

No. 02-

IN THE
Supreme Court of the United States

MOBIL CORPORATION AND HONEYWELL
INTERNATIONAL INC.,
Petitioners,

v.

BRUCE W. ADKINS, *et al.*,
Respondents.

**On Petition for a Writ of Certiorari to the Supreme
Court of Appeals of West Virginia**

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to the decisions of other federal and state courts, that the Due Process Clause of the Fourteenth Amendment permits the aggregation for a mass liability trial of thousands of disparate product-liability claims against hundreds of defendants without any inquiry into the commonality of those claims or the prejudice that would result from such an extraordinary undertaking.

2. Whether the Supreme Court of Appeals of West Virginia erred in holding, contrary to this Court's decision in *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985), and in conflict with decisions of other federal and state courts, that the Due Process Clause permits a state court to apply its own state law to thousands of product-liability cases, aggregated for a mass trial, that the court itself has acknowledged have no connection at all to the state.

PARTIES TO THE PROCEEDING

Petitioners are Mobil Corporation and Honeywell International Inc. Respondents are Bruce W. Adkins and all other plaintiffs in the case styled *In Re: Asbestos Litigation*, Civil Action No. 01-C-9000, Kanawha County, as well as the Honorable Booker T. Stevens and Arthur M. Recht in their capacities as judges/special appointees of the West Virginia Mass Litigation Panel. There are approximately 8,000 plaintiffs in Civil Action No. 01-C-9000, and no caption in this proceeding identifies those individuals. Petitioners have lodged separately with the Court an unofficial list of the approximately 2,700 plaintiffs subject to the challenged trial order who have named petitioner Mobil as a defendant. (App. 40a-146a).

Petitioners before the Supreme Court of Appeals of West Virginia also included the Honorable Martin J. Gaughan, in his capacity as a judge/special appointee of the West Virginia Mass Litigation Panel (since recused and replaced by Judges Stevens and Recht, substituted as respondents here), and 117 other defendants who joined petitioners' petition for a writ of prohibition and/or mandamus.

Petitioners also have lodged separately with the Court an unofficial list of the approximately 250 other defendants subject to the challenged trial order (App. 147a-156a), as well as a list of the 117 other defendants who joined petitioners before the Supreme Court of Appeals of West Virginia (App. 157a-161a).

CORPORATE DISCLOSURE STATEMENT

Petitioner Mobil Corporation (“Mobil”) is wholly owned by ExxonMobil Corporation. ExxonMobil has no parent corporations, and no publicly held companies own 10% or more of ExxonMobil’s stock.

Petitioner Honeywell International, Inc. (“Honeywell”) has no parent corporations, and no publicly held companies own 10% or more of Honeywell’s stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners respectfully pray that a writ of certiorari issue to review the judgment of the Supreme Court of Appeals of West Virginia in this case.

OPINIONS AND JUDGMENTS BELOW

The opinion of the Supreme Court of Appeals of West Virginia (App. 1a-19a) is reported at 563 S.E.2d 419. The concurring opinion of Justice Maynard (App. 19a-23a) is unreported. The order of the trial court (App. 24a-35a) is unreported.

JURISDICTION

The opinion of the Supreme Court of Appeals of West Virginia denying petitioners' petition for a writ of prohibition and/or mandamus was entered on April 25, 2002. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides: "nor shall any state deprive any person of life, liberty, or property, without due process of law"

STATEMENT OF THE CASE

The decision below approves a mass trial of thousands of product-liability cases alleging exposure to asbestos. The hundreds of defendants include premises owners, manufacturers, employers, and insurance carriers. The thousands of plaintiffs worked at hundreds of locations across the country, in different types of jobs, at different time periods spanning six decades, with different degrees of exposure and different individual health backgrounds. They were exposed to hundreds of different asbestos-containing products with different applications, instructions, and warning labels, and are assert-

ing different theories to recover for different injuries. In short, apart from the fact that their claims involve alleged exposure to asbestos, these approximately 8,000 plaintiffs have nothing in common.¹

Under West Virginia's special mass litigation rule, Trial Court Rule 26.01, *see* App. 36a-39a, the liability of hundreds of defendants to these thousands of plaintiffs will be resolved at once. There will be no inquiry into whether that mass adjudication affords defendants a fair opportunity to defend themselves. A defendant will not, for example, have any opportunity to show that the claims against it have no logical relationship to the claims made against other defendants, or to demonstrate that the tremendous differences among defendants will be lost during a mass trial. And defendants will have no opportunity to show that particular claims have no connection to West Virginia, so that application of West Virginia law is precluded by established due process principles.

This application of Rule 26.01 exalts speed and efficiency above fundamental fairness. It turns upside down the established structure of a civil lawsuit, and allows West Virginia to impose its own asbestos solution on potential defendants nationwide. Indeed, the mere threat of these mass proceedings may well be enough to produce the desired result: with no prospect of a fair trial, defendants will face extreme pressure from the financial markets and other sources to settle thousands of claims, regardless of merit.

The constitutional problem is enormous, but the precise issues presented here are quite simple. The court below refused to conduct any inquiry into whether these 8,000 claims have enough in common that their mass trial will not unduly

¹ Eight thousand is a conservative estimate. Respondents' lawyers recently suggested that the number may be higher than 11,000. Plaintiffs' Proposed Trial Plan at 1; *see also* App. 3a n.3 (West Virginia Supreme Court noting that "we are uncertain as to the exact number of plaintiffs included in the litigation below"). Petitioner Mobil is named as a defendant in approximately 2,700 of these claims.

prejudice the defendants or confuse the jury. Contrary to the view of the West Virginia court, that inquiry is a matter of due process, not subject to override by a state trial rule. This Court has carefully mapped out the analogous constitutional limits on class actions filed in federal court. But now mass tort litigation is filed increasingly in state courts, and through vehicles other than class actions. The Court should take this opportunity to clarify that the same due process principles that prohibit standardless aggregations in federal court apply in state courts, as well.

A. The Asbestos Litigation Crisis.

1. This country is in the midst of an “asbestos-litigation crisis.” *Amchem Prods. Inc. v. Windsor*, 521 U.S. 591, 597 (1997). The Court recognized as much in *Amchem*, and since then, the problem has only grown worse.² To address burgeoning asbestos dockets, even well-intentioned courts have adopted procedural rules intended to speed resolution of claims. But those efforts have simply fueled the fire, inviting more and more claims with little regard to merit. See Paul F. Rothstein, *What Courts Can Do in the Face of the Never-Ending Asbestos Crisis*, 71 Miss. L.J. 1 (2001).³

² The number of asbestos cases pending in courts around the nation roughly doubled from 100,000 in 1991 to 200,000 in 1999. See *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearings on H.R. 1283, Before the House Comm. on the Judiciary*, 106th Cong. 5 (July 1, 1999) (Prof. Christopher Edley, Jr., Harvard Law School). All told, the number of future claimants could reach as high as 3.5 million. See Judicial Conference Ad Hoc Committee on Asbestos Litigation, *Report to the Chief Justice of the United States And Members of the Judicial Conference of the United States* 5 (Mar. 1991).

