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.

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS OF THE STATE OF OKLAHOMA

MOTION FOR LEAVE TO FILE BRIEF AND BRIEF FOR AMICUS CURIAE THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONERS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Pursuant to Rule 37.2 of the Rules of this Court, the American Petroleum Institute (API) moves for leave to file the accompanying brief as amicus curiae in support of petitioners. Counsel for petitioners has consented to the filing of this brief; counsel for respondents has not.

Amicus curiae is a national non-profit trade association that represents over 400 members collectively engaged in all aspects of the petroleum and natural gas industry.

API has a particular interest in this litigation because of the potential adverse effects of the decision below on the petroleum and natural gas industry. As frequent litigants and frequent targets of large punitive damages awards, API's members have a strong interest

in ensuring the predictability and fairness of punitive damages awards. The arbitrary and excessive award affirmed by the Oklahoma Court of Civil Appeals is directly contrary to those constitutional values and exemplifies a trend that is particularly troublesome to API's members. In addition to violating defendants' due process rights, unpredictable punitive awards and incoherent review of such awards hamper innovation and undermine effective business and litigation planning.

Amicus curiae's considerable interest in ensuring the constitutional application of punitive damages awards gives it a strong interest in the resolution of the questions raised by the petitioners in this case. Accordingly, amicus curiae respectfully requests leave to file the attached brief.

Respectfully submitted,
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ROPES & GRAY LLP
Counsel for Amicus Curiae the American Petroleum Institute

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BRIEF FOR AMICUS CURIAE THE AMERICAN PETROLEUM INSTITUTE IN SUPPORT OF PETITIONERS

Amicus curiae the American Petroleum Institute (API) respectfully submits this brief in support of petitioners.[1]

[1] Counsel for each party was informed at least 10 days prior to this brief's due date of amicus curiae's intention to file this brief. Counsel for petitioners consented to the filing of this brief; counsel for respondents did not. Accordingly, amicus is filing herewith a motion for leave to file this brief pursuant to Rule 37.2 of this Court. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No per-

INTEREST OF AMICUS CURIAE

The American Petroleum Institute (API) is a national non-profit trade association that represents over 400 members collectively engaged in all aspects of the petroleum and natural gas industry.

API has a particular interest in this litigation because of the adverse effects that the decision below will have on the petroleum and natural gas industry. A recent survey found that companies in the energy and chemical industry are among the most frequent bearers of "blockbuster" (at least $100 million) punitive damages awards. See Alison F. Del Rossi & W. Kip Viscusi, *The Changing Landscape of Blockbuster Punitive Damages Awards*, 12 Am. L. & Econ. Rev. 116, 126 tbl.2 (2010). Unpredictable punitive awards, moreover, hamper innovation and undermine effective business and litigation planning. Amicus curiae thus has a considerable interest in ensuring that punitive awards are guided by uniform constitutional standards and are otherwise consistent with constitutional limits.

This case exemplifies the unpredictable punitive damages awards, far out of proportion to any wrongdoing committed by the defendant, to which amicus curiae's members are frequently subjected. Between 1973 and 1985, petitioner Shell failed to pay approximately $750,000 in "net profits" from an oil-and-gas lease. In 1995, respondents sued Shell in Oklahoma district court seeking actual and punitive damages. Shell asserted a statute of limitations defense, which was

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son other than amicus curiae or its counsel made a monetary contribution to the brief's preparation or submission.

tried to the jury; the amount of net profits if due was not contested. At the close of the liability phase of trial, the jury awarded respondents $13.2 million, reflecting the uncontested $750,000 in net profits plus prejudgment interest of $12.45 million, calculated almost entirely at Oklahoma's "special" 12% compounding interest rate for nonpayment on oil and gas leases. Okla. Stat. tit. 52, § 570.10 (2010). At the punitive damages stage, the jury awarded $53.6 million. The total award, arising out of $750,000 in withheld net profits, was $66.05 million. The Oklahoma district court upheld the punitive damages award, and the Oklahoma Court of Civil Appeals affirmed. The appellate court's purportedly *de novo* review of the constitutionality of this $53 million punitive award consisted entirely of two paragraphs in which the court simply observed that the punitive award was just over four times the amount of the jury's total award at the compensatory stage of trial, inclusive of prejudgment interest. Such grossly disproportionate punitive awards, and the lack of rigorous judicial review, are, unfortunately, all too common for API's members.

