No. 94-896

In the Supreme Court of the United States

OCTOBER TERM, 1994

BMW OF NORTH AMERICA, INC., *Petitioner*

v.

IRA GORE, JR., *Respondent*

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR THE PETITIONER

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court, having found that the jury's $4,000,000 punitive damages verdict unconstitutionally punished petitioner for hundreds of transactions that occurred entirely outside of Alabama, was obligated, but failed, to provide a meaningful remedy for that constitutional violation.

2. Whether the $2,000,000 remitted punitive exaction, which is 500 times respondent's compensatory damages, is so excessive at to violate the Due Process Clause of the Fourteenth Amendment.

RULE 29.1 STATEMENT

Petitioner BMW of North America, Inc. is a wholly-owned indirect subsidiary of Bayerische Motoren Werke, A.G., a German corporation. All of BMW of North America, Inc.'s subsidiaries are wholly-owned.

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OPINIONS BELOW

The opinion of the Supreme Court of Alabama (Pet. App. 1a-26a) is reported at 646 So. 2d 619. The order of the Circuit Court of Jefferson County denying petitioner's post-trial motions (Pet. App. 27a-30a) is unreported.

JURISDICTION

The Alabama Supreme Court issued an opinion in this case on October 29, 1993. On August 19, 1994, following the submission of timely applications for rehearing by both parties, the Alabama Supreme Court withdrew its opinion dated October 29, 1993, denied the applications for rehearing, and issued a substituted opinion. The certificate of judgment of affirmance (Pet. App. 31a-32a) was issued on September 9, 1994. The petition for a writ of certiorari was filed on November 17, 1994, and was granted on

January 23, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

In their journey from the assembly line to the dealer's showroom, automobiles occasionally experience minor damage requiring repair or refinishing. The question then naturally arises whether, or in what circumstances, the fact of repair or refinishing should be disclosed to the dealer or to the retail purchaser of the automobile. By 1983, several states had answered this question by statute or regulation. BMW canvassed these laws and adopted the strictest disclosure threshold — 3% of the manufacturer's suggested retail price ("MSRP") — as its nationwide policy. Since that time, numerous additional states have adopted disclosure thresholds. The vast majority, including Alabama (which enacted its statute after the trial in this case), require disclosure only if any repairs or refinishing cost more than 3% (or some higher percentage) of MSRP. See, *e.g.*, ALA. CODE § 8-19-5(22) (the failure to give notice of repairs or refinishing costing less than 3% of MSRP is not an unfair trade practice and "shall not * * * constitute a material misrepresentation or omission of fact").

In this case, a jury found that BMW's 3% disclosure policy constituted fraud under Alabama common law. It then proceeded to award $4 million in punitive damages (later reduced by the Alabama Supreme Court to $2 million) to plaintiff Dr. Ira Gore, not just for BMW's application of that policy to him but also for its application of the policy to hundreds of cars sold outside of Alabama

— despite the absence of any showing that those sales were unlawful where they occurred.

1. *The BMW Quality Control Process*. Bayerische Motoren Werke, A.G. (BMW AG) manufactures automobiles in Germany. R. 471.[1] BMW purchases newly manufactured vehicles from BMW AG, imports the cars into the United States, and prepares them for distribution and sale throughout the United States. R. 471, 530-531, 538-539.

Occasionally the finish of a vehicle suffers damage between the time the vehicle rolls off the assembly line in Germany and the time it arrives in the United States. The damage could be dents or scratches that occur during the trans-Atlantic voyage (R. 473, 476, 480-481) or it could be blemishes caused by environmental conditions, such as acid rain (R. 478-481).

When newly manufactured automobiles arrive in the United States, their first stop is one of BMW's vehicle preparation centers (VPCs). The VPCs are staffed by technicians, who have been trained to factory standards, and are stocked with the same equipment found in BMW AG's factories in Germany. R. 482, 483, 699-700, 735-737, 784. At the VPCs, the vehicles are prepared for delivery to dealers and inspected for transportation damage as well as any other imperfections. R. 472-474, 476, 530-531, 538-539, 646, 650-651.

If a vehicle has been damaged or is otherwise flawed, it is returned to factory quality at the VPC (or, in some past instances not pertinent here, at the facility of an independent contractor under the supervision of BMW employees). R. 474, 477, 479, 529-530, 651, 653, 677, 743-744. Refinishing takes place in a specially

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[1]The designation "R. __" refers to the Reporter's Transcript of the trial below.

designed paint booth, in which the paint is applied and baked until hard. R. 652-653. The paint booth provides constant air filtration and utilizes a down draft — a forceful air flow from ceiling to floor — to minimize the presence of dust in the painting area. R. 652, 732-734, 742, 756. The booth also contains controls for regulation of heat and humidity levels. R. 675-676, 734.

The refinishing process — which is essentially identical to that used by BMW AG when it detects an imperfection in a car's finish as it comes off the assembly line (R. 552, 651, 661, 680-681, 734, 735-737, 744, 760) — involves numerous steps and quality-maximizing safeguards. First, all moldings and emblems are removed from the surface that is to be refinished. R. 719-720. Then the entire vehicle is cleaned with silicone and dirt remover. R. 720. Next the flaws in the surface of the paint (whether from acid rain or other causes) are removed by lightly sanding the affected surface with a wet sander — a sanding machine with a hose producing a steady stream of water to wash away dust. R. 720-721. Then a technician performs additional light sanding by hand. R. 721. The sanding process removes no more than the top coat of paint. R. 721. It is not necessary to remove any of the protective coatings beneath the top coat. R. 721-722, 725-726, 773.

After sanding, the vehicle again is thoroughly cleaned and wiped off with silicone and dirt remover. R. 721. Next, masking tape is placed around the surfaces that are to be refinished and the vehicle is put in the paint booth, where it is wiped a final time with silicone and dirt remover and blown dry with air pressure. R. 721. Once the vehicle is in the paint booth and fully cleaned, the paint is applied to the affected surfaces and the booth is heated to a temperature adequate to harden the paint, but low enough to avoid damaging the other components of the vehicle. R. 653, 741-742, 758. BMW does not merely repaint the spots that had sustained damage; instead, it repaints the entirety of any panel that has some damage or

noticeable imperfection. R. 676-677, 762-763. After the paint has dried, the refinished vehicle is inspected to ensure proper gloss and texture and the absence of imperfections. R. 656-657.

2. *BMW's Disclosure Policy*. During the period relevant to this case, BMW had a formal policy relating to vehicles that required refinishing or repairs upon arrival in the United States. If the cost of the repairs exceeded 3% of MSRP, the vehicle would be placed into company service and driven for up to six months or ten thousand miles. J.A. 16-17; R. 508-510. BMW then would sell it to a dealer at auction as a used vehicle, with whatever disclosures were required by applicable law. J.A. 17; R. 986.

If the cost of VPC repairs performed on a vehicle did not exceed 3% of the vehicle's MSRP, however, BMW considered the car to be new and sold it to a dealer without disclosure of the repairs. J.A. 15-16. This policy was adopted in 1983 to satisfy the strictest of the various state statutes then in effect governing disclosure of repairs performed on vehicles sold to consumers as new. J.A. 35, 37.[2]

3. *Dr. Gore's Car*. In January 1990, Ira Gore, a medical doctor specializing in oncology, purchased a 1990 BMW 535i from German Auto in Birmingham, Alabama, for $40,750.88. Pet. App. 3a. Dr. Gore drove his car for approximately nine months before taking it to Slick Finish, an independent automobile detailing shop. *Ibid*. He was not dissatisfied with the car's overall appear-

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[2]At the time it adopted the policy (and subsequently), BMW was confronted with a patchwork of state disclosure requirements. Some states required disclosure of repairs exceeding 3% of MSRP, while others did not require disclosure unless the cost of the repairs exceeded 6% of MSRP. Among the states regulating the subject, some required disclosure only by dealers, while others required disclosure by manufacturers. Many of the statutes permitted the entity with the disclosure obligation to exclude from the calculation the cost of glass, tires, bumpers, and welded parts. J.A. 35. To simplify matters, BMW adopted the 3% threshold without exception for any kind of parts — *i.e.*, the strictest statutory requirement then in existence — as its nationwide policy. J.A. 37.

ance; nor had he noticed any problems with, or flaws in, the car's paint. *Ibid.* He simply wanted to make the car look "snazzier than it normally would appear." *Ibid.* The proprietor of the detailing shop, Leonard Slick, informed Dr. Gore that his car had been repainted. *Ibid.*

It turned out that the automobile purchased by Dr. Gore had sustained superficial paint damage (presumed by the parties to have resulted from acid rain) and that the horizontal surfaces had been refinished at the VPC in Brunswick, Georgia. Pet. App. 3a; R. 526, 554. In keeping with its nationwide policy, BMW had not disclosed the repairs to German Auto because the cost of those repairs — $601 — was substantially less than 3% of the MSRP for the vehicle. Pet. App. 3a.

4. *Proceedings Below*. Dr. Gore never contacted BMW to complain about the refinishing or to ask for any kind of recompense. R. 357, 375-376. Instead, he simply filed suit in Alabama state court. The complaint alleged that BMW's failure to disclose to Dr. Gore that it had performed some refinishing on his vehicle prior to selling it to German Auto constituted fraud, suppression, and breach of contract.

At trial, it was undisputed that the only flaw in the refinishing of Dr. Gore's car was a three or four-inch tape line on the rear fender that the technicians inadvertently had failed to remove. J.A. 23. There was no evidence that the paint had faded, chipped, or bubbled or that it was likely to do so in the future. The colors of the refinished surfaces matched the colors of the rest of the car. There was no unusual film build-up, and the gloss was exactly what would be expected of a vehicle that had come straight off the assembly line. J.A. 28-30. In short, with the exception of the tape line, which could have been buffed out without damage to the car's finish (J.A. 23-26), Dr. Gore's vehicle was indistinguishable from one that had not undergone refinishing. Although these facts raised serious doubt

about the materiality of the non-disclosure, the case was submitted to the jury on the strength of the uncorroborated testimony of the former owner of German Auto that even perfectly refinished vehicles suffer a 10% diminution in value (J.A. 7, 9-10).

During his closing statement, Dr. Gore's counsel requested compensatory damages of $4,000 — representing 10% of the approximately $40,000 purchase price of Dr. Gore's car — and punitive damages of $4 million. The closing statement made clear that the latter figure represented a penalty of $4,000 per car for each of the approximately 1,000 cars that BMW had refinished at a cost of more than $300 and sold as new anywhere in the United States over a ten-year period (J.A. 31):[3]

> They've taken advantage of nine hundred other people on those cars that were worth more — the damage was more than three hundred dollars. If what Mr. Cox said is true, they have profited some four million dollars on those automobiles. Four million dollars in profits that they have made that were wrongfully taken from people. That's wrong, ladies and gentlemen. They ought not be permitted to keep that. You ought to do something about it.
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> * * * * *
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> I urge each and every one of you and hope that each and every one of you has the courage to do something about it. Because, ladies and gentlemen, I ask you to return a verdict of four million dollars in this case to stop it.

