No. 17-900

IN THE

Supreme Court of the United States

CRANE CO.,

Petitioner,

v.

JEANETTE G. POAGE,

Respondent.

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

BRIEF IN OPPOSITION

MICHAEL A. GROSS
MICHAEL GROSS LAW OFFICE
231 S. Bemiston Ave.
Ste. 250
St. Louis, MO 63105
(314) 863-5887
mgross@grossbriefs.com

JOSEPH F. YECKEL
LAW OFFICE OF
JOSEPH F. YECKEL, LLC
231 S. Bemiston Ave.
Ste. 250
St. Louis, MO 63105
(314) 727-2430
joe@yeckel-law.com

ROBERT W. COWAN
Counsel of Record
AARON M. HECKAMAN
BAILEY PEAVY BAILEY COWAN
HECKAMAN PLLC
5555 San Felipe St.
Ste. 900
Houston, TX 77056
(713) 425-7100
rcowan@bpblaw.com
aheckaman@bpblaw.com

Counsel for Respondent

February 20, 2018

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

QUESTIONS PRESENTED

The Due Process Clause requires states to adopt procedures that prevent arbitrary punitive damages awards. *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007). This Court has established a standard of excessiveness to distinguish awards that satisfy due process from those that do not. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 562 (1996). It has identified factors to be considered in determining whether a particular award is constitutional, *id.* at 574-75, and criteria for evaluating a defendant's reprehensibility as a particular component of that evaluation. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417-29 (2003). And it has specified that appellate review of punitive damages awards must be "exacting." *Id.* at 418. The court below cited and discussed that authority, declared that it had reviewed the constitutional issue *de novo,* and stated that it had in fact considered mitigating and aggravating evidence in its review of the trial court's denial of remittitur. That court affirmed a gross compensatory damages award of $1.5 million for wrongful death and a punitive damages award of $10 million.

The following questions are presented:

1. Whether, in view of this Court's well-settled rules regarding the scope and methodology of appellate review for constitutional challenges to punitive damages awards, and the consistency of lower court opinions applying the requisite "exacting review," including the opinion of the court below in this case acknowledging the requirement of "exacting" appellate review and declaring that the court had considered mitigating evidence, there is a split of authority among those courts or a need for change to or expansion of the present guidance.

2. Whether, if the issue has been preserved, due process requires the categorical elimination or bright-line limitation of punitive damages awards against mass tort defendants when a single course of action might subject them to substantial compensatory and punitive damages awards in multiple cases.

TABLE OF CONTENTS

TABLE OF CONTENTS—Continued

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

TABLE OF AUTHORITIES—Continued

INTRODUCTION

The Petition begins with the propositions that punitive damage awards "'pose an acute danger of arbitrary deprivation of property'" and thus "are among the government actions most likely to give rise to a due process violation." Pet. 2 (quoting *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). But this Court has left no room to doubt that the states have "a legitimate interest in punishing unlawful conduct and deterring its repetition," that "[p]unitive damages may properly be imposed" to further those interests, and that in our federal system each state "necessarily ha[s] considerable flexibility" to fix its own limits for "different classes of cases and . . . any particular case." *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996).[1] Only awards that "can fairly be categorized as 'grossly excessive'" with respect to a state's interest in punishing and deterring reprehensible conduct "enter the zone of arbitrariness" and have the capacity to violate due process. *Id.*

Despite this Court's establishment of comprehensive guidelines for appellate courts called upon to determine whether a punitive damages award is so excessive that it violates due process, and without apparent regard for the "considerable flexibility" that ought to be accorded states in establishing their own parameters for "punishing unlawful conduct and deterring its repetition," Petitioner posits an "urgent" and "exceedingly important" need to impose additional

---

[1] The Missouri Supreme Court has found the same social utility in punitive damage awards. *Scott v. Blue Springs Ford Sales, Inc.*, 176 S.W.3d 140, 143 (Mo. 2005) (stating that such an award "provides one of the most effective deterrents of future misconduct by a defendant or by others who may be similarly tempted").

control over both federal and state appellate courts. Pet. 4, 12.

There is no such need. The rampant confusion and split of authority urged by Petitioner do not exist. Rather than flouting the standard and scope of review established by this Court, the court below recited those requirements and declared that it had complied with them. The ratio suggested by Petitioner is almost twice as great as the actual ratio of punitive to compensatory damages found by the jury. And Petitioner did not attempt to prove or timely assert its claim that exposure to a multiplicity of awards for a single course of action rendered the present punitive damages award unconstitutional. That claim thus is not preserved.

