No. 07-1055

In The
Supreme Court of the United States

EXXON MOBIL CORPORATION,

Petitioner,

v.

JOSEPH GREFER, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The Louisiana Court Of Appeal, Fourth Circuit

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. DID EXXON'S FULL, VOLUNTARY AND UNCONDITIONAL PAYMENT OF THE PUNITIVE DAMAGE AWARD EFFECT A WAIVER OF ANY ISSUES ON APPEAL AND RENDER THIS PETITION MOOT?

2. DID EXXON'S FAILURE TO PRESERVE ANY *WILLIAMS* OBJECTIONS WAIVE THOSE ISSUES?

3. DOES *WILLIAMS* EXPLICITLY PERMIT CONSIDERATION OF HARM TO THIRD PARTIES IN ASSESSING THE REPREHENSIBILITY OF EXXON'S MISCONDUCT?

4. DID THE LOUISIANA COURTS PROVIDE EXXON FULL DUE PROCESS PROTECTION – EVEN THOUGH EXXON DID NOT REQUEST IT?

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STATEMENT OF THE CASE

A. FACTUAL BACKGROUND

(1) Exxon Has Unconditionally Paid The Punitive Damage Award Contested Here.

At the outset, we note that after a series of discussions and negotiations by and between counsel for the Grefers and Exxon Mobil Corporation (hereinafter "Exxon"), reflected in correspondence by and between said counsel, Exxon "unconditionally" paid to the Grefers the full punitive damage award.[1] (Resp. App. 1a-26a). As Respondents assert hereinafter, this payment renders Exxon's Petition moot.

(2) The Grefer Property.

The instant suit involves a large tract of land owned by the Grefer family for over 125 years which, due to the wanton, reckless, and reprehensible conduct of Exxon, was thoroughly inundated with radioactive waste. The damage to this property began in 1968 when Intracoastal Tubular Services, Inc. ("ITCO") first leased the Grefer property from the Grefer family in order to operate a pipe yard for transporting, storing, cleaning, and inspecting Exxon's oilfield pipe.

During the many years of operations on the Grefer tract, Exxon sent ITCO millions of sections of

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[1] Exxon had previously paid the Grefers the full compensatory damage award, which is not at issue.

oilfield pipe encrusted with radioactive scale from Exxon's onshore and offshore oil production operations. R. 33:16.[2] This scale consisted of concentrated Radium-226, Radium-228, and their daughter products, collectively known as Technologically Enhanced Radioactive Material (TERM).[3] At Exxon's direction,[4] ITCO cleaned Exxon's pipes and allowed the waste to enter the environment in an uncontrolled fashion, as the radioactive scale fell from the pipes onto the ground when the pipes were transported in and around the yard, were off-loaded by crane or forklift, and were cleaned by both portable and stationary air rattling machines. R. 33:14-18, 34:48-52; R. 33:38-41, 34:49; Pl. Ex. 40-50. These rattling machines used high pressure air compressors that generated radioactive dust clouds. R. 33:17-19, 34:38. Aside from the deposit of scale from ITCO's cleaning operations, the radioactive scale in the pipes was also randomly

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[2] Citations to the trial court transcript are to the record filed with the Court of Appeal and take the form "R.[volume]:[page]."

[3] The acronym "TERM" refers to the radioactive scale deposits found in used oilfield drilling pipe. The acronym "NORM" is also used to describe that condition. *Grefer v. Alpha Technical*, 901 So.2d 1117, 1128, n.11 (La.App. 4th Cir. 2005); Petr. App. 48a. The decay of radium also generates Radon gas, which is a known human carcinogen.

[4] Exxon maintained offices at ITCO for its employees who managed materials, oversaw quality control, and supervised ITCO. R. 33:11-12, 46:40-41. The Grefers had no involvement with the industrial activities conducted by ITCO and Exxon on the property. R. 39:115-18.

buried and used as road and pipe rack building materials throughout the yard during all years of operations. R. 33:39-41, 34:48-52; ITCO Ex. 193(D). Estimates of the average amount of scale indicate that as much as *1.5 million pounds* of scale per cleaning machine was dispersed in the yard *each year*. R. 33:26, 29:10. *This waste was never removed from the yard, nor was there any record of a cleanup (of any sort).*

(3) Exxon's Conduct, Its Motivations and the Effect on the Grefer Family and Their Property.

The Fourth Circuit concluded that Exxon's actions in despoiling the Grefer property resulted from Exxon's "callous, calculated, despicable and reprehensible conduct during the time-period in question" (Petr. App. 114a), which showed that Exxon had no concern for human safety, "and even less concern about the property damage that it caused" to the Grefer family. Petr. App. 114a. Indeed, the facts clearly support that finding:

Exxon has long known of NORM contamination in oilfield equipment. Petr. App. 42a-43a. This knowledge pre-dated 1985, but in that year the United Kingdom Offshore Operators' Association – of which Exxon was a member – published safety guidelines and a reference manual that were distributed to all oil companies. The manual extensively covered the identification of radioactive scale in wells and the

procedure to follow up on such identification. Petr. App. 43a. Exxon officials felt that the guidelines were too onerous, restrictive, inflexible and unreasonable for Exxon's production operations in the United States. Petr. App. 88a.

Chevron discovered NORM contamination in its well sites in Mississippi in 1986. In May, 1986, after learning of Chevron's discovery, Exxon surveyed its Mississippi well sites and confirmed the presence of radiation in its equipment. Exxon's own hygienist admitted that had Exxon surveyed its U.S. wells sooner than 1986, it would have discovered radium in its wellheads sooner. Petr. App. 88a. Twice Exxon officials were notified that its cleaning contractors had to be informed of the radioactivity, since it posed a health and safety hazard, but Exxon still did nothing to warn them. Petr. App. 88a.

In fact, an internal memorandum written in August, 1986 by Exxon's then Director of Environmental and Regulatory Affairs showed that Exxon's "primary concern" after Chevron's NORM discovery was not health, safety or property clean-up – it was to get the oil industry and federal regulatory agencies to "slow down" the investigation into NORM contamination out of fear that the Environmental Protection Agency ("EPA") would increase its regulation and would eliminate the "produced water" exemption under the Resource Conservation Recovery Act ("RCRA"). Under that exemption oil companies such as Exxon are allowed to dispose of water produced

during drilling operations in an unregulated manner. Petr. App. 88a-89a.

