No. __-___

IN THE

Supreme Court of the United States

ICICLE SEAFOODS, INC.,

Petitioner,

v.

DANA CLAUSEN,

Respondent.

On Petition For Writ Of Certiorari To The Supreme Court Of Washington

PETITION FOR WRIT OF CERTIORARI

Michael A. Barcott
HOLMES WEDDLE
& BARCOTT, P.C.
999 Third Ave.
Suite 2600
Seattle, WA 98104

Meir Feder
Counsel of Record
Rajeev Muttreja
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

Eric E. Murphy
JONES DAY
325 John H. McConnell
Blvd., Suite 600
P.O. Box 165017
Columbus, OH 43216

JUNE 4, 2012

Counsel for Petitioner

QUESTIONS PRESENTED

In this maritime case, a jury awarded Respondent $37,420 for maintenance and cure, and $1.3 million in punitive damages—more than 34 times the compensatory damages. Notwithstanding the strict ratio between compensatory and punitive damages required in maritime cases by *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), the Supreme Court of Washington upheld the full $1.3 million punitive award. In conflict with several other courts, as well as this Court's decisions in *Exxon* and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), it inflated the "compensatory damages" element of the ratio by adding in $387,558 in later-awarded attorney's fees, turning a 34:1 ratio into a purported 2.79:1 ratio. And it dismissed the argument that even that ratio was excessive under *Exxon*'s 1:1 standard, holding that *Exxon* established no "broad, general rule."

The questions presented are:

1. Whether, in determining the ratio between compensatory and punitive damages for purposes of applying federal limits on punitive damages, court-awarded attorney's fees are properly included as compensatory damages.

2. Whether, and to what extent, punitive damages in maritime cases may exceed the 1:1 ratio between compensatory and punitive damages applied by the Court's *Exxon* decision.

PARTIES TO THE PROCEEDING

The sole defendant below was Petitioner Icicle Seafoods, Inc. The sole plaintiff below was Respondent Dana Clausen.

CORPORATE DISCLOSURE STATEMENT

Petitioner Icicle Seafoods, Inc., is a private corporation that is wholly owned by Icicle Midco, Inc., a private corporation that is wholly owned by Icicle Holdings, Inc. No publicly held company owns 10% or more of Icicle Seafoods' stock.

TABLE OF CONTENTS

Page(s)

TABLE OF CONTENTS
(continued)

Page(s)

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

TABLE OF AUTHORITIES
(continued)

Page(s)

STATUTES

TABLE OF AUTHORITIES
(continued)

Page(s)

OTHER AUTHORITIES

OPINIONS BELOW

The opinion of the Supreme Court of Washington, Pet. App. 1a-30a, is reported at 272 P.3d 827. The opinion of the Superior Court of Washington, Pet. App. 31a-50a, is unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Supreme Court of Washington entered its final judgment on March 15, 2012. Pet. App. 1a. This petition is timely filed on June 4, 2012.

STATEMENT OF THE CASE

This case arises out of a February 2006 maritime accident involving Respondent Dana Clausen, an engineer for Petitioner Icicle Seafoods, Inc. Pet. App. 3a. While working on board the Bering Star, a barge that had been docked in Dutch Harbor, Alaska, Clausen injured himself lifting a 122-pound piece of steel. *Id.* After reporting his injuries, Clausen went ashore to receive medical care, and returned home to Louisiana for additional care. *Id.*

A. Trial Court Proceedings

On January 18, 2008, Clausen commenced this action against Icicle in Washington state court, seeking damages for his injuries under federal maritime law. He asserted three claims. First, he sought to recover under the Jones Act, 46 U.S.C. § 30104, alleging that Icicle's negligence had caused his accident on the barge. *See* Pet. App. 4a. Second, Clausen brought a common-law claim alleging that Icicle's barge was not seaworthy. *Id.* Third, again under federal common law, Clausen sought "maintenance and cure," i.e., the

medical and living expenses incurred during his recovery.[1] *Id.*

Clausen's claims were tried before a Washington jury in 2009. On November 16, 2009, the jury found in Clausen's favor on his Jones Act claim and his maintenance-and-cure claim, and found in Icicle's favor on Clausen's unseaworthiness claim. *Id.*

