IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

NANCY FULLER HEBBLE, et al.,	)	
	)	
Plaintiffs/Appellees,	)	
	)	
v.	)	No. 106,470
	)	
SHELL WESTERN E&P, INC. and SHELL OIL COMPANY,	)	
	)	
	)	
Defendants/Appellants.	)	

AMICI CURIAE STATEMENT OF AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA & OKLAHOMA STATE CHAMBER OF COMMERCE AND INDUSTRY, INC. IN SUPPORT OF SHELL'S PETITION FOR WRIT OF *CERTIORARI*

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
(202) 463-5337

H. Sherman Joyce
AMERICAN TORT
REFORM ASSOCIATION
1101 Connecticut Avenue, N.W.
Suite 400
Washington, D.C. 20036
Telephone: (202) 682—1163

John N. Hermes, OBA # 4133
Gary W. Catron, OBA # 1570
Kristin M. Simpsen, OBA #22302
McAfee & Taft A Professional Corporation
Two Leadership Square, 10th Floor
211 N. Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-9621
Facsimile: (405) 235-0439

Pursuant to leave granted by this Court, the American Tort Reform Association, Chamber of Commerce of the United States of America and the Oklahoma State Chamber of Commerce and Industry, Inc. (collectively, "*Amici*") move the Court to grant the Petition for Writ of *Certiorari* filed by Appellants Shell Western E&P, Inc. and Shell Oil Company (collectively, "Shell").

REASONS FOR GRANTING A WRIT OF CERTIORARI

The Court of Civil Appeals' cursory review of the largest punitive damages award in Oklahoma history failed to remedy key errors that should have sharply limited, perhaps even eliminated, the award. This Court should therefore grant review to provide the exacting review the Court of Civil Appeals avoided and to vacate an award that contravenes well-established precedent. Leaving this judgment in place will invite prospective plaintiffs to choose Oklahoma courts because of its evident hospitability to large, arbitrary and unpredictable punitive damages awards. Such an outcome, offensive to notions of basic due process, also does not bode well for Oklahoman businesses and consumers.

As related below and as the Supreme Court has repeatedly recognized, the most effective means of infusing predictability into the assessment of punitive damages and shielding defendants from unconstitutionally excessive awards is through a rigorous application of the reprehensibility, ratio, and comparable-sanctions guideposts. The Civil Court of Appeals' decision upholding the punitive damages award in this case rests on a failure to rigorously apply each of those guideposts. The resulting arbitrary imposition of punitive damages awards creates intolerable legal uncertainty for Oklahoman, and American, businesses, which operate most effectively and efficiently against a backdrop of uniformly applied legal rules and a system of predictable sanctions. Notwithstanding the substantial compensation that respondents received

for the breach of contract, the Court of Civil Appeals upheld the jury's imposition of an additional punitive damages award of $53 million— a result that directly conflicts with the Supreme Court's guidance that ratios of punitive to compensatory damages that are greater than 1:1 are rarely, if ever, permissible where the plaintiffs have received substantial compensatory damages.

It is essential that punitive damages be imposed based on clear standards, rigorously applied, that constrain the punishment that can be meted out by a jury and that ensure that similar conduct is treated similarly. Such a regime is also mandated by principles of fundamental fairness in order to "assure the uniform general treatment of similarly situated persons that is the essence of law itself." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996). Based on these principles, the Chamber urges this Court to grant review and reverse the judgment of the Court of Civil Appeals.

I. The Court of Civil Appeals Failed to Conduct the Rigorous Examination Required by the United States Constitution

The Court of Civil Appeals' one-paragraph analysis of Shell's charge that the punitive damages award was excessive is not the exacting *de novo* review that the United States Constitution demands. *See Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424, 436 (2001) (requiring *de novo* review of punitive damages awards rather than review for abuse of discretion); *Gore*, 517 U.S. at 587 (1996) (Breyer, J., concurring) ("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."). Providing what could be only charitably described as abuse of discretion review, the Court of Civil Appeals made no effort to rigorously examine the guideposts identified in the Supreme Court's punitive damages

jurisprudence, opting instead to paint with a broad brush by comparing this award to pre-*Gore* precedent. This failure not only permitted the outlier verdict in this case, but it also encourages prospective plaintiffs to spin the roulette wheel in the hopes of their very own big score.

