No. 94-

In the Supreme Court of the United States

OCTOBER TERM, 1994

BMW OF NORTH AMERICA, INC.,
PETITIONER

v.

IRA GORE, JR., RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Alabama

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PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Whether the Alabama Supreme Court, having found that the jury's $4,000,000 punitive damages verdict unconstitutionally punished petitioner for hundreds of transactions that occurred entirely outside of Alabama, was obligated to provide a meaningful remedy for that constitutional violation.

2. Whether the $2,000,000 remitted punitive exaction, which is 500 times respondent's compensatory damages, is grossly excessive in violation of the Due Process Clause of the Fourteenth Amendment.

RULE 29.1 STATEMENT

Petitioner BMW of North America, Inc. is a wholly-owned indirect subsidiary of Bayerische Motoren Werke, A.G., a German corporation. All of BMW of North America, Inc.'s subsidiaries are wholly-owned.

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Petitioner BMW of North America, Inc. (BMW) respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Alabama in this case.

OPINIONS BELOW

The opinion of the Supreme Court of Alabama (App., *infra*, 1a-26a) is not yet reported. The order of the Circuit Court of Jefferson County denying petitioner's post-trial motions (App., *infra*, 27a-30a) is unreported.

JURISDICTION

The Alabama Supreme Court issued an opinion in this case on October 29, 1993. Timely applications for rehearing were submitted by both parties on November 12, 1993 and November 19, 1993. On August 19, 1994, the Alabama Supreme Court withdrew its opinion dated October 29, 1993, denied the applications for rehearing, and issued a substituted opinion. The certificate of judgment of affirmance (App., *infra*, 31a-32a) was issued on September 9, 1994. The jurisdiction of this Court is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides in relevant part: "nor shall any State deprive any person of life, liberty, or property, without due process of law * * *."

STATEMENT

In their journey from the assembly line to the dealer's showroom, automobiles occasionally experience minor damage requiring repair or refinishing. The question then naturally arises whether, or in what circumstances, the fact of repair or refinishing should be disclosed. A growing number of states have undertaken to answer this question by statute or regulation. At present, the vast majority of states to legislate on the subject require disclosure only of repairs or refinishing costing more than 3% (or some higher percentage) of the manufacturers suggested retail price ("MSRP"). See note 12, *infra*. Thus, for instance, the Alabama statute (which was enacted after the events in this case) provides that the failure of a manufacturer or distributor to give notice of repairs costing less than the greater of $500 or 3% of MSRP is not a deceptive trade practice and "shall not constitute a material misrepresentation or omission of fact." Ala. Code § 8-19-5(22)(c).

At the time relevant to this case, BMW had a disclosure threshold that was functionally identical to the one subsequently enacted by the Alabama Legislature. Pursuant to that threshold, it

did not disclose that it had performed $601 worth of refinishing on the $40,000 BMW 535i ultimately purchased by Dr. Ira Gore.

Dr. Gore drove his 535i for nine months without noticing anything unusual about his automobile's surface. When he learned that the car had been refinished, however, Dr. Gore immediately sued for fraudulent suppression of material facts and received a jury verdict of $4,000 in compensatory damages and $4 million in punitive damages. The jury arrived at the $4 million penalty by multiplying the supposed diminution in the value of Dr. Gore's car ($4,000) by the total number of cars BMW had refinished and sold throughout the United States over a ten-year period (approximately 1,000). App., *infra*, 16a; R. 585-586, 812-813.[1]

The Alabama Supreme Court acknowledged that the jury had unconstitutionally punished BMW for hundreds of transactions that occurred entirely outside of Alabama — and, indeed, that may have been entirely lawful where they occurred. Instead of fashioning a remedy that redressed this constitutional violation, however, the court merely cut the punitive damages in half under its usual test for determining whether a punitive verdict is excessive. The $2 million punishment left standing by the Alabama Supreme Court remains a staggering 500 times Dr. Gore's compensatory damages. BMW seeks review of the Alabama Supreme Court's decision, which constitutes a blatant violation of its rights under the Due Process Clause.

1. *The BMW Quality Control Process.* Bayerische Motoren Werke, A.G. (BMW AG) manufactures automobiles in Germany. R. 471. BMW purchases newly manufactured vehicles from BMW AG, imports them into the United States, and prepares those cars for distribution and sale throughout the United States. R. 471, 530-531, 538-539.

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[1] The designation "R. __" refers to the Reporter's Transcript of the trial below.

Occasionally the finish of a vehicle suffers damage between the time the vehicle rolls off the assembly line in Germany and the time it arrives in the United States. The damage could be dents or scratches that occur during the trans-Atlantic voyage (R. 473, 476, 480-481), or it could be blemishes caused by environmental conditions, such as acid rain (R. 478-481).

When newly manufactured automobiles arrive in the United States, their first stop is one of BMW's vehicle preparation centers (VPCs). The VPCs are staffed by technicians (who have been trained to factory standards) and are stocked with the same equipment found in BMW AG's factories in Germany. R. 482, 483, 699-700, 735-737, 784. At the VPCs, the vehicles are prepared for delivery to dealers and inspected for transportation damage as well as any imperfections that may have been missed by BMW AG. R. 472-474, 476, 530-531, 538-539, 646, 650-651.

If a vehicle has been damaged or is otherwise flawed, it is returned to factory quality at the VPC (or, in some instances not pertinent here, at the facility of an independent contractor under the supervision of BMW employees). R. 474, 477, 479, 529-530, 651, 653, 677, 743-744. Refinishing takes place in a specially designed paint booth, in which the paint is applied and baked until hard. R. 652-653. The paint booth provides constant air filtration to minimize the presence of dust in the painting area. R. 652, 732-734, 742, 756. The booth also contains controls for regulation of heat and humidity levels. R. 675-676, 734.