On the Jones Act claim, after finding Icicle 56% responsible and Clausen 44% responsible for his actual injury on the barge, the jury determined that Clausen had suffered $453,100 in damages for that injury. *Id.* No punitive damages or attorney's fees are available under the Jones Act, and none were awarded.[2]

On the maintenance-and-cure claim, the jury found that Icicle unreasonably failed to pay Clausen's maintenance and cure, Pet. App. 4a, but that this conduct resulted in no additional injury to Clausen beyond the unpaid amounts themselves, Pet. App. 30a n.2. The jury awarded Clausen $37,420 in compensatory damages on the claim, for his actual medical and living expenses in arrears. Pet. App. 30a n.2.

---

[1] Maintenance and cure are no-fault remedies akin to workers' compensation available to seamen under maritime law. *See, e.g.*, *Calmar S.S. Corp. v. Taylor*, 303 U.S. 525, 527-28 (1938). If a seaman is injured while in his ship's service, his employer, even if not responsible for the injury, must pay him maintenance and cure. *See, e.g.*, *id.*

[2] *See Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990) (holding that the Jones Act "incorporate[s] the pecuniary limitation on damages" set forth in the Federal Employers' Liability Act (FELA)); *Mich. Cent. R.R. Co. v. Vreeland*, 227 U.S. 59, 71 (1913) (holding that FELA "provid[es] only for compensation for pecuniary loss or damage").

But the jury awarded Clausen $1.3 million in punitive damages—a sum over 34 times Clausen's compensatory damages—in light of its finding that Icicle was "callous and indifferent, or willful and wanton" in its failure to pay Clausen's maintenance and cure. *See* Pet. App. 4a.

After the jury's verdict, Clausen filed a post-trial motion requesting over $470,000 in attorney's fees and costs under *Vaughan v. Atkinson*, 369 U.S. 527, 530-31 (1962), which permits an award of attorney's fees when an employer's failure to pay maintenance and cure is "callous" or "willful and wanton." *See* Pet. App. 4a. This request included the attorney work on Clausen's Jones Act and unseaworthiness claims, for which Clausen was not entitled to recover attorney's fees. Yet the trial court reduced the total amount of attorney's fees for the entire case by only ten percent, reasoning "that this was the attorneys' first case involving punitive damages for maintenance and cure, suggesting that the issue required a significant amount of time." Pet. App. 13a. The trial court ultimately awarded $387,558 in fees and $40,547.57 in costs. Pet. App. 5a.

Icicle moved to amend the judgment to reduce the punitive award to within the 1:1 compensatory-to-punitive damages ratio announced in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008). The trial court rejected Icicle's *Exxon* challenge, reasoning that, for ratio purposes, Clausen's compensatory damages should include his court-awarded attorney's fees and costs. With the inclusion of those items, Clausen's alleged "compensatory damages" swelled from the jury's award of $37,420 to a final total of $465,525. Pet. App. 37a.

Even with this inflation of the "compensatory damages" element of the *Exxon* ratio, the punitive damages still nearly tripled the compensatory award. The trial court held, however, that this 2.79:1 ratio complied with *Exxon*. *See* Pet. App. 50a. "*Exxon* imposed a 1:1 ratio under [its] particular facts," the trial court indicated, but "did not establish a 1:1 limit for all maritime cases." Pet. App. 34a.

Based on its review of the record, the trial court concluded that Icicle's failure to pay maintenance and cure was reprehensible. To the trial court, Icicle had "demonstrated intentional indifference to Mr. Clausen's health," in part because "Clausen's necessary medical care was going to cost [Icicle] money." Pet. App. 38a-39a. Among other things, the trial court found that Icicle had paid Clausen "only [$]20.00 a day in maintenance," which was "clearly not enough money for safe and secure lodging" and food; intentionally declined to pay Clausen's benefits "for a considerable time"; and misled Clausen about his condition "to force Mr. Clausen to settle his claim" for less than would otherwise be due. Pet. App. 39a-42a. The trial court also took issue with a lawsuit Icicle filed against Clausen a few months before this action commenced seeking to terminate Clausen's maintenance-and-cure rights. That suit's complaint, in the trial court's view, included "deliberate false statements." Pet. App. 43a. In light of these facts, the trial court stated that "[t]he punitive damages must be too painful to make such conduct profitable." Pet. App. 47a.