The Petition should be denied. This case has been properly adjudicated in accordance with this Court's constitutional guideposts. It requires no further review.

STATEMENT

1. Petitioner Crane Co. seeks clarification and expansion of the scope of appellate review when punitive damages awards are challenged under the Due Process Clause. That request is premised on two unsound propositions. *First*, Petitioner contends that the appellate courts across the country are in disarray regarding the principles governing that review and that there is a nationwide split and rampant confusion, evidenced by the fact that one state supreme court in one opinion found it appropriate to defer to jury findings rather than reweigh evidence that the defendant had adduced to mitigate the reprehensibility of its conduct. *Second*, Petitioner insists that in this case the Missouri Court of Appeals did the same—"refus[ing] to even consider" mitigating

or extenuating circumstances—despite that court's declarations to the contrary.

2. There is no split of authority requiring this Court's attention at this time. The Missouri Court of Appeals and three courts cited by Petitioner reviewed mitigating evidence in their evaluation of punitive damages awards. One state court did not. *Carpentier v. Tuthill*, 86 A.2d 1006, 1013-14 (Vt. 2013). The latter court erroneously conducted its review under a deferential abuse of discretion standard. *Id.* at 1013. The Petition cites no opinion in which an appellate court applied the requisite *de novo* standard of review and declined to consider mitigating evidence in its due process analysis. In the case below, the Missouri Court of Appeals afforded Petitioner's constitutional claim *de novo* review, enumerated and discussed the factors that this Court has specified for that review, and considered mitigating evidence in the course of reviewing the trial court's denial of remittitur. Pet. App. 37a, 43a.

3. The present appeal would be a poor vehicle for addressing Petitioner's concerns about a five-year-old opinion from another state, especially since the appellate court in that case clearly used an erroneous standard of review. The Vermont court's opinion has never been cited by any court outside of that state, and within the state only once (and not for the standard of appellate review of punitive damages awards). Most importantly, the scope of appellate review of punitive damages awards that this Court has established is clear and comprehensive. It was recognized and followed by the court below, and it needs neither clarification nor expansion.

4. Petitioner also seeks review because of supposed confusion regarding the constitutional limits on

punitive damages "where a defendant faces multiple, substantial punitive damages . . . awards arising from a single course of conduct." This issue was not preserved: Petitioner failed to utilize procedures provided by Missouri to protect defendants from excessive punitive damages awards and to facilitate prompt judicial review of constitutional claims. For example, Petitioner never availed itself of the statutory right to seek reduction of a punitive damages award by the amount of the defendant's potential liability for punitive damages arising from the same conduct. Mo. Rev. Stat. § 510.263.4. Nor did Petitioner avail itself of the opportunity—in fact the obligation for purposes of preservation—to assert this constitutional claim at the first opportunity during the underlying litigation. *See Meadowbrook Country Club v. Davis*, 384 S.W.2d 611, 612 (Mo. 1964) (recognizing Missouri's "firmly established" rule that "a constitutional question must be presented at the earliest possible moment . . . , otherwise it is will be waived").[2] Because the issue was not presented to or considered by the Missouri Court of Appeals, it not subject to review. *Adams v. Robertson*, 520 U.S. 83, 86 (1997).

[2] Petitioner did not assert its purported constitutional entitlement to protection from multiple awards attributable to a single course of action in its post-judgment request for remittitur by the trial court or in its briefing or oral argument in the state appellate court. It raised this due process argument—which Petitioner now contends is sufficiently important and unique to warrant review by this Court—for the first time in its unsuccessful request for review by the Missouri Supreme Court.

REASONS FOR DENYING THE WRIT

I. THERE IS NEITHER CONFUSION NOR A SPLIT REGARDING THE SCOPE OF APPELLATE REVIEW OF PUNITIVE DAMAGE AWARDS.

A. There Is No Need For Clarification Or Expansion Of The Scope Of Review That This Court Already Has Prescribed.

1. This Court has recognized the due process implications of punitive damages awards, *Philip Morris USA v. Williams*, 549 U.S. 346, 352 (2007), drawn the line that separates awards that are constitutional from those that are not, *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 562 (1996), identified the analytical criteria to be applied by appellate courts in determining whether an award satisfies due process or not, *id.* at 574-75, specified sub-factors for evaluating the defendant's reprehensibility in particular, *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408, 417-29 (2003), and mandated that appellate courts be "exacting" in conducting such review. *Id.* at 418. The scope of appellate review for challenges to punitive damages awards is well-settled.