REASONS FOR GRANTING THE WRIT

This Court's decisions acknowledge the constitutionally problematic nature of punitive damages. Left largely to their own discretion, guided only by general principles, juries are subject to improper influences, such as passion and bias against large, out-of-state corporations. The absence of clear rules regarding the circumstances in which punitive damages will be awarded, or in what amounts, is inconsistent with the fundamental constitutional guarantees of fair notice and predictability regarding punishments.

In recognition of those constitutional concerns, this Court has held out *de novo* judicial review as a protection against unconstitutional deprivations of property and the key to providing the guidance regarding the imposition of punitive damages that will allow potential defendants to organize their affairs. But the general principles that this Court has articulated for lower courts to apply have failed to provide the necessary predictability. And, as the Court recently acknowledged in *Exxon Shipping Co.* v. *Baker*, 128 S. Ct. 2605, 2628 (2008), mere "verbal formulations" can never do so; instead, only clear numerical benchmarks can provide the constitutionally required protection against arbitrary punishment. The Court should grant the petition and establish in clear terms the constitutional benchmark that, where actual damages are substantial, punitive damages should not exceed a 1:1 ratio to the compensatory award.

The Court should also grant the petition to clarify whether prejudgment interest that bears no direct relation to the conduct of the defendant to be punished can be included in the denominator of the comparative ratio. For punitive damages to serve their important, but limited, function of punishing and deterring misconduct, they must be assessed only with reference to the conduct the State seeks to punish. By including in the "compensatory damages" denominator prejudgment interest at a rate of 12% compounded, which does not reflect any assessment of the defendant's conduct, the court below severed the relationship between the punitive damages and the character of the conduct to be punished.

I. ALTHOUGH *DE NOVO* REVIEW OF PUNITIVE DAMAGES AWARDS IS CONSTITUTIONALLY MANDATED, REVIEWING COURTS FAIL IN THEIR CONSTITUTIONAL ROLE DUE TO THE ABSENCE OF CLEARER GUIDANCE FROM THIS COURT

Although this Court has long accepted that "punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition," *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568 (1996)) ("*Gore*"), the Court has simultaneously recognized that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994). The Court has therefore imposed both "procedural and substantive constitutional limitations" on the imposition of punitive damages awards. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003).

One important constitutional protection is that punitive damages awards must receive *de novo* judicial review. *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). Because the standard of review is constitutionally derived, state courts must undertake *de novo* review as well. *State Farm*, 538 U.S. at 418.

The promise of *de novo* review, however, has not been realized in practice. Standards articulated at a high level of generality and loose references to acceptable ratios have given lower courts little clear guidance. Further guidance from this Court regarding the proper role of the ratios in the constitutional analysis, and their relationship to the nature of the defendant's con-

duct, is essential for *de novo* review to fulfill its constitutionally mandated function.

A. *De Novo* Review Is Critical To A Constitutional System Of Jury-Imposed Punitive Damages

Punitive damages awards raise "fundamental due process concerns" related to the "risks of arbitrariness, uncertainty, and lack of notice." *Philip Morris USA* v. *Williams*, 549 U.S. 346, 354 (2007). "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." *Gore*, 517 U.S. at 574. Punitive damages awards, however, pose a high risk of violating these constitutional norms. Although they "serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding." *State Farm*, 538 U.S. at 417. In particular, because they are assessed, in the first instance, by juries, there is a distinct risk that punitive awards will be tainted by passion and bias, particularly "biases against big businesses * * * without strong local presences." *Ibid.* (quoting *Honda Motor*, 512 U.S. at 432).

Because of these concerns, the Court has held that reviewing courts must "apply a *de novo* standard of review when passing on [trial] courts' determinations of the constitutionality of punitive damages awards." *Cooper Indus.*, 532 U.S. at 436. "Exacting appellate review" of jury-awarded punitive damages is necessary to ensure that punitive damages remain within constitutional limits and "that an award of punitive damages

is based upon an 'application of law, rather than a decisionmaker's caprice.'" *State Farm*, 538 U.S. at 418 (quoting *Cooper Indus.*, 532 U.S. at 436).

