No. 25-1042

In the
Supreme Court of the United States

MONSANTO COMPANY,

Petitioner,

v.

DANIEL ANDERSON, JIMMY DRAEGER AND BRENDA DRAEGER, AND VALORIE GUNTHER,

Respondents.

On Petition for Writ of Certiorari to the Missouri Court of Appeals

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Constitutional Provision

Other Authorities

REPLY BRIEF FOR PETITIONER

The jury in this case held Monsanto liable based on a state-law claim that federal law preempts. It then awarded punitive damages against Monsanto that punished it for that preempted claim not once, not twice, but nine times over. That result would be intolerable (and constitutionally impermissible) in any case. But it is all the more so here, where countless other juries in other jurisdictions have imposed duplicative damages on Monsanto for identical conduct.

This Court should hold the petition pending its decision in *Monsanto Co. v. Durnell*, No. 24-1068 (U.S.). But if it affirms in *Durnell*, the Court should grant the petition to resolve the widespread and entrenched circuit split over whether punitive damages may exceed compensatory damages in cases featuring a "substantial" compensatory damages award. *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003). That important and recurring question profoundly affects the due process rights of defendants in mass-tort cases and warrants this Court's intervention.

I. The Court Should Hold The Petition Pending Disposition Of *Durnell*.

This case presents the same question that is presently before the Court in *Durnell*. As in *Durnell*, the jury in this case found Monsanto liable for failing to warn respondents that glyphosate causes cancer. Pet.App.5. If this Court agrees with Monsanto that FIFRA preempts such failure-to-warn claims (whether expressly or impliedly), that will affect the

resolution of this case. The Court should therefore hold this petition pending its disposition of *Durnell*.

Respondents claim that a hold is not necessary because the jury here also found against Monsanto on respondents' design-defect claim, which they insist will be unaffected by the Court's decision in *Durnell*. BIO.13-14. But as Monsanto's counsel explained at argument in *Durnell*, *contra* BIO.18, FIFRA preempts design-defect claims "if they are disguised failure-to-warn claims." *Durnell*.Oral.Arg.Tr.31:19-32:12. And, here, respondents' design-defect claims are classic "disguised claims for failure to warn." *Bates v. Dow Agrosciences LLC*, 544 U.S. 431, 457 (2005) (Thomas, J., concurring in part). The crux of respondents' argument at trial was that Monsanto had defectively designed its product by failing to alert consumers to the supposed cancer risk posed by glyphosate. *See* Trial.Tr.3751:1-11; 3754:6-12; 3755:15-19; 3763:10-14, 3771:13-15. Indeed, the failure-to-warn theory pervaded respondents' closing arguments, overwhelming any discussion of design defects, let alone any true design-defect claim. *See* Trial.Tr.3751:1-11; 3754:6-12; 3755:15-19; 3763:10-14, 3771:13-15. Time and again throughout the trial, respondents returned to the same essential theory that Roundup was defectively designed because Monsanto did not "warn customers" of glyphosate's alleged carcinogenicity. Trial.Tr.3751:12-15.[1]

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[1] *Contra* BIO.19-20, Monsanto argued at every stage of this litigation that FIFRA preempts "Respondents' design-defect and negligence claims" because they "center[] on Monsanto's alleged failure to warn of glyphosate's alleged carcinogenicity." Monsanto.Br.83-84, *Anderson v. Monsanto Co.*, No. WD87059

To be sure, respondents dispute that their design-defect claims are disguised failure-to-warn claims, and they suggest (in a footnote) that the Missouri Court of Appeals already resolved that disagreement in their favor. BIO.20 n.4. But the state court did not pass on Monsanto's argument that respondents' design-defect claims are disguised failure-to-warn claims. After all, it had no need to do so, since it concluded (based on the Missouri Court of Appeals' opinion in *Durnell*) that FIFRA did not even preempt respondents' failure-to-warn claims. Pet.App.83-84. If this Court decides that FIFRA preempts failure-to-warn claims like respondents', then the proper course is to grant this petition, vacate the decision below, and remand to the Missouri courts to decide in the first instance whether respondents' design-defect claims are disguised failure-to-warn claims that are preempted too.[2]

II. If The Court Affirms In *Durnell*, It Should Grant Certiorari To Review The Court Of Appeals' Punitive Damages Holding.

