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

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

The jury awarded $1 billion in punitive damages after being instructed that the only prerequisite for punishment was that ExxonMobil "w[as] wanton or reckless in [its] disregard for public safety." App. 10a. The Louisiana Court of Appeal affirmed that instruction and held ExxonMobil liable for $112 million in punitive damages where the only reprehensible conduct it identified was ExxonMobil's alleged mistreatment of nonparties. Plaintiffs cannot point to any decision of this Court that permits that result. Instead, they identify a series of procedural bars, most of which were rejected by the court below and none of which prevent this Court from reaching the merits. Plaintiffs' attempts to deflect attention from the enormous and unfounded punitive damages award cannot obscure that the Court of Appeal's refusal to follow *Philip Morris USA v. Williams,* 127 S. Ct. 1057 (2007), *petition for cert. filed*, (Mar. 24, 2008) (No. 07-1216), as well as the significant conflicts presented by its decision, warrant this Court's review.

ARGUMENT

I. THE COURT OF APPEAL REFUSED TO FOLLOW *WILLIAMS* AND PUNISHED EXXONMOBIL SOLELY FOR POTENTIAL HARM TO NONPARTIES.

On remand from this Court to reconsider in light of *Williams*, the court below affirmed a massive punitive damages award based *solely* on potential physical harm ExxonMobil might have caused nonparties in a case in which plaintiffs themselves al-

leged only economic injury. That refusal to follow *Williams* warrants summary reversal.

1. There is no merit to plaintiffs' claims that ExxonMobil's appeal became moot when it paid the punitive damages award or that ExxonMobil waived its objection to punishment for nonparty harm because it failed to request a "*Williams* instruction." BIO 17.[1] Plaintiffs made those arguments to the court below, which necessarily rejected them by deciding the "ultimate[]" question "whether Exxon received a fair trial" under *Williams*. App. 13a.

Contrary to plaintiffs' reliance on state law in this Court (BIO 15), the question whether a case becomes moot upon satisfaction of an underlying judgment is one of federal constitutional law. *See De Funis v. Odegaard*, 416 U.S. 312, 316 (1974) ("[E]ven in cases arising in the state courts, the question of mootness is a federal one which a federal court must resolve.") (internal quotation marks omitted). This Court has long held that "[t]here can be no question that a debtor against whom a judgment for money is

[1] ExxonMobil was not, as plaintiffs contend (BIO 13), "anxious" to pay the punitive damages judgment. It did so only after plaintiffs demanded payment, threatened to execute on the judgment, and filed a judgment debtor rule, ExxonMobil Petition-Stage Reply Br. 1-2, *Grefer v. Alpha Technical*, No. 2002-CA-1237 (La. Oct. 1, 2007), and after both this Court and the Louisiana Supreme Court denied applications for a stay. BIO 8-9. Although ExxonMobil offered "to unconditionally pay" the judgment, it explicitly maintained its right to seek review. BIO App 15a-17a; *see*, *e.g.*, *Koerner & Lambert, A Prof'l Law Corp. v. Allstate Ins. Co.*, 363 So.2d 546, 547 (La. Ct. App. 1978) (plaintiffs failed to prove acquiescence in judgment where, prior to defendant's payment under threat of execution, defense counsel told plaintiffs he recommended appeal).

recovered, may pay that judgment, and bring a writ of error to reverse it, and if reversed can recover back his money." *Dakota County v. Glidden*, 113 U.S. 222, 224 (1885); *accord Cahill v. N.Y., N.H. & H. R. Co.*, 351 U.S. 183, 183-184 (1956) (per curiam); *see* BIO App. 9a (plaintiffs' letter recognizing possibility of restitution if judgment below reversed).[2] Any other rule would inundate the Court with stay applications for money judgments and contravene the general "rule that issuance of a court's mandate or obedience to its judgment does not bar timely appellate review." *Graddick v. Newman*, 453 U.S. 928, 945 n.* (1981) (opinion of Rehnquist, J.).

Plaintiffs' additional assertion that ExxonMobil cannot object to punishment for nonparty harm because "the trial court's instructions tracked almost verbatim" those it proposed (BIO 17 (quoting App. 13a)) only demonstrates their misunderstanding of this Court's precedents. ExxonMobil requested the jury be instructed that it "[could] only award" punitive damages if, among other things, ExxonMobil had caused "the *plaintiffs*' damages … by … wanton and reckless conduct." App. 8a (emphasis added). The trial court instead instructed the jury that the sole predicate required for punitive damages was that "defendants were wanton or reckless in their disregard for *public* safety." App. 10a (emphasis added).[3]

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[2] The GVR Order in this very case was issued *after* the punitive judgment was paid. *See* BIO App. 25a; App. 122a.

