

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 NATIONAL WOMEN'S HEALTH
NETWORK AS *AMICUS CURIAE* IN SUPPORT
OF RESPONDENTS**

DENYSE F. CLANCY
KAZAN, MCCLAIN,
SATTERLEY & GREENWOOD
55 Harrison Street
Oakland, CA 94607
(510) 302-1000
dclancy@kazanlaw.com

ERIK S. JAFFE
(Counsel of Record)
SCHAERR | JAFFE LLP
1717 K Street, NW
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

JOHN EDDIE WILLIAMS
BRIAN ABRAMSON
WILLIAMS HART BOUNDAS
EASTERBY LLP
8441 Gulf Freeway
Houston, TX 77017
(713) 230-2200
jwilliams@whlaw.com

Counsel for Amicus Curiae

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INTEREST OF *AMICUS CURIAE* AND RULE 29.6 STATEMENT¹

Amicus curiae the National Women’s Health Network improves the health of all women by influencing policy and supporting informed consumer decision-making. The Network is supported by 8,000 individual and organizational members and accepts no financial support from pharmaceutical companies, tobacco companies, or device manufacturers. Since it was founded in 1975, the Network has worked to ensure that safe drugs, devices, and medical procedures are available to all women. The Network is interested in this case because it believes that effective state tort law remedies are necessary to protect women from dangerous products, especially those that have been specifically targeted at women. See, e.g., M. Isabelle Chaudry & Sarah Christopherson, *Dangerously Flawed Study Creates False Sense of Complacency: Why Women Should Still Avoid Talc-Based Powder*, National Women’s Health Network, Jan. 14, 2020, available at <https://nwhn.org/why-women-should-still-avoid-talc-based-powder> (visited April 18, 2021).

Amicus is not publicly traded and has no parent corporations, and no publicly traded corporation owns 10% or more of *amicus*.

¹ No counsel for a party authored this brief in whole or in part, nor did any person or entity, other than *amicus*, its members, or its counsel, make a monetary contribution intended to fund the preparation or submission of this brief. Counsel for the parties were notified of *amicus*’s intent to file this brief more than 10 days prior to the filing deadline and have consented to the filing of this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Johnson & Johnson (J&J) engaged in a decades-long, deadly scheme to conceal the dangers of asbestos in its talc-based Baby Powder. Despite its continuing protests, the presence of asbestos in talc generally, and in J&J talc products specifically, is not in genuine dispute.² The FDA has now recognized as much, and J&J has withdrawn its talc products from North American markets. Further, J&J concedes that asbestos is a known cause of ovarian cancer and that talc and asbestos were found in the tumors of women who developed ovarian cancer.

Not surprisingly, J&J's egregious conduct, including its continued denials and deception, resulted in a substantial punitive damages award. The size of that award is well-deserved, highly fact-bound, and does not remotely raise issues of concern for this Court.

Because the amount of punitive damages in a particular case is a fact intensive inquiry that eschews any "binding ratios" or "rigid benchmarks," *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003), *amicus* submits this brief to highlight the extensive evidence of J&J's reprehensible conduct that amply supports the punitive damages award.

1. The jury below had overwhelming evidence that J&J knew for decades that its talc sources and its talc products contained asbestos and engaged in a con-

² Lisa Girion, *Johnson & Johnson knew for decades that asbestos lurked in its Baby Powder*, REUTERS, Dec. 14, 2018, available at <https://www.reuters.com/investigates/special-report/johnsonandjohnson-cancer/> (visited April 19, 2021).

certed campaign to suppress that information. Indeed, J&J *predicted* in 1969 that there would be a “furor” if it became known that asbestos was in its talc. But instead of turning to cornstarch, a known safer alternative, J&J elected to contact the “litigation” department. PX3.

Rather than be honest about the dangers inherent in its talc products, J&J continued marketing those products for use on babies, teenagers, and women, ramped up its efforts to sell to Black and Hispanic women, and prioritized profits and image over the long-term health consequences from asbestos exposure. And those health consequences were severe: Plaintiffs each developed ovarian cancer, a pernicious and well-known consequence of exposure to asbestos. Many of them are now dead, after months or years of pain and suffering. The rest almost inevitably face the same fate, as ovarian cancer has one of the lowest cancer survival rates.