In appropriate cases, punitive damages can serve important functions of punishing and deterring

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(Mo. Ct. App. filed Oct. 18, 2024); *see also* Anderson.Br.68, *Anderson v. Monsanto Co.*, No. WD87059 (Mo. Ct. App. filed Dec. 16, 2024) (joining issue on this question).

[2] Respondents' effort to use this case to mount a collateral attack on the grant of certiorari in *Durnell*, *see* BIO.12 n.2, is not just misguided, but unavailing. The pending settlement they invoke has yet to be approved by the Missouri courts. And, in any event, Monsanto has already explained that the settlement does not affect the outcome of this case or resolve nearly $1 billion in outstanding liability against it. Pet.17 n.3.

reprehensible conduct. *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996). But punitive damages carry the "real problem" of "stark unpredictability." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 499 (2008). That unpredictability undermines the "consistency" and "fairness" with which "[c]ourts of law are concerned," and poses a serious problem for the due-process rights of defendants. *Id.* To mitigate that risk and ensure judges and juries award punitive damages based on law, rather than prejudice, this Court has articulated key guideposts to limit discretion and ensure consistency and fairness across cases. *State Farm*, 538 U.S. at 419, 424-25, 428. But, critically, as this Court has explained, "[w]hen compensatory damages are substantial," then "the outermost limit of the due process guarantee" may be a ratio of punitive damages "only equal to compensatory damages." *Id.* at 425.

1. Respondents do not dispute that the lower courts are deeply divided over how to assess whether compensatory damages are "substantial" for purposes of evaluating punitive damages awards. As Monsanto explained in its petition, federal courts of appeals and state courts of last resort are divided over what it means for a compensatory damages award to be "substantial" for due process purposes. Pet.23-24 (collecting cases).[3] Respondents do not say a word about that split in their brief. That silence speaks volumes. This Court's intervention would be justified to resolve that split alone.

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[3] And, as *Bridgeport Music* and *Flax* illustrate, that split divides state and federal courts *within the same state*, creating an intolerable disuniformity in federal law that depends exclusively on a plaintiff's choice of forum. *See* Pet.24.

But that split does not stand alone; the federal courts of appeals and state courts of last resort are also divided over whether this Court truly meant what it said in *State Farm* when it explained that "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit[s] of the due process guarantee" when compensatory damages are "substantial." *State Farm*, 538 U.S. at 425. Some courts enforce the constitutional line by limiting punitive damages with a one-to-one ratio when compensatory damages are substantial, while others do not. *See* Pet.24-25 (collecting cases). And Missouri itself is an exemplar of this division, as the disagreement between Missouri and the Eighth Circuit means that whether a one-to-one ratio applies depends on whether a plaintiff chooses to file his case in state or federal court. *Compare Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005), *with* Pet.App.78-79. Unsurprisingly, most plaintiffs choose state court if they can.[4]

Respondents deride that split as "illusory," claiming that the courts that comprise it have all "limited punitive damages only after applying all the

[4] Respondents claim that the Eighth Circuit did not follow this Court's one-to-one rule in *Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004). But *Eden Electrical* never passed upon the question of whether to follow this Court's one-to-one rule. *See id.* at 828-29. And in any event, just the next year, the Eighth Circuit ordered a punitive damages award remitted to "a ratio of approximately 1:1" in light of *State Farm* in a case featuring a substantial compensatory damages award. *Boerner*, 394 F.3d at 603. Regardless, whether the Eighth Circuit falls on one side of a split or the other does nothing to diminish the critical fact that a split does exist on this question.

State Farm factors." BIO.29. That observation is both unresponsive and unilluminating. The *State Farm* factors aid courts in exercising their remedial discretion to determine whether punitive damages are warranted and, if so, how large an award to permit. *See State Farm*, 538 U.S. at 416; *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18-19 (1991). There is no occasion to apply the one-to-one rule until *after* a court applies the *State Farm* factors, because the one-to-one rule has no effect if the court decides that punitive damages are unwarranted or that a lower ratio is appropriate. It is not even clear how a court *could* apply the one-to-one rule before evaluating the *State Farm* factors, as respondents suggest. *See* BIO.29.

