NO. 07-257

IN THE

Supreme Court of the United States

CONTINENTAL CARBON CO. AND CHINA SYNTHETIC RUBBER CORP.,

Petitioners,

v.

ACTION MARINE, INC. ET AL.,

Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

1. Whether this Court should combine aspects of the comparability guidepost articulated in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), with the reprehensibility guidepost that this Court has called the most important indicium of the validity of a punitive damages award?

2. Whether this Court should reverse its settled precedents by adopting a constitutional maximum ratio of punitive to compensatory damages of 1:1 whenever the compensatory award is deemed "substantial," regardless of the reprehensibility of defendants' misconduct, particularly when that misconduct was fraudulent and hidden and was advanced by litigation misconduct that the lower court found prejudiced the capacity to demonstrate the fullest measure of reprehensibility?

3. Whether, in applying the comparable penalties guidepost, a reviewing court must ignore state legislative judgments about the appropriate potential fines for comparably egregious misconduct?

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BRIEF FOR RESPONDENT IN OPPOSITION

Respondents Action Marine, Inc., John Tharpe, Owen Ditchfield, and the City of Columbus, Georgia ("Respondents") respectfully request that this Court deny the petition for writ of certiorari that seeks review of the decision of the United States Court of Appeals for the Eleventh Circuit in this case.

STATEMENT OF THE CASE

Petitioners have adopted a strategy of disparaging their underlying liability – liability not contested in any question presented – in order to obtain relief from punitive damages. That ploy should not work. Petitioners purvey the misguided notion that the jury and two reviewing courts held them liable despite their use of "best available pollution-control technology," despite their having "identified and remedied the causes of emissions when they occurred," and despite their having caused only "tiny amounts" of pollution deposits in all but one instance. Pet. at 3-6. That is not what the jury found and its findings are not subject to reexamination in this Court. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 439 n.12 (2001); U.S. Const. amend. VII.

Contrary to the tale Petitioners spin, this is a story of companies that knew that they had inadequately guarded against harmful emissions. They denied that pollution affecting Respondents and others came from their plant, despite knowing otherwise. They chose not to remediate because remediation would lessen – not eliminate, but lessen – profits. They intentionally harmed people. They hid documents that revealed their extensive knowledge of problems and then, from the filing of this case through trial and beyond, engaged in litigation misconduct for which they were separately sanctioned.

Petitioners' portrayal of the record, which Respondents describe in Part I (reasons for denying certiorari), continues the pattern of denial and obfuscation that has characterized their original misconduct. Their unclean hands should not be washed by this Court.

REASONS FOR DENYING THE PETITION

I. Petitioners Failed to Advise this Court of the Full Depth of Their Misconduct, the Extent to Which Their Actions Were Compounded by Litigation Misconduct at Trial, or That the Documents They Failed to Produce until after Trial Would Have Supported a Larger Award

Federal courts do not lightly conclude that particular acts of misconduct fall at the extreme end of the reprehensibility scale. Judges see a broad range of misconduct, civil and criminal, that makes them more likely to be blasé rather than shocked by new instances of egregious misconduct.

Accordingly, when both the District Court and the Court of Appeals find that a defendant engaged in a "pattern of intentional misconduct . . . leading to repeated damage to Plaintiffs' properties," that the defendant responded to complaints over a five-year period with subterfuge, and that the defendant's misconduct was "undeterred by both the prospect and reality of litigation," Pet. App. at 24a-25a, those courts' determinations should be considered earnestly made, and should be credited as reflecting a troubling record. The courts' statements ought to be treated as more credible than the disparagements of losing parties, who conveniently elide the parts of the record that are at odds with the tale they seek to concoct. In fact, reading Petitioners' narrative of the record, one would be hard-pressed to understand why the courts found any

misconduct at all, let alone the "exceedingly reprehensible" actions and inactions the Eleventh Circuit concluded had taken place. Pet. App. at 25a.

The massive trial record establishes a strategy of denial, deception, and subterfuge that permeated Petitioners' treatment of the Respondents and that continued through the trial and beyond. No relief from the jury's proper verdict, the trial court's affirmation of that verdict, and the careful and searching review by the Eleventh Circuit that confirmed its propriety should lie in this Court.

Petitioners' disregard of the record begins with factual findings, specially made by the jury, and not challenged here: that "clear and convincing evidence" demonstrated that Petitioners' harmful acts "showed willful misconduct, malice, fraud, oppression" or conscious indifference to the consequences of its actions, Jury Qs 4, 9, 14, 19 (a finding necessary, under governing Georgia law, to permit liability for punitive damages, O.C.G.A. §51-12-5.1(b) (2000)); that Petitioners acted in bad faith, Jury Qs 5, 10, 15, 20 (a finding prerequisite to an award of attorney fees under Georgia law, O.C.G.A. §13-6-11 (2006 Supp.)); and that Petitioners acted with "specific intent to harm the plaintiffs." Supp. Verdict Form Q 22 (a prerequisite to liability for punitive damages greater than $250,000, made in a supplemental trial under Georgia's bifurcated system of trying punitive damages claims, O.C.G.A. §51-12-5.1(f), (g)(2000)).

