No. 05-1256

In The Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ Of Certiorari To The Supreme Court Of Oregon

BRIEF AMICUS CURIAE OF UNITED POLICYHOLDERS IN SUPPORT OF RESPONDENT MAYOLA WILLIAMS

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INTEREST OF *AMICUS CURIAE*

United Policyholders is a national, not-for-profit educational organization whose mission is to educate the public, legislators and the courts on insurance issues and consumer rights, and to assist policyholders in securing prompt and fair insurance settlements.[1] The resolution of the issue presented in this case is of great importance to United Policyholders and its members because punitive damages are an extremely important tool in discouraging and deterring abusive claims behavior by insurers towards insureds.

SUMMARY OF ARGUMENT

We submit that the wisdom expressed by Justice Scalia becomes even more apparent in light of the present case. "The Due Process Clause provides no substantive protections against 'excessive' or 'unreasonable' awards of punitive damages. I am also of the view that the punitive damages jurisprudence which has sprung forth from *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), is insusceptible of principled application; accordingly, I do not feel justified in giving the case stare decisis effect. . . ." *State Farm Mutual Auto Ins. Co. v. Campbell*, 538 U.S. 408, 429 (Scalia, J., dissenting).

This Court has been remarkably effective in resolving procedural due process concerns regarding punitive damages. Unfortunately, the Court's attempt to create substantive due process boundaries for all cases, no matter the facts, law, defendants or jurisdiction is impossible. Punitive damages by their very nature differ widely from case to case. See, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 40-42 (1991) (Kennedy, J., concurring). Nonetheless, the result of the *Campbell* decision has been the application by the lower courts of a "one size fits all"

[1] The letters of consent have been lodged with the Clerk of the Court by both petitioner and respondent. No counsel for any party in this case authored this brief in whole or in part, and no person or entity other than United Policyholders and its members made any monetary contribution to the preparation or submission of this brief.

approach to the constitutionality of punitive damage awards. As we discuss below, this Court's prior experience with punitive damage awards well supports Justice Scalia's conclusion that principled application of the *Campbell* doctrine is logically and humanly impossible.

We submit that an even greater concern is that *Campbell*, as interpreted by the lower courts, *creates* due process violations by the imposition of boundaries and "guideposts" which do not and cannot be fairly applied. In an effort to reign in merely the perception[2] that punitive damage awards have run amuck, the Court has slayed the proverbial ant with the proverbial sledge hammer. True enough, the ant lay dead, but the collateral damage is worse than the harm offered by the ant in the first place. The "single-digit" ratio rule, now thoroughly embraced by the lower courts, has, in reality, become the one and only substantive due process test for punitive damage awards. Unfortunately, under this rule, the only parties who will truly be either punished or deterred from malicious malfeasance are those small companies, persons or entities against whom a single-digit award will have an impact. For those who are large enough to absorb single-digit awards with nary a glance, the single-digit rule only serves to incentivize the competition for mischievous behavior, thereby spurring its growth rather than deterring it.

ARGUMENT

1. The Court's Punitive Damage Jurisprudence Is Without Historical or Precedential Foundation.

This Court's punitive damage jurisprudence has wandered seemingly rudderless across its own prior

[2] "There appears to be a consensus among researchers that, media perceptions notwithstanding, large and disproportionate punitive damage awards are *not* a problem in our judicial system in any significant degree – there is no punitive damages crisis. (See Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry,* Wis.L.Rev. 15, 54-55 (1998) .)" *Lane v. Hughes Aircraft Co.,* 22 Cal.4th 405, 418 (2000) (Mosk, J. conc.).

rulings and without being strongly aligned with any historical or precedential foundation. The lower courts now must apply federal constitutional "guideposts", which are in the form of "marching orders."[3] *Campbell* at 439 (Ginsburg, J., dissenting). These guideposts were developed for the first time by this Court after hundreds of years of successful punitive damage jurisprudence. They were also developed in the context of quite odd, atypical and uncharacteristic punitive damage cases. None were directed at malicious, fraudulent or oppressive behavior directed on a large scale basis at consumers, individuals or other vulnerable victims.

In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the fraudulent activity related to the diminution in value of luxury cars. While the conduct was found to be fraudulent, the case is hardly a poster-child for the object of punitive damages. Similarly, in *Campbell*, the trial lasted half a year and yet, this Court found there was *no* evidence of other conduct sufficiently similar to that directed to the plaintiff to support a large punitive damage award. Moreover, the plaintiff in that action had, in fact, been responsible for recklessly causing the death and crippling of others and suffered only the fear of bankruptcy for their actions for a short period of time. These cases are very poor vehicles for the creation of uniform substantive due process guideposts. Indeed, it is likely that these cases rose to this Court's level precisely because of their oddity. In the vast majority of cases, the state courts and lower federal courts have long been well-equipped to resolve the question of whether a punitive damage award is excessive.

In the wake of this Court's intervention into the area on the basis of substantive due process limitations, the lower courts have struggled to make sense out of this

[3] In *Kentucky Ass'n of Health Plans, Inc. v. Miller*, 538 U.S. 329 (2003), the Court assigned the term "guideposts" an entirely different meaning. There, it merely meant to represent checking points used only to "confirm our conclusion."

Court's pronouncements. In *Romo v. Ford Motor Co.*, 99 Cal.App.4th 1115 (2002), *disapproved in Johnson v. Ford Motor Co.,* 35 Cal.4th 1191, 1205-08 (2005), an exasperated Court tried but could not make sense out of *Campbell*. *Campbell* confirmed that punitive damages served the dual purpose of deterrence and punishment. 538 U.S. at 416. It also declared that it was "obvious" that single-digit ratio's comported more closely with due process than a ratio of 145 to 1 or 500 to 1. *Id.* at 425. This was not obvious to the *Romo* Court. The best it could do was to conclude that by limiting punitive damages to punishment only and eliminate the need for deterrence could the Court recognize this obviousness. *Romo*, 99 Cal.App.4th at 751. But even then, it could only do so "to a certain extent."

