No. 20-1223

IN THE

Supreme Court of the United States

JOHNSON & JOHNSON AND
JOHNSON & JOHNSON CONSUMER INC.,
Petitioners,

v.

GAIL L. INGHAM, ET AL.,
Respondents.

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

BRIEF OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC. AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE*[1]

The Product Liability Advisory Council, Inc. (PLAC) is a non-profit corporation with approximately 90 corporate members representing a broad cross-section of American industry. (A current list of PLAC's corporate members can be found at https://plac.com/PLAC/Who_We_Are/Membership/PLAC/Membership/Corporate%20Membership.aspx.) These companies seek to contribute to the improvement and reform of the law in the United States and elsewhere, with emphasis on the law governing the liability of product manufacturers and others in the supply chain. PLAC's perspective is derived from the experiences of its diverse corporate membership. In addition, several hundred of the country's leading product liability defense attorneys are sustaining (non-voting) members of PLAC.

Since 1983, PLAC has filed over 1,100 briefs as *amicus curiae* in both state and federal courts, including this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the development and application of the law as it affects product manufacturers and suppliers.

The issues raised by the petition are of great concern to PLAC's members. The aggregation of

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[1] Pursuant to S. Ct. Rule 37.2(a), PLAC states that all parties' counsel of record received timely notice of PLAC's intent to file this brief, and all parties have filed blanket letters of consent with the Clerk. Pursuant to S. Ct. Rule 37.6, PLAC also states that no counsel for a party wrote this brief in whole or in part, no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief and no person or entity other than PLAC has made such a contribution.

multiple individual claims for trial, whether by initial multi-plaintiff joinder or subsequent consolidation, is a common plaintiff's tactic in mass tort cases, which PLAC's members regularly face, and one that courts frequently permit. In most instances, as in this case, such an aggregated trial causes severe prejudice, in violation of defendants' due process fair trial rights.

SUMMARY OF ARGUMENT

The consolidation of civil—and particularly mass tort—cases for trial presents a significant and growing threat to defendants' fair trial rights. After the Court and Congress severely curtailed abusive mass tort class actions through decisions such as *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997), and *Wal-Mart Stores, Inc. v. Dukes*, 564 U.S. 338 (2011), and the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005), plaintiffs' counsel have increasingly sought to enjoy the aggregated evidence and coercive effects of such actions by consolidating multiple individual suits.

Moreover, mass torts are rampant in the federal and state courts, with federal multi-district litigations, most of them mass tort cases, having *tripled in the last two decades* and comprising a *majority* of the civil docket, and *350,000 tort cases filed annually* in the state courts, many of them similarly aggregated for pretrial management. The reported cases—a mere sliver of litigation activity—reveal plaintiffs regularly use these case pools to seek consolidated trials, and courts, citing judicial "efficiency," frequently permit them. Enormous COVID-19 trial backlogs now only make this tactic even more likely.

While the Court has held that due process guarantees the right to a fair trial, it has not addressed what constraints this imposes on consolidated trials. This case presents a clear opportunity to do so. Also, as petitioners note, the decision below exacerbates a split with *ten* state and federal appellate courts regarding whether due process requires that courts examine the actual fairness of a consolidated trial, rather than simply presuming it is fair because the jury was instructed to treat each case individually.

Further, the consolidated trial below manifestly violated petitioners' due process rights. Innumerable courts have recognized the severe potential for prejudice to defendants inherent in consolidated trials—the mass of evidence makes it impossible for jurors to keep individual cases separate, the multiple claimants naturally make jurors more inclined to find both liability and causation, and jurors inevitably hear evidence that is inadmissible in some cases. And both experimental and actual jury verdict studies have documented such confusion and prejudice, with one study of New York City mesothelioma trials finding consolidation *increased plaintiff's chances of success by 75% and verdicts by 152%*.

All these risks were realized in this case, where a trial of 22 widely varying claims led to uniform plaintiff verdicts, identical $25 million compensatory awards and an enormous $4.05 billion punitive award. The Court should grant review.

ARGUMENT

I. THE DECISION BELOW, INVOLVING THE DUE PROCESS LIMITS ON THE CONSOLIDATION OF CIVIL CASES FOR TRIAL, PRESENTS AN IMPORTANT FEDERAL QUESTION THAT HAS NOT BEEN, BUT SHOULD BE, SETTLED BY THE COURT

A. The Consolidation of Civil—and Particularly Mass Tort—Cases For Trial Poses a Significant, and Growing, Threat to Defendants' Fair Trial Rights

Like our Constitution's framers, PLAC's members believe strongly in the American system of civil jury trials conducted under fair procedures and reasonable rules of substantive law. Under such a system, product manufacturers and sellers can make rational decisions based on the merits of an individual case whether to settle or try it, and in the latter instance can be reasonably assured of a fair trial.

