No. 07-219

IN THE

Supreme Court of the United States

EXXON SHIPPING COMPANY, *et al.,*

Petitioners,

v.

GRANT BAKER, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC., AS *AMICUS CURIAE* IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[1]

Product Liability Advisory Council, Inc. (PLAC) is a nonprofit association with 124 corporate members constituting a broad cross-section of manufacturers that seek to contribute to the development of sound legal principles, especially those affecting the liability of manufacturers. (A list of PLAC's corporate members is attached as Appendix A.) In addition, several hundred of the leading product liability defense attorneys in the country are sustaining (non-voting) members of PLAC.

This case is of interest to PLAC because it presents broad questions about common-law limitations on excessive punitive damages awards: what they were when this nation was founded; what their rationales were; and how they should continue to develop and be applied. The most breathtaking punitive damages awards have occurred in the last 30 years, all against business entities, including PLAC members. Accordingly, PLAC has a strong interest in providing this Court with information and analyses that may help protect against awards that, like the one in this case, contravene the common-law safeguards against arbitrary and excessive punitive damages.

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[1] Pursuant to Rule 37.6, *amicus* states that no counsel for a party has authored this brief in whole or in part, and no person or entity other than *amicus*, its members, and their counsel has made a monetary contribution to the preparation or submission of this brief. The parties have consented to the filing of this brief.

SUMMARY OF ARGUMENT

This Court granted *certiorari* in part to consider whether the $2.5 billion punitive damages award approved by the Ninth Circuit comports with the principles limiting punitive damages awards under general maritime law. To the extent not governed by congressional statute, maritime law is true federal common law, of which this Court is the ultimate arbiter. *United States v. Reliable Transfer Co.*, 421 U.S. 397, 409 (1975) (observing that "Congress ha[s] largely left to this Court the responsibility for fashioning the controlling rules of admiralty law") (citation omitted); U.S. Const. art. III, § 2, cl. 1. Although it has discussed common-law limitations on punitive damages in other contexts, this Court has not previously had occasion to apply them to general maritime law. There is no sound reason why those limitations, found necessary to guard against arbitrary and excessive punitive awards in all other areas of common law, should not provide similar safeguards in the federal common law of admiralty.

Here, the $2.5 billion punitive damages award against Exxon[2] violates the common-law principles limiting punitive awards to an amount reasonably necessary to serve the legitimate purposes of punishment and deterrence. Given the huge sums Exxon paid in compensatory damages, settlements, fines, and cleanup costs, and given Exxon's loss of its own vessel and cargo, no multi-billion-dollar punitive damages award is necessary to *legitimately* serve the common-law goals of punishment and deterrence.

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[2] Petitioners Exxon Shipping Co. and Exxon Mobil Corp. are collectively referred to herein as "Exxon."

The common law also did not permit increased punitive damages based on a corporate defendant's financial status, yet the jury here was presented with, and told to consider, evidence of Exxon's large income and net worth for that very purpose. Respondents told the jury that $5 billion was insignificant to Exxon and that only a huge award would "get them a message." (Tr. at 7573-84.) That evidence, the argument based on it both at trial and on appeal, and the resulting punitive damages judgment, violated the common-law requirement that the amount of punitive damages be reasonably necessary to the purposes of punishment and deterrence.

ARGUMENT

Long before the development of this Court's due process jurisprudence with respect to punitive damages, the common law required judicial review providing safeguards against arbitrary and excessive punitive damages awards. Such review aimed to ensure that punitive awards were reasonably necessary to further the goals of deterrence and punishment. Those common-law limiting principles should apply in admiralty because they are sound safeguards and because, "[d]rawn from state and federal sources, the general maritime law is an amalgam of traditional common-law rules, modifications of those rules, and newly created rules." *E. River S.S. Corp. v. Transamerica Delaval, Inc.*, 476 U.S. 858, 864-65 (1986).

The $2.5 billion punitive damages award approved by the Ninth Circuit violates those principles. The award is unnecessary and excessive because the court of appeals failed to consider properly that Exxon incurred costs in excess of $3.4 billion as a result of the oil spill from the *Valdez*. The imposition of

another $2.5 billion in punitive damages, urged by Respondents on the basis of Exxon's income and net worth, cannot be explained as reasonably necessary under any recognized theory of deterrence or punishment.

I. THE COMMON LAW HAS LONG RECOGNIZED THAT PUNITIVE DAMAGES MUST BE LIMITED TO AN AMOUNT REASONABLY NECESSARY TO ACHIEVE APPROPRIATE DETERRENCE AND PUNISHMENT

For as long as courts have allowed punitive damages at common law, the amount of such awards has been subject to judicial review for reasonableness in light of the purposes of punishment and deterrence. *See Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) ("Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable."). Any award that fails to comport with deterrence and punishment principles is arbitrary and excessive. *See, e.g.*, *Dardinger v. Anthem Blue Cross & Blue Shield*, 781 N.E.2d 121, 144 (Ohio 2002) (holding that, while not unconstitutionally excessive, punitive damages award was excessive under Ohio common law: "While certainly a higher award will always yield a greater punishment and a greater deterrent, the punitive damages award should not go beyond what is necessary to achieve its goals. The law requires an effective punishment, not a draconian one.").

A. Since Their Inception, Punitive Damages Awards Have Been Subject to Judicial Review for Excessiveness in Light of Punishment and Deterrence Principles

Common-law courts have reviewed punitive damages awards for excessiveness since before this nation was founded. *See Huckle v. Money*, 95 Eng. Rep. 768, 769 (K.B. 1763). In *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994), this Court recognized that "[j]udicial review of the size of punitive damages awards has been a safeguard against excessive verdicts for as long as punitive damages have been awarded." *Id.* at 421. Other courts considering challenges to punitive damages awards have likewise recognized common-law limitations on the amount of such awards, separate and apart from any constitutional due process limitations. *See, e.g.*, *United Int'l Holdings, Inc. v. Wharf (Holdings) Ltd.*, 210 F.3d 1207, 1232 (10th Cir. 2000) ("The question of whether the punitive damages award comports with state law is separate from the determination of whether it complies with the Due Process Clause of the Fourteenth Amendment."); *McCarthy v. Niskern*, 22 Minn. 90, 91-92 (1875) (setting aside verdict as "in excess of what may justly be regarded as compensation to plaintiff . . . or as punishment to defendant, or both"); *State ex rel. Atchinson, T. & S. F. Ry. Co. v. Ellison*, 186 S.W. 1075, 1078 (Mo. 1916) ("[T]he trial court had the right to set this verdict aside on the ground that the weight of the evidence in the whole case did not support the amount of punitive damages found by the trier of fact.").