2. Petitioner insists that courts around the country are in disarray about the scope of review in such cases. It contends that both the federal and the state appellate courts "have struggled . . . to apply clear and consistent constitutional limits" to punitive damages awards. It is the job of appellate courts to struggle sometimes in their consideration of cases in which a jury has awarded substantial punitive damages. That review is to be exacting. This Court never has suggested that there is a "clear" constitutional limit for punitive damage awards. To the contrary, the

Court has said repeatedly that there is no bright line test for deciding that a particular award is excessive and violates due process. *See, e.g.*, *Gore*, 517 U.S. at 582 (stating that "we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula").

3. The split of authority conjured by Petitioner—consisting of one opinion from the New Mexico Supreme Court, one from the Fifth Circuit, and one from the Second Circuit in which the consideration of mitigating evidence was found necessary or appropriate, and one case from the Vermont Supreme Court choosing to defer to the jury's findings—reflects neither a lack of comprehension of the due process analysis prescribed by this Court nor a need for retooling or expanding that prescription.

In *Aken v. Plains Electric Generation & Transmission Cooperative, Inc.*, the New Mexico court considered mitigating evidence in the course of its due process analysis. 49 P.3d 662, 669 (N.M. 2002). The Fifth Circuit did the same in *Cooper v. Morales.* 535 F. App'x 425, 433 (5th Cir. 2013) (per curiam). Neither of those courts needed more guidance than this Court already has provided to determine the scope of its due process analysis. Petitioner's citation of *Payne v. Jones* as an example of correct appellate review of constitutional challenges to punitive damages awards is mistaken. The Second Circuit made it clear that it was not reviewing for constitutional error because the appellant had not asserted a due process claim. 711 F.3d 85, 99-100 (2d Cir. 2013).

In *Carpentier v. Tuthill*, 86 A.2d 1006 (Vt. 2013), the Vermont Supreme Court said that it would defer to the jury's findings with regard to reprehensibility, "including the effect of any mitigating factors," in

determining whether the punitive damages award was excessive. *Id.* at 1013-14. That court was proceeding from the erroneous premise that its review should be conducted under a deferential abuse of discretion standard. *Id.* at 1013. This Court has made it clear that appellate courts must apply a *de novo* standard of review in determining whether a punitive damages award violates due process. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001). Any fault in the analysis of the Vermont Supreme Court is due to the erroneous application of a deferential standard of review, and not to a want of clarity in or need to expand the scope of appellate review that this Court has established for such cases.

4. The scope of appellate review when the constitutionality of a punitive damage award is challenged needs neither clarification nor expansion. Petitioner's suggestion of a new rule requiring appellate courts to reweigh a category of evidence every time an award of punitive damages is challenged—even evidence that the jury considered and plainly rejected—is self-serving and short-sighted and calls for an unwise invasion of the fact-finder's province. *Cf. Cooper Indus.*, 532 U.S. at 439 n.12 (suggesting that the Seventh Amendment would preclude a court from disregarding jury findings in its constitutional review of a federal jury's punitive damages award).

5. Even if there existed a deep conflict among the lower courts—and there is none—this case would be a poor vehicle for resolution of the issue. As demonstrated in the following section, Petitioner's notion that the Missouri Court of Appeals failed to consider mitigating evidence in its review of the present punitive damages award is untenable. *See* pp. 10-11, *infra.* Any doctrinal conflict that this Court might find

in the four opinions cited by Petitioner is incipient and undeveloped and should be allowed to percolate. As Justice Stevens noted, "experience with conflicting interpretations of federal rules may help to illuminate an issue before it is finally resolved and thus may play a constructive role in the lawmaking process." John P. Stevens, "Some Thoughts on Judicial Restraint," 66 Judicature 177, 183 (1982). Further, the purported conflict here, if it exists at all, is exceedingly narrow.

B. The Missouri Court Of Appeals Did Not "Refuse To Consider" Any Particular Evidence In Its Due Process Review, But Rather Recited And Presumably Applied The Constitutional Analysis Required By Prior Decisions Of This Court.

Petitioner contends the Missouri Court of Appeals "refused to consider" evidence "that demonstrated that [Petitioner's] behavior was not reprehensible." Pet. 7. In fact Petitioner makes a mantra of that notion, asserting it seven times in its Petition. *Id*. at i, 3, 5, 7-8, 9, 11-12, 13. Repetition does not make a fancy true.