³ West Virginia is a case in point. Early efforts to clear asbestos dockets through more modest consolidations attracted thousands of new claims, many of them from out of state. As the judge who oversaw those early consolidations ruefully concluded: “I will admit that we thought that [an early consolidation] was probably going to put an end to asbestos, or at least knock a big hole in it. What I didn’t consider was that that was a form of advertising. That when we could whack that batch of cases down that well, it drew more cases.” *In re Asbestos Litig.*, Civ. Action

In *Amchem*, Justice Breyer observed that “[u]p to one half of asbestos claims are now being filed by people who have little or no physical impairment.” 521 U.S. at 631 (Breyer, J., concurring in part and dissenting in part) (internal quotation omitted). Current estimates put the number as high as 90 percent. See Jennifer Biggs *et al.*, *Overview of Asbestos Issues and Trends* 3 (Dec. 2001). This flood of filings by unimpaired or less impaired plaintiffs diverts resources from the truly ill claimants who need them the most – a problem recognized by lawyers who represent injured plaintiffs.⁴ It also contributes to multiplying bankruptcies among asbestos defendants,⁵ leading to an ever-widening search for increasingly peripheral but still solvent defendants.

Petitioner Mobil illustrates the trend. Mobil is not an “asbestos company.” It neither produces nor markets asbestos, and it has no corporate relationship with any entity that does. Instead, Mobil finds itself a defendant in this action only because it used small amounts of encapsulated asbestos as a component in a line of heat-resistant coatings products manufactured between 1963 and 1980. When asbestos is encapsulated – that is, when asbestos fibers in a product are “locked in . . . bound with cement, mastic, resin, oil base or some other substance” – there is “no release, certainly no significant release, of asbestos fibers in either working areas or general air.” *In re Asbestos v. Bordelon*, 726 So.2d 926, 946 (La. 1998); see also *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1144-45 (5th Cir. 1985). Indeed, today’s regulations allow encapsulated products like Mobil’s

No. 00-Misc.-222, slip. op. (Cir. Ct. Kanawha Cty., W. Va. Nov. 8, 2000) (statement of Judge A. Andrew MacQueen III).

⁴ See “*Medical Monitoring and Asbestos Litigation*” – A Discussion with Richard Scruggs and Victor Schwartz, Vol. 17, No. 3 Mealey’s Litig. Rep.: Asbestos, Mar. 1, 2002, at 39.

⁵ More than 56 companies have been driven into bankruptcy to date, at least 18 in the last two years alone. See Mark A. Behrens, Editorial, *When the Walking Well Sue*, Nat’l L.J., Apr. 29, 2002, at A12.

heat-resistant coatings to be marketed and used without warning labels. *See* 29 C.F.R. § 1910.1001(j)(6)(i) (2001); *Asbestos Information Ass'n of N. Am. v. Reich*, 117 F.3d 891 (D.C. Cir. 1997). “[T]he net has spread from the asbestos makers to companies far removed from the scene of any wrongdoing.” Editorial, *Lawyers Torch the Economy*, Wall St. J., Apr. 6, 2001, at A14.

2. In *Amchem, supra*, and *Ortiz v. Fibreboard Corp.*, 527 U.S. 815 (1999), the Court acknowledged the dimensions of the asbestos problem in the courts. But even those exigencies, the Court concluded, cannot justify mass aggregations of factually dissimilar cases. In *Amchem*, the Court invalidated a proposed class-action settlement of thousands of asbestos claims, holding that it failed to satisfy the standards of Rule 23 of the Federal Rules of Civil Procedure. 521 U.S. at 629. In *Ortiz*, the Court relied on constitutional concerns as well as on Rule 23 to invalidate another proposed class-action settlement. 527 U.S. at 846.

As a result of these holdings, mass asbestos litigation, as a general rule, is no longer pursued in federal court. Nor is it often pursued through Rule 23's state-law equivalents, with their procedural protections for class action plaintiffs and defendants. Instead, efforts to aggregate massive numbers of asbestos claims in state courts now focus on the less stringent standards that govern joinder and consolidation or, as in the instant case, on special state court mass litigation rules.

B. West Virginia Trial Court Rule 26.01.

In the early 1990s, West Virginia's courts began to permit large aggregations of asbestos cases under the state's civil procedure rule authorizing consolidation under certain prescribed circumstances. *See* W. Va. R. Civ. P. 42. In 1996, the Supreme Court of Appeals of West Virginia – the

state's highest appellate court⁶ – approved a mass consolidation of claims filed against 17 defendants who owned facilities located in West Virginia. *State ex rel. Appalachian Power Co. v. MacQueen*, 479 S.E.2d 300, 302 (W. Va. 1996). Following that decision, thousands of new claims flooded West Virginia's courts.

The West Virginia Supreme Court responded by invoking its constitutional supervisory powers and enacting Trial Court Rule 26.01 in 1999. *See* App. 10a. Rule 26.01 establishes a Mass Litigation Panel (“MLP”) with the power to “develop and implement case management and trial methodologies for mass litigation and to fairly and expeditiously dispose of civil litigation which [is] referred to it.” App. 36a. The Rule does not establish any criteria for determining when a case should be transferred to the MLP. Nor does it indicate what transfer entails: whether, for instance, suits that have been transferred are “joined” or “consolidated” with other suits, for some purposes or for all. Apart from the reference to “fair[] and expeditious[]” procedures, the Rule provides no guidance at all as to how the MLP should resolve cases referred to it.

C. Proceedings Below.

On November 17, 2000, all “asbestos-based personal injury cases in West Virginia” were referred to the MLP by order of the West Virginia Chief Justice. *State ex rel. Allman v. MacQueen*, 551 S.E.2d 369, 372 (W. Va. 2001). The next month, those pending asbestos cases were transferred to Judge MacQueen. *See id.* At the time, Mobil understood that the referral was for coordinated pretrial proceedings only, much like those authorized by the federal multidistrict litigation statute.⁷ Mobil also reasonably believed that the

⁶ West Virginia has no intermediate appellate courts. The Supreme Court of Appeals of West Virginia (hereinafter “Supreme Court”) directly reviews the decisions of West Virginia's trial courts.

⁷ *See* 28 U.S.C. § 1407(a) (allowing transfer of actions for pretrial proceedings, but requiring actions to be remanded to the districts from

presiding judge would review any proposal for consolidation or aggregation for trial purposes under established guidelines and procedures.

On May 23, 2001, Judge MacQueen entered a “master plan” permitting pre-trial discovery by both parties, in anticipation of a series of group trials containing between 20 and 100 plaintiffs each. *MacQueen*, 551 S.E.2d at 372. In July 2001, the West Virginia Supreme Court⁸ rejected Judge MacQueen’s plan, holding that a more expeditious approach was required. *Id.* at 375. Specifically, the court held that *all* of the thousands of pending asbestos trials should commence no later than July 1, 2002. *Id.* at 377. Invoking its supervisory powers, the court designated an additional judge to supervise the administration of the asbestos litigation, and ordered a report to the Chief Justice on the status of the case with a view toward a July 1, 2002 commencement of trial. *Id.* Three days later, Judge Martin Gaughan was appointed the supervising judge for all asbestos litigation.

