No. 20-1223

In the

Supreme Court of the United States

JOHNSON & JOHNSON, *et al.*,
Petitioners,

v.

GAIL L. INGHAM, *et al.*
Respondents.

On Petition for Writ of Certiorari to the Missouri Court of Appeals, Eastern District

BRIEF OF *AMICUS CURIAE* THE MISSOURI ORGANIZATION OF DEFENSE LAWYERS IN SUPPORT OF THE PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

The Missouri Organization of Defense Lawyers (MODL) is a professional organization of over 1,300 attorneys devoted to defending entities similar to Petitioners in civil litigation. It seeks to develop Missouri tort law in a manner fair and equitable to civil defendants. As such, it has a natural interest in this case, where the Missouri Court of Appeals upheld a $1.6 billion punitive damages award, one of the largest of its kind in the state's history.

MODL agrees with the arguments of both Petitioner and *amici*, and will not repeat those arguments here. Instead, it will provide a general overview of how the Missouri courts, at both the intermediate appellate and supreme court level, have consistently failed to vindicate the Fourteenth Amendment due process rights of civil defendants in the context of punitive damages through a misreading of this Court's precedents. Despite Missouri's political reputation as a conservative, pro-business state, its judiciary has been downright hostile to most legislative attempts at tort reform over the past decade. This hostility stems from the notion that tort reform—including statutory caps on damages—somehow violates the right to a jury trial. It doesn't.

For all of its talk about the need to preserve the right to a jury trial, furthermore, the Missouri judiciary has never given any serious consideration to the logistical problems inherent in multi-plaintiff,

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[1] *Amicus* provided timely notice to both parties of its intent to file this brief, and both parties have provided blanket consent for the filing of *amicus* briefing. No counsel for either party authored this brief in whole or in part, nor did counsel for either party make any monetary contribution intended to fund the preparation or submission of this brief.

non-class action products liability lawsuits like this one and how they inherently make it difficulty for the jury to do its job.

The Missouri judiciary's hostility to tort reform through its refusal to enforce this Court's precedents governing the awarding of punitive damages—all in the name of supposedly vindicating a plaintiff's right to a jury trial—has made it practically impossible for defendants like Petitioners to receive a fair adjudication in the Show-Me State. Their Fourteenth Amendment due process rights are rights in name only. This Court should take up this case and put an end to such hostility.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

It is impossible to fully appreciate the gravity of Petitioners' punitive damages arguments without reading their brief against the broader background of the Missouri judiciary's hostility towards most aspects of tort reform over the past decade or so. It has, on multiple occasions, overturned the Missouri General Assembly's attempt to set limits on the amount of damages recoverable in common law causes of action, and in doing so has discarded how, under the Missouri state constitution, the General Assembly may modify or abolish common law causes of action, including the substantive elements and legal remedies available under such causes of action. In addition, the Missouri judiciary has been practically silent on the serious due process issues inherent in multi-plaintiff, non-class action trials like the one Petitioners went through below.

ARGUMENT

A. No Missouri court has ever given any serious consideration to the due process problems inherent in multi-plaintiff, non-class action jury trials.

As Petitioners correctly note, the Missouri Court of Appeals[2] failed to address the "serious due-process" concerns inherent in multi-plaintiff lawsuits such as this one where it took five hours for the court to read out the jury instructions. (Pet.Br.11-12). But the matter is even worse than what Petitioners have described. Not a single precedential Missouri court opinion has ever addressed the matter in any way.

Only one other opinion from the Court of Appeals has ever addressed this matter, and like the opinion below it categorically rejected the argument that multi-plaintiff trials create serious due process issues without proffering any serious legal discussion of the matter. *Barron v. Abbott Lab., Inc.*, No. ED103508, 2016 WL 6596091 (Mo. Ct. App., Nov. 8, 2016) ("*Barron I*").[3] Similar to this case, 24 plaintiffs

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[2] Missouri has a single Court of Appeals divided into three geographical districts: the Eastern District, based in St. Louis; the Western District, based in Kansas City; and the Southern District, based in Springfield. *Atkins v. Director of Revenue*, 303 S.W.3d 563, 567 n.4 (2010); Mo. Const. Art. V §1; Mo. Rev. St. §§477.040—477.070. Despite being a single, unified appellate court, its districts occasionally disagree with each other. *E.g., Fidelity Real Estate v. Norman*, 586 S.W.3d 873, 881-84 (Mo. Ct. App. 2019).

