No. 12-

IN THE
SUPREME COURT OF THE UNITED STATES

BASS PRO OUTDOOR WORLD, L.L.C.,

Petitioner,

v.

KYLE J. KELLY,

Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals, Eastern District

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PETITION FOR A WRIT OF CERTIORARI

ARTHUR R. MILLER
Of Counsel
New York University
School of Law
40 Washington Sq.,
South
Vanderbilt Hall 430F
New York, NY 10012
Telephone: 212.992.8147

GARRY G. MATHIASON
Counsel of Record
LITTLER MENDELSON, P.C.
650 California Street
20th Floor
San Francisco, CA 94108
Telephone: 415.433.1940
GMathiason@littler.com

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QUESTIONS PRESENTED

1. Given that this Court has said that a single digit maximum ratio between punitive damages and compensatory damages is appropriate in all but the most exceptional of cases, but greater ratios may comport with due process when "*a particularly egregious act* has resulted in only a *small amount of economic damages*," what factors determine whether conduct is "particularly egregious," whether economic damages are "small" as opposed to nominal, and what upper limits apply once a single digit ratio is exceeded?

2. When economic damages are above nominal, but arguably "small," does a punitive damages award that bears a triple-digit ratio to the compensatory damages violate Petitioner's due process rights under the Fourteenth Amendment to the United States Constitution?

PARTIES TO THE PROCEEDINGS AND RULE 29.6 DISCLOSURE

The following were parties to the proceedings in the Missouri Court of Appeals for the Eastern District and the Missouri Supreme Court:

1. Bass Pro Outdoor World, L.L.C., petitioner, was the appellant and the defendant below.

2. Kyle J. Kelly, respondent, was the respondent and the plaintiff below.

Bass Pro is a limited liability company organized in Missouri. Bass Pro's parent company is Bass Pro Group, LLC, a Delaware limited liability company. There are no publicly held companies owning 10% or more of Bass Pro Outdoor World, L.L.C.

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PETITION FOR A WRIT OF CERTIORARI

Pursuant to Supreme Court Rule 10, subparts (b) and (c), Bass Pro Outdoor World, L.L.C. ("Bass Pro" or "Petitioner") respectfully prays that this Court grant a writ of certiorari to review the judgment and opinion of the Missouri Court of Appeals for the Eastern District – which was denied review by the Missouri Supreme Court – on an issue of federal constitutional law.

OPINIONS BELOW

The July 3, 2012 order of the Supreme Court of Missouri denying review is reproduced in the Appendix ("A-") at A-1. The Missouri Court of Appeals, Eastern District's unpublished order affirming judgment and supplementary memorandum is reproduced at A-2. The Circuit Court of the County of St. Charles, State of Missouri's May 20, 2011

judgment amending punitive damages award is reproduced at A-12. The opinion of the Missouri Court of Appeals, Eastern District is reported at 245 S.W. 2d 841 (Mo. App. 2007) and reproduced at A-15.

JURISDICTION

The Supreme Court of Missouri denied Petitioner's Application for Transfer on July 3, 2012. The Missouri court's decision is final, involves a substantial federal question, and was not based on an adequate and independent state law ground. Accordingly, this Court's jurisdiction is appropriate under 28 U.S.C. §1257(a).

STATUTES INVOLVED

28 U.S.C. § 1257(a) provides:

> (a) Final judgments or decrees rendered by the highest court of a State in which a decision could be had, may be reviewed by the Supreme Court by writ of certiorari where the validity of a treaty or statute of the United States is drawn in question or where the validity of a statute of any State is drawn in question on the ground of its being repugnant to the Constitution, treaties, or laws of the United States, or where any title, right, privilege, or immunity is specially set up or claimed under the Constitution or the treaties or statutes of, or any commission held or authority exercised under, the United States.

United States Supreme Court Rules, Rule 10(c) provides that:

> Review on a writ of certiorari is not a matter of right, but of judicial discretion. A petition

> for a writ of certiorari will be granted only for compelling reasons. The following, although neither controlling nor fully measuring the Court's discretion, indicate the character of the reasons the Court considers:
>
> * * *
>
> (b) a state court of last resort has decided an important federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals;
>
> (c) a state court or a United States court of appeals has decided an important question of federal law that has not been, but should be, settled by this Court, or has decided an important federal question in a way that conflicts with relevant decisions of this Court.

United States Constitution, Fourteenth Amendment, Section 1 provides:

> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

I. STATEMENT OF FACTS

Petitioner Bass Pro operates a chain of retail outdoor sporting supply stores, including a store in St. Charles, Missouri. A-16. The company has employee policies that include complaint and non-retaliation provisions. A-49-50.

Respondent Kyle Kelly was a loss prevention agent at the St. Charles store from August 2001 until April 2003. His supervisor was Karl Ritter, who had been hired in late 2002 as the store's loss prevention manager. A-16.

The events leading up to Kelly's termination concern a 1988 Buick that had been sitting in the store's parking lot for several weeks. Ritter had called the police to tow the car but was told they could not because it was on private property. A-17-18. On the morning of April 11, 2003, Ritter told the loss prevention agent monitoring the security cameras, Mark McKernon, that he was going to open the car to find out who owned it. At trial, McKernon testified Ritter had a "smirked" look about him and said, "[Y]ou want to see something funny? Watch this[,] I am going to break into that car," and that he was going to find out who owned the Buick. Ritter opened the car, searched it, and closed it with his foot. He removed nothing from the car. All of this was recorded on the store's security video, which, the Missouri Court of Appeals noted, was shown to the jury. A-18-19.

McKernon showed the video to the other loss prevention agent, Bobby Southerly. They opined that

Ritter had committed the crime of "breaking and entering or tampering" with the Buick. Later that day, Kelly arrived for work. McKernon and Southerly showed him the video and shared their belief that Ritter had committed a crime. Kelly agreed. After viewing the videotape repeatedly, discussing Ritter's actions with several loss prevention agents who had prior law enforcement experience, and anonymously contacting the St. Charles Police Department, Kelly decided to report the incident to management based upon his belief a crime had occurred. A-19-21.