In adopting the *de novo* review requirement, the Court explained that only such judicial review could provide the fair notice and predictability required by the Constitution. *De novo* review allows appellate courts "to maintain control of, and to clarify, the legal principles" as well as to "unify precedent" and "stabilize the law." *Cooper Indus.*, 532 U.S. at 436 (quoting *Ornelas* v. *United States*, 517 U.S. 690, 697-698 (1996)). The Court further recognized that "general criteria," such as the guideposts identified in *Gore*, acquire "meaningful content" through the process of "case-by-case application at the appellate level." *Ibid.* In addition to providing citizens adequate "notice of what actions may subject them to punishment," "[r]equiring the application of law, rather than a decisionmaker's caprice * * * helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Ibid.* (internal quotation marks and citation omitted). In the absence of *de novo* review, the goals of clarity, unity, and stabilization that are essential to the fair notice and predictability required by due process are unfulfilled, and the framework that allows the imposition of punitive damages in a constitutional manner ceases to exist.

As demonstrated below, there remains a dearth of guidance to cabin juries' passions or ensure consistency across judgments. Without this Court's further guidance, there can be no constitutionally adequate system of assessing punitive damages.

B. The Court's Current Guidance Lacks Sufficient Clarity To Provide The Tools For Meaningful *De Novo* Review

1. As the Court has recognized, generalized standards alone are inevitably insufficient to protect against arbitrary and unpredictable punitive damages awards. *Exxon*, 128 S. Ct. at 2628. Unlike compensatory damages, which are "tied to specifically proven items of damages," *ibid.*, punitive damages calculations based on only general criteria cannot produce the notice and predictability the Constitution requires.

In *Exxon*, in the context of a punitive award imposed under maritime federal common law, the Court considered and ultimately rejected the adequacy of "verbal formulations" of general standards to ensure "against unpredictable outlier[]" punitive damages awards. 128 S. Ct. at 2628. The Court acknowledged that "[u]nder the umbrellas of punishment and its aim of deterrence, degrees of relative blameworthiness are apparent" and could be identified. *Id.* at 2621-2622 (noting maliciousness, intentional injury, harm inflicted for financial gain, and hard-to-detect wrongdoing as examples). The Court also noted attempts by several States to utilize "criteria for judicial review," such as the "degree of heinousness" and "a reasonable relationship to the compensatory damages awarded." *Id.* at 2627 (quoting *Bowden* v. *Caldor, Inc.*, 710 A.2d 267, 277-284 (1998)). After reviewing these approaches and jury "instructions offering, at best, guidance no more specific for reaching an appropriate penalty," the Court expressed its "skeptic[ism] that verbal formulations * * * are the best insurance against unpredictable outlier[]" punitive damages awards. *Id.* at 2627-2628.

The Court noted that the judicial experience in the criminal context was similar. The pre-Sentencing Guidelines "system of general standards," which left judges with "relatively unguided discretion to sentence within a wide range," had "defied consistency." *Exxon*, 128 S. Ct. at 2628.

The current system of punitive damages is, as the *Exxon* Court aptly observed, even worse than the pre-guidelines sentencing regime. Lacking anything comparable to a "'punitive-damages guidelines'" or "even a statutory maximum," "it is *inevitable* that the specific amount of punitive damages awarded by a judge or by a jury will be arbitrary." *Exxon*, 128 S. Ct. at 2628-2629 (emphasis added) (quoting *Mathias* v. *Accor Econ. Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003)).

In *Exxon*, the Court's review of failed attempts to cabin punitive awards led it to conclude that only "a quantified approach will work." *Exxon*, 128 S. Ct. at 2628. The Court adopted a strict 1:1 ratio as the upper limit for punitive damages in maritime cases. *Id.* at 2633. The Court relied on the fact that "the median ratio of punitive to compensatory awards has remained less than 1:1" and that the "real problem" was "the stark unpredictability of punitive awards." *Id.* at 2624-2625. The Court stressed that the range of punitive damages between those less than 1:1 and the "fully 14% of punitive awards in 2001 * * * greater than four times the compensatory damages" did not reflect "refin[ed]" judgments about the "optimal level of penalty and deterrence," nor did they produce "consistent results in cases with similar facts," but instead evidenced "'the inherent uncertainty of the trial process.'" *Id.* at 2625-2626 (quoting *BMW of N. Am., Inc.* v. *Gore*, 646 So.2d 619, 626 (Ala. 1994) (*per curiam*)).

