No.

IN THE

Supreme Court of the United States

FORD MOTOR COMPANY,

Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.

Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondent Benetta Buell-Wilson was injured when she lost control of her Ford Explorer and it rolled over. Although Ford had prevailed in the previous eleven cases alleging similar design defects in the Explorer, a California jury found that the vehicle was defectively designed and awarded respondent and her husband more than $368 million, including $246 million in punitive damages. The California Court of Appeal found that the jury had acted with "passion or prejudice," and reduced the awards, but upheld liability for both compensatory and punitive damages.

The questions presented are:

1. Whether California law deprives defendants of "fair notice" and thus violates the Due Process Clause if it permits the imposition of liability for punitive damages without regard to any objective indicators of reasonable conduct—including industry custom, governmental safety standards and policy judgments, and the existence of a genuine debate about what the law requires.

2. Whether, in upholding a $55 million punitive damage award and disregarding objective indicators of reasonableness and good faith in determining constitutional excessiveness, the court rendered the "reprehensibility guidepost" a nullity, by depriving it of any constraining force in product liability cases.

3. Whether the Due Process Clause prohibits using a punitive damage award to punish a manufacturer for selling products not at issue in the case or to third parties not before the court.

PARTIES TO THE PROCEEDINGS AND RULE 29.6 STATEMENT

The plaintiffs in this case are Benetta Buell-Wilson and Barry Wilson. The defendants are Ford Motor Company and Drew Ford.

Ford Motor Company has no parent corporation, and no publicly held company owns ten percent or more of its stock.

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PETITION FOR A WRIT OF CERTIORARI

Petitioner Ford Motor Company ("Ford") respectfully petitions this Court for a writ of certiorari to review the judgment of the California Court of Appeal in this case.

OPINIONS AND ORDERS BELOW

The court of appeal's opinion (Petitioner's Appendix ("App.") 1a-61a) is reported at 141 Cal. App. 4th 525 (2006).

JURISDICTION

The court of appeal entered its judgment on July 19, 2006. The California Supreme Court denied Ford's timely petition for review on November 1, 2006. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause provides: "No State shall . . . deprive any person of life, liberty, or property, without due process of law." U.S. CONST., amend. XIV, § 1. California's punitive damage statute, Civil Code Section 3294, is reproduced in the Appendix. *See* App. 115a-116a.

STATEMENT OF THE CASE

This Court has never examined the constitutional limits on punitive damages in the product design context, and this case presents the ideal opportunity to address three important and recurring questions that routinely arise in such cases.

The first question is whether a punitive damages statute that is interpreted to permit a manufacturer to be punished without reference to any objective indicator of reasonable conduct is unconstitutionally vague because it fails to provide "fair notice" as to how the manufacturer can conform its conduct to the law and avoid arbitrary, multimillion-dollar penalties. *See State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538

U.S. 408, 417 (2003) ("'[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment.'") (quoting *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 (1996)). The court of appeal held that, under California law, objective measures of reasonable conduct—such as compliance with industry custom and federal safety standards and policy judgments, and a reasonable disagreement within the engineering community—had no bearing on its punitive damage inquiry, and allowed the jury to impose punishment based on its retrospective determination that Ford had miscalculated when it balanced the risks and benefits of the Explorer's design. The court's interpretation renders California law so vague as applied to product design cases that manufacturers have no idea what conduct in hindsight might be deemed "malicious" and thus subject them to punishment. This approach not only directly conflicts with numerous decisions of this Court and lower courts, but also directly interferes with federal automotive safety policy.

The second question presented is how these objective indicators and other considerations should be factored into the reprehensibility analysis for determining the constitutionally permissible *amount* of a punitive damage award. By declining to consider objective factors, the court of appeal made reprehensibility a concept without constraining force in product liability cases, as the factors the court *did* consider—such as the fact that a consumer was physically injured and that the product (like almost all products) posed known risks—will be present in almost every case. The court's approach to reprehensibility conflicts with *State Farm* and *Gore*, as well as with the approach followed by the Sixth and Ninth Circuits. *See Clark* v. *Chrysler Corp*., 436 F.3d 594 (6th Cir. 2006); *In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006).

Finally, the third question is one that is currently before this Court in *Philip Morris USA* v. *Williams*, No. 06-1289: whether due process forbids punishing a defendant for alleged harm to third parties. Here, Ford was punished for its

sales of the Explorer—as well as the Bronco II—to third parties not before the court; therefore this Court should, at a minimum, hold this petition pending a decision in *Williams*.

1. In January 2002, respondent Benetta Buell-Wilson was driving her four-door 1997 Ford Explorer at freeway speed. App. 5a. She swerved suddenly to avoid a metal object that flew off a motor home in front of her. *Id*. Her vehicle rolled over 4 ½ times and came to rest upside down. *Id*. She suffered a severe spinal cord injury that rendered her paraplegic. *Id*. at 6a. She and her husband sued, alleging that their Explorer was "dangerously unstable and prone to rollover due to its overly narrow track width and high center of gravity" and the roof was "inadequately supported and defectively weak." *Id.* at 8a. Respondents also argued that Ford failed to warn of the alleged defects. *Id*. at 12a-14a.

Respondents' rollover defect theory was that the 1997 Explorer was "unstable and prone to rollover" because its "stability index"—a number obtained by dividing the track width of a vehicle by its center of gravity height—was too low. App. 8a-9a. Respondents' expert also claimed the Explorer's stability index was even lower than that of the Bronco II (a smaller, two-door SUV designed by Ford in 1981), and relied on a Ford document suggesting the Bronco II had a "rollover rate [that was] three times higher than the Chevy S-10 Blazer." *Id.* at 10a.

While admitting evidence concerning comparative rollover rates of other vehicles, the trial court refused to allow Ford to present such data *as to the Explorer itself*. Ford's analysis would have shown that the Explorer had a rollover rate that was much better than the Bronco II, virtually identical to the Chevrolet Blazer, and, in fact, "one of the best rollover rates compared to other SUV's in its class." App. 20a.

It was not surprising to Ford that the Explorer performed much better in the real world than simple reliance on the stability index would have predicted, because the index has long been known to be at best an incomplete predictor of rollover rates. This was not a conclusion Ford reached on its own. In

fact, the National Highway Traffic Safety Administration ("NHTSA")—the federal agency charged by Congress with regulating motor vehicle safety—has repeatedly considered whether imposing a minimum stability index is consistent with national safety policy, and has repeatedly concluded that it is not. NHTSA made this determination in part because the stability index "does not take into consideration such chassis and suspension variables as wheelbase, kinematic and compliance characteristics of suspensions, and spring and shock absorber characteristics," and in part because imposing a minimum stability index would "severely reduce the capability of utility vehicles to perform their intended off-road occupational and recreational functions." 52 Fed. Reg. 49033, 49035, 49037 (Dec. 29, 1987).