> The court found that these multipliers "demonstrate what should be obvious: Single-digit multipliers are more likely to comport with due process, while still achieving the state's goals of deterrence and retribution. . . . " (*Ibid.*) When considered in light of products liability actions against large corporate defendants for which single-digit multipliers may simply be a cost of doing business (see *Grimshaw*, *supra*, 119 Cal.App.3d at p. 820, 174 Cal.Rptr. 348), the court's conclusion is far from "obvious." However, in the light of the historical goal and measure of punitive damages, the obviousness appears, *to a certain extent*. [footnote]

(*Romo*, 113 Cal.App.4th at 751, emphasis added.)

Campbell itself represents another example of the inability of the lower Courts to decipher the true meaning of this Court's guideposts. The Utah Supreme Court attempted to interpret and apply those guideposts. Four out of the five members of the Utah Supreme Court attempted to apply the *BMW* guideposts and, in so doing, determined that the original jury award satisfied them. This Court, however, found that the case was "neither close nor difficult." *Campbell* at 418.

We briefly review this Court's punitive damage cases. We submit that these cases demonstrate that the Court's

precedents in this area have proven to be short-lived and that the current guideposts are ill-advised and do not accomplish the intended purpose. We suggest that the reason for this is the same reason behind this Court's long-standing reluctance to impose substantive due process guideposts. "[G]uideposts for responsible decisionmakers in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to exercise the utmost care whenever we are asked to break new ground in this field." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).[4]

As Justice Souter explained in *County of Sacramento v. Lewis*, 523 U.S. 833, 846 (1998), the Court's substantive due process jurisprudence has addressed legislation and executive action, developing a distinct mode of analysis for each. The Court has no historical or constitutional framework for analyzing the substantive due process claims raised within the judicial branch of government by civil litigants whose liability for punitive damages comports with state law and was imposed under fundamentally fair procedures.

"The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses . . . " *Bowers v. Hardwick*, 478 U.S. 186, 194-95 (1986). As we explain below, the guideposts applied in *Campbell* and *BMW* amount to the precise type of legislative action against which previous Courts have so carefully cautioned.

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[4] The very phrase "substantive due process" has been called "a contradiction in terms – sort of like 'green pastel redness.'" John Hart Ely, *Democracy And Distrust* 18 (1980).

2. The Court's Previous Punitive Damage Cases Are Conflicting And Confusing.

A. The Procedural Due Process Cases.

This Court entered the due process arena in punitive damage cases in *Pacific Mutual Life Ins. Co., v. Haslip,* 499 U.S. 1 (1990). This case arose out of the state courts of Alabama, the same state which this Court would later revisit in *BMW v. Gore*. Therein, an agent of Pacific Mutual and another insurance company, Union Fidelity Life Insurance Company, agreed to collect premium payments for employees of Roosevelt City, Alabama. He promised to transmit them to Union Fidelity, which had issued a medical policy insuring the City's employees. The agent instead stole the premium payments. Union Fidelity, believing the premiums were unpaid, denied medical benefits to Ms. Haslip and others.

Pacific Mutual then suffered both a compensatory and punitive damage award. Often lost in a discussion of *Haslip* is the fact that Pacific Mutual's liability was based solely on the theory of *respondeat superior*. Pacific Mutual did not issue the pertinent coverage. It did not deny any claims. It did not steal any money. Pacific Mutual was wholly unaware of the misdeeds of its agent, who was purporting to act on behalf of a completely independent insurance company. Nonetheless, under state law, Pacific Mutual suffered an award that was "more than 4 times the amount of compensatory damages [and] . . . more than 200 times the out-of-pocket expenses of respondent." *Id.* at 23. *It was in this context* that the Court wrote its oft-cited passage. "While the monetary comparisons are wide and, indeed, may be close to the line, the award here did not lack objective criteria. We conclude, after careful consideration, that in this case it does not cross the line into the area of constitutional impropriety." *Id.* at 23-24.

In most states, however, a punitive damage award under such circumstances would not even be permitted. Conduct far more culpable would be required to support a

punitive damage award.[5] Thus, one can only logically conclude that the award in *Haslip* would have been quite far from the line had, for example, Pacific Mutual itself engaged in the fraudulent conduct. Certainly, the facts in *Haslip* cannot be considered even remotely similar to the conduct at issue here. If a ratio of 4 to 1 was close to the line in *Haslip*, such a ratio must be a far, remote distance from the line here. Comparing the culpability of Pacific Mutual in *Haslip* with the culpability of Philip Morris here is akin to comparing the weight of a weightlifter to that of a toddler. They may both be measured on the same scale, but their weights will be found in far distant places on the scale. Similarly, a ratio that might be meaningful to the conduct of Pacific Mutual in *Haslip* would have no meaning when applied to Philip Morris' conduct here.

The *Haslip* Court, in a carefully written opinion, sets forth reasoning, which this Court apparently abandoned only 5 years later in *BMW*. The Court explained in *Haslip* that proper state procedural standards to review punitive damage awards, "*makes certain* that the punitive damages are reasonable in their amount and rational in light of their purpose to punish what has occurred and to deter its repetition." (*Id.* at 21, emphasis added.) Such procedures, the Court found, "*ensures* that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages." (499 U.S. at 22, emphasis added.) After carefully reviewing the jury instructions, the Court explained,

> To be sure, the instructions gave the jury significant discretion in its determination of punitive damages. But that discretion was not unlimited. It was confined to deterrence and retribution, the state policy concerns sought to be advanced. And if punitive damages were to be awarded, the jury "must take into consideration the character and the degree of the wrong as shown by the evidence

[5] See discussion below at part 3 below.

> and necessity of preventing similar wrong." [Cite omitted.] The instructions thus enlightened the jury as to the punitive damages' nature and purpose, identified the damages as punishment for civil wrongdoing of the kind involved, and explained that their imposition was not compulsory.
>
> These instructions, we believe, reasonably accommodated Pacific Mutual's interest in rational decisionmaking and Alabama's interest in meaningful individualized assessment of appropriate deterrence and retribution. The discretion allowed under Alabama law in determining punitive damages is no greater than that pursued in many familiar areas of the law as, for example, deciding "the best interests of the child," or "reasonable care," or "due diligence," or appropriate compensation for pain and suffering or mental anguish. As long as the discretion is exercised within reasonable constraints, due process is satisfied.

