No. - 10-349 



IN THE
# Supreme Court of the United States

SHELL OIL COMPANY; SWEPI LP (AS SUCCESSOR-IN-INTEREST TO SHELL WESTERN E & P, INC.),
*Petitioners*,

v.

NANCY FULLER HEBBLE, *ET AL.*,
*Respondents.*

**On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma**

## PETITION FOR A WRIT OF CERTIORARI

THOMAS R. PHILLIPS
DAVID M. RODI
EVAN A. YOUNG
BAKER BOTTS LLP
98 San Jacinto Boulevard
Suite 1500
Austin, TX 78701-4078
(512) 322-2500

TIMOTHY GEHL
SENIOR COUNSEL
SHELL OIL COMPANY
P.O. Box 2463
Houston, TX 77252-2463
(713) 241-2333

JEFFREY A. LAMKEN
*Counsel of Record*
ROBERT K. KRY
MARTIN V. TOTARO
MOLOLAMKEN LLP
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

KATHLEEN M. SULLIVAN
QUINN EMANUEL URQUHART & SULLIVAN LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7327

*Counsel for Petitioners Shell Oil Company and SWEPI LP*

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D.C. 20002

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## QUESTIONS PRESENTED

In *BMW* v. *Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), this Court held that courts must examine the "disparity" between the punitive damages award and the "actual or potential harm" from the misconduct—calculating "the ratio between punitive and compensatory damages"—to ensure the punitive award is consistent with due process. *State Farm*, 538 U.S. at 418, 425. "When compensatory damages are substantial," the Court stated, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit" of due process. *Id.* at 418. Here, the courts below upheld a punitive damages award of $53,625,000 based on Shell's failure to pay $750,708 in contractual net-profits in connection with an oil-and-gas lease. The jury also awarded about $12.5 million in prejudgment interest, calculated almost entirely at a special 12% rate under a statute that initially denominated such interest a "penalty"; interest at the State's ordinary 6% prejudgment rate would at most have been about $1.5 million. The courts calculated the ratio of punitive to compensatory damages as 4.06-to-1 only by deeming all prejudgment interest at the special 12% rate to be part of the "compensatory" award. The questions presented are:

1. Whether, in calculating the ratio of punitive damages to harm to the plaintiff, heightened penalties such as 12% interest imposed to compel compliance may be treated as "compensatory."

2. Whether, in determining the maximum punitive damages award in a case involving a substantial compensatory award and only economic harm, courts should be guided by the 1-to-1 ratio mentioned in *State Farm* or instead presume that anything within the range of 4-to-1 is permissible.

## PARTIES TO THE PROCEEDINGS BELOW

Petitioners Shell Oil Company and SWEPI LP (as successor-in-interest to Shell Western E & P, Inc.) were Defendants/Appellants in the Court of Civil Appeals of the State of Oklahoma and the Supreme Court of Oklahoma.

Nancy Fuller Hebble, Susan Fuller Maley, as Individuals; Nancy Fuller Hebble and Susan Fuller Maley, as Co-Trustees of the Thomas R. Fuller Testamentary Trust; Wachovia Bank, N.A., as Executor of the Estate and Trustee of the Elizabeth Fuller Gardner Trust; and Marshall T. Steves, as Trustee of the Dings Trust Agency, were Plaintiffs/Appellees in the Court of Civil Appeals of the State of Oklahoma and the Supreme Court of Oklahoma.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to this Court's Rule 29.6, petitioners state that Shell Oil Company is a Delaware corporation and a wholly owned subsidiary of Shell Petroleum, Inc. Shell Petroleum, Inc. is a Delaware corporation, the shares of which are owned directly or indirectly by Shell Petroleum N.V. Shell Petroleum N.V. was founded under the laws of the Netherlands. The shares of Shell Petroleum N.V. are 100% owned by Royal Dutch Shell plc, a publicly traded company.

Petitioners also state that SWEPI LP (successor-in-interest to Shell Western E & P, Inc.) is a Delaware limited partnership and is ultimately wholly owned by Shell Oil Company. SWEPI LP's predecessor, Shell Western E & P, Inc. (Shell Western Energy and Production, Inc.) was organized as a Delaware corporation. On December 29, 1999, it was converted into a Delaware limited partnership, and is now known as SWEPI LP.

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IN THE

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SHELL OIL COMPANY; SWEPI LP (AS SUCCESSOR-IN-INTEREST TO SHELL WESTERN E & P, INC.),

*Petitioners,*

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**On Petition for a Writ of Certiorari to the Court of Civil Appeals of the State of Oklahoma**

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## PETITION FOR A WRIT OF CERTIORARI

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Petitioners Shell Oil Company and SWEPI LP (successor-in-interest to Shell Western E & P, Inc.) (collectively "Shell") respectfully petition for a writ of certiorari to review the judgment of the Oklahoma Court of Civil Appeals in this case.

## OPINIONS BELOW

The opinion of the Court of Civil Appeals (App., *infra*, 1a-16a) is reported at __ P.3d __, 2009 WL 6764045 (Okla. Civ. App. Dec. 18, 2009). The orders and judgment of the District Court for Stephens County, Oklahoma (App., *infra*, 17a-30a) are unreported.

## STATEMENT OF JURISDICTION

The judgment of the Court of Civil Appeals was filed on December 18, 2009 (App., *infra*, 1a), and rehearing was denied on January 26, 2010 (*id.* at 31a). The Oklahoma Supreme Court denied a petition for a writ of certiorari on April 12, 2010, with two Justices dissenting (*id.* at 32a-33a). On July 1, 2010, Justice Sotomayor extended the time within which to file a petition for a writ of certiorari to and including August 10, 2010. On July 30, Justice Sotomayor further extended the time to and including September 9, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

## CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment provides in relevant part:

> No State shall * * * deprive any person of * * * property, without due process of law * * * .

U.S. Const. amend. XIV, § 1.

## PRELIMINARY STATEMENT

The decision below upholds a punitive damages award of more than $53 million based on Shell's failure to pay approximately $750,000 in contractual "net profits" from an oil-and-gas lease. That punitive award—the largest upheld in Oklahoma history—is more than 70 times the sum Shell failed to pay. The Oklahoma courts sustained that award under *BMW* v. *Gore*, 517 U.S. 583 (1996), and *State Farm Mutual Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), by deeming $12.5 million in prejudgment interest to be part of the "compensatory" award—even though almost all of that interest was imposed at a special 12% rate under a statute that, as originally enacted, expressly denominated it a "penalty." (By contrast, interest under Oklahoma's ordinary 6% prejudgment rate would at most have been about $1.5 million.) A $750,000 award thus ballooned to a "compensatory" award of more

than $13 million. Comparing the $53.6 million in punitive damages to that $13 million figure, the court of appeals announced that the ratio of punitive to compensatory damages was 4-to-1.

The court of appeals upheld that ratio in two brief paragraphs. The first paragraph quoted one sentence each from *Gore* and *State Farm* to acknowledge that excessive punitive damages awards violate the Constitution. App., *infra*, 15a. The second paragraph devoted 138 words to applying those precedents, upholding the award because it "compares favorably with [the ratio] in *TXO Production Co.* v. *Alliance Resources Corp.*, 509 U.S. 443 [(1993)]." *Id.* at 15a-16a. Of the five factors this Court has identified as relevant to reprehensibility, the court of appeals mentioned only one. And the court did not mention *State Farm*'s observation that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425.