2. The jury below also had overwhelming evidence that asbestos in talc causes ovarian cancer. It is undisputed that asbestos exposure causes ovarian cancer. And J&J knew since the early 1970’s that both talc and asbestos had been documented in the tumors of women with ovarian cancer. Numerous authoritative entities such as Department of Health and Human Services, the Environmental Protection Agency (EPA), the International Agency for Research on Cancer (IARC), the American Cancer Society, and the National Cancer Institute have agreed that solid science confirms asbestos causes ovarian cancer. App. 80a. Accordingly, the federal multi-district litigation (MDL) court overseeing all federal ovarian talc cancer

cases rejected J&J’s “no-causation” argument, finding sufficient reliable evidence of causation to satisfy this Court’s *Daubert* standard. *In re Johnson & Johnson Talcum Powder Prods.*, 2020 WL 8968851, at *50 (D.N.J. 2020).

In the end, J&J’s fact-bound attacks on the evidence supporting the jury’s verdict are unrelated to the Questions Presented, and do not make such questions worthy of this Court’s limited time and resources.

Because the “most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant’s conduct,” *State Farm*, 538 U.S. at 419, the punitive damage award falls squarely within this Court’s established precedent and should raise no meaningful concern, despite Petitioners’ dissatisfaction that the jury did not credit their unsuccessful factual defenses.

ARGUMENT

I. The Evidence at Trial Amply Supports the Conclusion that J&J’s Conduct Was Egregious and Warranted Substantial Punitive Damages.

No court has questioned this Court’s long-standing holding that the most important factor in assessing the constitutionality of a punitive damages award is the reprehensibility of defendant’s behavior “based upon the facts and circumstances of the defendant’s conduct and the harm to the plaintiff.” *State Farm*, 538 U.S. at 425. J&J’s decades of purposeful concealment of lethal asbestos in its Baby Powder is at

the highest end of the reprehensibility continuum. The court of appeals carefully reviewed the facts showing that J&J “engaged in outrageous conduct because of an evil motive or reckless indifference,” App. 85a, and maintained a single-digit multiplier of compensatory to punitive damages. App. 101a; *State Farm*, 538 U.S. at 425 (favorably comparing “[s]ingle-digit multipliers” with otherwise questionable ratios of hundreds-to-one). It should come as no surprise to anyone that decades of insidious behavior leading to tremendous suffering resulted in a substantial award of punitive damages, and that result raises no due process concerns, much less any legal issue worthy of this Court’s attention.

A. J&J has known since the 1950s its talc contains asbestos.

Talc is mined from the earth, as is asbestos, which forms alongside talc. Asbestos is a well-known human carcinogen and a long-established cause of ovarian cancer, as recognized by HHS, EPA, the IARC, and the National Cancer Institute, among others. PX9324; PX100; PX9324; Tr.3344-45. There is no known safe level of exposure to asbestos. PX7766.

The jury was presented with extensive and overwhelming evidence that J&J’s sources of talc and its end products contain asbestos, and that J&J has known that fact for decades. Yet J&J continues to re-litigate those well-supported facts, despite the applicable standard of review requiring that the record be viewed in the light most favorable to the verdict. Pet. 2.

J&J's own experts, personnel, and suppliers confirmed that J&J knew there was asbestos in its talc sources and in its talc products. For example, J&J's expert geologist, Dr. Matthew Sanchez, conceded that "you can find asbestiform tremolite I'm sure up and down the State of Vermont in the mountain chain," including in J&J's Vermont talc deposits. Tr.4016, 4025-26, 4058. One of J&J's Talc suppliers, Imerys, documented that tremolite and actinolite are "ubiquitous" in Vermont mines and that the "fibrous" (asbestiform) variety of "tremolite and actinolite" are "serious mineralogical contaminant[s]" of the Vermont ore. PX712; Tr.4018, 4061; PX22.

J&J's experts, employees, and outside testing labs also admitted that asbestos was documented in J&J's talc sources repeatedly from 1950s through today. See Tr.4064-4065 (Dr. Sanchez admitting that asbestos was repeatedly documented in J&J's mine sources); PX2370 (J&J executives documenting in 1971 that its Vermont talc mines contained "fibrous" minerals tremolite and actinolite); PX6 & Tr.5373, 4053 (J&J testing agency McCrone detected asbestos fibers in 1975 in samples of the J&J cosmetic talc). Government agencies likewise documented the presence of asbestos in J&J's talc sources. PX630 & Tr.4075 (Mine Safety and Health Administration 1980s documentation of asbestos at a mill used to supply J&J talc).

