No. 07-___

IN THE

Supreme Court of the United States

CHICAGO TITLE INSURANCE CORP.,

Petitioner,

v.

FIRST AMERICAN TITLE INSURANCE CO. AND JAMES A. MAGNUSON,

Respondents.

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

PETITION FOR WRIT OF CERTIORARI

STEVEN A. GOLDFARB
HAHN LOESER & PARKS, LLP
200 Public Square, Suite 3300
Cleveland, Ohio 44114
(216) 621-0150

LAURENCE H. TRIBE
Counsel of Record
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

JONATHAN S. MASSEY
JONATHAN S. MASSEY, PC
7504 Oldchester Road
Bethesda, MD 20817
(301) 915-0990

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BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

QUESTIONS PRESENTED

This punitive damages case presents three questions relating to the due process "guideposts" of *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1995), and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003).

1. Whether the due process guideposts govern only the *size* of punitive damages awards, or whether — despite this Court's overruling of *Lochner v. New York,* 198 U.S. 45 (1905) — the guideposts also license federal judicial interference with a State's considered judgment that certain types of misconduct are so egregious as to warrant punitive liability in the first instance.

2. Whether the "reprehensibility" guidepost of *Gore* and *State Farm* can support an assessment of punitive damages when the defendant's tortious conduct was malicious, or whether that guidepost requires a showing of an additional aggravating factor, such as the financial vulnerability of the plaintiff or the risk of physical harm.

3. Whether a defendant qualifies as a "repeated wrongdoer" (for purposes of the "reprehensibility" guidepost of *Gore* and *State Farm*) if it commits multiple reprehensible acts within a single transaction with the plaintiff, or whether the "repeated wrongdoer" test requires that additional acts be committed against parties other than the plaintiff.

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding are listed in the caption.

RULE 29.6 STATEMENT

Petitioner Chicago Title Insurance Corporation (actual name: Chicago Title Insurance Company) states that it is a wholly owned subsidiary of Chicago Title & Trust Company, which is a wholly owned subsidiary of Fidelity National Financial, Inc., a publicly held company.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Chicago Title Insurance Corporation ("Chicago Title") respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Sixth Circuit in this case.

OPINIONS BELOW

The Sixth Circuit's opinion (Pet. App. 1a-29a) is published at 487 F.3d 985 (CA6 2007). The opinion of the district court (Pet. App. 30a-113a) is not published but may be found at 2005 U.S. Dist. LEXIS 43884.

JURISDICTION

The Court of Appeals denied a timely petition for rehearing and rehearing en banc on September 7, 2007. Pet. App. 114a-115a. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

RELEVANT CONSTITUTIONAL AND STATUTORY PROVISIONS

The Fifth Amendment provides in relevant part: "No person shall be . . . deprived of life, liberty, or property, without due process of law." The Fourteenth Amendment provides in relevant part: "[N]or shall any State deprive any person of life, liberty, or property, without due process of law."

STATEMENT OF THE CASE

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1995), and *State Farm Mutual Automobile Insurance Company v. Campbell*, 538 U.S. 408 (2003), this Court articulated three "guideposts" for judicial review of the *size* of punitive damages awards: the

reprehensible nature of the defendant's conduct, the ratio between punitive damages and the compensable harm, and a consideration of similar civil and criminal penalties. This case presents the fundamental question whether the guideposts authorize the federal courts not merely to ensure that the *size* of an award comports with due process, but also to prevent a State from enforcing its own statute imposing punitive liability on certain categories of misconduct in the first place. In addition, this case presents two further questions regarding the meaning of the first (and most important) *Gore* guidepost, reprehensibility.

The Sixth Circuit acknowledged that there was ample evidence that the defendant in this case acted intentionally and "with malice" (Pet. App. 28a) to inflict substantial economic injury on the plaintiff. Yet the Sixth Circuit held that the *Gore* factors precluded the imposition of any punitive damages in cases such as this, where "there were no physical injuries or threat to personal safety" and where the plaintiff "was not a financially vulnerable victim." *Id.*

The Sixth Circuit's decision inexplicably converts the multi-factor *Gore* analysis, which courts have heretofore properly confined to a review of the potential excessiveness of a particular punitive award on the record and instructions in a specific case, into a new substantive due process standard for deciding which sorts of conduct categorically may be made subject to *any* punitive damages at all. The Sixth Circuit's invocation of due process to prevent Ohio from punishing the business tort in this case does not invoke *Lochner* explicitly but is thinly veiled *Lochnerism* nonetheless. It amounts to federal

judicial interference with the considered judgment of the State of Ohio that the kind of misconduct at issue here is so egregious that it warrants at least some level of deterrence and punishment through the mechanism of punitive damages.

Having radically transformed this Court's test for reviewing the size of particular damages awards into a basis for trumping the substantive law of Ohio, the Sixth Circuit compounded its misuse of the reprehensibility guidepost by construing it to bar a State from identifying cases involving malicious and intentional torts as eligible for punitive damages unless the defendant has caused "physical injuries or [a] threat to personal safety," or the plaintiff is "a financially vulnerable victim." Pet. App. 28a. Thus, the effect of the decision below is to render business tort cases and cases arising in many statutory contexts ineligible for punitive damages liability in the Sixth Circuit, as a matter of federal constitutional law – even when long-settled state law would entitle a plaintiff to recover them. Such a restriction on the authority of States — and, presumably, Congress as well — to select cases of intentional and malicious wrongdoing for prevention and punishment through punitive damages liability is unprecedented and unprincipled.

Finally, as addressed in the third question presented, the Sixth Circuit's decision deepens a circuit split under the first *Gore* guidepost on the issue of whether a defendant may qualify as a "repeated wrongdoer" if it commits multiple reprehensible acts within the single transaction with the plaintiff.

The Sixth Circuit's holding warrants plenary review, or summary reversal under the long line of precedent repudiating *Lochner*, because it plainly misconstrues this Court's instructions regarding the due process limits on punitive damages and represents a serious affront both to principles of federalism and to the separation of powers. In addition, the Sixth Circuit's judgment warrants review because it conflicts with decisions throughout the Nation on important questions of law regarding the meaning of this Court's punitive damages jurisprudence even in its proper setting.