If the due-process limits on punitive damages identified by this Court are to be the law of the land, the decision below cannot go unreviewed. *Gore* and *State Farm* hold that, in evaluating whether a punitive award is constitutionally permissible, courts must examine the "ratio" between "punitive" and "compensatory" damages. But state and federal courts have fragmented over the recoveries that can be considered "compensatory" as opposed to "punitive," depriving the ratio of its capacity to act as a constitutional check. This Court has also observed that, where compensatory damages are "substantial," a ratio of 1-to-1 may be the due-process limit. But courts have fractured on their construction of that guidance as well, disagreeing on the applicability and relevance of that 1-

to-1 ratio even where compensatory awards are manifestly "substantial."

Those issues are important and recurring. Either defendants are regularly being subjected to unconstitutional punitive damages awards in myriad jurisdictions, or plaintiffs are being erroneously denied the awards authorized by state law in others. In a Nation governed by a single federal Constitution, neither is tolerable. Review is warranted.

## STATEMENT

### I. BACKGROUND

This case arises out of a series of oil-and-gas agreements. Respondents' predecessors, W.F. Daiber and P.C. Dings, leased oil-and-gas extraction rights from a landowner. Tr. 303-306. In 1927, they executed a "drilling assignment" that transferred the lease to others but reserved for themselves a "net-profits interest." Tr. 306-309; App., *infra*, 2a. Unlike a royalty interest, which represents partial ownership of the underlying minerals, a net-profits interest is a contractual right to a portion of profits from production. U.S. Energy Information Administration Glossary, http://www.eia.doe.gov/glossary/index.cfm?id=N.

The lease, still subject to the net-profits interest, was assigned to Shell in 1948. App., *infra*, 2a. In 1962, the lease was the object of a "unitization" proceeding before the Oklahoma Corporation Commission in connection with one formation; in 1970 and 1972, it was the subject of a drilling-and-spacing order and a private joint-operating agreement covering another. *Id.* at 2a-4a, 6a-7a. The net effect was that respondents, as successors to Daiber and Dings, were entitled to a share of Shell's net profits from certain wells. *Id.* at 4a.

Between August 1973 and December 1985, Shell paid all sums due under the original Daiber/Dings assignment, but failed to pay respondents' share of net profits from two sources—the "Brittain Deese Waterflood Unit" and "Brittain Deep No. 2 Well." App., *infra*, 4a. In December 1985, Shell assigned its interests to Maynard Oil Company, which assumed all responsibility for paying respondents. *Ibid.* The unpaid sums at that point totaled $750,708. *Ibid.*

In 1985, attorneys for one of respondents' predecessors asked Shell about payments. Tr. 730-731. Respondents later claimed that Shell's responses, which were silent as to the Brittain Deep No. 2 well, were misleading. Tr. 1115-1116. Because Shell had sold the oil-and-gas lease to Maynard in 1985, one of respondents' predecessors also wrote to Maynard. Tr. 770-771. Maynard then contacted Shell. Tr. 381-384, 561-562. Shell referred the matter to a division-order analyst who, in 1987, wrote an internal memorandum concluding that the Brittain Deep No. 2 Well was subject to a net-profits interest and that, if net profits were earned, they had not been paid. Tr. 932-935, 945-946. On the same day she wrote that memorandum (but before anyone had acted on it), she sent a letter to Maynard stating that Shell was looking into the matter. Tr. 384-385, 946.

## II. Proceedings Below

### A. Proceedings In Trial Court

1. Eight years later, in 1995, respondents filed suit in Oklahoma district court. App., *infra*, 4a. They sought actual and punitive damages for breach of fiduciary duty, fraud, and violations of Oklahoma statutes regulating payments on oil-and-gas production, now codified (and collectively referred to as) the Production Revenue Standards Act ("PRSA"), 52 Okla. Stat. §§ 540, 570.10. Ad-

dressing a matter of first impression, the trial court held that Shell had owed respondents a fiduciary duty and rejected Shell's argument that the statute of limitations had run. The limitations period, the court ruled, did not begin to run until (1) Shell "repudiated" its duty, and (2) respondents knew or should have known that Shell had done so. App., *infra*, 4a. The trial court determined that a jury should decide when those events occurred. *Ibid.*

The trial was conducted in two stages. The first concerned Shell's liability for unpaid sums. At trial, Shell did not dispute that respondents had been contractually entitled to net profits. But any contract claim was clearly time-barred. Tr. 289-293. Respondents therefore asserted fraud and breach-of-fiduciary-duty claims. The court of appeals summarized the fraud evidence as follows:

> Shell knew in 1988 it held oil proceeds belonging to Owners. * * * (1) Shell knew Owners did not know about the proceeds, (2) Shell did not tell Owners about the proceeds, (3) Shell knew Owners relied on Shell's operating statements, and (4) Shell intended to keep Owners' proceeds based on its position the statute of limitations had run in 1987, two years after it sold the Crews Lease to Maynard.

App., *infra*, 14a-15a; see also *id.* at 23a-24a (district court's similar description).

Based on that evidence, the jury found Shell liable for breach of fiduciary duty and "false representation, nondisclosure or concealment, deceit, or constructive fraud." App., *infra*, 5a. It awarded a total of $13,205,916 "in actual damages for financial loss and statutory interest thereon." *Id.* at 29a. Of that sum, $750,708 represented the "net profits from 1973 through 1985" that Shell failed

to pay. *Id.* at 4a. The remaining $12,455,208 was prejudgment interest calculated almost entirely at a special 12% rate. Tr. 965-966, 981-983; Pltfs. Exh. 250. While Oklahoma law ordinarily calculates prejudgment interest at a 6% simple rate, 15 Okla. Stat. § 266, the PRSA provides a 12% rate for non-payment of oil-and-gas revenues. 52 Okla. Stat. § 570.10. As originally enacted in 1980, the PRSA expressly denominated that 12% rate a "penalty," 52 Okla. Stat. § 540(B) (1981); that word, however, was deleted in 1985, Okla. Sess. Laws 1985, ch. 141, § 1. In 1989, the PRSA was amended to provide for 12% *compound* interest. Okla. Sess. Laws 1989, ch. 241, § 1.

In the second stage of trial, the jury awarded respondents $53,625,000 in punitive damages. App., *infra*, 2a. The district court entered judgment on May 30, 2008. *Id.* at 27a.

2. The trial court denied Shell's post-trial motions, rejecting Shell's claim that the punitive damages violated due process. App., *infra*, 5a, 17a-26a; see *id.* at 38a-66a (motions and argument). The court briefly addressed the three guideposts this Court set forth in *Gore*, 517 U.S. at 580-583—reprehensibility, the ratio between punitive and compensatory damages, and statutory penalties for comparable conduct. The court stated that "the record supports the jury's finding that Defendants' conduct was very reprehensible." App., *infra*, 23a. The court calculated the ratio of punitive to compensatory damages by counting all $12.5 million in interest as "compensatory," rejecting Shell's claim that the 12% rate was punitive. *Id.* at 24a. The resulting 4.06-to-1 ratio, the court held, is "well within a constitutionally acceptable range." *Id.* at 25a.

