Received 6/10/2022 1:22:39 PM Supreme Court Western District

Filed 6/10/2022 1:22:00 PM Supreme Court Western District
14 WAP 2022

IN THE SUPREME COURT OF PENNSYLVANIA
WESTERN DISTRICT

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13 & 14 WAP 2022

THE BERT COMPANY D/B/A NORTHWEST INSURANCE SERVICES,
Appellees

v.

MATTHEW TURK, WILLIAM COLLINS, JAMIE HEYNES, DAVID MCDONNELL, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, and FNB CORPORATION

APPEAL OF: MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, and FNB CORPORATION

BRIEF OF *AMICI CURIAE* PENNSYLVANIA COALITION FOR CIVIL JUSTICE REFORM, AMERICAN PROPERTY CASUALTY INSURANCE ASSOCIATION, PENNSYLVANIA CHAMBER OF BUSINESS AND INDUSTRY, PENNSYLVANIA MANUFACTURERS ASSOCIATION, INSURANCE FEDERATION OF PENNSYLVANIA, & LEADINGAGE PA IN SUPPORT OF APPELLANTS

Appeal from the May 5, 2021 Published Opinion and Order of the Superior Court of Pennsylvania (Kunselman, J., King, J., & Colins, S.J.) at 817 WDA 2019 & 917 WDA 2019 Affirming the June 3, 2019 Judgment of the Court of Common Pleas of Warren County (Skerda, J.) at AD 260 of 2017

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STATEMENTS OF INTEREST OF *AMICI CURIAE*

The Pennsylvania Coalition for Civil Justice Reform ("PCCJR") is a statewide, nonpartisan alliance of organizations and individuals representing health care providers, professional and trade associations, businesses, nonprofit entities, taxpayers, and other perspectives. The Coalition is dedicated to bringing fairness to litigants by elevating awareness of civil justice issues and advocating for reform.

The American Property Casualty Insurance Association ("APCIA") is the primary national trade association for home, auto, and business insurers. APCIA promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back 150 years. APCIA's member companies represent nearly 60% of the U.S. property-casualty insurance market and 58% of Pennsylvania's market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus curiae* briefs in significant cases before federal and state courts, including this Honorable Court.

The Pennsylvania Chamber of Business and Industry ("PA Chamber") is the largest broad-based business association in Pennsylvania. It has close

to 10,000 member businesses throughout Pennsylvania, which employ more than half of the Commonwealth's private workforce. Its members range from small companies to mid-size and large business enterprises. The Pennsylvania Chamber's mission is to advocate on public policy issues that will expand private sector job creation, to promote an improved and stable business climate, and to promote Pennsylvania's economic development for the benefit of all Pennsylvania citizens.

Since its founding in 1909, the Pennsylvania Manufacturers' Association ("PMA") has served as a leading voice for Pennsylvania manufacturing, its 540,000 employees on the plant floor, and the millions of additional jobs in supporting industries. From its headquarters in the Frederick W. Anton, III, Center, across from the steps to the State Capitol Building in Harrisburg, PMA seeks to improve the Commonwealth's competitiveness by promoting pro-growth public policies that reduce the cost of creating and keeping jobs in Pennsylvania. PMA has forcefully advocated for civil justice reforms that will bring balance and stability to Pennsylvania's legal system.

The Insurance Federation of Pennsylvania ("IFP") (www.ifpenn.org), a nonprofit organization, is Pennsylvania's leading insurance trade association, representing over 200 insurance companies in Pennsylvania.

The IFP's members are of all sizes and issue every type of insurance policy. These members represent half of the insurance premiums written in the Commonwealth. The IFP seeks to ensure a balanced and fair insurance environment in Pennsylvania. It routinely serves as the voice of the insurance trade in litigation in the Commonwealth where those interests are implicated. The IFP enjoys a well-earned reputation for integrity in the pursuit of its members' interests.

LeadingAge PA is a trade association representing more than 370 quality senior housing, health care, and community services across the commonwealth. These providers serve more than 75,000 older Pennsylvanians and employ over 50,000 dedicated caregivers on a daily basis. Services our members offer include life plan communities/continuing care retirement communities, skilled nursing communities, assisted living residences, personal care homes, and affordable senior housing. LeadingAge PA advocates on behalf of our members at the state and local levels to influence positive change and affect a healthy vision for the delivery of quality, affordable, and ethical care for Pennsylvania's seniors.