Respondents' expert agreed that design characteristics, other than those reflected in the stability index, affect stability. Reporter's Transcript ("RT") 3712-3714. As he testified, "[y]ou can't tell until you go out and test it." RT3721. But the issue of what tests to use to evaluate rollover stability has itself been a subject of substantial debate among engineers and regulators for decades. In 1988, when the Explorer was being designed, NHTSA observed that "there is no standard, accepted test or series of test procedures and performance requirements which accurately predict a vehicle's rollover propensity." 53 Fed. Reg. 34866, 34867 (Sept. 8, 1988). Since that time, NHTSA has studied numerous proposed methods of testing and evaluating vehicle handling and stability, including, among many others, J-turn, Fishhook, and Consumers Union ("CU"). *See* 67 Fed. Reg. 62528 (Oct. 7, 2002). Not until October 2003, more than eighteen months after the accident at issue and fifteen years after the Explorer was developed, did NHTSA finally conclude that "[t]he J-Turn maneuver and the Fishhook maneuver . . . were . . . the most objective tests of the susceptibility of vehicles to maneuver-induced on-road rollover." 68 Fed. Reg. 59250-59251, 59252 (Oct. 14, 2003).

In accord with its longstanding policy, Ford required the Explorer to pass the J-turn test—an extreme maneuver in

which the driver abruptly turns the steering wheel 360 degrees in one direction. RT3243, 1288. Respondents' expert agreed the J-turn is an appropriate test, RT3612, and conceded the Explorer passed it. RT3657.

NHTSA has repeatedly considered and rejected the CU test, the stability test (other than the stability index) most heavily relied on by respondents. In 1988, as the Explorer was being designed, NHTSA found that the CU test "do[es] not have a scientific basis and cannot be linked to real-world crash avoidance needs, or to actual crash data." 53 Fed. Reg. 34866, 34867 (Sept. 8, 1988). Nevertheless, CU used its test to evaluate vehicles and publish reviews based on these tests, and Ford was concerned about unfavorable publicity in the event the Explorer did not receive a satisfactory rating from CU. Appellant's Appendix ("AA") 2482. Therefore, after the Explorer had already passed the J-turn test and *all* of Ford's other internal requirements, RT3261-3262, AA2480, Ford engineers suggested four design changes that would maximize the chances that the Explorer would pass the CU test. AA2478-2481. Although, like those at NHTSA, these engineers believed that the CU test is "generally unrepresentative of [the] real world," AA2518-2519, Ford made two of the suggested four changes. AA2502.

As a result, the production model Explorer sold to consumers passed the CU test when tested by Ford, by NHTSA, and by CU itself. RT3232, 3636. Although respondents cited evidence that some prototypes failed certain tests during development, their expert admitted that when tested by NHTSA even the *least stable* production model of the Explorer passed *all four* handling and stability tests that he advocated. RT3635-36.

The respondents' Explorer had a federally-mandated warning on the visor warning consumers that the vehicle handled differently than passenger cars and that there was a risk of rolling over in sudden maneuvers. RT1723-26.

Despite the fact that the Explorer conformed to industry custom, met all federal safety standards and requirements,

passed all tests required by Ford's internal policies, and received modifications that permitted it also to pass the non-mandated CU test, the trial court allowed respondents to argue that Ford had acted with "malice" in addressing Explorer stability issues during the design process. Respondents relied principally on internal Ford documents in which engineers—not surprisingly—debated the risks and benefits of the Explorer and compared it to the Bronco II. Although the jury was not asked to and did not decide if the Bronco II was defective, respondents' counsel encouraged the jury to impose punitive damages based on Ford's design and marketing of the Bronco II, RT8172-8174, as well as the Explorer. *Id.*

Respondents also argued that punitive damages were justified because Ford knew that the Explorer's roof design posed unreasonable risks and they alleged that the roof crushed during the rollover sequence, causing Mrs. Wilson's injury. Ford, however, introduced evidence that the Explorer's roof met Federal Motor Vehicle Safety Standard 216, 49 C.F.R. § 571.216, the standard governing roof strength. RT5145, 5179.[1]

Ford also demonstrated that engineers have debated the optimal level of roof strength for decades. Ford introduced scientific studies demonstrating that increasing roof strength does not result in a reduction of injuries, because rollover injuries typically occur when the vehicle occupant is thrown into the roof prior to any "crush" occurring. RT5151-5168.

2. Over Ford's due process and state law objections, RT8128-8136, 8433-8438, 8451-8456, 8461-8462, 8475-8488, 8496-8500, the trial court gave California's standard jury instructions on punitive damages. App. 109a-114a. The court rejected Ford's proposed additional instructions that would have told the jury that "[p]unitive damages generally are not appropriate where a manufacturer has designed its

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[1] Respondents complained about Ford's testing procedure and attacked the federal standard, contending that NHTSA "has blown it on 216," RT 2404, but their expert did not test the roof. RT2533-2534.

product to meet or exceed government safety standards," and that "[p]unitive damages ordinarily cannot be awarded where the manufacturer has designed its product consistent with industry custom and practice." App. 99a-102a. The court rejected Ford's proposed instruction that punitive damages cannot be imposed to punish objectively reasonable conduct: "You may not award punitive damages if reasonable people could disagree about whether Ford's conduct was correct or lawful." *Id*. at 97a-98a. And the court refused to instruct the jury that "[i]n determining the appropriate amount of punitive damages . . . you may consider only the harm to the plaintiffs," and that "you may not consider Ford's size, wealth, [or] its overall profits and revenues." *Id*. at 103a-105a.

Before this trial, eleven Ford Explorer cases involving similar claims had gone to judgment, and in all eleven cases judgment was entered in favor of Ford. AA1154-1235. But in this case, the jury found the Explorer had stability and roof design defects, that Ford failed to warn about the roof, and that these were substantial factors in causing Mrs. Wilson's injuries. App. 79a-83a. The jury awarded Mrs. Wilson $573,348 for past economic loss, $4.032 million for future economic loss, and $105 million for non-economic loss—five times more than requested. *Id.* at 14a, 33a-34a. The jury also awarded Mr. Wilson $13 million for loss of consortium. *Id.* at 84a. The jury found by a 9-3 vote that Ford acted with "malice" warranting punitive damages. *Id.*

In the trial's second phase, respondents' counsel emphasized Ford's worldwide net worth, at the time $12.8 billion. RT8509-8511. Counsel urged the jury to act as the "conscience of our community," RT8526, and exhorted the jury to "send a direct message from society to Ford Motor Company, to Mr. Ford and to his Board of Directors and their wall panel conference room," a message "that gets the publicity." RT8508-8510. He emphasized that "our community here in California is relying on you to do the job. And that is to assess, to send the message, to help make our community safe." RT8525; *see also* RT8156-8157 (addressing "what has happened to Benetta Wilson, and others like her").

