SUPREME COURT OF LOUISIANA

NO. 2010-C-2605

CRAIG STEVEN ARABIE, *ET AL.*

VERSUS

CITGO PETROLEUM CORPORATION
AND R&R CONSTRUCTION, INC.

ORGINAL BRIEF OF CITGO PETROLEUM CORPORATION

ON WRIT OF REVIEW
TO THE COURT OF APPEAL, THIRD CIRCUIT, NO. 10-244
FOURTEENTH JUDICIAL DISTRICT COURT, PARISH OF CALCASIEU
NO. 2007-2738, HONORABLE G. MICHAEL CANADAY

Richard Gerard, 6027
John B. Scofield, 11866
Robert E. Landry, 18999
SCOFIELD, GERARD, SINGLETARY
& POHORELSKY, L.L.C.
901 Lakeshore Drive, Suite 900
P.O. Drawer 3028 (70602-3028)
Lake Charles, LA 70601
Phone: 337-433-9436
Fax: 337-436-0306

Richard E. Sarver, 23558
Craig Isenberg, 29603
Meredith A. Cunningham, 26465
Jonathan R. Bourg, 31058
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER, L.L.C.
909 Poydras Street, Suite 2400
New Orleans, Louisiana 70112
Phone: 504-589-9700
Fax: 504-589-9701

H. Alston Johnson III, 7293
PHELPS DUNBAR LLP
400 Convention Street, Suite 1100
Baton Rouge, Louisiana 70802
Phone: 225-346-0285
Fax: 225-381-9197

Counsel for Defendant-Applicant
CITGO Petroleum Corporation

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STATEMENT OF THE CASE

The Court should reverse the Third Circuit Court of Appeal's erroneous application of foreign law to award punitive damages in a tort suit arising out of an oil spill at a Louisiana refinery that occurred only in Louisiana, was caused by conduct in Louisiana, and led to personal injury claims by Louisiana residents asserting that they were injured in Louisiana. If the lower court had correctly applied Louisiana's choice-of-law rules, Louisiana law – which does not permit punitive damages for Plaintiffs' claims – would have applied. Instead, the Third Circuit judicially redrafted the rules, creating a choice of law for punitive damages that the Legislature specifically rejected when the rules were enacted. No basis for this exists. Until the Third Circuit's decision, no Louisiana court had applied a foreign state's punitive damages law where, as here, all the events underlying the tort occurred in Louisiana. The decision flouts Louisiana's longstanding "general public policy against punitive damages," *Ross v. Conoco, Inc.*, 02-299, p. 14 (La. 10/15/02), 828 So. 2d 546, 555, and constitutes an abuse of judicial authority. Absent reversal, the decision will unsettle out-of-state companies' expectations and subvert Louisiana's deep-rooted interest in protecting its legal system from punitive awards. Contrary to the Legislature's intent, punitive damages will have found a safe haven in all tort suits against out-of-state companies.

The Third Circuit's choice of law was not its only error. The court's application of Texas punitive damages law violates both CITGO's constitutional due process rights and Texas substantive law. The court of appeal also fundamentally erred by changing the standard of proof for causation in a chemical exposure case; by upholding fear-of-future-injury awards that directly contradict this Court's jurisprudence; and by affirming the district court's unyielding refusal to permit CITGO a comparative fault defense, despite the Civil Code's instruction that courts assess comparative fault in all tort cases.

A. The Oil Spill At CITGO's Louisiana Refinery

This case centers on events that occurred only in Louisiana. CITGO operates three refineries, all in the United States, the largest of which is a 500-acre facility located entirely in Calcasieu Parish, Louisiana. (R. 26100.) Its Louisiana refinery has operated at its current site since the 1940s. (R. 28943-44.) It employs between 2,000 and 3,000 employees and contractors. (R. 29518.) CITGO is not in the business of exploration and development.

Operations at any refinery will generate wastewater, which requires treatment before discharge. CITGO's Louisiana refinery ("Refinery") built a new wastewater treatment unit ("WWTU") in 1994 to

treat its operational wastewater, as well as rain water draining through Refinery sewers, before discharge to the Calcasieu River. (R. 21236-37, 25963-65.) The WWTU included two 10-million gallon stormwater storage tanks intended for temporary storage during heavy rainfalls. (R. 26344-45.) On June 19, 2006, however, heavy rains overwhelmed the system, and the tanks overflowed. (R. 26105-06.)

The overflow would have been a non-event – the stormwater tanks sit in an enormous concrete dike to contain overflows on CITGO's property, and there was no dispute that the dike would have contained the oil (R. 26304, 26130) – except for three things. (R. 26296-97.) *First*, under normal conditions, the tanks should hold primarily stormwater and only a thin layer of oil on top. (R. 9072-73, 23741-42.) Because the Refinery had stopped using the tanks' skimmers, which were intended to remove oil sitting atop the water in the tanks, a large amount of oil accumulated, although no one knew how much because the tanks are enclosed. (R. 26139-40, 26296.)

Second, the Refinery failed to follow its own operational WWTU procedures. Those procedures required that personnel draw down the tanks' levels as low as possible before a storm because the *height* of material inside each tank was discernible from outside the tank, even if the *composition* of that material was not. (R. 25971, 26137-39.) Despite the high levels before the storm, the Refinery did not draw the levels down as required by its own procedure. (R. 25971, 26137-38, 26296.)

Third, at the time of the rain event, CITGO was building a third stormwater tank to keep pace with a refinery expansion sending more water to the WWTU. (R. 25969-70, 30099-101.) As part of this construction project, a portion of the concrete dike floor was temporarily removed, exposing the underlying dirt; and a concrete junction box housing drainage pipes was installed underground. (R. 26119-20, 26296-97, 29905-06, 29926-28.) This is important because, on June 19, 2006, when the tanks overflowed and the dike filled with oil, the oil penetrated the dirt floor into the junction box and through its drainage pipes that led to a creek and ultimately the Calcasieu River. (R. 26127-30.) No one at the Refinery realized that the underground junction box was acting like a bathtub drain and providing the means of escape for the oil until most of the oil had escaped. (R. 26125-30.)

Plaintiffs' only engineering expert, Nicholas Cheremisinoff, and CITGO's investigation team separately concluded that these mistakes – all made at the Louisiana refinery – solely caused the oil spill. (R. 26096-103, 26296-97.) According to Plaintiffs' expert Cheremisinoff, the oil would not have been released from CITGO's property had the Refinery properly handled these operational and maintenance issues. (R. 26304, 26310.) Every cause of the oil spill therefore occurred in Louisiana.

B. Plaintiffs' Exposure Claims

The 14 plaintiffs in this case were employed by Ron Williams Construction Company ("RWCC") in June, 2006. (R. 27009, 27620.) At the time, RWCC was building a new unit at Calcasieu Refining Company ("CRC"), another refinery located more than two miles downriver from CITGO. (R. 26874-75, 29460.) It took two days for the oil to migrate to CRC. (R. 21603-05.) During this time, most of the volatile compounds, which pose the greatest potential risk of inhalation exposure, evaporated before the oil reached CRC. (R. 29468-74.)

CITGO took prompt and successful measures to mitigate the effects of the oil spill. In less than three weeks, the Calcasieu River was open for all uses. (R. 28755-60.) And during this time, extensive air monitoring was performed to ensure the safety of the community. Louisiana's Department of Environmental Quality ("LDEQ") and the U.S. Coast Guard – the lead federal response agency for oil spills – in addition to CITGO and its contractors took thousands of air samples from the area, including samples at the source of the spill and from boats operating in the oil itself. (R. 29124, 28930, 29175-76, 29184.) The sampling – which, among other things, tested for volatile organic compounds (a composite of hydrocarbons consisting of benzene, toluene, ethylbenzene, and xylene) – uniformly showed very low exposure levels below heath-protective standards set by government agencies and health organizations. (R. 28930-32.) The LDEQ, based on its air sampling, concluded that "[t]he concentrations of most of the air toxic[] compounds while above normal ambient concentrations, are well below the ATDSR acute minimal risk levels (MRL) and do not pose an immediate health concern." (R. 16667.)