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[3]The $300 threshold was an arbitrary cut-off selected by Dr. Gore's counsel. See J.A. 18. For the sake of simplicity, references to "the number of refinished vehicles" mean "the number of vehicles refinished at a cost of over $300."

The jury did precisely what Dr. Gore's counsel requested, awarding Dr. Gore $4,000 in compensatory damages and $4 million in punitive damages. BMW then filed a combined motion for judgment notwithstanding the verdict, new trial, and remittitur. The trial court denied the motion in all respects. Pet. App. 27a-30a.

The Alabama Supreme Court affirmed the judgment against BMW, conditioned upon a remittitur of the punitive damages to $2 million. The court acknowledged that the verdict violated BMW's due process rights and impinged upon the sovereignty of other states by punishing BMW for sales that took place entirely outside of Alabama and that were not even shown to be illegal where they occurred. Pet. App. 16a-17a. Having said that, however, the court did not grant a new trial. Nor did the court apply the jury's $4,000 per car penalty either to Dr. Gore's car alone or to the total number of cars sold in Alabama, for which, in its view, the jury presumably could lawfully punish; that approach would have resulted in a punitive award of no more than $56,000.[4] Instead, the court merely articulated its usual *Green Oil* standards for determining whether a punitive award is excessive (see *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 223-224 (Ala. 1989)) and arbitrarily cut the punitive damages in half. Pet. App. 9a-10a, 21a.

In determining that a $2 million penalty was appropriate for BMW's conduct, the Alabama Supreme Court gave no weight to Alabama's recently enacted legislation adopting a 3% disclosure threshold for purposes of its Deceptive Trade Practices Act. See ALA. CODE § 8-19-5(22). The court concluded that the statute was irrelevant because "[t]he public policy of Alabama expressed in the statute had not been enacted at the time BMW NA adopted its policy of nondisclosure." Pet. App. 7a. The court also found it irrelevant that less than two months before the trial in this case

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[4]The record reflects that, of the 983 refinished vehicles made known to the jury, at most 14 were sold in Alabama. Pet. App. 17a, 23a; J.A. 36.

another jury in the same county heard essentially the same evidence relating to BMW's policy, yet found BMW not liable for *any* punitive damages. *Id*. at 13a-15a (discussing the *Yates* case).

Justice Houston filed a special concurrence. Pet. App. 22a-26a. He lamented the fact that cases like this one have caused "so many" observers to regard Alabama's punitive damages regime as a "lottery" (*id*. at 26a) and put special emphasis on the disparity in the results of the two nearly identical cases against BMW (*id*. at 25a):

> The *Yates* case and this case are almost identical. The same excellent lawyers represented Yates that represent Gore; the same excellent lawyers represented BMW NA in both cases. Excellent trial judges, in the same judicial circuit, conducted as nearly perfect trials as can be conducted. Each plaintiff was a member of a respected profession; each was a physician. BMW NA was the defendant in each case. How does Gore get $2,000,000 in punitive damages and Yates get nothing in punitive damages? Different juries.
>
> Perhaps Gore, Yates, BMW NA, the citizens of Alabama, and even this Justice will think something is not right — that, to paraphrase a Ray Stevens' song of several years ago, Gore got the gold mine and Yates got something else.

BMW filed an application for rehearing asserting, *inter alia*, that, having concluded that the jury had unconstitutionally punished BMW for transactions occurring entirely outside of Alabama, the court was required either to grant a new trial or to reduce the punitive damages to no more than $56,000 — the $4,000 per car penalty multiplied by the number of Alabama cars. Nine months later, the Alabama Supreme Court issued a substituted opinion and denied rehearing without addressing BMW's arguments.

SUMMARY OF ARGUMENT

1. There can be no question that, by imposing $4 million in punitive damages, the jury in this case punished BMW for hundreds of transactions that had no connection to Alabama. The Alabama Supreme Court so found, and the jury argument of Dr. Gore's counsel confirms it.

The Alabama Supreme Court correctly concluded that extraterritorial punishment of this sort is unconstitutional. In particular, the application of Alabama law to punish transactions that have no connection to Alabama was entirely arbitrary and unpredictable and therefore violated BMW's right to due process. It also infringed the sovereignty of Alabama's sister states. Finally, the application of Alabama law to punish BMW for non-Alabama transactions violated the Commerce Clause by unabashedly regulating out-of-state commerce.

Regrettably, the Alabama Supreme Court failed to remedy the constitutional violation it had identified. Rather than granting a new trial or applying the jury's $4,000 per car formula to the number of cars for which the jury legitimately could punish (either Dr. Gore's car alone or, at most, the 14 cars sold in Alabama), the court simply undertook its usual excessiveness inquiry and cut the punitive damages in half. But there is no reason to presume that a properly functioning jury would have imposed a punishment of anywhere near $2 million for BMW's Alabama-related conduct alone. Indeed, this jury's choice of a $4,000 per car punishment strongly suggests that it would have chosen $4,000 as the appropriate punishment for BMW's conduct with respect to Dr. Gore or $56,000 as the appropriate punishment for BMW's entire Alabama-related conduct. Had a properly functioning jury returned such a verdict, the Alabama Supreme Court would have had no authority under state law to increase it. Accordingly, by using the tainted $4 million punishment as its starting point and then merely reducing it to the maximum that

a properly functioning jury permissibly could impose, the Alabama Supreme Court perpetuated the constitutional violation. For that reason, the judgment must be reversed with instructions to either grant a new trial or apply the jury's $4,000 per car formula to the cars for which the jury legitimately could punish.

2. The $2 million punitive damages award must be set aside for the independent reason that it is grossly excessive in violation of the Due Process Clause. The punishment is a breathtaking **500** times the actual and potential harm allegedly suffered by Dr. Gore and is **35** times the harm to all 14 Alabama BMW owners (assuming an average harm of $4,000). In addition, the punitive damages are **1,000** times the civil penalty for violating Alabama's repair disclosure statute and over **70** times the maximum civil penalty that could be imposed for 14 violations.

Such disproportionate punishment cannot be justified by reference to the nature of the conduct. On the scale of reprehensibility, BMW's conduct in this case barely registers. The use of a 3% disclosure threshold is consistent with the statutes of the overwhelming majority of states that have legislated on the subject. Indeed, Alabama itself adopted a 3% disclosure threshold after the trial in this case. BMW's disclosure policy also is consistent with industry custom. Finally, BMW had no notice when it sold Dr. Gore's vehicle that its use of a 3% disclosure threshold would be deemed to violate the common law of any state.

It also would be wholly inappropriate to justify Dr. Gore's $2 million windfall by reference to the numerous other purchasers of refinished BMWs. Because the other purchasers were not parties to Dr. Gore's litigation, there is nothing to stop them from attempting to impose additional punishment against BMW for the very same conduct. It is cold comfort to suggest that other courts and juries can take into account the $2 million punishment in this case. No procedure exists to require them to do so, and experience in other multiple victim contexts demonstrates that they will not. Moreover,

such an approach ignores the very real possibility that the verdict in this case is aberrational. If succeeding juries were to absolve BMW entirely or at least find, like the *Yates* jury, that BMW's conduct does not merit punitive damages, it would, in retrospect, turn out to be exceedingly unfair to have enhanced BMW's punishment in this case on the erroneous assumption that each and every non-disclosure of refinishing would be deemed to be punishable misconduct.

The *only* fair and workable solution to these problems is to require that the punitive damages in each case be limited to punishing for what the defendant did to the plaintiff in that case. When that approach is applied here, it is manifest that a $2 million punishment for what BMW did to Dr. Gore is grossly excessive and must be set aside.

ARGUMENT

This case is emblematic of the highly disturbing role of punitive damages in the modern litigation landscape. After punitive damages had played a modest and beneficial role in American tort law for two centuries, a virulent new strain has emerged in the last several decades. This strain is especially likely to attack large, out-of-state corporations (see *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2340-2341 (1994)), often punishing savagely the slightest misstep. And although this Court may understandably take the view that others in our legal system — Congress, the state legislatures, or the common law courts — should assume the primary responsibility for dealing with this pernicious phenomenon, the verdicts of juries and the judgments of lower courts sometimes trample upon the defendants' constitutional rights and thus implicate the legitimate powers of this forum.

This is such a case. Acting in a manner that many would hold up as a model of good corporate citizenship, BMW approached the issue of disclosure of new car refinishing by reviewing the laws of the

various states that had adopted statutes regulating the subject and choosing to comply nationwide with the strictest of those statutes. This would hardly strike most people as wrongful, let alone egregious, conduct. Nevertheless, the jury in this case found BMW's policy to be fraudulent, returning a verdict that not only required it to pay $4,000 in compensatory damages for the plaintiff's alleged injury but that labeled BMW a malicious malefactor and punished it in the staggering amount of $4 million, later reduced by the Alabama Supreme Court (arbitrarily, for all that appears) to $2 million.

The jury's verdict punished BMW not just for any wrongdoing that took place in Alabama but for conduct in every other state across the Nation, wholly without regard to whether that conduct may have been perfectly lawful where it occurred. And the Alabama Supreme Court, although recognizing the constitutional impropriety of what the jury had done, provided no remedy to purge the effects of that impropriety.

The punishment that the court below left standing is a grotesque parody of justice, bearing no reasonable relationship to the harm caused or threatened to the plaintiff by the punishable conduct, to the reprehensibility of that conduct, to the range of penalties that legislatures have provided for similar improprieties, or to any other discernible criterion for testing the reasonableness of a punishment. This patent injustice cries out for rectification by this Court.

I. THE PUNITIVE DAMAGES CONSTITUTE UNCONSTITUTIONAL EXTRATERRITORIAL PUNISHMENT FOR WHICH THE COURT BELOW FAILED TO PROVIDE A CONSTITUTIONALLY ADEQUATE REMEDY

The jury in this case punished BMW at a rate of $4,000 for each of the approximately 1,000 refinished vehicles sold nationwide by BMW without disclosure. The Alabama Supreme Court correctly concluded that this kind of extraterritorial punishment violates the Federal Constitution. Nevertheless, the court did not grant a new trial; nor did it apply the jury's $4,000 per car formula to determine an appropriate punitive sanction for either the car sold to Dr. Gore or the 14 cars sold in Alabama. Instead, mouthing its usual standards for determining whether a punitive exaction is excessive, it merely cut the $4 million penalty in half.

The Alabama Supreme Court's conclusion that BMW was subjected to unconstitutional extraterritorial punishment is plainly correct. Its chosen remedy, however, fails to redress the constitutional violation. Due process requires that BMW receive a new trial on punitive damages or, alternatively, that the jury's $4,000 per car formula be applied to no more than the number of cars for which the jury legitimately could punish.

A. The Jury Imposed Punishment Under Alabama Law For Hundreds Of Transactions That Had No Connection To Alabama.

The Alabama Supreme Court found that the jury in this case punished BMW under Alabama law for hundreds of transactions that took place entirely outside of Alabama and that had no effects within Alabama. As that court stated, "the jury's punitive damages award is based upon a multiplication of $4,000 (the diminution in value of the Gore vehicle) times 1,000 (approximately the number of refinished vehicles sold in the United States)" and hence "was

based in large part on conduct that happened in other jurisdictions." Pet. App. 16a.