Justice Kennedy, in particular, weighed in with a concurring opinion, which strongly endorsed the principal role of the jury in determining awards of punitive damages, albeit that such awards are very likely to vary from state to state and from jury to jury:

> Historical acceptance of legal institutions serves to validate them not because history provides the most convenient rule of decision but because we have confidence that a long-accepted legal institution would not have survived if it rested upon procedures found to be either irrational or unfair.
>
> * * *
>
> Our legal tradition is one of progress from fiat to rationality. The evolution of the jury illustrates this principle. From the 13th or 14th century onward, the verdict of the jury found gradual acceptance not as a matter of *ipse dixit*, the basis for verdicts in trials by ordeal which the jury came to displace, but instead because the verdict was based upon rational procedures. See T.

Plucknett, A Concise History of the Common Law 120-131 (5th ed. 1956). Elements of whim and caprice do not predominate when the jury reaches a consensus based upon arguments of counsel, the presentation of evidence, and instructions from the trial judge, subject to review by the trial and appellate courts. There is a principled justification too in the composition of the jury, for its representative character permits its verdicts to express the sense of the community.

Some inconsistency of jury results can be expected for at least two reasons. First, the jury is empaneled to act as a decisionmaker in a single case, not as a more permanent body. As a necessary consequence of their case-by-case existence, juries may tend to reach disparate outcomes based on the same instructions. Second, the generality of the instructions may contribute to a certain lack of predictability. The law encompasses standards phrased at varying levels of generality. As with other adjudicators, the jury may be instructed to follow a rule of certain and specific content in order to yield uniformity at the expense of considerations of fairness in the particular case; or, as in this case, the standard can be more abstract and general to give the adjudicator flexibility in resolving the dispute at hand.

These features of the jury system for assessing punitive damages discourage uniform results, but nonuniformity cannot be equated with constitutional infirmity. As we have said in the capital sentencing context: "It is not surprising that such collective judgments often are difficult to explain. But the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy codification and that 'buil[d] discretion, equity, and flexibility into a legal system.'" *McCleskey v. Kemp*, 481 U.S. 279, 311, 107

> S.Ct. 1756, 1777, 95 L.Ed.2d 262 (1987) (quoting H. Kalven & H. Zeisel, The American Jury 498 (1966)).
>
> This is not to say that every award of punitive damages by a jury will satisfy constitutional norms. A verdict returned by a biased or prejudiced jury no doubt violates due process, and *the extreme amount of an award compared to the actual damage inflicted can be some evidence of bias or prejudice in an appropriate case. One must recognize the difficulty of making the showing required to prevail on this theory*. . . .
>
> In my view, the principles mentioned above and the usual protections given by the laws of the particular State must suffice until judges or legislators authorized to do so initiate system-wide change. We do not have the authority, as do judges in some of the States, to alter the rules of the common law respecting the proper standard for awarding punitive damages and the respective roles of the jury and the court in making that determination. Were we sitting as state-court judges, the size and recurring unpredictability of punitive damages awards might be a convincing argument to reconsider those rules or to urge a reexamination by the legislative authority. We are confined in this case, however, to interpreting the Constitution. . . .

(*Haslip*, 499 U.S. at 40-42 [Kennedy, J., concurring], emphasis added.)

The Court next disapproved of a punitive damage award because the state procedural protections were insufficient. *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). The Court then strengthened the procedural protections already considered sufficient under state law by demanding an exacting de novo judicial review. *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001).

Then in *TXO Production Corp. v. Alliance Resources Corp*., 509 U.S. 443 (1993) (cited with approval in *Campbell*), the Court again revisited the due process aspects of

punitive damages. In *TXO*, a purchaser of mineral rights intentionally raised false claims of defective title to the property held by the seller in order to renegotiate its purchase at a lower price. The jury awarded the sellers $19,000 and punitive damages of $10,000,000. This was a ratio of 526 to 1. However, the Court noted that by considering the potential harm that would have occurred if defendant had succeeded in its illicit scheme, the ratio could be considered to be as low as 10 to 1. The Court concluded that the ratio was not so large as to render the award unconstitutional. (*TXO*, 509 U.S. at 460-62.)

The plurality explained, "[a]ssuming that fair procedures were followed, a judgment that is a product of that process is entitled to a strong presumption of validity. Indeed, there are persuasive reasons for suggesting that the presumption should be irrebuttable." 509 U.S. at 457.

Justice Kennedy again wrote a lengthy concurrence. Significantly, he insisted that it was improper to consider the ratio as 10 to 1. Instead, he maintained that the Court must consider the validity of the award as if the ratio was 526 to 1. Even with that ratio, he approved of the award:

> As I have suggested before, [cite omitted] a more manageable constitutional inquiry focuses not on the amount of money a jury awards in a particular case but on its reasons for doing so. *The Constitution identifies no particular multiple of compensatory damages as an acceptable limit for punitive awards; it does not concern itself with dollar amounts, ratios, or the quirks of juries in specific jurisdictions*. . . .
>
> The plurality suggests that the jury in this case acted in conformance with these standards of rationality in large part on the basis of what it perceives to be the rational relation between the size of the award and the degree of harm threatened by TXO's conduct. . . . I do not agree that this provides a constitutionally adequate foundation for concluding that the punitive damages verdict against TXO was rational. It is a commonplace

> that a jury verdict must be reviewed in relation to the record before it. . . .
>
> *There is, however, another explanation for the jury verdict, one supported by the record and relied upon by the state courts, that persuades me that I cannot say with sufficient confidence that the award was unjustified or improper on this record: TXO acted with malice. This was not a case of negligence, strict liability, or respondeat superior.* TXO was found to have committed, through its senior officers, the intentional tort of slander of title. The evidence at trial demonstrated that it acted, in the West Virginia Supreme Court's words, through a "pattern and practice of fraud, trickery and deceit" and employed "unsavory and malicious practices" in the course of its business dealings with respondent. 187 W.Va. 457, 477, 467, 419 S.E.2d 870, 890, 880 (1992). "[T]he record shows that this was not an isolated incident on TXO's part – a mere excess of zeal by poorly supervised, low level employees – but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power." *Id.*, at 468, 419 S.E.2d, at 881.

