No. 01-1289

IN THE
SUPREME COURT OF THE UNITED STATES

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY,

Petitioner,

v.

CURTIS B. CAMPBELL AND INEZ PREECE CAMPBELL,

Respondents.

ON WRIT OF CERTIORARI
TO THE SUPREME COURT OF UTAH

BRIEF OF COMMON GOOD AS AMICUS CURIAE IN SUPPORT OF PETITIONER

Philip K. Howard
Counsel of Record
Robert A. Long, Jr.
Keith A. Noreika
COVINGTON & BURLING
1201 Pennsylvania Ave. N.W.
Washington, DC 20004-2401
(202) 662-6000

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DC: 622612-3

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INTEREST OF AMICUS CURIAE

Common Good is a non-profit, non-partisan organization formed to promote an "overhaul of America's lawsuit culture."[1] Common Good, *Common Good: Why We Have Come Together*, at http://www.ourcommongood.com (Aug. 15, 2002). Because of a widespread perception that anyone can sue for almost anything, Americans no longer feel free to act on their reasonable judgment. Common institutions such as hospitals and schools are paralyzed. Common Good advocates restoring the authority of judges and legislatures to make common choices, including who can sue for what. *Id.* *See generally* Philip K. Howard, *The Collapse of the Common Good* (2001); Philip K. Howard, *The Death of Common Sense* (1996).

Common Good has a strong interest in opposing limitless claims and awards of punitive damages by juries. One of the defining features of our lawsuit culture, and a prime contributor to the pervasive fear of litigation, is the threat of punitive damages "'limited only by the ability of lawyers to string zeros together in drafting a complaint,'" *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting) (quoting *Oki Am., Inc. v. Microtech Int'l, Inc.*, 872 F.2d 312, 315 (9th Cir. 1989) (Kozinski, J., concurring)).

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[1] Pursuant to Supreme Court Rule 37.3(a), the parties have submitted written consents to the filing of all timely *amicus* briefs. Pursuant to Supreme Court Rule 37.6, counsel for the *amicus* certifies that this brief was not authored in whole or in part by counsel for any party, and that no person or entity other than the *amicus*, its members, or its counsel has made a monetary contribution to the preparation or submission of this brief.

SUMMARY OF ARGUMENT

The punitive damages award of $145 million in a case with token economic loss contravenes the guidelines of *BMW v. Gore*. Like a parody of the rule of law, the award not only is wholly out of proportion to the harm or conduct, but comes out of the pockets of the parties supposedly protected by this "lesson," the other policyholders of Petitioner State Farm, a mutual company.

The court below sustained the award, purportedly under this Court's guidelines, out of deference to the jury's authority, and, implicitly, because of a presumption that any litigant has the right to prosecute a punitive damages claim.

These assumptions not only account for the error, but point to a broader constitutional problem not yet addressed by the Court. A huge claim, indeed even the possibility of a huge claim, has enormous *in terrorem* power. The justice system becomes a tool of extortion when any claimant, throughout years of litigation, can unilaterally keep defendants at risk for limitless sums.

The open season on limitless claims has not gone unnoticed by claimants. Punitive damages claims, the rare exception in common law jurisprudence, are now commonplace. The ready availability of ruinous claims not only gives claimants the upper hand, but has repercussions throughout society, infecting ordinary human dealings with fear of the legal system.

The solution is not a bright line test, but to require trial courts to scrutinize punitive damages claims for legal sufficiency as they do other claims and causes of action. Because standardless claims implicate constitutional concerns, the presumption must be against such claims, using the guidelines already set forth by the Court.

ARGUMENT

I. THE LOWER COURT'S MISAPPLICATION OF *BMW V. GORE* SUGGESTS THAT THE STANDARD SHOULD BE STRENGTHENED.

No reasonable person could have foreseen, on the facts of this case, a punitive damages verdict of $145,000,000, or even a small fraction of that amount. For this reason alone, the verdict violates the guidelines set forth by the Court in *BMW of North Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996):

> Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.