Especially problematic to Petitioners, who argue about the state of the record, is that the trial court, in sanctioning them post-appeal for their contemptuous abuse of discovery, found that their bad faith "prejudiced [Respondents] in their presentation of evidence to the jury, *and on appeal*." Sanctions Op. at *19, App. A, *infra*,

35a[1] (emphasis added). Petitioners withheld evidence germane to assessing the reprehensibility of their conduct and evidence directly related to misconduct they continue to soft-peddle. *See, e.g.,* Sanctions Op. at *5-6, App. A, *infra*, 10a-11a (information related to "knowledge of the discharge of carbon black dust on the surrounding community," the causes of the discharges, remedies for the discharges, delays in implementing remedies, and the costs involved in correcting operational and environmental problems compared to delays in making the corrections); *compare, e.g.,* Pet. at 4 ("Nevertheless, *uncontradicted evidence*[2] showed that [Petitioners] identified and remedied the causes of emissions when they occurred') (emphasis supplied). Perhaps anticipating this very scenario, the lower court, noting Petitioners' intent to gain advantage on appeal, noted that their "strategy to withhold evidence until the post-trial stages would enure to them great benefit." Sanctions Op. at *15, App. A, *infra*, 27a.

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[1] The Sanctions Opinion, *Action Marine, Inc. v. Continental Carbon, Inc.*, __ F.R.D. __, 2007 WL 2301897 (M.D. Ala. Aug. 9, 2007), is reprinted in Appendix A, *infra*, 1a.

[2] This remarkable misrepresentation of the record was contradicted by evidence that discharges often occurred at night, when they could not be visibly detected. The capacity of the bag filters designed to capture emissions and prevent their discharge was known to be inadequate and decisions were made not to spend the money that would have addressed that inadequacy. Petitioners investigated the complaints of discharge, concluded that they were valid, and Petitioner still denied that they were the cause, continuing to do business just as before. (R. 1368-70, 1692; Dkt. 268, Ex. A, pp. 5-20, 413, 425; Dkt. 268, Ex. C, pp. 19, 126-27, 169, 291-92, 369, 410-11, 414-15, 463, 628; PX 1,3, 4, 5, 6, 7, 8, 9, 10, 11, 13, 14, 15, 17, 23, 43, and 172-6).

Petitioners emphasize the fact that "Several of the properties for which the City sought recovery tested negative for carbon black," and that the City "recovered damages to remediate these properties." Pet. at 5-6. Petitioners' suggestion of injustice is supported by only one thread in a strong cloth of evidence.

Respondents conducted random sampling during the life of this case. E.g., PX 104B-8, 9, 10, 11, 13, 14, 18, 19, 21, 22, 27-30, 34, 35, 42-45, 60-62, 65, 67, 69-71, 73, 74. [NOTE: These are all page numbers in 1 composite exhibit, 104B.] One sample collected at the Rigdon Park baseball field and one at Memorial Stadium did not yield positive laboratory results for carbon black (PX 104-B-21 and 68); Respondents did not collect a sample from the Whopper softball field. (R. 1447). This is the thread on which Petitioners' suggestion hangs.

But the Rigdon Park ball field lies directly between the Rigdon Park pool and playground (same property). (R. 720, 726, 1233). Both the pool and playground yielded positive samples. (PX 104-B-13, 69, 70, 71; PX 109-75). Similarly, the Memorial Stadium and Whopper softball field facilities share a parking lot with the Civic Center and Golden Park. (R. 1009-10, 1219-20, 1427,1465). Petitioners and Respondents both collected positive samples at the Civic Center and Golden Park and additional scientific evidence in the form of air-modeling data placed each facility in the fallout area. (PX 61; PX 104-B-11, 19, 65, 67; PX 144; R. 369-73, 374-75, 877-90, 928, 1353, 1373, 1785-86, 1816, 1821-22).[3] Abundant

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[3] Reviewing the laboratory reports, photographs, and data generated by Respondents' expert, Petitioners' own expert conceded at trial it was "fine work." (R. 1824-1826). While Respondents introduced expert testimony and evidence relating to air emission modeling, Petitioners offered none. (PX 144; R. 877-78, 891-92, 909).

evidence supports the findings Petitioners decry but do not challenge.

Similarly, Petitioners suggest that they "identified and remedied the causes of emissions when they occurred," Pet. at 4; "built new plant facilities" that "pretty much solved" problems, Pet. at 4; and did all this "before judgment was entered." Pet. at 13, n.4.

