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 ATLANTIC LEGAL FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF THE *AMICUS CURIAE* [1]

Established in 1977, the Atlantic Legal Foundation is a national, nonprofit, public interest law firm whose mission is to advance the rule of law and civil justice by advocating for individual liberty, free enterprise, protection of property rights, limited and efficient government, sound science in judicial and regulatory proceedings, and school choice. With the benefit of guidance from the distinguished legal scholars, corporate legal officers, private practitioners, business executives, and scientists who serve on its Board of Directors and Advisory Council, the Foundation pursues its mission by participating as *amicus curiae* in carefully selected appeals before the Supreme Court of the United States, federal courts of appeals, and state supreme courts.

The Atlantic Legal Foundation long has been recognized as one of the nation's foremost advocates for ensuring that expert testimony is scientifically sound in product liability, toxic tort, and other cases involving medical or other scientific issues. For example, on behalf of renowned scientists such as

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[1] As required by Supreme Court Rule 37.2(a), Petitioners' and Respondents' counsel of record were provided timely notice of the Atlantic Legal Foundation's intent to file this amicus brief. Each counsel of record has lodged a blanket consent to the filing of amicus briefs in this case. In accordance with Supreme Court Rule 37.6, the Atlantic Legal Foundation certifies that no counsel for a party authored this brief in whole or part, and that no party, party's counsel, or other person or entity, other than the *amicus curiae*, its supporters, or its counsel, made a monetary contribution intended to fund preparation or submission of this brief.

Nicholaas Bloembergen (a Nobel laureate in physics) and Bruce Ames (one of the world's most frequently citied scientists), the Foundation submitted amicus briefs in each of the "*Daubert* trilogy" of cases—*Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993); *General Electric Co. v. Joiner*, 522 U.S. 136 (1997); and *Kumho Tire Co. v. Carmichael*, 526 U.S. 137 (1999). In *Daubert*, the Court quoted the Foundation's brief on the meaning of "scientific . . . *knowledge*" as used in Federal Rule of Evidence 702. *See Daubert*, 509 U.S. at 590 ("Indeed, scientists do not assert that they know what is immutably 'true'—they are committed to searching for new, temporary theories to explain, as best they can, phenomena.") (quoting Brief for Nicholaas Bloembergen, *et al.* at 9).

* * *

Amicus curiae Atlantic Legal Foundation is submitting this brief because it is deeply troubled by the junk science that led to the jury's finding of liability and award of outrageously excessive compensatory and punitive damages in this highly publicized, multi-plaintiff, product liability case. The notoriously plaintiff-friendly City of St. Louis state circuit court allowed patently unreliable expert testimony purporting to establish a causative link between women's personal use of Johnson & Johnson talc products and ovarian cancer, *see* Pet. at 8, to gloss over what the Missouri Court of Appeals acknowledged was the "host of differentiating characteristics" among the 22 plaintiffs. App. 11a; *see* Pet. at 7 ("plaintiffs had used different talc products at different levels of intensity for different periods of

time in different States," and "also had dramatically different risk factors for and experiences with cancer"); *id.* at 18 ("The mass trial papered over these differences, allowing the jury to overlook significant weaknesses in individual plaintiffs' claims—and to infer causation from the number of plaintiffs before it.").

Plaintiffs' causation evidence was a house of cards erected on the flimsy testimony of Dr. William Longo, a well-traveled professional expert witness who attempts to use scientifically invalid analytical methods and assumptions, and highly prejudicial videotaped "simulation" demonstrations, to persuade juries that Petitioners' talc products contain asbestos, and that consumers are exposed to it. This amicus brief highlights Dr. Longo's shoddy, one-size-fits-all causation testimony—which has been squarely rejected by other courts as scientifically unreliable—because it underlies at least two of the important due process questions for which Petitioners seek this Court's review: Whether a defendant is deprived of due process (i) where a trial court insists on conducting a mass trial for multiple disparate product liability plaintiffs before a single jury that is supposedly cured of confusion and prejudice by the recitation of five hours of instructions covering the law of 12 different States, or (ii) where a jury awards billions of dollars in punitive damages that far exceed

the substantial and identical compensatory damages that it has awarded to each dissimilar plaintiff.