B. Appellate Proceedings

Icicle appealed, arguing (as relevant here) that *Exxon* required the trial court to substantially reduce

Clausen's $1.3 million punitive-damages award, Pet. App. 15a, and that the trial court erred by adding Clausen's attorney's fees to the compensatory-damages element of the ratio between compensatory and punitive damages, Pet. App. 20a. Due to the significance of the issues, the appeal was immediately transferred to the Washington Supreme Court. Pet. App. 5a.

The Washington Supreme Court affirmed in a divided decision. Pet. App. 21a. The majority rejected both Icicle's contention that attorney's fees are not properly included in the punitive-to-compensatory ratio under *Exxon* and its contention that *Exxon* imposed a maximum 1:1 ratio in maritime cases.

With respect to the 1:1 ratio, the majority characterized *Exxon* as not "establishing a broad, general rule limiting punitive damage awards," Pet. App. 17a, but rather as embracing "a variable limit" on punitive damages "based on the tortfeasor's culpability." Pet. App. 18a. The ratio applied in *Exxon* was inapplicable here, the majority held, because *Exxon* involved "a case of reckless action, profitless to the tortfeasor," Pet. App. 17a (quoting 554 U.S. at 510-11), whereas "Icicle's conduct was not just reprehensible, it was egregious," so a substantial punitive award was necessary to "serve[] as a deterrent" to prevent "Icicle, and any employer," "from profiting at the expense of their employee's health." Pet. App. 19a.

The court further reasoned that the applicable punitive-to-compensatory ratio was not 34 to 1 but rather was really 2.79 to 1, holding that the trial court properly "include[d] attorney fees as part of the compensatory damages award when calculating the puni-

tive damages ratio." Pet. App. 20a. "[R]ecovery of attorney fees is compensatory in that those fees attempt to make Clausen whole for the employer's actions." *Id.* Citing several cases applying the due-process limits on punitive damages, the court concluded that "[c]ourts in other jurisdictions include attorney fees as part of the compensatory damages award for punitive damages ratio comparison purposes." Pet. App. 20a (citing *Blount v. Stroud*, 915 N.E.2d 925, 944 (Ill. App. Ct. 2009); *Action Marine, Inc. v. Cont'l Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 235-36 (3rd Cir. 2005)).

Justice Johnson dissented, in an opinion joined by Justice Alexander, arguing that "the majority ignore[d] instruction from the United States Supreme Court . . . as articulated in *Exxon*." Pet. App. 21a. "To solve the problem of runaway punitive damage awards," the dissent emphasized, "the *Exxon* Court concluded that punitive damages should be 'pegg[ed] . . . to compensatory damages using a ratio. . . .'" Pet. App. 23a (quoting 554 U.S. at 506). While noting the possibility that *Exxon* might be interpreted as permitting a slightly higher ratio than 1:1 in some cases, the dissent pointed out that the "highest ratio considered potentially applicable in *Exxon* was 3:1." Pet. App. 26a.

The dissent next rejected the majority's assertion that "the punitive damage award in this case is no more than three times the compensatory award"—based on the majority's inclusion of nearly $400,000 of attorney's fees as compensatory damages—as sheer "fiction." Pet. App. 27a. It explained that "attorney fee awards in maintenance and cure actions

are characterized as punitive," not compensatory—as this Court and other courts have indicated—"because fees are not available unless a showing of callous or willful and wanton conduct is made." Pet. App. 28a (citing *Vaughan*, 369 U.S. at 531). Thus, the dissent explained, Clausen's punitive damages dwarfed his compensatory damages by a measure that "vastly exceeds any ratio considered palatable by the *Exxon* Court," Pet. App. 26a, and were "plainly excessive in relation to the actual harm caused by" Icicle. Pet. App. 30a. "By upholding the award," the dissent warned, "this court perpetuates a problem the *Exxon* Court intended to remedy: the issue of unpredictable punitive damage awards that fail the fundamental goal of deterrence." Pet. App. 30a. Thus, the dissent would have reduced Clausen's punitive damages to, at most, "$112,260—three times the compensatory award of $37,420." Pet. App. 27a.

