

No. 07-

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**In the Supreme Court of the United States**

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CONTINENTAL CARBON CO. AND CHINA SYNTHETIC RUBBER  
CORP.,

*Petitioners,*

v.

ACTION MARINE, INC. ET AL.,

*Respondents.*

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

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**PETITION FOR A WRIT OF CERTIORARI**

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H. THOMAS WELLS, JR.  
PETER S. FRUIN  
*Maynard, Cooper & Gale*  
*1901 Sixth Ave. North*  
*2400 AmSouth/Harbert*  
*Plaza*  
*Birmingham, AL 35203*  
*(205) 254-1000*

EVAN M. TAGER  
*Counsel of Record*  
NICKOLAI G. LEVIN  
*Mayer, Brown, Rowe &*  
*Maw LLP*  
*1909 K St., NW*  
*Washington, DC 20006*  
*(202) 263-3000*

J. BRETT BUSBY  
*Mayer, Brown, Rowe &*  
*Maw LLP*  
*700 Louisiana St., Suite 3400*  
*Houston, TX 77002*  
*(713) 238-2606*

*Counsel for Petitioners*

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## QUESTIONS PRESENTED

This petition challenges a \$17.5 million award of punitive damages for petitioners' failure to do more to prevent periodic releases of carbon black during the manufacturing process. There are no claims of physical injury, only property damage. And the compensatory damages of \$1,915,000 are substantial by any definition: Among other things, they include the costs of remediating properties that tested negative for carbon black, reimbursement for a company's ordinary business debts (such as a mortgage and a truck loan), and compensation for the emotional distress allegedly suffered by the owner of the company.

The general question presented is whether the \$17.5 million punitive award is unconstitutionally excessive under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). More specifically, this case raises questions about the application of the three *BMW* guideposts, each of which has divided the lower courts:

1. Whether courts applying the reprehensibility guidepost should consider how the defendant's conduct compares to conduct in other punitive damages cases in determining whether the amount of punitive damages is out of proportion to the gravity of the offense.

2. Whether, and if so in what circumstances, a punitive/compensatory ratio in excess of 1:1 is allowable when the amount of compensatory damages is "substantial" and other forms of punishment and deterrence, including significant attorneys' fees for "bad faith" and extensive injunctive relief, have already been imposed.

3. Whether, in applying the comparable penalties guidepost, a reviewing court may disregard the most realistic legislative penalty and instead speculate about the remote possibility of a severe, yet unprecedented and extremely unlikely, fine.

**RULE 29.6 STATEMENT**

Petitioner Continental Carbon Co. is wholly owned by CCC USA Corporation, which is two-thirds owned by Petitioner China Synthetic Rubber Corporation and one-third owned by Taiwan Cement Corporation. Both China Synthetic Rubber Corporation and Taiwan Cement Corporation are publicly traded in Taiwan. No publicly owned company owns more than 10% of China Synthetic Rubber Corporation's or Taiwan Cement Corporation's stock.

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## **PETITION FOR A WRIT OF CERTIORARI**

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Continental Carbon Co. and China Synthetic Rubber Corp. (collectively “CCC”) respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Eleventh Circuit in this case.

### **OPINIONS BELOW**

The opinion of the court of appeals (App., *infra*, 1a-32a) is reported at 481 F.3d 1302. The order of the court of appeals denying rehearing (App., *infra*, 55a) is unreported. The orders of the district court denying petitioners’ post-trial motions (*id.* at 33a-47a), entering injunctive relief (*id.* at 48a-54a), and entering final judgment on the claims submitted to the jury (*id.* at 56a) are unreported.

### **JURISDICTION**

The judgment of the court of appeals was entered on March 21, 2007, and a timely petition for rehearing was denied on May 18, 2007. Justice Thomas extended the time for filing a petition for writ of certiorari to August 27, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

### **CONSTITUTIONAL, STATUTORY, AND REGULATORY PROVISIONS INVOLVED**

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides in relevant part: “No State shall \* \* \* deprive any person of life, liberty, or property, without due process of law.” U.S. Const. amend. XIV, § 1.

O.C.G.A. § 13-6-11 and ALA. CODE § 22-22A-5(18)(c) are included in the appendix at 57a.

### **STATEMENT**

Over the past decade and a half, this Court repeatedly has expressed concern about awards of punitive damages that, “today, may be many times the size of such awards in

the 18th and 19th centuries.” *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1064 (2007). To assist courts in determining when a punitive award is unconstitutionally excessive, the Court has identified three guideposts: (i) the degree of reprehensibility of the misconduct; (ii) the ratio between the punitive and compensatory damages (or potential harm in the unusual circumstance of a thwarted attempt); and (iii) the difference between the punitive damages and the legislative and/or administrative penalties for comparable misconduct. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-85 (1996). And it has required “[e]xacting appellate review” of the trial court’s analysis of these guideposts to ensure that the amount of punitive damages is “based upon an application of law, rather than a decisionmaker’s caprice.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417-18 (2003) (internal quotation marks and alterations omitted).

Regrettably, lower courts often apply the *BMW* guideposts mechanically without considering this Court’s broader concerns about the size of punitive awards, such as whether they are “tantamount to a severe criminal penalty” (*BMW*, 517 U.S. at 585), “extraordinary by historical standards” (*id.* at 594 (Breyer, J., concurring)), or excessive in relation to a “State’s legitimate interests in punishing unlawful conduct and deterring its repetition” (*id.* at 568). Moreover, courts routinely misapply the guideposts, weakening their “constraining power to protect against serious and capricious deprivations [of property]” (*id.* at 590 (Breyer, J., concurring)). This case is emblematic. In affirming a \$17.5 million punitive award that is over nine times the compensatory damages, while ignoring the punitive and deterrent effect of the compensatory damages, attorneys’ fees, and injunctive relief, the Eleventh Circuit applied the *BMW* guideposts in a manner that deprived them of their “constraining power.” Review is necessary because the Eleventh Circuit’s decision is unfaithful to the Court’s precedents and conflicts with numerous decisions applying those precedents.

**1. CCC's operations.** CCC owns a plant in Phenix City, Alabama, that manufactures carbon black. R52, 534. Carbon black is a highly engineered product that is manufactured by heating feedstock oil to a high temperature in a low-oxygen reactor. R218-19. The resulting product is smoke that includes both carbon black and waste gases. R84. The carbon black is separated from the gases, processed, and formed into small pellets for ease of handling and shipment. R217, 226.

Carbon black has many commercial applications. Its most popular use is in making tires. CCC also sells carbon black for use as pigment in rubber and plastic items, inks, and many other useful products. Dkt. 38, at 3.

While the plant originally had one production unit, Unit 1, CCC built a second production unit in 1999, Unit 2, to meet expanding demand for carbon black. R224. During construction, CCC worked with the Alabama Department of Environmental Management ("ADEM") to identify and install the best available pollution-control technology.<sup>1</sup> R221-22, 347, 563. For example, each unit has several large "bagfilter" compartments, each of which contains several hundred bags that collect the carbon black after it is produced. R217, 221, 559-60. A thermal oxidizer is designed to incinerate any particulate matter not captured by the bagfilters (including carbon black) at 1700 degrees Fahrenheit. R221, 332, 343. The gas stream that comes out of the thermal oxidizer is vented through a stack. R350. Electronic probes called Triboguards detect any solid particles in the stream and sound an alarm if anything is amiss so that employees can investigate. R223, 345-46, 350.