(*TXO*, 509 U.S. at 466-470 [Kennedy, J., concurring].)

B. The Substantive Due Process Cases.

The Court then issued its decision in *BMW v. Gore* only three years later. The Court's opinion in that case ran head-on into its and Justice Kennedy's opinions in *Haslip* and *TXO*. *BMW*, like *Haslip*, arose out of the Alabama state courts. The same state court procedures found to be sufficient in *Haslip* were now apparently insufficient – even though the Alabama Supreme Court reduced the verdict, just as those procedures were designed to accomplish. Indeed, the error which the Alabama Supreme Court relied on was the same error carefully explained by this Court – that the verdict punished BMW for conduct that was lawful in other states. Still, this Court found the

award improper and applied three guideposts to determine if the award passed due process muster.

But *Gore* was an extraordinarily unique case for three fundamental reasons. First, the reprehensibility was very low. The dispute here was not the kind of dispute for which punitive damages were intended. Under no circumstances could *Gore* possibly be considered similar to the present case. While both involved damages called "punitive damages", the facts and circumstances of these two cases could not be much farther apart. If anything, these two cases disclose the wide variety of facts, procedures and circumstances where punitive damages might come into play. To apply the same procedures or guideposts that may have been relevant in *Gore* to the facts here is simply illogical.

Second, the case involved conduct which was wholly proper in other states. Other states had, in fact, specifically adopted regulations permitting BMW's conduct. It is unlikely that any of Philip Morris' conduct here could be considered proper in other states.

Third, the *Gore* verdict contained an element which is almost never present. The Court was able to conclude based solely on the amount of the verdict that the amount of the verdict was based on conduct which was legal elsewhere. As Philip Morris concedes, the occasions when an appellate court can determine the basis upon which a jury arrived at a punitive damage award are nearly nonexistent. (Brief for Pet. at 22.) This Court found the basis apparent in *BMW* only because of the direct relationship between the award and the evidence of other incidences, together with counsel's argument. But courts are rarely provided such clarity, nor is it desired. Doing so in most instances is in direct contravention to the sanctity of the jury's deliberations. It was only because of these unique circumstances that the Court was able to make a determination that the award was improperly based on conduct which was entirely proper.

Because of the uniqueness of *BMW*, it is a poor vehicle to attempt to carve out guidelines by which to judge the substantive due process of other awards.

Finally, this Court issued *Campbell* in 2003. Again, the facts there are incomparable to the facts here. Remarkably, *Campbell* simply casts aside carefully reasoned holdings of this Court's prior opinions. In *Haslip, TXO* and *Cooper*, the Court all but announced that punitive awards were constitutional where adequate procedural safeguards were applied, including appellate review. Yet, in *Campbell*, the Court simply referenced "vague instructions or those that merely inform the jury to avoid 'passion and prejudice' [cite] do little to aid the decisionmaker in its task . . . " There was no reference to the precise instructions to which the Court referred. We assume they were no less vague than the instructions in *Haslip* where this Court said that punitive damage jury instructions were "enlightening", ensured a constitutional award and "reasonably accommodated Pacific Mutual's interest in rational decisionmaking . . . " Also bulldozed was the Court's declaration in *TXO*, that adequate procedures, including proper jury instructions carried with them a nearly irrebuttable presumption that the award was valid.

In *TXO*, the Court also made clear that when addressing the punitive damage to harm ratio factor, "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." *TXO* at 460. In *Campbell*, however, the Court retracted this statement, limiting the evaluation to only potential harm to the plaintiff. *Campbell* at 409.

In both *BMW* and *Haslip*, the Court, when discussing the third guidepost, specifically included reference to comparable civil and criminal statutes. *BMW* at 583; *Haslip* at 23. This guidepost had been adopted by the Court in response to Justice O'Connor's concurring and dissenting opinion in *Browning-Ferris Industries of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989). She specifically included criminal statutes among those legislative actions which should be considered.

> . . . [B]ecause punitive damages are penal in nature, the court should compare the civil and criminal penalties imposed in the same jurisdiction for different types of conduct, and the civil and criminal penalties imposed by different jurisdictions for the same or similar conduct. In identifying the relevant civil penalties, the court should consider not only the amount of awards of punitive damages but also statutory civil sanctions. In identifying the relevant criminal penalties, the court should consider not only the possible monetary sanctions, but also any possible prison term.

In *Campbell*, the Court again retracted its earlier statement in *BMW* and limited comparable statutes to only civil statutes. *Campbell* at 428. As we discuss below, legislative choices relating only to civil statutes provide no basis to suggest that the legislature intended punitive damages to be limited in any way.

Campbell, citing from *Honda*, admonished that punitive damages posed an acute danger of arbitrary deprivation of property. *Id.* at 417. While *Honda* most certainly recognized this principle, it also explained that adequate state procedures, including judicial review, safeguarded against this danger. 512 U.S. at 432.

Eschewing any reference to whatever procedural due process may have been present in Utah, the Court's decision was based entirely on substantive due process. In so doing, it left the question of what significance then are the procedural due process requirements of *Haslip* and *TXO*?

The Court then set forth and discussed the three guideposts, reprehensibility, ratio and similar punishments, it first articulated in *BMW*. But these guideposts in many instances do not embrace logic well and, in other instances, are so vague as to leave the lower courts scratching their heads over their meaning. They also smack head on into Justice Kennedy's remarks in *Haslip* that the Court has no such authority to wander into the

legislative arena and his remarks in *TXO* that a ratio has no place in the substantive due process analysis.

The Court explained that reprehensibility was the most important factor. 538 U.S. at 419. It then noted that it refused to set a bright line test for the ratio factor, but "in practice" only rarely will an award be constitutional where it is significantly greater than single digits.[6] *Id.* at 425.