In his brief in opposition to the petition for certiorari (at 7-8), Dr. Gore took issue with this finding of the Alabama Supreme Court, claiming that BMW was punished solely for its "sale in Alabama of damaged cars." Of course, this Court generally accepts a state appellate court's findings as to "what occurred at the trial" and "the basis of the verdict" (*Minneapolis St. P. & S. Ste. M. Ry.* v. *Moquin*, 283 U.S. 520, 521 (1931)), and here the finding was that BMW's punishment was "based in large part on" non-Alabama sales (Pet. App. 16a).

In any event, Dr. Gore's own summation to the jury belies his revisionist interpretation of the verdict. In that summation, his counsel specifically asked the jury to punish BMW for each of the approximately 1,000 refinished cars it had sold nationwide over the preceding ten-year period by removing BMW's asserted $4,000 profit from the sale of each and every one of those cars (J.A. 31):

> They've taken advantage of nine hundred other people on those cars that were worth more — the damage was more than three hundred dollars. If what Mr. Cox said is true, they have profited some four million dollars on those automobiles. Four million dollars in profits that they have made that were wrongfully taken from people. That's wrong, ladies and gentlemen. They ought not be permitted to keep that. You ought to do something about it.
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> I urge each and every one of you and hope that each and every one of you has the courage to do something about it. Because, ladies and gentlemen, I ask you to return a verdict of four million dollars in this case to stop it.

In light of this clear request that the jury impose a punishment of $4,000 for each of the approximately 1,000 refinished cars sold nationwide, it is absurd to suggest that the jury's $4 million punitive verdict reflects punishment only for the cars sold in Alabama.

B. Extraterritorial Punishment Violates The Constitution.

There can be no question that the Alabama Supreme Court was correct in concluding that extraterritorial punishment of the sort that took place here is unconstitutional. Indeed, the application of Alabama law to punish BMW for transactions that took place entirely in other states — all of which have their own laws governing fraud and punitive damages and many of which regulate disclosure of repairs by statute — offends several distinct constitutional values. See Brief of Amici Curiae the American Automobile Manufacturers Association and the Association of International Automobile Manufacturers in Support of Petitioner at 13-24. ("AAMA/AIAM Br."); Brief of the National Association of Manufacturers as Amicus Curiae in Support of the Petitioner at 5-18 ("NAM Br.").[5]

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[5]Dr. Gore contended in his brief in opposition to the petition for certiorari (at 9-11) that the law of fraud is the same everywhere and that the jury therefore was entitled to punish for all 1,000 sales as if they had occurred in Alabama. Contrary to Dr. Gore's facile assumption, however, there simply is no basis for concluding that any state other than Alabama would find BMW's conduct to be fraudulent, let alone punishable by punitive damages.

To begin with, whatever may be the case in Alabama, it is most unlikely that the 21 other states that have enacted disclosure thresholds of 3% of MSRP or higher would deem BMW's 3% threshold to be fraudulent under their common law. Furthermore, Dr. Gore's "fraud-is-fraud" argument ignores the fact that the various states have vastly different punitive damages regimes. Several states do not permit punitive damages at all or limit them to circumstances specifically authorized by statute. See *Santana* v. *Registrars of Voters*, 502 N.E.2d 132, 135 (Mass. 1986) (punitive damages available only if authorized by statute); *Thompson* v. *Paasche*, 950 F.2d 306, 314 (6th Cir. 1991) (in Michigan punitive damages are unavailable if actual damages are sufficient to make the plaintiff whole); *Miller* v. *Kingsley*, 230

1. Due process

This Court repeatedly has made clear that it violates due process for a state to apply its law to activities that have no relation to that state. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818-823 (1985); *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 310-311 (1981) (plurality opinion); *id*. at 327 (Stevens, J., concurring); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-410 (1930). As Justice Stevens has explained:

> The application of an otherwise acceptable rule of law may result in unfairness to the litigants if, in engaging in the activity which is the subject of the litigation, they could not reasonably have anticipated that their actions would later be judged by this rule of law. A choice-of-law decision that frustrates the justifiable expectations of the parties can be fundamentally unfair. This desire to prevent unfair surprise to a litigant has been the central concern in this Court's review of choice-of-law decisions under the Due Process Clause.

Hague, 449 U.S. at 327 (Stevens, J., concurring).

N.W.2d 472, 474 (Neb. 1975) (punitive damages unavailable); N.H. REV. STAT. ANN. § 507:16 (punitive damages unavailable); *Fisher Properties, Inc.* v. *Arden-Mayfair, Inc.*, 726 P.2d 8, 23 (Wash. 1986) (punitive damages unavailable unless authorized by statute). Others require a higher standard of proof than the one that prevails in Alabama. See COLO. REV. STAT. § 13-25-127(2). Still others limit imposition to cases in which the defendant's conduct is so egregious as to amount to criminality. See, *e.g.*, *Greater Providence Deposit Corp.* v. *Jenison*, 485 A.2d 1242, 1244 (R.I. 1984); *Weaver* v. *Mitchell*, 715 P.2d 1361, 1369 (Wyo. 1986). See also *Gargano* v. *Heyman*, 525 A.2d 1343, 1347 (Conn. 1987) ("the flavor of the basic requirement to justify an award of punitive damages is described in terms of wanton and malicious injury, evil motive and violence"). See generally AAMA/AIAM Br. App. B. In light of these and other differences, the assumption that BMW's 3% threshold would subject it to punishment everywhere in the United States is fanciful to say the least.

Shutts is a textbook example of the application of this fairness principle. The case was a class action filed in Kansas by residents of all 50 states against a lessee of oil and gas properties located in 11 states. The trial court applied Kansas law to every plaintiff's claim without regard to whether the plaintiff resided in Kansas or whether the property that was the subject of the claim was located in Kansas. Noting that "[t]here is no indication that when the leases involving land and royalty owners outside of Kansas were executed, the parties had any idea that Kansas law would control," the Court held that the application of Kansas law to claims that had nothing to do with Kansas was "sufficiently arbitrary and unfair as to exceed constitutional limits." 472 U.S. at 822.

Here, as in *Shutts*, the finder of fact applied the forum state's law to hundreds of transactions that took place entirely in other states. Specifically, without considering whether nondisclosure of repairs costing less than 3% of a vehicle's MSRP violated the law of any state other than Alabama, the jury punished BMW at a rate of $4,000 for each of the nearly 1,000 refinished vehicles it sold nationwide. As in *Shutts*, BMW could not conceivably have anticipated when it sold cars in Vermont, Kentucky, or Wyoming that it might be punished for those sales under Alabama law. Accordingly, just as in *Shutts*, the jury's application of Alabama's law to deem out-of-state sales punishable "is sufficiently arbitrary and unfair as to exceed constitutional limits." 472 U.S. at 822.

Indeed, the degree of unfairness in the present case greatly exceeds that in *Shutts* because many of the sales for which the jury punished BMW under Alabama law took place in states whose positive law affirmatively *permitted* non-disclosure of repairs costing

less than 3% (or some higher percentage) of MSRP.[6] As this Court observed in *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978), "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." See also *Bouie* v. *City of Columbia*, 378 U.S. 347, 352 (1964).

This case is even more extreme than *Shutts* for a second reason as well. Here, a single Alabamian is seeking to collect punitive damages for BMW's conduct with respect to each of the 1,000 purchasers of refinished BMWs throughout the country. In *Shutts*, it was the out-of-state royalty owners *themselves* who (via the class representatives) sought application of Kansas law; thus, any judgment in the *Shutts* class action would have been binding on every out-of-state royalty owner who did not opt out of the class. By contrast, principles of res judicata provide BMW no protection against suits by non-Alabama purchasers seeking additional punitive damages under the laws of the states in which they purchased their cars. It is grossly unfair to allow a self-appointed avenging angel to collect punitive damages on behalf of all of the 1,000 BMW buyers nationwide when BMW is powerless to protect itself from subsequent lawsuits by those very same individuals. See *Western Union Tel. Co.* v. *Pennsylvania*, 368 U.S. 71, 75 (1961).

2. State sovereignty

This Court has recognized that the Constitution has "special concern * * * with the autonomy of the individual States within their respective spheres." *Healy* v. *Beer Institute*, 491 U.S. 324, 335-336 (1989). "The sovereignty of each State * * * implie[s] a limitation on the sovereignty of all of its sister States — a limitation

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[6]BMW adduced uncontroverted evidence that 60% of the 1,000 sales for which it was punished took place in states that had, by statute or regulation, adopted a disclosure threshold that was equal to or higher than BMW's 3% threshold. Pet. App. 17a; J.A. 36. Virtually all of the remaining sales took place in states that had not adopted any disclosure threshold but had never held that non-disclosure in circumstances like these was fraudulent or in any way improper.

express or implicit in both the original scheme of the Constitution and the Fourteenth Amendment." *World-Wide Volkswagen Corp.* v. *Woodson*, 444 U.S. 286, 293 (1980). Consistent with this limitation, it is well established that no state may apply its own law in an effort to regulate conduct occurring entirely within a sister state even when — as is not the case here — by doing so it attempts to protect its own citizens. See, *e.g.*, *Bigelow* v. *Virginia*, 421 U.S. 809, 824 (1975) ("[a] State does not acquire power or supervision over the internal affairs of another State merely because the welfare and health of its own citizens may be affected when they travel to that State"); *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881) ("[n]o State can legislate except with reference to its own jurisdiction").

If the Attorney General of Alabama had sought to impose civil penalties for BMW's out-of-state transactions, there is no doubt that his effort would be rejected as an unconstitutional intrusion upon the prerogative of other states to regulate BMW's conduct in those states. Dr. Gore, as a private attorney general, has no greater authority to invoke Alabama law so as to infringe the sovereignty of Alabama's sister states. Dr. Gore's punitive verdict, which was the direct result of his request that the jury apply Alabama law to punish BMW's nationwide conduct, is therefore patently unconstitutional.

3. Interstate commerce

Because interstate commerce would grind to a halt if states were granted authority to interfere with commerce in their sister states, this Court has made clear that the Commerce Clause "precludes the application of a state statute to commerce that takes place wholly outside of the State's borders." *Healy*, 491 U.S. at 336. Indeed, "a statute that directly controls commerce occurring wholly

outside the boundaries of a State exceeds the inherent limits of the enacting State's authority and is invalid regardless of whether the statute's extraterritorial reach was intended by the legislature." *Ibid.*

The Court has applied these principles in a variety of contexts to thwart local efforts to "project[]" economic regulation beyond the State's borders (*Healy*, 491 U.S. at 337). See, *e.g.*, *C&A Carbone, Inc.* v. *Town of Clarkstown*, 114 S. Ct. 1677, 1683 (1994) (discriminatory "flow control" ordinance could not be justified as a means of diverting waste away from unsafe out-of-state disposal facilities because "[s]tates and localities may not attach restrictions to exports or imports in order to control commerce in other states"); *Healy*, *supra* (striking down Connecticut beer price affirmation statute because it had the effect of restricting beer pricing in other states); *Brown-Forman Distillers Corp.* v. *New York State Liquor Auth.*, 476 U.S. 573 (1986) (same with respect to New York liquor price affirmation law); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 640-643 (1982) (plurality opinion) (Illinois anti-takeover statute impermissibly regulated transactions occurring entirely outside of Illinois).[7]

The jury in this case found that BMW's 3% disclosure threshold constituted punishable misconduct as a matter of Alabama common law and directly applied that determination to BMW's sales of refinished vehicles throughout the country. That direct projection of Alabama law into other states violates the Commerce Clause for the same reasons that the regulation of out-of-state commerce was condemned in *Healy*, *Brown-Forman*, and *Edgar*.