All too often, however, plaintiffs' lawyers seek to impose procedural or substantive rules that interfere with defendants' rights to a fair trial in order to gain an unfair advantage, both in settlement and any eventual trial. And in too many instances, courts—especially state courts in certain jurisdictions—aid and abet such justice distortions.

The aggregation of multiple claims in a single proceeding is a classic example of a procedural mechanism that can, absent proper constraints, jeopardize defendants' fair trial rights. Both Congress and the Court have recognized the threats that claim aggregation through the mechanism of a class action can pose to due process, and both have

established protections to guard against those threats.

In *Amchem Prods. v. Windsor*, the Court rejected the certification under Fed. R. Civ. P. 23(b)(3) for settlement purposes of a class of asbestos claimants who had been exposed to different products in different ways for different lengths of time over different time periods, suffered from different diseases or none at all and had different smoking histories. 521 U.S. 591, 624-25 (1997). Because the Rules Enabling Act forbade the class aggregation procedure to abridge substantive rights, the claimants could not be bound by a common adjudication or settlement, as their claims were not "sufficiently cohesive to warrant adjudication by representation." 521 U.S. at 623.[2]

In *Wal-Mart Stores, Inc. v. Dukes*, the Court rejected a Rule 23(b)(2) employment discrimination class as lacking a meaningful common question of law or fact under Rule 23(a), as class aggregation required a contention "central to the validity of each one of the claims" that was "capable of classwide resolution." 564 U.S. 338, 350 (2011). Moreover, "Due Process," *id.* at 366, reinforced by the Rules Enabling Act, *id.* at 367, prohibited claim aggregation from depriving defendant of the right to "individualized determinations of each [claimant]'s" claim. *Id.* at 366. Accordingly, an aggregated adjudication where

[2] The Court noted that while the text of the rule did not explicitly rule out class certification of "mass accident" cases, the Advisory Committee Notes accompanying the rule's 1996 revisions admonished that such cases were "ordinarily not appropriate" for class treatment, as they were "likely to present 'significant questions, not only of damages but of liability and defenses [to] liability . . . affecting the individuals in different ways." *Id.* at 625.

defendant's liability to all claimants would be based on the average result of a trial of sample class members' claims was improper. *Id.* at 367.

In *AT&T Mobility v. Concepcion*, the Court recognized one of the major unfairness risks that claim aggregation poses, namely of "'in terrorem settlements" whereby, "faced with even a small chance of a devastating loss, defendants will be pressured into settling questionable claims." 131 S. Ct. 1740, 1752 (2011); *see also In re Rhone-Poulenc Rorer Inc.*, 51 F.3d 1293, 1298 (7th Cir. 1995) ("easily [] facing $ 25 billion in potential liability (conceivably more), and with it, bankruptcy . . . [defendants] may not wish to roll these dice. . . . . They will be under intense pressure to settle"). Based on these concerns, and the lack of meaningful appellate review in arbitration, *AT&T,* 131 S. Ct. at 1752, the Court held class arbitration waivers enforceable under the Federal Arbitration Act, notwithstanding contrary state law, *id.* at 1752-53.

For its part, in enacting the Class Action Fairness Act of 2005, Pub. L. No. 109-2, 119 Stat. 4 (2005) ("CAFA"), Congress recognized that claim aggregation "can give a class attorney unbounded leverage, particularly in jurisdictions that are considered plaintiff-friendly." S. Rep. No. 109-14, at 20 (2005). "[W]hen plaintiffs seek hundreds of millions of dollars in damages, basic economics can force a corporation to settle the suit, even if it is meritless and has only a five percent chance of success." *Id.* at 21. In addition, many state courts had "reputations for readily certifying classes," *id.* at 4, and by being "lax" about following rules "intended to protect the due process rights of both unnamed class members and defendants," *id.* at 14, "often ignored" those rights, *id.* And this tilted system "[n]ot

surprisingly . . . led to the filing of many frivolous class actions." *Id.* at 21.[3]

To aid in the amelioration of abusive state court claim aggregations, CAFA significantly expanded federal diversity jurisdiction to encompass most class or "mass" actions of more than 100 plaintiffs where the matter in controversy exceeds $5,000,000 and minimal diversity exists, and to permit removal without regard to defendants' citizenship. 28 U.S.C. §§ 1332(d), 1453.

