No.

In the Supreme Court of the United States

WYETH LLC AND WYETH PHARMACEUTICALS INC.,
PETITIONERS

v.

JERALDINE SCOFIELD, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether, when a verdict has been tainted by a jury's passion or prejudice, due process requires a trial court to grant a new trial instead of remittitur.

2. Whether, and in what circumstances, a trial court violates due process when it awards a substantial amount in compensatory damages but nevertheless proceeds to award punitive damages in an amount exceeding the one-to-one ratio indicated in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), and *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471 (2008).

PARTIES TO THE PROCEEDING AND CORPORATE DISCLOSURE STATEMENT

Petitioner Wyeth LLC is wholly owned by Pfizer Inc.; petitioner Wyeth Pharmaceuticals Inc. is wholly owned by Wyeth LLC. Pfizer has no parent corporation, and no publicly held company owns 10% or more of its stock.

Respondents are Jeraldine Scofield; Wendell Forrester, special administrator for the estate of Pamela Forrester; and Jeffrey Ouellette and Richard Rowatt, special administrators for the estate of Arlene Rowatt.

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Wyeth LLC and Wyeth Pharmaceuticals Inc. respectfully petition for a writ of certiorari to review the judgment of the Supreme Court of Nevada in this case.

OPINIONS BELOW

The opinion of the Nevada Supreme Court (App., *infra*, 1a-44a) is reported at 244 P.3d 765. The trial court's orders granting remittitur (App., *infra*, 45a-52a) and denying petitioners' motion for a new trial (App., *infra*, 53a-64a) are unreported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on November 24, 2010. On February 15, 2011, Justice Kennedy extended the time within which to file a pe-

tition for a writ of certiorari to and including March 24, 2011. The jurisdiction of this Court is invoked under 28 U.S.C. 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law.

STATEMENT

This case involves claims by three plaintiffs who alleged that they had developed breast cancer as a result of taking medicines manufactured by petitioners and prescribed to them by their doctors. Although petitioners' labeling, which had been approved by the Food and Drug Administration (FDA), warned about the risk of breast cancer from the use of those medicines, plaintiffs claimed that those warnings were inadequate. The trial was bifurcated, with any consideration or assessment of punitive damages confined to the second phase. Incited by plaintiffs' improper and inflammatory closing argument in the first phase, however, the jury returned an award totaling $134.6 million. It quickly became clear that the jury had disregarded the trial court's instructions and that its award contained a sizable (and impermissible) punitive component. Although the trial court attempted to cure the defect in the proceedings by reinstructing the jury and ordering it to redeliberate, the jury ultimately returned an award of compensatory and punitive damages totaling almost exactly the same amount, $134.1 million—then the largest tort award in Nevada history.

As the lower courts recognized, the only explanation for this otherwise inexplicable verdict was that the jury

acted with passion and prejudice. Notwithstanding the very real possibility that the jury's passion and prejudice tainted its determination of liability, as well as its award of damages, the trial court attempted to save the verdict by remitting the award to a total of $22.8 million in compensatory damages and $35 million in punitive damages.

In the decision under review, the Nevada Supreme Court held, first, that, although the verdict had been tainted by the jury's passion and prejudice, the remittitur had cured the resulting error, and second, that, although the award of punitive damages was considerably larger than the already substantial award of compensatory damages, the award was not constitutionally excessive. App., *infra*, 1a-44a. The Nevada Supreme Court's decision was seriously flawed in each respect, and it warrants this Court's review.

1. Petitioners manufacture prescription medicines colloquially known as "hormone therapy," which have been approved for use for many decades to combat the symptoms of menopause and to prevent osteoporosis. For much of that time, there has been extensive scientific investigation and debate as to whether there is a link between hormone therapy and breast cancer. Pet. Nev. S. Ct. Br. 7-10, 50.

To this day, the FDA continues to approve petitioners' medicines as safe and effective. When the FDA approved one of those medicines in 1994, it paid particular attention to recent studies concerning the risk of breast cancer. In the "Warnings" section of the labeling, petitioners warned about seven risks, starting with "breast cancer." Petitioners explained that "[s]ome studies have reported a moderately increased risk of breast cancer (relative risk of 1.3 to 2.0) in those women on [hormone] therapy taking higher doses, or in those taking lower doses for prolonged periods of time." After requiring

certain revisions, the FDA approved the labeling, including the warning about the risk of breast cancer. Pet. Nev. S. Ct. Br. 7-10, 50.

In 2002, a study by the Women's Health Initiative (WHI), conducted under the auspices of the National Institutes of Health, reported that women who used hormone therapy were relatively more likely to develop breast cancer than women in the control group, although the absolute rate remained low (and the relative rate was in fact lower than indicated in the previously approved labeling). In consultation with the FDA, petitioners immediately revised the breast cancer warning on their labeling and notified doctors of the results of the WHI study. App., *infra*, 10a-11a; Pet. Nev. S. Ct. Br. 5-6, 10, 48-55.

2. In the wake of the WHI study, more than 10,000 women who had used hormone therapy and developed breast cancer filed suit against petitioners and other pharmaceutical companies, contending, *inter alia*, that the companies had failed to provide adequate warnings of the risk of breast cancer.

This case involves lawsuits filed in Nevada state court by three of those women.[1] In those lawsuits, plaintiffs alleged that, notwithstanding the accuracy of petitioners' warning about breast cancer in light of the state of scientific knowledge at the time, petitioners should have conducted additional testing earlier—and, if they had done so, the warnings would have been more definitive at the time plaintiffs began using hormone therapy. Plaintiffs sought punitive damages based on the allegation that pe-

[1] After the trial in this case, two of the three plaintiffs died of unrelated causes. The administrators of their estates were substituted as parties on appeal and are named as respondents in this Court.

titioners had acted with malice or committed fraud in inadequately warning of the risk of breast cancer and marketing their hormone-therapy medicines. App., *infra*, 3a-5a.