SUMMARY OF ARGUMENT

The panel opinion engages in three major legal errors. First, contrary to the panel's view, the most faithful reading of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), is that awards with punitive-to-compensatory-damage ratios of more than 4:1 are within the normal range of constitutionally permissible awards, ratios of up to 9:1 are constitutionally permissible in extreme cases, and ratios more than 9:1 are presumptively unconstitutional absent exceptional circumstances, such as highly egregious conduct causing nominal compensatory damages, and that a ratio of 1:1 is the constitutional maximum in cases with substantial compensatory damages. This reading is confirmed by applications of *State Farm* throughout the United States. The panel's opinion ignores this reading and torrent of authority by overstating the *State Farm* Court's declination to adopt a bright-line, general ratio-based rule for all cases, and also by ignoring the Court's considered and authoritative ratio guideposts.

Second, although it is an open question, evaluation of the ratio in the context of jointly and severally liable tortfeasors should be performed on a per-judgment, not a per-defendant, basis. Where jointly and severally liable tortfeasors are assessed compensatory damages jointly, there is no way to accurately assess the ratio of punitive-to-compensatory damages on a per-

defendant basis. The panel's opinion, as well as the decisions upon which it relies, did not reckon with this basic principle.

Third and finally, whether or not an award of punitive damages may be justified by resort to a plaintiff's *potential* harm, it may not be justified post-hoc by resort to evidence and arguments never presented to and considered by a jury. The panel's opinion does just that.

In appropriate circumstances, punitive damages can serve legitimate governmental objectives of punishing tortious conduct and deterring would-be tortfeasors, and the U.S. Supreme Court has provided important guideposts to prevent arbitrary deprivations of property that are plainly excessive to accomplishing those goals. The panel decision not only disregards those guideposts, but also sanctions damages calculations that make awards *more* arbitrary. This Honorable Court should correct its errors.

ARGUMENT

1. The most faithful reading of *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003), is that awards with punitive-to-compensatory-damage ratios of more than 4:1 are within the normal range of constitutionally permissible awards, ratios of up to 9:1 are constitutionally permissible for highly egregious conduct, and ratios more than 9:1 are presumptively unconstitutional absent exceptional circumstances, such as highly egregious conduct causing nominal compensatory damages, and that a ratio of 1:1 is the constitutional maximum in cases with substantial compensatory damages, and this reading is confirmed by applications of *State Farm* throughout the United States.

The Fourteenth Amendment to the United States Constitution provides that "No State shall . . . deprive any person of . . . property, without due process of law[.]" U.S. Const., amend XIV. This constitutional guarantee of due process of law contains both procedural and substantive components: the state may not deprive a person of property without adequate procedural safeguards, and may not deprive a person of property beyond that which is necessary to accomplish its legitimate governmental objectives. *See generally*, *e.g.*, *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919) (involving challenges by a common carrier to penalties for charging more than statutorily provided rates as both violative of procedural component for lack of a pre-enforcement challenge mechanism and substantive component for severity disproportionate to the prohibited conduct).

The U.S. Supreme Court has recognized that awards of punitive damages are subject to this analysis. Beginning in the late 1990s, the Court recognized that the substantive component of due process prohibits awards of punitive damages that are grossly excessive to the state's legitimate governmental objectives of punishing tortfeasors and deterring would-be tortfeasors. *See generally Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (acknowledging that excessive awards of punitive damages may violate due process and contemplating that compensatory-to-punitive-damage ratios of 1:4 may be near the constitutional brink); *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993) (plurality); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996) (same, adopting "guideposts" for determining whether an award of punitive damages violates due process); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994) (holding state constitutional amendment precluding judicial review of awards of punitive damages violated due process); *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001) (adopting *de novo* standard of review of determinations that an award of punitive damages violates due process); *State Farm Mut. Auto. Ins. v. Campbell*, 538 U.S. 408 (2003) (refining the *Gore* "guideposts"); *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008) (involving punitive damages in maritime law).

The Court's decisions in *Gore* and *State Farm* are most salient herein. In *Gore*, the plaintiff sued his automobile's dealer, distributor, and manufacturer, for failing to disclose that it had been damaged and repainted prior to delivery, culminating in an award of $4,000 in compensatory damages and $4,000,000 in punitive damages, which the Alabama Supreme Court, for reasons not pertinent herein, reduced to $2,000,000. *See Gore*, 517 U.S. at 562-68. The defendants sought and obtained *certiorari*, and, on further appeal, the U.S. Supreme Court reiterated that although states have "considerable flexibility," awards of punitive damages that are grossly excessive to the legitimate goals of punishment and deterrence violate due process. *See id.* at 568. The *Gore* Court offered an analytical framework composed of three "guideposts" to determine whether a particular award of punitive damages was grossly excessive: "the degree of reprehensibility of the [defendant's conduct]; the disparity between the harm or potential harm suffered . . . and his punitive damages award; and the difference between this remedy and the civil penalties authorized or imposed in comparable cases." *See id.* at 574-75.