The salutary combined effect of the Court's class action jurisprudence and CAFA has been largely to eliminate the aggregation of mass tort claims, with its attendant abuses, through class actions. *See* American Law Institute, Principles of the Law of Aggregate Litigation § 1.02 (2010) ("As a doctrinal matter, the class action has fallen into disfavor as a means of resolving mass-tort claims arising from personal injuries" due, among other factors, to "the need for individual evidence of exposure, injury, and damages," citing *Amchem* and *Ortiz v. Fibreboard Corp.,* 527 U.S. 815 (1999)); 32 J. Moore et al., Moore's Federal Practice – Civil § 22.7 (2021) ("After experimentation with class treatment of some mass torts during the 1980s and 1990s, the courts have greatly restricted its use[;] . . . [m]ass tort personal

[3] The same phenomenon has resulted from the aggregation of claims, in theory for pre-trial purposes only, through federal multidistrict litigations (MDLs). *In re Mentor Corp. Obtape Transobturator Sling. Prods.*, MDL No. 2004, 2016 U.S. Dist. LEXIS 121608 at *7-8 (M.D. Ga. Sept. 7, 2016) (observing that MDL "consolidation for products liability actions does have the unintended consequence of producing more new case filings of marginal merit in federal court, many of which would not have been filed otherwise").

injury cases are rarely appropriate for class certification.").

In response, enterprising plaintiffs' counsel have increasingly sought many of the same unfair advantages offered by class action aggregation through the aggregation of multiple individual, *i.e.*, non-class, claims for a common trial. In many cases counsel seek to achieve these advantages by joining multiple unrelated plaintiffs' claims against a defendant or group of defendants in a single action from the outset, and then opposing severance of the claims for trial, as in the proceedings below. In others, plaintiffs file multiple separate actions and later move to consolidate them for trial.

As PLAC's members know only too well, this phenomenon is particularly common in the mass tort context. Mass torts are rife throughout both the federal and state civil dockets, and thus provide ample opportunities for improperly consolidated trials.

On the federal side, cases aggregated for pretrial management as MDLs represented an outright *majority of the federal civil docket* as of 2018, and MDL cases have *more than tripled* in the last two decades. Daniel S. Wittenberg, *Multidistrict Litigation: Dominating the Federal Docket*, American Bar Association (Feb. 19, 2020), https://www.americanbar.org/groups/litigation/publications/litigation-news/business-litigation/multidistrict-litigation-dominating-federal-docket/ (citing studies).

As of March 15, 2021, there were 185 MDLs, comprising *more than 350,000 cases* in 46 district courts before 153 judges. *MDL Statistics Report – Distribution of Pending MDL Dockets by District*,

Judicial Panel on Multidistrict Litigation (Mar. 15, 2021) https://www.jpml.uscourts.gov/sites/jpml/files/Pending_MDL_Dockets_By_District-March-15-2021.pdf. Within this group, mass tort suits represented a substantial majority, many of which were pharmaceutical and medical device product liability suits involving hip implants, Zantac, Xarelto, hernia mesh, suboxone, and numerous other products. *See id.* Talcum powder cases such as those in the state court proceedings at issue here were also represented, with 28,427 claims consolidated in a New Jersey MDL. *Id.*

Similarly, although the plenary jurisdiction of state courts necessarily causes mass torts to represent a smaller percentage of the total caseload, *see, e.g., State Court Caseload Digest: 2018 Data*, National Center for State Courts (2020), https://www.courtstatistics.org/__data/assets/pdf_file/0014/40820/2018-Digest.pdf (53% of filings, or 44.4 million, concerned traffic violations), approximately 350,000 tort cases are filed *annually*, *id.*, a number equal to the approximate *cumulative* caseload of the federal MDLs. Moreover, just as in federal court, a large proportion of these cases are mass tort cases that are aggregated for pretrial management in centralized proceedings. For example, in 2019 New Jersey's Multi-County Litigation program had over 22,100 active cases, *see Annual Report of the State of New Jersey Courts, Court Year 2018-2019* at 52, State of New Jersey (Sept. 2020), https://njcourts.gov/public/assets/annualreports/AnnualReportCY19_web.pdf?c=piS, and Pennsylvania's Mass Tort Program had 10,719, *2019 Mass Tort Report* at 2, First Judicial District of PA (Jan. 15,

2020) https://www.courts.phila.gov/pdf/cpcivil/2019-Mass-Tort-Program-Report.pdf.