On September 6, 2001, Judge Gaughan ruled that he would conduct a single “mass trial” of all asbestos claims. App. 4a-5a.⁹ Over the due-process objections of petition-

which they were transferred “at or before the conclusion of pretrial proceedings”).

⁸ Both plaintiffs and Mobil sought review of the master plan. Mobil argued against the so-called “small-group” trials on the ground that unrelated product-liability asbestos cases may not be aggregated for trial without a meaningful review of commonality and prejudice.

⁹ Shortly thereafter, four railroad companies subject to the application of Rule 26.01 filed a § 1983 lawsuit in federal court, challenging on due process grounds the operation of Rule 26.01. The suit names as defendants the Justices of the Supreme Court as well as Judges MacQueen and Gaughan. *See Norfolk Southern Railway Co. v. Chief Justice Warren R. McGraw*, Case Number 2:01-1238 (D. W. Va. Nov. 29, 2001).

ers,¹⁰ Judge Gaughan then entered the official “Trial Scheduling Order” (“TSO”) on February 26, 2002. *Id.* 14a. Under the TSO, the mass trial, now scheduled for September 23, 2002, will resolve approximately 8,000 cases against three “groups” of defendants: manufacturers, premises owners, and employers. The first three phases of the mass trial – keyed to the three groups of defendants – will determine the fault of each defendant. The Group I trial, which includes petitioners and over a hundred other defendants, will resolve “the common issues of fault of all manufacturers and distributors of asbestos-containing products, as well as any defendants whose purported fault is based on an allegation of conspiracy, tortious joint venture, or other tortious combination with a manufacturer or distributor.” App. 26a.

At the end of each of these three “fault” trials – but before any determination of causation or injury – the jury will consider punitive damages. For any defendant whose conduct warrants an award of punitive damages, the jury will select a “punitive damages multiplier” – that is, the number by which any subsequent award of compensatory damages should be multiplied to arrive at a punitive damages award. App. 15a. Causation and compensatory damages will be determined only after the fault phase is completed, either through mini-trials or through mini-trials in combination with a statistical matrix by which early verdicts are extrapolated to the remaining claims. *Id.* at 28a-29a.

Finally, the TSO provided for pretrial discovery by defendants and ordered plaintiffs to make certain basic “certifications,” or disclosures, before the September 23 trial date: the nature of their claims, the place where they were residing when they were exposed to asbestos, and the products to

¹⁰ *See, e.g.*, Mobil Corporation’s Objections and Request for Clarification in Response to the Court’s Proposed Trial Scheduling Order at 2 (Jan. 31, 2002). Those objections were consistent with at least three previous filings—dated November 5, 2001, November 20, 2001, and December 12, 2001—before Judge Gaughan objecting to the Report. *See id.*

which they were exposed. App. 30a.

D. Decision Below.

On April 25, 2002, the West Virginia Supreme Court denied petitioners' request for relief and approved both the operation of Rule 26.01 and, in important respects, the trial plan set forth in the TSO.¹¹

The court held, first, that the mass aggregation of plaintiffs' claims under Rule 26.01 is permissible even in the absence of findings regarding the risk of prejudice to defendants. The court acknowledged that West Virginia's consolidation rule – which tracks Rule 42 of the Federal Rules of Civil Procedure – requires a pretrial inquiry into whether cases set for consolidation have enough in common that there will be no undue risk of prejudice or juror confusion. App. 9a-14a & n.12. Because these cases were aggregated under Rule 26.01 rather than Rule 42, however, the court concluded that it could dispense with the standard inquiry into prejudice and confusion. *Id.* As the court summed up, Rule 26.01 has “effectively superseded” the ordinary inquiry into whether defendants' rights will be compromised by aggregation. *Id.* at 13a.

The West Virginia Supreme Court also rejected petitioners' argument that West Virginia law could not constitutionally be applied to these thousands of claims. The court failed even to address petitioners' argument that basic pretrial discovery of plaintiffs was required so that the defendants – and the court itself – could ascertain whether the claims of thousands of out-of-state plaintiffs could be adjudicated under

¹¹ Petitioners sought a writ of prohibition and/or mandamus, and argued against both the mass aggregation and application of West Virginia law on due process grounds. *See* Pet'rs Memo. at 21 (“The denial of [factual] findings [prior to aggregation] violates the United States Constitution”); *id.* at 26 (“United States Supreme Court has established that, as a matter of due process, a state cannot categorically apply its substantive law to govern claims in which a state has little or no interest”). Several plaintiffs cross-petitioned for relief from the TSO discovery provisions.

West Virginia law consistent with the Due Process Clause. *See Mobil Corporation's Response to Certain Asbestos Plaintiffs' Petitions for Extraordinary Writs* at 7. Instead, the Court held expressly that West Virginia substantive law would apply during the mass trial, at least in some of its crucial phases. App. 7a (West Virginia law applies to all claims against employer defendants).

The West Virginia Supreme Court also, at plaintiffs' behest, invoked its supervisory powers to repudiate the provisions of the TSO requiring discovery prior to the mass trial. App. 15a-16a & n.18.¹² The court declined to exercise its supervisory authority to reach two of petitioners' specific challenges to the TSO: the assessment of a punitive damages multiplier prior to determination of causation or injury, and the use of a statistical matrix to establish causation and damages as to particular plaintiffs. Because the trial court had not yet "definitively" ruled on those issues, the West Virginia Supreme Court held, review would be premature. *Id.* at 15a.

The court acknowledged that Rule 26.01 and the mass trial procedure do not "perfectly address[]" the problem of asbestos litigation, and that a congressional solution would be "far preferable." App. 11a-12a. But Rule 26.01 and its implementation by the trial court "represent the judicial system's best efforts to address the unique challenges of managing this voluminous litigation, while at the same time trying to afford substantial justice to all the parties involved in a timely manner." *Id.* at 12a. The court closed by making clear that no further pretrial review would be forthcoming: "[W]e fully intend to allow the supervising judge to continue to fashion and implement various trial management plans

¹² Three days after the West Virginia Supreme Court issued its decision, Judge Gaughan amended his TSO accordingly, effectively precluding any discovery by defendants prior to the September 23 mass trial and narrowing significantly the scope of the required certifications. A later order barred Mobil from pursuing any written discovery regarding any of the plaintiffs.

without further intrusion by this Court.” *Id.* at 18a.

