No. 11-1475

IN THE

Supreme Court of the United States

ICICLE SEAFOODS, INC.,

Petitioner,

v.

DANA CLAUSEN,

Respondent.

Application For Partial Stay Of Judgment Of The Supreme Court Of Washington, Pending Disposition Of A Petition For A Writ Of Certiorari

DIRECTED TO THE HONORABLE ANTHONY M. KENNEDY, ASSOCIATE JUSTICE OF THE SUPREME COURT AND CIRCUIT JUSTICE FOR THE NINTH CIRCUIT

Michael A. Barcott
HOLMES WEDDLE
& BARCOTT, P.C.
999 Third Ave.
Suite 2600
Seattle, WA 98104

Meir Feder
Counsel of Record
Rajeev Muttreja
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

Eric E. Murphy
JONES DAY
325 John H. McConnell Blvd., Ste. 600
P.O. Box 165017
Columbus, OH 43216

Counsel for Petitioner
Icicle Seafoods, Inc.

JUNE 11, 2012

CORPORATE DISCLOSURE STATEMENT

Petitioner Icicle Seafoods, Inc., is a private corporation that is wholly owned by Icicle Midco, Inc., a private corporation that is wholly owned by Icicle Holdings, Inc. No publicly held company owns 10% or more of Icicle Seafoods' stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page

CASES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES

APPLICATION TO STAY JUDGMENT OF THE SUPREME COURT OF WASHINGTON, PENDING DISPOSITION OF A PETITION FOR A WRIT OF CERTIORARI

To the Honorable Anthony M. Kennedy, Associate Justice of the Supreme Court and Circuit Justice for the Ninth Circuit:

Pursuant to Rules 22 and 23 of this Court's rules, as well as 28 U.S.C. §§ 1651(a) and 2101(f), Petitioner Icicle Seafoods, Inc., respectfully requests a partial stay of the judgment of the Supreme Court of Washington, dated March 15, 2012, pending disposition of Icicle's Petition for a Writ of Certiorari that was timely filed in this Court on June 4, 2012. *See Icicle Seafoods, Inc. v. Clausen*, No. 11-1475 (June 4, 2012) (attached as Ex. A). This case arises under federal maritime law. The jury awarded Respondent Dana Clausen $37,420 in compensatory damages and $1.3 million in punitive damages for Icicle's failure to pay him maintenance and cure, producing a ratio of punitive to compensatory damages of over 34 to 1. Icicle moved to remit the award, citing the holding of *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), that generally "[a] punitive-to-compensatory ratio of 1:1 . . . yields maximum punitive damages" in maritime cases. *Id.* at 515. Over a two-Justice dissent, the Washington Supreme Court refused. The majority turned the 34:1 ratio into a 2.79:1 ratio on what the dissent described as a "fiction." In stark conflict with the decisions of several courts, the majority attempted to justify the punitive award by adding Clausen's nearly $400,000 in later-awarded attorney's fees—fees that are themselves punitive relief under this Court's cases—to the compensatory side of the ratio. Moreover, the majority found that *Exxon* established no general limits on punitive awards, and refused to follow *Exxon*'s 1:1 ratio.

Icicle has paid Clausen his awards of compensatory damages and attorney's fees, but asked the Washington Supreme Court to stay the punitive-damages part of the judgment pending this Court's disposition of Icicle's Petition for a Writ of Certiorari (and, if granted, this Court's decision on the merits). The Washington Supreme Court denied that request, but granted a 35-day stay (expiring on July 10, 2012) to permit Icicle to seek a stay from this Court. The Court should grant the partial stay both because there is a reasonable probability that it will grant certiorari (and reverse) due to the sharp conflict between the decision below and the decisions of this Court and of other courts, and there is a serious risk that Icicle will be unable to recover the security that it has posted in state court if those funds are released to Clausen before the Court resolves this case.

JURISDICTION

Icicle's Petition for Writ of Certiorari seeks review of the Supreme Court of Washington's decision dated March 15, 2012. This Court has jurisdiction to review that decision under 28 U.S.C. § 1257(a). The Court has the authority to issue stays and injunctions in aid of its jurisdiction under 28 U.S.C. § 1651(a) and 28 U.S.C. § 2101(f).

BACKGROUND

As the Petition notes (Pet. 1-7), this case arises out of a February 2006 maritime accident. Pet. App. 3a. After injuring himself while working on a barge, Clausen sued Icicle, asserting three federal claims: (1) a negligence claim under the Jones Act, 46 U.S.C. § 30104; (2) an unseaworthiness claim under federal common law; and (3) a maintenance-and-cure claim under federal common law.

The jury found in Clausen's favor on his Jones Act and maintenance-and-cure claims, but found in Icicle's favor on his unseaworthiness claim. *Id.* The Jones Act claim arose from his accident on the barge. The jury found Icicle 56% responsible for that accident and further found that Clausen had suffered $453,100 in damages on that claim, awarding Clausen approximately $253,000. No punitive damages or attorney's fees are available under the Jones Act, and none were awarded.