Deterrence and punishment, or retribution, are the only purposes of punitive damages recognized as legitimate at common law. *See, e.g.*, *Lake Shore & M.*

S. Ry. Co. v. Prentice, 147 U.S. 101, 107 (1893) (punitive damages can be imposed "as a punishment to the guilty [and] to deter from any such proceeding for the future") (quoting *Wilkes v. Wood*, 98 Eng. Rep. 489, 498-99 (K.B. 1763)); *Smith v. Wade*, 461 U.S. 30, 54 (1983) (observing that under the common law "[t]he focus is on the character of the tortfeasor's conduct—whether it is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards"); *Thompson v. Morris Canal & Banking Co.*, 17 N.J.L. 480, 484 (1840) (punitive damages are awarded "by way of punishment for wanton mischief or malicious and revengeful actions, sometimes called exemplary damages to deter men from such kind of conduct"); *Grable v. Margrave*, 4 Ill. (3 Scam.) 372, 373 (1842) (punitive damages are awarded "for the double purpose of setting an example, and of punishing the wrong-doer"); *Titus v. Corkins*, 21 Kan. 722, 723 (1879) ("[P]unitive damages mean more than compensation; they imply punishment, and are to deter the wrong-doer . . . ."). Plainly, a punitive award cannot *legitimately* promote either deterrence or punishment if it is larger than what is reasonably necessary under recognized deterrent and retributive principles.

> We could set a good example to induce safe driving by sentencing the traffic offender to hang . . . even though he could be deterred by much less severe punishment. By this example, others might well be deterred from speeding . . . . That benefit notwithstanding, to punish the guilty beyond their guilt is not different from punishment of the innocent,

> and it cannot be done in a manner consistent with ordinary notions of justice.

Dan D. Dobbs, *Ending Punishment in "Punitive" Damages: Deterrence-Measured Remedies*, 40 Ala. L. Rev. 831, 854 (1989).

Accordingly, the purpose of judicial review of the size of punitive damages awards must be to ensure that the awards reasonably comport with such principles. *See, e.g.*, *Mayer v. Frobe*, 22 S.E. 58, 63 (W. Va. 1895) ("But if the damages assessed as compensatory are sufficient in amount to operate at the same time as a punishment and a warning, the jury are not authorized to add still a further and greater sum, and thus subject the defendant to a double punishment in the same case for the same wrong."); *cf., e.g.*, *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 584 (1996) ("The sanction imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve the goal."). As this Court has put it in the due process context, the procedures employed must "make[] 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." *Haslip*, 499 U.S. at 21; *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419-20 (2003) ("While we do not suggest there was error in awarding punitive damages based upon [the defendant's] conduct towards the [plaintiffs], a more modest punishment for this reprehensible conduct could have satisfied the State's legitimate objectives, and the Utah courts should have gone no further.").

Judicial review of punitive damages awards in light of the rational principles underlying the purposes of "deterrence" and "punishment" is particularly important to sound common law, in admiralty and otherwise, for two reasons. First, in most cases, as in this one, the jury is never instructed on the legal meaning of either word or, more importantly, on the limiting principles dictated by those purposes. Accordingly, it is extraordinarily unlikely that the jury will somehow divine and scrupulously adhere to those limiting principles. Second, unless judicial review applies principles based on recognized, rational theories of deterrence and punishment, reviewing courts will merely substitute their own subjective notions for those of juries, resulting in "an imprecise pattern of subjective judicial reactions mixed with some episodes of deference to jury verdicts." *2-D's Logging, Inc. v. Weyerhaeuser Co.*, 632 P.2d 1319, 1326 (Or. Ct. App. 1981).

B. The Common Law Recognized That Punitive Damages Should Not Exceed an Amount Reasonably Necessary to Deter the Wrongful Conduct in Question

The basic premise of deterrence is that actors will rationally weigh their gains and losses likely to result from the wrongful conduct they are contemplating. *See* Herbert L. Packer, *The Limits of the Criminal Sanction* 45-48 (1968); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 23-24, 43-53 (1982). Threatened adverse consequences will deter a rational actor from engaging in wrongful conduct if the adverse consequences expected by the actor exceed the benefits that the actor expects to derive from the conduct. Because corporations are purely economic actors, not

individuals acting to satisfy a range of human emotions, a punishment should deter a corporation from acting wrongfully if it removes the prospect of monetary gain from the wrongful behavior.[3] Therefore, punitive damages awards greater than necessary to cause the corporate defendant to conclude that engaging in similar misconduct in the future would be unprofitable violate this basic deterrence principle.[4] *Cf. Haslip*, 499 U.S. at 21 (review of punitive damages awards must ensure that the amounts of such awards are "rational in light of their purpose to punish what has occurred and to deter its repetition").

Such awards are particularly harmful to the public where, as here, the corporate defendant is engaged in socially beneficial, albeit inherently risky, behavior. *See In re the Exxon Valdez*, 270 F.3d 1215, 1244

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[3] For instance, if a manufacturer is deciding whether to make a defectively designed product, the manufacturer will correct the defect if the manufacturer's expected economic detriment resulting from the defect outweighs the manufacturer's expected economic benefits to be derived from selling the product with the defect. *See, e.g.*, Malcolm E. Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-51 (1989) ("[A] rational, risk-neutral, profit-motivated corporation, regardless of its size, will refrain from any act that has associated expected costs exceeding the associated expected gains for the corporation. If the selection of a defective design will generate a net loss of one dollar, it will be as unattractive to [a large corporation] as to [a smaller one].").

[4] Corporations differ from individuals in this regard. Individuals can realize both monetary gain and non-monetary pleasures from a variety of socially undesirable conduct. To achieve optimal deterrence of individuals, therefore, an award exceeding the individual's expected monetary gain is more likely to be appropriate.