And J&J *knew* that its sources were contaminated and that *none* of its talc mines were asbestos-free. Tr.5331 & PX40 ("It's our joint conclusion we should not rely on the 'clean mine' approach as a protective device for baby powder in the current asbestos or as-

bestos form controversy. We believe this mine to be very clean. However, we're also confident fiber-forming or fiber-type materials could be found. The usefulness of the 'clean mine' approach for asbestos only is over.”).

Given the ample evidence and knowledge of asbestos in the mines from which J&J sourced its talc, it is hardly surprising that the evidence also demonstrated that such asbestos also made it into J&J's talc products and that J&J was well-aware of that fact. Indeed, J&J's own experts conceded as much. Tr.4039, 4040, 4048, 4053 (J&J geology expert conceded that J&J testing company had documented asbestos in both J&J's mine ore and product “time after time”).

Outside testing likewise confirmed the presence of asbestos in J&J's talc products. PX6804 (Colorado School of Mines 1971 documentation of tremolite in “a production batch of [J&J's] product”); App. 85a & PX1653 (early 1970s documentation from FDA scientist Dr. Lewin of asbestos in Johnson's Baby Powder); PX2 (2004 investigative TV report finding 3.8% anthophyllite asbestos in Johnson's Baby Powder sent to laboratory for analysis).

J&J's own testing labs reached similar conclusions, and its executives recognized that the findings of asbestos were “not new,” and were “confirmed both by McCrone and Bill Ashton.” PX9; see also, PX1696 (J&J found tremolite in four samples of its Johnson's Baby Powder in 1973); Tr.4297 & PX13 (retained geologist Dr. Alice Blount informed J&J in the 1990s that Johnson's Baby Powder contains asbestos). Internally, J&J itself recognized it “cannot say” that its

talc products have “always” been asbestos-free. PX1; Tr.4234-35.

Despite the decades-long knowledge by J&J and others that its sources and products contained asbestos, its *amicus*, the Atlantic Legal Foundation (ALF), takes issue with the asbestos testimony of a particular witness, Dr. William Longo, erroneously labeling it “junk science.” ALF *Amicus* Br. 5-7, 18. Both the court of appeals below and the trial court rejected such baseless assertions, and for good reason.

Dr. Longo is the CEO of Materials Analytical Sciences, a laboratory specializing in the analysis of materials for asbestos content. *In re Johnson & Johnson Talcum Powder Prods.*, 2020 WL 8968851, at *17. Dr. Longo served on the peer review group for the EPA’s asbestos engineering program. *Id.* He served on the American Society for Testing Materials (“ASTM”) committee that developed the protocol for testing materials with a transmission electron microscope (TEM). *Id.* In short, “[t]here is no dispute that Dr. Longo is qualified to testify as an expert on the issue of whether the subject talc products contain asbestos.” *Id.* Dr. Longo tested historical samples of J&J’s talc products and found that twenty of the thirty-six bottles contained asbestos. App.54a.

Nonetheless, *amicus* ALF argues that Dr. Longo did not actually find “asbestiform” asbestos in the J&J talc samples he tested. But even J&J did not see fit to raise this challenge to Dr. Longo on appeal below, likely because it presents the unsupportable “confusing the minerology” defense rejected by the EPA and even by J&J’s own talc supplier, Imerys. PX9391; Tr.3956; Tr.3933; PX9; PX73. The asbestos

in J&J talc is asbestos by any public-health definition, and J&J's and its *amicus*'s attempt to re-name as "non-asbestos" fibers that are the same shape, size, and chemistry as asbestos was resoundingly rejected by the jury. Tr.3368-3369.

Dr. Longo's methodology likewise is beyond re-proof, as recognized by the federal MDL court handling J&J talc/ovarian cancer cases when it denied a *Daubert* challenge to Dr. Longo's methodology used to identify asbestos in talc. *In re Johnson & Johnson Talcum Powder Prods.*, 2020 WL 8968851, at *18-20. Indeed, J&J itself recognizes internally that the concentration method and TEM used by Dr. Longo are the "most sensitive" and the "best method[s]" to identify asbestos in talc. Tr.4089; PX51.