1. The Petition overlooks passages of the Missouri appellate court's opinion that actually set forth the review standard employed by that court to assess the constitutionality of the jury's punitive damages award. In a section labeled clearly enough "Standard of Review for Remittitur of Punitive Damages," the court addressed first the deferential abuse of discretion standard generally applied by Missouri courts called upon to review the denial of a request for remittitur under state law and then the non-deferential standard to be applied in its due process analysis:

> [W]e review the denial of remittitur of punitive damages using an abuse of discretion standard. For punitive damages, an abuse of discretion is established only when the size of the award is manifestly unjust, and so disproportionate to the relevant factors that it reveals improper motives or a clear absence of the honest exercise of judgment. We view the evidence and all reasonable inferences therefrom in the light most favorable to the trial court's decision. Our court does not weigh the evidence, and our inquiry is limited to determining if the jury's verdict is supported by substantial evidence. When the trial court approves a jury's verdict, its discretion is practically conclusive. However, we review the constitutionality of the imposition of punitive damages *de novo*.

Pet. App. 36a-37a (internal quotes and citations omitted).[3]

2. Petitioner also has chosen not to mention the Missouri court's exegesis of due process analysis required by the prior opinions of this Court, the Missouri Supreme Court, and the state's lower appellate courts. Thus the opinion below recites: "The due process guaranteed by both [the federal and state] constitutions 'prohibits the imposition of grossly excessive or arbitrary punishment on a tortfeasor.'" *Id.* at 37a (quoting *State Farm*, 538 U.S. at 416). The state appellate court set out the factors identified by this

[3] Petitioner cites only the standard of review set forth by the Missouri appellate court for its consideration of the submissibility of respondent's case. Pet. 7. That review was conducted because Petitioner's first issue on appeal was a submissibility challenge. *Id.* at 4a-5a.

Court in *State Farm* and other opinions and adopted by the Missouri Supreme Court in cases such as *Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014), Pet. App. 37a-38a, and noted the need to weigh "aggravating and mitigating circumstances." *Id.* at 43a.[4] It recognized that "[c]ourts have a *mandatory* duty to reduce a verdict if it is unconstitutional and violates a defendant's due process." *Id.* at 42a (emphasis in original). The Petition also ignores the Missouri court's assertions that it has applied "the factors described in *Lewellen* and *State Farm Mut. Auto. Ins. Co."* and that after considering enumerated factors—including "aggravating and mitigating circumstances"—it had determined that "there was a significant degree of 'reprehensibility' in Crane's conduct" and found no basis for concluding that the jury's verdict was excessive. *Id.* at 39a, 43a.

3. Nowhere does the Missouri Court of Appeals suggest that it "refused to consider the . . . evidence Crane Co. offered that demonstrated that its behavior was not reprehensible" or "focus[ed] exclusively on the evidence favoring the jury's punitive damages award and disregard[ed] . . . extenuating factors presented by petitioner," as Petitioner incants time and again. Instead the court recognized the standard of review and analytical paradigm this Court has established for determining whether a punitive damages award complies with due process, and declared that this is how its constitutional analysis was performed. Petitioner

[4] The explicit reference to mitigating circumstances appears in the Missouri Court of Appeals' discussion of the scope of review for a denial of remittitur generally. Pet. App. 43a. That reference leaves no room to doubt the state court's understanding of the scope of review and undermines Petitioner's insistence that the court refused to consider mitigating evidence in this appeal.

insists that this Court discredit that assurance. Precisely the opposite is appropriate. *See TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 465 (1993) (plurality opinion) (stating that "[w]hile it is always helpful for . . . judges to explain the basis for their rulings as thoroughly as is consistent with the efficient dispatch of their duties, we certainly are not prepared to characterize [such] failure as a constitutional violation").

4. It cannot be said that the Missouri Court of Appeals' opinion diverged in any significant way from the cases lauded by Petitioner as exemplifying "[e]xacting appellate review" of punitive damages. Like the courts in *Payne v. Jones*, 711 F.3d 85 (2d Cir. 2013), *Cooper v. Morales*, 535 F. App'x 425 (5th Cir. 2013) (per curiam), and *Aken v. Plains Electric Generation & Transmission Co-op, Inc.*, 49 P.3d 662, 669 (N.M. 2002), the Missouri appellate court did not "refuse[] to consider other evidence establishing significant extenuating circumstances." Pet. 11. That is especially true in view of the court's explicit acknowledgment that it must weigh "aggravating and mitigating circumstances" when determining whether a punitive damages award was excessive for purposes of possible remittitur. *Id.* at 43a. That Petitioner is dissatisfied with the extent to which the state court explained its consideration of specific evidence is no basis for review by this Court.

II. THE GUIDELINES FOR EVALUATING THE CONSTITUTIONALITY OF PUNITIVE DAMAGES IN MASS TORT CASES DO NOT REQUIRE CLARIFICATION.