The maintenance-and-cure claim—a maritime-law claim analogous to worker's compensation that provides for no-fault remedies—arose out of Icicle's alleged obligation to pay for certain medical and living expenses during Clausen's recovery. The jury awarded Clausen $37,420 on this claim for unpaid medical and living expenses, but found that Icicle's failure to pay sufficient maintenance and cure resulted in no injury to Clausen beyond the unpaid amounts themselves. Pet. App. 4a, 30a n.2. Yet the jury also awarded Clausen $1.3 million in punitive damages on this claim—a sum over 34 times Clausen's compensatory damages—in light of its finding that Icicle was "callous and indifferent" or "willful and wanton" in its failure to pay maintenance and cure. *See* Pet. App. 4a. After the verdict, on motion from Clausen, the trial court awarded Clausen $387,558 in attorney's fees and $40,547.57 in costs under *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962), which permits an award of attorney's fees when an employer's failure to pay maintenance and cure is "callous" or "willful and wanton." *See* Pet. App. 4a.

Icicle moved to reduce the punitive award to within the 1:1 compensatory-to-punitive damages ratio announced for maritime cases in *Exxon Shipping Co. v.*

Baker, 554 U.S. 471 (2008). The trial court rejected Icicle's challenge, reasoning that, for ratio purposes, Clausen's $37,420 in compensatory damages should be supplemented by his court-awarded attorney's fees and costs. With the inclusion of those items, Clausen's "compensatory damages" swelled from the jury's award of $37,420 to a total of $465,525. Pet. App. 37a. And while, even with this inflated number, the punitive damages still nearly tripled the compensatory award, the trial court held that the resulting 2.79:1 ratio complied with *Exxon*. *See* Pet. App. 50a.

Icicle appealed after posting security for the entire judgment in the trial court. *See* Icicle Emergency Mot., at Ex. A.1 (attached as Ex. B). On appeal, Icicle argued (as relevant here) that *Exxon* required the trial court to reduce Clausen's $1.3 million punitive-damages award, Pet. App. 15a, and that the trial court erred by adding Clausen's attorney's fees to the compensatory-damages element of the ratio between compensatory and punitive damages, Pet. App. 20a.

On March 15, 2012, over a dissent, the Washington Supreme Court affirmed. The majority rejected both of Icicle's contentions. It characterized *Exxon* as not "establishing a broad, general rule limiting punitive damage awards," Pet. App. 17a, but rather as embracing "a variable limit" on punitive damages "based on the tortfeasor's culpability," Pet. App. 18a. No ratio was applicable here, the majority held, because *Exxon* involved "a case of reckless action, profitless to the tortfeasor," Pet. App. 17a (quoting 554 U.S. at 510-11), whereas "Icicle's conduct was not just reprehensible, it was egregious," Pet. App. 19a.

The court further held that the applicable ratio was not 34 to 1 but rather 2.79 to 1, holding that the trial court properly "include[d] attorney fees as part of the compensatory damages award when calculating the punitive damages ratio." Pet. App. 20a. The majority found that "recovery of attorney fees is compensatory in that those fees attempt to make Clausen whole for the employer's actions." *Id.* In support, it cited several cases applying the due-process limits on punitive damages, noting that "[c]ourts in other jurisdictions include attorney fees as part of the compensatory damages award for punitive damages ratio comparison purposes." *Id.*

The dissent argued that "the majority ignore[d] instruction from . . . *Exxon*." Pet. App. 21a. "To solve the problem of runaway punitive damage awards," the dissent emphasized, "the *Exxon* Court concluded that punitive damages should be 'pegg[ed] . . . to compensatory damages using a ratio . . . .'" Pet. App. 23a (quoting 554 U.S. at 506). While noting the possibility that *Exxon* might permit a slightly higher ratio than 1:1 in some cases, the dissent pointed out that the "highest ratio considered potentially applicable in *Exxon* was 3:1." Pet. App. 26a.

The dissent next rejected the majority's assertion that "the punitive damage award in this case is no more than three times the compensatory award" as sheer "fiction." Pet. App. 27a. It explained that "attorney fee awards in maintenance and cure actions are characterized as punitive," not compensatory—as this Court and other courts have indicated—"because fees are not available unless a showing of callous or willful and wanton conduct is made." Pet. App. 28a (citing *Vaughan*, 369

U.S. at 531). Thus, the dissent explained, Clausen's punitive damages dwarfed his compensatory damages by a measure that "vastly exceeds any ratio considered palatable by the *Exxon* Court," Pet. App. 26a, and were "plainly excessive in relation to the actual harm caused by" Icicle, Pet. App. 30a. "By upholding the award," the dissent warned, "this court perpetuates a problem the *Exxon* Court intended to remedy: the issue of unpredictable punitive damage awards that fail the fundamental goal of deterrence." Pet. App. 30a.