The jury then imposed $246 million in punitive damages—twice the amount respondents sought. The trial court denied JNOV but found the damages excessive. It reduced Mrs. Wilson's compensatory damages award to $70 million, Mr. Wilson's loss of consortium award to $5 million, and the punitive damages to $75 million. App. 71a.

3. The California Court of Appeal affirmed the judgment on liability for both compensatory and punitive damages. App. 4a. Although the court found "compelling evidence" that during the phase of the trial in which the jury held Ford liable for punitive damages, the jury was acting out of "passion or prejudice" and was not a "fair and neutral trier of fact," App. 35a, the court held that these defects could be cured by remitting the compensatory damages to $27.6 million and the punitive damages to $55 million. App. 4a.

In upholding liability for punitive damages, the court held that evidence that the Explorer "had one of the best rollover rates compared to other SUV's in its class" was "irrelevant" under California law, and that "admission of such evidence [would have been] reversible error." App. 20a-22a. The court declared that "compliance with industry standards or custom was irrelevant not only to the issue of defect, but also to punitive damages." *Id*. at 23a.

Nor did the court give any weight to Ford's compliance with the federal safety standards and the policy judgments of NHTSA, deciding instead that "'[g]overnmental safety standards . . . have failed to provide adequate consumer protection against the manufacture and distribution of defective products.'" *Id*. at 47a (quoting *Grimshaw* v. *Ford Motor Co.*, 119 Cal. App. 3d 757, 810 (1981)). The court also "reject[ed] [the] contention" that the existence of a "reasonable disagreement" among engineers and safety experts over these technical and complex design judgments precluded an award of punitive damages. *Id*. at 43a. And the court rejected Ford's argument that, if punitive damages were imposed here, then California law is unconstitutionally vague as applied because there would be no objective standards by

which a manufacturer could safely judge its design decisions and avoid punishment. App. 50a.

Finally, the court rejected these same objective factors in addressing Ford's constitutional challenge to the amount of the punitive damage award, holding that "the reprehensibility of Ford's conduct was high." App. 55a. The court premised the punishment on Ford's sale of the Explorer, as well as the Bronco II, to third parties not before the court. *Id*. at 43a, 47a, 55a-57a; *see also* App. 107a-108a.

3. Ford filed a timely petition for review with the California Supreme Court arguing, among other things, that "[r]eview is . . . needed because the Court of Appeal's interpretation of section 3294 renders it unconstitutionally vague as applied in this case, both because Ford did not have notice sufficient to tailor its conduct to avoid punishment and because of the risk of arbitrary and discriminatory enforcement." Pet. for Rev. 32 n. 5. Ford further argued that the court of appeal "misinterpreted the due-process excessiveness standards governing punitive damages" by refusing "to consider key objective factors in upholding a record-setting $55 million punishment. Instead, the court relied on factors condemned by *State Farm*, such as Explorer sales to consumers not before the court, even though Ford had prevailed in the eleven prior Explorer cases." *Id*. at 5. The California Supreme Court denied review. App. 108a.

REASONS FOR GRANTING THE WRIT

I. REVIEW IS WARRANTED TO CLARIFY HOW THE DUE PROCESS "FAIR NOTICE" PRINCIPLE APPLIES TO STANDARDS FOR DETERMINING PUNITIVE DAMAGE LIABILITY

The decision below upholding the jury's imposition of punitive damages flatly contravenes the Due Process Clause's prohibition on punishments based on standards that are so vague that they neither meaningfully inform the de-

fendant of what conduct is proscribed nor prevent the arbitrary infliction of punishment. While this Court's prior decisions have addressed the constitutional constraints on the *amount* of punitive damage awards, the Court has never granted review in a case to clarify what the due process "fair notice" mandate requires in the context of the threshold liability determination as to these punishments.

The Court should do so here. The ad hoc, arbitrary imposition of punitive damages based on vague and subjective standards is the root cause of the flood of huge verdicts that prompted this Court to recognize "that there are procedural and substantive constitutional limitations on these awards." *State Farm*, 538 U.S. at 416-417 (quotation marks omitted). Guidance from this Court will help stem the tide of unconstitutional punitive damage verdicts and reduce the need for courts to engage in excessiveness review.

1. "'[E]lementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice . . . of the conduct that will subject him to punishment." *State Farm*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574). Indeed, the "concept of fair notice [is] the bedrock of any constitutionally fair procedure." *Lankford* v. *Idaho*, 500 U.S. 110, 121 (1991). "The Due Process Clause does not permit a State to classify arbitrariness as a virtue," and "[a] State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim." *State Farm*, 538 U.S at 417 (citations omitted).

While *State Farm* and *Gore* focused on the failure to provide fair notice of the *severity* of the punishment that could be imposed, the right to fair notice of the *conduct* that can give rise to punishment is even more fundamental. No matter what one might think of the Court's involvement in issues concerning the *amount* of punitive damages, the Court's concern with providing fair notice and opportunity to avoid punishment altogether has an even longer pedigree and is even more strictly enforced. As the Court put it most re-

cently in *Arthur Andersen LLP* v. *United States*, 544 U.S. 696 (2005), "a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *Id*. at 703 (quotation omitted).

Moreover, the Court has made clear that "because we assume that man is free to steer between lawful and unlawful conduct, we insist that laws give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, so that he may act accordingly. Vague laws may trap the innocent by not providing fair warning." *Grayned* v. *City of Rockford*, 408 U.S. 104, 108 (1972); *see also City of Chicago* v. *Morales*, 527 U.S. 41, 56 (1999) (due process requires "the kind of notice that will enable ordinary people to understand what conduct [a law] prohibits"). In addition, if arbitrary and discriminatory enforcement is to be prevented, laws must provide explicit standards for those who apply them. "A vague law impermissibly delegates basic policy matters to policemen, judges, and juries for resolution on an *ad hoc* and subjective basis, with the attendant dangers of arbitrary and discriminatory application." *Grayned*, 408 U.S. at 108-109; *Kolender* v. *Lawson*, 461 U.S. 352, 357-358 (1983) (law unconstitutionally vague if it fails to "establish minimal guidelines to govern law enforcement" and confers upon "policemen, prosecutors, and juries" "a standardless sweep . . . to pursue their personal predilections").

In short, a "statute which either forbids or requires the doing of an act in terms so vague that men of common intelligence must necessarily guess at its meaning and differ as to its application, violates the first essential of due process." *Connally* v. *Gen'l Constr. Co.*, 269 U.S. 385, 391 (1926).