Amicus ALF's other complaint about Dr. Longo's asbestos testing is equally meritless. The suggestion, ALF *Amicus* Br. 5, 19, that his samples were "possibly contaminated" (other than by J&J's own talc sources) echoes J&J's chain-of-custody complaint that the bottles were obtained second-hand, which was soundly rejected at trial and on appeal. App. 54a-55a. But the samples tested included talc that came directly from the J&J museum, which Dr. Longo found contained asbestos, and the other samples were the best available evidence at that time and were amply authenticated to show they contained the original J&J product. App.53a-56a.³ J&J eventually was re-

³ The various means of authentication are described by the court of appeals and confirm the product was J&J's. App. 55a. The security of the containers and the lack of tampering likewise were the subject of evidence that confirmed the absence of

quired to produce more of its own historical talc samples, though not in time for use at trial here, and Dr. Longo documented asbestos in 50 containers of the 72 J&J samples he tested. *In re Johnson & Johnson Talcum Prods.*, 2020 WL 8968851, at *17.

In short, there was overwhelming evidence for the jury to conclude that J&J talc products contained asbestos, and that J&J knew this fact for decades. Suggestions that *this* Court should ignore the jury's conclusions border on the frivolous.

B. The evidence demonstrated that J&J sought to conceal the dangers of its talc for decades.

Despite knowing that its talc products contained asbestos, J&J engaged in a decades-long campaign to conceal that fact from consumers and the government. Such prolonged and intentional deceit took multiple forms.

tampering and the implausibility of backward contamination of a talc bottle. *Id.*; see also Jennifer S. Pierce, *Evaluation of the Presence of Asbestos in Cosmetic Talcum Products*, 29 INHALATION TOXICOLOGY 443, 445 (2017). And importantly, the types of asbestos Dr. Longo documented in Johnson's Baby Powder, and that J&J itself detected in its talc, are not used for commercial purposes in the United States, Tr.1150, Tr.1156, Tr.1223-24, Tr. 1483, Tr.3698, Tr.4017, Tr.4075, and hence could not have come from "contamination" from household asbestos, such as attic insulation. In any event, Dr. Longo's findings and methods merely corroborated what J&J already knew from its own scientists and outside labs, who repeatedly found asbestos in its products throughout the 1950s, 1960s, 1970s, 1980s, 1990s, and 2000s. *Supra* at 6-8.

First, J&J manipulated the testing and research surrounding the connection between talc and asbestos, suppressing internal findings and forcing alterations in adverse reports. See, e.g., PX93; Tr.5361-65 (J&J managed to have McCrone redo its report and the percentages of documented tremolite were deleted from the revised, backdated report).

If asbestos was detected in J&J's talc, J&J's policy was to send it to the RJ Lee laboratory to "re-test" the sample. PX59; PX6973; Tr.3883, 3916. J&J's talc supplier Imerys described RJ Lee as a "whore" for the talc industry. Tr.3839; PX19. Imerys's scientists did not "believe that RJ Lee are either capable or geologically sophisticated enough" to audit talc for asbestos. Tr.3880; PX8364. And RJ Lee's manipulative method of "tilt[ing]" the microscopy stage to find a "talc diffraction pattern" was used to justify denying the plain presence of asbestos. PX73. As criticized by Imerys, RJ Lee would deceptively claim "that if you can find a hint of a diffraction pattern from another mineral while you are looking at the amphibole fiber, then you can call the fiber 'transitional' and not truly amphibole." PX73.

In addition to manipulating testing results, J&J also sought to manipulate outside scientific studies. For example, it secretly funded, controlled, and even drafted studies of talc miners and millers. Tr.5397; Tr.4357-59. It stopped publications of books detailing asbestos in talc. PX7489; Tr.5394. It caused talc to be written out of the ASTM Dust/Talc method. Tr.5400-5401. And it worked hand-in-hand with its industry trade organization, the Cosmetic, Toiletry, and Fragrance Association (CTFA) to fund a secret effort to

keep talc from being listed as a carcinogen in the National Toxicology Program. Tr.5401; PX9903; PX4150.

Second, J&J actively opposed accurate and sensitive testing methods, instead promoting an “industry standard” test it knew was deficient at detecting hazardous levels of asbestos. One key method of detecting asbestos in talc is to “pre-concentrate” any sample by centrifuging it such that the heavier asbestos particles fall to the bottom for collecting and testing, and the lighter talc rises to the top. J&J’s own testing companies, scientists and employees recognized that it was essential to “pre-concentrate” samples of talc in order to accurately detect asbestos contamination. See PX1795 (Colorado School of Mines informed J&J it is “essential” to “pre-concentrate” samples to find the “needle in a haystack” of asbestos in talc); Tr.4089 (J&J knew preconcentration and TEM are the best methods for detecting asbestos fibers).