Icicle has now paid Clausen $825,545.64, an amount representing the compensatory damages, attorney's fees, and costs that Clausen was awarded. *See* Emergency Mot., at 5. On April 6, 2012, however, Icicle moved in the trial court for a partial stay of the judgment under 28 U.S.C. § 2101(f). Icicle sought to stay the $1.3-million punitive award pending review by this Court, pointing out that the security for that punitive award would remain posted in state court in the interim. On April 23, 2012, the trial court denied the motion. *See Clausen v. Icicle Seafoods, Inc.*, No. 08-2-03333-3 SEA (Wash. Super. Ct. Apr. 23, 2012) (attached as Ex. C).

On April 27, 2012, Icicle filed both a notice of appeal seeking discretionary review by the Washington Supreme Court of the trial court's denial of its requested partial stay and a motion in the Washington Supreme Court seeking the same partial stay. Icicle's motion noted that Clausen had sought to have the funds bonding the punitive award released and that it would not be able to recoup these funds if this Court were to grant certiorari and reverse. *See* Emergency Mot., at 2.

At the least, the motion requested a temporary stay to permit this Court to determine whether it should grant a stay. *Id.* at 13-14.

On May 3, 2012, a Washington Supreme Court commissioner tentatively denied Icicle's motion for a partial stay. *See Clausen v. Icicle Seafoods, Inc.*, No. 87314-3, at 4-5 (Wash. May 3, 2012) (attached as Ex. D). But the commissioner issued a temporary stay to allow the Justices of the Washington Supreme Court to consider the request at a conference on June 5, 2012. *See id.* The commissioner also suggested that Icicle should file a petition for writ of certiorari in this Court before that time. *See id.* at 5 n.3. Icicle filed its Petition on June 4, 2012.

On the following day, the Supreme Court of Washington denied both Icicle's motion for a partial stay and its request for discretionary review of the trial court's denial of a stay. *See Clausen v. Icicle Seafoods, Inc.*, No. 87314-3, at 1 (Wash. June 5, 2012) (attached as Ex. E). At the same time, however, the court granted Icicle a 35-day stay, expiring on July 10, 2012, presumably to give Icicle sufficient time to seek a stay in this Court. *Id.* Icicle filed this application expeditiously to provide this Court with an adequate opportunity to consider it before the expiration of the temporary stay granted below.

REASONS FOR GRANTING THE STAY

The standards for granting a stay pending disposition of a petition for certiorari are "well settled." *U.S. Postal Serv. v. Nat'l Ass'n of Letter Carriers, AFL-CIO*, 481 U.S. 1301, 1302 (1987) (Rehnquist, C.J., in chambers). "First, there must be a reasonable probability that certiorari will be granted (or probable jurisdiction noted). Second, there must be a significant possibility that the judgment below will

be reversed. And third, assuming the applicant's position on the merits is correct, there must be a likelihood of irreparable harm if the judgment is not stayed." *Philip Morris USA Inc. v. Scott*, 131 S. Ct. 1, 3 (2010) (Scalia, J., in chambers). Finally, "[i]n appropriate cases, a Circuit Justice will balance the equities to determine whether the injury asserted by the applicant outweighs the harm to other parties or to the public." *Lucas v. Townsend*, 486 U.S. 1301, 1304 (1988) (Kennedy, J., in chambers). All of these factors illustrate that the Court should grant a stay of the Supreme Court of Washington's judgment in this case.

I. THERE IS A REASONABLE PROBABILITY THAT THE COURT WILL GRANT CERTIORARI

In this case, the Washington Supreme Court upheld punitive damages that were 34 times larger than compensatory damages by (1) comparing the punitive award to a "compensatory damages" figure inflated by nearly $400,000 in attorney's fees, and (2) interpreting *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), as establishing no generally applicable limits on punitive damages. As illustrated in more detail in Icicle's Petition (Pet. 7-28), for at least four reasons, there is a reasonable probability that the Court will grant a writ of certiorari to review the Washington Supreme Court's decision.

First, the Petition demonstrates (Pet. 9-12) that the Washington Supreme Court's use of attorney's fees in the ratio between compensatory and punitive damages conflicts with this Court's decisions in *Exxon* and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). The *Exxon* Court could not have been clearer that the prescribed ratio was between punitive damages and

compensatory damages, holding it appropriate to "peg[] punitive to *compensatory damages* using a ratio or maximum multiple." 554 U.S. at 506 (emphasis added); *see id.* at 513 (noting that "a median ratio of punitive to *compensatory damages* of about 0.65:1 probably marks the line near which cases like this one largely should be grouped." (emphasis added)). This ratio plainly excludes court-awarded attorney's fees, which are not an element of damages that must be proved to a jury but a form of collateral relief ordered as costs by the court. *See Hutto v. Finney*, 437 U.S. 678, 697 (1978); *see also* Pet. App. 12a (noting that the award of attorney's fees was "not part of the plaintiff's substantive claim for damages" but collateral relief). This conclusion is confirmed by the *Exxon* Court's repeated reliance on recommendations and studies that themselves compared punitive damages simply to the jury's compensatory verdict. *See* 554 U.S. at 497-98 & nn.13-14, 506-07.

