No. ED 107476

IN THE MISSOURI COURT OF APPEALS
FOR THE EASTERN DISTRICT

GAIL L. INGHAM, ROBERT INGHAM, LAINE GOLDMAN, CAROLE WILLIAMS, MONICA SWEAT, GREGORY SWEAT, ROBERT PACKARD, ANDREA SCHWARTZ-THOMAS, JANIS OXFORD, WILLIAM OXFORD, STEPHANIE MARTIN, KEN MARTIN, SHEILA BROOKS, MARTIN MAILLARD, KRYSTAL KIM, ANNETTE KOMAN, ALLAN KOMAN, TONI ROBERTS, MARCIA OWENS, MITZI ZSCHIESCHE, TRACEE BAXTER, CECILIA MARTINEZ, OLGA SALAZAR, KAREN HAWK, MARK HAWK, PAMELA SCARPINO, JACKIE HERBERT NORTH, MARVIN WALKER, TALMADGE WILLIAMS,

Plaintiffs-Appellees,

v.

JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER INC. F/K/A JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,

Defendants-Appellants.

On Appeal from the Circuit Court of the City of St. Louis,
The Honorable Rex M. Burlison

MOTION OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MISSOURI CHAMBER OF COMMERCE AND INDUSTRY FOR LEAVE TO FILE BRIEF AS *AMICI CURIAE* IN SUPPORT OF DEFENDANTS-APPELLANTS

The Chamber of Commerce of the United States of America ("the U.S. Chamber") and the Missouri Chamber of Commerce and Industry ("the Missouri Chamber") respectfully move for leave to file an *amicus curiae* brief

in support of defendants-appellants Johnson & Johnson and Johnson & Johnson Consumer Inc. f/k/a Johnson & Johnson Consumer Companies, Inc.

The U.S. Chamber is the world's largest business federation. It represents 300,000 direct members and indirectly represents 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. An important function of the U.S. Chamber is to represent the interests of its members in matters before the courts, Congress, and the Executive Branch. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases that raise issues of concern to the nation's business community.

The Missouri Chamber is the largest business association in Missouri. Representing more than 40,000 employers, the Missouri Chamber advocates for policies and laws that will enable Missouri businesses to thrive, promote economic growth, and improve the lives of all Missourians. The Missouri Chamber also advocates for legislative policy and court outcomes that make Missouri attractive to job creators, and encourage existing job creators to stay and grow within Missouri.

This appeal involves three recurring issues that are of great importance to *amici*'s members and as to which *amici* collectively have filed *amicus* briefs in the U.S. Supreme Court, the appellate courts of Missouri, and state and federal appellate courts across the country.

First, this case presents a persistent question about the circumstances in which courts permissibly may exercise personal jurisdiction over the claims of out-of-state plaintiffs against an out-of-state defendant. Over the past several years, the U.S. Supreme Court has consistently emphasized that courts may exercise specific personal jurisdiction in such circumstances only when the plaintiff's claims arose out of the defendant's conduct within the forum state. The proposed *amicus* brief explains why the trial court's ruling that the 17 out-of-state plaintiffs satisfied this requirement is misguided and will have deleterious consequences for Missouri's economy by discouraging companies from conducting any part of their business in the state.

Second, the appeal raises serious and recurring questions about the propriety and fairness of joining the claims of multiple individuals who allege that they were injured as a result of using the same product, but at different times, from different sources, and in different amounts. The proposed *amicus* brief explains why the joinder of 22 claims in this case is irreconcilable with a tidal wave of precedent and deprived appellants of their right to due process.

Third, the two enormous punitive damages awards in this case raise issues about the fair administration of punitive damages that have long been a concern of *amici*'s members. Federal and state courts have endeavored over the past few decades to develop a framework for reviewing punitive awards to ensure that they are imposed in a reasonable, fair, and consistent way. The

Supreme Court took great strides in that direction when it adopted three guideposts to assist courts in deciding whether a punitive award is excessive: (1) the degree of reprehensibility of the defendant's conduct; (2) the ratio of punitive to compensatory damages; and (3) the civil penalties applicable to comparable conduct. However, issues regarding the proper application of these guideposts persist.

The proposed *amicus* brief addresses the proper application of the ratio guidepost in this case. The *amici*'s interest in the issue transcends that of the appellants. The *amici*'s members find themselves facing punitive damages litigation in Michigan and elsewhere. What this Court says about the ratio guidepost in this appeal—and more broadly about the maximum permissible amount of punishment—could influence litigation involving their members both in Missouri and in other jurisdictions.

In sum, the U.S. Chamber and the Missouri Chamber have a strong interest in presenting the Court with their analysis of these important, recurring issues.

Counsel for appellants consents to the filing of this *amicus* brief. Counsel for appellees indicated that plaintiffs oppose the filing of the brief.

CONCLUSION

The Court should grant permission to file the proposed *amicus* brief.

Respectfully submitted,

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BRIEF OF *AMICI CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MISSOURI CHAMBER OF COMMERCE AND INDUSTRY IN SUPPORT OF DEFENDANTS - APPELLANTS

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INTEREST OF THE *AMICI CURIAE*

The Chamber of Commerce of the United States of America ("the U.S. Chamber") is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents 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.

The Missouri Chamber of Commerce and Industry ("the Missouri Chamber") is the largest business association in Missouri. Representing more than 40,000 employers, the Missouri Chamber advocates for policies and laws that will enable Missouri businesses to thrive, promote economic growth, and improve the lives of all Missourians. The Missouri Chamber also advocates for legislative policy and court outcomes that make Missouri attractive to job creators, and encourage existing job creators to stay and grow within Missouri.

An important function of the U.S. Chamber and the Missouri Chamber is to represent the interests of their members in matters before the courts, Congress, and the Executive Branch. To that end, both organizations file *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community. As described in the motion for leave to file this brief, the U.S. Chamber and the Missouri Chamber have a particularly strong interest

in this Court's resolution of the personal-jurisdiction, joinder, and punitive damages issues presented by this appeal.

INTRODUCTION AND SUMMARY OF ARGUMENT

The damages awards in this case—$25 million (on the dot) in compensatory damages to each of 22 different plaintiffs whose use of the product in question and injuries varied dramatically and punitive damages against the two defendants totaling $4.14 ***billion***—are indicative that something went badly awry. In fact, at every step the trial court committed serious errors that all but ensured this eyebrow-raising outcome. In this brief, *amici* address but three of those errors—three that unfortunately recur with some regularity in mass-tort litigation.

To begin with, the trial court violated appellants' due process rights by exercising personal jurisdiction with respect to the claims of 17 out-of-state plaintiffs against the two out-of-state defendants. As the United States Supreme Court repeatedly has made clear, a court may exercise specific personal jurisdiction over claims against a non-resident defendant only if those claims arose out of conduct that occurred within the forum. The claims of the 17 out-of-state plaintiffs did not arise out of conduct that occurred in Missouri, and the trial court's conclusion otherwise amounts to trying to force a square peg into a round hole.

The trial court exacerbated the due process violation by allowing all 22 plaintiffs—the five Missouri residents and the 17 out-of-staters—to try their claims together. This had the fundamentally unfair effect of enabling the plaintiffs to create a perfect composite plaintiff and depriving appellants of any realistic opportunity to defend against the claims by means of individualized evidence. The very fact that the jury awarded exactly the same amount of damages to each plaintiff, regardless of her individual circumstances, confirms both that the standard for permissive joinder was violated and that the violation could not have been more prejudicial.

Finally, after the jury imposed one of the highest punitive exactions in history, the trial court abdicated its constitutional duty to provide exacting review of the amount. The court ignored Supreme Court authority suggesting that the highest constitutionally permissible punitive award is equal to or less than the compensatory damages. Indeed, because the compensatory awards are so large and self-evidently contain a punitive component, an even lower punitive award (and perhaps no punitive award at all) is sufficient to accomplish Missouri's interests in punishing and deterring the conduct at issue. The court likewise gave no heed to the need to ensure that the jury was punishing appellants solely for the harm to the plaintiffs and not for injuries to other women who have their own claims. Had it done so, it would have

been obliged to conclude that only a small fraction of the punitive awards could possibly comport with due process.

ARGUMENT

I. The Trial Court Lacked Personal Jurisdiction As To The Out-Of-State Plaintiffs' Claims Under Binding U.S. Supreme Court Precedent.

