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 a Writ of Certiorari to the Missouri Court of Appeals for the Eastern District

BRIEF IN OPPOSITION FOR RESPONDENTS

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QUESTIONS PRESENTED

Respondents are five Missouri plaintiffs and 15 non-Missouri plaintiffs who sued petitioners Johnson & Johnson ("J&J") and Johnson & Johnson Consumer Inc. ("JJCI") in Missouri after developing ovarian cancer from exposure to asbestos in petitioners' talc powders. The Missouri plaintiffs were injured in Missouri, whereas the non-Missouri plaintiffs used a powder manufactured and labeled in Missouri at petitioner JJCI's direction. Common questions of law and fact led the trial court to hold a joint trial, while employing individualized jury instructions and verdicts.

The jury found that petitioners' negligence in manufacturing and failing to warn about talc powders that they knew contained asbestos—while concealing that fact for decades—caused respondents' ovarian cancer. Based on petitioners' highly reprehensible conduct, and after substantially reducing punitive damages to account for J&J's lack of Missouri contacts, the Missouri Court of Appeals held that punitive damages of less than six times the compensatory damages for J&J and less than two times the compensatory damages for JJCI were within constitutional limits.

The questions presented are:

1. Whether petitioners preserved an argument that the Due Process Clause imposes substantive federal limits on the consolidation of trials, and, if so, whether the appellate court merely presumed that jury instructions cure all prejudice from consolidation and thereby violated due process.

2. Whether this Court should adopt a new constitutional rule limiting the ratio between compensatory and punitive damages to 1:1 when compensatory

damages are substantial, regardless of how reprehensibly the defendants acted, and whether the Court should specify how to calculate the ratio in cases involving multiple defendants that fail to request an allocation of fault between them.

3. Whether, in light of this Court's decision to reject a proximate-cause requirement for specific jurisdiction in *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021), the Court needs to grant, vacate, and remand this case.

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INTRODUCTION

Petitioners knew for decades that their talc powders contained asbestos, a highly carcinogenic substance with no known safe exposure level. They could have protected customers by switching from talc to cornstarch, as their own scientists proposed as early as 1973. But talc was cheaper and petitioners were unwilling to sacrifice profits for a safer product. Instead, they launched a decades-long cover-up, hiding test results, pushing ineffective asbestos testing methods, misleading regulators, tainting scientific research, and intimidating those who questioned their powders' safety. The truth eventually was revealed. Following this trial, adverse rulings in federal multidistrict litigation, FDA testing, and congressional hearings, petitioners stopped selling their talc products in the United States.

Respondents are among petitioners' victims. Unaware of the dangers, they used petitioners' asbestos-laced products for decades before being diagnosed with ovarian cancer—a painful, deadly disease linked to asbestos exposure. Based on extensive evidence, internal documents, and expert testimony, the jury found that petitioners' talc contained asbestos and caused respondents' cancer. The jury—and the trial court, in a post-verdict ruling—also found that petitioners' extraordinarily reprehensible conduct warranted significant punitive damages. A thorough, deliberate appellate decision largely affirmed that judgment.

In this Court, petitioners continue to avoid the facts on which the jury found liability and reprehensibility. They mischaracterize the appellate court's decision and raise new arguments not advanced below. Even on their own terms, petitioners' contentions fail.

First, they ask the Court to federalize state procedural rules on consolidation, a request they attempt to justify through selective and out-of-context quotations from the decision below and other cases. In fact, no case imposes a rule as a matter of federal due process that overrides commonly applied state consolidation rules.

Second, they ask the Court to decree, as a matter of substantive due process, an arbitrary mathematical limit on state punitive damages that would require courts and juries to ignore the profound reprehensibility of petitioners' decades-long wrongdoing. Yet they cite no case that restricts punitive damages for comparably reprehensible conduct exposing unwitting consumers to deathly harm.

Finally, petitioners reprise a request, which this Court recently rejected, to limit personal jurisdiction to fora in which the defendant's actions proximately caused the plaintiff's injuries. Because the decision below faithfully applied precedent and this Court rejected petitioners' requested personal-jurisdiction test, further review on personal jurisdiction is unwarranted.

STATEMENT

Respondents are 20 women with ovarian cancer, who were long-time, frequent users of Johnson's Baby Powder ("JBP"), Shower to Shower, and Shower to Shower Shimmer Effects ("Shimmer").[1] Six respondents (represented by their estates) had died from ovarian cancer by the time of trial in this case; another three have died from it since. Over a six-week trial,

[1] The appellate court dismissed two out-of-state plaintiffs' cases for lack of personal jurisdiction. App.40a, 48a-49a. They are not respondents here.

respondents proved that petitioners knowingly sold talc-based powders containing asbestos and that this exposure caused serious injuries and death.

A. Factual Background[2]

For decades, petitioners knowingly misrepresented that their products contained no asbestos. A 1969 internal memorandum acknowledged the presence of asbestos in their talc products, as well as the potential "furor" and "litigation" that could occur "if it became known that our talc formulations contained any significant amount" of asbestos. PX3.P2; App.85a. A J&J scientist who found trace amounts of tremolite asbestos[3] wrote in an internal letter that "[t]his is not new." App.85a. In 1972, the FDA replicated that finding, which an independent lab confirmed in 1975. *Id.* Petitioners' own expert admitted that asbestos was a "common contaminant" in cosmetic talc in the 1970s and that such contamination persisted into the 1980s. PX186.P8. Testing by the Mine Safety and Health Administration at a J&J talc mill found asbestos in 1984. App.86a. In 1991, a Rutgers mineralogist later retained by petitioners found asbestos in samples from petitioners' talc mines, and she testified that petitioners' talc had contained asbestos since the 1970s. *Id.*; Tr.2.880-83. Another independent lab found asbestos in petitioners' powders in 2004. App.86a.

Petitioners nonetheless hid the truth from the public, while using and promoting testing methods

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[2] In an appeal from a jury verdict, this Court "view[s] the evidence in the light most favorable" to the party prevailing below. *Brooke Grp. Ltd. v. Brown & Williamson Tobacco Corp.*, 509 U.S. 209, 213 (1993).

[3] Trace amounts, less than 0.1%, can include millions of asbestos fibers. Tr.3.1240.

with three deficiencies they knew would produce false negatives. First, they refused to pre-concentrate their talc samples. Asbestos fibers are microscopic and easily concealed in talc. In 1973, the Colorado School of Mines told petitioners that "pre-concentration"—which uses a centrifuge to separate asbestos fibers from talc—was "essential" for detecting asbestos in talc. Tr.3.1260-65; PX1795.P1-4; App.89a. Petitioners already knew about pre-concentration, having decided it was "too sensitive" after using it earlier that year and finding asbestos in their talc. App.90a; PX51.P5. They then opposed a "disturbing" FDA proposal in 1976 to use concentration techniques. PX26; App.90a. They advised their trade group, the Cosmetic Toiletry and Fragrance Association, that it was "critical for the C.T.F.A. to" recommend a different, less-effective method "before the art advances to more sophisticated techniques with higher levels of sensitization." App.90a. Petitioners "deliberately" did not use pre-concentration because they "felt it would not be in worldwide company interests." *Id.*; *see also* PX8377.P3 ("We want to avoid promotion of this approach.").