Likewise, in *State Farm*, the Court declined to adopt the respondents' express argument that the compensatory-damages element of the ratio in that case should include both the $1 million in compensatory damages and some $800,000 in attorney's fees and costs,[1] instead making clear that the relevant ratio was the 145 to 1 ratio between the $145 million in punitive damages and the $1 million in compensatory damages. *See State Farm*, 538 U.S. at 425-26.

Second, as also illustrated in the Petition (Pet. 12-18), the Washington Supreme Court's decision to include court-awarded attorney's fees in the ratio between compensatory and punitive damages deepens an existing split of authority

[1] *See* Br. of Respondents, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289), 2002 WL 31387421, at *17 n.5.

on that question.[2] On the one hand, like the dissent below, Pet. App. 27a-30a, most courts have refused to include attorney's fees in the ratio when measuring a punitive award against federal limits. The Utah Supreme Court, for example, held that the Court's *State Farm* decision "foreclose[d] consideration of a compensatory damages number" inflated to include attorney's fees. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419 (Utah 2004). The D.C. Court of Appeals has gone a step further by indicating that attorney's fees "'includ[e] a certain punitive element' and to that extent . . . favor[] a lesser rather than greater award of punitive damages" under this Court's cases. *Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003); *see also Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (Cal. Ct. App. 2010) (rejecting "attempts to alter the ratio by arguing that" post-trial awards of attorney's fees should be treated as compensatory damages); *Chasan v. Farmers Grp., Inc.*, No. 1 CA-CV 07-0323, 2009 WL 3335341, at *10 (Ariz. Ct. App. Sept. 24, 2009) (same). Many other courts have reduced punitive awards as excessive when compared to compensatory damages without including the plaintiff's award of attorney's fees in the ratio, even where, as here, attorney's fees were (or were destined to be) substantially larger than the compensatory damages. *See, e.g.*,

---

[2] Many of these cases have arisen in the context of the *State Farm* due-process analysis rather than the *Exxon* federal common-law analysis, but the question is identical in both contexts. While the Due Process Clause may permit a higher ratio of compensatory to punitive damages than federal admiralty law, *compare Exxon*, 554 U.S. at 513, *with State Farm*, 538 U.S. at 425, the definition of the ratio is the same in both types of cases. *Exxon* noted that the same ratio it applied was "a central feature in [the Court's] due process analysis." 554 U.S. at 507. The Washington Supreme Court itself recognized as much, relying on several such due-process cases as the sole authority for its holding. Pet. App. 20a.

Quigley v. Winter, 598 F.3d 938, 955-58 (8th Cir. 2010); *Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 362-63 (8th Cir. 2009); *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1120-23 (9th Cir. 2008); *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 118, 126-27 (2d Cir. 2004). The Ninth Circuit's *Mendez* decision, for example, shows that it would have reached a different result than the decision below. In that case, the court reduced a $250,000 punitive award by comparing it to the $2 compensatory damages, excluding the award of attorney's fees to which the court found the plaintiff entitled. *See* 540 F.3d at 1120, 1130.

On the other hand, the Petition demonstrates (Pet. 16-17) that a growing number of cases has taken the opposite position. Citing several cases in support, the Washington Supreme Court's decision below adopted this view that attorney's fees should be included "as part of the compensatory damages award when calculating the punitive damages ratio." Pet. App. 20a. Illinois courts have also upheld substantial punitive awards by including attorney's fees in the ratio, claiming that "the majority of the courts across the country" follow their approach. *Blount v. Stroud*, 915 N.E.2d 925, 943-46 (Ill. App. Ct. 2009) (upholding $2.8-million punitive award by adding $1,182,832.10 award of attorney's fees to $282,350 compensatory damages); *see Lawlor v. N. Am. Corp. of Ill.*, 949 N.E.2d 155, 175-76 (Ill. App. Ct. 2011) (upholding $1.75-million award because, while compensatory damages were only $65,000, the plaintiff had been awarded $600,000 in attorney's fees); *Kirkpatrick v. Strosberg*, 894 N.E.2d 781, 797 (Ill. App. Ct. 2008) (upholding $300,000 punitive-damages award because, while compensatory damages were

nominal, the plaintiff was awarded $83,000 in attorney's fees). And two federal circuit courts have permitted attorney's fees to be included in the ratio, at least if the fees could be characterized under state law as "compensatory." *See Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007); *Willow Inn, Inc. v. Public Serv. Mut. Ins. Co.*, 399 F.3d 224, 236 (3d Cir. 2005).

