No. 07-219

In the Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.*,

Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

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

BRIEF OF THE AMERICAN PETROLEUM INSTITUTE, THE AMERICAN CHEMISTRY COUNCIL, THE AMERICAN TORT REFORM ASSOCIATION, THE NATIONAL ASSOCIATION OF MANUFACTURERS, AND THE WESTERN STATES PETROLEUM ASSOCIATION AS *AMICI CURIAE* IN SUPPORT OF PETITIONERS

HARRY M. NG
JANICE K. RABURN
American Petroleum Institute
1220 L St., NW
Washington, DC 20036
(202) 682-8253

ANDREW L. FREY
Counsel of Record
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer Brown LLP
1909 K St., NW
Washington, DC 20006
(202) 263-3000

Counsel for Amici Curiae
[Additional counsel on inside cover]

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

DONALD D. EVANS
American Chemistry Council
1300 Wilson Blvd.
Arlington, VA 22209
(703) 741-5000

JAN S. AMUNDSON
QUENTIN RIEGEL
National Association of Manufacturers
1331 Pennsylvania Ave., NW
Washington, DC 20004
(202) 637-3000

SHERMAN JOYCE
American Tort Reform Association
1850 M St., NW
Suite 1095
Washington, DC 20036
(202) 682-1163

KEVIN M. FONG
Pillsbury Winthrop Shaw Pittman LLP
50 Fremont St.
San Francisco, CA 94105
(415) 983-1270
Counsel for the Western States Petroleum Association

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INTEREST OF THE *AMICI CURIAE*[1]

The American Petroleum Institute ("API") is a nationwide, non-profit, trade association headquartered in Washington, DC, that represents over 400 members engaged in all aspects of the petroleum and natural gas industry. API members are both owners and charterers of vessels for transporting oil and oil products. As such, they are impacted by, and thus have a strong interest in, the law applying to punitive damages awards in the maritime context. Moreover, as businesses engaged in the exploration, production, refining, and distribution of petroleum products, API members are impacted by punitive damages beyond the maritime context.

The American Chemistry Council ("ACC") represents the leading companies engaged in the business of chemistry. The business of chemistry is a $635 billion enterprise and accounts for ten cents of every dollar in U.S. exports. ACC members are frequently the subjects of suits seeking massive amounts of punitive damages. Accordingly, they have a strong interest in the fair administration of such damages.

The American Tort Reform Association ("ATRA") is a broad-based coalition of more than 300 businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. ATRA has filed numerous amicus curiae briefs in cases before this Court concerning important issues of liability, including the constitutional restrictions on punitive damages awards. ATRA's members have a substantial interest in the development of sound legal

[1] Pursuant to Supreme Court Rule 37.6, *amici* affirm that no counsel for a party authored this brief in whole or in part and that no person other than *amici* and their counsel made a monetary contribution to its preparation or submission. Petitioners have given blanket consent to any person seeking to file an *amicus* brief. Respondents' letter consenting to the filing of this brief has been filed contemporaneously with this brief.

principles governing the power of juries to mete out punishment in civil litigation.

The National Association of Manufacturers ("NAM") is the nation's largest industrial trade association, representing small and large manufacturers in every industrial sector and in all 50 states. NAM's mission is to enhance the competitiveness of manufacturers by shaping a legislative and regulatory environment conducive to U.S. economic growth and to increase understanding among policymakers, the media, and the general public about the vital role of manufacturing to America's economic future and living standards. NAM has filed numerous amicus curiae briefs addressing the constitutional restrictions on punitive damages awards. Because NAM's members have frequently been the subject of suits seeking large amounts of punitive damages, NAM has a significant interest in the sound administration of such damages.

The Western States Petroleum Association ("WSPA") is a non-profit trade association that represents approximately two dozen companies that explore for, develop, produce, refine, market and transport petroleum and petroleum products in the six western States of Arizona, California, Hawaii, Nevada, Oregon and Washington. WSPA is dedicated to ensuring that Americans continue to have reliable access to petroleum and petroleum products through policies that are socially, economically and environmentally responsible. On occasion, WSPA members are named as defendants in suits seeking punitive damage awards, sometimes in the maritime context. Accordingly, WSPA members have a strong interest in the legal principles governing punitive damages and the issues presented in the petition.

