No. 20-1223

In the Supreme Court of the United States

JOHNSON & JOHNSON and
JOHNSON & JOHNSON CONSUMER INC.,

Petitioners,

v.

GAIL L. INGHAM, *et al.*,

Respondents.

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

BRIEF FOR DRI–THE VOICE OF THE DEFENSE BAR AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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INTEREST OF *AMICUS CURIAE*

Amicus curiae DRI–The Voice of the Defense Bar (www.dri.org) is an international organization composed of approximately 16,000 attorneys who defend the interests of businesses and individuals in civil litigation.[1] DRI's mission includes enhancing the skills, effectiveness, and professionalism of defense lawyers, promoting appreciation for the role of defense lawyers in our legal system, and anticipating and addressing substantive and procedural issues germane to defense lawyers and the clients they represent.

In keeping with its mission, DRI participates as *amicus curiae* in cases where the issues significantly affect civil-defense attorneys, their corporate or individual clients, and the conduct of civil litigation. One of the principal issues in this case—whether and to what extent the Due Process Clause of the U.S. Constitution protects a corporate defendant from the prejudice and unfairness that arises from a multi-plaintiff personal-injury trial—plainly and directly impacts DRI's members and their clients.

DRI's members frequently represent defendants in mass-tort personal-injury lawsuits where multiple plaintiffs seek to try their claims in one consolidated proceeding before one jury. The prejudice and unfairness to targeted defendants arising from consolidated

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[1] No counsel for a party authored this brief in whole or in part, and no person other than *amicus* or its counsel made a monetary contribution intended to fund the preparation or submission of this brief. Petitioners and respondents have filed blanket consents to the filing of *amicus* briefs. Counsel of record for petitioners and respondents received notice of *amicus*' intent to file this brief more than ten days before the brief's due date.

multi-plaintiff trials is serious, inherent, and well-documented by courts and commentators alike. After decades of firsthand experience, DRI's members can attest to this prejudice and unfairness as well.

DRI's members' clients manufacture, produce, market, and sell a wide variety of medical devices, pharmaceuticals, chemicals, automobiles, wearing apparel, and household goods, among thousands of diverse products affecting individuals in all aspects of their lives. These products range from life-saving to life-sustaining, life-enhancing to life-changing, and every stopping point in between. Even with all their diversity, however, they have one thing in common: if injury or harm is alleged to result from a product's use, multi-plaintiff lawsuits involving hundreds or thousands, or even hundreds of thousands, of individuals will follow.

At that point, as cases proliferate in various federal and state jurisdictions, the courts and targeted defendants are confronted with resolution issues that appear overwhelming, perceptibly outstripping available public and private resources. Over time, various approaches to dealing with this influx have developed, including class actions under Federal Rule of Civil Procedure 23 and state counterparts, federal multi-district proceedings and their mass-action state counterparts, and consolidated multi-plaintiff actions under joinder rules in federal or state court. Each of these options is utilized in an effort to bring efficiencies to resolution. But the desire to achieve efficiency has consequences for targeted defendants when multi-plaintiff trials are adopted as a resolution tool.

DRI's experience shows that consolidated multi-plaintiff trials pose a heightened risk that juries will

be confused and overwhelmed by disparate lay and expert testimony related to the many distinct plaintiffs and claims. This complexity brings with it the substantially increased likelihood of plaintiffs' verdicts with actual damages easily reaching hundreds of millions of dollars. When the potential for punitive damages is added, as is often the case, these already significant risks are magnified exponentially. And the threat of this extraordinary exposure, in turn, engenders predictable—but unacceptably high—pressure on defendants to settle, even when many of the plaintiffs have weak or unmeritorious claims. Indeed, the "blackmail settlement" problem in aggregated litigation that Judge Friendly long ago identified reaches its zenith in consolidated mass-tort, multi-plaintiff trials. Henry J. Friendly, *Federal Jurisdiction: A General View* 120 (1973).