The refinishing process involves numerous steps and quality-maximizing safeguards, including a sophisticated sanding process to remove imperfections in the paint's surface without damaging the protective undercoatings that had been applied at the factory, a multi-step cleaning process to ensure a smooth finish, and the application of paint to the affected surfaces. R. 652-653, 719-726, 739-742. BMW does not merely repaint the spots that had sustained damage; instead, it repaints the entirety of any panel that has some damage or noticeable imperfection. R. 676-677, 762-763. After the paint has dried, the refinished vehicle is inspected to

ensure proper gloss and texture and the absence of imperfections. R. 656-657. The refinishing process is essentially identical to that used by BMW AG in Germany when it detects an imperfection in a car's finish as it comes off the assembly line. R. 552, 651, 661, 680-681, 734, 735-737, 744, 760.

2. *BMW's Disclosure Policy.* During the period relevant to this case, BMW had a formal policy relating to vehicles that required refinishing or repairs upon arrival in the United States. If the cost of the repairs exceeded 3% of MSRP, the vehicle would be placed into company service and driven for up to six months or ten thousand miles. R. 508-510, 532. BMW then would sell it to a dealer at auction as a used vehicle, with whatever disclosures were required by applicable law. R. 532-533, 986.

If the cost of VPC repairs performed on a vehicle did not exceed 3% of the vehicle's MSRP, however, BMW considered the car to be new and sold it to a dealer without disclosure of the repairs. R. 502-503.[2] The policy was adopted in 1983 to satisfy the strictest of the various state statutes then in effect governing disclosure of repairs performed by the manufacturer or distributor prior to sale to a dealer. R. 970-971, 980.[3]

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[2] Nonetheless, BMW kept track of such repairs and disclosed the exact type of repairs performed upon a particular vehicle if requested to do so by either a dealer or a customer. R. 306-307, 498, 501, 502, 535.

[3] At the time it adopted the policy (and subsequently), BMW was confronted with a patchwork of state disclosure requirements. Some states required disclosure of repairs exceeding 3% of MSRP and others required disclosure of repairs only if they exceeded 6% of MSRP. Among these, some states required disclosure by dealers and others required disclosure by manufacturers. Many of the statutes permitted the entity with the disclosure obligation to exclude from the calculation the cost of glass, tires, bumpers, and welded

(continued...)

3. *The Events Leading Up To This Case.* In January 1990, Ira Gore, a medical doctor specializing in oncology, purchased a 1990 BMW 535i from German Auto in Birmingham, Alabama, for $40,750.88. App., *infra*, 3a. Dr. Gore drove his car for approximately nine months before taking it to Slick Finish, an independent automobile detailing shop. *Ibid.* He was not dissatisfied with the car's overall appearance; nor had he noticed any problems with, or flaws in, the car's paint. *Ibid.* He simply wanted to make the car look snazzier than it normally would appear. *Ibid.* The proprietor of the detailing shop, Leonard Slick, informed Dr. Gore that his car had been repainted. *Ibid.*

It turned out that the automobile purchased by Dr. Gore had sustained superficial paint damage (presumed by the parties to be the result of acid rain) and that the horizontal surfaces had been refinished at the VPC in Brunswick, Georgia. App., *infra*, 3a; R. 526, 554. In keeping with its nationwide policy, BMW had not disclosed the repairs to German Auto because the cost of those repairs — $601 — was substantially less than 3% of the MSRP for the vehicle. App., *infra*, 3a.

4. *Proceedings Below.* Dr. Gore never contacted BMW to complain about the refinishing or to ask for any kind of recompense. R. 357, 375-376. Instead, he simply filed suit in Alabama state court. The complaint alleged that BMW's failure to disclose to Dr. Gore that it had performed some refinishing on his vehicle prior to selling it to German Auto constituted fraud, suppression, and breach of contract.

At trial, it was undisputed that the only flaw in the refinishing of Dr. Gore's car was a three or four-inch tape line on the rear fender

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[3] (...continued)
parts. R. 970. To simplify matters, BMW adopted the 3% threshold without exception for any kind of parts — *i.e.*, the strictest statutory requirement then in existence — as its nationwide policy. R. 980.

that the technicians inadvertently had failed to remove. R. 657. There was no evidence that the paint had faded, chipped, or bubbled or that it was likely to do so in the future. The colors of the refinished surfaces matched the colors of the rest of the car. There was no unusual film build-up and the gloss was exactly what would be expected of a vehicle that had come straight off the assembly line. R. 786-790. In short, with the exception of the tape line, which could have been buffed out without damage to the car (R. 657-659, 745-746), Dr. Gore's vehicle was indistinguishable from one that had not undergone refinishing. Although these facts raised serious doubt about the materiality of the non-disclosure, the case was submitted to the jury on the strength of the uncorroborated testimony of the former owner of German Auto that even perfectly refinished vehicles suffer a 10% diminution in value (R. 279-280, 336-337).

During his closing statement, Dr. Gore's counsel requested compensatory damages of $4,000 — representing 10% of the approximately $40,000 purchase price of Dr. Gore's car — and punitive damages of $4 million. The closing statement made clear that the latter figure represented a penalty of $4,000 per car for each of the approximately 1,000 cars that BMW had refinished at a cost of over $300 and sold anywhere in the United States over a ten-year period (R. 812-813):[4]

> They've taken advantage of nine hundred other people on those cars that were worth more — the damage was more than three hundred dollars. If what Mr. Cox said is true, they have profited some four million dollars on those automobiles. Four million dollars in profits that they have made that were wrongfully taken from people. That's wrong, ladies and gentlemen. They ought not be permitted to keep that. You ought to do something about it.

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[4] The $300 threshold was an arbitrary cut-off selected by Dr. Gore's counsel. See R. 585-586. For the sake of simplicity, we will hereinafter use "the number of refinished vehicles" as a short hand for "the number of vehicles refinished at a cost of over $300."