INTRODUCTION AND SUMMARY OF ARGUMENT

Amici fully support Exxon's request for review and reversal on the liability issues presented in the petition. Because *amici*'s interests transcend the maritime context, however, we focus in this brief on why the Court should grant re-

view of the excessiveness issue. The Ninth Circuit's treatment of that issue is emblematic of a growing misperception among reviewing courts that the Constitution—and, in this case, maritime law—never requires a punitive award to be less than the compensatory damages no matter how fully the compensatory damages satisfy the State's interests in deterrence and punishment.[2] That misperception grows out of a failure to recognize that large compensatory damages (and other costs borne by the defendant as a result of its tort) can and often do punish and deter in their own right and that the ultimate question in any constitutional (or maritime law) inquiry must be whether the *absolute* amount of the penalty is excessive in relation to the State's objectives.

The present case perfectly demonstrates this principle. As the Ninth Circuit acknowledged, Exxon's "conduct was not intentional and [Exxon] promptly took steps to ameliorate the harm it caused." Pet. App. 40a. Moreover, as the Ninth Circuit observed in its first opinion but seems to have forgotten in its subsequent opinion, "[d]epending on the circumstances, a firm might reasonably, were there no punishment, be deterred, in some cases but not all, by its actual expenses." *Id.* at 99a. Because Exxon gained *nothing* from its tort yet lost its valuable cargo and had to pay over $3.4 *billion* in damages, fines, and remediation expenses—not to mention suffering a public relations disaster of vast magnitude—it is hard to imagine a case in which punitive damages were less necessary to deter the defendant and others from committing similar lapses of judgment in the future. See *id.* at 100a (observing that "if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him 'only'

[2] Throughout this brief, we use the word "State" as a short-hand for "governmental"; as in other cases that arise under federal law, there technically are no "State" interests in a case that arises under maritime law.

$10,005 and he was not otherwise punished" and noting that "[t]his case is like the ink on the rug example").

Yet on the basis of its belief that the degree of reprehensibility of Exxon's conduct was in the "mid range" (*id.* at 31a)—itself a highly questionable proposition—the Ninth Circuit concluded that a punishment in the mid range of single-digit ratios was constitutionally permissible (*id.* at 40a). That this formula yielded a record-smashing $2.5 billion exaction for non-intentional, non-profit-motivated conduct seems to have been entirely lost on the Ninth Circuit. This case is thus an ideal one in which to refocus the lower courts on the central mission of determining whether the *absolute* size of the punitive award is excessive in relation to the State's legitimate interests in deterrence and retribution.

That mission is not always just a constitutional one; for example, in this case maritime law also places substantive limits on the permissible amount of punitive damages. Because the excessiveness inquiry under maritime law is likely to involve many of the same considerations as the due process analysis, we do not separately discuss maritime law in this brief. However, we do join Exxon in urging the Court to review whether the $2.5 billion punitive award is excessive under *both* maritime law *and* the Due Process Clause.

ARGUMENT

Over the past decade and a half, this Court repeatedly has expressed concern about punitive damages awards that, "today, may be many times the size of such awards in the 18th and 19th centuries." *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1064 (2007). Alarmed by the increasingly large exactions being imposed by juries, the Court has found itself compelled to remind bench and bar that a $2 million punitive award is "tantamount to a severe criminal penalty" (*BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 585 (1996)) and to explain that such a substantial exaction "cannot be justified on the ground that it [is] necessary to deter future misconduct

without considering whether less drastic remedies could be expected to achieve that goal" (*id.* at 584). See also *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419-20 (2003) ("a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further").

To assist courts in determining when a punitive award is unconstitutionally excessive, the Court identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of the punitive to the compensatory damages (or potential harm in the unusual circumstance of a thwarted attempt); and (iii) the difference between the punitive damages and the legislative and/or administrative penalties for comparable misconduct. *BMW*, 517 U.S. at 574-85.

Ironically, in many cases the guideposts have actually led reviewing courts astray. In applying (or, more accurately, misapplying) the guideposts, the Ninth Circuit and other lower courts have completely lost sight of the concerns that caused the Court to articulate and then refine the guideposts in the first place. Failing to recognize that the ultimate inquiry is whether the *absolute* amount of punishment is excessive, these courts have (i) viewed reprehensibility in the abstract, making no effort to determine whether the conduct was egregious enough to warrant the specific amount of punishment at issue; (ii) treated the ratio guidepost as a safe harbor that shields from invalidation punitive awards that are single-digit multiples of compensatory damages—without regard to whether the compensatory damages and other costs borne by the defendant as a result of its conduct already effect significant deterrence and punishment; and (iii) turned the third guidepost into a virtual nullity by allowing punitive awards that are millions (or, in this case, billions) of dollars greater than the amount that an expert regulator could or would impose as a fine after conducting a thorough investigation.

