. The court failed to address Petitioners' argument that the improper aim of the jury's punitive damages award was to "disgorge[] what plaintiffs' counsel deemed defendants' profits from *every* talc sale made to *anyone* in *any* state for nearly half a century." Brief of Appellants J&J and JJCI at 138, *Ingham v. Johnson & Johnson*, No. ED 107476 (Mo. Ct. App. Sept. 6, 2019) (emphasis in original). As a result, the decision below affirms a massive punitive award that not only impermissibly punishes alleged conduct toward nonparties, but also exceeds the 1:1 ratio that is constitutionally required in this case.

In short, in both this case and *Olson*, the courts erroneously ignored or flouted the constitutional limits on punitive damages recognized by this Court. These awards are particularly troubling given the highly substantial compensatory damages already awarded.

This disregard of this Court's punitive damages jurisprudence can be seen in several other decisions, both state and federal. *See, e.g.*, *In re Actos (Pioglitazone) Prod. Liab. Litig.*, 2014 WL 5461859, at *3, *55 (W.D. La. Oct. 27, 2014) (approving remitted awards of $27.65 million in punitive damages and $1.1 million in compensatory damages against one defendant—and $9.2 million in punitive damages and $368,750 in compensatory damages against the

other—for a ratio of around 25:1, even though similar awards in some of the other 8,000 cases pending against the same defendants could render them insolvent); *Miller v. Equifax Info. Servs., LLC*, 2014 WL 2123560, at *7, *10–11 (D. Or. May 20, 2014) (rejecting defendant's argument that 1:1 ratio was warranted because jury awarded a "substantial" $180,000 in compensatory damages; instead imposing 9:1 ratio because it is "ordinarily accepted as within constitutional limits," and approving $1.6 million punitive award); *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73, 103–05 (W. Va. 2014) (noting that various courts have approved high ratios after *State Farm* and *Philip Morris*; approving $32 million punitive award, with 7:1 ratio to $4.2 million compensatory award).

As these decisions show, further guidance by this Court is much needed. This Court should grant review and impose a 1:1 cap on the ratio of punitive to compensatory damages to ensure that courts cannot continue to skirt due process.

II. A CLEAR 1:1 CAP ON PUNITIVE DAMAGES WHEN COMPENSATORY DAMAGES ARE SUBSTANTIAL WOULD INHIBIT MULTIPLICATIVE PUNITIVE AWARDS AND PROTECT DUE PROCESS RIGHTS.

Many state and federal courts continue to give short shrift to the procedural and substantive due process limits on punitive damage awards, which were already "well established" at the time of this Court's decision in *State Farm*. *See* 538 U.S. at 416. As a result, defendants are increasingly subject to punishment without "fair notice . . . of the severity of the penalty that a State may impose," *BMW*, 517 U.S. at 574, and

to an "arbitrary deprivation of property" in the form of punitive damages that have no relation to the plaintiffs' injury but rather punish the defendants for conduct to parties not before the court. *See Oberg*, 512 U.S. at 432. Especially in mass tort cases, such unconstitutional awards may be inflicted repeatedly on a defendant for the same conduct.

When, as here, a single jury imposes punitive damages based on the nationwide impact of Petitioners' alleged misconduct over several decades, the extent of the constitutional injury is exacerbated by the great potential for repeat punitive awards in pending and future cases.

This Court has repeatedly questioned "the possibility of multiple punitive damages awards for the same conduct" because such a result would so clearly violate the Due Process Clause. *State Farm*, 538 U.S. at 422; *accord Philip Morris*, 549 U.S. at 349, 355. Despite this Court's jurisprudence, courts have continued to permit such awards to stand—particularly in the context of mass torts, where thousands of potential claims often lead to multiplicative punitive awards.

When, as here, compensatory damages are substantial, the Court should require the lower courts to heed the precept it set forth in *State Farm*—that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. Some courts have disregarded this guidance as "nonbinding" or "dicta." *See, e.g.*, *Cote v. Philip Morris USA, Inc.*, 985 F.3d 840,

849 (11th Cir. 2021); *Olson*, 2020 WL 6603580 at *44. Requiring a 1:1 ratio would curtail the risk of multiplicative punitive awards in mass tort cases like this one. That risk is showcased here and in *Olson*, which both culminated in massive, overlapping punitive awards. *Olson* acknowledged the "risk of duplicative punishments from overlapping punitive awards," *id.* at *45, but failed to cabin the punitive damages award to punishing only the harm sustained by Respondents.

The Petition offers the Court a chance to curb this pervasive problem. Despite its previous reluctance to specify "a bright-line ratio," *State Farm*, 538 U.S. at 425, the Court should impose a firm 1:1 cap on the ratio of punitive to compensatory damages in cases in which compensatory damages are substantial. Such a cap would ensure that punitive damages bear some reasonable relationship to the harm to the plaintiff and stay within constitutional bounds.