The trial court consolidated plaintiffs' lawsuits for trial. Because plaintiffs sought punitive damages, Nevada state law required bifurcation of the trial, with any consideration or assessment of punitive damages confined to the second phase. See Nev. Rev. Stat. § 42.005. In the first phase, the jury was instructed to consider only whether petitioners were liable for plaintiffs' injuries; if so, how much plaintiffs should receive in compensatory damages; and whether petitioners had acted with malice or committed fraud. Only if the jury answered yes to the last question would the trial proceed to the second phase, in which the jury would be given the constitutionally required instructions concerning punitive damages and asked to determine how much (if anything) plaintiffs should receive in punitive damages. App., *infra*, 4a-5a; see *Philip Morris USA* v. *Williams*, 549 U.S. 346, 355, 357 (2007).

At trial in the first phase, plaintiffs' counsel made a series of improper arguments designed to inflame the jury and vilify petitioners. Over petitioners' objections, plaintiffs' counsel was allowed to argue: (1) that, based on the fallacy that correlation implies causation, petitioners had caused 100,000 other women to suffer breast cancer, enough to "fill the UNR and UNLV stadiums" (two Nevada college football stadiums whose pictures were then displayed to the jury); (2) that the jury should consider a poem plaintiffs' counsel recited about the Race for the Cure, describing "women of cancer" whose breasts were "cut off and thrown in the trash," whose skin "blistered hot from the radiation," and who had gone "bald" with "[n]o eyelashes, no eyebrows"; and (3)

that the jury should measure plaintiffs' pain and suffering for one year on the basis of the combined annual compensation paid to several of petitioners' executives who testified at trial. The trial judge not only overruled petitioners' objections to those statements, but refused to instruct the jury in the first phase that it could not base its determinations on a desire to punish petitioners for conduct that allegedly affected others. App., *infra*, 36a n.11; Pet. Nev. S. Ct. Br. 11, 12, 39-41.

At the conclusion of the first phase, the jury found petitioners liable and awarded plaintiffs a total of $134.6 million in damages. It quickly became clear that the jury's damages award in fact contained a sizable punitive component, in contravention of the court's instructions and the limits contained in the verdict form. Before the start of the second phase, the trial judge disclosed that the jurors had told the bailiff when they learned they were required to return to consider punitive damages: "We already did that. We already awarded damages to punish and make an example and so on and so forth." App., *infra*, 30a-32a, 41a-44a; Pet. Nev. S. Ct. Br. 13-14.

Petitioners moved for a mistrial, contending that the jury's premature determination of punishment—in violation of the trial court's instructions and in the absence of the constitutionally required instructions concerning punitive damages—constituted juror misconduct and tainted its verdict. Although the judge commented to counsel that "this verdict is not worth a nickel," he denied the motion and instead asked the jury whether it had previously "discuss[ed] and include[d] damages in its verdicts for the purpose of punishment or example." In response, the jury answered his question with a question of its own: "If we answer yes, can we consider punitive damages?" Given the jury's apparent determination to punish, petitioners renewed their motion for a mistrial,

which the judge again denied. Over petitioners' objection, the judge answered "yes" to the jury's question. Only then did the jury answer "yes" to the judge's original question, thereby acknowledging that it had already decided the issue of punishment. Pet. Nev. S. Ct. Br. 14.

The trial judge continued to refuse to grant a mistrial, instead instructing the jury to "deliberate again on the amount of compensatory damages without including any punitive [damages] in them." When the jury returned less than three hours later with an award of $35.1 million in compensatory damages, the judge permitted the trial to proceed to the second phase. In that phase, after less than two hours of deliberation, the jury awarded $99 million in punitive damages, for a total of $134.1 million in damages—effectively restoring the original award. Over petitioners' objections, the court entered judgment for plaintiffs in that amount. App., *infra*, 41a-44a; Pet. Nev. S. Ct. Br. 14-15.

Petitioners moved for a new trial or other relief. The trial court ultimately found that the "totality of the circumstances indicate that the amounts of the verdicts suggest they were the result of passion and prejudice." App., *infra*, 51a (internal quotation marks and citation omitted). Acknowledging the irregularities in the proceedings, the court conceded that "[i]t appears that the jury's feelings regarding punitive damages impacted its award of compensatory damages," which would be "flagrantly improper." *Id.* at 46a-47a (citation omitted). Further acknowledging the role that passion and prejudice had played in the substantial compensatory awards, the court noted that the jury had awarded compensatory damages that were 121, 132, and 751 times plaintiffs' actual damages, respectively. *Id.* at 47a. This despite the fact that, in the court's view, plaintiffs had offered "very limited evidence and argument in support of compensa-

tory damages"; had offered "no evidence" of future medical expenses; and "did not argue, or even suggest, an amount of general damages," which nevertheless constituted the "great bulk" of plaintiffs' compensatory damages. *Id.* at 46a-47a & n.2.

Notwithstanding those findings, the trial court denied petitioners' motion for a new trial and instead remitted the award to a total of $22.8 million in compensatory damages and $35 million in punitive damages. App., *infra*, at 47a-48a, 50a-51a.[2] Plaintiffs accepted the remittitur. *Id.* at 32a.

3. Petitioners appealed to the Nevada Supreme Court. As is relevant here, petitioners argued that, once the trial court determined that the verdict had been infected by the jury's passion and prejudice, remittitur was "patently inadequate," and the only proper remedy was a new trial. Pet. Nev. S. Ct. Br. 2-3; see *id.* at 5, 16-27. Petitioners also argued that, under the principles articulated in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and its progeny, the trial court violated due process when it awarded a substantial amount in compensatory damages but proceeded to award a considerably greater amount in punitive damages. Pet. Nev. S. Ct. Br. 55-58.