In short, although civil trials lack the safeguards of criminal proceedings, and civil juries lack the expertise, investigative resources, time, and perspective of regulatory agencies, courts now are routinely upholding punitive awards that far exceed the fines that could or would be imposed in a criminal trial or administrative proceeding. Review is urgently needed to correct this anomaly and to remind the lower courts that the guideposts are meant to assist in determining whether the *absolute* amount of a punitive award is excessive in relation to the State's interests in retribution and deterrence.

A. This Court Has Repeatedly Expressed Concerns About Large Punitive Awards And Identified Several Risks That Require Caution In The Imposition Of Punitive Damages.

This Court has long cautioned that "[p]unitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994). In recent years, the Court has either struck down or articulated doubts about large punitive awards on several occasions.

In *BMW*, the Court held that a $2 million punitive award was unconstitutionally excessive, explaining that "a lesser deterrent" would adequately advance the State's interests in deterring misconduct. 517 U.S. at 584. Five years later, the Court expressed grave doubts about the sustainability of a $4.5 million punitive award, observing that the court of appeals' ruling upholding the exaction was based on "a series of questionable conclusions by the District Court" that "likely" could not be sustained on a "thorough, independent review" of the record. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 441 (2001). And just two years later, the Court held a $145 million punitive award unconstitutionally excessive, stating that "a more modest punishment for this reprehensible [fraudulent] conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further." *State Farm*, 538 U.S. at

419-20. In all, the Court suggested that "a punitive damages award at or near the amount of compensatory damages"—$1 million—was likely the constitutional maximum. *Id.* at 429.[3]

In each of these cases—as well as several of their predecessors—the Court articulated a range of concerns about punitive damages.

First, although punitive damages "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417.

Second, civil juries are typically subject to few constraints, lack the expertise of regulators, and may even harbor "'biases against big businesses.'" *Ibid.* (citation omitted). This creates a severe risk that the jury will choose an amount of punitive damages that bears little relation to the "circumstances of the defendant's conduct and the harm to the plaintiff" (*id.* at 425), that is "tantamount to a severe criminal penalty" (*BMW*, 517 U.S. at 585), and that dwarfs "the size of such awards in the 18th and 19th centuries," even after adjusting for inflation (*Philip Morris*, 127 S. Ct. at 1064).

Third, "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose[,] constitutes an arbitrary deprivation of property," and violates "'elementary notions of fairness.'" *State Farm*, 538 U.S. at 417 (quoting *BMW*, 517 U.S. at 574); see also *Philip Morris*, 127 S. Ct. at 1062 (emphasizing the risk that a State's punitive damages system "may deprive a defendant of fair notice of the severity of the

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[3] More recently, the Court granted certiorari in *Philip Morris USA* v. *Williams* to consider whether: (i) the Due Process Clause prohibits juries in individual cases from punishing defendants for injuries suffered by non-parties; and (ii) the $79.5 million punitive award in that case was unconstitutionally excessive. 127 S. Ct. at 1062. Because the Court ruled for Philip Morris on the first issue, it did not need to reach the excessiveness issue. *Id.* at 1065.

penalty that a State may impose" and "threaten arbitrary punishments, *i.e.*, punishments that reflect not an application of law but a decisionmaker's caprice") (internal quotation marks, ellipses, and citations omitted).

Fourth, if a punitive award is "sufficiently large," it may, in practical effect, "impose one State's (or one jury's) policy choice * * * upon neighboring States with different public policies." *Philip Morris*, 127 S. Ct. at 1062 (internal quotation marks and citation omitted).

Because of these concerns, the Court "has found that the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as 'grossly excessive.'" *Ibid.* Most important for present purposes, the Court has held that the Due Process Clause prohibits the imposition of punitive damages in amounts that are excessive in relation to the State's interests in retribution and deterrence. More particularly, "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419.[4] And even when it is determined that *some* amount of punitive damages is necessary, the question then becomes "whether a lesser deterrent would have adequately" served the State's interests. *BMW*, 517 U.S. at 584; see also *State Farm*, 538 U.S. at 419-20 ("a

[4] As this Court has explained, "[p]unitive damages aside," "[d]eterrence * * * operates through the mechanism of damages that are *compensatory*." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 306-07 (1986); see also 1 Dan B. Dobbs, LAW OF REMEDIES § 3.1, at 282 (2d ed. 1993) ("[e]ven if the defendant is not subject to punitive damages, an ordinary compensatory damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931) ("if the 'compensatory' damages are large, the defendant is severely admonished without the addition of any punitive damages").

more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further").

This required inquiry perforce necessitates careful scrutiny of the absolute amount of the punitive damages. To assist courts in conducting that scrutiny, the Court identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio of the punitive damages to the harm to the plaintiff (typically measured by the compensatory damages); and (iii) the civil fines authorized or imposed for similar conduct. *BMW*, 517 U.S. at 574-85.