[3] *Barron I* is not binding precedent in Missouri because, while initially released as a published opinion, the Missouri Supreme Court subsequently granted transfer and agreed to hear the case. The supreme court subsequently published an opinion that did not address the due process issues. *Barron v. Abbott Lab., Inc.*, 529 S.W.3d 795 (Mo. 2017) ("*Barron II*").

Unlike this Court's certiorari procedure, in which it reviews

brought a products liability lawsuit in the Circuit Court of the City of St. Louis against the manufacturer of an antiepileptic drug, alleging that they suffered birth defects due to their mothers' use of the drug. *Barron I*, 2016 WL at *1. The drug company sought severance of the claims, arguing that the claims should be viewed "solely from the perspective of the particular circumstances of each plaintiff's mother's use of [the drug]…and not from the perspective of [the defendant's] nationwide promulgation and marketing of [the drug]." *See id*. at *4. The appellate court rejected this out-of-hand. *Id*. at **4-5.

The court likewise rejected the defendant's argument that a risk existed for the jury to be confused in having to rule on the claims of 24 plaintiffs, each with particularized circumstances. The defendant, the court noted, did "not cite any Missouri law or controlling precedent in support of is argument the plaintiffs' claims should be severed because trying multiple plaintiffs' claims creates a risk of confusion and the improper consideration of

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the decision of the lower appellate court, transfer to the Missouri Supreme Court automatically vacates the opinion of the Court of Appeals, and the supreme court directly reviews the trial court's judgment as though the matter were on direct appeal, bypassing the Court of Appeals' opinion entirely. *See* Mo. Const. Art. V §10; Mo. S.Ct. R. 83.08(a), 83.09.

Consequently, after the Missouri Supreme Court grants transfer the Court of Appeals' opinion "is 'necessarily vacated and set aside and may be referred to as *functus officio*,' meaning 'without further authority or legal competence.'" *Bolden v. State*, 423 S.W.3d 803, 808 n.6 (Mo. Ct. App. 2013) (quoting *State v. Norman*, 380 S.W.2d 406, 407 (Mo. 1964); and Black's Law Dictionary (9th ed. 2009) (no pinpoint citation given)). As such, it is not even citable as persuasive authority within the Missouri courts. MODL discusses *Barron I* only to illustrate the attitude the Missouri judiciary has taken to this issue.

collective evidence by the jury." *Id*. at *5. It concluded, without citing to any supporting law, that "[a]ny alleged risk…can be prevented by properly instructing the jury." *Id*.

In faulting the defendant for failing to cite to any "Missouri law or controlling precedent" in support of its argument about jury confusion, the Court of Appeals overlooked *why* defendant failed to do so: no *controlling* Missouri precedent exists even addressing the matter in the first place. Ironically, the court then proceeded to do the very thing it faulted the defendant for doing: it concluded, without citing to any controlling precedent or Missouri law, that jury instructions could cure any risk of confusion. Indeed, the court failed to cite *any* precedent in support of its conclusion that jury instructions act as some sort of magic cure-all for the confusion inherent in multi-plaintiff trials.

B. The Missouri judiciary has a mistaken conception of the "right to a jury trial."

While Petitioners do not directly challenge any statutory caps on the recovery of damages, the Missouri judiciary has displayed an untenable hostility to such caps in the context of common law causes of action, and it is critical that this Court, in reviewing Petitioners' brief challenging the award of punitive damages, keep this hostility in mind as a means of fully appreciating how problematic the awarding of punitive damages is within the Show-Me State.

1. The Missouri Supreme Court ostensibly recognizes that the General Assembly, having plenary power under the state constitution, "may modify or

abolish a cause of action that had been recognized by common law…." *Kilmer v. Mun*, 17 S.W.3d 545, 550 (Mo. 2000). This derives from how the Missouri "Constitution is not a grant but a restriction upon the powers of the legislature," and "[c]onsequently, the General Assembly has the power to do whatever is necessary to perform its functions except as expressly restrained by the [Missouri] Constitution." *State v. Clay*, 481 S.W.3d 531, 537 (Mo. 2016) (citing *Liberty Oil Co. v. Dir. of Revenue*, 813 S.W.2d 296, 297 (Mo. 1991)); *accord Munn v. People of the State of Illinois*, 94 U.S. 113, 124 (1876) (state legislatures, unlike the federal Congress, "possess all the powers of the Parliament of England, except such as have been delegated to the United States or reserved by the people.").