Second, petitioners principally tested their products using "x-ray diffraction" ("XRD"), which routinely failed to identify asbestos that other methods would detect. Tr.2.1008-12. If XRD showed asbestos, they moved to other advanced microscopy methods known to be more effective, but *only if* combined with pre-concentration. Tr.2.1013-15; Tr.3.1278-79. Petitioners could tout their use of advanced methods, knowing they would not regularly detect asbestos.

And, third, petitioners deemed a sample positive only if they detected at least five fibers of the same asbestos type, even though multiple types of asbestos are commonly found in talc. Tr.2.1019-20, 1060-62.

Despite the well-documented presence of asbestos in their talc, App.86a-87a, petitioners falsely represented to the FDA in 2016 that "[n]o asbestos-form structures have ever been found during any testing." Tr.7.4414-15. Petitioners also silenced or strong-armed those who researched or reported asbestos in their powders. App.90a-91a. In 1972, after an FDA consultant found potential asbestos contamination, J&J threatened legal action to prevent public identification of the contaminated products. DX2066; Tr.3.1488-91. In 1975, petitioners demanded that Mount Sinai "immediate[ly] remov[e]" its researchers' "hostile" findings of asbestos in talc. Tr.3.1639; App.91a. Petitioners did not claim that the findings were wrong, just that Mount Sinai's samples were three years old. PX.5327. Petitioners also secretly funded a 2008 article concluding that cosmetic talc does not cause cancer, laundering payment through a law firm that could claim attorney-work-product privilege if asked to divulge the funding's source. App.90a-91a; Tr.3.1576-83. And petitioners worked through a seemingly neutral watchdog, the Center for Regulatory Effectiveness, to "divert an almost guaranteed listing for talc" as a carcinogen by the federal National Toxicology Program, thereby "saving the talc business from certain ruin." Tr.7.4375-82; PX4129, 4151.

Petitioners chose secrecy to advance profit. Petitioners feared "economic hardship" (DX2066.P2) if the public learned they had sold powders containing asbestos, thereby losing their "emotional connection" with JBP. PX2821. Replacing talc with cornstarch would have eliminated the risk. App.87a-88a. But cornstarch costs more, and the change would have eliminated revenues from talc mines owned by

petitioners. App.86a, 88a; Tr.2.770-71; Tr.6.3777. So petitioners kept selling talc-based products without warning of the health risks.

Recently, the FDA again found asbestos in petitioners' powders. *See* Press Release, FDA, *Baby powder manufacturer voluntarily recalls products for asbestos* (Oct. 18, 2019) (advising consumers "to stop using affected products"). And, in 2020, after Congress and the Department of Justice opened investigations, petitioners finally relented and removed talc from their products sold in the United States and Canada.[4]

B. Procedural History

1. In 2015, respondents brought product-liability claims in Missouri circuit court alleging that petitioners' powders caused their ovarian cancer. Five respondents used petitioners' powders and developed cancer in Missouri, while 15 did so in other States. The 15 non-Missouri respondents used Shimmer, a product "manufactured, packaged, and labeled . . . in Missouri" by a JJCI contractor "according to JJCI's specifications." App.34a, 36a.

At trial, respondents presented expert testimony and internal corporate documents proving that petitioners' products long have contained asbestos. *See supra* pp. 3-5. For example, a microscopy expert tested 36 powder samples originating from the four mines supplying petitioners' talc. App.53a, 66a;

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[4] *See* J&J, SEC Form 10-K at 88 (Feb. 22, 2021); Press Release, U.S. House Comm. on Oversight & Reform, *Oversight Subcommittee's Year-Long Investigation Leads to Johnson & Johnson Discontinuing Talc-based Baby Powder* (May 19, 2020); Letter from Raja Krishnamoorthi, Chairman, Subcomm. on Economic & Consumer Policy of the H. Comm. on Oversight & Reform, to Stephen M. Hahn, Comm'r, FDA (May 3, 2020).

Tr.3.1269. He detected asbestos in 20 of these samples, including one that came straight from J&J's own museum. App.53a.[5]

Respondents also proved that asbestos causes ovarian cancer, App.79a, a fact petitioners did not seriously dispute. Dr. Jacqueline Moline described the research establishing the causal link and explained how asbestos can travel to ovaries and fallopian tubes. App.80a; Tr.5.3332-42. Based on that evidence, the International Agency for Research on Cancer, the National Cancer Institute, and the American Cancer Society list asbestos as a proven cause of ovarian cancer. App.80a.

Respondents further demonstrated that exposure to asbestos in talc products can cause ovarian cancer and in fact contributed to respondents' cancer. *See*, *e.g.*, Tr.7.4825-26 (describing studies reporting link between talc and ovarian cancer); Tr.8.5606, 5654-55 (same). Dr. Dean Felsher, the director of the Dean Felsher Lab for cancer research at Stanford University, examined each respondent then living, analyzed every respondent's risk factors, and concluded that asbestos exposure through petitioners' powders directly caused or contributed to cause *each* respondent's cancer. App.16a. Dr. Felsher fully considered and rejected petitioners' claim that some respondents' genetic predisposition, or other risk factors, accounted for their conditions. App.75a-76a. He explained, for

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[5] The Missouri courts rejected petitioners' *Daubert* challenge to the expert's testing methodology, as has the MDL court overseeing federal talc litigation. *See* App.54a-56a, 66a-67a (finding that the expert, Dr. William Longo, gave reliable testimony and established the samples were authentic and representative of the relevant years); *In re Johnson & Johnson Talcum Powder Prods. Mktg., Sales Practices & Prods. Liab. Litig.*, 2020 WL 8968851, at *17-20 (D.N.J. Apr. 27, 2020).

example, that even those with a genetic predisposition ordinarily develop cancer only in response to some other contributing cause, "[l]ike a carcinogen." App.75a. The jury also heard testimony of each respondent's habitual use of petitioners' powders, diagnosis, and subsequent suffering.

Petitioners' principal defense was not specific to any plaintiff. They argued unpersuasively their powders could not cause ovarian cancer because they never contained asbestos. Tr.7.4232; Tr.9.6024. They further insisted that epidemiological studies disproved a link between their powders and ovarian cancer. But petitioners' expert conceded multiple shortcomings in those studies, including their failure to follow subjects long enough to detect a link to ovarian cancer, which often arises decades after initial exposure to asbestos. Tr.5.3303; Tr.6.3458-59; Tr.8.5580-97.

The jury considered the same two claims for each plaintiff against each defendant: negligence, either in manufacturing or in failing to warn, and strict liability. Tr.9.5807-5949. The court gave jury instructions specific to each respondent, explaining the materially similar liability standards of the various States. *See*, *e.g.*, Tr.9.5837-44 (Missouri plaintiff); Tr.9.5844-50 (Arizona plaintiff).[6]

After deliberations spanning two days, Tr.9.6100-6201, the jury rendered a unanimous verdict for respondents on all claims against each petitioner. Tr.9.6201-27.