Judge Maynard wrote separately to describe his “profound disquiet.” App. 19a.¹³ Citing *Amchem* and *Ortiz*, he argued that the proposed mass trial likely would deny petitioners due process – and that “some federal court will eventually tell us so.” *Id.* Of particular concern was the due process problem that would be raised by application of West Virginia law to claims of “as many as five thousand” plaintiffs with “NO connection whatsoever with West Virginia” but who have “migrated here because of the asserted pro-plaintiff bias with which Mobil claims this State handles asbestos litigation.” *Id.* at 22a (emphasis in original). With these reservations, Judge Maynard nevertheless concurred in the decision below, in part because he believed review would be premature, *id.* at 19a, and in part because he could see no “simple” alternative for resolution of West Virginia’s asbestos claims, *id.* at 23a.¹⁴

REASONS FOR GRANTING THE WRIT

As this Court has made clear, regardless of the exigencies created by the asbestos-litigation crisis, courts are not authorized to abandon the fundamental rights of litigants. Here, the courts of one state – West Virginia – have undertaken to impose on rest of the nation a “legislative” solution that no legislature, state or federal, has enacted. That solution is to combine all plaintiffs and all defendants into one massive proceeding regardless of the number of parties involved, and without any attention to the particulars of any individual plaintiff or defendant – and then to apply West Virginia’s

¹³ Judge Maynard reserved the right to file a concurring opinion when the West Virginia Supreme Court issued its decision on April 25, and filed his concurrence separately on July 5, 2002.

¹⁴ After the West Virginia court issued its decision, Judge Gaughan was recused from the proceedings and replaced by Judges Booker Stevens and Arthur Recht. The trial is still scheduled to go forward in the form approved by the West Virginia Supreme Court in the opinion below.

substantive law without any analysis of whether all of those claims have the constitutionally necessary connection to the state. The Due Process Clause of the Fourteenth Amendment does not permit this unprecedented and profound distortion of the processes of civil justice.

To be exact, the Due Process Clause does not permit the joinder for a mass liability trial of thousands of disparate asbestos cases against hundreds of defendants in the absence of any inquiry into the commonality of those claims or the prejudice that would result from such an extraordinary undertaking. The decision of the West Virginia Supreme Court to dispense with any determination of commonality and prejudice directly conflicts with cases from other courts recognizing that due process and fundamental fairness require courts to determine whether common questions of law or fact permit aggregation, and whether aggregation will unduly hinder a party's right to defend itself in a multi-party proceeding.

Nor is West Virginia free simply to apply its law to all claims joined through a mass litigation rule without allowing for a determination of whether the underlying complaints have any connection to the state. On this point, the decision below is in clear conflict with decisions of this Court setting outer constitutional limits on the application of a forum's law, and also with cases from lower courts acknowledging and applying those limits.

The pre-trial and trial processes for this mass endeavor raise a number of constitutional questions of the utmost seriousness. Some of these questions are premature for this Court's review;¹⁵ others – those raised here – are decidedly

¹⁵ Petitioners do not now seek review, for instance, of the assessment of a "punitive damages multiplier" prior to any determination of causation or injury, or of the use of a statistical "matrix" to extrapolate findings of causation and injury. But even those provisions of the TSO have an immediate effect: hanging over the proceedings like a sword of Damocles, they help to coerce the very mass settlements that may permanently insulate them from judicial review. *See infra* at 28-30.

not premature. Indeed, for the questions in this latter category, this is the only meaningful opportunity for federal review. Post-trial review may well be impossible: the stakes may simply be too high for a defendant to proceed to a mass trial in which it will have no real opportunity to defend itself.

I. THE WEST VIRGINIA COURT'S HOLDING THAT MASS AGGREGATION FOR TRIAL REQUIRES NO INQUIRY INTO COMMONALITY OR POTENTIAL PREJUDICE CONFLICTS WITH DECISIONS OF OTHER COURTS.

Holding that Rule 26.01 is not “affected by case law interpreting various rules of civil procedure,” App. 4a – including the rules governing joinder, class actions, and consolidations – the Supreme Court of West Virginia approved an aggregated trial of 8,000 plaintiffs against hundreds of defendants without subjecting it to review under any standard at all. The Court expressly held that the ordinary consolidation standard – requiring sufficient commonality to avoid an undue risk of prejudice or jury confusion – is “superseded” by Rule 26.01. But Rule 26.01 establishes no criteria of its own for aggregation of cases, nor any guidance for treatment of cases referred to the MLP. In short, the decision below not only permits, but specifically approves an entirely standardless aggregation of thousands of asbestos claims.

1. That decision is in clear conflict with decisions of the United States Court of Appeals for the Second and Fifth Circuits, and with appellate decisions in two of the nation's largest states, California and Texas. Those courts have required a judicial determination that a proposed aggregation does not combine cases so factually dissimilar that it would unduly interfere with a party's right to litigate its own claims or defenses. And, importantly, that determination is deemed necessary not only as a matter of civil procedure, on which there is room for jurisdictional differences, but as a matter of due process and fundamental fairness, on which there is not.

The Second Circuit has made clear that review of a proposed consolidation for commonality and risk of prejudice is required by the Due Process Clause. *See, e.g., Garber v. Randell*, 477 F.2d 711, 716 (2d Cir. 1973) (invalidating consolidation order pretrial where it would “deny a party his due process right to prosecute his own separate and distinct claims or defenses without having them so merged into the claims or defenses of others that irreparable injury will result”); *Malcolm v. Nat’l Gypsum Co.*, 995 F.2d 346, 350 (2d Cir. 1993) (reversing consolidation of 48 asbestos cases because the “benefits of efficiency can never be purchased at the cost of fairness”). The Fifth Circuit applies the same rule. *See, e.g., In re Chevron U.S.A., Inc.*, 109 F.3d 1016, 1020 (5th Cir. 1997) (invalidating, pretrial, proposed trial plan in mass consolidation under Due Process Clause); *Gwathmey v. United States*, 215 F.2d 148, 155-56 (5th Cir. 1954) (consolidation precluded where deprives litigants of due process right to “fair opportunity to have [their cases] determined from the evidence in reasonable proceedings”).

Appellate courts in California and Texas also have recognized that overbroad consolidations of factually dissimilar claims may contravene due process limits as well as ordinary rules of civil procedure. *See, e.g., Todd-Stenberg v. Dalkon Shields Claimants Trust*, 56 Cal. Rptr. 2d 16, 18 (Cal. Ct. App. 1996) (recognizing that consolidation of disparate claims can cause confusion and prejudice to the point of depriving defendants of due process); *Union Pac. Res. Group, Inc. v. Hankins*, 51 S.W.3d 741, 749 (Tex. Ct. App. 2001) (due process violated in aggregated proceedings unless defendants have “opportunity to adequately and vigorously present any material claims and defenses”).