Respondents are thus left insisting that the split is simply explained by the facts of each case: some involve especially reprehensible conduct, others not; some involve physical injury, others not. BIO.31-32. But if gerrymandering the split out of existence requires that level of fine-grained analysis, then it only proves how poorly *State Farm*'s effort to ensure predictability and eliminate arbitrariness is faring in the lower courts. *See State Farm*, 538 U.S. at 416-17. In all events, the divide in the courts does not turn on the facts; courts that heeded this Court's admonition in *State Farm* perceived none of the economic-or-physical-damage or other constitutional lines that respondents must invent to try to explain away the circuit split. *E.g.*, *Boerner*, 394 F.3d at 603; *see also Thomas v. iStar Fin., Inc.*, 652 F.3d 141, 149 (2d Cir. 2011); *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1090 (7th Cir. 2019). This Court's intervention is sorely needed to set the lower courts straight.

2. The decision below is on the wrong side of the split. Due process forbids "grossly excessive" or "arbitrary punishment[]" against civil defendants. *State Farm*, 538 U.S. at 416; *cf.* U.S. Const. amend. VIII (criminal context). As this Court has recognized, punitive damages pose an "acute danger" of such problems. *State Farm*, 538 U.S. at 417. Due process therefore requires that punitive damages be limited at most by a single-digit ratio to compensatory damages. *Id.* at 425. In cases involving "substantial" awards of compensatory damages, however, even most single-digit ratios will be too much. *Id.* In those cases, the "outermost limit of the due process guarantee" is an award of punitive damages "equal to compensatory damages." *Id.* This ensures not only that defendants are not subject to excessive or arbitrary punishment, *id.* at 416, but also that they are not subject to "multiple punitive damages awards for the same conduct," *id.* at 423. Similar concerns have driven this Court to impose a comparable one-to-one rule for maritime cases. *Exxon*, 554 U.S. at 514-15. Yet the Missouri court cast all that aside.

3. Respondents try to defend the decision below by seizing on this Court's remark in *State Farm* that it has "decline[d]" to "impose a bright-line ratio which a punitive damages award cannot exceed," 538 U.S. at 425. BIO.27. But "one should not overstate the extent of the Court's aversion to ratios." *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004). This Court has imposed a presumptive single-digit ratio on punitive damages awards across all cases. *State Farm*, 538 U.S. at 425. And it has adopted a hard-and-fast one-to-one ratio in maritime cases. *Exxon*, 554 U.S. at 514-15. While there may be no fixed

"mathematical formula" to calculate punitive damages, *see Gore*, 517 U.S. at 582, this Court has not shied away from the use of ratios to set outer limits on the permissible discretion of judges and juries to keep punitive damage awards consistent with the Constitution.

Nor does it help respondents to insist that punitive damages awards "must be based upon the facts and circumstances of the defendant's conduct." BIO.27 (quoting *State Farm*, 538 U.S. at 425). Of course they must, but they must also abide the demands of the Constitution, which abhors arbitrary punishment. It thus blinks reality to claim that Monsanto advocates "unwinding … the *Gore*/*State Farm* line of cases to be replaced with a rigid, atextual 1:1 punitive damages ratio." BIO.22. Instead, Monsanto seeks to vindicate the one-to-one ratio that serves as a critical component of this Court's ongoing efforts to ensure that the rather extraordinary authority of civil juries to mete out punishment is wielded consistently with the Due Process Clause.

Respondents' own brief highlights some of the fundamental problems of uncabined discretion in the punitive-damages context. The trial court explicitly based its punitive damages assessment on the fact that Monsanto is "a multi-billion dollar corporation" rather than "a small business." Pet.App.79; *see also* Trial.Tr.3798:16-3799:17 (respondents inviting this analysis). Respondents echo that sentiment. *E.g.*, BIO.28 (invoking Monsanto's "billions in annual profit"); BIO.29 (arguing higher punitive damages necessary against "multi-billion-dollar company"). This Court itself recognized that punitive damages

create the serious risk that "juries will use their verdicts to express biases against big businesses." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994); *see also id.* at 431. *State Farm*'s constitutional limits are some of "the few procedural safeguards by which" the courts can guard "against that danger." *Id.* at 432.[5]

Enforcing a one-to-one ratio would ensure predictability and fair notice without radically disrupting the status quo. "[B]y most accounts[,] the median ratio of punitive to compensatory awards has remained less than 1:1." *Exxon*, 554 U.S. at 497-98. Indeed, it is 0.62:1 or 0.66:1, depending on whether a judge or jury is doing the awarding. *Id.* at 499-500.[6] That proves that "in many instances a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter." *Id.* at 499. Indeed, punitive damages within the bounds of the one-to-one ratio can usefully serve the underlying purposes of punitive damages and account for the American rule that successful plaintiffs generally bear the costs of litigation. *See* Note, *An Economic Analysis of the Plaintiff's Windfall from Punitive Damage Litigation*, 105 Harv. L. Rev. 1900, 1902-03 (1992). Awards that exceed that ratio despite substantial

