No. 09-1572

IN THE

Supreme Court of the United States

JOSEPH STROUD AND JOVON BROADCASTING,
WJYS-TV 62/34,
Petitioners,

v.

JERRI BLOUNT,
Respondent.

On Petition For Writ Of Certiorari To
The Appellate Court Of Illinois

REPLY BRIEF

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SUMMARY

Respondent's contention that Petitioners did not preserve the questions presented is meritless. Under this Court's preservation standard – which Respondent fails to mention, much less apply – a party may make any argument in support of a claim raised below. Petitioners easily surpass that standard. Not only did Petitioners raise the relevant claims below, they made essentially the same arguments as set forth in the Petition. Respondent's contrary assertions, which mischaracterize the record and the law, represent a misplaced attempt to forestall the Court's consideration of important issues of constitutional law on which lower courts are divided.

On the merits, Respondent fails to refute Petitioners' showing of a conflict on the first question presented, regarding treatment of court-awarded attorneys' fees under the *State Farm* and *BMW* due process analysis. Respondent's arguments simply highlight the confusion in the lower courts. And Respondent does not and cannot deny that resolution of this conflict is critical to safeguarding the constitutional right against disproportionate punitive damages awards – as this case vividly illustrates. Indeed, Respondent makes no attempt to defend the analysis below, which plainly is at odds with the *State Farm-BMW* framework.

On the second question presented, Respondent incorrectly suggests the court below did not say what it in fact said when it rejected Petitioners' *Noerr-Pennington* objection to the admission of prejudicial testimony concerning Petitioners' First Amendment

activity. The lower court unambiguously rejected *Noerr-Pennington* based on its erroneous rulings that the doctrine applies neither to retaliation claims nor to past petitioning. Those rulings plainly create conflicts of authority. As for the court's third reason for rejecting *Noerr-Pennington* – that the testimony was offered in support of a claim based on other conduct – Respondent contends this ruling is not worthy of review because it was addressed by a footnote in *Pennington*. But as the Petition showed, and Respondent does not contest, that footnote was dictum that is not binding on this Court, yet forestalls the ordinary process of development of the law in the lower courts. As such, this Court should address the issue in this case, where it is actually presented, to protect this core First Amendment right against the chilling effect of the rulings below.

ARGUMENT

I. The Questions Presented Are Preserved.

In an effort to forestall the Court's consideration of the important constitutional questions presented, Respondent's primary argument is that Petitioners "did not raise in the courts below the constitutional question[s] which they now urge this Court to consider." Opp. 8. But Respondent fails to mention, much less apply, the Court's preservation standard: "Once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *accord Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995).

Petitioners went far beyond what is required under *Yee*. Not only did Petitioners raise the relevant claims below, they pressed the main arguments set forth in the Petition for Certiorari.

1. With respect to the first question presented, both Petitioners' *and* Respondent's initial submissions to the Illinois Appellate Court *excluded* attorneys' fees from the *State Farm-BMW* comparison of compensatory and punitive damages – treatment consistent with Petitioners' position before this Court. *See* Pet. 6-7. Accordingly, the precise question presented here did not arise until the Appellate Court *sua sponte* added attorneys' fees to compensatory damages when performing the due process ratio analysis. Petitioners then timely raised their due process objection to that treatment of the fees – first in seeking rehearing in the Appellate Court, and again in seeking discretionary review in the Illinois Supreme Court. *See* Appellants' Pet. for Rehearing 1, 4-9 (Ill. App. Ct.); Pet. for Leave to Appeal 8 (Ill. Sup. Ct.). "The additional federal claim thus made [in seeking rehearing] was timely, since it was raised at the first opportunity." *Brinkerhoff-Faris Trust & Savs. Co. v. Hill*, 281 U.S. 673, 678 (1930).