2. The combination of California product liability and punitive damage law, as applied here, violates these fundamental due process principles, and conflicts with decisions of this Court and other courts in analogous contexts.

a. California's standards for determining strict tort liability for defective product designs are exceedingly vague

and subjective, and by definition retrospective, with the jury setting a new safety "standard" in each case and then applying that standard to the facts at hand. California's "risk-benefit" test, which the courts applied here, empowers a jury to decide, "through hindsight," if a product design is defective by weighing, "among other relevant factors, the gravity of the danger posed by the challenged design, the likelihood that such danger would occur, the mechanical feasibility of a safer alternative design, the financial cost of an improved design, and the adverse consequences to the product and to the consumer that would result from an alternative design." *Barker* v. *Lull Eng'g Co., Inc.*, 20 Cal. 3d 413, 431 (1978). The risk-benefit test thus "directs the jury to weigh or balance a number of factors and sets out a list of *competing* considerations for the jury to evaluate in determining the existence of a design defect." *Anderson* v. *Owens-Corning Fiberglas Corp.*, 53 Cal. 3d 987, 1001 (1991) (emphasis added). Once the plaintiff proves the design caused his or her injuries, California law shifts the burden to the defendant to prove that the design's benefits outweigh its risks, *Barker*, 20 Cal. 3d at 432, and the plaintiff need not prove fault.

Because this test authorizes individual lay juries to make an after-the-fact policy decision as to a complex product design, its application is necessarily unpredictable. As one commentator has observed, "[t]he very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree" and "[t]here is therefore a vast defect 'no man's land' where a manufacturer has no idea whether it is on the right or wrong side of the law. . . ." David G. Owen, *Problems In Assessing Punitive Damages Against Manufacturers Of Defective Products*, 49 U. Chi. L. Rev. 1, 37-38 (1982).

b. Although the California punitive damage standard is theoretically capable of rational application in many circumstances, the court of appeal in this case applied the standard in a way that renders it devoid of any objective content that might provide fair notice of when punitive damages may be

imposed against a manufacturer in the murky area of product liability.[2] California Civil Code Section 3294 permits punitive damages where "it is proven by clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice." As relevant here, section 3294(c)(1) defines "malice" as "despicable conduct which is carried on by the defendant with a willful and conscious disregard of the rights or safety of others." But in evaluating whether Ford acted with such malice, the court of appeal (like the trial court) dismissed as irrelevant all objective standards, including three that are widely recognized in product design cases as bearing directly on punitive damages: conformance to industry custom, compliance with federal regulations and policy judgments, and the existence of an objectively reasonable disagreement in the engineering community over the design issues in question. *See supra*, at 6-9.[3]

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[2] Ford is making an as-applied challenge, and is not arguing that the statute is unconstitutional on its face. The nature of the challenge, however, does not diminish the broad significance of the question presented, because a decision by this Court establishing the constitutional boundaries for imposition of punitive damage liability in design defect cases will serve as a due process check on hundreds—if not thousands—of such cases each year, as well as influence the manner is which punitive damage standards are applied and reviewed in countless other cases.

[3] **Industry custom**: *See, e.g.*, *Drabik* v. *Stanley-Bostitch, Inc*., 997 F.2d 496, 510 (8th Cir. 1993) ("Compliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind. . . ."); *Flax* v. *DaimlerChrysler Corp*., 2006 WL 3813655, *27 (Tenn. Ct. App. Dec. 27, 2006) (vacating punitive damage verdict and observing that vehicle manufacturer's adherence to "industry customs and standards" is "relevant when determining whether [its] conduct is reckless"). **Federal safety standards**: *See, e.g.*, *Richards* v. *Michelin Tire Corp*., 21 F.3d 1048, 1059 (11th Cir. 1994) (granting judgment on punitive damages where, inter alia, "the record demonstrates that [the manufacturer] complied with all requisite Federal Motor Vehicle Safety Standards"); *Flax*, 2006 WL 3813655, at *25 (such compliance "weighs heavily . . . against a clear and convincing finding of recklessness"); W. Page Keeton, *et al*., *Prosser and Keeton on the Law of Torts* § 36, at 233 n. 41 (5th ed. 1984) ("In most contexts . . .

The court's approach necessarily made it impossible for Ford to determine, in advance, if its design decisions as to the Explorer would subject it to punishment in California, and leaves Ford with no guidance as it makes day-to-day design decisions about what might subject it to punitive damages in California in the future. Section 3294 does not define what level of "safety" must be willfully and consciously disregarded to be deemed "despicable" and thus trigger punitive damage liability, and California law expressly recognizes that the design of a product inherently involves balancing safety with other legitimate concerns and that some level of danger will remain no matter what. *See, e.g.*, *Barker*, 20 Cal. 3d at 430; *Hansen* v. *Sunnyside Prods., Inc*., 55 Cal. App. 4th 1497, 1512 (1997) ("the test is not 'preventable danger' but 'excessive preventable danger'"); *see also* Restatement (Third) of Torts: Products Liability § 2, cmt a, at 16 (1998) ("Society does not benefit from products that are excessively safe—for example, automobiles designed with maximum speeds of 20 miles per hour—any more than it benefits from products that are too risky. Society benefits most when the right, or optimal, amount of product safety is achieved.").

If, however, no objective standards of reasonableness inform the California malice standard, as the court of appeal held, then Ford and other manufacturers "must necessarily guess at its meaning" and hope that the juries and courts will agree with them. *Connally*, 269 U.S. at 391. In fact, under the court of appeal's ruling, Ford could be punished severely simply because a single jury concludes that a single engineer

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[Footnote continued from previous page]

compliance with a statutory standard should bar liability for punitive damages."). **Reasonable disagreement**: *See, e.g.*, *Satcher* v. *Honda Motor Co.*, 52 F.3d 1311, 1317 (5th Cir. 1995) (vacating punitive award when, inter alia, "there is a genuine dispute in the scientific community" regarding reasonableness of design); *Hillrichs* v. *Avco Corp.*, 514 N.W.2d 94, 100 (Iowa 1994) ("an award of punitive damages is inappropriate when room exists for reasonable disagreement over the relative risks and utilities of the conduct and device at issue").

believed that the design created too much risk, even though all of the other engineers, and company executives, other manufacturers, the federal government and numerous other juries and courts disagreed. This ruling "violates the first essential of due process," *id.*, and conflicts with many decisions of this Court and other courts.[4]

For example, in *Southwestern Tel. & Tel. Co.* v. *Danaher*, 238 U.S. 482, 490 (1915), the Court held that a $6,300 civil penalty violated due process where the defendant was "well justified in regarding [its conduct] as reasonable and in acting on that belief." The Court reached this conclusion even assuming that the defendant "should have known that the Supreme Court of the State . . . might hold the [conduct] unreasonable." *Id*.; *see also A.B. Small Co.* v. *Am. Sugar Ref. Co.*, 267 U.S. 233, 239-240 (1925) (striking down statute prohibiting "unjust, unreasonable and excessive" sugar prices as applied in civil suit because it provided no standard and "there was no accepted and fairly stable commercial standard which could be regarded as impliedly taken up and adopted by the statute"); *Champlin Ref. Co.* v. *Corp. Comm'n of Oklahoma*, 286 U.S. 210, 242-243 (1932) (striking down statute because its "general terms" were not well defined by the common law or "shown to have any meaning in the oil industry sufficiently definite to enable those familiar with the operation of oil wells to apply them with any reasonable degree of certainty"); *S & H Riggers & Erectors, Inc.* v. *Occupational Safety & Health Review Comm'n*, 659 F.2d 1273, 1281 (5th Cir. 1981) (invalidating application of regulation permitting subjective evaluation of defendant's conduct without incorporating industry standards or actual knowledge requirement).