As for damages, neither side pressed for different awards for different plaintiffs. Respondents sought

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[6] Petitioners did not challenge any jury instructions on appeal.

compensation for past and future pain and suffering, but not economic damages that would vary among plaintiffs. Petitioners elected not to address damages in closing arguments. The jury awarded $25 million in compensatory damages to each respondent. *Id.*; App.8a.[7]

At petitioners' request, the jury determined one punitive-damages amount for all claims. Tr.9.6243-46. It awarded $3.15 billion against J&J ($143.18 million per plaintiff) and $990 million against JJCI ($45 million per plaintiff).[8] App.8a.

2. The Missouri Court of Appeals rejected petitioners' various evidentiary challenges and held that "the evidence adduced [at] this trial showed clear and convincing evidence Defendants" acted with "evil motive or reckless indifference" to their customers' safety. App.94a. In doing so, the court rejected petitioners' challenge to the sufficiency of the evidence proving that their products caused respondents' cancer. App.79a. The court further upheld consolidation of the cases for trial, but partially reversed the trial court's personal-jurisdiction rulings and substantially reduced the punitive-damages award.

Consolidation. The appellate court rejected petitioners' argument that Missouri Rule of Civil Procedure 52.05(b), the state analogue to Federal Rule of Civil Procedure 42(b), required separate trials. App.9a. The court first observed that petitioners did not challenge the joinder of each plaintiff in the lawsuit and

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[7] Petitioners did not propose having the jury allocate fault, and it did not do so.

[8] Petitioners quote (at 9) an anonymous juror regarding the punitive-damages amount, but they do not challenge the award on the ground that it unconstitutionally punishes harms to non-parties.

held that joinder was appropriate: each respondent used petitioners' products; developed ovarian cancer because of petitioners' wrongful conduct; and asserted the same causes of action, implicating much of the same evidence. App.12a.

The appellate court next held that the trial court did not abuse its discretion in denying petitioners' request to sever the trials.[9] App.13a. The court rejected petitioners' claim that the joint trial confused the jury and prejudiced petitioners. Petitioners had not specified a source of jury confusion; they had "instead effectively worked backwards, speculating as to the reason for the [identical] compensatory awards based on the end result." App.14a-15a. But any risk of prejudice was reduced by (i) plaintiff-specific causation evidence, (ii) the instruction that the jury must find the products caused each individual's injury, and (iii) the separate verdict forms for each individual. App.15a-16a. In those circumstances, claiming jury confusion based only on identical damages amounts was "unfounded speculation that the jurors disregarded clear instructions of the court in arriving at their verdict." *Id.*

Personal Jurisdiction. Petitioners challenged the court's personal jurisdiction over the non-Missouri respondents under *Bristol-Myers Squibb Co. v. Superior Court*, 137 S. Ct. 1773 (2017). App.29a.

Applying *Bristol-Myers*, the appellate court affirmed the exercise of jurisdiction over JJCI concerning the 15 non-Missouri respondents who used Shimmer, because JJCI "contracted with Missouri-based Pharma Tech Industries to manufacture, package, and label

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[9] The trial court denied petitioners' pre-trial motion to sever, D4050, and it then denied petitioners' post-trial motion for new, separate trials, D5860.

[that product] in Missouri." App.36a. These activities "firmly connect[ed]" the 15 non-Missouri respondents' claims to Missouri. App.35a.[10] The court rejected petitioners' attempt to analogize JJCI's relationship with its manufacturer to Bristol-Myers' contractual relationship with a California distributor that this Court held insufficient for personal jurisdiction in *Bristol-Myers*. App.33a-34a. *Bristol-Myers* had emphasized that the defective product was not "manufactured, labeled, or packaged in California," whereas respondents here brought negligent-manufacturing claims concerning a product manufactured, labeled, and packaged in the forum. App.34a.

The court, however, reversed awards to the two non-Missouri respondents who only used products manufactured in Georgia. App.36a-40a. And it held that none of JJCI's Missouri contacts could be imputed to J&J. App.41a-49a. Consequently, personal jurisdiction over J&J was proper for only the five Missouri residents. App.49a.

Punitive Damages. Based on its personal-jurisdiction rulings, the appellate court reduced the aggregate punitive-damages awards by more than 60%. App.100a-101a.[11] The court rejected petitioners' challenge to the remainder. App.94a-95a.

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[10] The appellate court rejected petitioners' effort to relitigate the trial court's factual determination that these 15 respondents used Shimmer. App.35a-36a.

[11] J&J's joint and several liability was decreased from $550 million to $125 million—$25 million for each of the five Missouri plaintiffs. App.100a. The court decreased compensatory damages against JJCI from $550 million to $500 million, reflecting the two plaintiffs with no Missouri contacts. *Id.* To preserve the jury's chosen ratio of punitive to compensatory damages, the court reduced J&J's punitive damages from $3.15 billion to

In reviewing the award, the court analyzed this Court's "'three guideposts'": (1) the reprehensibility of the defendant's conduct, "'the most important indicium of the reasonableness of a punitive damages award,'" (2) the disparity between the actual or potential harm suffered and the punitive-damages amount, and (3) the difference between the punitive damages and civil penalties authorized in comparable cases. App.96a-97a (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418-19 (2003); and citing *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996)).

The court first found "significant reprehensibility." Respondents' harms were "physical, not just economic," and severe in nature. App.97a-98a. Petitioners knew their talc had contained asbestos for years; yet they refused to adopt more-accurate testing methods, promoted less-accurate methods, and declined to use a safe alternative due to expense. App.98a. Petitioners thereby exhibited "reckless disregard of the health and safety of others." *Id.*

Applying the second guidepost, the court noted that "there is no 'mathematical bright line . . . that would fit every case.'" App.99a (quoting *Gore*, 517 U.S. at 580, 582-83). But it acknowledged that "'[f]ew awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.'" *Id.* (quoting *State Farm*, 538 U.S. at 425).

In calculating ratios, the court divided each defendant's punitive-damages award by the amount of compensatory damages for which it was held liable. App.99a-100a n.27. It determined the resulting

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$715.9 million and JJCI's from $990 million to $900 million. App.100a-101a.

ratios—1.8:1 for JJCI and 5.72:1 for J&J—were within constitutional limits. App.100a-103a (citing cases).

The court rejected petitioners' claim that a punitive-damages ratio of 1:1 is the "outermost constitutional limit" when compensatory damages are "substantial." App.101a. Citing *State Farm*'s rejection of "rigid benchmarks," 538 U.S. at 425, it found the ratios appropriate here. Deterrence and reprehensibility justified J&J's higher ratio, because its reprehensible conduct began years before JJCI was created. App.103a. The court noted that higher ratios also are justified when, as here, "'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'" App.103a (quoting *Gore*, 517 U.S. at 582).