(9th Cir. 2001) (*Punitive Damages Opinion I)* (recognizing that "fuel for the United States at moderate expense has great social value"). If a punitive award too greatly exceeds any benefit the corporate defendant could have expected to gain by engaging in the wrongful conduct, the punishment will over-deter the defendant and cause it to take socially inefficient precautions, or even to decline to make beneficial services and products available to the public. *See, e.g.*, *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposals, Inc.*, 492 U.S. 257, 282 (1989) (O'Connor, J., concurring in part and dissenting in part) (punitive damages greater than reasonably necessary for punishment or deterrence hurt society by discouraging socially desirable activity); *see also Wade*, 461 U.S. at 60 (Rehnquist, C.J., dissenting) ("[T]he alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined."). *See also* Cass A. Sunstein, Daniel Kahneman & David Schkade, *Assessing Punitive Damages (with Notes on Cognition and Valuation in Law)*, 107 Yale L.J. 2071, 2077 & nn.22, 23 (1998) ("[A] risk of extremely high awards is likely to produce excessive caution in risk-averse managers and companies . . . ."); A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 873 (1998) (same).

In determining whether a punitive damages award is excessive in light of its deterrent purpose, it is important to bear in mind that the detriment incurred by a defendant—and thus the deterrent force—is not only the amount of the punitive award.

Rather, the detriment—and thus the deterrent force—includes *all* costs incurred by the defendant as a result of its wrongful conduct, including lost time of employees whose attention is diverted to litigation, lost goodwill, legal fees and litigation costs, sales opportunities and other business opportunities lost due to adverse publicity, and, in this case, staggering mitigation and cleanup costs, massive fines, and the cost of a lost ship and its cargo. *See, e.g.*, *Zazu Designs v. L'Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (noting that a tortfeasor's "entire penalty includes extra-judicial consequences").

Furthermore, as this Court has recognized, compensatory damages both deter and punish wrongful conduct. *Wade*, 461 U.S. at 54 (stating that the focus is on whether the tortfeasor's conduct "is of the sort that calls for deterrence and punishment over and above that provided by compensatory awards"); *see Memphis Cmty. Sch. Dist. v. Stachura*, 477 U.S. 299, 307 (1986) ("[d]eterrence . . . operates through the mechanism of damages that are compensatory") (emphasis omitted). Other courts, as well as legal scholars, have long recognized that compensatory damages provide deterrence and punishment. *See, e.g.*, *Mayer*, 22 S.E. at 63 (stating that compensatory damages can be "sufficient in amount to operate at the same time as a punishment and a warning"); Clarence Morris, *Punitive Damages in Tort Cases*, 44 Harv. L. Rev. 1173, 1182-83 (1927).

To achieve reasoned, socially desireable deterrence, therefore, punitive damages should be imposed only in an amount that is reasonably necessary, when added to compensatory damages awards, litigation costs, loss of business opportunity and goodwill, and other detriments, to eliminate the company's finan-

cial incentive to repeat the wrongful conduct. Any larger sum is unjustified by deterrence principles. *See Gore*, 517 U.S. at 584 ("The sanctions imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal.").

C. Proportionality Between Punishments and Wrongs Was a Fundamental Common-Law Requirement to Protect Against Arbitrary and Excessive Punishment

Retributivism has for centuries rested on the principle that the punishment inflicted on a wrongdoer must be proportional to the moral gravity of the offense. *See* Immanuel Kant, *The Philosophy of Law* 194-98 (W. Hastie trans. 1887); Georg Hegel, *Philosophy of Right* 71 (1958); A.C. Ewing, *Morality of Punishment* 39-40 (1929); W.G. Maclagan, *Punishment and Retribution*, 14 Philosophy 290-92 (1939); J.D. Mabbot, *Punishment*, *in The Philosophy of Punishment* 39, 39-41 (H. Acton ed. 1969). It finds perhaps its oldest expression in the Biblical passage, "Eye for eye, tooth for tooth, hand for hand, foot for foot." *Exodus* 21:24. Its common-law roots extend back to at least 1215, when Magna Carta limited the imposition of amercements, the progenitor of punitive damages, by stating:

> A Free-man shall not be amerced for a small fault, but after the manner of the fault; and for a great fault after the greatness thereof, saving to him his contentment; and a Merchant likewise, saving to him his Merchandise; and any other's villain than ours shall

> be likewise amerced, saving his wainage, if he fall into our mercy.

Browning-Ferris, 492 U.S. at 288-89 (O'Connor, J., dissenting) (quoting Magna Carta ch. 20 (1215)). Thus, Magna Carta required punitive awards to be proportioned to the "manner of the fault."

For more than a century in this country, state courts applying common law have recognized proportionality as a fundamental limit on the amount of punitive damages. *See, e.g.*, *Flannery v. Baltimore & Ohio R.R. Co.*, 15 D.C. 111, 125 (1885) (remitting punitive award that court deemed "out of all proportion to the injuries received"); *Grant v. McDonogh*, 7 La. Ann. 447, 448 (1852) (remitting verdict and stating that "exemplary damages should bear some proportion to the real damage sustained"); *McCarthy*, 22 Minn. at 91-92 (setting aside verdict as "in excess of what may justly be regarded as . . . punishment to defendant"). This Court has recognized that the requirement of proportionality between punishments and the wrongs for which they are inflicted is a principle "deeply rooted and frequently repeated in common-law jurisprudence." *Solem v. Helm*, 463 U.S. 277, 284 (1983); *accord Gore,* 517 U.S. at 575 ("As the Court stated nearly 150 years ago, exemplary damages imposed on a defendant should reflect 'the enormity of his offense.'") (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1852)); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 478-79 (1993) (O'Connor, J., dissenting) ("[C]ourts historically have required that punitive damages awards bear a reasonable relationship to the actual harm imposed."); *see Mass. Bonding & Ins. Co. v. United States*, 352 U.S. 128, 133 (1956) ("By definition, punitive dam-

ages are based upon the degree of the defendant's culpability.").

Although the requirement is one of proportionality between punishment and culpability, it often has been framed as mandating proportionality between punitive damages and the harm caused or, even more particularly, between punitive damages and compensatory damages. *See Gore*, 517 U.S. at 580 ("The principle that exemplary damages must bear a 'reasonable relationship' to compensatory damages has a long pedigree."); *TXO*, 509 U.S. at 459 (plurality opinion) ("[S]tate courts have long held that exemplary damages allowed should bear some proportion to the real damage sustained." (quotation marks omitted)); *Mayer*, 22 S.E. at 61 ("[T]he principle of punitive damages assessed in proportion to the evil intent of the wrongdoer is declared established."); *Saunders v. Mullen*, 24 N.W. 529 (Iowa 1885) ("When the actual damages are so small, the amount allowed as exemplary damages should not be so large."); *Flannery*, 15 D.C. at 125 (remitting punitive award that court deemed "out of all proportion to the injuries received"); *Grant*, 7 La. Ann. at 448 ("[E]xemplary damages allowed should bear some proportion to the real damages sustained."). Undoubtedly, this is because the nature and scope of harm caused by wrongful conduct usually provides at least a rough measure of the conduct's reprehensibility and the amount of deterrence needed, and compensatory damages are the monetary measure of the harm.[5]

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[5] This was not always so. In early common law, when compensatory damages could not be awarded for many types of intangible harms, the amount of a compensatory award inadequately reflected the reprehensibility of the defendant's conduct, and

Because the basic retributive principle requires that punishment be proportional to the moral gravity of the wrongdoing, any intentional increase of a punishment beyond the level necessary to achieve the required proportionality is, for the retributive purpose, arbitrary and unjustifiable.