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[4] As the Solicitor General explains in a case pending before this Court, it is widely accepted that "reckless disregard in the civil context is, at bottom, *an objective standard*." Brief for the United States in Nos. 06-84 & 06-100, *Safeco Ins. Co.* v. *Burr* & *GEICO Gen. Ins. Co.* v. *Edo*, at 22 (emphasis added); *see also* Prosser & Keeton on the Law of Torts, § 34 at 213 ("an objective standard must of necessity in practice be applied").

In *Screws* v. *United States*, 325 U.S. 91 (1945), this Court interpreted the word "willful" to include an objective component in order to avoid this precise constitutional problem. In that case, three law enforcement officers were charged with "willfully" depriving a prisoner of his constitutional rights in violation of the precursor to 18 U.S.C. § 242. Concerned about the constitutional implications of interpreting "willfully" in a way that would permit an officer to be punished for actions that reasonable people could conclude were lawful, the Court construed "willfully" to require proof that the defendants had the "specific intent to deprive a person of a federal right *made definite* by decision or other rule of law." 325 U.S. at 97, 103 (emphasis added).

Likewise, in *Giaccio* v. *Pennsylvania*, 382 U.S. 399 (1966), the Court struck down a Pennsylvania statute that had been interpreted to authorize juries to impose costs of misdemeanor prosecutions on an acquitted defendant "if they [found] that his conduct, though not unlawful, [was] 'reprehensible in some respect,' 'improper,' outrageous to 'morality and justice,' . . . or that though acquitted 'his innocence may have been doubtful.'" *Id.* at 404. The Court held that, "whether labeled 'penal' or not," "a law fails to meet the requirements of the Due Process Clause if it is so vague and standardless that it leaves the public uncertain as to the conduct it prohibits or leaves judges and jurors free to decide, without any legally fixed standards, what is prohibited and what is not in each particular case." *Id.* at 402-403. Because the statute as interpreted "leave[s] to the jury such broad and unlimited power in imposing costs . . . that the jurors must make determinations of the crucial issue upon their own notions of what the law should be instead of what it is," it violated due process. *Id.* at 403-404.

And in *Connally*, the Court struck down a statute that imposed a fine and potential imprisonment for certain employers who failed to pay employees at least "the current rate of per diem wages in the locality where the work is performed." *Id.* at 388. The Court held that a punitive statute "must be so clearly expressed that the ordinary citizen can

choose, in advance, what course it is lawful for him to pursue," and that a "citizen cannot be held to answer charges based upon penal statutes whose mandates are so uncertain that they will reasonably admit of different constructions." 269 U.S. at 392 (quoting *United States* v. *Capital Traction Co.*, 34 App. D.C. 592, 596, 598 (1910)).

The decision below cannot be reconciled with any of these cases. Punitive damages are "quasi-criminal," *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 432 (2001), and thus are subject to the same vagueness standard that governs criminal laws. *See Village of Hoffman Estates* v. *Flipside*, 455 U.S. 489, 499 (1982) (employing strict vagueness scrutiny for statute imposing quasi-criminal penalties). The court of appeal, however, interpreted California's malice standard to be utterly subjective and then applied it in a substantive area—strict product liability for design defect—that itself is subjective, retrospective, and unpredictable. Neither respondents nor the court disputed the existence of a reasonable disagreement over the design issues in this case, and the only objective benchmarks—industry custom and federal safety standards and policy determinations—support Ford's side of the debate, not respondents'. Yet, in the face of numerous decisions from other juries and courts in favor of Ford on these precise design issues, the court of appeal disregarded these objective standards and upheld a massive punishment based on a single California jury's verdict that Ford's conduct was "despicable" and in "willful and conscious disregard." The court's approach leaves juries free to impose punishment based on their own idiosyncratic "notions of what the law should be instead of what it is." *Giaccio*, 382 U.S. at 403-404. The result is that:

> the application of the law depends not upon a word of fixed meaning in itself, or one made definite by statutory or judicial definition, or by the context or other legitimate aid to its construction, but upon the probably varying impressions of juries . . . . The constitutional guaranty of due process cannot be allowed to rest upon a support so equivocal.

Connally, 269 U.S. at 395; *see also Herndon* v. *Lowry*, 301 U.S. 242, 263 (1937) (statute unconstitutionally vague where it "licenses the jury to create its own standard in each case").

3. This question is important and recurring and deserves this Court's attention. The court below expressly declared that individual California juries are empowered, on an ad hoc, retrospective and subjective basis, to trump national automotive safety policy as determined by NHTSA because, in its view, "[g]overnmental safety standards . . . have failed to provide adequate consumer protection." App. 47a. This is a recipe for irrational safety regulation through arbitrary punishments that interferes with federal prerogatives. *See Gore*, 517 U.S. at 571 ("[O]ne State's power to impose burdens on the interstate market for automobiles is . . . subordinate to the federal power over interstate commerce"); *id.* at 573 n. 17 ("State power may be exercised as much by a jury's application of a state rule of law in a civil lawsuit as by a statute.") (citing *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 265 (1964) ("The test is not the form in which state power has been applied but, whatever the form, whether such power has in fact been exercised"); *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959) ("Regulation can be as effectively exerted through an award of damages as through some form of preventive relief")).

Moreover, this Court has repeatedly "admonished that 'punitive damages pose an acute danger of arbitrary deprivation of property,'" *State Farm*, 538 U.S. at 417 (citation omitted), and expressed "concerns over the imprecise manner in which punitive damages systems are administered." *Id.* The Court also has recognized that "[v]ague instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *Id.* at 418; *see also Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., joined by Scalia, J., concurring in part and concurring in the judgment) (noting that a court's failure to give the jury proper standards for imposing punitive damages "appears inconsistent with due process"); *Browning-*

Ferris Indus. of Vermont, Inc. v. *Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring, joined by Marshall, J.) (warning of the due process dangers that arise when juries are told "little more than . . . to do what they think is best" and are thus "left largely to themselves in making this important, and potentially devastating, decision").

