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 CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, NATIONAL ASSOCIATION OF MANUFACTURERS, COALITION FOR LITIGATION JUSTICE, INC., AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AND BUSINESS ROUNDTABLE AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICI CURIAE*[1]

The Chamber of Commerce of the United States of America is the world's largest business federation, representing approximately 300,000 direct members and indirectly representing the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country.

National Association of Manufacturers is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and in all 50 States.

American Tort Reform Association is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation.

Coalition for Litigation Justice, Inc. was formed by insurers in 2000 as a nonprofit association to address and improve the litigation environment for asbestos and other toxic tort claims.

American Property Casualty Insurance Association is the primary national trade association for home, auto, and business insurers.

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[1] Pursuant to Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici*, their members, and their counsel made a monetary contribution to its preparation or submission. Counsel of record received timely notice and all parties consented to the filing of the brief.

Pharmaceutical Research and Manufacturers of America is a voluntary, nonprofit association representing the nation's leading research-based pharmaceutical and biotechnology companies.

Business Roundtable is an association of chief executive officers of over 200 leading U.S. companies that together have more than $7 trillion in annual revenues and more than 15 million employees.

Many of *amici*'s members increasingly face litigation in which groups of plaintiffs seek to join their claims together for trial. *Amici*'s members believe that such joinder often impedes their ability to defend individual cases and creates unfair systemic biases that favor plaintiffs. These due process concerns only increase as larger groups of plaintiffs are joined together for trial. *Amici* therefore have a substantial interest in the due process limits on the joinder of claims in civil litigation.

Amici file this brief to explain the threat of involuntary joinder faced by their members and the need for intervention by this Court to prevent further abuses of this procedural device.

INTRODUCTION AND SUMMARY OF ARGUMENT

This Court has recognized that, under some circumstances, joinder of defendants in a criminal trial can deprive the defendants of their Fifth Amendment rights to a fair trial. *United States* v. *Lane*, 474 U.S. 438, 446-449 (1986). And the Court also has recognized that the mass joinder of claims by means of the class action device can likewise result in procedural unfairness. See, *e.g.*, *Wal-Mart Stores, Inc.* v. *Dukes*, 564 U.S. 338, 367 (2011) (courts may not certify a class

"on the premise that [the defendant] will not be entitled to litigate its … defenses to individual claims").[2] But the Court has yet to address the due process implications of permitting the joinder of multiple plaintiffs in a single civil trial. This case provides an ideal vehicle to confront this growing problem.

Overcrowding of both federal and state-court systems is a fact of modern life. So too is the sometimes prohibitive cost of litigating individual cases. Attempts to address these practical concerns, however, must always be consistent with the due process rights of litigants. After all, it is a central guarantee of the Fifth and Fourteenth Amendments that governmental entities may deprive defendants of their property only through procedures that ensure due process, while the Constitution says nothing about the efficiency or cost-effectiveness of litigation. When, as happened here, a procedure of convenience interferes with a defendant's ability to put on a full and fair defense or creates structural biases that favor the plaintiff, that procedure must be rejected as being inconsistent with the constitutional guarantee of due process for all litigants.

The Missouri courts lost sight of the constitutional interests that are at stake, reducing petitioners' due process rights to a bare requirement that the jury be instructed to decide each plaintiff's claim on its own

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[2] See also, *e.g.*, *Philip Morris USA Inc.* v. *Scott*, 561 U.S. 1301, 1303-1304 (2010) (Scalia, J., in chambers) ("The extent to which class treatment may constitutionally reduce the normal requirements of due process is an important question. National concern over abuse of the class-action device induced Congress to permit removal of most major class actions to federal court … where they will be subject to the significant limitation of the Federal Rules.").

merits. The bromide that jurors are presumed to follow their instructions has its place, but instructions cannot cure all ills. That is evident in the verdict here, which awarded each of the 22 plaintiffs an identical amount as compensation for what indisputably are widely varying injuries. And the only plausible explanation for the eye-popping punitive award is that the jury was overwhelmed and inflamed by the sheer number of genuinely suffering plaintiffs paraded before it.