II. THE $2.5 BILLION PUNITIVE DAMAGES AWARD APPROVED BY THE NINTH CIRCUIT IS EXCESSIVE IN LIGHT OF THE COMMON- LAW REQUIREMENT THAT THE AWARD BE REASONABLY NECESSARY TO ACHIEVE APPROPRIATE DETERRENCE AND PUNISHMENT

A. The $2.5 Billion Punitive Damages Award Violates the Common-Law Requirement of Being Reasonably Necessary to Achieve Deterrence

The court of appeals ordered that the $4.5 billion punitive damages award approved by the district

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punitive damages were needed to achieve the proportionality dictated by "eye for eye." *See, e.g.*, *Cooper Indus. Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 437 n.11 (2001) ("Until well into the 19th century, punitive damages frequently operated to compensate for intangible injuries, compensation which was not otherwise available under the narrow conception of compensatory damages prevalent at the time."); *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting) (same). As the common-law conception of compensatory damages has evolved to provide compensation for a greater array of intangible harms, compensatory damages have come to provide a more reliable proxy for the measure of the conduct's reprehensibility. *See State Farm*, 538 U.S. at 426 (observing that "a major role of punitive damages" is to condemn conduct that causes "outrage and humiliation" and that compensatory damages for intangible harms "already contain this punitive element").

court be remitted by $2 billion. *See In re the Exxon Valdez*, 490 F.3d 1066, 1073 (9th Cir. 2007) (per curiam) (*Punitive Damages Opinion II*). One of the primary reasons the court ordered the remittitur was that, "in assessing the reprehensibility of Exxon's misconduct," there were several "mitigating facts," including the "prompt action taken by Exxon both to clean up the oil and to compensate the plaintiffs for economic loss." *Id.* The court determined that these mitigating facts "mollify" the "reprehensibility in economic terms of Exxon's original misconduct." *Id.*

Although the court of appeals certainly was correct in stating that the $2.1 billion Exxon expended to clean up the oil spill must be taken into account, the manner in which the court did so failed to give appropriate weight to the expenditures' deterrent effect on Exxon. Specifically, a correct analysis does not lead merely to the conclusion reached by the court—*i.e.*, that Exxon's conduct related to the oil spill was less reprehensible than it would have been had it done nothing after the spill occurred. Instead, a correct analysis shows that the deterrent effect of having to incur those enormous costs makes any punitive damages award wholly unnecessary and contrary to deterrence principles.

Under this Court's due process analysis and deterrence principles, the more reprehensible the defendant's conduct *that caused the plaintiff's harm*, the larger the constitutionally permissible ratio between compensatory damages and punitive damages may be. *Gore*, 517 U.S. at 575-76. Thus, it is neither logical nor consistent with the purposes of punitive damages to determine reprehensibility—greater or lesser—based on actions or omissions that occurred *after* the misconduct that caused the harm for

which a plaintiff seeks compensatory and punitive damages and *after* the harm for which compensatory damages are awarded occurred.

The analytical awkwardness of trying to shoehorn Exxon's salutary, mitigating post-accident steps into the reprehensibility prong of the due process analysis would have been avoided had the court of appeals considered the cost of those actions to Exxon in light of the traditional common-law limitations on punitive damages awards. Specifically, the court of appeals would have recognized that the more than $3.4 billion in costs that Exxon incurred as a result of the oil spill must be considered an important detriment to the defendant—*i.e.*, *an important part of the deterrent force*.

As stated above at page 9, because corporations are purely economic actors, a punishment suffices to deter a corporation if it removes the prospect of monetary gain from wrongful behavior. To determine whether the prospect of monetary gain has been removed from a corporate defendant's wrongful behavior, it is necessary to identify *all* economic detriments incurred by the defendant in connection with the behavior. Such economic detriments include *all* costs incurred as a result of the tortious conduct. *See, e.g.*, *Zazu Designs*, 979 F.2d at 508 (noting that a tortfeasor's "entire penalty includes extra-judicial consequences"). To achieve optimal deterrence, punitive damages should be imposed only in the amount that must be added to compensatory damages awards and any "extra-judicial consequences" to eliminate the company's financial incentive to repeat the wrongful conduct.

Here, the costs Exxon incurred because of its wrongful conduct include the millions of dollars in judgments, settlements, and other recoveries that various plaintiffs obtained as a result of the oil spill; the $900 million settlement Exxon paid to the government to restore natural resources; the $125 million fine and restitution; the $2.1 billion Exxon paid in cleanup costs; the $46 million in damage to the ship and in lost cargo; the undetermined amounts Exxon paid in litigation costs; and loss of business opportunity and goodwill. These amounts, totaling more than $3.4 billion, are more than sufficient to remove any prospect of gain from its wrongful behavior, when the only benefit to Exxon, if any, of engaging in a similar future act would be the much smaller amount that Exxon might save by, for example, not having to hire ship captains more reliable than, but at least as skilled as, Captain Hazelwood. The Ninth Circuit, in an earlier opinion remanding the original $5 billion punitive damages award in this case, appeared to embrace these concepts:

> The cleanup expenses Exxon paid should be considered *as part of the deterrent already imposed*. Depending on the circumstances, a firm might reasonably, were there no punishment, be deterred, in some cases but not all, by its actual expenses. For example, a person painting his trim may not carefully mask window glass, because it is cheaper and easier to scrape the paint off the glass than to mask it carefully. But if a person ruined a $10,000 rug by spilling a $5 bottle of ink, he would be exceedingly careful never to spill ink on the rug again, even if it cost him “only” $10,005 and he was not otherwise punished.