Although Petitioners certainly identified equipment and operational problems that were causing carbon black emissions, they did not remedy any of those problems or replace any equipment until after this case was filed. Even then, the bulk of their equipment problems were not addressed until after the jury returned its verdict and after Petitioners were confronted with the prospect of an injunction requiring the work. In delaying, corporate decisionmakers ignored the pleas of plant managers to spend the money necessary to avoid the harm that all of them knew was occurring, betting the health of the community against their corporate bottom line.[4]

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[4] Petitioners assert that "there was no evidence that the carbon black emissions posed a health risk to the community," Pet. at 5 n.3, but do not challenge the findings otherwise that are well-supported in the record. According to Petitioners' own Material Data Safety Sheets, the Occupational Safety and Health Administration (OSHA) classifies carbon black as "hazardous under OSHA regulations"; the U.S. National Institute on Occupational Safety and Health has adopted a air concentration limit for exposure to polyaromatic hydrocarbons (PAHs) in carbon blacks with specified PAH levels, "[a]s some PAHs are possible human carcinogens"; and IARC, the International Agency for Research on Cancer, has classified both carbon black and carbon black extracts as "possibly carcinogenic to humans." (PX 32-8, 32-17).

The Phenix City facility has been in operation for over twenty years. (Dkt. 175-1). The original production unit (Unit One) was constructed in 1968. (PX29). In 1998, by adding a second production unit (Unit Two), Petitioners doubled annual carbon black production capacity to 200 million pounds. (Dkt. 268, Exhibit C, p. 2) (R. 74, 224). Even before Petitioners doubled production capacity, City of Columbus officials and local residents had complained to Petitioners about carbon black pollution and damages. (PX2). Although Petitioners publicly denied the problems, and even lied to Respondent Action Marine by advising Respondent that samples taken from Respondent's property did not contain carbon black, Petitioners admitted internally that Unit One was in deplorable condition when the plant expansion began. (R. 291-292, 322). Plant manager Barry Nicks stated in an e-mail: *"Damn those who let it get in such a disgraceful state."* (R. 322; PX3) (emphasis added).

Within one year after the additional operating unit came on line Petitioners were aware that their facility was polluting the environment and damaging properties. (PX1, 2, 5, 6, 7, 8, 11, 12, 19, 22, 153; R. 258; Dkt. 268, Exhibit A, p.14; Dkt. 268, Exhibit C, p. 2 (Continental Carbon Co. (hereinafter "CCC") president, Kim Pan, admitting knowing since 1999 of bag filter defects)). In various internal documents, Petitioners exhibited knowledge that reparable manufacturing defects and deficiencies at their facility were causing harm. (PX 5; R. 188, 369, 390-91, 399-400, 412-13, 415, 425, 426, 459-60, 463, 473). Petitioners specifically acknowledged that repeated bag filter failures and over-pressurization of their production system were harming the environment and the Respondents. (Dkt. 268, Exhibit A, pp. 8-11, 14).

One undated internal Request for Expenditure ("RFE"), going from the local plant to corporate

decisionmakers, detailed the history of bag filter failures and carbon black releases:

> *Phenix City has experienced operational problems with the bag filter system since Unit 2 was commissioned in 1999.* The filter media fails . . . *causing* unnecessary unit down time, operating cost, and *carbon black release into the environment.* . . . The engineering analysis points to basic over-loading of the bag filter system (commonly referred to as: high air/cloth ratio).

(PX9) (emphases added). In this same RFE, Petitioners attributed this lawsuit to bag filter failures, admitted they were harming the environment, and evaluated civil liability in this case:

> *The frequent bag filter failure* has been a constant drain on Phenix City resources, both economically, and in human capital. . . . *Most importantly, the damage to the environment and public perception to this plant operation has a serious implication on this facility's future.* The ongoing civil class action law suit at this location can be directly attributed, in part, by this problematic bag filter system. *We must resolve this bag filter leakage problem or the existence of the plant will be in serious jeopardy.* Total liability for the civil suit can easily exceed $500K.

(PX9) (emphases added).

In one February 29, 2000 e-mail, petitioners noted:

> This recent round of problems with Unit 2 bag filters gives us enough history to know that we cannot continue via the current path. *We know that there is an inherent design problem in the filters,* and are currently suffering from another round.

(PX4) (emphasis added).

In a related February 29, 2000 e-mail to Juan Rodriguez (Petitioners' corporate trial representative), plant-level operatives noted, *"This plant is on the verge of shutting down U2 due to a lack of bags to protect the environment."* (PX4)(emphasis added).

Despite knowledge of manufacturing deficiencies and resulting pollution, corporate management refused expenditures because the "payback" (financial return) for necessary expenditures could not be recovered quickly enough. (R. 127; Dkt. 268, Exhibit C, pp. 1-2 following p. 24). In an e-mail dated October 10, 2001, employees debated whether CCC could afford *not* to take action to remedy bag filter defects. CCC plant manager Barry Nicks stated in one e-mail:

> There is something much more critical in this RFE than capital recovery. It is the avoidance of a Civil Law Suit - Class Action. *If we do not get this bagfilter under control so that is not constantly operating with some small leak up to an intolerable leak, then this plant*

> *can become just like Baytown ECI.*[5] *The payback in such a case may be really fast.*

(PX5) (emphasis added).