The issue on which the decision below conflicts with these other authorities – the constitutional necessity for review of commonality and potential prejudice – has direct and important consequences. In courts in which this review is required, the result is substantial and meaningful limits on

the number and types of cases that may be consolidated for trial. Those courts routinely hold that asbestos cases may be consolidated for trial only when they involve – at a minimum – common worksites, similar occupations, similar exposure times and similar injuries. *See, e.g., Johnson v. Celotex Corp.*, 899 F.2d 1281, 1285 (2d Cir. 1990) (analyzing and upholding consolidation of two asbestos claims for trial); *Hendrix v. Raybestos-Manhattan, Inc.*, 776 F.2d 1492, 1495-96 (11th Cir. 1985) (approving consolidation of four asbestos claims after concluding that workers with same injuries and same jobs were exposed within the same time frames and at many of the same job sites). It is only by forgoing that inquiry altogether, by contrast, that the court below could approve the aggregation for trial of 8,000 wildly disparate asbestos claims against 250 defendants.¹⁶ In short, the outcome in this case would have been different had the case arisen in any of the majority of jurisdictions that recognize a due process limit on the aggregation of cases for trial.

2. This Court should grant the petition on the basis of the conflict among the lower courts alone. But it is also clear that on the merits, the court below erred in holding that state courts are free to dispense with any review for prejudice and confusion when aggregating asbestos cases.

a. States possess considerable flexibility in creating rules of civil procedure, but that flexibility is ultimately constrained by the Due Process Clause. *Hansberry v. Lee*, 311 U.S. 32, 40-42 (1940); *Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 432 (1982) (“because minimum [procedural] re-

¹⁶ The initial referral of all “asbestos” cases to the MLP in November of 2000 is no substitute for the standard due process inquiry. *Cf.* App. 13a (relying on initial determination that these cases can “be grouped together for trial purposes”). Contrary to the suggestion of the West Virginia Supreme Court, that one-time administrative referral did not constitute a determination that the cases would – or could, constitutionally – be litigated together in a mass trial, and accordingly did not include the appropriate review for commonality or potential prejudice and jury confusion.

quirements [are] a matter of federal law, they are not diminished by the fact that the State may have specified its own procedures that it may deem adequate” (citation omitted).¹⁷ Of special relevance here, the Court has on several occasions invalidated state rules of civil procedure when they afford individuals affected by mass litigation inadequate protections. See *Hansberry*, 311 U.S. at 40-42; *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797 (1985); *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156 (1974).

Due process limits on state authority to aggregate cases for trial protect important interests of both plaintiffs and defendants. First, due process principles ensure that before they are bound to the outcome of a mass proceeding, plaintiffs receive notice of the action, see *Eisen*, 417 U.S. at 176, and are adequately represented at trial, see *Hansberry*, 311 U.S. at 41-42. Indeed, it was primarily concerns about the adequacy of representation – in light of substantial factual disparities among plaintiffs – that caused the Court to invalidate the proposed class-action settlements in *Amchem* and *Ortiz*. See 521 U.S. at 625; 527 U.S. at 856.

Though these principles apply directly to plaintiffs, defendants – like petitioners here – have an equal stake in their proper application. Defendants have an obvious interest in ensuring that any judgment in an aggregated proceeding binds all the plaintiffs in the future and, in this sense, the requirements of notice and adequate representation protect *defendants* by affording them some measure of finality at the close of a mass proceeding. See *Shutts*, 472 U.S. at 809-10 (defendants have standing to allege deficiencies in notice and representation); *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 314 (1950).

¹⁷ The same supremacy principle applies to state constitutional provisions. The fact that the West Virginia Constitution mandates the administration of justice without delay, see App. 12a (citing W. Va. Const. art. III, § 17), in other words, cannot justify expedited proceedings that fall short of the federal due process standard.

Due process limits on aggregation also safeguard the rights of defendants more directly. The commonality requirement ensures that a defendant forced to deal with several plaintiffs at once is in fact defending only against a single and narrowly presented legal situation. That precaution is doubly important in cases like this one, involving not only multiple plaintiffs but also multiple defendants. Without a careful inquiry into commonality, the proceeding may easily become so large and confusing that it is impossible for each defendant to present a meaningful defense: evidence inadmissible as to one defendant may be admitted as to others, see *Cain v. Armstrong World Industries*, 785 F. Supp. 1448, 1457 (S.D. Ala. 1992), and the complexity of the proceedings may make it impossible for the jury to sort through the evidence and various defenses to tailor a verdict to each party's culpability, see *Logan*, 455 U.S. at 433 (due process guarantees "the aggrieved party the opportunity to present his case and have its merits fairly judged"); see also *Broussard v. Meineke Discount Muffler Shops, Inc.*, 155 F.3d 331, 343-45 (4th Cir. 1998) (improper aggregation unfairly allows plaintiffs to litigate on behalf of composite "perfect plaintiff," combining strongest aspects of unrelated claims).

This case amply illustrates the wisdom of those constitutional limits. The single common element in the 8,000 claims massed for trial is that the word "asbestos" appears in each complaint. The thousands of plaintiffs have been "exposed to different asbestos-containing products, for different amounts of time, in different ways, and over different periods. Some [plaintiffs] suffer no physical injury or have only asymptomatic pleural changes, while others suffer from lung cancer, disabling asbestosis or from mesothelioma." *Amchem*, 521 U.S. at 624 (quotation omitted); see also App. 22a (Maynard, J., concurring). It is obviously not the case that all 8,000 of the plaintiffs will be "actually before the court" in anything "more than a fictional sense." *In re Fibreboard Corp.*, 893 F.2d 706, 711 (5th Cir. 1990); see also Richard L.

Marcus, *Confronting the Consolidation Conundrum*, 1995 BYU L. Rev. 879, 892 (1995) (“consolidation can leave claimants with as little control over their cases as unnamed class members in a class action”). But there has been no inquiry – nor will there be – into whether each of these very differently situated plaintiffs will or can be adequately represented at the mass trial.

On the defendant side, the mass trial approved below will make it impossible for a defendant like Mobil to assert its unique defenses in a meaningful way. The Group I mass trial includes over a hundred defendants, each of which manufactured or distributed a different asbestos-containing product or products. Petitioner Mobil alone manufactured a number of distinct products between 1963 and 1980. Mobil’s products were applied in small amounts, such as through use of a putty knife to seal cracks in coatings on boilers or to cover small nail holes. And all of Mobil’s products – unlike many other defendants’ – entirely encapsulated small amounts of chrysotile asbestos within other materials.¹⁸ There is no scientific evidence that *Mobil’s* products can cause asbestos-related diseases or illnesses.