During the spill, Plaintiffs performed their routine jobs at CRC; they did not help with the clean-up efforts or have direct contact with the oil. (R. 26874-75.) While Plaintiffs offered no objective exposure data at trial – and no evidence that contradicted LDEQ's finding or thousands of sampling results – they claimed that they were exposed to the oil's odor either from the river or from oily materials in roll-off boxes on CRC's property. (*See, e.g.*, R. 28337, 28409-10, 28456-57.) They claimed a host of common symptoms that have many causes, such as headaches, sinus problems, nausea, diarrhea, and eye irritation. Plaintiffs alleged that some symptoms disappeared as the odor diminished after the first few weeks. (R. 26992, 27555, 27767, 28393.) But others, Plaintiffs assert, lasted several months or more. (R. 27556, 28393.)

Plaintiffs' actions tell a different story about the extent of any symptoms they experienced. No plaintiff missed work as a result of his alleged symptoms. (*See, e.g.*, R. 27613, 27621-22.) None sought

medical attention from his employer or workers' compensation benefits. (*See, e.g.*, R. 26890, 27830, 29976.) None consulted his regular treating physician; indeed, those who visited their regular physician during the months following the spill mentioned nothing of the symptoms they allege here. (R. 27872-74, 30002-04.) Instead, in virtually every case, Plaintiffs reported symptoms only to physicians hired by Plaintiffs' lawyers to testify in this case and, even then, waited two to seven months after the spill to do so, by which time many had no complaints at all. (R. 18587-82, 27817, 28420, 30002.) The objective medical tests administered by the litigation doctors showed no evidence that any plaintiff had a toxic exposure. (R. 29957, 28174, 28179.) In short, Plaintiffs presented no objective, scientific evidence that they were exposed to sufficient levels of any chemical to cause the symptoms they claimed.

C. The Lower Courts' Rulings

CITGO stipulated to fault, leaving for trial only the issues of causation, damages, and punitive damages. After a three-week bench trial, the district court held CITGO liable for "effects [that] were short term, approximately one to three months, [with] no long term or permanent injuries ... suffered." (R. 25029, Written Reasons at p. 2.) Despite its finding of transitory symptoms, the court awarded general damages ranging from $7,000 to $15,000, which included compensation for "fear of developing disease" – even for one plaintiff who testified he did not fear future disease. (R. 25032-45, Written Reasons at pp. 5-18.) After compensating Plaintiffs under the Civil Code, the district court looked west for purposes of punishment and decided that the laws of Oklahoma *or* Texas applied to Plaintiffs' punitive damages claims and awarded each $30,000. (R. 25046-49, Written Reasons at pp. 19-22.)

The Third Circuit affirmed. *See Arabie v. CITGO Petroleum Corp.*, 10-244 (La. App. 3 Cir. 10/27/10), 49 So. 3d 529. As to the choice of law, the court concluded that the place of "injurious conduct" was CITGO's corporate headquarters where it made "budget and management decisions leading to the subject release in 2006" – Oklahoma from 1994-2004 and Texas thereafter. *Id.* at pp. 36, 45, 49 So. 3d at 551, 556-57. It next determined CITGO's domicile. For choice of law purposes in the tort context, article 3548 requires out-of-state corporations that transact business in Louisiana and incur tort liability from activities in Louisiana be treated as Louisiana domiciliaries. Before applying that rule to the facts of this case, however, the court of appeal stated that this definition in article 3548 is "*contingent* upon whether it is appropriate under the principles of ... art. 3542" – the general interests-based choice-of-law provision for delicts. *Id.* at p. 37, 49 So. 3d at 552 (emphasis in original). The court proceeded to weigh the competing states' interests in this litigation, though its interests analysis

did not use the factors and guidance in article 3542. Instead, the court exclusively used article 3543 – which provides a choice of law for standards of safety and conduct that differ among interested states. This marked the first time any court or litigant had invoked that article in this litigation.

The court concluded that "the states awarding punitive damages for negligent conduct have higher standards of conduct than states not awarding punitive damages for the same conduct." *Id.* at p. 42, 49 So. 3d at 555. Since Texas and Oklahoma allow punitive awards, and Louisiana does not, the court found Texas's and Oklahoma's interests superior to those of Louisiana. *Id.* at pp. 42-45, 49 So. 3d at 555-57. The court ultimately chose Texas law over Oklahoma's because "Texas is the current domicile of CITGO and likely has a greater interest in enforcing its punitive damage law in this case than does Oklahoma." *Id.* at p. 45, 49 So. 3d at 556. The court also affirmed the lower court's finding of causation and refusal to assess comparative fault, and maintained the awards for "fear of future injury," even as to the plaintiff who testified he had no such fear. *Id.* at pp. 28-31, 49 So. 3d at 547-48.

ASSIGNMENTS OF ERROR

1. Louisiana law does not permit punitive damages awards for Plaintiffs' claims, and Louisiana has a strong public policy against punitive awards in its courts. The appellate court misapplied Louisiana's choice-of-law rules – and, contrary to legislative policy, declared a new policy embracing punitive damages – in affirming punitive damages awards under Texas law although this case involved an oil spill to Louisiana waters from a Louisiana refinery, asserted by plaintiffs who reside solely in Louisiana and allege injuries occurring solely in Louisiana.

2. The appellate court erred in affirming an award of punitive damages under Texas law without evidence that the conduct allegedly justifying punitive damages was causally linked to the oil spill or evidence that the causes of the oil spill resulted from gross negligence. Accordingly, the punitive damages award violates CITGO's due process rights under the United States Constitution and is contrary to the Texas law that the appellate court wrongly chose to apply.

3. The appellate court erred in affirming Plaintiffs' compensatory damages awards because they failed to prove that they were exposed to harmful levels of any chemicals from the oil spill and, therefore, did not establish causation, an essential element of their claims.

4. The appellate court erred in affirming awards to each plaintiff of $2,500 for fear of future illness because there was no evidence that Plaintiffs were at risk for future health problems or had any reason to fear for their future health because of the CITGO oil spill.

5. The appellate court erred in affirming the district court's ruling that CITGO was barred as a matter of law from presenting a comparative fault defense.

SUMMARY OF ARGUMENT

1. Louisiana substantive law – which does not allow punitive damages on the underlying claims alleged here – should have been applied by the lower courts. Civil Code Article 3546 prohibits a Louisiana court from awarding punitive damages unless the substantive law of at least two of three locations authorizes such an award: (1) the place of alleged injury; (2) the place of alleged injurious conduct; or (3) the place of defendant's domicile. Here, Plaintiffs were injured in Louisiana, and Louisiana law therefore governs punitive damages if either CITGO's domicile is Louisiana under article 3548 or the place of injurious conduct is Louisiana.

Domicile: The inclusion of domicile as an Article 3546 factor discourages application of another state's law in suits against Louisiana domiciliaries and, by way of article 3548, extends to out-of-state corporations like CITGO. Article 3548 treats as Louisiana domiciliaries out-of-state corporations that operate in this state and incur tort liability arising from those operations "provided it is appropriate under the principles of Article 3542." CITGO, as a corporation doing business in Louisiana and facing claims from its operations here, is a Louisiana domiciliary for choice of law purposes. And treating it as such is appropriate under the principles of Article 3542 because Louisiana's policies against punitive damages would be most seriously impaired if its law were not applied in this case.

The appellate court, however, did not decide CITGO's domicile by reference to the principles in article 3542. Instead, it used a Code article neither side nor the district court ever raised – article 3543, which governs standards of safety and conduct by choosing the state's law with the higher standard, *regardless of a defendant's domicile*. Doing so perverted the analysis intended for punitive damages. The drafters perceived article 3543 as having a "pro-victim tilt" and, in response, drafted the separate article for punitive damages, article 3546, to make relevant a defendant's domicile. That history shows the appellate court's decision to use article 3543 – which ignores a defendant's domicile – to determine CITGO's domicile for punitive damages was legal error. Worse, the court concluded that a state with punitive damages *always* has the "higher" standard of conduct under article 3543, which biases its test for "domicile" to default to states with punitive damages. This result frustrates the intent of the legislative drafters, who deliberately accorded Louisiana domiciliary status to corporations like CITGO.

The Third Circuit also erred in its application of article 3542 by finding that Louisiana no longer

has a policy interest against punitive damages, despite this Court's pronouncement that Louisiana has a "general public policy against punitive damages." *Ross*, p. 14, 828 So. 2d at 555. Indeed, Louisiana disallows punitive damages absent express legislative authorization, and there is no such authorization here. On the contrary, the Legislature has twice rejected penalizing the tortious handling of oil or hazardous materials in recent years. Contrasting that with the Texas policy underlying punitive damages reveals the punitive award here not only offends Louisiana policy, but does not further any policy of Texas. The state contacts to this litigation reinforce Louisiana's interests, as well. This case is about a Louisiana refinery spilling oil to Louisiana waters that Louisiana citizens contend caused injury in Louisiana. Texas's interest in this litigation is, at best, remote when compared to Louisiana's, and treating CITGO as a Louisiana domiciliary is consistent with the broader principles of article 3542.