**B. Proceedings On Appeal**

1. Oklahoma's Court of Civil Appeals affirmed. App., *infra*, 1a-16a.[1] Addressing whether Shell owed respondents a fiduciary duty, the court acknowledged the general rule that "oil and gas operators have no fiduciary duty to non-operators arising solely from contracts such as leases, communitization agreements, or joint operating agreements," and that breaches of such agreements ordinarily give rise only to contract claims. *Id.* at 5a-6a. The court held, however, that the general rule does not apply to an operator who manages a "unit organization" established by the Oklahoma Corporation Commission. *Id.* at 6a. The "resort to the police powers of the state" in "unitization proceedings," the court held, gives rise to a fiduciary duty. *Ibid.*

Even so, the court admitted that, for most of the revenue at issue, it was not "clear-cut" that Shell owed a fiduciary duty. App., *infra*, 6a. In particular, for the Brittain Deep No. 2 Well that had generated $715,000 of the $750,000 at issue, Shell became the operator not because the State pooled interests and appointed it; rather, it became the operator "pursuant to a joint operating agreement" among *private* parties. *Id.* at 7a. Ultimately, however, the court held that Shell owed a fiduciary duty to respondents for that well nonetheless. *Ibid.*[2]

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[1] In Oklahoma, civil appeals ("petitions in error") are filed in the Oklahoma Supreme Court, which either reviews them or orders review by the Court of Civil Appeals. In this case, the Oklahoma Supreme Court directed the Court of Civil Appeals to consider the appeal. App., *infra*, 36a.

[2] The court also held that the limitation period had been tolled under Oklahoma's discovery rule, App, *infra*, 8a-9a; upheld the trial court's instruction on the burden of proof, *id.* at 9a-10a; and ruled that Shell had waived its challenge to respondents' proof of reliance, *id.* at 10a.

The court also affirmed the award of prejudgment interest at 12% under the PRSA. App., *infra*, 10a-13a. The court conceded that the PRSA's enhanced interest provisions could be applied only "prospectively." *Id.* at 12a. The court held, however, that Shell must pay 12% interest on all amounts owing as of the PRSA's 1980 enactment, even if those obligations had accrued years before. *Ibid.* The court similarly held that, regardless of the accrual date, all sums outstanding when the PRSA was amended to provide for compound interest in 1989 were subject to compound 12% interest from that date forward. *Ibid.*

Most important here, the court held that all of the prejudgment interest must be considered "part of compensatory damages." App., *infra*, 13a. The court did not dispute that, until October 1985, the PRSA expressly designated 12% interest a "penalty." *Ibid.* But it held that, because the word "penalty" was deleted in 1985, the 12% rate was not a penalty, even as applied to interest accruing between 1980 and 1985—when the PRSA expressly designated the interest a penalty. *Ibid.*

Finally, the court turned to whether the punitive damages were excessive under the U.S. Constitution. App., *infra*, 15a-16a. Notwithstanding its obligation to conduct *de novo* review under *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the court devoted just two paragraphs to rejecting Shell's argument (App., *infra*, 72a-76a, 78a-87a) that the $53.6 million award—more than 70 times the amount Shell erroneously withheld—exceeded constitutional bounds. The first paragraph cited *Gore* for the proposition that a "grossly excessive punitive damage award violates the Fourteenth Amendment." App., *infra*, 15a. It then cited *State Farm* to identify the now-familiar "three guideposts" used to evaluate excessiveness. *Ibid.*

The second paragraph purported to apply those holdings to the facts. In full, it stated:

> In the present case, the reprehensibility of Shell's conduct is heightened by its intentional deceit of the interest owners whose oil proceeds it held for their benefit while it owed a fiduciary duty to those owners arising from its resort to the police powers of the state in unitizing oil and gas interests. The amount of the punitive damage award was slightly more than four times the amount of the actual damages awarded. We do not find this disparity unreasonable. The punitive damage award in this case compares favorably with that in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 [(1993)], where the jury awarded $19,000.00 in actual damages arising from the defendant's baseless claim on plaintiff's oil and gas interests and $10,000,000.00 in punitive damages. Proportionately, Shell has received a much lighter sanction.

App., *infra*, 15a-16a. Rehearing was denied. *Id.* at 31a.

### C. Proceedings Before The Oklahoma Supreme Court

Shell sought review in the Oklahoma Supreme Court. Challenging the constitutionality of the punitive damages award, Shell urged that 12% interest under the PRSA "is penal in nature" and "cannot be considered compensatory when evaluating the compensatory-to-punitive ratio." App., *infra*, 102a. Shell also urged that even a 4-to-1 ratio exceeds constitutional bounds, and challenged the court of appeals' failure to perform meaningful *de novo* review, including the failure to address four of the five factors this Court had identified as relevant to reprehensibility. *Id.* at 99a-103a.

The court denied certiorari on April 12, 2010. App., *infra*, 32a. Vice Chief Justice Taylor, joined by Justice Winchester, dissented:

> I would grant certiorari to give a full and meaningful *de novo* review of this punitive damages award under the *State Farm* v. *Campbell*, 538 U.S. 408 (2003), guideposts and factors. That review should also include a complete examination of the issue of due process in the award of these punitive damages.

*Id.* at 32a-33a. The court later stayed the mandate's effectiveness pending this Court's review. *Id.* at 34a.

## REASONS FOR GRANTING THE PETITION

In *BMW* v. *Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), this Court held that excessive punitive damages awards violate due process. To ensure that such awards are "reasonable" and "proportionate," the Court held that reviewing courts must examine (among other things) the "disparity" between the amount of the punitive award and the "actual or potential harm" from the misconduct. *State Farm*, 538 U.S. at 418. "When compensatory damages are substantial," the Court observed, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425; see *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2634 n.28 (2008) (where recovery is "substantial," the "constitutional outer limit may well be 1:1").

The decision below upheld a $53 million punitive damages award that is *more than 70 times* the $750,708 that Shell failed to pay. The Oklahoma courts sustained that breathtaking award by ruling that $12.5 million of interest imposed almost exclusively at 12%—under a statute that initially denominated such interest a "penalty"—should be considered part of the "compensatory" award.

(Under Oklahoma's ordinary prejudgment rate, by contrast, interest would at most have been about $1.5 million.) By shifting millions in penalty interest to the compensatory side of the ledger, the court transformed a clearly improper double-digit punitive-to-compensatory ratio into a putatively more presentable 4.06-to-1 ratio. It then sustained that ratio by asserting that this Court had upheld a higher one in *TXO Production Co.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993)—a pre-*Gore* case involving small compensatory damages ($19,000) and enormous potential harm.

The decision below raises two questions warranting this Court's review. First, the ratio of punitive to compensatory damages this Court identified in *Gore* and *State Farm* can provide a meaningful check on disproportionate punitive awards only if courts apply consistent standards to distinguish between punitive sums (that belong in the numerator) and compensatory awards (that belong in the denominator). As this case illustrates, deeming a portion of an award "compensatory" can mean the difference between an obviously excessive double-digit ratio and one that is potentially permissible. Yet lower courts have fragmented on how to determine whether an award is compensatory for due-process purposes.

Second, while this Court has "decline[d] to impose a bright-line ratio which a punitive damages award cannot exceed," it has held that the permissible ratio depends on whether compensatory damages are "substantial." *State Farm*, 538 U.S. at 425. Relatively higher ratios "may comport with due process where 'a particularly egregious act has resulted only in a small amount of economic damages.'" *Ibid.* But "substantial" compensatory awards require "a lesser ratio, perhaps only equal to compensa-

tory damages." *Ibid.* Courts, however, have divided on the meaning of that guidance.