The trial court's decision to exercise specific personal jurisdiction over appellants with respect to the claims of the 17 out-of-state plaintiffs squarely conflicts with several decisions of the U.S. Supreme Court regarding the limitations on personal jurisdiction established by the Due Process Clause of the Fourteenth Amendment. The Supreme Court has held—in no uncertain terms—that specific jurisdiction exists only when the claims in the lawsuit are themselves ***directly connected*** to the defendant's in-forum conduct. The claims of these 17 plaintiffs lacked the necessary direct connection to Missouri and accordingly should not have been tried here.

A. Specific jurisdiction must rest on in-state contacts directly related to the plaintiff's claims.

Since its seminal decision in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945), which first defined the modern "minimum contacts" approach to specific jurisdiction that still governs today, the U.S. Supreme Court has consistently required a connection between the plaintiff's claims and the defendant's in-state activities. Explaining why such contacts satisfy

the due-process requirements for specific jurisdiction, the Supreme Court observed that when "a corporation exercises the privilege of conducting activities within a state, it enjoys the benefits and protection of the laws of that state." *Id.* at 319. "The exercise of that privilege," the Court reasoned, "may give rise to obligations; and, so far as those obligations ***arise out of or are connected with the activities*** within the state, a procedure which requires the corporation to respond to a suit brought to enforce them can, in most instances, hardly be said to be undue." *Id.* (emphasis added). The Court went on to conclude that the exercise of specific jurisdiction over the defendant was permissible because the defendant had engaged in activities within the forum state and "[t]he obligation which is here sued upon arose out of ***those very activities***," making it "reasonable and just … to permit the state to enforce ***the obligations which [the defendant] ha[d] incurred there***." *Id.* at 320 (emphases added).

The *International Shoe* framework thus rests on the principle that due process permits a state to subject an out-of-state defendant to the jurisdiction of the state's courts ***only*** with respect to claims that arise out of "th[e] very activities" that the defendant engaged in within the forum state. *Id.* That principle necessarily forbids state courts from exercising specific jurisdiction with respect to claims that do ***not*** arise out of in-state activities or obligations.

The U.S. Supreme Court's more recent decisions have reaffirmed that the exercise of specific personal jurisdiction requires a direct connection between the plaintiff's claims and the defendant's in-state conduct. In *J. McIntyre Machinery, Ltd. v. Nicastro*, for example, the plurality opinion contrasted specific jurisdiction with general jurisdiction, which allows a state "to resolve both matters that originate within the State and those based on activities and events elsewhere." 564 U.S. 873, 881 (2011) (plurality op.). Specific jurisdiction, the plurality explained, involves a "more limited form of submission to a State's authority," whereby the defendant subjects itself "to the judicial power of an otherwise foreign sovereign ***to the extent that power is exercised in connection with the defendant's activities touching on the State***." *Id.* (emphasis added).

Then, in a pair of decisions outlining the limitations on general (or all-purpose) personal jurisdiction, the Court reiterated the very different, "more limited" role played by specific personal jurisdiction. In *Goodyear Dunlop Tires Operations, S.A. v. Brown*, the Court explained that whereas general personal jurisdiction can be exercised with respect to claims arising anywhere, an exercise of specific jurisdiction "depends on an affiliation between the forum and the underlying controversy, principally, ***activity or an occurrence that takes place in the forum State and is therefore subject to the State's regulation***." 564 U.S. 915, 919 (2011) (emphasis

added; brackets and internal quotation marks omitted). Thus, specific jurisdiction exists only when a defendant engages in continuous activity in the state "and *that activity gave rise to the episode-in-suit*" (*id.* at 923), or when the defendant commits "single or occasional acts in a State [that are] sufficient to render [it] answerable in that State with respect to those acts, ***though not with respect to matters unrelated to the forum connections***" (*id.* (emphasis added; quotation marks omitted)). The Court emphasized that under either scenario, for there to be specific personal jurisdiction, the plaintiff's suit must be one that "'aris[es] out of or relate[s] to the defendant's contacts with the forum.'" *Id.* at 923-24 (quoting *Helicopteros Nacionales de Colombia, S.A. v. Hall*, 466 U.S. 408, 414 n.8 (1984)).

Similarly, in *Daimler AG v. Bauman*, the Court reaffirmed that specific jurisdiction is available only when the defendant's in-state activities "g[i]ve rise to the liabilities sued on" or when the suit "relat[es] to that in-state activity." 571 U.S. 117, 126-27 (2014) (internal quotation marks omitted).

Then, in *Bristol-Myers Squibb Co. v. Superior Court* ("*BMS*"), the Court made it unmistakably clear that a court may not exercise specific jurisdiction unless the defendant has engaged in in-state activity that gives rise to the particular plaintiff's own claims. The plaintiffs in *BMS* included both California and non-California residents who sued a pharmaceutical manufacturer in California on product-liability claims arising from their use

of a particular drug. Although their claims, like those of the in-state plaintiffs, arose from the defendant's nationwide marketing of the drug, including in California, the Court held that the out-of-state plaintiffs could not obtain specific personal jurisdiction over the defendant in California, because "all the conduct giving rise to [their] claims occurred elsewhere" inasmuch as the specific doses that they received, unlike those received by the California plaintiffs, had been prescribed, purchased, and ingested outside California. 137 S. Ct. 1773, 1782 (2017). The Court explained that specific jurisdiction requires a connection between the plaintiff's claims and the defendant's conduct in the forum and that, "***[w]hen there is no such connection, specific jurisdiction is lacking regardless of the extent of a defendant's unconnected activities in the State***." *Id.* at 1781 (emphasis added).

Finally, in its latest decision regarding personal jurisdiction, the Court reiterated that a corporate defendant's "in-state business … does not suffice to permit the assertion of general jurisdiction over claims … that are unrelated to any activity occurring in" the forum state. *BNSF Ry. v. Tyrrell,* 137 S. Ct. 1549, 1559 (2017). Thus, absent general personal jurisdiction, which typically exists only in those states where a corporate defendant is either incorporated or has its principal place of business, doing business in a particular state "is sufficient" only "to subject the [defendant] to specific

personal jurisdiction in that State on claims related to the business it does in [that State]." *Id*.

In short, the Supreme Court has repeatedly held that specific jurisdiction is available ***only*** for claims that relate directly to a defendant's in-state activities. A state cannot exercise specific jurisdiction with respect to claims that do not directly relate to a defendant's contacts with the forum state.

B. The contacts relied on by the trial court lack a direct relationship to the out-of-state plaintiffs' claims.

Plaintiffs did not dispute below that Missouri lacks general personal jurisdiction over appellants. The trial court held, however, that it could exercise specific personal jurisdiction over appellants with respect to the out-of-state plaintiffs' claims based on (1) a contractual relationship between Johnson and Johnson Consumer Inc. ("JJCI") (a J&J subsidiary) and Pharma Tech (a Missouri company) to manufacture a product called "Shimmer Effects" in Missouri and (2) JJCI's development of certain baby powder marketing in Missouri. That conclusion is inconsistent with the test for specific personal jurisdiction articulated by the U.S. Supreme Court. The out-of-state plaintiffs here did not purchase or use any J&J product in Missouri. Their product-liability and failure-to-warn claims thus arise entirely from appellants' ***out-of-state*** conduct—and therefore fail to satisfy the

constitutional requirement of a direct connection between the defendant's in-state activities and the claims in the lawsuit.

To begin with, under *BMS* it is crystal clear that JJCI's decision to contract with Pharma Tech to produce Shimmer Effects in Missouri cannot support specific jurisdiction over the claims of the out-of-state plaintiffs. The out-of-state plaintiffs in *BMS* argued, in part, that California could exercise specific jurisdiction over their claims because the defendant BMS had contracted with a California company to distribute the drug at issue nationally. 137 S. Ct. at 1783. But the Supreme Court rejected that argument, explaining that "[t]he bare fact that BMS contracted with a California distributor is not enough to establish personal jurisdiction in the State," because "'[a] defendant's relationship with a third party, standing alone, is an insufficient basis for jurisdiction.'" *Id.* (quoting *Walden v. Fiore*, 571 U.S. 277, 286 (2014)) (ellipsis omitted). BMS's relationship with the distributor would thus be relevant to specific jurisdiction only if there were allegations that BMS had "engaged in relevant acts together with [the distributor] in California" or that it was "derivatively liable for [the distributor's] conduct in California"—allegations that the plaintiffs there had not made. *Id.*

The claims of the out-of-state plaintiffs here similarly lack any connection to JJCI's relationship with Pharma Tech, because Plaintiffs did

not allege or prove that appellants engaged in any "relevant acts" in Missouri as part of that relationship. The evidence showed that JJCI simply provided Pharma Tech with specifications for how to manufacture its product. But plaintiffs' claims arise from the way that the products they used were developed and sold and the warnings that accompanied them; the claims have nothing to do with Pharma Tech's physical act of processing raw talc into the products and bottling them. JJCI's contract with Pharma Tech, in short, is exactly the kind of "relationship with a third party, standing alone," that does not support specific jurisdiction.[1] *Id.*

Appellants' alleged marketing activities in Missouri are not a basis for subjecting them to specific jurisdiction in Missouri either. Even assuming *arguendo* that marketing research by appellants or marketing by a third-party contractor could support personal jurisdiction, none of the out-of-state plaintiffs claimed to have bought any J&J products in Missouri, or to have been exposed to any of the alleged J&J marketing in Missouri. Thus, the out-of-state plaintiffs' claims cannot be said to have ***any*** connection to appellants'

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[1] *Amici* also agree with appellants' arguments that the JJCI-Pharma Tech relationship (1) cannot support specific jurisdiction over the out-of-state plaintiffs' claims because no out-of-state plaintiff proved that she used the Shimmer Effects product that Pharma Tech manufactured and (2) cannot support specific jurisdiction over ***J&J*** in any event, because J&J and JJCI are separate companies (and thus legally distinct persons) and plaintiffs did not prove any in-state conduct by J&J (as opposed to JJCI).