Regarding the first guidepost – reprehensibility – the court looked for "aggravating factors," such as violence, deception, victimization of the vulnerable, or repeated tortious behavior, and, finding none, reasoned that

the conduct at issue "was not sufficiently reprehensible to warrant imposition of a $2 million exemplary damages award." *Id.* at 575-80.

Regarding the second guidepost – disparity between harm and punishment – the court noted the longstanding norm of proportionality and long tradition of statutes providing for double, treble, or quadruple damages and its earlier sanctioning in *Haslip* of a ratio of 4:1 and in *TXO* of a ratio of 10:1, and compared those to the extant 500:1 ratio, opining that it was "dramatically greater than those considered in *Haslip* and *TXO*." *Id.* at 582. Nevertheless, the court was reticent to adopt a bright-line rule, and explained that the disparity inquiry is slightly more nuanced, as a higher ratio might be justified by exceptional circumstances:

> Of course, we have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award. *TXO*, 509 U.S., at 458. Indeed, low awards of compensatory damages may properly support a higher ratio than high compensatory awards, if, for example, a particularly egregious act has resulted in only a small amount of economic damages. A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine. It is appropriate, therefore, to reiterate our rejection of a categorical approach. Once again, "we return to what we said . . . in *Haslip*: 'We need not, and indeed we cannot, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit

> every case. We can say, however, that [a] general concer[n] of reasonableness . . . properly enter[s] into the constitutional calculus.'" *Id.* at 458 (quoting *Haslip*, 499 U.S., at 18). In most cases, the ratio will be within a constitutionally acceptable range, and remittitur will not be justified on this basis. When the ratio is a breathtaking 500 to 1, however, the award must surely "raise a suspicious judicial eyebrow." *TXO*, 509 U.S., at 481 (O'Connor, J., dissenting).

Id. at 582-83.

Finally, regarding the third guidepost – civil penalties – the court noted that the maximum applicable civil penalty for the defendants' conduct in Alabama was $2,000, and, in other states, a maximum of $10,000, none of which could conceivably lead to such a stark sanction, finding this, too, suggested that the award was grossly excessive. *See id.* at 584-85.

Thus, the *Gore* court ultimately reversed and remanded to the Alabama Supreme Court. *See id.* at 586.

Seven years later, in *State Farm*, the High Court further refined the "guideposts." In that case, the plaintiffs brought an action against their insurer, State Farm, for a bad-faith failure to settle a claim arising from an automobile accident, ultimately obtaining a verdict of approximately $2.6 million in compensatory damages and $145 million in punitive damages. *State Farm*, 538 U.S. at 412-16. State Farm challenged the award, ultimately before the U.S. Supreme Court, which held that the case was "neither close

nor difficult" and that the award was plainly excessive. *See id.* at 418. In its opinion, the Court further refined the *Gore* guideposts, first addressing reprehensibility and identifying factors that could contribute to a finding thereof:

> "[T]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *Gore,* 517 U.S., at 575, 116 S.Ct. 1589. We have instructed courts to determine the reprehensibility of a defendant by considering whether: the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident. *Id.,* at 576–577, 116 S.Ct. 1589. The existence of any one of these factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award; and the absence of all of them renders any award suspect. It should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence. *Id.,* at 575, 116 S.Ct. 1589.

Id. at 419.