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[7]Although these cases involved the extraterritorial effects of legislation, it is settled that "regulation can be as effectively exerted through an award of damages as through [enforcement of a statute or regulation]." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). See also, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992). This is especially true with respect to punitive damages, which are specifically designed to alter the behavior of the defendant and others similarly situated.

C. This Court's Decision In *TXO* Does Not Authorize Extraterritorial Punishment.

In his brief in opposition to the petition for certiorari (at 1-3, 5, 6-7), Dr. Gore argued strenuously that this Court's decision in *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), authorized the kind of extraterritorial punishment that took place here. That argument reflects a fundamental misunderstanding of *TXO*. The plurality there observed simply that evidence of similar acts of misconduct (wherever they occurred) traditionally has been considered relevant in assessing the reprehensibility of the misconduct at issue. 113 S. Ct. at 2722 n.28. The plurality (*id*. at 2722-2723) and Justice Kennedy (*id*. at 2726) then proceeded to rely on the evidence of out-of-state misconduct for the limited purpose of determining that the conduct before the Court was reprehensible because it was part of a pattern rather than an isolated incident.

We make no claim in this case that the mere admission of evidence of extraterritorial transactions violated BMW's due process rights.[8] Nor is there any issue here of the consideration of similar acts of out-of-state misconduct in gauging the appropriate punishment for the defendant's in-state activities. Rather, our argument is that the Constitution forbids Alabama juries from punishing defendants under Alabama law for conduct that had no connection to Alabama.

There was no suggestion in *TXO* that any part of the $10 million punitive damages in that case was meant to punish the defendant for its out-of-state conduct. Here, by contrast, the Alabama Supreme Court has found that the jury directly punished BMW for its out-of-state conduct by using the total number of sales of refinished vehicles

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[8]We do note, however, that, because there was no dispute that the non-disclosure to Dr. Gore was the result of a nationwide policy, the evidence of the extraterritorial transactions was wholly unnecessary.

as a multiplier. Nothing in *TXO* purports to approve that sort of direct extraterritorial punishment.

D. The Alabama Supreme Court Failed To Redress The Constitutional Violation.

The Alabama Supreme Court acknowledged that it was unconstitutional for the jury to "use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award." Pet. App. 16a (emphasis in original). The court nonetheless proceeded to resolve the case as if no violation had occurred. The court did not even consider what an appropriate remedy would be for a constitutional violation of the sort it had found. And the court did not purport to discard the jury's verdict by reviewing the evidence *de novo* and determining the proper punishment itself. Instead, it started with the jury's tainted $4 million award, reviewed that award *for excessiveness* under its standard *Green Oil* factors, and then held that "a constitutionally reasonable punitive damages award in this case is $2,000,000." *Id*. at 21a.[9] This violated BMW's constitutional rights every bit as much as the jury's original act of extraterritorial regulation.

This Court long has held that it is not sufficient merely to recognize the violation of a constitutional right; in the absence of a countervailing legal doctrine (such as sovereign immunity), courts must also provide a remedy that adequately redresses the violation. Thus, as Chief Justice Marshall explained in *Marbury* v. *Madison*, 5 U.S. (1 Cranch) 137, 161-163 (1803):

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[9]Indeed, the finding of unconstitutionality was made *as part of* the *Green Oil* analysis, rather than as a necessary threshold determination. Having started with the wrong question, it is hardly surprising that the court arrived at the wrong solution.

> The very essence of civil liberty certainly consists in the right of every individual to claim the protection of the laws, whenever he receives an injury. * * *
>
> The government of the United States has been emphatically termed a government of laws, and not of men. It will certainly cease to deserve this high appellation if the laws furnish no remedy for the violation of a vested legal right.

The Court consistently has hewed to that approach, stating repeatedly over the years that "[t]he task [of the courts] is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution." *Swann* v. *Board of Educ.*, 402 U.S. 1, 16 (1971).[10]

In this case, in light of the verdict reached by this jury, the Alabama Supreme Court had two options for redressing the constitutional violation. Most obviously, it could have granted a new trial on punitive damages. Alternatively, it could have applied the jury's $4,000 per car formula to Dr. Gore's vehicle alone or, at most, to the 14 Alabama transactions that were in evidence, which would have resulted in a remittitur to either $4,000 or $56,000. Either remedy would have served to eradicate the effect of the jury's unconstitutional punishment of BMW for conduct occurring entirely outside of Alabama.

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[10]See also *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990) (if a state collects under duress a tax that discriminates against interstate commerce, the Due Process Clause mandates that the state provide backward-looking relief that fully removes the discriminatory effects of the unconstitutional tax); *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971) ("[h]aving once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation"); *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930) ("a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment").

By contrast, in conducting its standard excessiveness inquiry and then merely cutting the punitive damages in half, the Alabama Supreme Court did nothing to remedy the jury's unconstitutional verdict (and identified no countervailing legal doctrine justifying that failure). Indeed, by using the tainted $4 million figure as its starting point, the Alabama Supreme Court *perpetuated* the jury's constitutional violation. In short, even taking the Alabama Supreme Court at its word that, in applying its "reasonable relationship test," it did not consider BMW's out-of-state transactions (Pet. App. 19a), the figure nonetheless reflects that court's perception of the *maximum* permissible punishment for BMW's in-state conduct. See, *e.g.*, *Big B, Inc.* v. *Cottingham*, 634 So. 2d 999, 1006 (Ala. 1993) ("[i]n remitting a punitive damages award, we must remit only that amount in excess of the maximum amount that a properly functioning jury could have awarded"). But there is no basis for supposing that a jury proceeding in a wholly constitutional manner would have imposed the maximum permissible punishment.

To the contrary, *this* jury indicated an unambiguous intention to punish BMW at a rate of $4,000 for each sale. There is thus every reason to conclude that it would have imposed punitive damages of $56,000 for the 14 Alabama sales in evidence or $4,000 for Dr. Gore's car alone.

Because Alabama law does not permit additur (*Bozeman* v. *Busby*, 639 So. 2d 501 (Ala. 1994)), and because the Alabama courts must defer to the jury's choice of punishment if the amount is not excessive (Pet. App. 20a; *Armstrong* v. *Roger's Outdoor Sports, Inc.*, 581 So. 2d 414 (Ala. 1991)), an untainted verdict of $4,000 or $56,000 (or, indeed, any amount less than the $2 million figure selected by the court) would have been binding on the Alabama Supreme Court even though the court would have been willing to uphold a larger verdict. Manifestly, then, the court's mere reduction of the verdict to some amount of its own choosing (greater than an amount that would have resulted from purging the jury

verdict of its constitutional taint) utterly fails to rectify the constitutional wrong suffered by BMW. See Brief of the Chamber of Commerce of the United States of America as Amicus Curiae in Support of Petitioner at 6-15.

A hypothetical will illustrate the inadequacy of the "remedy" granted BMW for the violation of its constitutional right to be free from extraterritorial punishment. Suppose that Dr. Gore had appealed to the jury's anti-German bias in seeking a large punitive exaction against BMW. The Alabama Supreme Court certainly could not remedy that constitutional violation merely by cutting the jury's tainted penalty to an amount reflecting the *most* that an untainted jury would have been entitled to impose. See *Minneapolis, St. P. & S. Ste. M. Ry.* v. *Moquin*, 283 U.S. 520 (1931) (remittitur cannot salvage a verdict that is the product of an improper appeal to passion or prejudice). Such an approach is no more acceptable when the constitutional violation involves an effort to punish extraterritorially. In either situation, the "remedy" simply is unresponsive to the constitutional violation because it does not exclude the possibility that an untainted jury could have (and probably would have) returned a smaller verdict.

In sum, the Alabama Supreme Court failed to provide BMW with a meaningful remedy for the deprivation of its constitutional rights. This Court accordingly should reverse the judgment below with instructions either to grant a new trial or to apply the jury's $4,000 per car formula only to Dr. Gore or, at most, to Alabama sales for which the jury lawfully could have imposed punishment.[11]

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[11]We discuss below (at pages 45-50) why other constitutional considerations weigh against allowing Dr. Gore to collect punishment for the sale of any car other than his own. However, if, notwithstanding that argument, the remedy ultimately selected does involve application of the $4,000 per car formula to the total number of Alabama sales of refinished vehicles, it should be accompanied by a clear statement that BMW may not be punished for Alabama transactions in future litigation.

II. THE $2 MILLION PUNISHMENT IS GROSSLY EXCESSIVE AND THEREFORE VIOLATES THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE

Even assuming that there were no problem of improper extra-territorial punishment — *i.e.*, if the jury's verdict were limited to the Alabama sales — the punishment in this case would still be grossly excessive and would have to be set aside.

It is by now common ground that the Due Process Clause "imposes a substantive limit on the size of punitive damage awards." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2335 (1994).[12] Although the Court has not fully sketched out "the character of the standard that will identify unconstitutionally excessive awards" (*id.* at 2335), it has indicated that "general concerns of reasonableness" should guide the inquiry (*Haslip*, 499 U.S. at 18) and more specifically that punitive exactions should not be "greater than reasonably necessary to punish and deter" (*id.* at 22).[13] Implicit in

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[12]See also *TXO Prod. Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2718-2719 (1993) (plurality opinion); *id.* at 2731 (O'Connor, J., dissenting); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991); *St. Louis, I.M. & S. Ry.* v. *Williams*, 251 U.S. 63, 66-67 (1919); *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 490-491 (1915); *Missouri Pac. Ry.* v. *Tucker*, 230 U.S. 340, 351 (1913).

[13]The requirement that the amount of an exaction be no greater than reasonably necessary to accomplish its purposes is a familiar one. For instance, in the excessive bail context the Court has explained that "to determine whether the Government's response is excessive, we must compare that response against the interest the Government seeks to protect by means of that response. Thus, when the Government has admitted that its only interest is in preventing flight, bail must be set by a court at a sum designed to ensure that goal, *and no more*." *United States* v. *Salerno*, 481 U.S. 739, 754 (1987) (emphasis added). See also *Stack* v. *Boyle*, 342 U.S. 1, 5 (1951) (if "[b]ail is set at a figure higher than an amount *reasonably calculated* to fulfill th[e] purpose[s]" of bail, it is excessive) (emphasis added). Similarly, the Court has indicated that fines for contempt should not be greater than

this "reasonably necessary" standard is the understanding that some exactions can effect unreasonable overdeterrence and overpunishment. See *TXO*, 113 S. Ct. at 2719 (plurality opinion) (rejecting notion that "*any* award that would serve the legitimate state interest in deterring or punishing wrongful conduct, no matter how large, would be acceptable") (emphasis in original).