The Nevada Supreme Court affirmed. App., *infra*, 1a-44a. With regard to whether remittitur was an appropriate remedy, it agreed with the trial court that "the premature jury deliberations on punitive damages had

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[2] As remitted, the court awarded plaintiff Forrester a total of $21 million ($8 million in compensatory damages and $13 million in punitive damages); plaintiff Rowatt a total of $17.6 million ($7.6 million in compensatory damages and $10 million in punitive damages); and plaintiff Scofield a total of $19.3 million ($7.3 million in compensatory damages and $12 million in punitive damages).

significantly tainted the jury's verdict as being the result of passion and prejudice." *Id.* at 43a. The Nevada Supreme Court recognized that the passion and prejudice were "evident" both from the jury's initial award of $134.6 million in damages and from its almost identical subsequent award. *Ibid.* It further recognized that "the jury's improper deliberations may not have been salvaged" when the trial court reinstructed the jury and ordered it to redeliberate. *Ibid.* The Nevada Supreme Court nevertheless rejected petitioners' claim that they were entitled to a new trial, holding that "the verdicts were spared when the [trial] court granted the remittitur and reduced the awards." *Ibid.*

With regard to whether the punitive award was excessive, the Nevada Supreme Court concluded that, as remitted, the ratio between the punitive and compensatory awards was "well within the accepted ratios." App., *infra*, 40a.[3] The court did not specifically address petitioners' contention that, because the compensatory award was so substantial, the punitive award could not constitutionally exceed that amount. *Ibid.* The court then summarily considered the other *BMW* guideposts, determining that petitioners' conduct was reprehensible and that the award was not excessive when compared with the civil penalties authorized or imposed in similar cases. *Id.* at 40a-41a.

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[3] At points in its opinion, the Nevada Supreme Court appears to have been operating on the erroneous assumption that the trial court had awarded $57.8 million in punitive damages *alone*, rather than $57.8 million in compensatory and punitive damages combined. See App., *infra*, 32a, 40a.

REASONS FOR GRANTING THE PETITION

This case presents two issues of enormous importance to civil litigants. First, the Nevada Supreme Court held that remittitur—a mere reduction in a damages award—can purge the effect of a jury's passion or prejudice on a verdict. Second, it held that the remitted award of $35 million in punitive damages was not constitutionally excessive despite the substantial award of $22.8 million in compensatory damages.

As to the first issue, following an earlier decision of this Court, the overwhelming majority of federal courts of appeals and state courts of last resort to have considered the issue have held that only a new trial can cure a jury verdict that is the result of passion or prejudice. The Nevada Supreme Court's decision to permit remittitur, despite its recognition that passion and prejudice infected the verdict, cannot be reconciled with that body of authority.

As to the second issue, this Court indicated in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), that, when compensatory damages are "substantial," it may violate due process to award a greater amount in punitive damages. Since then, federal courts of appeals and state courts of last resort have differed over whether, and in what circumstances, such an award violates due process. This case presents a particularly suitable vehicle in which to address that frequently recurring issue, both because the compensatory damages here were substantial by any measure and because consideration of other guideposts confirms that the punitive damages were excessive. The Court should grant review to provide much-needed guidance on each issue and reverse the seriously flawed decision of the Nevada Supreme Court.

A. This Court Should Grant Review To Decide Whether The Only Appropriate Remedy For A Verdict Resulting From A Jury's Passion Or Prejudice Is A New Trial

1. The Federal Courts Of Appeals And State Courts Of Last Resort Are Divided On The Issue

a. Remittitur refers to the longstanding practice in federal and state courts whereby a court denies a defendant's motion for a new trial on the condition that a prevailing plaintiff accept a reduction in the damages awarded. When a court grants remittitur, "the plaintiff is given the option of either submitting to a new trial or accepting the amount of damages that the court considers justified." 11 Charles Alan Wright, Arthur R. Miller & Mary K. Kane, *Federal Practice and Procedure* § 2815, at 160 (2d ed. 1995) (Wright & Miller).

This Court has long approved remittitur as a means of permitting courts to "overturn[] verdicts for excessiveness." *Gasperini* v. *Center for Humanities, Inc.*, 518 U.S. 415, 433 (1996). Remittitur is primarily used when a court concludes that "the jury's award is unreasonable on the facts"; in granting remittitur, a court effectively "substitute[s] [its] judgment for that of the jury." *Johansen* v. *Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331 (11th Cir.) (emphasis omitted), cert. denied, 528 U.S. 931 (1999).

b. This case presents the issue whether, as a matter of due process, remittitur is appropriate not only where the damages awarded are excessive, but where the verdict is tainted by a jury's passion or prejudice. This Court addressed the permissibility of remittitur in such circumstances, albeit without extended discussion, in *Minneapolis, St. Paul & Sault Ste. Marie Railway Co.* v. *Moquin*, 283 U.S. 520 (1931). There, the Court granted certiorari to review a decision of the Minnesota

Supreme Court that had upheld a remittitur despite determining that the verdict in question was "excessive because of passion and prejudice." *Id.* at 521 (internal quotation marks omitted). This Court reversed. As a preliminary matter, the Court found it unnecessary to review the record below, relying on the Minnesota Supreme Court's determination that the verdict had been tainted by passion and prejudice. *Ibid.* Turning to "the action [that determination] requires," this Court held that "no verdict can be permitted to stand which is found to be in any degree the result of appeals to passion and prejudice." *Ibid.* A reduction of damages through remittitur is an inappropriate remedy in such circumstances, the Court explained, because the "extent of the wrong inflicted" cannot be rectified by "calculation" that is "little better than speculation." *Id.* at 521-522.

Since *Moquin*, the federal courts of appeals have almost universally concluded that, while "mere excessiveness in the amount of an award may be cured by a remittitur, * * * excessiveness which results from jury passion and prejudice may not be so cured" and "a new trial is required." *Mason* v. *Texaco, Inc.*, 948 F.2d 1546, 1561 (10th Cir. 1991), cert. denied, 504 U.S. 910 (1992); see *De Leon Lopez* v. *Corporacion Insular de Seguros*, 931 F.2d 116, 125 (1st Cir. 1991); *Earl* v. *Bouchard Transp. Co.*, 917 F.2d 1320, 1327 (2d Cir. 1990); *Dunn* v. *HOVIC*, 1 F.3d 1371, 1383 (3d Cir.) (en banc), cert. denied, 504 U.S. 910 (1993); *Arnold* v. *Eastern Air Lines, Inc.*, 681 F.2d 186, 206 (4th Cir. 1982), cert. denied, 460 U.S. 1102 (1983); *Consolidated Cos.* v. *Lexington Ins. Co.*, 616 F.3d 422, 435 (5th Cir. 2010); *Dresser Industries, Inc.* v. *Gradall Co.*, 965 F.2d 1442, 1448 (7th Cir. 1992); *Dossett* v. *First State Bank*, 399 F.3d 940, 947 (8th Cir. 2005); *Watec Co.* v. *Liu*, 403 F.3d 645, 655 (9th Cir. 2005); *Frederick* v. *Kirby Tankships, Inc.*, 205 F.3d 1277, 1284 (11th

Cir.), cert. denied, 531 U.S. 813 (2000); *McCown* v. *Boone*, 154 F.2d 19, 20 (D.C. Cir. 1946).