ADEM recognized that this technology, while the best available, was not perfect and issued a permit to CCC to emit

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<sup>1</sup> Under the Clean Air Act, State agencies—not industry—determine the best available pollution control technology. See *Alaska Dep't of Env'tl. Conserv. v. EPA*, 540 U.S. 461, 468-69 (2004).

120 tons per year of particulate matter, including carbon black. R327-28, 937-38. Unfortunately, some carbon black emissions did occur: Unit 1 developed leaks (R167-68, 372, 425, 497, 1335, 1340), while Unit 2 had insufficient bagfilter capacity, causing premature bag failure (R71-75, 367-68).

Nevertheless, uncontradicted evidence showed that CCC identified and remedied the causes of emissions when they occurred (PX17) and repaired and replaced parts of its existing plant (R74-75, 167, 182-83, 385, 572). CCC also built new plant facilities, including two additional bagfilter compartments for Unit 2 in 2003. R75, 1361. These additional bagfilter compartments “pretty much” solved the Unit 2 problems. R1361.

A group of nearby property owners—a boat dealership, Action Marine, Inc.; its owner John Tharpe; the City of Columbus, Georgia; and city resident Owen Ditchfield—were dissatisfied with these measures. They claimed that carbon black had periodically escaped from CCC’s plant and been carried by the wind onto their properties, causing a black discoloration.<sup>2</sup> And they wanted CCC to do more to remedy the emissions sooner. In particular, they wanted CCC to replace Unit 1 instead of trying to repair the leaks first. R167-68, 372, 425, 497, 1335, 1340. And they asserted that CCC waited too long to replace the Unit 2 bagfilter system. R71-75, 367-68.

## **2. Respondents sue CCC and receive a huge verdict.**

These property owners—respondents in this Court—eventually brought claims against CCC for negligence, nuisance, trespass, and wantonness under Georgia law. Respon-

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<sup>2</sup> Action Marine claimed that its boats were discolored and that it was therefore losing customers. R1052-53. The City claimed that carbon black emissions had blackened the roof of the Civic Center and caused black streaking at nearby city facilities. R1010-11, 1224, 1230-32. Owen Ditchfield claimed that the material dirtied the paint on his houses and the finish on his vehicles. R1188-90.

dents sought recovery for their property damage, injunctive relief, punitive damages, and attorneys' fees for "bad faith" under O.C.G.A. § 13-6-11. They did not claim any physical illness or injury.<sup>3</sup>

CCC contested several elements of the various causes of action as well as the extent of respondents' damages: Several of the properties for which the City sought recovery tested negative for carbon black. R1447, 1613, 1795-96; R1448, 1794, PX104B-63; R1451-53, 1616, PX104A-2, 104B-21, DX162, at 5. Moreover, only tiny amounts of carbon black were present on all of respondents' other properties except one of Action Marine's boats. R1786-89, 1802-03, 1817, 1825, 1863-64; DX162. On these properties, microscopic examination revealed that other dark particles such as mold spores and pollen—not carbon black—were responsible for the discoloration. R1782-83, 1791-92.

The jury nevertheless returned a general verdict for respondents and awarded them \$1,915,000 in compensatory damages: \$45,000 to Ditchfield, \$100,000 to Tharpe for emo-

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<sup>3</sup> Moreover, there was no evidence that the carbon black emissions posed a health risk to the community. Though the Eleventh Circuit disagreed, its position was based on the erroneous belief that CCC's Material Safety Data Sheets ("MSDSs") proved that carbon black emissions were possibly carcinogenic to humans. App., *infra*, 24a & n.20. In fact, the MSDSs state that the U.S. National Toxicology Program and the U.S. Occupational Safety and Health Administration have *not* designated carbon black as a carcinogen. PX32-17. While one agency, IARC, has concluded that carbon black has possible carcinogenic effects based on rat inhalation studies, and therefore classified carbon black as a class 2-B carcinogen, even it acknowledged that "[t]here is inadequate evidence in humans for the carcinogenicity of carbon black." *Id.* (emphasis added). Plaintiffs presented no evidence that either humans or animals could potentially get cancer or suffer other adverse health effects from the periodic, atmospheric releases of carbon black at issue here.

tional distress, \$1.2 million to Action Marine for lost business value, and \$570,000 to the City for remediation costs. Dkt. 216. The City's award included \$132,350 for properties that did not test positive for carbon black. PX113, at 19-20; Appellants' Br. 17 n.2. And Action Marine's award included lost profits as well as \$795,000 for payment of ordinary business debts, such as a mortgage and a truck loan, that Action Marine claimed it would have paid down with those profits but for the discoloration. R1111-16; PX79, Ex. 5. The jury also awarded respondents \$17.5 million in punitive damages, as well as \$1,294,000 in attorneys' fees based on a finding of "bad faith." Dkt. 216; Dkt. 217.

**3. The district court enters judgment for respondents.**

The district court denied CCC's post-trial motions and entered judgment on the verdict. App., *infra*, 33a-47a. The court recognized that the \$17.5 million punitive award was over nine times the compensatory damages and seventy times the maximum civil penalty of \$250,000 under Alabama law (the state with regulatory authority over the plant). *Id.* at 45a-46a & n.6 (citing Ala. Code § 22-22A-5(18)(c)). But the court held that these disparities were permissible, relying primarily on *Johansen v. Combustion Engineering, Inc.*, 170 F.3d 1320 (11th Cir. 1999), a pre-*State Farm* case that allowed \$4.35 million in punitive damages even though that amount "was around 100 times the amount of actual damages awarded by the jury" and "100 times greater than the maximum penalty that could have been imposed." App., *infra*, 45a-47a & n.6.

The district court also ordered extensive injunctive relief. App., *infra*, 48a-54a. CCC had to replace or repair substantial parts of the Unit 1 bagfilter system; submit to air and video monitoring; and file progress reports subject to court verification. *Id.* at 49a-53a. A CCC employee estimated that these measures would cost at least \$4.2 million. R475-76.

**4. The court of appeals affirms.** CCC appealed to the Eleventh Circuit, which affirmed the judgment. App., *infra*,

1a-32a. As relevant here, the court concluded that CCC's conduct was "exceedingly reprehensible" and supported \$17.5 million in punishment. *Id.* at 23a-26a. But the court admitted that it reached its reprehensibility conclusion without comparing CCC's conduct to the misconduct in other punitive damages cases, instead basing its holding "on the facts before us in this case alone." *Id.* at 25a-26a.

The court also held that a 5.5:1 ratio—which it reached by adding the \$1,294,000 attorneys' fees award for "bad faith" to the compensatory damages of \$1,915,000 to produce a total denominator of \$3.2 million—was acceptable. *Id.* at 27a-29a. Relying on Ninth Circuit decisions, the court reasoned that while "ratios in excess of 1:1 and/or 4:1 may only rarely satisfy due process requirements," and "a 1:1 ratio [is] the general rule when substantial compensatory damages have been awarded," this case was "the rare exception" in which a higher ratio was allowed. *Id.* at 28a-29a & n.24 (citing *In re Exxon Valdez*, 472 F.3d 600, 624 (9th Cir. 2006); and *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005), cert. denied, 547 U.S. 1111 (2006)).