Missouri marketing activities—let alone the direct, "substantial connection" required by the Supreme Court's precedents. *Walden*, 571 U.S. at 284.

To be sure, a plaintiff who bought the relevant J&J products in Missouri and ***did*** see and act upon marketing conducted by the appellants might be able to invoke that marketing as a basis for specific jurisdiction. But the fact that the Missouri plaintiffs here (or other Missouri consumers) might be able to make such an argument does not provide a basis for specific jurisdiction with respect to the claims of the 17 out-of-state plaintiffs. The Supreme Court made this clear in *BMS*, when it explained that "[t]he mere fact that *other* plaintiffs were prescribed [and] obtained" the drug at issue in California did not create specific jurisdiction in California with respect to the claims of out-of-state plaintiffs. 137 S. Ct. at 1781. And courts in other product-liability cases like this one have applied the same principle to hold that in-state marketing that was not seen by out-of-state plaintiffs is irrelevant to the question whether there is specific jurisdiction over the out-of-state plaintiffs' claims. For example, in another lawsuit related to talc products, a Delaware court held that advertising in Delaware was "not germane to [a] nonresident Plaintiff's claim," because "[t]he nonresident presumably was subject to sales and marketing forces in her own jurisdiction, not in Delaware." *In re Talc Prod. Liab. Litig.*, 2018 WL 4340012, at *6 (Del. Super. Ct. 2018).

In short, the in-state activities of appellants upon which the trial court relied to find specific personal jurisdiction lacked the requisite connection to the out-of-state plaintiffs' claims and thus do not permit Missouri courts to exercise specific personal jurisdiction over those claims. Indeed, if the activities invoked by the trial court were sufficient, then virtually any plaintiff who bought and used J&J products anywhere in the country could bring a lawsuit in Missouri. That is not how the Due Process Clause works. The U.S. Supreme Court has consistently held that for specific personal jurisdiction to exist in a given forum, the defendant's in-state conduct must be ***directly*** related to a plaintiff's claims—or, in the Court's words, the plaintiff's suit must be one that "aris[es] out of or relate[s] to the defendant's contacts with the forum." *Goodyear*, 564 U.S. at 923-24 (internal quotation marks omitted); *accord, e.g.*, *BMS*, 137 S. Ct. at 1776, 1782. In this case, the conduct giving rise to the out-of-state plaintiffs' claims did ***not*** occur in Missouri—it occurred in the states where they purchased and used J&J's products. Accordingly, there was no basis for exercising personal jurisdiction over the claims of the 17 out-of-state plaintiffs.

C. The approach to specific jurisdiction adopted by the trial court would have serious, harmful consequences.

If the trial court's expansive approach to personal jurisdiction is allowed to stand, it will have negative practical consequences for the citizens

and economy of Missouri. An approach to specific jurisdiction that does not require a direct connection between the plaintiff's claim and the defendant's in-state activity will make it less attractive for out-of-state corporations to do business in Missouri, thereby threatening investment here. For this reason, the trial court's decision to exercise specific jurisdiction over the out-of-state plaintiffs' claims threatens to impose serious costs on the state and its citizens.

The U.S. Supreme Court has observed that due process limits on personal jurisdiction confer "'a degree of predictability to the legal system that allows potential defendants to structure their primary conduct with some minimum assurance as to where that conduct will and will not render them liable to suit.'" *Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 472 (1985) (quoting *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297 (1980)). As Justice Ginsburg explained for the Court, a corporation's place of incorporation and principal place of business—the jurisdictions in which a corporation is subject to general jurisdiction—"have the virtue of being unique." *Daimler*, 571 U.S. at 137. "[T]hat is, each ordinarily indicates only one place"—a forum that is "easily ascertainable." *Id.* The rule articulated by the Supreme Court in *Daimler* thus allows corporations to anticipate that they will be subject to general jurisdiction in only a few (usually one or two) well-defined jurisdictions. Such "[p]redictability is valuable to corporations

making business and investment decisions." *Hertz Corp. v. Friend*, 559 U.S. 77, 94 (2010) (explaining benefits of clear jurisdictional rules in the context of the diversity-jurisdiction statute).

The approach to specific jurisdiction embodied in the trial court's decision undermines that predictability, making it impossible for corporations to structure their affairs to limit the number of jurisdictions in which they can be sued on any claim by any plaintiff residing anywhere. Many product manufacturers do business with suppliers, and market their products generally, in a large number of states. If such activities were deemed sufficient to give rise to specific jurisdiction on any claim related to the manufacturer's products, no matter where the particular plaintiff bought or used it, then a corporation could be sued throughout the country regardless of whether its in-state activity had any connection to a particular claim. That is exactly the kind of application of specific jurisdiction that the Supreme Court rejected in *BMS* as a "loose and spurious form of general jurisdiction." 137 S. Ct. at 1781.

If a company could face litigation in Missouri courts over nearly any claim relating to its products anywhere in the nation—irrespective of whether it has any connection to the company's activities in Missouri—any rational business would have little choice but to weigh carefully the benefits of investing in Missouri against the substantial risk of being sued here on

claims that have nothing to do with its in-state conduct. That risk may result in the movement of jobs and capital investment away from Missouri and an aversion to future investment in the state. As the Delaware Supreme Court explained in declining to subject out-of-state corporations to general personal jurisdiction based on their registration to do business in Delaware:

> Our citizens benefit from having foreign corporations offer their goods and services here. If the cost of doing so is that those foreign corporations will be subject to general jurisdiction in [this state], they rightly may choose not to do so.

Genuine Parts Co. v. Cepec, 137 A.3d 123, 142 (Del. 2016).

There are no countervailing benefits to Missouri from imposing these significant costs on the state's economy. If a nonresident corporation has meaningful contacts with Missouri and its in-state conduct is alleged to harm a Missouri resident, it can be sued in Missouri on a specific-jurisdiction theory. *See, e.g.*, *Walden*, 571 U.S. at 284. The broader approach taken by the trial court is therefore not necessary to ensure that companies that conduct business in Missouri may be held accountable for their conduct ***in Missouri***. Rather, it serves only to encourage litigation tourism that consumes the resources of the courts of this state in deciding disputes that—like this case—have only random or "fortuitous" connections to Missouri. *World-Wide Volkswagen*, 444 U.S. at 295.

II. The Trial Court Failed To Ensure That Joinder Did Not Prejudice Appellants.

Missouri allows that "[a]ll persons may join in one action as plaintiffs if they assert any right to relief jointly, severally, or in the alternative in respect of or arising out of the same transaction, occurrence or series of transactions or occurrences ***and*** if any question of law or fact common to all of them will arise in the action." Mo. Sup. Ct. R. 52.05(a) (emphasis added); § 507.040.1, RSMo (emphasis added). Joinder can be proper only if ***both*** prongs of Rule 52.05(a) are satisfied. *See State ex rel. Gulf Oil Corp. v. Weinstein*, 379 S.W.2d 172, 175 (Mo. Ct. App. 1964) (explaining that "[t]he permissive joinder of parties is fixed by the Civil Rule" and that "the trial court cannot lawfully exercise any discretion contrary to the law relating to the matter before it").