The first guidepost requires courts to ask whether the conduct is heinous enough to warrant the amount of punishment imposed. In other words, the "punishment should fit the crime." *Id.* at 575 n.24. It therefore is not sufficient to ask "Is the conduct bad?"; the conduct has to be egregious to warrant any punitive damages in the first place. Moreover, while necessary, it does not suffice to ask "How does this conduct compare to other punishable conduct?"[5] Instead, for this guidepost to serve as a constraining force, courts must also ask whether "the extraordinary size of the award * * * is explained by the extraordinary wrongfulness of the defendant's behavior" (*id.* at 595 (Breyer, J., concurring)).

The second guidepost is designed to ferret out punitive awards that are disproportionate to the harm caused by the misconduct. Whether a punitive award will be deemed disproportionate is a function of the amount of compensatory damages and the degree of reprehensibility of the conduct. While "few awards exceeding a single-digit ratio between punitive and compensatory damages * * * will satisfy due process," *the converse is not necessarily true*: "When compensatory damages are substantial, then a lesser ratio, per-

[5] Many courts do not do even this much. See, *e.g.*, *Action Marine, Inc.* v. *Cont'l Carbon Inc.*, 481 F.3d 1302, 1320 (11th Cir.), petition for cert. filed (U.S. Aug. 24, 2007) (No. 07-257).

haps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425.

Of course, in many cases "the ratio [of punitive damages to harm] will be within a constitutionally acceptable range, and remittitur will not be justified *on this basis*." *BMW*, 517 U.S. at 583 (emphasis added). But that in no way means that punitive awards that are modest multiples of the compensatory damages are immune from invalidation. As this Court has emphasized, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." *State Farm*, 538 U.S. at 426. An award that is a low single-digit multiple of the compensatory damages might not be disproportionate, but it still could be unreasonable in light of the facts and circumstances, which include the extent to which the compensatory damages and other financial and reputational consequences incurred by the defendant as a result of its conduct already serve to punish and deter.

The third guidepost addresses three significant concerns. First, principles of comparative institutional competence warrant giving "substantial deference" to "legislative judgments concerning appropriate sanctions for the conduct at issue." *BMW*, 517 U.S. at 583 (internal quotation marks omitted). Second, the magnitude of applicable civil penalties bears on whether the defendant had "fair notice" of the size of the punishment to which it could be subjected. *Id.* at 584. Finally, this guidepost accounts for the fact that juries lack the expertise, perspective, and resources of expert regulatory agencies. When exercising their sanctioning powers, regulatory agencies have the time, expertise, and resources to conduct a full and impartial investigation. They also have knowledge of the regulatory backdrop and of the spectrum of punishable conduct, which enables them to "assure the uniform general treatment of similarly situated persons that is the essence of law itself" (*Cooper Indus.*, 524 U.S. at 436

(internal quotation marks and citation omitted)). Consideration of the penalties provided by statute and, even more importantly, the expert agency's actual fining practice, is therefore essential in determining whether the punitive damages exceed the amount reasonably necessary to punish and deter. As Justice Breyer has aptly put it in an analogous context, it is "anomalous" to "grant greater power * * * to a single state jury than to state officials acting through state administrative or legislative lawmaking processes." *Medtronic, Inc.* v. *Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring).

Used properly, the three guideposts are well suited to their assigned task of assisting courts in determining whether a punitive award is excessive in relation to the State's legitimate interests in retribution and deterrence. Regrettably, this case and others reflect that many lower courts have lost the forest by focusing too much on the trees and need further guidance on the purpose and proper application of the guideposts.

B. In Applying The Guideposts, The Ninth Circuit And Other Courts Have Lost Sight Of The Concerns Underlying This Court's Punitive Damages Cases.

If any case is a poster child for gratuitous punitive damages, it is this one. The Ninth Circuit never once considered whether a $2.5 *billion* exaction—over twice the highest punitive award ever upheld anywhere[6]—is necessary to deter Exxon and others from making the misguided decision to allow a supposedly recovered alcoholic to captain a tanker. Had it asked that question, the court would have had to conclude (as it appeared to conclude five years earlier) that the

[6] The previous record was the $1.2 billion in punitive damages awarded under Philippine law to a class of approximately 10,000 Philippine nationals whose relatives were "tortured, summarily executed or 'disappeared'" by the Marcos regime. See *Hilao* v. *Estate of Marcos*, 103 F.3d 767, 771-72, 780-82 (9th Cir. 1996).

more than $3.4 *billion* that Exxon already had paid in damages, settlements, fines, and remediation costs more than sufficed to punish it for its bad judgment and deter it and others from taking similar risks in the future. See Pet. App. 100a ("Whether cost of cleanup and compensatory damages, damage to the vessel, and lost oil deters bad future acts depends on whether it greatly exceeds the expense of avoiding such accidents, not whether the amounts are compensatory or punitive. * * * Because the costs and settlements in this case are so large, a lesser amount is necessary to deter future acts.").