Finally, the court held that Alabama Code § 22-22A-5(18)(c) provided fair notice of a \$17.5 million punishment. App., *infra*, 29a-32a. As the court explained, that provision limited fines to \$25,000 "per violation" and up to \$250,000 "per order." *Id.* at 30a. But nothing in the statute, it noted, expressly precluded ADEM from issuing multiple orders. *Id.* at 30a-31a. Thus, the court believed that it was reasonable to assume that, "if Alabama citizens have found themselves the victims of [CCC's] malfeasance," ADEM would have issued repeated orders, ultimately fining CCC "several million dollars." *Id.* at 31a. Accordingly, it held that the \$17.5 million punitive award satisfied due process. *Id.* at 31a-32a.

### REASONS FOR GRANTING THE PETITION

This Court has long cautioned that “punitive damages pose an acute danger of arbitrary deprivation of property.” *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). In *BMW*, it adopted three guideposts to help courts identify when a “multimillion dollar penalty” is “grossly excessive” and a “lesser” award would adequately advance the State’s interests in punishment and deterrence. 517 U.S. at 584-85.

Unfortunately, *BMW* did not have its intended effect. Hence, the Court was compelled to provide additional guidance in *State Farm*. Although it found State Farm’s conduct “reprehensible,” the Court held that “a more modest punishment” than the \$145 million awarded by the jury “could have satisfied the State’s legitimate objectives.” 538 U.S. at 419-20. The Court suggested that, “in light of the substantial compensatory damages,” a “punitive damages award at or near the amount of compensatory damages”—\$1 million—was likely the constitutional maximum. *Id.* at 429.

Yet even *State Farm* did not stem the tide of large punitive awards. Thus, in 2006 this Court granted certiorari to review a \$79.5 million punitive award. See *Philip Morris USA v. Williams*, 126 S. Ct. 2329 (2006). In *Philip Morris*, the Court agreed to consider whether: (i) the Due Process Clause prohibits juries in individual cases from punishing defendants for injuries suffered by non-parties; and (ii) the \$79.5 million punitive award was unconstitutionally excessive. *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1062 (2007). Because the Court ruled for Philip Morris on the first issue, it did not need to reach the excessiveness issue. *Id.* at 1065.

This case offers a perfect opportunity to provide the guidance on the proper application of the *BMW* guideposts—and on the excessiveness inquiry more generally—that the lower courts sorely need but that the disposition in *Philip Morris* forestalled. The Eleventh Circuit’s conclusion that a \$17.5 million punitive exaction is constitutionally acceptable

is irreconcilable with the concerns about arbitrary punishments that this Court repeatedly has expressed. Moreover, that court’s strained application of the *BMW* guideposts directly conflicts with numerous decisions by other federal circuit courts and state courts of last resort. The depth, breadth, and significance of these conflicts strongly support certiorari.

**I. THE LOWER COURTS ARE SPLIT AND NEED GUIDANCE ON THE PROPER APPLICATION OF THE *BMW* GUIDEPOSTS.**

The Eleventh Circuit’s application of each *BMW* guidepost conflicts with numerous federal circuit court and state supreme court decisions. Review is necessary and appropriate because these issues that have divided the lower courts arise with regularity in punitive damages litigation.

**A. There Is A Conflict Regarding Whether Reviewing Courts Should Consider The Full Spectrum Of Punishable Conduct When Applying The Reprehensibility Guidepost.**

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 (internal quotation marks omitted). Here, the Eleventh Circuit concluded that CCC’s conduct was “exceedingly reprehensible.” App., *infra*, 23a-26a. In so holding, the court expressly “declined [CCC’s] invitation” to compare its conduct to that of defendants in other punitive damages cases. App., *infra*, 25a-26a. Instead, citing the three-Justice plurality’s rejection of a “comparative approach” in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 458 (1993), the court based its reprehensibility “conclusion on the facts before us in this case alone.” App., *infra*, 26a. The Sixth Circuit has likewise expressed “war[iness] of any attempt to graft our ruling here onto another set of facts” because of its perception that *TXO* forecloses a comparative approach. *Bach v. First Union Nat’l Bank*, 486 F.3d 150, 156 (6th Cir. 2007).

But the *TXO* plurality did not affirmatively condemn comparisons with other cases; it merely refused to “enshrine” a comparative analysis as part of a “test.” 509 U.S. at 458. Indeed, as the Eleventh Circuit acknowledged (App., *infra*, 26a), the plurality “[did] not rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations.” *Ibid.* (emphasis omitted). In any event, the plurality’s decision not to embrace any particular “test” commanded only three votes, and the Court’s punitive damages jurisprudence has since taken a different path. Of particular significance, the Court in *BMW* directed lower courts to apply three guideposts when reviewing a punitive award for excessiveness. 517 U.S. at 574-85. In describing the reprehensibility guidepost, the Court explained “that some wrongs are more blameworthy than others.” *Id.* at 575. That is a tacit recognition that some comparison with the conduct in other cases is essential.

Moreover, as the Court later emphasized in requiring “*de novo*” application of the guideposts, ““assur[ing] the uniform general treatment of similarly situated persons \* \* \* is the essence of law itself.”” *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001) (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)). Disregarding the results in other cases is antithetical to the even-handed application of justice that this Court has required and is destined to lead to an upward spiral of punitive damages awards. As the Court has made clear, the reprehensibility guidepost is supposed to ensure that the amount of punitive damages is not out of proportion to ““the enormity of [the] offense.”” *BMW*, 517 U.S. at 575. That objective becomes illusory if courts persist in evaluating the offense in isolation instead of placing it on a spectrum of punishable conduct informed by other punitive damages cases. Cf. *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 127 S. Ct. 2499, 2510 (2007) (“The strength of an inference cannot be decided in a vacuum. The inquiry is inher-

ently comparative \* \* \*.”); *BMW*, 517 U.S. at 594 (Breyer, J., concurring) (“[a] punitive damages award of \$2 million for intentional misrepresentation causing \$56,000 of harm is extraordinary by historical standards”).

Accordingly, the Eighth and Ninth Circuits and the California Supreme Court have recognized that the reprehensibility guidepost requires courts to compare the misconduct at issue to the conduct in other punitive damages cases—*i.e.*, to place the conduct on a spectrum of reprehensibility. See, *e.g.*, *Bains LLC v. ARCO Prods. Co.*, 405 F.3d 764, 775 (9th Cir. 2005) (misconduct in connection with the performance of “a socially valuable task” is less reprehensible than conduct serving no legitimate purpose, such as “intentional, repeated ethnic harassment”); *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 747 (8th Cir. 2003) (affirming \$1.25 million punitive award for breach of fiduciary duty because the misconduct, “according to the hierarchy of reprehensiveness, was clearly more reprehensible than the conduct in [*BMW*], and is at a similar level to the conduct in *State Farm*”); *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005) (reducing punitive award from \$1.7 million to \$50,000 in part because the fraud at issue was “of relatively low culpability” compared to “the universe of cases warranting punitive damages under California law”); cf. *Goddard v. Farmers Ins. Co.*, 120 P.3d 1260, 1262, 1282-84 (Or. Ct. App. 2005) (reducing \$25 million punitive award to \$2,589,822 because defendant’s “manifestly malicious and deceitful” misconduct fell in the middle of the egregiousness spectrum when compared to other cases), modified on reconsideration, 126 P.3d 682 (Or. Ct. App. 2006), rev. granted, 143 P.3d 239 (Or. 2006).

