No. 09-1123

In the Supreme Court of the United States

WYETH LLC, ET AL., PETITIONERS

v.

DONNA SCROGGIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

REPLY BRIEF FOR THE PETITIONERS

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Respondent devotes much of her brief in opposition to a flurry of slanted factual allegations. The issue for this Court, however, is whether the courts of appeals are in disarray on the questions whether a partial retrial limited to punitive damages is consistent with the Seventh Amendment and whether a trial court can admit the testimony of a scientific expert without first addressing the applicability of the *Daubert* factors. Respondent cannot reconcile the decisions of the courts of appeals on either question. Nor does she dispute that each question is one of enormous practical significance for civil litigants. The decision below is wrong in both respects, and this case is an excellent vehicle for consideration of the questions presented. The Court should therefore grant review and reverse the judgment below.

A. This Court Should Grant Review To Decide Whether A Partial Retrial Limited To Punitive Damages Violates The Seventh Amendment

1. The Courts Of Appeals Are Divided On The Permissibility Of A Partial Retrial Limited To Punitive Damages

As explained in the petition, for nearly eighty years, lower courts have struggled to apply the standard set out by this Court in *Gasoline Products Co.* v. *Champlin Refining Co.*, 283 U.S. 494 (1931), for determining when a partial retrial is consistent with the Seventh Amendment. See Pet. 12-18. The courts of appeals disagree, moreover, on the specific issue whether a partial retrial limited to punitive damages is permissible. Some courts of appeals have taken a broad view of the Seventh Amendment's protections and held that the issue of punitive damages is not "distinct and separable" from the issue of liability on the underlying claim, see Pet. 12-14; others have taken a narrow view and generally permitted partial retrials on punitive damages, see Pet. 14-15; and still others have focused on the extent to which the error at the initial trial actually affected other portions of the verdict, see Pet. 15-18.

Respondent does not dispute that the circuits have reached divergent outcomes on the question whether a partial retrial limited to punitive damages is consistent with the Seventh Amendment. Instead, respondent marches seriatim through the numerous decisions on the issue, see Br. in Opp. 21-29, and contends that they were "based on the facts of the cases" rather than "universal rules," *id.* at 21. But respondent makes no effort to explain what it is about "the facts of the cases" that justifies their divergent outcomes—or why it is that, in any given case, the issues of liability and punitive damages were not sufficiently intertwined to satisfy the *Gasoline*

Products standard. Even if it were true, therefore, that the cited decisions did not set out any "universal rules," the divergent outcomes in those cases, in seemingly indistinguishable factual circumstances, amply justify this Court's review.

But in any event, it is incorrect to say that the circuits' decisions in this area are somehow confined to their facts. To the contrary, while those decisions may not have expressly adopted bright-line rules (and some even abjured them), many contain broad reasoning that would appear to apply in *any* case involving a potential retrial limited to punitive damages. Specifically, at least three courts of appeals have stated, with seemingly unqualified reasoning, that liability on the underlying claim and punitive damages are interwoven issues. See, *e.g.*, *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1554 (10th Cir. 1991) (explaining that "[a] punitive damage claim * * * is part and parcel of a liability determination" and that "[p]roof of gross, willful, wanton or malicious conduct by a defendant is not separate from proof of a defendant's negligence"), cert. denied, 504 U.S. 910 (1992); *Simone* v. *Golden Nugget Hotel & Casino*, 844 F.2d 1031, 1040-1041 (3d Cir. 1988) (observing that "[t]he issues of liability and damages are interwoven warp and woof" where, "on the question of punitive damages, the jury would have to assess the conduct of the [defendant] to determine whether it acted with malice or in willful disregard of [the plaintiff's] rights"); *United Air Lines, Inc.* v. *Wiener*, 286 F.2d 302, 306 (9th Cir.) (reasoning that "[t]he question of damages is so interwoven with that of liability that the former cannot be submitted to the jury independently of the latter without confusion and uncertainty which would amount to a denial of a fair trial"), cert. denied, 366 U.S. 924 (1961). Based on the foregoing statements, there can be no real debate that those courts

would have reached a different result than the court below if confronted with the Seventh Amendment objection in this case.