Although *Exxon* was decided under the Court's federal common-law authority, the decision noted, without answering, the possible "constitutional significance of the unpredictability of high punitive awards" on which the Court's analysis and holding was based. 128 S. Ct. at 2627. Indeed, it would seem to follow necessarily that the same unpredictability of a system based on only "verbal formulations" that led the Court in *Exxon* to adopt a numerically grounded system as a matter of common law should likewise lead the Court to reject "verbal formulations" as adequate as a constitutional matter. As noted above, the Court has repeatedly stressed that the due process guarantee does not permit a system of punitive damages that is incapable of providing defendants with "fair notice" of the "severity of the penalty that a State may impose." *Gore*, 517 U.S. at 574. The same arbitrariness that condemned a system of general principles and "verbal formulations" as a matter of common law also makes that same system intolerable under the Constitution.

2. This case demonstrates the inadequacy of the Court's current approach of "guideposts" and "factors." See *State Farm*, 538 U.S. at 418-419. Loose reference to acceptable ratios and even looser reference to general standards to be considered have reduced supposed *de novo* review to an abuse-of-discretion review under which courts feel free to uphold virtually any punitive damages award. The Oklahoma appellate court's punitive damages review is emblematic of many reviewing courts' inability to effectuate *de novo* review of punitive awards without stronger guidance.

Here, the Oklahoma appellate court provided only two paragraphs of non-analysis. That court made no attempt whatsoever to evaluate the guideposts in

terms of the legitimate purposes of punitive damages or whether the large punitive award might have reflected improper considerations. Instead of analyzing whether Shell's conduct represented a degree of reprehensibility that could justify a punitive damages ratio far in excess of the 1:1 ratio that this Court indicated might be "the outermost limit of the due process guarantee" when "compensatory damages are substantial," *State Farm*, 538 U.S. at 425, the Oklahoma Court of Civil Appeals terminated its review after stating simply (and incorrectly) that this Court had approved a dramatically higher ratio in *TXO Production Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443 (1993). According to the Oklahoma court, the ratio in this case was 4:1, which

> compares favorably with that in *TXO* * * *, 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., 15a-16a.

The decision below reflects the continuing pernicious effect of the *TXO* decision. This Court has repeatedly clarified that the relevant comparison in *TXO* was the ratio between the punitive award and the large potential loss to the plaintiffs that could have resulted if the defendant's fraudulent scheme had been successful (which made the ratio between 2.5:1 and 10:1, not 526:1). 509 U.S. at 462; *Gore*, 517 U.S. at 581. Nevertheless, lower courts continue to exploit the facts while ignoring the law of *TXO* to justify punitive damages far

in excess of those *State Farm* and *Gore* contemplate in the absence of exceptional circumstances. See, *e.g.*, *Goff* v. *Elmo Greer & Sons Constr. Co.*, 297 S.W.3d 175, 194 (Tenn. 2009), cert. denied, 130 S. Ct. 1910 (2010) (citing *TXO* as affirming "a punitive damage award that was 526 times as great as the compensatory damages"); *Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 47-48 (D.C. 2010) (characterizing *TXO* ratio as 526:1). Indeed, these decisions prove correct Justice Scalia's prediction that "the great majority of due process challenges to punitive damages awards can henceforth be disposed of simply with the observation that 'this is no worse than *TXO*.'" *TXO*, 509 U.S. at 472 (Scalia, J., concurring in judgment).

Many courts, like the Oklahoma court here, treat any ratio that can be characterized as within single digits, where there is even the least degree of reprehensibility, as *per se* constitutional. *E.g.*, *Zhang* v. *Am. Gem Seafoods, Inc.*, 339 F.3d 1020, 1044 (9th Cir. 2003), cert. denied, 541 U.S. 902 (2004) ("We are aware of no Supreme Court or Ninth Circuit case disapproving of a single-digit ratio between punitive and compensatory damages, and we decline to extend the law in this case."); *Trinh* v. *Gentle Commc'ns, LLC*, 881 N.E.2d 1177 (Mass. App. Ct. 2008).

By assuming that any punitive damages award within the ratios that the Court has identified as the "outer limits" of what the Constitution will tolerate is acceptable, courts substitute a deferential, abuse-of-discretion-type analysis that looks to whether *any* reprehensibility factor is present and the award is within a single-digit ratio. Without searching, *de novo* review of whether the ratio applied appropriately reflects the reprehensibility of the defendant's conduct in the given

case or whether the denominator in the ratio is the proper measure of the defendant's sanctionable misconduct, punitive damages awards are often arbitrary and unpredictable, and therefore inconsistent with fundamental due process requirements.