SUMMARY OF ARGUMENT

The product liability litigation from which this appeal emanates was tried in the City of St. Louis circuit court, which is a perennial member of the American Tort Reform Foundation's top ten "Judicial Hellholes" list. That Foundation's *2020/2021 Judicial Hellholes Report* explains that

> [t]he City of St. Louis Circuit Court is notorious for allowing blatant forum shopping and awarding excessive punitive damage awards. The court also fails to ensure that cases are guided by sound science.
>
> * * *
>
> Personal injury lawyers flock to St. Louis to file their lawsuits to take advantage of the plaintiff-friendly judges. These "out of state" plaintiffs clog the city's courts, drain court resources, and drive businesses out of the state leading to job loss.

Report at 36, 37.[2] Pointing to the "astounding result" in *this* litigation—"St. Louis is home to the largest talc verdict to date"—the Report further indicates that "[d]espite the legislature enacting expert evidence reform in 2017, St. Louis judges have allowed junk science to be heard in their courtrooms." *Id.* at 36, 37.

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[2] Available at https://tinyurl.com/ywfmtkpd.

"Plaintiffs' experts, whose testimony has been determined to not be based in science by other state courts, have been permitted to testify in St. Louis courts." *Id.* at 37.

Daubert and its progeny—which establish expert witness reliability principles that Missouri state courts have formally adopted but failed to follow here—unequivocally mandate that trial courts act as gatekeepers that protect juries from being confused and misled by expert testimony that is unreliable. "*Daubert* is more important today than it was . . . at its inception. Judges of all philosophical views should stand fast as gatekeepers when ruling on the admission of expert evidence and protect against 'junk science' in the courtroom." Victor E. Schwartz & Cary Silverman, *The Draining of Daubert and the Recidivism of Junk Science in Federal and State Courts*, 35 Hofstra L. Rev. 217, 219 (2006).

Regardless of whether it was admissible, the trial court in this litigation abdicated its gatekeeper role by allowing the jury to be influenced by scientifically invalid causation testimony that glossed over the numerous cracks in plaintiffs' case, thereby obscuring the sharp, medically significant differences among each of the plaintiffs. Plaintiffs' principal expert, Dr. Longo, (i) sampled old, previously opened, possibly contaminated talc product containers from unknown sources; (ii) purported to identify trace amounts of amphibole mineral fibers that he simply assumed were all asbestiform fibers; (iii) enlarged those trace amounts by assuming that they are uniformly present throughout Petitioners' products; and (iv) produced a

prejudicial talc exposure simulation video to show to the jury. This junk science, and the other expert testimony that plaintiffs premised upon it, exacerbated the prejudicial effect of the trial court's refusal to require a separate trial for each plaintiff (most of whom had no material connection to Missouri), and in turn, deprived Petitioners of due process.

The junk science that infected this case—specifically, the notion that the Petitioners failed to disclose the presence of asbestos that in reality was not there—not only was the basis for the jury's finding of liability, but also undoubtedly induced the jury to award unwarranted, very substantial, and identical compensatory damages for each plaintiff, and a grossly disproportionate amount of punitive damages.

Despite their formal adoption of *Daubert* standards, Missouri's appellate courts utterly failed to correct the trial court's dereliction of its expert testimony gatekeeper duty and the resultant injustice suffered by the Petitioners. The legal issues identified in the Petition for a Writ of Certiorari—far-reaching due process questions underlying the judicial mess that shoddy science created or aggravated in this case—warrant this Court's immediate attention.

ARGUMENT

The Court Should Grant Review

This Court's *Daubert* trilogy established the requirement, reflected in Federal Rule of Evidence 702 and its many, virtually identical state counterparts, that expert testimony concerning scientific or other

technical matters must be based on reliable principles and methods in order to avoid juror confusion and prejudice and thereby ensure due process. Most states, including Missouri, have adopted this reliability standard, but both the trial court and state court of appeals failed to follow it here. This is more than a question of admissibility: Allowing junk science to purport to establish across-the-board causation in a mass product liability trial—thereby enabling a jury to hold a company liable despite the striking, relevant differences among the plaintiffs, and inducing the jury to award runaway compensatory and punitive damages—goes to the heart of due process. The Court should grant certiorari to address the transcendent due process questions that this mass product liability litigation has provoked.