There is, of course, no mathematically precise means of determining whether any particular exaction exceeds an amount that is reasonably necessary to punish and deter. Rather, the determination generally should be made on a case-by-case basis with reference to factors that historically have been used in evaluating the reasonableness of punishments. As we explain in Section A of this Point, application of such factors demonstrates overwhelmingly that a $2 million exaction simply cannot be justified as punishment for what BMW did to Dr. Gore (or even for all of BMW's Alabama-related conduct). Nor, as we explain in Section B of this Point, is it appropriate to justify that massive windfall on the ground that BMW's 3% threshold affected numerous other BMW owners.

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necessary to punish the contemnor and force compliance with the court's order. *United States* v. *United Mine Workers of Am.*, 330 U.S. 258, 303-304 (1947) (holding that $700,000 of $3.5 million fine for criminal and civil contempt was sufficient for punishment and that the interest in forcing compliance could be achieved by making payment of the remainder of the fine conditional upon the contemnor's failure to comply within five days).

A. A $2 Million Punishment For What BMW Did To Dr. Gore, Or Even For All Of BMW's Alabama-Related Conduct, Far Exceeds An Amount Reasonably Necessary To Accomplish Alabama's Interests In Punishment And Deterrence.

It is not entirely clear from the Alabama Supreme Court's opinion whether the $2 million exaction in this case was meant as punishment for what BMW did to Dr. Gore alone or instead for BMW's entire Alabama-related conduct.[14] In either event, application of the factors that this and other courts have found relevant in prior cases leaves no doubt that the $2 million punishment in this case is grossly excessive.

1. The ratio of punitive damages to actual or potential harm to the plaintiff

This Court long has recognized that the relationship of the civil punishment to the harm caused or threatened by the defendant's action is a significant factor in assessing the reasonableness of that punishment.[15] This emphasis on the relationship between punishment

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[14]On the one hand, the court indicated that, in applying its "reasonable relationship test" to evaluate the size of the punishment, it was "not consider[ing] those acts that occurred in other jurisdictions" (Pet. App. 19a), thus implicitly suggesting that the punishment did encompass all of BMW's conduct within the state. On the other hand, the court did not expressly foreclose future punishment for Alabama transactions, although the concurring Justice indicated his belief that any further punishment would be unconstitutional. Pet. App. 24a (Houston, J., concurring).

[15]See, *e.g.*, *Life & Casualty Ins. Co.* v. *McCray*, 291 U.S. 566, 573 (1934) (upholding statutory penalty for delay in paying insurance claims because the amount "bears a reasonable proportion to the loss or inconvenience likely to be suffered by the creditor"); *Tucker*, 230 U.S. at 351 (holding that $500 liquidated civil penalty was excessive in case involving actual damages of $3.02 because the liquidated damages were "grossly out of proportion to the possible actual damages"); *Missouri Pac. Ry.* v. *Humes*, 115 U.S. 512, 522-523 (1885) (upholding double damages remedy in part because "[t]he statute only fixes the amount of the penalty in damages proportionate to the injury inflicted").

and harm, ordinarily captured by comparing punitive and compensatory damages, also has been a central focus of common-law excessiveness review for well over a century.[16]

To be sure, a plurality of the Court recently rejected "an approach that concentrates entirely on the relationship between actual and punitive damages." *TXO*, 113 S. Ct. at 2721. But far from abandoning the age-old principle that punishment should be proportionate to harm, the plurality merely refined the concept, noting that, in cases in which the threatened harm was averted (and thus where the actual damages were small), the focus may

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[16]See, *e.g.*, *Mobile & M.R.R.* v. *Ashcraft*, 48 Ala. 15, 33 (1872) ("[t]he punitive damages ought * * * to bear proportion to the actual damages sustained"); *Page* v. *Yool*, 65 P. 636, 637 (Colo. 1901) (reversing judgment because exemplary damages were "not commensurate with the injury done"); *Flannery* v. *Baltimore & O.R.R.*, 15 D.C. 111, 125 (1885) ("when we think the [exemplary] verdict rendered is out of all proportion to the injuries received, we feel it our duty to interfere"); *Saunders* v. *Mullen*, 24 N.W. 529, 529 (Iowa 1885) ("[w]hen the actual damages are so small, the amount allowed as exemplary damages should not be so large"); *Louisville & N.R.* v. *Roth*, 114 S.W. 264, 266 (Ky. 1908) (punitive damages "must have some reasonable relation to the injury and the cause of it, and not be disproportionate to the one or the other"); *Grant* v. *McDonogh*, 7 La. Ann. 447, 448 (1852) ("the exemplary damages allowed should bear some proportion to the real damage sustained"); *Mitchell* v. *Randal*, 137 A. 171, 172 (Pa. 1927) ("[it] is the rule in Pennsylvania that an award of exemplary damages must bear a reasonable proportion to the award of actual damages"); *International & G.N.R.* v. *Telephone Tel. Co.*, 5 S.W. 517, 519 (Tex. 1887) ("[t]he verdict is clearly excessive, and manifests, by the disproportion between the actual injury sustained and the aggregate sum awarded, that the jury were influenced by passion, prejudice, or partiality"); *Pennington* v. *Gillaspie*, 66 S.E. 1009, 1015 (W. Va. 1910) (exemplary damages "should bear some reasonable proportion to the actual damages done else they would be unreasonable and excessive"). See generally 4 T. SEDGWICK, A TREATISE ON THE MEASURE OF DAMAGES § 1344, at 2699 (9th ed. 1920) ("if the amount [of exemplary damages] is out of all proper proportion to the actual damages the verdict will be set aside as excessive"); 13 CYC. OF L. & P 119 (1904) ("the [exemplary] damages awarded should bear some reasonable proportion to the real damage sustained").

permissibly be on the potential harm rather than the harm that in fact occurred. *Id*. at 2721-2722.[17]

We eschew any suggestion that there is some ratio of punitive damages to actual or potential harm that will be appropriate for every case. In cases in which actual damages are extremely small, a high ratio of punitive to actual damages may be necessary to

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[17]In many cases, the flip-side of harm to the plaintiff is gain to the defendant, and it accordingly may be tempting to refer to the two concepts interchangeably. Indeed, the Alabama Supreme Court's *Green Oil* formulation refers to "remov[ing] the profit" as one of the bases for justifying a punishment. 539 So. 2d at 223. We urge the Court to resist any temptation to give general endorsement to such a rationale, which is unnecessary in this case and may produce extremely perverse results in cases where the cost of preventing the injury (which plaintiffs characteristically denominate the defendant's "gain") significantly exceeds the harms avoided by the preventive action.

Consider the following hypothetical: the defendant's lawful activity on its property creates a condition that constitutes a common law nuisance as it affects a neighboring property; under state law punitive damages may be imposed for knowingly maintaining a nuisance; the cost of eliminating the condition would be $10 million, but the harm to the adjoining landowner is only $10,000. Is $10 million a proper benchmark for the excessiveness inquiry? Would $100 million be the proper benchmark if it cost that much to avoid the $10,000 harm? Obviously, as the cost of avoiding the harm increases relative to its benefit, society has less, not more, interest in deterring the harm. Indeed, at some point, as the cost-benefit ratio becomes larger, the conduct ceases to be tortious at all. See *United States* v. *Carroll Towing Co.*, 159 F.2d 169, 173 (2d Cir. 1947) (L. Hand, J.). It is thus utterly irrational in such a circumstance to measure punishment by gain rather than harm.

In any event, in the present case the use of gain does nothing to justify the size of the punishment. There is no evidence that BMW gained a single penny from its policy; certainly, Dr. Gore's facile assumption that BMW's gain must have equalled his (absurdly inflated) loss finds no support in the record. To the contrary, the only evidence on the subject is the unrebutted testimony at the post-trial excessiveness hearing that, even after switching to a policy of full disclosure, BMW has continued to receive full price for refinished vehicles. J.A. 33-34, 38-39. See also J.A. 15. This evidence demonstrates that BMW gained nothing by failing to disclose refinishing that cost less than 3% of MSRP. Accordingly, to the extent "gain" is relevant, it weighs against the $2 million punishment in this case.

accomplish an appropriate level of deterrence. See, *e.g.*, *St. Louis, I.M. & S. Ry.* v. *Williams*, 251 U.S. 63 (1919) (upholding statutory civil penalty of $75 in case in which plaintiff's actual damages were $0.66). On the other hand, when compensatory damages are high, even a 1:1 ratio of punitive to compensatory damages might produce excessive punishment and deterrence.[18]

Nevertheless, history and custom provide a useful starting point for the analysis of any award. Because double and treble damages long have been a preferred legislative measurement of civil

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[18]See, *e.g.*, *Crookston* v. *Fire Ins. Exch.*, 817 P.2d 789, 810 (Utah 1991) (suggesting that the acceptable ratio of punitive to compensatory damages decreases as compensatory damages increase); *Chandler* v. *Denton*, 741 P.2d 855, 868 (Okla. 1987) (where $600,000 compensatory award was "ample and generous," $500,000 punitive exaction was "not * * * responsive to the purpose of civil punishment" and should be reduced to $250,000).

In this connection, it is worth keeping in mind that the underlying premise of much of American tort law, and certainly the law of negligence and of products liability, is that the payment of compensatory damages will itself ordinarily provide the proper level of incentives to take reasonable precautions against injuring others. See, *e.g.*, W. KEETON *et al*., PROSSER AND KEETON ON THE LAW OF TORTS § 4, at 25 (5th ed. 1984) ("[w]hen the decisions of the courts become known, and defendants realize that they may be held liable, there is of course a strong incentive to prevent the occurrence of the harm"); 1 D. 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"); R. POSNER, ECONOMIC ANALYSIS OF LAW § 6.10 (3d ed. 1986); *Memphis Community School Dist.* v. *Stachura*, 477 U.S. 299, 312, (1986) ("[d]eterrence * * * operates through the mechanism of damages that are compensatory"); *Smith* v. *Wade*, 461 U.S. 30, 94 (1983) (O'Connor, J., dissenting) ("awards of compensatory damages and attorney's fees already provide significant deterrence"). See also Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1173-1175 (1931). The addition of punitive damages will thus cause overdeterrence unless there are special circumstances, such as a likelihood of escaping detection, that make compensatory damages inadequate for deterrence purposes.

punishment,[19] common-law courts historically have viewed with skepticism punitive verdicts that were more than a few times the plaintiff's compensatory damages. For example, over 75 years ago the West Virginia Supreme Court explained:

> Upon this question of the measurement of punitive damages we have some statutes allowing a recovery of double or treble damages where a trespass is committed wantonly or maliciously, and while we do not mean to say that these statutes furnish an infallible guide to be followed in the ascertainment of punitive damages in a case like this, still they are an indication of public policy as ascertained and declared by the legislative body in this regard, and the analogy existing between the damages awarded under such statutes and the damages sought under the claim of punitive damages in cases like this make them a guide which cannot well be disregarded when a verdict of this character is challenged on the ground of excessiveness.