Third, the Petition likewise showed (Pet. 18-20) that the question whether attorney's fees are properly included in the compensatory-damages element of the ratio between punitive and compensatory damages is important, recurring, and in need of immediate resolution. This Court itself has repeatedly highlighted the importance of the ratio, referring to it as "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 580 (1996). In admiralty cases, the ratio now provides the definitive test for determining the cap on punitive awards. *See Exxon*, 554 U.S. at 506. And, in constitutional cases, the ratio is a "significant," *BMW*, 517 U.S. at 581, and "central" part of the analysis, *Exxon*, 554 U.S. at 507. In addition, the question needs immediate resolution. Without guidance from this Court on how to determine the ratio, it cannot serve the very purpose for which the Court adopted it—to eliminate the "stark unpredictability" of punitive awards. *Exxon*, 554 U.S. at 499. Unpredictability will remain as long as courts can define the ratio in different ways. Finally, the question arises frequently. Punitive damages and attorney's fees are routinely available for the same claims, including, for example, those at issue here, *see Atl. Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2571 (2009); *Vaughan*,

369 U.S. at 530-31, and numerous civil-rights claims, *see* 42 U.S.C. § 1988, among others.

Fourth, the Petition showed (Pet. 24-27) that even apart from its decision to inflate the compensatory side of the ratio, the Washington Supreme Court erred by holding that "the *Exxon* case cannot be read as establishing a broad, general rule limiting punitive damage awards." Pet. App. 17a. This reading that *Exxon* had "expressly limit[ed] its holding to the facts presented," *id.*, is irreconcilable with the rule that *Exxon* adopted. Exercising its ability to make federal common law, *Exxon* held that "quantified limits" on punitive damages were necessary, deciding to "peg[] punitive to compensatory damages using a ratio or maximum multiple." 554 U.S. at 506. Contrary to the Washington Supreme Court's decision, the *Exxon* rule does not permit lower courts to simply ignore these quantified limits if they find the defendant's conduct sufficiently "egregious." Pet. App. 19a. Indeed, *Exxon* rejected the very notion that such subjective "verbal formulations"—tying punitive damages to such things as a defendant's "'degree of heinousness'"—were sufficient to eliminate "unpredictable outliers," expressing doubt that "anything but a quantified approach will work." 554 U.S. at 503-04 (citation omitted). The Washington Supreme Court's refusal to follow the Court's quantified approach provides yet another reason why the Court will likely grant certiorari in this case.

In sum, the Washington Supreme Court's decision here conflicts with this Court's decisions, adds to an existing split of authority, and raises issues that are recurring, important, and in need of immediate resolution. These factors establish

the necessary "reasonable probability" that at least four Justices will vote to grant certiorari in this case. *Philip Morris*, 131 S. Ct. at 3; *cf. United States v. Dominguez Benitez*, 542 U.S. 74, 83 n.9 (2004) (noting that the "reasonable probability" standard is less than a preponderance of the evidence).

II. THERE IS A SIGNIFICANT POSSIBILITY THAT THE COURT WILL REVERSE THE WASHINGTON SUPREME COURT'S DECISION

If the Court grants certiorari, it will likely reverse the decision below. The Washington Supreme Court's attempts to justify the 34:1 ratio between punitive and compensatory damages in this case are comparable to other courts' efforts to "depart[] from well-established constraints on punitive damages" that this Court has adopted. *State Farm*, 538 U.S. at 427. A majority of this Court will likely find error both in the Washington Supreme Court's use of court-awarded attorney's fees when comparing compensatory and punitive damages and in its unduly narrow reading of *Exxon*'s impact on federal maritime cases.

A. Court-Awarded Attorney's Fees Should Not Be Included In The Ratio Between Compensatory And Punitive Damages When Applying Federal Limits On Punitive Awards

As the Petition explained (Pet. 20-24), the Washington Supreme Court committed obvious error when it justified a 34:1 ratio between punitive and compensatory damages by adding court-awarded attorney's fees to the compensatory side of the ratio. If a defendants' wealth, *see State Farm*, 538 U.S. at 427, or harm to third parties, *see Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007), cannot justify an otherwise excessive ratio between compensatory and punitive damages, court-awarded attorney's fees cannot either.

First, this Court requires a comparison of punitive damages to *compensatory damages* because those damages measure the harm caused by the defendant's conduct that is at issue in the litigation. *See, e.g.*, *BMW*, 517 U.S. at 582 ("The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court is 500 times the amount of his *actual harm as determined by the jury*." (emphasis added)). Attorney's fees, in contrast, are not a measure of harm; they are a measure of subsequent litigation cost—and one that, as in this case (where the attorney's fees were more than ten times the amount of maintenance-and-cure damages), can overwhelm the actual harm found by the jury. The inclusion of attorney's fees turns the required proportionality between punitive damages and the harm caused by the wrongful conduct into a nonsensical requirement that punitive damages be proportional to litigation cost.[3]

Second, a core problem addressed by the *Exxon* ratio "is the stark unpredictability" of punitive awards. 554 U.S. at 499; *see also id.* at 501 ("We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances."). The punitive-to-compensatory ratio provides the most effective way to alleviate this problem by creating an objective baseline against the "risks of arbitrariness, uncertainty, and lack of notice" that result from unconstrained punitive awards. *Williams*, 549 U.S. at 354.

---

[3] Indeed, if the relevant harm from a defendant's conduct included subsequent attorney's fees, it would make no sense to include those fees in the ratio only for plaintiffs who are awarded attorney's fees: the "harm" of paying one's attorney is the same regardless of whether the plaintiff is fortunate enough to qualify for an exception to the American Rule that each party bears its own fees.