REASONS FOR GRANTING THE PETITION

In recent years, this Court has repeatedly found it necessary to establish limits on punitive damages, both as a matter of federal due process, *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 422-23 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 585-86 (1996), and as a matter of federal admiralty law, *see Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513-14 (2008). In both types of cases, the Court has used the *ratio* between the punitive and compensatory damages as a critical objective indicator for preventing runaway punitive awards. In admiralty cases, the Court has established the general rule that "[a] punitive-to-compensatory ratio of 1:1 . . . yields maximum punitive damages." *Exxon*, 554 U.S. at 515. In due-process cases, the ratio is also a "central

feature in [the Court's] analysis," *id.* at 507, because "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," *State Farm*, 538 U.S. at 425.

This admiralty case presents two important and recurring questions fundamental to the application of those federal limits on punitive damages. The Washington Supreme Court purported to justify a punitive award 34 times the size of the compensatory damages by (1) comparing the punitive award to a "compensatory" figure inflated by nearly $400,000 in attorney's fees instead of to compensatory damages as required by *Exxon*, and (2) interpreting *Exxon* as establishing no generally applicable limit on punitive damages. The questions presented are: *First*, whether court-awarded attorney's fees are properly included as compensatory damages for purposes of the federal limits on punitive awards. *Second*, whether, and if so to what extent, admiralty courts may depart from the 1:1 ratio that *Exxon* applied.

I. THE DECISION BELOW THAT ATTORNEY'S FEES ARE PROPERLY INCLUDED IN THE PUNITIVE-DAMAGES RATIO CONFLICTS WITH THIS COURT'S DECISIONS AND NUMEROUS STATE AND FEDERAL CASES

The Court should grant certiorari to address the recurring question whether, for purposes of the federal limits on punitive damages, attorney's fees are properly included in the compensatory side of the ratio between compensatory and punitive damages. The Washington Supreme Court's decision to do so in this case conflicts with this Court's decisions, adds to

an existing split of authority, and raises an issue that is recurring, important, and in need of resolution.

A. The Decision Below Conflicts With This Court's Decisions In *Exxon* And *State Farm*

In this case, the Washington Supreme Court upheld a $1.3 million punitive award more than 34 times larger than the $37,420 in compensatory damages, on the "fiction," Pet. App. 27a, that the ratio was purportedly only 2.79:1. This manipulation of the prescribed ratio is comparable to other courts' efforts to "depart[] from well-established constraints on punitive damages," *State Farm*, 538 U.S. at 427, such as by relying on the defendant's assets, *id.*, or by looking to harm to others not before the court, *Philip Morris USA v. Williams*, 549 U.S. 346, 354 (2007), when attempting to justify an excessive ratio between punitive and compensatory damages.

The Washington Supreme Court's alteration of the punitive-to-compensatory ratio is squarely contrary to this Court's cases. *Exxon* adopted a ratio requirement for maritime cases because of the need for a specifically defined "quantified limit[]" that could be mechanically and consistently applied and thereby eliminate "unpredictable outliers." 554 U.S. at 504, 506. It defined that ratio as the one between punitive damages and *compensatory damages*, holding it appropriate to "peg[] punitive to *compensatory damages* using a ratio or maximum multiple." *Id.* at 506 (emphasis added). And, when opting for the precise 1:1 ratio, the Court noted that "a median ratio of punitive to *compensatory damages* of about 0.65:1 probably marks the line near which cases like this one largely should be grouped." *Id.* at 513 (emphasis added).

This Court's definition of the ratio as one between the punitive award and compensatory damages plainly excludes court-awarded attorney's fees. To begin with, the established and widely accepted meaning of "compensatory damages" in this country excludes attorney's fees. Except in unusual cases—such as lawsuits for abuse of process—attorney's fees are not an element of damages. *See, e.g.*, *Doe v. Chao*, 540 U.S. 614, 625 n.9 (2004) (distinguishing "actual damages" from "costs and reasonable attorney's fees"); Fed. R. Civ. P. 54(d)(2) (noting that "a claim for attorney's fees and related nontaxable expenses must be made by motion unless the substantive law requires those fees to be proved at trial as an element of damages"). Indeed, under the American Rule, attorney's fees normally are not recoverable, and even when they are recoverable (whether by statute, as a sanction for misconduct, or for some other reason), they are a form of collateral relief ordered as costs by the court, not an element of damages found by the factfinder. *See, e.g.*, *Hutto v. Finney*, 437 U.S. 678, 697 (1978) ("In America, although fees are not routinely awarded, there are a large number of statutory and common-law situations in which allowable costs include counsel fees."). Here, for example, attorney's fees were "not part of the plaintiff's substantive claim for damages," Pet. App. 12a, which would have required the jury to find them, but rather a form of subsequent and collateral relief ordered by the trial court. In short, the plain meaning of "compensatory damages" in the *Exxon* ratio excludes court-awarded attorney's fees.