Not only does this case squarely present an important, recurring constitutional problem, but it arises at a time when the problem is likely to intensify if it is not urgently addressed. The backlog of cases resulting from the shuttering of most trial courts during the pandemic is certain to generate additional pressure on already overburdened court systems. As courts begin to reopen, that pressure will bring renewed urgency to questions about the proper use of joinder and other procedural devices intended to address court congestion.[3]

ARGUMENT

A. The Improper Joinder Of Civil Cases For Trial Is A Threat To Due Process.

The structural and psychological effects of joining myriad plaintiffs' cases together in one trial are significant and uniformly unfavorable to the defendant.

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[3] Although *amici*'s brief focuses on the issue of improper joinder of claims, *amici* agree with petitioners that Missouri courts improperly found specific personal jurisdiction to exist with respect to plaintiffs who did not purchase, use, or suffer injury from petitioners' products in Missouri. *Amici* also agree with petitioners that the shocking amount of punitive damages upheld in this case is inconsistent with this Court's precedents.

The repetition of 22 plaintiffs' accounts lends undue weight to the emotional aspects of a personal injury case. Worse still, that repetition appears to generate evidence of causation by creating a false cohort of individuals who appear to share only two things: product use and disease. Joinder also crowds out any plaintiff-specific issues by forcing the defendant to devote finite resources to those issues that affect all of the cases in the proceeding. There is also an inevitable blurring of facts when so many plaintiffs are joined together, allowing plaintiffs' counsel to present a composite picture based on the strongest aspects of individual cases. And the same kind of blurring occurs with the applicable legal principles when, as here, the individual claims are governed by a dozen State's laws. Finally, the aggregation of so many cases for an "immature" tort like this one deprives the parties of useful information about the merits and value of individual cases and places undue weight on a single proceeding.

1. Joinder creates a tilted playing field that favors plaintiffs through the repetition of fact patterns and claims.

The jury here saw 22 women or their surviving families tell emotionally fraught stories of each woman suffering through, or even dying from, a terrible disease. And each of those 22 plaintiffs, one after the other, blamed petitioners' products for the suffering that they described. There is, of course, a risk that juror sympathy will play a role in attribution of liability or the size of damage awards in any personal-injury litigation. Well-intentioned and properly instructed jurors, however, are usually able to rise above the emotional pull of a case and reach a verdict based on the evidence presented to them. But at some

point, it becomes unreasonable to expect jurors to avoid being influenced by the emotional barrage to which they have been subjected.

Moreover, the prejudice created by the repetition of fact patterns and allegations is even greater—and less defensible—in cases like these, in which there is a dispute about general causation. Petitioners' products are common household goods that have been used for decades by millions of women. Pet. 5. And each year over 20,000 women are diagnosed with ovarian cancer. American Cancer Society, *Key Statistics for Ovarian Cancer* (Jan. 12, 2021), www.cancer.org/cancer/ovarian-cancer/about/key-statistics.html. It is thus expected that a significant number of the millions of women who have used petitioners' products unfortunately will later develop ovarian cancer—and countless other health conditions for that matter. Correlation, of course, does not equate with causation. To the contrary, overlapping populations exist for any widely available consumer product and all but the rarest diseases. It is a question for epidemiological research whether the use of petitioners' products results in an increased incidence of ovarian cancer.

However, when a jury is presented with an artificial cohort of 22 women who developed ovarian cancer and appear to have nothing else in common besides use of petitioners' products, the inference of causation is natural and compelling, even if scientifically baseless. The systemic bias created by joining so many plaintiffs together for trial is prejudicial to the defense precisely because that false inference of causation is so effective.