Rather than make repairs in 1999, 2000, or 2001, Petitioners continued to disregard environmental concerns and the well-being of Respondents. In a round of e-mails on January 17, 2002 (almost one year after the case was filed), CCC Vice President of Operations Juan Rodriguez informed Phenix City plant manager, Barry Nicks, that the company was rejecting the plant's request to fix the Unit 2 bagfilter defects, not because the expenditure would render the plant unprofitable, but because it would not satisfy the defendants' corporate policy of recouping all of the project costs within 2 to 3 years. (R. 126-27; PX13).

Mr. Nicks responded by sending an e-mail to CCC corporate engineer N.L. Lee (which he copied to Rodriguez):

> The bottom line will be that U2 will have a higher filter bag maintenance cost, . . . and (most frightening) the possibility of liability payments to the community (not budgeted). Then there is the potential that the legal side will become so visible and costly, that

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5 The Baytown, Texas ECI facility manufactures carbon black and is a direct competitor of Petitioners. (R. 159). Nicks' purpose in mentioning the Baytown plant was to scare his corporate superiors into thinking that if they did not correct their environmental problems at the Phenix City plant, they would be put out of business. (R. 414 & 415).

> the plant itself will be forced to close due to political pressures. Since the plant generated in excess of $2.0MM Gross Operating Profit for the Company's revenue from its miserable operation during the bad economy of 2001, surely there is value in keeping it operating in future years with sold out parameters, rather than having a closed chemical plant liability.
>
> From my point of view . . . how can we afford NOT TO correct the problem?"

(PX13) (emphasis added). The Unit 2 defects were not resolved before trial.

Petitioners suggest that emissions from the plant were occasional, unavoidable, reported, and promptly corrected. Randy Wangle is the former maintenance supervisor of the plant. (R1330). According to Mr. Wangle, stopping production to repair a leak was a last resort. (R1370).

Wangle testified that carbon black emissions into the environment were visible at the plant. (R1355). Wangle knew about the "chronic bag filter problems, they would bust, the air to cloth was too high," (R1359), and that filter bag ruptures released carbon black into the environment. (R1360-61).

Mr. Wangle described purposeful subterfuge to evade responsibility: carbon black leaks at night were not reported to regulators because they could not be seen by third parties. (R1368). With regulatory authority eluded, the plant ran higher production levels at night. (R1692).

Maintenance employees would not begin looking for "leaks" unless alarms kept going off "frequently within an hour's time." (R1370). Leak detection devices, called triboguards, would be cleaned and restarted without repairing the cause of the leak. (R1370). Frequently carbon black leaks at night were not repaired until morning. (R1369). Petitioners hid their misconduct under cover of night.

Mr. Wangle testified that corporate managers did not have real concern about the carbon black pollution and saw it as "more of a joke." (R. 1353-54). Management *never* stressed that safety, health, and the environment be put first, even though it "knew" that carbon black was "getting out into the environment." (R1355).

Petitioners assert that they used "best available control technology." Pet. at 3. But, in the July 5, 2005 injunctive relief order (Dkt. 295-1), the Court directed Petitioners to make capital improvements and repairs to their operating equipment. (Dkt. 295-2). The Court's Order also imposed a strict timetable to carry out upgrades, and included a schedule of dates for the Petitioners to submit progress reports. (Dkt. 295-1). Had Petitioners taken steps to make these improvements before the filing of this lawsuit or during the three years between its filing and trial, then they might well be in a position to argue their plant used best available control technology. But, the record clearly reflects that because Petitioners made no such efforts, the Court was required nearly a year after the jury's verdict to force Petitioners to take action. (R. 295-1).[6]

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[6] Petitioners' claim regarding their use of "best available control technology" has varied with the perceived exigencies of this litigation. At trial, Petitioners found it advantageous to claim they had used such technology (R. 32, 34) (opening statement), a claim implicitly rejected by the jury. But later,

Given that (1) Petitioners have not given an accurate account of the record, (2) the record reveals a company that resisted addressing a known hazard and instead adopted a pattern of subterfuge, and (3) Petitioners' dishonesty continued during the course of this litigation and beyond trial, resulting in imposition of sanctions against Petitioners post-appeal, which Petitioners have not challenged, this case provides a poor vehicle for review of any conflicts that might exist within the circuits over punitive damages.

II. The Lower Courts Are Not Confused About the Relevant Conduct That Goes Into the Reprehensibility Guideline.

Though they present no question for this Court to decide on this subject, Petitioners assert that the lower courts are in conflict regarding whether they should consider "the full spectrum of punishable conduct" when ascertaining "the degree of reprehensibility." Pet. at 9. In doing so, they ignore the State's interest in defining the misconduct deemed worthy of punitive damages. *See State Farm Mut. Auto. Ins. Co. v. Campbell,* 538 U.S. 408, 422 (2003) ("A basic principle of Federalism is that each State may make its own reasoned judgment about what

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using documents withheld from Respondents during pre-trial discovery, Petitioners offered evidence they had made repairs to the operating units (and, implicitly, to their "best available control technology"), "for the *purposes of staving off the injunctive relief* sought by [Respondents] post-trial" – part of the litigation misconduct the District Court found sanctionable post-appeal. Sanctions Op. *at* 13, App. A, *infra,* 24a (emphasis in original). Now, despite having concededly been ordered (without objection) "to replace or repair substantial parts of the Unit I bagfilter system," Pet. at 6; Pet. App. at 48a, Petitioners again claim to have used "best available control technology" in urging review of the Eleventh Circuit's findings on reprehensibility. *See id.* at 3 & 13 n.4.

conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." (citation omitted)). Moreover, they also confound two rightly separate analyses: ascertaining the degree of reprehensibility, and ascertaining appropriate damages once reprehensibility has been decided.