Permissive joinder "is merely a procedural device" intended "to promote trial convenience and expedite the final determination of disputes, thereby preventing multiple lawsuits." 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, FED. PRAC. & PROC. § 1652, at 395, 398 (3d ed. 2001) (discussing the federal permissive joinder rule set forth in Fed. R. Civ. P. 20); *see also State ex rel. Farmers Ins. Co. Inc. v. Murphy*, 518 S.W.2d 655, 662 (Mo. banc 1975) ("[T]he philosophy of permissive joinder ... is to promote judicial economy, expedite final disposition of litigation and prevent inconsistent results due to

multiple separate lawsuits.").[2] However, permissive joinder "does not alter the substantive rights of the parties." 7 CHARLES ALAN WRIGHT & ARTHUR R. MILLER, *supra* § 1652, at 398; *see also* Mo. Sup. Ct. R. 52.05(a) ("Judgment may be given for one or more of the plaintiffs according to their ***respective rights to relief***.") (emphasis added); § 507.040.1, RSMo (same); *Gates v. L.G. DeWitt, Inc.*, 528 F.2d 405, 413 (5th Cir. 1976) (Rule 20(a) "is a procedural rule based on trial convenience" that "does not affect principles of substantive state law on the basis of which the respective liabilities of the defendants are determined"), *modified per curiam*, 532 F.2d 1052 (5th Cir. 1976).

But when plaintiffs are ***improperly*** joined for trial, serious due process concerns arise because there is a risk of confusion of both the evidence and the law applicable to each plaintiff. That is particularly true in cases like this one in which multiple plaintiffs allege a causal link between their development of a disease and their use of the defendant's product, because these claims involve highly individualized facts about each plaintiff. The trials of such cases invite cross-contamination among claims, with jurors

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[2] "Missouri's Rule 52.05(a) is substantially the same as Federal Rule 20(a), and, when the Missouri and federal rules are essentially the same, federal precedents constitute persuasive, although not binding, authority." *State ex rel. Johnson & Johnson v. Burlison*, 567 S.W.3d 168, 189 n.4 (Mo. banc 2019) (internal quotation marks omitted); *see also State ex rel. Nixon v. Dally*, 248 S.W.3d 615, 617 (Mo. banc 2008) (Because "Rule 52.05(a) is derived from the federal rule" its interpretation "generally should be in accord with the interpretation of the federal rule from which it came.") (internal quotation marks omitted).

considering evidence admissible only as to one plaintiff when assessing the claim of another plaintiff, thus making a fair verdict virtually impossible.

There can be little question that this danger was realized in this action. For one thing, joinder was improper as a matter of law because it was grounded solely on the plaintiffs' use of the same product, a factor that both Missouri's courts and the General Assembly have declared insufficient to support permissive joinder. For another, the jury's award of the identical amount of compensatory damages to each of the 22 plaintiffs in this action—$25 million—after deliberating for less than eight hours following a six-week trial is proof positive that the jury failed to consider each plaintiff's claim individually. Accordingly, the judgments should be vacated and the case remanded for new, separate trials.

A. As a matter of law, plaintiffs' claims do not satisfy the requirements for permissive joinder.

The trial court permitted 22 women (or their surviving family members) from across the country to join together as plaintiffs for purposes of trying their individual claims alleging that they each developed ovarian cancer as a result of their use of two of appellants' talc products. The trial court's decision to allow joinder flies in the face of long-settled Missouri law holding that allegations by individual plaintiffs that the same product caused their injuries do not satisfy the requirement that the plaintiffs' claims must

"aris[e] out of the same transaction, occurrence or series of transactions or occurrences." *Weinstein*, 379 S.W.2d at 174-75 (holding joinder improper where the claims arose out of the use of fuel oil allegedly supplied by the defendant but purchased by plaintiffs at different times "from an unnamed party or parties"). Indeed, just last month, the Missouri General Assembly amended Missouri's permissive joinder statute to clarify that "claims arising out of … separate incidents involving the same product or services shall not satisfy this section." § 507.040.1, RSMo (amended by 2019 Mo. Legis. Serv. S.B. 7 § A, eff. Aug. 28, 2019 (West)). Accordingly, joinder of the plaintiffs' claims in this case was improper because it was based solely on plaintiffs' allegation that they developed ovarian cancer due to their use of the same talc products over vastly different time periods and at vastly different frequencies at different stages of their lives.

Federal courts sitting in Missouri and applying the nearly identical federal rules on joinder have similarly held that plaintiffs asserting claims involving the same medical device or drug are not properly joined when they were treated at different times in different places by different doctors for different diagnoses. For example, in *Hyatt v. Organon USA, Inc.*, 2012 WL 4809163 (E.D. Mo. 2012), multiple plaintiffs brought suit for injuries allegedly caused by their use of a birth-control device. The court held that the plaintiffs' claims "did not arise out of the same transaction or occurrence"

because "[e]ach Plaintiff was injured at different times in different states allegedly from their use of [the device] that was presumably prescribed by different healthcare providers," and plaintiffs did not allege similar injuries. *Id*. at *1; *see also Alday v. Organon USA, Inc.*, 2009 WL 3531802, at *1 (E.D. Mo. 2009) (same). Similarly, in *Boschert v. Pfizer, Inc.*, 2009 WL 1383183 (E.D. Mo. 2009), the plaintiffs brought suit based on "improper design, manufacturing, sales, testing, marketing, advertising, promotion, and distribution" of a smoking-cessation drug. *Id*. at *1. The court explained that, because plaintiffs were from different states, received their prescriptions through different health care providers, consumed the medication at different times for different durations, had different medical histories, and raised claims under the laws of different states, there was "not enough of a logical or factual connection to satisfy the same transaction or occurrence requirement." *Id*. at *3–4.[3]

[3] Consistent with these Missouri cases, courts throughout the nation routinely sever multi-plaintiff actions like this one that are brought against prescription drug and medical-device manufacturers. *See, e.g.*, *Dunbar v. Medtronic, Inc.*, 2014 WL 3056081, at *3 (C.D. Cal. 2014) (in litigation involving the Infuse device, severing and dismissing claims of 28 out-of-state plaintiffs "without prejudice to [their] re-filing their actions in the proper venue" because the plaintiffs alleged surgeries in different places at different times, facts that "inherently weigh toward finding no common transaction or occurrence") (citations to complaint omitted); *Burns v. Medtronic, Inc.*, 2013 WL 5596122, at *2 (C.D. Cal. 2013) (holding that 16 plaintiffs who had brought claims relating to the Infuse device were improperly joined and ordering each plaintiff to file a separate complaint); *Warner v. Stryker Corp.*,

2009 WL 1773170, at *2 (D. Or. 2009) (severing product-liability claims arising from a medical device upon finding that the claims did not "'aris[e] out of' the same transaction, occurrence or series of transactions" given that the "plaintiffs received individualized medical care in vastly different geographical regions"); *Stinnette v. Medtronic Inc.*, 2010 WL 767558, at *2 (S.D. Tex. 2010) (holding that plaintiffs who were prescribed potentially different models of the medical device by different doctors in different states at different times and who allegedly suffered from different complications had failed to show that their claims were properly joined); *Cumba v. Merck & Co.*, 2009 WL 1351462, at *1 (D.N.J. 2009) ("The majority of courts to address joinder in the context of drug liability cases have found that basing joinder merely on the fact that the plaintiffs ingested the same drug and sustained injuries as a result thereof is insufficient to satisfy Rule 20(a)'s 'same transaction' requirement."); *McNaughton v. Merck & Co.*, 2004 WL 5180726, at *2 (S.D.N.Y. 2004) ("The mere existence of common questions of law or fact does not satisfy the same transaction or occurrence requirement. In particular, drug liability cases have held that related factual or legal issues, such as a similar injury allegedly caused by the same drug, are insufficient for Rule 20 joinder purposes.") (citations omitted); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*, 294 F. Supp. 2d 667, 679 (E.D. Pa. 2003) (agreeing with other courts that the joinder of plaintiffs is improper when "the only connection among plaintiffs is their use of certain pharmaceuticals or a pharmaceutical medical device"); *In re Baycol Prods. Liab. Litig.*, 2002 WL 32155269, at *2 (D. Minn. 2002) (explaining that "[t]he fact that defendants' conduct is common to all of plaintiffs' claims and that the legal issues of duty, breach of duty and proximate cause and resulting harm are common do not satisfy Rule 20's requirements" and holding that joinder was not proper because the plaintiffs were "from many states [and] went to different doctors or teams of doctors and medical facilities and providers … for different reasons, and underwent surgery at different times") (internal quotation marks omitted); *Graziose v. Am. Home Prods. Corp.*, 202 F.R.D. 638, 640 (D. Nev. 2001) (allegations were "insufficient to justify joinder" because "[t]he only concrete similarity among the various Plaintiffs are that they (or their spouse) took a medicine containing PPA … and they allegedly suffered an injury"); *Adams v. I-Flow Corp.*, 2010 WL 1339948, at *8 (C.D. Cal. 2010) (holding that geographically diverse plaintiffs alleging injuries based on the administration of anesthetics by pain pumps and who underwent separate surgeries performed at different hospitals over the span of ten years were misjoined).