Exxon's entirely selfish motivations were further demonstrated when the same Exxon official,[5] at a meeting of Exxon executives concerning NORM in January, 1987, calculated that the loss to Exxon if it were to lose its produced water exemption would be $750 million in the first year and $150 million for each subsequent year. Petr. App. 89a.

At the same meeting, several Exxon officials concluded that notifying pipe-cleaning contractors such as ITCO about the health and safety risks of NORM was "premature." Petr. App. 89a. This was contrary to the advice of an Exxon hygienist who had earlier opined that cleaning contractors such as ITCO had to be notified of the presence of radioactivity. Petr. App. 43a-44a.

Another confidential memo written by another Exxon executive in October, 1986 showed that Exxon wanted to downplay the NORM problem because of Exxon's potential exposure to litigation. The memo noted that litigation against Chevron by one of its pipe yard contractors had followed Chevron's disclosure of NORM contamination. The same memo noted that ITCO was a potential "look alike" to the Chevron contractor and suggested Exxon perform "low key"

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[5] The same Exxon official also wrote that Chevron's discovery was "nothing new." Petr. App. 89a-91a.

radiation exposure measurements. Petr. App. 89a-90a.

Exxon did not send any notification to ITCO until March, 1987 (five months after the October, 1986 memo, and ten months after it had identified the NORM problem at its domestic well sites), *causing further (and still unrestricted) contamination of the Grefer property*. Even then, Exxon downplayed the problem. In a videotape played for ITCO's president, Exxon portrayed the health risks associated with NORM as minor, and the safety procedure guidelines as merely suggestive of taking precautions to avoid breathing or ingesting airborne dust. Petr. App. 90a. *Exxon's inadequate warning did nothing to protect the Grefer property from further contamination or to address the problem already existing at the property.*

Even after Exxon no longer used ITCO as a cleaning contractor, Exxon was aware that contaminated equipment remained stockpiled on the Grefer property and was further aware of the danger posed by NORM-contaminated scale; *yet Exxon took no step to remove its radioactive material from the Grefer property*. Petr. App. 94a-95a.

At no point did Exxon notify or warn the Grefer family about the contamination at their property. R. 20:4946-48. *Rather, Exxon knowingly and intentionally left the Grefer family with a huge mess.* As a result of the radioactive contamination described above, the Grefers' long-held family property was despoiled. Petr. App. 95a. *Exxon's actions financially*

burdened the Grefers with the task of cleaning up the property. Petr. App. 95a. That burden, according to the jury, was $56 million (not the $1.5 million market value of the land asserted by Exxon). (Pet. 31.) This was less than the estimate of plaintiffs' expert, Mr. Stanley Waligora, and more than that of Exxon's expert.[6] Petr. App. 74a-77a. The Fourth Circuit determined that there was sufficient evidence to support the jury's award. Petr. App. 107a; 113a-115a. That judgment is now final and has been satisfied.[7]

Exxon's actions have not only exposed the Grefers to the expense of defending claims brought by third parties as a result of the contamination of the Grefer property but have also exposed the Grefers to significant potential liabilities. Petr. App. 117a-118a. In fact, a number of suits have already been instituted against the family.

B. PROCEEDINGS BELOW.

The Grefers filed the instant suit in August of 1997 to recover damages for the burial, concealment and disposal of radioactive scale throughout the Grefer tract, a large (32.75 acre) property, located in a suburb of New Orleans. Trial Record Volume 34, pp.

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[6] R. 29:22, 29:36, 33:163-64, 33:166.

[7] Indeed, Exxon has unconditionally paid that amount, with interest, to the Grefer family. *See* Exxon's Motion For Stay and Renewed Motion For Stay, *ExxonMobil v. Grefer, Joseph, et al.*, No. 05A981.

35-36 ("R34:35-36"); Plaintiffs' Exhibit No. ("Pl. Ex.") 13; Pl. Ex. 35-39; ITCO Exhibit No. ("ITCO Ex.") 193(A). They sought compensatory damages for the costs of restoration, general damages associated with the damage to the Grefer tract, and exemplary (punitive) damages under Louisiana Civil Code art. 2315.3. Petr. App. 5a. After a five-week trial, the jury found Exxon 85% at fault, ITCO 5% at fault, and two absent defendants 10% at fault. The jury rendered a verdict of: (1) $56,000,000.00 for the cost of remediating the contamination at the Grefer tract; (2) $145,000.00 in general damages associated with the damage to the Grefer tract; and (3) one billion dollars in punitive damages assessed against Exxon.

The Fourth Circuit affirmed the judgment in its entirety but reduced the punitive award to an amount equal to twice the compensatory damage award. *Grefer v. Alpha Technical*, 901 So.2d 1117 (La.App. 4th Cir. 2005) ("*Grefer I*"); Petr. App. 107a; 113a-115a. Both the plaintiffs and Exxon applied for Writs of Certiorari to the Louisiana Supreme Court. The Louisiana Supreme Court denied both Writ Applications on March 31, 2006. Petr. App. 120a-121a.

On April 5, 2006, seeking to stay execution of the punitive damage award, Exxon filed in the Supreme Court of Louisiana an "Emergency Motion to Stay Execution of Judgment." The court denied the Motion on April 24, 2006.

On April 27, 2006, Exxon filed a Motion to Stay in this Court. Justice Scalia denied the Motion on

May 1, 2006. *ExxonMobil Corporation v. Grefer, Joseph, et al.*, No. 05A981. Exxon filed a Renewed Motion to Stay, which was referred to all members of this Court, and was also denied. *ExxonMobil Corp. v. Grefer*, 126 S. Ct. 2056 (2006).

Exxon then applied to this Honorable Court for a Writ of Certiorari to the Louisiana Court of Appeal, Fourth Circuit. On February 26, 2007 this Court granted the writ, vacated the Fourth Circuit's decision, and remanded the case to the Fourth Circuit "for further consideration in light of *Philip Morris USA v. Williams*, 549 U.S. ___ (2007)."

The Fourth Circuit, after exhaustively reviewing its prior decision, the record of this case, and this Court's *Philip Morris* decision, elaborated and expanded on its "thought process" that went into its earlier opinion and reaffirmed its initial decree with regard to its award of exemplary damages. *Grefer v. Alpha Technical, on remand*, 965 So.2d 511, 526 (La.App. 4th Cir. 2007) ("*Grefer II*"); Petr. App. 33a.