A. The Second Question Presented Has Not Been Preserved And Should Not Be Reviewed.

1. The second question presented is whether the Due Process Clause limits the amount of punitive damages a court may impose on a "mass tort" defendant who "faces multiple, substantial punitive and compensatory damages arising from a single course of conduct." Pet. i, 14. The Court should decline to review this question because Petitioner has forfeited it. Petitioner did not assert this constitutional issue in the trial court or the Missouri Court of Appeals and presented no evidence of the purported "myriad other suits" it has and will face for selling of asbestos-containing products or that it has paid or will have to pay any damages in other lawsuits arising out of that activity. Consequently, the record below contains zero evidence supporting the predicates of the second question presented.

2. Petitioner has not claimed that Missouri lacked adequate procedures for it to present such mitigating evidence at trial or for courts to consider such evidence. That would have been a poor argument since Missouri has adopted ample procedures to protect defendants like Petitioner from excessive punitive damages arising out of the same course of conduct. Once punitive damages become an issue in a wrongful death case, the defendant is entitled to introduce evidence that mitigates against the imposition of punitive damages. *Bennett v. Owens-Corning Fiberglass Corp.*, 896 S.W.2d 464, 468 (Mo. 1995). The defendant

may request an instruction informing the jury that it may consider mitigating circumstances. *Id.* ("When supported by the evidence, a defendant in a wrongful death action is entitled to a mitigating circumstances instruction."); *see Hagen v. Celotex Corp.*, 816 S.W.2d 667, 674-75 (Mo. 1991) (finding that mitigating circumstances instruction should be given on retrial if the defendant offers sufficient evidence demonstrating "that, at the time it sold the [asbestos containing] products on which [the decedent] worked, it believed that they were safe, beneficial, and useful as insulating materials").

3. Missouri also has implemented post-verdict procedures for remitting constitutionally excessive punitive damages awards. The defendant may file a motion to reduce the punitive damages award by the amount of punitive damages it has paid in other cases based on the same conduct. *See* Mo. Rev. Stat. § 510.263.4 ("Within the time for filing a motion for new trial, a defendant may file a post-trial motion requesting the amount awarded by the jury as punitive damages be credited by the court with amounts previously paid by the defendant for punitive damages arising out of the same conduct on which the imposition of punitive damages is based."); *see Elam v. Alcolac, Inc.*, 765 S.W.2d 42, 230 (Mo. Ct. App. 1988) ("It is a desideratum of the statute . . . that a defendant not be required to pay redundant punitive damages based on the same conduct."). In addition to the protections afforded by Section 510.263.4, Missouri jurisprudence makes clear that, if requested by the defendant, the trial and appellate courts must consider the defendant's *potential* exposure to liability in other cases arising from the same conduct:

> In reviewing the jury's verdict, the trial court, as well as the appellate court, must consider both previous and pending judgments against the defendant as mitigating circumstances when the prior judgment was for the same conduct as the conduct at issue before them. The burden is on the defendant to establish that previous or pending punitive damage judgments against the defendant result from the same conduct at issue in the present case. The defendant is certainly in the best position to know of previous or pending judgments against them. By giving consideration to other judgments upon a request for remittitur, the appellate court can in the spirit of § 510.263.4, effectuate the goal of the credit statute—to prevent repetitive punitive awards for the same conduct.

Barnett v. La Societe Turbomeca France, 963 S.W.2d 639, 668-69 (Mo. Ct. App. 1997), *overruled on other grounds by Badahman v. Catering St. Louis*, 395 S.W.3d 29, 40 (Mo. 2013).

4. Inexplicably, Petitioner did not utilize any of these procedures. It did not request a mitigation instruction. It offered no evidence regarding the extent of the compensatory and punitive damages it faces for injuries sustained by others exposed to its asbestos containing products. It did not file a post-trial motion seeking a reduction of the punitive damages award based on its actual and potential liability in other cases based on the same course of conduct. The issue was not raised in the Missouri Court of Appeals or addressed in the opinion issued by that court.

5. Because Petitioner utterly failed to preserve the issue, this Court should deny review. *See Adams v. Robertson*, 520 U.S. 83, 86 (1997) ("With 'very rare

exceptions,' we have adhered to the rule in reviewing state court judgments under 28 U.S.C. § 1257 that we will not consider a petitioner's federal claim unless it was either addressed by, or properly presented to, the state court that rendered the decision we have been asked to review.") (quoting *Yee v. Escondido*, 503 U.S. 519, 533 (1992)).