First, the simple repetition of a correlation between product use and disease in 22 out of 22 cases

presented in the courtroom will intuitively dispose jurors to believe that there is a causal relationship. The jurors will hear scholarly accounts of statistical studies conducted by experts, but there are 22 real people in front of them whose detailed stories appear to demonstrate a compelling statistical association between the product and the disease. And the larger the cohort of plaintiffs, the more likely it becomes that the jurors will believe that it is simply "too much of a coincidence" that every one of the plaintiffs used the product and then developed the disease. That reasoning is scientifically unsound, but psychologically compelling when plaintiff after plaintiff conforms to the pattern.

Second, while plaintiffs' allegations offer an easy and uniform solution to the question of why these 22 women developed ovarian cancer, the alternative explanation offered by the defendants is necessarily complex, varied, and unsatisfying because the truth—*according to the American Cancer Society*—is that "[w]e don't yet know exactly what causes most ovarian cancers." American Cancer Society, *What Causes Ovarian Cancer?* (Jan. 12, 2021), www.cancer.org/cancer/ovarian-cancer/causes-risks-prevention/what-causes.html. In an individual trial, there is no structural impediment to the jury accepting that the causes of a plaintiff's disease are complex and may be idiopathic. But when the claims of multiple plaintiffs who have the same condition and used the same product are joined together for trial, there is a grave risk that the structure of the trial itself (not dispassionate consideration of the evidence) will cause the jury to reject the defendants' complex, individualized explanations in favor of the plaintiffs' simple, yet unscientific one.

Plaintiffs' counsel in this case were fully aware of and brazenly exploited the psychological biases created by their successful request to join so many cases in one trial. They openly encouraged the jurors to rely on the false courtroom epidemiological study that they had created through joinder and find that petitioners' products cause ovarian cancer because all 22 plaintiffs had two things in common: product use and ovarian cancer.[4] Pet. App. 152a ("[A]ll of these women have something in common. All of them used regularly and extensively Johnson & Johnson Baby Powder and had to listen when a doctor said to them: You've got cancer. … Now, all of these women have had that … and what you've got to do in your position in this case is figure out why."). Of course, the statistical correlation emphasized by plaintiffs' counsel is entirely attributable to selection bias. The only reason that all 22 plaintiffs share the traits of having used Petitioners' products and then developed ovarian cancer is that plaintiffs' counsel picked individuals from across the country who possessed those two traits and brought them together for a single trial. No court would admit the testimony of an expert who endorsed such a causal inference from a self-selected cohort of plaintiffs, but a joint trial in which so many plaintiffs' claims were presented together allowed counsel to fabricate this supposed evidence of causation out of the structure of the trial itself.

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[4] The actual epidemiological studies that have been conducted—involving tens of thousands of randomly selected women and appropriate scientific methods and controls—have found that there is not a meaningful relationship between use of petitioners' products and ovarian cancer. Pet. 5-6.

2. Joinder compromises the defendant's ability to present individual issues.

When a defendant is forced to address numerous individuals' claims in a single proceeding, the abandonment of meritorious arguments specific to individual plaintiffs is inevitable. The time allotted for trials, the attention of jurors, the patience of judges, and the length allowed for briefs all are finite. The larger the number of cases that have been forced into a single proceeding, the more arguments and evidence must be sacrificed on the altar of efficiency.

In this case, for example, seven plaintiffs' claims are governed by the laws of States that have imposed statutory caps on the amount of punitive damages.[5]

- Plaintiffs Groover's and Kim's claims are subject to a cap of five times the compensatory award under New Jersey law. N.J. Stat. Ann. § 2A:15-g.14(b) (West 2021) ("No defendant shall be liable for punitive damages in any action in an amount in excess of five times the liability of that defendant for compensatory damages or $350,000, whichever is greater."); *Neale* v. *Volvo Cars of N. Am., LLC*, 794 F.3d 353, 358 n.1 (3d Cir. 2015) (assuming that total punitive award against members of corporate family was capped at five times the total compensatory damages under New Jersey law).
- Plaintiff Martin's claims are subject to a cap of three times the compensatory award under

[5] Plaintiff Owens's claims also were subject to a statutory cap on punitive damages under North Carolina law. N.C. Gen. Stat. Ann. § 1D-25(b) (West 2021). The Missouri Court of Appeals dismissed her claims for lack of personal jurisdiction. Pet. App. 105a.