[3] Although plaintiffs contend (BIO 18-19) that ExxonMobil did not object to the court's instructions, there is no way to determine that because the court lost the transcript of the charge

Even if plaintiffs were otherwise correct about the reasons why the Court of Appeal *might* have found (but did not find) ExxonMobil's claims procedurally barred under state law (BIO 14, 18-19), that would have no impact on this Court's jurisdiction, which extends to each federal claim pressed or passed upon below. *See Orr v. Orr*, 440 U.S. 268, 274-75 (1979); Eugene Gressman et al., *Supreme Court Practice* 203 (9th ed. 2007). Because, as plaintiffs themselves acknowledge (BIO 25), "the [Court of Appeal] analyzed the *Williams* due process issue on its merits," that issue is properly before this Court.

2. At last reaching the merits, plaintiffs claim (BIO 20) the focus on nonparty harm was justified because *Williams* "permits consideration of harm to third parties in assessing … reprehensibility." Plaintiffs argue (BIO 21-23) that evidence of recklessness toward ITCO was relevant to the reprehensibility of ExxonMobil's conduct toward plaintiffs because it showed a general disregard for public safety.

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conference. App. 67a. As explained *infra* pages 5-7, moreover, regardless whether ExxonMobil objected to the instructions, the court erred even in *admitting* evidence of ExxonMobil's conduct toward nonparties. That evidence was in no way relevant to the reprehensibility of ExxonMobil's actions toward plaintiffs, who suffered only economic injury. Plaintiffs also wrongly claim (BIO 19-20 n.20) that ExxonMobil did not object to that evidence on due process grounds. In fact, ExxonMobil repeatedly objected to evidence "about … issues other than connected to the remediation of [plaintiffs'] property" and moved for a mistrial on the ground that plaintiffs had turned the trial into a "health-effect case" that they lacked "standing to bring" for "third parties … allegedly injured by this alleged toxic waste." Trial Tr. 114, 120, *Grefer v. Alpha Technical*, No. 97-15004 (Civ. Dist. Ct. Parish of Orleans, La. Apr. 20, 2001).

But plaintiffs' evidence of alleged health risks to ITCO employees in fact invited the jury to punish for *that* potential harm, not for their property damage. And plaintiffs *continue* to rely on health risks to nonparties to justify punitive damages in their opposition.[4]

In any event, plaintiffs' argument proves too much. If recklessness toward third parties could suffice to establish reprehensibility as to a plaintiff, then risks or harm to nonparties would always justify punitive damages. This Court has squarely rejected that contention: "[The] potential harm [to be considered] [i]s harm potentially caused *the plaintiff*." *Williams*, 127 S. Ct. at 1063; *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 423 (2003) (defendant should not be punished "for being an unsavory individual or business"). The *only* conduct the court below found reprehensible was ExxonMobil's conduct toward nonparties. But that is insufficient to support an award of punitive damages where there has been no reprehensible conduct as to plaintiffs themselves.[5] Additionally, allowing

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[4] *E.g.*, BIO 2 (contractors "generated radioactive dust clouds"), 4 (ExxonMobil failed to notify contractors of "health and safety hazard"). In fact, the uncontroverted evidence at trial was that 99.2% of plaintiffs' property was within the limits set by the Louisiana Department of Environmental Quality (LDEQ) for unrestricted use. App. 67a.

[5] Plaintiffs cite two statements to contend the court below found ExxonMobil's conduct reprehensible vis-à-vis plaintiffs. BIO 23 n.24. They show the contrary. First, the court deemed it reprehensible not that ExxonMobil "'took no step to remove the radioactive material' from the Grefer tract," BIO 23 n.24 (quoting App. 96a), but that ExxonMobil "took no step to remove the radioactive material from *ITCO's* premises." App.

plaintiffs to seek damages for potential third-party harm could well lead to the duplicative punishment against which this Court guarded in *State Farm*, 538 U.S. at 423. Pet. 15 (discussing third-party litigation).

Although plaintiffs insist (BIO 24-25) that nothing in *Williams* requires their harm to resemble the potential harm upon which the finding of reprehensibility was based, they are mistaken.[6] The heart of *Williams*' holding is that "the Due Process Clause prohibits a State from punishing an individual without first providing that individual with an opportunity to present every available defense," 127 S. Ct. at 1063 (internal quotation marks omitted) – and a defendant has no way effectively to defend against dissimilar injuries to nonparties when "charged" only with injury to plaintiffs.