But J&J refused to allow the use of pre-concentration, because it did not want asbestos detected in its talc. See PX51 (J&J complaining in 1973 that the “limitation of this [pre-concentrating] method is that it may be *too sensitive*”) (emphasis added); PX26 & Tr.5288 (J&J complaining about FDA’s “disturbing proposal” in 1976 to use “concentration procedures” to analyze asbestos in cosmetic talc products because it would “open up new problems with asbestos and talc minerals”); Tr.4072, 4079 (J&J testing experts admitting he did not use the pre-concentration technique notwithstanding that it would “speed up and help that process” and help with “identifying materials”). And J&J witnesses were unabashed in admitting that they did not use the su-

perior technique in part because asbestos might be found, and sales would plummet. Tr.4084; see also PX58 (internal communication explaining “deliberate[]” exclusion of concentration technique, as inclusion would be against “worldwide company interests”).

Rather than use an accurate and sensitive method of detecting asbestos, J&J pushed for an “industry standard” of the least sensitive means of testing—the J4-1 method, which mainly used x-ray diffraction. Tr.4093 (J&J expert admitting x-ray diffraction method is the “weakest in terms of sensitivity”); Tr.5294, 5298 (J&J caused trade association to adopt J4-1 method as industry standard). J&J and its trade organization, the CTFA, knew internally that the J4-1 method could not detect asbestos in talc with “accuracy, reliability and practicality.”⁴ Tr.1451-53. And again, J&J was quite overt in its reasons for wanting to suppress better testing, admitting in internal documents that “[w]e believe it’s critical for [the cosmetics trade association] to now recommend these methods to the FDA before the art advances to more sophisticated techniques with higher levels of sensitization.” PX4767; Tr.5291.

With an intentionally insensitive testing protocol in place as its testing standard, and refusing to use the concentration method even when it infrequently performed tests by TEM, J&J promptly used the resulting fraudulently negative results to justify continued sales. Tr.4093 (J&J policy that if J4-1 test “de-

⁴ J&J’s employee served as Chairman of the CTFA committee on analytical methods. PX58.

fects” no asbestos, the talc is approved for sale). And it continues to do so. In 2016, J&J wrote to the FDA, attesting that “[n]o asbestos-form structures have ever been found during any testing.” PX131. And J&J’s websites continue to tell the world that its talc is asbestos-free. Tr.5378; PX130.

Such continued deception causing deadly harm makes it no surprise that J&J is now under criminal investigation by the Department of Justice for its concealment of the asbestos in its talc.⁵

Third, J&J maliciously sought to pressure, attack, and discredit any source of scientific evidence showing asbestos in its talc.

In 1976, when the United States Department of Health, Education and Welfare wrote to Vernon Zeitz, the head of J&J’s Vermont Windsor mines, about the safety of J&J’s talc, Mr. Zeitz recommended to J&J that J&J be ruthless in fending off any questions about asbestos in talc: “[M]ost wars are not won at peace talks around the conference table, but

⁵ See Jef Feeley, *J&J Denials of Asbestos in Baby Powder Spur Criminal Probe*, BLOOMBERG, July 12, 2019, available at <https://www.bloomberg.com/news/articles/2019-07-12/j-j-denials-of-asbestos-in-baby-powder-spur-us-criminal-probe> (visited Apr. 19, 2021); *J&J Faces U.S. Criminal Probe Related to Baby Powder*, REUTERS, July 12, 2019, available at <https://www.reuters.com/article/us-johnson-johnson-talc-probe/jj-faces-u-s-criminal-probe-related-to-baby-powder-bloomberg-idUSKCN1U726J> (visited Apr. 19, 2021); Soo Youn, *DOJ and SEC are investigating Johnson & Johnson over asbestos-related claims in its baby powder*, ABC NEWS, Feb. 21, 2019, available at <https://abcnews.go.com/Business/doj-sec-investigating-johnson-johnson-asbestos-related-claims/story?id=61209442> (visited Apr. 19, 2021).

are won on the battle field by legions who are the most ruthless * * * it is imperative we overcome the inertia of our past to modernize and mobilize our defenses and our offenses so we enter into battle with the outcome assured.” Tr.5399; PX9718.

J&J took that advice to heart and was indeed ruthless with its perceived opponents. For example, after the New York Mt. Sinai Medical Center and the FDA documented asbestos in J&J’s talc, J&J created an enemies list of scientists who dared conclude there was asbestos in talc.⁶ J&J’s enemies list included Dr. Irving Selikoff, America’s foremost medical expert on asbestos related diseases and epidemiology, Dr. Arthur Langer of Mt. Sinai; the Director of the Environmental Protection Agency of New York City; the FDA; and New York University.