The fact that the Supreme Court of Utah sustained this massive award, purportedly under the principles of *BMW v. Gore*, suggests that the legal framework under which punitive damages are claimed and awarded is insufficient to curb standardless claims. The proliferation of punitive damages claims in recent decades also suggests that the common law presumption that damages should be compensatory, with punitive damages the rare exception,[2] has now radically shifted.

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[2] *See* W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* 9-11 (5th ed. 1984). Until the mid-1970s, only three reported appellate cases confirmed awards of punitive damages for product liability claims. *See Gillham v. Admiral Corp.*, 523 F.2d 102, 108-09 (6th Cir. 1975) (upholding $100,000 punitive damages award on $125,000 compensatory damages award); *Moore v. Jewel Tea Co.*, 253 N.E.2d 636, 638-40 (Ill. App. 1969) (upholding $10,000 punitive damages award on $920,000 compensatory damages award), *aff'd* 263 N.E.2d 103 (Ill. 1970); *Toole v.* (...continued)

Any dispute can be cloaked in the rhetoric of outrage. *See BMW*, 517 U.S. at 576 ("Dr. Gore contends that BMW's conduct was particularly reprehensible because nondisclosure of the repairs to his car formed part of a nationwide pattern of tortious conduct."). Claimants have learned that there is a great advantage in a system that, throughout long years of litigation, enables them to keep defendants at risk for virtually limitless sums.

The litigation landscape in which the Court hears this case thus differs markedly from that of past decades. "Forty years ago, punitive damage verdicts were exceptionally rare in all jurisdictions and were available against only the most extreme and egregious of defendant actions." George L. Priest, *Punitive Damage Reform: The Case of Alabama*, 56 La. L. Rev. 825, 826-27 (1996). By the 1990s, in certain counties of Alabama, the vast majority of all accident cases included claims for punitive damages. *See id.* at 827-28. In one county, punitive damages were sought in 95.6 percent of all cases. *Id.* at 828.

This Court has yet to address the *in terrorem* effects of punitive claims. The focus instead has been on maintaining the rule of law through appellate rulings that reduce the most extreme verdicts. *See, e.g., Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433-40 (2001) (holding that constitutionality of punitive damages awards should be reviewed *de novo* by appellate courts); *BMW*, 517 U.S. at 568 (holding that a punitive damages award was unconstitutionally excessive); *Haslip*, 499 U.S. at

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Richardson-Merrell, Inc., 251 Cal. App.2d 689, 693-94 (1967) (upholding $250,000 punitive damages award on $175,000 compensatory damages award). By contrast, in 1999, a jury found General Motors liable for almost $4.8 billion in punitive damages on a $107.6 million compensatory damages award. *See* Andrew Pollack, *$4.9 Billion Verdict In G.M. Fuel Tank Case*, N.Y. Times, July 10, 1999, at A8.

23 (plurality opinion) (noting Pacific Mutual had the full benefit of post-verdict judicial and appellate review).

Tolerating such claims, with judicial review only at the end of years of litigation, has led to a steady escalation of both punitive claims and the size of verdicts.[3] Although the absolute number of punitive awards is still relatively small, regular reports of massive verdicts have changed the public's view of justice. Americans correctly perceive that any angry person can sue for practically any amount. Instead of standing for balance and proportion, the justice system is perceived as a tool for extortion.

Widespread distrust of the system of justice has infected ordinary daily judgments, eroding people's freedom to do what is reasonable. *See generally* Howard, *The Collapse of the Common Good* 1-70. A recent Harris survey of physicians commissioned by Common Good confirms the general distrust of the justice system: Eighty-three percent said that, if sued, they did not trust the justice system to achieve a reasonable result. *See* Harris Interactive, *Common Good Fear of Litigation Study: The Impact on Medicine* 11 (2002).[4] Because they do not trust the justice system, physicians no longer feel free to act on their best judgment: The majority report that, because of legal fear, physicians order tests, make referrals to specialists, prescribe medicines

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[3] *See* Lewis Powell, *Rule of Law: The 'Bizarre Results' of Punitive Damages*, Wall St. J., Mar. 8, 1995, at A21:

> As recently as a decade ago, the largest punitive damages award approved by an appellate court in a products liability case was $250,000. Since then, awards more than thirty times as high have been sustained on appeal.