The Missouri verdict in this case proves the point. Here, a diverse group of plaintiffs produced identical $25 million actual-damage awards for each plaintiff and multi-billion-dollar punitive damage awards that extended well beyond any rational relationship to the actual damages awarded. But this is just one example. And, as the petition also illustrates, there is no effective judicial check in place to alleviate the prejudice resulting when a verdict crosses the line to the unreasonable and irrational. Certain federal courts and jurisdictions properly bring due process principles to bear when consolidation threatens or compromises the fairness of trials and the ability to present a defense. Other jurisdictions, Missouri among them, do not.

The problems raised by multi-plaintiff trials that trample the due process boundaries are concrete, disruptive, and fundamental. When extraordinary and excessive verdicts are entered and upheld, a business enterprise must find a way to absorb it. And if it is able to do so through insurance or its own revenues, then trade-offs inevitably must follow. Insurance costs increase, product prices are raised, and investments in hiring, employees, and product development are curtailed or ended entirely.

For the reasons more fully set forth below, DRI urges the Court to grant this petition and define the due process boundaries that our system of justice should insist on—and that the Constitution commands. That holding from this Court will promote rationality and fairness and avoid perpetrating miscarriages of justice like the one in this case.

SUMMARY OF ARGUMENT

"It is axiomatic that '[a] fair trial in a fair tribunal is a basic requirement of due process.'" *Caperton v. A. T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) (quoting *In re Murchison*, 349 U.S. 133, 136 (1955)). Part and parcel of this requisite "fair trial" is that defendants be given a full "'opportunity to present every available defense.'" *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (quoting *Lindsey v. Normet*, 405 U.S. 56, 66 (1972)).

As courts have warned many times, however, consolidated multi-plaintiff trials test this immutable fairness principle, impacting principally on the targeted defendant's ability to prepare and mount a defense. Trials that confound juries with witness after witness, document after document, followed up by

hours of jury instructions, are not "fair" by any objective measure for those who are trying to defend them. And their coercive effect is well known. Simply put, the threat of aggregated proceedings "can unfairly 'plac[e] pressure on the defendant to settle even unmeritorious claims[.]'" *Epic Sys. Corp. v. Lewis*, 138 S. Ct. 1612, 1632 (2018) (quoting *Shady Grove Orthopedic Assocs., P. A. v. Allstate Ins. Co.*, 559 U.S. 393, 445, n.3 (2010) (Ginsburg, J., dissenting)).

Unfortunately, as the petition highlights, there is no uniformity among federal and state courts in applying fundamental principles of due process to check or rectify the prejudice and unfairness that can result from consolidated trials involving personal injury plaintiffs. But fundamental due process principles are not jurisdiction-specific—our Constitution commands that those principles apply to all controversies that are resolved by our courts.

Given the inconsistencies in lower court precedents, this Court should grant review and hold that due process principles must intercede where juries render irrational and excessive verdicts in consolidated multi-plaintiff cases. That holding will, in turn, protect defendants and properly ensure that such outcomes are not sustainable under our justice system.

REASONS FOR GRANTING THE PETITION

I. DUE PROCESS PRINCIPLES SHOULD BE APPLIED ON REVIEW OF JURY VERDICTS IN CONSOLIDATED MULTI-PLAINTIFF TRIALS

A. Personal Injury Trials Involving Defective Products Or Other Mass Torts Are Inherently Complex And Present Highly Individualized Issues

The petition here arises on a fact pattern all too familiar to DRI and the companies DRI's members represent and defend. A product sold nationwide for a number of years and with tens or hundreds of thousands of purchasers is alleged to have a defect causing injury and harm. Lawsuits are filed in various jurisdictions in state and federal court by individuals as class actions or as multi-plaintiff mass actions. A coordination effort begins among the various plaintiffs' attorneys to bring maximum resolution pressure on the corporate target. The corporate target, in turn, retains its own team of lawyers to try to bring consistency to its defense. Resting firmly in between these two organizing efforts are state and federal courts, who are faced with trying to resolve each case. Reality quickly sets in.

The trial of one of these cases—to fully present the evidence, the law, and arguments on both—routinely runs longer than two weeks, even if well-managed by counsel and the court. The trial timeline typically will start with the resolution of some final disputes over the admission of evidence and witness timing, after which jury selection will begin. Once the *voir dire* concludes and the jury is impaneled, the trial

court will give some pre-trial instructions on juror behavior and on what the case is about. Both sides then will give opening statements, laying out the evidence and issues to be resolved.