1. Background.

Chicago Title and First American are rivals in the "highly competitive" title insurance business. Pet. App. 4a. In 2002, First American launched a new title insurance brand, The Talon Group ("Talon"), and "embarked on an expansion strategy that included recruiting experienced individuals from industry competitors." *Id.* First American targeted key Chicago Title employee James Magnuson ("Magnuson") as the lynchpin to a plan to raid employees and customers from Chicago Title's Columbus area offices. First American knew that Magnuson had an agreement not to compete against Chicago Title in Columbus and contiguous counties through 2006. *Id.* In feigned deference to the non-compete agreement, First American purported to "carve[] out" central Ohio from Magnuson's area of responsibility. *Id.* at 18a. But the carve-out was a sham, and First American never intended to honor it. Instead, the Court of Appeals found that there was "undisputed evidence" of First American's deliberate intent: "First American placed Magnuson its

Columbus office building, included him in a local title insurance industry directory, listed his cell phone number as the regional office number, placed an incoming local phone line on his desk, included his name on marketing materials, and had him participate in sales calls to Columbus-area clients." *Id.* First American even promised to indemnify Magnuson for breaching his non-compete agreement. *Id.* at 4a. The scheme had the intended devastating effect on Chicago Title's central Ohio operations. *Id.* at 4a, 25a.

Chicago Title brought a diversity suit under Ohio law against Magnuson for breaching the non-compete agreement and First American for intentionally inducing the breach. The District Court granted partial summary judgment for Chicago Title on its tortious interference claim, finding that "no reasonable mind could conclude that . . . Talon did not intentionally induce Magnuson into breaching his contractual obligations." *Id.* at 17a-18a. After a sixteen-day trial on proximate cause and damages, the jury awarded Chicago Title $10.8 million in compensatory damages. *Id.* at 5a. The jury also found that First American had acted with malice under Ohio law and, on that basis, assessed punitive damages of $32.4 million. *Id.* In sustaining the punitive damages award, the District Court noted that First American's deceptive strategy permeated not only the transaction, but also the testimony it offered to the jury to explain and excuse its misconduct. *Id.* at 37a-39a. The District Court characterized the malice as "particularly egregious." *Id.* at 51a.

2. The Court of Appeals' Decision.

The Sixth Circuit upheld the summary judgment rulings that, under Ohio law, Magnuson was liable for having breached the non-compete agreement and that First American was liable for having intentionally interfered with the contract. *Id.* at 5a-18a. The Sixth Circuit nevertheless reversed the award of compensatory damages, holding that the District Court had improperly granted Chicago Title's motion for judgment as a matter of law on the mitigation defense rather than submitting that issue to the jury. *Id.* at 18a-23a.

The Sixth Circuit then conducted a due process review under the *Gore* factors and summarily rejected the constitutionality of *any* punitive damages in cases such as this one, notwithstanding the jury's finding of actual malice under Ohio law and the District Court's finding (which the Court of Appeals affirmed) that no reasonable person could find that First American's misconduct was anything other than intentional. *Id.* at 17a-18a. The Sixth Circuit explained that it had "already upheld the district court's finding that First American intentionally interfered with the Contract, so we are willing to assume, for sake of argument, that First American acted maliciously rather than by accident." *Id.* at 25a.

Nevertheless, in a remarkable holding with sweeping implications, the Sixth Circuit concluded that First American's malice could not by itself establish the requisite reprehensibility to justify punitive damages under the *Gore* analysis *and* that, because this was so, Ohio could not treat the underlying conduct as warranting punitive damages at all:

> Here, the only factor present is that First American acted with malice. Especially because there were no physical injuries or threat to personal safety as a result of First American's conduct, and because Chicago Title was not a financially vulnerable victim, the fact that First American acted maliciously is insufficient to support a finding that [its] behavior was *sufficiently reprehensible* for an award of punitive damages."

Id. at 28a (emphasis added). The Sixth Circuit added that the remaining two *Gore* guideposts were "irrelevant," "[s]ince punitive damages are inappropriate in this case due to insufficient reprehensibility of First American's conduct." *Id.* at 29a n.9.

REASONS FOR GRANTING THE WRIT

Review is warranted to address the basic question whether this Court's punitive damages jurisprudence authorizes federal courts, in the name of substantive due process, to override state (and, presumably, federal) choices regarding the *kinds of wrongful and injurious conduct* that warrant punitive damages. The Sixth Circuit licensed the federal courts to substitute their judgment for that of a state legislature that has defined by statute the sort of egregious conduct that may give rise to civil punishment.

The Sixth Circuit's decision is flatly inconsistent with this Court's teachings regarding the due process limits on punitive damages. The Court of Appeals assumed that First American's conduct was actionably malicious and accordingly met the criteria

for punitive damages under long-settled Ohio law. Nevertheless, the court invoked "due process" as a basis for eliminating punitive damages altogether from the panoply of options available to Ohio for dealing with such conduct.

The Sixth Circuit's judgment conflicts with the decisions of this Court and of lower courts in three distinct and troubling ways:

First, the Sixth Circuit's judgment departs from decisions of this Court and of lower courts regarding the *target* of federal due process review. Courts have properly confined that review to the *size* of a punitive damages verdict. When the conduct in question is sufficiently egregious to warrant punitive damages under state law, courts (until now) have never invoked due process to evaluate the propriety of an underlying finding of punitive liability – preserving state authority to specify the type and level of wrongful and injurious conduct that warrants imposing punitive damages in the first place. The Court of Appeals' usurpation of Ohio's prerogative to define the elements of punitive liability amounts to a virtually complete return to the misguided days of *Lochner v. New York,* 198 U.S. 45 (1905).

Second, the Sixth Circuit's judgment creates a two-factor minimum for the reprehensibility guidepost, which conflicts with decisions of this Court and of lower courts under which a single reprehensibility factor – particularly malice – is enough to justify an award of punitive damages.

Third, the Sixth Circuit's decision conflicts with decisions in other circuits regarding the meaning of the "repeated conduct" factor of the reprehensibility

guidepost – specifically, whether a defendant may qualify as a "repeated wrongdoer" if it commits reprehensible acts within the single transaction with the plaintiff, or whether the repeated acts must be committed against a variety of different parties, in addition to the plaintiff, before the defendant may be deemed to be a recidivist.

I. THE SIXTH CIRCUIT'S JUDGMENT CONFLICTS WITH DECISIONS LIMITING THE *GORE* FACTORS TO AN ASSESSMENT OF THE SIZE, NOT THE FACT, OF A PUNITIVE ASSESSMENT..

The Sixth Circuit's decision warrants review because it transforms the *Gore* factors from a test of whether punitive damages are "grossly excessive" in a particular case into a test of whether punitive damages may be imposed at all – even when proper under settled state law.