In reality, however, the lower courts have interpreted *Campbell* in a manner which does not reflect Court's language. "In practice", the reprehensibility factor is no longer the most important indicium of the reasonableness of a punitive damage award. The ratio is. Notwithstanding the Court's careful language, the lower courts have imposed a bright line test for a punitive to compensatory ratio, with the only exception being for small or nominal damages. In a nutshell, the lower courts have nearly uniformly reviewed punitive damages based on the following interpretation of *Campbell*: Punitive damages may not exceed a ratio of 9 or 10 to 1 unless the compensatory damages are nominal. The precise ratio between 1 and 10 is then determined by the reprehensibility of the conduct. The third factor, comparing the award to similar civil remedies is essentially ignored for the simple reason that it is impossible to compare a civil penalty to a punitive damage award.[7] Thus, the *Campbell* rule is that (with minor exceptions) punitive damages are capped at a ratio to the harm of 10 to 1.

Reprehensibility has been relegated to nothing more than the "threshold" that must be passed, before punitive

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[6] As we discuss below, the lower courts have consistently misinterpreted this court's language to refer to single digits ratio's instead of ratio's in excess of single digits "to a significant degree."

[7] See e.g. *Eden Elec., Ltd. v. Amana Co.,* 370 F.3d 824 (8th Cir. 2004); *Conseco Finance Servicing Corp. v. North American Mortgage Co.,* 381 F.3d 811 (8th Cir. 2004); *Republic Tobacco Co. v. North Atlantic Trading Co., Inc.,* 381 F.3d 717 (7th Cir. 2004); *Campbell v. State Farm Mut. Auto Ins. Co.,* 98 P.3d 409, 418 (Utah, 2004); *McClain v. Metabolife Intern., Inc.,* 259 F.Supp.2d 1225 (N.D.Ala. 2003).

damages can be awarded in the first instance. Once that threshold is passed, the mathematical ratio between compensatory and punitive damages becomes the constitutional ruler against which the amount of the punitive award must be measured. Reprehensibility's only remaining relevance then is to determine where to peg the precise ratio on the scale of 1 to 9. This is how all lower courts have interpreted *Campbell*.

This too butts heads with the plurality in *TXO*, which insisted that the ratio is not controlling. 509 U.S. at 462. Many other authorities consider the ratio factor the least important factor. See e.g., *Downey Savings & Loan Ass'n v. Ohio Casualty Ins. Co.,* 189 Cal.App.3d 1072, 1098 (1987); *Betts v. Allstate Ins. Co.,* 154 Cal.App.3d 688, 711-12 (1984).

This *Campbell* rule defies all logic. If, for example, a plaintiff receives compensatory damages of $1 million under the circumstances of *Campbell*, the maximum punitive damage award would be $10,000,000. Similarly, were one to lose merely $19,000 under the circumstances of *TXO*, which was a business dispute, the maximum award is the same $10,000,000. If the plaintiff in circumstances such as those now before the Court were to suffer $1 million in harm, the maximum award is again $10,000,000. Yet the reprehensibility of the conduct in these instances is worlds apart, as is, presumably, the size of the defendant. The deliberate sustained and continued effort to mislead the public about the risks of death and disease from tobacco is hardly comparable to a single instance of insurance bad faith or the deliberate attempt to defraud a landowner out of his rights. Which conduct would justify a greater punishment and which conduct would justify a greater need for deterrence? Clearly, the tobacco conduct is far more reprehensible, touching tens of millions of lives than a dispute involving claims of fraud by one company against another company. Yet, under the *Campbell* rule, the constitutional maximums are identical.

Worse yet, the award in the tobacco case will have no deterrent effect regardless of where it lay on the single-digit scale. There is no significant difference to Philip

Morris between a $1 million punitive damage award and a $10 million award. Neither amounts to a hill of beans to Philip Morris.

The single-digit standard also removes the element of deterrence, which at base, is the most important aspect of punitive damages. This Court continues to recognize this important element. We note, however, that throughout petitioner's brief, it only uses the word punishment when referencing punitive damages. Deterrence is never referenced. However, the lower courts cannot square the single-digit rule with punitive damages' deterrence role. As we noted above, the Court in *Romo v. Ford*, *supra*, interpreted *Campbell* as saying that a reasonable relationship cap between punitive damages and compensatory damages is logical only if the "goal of punitive damages is not to disable the defendant from continuing the course of conduct, but instead to punish the defendant for the outrage committed against the plaintiff." *Romo* at 751. The California Supreme Court was also forced to concede that, under *Campbell*, the level of deterrence may be limited and "the state may have to partly yield its goals of punishment and deterrence to the federal requirement that an award stay within the limits of due process." *Simon v. San Paolo U.S. Holding Co., Inc.* 35 Cal.4th 1159, 1187 (2005).

We also note that the Court supported its analysis by reference to a variety of legislation commonly imposing damages of 2 or 3 times the harm. We submit, however, that this supports a claim for much greater ratio's rather than the suggestion that punitive damages should approach those legislatively imposed ratio's. California Supreme Court Justice Mosk directly addressed this issue in *Lane v. Hughes Aircraft Co.,* 22 Cal.4th 405, 420 (2000) (Mosk, J., concurring.)

> The Legislature has in many statutes provided for punitive damages *without* double or treble limitation, or in fact any limitation. Of course, Civil Code section 3294, the statute generally authorizing punitive damages in noncontract cases,

> is the most significant example of such a statute. But there are many others as well [citations omitted.] Yet other statutes specify that no punitive damages are to be awarded [citations omitted.] Indeed, my research reveals that there are over 150 California statutes that address punitive or exemplary damages. Taking the concurring opinion's figure that double and treble damages are used in "more than 30 instances" (conc. opn. of Brown, J., *post* . . .), we must conclude that the Legislature has used double or treble damages as a limit on punitive damages in a *small minority* of the statutes in which it has chosen to address punitive damages.
>
> Thus, the generalization that "the Legislature has selected compensatory damages as the best . . . metric for calibrating the punitive component of a damages award" (conc. opn. of Brown, J., *post*, 93 Cal.Rptr.2d at p. 75, 993 P.2d at p. 401) is simply inaccurate. Rather, all we can safely generalize, after observing the entire patchwork of punitive damages statutes, is that the Legislature has enacted a number of statutes containing a variety of responses to punitive damages, some providing double damages, some treble damages, some providing monetary caps, some prohibiting punitive damages altogether, and many statutes permitting punitive damages without limitation. The unmistakable inference to be drawn from this patchwork is that the Legislature knew how to limit punitive damages as a multiple of compensatory damages, and in many instances, including the statute broadest in scope, *Civil Code section 3294*, declined to do so.