After that, plaintiff begins the presentation of his or her case, which typically involves testimony from the plaintiff, his or her family members, several fact witnesses, treating doctors and other healthcare professionals, and multiple expert witnesses on liability and damages. This liability and damages evidence delves into the plaintiff's medical history, plaintiff-specific alternative causation factors, and that plaintiff's prognosis, treatments, and experiences.

Plaintiff also elicits testimony from the corporate target's witnesses, either live or by depositions. Defense counsel will conduct cross-examination along the way, some brief and some extensive. Once the plaintiff rests, defense counsel typically will make a pre-verdict dispositive motion aimed at one or more of the claims being pursued.

The defense case follows and it is equally involved, with testimony from fact witnesses, corporate personnel, experts on care and treatment, liability, and damages. If punitive damages are implicated, various witnesses will be called to further defend the company's behavior and probe its finances. The plaintiff's counsel will have cross-examination for all the defense witnesses, and for most corporate witnesses and experts it will be extensive. The plaintiff also will be permitted to put on rebuttal witnesses, spurring further cross-examination by the defense.

Once the presentation of the evidence concludes, jury instructions will have to be settled, often thirty

or forty in number, together with a multi-page verdict form encompassing the relevant claims, defenses, damages, and fault-allocation principles. After that, both sides make their closing arguments and the court reads jury instructions. Jury deliberations follow until a verdict is reached. After the verdict, post-trial motions and proceedings involving the entry of judgment will be heard and decided.

So, back to reality. When hundreds or thousands of plaintiffs are involved, coordination can conceivably achieve certain efficiencies during the discovery and pretrial motion process. But when trials ultimately are needed to resolve the individual cases, efficiency cannot drive the analysis, and coordination cannot be the rule.

A moment's reflection shows why. In a consolidated multi-plaintiff trial, the court will be faced with a diverse group of individuals, with differing law, facts underlying their alleged injuries and their causes, and ranges of recoverable damages. The relevant conduct can extend over many years, with different exposures, actions, documents, witnesses, and scientific and corporate knowledge. The law that is applicable can vary depending on fact patterns as well, particularly when it comes to the admission of evidence, claims, and available defenses.

Yet, despite these inevitable and consequential differences, plaintiffs' counsel routinely will propose, as they did in this case, that multiple plaintiffs' cases be tried together in the interests of efficiency. And, as was also the case here, the defendant will resist that joinder because it knows what is likely to happen if a multi-plaintiff trial is ordered. When these cases are

consolidated, their individuality is lost and the outcomes do not replicate what would happen if the cases are tried one at a time. On the contrary, things get demonstrably worse for the defendants.

B. Consolidated Multi-Plaintiff Products Liability Or Other Mass-Tort Trials Are Demonstrably Prejudicial And Unfair To Defendants

A full and fair defense of an individual products liability suit is reflected in the story of the trial recited above. It involves days of focused testimony and evidence and argument tied to the applicable law and aimed discretely at the individual plaintiff's case. That single fact pattern will have the jury's undivided attention and be top-of-mind in determining liability, causation, damages, and available defenses. That fact pattern will have governed the examination and cross-examination of the witnesses, lay and expert, and will determine the effect of the substantive law on the admission of evidence, for the closing argument, the jury instructions, and the completion of the verdict form.

But, as DRI's members know firsthand, what occurs in multi-plaintiff trials is categorically different from what happens when a single case is tried. In such trials, there is no discrete, individualized fact pattern for the jury to evaluate, and the chances for a defense verdict fall commensurately as the complexity of the trial increases.

