No. 07-257

IN THE

# Supreme Court of the United States

CONTINENTAL CARBON CO. AND
CHINA SYNTHETIC RUBBER CORP.,
*Petitioners,*

v.

ACTION MARINE, INC., ET AL.,
*Respondents*.

**On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Eleventh Circuit**

## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS


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## QUESTION PRESENTED

"Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). In the decision below, the Eleventh Circuit upheld a $17.5 million punitive damages award without comparing petitioners' conduct to the conduct of defendants in other punitive damages cases and without heeding this Court's guidance that a substantial compensatory damages award—in this case, nearly $2 million—cannot generally support a punitive damages award larger than the compensatory damages award. The question presented is whether the punitive damages award is unconstitutionally excessive because petitioners did not "receive fair notice" that their conduct could expose them to $17.5 million in punitive damages.

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## BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

## INTEREST OF *AMICUS CURIAE*[1]

The question presented in this case is whether a $17.5 million punitive damages award is constitutionally excessive where the court of appeals failed to compare petitioners' conduct to that of defendants in other punitive damages cases and where the award dwarfs the already substantial compensatory damages award of nearly $2 million. The Chamber of Commerce of the United States of America has a substantial interest in the correct resolution of that question because the businesses that comprise its membership require legal certainty regarding the permissible bounds of potential punitive damages awards and protection against arbitrary and oppressive awards. As this Court has repeatedly recognized, the most effective means of infusing predictability into the assessment of punitive damages and shielding defendants from unconstitutionally excessive awards is through a rigorous application of the reprehensibility, ratio, and comparable-sanctions guideposts. The court of appeals' decision upholding the punitive damages award in this case rests on a profound misapplication of each of those guideposts.

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[1] Pursuant to this Court's Rule 37.3(a), letters of consent from all parties to the filing of this brief have been submitted to the Clerk. Pursuant to this Court's Rule 37.6, *amicus* states that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than *amicus* or its counsel made a monetary contribution to the preparation or submission of this brief.

The Chamber is the Nation's largest business federation. With a substantial number of members in every State, the Chamber has an underlying membership of more than three million businesses and business organizations, which are of every size and in every industry sector. One of the Chamber's associational purposes is to protect its members from unlawful punitive damages awards, and the Chamber has frequently participated as an *amicus curiae* in litigation concerning the validity of such awards. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996).

The Chamber is deeply concerned about the failure of an increasing number of lower courts—including the Eleventh Circuit in the decision below—to faithfully apply the punitive damages guideposts. Those constitutional benchmarks provide businesses with notice regarding the possible punitive sanctions that may attach for specific conduct and impose a check upon jurors' "biases against big businesses, particularly those without strong local presences." *State Farm*, 538 U.S. at 417 (internal quotation marks omitted). This Court should grant certiorari to clarify the lower courts' pervasive confusion regarding the *BMW* guideposts and to make clear that the Constitution requires the rigorous application of those guideposts to every punitive damages award.[2]

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[2] Although the court of appeals misapplied all three of the *BMW* guideposts, and a faithful implementation of each guidepost is essential to ensure the constitutionality of a punitive damages award, the Chamber's brief focuses principally on the reprehensibility and ratio guideposts.

## STATEMENT

1. Respondents brought this diversity action in the United States District Court for the Middle District of Alabama, alleging that petitioners were liable under Georgia law for negligence, nuisance, trespass, and wantonness, based on the release of a material known as carbon black from their manufacturing facility. The jury returned a verdict in favor of respondents, awarding them $1,915,000 in compensatory damages, which encompassed lost business value, remediation costs, and emotional distress, and an additional $1,294,000 in attorneys' fees. The jury also assessed a punitive damages award against petitioners of $17.5 million.

2. Purporting to apply the guideposts endorsed by this Court in *BMW* and *State Farm*, the Eleventh Circuit upheld the punitive damages award in its entirety. As a threshold matter, the court deemed petitioners' conduct to be "exceedingly reprehensible," even though respondents did not allege that they had suffered any physical harm as a result of the carbon black emissions and petitioners voluntarily remedied the cause of those emissions through modifications to their manufacturing facility. Pet. App. 25a. In evaluating the reprehensibility of petitioners' conduct, the court of appeals "decline[d] . . . to compare [petitioners'] actions with those of other defendants" in other cases and instead "base[d] [its] conclusion on the facts . . . in this case alone." *Id.* at 25a-26a.