## I. THE COURT SHOULD GRANT REVIEW TO ESTABLISH THE CRITERIA FOR DETERMINING WHETHER AN AWARD IS "COMPENSATORY" FOR DUE-PROCESS PURPOSES

In evaluating the constitutionality of punitive damages awards, courts must examine the "disparity between the actual or potential harm suffered by the plaintiff" on the one hand "and the punitive damages award" on the other. *State Farm*, 538 U.S. at 418, 424-425; *Gore*, 517 U.S. at 580-583. The ratio between the punitive award and the harm to the plaintiff, together with evaluation of the conduct's reprehensibility and comparable statutory penalties, ensures the "reasonable[ness]" and "proportion[ality]" the Constitution requires. *State Farm*, 538 U.S. at 426. The ratio, however, is wholly dependent on whether particular relief is categorized as "compensatory" or "punitive." Here, the court of appeals ruled that $12.5 million in prejudgment interest, mostly calculated at a special *12%* rate, should be treated as "compensatory" even though 12% is twice Oklahoma's ordinary prejudgment rate and was imposed under a statute that originally designated it a "penalty." Simply placing the "compensatory" label on an award that is functionally punitive defeats the "reasonableness" and "proportionality" that due process requires. To prevent such results and restore uniformity, review should be granted.

### A. The Courts Are Divided On What Constitutes A Compensatory Award

In *State Farm*, this Court held that courts must examine the "ratio between harm, or potential harm, to the plaintiff and the punitive damages award." 538 U.S. at 424; see *Gore*, 517 U.S. at 580. The "harm inflicted on the

plaintiff" often will equal the award of compensatory damages. See *Gore*, 517 U.S. at 580. But sometimes an award formally labeled "compensatory" is "based on a component which was duplicated in the punitive award." *State Farm*, 538 U.S. at 426. Due-process protections must apply in that situation as well: To allow litigants, courts, or legislatures to evade constitutional requirements by slapping the "compensatory" label on recoveries that are obviously punitive would render this Court's "restraints on jury excess" just "as fickle as the process [they were] designed to superintend." *TXO*, 509 U.S. at 467 (Kennedy, J., concurring). Courts, however, are divided on how to determine whether a particular recovery is compensatory.

1. In this case, no one disputes that the award of $750,708—the amount Shell failed to pay respondents—is compensatory. Comparing that figure to the $53 million in punitive damages produces a ratio of more than 70-to-1. That is precisely the sort of award "exceeding a single-digit ratio" that, under this Court's decisions, almost always violates due process. *State Farm*, 538 U.S. at 425.

The Oklahoma courts, however, deemed 30 years of interest at a 12% rate—under a statute initially designating such interest a "penalty"—to be "compensatory." App., *infra*, 2a, 15a. Adding the $12.5 million in interest to the original $750,000 award produced a "compensatory" award of over $13 million and a ratio approximating 4-to-1. *Id.* at 15a. The 12% rate imposed here is twice the "'standard,' nonpunitive" prejudgment rate of 6% simple interest Oklahoma ordinarily uses "to compensate for the use of money." *Tulsa Energy* v. *KPL Prod. Co.*, 111 F.3d 88, 91 (10th Cir. 1997); 15 Okla. Stat. § 266. Had interest at Oklahoma's "'standard,' nonpunitive" 6% rate been awarded instead, total interest would at most have

been about $1.5 million—a fraction of the $12.5 million awarded.[3]

In placing the entire $12.5 million interest award on the "compensatory" side of the ledger, the decision below did not ask whether imposing compound interest at double the ordinary rate serves as "compensation" in any traditional sense. Instead, it relied on the legislature's label. The court conceded that, before the PRSA was amended in 1985, it expressly denominated the 12% rate a "penalty": Covered defendants, the PRSA declared, "shall be liable to the persons legally entitled to the proceeds from production for the unpaid amount * * * with interest thereon at the rate of twelve percent (12%) per annum, *as the penalty*." 52 Okla. Stat. § 540(B) (1981) (emphasis added). But the court of appeals held that the PRSA's 12% rate is compensatory rather than punitive because a 1985 amendment replaced the phrase "as the penalty" with the clause "calculated from the date of first sale." Okla. Sess. Laws 1985, ch. 141, § 1; App., *infra*, 13a (citing *Purcell* v. *Santa Fe Minerals, Inc.*, 961 P.2d 188 (Okla. 1998)). The court then applied that conclusion even to interest that accrued between 1980 and 1985—when the statute *did* denominate 12% interest a "penalty"—and to interest on that penalty interest until judgment.

The impact of that ruling could not be more stark. Of the $13.3 million the Oklahoma courts deemed "compensatory," more than 90% was interest, and nearly 90% was attributable to the special 12% rate. If the statutory award of double-ordinary-interest were categorized as

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[3] Even if one assumes that all $750,708 in unpaid net profits accrued in 1973 rather than throughout the 12-year period between 1973 and 1985, the ordinary 6% rate would have generated $45,042.48 in annual interest—$1,531,444 over 34 years.

punitive, the ratio of punitive to compensatory damages would be approximately 87-to-1. Excluding penalty interest from the calculation entirely yields a ratio exceeding 70-to-1. And even if one includes prejudgment interest at Oklahoma's "'standard,' nonpunitive" 6% rate in the compensatory award, *Tulsa Energy*, 111 F.3d at 91, the ratio is still well above 20-to-1. Only by treating the entire 12% interest award as compensatory could the courts below avoid exceeding the "single-digit ratio" beyond which awards rarely "satisfy due process," *State Farm*, 538 U.S. at 425:

| | | |
|---|---|---|
| Punitive damages + 12% penalty interest ($64,548,764) | Sum withheld ($750,708) | 86.9:1 |
| Punitive damages only ($53,625,000) | Sum withheld ($750,708) | 71.4:1 |
| Punitive damages + 12% penalty interest ($64,548,764) | Sum withheld + interest at standard rate ($2,283,152) | 28.2:1 |
| Punitive damages only ($53,625,000) | Sum withheld + interest at standard rate ($2,283,152) | 23.4:1 |
| Punitive damages only ($53,625,000) | Sum withheld + 12% penalty interest ($13,205,916) | 4.06:1 |

2. The decision below implicates a wide-ranging conflict. Like the decision below, many courts make the legislature's "compensatory" label dispositive. For example, in *Modern Management Co.* v. *Wilson*, 997 A.2d 37 (D.C. 2010), the District of Columbia's highest court held that a treble damages award (which necessarily exceeds "the actual harm suffered") should be considered compensatory. The court "compare[d] the treble figure to the pu-

nitive award," not because the treble figure reflected the plaintiff's actual injury, but rather "because the treble figure reflects the legislature's desire to ensure 'full compensation.'" *Id.* at 57.