On Saturday, April 12, Kelly reported his concern to Lee Beasley, the store's assistant general manager. Kelly testified Beasley instructed him "do not let [this] leave the loss prevention department." Beasley testified he directed Kelly "not to talk to anyone about it except [Jerry Rogers, the store's General Manager] and myself" and said he was unaware that both loss prevention agents and officers had already viewed the video. A-20-21.

Thereafter, Rogers learned that Kelly had continued to discuss the issue with other loss prevention agents. He and local Human Resources Manager, Ron Goetz consulted with John Sargent, the Regional Manager of Human Resources, who agreed with their decision to terminate Kelly's employment for disobeying a direct order. A-23-24. Pursuant to company policy, Ritter was not involved in the decision to terminate because he was involved in the incident. A-23.

On April 17, Rogers and Goetz met with Kelly and told him he had disobeyed Beasley's direct order to refrain from discussing the incident further with anyone. Kelly denied receiving a direct order and

told Rogers he was instructed to keep the discussion within the loss prevention department. At the conclusion of the meeting, Kelly was terminated. A-24.

II. PROCEDURAL HISTORY

Kelly sued, claiming he was fired because he reasonably believed and complained that his supervisor, Karl Ritter, had illegally opened a car that was in the store's parking lot. A-25. The jury found in Kelly's favor. It awarded him $4,300 in compensatory damages for lost wages from the time he was terminated until he found a new job, but awarded $2.8 million in punitive damages. A-25.

Bass Pro appealed, arguing, among other points, that the punitive damages award violated due process. The Missouri Court of Appeals for the Eastern District reversed and remanded the punitive damage award for review by the trial court to "determine whether the amount of the award is in accordance with [*State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408 (2003)]." A-33-36.

After remand, the trial court entered a Judgment Amending Punitive Damages Award ("Judgment"), in which it lowered the punitive damages to $650,000 – which was still over a 151:1 ratio. A-12-14.

Bass Pro appealed again. The Court of Appeals affirmed the award, relying in large part on a recent Missouri Supreme Court decision, *Estate of Overbey v. Chad Franklin Nat'l Auto Sales North LLC*, 361 S.W.3d 364 (Mo. 2012), upholding a $500,000 punitive damages award when the compensatory damages were only $4,500. According to the Court of Appeals:

> As the *Overbey* Court opined, a "jury would be within its discretion in determining that, in these circumstances, in which 'a particularly egregious act has resulted in only a small amount of economic damages,' the usual single digit ratio may not be an appropriate measure of the limits of due process." [citing *Campbell*] Bass Pro's maximum suggested award of $38,700, or nine times the compensatory damages award, would have no punitive or deterrent impact. Informed by *Overbey* and the cases cited therein, we conclude that the trial court's amended award of $650,000 is not patently unconstitutional.

A-9-10.

Bass Pro applied for transfer to the Missouri Supreme Court. The court denied the request on July 3, 2012. A-1.

REASONS FOR GRANTING THE PETITION

This Court has held that in "all but the most exceptional cases," a single digit is the maximum appropriate ratio between punitive and compensatory damages, and that a 1:1 ratio might be the outermost limit when compensatory damages are substantial. *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 574-575 (1996); *Campbell*, 538 U.S. at 418. One possible exception is when a "particularly egregious act" results in a small amount of damages. *BMW*, 517 U.S. at 582; *Campbell*, 538 U.S. at 425.

In the nine years since *Campbell,* state Supreme Courts and federal Circuit Courts have struggled and their decisions have become increasingly inconsistent and contradictory in interpreting and applying this exception. As a result, there is a conflict as

to how constitutional limits on punitive damages are applied when small compensatory awards are involved as opposed to either nominal or substantial compensatory awards.

The federal and state courts are in need of further guidance regarding what is a "particularly egregious act" resulting in a "small amount of damages" such that an extraordinary condition exists, allowing punitive damages exceeding a single digit ratio. The current conflicts between and among the highest state courts and the federal courts of appeals justify the Court's review in accordance with Rule 10 subpart (c).

A. Inconsistent Interpretations and Different Standards Exist Among the States and The Circuits.

In an article published only a few years after *Campbell*, the authors surveyed 199 post-*Campbell* punitive damages verdicts that had been reviewed for excessiveness. Lauren R. Goldman & Nickolai G. Levin, *Practitioner Note: State Farm at Three: Lower Courts' Application of the Ratio Guidepost*, 2 N.Y.U. J.L. & Bus. 509 (2006). Twenty-six of the cases involved punitive awards when the compensatory damages were from $500 to below $25,000. A-51-70. The ratio of punitive and compensatory damages in those cases ranged from a low of 3:1 to as high as 408:1. A-51-70. Nineteen cases involved compensatory damages between $25,000 and $100,000. A-71-85. In those cases, the ratio of punitive damages to compensatory damages ranged from 1:1 to 22:1. A-71-85. The authors observed that courts upheld punitive damage awards that exceeded the single digit ratio guidepost typically when the compensato-

ry damages were less than $12,000. Goldman & Levin, *supra*, at 515. They concluded that:

> [*Campbell*] clearly has had the general salutary effect of making the imposition and review of punitive damages fairer and more predictable, but there remain many courts that resist fully implementing [*Campbell's*] guidance. As a result, we think it inevitable that the Supreme Court will soon be forced to provide additional instruction in this volatile area.

Id. at 549.