This conflict potentially affects every punitive damages case because all reviewing courts must apply the reprehensibility guidepost. The issue is also very significant in this case: Had the Eleventh Circuit been willing to compare CCC’s conduct—the failure to do more to prevent periodic

releases of carbon black during the manufacturing process—to the conduct of defendants in other punitive damages cases, the outcome likely would have been different. CCC’s conduct involved a lesser degree of reprehensibility because carbon black production is a “socially valuable” task. See *Bains*, 405 F.3d at 775. Moreover, other courts have reduced punitive awards to amounts well below \$17.5 million even though the misconduct at issue was markedly more egregious than CCC’s periodic failure to prevent carbon black releases.

In *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594 (8th Cir. 2005), for instance, the Eighth Circuit held that the defendant’s “conduct was highly reprehensible”:

Pall Mall cigarettes were extremely carcinogenic and extremely addictive \* \* \*; the sale of this defective product occurred repeatedly over the course of many years despite American Tobacco’s knowledge that the product was dangerous to the user’s health; and American Tobacco actively misled consumers about the health risks associated with smoking. Moreover, the reprehensible conduct [led to] a most painful, lingering death following extensive surgery.

*Id.* at 602-03. The Eighth Circuit nevertheless reduced the \$15 million punitive award to \$5 million. *Id.* at 603.

In *Planned Parenthood*, anti-abortion activists put up “WANTED” posters threatening doctors who provided abortions. 422 F.3d at 958. The risk of harm was so serious that the FBI “warned [the] physicians to purchase bullet proof vests.” *Ibid.* Applying *State Farm*, the Ninth Circuit nevertheless reduced punitive awards totaling \$109 million to just over \$4.7 million. 422 F.3d at 963.

In *Eden Electrical, Ltd. v. Amana Co.*, 370 F.3d 824 (8th Cir. 2004), the district court could “hardly think of a more reprehensible case of business fraud.” *Id.* at 828-29. Yet the Eighth Circuit affirmed the district court’s determination that

the \$17,850,000 punitive award was unconstitutionally excessive and had to be reduced to \$10 million. *Ibid.*

And in *Kemp v. AT&T Co.*, 393 F.3d 1354 (11th Cir. 2004), AT&T was found to have participated in a “large-scale corporate” effort “to exploit customers who were unsophisticated and economically vulnerable” by misleadingly presenting gambling debts as “legitimate” long-distance phone charges. *Id.* at 1363. Despite evidence indicating that “AT&T intended to target financially vulnerable individuals” with its illegal gambling scheme (*ibid.*), the Eleventh Circuit reduced the punitive damages from \$1 million to \$250,000, concluding that even \$250,000 would be “a meaningful deterrent to a corporation like AT&T.” *Id.* at 1365; see also *Life Ins. Co. v. Johnson*, 701 So. 2d 524, 526-29 (Ala. 1997) (reducing punitive damages from \$15 million to \$3 million where defendant engaged in pattern of selling worthless Medicare supplement policies to “elderly, uneducated, single black women”).

Under no stretch of the imagination can CCC’s conduct—which did not cause physical injury or target vulnerable individuals—be placed in the same league of heinousness as the conduct of these other defendants. Review is necessary to clarify whether the Eleventh Circuit erred in disregarding the results in other cases, thereby allowing the aberrational award against CCC to stand.<sup>4</sup>

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<sup>4</sup> The Eleventh Circuit’s reprehensibility assessment is flawed even if CCC’s conduct is evaluated in isolation. First, the court stated that CCC “continued its course of action and inaction undeterred by both the prospect and reality of litigation.” App., *infra*, 25a. But uncontradicted evidence showed that CCC identified and remedied the causes of emissions when they occurred, repaired and replaced parts of its existing plant, and built new facilities to curtail emissions—all before judgment was entered. See p. 4, *supra*.

Second, the court concluded that it was “of no consequence” “that Alabama permitted [CCC] to release carbon black into the atmosphere” because the permit did not allow for property dam-

**B. There Is A Conflict Regarding The Maximum Permissible Ratio When Compensatory Damages Are “Substantial.”**

In *State Farm*, this Court explained that “[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages*, can reach the outermost limit of the due process guarantee.” 538 U.S. at 425 (emphasis added). Heeding this guidance, several courts, including the Sixth and Eighth Circuits, have reduced punitive awards to amounts at or near compensatory damages when the latter were “substantial.” See, e.g., *Bach*, 486 F.3d at 156 (6th Cir.) (reducing \$2,228,600 punitive award for violation of Fair Credit Reporting Act to \$400,000, the amount of compensatory damages, because “the plaintiff has received a substantial compensatory award, and a ratio of 1:1 or something near to it is an appropriate result”); *Clark v. Chrysler Corp.*, 436 F.3d 594, 608 (6th Cir. 2006) (reducing \$3 million punitive award for death caused by defective truck design to \$471,258.26, the amount of compensatory damages);<sup>5</sup> *Boerner*, 394 F.3d at 603 (8th Cir.) (reducing ratio

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age. App., *infra*, 25a-26a n.21. But the existence of a permit to emit carbon black reduces CCC’s culpability by undercutting the argument that simply letting emissions occur was reprehensible.

Third, the court suggested that the degree of reprehensibility was increased because of CCC’s “willingness to elude accountability.” *Id.* at 25a. It relied in part on evidence that CCC “apparently” was warned by ADEM prior to inspections. *Ibid.* But even if such warnings occurred, there was no evidence that CCC affirmatively sought them. Punishing a defendant for actions by a third party raises serious due process concerns. See, e.g., *United States v. Ashland, Inc.*, 356 F.3d 871, 874 (8th Cir. 2004) (discussing “fundamental[] unfair[ness]” of “punishing a defendant based solely on the conduct of another party”).

<sup>5</sup> The jury found 50% comparative fault; thus, the plaintiff received only \$235,629.13. Using this figure as the denominator, one member of the two-judge majority treated the punitive/compensatory

from 3.7:1 to 1.2:1 where compensatory damages were \$4,025,000); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 798 (8th Cir. 2004) (reducing \$6,063,750 punitive award for racial harassment to \$600,000, the amount of compensatory damages); *Jet Source Charter, Inc. v. Doherty*, 55 Cal. Rptr. 3d 176, 178 (Cal. Ct. App. 2007) (reducing \$26 million punitive award for repeated breaches of fiduciary duty and fraud to \$6.5 million because 1:1 is maximum ratio when the harm is economic, the plaintiff is not vulnerable, and the compensatory damages are “substantial”).<sup>6</sup>

Other lower courts have refused to follow this guidance, however. The Ninth Circuit has held that, “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.” *Planned Parenthood*, 422 F.3d at 962. It allows even higher ratios if the behavior is more egregious. See *ibid.*; see also *In re Exxon Valdez*, 490 F.3d 1066, 1093-94 (9th Cir. 2007) (per curiam) (declaring 5:1 ratio permissible even though compensatory damages and settlement pay-

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ratio as being 2:1. *Clark*, 436 F.3d at 606-07. The other member of the majority believed that the full amount of compensatory damages should be used as the denominator and therefore considered the ratio to be 1:1. *Id.* at 613-14 (Kennedy, J., concurring).