A. The Sixth Circuit's Judgment Conflicts With Decisions Of This Court Regarding The Nature Of The *Gore* Guideposts.

The Sixth Circuit held that the *Gore* factors prevented the State of Ohio from imposing any punitive liability for business torts against financially viable defendants, even though the finding of malice was sufficient to support an assessment of punitive damages under the applicable Ohio law, which provided clear statutory notice that conduct "demonstrat[ing] malice" may lead to punitive damages. OHIO REV. CODE. ANN. § 2315.21(C)(1).

To Chicago Title's knowledge, no court anywhere has ever construed the *Gore* factors to permit the

outright elimination of punitive liability in a category of cases in which the legal basis for the award of punitive damages under the governing substantive law is otherwise satisfied. *E.g.*, *Williams v. Kaufman County*, 352 F.3d 994, 1016 (CA5 2003) (rejecting an interpretation of *Gore* factors that "would defeat the ability to award punitive damages at all" in actions with only nominal compensatory damages).

In both *Gore* and *State Farm*, this Court was careful to limit its decisions to the issue of the gross *excessiveness* of particular awards of damages. This Court did not apply the due process guideposts to question whether the conduct could be subjected to punitive damages in the first instance. In *Gore*, for example, the Court explained that "[o]nly when an award can be fairly categorized as '*grossly excessive*' . . . does it enter the zone of arbitrariness that violates the Due Process Clause." 517 U.S. at 568 (emphasis added). The Court explained that it did not question the authority of the State to impose *some* punitive sanction to the conduct at issue: "we *of course* accept the Alabama courts' view that the state interest in protecting its citizens from deceptive trade practices justifies a sanction in addition to the recovery of compensatory damages." *Id.* at 585 (emphasis added). The Court's focus was solely on the *size* of the particular punitive award. *See id.* at 574 ("BMW did not receive adequate notice of the *magnitude* of the sanction that Alabama might impose.") (emphasis added); *id.* at 580 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a *modest award* of exemplary damages does not establish the high degree of culpability that warrants a *substantial* punitive

damages award.") (emphases added); *id.* at 584-85 (asking "whether a *lesser deterrent* would have adequately protected the interests of Alabama consumers") (emphasis added).

Similarly, in *State Farm*, this Court applied the *Gore* guideposts to the *amount* of the award, not the State's imposition of punitive liability in the first place. *See* 538 U.S. at 419-20 ("While we do not suggest there was error in awarding punitive damages[,] ... a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives ...."). Thus, the Court remanded the matter for "[t]he proper *calculation* of punitive damages." *Id.* at 429 (emphasis added). *See also Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007) ("we have emphasized the need to avoid an arbitrary determination of an award's *amount*") (emphasis added).[1]

B. The Sixth Circuit's Decision Represents A Return To *Lochnerism.*

The Court has recognized that each State has the authority to determine for itself under the Tenth Amendment what conduct to define as subject to

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[1] The Sixth Circuit's sole justification for its radical approach is an isolated statement in *State Farm* that "the existence of one" reprehensibility factor "may not be sufficient to sustain a punitive damages award." Pet. App. 28a n.8 (quoting *State Farm*, 538 U.S. at 419). But the Sixth Circuit took the reference out of context. The authority cited in *State Farm* for the quoted proposition is *Gore*. *See State Farm*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 575). That section of *Gore*, in turn, focuses on the relationship between reprehensibility and the size of the specific award, not punitive liability *vel non*. *See Gore*, 517 U.S. at 575.

liability for punitive damages. Thus, the predicate finding of liability for punitive damages is "entitled to a strong presumption of validity," *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 457 (1993), and is subject to *no* "heightened scrutiny." *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 431 n.4 (2001); *see also id.* at 433 ("legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards"). In *Gore*, the Court emphasized that, notwithstanding its role in checking excessive awards of punitive damages, the Constitution does not constrain a state's "legitimate interests in punishment and deterrence" or its "considerable flexibility" in determining the *availability* of punitive damages. 517 U.S. at 568. In *State Farm*, the Court again underscored the "discretion" that states enjoy "over the imposition of punitive damages." 538 U.S. at 417. In *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007), the Court reaffirmed the same point.

This limitation reflects bedrock principles of federalism as well as separation of powers. The constitutional analysis must accommodate not only the limited institutional role of the federal judiciary but also "the diverse policy judgments of lawmakers in 50 States." *Gore*, 517 U.S. at 570. "A basic principle of federalism is that each State may make its own reasoned judgment about what 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." *State Farm*, 538 U.S. at 422. The Sixth Circuit's decision intrudes on the

authority of the States reserves by the Tenth Amendment.

The Article III judiciary oversteps the boundaries of the judicial function most conspicuously when it undertakes to direct policy-makers at any level of government, state or federal, as to conduct deserving of civil punishment. The federal judiciary should not, in the guise of due process, interfere with the power of a State to determine that malicious conduct causing injury, whether economic or physical, may be sufficiently egregious to warrant punitive damages. Indeed, Members of this Court have expressed doubts about the legitimacy of exercising substantive judicial review even over the *magnitude* of *particular* punitive awards.[2] Whatever the wisdom, as a matter of *stare decisis*, in retaining such limited review for gross excessiveness, the Court should not permit the Sixth Circuit to engage in a radical expansion of the *Gore* guideposts to second-guess essentially political determinations about the regulation of malicious business conduct and other species of intentional torts causing substantial social harm. Such a transformation of the guideposts would effectively resurrect the sorry history of the *Lochner* era.[3]

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[2] *See Philip Morris*, 127 S. Ct. at 1067-68 (Thomas, J., dissenting); *id.* at 1068 (Ginsburg, J., joined by Scalia and Thomas, JJ., dissenting); *State Farm*, 538 U.S. at 429 (Scalia, J., dissenting); *id.* at 429-30 (Thomas, J., dissenting); *id.* at 431 (Ginsburg, J., dissenting); *Gore*, 517 U.S. at 598-602 (Scalia, J., joined by Thomas, J., dissenting); *id.* at 607 (Ginsburg, J., joined by Rehnquist, C.J., dissenting); *TXO*, 509 U.S. at 470 (Scalia, J., joined by Thomas, J., concurring in judgment); *Pacific Mut. Life Ins. Co. v. Haslip,* 499 U.S. 1, 25-28 (1991) (Scalia, J., concurring in judgment).

[3] *Lochner v. New York,* 198 U.S. 45 (1905).