Numerous state courts of last resort, often relying on *Moquin*, have likewise concluded that remittitur is not an appropriate remedy when a verdict is the product of passion or prejudice. See *Hash* v. *Hogan*, 453 P.2d 468, 473 & n.15 (Alaska 1969); *Sabella* v. *Southern Pac. Co.*, 449 P.2d 750, 752 n.2 (Cal.), cert. denied, 395 U.S. 960 (1969); *Higgs* v. *District Court*, 713 P.2d 840, 861 (Colo. 1985); *Quick* v. *Crane*, 727 P.2d 1187, 1198 (Idaho 1986); *Ross* v. *Duluth, Missabe & Iron Range Ry. Co.*, 290 N.W. 566, 570 (Minn. 1940); *Stokes* v. *Wabash Ry. Co.*, 197 S.W.2d 304, 309 (Mo. 1946) (all citing *Moquin*); see also *Chilson* v. *Allstate Ins. Co.*, 979 A.2d 1078, 1085 (Del. 2009); *Jasper* v. *H. Nizam, Inc.*, 764 N.W.2d 751, 771 (Iowa 2009); *Dixon* v. *Prothro*, 840 P.2d 491, 494 (Kan. 1992); *Nelson-Holst* v. *Iverson*, 479 N.W.2d 759, 762 (Neb. 1992); *Harris* v. *Mt. Sinai Med. Ctr.*, 876 N.E.2d 1201, 1208 (Ohio 2007).

By contrast, since *Moquin*, only a small minority of lower courts to have considered the issue have concluded that remittitur is an appropriate remedy when a verdict has been tainted by passion or prejudice. Among the federal courts of appeals, only the Sixth Circuit has taken that view, stating that remittitur is appropriate even when a verdict results from "passion, bias or prejudice." *Mid-Michigan Computer Systems, Inc.* v. *Marc Glassman, Inc.*, 416 F.3d 505, 509 (6th Cir. 2005) (internal quotation marks omitted); *Gregory* v. *Shelby County*, 220 F.3d 433, 443 (6th Cir. 2000). And some state courts of last resort, like the Nevada Supreme Court in the decision below, continue to permit remittitur even when a verdict is the product of passion or prejudice. See *Carr* v. *Nance*, No. 10-562, 2010 WL 5144789 (Ark. Dec. 16, 2010); *Pinecrest, LLC* v. *Harris ex rel. Estate of Callen-*

dar, 40 So. 3d 557, 560 (Miss. 2010); *Blessum* v. *Shelver*, 567 N.W.2d 844, 853 (N.D. 1997); *Bonn* v. *Pepin*, 11 A.3d 76, 78 (R.I. 2011). The lingering inconsistency in the approaches of federal courts of appeals and state courts of last resort on this frequently recurring issue warrants the Court's review.

2. *The Nevada Supreme Court's Decision To Allow Remittitur Is Erroneous*

The Nevada Supreme Court held that remittitur of the total damages award from $134.1 million to $57.8 million was an appropriate remedy, notwithstanding its determination that the jury's verdict resulted from passion and prejudice. See App., *infra*, 41a-44a. That holding is incorrect.

a. The majority rule that remittitur cannot cure a verdict that is infected by passion or prejudice is rooted in fundamental principles of due process. It is well established that, when a jury returns a verdict that is infected by passion or prejudice, due process mandates that the resulting verdict cannot be sustained. See, *e.g.*, *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 276 (1989) (observing that "a jury award may not be upheld if it was the product of bias or passion"); *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 41 (1991) (Kennedy, J., concurring in the judgment) (stating that "[a] verdict returned by a biased or prejudiced jury no doubt violates due process"); *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 475-476 (1993) (O'Connor, J., dissenting) (noting that "[i]nfluences such as caprice, passion, bias, and prejudice are antithetical to the rule of law" and "[i]f there is a fixture of due process, it is that a verdict based on such influences cannot stand").

When a jury returns a verdict that is infected by passion or prejudice, due process is not adequately served when a court orders remittitur instead of a new trial. That is because, when passion or prejudice taints the jury's deliberations, "it is virtually impossible to determine the degree to which those factors affected the jury generally," as opposed to particular aspects of the jury's decision. *Higgs*, 713 P.2d at 861. When a jury is simultaneously considering liability and damages, there is a very real risk that "prejudice may have infected the decision of the jury on liability, as well as on damages"—in which case remittitur would be an insufficient remedy. 11 Wright & Miller § 2815, at 165. As this Court noted in *Moquin*, "passion and prejudice * * * may be quite as effective to beget a wholly wrong verdict as to produce an excessive one." 283 U.S. at 521; see *Dossett*, 399 F.3d at 947; *Dresser Industries*, 965 F.2d at 1448; *Stokes*, 197 S.W.2d at 309.

A case in which the verdict is tainted by a jury's passion or prejudice therefore materially differs from a case in which the damages awarded are excessive. In the latter instance, the court need only determine the amount that the jury could validly have awarded based on the evidence. See 11 Wright & Miller § 2815, at 167-168 (discussing remittitur standard). By contrast, when the verdict has been tainted by the jury's passion or prejudice, a court must put itself in the shoes of the jury and redo the *entire* verdict, by projecting what an untainted jury would have decided about both liability and damages. Just as bias on the part of the trial judge constitutes structural error requiring automatic reversal in criminal proceedings, see *Tumey* v. *Ohio*, 273 U.S. 510, 535 (1927), so too does passion or prejudice on the part of the jury deprive a defendant of its right to a fair trial and require more than remittitur in civil proceedings.

b. This case amply illustrates the difficulties with allowing remittitur in cases in which the verdict results from passion or prejudice. Both the trial court and the Nevada Supreme Court recognized that passion and prejudice had tainted the jury's verdict. See App., *infra*, 46a-47a, 51a (trial court); *id.* at 43a (Nevada Supreme Court). Yet the trial court seemingly assumed that the passion and prejudice had not tainted the jury's decision on *liability*. And as to the jury's damages award, the trial court simply reduced the compensatory and punitive awards to each plaintiff by roughly similar amounts, without any explanation for why the amounts it chose were appropriate. See, *e.g.*, *id.* at 47a-48a (reducing compensatory awards for past damages by $3 million per plaintiff); *id.* at 50a-51a & n.4 (reducing the punitive awards to plaintiffs Scofield and Rowatt by $21 million each, but reducing the punitive award to plaintiff Forrester by $22 million). The trial court therefore effectively replaced the jury's verdict with its own, based on "little better than speculation" about "the extent of the wrong" that the passion and prejudice inflicted on petitioners. *Moquin*, 283 U.S. at 521-522. The Court should grant review in this case to clarify that, as a matter of due process, remittitur is not appropriate in these circumstances.