Turning to the ratio guidepost, the court of appeals aggregated the compensatory damages award and the attorneys' fees award, and held that the ratio between the punitive and compensatory damages assessed by the jury was 5:1, rather than 9:1 (which would have been the case if the attorneys' fees had

been excluded from the compensatory damages calculation). Pet. App. 28a. While acknowledging this "Court's guidance . . . that ratios in excess of 1:1 and/or 4:1 may only rarely satisfy due process," the court held that the "punitive damages award of $17.5 million is proportionally related to the compensatory damage award of approximately $3.2 million" due to the purported reprehensibility of petitioners' conduct. *Id.* at 28a.

Finally, the court of appeals held that the comparable-sanctions guidepost was also satisfied. Although the Alabama Environmental Management Act provides for penalties of only $25,000 per violation and a total of $250,000 per order—amounts well below the $17.5 million punitive damages award—the court held that "[c]onsidering the reprehensibility of [petitioners'] conduct," they were "on notice that [their] actions could result in civil penalties that far exceed the per-order cap." Pet. App. 31a. It would not have been "implausible," the court concluded, for "vigorous enforcement" by state officials to "have led to an accrual of fines totaling several million dollars" through the imposition of multiple administrative orders. *Id.*

## SUMMARY OF ARGUMENT

"Punitive damages pose an acute danger of arbitrary deprivation of property." *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994). This Court has therefore attempted to impose rational constraints on punitive damages awards—in the form of three guideposts for evaluating constitutionality—in order to provide defendants with fair notice of the punitive sanctions they may face and to protect defendants against grossly excessive awards. Application of those guideposts, however, has fostered extensive

disagreement among lower courts. Indeed, as the decision below exemplifies, a number of courts have continued to uphold staggering and unwarranted punitive damages awards despite this Court's efforts to establish sensible, constitutionally mandated limitations on punitive damages.

This case affords the Court the opportunity to resolve the lower courts' widespread confusion regarding application of the *BMW* guideposts and to ensure that, through a faithful implementation of those guidelines, defendants are shielded from arbitrary punitive damages assessments. Restoring the *BMW* guideposts as a viable due process safeguard is a matter of exceptional importance to all American businesses, which must daily confront the unfounded and irrational biases of juries in courtrooms across the country.

I. Certiorari is warranted to resolve whether application of the reprehensibility guidepost requires courts to undertake a comparison with conduct and awards in other punitive damages cases. The Eleventh Circuit explicitly declined to perform a comparative analysis—in direct conflict with decisions from the Second and Sixth Circuits, among others—and instead attempted to gauge the reprehensibility of petitioners' conduct and the propriety of the award without reference to other cases.

A comparison with conduct and awards in other cases is essential to determining the reprehensibility of a defendant's conduct and evaluating the constitutional soundness of a punitive damages award. Rejecting a comparative approach to reprehensibility vastly increases the likelihood that arbitrary punitive damages awards will withstand judicial scrutiny. Indeed, evaluating reprehensibility in a vac-

uum removes an important check on the size of punitive damages awards and inevitably results in similarly situated defendants receiving different treatment in factually and legally indistinguishable cases. The Court should use this case as a vehicle for clarifying that comparative analysis is an indispensable component of every reprehensibility inquiry.

II. Certiorari is also warranted to clarify application of the ratio guidepost in cases where the plaintiff has been awarded a substantial amount of compensatory damages. Notwithstanding this Court's instruction in *State Farm* that a ratio of punitive to compensatory damages that exceeds 1:1 will rarely, if ever, be constitutional where substantial compensatory damages have been awarded (538 U.S. at 425), the Eleventh Circuit upheld a $17.5 million punitive damages award to plaintiffs who had already received complete and substantial compensation in the form of large awards of both compensatory damages and attorneys' fees. The Eleventh Circuit is not alone in disregarding this aspect of the Court's punitive damages jurisprudence. *See*, *e.g.*, *In re Exxon Valdez*, 490 F.3d 1066, 1095 (9th Cir. 2007) (per curiam).