Moreover, the *Exxon* Court's reasoning in support of the ratio it adopted relied significantly on recommendations that themselves compared punitive

awards with the compensatory verdict alone—i.e., without including attorney's fees. *See* 554 U.S. at 506-07; *see, e.g.*, ABA, Report of Special Comm. on Punitive Damages, Section of Litigation, Punitive Damages: A Constructive Examination 65 (1986) ("Our specific proposal is that a ratio be adopted of a punitive damages three times the *compensatory verdict*." (emphasis added)). Likewise, in analyzing the question, the Court relied on a host of studies identifying ratios between compensatory and punitive damages. *See Exxon*, 554 U.S. at 497-98 & nn.13-14, 506-07. "[B]y most accounts," the Court noted, "the median ratio of punitive to *compensatory awards* has remained less than 1:1." *Id.* at 497-98 n.14 (citing Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. of Empirical Legal Studies 263, 278 (2006); Vidmar & Rose, *Punitive Damages by Juries in Florida*, 38 Harv. J. Legis. 487, 492 (2001)). All of these studies appear to have addressed the ratio between punitive awards and the compensatory verdicts; there is no indication that any of them included attorney's fees in that ratio.

This Court's decision in *State Farm* likewise identified the relevant ratio as that between punitive and compensatory *damages*—and, in fact, specifically excluded attorney's fees. The respondents in *State Farm* expressly argued that the Court should include as "compensatory damages" not simply the $1 million compensatory award, but also over $800,000 in attorney's fees and costs. *See* Br. of Respondents, *State Farm Mutual. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289), 2002 WL 31387421, at *17 n.5. This Court, however, excluded those amounts

from its calculation and determined that the punitive-to-compensatory ratio was "145 to 1," 538 U.S. at 425—the ratio between the $145 million punitive award and the $1 million compensatory award. It further found the $1 million award to be "complete compensation" for the plaintiffs. *Id.* at 426; *see also BMW*, 517 U.S. at 580 (noting "[t]he principle that exemplary damages must bear a 'reasonable relationship' to *compensatory damages*" (emphasis added)).

In short, the Washington Supreme Court's decision to justify a disproportionate punitive award by comparing it to the amount of attorney's fees cannot be reconciled with *Exxon* and *State Farm*.[3]

B. The Decision Below Deepens An Existing Split Over Whether Attorney's Fees May Be Used In The Ratio

Certiorari is also warranted because the decision below deepens a significant split of authority over whether—in applying the punitive-to-compensatory ratio under *Exxon* and *State Farm*—an award of attorney's fees is properly included in the compensatory-damages element of the ratio. Consistent with this Court's cases, most courts have excluded attorney's fees from the ratio. But a growing number of courts, several of them cited in support of the holding below, *see* Pet. App. 20a, have held that attorney's

---

[3] In addition to this direct inconsistency with *Exxon* and *State Farm*, the decision below is inconsistent with the reasoning of those cases. *See* Part I.D, *infra*.

fees are properly included as compensatory damages.[4]

1. Several courts have flatly rejected plaintiffs' requests to treat attorney's fees as "compensatory" when analyzing whether the ratio between punitive and compensatory damages complied with federal law. The Utah Supreme Court adopted this approach on remand from this Court's *State Farm* decision. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419-20 (Utah 2004). The Utah Supreme Court recognized that this Court itself had not included the plaintiffs' award of attorney's fees in the ratio, and thus it held that the Court's opinion "foreclose[d] consideration of a compensatory damages award" inflated to include attorney's fees. *Id.* at 419. It further noted that "[t]o consider attorney fees and expenses in awarding punitive damages . . . invites unnecessary conceptual and practical complications to an already complex enterprise." *Id.* at 420. Unlike the Washington Supreme Court, *see* Pet. App. 12a, the Utah Supreme Court held that "[t]he incorporation of attorney fees and expenses into the compensa-