In short, because plaintiffs' reliance on their use of the same products as the basis for liability is insufficient as a matter of Missouri law to support permissive joinder, the trial court erred in permitting the plaintiffs' claims to be tried together.

B. The jury's award of identical damages to each of the 22 plaintiffs is proof positive that joinder prejudiced appellants.

"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) (internal quotation marks and brackets omitted); *see also Jamison v. State, Dep't of Soc. Servs., Div. of Family Servs.*, 218 S.W.3d 399, 405 n.7 (Mo. banc 2007) ("treat[ing] the state and federal due process clauses as equivalent"). Courts have made clear that serious due process concerns are implicated whenever, as in this case, the claims of multiple parties are tried in a single action and that the "[c]onsiderations of convenience and economy" that underlie joinder "must yield to a paramount concern for a fair and impartial trial." *Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) (discussing consolidation under Fed. R. Civ. P. 42(a)); *see also Arnold v. E. Air Lines, Inc.*, 712 F.2d 899, 906 (4th Cir. 1983) (when cases are consolidated for trial under Fed. R. Civ. P. 42, "considerations of convenience may not prevail where the inevitable consequence to another party is harmful and serious prejudice"). Speaking specifically about the concerns presented by permissive

joinder, the Ninth Circuit emphasized that "[a]lthough the specific requirements of Rule 20 … may be satisfied, a trial court must also examine the other relevant factors in a case in order to determine whether the permissive joinder of a party will comport with the principles of fundamental fairness." *Desert Empire Bank v. Ins. Co. of N. Am.*, 623 F.2d 1371, 1375 (9th Cir. 1980). Thus, due process concerns are implicit in every action in which permissive joinder of plaintiffs is ordered by a trial court, and the trial court therefore has the duty to ensure that the trial is conducted so as to minimize "'the specific risks of prejudice and possible confusion'" that may accompany joint trials. *Johnson*, 899 F.2d at 1285 (quoting *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495 (11th Cir. 1985)). The trial court in this case plainly failed to satisfy that duty.

Rule 52.05(a), Section 507.040.1, and the principles of due process required the jury to assess each of the distinct claims of the 22 different plaintiffs from across the country who are joined in this action and to award damages, if any, based upon the unique circumstances of each plaintiff. Each of those plaintiffs had her own unique set of risk factors for ovarian cancer, diagnoses, and health outcomes. Each plaintiff had her own distinct history of exposure to appellants' talc that was sourced from different mines around the globe. And each plaintiff was subject to different defenses, in many cases under the laws of the 12 different states in which the plaintiffs reside.

However, after a six-week trial at which 40 witnesses testified regarding myriad complex factual and scientific issues, the jury deliberated for just eight hours—less than 20 minutes per plaintiff family—and awarded each plaintiff the exact same amount of compensatory damages, $25 million.

This unusual verdict—which awarded ***identical*** amounts to one plaintiff who has been cancer-free for 32 years and another who passed away after a ten-year battle with cancer—is conclusive evidence that the jury ***did not*** decide the claims of each plaintiff individually, but rather awarded damages "on behalf of a 'perfect plaintiff' pieced together for litigation." *Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 344 (4th Cir. 1998); *see also Malcolm v. Nat'l Gypsum Co.*, 995 F.2d 346, 352 (2d Cir. 1993) ("there is an unacceptably strong chance that the equal apportionment" of damages "amounted to the jury throwing up its hands in the face of a torrent of evidence" and jury instructions). That outcome was virtually guaranteed by both (1) the manner in which the court allowed plaintiffs' counsel to present plaintiffs' evidence—for example, by asserting that "all of these women have something in common," *i.e.*, "[a]ll of them used … Johnson & Johnson Baby Powder" and all of them "got cancer" (Tr. 767)—and (2) the overwhelming complexity of the court's jury instructions, which took so long to deliver—five hours—that the court expressed concern that it was losing the jury's attention.

In this regard, this action closely resembles the facts that prompted the Fourth Circuit to order the decertification of a class action in *Broussard*. A class action "is a species" of joinder that, "like traditional joinder, … leaves the parties' legal rights and duties intact and the rules of decision unchanged." *Shady Grove Ortho. Assocs. P.A. v. Allstate Ins. Co.*, 559 U.S. 393, 408 (2010) (plurality op.). And like permissive joinder, federal class actions present grave due process concerns that can be addressed only if (1) the trial court "rigorously appl[ies] the requirements of Rule 23 to avoid the real risk … of a composite case being much stronger than any plaintiff's individual action would be" (*Broussard*, 155 F.3d at 345), and (2) the jury exercises its function "under the guidance and within the framework of basic principles of law" as explained by the trial court (*id.* at 352).

In *Broussard*, the Fourth Circuit held that the trial court failed to satisfy those obligations by certifying a class that was "no more than 'a hodgepodge of factually as well as legally different plaintiffs,' that should not have been cobbled together for trial." 155 F.3d at 343 (quoting *Georgine v. Amchem Prods., Inc.,* 83 F.3d 610, 632 (3d Cir.1996)). Specifically,

> [the plaintiff] franchisees' contractual rights and obligations differ[ed]; [defendant] Meineke directed different representations to different franchisees; franchisees relied on these representations in a different manner or to a different degree; each franchisee's entitlement to toll the statute of limitations [was] fact-dependent; and the profits lost by franchisees also differed according to their individual business circumstances.

Id. However, the "plaintiffs portrayed the class at trial as a large, unified group that suffered a uniform, collective injury," and the defendants were "often forced to defend against a fictional composite." *Id.* at 345. The Fourth Circuit held that these circumstances improperly allowed "the procedural device of Rule 23 … to expand the substance of the claims of class members." *Id.*; *see also* 28 U.S.C. § 2072(b) (Federal Rules "shall not abridge, enlarge or modify any substantive right").

So too in this case. The plaintiffs had vastly different risk factors for developing ovarian cancer that would have affected their ability to prevail if their claims had been tried separately. Additionally, the plaintiffs were diagnosed with different types of ovarian cancer at different ages. Plaintiffs also alleged vastly different durations and frequencies of talc use at different times in their lives. In individual trials, the jury's focus would have been on the question whether the plaintiff's cancer was more likely to have been caused by various established risk factors for ovarian cancer or by a personal history of talc use. At the trial of this action, however, the trial court abandoned its obligation to keep the jury focused on the distinct elements of each plaintiff's claim and enabled the jury instead to treat the plaintiffs collectively as an undifferentiated single unit for purposes of determining the appellants' liability and assessing the amount of damages due to the

plaintiffs. *See Broussard*, 155 F.3d at 352 (it is a "basic principle" of our legal system "that in size and in nature a legal remedy must bear some degree of proportion to the extent of the legal wrong actually committed."). That failure deprived appellants of due process under the U.S. and Missouri Constitutions, thus requiring that the judgment be vacated, with instructions that the court conduct separate trials of each plaintiff's claim.

III. The Punitive Damages Are Unconstitutionally Excessive.

The fundamental question underlying constitutional review of punitive awards for excessiveness is "whether [the] particular award is greater than reasonably necessary to punish and deter." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). When "a more modest punishment … could have satisfied the State's legitimate objectives," then a reviewing court should reduce the award to that amount and "go[] no further." *State Farm Mut. Auto Ins. Co. v. Campbell*, 538 U.S. 408, 419-20 (2003); *see also BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584 (1996) ("The sanction imposed … cannot be justified … without considering whether less drastic remedies could be expected to achieve [punishment and deterrence]."); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1065 (10th Cir. 2016) ("we must primarily decide whether the particular award is greater than reasonably necessary to punish and deter" and permit the punitive award to "go no further if a more modest punishment for the reprehensible conduct at issue could have

satisfied the State's legitimate objectives of punishing and deterring future misconduct") (internal quotation marks and brackets omitted); *cf. Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008) (recognizing "the need to protect against the possibility … of [punitive] awards that are unpredictable and unnecessary, either for deterrence or for measured retribution").