J&J’s strategy was effective in disrupting research and reporting on asbestos in talc, with its threats leading to suppressed evidence and findings. PX5327. For example, J&J, a major donor to the Mt. Sinai School of Medicine, demanded that Dr. Langer withdraw previous findings of asbestos in talc and suppress recent asbestos findings. Tr.5376.⁷

J&J was also effective in disrupting government oversight and regulation. First, it threatened to sue the FDA if it disclosed that the agency had found asbestos in talc. DX8371. Then J&J lied to the FDA and

⁶Lisa Girion, *Johnson & Johnson knew for decades that asbestos lurked in its Baby Powder*, REUTERS, *supra* at 2 n. 2.

⁷ It is ironic that J&J views the success of threats as a supporting fact rather than a damning one. Pet.5.

told it that no asbestos had ever been found in J&J talc. See Tr.5377. J&J also misled the National Institute of Occupational Health and Safety (NIOSH), which attempted to study J&J's Vermont talc mine, by promoting a false impression of "minimal quantities of undesirable minerals" in J&J's talc and by "creat[ing] a mystique around our talc involvement through our operations and factual knowledge." PX8485 & Tr.4046-47. J&J even blocked the National Toxicology Program from listing talc as a carcinogen, by arguing, amazingly, that prior studies linking talc with ovarian cancer were the result of asbestos contamination that it falsely claimed no longer existed in "current" talc. Tr.4336-81; PX1675, PX4129, PX4131, PX4150 & PX4161. As for OSHA, J&J caused it to thr[o]w in the towel" rather than expend limited resources on the geological versus health-based definition of asbestos. PX8. Such tactics were effective at warding off stronger government action for decades.⁸

⁸ Once again, it is ironic that J&J touts the effectiveness of its deceitful tactics as a positive fact rather than a damning one. Compare Pet. 6 (touting lack of FDA required warning label), with *supra* at 12-13, 15-16 (discussing J&J efforts to prevent effective testing at FDA and concealing its own positive test results); Tr.4397 & DX7214 (FDA complaining about poor testing and "limited cooperation" and noting that "these results do not prove that most or all talc or talc-containing cosmetic products currently marketed in the United States are likely to be free of asbestos contamination").

C. The evidence demonstrated severe physical harm, and J&J's indifference to the human costs of its deceit.

Ovarian cancer is one of the deadly consequences of asbestos exposure. App. 97a-98a. The evidence before the jury showed that J&J knew since at least the early 1970s that both talc and asbestos had been found in the tumors of women with ovarian cancer. PX4804; Tr.4268; PX7379; PX3997; Tr.3334. And as J&J and, unfortunately, the members of this *amicus* National Women's Health Network well know, ovarian cancer is a devastating, painful, and almost certainly terminal disease. App. 97a-98a; *infra* at 19-20.

Yet despite that knowledge, J&J prioritized profit and image over the dangers to its customers. For example, in debating how to handle the asbestos in talc problem in the early 1970s, J&J executives recognized that cornstarch was a viable, safer alternative: "Corn Starch is obviously another answer. The product by its very nature does not contain fibers. Furthermore, it is assimilated by the body." PX40; see also Tr.3959. Indeed, in 2008, J&J's Global Creative Director went on a "mission to remove talc," writing that J&J should "simply replace the talc ingredient with cornstarch," as this would "align with our Best for Baby charter." Tr.4383; PX10. J&J knew that talc has no medicinal value, and that "wherever placed it serves as a foreign body." PX20.

But cornstarch would have had a high price point, costing J&J profits. PX57. More importantly, J&J executives did not want to abandon Baby Powder and substitute it with "Johnson's Cornstarch," because Baby Powder "represents the cornerstone of our baby

products franchise.” Tr.4255. Despite knowing that its *baby* product contains asbestos, J&J would not replace it with cornstarch, because Baby Powder was its “golden egg.” Tr.5404. J&J’s internal marketing documents explained that it captured the market for *all* its products by engendering an emotional bond in infancy due to the distinctive smell and remembrance of touch from its Baby Powder. Tr.5402. That smell then captures brand loyalty for the entire company’s products. Tr.5402-5403; PX2821.

Not only did J&J conceal the dangers to preserve its brand image, it doubled down on claiming that its products designed for babies are safe. For decades, J&J assured its users that Johnson’s Baby Powder was “purest protection,” Tr.5386, even though internally it was advised it could *not* say its talc offered “purest protection.” PX7821.