Think of a jury confronted with 20 cases involving the evidentiary and witness presentation described above, and now spread that over the diverse fact patterns for each plaintiff on liability, causation,

defenses, and damages. The jury instructions and verdict forms, just to capture this diversity, can run hundreds of pages. To call it mind-numbing is to understate the task at hand and the prejudice to the defendant that follows. As the Fifth Circuit has explained, whatever efficiencies might arise in the "ongoing struggle with the problems presented by the phenomenon of mass torts," complex, mass consolidations have the potential to make a mockery of the very word "trial." *In re Fibreboard*, 893 F.2d 706, 710, 712 (5th Cir. 1990); *Coleman v. Quaker Oats Co.*, 232 F.3d 1271, 1296-97 (9th Cir. 2000) (affirming decision to conduct separate trials for ten plaintiffs where district court "properly considered the potential prejudice to [defendant] created by the parade of [plaintiffs] and the possibility of factual and legal confusion on the part of the jury"); *Moorhouse v. Boeing Co.*, 501 F. Supp. 390, 393 n.4 (E.D. Pa. 1980) (concluding that "even the strongest jury instructions could not have dulled the impact of a parade of witnesses, each recounting his" individualized "contention"), *aff'd*, 639 F.2d 774 (3d Cir. 1980).

An October 2019 study by the Institute for Legal Reform (ILR) found that no consolidated multi-plaintiff trials that it identified ended in split verdicts. John Beisner *et al.*, U.S. Chamber Inst. For Legal Reform, *Trials and Tribulations: Contending with Bellwether and Multi-Plaintiff Trials in MDL Proceedings*, 9 (Oct. 2019). Uniform verdicts are a telling indication that juries do not, or cannot, differentiate the legal and factual arguments when faced with the complexity of multi-plaintiff trials.

ILR also found that consolidated multi-plaintiff trials in MDL proceedings "substantially increas[ed]

the likelihood and size of each plaintiff's verdict." *Id.* at 8. Statistically, consolidated trials resulted in plaintiff verdicts almost 80 percent of the time. By contrast, single-plaintiff trials in MDL proceedings favored plaintiffs less than 40 percent of the time. *Id*. at 8-9; *see also* Irwin A. Horowitz & Kenneth S. Bordens, *The Consolidation of Plaintiffs: The Effects of Number of Plaintiffs on Jurors' Liability Decisions, Damage Awards, and Cognitive Processing of Evidence*, 85 J. Applied Psychol. 909 (2000) (study finding defendants more likely to be judged as liable, and that damages were more likely to be higher, when claims were consolidated for trial).

As these studies reflect, jury confusion—and the prejudice that results for defendants—is a widely recognized problem in multi-plaintiff trials. *See* Matthew A. Reiber & Jill D. Weinberg, *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases*, 78 U. Cin. L. Rev. 929, 929 (2010) (concluding that juror "comprehension declines as complexity increases, particularly when the complexity arises from the presence of multiple parties or claims"). In the mélange of claims and defenses, jurors particularly will lose sight of alternate causes of injuries, differences in exposures, changes in courses of conduct, and limitations on the relevance of admitted evidence. *See Malcolm v. National Gypsum Co.*, 995 F.2d 346, 349, 352 (2d Cir. 1993) (reversing trial court's decision to consolidate asbestos trials because "the jury was presented with a dizzying amount of evidence" that would not have been admissible had the cases been tried separately and recognizing that there

was an "unacceptably strong chance that the equal apportionment of liability amounted to the jury throwing up its hands in the face of a torrent of evidence").

Beyond the perceptible confusion, when multiple plaintiffs present jurors with numerous claims against a defendant, juries tend to develop a negative view of that defendant based on the sheer number of claims. *See* Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. of Legal Stud. 365, 373 (2006) (explaining that jurors in consolidated trials base their decisions on more information than juries in individual trials, and that if additional information makes a defendant appear "callous," jurors can become more sympathetic to plaintiffs). In this way, a particularly sympathetic plaintiff can color jurors' feelings about the others. *See Cantrell v. GAF Corporation*, 999 F.2d 1007, 1011 (6th Cir. 1993) (noting that "[c]are must be taken that consolidation does not result in unavoidable prejudice or unfair advantage" and that "potential for prejudice resulting from the consolidation of a cancer case with a non-cancer case is obvious. Evidence relevant only to the causation of one plaintiff's cancer may indicate to the jury that the other plaintiff will likely develop cancer in the future."); *Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994) ("There is a tremendous danger that one or two plaintiffs' unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims."); *Johnson v. Advanced Bionics, LLC*, No. 2:08-CV-02376-JPM, 2011 WL 36289, at *6 (W.D. Tenn. Apr. 4, 2011) (denying consolidation and explaining that, "[g]iven the differences, potentially great, between [plaintiff one's] damages and

[plaintiff two's] damages, there is a risk that a jury would be unduly influenced by the facts of one case and respond in both cases accordingly").