A. Junk science undermined due process in this case by causing jury confusion and prejudice

1. *Daubert* and its progeny require exclusion of junk science from the courtroom

"Junk science is often defined as 'science without evidence,' and uses 'questionable methodology to reach unsupported conclusions.'" Nicole Prefontaine, Comment, *Talcum Powder and Expert Power: Admissibility Standards of Scientific Testimony*, 59 Jurimetrics 341, 351 (2019) (quoting Debra L. Worthington, et al., *Hindsight Bias, Daubert, and the Silicone Breast Implant Litigation: Making the Case for Court-Appointed Experts in Complex Medical and Scientific Litigation,* 8 Psychol., Pub. Pol'y, and the

Law 154, 158 (2002)). More specifically, "[j]unk science could be generally defined as scientific testimony based on idiosyncratic, invalid, or unreliable science, in which the methodologies used are not generally accepted by the relevant scientific community." Thomas G. Gutheil, M.D. & Harold J. Bursztajn, M.D., *Attorney Abuses of Daubert Hearings: Junk Science, Junk Law, or Just Plain Obstruction?,* 33 J. Am. Acad. Psychiatry L. 150 (2005). In short, junk science is "'the science of things that aren't so.'" Peter Huber, *Junk Science and the Jury*, 1990 U. Chi. Legal F. 251, 276 (1990) (quoting Irving Langmuir, *Pathological Science* (1953)).

"Judicial concern over junk science is at least [120] years old." Henry P. Sorett, *Junk Science in the States: The Battle Lines*, Atl. Legal Found., Science in the Courtroom Rev. (Autumn 2000), at 30; *see also Chaulk v. Volkswagen of Am., Inc.*, 808 F.2d 639, 644 (7th Cir. 1986) (referring to "the age-old problem of expert witnesses who are 'often the mere paid advocates or partisans of those who employ and pay them, as much so as the attorneys who conduct the suit. There is hardly anything, not palpably absurd on its face, that cannot now be proved by some so-called experts.'") (quoting *Keegan v. Minneapolis & St. Louis R.R. Co.*, 78 N.W. 965 (1899)) (internal quotation marks partially omitted); *see generally* Jim Hilbert, *The Disappointing History of Science in the Courtroom: Frye, Daubert, and the Ongoing Crisis of 'Junk Science' in Criminal Trials*, 71 Okla. L. Rev. 759, 773-80 (2019) (discussing "The Rise of 'Junk' Science").

Former U.S. Attorney General Dick Thornburg's concern, expressed more than 20 years ago, that "[j]unk science is made possible in part by so-called 'experts' who will testify to any theory the lawyer wants for a price," is still a reality of contemporary litigation. Dick Thornburg, *Junk Science – The Lawyer's Ethical Responsibilities*, 25 Fordham Urb. L.J. 449, 452 (1998). Indeed, as the current onslaught of thousands of talc-related product liability suits illustrates, *see* Pet. at 2, 6, junk science continues to clog and pollute the nation's judicial system—and enrich contingency-fee lawyers who use slick cable TV ads and infomercials to troll for hapless cancer victims—in mass-action and class-action product liability and toxic tort litigation.

Any discussion of junk science's continuing impact on juries must begin with the *Daubert* trilogy. "With *Daubert*, the Supreme Court attempted to redress the distortions caused by the increasing influence of junk science in the courtroom." Worthington, *supra* at 159; *see also* Hilbert, *supra* at 760 ("the law of admissibility of expert testimony certainly needed reform by the time of *Daubert*"). "At its core," the battle against junk science "is ultimately intended to prevent fraud on society and the legal system." Sorett, *supra* at 31.

In *Daubert v. Merrell Dow Pharmaceuticals, Inc.*, 509 U.S. 579 (1993), "this Court focused upon the admissibility of scientific expert testimony [and] pointed out that such testimony is admissible only if it is both relevant and reliable." *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999); *see Daubert*, 509 U.S. at 589 (under Federal Rule of Evidence 702 "the

trial judge must ensure that any and all scientific testimony or evidence admitted is not only relevant, but reliable"). Emphasizing "the 'gatekeeper' role of the trial judge in screening [scientific] evidence" for reliability, *Gen. Elec. Co. v. Joiner*, 522 U.S. 136, 142 (1997), "*Daubert* attempts to strike a balance between a liberal admissibility standard for relevant evidence on the one hand and the need to exclude misleading 'junk science' on the other." *United States v. Lavictor*, 848 F.3d 428, 441 (6th Cir. 2017); *see also McKiver v. Murphy-Brown LLC*, 980 F.3d 937, 1008 (4th Cir. 2020) (*Daubert* "'attempted to ensure that courts screen out junk science'") (quoting *United States v. Crisp*, 324 F.3d 261, 268 (4th Cir. 2003)); *United States v. Machado-Erazo*, 901 F.3d 326, 339 (D.C. Cir. 2018) (*Daubert* was "spawned by 'junk science' masquerading as science").