[4] Available at ourcommongood.com/medicine (Aug. 7, 2002).

and even conduct invasive procedures that are medically unnecessary and inappropriate. *See id.* at 8-9.

In a nice irony, this case illustrates the *in terrorem* impact of legal claims. Plaintiffs' complaint was that they suffered emotional distress from having to endure years of litigation under the cloud of a possibly ruinous verdict. 2001 WL 1246676, at *30. The risk of a huge verdict does indeed have a power of its own, independent of the merits of the dispute. The specter of a huge damages award, however remote, may cause a party to settle a claim, even if it has done nothing wrong. The abstract possibility of such a claim, available unilaterally at the whim of one angry person, infects daily choices with fear of the legal system.[5] That is why this Court should instruct lower courts to keep *claims* for huge punitive damages, as well as awards, within boundaries of reasonableness. This Court has already held that the constitutionality of punitive damages is subject to *de novo* review. *Cooper Industries*, 532 U.S. at 433-40. This holding implies that judges should limit or reject outright many claims for punitive damages at an early stage of the litigation, by way of a motion to dismiss or motion for summary judgment. *Cf. id.* at 436 (analogizing constitutionality of punitive damages to judicial determinations of reasonable suspicion and probable cause).

[5] A company that is uncertain about whether it will be compelled to pay punitive damages for its conduct is likely to "overinvest[ ] in liability avoidance" (and pass along higher insurance costs in the form of higher prices), "or worse, suppress[ ] innovation." Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 988 (1989). In either case, consumers are harmed.

II. LIMITLESS CLAIMS FOR PUNITIVE DAMAGES VIOLATE RIGHTS PROTECTED BY THE DUE PROCESS CLAUSE.

Our government "has been emphatically termed a government of laws, and not of men." *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803). Law is the foundation of freedom in part because it lets people know where they stand. Justice Holmes famously defined law as "prophecies of what courts will do." O. W. Holmes, *The Path of the Law*, 10 Harv. L. Rev. 457, 461 (1897). This predictability helps people shape their conduct, making them feel comfortable doing what is considered reasonable and nervous doing what is considered wrong. *See id.* at 457 ("People want to know under what circumstances and how far they will run the risk of coming against what is so much stronger than themselves.").

Predictability of the range of possible damages is an integral part of the rule of law. Forseeability, for example, is a limit on damages even where the defendant's conduct clearly caused the harm. *See Palsgraf v. Long Island Railroad Co.*, 162 N.E. 99, 100 (N.Y. 1928).

Like treatment of like cases is another defining characteristic of the rule of law. "Requiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform treatment of similarly situated persons that is the essence of law itself." *Cooper Indus.*, 532 US at 436 (quoting *BMW*, 517 U.S. at 587 (Breyer, J, concurring)).

Finally, the rule of law aspires to balance. The allegorical figure of justice holding balanced scales embodies

the idea of proportion.[6] Justice is not a wrathful god, seeking to destroy any who make the slightest mistake. Justice without proportion is not justice. *See* Aristotle, *The Nicomachean Ethics* 273 (H. Rackham, Jr., ed. 1990) ("[T]he unjust is that which violates proportion.").

Punitive damages, unless carefully bounded by legal rulings, offend all these precepts of the rule of law. Punitive verdicts get headlines precisely because they are shocking and unpredictable. Often the conduct at issue, as in *BMW v. Gore*, is subject to regulatory sanctions that place a very different penalty on the very same conduct. *See BMW*, 517 U.S. at 583-85. Instead of comparable treatment, one defendant pays hundreds of dollars in fines and another millions of dollars in punitive damages for the very same infraction.