---

[4] Many of these cases have arisen in the context of the *State Farm* due-process analysis rather than the *Exxon* federal common-law analysis, but the question is identical in both contexts. While the Due Process Clause may permit a higher ratio of compensatory to punitive damages than federal admiralty law, *compare Exxon*, 554 U.S. at 513, *with State Farm*, 538 U.S. at 425, the definition of the ratio is the *same* in both types of cases. *Exxon* noted that the same ratio it applied was "a central feature in [the Court's] due process analysis." 554 U.S. at 507. The Washington Supreme Court itself recognized as much, relying on several such due-process cases as the sole authority for its holding. Pet. App. 20a.

tory damages award" would require those items to be considered by the jury during trial rather than by the judge after trial, and so would "substantially alter the manner in which trials are conducted." *State Farm*, 98 P.3d at 419-20.

The D.C. Court of Appeals has likewise rejected inclusion of attorney's fees in the compensatory damages denominator under *State Farm*, and has even gone a step further by suggesting that an award of attorney's fees should mean a reduced punitive award, not a greater one. In *Daka, Inc. v. McCrae*, 839 A.2d 682 (D.C. 2003), that court explained that attorney's fees "'includ[e] a certain punitive element' and to that extent . . . favor[] a lesser rather than greater award of punitive damages" under this Court's cases. *Id.* at 701 n.24 (citation omitted); *see also Parrish v. Sollecito*, 280 F. Supp. 2d 145, 164 (S.D.N.Y. 2003) (same).

Since *State Farm*, the Arizona and California appellate courts have also repeatedly rejected plaintiffs' "attempts to alter the ratio by arguing that" their post-trial awards of attorney's fees should be treated as compensatory damages. *Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (Cal. Ct. App. 2010); *Chasan v. Farmers Group, Inc.*, No. 1 CA-CV 07-0323, 2009 WL 3335341, at *10 (Ariz. Ct. App. Sept. 24, 2009). Like the Utah Supreme Court, these courts have found as a matter of "[l]ogic and common sense" that the jury's compensatory award "most closely reflects the United States Supreme Court's formulation of the 'actual harm as determined by the jury.'" *Bardis v. Oates*, 14 Cal. Rptr. 3d 89, 101 (Cal. Ct. App. 2004) (quoting *BMW*, 517 U.S. at 582); *Chasan*, 2009 WL 3335341, at *10; *see also Walker v. Farmers Ins. Exch.*, 63 Cal. Rptr. 3d 507,

513 (Cal. Ct. App. 2007) (finding a reduced punitive award proper in light of plaintiff's receipt of attorney's fees).

Finally, perhaps reflecting the obviousness of the correct approach, many decisions have (like *State Farm* itself) excluded attorney's fees from the punitive-to-compensatory ratio when finding a punitive award excessive, without even addressing the possibility that the attorney's fees might properly be included—even where, as here, attorney's fees dwarfed the compensatory damages. *See, e.g.*, *Quigley v. Winter*, 598 F.3d 938, 955-58 (8th Cir. 2010); *Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 362-63 (8th Cir. 2009); *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1120-23 (9th Cir. 2008); *Fabri v. United Techs. Int'l, Inc.*, 387 F.3d 109, 118, 126-27 (2d Cir. 2004).

The Ninth Circuit's *Mendez* decision, for example, leaves no doubt that that court would have reached a different result from the Washington Supreme Court had this suit been filed in federal court. There, the jury awarded the plaintiff $2 in compensatory damages and $250,000 in punitive damages for claims under 42 U.S.C. § 1983. *See* 540 F.3d at 1120. The Ninth Circuit found that the $250,000 punitive award was "excessive as a matter of due process," because it was 125,000 times the compensatory damages that the jury awarded. *Id.* at 1121-23. In deciding the case based on a ratio of 125,000:1, the court excluded from the ratio the award of attorney's fees under 42 U.S.C. § 1988 to which it held the plaintiff entitled. *Id.* at 1120, 1130. Thus, the Ninth Circuit, along with several others, has repeatedly *reduced*

punitive awards based on a ratio that routinely *excludes* awards of attorney's fees.[5]