Regarding the second *Gore* "guidepost," the Court reiterated that it was not establishing a bright-line, *per se* rule, but, salient herein, recognized that

punitive-to-compensatory-damages ratios exceeding single digits would almost never satisfy constitutional scrutiny, except in extreme circumstances, such as particularly egregious conduct causing nominal damages:

> [W]e have been reluctant to identify concrete constitutional limits on the ratio between harm, or potential harm, to the plaintiff and the punitive damages award. 517 U.S., at 582, 116 S.Ct. 1589 ("[W]e have consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual *and potential* damages to the punitive award"); *TXO, supra,* at 458, 113 S.Ct. 2711. We decline again to impose a bright-line ratio which a punitive damages award cannot exceed. 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**. In *Haslip,* in upholding a punitive damages award, we concluded that **an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety**. 499 U.S., at 23–24, 111 S.Ct. 1032. **We cited that 4–to–1 ratio again in *Gore*.** 517 U.S., at 581, 116 S.Ct. 1589. **The Court further referenced a long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish.** *Id.,* at 581, and n. 33, 116 S.Ct. 1589. While these ratios are not binding, they are instructive. They 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, than awards with ratios in range of 500 to 1, *id.,* at 582, 116 S.Ct. 1589, or, in this case, of 145 to 1.
>
> Nonetheless, because there are no rigid benchmarks that a punitive damages award may not surpass, ratios greater than those we have previously upheld may comport with due process where "a particularly egregious act has resulted in only a small amount of economic damages." *Ibid.;* see also *ibid.* (positing that a higher ratio *might* be necessary where "the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine").

Id. at 424–25 (emphasis added). Notably, the court also recognized that where damages were substantial, ratios as low as 1:1 would mark the constitutional boundaries:

> When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee. The precise award in any case, of course, must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff.

Id. at 425. Applying the foregoing, the Court summarized as follows:

> In sum, courts must 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. In the context of this case, we have no doubt that there is a presumption against an award that has a 145–to–1 ratio. The compensatory award in this case was substantial; the [plaintiffs] were awarded $1 million for a year and a half of emotional distress. This was complete

> compensation. The harm arose from a transaction in the economic realm, not from some physical assault or trauma; there were no physical injuries; and State Farm paid the excess verdict before the complaint was filed, so the Campbells suffered only minor economic injuries for the 18–month period in which State Farm refused to resolve the claim against them.

Id. at 426.

Finally, regarding the third *Gore* "guidepost," the Court explained that the maximum fine for State Farm's conduct appeared to be a $10,000 fine, insufficient to justify the award of punitive damages therein. *See id.* at 428. And taking all the "guideposts" into consideration, the Court concluded that, given the substantial compensatory damages, the likely justifiable award was **at or near** the amount of compensatory damages, or a ratio of 1:1. *See id.* at 429.

The most faithful reading of *State Farm* reveals something of a flexible, regulatory framework. *Gore* and *State Farm* clearly set guidelines: in ordinary cases, a ratio of 4:1 is "close to the line" of constitutional prohibition, a sort of standard range of permissible punitive damage awards, consistent with the long tradition of statutes providing for double, triple, and sometimes quadruple exemplary damages; other single-digit ratios may be justifiable in extreme cases, and "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due

process." *Id.* at 424; *see also Gore*, 538 U.S. at 582-83. Higher ratios may be justified in exceptional circumstances, such as "where 'a particularly egregious act has resulted in only a small amount of economic damages' or 'the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.'). And even single-digit ratios may be constitutionally violative "[w]hen compensatory damages are substantial," in which case a ratio of 1:1 may be near the constitutional boundary. *State Farm*, 538 U.S. at 425; *see also id.* at 426 (suggesting only a 1:1 ratio would be constitutionally permissible). In other words, in terms of the question posed herein, double-digit punitive-to-compensatory-damage ratios are presumptively unconstitutional absent extraordinary circumstances such as particularly egregious conduct causing nominal compensatory damages; and even multiple-single-digit ratios are unconstitutional when compensatory damages are substantial.[1]

[1] *State Farm*'s "guideposts" in this regard are roughly analogous to sentencing guidelines, which typically provide mitigated, standard, and aggravated ranges of punishment for criminal conduct, each requiring varying degrees of justification, and allow for departures in the most egregious of circumstances. *Compare*, *e.g.*, *Payne v. Tennessee*, 501 U.S. 808, 820 (1991) (involving and discussing federal sentencing guidelines); *Commonwealth v. Walls*, 926 A.2d 957 (Pa. 2007) (involving and discussing Pennsylvania sentencing guidelines).