Plaintiffs' argument (BIO 7, 23-24, 38) that both the punitive and compensatory damages below were properly based on plaintiffs' "potential[] liab[ility] to third parties under Louisiana law" is again mistaken. "Potential liability" was not the reason the

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96a (emphasis added). Second, the court did not find it reprehensible that plaintiffs were left to remediate the property after ITCO. *See* BIO 23 n.24. Rather, the court suggested it reprehensible that ExxonMobil put ITCO out of business by sending contaminated equipment elsewhere, thus awarding punitive damages because ExxonMobil *stopped* any contamination of plaintiffs' land. App. 23a-24a.

[6] While *Williams* indicates that, in appropriate cases, plaintiffs can introduce evidence that conduct toward plaintiffs endangered the public, it nowhere suggests that the harm posed to the public may differ from the harm plaintiffs experienced. *See* 127 S. Ct. at 1064.

appellate court upheld the awards. *See* App. 117a-118a (Tobias, J., concurring in denial of rehearing). And there is no record evidence establishing the nature and extent of plaintiffs' newly-claimed litigation liability. Upholding punitive damages based on such belated, unsupported, and speculative assertions of potential liability would vitiate *Williams* and *State Farm*, denying defendants the opportunity fully to defend themselves. *Williams*, 127 S. Ct. at 1063.

It would also allow plaintiffs to recover duplicative awards in cases where future litigation is likely. Indeed, even as plaintiffs in this case argue their compensatory and punitive damages awards are necessary to cover potential damages from future litigation (BIO 7, 38), they have already named *ExxonMobil* as a cross-claim defendant in third-party litigation and have "specifically ple[d]" ExxonMobil's "fault … as a bar, set off or reduction to any fault attributed to them or damages awarded against them." Grefer Answer & Cross-Claim 6, 9, *Warner v. ExxonMobil Corp., et al.*, No. 02-19657 (Civ. Dist. Ct., Parish of Orleans, La. Aug. 18, 2005). Plaintiffs' reliance on future litigation thus exposes their suit for what it is: an attempt to obtain punitive damages for potential harm that has not been (and may never be) inflicted upon them.

II. THIS CASE PRESENTS AN UNRESOLVED CONFLICT REGARDING HOW TO REMEDY IMPROPER CONSIDERATION OF NONPARTY HARM.

The jury's award in this case was, by the Court of Appeal's own reckoning (App. 27a), tainted by consideration of improper evidence, and that taint was

not remedied by reduction of the award. As ExxonMobil has explained (Pet. 24), due process constrains both the amount of a punitive damages award and the procedure used to impose it. *Williams*, 127 S. Ct. at 1062. Those different limitations require different remedies: Although a court can cure an excessive award by reducing it, a new trial is necessary to correct a procedurally-deficient award when there is no way to determine what part of the award has been tainted by the violation. Plaintiffs do not address this important distinction.

1. Plaintiffs nonetheless argue (BIO 28) that *Williams* allows lower courts to choose among remedies. In quoting *Williams*, however, plaintiffs omit the text that "remand[s] the case" to the Oregon Supreme Court. 127 S. Ct. at 1065. This Court did not give lower courts unfettered discretion to remedy procedural due process violations however they see fit, and it certainly did not hold that a *Williams* violation could be remedied by reducing the damages awarded. It simply asked *the Oregon* court to consider the question.

2. Plaintiffs next argue (BIO 30) that there is no split in authority because no court has "held that retrial [i]s required whenever a jury [is] not … provided with *Williams* guidelines." Plaintiffs ignore that the split in authority presented by this case is not whether appellate reduction can *ever* properly remedy a procedural due process violation, but "whether such a reduction is a permissible remedy *when the reviewing court cannot determine what portion of the award has been tainted* by improper considerations." Pet. 11 (emphasis added). As Exxon-

Mobil has explained (Pet. 20-23), there is a deep, long-standing split over that question.