Respondent's argument that the "only federal issue" Petitioners raised below "concerned a question of statutory interpretation" under 42 U.S.C. § 1988 (Opp. 14) is contradicted by the quotations in Respondent's own brief, which state that treating fees awarded under § 1988 as compensatory damages is an erroneous application of "'the *Gore-Campbell* [*i.e.*, *BMW-State Farm*] ratio.'" Opp. 9 (quoting

Appellants' Pet. for Rehearing 1). In the Appellate Court, Petitioners elaborated: "If attorneys' fees had been properly excluded from the *Gore-Campbell* calculus, the ratio of punitive [to compensatory] damages would have been nearly 10:1, which strays far beyond the proper constitutional benchmark of 1:1." Appellants' Pet. for Rehearing 3-4. Likewise, Petitioners sought review in the Illinois Supreme Court on the ground that under *BMW* and *State Farm*, "a punitive damage award [must] be proportional to the actual harm suffered by the plaintiff," and that attorneys' fees as costs may not be considered compensatory under this analysis "because they do not provide a remedy for the injury or harm that gave rise to the suit." Pet. for Leave to Appeal, at 8-9; *see also* Mot. for Reconsideration 7 (Ill. Sup. Ct.).[1]

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[1] Respondent also cites pleadings filed after the state court decisions became final. Opp. 13. Although these later pleadings should not be relevant to whether the issues were timely presented in the courts below, Respondent's selective "quotation" and characterization of the later pleadings underscores the Opposition's reckless approach to the record. When the parts omitted by Respondent are included, these pleadings plainly make the same argument presented in the Petition:

> [T]he decision below raises serious due process concerns regarding the amount of punitive damages. The United States Supreme Court has held that although the constitutionality of punitive damages awards cannot be reduced to a mathematical formula, the ratio of compensatory damages to punitive damages is a critical factor. Here, the jury awarded $2,800,000 in punitive damages. Even assuming that back pay

To be sure, one aspect of Petitioners' argument has always been that even if attorneys' fees may be included on the compensatory side of the due process ratio when the fees were awarded by the factfinder as damages under the substantive law, it violates due process to count attorneys' fees as compensatory damages when they were awarded by the court as costs, as occurred here pursuant to § 1988. But that is the very same argument Petitioners make to this Court in seeking certiorari. *See* Pet. 16-17. The Court might adopt a rule excluding attorneys' fees from the due process ratio in all cases, as some courts have done, or allow fees to be counted as compensatory damages only when the substantive law so provides, as other courts have held. *Id.* But under either rule, the approach of the court below violates the Constitution.

> constitutes compensatory damages (rather than equitable relief), the total compensatory damages plus back pay awarded amounts to only $282,350, leading to an extreme 10:1 ratio of punitive damages compared to harm actually suffered. But [the Appellate] Court did not analyze the ratio in this way, choosing instead to include the award of $1,182,832 in attorneys' fees as compensatory damages for purposes of a due process analysis. [The Appellate] Court therefore upheld the punitive damages award because it resulted in "only" a 1.8:1 ratio. Contrary to the court's ruling, the plain language of § 1988 makes clear that "a reasonable attorney's fee [is] part of the costs," not damages.

Mot. to Recall and Stay 3 (Ill. App. Ct.) (citations omitted); *see also* Appl. for Extension of Time 5 (U.S.).

2. Respondent's assertion that the second question presented was not preserved is equally baseless. The Appellate Court expressly found that Petitioners preserved their *Noerr-Pennington* objection to admission of evidence concerning lawful petitioning of criminal justice authorities for redress against Respondent's violation of Illinois's criminal eavesdropping law. Pet. App. 39a.[2] In arguing non-preservation, Respondent focuses on a single alternative argument in the Petition concerning only one of the three erroneous *Noerr-Pennington* rulings challenged here: the argument that even if *Noerr-Pennington* permitted evidence of constitutionally protected petitioning in some circumstances, there must still be a heightened showing that the probative value of such evidence outweighs the prejudice to First Amendment rights. Pet. 34-35; *infra* at 11; Opp. 32-33 & n.27. But as Respondent concedes, Petitioners' primary argument below – as in this Court – was that *Noerr-Pennington* always precludes admission of such evidence. Opp. 32. Offering a fallback argument in support of the same claim – that *Noerr-Pennington* at least requires exclusion of the evidence in this case, even if not in every case – is proper. *See Yee*, 503 U.S. at 535.