A significant sampling of reviewing court decisions since the 2006 NYU article shows continuing inconsistency and a lack of sufficient guidelines when assessing the constitutional limits of punitive damages. A-86-120. Of forty-one decisions in which compensatory damages were between $500 and $100,000 (not including the one in this case), the ratio of affirmed punitive damages to compensatory damages ranged from 1.5:1 to 151:1. *Supra.* Several cases demonstrate the disparate treatment for similar claims. For example, in *Overbey,* an automobile sales fraud case, the court affirmed a $500,000 punitive damages award when compensatory damages were only $4,500 (a 145:1 ratio). *Overbey*, 361 S.W.3d at 374. In contrast, in an automobile sales fraud cases in Illinois, in which compensatory damages were $8,527.97, the court reduced punitive damages from $88,168.50 (a 10:1 ratio) to $59,695.79 (a 7:1 ratio). *Gehrett v. Chrysler Corp.*, 882 N.E.2d 1102, 1122 (Ill. App. 2008). Similarly, in *Jim Ray, Inc. v. Williams*, 260 S.W.3d 307, 324 (Ark. App. 2007), another automobile sales fraud case in which

compensatory damages were only $4,425.87, the appellate court reduced punitive damages from $75,000 (a 17:1 ratio) to $30,000 (a 7:1 ratio).

Notably, six of the forty-one decisions involve retaliation in employment claims with the final punitive to compensatory damages ratios ranged from 3:1 to 16.67:1. *Wallace v. DTG Operations, Inc*., 563 F.3d 357 (8th Cir. 2009)(4:1); *Goldsmith v. Bagby Elevator Co*., 513 F.3d 1261 (11th Cir. 2008)(9.2:1); *Laymon v. Lobby House, Inc*., 613 F. Supp. 2d 504 (D.C. Del. 2009)(16.67:1); *Polek v. Grand River Navigation*, No. 09-13869, 2012 U.S. Dist. LEXIS 72989 (E.D. Mich. 2012)(3:1); *Manzo v. Sovereign Motor Cars, Ltd*., 2010 U.S. Dist. LEXIS 46036 (E.D.N.Y. 2010)(4:1); *Lamore v. Check Advance of Tenn., LLC*, 2010 Tenn. App. LEXIS 56 (Tenn. App. 2010)(13.5:1). Although the facts in these cases reflected conduct substantially more egregious than the conduct in the instant case, the approved punitive damages awards in the other courts were significantly lower than in this case both in size and in relation to the compensatory awards.[1]

There are at least two explanations for the vastly different constitutionally approved ratios between cases that often involve similar misconduct. First, cases vary as to how liberally or restrictively a specific court defines "particularly egregious" for purposes of allowing more than a single digit ratio. Second, once courts conclude that punitive damages can exceed the single digit ratio, there is virtually no

[1] In *Wallace* and *Layman* the courts reduced the ratios from 16:1 to 4:1 and from 66.67:1 to 16.67:1 respectively by the reviewing courts. In *Goldsmith, Polek* and *Manzo*, the courts approved single digit ratios.

standard that defines how far beyond single digit ratios is still within constitutional limits. Thus, when compensatory damages are found to be small, some courts appear to interpret the exception as allowing for almost any punitive damage award regardless of the ratio. At the same time, other courts have set a high standard for egregious behavior and keep the ratio either within or close to single digits. This has led to an unacceptable deviation among the state courts and a comparable divergence in the federal Circuits.

At least six of the Circuit Courts and seven of the state Supreme Courts have examined the constitutional limits of punitive damages when the underlying economic loss is small. Although each specific court's approach is materially different, the decisions can generally be categorized as falling in two divergent groups.

The first group includes the Fourth, Seventh, and Tenth Circuit Courts of Appeals and the highest courts in Missouri, Oregon, and Tennessee. They view any relatively small compensatory award as authorization for a punitive damage award exceeding single digits. The underlying misconduct is frequently labeled reprehensible, but the courts do not distinguish between the minimum level of reprehensibility necessary to permit punitive damages and the implicitly higher level of reprehensibility that can be characterized as particularly egregious. *See Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 154 (4th Cir. 2008) (affirming 80:1 punitive damages to compensatory damages ratio in a Fair Credit Reporting Act case); *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 678 (7th Cir. 2003)

(upholding a jury award of $5,000 in compensatory damages and $186,000 in punitive damages – a 37.2 to 1 ratio – to motel occupants bitten by bedbugs); *Deters v. Equifax Credit Info. Servs., Inc.*, 202 F.3d 1262, 1273 (10th Cir. 2000) (in a sexual harassment case, the Tenth Circuit upheld a $295,000 punitive damages award when compensatory damages were only $5,000, a 59:1 ratio; *Overbey v*, 361 S.W.3d at 374 (upholding a $500,000 punitive damages award in an automobile sale fraud case when actual damages were only $4,500); *Hamlin v. Hampton Lumber Mills, Inc.*, 246 P.3d 1121, 1131 (Or. 2011) (affirming a $175,000 punitive damages award for failure to reinstate injured worker when compensatory damages were only $6,000, a 29:1 ratio); *Goff v. Elmo Greer & Sons Constr. Co.*, 297 S.W.3d 175, 194 (Tenn. 2009) (finding a $500,000 punitive damages award in a nuisance case that was 151 times higher than compensatory damages award ($3,305) constitutional because the compensatory damages award was small).

What this means is that defendants in these states are subject to higher than single digit ratios if the plaintiff's compensatory damages are small. Yet these courts did not provide a substantive explanation as to why the conduct is so "particularly egregious" to justify these higher ratios.