<sup>6</sup> See also *Kent v. United of Omaha Life Ins. Co.*, 430 F. Supp. 2d 946, 959-60 (D.S.D. 2006), rev'd in part on other grounds, 484 F.3d 988 (8th Cir. 2007); *Casumpang v. Int'l Longshore & Warehouse Union, Local 142*, 411 F. Supp. 2d 1201, 1220 (D. Haw. 2005); *Ceimo v. Gen. Am. Life Ins. Co.*, 2003 WL 25481095, at \*2 (D. Ariz. Sept. 17, 2003), aff'd, 137 F. App'x 968, 970 (9th Cir. 2005) (unpublished); *Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 513 (Cal. Ct. App. 2007); *Roby v. McKesson HBOC*, 2006 WL 3775897, at \*19 (Cal. Ct. App. Dec. 26, 2006) (unpublished in relevant part), rev. granted, 156 P.3d 1014 (Cal. 2007); *Czarnik v. Illumina, Inc.*, 2004 WL 2757571, at \*11 (Cal. Ct. App. Dec. 3, 2004) (unpublished).

ments totaled \$513.1 million, because conduct was in “mid-range” on spectrum of reprehensibility). Likewise, the Federal Circuit has held that a 4:1 ratio is the “threshold where the punitive award may become suspect.” *Rhone-Poulenc Agro S.A. v. DeKalb Genetics Corp.*, 345 F.3d 1366, 1372 (Fed. Cir. 2003) (upholding 3.33:1 ratio where compensatory damages were \$15 million). And several state supreme courts have allowed ratios above 4:1 even when the compensatory damages exceeded several hundred thousand dollars.<sup>7</sup>

The current case deepens this conflict. The compensatory damages of \$1,915,000 are indisputably “substantial” and afford respondents “complete compensation” for their injuries. *State Farm*, 538 U.S. at 425-26. For example, one respondent recovered damages to remediate properties that tested *negative* for carbon black; another recovered damages to reimburse it for ordinary business debts (such as a mortgage and a truck loan); and a third recovered damages for the emotional distress of worrying about the harm to his business allegedly caused by carbon black discoloration. *See* p. 6, *supra*. Yet the \$17.5 million punitive award is over nine times higher. Even if the \$1,294,000 award of attorneys’ fees for “bad faith” is added to the denominator, as the court of appeals held it should be, the ratio is still 5.5:1.

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<sup>7</sup> *See Seltzer v. Morton*, 154 P.3d 561, 611 (Mont. 2007) (permitting \$9.9 million in punitive damages where compensatory damages were \$1.1 million because “substantial compensatory damages do not always require low single-digit ratios”); *Union Pac. R.R. v. Barber*, 149 S.W.3d 325, 348 (Ark. 2004) (upholding \$25 million punitive award, even though compensatory damages were \$5.1 million, because 5:1 ratio was not “breathtaking”); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004) (holding, on remand, that 9:1 ratio comported with due process despite compensatory damages of \$1 million); *Trinity Evangelical Lutheran Church & Sch.–Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 803 (Wis. 2003) (upholding \$3.5 million punitive award that was over seven times the potential harm of \$490,000).

Indeed, the Eleventh Circuit's treatment of the attorneys' fees implicates two additional splits. First, the courts are divided as to whether a reviewing court may enhance the denominator by the amount of attorneys' fees. In conflict with the Eleventh Circuit, the Utah Supreme Court has held that *State Farm* precludes doing so.<sup>8</sup>

Second, whether or not it is appropriate to include attorneys' fees in the denominator, the courts are in disarray regarding the significance of a large fee award to the excessiveness inquiry. Taking no account of the fact that an award of attorneys' fees has punitive and deterrent effects,<sup>9</sup> the Eleventh Circuit used the fee award to justify upholding an amount of punitive damages that it might otherwise have found excessive in relation to the compensatory damages.<sup>10</sup> By contrast, the D.C. Court of Appeals has held that, because substantial attorneys' fees include "a certain punitive element[,]'" they "favor[] a lesser rather than greater award of

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<sup>8</sup> In *State Farm*, the plaintiff argued that the denominator should include over \$800,000 in attorneys' fees and expenses in addition to \$1 million in compensatory damages. Resp. Br., 2002 WL 31387421, at \*17 n.5 (U.S. Oct. 17, 2002). This Court nevertheless stated that the ratio was 145:1 (\$145 million to \$1 million), not 80.5:1, the ratio if fees and expenses were included. 538 U.S. at 426. On remand, the Utah Supreme Court explained that "the considerable attention given by the Supreme Court to the issue of compensatory damages and the methodology for arriving at a constitutionally permissible ratio of compensatory to punitive damages convinces us that we would not be at liberty to consider a substitute denominator." 98 P.3d at 419.

<sup>9</sup> See, e.g., *City of Warner Robins v. Holt*, 470 S.E.2d 238, 240 (Ga. Ct. App. 1996) (recognizing that attorneys' fees awarded under Georgia law "may often have a somewhat punitive effect on the party against whom they are awarded" even if their primary purpose is compensatory).

<sup>10</sup> See App., *infra*, 27a (finding it unnecessary to decide whether 9:1 ratio would be constitutional).

punitive damages.” *Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003). Similarly, the California Court of Appeal recently held that a 1:1 ratio was the constitutional maximum because the “substantial” emotional-distress damages and attorneys’ fees contained a “punitive element.” *Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507, 513 (Cal. Ct. App. 2007). This Court’s review is necessary to resolve these conflicts and provide guidance on the proper application of the ratio guidepost.

**C. There Is A Conflict Regarding The Propriety Of Speculating About Severe, But Highly Unlikely, Legislative Fines When Applying The Comparable Penalties Guidepost.**

This Court has instructed reviewing courts to consider legislatively established penalties for comparable conduct because principles of comparative institutional competence warrant giving “substantial deference” to “legislative judgments concerning appropriate sanctions for the conduct at issue.” *BMW*, 517 U.S. at 583 (internal quotation marks omitted). In addition, the magnitude of legislative penalties bears on whether the defendant had “fair notice” of the size of the punishment to which it could be subjected. *Id.* at 584. Finally, this guidepost accounts for the fact that juries lack the expertise, perspective, and resources of expert regulatory agencies. As Justice Breyer has aptly put it in an analogous context, it is “anomalous” to “grant greater power \* \* \* to a single state jury than to state officials acting through state administrative or legislative lawmaking processes.” *Medtronic, Inc. v. Lohr*, 518 U.S. 470, 504 (1996) (Breyer, J., concurring in part and concurring in the judgment).

Perhaps because this Court has not yet provided a detailed analysis of this guidepost, lower courts consistently have expressed confusion about its proper application. As the Third Circuit remarked: “[T]he Supreme Court has not declared how courts are to measure civil penalties against punitive damages, and many courts have noted the difficulty in

doing so. We are similarly unsure as to how to properly apply this guidepost, and we are reluctant to overturn the punitive damages award on this basis alone.” *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237-38 (3d Cir. 2005) (citations omitted).