Punitive damages in strict liability design defect cases pose especially troubling due process issues.[5] The "advent of product liability" has been singled out as a reason for the "[r]ecent . . . explosion in the frequency and size of punitive damages awards." *Pacific Mut. Life. Ins. Co.* v. *Haslip*, 499 U.S. 1, 61-62 (1991) (O'Connor, J., dissenting).[6] And, as discussed above, the trial court rejected Ford's proposed jury instructions, which would have provided objective criteria for

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[5] The imposition of punitive damages in strict liability cases for sale of a lawful product was unknown at common law when the Fourteenth Amendment was ratified, and the court of appeal's approach here, by stripping the analysis of any objective component, is an especially radical departure from the traditional practice. *See Honda Motor Co., Ltd.* v. *Oberg*, 512 U.S. 415, 430 (1994) ("Oregon's abrogation of a well-established common-law protection against arbitrary deprivations of property" violated the Due Process Clause); *id*. at 436 (Scalia, J., concurring) (agreeing that by eliminating protections "traditionally accorded at common law," Oregon "violate[d] the Due Process Clause").

[6] *See*, *e.g*., *Anderson* v. *General Motors Corp.*, No. BC116926 (Cal. Super. Ct., Los Angeles County) (jury award of $4.8 billion in punitive damages, subsequently reduced by trial court to $1 billion and settled on appeal); *Jimenez* v. *DaimlerChrysler Corp.*, 74 F. Supp. 2d 548 (D.S.C. 1999) ($250 million punitive damage award), *reversed for insufficiency of evidence*, 269 F.3d 439 (4th Cir. 2001); Alex Berenson, *For Merck, Vioxx Paper Trail Won't Go Away*, N.Y. Times, Aug. 21, 2005, at 1 ($229 million punitive damage award verdict (later reduced) against Merck regarding the drug Vioxx); *Estate of Mohr* v. *DaimlerChrysler Corp.*, No. CV03-2433 (Tenn. Cir. Ct. February 2005), *appeal pending* (jury award of $48 million in punitive damages in design defect case); *see also Interstate Southwest Ltd.* v. *Avco Corp*., No. 29,385 (Tex. Dist. Ct. 2005), *appeal pending* (jury verdict of $86.4 million in punitive damages in case involving commercial dispute over cause of defect in crankshafts used in aircraft engines manufactured by the defendant).

deciding whether Ford acted with punishable malice.

Review by this Court is imperative if manufacturers are not to be subjected to arbitrary punitive damage awards based upon the whims of individual juries. To say, as the court did here, that the jury could find malice because "there is substantial evidence that Ford decision makers knew how to make the Explorer less dangerous, but chose not to because of financial considerations," App. 44a, is to place no limit whatsoever on the jury's discretion to impose punishment. That is because *all* manufacturers sell products to make a profit, *all* products can and do cause injury, and *all* design decisions reflect a balance of risks, costs, and utility. *See, e.g.*, *Corrosion Proof Fittings* v. *E.P.A.*, 947 F.2d 1201, 1223 n. 23 (5th Cir. 1991) ("over the next 13 years, we can expect more than a dozen deaths from ingested *toothpicks*").

Many products, like automobiles, by their very nature pose risks of serious injury and death that cannot be materially reduced without significant cost to society in the form of increased prices, less convenience or utility, or even less safety in other circumstances. *See generally* W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52 STAN. L. REV. 547, 548-550 (2000). The due process problems arise because once a jury concludes that the product is defective—*i.e.*, that, by its lights, the manufacturer struck the risk-benefit balance in the wrong place—it is all too easy for the jury to take the next step and conclude the manufacturer acted with malice or conscious disregard for safety. In the absence of any objective standards, it will always be possible for a jury to conclude that the manufacturer "disregarded safety" by selling a product that it knew could be made even safer if it spent more money or sacrificed other product benefits. And empirical research shows that juries are more likely to assess punitive damages against manufacturers who have engaged in risk-benefit analysis. *Id.* at 550-551, 556-557, 589-590.

Deeply compounding the problem, jurors are confronted with deciding whether a product creates "too much risk" in the context of individual cases involving tragic personal inju-

ries, using hindsight, on the basis of a highly technical record and arcane and often conflicting opinion testimony from engineers and scientists. Stephen Breyer, BREAKING THE VICIOUS CIRCLE: TOWARD EFFECTIVE RISK REGULATION 59 (1992); *Carroll* v. *Otis Elevator Co.*, 896 F.2d 210, 215-216 (7th Cir. 1990) (Easterbrook, J., concurring) ("The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. . . . [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states."); Reid Hastie et al., *Looking Backward in Punitive Judgments: 20-20 Vision?*, in Cass R. Sunstein et al., PUNITIVE DAMAGES: HOW JURIES DECIDE 96, 108 (2002) (concluding that "hindsight bias is almost inevitable when jurors make punitive damages decisions"). Indeed, if manufacturers can be punished for selling products that reasonable people (such as the jurors in the eleven previous Explorer rollover cases) could conclude are not defective, the only way they can modify their conduct to avoid punishment is to stop selling all products that might be subject to criticism by a plaintiff's expert. *See United States* v. *Powell*, 423 U.S. 87, 93 (1975) (explaining why prohibition against charging an "unreasonable" price for sugar was unconstitutionally vague: "Engaged in a lawful business which Congress had in no way sought to proscribe, [the defendant] could not have charged any price with the confidence that it would not later be found unreasonable.") (emphasis omitted).

Product design cases thus pose a particularly high risk that juries will "use their verdicts to express biases against big businesses." *State Farm*, 538 U.S. at 417 (citation omitted). In fact, the court of appeal found that the jury in this case actually "acted out of passion or prejudice" and "was not acting as a fair and neutral trier of fact" during the same deliberation in which it found that Ford acted with malice and should be punished. App. 35a. And yet the court permitted that same jury's determination of liability for punitive

damages to stand without regard to multiple objective factors that demonstrate that Ford's conduct was objectively reasonable, not malicious. This Court should grant review and make clear that due process forbids such punishment.

II. REVIEW IS NECESSARY TO CLARIFY THE REPREHENSIBILITY GUIDEPOST IN PRODUCT LIABILITY AND PERSONAL INJURY CASES

This Court also should grant review to provide guidance on how to evaluate reprehensibility in product liability and personal injury cases. This Court's decisions in *State Farm* and *Gore* were rendered in the financial tort setting and thus the Court has not detailed the factors that should be considered in analyzing reprehensibility in product liability cases involving personal injury, in which many of the most severe and arbitrary punishments are imposed. The court of appeal's rulings not only contradict this Court's decisions in *State Farm* and *Gore*, but also conflict with the Sixth Circuit's decision in *Clark* v. *Chrysler Corp*., 436 F.3d 594 (6th Cir. 2006), and the Ninth Circuit's decision in *In re Exxon Valdez*, 472 F.3d 600 (9th Cir. 2006). If reprehensibility is properly evaluated, the necessary conclusion is that Ford's conduct was not remotely reprehensible and the $55 million punishment is grossly excessive and unconstitutional.