Injurious Conduct: The "injurious conduct" – meaning, the "principal cause of the injury" under the Code – also occurred in Louisiana. The oil spill in Louisiana was the principal cause of Plaintiffs' alleged injuries, not general corporate policies or decisions in other states. Plaintiffs' sole engineering causation witness agreed, testifying that it was the Refinery's conduct in Louisiana alone that caused the spill. Indeed, Plaintiffs' theory that the injurious conduct consisted of decisions at corporate headquarters leading to insufficient capacity at the WWTU was flatly rejected by the undisputed evidence that CITGO had enough capacity at the time of the event to keep the oil on its property. Only the breach of the containment area – a result of a construction project that undisputedly occurred at the Louisiana Refinery – allowed the oil to escape. Each article 3546 location is in Louisiana and the punitive award therefore violates Louisiana law.

2. The punitive award also violates CITGO's rights under the Due Process Clause, which requires a nexus between the "conduct" warranting punitive damages and the specific harm a plaintiff suffered. Here, the corporate conduct that the lower courts "punished" under Texas law did not cause the spill according to Plaintiffs' own expert. Moreover, under the Third Circuit's interpretation of article 3543 – that a state with punitive damages provides a higher standard of safety and conduct – the lower courts should have applied Texas law to the underlying tort claim. But Plaintiffs have no viable negligence claim under Texas law from which a punitive award could draw because they failed to submit the evidence that Texas requires – objective, scientific evidence of specific dose sufficient to cause the injuries alleged.

Also, the corporate conduct of which Plaintiffs complain – general corporate budgeting and other

decisions – does not meet the threshold for awarding punitive damages in Texas as it does not amount to an actual awareness of the risk of the oil spill in conscious indifference to the rights, safety, or welfare of others. There was no evidence that anyone at corporate headquarters knew about the oil accumulation or the junction box that allowed oil to escape. The appellate court's decision on punitive damages is irreparably flawed as a matter of Louisiana law, Texas law, and constitutional law.

3. The appellate court's decisions on the liability portion of Plaintiffs' claims are equally unsound. In Louisiana, a plaintiff in an exposure case must prove causation with scientific evidence showing exposure levels sufficient to cause the injuries alleged. When faced with thousands of air monitoring data points uniformly showing exposure levels below heath-protective standards in and around the spill, Plaintiffs presented only evidence that their descriptions of symptoms were consistent with those that *could* result from overexposure to certain chemicals in the oil. That evidence does not establish causation under Louisiana law.

4. Plaintiffs' proof failed, too, with respect to their claims for fear of future injury. To recover on those claims, a plaintiff must show his fear is more than "speculative or merely possible." Here, one plaintiff even testified he had no such fear, and Plaintiffs' expert testified it was "unlikely" that Plaintiffs would experience future injury or illness from the exposure alleged. Absent evidence showing Plaintiffs are at risk for future health problems, or have any rational reason to fear for their future health, these awards should not stand.

5. While the lower courts forgave Plaintiffs their insufficient evidence time and again, they also ignored the Code's requirement and this Court's instructions that comparative fault be allocated among the parties and third parties, but not because the evidence was lacking – even the Third Circuit's opinion identifies examples of it. Rather, the district court improvidently granted Plaintiffs summary judgment on the issue months before trial and refused to reconsider the ruling at trial; the Third Circuit committed legal error in affirming.

ARGUMENT

I. LOUISIANA LAW SHOULD APPLY TO PLAINTIFFS' PUNITIVE CLAIMS.

Article 3546 provides the choice-of-law analysis for punitive damages claims and identifies three locations that a court must consider: (1) where the injury occurred; (2) where the person whose conduct caused the injury is domiciled; and (3) where the injurious conduct occurred. "Article 3546 expressly prohibits a Louisiana court from awarding punitive damages unless the substantive law of no less than

two of the Article 3546 locations authorizes such an award." *Security Title Guar. Corp. v. United Gen. Title Ins. Co.*, No. 95-31062, 1996 WL 400048, at *2 (5th Cir. May 29, 1996). Here, it was undisputed that the alleged injury occurred in Louisiana. Thus, the lower courts were required to apply Louisiana law, which does not provide for punitive damages here, so long as either CITGO was domiciled in Louisiana ***or*** the injurious conduct occurred in Louisiana. The evidence showed that CITGO met ***both*** of these additional factors.

In holding that Texas law should apply, the Third Circuit incorrectly interpreted the 1991 enactment of article 3546 as somehow blessing punitive awards in Louisiana. But in reality, "article 3546 is: (a) much more conservative than the practice of many sister state courts of awarding punitive damages if any one of ... three states, or a state having only one of the above contacts, such as the place of conduct, allows such damages; (b) more conservative than pre-1991 Louisiana jurisprudence; and (c) fairly protective of Louisiana industry and other activity within this state." Symeon C. Symeonides, *Louisiana's New Law of Choice of Law for Tort Conflicts: An Exegesis*, 66 Tul. L. Rev. 677, 743-44 (1992). The protective nature of article 3546 arises from the combination of two factors: "(1) article 3546's determinative use of the places of the defendant's conduct and domicile for selecting the applicable law; and (2) Louisiana's general prohibition of punitive damages." *Id.* at 744. The article's history makes clear that its drafters intended to limit, not to expand, the availability of punitive damages when they identified a defendant's domicile as relevant to choosing the law for punitive damages.

Before the lower courts' rulings here, courts confronting theories similar to Plaintiffs'– that corporate management and policy constituted the punitive "conduct" – uniformly applied Louisiana law, either because they found the out-of-state defendant was domiciled in Louisiana[1] or because the injurious conduct occurred where the tort was carried out, not where alleged injury-causing decisions occurred.[2] The Third Circuit, however, ignored the jurisprudence – it mentioned none of it in its 50-page opinion – and applied the choice-of-law provisions arbitrarily and erroneously. In the end, the court's decision undermines Louisiana's longstanding interest in protecting its judicial system from punitive awards and establishes a judicially-endorsed road map for Louisiana litigants hoping to take advantage of out-of-state punitive damages. These errors should be reviewed *de novo*. *Wooley v.*

[1] *See Nicholas v. Allstate Ins. Co.*, 30,735, p. 22 (La. App. 2 Cir. 5/28/99), 739 So. 2d 830, 844, *rev'd on other grounds*, 99-2522 (La. 8/31/00), 765 So. 2d 1017; *Security Title*, 1996 WL 400048, at *2; *Lenert v. Duck Head Apparel Co.*, No. 95-31122, 1996 WL 595691 (5th Cir. Sep. 25, 1996).

[2] *In re Train Derailment Near Amite, La.*, No. 1531, 2004 WL 169805, at *2 (E.D. La. Jan. 26, 2004); *In re Genetically Modified Rice Litig.*, No. 06-1811, 2010 WL 2326036, at *9 (E.D. Mo. June 7, 2010).

Lucksinger, 06-1140, p. 46 (La. App. 1 Cir. 12/30/08), 14 So. 3d 311, 358-59, *writ granted*, 09-571 (La. 12/18/09), 23 So. 3d 953 ("Determining the proper choice-of-law law to be applied to an issue is a question of law for which [an appellate court] has the plenary and unlimited constitutional power and authority to review *de novo*."); *see also Mihalopoulos v. Westwind Africa Line, Ltd.*, 511 So. 2d 771, 775-76 (La. App. 5th Cir. 1987).

A. CITGO Is A Louisiana Domiciliary Under The Punitive Damages Conflicts Rule.

1. The appellate court usurped the legislative role and rewrote the rules.

As its history reflects, article 3546 is intended to limit, not to expand, application of punitive damages. One way it does this is by reference to a defendant's domicile through article 3548, which states: "[P]rovided it is appropriate under the principles of Article 3542, a juridical person that is domiciled outside this state, but which transacts business in this state and incurs a delictual or quasi-delictual obligation arising from activity within this state, *shall* be treated as a domiciliary of this state." La. Civ. Code art. 3548 (emphasis added). Plaintiffs did not and could not dispute that CITGO "transact[ed] business" or that it "incur[red] a delictual . . . obligation" in Louisiana. So the only question before the lower courts was whether it was appropriate "under the principles of Article 3542" to treat CITGO as a Louisiana domiciliary. Given that this case involved an oil spill at a Louisiana refinery involving only Louisiana residents claiming injuries only in Louisiana, it was undoubtedly appropriate to apply Louisiana law under article 3542's principles.