* * * * *

> I urge each and every one of you and hope that each and every one of you has the courage to do something about it. Because, ladies and gentlemen, I ask you to return a verdict of four million dollars in this case to stop it.

The jury did precisely what Dr. Gore's counsel requested, awarding Dr. Gore $4,000 in compensatory damages and $4 million in punitive damages. BMW then filed a combined motion for judgment notwithstanding the verdict, new trial, and remittitur. The trial court denied the motion in all respects. App., *infra*, 27a-30a.

The Alabama Supreme Court affirmed the judgment against BMW, conditioned upon a remittitur of the punitive damages to $2 million. The court acknowledged the soundness of the contention that the verdict violated BMW's due process rights and impinged upon the sovereignty of other states by punishing BMW for sales that took place entirely outside of Alabama and that were not even shown to be illegal where they occurred. App., *infra*, 16a-17a. Having said that, however, the court did not grant a new trial. Nor did the court apply the jury's $4,000 per car penalty to the number of cars for which the jury lawfully could punish, which would have resulted in a punitive award of no more than $56,000.[5] Instead, the court merely articulated its usual *Green Oil* standards for determining whether a punitive award is excessive,[6] and arbitrarily cut the punitive damages in half. App., *infra*, 9a-10a, 21a.

The Alabama Supreme Court gave no weight to Alabama's recently enacted legislation expressly providing that the non-disclosure of repairs costing less than 3% of MSRP is *not* an unfair

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[5] The record reflects that, at most, 14 refinished vehicles — *i.e.*, 1.4% of the cars for which BMW was punished by the jury — were sold in Alabama. App., *infra*, 17a, 23a; R. 972.

[6] See *Green Oil Co.* v. *Hornsby*, 539 So. 2d 218, 223-224 (Ala. 1989).

trade practice and does *not* constitute "a material misrepresentation or omission of fact." See Ala. Code § 8-19-5(22). The court concluded that the statute was irrelevant because "[t]he public policy of Alabama expressed in the statute had not been enacted at the time BMW NA adopted its policy of nondisclosure." App., *infra*, 7a. The court also found it irrelevant that less than two months before the trial in this case another jury in the same county heard essentially the same evidence relating to BMW's policy, yet found BMW not liable for *any* punitive damages. *Id*. at 13a-15a.

Justice Houston filed a special concurrence. App., *infra*, 22a-26a. He lamented the fact that cases like this one have caused "so many" observers to regard Alabama's punitive damages regime as a "lottery" (*id*. at 26a), and put special emphasis on the disparity in the results of the two nearly identical cases against BMW (*id*. at 25a):

> The *Yates* case and this case are almost identical. The same excellent lawyers represented Yates that represent Gore; the same excellent lawyers represented BMW NA in both cases. Excellent trial judges, in the same judicial circuit, conducted as nearly perfect trials as can be conducted. Each plaintiff was a member of a respected profession; each was a physician. BMW NA was the defendant in each case. How does Gore get $2,000,000 in punitive damages and Yates get nothing in punitive damages? Different juries.
>
> Perhaps Gore, Yates, BMW NA, the citizens of Alabama, and even this Justice will think something is not right — that, to paraphrase a Ray Stevens' song of several years ago, Gore got the gold mine and Yates got something else.

BMW filed an application for rehearing asserting, *inter alia*, that, having concluded that the jury had unconstitutionally punished BMW for transactions occurring entirely outside of Alabama, the court was required either to grant a new trial or to reduce the punitive damages to no more than $56,000 — the $4,000 per car penalty multiplied by the number of Alabama cars. Nine months later, the Alabama Supreme Court issued a substituted opinion and denied rehearing without addressing BMW's arguments.

REASONS FOR GRANTING THE PETITION

It should go without saying that courts have a constitutional obligation not just to identify constitutional violations but also to remedy them. The Alabama Supreme Court utterly failed to satisfy that obligation in this case. Its unexplained decision to cut the punitive damages in half is entirely unresponsive to the constitutional error that infected the jury's verdict. Summary reversal is warranted to correct the Alabama Supreme Court's dereliction of its duty to provide a meaningful remedy for the unconstitutional punishment.

Putting aside the problem of extraterritorial punishment, the $2 million penalty imposed by the Alabama Supreme Court is, by every objective benchmark, so excessive as to violate the Due Process Clause. Because many of the indicia of excessiveness in this case recur in punitive damages litigation, the case offers an appropriate opportunity for the Court to take up the unfinished business of shaping "the character of the standard that will identify unconstitutionally excessive awards" (*Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2335 (1994)). That the Alabama Supreme Court could have approved a $2 million punitive judgment in the circumstances of this case strongly suggests that, in the words of the concurrence, "something is not right" (App., *infra*, 25a) and that the lower courts are sorely in need of further guidance from this Court.

I. THE ALABAMA SUPREME COURT ABDICATED ITS RESPONSIBILITY TO PROVIDE A REMEDY FOR THE CONSTITUTIONAL VIOLATION

There can be no question that the jury in this case sought to punish BMW under Alabama law for conduct that took place entirely outside of Alabama and that had no effects within Alabama. As the Alabama Supreme Court found, "the jury's punitive damages award is based upon a multiplication of $4,000 (the diminution in value of the Gore vehicle) times 1,000 (approximately the number of refinished vehicles sold in the United States)" and hence "was based in large part on conduct that happened in other jurisdictions." App., *infra*, 16a.