3. The Issue Is An Important One That Warrants The Court's Review In This Case

There can be few questions as important to the integrity of the judicial system as the extent to which due process protects litigants from a jury's passion and prejudice. As discussed above, the question whether remittitur is an appropriate remedy when a verdict has been infected by passion or prejudice is a frequently recurring one, with lower courts reaching differing conclusions.

See pp. 11-14, *supra*. Virtually all of the federal courts of appeals, and many state courts of last resort, have now considered that issue, and there would therefore be little if any benefit to further percolation.

Furthermore, this case presents an excellent vehicle for consideration of the issue, because there is no doubt here that the jury's verdict was in fact infected by passion and prejudice. The trial court so found, and the Nevada Supreme Court agreed, stating unequivocally that the numerous improprieties below "tainted the jury's verdicts." App., *infra*, 43a (Nevada Supreme Court); see *id.* at 51a (trial court).

The lower courts' findings on passion and prejudice, moreover, were plainly correct. During the first phase of the trial, plaintiffs' counsel, over petitioners' objections, made repeated inflammatory statements to the jury. Most egregiously, plaintiffs contended that petitioners were responsible for enough cases of breast cancer to fill two football stadiums and urged the jury to consider a poem depicting cancer victims participating in the Race for the Cure. The trial judge not only overruled petitioners' objections to those statements, but refused to instruct the jury in the first phase that it could not base its determinations on a desire to punish petitioners for conduct that allegedly affected others. See pp. 5-6, *supra*.

The jury's subsequent conduct provided ample confirmation that its deliberations had been fatally tainted. The jury indisputably disregarded the trial court's instructions in the first phase and considered liability and punitive damages at the same time. It did so, moreover, without receiving the constitutionally required instructions on punitive damages—thus leaving the jury free (at the invitation of plaintiffs' counsel) impermissibly to award damages intended to punish not only petitioners'

conduct toward plaintiffs, but also petitioners' conduct toward non-parties. And when the trial judge asked the jury whether it had already decided punitive damages, the jury refused to answer until the judge provided assurances that it would still be able to impose punitive damages if it said yes. The jury proceeded to subtract a portion of the original verdict from its compensatory award, only to add it back in when it made its new punitive award.

The trial court's extraordinary series of errors in this case cannot be rectified through the simple expedient of a remittitur that reduced the damages to "only" $57.8 million. This case is an ideal vehicle for the Court to resolve the conflict among the lower courts and hold that, when a jury verdict is infected by passion or prejudice, a new trial is the only appropriate remedy.

B. This Court Should Grant Review To Decide Whether The Remitted Punitive Damages Are Constitutionally Excessive

1. The Federal Courts Of Appeals And State Courts Of Last Resort Are Divided On The Circumstances Under Which A Punitive Award May Exceed A Substantial Compensatory Award

Even if the remittitur in this case otherwise satisfied the requirements of due process, the Court's review would nevertheless be warranted because this case presents an important and independent issue concerning the constitutionality of an award of punitive damages that exceeds an already substantial award of compensatory damages.

a. In a series of pathmarking decisions starting with *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), this Court has recognized that due process "prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm*, 538 U.S. at

416. The Court has instructed lower courts to consider three guideposts in assessing the validity of a punitive award: "(1) the degree of reprehensibility of the defendant's misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases." *Id.* at 418.

b. Since the Court's decision in *BMW*, lower courts have struggled with the application of these guideposts. Perhaps the greatest disarray concerns the "disparity" guidepost, which requires a court to consider the ratio of punitive damages to "the actual harm inflicted on the plaintiff." *BMW*, 517 U.S. at 580. This Court has "decline[d]" more generally to "impose a bright-line ratio which a punitive damages award cannot exceed." *State Farm*, 538 U.S. at 425. At the same time, however, the Court has specifically stated 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." *Ibid.*; see *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 501, 514 (2008) (characterizing foregoing principle as a "due process standard[] that every award must pass" and a "constitutional upper limit").

In the absence of more definitive guidance from this Court, lower courts have taken divergent approaches as to what constitutes a "substantial" award of compensatory damages and whether the "lesser ratio" of 1:1 is a true constitutional limit or merely a guideline. The Sixth Circuit, for example, has deemed "substantial" a series of compensatory awards ranging from $400,000 to $6 million. See *Morgan* v. *New York Life Ins. Co.*, 559 F.3d 425, 442 (2009); *Bach* v. *First Union Nat'l Bank*, 486

F.3d 150, 155-156 (2007); *Pollard* v. *E.I. DuPont de Nemours, Inc.*, 412 F.3d 657, 668 (2005). In each of those cases, moreover, the Sixth Circuit required a ratio of punitive or compensatory damages of or approximating 1:1. See *Morgan*, 559 F.3d at 443 (vacating and remanding for punitive damages "not to exceed the amount of compensatory damages"); *Bach*, 486 F.3d at 155-156 (concluding that "a ratio of 1:1 or something near to it is an appropriate result"); *Pollard*, 412 F.3d at 668 (noting that "[t]he total compensatory damages of $2.2 million is close to a 1-to-1 ratio").