Nevertheless, Mobil’s liability will be assessed in conjunction with that of over a hundred other manufacturers, distributors, and alleged conspirators: those who made products

¹⁸ The term “asbestos” – the only thing these cases have in common – actually refers to a range of minerals with significant variations among them. “Asbestos” is the name given to a whole “class of magnesium-silicate minerals that occur in fibrous form. Minerals that are included in this group are chrysotile, crocidolite, amosite, tremolite asbestos, anthophyllite asbestos and actinolite asbestos.” See Occupational Safety & Health Standards, 29 C.F.R. § 1910.1001, App. G. (2001). “[A]sbestos products are not made from the same formula, come in various forms and carry different risks of harm.” *Becker v. Baron Brothers Coliseum Auto Parts, Inc.*, 649 A.2d 613, 621 (N.J. 1994) (citing *Mullen v. Armstrong World Indus., Inc.*, 246 Cal. Rptr. 32, 36-37 (Cal. Ct. App. 1988)); see also *Gideon v. Johns-Manville Sales Corp.*, 761 F.2d 1129, 1145 (5th Cir. 1985); accord *Celotex Corp. v. Copeland*, 471 So. 2d 533, 538 (Fla. 1985).

before and after Mobil, those who had knowledge of the dangers of their products, and those whose products exposed workers to great risk of asbestos-related illness. Evidence concerning the alleged knowledge and conduct of all these other defendants will be admitted into the mass proceeding, where it will almost inevitably tar petitioners, as well. *Gwathmey*, 215 F.2d at 154 (cumulative effect of evidence against some defendants prejudices jury against all defendants in consolidated case). And the sheer quantity and complexity of the information that will be presented is virtually certain to overwhelm the jury, making it impossible to distinguish one defendant or defense from another and to render a fair verdict on petitioners' unique defenses. *Malcolm*, 995 F.2d at 352 (finding that "sheer breadth of the evidence" when 48 asbestos cases are consolidated makes it impossible to prevent jury confusion).¹⁹

b. "As this Court has stated from its first due process cases, traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994); see also *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 30 (1991) (state civil trials must operate "according to the settled course of judicial proceedings"); *Schad v. Arizona*, 501 U.S. 624, 650 (1991) (Scalia, J., concurring in part and concurring in the judgment) ("It is precisely the historical practices that *define* what is 'due.'"). Against this benchmark, too, the procedure approved by the West Virginia Supreme Court comes up short.

Traditional practice in both federal and state courts is to review for commonality and prejudice before cases are aggregated for trial. See, e.g., 8 James Wm. Moore, et al.,

¹⁹ Contrary to the West Virginia Supreme Court's supposition, this constitutional problem cannot be obviated by careful specification of the issues put to the jury at the close of the mass trial. See App. 15a. The problem inheres in *any* effort to have a single jury determine the "fault" of hundreds of differently situated defendants in relation to thousands of disparate plaintiffs.

Moore's Federal Practice § 42.10[4]-[5] (Matthew Bender 3d ed. 2002); *Johnson*, 899 F.2d at 1284 (reviewing cases); *In re Ethyl Corp.*, 975 S.W.2d 606, 612-15 (Tex. 1998) (same); *Glussi v. Fortune Brands, Inc.*, 714 N.Y.S.2d 516, 518 (N.Y. App. 2000) (“[W]here prejudice to a substantial right is shown . . . a joint trial should not be granted even if common issues of law or fact exist.”). And in asbestos cases specifically, common practice is to aggregate “five or fewer claims at a time” – and those only on a stringent showing of common or similar worksites, occupations, periods of exposure, alleged injuries, and the like. *In re Ethyl Corp.*, 975 S.W.2d at 612. Federal courts – and the majority of state courts that model their rules after the Federal Rules of Civil Procedure – agonize about the consolidation of two, *Johnson*, 899 F.2d at 1285, four, *Hendrix*, 776 F.2d at 1495-96, thirteen, *Cain*, 785 F. Supp. at 1451, and even twenty-two, *In re Ethyl Corp.*, 975 S.W.2d at 615-17, asbestos claims for trial. A consolidation for trial of 8,000 claims against 250 defendants “so departs from [the] accepted norm as to be presumptively violative of due process.” *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993) (plurality opinion).

The decision below also departs from traditional practice by approving a method of aggregation – what the court below termed “conjoin[der],” App. 10a – that is otherwise unknown to civil litigation. Indeed, the West Virginia Supreme Court expressly held that this mass trial proceeding is unconstrained by any of the traditional state rules that govern aggregations, *see supra* at 9 – apparently without considering whether these traditional ways of proceeding might now set the constitutional baseline. *See Oberg*, 512 U.S. at 430 (“abrogation of a well-established common-law protection against arbitrary deprivations of property raises a presumption that its procedures violate the Due Process Clause”).

Traditionally, consolidation may not operate to abridge the rights that parties would have if their cases proceeded

separately. See *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496-97 (1933) (consolidation does not “merge the suits into a single cause, or change the rights of the parties”); *Cablevision Sys. Dev. Co. v. Motion Picture Ass’n of Am., Inc.*, 808 F.2d 133, 135 (D.C. Cir. 1987); *In re TMI Litig.*, 193 F.3d 613, 724-25 (3d Cir. 1999). But the “conjoinder” approved below clearly alters the substantive rights of the parties: all “asbestos” claims are automatically referred to the MLP, and defendants are denied any opportunity to conduct standard discovery necessary to file standard pretrial motions (i.e., motions challenging venue or motions for summary judgment) in order to weed out frivolous or non-meritorious claims.

Departures from prevailing practice and traditional rules should be particularly suspect in this context. In cases ranging from *Hansberry* to *Amchem* and *Ortiz*, this Court has recognized the critical importance of the traditional protections that attend class-action aggregations. Those protections will be rendered meaningless if state procedural innovations, like the West Virginia “conjoinder,” operate unchecked by traditional aggregation rules and standards. Whatever the label affixed by the state, a mass aggregation that implicates the rights of plaintiffs to adequate representation and the rights of defendants to a fair opportunity to defend should be accompanied by the traditional protections – including the standard judicial inquiry into commonality and risk of prejudice and jury confusion. See, e.g., Joan Steinman, *Reverse Removal*, 78 Iowa L. Rev. 1029, 1042 (1993) (noting concern that mass consolidations lack the “procedural safeguards that due process and codified rules demand in class actions of similar magnitude”).

II. THE WEST VIRGINIA COURT’S CHOICE-OF-LAW HOLDING CONFLICTS WITH DECISIONS OF THIS COURT AND OTHER COURTS.

Petitioners argued below that without pretrial discovery, defendants have no opportunity to prove that West Virginia

law may not be applied to thousands of claims with no connection to the state. Without addressing this argument directly, the West Virginia Supreme Court held that West Virginia law will be applied to determine the fault of at least one group of defendants. App. 7a. Justice Maynard, on the other hand, focused extensively on the constitutional problems raised by any effort to apply forum law to all of the claims at issue, thousands of which have no meaningful connection to West Virginia. *Id.* at 21a-22a (“All the due process arguments are compelling, but this [choice-of-law] is the due process claim about which I am most fearful of eventual reversal.”).