In contrast, the courts in the second group, including the Sixth Circuit, Eighth Circuit, and the highest courts in California, Illinois, South Carolina, and Texas, have significantly reduced punitive damage awards that exceeded single digits when compensa-

tory damages are small.[2] Even when ratios are within single digits, these reviewing courts require significantly elevated levels of reprehensibility to justify punitive damage ratios in the upper half of single digits. Only in rare cases does the extreme egregiousness of the misconduct justify constitutionally exceeding single digits. *See Arnold v. Winter*, 657 F.3d 353, 372 (6th Cir. 2011) (reducing $1 million punitive damages award (17.4:1 ratio) against police officer for false arrest, malicious prosecution, and battery to $550,000 (9.6:1 ratio) when compensatory damages were $57,400); *Quigley v. Winter*, 598 F.3d 938, 955-956 (8th Cir. 2010) (reducing punitive damages in a sexual harassment and sex discrimination housing case from 18:1 to 4:1 ratio because defendant's conduct was not sufficiently egregious); *Wallace*, 563 F.3d at 363 (holding $500,000 punitive damages award in sexual harassment and retaliation case unconstitutionally excessive in comparison to the $30,000 in compensatory damages); *Simon v. San Paolo U.S. Holding*, 113 P.3d 63, 82 (Ca. 2005) (reducing $1.7 million dollar punitive damages award in fraud case to $50,000 when compensatory damages were only $5,000); *Int'l Union of Operating Eng'rs, Local 150 v. Lowe Excavating Co.*, 870 N.E.2d 303, 324 (Ill. 2006), *cert. denied*, 552 U.S. 1099 (2008) (reducing $525,000 punitive damages award to $50,000 in trade libel case when compensatory damages were only $4,680 and the defendant's "conduct was minimally reprehensible"); *Atkinson v.*

[2] The 11th Circuit approved a $500,000 award when compensatory damages in a race discrimination and retaliation case were $54,321 because the conduct at issue was sufficiently reprehensible to allow a 9.2:1 ratio. *Goldsmith*, 513 F.3d at 1284-1285.

Orkin Exterminating Co., Inc., 604 S.E.2d 385, 392-393 (S.C. 2004) (holding $786,500 punitive damages award excessive when compensatory damages for structural damage to house was only $6,191 because defendant's "acts were not so egregious as to warrant a 127 to 1 ratio"); *Bennett v. Reynolds*, 315 S.W.3d 867, 879 (Tex. 2010) ($1.25 million punitive damages award for cattle theft and conversion unconstitutionally excessive when compensatory damages were only $5,327.11).

B. The Split Is Anchored On Different Interpretations of "Particularly Egregious."

Little judicial guidance exists on what types of conduct qualify as "particularly egregious," as is demonstrated by the two groups of divergent decisions described above. Without standards or approved comparisons, unacceptable variations emerge. Some courts treat conduct that is sufficiently reprehensible to justify punitive damages as automatically qualifying as "particularly egregious" to support greater than single digit ratios, even when compensatory damages are small. Other courts self-establish higher standards beyond what is minimally required for punitive damages. The differences in result make this much more than a matter of semantics.

1. Some Courts Equate Reprehensible Conduct with Particularly Egregious Conduct Permitting Large Punitive Ratios When Compensatory Damages Are Small.

The overriding reality is that the term "particularly egregious" has failed to yield any uniform standards or guidelines on how the term should be applied. Accordingly, some courts focus almost entirely on the small size of an award and summarily conclude that the case is subject to a higher ratio. *See Saunders*, 526 F.3d at 154.

For example, in *Overbey*, 361 S.W.3d at 373, the Missouri Supreme Court affirmed a $500,000 punitive damages award in a fraud case when the compensatory damages were only $4,500.[3] In upholding a punitive damages ratio of 111:1, the Missouri Supreme Court relied heavily on this Court's "small amount of economic damages" language in *Campbell*:

> *State Farm* also held that far greater ratios may "comport with due process where 'a particularly egregious act has resulted in only a small amount of economic damages.'"

Id. at 373. The Missouri court distinguished the case before it from *Campbell* because "the actual damage award of $4,500 was small, in contrast to the large actual damage award in [*Campbell*] of $2.6 million,

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[3] The jury awarded $1 million in punitive damages but the trial court reduced the punitive damages award to $500,000 pursuant to a Missouri punitive damages cap law. That statute, Missouri R.S. §510.265.1 limits punitive damages to $500,000 when the compensatory award is below $100,000. It was not in effect at the time of the trial in this case.

so that a single digit ratio would be insufficient to punish and deter the defendant properly." *Id.*[4] Notably, however, it did not try to distinguish *BMW*, even though that case involved an even smaller compensatory damages award ($4,000) and a similar tort of fraud in the sale of automobiles.

The *Overbey* court also failed to explain how the defendant's conduct was so "particularly egregious" that it merited a 111:1 ratio. Significantly, the $500,000 punitive damages award in *Overbey* is the largest punitive damages award allowed under a new Missouri law when compensatory damages are less than $100,000. This means that either the Missouri Supreme Court gave no real meaning to the term "particularly egregious" for purposes of warranting a higher than single digit ratio, or that it considers the conduct in *Overbey* – fraud in the sale of an automobile that causes $4,500 in damage – to be at the high end of the reprehensibility spectrum which implausibly means that fraud is equally or more egregious than systemic sexual harassment involving physical assault. By equating the legislative limit on punitive damages of $500,000 for economic losses less than $100,000 with what meets due process requirements

[4] The Court also held that its reasoning was "supported by the language of [Missouri's punitive damages cap law], in which the legislature provided that the ratio of punitive damages should not be more than five times actual damages in cases with damages of more than $100,000, but if the amount of actual damages was less than $100,000, then it authorized an award of up to $500,000 regardless of the size of the actual damage verdict." *Id.* This law, the court held, supported the argument that "in cases of small awards, due process does not prevent large ratios, if necessary, given particular facts, to impose punishment and deter future misconduct." *Id.*

under the Fourteenth Amendment, a defendant who defrauded someone out of her $99,999 life savings would be subject to the same amount of punitive damages as a defendant who defrauded someone out of $4,500 in the sale of an automobile. This contradicts the fundamental constitutional principle that "exemplary damages imposed on a defendant should reflect 'the enormity of his offense'" or, in other words, "that some wrongs are more blameworthy than others." *BMW*, 517 U.S. at 575-576.