Moreover, nothing in the decision below would limit its application to state-created causes of action: Congress is equally covered by the Sixth Circuit's holding, which simply failed to recognize that a polity is entitled to deter and punish with special severity — opting for punitive damages liability as one available mechanism — what it deems malicious wrongdoing. "[S]ociety has an interest in deterring and punishing *all* intentional or reckless invasions of the rights of others ...." *Smith v. Wade,* 461 U.S. 30, 54 (1983).

The Sixth Circuit's transformation of the *Gore* factors into a test of eligibility for punitive liability will strip the States and the Federal Government alike of the fundamental authority to choose both the kinds of conduct they will regulate and the manner in which they will regulate it — whether through criminal fines and imprisonment, punitive damages assessments, or some mix of these devices. Here, Ohio is entitled, and its legislature has chosen, to punish and deter parties that intentionally harm their competitors even if the only harm is economic, there is no financial vulnerability or recidivism, and compensatory damages make the plaintiff whole. While due process places checks on the *extent* to which Ohio may punish under these circumstances, the Sixth Circuit improperly usurped the prerogative of Ohio to punish *at all.* Indeed, the Court of Appeals has essentially invited potential wrongdoers to violate Ohio public policy through malicious infliction of economic harm on solvent competitors.

C. The Court's Grant of Certiorari In *Exxon Shipping* Heightens The Need For Review Here.

By Order of October 29, 2007, the Court granted certiorari in *Exxon Shipping Co. v. Baker*, No. 07-219, to examine the imposition of punitive damages under maritime law. Although the Court did not grant the petitioner's request for review of the Ninth Circuit's application of the *Gore* factors, this case is an ideal "bookend" to *Exxon Shipping*.

First, this case presents an issue that is in some respects a mirror image of *Exxon Shipping*. The first question presented in *Exxon Shipping* is whether maritime law, a species of federal common law, *permits* the imposition of punitive damages against a shipowner for the conduct of a ship's master at sea, absent any finding that the owner directed, countenanced, or participated in that conduct, and even when the conduct was contrary to policies established and enforced by the owner. Here, by contrast, the question is whether due process *prohibits* the imposition of punitive damages *even when* the defendant corporation directed, countenanced, and participated in the misconduct, and even when the conduct was carried out in fulfillment of the policies established and enforced by the defendant. In the case at bar, the Sixth Circuit specifically found that there was "undisputed evidence" of First American's deliberate intent and upheld the District Court's summary judgment ruling that First American intentionally interfered with the contract. Pet. App. 17a. The Sixth Circuit, in other words, held that punitive damages were prohibited by due process despite the kind of direct, malicious

involvement by the defendant that the Ninth Circuit held to be unnecessary under maritime law for the award of such damages.

More fundamentally, this case presents the opportunity to elaborate on the principles of federalism that complement the separation-of-powers principles involved in *Exxon Shipping*. The second question presented in *Exxon Shipping* is whether federal judge-made law may expand the remedies provided by Congress in the Clean Water Act, which specifies the criminal and civil penalties for maritime conduct but contains no punitive damages liability. This case, too, involves the principle that the sovereign responsible for regulating the wrongdoing at issue enjoys the prerogative to decide whether to use punitive damages, civil fines, criminal penalties, or some other sanction altogether to deter that misconduct and to punish it when it takes place.

In *Exxon Shipping*, the relevant sovereign is the United States, acting through Congress in the Clean Water Act. The question is whether federal courts may revise Congress' decision about the punishment of maritime misconduct by *adding* judge-made punitive damages to specified civil and criminal penalties. In the instant case, the relevant sovereign is Ohio, acting through its legislature and courts. The salient question is whether federal courts may revise Ohio's decision about punishment of economic misconduct by *subtracting* punitive damages from the state-created scheme.

Both cases, in other words, involve fundamental limits on the federal judicial role in second-guessing the substantive decisions of political bodies. Granting review in the instant case would allow the

Court to consider the principles of federalism that reinforce the separation-of-powers rules that govern *Exxon Shipping*.

II. THE SIXTH CIRCUIT'S JUDGMENT CONFLICTS WITH DECISIONS FINDING THAT MALICIOUS CONDUCT ALONE ESTABLISHES SUFFICIENT REPREHENSIBILITY TO UPHOLD PUNITIVE DAMAGES ASSESSMENTS.

The Sixth Circuit's judgment warrants review for an additional reason: Even setting aside its improper extension of due process review into the fact, rather than the amount, of a punitive assessment, the judgment below conflicts with decisions of this Court and of lower courts establishing that the "reprehensibility" guidepost of *Gore* can support a punitive award merely by a showing that the defendant's tortious conduct was intentional or malicious. The Sixth Circuit improperly demanded evidence of an additional aggravating factor, such as the financial vulnerability of the plaintiff or the risk of physical harm.

In *State Farm*, this Court granted review to address "the imprecise manner in which punitive damages systems are administered." 538 U.S. at 418. Review is warranted here to clarify the reprehensibility guidepost and to address the conflict created by the Sixth Circuit.

A. The Sixth Circuit's Judgment Conflicts With Decisions of This Court.

The first guidepost — the degree of reprehensibility — is "[t]he most important indicium

of the reasonableness of a punitive damages award." *State Farm,* 538 U.S. at 419. The Court has instructed that judicial review of the "reprehensibility" guidepost must consider several factors, including whether the defendant's conduct was intentionally malicious:

> 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*.

Id. at 419 (emphasis added). Hence, the Court expressly has listed the question of whether a defendant's conduct is intentional or malicious as one of the reprehensibility factors that can warrant a punitive award.

There is no way to square the Sixth Circuit's decision with this Court's articulation of the reprehensibility guidepost in *State Farm.* The Sixth Circuit refused to treat a showing of intentional malice as sufficient by itself to 'satisfy' the reprehensibility guidepost. The Sixth Circuit held that *two* reprehensibility factors must be present — i.e., that malicious conduct must be coupled with an *additional* "aggravating" factor — in order to justify an award of punitive damages. But this Court has consistently repudiated efforts to subject the due process analysis to such a litmus test, much less a

test requiring at least *two* indicia of reprehensibility. To the contrary: in both *Gore* and *State Farm*, this Court opined that the reprehensibility guidepost was satisfied by conduct that did *not* contain any additional "aggravating" factor beyond the malicious nature of the defendant's conduct, by itself.