This failure is not harmless error. Courts around the country know all too well the dangers of punitive damages "'run wild.'" *Pac. Mut. Life Ins.Co. v. Haslip*, 499 U.S. 1, 18 (1991). Most recently, in *Exxon Shipping v. Baker,* 128 S. Ct. 2605 (2008), the Court indicated that "runaway" punitive awards may not be "mass-produced," *id.* at 2624, but "the spread is great" and punishment continues to be imposed arbitrarily in outlier cases. *Id.* at 2625. Without a carefully applied, uniform framework establishing clear standards, punitive damages can "have a devastating potential for harm" and "encourage inconsistent and unpredictable results by inviting juries to rely on private beliefs and personal predilections." *Haslip*, 499 U.S. at 42-43(O'Connor, J. dissenting). Large businesses are particularly at risk of being targeted by such jury determinations. *See Honda Motor Co. v. Oberg*, 512 U.S. 415, 431 (1994) ("[T]he rise of large, interstate and multinational corporations has aggravated the problem of arbitrary awards and potentially biased juries"). Accordingly, where, as here, juries provide an initial assessment of punitive damages, the courts must retain substantial authority to prevent abuse. In defining the legal framework to be applied, it is critical to Oklahoma businesses, and indeed all American businesses, that this Court reinforce clear standards that will cabin discretion and lead to fair, consistent and predictable results.

This articulation of clear standards goes hand in hand with a rigorous examination of the record. "Exacting appellate review ensures that an award of punitive damages is based upon an 'application of law rather than a decisionmaker's caprice.'" *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003) (citation omitted). In its decisions, the Supreme Court has

observed that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," *Oberg*, 512 U.S. at 432; *Campbell*, 538 U.S. at 417, because "defendants subjected to punitive damages in civil cases have not been accorded the protections available in a criminal proceeding." *Campbell*, 538 U.S. at 417. The Supreme Court also has recognized that punitive damages, like many forms of punishment, are by their nature, designed to "engender adverse social consequences," *Addington v. Texas*, 441 U.S. 418, 426 (1979), and may have "potentially devastating" ramifications for a defendant's character, reputation, business, and good will. *Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan and Marshall, J.J., concurring). An exhaustive analysis of the record is therefore necessary to ensure that regulated entities and the broader public obtain the justice they deserve. The Court of Civil Appeals' one paragraph "analysis" simply does not begin to do justice to these concerns and warrants immediate review by this Court.

II. The Punitive Damages Award Before the Court Violates the Due Process Clause of the United States Constitution.

As the United States Supreme Court has repeatedly made clear, punitive damages awards must be fair and predictable. *See, e.g., Campbell*, 538 U.S. at 416-418. Otherwise, defendants would be subject to the whim and caprice of the factfinder, a result that runs afoul of the Due Process Clause's guarantee of fair notice. *Id.* Outlier verdicts—such as the fifty three million dollar punitive damages award due to an underpayment of $750,000 in this case— represent the very essence of unpredictability and arbitrariness. *See Baker*, 128 S. Ct. at 2625 ("The real problem ... is the stark unpredictability of punitive awards. ... [T]he outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories.").

The Court of Civil Appeals approved this anomalous result, a 74:1 ratio of punitive to compensatory damages, by improperly incorporating prejudgment interest—itself a penalty—in

its calculation of the ratio and by failing to conduct any serious examination of reprehensibility. Had it done so, the Court of Civil Appeals would have reached the same result that the Supreme Court did when confronted by the Exxon Valdez accident and decided to impose a 1:1 ratio. *See id.*. at 2626 (finding that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process").[1]

No more than a 1:1 ratio was warranted in this case. The Supreme Court has noted that, while "ratios greater than those [it] ha[s] previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages, . . . [w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Campbell*, 538 U.S. at 425 (internal quotation marks omitted). This principle reflects the fact that compensatory damages—especially when awarded in large amounts—can deter and punish as effectively as punitive damages. The necessity—and constitutional justification—for a large punitive damages award is therefore obviated where a substantial compensatory award has been imposed. *See* Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages*, 56 S. Cal. L. Rev. 133, 137 (1982) (many decisions upholding punitive damages awards are "oblivious[ ] to the basic point that ordinary civil damages—in the course of providing compensation—concurrently function to deter").

Rigorous judicial enforcement of the limitations imposed by the ratio guidepost is therefore essential to ensure that defendants are shielded from irrational and constitutionally infirm punitive damages awards "inflicted on a whim" by potentially hostile and biased jurors.