Rather than promoting a fair and balanced process, punitive damages operate as a tool of extortion. To analogize to criminal law, it is as if the prosecutor were permitted to seek the death penalty for every crime, even a misdemeanor. Even if the odds of receiving the death penalty were infinitesimal, the mere possibility would drive people to plea bargain on unfair terms.

This case demonstrates the wisdom of avoiding such "justice," at almost any cost. In a case where the out-of-pocket costs totaled $911.25, plaintiffs were awarded $145,000,000 in punitive damages. 2001 WL 1246676, at *1. Neither the verdict, nor subjecting the defendant to the risk of such a verdict, is consistent with the rule of law.

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[6] *See generally* Dennis E. Curtis & Judith Resnik, *Images of Justice*, 96 Yale L.J. 1727 (1987).

III. CLAIMS FOR PUNITIVE DAMAGES SHOULD BE PERMITTED ONLY WITHIN GUIDELINES SET BY COURTS AS A MATTER OF LAW.

Restoring balance and proportion to a system of justice in which claims for punitive damages have become commonplace requires judges to assume a more active role than was needed historically. Setting limits on punitive damages is not an infringement on claimants' freedom, but an essential protection to safeguard the freedom of everyone else in society. Otherwise one self-interested person, by asserting a claim for punitive damages, can use the threat of state power to bully another citizen.

The Utah courts placed no limit on the plaintiffs' claim for punitive damages. Once the jury rendered its verdict, moreover, the Supreme Court of Utah held that the verdict was entitled to substantial deference:

> "We view the evidence in the light most supportive of the verdict, and assume that the jury believed those aspects of the evidence which sustain its findings and judgment."

2001 WL 1246676, at *5 (citation omitted). The Utah court's ruling embodies two implicit principles: (i) that a claim for punitive damages is a plaintiff's right or entitlement; and (ii) that, notwithstanding this Court's recent ruling in *Cooper Industries*, courts should, for the most part, continue to treat the award of punitive damages as a fact-finding, rather than a legal, determination. Both principles undermine the rule of law and conflict with guidelines this Court has set for judging punitive awards.

Restoring balance and predictability to punitive damages claims, given the case-specific nature of the inquiry, probably cannot be achieved through a "bright line" test. In the common law tradition, judges must assume this responsibility. Asserting judicial authority does not offend

the traditional role of judges versus juries because most of the judgments required to set the boundaries of appropriate claims for punitive damage are those traditionally made by judges. *See Cooper Indus.*, 532 U.S. at 433-40.

A. Courts Should Determine Whether The Claimed Conduct Meets The Legal Threshold For Punitive Damages.

It is the role of judges, not juries, to determine whether a claim alleged meets the requirements of a legal cause of action. *See* Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 Harv. L. Rev. 443, 458 (1899) ("negligence . . . [is] a standard of conduct, a standard which we hold the parties bound to know beforehand .. . not a matter dependent upon the whim of the particular jury or the eloquence of the particular advocate"). A claim for punitive damages requires a similar legal ruling, *i.e.*, whether conduct is so reprehensible as to meet the threshold for imposing punitive damages.

Asserting a claim for punitive damages is not a unilateral constitutional right like freedom of speech or free exercise of religion. Those rights of freedom provide protection against state power. A claim for punitive damages is a *use* of state power against another free citizen. The Constitution affords the right to trial by jury only "according to the rules of the common law." U.S. Const. amend. VII. That is why a legal ruling is required to determine whether the claim should be permitted. *Cf. Cooper Industries*, 532 U.S. at 434-36 (concluding that appellate courts should review *de novo* constitutional factors for determining whether award is "grossly excessive," including degree of defendant's reprehensibility; relationship between penalty and harm to victim, and review of comparable sanctions for comparable misconduct).