Indeed, in *Gore*, the Court found that the conduct in question met "none" of the reprehensibility factors, because BMW (unlike First American here) was not guilty even of intentional affirmative misconduct. 517 U.S. at 576; *id.* at 579 ("the record in this case discloses no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive"); *id.* at 580 ("this case exhibits none of the circumstances ordinarily associated with egregiously improper conduct"). Nevertheless, the Court explained that even conduct without a "high degree of culpability" could give rise to least a "modest" punitive award. *Id.* at 580 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award."). The Court opined that *either* intentional acts of misconduct *or* the financial vulnerability of the victim could trigger punitive damages. *Id.* at 576 (the "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, *or* when the target is financially vulnerable, can warrant a substantial penalty") (emphasis added). Moreover, this Court indicated that, for Justice Kennedy, "the defendant's intentional malice was the decisive element in a 'close and difficult' case." *Id.* (citing *TXO*, 509 U.S. at 468 (separate opinion)).

Hence, *Gore* makes clear that malicious conduct alone can serve as the basis for punitive damages, with none of the additional aggravating factors demanded by the Sixth Circuit.

In *State Farm*, the Court again implied that an award could be imposed based solely on the defendant's malicious conduct. *State Farm* held that the vast bulk of the plaintiffs' reprehensibility arguments were irrelevant and impermissible because they related to the defendant's "nationwide policies rather than [to] the conduct directed toward the Campbells." 538 U.S. at 420. The Court specifically rejected any claim that plaintiffs had suffered physical harm or that there was a risk to the health or safety of others. *Id.* at 426. The Court also found that there was no basis for contending that State Farm's conduct involved repeated actions. *Id.* at 423.

In short, the Sixth Circuit's demand for a further "aggravating" factor — in addition to the defendant's malice — flatly conflicts with both *Gore* and *State Farm*. Indeed, the Court has long recognized the States' wide constitutional latitude to impose punitive damages even when a defendant is guilty of *no* intentional wrongdoing — let alone the kind of deliberate tort at issue in this case. In *Smith v. Wade*, the Court surveyed the historical record and concluded that, when the Fourteenth Amendment was adopted, "[t]he large majority of state and lower federal courts were in agreement that punitive damages awards did not require a showing of actual malicious intent; they permitted punitive awards on variously stated standards of negligence,

recklessness, or other culpable conduct short of actual malicious intent." 461 U.S. at 45.

In *Kolstad v. American Dental Ass'n,* 527 U.S. 526 (1999), the Court also rejected the need for the additional aggravating factors required by the Sixth Circuit. In *Kolstad*, the Court surveyed the common-law history to find that a plaintiff could recover punitive damages solely on the basis of a defendant's malicious intent, without any showing that the defendant had engaged in "conduct with some independent, 'egregious' quality before being subject to a punitive award." *Id.* at 538. "Most often . . . eligibility for punitive awards is characterized in terms of a defendant's motive or intent. Indeed, '[t]he justification of exemplary damages lies in the evil intent of the defendant.' . . . Conduct warranting punitive awards has been characterized as 'egregious,' for example, *because* of the defendant's mental state." *Id.* (citation omitted). The Sixth Circuit's decision therefore urgently warrants this Court's review.

B. The Sixth Circuit's Judgment Conflicts With Decisions Of Other Courts.

Next, the Sixth Circuit's judgment conflicts with decisions of other circuits and state courts refusing to require multiple reprehensibility factors and upholding punitive awards solely on the basis that a defendant's conduct was intentional and malicious:

- The Federal Circuit has upheld a punitive award similar in magnitude to the award in this case ($50 million/3.3:1 ratio) even when malice was the only reprehensibility factor. *See Rhone-Poulenc Agro,*

S.A. v. DeKalb Genetics Corp., 345 F.3d 1366, 1371 (Fed. Cir. 2003). The Court of Appeals explained that "[i]t is true that the facts alleged herein do not demonstrate any of the criteria enhancing reprehensibility mentioned in *Gore,* such as an act of violence, disregard for the health and safety of others, a pattern of misconduct, or the exploitation of a financially vulnerable target." *Id.* at 1370 (internal quotation marks omitted). Nevertheless, in contrast to the Sixth Circuit in the decision below, the Federal Circuit in *Rhone-Poulenc* recognized that *State Farm* listed the intentional nature of wrongdoing as a factor that, *by itself*, can warrant a punitive award: "[f]or the Court's majority, [intentional malice, trickery, or deceit] has become an important criterion of what the Constitution accepts as reprehensible conduct." 345 F.3d at 1371. The Federal Circuit held that the defendant "acted with the necessary intentional malice, trickery or deceit to satisfy *Gore*'s requirement of reprehensibility." *Id.* That holding is not irreconcilable with the Sixth Circuit's decision in the instant case.

• The Second Circuit has also held that the reprehensibility guidepost counsels in favor of upholding a punitive award even where any "harm caused by defendants was not 'physical as opposed to economic'"; where defendants did not directly endanger the health and safety of others; and where plaintiffs were not "'financially vulnerable.'" *See Motorola Credit Corp. v. Uzan*, 388 F.3d 39, 63-64 (CA2 2004). The Second Circuit has opined that where a punitive damages assessment arises from economic injury, the due process review should functionally focus on the "severity of [the]

misconduct" and the amount "needed to deter other potential perpetrators," not mechanistically "on how many relevant [reprehensibility] factors" a defendant's conduct manifests. *Id.* at 64.

• In *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 233 (CA3 2005), the Third Circuit held that a defendant's "purposefully indifferent inaction and intentionally dilatory action" demonstrated sufficient reprehensibility. The Court of Appeals noted that "the critical input to the reprehensibility calculus in this case is whether the delay in settling the claim was due to legitimate differences of opinion over its value or, rather, to [defendant's] dilatoriness and inertia." *Id.* at 231. The Third Circuit stressed that the evaluation of whether the conduct was intentionally malicious or taken in good faith "was best made by the judge who heard the testimony and observed the demeanor of all of the significant participants." *Id.* Accordingly, the Third Circuit followed this Court's instruction that "'the district courts have a somewhat superior vantage over courts of appeal, and even then the advantage exists primarily with respect to issues turning on witness credibility and demeanor.'" *Id.* at 230-31 (quoting *Cooper Indus.*, 532 U.S. at 424).

• In *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (CA7 2003), Judge Posner upheld a 37 to 1 ratio of punitive damages to compensatory damages as constitutional, where a hotel failed to fumigate to remove bedbugs. The court explained that the "defendant's behavior was outrageous but the compensable harm" was "slight" and "difficult to quantify." *Id.* at 677.