Cain v. Armstrong World Industries, 785 F. Supp. 1448 (S.D. Ala. 1992), illustrates the point. Despite the diverse experiences of the 27 plaintiffs and the disparate evidence presented about each—including when the various symptoms manifested, what injuries the drug allegedly caused, and what damage could be attributed to other causes—each plaintiff received the same exact percentage of his or her claimed damages. *Id.* at 1455. Coupled with the jury's "relatively short deliberation time as well as in the inflated amounts of many of the damage awards and the lack of evidence supporting some of the damages in several cases[,]" *id.*, this led "the Court to the overwhelming conclusion that the consolidation of these actions was unduly prejudicial." *Id.* at 1454-55.

As also might be expected, the confusion and prejudice engendered by consolidation of complex personal injury cases also leads to damage awards that are significantly higher than they are for those in single-plaintiff trials. *See* Irwin A. Horowitz & Kenneth S. Bordens, *The Effects of Outlier Presence, Plaintiff Population Size, and Aggregation of Plaintiffs on Simulated Civil Jury Decision*, 12 L. & Hum. Behav. 209 (1988) (finding punitive awards were higher for all plaintiffs in multi-plaintiff trials that included an outlier plaintiff with injuries that were significantly more severe than the other plaintiffs); Chilton Davis Varner, *The Beginning of MDL Consolidation: Should Cases be Aggregated and Where?*, 37 Rev. Litig. 227, 239 (2018) (noting the "breath-taking verdicts

awarded thus far in multiple-plaintiff [MDL] 'bundled' trials").

Practically speaking, plaintiffs' counsel also will use the threat of a consolidated trial to seek a higher settlement value, especially in cases including one or more plaintiffs with serious injuries. *See Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996) (stating reasons why the threat of consolidated trials gives plaintiffs leverage against the defense, including that it "magnifies and strengthens the number of unmeritorious claims," "makes it more likely that a defendant will be found liable," "results in significantly higher damage awards," and "creates insurmountable pressure on defendants to settle," which is akin to "judicial blackmail"); *In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) (discussing the "intense pressure to settle" that accompanies aggregated claims of multiple plaintiffs in such cases even where there is only "a small probability of an immense judgment" (citation omitted)).

The systemic challenges posed by multi-plaintiff trials have received their closest scrutiny in considering classwide trials under Federal Rule of Civil Procedure 23 and its state-law counterparts. And, because of their inherent factual diversity and evidentiary and legal complexity, federal and state courts alike routinely find that mass-tort personal-injury claims are unsuitable for classwide trial.

The Advisory Committee on the Federal Rules of Civil Procedure zeroed in on this 55 years ago in discussing amendments to Rule 23 of the Federal Rules of Civil Procedure, explaining that a "'mass accident' resulting in injuries to numerous persons is ordinarily

not appropriate for a class action because of the likelihood that significant questions, not only of damages, but of liability and defenses of liability, would be present, affecting the individuals in different ways." Rule 23, Notes of Advisory Committee on Rules, 1966 Amendment. "In these circumstances[,]" the Committee continued, "an action conducted nominally as a class action would degenerate in practice into multiple lawsuits separately tried." *Id.*

This Court noted these very trial manageability issues in its watershed decision in *Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997). There, the Court rejected certification of a settlement class of plaintiffs asserting claims arising from asbestos exposure. The Court stressed that "[c]lass members were exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods." *Id.* at 624. It further observed that the plaintiffs suffered a wide variety of symptoms, ranging from asymptomatic changes to lung cancer; each had a "different history of cigarette smoking, a factor that complicates the causation inquiry"; and "they all would "incur different medical expenses." *Id.* "[C]aution," the Court stressed, is called for when "disparities among class members [are] great[,]" and "the certification in this case does not follow the counsel of caution." *Id.* at 625.