This Court has provided clear guidance on the question of how to determine whether the degree of reprehensibility supports the amount of punitive damages assessed. The lower courts – including the courts singled out by Petitioners – have exhibited no trouble applying it.

In *State Farm*, this Court counseled:

> We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

538 U.S. at 419.

The circuits have recognized the importance of these aggravating factors in assessing the reprehensibility determination, and no conflict exists between the circuits. *See, e.g., Action Marine, Inc. v.*

Continental Carbon Inc., 481 F.3d 1302, 1318-19 (11th Cir. 2007); *CGB Occupational Therapy, Inc. v. RHA Health Serv., Inc.*, ___ F.3d ___, 2007 WL 2390386 at *3 (3d Cir. 2007); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 153 (6th Cir. 2007); *Diesel Mach., Inc. v. B.R. Lee Indust., Inc.*, 418 F.3d 820, 839 (8th Cir. 2005); *Bains LLC v. Arco Prod. Co., Div. of Atlantic Richfield Co.*, 405 F.3d 764, 775 (9th Cir. 2005); *Rain Bird Corp. v. National Pump Co. LLC*, 144 Fed. App'x 373, 376 (Fed. Cir. 2005); and *Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63 (2d Cir. 2004). And, the Eleventh Circuit properly applied these factors in making its reprehensibility determination in this case. Pet. App. at 23a-26a.

III. Three *BMW* Guideposts – Reprehensibility, Comparability, and Proportionality – Are and Must Remain Independent

BMW establishes three independent guideposts – reprehensibility, proportionality, and comparability. Petitioners suggest that a comparative element, identical to that utilized in considering the third *BMW* guidepost (comparability), be added to the first *BMW* guidepost (reprehensibility) for purposes of determining the proportionality of the punishment to the offense, the essence of the second *BMW* guidepost. Such an approach collapses all three *BMW* guideposts into a single one in a manner that detracts from the centrality of reprehensibility as the "most important indicium of the reasonableness of a punitive damage award," and double counts the importance of the other two guideposts. *BMW of N. Am. v. Gore*, 517 U.S. 559, 575 (1996).

Equally important, it would transform the historically validated test that requires that punitive damages match the "'enormity of the offense'", *see id* (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)), into a comparison that would burden the existing process with evidence of the facts in other cases in order

to make meaningful comparisons. Punitive damages reflect the jury's "moral condemnation" of the misconduct. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). Necessarily, the determination of the level of appropriate moral outrage any given fact pattern entails is more properly a jury question. *Compare id.* at 437 n.11 (recognizing the jury's primacy in fact-sensitive punitive damage amount determinations) *with id.* at 440 (recognizing trial court's greater institutional competence in evaluating evidence material to the reprehensibility guidepost). Thus, it would be the function of the jury to make the type of novel record comparison Petitioners propose, massively complicating – and changing the historical understanding of – the punitive damage phase of the trial.

Certainly, in applying those considerations in *State Farm*, this Court did not engage in the kind of analysis Petitioners argue is constitutionally required: "compar[ing] the misconduct at issue *to the conduct in other punitive damages cases.*" Pet. at 11 (emphasis added). *See State Farm,* 538 U.S. at 419. The reason is simple: deciding whether a given case falls into a given category does not require knowledge of whether any other case falls into that category. The cases Petitioners cite apply this test without consternation and do not engage in a comparative analysis in order to assess degree of reprehensibility. *See Bains v. Arco Prod. Co.*, 405 F.3d 764, 775 (9th Cir. 2005); *Asa-Brandt v. ADAM Investor Serv., Inc.*, 344 F.3d 738, 746-47 (8th Cir. 2003); *Simon v. San Paolo U.S. Holding Co., Inc.*, 113 P.3d 63, 75-76 (Cal. 2005); *Goddard v. Farmers Ins. Co. of Or.*, 120 P.3d 1260, 1281-82 (Or. App. 2005).

Some of these cases do use a comparative analysis, but for a separate purpose, one recognized separately in this Court's decisions in *BMW* and *State Farm*: assessing the amount of damages appropriate once a degree of

reprehensibility is ascertained. For example, the court in *Planned Parenthood of Columbia/Willamette, Inc v. American Coalition of Life Activists,* 422 F.3d 949 (9th Cir. 2005), Pet. at 12, extensively discusses potentially similar cases for purposes of ascertaining the amount of damages, *id.* at 954-57, but does not engage in a similar discussion regarding degree of reprehensibility. *Id.* at 958-60.