The Third Circuit and Illinois courts have held that an award of attorney's fees goes "on the compensatory side" of the ratio because the legislative "purpose" is "to ensure that plaintiffs could secure counsel." *Blount* v. *Stroud*, 915 N.E.2d 925, 944-945 (Ill. Ct. App. 2009), pet'n for cert. filed, No. 09-1572 (U.S. June 25, 2010). Thus, in *Willow Inn, Inc.* v. *Public Service Mutual Insurance Co.*, 399 F.3d 224 (3d Cir. 2005), the court agreed that *Gore* requires courts to examine "the actual harm inflicted" on the plaintiff, and conceded that it was a "stretch" to say the defendant had "inflicted" attorney's fees and court costs. *Id.* at 236. But the court held that fees and costs are nonetheless a "proper term to compare to the punitive damages award for ratio purposes" because the State's fee-shifting statute had a purpose of enabling plaintiffs to bring actions and "to secure counsel on a contingency fee." *Id.* at 235, 236; see also *Jurinko* v. *Med. Protective Co.*, 305 F. App'x 13, 28 n.16 (3d Cir. 2008) ("In calculating this ratio, we include attorney's fees and costs as part of compensatory damages."). Following *Willow Inn*, *Blount* similarly treated a million-dollar fee award that was many times actual damages as compensatory, reducing the ratio from 10-to-1 to less than 2-to-1. 915 N.E.2d at 943-946.

Other courts, by contrast, look to the *function served* by the recovery—whether it provides money to compensate for the harm imposed or instead "includes a punitive element that is duplicated in the punitive damages award." *Bridgeport Music, Inc.* v. *Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007). As this Court has explained, compensatory awards "redress the concrete loss

that the plaintiff suffered by reason of the defendant's wrongful conduct." *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001). In other words, compensatory damages provide a recovery that "'will compensate the injured party for the injury sustained, *and nothing more*.'" *McMillian* v. *FDIC*, 81 F.3d 1041, 1055 (11th Cir. 1996) (quoting *Black's Law Dictionary* 270 (6th ed. abridged 1991) (emphasis added)); accord *Vt. Microsystems, Inc.* v. *Autodesk, Inc.*, 138 F.3d 449, 452 (2d Cir. 1998). Punitive damages, by contrast, do not compensate but provide retribution and deterrence. *State Farm*, 538 U.S. at 416.

Thus, in *Bridgeport*, the Sixth Circuit looked beyond legislative labels to hold that a putatively "compensatory" award making the infringer "liable for the copyright owner's actual damages and the profits of the infringer" included "a punitive element." 507 F.3d at 489. The court ruled that the "actual harm" the plaintiff suffered "[wa]s reflected in the amount * * * lost because of the infringement." *Ibid.* But the disgorgement of profits gained by the infringer, the court held, was punitive: It had the deterrent effect of "prevent[ing] the infringer from unfairly benefiting from a wrongful act." *Ibid.* Comparing the $3.5 million punitive award to the actual loss of approximately $50,000—and not to the larger sum the defendant was forced to disgorge—produced "very high" ratios. *Ibid.*

This Court too has looked beyond legislative labels, holding that a putatively compensatory award for "emotional distress" may embody jury outrage that duplicates a punitive function. *State Farm*, 538 U.S. at 426. Following that decision, many courts have reduced punitive awards where an award for emotional distress has already been made. See, *e.g.*, *Roby* v. *McKesson Corp.*, 219

P.3d 749, 768-769 (Cal. 2009); *Tony Gullo Motors I, L.P.* v. *Chapa*, 212 S.W.3d 299, 308-310 (Tex. 2006).

3. The approach adopted in cases like this one and *Wilson* cannot be reconciled with this Court's cases, settled understandings, or common sense. *State Farm* and *Gore* make clear that courts must look to the "harm" to the plaintiff. Here, there can be no claim that 12% interest compensates for such a harm or represents the lost time-value of money. To the contrary, 12% is double Oklahoma's 6% "'standard,' nonpunitive rate of interest," which *is* designed "to compensate for the use of money." *Tulsa Energy*, 111 F.3d at 91; see *Sec'y of Admin. & Fin.* v. *Labor Relations Comm.*, 749 N.E.2d 137, 142 (Mass. 2001) ("flat twelve percent" interest "significantly above-market"). It does not simply provide money to substitute for the injury sustained "and no more." The Oklahoma Supreme Court has recognized that 12% interest functions as a penalty—it is "*not* merely compensation for the use of money belonging to another," but instead "interest *qua penalty* to compel compliance" with payment requirements. *Fleet* v. *Sanguine, Ltd.*, 854 P.2d 892, 899-900 (Okla. 1993) (some emphasis added).[4]

It is true that, when the Oklahoma legislature amended the PRSA in 1985, it eliminated the word "penalty" from the statute. But that amendment in no way altered the *function* of 12% interest. The only substantive change in Oklahoma's statute occurred in 1989, when the penalty was increased to provide 12% *compound* inter-

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[4] Notably, the PRSA exempts defendants who *justifiably* withhold payment based on a legitimate dispute over title. Such defendants pay only the "'standard,' nonpunitive rate" of "six percent" simple interest—the amount needed to *compensate*, but not the higher amount which *punishes*. *Tulsa Energy*, 111 F.3d at 91; see *Hull* v. *Sun Ref. & Mktg. Co.*, 789 P.2d 1272, 1276-1277 (Okla. 1990).

est. App., *infra*, 12a; 1989 Okla. Laws, ch. 241, § 1. That made the penalty *more* punitive, not less.[5]

Whether a recovery is compensatory or punitive for due-process purposes is a federal question. For federal purposes, penalties should be uniformly treated as penalties regardless of the label the State chooses to attach (or remove). In the criminal context, for example, every fact necessary to authorize a higher sentence is considered an element of the offense that must be found by a jury beyond a reasonable doubt, "no matter how the State labels it." *Ring* v. *Arizona*, 536 U.S. 584, 602 (2002). "[W]hether the [state] statute calls them elements of the offense, sentencing factors, or Mary Jane," the Constitution treats them the same. *Id.* at 610 (Scalia, J., concurring). The Takings Clause likewise cannot be avoided simply by declaring a landowner's otherwise established property rights to be something other than "property." For the same reasons, the legislature's deletion of the word "penalty" from the statute here, without changing the statute's substance, should not alter the award's characterization for due-process purposes. Cf. *Ala. Dep't of Conservation & Natural Res.* v. *Exxon Mobil Corp.*, 11 So. 3d 194, 200-201 (Ala. 2008) (legislature's deletion of the word "penalty" from bill's title is irrelevant to whether heightened interest rate under Alabama's oil-and-gas payment statute is "penal in nature").

A contrary rule would yield absurd results. Under it, States that limit plaintiffs to traditional compensation

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[5] Indeed, the common law generally disallowed compounding "because of its harsh and oppressive character." Hale, *Handbook on the Law of Damages* 172 (1896). As an "exception to the general rule * * * compound interest [wa]s sometimes inflicted by way of punishment." Sedgwick, *A Treatise on the Measure of Damages* 404 (3d rev. ed. 1858).

would face stricter limits on punitive damages. But States that depart from traditional limits—imposing increasingly harsh remedies such as double damages or double interest awards—would be constitutionally permitted to impose proportionately higher punitive damages awards as well, even where the underlying "harm" is the same. This case exemplifies that absurdity. If interest had been limited to the ordinary, nonpunitive 6% rate, the "compensatory" award here would have been no greater than $2.3 million, and the $53 million punitive award—a ratio exceeding 20-to-1—would have been clearly impermissible. But the courts below ruled that Oklahoma's imposition of the extreme sanction of 12% compound interest, by reducing the ratio to 4-to-1, made it constitutionally permissible to impose an even more extreme $53 million punitive damages award.