B. Petitioner Misstates the Proper Ratio For The Second *Gore* Guidepost.

1. Petitioner states that the punitive to compensatory damages ratio is 12:1. Pet. 5, 7, 8, 17, 21. The actual ratio is 6.7:1 given the jury's assessment of plaintiff's compensatory damages at $1,500,000. Petitioner derives the higher ratio by deducting $677,750 in setoffs required by Missouri law from the jury's total award of compensatory damages. Pet. 6-7; Pet. App. 47a. Courts have consistently held that punitive damages should be compared to the compensatory damages awarded without deducting setoffs. *See, e.g.*, *Kelley v. Michaels*, 59 F.3d 1050, 1055 (10th Cir. 1995) (finding that actual damages award of $292,750, and not net award of $2,750 after setoff, should be used to determine ratio of punitive to compensatory damages); *Hayes Sight & Sound, Inc. v. ONEOK, Inc.*, 136 P.3d 428, 448 (Kan. 2006) ("There is no sound reason for subtracting setoff before calculating the ratio of punitive to compensatory damages."); *Allsup's Convenience Stores, Inc. v. N. River Ins. Co.*, 976 P.2d 1, 19 (N.M. 1999) ("The fact that damages may be offset does not mean that they were not caused or that they never existed sufficiently to support a punitive damages award.").

C. There Is No Split In The Lower Courts Regarding The Constitutional Limits On Punitive Damages When Substantial Compensatory Damages Are Awarded.

1. Petitioner contends *State Farm* held that due process prohibits punitive damages awards in excess of compensatory damages when the compensatory damages award is "substantial." Pet. 14-15. *State Farm* cannot be reasonably construed in that manner. The Court, in fact, expressly declined to impose a maximum ratio:

> Turning to the second *Gore* guidepost, we have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award . . . . We decline again to impose a bright-line ratio which a punitive damages award cannot exceed.

538 U.S. at 425-26.[5] The Court has repeatedly rejected calls to impose "rigid benchmarks" or "concrete constitutional limits" on the ratio of punitive to compensatory damages. *Id*. at 425-26; *see Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008) ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula . . . .") (quoting *Gore*, 517 U.S. at 582). Indeed, the Court has acknowledged the impossibility of "draw[ing] a

[5] The only presumption identified in *State Farm* is that a 145:1 ratio is unreasonable and disproportionate to the harm arising from a purely economic transaction where the plaintiffs sustained no physical injuries and only minor economic injuries for an 18-month period. 538 U.S. at 426.

mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case." *Gore*, 517 U.S. at 582-83 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991)).

2. *State Farm* provided guidance to lower courts regarding the constitutionally permissible range for the ratio of punitive to compensatory damages. It stated "what should be obvious"—that "[s]ingle digit multipliers are more likely to comport with due process" and "few awards exceeding a single-digit ratio between punitive and compensatory damages, *to a significant degree*, will satisfy due process." *Id.* (emphasis added). *State Farm* confirmed that the constitutional limitation on punitive damages is flexible and case-dependent. "[T]he precise award in any case . . . must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff." *Id*. at 425.

A mandatory 1:1 punitive to compensatory damages ratio cannot be reconciled with this Court's directive that courts must analyze each *Gore* guidepost and give the greatest weight to the reprehensibility guidepost. *State Farm*, 538 U.S. at 418-19 ("[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct."). A compulsory 1:1 ratio would unsettle that established precedent by making the ratio guidepost decisive whenever compensatory damages could be characterized as "substantial" regardless of the egregiousness of the defendant's conduct. It would also eviscerate the principle that punitive damages awards must be evaluated based upon the facts of each case. *State Farm*, 538 U.S. at 425.

Nor is there confusion in the lower courts over what constitutes a substantial compensatory damages

award that requires a lower ratio of punitive to compensatory damages. The cases Petitioner cites—in which compensatory damages awards were deemed so large that a 2:1 or 1:1 ratio of punitive to compensatory damages was deemed necessary—all involved economic injuries unaccompanied by any physical injuries. *See Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1208 (10th Cir. 2012) ($630,307 award in retaliatory discharge case); *Bridgeport Music, Inc. v. Justin Combs Pub.*, 507 F.3d 470, 489-90 (6th Cir. 2007) ($366,939 award in copyright infringement case); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) ($600,000 award in employment discrimination case); *see also Bach v. First Nat'l Bank*, 486 F.3d 150, 156 (6th Cir. 2007) ($400,000 award in Fair Credit Reporting Act violation case). In contrast, the two cases Petitioner cites in which six- and seven-figure compensatory damages awards were not considered so large as to require a low single-digit ratio involved physical injuries. *See Flax v. DaimlerChrysler Corp.*, 272 S.W.3d 521, 539 (Tenn. 2008) ($2,500,000 award in wrongful death case), *cert. denied*, 556 U.S. 1257 (2009); *Bullock v. Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 399–401 (Ct. App. 2011) ($850,000 award in lung cancer case).