---

[1] While not explicitly relying on the Due Process Clause, the *Exxon* decision usefully demonstrates how to rigorously examine reprehensibility, a requirement of the Supreme Court's Due Process punitive damages jurisprudence.

Pac. Mut. Life Ins. Co. v. Haslip, 499 U.S. 1, 43 (1991) (O'Connor, J., dissenting). Because the Court of Civil Appeals disregarded the requirements of the ratio guidepost and upheld a punitive damages award that vastly exceeded the already substantial compensatory damages, this Court's review is urgently needed.

The Court of Civil Appeals also failed to properly examine the reprehensibility guidepost. The reprehensibility guidepost—which is "[p]erhaps the most important indicium of the reasonableness of a punitive damages award", *Gore*, 517 U.S. at 575—requires a court to place the defendant's conduct on a continuum of wrongdoing in order to assess whether the punitive damages "imposed . . . reflect the enormity of [the] offense." *Id.* (internal quotation marks omitted). "This principle," the Supreme Court has explained, "reflects the accepted view that some wrongs are more blameworthy than others." *Id.* The reprehensibility guidepost therefore puts defendants on notice that, as the blameworthiness of their conduct increases, so does the size of the punitive damages award that may constitutionally be assessed against them. Instead of conducting this rigorous analysis, the Court of Civil Appeals relied on pre-*Gore* precedent, precedent issued before the United States Supreme Court seriously delved into this area of the law and provided significant clarity of the interrelationship between punitive damages and the Due Process Clause. The Court of Civil Appeals' avoidance of a direct comparison with the factors articulated in those later—and more on point—cases, *see* Shell's Petition at 4 (collecting relevant factors), represents a serious error in need of immediate correction, lest other courts follow the Court of Civil Appeals' lead.

III. Novel Claims Should Never Support the Imposition of Punitive Damages

As Appellants have made clear below and before this Court, the underlying fiduciary duty claim upon which the punitive damages are based, at least in part, is a novel one. *See*

Shell's Petition at 6-8; *Amicus* Statement of Oklahoma Independent Petroleum Association, Chesapeake Energy Corporation, ConocoPhillips Company, and Mid-Continent Oil & Gas Association of Oklahoma at 1-6. Instead of applying that novel understanding prospectively, the courts below imposed it retroactively on past conduct. Retroactive application of the law is deeply offensive to traditional understandings of the law and due process, but, to make matters worse, the courts below permitted the awarding of Oklahoma's largest punitive damages award ever on the basis of a rule of law that Shell could not reasonably anticipate. "Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice ... of the conduct that will subject him to punishment." *Campbell*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574). That notice was absent here.

As Justice Souter trenchantly reminded us in *Baker*, "a penalty should be reasonably predictable in its severity, so that *even* Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another." *Baker*, 128 S.Ct. at 2627 (emphasis added). The Court of Civil Appeals' decision to permit punitive damages without reasonable notice of the underlying fiduciary duty claim undermines this basic understanding of how law should operate and therefore requires immediate review by this Court.

IV. This Court Should Grant Review to Preempt Efforts by the Plaintiffs' Bar to Invoke Oklahoma Courts to Obtain Excessive Punitive Damages Awards

Finally, the decisions below, if left undisturbed, will make Oklahoma an extraordinarily attractive forum for filing breach of contract lawsuits for punitive damages. And, the effect of this decision will not merely be felt by the big businesses that retain operations in the state, but also by the countless small businesses threatened by frivolous lawsuits containing *in terrorem* requests for damages. Businesses will confront tough decisions about whether to locate or

remain in Oklahoma and whether to sell products in the state, decisions that companies have made about other states with unfavorable punitive damages environments.

For most of this nation's history, punitive damages "merited scant attention" by businesses and individuals alike, because they "were rarely assessed and likely to be small in amount." D. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. CAL. REV. 1, 2 (1982). Punitive damages, sometimes called exemplary damages, were traditionally reserved for a narrow category of torts involving conscious and intentional harm inflicted by one person on another, such as assault and battery, false imprisonment, and trespass. *See* James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 ST. MARY'S L.J. 351, 355 (1983); James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 VAND. L. REV. 1117 (1984). Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all. *See* Victor E. Schwartz et al., *Reining In Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures*, 65 BROOK. L.REV. 1003, 1008 (2000).

Beginning in the late 1960s, however, courts slowly began to allow punitive damages in a broader array of cases. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (1967) (holding for the first time that punitive damages were recoverable in a strict product liability action). The "perfect storm" created by the coupling of this dramatic expansion in the law with the advent of "mass torts" began to impact the frequency and size of punitive awards. For example, until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and in each case the awards were relatively modest. Then, in the late 1970s and 1980s, the size of punitive damages awards "increased dramatically," George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. CAL. L. REV.