Of course, States have a legitimate interest in imposing penalties to compel compliance. For example, "to assure prompt and full payment of economic claims," New York provides a heightened "interest rate [that] is designed to inflict an economic sanction or penalty on those insurers who do not comply. Said differently, the statute and regulation are punitive, with severe penalties, to encourage prompt adjustments of claims." *Cardinell* v. *Allstate Ins. Co.*, 302 A.D.2d 772, 774 (N.Y. App. Div. 2007) (addressing N.Y. Ins. Law § 5106(a)) (citations and quotation marks omitted). Likewise, federal law has punitive prompt-payment provisions.[6] But such statutes

[6] The federal prompt-payment statute establishes an "interest penalty" government agencies owe late-paid contractors. 31 U.S.C. § 3902. Rather than compensating for the time-value of money, such interest deters bad behavior by providing "incentives for the Federal Government to pay its bills on time.'" *Inversa, S.A.* v. *United States*, 73 Fed. Cl. 245, 248 (2006). That penalty rate, however, is currently less than 4%. 75 Fed. Reg. 37,881.

achieve "deterrence and retribution," not compensation. *State Farm*, 538 U.S. at 416; see *Sterilite Corp.* v. *Cont'l Cas. Co.*, 494 N.E.2d 1008, 1011 (Mass. 1986) ("prejudgment interest" at excessive rate "could result in a windfall for plaintiffs amounting, in essence, to an award of punitive damages"). Because such statutes go beyond compensating plaintiffs and instead punish defendants, they are punitive, not compensatory.

**B. The Issue Is Important And Recurring**

The question raised by this case—which portions of an award count as "compensatory" for due-process purposes—is important and recurring. Whenever courts examine a punitive damages award, "the question becomes: What figure comprises the second term of the ratio to compare to the * * * punitive damages award? There is no shortage of candidates." *Willow Inn*, 399 F.3d at 234. Courts repeatedly confront "attempts to alter the ratio" by including or excluding recoveries for attorney's fees, prejudgment interest, and statutory penalties. *Amerigraphics, Inc.* v. *Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (Cal. Ct. App. 2010).

The issue has divided courts in a variety of contexts. Courts have disagreed over whether statutory treble damages awards should be considered compensatory or punitive. Some courts count treble damages as "compensatory." See pp. 16-17, *supra* (discussing *Wilson*, 997 A.2d at 57). But others hold that "[t]reble damages are a *form* of punitive damages" and thus *substitute* for jury-imposed multipliers. See *Perez* v. *Z Frank Oldsmobile, Inc.*, 223 F.3d 617, 621, 624 (7th Cir. 2000) (Easterbrook, J.). Courts similarly disagree over the proper treatment of attorney's fees. Many hold that such awards "should be counted on the compensatory side of the *Gore* ratio." See p. 17, *supra* (citing cases). But others have held that, because fee awards "'includ[e] a certain punitive ele-

ment,'" they "favor[] a lesser rather than greater award." *Daka, Inc.* v. *McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003); see also *Parrish* v. *Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003); *Wallace* v. *DTG Operations, Inc.*, 563 F.3d 357 (8th Cir. 2009) (substantial attorney's fees not included as actual damages).

Courts likewise diverge on the proper treatment of disgorged profits. In *Bridgeport*, the Sixth Circuit concluded that disgorgement is punitive. See p. 18, *supra*. But the Federal Circuit has held otherwise. When a jury awarded $1 in nominal damages for actual losses and *$15 million* for unjust enrichment, the court affirmed a *$50 million* punitive damages award based on its conclusion that all $15,000,001 was compensatory. *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 272 F.3d 1335 (Fed. Cir. 2001). On remand in light of *State Farm*, see 538 U.S. 974 (2003), the Federal Circuit again treated unjust enrichment as compensation. 345 F.3d 1366, 1369, 1372 (Fed. Cir. 2003). And notwithstanding this Court's conclusion in *State Farm* that putatively "compensatory" awards for mental anguish overlap with punitive damages, see p. 18, *supra*, some courts reject the notion that such awards include punitive components. See *Boyd* v. *Goffoli*, 608 S.E.2d 169, 182-184 (W. Va. 2004)

Courts are even divided on whether to treat ordinary prejudgment interest as compensatory. Some have held that ordinary prejudgment interest compensates for the time-value of money and is therefore compensatory. See *Goddard* v. *Farmers Ins. Co. of Or.*, 179 P.3d 645, 667 (Or. 2008); *Baker* v. *Nat'l State Bank*, 801 A.2d 1158, 1167, 1172 (N.J. Super. Ct. App. Div. 2002). But others disagree, perhaps because it makes little sense to punish stale claims more severely—much less to allow the passage of decades to multiply the punishment under an artificially high compound rate, as happened here. See,

*e.g.*, *JCB, Inc.* v. *Union Planters Bank, NA*, 539 F.3d 862, 869, 876 (8th Cir. 2008); *Amerigraphics*, 107 Cal. Rptr. 3d at 326-329; see also *Bridgeport Music*, 507 F.3d at 484-490 (omitting prejudgment interest without comment); *Peters* v. *Rivers Edge Mining, Inc.*, 680 S.E.2d 791, 803 & n.10, 826 (Va. 2009) (same). And courts have excluded prejudgment interest even where it was far too large to be overlooked as a mere rounding error. See *United Int'l Holdings, Inc.* v. *Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1232-1234 (10th Cir. 2000) (ignoring $28 million in prejudgment interest in ratio calculation); *Burns* v. *Prudential Sec., Inc.*, 857 N.E.2d 621 (Ohio Ct. App. 2006) (ignoring $4 million in prejudgment interest).

In each of those contexts, state and federal courts are vexed by the same fundamental question—how to distinguish the compensatory from the punitive for due-process purposes. And in each context, the answer to that question affects the ratio dramatically. Excluding a sum from the "punitive" numerator reduces the ratio arithmetically. Including that sum in the "compensatory" denominator reduces it geometrically. Such changes can alter the ratio by a factor of 20 or more, often (as here) with multi-million-dollar consequences. See p. 16, *supra*.

Only by granting review can this Court provide the guidance needed to eliminate the disarray. In each context, the basic standard should be the same, without regard to statutory labels. If the recovery represents a historically accepted and currently reasonable estimate of the "concrete loss that the plaintiff suffered by reason of the defendant's wrongful conduct," *Cooper Indus.*, 532 U.S. at 432, providing the plaintiff with the equivalent in money to "make good or replace the loss" and "nothing more," *McMillian*, 81 F.3d at 1055, it is compensatory. Compound interest at double the ordinary rate, multiple

damages awards, and other statutory penalties simply are not.

### C. This Case Is An Ideal Vehicle

This case represents an especially good vehicle for addressing the issue. First, the heightened prejudgment interest here was calculated using a concrete figure—12% interest. This case thus would not require evaluation of a subjective jury determination, such as an award for mental anguish, that might or might not contain a punitive element; the figures are definite and their origins statutory. Only the purely legal question of the award's proper treatment under this Court's precedents is in dispute. Second, the impact could not be more obvious. The 12% interest Oklahoma initially imposed as a penalty produced over 90% of what the courts below called "compensatory damages"; only a small fraction of that would have accrued at Oklahoma's ordinary prejudgment rate.