Before the Third Circuit's decision here, every court addressing this precise issue held that a foreign defendant operating in Louisiana and facing claims based on those Louisiana operations should be treated as a Louisiana domiciliary under the Code regardless of decisions that may have been made at out-of-state corporate offices. In *Nicholas*, for example, an employee-plaintiff alleged wrongful termination from Allstate's Shreveport, Louisiana office. *Nicholas*, p. 1, 739 So. 2d at 834. He sued in Louisiana and sought punitive damages under Mississippi or Illinois law because Allstate's managers in those states decided to terminate him. *Id.* at pp. 2, 19, 739 So. 2d at 835, 844. Similar to the claim here that corporate decisions led to the Louisiana oil spill, the *Nicholas* plaintiff contended that the tortious decision to fire him occurred in Mississippi or Illinois, and that the interests analysis of article 3542 weighed in favor of those states' laws. *Id.* at p. 20, 739 So. 2d at 844-45. The Second Circuit rejected this contention, however, and held that, regardless of the out-of-state conduct, the defendant transacted business in and incurred the tort obligation in Louisiana by terminating the plaintiff's employment in

Louisiana. *Id.* at p. 20, 739 So. 2d at 844. And contrary to the Third Circuit's reliance on article 3543 – which turns on the location of injurious conduct and writes domicile out of the analysis altogether – *Nicholas* held that Louisiana law should apply to a foreign corporation considered a Louisiana domiciliary under article 3548 "[e]ven if the injurious conduct occurred in [another state]." *Id.*

Consistent with the *Nicholas* decision, the United States Fifth Circuit Court of Appeals has twice held that out-of-state decisions leading to an alleged tort in Louisiana are insufficient to make the company an out-of-state domiciliary under article 3548. In *Security Title*, the court affirmed the dismissal of a punitive damages claim against two out-of-state insurers that allegedly breached an obligation to provide information to the Louisiana Insurance Commissioner. 1996 WL 400048, at *1. As in this case, the plaintiff in *Security Title* urged application of foreign punitive damages law because the "corporate decision[]" in Texas or Maryland to refrain from notifying the commissioner constituted the "the dispositive 'activities' for purposes of Article 3548." *Id.* at *2. Rejecting that argument, the court held that the defendants were Louisiana domiciliaries because of "the considerable business activities that [they] conducted in Louisiana, which gave rise to the underlying tort and without which the resulting injury would not have occurred," even though the ultimate decision against notifying the commissioner may have occurred outside Louisiana. *Id.*; *accord Lenert*, 1996 WL 595691, at *6 n.6 (even if plaintiffs were correct that the "punitive damages claim arose only out of activity that occurred in Georgia ... it does not create a fact issue concerning [article 3548's] application, because the tort obligation to the plaintiffs arose out of Duck Head's business activity within Louisiana").

Neither Plaintiffs nor the lower courts cited any authority to the contrary. Yet instead of following the jurisprudence and doing what articles 3548 and 3542 instruct, the Third Circuit looked to article 3543. Before that time, neither side in this case nor the district court had ever referenced this article, and the court's decision to do so erred in several material ways. First, it was error to weigh the states' interests as they relate to punitive damages through use of article 3543. The court's reliance on article 3543 makes domicile irrelevant and, as a result, yields a choice-of-law rule more permissive than what the drafters intended. Indeed, article 3546 was drafted to *avoid* a punitive-damage choice-of-law evaluation under article 3543: "[T]he Council of the Louisiana State Law Institute saw in article 3543 a pro-victim tilt that the Council considered undesirable in punitive damages conflicts, [so] the Council instructed this Reporter to draft a separate article for punitive damages. After several debates, an article that later became article 3546 was adopted by the Council." Symeonides, 66 Tul. L. Rev. at 735. The

Third Circuit's decision frustrates these efforts and renders article 3546 superfluous.

Its analysis also frustrates the drafters' intent for a second reason. Article 3543 determines applicable law based *only* on the place of injury and injurious conduct. It does *not* include the third factor that must be considered for punitive damages claims under article 3546 – a defendant's domicile. The Third Circuit's methodology thus determined CITGO's domicile based on an article that eschews domicile altogether. Under the principles of article 3542, the domicile of all parties is a factor to consider. Here, the Plaintiffs and CITGO were domiciled in Louisiana under the Code, further showing the appellate court's error in discarding domicile from the choice-of-law analysis. The drafters could not have intended that a defendant's domicile as defined in article 3548 be eliminated so easily from the punitive damages calculus, particularly where the domicile factor and article 3546 were specifically intended to restrict the punitive awards that article 3543 would otherwise make available.

In misapplying the Code articles, the Third Circuit created a conflicts analysis that is biased in favor of punitive damages, precisely the opposite of the Legislature's intent. Article 3543 resolves conflicts based on which state's law provides the higher standard of safety and conduct. And according to the Third Circuit, "the states awarding punitive damages for negligent conduct have higher standards of conduct than states not awarding punitive damages for the same conduct." *Arabie*, p. 42, 49 So. 3d at 555. Thus, the interests analysis used to determine an article 3548 domicile for *any* out-of-state defendant (by way of article 3543) will always result in punitive damages if that out-of-state corporation has an office in a state that permits punitive damages (and Plaintiffs allege that a decision in that office is somehow related to the alleged injury). There is no way to reconcile this result with the narrowly confined circumstances in which the Legislature has authorized punitive damages and "the general public policy against punitive damages" announced by this Court. *Ross*, p. 14, 828 So. 2d at 555.

2. The appellate court failed to apply the interests analysis of article 3542 and in so doing subverted both the Legislature's and this Court's policy statements that punitive damages are disfavored in this State.

The only way that the Third Circuit could treat CITGO as a foreign domiciliary under the Code would be to find that it is inappropriate to treat CITGO as a Louisiana domiciliary under article 3542, which requires the court to determine "the state whose policies would be most seriously impaired if its law were not applied." But the lower courts failed to perform this analysis and in doing so wholly ignored Louisiana's well-established public policy against punitive damages. If those courts had adhered to the Code and applicable jurisprudence, they would have concluded that Louisiana has the

overwhelming interest in having its laws applied to this case.

As discussed above, no court has ever found it "[in]appropriate under the principles of Article 3542" to treat a foreign corporation as a Louisiana domiciliary under article 3548 when all other requirements of that article are met. If there were a case for such a finding, this is not it. CITGO operates the nation's fourth largest refinery on 500 acres in Calcasieu Parish and employs thousands of Louisiana's citizens. (R. 29518, 26100.) And all of the relevant events giving rise to this case occurred in Louisiana. With all these connections to Louisiana, the court erred in finding it inappropriate to treat CITGO as a Louisiana domiciliary.

It is also clear that Louisiana has a policy against punitive damages on the very facts of this case. Before 1996, punitive damages were awardable for torts committed in the context of storage, handling, or transportation of hazardous wastes. *See* La. Civ. Code art. 2315.3, *repealed by* 1996 La. Acts No. 2, § 1. In 1996, the Legislature specifically repealed article 2315.3. *See* 1996 La. Acts No. 2, § 1. The repeal of 2315.3 was intended to "allow criminal statutes and [L]DEQ regulations ... [to] regulate the storage, handling, and transportation of hazardous or toxic substances, thus negating the need for exemplary damages which serve only to punish."[3] The repeal of article 2315.3 shows that Louisiana has a policy interest against injecting punitive damages into tort suits like this one. This interest was reaffirmed just this year when the Legislature rejected an attempt to reintroduce 2315.3-type punitive damages into Louisiana law. (*See* Exhibit 3 to CITGO's writ application.)