In the 1970’s J&J drastically increased its marketing to try to take over the adult market. Tr.5385. In 1977, J&J spent three times more on marketing its cosmetic talc than any competitor. Tr.5384. By the 1990’s, J&J had developed a strategy to target African American and Hispanic women. Susan Berfield, Jef Feeley & Margaret Cronin Fisk, *Johnson & Johnson Has a Baby Powder Problem*, BLOOMBERG, Mar. 31, 2016, <https://www.bloomberg.com/features/2016-baby-powder-cancer-lawsuits/> (visited Apr. 19, 2021); https://www.bloomberg.com/features/2016-baby-powder-cancer-lawsuits/img/baby_powder_major_opportunities_and_major_obstacles.pdf (J&J “Major Opportunities” marketing memo) (visited Apr. 19, 2021). In 2005, J&J launched the Shower to Shower Business Plan to target African Americans and His-

panics. Tr.5385. In 2016, J&J sent representatives to speak with physicians to deny that talc contains asbestos. Tr.5385. J&J launched these aggressive campaigns while at the same time recognizing that a “major obstacle” was the “cancer linkage” from exposure to talc.⁹ In 2017, an email to the Board of Directors put asbestos in talc on the agenda to discuss only “reputational risk,” with no mention of any potential harm to J&J’s consumers. Tr.5414. And, unlike some of its competitors, J&J’s concern for reputation and profit was so strong that it would not even put a *warning* label on its talc products. Tr.4339. As J&J’s safety vice-president conceded at trial, she would not buy product with a warning that it “might have asbestos.” Tr.4277.

Rather than transitioning away from a talc-based product it knew contained asbestos, J&J dug in its heels. J&J’s marketing director, after pushing to eliminate talc, finally threw in the towel, concluding: “Baby Powder is such a sacred cow that we’re just going to leave it alone.” Tr.4252; PX55.

As a result of J&J’s prioritization of profits and image over health and safety, each plaintiff contracted almost certainly terminal ovarian cancer, requiring “chemotherapy, hysterectomies, and countless other surgeries.” App.97a. These medical procedures in turn caused hair loss, sleeplessness, mouth sores, loss of appetite, seizures, neuropathy, and other infections. App.97a-98a. Six of the plaintiffs had died by the time of trial, and three have died during the

⁹ Susan Berfield, *et al.*, *Johnson & Johnson Has a Baby Powder Problem*, *supra*.

appeal. App. 98a & n. 26.¹⁰ In short, a diagnosis of ovarian cancer ensures a path of terror, loss of intimacy, pain, chemotherapy, extraordinary medical expenses, and final goodbyes to one's family and friends. The jury was fully justified in awarding compensatory and punitive damages that both compensated for the harm and attempted to deter any future similar conduct by J&J or any other business marketing to babies, children, and women.

* * * * *

Each of these factors—the knowledge of asbestos in talc and its dangers, the concealment of those dangers and obstruction of others seeking to research or regulate those dangers, and the prioritization of profits over human life and suffering, all mark this case as involving some of the most egregious conduct possible. It should thus be no surprise that the jury and the courts below rendered and affirmed a large punitive damages award. Such award was amply justified under this Court's precedent and raises no red flags or cert.-worthy issues.

¹⁰ Most women (65-70%) with Stage III cancer will not survive five years, and 85% with Stage IV will not survive five years. Tr.5042-5043.

II. The Link between Asbestos and Ovarian Cancer Is Well Supported by Strong Science over Decades.

It is undisputed that asbestos exposure causes ovarian cancer. J&J knew since the early 1970's, at the time of Respondents' exposures, that talc and asbestos had been found in the tumors of women with ovarian cancer. PX4804; Tr.4268; PX7379; PX3997; Tr.3334. J&J's employee in charge of talc safety, Dr. Susan Nicholson, conceded that asbestos translocates to the ovaries when you breathe it. Tr.4346.

Of the ten plaintiffs who had their pathology studied for asbestos, eight out of the ten showed asbestos in the lymph nodes surrounding the area where the ovarian tumor was removed. Tr.1743-49; Tr.1753-56; Tr.1801.