Daubert identifies "specific factors, such as testing, peer review, error rates, and 'acceptability' in the relevant scientific community, some or all of which might prove helpful in determining the reliability of a particular scientific 'theory or technique.'" *Kumho*, 526 U.S. at 141 (citing *Daubert*, 509 U.S. at 593-94). The Court emphasized in *Daubert* that "[t]he inquiry envisioned by Rule 702 . . . is a flexible one." 509 U.S. at 594; *see also Kumho*, 526 U.S. at 141 (the "test of reliability is 'flexible'"). "Its overarching subject is the scientific validity — and thus the evidentiary relevance and reliability — of the principles that underlie a proposed submission. The focus, of course, must be solely on principles and methodology, not on

the conclusions that they generate." *Daubert*, 509 U.S. at 594-95.

In his *Kumho* concurrence Justice Scalia cautioned "that the discretion [the Court] endorses — trial-court discretion in choosing the manner of testing expert reliability — is not discretion to abandon the gatekeeping function [or] to perform the function inadequately." *Kumho*, 526 U.S. at 158-59 (Scalia, J., concurring). "Rather, it is discretion to choose among *reasonable* means of excluding expertise that is *fausse* and science that is junky." *Id.*; *see also Weisgram v. Marley Co.*, 528 U.S. 440, 455 (2000) ("Since *Daubert* . . . parties relying on expert evidence have had notice of the exacting standards of reliability such evidence must meet."); *Amorgianos v. Nat'l R.R. Passenger Corp.*, 303 F.3d 256, 267 (2d Cir. 2002) ("The flexible *Daubert* inquiry gives the district court the discretion needed to ensure that the courtroom door remains closed to junk science while admitting reliable expert testimony that will assist the trier of fact.").

"'[N]othing in either *Daubert* or the Federal Rules of Evidence requires a district court to admit opinion evidence that is connected to existing data only by the *ipse dixit* of the expert.'" *Kumho*, 526 U.S. at 157 (quoting *Joiner*, 522 U.S. at 146); *see also* Edward J. Imwinkelried, *The Best Insurance Against Miscarriages of Justice Caused By Junk Science: An Admissibility Test That is Scientifically and Legally Sound*, 81 Alb. L. Rev. 851, 854 (2017/2018) (In *Joiner*, the Court "explicitly stated that a trial judge may not admit expert testimony relying solely on the expert's *ipse dixit* claim that the underlying technique or

theory is valid."). Commenting on the amendment that conformed Federal Rule of Evidence 702 to "the teachings of the *Daubert–Joiner–Kumho* line of authority," the Advisory Committee on Proposed Rules "declared that the trial judge may not 'simply tak[e] the expert's word for it.'" *Id.* at 854-55 (quoting Fed. R. Evid. 702 advisory committee's note to 2000 amendment) (internal quotation marks partially omitted). "No matter how vociferously the expert proclaims his or her personal belief in the truth of the hypothesis, at most that proclamation amounts to the proposal of a hypothesis." *Id.* at 854. As Judge Posner explained, "the courtroom is not the place for scientific guesswork, even of the inspired sort. Law lags science; it does not lead it." *Rosen v. Ciba-Geigy Corp.*, 78 F.3d 316, 319 (7th Cir. 1996).

2. The *Daubert* gatekeeper role is critical to due process

The responsibility of a trial court to act as a gatekeeper that admits *only* expert scientific testimony that is reliable—in other words, a trial court that interposes a barrier to presentation of junk science to a jury—is essential to due process. "[F]irm control over the conduct of litigation . . . prevent[s] litigation from . . . being degraded by 'junk science,' appeals to prejudice, runaway jury verdicts, and other justly reprobated abuses of the legal process." *Braun v. Lorillard Inc.*, 84 F.3d 230, 232 (7th Cir. 1996).