II. The Punitive Damages Ruling Merits Review.

On the merits, Respondent has failed to refute Petitioners' showing that the Illinois court's punitive

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[2] In so ruling, the Appellate Court rejected Respondent's contention (Opp. 31) that, by eliciting certain *other* testimony relating to petitioning of *civil* law authorities, Petitioners opened the door to allowance of the testimony at issue here.

damages ruling under *State* [illegible] and *BMW* warrants review. At the outset, [illegible]ondent does not and cannot deny that this qu[illegible]ion is critically important. By counting court-[illegible]arded attorneys' fees as compensatory relief, the court below radically skewed the *State Farm-BMW* quantitative analysis. In this very case, the attorneys' fees dwarfed the actual compensatory relief awarded by the jury; indeed, the trial court made its fee award long after the jury's verdict. *See* Pet. 15. Allowing the trial court to artificially inflate the "compensatory relief" by adding its own fee award to the factfinder's damages award would render the quantitative guideposts established by this Court essentially meaningless.

Respondent's contention that there is no conflict of authority concerning this vital question is patently incorrect. Respondent asserts that the Utah Supreme Court's remand decision in *State Farm* is "too opaque" to give rise to a direct split with the decision below. Opp. 16. But there is nothing "opaque" about the Utah Supreme Court's holding that "attorney fees" may not be "included as part of the denominator in calculating a ratio between compensatory and punitive damages." *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004). The court below held just the opposite: "attorneys fees should be taken into account as part of the compensatory damages factor in the *Gore* analysis." Pet. App. 30a. The two courts reached polar opposite conclusions on the question presented. The conflict is clear.

Respondent's further suggestion (Opp. 17) that the Utah court was simply interpreting this Court's mandate just serves to reinforce the conflict between the decision below and this Court's precedents. *See* Pet. 17-19. Nonetheless, Respondent argues (Opp. 25) that this Court's decisions cannot be taken at their word when they direct quantitative comparison of punitive damages to the "actual harm as determined by the jury," *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 582 (1996), because that rule would purportedly bar punitive damages in a bench trial. That is merely a debater's point, as the Court self-evidently used the word "jury" as shorthand for "factfinder." At the same time, the substance of the Court's holdings is unmistakable: punitive damages must be compared to the actual harm reflected in the factfinder's verdict under the substantive law. *See* Pet. 17-18. The decision below conflicts with that rule.

The remainder of Respondent's argument concerning the first question quarrels with Petitioners' reading of certain lower court cases. But none of those quibbles alters the fundamental point that there is a conflict and an array of approaches in the lower courts. For example, Respondent takes issue with Petitioners' discussion of *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224 (3d Cir. 2005), in which the Third Circuit (like the Illinois court below, which relied on *Willow Inn*) counted attorneys' fees as compensatory damages under *State Farm* and *BMW*. The Petition for Certiorari stated that *Willow Inn* applies the same rule as the decision below because the attorneys' fees

were "awarded by the court as collateral relief." Pet. 19-20. Respondent disagrees and argues that the Third Circuit's treatment of the fees as compensatory relief actually turned on its reading of the substantive Pennsylvania statute that applied, under which "fees . . . are to be considered compensatory damages." Opp. 21 (citing *Willow Inn*, 399 F.3d at 421). Assuming that Petitioners' reading of *Willow Inn* is the better one, it merely heightens the conflict of authority, because it moves *Willow Inn* from agreeing with the decision below to conflicting with it. According to Respondent, the Third Circuit permits fees to be counted as compensatory relief in the due process analysis only when the fees are awarded by the factfinder as compensatory relief under the applicable substantive law. *See* Pet. 20-21 (identifying other cases taking this approach). That is contrary to the decision below, which included court-awarded fees even though the substantive law plainly defines them as "costs." 42 U.S.C. § 1988.

In short, the existence of a substantial conflict between the decision below and other decisions from federal appellate and state supreme courts is undeniable. This Court should provide the guidance needed on this important issue.