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[19]See 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW BEFORE THE TIME OF EDWARD I, at 522 (2d ed. 1899) ("under Edward I, a favourite device of [English] legislators [was] that of giving double or treble damages to `the party grieved'"). For examples of federal statutes providing for double or treble damages, see 15 U.S.C. § 15 (treble damages for antitrust violation); 18 U.S.C. § 1964(c) (treble damages for civil RICO violation); 31 U.S.C. § 3729 (double damages for making false claim against the United States); 35 U.S.C. § 284 (up to treble damages permitted for patent infringement).

Pendleton v. *Norfolk & W. Ry.*, 95 S.E. 941, 944 (1918).[20]

This Court too has made clear that punitive damages substantially in excess of the actual or potential harm are constitutionally suspect. For example, in *Haslip* it suggested that a 4:1 ratio of punitive to compensatory damages was "close to the line" separating constitutional from unconstitutional punishments. 499 U.S. at 23. And in *TXO* the plurality found the "shock" of the 526:1 ratio of punitive to

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[20]This view was common among courts of that era. See, *e.g.*, *Flannery*, 15 D.C. at 125 (where exemplary damages represented $4,500 of $5,000 general verdict, new trial was warranted unless plaintiff remitted $3,500 of the total, resulting in a 2:1 ratio of exemplary to compensatory damages); *Buford* v. *Hopewell*, 131 S.W. 502 (Ky. 1910) (ordering new trial where punitive damages comprised more than two-thirds of the lump sum verdict); *Hunter* v. *Kansas City Rys.*, 248 S.W. 998, 1003 (Mo. Ct. App. 1923) ("it seems that in this case [a punitive] award of five times the actual damages inflicted is clearly excessive; an award of three times the actual damages, or $1,500, is amply sufficient"); *Rider* v. *York Haven Water & Power Co.*, 95 A. 803, 806 (Pa. 1915) (ordering new trial where punitive damages were 2.7 times compensatory damages and stating that "[w]e know of no case in our own state where punitive damages were allowed in almost treble the amount of the actual damage sustained"); *Mitchell*, 137 A. at 172-173 (citing *Rider* and holding that an exaction of five times compensatory damages was disproportionate); *International & G.N.R.*, 5 S.W. at 518-519 (setting aside $10,000 exemplary verdict because it was 50 times the compensatory award); *P.J. Willis & Bro.* v. *McNeill*, 57 Tex. 465, 480 (1882) (setting aside $12,000 exemplary verdict because it was 12 times the compensatory award and far in excess of comparable legislative fines). Modern courts also have used low ratios of punitive to compensatory damages as a benchmark. See, *e.g.*, *Maxey* v. *Freightliner Corp.*, 665 F.2d 1367, 1377-1378 (5th Cir. 1982) (en banc) ("a formula of punitive damages equal to three times compensatory damages is a fairly good standard against which to assess whether a jury abused its discretion"). In addition, respected commentators have expressed the view that treble damages is an appropriate benchmark of excessiveness. See, *e.g.*, ABA SPECIAL COMM. ON PUNITIVE DAMAGES, PUNITIVE DAMAGES: A CONSTRUCTIVE EXAMINATION 65-66 (1986) (punitive damages exceeding three times compensatory damages should be presumptively excessive); AMERICAN COLLEGE OF TRIAL LAWYERS, REPORT ON PUNITIVE DAMAGES 15 (1989) (endorsing a cap of twice compensatory damages or $250,000, whichever is greater). See also 2 AMERICAN LAW INSTITUTE, REPORTER'S STUDY, ENTERPRISE LIABILITY FOR PERSONAL INJURY 257 (endorsing a "firm and tight" ratio as the "dominant factor" in the analysis).

compensatory damages to dissipate only because the ratio of punitive damages to potential harm was somewhere between 1.2:1 and 10:1 (and most likely, given the plurality's conclusion that the jury could have found a "multimillion dollar" potential harm, around 3:1). 113 S. Ct. at 2722.

Using a small multiple of actual or potential harm as a benchmark is particularly appropriate here because the jury unambiguously indicated its determination that a double damages remedy — *i.e.*, a 1:1 ratio of punitive damages to potential and actual harm — was the appropriate level of punishment. Starting with double, treble or even quadruple damages as a benchmark, the $2 million exaction in this case is manifestly disproportionate. As remitted, the punitive damages are a staggering **500** times Dr. Gore's $4,000 compensatory award, which represents the full extent of his actual and potential harm.[21] Moreover, they are a remarkable **35** times the harm to all 14 Alabama purchasers (assuming, as the jury did, an average harm of $4,000).

Disturbing in the context of a single-victim tort, ratios of this magnitude are absolutely mind-boggling when, as here, the policy decision for which the defendant is being punished affected hundreds of other individuals, each of whom may be entitled to bring his or her own suit seeking punitive damages for the same policy decision. If a 500:1 (or 35:1) ratio is appropriate for Dr. Gore, it presumably would be equally appropriate for the remainder of the roughly 1,000

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[21]It bears noting in this regard that none of the $4,000 award represents "actual" harm. Given that the refinishing was performed so expertly that Dr. Gore himself never detected it, that BMW has never received less than full price for refinished vehicles sold after it began its policy of full disclosure (see note 17, *supra*), that there is no evidence that a properly refinished vehicle ever has brought less money on resale than a comparable vehicle that had not experienced refinishing, and that as of the time of trial Dr. Gore had not in fact attempted to sell his vehicle, the entirety of Dr. Gore's compensatory award reflects what might aptly be characterized as metaphysical harm.

purchasers of refinished BMWs. Yet it would be the height of absurdity to suggest that BMW could constitutionally be punished in the amount of **$2 billion** (or **$140 million**, if all Alabama purchasers are covered by the punishment in this case) for its unitary policy decision to utilize a 3% disclosure threshold.[22]

In sum, the punitive damages in this case are grossly disproportionate to any harm suffered by Dr. Gore and the other Alabama purchasers. As we show in the remainder of this brief, neither the nature of BMW's conduct nor any other factor that properly bears on the excessiveness inquiry justifies such a disproportionate punishment.

2. The nature of the alleged misconduct

"The principle that a punishment should be proportionate to the crime is deeply rooted and frequently repeated in common-law jurisprudence." *Solem* v. *Helm*, 463 U.S. 277, 284 (1983). See also *Weems* v. *United States*, 217 U.S. 349, 367 (1910) (it is "a precept of the fundamental law" as well as "a precept of justice that punishment for crime should be graduated and proportioned to offense"). The lineage of this principle traces as far back as Magna Carta, which regulated amercements, the civil fines of the time, providing that a person "shall not be amerced for a slight offence, except in accordance with the degree of the offence; and for a grave offence he shall be amerced in accordance with the gravity of the offense." Magna Carta, ch. 20, reprinted in W. MCKECHNIE, MAGNA CARTA 284 (2d ed. 1914). See generally Amici Curiae Brief of Product Liability Advisory Council, Inc. and the Business Roundtable in Support of Petitioner at 6-9; Brief of the Washington Legal Foundation in Support of Petitioner at 7-8 ("WLF Br.").

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[22]We discuss below (at pages 47-50) why it is unfair and impractical to hold that BMW's only protection from aggregate overpunishment is by remittitur in future cases.

This Court repeatedly has recognized the applicability of this venerable precept to the determination of the reasonableness of punitive damages and similar civil penalties. Thus, in *Haslip* the Court approved Alabama's procedures for reviewing punitive verdicts in part because of its conclusion that such review "ensures that punitive damages awards are not grossly out of proportion to the severity of the offense." 499 U.S. at 22. See also *id*. at 59 (O'Connor, J., dissenting) ("[d]ue process requires, at some level, that punishment be commensurate with the wrongful conduct"). And in *TXO*, both the plurality (113 S. Ct. at 2722) and Justice Kennedy (*id*. at 2726) placed heavy emphasis on the egregious nature of the defendant's misconduct in concluding that the punitive damages in that case did not cross the line of constitutional impropriety. Conversely, the Court has concluded that a civil penalty that was hundreds of times the plaintiff's actual damages was excessive where "[t]here was no intentional wrongdoing; no departure from any prescribed or known standard of action, and no reckless conduct." *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 490 (1915). See generally *Massachusetts Bonding & Ins. Co.* v. *United States*, 352 U.S. 128, 133 (1956) ("[b]y definition, punitive damages are based upon the degree of the defendant's culpability").

A variety of objective factors may assist courts in locating a defendant's conduct on the reprehensibility spectrum. Application of these factors confirms that BMW's conduct is among the least reprehensible for which punishment is permissible and accordingly that the $2 million penalty in this case simply cannot be justified by reference to the nature of the conduct. See WLF Br. at 10-23.

First, a defendant's application of a uniform corporate policy is objectively less reprehensible if the policy has been approved in other states. In *Danaher*, for example, a telephone company was held liable for civil penalties for enforcing against an Arkansas customer its uniform policy of discontinuing service and denying

prompt-payment discounts to customers who had been derelict in paying their bills. This Court found the $6,300 civil penalty, which bore no relationship to the harm to the plaintiff, to be "so plainly arbitrary and oppressive as to be nothing short of a taking of [the defendant's] property without due process of law." 238 U.S. at 491. Essential to that holding was the Court's perception that the defendant's violation of state law was only minimally wrongful:

> Regulations like that which the telephone company applied to the plaintiff were not declared unreasonable by the statute [barring discriminatory treatment of customers]. It left that matter entirely open and to be determined according to general principles of law. * * * The regulation * * * was adopted in good faith, had been uniformly and impartially enforced for many years and was impartially applied in this instance. There has been no decision in the State holding or indicating that it was unreasonable. Like regulations often had been pronounced reasonable and valid in other jurisdictions and while some differences of opinion upon the subject were disclosed in reported decisions the weight of authority was on that side.

Id. at 489 (footnote omitted).[23]

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[23]In a similar vein, several lower courts have held that, although compliance with federal or state regulations might not be a defense to liability for compensatory damages, it generally is inconsistent with a finding that the conduct is reprehensible and hence weighs strongly against imposition of *any* punitive damages. See, *e.g*., *Richards* v. *Michelin Tire Corp*., 21 F.3d 1048, 1059 (11th Cir. 1994) (finding insufficient evidence to support imposition of punitive damages in light of defendant's compliance with federal safety standards), cert. denied, 115 S. Ct. 902 (1995); *Sloman* v. *Tambrands, Inc.*, 841 F. Supp. 699, 703-704 n.8 (D. Md. 1993) (compliance with federal regulations precludes finding of malice and necessitates entry of summary judgment on claim for punitive damages); *Stone Man, Inc*. v. *Green*, 435 S.E.2d 205, 206 (Ga. 1993) (holding that as a general rule punitive damages are improper when a defendant has complied with environmental or safety

The present case is not materially different from *Danaher*. At the time it sold a refinished vehicle to Dr. Gore, BMW had no notice that Alabama would consider its application of the 3% disclosure threshold to be punishable misconduct. Moreover, then, as now, BMW's policy comported with the statutory disclosure thresholds of numerous states. At present fully 22 states — including even Alabama — have adopted explicit disclosure thresholds that call for disclosure only of repairs costing more than 3% of MSRP.[24] To our knowledge, no more than three states even arguably require disclo-

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regulations). See also Note, *The Role of Regulatory Compliance in Tort Actions*, 26 HARV. J. ON LEGIS. 175, 200 (1989) ("regulatory compliance should in most cases bar an award of punitive damages against a manufacturer").