The Sixth Circuit said the same thing in rejecting certification of a sprawling medical-device products liability suit. *See In re American Medical Sys.*, 75 F.3d 1069, 1084-85 (6th Cir. 1996). The court explained that "[i]n complex, mass, toxic tort accidents, where no one set of operative facts establishes liability, no single proximate cause applies to each potential class

member and each defendant, and individual issues outnumber common issues, the district court should properly question the appropriateness of a class action for resolving the controversy." *Id.* at 1084 (citation and internal quotation marks omitted). In medical device products liability litigation in particular, "the factual and legal issues often do differ dramatically from individual to individual because there is no common cause of injury." *Id.* "No single happening or accident occurs to cause similar types of physical harm or property damage. No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant." *Id.* Plus, "the alleged tortfeasor's affirmative defenses (such as failure to follow directions, assumption of the risk, contributory negligence, and the statute of limitations) may depend on facts peculiar to each plaintiff's case." *Id.* at 1085 (citation omitted).

Many other courts echo the same insoluble manageability concerns. *See*, *e.g.*, *Steering Comm. v. Exxon Mobil Corp.*, 461 F.3d 598, 603 (5th Cir. 2006) (underscoring "the vastly more complex individual issues of medical causation and damages" raised by plaintiff's tort claims arising out of a refinery fire); *In re N. Dist. of Cal., Dalkon Shield IUD Prods. Liab. Litig.*, 693 F.2d 847, 853 (9th Cir. 1982) ("In product liability actions, however, individual issues may outnumber common issues. No single happening or accident occurs to cause similar types of physical harm. . . . No one set of operative facts establishes liability. No single proximate cause applies equally to each potential class member and each defendant. Furthermore, the alleged tortfeasors' affirmative defenses . . . may depend on facts peculiar to each plaintiff's case."); *Sw.*

Ref. Co. v. Bernal, 22 S.W.3d 425, 436 (Tex. 2000) (observing that "[p]ersonal injury claims will often present thorny causation and damage issues with highly individualistic variables that a court or jury must individually resolve"); *Smith v. Ill. Cent. R.R.*, 223 Ill. 2d 441, 450 (2006) (adopting the reasoning of *Southwest Refining* and recognizing the "unsuitability of the class action device for mass tort personal injury cases"); *Jolly v. Eli Lilly & Co.*, 44 Cal. 3d 1103, 1123 (1988) ("The major elements in tort actions for personal injury—liability, causation, and damages—may vary widely from claim to claim, creating a wide disparity in claimants' damages and issues of defendant liability, proximate cause, liability of skilled intermediaries, comparative fault, informed consent, assumption of the risk and periods of limitation.").

When, as in this case, issues of compensatory damages—in addition to punitive damages—are added, the manageability challenges ratchet up even further. This Court again has made that abundantly clear: "Questions of individual damage calculations will inevitably overwhelm questions common to the class." *Comcast Corp. v. Behrend*, 569 U.S. 27, 34 (2013). Others courts have, too. *See*, *e.g.*, *Steering Comm.*, 461 F.3d at 604-05 (reasoning that "individual issues relating to the plaintiffs' claims for compensatory and punitive damages" arising out of alleged injuries caused by a refinery fire "detract[] from the superiority of the class action device in resolving these claims" (citations omitted)); *Lemon v. Int'l Union of Operating Eng'rs, Local No. 139*, 216 F.3d 577, 580 (7th Cir. 2000) (pointing out that a "suit for money damages . . . jeopardizes . . . cohesion and homogeneity" among a class of plaintiffs "because individual

claims for compensatory or punitive damages typically require judicial inquiry into the particularized merits of each individual plaintiff's claim").

Given all of this, there is reason for pause. Of necessity, trial manageability challenges raised by the highly individualized aspects of products liability, chemical exposure, or other mass-tort lawsuits are reprised in any form of aggregate litigation. This follows from the very nature of the claims themselves. But while the risks of trying mass-tort claims in a class-wide trial have been held firmly in check by rulemaking and judicial decisions, no comparable construct addresses them in consolidated multi-plaintiff trials. This has to change, and change must come from this Court's articulation and adoption of constitutional due process principles that can be relied on to put a stop to the injustice of verdicts like the one affirmed in this case.

II. A DEFINITIVE PRECEDENT IS NEEDED FROM THIS COURT ESTABLISHING THAT DUE PROCESS PRINCIPLES PROTECT DEFENDANTS FROM THE UNFAIRNESS AND PREJUDICE ARISING FROM A MULTI-PLAINTIFF TRIAL.