Instead, the Ninth Circuit came up with the $2.5 billion figure by reasoning that (i) Exxon's conduct was in the "mid range" of the spectrum of reprehensibility (*id.* at 31a); (ii) conduct in the "mid range" of the spectrum supports a punitive/compensatory ratio in the mid-single digits (*id.* at 38a-40a); and (iii) the only role of the third guidepost is to determine whether the conduct is "dealt with seriously under state civil or criminal laws"—ignoring that the punishment was *billions* of dollars greater than the fines actually imposed on Exxon (*id.* at 41a). In so doing, the Ninth Circuit misapplied each of the three guideposts in ways that are becoming increasingly common among reviewing courts.

1. Reprehensibility

After analyzing each of the five reprehensibility factors identified in *State Farm* and considering Exxon's substantial post-grounding efforts to mitigate the harm, the Ninth Circuit concluded that the degree of reprehensibility of Exxon's conduct was in a "mid range." Pet. App. 22a-31a. But a conclusion that conduct is in the middle of the spectrum of reprehensibility, even if correct,[7] is only the beginning, not the

[7] We strongly disagree with the Ninth Circuit's assessment of the *State Farm* reprehensibility factors. If the Court grants the petition, we expect that both Exxon and *amici* will explain why the conclusion that Exxon's non-malicious conduct was in the mid range of the reprehensibility spectrum is manifestly misguided.

end, of the exercise. The question is and must be whether the conduct is bad enough to warrant the severity of the penalty imposed. See *BMW*, 517 U.S. at 574. The Ninth Circuit never asked that question, which can reasonably be answered only in the negative: As the Ninth Circuit itself recognized, Exxon's conduct "was not intentional" (Pet. App. 40a); Exxon's tort was the product of poor judgment rather than greed (see *id.* at 100a); and Exxon "promptly took steps to ameliorate the harm it caused" (*id.* at 40a). Under these circumstances, the notion that Exxon's conduct warrants the highest punitive award ever imposed is utterly untenable.

Unfortunately, the Ninth Circuit is hardly alone in failing to ask whether the conduct at issue is bad enough to warrant the absolute amount of punitive damages imposed. Indeed, the overwhelming majority of courts have overlooked this key question, and many do nothing more than run through the list of *State Farm* factors and then declare the conduct "reprehensible."[8] The courts plainly need reminding that the

[8] See, *e.g.*, *Diesel Mach., Inc.* v. *B.R. Lee Indus., Inc.*, 418 F.3d 820, 839-40 (8th Cir. 2005); *Winkler* v. *Petersilie*, 124 F. App'x 925, 937 (6th Cir. Feb. 25, 2005); *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1370-71 (Fed. Cir. 2003); *Bogle* v. *McClure*, 332 F.3d 1347, 1361 (11th Cir. 2003); *Lopez* v. *Aramark Uniform & Career Apparel, Inc.*, 426 F. Supp. 2d 914, 969-70 (N.D. Iowa 2006); *Jurinko* v. *Med. Protective Co.*, 2006 WL 785234, at *6-*7 (E.D. Pa. Mar. 29, 2006) (unpublished); *Hussein* v. *Universal Dev. Mgmt., Inc.*, 2006 U.S. Dist. LEXIS 49, at*29-*31 (W.D. Pa. Jan. 3, 2006); *Shiv-Ram, Inc.* v. *McCaleb*, 892 So. 2d 299, 316 (Ala. 2003); *Casciola* v. *F.S. Air Serv., Inc.*, 120 P.3d 1059, 1068 (Alaska 2005); *Union Pac. R.R.* v. *Barber*, 149 S.W.3d 325, 348 (Ark. 2004); *Advocat, Inc.* v. *Sauer*, 111 S.W.3d 346, 360-61 (Ark. 2003); *Superior Fed. Bank.* v. *Jones & Mackey Constr. Co.*, 219 S.W.3d 643, 651 (Ark. Ct. App. 2005); *Wrysinski* v. *Agilent Techs., Inc.*, 2006 WL 2742475, at *25 (Cal. Ct. App. Sept. 27, 2006) (unpublished); *Century Surety Co.* v. *Polisso*, 43 Cal. Rptr. 3d 468, 498-99 (Cal. Ct. App. 2006); *Craig* v. *Holsey*, 590 S.E.2d 742, 747-48 (Ga. Ct. App. 2003); *Hayes*

entire point of the reprehensibility inquiry is to determine whether the conduct was "*especially* or *unusually* reprehensible enough to warrant" the amount of punishment imposed (*BMW*, 517 U.S. at 590 (Breyer, J., concurring)).