In addition, there is evident disagreement concerning the correct legal standard for determining when a partial retrial is consistent with the Seventh Amendment, with some courts faithfully attempting to apply the "distinct and separable" standard from *Gasoline Products* and others focusing instead on whether an error at the initial trial "infected" other portions of the verdict (or, in the words of the decision below, on whether a partial retrial limited to punitive damages would work an "injustice"). See Pet. 15-17; Pet. App. 43a-44a. Indeed, respondent appears to endorse the latter approach when she suggests that a partial retrial limited to punitive damages would not be "unjust" simply because all of the evidence from the initial trial would be admissible. See Br. in Opp. 15, 17, 19. That approach, however, fundamentally misapprehends *Gasoline Products*, which preserved the common-law right to have the same jury decide all intertwined issues. If it were really true that a partial retrial is permissible as long as the same evidence is available, the result in *Gasoline Products* would presumably have been different, because the Court could merely have instructed that all of the evidence from the initial trial be admitted in any ensuing partial retrial. Instead, the correct inquiry under *Gasoline Products* is whether "the issue to be retried is so *distinct and separable* from the others that a trial of it alone may be had without injustice." 283 U.S. at 500 (emphasis added). The lingering uncertainty concerning the correct legal standard for evaluating Seventh Amendment challenges to partial retrials underscores the need for this Court's review.

2. *The Court Of Appeals' Decision To Grant A Partial Retrial Limited To Punitive Damages Is Erroneous*

Under the correct legal standard, the court of appeals' holding in this case that a partial retrial on punitive damages would not violate the Seventh Amendment is incorrect. Respondent conspicuously does not dispute that the issues of liability and punitive damages are here closely interwined. Nor could she do so in light of the verdict forms from the initial trial, which reflect the relatedness of the issues, see Pet. 18-19; the district court's instruction that the jury should consider the evidence from the liability phase in considering punitive damages, see Pet. 19; and the parties' repeated references to that evidence in the punitive-damages phase, see *ibid.*

Respondent instead contends (Br. in Opp. 17) only that a partial retrial limited to punitive damages would not violate the Seventh Amendment because "the jury would * * * be free to draw all permissible inferences from the evidence." But that contention is premised on the assumption that the jury would not be instructed to presume that the evidence establishes liability—an instruction that respondent would surely seek on remand. In the event of such an instruction, the second jury would effectively be encouraged to conclude that Wyeth had acted with malice, and it would be deprived of the opportunity to conclude that Wyeth provided adequate warnings of the risk of cancer in the first place (and therefore should not be liable for punitive damages). See DRI Br. 13; WLF Br. 18-19, 21-22. And even in the absence of such an instruction, a partial retrial limited to punitive damages would lead to precisely the "confusion and uncertainty" of which this Court warned in *Gasoline Products*, in light of the close relation between the issues of liability and punitive damages. 283 U.S. at 500.

Respondent suggests (Br. in Opp. 17) that it is irrelevant to the analysis that the amount of punitive damages must bear a reasonable relationship to the amount of compensatory damages, because that requirement is a purely legal one that does not "guid[e] the jury's evaluation." The key point, however, is not that the jury must have the amount of compensatory damages in front of it in order to determine the amount of punitive damages—although it arguably should, as respondent does not seriously dispute. *See ibid.* Instead, it is that this Court's jurisprudence on the relationship between compensatory and punitive damages confirms that the issue of punitive damages is not "distinct and separable" from the issue of liability. See DRI Br. 6-7. The Court should grant review and hold that, under the rule of *Gasoline Products*, a partial retrial limited to punitive damages is inconsistent with the Seventh Amendment.[1]

3. The Permissibility Of A Partial Retrial Limited To Punitive Damages Is An Important And Recurring Issue That Warrants This Court's Review In This Case

Respondent does not dispute that the issue of the permissibility of a partial retrial limited to punitive damages frequently recurs in modern civil litigation; indeed, as the petition makes clear, it has recurred multiple times even in individual circuits. See Pet. 11-18. Nor

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[1] Contrary to respondent's insinuation (Br. in Opp. 18-19), the validity of partial retrials under the Seventh Amendment has nothing to do with the propriety of bifurcation. Bifurcation guards against prejudice arising from the order of proof before a *single jury*; the Seventh Amendment prohibition against partial retrials guards against the unfairness of having *separate juries* decide inextricably intertwined issues.

does respondent dispute that the permissibility of a partial retrial also arises regularly in a variety of other contexts. See Pet. 21-22.