[24]See ALA. CODE § 8-19-5(22)(c) (3% of MSRP or $500, whichever is greater); ARIZ. REV. STAT. ANN. § 28-1304.03 (3% of MSRP); ARK. CODE ANN. § 23-112-705 (6% of sticker price); CAL. VEH. CODE §§ 9990-9991 (3% of MSRP or $500, whichever is greater); IDAHO CODE § 49-1624 (6% of MSRP); 1994 ILL. LEGIS. SERV. P.A. 88-581 (6% of MSRP) (to be codified at ILL. COMP. STAT. ch. 815, § 710/5); IND. CODE ANN. §§ 9-23-4-4, 9-23-4-5 (4% of MSRP); IOWA CODE ANN. § 321.69 ($3,000 for cars sold as used); KY. REV. STAT. ANN. § 190.0491(5) (6% of sticker price); LA. REV. STAT. ANN. § 32:1260 (6% of MSRP); MINN. STAT. ANN. § 325F.664 (4% of MSRP or $500, whichever is greater); MISS. MOTOR VEHICLE COMM'N REG. § 1 (filed Aug. 19, 1992) (6% of MSRP); N.H. REV. STAT. ANN. § 357-C:5(III)(d) (6% of MSRP); N.Y. GEN. BUS. LAW § 396-p(5)(a), (d) (5% of lesser of MSRP or distributor's suggested retail price); N.C. GEN. STAT. § 20-305.1(d)(5a) (3% of MSRP); OHIO REV. CODE Ann. § 4517.61 (6% of MSRP); OKLA. STAT. ANN. tit. 47, § 1112.1 (3% of MSRP or $500, whichever is greater); R.I. GEN. LAWS § 31-5.1-18(d), (f) (6% of MSRP); VT. STAT. ANN. tit. 9, § 4087(d) (5% of first $10,000 of MSRP and 2% of any amount above $10,000); VA. CODE ANN. § 46.2-1571(D) (3% of MSRP); WIS. ADMIN. CODE § TRANSP. 139.05(6) (6% of MSRP); WYO. STAT. § 31-16-115 (6% of MSRP).

sure of refinishing costing less than 3% of MSRP.[25] The remaining 25 states and the District of Columbia do not appear to have addressed the subject by statute or regulation.

Particularly now that the Alabama legislature has joined ranks with the vast majority of other states that have legislated on the subject, enacting a statute stating that the nondisclosure of repairs costing less than 3% of MSRP is *not* an unfair trade practice, the notion that BMW's use of that very same 3% threshold is sufficiently egregious to merit any punishment, let alone a $2 million imposition, is preposterous. It requires the startling conclusion that the standard of conduct endorsed by 22 states constitutes not just ordinary fraud but flagrant misconduct.[26]

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[25]See FLA. STAT. ANN. § 320.27(9)(n) (*dealer* must disclose repairs costing more than 3% of MSRP of which it has actual knowledge, but must disclose repairs involving application of "touch-up paint" if the cost of the touch-up paint application exceeds $100); GA. CODE ANN. § 40-1-5(b), (c), (d) & (e) (requiring disclosure of paint repairs costing more than $500); OR. REV. STAT. § 650.155 (requiring disclosure of the nature and extent of all "post-manufacturing repairs"). Only the Georgia statute clearly forecloses the use of a 3% threshold for repairs performed under the auspices of a manufacturer or its distribution subsidiary. That statute was not enacted until after Dr. Gore purchased his car.

[26]The Alabama Supreme Court has recently stated that the apparent safe harbor provided by Alabama's 3% disclosure statute does not preclude common-law fraud actions for non-disclosure of repairs costing less than the threshold. *Hines* v. *Riverside Chevrolet-Olds, Inc.*, 1994 WL 474206, at *15 n.2 (1994). This statement (in a short footnote) was pure dictum and, as the Alabama Supreme Court itself pointed out, the issue was neither briefed nor argued by the parties. Moreover, the court appears to have overlooked (and essentially vitiated) the statute's plain statement that non-disclosure of repairs costing less than the statutory threshold "shall not * * * constitute a material misrepresentation or omission of fact." ALA. CODE § 8-19-5(22)(c). Finally, the *Hines* dictum does not suggest that actual reliance upon the disclosure statute would be insufficient to negate the element of intent to deceive, much less that any "fraud" of this kind could possibly be classified as "gross, oppressive or malicious," so as to support punitive damages under Alabama law. In any event, whatever the law may be in Alabama, there is no reason to suppose that the other states that have gone to the trouble of enacting disclosure

Second, as the Alabama Supreme Court recognized, undisputed evidence showed that BMW's 3% threshold is consistent with industry practice. Pet. App. 11a, 17a. Although adherence to industry custom is not a complete defense to liability in a negligence action (see, *e.g.*, *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), cert. denied, 287 U.S. 662 (1932)), it constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant *any* punitive exaction, let alone one of enormous size. See Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. CHI. L. REV. 1, 40-41 (1982) ("[r]arely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm").[27]

Third, conduct is objectively more reprehensible when the defendant is on notice that others consider it wrongful, either because the conduct is *malum in se* — that is, universally understood to be wrongful — or because there have been prior judgments imposing liability for that conduct. Here, the conduct is not *malum in se*. To the contrary, at the risk of belaboring the point, the vast majority of state legislatures to adopt standards governing the subject have set the disclosure threshold at no less than 3% of

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thresholds would regard non-disclosure of repairs costing less than the thresholds to be fraud.

[27]See also *Drabik* v. *Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind"); *Alley* v. *Gubser Dev. Co.*, 785 F.2d 849, 856 (10th Cir.) (reversing denial of directed verdict on punitive damages where defendant's conduct was consistent with industry practice), cert. denied, 479 U.S. 961 (1986); *Maxey*, 665 F.2d at 1378 (finding a $10 million punishment excessive and remanding for further consideration in light of fact that defendant's design comported with designs of all other members of the industry), appeal on remand, 722 F.2d 1238, 1242 (affirming remittitur of punitives to $450,000), modified on other grounds, 727 F.2d 350 (5th Cir. 1984).

MSRP. See page 39, *supra*. What is more, the record in this case reflects that, at the time of the sale of Dr. Gore's car, BMW had never even been sued, let alone held liable, with regard to its policy of not disclosing repairs costing less than 3% of MSRP. R. 1012.[28] BMW had no indication before the *Yates* verdict — which was rendered more than two years after Dr. Gore purchased his car — that its 3% threshold would be deemed to violate the common law of any state, including Alabama. Because BMW's 3% threshold was fully consistent with the disclosure statutes of numerous states and because BMW had no other reason to expect that its use of such a threshold would be found fraudulent under Alabama common law, a seven-figure punitive exaction is far out of line.

3. Civil penalties for comparable misconduct

Courts long have regarded fines for comparable misconduct as an extremely valuable benchmark for assessing the reasonableness of a punitive award. For example, over 100 years ago, the Texas Supreme Court stated:

> The legislature wisely, in the administration of the criminal law, has seen proper to limit [the] discretion [to set punishment] by providing as a general rule in those cases where a fine in money is prescribed, either as the only punishment, or as an alternative for imprisonment, that the same shall not be less nor more than a certain amount. * * * By analogy, in the absence of a more definite rule, we might look to the example of the legislature in those cases in which they have fixed a minimum and maximum amount proportioned to the actual injury received.

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[28]Nor has research disclosed any case in which any other manufacturer had been found to have committed fraud for similar conduct.

P.J. Willis & Bro. v. *McNeill*, 57 Tex. 465, 479-480 (1882). Cf. *Solem*, 463 U.S. at 298-300. See generally Brief *Amici Curiae* of Life Insurance Company of Georgia, Inc., ITT Corporation and American General Life and Accident Insurance Company in Support of Petitioner at 22-27.

Here, the Alabama Legislature has set the maximum civil penalty for violations of its Deceptive Trade Practices Act at $2,000 per violation. ALA. CODE § 8-19-11(b). The punishment selected by the Alabama Supreme Court is **1,000** times that amount (and over **70** times the maximum civil penalty that could be imposed for the sale of all 14 cars). It is also completely out of line with civil penalties provided in other states for similar nondisclosure offenses. *E.g.*, ARK. CODE ANN. § 23-112-309(b) (up to $5,000 if violation of state Motor Vehicle Commission Act (of which disclosure statute is part) otherwise would justify suspension of dealer's license; up to $10,000 if violation of Act otherwise would justify revocation of dealer's license); FLA. STAT. ANN. § 320.27(12) (up to $1,000); GA. CODE ANN. §§ 40-1-5(g), 10-1-397(a) (up to $2,000 through administrative order; up to $5,000 upon showing made in superior court); IND. CODE ANN. § 9-23-6-1 ($50 to $1,000); N.Y. GEN. BUS. LAW § 396-p(6) ($50 for first offense; $250 for subsequent offenses).[29]

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[29]The criminal fines authorized by the other states are similarly modest. See, *e.g.*, ARIZ. REV. STAT. ANN. §§ 28-1326, 13-802(C), 13-707 (up to $500 and/or 30 days imprisonment); KY. REV. STAT. ANN. § 190.990(1) (up to $500 and/or 30 days imprisonment); LA. REV. STAT. ANN. § 32:1258 (up to $5,000; no imprisonment); N.H. REV. STAT. ANN. §§ 357-C:15, 651:2 (corporate fine of up to $20,000); OHIO REV. CODE ANN. §§ 4517.99(a), 2929.31 (organizational penalty of up to $2,000); OKLA. STAT. ANN. tit. 47, § 1151(I) ($10 to $100; no imprisonment) WYO. STAT. § 31-16-112 (up to $750 and/or six months imprisonment).

This Court was reluctant in *Haslip* to place too much weight on a lack of proportionality between the size of a punitive exaction and the amount of a criminal fine for analogous conduct because criminal punishments, which generally are formulated with individual rather than corporate offenders in mind, often include

4. Financial condition

This Court has suggested that the defendant's financial condition may be relevant to gauging the need for a substantial punitive exaction. *TXO*, 113 S. Ct. at 2722. Although we strongly disagree that rational deterrence justifies imposing higher punishments on large corporate defendants,[30] there is no need for the Court to address that extremely significant issue here. As the Court recognized in *Haslip* (499 U.S. at 22), Alabama juries *may not* calibrate punitive damages by reference to the defendant's financial condition. Although reviewing courts in Alabama take financial condition into account, they do not use it as an independent factor justifying an otherwise impermissible award. As in the present case (see Pet. App. 12a), they consider evidence of the defendant's wealth solely for purposes of determining whether the defendant's financial condition necessitates a *reduction* of the award. Because the Alabama Supreme Court did not justify the $2 million penalty by reference to BMW's financial condition, there is no basis for doing so here.