In *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 154 (4th Cir. 2008), a jury found a bank liable under the Fair Credit Reporting Act for failing to report that the plaintiff's debt was disputed, which damaged the plaintiff's credit. The jury awarded $1,000 as the maximum statutory damages and $80,000 in punitive damages. The Fourth Circuit Court of Appeals affirmed. Regarding reprehensibility, the Court noted that only one factor (a financially vulnerable victim) was present and found the defendant's conduct "not extraordinarily blameworthy but [was] sufficiently reprehensible to justify an award of punitive damages." *Id.* at 153. Purporting to rely on this Court's decision in *Campbell*, it upheld the 80:1 ratio because the compensatory damages were small: "The Supreme Court has long recognized that greater ratios may comport with due process, however, when reprehensible conduct results 'in only a small amount of economic damages.'" *Id.* at 154. Notably, the Fourth Circuit did not address this Court's requirement in *Campbell* that the misconduct of failing to report that the debt was disputed be "particularly egregious" to permit a higher than single digit ratio.

2. Other Courts Interpret "Particularly Egregious" To Require Conduct Significantly More Reprehensible Than What Is Minimally Required To Obtain Punitive Damages.

In contrast, the courts that apply lower punitive damages ratios to smaller damages awards afford greater significance to the term "particularly egregious." The Texas Supreme Court's decision in *Bennett,* is a good example. In that case a jury found the defendants, a corporation and its president, liable for conversion for intentionally selling thirteen head cattle that belonged to a feuding neighbor. The jury awarded $5,327.11 in compensatory damages and $1 million in punitive damages against the corporation and $250,000 against the individual defendant; approximately 188:1 and 47:1 punitive to compensatory damages ratios. The court held that while the evidence of malicious cattle theft and various furtive acts to conceal it satisfied one of the five *Campbell* reprehensibility factors, the level of reprehensibility did not justify $1.25 million in exemplary damages. *Id*. at 877. The court compared the facts before it to an earlier decision in which it had held that a $125,000 punitive damages award was unconstitutionally excessive because it was 4.33 times the compensatory award. *Id*. at 877 (citing *Tony Gullo Motors I, L.P. v. Chapa,* 212 S.W.3d 299 (Tex. 2006)).[5] The court reemphasized why punitive

[5] *Gullo* was an automobile sales fraud case in which the plaintiff claimed that an automobile dealer had committed fraud by promising to deliver a certain model and delivering instead a less-luxurious model. The jury awarded economic

damages awards at the constitutional limits needed to be reserved for the most serious violations:

> Pushing exemplary damages to the absolute constitutional limit in a case like this [automobile sales fraud] leaves no room for greater punishment in cases involving death, grievous physical injury, financial ruin, or actions that endanger a large segment of the public. On this record, Gullo Motors' conduct merited exemplary damages, but the amount assessed by the court of appeals exceeds constitutional limits.

Bennett, 315 S.W.3d at 878 (citing *Gullo*, 212 S.W.3d. at 310).

Further, in applying the second guidepost in *Campbell*, the ratio of punitive to compensatory damages, the court rejected the argument that a higher than single digit ratio was permissible because the compensatory damages were only $5,300. *Id*. at 878-879. Rather, it noted that the plaintiff had been fully compensated for the actual damages sought and focused on the requirement that even where actual damages are small, the conduct in question must be "particularly egregious" to warrant higher than single digit ratios:

> Even assuming that $5,327.11 is "small," the other part of the exception -- "a particularly egregious act" -- is absent here just as in [*BMW*], where the Court rejected $2 million in

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damages of $7,213, mental-anguish damages of $21,639 and $250,000 in punitive damages. The Texas Court of Appeal reduced the punitive damages to $125,000. *Gullo*, 212 S.W.3d at 303.

> exemplary damages on $4,000 in actual damages. . . .
>
> If courts fail to diligently police the "particularly egregious" exception, they insulate from due-process review precisely those cases where judicial review matters most: those involving unsympathetic defendants where juries are most likely to grant arbitrary and excessive awards. Allowing a freewheeling reprehensibility exception would subvert the constraining power of the ratio guidepost.

Id. at 879. The Court remanded the case for remittitur. The Texas Court of Appeal remitted both punitive damages award to $10,000. *Bennett v. Reynolds*, 2010 Tex. App. LEXIS 9213 (Tex. App., 2010) ("due process permits an exemplary damages award against Bennett and Bonham Corporation of not more than $10,000 each.").

In *Simon,* 113 P.3d at 69, the jury found a property seller liable for promissory fraud because he backed out of a promise to negotiate exclusively with the buyer. The jury awarded the plaintiff $5,000 in compensatory damages to cover its out-of-pocket expenses, plus $1.7 million in punitive damages. *Id.* After numerous appeals, including a remand from this Court for further consideration in light of *Campbell,*[6] the California Supreme Court reversed, holding that the maximum punitive damages award was $50,000, or a 10:1 ratio. *Simon,* 113 P.3d at 69. The court rejected the argument that a higher ratio was constitutional under *Campbell* simply because the economic damage was small:

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[6] *San Paolo U.S. Holding Co. v. Simon*, 538 U.S. 974 (2003).

> Nor can the 340-to-1 ratio here be justified on the ground that "'a particularly egregious act has resulted in only a small amount of punitive damages'" [*Campbell*, 538 U.S. at 425], for while San Paolo Holding's fraud qualified for punitive damages under California law, ***compared to conduct in other punitive damages cases it was not highly reprehensible***.

Simon, 113 P.3d at 78 (emphasis added).

This conflict exists even within cases arising in Missouri. The Eighth Circuit applies the Fourteenth Amendment to punitive damage awards very differently than the Missouri Supreme Court and the other Circuit courts referenced above. *See Quigley*, 598 F.3d at 954 (reducing punitive damages in sexual harassment and sex discrimination FHA case from 18:1 to 4:1 ratio because "we do not believe the degree of reprehensibility of Winter's conduct justifies the jury's large punitive damages award"); *Wallace*, 563 F.3d 357 (in sexual harassment retaliation case, "the present defendant's actions were not so egregious as to set this case apart from other retaliation cases involving punitive damage awards. With no such outstanding circumstances, the extraordinary, sixteen-to-one ratio appears excessive"). These two cases are radically different in their approach to punitive damages from the current case or the Missouri Supreme Court's earlier decision in *Overbey*, which means that a defendant in the same state would receive different applications of Fourteenth Amendment due process protection depending on whether the case was in federal or state court.