Similarly, the Eighth Circuit has deemed compensatory awards ranging from $600,000 to over $4 million to be "substantial," and, on that basis, imposed a ratio of or approximating 1:1. See *JCB, Inc.* v. *Union Planters Bank, NA*, 539 F.3d 862, 876 (2008) (affirming punitive damages of $1.15 million where compensatory damages were $1.1 million); *Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (2005) (holding that, "given the $4,025,000 compensatory damages award in this case, * * * a ratio of approximately 1:1 would comport with the requirements of due process"); *Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 799 (2004) (observing that $600,000 in compensatory damages is "a lot of money" and concluding that "due process requires that the punitive damages award * * * be remitted to $600,000").

Other courts of appeals and state courts of last resort have applied a similarly stringent approach. See, *e.g.*, *Mendez-Matos* v. *Municipality of Guaynabo*, 557 F.3d 36, 55 (1st Cir. 2009) (noting that a $35,000 compensatory award was "substantial" and concluding that "this fact supports the one-to-one ratio between the compensatory damages * * * and a $35,000 punitive damages award"); *Jurinko* v. *Medical Protective Co.*, 305 Fed. Appx. 13, 30 (3d Cir. 2008) (reducing the punitive award

to "reflect a 1:1 ratio" in light of a compensatory award of $1.7 million); *Roby* v. *McKesson Corp.*, 219 P.3d 749, 769-770 (Cal. 2009) (applying the "federal constitutional limit" of *State Farm* to a compensatory award of $1.9 million).

By contrast, other courts have held that, even though an award of compensatory damages was concededly "substantial," a 1:1 ratio was not required. See, *e.g.*, *Planned Parenthood of Columbia/Willamette Inc.* v. *American Coal. of Life Activists*, 422 F.3d 949, 963 (9th Cir. 2005) (addressing compensatory damages ranging from $375 to $406,000 and holding that "[m]ost of the compensatory awards are substantial," but remitting punitive awards at 9:1 ratio), cert. denied, 547 U.S. 1111 (2006); *Bains LLC* v. *ARCO Prods. Co.*, 405 F.3d 764, 776 (9th Cir. 2005) (holding that a $50,000 compensatory award was substantial, but remanding for punitive award at ratio between 6:1 and 9:1); *Bogle* v. *McClure*, 332 F.3d 1347, 1362 (11th Cir. 2003) (holding that a $500,000 compensatory award was substantial, but affirming punitive award at 4:1 ratio), cert. dismissed, 540 U.S. 1158 (2004); *Goddard* v. *Farmers Ins. Co.*, 179 P.3d 645, 667-668 (Or. 2008) (holding that a $691,000 compensatory award was substantial, but applying 4:1 ratio to punitive award); *Seltzer* v. *Morton*, 154 P.3d 561, 613 (Mont. 2007) (holding that a $1.1 million compensatory award was substantial, but affirming punitive award at 9:1 ratio). Perhaps most remarkably, on remand from this Court in *State Farm* itself, the Utah Supreme Court applied a 9:1 ratio to the punitive award where the compensatory award was $1 million—the very same award that this Court had described as "substantial." See *Campbell* v. *State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 417 (Utah), cert. denied, 543 U.S. 874 (2004).

Further complicating the issue, some courts have seemingly recognized that a 1:1 ratio is required where an award of compensatory damages is "substantial," but have either explicitly or implicitly held that sizable compensatory awards were not sufficiently substantial to trigger that requirement. See, *e.g.*, *Action Marine, Inc.* v. *Continental Carbon Inc.*, 481 F.3d 1302, 1321-1322 & n.24 (11th Cir. 2007) (recognizing that the 1:1 ratio is "the general rule when substantial compensatory damages have been awarded," but affirming punitive award at 5:1 ratio based on compensatory damages of $3.2 million), cert. denied, 554 U.S. 932 (2008); *Flax* v. *Daimler-Chrysler Corp.*, 272 S.W.3d 521, 539 (Tenn. 2008) (holding that a compensatory award of $2.5 million was not "so large as to require a ratio of 1 to 1"), cert. denied, 129 S. Ct. 2433 (2009); see also *Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1371-1372 (Fed. Cir. 2003) (affirming punitive award at nearly 3:1 ratio based on compensatory damages of $15 million), cert. denied, 540 U.S. 1183 (2004).

Clearly, then, there is considerable confusion among the lower courts concerning what constitutes a "substantial" award of compensatory damages and to what extent the 1:1 ratio cited in *State Farm* and *Exxon Shipping* limits punitive damages in the face of such an award. That confusion has not gone unnoticed by commentators, who have pointed out that, while some lower courts "have heeded *State Farm*'s admonition that a lower ratio is appropriate where the amount of compensatory damages is substantial," others have "all but ignored" the Court's "recommendation of a 1:1 ratio in these cases." Lauren R. Goldman & Nickolai G. Levin, *'State Farm' at Three: Lower Courts' Application of the Ratio Guidepost*, 2 N.Y.U. J.L. & Bus. 509, 546 (2006). The Court's review is desperately needed to provide guidance to the

lower courts on this vitally important and frequently recurring issue.

2. *The Nevada Supreme Court's Decision To Uphold The Punitive Award Is Erroneous*

The Nevada Supreme Court affirmed the remitted punitive award of $35 million, notwithstanding the fact that it considerably exceeded the already substantial award of $22.8 million in compensatory damages. See App., *infra*, 39a-41a. In upholding the punitive award, the Nevada Supreme Court erred.

a. As this Court indicated in *State Farm* and *Exxon Shipping*, when a court awards a substantial amount in compensatory damages, it would violate due process to award an even greater amount in punitive damages. As the Court has explained, punitive damages are designed to deter and to punish. See *State Farm*, 538 U.S. at 416. Where compensatory damages are small, higher ratios of punitive to compensatory damages are constitutionally permissible, because plaintiffs would otherwise have little incentive to bring suit and juries would have limited opportunities to exact retribution. See *ibid.*; *BMW*, 517 U.S. at 582. When compensatory damages are substantial, however, the need for deterrence and retribution is accordingly lower, for the compensatory award itself serves deterrent and retributive purposes. A "substantial" compensatory award "takes into account the role of punitive damages to induce legal action when pure compensation may not be enough to encourage suit." *Exxon Shipping*, 554 U.S. at 515 n.28. And because "there is no clear line of demarcation between punishment and compensation" in cases involving claims for damages such as pain and suffering, a substantial compensatory award that significantly exceeds the plaintiff's actual damages will often reflect the jury's desire not just to make the

plaintiff whole but to punish the defendant. Restatement (Second) of Torts § 908 cmt. c (1979); see *State Farm*, 538 U.S. at 426.

b. This is the paradigmatic case in which the compensatory award itself serves deterrent and retributive purposes, such that a punitive award that is over $12 million larger than the compensatory award is inappropriate.