The ratio, moreover, was obviously dispositive in this case. Neither court below suggested it would have upheld a ratio exceeding 4-to-1, let alone a double-digit ratio far exceeding 20-to-1. And if ever there were a case that warranted a low ratio, this is it. Shell does not dispute that it failed to pay $750,000 in contractual net profits it owed respondents. But, of the five factors this Court considers in evaluating the critical due-process guidepost of reprehensibility, *four* weighed against a substantial award: There was no risk of "physical as opposed to economic" harm; no "disregard of the health and safety of others"; no "target[ing]" of the "financial[ly] vulnerab[le]"; and no recidivism. *State Farm*, 538 U.S. at 419.

The courts below identified only one factor, "deceit," to support the claim that Shell's conduct showed "heightened" reprehensibility. App., *infra*, 15a. But deceit is present in *every* fraud case. And the only evidence of

fraud invoked by the courts to sustain the verdict below was that, more than two years after Shell sold its interests in the oil-and-gas leases, it became aware that it had erroneously failed to pay respondents; knew respondents were unaware of that error; knew its prior statements to them were in error; but nonetheless chose "to keep [respondents'] proceeds based on its position the statute of limitations had run." App., *infra*, 14a-15a, 23a-24a; p. 6, *supra*. The deceit relied on here thus amounts to keeping sums obtained because of an earlier accounting error and later asserting an unsuccessful statute-of-limitations defense. That conduct may warrant disapproval. It does not, however, amount to a particularly aggravated fraud. It is inconceivable that this case would have come out the same way if the courts below had properly understood the ratio to be not 4.06-to-1 but 23-to-1, 70-to-1, or more. See, *e.g.*, *Bridgeport Music*, 507 F.3d at 486, 487 ("In this case where only one of the reprehensibility factors is present"—"deceit"—a "ratio in the range of 1:1 to 2:1 is all that due process will allow.").

## II. THE COURTS ARE IN CONFLICT ABOUT WHETHER *STATE FARM* IMPOSES A 1-TO-1 BENCHMARK WHEN COMPENSATORY DAMAGES ARE "SUBSTANTIAL"

This case implicates a second important issue dividing the courts, even assuming the ratio here to be 4.06-to-1. In *State Farm*, this Court observed that, "[w]hen compensatory damages are substantial, then a lesser ratio, *perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.*" 538 U.S. at 425 (emphasis added); see also *Exxon Shipping*, 128 S. Ct. at 2626, 2634 n.28 (if compensation is "substantial," the "constitutional outer limit may well be 1:1"). Since *State Farm*, however, courts have reached dramatically divergent conclusions on the meaning of that guidance.

### A. The Courts Are Squarely Divided

1. Case after case has read *State Farm* to establish the 1-to-1 benchmark as the presumptive constitutional norm where compensatory damages are substantial. For example, in *Bridgeport Music*, the Sixth Circuit announced that the "Supreme Court *has made clear* that '[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.'" 507 F.3d at 488 (emphasis added). The court therefore ruled that the ratio before it, 3.5-to-1 on compensatory damages of $366,939, was "excessive." *Id.* at 489. "In this case where only one of the reprehensibility factors is present, a ratio in the range of 1:1 or 2:1 is all that due process will allow." *Id.* at 487. Likewise, in *Bach* v. *First Union National Bank*, 486 F.3d 150, 154-156 (6th Cir. 2007), the Sixth Circuit invoked *State Farm*'s "helpful guideline[ ]" of 1-to-1. Because economic damages of $400,000 were "substantial," the court concluded that "an award of punitive damages at or near the amount of compensatory damages" was the constitutional maximum. *Id.* at 156. A "plaintiff who receives a considerable compensatory damages award," the court held, "ought not also receive a sizeable punitive damages award absent special circumstances," such as where "a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.* (internal quotation marks omitted).

Other courts interpret *State Farm* similarly. The First Circuit has limited punitive damages to a 1-to-1 ratio on a "substantial" compensatory award of $35,000 (despite finding "a real and serious threat of violence" and "disregard" for the "safety of others"). *Mendez-Matos* v. *Municipality of Guaynabo*, 557 F.3d 36, 53-56 (1st Cir. 2009). In *Williams* v. *ConAgra Poultry Co.*, 378 F.3d

790, 799 (8th Cir. 2004), the Eighth Circuit invoked *State Farm* to reduce punitive damages to a 1-to-1 ratio, finding $600,000 to be a "large compensatory award" and seeing no reason to "depart[ ] from the heartland of permissible exemplary damages." And in *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-603 (8th Cir. 2005), that court again invoked *State Farm* to reduce a punitive award from just under 4-to-1 to 1.2-to-1 on compensatory damages of $4,025,000, even though the defendant engaged in "highly reprehensible" misconduct, "misled consumers," and "exhibited a callous disregard" for public health, resulting in "a most painful, lingering death." *Ibid.* As the Third Circuit has summarized, many courts "have used a 1:1 ratio as a benchmark when compensatory damages are substantial." *Jurinko*, 305 F. App'x at 27-28, 30.

The Ninth and Federal Circuits have taken a contrary approach. Rather than treating 1-to-1 as the benchmark in cases with a "substantial" compensatory award, they use 4-to-1 or any single-digit ratio as the starting point—and move up from there. The Ninth Circuit has ruled that "*State Farm*'s 1:1 compensatory to punitive damages ratio is not binding, no matter how factually similar the cases may be." *Hangarter* v. *Provident Life & Accident Ins. Co*, 373 F.3d 998, 1014 (9th Cir. 2002). Accordingly, that court holds that, "where there are significant economic damages and * * * behavior is not particularly egregious, a ratio of up to 4 to 1 serves as a good proxy for the limits of constitutionality." *Planned Parenthood* v. *Am. Coalition of Life Activists*, 422 F.3d 949, 962 (9th Cir. 2005). For "more egregious behavior," it has ruled, "a single-digit ratio greater than 4 to 1 might be constitutional." *Ibid.* Following a similar approach, the Federal Circuit has upheld a $50 million punitive award that was more than three times the compensatory award of $15

million, holding that such an award does "not even reach[] the 4-to-1 ratio mentioned by the Court as a threshold where the punitive award may become suspect." *Rhone-Poulenc*, 345 F.3d at 1372.

The decision below follows that same path. After labeling the conduct at issue highly reprehensible based on one factor—alleged deceit—the court's analysis began and ended with the assertion that the ratio was 4.06-to-1. App., *infra*, 15a. That analysis may be consistent with the Ninth Circuit's use of a 4-to-1 benchmark and the Federal Circuit's holding that 4-to-1 is the "threshold" where a "punitive award may become suspect." But none of those cases can be reconciled with the many decisions from other jurisdictions that treat the 1-to-1 ratio identified in *State Farm* as the benchmark where compensatory damages are substantial.

The cases also squarely conflict on their facts. Just as in the Federal Circuit's decision in *Rhone-Poulenc* and the Sixth Circuit's decision in *Bridgeport Music*, the sole factor supporting "reprehensibility" here was deceit. Compare *Rhone-Poulenc*, 345 F.3d at 1371 ("malice, trickery, or deceit"), and *Bridgeport Music*, 567 F.3d at 486 ("intentional malice, trickery, or deceit"), with App., *infra*, 16a ("deceit"). Yet the court below nonetheless upheld a 4.06-to-1 punitive award based on an already substantial compensatory award. That decision flies in the face of the rule followed by most other courts—that a "plaintiff who receives a considerable compensatory damages award ought not also receive a sizeable punitive damages award absent special circumstances," such as where "a particularly egregious act has resulted in only a small amount of economic damages." *Bach*, 486 F.3d at 156 (internal quotation marks omitted).