This reading is confirmed by *State Farm*'s application in the Circuit Courts of Appeal. *See*, *e.g.*, *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36 (1st Cir. 2009) (finding award with 10:1 ratio unconstitutional and finding award with 1:1 ratio appropriate in light of substantial compensatory damages); *Payne v. Jones*, 711 F.3d 85 (2nd Cir. 2013) (finding award with 5:1 ratio unconstitutional and finding award with 1:1 ratio appropriate in light of substantial compensatory damages); *Jurinko v. Medical Protective Co.*, 305 Fed. Appx. 13, 2008 WL 5378011 (3d Cir. 2008) (finding ratio of 3:1 unconstitutional in light of substantial compensatory damages and suggesting 1:1 ratio is maximum permissible ratio); *Nance v. Kentucky Nat. Ins. Co.*, 240 Fed. Appx. 539 (4th Cir. 2007) (finding ratio of 4:1 constitutionally permissible); *Rain Bird Corp. v. National Pump Co. LLC*, 144 Fed. Appx. 373 (5th Cir. 2005) (finding fractional ratio of 0.17:1 constitutional); *Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006) (finding ratio of 13:1 unconstitutional); *Epic Systems Corp. v. Tata Consultancy Servs. Ltd.*, 971 F.3d 662 (7th Cir. 2020) (finding ratio of 2:1 unconstitutional in light of substantial compensatory damages); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790 (8th Cir. 2004) (finding ratio of 10:1 unconstitutional in light of substantial compensatory damages); *Bennett v. American Medical Response, Inc.*, 226 Fed. Appx. 725 (9th Cir. 2007) (finding ratio of 6.49:1

unconstitutional in light of substantial compensatory damages); *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041 (10th Cir. 2016) (finding ratio of 11.5:1 unconstitutional in light of substantial compensatory damages).

It is also confirmed by decisions of state courts. *See*, *e.g.*, *M & J Materials, Inc. v. Isbell*, 153 So.3d 24 (Ala Civ. App. 2013) (finding ratio of 14:1 unconstitutional); *Hudgins v. Southwest Airlines, Co.*, 212 P.3d 810 (Ariz. App. Div. 2009) (finding ratio of 9:1 unconstitutional in light of substantial compensatory damages); *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63 (Cal. 2005) (adopting general framework based on ratios); *Roby v. McKesson Corp.*, 219 P.3d 749, 770 (Cal. 2009) (limiting awards to a 1:1 ratio in the context of substantial awards); *DeLucia v. Great Stuff, Inc.*, 2015 WL 5157127 (Del. Super. 2015) (finding ratio of 7.25:1 unconstitutional in light of substantial compensatory damages); *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. 2003) (finding ratio of 26:1 unconstitutional); *R.J. Reynolds Tobacco Co. v. Townsend*, 90 So.3d 307, 313 (Fla. App. 2012) (finding ratio of 4:1 unconstitutional in light of substantial compensatory damages); *Hall v. Farmers Alliance Mut. Ins. Co.*, 179 P.3d 276 (Idaho 2008) (finding ratio of roughly 35:1 unconstitutional but reasoning that ratio of 4:1 would be constitutional); *Turner v. Firstar Bank., N.A.*, 845 N.E.2d 816 (Ill. App. 2006) (finding ratio of 20:1 unconstitutional and reasoning that a single-digit ratio

would be constitutional); *Thornton v. American Interstate Ins. Co.*, 940 N.W.2d 1 (Iowa 2020) (finding ratio of 18:1 unconstitutional absent exceptional circumstances); *Yung v. Grant Thornton LLP*, 563 S.W.3d 22 (Ky. App. 2016) (finding 4:1 ratio permissible); *Grefer v. Alpha Technical*, 901 So.2d 1117 (La. App. 2005) (finding 18:1 ratio unconstitutional, and reasoning that a single-digit ratio would be appropriate); *Harvey-Jones v. Coronel*, 196 A.3d 36 (Md. App. 2018) (finding ratio of 20:1 appropriate in light of exceptional circumstance that harm was difficult to prove); *Rhodes v. AIG Domestic Claims, Inc.*, 961 N.E.2d 1067 (Mass. 2012) (affirming award with ratio of 2:1); *Atler v. Murphy Enterprises, Inc.*, 104 P.3d 1092 (N.M. App. 2004) (affirming award with single-digit ratio); *Brown v. LaFontaine-Rish Medical Assocs.*, 822 N.Y.S.2d 527 (N.Y. App. Div. 2006) (finding double-digit ratio constitutional); *Goddard v. Farmers Ins. Co. of Oregon*, 120 P.3d 1260 (Or. App. 2005) (holding ratio of approximately 22:1 unconstitutional and imposing a maximum ratio of 3:1); *Duncan v. Ford Motor Co.*, 682 S.E.2d 877 (S.C. App. 2009) (affirming single-digit ratio); *Roth v. Farner-Bocken Co.*, 667 N.W.2d 651 (S.D. 2003) (finding 20:1 ratio unconstitutional and limiting to a 1:1 ratio); *SAS & Associates, Inc. v. Home Marketing Servicing,*