• In *Eden Elec., Ltd. v. Amana Co.*, 370 F.3d 824, 829 (CA8 2004), *cert. denied*, 543 U.S. 1150 (2005), the Eighth Circuit affirmed a punitive damage award approximately 4.5 times greater than the compensatory damages where the only reprehensibility factor was that the defendant "was guilty of malice, trickery, and deceit." *Id.* at 829. The Eighth Circuit acknowledged that the plaintiff's "compensatory damage recovery was significant and that this is a commercial case." *Id.* Moreover, the court conceded that "this is a case of economic rather than physical harm. [Defendant's] conduct did not evince a disregard for the health or welfare of others, and the fraud involved only a single incident and a single victim." *Id.* Nonetheless, the court of appeals upheld a punitive award of $10 million. Similarly, in *Diesel Mach., Inc. v. B.R. Lee Indus., Inc.*, 418 F.3d 820 (CA8 2005), the Eighth Circuit concluded that the defendant was liable for punitive damages because it exhibited "a callous disregard for the dealers' legal rights," *id.* at 840, even though "the first three reprehensibility factors weigh on [defendant's] side. [Plaintiff's] harm was economic, not physical; the tortious conduct did not jeopardize personal health or safety; and [plaintiff] was not financially vulnerable. The punitive damage award is not doomed, however, simply because some factors weigh in the defendant's favor." *Id.* at 839.

• The Ninth Circuit has opined that even modest reprehensibility factors in cases of purely economic harm can warrant a 4:1 ratio between punitive and compensatory damages. *Planned Parenthood of Columbia/Willamette Inc. v. Am. Coalition of Life Activists*, 422 F.3d 949, 962 (CA9 2005) ("In cases

where there are significant economic damages and punitive damages are warranted but behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality.").

• In *Employees' Benefit Ass'n v. Grissett*, 732 So.2d 968, 979 (Ala. 1998), the Alabama Supreme Court upheld a punitive award that was 17 times the compensatory damages, even though it concluded that "[t]he degree of reprehensibility in this case is low." "[T]he evidence indicates that [the defendant's conduct was] . . . merely clumsy and dogmatic, not malicious. There was no evidence at all to indicate that [defendant] tried to conceal its actions." *Id.* at 980. "This present case involves no false representations." *Id.* at 979. "[I]t does not reflect the degree of reprehensibility, often marked by greed, that has been the basis of large punitive damages awards in the past." *Id.* at 980. Nonetheless, the state court concluded that the defendant's "dogmatic adherence to rules and bylaws that are inartfully drafted and therefore unworkable" justified "an award of more than token punitive damages." *Id.* The facts in the instant case are far more egregious.

• In *Casciola v. F.S. Air Serv., Inc.*, 120 P.3d 1059, 1068 (Alaska 2005), the Alaska Supreme Court held the reprehensibility guidepost met because "[t]he superior court found that [defendant's] actions were 'outrageous, malicious and with bad motives' and 'the injuries suffered by [plaintiff] flowed from [defendant's] 'intentional malice, trickery, or deceit.'" (citation omitted).

• In *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005), *cert. denied*, 127 S.Ct. 48 (2006), the California Supreme Court imposed a

punitive award of ten times the compensatory damages in a case involving purely economic harm. The court held that the defendant's intentional wrongdoing was the only reprehensibility factor met. The court explained that "the tortious act on which liability was based was a single false promise (or set of promises) made in the letter of intent, and no evidence indicated [defendant] had acted similarly toward other potential buyers." *Id.* at 76. The injury suffered was solely economic, and there was no threat to health or safety. *Id.* The court concluded that, "of the five subfactors relevant to reprehensibility, only one applies. In the universe of cases warranting punitive damages under California law, the fraudulent promise or promises ... have to be regarded as of relatively low culpability." *Id.* Nonetheless, the court concluded that the reprehensibility guidepost was sufficiently satisfied to warrant a 10:1 ratio between punitive and compensatory damages.

- Texas courts have also recognized that malicious conduct, by itself, can satisfy the first *Gore* guidepost. For example, in *Mission Res., Inc. v. Garza Energy Trust,* 166 S.W.3d 301, 318 (Tex. Ct. App. 2005, pet. granted), the Texas Court of Appeals upheld a $10 million punitive award by observing that "[t]he high Court has also explained that intentional malice can be the decisive element in a 'close and difficult case.'" *Id.* at 318 (quoting *Gore*). The state court opined that the intentional nature of the defendant's conduct satisfied the reprehensibility guidepost. *Id.* ("Although [defendant's] conduct did not cause physical injury, it did involve a substantial amount of economic harm. [Defendant] breached its

contract and committed the intentional tort of trespass. It acted with malice, and its conduct amounted to felony theft."). *See also Bright v. Addison,* 171 S.W.3d 588, 603-04 (Tex. Ct. App. 2005, pet dism'd) ("We agree the harm suffered by [plaintiffs] was economic and did not involve their health, safety, or financial vulnerability. [Defendant's] conduct, however, was an intentional breach of his fiduciary duty to his clients. . . . The evidence showed [defendant] acted with intentional malice, trickery, and deceit rather than mere accident.").

The Sixth Circuit's judgment also conflicts with many other decisions recognizing that malicious conduct, by itself, can satisfy the reprehensibility guidepost. *E.g., In re John Richards Homes Bldg. Co.*, 291 B.R. 727, 739 (E.D. Mich. 2003) (upholding punitive damages award because "evidence of [defendant's] bad faith is overwhelming"); *Borne v. Haverhill Golf & Country Club, Inc.*, 791 N.E.2d 903, 916 (Mass. App. 2003) (upholding punitive damages award because defendant was "cavalier and callously indifferent").

This Court's review is also warranted because of the need for guidance regarding the reprehensibility guidepost. Lower courts have complained that the "reprehensibility of a party's conduct, like truth and beauty, is subjective. One's view of the quality of an actor's conduct is the result of complex value judgments." *In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1093 (D. Alaska 2004), *vacated and remanded*, 472 F.3d 600 (CA9 2006), *as amended*, 490 F.3d 1066, *cert. granted* (No. 07-219).

To be sure, this Court has attempted to bring some level of objectivity to the inherently subjective reprehensibility analysis by promulgating a series of sub-rules for lower courts to consider when evaluating defendants' misconduct. However, as one commentator has noted, "these sub-rules have, in fact, done very little in the way of promoting uniformity." Jenny Jiang, Comment, *Whimsical Punishment: The Vice of Federal Intervention, Constitutionalization, and Substantive Due Process in Punitive Damages Law,* 94 CAL. L. REV. 793, 794 (2006).