Remarkably, the Third Circuit found the repeal of article 2315.3 irrelevant and asserted that the 1991 enactment of the choice-of-law rules, including article 3546's rules for punitive damages claims, marked a legislative endorsement of punitive damages. That is incorrect. The comments that went into effect with article 3546 specifically reiterate "the prevailing hostility towards punitive damages in Louisiana." La. Civ. Code art. 3546 cmt. (b). "Without in any way questioning Louisiana's general hostility towards punitive damages, article 3546 simply delineates those multistate cases in which punitive damages may be awarded under the law of a state that allows them.... If anything, article 3546 is ... more conservative than pre-1991 Louisiana jurisprudence[.]" Symeonides, 66 Tul. L. Rev. at 743-44 (emphasis omitted). The drafters of article 3546 made this clear when reporting the article to the Law Institute and informing the legal community of the new article. (*See* Exhs. 4-5 to CITGO's writ

[3] *See* Minutes, Civil Law and Procedure Committee, March 26, 1996, at 2 (Exh. 2 to CITGO's writ application). That is exactly what happened here. On September 17, 2008, CITGO pled to a misdemeanor under the Clean Water Act and paid $13 million in penalties. (R. 14115-69.)

application.) The enactment of "more conservative" rules that emphasize Louisiana's "prevailing hostility" to punitive damages in no way represents a legislative endorsement of punitive damages.

The appellate court stated that Louisiana no longer has an "unswerving" interest in the "rejection of punitive damages in a civil action," *Commercial Union Ins. Co. v. Upjohn Co.*, 409 F. Supp. 453, 458 (W.D. La. 1976), claiming that such judicial pronouncements are outdated. That is simply wrong and ignores this Court's recent affirmation that "there is a general public policy against punitive damages." *Ross*, p. 14, 828 So. 2d at 555. This policy "lies in the protection of [Louisiana's] judicial system ... from what it might consider inherently speculative awards." *Pittman v. Kaiser Alum. & Chem. Corp.*, 559 So. 2d 879, 883 (La. App. 4th Cir. 1990); *accord Lee v. Ford Motor Co.*, 457 So. 2d 193, 194-95 (La. App. 2d Cir. 1984). As a result, "a fundamental tenet of [Louisiana] law is that punitive or other penalty damages are not allowable unless expressly authorized by statute." *Ross*, p. 14, 828 So. 2d at 555. The Legislature has deemed only a few specific and egregious instances of misconduct eligible for punitive damages, such as child pornography, drunk driving, and child molestation, none of which is at issue here. The Third Circuit's decision contradicts legislative policy and would make Louisiana a friendly enclave for punitive damages.

Moreover, the Third Circuit ignored the judicial decisions holding that Louisiana's policy against punitive damages outweighs competing interests that other states may have. *See Pittman*, 559 So. 2d at 883-84 (recognizing California's "interest in preventing manufacturers within its boundaries from placing defective products in the stream of commerce," but deferring to Louisiana's interest in protecting its judicial system "from what it might consider inherently speculative awards").[4] It also failed to provide a rational basis for concluding that Texas's interest surpassed Louisiana's interest in this case. It would have been hard-pressed to do so: Texas courts have consistently *refused* to apply Texas law in similar situations.[5] "[T]he policy of deterrence reflected in [a punitive damages] award

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[4] *See also Ramsey v. Bell Helicopter Textron, Inc.*, 704 F. Supp. 1381, 1383-84 (E.D. La. 1989) (finding that Texas's authorization of punitive damages does not itself display a competing interest capable of overcoming Louisiana's "well recognized" interest in "effectuating and enforcing its own policies against exemplary damages" and that"[w]hile a Louisiana plaintiff may want to take advantage of awards not permitted by his own law, to adopt such a rule would obliterate any attempt for certainty, predictability and uniformity").

[5] *See Union Natural Gas Co. v. Enron Gas Mktg., Inc.*, No. 98-183, 2000 WL 350546 (Tex. App. Apr. 6, 2000) (applying Louisiana law to punitive damages claim where injury occurred in Louisiana, relationship was based in Louisiana, and Louisiana citizens were using defendant's product, though tortious conduct occurred both in Texas and Louisiana and defendant's primary place of business was in Texas); *Gauthier v. Union Pac. R.R. Co.*, 644 F. Supp. 2d 824 (E.D. Tex. 2009) (applying Louisiana law to punitive damages claim in train accident case against a non-Louisiana domiciliary because injury occurred in Louisiana, majority of the plaintiffs were domiciled in Louisiana, and the train crossing was operated in Louisiana); *accord Punyee v. Bredimus*, No. 04-893, 2004 WL 2511144, at *9 (N.D. Tex. Nov. 5, 2004); *CPS Int'l, Inc. v. Dresser Indus., Inc.*, 911 S.W.2d 18, 30 (Tex. App. 1995); *Bridas Corp. v. Unocal Corp.*, 16 S.W.3d 893, 898 (Tex. App. 2000).

ultimately seeks the protection of Texas citizens against injury, and does not automatically translate into an interstate policy designed to punish [Texas's] own manufacturing citizens for allegedly causing injury elsewhere." *Ramsey,* 704 F. Supp. at 1383. Such an overreaching principle would "tread[] upon the policy choices" that a foreign state "has made in the competing objectives and costs of tort law." *Punyee*, 2004 WL 2511144, at *9. Surely, Texas's interest is not imperiled by applying Louisiana law when its own courts refuse to "right[] any perceived inequities" created by the application of foreign law. *Id.*

Despite article 3548's instruction to apply the interest analysis of article 3542, neither the district court nor the appellate court performed the required analysis, and neither court provided any authority showing that Texas has any interest that approaches Louisiana's virtually "insurmountable" interest in having its laws applied to refineries and other facilities operating in this state. *See Upjohn*, 409 F. Supp. at 458. The appellate court failed to follow the Civil Code and the jurisprudence of this Court and others, usurping for itself the function of legislator and creating new law that conflicts with existing law and longstanding Louisiana public policy. This error demands reversal.

B. CITGO's Alleged Injurious Conduct Occurred In Louisiana.

The "injurious conduct" factor also points to Louisiana and thus presents an independent basis for reversing the Third Circuit's decision. The Code provides that the location of injurious conduct is where the "principal cause of the injury" occurred. La. Civ. Code art. 3543 cmt. (h). The oil spill was the "principal cause" of the alleged injury and resulted from actions undisputedly occurring in Louisiana. Even "[a]ssuming *arguendo* that management-level employees located in [Oklahoma or Texas] contributed in some way to the [oil spill], their actions cannot conceivably outweigh or equal the allegedly tortious conduct that occurred in Louisiana." *See In re Train Derailment*, 2004 WL 169805, at *1; *accord Rice Litig.*, 2010 WL 2326036, at *9 (under article 3546 "in a non-intentional tort case, such as a claim of negligence, the site of the physical conduct causing the injury is more important than the site where decisions, or non-decisions, were made").

Moreover, Plaintiffs' sole engineering causation witness agreed that the causes of the oil spill took place in Louisiana. He testified that the oil spill resulted solely from three things, all of which occurred at the Refinery in Calcasieu Parish: (1) the accumulation of oil in storm water tanks because of inoperable oil skimmers in the tanks, (2) failure to maintain low levels in the tanks, and (3) the installation of the earthen containment dike and the unsealed junction box. (R. 26296-97.) He confirmed

that the oil would not have been released from CITGO property if these issues had been properly addressed in Calcasieu Parish:

> Q: ...[E]ach and every one of those were things that happened in Calcasieu Parish at the Citgo Refinery, nowhere else; right?
>
> A: Yes.
>
> Q: No question about that?
>
> A: Yes.
>
> * * *
>
> Q: And each and every one of those actions that could have prevented this release would have been taken in Calcasieu Parish, Lake Charles, Louisiana?
>
> A: Yes, I agree with that.

See R. 26297, R. 26310. The evidence was therefore undisputed that CITGO had enough capacity to contain the oil spill but that the breach in the containment area, including the unsealed junction box, a product of the third-tank construction project that plainly occurred in Louisiana, resulted in the oil release. (R. 26127-30, 26926-97, 26304.) This destroys Plaintiffs' theory – which was adopted by the lower courts – that decisions at corporate headquarters caused insufficient capacity at the WWTU leading to the oil spill.

In any event, there was no evidence that corporate headquarters did anything other than approve funds related to the WWTU, which cannot possibly be "injurious conduct." Indeed, the uncontroverted evidence showed that every funding request by the Refinery from the WWTU's initial construction in 1994 through the date of the oil spill was approved by corporate headquarters. (R. 21384, 21415, 21456.) In fact, the Refinery did not request funding for a third tank until 2004 and it was approved by headquarters. (R. 21415.) Not once did headquarters – whether in Oklahoma or Texas – reject a request by the Refinery for a third tank or any other environmental or safety project at the WWTU.[6] CITGO did not move its headquarters to Texas until 2004. And neither lower court pointed to any evidence of conduct that occurred in Texas between 2004 and 2006 that supported punitive damages.