Inc., 168 S.W.3d 296 (Tex. App. 2005) (finding ratio of 16:1 unconstitutional); *Carpentier v. Tuthill*, 86 A.3d 1006 (Vt. 2013) (affirming single-digit ratio).[2]

Below, the panel acknowledged *State Farm*'s guidance in this regard, but essentially ignored it in substance, relying on the Court's reluctance to adopt all-purpose ratio-based rules. *See Bert*, 257 A.3d at 122 (Pa. Super. 2021) (emphasizing the court's statements that it has not established any "bright-line ratio" and that "there are no rigid benchmarks"). Certainly, the Court was not inclined to say, for example, that a ratio of 4:1 is *always*

[2] It is also noteworthy around the same time, the High Court and this Honorable Court have, in the criminal context, recently shown willingness to enforce constitutional restrictions on grossly excessive monetary sanctions, albeit under different constitutional grounds. *See generally Austin v. United States*, 509 U.S. 602 (1993) (involving forfeiture of mobile home and auto body shop based on owner's sale of cocaine); *United States v. Bajakaijian*, 524 U.S. 321 (1998) (involving forfeiture of $357,144 for owner's failure to report taking it out of the country); *Commonwealth v. 5444 Spruce Street*, 832 A.2d 396 (Pa. 2003) (involving forfeiture of house based on owner's sale of drugs); *Commonwealth v. Eisenberg*, 98 A.3d 1268 (Pa. 2014) (involving fine of $75,000 for theft of $200); *Commonwealth v. 1997 Chevrolet and Contents Seized from Young*, 160 A.3d 153 (Pa. 2017) (involving civil forfeiture of home and vehicle used by owner's marijuana-dealing son); *Shoul v. Commonwealth*, 173 A.3d 669 (Pa. 2017) (involving forfeiture of commercial driver's license for drug offense). Importantly, although these efforts are salutary, analysis of criminal monetary sanctions contemplates a wider range of constitutionally permissible sanctions because of the additional procedural protections attendant a criminal proceeding. *See State Farm*, 538 U.S. at 417 (noting increased scrutiny warranted based on lack of procedural protections). In other words, a fine, imposed after a criminal trial, may be constitutional, where an equivalent punitive damage award, imposed after a civil trial, is not.

unconstitutional, regardless of the presence of aggravating circumstances, or that a ratio of 2:1 is *always* constitutional, regardless of whether compensatory damages are significant. But the panel overstates the Court's reluctance to provide ratio-based guidance. In other words, it is one thing to say that there are no "rigid benchmarks" and another to say that there are none at all, particularly in light of the Court's repeated instructions in *Haslip*, *Gore*, and *State Farm*, and the overwhelming bulk of authority throughout the nation that the universe of permissible ratios, at least absent extraordinary circumstances, is in the single-digits, and almost always the lower single-digits, and that even 1:1 may be too great in the context of significant compensatory damages. In short, the panel simply gives the High Court's considered formulation and refinement of the second "guidepost" short shrift. *But see*, *e.g.*, *Dole v. City of Philadelphia*, 11 A.2d 163, 166 (Pa. 1940) (noting High Court's pronouncements, even in dicta, are "not merely chance observation[s]").

2. Analysis under *State Farm* in the context of jointly and severally liable tortfeasors should be conducted on a per-judgment basis, which is more consistent with the nature of joint and several tortfeasors, and a contrary rule leads to further arbitrariness in the form of "double-counting" of compensatory damages.

It is an open question, in terms of U.S. Supreme Court decisional law, whether analysis under *State Farm*, in the context of jointly and severally

liable tortfeasors, should be conducted on a per-judgment basis or a per-defendant basis. Indeed, courts have decided the issue both ways. *See*, *e.g.*, *Olson v. Brenntag N. Am., Inc.*, 2020 WL 6603580 (N.Y. Sup. Ct. 2020); *Planned Parenthood of Columbia/Willamette, Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949 (9th Cir. 2005) (per defendant).