Instead, respondent suggests (Br. in Opp. 14-15) that this case is a poor vehicle for further review because it arises in an interlocutory posture. Where an alleged Seventh Amendment violation is involved, however, the injury for which relief is sought is being forced to submit to further proceedings in derogation of the right to a jury trial—an injury that can be prevented only through immediate review. Accordingly, this Court has repeatedly granted certiorari to consider Seventh Amendment issues in an interlocutory posture, including in *Gasoline Products* itself. See, *e.g.*, *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 422 (1996); *Dimick* v. *Schiedt*, 293 U.S. 474, 486 (1935); *Gasoline Products*, 283 U.S. at 496-497. This Court has even ordered pretrial writs of mandamus to prevent interference with the Seventh Amendment right. See *Dairy Queen, Inc.* v. *Wood*, 369 U.S. 469, 470 (1962); *Beacon Theatres* v. *Westover*, 359 U.S. 500, 510 (1959). And there would be no value in waiting to grant review until after any subsequent retrial, both because a retrial would not develop the relevant record in any meaningful way and because a retrial would waste judicial resources in the event the Court were to hold that a partial retrial limited to punitive damages is unconstitutional. This case constitutes an excellent vehicle for consideration of the issue, and the Court should grant review on it here.

B. This Court Should Grant Review To Decide Whether A Trial Court Can Admit The Testimony Of A Scientific Expert Without Expressly Addressing The Applicability Of The 'Daubert' Factors

1. The Courts Of Appeals Are Divided On The Correct Approach To The Application Of The 'Daubert' Factors

a. As explained in the petition, since this Court's decision in *Daubert* v. *Merrell Dow Pharmaceuticals*, 509 U.S. 579 (1993), the courts of appeals have taken divergent approaches on the extent to which they require trial courts to address the applicability of the *Daubert* factors, with some circuits requiring specific analysis of the *Daubert* factors and detailed findings of fact and others rejecting such requirements. See Pet. 23-26.

Respondent concedes (Br. in Opp. 37) that the courts of appeals impose different requirements on trial courts as they go about the process of applying *Daubert*. But respondent contends (*ibid.*) that any conflict "has no bearing on this lawsuit" because the outcome would be the same in any circuit. That contention lacks merit. To take but one example, in the Fifth Circuit, a district court is required to "decide whether the factors discussed in *Daubert* are appropriate, use them as a starting point, and then ascertain if other factors should be considered." *Hathaway* v. *Bazany*, 507 F.3d 312, 318 (5th Cir. 2007). In this case, none of the lower courts made any effort to analyze the *Daubert* factors: the magistrate judge simply cut and pasted a recitation of those factors from another opinion, without explaining why those factors are inapplicable in this case. Compare Pet. App. 117a (magistrate judge's order) with *id.* at 127a (district court order in earlier case); see also *id.* at 27a-31a (court of appeals opinion). Where, as here, a trial court pays lip service to the *Daubert* factors but fails to

apply the factors or explain why they are inapplicable, an appellate court cannot meaningfully review the trial court's ruling on the admissibility of expert testimony. See DRI Br. 20. Because the trial court in this case failed to conduct a sufficient analysis under the standard of the Fifth Circuit—or the similar standards of the Ninth and Tenth Circuits, see Pet. 24-25—the choice of standard would be outcome-dispositive here, and this case is an ideal vehicle for resolution of the inconsistency in the circuits' approaches.

b. Respondent contends at length (Br. in Opp. 31-36) that the lower courts correctly held that the testimony of her expert, Dr. Elizabeth Naftalis, was admissible. Yet respondent, like the lower courts, makes no effort to explain why that testimony satisfies the four *Daubert* factors: *viz.*, whether Dr. Naftalis's technique can be and has been tested; whether it has been subjected to peer review and publication; whether it has a known or potential rate of error and standards exist to control its operation; and whether it enjoys general acceptance within a relevant scientific community. See 509 U.S. at 593-594. Nor does respondent make any effort to explain why the *Daubert* factors are inapplicable in this case.