To aid courts in determining whether a punitive award exceeds the amount necessary to punish and deter, the Supreme Court has identified three "guideposts": (1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *See, e.g.*, *BMW*, 517 U.S. at 574-75. "Exacting" judicial review employing these guideposts is necessary to "ensure[] that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (internal quotation marks omitted).[4]

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[4] In applying the guideposts, this Court may not presume that the jury resolved all factual disputes and construed all inferences in favor of plaintiffs. "Unlike the measure of actual damages suffered, … the level of punitive damages is not really a 'fact' 'tried' by the jury." *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 437 (2001) (quotation and citation omitted). Thus, "a hands-off appellate deference to juries, typical of other kinds of cases and issues, is unconstitutional for punitive damages awards." *In re Exxon Valdez*, 270 F.3d 1215, 1239 (9th Cir. 2001); *see also*, *e.g., Simon*

A. The trial court erred by taking a deferential, hands-off approach to the question of excessiveness.

Under the Due Process Clause, reviewing courts must take an active role in policing punitive awards for excessiveness. As the Supreme Court has held, review of punitive awards is *de novo* and must be "[e]xacting" to "ensure[] that an award of punitive damages is based upon an application of law, rather than a decisionmaker's caprice." *State Farm*, 538 U.S. at 418 (internal quotation marks omitted).

When a criminal defendant has been found guilty beyond a reasonable doubt, following a trial safeguarded by numerous Due Process protections that are not available to a civil defendant, the range of appropriate punishments generally is cabined by statute. In contrast, civil juries tasked with setting punitive damages have "nothing to rely on other than the instincts of the jurors and random, often inaccurate, bits of information derived from press accounts or word of mouth in the community about how [punitive damages] have been valued in other cases." *Payne v. Jones*, 711 F.3d 85, 93 (2d Cir. 2013). They have "no objective standards to guide them, and understandably outraged by the bad conduct of the defendant, jurors

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v. San Paolo U.S. Holding Co., 113 P.3d 63, 72 (Cal. 2005) ("[w]hile we defer to express jury findings supported by the evidence …, in the absence of an express finding on the question we must independently decide" factual issues bearing on the constitutionally permissible amount of punitive damages); *Lompe*, 818 F.3d at 1063-65.

may be impelled to set punitive damages at any amount." *Id*. at 93-94. Thus, studies have shown that "salient numbers, such as a plaintiff's request for a specific dollar amount, have a dramatic impact on [mock] jurors' awards" of punitive damages, whether or not those numbers have a legitimate relationship to the appropriate punishment for the defendant's conduct. CASS R. SUNSTEIN ET AL., PUNITIVE DAMAGES: HOW JURIES DECIDE 240 (2002). Moreover, jurors may be influenced by extraneous factors such as "[r]egional biases against particular companies." *Payne*, 711 F.3d at 94. It is thus critically important that courts diligently carry out their role under the Due Process Clause to ensure that punitive damages imposed by a civil jury are no greater than "reasonably necessary to punish and deter." *Haslip*, 499 U.S. at 22; *see also Lompe*, 818 F.3d at 1065; *Kimble v. Land Concepts, Inc.*, 845 N.W.2d 395, 407 (Wis. 2014) ("[a] punitive damages award is excessive, and therefore violates due process, if it is more than necessary to serve the purposes of punitive damages") (internal quotation marks omitted).

Here, the trial court fundamentally misunderstood its role when reviewing the quasi-criminal punitive awards imposed by the jury. Instead of engaging in an exacting review to determine whether Missouri's interest in punishment and deterrence could be accomplished by a lesser sanction, the court sustained two eye-popping punitive awards totaling $4.14 billion based on a single paragraph of cursory analysis. Most egregiously, the court stated

that "Defendants' actions caused significant physical harm and potential physical harm," but failed to consider either how the punitive damages compared to that harm or the significant body of law that has developed describing the due process limits on the ratio between compensatory and punitive damages.

B. The ratio of compensatory to punitive damages generally should not exceed 1:1 when, as here, the compensatory damages are substantial.

In *State Farm*, the Supreme Court "addressed [the ratio] guidepost with markedly greater emphasis and more constraining language" than it had in previous cases, "tighten[ing] the noose" that it previously had thrown around the problem of excessive punitive awards. *Simon*, 113 P.3d at 76. Specifically, the Court reiterated its statement in *BMW* that a punitive award of four times compensatory damages is generally "close to the line of constitutional impropriety" and indicated that, though "not binding," the 700-year-long history of double, treble, and quadruple damages remedies (*i.e.*, ratios of 1:1 to 3:1) is "instructive." *State Farm*, 538 U.S. at 425. Most important, *State Farm* "emphasizes and supplements" *BMW* "by holding that '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 776 (9th Cir. 2005) (quoting *State Farm*, 538 U.S. at 425). Five years later, the

Supreme Court echoed that holding in *Exxon Shipping*. 554 U.S. at 501; *see also id.* 514 & n.28 (quoting the same language again and stating that "[i]n this case, then, the constitutional outer limit may well be 1:1").[5]

To be sure, these principles do not establish a rigid mathematical formula for calculating punitive damages, but instead create a rough framework under which the maximum permissible ratio depends principally on two variables: the degree of reprehensibility of the conduct and the magnitude of the harm caused by the conduct (here, as in most cases, measured by the amount of the compensatory damages). The maximum permissible ratio is directly related to the degree of reprehensibility and inversely related to the harm caused. In other words, for any particular degree of reprehensibility, as the compensatory damages increase, the maximum permissible ratio decreases. And for any particular amount of compensatory damages, the lower on the reprehensibility spectrum the

[5] Although the Supreme Court reviewed the punitive award in *Exxon Shipping* under federal maritime law rather than the Due Process Clause, the Court's discussion of the due process standard must be given significant weight by lower courts. *See, e.g.*, *Nichol v. Pullman Standard, Inc.*, 889 F.2d 115, 120 n.8 (7th Cir. 1989) ("This Court should respect considered Supreme Court dicta."); *Wynne v. Town of Great Falls, S.C.*, 376 F.3d 292, 297 n.3 (4th Cir. 2004) ("carefully considered language of the Supreme Court, even if technically dictum, generally must be treated as authoritative") (quoting *Sierra Club v. E.P.A.*, 322 F.3d 718, 724 (D.C. Cir. 2003)). Indeed, the Supreme Court's concern in *Exxon Shipping*—that the current punitive damages system is not producing "consistent results in cases with similar facts" (554 U.S. at 500)—applies with even greater force in the context of due process.

conduct falls, the lower the constitutionally permissible ratio. Illuminating this principle, the Second Circuit has explained that a 10:1 ratio might have been permissible had the conduct before it caused only $10,000 in compensable harm, while a 1:1 ratio would be "very high" if the compensatory damages had been $300,000. *Payne*, 711 F.3d at 103. The court concluded that, "given the substantial amount of the compensatory award"—$60,000 in that case—a 5:1 ratio "appears high" (*id.*); ultimately, it ordered a remittitur to $100,000, representing a ratio of 1.67:1 (*id.* at 106).

Since *State Farm*, many courts have concluded that, when compensatory damages are substantial, a ratio of 1:1 or lower marks the outer limit of due process. Perhaps the best example is the Eighth Circuit's decision in *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005). In *Boerner*, the court found that the defendants' deceptive marketing of cigarettes, which contributed to the plaintiff's death from lung cancer, "was highly reprehensible." *Id.* at 602-03. Nevertheless, the court reduced the jury's $15 million punitive award to $5 million, roughly 1¼ times the compensatory damages of $4,025,000. The court explained that "a ratio of approximately 1:1 would comport with the requirements of due process" because "[f]actors that justify a higher ratio, such as the presence of an 'injury that is hard to detect' or a 'particularly egregious act [that] has resulted in only a small amount of economic damages,' are absent here." *Id.*

(quoting *BMW*, 517 U.S. at 582); *see also, e.g.*, *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) (ordering remittitur of punitive award from $6,000,000 to $600,000 in case involving a pattern of racial harassment and explaining: "[The plaintiff's] large compensatory award … militates against departing from the heartland of permissible exemplary damages. The Supreme Court has stated that '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.' [The plaintiff] received $600,000 to compensate him for his harassment. Six hundred thousand dollars is a lot of money. Accordingly, we find that due process requires that the punitive damages award on [his] harassment claim be remitted to $600,000."). *Id.* at 799 (citation omitted).[6]