Exxon applied for writs of certiorari to the Louisiana Supreme Court. That Court denied the application on November 16, 2007. Petr. App. 123a. Exxon now seeks review in this Honorable Court.

REASONS FOR DENYING THE PETITION

A. EXXON'S FULL, VOLUNTARY AND UNCONDITIONAL PAYMENT OF THE PUNITIVE DAMAGE AWARD EFFECTED A WAIVER OF ANY ISSUES ON APPEAL, AND RENDERED THIS PETITION MOOT.

Exxon has voluntarily and unconditionally paid the full amount of the punitive damages award included in the judgment entered below. Under applicable state law, that payment waived all issues on appeal. Exxon's petition is moot.

(1) Exxon's Payment of the Punitive Damage Award Was Unconditional.

Exxon "unconditionally" tendered to the Grefers the full punitive damages award contained within the June 22, 2001 judgment. This is clearly demonstrated by the letters attached, *in globo*, as Resp. App. 1a-26a. That correspondence demonstrates that the Grefers insisted at the time that, in order to stop the accumulation of interest, any payment must be "unconditional," and cited pertinent jurisprudence such as *American Motor Insurance Co. v. American Rent-All, Inc.*, 617 So.2d 944 (1993).[8] In his letter of May 18, 2006, Exxon attorney, Glen M. Pilié, wrote to Grefer attorney, Michael G. Stag:

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[8] Correspondence dated May 18, 2006 from Grefer attorney Michael G. Stag to Exxon attorney Glen M. Pilié. Resp. App. 5a-6a.

> ExxonMobil hereby makes an unconditional tender of full payment of the punitive damage component of the judgment and all legal interest thereon as of May 24, 2006 . . . [9]

Exxon thereafter unconditionally paid the Grefers the full amount of the punitive damage award, including legal interest.[10] The correspondence thus clearly shows that Exxon tendered and the Grefers accepted nothing less than an unconditional payment. Exxon's choice of the word "unconditional" was unqualified. Louisiana Civil Code art. 2047 provides that "the words of a contract must be given their generally prevailing meaning." Webster's Dictionary defines "unconditional" as "not limited: *absolute, unqualified* . . . "[11] Exxon uses the word "unconditional" or "unconditionally" in its correspondences dated May 18, 2006 and May 22, 2006, respectively. Resp. App. 7a-8a; 15a-16a. Because the Grefers had previously provided Exxon with pertinent jurisprudence which demonstrated that only an unconditional tender would stop the running of interest, Exxon knew, when it employed the word "unconditional," that the law imposed certain consequences on the use of the term. Exxon's transmission of funds, against

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[9] Resp. App. 7a-8a.

[10] Correspondence dated June 16, 2006, Stuart H. Smith to Mr. Pilié. Resp. App. 19a-20a; correspondence dated June 20, 2006, from Glen M. Pilié to Stuart H. Smith. Resp. App. 21a-22a.

[11] Webster's Ninth New Collegiate Dictionary (1986) (emphasis added).

this background, is proof of Exxon's deliberate and informed acceptance of the consequences of unconditional payment.[12]

(2) Exxon's Payment of the Punitive Damage Award Was Voluntary.

The correspondence reveals that Exxon was eager to terminate the accrual of interest on the punitive damage award. Exxon even asserted that it would attempt to deposit the funds into the registry of court if the Grefers refused to accept payment.[13] Coincident with its "unconditional" payment, Exxon asked for and obtained the Grefers' acknowledgment of the payment, allowing Exxon to release the suspensive appeal bond which it had posted.[14]

In short, Exxon paid the Grefers so that it could end its obligation to pay legal interest on the underlying judgment and premiums on the suspensive appeal bond. To achieve these savings, Exxon had to pay the money "unconditionally," and that is precisely what it did.

Exxon performed a simple risk analysis, balancing its chances of obtaining certiorari and a reversal

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[12] Exxon did not respond to Mr. Smith's letter (in which he accepted Exxon's "unconditional" tender) to clarify that the payment Exxon was making was not "unconditional."

[13] Correspondence dated May 18, 2006 from Mr. Stag to Mr. Pilié. Resp. App. 6a.

[14] Correspondence from Mr. Pilié to Mr. Smith dated June 20, 2006. Resp. App. 21a.

of the punitive damage award against the certainty of further accumulation of interest and bond premiums. Exxon opted to save the money.[15] This was a clear and deliberate choice, a choice which garnered Exxon an immense savings in interest and bond premium payments – a choice which Exxon was not just willing, but anxious, to make. Exxon thus benefitted from its "unconditional" tender in the form of legal interest and bond premiums saved, and clearly paid the money to obtain those benefits.

(3) Exxon's Unconditional and Voluntary Payment of the Punitive Damage Award Renders This Petition Moot.

The "unconditional" and voluntary payment by Exxon to the Grefers renders this petition moot because, under Louisiana law, the payment extinguished the action. In *Griffin v. International Insurance Company*, 727 So.2d 485 (La.App. 3d Cir. 1998), the defendants paid the full amount of the judgment with accrued interest and court costs into the registry of court, executing a document which asserted that the tender was "unconditional" and was made to "eliminate the continued accrual of legal interest pending plaintiff's delay for appeal and/or pending an appeal if taken." The defendants then appealed

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[15] Obviously, Exxon hoped it could pay the money and, nevertheless, seek to "vindicate" a legal principle, which is why it filed its Application for Writ of Certiorari with the U.S. Supreme Court.

the judgment. The Louisiana Third Circuit dismissed the appeal as moot:

> . . . to permit such an appeal would directly contradict La. Code Civ. P. art. 2085, which reads:
>
> > An appeal cannot be taken by a party who confessed judgment in the proceedings in the trial court or who voluntarily and unconditionally acquiesced in a judgment rendered against him. Confession of or acquiescence in part of a divisible judgment or in a favorable part of an indivisible judgment does not preclude an appeal as to other parts of such judgment.
>
> *We find that Abbeville and International Insurance voluntarily and unconditionally acquiesced in this judgment. Therefore, we find that although they have halted the accrual of interest on the amount of the judgment tendered, they are prohibited from appealing.*[16]

The unconditional payment of the punitive award in this case renders Exxon's petition moot, as under Louisiana law there is no longer a justiciable controversy. *Saint Charles Parish Sch. Bd. v. GAF Corp.*, 512 So.2d 1165, 1170 (La. 1987). It is well settled that

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[16] *Griffin* at 489. Emphasis added. It is instructive that in *Griffin* the defendant *thought* it could voluntarily and unconditionally pay the judgment and still prosecute its appeal.

courts will not decide abstract hypothetical or moot controversies. *Id.* at 170.