The court agreed with the parties that the third guidepost was less important because common-law torts do not easily compare to statutory penalties. App.103a-104a. After weighing the three guideposts, the court held that the reduced punitive-damages awards were "not grossly excessive considering Defendants' actions of knowingly selling Products that contained asbestos to consumers." App.105a.

3. The Missouri Supreme Court denied discretionary review.

REASONS FOR DENYING THE PETITION

I. The Denial Of Severance Does Not Warrant Review

Consolidation has a long lineage in American law. *See Hall v. Hall*, 138 S. Ct. 1118, 1125 (2018); *e.g.*, *Brewster v. Stewart*, 3 Wend. 441, 442 (N.Y. Sup. Ct. Jud. 1830). Petitioners themselves repeatedly have sought consolidation of talc cases when it suits their strategic interests.[12]

State courts make consolidation and severance decisions by applying state rules of civil procedure, subject to appellate review. Petitioners and their *amici* unpersuasively urge this Court to displace that traditional state authority by developing uniform federal standards under the Due Process Clause. Petitioners do not deny that consolidation is already governed by generally uniform rules in state and federal court. Nor do they identify any due process flaw in the rules as written. And they do not deny that, when existing consolidation rules are properly applied, due process is satisfied.

Petitioners' only complaint is that those settled, uncontroversial consolidation rules were misapplied here. They were not. But, more importantly, this Court need not wade into that dispute. Petitioners preserved no due process objection to consolidation. Their claim that courts disagree about the due process limits on consolidation is not faithful to the cases,

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[12] *See*, *e.g.*, Mem. in Support of Motion To Fix Venue for Claims at 1-2, *In re Imerys Talc Am., Inc.*, 602 B.R. 248 (D. Del. 2019) (No. 1:19-mc-103), ECF No. 2 (moving unsuccessfully to consolidate approximately 2,400 talc suits with their talc supplier's bankruptcy proceedings and arguing that the suits were "overwhelming" state courts and could be "harmonized" via consolidation in a "single, centralized forum").

including the appellate decision below. And, after hundreds of pages of briefing, petitioners and their *amici* are unable to articulate a rule of constitutional law this Court could adopt that is not already a settled principle of state and federal rules of civil procedure.

A. The Missouri Court Of Appeals Correctly Rejected Petitioners' Challenge To The Joint Trial

Consolidation in tort cases is commonplace, an essential practice for preserving the resources of courts and parties when common issues—such as the product's safety and the defendant's knowledge of its danger—predominate, as they did here. *See*, *e.g.*, 9A Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure* § 2384, at 63 & n.21 (3d ed. 2008 & 2019 Supp.). State and federal rules generally allow joint trials when the plaintiffs' claims arise out of the same series of transactions and raise common questions, unless consolidation would unduly delay the case or prejudice a party. *See*, *e.g.*, Mo. R. Civ. P. 52.05, 66.01, 66.02; Fed. R. Civ. P. 20, 42. Petitioners mount no federal challenge to those established standards. Their attempt to make a constitutional case out of a state-law dispute about these rules' proper application lacks merit.

1. As the Missouri appellate court explained, the "evidence adduced at trial involved common issues regarding whether talc or asbestos cause cancer, whether the Products contained asbestos, Defendants' testing methodology, whether Defendants knew the Products contained asbestos, and whether Defendants disseminated misleading information regarding the risks of the Products." App.12a. Those common topics consumed approximately 21 of the 28 trial days. The trial judge had presided previously over four

individual-plaintiff talc trials against petitioners, and so decided to consolidate here based on significant knowledge of the common issues of law and fact.

Petitioners object that consolidation allowed respondents to avoid proving individualized causation and damages. Pet. 11, 18-19.[13] But, as the appellate court explained, "Plaintiffs presented evidence of specific causation for each individual Plaintiff through their expert, Dr. Felsher." App.15a-16a. Dr. Felsher

> considered and compared the unique risk factors of each individual Plaintiff in detail. He meticulously told the jury about each individual Plaintiff's personal history, opined about which aspects of her history made her more or less at risk for developing ovarian cancer, and concluded talc exposure directly caused or directly contributed to cause her ovarian cancer.

Id.[14] The court instructed the jury to decide each case individually, provided separate instructions for each plaintiff, and required individual verdicts on separate verdict forms with separate signature pages for each one. D5684.P4; D5688.P1-83.

Petitioners' only basis for claiming that the jury disregarded that evidence, the court's instructions, and the separate verdict forms is the uniformity of the compensatory damage awards. Pet. 11, 18-19.

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[13] Petitioners also note the length of the jury instructions on the elements of respondents' claims. Pet. 11. But they do not identify any material difference in the law among the jurisdictions or cite any evidence of actual juror confusion. *See* Pet. 11, 17-21.

[14] The jury reasonably credited Dr. Felsher's testimony over the opinions on individual causation of petitioners' medical experts, who admitted they had no experience with asbestos before this trial. Tr.7.4761-62; Tr.8.4950-58, 5510-12.

But petitioners elicited little individualized damages evidence. Instead, petitioners decided to train their firepower on denying their products contained asbestos and caused cancer. *See supra* p. 5. For their part, respondents did not seek forms of damages—such as medical expenses or lost wages—that normally would lead to varied awards. Instead, they sought damages for past and future pain and suffering. Tr.9.6018-20. Consequently, during closing arguments neither side asked for different awards for different plaintiffs. Indeed, petitioners' counsel elected not to address damages at all. *See supra* p. 9.

Petitioners single out Gail Ingham as a supposed sign of a trial gone awry. But the jury heard all of the arguments they make in the petition (at 18). *See* Tr.5.3218-19. It *also* heard that Ms. Ingham experienced serious pain, underwent a hysterectomy, went into surgically induced menopause as a result, endured 13 chemotherapy treatments, lost her hair and her memory and her ability to think clearly, and was forced into isolation to minimize her risk of infection, all in view of her young son who cried in her arms, afraid she would die. Tr.5.3200-15. The jury also knew that Ms. Ingham would live the rest of her life knowing that the cancer was likely to recur and take her life. Tr.5.3198.

Given each respondent's similar pain and suffering and a likely future death from ovarian cancer, the jury had ample reason to conclude that one respondent's suffering was not worth less than another's.

2. Petitioners claim that the state appellate court nonetheless violated due process by failing to consider their purported evidence of prejudice and instead assuming no prejudice because the jury was instructed to consider each case individually. Pet. 12. The court's opinion belies that claim.

In describing Missouri's governing law, the appellate court explained that courts must "consider the 'practical difficulties' involved in proceeding with one trial when there are multiple issues, plaintiffs, or defendants," as well as "the avoidance of prejudice . . . and the conflicting interests of the parties." App.13a; *see also id.* (state rules permit "separate trials of any claim . . . to avoid prejudice").

The court then applied that standard, finding that the jury instructions "reduced" the risk of prejudice, but then going beyond the instructions to fully consider petitioners' purported evidence of prejudice. App.15a. It explained, for example, that petitioners failed to produce anything beyond "unfounded speculation" that the jury was confused and failed to identify any "direct source of the jury's alleged confusion." App.14a.[15] Additionally, petitioners waived any objection that consolidation allowed the jury to hear otherwise inadmissible testimony about other plaintiffs' experiences. App.17a. And the court observed that the jury instructions were accompanied by individualized evidence. *E.g.*, App.16a.