C. The Promise Of *De Novo* Review Can Be Achieved Only Through Clarification Of The Critical Character Of The Ratios, Especially The 1:1 Ratio, And The Relationship Between Them

The promise of *de novo* review—providing clarity, predictability, a check on abuse and caprice, and consistency across punitive damages awards—has not been realized because reviewing courts lack the tools to discern and develop the meaningful content that might, over time, fulfill the constitutional function this Court has assigned to the *de novo* standard. The decision below, and those like it, illustrate the correctness of this Court's conclusion in *Exxon* that multifactor, nebulous approaches do not provide the clarity and certainty, 128 S. Ct. at 2628, that due process requires and to which *de novo* review aspires. Instead, due process review of punitive damages awards must be rooted in numerical benchmarks.

This Court has already intimated at those benchmarks and the several factors that warrant gradation between them, as well as the limited circumstances in which departure from the ratio benchmarks may be appropriate. For the reasons discussed above, however, the Court must clarify and strengthen that guidance. The Court has frequently referenced different benchmarks, but done so in language that fails to convey just how critical those numerical touchstones must be to

lower courts' *de novo* review of punitive damages awards. Rather, the Court's repeated references to eschewing "a mathematical bright-line," *Pac. Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 18 (1991), or "a simple mathematical formula," *Gore*, 517 U.S. at 582, have led lower courts to conclude that they are free to eschew this Court's statements about the significance of the numerical benchmarks. See, *e.g.*, *Mitchell* v. *Fortis Ins. Co.*, 385 S.C. 570, 588 (2009), cert. denied, 130 S. Ct. 1896 (2010).

The Court's discussion in *State Farm* illustrates both the proper analysis and how imprecisely phrased caveats in the Court's opinions allow lower courts to largely ignore that analysis. In *State Farm*, the Court recognized that, apart from egregious circumstances, in a case with substantial compensatory damages a "ratio * * * equal to compensatory damages * * * reach[es] the outermost limit of the due process guarantee." 538 U.S. at 425. Yet the Court couched that recognition in qualified language that many lower courts have seized upon as a reason to ignore the 1:1 ratio altogether. See *ibid.* ("When compensatory damages are substantial, then a lesser ratio, *perhaps* only equal to compensatory damages, *can* reach the outermost limit of the due process guarantee." (emphasis added)); see, *e.g.*, *Ragland* v. *Digiuro*, --- S.W.3d ---, No. 2009-CA-186, 2010 WL 4137183, at *12 (Ky. App. Oct. 22, 2010) ("However, we believe the Supreme Court's choice of ambiguous terms, such as 'substantial' and 'lesser ratio' and 'outermost limit' and 'perhaps,' was intended to facilitate our 'considerable flexibility in determining the level of punitive damages.'" (quoting *Gore*, 517 U.S. at 568)). Indeed, the Court's reference to the Constitution permitting "few awards *exceeding* a single-digit ratio,"

State Farm, 538 U.S. at 425 (emphasis added), has encouraged some lower courts, as noted above, to believe that a single-digit ratio automatically blesses a particular punitive award. See, *e.g.*, *Perrine* v. *E.I. du Pont de Nemours & Co.*, 694 S.E.2d 815, 895 (W. Va. 2010) ("[A]ny punitive damages award that is in single digits would presumptively be within the constitution.").

As the Court's analysis in *Exxon* demonstrates, 128 S. Ct. at 2628, only clear guidance regarding firm numerical benchmarks and the factors that warrant gradation of a punitive damages award between those breakpoints can provide a foundation for a punitive damages system that satisfies the due process requirements of fair notice and predictability.