Accordingly, this Court should deny review for this reason alone.

B. EXXON'S FAILURE TO PRESERVE ANY *WILLIAMS* OBJECTIONS WAIVED THOSE ISSUES.

The *Williams* opinion sets forth a three-step analysis:[17]

- **First**, the court must find that there was a significant risk that the jury might utilize punitive damages to punish the defendant for misconduct to third parties.
- **Second**, the defendant must request a cautionary instruction.
- **Third**, the defendant must be afforded "some form of protection" to ensure that the jury's punitive damage award calculation does not include money meant to

[17] "In particular, we believe that where the risk of that misunderstanding is a significant one – because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury – a court, upon request, must protect against that risk. Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide some form of protection in appropriate cases." *Philip Morris USA v. Williams*, 127 S. Ct. at 1065.

> punish the defendant for harm to third parties.

Regardless of whether or not the first element existed in this case, Exxon clearly failed to comply with the second element. The Fourth Circuit found that Exxon *failed to request a cautionary instruction.* Petr. App. 8a-9a; 13a. Despite this failure, the courts of Louisiana went out of their way to ensure that the final punitive damage award included only damages related to the Grefers' loss.

(1) The Trial Court's Instructions Were Proper, and Exxon Never Asked for the Relief It Now Demands.

Indeed, Exxon does not (and cannot) actually argue that the instructions which were given misstated the law. A comparison of the instructions requested by Exxon reveals that they differ very little – and, for purposes of this petition, not at all – from the instructions actually given by the trial court. The essence of the argument Exxon does make is that the trial court should have given the jury *additional* instructions, instructions which explicitly informed the jury that it could not include in its award sums meant to punish third parties – instructions which *Exxon never requested*, as is required under *Williams*.

The Fourth Circuit quickly and soundly dispatched this argument:

> Moreover, even though the record does not include the objections made by Exxon to the

> instructions during the jury charge conference, two facts should be noted. First, unlike the defendant in *Philip Morris*, Exxon raised no assignment of error on appeal as to either the trial court's jury instructions or to the trial court's refusal to give Exxon's proposed jury instructions. Second, for all intents and purposes, the trial court's instructions tracked almost verbatim Exxon's proposed instructions.[18]

As the Fourth Circuit recognized, the single most glaring fact of this case is that Exxon never requested the relief at trial which it now demands (nor did it timely raise the issue on appeal). The charge Exxon asked for was – "almost verbatim" – the charge which was given. Despite Exxon's assertion that it objected to the court's charge to the extent it did not include a "*Williams* instruction," *nothing in the record supports that claim.*[19] Pet. 9-10; 14. Tellingly, Exxon's proposed instructions contained nothing resembling a "*Williams* instruction" – an instruction which, this Court held, must only be furnished *"upon request." Williams*, 127 S. Ct. at 1065.

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[18] Petr. App. 13a.

[19] In its writ application, Exxon does not point to an actual objection to the trial court's charge. At the Fourth Circuit, Exxon acknowledged that no such objection was in the record but suggested that the court should "assume" that it was made. To say the least, it is disingenuous of Exxon to suggest that it "may have" objected to the absence of something in the trial court's instructions *that Exxon did not bother to include in its proposed instructions.*

(2) Exxon's Failure to Request a *Williams* Instruction Waived the Issue.

There is no concept of "fundamental error" in the *Williams* opinion, or in any other opinion addressing the subject. Post-*Williams* cases uniformly recognize that a failure to raise the matter is a waiver of the issue. *See, e.g., Kauffman v. Maxim Healthcare Services, Inc.*, 509 F.Supp.2d 210 (E.D. N.Y. 2007) (defendant failed to request the instruction; issue waived); *Southstar Funding, LLC v. Sprouse*, 2007 U.S. Dist. LEXIS 22585 (D. N.C. 2007), n.2 (defendant failed to request the instruction; issue waived). The fact is that Exxon focused on different issues in its punitive damage trial, and only discovered the *Williams* principles when those tactics failed. Exxon did not request the relief it now demands, and it, therefore, failed the second prong of the *Williams* analysis.

(3) Exxon Also Waived the *Williams* Issue Under Louisiana Law.

This is consistent with Louisiana procedural law. A party who does not propose a jury instruction or who does not object to the omission of an instruction waives any right to appeal that issue. *Delaney v. Whitney*, 703 So.2d 709, 719 (La.App. 4th Cir. 1997), *writ denied*, 715 So.2d 1211 (La. 1998). The Louisiana Code of Evidence likewise required Exxon to propose a limiting jury instruction:

> When evidence which is admissible as to one party or *for one purpose* but not admissible as to another party or *for another purpose* is admitted, the court, *upon request*, shall restrict the evidence to its proper scope and instruct the jury accordingly. *Failure to restrict the evidence and instruct the jury shall not constitute error absent a request to do so.* Louisiana Code of Evidence art. 105 (emphasis added).

Thus, the failure of Exxon to propose a limiting jury charge and/or to preserve that issue on appeal, constitutes an independent state ground for affirming the judgment without even reaching any federal question asserted by Exxon.

(4) Exxon Made No Due Process Objection to Evidence of Third-Party Harm.

Exxon's failure to request a limiting jury instruction was not its only failure to preserve the issue. Despite Exxon's assertion that evidence of alleged harm to non-parties was admitted into evidence over its objections, Exxon has cited *not one instance* in the trial record where it objected to evidence of harm to third parties on due process grounds, or where Exxon asked that the jury be instructed to limit its consideration of that evidence, much less an instance where such an objection was overruled.[20] Exxon's failure to

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[20] Exxon's argument about the admission of evidence of the risk posed to third parties is eviscerated by what concurrently

(Continued on following page)

object on due process grounds constituted a failure to preserve its rights to assert error on that basis. *See, e.g., Cooper v. AMI, Inc.*, 454 So.2d 156, 161 (La.App. 1 Cir. 1984), *writ denied*, 459 So.2d 539 (La. 1984). ("Different grounds for objection cannot be asserted on appeal.")