B. Petitioners' Failure To Preserve A Federal Due Process Challenge Deprives This Court Of Jurisdiction

Petitioners failed to satisfy the prerequisites for jurisdiction because they did not press, and the appellate court did not pass upon, a due process challenge to consolidation. *See*, *e.g.*, *Webb v. Webb*, 451 U.S. 493, 495-502 (1981).

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[15] The broadly representative jury included persons by training and profession capable of individualized judgments: a DuPont scientist, nurse, financial analyst, and legal assistant at a defense law firm. Tr.2.413-15, 433, 452, 461, 473-74, 704-06.

Petitioners acknowledge that the Missouri Court of Appeals did not address any due process challenge to consolidation. Pet. 12. "[W]hen, as here, the highest state court has failed to pass upon a federal question," this Court "assume[s] that the omission was due to want of proper presentation in the state courts, unless the aggrieved party in this Court can affirmatively show the contrary." *Street v. New York*, 394 U.S. 576, 582 (1969). Petitioners' voluminous appellate briefs mentioned the federal Due Process Clause only once:

> In short, the joint trial of 22 plaintiffs' disparate personal injury claims was unacceptable both under Rule 52.05 and as a matter of due process under the Missouri and United States Constitutions, which demand that any benefits from proceeding with multiple plaintiffs "yield to a paramount concern for a fair and impartial trial."

Pet'r C.A. Br. 82 (quoting *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990)). Petitioners did not explain why their arguments under state consolidation rules also established a federal due process violation. *Id.* Invoking *Johnson* could not fill that void: the passage quoted by petitioners describes Federal Rule of Civil Procedure 42(a) requirements, not due process. *See* 899 F.2d at 1284-85.[16] Nor did the other cases in the short string cite that followed apply the Due Process Clause to consolidation. *See* Pet'r C.A. Br. 82-83.

In seeking Missouri Supreme Court review, petitioners did not fault the appellate court for declining

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[16] In a different passage, *Johnson* actually *rejected* a call to apply the Due Process Clause in addition to consolidation rules. *See* 899 F.2d at 1289; *infra* p. 21.

to address the Due Process Clause or otherwise press that federal constitutional argument. *See* Application for Transfer 4-10 (Aug. 12, 2020).

Petitioners thus failed to preserve any federal question for this Court's review. *See*, *e.g.*, *Beck v. Washington*, 369 U.S. 541, 553 (1962) (finding no jurisdiction given "the failure of petitioner to argue the constitutional contention in his [state-court] brief, as opposed to merely setting it forth as he did in one sentence of his 125-page brief"); *Boswell v. Steel Haulers, Inc.*, 670 S.W.2d 906, 912 (Mo. Ct. App. 1984) (argument abandoned when party "provided this court with one-half page of argument in its brief and has cited no authority or rationale to support the contention").

C. No Circuit Split Exists On The First Question Presented

The courts are not divided on the narrow question that petitioners frame as a due process violation: whether a court can avoid evaluating consolidation's potential to prejudice a party so long as the jury was instructed to consider each case individually. Pet. i. Petitioners identify no Missouri Supreme Court decision establishing what they call the "Missouri-Alabama rule." Pet. 17. And, even if an intermediate appellate court could create a cert-worthy conflict, the opinion below adopted no such rule. *See supra* p. 16. Accordingly, if a split exists on the first question presented, Missouri is not part of it and this case presents no vehicle to resolve it.

In any event, the claimed conflict is illusory. Petitioners' single case from Alabama, a one-page opinion with scant analysis, considered a jury instruction "[i]n addition" to other factors, without

any reference to due process. *Owens-Corning Fiberglass Corp. v. Gant*, 662 So. 2d 255, 256 (Ala. 1995).

Hardly any cases petitioners place on the *other* side of the conflict address due process. Most exclusively apply rules of procedure. *See*, *e.g.*, *Malcolm v. National Gypsum Co.*, 995 F.2d 346, 349-52 (2d Cir. 1993). Only three even discuss due process in ruling on consolidation. Two of those do not address petitioners' question presented. *See In re Fibreboard Corp.*, 893 F.2d 706, 710-11 (5th Cir. 1990) (no discussion of role of jury instructions); *Gwathmey v. United States*, 215 F.2d 148, 156 (5th Cir. 1954) (same). The third, *Johnson*, *rejected* a role for the Due Process Clause in consolidation analysis. Because the consolidation satisfied the federal rules and "the trial judge carefully instructed the jury throughout the trial to consider each plaintiff's claims individually, there was no need to provide other procedural safeguards concerning the consolidation." *Johnson*, 899 F.2d at 1289.

To the extent petitioners seek to persuade the Court that other jurisdictions would have denied consolidation on these facts under their consolidation rules, that is no basis for certiorari. All of the decisions apply the same basic consolidation standards as Missouri. *Compare*, *e.g.*, App.13a *with Arnold v. Eastern Air Lines, Inc.*, 681 F.2d 186, 193 (4th Cir. 1982). The variation in results reflects material differences in the facts. *Gwathmey*, for example, rejected the United States' bid as plaintiff to hold a single condemnation trial for 236 tracts of land with widely varying attributes and with landowners represented by 12 different law firms. *See* 215 F.2d at 151-53. This was not a simple case of "just *two* plaintiffs," as petitioners erroneously assert. Pet. 13. *Fibreboard* vacated an order consolidating 3,031 asbestos cases for trial, where the district court proposed to enter

judgment for all plaintiffs based on a jury trial of a few representative cases. *See* 893 F.2d at 707. And *Malcolm* involved more than twice as many plaintiffs as this case with three different medical conditions, five different plaintiffs' firms, and 25 direct and more than 200 impleaded third-party defendants. *See* 995 F.2d at 348-52.

Finally, several of petitioners' cases *allowed* consolidation of cases comparable to, or even more complicated than, this one. *See*, *e.g.*, *In re Ethyl Corp.*, 975 S.W.2d 606 (Tex. 1998) (allowing consolidation under Texas rules of 22 asbestos suits against five separate defendants, based on exposure in different occupations at different worksites, resulting in a wide variety of diseases).

D. The First Question Presented Has Vanishing Significance

Petitioners say "[t]his case offers the Court the chance to do" something about alleged runaway consolidation. Pet. 20. But they ask the Court to decide only the limited question whether courts must consider prejudice in addition to jury instructions, a principle they say (incorrectly) only two States doubt. Pet. 20-21. The only other standard they propose is that consolidation may not prevent the jury from "fairly adjudicat[ing] consolidated claims." *Id.* But state and federal consolidation rules already require that.