III. The *Noerr-Pennington* Rulings Merit Review.

Respondent also fails to refute Petitioners' showing that the Illinois court's *Noerr-Pennington* rulings warrant the Court's review. As the Petition explains, the decision below includes three certworthy rulings rejecting *Noerr-Pennington*. Pet. 23-36. Respondent begins with the third ruling:

that the evidence of protected petitioning was introduced to hold Petitioners liable for other conduct, rather than imposing liability for the First Amendment activity as such. Respondent contends this ruling is "settled law" because it was addressed in a footnote in *Pennington*. Opp. 28-30. But that contention ignores the central point of the Petition about this issue: the *Pennington* footnote is pure dictum, which constrains the lower courts but not this Court. Pet. 33-34. The existence of that dictum makes the case for certiorari on this issue especially compelling because it blocks percolation of the issue in the lower courts and can only be corrected by this Court. At the same time, because the dictum lacks stare decisis effect, there is no need to show unworkability or the other factors demanded by Respondent (Opp. 30-31), which are relevant only when the Court reconsiders prior holdings with precedential force. *See* Pet. 33.

This very case shows how the rule adopted below, and suggested by the *Pennington* dictum, subverts fundamental rights. Petitioner Stroud petitioned criminal justice officials two full years after Respondent's alleged retaliatory discharge. Pet. 5. That First Amendment conduct shows only that Petitioner was trying to enforce his rights under Illinois criminal law; it has no relevance to the long-past discharge. Yet the courts below allowed evidence of it to inflame the jury's passions, as reflected in an enormous and disproportionate punitive damages award. The suggestion that Petitioners have not been punished for constitutionally protected activity blinks reality.

Respondent argues that evidence of First Amendment activity might be relevant in other cases, such as where a white supervisor is a member of the Ku Klux Klan and fires a minority employee. Opp. 31. But even assuming that such evidence were ever admissible, it would only be so where its probative value greatly outweighed its prejudicial and chilling effect on First Amendment rights. Multiple courts have so held. Pet. 35-36. Under any constitutional rule, the evidence should not have been admitted against Petitioners here. The Court should revisit the *Pennington* dictum to guard against further encroachments on this core right.

The logic of Respondent's arguments concerning the Illinois court's other two *Noerr-Pennington* rulings is difficult to follow, but appears to be that the court did not mean what it said. Respondent nowhere denies that the Appellate Court's refusal to apply *Noerr-Pennington* to petitioning that has already been completed creates a split with this Court and with numerous courts of appeals. *See* Pet. 30-32. Instead, Respondent contends the Appellate Court did not refuse to apply *Noerr-Pennington* to completed petitioning activity. Opp. 34-35. That is incorrect. To be sure, the Appellate Court recited that "the doctrine may also be applied where a party contends that another party's completed lawsuit is unlawful." Pet. App. 42a-43a. But then, ignoring that principle, the court rejected Petitioners' *Noerr-Pennington* objection on the very ground that "defendants have already had their 'day in court' on their civil eavesdropping claim against Blount, and the State's Attorney decided that there were no

grounds to charge Blount criminally." Pet. App. 43a. Whatever passing lip service the court may have paid to *Noerr-Pennington*'s applicability to completed conduct, it applied a very different rule of decision here, in conflict with numerous other courts.

As for the Appellate Court's first *Noerr-Pennington* rationale – that the doctrine does not apply to retaliation claims – Respondent again does not contest that this ruling conflicts with the decisions of this Court and multiple courts of appeals. *See* Pet. 25-29. Instead, Respondent engages in verbal contortions to argue that this is not actually what the court below held. Respondent's arguments cannot be squared with the court's opinion. Respondent never mentions the operative language of the Appellate Court's ruling, which is unmistakably clear: the court "decline[d] to extend the applicability of the *Noerr-Pennington* doctrine to provide immunity from retaliation claims." Pet. App. 41a-42a. Given this plain language, Respondent's claim (Opp. 36) that "[n]othing in the decision below suggests that the Appellate Court would refuse to apply the *Noerr-Pennington* doctrine in similar cases," including "retaliation cases," is inexplicable.[3]

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[3] Respondent also misleadingly contends that the Appellate Court "recognized that the *Noerr-Pennington* doctrine does generally apply in cases (including retaliation cases) involving labor law or business and economic interests." Opp. 35. But to underscore its view that the doctrine does *not* apply in *other* cases, the court below stated: "Notably, the United States Supreme Court has never applied the doctrine in a case that did not involve the Sherman Act, the National Labor Relations Act, or business and economic interest disputes between competitors." Pet. App. 40a.

The *Noerr-Pennington* rulings below plainly merit review.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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