IN THE SUPREME COURT
OF THE STATE OF WASHINGTON

KERRY L. ERICKSON, MICHELLE M. LEAHY, RICHARD A. LEAHY, and JOYCE E. MARQUARDT,

Petitioners,

vs.

PHARMACIA LLC, a Delaware limited liability company, f/k/a Pharmacia Corporation,

Respondent.

No. 1031351
(COA No. 83287-5-I)

REPLY IN SUPPORT OF MOTION FOR ACCELERATED REVIEW

Monsanto does not deny that accelerated review is urgently needed to provide guidance to the lower courts in the numerous pending cases raising the identical issues presented here. Indeed, Monsanto's response brief (at 13) "ultimately takes no position on, and defers to the Court on the proper resolution of, petitioners' motion for acceleration." Nor does the company claim that it would suffer prejudice from accelerated review or identify any other considerations counseling against it. The motion thus effectively stands unopposed.

Monsanto nevertheless mistakenly contends (at 2) that this Court has not previously granted accelerated review "in a money-

judgment case like this." But, as the company acknowledges, the Court has broad discretion to "set *any* review proceeding for accelerated disposition." Resp. Br. 6–7 (quoting RAP 18.12 (emphasis added)); *see also* RAP 18.8(a) (authorizing the Court to "waive or alter" any deadlines). This Court and the court of appeals have thus granted accelerated review in a gamut of cases ranging from zoning issues to landlord-tenant disputes. *See, e.g.*, *Nyman v. Hanley*, 198 Wn.2d 72, 491 P.3d 974 (2021) (eviction case); *In re Est. of Rehwinkel*, 71 Wn. App. 827, 862 P.2d 639 (1993) (dispute over a will); *Hanno v. Neptune Orient Lines, Ltd.*, 67 Wn. App. 681, 838 P.2d 1144 (1992) (claim for personal injuries); *Murray Publ'g Co. v. Malmquist*, 66 Wn. App. 318, 832 P.2d 493 (1992) (claim for tortious interference with a private contract); *Jones v. Chen*, No. 36522-3-I, 1996 WL 290929, at *1 (Wash. Ct. App. 1996) (action to enforce a private settlement). And, contrary to what Monsanto says, that includes cases for money damages. In *Marine Power & Equipment Co. v. Industrial Indemnity Co.*, for example, the Court granted accelerated review in a $30 million insurance dispute. 102 Wn.2d 457, 687 P.2d 202 (1984).

In any event, our motion for accelerated review isn't based primarily on private costs, but on the enormous *public* expense

required to resolve the Sky Valley cases one at a time. As Monsanto previously told this Court, these cases "involve enormous records, and many of the arguments … are record-intensive and will require substantial work" by the courts to resolve. Mot. for Discretionary Review, *Long v. Pharmacia LLC*, No. 101592-5, at 13 (Wash. filed Jan. 3, 2023) (Attach. 1); *see also id.* at 8 (noting that the records in these cases comprise tens of thousands of pages each). The lower courts deserve an authoritative decision on these issues now.

Even setting aside the considerable costs for the Washington judiciary, this case involves an issue of significant public concern: the poisoning of children and teachers at a public school by forever chemicals. If Monsanto gets its way, these innocent plaintiffs—who suffer from serious injuries because of Monsanto's conduct—will not only be denied any relief, but may be forced to pay nearly $2 million in costs out of their own pockets. Monsanto does not deny this. Moreover, the case raises an important constitutional challenge to the Washington Product Liability Act, with the potential to affect all future product-liability claims. This Court often grants acceleration in cases involving constitutional issues or the validity of legislative enactments. *See, e.g.*, *King Cnty. v. Taxpayers of King Cnty.*, 133 Wn.2d 584, 949 P.2d 1260 (1997); *Eyman v. Wyman*, 191

Wn.2d 581, 424 P.3d 1183 (2018); *Huff v. Wyman*, 184 Wn.2d 643, 361 P.3d 727 (2015); *HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wn.2d 612, 121 P.3d 1166 (2005).

Monsanto's remaining argument (at 2) is that the plaintiffs' motion for acceleration is "inconsistent with the public representations of their counsel." But there is no inconsistency. The statements by the plaintiffs' counsel that Division One's decision, even if unreviewed, "gives the trial judges guidance on how to try these cases moving forward" and "simplifies [future] trial[s]" are just common sense. The decision, after all, is binding precedent that resolves several key disputes common to the Sky Valley cases. Until this Court weighs in, however, the judges in those cases can have no assurance that this decision was the correct one. Division One's guidance is thus at least as likely to lead the courts astray as it is to aid them.