C. *WILLIAMS* EXPLICITLY PERMITS CONSIDERATION OF HARM TO THIRD PARTIES IN ASSESSING THE REPREHENSIBILITY OF EXXON'S MISCONDUCT.

Following remand, the Fourth Circuit carefully analyzed the actual punitive damage instruction given to the jury. Although *Williams* prohibits an award which includes money meant to punish the defendant for harm to third parties, *Williams* also makes clear that harm to third parties is very much a part of the reprehensibility analysis:

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transpired at trial: R. 32:17 (no objection); R. 32:122 (no objection); R. 32:131 (no objection); R. 33:19 (objection and motion to strike, no grounds stated, sustained); R. 33:200 (no objection); R. 34:38 (no objection); R. 29:131 (no objection); R. 29:137-41 (objection, foundation, sustained); R. 32:153 (objection, no grounds stated, sustained). The same is true of Exxon's assertion that plaintiff counsel's argument relating to the risks posed to third parties was improper: R. 56:36 (no contemporaneous objection); R. 56:42 (no objection); R. 56:43 (objection, relevance and prejudice, Grefers' counsel instructed not to mention incident); R. 56:51 (no objection); R. 56:53 (no objection); R. 56:84 (no objection); R. 56:95 (no objection).

> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible – although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless posed a grave risk to the public, or the converse.[21]

Indeed, this Court has stressed that reprehensibility is the most crucial aspect of a punitive damage award analysis. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575, 116 S. Ct. 1589, 1599, 134 L.Ed.2d 809 (1996) ("Perhaps the most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *BMW*, 517 U.S. at 575); *see also Action Marine, Inc. v. Continental Carbon Incorporated*, 481 F.3d 1302 (11th Cir. 2007).

Considering the reprehensibility of Exxon's misconduct, the Fourth Circuit observed:

> In reviewing an award of punitive/exemplary damages, we have the responsibility of looking to the callous, calculated, despicable and reprehensible conduct of Exxon during the time period in question. Even though this case is not a personal injury claim by the ITCO workers, the mindset of Exxon should be considered in deciding whether the sum

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[21] *Williams*, 127 S. Ct. at 1064.

> awarded was appropriate. The fact that Exxon showed no regard for ITCO's workers, *i.e.*, no concern for human safety, certainly demonstrates that it had even less concern for the property damage that it caused, thus further demonstrating the morally culpable nature of its conduct.[22]

That Exxon had little, if any, regard for human life and even less regard for the value of property is an appropriate and significant factor in determining whether punitive damages were warranted. The Fourth Circuit's conclusion that a nexus existed between Exxon's conduct towards non-parties and the harm to the Grefers is amply supported by the record. For instance, Exxon's failure to tell anyone about the contamination at the Grefer tract (whether for one year in the case of ITCO, or never in the case of the Grefers) not only put ITCO's workers and the surrounding neighbors at risk but also *led to further contamination of the Grefer tract.*[23] Additionally,

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[22] *Grefer I* at 1154-55. Petr. App. 114a.

[23] Exxon contends that by 1986 the property already required whatever remediation it was ever going to require. Pet. 14, n.4. Exxon then concludes, based on this contention, that the fact that it allowed further radioactive material to be dumped throughout the Grefer tract after learning of the NORM problem did not harm the Grefers. This is simply ridiculous. First, the disposal costs associated with the Grefers' clean-up plan (notably, the most expensive component of that plan) necessarily correlate with the amount of radioactive material in the soil. When Exxon dumped more radioactive material on the site, the Grefers' disposal costs (harm) went up. Second, allowing the property to be further contaminated increased the Grefers'

(Continued on following page)

Exxon's failure to properly warn ITCO (when a warning finally was given) and its failure to implement adequate screening and handling procedures at the yard, not only put ITCO's workers and the surrounding neighborhood at risk *but also led to even more contamination of the Grefer tract*, leaving the Grefers with a huge mess. Perhaps most important, Exxon's misconduct delayed the remediation of the property, allowing a hazard to remain on the Grefers' land and in their neighbors' community.[24]

Additionally, the risk posed by Exxon's conduct towards ITCO's workers and the surrounding neighbors was directly related to the potential harm to the Grefers. Because the Grefers are potentially liable to third parties under Louisiana law (as owners of the contaminated property), the nature and extent of the risks posed to third parties increased the potential liability of – and thus harm to – the Grefers,

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exposure to lawsuits and regulatory enforcement actions, subjecting them to further potential harm.

[24] This was clearly a fact the Fourth Circuit considered during its reprehensibility analysis. When discussing the financial vulnerability factor, the court found that the Grefers "are now financially burdened with the task of remediating the property." *Grefer I* at 1149; Petr. App. 96a. Later in its reprehensibility analysis, the court also found that "Exxon took no step to remove the radioactive material" from the Grefer tract. *Id.* at 1149; Petr. App. 96a. Exxon's suggestion at Pet. 8 that the Fourth Circuit found Exxon's conduct reprehensible based solely on a "nine-month delay in notifying ITCO" is flatly contradicted by these portions of the court's reprehensibility analysis.

a valid consideration under the second *BMW* guidepost. *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (confirming that the second *BMW* guidepost considers the ratio between the "harm, or potential harm, to the plaintiff and the punitive damages award").