South Carolina law. S.C. Code Ann. § 15-32-530(A) (2021) ("[A]n award of punitive damages may not exceed the greater of three times the amount of compensatory damages awarded to each claimant entitled thereto or the sum of five hundred thousand dollars.").

- Plaintiffs Martinez's and Zschiesche's claims are subject to a cap of $750,000 from each defendant under Texas law because the compensatory damages were entirely non-economic in nature. Tex. Civ. Prac. & Rem. Code § 41.008(b) (West 2021) ("Exemplary damages awarded against a defendant may not exceed an amount equal to the greater of: (1)(A) two times the amount of economic damages; plus (B) an amount equal to any noneconomic damages found by the jury, not to exceed $750,000; or (2) $200,000.").
- Plaintiff Oxford's claims are subject to a cap of two times the compensatory award under North Dakota law. N.D. Cent. Code § 32-03.2-11.4 (West 2021) ("[T]he amount of exemplary damages may not exceed two times the amount of compensatory damages or two hundred fifty thousand dollars, whichever is greater.").
- Plaintiff Schwartz-Thomas's claims are subject to a $350,000 cap on total punitive damages under Virginia law. Va. Code Ann. § 8.01-38.1 (West 2021) ("In no event shall the total amount awarded for punitive damages exceed $350,000."); *Crouse* v. *Med. Facilities of Am. XLVIII*, 86 Va. Cir. 168 (2013) (reducing punitive damages for jointly and severally liable defendants to a total of $350,000).

Petitioners raised these state-law caps on punitive damages in their post-trial motion for a new trial or remittitur.[6] The trial court, however, did not address the issue in its order denying petitioners' post-trial motions. Pet. App. 116a-18a. Faced with a limited amount of space in their appellate brief and a long list of issues that could impact liability or damages in all 22 cases, as opposed to only the seven cases covered by an applicable cap statute, petitioners evidently elected not to raise the state-law caps on appeal.[7] Petitioners obviously would not have made that choice if

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[6] Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.'s Motion and Memorandum of Law in Support of Motion for New Trials on Damages or, in the Alternative, Remittitur at 28-32, *Ingham* v. *Johnson & Johnson*, No. 1522-CC10417-01 (Mo. Cir. Ct. Dec. 19, 2018).

[7] The Missouri Court of Appeals granted petitioners' motion for leave to file a brief of up to 33,000 words—1,500 words per plaintiff—but said that it was "not inclined to grant further … requests from Appellants to exceed word limitations for the Appellants' Brief." *Ingham* v. *Johnson & Johnson*, No. ED107476 (Mo. Ct. App. Aug. 27, 2019) (order granting motion to exceed word limit). Although 33,000 words may seem like a lot, Missouri requires that "[a]ll material contained in the brief except the cover, any certificate …, signature block and appendix count toward the word limitations." Mo. R. Civ. P. 84.06(b). That includes "[a] detailed table of contents," a table of authorities, and "[t]he points relied on," which must be stated in formulaic fashion, requiring dozens of words for each point raised. Mo. R. Civ. P. 84.04(a), (d). In addition, for each point relied on, the brief must include a list of up to four authorities upon which the party principally relies. Mo. R. Civ. P. 84.04(d)(5). Other requirements also chew up space. See, *e.g.*, Mo. R. Civ. P. 84.04(e) (requiring any challenged jury instructions to be quoted in full). To make matters worse, the Missouri appellate courts strictly enforce these requirements. See, *e.g.*, *Nelson* v. *Nelson*, 195 S.W.3d 502, 514 (Mo. Ct. App. 2006) (dismissing point of error for failure to articulate it in prescribed manner).

they were appealing from a judgment in favor of a single plaintiff.

Petitioners also had to forgo record-intensive arguments specific to individual plaintiffs. They simply did not have the space to present fact-specific arguments on a plaintiff-by-plaintiff basis regarding the statute of limitations, causation, or excessiveness of compensatory damages. Those arguments would have required lengthy recitations of facts and discussions of the applicable law of numerous States.[8] Petitioners had no realistic choice but to devote the limited space they had been afforded on appeal to issues that could provide relief as to all or most of the 22 plaintiffs.