1. *State Farm* and *Gore* held that the due process excessiveness analysis should be conducted by reference to three guideposts: the reprehensibility of the defendant's conduct; the ratio between punitive and actual or potential damages; and the difference between the award and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. "The[se] principles . . . must be implemented with care, to ensure both reasonableness and proportionality." *Id*. at 428.

In *Gore*, the Court stated that "[t]he most important indicium of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." 517 U.S. at 575. "That conduct is sufficiently reprehensible

to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award." *Id*. at 580. The Court also made clear that, even in the face of a finding of malicious fraud or other conduct warranting punitive damages, the existence of "reasonable disagreement" about the lawfulness of the defendant's conduct is a factor that reduces reprehensibility. *Id*. at 579-580.

In *State Farm*, the Court emphasized the need for "exacting" *de novo* scrutiny of punitive damages under the Due Process Clause. 538 U.S. at 418. The Court stated that "[i]t 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 419. And the Court "instructed [lower] 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.*

2. The lower courts have divided over how these factors apply in design defect and other cases outside the realm of the financial torts involved in *State Farm* (insurance bad faith) and *Gore* (consumer fraud).

The court below concluded that "the reprehensibility of Ford's conduct was high, given the catastrophic nature of Mrs. Wilson's injuries, Ford's reckless disregard for the safety of others, the repeated nature of Ford's conduct, and the fact that Ford's acts were intentional." App. 55a.[7] But in

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[7] While the court purported to be applying a *de novo* standard in conducting its due process review, App. 54a-55a, the court simply adopted

reaching this conclusion, the court gave no weight to the many objective factors, such as industry custom, federal regulatory judgments, and reasonable grounds for disagreement, that significantly mitigate against any finding of reprehensibility.

This approach conflicts with the Sixth Circuit's decision in *Clark*. In *Clark*, the plaintiff was killed when his Dodge Ram pickup truck collided with a police car and his door opened during the accident and he was ejected. His estate persuaded a federal jury in Kentucky to find that Chrysler had acted with reckless disregard in designing the door because it did not perform certain strength tests on the door frame recommended by plaintiff's experts—so-called "B-pillar twist out tests." The jury imposed $3 million in punitive damages. *See* 436 F.3d at 596, 603.

The Sixth Circuit initially affirmed, but following a remand from this Court for reconsideration in light of *State Farm*, the Sixth Circuit reduced the punitive award to approximately $470,000. In its reprehensibility analysis, the court noted that while there was evidence "sufficient to support the jury's decision to award punitive damages," it "disagree[d] with the district court's decision that Chrysler's conduct is sufficiently indifferent or reckless to support a $3 million award." *Id.* at 601-602.

Contrary to the court of appeal here, the *Clark* court expressly relied on Chrysler's conformance with industry custom and federal regulations and the fact that there was "a good-faith dispute over whether such testing is necessary." *Id*. at 603. The court reasoned that, although Chrysler was allegedly aware that General Motors had engaged in such testing and "GM's test may have alerted Chrysler to the defi-

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the same extraordinarily deferential view of the evidence that it used when applying the state-law "substantial evidence" test to the jury's finding of malice. App. 56a ("As discussed *ante*, and as found by the jury . . . ."). This form of review clearly violates *State Farm*.

ciencies of its B-pillar design and prevented Mr. Clark's accident," that did not establish high reprehensibility "because the test was neither required by the government nor used by other manufacturers." *Id.* (citing *Barber* v. *Nabors Drilling U.S.A., Inc.*, 130 F.3d 702, 710 (5th Cir. 1997) (reversing punitive damage award based on "good faith dispute" whether the defendant's conduct violated plaintiff's rights) and *Satcher*, 52 F.3d at 1317 (vacating punitive damage award based on, inter alia, genuine dispute in scientific community over safety feature at issue)).

The Sixth Circuit also rejected the argument that the "financial vulnerability" factor supports a finding of high reprehensibility in the product design context. The court explained that, because "[i]n this case, economic injury is not involved [and] no other connection between Chrysler's financial resources and the physical injury suffered by Mr. Clark was established," the financial vulnerability "factor weighs against finding Chrysler reprehensible." 436 F.3d at 604. But the court in this case ruled directly to the contrary, declaring that "[t]he defendant's financial condition is an essential factor in fixing an amount," App. 51a,[8] and holding that the "vulnerability" factor supported a finding of high reprehensibility because the "target of the conduct in this case was consumers, individuals who were vulnerable." *Id.* at 56a. This ruling also conflicts with the Ninth Circuit's most recent ruling in the *Exxon Valdez* oil spill case. *In re Exxon Valdez*, 472 F.3d at 616-617 (explaining that for this factor to be relevant, "there must be some kind of intentional aiming or targeting of the vulnerable" and "Exxon did not intentionally target subsistence fisherman").

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[8] The California court's use of Ford's wealth at the time of trial to justify the punishment is itself irrational. While Ford had a net worth of $12.8 billion when the verdict was rendered, it *lost* $12.7 billion in 2006. *See* Jeffrey McCracken, "Big Three Face New Obstacles In Restructuring; Ford's Massive '06 Loss, GM's Accounting Woes Underscore Challenges," Wall St. J., Jan. 26, 2007, at A1.

The court of appeal's finding that Ford's conduct qualified as "intentional" and thus highly reprehensible conflicts with both *Clark* and *Exxon Valdez.* The court found that "[t]he evidence presented by the Wilsons in this case supports a finding that Ford's actions were the result of intentional conduct and deliberate decisions by Ford's management, knowing the unreasonable risk of harm posed to consumers, as opposed to a mere accident." App. 57a. But this is a strict liability case, not an intentional tort case, and it is undisputed that Ford engineers and executives did not "intend" to injure the Wilsons or anyone else. The "evidence" of intent cited by the court is nothing more than the evidence discussed above demonstrating that Ford's engineers debated the pros and cons of various designs and tests in striking the balance between risk and utility.

The Sixth Circuit, however, rejected this approach. Even though Chrysler's design "was substantially outdated and had been removed from the modern state of the art and state of the industry for over 40 years," "B-pillar twist-out was a known failure in the automotive industry," and "Chrysler knew that if a driver was ejected, the risk of death substantially increased," the court rejected the argument that Chrysler's design decisions could be characterized as "intentional." While the court "agree[d] that Chrysler ignored potential hazards presented by a weak B-pillar," it "disagree[d] that this [intentional misconduct] factor weighs in favor of finding Chrysler's conduct reprehensible." 436 F.3d at 601, 605. The Ninth Circuit's approach in *Exxon Valdez* mirrors that of the Sixth Circuit. The court observed that, while Exxon's conduct "imposing a tremendous risk on a tremendous number of people" could not "be regarded as merely accidental," Exxon "acted with no intentional malice towards plaintiffs . . . . Exxon did not spill the oil on purpose." 472 F.3d at 618, 631 n.6. The "conduct did not result in any intentional damage to anyone," and this factor "militates against viewing Exxon's misconduct as highly reprehensible." *Id.* at 618.