Because it is those defendants who are subject to large compensatory damages awards who are most likely to receive an arbitrary and irrational punitive damages assessment from a biased jury, stringent application of the ratio guidepost is essential to guaranteeing due process in such cases. Courts that apply the ratio guidepost permissively essentially abdicate their responsibility to ensure that these defendants receive due process. This Court's review is necessary to restore the ratio guidepost as a meaningful due process safeguard.

## ARGUMENT

### I. CERTIORARI IS WARRANTED TO CLARIFY THAT A COMPARISON WITH OTHER CASES IS AN ESSENTIAL COMPONENT OF THE REPREHENSIBILITY INQUIRY.

In evaluating the reprehensibility of petitioners' conduct, the Eleventh Circuit expressly refused to take into account the conduct of defendants in other punitive damages cases and the awards assessed against those defendants. The court of appeals' unwillingness to engage in a comparative inquiry is squarely at odds with the comparative reprehensibility analysis endorsed by several other circuits. It also substantially undermines the efficacy of the reprehensibility inquiry as a means of ensuring that defendants receive constitutionally adequate notice of possible punitive damages awards. Certiorari is warranted to resolve this conflict among the lower courts and to restore the reprehensibility guidepost as a meaningful tool to protect defendants against arbitrary and oppressive punitive damages awards.

A. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). The "basic protection against 'judgments without notice' afforded by the Due Process Clause is implicated by civil penalties" (*id.* at 574 n.22 (emphasis and citation omitted)), and animates much of this Court's punitive damages jurisprudence. *See Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1063 (2007) ("the fundamental due process concerns to which [this Court's] punitive damages cases refer" include the

"risks of arbitrariness, uncertainty and lack of notice").

The guideposts for evaluating the constitutionality of punitive damages awards adopted by this Court in *BMW* are designed to ensure that defendants are protected from "grossly excessive or arbitrary punishments." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003). The reprehensibility guidepost—which is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award" (*BMW*, 517 U.S. at 575)—requires a court to place the defendant's conduct on a continuum of wrongdoing in order to assess whether the punitive damages "imposed . . . reflect the enormity of [the] offense." *Id.* (internal quotation marks omitted). "This principle," the Court has explained, "reflects the accepted view that some wrongs are more blameworthy than others." *Id.* The reprehensibility guidepost therefore puts defendants on notice that, as the blameworthiness of their conduct increases, so does the size of the punitive damages award that may constitutionally be assessed against them.

The Eleventh Circuit chose to undertake its reprehensibility inquiry in a vacuum, without comparing petitioners' conduct and the punitive damages award imposed upon them to the conduct and awards in other punitive damages cases. Other courts, however, have endorsed such a comparative analysis as an essential component of the punitive damages inquiry, recognizing that the only meaningful way to evaluate the reprehensibility of a defendant's conduct—and the propriety of the punitive damages award based on that conduct—is to compare both the defendant's misfeasance and the size of the damages award to the facts of other cases. *See*, *e.g.*, *Int'l Un-*

*ion of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 870 N.E.2d 303, 322-23 (Ill. 2006) ("the best way to determine whether a given ratio" between compensatory damages and punitive damages "is appropriate is to compare it to punitive damages awards in other, similar cases").

In *Lee v. Edwards*, 101 F.3d 805 (2d Cir. 1996), for example, the Second Circuit "turn[ed] to other police misconduct cases for assistance in determining the proper" punitive damages award to be assessed against a police officer found liable for malicious prosecution. *Id.* at 812. Based on that comparative inquiry, the court concluded that the $200,000 punitive damages award was excessive because the plaintiff had not suffered any physical injury and the size of the award "exceed[ed] the punitive damages awarded for the numerous and severe physical and psychological harms suffered by" plaintiffs in three other police misconduct cases. *Id.* at 812-13; *see also DiSorbo v. Hoy*, 343 F.3d 172, 188 (2d Cir. 2003) ("To determine the appropriate level of punitive damages, we assess such awards in other police misconduct cases.").