Among these voluminous mass tort filings, asbestos cases—perhaps the original and prototypical mass tort[4]—remain ubiquitous. Thousands of such cases are filed in state courts every year, and they are overwhelmingly concentrated in a small number of plaintiff-friendly jurisdictions. *See Asbestos Litigation: 2019 Year in Review* at 5, KCIC (2020) https://www.kcic.com/media/2059/kcic-2019-asbestos-report.pdf. (82% of filings in 2019 were in only fifteen jurisdictions). Hence in 2019, 1,150 new asbestos suits were filed in Madison County, Illinois, 359 in St. Clair County, Illinois and 322 in New York City. *Id.* at 6. And the "standard" asbestos cases have metastasized into asbestos-in-talc cases, of which the present action represents just one instance. Philip S. Goldberg, Christopher E. Appel & Victor E. Schwartz, *The U.S. Supreme Court's Personal Jurisdiction Paradigm Shift to End Litigation Tourism*, 14 Duke J. Const. L. & Pub. Pol'y 51, 86 (2019) (noting that in 2016, more than 2,100 such claims were grouped in 260 lawsuits around the country, more than two-thirds in St. Louis).

Beyond asbestos, the state mass tort caseload reflects a variety similar to that of the federal MDLs, with pharmaceutical and medical devices a frequent subject. Thus in 2019, the Pennsylvania Mass Torts Program included 6,912 Risperdal cases, *2019 Mass Tort Report* at 2, First Judicial District of PA (2020) https://www.courts.phila.gov/pdf/cpcivil/2019-Mass-Tort-Program-Report.pdf, as well as litigation over

[4] *See Ortiz.*, 527 U.S. at 821 (noting the then "elephantine mass of asbestos cases").

Xarelto, vena cava filters and pelvic mesh (and, of course, asbestos), *id.* Currently in New Jersey, "several hundred [pelvic mesh cases] remain pending." *See Hrymoc v. Ethicon, Inc.*, No. A-5151-17, 2021 N.J. Super. LEXIS 24, at *7 (N.J. Super. Ct. App. Div. Mar. 2, 2021).

Given this "elephantine" and ever-growing volume of modern mass tort litigation, *compare Ortiz*, 527 U.S. at 821, it is not surprising that plaintiffs' counsel have sought to achieve the unfair advantages of aggregation—of which they have been generally deprived under the class action mechanism—by seeking consolidated trials of multiple individual claims. Thus petitioners' brief cites a significant number of cases in which courts have grappled with such efforts by plaintiffs' counsel. *See* Pet. 11-17.

But a review of even more recent case law reveals the phenomenon to be persisting, if not increasing, and of course the reported decisions capture only a portion of litigation activity. Certainly the present case, involving plaintiffs' successful effort to try 22 individual claims together, is one example. Similarly, *Campbell v. Boston Sci. Corp.*, 882 F.3d 70 (4th Cir. 2018), and *Eghnayem v. Boston Scientific Corp.*, 873 F.3d 1304 (11th Cir. 2017), each involved successful efforts to consolidate four pelvic mesh cases for trial. *Campbell*, 882 F.3d at 72; *Eghnayem*, 873 F.3d at 1310. Notably, the results in those cases were similar to the result in the present one: the jury returned nearly-identical verdicts in favor of all plaintiffs. *Campbell*, 882 F.3d at 74 (damages awards ranging from $ 4,250,000 to $ 5,250,000); *Eghnayem*, 873 F.3d at 1312 (damages awards ranging from $ 6,533,333 to $ 6,766,666).

In other recent cases, plaintiffs' counsel have succeeded in obtaining trial consolidation, but trial has been avoided either due to motion practice or because consolidation achieved the desired *in terrorem* effect of coercing settlement. *See, e.g.*, *Mullins v. Ethicon*, 117 F.Supp. 3d 810 (S.D.W. Va. 2015) (denying defendants' objections to pre-trial order consolidating 37 pelvic mesh cases for trial).

And in still others, plaintiffs' counsel's consolidation efforts have not succeeded, but the salient fact is that the tactic has been attempted. *See, e.g.*, *Jones v. Eli Lilly & Co.*, No. 1:15-cv-00701-JMS-MJD, 2015 U.S. Dist. LEXIS 141925 (S.D. Ind. Oct. 19, 2015) (defendant's motion to sever claims of fifteen Cymbalta plaintiffs granted); *Boles v. Eli Lily & Co.*, No. 1:15-cv-00351-JMS-DKL, 2015 U.S. Dist. LEXIS 141922 (S.D. Ind. Oct. 19, 2015) (same as to claims of twenty Cymbalta plaintiffs); *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004) (reversing consolidation of 20 chemical exposure plaintiffs' claims); *Agrofollajes, S.A. v. E.I. Du Pont de Nemours & Co.*, 48 So. 3d 976, 986 (Fla. Dist. Ct. App. 2010) (reversing consolidation of 27 fungicide plaintiffs' claims).