Nor can there be any question that this sort of extraterritorial punishment violates the Constitution. This Court repeatedly has made clear that it violates due process for a state to apply its law to activities that have no relation to that state. See, *e.g.*, *Phillips Petroleum Co.* v. *Shutts*, 472 U.S. 797, 818-823 (1985); *Allstate Ins. Co.* v. *Hague*, 449 U.S. 302, 310-311 (1981) (plurality opinion); *id*. at 327 (Stevens, J., concurring); *Home Ins. Co.* v. *Dick*, 281 U.S. 397, 407-410 (1930). The Court also has held in a variety of contexts that the Commerce Clause and the constitutionally based principle that the states are co-equal sovereigns bar states from regulating conduct occurring outside their boundaries. See, *e.g.*, *Healy* v. *Beer Institute*, 491 U.S. 324, 336-337 (1989); *Edgar* v. *MITE Corp.*, 457 U.S. 624, 642 (1982) (plurality opinion); *Bigelow* v. *Virginia*, 421 U.S. 809, 822-824 (1975); *Bonaparte* v. *Tax Court*, 104 U.S. 592, 594 (1881).[7]

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[7] Although these cases involved the extraterritorial effects of legislation, it is settled that "regulation can be as effectively exerted

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The prohibition against extraterritorial regulation applies with added force when, as here, a state is seeking to punish the defendant for hundreds of transactions that were statutorily authorized in the states in which they took place.[8] "To punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort * * *." *Bordenkircher* v. *Hayes*, 434 U.S. 357, 363 (1978). Yet that is precisely what the jury did in this case.

The Alabama Supreme Court acknowledged that it was unconstitutional for the jury to "use the number of similar acts that a defendant has committed in other jurisdictions as a multiplier when determining the *dollar amount* of a punitive damages award." App., *infra*, 16a (emphasis in original). The court nonetheless proceeded to resolve the case as if no violation had occurred. The court did not even consider what an appropriate remedy would be

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[7] (...continued)
through an award of damages as through [enforcement of a statute or regulation]." *San Diego Building Trades Council* v. *Garmon*, 359 U.S. 236, 247 (1959). See also, *e.g.*, *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608, 2620 (1992). This is especially true with respect to punitive damages, which are specifically designed to alter the behavior of the defendant and others similarly situated.

[8] BMW adduced uncontroverted evidence that 60% of the 1,000 sales for which it was punished took place in states that had, by statute or regulation, adopted a disclosure threshold that was equal to or higher than BMW's 3% threshold. App., *infra*, 17a; R. 972. Virtually all of the remaining sales took place in states that had not adopted any disclosure threshold but had never held non-disclosure in circumstances like these to be fraudulent or in any way improper.

for a constitutional violation of the sort it had found. Instead, it started with the jury's tainted $4 million award, reviewed that award *for excessiveness* under its standard *Green Oil* factors, and then held that "a constitutionally reasonable punitive damages award in this case is $2 million." *Id*. at 21a.[9] This violated BMW's constitutional rights every bit as much as the jury's original act of extraterritorial regulation.

This Court repeatedly has held that it is not sufficient for state courts merely to recognize the violation of a constitutional right; they must also provide a remedy that adequately redresses the violation. Thus, in its most recent exposition on the subject, the Court held that, if a state collects under duress a tax that discriminates against interstate commerce, state courts may not simply declare the tax unconstitutional and enjoin its future collection: the Due Process Clause mandates that the state provide backward-looking relief that fully removes the discriminatory effects of the unconstitutional tax. *McKesson Corp.* v. *Division of Alcoholic Beverages & Tobacco*, 496 U.S. 18 (1990). See also, *e.g.*, *Carpenter* v. *Shaw*, 280 U.S. 363, 369 (1930) ("a denial by a state court of a recovery of taxes exacted in violation of the laws or Constitution of the United States by compulsion is itself in contravention of the Fourteenth Amendment").[10]

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[9] Indeed, the finding of unconstitutionality was made *as part of* the *Green Oil* analysis, rather than as a necessary threshold determination. Having started with the wrong question, it was inevitable that the court would arrive at the wrong solution.

[10] The Court also has held that state courts cannot limit the relief for a regulatory taking to an injunction. A fully adequate remedy requires payment for the lost use of the property during the time the regulation was in effect. *First English Evangelical Lutheran*

(continued...)

The Alabama Supreme Court had two options for redressing the constitutional violation in this case. Most obviously, it could have granted a new trial on punitive damages. Alternatively, it could have applied the jury's $4,000 per car formula to Dr. Gore's vehicle alone or, at most, to the 14 Alabama transactions, which would have resulted in a remittitur to either $4,000 or $56,000. Either remedy would have ensured that BMW was not punished unconstitutionally for conduct occurring entirely outside of Alabama. By contrast, in conducting its standard excessiveness inquiry and then merely cutting the punitive damages in half, the Alabama Supreme Court did nothing to remedy the jury's unconstitutional conduct. Indeed, by using the tainted $4 million figure as its starting point, the Alabama Supreme Court *perpetuated* the jury's constitutional violation.[11]

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[10] (...continued)
Church v. *County of Los Angeles*, 482 U.S. 304 (1987). And, of course, the Court repeatedly has emphasized the lower courts' obligation to provide an adequate remedy for violations of the Equal Protection Clause. See, *e.g.*, *Swann* v. *Board of Educ.*, 402 U.S. 1, 16 (1971) ("[t]he task is to correct, by a balancing of the individual and collective interests, the condition that offends the Constitution"); *Davis* v. *Board of School Comm'rs*, 402 U.S. 33, 37 (1971) ("[h]aving once found a violation, the district judge or school authorities should make every effort to achieve the greatest possible degree of actual desegregation").

[11] Certainly, Justice Houston understood that to be the case. He forthrightly acknowledged that the $2 million punishment in this case is based on "the totality of [BMW's] pattern and practice" — *i.e.*, "evidence that BMW NA sold 983 vehicles in this way." App., *infra*, 24a. Because he understood the $2 million penalty to be for the entirety of BMW's conduct, he expressed the belief that "to allow any additional punitive damages award against BMW NA in
(continued...)

If Dr. Gore had appealed to the jury's anti-German bias in seeking a large punitive exaction, there can be no question that the Alabama Supreme Court could not remedy that constitutional violation merely by cutting the jury's tainted penalty in half (or by making any other reduction for that matter). Halving the punitive verdict is no more acceptable when the constitutional violation involves an effort to punish extraterritorially. In either situation, the "remedy" simply bears no relation to the wrong.