2. Ratio

The Ninth Circuit held that conduct in the middle of the reprehensibility spectrum warrants a punitive/compensatory ratio in the middle of the single-digit range. Pet. App. 39a-40a. That holding misunderstands the ratio guidepost in two respects.

First, the Ninth Circuit disregarded this Court's admonition that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee" (*State Farm*, 538 U.S. at 425). The compensatory damages and settlement payments in this case exceeded $500 million. That is "substantial" under any definition of the term. If the Court's statement applies to any case, it applies to this one.

Second, although the Ninth Circuit recognized that "the costs that Exxon incurred in compensating the plaintiffs and cleaning the oil spill have already substantially served the purposes of deterrence, lessening the need for a high punitive damages award," it treated this fact only as an additional rea-

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Sight & Sound, Inc. v. *ONEOK, Inc.*, 136 P.3d 428, 446-47 (Kan. 2006); *Grefer* v. *Alpha Technical*, 901 So. 2d 1117, 1148-49 (La. Ct. App. 2005), vacated sub nom. *Exxon Mobil Corp.* v. *Grefer*, 127 S. Ct. 1371 (2007), aff'd, 2007 WL 2473250 (La. Ct. App. Aug. 8, 2007); *Bright* v. *Addison*, 171 S.W.3d 588, 603-04 (Tex. Ct. App. 2005, pet dism'd); *Mission Res., Inc.* v. *Garza Energy Trust*, 166 S.W.3d 301, 318 (Tex. Ct. App. 2005, pet. granted); *Haggar Clothing Co.* v. *Hernandez*, 164 S.W.3d 407, 418-19 (Tex. Ct. App. 2003), rev'd per curiam on other grounds, 164 S.W.3d 386 (Tex. 2005); *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 414-17 (Utah 2004).

son why a 5:1 ratio was more appropriate than a 9:1 ratio. Pet. App. 40a. It never set forth any "basis for assuming that a more modest sanction would not have been sufficient" to accomplish the State's interests in retribution and deterrence (*BMW*, 517 U.S. at 585). Nor could it have. As the same panel recognized five years earlier, "if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him 'only' $10,005 and he was not otherwise punished. * * * This case is like the ink on the rug example * * *." Pet. App. 100a. Giving this consideration the weight it is due compels the conclusion that a ratio of even 1:1, and *a fortiori* a ratio in the mid-single-digit range, "furthers no legitimate purpose and constitutes an arbitrary deprivation of property" (*State Farm*, 538 U.S. at 417).

Once again, the Ninth Circuit's errors are by no means unique. Numerous lower courts have ignored this Court's admonition that a 1:1 ratio may be the constitutional maximum when compensatory damages are "substantial," instead treating any single-digit ratio as immune from scrutiny.[9] And

[9] See, *e.g.*, *Cambio Health Solutions, LLC* v. *Reardon*, 2007 WL 627834, at *7 (6th Cir. Feb. 27, 2007) (upholding $5 million punitive award that was 5.65 times the compensatory damages and prejudgment interest of $884,291.18 because it was "well within the Supreme Court's single-digit prescription"); *Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (holding that $2 million punitive award was permissible, even though "the compensatory damages award [of $500,000] is substantial * * * and the punitive damages award is many times [the defendant's] net worth" because this Court approved a 4:1 ratio in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991)); *Greenberg* v. *Paul Revere Life Ins. Co.*, 91 F. App'x 539, 542 (9th Cir. Jan. 12, 2004) (upholding $2.4 million punitive award in insurance bad faith case in which compensatory damages were $547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"); *Rhone-Poulenc*, 345 F.3d at

only a few courts have conducted the broader inquiry into whether and to what extent the compensatory damages and other costs borne by the defendant as a consequence of its conduct serve the State's interests in retribution and deterrence, rendering even a 1:1 ratio excessive.[10]