Plaintiffs' suggestion (BIO 31-32) that the split is not worth resolving because cases cited in the petition pre-date *Williams* is unpersuasive. This Court recognized that the split over remedy merited its attention as early as *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), although it did not reach the question there. Pet. 19 & n.8. *Williams* likewise failed to resolve the issue, and the split continues to widen. *Compare White v. Ford Motor Co.*, 500 F.3d 963, 972-73 (9th Cir. 2007) (new trial "the proper remedy" where jury "may have" relied on nonparty harm; remittitur "not designed to compensate for excessive verdicts in cases where jury is improperly instructed"), *and Buell-Wilson v. Ford Motor Co.*, --- Cal. Rptr. 3d ---, 2008 WL 625016, at *52-53 (Ct. App. Mar. 10, 2008) (no need for new trial after alleged procedural violation where court "reduced the award to comport … with due process principles" and "[defendant]'s conduct justified … a two-to-one ratio").

Plaintiffs' suggestion (BIO 32-33) that Louisiana law provides adequate remedy for improper consideration of risks to nonparties is likewise misguided. The Court of Appeal did not engage in the kind of fact-finding plaintiffs suggest. Rather, the court relied solely on risks to ITCO to award punitive damages to plaintiffs who did not face the same potential harm. And it attempted to correct the reliance upon nonparty harm that it did recognize by simply reducing the award to what it believed the constitutional maximum available. App. 22a-24a, 27a-28a. There

is thus no state-law bar to the Court's resolution of the question presented.

III. THERE IS SIGNIFICANT DISAGREEMENT OVER THE CONSTITUTIONAL MAXIMUM IN CASES OF SUBSTANTIAL COMPENSATORY DAMAGES.

The $112 million of punitive damages awarded below is excessive by any measure. Plaintiffs received an undeniably "substantial" $56 million award of restoration costs, equal to 37 times their economic loss. They are not required, and indeed, have no need, to spend that award on restoration, given that the damages awarded far exceed anything necessary to remediate the land to standards that "fully protect[] human health and the environment" as a matter of law. *Amicus* Br. of LDEQ 7-8, *Grefer v. Alpha Technical*, No. 05-C-190 (La. June 23, 2005). Punitive damages in this case of solely economic injury clearly should not exceed the $56 million already awarded for a $1.5 million piece of land.

1. Again seeking to avoid the merits, plaintiffs suggest (BIO 34-35) the question of excessiveness is not properly before this Court because the amount of punitive damages was not "raise[d]" by ExxonMobil below and was "beyond the scope of this Court's remand." But that was not plaintiffs' position below, when they argued the court should *increase* the award. Pl. Br. on Remand 22, *Grefer v. Alpha Technical*, No. 2002-CA-1237 (La. Ct. App. May 7, 2007) (application of *State Farm* "demonstrates that this Court's reduction of the punitive award to 2:1 was excessive, and an increase … is justified"). ExxonMobil has consistently challenged that award as ex-

cessive, both in its first petition in this Court, *ExxonMobil v. Grefer*, No. 05-1670 (third question presented), and in response to plaintiffs' claims on remand, *see* Reply Br. on Remand 12, *Grefer v. Alpha Technical*, No. 2002-CA-1237 (La. Ct. App. May 17, 2007) (any "suggest[ion] that the award should be increased reflects a disregard for the holdings of … the Supreme Court"). Although the Court of Appeal did not rule on the scope of remand, it readopted its original calculation under *BMW*, *see* App. 21a, 32a, again placing its analysis (and ratio) properly before this Court. *See Orr*, 440 U.S. at 274-75.

2. On the merits, plaintiffs argue (BIO 35-36) *State Farm* does not require a 1:1 ratio of punitive damages to actual harm whenever compensatory damages are substantial. But *State Farm* requires that any punitive damages further, and not exceed, the "legitimate purpose" of punishment and deterrence. 538 U.S. at 417. Compensatory verdicts themselves may have a deterrent function, *id.* at 426, so punitive damages "should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of *further* sanctions to achieve punishment or deterrence," *id.* at 419 (emphasis added). Plaintiffs have shown no reason why additional punishment is required on top of the enormous $56 million award for restoration costs. The only reason plaintiffs offer for further punishment and deterrence (BIO 38) is the risk of harm to nonparties. That cannot constitutionally be the only basis for the award.

Plaintiffs also err (BIO 36-38) in suggesting that the $56 million restoration award correctly measures

their harm. That award goes far beyond anything necessary to protect human health or the environment, *supra* page 10; *cf. State Farm*, 538 U.S. at 426 (suggesting punitive damages should not "duplicate[]" compensatory award), and plaintiffs' harm certainly cannot be determined (BIO 38) by reference to future litigation, *see supra* pages 6-7. Rather, given the substantial restoration damages that did far more than compensate, there is no reason to believe any additional award is necessary to punish or deter here.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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