Yet the appellate court said nothing about this undisputed evidence. Instead, it came up with a theory that Plaintiffs themselves had never pursued, pointing to documents stating that CITGO's "Executive Management" will "establish[] policies, approve[] standards and goals for performance, and review[] ... compliance for all facilities." *Arabie*, p. 38, 49 So. 3d at 552. But there can be no serious suggestion that this type of general corporate policy and oversight establish that the cause of an accident

[6] For example, in 1999, when the Refinery requested funding to pave the containment area surrounding the tanks, headquarters was told by the Refinery that approval of this request would assure environmental compliance and safety. (R. 21386.) Headquarters approved the request. (R. 21384.)

originated with a company's corporate management. If so, every corporation establishing corporate safety policies would be subject to another state's law when those policies are not followed by employees working in Louisiana. The inexorable result of this judicially-created scheme is that punitive damages will be applied against every out-of-state defendant doing business in this state, as long as it is headquartered in a state that allows punitive damages.

Finally, defining decisions and corporate policies as "conduct" for choice-of-law purposes encourages arbitrary results that treat out-of-state corporations much differently from in-state corporations. Corporate policy or decisions can be made anywhere in today's world. They can be made on conference calls, in airports, or among executives in different states and even countries. Identifying as the place of "conduct" the location of a decision about routine issues of corporate governance (for example, here, setting general operational standards or requesting that a budget be reassessed) means the "conduct" quite literally could take place anywhere.[7] Yet, if the "conduct" happens to take place in a jurisdiction with punitive damages – say, in the Houston airport – then an out-of-state corporation would be subject to punitive damages under the Third Circuit's decision. Conversely, even if a Louisiana executive engages in the same conduct at the Houston airport, the Louisiana company will never be subject to punitive damages because the company's domicile is unquestionably in Louisiana. The result discriminates against out-of-state corporations with no valid justification for doing so. Such discrimination is directly at odds with the legislative will to promote economic growth in Louisiana by treating out-of-state corporations as Louisiana domiciliaries if the standards of article 3548 are met. CITGO unquestionably met those standards here.

If any violation of corporate policy is deemed to constitute the "principal cause" of the spill, that violation occurred – as Plaintiffs' expert witness testified – in Louisiana, and the injurious conduct therefore took place in Louisiana. It was legal error to hold otherwise.

II. THE LOWER COURTS ERRONEOUSLY AWARDED PUNITIVE DAMAGES IN VIOLATION OF THE UNITED STATES CONSTITUTION AND TEXAS LAW.

A. The Punitive Damages Award Violated CITGO's Due Process Rights.

The United States Supreme Court has held that, to comply with the Due Process Clause of the United States Constitution, the conduct allegedly warranting punitive damages must have "a nexus to the specific harm suffered by the plaintiff." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408,

[7] In fact, the Third Circuit correctly noted that pre-construction communications between the Refinery and corporate management about the cost of the WWTU took place in Louisiana. *See Arabie*, p. 38, 49 So. 3d at 553.

422 (2003). As discussed above, Plaintiffs presented no evidence that decisions at corporate headquarters – the conduct they claimed justified punitive damages – were linked to the oil spill. Moreover, any theoretical link that could have existed surely was broken by the intervening causes identified by Plaintiffs' own engineering expert: The oil spill was caused solely by operational and maintenance issues at the Refinery in Louisiana. And Plaintiffs do not contend that this in-state conduct warrants punitive damages, presumably because they hope to place all "conduct" in this case in Texas. The Due Process Clause does not permit a court to punish CITGO for conduct in Texas, *i.e.*, alleged corporate decisions, that did not cause the underlying harm at issue in the case. Because the conduct at corporate headquarters that was the basis of the punitive awards was not the "conduct that harmed the plaintiff," CITGO's due process rights were violated by the punitive awards. *See id.* at 423.

Similarly, "[t]he injustice of imposing a greater liability than that created by the law governing the conduct of the parties at the time of the act or omission complained of is obvious[.]" *W. Union Tel. Co. v. Brown*, 234 U.S. 542, 547 (1914). Yet this injustice will result here absent reversal. The Third Circuit's novel choice-of-law analysis under article 3543 – any state with punitive damages in negligence cases, here Texas, has a higher standard of safety and conduct – sets a *per se* rule that foreign law trumps Louisiana law insofar as standards of safety and conduct are concerned. Giving weight to the appellate court's choice of law under article 3543 means Texas's standards of conduct and safety should *always* prevail over those of Louisiana in the face of any conflict, not just as to a conflict on punitive damages. Here, Texas's and Louisiana's laws of negligence – laws governing conduct and safety – do differ; yet the Third Circuit failed to give Texas's law effect. While Louisiana law requires objective proof of exposure to harmful levels, Texas law imposes an even higher threshold of proof. A toxic-exposure negligence claim in Texas requires scientific evidence that a plaintiff was exposed to a specific dose sufficient to have caused harm. *Borg-Warner Corp. v. Flores*, 232 S.W.3d 765, 771-72 (Tex. 2007). There is no dispute that Plaintiffs failed to present this evidence. In the Third Circuit's words, Plaintiffs' specific-causation expert "did not have any dose response or quantitative exposure information." *Arabie*, p. 17, 49 So. 3d at 541. Under *Borg-Warner*, Plaintiffs could not recover *anything* against CITGO, much less punitive damages.

If the Third Circuit's decision on the "standards of conduct and safety" is to be given any weight, Texas's negligence law should have applied and, on the facts here, Plaintiffs would take nothing. But, instead, the appellate court used Texas law to punish CITGO where the underlying claims are not

actionable at all. This, too, exceeds the constitutional boundaries of Due Process in *Campbell*. To protect CITGO's constitutional rights, the appellate court's decision should be reversed.[8]

B. The Lower Courts Did Not Apply Standards Of Proof Mandated By Texas Law.

Even if Texas punitive damages law applied, and there was a link between conduct in Texas and the oil spill, there was no evidence to support a finding that CITGO was grossly negligent as required to recover punitive damages. Under Texas law, a plaintiff seeking punitive damages must prove by clear and convincing evidence that the defendant committed gross negligence, which is "an entire want of care as to establish that the act or omission complained of was the result of actual conscious indifference to the ... person affected." *Potharaju v. Jaising Maritime, Ltd.*, 193 F. Supp. 2d 913, 920 (E.D. Tex. 2002) (quotations omitted); Tex. Civ. Prac. & Rem. Code § 41.003. The difference between ordinary and gross negligence rests with the "actual conscious indifference" of the tortfeasor. *See Uniroyal Goodrich Tire Co. v. Martinez*, 928 S.W.2d 64, 71 (Tex. App. 1995), *aff'd*, 977 S.W.2d 328 (Tex. 1998); *Gen Motors Corp. v. Sanchez*, 997 S.W.2d 584, 595 (Tex. 1999) (gross negligence exists when the "actor has actual awareness of the risk involved but nevertheless proceeds in conscious indifference to the rights, safety, or welfare of others").

Because punitive damages are meant to punish (and thus are quasi-criminal in nature), Texas imposes stricter requirements – a higher standard of proof (clear and convincing) and standard of conduct (gross, not ordinary, negligence) before they can be assessed. While the lower courts embraced the availability of punitive damages under Texas law to authorize punitive damages, they failed to follow the substantive requirements of Texas law and, thus, deprived CITGO of the basic protections that accompany Texas's punitive damages regime.[9]

There was no dispute that there were operating mistakes at the WWTU in Calcasieu Parish. But these mistakes, without more, do not establish gross negligence. In fact, neither lower court pointed to any evidence that CITGO acted with "conscious indifference to the rights, safety, or welfare of others." Rather, the undisputed evidence showed that corporate headquarters provided funding for every request for an environmental or safety measure at the WWTU from 1994 through the time of the spill, which

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[8] That Texas would not award compensatory damages for the claims presented here also highlights the error in the Third Circuit's decision that Texas's interests were primary in this litigation. It is difficult to believe a state that would award Plaintiffs no compensation would find a compelling state interest to punish CITGO.

[9] In addition, a defendant has a constitutional right to a jury trial under Texas law, *In re Lesikar*, 285 S.W.3d 577, 586-87 (Tex. App. 2009), which CITGO did not have here because each plaintiff stipulated that his damages were $50,000 or less. Selectively applying only Texas's substantive law of punitive damages deprives CITGO of the due process protections in Texas law that are intended to prevent unfair damages awards, including the right to a jury.

included funding the third tank the first time it was requested by the Refinery. (R. 21384, 21415, 21456, 29613, 30085-87, 30099, 30118.)