Similarly, in *Romanski v. Detroit Entertainment, L.L.C.*, 428 F.3d 629 (6th Cir. 2005), the Sixth Circuit ordered the reduction of an $875,000 punitive damages award in a wrongful arrest case because "an award of $600,000 . . . fit[ ] more comfortably in the ballpark of punitive awards that have been upheld in similar cases." *Id.* at 632. The court concluded that, "[i]n comparative terms, . . . because [the plaintiff] was not beaten, charged or tried, the conduct here was not as reprehensible as the defendants' conduct in some of the civil rights cases [the court] ha[d] canvassed." *Id.* at 649.

B. The Eleventh Circuit did not perform a comparative inquiry in the decision below. Indeed, relying upon the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), which suggested that a comparative inquiry may not be a mandatory component of punitive damages analysis (*id.* at 458), the Eleventh Circuit categorically refused to compare petitioners' conduct and the $17.5 million punitive damages award against them to the conduct and punitive damages awards in other cases. Pet. App. 26a. That holding is flatly inconsistent with the comparative analysis endorsed by, among other courts, the Second and Sixth Circuits. *See also* Pet. for Writ of Cert. at 11 (citing cases from the Eighth and Ninth Circuits and the California Supreme Court adopting a comparative approach to the reprehensibility inquiry). This Court's review is necessary to resolve the lower courts' widespread confusion over whether a comparison with other cases is a necessary component of reprehensibility analysis and to clarify whether the *TXO* plurality's discussion of this question retains any force after *BMW* and *State Farm*.[3]

Resolving the lower courts' uncertainty regarding this issue—and rejecting the Eleventh Circuit's flawed decision not to undertake a comparative inquiry as part of its reprehensibility analysis—is ex-

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[3] A fair reading of *BMW* and *State Farm*—which focus on affording defendants adequate notice of potential punitive damages awards and shielding defendants from arbitrary awards (*BMW*, 517 U.S. at 574; *State Farm*, 538 U.S. at 416)—indicates that the *TXO* plurality's reasoning on this point has been authoritatively superseded because a comparative inquiry is essential to affording defendants notice and preventing the assessment of arbitrary and excessive awards.

ceptionally important to thousands of businesses across the Nation. Indeed, this case vividly illustrates that—despite this Court's efforts to establish constitutional guidelines to cabin juries' broad discretion in awarding punitive damages—juries are continuing to impose staggering punitive damages awards on defendants—and on business defendants, in particular—and that appellate courts routinely uphold such awards. *See*, *e.g.*, *In re Exxon Valdez*, 490 F.3d 1066, 1095 (9th Cir. 2007) (per curiam) (holding that a $2.5 *billion* punitive damages award was not unconstitutionally excessive); *Mission Res., Inc. v. Garza Energy Trust*, 166 S.W.3d 301, 319 (Tex. App. 2005) (upholding a $10 million punitive damages award in a trespass action where compensatory damages were only $543,000).

As this Court emphasized in *BMW*, the "fact that [a defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair notice of the demands that the several States impose on the conduct of its business." 517 U.S. at 585. A comparative approach to the application of the reprehensibility guidepost is an indispensable component of the "fair notice" to which this Court has held all punitive damages defendants—including corporations and other business entities—to be entitled. A defendant who can be assured that any punitive damages award assessed by a jury will bear a substantial relationship to the awards imposed upon other defendants in comparable cases has been put on notice regarding the financial repercussions that may accompany specific misconduct.

On the other hand, where a court refuses to consider punitive damages awards in previous cases as part of its reprehensibility analysis, the defendant has significantly diminished protection against arbi-

trary awards disproportionate to the blameworthiness of the defendant's conduct and lacks meaningful notice of the punishment that may be assessed for specific legal transgressions. It is the height of arbitrariness—and an unquestionable violation of fundamental due process principles (*State Farm*, 538 U.S. at 416)—for similarly situated defendants to be subject to vastly different punitive sanctions for comparable conduct. *Compare* Pet. App. 32a (upholding a $17.5 million punitive damages award against petitioners based on harm caused to surrounding property owners by the release of carbon black), *with Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1339 (11th Cir. 1999) (holding that $4.35 million was the maximum punitive damages award that could be constitutionally assessed for harm to surrounding property owners caused by the discharge of acidic water from a mining site). Moreover, just as similar conduct should be treated similarly, less reprehensible conduct should be punished less severely than comparatively more reprehensible conduct; subjecting a defendant who has engaged in only moderately reprehensible wrongdoing to a punitive damages award that is larger than the awards imposed on defendants who engaged in significantly more reprehensible conduct is arbitrary and irrational. *See BMW*, 517 U.S. at 575.