This Court, "by stressing the judge's role as a gatekeeper, appears implicitly to have assumed that the judge should protect the jury." Neil Vidmar & Shari Seidman Diamond, *Juries and Expert Evidence*,

66 Brook. L. Rev. 1121, 1125 (2001); *see Murray v. S. Route Maritime SA*, 870 F.3d 915, 923 (9th Cir. 2017) ("District judges play an active and important role as gatekeepers examining the full picture of the experts' methodology and preventing shoddy expert testimony and junk science from reaching the jury."); *Thomas v. Novartis Pharm. Corp.*, 443 F. App'x 58, 60 (6th Cir. 2011) ("Under *Daubert* and its progeny, district courts must exercise a gatekeeping role in screening the reliability of expert testimony to keep 'junk science' away from juries."); *Allison v. McGhan Med. Corp.*, 184 F.3d 1300, 1310 (11th Cir. 1999) ("While meticulous *Daubert* inquiries may bring judges under criticism for donning white coats and making determinations that are outside their field of expertise, the Supreme Court has obviously deemed this less objectionable than dumping a barrage of questionable scientific evidence on a jury, who would likely be even less equipped than the judge to make reliability and relevance determinations and more likely than the judge to be awestruck by the expert's mystique.").

"Expert testimony, whether presented by plaintiffs or defendants, can strongly influence juries," including because "[a]n expert witness has extraordinary powers and privileges in court." Schwartz, *supra* at 220; *see also* Prefontaine, *supra* at 351 ("The designation of a witness as an 'expert' carries weight in the jurors' perception of the witness's testimony."). Quoting Judge Weinstein, this Court explained in *Daubert* that "expert evidence can be both powerful and quite misleading because of the difficulty

in evaluating it." 509 U.S. at 596 (internal quotation marks omitted); *see also* Worthington, *supra* at 158 ("Junk science is persuasive because jurors often have difficulty assessing the merits of technical arguments.").

Due process requires trial judges to shield juries from junk science testimony because it "attempts to make causation appear more plausible in cases where it is doubtful, thus enhancing jurors' inherent tendency to engage in hindsight bias." *Id.* Hindsight bias—"a person's tendency to judge past decisions in light of one's current knowledge of the outcome"—"distorts one's ability to judge the true probability of a particular outcome," *id.* at 155, such as the true probability that a diverse group of women all have developed ovarian cancer merely because they (like hundreds of millions of women around the world) all used cosmetic talc at some point in their lives, albeit at different times and frequencies, and in different ways.

"Junk science also relies on the elevated status that 'science' enjoys among jurors as a method of truth finding." *Id.* at 158. As a result, "jurors can be easily overwhelmed, confused, and misled by 'hired-gun' experts peddling 'junk science.'" *Kondash v. Kia Motors Am., Inc.*, No. 1:15–cv–506 (S.D. Ohio Sept. 30, 2020), at 8 (order denying class certification); *see also* Schwartz, *supra* at 220 ("Evidence that purports to be based on science beyond the common knowledge of the average person that does not meet the judicial standard for scientific validity can mislead, confuse, and mystify the jury.") (internal quotation marks

omitted). This is why part of a trial court's *Daubert* gatekeeper role is to exclude relevant evidence "'if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury.'" *Daubert*, 509 U.S. 495 (quoting Fed. R. Evid. 403); *see United States v. Lavictor*, 848 F.3d at 444 ("[A] consideration of Rule 403 is included in the *Daubert* analysis.") (internal quotation marks omitted).

The certiorari petition surveys federal and state cases holding in product liability and other contexts that a mass trial consolidating disparate plaintiffs' claims violates a defendant's due process rights, including because such a proceeding can cause juror confusion and provoke undue prejudice. *See* Pet. at 11-17. Here, the trial court's decision to conduct a mass trial despite the Petitioners' objections *heightened* its obligation to act as a gatekeeper and protect the integrity of the proceeding, including the Petitioners' due process rights, by excluding plaintiffs' junk science experts.