Other scholars have found that, despite this Court's desire to illuminate a path for lower courts to follow,

> the Court's guideposts have not produced a workable and predictable test for determining the constitutionality of large punitive awards. . . . Although the Court has said that the first guidepost, the degree of reprehensibility of the defendant's conduct, is the "most important," it has proved to be amorphous in application.

Steven Chanenson & John Yotanda, *The Foggy Road for Evaluating Punitive Damages: Lifting the Haze From the* BMW/State Farm *Guideposts,* 37 U. MICH. J.L. REFORM 441, 466-67 (2004).[4]

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[4] John Zenneth Lagrow, BMW of North America, Inc. v. Gore: *Due Process Protection Against Excessive Punitive Damages Awards*, 32 New Eng. L. Rev. 157, 196-97 (1997) (it is unclear "how courts should determine the proper amount of punitive damages to assess when the defendant's conduct falls between the ranges of violence and pure economic harm"); Andrew C.W. Lund, *The Road From Nowhere? Punitive Damage Ratios After*

The Sixth Circuit's decision in this case illustrates the need for additional clarification of the reprehensibility guidepost. The Court of Appeals misunderstood the nature of the guidepost and demanded a showing of "aggravating" factors beyond malicious and intentional misconduct. That decision is utterly irreconcilable with this Court's precedent and with decisions in the lower courts.

BMW v. Gore *and* State Farm v. Campbell, 20 Touro L. Rev. 943, 968-69 (2005) ("[T]he punitive damage analog of any particular level of reprehensibility is extremely murky."); Robert L. McFarland, BMW v. Gore: *Ten Years Later*, 68 Ala. Law. 126, 127 (Mar. 2007) ("The *Gore* guideposts, much like the infamous three-pronged *Lemon* test, possess the deceptive appearance of utility. It is easy to memorize the three factors, but difficult to know what they mean."); Stephanie L. Nagel, BMW v. Gore: *The United States Supreme Court Overturns an Award of Punitive Damages as Violative of the Due Process Clause of the Constitution*, 71 Tul L. Rev. 1025, 1039 (1997) ("the only predictable cases are those that land at the extremes of the reprehensibility scale"); George L. Priest, *Punitive Damages Reform: The Case of Alabama,* 56 Ala. L. Rev. 825, 838 (1996) (reprehensibility "is a very vague concept and hardly susceptible of careful measurement"); Neil B. Stekloff, *Note and Comment, Raising Five Eyebrows: Substantive Due Process Review of Punitive Damages Awards After BMW v. Gore*, 29 Conn. L. Rev. 1797, 1817 & 1819 (1997) (*Gore* guideposts are "far too subjective and malleable to be meaningful"); Nitin Sud, *Punitive Damages: Achieving Fairness and Consistency After* State Farm v. Campbell, 72 Def. Couns. J. 67, 74 (2005) (surveying lower courts and complaining that "there is little consistency in the applications of *State Farm*"); Jeffrey R. White, State Farm *and Punitive Damages: Call the Jury Back*, 5 J. High Tech. L. 79 (2005) (noting "[t]he wide variation in the application of these [reprehensibility] factors by the courts" and predicting that the variation in approaches in the lower courts "dims the outlook for more predictable punitive damage awards").

C. The Sixth Circuit's Decision Involves An Important Question of Law.

Review is also justified because the Sixth Circuit's decision will have a host of pernicious and disruptive effects. The Sixth Circuit has held that due process bars a State from imposing punitive damages altogether, even in cases involving malicious and intentional torts, where there are "no physical injuries or threat to personal safety" and where the plaintiff is "not a financially vulnerable victim." Pet. App. 28a.

The net effect of this decision will be to render punitive damages essentially unavailable in economic tort cases with commercial actors, as a matter of federal constitutional law. Business tort cases typically do not involve physical injuries, threats to personal safety, or financially vulnerable victims. Hence, the Sixth Circuit's ruling will effectively insulate business wrongdoers from punitive damages as a matter of constitutional law, limiting punitive liability to personal injury cases and other contexts involving physical injuries, threats to personal safety, and other aggravating factors cited by the Sixth Circuit.

Yet it is no accident that one of the few recent decisions of this Court to uphold a punitive award in full was a business tort case. *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993). Punitive damages often make good economic sense in commercial tort cases because they can remove a defendant's anticipated financial gain, as adjusted by the probability of detection, and therefore ensure

adequate deterrence.[5] This Court has noted the plethora of statutes mandating double and treble damages for a wide variety of business torts – underscoring the reasonableness of punitive damages in the commercial context. *Gore*, 517 U.S. at 581 n.33. Yet under the Sixth Circuit's new rule, punitive damages will be essentially unavailable in the one category of cases in which such damages make the most obvious economic sense.

Moreover, the Sixth Circuit's decision calls into question the availability of punitive damages in many other contexts in which malicious conduct, by itself, has been the traditional basis for punitive liability. For example, the sole statutory requirement for punitive damages in federal employment discrimination cases under Title VII is whether a defendant's practices exhibit "malice or . . . reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(b)(1). Until now, courts in Title VII cases had uniformly rejected the additional aggravating elements demanded by the Sixth Circuit. *E.g., Kolstad,* 527 U.S. at 538.

Indeed, many federal statutory schemes authorize the imposition of punitive damages without the two-factor reprehensibility showing demanded by the Sixth Circuit. The Fair Credit Reporting Act, for example, provides that a court may award punitive damages when a consumer reporting agency willfully fails to comply with the requirements imposed by the

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[5] See *Kemezy v. Peters*, 79 F.3d 33, 34-35 (CA7 1996) (Posner, J.); *Zazú Designs v. L'Oréal, S.A.*, 979 F.2d 499, 508 (CA7 1992) (Easterbrook, J.); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 874-75 (1998).

Act. 15 U.S.C. §1681n(a)(2). A "willful" failure under the Act includes a violation committed in mere reckless disregard of statutory obligations. *See Safeco Ins. Co. of America v. Burr*, 127 S.Ct. 2201 (2007). Similarly, the Equal Credit Opportunity Act, 15 U.S.C. §1691e(b), and the Fair Housing Act, 42 U.S.C. §3613(c), provide for punitive damages without the requirements imposed by the Sixth Circuit.

In all of these contexts, malicious conduct, *by itself*, is a sufficient basis for the award of punitive damages. The Sixth Circuit's decision erecting a constitutional barrier to the imposition of such liability therefore threatens substantial disruption to statutory schemes for the enforcement of important federal rights.

III. REVIEW IS NEEDED TO CLARIFY WHETHER A DEFENDANT QUALIFIES AS A "REPEATED WRONGDOER" BY COMMITTING MULTIPLE REPREHENSIBLE ACTS WITHIN THE SINGLE TRANSACTION WITH THE PLAINTIFF.