The Alabama Supreme Court completely disregarded its constitutional obligation to provide BMW with a meaningful remedy

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[11] (...continued)
regard to the sale of any of the 983 vehicles may violate numerous constitutional rights." *Ibid*.

Even if, contrary to Justice Houston's understanding, the $2 million exaction is only for Alabama-related conduct, it would simply reflect the Alabama Supreme Court's perception of the *maximum* permissible punishment for such conduct. See, *e.g., Big B, Inc.* v. *Cottingham*, 634 So. 2d 999, 1006 (Ala. 1993) ("[i]n remitting a punitive damages award, we must remit only that amount in excess of the maximum amount that a properly functioning jury could have awarded"). But there is no basis for supposing that a jury untainted by unconstitutional motives would have imposed the maximum permissible punishment. To the contrary, *this* jury indicated an unambiguous intention to punish BMW at a rate of $4,000 for each sale as to which it was entitled to exact punishment. There is thus no reason to conclude other than that it would have imposed punitive damages of $56,000 for the 14 Alabama sales in evidence. In view of the utter improbability that any jury would have imposed the maximum permissible punishment, a remittitur to that amount is a patently inadequate remedy for the constitutional violation in this case.

for the deprivation of its constitutional rights. This Court accordingly should grant the petition and summarily reverse the judgment below with instructions to afford a remedy that redresses the constitutional violation.

II. THE $2 MILLION PUNITIVE EXACTION IS GROSSLY EXCESSIVE AND THEREFORE VIOLATES THE SUBSTANTIVE COMPONENT OF THE DUE PROCESS CLAUSE

This case would be worthy of the Court's review even if the Alabama Supreme Court's dereliction of its duty to remedy the constitutional violation were somehow excusable. Assuming for present purposes that the $2 million penalty approved by the court below truly does represent punishment simply for BMW's Alabama-related conduct, that massive penalty for minimally culpable conduct — nondisclosure of refinishing performed so expertly that it is undetectable to the untrained eye — raises the important and recurring question as to when a punitive exaction violates substantive due process.

This Court has recently expressed its concern that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," particularly in cases involving big businesses "without strong local presences." *Honda Motor Co.* v. *Oberg*, 114 S. Ct. 2331, 2340-2341 (1994). Although procedural safeguards can reduce the risk of arbitrariness, in some cases a guarantee of fair procedures simply is not enough. Accordingly, this Court has recognized that the Due Process Clause "imposes a *substantive* limit on the size of punitive damage awards." *Id*. at 2335 (emphasis added). A plurality of the Court has indicated that punishments that are "grossly excessive" breach that limit and that this "grossly excessive" standard incorporates "a general concern of reasonableness." *TXO Production Corp.* v. *Alliance Resources Corp.*, 113 S. Ct. 2711, 2720 (1993)

(internal quotation marks and brackets omitted). Beyond that, however, the Court has not had an opportunity to elucidate "the character of the standard that will identify unconstitutionally excessive awards." *Oberg*, 114 S. Ct. at 2335.

The instant case presents the Court with an opportunity to provide meaningful guidance in this area. The case involves several objective indicia of unreasonableness that recur with some frequency in punitive damages litigation. It therefore is a highly appropriate vehicle for developing the "character" of the reasonableness standard.

A. Several Objective Factors Demonstrate The Unreasonableness Of The $2 Million Exaction In This Case.

1. The nature of the misconduct

As both the plurality (113 S. Ct. at 2722) and Justice Kennedy (*id*. at 2726) recognized in *TXO*, the nature of the defendant's misconduct is an extremely significant consideration in any analysis of the reasonableness of a punitive award. Here, several objective factors that recur in punitive damages cases indicate that the $2 million penalty bears no reasonable relationship to the nature of the alleged misconduct.

First, as the Alabama Supreme Court recognized, BMW's 3% threshold is consistent with industry practice. App., *infra*, 11a, 17a. Although adherence to industry custom is not a complete defense to liability in a negligence action (see, *e.g.*, *The T.J. Hooper*, 60 F.2d 737, 740 (2d Cir.), cert. denied, 287 U.S. 662 (1932)), it constitutes powerful evidence that the conduct at issue is not so universally condemnable as to warrant *any* punitive exaction, let alone one in the amount of $2 million. See Owen, *Problems in Assessing Punitive Damages Against Manufacturers of*

Defective Products, 49 U. Chi. L. Rev. 1, 40-41 (1982) ("[r]arely will an entire industry act with flagrant impropriety against the health and safety of the consuming public, and running with the pack in general should shield a manufacturer from later punishment for conforming to the norm"); *Drabik* v. *Stanley-Bostitch, Inc.*, 997 F.2d 496, 510 (8th Cir. 1993) ("[c]ompliance with industry standard and custom serves to negate conscious disregard and to show that the defendant acted with a nonculpable state of mind"); *Maxey* v. *Freightliner Corp.*, 665 F.2d 1367, 1378 (5th Cir. 1982) (en banc) (finding a $10 million punitive award excessive and remanding for further consideration in light of fact that defendant's design comported with designs of all other members of the industry), appeal on remand, 722 F.2d 1238, 1242 (affirming remittitur of punitive award to $450,000), modified on other grounds, 727 F.2d 350 (5th Cir. 1984).