However, the better view is that analysis under *State Farm* should be conducted on a per-judgment basis, at least in cases such as this one. Juries assess – and, more saliently, this jury assessed – compensatory damages against joint and several tortfeasors all at once, as they are all liable for the full amount of damages. *See generally Maloney v. Valley Medical Facilities*, 984 A.2d 478, 488-89 (Pa. 2009) (discussing nature of joint and several liability). Thus, in the instant case, there is no factually or legally cogent way to assess *defendant*-specific compensatories, and therefore no factually or legally cogent way to assess *defendant*-specific compensatory-to-punitive-damage ratios for evaluation under *State Farm*. The court in *Olson* identified the rub:

> Some courts have dealt with this issue by computing the punitive-to-compensatory damages ratio based on the defendants' relative degrees of culpability as found by the jury. (*See Lompe v. Sunridge Partners LLC*, 818 F3d 1041, 1068-1069 & n 25 [8th Cir 2016].) Here, however, the jury's compensatory-damages verdict in Phase I did not differentiate between the two defendants. The Phase I verdict

> sheet—to which, in relevant part, plaintiffs agreed—called for the jury to find simply *whether* each defendant was culpable (yes or no) and to assign a *total* award for each component of compensatory damages, rather than separately award compensatory damages as against each defendant. (*See* Tr. at 9517-9522 [May 21, 2019] [announcement of verdict]; *see generally* Tr. at 8709-9744 [May 13, 2019] [charge conference].)
>
> . . . [A]s the Phase I verdict sheet reflects, this case was not *tried* in a way that treated the two defendants separately, whether in terms of particular wrongful acts, relative culpability for conduct harming plaintiffs, or overall reprehensibility. In these circumstances, this court concludes that the only appropriate method to calculate the punitives-to-compensatories ratio is to compare total punitive and total compensatory damages. (*See Bardis v. Oates*, 119 Cal App 4th 1, 21 n 8 [Cal Ct App, 3d Dist 2004], *rev. denied* (Sept. 15, 2004), *cert. denied*, 543 U.S. 1150 [2005].)

Olson, 2020 WL 6603580 at *47.

In practice, then, what assessing a punitive-to-compensatory ratio on a per-defendant basis in the context of joint and several tortfeasors actually amounts to is the double- (or more) counting of compensatory damages. By way of illustration, suppose ten tortfeasors are assessed a total of $100,000 in compensatory damages and $200,000 in punitive damages. Each defendant is actually responsible for some portion of the $100,000, but is held vicariously liable for the remainder actually attributable to the other tortfeasors. *Accord Maloney*, *supra*. Yet, assessing the ratio on a per-

defendant basis, the same $100,000 provides the separate bases for calculating the outer limit of 10 punitive damage awards. Assuming for the sake of argument that a ratio of 9:1 were constitutionally permissible due to the presence of particularly aggravating circumstances, this would mean that the same $100,000 verdict would justify punitive damages of up to $900,000 per defendant, or $9,000,000 in total. And if there were 20 tortfeasors instead of 10, the limit would be $1,800,000 per defendant, or $18,000,000 in total. Such arbitrariness is the hallmark of a due process violation.

The panel's opinion, mired in unnecessary mathematical abstraction,[3] failed to account for this basic principle. The panel relied heavily on *Planned Parenthood*, in which the district court "compar[ed] the total joint and several liability of each defendant for compensatory damages . . . with that defendant's liability for punitive damages." *Planned Parenthood*, 422 F.3d at 960. On appeal, the 9th Circuit displaced that approach in favor of one "that would compare each plaintiff's individual compensatory damages and punitive damages awards as to each defendant." *Id.* at 960. In other words, the 9th Circuit focused on individualized harm, individualized awards, and individualized constitutional claims, which it found "more accurately

[3] *See Bert*, 257 A.3d at 125-27 (identifying different methods of calculation by resort to mathematical formulae containing Greek variables and subscripts).

reflect[ed] the true relationship between the harm for which a particular defendant is responsible, and the punitive damages assessed against that defendant." *Id.*

First, it bears noting that in *Planned Parenthood*, the defendants were at least arguably not joint and several tortfeasors: indeed, the 9th Circuit expressed some degree of pause on the subject, although not disturbing the district court's finding in that regard. *See id.* at 960 & n.5 (noting the parties "do not dispute" that the awards are joint and several and explaining the basis for potential dispute). But more importantly, the verdict slip therein contained itemized compensatory damages for each and every defendant, seemingly reflecting that they were actually treated as consecutive or successive tortfeasors. *See id.* at 961-962 (discussing individualized amounts and calculating ratios based on each amount). Thus, the individualized approach in *Planned Parenthood* was capable of principled application.[4]

[4] The panel also relied on *Horizon Health Corp. v. Acadia Healthcare Co., Inc.*, 520 S.W.3d 848 (Tex. 2017), which followed similar logic and likewise failed to account for the problem of double-counting and, in any event, was rooted in a state-specific procedural rule. *See*, *e.g.*, *JNM Express, LLC v. Lozano*, 2021 Tex. App. LEXIS 3036, at *32 (Tex. App. 2021) (explaining the local procedural wrinkle).