B. The Amounts Of Punitive Damages That Can Be Claimed Should Be Subject To Judicial Limitation.

While damages are traditionally determined by juries as a matter of fact, punitive damages are not subject to objective calculation.[7] Literally any amount is possible: Plaintiffs are "'limited only by the ability of lawyers to string zeros together in drafting a complaint,'" *Haslip*, 499 U.S. at 62 (O'Connor, J., dissenting) (citation omitted). All that is needed is a theory, here that $145,000,000 is less than one percent of State Farm's assets. *See* 2001 WL 1246676, at *8 ("the jury's punitive damage award of $145 million is only 0.26 of one percent of State Farm's wealth as computed by the trial court, to whose judgment on this factual matter we defer").

The amount of punitive damages requires a value judgment as to what is an appropriate penalty. Because punitive damages embody a theory of social deterrence, this type of judgment should be made, or at least bounded, by a ruling from a judge. In other areas of punishment, such as criminal sentencing, this is the traditional role of the judge. *See* David G. Owen, Comment, *Civil Punishment and the Public Good*, 56 S. Cal. L. Rev. 103, 120 (1982) ("Judges have more familiarity than do juries with distinguishing 'wrong' from 'very wrong' behavior (and fixing the

[7] *See Cooper Indus.*, 532 U.S. at 437 ("the level of punitive damages is not really a 'fact' 'tried' by the jury") (quoting *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting)).

appropriate level of punishment therefor) upon a formal social scale").[8]

Without judicial boundaries, different parties are subject to wildly disparate claims and penalties for the same conduct. In this regard, the findings discussed in Cass R. Sunstein, *et al.*, *Punitive Damages: How Juries Decide* (2002) are startling. The juror experiments reported by Professor Sunstein and his colleagues demonstrate, among other things, that: juries award erratic penalties for similar conduct (*id.* at 22, 31, 41); juries are irrationally influenced by the size of the plaintiff's requested award (*id.* at 22, 62); juries are geographically biased (*id.* at 22); juries exhibit "hindsight bias" that encourages punitive damages (*id.* at 96-97); jurors are irrationally averse to risk analysis, and penalize companies even if the risk-reward tradeoffs were socially beneficial (*id.* at 129, 184, 228); and juries do not adequately consider legal instructions, resulting in excessive punitive awards (*id.* at 77). These results call into question the fundamental fairness of subjecting defendants to huge punitive damages claims that, for the most part, juries decide without meaningful judicial oversight.

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[8] *See also* Powell, *supra*:

> In the federal system and in most states, criminal fines are imposed by judges subject to statutory limitations. Where juries are authorized to fix a criminal defendant's sentence, they do so pursuant to instructions that limit their discretion, and subject to searching review by the trial and appellate courts to ensure that those instructions were followed. Jurors in punitive damages cases, by contrast, lack the legal education and experience of judges, are not subject to statutory limitations, and are not constrained by the guidance and oversight of a court. In sum, a jury imposing punitive damages acts as legislator and judge, without the training, experience, or guidance of either.

C. Judicial Limits Are Essential To Prevent Multiple Penalties For The Same Conduct.

Juries lack the power to make rulings of general application and render verdicts that bind only the particular parties before them. A finding of punitive damages against a party in one case does not preclude another finding of punitive damages against the same party for the same conduct. This results in multiple penalties contrary to basic precepts of justice. *See BMW*, 517 U.S. at 593 (Breyer, J., joined by O'Connor and Souter, JJ., concurring) ("Larger damages might also 'double count' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover.").

D. Judicial Limits Are Required To Protect Parties In Interest That Are Not In The Courtroom.

Punitive damages, by requiring payments over and above plaintiffs' losses, affect many parties not in the courtroom. A huge award against a doctor or hospital, for example, affects the availability and cost of health care.

Plaintiffs here argued that punitive damages were important to deter State Farm from abusing its policyholders. 2001 WL 1246676, at *18. But State Farm is a *mutual* insurance company, owned by its policyholders. The penalty of $145,000,000 comes directly out of *their* economic interest in the company. Who is protecting them?