> Exxon's casualty losses for the vessel and cargo (approximately $46 million), the costs of clean up (approximately $2.1 billion), the fine and restitution ($125 million), settlement with the government entities (approximately $900 million), settlements with private parties (approximately $300 million), and the net compensatory damages (approximately $19.6 million) totaled over $3.4 billion . . . . A company hauling a cargo worth around $25.7 million has a large incentive to avoid a $3.4 billion expense for the trip. This case is like the ink on the rug example, not the paint on the window example. *Just the expense, without any punishment, is too large for a prudent transporter to take much of a chance, given the low cost of making sure alcoholics do not command their oil tankers.*

Punitive Damages Opinion I, 270 F.3d at 1244 (emphasis added).

It contravenes basic deterrence principles to permit juries to award punitive damages in an amount greater than necessary to deter the defendant from again engaging in the wrongful conduct in question. Because any punitive damages on top of the $3.4 billion already incurred by Exxon would constitute massive over-deterrence, no punitive damages could have been awarded in this case consistent with the deterrence rationale. *See, e.g.*, *Gore*, 517 U.S. at 584 ("The sanctions imposed in this case cannot be justified on the ground that it was necessary to deter future misconduct without considering whether less drastic remedies could be expected to achieve that goal."); *Browning-Ferris*, 492 U.S. at 282 (O'Connor, J., concurring in part and dissenting in part) (exem-

plary exactions that are greater than reasonably necessary for punishment or deterrence hurt society by discouraging socially desirable activity); *see also Wade*, 461 U.S. at 59 ("[T]he alleged deterrence achieved by punitive damage awards is likely outweighed by the costs—such as the encouragement of unnecessary litigation and the chilling of desirable conduct—flowing from the rule, at least when the standards on which the awards are based are ill-defined.") (Rehnquist, C.J., dissenting).

B. The Punitive Damages Award Violates the Requirement of Being Reasonably Necessary to Achieve Proportionality That Comports with Retributive Principles

In calculating the amount of harm to Respondents, both the district court and the court of appeals aggregated the $287 million jury verdict with the judgments, settlements, and other recoveries various plaintiffs obtained from Exxon as a result of the oil spill. *See Punitive Damages Opinion II*, 490 F.3d at 1089-93. The Ninth Circuit ultimately settled on $504.1 million as the total amount of economic harm resulting from Exxon's wrongful conduct to be used in arriving at a constitutionally appropriate ratio between the harm resulting from Exxon's wrongful conduct and the amount of punitive damages that should be awarded. *Id.* at 1093.

In determining the ratio of punitive damages to actual harm for its due process analysis, the court of appeals referenced this Court's observation in *State Farm* that substantial compensatory damages counsel in favor of a lesser ratio, and that even a punitive award equal to compensatory damages "might mark

the outer limits of due process." *Id.* Nevertheless, the Court ultimately concluded that, because Exxon's conduct was "particularly egregious," a punitive award approximately five times the compensatory damages was constitutionally sound. *Id.* at 1094.

Even if the Ninth Circuit correctly applied the required constitutional due process analysis,[6] its decision is nevertheless flawed because it failed to consider whether the punitive damages award comports with the common law's retributive limitation of proportionality. In approving the $2.5 billion punitive award, the Ninth Circuit acknowledged that the costs incurred by Exxon as a result of Exxon's actions were "significant," *id.* at 1093-94, but misunderstood the import of that fact. Only in instances when compensatory damages and other costs incurred by a defendant as a result of its misconduct do not reflect the reprehensibility of the misconduct—for example, an unsuccessful attempt to cause harm to a person or property—is proportionality served by a punitive award in addition to the compensatory award. And the common-law retributive "outer limits" could be zero or a fraction, rather than a multiple, of the compensatory damages, regardless of what the due process "outer limits" might be.

Exxon incurred billions of dollars in other costs on top of the compensatory damages award, so the costs incurred by Exxon as a result of its misconduct

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[6] We disagree that Exxon's conduct was "particularly egregious," and instead endorse the analysis of Exxon's conduct provided in the brief of *amici curiae* American Petroleum Institute, American Chemistry Council, American Tort Reform Association, National Association of Manufacturers, and Western States Petroleum Association.

vastly exceeded the harm its misconduct caused Respondents. Therefore, without any punitive damages award, and certainly without a multi-billion-dollar punitive damages award, the cost to Exxon was for retributive purposes proportional to the harm caused. No punitive award was reasonably necessary to achieve retributive proportionality.

III. ALLOWING JURIES TO INCREASE PUNITIVE DAMAGES BASED ON A CORPORATE DEFENDANT'S NET WORTH DISSERVES DETERRENT AND RETRIBUTIVE PURPOSES

For several decades after our country's founding, the common law did not permit juries to increase punitive damages based on a defendant's financial status. The traditional common-law requirements of reasonable necessity and proportionality dictated by deterrent and retributive principles have eroded, however, and the result in recent years has been historically unprecedented blockbuster punitive damages verdicts driven by prejudice against, and a desire to "take down," corporations with substantial net worth.[7]

[7] Researchers at the RAND Institute for Civil Justice have empirically determined that "[c]orporate defendants are . . . more likely than individuals or public agencies to be the target of [punitive damages] awards." Mark A. Peterson, Syam Arma & Michael G. Stanley, *Punitive Damages: Empirical Findings* iii (1987). In 1955 an award of $75,000 was the largest punitive damages verdict in California history and one of the two largest in the history of the United States. Levit, *Punitive Damages: Yesterday, Today and Tomorrow*, Ins. L.J., May 1980, at 257, 259 (1980). In 2000, in a product liability case arising out of a crash of a 14-year-old Chevrolet Malibu, a jury rendered a ver-

That desire is evident here. Respondents' entire focus in Phase III of the trial was on Exxon's income and net worth. In closing, Respondents urged the jury to "get them a message" and suggested that only an outsized verdict could affect such a large company. (*See, e.g.*, Trial Tr. at 7560 (referring to Exxon's "mahogany-polished boardroom" and "boards of director's rooms throughout the world"), 7564 (discussing Exxon's $10-12 billion cash flow), 7575-85 (referring to Exxon's and its officers' wealth, stating that $5 billion is nothing to Exxon, and telling the jury to "get them a message").) Respondents continued this tactic before this Court, pointing out on the first page of their Brief in Opposition to Petition for a Writ of Certiorari that the $2.5 billion punitive damages verdict "represents barely more than three weeks of Exxon's current net profits." The argument that a huge punitive damages judgment is appropriate because of Exxon's substantial net worth is an emotional plea that conflicts with basic common-law principles.