A. The Due Process Clause forbids punitive damages based on harm to nonparties.

A jury may not "use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Philip Morris*, 549 U.S. at 349, 355. An award based—even in part—on a desire "to punish the defendant for harming persons who are not before the court . . . would amount to a taking of 'property' from the defendant without due process." *Id.*

As this Court has emphasized, "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis." *State Farm*, 538 U.S. at 423. Above all, an award must not create "the possibility of multiple punitive damages awards for the same conduct." *Id.*

Likewise, this Court has tasked state courts with ensuring that "juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused [to] strangers." *Philip Morris*, 549 U.S. at 355. Yet, as this case shows, many courts all but ignore their constitutional obligation to ensure that juries do not base punitive damages awards on harm to nonparties, and many state legislatures are unable, or unwilling, to rein them in. This state of affairs is untenable.

B. The jury below imposed excessive punitive damages based on harm to nonparties, in violation of the Due Process Clause.

The record confirms that the jury based its punitive damages award on evidence of harm to nonparties. At trial, Respondents' counsel: (1) emphasized that Petitioners "make 70 million bucks a year" from talcum powder, citing an email from J&J employee "Todd True"; (2) opined to the jury that the Petitioners knew for 45 years that their talcum products contained asbestos; and, (3) implored the jury to speak with the "voice of the world" in reaching its verdict. *See* Motion for New Trials on Damages or, in the

Alternative, Remittitur at 13, *Ingham v. Johnson & Johnson*, No. 1522-CC10417-01 (Mo. Cir. Ct. Sept. 20, 2018) (citing Tr. 6087:21–6088:1, 6097:14–17, 6099:11). During its brief deliberations, the jury asked to see the "Todd True" email at the same time it asked when punitive damages would be assessed. *Id.* (citing Tr. 6087:21–6088:1).

The numbers show that the jury did exactly what Respondents' trial counsel asked: it awarded excessive punitive damages to punish Petitioners for all their sales of talcum powder for 45 years. Thus, multiplying $70-million (presented to the jury as one year's profits from talcum) by 45 (the number of years that Petitioners sold talcum while allegedly knowing it contained asbestos) yielded the precise amount of punitive damages the jury awarded against J&J. Motion for New Trials, *supra*, at 13. The punitive damages verdict against JJCI was based on a similar calculation by the jurors. *Id.* at 13–14. And in a post-verdict interview, one juror explained that the jury intended for the punitive damages award to disgorge Petitioners' nationwide profits from talc products over the four decades. *Id.* at 14 n.3. Although the Missouri Court of Appeals acknowledged Petitioners' argument on this point, *see* Pet. App. 95a, it provided no analysis or express ruling on this issue.

This kind of punitive damages award violates the Due Process Clause because it is based almost entirely on harms to nonparties. As this Court has stated, the "Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties," since a defendant "has no

opportunity to defend against" such claims by nonparties. *Philip Morris*, 549 U.S. at 353. A 1:1 cap on the ratio of punitive to compensatory damages would help to ensure that punitive damages are not based on harms to nonparties, by anchoring the punitive damages awarded to the harm sustained by the plaintiffs.

As of February 2021, Petitioners still face 25,000 lawsuits alleging that their talc products cause cancer due to asbestos contamination. Eric Sagonowsky, *Johnson & Johnson Tots up a Potential $4B Talc Bill as Tens of Thousands of Lawsuits Pile Up*, Fierce Pharma (Feb. 23, 2021), *available at* https://perma.cc/P4Z8-BTYT. These 25,000 cases pose a very real risk that thousands of future juries will punish Petitioners for the same allegedly wrongful conduct nationwide against thousands of nonparties, as the jury did here. Such multiplicative punishment would only compound the improper punishment imposed below for Petitioners' alleged nationwide conduct over a 45-year period. *See State Farm*, 538 U.S. at 423; *Racich v. Celotex Corp.*, 887 F.2d 393, 398 (2d Cir. 1989) ("[T]he multiple imposition of punitive damages for the same course of conduct may raise serious constitutional concerns."). It would also exacerbate the serious due process concerns about the availability of complete compensatory recovery by the thousands of plaintiffs who have yet to see their day in court.

Although no issue of potential insolvency has arisen here, the widespread phenomenon of large, multiplicative punitive damages awards in ever-

larger mass tort litigations poses a serious economic threat if left unchecked—on top of a serious due process threat. American businesses cannot forecast—and effectively plan for—damages awards in future litigation due to wildly inconsistent verdicts and inconsistent judicial review of those verdicts. *See* Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 Va. L. Rev. 1721, 1747 (2002) ("[T]here has been a gross disparity in jury verdicts among the states, usually with the largest verdicts coming from the same counties that allow large mass filings.").