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The conduct in this case is minimally — if at all — culpable. The punishment is out of all proportion to fines applicable to equivalent conduct and bears no relation whatever to the actual and

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imprisonment (see 499 U.S. at 23); still, the Court did not go so far as to say that criminal fines are irrelevant to the inquiry. The reluctance expressed in *Haslip*, however, obviously does not apply to civil penalties, which typically are framed with corporate offenders in mind and, by definition, do not encompass incarceration. Nor would it apply to criminal sentencing provisions for organizations or to penalties that do not encompass imprisonment.

[30]For an explanation of why it is inappropriate to justify large punishments by reference to the financial condition of corporate defendants, see the amicus brief filed by the American Tort Reform Association in *TXO* at 17-20.

potential harm to Dr. Gore. In short, the $2 million punishment simply cannot be squared with "general concerns of reasonableness" (*Haslip*, 499 U.S. at 18) and is far "greater than reasonably necessary to punish and deter" (*id*. at 22).

B. The Fact That BMW's 3% Disclosure Threshold Affected Sales To Numerous Other BMW Owners Does Not Justify The $2 Million Punishment.

As the above discussion demonstrates, a $2 million punishment simply cannot be justified on the basis of the harm done to Dr. Gore alone. For that reason, we anticipate that Dr. Gore might argue that $2 million would not be excessive punishment for the *total* course of conduct engaged in by BMW nationwide. But even putting to one side the problem of extraterritorial punishment inhering in such an argument, that contention cannot provide an acceptable basis for upholding the punishment in this case in the absence of some procedure to ensure that BMW is not subjected to unconstitutionally excessive punishment by being sanctioned over and over for the impact of its conduct on the same persons.[31]

Of course, the Alabama Supreme Court has no power to preclude the courts of other states from permitting such excessive punishment in future cases. Nor did it expressly indicate that it was precluding punitive damages claims even by other Alabama plaintiffs. In such circumstances, it would be fundamentally unfair to uphold the $2 million punishment on the basis of the impact of BMW's conduct on other purchasers, when all of those other purchasers (or at least

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[31]This is no mere theoretical possibility. Dr. Gore's counsel have been actively soliciting clients to sue BMW. As of the time of the briefing of the *Gore* appeal, they had filed suit on behalf of 25 different BMW owners. Pet. App. 13a-14a. Dr. Gore's counsel also have sought to certify a nationwide class in one of these cases (*Wilkinson* v. *Bayerische Motoren Werke, A.G.*). BMW has opposed certification on, *inter alia*, manageability grounds. The motion for class certification remains pending and, because a stay of the proceedings is in effect, will not be resolved until after this case is decided.

those outside of Alabama) are free to bring their own lawsuits claiming fraud and seeking punitive damages (assuming the law of the state in which their vehicle was purchased permits such an action). *Western Union*, 368 U.S. at 75. See NAM Br. 20-25.[32]

Accordingly, in the absence of a class action (which would pose grave manageability problems in a case like this, where the varying laws of 50 different states would have to be applied and the facts of each transaction are different) or some other means of preventing repetitive (and therefore excessive) punishment for the impact of the defendant's actions on the same persons, this concern dictates that the excessiveness of a punishment be assessed solely with reference to the plaintiff(s) in the case at hand.[33] The question to be asked is: if every other plaintiff recovered the same amount of punitive damages, would the resulting punishment be excessive?

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[32]We note in this connection that the historical experience with punitive damages, and the common law institutions developed to administer them, almost exclusively involved individualized torts with single, or few, victims. Modern products liability, consumer fraud, or mass tort litigation raises wholly new problems for which traditional procedures were never intended and are in many ways inadequate to assure even minimal fairness. See Brief for Owens-Corning Fiberglas Corporation as Amicus Curiae in Support of Petitioner at 10-12 ("Owens-Corning Br.").

[33]In saying this, we do not mean that the fact-finder may not consider other acts of the defendant, insofar as they reasonably bear upon the defendant's culpability and the proper punishment for the acts directed against the plaintiff. That is what the Court endorsed in *TXO*. It is, however, a very different matter actually to punish the defendant for its acts toward other persons. See pages 22-23, *supra*.

It is also important to emphasize that the problem we are addressing is not the mere fact that a defendant might be repetitively punished in different cases for the same act. So long as the punishment in each case is properly apportioned to the plaintiff(s) in that case, there is no threat of excessive punishment, nor any inherent unfairness to the defendant (leaving double-jeopardy-type concerns to one side).

In this case, where Dr. Gore has identified approximately 1,000 other persons who purchased new BMW automobiles that had undergone undisclosed refinishing costing more than $300 but less than 3% of MSRP, this calculation is easily done. The $2 million punitive judgment in Dr. Gore's favor is sustainable only if **$2 billion** would not be excessive for BMW's total course of conduct. We have little doubt that the Court would agree that such a level of punishment would be utterly absurd.

We do not expect Dr. Gore to attempt to defend $2 billion as a constitutionally acceptable punishment or to assert that it is appropriate to punish BMW in case after case for the impact of its conduct on the same universe of "victims." Rather, he will no doubt voice the common refrain that the Court should uphold the punishment in *this* case and worry about excessive, repetitive punishment in future cases. For several reasons, that ostrich-like approach is wholly unacceptable and unworkable. See generally NAM Br. 25-30.

First, there are serious procedural problems with the "take it into account later" approach. Many states (unlike Alabama) do not allow new evidence to be admitted at the remittitur stage. See, *e.g.*, *Kochan* v. *Owens-Corning Fiberglass Corp.*, 610 N.E.2d 683, 697 (Ill. App. Ct. 1993) (refusing to consider list of prior punitive damages awards submitted as part of post-trial affidavit). See also *Davis* v. *Celotex Corp.*, 420 S.E.2d 557, 564-566 (W. Va. 1992). In such instances, the defendant is placed in the grossly unfair position, if it wishes to have prior punishments taken into account, of having to tell juries about other findings of punitive liability while still contesting such liability in the case at hand.

Second, this kind of approach injects tremendous complexity into the process. How are subsequent courts and juries to know whether prior juries intended their punishment to be for the full course of the defendant's conduct, part of that conduct, or only the conduct with respect to the particular plaintiff?[34] Presumably, there would have to be a mini-trial covering the kind of evidence that was put on and the arguments that were made in the earlier cases. Even then, it generally would be difficult to ascertain the prior juries' intentions.[35]

Third, the court that upholds the first large verdict generally has no way of ensuring that other courts, usually in other states, will adequately protect the defendant from excessive punishment deriving from multiple nonapportioned judgments. Indeed, the "pay now get credit (maybe) later" approach turns a blind eye to the practical reality that courts in one state will often be unwilling to limit the recovery to an in-state plaintiff because a plaintiff in a prior case in another state received a punitive verdict that was based on the overall course of conduct. As Judge Friendly put it, "whatever the right result may be in strict theory, we think it somewhat unrealistic to expect a judge, say in New Mexico, to tell a jury that their fellow townsman should get very little by way of punitive damages because Toole in California and Roginsky and Mrs. Ostopowitz in New York had stripped that cupboard bare * * *." *Roginsky* v.

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[34]An example of this kind of vagueness is the opinion of the Ninth Circuit in *Hopkins* v. *Dow Corning Corp.*, 33 F.3d 1116, 1127 (1994), cert denied, 115 S. Ct. 734 (1995), which makes it impossible to tell the extent to which the punishment was apportioned solely to Ms. Hopkins.

[35]The present case presents the relatively unusual situation in which the jury was asked to apply a formula based upon the total number of people affected by the conduct, and its verdict revealed that it did just that. More typically, plaintiffs' counsel will invoke the full course of the defendant's conduct, while suggesting a punishment that is a percentage of the defendant's net worth, profits, or revenues. See Owens-Corning Br. at 2.

Richardson-Merrell, Inc., 378 F.2d 832, 840 (2d Cir. 1967). See also *Juzwin* v. *Amtorg Trading Corp.*, 718 F. Supp. 1233, 1235-1236 (D.N.J. 1989); *Fischer* v. *Johns-Manville Corp.*, 512 A.2d 466, 478 (N.J. 1986). See generally Owens-Corning Br. at 7-8; Brief for the Center for Claims Resolution as *Amicus Curiae* Supporting Petitioner at 9-15.

Fourth, an approach that allows the first plaintiff to grab all or the lion's share of the total punishment for a defendant's overall course of conduct promotes inequity among plaintiffs and disrespect for the law. It also is certain to engender an unseemly and undesirable race to the courthouse (or, more accurately, to final judgment).

Fifth, courts confronted with a request to give credit for prior punishments repeatedly have declined to consider prior *settlements* even while acknowledging that such settlements may have been inflated to take into account the risk of high punitive damages. See, *e.g.*, *Dunn* v. *HOVIC*, 1 F.3d 1371, 1389-1390 (3d Cir.) (en banc), cert. denied, 114 S. Ct. 650 (1993); *Simpson* v. *Pittsburgh Corning Corp.*, 901 F.2d 277, 282 (2d Cir.), cert. dismissed, 497 U.S. 1057 (1990). That refusal — based largely on the perceived difficulty of ascertaining the punitive component of a settlement — makes overpunishment a virtual certainty under the "take it into account later" approach.

Finally, any approach that does not restrict the plaintiff to a reasonably apportioned share of total potential punitive liability will result in gross unfairness when — as we submit is the case here — the jury's finding of punitive liability is aberrational. Assume, for example, that 99 cases out of 100 would result in a verdict for the defendant on punitive liability. Although this fact does not in itself mean that the verdict in the case the defendant loses is necessarily "wrong" on the record in that case or should be set aside on that ground, it *does* mean that it would be quite bizarre to measure (or enhance) the defendant's punishment in the one case it loses on the

basis of the injuries alleged in the 99 cases it won. In other words, assuming $2 million were the maximum permissible total punishment for BMW, it would nevertheless be manifestly unfair to allow that amount to be exacted by one jury even though every other jury would exonerate the company. This problem disappears if a meaningful effort at apportionment is required.

In conclusion, the *only* workable way to prevent the problems associated with the fact that a single course of conduct can have multiple victims is to require that the punitive damages in any particular case be limited to punishing for what the defendant did to the plaintiff or plaintiffs in *that* case. Such an approach eliminates concerns about excessive multiple punishments: because each punishment will be apportioned to the harm done to the particular plaintiff, the aggregate punishment will not involve any double or triple counting. Moreover, because the punishment in any case would be imposed solely for what the defendant did to the plaintiff in that case, a defendant that wins a substantial percentage of its cases will not suffer the unfairness of having its victories eviscerated in a single case awarding punitive damages for the entire course of its conduct.

CONCLUSION

The judgment of the Alabama Supreme Court should be reversed.

Respectfully submitted.

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