There is no legitimate deterrent or retributive basis for allowing a jury to impose greater punishment on a corporate defendant with more net worth than on one with less. That is especially so when, as here, the wrongful act in issue has cost the company more than $3.4 billion in judicial and extra-judicial expenditures without any punitive damages; when any similar wrongful act in the future could readily result in similar costs should another oil spill result; and when the only benefit to Exxon, if any, of engaging in a similar act would be the relatively trivial ad-

dict against General Motors of $107.6 million in compensatory damages and $4.9 *billion* in punitive damages. Margaret Cronin Fisk, *A Typical Verdict Last Year Was Way up, but Nothing like This One*, 22 Nat'l L.J. No. 27, p. A1 (Feb. 28, 2000).

ditional amount that Exxon might have to pay to hire ship captains more reliable than, but at least as skilled as, Captain Hazelwood. The total cost imposed should be adequate to punish proportionately to the culpability and to deter future similar conduct, but not over-deter; and that metric has nothing to do with the size of the corporate defendant.

A. Allowing Juries to Increase Punitive Damages Based on a Corporate Defendant's Net Worth Violates the Common-Law Requirement of Proportionality

As discussed above at 12, ensuring the common-law retributive requirement of proportionality dates at least back to Magna Carta. *See Browning-Ferris*, 492 U.S. at 288-89 (O'Connor, J., dissenting) (quoting Magna Carta ch. 20 (1215)). Moreover, "[a]fter Magna Carta, the amount of an amercement was initially set by the court. A group of the amerced party's peers would then be assembled to *reduce* the amercement in accordance with the party's ability to pay." *Id.* (emphasis added). Thus, liability was determined, a punishment proportional to the wrongdoing was selected, and only then was the defendant's financial status considered, potentially to reduce, not increase, any punitive damages.

This common-law principle prevailed for decades after this nation was founded: reviewing courts generally applied the traditional proportionality test and did not allow evidence of wealth as a factor to be considered in increasing punitive damages. As late as 1868 the Supreme Court of Iowa stated:

> [W]hile some of the cases have held, that the pecuniary condition of a defendant may be shown, when plaintiff is entitled

> to vindictive damages, or in case of malicious torts, yet it is believed that the weight of authority is the other way. . . . Aside from the exceptional cases of slander and breach of promise to marry, courts should hesitate long before receiving such evidence, or allowing the jury to take into consideration the defendant's pecuniary ability, even under circumstances of aggravation, insult or cruelty, or of vindictiveness and malice.

Hunt v. Chicago & N.W.R.R., 26 Iowa 363, 373-74 (1868). The court added that if defendants' wealth were allowed into evidence, "damages will be recovered, not according to the extent of the injury sustained, but the means of defendant to pay. . . . Such cannot be the rule." *Id.* at 374; *cf. Day*, 54 U.S. (13 How.) at 371 ("It is a well-established principle of the common law, that . . . a jury may inflict what are called exemplary, punitive . . . damages upon a defendant, *having in view the enormity of his offence* . . . . [A]nd the damages assessed depend on the circumstances, *showing the degree of moral turpitude or atrocity of the defendant's conduct*." (emphasis added)).[8] It was not until 1899 that any case reached this Court in which evidence of a defendant's wealth

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[8] In *Bennett v. Hyde*, 6 Conn. 24 (1825), the court allowed consideration of the defendant's wealth in a slander action because of a belief that defamatory statements, when made by wealthy defendants, could cause more harm, and therefore be more reprehensible and warrant more deterrence, than those made by less wealthy defendants. One earlier decision sanctioned such a use of the defendant's wealth, but it was reversed for unspecified reasons. *See Ogden v. Gibbons*, 5 N.J.L. 518, 539, *rev'd,* 5 N.J.L. 853 (1819).

had been allowed to increase a punitive damages award, and in that case the Court reversed on narrower grounds without considering whether the procedure was allowable. *See Wash. Gas-Light Co. v. Lansden*, 172 U.S. 534 (1899).[9]

In short, the common-law retributive rule in England and in this country required that punitive damages be proportional to the wrong committed and did not permit juries to ignore that requirement and use a defendant's wealth to increase punitive damages awards. It is only in recent history that courts have destroyed this safeguard, sometimes encouraging juries to consider wealth and then upholding massive punitive damages verdicts with the justification that such outsized verdicts are the only way to "get the attention" of large corporations. That reasoning is illogical and inconsistent with more than a century of early common law.

It is simple logic that if the punishment for a wrong is to be proportional to the nature of the offense (or the "manner of fault"), the focus must be on the offense, not on a corporate defendant's net worth. *See Clark v. Chrysler Corp.*, 436 F.3d 594, 604 (6th

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[9] The case was a libel action in which a corporation and four of its executives were joined as defendants. Under the applicable state law, each defendant was liable for the full amount of any judgment and could not obtain contribution from the others. The Court held that under those circumstances the trial court had erred by admitting evidence of the corporation's wealth to be considered in setting the amount of punitive damages to be imposed against the corporation because "there is no justice in allowing the recovery of punitive damages, in an action against several defendants, based upon evidence of the wealth and ability to pay such damages on the part of one of the defendants only." *Wash. Gas-Light*, 172 U.S. at 553.

Cir. 2006); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003). From a proportionality standpoint, if one assumes comparable actions by two companies, the punitive award should not be greater for a Fortune 100 company than for a Fortune 1000 company, or for a highly profitable company versus one in financial distress.

Consistent with that logic, the three guideposts established by this Court under its due process jurisprudence to ensure proportionality and reasonableness in punitive damages awards make no mention of the corporate defendant's net worth or income. *See Gore*, 517 U.S. at 574-75. Instead, all three are undermined by the use of evidence of a corporation's financial status to increase punishments. The first guidepost, reprehensibility of the defendant's conduct, focuses on the nature of the wrong, and so by definition cannot include consideration of corporate net worth or income. The second guidepost, the ratio of actual damages to punitive damages, also does not mention or involve the company's financial status. The third guidepost provides another check on reasonableness and proportionality by comparing the punitive award to legislatively enacted punishments for the same acts, again with no consideration of corporate net worth or income. Thus, any use of a corporate defendant's financial status to increase an award that satisfies the guideposts would logically violate them.