Moreover, with the COVID-19 pandemic having halted virtually all civil trials across the country for over a year, the enormous resulting backlogs will inevitably cause plaintiffs' counsel to seek, and courts will increasingly be tempted to permit, the use of consolidated trials to "encourage" settlement or make more "efficient" use of trial time. In short, the consolidation of civil, and especially mass tort, cases for trial, presents a significant and growing threat to defendants' due process rights.

B. The Court Has Not Addressed the Due Process Limits on Civil Trial Consolidation

The Court has clearly declared that due process guarantees the right to a fair trial. *Caperton v. A.T. Massey Coal Co.*, 556 U.S. 868, 876 (2009) ("It is axiomatic that a fair trial in a fair tribunal is a basic requirement of due process."). A trial decided by a biased jury is unfair, whether that bias arises from a juror's personal history, out-of-court influences or trial procedures. *See McDonough Power Equip. v. Greenwood*, 464 U.S. 548, 554 (1984) ("One touchstone of a fair trial is an impartial trier of fact"); *Sheppard v. Maxwell*, 384 U.S. 333, 362, 86 S. Ct. 1507, 1522 (1966) ("Due process requires that the accused receive a trial by an impartial jury free from outside influences."). Moreover, due process forbids procedures that cause "even the probability of unfairness." *In re Murchison*, 349 U.S. 133, 136 (1955).

In criminal cases, the Court has recognized that consolidation may impair an individual defendant's constitutional rights under the Confrontation Clause because the jury may be unable to disregard evidence that is admissible only against another defendant. *See Bruton v. United States*, 391 U.S. 123, 126 (1968). Yet the Court has not addressed the question of what limits due process imposes on the consolidation of *civil*, and particularly mass tort, cases for trial.

As discussed in detail at pp. 16-22 below, such consolidation inherently poses a significant risk of violating defendants' due process rights to a fair trial. The mere presence of multiple plaintiffs tends to bolster each individual plaintiff's claim by making

both liability and causation seem more likely. This effect is only amplified by the jury's hearing evidence that would be inadmissible as to a particular plaintiff in a single-plaintiff trial. And the volume of consolidated trial evidence often makes it impossible for jurors to keep individual case evidence separate and hence to decide cases individually. Predictably, therefore, studies of consolidation—in experiments as well as actual trials—have found it increases both plaintiffs' chances of success and the size of plaintiffs' verdicts.

For all the above reasons, the Missouri Court of Appeals' decision regarding the due process limits on civil trial consolidation presents an important question of federal law that has not been, but should be, settled by the Court. S. Ct. Rule 10(c).

II. THE DECISION BELOW ALSO EXACERBATES SPLITS AMONG STATE HIGH COURTS AND WITH FEDERAL COURTS OF APPEALS REGARDING THE DUE PROCESS LIMITS ON CONSOLIDATION

In addition, as petitioners note, the decision below exacerbates a split between at least one state court of last resort (the Alabama Supreme Court), now joined by Missouri's intermediate appellate court, and multiple other state courts of last resort, as well as with federal courts of appeals, regarding whether due process requires courts actually to assess confusion and prejudice when consolidating multiple plaintiffs' claims for trial, or whether courts may simply presume that jury instructions cure any

potential unfairness. *See* Pet. at 12-17; S. Ct. Rule 10(b).[5]

The Missouri-Alabama rule that jury instructions alone suffice to guarantee a fair trial conflicts with a total of *ten* state courts of last resort and federal courts of appeals, all of which require courts to look beyond the jury instructions and evaluate a trial's actual fairness. Two of the federal courts—the Second and Fifth Circuits—have invoked due process in evaluating consolidation, *see Gwathmey v. United States*, 215 F.2d 148, 156 (5th Cir. 1954), *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285, 1289 (2d Cir. 1990), and would clearly have vacated consolidation in this case as resulting in an unfair trial, notwithstanding the trial court's jury instructions, *see Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 349-52 (2d Cir. 1993) (relying on *Johnson* and reversing judgment in consolidated asbestos trial even though "[t]he jury was instructed on several occasions to consider each case separately"); *Gwathmey v. United States*, 215 F.2d 148, 152, 156 (5th Cir. 1954) (consolidated trial violated due process even though jury received instructions and a verdict form "with blanks left for inserting the awards to each [individual] claimant").