C. This Case Provides an Excellent Vehicle To Establish Needed Guidance.

What the above-described cases demonstrate is that despite this Court's efforts in *BMW* and *Campbell*, defendants facing liability for actions resulting in less than a substantial compensatory award are provided precious little in the way either of predictability or fair notice of "the severity of the penalty that a State may impose." *BMW*, 517 U.S. at 574. This lack of consistency both in methods of calculation and the size of awards has made it extremely difficult to predict punitive damages as a result of misconduct that causes more than nominal, but less than "substantial" compensatory damages.

Petitioner is not alone in seeking this Court's assistance. Last year, a frustrated Oregon Supreme Court Justice – who was grappling with applying *Campbell* to a small compensatory damages award – asked for this Court's help in clarifying the constitutional standards for punitive damages:

> I add one final note: a plea to the Supreme Court of the United States. For years this court generally, and I personally, have struggled to apply *BMW* and *Campbell* faithfully to the cases before us. This case represents but one of the many problems that have cropped up in the seven years since the Court decided *Campbell*. **The courts around [sic] are in need of — indeed, I will assert that we deserve — further guidance that only the Court can provide. Whether the Court agrees with my analysis, or the majority, or something in between, does not matter**

> **to me. But it would be a responsible act of comity for the Court to say something clear to help in future cases [emphasis added].**

Hamlin, 246 P.3d at 1136 (emphasis added).[7]

This case provides an especially appropriate vehicle for establishing additional guidelines that will better harmonize the treatment of small compensatory damage awards with the due process requirements of the Fourteenth Amendment. First, it provides an opportunity for this Court to provide greater guidance regarding what constitutes a "small" award for purposes of permitting higher punitive damage ratios that are within constitutional limits. Second, review of this case would be an occasion to help state and federal courts regarding instructions on how to define "particularly egregious conduct" that exceeds what is necessary to qualify under state or federal law for punitive damages. Third, touchstones could be identified to help guide judges in the determination of permissible punitive damages when the ratio

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[7] In *Hamlin*, the court affirmed a jury award of $6,000 for lost wages and $175,000 in punitive damages (a more than 29:1 ratio) when the employer failed to reinstate the plaintiff after he returned from an injury as required by Oregon law. *Id.* at 1124. The court held that the small size of the award justified a ratio of punitive to compensatory above single digits. *Id.* at 1128. The dissent argued that the majority had "dropped the requirement of 'particularly egregious misconduct' and expanded the exception to reach all 'small' compensatory damage awards," *id.* at 1133, and observed that the majority's rule requires a plaintiff who suffers more harm to receive less punitive damages, and "will effectively reward defendants for inflicting more harm on plaintiffs, while punishing those plaintiffs unfortunate enough to have suffered extra harm." *Id.*

of punitive to "small" compensatory damages reaches the high single digits or exceeds single digits.

1. Defining "Small" Compensatory Damage Awards That Are More Than Nominal and Less Than Substantial Requires Additional Benchmarks.

As an initial matter, the instant case provides this Court with an opportunity to reduce existing uncertainty by providing guidance on what constitutes a "small" compensatory damage award for the purpose of computing punitive damages. Many courts have been inconsistent in distinguishing between "small" and "substantial" awards.

Shortly after *Campbell* a commentator summarized early court attempts to define a "small" compensatory damage award:

> Most courts have interpreted "small" . . . to be a relative rather than an absolute term. Compensatory damages ranging from $150,000 to $500,000 have been deemed sufficiently "small" to warrant the imposition of a ratio in excess of 4:1 (although less than 9:1). . . . Indeed, the district court in the Exxon Valdez case recently characterized compensatory damages of over $500,000,000 as small enough to warrant a high ratio, remitting its previously reversed punitive damages award of $5 billion to $4.5 billion.[8] ***Given this range of***

[8] *See In re Exxon Valdez*, 296 F. Supp. 2d 1071, 1104 (D. Alaska 2004). This Court did not agree that the $500 million verdict was small. To the contrary, it characterized the case as

> ***compensatory damages awards that few would consider "small" as an objective matter, further guidance, obviously short of an absolute number, is needed to help lower courts more uniformly and fairly determine when a higher ratio should be imposed based on this rationale.***

Laura J. Hines, *Due Process Limitations on Punitive Damages: Why State Farm Won't Be the Last Word*, 37 Akron L. Rev. 779, 803-804 (2004) (emphasis added) (citing *Phelps v. Louisville Water Co.*, 103 S.W.3d 46, 54 (Ky. 2003) ($150,000 is a "relatively small amount of compensatory damages" for loss of income in a case involving death of *parents); Bocci v. Key Pharmaceuticals, Inc.*, 76 P.3d 669, 674 (Or. 2003) (considering whether fraudulent conduct in a products liability case was "particularly egregious" for purposes of allowing a higher than single digit ratio); *Mathias*, 347 F.3d at 672 ($5,000 in compensatory damages per individual is small economic award in a bed bug case); *In re Exxon Valdez*, 296 F. Supp. 2d at 1104 ($513 million punitive damages award is not substantial when divided by 32,6777 claimants because "economic damages recovered by the average plaintiff [$15,704] was relatively small"); *see also Saunders*, 526 F.3d at 154 (in a Fair Credit Reporting Act case, $1,000 was a small or nominal award and therefore a single digit ratio would not have sufficient deterrent effect); *Hamlin*, 246 P.3d at 1128 (although the court was "unwilling to draw a rigid line between 'small' and 'substantial' compensatory damages awards," it held $6,000 damages in the

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one "resulting in substantial recovery for substantial injury." *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 551 (2008).

case before it was small for purposes of allowing a higher ratio).

State and federal courts would benefit from this Court providing more objective criteria for determining whether the actual or potential damages are small or substantial. One solution would be to require courts to measure the compensatory award on a continuum ranging from nominal to substantial, which can be based on the nature of the claims and the plaintiff's financial position. In other words, does the compensatory award represent a significant amount to the plaintiff?