II. PREJUDGMENT INTEREST THAT DOES NOT MEASURE A DEFENDANT'S REPREHENSIBLE CONDUCT SHOULD BE EXCLUDED FROM THE RATIO OF PUNITIVE TO COMPENSATORY DAMAGES

As the Court has observed, the "imposition of punitive damages is an expression of moral condemnation." *Cooper Indus.*, 532 U.S. at 432. Operating as "private fines," punitive damages "punish" the defendant's misconduct and "deter future wrongdoing." *Ibid.* As such, the "focus[]" in a court's *de novo* review of a punitive damages award must always be "the degree of the defendant's reprehensibility or culpability." *Id.* at 435. This Court's review of the awards in *Cooper Industries* and other recent punitive damages cases demonstrates that a critical function of a court in conducting that required *de novo* review is to ensure that the punitive award is compared to the "relevant" figure measuring "the harm caused by [the defendant's] tortious con-

duct." See *id.* at 441-442. As those decisions reflect, the "fundamental due process concerns" of "arbitrariness, uncertainty and lack of notice" require that punitive damages be based only on the defendant's own conduct and its direct consequences. *Philip Morris*, 549 U.S. at 354.

Many courts, like the Oklahoma court below, continue to misunderstand the significance of that responsibility. The Court should grant the petition for certiorari to clarify that only compensatory damages directly attributable to the reprehensible conduct that is to be punished are to be included in the comparative part of the *de novo* analysis. Because prejudgment interest does not reflect harm directly attributable to the defendant's wrongful conduct—and interest at a 12% penalty rate plainly does not—it should be excluded from the ratio of punitive to compensatory damages.

A. For The *Gore* Ratio To Serve Its Function, The Denominator Must Include Only Harm Directly Attributable To The Conduct To Be Punished

This Court's decisions make clear that the reprehensible nature of the defendant's conduct is the ultimate foundation of any punitive damages award. A punitive damages award can only be justified in relation to the State's interest in "punishing unlawful conduct and deterring its repetition." *Philip Morris*, 549 U.S. at 352 (quoting *Gore*, 517 U.S. at 568). Thus, "punitive damages should only be awarded if the defendant's culpability," after fully compensating the plaintiff, "is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419. Reprehensibility, in other

words, is the threshold requirement for any award of punitive damages, and "the degree of reprehensibility of the defendant's conduct" is "the most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575.

The "second" and "most commonly cited" guidepost in assessing the excessiveness of a punitive damages award is the "ratio" of the punitive damages "to the actual [or potential] harm inflicted on the plaintiff." *Gore*, 517 U.S. at 580. The function of the ratio is to ensure that "the award bears a reasonable relationship to the actual and potential harm caused by the defendant to the plaintiff." *Philip Morris*, 549 U.S. at 353 (paraphrasing *Gore*). Thus, the ratio, like the reprehensibility factor itself, focuses on "the defendant's actions" and the harm they caused. *Cooper Indus.*, 532 U.S. at 435.

This Court's opinions confirm that the compensatory damages that serve as the denominator in the *Gore* ratio must be limited to damages that flow from the conduct that the State has a legitimate interest in "punishing." In *Philip Morris*, for example, the Court ruled that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties." 549 U.S. at 353. Likewise, a "defendant's dissimilar acts, independent from the acts upon which liability is premised, may not serve as the basis for punitive damages." *State Farm*, 538 U.S. at 422-423.

A court's *de novo* review therefore requires it to determine whether the "harm" that the plaintiff proposes as the relevant comparator is "attributable to [the] misconduct" that the state seeks to punish and deter. *Cooper Indus.*, 532 U.S. at 442. In *Cooper Indus-*

tries, the Court remanded for a new *de novo* review by the court of appeals because the "wrongdoing" that was the premise of the punitive damages award—the defendant's misleading use of the plaintiff's tool in marketing materials—"could not be treated as the principal cause" of the "potential harm" the plaintiff proposed as the relevant comparator. *Ibid.*

The reviewing court must also ensure that the "compensatory damages" comparator does not already incorporate a punitive element beyond the actual damages directly caused by the defendant's sanctionable conduct. Thus, for example, the Court explained in its assessment of the 145-to-1 ratio in *State Farm* that the ratio arguably understated the extent of the disparity because the plaintiffs' compensatory damages for emotional distress already reflected "the outrage and humiliation" resulting from the defendant's conduct, which "duplicated [ ] the punitive award." 538 U.S. at 426.

As these decisions make clear, the ratio of punitive damages to compensatory damages is only instructive to the court's *de novo* review if the denominator is limited to those damages that flow directly from the conduct that the state seeks to punish. Elements of the plaintiff's ultimate recovery, such as prejudgment interest (particularly at a punitive 12% rate), that are not directly related to the misconduct that gives rise to the punitive damages award must therefore be excluded from the ratio.