When a defendant is forced to abandon meritorious factual or legal issues simply because they cannot be generalized to a broad group of plaintiffs joined together for trial, it is a disservice to the truth-finding function of the legal system. "Due process requires that there be an opportunity to present every available defense." *Am. Surety Co.* v. *Baldwin*, 287 U.S. 156, 168 (1932). While this guarantee does not negate reasonable limitations on the process of litigation, it surely demands that parties have a practical and fair

[8] For example, Petitioners' post-trial motion for judgment argued that ten plaintiffs' claims were untimely under the applicable laws of nine different states. Defendants Johnson & Johnson and Johnson & Johnson Consumer Inc.'s Motion and Memorandum of Law in Support of Motion for Judgment Notwithstanding the Verdict at 39-53, *Ingham* v. *Johnson & Johnson*, No. 1522-CC10417-01 (Mo. Cir. Ct. Dec. 19, 2018). The trial court dismissed this categorically as "a fact issue for the jury to decide." Pet. App. 111a-12a. Petitioners then evidently made a strategic decision not to use the limited word allotment they had on appeal to raise this record-intensive and plaintiff-specific issue.

opportunity to present fundamental case-specific issues such as timeliness, sufficiency of the evidence, excessiveness, and statutory caps on damages.

3. Joinder allows plaintiffs to present a composite picture that obscures weaknesses in individual claims.

Not only does joinder of numerous claims force defendants to abandon factual and legal issues related to individual plaintiffs in favor of those that affect the joined cases as a whole, it allows plaintiffs to create a composite picture of the plaintiffs that obscures factual or legal weaknesses in the individual claims.

Courts rejecting requests to join or consolidate cases have done so in part out of concern about the blurring of evidence that inevitably occurs in such proceedings. As one court explained, "jurors considering a particular plaintiff might be prejudiced by the evidence presented on behalf of the other plaintiffs, since they would be permitted to hear allegations … not relevant to the particular plaintiff's case." *Hasman* v. *G.D. Searle & Co.*, 106 F.R.D. 459, 461 (E.D. Mich. 1985). Consequently, "the jury's verdict might not be based on the merits of the individual cases but could potentially be a product of cumulative confusion and prejudice." *Ibid*; see also, *e.g.*, *Cantrell* v. *GAF Corp.*, 999 F.2d 1007, 1011 (6th Cir. 1993) ("Evidence relevant only to the causation of one plaintiff's cancer may [mistakenly] indicate to the jury that the other plaintiff will likely develop cancer in the future."); *Leeds* v. *Matrixx Initiatives, Inc.*, No. 2:10cv199, 2012 WL 1119220, at *3 (D. Utah Apr. 2, 2012) ("differences in each Plaintiff's ability to identify their manner of use and reactions to [the defendant's] products … raise concerns for potential prejudice in defending against various allegations"); *In re Consolidated Parlodel*

Litig., 182 F.R.D. 441, 447 (D.N.J. 1998) ("[a] consolidated trial of these fourteen cases would compress critical evidence of specific causation and marketing to a level which would deprive [the defendant] of a fair opportunity to defend itself").