The arbitrary imposition of punitive damages awards creates intolerable legal uncertainty for American businesses, which operate most effectively and efficiently against a backdrop of uniformly applied legal rules and a system of predictable sanctions. This Court should grant certiorari and authoritatively establish that comparative analysis is an indispensable component of punitive damages review. A decision to that effect will infuse urgently

needed predictability into punitive damages jurisprudence, ensure that defendants receive constitutionally adequate notice of the punitive damages that may be assessed against them, and protect against arbitrary and irrational treatment of similarly situated parties.

## II. CERTIORARI IS WARRANTED TO CLARIFY THE CONSTITUTIONAL LIMITATIONS ON PUNITIVE DAMAGES WHERE COMPENSATORY DAMAGES ARE SUBSTANTIAL.

Respondents received a substantial compensatory damages award of $1,915,000—which encompassed lost business value, remediation costs, and emotional distress—as well as an additional $1,294,000 in attorneys' fees. Notwithstanding the complete compensation that respondents received both for the alleged harm attributable to the carbon black emissions and for the cost of pursuing this suit, the Eleventh Circuit upheld the jury's imposition of an additional punitive damages award of $17.5 million—a result that directly conflicts with this Court's guidance that ratios of punitive to compensatory damages that are greater than 1:1 are rarely, if ever, permissible where the plaintiffs have received substantial compensatory damages. *State Farm*, 538 U.S. at 425. Because the Eleventh Circuit is not alone in disregarding this aspect of *State Farm*, this Court's review is urgently required to clarify application of the ratio guidepost and to ensure that lower courts do not continue to evade this important constitutional limitation on punitive damages.

A. This Court has made clear that, while "ratios greater than those [it] ha[s] previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of eco-

nomic damages, . . . [w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425 (internal quotation marks omitted). This principle reflects the fact that compensatory damages and attorneys' fees—especially when awarded in large amounts—can deter and punish as effectively as punitive damages. *See generally* Pet. for Writ of Cert. at 23-24. The necessity—and constitutional justification—for a large punitive damages award is therefore obviated where a substantial compensatory award has been imposed. *See* Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. Cal. L. Rev. 133, 137 (1982) (many decisions upholding punitive damages awards are "oblivious[ ] to the basic point that ordinary civil damages—in the course of providing compensation—concurrently function to deter").

Lower courts nevertheless routinely uphold multimillion-dollar punitive damages awards coupled with substantial assessments of compensatory damages. *See*, *e.g.*, *Exxon*, 490 F.3d at 1095 (5:1 ratio with compensatory damages and settlement payments of more than $500 million); *Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1182 (Or. 2006) (97:1 ratio with compensatory damages of more than $800,000), *rev'd on other grounds*, 127 S. Ct. 1057 (2007); *Mission Res.*, 166 S.W.3d at 319 (18.4:1 ratio with compensatory damages of more than $500,000); *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 413 (Utah 2004) (9:1 ratio with compensatory damages of more than $1 million); *see also* Pet. for Writ of Cert. at 15-16 & n.7, 27 n.12. Such staggering punitive damages awards raise grave constitu-

tional concerns that a jury fueled simply by bias and emotion has imposed an arbitrary and unwarranted sanction upon a defendant. Indeed, it is often irrational "biases against big businesses" that produce such potentially crippling punitive damages awards. *State Farm*, 538 U.S. at 417 (internal quotation marks omitted).

B. The decision below is part of this troubling trend. Based exclusively on the purported "reprehensibility" of petitioners' conduct, the Eleventh Circuit deemed this case to be "the rare exception" where a ratio in excess of 1:1 was appropriate despite the substantial compensatory damages award. Pet. App. 29a. But even if the Constitution did permit an exception to the 1:1 principle where the defendant's conduct is particularly reprehensible, this case—where respondents suffered no personal injury and petitioners took voluntary steps to remedy the cause of their environmental discharges—would certainly not fall within the contours of that exception. Like *State Farm*, this is a case where the compensatory damages not only afforded petitioners "complete compensation," but also included a "punitive element" in the form of the $100,000 emotional damages award to respondent John Tharpe. 538 U.S. at 426.