As an initial matter, the compensatory damages here were indisputably "substantial," whether taken together ($22.8 million) or separately ($8 million, $7.6 million, and $7.3 million, respectively). The $22.8 million awarded in total to plaintiffs is far higher than amounts other courts have deemed substantial, see pp. 19-21, *supra*, and indeed is 22.8 times larger than the compensatory damages that this Court deemed "substantial" in *State Farm*, see 538 U.S. at 426.[4]

In this case, it is particularly clear that those substantial compensatory damages serve to deter and punish, as well as to compensate. As the trial court itself recognized, the "great bulk" of the compensatory damages "were for pain, suffering and emotional distress." App., *infra*, 46a. The only evidence of actual damages presented by plaintiffs was their medical bills, which totaled only $130,000. See *id.* at 46a & n.1. Because the compensatory award (even as remitted) was *175 times* that amount, the punitive award in this case "likely

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[4] Notably, the Court has stated that, for purposes of triggering the 1:1 ratio, "individual awards are not the touchstone" in cases in which multiple plaintiffs are involved. *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 515 n.28 (2008). Even if the compensatory award were broken down into the individual awards to each plaintiff, however, those awards comfortably exceed the awards deemed "substantial" by other courts and by this Court in *State Farm*.

* * * duplicated" substantial aspects of the compensatory award, *State Farm*, 538 U.S. at 426.[5] And given the jury's fixation on punishment when it determined compensatory damages in this case, the duplication between the compensatory and punitive awards here was not simply "likely," but nearly certain.

In the particular context of mass tort litigation such as pharmaceutical litigation, moreover, there is far less need for punitive damages in order to achieve the goals of deterrence and punishment. In cases in which there may be thousands of plaintiffs seeking damages in individual lawsuits, the combined cost of compensatory awards alone can run into the billions of dollars. As Judge Friendly observed even before the advent of multidistrict litigation, a "manufacturer distributing a drug to many thousands of users under government regulation scarcely requires th[e] additional measure [of punitive damages] for manifesting social disapproval and assuring deterrence," for "[c]riminal penalties and heavy compensatory damages" are ordinarily sufficient to satisfy those objectives. *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 840-841 (2d Cir. 1967); see Restatement (Second) of Torts § 908 cmt. e. In sum, the circumstances here are precisely those in which a punitive award that is larger than the already substantial compensatory award surpasses the "outermost limit of the due process guarantee." *State Farm*, 538 U.S. at 425.

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[5] Even when considered individually, the smallest of the remitted awards in this case is nearly twice as large as the next largest award in any of the other 14 trials to date in the hormone therapy litigation.

c. This case is a particularly suitable candidate in which to apply the 1:1 ratio because the other *BMW* guideposts weigh against a sizable punitive award.

i. As to reprehensibility, undisputed evidence established that petitioners provided explicit, detailed warnings regarding breast cancer to doctors and patients throughout the period in question, and those warnings, as plaintiffs' regulatory expert acknowledged, accurately reflected then-existing science. See Pet. Nev. S. Ct. Br. 50. The warnings, moreover, candidly disclosed the limits of the existing scientific knowledge, noting that some studies showed a small increased risk of breast cancer while others showed no risk at all. See *id.* at 7-8, 51. In addition, petitioners' position reflected the majority view in the ongoing medical and scientific debate: of the hundreds of articles in the medical literature about hormone therapy and breast cancer, plaintiffs could cite only three claiming that hormone therapy "causes" breast cancer. See *id.* at 51-52. In the presence of such a genuine dispute in the medical and scientific community, a defendant's conduct cannot be said to be reprehensible, and punitive damages are unwarranted. See, *e.g.*, *Clark* v. *Chrysler Corp.*, 436 F.3d 594, 603 (6th Cir. 2006); *Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995), cert. denied, 516 U.S. 1045 (1996).[6]

In addition, undisputed evidence established that petitioners complied with all relevant FDA requirements for warning about the risk of breast cancer and kept the FDA informed of the available scientific data regarding the risk. See Pet. Nev. S. Ct. Br. 8-9, 51, 57. The FDA

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[6] In addition, petitioners actively supported further research concerning the possible association between hormone therapy and breast cancer. See Pet. Nev. S. Ct. Br. 50.

itself focused on the breast-cancer risk in approving one of petitioners' medicines in 1994 and reapproving it in 1995 and 1998. See *id.* at 8-10. Although that compliance does not affirmatively preempt plaintiffs' failure-to-warn claims, see *Wyeth* v. *Levine*, 129 S. Ct. 1187 (2009), it does constitute compelling evidence weighing against a determination of reprehensibility. See, *e.g.*, *Nader* v. *Allegheny Airlines, Inc.*, 626 F.2d 1031, 1035 (D.C. Cir. 1980); *Phillips* v. *Cricket Lighters*, 883 A.2d 439, 447 (Pa. 2005); *Alcorn* v. *Union Pac. R.R. Co.*, 50 S.W.3d 226, 249 (Mo. 2001).

In support of their argument that petitioners' conduct was reprehensible, plaintiffs relied almost entirely on evidence of conduct by petitioners that was unconnected either to the individual plaintiffs or to the State of Nevada. See, *e.g.*, App., *infra*, 10a (describing the alleged ghostwriting of journal articles that were not read by plaintiffs or their doctors); *id.* at 9a-10a (describing marketing practices that did not reach plaintiffs' doctors). As this Court has made clear, however, such evidence cannot play any role in the determination of punitive damages, because the Due Process Clause prohibits States from punishing a defendant "for injury that it inflicts upon * * * strangers to the litigation," *Philip Morris*, 549 U.S. at 353, or for conduct, lawful or unlawful, that was "committed outside of the State's jurisdiction," *State Farm*, 538 U.S. at 421.