There is no conflict evident in these cases. They demonstrate that a certain amount of compensatory damages may be substantial in an economic injury case but insubstantial in a physical injury case. *See Aleo v. SLB Toys USA, Inc.*, 995 N.E.2d 740, 757 (Mass. 2013) ("While $2,640,000 may be a substantial sum of money by many measures, its significance pales when viewed not as compensation for economic loss or emotional distress but for the loss of a young woman's life."). Even a certain amount of compensatory damages that may be viewed as substantial in one

physical injury case may be regarded as low in another physical injury case. The cases are consistent with the Court's directive to evaluate each case based on its particular facts and circumstances. *See State Farm*, 538 U.S. at 425.

3. Petitioner is also wrong in claiming that courts disagree about the maximum ratio of punitive to compensatory damages in cases involving "substantial" compensatory damages. In the cases Petitioner cites in support of this argument, all but one involved purely economic injuries. *See* Pet. 15-17. Application of the constitutionally mandated guidelines to the particular facts and circumstances of the case naturally yielded different results. Petitioner urges this Court to adopt a bright-line maximum ratio of punitive damages in every case in which compensatory damages meet or exceed a certain amount, contrary to this Court's refusal over the years to impose a bright-line ratio that a punitive damages award cannot exceed. Again, the Court has consistently refused to "identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 424. In rejecting such a "categorical approach," this Court explained that a "higher ratio may . . . be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine." *Gore*, 517 U.S. at 582.

Courts reviewing awards in personal injury and wrongful death cases have approved single-digit or low double-digit ratios of punitive to compensatory damages. *See, e.g.*, *Aleo*, 995 N.E.2d at 417-20 (wrongful death case; $18 million in punitive damages and $2,660,000 in compensatory damages; slightly less than 7:1 ratio); *Ragland v. DiGiuro*, 352 S.W.3d 908,

924 (Ky. Ct. App. 2010) (wrongful death case; $30 million in punitive damages and $3,347,708 in compensatory damages; slightly less than 9:1 ratio); *Grassie v. Roswell Hosp. Corp.*, 258 P.3d 1075, 1089 (N.M. Ct. App. 2010) (wrongful death case; $10 million in punitive damages and $993,465 in compensatory damages; just over 10:1 ratio); *Boeken v. Philip Morris Inc.*, 26 Cal. Rptr. 3d 638, 683-87 (Ct. App. 2005) (personal injury; $50 million in punitive damages and $5,539,127 in compensatory damages; 9:1 ratio), *cert. denied*, 547 U.S. 1018 (2006); *Union Pac. R.R. Co. v. Barber*, 149 S.W.3d 325, 303 (Ark. 2004) (personal injury case; $25 million in punitive damages and $5.1 million in compensatory damages; 5:1 ratio), *cert. denied*, 543 U.S. 940 (2004); *CSX Transp., Inc. v. Palank*, 743 So. 2d 556, 558 (Fla. Ct. App. 1999) (wrongful death case; $50 million in punitive damages and $6.14 million in compensatory damages; 8:1 ratio), *cert. denied*, 531 U.S. 822 (2000); *Flax*, 272 S.W.3d at 538-39 (wrongful death case; $13,367,345 in punitive damages and $2.5 million in compensatory damages; 5.35:1 ratio), *cert. denied*, 556 U.S. 1257 (2009). The state appellate court's acceptance of a 6.7:1 is no outlier.

4. The Missouri Court of Appeals properly analyzed the second guidepost by examining the disparity between the harm suffered by Mr. Poage and the punitive damages award. Pet. App. 37a. It observed that Mr. Poage suffered physical harm well beyond "mere economic damages." Pet. App. 41a. It noted that Mr. Poage's exposure to Petitioner's asbestos containing products caused him to contract mesothelioma, a "gruesome disease" that produces death by suffocation or starvation. Pet. App. at 11a, 41a. The court observed that Mr. Poage's injury was hard to detect because mesothelioma has a long latency period, and