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[5] While the decision below is that of an intermediate state court, the Missouri Supreme Court denied review, leaving the decision as binding precedent. Moreover, as petitioners note, this Court has often granted review in cases arising from intermediate state courts, including for the purpose of resolving a split of authority. *See, e.g., Cyan, Inc. v. Beaver Cty. Emples. Ret. Fund*, 138 S. Ct. 1061, 1068-69 (2018) (granting certiorari to California intermediate appellate court "to resolve a split among state and federal courts" over effect of Securities Litigation Uniform Standards Act on certain state court securities class actions).

And eight other state and federal courts—the Texas Supreme Court, Supreme Court of Appeals of West Virginia, Iowa Supreme Court, Mississippi Supreme Court, Maryland Court of Appeals and Minnesota Supreme Court, as well as the Fourth and Sixth Circuits—require courts to at least consider actual fairness to defendants based on all appropriate factors, in some cases including jury instructions, when evaluating consolidation rather than relying solely on a presumption that such instructions will cure any confusion or prejudice. Pet. at 14-17.

For the above reasons, the Missouri Court of Appeals, like the Alabama Supreme Court before it, has decided the important federal question regarding the due process limits on civil trial consolidation in a way that conflicts with the decisions of other state courts of last resort, as well as several United States courts of appeals. S. Ct. Rule 10(b).

III. THE CONSOLIDATED TRIAL BELOW VIOLATED PETITIONERS' DUE PROCESS RIGHTS

A. The Consolidation of Civil—and Especially Mass Tort—Cases for Trial Inherently Poses a Significant Risk of Violating Defendants' Fair Trial Rights

Innumerable courts, some cited by petitioners and others added below, have recognized that the consolidation of civil—and especially sympathetic tort—cases for trial frequently creates jury confusion and a pro-plaintiff bias that denies defendants a fair trial. These conclusions are supported by social science studies cited by petitioners, as well as statistical analyses of actual consolidated trial verdicts discussed below.

Consolidated trials necessarily generate voluminous and confusing evidence that may cause a jury verdict to result from guesswork rather than a reasoned application of the law to the evidence in each individual case, depriving defendants of a fair trial. *See* Manual for Complex Litigation, Fourth, § 11.631 ("Unless common evidence predominates, consolidated trials may confuse the jury rather than promote efficiency."). The Fifth Circuit recognized this in *Gwathmey v. United States*, holding a consolidated trial of eminent domain cases violated due process where the court did "not believe it was humanly possible for the jury to have a really informed opinion" of the value of the individual tracts of land at issue, and "was driven to some other device in selecting the figures" it awarded. 215 F.2d 148, 156 (5th Cir. 1954).

A hallmark of jury confusion is the rendering of identical verdicts on different sets of facts. Thus the Second Circuit reversed a consolidated asbestos trial judgment in which "the jury apportioned an equal 9% liability to each defendant," a verdict that was "hard to explain" and likely "amounted to the jury throwing up its hands in the face of a torrent of evidence." *Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993); *see also Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1455 (S.D. Ala. 1992) (defendants in mass asbestos trial "did not receive a fair trial" where "confusion and prejudice [were] manifest in the identical damages awarded in the non-cancer personal injury cases and in the cancer personal injury cases"); *Vicksburg Chem. Co. v. Thornell*, 355 So. 2d 299, 302 (Miss. 1978) ("identical verdicts" in consolidated injury cases based on air pollution signaled "jury was confused"); *Agrofollajes, S.A. v. E.I. Du Pont De Nemours & Co.*, 48 So. 3d 976,

988 (Fla. Dist. Ct. App. 2010) (overturning jury award in consolidated fungicide product liability cases of identical sums for 27 different plaintiffs after eight-week trial).