Perhaps recognizing the constitutionally doubtful nature of the onerous punitive damages award, the Eleventh Circuit attempted to lower the ratio between punitive and compensatory damages by adding the attorneys' fees award to the compensatory damages assessment, thereby reducing the ratio from 9:1 to 5.5:1. Pet. App. 28a. In so doing, however, the court exacerbated an existing circuit split as to whether attorneys' fees should be included in the amount of compensatory damages for purposes of

the ratio guidepost. *Compare Campbell*, 98 P.3d at 419 (excluding attorneys' fees from the calculation of compensatory damages), *with Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 237 (3d Cir. 2005) (including attorneys' fees as a component of compensatory damages). This additional conflict reinforces the need for this Court to provide the bench and bar with authoritative guidance regarding application of the *BMW* guideposts.[4]

Ultimately, regardless of whether the correct ratio in this case is 9:1 or 5.5:1, the award cannot with-

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[4] Indeed, classifying attorneys' fees as part of the compensatory damages award for purposes of the ratio guidepost leads to anomalous and arbitrary results. Consider, for example, two punitive damages cases involving legally and factually indistinguishable conduct and harm. Each plaintiff incurs attorneys' fees of $10,000 while litigating the case, and each is ultimately awarded $5,000 in compensatory damages and $60,000 in punitive damages. The only difference is that in Case 1, the court awards attorneys' fees, whereas in Case 2, the fees are unreimbursed. If fees awarded by a court can be added to compensatory damages under the ratio guidepost, then Case 1 would result in a ratio of 4:1 ($60,000 in punitive damages and $15,000 in total compensatory damages), which would likely withstand constitutional scrutiny under *BMW* and *State Farm*. Case 2 would result in a ratio of 12:1 ($60,000 in punitive damages and $5,000 in compensatory damages), a double-digit ratio that would likely be unconstitutional. *See State Farm*, 538 U.S. at 425. The plaintiff in Case 1 has therefore enjoyed a double benefit over the similarly situated plaintiff in Case 2: the initial award of attorneys' fees, and the subsequent use of that fee award to uphold a larger award of punitive damages. That fee award should militate in favor of a *smaller*, rather than a *larger*, punitive damages assessment. *See Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003) (when imposing punitive damages, a court "should consider the fact that [a plaintiff] has been awarded substantial statutory attorneys' fees," which "favor[s] a lesser rather than greater award of punitive damages").

stand constitutional scrutiny. The touchstone of this Court's punitive damages jurisprudence is affording defendants "fair notice" of the punitive sanctions that may be imposed for specific conduct. *BMW*, 517 U.S. at 574. If a defendant found liable for several million dollars in compensatory damages could be assessed an additional punitive damages award ranging anywhere from $1.00 to $10 million or more, the defendant would have little meaningful notice of the punitive sanctions that may be assessed. Moreover, it is precisely in cases with large compensatory damages awards—where a jury may have developed sympathy for an injured plaintiff—that defendants need the greatest protection against wholly arbitrary punitive damages awards. *See BMW*, 517 U.S. at 588 (Breyer, J., concurring) (standards governing review of punitive damages "must offer some kind of constraint upon a jury or court's discretion, and thus protection against purely arbitrary behavior"). Indeed, many courts, including the Eleventh Circuit in the decision below, have erroneously read *State Farm* as creating a virtual safe harbor for single-digit ratios. "Multipliers *less* than nine or 10 are not, however, presumptively *valid* under *State Farm*" (*Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 77 (Cal. 2005) (emphases in original))—where substantial compensatory damages have been awarded, even ratios of 2:1 or 1:1 can raise significant constitutional concerns if they would result in oppressive and potentially bankrupting punitive damages awards.

Rigorous judicial enforcement of the limitations imposed by the ratio guidepost is therefore essential to ensure that defendants are shielded from irrational and constitutionally infirm punitive damages awards "inflicted on a whim" by potentially hostile

and biased jurors. *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting). Because lower courts—including the Eleventh Circuit in the decision below—routinely disregard the requirements of the ratio guidepost and regularly uphold punitive damages awards that vastly exceed already substantial compensatory damages assessments, this Court's review is urgently needed.

## CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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