B. Prejudgment Interest Does Not Reflect The Defendant's Conduct That Warrants Punishment

1. The "compensatory damages" that provide the denominator of the *Gore* ratio are those damages "intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Cooper Indus.*, 532 U.S. at 432; see *McEvoy Travel Bureau, Inc.* v. *Norton Co.*, 408 Mass. 704, 718 (1990) (noting that "actual damages" are losses "flowing directly from a wrongful act"). The determination of the "actual damages suffered," the Court has recognized, "presents a question of historical and predictive fact" that is tried to the jury. *Cooper Indus.*, 532 U.S. at 437 (quoting *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996)). Prejudgment interest, by contrast, is not a question of the "concrete loss" caused by the defendant's "wrongful conduct." Nor, in most states, is prejudgment interest decided by the jury at all, but is instead imposed by the court (or the clerk). See, *e.g.*, *d'Arc Turcotte* v. *Estate of LaRose*, 153 Vt. 196, 200 (1989) ("The question of interest is not properly within the province or discretion of the fact-finder."); *Grove* v. *Myers*, 181 W. Va. 342, 347 (1989); *DiMeo* v. *Philbin*, 502 A.2d 825, 826 (R.I. 1986) (per curiam). Because prejudgment interest does not measure a "historical fact" of injury to the plaintiff caused by "the defendant's wrongful conduct," it must be excluded from the comparative analysis.

Even in those cases, such as this one, in which the jury is asked to calculate prejudgment interest, the resulting figure does not represent the harm to the plaintiff caused by the defendant's wrongful conduct. The jury in this case was not asked to determine the oppor-

tunity cost to respondents, as a matter of historical fact, that resulted from Shell's failure to pay net profits. Rather, the statute itself specified a compounded rate of 12%, without regard to any evaluation of the time value of money during the relevant period. Okla. Stat. tit. 52, § 570.10. Nor did the statute require the jury to make any individualized finding of Shell's culpability in causing the delay in payment.[2] Instead, by the statute's terms, the fact of the delay was itself sufficient for interest to accrue at a 12% compounding rate. *Ibid.* Inclusion of prejudgment interest in the ratio thus makes the relationship between the punitive damages award and the "the degree of reprehensibility of the defendant's conduct," *Gore*, 517 U.S. at 575, even more tenuous.

In most instances, where prejudgment interest is calculated by the court at the time judgment is entered, it would not form part of the compensatory basis that the jury or trial judge would consider as they assess the relationship between punitive and compensatory damages. Thus, in most jurisdictions, assuming *arguendo* that Shell's conduct warranted a 4:1 ratio of punitive to compensatory damages, the punitive damages award would have been $3,000,000. To have prejudg-

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[2] The amount of interest due was significantly increased by delays attributable to respondents' failure to initiate suit until 1995, and the courts' failure to try the case until May 2008. Pet. App., 4a-5a. There is no suggestion that Shell improperly delayed the adjudication of this case. Even if Shell had caused delay, that was not the "wrongful conduct" for which the punitive damages were imposed, and thus should have been excluded from the denominator. See *Cooper Indus.*, 532 U.S. at 441 (limiting comparison to "the harm caused by Cooper's tortious conduct").

ment interest included in the punitive damages denominator in states in which the jury does the math, but excluded where the judge makes the calculation, introduces additional opportunity for arbitrariness in an already unpredictable system of punitive damages and flouts the "elementary notions of fairness enshrined in our constitutional jurisprudence" that a person have "fair notice" of both the punishable conduct and the potential severity of the penalty. See *Gore*, 517 U.S. at 574.

Because prejudgment interest does not reflect the defendant's conduct or the harm directly inflicted by it, inclusion of prejudgment interest in the denominator is inconsistent with the constitutional analysis. Fully 90% of the $13.2 million compensatory damages figure the court below used for comparison purposes had no direct relationship to the defendant's punishable conduct. The punitive award here punishes Shell in the absence of responsibility or control, see *State Farm*, 538 U.S. at 422, thereby violating the fundamental due process concerns of fair notice and non-arbitrary application of the law. Cf. *United States* v. *Bornstein*, 423 U.S. 303, 312 (1976) (excluding, in context of tallying culpable acts for purposes of imposing penalties under the False Claims Act, instances of wrongdoing that were "completely fortuitous and beyond [the defendant's] knowledge or control").