The trial court's application of Missouri rules was a reasonable exercise of discretion to conserve scarce judicial and litigant resources, contrary to petitioners' unsupported assertion (at 2) that it represents a "winning formula" for plaintiffs. Moreover, consolidated talc trials have only occurred twice, in both

instances after the trial judge had already presided over multiple single-plaintiff trials.[17]

To the extent petitioners complain about Missouri specifically, recent legislation prohibits consolidation in similar future cases. *See* Mo. Rev. Stat. § 507.040(1) (prohibiting joinder of "claims arising out of separate purchases of the same product or service, or separate incidents involving the same product or services").

Ultimately, the only function of petitioners' proposed constitutionalization of consolidation rules is to provide a jurisdictional basis for this Court to review petitioners' real contention, which is the one they made below: the meritless claim that state courts misapplied settled state consolidation rules in this particular case.

II. The Punitive-Damages Award Does Not Warrant Review

Petitioners also ask this Court to review the punitive-damages award. Because the Missouri Court of Appeals correctly applied settled law, further review is unwarranted.

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[17] The trial judge here had presided over four. *See*, *e.g.*, *Fox v. Johnson & Johnson*, 2016 WL 799325 (Mo. Cir. Ct. Feb. 26, 2016), *rev'd sub nom. Estate of Fox v. Johnson & Johnson*, 539 S.W.3d 48 (Mo. Ct. App. 2017) (reversing for lack of personal jurisdiction due to intervening decision in *Bristol-Myers*). The other consolidated trial, *Barden v. Brenntag N. Am. Inc.*, No. L-001809-17, *verdict returned* (N.J. Super. Ct., Middlesex Cty. Feb. 6, 2020) (Viscomi, J.), followed three single-plaintiff trials before the same judge. The fact that plaintiffs and defendants have both won and lost individual talc trials further disproves petitioners' contention: lawyering matters, and a party's success turns on many factors.

A. The Court Of Appeals Faithfully Applied This Court's Punitive-Damages Precedents

The appellate court diligently scrutinized the punitive damages under *Gore*'s guideposts.

The court began with reprehensibility, "'[t]he most important indicium of the reasonableness of a punitive damages award.'" *State Farm*, 538 U.S. at 419 (quoting *Gore*, 517 U.S. at 575). The court rightly found petitioners' misconduct highly reprehensible under every metric this Court has identified. App.97a (listing factors). First, the injury was "physical," not "economic." *Id.* "Plaintiffs underwent chemotherapy, hysterectomies, and countless other surgeries," which "caused them to experience symptoms such as hair loss, sleeplessness, mouth sores, loss of appetite, seizures, nausea, neuropathy, and other infections." App.97a-98a. "Several Plaintiffs died, and surviving Plaintiffs experience recurrences of cancer and fear of relapse." App.98a (footnote omitted).

Those horrific injuries resulted from conduct that went far beyond accidents or mere negligence. "Plaintiffs proved with convincing clarity that Defendants engaged in outrageous conduct because of an evil motive or reckless indifference." App.85a. For decades, petitioners knew that their products contained asbestos, there was no safe level of asbestos exposure, and they could eliminate that risk by switching to cornstarch, which they refused to do because that would decrease profits. App.85a-88a, 98a. Petitioners further knew that their customers relied on petitioners and regulators to confirm the powders were safe. Yet petitioners "worked tirelessly to ensure the industry adopted testing protocols not sensitive enough to detect asbestos in every talc sample." App.88a-89a. And they persuaded the FDA

not to require "more sophisticated techniques with higher levels of sensitization," because they "felt it would not be in worldwide company interests." App.90a (quoting internal document); App.92a-93a.

This was no one-time lapse in judgment or isolated incident. *See State Farm*, 538 U.S. at 419. Petitioners made the choice to double down on their deception each time new evidence emerged that their products contained asbestos. *See* App.90a-91a (recounting how petitioners "attempted to discredit scientists who published or sought to publish unfavorable studies regarding their Products").

Given the extraordinary reprehensibility of petitioners' conduct, the ratio of punitive damages to harm and potential harm did not render the verdicts unconstitutional. App.98a-99a. The awards, while significant, fall well within the single-digit range, amounting to less than twice the compensatory damages against JJCI and less than six times for J&J. App.99a. *See*, *e.g.*, *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23-24 (1991) (4.2:1 ratio in financial fraud case did not "cross the line"). Particularly given the low *ex ante* risk of detection—arising from the hidden nature of the danger and ovarian cancer's decades-long latency period—Missouri could reasonably conclude that a lesser ratio would fail to deter such profitable misconduct by multi-billion-dollar companies. *See* App.102a-103a; *Gore*, 517 U.S. at 582; *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 & n.28 (1993) (plurality) (considering petitioner's wealth in upholding punitive damages).

With respect to the final *Gore* guidepost, the appellate court observed that Missouri, like most States, imposes significant financial penalties and prison sentences on those who defraud the public. App.104a.

The awards here are comparable to traditional "double, treble, or quadruple damages" remedies authorized for centuries in a range of contexts. *State Farm*, 538 U.S. at 425.

B. The Court Should Reject Petitioners' Request To Impose A New Mathematical Limit On Punitive Damages

Petitioners make no effort to apply the *Gore* analysis or to question the appellate court's application of this Court's precedents. Indeed, they refuse to acknowledge the facts supporting the jury's and the appellate court's findings on reprehensibility, the most important consideration under existing law. *See* Pet. 5-9, 28-32.

Petitioners' failure to apply *Gore* exposes that their gambit is to overturn this Court's precedent, rather than apply it faithfully. That precedent permits significant punitive damages in cases of highly reprehensible conduct. Petitioners ask the Court to replace *Gore*'s guideposts with a mathematical formula limiting punitive damages to the amount of compensatory damages whenever the latter are "substantial." Pet. i, 30.[18] The Court should decline that invitation.

1. No Split Exists

Petitioners erroneously assert that five States and federal circuits hold unconstitutional any "punitive-damages award that far exceeds substantial compensatory damages." Pet. 22. Each decision limited punitive damages only after applying all the *Gore* factors, starting with reprehensibility. Those courts assessed the facts of each case; they did not robotically

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[18] This Court refused an invitation to create such a rule earlier this Term. *See Trans Union LLC v. Ramirez*, 141 S. Ct. 972 (2020) (rejecting question presented).

impose a predetermined ratio.[19] Most expressly disavowed applying a mathematical formula.[20]

This is no less true in the Eighth Circuit, upon which petitioners place special significance. *See* Pet. 23; *Williams*, 378 F.3d at 798 ("[D]ue process cannot be expressed in a simple numerical ratio."); *see also*, *e.g.*, *Lee ex rel. Lee v. Borders*, 764 F.3d 966, 969, 976 (8th Cir. 2014) (holding that "a 3:1 ratio does not indicate unconstitutionally excessive punitive damages" with award of $1 million compensatory damages).[21] And in *Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824, 826 (8th Cir. 2004), which petitioners ignore, the court approved a 4.8:1 ratio to a $2.1 million compensatory award for an egregious commercial fraud.