Moreover, there is no evidence that corporate headquarters knew about the sizeable build-up of oil in the tanks or the compromised containment area surrounding the tanks, including the flaw in the underground junction box. Even assuming it ignored wastewater management problems at the WWTU – though there is no evidence of this – an overflow of *wastewater* to a concrete dike located exclusively on CITGO's property is of a different tenor altogether than an *oil* spill to the Calcasieu River. There was no evidence that headquarters or the Refinery acted with "actual conscious indifference" as it relates to the release of oil from Refinery property. And therefore there was no evidence meeting the strictures of gross negligence under Texas law, which requires actual awareness of the likelihood of injury to the plaintiff.

III. THE APPELLATE COURT'S DECISION CHANGES THE BURDEN OF PROOF IN LOUISIANA CHEMICAL EXPOSURE CASES.

The Third Circuit's decision also should be reversed because it fundamentally changes the legal standard for establishing causation in a chemical exposure case. A plaintiff must prove it is more probable than not that a defendant's conduct caused the plaintiff's injury. *Maranto v. Goodyear Tire & Rubber Co.*, 94-2603 (La. 2/20/95), 650 So. 2d 757, 759. It is well settled that, in exposure cases, "the causation element requires scientific evidence." *Molden v. Ga. Gulf Corp.*, 465 F. Supp. 2d 606, 611 (M.D. La. 2006). A plaintiff cannot recover without showing the exposure to a chemical was of "such a level so as to cause the injuries they complained of." *Trent v. PPG Indus., Inc.*, 05-989, p. 7 (La. App. 3 Cir. 5/10/06), 930 So. 2d 324, 329. Thus, "when the scientific evidence does not provide for exposure beyond the potentially harmful levels, recovery should not be allowed." *Molden*, 465 F. Supp. 2d at 612; *accord Schexnayder v. Exxon Pipeline Co.*, 01-1236 (La. App. 5 Cir. 3/13/02), 815 So. 2d 156, 159 (plaintiffs could not recover damages because they failed to present evidence that they were exposed to "unsafe concentrations" of hydrocarbons following an oil spill).

Plaintiffs claimed symptoms such as headaches, sinus irritation, and stomach issues (R. 25032-45) – symptoms that can be caused by things as common as seasonal allergies, the common cold, or the flu. While Plaintiffs claimed that these symptoms began shortly after the oil reached their workplace, the evidence suggested otherwise. They did not miss work, seek medical treatment, or report the problems to their employer or worksite at the time of the spill. (R. 26890, 27613, 27621-22, 27872-74, 27880, 29976.) Rather, they went to doctors hired by their lawyers two to seven months after the oil

spill to be evaluated solely for litigation purposes. (R. 30002-04.) All objective medical tests performed by the litigation doctors came back normal. (R. 28174, 28179, 29957.) Not one plaintiff ever sought treatment from his regular doctor for the symptoms that he claimed related to the oil spill.

Showing the litigation-driven nature of these claims, Scott Levy – who received a compensatory award of $7,500 – was not even working at CRC the day of the spill or for the next three weeks, and returned to work at CRC only after most of the oil had been removed from the waterways and what remained was so inert as to be incapable of causing the injuries alleged. (R. 28467-69, 29468-74.) Craig Arabie – who was awarded $8,412 by the district court, which the appellate court increased by $7,500[10] – underwent an unrelated knee surgery only a few weeks after the spill and, when specifically asked by the medical professionals at his pre-surgery evaluation, denied having any of the symptoms he now claims to have been experiencing at that time. (R. 27863, 27871-77.)

Moreover, Plaintiffs presented no scientific evidence establishing the threshold level at which the symptoms they claimed could occur or that any plaintiff's exposure was "beyond the potentially harmful levels." *See Molden*, 465 F. Supp. 2d at 612. In fact, it was undisputed that all of the exposure monitoring data showed low levels of exposure well below recognized health standards (R. 28930-32), and there was no objective medical testing that linked Plaintiffs' symptoms to the alleged harm (R. 29957, 28174, 28179). The appellate court upheld the causation finding based not on objective, scientific evidence of exposure beyond harmful levels but, rather, based solely on Plaintiffs' litigation doctors' and experts' statements that the subjective and generic descriptions of symptoms were consistent with symptoms that could be suffered from overexposure to certain chemicals in the oil. But "[c]onsistent with" fails to meet the standard repeatedly announced by Louisiana courts. A plaintiff must prove exposure to "unsafe concentrations" of chemicals. *Schexnayder*, 815 So. 2d at 159; *accord Molden*, 465 F. Supp. 2d at 612; *Trent*, p. 7, 930 So. 2d at 329; *In re Ingram Towing Co.*, Nos. 93-3311, 94-1143, 1995 WL 241828, at *2 (E.D. La. Apr. 24, 1995) ("there is no physical way that the fumes at issue could have caused the nausea and diarrhea" because the exposure levels were below limits set by OSHA).

The appellate court tried to distinguish *Schexnayder* because it involved "exposure to crude oil vapors" and contrasted that with slop oil, which is "a mixture of toxic chemicals ... for which there is no

[10] On Plaintiffs' separate appeal, the Third Circuit increased the district court's general damages awards for six plaintiffs. *See Arabie v. CITGO Petroleum Corp.*, 10-334 (La. App. 3 Cir. 10/27/10), 49 So. 3d 985 . CITGO filed a separate application seeking review of that decision, which is still pending, although that application will become moot if the Court were to reverse on the issue of causation.

government-issued permissible exposure guideline." *Arabie*, p. 6, 49 So. 3d at 535. But there is no "government-issued permissible exposure guideline" for crude oil vapors, either. Indeed, crude oil is a mix of similar chemicals to that found in slop oil, as the appellate court appeared to acknowledge later in its opinion. *See id.* at p. 18, 49 So. 3d at 541. In *Schexnayder*, there was no evidence that the plaintiff was exposed above harmful levels for the constituents of the oil. The same is true here. In fact, there was extensive monitoring for VOCs (a mix of several volatile organic compounds), which showed no harmful levels of exposure. Moreover, after independently analyzing the slop oil, the National Oceanic and Atmospheric Administration found "[n]o obvious mystery or non-petroleum hydrocarbons" and no evidence "that the slop oil contains chemicals of a greater health or environmental hazard than those typical of crude and refined oil products." (R. 18256-60.)

It should be noted that the Third Circuit's reliance on epidemiology studies and CITGO's MSDS to support the district court's ruling is particularly misplaced. While epidemiology and MSDSs can establish general causation – *i.e.*, that a certain chemical *can* cause certain symptoms – it cannot establish specific causation – *i.e.*, that the chemical *in fact caused* a plaintiff's symptoms. Specific causation requires proof that a plaintiff was exposed to harmful levels. As the United States Fifth Circuit Court of Appeals has observed under similar circumstances, "[t]he MSDS made it clear that the effects of exposure to Toluene depended on the concentration and length of exposure." *Moore v. Ashland Chem. Inc.*, 151 F.3d 269, 278 (5th Cir. 1998). With "no information on the level of exposure necessary for a person to sustain the injuries about which the MSDS warned" there is no evidentiary basis for a causation finding. *Id.* "It makes little sense to argue that a scientist can look at pictures and a list of chemicals ... and arrive at a level of exposure" in the absence of "occupational exposure data." *Mitchell v. Gencorp Inc.*, 165 F.3d 778, 781 (10th Cir. 1999).

As a whole, the Third Circuit's decision turns the burden of proof on its head. Under the appellate court's holding, a plaintiff is relieved of his evidentiary burden by pointing to an *absence* of objective data specific to him. He need only hire a lawyer to hire a doctor; obtain an MSDS to identify what symptoms *could* be caused by exposure and to cause him fear of future disease; and, if pressed on a lack of objective evidence of exposure, resort to the novel concept the Third Circuit embraced: the inability to measure the theoretical "additive" effects of the oil's constituents. That is not the law. It was incumbent upon Plaintiffs to provide scientifically valid evidence of overexposure – through monitoring data or otherwise.

Here, all the occupational exposure data, including thousands of monitoring results, established that Plaintiffs were not exposed to a sufficient level of any chemical to cause the injuries they alleged. (R. 28930-32.) There was no evidence to the contrary, and the lower courts therefore erred in finding causation, effectively shifting the burden of proof to CITGO.