Finally, the California court's holding that Ford's conduct was "more reprehensible" because it was "repeated and not an isolated incident," App. 56a-57a, also conflicts with *Clark*. While Ford *won* the eleven prior trials alleging the same defects in the Explorer—and then won two victories during the trial below and additional victories since[9]—the court ruled that Ford's conduct was "repeated." *Id.* But the Sixth Circuit rejected this argument: "The district court also held that Chrysler's conduct was not isolated because . . . Chrysler put anyone who drove a Dodge Ram pickup truck at risk. Because there is no evidence that Chrysler repeatedly engaged in misconduct while knowing or suspecting that it was unlawful, we conclude to the contrary." 436 F.3d at 604; *see also* Part III *infra*.

3. The court of appeal's approach "make[s] 'reprehensibility' a concept without constraining force," *Gore*, 517 U.S. at 590 (Breyer, J., concurring),[10] and contradicts this Court's decision in *Gore*. In *Gore*, the jury found that the defendant's policy with respect to the disclosure of factory repairs constituted "'gross, oppressive, or malicious' fraud" even though that policy was consistent with statutes defining disclosure obligations in about 25 States. 517 U.S. at 565. Alabama had no such disclosure statute, and this Court "accept[ed] . . . the jury's finding that BMW suppressed a material fact which Alabama law obligated it to communicate." 517 U.S. at 579-580. Nevertheless, this Court recognized that BMW, in attempting to determine what it was required

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9 *See, e.g.*, *Shatz* v. *Ford Motor Co.*, 412 F. Supp. 2d 581 (N.D. W. Va. 2006) (jury verdict in Ford's favor); *Davis* v. *Ford Motor Co.*, No. Civ. A. 302CV271LN, 2006 WL 83500 (D. Miss. Jan. 11, 2006) (mem. op.) (judgment as a matter of law in Ford's favor); *cf. Jaramillo* v. *Ford Motor Co*., 116 Fed. Appx. 76 (9th Cir. 2004) (initial jury verdict in favor of Ford reversed and remanded for new trial).

10 *See also TXO Prod. Corp.* v. *Alliance Res. Corp*., 509 U.S. 443, 480-481 (1993) (O'Connor, J., dissenting) ("[w]ithout objective criteria on which to rely, almost any decision regarding proportionality will be a matter of personal preference") (citation omitted); *Haslip*, 499 U.S. at 23 (affirming punitive damages where they "did not lack objective criteria").

to disclose, "could reasonably rely on [other] state . . . statutes for guidance." *Id.* at 579. The Court also noted that the "diversity" of state laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement." *Id.* at 570. The Court concluded that a failure to disclose is "less reprehensible . . . when there is a good-faith basis for believing that no duty to disclose exists," *id.* at 579-580, and when "a corporate executive could reasonably interpret" the law to allow nondisclosure. *Id*. at 578.

This same analysis is equally applicable in product liability cases. Even if *some* amount of punitive damages can be imposed because respondents' paid experts disagree with Ford—and with Ford's experts, the federal government, the entire motor vehicle industry concerning stability and roof design, and many other juries—the existence of grounds for reasonable people to disagree on this issue is surely *relevant* to the reprehensibility analysis, just as the state disclosure statutes were relevant to that issue in *Gore*. But the court below simply disregarded these and all other objective indicators of good faith and reasonableness in branding Ford's design decisions highly reprehensible.

This Court should grant review because meaningful application of the reprehensibility guidepost is crucial in product liability cases. As this case shows, such cases often produce very substantial compensatory damage verdicts, including large non-economic damage awards for pain and suffering and emotional distress. Absent careful and objective scrutiny of reprehensibility, even a 1:1 or 2:1 ratio between punitive and actual damages can result in a "a punitive sanction that is tantamount to a severe criminal penalty," *Gore*, 517 U.S. at 585, and unconstitutional.

III. AT A MINIMUM, THIS COURT SHOULD HOLD THIS PETITION PENDING ITS DECISION IN *PHILIP MORRIS* V. *WILLIAMS.*

Philip Morris USA v. *Williams*, No. 06-1289, presents the question whether the Oregon courts improperly punished Philip Morris for allegedly causing harm to third parties not

before the courts in that case. That issue is squarely, and quite graphically, presented in this case.

Ford filed a motion *in limine* to bar any punitive damage evidence or argument that did not relate to conduct that caused injury to respondents (Motion in Limine No. 31), and a separate motion to exclude the Bronco II evidence. Respondents' Appendix 12-17; RT82-89. The court denied that motion, but granted Ford a standing objection. RT629. At trial, respondents focused extensively on the Bronco II, attacking the Bronco II's design in their opening and closing arguments, and spending the better part of several days examining witnesses about it. *See, e.g.*, RT662-690, 1247-1251, 1269-1272, 1274-1275, 2858-2880, 2887-2893, 2906-2909, 2991-2996, 8169-8174, 8508-8509. And they encouraged the jury to impose punitive damages based on the Bronco II. RT8172-8174.

Although Ford asked that the jury be instructed that "[i]n determining the appropriate amount of punitive damages . . . you may consider only the harm to the plaintiffs," App. 103a, the court denied the instruction, RT8497-8498, and the jury imposed $246 million in punitive damages. Respondents acknowledge that the award was based in part on Ford's sale of supposedly "other defective vehicles," including the Bronco II and the Pinto. App. 107a. As there is no allegation that respondents were harmed by the Bronco II or the Pinto, there can be no dispute that the jury and the court below punished Ford for alleged harm to third parties. Yet the court rejected Ford's arguments that due process precluded the imposition of punitive damages for its sale of the Bronco II or for otherwise allegedly harming third parties. App. 56a-57a.

Moreover, to the extent it assumed that every sale of the Explorer is an example of "repeated" misconduct the court effectively nullified Ford's many prior victories in Explorer cases, and inflicted punishment based on conduct exonerated by other juries. The court has also subjected Ford to the threat of duplicative punishment in future cases that rely on the same supposed "repeated" conduct to impose additional

punitive damages for marketing the Explorer. *See State Farm*, 538 U.S. at 423.

Accordingly, this Court should, at a minimum, hold this petition pending the decision in *Williams*.

CONCLUSION

The Court should grant certiorari and set this case for plenary consideration, or, in the alternative, hold this petition pending its decision in *Williams*.

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