Instead, respondent argues (Br. in Opp. 32) that, "[b]ecause [petitioners] conceded the reliability of differential diagnosis, there was no need for the courts to write about each *Daubert* factor in explaining why differential diagnosis is reliable." In so arguing, however, respondent misses the point. The issue for purposes of *Daubert* is not whether differential diagnosis is a reliable technique in the abstract; rather, it is whether differential diagnosis is reliable *as applied to breast cancer.* Petitioners conceded below that differential diagnosis is generally accepted where the potential causes of a disease are known, but contended that it is not where, as

here, they are largely unknown. See Pet. 27 n.5. Lower courts have consistently recognized that distinction and excluded expert testimony in the latter situation. See *ibid.* (citing cases). And Dr. Naftalis's own testimony amply confirms that differential diagnosis, as applied to breast cancer, does not satisfy *any* of the four *Daubert* factors. See Pet. 28.[2]

Respondent nevertheless asserts (Br. in Opp. 31-34), again without reference to the *Daubert* factors, that differential diagnosis is reliable to determine whether petitioners' medicines *promoted the growth* of respondent's breast cancer. By focusing on "promotion," respondent suggests (*id.* at 11) that all that Dr. Naftalis needed to do was to exclude the possibility that respondent's own hormones promoted the growth of her breast cancer—with the implication that, because respondent was suffering from menopausal symptoms caused by low hormone levels, her own hormones could not possibly have done so. Yet respondent ignores the ample evidence that even symptomatic women develop hormone-dependent cancer; that doctors do not know what causes them to do so; and that doctors do not actually use differential diagnosis to determine the cause of breast cancer; and that differential diagnosis is therefore unreliable as applied in

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[2] Respondent notes (Br. in Opp. 34) that, in the petition for certiorari, Dr. Naftalis's trial testimony was incorrectly cited as "*Daubert* Tr." rather than "Tr." That citation error, however, is as irrelevant as it was inadvertent. In her trial testimony, Dr. Naftalis made concessions confirming that differential diagnosis, as applied to breast cancer, does not satisfy the *Daubert* factors. See Pet. 28. And respondent does not dispute that the trial testimony was materially identical to the evidence submitted at the *Daubert* hearing, which included several prior depositions of Dr. Naftalis. See D. Ct. Dkt. 114, Exs. 1-52.

this context. See, *e.g.*, D. Ct. Dkt. 114, Exs. 1-52; D. Ct. Dkt. 201, at 8-15.

In any event, respondent's lengthy excursus on whether the lower courts properly admitted Dr. Naftalis's testimony should not distract from the fact that the lower courts failed to conduct a sufficient *Daubert* analysis. This Court should grant review and hold that, at least in a case involving the testimony of a scientific expert, a trial court must address the applicability of the *Daubert* factors before discarding those factors and relying on other factors in the reliability analysis.

2. The Correct Approach To The Application Of The 'Daubert' Factors Is An Important And Recurring Issue That Warrants This Court's Review In This Case

Finally, respondent does not dispute that the *Daubert* issue, like the Seventh Amendment issue, is an important and recurring one. The admissibility of expert testimony takes on particular significance in multidistrict litigation, where, as here, a single *Daubert* ruling on a critical issue such as causation can have a potentially case-dispositive effect on thousands of cases. This Court has not provided substantial guidance concerning how trial courts should go about the process of applying *Daubert*. And that is precisely the sort of practically significant issue on which the Court's guidance is sorely needed. The Court should grant review on the *Daubert* issue, as well as the Seventh Amendment issue, and bring much-needed consistency to the law in these vital areas.

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The petition for a writ of certiorari should be granted.

Respectfully submitted.

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