This phenomenon is evident here in the jury's failure to draw any distinctions among 22 plaintiffs with widely divergent medical backgrounds, histories of product use, and injuries. Most obviously, it is patent in the identical compensatory awards returned by the jury. Plaintiff Ingham, for example, was diagnosed with ovarian cancer in 1985, went into remission the next year, and has been cancer-free ever since. She considers herself "fortunate," and plaintiffs' counsel described her as a "success story." Defs.' Mot. for Remittitur, *supra* n.6, at 7. Ms. Packard, on the other hand, underwent approximately 60 applications of chemotherapy over ten years, experienced intense and prolonged suffering, and ultimately passed away from the cancer. *Ibid.* The jury awarded each of them $25,000,000 (and the same amount to the other 20 plaintiffs as well). As one court explained in remarkably similar circumstances involving joinder of 13 civil actions for trial, "[i]t is inconceivable … that a properly functioning jury could have awarded the same amount in each case"—"[i]t appears that the jury simply lumped the personal injury plaintiffs [together] and gave plaintiffs … the same amount of compensatory damages no matter what their injuries." *Cain* v. *Armstrong World Indus.*, 785 F. Supp. 1448, 1455 (S.D. Ala. 1992); see also, *e.g.*, *Malcolm* v. *Nat'l Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) (there was "an unacceptably strong chance" that identical verdicts in the face of distinct facts "amounted to the jury throwing up its hands in the face of a torrent of evidence").

If it is "inconceivable" that a properly functioning jury could award the same amount of compensatory damages to 13 plaintiffs—and it surely is—then it is beyond absurd to suggest that a properly functioning jury could award the same amount to *22* plaintiffs. Instead, the jury's choice to bestow on each of 22 plaintiffs the same massive, round-number damages award is proof positive that adjudicating the claims of these disparate plaintiffs in a single trial distorted the outcome in violation of petitioners' due process rights.

The more cases that are presented one after the other in an increasingly lengthy consolidated proceeding, the harder it becomes for even a well-intentioned jury to recall and maintain focus on the distinctions among the manifold plaintiffs. At the same time, the more claims that are included in a joint trial, the easier it becomes for plaintiffs' counsel to paper over weaknesses in individual cases and encourage the jury to reach a verdict based on a composite picture that incorporates the strongest aspects of individual plaintiffs' cases. As the Fourth Circuit has held in the context of class actions, procedural devices should not allow plaintiffs' counsel to litigate "on behalf of a 'perfect plaintiff' pieced together for litigation," forcing the defendant "to defend against [that] fictional composite." *Broussard* v. *Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 344-345 (4th Cir. 1998). That is just as true for joinder as it is for class actions.

4. Joinder of claims governed by the laws of different States inevitably eliminates or obscures distinctions in the law.

The prejudicial effects of joinder are not limited to evidentiary issues. When a joinder, like the one at issue here, brings together plaintiffs whose claims are

governed by the laws of a dozen different States, distinctions in the applicable law inevitably are lost or ignored.

Even (or perhaps especially) when the jurors are instructed on the law applicable to each plaintiff's claim over the course of five hours, it is inevitable that they will fail to understand, remember, or focus on legal distinctions that apply to only one or two of the 22 plaintiffs before them.

Indeed, even courts are not immune to overlooking significant distinctions in the applicable law when there are so many moving parts in play. Here, for example, the Missouri Court of Appeals affirmed the punitive-liability verdict as to all plaintiffs, in part, because it refused "to entertain evidence and inferences from the evidence contrary to the jury's verdict," noting that considering the defendant's evidence would "defy[] our standard of review." Pet. App. 92a. That may be the standard applicable to the Missouri plaintiffs, but it is not the standard that governs the claims of out-of-state plaintiffs like California residents Brook and Goldman. See *Johnson & Johnson Talcum Powder Cases*, 37 Cal. App. 5th 292, 332-335 (2019) (affirming judgment as a matter of law for petitioners on the issue of punitive liability based, in part, on evidence contrary to the jury's verdict that the Missouri Court of Appeals refused to consider).

5. For an "immature" mass tort, joinder eliminates natural variation and opportunities to gain information about the merits and value of the claim.

Although avoidance of inconsistent results is often cited as a benefit of consolidated proceedings, that

may be so only for litigation in which consistent outcomes is desirable. In relatively novel and evolving mass-tort litigation like this, there is no valid reason to prefer consistency. On the contrary, the parties and the judicial system benefit from allowing the litigation to evolve naturally through individual, potentially varying outcomes.