Exxon's central argument is that because Exxon's misconduct threatened a different type of ***harm*** to third parties than the harm suffered by the Grefers, the jury could not consider the threat to the third parties. This is an incorrect statement of the law. *State Farm* holds that "a defendant's dissimilar ***acts***, independent from the ***acts*** upon which liability was premised, may not serve as the basis for punitive damages (538 U.S. at 423)." Exxon confuses "dissimilar acts" with "dissimilar harm." There is no requirement that in the reprehensibility analysis the applicable third parties must have suffered the same harm, but only that the misconduct to the third parties be similar to the misconduct to the plaintiff:

> Evidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible – although counsel may argue in a particular case that conduct resulting in no harm to others nonetheless

posed a grave risk to the public, or the converse.[25]

Here, although the Grefers suffered a different "harm" from third parties such as ITCO and its workers, all were harmed by the similar – in fact, the same – *conduct* on the part of Exxon. This was a proper application of the reprehensibility analysis, and confirmed the Fourth Circuit's conclusion that "When we consider the totality of the trial court's jury instructions on exemplary damages, we find they are both permissible and constitutional."[26]

D. THE LOUISIANA COURTS PROVIDED EXXON FULL DUE PROCESS PROTECTION - EVEN THOUGH EXXON DID NOT REQUEST IT.

Although Exxon's voluntary and unconditional payment of the entire judgment rendered the case moot, the Fourth Circuit gave Exxon the benefit of the doubt and analyzed the *Williams* due process issue on its merits. In an opinion notable for its extended reconsideration of the punitive damage award, the Fourth Circuit determined that the constitutional safeguards missing in *Williams* were provided to Exxon. Despite the fact that Exxon never requested any form of protection at trial, as is required, there have been ***at least*** five different occasions upon which

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[25] *Williams*, at 127 S. Ct. 1064.

[26] Petr. App. 13a.

Exxon was, nevertheless, provided protection against any impermissible miscalculation of punitive damages. First, the jury instructions correctly stated the law. Second, the trial court clarified any potential jury misunderstanding before the verdict, by informing the jurors that the entire punitive damage award would be paid to the Grefers alone.[27] Third, the Fourth Circuit itself, in *Grefer I*, took elaborate precautions to cure any possible jury confusion, slashing the billion dollar punitive damage award to a sum directly proportional to the quantified compensatory damages awarded by the jury. Fourth, the punitive damage award was reassessed by the Fourth Circuit on rehearing. Fifth, the Fourth Circuit has again reviewed the punitive damage award after this Court's remand. That is to say that the case has been reviewed by a court of Louisiana ***twice*** since the Fourth Circuit's radical reduction of the punitive damage award. Exxon's argument that it was punished for harm to third parties, and not for harm to the Grefers, simply has not survived this intense appellate review. In its three separate opinions on the

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[27] Approximately one hour before the jury concluded its deliberations, the trial judge issued a further instruction in response to a jury question: "[E]xemplary damages are not compensation . . . Any exemplary damage award that you may make will be paid to the Grefers, no matter what amount you decide on." R. 59:16-17. This instruction made it clear that increasing the award based upon harm to people other than the Grefers would not benefit those non-parties, and thus, there was no reason for the jury to punish "directly on account of" that harm.

issue, the Fourth Circuit has explained, over and over again, that the harm to the Grefers was directly linked to the harm to third parties. Exxon's inexcusable delay in warning the Grefers, their tenants and others of the existence and danger of radioactive contamination allowed additional contamination of the Grefer property, and delayed the much-needed cleanup of the existing hazard. The Fourth Circuit ensured this relation between misconduct and award by molding the award to reflect a direct link of the Grefers' compensatory damages and the punitive damages awarded to them.

In short, the Fourth Circuit bent over backwards to assess, for the third time, whether Exxon received a fair trial on this matter. These extensive review procedures satisfied *Williams'* requirement of "some form of protection in appropriate cases." There is, thus, no conflict between the Louisiana courts' application of federal law in this case and the *Williams* decision.

There is no important question of federal law raised by this case which has not already been settled by this Court; nor does the Fourth Circuit's interpretation of federal law conflict with any decisions of any state court of last resort or of any United States court of appeals. Therefore, there is not one consideration supporting the grant of the writ petition under Rule 10.

E. *WILLIAMS* DOES NOT REQUIRE A RETRIAL.

Exxon argues at great length that procedural due process violations can only be cured by starting over again with a new trial. Exxon claims that the lower courts are split on this issue. Even assuming that Exxon had requested a limiting instruction as is required by *Williams* (it did not), and that the lower courts were actually split (they are not), neither *Williams* nor the post-*Williams* cases supports such a draconian view of the appropriate remedy for cases where – unlike the present case – a procedural due process violation has occurred.

First, and most obviously, *Williams* itself gave courts the option to choose how to deal with an instance where the jury improperly awarded punitive damages for harm to third parties:

> Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide ***some*** form of protection in appropriate cases. . . . the application of this standard may lead to the need for a new trial, ***or a change in the level of the punitive damages award.***[28]

This was fully consistent with the Court's opinion in *BMW of North America v. Gore*, 517 U.S. at 586:

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[28] *Williams*, 127 S. Ct. at 1065. Emphasis added.

> Whether the appropriate remedy requires a new trial or merely an independent determination by the Alabama Supreme Court of the award necessary to vindicate the economic interests of Alabama consumers is a matter that should be addressed by the state court in the first instance.

It is also fully consistent with the Court's opinion in *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. at 422, which remanded the case to the Utah courts for a recalculation of punitive damages – and not a retrial – where the jury instructions were held deficient because the jury had not been instructed "that it may not use evidence of out-of-state conduct to punish a defendant for action that was lawful in the jurisdiction where it occurred."[29]

A rigid view that remand is the ***only*** appropriate remedy would, of course, negate the Court's presumptively deliberate language in *Williams* that "a change in the level of the punitive damages award" may satisfy the procedural safeguard requirement. This has been implicitly recognized by all lower courts which have addressed the issue. There is no split of authority at all; the cases are fully consistent with this Court's guidance in the foregoing opinions. Although

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[29] On remand, the Utah Supreme Court made its own determination of an appropriate punitive damage award in accordance with the guidelines enunciated by this Court. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 411-412, 416 (Utah 2004), *cert. denied*, 543 U.S. 874, 125 S. Ct. 114, 160 L. Ed.2d 123 (2004).

Exxon claims that "[a] number of courts, both before and after *Williams*, have held that a reviewing court must order a new trial when a jury's award of punitive damages is based either on improper evidence or instructions," this is plainly incorrect, and the cases Exxon cites do not support Exxon's statement.