Despite its protests to the contrary, the Missouri Supreme Court effectively upended any ability of the General Assembly to abolish or modify a common law cause of action in *Watts v. Lester E. Cox Med. Ctr.*, 376 S.W.3d 633 (Mo. 2012). The plaintiff brought a medical malpractice action after her son was born with birth defects. *Id.* at 635. The jury returned a verdict in her favor, awarding her $1.45 million in non-economic damages and $3.371 million in future economic damages. *Id.* In accordance with Mo. Rev. Stat. §538.210 (2000), the trial court then reduced the jury award of non-economic damages to the statute's cap of $350,000. *Id.*

The Missouri Supreme Court held that §538.210's imposition of a $350,000 cap on non-economic damages violated the Missouri Constitution, *id.* at 635-36, which holds that ""the right of trial by jury as heretofore enjoyed shall remain inviolate…." Mo. Const. Art. I §22(a). In coming to this conclusion, the court purported to engage in a historical analysis of

the common law as it was understood in 1820, the year Missouri joined the Union. *Watts*, 376 S.W.3d at 639-41. It started by making the uncontroversial observation that a jury functions to determine factual issues on both liability and the amount of damages, and to enter a verdict based on such findings. *Id.* at 640. The court made the further observation, also uncontroversial, that "[o]nce the right to a trial by jury attaches…the plaintiff has the full benefit of that right free from the reach of hostile legislation." *Id.* at 640. *Accord Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998) (ruling that the Seventh Amendment's guaranty of a right to a jury trial applies not only to common law claims, but to statutory claim analogous to common law claims that seek monetary damages).

So far, so good. But the court then proceeded to conclude that "because the assessment of damages is one of the factual findings assigned to the jury rather than to a judge, any limit on damages that restricts the jury's fact-finding role violates the [Missouri] constitutional right to trial by jury." *Watts*, 376 S.W.3d at 640. It based this on the dubious proposition on the notion that "[b]ecause the common law did not provide for legislative limits on the jury's assessments of civil damages, Missouri citizens retain their individual right to trial by jury subject only to judicial remittitur based on evidence in the case." *Id.* "The individual right of trial by jury," the court continued, "cannot 'remain inviolate' when an injured party is deprived of the jury's constitutionally assigned role of determining damages according to the particular facts of the case." *Id.* "Because the constitutional right to a civil jury trial is contingent upon there being an action for damages, statutory limits on those damages directly curtail the individual

right to one of the most significant constitutional roles performed by the jury—the determination of damages." *Id*. at 642. Without ever seriously addressing the argument that monetary damages are themselves a *legal* remedy under the common law, and thus subject to legislative change, *Watts* simply held, via circular reasoning, that such a notion "simply 'pays lip service to the form of the jury but robs it of its function.'" *Id*. (quoting *Sofie v. Fibreboard Corp.*, 771 P.2d 711, 721 (Wash. 1989).

2. Even worse, the Missouri Supreme Court came to its conclusion in *Watts* by misstating this Court's own conclusions in *Feltner*. In *Feltner*, this Court noted that "there is a clear and direct historical evidence that juries…as a general matter…set the amount of damages awarded to a successful plaintiff." *Feltner*, 523 U.S. at 355. The court in *Watts* cited to this language in support of this conclusion that legislative caps on statutory damages violate a litigant's right to a jury trial. *Watts*, 376 S.W.3d at 643-44.

In relying upon *Feltner* to support its dubious conclusion that a state legislature may not set a cap on civil damages, the Missouri Supreme Court quoted that case out of its context and turned it into something it was never meant to stand for. *Feltner* involved the constitutionality of a copyright statute that not only imposed statutory caps on the recovery of damages, but also provided that the district court, and not a jury, was to assess the factual issue of damages in the first place. *Feltner*, 523 U.S. at 344-47. In other words, the copyright statute did not even allow a jury trial to begin with. *Id.* This Court held that the statute violated the Seventh Amendment, holding that "if a party so demands, a jury must determine the actual amount of statutory damages

under the [copyright act] in order 'to preserve the substance of the common-law right of trial by jury.'" *Id*. at 355 (quoting *Tull v. U.S.*, 481 U.S. 412, 426 (1987)).

Contrary to the Missouri Supreme Court's conclusion in *Watts*, this Court limited its holding in *Feltner* to concluding that Congress cannot, consistent with the Seventh Amendment, mandate that the district court, instead of a jury, sit as the initial factfinder in a statutory cause of action involving a claim for monetary damages. *Feltner*, 523 U.S. at 352-55. It did *not* find that the actual cap on statutory damages was, of itself, unconstitutional. As Justice Scalia observed in an earlier case, "Congress could…create a private cause of action by one individual against another for a fixed amount of damages, but it surely does not follow that if it creates such a cause of action *without* prescribing the amount of damages, that issue could be taken from the jury." *Tull*, 481 U.S. at 427 (1987) (Scalia, J., concurring in the judgment).