This has driven many mass-tort defendants who are not well capitalized into insolvency. For example, a large talc supplier "filed for bankruptcy protection in an effort to end nearly a decade's worth of lawsuits claiming its [talc] product cause[d] cancer." Jef Feeley *et al.*, *Imerys Talc Units File Bankruptcy as Cancer-Suit Risk Soars (2)*, Bloomberg Law (Feb. 13, 2019), *available at* https://perma.cc/7UGC-45PD. As one commentator has observed, "when [mass tort] cases proceed to trial, the tort system can produce 'lottery-like' outcomes," which has resulted in "the bankruptcy system increasingly [] being called upon to provide a solution." Douglas G. Smith, *Resolution of Mass Tort Claims in the Bankruptcy System*, 41 U.C. Davis L. Rev. 1613, 1629, 1634 (2008); *see also* S. Elizabeth Gibson, *Judicial Management of Mass Tort Bankruptcy Cases* 155–62, Fed. Judicial Ctr. (2005) (collecting mass tort cases culminating in bankruptcy). Such insolvencies could inflict significant harm on employees, shareholders, and the economy as a whole. *See, e.g.*, John R. Graham *et al.*, *The Labor Impact of Corporate Bankruptcy* 2,

National Bureau of Economic Research (2019) (discussing how, on average, "[a]n employee's annual earnings fall by 10% the year her firm files for bankruptcy and fall by a cumulative present value of 67% over seven years"). They can also prevent all but the earliest plaintiffs from receiving compensation for their injuries.

III. THE COURT SHOULD SEIZE THIS OPPORTUNITY TO REIN IN PUNITIVE DAMAGES AND ENSURE THAT FUTURE PLAINTIFFS ARE NOT DENIED FULL COMPENSATION.

This Court's punitive damages jurisprudence has not squarely focused on the impact that awarding punitive damages to either a single plaintiff—or a small group of plaintiffs—on behalf of the "world" (as Respondents' trial counsel urged here) will have on the due process rights of other plaintiffs whose claims will be tried later. *See* Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 Yale L.J. 349, 352 (2003). But this issue has only increased in significance as the scope of mass tort actions has mushroomed over the past few decades.

At the core of this issue lies a "tragedy of the commons" problem, whereby initial plaintiffs are motivated to "consume" a defendant's limited resources immediately, maximizing their own recovery, but leaving little if any resources for future plaintiffs. *See, e.g.*, Samir D. Parikh, *The New Mass Torts Bargain* 4–5 (July 12, 2020), *available at* https://ssrn.com/abstract=3649611; Francis E. McGovern, *The Tragedy of the Asbestos Commons*, 88 Va. L. Rev. 1721, 1726 (2002). Thus, punitive damages

awards that are many multiples of compensatory damages divert resources that might otherwise be available for future plaintiffs seeking compensation for injuries. *See* U.S. Gov't Accountability Off., GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 2 (2011).

When compensatory damages are substantial, imposing a 1:1 cap on the ratio of punitive to compensatory damages provides an appropriate way to ameliorate these serious due process concerns. Other proposed solutions have long been found to be counterproductive.

For example, having a jury account for prior punitive damages awards in similar litigation tends to anchor the jury's analysis to that high figure. As one commentator has explained, "[a] jury may be influenced unfairly by prior verdicts against the defendant; it may believe that previous awards of punitive damages justify a similar award in the case before it and may even rely on such awards in determining the defendant's compensatory damages liability." Richard A. Seltzer, *Punitive Damages in Mass Tort Litigation: Addressing the Problems of Fairness, Efficiency, and Control*, 52 Fordham L. Rev. 37, 59–60 & n.126–27 (1983).

Moreover, as Judge Friendly observed in *Roginsky v. Richardson-Merrell, Inc.*, "it is hard to see what even the most intelligent jury would do" with information about "the potential number of actions similar to this one" that may subject the defendant to liability, as even "the most intelligent jury" is "unable

to know what punitive damages, if any, other juries in other states may award other plaintiffs in actions yet untried." 378 F.2d 832, 839 (2d Cir. 1967). Relatedly, studies have found that limiting instructions and admonitions to jurors can often provoke the opposite of the intended effect. Andrew J. Wistrich *et al.*, *Can Judges Ignore Inadmissible Information? The Difficulty of Deliberately Disregarding*, 153 U. Penn. L. Rev. 1251, 1254 n.19, 1275–76 (2005).

By granting certiorari and imposing a 1:1 cap on punitive damages when compensatory damages are substantial, this Court can help ensure that the risk of multiplicative punitive awards is curtailed—consistent with the principles articulated in this Court's decisions in *State Farm*, *Exxon*, and *Philip Morris*.

CONCLUSION

The Petition should be granted.

Respectfully submitted,

CORY L. ANDREWS
JOHN M. MASSLON II
WASHINGTON LEGAL FOUNDATION
2009 Mass. Ave., NW
Washington, DC 20036

THEODORE E. YALE
DECHERT LLP
2929 Arch Street
Philadelphia, PA 19104

DOUGLAS W. DUNHAM
Counsel of Record
ELLEN P. QUACKENBOS
MATTHEW P. STEINBERG
DECHERT LLP
1095 Avenue of the Americas
New York, NY 10036
(212) 698-3500
douglas.dunham@dechert.com

April 5, 2021