Exxon cites two U.S. Ninth Circuit cases, *White v. Ford Motor Company*, 500 F.3d 963 (9th Cir. 2007) and *Merrick v. Paul Revere Life Ins. Co.*, 500 F.3d 1007 (9th Cir. 2007). The Ninth Circuit's conclusion that *Williams*-defective jury instructions required retrial may be explained by the fact that both cases were going to be remanded for new trials because of other errors anyway. Neither case held that retrial was required whenever a jury had not been provided with *Williams* guidelines, and both expressly recognized that *Williams* permits either remand or reduction in the award.[30]

In the California Second District Court of Appeals' decision in *Bullock v. Philip Morris USA, Inc.*, 159 Cal.App.4th 655 (Cal. Ct. App. 2d Dist. 2008), the court expressly recognized that:

> The use of a remittitur by a reviewing court is not limited to cases where the only error at trial was in the amount of the award. Rather, remittitur may be appropriate where instructional error resulted in an excessive

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[30] *White* at 500 F.3d 972-973; *Merrick*, at 500 F.3d 1017-1018.

> award and the amount of the excess is ascertainable . . . Moreover, in *Stevens v. Snow* . . . the California Supreme Court issued a remittitur reducing by one-half the amount of a judgment based on instructional error and error in the admission of evidence despite the Supreme Court's express acknowledgment that it could not determine how the errors affected the amount of the judgment.[31]

The *Bullock* court decided that "[i]n this case, we cannot determine how the instructional error that we have found affected the amount of the punitive damages award and we cannot substitute our own assessment of the appropriate amount of punitive damages for that of a jury." The reason for this was clear: the punitive damage award was – exactly – one million dollars for each of the 28,000 non-party Californians who plaintiff argued had died from smoking over the past 40 years. The lower court's reduction of this amount to $28 million dollars could not obscure the fact that the entire punitive damage award was clearly and precisely based on harm to non-parties. By contrast, the Louisiana Fourth Circuit's reduction of the award in this case corresponds, equally precisely, to the compensatory damages sustained by the Grefers, and is completely detached from any harm to any third party.

In order to create the appearance of a "split," Exxon at Pet. 22-23 cites cases which did not remand

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[31] 159 Cal.App.4th 696.

for a new trial. All of these cases pre-date *Williams*, and therefore do not have the advantage of this Court's explicit *Williams* analysis, nor do they discuss, or are even arguably concerned with, any "split" of authority.[32] Reduction by an appellate court was proper under *State Farm*; it is proper under *Williams*. These cases are hardly evidence of a split of authority. Indeed, Exxon has not cited one case which even purports to say that there is only One True Path to remedy a *Williams* violation. There is no split of authority for this Court to straighten out.

Williams' requires that state courts provide appropriate protection, not necessarily state trial courts. "Although the States have some flexibility to determine what kind of procedures they will implement, federal constitutional law obligates them to provide *some form of protection* in appropriate cases."[33]

Uniquely, Louisiana's Constitution provides for appellate review of both law and fact. When a Louisiana appellate court determines that trial errors may have influenced a jury's award, the appellate court is under a duty to review *de novo* the law and the facts and to render a judgment based upon that independent review. LA. Const. art. V, §10(B); *Temple v. Liberty*

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[32] This is also true of *Sand Hill Energy, Inc. v. Smith*, 142 S.W.3d 153 (Ky. 2004), which Exxon places in the "retrial only" camp.

[33] *Williams*, 127 S. Ct. at 1065. Emphasis added.

Mutual Ins. Co., et al., 330 So.2d 891, 892 (La. 1976) and *Riley v. Salley*, 874 So.2d 874, 878 (La.App. 4th Cir. 2004). Judicial economy, in addition to constitutional authority, encourages Louisiana appellate courts to review even factual findings because, when the entire record is before the appellate court, remand for a new trial produces "delay of the final outcome . . . while adding little to the judicial determination process." *Gonzales v. Xerox Corp.*, 320 So. 2d 163, 165-166 (La. 1975).[34] The Fourth Circuit, in its opinions below, recognized this unique function, and held that

> Furthermore, the U.S. Supreme Court remand and the *Philip Morris* decision do not mandate that we order a new trial but instead allow us to correct any procedural and/or substantive errors by our constitutionally delegated authority of *de novo* review. This court is constitutionally allowed to review both law and facts. La.Const. art. V, §10(B).[35]

This is absolutely correct. The Fourth Circuit's review ensured the due process protection discussed in *Williams*, despite Exxon's unequivocal failure to request it.

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[34] *See also Rodriguez v. Taylor*, 468 So.2d 1186, 1187 (La. 1985) and *Buckbee v. United Gas Pipe Line Co. Inc.*, 561 So.2d 76 (La. 1990).

[35] Petr. App. 33a.

F. ANY *STATE FARM* RATIO ISSUE IS BEYOND THE SCOPE OF THIS COURT'S REMAND, WAS NOT RAISED IN THE COURTS BELOW, AND IS NOT EVEN ARGUABLY MERITORIOUS.

(1) Exxon's 1:1 Ratio Argument Is Beyond the Scope of This Court's Remand and Was Not Preserved on Appeal.

The Order remanding this case was clear:

> The judgment is vacated and the case is remanded to the Court of Appeal of Louisiana, Fourth Circuit for further consideration in light of *Philip Morris USA v. Williams*, 549 U.S. ___, 127 S. Ct. 1057, 166 L.Ed.2d 940 (2007).[36]

The *Williams* opinion expressly did not consider any issue of proportionality between actual damages and punitive damages. "Because we shall not decide whether the award here at issue is 'grossly excessive,' we need now only consider the Constitution's procedural limitations."[37] Exxon did not raise the proportionality issue in either its brief to the Fourth Circuit or in its application for a writ to the Louisiana Supreme Court. Its petition for writ of certiorari to this Court is bare of any citation to where the proportionality issue has been preserved, as is required by Rule

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[36] *ExxonMobil Corp. v. Grefer*, 127 S. Ct. 1371 (U.S. 2007); Appendix 122a.

[37] *Williams*, at 127 S. Ct. 1063.

14(g)(i). Neither the Louisiana Fourth Circuit nor the Louisiana Supreme Court has considered the issue since Exxon's first appeal – and this Court did not deem the issue significant when it issued the GVR at the conclusion of that first appeal. Consequently the issue is unpreserved and should not be considered for the first time now.

Even if Exxon had preserved the right to argue that 1:1 ratio is the highest ratio constitutionally permitted in this case, the issue lacks any merit and does not justify this Court's review.

(2) Exxon's 1:1 Ratio Argument, Even if It Could Properly Be Raised At This Time, Does Not Merit This Court's Review.

a. The 2:1 Ratio In This Case Is Entirely Consistent With *State Farm*.