Beyond confusion, the mere presence of multiple plaintiffs with similar claims creates a pro-plaintiff prejudice by inclining jurors to believe "where there's smoke, there's fire," as to both liability and causation. Thus the Texas Supreme Court vacated an order consolidating claims of 20 plaintiffs asserting workplace toxic tort claims to avoid an "unfair trial," as "consolidation risks the jury finding against a defendant based on sheer numbers." *In re Van Waters & Rogers, Inc.*, 145 S.W.3d 203, 211 (Tex. 2004). This risk persists even in smaller consolidated trials. *See Rubio v. Monsanto Co.*, 181 F. Supp. 3d 746, 758 (C.D. Cal. 2016) ("by trying the two [toxic tort] claims together, one plaintiff, despite a weaker case of causation, could benefit merely through association with the stronger plaintiff's case."); *Bradford v. Coleman Catholic High Sch.*, 488 N.Y.S.2d 105, 106 (App. Div. 1985) (trying "both [youth sports injury] claims to the same jury would tend to bolster each claim" and prejudice defendants where "[p]laintiffs were injured in two separate incidents, and each alleges that his or her injury was caused by similar acts of negligence by defendants' employees").

The jury in a consolidated trial almost inevitably also hears evidence that is relevant only to one particular case, yet may rely on it to reach a verdict in another. *See Leeds v. Matrixx Initiatives, Inc.*, No. 2:10cv199DAK, 2012 U.S. Dist. LEXIS 47279, at *8 (D. Utah Apr. 2, 2012) (denying consolidation of product liability cases based on risk jurors would "be prejudiced by the evidence presented

on behalf of the other plaintiffs, since they would be permitted to hear allegations of defects and adverse reactions not relevant to the particular plaintiff's case") (quoting *Hasman v. G.D. Searle & Co.*, 106 F.R.D. 459, 461 (E.D. Mich. 1985)); *Johnson v. Advanced Bionics, LLC*, No. 2:08-cv-02376-JPM, 2011 U.S. Dist. LEXIS 36289, at *18 (W.D. Tenn. Apr. 4, 2011) (ordering separate trials of medical device cases due to "risk that a jury would be unduly influenced by the facts of one case and respond in both cases accordingly"); *Grayson v. K-Mart Corp.*, 849 F. Supp. 785, 790 (N.D. Ga. 1994) (noting "tremendous danger that one or two [age discrimination] plaintiff's [*sic*] unique circumstances could bias the jury against defendant generally, thus, prejudicing defendant with respect to the other plaintiffs' claims.").

And consolidating plaintiffs with differing outcomes, including living and deceased plaintiffs, only magnifies unfairness because "[t]he dead plaintiffs may present the jury with a powerful demonstration of the fate that awaits those claimants who are still living." *Malcolm*, 995 F.2d at 351-52 (mass asbestos trial); *see also Cantrell v. GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) (in asbestos cases, "[t]he 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.").

Moreover, multiple social science studies confirm the conclusions that consolidation decreases juror comprehension and favors plaintiffs. In mock trial experiments, when four plaintiffs' claims were tried together, "jurors ha[d] difficulty distinguishing among various plaintiffs" and "plaintiffs [we]re

treated as a group with respect to compensation and damages." 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 Psychology 909, 916 (2000); *see also* Matthew A. Reiber & Jill D. Wenberg, *The Complexity of Complexity: An Empirical Study of Juror Competence in Civil Cases*, 78 U. Cin. L. Rev. 929, 929 (2010) (survey of 360 summoned jurors found "comprehension declines as complexity increases, particularly when the complexity arises from the presence of multiple parties or claims"). Nor does juror confusion merely produce random effects; rather, "[t]he general trend is that as the number of plaintiffs increased, more liability adhered to the defendant." Horowitz & Bordens, *The Consolidation of Plaintiffs*, at 914.

In addition, statistical analyses of actual jury verdicts in consolidated cases make these conclusions even more tangible. A study of all jury verdicts in New York City mesothelioma cases in 2010-14 compared the results of seven consolidated trials collectively involving sixteen plaintiffs with the results of eight individual trials. *See generally* Peggy L. Ableman et al., *The Consolidation Effect: New York City Asbestos Verdicts, Due Process And Judicial Efficiency*, 30 Mealey's Litigation Report: Asbestos 1 (May 6, 2015). The results: consolidating cases for trial increased a plaintiff's chances of prevailing *from 50% in an individual trial to 87.5% in a consolidated one*, and increased the mean plaintiff's verdict *from $9,208,250 to $23,178,571.* Another study of asbestos trials involving a variety of diseases in a variety of jurisdictions during 1987-2003 found that a consolidated trial of two to five plaintiffs' claims

increased plaintiffs' probability of prevailing by fifteen percent, and also increased the chances of a punitive damages award. *See* Michelle J. White, *Asbestos Litigation: Procedural Innovations and Forum Shopping*, 35 J. Legal Stud. 365, 385-90 (2006).