IV. THE THIRD CIRCUIT FAILED TO FOLLOW THIS COURT'S JURISPRUDENCE IN AWARDING DAMAGES FOR FEAR OF FUTURE INJURY.

The Court should reverse the lower courts' awards to each plaintiff for fear of future illness, including to a plaintiff, Larry Thomas, who admitted that he had no such fear (R. 27057), particularly where the "fear" the district court identified arose not from CITGO but from "dirty industry" in general. (R. 25031, Written Reasons at p. 4.) The awards conflict with this Court's holding in *Bonnette v. Conoco, Inc.*, 01-2767, pp. 16-17 (La. 1/28/03), 837 So. 2d 1219, 1230-31. There, the Court reversed a district court's award to plaintiffs who had sustained a "slight" exposure to asbestos in their lawns corresponding to a "slight" increase in risk for cancer. *See id.* As the plaintiffs in *Bonnette* did not produce evidence of a risk greater than that faced by anyone inhaling "background" levels of asbestos, the Court found they could not recover for an increased risk of future injury. *Id.* at p. 21, 837 So. 2d at 1233. The Third Circuit erroneously found *Bonnette* distinguishable because the *Bonnette* plaintiffs did not suffer physical injury. This is a distinction with no difference here. This Court held that an award for fear of future injury must be supported by a showing that the alleged fear is more than "speculative or merely possible." *Id.* at pp. 16-17, 837 So. 2d at 1230-31. And, here, there is no such evidence.

Indeed, Plaintiffs offered nothing more than self-serving testimony, prompted by counsel's leading questions, of vague and unarticulated fears. (*See, e.g.*, R. 27658.) While the Third Circuit emphasized that Plaintiffs reported their alleged fears to the litigation experts, Drs. Looney and Levy, that does not make the concerns legally viable – certainly not when those experts were unable to testify that any plaintiff was at risk for future illness. Indeed, Dr. Looney testified that it was "unlikely" Plaintiffs would suffer future injury (R. 11418, 11532-33), and Dr. Levy conceded the potential carcinogenic effects of benzene have been linked only to chronic, long-term exposures not present here. (R. 28111-12.) Under this Court's holding in *Bonnette*, the lower court's decision should be reversed.

V. THE LOWER COURTS LEGALLY ERRED IN FAILING TO ALLOCATE FAULT TO ALL INDIVIDUALS RESPONSIBLE FOR PLAINTIFFS' ALLEGED INJURIES.

The lower courts' failure to consider evidence of comparative fault is directly contrary to the Civil Code and the jurisprudence requiring trial courts to allocate fault to every person responsible for a

plaintiff's injury. *See* La. Civ. Code art. 2323; *Dumas v. State ex rel. Dep't of Culture, Recreation & Tourism*, 02-563 (La. 10/15/02), 828 So. 2d 530, 537. While the evidence did not support a causation finding, assuming there was causation, there was also substantial evidence supporting allocation of fault to RWCC (Plaintiffs' employer), CRC (Plaintiffs' worksite), and Plaintiffs themselves. But the lower courts, in direct conflict with this Court's guidance, categorically refused to apportion fault, holding that CITGO was barred as a matter of law from asserting a comparative fault defense. *See Haywood v. E.I. Dupont De Nemours & Co.*, 06-2188, p. 1 (La. 11/22/06), 942 So. 2d 520 (Victory, J. concurring in denial of writs) ("[T]he percentage of fault, if any, which should be assigned to plaintiffs ... is not appropriate for summary judgment."); *accord Benniefiel v. Zurich Am. Ins. Co.*, 08-1416, p. 5 (La. App. 3 Cir. 5/6/09), 10 So. 3d 381, 385.

Even the appellate court stated that Plaintiffs were injured in part from exposure to materials in a roll-off box that was located on CRC property and completely outside CITGO's control.[11] Plaintiffs claimed they experienced irritation from having to eat lunch near the roll-off boxes, which generated vapors so strong that they "masked out the odor of the chemical toilet." *Arabie*, p. 21, 49 So. 3d at 543 (quotations omitted). Common sense would have dictated that Plaintiffs eat someplace else or ask their employer or worksite to move their lunch area or the roll-off boxes. The undisputed evidence showed that neither Plaintiffs, nor CRC or RWCC, took any commonsense measure to address Plaintiffs' alleged discomfort. (R. 27153-54, 27722-24, 27813-16.) In reality, the entire roll-off-box story seems incredible. But if credited, the law required apportionment of fault.

The Third Circuit reasoned, however, that because CITGO failed to warn of the dangers associated with the slop oil, Plaintiffs, CRC, and RWCC were absolved from any fault. *Id.* at p. 33, 49 So. 3d at 550. But this, too, conflicts with this Court's and other appellate court's teachings on comparative fault. "Awareness of the danger" is one factor in the comparative fault analysis, but the source of the awareness need not be the defendant to apportion fault to a plaintiff or third parties.[12] *See Watson v. State Farm Fire & Cas. Ins. Co.*, 469 So. 2d 967, 974 (La. 1985); *see also Bostwick v. M.A.P.P. Indus., Inc.*, 97-791 (La. App. 5 Cir. 12/30/97), 707 So. 2d 441 (15% allocation of fault to

[11] There was no evidence that CITGO had any responsibility for the roll-off boxes on CRC's property or that CITGO had control over any operations and materials at CRC during the cleanup of the oil on the river. Moreover, those who were involved in the clean-up operations all testified that CITGO and its contractors never put any materials into any roll-off box on CRC property. (R. 29903-04, 28770.)

[12] Plaintiffs' claims that "no one knew anything" are unbelievable given the local news coverage of the spill noted in the Third Circuit's opinion and Plaintiffs' testimony about their alleged immediate physical reactions.

plaintiff where defendant was aware of defective stairs but did not warn plaintiff); *Haydel v. Hercules Transport, Inc.*, 94-1246 (La. App. 1 Cir. 4/7/95), 654 So. 2d 418 (plaintiff allocated fault in chemical release case where plaintiff failed to take action after smelling ammonia and seeing a gas cloud). So regardless of whether CITGO warned of the possible health symptoms potentially associated with the slop oil, the district court was required to apportion fault to all potentially responsible parties. Moreover, CRC, like CITGO, is an oil refinery and has an expert understanding of oil and its constituents. It was fully able to understand whether there was a real risk associated with the oil without input from CITGO. Many of the plaintiffs themselves received training about exposure and knew to report and react to the symptoms they now claim. The appellate court forgave their inaction, contrary to the Code's mandate to allocate comparative fault. The appellate court's decision should be reversed.

PRAYER FOR RELIEF

For the reasons stated above and in CITGO's writ application, CITGO prays that the Court reverse the decisions of the lower courts and render judgment in favor of CITGO.

Respectfully Submitted,

Richard E. Sarver, 23558
Craig Isenberg, 29603
Meredith A. Cunningham, 26465
Jonathan R. Bourg, 31058
BARRASSO USDIN KUPPERMAN
FREEMAN & SARVER, L.L.C.
909 Poydras Street, Suite 2400
New Orleans, Louisiana 70112
Phone: 504-589-9700
Fax: 504-589-9701

Richard Gerard, 6027
John B. Scofield, 11866
Robert E. Landry, 18999
SCOFIELD, GERARD, SINGLETARY
& POHORELSKY, L.L.C.
901 Lakeshore Drive, Suite 900
P.O. Drawer 3028 (70602-3028)
Lake Charles, LA 70601
Phone: 337-433-9436
Fax: 337-436-0306

H. Alston Johnson III, 7293
PHELPS DUNBAR LLP
400 Convention Street, Suite 1100
Baton Rouge, Louisiana 70802
Phone: 225-346-0285
Fax: 225-381-9197

Counsel for CITGO Petroleum Corporation

VERIFICATION

STATE OF LOUISIANA

PARISH OF ORLEANS

BEFORE ME, the undersigned authority, personally came and appeared:

Richard E. Sarver

who being duly sworn did depose and say that he is an attorney for Defendant-Applicant, CITGO Petroleum Corporation in this action; that the allegations contained in the above and foregoing Original Brief are true and correct to the best of his information, knowledge and belief, and that a copy of this Original Brief has been forwarded to all counsel of record by electronic mail, facsimile and U.S. Mail, properly addressed and postage paid, this 1st day of March, 2011.

Sworn to and subscribed before me,
this 1st day of March, 2011.

Notary Public
Print Name: Jonathan R. Bourg
Attorney/Notary Number: 31058
My Commission is for Life.