Petitioners suggest (at 25) that other jurisdictions, applying *Gore*'s analysis, would have reduced these awards. That fact-bound disagreement with a court's application of settled law would not warrant review, even if there were a basis for it. Like any multi-factor

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[19] *See*, *e.g.*, *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1073 (10th Cir. 2016); *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 443 (6th Cir. 2009); *Jurinko v. Medical Protective Co.*, 305 F. App'x 13, 27-29 (3d Cir. 2008); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 153-56 (6th Cir. 2007); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 796-97 (8th Cir. 2004); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 665-71 (S.D. 2003).

[20] *See*, *e.g.*, *Lompe*, 818 F.3d at 1068; *Jurinko*, 305 F. App'x at 27; *Bach*, 486 F.3d at 155-56; *Boerner*, 394 F.3d at 603; *Williams*, 378 F.3d at 798; *Roth*, 667 N.W.2d at 668.

[21] Petitioners dismiss (at 23) *Lee* and *Ondrisek v. Hoffman*, 698 F.3d 1020, 1029-31 (8th Cir. 2012) (approving 4:1 ratio to $3 million compensatory award), as "intentional tort" cases, but cite no Eighth Circuit precedent adopting different standards for intentional torts and other cases. Given petitioners' purposeful, decades-long concealment of asbestos in their talc powders, the comparable ratios awarded here reflect judicial consistency.

reasonableness analysis, the *Gore* factors require an exercise of judgment; consequently, some variation in application is unavoidable.

In fact, the cases petitioners cite to support their proposed numerical rule illustrate how courts use the degree of reprehensibility to decide when a higher ratio is permitted. Petitioners' cases limiting a punitive award to the amount of compensatory damages did so due to the lack of physical harm, the defendant's relatively low culpability, or both.[22] In petitioners' lead case, the plaintiff had suffered only minor physical injuries due to her landlord's failure to maintain carbon-monoxide detectors. *See Lompe*, 818 F.3d at 1066. And, in *Boerner*, the court disclaimed any "simple formula or bright-line ratio" and acknowledged that "a higher ratio" than 1:1 could be "justif[ied]" in cases with "[f]actors . . . such as the presence of an 'injury that is hard to detect.'" 394 F.3d at 603.

Conversely, cases upholding higher ratios resemble this one, involving egregious misconduct, serious physical injury, or both. *See Cote v. Philip Morris USA, Inc.*, 985 F.3d 840, 847-48 (11th Cir. 2021) (defendant concealed dangers of smoking, contributing to plaintiff's death); *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1181-82 (Or. 2006) (same); *Manor Care, Inc. v. Douglas*, 763 S.E.2d 73, 95 (W. Va. 2014) (nursing home acted with "actual malice" in wrongful-death case while deceiving regulators); *Planned Parenthood of Columbia/Willamette Inc. v. American Coal. of Life Activists*, 422 F.3d 949, 958 (9th Cir. 2005) (credible death threats); *Union Pac. R.R. Co. v.*

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[22] *See*, *e.g.*, *Morgan*, 559 F.3d at 441-42; *Jurinko*, 305 F. App'x at 28-29; *Bach*, 486 F.3d at 154-55; *Williams*, 378 F.3d at 797-98; *Roth*, 667 N.W.2d at 667.

Barber, 149 S.W.3d 325, 347-48 (Ark. 2004) (railway accident caused death and severe injury to motorists).

The variation in ratios does not represent a split. It reflects courts' considered application of the most important *Gore* factor, allowing higher ratios only in cases involving more reprehensible conduct, particularly conduct that puts profit over safety for consumers who unknowingly are exposed to life-threatening risks.

2. Petitioners' Proposed Rule Has No Merit

Petitioners ask the Court to abandon the well-settled and factually nuanced analyses these courts apply and impose a one-size-fits-all 1:1 limit in cases involving "substantial" compensatory awards. Pet. 29. But this Court has "'consistently rejected the notion that the constitutional line is marked by a simple mathematical formula.'" *State Farm*, 538 U.S. at 424 (quoting *Gore*, 517 U.S. at 582); *see also TXO Prod.*, 509 U.S. at 460 (plurality); *Haslip*, 499 U.S. at 18. The sentence from *State Farm* that petitioners cite is preceded by a reaffirmation of that principle—"We decline again to impose a bright-line ratio which a punitive damages award cannot exceed." 538 U.S. at 425. And the sentence itself was non-categorical. *See id.* ("When compensatory damages are substantial, then a lesser ratio, *perhaps* only equal to compensatory damages, *can* reach the outermost limit of the due process guarantee.") (emphases added).

Petitioners argue that the Court's precedents have proved an unworkable failure. Pet. 28-30. But they identify nothing in the Constitution's text, original understanding, or history to support a 1:1 limit on state-court punitive-damages awards. Petitioners' only authority is an inapplicable maritime case in which

the Court undertook its law-making responsibilities as a common-law tribunal, rather than as an expositor of the Constitution's limits on States' authority. *See* Pet. 29 (citing *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 514-15 (2008)). Petitioners' request for the Court to play the same policymaking role here reveals that their arguments lack a constitutional basis. They seek instead a raw exercise of judicial power to protect the economic interests of a class of defendants capable of protecting themselves through the political process.

Indeed, half of the States already have enacted legislation either prohibiting punitive damages or imposing single-digit ratio caps.[23] States have taken other measures, too. Missouri, for example:

- Allows punitive awards only under a "clear and convincing evidence" standard;[24]
- Precludes consideration of harm to nonparties;[25]
- Imposes special pleading requirements for punitive-damages claims;[26]
- Restricts punitive-damages evidence to a second stage of a bifurcated trial;[27]
- Addresses the prospect of serial punitive awards by allowing defendants to deduct from any Missouri award the amount of any prior punitive

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[23] *See* Tara Blake & Katelyn Marshall, *50-State Survey of Statutory Caps on Damages and the Applicability of the Collateral Source Rule*, JD Supra (Nov. 13, 2020), https://www.jdsupra.com/legalnews/50-state-survey-of-statutory-caps-on-39804/.

[24] Mo. Rev. Stat. § 510.261(1).

[25] *Id.* § 510.261(6).

[26] *Id.* § 510.261(5).

[27] *Id.* § 510.263(1).

awards paid in other cases arising from the same conduct;[28] and

- Requires that 50% of the net punitive award be paid to the State's Tort Victims' Compensation Fund, a practice also followed by a number of other States.[29]

Petitioners trumpet their proposed 1:1 limit as a useful additional prophylactic against unpredictable awards, juries punishing defendants for harm to others, and financially ruinous serial punitive-damages judgments. Pet. 28-30. But a 1:1 cap is too blunt an instrument. It would apply regardless of especially egregious misconduct, how many times innocent people were endangered, or how much profit had been extracted. Nothing prevents a defendant from pointing to past awards as a reason to limit further punitive awards on the grounds that they have been punished enough. Likewise, nothing prevents a defendant from arguing that a large award risks leaving nothing for other victims. But petitioners advanced no such argument at trial.

Petitioners' proposal would result in under-deterrence of exceedingly harmful behavior, particularly when (as here) the wrongful behavior is highly profitable and the risk of detection is low.