In addition, the risk of a due process violation is compounded where punitive damages are sought. The Court has explicitly held that due process forbids punishing a defendant other than for harm to the individual plaintiff. *Philip Morris USA v. Williams*, 549 U.S. 346, 353 (2007) (due process "forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or to those whom they directly represent, i.e., injury that it inflicts upon those who are, essentially, strangers to the litigation."). In a consolidated trial, the jury will necessarily hear of harm to multiple other irrelevant persons.

Nor can the multiple harms inflicted by consolidated trials be magically erased by jury instructions. *See Bruton v. United States*, 391 U.S. 123, 135 (1968) ("there are some contexts in which the risk that the jury will not, or cannot, follow instructions is so great, and the consequences of failure so vital to the defendant, that the practical and human limitations of the jury system cannot be ignored"). As petitioners note, most courts, both trial and appellate, recognize this. Pet. at 12-17; *see, e.g., Malcolm*, 995 F.2d at 349 (reversing judgment although "[t]he jury was instructed on several occasions to consider each case separately and each juror was given a notebook for this purpose"); *Cain*, 785 F. Supp. at 1454 ("[D]espite all the precautionary measures taken by the Court (e.g., juror notebooks, cautionary instructions before, during and after the

presentation of evidence, special interrogatory forms) the joint trial of such a large number of differing cases both confused and prejudiced the jury."). Unfair trials must be prevented before they begin, as they cannot be cured after the fact.

B. The Trial Below Was a Paradigmatic Example of a Due Process Violation

The trial and resulting *$4.6 billion verdict* against petitioners illustrates the myriad ways consolidation can violate a defendant's due process right to a fair trial. The jury confronted voluminous evidence—involving 22 different plaintiffs with exposures to different products in different amounts over different time periods, diagnosed with different diseases, following different clinical courses, obtaining different results and having different relevant risk factors—over the course of a six-week trial. *Ingham v. Johnson & Johnson*, 608 S.W.3d 663, 677, 680 (Mo. 2020). The trial culminated in five hours of jury instructions under the laws of twelve different states. Pet. at 8. If the sheer impossibility of keeping separate the evidence and law relevant to each of the 22 plaintiffs were not by itself enough, the identical $25 million compensatory awards in favor of each of them unmistakably demonstrates the jury's confusion, just as such awards did in *Malcolm*, 995 F.2d at 352 (jury "thr[ew] up its hands in the face of" the voluminous evidence), *Cain*, *Vicksburg Chemical* and *Agrofollajes*. *See supra* at 16-17.

Moreover, the multiplicity and combined circumstances of the 22 plaintiffs manifestly prejudiced petitioners. While petitioners have

prevailed in many individual talc trials,[6] the jury here found for all 22 plaintiffs regardless of differences in the applicable evidence, defenses and law. As noted, the jury also awarded a uniform $25 million in compensatory damages to each plaintiff despite differing circumstances, an award that was baldly outsize for some plaintiffs, such as one whose cancer was treated for a year and was then in remission for the 32 years before trial. Pet. at 18. And the jury issued a massive $4.05 billion omnibus punitive award.

These results demonstrate all the hallmarks of a prejudicial boost both to plaintiffs' likelihood of success and amount of recovery that courts have cited, and experimental and actual trial verdict studies have confirmed. To suggest on this record that the jury in fact followed the judge's instructions to consider each claim independently, and did not use the collective evidence to reach their verdict, would be to deny reality, and to make a mockery of petitioners' due process fair trial rights.

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[6] *See, e.g.*, *Swann v. Johnson & Johnson*, No. 1422-CC09326-01 (Mo. Cir. Mar. 3, 2017); *Forrest v. Johnson & Johnson et al.*, No. 1522-CC00419-01 (Mo. Cir. Dec. 20, 2019). *See generally* Josh Nathan-Kazis, *Johnson & Johnson Stock Gets More Good News, But a Big Test Is on the Way*, Barron's (Dec. 23, 2019), https://www.barrons.com/articles/johnson-johnson-stock-talc-lawsuit-51577121406 (noting "fourth consecutive verdict in favor of Johnson & Johnson" and "eighth defense verdict this year").

CONCLUSION

Without intervention by the Court, the lower courts—especially state courts in mass tort cases in certain jurisdictions—will continue to allow abusive consolidation practices, exposing defendants to massive liability and violating their due process fair trial rights. The Court has never addressed this issue, on which state and federal appellate courts are split, and this case presents a clear opportunity to do so. For all the foregoing reasons, as well as those stated by petitioner, the Court should grant the petition as to the due process consolidation issue.

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