There is also nothing inconsistent about counsel's statement that the plaintiffs prevailed on roughly "90% of the issues Monsanto complained about in its appeal." Resp. Br. 9. While that statement is true, it does nothing to diminish the importance of the three critical issues on which Monsanto did prevail and on which the plaintiffs have petitioned for review. Monsanto's own public

statements confirm that all three of these issues have "cross-cutting effects on the SVEC injury litigation, including past and future cases, due to the inadmissibility of plaintiffs' key expert exposure opinions, the reliance of plaintiffs' causation experts on this testimony, and the lack of punitive damages available based on post-sale failure to warn." Amanda Bronstad, *Monsanto: Reversal of $185M Jury Award Could Wipe Out Other PCB Verdicts*, Law.com, May 17, 2024, https://perma.cc/H5WT-RU3G. As Monsanto told this Court, these issues "substantially impact every pending SVEC case." Mot. for Discretionary Review, *Long v. Pharmacia LLC*, No. 101592-5 at 18 n.10.

The trial courts, too, have repeatedly acknowledged that the decision in *Erickson* will impact past and future Sky Valley trials. Judge Ryan noted that resolution of this case "likely determines the outcome on several issues" in the other cases. Likewise, Judge Rogers concluded that *Erickson* would impact other cases, noting that he was "frustrated" at the slow pace of appellate review. Emergency Mot. for Stay Pending Appeal, *Grant v. Pharmacia LLC*, No. 21-2-14304-7, at 10, 17–18 (King Cnty. Super. Ct. filed Apr. 24, 2024) (Mot. for Accelerated Review, Attach. 1). Indeed, Monsanto concedes (at 10–11) that Division One's reliance on the WPLA's

statute of repose will require retrials at least on the statute's applicability to the facts here. And it has publicly argued that the verdicts in *Bard* and five other cases improperly applied Missouri law. Rachel Riley, *Monsanto Tries to Flip $1B PCB Losses as Plaintiffs Press On*, Law360, June 4, 2024, https://perma.cc/29MF-4TEC. It is Monsanto—not the plaintiffs—that is being inconsistent.

On the issue of Coghlan's testimony, Monsanto points out (at 11–12) that Division One invalidated just two of his three methodologies for measuring the concentration of PCBs at Sky Valley. But Monsanto has publicly argued that Coghlan's disallowed methodologies were "central to the seven other adverse verdicts in this litigation and Monsanto will seek their reversal." Bronstad, *Monsanto: Reversal of $185M Jury Award*. It is thus not surprising that Monsanto (at 12 n.7) pointedly refuses to "concede that Coghlan's remaining methodology is sufficient evidence of petitioners' potential exposure levels at SVEC." Indeed, the company has already asked Judge Rogers to set aside the judgment in *Bard v. Pharmacia* based on Division One's rejection of Coghlan's methodology and the post-sale failure to warn claims. And it has announced its intent to "pursue the reversal of the seven other past

verdicts" on the same grounds. Riley, *Monsanto Tries To Flip $1B PCB Losses*.

At a minimum, Monsanto's argument illustrates that, as it told the trial court in *Grant*, "there is a significant dispute" over the impact of the court of appeals' decision on other Sky Valley cases. Hr'g Tr., *Grant v. Pharmacia LLC*, No. 21-2-14304-7, at 679–80 (King Cnty. Super. Ct.) (Attach. 2). Unless this Court intervenes, courts in every Sky Valley case will have to decide whether the exclusion of five minutes' worth of Coghlan's testimony requires a seven-week retrial. The ensuing uncertainty and chaos in the lower courts can only be avoided by this Court's review. As Judge Rogers told the parties, "the issue of Coghlan"—especially in light of Judge Dwyer's dissent—is thus "an obvious issue that I imagine the Supreme Court will be considering." *Id.* at 697.

CONCLUSION

The Court should grant accelerated review of the petition.

July 31, 2024

Respectfully submitted,

/s/ Deepak Gupta

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I certify under penalty of perjury under the laws of the state of Washington and the United States that the foregoing is true and correct.

July 31, 2024

/s/ Deepak Gupta
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