Several years ago Missouri "emerged as one of the hubs of talc powder litigation." Izabelle Tully, Note, *The Courtroom Turned Classroom: A Model Procedure for Educating the Gatekeepers of Expert Evidence in Toxic Tort Cases*, 40 Cardozo L. Rev. 2405, 2407 (2019); *see also* Am. Tort Reform Ass'n, *supra* at 37. "[L]arge damages awards" in Missouri talc litigation prior to the gargantuan award in this case "catalyzed the state's decision to abandon its old expert evidence standard" and become a *Daubert* state. Tully, *supra* at 2420. The Missouri Court of Appeals, from which

this appeal arises, explained in its opinion that the Missouri evidentiary rules governing expert witnesses, *see* Mo. Rev. Stat. § 490.065 (Cum. Supp. 2018), as amended in September 2017, "contain language identical" to Federal Rules of Evidence 702 and 703. App. 50a. Because § 490.065 "now mirrors" the federal rules, which are "interpreted under *Daubert* and its progeny, the cases interpreting those federal rules remain relevant and useful in guiding interpretation of . . . Section 490.065." *Id.* 51a (internal quotation marks omitted). As a result, Missouri state "trial courts must act as gatekeepers to ensure that the testimony sought to be admitted . . . is not only relevant, but reliable." *Id.* (internal quotation marks omitted).

Contrary to the state appellate court's opinion, the trial court in this case shirked its *Daubert*-based due process gatekeeping responsibility, which is even more crucial in a mass product liability trial where, as here, multiple plaintiffs each have distinct personal profiles (e.g., age, occupation, personal habits), genetic characteristics and medical histories, and alleged product usage and exposure patterns. As discussed in the next section of this brief, the trial court allowed the plaintiffs' junk science testimony to seduce the jurors with such abandon, they not only found liability after deliberating an average of less than 20 minutes per plaintiff, *see* Pet. at 8, but also recklessly awarded breathtaking amounts of punitive as well as compensatory damages.

B. The trial court's consolidation of 22 disparate plaintiffs' claims exacerbated the prejudicial impact of junk science on the jury

1. Mass trials of dissimilar plaintiffs amplify junk science's due process repercussions

The persuasive effect of junk science on juries is magnified in mass trials. "[J]unk science often has sweeping implications for large populations. . . . The smallest measurable exposures can be blamed for the most grave and far-reaching effects. . . . which means that junk science can lend weight to the claims of arbitrarily large numbers of plaintiffs." Huber, *supra* at 286. This was the situation here: The specious "scientific" testimony that the trial court allowed plaintiffs' professional expert witnesses to present regarding the supposed presence of asbestos fibers in Petitioners' talc products enabled the jury to overlook the significant differences among the plaintiffs and infer causation simply because 22 women all used talc and developed ovarian cancer. The same testimony also triggered the jury's runaway damages awards. "The thinner the science, it appears, the greater the damages are likely to be if and when a jury finally bites." *Id.*

"There is no more important issue in the law of torts than factual causation. If a defendant is held liable for something it did not do, then the justice system has failed." Schwartz, *supra* at 217. Justice failed here. Petitioners were deprived of due process because the trial court allowed junk science to gloss over the plaintiffs' significant individual differences

and thereby confuse and mislead the jury about the critical issue of causation. Although the only true cure for this due process violation would have been to prevent it from occurring by shielding the jury from the pile of junk science that the trial court permitted the plaintiffs to deposit inside the courtroom, conducting a separate trial for each plaintiff would have greatly helped to mitigate its prejudicial effect.

2. Plaintiffs' causation testimony was junk science

Plaintiffs' attempt to prove causation was predicated upon Dr. Longo's testimony that Petitioners' cosmetic talc products—primarily Johnson's Baby Powder—contain cancer-causing asbestos fibers. As the Missouri Court of Appeals acknowledged, the testimony presented by plaintiffs' other three experts was almost entirely dependent on the reliability of Dr. Longo's testimony. *See* App. 63a (Dr. Madigan's statistical testimony was "[b]ased on Dr. Longo's findings . . . . He testified he 'rel[ied] heavily on Dr. Longo's work' in reaching his opinions"); *id.* 68a (Dr. Egilman's asbestos exposure calculations were primarily "[b]ased on the results of the Dr. Longo's simulation study"); *id.* at 73a (Dr. Felsher's differential diagnosis testimony "assumed the accuracy of [Dr. Longo's, Dr. Madigan's, and Dr. Egilman's] opinions without checking them" because "each vouched for the reasonableness and accuracy of their tests and opinions").