In this case, including prejudgment interest in the ratio is particularly problematic because the State's 12% compounding interest rate was manifestly punitive in its own right. Its inclusion in the *Gore* ratio duplicated the State's interest in punishment and deterrence. At the very least, including the punitive prejudgment interest award in the *Gore* ratio should have

decreased the permissible ratio based on the fact that the State has already imposed punishment. Instead, as applied by the Oklahoma courts: The more punitive the interest rate, the greater additional punishment can be imposed on top of it as punitive damages. That is exactly backwards. See *State Farm*, 538 U.S. at 426. The presence of prior punishment through an enhanced interest rate (or likewise multiple statutory damages) should draw into question whether further additional punishment is warranted or permissible at all—not serve as justification for increasing the amount of further punishment that can be piled on.

2. Including prejudgment interest in the denominator of the *Gore* ratio is particularly arbitrary because it permits courts to evade the longstanding prohibition against awarding prejudgment interest on punitive damages. Most states, including Oklahoma, do not permit prejudgment interest on punitive damages awards. See Okla. Stat. tit. 12, § 727 (2009); *Johnson* v. *Ford Motor Co.*, 45 P.3d 86, 95 (Okla. 2002); see also Alaska Stat. § 09.30.070 (2010) ("Prejudgment interest may not be awarded for * * * punitive damages."); Ind. Code § 34-51-4-3 (2010); *d'Arc Turcotte*, 153 Vt. at 200; Restatement (Second) of Torts § 913 cmt. d (1979) ("Interest is not allowable as an element in punitive damages."). Courts have explained several reasons for this rule. First, awarding prejudgment interest on punitive damages compounds the penalty. See *Fortino* v. *Quasar Co.*, 950 F.2d 389, 398 (7th Cir. 1991); *McEvoy*, 408 Mass. at 717. Second, calculating prejudgment interest on a punitive damages award is inappropriate because the plaintiff's right to punitive damages does not arise until judgment is entered. See, *e.g.*, *Wheeler Motor Co.*

v. *Roth*, 315 Ark. 318 (1993); *Dees* v. *Am. Nat'l Fire Ins. Co.*, 861 P.2d 141 (Mont. 1993).

Despite the consensus that prejudgment interest does not apply to punitive damages, including prejudgment interest in the denominator of the *Gore* ratio, as the courts below did, is the functional and mathematical equivalent. Because the multiplication of numbers does not depend on the order in which they are multiplied, it does not matter whether the compensatory award is first multiplied by the *Gore* ratio and then multiplied by the rate of prejudgment interest (which is forbidden) or whether the compensatory award is first multiplied by the rate of prejudgment interest and then multiplied by the *Gore* ratio, as the lower court did here. The outcome is the same, and it should be precluded by whichever route.

Using a slightly simplified version of the facts of this case demonstrates the point. Assuming that the constitutionally permissible *Gore* ratio in this case is 4:1, then if the punitive damages were deemed owing at the time of the wrongful conduct in 1985 and, contrary to Oklahoma law, prejudgment interest was assessed on the punitive damages, the total award to plaintiffs would have been $63,750,000. (Compensatory damages on $750,000 of actual harm would result in $3,000,000 in punitive damages, and applying the State's punitive 12% compounding prejudgment interest rate to the full $3,750,000 from 1985 would reach $63,750,000 by 2010.) The court below reached the same improper result but in a different order. Applying 12% compounding interest to the $750,000 in actual damages for twenty-five years produces $12,750,000. Applying a 4:1 ratio to this inflated figure yields a punitive award of $51,000,000—for a total of $63,750,000. The resulting award, in other

words, was the mathematical equivalent of precisely what Oklahoma law forbids.

Had the Oklahoma court started with the compensatory award of $750,000, awarded four times that amount as punitive damages, and then calculated prejudgment interest only on the compensatory portion of the award, the Hebble's entire award would have totaled only $15,750,000 ($750,000 multiplied by 12% compound interest, plus $3,000,000 in punitive damages). By first calculating prejudgment interest and then applying the *Gore* ratio to that inflated amount, the courts below gave respondents an approximately $48 million windfall. So arbitrary an award is inconsistent with the constitutional guarantees that *de novo* judicial review is supposed to protect. The Court should grant the petition and reverse this arbitrary award.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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