State courts are likewise in conflict. Some treat 1-to-1 as the presumptive benchmark.[7] Others use 4-to-1 or more.[8] Respondents in this very case acknowledged that disarray, variously advising the trial court that, according to "a former [Oklahoma] Supreme Court justice," anything "within the 4 rule" (*i.e.*, 4-to-1) is "fine"; that "you're good up to 10"; and that "you can find cases across the board that justify almost any ratios," whether "a 500:1 ratio, 150:1 ratio, [or] a 96:1 ratio." 8/18/2008 Tr. 29, 34 (App., *infra*, 55a-56a, 57a). On that lattermost point, respondents are correct: It *is* possible to find cases supporting virtually any ratio on any set of facts.

This Court concededly "ha[s] been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive

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[7] *Roby* v. *McKesson Corp.*, 219 P.3d 749 (Cal. 2009) (1-to-1 maximum on actual damages of $1.9 million); *Roth* v. *Farner-Bocken Co.*, 667 N.W.2d 651, 669-671 (S.D. 2003) (limiting punitive damages to sum "at or near" the "substantial compensatory damage award of $25,000"); *Sec. Title Agency, Inc.* v. *Pope*, 200 P.3d 977, 1000-1001 (Ariz. Ct. App. 2008) (reducing punitive damages to match "substantial" $6.1 million compensatory award despite presence of "two reprehensibility factors"); *Burns* v. *Prudential Sec., Inc.*, 857 N.E.2d 621, 652-653, 659-660 (Ohio Ct. App. 2006) (reducing punitive damages to approximate actual damages of $6 million where the harm "was wholly economic").

[8] *Hayes Sight & Sound, Inc.* v. *ONEOK, Inc.*, 136 P.3d 428, 447-448 (Kan. 2006) (reading *Gore* and *State Farm* as presumptively authorizing 4-to-1; holding 6-to-1 permissible because it is a "single-digit multiplier[ ]"; rejecting 1-to-1 benchmark as a "distort[ion]"); *Goddard* v. *Farmers Ins. Co. of Or.*, 179 P.3d 645, 662, 667 (Or. 2008) (using "four times * * * compensatory damages" as "very general rule of thumb" for economic injuries, while allowing "a higher ratio * * * in unusual circumstances"); *Seltzer* v. *Morton*, 154 P.3d 561, 612, 614 (Mont. 2007) (limiting ratio to single digits solely because there was no profit motive or recidivism); *Flax* v. *DaimlerChrysler Corp.*, 272 S.W.3d 521 (Tenn. 2008) (5-to-1 on damages of $2.5 million).

damages award." *State Farm*, 538 U.S. at 424. But it is now apparent that the primary determinant of the constitutionally permissible award—1-to-1, 4-to-1, or beyond—is the court in which the issue arises. In *Exxon Shipping*, this Court recognized the disarray and expressed "doubt[] that anything but a quantified approach will work." 128 S. Ct. at 2628. That doubt is now certainty. This Court should grant review to give urgently needed guidance.

### B. This Case Represents An Ideal Vehicle For Resolving This Important And Recurring Issue

The issue is also important and recurring. Where compensatory awards are substantial, the choice between a baseline of 1-to-1, 4-to-1, or single-digits can be enormous. In this case, *Rhone-Poulenc*, and *Flax*, for example, the difference was at least $30 million. Even seemingly small differences in the ratio can have important economic consequences. For instance, here, the court below calculated the ratio as 4.06:1. But the ".06" portion of the punitive damages award by itself is greater than the entire amount Shell failed to pay.[9] And juries regularly return large punitive damages awards around the Nation.

The disuniformity has enormous consequences for plaintiffs and defendants alike. Where courts take *State Farm*'s reference to a 1-to-1 ratio seriously, plaintiffs—like the copyright holders in *Bridgeport Music*, the elderly widow in *Bach*, and the victims in *Boerner*—are being denied awards they would otherwise receive. Where courts do not, defendants, like Shell here, are subjected to potentially unconstitutional deprivations. Either way, the brand of federal constitutional law the parties receive

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[9] 0.06 times $13.2 million is $792,000; the amount Shell failed to pay was $750,708.

depends largely on the happenstance of the jurisdiction in which the case is brought.

This case represents an appropriate vehicle for resolving the issue. In terms of reprehensibility, this case is at the lower end of the scale: Of the five reprehensibility factors this Court has identified, the court of appeals found only one present—deceit. See p. 10, *supra*. The case clearly does not involve any "special circumstance[ ]" that might justify an upward departure from a 1-to-1 benchmark. *Bach*, 486 F.3d at 156.

The reasoning of the court below also vividly illustrates the importance of considering the substantiality of the compensatory award in setting the appropriate ratio. The court held that a 4.06-to-1 ratio was permissible here because it "compares favorably with that in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 [(1993)], where the jury awarded $19,000.00 in actual damages arising from the defendant's baseless claim on plaintiff's oil and gas interests and $10,000,000.00 in punitive damages." App., *infra*, 15a-16a. "Proportionately," the court noted, "Shell has received a much lighter sanction." *Id.* at 16a. But the court ignored the fact that the permissible ratio in a case with such a modest compensatory award has no bearing where, as here, the compensatory award is self-evidently "substantial." See *State Farm*, 538 U.S. at 425. Moreover, because the plurality in *TXO* relied on *potential* harm of "between $5 and $8.3 million," 509 U.S. at 461, the ratio of punitive damages to "actual *or potential harm* suffered" in *TXO*, see *State Farm*, 538 U.S. at 418 (emphasis added), was actually less than 2-to-1, approaching 1-to-1. The "lesson of *TXO*" is that "punitive damages can match the scale of the *attempted* swindle." *Willow Inn*, 399 F.3d at 234 (emphasis added). Because this case was not about potential harm—any "attempted swindle" was limited to the

$750,708 Shell actually failed to pay—*TXO*'s "analysis is inapposite." *Ibid.* This is thus an ideal case in which to make clear that this Court meant what it said in *State Farm*—that the size of the compensatory award matters and that, where that award is already substantial, a 1-to-1 ratio is normally the "outermost limit of the due process guarantee." 538 U.S. at 425.

## CONCLUSION

The petition for a writ of certiorari should be granted. In the alternative, the Court may wish to consider summary reversal with respect to the first question presented.

Respectfully submitted.

THOMAS R. PHILLIPS
DAVID M. RODI
EVAN A. YOUNG
BAKER BOTTS LLP
98 San Jacinto Boulevard
Suite 1500
Austin, TX 78701-4078
(512) 322-2500

JEFFREY A. LAMKEN
*Counsel of Record*
ROBERT K. KRY
MARTIN V. TOTARO
MOLOLAMKEN LLP
600 New Hampshire Ave., NW
Washington, D.C. 20037
(202) 556-2000
jlamken@mololamken.com

TIMOTHY GEHL
SENIOR COUNSEL
SHELL OIL COMPANY
P.O. Box 2463
Houston, TX 77252-2463
(713) 241-2333

KATHLEEN M. SULLIVAN
QUINN EMANUEL URQUHART
& SULLIVAN LLP
51 Madison Avenue
22nd Floor
New York, NY 10010
(212) 849-7327

*Counsel for Petitioners*
*Shell Oil Company and SWEPI LP*

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