Based on the Missouri Court of Appeals opinion (App. 53a-55a, 58a-60a), the certiorari petition (Pet. at 8), and other case-related materials, our

understanding of Dr. Longo's causation testimony—and its obvious flaws—is as follows:

- Dr. Longo analyzed samples from 36 containers of cosmetic talc products. Only *one* of these containers actually came from a plaintiff's home. All but two of the other 35 containers—whose age or chain of manufacture and custody could not be traced, and each of which had been *previously opened* and thus possibly contaminated—were provided to Dr. Longo by the plaintiffs' attorneys.

- Using a transmission electron microscope ("TEM"), Dr. Longo testified that he found *trace* levels of "amphibole mineral fibers" in samples from 20 of the 36 containers. (He did not detect any amphibole mineral fibers in samples from the unopened containers.) Dr. Longo simply *assumed* that the barely detectable presence of such fibers meant that the talc products allegedly used by the plaintiffs contained asbestos. Amphibole mineral fibers, however, occur in two varieties: asbestiform and nonasbestiform. Only *asbestiform* varieties of amphibole mineral fibers are considered "asbestos." *See* 40 C.F.R. § 763.83 (EPA definition of asbestos) (*"Asbestos* means the asbestiform varieties [of chrysotile, crocidolite, amosite, anthophyllite, tremolite, and actinolite].") (underscoring added); 73 Fed. Reg. 11284, 11292 (Feb. 29, 2008) (preamble to Mine Safety and Health Administration final asbestos exposure limit rule explaining that "consistent with the regulatory provisions of several Federal agencies . . . Asbestos is . . . a generic name for a group of minerals with specific characteristics [and] *does not*

include nonfibrous or nonasbestiform minerals") (italics and underscoring added) (citations omitted).

Dr. Longo repeatedly has conceded in depositions that his TEM methodology *cannot distinguish* between asbestiform and nonasbestiform fibers. Therefore, Dr. Longo could not confirm that he found *any* asbestos—even trace levels—in the samples that he tested. Further, Dr. Longo simply *assumed* that the sample he tested from each container was representative of the entire container. For example, even if he found only a *single* amphibole fiber in a sample taken from a particular talc container, he *assumed* that there were thousands of fibers in each gram of talc in that container.

- Dr. Longo used a videotaped "simulation" to estimate the amount of airborne "asbestos" to which a woman supposedly would be exposed while applying talc products "below the waist." In this made-for-litigation video, which the trial court allowed to be presented to the jury, a *man* wearing underpants and a formidable gas mask applied talc to his lower body in a specially lighted room that made airborne talc dust visible. For this contrived demonstration, Dr. Longo used an outlier sample of a talc product that contained amphibole fiber levels more than *30 times higher* than his own average findings in the talc samples that he tested.

Unlike the trial court here, other courts have found Dr. Longo's methods to be unreliable, and indeed, junk science. For example, in *Krik v. Crane*, 71 F. Supp. 3d 784, 785 (N.D. Ill. 2014), a district court rejected an asbestos personal injury plaintiff's attempt to present

Dr. Longo's "videotaped experiments to demonstrate the potential pathways of exposure to asbestos fibers." The court found, *inter alia*, that Dr. Longo did not "make any attempt to verify that the product demonstrated in the videotapes is the same product to which [the plaintiff] was allegedly exposed." *Id.* at 792. Applying *Daubert* criteria, the court ruled that Dr. Longo's testimony was inadmissible, explaining that "any slim probative value the [Longo videos] may have is outweighed by the *strong likelihood of jury prejudice and confusion*." *Id.* (emphasis added). In reaching this conclusion, the district court cited "[a] number of other courts [that] have rejected the reliability of the [Longo] evidence." *Id.* at 791 n.5; *see, e.g.*, *id.* at 790 (citing *In re Lamar Cnty. Asbestos Litig.*, No. 2000–3559, 2001 WL 35918974, at *1 (Tex. Dist. Ct. Jul. 5, 2011) ("striking Dr. Longo's testimony because tests conducted by [his firm] '*constitute[d] junk science*,' and were '*not sufficiently tied to the facts of any individual case* in a manner to aid the finder of fact in resolving a factual dispute'") (internal quotation marks partially omitted) (emphasis added)).