1. The choice-of-law decision below conflicts with the express dictates of this Court, as well as with the decisions of lower federal courts applying those rulings. In *Phillips Petroleum Co. v. Shutts*, 472 U.S. 797, 815 (1985), this Court held that the mere fact that a defendant does business in a state does not justify application of that state’s law to claims that have no other “apparent connection” to the state. Instead, a state may apply its law consistent with the Due Process Clause only if it has a “significant” connection to the claims asserted by *each* plaintiff – even in the context of a nationwide class action, in which it “may be more difficult or more burdensome to comply with [these] constitutional limitations because of the large number of transactions which the State proposes to adjudicate and which have little connection with the forum.” *Id.* at 821-22. *See also Allstate Ins. Co. v. Hague*, 449 U.S. 302, 310-11 (1981) (plurality opinion) (“if a State has only an insignificant contact with the parties and the occurrence or transaction, application of its law is unconstitutional” under Due Process Clause).²⁰ As Justice May-

²⁰ Constitutional provisions other than the Due Process Clause also limit a state’s ability to regulate or proscribe conduct having no relationship to that state. *See, e.g., Edgar v. MITE Corp.*, 457 U.S. 624, 642-43 (1982) (plurality opinion) (Dormant Commerce Clause); *San Diego Building Trades Council v. Garmon*, 359 U.S. 236, 247 (1959) (same); *BMW of N. Am. v. Gore*, 517 U.S. 559, 572 (1996) (“principles of state

nard put it in his concurring opinion, “The United States Supreme Court has established that, as a matter of due process, a state cannot categorically apply its substantive law to govern claims in which [it] has little or no interest.” App. 21a.

The decision below, forgoing any inquiry into the existence of contacts sufficient to justify application of forum law, cannot be reconciled with the precedent of this Court. See App. 22a (Maynard, J., concurring) (“Because so many of the plaintiffs have NO connection whatsoever with West Virginia, and because the United States Supreme Court was so clear in the *Phillips* case, I just don’t see how the trial court can tread safely through this judicial minefield.”). Not surprisingly, it also conflicts with decisions from lower courts faithfully applying this Court’s case law. In aggregated proceedings in which injuries have accrued nationwide, courts routinely engage in an “individualized choice of law analysis” with respect to each plaintiff’s claims, *Georgine v. Amchem Products, Inc.*, 83 F.3d 610, 627 (3d Cir. 1996), *aff’d sub nom., Amchem Products, Inc. v. Windsor*, 521 U.S. 591 (1997), and apply forum law only if they can confirm that each claim has the necessary “significant contact” with the forum state, see *Nicolet, Inc. v. Superior Court*, 224 Cal. Rptr. 408, 414-15 (Cal. Ct. App. 1986) (applying due process choice-of-law analysis to individual claims); *Hime v. State Farm Fire & Casualty Co.*, 284 N.W.2d 829, 831-32 (Minn. 1979) (“slight and casual” contacts insufficient to justify application of forum law consistent with due process); see also *McBride v. Galaxy Carpet Mills, Inc.*, 920 F. Supp. 1278, 1285 (N.D. Ga. 1995) (*Phillips* requires application of law of state in which each plaintiff resides, rather than forum law).

The failure of the West Virginia Supreme Court to engage in an analysis of “significant contacts” under *Phillips* has dramatic consequences for this case. Thousands of the

sovereignty and comity” dictate “that a State may not impose economic sanctions on violators of its laws with the intent of changing the tortfeasors’ lawful conduct in other states”).

claims at issue involve plaintiffs who reside in *and* were allegedly exposed to asbestos in states other than West Virginia. See App. 21a (Maynard, J., concurring) (“as many as five thousand of the plaintiffs included in the [] mass trial are not West Virginia residents and were never exposed to asbestos in this State”).²¹ Even Judge Gaughan has recognized as much, taking “judicial notice” of the fact that “there is a long history of massive filings on behalf of non-West Virginia residents having no exposure to asbestos in West Virginia.” Order on Certain Defendants’ Motions to Dismiss Out-of-State Plaintiffs, May 6, 2002, at 4. Even a cursory analysis under *Phillips* would have made plain the constitutional impossibility of applying West Virginia law to these claims. See *Georgine*, 83 F.3d at 627.

Nor could the constitutional problem be avoided by postponing until trial a determination of what law should be applied.²² The 8,000 plaintiffs in this case reside in and were allegedly exposed to asbestos in as many as 35 different states. Whenever the *Phillips* inquiry is undertaken, it will result in application of the laws of all or most of those various states – making a mass trial of all 8,000 claims even more confusing and unmanageable, and hence unconstitutional, than it otherwise would be. See, e.g., *In re Bridge-*

²¹ Because no discovery of plaintiffs has been permitted, it is impossible to identify the precise number of plaintiffs without connection to the state.

²² In fact, of course, the West Virginia Supreme Court already has expressly approved application of West Virginia law at trial, at least as to some defendants. And all defendants are currently held to West Virginia law with respect to substantive pretrial motions and defenses. For instance, under the laws of many of the states in which plaintiffs reside, a defendant could prevail on summary judgment unless each plaintiff could make a sufficient showing that he or she was exposed to the particular defendant’s products. See, e.g., *Lohrman v. Pittsburgh Corning Corp.*, 782 F.2d 1156, 1162-63 (4th Cir. 1986) (Pennsylvania law). That state-law standard has been replaced here by West Virginia law, which allows cases to proceed directly to trial even in the absence of such a showing.

stone/Firestone, Inc., 288 F.3d 1012, 1018 (7th Cir. 2002) (Easterbrook, J.) (commonality inquiry screens for situations in which “claims must be adjudicated under the law of so many jurisdictions” that aggregated treatment becomes impossible). Indeed, this seems to be precisely the scenario that Justice Maynard had in mind when he expressed his considerable doubt that a mass trial could be held consistent with *Phillips* and the Due Process Clause. App. 21a-22a.

2. The question of whether and under what circumstances a state may apply its own law to cases that accrue throughout the nation is exceptionally important. Without some limit on a state’s authority to apply its own law, particular state courts can become magnets for resolution of critical national issues. The result is the worst kind of forum-shopping – and effective authorization for those states to impose their policy choices on the rest of the country.

State product-liability laws reflect fundamental decisions about how best to protect citizens from defective products, regulate the state economy, and structure the judicial system. There is no reason to think that one state’s policy judgments will be the same as or consistent with those of other states. West Virginia, for instance, is among the distinct minority of states that has retained the doctrine of pure joint and several liability in product-liability cases. See *Board of Ed. v. Zando, Martin & Mistead, Inc.*, 390 S.E.2d 796, 799 (W. Va. 1990). That is West Virginia’s prerogative. The problem arises when West Virginia seeks to apply its own law to claims that arise exclusively in other states – states that have rejected pure joint and several liability as fundamentally unfair to defendants. See, e.g., *Teepak, Inc. v. Learned*, 699 P.2d 35, 39 (Kan. 1985) (“There is nothing inherently fair about a defendant who is 10% at fault paying 100% of the loss, and there is no social policy that should compel defendants to pay more than their fair share of the loss.”).²³

²³ This Court recently granted review in *Norfolk & Western Railway Co. v. Ayers*, Nos. 92-C-5829, 93-C-7004, 93-C (Cir. Ct. Kanawha Cty.,

Joint and several liability is just one example; there are countless other aspects of product-liability law and policy that differ substantially from state to state. *See* Robert Rabin, *Federalism and the Tort System*, 50 Rutgers L. Rev. 1, 9-10 (1997) (describing conflicting state policy choices regarding premises' owners liability, comparative fault, liability for emotional distress, and foreseeability). West Virginia should not be permitted, through mass proceedings like the one approved below, to impose its policy preferences on thousands of claims with no meaningful connection to the state. Whatever efficiencies might result would be far outweighed by the cost to fundamental principles of federalism. *See In re Bridgestone/Firestone*, 288 F.3d at 1020 ("Differences across states may be costly for courts and litigants alike, but they are a fundamental aspect of our federal republic and must not be overridden in a quest to clear the queue in court.").