The most troubling aspect of the single-digit rule is that it creates unfairness and, in fact, due process violations themselves by treating parties differently in important respects. If punitive damage awards are limited to single-digit multipliers, then in situations where large

corporate defendants have engaged in such conduct, it would be nearly impossible to find an award that is large enough to deter. In fact, in most instances, single-digit multipliers will *encourage* unlawful behavior because such defendants will quickly realize that punitive damages are merely a cost of doing business, and as such they will likely conclude that it is more profitable to just price the cost into its product. And where competitors see that it is profitable to defraud consumers, even if caught, they too will be induced, if not forced, to engage in similar conduct in order to compete.

Single-digit ratios may well accomplish the states' legitimate goals of deterrence in certain, and perhaps many, cases. Manifestly, it will not do so in others. If we take, for example, a multi-billion dollar insurance company which is engaged in intentionally and systematically depriving insureds of disability insurance benefits for the sole purpose of slashing reserves and increasing profits, single-digit ratios are wholly ineffective. Even if the benefits denied were $1 million, a $5 million (or middle single-digit multiplier) would have no deterrent effect on such a large corporation.

More alarming is the fact that the single-digit ratio rules provide far more punishment and deterrence for small defendants than they do for large defendants and therefore treat defendants unfairly and unequally. For example, a damage award of $50,000 and a punitive award of $200,000 (4 to 1 ratio) may be effective in deterring conduct of a $1 million or even a $10 million company. But it will have no deterrent effect at all on a $100 million or $1 billion company. For the former, it may really hurt and serve both as an effective punishment and deterrence. To the latter, it is simply written off as a cost of doing business. Thus, the "single-digit" cap would convert a test whose very purpose is to inject rationality

into the measurement of punitive damage awards into an arbitrary and unworkable standard.[8]

3. The Single-Digit Cap is Unnecessary and Arbitrary.

The nub of *Campbell* is that it imposes a single-digit test on top of any and all state procedures designed to assure a fair punitive damage award. Ironically, in an effort to stamp out arbitrary awards, the Court has arbitrarily picked 10 as the highest ratio above which most ratio's should not exceed. As we noted above, this number is untethered to any historical or precedential foundation. More importantly, it is wholly unnecessary. We offer California as an example.[9]

Punitive Damages may not be awarded unless a jury determines by clear and convincing evidence that the defendant acted with malice, fraud or oppression. The clear and convincing evidence jury instruction provides "Certain facts must be proved by clear and convincing evidence, which is a higher burden of proof. This means

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[8] It has been suggested that the rule is fair because larger companies will suffer more punitive awards than smaller companies. This, of course, is not true in practice because, as the Court said in *TXO*, no two cases are alike. *TXO*, 509 U.S. at 457. It also assumes that all of the defendant's activities are the activities in question. It may, in fact, be a small or large part of the defendant's activities as compared with small or large part of a smaller company's activities.

Worse yet, it permits defendants to suffer punitive damage awards and continue to claim their conduct was proper in other cases. The punitive award should be sufficient to effectuate deterrence. This is accomplished by permitting the defendant to introduce evidence of other awards so that the jury can assess whether the defendant has been deterred. See *Boeken v. Philip Morris, Inc., supra*, 122 Cal.App.4th 684, 741-42 (2004), citing *Stevens v. Owens-Corning Fiberglas Corp.,* 49 Cal.App.4th 1645, 1661 (1996) [defendant can avoid duplicative punitive awards by advising the jury of past awards and its response thereto].)

[9] We do not suggest that the law in other states should not be examined. We merely use California as an example of how the states are more than capable of protecting against unconstitutional awards.

the party must persuade you that it is highly probable that the fact is true." CACI Jury Inst. No. 201. Malice, fraud and oppression are statutorily defined as follows: (1) "Malice" means conduct which is intended by the defendant to cause injury to the plaintiff or despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others. "Oppression" means despicable conduct that subjects a person to cruel and unjust hardship in conscious disregard of that person's rights. Cal. Civ. Code §3294. Despicable conduct in turn is defined as, "conduct that is so vile, base, or contemptible that it would be looked down on and despised by reasonable people." CACI 3940.

"Fraud" means an intentional misrepresentation, deceit, or concealment of a material fact known to the defendant with the intention on the part of the defendant of thereby depriving a person of property or legal rights or otherwise causing injury. Cal. Civ. Code §3294.

In addition, a defendant has a right to a protective order precluding any financial evidence until a prima facie case of punitive conduct is made. Cal. Civ. Code §3295. A party may not obtain any discovery of a defendant's financial status without an adequate showing of potential punitive conduct (*Id.*) and any defendant has the right to demand a bifurcation of the trial such that no evidence of its wealth is admissible unless and until the jury has actually found by clear and convincing evidence that the defendant has acted with malice, fraud or oppression. (*Id.*)

The jury is also required to be told that in determining the amount of punitive damages, the jury must consider three factors (1) the reprehensibility of the defendant's conduct, (2) that the punitive damages must bear a reasonable relationship to the compensatory harm, and (3) the wealth of the defendant. (*Neal v. Farmers Insurance Exchange,* 21 Cal.3d 910, 928 (1978); Civ. Code §3295.)

> Although there is no fixed ratio by which to determine the propriety of a punitive damage award, there is law to the effect that punitive

> damages should bear a reasonable relationship to the compensatory damages award. . . .
>
> We have said that "In considering whether the [award was] excessive, we realize the very familiar rule that to the jury, to a very large extent, is committed the responsibility of awarding compensation for an injury sustained. When the award as a matter of law appears excessive, or where the recovery is so grossly disproportionate as to raise a presumption that it is the result of passion or prejudice, the duty is then imposed upon the reviewing court to act."

Neal, supra at 937 (Richardson, J., dissenting).