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[5] Respondents attempt to defend the jury's verdict on the ground that Monsanto is "a recidivist for which previous punitive damages judgments changed nothing." BIO.34. But even they concede that the "jury never knew" that alleged fact. *Id.* So it is hard to understand how it could justify the punitive damages award.

[6] Even accounting for the rare outlier, the *mean* ratio is only 2.9:1 (from juries) or 1.6:1 (from judges). *Exxon*, 554 U.S. at 499-500.

compensatory awards, by contrast, bestow windfalls on plaintiffs and plaintiffs' lawyers alike, diverting legal resources from issues like civil rights violations that Congress has prioritized by providing for fee-shifting, all while denying defendants fair notice. *Id.* at 1903-1910.

In short, this Court has already recognized the need for stringent guideposts to limit the discretion of judges and juries in imposing punitive damages and to guard against arbitrariness and prejudice in punitive damages awards. It should make clear once more that constitutional limits on punitive damages are something lower courts must take seriously.

4. There is simply no denying that this issue is recurring and important. In recent years, this Court has been presented multiple petitions seeking review of this question, which recurs in nearly every modern mass-tort case. *See, e.g.*, *Monsanto Co. v. Pilliod*, No. 21-1272 (U.S.); *Johnson & Johnson v. Ingham*, No. 20-1223 (U.S.); *TransUnion, LLC v. Ramirez*, No. 20-297 (U.S.); *Crane Co. v. Poage*, No. 17-900 (U.S.); *cf. Icicle Seafoods, Inc. v. Clausen*, No. 11-1475 (U.S.). Missouri itself is a repeat offender: The Missouri courts have repeatedly flouted this Court's guidance in *State Farm*, provoking the petitions in *Ingham* ($1.6 billion in punitives), *Poage* (12-times punitive-damages multiplier), and this case. And because the problem stems from confusion over the proper interpretation of *State Farm*, *only* this Court is capable of intervening to address the confusion and resolve the circuit split.

The problems created by the split are real. Excessive and duplicative punitive damages awards—

like the one at issue here—impose crushing liability on defendants, risking insolvency due to an unending stream of duplicative tort judgments. That outcome is not just bad for defendants; it hurts plaintiffs too, who must scramble for the courthouse door to lock in their recovery before other plaintiffs drive the defendant into bankruptcy. This is exactly what happened in the asbestos cases, *see* U.S. Gov't Accountability Off., GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 2 (Sept. 2011), and it can recur in any modern mass-tort case. If anything, respondents' own brief illustrates the risk. As it catalogs, courts have imposed punitive damages at upper single-digit ratios on Monsanto again and again and again for precisely the same conduct. BIO.28 (citing *Johnson v. Monsanto*, 52 Cal.App.5th 434 (2020); *Hardeman v. Monsanto*, 997 F.3d 941 (9th Cir. 2021); *Pilliod v. Monsanto*, 67 Cal.App.5th 591 (2021)). Those awards, duplicative even within a single case, impose orders-of-magnitude higher damages awards on Monsanto than the Constitution permits.

5. Finally, this case presents an ideal vehicle for the Court to address this issue. It arrives after final judgment with a developed evidentiary record. And the nationwide litigation campaign against Monsanto makes clear beyond cavil that the punitive damages in this case truly are duplicative. This case would thus allow the Court to address the question presented without distractions from extraneous factual or legal issues.

Moreover, while this issue will continue to arise, the opportunities for this Court's intervention are not

unlimited. It is only the rare defendant that has the capacity to post an appeal bond and continue litigating in the face of many millions—or even billions—of dollars in punitive damages liability. This Court should take advantage of the opportunity to resolve this issue now, before it continues to simmer in the lower courts and bedevil mass-tort defendants for years to come.

CONCLUSION

The Court should hold the petition pending the disposition of *Monsanto Co. v. Durnell*, No. 24-1068 (U.S.). If the Court affirms in *Durnell*, it should grant the petition to consider the punitive damages issue.

Respectfully submitted,

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