Feltner's subsequently history on remand proves that the Missouri Supreme Court's interpretation has no legitimate basis. After remand, the copyright case went to a jury trial, and the defendant appealed the adverse judgment to the Ninth Circuit. *Columbia Pictures Television, Inc. v. Krypton Broad. of Birmingham, Inc.*, 259 F.3d 1186 (9th Cir. 2016). In upholding the jury verdict on damages, the Ninth Circuit noted, in passing, that the award on damages was "well within the statutory range [of permissible damages] for willful infringement." *Id*. at 1195. Had *Feltner* invalidated the statutory caps themselves, the Ninth Circuit would never have made reference to the statutory range for willful infringement in the first place.

Not a single federal appellate court has interpreted the Seventh Amendment's right to a jury trial in the manner the Missouri Supreme Court has done in *Watts*. Indeed, the Eighth Circuit—which is based in St. Louis, Missouri—rejected *Watts'* interpretation of *Feltner* in *Schmidt v. Ramsey*, 860 F.3d 1038 (8th Cir. 2017). There, the plaintiff brought a diversity medical malpractice lawsuit under Nebraska law and challenged the Nebraska's statutory cap on damages, similar to the cap the Missouri General Assembly had enacted prior to *Watts*. *See Schmidt*, 860 F.3d at 1042-45. The plaintiff argued that the statutory caps violated the Seventh Amendment as this Court had interpreted it in *Feltner*. *Schmidt*, 460 F.3d at 1045.

The Eighth Circuit rejected this argument outright, holding that the plaintiff has misread *Feltner's* holding. *Id*. "The statute in *Feltner*," the Eighth Circuit ruled, "allowed a judge to determine damages in the first instance. Because that role had historically belonged to juries the statute collided with the Seventh Amendment." *Id*. By contrast, under the Nebraska statute imposing caps on damages, "[t]he jury…performed its historical role by finding liability and assessing damages….and the district court [subsequently] applied that limit as a matter of law." *Id*. Thus, "[t]he Nebraska cap imposed an upper *legal* limit on that jury determination, and the district court applied that limit as a matter of law." *Id*. (emphasis added) (internal citations omitted).

The Eighth Circuit's interpretation of the Seventh Amendment as not imposing any substantive barrier to statutory caps on damages accords with what every other federal appellate court has concluded on the matter. *See Learmouth v. Sears*, 710 F.3d 249 (5th Cir. 2013); *Smith v. Botsford Gen. Hosp.*, 419 F.3d 513

(6th Cir. 2005); *Boyd v. Bulala*, 877 F.2d 1191 (4th Cir. 1989); *Davis v. Omitouwoju*, 883 F.2d 1155 (3d Cir. 1989); *see also Gasperini v. Center for Humanities, Inc.*, 418 U.S. 415, 429 n.9 (1996) ("While we have not specifically addressed the issue, courts of appeals have held that the district court application of state statutory caps in diversity cases, post-verdict, does not violate the Seventh Amendment.").

It is not surprising that every federal appellate court to address the matter has concluded that legislative caps on statutory damages accords with the Seventh Amendment's guaranty of a jury trial. This Court's cases "have clearly established that '[a] person has no property, no vested interest, in any rule of common law.'" *Duke Power Co. v. Carolina Envtl. Study Grp., Inc.*, 438 U.S. 59, n.32 (1978) (quoting *Second Employers' Liability Cases*, 223 U.S. 1, 50 (1912)). As the New Mexico Supreme Court recently recognized, a statutory cap on damages "does not violate the right to trial by jury because the cap does no invade the province of the jury. Rather, this statutory damages cap merely gives legal consequence to the jury's determination of the amount of the verdict." *Siebert v. Okun*, No. S-1-SC-37231, – P.3d –, 2021 WL 959248 at *3 (N.M. March 15, 2021).

3. Nor is it surprising that the Missouri judiciary is an outlier when it comes to state courts of last resort interpreting whether the right to a jury trial forbids the imposition, as a matter of law, of statutory caps on damages. In coming to its above conclusion in *Siebert,* the New Mexico Supreme Court noted that of the thirty state jurisdictions to consider the constitutionality of statutory caps on damages, only Missouri and four other states—Alabama, Georgia, Kansas, and South Dakota—have ruled them unconstitutional. *See Siebert*, 2021 WL at *12 n.3.