In defining a small compensatory award it is essential to distinguish "small" from "nominal" for the purpose of punitive damages. Very small awards especially under $500 are often deemed "nominal" awards symbolic of an injury but not intended to compensate the plaintiff meaningfully for a loss. "Nominal damages are a trivial sum of money awarded to a litigant who has established a cause of action but has not established that he is entitled to compensatory damages." Restatement 2nd of Torts, § 907. Nominal damages are awarded, for example, when a plaintiff has established that an important constitutional or legal right has been violated but is unable to prove actual damages. *See, e.g., Carey v. Piphus*, 435 U.S. 247, 266 (1978) (permitting nominal damages in Section 1983 civil rights case and noting that "[c]ommon-law courts traditionally have vindicated deprivations of certain 'absolute' rights that are not shown to have caused actual injury through the award of a nominal sum of money").

Clearly great wrongs can be perpetrated without causing actual injury or the economic injury can be

negligible. Such awards are often classified as nominal, and ratios between the economic loss and punitive damages are significantly less relevant. A token $1 award coupled with $5,000 of punitive damages could be justified to punish a wrongdoer and serve as a deterrent. A ratio of 1 to 5,000 would very likely comply with due process requirements in that situation, but that should not serve as precedent for similar ratios for "small" awards that meaningfully compensate for an actual economic loss.[9]

Compensatory damage awards are those intended to redress concrete losses and constitute appropriate restitution. In this case, for example, a $650,000 punitive award was held to be within constitutional limits while recognizing Kelly's lost wages and benefits totaled $4,300. Kelly did not suffer physical harm but did lose three months of income before finding other employment. Clearly the recovery of this lost compensation is more than "nominal" and, from Kelly's perspective, may be substantial. *See Bennett*, 315 S.W.3d at 879 ("[E]conomic damages of $5,327.11 were substantial and cannot fairly be characterized as nominal or trivial. . . . [I]t is the amount the jury believed would redress the concrete loss that Reynolds suffered.").

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[9] In reviewing ratios, cases involving an economic recovery of $500 or less have been excluded from the comparison charts provided in A-51-120. It is recognized that the circumstances of each case differ and a bright line cannot be established to define the maximum dollar amount of a "nominal" award. Nonetheless, excluding cases when the economic loss recovery is $500 or provides is practical method of approximating a "nominal" award and making the comparative ratio analysis more meaningful among cases with greater economic loss recoveries.

Currently, the state and federal courts lack guidance on the factors that differentiate a "substantial" compensatory recovery from one that is "small." The instant case offers an opportunity to provide guidance on these categories. Factors could include, for example, the perspectives of the parties, the type and measurability of the loss, the industry involved, and the type of litigation. Petitioner does not dispute that the lower courts were justified in classifying $4,300 as a small award, but knowing how such a classification should be made would provide perspective on how close this award is to "substantial," especially from the Plaintiff's perspective. Currently courts lack guidance on whether the presumption of a single digit ratio becomes stronger the closer a "small" award is to becoming "substantial." The current case, with the loss of three months of income and benefits ($4,300), provides a useful factual setting for this Court to articulate what constitutes a "small" compensatory award and whether the single digit ratio presumption strengthens the closer the small award is to becoming "substantial."

2. Guidance Is Needed for Assessing What Constitutes "Particularly Egregious" Conduct.

In addition to reviewing the size of the economic loss, a court should assess the offending conduct comprising the cause of action for its reprehensibility relative to other types of harm that would permit punitive damages. Neither *BMW* nor *Campbell* explains that "particularly egregious" conduct justifying a higher punitive damage ratio in cases with a "small" economic loss requires a comparison between

and among different levels of egregious misconduct all of which would justify punitive damages. This case offers an opportunity to fill that gap and reduce the unacceptable variance in awards that currently exists. To have any independent meaning, "particularly egregious" should require misconduct materially worse than the minimum threshold required for punitive damages. To obtain punitive damages in Missouri, for example, a plaintiff must establish "with convincing clarity--that is, that it was highly probable--that the defendant's conduct was outrageous because of evil motive or reckless indifference." *Brady v. Curators of University of Missouri*, 213 S.W.3d 101, 109 (Mo. App. E.D. 2006). Conduct that meets this standard is neither necessarily nor automatically to be categorized as "particularly egregious." Once the minimum threshold for punitive damages is met, the conduct at issue should be compared with other behavior that justifies such damages to see if it meets the more elevated test for qualifying as "particularly egregious." Several factors can be considered including physical injury, repeated misconduct, community standards, criminality, and social and moral norms.

Confirmation that the misconduct should be evaluated relative to examples of other types of bad acts would provide corrective guidance to those courts currently viewing behavior justifying punitive damages as identical to conduct that is "particularly egregious." Additionally, this is an opportunity to consider mitigating factors. For example, the defendant's written policy of non-retaliation, training of supervisors to follow the policy, and internal complaint procedures would be relevant in showing that a retaliatory discharge by a store manager was an

isolated event that the employer had reasonably tried to prevent retaliation by its managers. Such measures would not excuse liability nor necessary prevent punitive damages, but should be relevant in determining the level of those damages. An employer taking reasonable measures to prevent retaliation is less culpable than an employer making little or no effort at prevention.

Since the current case is a classic retaliatory discharge cause of action, it is a very relevant and contemporary platform for showcasing needed standards and guidelines for better defining "particularly egregious" behavior supporting punitive damages when the compensatory award is small.[10]

Turning to specifics of the instant case, terminating an employee for allegedly reporting what he believed in good faith to be an infraction or misdemeanor committed by his supervisor can justify punitive damages. However, no physical injury occurred and there is no evidence that this was part of a scheme or plot that extended beyond a single event. A comparison with the retaliation cases cited in the Appendix shows the current case involves misconduct less severe than that in other decisions.