In particular, the lower courts are divided regarding whether it is appropriate to compare the punitive damages to theoretical maximum penalties that are rarely if ever imposed in practice, or whether courts instead must focus on the penalties that realistically could be anticipated for the conduct before them. Though this Court in *State Farm* rebuked the Utah Supreme Court for “speculat[ing] about the loss of State Farm’s business license, the disgorgement of profits, and possible imprisonment” in the absence of any evidence that those fines realistically could have been imposed (538 U.S. at 428), some lower courts have disregarded this admonition when considering the relevance of highly severe—but also highly unlikely—penalties. See, e.g., *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003) (noting that “[w]e are sure that the defendant would prefer to pay the punitive damages assessed in this case than to lose its license” even though there was no evidence that such a penalty was remotely possible for the conduct at issue); *Greenberg v. Paul Revere Life Ins. Co.*, 91 F. App’x 539, 542 (9th Cir. Jan. 12, 2004) (observing in insurance bad-faith case that “possible civil sanctions for this type of conduct include the suspension or revocation of an insurer’s licenses, which \* \* \* could be worth hundreds of millions of dollars”); *Union Pac. R.R. v. Barber*, 149 S.W.3d 325, 350 (Ark. 2004) (holding in case involving train accident caused by failure to clear vegetation near grade crossing that \$25 million punitive award satisfied the third guidepost because it was “comparable” to “the total civil penalties authorized by law,” which court determined to be \$9.9 million by adding the maximum daily state and federal fines for overgrown vegetation and treating each day as a separate violation).

This case is a perfect example. In analyzing the third guidepost, the Eleventh Circuit relied on a theoretical maximum penalty that was virtually unthinkable in practice: While Alabama’s environmental statute authorizes ADEM to impose fines of \$25,000 per violation up to a total of \$250,000 “per order,” the court speculated that ADEM could have issued repeated orders, ultimately fining CCC “several million dollars.” App., *infra*, 30a-31a (citing Ala. Code § 22-22A-5(18)(c)). Nothing in the record substantiates the court’s assumptions. ADEM never issued any orders because of fugitive emissions by CCC. Moreover, there is no indication that ADEM ever had, ever would, or even could, issue multiple retrospective orders so as to evade the \$250,000 limit on its power to punish. Indeed, while the court of appeals stated that “evidence in the record indicates that [CCC] did indeed violate conditions of its permit” (App., *infra*, 31a), there was no evidence quantifying particular emissions. Thus, as the court ultimately admitted, it was engaging in pure conjecture. See *ibid.* (court was not “capable of guessing as to the frequency of Continental’s violations”).

In contrast, the Sixth Circuit and other courts have focused on more realistic penalties grounded in the evidence before the court. In *Clark*, for instance, a design defect in a truck had contributed to a driver’s death. 436 F.3d at 597. Under the version of 49 U.S.C. § 30165(a) in effect at the time, the National Highway Traffic Safety Administration (“NHTSA”) could issue fines for design defects of \$1,000 per vehicle, up to a maximum of \$800,000 for a related series of violations. *Id.* at 608. The district court held that the third guidepost supported the \$3 million punitive award because NHTSA could theoretically issue penalties above \$800,000 or revoke the defendant’s business license in extreme circumstances. *Ibid.* The Sixth Circuit reversed, noting that no evidence in the record showed that such severe penalties were realistic and citing *State Farm*’s warning against engaging in speculation. *Ibid.* The court proceeded to hold that the

“civil penalties that could be imposed for comparable conduct do[] not support the award.” *Ibid.*

The Texas Supreme Court similarly refused to consider the possibility that a car dealer would lose its license due to the fraud at issue because the plaintiff “provide[d] no proof that such a sanction has ever been awarded in a case like this.” *Tony Gullo Motors I, L.P. v. Chapa*, 212 S.W.3d 299, 309 (Tex. 2006). Likewise, the Guam Supreme Court concluded that the “‘maximum fine provided by the statute’” is irrelevant where it “bears no ‘relation to the egregiousness of the [fraud in the] case.’” *Park v. Mobil Oil Guam, Inc.*, 2004 WL 2595897, at \*16 (Guam Nov. 16, 2004). And the Arkansas Court of Appeals held that theoretically severe penalties, such as loss of license, had “no application” because there was no proof that a lesser sanction had been ineffective in the past, and “the record [did not] demonstrate conduct so egregious and so widespread that the civil penalty of business-closure was a real prospect” for the fraud at issue. *Jim Ray, Inc. v. Williams*, \_\_ S.W.3d \_\_, 2007 WL 1831790 (Ark. Ct. App. June 27, 2007); cf. *Leatherman Tool Group, Inc. v. Cooper Indus., Inc.*, 285 F.3d 1146, 1149 (9th Cir. 2002) (reducing \$4.5 million punitive award to \$500,000 on remand from this Court because, “even assuming that as a general matter ‘severe’ awards might be appropriate in some cases, [the plaintiff] has not shown that the award here was comparable to the amount that might have been recovered in civil penalties in a comparable case”).

Like the conflicts involving the other *BMW* guideposts, this issue arises with considerable frequency in punitive damages litigation. Environmental cases are one example; often, there are high per-day penalties for statutory violations but no evidence as to the actual number of violations or of the relevant agency’s actual fining practice. See, e.g., *Johansen*, 170 F.3d at 1337; *City of Modesto Redevelopment Agency v. Dow Chem. Co.*, 2006 WL 2346275, at \*14 (Cal. Super. Ct. Aug. 1, 2006) (unpublished). Insurance bad-faith

cases are another example; the statutory scheme often provides for a range of penalties, including the loss of the insurer's license. See, e.g., *State Farm*, 538 U.S. at 428.

This issue also is very important. Many lower courts already tend to treat the comparable penalties guidepost as an inconsequential part of the punitive damages analysis. See, e.g., *Exxon Valdez*, 490 F.3d at 1094 (noting that, “[i]n several recent decisions we have not discussed the [third guidepost] at all,” and concluding that third guidepost supported \$2.5 billion punitive award solely because “the matter of spilling oil in navigable water has clearly been taken quite seriously by legislatures”) (citations omitted); *Kemp*, 393 F.3d at 1364 (the third guidepost “is accorded less weight in the reasonableness analysis than the first two guideposts”); *James v. Horace Mann Ins. Co.*, 638 S.E.2d 667, 672 (S.C. 2006) (stating that statutory penalties have little relevance where they “were set at ‘such a low level, there is little basis for comparing it with any meaningful punitive damage award’”); *Campbell*, 98 P.3d at 419 (holding, on remand, that a wide disparity between \$9,018,780.75 punitive award and \$10,000 maximum legislative penalty for comparable conduct was irrelevant because “the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a legislature can be quixotic”); cf. *Steel Techs., Inc. v. Congleton*, \_\_ S.W.3d \_\_, 2007 WL 1790599, at \*10 (Ky. June 21, 2007) (concluding that the third guidepost supported \$1 million punitive award even though maximum fine was \$10,000 because the “difference [between the punitive award and maximum fine] is significantly less than that encountered in *Gore* and *Campbell*”). This guidepost will effectively become a nullity if courts can rely on high (but unlikely) theoretical maxima or assume away all possible limitations on the amount of fines, as the Eleventh Circuit did here. Review is necessary to make clear that the Eleventh Circuit should have focused on more realistic penalties.

## II. THE ELEVENTH CIRCUIT'S DECISION IS REPRESENTATIVE OF A PERVASIVE FAILURE AMONG THE LOWER COURTS TO HEED THE CONCERNS UNDERLYING THIS COURT'S PUNITIVE DAMAGES CASES.