Second, BMW's policy comports with the statutory disclosure thresholds of numerous states, including now even Alabama.[12]

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[12] At present 22 states have disclosure statutes that do not require disclosure of refinishing costing less than 3% of MSRP. See Ala. Code § 8-19-5(22)(c) (3% of MSRP or $500, whichever is greater); Ariz. Rev. Stat. Ann. § 28-1304.03 (3% of MSRP); Ark. Code Ann. § 23-112-705 (6% of sticker price); Cal. Veh. Code §§ 9990-9991 (3% of MSRP or $500, whichever is greater); Idaho Code § 49-1624 (6% of MSRP); 1994 Ill. Legis. Serv. P.A. 88-581 (6% of MSRP) (to be codified at Ill. Comp. Stat. ch. 815, § 710/5); Ind. Code Ann. §§ 9-23-4-4, 9-23-4-5 (4% of MSRP); Iowa Code Ann. § 321.69 ($3,000); Ky. Rev. Stat. Ann. § 190.0491(5) (6% of sticker price); La. Rev. Stat. Ann. § 32:1260 (6% of MSRP); Minn. Stat. Ann. § 325F.664 (4% of MSRP or

(continued...)

When the Alabama Legislature has joined ranks with the vast majority of other states to legislate on the subject and has concluded that the nondisclosure of repairs costing less than 3% of MSRP is neither an unfair trade practice nor a material misrepresentation or omission of fact, the notion that BMW's use of that very same 3% threshold is sufficiently egregious to merit any punishment, let alone a $2 million imposition, is preposterous. (It reflects, at bottom, the

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[12] (...continued)
$500, whichever is greater); Miss. Motor Vehicle Comm'n Reg. § 1 (filed Aug. 19, 1992) (6% of MSRP); N.H. Rev. Stat. Ann. § 357-C:5(III)(d) (6% of MSRP); N.Y. Gen. Bus. Law § 396-p(5)(a), (d) (5% of lesser of MSRP or distributor's suggested retail price); N.C. Gen. Stat. § 20-305.1(d)(5a) (3% of MSRP); Ohio Rev. Code Ann. § 4517.61 (6% of MSRP); Okla. Stat. Ann. tit. 47, § 1112.1 (3% of MSRP or $500, whichever is greater); R.I. Gen. Laws § 31-5.1-18(d) (6% of MSRP); Vt. Stat. Ann. tit. 9, § 4087(d) (5% of first $10,000 of MSRP and 2% of any amount above $10,000); Va. Code Ann. § 46.2-1571(D) (3% of MSRP); Wis. Admin. Code § Transp. 139.05(6) (6% of MSRP); Wyo. Stat. § 31-16-115 (6% of MSRP). To our knowledge, no more than three states even arguably require disclosure of refinishing costing less than 3% of MSRP. See Fla. Stat. Ann. § 320.27(9)(n) (*dealer* must disclose repairs costing more than 3% of MSRP of which it has actual knowledge, but must disclose repairs involving application of "touch-up paint" if the cost of the touch-up paint application exceeds $100); Ga. Code Ann. § 40-1-5(b), (c), (d) & (e) (requiring disclosure of paint repairs costing more than $500); Or. Rev. Stat. § 650.155 (requiring manufacturer to disclose nature and extent of all "post-manufacturing repairs"). The remaining 25 states and the District of Columbia do not appear to have addressed the subject by statute or regulation.

absurd conclusion that 22 states have authorized the defrauding of their citizens.)

In this regard, the present case bears similarity to the common situation in which a defendant is sued for damages even though its conduct met federal safety standards. Although compliance with such standards might not be a defense to liability for compensatory damages, several lower courts have held that it generally is inconsistent with a finding that the conduct is reprehensible and hence weighs strongly against imposition of *any* punitive damages. See, *e.g.*, *Richards* v. *Michelin Tire Corp.*, 21 F.3d 1048, 1059 (11th Cir. 1994) (finding insufficient evidence to support imposition of punitive damages in light of defendant's compliance with federal safety standards); *Sloman* v. *Tambrands, Inc.*, 841 F. Supp. 699, 703-704 n.8 (D. Md. 1993) (compliance with federal regulations precludes finding of malice and necessitates entry of summary judgment on claim for punitive damages); *Stone Man, Inc.* v. *Green*, 435 S.E.2d 205, 206 (Ga. 1993) (holding that as a general rule punitive damages are improper when a defendant has complied with environmental or safety regulations). See also Note, *The Role of Regulatory Compliance in Tort Actions*, 26 Harv. J. on Legis. 175, 200 (1989) ("regulatory compliance should in most cases bar an award of punitive damages against a manufacturer").

Third, it is common in the product liability, mass disaster, and consumer fraud contexts for numerous lawsuits to arise out of the same alleged act of misconduct. The lawsuits often involve the same theories of liability, the same evidence, and even the same attorneys. In such circumstances, the outcome of other trials is a useful benchmark for measuring the reasonableness of any particular punitive award. For instance, if three juries impose punitive damages in the $200,000 to $300,000 range in cases involving similar allegations and evidence, the fact that the three exactions are tightly clustered is an indication that the awards are not unreasonable. By contrast, if a fourth jury were thereafter to impose a $4 million

punishment in a similar case, the massive disparity in outcomes would be a powerful indication that the fourth verdict is unreasonable.

The present case involves just such a disparity. The jury in the *Yates* case imposed no punitive damages at all. What is more, the jury in *this* case indicated its unambiguous conclusion that the appropriate penalty was $4,000 for each car for which it was entitled to punish. When one jury does not even believe that the conduct is bad enough to pass the threshold for imposition of punitive damages and another jury (in the case under review) concludes that proper punishment is $4,000 per transaction, that is compelling evidence that a punishment of $2 million (which amounts to over $140,000 per Alabama transaction) is patently unreasonable.

Fourth, conduct is objectively more reprehensible when the defendant is on notice that others consider it wrongful, either because the conduct is *malum in se* — that is, universally understood to be wrongful — or because there have been prior judgments imposing liability for that conduct. Here, the conduct is not *malum in se*. To the contrary, the vast majority of state legislatures to adopt standards governing the subject have set the disclosure threshold at no less than 3% of MSRP. See note 12, *supra*. What is more, the record in this case reflects that, at the time of the sale of Dr. Gore's car, BMW had never even been sued, let alone held liable, with regard to its policy of not disclosing repairs costing less than 3% of MSRP. R. 1012.[13] BMW had no indication before the *Yates* verdict — which was rendered over two years after Dr. Gore purchased his car — that its 3% threshold would be deemed to violate the common law of any state, including Alabama.