Further, the common-law principle of proportionality carries with it a notion that comparable actions by different persons should not yield arbitrary punitive results. *See Gore*, 517 U.S. at 588 (Breyer, J., concurring); *Haslip*, 499 U.S. at 20. Allowing the use of corporate net worth to increase punitive damages

does just the opposite, inviting juries to "express biases against big businesses, particularly those without strong local presences." *Oberg*, 512 U.S. at 432. That was certainly the case here, where Respondents argued to the jury at length about the need to punish the large out-of-state company, with its chairman and his "$14 million in stock options" and its "mahogany-polished boardroom in Houston, Texas," because

> Exxon Corporation has no soul and has no body, and its language and the language of the people in boards of director's rooms throughout the world is [money], this is their language. . . . 5 billion is the average yearly net profit. 7.92 billion was the cash flow the year of the spill. This 5 billion, Exxon, because of its size and wealth, can sustain a 5 billion dollar award and shrug their shoulders.
>
> Your job is to look at these numbers and to come up with a number that . . . punishes the conduct . . . in light of the wealth of the defendant.
>
> You're going to punish the conduct, you're going to get them a message.

(Tr. at 7573-84.) Such facts and arguments "had little to do with the actual harm sustained by the [plaintiffs]," *State Farm*, 538 U.S. at 427, and they have no logical place in determining any award of punitive damages against a publicly-held corporation.

Thus, any intentional increase of a punishment beyond the level necessary to achieve the required proportionality is, as to the retributive purpose, arbi-

trary and discriminatory. If a particular punishment is determined to be properly proportional to the moral gravity of a particular offense, the basic retributive principle would be violated by inflicting more punishment simply because the corporate defendant happens to have a large net worth.

Seeking to punish a publicly-held corporate entity presents additional logical disconnects. More than 25 years ago, this Court explained:

> Regarding retribution, it remains true that an award of punitive damages against a municipality "punishes" only the taxpayers, who took no part in the commission of the tort. . . . Neither reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing taxpayers. Under ordinary principles of retribution, it is the wrongdoer himself who is made to suffer for his unlawful conduct. If a government official acts knowingly and maliciously to deprive others of their civil rights, he may become the appropriate object of the community's vindictive sentiments. A municipality, however, can have no malice independent of the malice of its officials. Damages awarded for punitive purposes, therefore, are not sensibly assessed against the governmental entity itself.

City of Newport v. Fact Concerts, Inc., 453 U.S. 247, 267 (1981). The Court then stated: "Whatever its weight, the retributive purpose is not significantly advanced, if it is advanced at all, by exposing municipalities to punitive damages." *Id.* at 268.

Those observations apply with equal force to a publicly-held corporation like Exxon, with its millions of disparate shareholders.[10] First, a punitive award against such companies "'punishes' only the [shareholders], who took no part in the commission of the tort." *Id*. at 264. Second, "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing [shareholders]." *Id*. Third, a corporation "can have no malice independent of the malice of its [officers, directors, managing agents, and employees]." *Id*. "Damages awarded for punitive purposes, therefore, are not sensibly assessed against the [corporate] entity itself." *Id*. Furthermore, with large, publicly-held corporations, by the time a case has been tried to verdict, punitive damages assessed, appeals decided, and a final judgment entered, the shareholders who suffer the resulting loss of market value or a reduced dividend may be substantially different, or even entirely different, from the shareholders who benefited from the wrongful conduct many years earlier.

Thus, consideration of net worth to increase punitive damages against corporate defendants violates the basic retributive requirement of proportionality between punishments and wrongs. Any punitive

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[10] As this Court said of the ship owners in *The Amiable Nancy*, 16 U.S. (3 Wheat.) 546, 558-59 (1818), where the number of owners undoubtedly was far smaller than the number of Exxon's shareholder-owners, "They are innocent of the demerit of this transaction, having neither directed it, nor countenanced it, nor participated in it in the slightest degree. Under such circumstances . . . they are not bound to the extent of vindictive damages."

damages award based on such evidence should be precluded under federal common law.

B. Allowing Juries to Increase Punitive Damages Based on a Corporate Defendant's Net Worth Violates Basic Deterrence Principles

It is not irrational to allow greater punitive damages against wealthier individuals than against poorer individuals who have committed torts that are not economically motivated, such as assault or defamation, to attain the degree of deterrence needed to prevent additional wrongs. Because it is generally accepted that a dollar is less important to persons of great wealth than to persons of modest means, greater punishment may be needed to deter a multi-millionaire from, say, punching or making a defamatory statement about another person. *See Zazu Designs*, 979 F.2d at 499.

Publicly-held corporations, however, are not sentient beings; they are entities that exist to generate monetary profits for their shareholders. They are literally incapable of realizing any type of personal, non-monetary gain, such as wrongfully satisfying a sexual urge or a sadistic desire to inflict pain. Accordingly, the effect of liability in deterring future behavior should not differ based on the size of the company: each such company, regardless of size or net worth, should be deterred from wrongful conduct if the punishment is sufficient to show the company that it should expect the result of similar future wrongful behavior to be a monetary loss of even one dollar, rather than a monetary profit. *See, e.g.*, 2 Am. L. Inst., *Reporters Study, Enterprise Responsibility for Personal Injury* 254-55 (1991); Kenneth S. Abra-

ham & John C. Jeffries, *Punitive Damages and the Rule of Law: The Role of the Defendant's Wealth*, 18 J. Legal Stud. 415, 417 (1989). Thus, it is irrational, in the name of deterrence, to impose greater punishments based on greater corporate net worth.

The facts of this case present a perfect example. Exxon did not derive any great economic benefit from leaving Captain Hazelwood in charge of its tanker, rather than, for example, seeking out, and perhaps paying a somewhat higher salary to, a more reliable and at least equally skilled officer. But it incurred billions of dollars in losses as a result of its decision. The court of appeals offered no coherent explanation, under any recognized deterrence theory, of why Exxon's multi-billion-dollar loss would fail to deter Exxon from hiring officers like Captain Hazelwood, but would succeed in doing so if Exxon's net worth were, say, half of what it actually is. Put differently, the court offered no explanation of why Exxon would be any less deterred by the multi-billion non-punitive-damages losses than any existing smaller shipping company would be. The now-experienced and readily-predictable costs of an oil spill should deter any similar conduct by *any* rational corporate entity, even one ten times wealthier than Exxon, and the court of appeals was unable to explain why this is not so.