The Sixth Circuit's decision warrants review for a final reason relating to the meaning of one of the reprehensibility factors, recidivism. The Sixth Circuit followed circuit precedent in holding that a defendant cannot qualify as a "repeated wrongdoer" under the guidepost unless the acts in question were committed against *different* parties, other than the plaintiff. Pet. App. 26a-27a.

This Court's review is warranted because the lower courts are divided on the question. The Second

Circuit has agreed with the Sixth Circuit. *See Lee v. Edwards,* 101 F.3d 805, 809 (CA2 1996) (citing need for evidence of repeated misconduct with respect to other employees rather than repeated misconduct against the plaintiff).

But the Third Circuit has interpreted the "repeated wrongdoing" factor differently. The Third Circuit has held that repeated acts of wrongdoing can demonstrate reprehensibility even when they involve parties other than the plaintiff: "[W]hile the 'repeated conduct' subfactor will necessarily have less force where the defendant's misconduct did not extend beyond his dealings with the plaintiff, it may still be relevant in measuring the reprehensibility of the defendant's conduct, based on the particular facts and circumstances presented." *CGB Occupational Therapy, Inc. v. RHA Health Servs.*, 499 F.3d 184, 191 (CA3 2007) (internal quotation marks omitted). The Third Circuit proceeded to find — in a case of wrongful employee recruiting with parallels to the instant case — that the defendant's persistence in its wrongful conduct justified a finding of recidivism. *Id.*

The Ninth Circuit has adopted the same view as the Third Circuit. *Southern Union Co. v. Southwest Gas Corp.*, 415 F.3d 1001, 1010 (CA 9 2005) (holding that conduct toward same plaintiff, including improper litigation tactics against same plaintiff, could establish reprehensibility); *Planned Parenthood,* 422 F.3d at 959 (citing need to show that defendant's past conduct caused harm to particular plaintiffs before court). State courts have followed the Third Circuit's approach as well. In *Superior Fed. Bank. v. Jones & Mackey Constr. Co.,* 219 S.W.3d 643 (Ark. Ct. App. 2005), the Arkansas Court

of Appeals held that the "repeated conduct" factor was satisfied "given that several statements were made by [defendant] in what seemed to be a continuing effort to inflict harm" on the same plaintiff. *Id.* at 651. The court explained that *Gore* and *TXO* "recogniz[ed] that evidence of other transactions may be relevant in determining a defendant's degree of reprehensibility. *TXO* also considered evidence of a 'pattern of fraud, trickery, and deceit.'" *Id.* at 650 n.3. The court held that a course of conduct involving the same plaintiff could satisfy the "repeated wrongdoing" test:

> the other defamatory statements that appellant asks us to disregard were not directed to other persons and did not involve separate, unrelated claims; nor were they dissimilar acts, independent from the acts upon which liability was premised. Instead, they were part of a pattern of behavior directed toward the LLC, and they paint a telling picture of appellant's overall conduct and intent to cause harm.

Id. at 650.[6]

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[6] *See also Century Surety Co. v. Polisso,* 43 Cal. Rptr. 3d 468, 499-500 (Cal. Ct. App. 2006) ("While there was no evidence Century engaged in such tactics with other individuals, its conduct with respect to the Polissos was hardly limited to a single event. Century engaged in a course of conduct over a five-year period of time . . . . Under these circumstances, we conclude Century's conduct rates moderately high on the reprehensibility scale."); *Hayes Sight & Sound, Inc. v. ONEOK, Inc.,* 136 P.3d 428, 447 (Kan. 2006) (holding that defendant's conduct was reprehensible because it "was not an isolated incident," even though all evidence referred to the single natural gas well involving plaintiff).

This Court should grant review to address the divergent approaches by the lower courts. The Sixth Circuit's decision has created precisely the constitutional risk that the Court condemned in *State Farm* and *Philip Morris* – namely, that juries and trial courts might use punitive damages to punish a defendant for wrongdoing against absent parties rather than against the plaintiff. *See* 127 S. Ct. at 1062; 538 U.S. at 422-23. Conversely, when the repeated acts are all directed at the plaintiff in a common course of conduct before the court, the acts necessarily share a joint focus, and the defendant has ample ability to obtain relevant evidence and mount a defense.

Granting review would therefore afford the Court the opportunity to clarify the principles articulated in *State Farm* and *Philip Morris* in the context of the "repeated wrongdoing" factor of the reprehensibility guidepost. Commentators have stressed the need for further guidance in this area.[7] This Court should make clear that a standard focusing on repeated acts of wrongdoing against the same plaintiff is relevant

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[7] Jeff Bleich, et al., Philip Morris *Provides Yet Another Chapter in the Ongoing Saga of Punitive Damages in the U.S. Supreme Court*, 67 Or. St. B. Bull. 24 (2007) ("[T]he *Philip Morris* test may be a difficult one to apply or police, and so it may not amount to much of a limitation at all."); Erwin Chemerinsky, *More Questions About Punitive Damages*, 43 Trial 72 (May 2007) ("Appellate courts are left with little guidance on when the size of a punitive damages award is appropriate and when it is unconstitutional."); Michael I. Krauss, *Punitive Damages And The Supreme Court: A Tragedy In Five Acts*, 2007 Cato Sup. Ct. Rev. 315, 333 ('We can look forward to years of litigation and circuit splits trying to sort out what the Court hath wrought."); Mark K. Moller, *Introduction*, 2007 Cato Sup. Ct. Rev. 1, 5 (complaining that *Williams* is "no model of clarity").

to the reprehensibility guidepost and, indeed, minimizes the constitutional concerns expressed by this Court in *State Farm* and *Philip Morris*. The need to clarify the "repeated wrongdoer" element of the reprehensibility guidepost is a further reason to grant certiorari.

CONCLUSION

The petition for writ of certiorari should be granted. In the alternative, the Sixth Circuit's judgment should be summarily reversed.

Respectfully submitted,

STEVEN A. GOLDFARB
HAHN LOESER & PARKS, LLP
200 Public Square, Suite 3300
Cleveland, Ohio 44114
(216) 621-0150

LAURENCE H. TRIBE
Counsel of Record
Hauser Hall 420
1575 Massachusetts Avenue
Cambridge, MA 02138
(617) 495-4621

JONATHAN S. MASSEY
JONATHAN S. MASSEY, PC
7504 Oldchester Road
Bethesda, MD 20817
(301) 915-0990

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