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[13] Nor has research disclosed any case in which any other manufacturer had been found to have committed fraud for similar conduct.

Because BMW's 3% threshold was fully consistent with the disclosure statutes of numerous states and because BMW had no other reason to expect that its use of such a threshold would be found fraudulent under Alabama common law, a seven-figure punitive exaction is far out of line.

Fifth, administrative fines for comparable conduct supply an extremely valuable benchmark for assessing the reasonableness of a punitive award. Here, the Alabama Legislature has set the maximum civil penalty for violations of its Deceptive Trade Practices Act at $2,000 per violation. Ala. Code § 8-19-11(b). The punishment selected by the Alabama Supreme Court is **1,000** times that amount.[14]

2. Relationship to the harm or potential harm to the plaintiff

The *TXO* plurality indicated that the relationship between the punitive damages and compensatory damages is a relevant, albeit not dispositive, consideration. 113 S. Ct. at 2721. For example, because the compensatory damages may understate the potential harm to the plaintiff from the defendant's misconduct, it is also

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[14] This Court has indicated that a lack of proportionality between the size of a punitive exaction and the amount of a *criminal fine* for analogous conduct is not dispositive of the excessiveness inquiry because criminal conduct typically also is punishable by imprisonment. *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 23 (1991). That does not mean, of course, that the criminal fines for similar misconduct are irrelevant to the inquiry. Moreover, the *Haslip* reasoning obviously has no application to civil penalties, which, by definition, do not encompass incarceration.

appropriate to consider the relationship between the punitive damages and the potential harm. *Id*. at 2721-2722.

Here, there was no evidence of any potential, but unrealized, harm to Dr. Gore. The $4,000 compensatory award reflects the full amount claimed by Dr. Gore as his actual (and potential) damages. Accordingly, the appropriate focus in this case is on the ratio between the punitive and compensatory awards.

The ratio of the punitive damages (as reduced by the Alabama Supreme Court) to the compensatory award in this case is a staggering **500:1**. Moreover, the punishment is a remarkable **35** times the harm to all 14 Alabama purchasers combined (assuming average compensatory damages of $4,000).[15] This Court found a 4:1 ratio of punitive to compensatory damages to be "close to the line" in *Haslip*, 499 U.S. at 23. And in *TXO* the plurality found "the shock[]" of the 526:1 ratio of punitive to compensatory damages to dissipate only because the ratio of punitive damages to the potential harm to the plaintiff was *at most* 10:1. 113 S. Ct. at 2722. Here, there is no uncompensated potential harm to dissipate the shock of the 500:1 (or 35:1) ratio of punitive to compensatory damages. Indeed, as indicated above, it is clear from the record that the ratio is a direct result of the jury's improper effort to punish BMW for all of the 1,000 refinished cars it had sold nationwide and hence has nothing at all to do with the potential harm to Dr. Gore. The 500:1 (or 35:1) ratio accordingly constitutes a powerful measure of the disproportionality of the punishment in this case.

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[15] Application of a 35:1 ratio to the totality of the 1,000 cars sold nationwide would yield a punishment of **$140 million**. We submit that not even the staunchest defender of punitive damages could contend that it would be appropriate to mulct BMW in this amount for its unitary policy decision to adopt a 3% threshold.

3. Comparable cases

The *TXO* plurality rejected the use of a comparative analysis "*as a test* for assessing whether a particular punitive award is presumptively unconstitutional." 113 S. Ct. at 2720 (emphasis in original). At the same time, it took pains not to "rule out the possibility that the fact that an award is significantly larger than those in apparently similar circumstances might, in a given case, be one of many relevant considerations * * *." *Ibid*.

This is such a case. Justice Houston performed a comparative analysis and concluded that inflation-adjusted punitive damages awards in Alabama cases involving fraud in the sale of an automobile ranged from $11,800 to $162,637 and averaged approximately $85,000. App., *infra*, 22a. The $2 million penalty approved by the Alabama Supreme Court is more than **23** times the average derived by Justice Houston and over **12** times the previous high. That kind of gross disparity once again reflects the unreasonableness of the punitive award in this case.

4. Presence or absence of a pattern of misconduct

In finding that the $10 million punishment in *TXO* was not excessive, both the plurality (113 S. Ct. at 2722-2723) and Justice Kennedy (*id*. at 2726) emphasized the evidence that the defendant had engaged in several other acts of misconduct that, along with the conduct for which the petitioner was held liable, formed an overall pattern of oppression.

Evidence that the defendant's overall business practices are permeated by misconduct would provide a ground for concluding that a substantial punishment is necessary to provide adequate deterrence and punishment. By the same token, if the record shows nothing more than the single act, policy, or design decision for which the defendant is being punished, there is far less need for a substan-

tial punishment. That is the case here. The 3% threshold (which, we repeat, is consistent with the disclosure statutes of the vast majority of states to address the subject legislatively) is the product of a unitary policy decision, and there is no evidence in the record of any other misconduct on the part of BMW that would support enhancement of its punishment.

B. Lower Courts Charged With The Task Of Reviewing The Size Of Punitive Damages Awards Under The Due Process Clause Are In Need Of Guidance From This Court.