The Manual for Complex Litigation defines a "mature" mass tort as one as to which "little or no new evidence is likely, appellate review of novel legal issues has been completed, and a full cycle of trial strategies has been explored." *Manual for Complex Litigation, Fourth* § 22.314 (June 2004). The claim that petitioners' baby-powder products cause ovarian cancer is far from settled into the mold of a mature mass tort. Defendants and plaintiffs each have prevailed on the question of liability in the individual trials conducted so far. And when plaintiffs have prevailed, the cases have reached different conclusions about the appropriate amount of compensatory damages and the availability and amount of punitive damages. This variation is both natural for a relatively novel claim and useful for parties attempting to evaluate the merits and value of claims in a mass litigation involving a product that was used by millions of people.

Courts have recognized that "'[f]airness may demand that mass torts with few prior verdicts or judgments be litigated first in smaller units.'" *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 748 (5th Cir. 1996) (citation omitted). That is because "[i]f there are few prior verdicts, judgments, or settlements, additional information may be needed to determine whether aggregation is appropriate." *Manual for Complex Litigation, Fourth* § 22.314; see also, *e.g.*, *In re Allied Chem. Corp.*, 227 S.W.3d 652, 654 (Tex. 2007) ("trial courts

should 'proceed with extreme caution' in setting consolidated trials in immature mass torts") (citation omitted); *In re Bristol–Myers Squibb Co.*, 975 S.W.2d 601, 603 (Tex. 1998) ("Until enough trials have occurred so that the contours of various types of claims within the … litigation are known, courts should proceed with extreme caution in consolidating claims.").

The joint proceeding here deprived the parties of an opportunity to gather individualized information about the merits and value of claims by 22 plaintiffs with widely divergent medical backgrounds, product use histories, and injuries. Instead, all 22 plaintiffs were forced into a single mold and treated by the jury as mere multipliers for an arbitrary damages figure.

B. Federal Courts Have Recognized That Due Process Imposes Limits On The Use Of Joinder In Civil Trials.

For many of the foregoing reasons, federal courts have consistently recognized the danger to litigants' due process rights when cases are joined together for trial over the objection of one of the parties. The Second Circuit, for example, has cautioned that "'[t]he systemic urge to aggregate litigation must not be allowed to trump our dedication to individual justice'" and that "[t]he benefits of efficiency can never be purchased at the cost of fairness." *Malcolm*, 995 F.2d at 350 (citation omitted); see also, *e.g.*, *In re Brooklyn Navy Yard Asbestos Litig.*, 971 F.2d 831, 853 (2d Cir. 1992) ("[W]e are mindful of the dangers of a streamlined trial process in which testimony must be curtailed and jurors must assimilate vast amounts of information. … [W]e must take care that each individual plaintiff's—and defendant's—cause not be lost in the shadow of a towering mass litigation."); *Arnold* v. *Eastern Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir.

1983) ("a trial must remain fair to both parties, and such considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice"); *Dupont* v. *S. Pac. Co.*, 366 F.2d 193, 196 (5th Cir. 1966) ("the trial judge should be most cautious not to abuse his judicial discretion and to make sure that the rights of the parties are not prejudiced by the order of consolidation under the facts and circumstances of the particular case").

Demonstrating the primary importance of a defendant's due process rights, courts have overturned judgments when too many claims were joined together, resulting in proceedings that interfered with the defendants' ability to put on a full and fair defense of each plaintiff's claim. They have done so even when the trial courts went to great lengths to preserve the integrity of each claim, including repeatedly instructing the jury to treat each plaintiff's claim separately.

In *Malcolm*, for example, the Second Circuit overturned a judgment in a trial of the claims of 48 plaintiffs alleging asbestos-related injuries, although all but two of the plaintiffs had settled by the end of trial. 995 F.2d at 348-349. The court observed that "the jury was presented with a dizzying amount of evidence regarding each victim's work history," "[a] parade of medical doctors" and "[e]conomists," and "evidence of the debilitating diseases and/or deaths of all 48 plaintiffs." *Id.* at 348-349. The court noted that "[t]he district court and the lawyers valiantly attempted to maintain the identity of each claim throughout the trial," including by instructing the jury "on several occasions to consider each case separately." *Id.* at 349. Nevertheless, the court concluded that "the sheer breadth of the evidence made these precautions feckless in preventing jury confusion." *Id.* at 352.