1372 (taking no account of the absolute amount of the punitive award ($15 million) and reasoning that the 3.33:1 ratio of punitive to compensatory damages "does not even approach the possible threshold of constitutional impropriety"); *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding $2.6 million punitive award where compensatory damages were $260,000 because the ratio was "slightly more than seven to one" and "[w]e are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages"); *Bogle*, 332 F.3d at 1362 (upholding approximately $2 million in punitive damages to each of seven defendants despite "substantial" compensatory damages of $500,000 because the ratio "in this case is in the neighborhood of 4:1, a range which the Supreme Court has found to be 'instructive'"); *Barber*, 149 S.W.3d at 348 (upholding $25 million punitive award, even though compensatory damages were $5.1 million, because 5:1 ratio was not "breathtaking"); *Seltzer* v. *Morton*, 154 P.3d 561, 611 (Mont. 2007) (permitting $9.9 million in punitive damages where compensatory damages were $1.1 million because "substantial compensatory damages do not always require low single-digit ratios"); *Bocci* v. *Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App.) (stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court" and reducing 45:1 ratio to 7:1 where compensatory damages were $500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003); *Campbell*, 98 P.3d at 418 (upholding $9,018,780.75 in punitive damages on remand—a 9:1 ratio—even though this Court suggested that the constitutional maximum was around $1 million).

[10] See, *e.g.*, *Inter Med. Supplies, Ltd.* v. *EBI Med. Sys., Inc.*, 181 F.3d 446, 468-70 (3d Cir. 1999) (reducing $50 million punitive award for breach of contract and fraud to $1 million because "large compensatory damages [$48 million] have been awarded" and the

3. Comparable Penalties

The punitive award in this case is $2.375 *billion* greater than the record-setting $125 million in criminal penalties imposed against Exxon (Pet. 4) and $2.42 *billion* greater than the $80 million maximum civil penalty that could have been imposed (*id.* at 30). Nevertheless, the Ninth Circuit held that the third guidepost "support[ed]" its record-breaking punitive award. It explained that in some prior cases it had "looked only to whether or not the misconduct was dealt with seriously under state civil or criminal laws" and in the other cases "ha[d] not discussed this factor at all." Pet. App. 41a. Thus, as far as the Ninth Circuit was concerned, the fact that "spilling oil in navigable water has clearly been taken quite seriously by" Congress and the State of Alaska was the end of the matter. *Ibid.*

This reasoning converts the third guidepost from an important check on the absolute amount of punitive damages into a nullity in all cases in which legislatures have authorized significant fines for comparable conduct. Indeed, under the Ninth Circuit's approach, the third guidepost would have been no more a safeguard against the jury's $5 billion punitive award or the $4.5 billion punitive award endorsed by the

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harm was economic "and hence 'less worthy of large punitive damages awards than torts inflicting injuries to health or safety'"); *Pichler* v. *UNITE*, 457 F. Supp. 2d 524, 530-32 (E.D. Pa. 2006) (disallowing punitive damages against union for willful and reckless violation of the Driver's Privacy Protection Act, 18 U.S.C. § 2724, because statutory damages of over $4 million and other fees and costs would provide "ampl[e]" punishment and deterrence "without imposing punitive damages"); *United States* v. *Bailey*, 288 F. Supp. 2d 1261, 1281 (M.D. Fla. 2003) (vacating $3 million punitive award for civil theft and conversion "in its entirety" because the plaintiff received $2 million in compensatory damages and the defendant's conduct did "not warrant the imposition of further sanctions to achieve punishment or deterrence"), aff'd, 419 F.3d 1208 (11th Cir. 2005).

district court than it was against the $2.5 billion exaction endorsed by the panel.

More broadly, the Ninth Circuit entirely ignored the purposes served by the third guidepost. A punitive award that is billions (or even, as in most cases, millions) of dollars greater than the applicable criminal and civil penalties is surely one that grossly exceeds the amount reasonably necessary to punish and deter. Indeed, when, as here, federal and state regulatory authorities scrutinized the conduct and agreed upon an appropriate penalty, it is questionable whether any significant amount of punitive damages is necessary to advance the State's interests in punishment and retribution. Instead, the third guidepost confirms that a large punitive award serves no legitimate function and is nothing more than a windfall to the plaintiffs and their lawyers.

Again, the Ninth Circuit does not stand alone in refusing to employ the third guidepost as a meaningful constraint on outsized punitive awards. To the contrary, the overwhelming majority of courts have treated the third guidepost as nothing more than an inconvenience.[11]

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[11] See, *e.g.*, *Willow Inn, Inc.* v. *Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237-38 (3d Cir. 2005) (disregarding disparity between $135,000 punitive award and maximum comparable penalty of $10,000 because the court was "reluctant to overturn the punitive damages award on this basis [of the third guidepost]"); *Kemp* v. *AT&T Co.*, 393 F.3d 1354, 1364 (11th Cir. 2004) (the third guidepost "is accorded less weight in the reasonableness analysis than the first two guideposts"); *James* v. *Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006) (stating that legislative penalties have little relevance when they "are set at 'such a low level, there is little basis for comparing it with any meaningful punitive damage award'"); *Campbell*, 98 P.3d at 419 (holding on remand that a wide disparity between $9,018,780.75 punitive award and $10,000 maximum legislative penalty for comparable conduct was irrelevant because "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties af-

C. Review Is Necessary To Ensure That The Ninth Circuit's Misapplication Of This Court's Precedents Does Not Infect Future Cases.