Those points are especially salient here because plaintiffs Rowatt and Scofield began taking petitioners' medicines in Oregon and Washington, respectively, and lived in those States for all but a few months of their use of the medicines. See App., *infra*, 14a; Pet. Nev. S. Ct. Br. 6-7. The alleged failure to warn that was the basis of their claims therefore took place in Oregon and Washington. But under the laws of those States, punitive

damages would be unavailable. See Or. Rev. Stat. § 30.927; *Sofie* v. *Fibreboard Corp.*, 771 P.2d 711, 726 (Wash. 1989) (en banc). Affording those plaintiffs punitive damages under *Nevada* law, without discounting for the fact that most of the relevant conduct occurred outside Nevada, raises serious constitutional concerns. As this Court has noted, "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." *State Farm*, 538 U.S. at 422. The practical effect of applying Nevada law to afford plaintiffs punitive damages is to "impose[] [Nevada's] own policy choice" on Oregon and Washington, in contravention of that basic constitutional principle. *BMW*, 517 U.S. at 571-572.

ii. As to comparable penalties, the Nevada Supreme Court merely pointed to "a recent comparable fine" for $600 million against "a company that promoted its drug for unapproved benefits." App., *infra*, 40a. As a preliminary matter, while the court noted the testimony of plaintiffs' regulatory expert concerning that fine, the expert never identified the target of the fine; the conduct that led to the fine; or any other information that would support using the fine as a comparator. The "comparable penalties" guidepost requires a court to consider the "penalties that could be imposed for *comparable misconduct*." *BMW*, 517 U.S. at 583 (emphasis added). But the record wholly lacked any details about the "misconduct" upon which the supposedly comparable penalty was based.

In addition, this Court has never approved the use of federal penalties—much less federal criminal fines of the type seemingly at issue here—when examining an award

of punitive damages under *state* law. See *State Farm*, 538 U.S. at 428 (noting that courts must consider "the seriousness with which a State views the wrongful action" and looking to "[t]he most relevant civil sanction under Utah state law"); *BMW*, 517 U.S. at 584 (reviewing penalties authorized by state legislatures). Just as the Court did not, in those decisions, invoke recent fines imposed by the federal government for deceptive behavior, nor should the Nevada Supreme Court have looked to a recent federal fine, rather than to the most relevant comparable penalty—Nevada's $5,000 penalty for engaging in deceptive trade practices. See Nev. Rev. Stat. § 598.0999(2).

Finally, a "recent" penalty does not provide a defendant with the fair notice required by the Constitution. The Due Process Clause "dictate[s] 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." *State Farm*, 538 U.S. at 417 (quoting *BMW*, 517 U.S. at 574). That fundamental principle is violated if a court may, as a basis for affirming a punishment, invoke a penalty indisputably imposed *after* the conduct in question, as occurred here. Because petitioners had no fair notice that, many years later, the federal government would impose a $600 million fine on another company, they had no opportunity to conform their behavior accordingly.

By any standard, therefore, the punitive award in this case was grossly excessive and arbitrary. The Court should grant certiorari to clarify that the 1:1 ratio is applicable where, as here, compensatory damages are "substantial," and hold that the $35 million punitive award in this case violated due process.

3. The Conflict Among The Lower Courts Warrants The Court's Review In This Case

The question whether the 1:1 ratio is a strict limit in cases involving substantial compensatory damages or merely a guideline is an important and recurring one warranting the Court's review. As discussed above, the lower courts are plainly struggling with that question, reaching different results on materially identical facts. See pp. 19-22, *supra*. The resulting disuniformity has serious consequences for both plaintiffs and defendants, because the permissible size of punitive awards has come to depend on the particular jurisdiction in which the awards are imposed and reviewed. If, for example, this case had been tried in the Eastern District of Arkansas—where federal hormone-therapy cases have been consolidated by the Judicial Panel on Multidistrict Litigation—plaintiffs almost certainly would have been limited to $22.8 million in punitive damages, given the Eighth Circuit's fidelity to the 1:1 ratio. In essence, then, petitioners are paying over $12 million more simply because they faced suit in Nevada state court rather than Arkansas federal court. That "feature of happenstance," *Exxon Shipping*, 554 U.S. at 502, cannot be reconciled with this Court's commitment to ensuring that a defendant has "fair notice of the severity of the penalty" that may be imposed. *Philip Morris*, 549 U.S. at 352 (internal quotation marks and ellipsis omitted).

This case, moreover, is an ideal vehicle in which to address the question. By any measure, the $22.8 million in compensatory damages is "substantial"; therefore, the Court need not dwell upon whether that antecedent condition has been satisfied—a significant obstacle to review in many of the cases in which this Court has previously had the opportunity to consider the question. See, *e.g.*, *Fortis Ins. Co.* v. *Mitchell*, cert. denied, 130 S. Ct. 1896

(2010) (No. 09-854) ($150,000 in compensatory damages); *DaimlerChrysler Corp.* v. *Flax*, cert. denied, 129 S. Ct. 2433 (2009) (No. 08-1010) ($2.5 million); *Energen Resources Corp.* v. *Jolley*, cert. denied, 129 S. Ct. 1633 (2009) (No. 08-1001) ($1.9 million). Indeed, the compensatory damages here are higher than in any previous petition presenting the question to this Court except one—and in that case (which presented the question only indirectly), the petition was dismissed by agreement of the parties. See *NiSource Inc.* v. *Estate of Tawney*, cert. dismissed, 129 S. Ct. 1186 (2008) (No. 08-229). As noted above, moreover, the other *BMW* guideposts here weigh against, rather than in favor of, a sizable punitive award—making this case a particularly appropriate vehicle in which to hold that the 1:1 ratio is applicable. See pp. 26-29, *supra*.

Members of this Court have famously expressed divergent views as to the propriety of reviewing the excessiveness of punitive damages. The propriety of that review having been established, however, there can be no disagreement that lower courts need guidance as to the circumstances under which punitive damages are excessive—and, in particular, on the longstanding question of whether a court may award a greater amount in punitive damages when compensatory damages are already substantial. The Court's review is warranted to provide much-needed clarity on that question and to reverse the manifestly unjust outcome in this case.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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