"For all its consequence, 'due process' has never been, and perhaps can never be, precisely defined." *Lassiter v. Dep't of Social Servs.*, 452 U.S. 18, 24 (1981). "'[Unlike] some legal rules,' this Court has said, due process 'is not a technical conception with a fixed content unrelated to time, place and circumstances.'" *Id.* (quoting *Cafeteria & Rest. Workers Union, Local 473, AFLCIO v. McElroy*, 367 U.S. 886, 895 (1961)). "Rather, the phrase expresses the requirement of 'fundamental fairness,' a requirement whose

meaning can be as opaque as its importance is lofty." *Id.*

In the context of court proceedings, this "fundamental fairness" guarantee of due process requires a "fair trial." *Caperton*, 556 U.S. at 876 (citation omitted). It also protects a defendant's right and "opportunity to present every available defense." *Philip Morris USA*, 549 U.S. at 353 (citation omitted). And it checks "the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003).

The need to apply overarching due process principles to a verdict like the one rendered here is manifest. As the record shows, state-court standards of appellate review will not necessarily provide the protections needed. The Missouri Court of Appeals justified the trial court's consolidation of the 22 plaintiffs' unique claims for trial by noting that the instructions to the jury could account for each individualized claim. Five hours of instructions were read and the court of appeals embraced the presumption that the jury in fact followed them.

In the mine run of lawsuits, jury instructions certainly can aid courts in their duty to ensure fairness and prevent prejudice in the way lawsuits are decided. When a court reviews a jury's work and must ascertain what it did—and didn't—conclude, it is sensible and efficient to presume that the jury followed the instructions it received. And there is no denying that "[p]rocedure by presumption is always cheaper and easier than individualized determination." *Stanley v. Illinois*, 405 U.S. 645, 656-57 (1972).

But that doesn't mean a presumption solves a problem of *constitutional* dimension—or that its use is even constitutional in the first place. Indeed, the lower court's use of the jury-instruction presumption here runs directly counter to the "very nature" of due process, which "negates any concept of inflexible procedures universally applicable to every imaginable situation." *Lujan v. G & G Fire Sprinklers*, 532 U.S. 189, 196 (2001) (citation and internal quotation marks omitted); *Wilkinson v. Austin*, 545 U.S. 209, 224 (2005) (due process is "flexible and call[s] for such procedural protections as the particular situation demands") (internal quotation marks and brackets omitted).

There is no reason, as a matter of fact or law, that fundamental due process principles cannot be resorted to when evaluating state-law jury verdicts. Yet despite the constitutional compulsion, there is a lack of uniformity—documented in the petition—on bringing those principles to bear when irrational and excessive verdicts result from the unwarranted consolidation of complex personal injury cases. Those jurisdictions, federal and state, that bring these constitutional due process principles to bear on such verdicts have it right. But there is no room for differing views on this point.

For that reason, the Court should grant review to make clear, first of all, that—as in the class action context—the Due Process Clause requires careful, rigorous scrutiny of the propriety of consolidation in multi-plaintiff cases on a case-by-case basis. *See Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338, 351 (2011) (requiring a "rigorous analysis" of class-certification requests); *see also In re Repetitive Stress Injury Litig.*,

11 F.3d 368, 373 (2d Cir. 1993) (requiring "close attention" to the "special underlying facts" bearing on consolidation "before ordering a consolidation" (citation omitted) (cleaned up)). This, in turn, will immediately solve the patchwork problem that presently persists, where federal and state courts apply widely divergent approaches to consolidation requests based on varying procedural rules that give trial courts wide discretion. Pet.12-18.

Of even greater significance, this Court's review and clarification of the applicable principles will replace that hodgepodge of inconsistent (or non-existent) rules with a uniform standard that will apply regardless of where plaintiffs file their cases, thus minimizing the risk of forum-shopping and "litigation tourism" and the adverse systemic consequences that follow from it. *Cf. Trump v. Hawaii*, 138 S. Ct. 2392, 2425 (2018) (Kennedy, J., concurring) (noting that rules "encouraging forum shopping . . . take a toll on the federal court system"). And it will make clear that while courts have discretion to structure and manage the procedure of the cases before them, that discretion must be exercised within constitutional limits. *See Danjaq LLC v. Sony Corp.*, 263 F.3d 942, 961 (9th Cir. 2001) (acknowledging that "discretion" in deciding whether to consolidate "is limited by constitutional constraints").