Campbell explained that due process required that the Courts "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered." (538 U.S. at 426.) California juries and appellate courts have been assessing the propriety of punitive damage awards for decades, including an examination of whether the ratio was a reasonable ratio and an examination of the reprehensibility of the conduct. California courts have been evaluating and assessing ratios for decades with one purpose in mind – assuring that punitive awards are both reasonable and proportional. (See, e.g., *Neal*, 21 Cal.3d at 928 ["in general, even an act of considerable reprehensibility will not be seen to justify a proportionally high amount of punitive damages if the actual harm suffered thereby is small"]; CACI 3940 ["Is there a reasonable relationship between the amount of punitive damages and [*name of plaintiff*]'s harm?"]; BAJI 14.71 ["the punitive damages must bear a reasonable relation to the injury, harm, or damage actually suffered by the plaintiff"].) California appellate decisions have continually declined to allow unlimited ratios and instead have carefully scrutinized punitive damage awards under a "reasonable" ratio analysis, while ensuring that punitive damage awards retain a deterrent effect.

Thus, *Campbell* effectively adds only one thing to California punitive damage jurisprudence – that a reasonable ratio cannot ordinarily exceed 10 – 1. This arbitrary cap is contrary to decades of decisions by hundreds of California judges and juries, all of whom have been charged with the same question – *i.e.*, what is a reasonable ratio? The Court, in one broad swoop, has not only determined that all of these prior awards were unreasonable, but that they were grossly unreasonable, arbitrary[10] and "jar one's Constitutional sensibilities." *Haslip*, 499 U.S. at 18. Undoubtedly, this comes as quite a shock to the many courts and juries which found otherwise.

The Court has strongly endorsed the states' fundamental and individual interest in using punitive damages to deter wrongful conduct that injures its residents. The federal constitution continues to respect the states' individual interests in achieving their legitimate goals of "deterrence and retribution." (*Campbell*, 538 U.S. at 416 ["punitive damages . . . are aimed at deterrence and retribution"], citing *Cooper*, 532 U.S. at 432; *BMW*, 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"); *Haslip*, 499 U.S. at 19 ["punitive damages are imposed for purposes of retribution and deterrence"].)

California has declared that punitive damages are especially important in the deterrence of objectionable corporate policies.

> One of this state's principal purposes in permitting punitive damages is the deterrence of "'objectionable corporate policies'" when "[g]overnmental safety standards and the criminal law have failed to provide adequate consumer protection against the manufacture and

[10] "Only when an award can fairly be categorized as 'grossly excessive' in relation to these interests does it enter the zone of arbitrariness that violates the Due Process Clause of the Fourteenth Amendment." (*BMW*, 517 U.S. at 568.)

> distribution of defective products. [Citations.]" (*Grimshaw v. Ford Motor Co.,* 119 Cal.App.3d 757, 810, 174 Cal.Rptr. 348 (1981) (*Grimshaw*); see *Egan v. Mutual of Omaha Ins. Co.,* 24 Cal.3d 809, 820, 169 Cal. Rptr. 691, 620 P.2d 141 (1979).)
>
> "Punitive damages thus remain as the most effective remedy for consumer protection against defectively designed mass produced articles." (*Grimshaw*, *supra*, 119 Cal.App.3d at p. 810, italics added.) A larger award may be necessary for this purpose, where reprehensible conduct has "exhibited a conscious and callous disregard of public safety in order to maximize corporate profits," and has endangered the lives of thousands. (*Id.* at p. 819.)

Boeken v. Philip Morris, Inc., 122 Cal.App.4th 684, 739-40 (2004).

"Because no two cases are truly identical, meaningful comparisons of such awards are difficult to make." (*TXO*, 509 U.S. at 457.) Nonetheless, punitive damages in California have been most commonly assessed in cases where a showing has been made of a continuous wrongful course of conduct or where there is an established policy of being harmful to victims. *Tomaselli v. Transamerica Ins. Co.,* 25 Cal.App.4th 1269, 1287 (1994); *Mock v. Michigan Millers Mutual Ins. Co.,* 4 Cal.App.4th 306, 329 (1992).

The California system for awarding punitive damages is, therefore, very strict and very well controlled and the Courts are well versed in seeing to it that such awards are consistent with the proper purpose of punitive damages. In addition to the state procedures, the courts must conduct the federal requirement of an exacting de novo review. Why isn't this sufficient to satisfy any due process concerns defendants may have? Why is it necessary to superimpose on top of everything else a "one-size-fits-all" cap regardless of the circumstances? What purpose is served by simply capping these awards and why is 10 to 1 the chosen cap? Certainly, it makes little sense to relegate the reprehensibility factor to simply pegging the precise ratio

somewhere between 1 to 1 and 10 to 1. All cases in which punitive damages are awarded must, by definition involve highly reprehensible conduct and this conduct must be supported by clear and convincing evidence. Thus, all cases would tend to justify the highest rating of 10 to 1 or near to it. See *Simon v. San Paolo U.S. Holding Co., Inc*. 35 Cal.4th at 1189 (finding a ratio of 10 to 1 even though reprehensibility was low.)

In sum then, *Campbell* holds, in effect, that, in California, punitive damage cases shall ordinarily be a ratio of 10 to 1 because that is the highest ratio permitted and all punitive damage cases are highly reprehensible, thereby justifying the highest permissible ratio. Clearly, under *Campbell*, the ratio becomes the defining punitive damage factor.

This makes no sense.

4. The Five Sub-Factors Of Reprehensibility Are Confusing.

The same lack of common sense instructs us on the five sub-factors under the reprehensibility scale. These factors were described by the Court as (1) "the harm caused was physical as opposed to economic; (2) the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; (3) the target of the conduct had financial vulnerability; (4) the conduct involved repeated actions or was an isolated incident; and (5) the harm was the result of intentional malice, trickery, or deceit, or mere accident. . . ." (538 U.S. at 419.)

The Court merely lists the factors without any guidance as to how to apply them. Application of these factors, however, is confusing and inexplicable. The first factor elevates physical harm over economic harm and appears to leave out emotional harm entirely. This is confusing because emotional harm can often far exceed physical harm. Compare, for example, a mother who witnesses the death of a child is certainly as aggrieved as an individual who suffered bodily harm. Similarly, economic disaster can lead to emotional harm and consequences that can far

exceed bodily injury. It is also unclear why physical harm is elevated above economic harm in the first factor when the third factor is the victim's financial vulnerability. Assuming the victim had financial vulnerability, economic harm is to be expected. In this regard, the first and third factors appear contradictory.