Petitioners acknowledge that the court below considered it appropriate to engage in comparative analysis to determine the amount of an award. Pet. at 10 (quoting the court below: "'the fact that an award is significantly larger than an award in apparently similar circumstances'" could affect the analysis of how large an award should be). Petitioners fail to note, however, that the lower court found that none of the instances Petitioners had proposed for comparison were, in fact, similar to the case at hand. Pet. App. at 26a. Petitioners do not challenge that finding with regard to the cases it put before the lower court. The question of whether similarly situated parties were treated differently is not raised by this case.

Petitioners characterize the conduct for which they are being punished as "the failure to do more to prevent periodic releases of carbon black during the manufacturing process." Pet. at 11-12. *See also* Pet. at 12 ("periodic failure to prevent carbon black releases.") The lower courts characterized Petitioners' conduct differently and eloquently.

The District Court noted, "[t]he evidence before the jury established a pattern of intentional conduct on the part of [Petitioners] leading to repeated" trespasses. Pet. App. at 43a-44a. "This misconduct included bolstering profits rather than remedying known defects . . . and a less than honest approach to their dealings" with injured parties. Pet. App. at 44a.

The Court of Appeals, affirming, said:

> With respect to the pattern and duration of Continental's intentional misconduct, the events at issue spanned more than five years, and Continental continued its course of action and inaction undeterred by both the prospect and reality of litigation. In addition, the harm inflicted cannot adequately be characterized as solely economic. Continental's actions resulted in the destruction of a once successful business and interfered with the use and enjoyment of municipal property. . . .
>
> The evidence also demonstrated Continental's willingness to elude accountability. . . .
>
> Finally, we note that Continental's actions likely harmed a great number of people and businesses who are not parties to this litigation.

Pet. App. at 25a-26a.

There is little wonder that the cases Petitioners considered worthy of comparison were properly rejected by the lower courts as inadequate to cover the same level of reprehensibility as occurred here. The only proper conclusion is that the degree of reprehensibility of Petitioners' conduct was properly and accurately ascertained.

IV. There Is No Legal Conflict to Resolve Over the Proper Ratio Between "Substantial"

Compensatory Awards and Punitive Damages.

Petitioners claim that there is a conflict among the federal circuits regarding the maximum ratio permitted when the compensatory damages awarded are "substantial." Pet. at 14-18. To assert that novel proposition, Petitioners claim that this Court has established a 1:1 ratio ceiling as a "constitutional maximum," Pet. at 18, relying on language in *State Farm,* which cannot be viewed as creating the categorical limit Petitioners assert it does. 538 U.S. at 425.

In advancing this unjustified claim, Petitioners manufacture a mathematical bright-line strait-jacket out of precedential cloth that this Court has repeatedly, categorically, and wisely declared cannot be woven together – and so states in the very case Petitioners assert held otherwise. *See State Farm*, 538 U.S. at 424-25 ("[w]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. We decline *again* to impose a bright-line ratio which a punitive damages award cannot exceed.") (emphasis added; citations omitted). *See also BMW,* 517 U.S. at 582 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula"); *Pac. Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 18 (1991) ("We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable.").

In fact, the same paragraph in *State Farm* that suggested a single-digit ratio was "perhaps" appropriate when the compensatory award was "substantial" reiterated that "there are no rigid benchmarks that a punitive damages award may not surpass" and that "[t]he precise award in any case, of course, must be based upon

the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *State Farm,* 538 U.S. at 425.

For that reason, it is entirely improper for Petitioners, in seeking to manufacture an artificial conflict, to take the few cases across the circuits that have both substantial compensatory damage awards as well as punitive damages and compare whether they fall uniformly within a 1:1 ratio, as Petitioners suggest. Such an examination utterly ignores the fact-sensitive nature of the type of review this Court has authorized. Moreover, it elevates "ratio" into the conclusive measure of "gross excessiveness," undermines the preeminence that this Court has accorded to the reprehensibility guidepost, and turns judicial review of punitive damage awards into nothing more than an exercise in elementary-school mathematics.

Even if this Court were inclined to speak further about mandatory ratios, granting review in this case, based on this record, would only encourage other parties to hide responsibility through falsehoods and obfuscation, to compound their egregious behavior through litigation misconduct, and to continue such behavior with impunity, knowing that, if caught, their punitive liability is capped at whatever their compensatory liability is. Simply put, they would have no incentive to stop misconduct that warrants punishment.[7]

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[7] Petitioners' coldly calculated choice not to repair, before verdict, the known problems that directly caused Respondents' damages provides a prime illustration. Petitioner Continental Carbon's president testified repairs were not authorized to Unit One because the Petitioners could earn more than a 582% return on that investment, if made elsewhere. (Dkt. 268, Ex. C, pp. 1-2 following p. 24). Imposition of a maximum ratio of punitive to compensatory damages of 1:1, thereby capping

V. The Lower Courts' Treatment of Civil Penalties Does Not Require This Court's Intervention.

This Court has given the third *BMW* guidepost, comparability, a lesser level of importance than it has accorded to the other guideposts. In *State Farm,* it found the most relevant civil penalty to be $10,000 and suggested that an appropriate punitive damage award would be on the order of $1 million. *State Farm,* 538 U.S. at 428. Petitioners seek to enhance the relevance of this guidepost in their third question presented, through which they seek to require courts to determine how realistic it is that a penalty be assessed before using it for comparative purposes.