The addition of attorney's fees into the ratio conflicts with this reason for it. The American Rule renders attorney's fees only intermittently available, and many of the cases where an exception is potentially applicable will turn on an unpredictable exercise of the trial court's discretion. *See, e.g., Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 46 (1st Cir. 2010) (noting that "district courts have broad discretion in determining when and whether to exercise inherent powers, particularly with respect to fee-shifting on account of a party's supposed bad faith").

Further, even when permitted, the amount that any plaintiff receives as attorney's fees will vary with the billing rates of the lawyer employed by the plaintiff, the complexity of the litigation, the extent of discovery and motion practice permitted by the trial judge, and the trial court's ultimate exercise of discretion as to the amount of fees awarded. *See, e.g., Cardinal Health 110, Inc. v. Cyrus Pharm., LLC*, 560 F.3d 894, 902 (8th Cir. 2009) (noting that the "'district court's determination of the amount of the fee award is reviewed for abuse of discretion'"). In this case, for example, the trial court justified a greater award of attorney's fees because "this was the attorneys' first case involving punitive damages for maintenance and cure, suggesting that the issue required a significant amount of time." Pet. App. 13a.

Third, tying punitive damages to attorney's fees produces various anomalies. For one thing, the very same attorney's fees would be deemed "compensatory damages" or "not compensatory damages" under the ratio depending solely on an unrelated after-the-fact determination of whether the court exercises its discretion

to award them in a particular case. For another, a plaintiff who has received greater compensation (by receiving attorney's fees) will be entitled to greater punitive damages than a plaintiff who received lesser compensation (even though both will have incurred attorney's fees). *Cf. State Farm*, 538 U.S. at 426 (suggesting that punitive-damages ratios should be lower, not higher, when a plaintiff receives "complete compensation"). In short, the decision to include attorney's fees in the ratio will enhance the "stark unpredictability" of punitive damages that led the Court to adopt that ratio. *Exxon*, 554 U.S. at 499.

Fourth, the use of attorney's fees in the ratio conflicts with this Court's analysis in *State Farm* that punitive awards are *more* suspect, not *less* so, if there is a likelihood that those damages "duplicate[]" a "component" of the plaintiff's "compensatory damages." *State Farm*, 538 U.S. at 426. In *State Farm*, for example, because the plaintiffs obtained compensatory damages for their emotional distress, which "already contain[ed] [a] punitive element," the Court found a smaller punitive award necessary. *Id.*

This duplication plainly exists here, because attorney's fees themselves frequently are a form of punishment. Indeed, as the dissent below noted, Pet. App. 28a, this Court has already found that attorney's fees in maintenance-and-cure cases are themselves punitive, in that they are awarded only if the employer has engaged in a "callous," "willful and persistent" failure to pay maintenance and cure. *Vaughan*, 369 U.S. at 530-31; *see Townsend*, 129 S. Ct. at 2571. In other words, "the underlying rationale of 'fee shifting'" in these cases is "punitive, and the

essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." *Hall v. Cole*, 412 U.S. 1, 5 (1973); *see Chambers v. NASCO, Inc.*, 501 U.S. 32, 53-54 (1991). The Washington Supreme Court thus compared the punitive-damages award, not to the actual harm that Icicle's conduct caused, but to *other* punishment that Icicle received in the form of attorney's fees. That Icicle had been punished once allowed it to be punished again. But, as should be obvious, the punitive award of attorney's fees should have *reduced,* not *increased*, the amount of punitive damages to which Clausen was entitled under federal maritime law.

Finally, if allowed to stand, the decision below offers a roadmap for other courts on how effectively to turn "well-established constraints on punitive damages" into meaningless exercises. *State Farm*, 538 U.S. at 427. Because attorney's fees are often large in relation to compensatory damages, they can frequently be used to rationalize otherwise excessive punitive awards. And a trial court's acknowledged discretion as to the amount of attorney's fees likewise provides it with substantial room to insulate itself from the otherwise de novo review that would apply to a review of a punitive-damages award. *See Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 443 (2001). The Court has cautioned against allowing states to evade its punitive-damage limits in the due-process context. "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*." *State Farm*, 538 U.S. at 427. That concern is even more pronounced in this admiralty

context, in which this Court, not the state courts, exercises final responsibility to create the proper "judge-made law." *Exxon*, 554 U.S. at 502.

B. *Exxon* Establishes Quantified Limits On Punitive Awards

If the Court grants certiorari, it will also likely reverse the Washington Supreme Court's departure from the 1:1 ratio between compensatory and punitive damages applied in *Exxon* or, at the least, the Washington Supreme Court's decision that "[t]he *Exxon* case cannot be read as establishing a broad, general rule limiting punitive damage awards." Pet. App. 17a. Instead, according to the decision below, the *Exxon* Court "expressly limit[ed] its holding to the facts presented," *id.*, such that "[n]othing in the *Exxon* opinion can be read as overruling cases allowing higher punitive awards," Pet. App. 18a. And the court found that *Exxon*'s quantified approach did not apply here because that case involved "reckless conduct," whereas Icicle's conduct "was not just reprehensible, it was egregious." Pet. App. 19a. This view that no quantifiable limits apply to maritime cases involving intentional conduct cannot be reconciled with *Exxon*.