123, 123 (1982), and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface." John Calvin Jeffries, Jr., *A Comment on The Constitutionality of Punitive Damages*, 72 VA. L. REV. 139, 142 (1986); E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Efficiently*, 40 ALA. L. REV. 1053, 1061 (1989) (noting a "general trend toward awarding punitive damages more frequently and in larger amounts in recent years."). "In recent years, ... a growing number of States have permitted recovery of punitive damages where a contract is breached or repudiated in bad faith." *Haslip*, 499 U.S. at 62 (1991) (O'Connor, J., dissenting) (noting that "[f]or over 200 years, recovery for breach of contact ha[d] been limited to compensatory damages).

These developments were not the result of chance or happenstance. Plaintiffs have made a concerted effort to identify the jurisdictions most hospitable to large, unpredictable punitive damages awards even for causes of actions not thought to be susceptible to punitive damages relief, like breach of contract. For prospective defendants who deserve a clear regulatory scheme in order to frame the business decisions they make each day, this forum shopping has become increasingly intolerable. This Court should grant review to ensure that Oklahoma courts do not become the next refuge for unpredictable, arbitrary awards.[2]

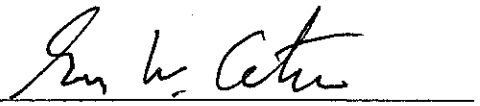
Conclusion

The punitive damages award in this case offends traditional notions of fair play and due process. Consistent with a rich body of precedent, this Court should grant review to confirm that Oklahoma courts are not a refuge for those seeking arbitrary penalties, especially by those who

[2] Subsequent to the filing of this case, Oklahoma amended its punitive damages statute to, among other things, impose caps on certain types of punitive damages. While *Amici* welcome these developments, and have sought additional tort reform, these caps are not airtight. Thorough and effective policing of excessive punitive damages awards will still require careful elaboration of the applicable limits imposed by the Due Process Clause.

have recharacterized a garden variety breach of contract action in order to obtain tort-based liability. To do otherwise would attract litigants whose primary purpose will be to extract rents from businesses and consumers whose only mistake was do business, or live in, Oklahoma.

Respectfully submitted,



John N. Hermes, OBA # 4133
Gary W. Catron, OBA # 1570
Kristin M. Simpsen, OBA #22302
McAfee & Taft A Professional Corporation
Two Leadership Square, 10th Floor
211 N. Robinson
Oklahoma City, Oklahoma 73102
Telephone: (405) 235-9621
Facsimile: (405) 235-0439

Attorneys for *Amici Curiae*
The Oklahoma State Chamber of Commerce and Industry, Inc. and American Tort Reform Association

Robin S. Conrad
Amar D. Sarwal
NATIONAL CHAMBER
LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, D.C. 20062
Telephone: (202) 463-5337

Attorneys for *Amicus Curiae*
Chamber of Commerce of the United States
of America

CERTIFICATE OF SERVICE

On the 4th day of March, 2010, a true and correct copy of the foregoing document was mailed, postage prepaid, to:

Randall K. Calvert Calvert Law Firm 1041 N.W. Grand Blvd. Oklahoma City, OK 73118	Clark O. Brewster Guy A. Fortney Brewster & DeAngelis 2617 East 21st Street Tulsa, OK 74114
Greg McKenzie Gregory A. McKenzie, P.C. 19100 Saddle River Drive Edmond, OK 73012	Brad Miller Durbin, Larimore and Bialick, P.C. 920 North Harvey Oklahoma City, Oklahoma 73102
Sharon T. Thomas Hall, Estill 100 North Broadway Chase Tower, Suite 2900 Oklahoma City, Oklahoma 73102	Brian R. Matula Senior Attorney Chesapeake Energy Corporation P.O. Box 18496 Oklahoma City, OK 73154-0496
Mark D. Christiansen Crowe & Dunlevy 20 N Broadway Ave Oklahoma City, OK 73102	Tim Gehl Senior Counsel Shell Oil Company P.O. Box 2463 Houston, TX 77252-2463
Dennis C. Cameron Bradley W. Welsh GABLE & GOTWALS 1100 ONEOK Plaza 100 West Fifth Street Tulsa, OK 74103-4217)	

Gary W. Catron