This case also exemplifies a tendency of many courts to apply the guideposts mechanically without considering the core constitutional problems that led this Court to address this subject in the first place. As this Court has recognized, punitive damages “serve the same purposes as criminal penalties, [but] defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding.” *State Farm*, 538 U.S. at 417. Civil juries that are typically subject to few constraints, that lack the expertise of regulators, and that may even possess “biases against big business” (*ibid.*) can all too easily impose multi-million-dollar punitive awards that are “tantamount to a severe criminal penalty” (*BMW*, 517 U.S. at 585) and that dwarf “the size of such awards in the 18th and 19th centuries,” even after adjustment for inflation (*Philip Morris*, 127 S. Ct. at 1064).

The Court accordingly has explained that “[i]t should be presumed [that] a plaintiff has been made whole for his injuries by compensatory damages, 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.” *State Farm*, 538 U.S. at 419. Even if some punitive damages are appropriate, the reviewing court should consider whether “a less drastic remed[y] could be expected to achieve [adequate punishment and deterrence].” *BMW*, 517 U.S. at 584.

This guidance reflects the basic understanding that, while punitive damages are an important means of achieving punishment and deterrence, they are not the only way to accomplish those objectives. “Punitive damages aside,”

“[d]eterrence \* \* \* operates through the mechanism of damages that are *compensatory*.” *Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 306-07 (1986) (emphasis in original).<sup>11</sup> Awards of attorneys’ fees also “provide significant deterrence.” *Smith v. Wade*, 461 U.S. 30, 94 (1983) (O’Connor, J., dissenting). And so does injunctive relief. Cf. *In re Exxon Valdez*, 270 F.3d 1215, 1244 (9th Cir. 2001) (various costs incurred by defendant as a result of its conduct “should be considered as part of the deterrent already imposed”).

Likewise, compensatory damages and awards of attorneys’ fees often can have a punitive effect. See *State Farm*, 538 U.S. at 426 (“Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.”); pp. 17-18, *supra*.

The guideposts announced in *BMW* and refined in *State Farm* were supposed to help courts determine when a punitive award exceeds the amount needed to punish and deter and therefore constitutes an arbitrary deprivation of property. Some courts have kept this ultimate inquiry in mind, reducing large punitive awards to an amount at or below the compensatory damages or throwing them out entirely after taking into account the punitive and deterrent effects of the compensatory award and other obligatory payments.

In *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), for instance, the jury

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<sup>11</sup> See also 1 Dan B. Dobbs, LAW OF REMEDIES § 3.1, at 282 (2d ed. 1993) (“[e]ven if the defendant is not subject to punitive damages, an ordinary compensatory damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior”); Clarence Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1182 (1931) (“if the ‘compensatory’ damages are large, the defendant is severely admonished without the addition of any punitive damages”).

awarded over \$100 million in punitive damages and \$48 million in compensatory damages for breach of contract and fraud. The district court reduced the punitive award to \$50 million. *Id.* at 454. The Third Circuit held that the reduced punitive award was still unconstitutionally excessive. *Id.* at 467. As the court explained, the plaintiff was not “weak” and “the harm inflicted on [it] was economic \* \* \* and hence ‘less worthy of large punitive damages awards than torts inflicting injuries to health or safety.’” *Ibid.* Moreover, “large compensatory damages have been awarded.” *Ibid.* The court accordingly held that \$1 million was the constitutional maximum because a greater amount was “not ‘reasonably necessary to punish and deter.’” *Id.* at 470 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991)).

Similarly, in *Chicago Title Insurance Corp. v. Magnuson*, 487 F.3d 985 (6th Cir. 2007), the jury awarded \$32.4 million in punitive damages and \$10.8 million in compensatory damages for tortious interference with a contract. The Sixth Circuit held that a new trial was required on damages, but no punitive damages would be allowed. *Id.* at 998. The court reasoned that there “were no physical injuries or threat to personal safety as a result of [the misconduct]” or any evidence of recidivism. *Id.* at 1001. And the plaintiff “was not a financially vulnerable victim.” *Ibid.* Thus, the court held, while there was evidence of malice, this evidence did not by itself prove that “‘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.’” *Ibid.* (quoting *State Farm*, 538 U.S. at 419).

Likewise, in *Pichler v. UNITE*, 457 F. Supp. 2d 524 (E.D. Pa. 2006), a federal district court in Pennsylvania denied a request for punitive damages under the Driver’s Privacy Protection Act (“DPPA”), 18 U.S.C. § 2724. There, a union had violated DPPA by recording certain license plate numbers to get the owners’ addresses from motor vehicle records. *Pichler*, 457 F. Supp. 2d at 530. The court held that

punitive damages were inappropriate, even if the union’s behavior was willful and reckless. *Id.* at 531. The union had discontinued the illegal activity before judgment and knew that it would have to pay “costly damage awards” for future DPPA violations. *Id.* at 532. This sufficed “to achieve deterrence without imposing punitive damages.” *Ibid.* Moreover, the statutory damages were over \$4 million, and the attorneys’ fees and costs were likely to be “considerable.” *Ibid.* These awards would “amply punish[]” the union for its misconduct. *Ibid.* Thus, “mindful” of *State Farm*’s admonition that punitive damages should be awarded only if necessary to achieve punishment or deterrence (*id.* at 531), the court disallowed punitive damages (*id.* at 532).

Regrettably, these decisions are in the minority: Many lower courts have misunderstood (or even affirmatively flouted) this Court’s guidance and upheld multi-million-dollar punitive awards even when compensatory damages were “substantial” and “a more modest punishment” would have sufficed. *State Farm*, 538 U.S. at 419-20, 425. The Utah Supreme Court’s decision on remand in *State Farm* is illustrative. Though this Court suggested that a punitive award “at or near” the \$1 million compensatory award was the constitutional maximum (*id.* at 429), the Utah Supreme Court upheld more than \$9 million in punitive damages (98 P.3d at 413).

Another example is the Ninth Circuit’s recent decision in *Exxon Valdez*. There, the court allowed \$2.5 billion in punitive damages to a class of fishermen following the Exxon Valdez tanker disaster—“the largest punitive damages award affirmed by a federal court” (490 F.3d at 1071 (Kozinski, J., dissenting from denial of rehearing))—even though Exxon spent \$2.1 billion remediating the harm, paid \$513.1 million in compensatory damages and settlement payments to the plaintiffs, and paid the United States and Alaska \$125 million in fines and \$900 million for damage to the environment. The dissenting judge, meanwhile, would have upheld the entire \$4.5 billion punitive award because it was a single-digit

multiple of the compensatory damages and settlement payments. See *id.* at 1102 (Browning, J., dissenting).

The present case is another excellent example. The \$17.5 million punishment here is “many times the size of [punitive] awards in the 18th and 19th centuries” (*Philip Morris*, 127 S. Ct. at 1064) and “is tantamount to a severe criminal penalty” (*BMW*, 517 U.S. at 585). The most realistic comparable penalty is no more than \$250,000 (1/70th of the punitive award). See p. 20, *supra*. And by no means does the misconduct here fall in the upper echelons of reprehensibility. See pp. 11-13, *supra*. Finally, the jury awarded substantial compensatory damages of \$1,915,000 as well as \$1,294,000 in attorneys’ fees for “bad faith,” while the district court ordered extensive injunctive relief that has cost CCC millions more. These awards and costs provide significant punishment and deterrence in their own right and eliminate the need for \$17.5 million in “further sanctions.” *State Farm*, 538 U.S. at 419; see also pp. 23-24, *supra*. The Eleventh Circuit nevertheless upheld the entire punitive award by manipulating the ratio of punitive to compensatory damages to get it into the mid-single digits and reading *State Farm* to allow such ratios whenever there is a “finding of reprehensibility” (App., *infra*, 29a).