The structure of a publicly-held corporation further shows why deterrence does not require, and cannot justify, greater punishments based on corporate net worth:

> Corporations are abstractions; investors own the net worth of the business. . . . Corporate assets finance ongoing operations and are un-

> related to either the injury done to the victim or the size of the award needed to cause corporate managers to obey the law. Net worth is a measure of profits that have not yet been distributed to the investors. Why should damages increase because the firm reinvested its earnings?

Zazu Designs, 979 F.2d at 508. Justices Breyer, Souter, and O'Connor have recognized this point, noting that the defendant's financial condition would have little relevance to a state's "interest in deterrence, given the more distant relationship between a defendant's wealth and its responses to economic incentives." *Gore*, 517 U.S. at 591 (Breyer, J., concurring).

Still further, increasing punitive damages based on a corporation's net worth causes larger companies to pay a larger share of their net worth. If, for example, Toyota recklessly uses a defective design in a million cars and Subaru, one-tenth Toyota's size, makes 100,000 identically defective cars, if one of every 50,000 of these cars has an accident caused by the defect, and if each punitive award is set at one percent of the defendant's net worth as of a specific date, Subaru will lose two percent of its net worth, but Toyota will lose twenty percent of its net worth. Thus, increasing punitive damages to reflect a company's size leads to disproportionate deterrence.

Finally, linking punitive damages to a corporate defendant's net worth cannot be justified on deterrence grounds by the notion that the punitive award has to be massive to ensure that the company's board of directors will "get the message" about a need for a change. Here, for example, it is beyond ludicrous to

suggest that any company's board of directors would be oblivious to $3.4 billion in costs, and the massive negative publicity, incurred by the company as a result of a decision made by one of its officers or employees. Even when much lesser sums are involved, the performance reviews of a company's employees who cause a major loss to the company are sure to be adversely affected. Employees therefore will have strong incentives to "get the message" without any imposition of punitive damages on their corporate employer, because the large compensatory damages and extra-judicial costs will readily be seen as resulting from their actions and omission.

In sum, considering corporate net worth in determining the amount of punitive damages is a relatively recent development and conflicts with more traditional common-law principles that hew far more closely to the fundamental principles of deterrence and retribution. Therefore, in deciding what the rule of federal common law should be with respect to punitive damages, this Court should rule that evidence of corporate net worth should not be allowed as a basis to increase punitive damages.

CONCLUSION

Federal maritime common law should embrace and emphasize the traditional common-law safeguards requiring the imposition of only such punitive damages as are reasonably necessary to meet deterrent and retributive goals. Because the punitive damages award approved by the court of appeals violates those principles, the judgment should be reversed.

Respectfully submitted.

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APPENDIX

Corporate Members of Product Liability Advisory Council

3M

A.O. Smith Corporation

Altec Industries

Altria Corporate Services, Inc.

American Suzuki Motor Corporation

Andersen Corporation

Anheuser-Busch Companies

Appleton Papers, Inc.

Arai Helmet, Ltd.

Astec Industries

BASF Corporation

Bayer Corporation

Bell Sports

Beretta U.S.A. Corp.

BIC Corporation

Biro Manufacturing Company, Inc.

Black & Decker (U.S.) Inc.

BMW of North America, LLC

Boeing Company

Bombardier Recreational Products

BP America Inc.

Bridgestone Americas Holding, Inc.

Briggs & Stratton Corporation

Brown-Forman Corporation

CARQUEST Corporation

Caterpillar Inc.

Chevron Corporation

Chrysler LLC

Continental Tire North America, Inc.

Cooper Tire and Rubber Company

Coors Brewing Company

Crown Equipment Corporation

The Dow Chemical Company

E & J Gallo Winery

E.I. DuPont De Nemours and Company

Eaton Corporation

Eli Lilly and Company

Emerson Electric Co.

Engineered Controls International, Inc.

Estee Lauder Companies

Exxon Mobil Corporation

Ford Motor Company

Freightliner LLC

Genentech, Inc.

General Electric Company

General Motors Corporation

GlaxoSmithKline

The Goodyear Tire & Rubber Company

Great Dane Limited Partnership

Harley-Davidson Motor Company

The Heil Company

Honda North America, Inc.

Hyundai Motor America

Illinois Tool Works, Inc.

International Truck and Engine Corporation

Isuzu Motors America, Inc.

Jarden Corporation

Johnson & Johnson

Johnson Controls, Inc.

Joy Global Inc., Joy Mining Machinery

Kawasaki Motors Corp., U.S.A.

Kia Motors America, Inc.

Koch Industries

Kolcraft Enterprises, Inc.

Komatsu America Corp.

Kraft Foods North America, Inc.

Lincoln Electric Company

Lyondell Petrochemical Company

Magna International Inc.

Mazda (North America), Inc.

Medtronic, Inc.

Merck & Co., Inc.

Michelin North America, Inc.

Microsoft Corporation

Mine Safety Appliances Company

Mitsubishi Motors North America, Inc.

Nintendo of America, Inc.

Niro Inc.

Nissan North America, Inc.

Nokia Inc.

Novartis Consumer Health, Inc.

Novartis Pharmaceuticals Corporation

Occidental Petroleum Corporation

PACCAR Inc.

Panasonic

Pfizer Inc

Porsche Cars North America, Inc.

PPG Industries, Inc.

Purdue Pharma L.P.

Putsch GmbH & Co. KG

The Raymond Corporation

Raytheon Aircraft Company

Remington Arms Company, Inc.

Rheem Manufacturing

RJ Reynolds Tobacco Company

Sanofi-Aventis

Schindler Elevator Corporation

SCM Group USA Inc.

Shell Oil Company

The Sherwin-Williams Company

Smith & Nephew, Inc.

St. Jude Medical, Inc.

Sturm, Ruger & Company, Inc.

Subaru of America, Inc.

Synthes (U.S.A.)

Terex Corporation

Textron, Inc.

TK Holdings, Inc.

The Toro Company

Toshiba America Incorporated

Toyota Motor Sales, USA, Inc.

TRW Automotive

UST (U.S. Tobacco)

Vermeer Manufacturing Company

The Viking Corporation

Volkswagen of America, Inc.

Volvo Cars of North America, Inc.

Vulcan Materials Company

Watts Water Technologies, Inc.

Whirlpool Corporation

Wyeth

Yamaha Motor Corporation,
U.S.A.

Yokohama Tire Corporation

Zimmer, Inc.