Similarly, after presiding over a joint trial of 13 asbestos cases, a federal district court granted a new trial upon assessing the fallout. *Cain*, 785 F. Supp. at 1455-1457. The court concluded that, "despite 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." *Id.* at 1455. The court reached this conclusion, in part, because "[i]t appear[ed] that the jury simply lumped the personal injury plaintiffs into two categories and gave plaintiffs in each category the same amount of compensatory damages no matter what their injuries." *Ibid.* The court thought it "inconceivable … that a properly functioning jury could have awarded the same amount in each case." *Ibid.*

As these and other cases have recognized, the due process rights of litigants must take precedence over procedures intended to address practical issues like court congestion and the costs of litigation.

And although a defendant's due process rights can never simply be set aside to create efficiencies for plaintiffs or courts, it is worth noting that the purported efficiency benefits of joinder are often illusory or overblown. This is a case in point. As the verdicts returned by the jury here confirm beyond any doubt, these cases can be cost-effectively litigated on an individual basis. The amount at stake for each plaintiff is more than sufficient to justify the time and attention of an individual trial that allows the parties to fully develop the factual and legal disputes specific to that plaintiff's claim. Moreover, the joinder of claims that was requested by plaintiffs here was not a response to

the natural overburdening of the Missouri court system. On the contrary, plaintiffs' counsel intentionally pulled cases from across the country into this court precisely so that they could join them together for trial. Such a "strategic" use of joinder is a clear warning that the due process rights of the defendant are at risk and a sure sign that the countervailing practical interests in judicial efficiency are insufficient to overcome the danger of prejudice to the defendant.

Given plaintiffs' strategic use of joinder, it should not be surprising that, as described above, this case exemplifies the numerous ways in which joinder can prevent a defendant from putting on a full and fair defense and unjustifiably tilt the playing field in favor of the plaintiffs.

C. This Court's Guidance Is Needed To Establish Due Process Limitations On The Use Of Joinder.

The Missouri Court of Appeals held that any prejudice caused to petitioners by the joinder of 22 plaintiffs' claims was cured because "the trial court instructed the jury to consider each Plaintiff's claim on its own merits," and "in over 140 pages of trial transcript, read the jury instructions for each individual Plaintiff to the jury." Pet. App. 14a. The court was satisfied that this protected petitioners' right to a fair trial because "[w]e presume the jury followed the trial court's instruction in reaching its verdict." Pet. App. 18a. Even the fact that the jury awarded all 22 plaintiffs precisely the same round amount of compensatory damages—ignoring obvious and significant differences in the harm alleged by individual plaintiffs—was not enough to overcome the court's faith in instructions as a panacea. Under that logic, there are no practical limits on the number of cases that could be

joined together for trial, so long as the trial court is willing to go through the protracted and mind-numbing exercise of instructing the jury on the law governing each plaintiff's claim.

The use of large multi-plaintiff joint trials to clear overburdened dockets already is a significant issue in certain courts.[9] Given the remarkable success of this strategic use of joinder from plaintiffs' point of view, there is no doubt that other similarly large, or even more ambitious, attempts to join cases together for trial will follow. And if other jurisdictions believe that Missouri's approach is consistent with due process, the temptation to use increasingly large joint trials as a method for addressing court congestion and clearing dockets will only increase.

CONCLUSION

The Court should grant the petition.

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[9] *E.g.*, 2012 Asbestos Case Management Order with Attached Exhibits at 4, *In re: Asbestos Pers. Injury Litig.*, No. 03-C-9600 (W. Va. Cir. Ct. Jan. 6, 2012), www.courtswv.gov/lower-courts/mlp/mlp-orders/asbestos-2012-CMO.pdf ("[c]ases processed under this Order will be combined into 'Trial Groups' … of twenty (20)").

Respectfully submitted.

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