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[6] Other decisions of federal courts of appeals holding that a 1:1 ratio was the constitutional maximum include *Lompe*, 818 F.3d at 1068-69 (reducing $22.5 million punitive award against one defendant to amount of compensatory damages attributable to that defendant—$1,950,000); *Burton v. Zwicker & Assocs.*, 577 F. App'x 555, 565 (6th Cir. 2014) (affirming reduction of $600,000 punitive award to $350,000, the amount of compensatory damages); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1206-08 (10th Cir. 2012) (reducing $2,000,000 punitive award to amount equal to the $630,307 compensatory award); *Morgan v. New York Life Ins. Co.*, 559 F.3d 425, 441-43 (6th Cir. 2009) (vacating $10,000,000 punitive award that was 1.67 times the compensatory award and remanding with instructions to enter remittitur to an amount not more than compensatory damages); *Méndez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 56 (1st Cir. 2009) (reducing $350,000 punitive award to $35,000, which equaled the compensatory damages); *Zakre v. Norddeutsche Landesbank Girozentrale*, 344 F. App'x 628, 631 (2d Cir. 2009) (affirming reduction of punitive award

from $2.5 million to $600,000 where compensatory damages were approximately $1.5 million); *Jurinko v. Medical Protective Co.*, 305 F. App'x 13, 27-32 (3d Cir. 2008) (reducing 3.13:1 ratio to 1:1 where compensatory damages and attorneys' fees totaled approximately $2 million); *Bridgeport Music v. Justin Combs Publ'g*, 507 F.3d 470, 487 (6th Cir. 2007) (reversing punitive award that was 9.5 times the compensatory damages and holding that "[i]n this case where only one of the reprehensibility factors is present, a ratio in the range of 1:1 to 2:1 is all that due process will allow"); *Bach v. First Union Nat'l Bank*, 486 F.3d 150 (6th Cir. 2007) (ordering reduction of punitive damages to no more than the $400,000 compensatory damages); *DiSorbo v. Hoy*, 343 F.3d 172, 176-77, 189 (2d Cir. 2003) (ordering remittitur of compensatory award to $250,000 and remittitur of punitive damages from $1,275,000 to $75,000).

There are many additional decisions of federal district courts and state appellate courts reducing punitive awards to the amount of the compensatory damages or below. The following is only a representative sample of state-court decisions following this rule: *Nardelli v. Metro. Grp. Prop. & Cas. Ins. Co.*, 277 P.3d 789, 806-10 (Ariz. Ct. App. 2012) (reducing to a 1:1 ratio a punitive award that the lower court had already reduced from roughly 355:1 to 4:1, since the conduct was at most in "the middle range of the reprehensibility scale" and the harm was only economic); *Hudgins v. Sw. Airlines Co.*, 212 P. 3d 810, 830 (Ariz. Ct. App. 2009) (reducing $4 million punitive award to $500,000 for each plaintiff, the amount of compensatory damages); *Sec. Title Agency, Inc. v. Pope*, 200 P. 3d 977, 1000-01 (Ariz. Ct. App. 2008) (reducing $35 million punitive award to $6 million, the amount of compensatory damages); *Roby v. McKesson Corp.*, 219 P.3d 749, 770 (Cal. 2009) (holding that 1:1 was constitutional maximum in light of the "relatively low degree of reprehensibility and the substantial award of noneconomic damages"); *Torres v. B/E Aerospace, Inc.*, 2018 WL 2228643, at *18 (Cal. Ct. App. May 16, 2018) (affirming reduction of punitive damages from $7 million to $1 million, where compensatory damages of $1.516 million "contained a large component of emotional distress damages" that itself served deterrent purposes); *Walker v. Farmers Ins. Exch.*, 153 Cal. App. 4th 965, 973-74 (2007) (reducing $8.3 million punitive award to $1.5 million, the amount of compensatory damages); *Jet Source Charter, Inc. v. Doherty*, 148 Cal. App. 4th 1 (2007) (remanding $26 million punitive award to trial court with instructions to limit the award to an amount not exceeding the total compensatory damages awarded, $6.5 million); *Czarnik v. Illumina, Inc.*, 2004 WL 2757571, at *11 (Cal. App. 4th Dec. 3, 2004) (reducing $5,000,000

It is hard to see how an upward departure from *Boerner* can be justified in this case. The conduct in this case cannot be characterized as more egregious than the conduct alleged in *Boerner*. And each of the compensatory awards in this case is more than five times the award in *Boerner* for harm that is roughly analogous to the most serious of the plaintiffs' cases here (wrongful death from cancer). Because "[c]ourts of law are concerned with fairness as consistency," and "a penalty should be reasonably predictable in its severity" (*Exxon Shipping*, 554 U.S. at 499, 502), an analogy to *Boerner*—along with the numerous other 1:1 cases cited above—would be an

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punitive award to $2,200,000 because "the $2.2 million compensatory damage award was without question 'substantial' and, in light of the fact that [the defendant's] conduct was not highly reprehensible … a 1:1 ratio of punitive to compensatory damages is the maximum award that is sustainable against a due process challenge"); *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P. 3d 1221, 1262 (Idaho 2010) (reducing $6 million punitive award to $1.89 million, the amount of compensatory damages); *Thistlethwaite v. Gonzalez*, 106 So. 3d 238, 267-68 (La. Ct. App. 2012) (reducing punitive award to a 1:1 ratio, citing the high level of compensatory damages); *Guest v. Allstate Ins. Co.*, 2006 WL 6620226, at *1 (N.M. Ct. App. Oct. 27, 2006) (reducing $9 million punitive award to $1,842,900, the amount of compensatory damages), *rev'd in part on other grounds*, 205 P.3d 844 (N.M. Ct. App. 2009); *Burns v. Prudential Sec., Inc.*, 857 N.E.2d 621, 659 (Ohio Ct. App. 2006) (reducing punitive award from $250 million to $6.8 million where compensatory damages on tort claim were approximately $6 million); *Mercedes-Benz USA, LLC v. Carduco, Inc.*, 562 S.W.3d 451, 495 (Tex. App. 2016) (reducing ratio from 7.5:1 to 0.04:1 where compensatory damages were $15.3 million), *rule 53.7(f) motion subsequently granted and judgment set aside, opinion not vacated*, 562 S.W.3d at 500, *rev'd on other grounds*, 2019 WL 847845 (Tex. Feb. 22, 2019).

appropriate basis for this Court to hold that the maximum permissible constitutional ratio here is no more than 1:1.

C. A lower ratio is appropriate when the compensatory damages already serve to punish and deter.

The Supreme Court repeatedly has held that the deterrent and retributive effects of compensatory damages must be taken into account in determining both whether and in what amount punitive damages are appropriate. As the Court explained in *State Farm*:

> It should be presumed [that] a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, ***after having paid compensatory damages***, is so reprehensible as to warrant the imposition of ***further*** sanctions to achieve punishment or deterrence.

538 U.S. at 419 (emphasis added); *see also, e.g.*, *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("Deterrence … operates through the mechanism of damages that are *compensatory*."). Following this principle, courts have held that "when the compensatory damages are substantial ***or already contain a punitive element***, lesser ratios 'can reach the outermost limit of the due process guarantee.'" *Simon*, 113 P.3d at 77 (emphasis added) (quoting *State Farm*, 538 U.S. at 425).

In particular, courts have recognized that "compensatory damages … awarded solely for [the plaintiff's] physical and emotional distress … may have reflected the jury's indignation at [the defendant's] conduct, thus

including a punitive component." *Roby*, 219 P.3d at 769-70 (ordering reduction of punitive damages to 1:1 ratio); *see also, e.g.*, *Bach v. First Union Nat'l Bank*, 149 F. App'x 354, 365 (6th Cir. 2005) (deeming a 6.6:1 ratio to be "alarming" "considering the fact that much of the compensatory damage award must be attributable to Bach's [emotional distress]," which "compels the conclusion that the punitive damage award is duplicative"); *Tomao v. Abbott Labs., Inc.*, 2007 WL 2225905, at *22 (N.D. Ill. 2007) (reducing punitive award to 2:1 ratio, in part because "Tomao has also received significant compensatory damages for her emotional distress; *i.e.*, nearly $10,000 for two months of distress" and "[s]uch damages contain a punitive element") (internal quotation marks omitted); *Walker*, 153 Cal. App. 4th at 974 (affirming reduction of punitive damages to 1:1 ratio because award of emotional-distress damages added "a punitive element to respondents' recovery of compensatory damages"); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651, 671 (S.D. 2003) (punitive award was excessive, in part, because "there was a substantial compensatory damage award containing a punitive element which fully compensated Roth for the harm caused").