Petitioners' initial premise guiding their argument is erroneous. In *State Farm,* this Court did not hold that it was wrong to consider the possible loss of a license, disgorgement of profits, or even possible imprisonment, as Petitioners contend. Pet. at 19. Instead, this Court found the Utah Supreme Court's use of those considerations was irrevocably tainted by their dependence on evidence of a "broad fraudulent scheme drawn from evidence of out-of-state and dissimilar conduct" that this Court held was improperly considered in arriving at the award. *State Farm,* 538 U.S. at 428. Thus, this Court has held not that such considerations are improper, but instead that they must be limited to the misconduct properly before the jury.

Because there is no mandate to avoid consideration of other relevant potential sanctions, courts

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punitive liability at whatever the amount of compensatory liability, would not even disgorge Petitioners of the unjust gain they realized from diverting the needed investment in repairs to Unit One to other, more lucrative returns.

are not divided on the question, despite Petitioners' claim that they are. *See* Pet. at 19. Much like Petitioners' skewed characterization of this Court's statement in *State Farm,* Petitioners have given short shrift to what courts have actually done in response. A faithful reading of the cases reveals no conflict that should engage this Court's attention.

For example, Petitioners cite *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.,* 399 F.3d 224, 237-38 (3d Cir. 2005), which used as a comparative factor the civil penalty that the "parties agree[d was] most applicable," a fine under the state's unfair insurance practices law. It is difficult to accuse a court of using an unrealistic and speculative civil penalty when it is the product of agreement between the parties.

Petitioners also cite *Mathias v. Accor Econ. Lodging, Inc.,* 347 F.3d 672, 678 (7th Cir. 2003), where the court indicated that the parties, unhelpfully, had failed to "present[] evidence concerning the regulatory or criminal penalties to which the defendant exposed itself by deliberately exposing its customers to a substantial risk of being bitten by bedbugs." Even so, the court took "judicial notice that deliberate exposure of hotel guests to the health risks created by insect infestations exposes the hotel's owner to sanctions under Illinois and Chicago law that in the aggregate are comparable in severity to the punitive damage award in this case." *Id.* Rather than rely solely on the possibility that the Defendant could have lost its license, as Petitioners suggest, the court related the amount of punitive damage to the fine and cited a case in which a corporate official was actually imprisoned for violation of the applicable law. *Id.* Given the realism in which the Seventh Circuit grounded its decision, it can hardly be described as rampantly speculative, contrary to Petitioners' portrayal.

Petitioners also cite the unpublished decision in *Greenberg v. Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir.), *cert. denied,* 542 U.S. 939 (2004), which engaged in no analysis and has no precedential value. Finally, Petitioners decry a state supreme court's conclusion that, if enforced, federal daily fines for a railroad's 450-day violation of a clear-sight rule, which resulted in a death, totaled $9.9 million and that the state's separate sanctions of the misfeasance that would add $186,000 per year in fines, were not so out of line with a $25 million award as to require its reduction. *Union Pac. R.R. v. Barber,* 149 S.W.3d 325, 350 (Ark. 2004). None of these decisions demonstrate a flaunting of this Court's instructions, Petitioners' suggestion notwithstanding.

VI. This Case Does Not Present a Vehicle to Define More Clearly This Court's Punitive Damage Jurisprudence.

Separate and apart from the "unclean hands" Petitioners bring to this case and the legal issues that they raise, Petitioners' request for clarification of this Court's punitive damages jurisprudence, Pet. at 23, rings hollow in light of what Petitioners assert those cases hold.

First, Petitioners complain that there is a "tendency [among] many courts to apply the [*BMW*] guideposts mechanically." Pet. at 23. Yet, Petitioners' preferred solution is to establish a far more mechanical ratio of precisely the type this Court has resisted, one that would operate without consideration of the behavior that merited the punitive damages. Contrary to Petitioners' entreaties, the Due Process Clause contains no numerical limits and instead requires the type of careful weighing of evidence that courts have uniformly endeavored to employ in evaluating the propriety of punitive awards. *See State Farm,* 538 U.S. at 425 (the

"precise award . . . must be based on facts and circumstances" of the case).

Second, Petitioners claim that defendants are being punished even if their culpability, after having paid compensatory damages, is not sufficiently reprehensible to merit punitive damages.[8] Pet. at 23.[9] Yet, as examples

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[8] Petitioners assert that an award of attorneys fees in the amount of $1,294,000 has "punitive and deterrent effects" that should lower the punitive damages. Pet. at 17. As a matter of state law, that award is compensatory. Pet. App. 22a-28a. A grant of certiorari in this case would require resolution of whether that independent finding of state law could be ignored in applying the *BMW/State Farm* factors.