C. There Is No Reason To Grant Certiorari To Decide How To Calculate The *Gore* Ratio In Cases Of Joint And Several Liability

Petitioners briefly ask the Court to resolve an alleged conflict between "the Missouri Supreme Court

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[28] *Id.* § 510.263(4).

[29] *Id.* § 537.675(g)(3); *see also Gore*, 517 U.S. at 616-18 (Ginsburg, J., dissenting) (Appendix) (collecting examples from other States).

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." Pet. 26. That technical question, which has arisen only occasionally since *Gore*, does not warrant review.

1. The Courts Are Not Split

There is no square, considered conflict on this issue. The only Missouri case petitioners cite (at 26-27) is *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014). But, as petitioners emphasized below, "the parties in *Lewellen* agreed to that approach, so the court adopted it without constitutional scrutiny." C.A. Reply Br. 57.

Lewellen does not, in any event, conflict with *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848 (Tex. 2017). There, the court compared the ratio of punitive damages to "the harm caused by each defendant, as found by the jury." *Id.* at 879. Petitioners could have asked the jury to apportion fault between them, but elected not to do so. *See Burg v. Dampier*, 346 S.W.3d 343, 360 (Mo. Ct. App. 2011). Texas has not confronted a similar case, much less held that in comparable circumstances courts should treat each defendant as responsible for only half the harm.

Nor has the Eighth Circuit confronted this situation. At the time of *Grabinski v. Blue Springs Ford Sales, Inc.*, 203 F.3d 1024 (8th Cir. 2000), Missouri held joint tortfeasors jointly and severally liable without regard to assessment of fault. *See* Mo. Rev. Stat. § 537.067(1) (2000). But the statute now provides that each defendant "shall only be responsible for the percentage of the judgment for which the defendant is determined to be responsible by the trier

of fact," unless the defendant is "found to bear fifty-one percent or more of fault." Mo. Rev. Stat. § 537.067(1). Accordingly, Missouri law now contemplates that juries will generally apportion fault and that only one defendant can be jointly and severally liable for the full judgment. Like Texas, the Eighth Circuit has not yet decided what should happen when defendants, like petitioners, forgo apportionment.

Likewise, Texas and the Eighth Circuit have not confronted a case involving related companies. In another talc case, however, petitioners successfully argued that, in those circumstances, courts should compare the combined compensatory and combined punitive-damages awards. *See Olson v. Brenntag N. Am., Inc.*, 2020 WL 6603580, at *43 & n.83 (N.Y. Sup. Ct. Nov. 11, 2020) (judgment noted at 132 N.Y.S.3d 471 (table)). They make no such argument to this Court, presumably because the ratio would be a modest 3.23:1.

Petitioners' failure to seek apportionment or advance the *Olson* rule precludes the Court from considering the full spectrum of possible rules, making this a poor vehicle to decide any ratio calculation question.

2. The Decision Below Is Correct

In any event, the decision below was correct. The point of the *Gore* ratio is not to compare punitive damages to the amount of compensatory damages a defendant is expected to pay. Instead, courts must compare "the ratio between *harm*, or *potential harm*, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 424 (emphases added). The ordinary premise of joint and several liability is that, when defendants act jointly to cause a single, indivisible harm, they both caused and are responsible for the

entire injury. *See Honeycutt v. United States*, 137 S. Ct. 1626, 1631 (2017); Restatement (Second) of Torts § 875 (1979). The involvement of co-defendants does not diminish the reprehensibility of each participant's conduct. When two people commit a murder together, they do not split the prison time.

If a defendant believes this ordinary premise is unwarranted on the facts of a given case, it can ask the jury to apportion fault and ask the court to apply Texas's rule. But that did not happen here.

III. Petitioners' Personal-Jurisdiction Theory Is Not Cert-Worthy And Lacks Merit

A. The Court Unanimously Rejected Petitioners' Proposed Proximate-Cause Requirement In *Ford*

Petitioners raise "the same question this Court [wa]s considering in" *Ford Motor Co. v. Montana Eighth Judicial District Court*, 141 S. Ct. 1017 (2021). Pet. 32; *see* Pet. i. They accuse Missouri of breaking "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." Pet. 32. This Court unanimously rejected any proximate-cause requirement in *Ford*, so a GVR or further plenary review is unwarranted. *See Ford*, 141 S. Ct. at 1039 (Gorsuch, J., concurring in the judgment) (calling for further percolation).

A GVR also is unwarranted because petitioners did not preserve any causation argument—proximate or otherwise—concerning personal jurisdiction. Instead, they argued that jurisdiction was improper under *Bristol-Myers* because respondents' claims allegedly

had no jurisdictionally significant connection with the forum. *See* Pet'r C.A. Br. 96-97.[30]

B. The Missouri Appellate Court's Application of *Bristol-Myers* Is Correct And Does Not Warrant Review

With proximate cause off the table, petitioners fail to raise *any* cert-worthy issue on personal jurisdiction. Specific jurisdiction requires a suit to "arise out of or relate to the defendant's contacts with the *forum*." *Bristol-Myers*, 137 S. Ct. at 1780 (brackets and citation omitted); *see id.* (requiring "an affiliation between the forum and the underlying controversy") (citation omitted). Where the defendant "did not manufacture, label, [or] package" the product in the forum, the Court held that a tangential contact, such as a national distribution contract with a company in the forum, did not create the required "affiliation." *Id.* at 1778, 1781, 1783.

Applying that holding, Missouri's appellate court correctly found "JJCI's activities relating to the manufacture, packaging, and labeling of Shimmer in Missouri make it reasonable to require it to submit to the burdens of litigation in Missouri." App.33a (citation omitted). Respondents' negligent-manufacturing claims arise from those activities. App.36a. JJCI reasonably could anticipate being haled into Missouri courts to answer for that tortious conduct. *See*, *e.g.*, *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776

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[30] *Ford* precludes petitioners' assertion (at 33) that jurisdiction cannot be premised on the acts of a third-party agent implementing a defendant's specifications. *See* 141 S. Ct. at 1029-30 (relying on Ford's contacts through third-party dealers, parts suppliers, and advertising agencies); *id.* at 1026, 1028 (rejecting contention that design-defect claim can be brought only in the State where the product was designed).

(1984) (States have "an especial interest in exercising judicial jurisdiction over those who commit torts within [their] territory.") (citation omitted).

The petition offers no reason for this Court to review that holding. *Ford* confirmed the baseline rule that, when a defendant purposefully conducts activities in the forum State, including manufacturing and packaging a product, a suit concerning the harms caused by the product is permissible there. *See*, *e.g.*, *Ford*, 141 S. Ct. at 1025 (connection between "'an activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation'" will suffice) (quoting *Bristol-Myers*, 137 S. Ct. at 1780) (brackets omitted). Even Ford agreed that plaintiffs injured by a product *produced* in the forum can sue there. *See id.* at 1026. While *Ford* refused to "limit jurisdiction to" those locations, it confirmed that such a connection suffices. *Id.* at 1028.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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April 19, 2021