The *State Farm* decision provided the lower courts with further guidance with respect to the application of the *BMW* guidelines. For example, the Court instructed that "in practice, few awards exceeding a *single-digit ratio* between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425 (emphasis added). The Court also advised that "when compensatory damages are substantial, then a lesser ratio, *perhaps* only equal to compensatory damages, *can* reach the outermost limit of the due process guarantee." *Id.* (emphasis added). However, the Court

"decline[d] again to impose a bright-line ratio which a punitive damages award cannot exceed." *Id.* It reaffirmed that "the precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id.*

Exxon's argument that a 2:1 ratio in this case is excessive cuts against everything this Court held in *State Farm*. This Court did not state (or even imply) that 1:1 ratios are the absolute limit in substantial damage cases.[38] If this Court had intended to do that, it would not have said "*perhaps* only equal to compensatory damages" and "*can* reach the outermost limit of the due process guarantee." This Court certainly would not have declined again to impose a bright-line ratio which punitive damages cannot exceed. Yet, again Exxon argues fervently that there is a cap, and that it is 1:1. Pet. 27, 31. In reality, *State Farm* allows for (and explains) the inconsistency in the lower courts that Exxon argues must be "resolved."

Recognizing that its argument that *State Farm* imposed a 1:1 ratio limit on substantial damage awards is a stretch among stretches, Exxon falls back

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[38] The history of the *State Farm* case after this Court rendered its opinion supports the Grefers' position. Following the Utah Supreme Court's reconsideration of the punitive award against State Farm and consequent reduction to a *9:1* ratio, this Court denied writs. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409 (Utah), *cert. denied*, 543 U.S. 874 (2004).

to another (even less credible) argument. Specifically, Exxon asserts that, because the Grefer property only has a market value of $1.5 million, the ratio in this case is actually much higher than 2:1. Pet. 31. This argument is thoroughly flawed. To begin with, it disregards the fact that there are no cases which have held that actual harm, for purposes of a punitive damage analysis, can be limited to certain portions of a compensatory award. Indeed, both *BMW* and *State Farm* confirm that the compensatory award, as a whole, comprises the plaintiff's actual harm. *BMW*, 517 U.S. at 580 ("[E]xemplary damages must bear a 'reasonable relationship' to compensatory damages"); *State Farm*, 538 U.S. at 425 ("ratio between punitive and compensatory damages"). The lower courts are consistent on this point.[39]

Exxon cannot dispute that the compensatory portion of this award, pursuant to the Louisiana Fourth Circuit's final and executable judgment, is $56,145,000.00. In fact, recognizing that there is no basis to challenge the compensatory award in this Court, Exxon has already unconditionally paid that amount to the Grefers. In short, the actual harm in this case has been established. Exxon is foreclosed from arguing to this Court that a lesser amount is

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[39] Tellingly, all of the cases cited by Exxon at pages 28-29 of its Petition relate to the lower courts' consideration of the ratio between "*punitives*" and "*compensatories*." Pet. 28-29 (emphasis added).

somehow the "true" measure of the Grefer's harm in this case.

Moreover, Exxon's argument ignores the fact that, under Louisiana law, plaintiffs are entitled to have their property restored, even if the cost of the remediation plan exceeds the value of the land.[40] *Roman Catholic Church of the Archdiocese of New Orleans v. Louisiana Gas Serv. Co.*, 618 So.2d 874, 879-80 (La. 1993). In other words, Louisiana law instructs that the Grefers actual harm is the cost of clean-up.[41]

This result is sensible. Without the $56 million restoration award in this case, the Grefers would not be in a position to conduct a clean-up that ensures that their entire property complies with state and federal standards. In turn, the Grefers would be saddled with virtually never ending liability, and their actual and potential harm would *increase* with each passing day.[42] The Grefers would not be able to prevent new civil lawsuits, and they would have no way of complying with government enforcement actions.

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[40] Petr. App. 71a-80a; 113a-114a.

[41] Exxon does not challenge the constitutionality of this substantive law.

[42] Radium-226 has a half-life of approximately 1600 years. R. 32:144.

CONCLUSION

Exxon's petition for certiorari should be denied, for at least the following reasons:

- Exxon's full payment of compensatory and punitive damages has mooted this controversy under state law.
- Exxon completely failed to preserve any *Williams* procedural due process claim. It requested no limiting jury charge. Indeed, there is no meaningful distinction between the charge Exxon requested and the charge the trial court gave. Moreover, Exxon never objected to any evidence on due process grounds. *Williams* requires that the issue be preserved, and it was not. An equally dispositive point is that Exxon failed to raise an assignment of error on its original appeal as to the trial court's punitive damage instruction.
- Despite its utter failure to preserve these alleged due process issues on appeal, the Louisiana courts have bent over backwards to provide consideration to Exxon. The trial court fully analyzed the case on post-trial motions. The Louisiana Fourth Circuit has now reviewed this case three times. The Louisiana Supreme Court has twice rejected Exxon's writ applications as not meriting review. The analyses of these courts have carefully examined the trial and the verdict in exquisite detail, and have determined

that Exxon received the benefit of all due process protection afforded by *Williams*, *State Farm*, *Gore* and Louisiana's own cases. In particular, Louisiana's appellate system has ensured that any alleged evidence of harm to third parties introduced at trial was utilized only to establish reprehensibility – which is proper under *Williams*. The punitive damages assessed against Exxon were – exactly – twice the compensatory damages suffered by the Grefers, and do not reflect any harm to third parties.

- Exxon has provided no support for its contention that a procedural due process denial necessarily requires a complete retrial. Certainly, there is no split of authority in the lower courts reflecting such a dramatic new rule. Moreover, the Louisiana Constitution uniquely provides for appellate review of both law and fact.

- Exxon's *State Farm* proportionality issue was not the subject of this Court's remand, and was not deemed appropriate for separate review by this Court. Even if it were otherwise, the 2:1 ratio of punitive damages to compensatory damages is well within the permissible scope of constitutional limits.

In short, there are no compelling reasons for granting certiorari under Supreme Court Rule 10. The courts below properly applied the factors which

were the subject of the *Williams* decision – even before this Court issued the *Williams* opinion. Exxon's petition simply asks this Court to act as one more appellate court in this case. The petition should be denied.

Respectfully submitted,

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