It is the traditional role of law, and of judges interpreting law, to try to protect the broader social interests implicated by a case. *See* Benjamin N. Cardozo, *The Nature of the Judicial Process* 16 (1921) ("The judge [i]s the interpreter for the community of its sense of law and

order").[9] A ruling on the availability of a punitive penalty should be made on behalf of all policyholders and of all society. Juries, lacking the power to make rulings of general application, are unable to fulfill that responsibility. *See* Sunstein, *et al.*, *supra*, at 234, 238, 248.

E. The Overall Health Of The System Of Justice Requires Judicial Intervention.

The most important reason why the boundaries of punitive damages in each case should be determined as a matter of law is to restore confidence in the reliability of the justice system.[10] Twenty years ago Chief Justice Burger noted "'litigation neuroses'" that have arisen "in otherwise normal, well-adjusted people." Warren E. Burger, *Isn't There A Better Way?*, 68 A.B.A. J. 274, 275 (1982). Former Senators McGovern and Simpson recently cast a harsh light on modern American justice: "Our system of justice, long America's greatest pride, has become an object of ridicule, noted for its shock value rather than any balance." George McGovern & Alan K. Simpson, *We're Reaping What We Sue*, Wall St. J., Apr. 17, 2002, at A20.

Easy lawsuits, like easy virtue, have consequences far beyond the particular event. When justice is unpredictable,

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[9] *See also* David W. Peck, *The Complement of Court and Counsel*, 9 The Record 272, 273 (1954) ("The judge . . . . is mindful of a larger orbit than the parties . . . immediately before him . . . . He is conscious of unrepresented social interests . . . .").

[10] The United States singularly allows plaintiffs to assert such limitless claims. *See* Powell, *supra*. In 1964, the House of Lords, in *Rookes v. Barnard*, 1 All Eng. Rep. 367, 407 (HL 1964), limited punitive damages for private defendants to those cases expressly allowed by statute, or where a defendant's conduct was calculated to benefit him to a greater degree than the loss to the plaintiff.

people assume the worst.[11] The possibility of having to defend against suit is an important influence in guiding daily choices. "[A]n act is illegal," Professor Donald Black observed, "if it is *vulnerable* to legal action." Donald J. Black, *The Mobilization of Law*, 2 J. Legal Studies 125, 131 n.24 (1973).

The resulting crisis of confidence in the American justice system affects the ability of doctors to deliver quality health care and, indeed, their willingness to continue to practice. *See* U.S. Department of Health and Human Services, *Confronting The New Health Care Crisis: Improving Health Care Quality And Lowering Costs By Fixing Our Medical Liability System* (July 25, 2002).[12] It affects the ability of teachers to maintain order in the classroom. *See* Jackson Toby, *Getting Serious About School Discipline*, The Public Interest, Fall 1998, at 68, 76-78. Distrust of justice corrodes the very foundations of freedom, causing an epidemic of legal fear at the same time that it titillates, as here, with the rewards of a legal lottery.

Standardless claims for damages necessarily implicate constitutional concerns of fair notice and equal treatment. *See, e.g.*, *BMW*, 517 U.S. at 574; Powell, *supra*. That is the reason constitutional restraints are important to prevent the self-interested use of state power, in the form of claims for punitive damages, from denying others their constitutional rights. *BMW*, 517 U.S. at 574. As the ruling below indicates, more guidance from this Court is needed to correct the common and, we submit, unconstitutional

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[11] *See, e.g.*, Marshall B. Kapp, *Our Hands Are Tied: Legal Tensions and Medical Ethics* 8-22 (1998).

[12] Available at http://aspe.hhs.gov/daltcp/reports/litrefm.htm (Aug. 16, 2002).

presumption that claimants are entitled to pursue virtually limitless claims for punitive damages.

CONCLUSION

For the reasons set forth above, and in the briefs of Petitioner and its other supporting *amici*, the judgment should be reversed.

Respectfully submitted,

Philip K. Howard
Counsel of Record
Robert A. Long, Jr.
Keith A. Noreika
COVINGTON & BURLING
1201 Pennsylvania Ave. N.W.
Washington, DC 20004-2401
(202) 662-6000

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