In the face of this linkage, J&J claims there is no epidemiology showing a link between use of talc and ovarian cancer. Pet. 5. But that claim has been resoundingly rejected by not only the court of appeals below, but also by both the federal and state courts in J&J's home state. See *In re: Johnson & Johnson Talcum Powder Prods.*, 2020 WL 8968851, at *25-*50 (holding under the *Daubert* standard that Plaintiffs' medical experts had reliable data supporting their opinions that talc exposure causes ovarian cancer); *Carl v. Johnson & Johnson*, 464 N.J. Super. 446, 465-87 (2020) (holding trial court abused its discretion in finding that plaintiffs' experts did not have sound methodology in concluding that exposure to talc causes ovarian cancer after conducting a detailed analysis

of the relevant factors for evaluating scientific evidence).

In response to overwhelming direct and indirect evidence of causation, J&J cites to studies that suffer from fatal deficiencies, just as J&J relied on studies of miners and millers that J&J knew would show nothing given their inherent flaws. See, e.g., PX8485 (J&J predicting “with a high level of certainty” the negative outcome of the Vermont talc miner and miller study, given the insufficient latency time” allowed for in the study). Specifically, the ovarian talc studies upon which J&J relies did not follow the subjects long enough for cancer to occur (the latency period for ovarian cancer can be as long as 30-40 years from exposure), and the studies only looked at genital usage, and did not account for substantial exposures arising from full-body use. Tr.3458-59; Tr.3323; Tr.3424-25, Tr.3458-59, Tr.3632; PX335; Tr.5563-67. Further, J&J’s experts could not identify any of its studies in which the cohorts used talc in the same manner, frequency, and duration as the Plaintiffs. Tr.4855-57; Tr.5580-84; Tr.5589-97; Tr.5657.

Furthermore, the intended use of J&J’s talc products and the ensuing exposure further corroborate the causal connection between asbestos in talc and ovarian cancer. Using J&J talc powder as prescribed, the users shake the talc into their breathing zone and onto their body and vaginal area. The asbestos fibers thus become respirable, both during the time the bottle is shaken, afterwards while the fibers remain airborne. Tr.3290-3291. Additionally, application to the vaginal region increases exposure of the ovaries because talc migrates to the ovaries both through the

vaginal route and the inhalation route. Tr.3332; PX4795; Tr.3327-29.¹¹

Plaintiffs' expert in industrial hygiene calculated, based on studies performed by NIOSH and J&J, that the levels of asbestos exposure to the Plaintiffs from their use of J&J talc were the equivalent of those working in commercial settings with asbestos, such as construction, and thus in high enough quantities to cause Plaintiffs' ovarian cancer. Tr.3460; Tr.3546-3594; Tr.2084-2085; see also Tr.4825-4826 (studies showing talc exposure linked to ovarian cancer). But unlike in the construction trades, none of the Plaintiffs were told to wear any protective mask or respirator while using J&J cosmetic talc products.

Once again, J&J's complaints on questions soundly and properly rejected by the jury and the court of appeals are merely red herrings seeking attention for its petition, though not themselves raising issues proper for or worthy of this Court's attention.

* * * * *

Punitive damages are aimed "principally at retribution and deterring harmful conduct." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008). Here, the jury was properly instructed on these "twin goals of punitive awards." *Id.* at 492-493. Tr.6250; see also

¹¹ A study of stillborn infants whose mothers had used talc proved that asbestos travels through the blood, as is evidenced that it traveled through the placenta and into the babies *in utero*. Tr.3341; PX292.

Tr.6250.¹² In light of the extraordinary reprehensibility of J&J's conduct and the highly fact-bound nature of the inquiry, the large award was amply justified and does not pose any genuine constitutional issues for this Court to review.

CONCLUSION

For the foregoing reasons, this Court should deny the Petition for a writ of certiorari.

¹² While J&J woefully complains, Pet. 8, 11, that reading the jury instructions took a long time, it ignores that the jury also had the instructions in the jury room to refer to as it addressed the individual verdict forms for each plaintiff. Tr.5950 & 6100.

Respectfully submitted,

ERIK S. JAFFE
(Counsel of Record)
SCHAERR | JAFFE LLP
1717 K Street, NW, Suite 900
Washington, DC 20006
(202) 787-1060
ejaffe@schaerr-jaffe.com

DENYSE F. CLANCY
KAZAN, McCLAIN,
SATTERLEY & GREENWOOD
55 Harrison Street
Oakland, CA 94607
(877) 995-6372
dclancy@kazanlaw.com

JOHN EDDIE WILLIAMS
BRIAN ABRAMSON
WILLIAMS HART BOUNDAS
EASTERBY LLP
8441 Gulf Freeway
Houston, TX 77017
(713) 230-2200
jwilliams@whlaw.com

Counsel for Amicus Curiae

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