that the noneconomic harm was difficult to measure given that this is a wrongful death case. Pet. App. 39a-41a (quoting *Gore*, 517 U.S. at 582 ("A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.")); *see also Exxon Shipping*, 554 U.S. at 494 ("Regardless of culpability, however, heavier punitive awards have been thought to be justifiable when wrongdoing is hard to detect (increasing chances of getting away with it) . . . ."). The court determined that a large punitive damages award was necessary to punish Petitioner for its reprehensible conduct in placing unreasonably dangerous products into the stream of commerce and to deter it and others from engaging in such conduct in the future. Pet. App. 39a; *see also Gore,* 517 U.S. at 568 ("Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition."). In light of these circumstances, the 6.7:1 ratio of punitive to compensatory damages in this case does not shock the conscience unlike the 500:1 ratio in *Gore* or the 145:1 ratio in *State Farm*. Because the single-digit ratio in this case falls "within a constitutionally acceptable range," *Gore*, 517 U.S. at 583, no need for further guidance on the second *Gore* guidepost is needed.

D. There Is No Confusion Regarding The Constitutionality of Punitive Damages In Cases Involving Conduct That Leads To Multiple Compensatory Damages Awards.

1. Prohibiting punitive damages awards in the broad class of cases Petitioner attacks cannot be reconciled with the salutary principle that the

constitutionality of a punitive damages award is based upon the particular facts and circumstances of each case. *See State Farm*, 538 U.S. at 425. It would contravene this Court's declaration that there is no fixed line that separates awards that satisfy due process from those that do not. *See id.* at 424. In addition, it would lead to the untenable result that although a punitive damages award cannot punish a defendant for harm it inflicts on nonparties, *Philip Morris*, 549 U.S. at 353, a plaintiff would be prohibited from obtaining a punitive damages award solely because a defendant engaged in a course of conduct that also injured nonparties or could possibly do so in the future.

2. Petitioner's assertion that times have changed with respect to punitive damages is unfounded. Cases involving conduct by a defendant that injures numerous other individuals are not new. This Court has considered constitutional guidelines and limits on punitive damages awards in such cases, both in the personal injury and economic injury contexts. *See, e.g.*, *Philip Morris*, 549 U.S. at 349-50 (personal injury); *Gore*, 517 U.S. at 562-63 (economic injury). Yet, the Court has never intimated that the Constitution could preclude punitive damages awards in such cases. To the contrary, this Court has recognized that "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case." *Gore*, 517 U.S. at 568. That pronouncement cannot be reconciled with Petitioner's notion of barring states from assessing punitive damages against defendants found liable for the commission of mass torts. The due process rights of a mass tort defendant can be protected by procedural safeguards such as those Missouri has adopted which permit the

defendant to request a credit against a punitive damage award based on its potential liability for the same conduct in other cases. *See* Mo. Rev. Stat. § 510.263.4; *Barnett*, 963 S.W.2d at 668-69.

3. Lastly, Petitioner's speculation about what would have happened if this case had arisen in the class action context is immaterial because class actions are not suited for personal injury or wrongful death claims. *See* Advisory Committee's 1966 note on subd. (b)(3) of Fed. R. Civ. P. 23 ("A 'mass accident' resulting in injuries to numerous persons is ordinarily not appropriate for a class action because of the likelihood that significant questions, not only of damages but of liability and defenses of liability, would be present, affecting the individuals in different ways."). Further, individual compensatory damages awards are not the touchstone for punitive damages awards in class actions because a class is limited to those within the class definition who do not opt-out, making total compensatory damages for the class ascertainable. *See Exxon Shipping*, 554 U.S. at 515 n.28 (explaining that "individual awards are not the touchstone, for it is the class option that facilitates suit" and noting that the constitutional outer limit for punitive damages "may well be 1:1" given that the class recovery was $500 million). In contrast, when a defendant engages in conduct that causes personal injuries to multiple individuals over time, the total compensatory damages may never be ascertainable. Therefore, individual compensatory damage awards are the proper touchstone for punitive damages awards in personal injury actions.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

MICHAEL A. GROSS
MICHAEL GROSS LAW OFFICE
231 S. Bemiston Ave.
Ste. 250
St. Louis, MO 63105
(314) 863-5887
mgross@grossbriefs.com

JOSEPH F. YECKEL
LAW OFFICE OF
JOSEPH F. YECKEL LLC
231 S. Bemiston Ave.
Ste. 250
St. Louis, MO 63105
(314) 727-2430
joe@yeckel-law.com

ROBERT W. COWAN
Counsel of Record
AARON M. HECKAMAN
BAILEY PEAVY BAILEY COWAN
HECKAMAN PLLC
5555 San Felipe St.
Ste. 900
Houston, TX 77056
(713) 425-7100
rcowan@bpblaw.com
aheckaman@bpblaw.com

Counsel for Respondent

February 20, 2018