To be sure, distilling clear and administrable standards for determining whether the Due Process Clause's "fairness" requirement is violated by consolidation or in the way a civil lawsuit is constructed and tried is no easy task. Yet, courts are "often called upon to resolve questions of constitutional law not susceptible to the mechanical application of bright and clear

lines[,]" *United States v. Lopez*, 514 U.S. 549, 579 (1995) (Kennedy, J., concurring), especially when they involve the reach of the Due Process Clause, *see, e.g.*, *Lujan*, 532 U.S. 196-97 (noting that the Due Process Clause, by its "very nature[,] . . . negates any concept of inflexible procedures universally applicable to every imaginable situation"); *Kingsley Int'l Pictures Corp. v. Regents of the Univ. of N.Y.*, 360 U.S. 684, 696 (1959) (Frankfurter, J., concurring in the judgment) ("Such an exercise of the judicial function . . . inheres in the very nature of the judicial enforcement of the Due Process Clause. We cannot escape such instance-by-instance, case-by-case application of that clause . . . ."). Indeed, the Court must do so, for "[a]bdication of [this judicial] responsibility is not part of the constitutional design." *Kisor v. Wilkie*, 139 S. Ct. 2400, 2440 (2019) (Gorsuch, J., concurring in the judgment) (citation omitted). Simply put, when constitutional limits are transgressed, "it is necessary to draw a line . . . ." *Duncan v. Louisiana*, 391 U.S. 145, 160 (1968).

Courts should, moreover, be admonished and advised to look for markers showing when the due process boundaries have been—or might be—crossed. This case presents an excellent vehicle for declaring what those markers can and should be. It is apparent on review of this record and verdict that the number of plaintiffs—22—overwhelmed the jury's ability to make individualized determinations. The mathematical rectitude of the significant damage awards—when evaluated against the disparate circumstances of each plaintiff—makes that plain. It is equally apparent that the number of plaintiffs severely handicapped the ability to put on a defense. The number affected

the view of the defendant and drove the damage awards, actual and punitive, upward with no rational connection to each plaintiff.[2]

There should be no inertia in the system, through the standard of review or otherwise, to affirm a verdict that shocks basic sensibilities on how it was arrived at. Quite the contrary, due process should demand more and provide basic principles of fairness and justice to ensure that such a verdict is reversed. This Court has drawn due process lines for punitive damages to keep them within rational bounds. Actual damage verdicts of the magnitude here can inflict the same deleterious consequences and they deserve the same attention.

CONCLUSION

By any measure, this case is extraordinary, and such extraordinary matters "often test the bounds of established legal principles." *Caperton*, 556 U.S. at 887 (citations omitted). But they are also "more likely to cross constitutional limits, [thus] requiring [judicial] intervention"—especially "when[,]" as here, "due

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[2] Courts are up to this task and can perform it effectively before, during, or after trial. *See*, *e.g.*, *In re Repetitive Stress Injury Litig.*, 11 F.3d at 371, 373 (vacating consolidation order in multi-plaintiff "repetitive stress injury" cases "where claimed afflictions d[id] not have a single cause" and "plaintiffs presumably have the usual wide variety of individual health conditions and problems that are found in any similar sample of persons"); *Bowles v. Novartis Pharmaceuticals Corp.*, Nos. 3:12-CV-145, 238, 2013 WL 663040, at * 1-2 (S.D. Ohio Feb. 25, 2013) (denying consolidation in pharmaceutical products liability case because of temporal difference in when drugs were prescribed, treatment by different doctors, different underlying medical histories, and different risk factors for the alleged injury); *Johnson*, 2011 WL 1323883, at *6 (similar).

process is violated." *Id.* The Court should grant certiorari and declare that due process constraints must be brought to bear to uphold the fundamental "fair trial" guarantee that the Due Process Clause enshrines.

Respectfully submitted,

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