(citing, among others, *Moore v. Mobile Infirmary Ass'n*, 592 So.2d 156,159-65 (Ala. 1991)). Notably, one of these jurisdictions—Alabama—is the only other state to agree with Missouri that jury instructions somehow operate as a magical solution to the problems inherent in multi-plaintiff, non-class action products liability lawsuit. (*See* Pet.Br.17-21).

4. Obviously, statutory caps on damages are not directly at issue in this case. Nevertheless, it is critical that this Court review Petitioner's brief with the above background in context in under to have a full appreciation of just how hostile the Missouri judiciary has become to tort reform. On the one hand, *Watts* claims that statutory caps on damages—which require a judge, as a matter of law, to reduce any jury verdict that exceeds those caps, regardless of the particular factual findings—interferes with the jury's fact-finding function. Yet on the other hand, that same case holds that remittitur—which allows a judge to reduce a jury's award of damages if it concludes that the verdict is excessive based on its own independent assessment of the evidence of the case—does not violate this same fact-finding function. But if the common law, as understood in 1820, permitted a judge to reduce a jury's damages award based on a conclusion that the jury's factual findings did not support such an award, it cannot be said that the same common law forbids a judge to apply a mandatory, statutory cap on damages and reduce any damages that exceed such caps *regardless of the jury's particular facts*. *Compare with Dimick v. Schiedt*, 293 U.S. 474 1935) (discussing the nature of remittitur).

At the end of the day, the Missouri Supreme Court's hostility to statutory caps on recovering damages in common law causes of action is less about preserving the right to a jury trial and more about

preventing any sort of modification to the legal remedies available under such causes of action. Under the common law, there were no caps on such damages, but that did not change the fact that the remedies were *legal* in nature, distinct from any factual findings by a jury. The Missouri General Assembly, through its plenary power to abolish or amend the common law, decided to modify these legal remedies. In holding the General Assembly cannot do this, the Missouri Supreme Court has in effect ruled that plaintiffs have a vested right to common law causes of action that no legislative action can abrogate. But neither the Missouri Constitution nor the United States Constitution vest an individual with any interest "'in any rule of the common law.'" *Blaske v. Smith & Entezeroth, Inc.*, 821 S.W.2d 822, 834 (Mo. 1991) (quoting *Duke*, 438 U.S. at 88 n.32).

While the Missouri judiciary has spilled much ink in attempting to uphold for plaintiffs a nonexistent due process right to a particular common law cause of action, it has failed to give the same attention and consideration to the very real due process rights that Petitioners have in the context of punitive damages. This Court should put an end to such practices and agree to hear this case.

C. The punitive damages ratios in Missouri courts grossly exceed *State Farm's* limits.

This Court has held "that, in practice, few awards exceeding a single-digit ration between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). But in Missouri, single-digit ratios are not the exception—they are practically the norm.

As Petitioners themselves have noted (Pet.Br.26-

27), the Missouri Supreme Court has upheld punitive damages ratios against two defendants at 40:1 and 22:1, respectively. *Lewellen v. Franklin*, 441 S.W.3d 136, 147 (Mo. 2014). That is only the tip of the iceberg when it comes to Missouri courts upholding excessive punitive ratios. Missouri courts have regularly upheld ratios in the double—and even triple—digits. *See Heckadon v. CFS Enterprises, Inc.*, 400 S.W.3d 372, 384 (Mo. Ct. App. 2013) (affirming ratio of 187:1); *Krysa v. Payne*, 176 S.W.3d 150, 160-62 (Mo. Ct. App. 2005) (affirming ratio of 27:1); *Estate of Overby v. Franklin*, 361 S.W.3d 364, 374 (Mo. 2012) (affirming ratio of 111:1); *Weaver v. African Methodist Episcopal Church*, 54 S.W.3d 575, 588 (Mo. Ct. App. 2001) (affirming ratio of 66:1).

In attempting to justify awards in excess of single-digit ratios, the Missouri Supreme Court in *Lewellen* relied in part on this Court opinion in *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 461 (1993), which upheld a ratio of 526:1. *See Lewellen*, 441 S.W.3d at 148 (citing *TXO Prod.*, 509 U.S. at 461). But in doing this, the Missouri Supreme Court ignored ow (1) how *TXO Prod.* preceded this Court's *State Farm* opinion giving further elaboration on what ratios are appropriate; and (2) how *TXO Prod.* is itself a plurality opinion, and consequently has no precedential authority. This Court's review is desperately needed to put an end to the regular upholding of such grossly excessive ratios.

CONCLUSION

This Court should grant the Petition for a writ of certiorari.

Respectfully submitted,

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