The second factor references conduct which is directed to the health and safety of others. This is repetitive of the first factor, as the natural result of endangering one's health and safety is to cause physical harm. It is also unclear why the Court did not reference a reckless indifference to one's rights. See e.g. *TXO,* in which the conduct involved only a business dispute.

The second factor also references "indifference to or reckless disregard". But this is repetitive of the fifth subfactor – whether the conduct was an accident or involved intentional malice, trickery or deceit. If the conduct constituted intentional malice directed towards physical harm, it undoubtedly constitutes a reckless disregard for the health or safety of others. Moreover, in many states, such as California, the fifth and second factors are irrelevant because malicious, oppressive or fraudulent conduct is required for punitive damages. Thus, how are courts in California supposed to evaluate these factors?

Manifestly, we submit, juries and judges have long been well aware and are familiar with how to assess the reprehensibility of a party's actions. Naturally included in that assessment are the nature of the harm and vulnerability of the plaintiff in the assessment. That analysis has been thoroughly accomplished for many years under state law. The Court's five sub-factors add nothing substantive to the analysis.

5. The Lower Courts Have Uniformly Misinterpreted *Campbell*.

While the lower courts have uniformly adopted a single-digit rule from *Campbell*, that is not what the Court said. The Court actually said, "Our jurisprudence and the principles it has now established demonstrate, however,

that, in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, **to a significant degree**, will satisfy due process." (538 U.S. at 425, emphasis added.) This is clearly different than if this Court had said that few awards exceeding single digits will satisfy due process. Thus, the actual language of *Campbell* states that the Court fully expects that the ratio will exceed single digits. However, it does not expect the ratio to exceed single digits "to a significant degree." We must assume that the Court intended that ratio's higher than single digits were expected to be commonplace. Otherwise, it would not have added the important phrase "to a significant degree."

Other language in *Campbell* has also gone unexplained. The Court said, "Single-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1 [cite omitted] or, in this case, of 145 to 1." (123 U.S. at 425.) The Court thus clearly stated in *Campbell* that ratios *closer* to single digits are more likely to be constitutionally appropriate *than* a ratio of 500 (*BMW*) or 145 (*Campbell*) to 1. This is a far cry from stating that only single digit ratios are acceptable. Indeed, it is apparent that in many instances, single digits do not serve the State's "goals of deterrence and retribution". *Campbell* then went on to state that "ratios greater than those *we have previously upheld* may [only] comport with due process" in certain limited circumstances. (123 S.Ct. at 1524, emphasis added.) This raises the question of how to interpret the results in *TXO*, the most recent case in which this Court upheld punitive damages. *Campbell*'s author, Justice Kennedy, made clear that he considered the ratio in *TXO* to be 526 to 1. Are we to presume that the above language from *Campbell* was intended to give lower courts very broad, general guidelines about what "a significant degree" beyond single digits may be, knowing that states and cases differ so dramatically that the functions of deterrence cannot be confined simply to a small box of single-digit ratios? Are we to presume that Justice Kennedy was referring to the 526 to

1 ratio of his concurring opinion or the 10 to 1 ratio of the plurality?

We submit that, however the Court rules in this matter, that its intent in *Campbell* be made clear. If, indeed, the Court intended the ratio to cap punitive damages in most cases at a single-digit ratio, we urge the Court to make that clear. If, instead, *Campbell* intended to provide the lower courts more flexibility than that, this should be made clear. In point of fact, a single-digit rule now exists. Litigants and parties need to know if this is this Court's position. If not, the lower courts have repeatedly misinterpreted *Campbell* and are in desperate need of clarification.

CONCLUSION: JUSTICES SCALIA, THOMAS AND GINSBURG ARE CORRECT

Justices Scalia, Thomas and Ginsburg have repeatedly made known their view that the Court should not be setting substantive due process standards for punitive damage cases. It is rare to read that a Justice of the Supreme Court has found an opinion so lacking in substance that he cannot give it *stare decisis* effect. Justice Scalia is not the only judge having trouble trying to make sense of *Campbell*. As we noted, other courts have been at a complete loss as well. It is certainly fair to say that, if Justice Scalia finds *Campbell* unsusceptible of principled application, other courts are certain to suffer the same confusion.

Reviewing the Court's journey through punitive damages reflects the frustrations of a chef looking for the perfect recipe. When his customers don't appreciate the first batch, he keeps experimenting, always hoping the next batch will prove to be it. Unfortunately, it is no way to run a restaurant or the Supreme Court.

Given the power, prestige, and responsibilities of the Supreme Court, is it not fair to ask difficult questions? How are we to respond when the Court holds that the procedures of a State make certain and ensure that a

verdict satisfies due process but then five years later finds that it did not? How do we address state and federal judges that have carefully balanced the ratios between punitive and compensatory damages for decades to make sure that the ratio's are reasonable and proportionate, only to find out later that the due process clause of the United States Constitution contains within it a numerical limit of 10 to that ratio? The due process clause protects only against judgments that shock the conscience or are too far out of scale as to be considered grossly unreasonable. Given the fact that judges for decades have found ratio's in excess of single digits to be fair and reasonable on innumerable occasions, how is it that, all of a sudden, a ratio of 15 to 1 now is presumed to shock the conscience?

How is it that a justice can assure us that the Supreme Court has no ability to create substantive due process standards in this area and that ratio's have no relevance, yet hold only 13 years later that ratio's are not only important but that they cannot exceed the arbitrary number of 10? How is it that the Court in *Campbell* can simply cast aside so many recent holdings? In short, how are we to view, follow and respect the opinions of a Court whose opinions are so facile?

We submit that it is not the Court, but the topic, which has led to so much confusion. Substantive due process simply cannot be applied through a one-size-fits-all formula and certainly a ratio limit of 10 is no less arbitrary than the awards which this Court has sought to reverse. The best that can be done is to leave the lower courts to resolve these cases as they have – within principled due process procedures and based on the individual circumstances of each case. Anything further must be left to the appropriate legislative bodies. Anything else simply turns this Court into a 9-member legislature attempting to solve problems that are not susceptible of resolution based on substantive due process.

Respectfully submitted,

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