To begin with, the notion that the *Exxon* Court was not establishing an across-the-board rule for punitive awards conflicts with the Court's description of the problem that punitive damages pose. *See Exxon*, 554 U.S. at 499-503. The Court found the "real problem" to be "the stark unpredictability of punitive awards," noting that there is an unacceptable "spread between high and low individual awards" across cases under current law. *Id.* at 499. In other words, the problem with punitive damages was a *systematic* one that applied across the board.

In addition, the notion that *Exxon* engaged in a mere case-specific exercise is equally inconsistent with the Court's solution to this general problem. *Exxon* rejected a status-quo solution that would consider a host of factors on a case-by-case basis, expressing "skeptic[ism] that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers." *Id.* at 504. Rather, the Court's "best judgment" was to opt for "quantified limits" by "pegging punitive to compensatory damages using a ratio or maximum multiple." *Id.* at 506. It nowhere suggested that this quantified approach was limited to the facts of *Exxon*, and indeed such a limitation would be completely inconsistent with the Court's stated goal of adopting an approach to eliminate "unpredictable outliers." *Id.* at 504.

The Washington Supreme Court's decision is also inconsistent with the underlying reasons why *Exxon* opted for the specific 1:1 limit in particular. The *Exxon* Court chose that ratio based on "studies cover[ing] cases of the *most* as well as the least blameworthy conduct triggering punitive liability." *Id.* at 512 (emphasis added). Those studies suggested a "median ratio for the *entire gamut* of circumstances at less than 1:1, . . . meaning that the compensatory award exceeds the punitive award in most cases." *Id.* (emphasis added). And it found that the merely reckless conduct at issue on the facts of the case should fall "at the median *or lower*" of these awards. *Id.* at 513 (emphasis added) (noting that "a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped"). Yet *Exxon* ultimately opted

for a greater 1:1 ratio (rather than the 0.65:1 ratio), illustrating that it was adopting a broader rule to govern more than just the facts of the case at issue. *Id.*

Finally, as the dissent below pointed out, "[t]he majority's conclusion that Icicle's conduct was more reprehensible than *Exxon*'s is certainly debatable." Pet. App. 26a n.1. The actual harm in *Exxon*—an ecological disaster that cost billions to clean up and that stripped many of their livelihoods, *see* 554 U.S. at 479-80—was "exponentially more devastating" than the harm resulting from Icicle's failure to pay maintenance and cure. Pet. App. 26a n.1. Indeed, the jury found that the failure to pay Clausen maintenance and cure did not injure Clausen any more than the amounts of the actual payments that were due him. Pet. App. 30a n.2.

In sum, contrary to the decision below, *Exxon* cannot be interpreted to permit routine departures from its 1:1 standard, and certainly cannot allow for the 34:1 ratio that actually occurred here. If this Court takes this case, it will reverse.

III. ICICLE WILL LIKELY SUFFER IRREPARABLE INJURY IF THE COURT FAILS TO GRANT A STAY

It is also likely that Icicle will suffer irreparable injury if the Court does not grant a stay, because of the severe risk that Icicle will not be able to recover the punitive award from Clausen once the award is paid to him. On several occasions, the Court has found irreparable harm where "it [was] unlikely that disputed payments made pursuant to [a lower court's] judgment could be recovered." *Ledbetter v. Baldwin*, 479 U.S. 1309, 1310 (1986) (Powell, J., in chambers); *see Philip Morris*, 131 S. Ct. at 4 (granting stay where a "substantial portion of the [petitioners'] fund[s] . . . will be irrevocably expended"); *Heckler v. Turner*, 468 U.S.

1305, 1308 (1984) (Rehnquist, J., in chambers) (granting stay because it was "extremely unlikely that the [Petitioner] would be able to recover funds improperly paid out"); *Mori v. Int'l Bhd. of Boilermakers*, 454 U.S. 1301, 1303 (1981) (Rehnquist, J., in chambers) (granting stay because "[t]he funds held in escrow . . . would be very difficult to recover should applicants' stay not be granted"); *Edelman v. Jordan*, 414 U.S. 1301, 1302-03 (1973) (Rehnquist, J., in chambers) (granting stay because "I would think it extremely unlikely that petitioner, should he succeed in this Court, would be able to recover funds paid out [under a lower court's judgment] to respondent welfare recipients"). This case falls within this general rule.

First, Clausen will likely be judgment proof at the end of this case if no stay is issued and he can immediately and freely spend the punitive award that he obtains from Icicle. In fact, a principal reason why the lower courts departed from *Exxon* in this case is their view that Icicle intentionally refused to pay Clausen maintenance and cure despite the fact that "Clausen was financially vulnerable." Pet. App. 40a. *Cf. Edelman*, 414 U.S. at 1302-03 (unlikelihood of recovering money paid to individuals lacking in resources amounts to irreparable harm).