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[10] Employment retaliation cases have become one of the largest and fastest growing forms of litigation. Bypassing race and sexual harassment, retaliation has become the most common charge filed with the EEOC, accounting for 37,334 claims in fiscal year 2011. A-37-43. This trend promises to continue with increased whistleblower legislation and judicial decisions affirming the inherent right against retaliation in employee and consumer rights legislation, *See Burlington Northern & Santa Fe (BNSF) Railway Co. v. White*, 548 U.S. 53 (2006); David L. Hudson, Jr., *Back At Ya: Employee Retaliation Claims Play Big Before the High Court*, 97 A.B.A. J. 21 (2011).

This Court's guidance would be useful in many cases regarding the importance of comparative factors such as those noted above in determining whether conduct was "particularly egregious."

3. The Importance of the Single Digit Ratio Between Compensatory and Punitive Damages Should Be Further Explained and Reaffirmed.

The Court should clarify that once a reviewing court determines comparative reprehensibility, the ratio of compensatory to punitive damages becomes critical. If the compensatory recovery is "small," a presumption should remain that the punitive damage ratio will be in single digits. If the conduct only meets the requirements for punitive damages, the expectation should be a ratio not greater than 4:1 for a small compensatory award. If the conduct is more reprehensible, the ratio could increase to as high as 9:1. It follows that what is most needed is additional guidance regarding the extraordinary reprehensibility required to push the ratio into two digits, and what, if anything might justify a court finding constitutionally permissible ratios in the mid-to-upper two digits.

In evaluating punitive damage awards exceeding single digit ratios, it is important to recognize a "small" award is not a "nominal" award. To prevent further gross disparities in the application of a constitutional principle, Petitioner requests that the Court offer guidance on identifying what cases are so horrific that a small compensatory award that is clearly beyond nominal would justify a ratio in the upper two digits or as high as 100:1.

In making the request for needed guidance, Petitioner is not seeking declaratory relief about a hypothetical dispute. The current case allows this Court to examine whether a 151:1 ratio is constitutionally permissible and what standards and guidelines apply. Accepting the facts as favoring the plaintiff, Petitioner submits that nothing in the record justifies a finding of "particularly egregious" behavior so extreme that a ratio of 151:1 would withstand constitutional scrutiny. In the six years since the NYU survey, the 151:1 ratio is the most extreme any reviewing court has approved as constitutional involving a small compensatory award above $500. Out of the forty-one punitive damages decisions identified since 2006 involving small compensatory awards, only two others were found with triple digit multipliers. *See Overbey*, 361 S.W. 3d at 374 (111:1 ratio on automobile sales fraud case); *Goff*, 297 S.W. 3d at 196 (151:1 ratio in case involving unlawful disposal of hazardous waste and tires). Neither shows a level of extreme reprehensibility justifying differentiating them from other punitive damage awards with much smaller ratios. These cases and the instant case are like neon signs welcoming awards well in excess of single digits.

In this case, the reviewing court attempted to justify a ratio of 151:1 in terms of what was necessary to deter future conduct. Although deterrence is a relevant inquiry, its unlimited application needs to be cabined given the guidance already provided by *Gore* and *Campbell*.

> The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without consider-

> ing whether less drastic remedies could be expected to achieve that goal. The fact that a multimillion dollar penalty prompted a change in policy sheds no light on the question whether a lesser deterrent would have adequately protected the interests of Alabama consumers.

BMW, 517 U.S. at 585.

First, there is no basis for assuming that deterrence fails if a court awards ten or fifteen times a small economic loss (in this case $4,300). That ratio sends a strong message, especially in the workplace. Employers understand that following a punitive damage verdict for one employee, they risk similar awards for other employees if the behavior is not immediately corrected. Second, linking the award to the ability to pay without regard to the economic loss becomes confiscatory and directly contrary to this Court's prior decisions. Third, the results become inconsistent with punitive damages assessed for more substantial economic losses. If, hypothetically, Mr. Kelly was unemployed with no income for two years, resulting in a $40,000 economic loss, and he received a maximum punitive damage award of 4:1 ($160,000) or even 9:1 ($360,000), which would be extreme for the misconduct suffered, both awards, would be significantly less than the 151:1 ($650,000) punitive damage award assessed with only three months of lost income.

D. Nine Years of Lower Court Applications of *Campbell* Provide This Court With Demonstrative Evidence of the Need For Greater Guidance.

The suggestions above are intended to show how critical it is to have more specific guidelines, especially for cases with "small" compensatory damage awards. Briefing on the merits will provide the Court with further analysis and recommendations for articulating standards for punitive damages involving small compensatory damage awards.

Turning to the nine years of court reviewed punitive damage awards listed in the Appendix, even a quick review shows vast differences between courts and jurisdiction especially when compensatory damages are small. A-71-120. These differences cannot be explained by the severity of the misconduct. The one factor that comes closest to providing some predictability is the identity of the reviewing court. For example, if this case could have been removed to federal court, it seems inconceivable that the Eighth Circuit would have affirmed a 151:1 ratio based on the Petitioner's conduct. Because the case was not removable, the Missouri Supreme Court set a clear precedent welcoming ratios in excess of 100:1 for small awards, almost without regard for underlying misconduct's level of egregiousness. Jurisdiction and geography should not determine whether and to what extent a defendant's Fourteenth Amendment rights are protected. This Court has brought greater predictability to the constitutional limits of punitive damage awards when substantial losses are involved. Petitioner now seeks this Court's review to provide similar constitutional predictability when

small economic losses are multiplied through punitive damages.

CONCLUSION

For the foregoing reasons, the Court should grant this Petition.

Respectfully submitted,

ARTHUR R. MILLER
Of Counsel
New York University
School of Law
40 Washington Sq.,
South
Vanderbilt Hall 430F
New York, NY 10012
Telephone: 212.992.8147

GARRY G. MATHIASON
Counsel of Record
LITTLER MENDELSON, P.C.
650 California Street
20th Floor
San Francisco, CA 94108
Telephone: 415.433.1940
gmathiason@littler.com

Counsel for Petitioner