The Missouri Court of Appeals acknowledged that many trial courts around the United States have excluded Dr. Longo's asbestos detection and exposure methods and testimony as unreliable. *See* App. 56a n.19 & 62a n.21 (collecting cases). For example, the court of appeals cited *In re Garlock Sealing Techs., LLC,* 504 B.R. 71, 80 (Bankr. W.D.N.C. 2014), an asbestos-related bankruptcy proceeding in which the court found that Dr. Longo's studies are "*pseudo-science at best* . . . the appearance is that Dr. Longo's

studies were carried out in such a way as to *produce the highest results possible* and to *overdramatize* the process. . . . the court *cannot accept his studies or opinions as probative*" (emphasis added); *see also Weirick v Brenntag N. Am. Inc.*, No. JCCP 4674 (Cal. Super. Ct. July 23, 2018) ("order excluding Dr. Longo's testimony regarding samples of talc because the Products he tested 'came from multiple sources (clients, collectors, and off-the shelf purchases by the plaintiff firms) and multiple eras (unknown, 1950s, 1960s, 1970s, 1990s, 2000s, and 2010s)' and plaintiffs 'fail[ed] to explain how the samples were stored, repackaged, delivered, etc.'") (quoting App. 56a n.19); *Herford v. AT&T Corp.*, No. BC646315, at *81 (Cal. Super. Ct. Sept. 27, 2017) (Rep. Tr.) (trial court ruling that Dr. Longo's talc exposure video is "certainly not admissible," and that "his extrapolation of his test results to the party – – to the talc that was actually used by the plaintiff over a long period of time" was inadmissible); *Dugas v. 3M Co.,* 2016 WL 3946802, at *6 (M.D. Fla. June 21, 2016) (asbestos occupational exposure case) ("Showing Dr. Longo's video runs *too high a risk that the jury would be unfairly influenced* . . . the video offers little probative evidence, but *invites a plethora of unfair inferences*.") (emphasis added).

The fact that some courts have admitted Dr. Longo's testimony, *see* App. 57a, 62a, including the trial court here, does not transform junk science into sound science or diminish its prejudicial effect on juries. Indeed, the certiorari petition explains that (i) decades of large-scale epidemiological studies have

found no meaningful relationship between talc use and ovarian cancer; (ii) the Food and Drug Administration, National Cancer Institute, and American Cancer Society have reached the same conclusion; (iii) and the Petitioners have conducted thousands of tests, through independent laboratories and their own facilities, to ensure that their talc products contain no asbestos. *See* Pet. at 5-6.

Unjustifiably equating this impressive body of solid scientific evidence with Dr. Longo's junk science, the Missouri Court of Appeals asserted that "the parties presented the jury with *competing theories* of whether the Johnson's Baby Powder contained asbestos." App. 56a (emphasis added). This blatant mischaracterization of the weight of the scientific evidence concerning the absence of asbestos in Petitioners' talc product as merely some sort of "theory" that "competes" with Dr. Longo's widely repudiated pseudoscientific methods represents a dereliction of the state appellate court's responsibility to ensure that state trial courts are complying with the *Daubert*-type expert witness reliability standards that Missouri has adopted.

The trial court's decisions to aggregate the claims of multiple dissimilar plaintiffs, and to allow them to present *collectively* to the jury patently unreliable expert testimony about the supposed link between their alleged exposure to cosmetic talc and their ovarian cancer, caused jury confusion and prejudice. These rulings enabled the jury to side step the rigorous *individualized* causation analysis that it not only should have undertaken, but almost certainly

would have conducted, had it been confronted only with an individual plaintiff's claim.

Punishing one of the nation's most prominent, venerable, and innovative healthcare companies (the company that developed the single-shot Covid-19 vaccine) with *billions* of dollars in damages as a result of the contingency-fee bar's successful recruitment of plaintiffs, forum shopping, procedural maneuvers, and presentation of junk science through an evidentiary gate that the trial court left wide open not only deprives the Petitioners of due process, but also harms the nation's judicial system. The egregious unfairness that occurred in this closely watched talc litigation—and the growing wave of even more talc suits that it will continue to engender unless this Court intervenes—is a compelling reason why the Court should grant review.

CONCLUSION

The Court should grant the Petition for a Writ of Certiorari.

Respectfully submitted,

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April 2021