Second, it is likely that a portion of Clausen's punitive award will be paid to his attorneys. But, under Washington law, a party who has paid a judgment that is invalidated on appeal may seek restitution only from the *opposing party*, not from the opposing party's *counsel*. *See Ehsani v. McCullough Family P'ship*, 159 P.3d 407, 410-11 (Wash. 2007). This case, therefore, is like those where the court has found irreparable injury given the substantial risk that state courts on remand

"would deny restitution" of a portion of the funds expended pursuant to an invalid judgment. *Am. Trucking Ass'n v. Gray*, 483 U.S. 1306, 1309 (1987) (Blackmun, J., in chambers); *see also Ohio Oil Co. v. Conway*, 279 U.S. 813, 814 (1929) (per curiam) (granting injunction when there was no "adequate remedy" if a court found unconstitutional the statute under which the petitioner made the disputed payment).

In short, it is likely that at least a "substantial portion" of the punitive award will be unrecoverable by Icicle once it is paid to Clausen, even if Icicle is ultimately successful before this Court. *Philip Morris*, 131 S. Ct. at 4.

IV. THE BALANCE OF EQUITIES FAVORS A STAY

Lastly, given the irreparable injury that Icicle will likely incur if the Court does not grant the stay, the substantial amount it has already paid to Clausen, and Icicle's posting of full security, the balance of equities tilts decidedly in its favor. In the first place, Icicle seeks only a *partial* stay. Icicle has already paid Clausen an award of $825,545.64, which includes his compensatory damages and attorney's fees. *See* Emergency Mot., at 5. Clausen has thus been made whole; the punitive award would only serve to provide him an additional amount beyond that which was necessary to remedy any injury.

In addition, there is no risk that Clausen would be unable to recover the punitive award from Icicle if this Court were to grant a stay but ultimately deny certiorari or affirm the Washington Supreme Court's judgment. Rather, during the stay, adequate security for the $1.3-million punitive award will remain posted in the Washington Superior Court. Emergency Mot., at Ex. A.1; *see also Barnes v. E-*

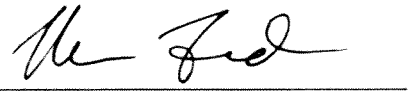
Systems, Inc. Grp. Hosp. Med. & Surgical Ins. Plan, 501 U.S. 1301, 1305 (1991) (Scalia, J., in chambers) (granting stay because the disputed funds would be available to the respondents at the end of the litigation); *Edelman*, 414 U.S. at 1303 (granting stay because the respondent would "be able to collect from petitioner all of the back payments found due . . . should he prevail"). Thus, any injury to Clausen "will likely be no more than the inconvenience of delay." *Araneta v. United States*, 478 U.S. 1301, 1305 (1986) (Burger, C.J., in chambers).

Finally, a stay comports with the public interest. *Exxon* established quantified limits, in part, because "judicially derived standards leave the door open to outlier punitive-damages awards," 554 U.S. at 507, and thus fail the adequate-notice requirements of "a system whose commonly held notion of law rests on a sense of fairness in dealing with one another," *id.* at 502. The errors of the decision below hinder these notice concerns and thereby negatively impact the "common sense of justice" that underlay the decision in *Exxon*. *Id.* at 503.

CONCLUSION

For these reasons, Petitioner Icicle Seafoods, Inc., respectfully requests that the Court stay the portion of the Washington Supreme Court's judgment awarding Respondent Dana Clausen $1.3 million in punitive damages pending the disposition of Icicle's timely filed Petition for Writ of Certiorari.

Respectfully submitted.



Meir Feder
Counsel of Record
Rajeev Muttreja
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

Eric E. Murphy
JONES DAY
325 John H. McConnell Blvd., Ste. 600
P.O. Box 165017
Columbus, OH 43216

Counsel for Petitioner
Icicle Seafoods, Inc.

Michael A. Barcott
HOLMES WEDDLE
& BARCOTT, P.C.
999 Third Ave.
Suite 2600
Seattle, WA 98104

JUNE 11, 2012

No. 11-1475

IN THE

Supreme Court of the United States

ICICLE SEAFOODS, INC.,

Petitioner,

v.

DANA CLAUSEN,

Respondent.

CERTIFICATE OF SERVICE

Pursuant to Supreme Court Rule 29.5, I certify that a copy of the Application For Partial Stay Of Judgment Of The Supreme Court Of Washington, Pending Disposition Of A Petition For A Writ Of Certiorari in *Icicle Seafoods v. Clausen*, No. 11-1475, was served via overnight mail on all parties required:

James P. Jacobsen
Joseph Stacey
Beard, Stacey & Jacobsen, LLP
4039 21st Avenue West, Suite 401
Seattle, WA 98199
(206) 282-3100

Phillip A. Talmadge
Talmadge/Fitzpatrick
18010 Southcenter Parkway
Tukwila, WA 98188
(206) 574-6661

Lawrence N. Curtis
300 Rue Beauregard, Bldg C
Lafayette, LA 70508
(337) 235-1825

Counsel for Petitioner

I declare under penalty of perjury that the foregoing is true and correct.

Date: June 11, 2012

Meir Feder