[9] Petitioners suggest in their second Question Presented that (1) "substantial" compensatory damages, "significant" attorney's fees, and/or "extensive" injunctive relief should confine permissible punitive damages to no more than a 1:1 ratio to such other relief, and (2) courts conflict in their treatment of fees as a factor to reduce, rather than increase, the maximum permissible punitive award. Pet. at i, 17-18.

But, the first suggestion ignores the distinct and well-settled differences in the primary purposes of each such type of relief. Whereas punitive damages seek to punish a defendant's unlawful conduct and to deter repetition of similar behavior by others, *e.g., State Farm*, 538 U.S. at 416; *Cooper Indus.*, 532 U.S. at 432; *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 n.9 (1986), compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *State Farm*, 538 U.S. at 416 (quoting *Cooper Indust.*, 532 U.S. at 432; *see also, e.g., Memphis Cmty Sch. Dist.*, 477 U.S. at 306-07. Similarly, attorneys fees, in those limited circumstances under which such awards are authorized here, are awarded to compensate an injured party to avoid further injury "by the cost incurred as a result of the necessity of seeking legal redress for [the party's] legitimate grievances." *City of Warner Robins v. Holt*, 470 S.E.2d 238, 240 (Ga. App. 1996) (*see, e.g., Nat'l Farmers Union Ins. Co. v. Crow Tribe of Indians*, 471 U.S. 845, 856 n.22

of their claim that the majority of courts cross the constitutional line on this question, they rely entirely on cases where the ratio is merely more than 1:1, with the majority of those cases still falling well within a single-digit ratio and having been decided before 2003, the year of this Court's decision in *State Farm*. Pet. at 27 n.12.

Petitioners make no attempt to evaluate the factual circumstances of the misconduct in the cases they cite, and they ignore the vast empirical evidence that demonstrates that few punitive damage awards reach eye-popping amounts. *See, e.g.,* Bureau of Justice Statistics, U.S. Dep't of Justice, *Civil Justice Survey of State Courts, 2001: Punitive Damage Awards in Large Counties, 2001*, NCJ 208445, at 8 tbl. 9 (Mar. 2005) (finding, based on the most recent available statistics, that the median inflation-adjusted punitive award was only $50,000 in 2001, compared with $63,000 in 1992). Their presentation, calling the majority of courts roguish in their flaunting of this Court's holdings, is wrong, fails to consider the record before those courts, and cannot establish an issue worthy of a grant of certiorari.

(1985)). Injunctive relief likewise is not imposed as punishment, but instead lies only where there is no adequate remedy in damages at law.

Petitioners' second suggestion founders on an illusory and undeveloped "conflict" assertedly resting upon only one state supreme court decision (in dictum) and one intermediate appellate court decision in which the fee award were, respectively, less than 2 percent of the size of the punitive award and less than 10 percent of the size of the punitive award. Pet. at 17-18 (citing *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. 2003), and *Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507 (Cal. Ct. App. 2007). The absence of clear conflict and, even if such conflict were present, the immature stage of such conflict reflect a "dispute" insufficiently developed to warrant exercise of this Court's supervisory discretion.

Third, Petitioners resolutely ignore what this Court has found to be the first consideration in any punitive damages evaluation – the States' legitimate interest in punishing unlawful conduct and deterring its repetition. *See Phillip Morris USA v. Williams,* 127 S.Ct. 1057, 1062 (2007); *BMW,* 517 U.S. 559, 568 (1996) ("Federal excessiveness inquiry appropriately begins with an identification of the state interests that a punitive award is designed to serve."). States have different interests that are pursued differently with respect to punitive damages. *Id.* ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."). For example, in Alabama punitive damages substitute for the role that other states assign to compensatory damages in wrongful death actions. *See Lance, Inc. v. Ramanauskas,* 731 So. 2d 1204, 1218 (Ala. 1999). In some states, the State's interest is expressed by allocating significant portions of a punitive damage award to public purposes. *See, e.g.,* Ind. Code § 34-51-3-6 (75 percent). In Georgia, whose law governed this award, punitive damages are capped at $250,000 per plaintiff, unless there is a finding of a specific intent to cause harm, as was found here.[10] *See* O.C.G.A § 51-12-5.1(f), (g).

Such differences in State treatment of punitive damages make the purely ratio-based comparison advocated by Petitioners at odds with the federalist system adopted by our Constitution. It would complicate, rather than make more predictable, the determination and review of punitive damages, serving no useful practical purpose, let alone any proper constitutional one. To present a proper case for review by this Court, a

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[10] Petitioners do not contest the jury's finding on this point in their petition.

petitioner should bear the burden of proving, based on an accurate rendition of the record, that a lower award would be sufficient to vindicate the particular State's defined interest in a manner that the lower courts failed to appreciate. Pure numerical comparisons can never substitute for such a showing – and no attempt to make the proper, necessary showing is contained in Petitioners' application to this Court. It must therefore be denied.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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