By now, it hardly needs saying that the number of cases in which punitive damages are awarded and the amount of the punishment imposed in such cases is staggering. The newspapers carry reports of enormous punitive verdicts on a weekly basis. In August, September, and October 1994, for example, juries imposed punitive exactions of **$5 billion** against Exxon; **$109 million** against Blockbuster Entertainment Corp.; **$80 million** against Hughes Aircraft; **$70 million** against a director of Amerco, the corporate parent of U-Haul; **$65 million** against the Southern California Physicians Insurance Exchange; **$58 million** against Maryland Casualty Co.; **$57.5 million** against Key Pharmaceutical; **$50 million** against Mercury Finance; **$31 million** against Chevron U.S.A.; **$15 million** against Merrell Dow Pharmaceuticals, Inc.; **$8 million** against Schering-Plough Corp.; **$7 million** against Nash Finch Co.; **$6.9 million** against the law firm Baker & McKenzie; **$6.6 million** against Farmers Insurance Co.; **$6.5 million** against Wal-Mart; **$5 million** against the Hilton Hotel Corporation; and **$2.7 million** against McDonald's.[16]

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[16] See Schneider, *Exxon Is Ordered to Pay $5 Billion for* (continued...)

For its part, Alabama is among the nation's leaders in both the number and the size of its punitive damages awards. Statistics compiled by Jury Verdict Research reflect that Alabama juries award punitive damages **ten** times more often than juries in the country as a whole; moreover, the average punitive exaction in Alabama is more than **three** times the national median and roughly **eleven** times the average punitive sanction imposed in neighboring

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[16] (...continued)
Alaska Spill, N.Y. Times, Sept. 17, 1994, at 1; *Blockbuster Busted for $123.6 Million*, Nat'l L.J., Sept. 26, 1994, at A13; Silverstein, *Jury Awards $89.5 Million in Hughes Race Bias Lawsuit*, L.A. Times, Oct. 24, 1994, at D1; *Shareholder Group Awarded $1.47 Billion in U-Haul Suit*, N.Y. Times, Oct. 12, 1994, at D5; *Insurance Exchange Must Pay $70.7 M*, UPI, Aug. 11, 1994; *Jury Orders Insurer to Pay $61 Million to Manufacturer*, Orlando Sentinel, Nov. 3, 1994, at A20; *Drug Makers Liable for Brain-Damaged Student*, Nat'l L.J., Sept. 26, 1994, at A13; *Alabama Jury Awards $50 Million Punitive Damages to Car Buyer*, Chi. Trib., Aug. 9, 1994, at 1; *Chevron U.S.A. Slapped for Breach of Contract*, Nat'l L.J., Oct. 3, 1994, at A21; *Drug Co. Liable for Boy's Birth Defect*, Pa. L. Wkly., Oct. 10, 1994, at 4; *Ex-Schering Salesman Gets $8.4 Million in Bias Suit*, Wall St. J., Oct. 31, 1994, at B10; *Korean Denied Promotion Wins Civil Rights Case*, Nat'l L.J., Oct. 31, 1994, at A11; Chiang, *$7.1 Million Harassment Penalty Raises Questions*, S.F. Chron., Sept. 8, 1994, at A1; *$7.2 Million Verdict Favors Altadena Pair*, L.A. Times, Oct. 13, 1994, at J3; *Wal-Mart Held Liable for Promissory Estoppel*, Nat'l L.J., Oct. 3, 1994, at A21; *Woman Wins $5 Million for Tailhook*, N.Y. Times, Nov. 1, 1994, at A24; *Big Jury Award for Coffee Burn*, N.Y. Times, Aug. 19, 1994, at D5.

Georgia. Bueno, *As Alabama Juries Punish Business, Business Seeks to Punish the Judge*, Wall St. J., Nov. 2, 1994, at S1.

Trial and appellate courts often order remittiturs of punitive awards, but typically there is no rhyme or reason either to their decision as to whether a particular punishment is excessive or to their conclusion as to what a permissible amount would be. The court below, for example, is notorious for mouthing its *Green Oil* standards and then cutting the punitive award in half or picking some other equally arbitrary figure without any explanation whatever.[17] Other courts have been more forthright in expressing the need for guidance in conducting the excessiveness inquiry. For instance, a member of the Georgia Court of Appeals recently complained in a case involving a $101 million punitive judgment that "there is a great dearth of objectivity in the analysis or evaluation of punitive damages awards in Georgia. Our law provides much platitude and little guidance for determining an award of punitive damages." *General Motors Corp.* v. *Moseley*, 447 S.E. 2d 302, 315 (1994) (Banke, J., concurring). And speaking more generically of the need of all states for concrete guidance from this Court, the West Virginia Supreme Court has stated:

> State courts have adopted standards that are, for the most part, not predictable, not consistent and not uniform. Such fuzzy standards inevitably are most likely to be applied arbitrarily against out-of-state defendants. Moreover, this is a problem that state courts are by themselves incapable

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[17] See, *e.g.*, App., *infra*, 21a (cutting punitive award in half); *Northwestern Mut. Life Ins. Co.* v. *Sheridan*, 630 So. 2d 384, 395 (1993) (cutting punitive award in half); *Alabama Power Co.* v. *Turner*, 575 So. 2d 551, 558 (cutting $5 million punitive award to $3.5 million), cert. denied, 500 U.S. 953 (1991); *United Servs. Auto. Ass'n* v. *Wade*, 544 So. 2d 906, 917 (1989) (cutting $3.5 million punitive award to $2.5 million).

> of correcting regardless of surpassing integrity and boundless goodwill.
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> We must remember that although *Haslip* may not have created the clear, bright-line rules that we would all like, it is the beginning of national common law development in this area and not the end.

Garnes v. *Fleming Landfill, Inc.*, 413 S.E.2d 897, 905, 907 (1991).

As indicated, the instant case involves several objective indicia of excessiveness that arise with regularity in punitive damages litigation. It accordingly presents an excellent opportunity to provide the guidance that the lower federal and state courts manifestly need.

CONCLUSION

The petition for a writ of certiorari should be granted and the judgment of the Alabama Supreme Court should be summarily reversed. Alternatively, the Court should grant plenary review of the judgment below.

Respectfully submitted.

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NOVEMBER 1994