Here, the panel goes yet further afield, sanctioning the use of the *total* amount of compensatory damages (and indeed, potential damages) as a comparator to the award of punitive damages. *See Bert*, 257 A.3d at 132. This method not only holds each defendant responsible for a portion of damages attributable for its own conduct, but also portions attributable to all other defendants' conduct, *and* does it over and again for each defendant. In other words, the compensatory damages factually attributable to *other* defendants arbitrarily provide the basis for punitive damages against each individual defendant. Again, this is the hallmark of arbitrariness that violates due process.

3. The most faithful reading of *State Farm* and related decisions reflects that analysis thereunder should not be conducted on the basis of a plaintiff's potential harms left unpresented to the jury, and this reading is confirmed by State Farm's application in courts throughout the country.

Finally, it is also something of an open question whether and to what degree a punitive damages award should be justified by resort to a plaintiff's "potential harm." The concept arises from *TXO*, a plurality decision, which considered potential harm, which at least one sitting Justice referred to as judicial activism designed to preserve the verdict therein, and likely to undo the salutary holding of *Haslip*. *See generally TXO*, 509 U.S. at 472 (O'Connor, J., dissenting); *see also id.* at 484-85 ("Virtually any tort . . . can

cause millions of dollars of harm if imposed against a sufficient number of victims."). And although the *Gore* court referred to the *lack* of potential harm implicated therein, it did not reiterate *TXO*'s adoption of the rubric. *See Gore*, 517 U.S. at 584. And although *State Farm* appeared to recognize potential harm as a factor, *State Farm*, 538 U.S. at 418, the Court has subsequently cautioned against reliance on potential harm that is not "likely" to occur. *See Cooper Indus.*, 532 U.S. at 442 (distinguishing between likely harm and harm that might occur); *see also Roth v. Farmer-Bocken Co.*, 667 N.W.2d 651, 669 (S.D. 2003) (applying distinction). Additionally, it is notable that neither *Gore* nor *State Farm* actually involved the use of potential harm to justify an award. *Accord Union Co. v. Southwest Gas Corp.*, 281 F. Supp. 2d 1090, 1104 (D. Ariz. 2003) (explaining as much). In any event, inasmuch as it is the jury's award that is being reviewed, evidence, argument, and instruction about potential harm should be presented to the jury; analysis under *State Farm* should not simply be an "after-the-fact-rationalization invented . . . to defend [a] startling award on appeal." *TXO*, 509 U.S. at 484-85 (O'Connor, J. dissenting).

The panel below goes to great lengths to suggest that the jury considered potential harm herein. *See Bert*, 257 A.3d at 128-32. However, the record demonstrates otherwise. Preliminarily, the trial court *precluded*

the plaintiffs from referring to its preliminary injunction of the underlying conduct *and* from referring to any potential harm that its continuation could have caused. Moreover, the parties made no argument on the subject, and the verdict slip contained no separate finding of potential harm. Instead, the evidence cited by the panel, although perhaps providing the basis for advocacy in the trial court, is best described as a post-hoc rationalization to preserve the award. The panel's sanctioning of such post-hoc rationalization and its application herein should be rejected by this Honorable Court.

CONCLUSION

In appropriate circumstances, punitive damages can serve legitimate governmental objectives of punishing tortious conduct and deterring would-be tortfeasors, and the U.S. Supreme Court has provided important guideposts to prevent arbitrary deprivations of property that are plainly excessive to accomplishing those goals. The panel decision not only disregards those guideposts, but also sanctions damages calculations that make awards *more* arbitrary. This Honorable Court should correct its errors. Accordingly, *Amici Curiae* respectfully request that this Honorable Court enter an order reversing the panel's order.

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I certify that this brief complies with the word-count limits of Pa.R.A.P. 531, as it contains fewer than 7,000 words, exclusive of excluded materials, and complies with the provisions of the *Public Access Policy of the Unified Judicial System of Pennsylvania – Case Records of the Appellate and Trial Courts* requiring the filing of confidential information and documents differently than non-confidential information and documents.

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