III. IMMEDIATE REVIEW BY THIS COURT IS BOTH APPROPRIATE AND NECESSARY.

The fact that one or a few state courts have adopted a legal standard that conflicts with the law in other courts does not always warrant immediate Supreme Court review. But this case does. In combination, the two holdings below – allowing mass aggregation of claims without any review for commonality and potential prejudice, and allowing for wholesale application of West Virginia law – mean that a single state jurisdiction may become the repository for enormous numbers of cases arising throughout the nation. Indeed, West Virginia is well on its way to becoming just such a magnet for mass filings – making it increasingly unlikely that other states will ever face the same issues raised here. Under these circumstances, even a single outlier state can have nationwide impact, and even a relatively one-sided con-

W. Va.), *cert. granted*, __ U.S. __, 122 S. Ct. 1434 (2002) (No. 01-963), in part to consider the closely related question of whether West Virginia properly applies its own state-law rule of joint and several liability to claims arising under the Federal Employers' Liability Act.

flict requires resolution by this Court.

The two precise questions raised by petitioners are fully ripe for review by this Court. The Supreme Court of West Virginia has approved a standardless aggregation of thousands of claims for trial without any inquiry into commonality or potential prejudice, and it has decided to apply West Virginia law without engaging in a *Phillips* choice-of-law analysis. These two questions are cleanly and squarely presented by the holdings of the West Virginia Supreme Court, and no further factual development is required. And though petitioners have made every effort to obtain relief from the West Virginia courts, the West Virginia Supreme Court has held that it will not revisit these two questions, App. 18a, leaving review by this Court as the only remaining avenue for protection of petitioners' fundamental rights.

There is no question but that the decision below is a "final" decision over which this Court has jurisdiction under 28 U.S.C. § 1257. A petition for a writ of mandamus or a writ of prohibition filed before the highest court of a state is a "distinct lawsuit that is 'fully and finally determined' even if 'further proceedings are to be had in the lower court.'" *Board of Educ. v. Super. Ct.*, 448 U.S. 1343, 1345-46 (1980) (quoting *Fisher v. Dist. Ct.*, 424 U.S. 382, 285 n.7 (1976)); see also *Madruga v. Super. Ct.*, 346 U.S. 556, 557 n.1 (1954) ("The State Supreme Court's judgment finally disposing of the writ of prohibition is a final judgment reviewable here under 28 U.S.C. § 1257.").

Finally, though interlocutory review is generally disfavored as a prudential matter, that presumption does not apply when postponing review might be the equivalent of denying review altogether – when, that is, "crucial collateral claims" might be lost if they are not reviewed immediately. *Mathews v. Eldridge*, 424 U.S. 319, 332 (1976); see also *Local 438, Constr. & Gen. Laborers' Union v. Curry*, 371 U.S. 542, 550 (1963). This is just such a case.

Post-trial review of mass aggregations is effectively unavailable, as the “paucity of appeals challenging trial settings of multiple [consolidated] claims” attests. *In re Ethyl Corp.*, 975 S.W.2d at 610-11. Given the enormous potential liability that mass aggregations pose for defendants, combined with scrutiny from financial markets, aggregated proceedings exert powerful pressure on defendants to settle even meritless cases. Aggregation may raise the stakes of litigation to the point where a defendant simply cannot risk trial, regardless of the merits, thus opening the door to what are effectively “blackmail” settlements. “The risk of facing an all-or-nothing verdict presents too high a risk, even when the probability of an adverse judgment is low.” *Castano v. Am. Tobacco Co.*, 84 F.3d 734, 746 (5th Cir. 1996); see also *In re Rhone-Poulenc Rorer, Inc.*, 51 F.3d 1293, 1298-99 (7th Cir. 1995) (same); Fed. R. Civ. P. 23(f), advisory committee notes (providing for interlocutory review of class certification decisions because certification “may force a defendant to settle rather than incur the costs of defending a class action and run the risk of potentially ruinous liability”).

The settlement pressure exerted by mass aggregation is especially pronounced when – as in this case – the underlying claims assert potentially serious personal injuries. In *In re Chevron*, which involved an aggregation of 3,000 personal-injury claims against a single defendant, the Fifth Circuit concluded that the decision to aggregate would “probably not [be] effectively reviewable after trial. The pressure on the parties to settle in fear of the result of a perhaps all-or-nothing . . . trial is enormous.” 109 F.3d at 1022. Outside observers increasingly agree. See, e.g., *The Fairness in Asbestos Compensation Act of 1999: Legislative Hearing on H.R. 1283 Before the House Committee on the Judiciary*, 106th Cong. (July 1, 1999) (Prof. William N. Eskridge, Yale Law School) (“Especially in state courts, defendants in the typical [asbestos] jumbo consolidation now face an Armageddon scenario if they do not settle on terms favorable to

plaintiffs.”).

And those are just the settlement pressures exerted by the standard mass aggregation. The pressure for settlement here is made even more intense by the ever-present threat of especially Draconian measures like “punitive damages multipliers” assessed against defendants even before they are shown to have caused any injury, and findings of ultimate liability based not on trial but extrapolation from a statistical matrix. Such measures are, to put it mildly, of dubious constitutionality. But so long as they remain on the table – and the West Virginia Supreme Court has kept them there, by refusing to use its robust “supervisory” power to evaluate their permissibility – they inevitably work to extort pretrial settlements.

Indeed, all of the parties to the West Virginia litigation fully understand the coercive pressures at work. Lawyers for the plaintiffs argued against Judge MacQueen’s original small-group trial plan on the express basis that it would not impose “enough leverage on [defendants] to cause them to settle a thousand cases.” *In re Asbestos Litig.*, Civ. Action No. 00-Misc.-222 (Cir. Ct. Kanawha Cty., W. Va. March 16, 2001), Transcript of Hearing at 72-73 (statement of James F. Humphrey). The West Virginia courts themselves have relied on the certainty that the planned mass trial will provoke mass settlements – in order to explain why the mass trial will not be as hopelessly sprawling and confusing as it now appears. *See* App. 5a. It is one thing to take account of the possibility of settlements driven by external factors in planning an aggregated trial. But it is something else entirely when the anticipated settlements are driven by the mass trial proceeding itself, so that the coercive nature of a mass trial becomes its own justification.

As a practical matter, this may well be the only opportunity defendants like petitioners will have to bring their claims before the Court. It may also be the Court’s best opportunity to clarify the limits imposed by the Due Process Clause on mass aggregations in state courts. Under circumstances like

these, immediate review is entirely appropriate. Indeed, it is essential.

CONCLUSION

For the foregoing reasons, the petition should be granted.

Respectfully submitted,

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