These examples are far from unique: Numerous other courts also have missed this Court’s point, giving single-digit ratios a constitutional “free pass” even when the compensatory damages exceeded several hundred thousand dollars and a lower punitive award might have satisfied the objectives of punishment and deterrence.<sup>12</sup>

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<sup>12</sup> See, e.g., *Cambio Health Solutions, LLC v. Reardon*, 2007 WL 627834, at \*7 (6th Cir. Feb. 27, 2007) (unpublished) (upholding \$5 million punitive award that was 5.65 times the compensatory damages and prejudgment interest of \$884,291.18 because it was “well within the Supreme Court’s single-digit prescription”); *Stogsdill v. Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004)

The fundamental error of these courts is their belief that the second guidepost is not merely one of several possible indicia of excessiveness, but instead is a safe harbor for massive exactions. That premise seriously misunderstands this Court's precedents. *BMW* indicates that "[i]n most cases, the

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(holding that \$2 million punitive award was permissible, even though "the compensatory damages award [of \$500,000] is substantial \* \* \* and the punitive damages award is many times [the defendant's] net worth" because this Court approved a 4:1 ratio in *Haslip*); *Rhone-Poulenc*, 345 F.3d at 1372 (Fed. Cir.) (taking no account of the absolute amount of the punitive award and reasoning that the 3.33:1 ratio of punitive to compensatory damages "does not even approach the possible threshold of constitutional impropriety"); *Zhang v. Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003) (upholding \$2.6 million punitive award where compensatory damages were \$260,000, because the ratio was "slightly more than seven to one" and "[w]e are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages"); *Bogle v. McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (upholding approximately \$2 million in punitive damages to each of seven defendants despite "substantial" compensatory damages of \$500,000 because the ratio "in this case is in the neighborhood of 4:1, a range which the Supreme Court has found to be 'instructive'"); *Greenberg*, 91 F. App'x at 542 (upholding \$2.4 million punitive award in insurance bad faith case in which compensatory damages were \$547,445.42 on ground that 4.4:1 ratio at issue was "similar to the 4:1 ratio in *BMW* and well within the 'single digit ratio' that marks the outer limits of permissible disparities"); *Advocat, Inc. v. Sauer*, 111 S.W.3d 346, 361 (Ark. 2003) (allowing \$21 million punitive award that was 4.2 times the remitted compensatory damages of \$5 million, because a ratio of 4.2:1 is not "breathhtaking"); *Seltzer*, 154 P.3d at 611 (Mont.) (discussed above at p. 16 n.7); *Bocci v. Key Pharms., Inc.*, 76 P.3d 669, 675 (Or. Ct. App.) (stating that 4:1 "apparently is something of a benchmark for the United States Supreme Court," and reducing 45:1 ratio to 7:1 where compensatory damages were \$500,000), modified, 79 P.3d 908 (Or. Ct. App. 2003).

ratio will be within a constitutionally acceptable range, and remittitur will not be justified *on this basis*.” 517 U.S. at 583 (emphasis added). It does not say that, if the ratio is modest, the punitive award is perforce permissible. Rather, as discussed above, *BMW*, *State Farm*, and *Philip Morris* all suggest a broader concern with the risk of arbitrariness that arises when the *absolute* amount of punitive damages exceeds the fine that would be imposed in a criminal proceeding attended by full criminal safeguards or in an administrative proceeding supervised by an expert agency.

This Court’s cases also reflect the paramount principle that no award should be greater than reasonably necessary to serve the State’s goals of deterrence and retribution. Application of that limiting principle necessarily entails considering the deterrent effect of other forms of liability imposed upon the defendant as a consequence of its punishable conduct. The courts that treat the ratio guidepost as a safe harbor have lost sight of this critical consideration entirely.

Because the Eleventh Circuit committed precisely that error here, review is warranted to make clear that a single-digit ratio is not a free pass. This case presents an excellent opportunity to remind the lower courts that they must scrutinize the *absolute* size of punitive awards to ensure that fines that could or would never be imposed by a criminal sentencer or expert administrative agency are not levied through the civil process with its comparatively *weaker* protections and that, in determining whether an award is excessive, they must take account of other deterrents faced by the defendant.

**III. THIS COURT SHOULD GRANT PLENARY REVIEW IN BOTH THIS CASE AND *EXXON VALDEZ* OR, ALTERNATIVELY, GRANT REVIEW IN ONE AND HOLD THE OTHER.**

As discussed above, the Eleventh Circuit’s analysis of the ratio and reprehensibility guideposts relied on the Ninth Circuit’s decision in *Exxon Valdez*. App., *infra*, 26a, 29a.

Exxon has recently filed a petition for certiorari, arguing, among other things, that the Ninth Circuit's treatment of the ratio and comparative penalties guideposts was fundamentally unsound. See *Exxon Shipping Co. v. Baker*, No. 07-219. Given the similar issues raised by these cases, the Court should grant plenary review in both to provide maximum guidance to the lower courts. In recent years, this Court has followed this practice in cases involving constitutional challenges to school assignment plans,<sup>13</sup> criminal sentencing,<sup>14</sup> and religious displays.<sup>15</sup> Granting both petitions is especially warranted here because, as in *Philip Morris*, Exxon has raised issues that, if decided in its favor, would make it unnecessary for this Court to reach Exxon's excessiveness arguments.

At minimum, the Court should grant review in one of the cases and hold the other. See Robert L. Stern et al., SUPREME COURT PRACTICE § 4.16, at 255 (8th ed. 2000) ("Where the petition for certiorari presents a question that is identical with, or similar to, an issue already pending before the Supreme Court in another case in which certiorari has been granted, the issue is obviously important and the Court will either grant the petition and set the case for argument or postpone consideration of the petition until the other case has been decided and then make summary disposition of the case in accordance with that decision.").

### CONCLUSION

The petition for a writ of certiorari should be granted.

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<sup>13</sup> *Parents Involved in Cmty. Sch. v. Seattle Sch. Dist. No. 1*, 126 S. Ct. 2351 (2006); *Meredith v. Jefferson Cty. Bd. of Educ.*, 126 S. Ct. 2351 (2006).

<sup>14</sup> *Rita v. United States*, 127 S. Ct. 551 (2006); *Claiborne v. United States*, 127 S. Ct. 551 (2006).

<sup>15</sup> *McCreary Cty. v. ACLU*, 543 U.S. 924 (2004); *Van Orden v. Perry*, 543 U.S. 923 (2004).

Respectfully submitted.

H. THOMAS WELLS, JR.  
PETER S. FRUIN  
*Maynard, Cooper & Gale*  
*1901 Sixth Ave. North*  
*2400 AmSouth/Harbert*  
*Plaza*  
*Birmingham, AL 35203*  
*(205) 254-1000*

EVAN M. TAGER  
*Counsel of Record*  
NICKOLAI G. LEVIN  
*Mayer, Brown, Rowe &*  
*Maw LLP*  
*1909 K St., NW*  
*Washington, DC 20006*  
*(202) 263-3000*

J. BRETT BUSBY  
*Mayer, Brown, Rowe &*  
*Maw LLP*  
*700 Louisiana St., Suite 3400*  
*Houston, TX 77002*  
*(713) 238-2606*

*Counsel for Petitioners*

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