Here, each plaintiff family received an enormous $25,000,000 compensatory award, for a total compensatory judgment of $550,000,000. A verdict of that size alone may be sufficient to punish and deter the appellants' conduct. Moreover, the great majority of the plaintiffs' compensatory

damages is for non-economic damages and thus already has a strong punitive effect on the appellants. *See State Farm*, 538 U.S. at 426 (observing that the compensatory damages for emotional distress "likely were based on a component which was duplicated in the punitive award"). Indeed, the jury's decision to award precisely the same total "compensation" to 22 different families confirms that the jury was ***not*** concerned with accurately compensating individuals for the varying harms they have suffered. The inherently punitive nature of the enormous compensatory award in this case provides a further reason to conclude that the highest constitutionally permissible award of punitive damages is significantly less than the amount of compensatory damages. In fact, the Court would be fully justified in holding that Missouri's interest in punishment and deterrence for the conduct that harmed these plaintiffs would be accomplished here without ***any*** "punitive" damages over and above the half-billion dollars that were awarded as compensation (assuming *arguendo* that the compensatory damages are not vacated).

The Supreme Court has made clear that a punitive award that is greater than necessary to accomplish a state's interest in punishment and deterrence "furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *State Farm*, 538 U.S. at 417. Because the large amount of compensatory damages awarded to each plaintiff—$550,000,000 *in*

toto—already serves to punish appellants, a "more modest punishment" would more than adequately serve Missouri's interest in "punishing and deterring future misconduct," and the Due Process Clause therefore requires that the punitive award "go no further." *Lompe*, 818 F.3d at 1065 (internal quotation marks omitted).

D. The punitive awards impermissibly punish appellants for harms to non-parties.

In *State Farm*, the Supreme Court held that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant under the guise of the reprehensibility analysis. … Punishment on these bases creates the possibility of multiple punitive damages awards for the same conduct; for in the usual case nonparties are not bound by the judgment some other plaintiff obtains." 538 U.S. at 423.

Four years later, the Court eliminated any doubt on the question, holding that a jury may not "use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties" because a punitive award that aims "to *punish* the defendant for harming persons who are not before the court … would amount to a taking of 'property' from the defendant without due process." *Philip Morris USA v. Williams*, 549 U.S. 346, 349, 355 (2007). It is the prerogative of other juries to

decide whether the defendant harmed other individuals and, if so, whether punitive damages are warranted and in what amount.

As the Eighth Circuit has explained:

> Tying punitive damages to the harm actually suffered by the plaintiff prevents punishing defendants repeatedly for the same conduct: If a jury fails to confine its deliberations with respect to punitive damages to the specific harm suffered by the plaintiff and instead focuses on the conduct of the defendant in general, it may award exemplary damages for conduct that could be the subject of an independent lawsuit, resulting in a duplicative punitive damages award. Where there has been a pattern of illegal conduct resulting in harm to a large group of people, our system has mechanisms such as class action suits for punishing defendants. Punishing systematic abuses by a punitive damages award in a case brought by an individual plaintiff, however, deprives the defendant of the safeguards against duplicative punishment that inhere in the class action procedure.

Williams, 378 F.3d at 797.

Egged on by plaintiffs' closing arguments, the jury evidently intended the two punitive awards in this case to disgorge appellants' national profits from the relevant products for decades. That is not a punishment tailored to the harm allegedly experienced by these individual plaintiffs, but seeks to punish appellants for a nationwide course of conduct and its alleged effect on numerous individuals who are not before the court. Moreover, because this single verdict already punishes appellants for decades of conduct allegedly affecting thousands of people across the nation, the threat that appellants will suffer duplicative punishment in other cases in this large and ongoing

body of litigation is very real. That outcome is flatly inconsistent with *State Farm* and *Williams*.

Indeed, the constitutional requirement that juries may punish defendants only for the harm experienced by the plaintiff or plaintiffs in the case at hand means that the punitive damages imposed in a single case should be no greater than that plaintiff's proportionate share of the total punishment that could be imposed, consistent with due process, in all cases arising out of the relevant course of conduct. In other words, the punitive damages awarded in an individual case must be in an amount that would result in a constitutionally permissible aggregate punishment if it were awarded to each of the individuals allegedly harmed by the defendant's conduct. Thus, this Court should consider what the total punishment for appellants would be if the thousands of plaintiffs with pending claims against appellants or who might bring claims against appellants in the future were awarded the same amount of punitive damages as these 22 plaintiff families. The present awards of $188,000,000 per family obviously could not be replicated thousands of times over without far exceeding constitutional limits. It follows that $188,000,000 cannot be permissible punishment for the harm to one family.

That outcome would violate due process not only because it results in punishment that is patently and grossly excessive, but also because it would

allow one jury to arrogate to itself decisions that are properly entrusted to other juries hearing other individuals' claims (often under the laws of other states, many of which do not even permit punitive damages or sharply limit them). In particular, that outcome would strip appellants of the benefit of decisions by juries that have found in their favor or have rejected claims for punitive damages (or that may do so in the future). As Judge Posner has observed, because different juries inevitably will interpret the same evidence differently, a "decentralized process of multiple trials, involving different juries and different standards of liability, in different jurisdictions" is more likely to be fair than a system in which defendants "stake their companies on the outcome of a single jury trial." *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1299 (7th Cir. 1995).[7] Even less fair—and completely inconsistent with due process—is a system in which a single jury is allowed to overturn the decisions of other juries and assume for itself the authority to punish a defendant for conduct that those juries decided was not wrongful or did not warrant punishment. Such a system would not only claim moral and legal authority that no single jury possesses, but would turn successive litigation into a ratchet in which a defendant can win 99 cases, but still be punished for

[7] Although Judge Posner was explaining why individual actions are preferable for cases like this one, his reasoning also explains why it would be a mistake to allow a single jury to punish for an entire course or a disproportionate share of conduct alleged to have affected many potential plaintiffs.

all 100 if it loses one. As *State Farm* and *Williams* held, the guarantees of due process mean that each jury is limited to determining whether to punish the defendant for the harm to the plaintiff whose claim is before the court. Other juries can decide the claims of other possible plaintiffs.

Among other constitutional considerations, this Court should ensure that the punitive awards in these cases are not larger than each individual plaintiffs' share of the aggregate punishment that would be constitutionally permissible if the same amount were awarded to all other potential claimants.

CONCLUSION

The Court should reverse the judgment with respect to the claims of the 17 out-of-state plaintiffs and remand with directions to dismiss those claims for lack of personal jurisdiction. The Court should vacate the judgment with respect to the remaining five plaintiffs because of the fundamentally unfair joinder permitted by the trial court. Failing that, the Court should reduce the punitive damages awards to a nominal amount and certainly no more than the amount of compensatory damages.

Dated: September 6, 2019

Respectfully submitted.

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CERTIFICATE OF COMPLIANCE

The undersigned hereby certifies that:

1. The Brief of Amici Curiae The Chamber of Commerce of the United States of America and The Missouri Chamber of Commerce and Industry in Support of Defendants-Appellants contains the information required by Rule 55.03.

2. The Brief of Amici Curiae The Chamber of Commerce of the United States of America and The Missouri Chamber of Commerce and Industry in Support of Defendants-Appellants complies with Rule 84.06(a) and the limitations contained in Local Rule 360.

3. The Brief of Amici Curiae The Chamber of Commerce of the United States of America and The Missouri Chamber of Commerce and Industry in Support of Defendants-Appellants, excluding the cover page, table of contents, table of authorities, signature page, certificate of service, and this certificate, contains 11,451 words, as determined by the Word Count tool in Microsoft Word 2016.

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IN THE MISSOURI COURT OF APPEALS
FOR THE EASTERN DISTRICT

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Plaintiffs-Appellees,

v.

JOHNSON & JOHNSON, JOHNSON & JOHNSON CONSUMER INC. F/K/A JOHNSON & JOHNSON CONSUMER COMPANIES, INC.,

Defendants-Appellants.

On Appeal from the Circuit Court of the City of St. Louis,
The Honorable Rex M. Burlison

CERTIFICATE OF COMPLIANCE
OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AND THE MISSOURI CHAMBER OF COMMERCE

Pursuant to Rule 55.03(a), the undersigned hereby verifies that the original Motion of the Chamber of Commerce of the United States of America and the Missouri Chamber of Commerce and Industry's Motion for Leave to File Amici Curiae in Support of Defendants-Appellants and accompanying Brief of Amici Curiae have been signed by counsel. Counsel will retain such

original, signed copies for a period not less than the maximum allowable time to complete the appellate process.

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CERTIFICATE OF SERVICE

I hereby certify that that a copy of the foregoing was filed and served via electronic mail through the Court's electronic filing system, on this 6th day of September, 2019, on:

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