Given the magnitude of the compensatory damages in this case, the Ninth Circuit's decision approving a 5:1 ratio can only be understood as holding that compensatory damages can never be substantial enough to require a ratio of 1:1 or below. "If the Ninth Circuit would uphold a 5:1 ratio in *Exxon*," the argument would go, "surely a 5:1 ratio must be okay in this case in which the compensatory damages are only $10 million." Indeed, the Eleventh Circuit already has done essentially that. In a recent case involving the failure to prevent the escape of carbon black dust from a manufactur-

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fixed by a legislature can be quixotic"); see also *Winkler*, 124 F. App'x at 938 (upholding $200,000 punitive award against four defendants for malicious destruction of property even though criminal fine for vandalism was only $10,000); *Steel Techs., Inc.* v. *Congleton*, __ S.W.3d __, 2007 WL 1790599, at *10 (Ky. June 21, 2007) (concluding that the third guidepost supported $1 million punitive award even though maximum fine was $10,000 because the "difference [between the punitive award and maximum fine] is significantly less than that encountered in *Gore* and *Campbell*"); *Seltzer*, 154 P.3d at 613 (noting that "a 100:1 ratio between an appropriate punitive sanction and the most relevant legislatively established civil penalty was not inappropriate" and disregarding wide discrepancy between $9.9 million punitive award and $50,000 maximum criminal fine); *Boyd* v. *Goffoli*, 608 S.E.2d 169, 184 (W. Va. 2004) (disregarding disparity between $1 million punitive award and $10,000 maximum civil penalty because it is "[a]pparent * * * that the Supreme Court did not believe that a punitive damages award one hundred times greater than the civil penalty that could be imposed for such conduct was excessive"); *Schwigel* v. *Kohlmann*, 694 N.W.2d 467, 475 (Wis. Ct. App. 2005) (upholding $375,000 punitive award in conversion case even though most comparable legislative fine was $25,000, because "the conduct exhibited here 'could scarcely have been contemplated by the legislature when it enacted these statutes'").

ing facility, that court upheld a $17.5 million punitive award that was 5.5 times the compensatory damages and attorneys' fees. In so doing, the court explained that the Ninth Circuit had concluded in this case that "a ratio of approximately 5:1 ($2.5 billion:$504 million) was constitutionally sound despite finding that the conduct at issue was neither intentional nor malicious and that previous efforts to correct the damage mitigated reprehensibility." *Action Marine*, 481 F.3d at 1322. And the court cited the decision here for the proposition that the defendant's conduct warranted "[a] substantial penalty beyond the compensatory damages," noting that the Ninth Circuit allowed $2.5 billion in punitive damages even though Exxon had already paid $504.1 million in compensatory damages. *Id.* at 1320.

Moreover, though this Court has stated countless times that denials of certiorari do not indicate agreement on the merits, some lower courts have invoked the denial of certiorari in the *State Farm* remand as an indication that the Court's suggestion that 1:1 was the maximum permissible ratio in that case was merely hortatory. See, *e.g.*, *Seltzer*, 154 P.3d at 611-12. Other courts can be sure to follow if the Court denies review here.

The same is true of the Ninth Circuit's evisceration of the third guidepost. If courts follow the decision here and assert that the mere availability of significant penalties shows that legislatures take the misconduct "seriously" and therefore justifies a massive punitive award—even one that dwarfs the size of those penalties—then a significant constraint on the amount of punitive damages will be lost.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

HARRY M. NG
JANICE K. RABURN
American Petroleum Institute
1220 L St., NW
Washington, DC 20036
(202) 682-8253

DONALD D. EVANS
American Chemistry Council
1300 Wilson Blvd.
Arlington, VA 22209
(703) 741-5000

JAN S. AMUNDSON
QUENTIN RIEGEL
National Association of Manufacturers
1331 Pennsylvania Ave., NW
Washington, DC 20004
(202) 637-3000

ANDREW L. FREY
Counsel of Record
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer Brown LLP
1909 K St., NW
Washington, DC 20006
(202) 263-3000

SHERMAN JOYCE
American Tort Reform Association
1850 M St., NW
Suite 1095
Washington, DC 20036
(202) 682-1163

KEVIN M. FONG
Pillsbury Winthrop Shaw Pittman LLP
50 Fremont St.
San Francisco, CA 94105
(415) 983-1270
Counsel for the Western States Petroleum Association

Counsel for Amici Curiae

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