2. By contrast, a growing number of cases has taken the opposite position, adding attorney's fees to the ratio to justify an otherwise disproportionate punitive award. Indeed, one court recently suggested that "the majority of the courts across the country that have considered this issue have agreed that an award of attorney fees should be taken into account as part of the compensatory damages factor." *Blount v. Stroud*, 915 N.E.2d 925, 943 (Ill. App. Ct. 2009). The decision below falls into this camp, and thereby deepens the split, adopting the view that attorney's fees should generally be included "as part of the compensatory damages award when calculating the punitive damages ratio." Pet. App. 21a.

A similar stance has become well established in Illinois. In *Blount*, the court added the plaintiff's $1,182,832.10 award of attorney's fees to her $282,350 compensatory damages to uphold the jury's $2.8-million punitive award. *Id.* at 943-46. The court justified this result because "the economic cost of the litigation is a relevant consideration to factor into the side of the ratio that quantifies the amount necessary to make the plaintiff whole." *Id.* at 943; *see also Lawlor v. N. Am. Corp. of Ill.*, 949 N.E.2d 155, 170 (Ill. App. Ct. 2011) (upholding $1.75-million award because, while compensatory damages were only $65,000, the plaintiff had been awarded $600,000 in

---

[5] Such a conflict between a federal appellate court and the high court of one of its constituent states is a particularly compelling reason to grant review. *See, e.g.*, *Baldwin v. Alabama*, 472 U.S. 372, 374 (1985).

attorney's fees); *Kirkpatrick v. Strosberg*, 894 N.E.2d 781, 797 (Ill. App. Ct. 2008) (upholding $300,000 punitive-damages award because, while compensatory damages were nominal, the plaintiff was awarded $83,000 in attorney's fees).

Two federal circuit courts have likewise permitted attorney's fees to be included in the federal punitive-to-compensatory ratio, at least where the fees could be characterized under state law as "compensatory." In *Willow Inn, Inc. v. Public Service Mutual Insurance Co.*, 399 F.3d 224 (3d Cir. 2005), for example, the Third Circuit held that "attorney fees and costs awarded pursuant to" a state statute prohibiting an insurance company from acting in bad faith toward an insured were "compensatory damages for *Gore*/*Campbell* multiplier purposes." *Id.* at 236; *see also Gallatin Fuels, Inc. v. Westchester Fire Ins. Co.*, 244 F. App'x 424, 435-37 (3d Cir. 2007) (same).

The Eleventh Circuit agreed with the Third Circuit's view in *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007), a case that involved a similar Georgia statute that permitted an award of attorney's fees where a litigant acts in bad faith. Citing *Willow Inn* for the proposition that courts should "rely[] on state law to define the character of an attorney fee award," the Eleventh Circuit noted that, "[i]n Georgia, awards of attorney fees in tort cases involving bad faith are compensatory in nature." *Id.* It thus "include[d] the attorney fees as part of the measure of actual damages for the necessary comparison" in applying *State Farm*. *Id.*

As these diverging cases show, there is now a well-established split over when, if ever, an award of attorney's fees may be treated as compensatory when

determining whether a punitive award comports with federal limits on punitive damages.

C. The Decision Below Raises A Question That Is Important, Recurring, And In Need Of Immediate Resolution

The question whether attorney's fees are properly included in the compensatory-damages element of the ratio between punitive and compensatory damages is an important one in need of immediate resolution. The ratio is "perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award," and one with a "long pedigree." *BMW*, 517 U.S. at 580. In admiralty cases, it now provides the definitive test for determining the cap on punitive damages. *See Exxon*, 554 U.S. at 506. In constitutional cases, the ratio is a "significant," *BMW*, 517 U.S. at 581, and "central" part of the analysis, *Exxon*, 554 U.S. at 507.

In addition, the question needs immediate resolution. The ratio exists to provide an *objective* factor for comparing punitive awards across cases and thereby to eliminate the "stark unpredictability" of unconstrained punitive awards. *Exxon*, 554 U.S. at 499. As this Court indicated, "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." *Id.* at 502. But the ratio cannot serve this central purpose if, as exists now, courts take drastically differing approaches for calculating it. When the Ninth Circuit excludes attorney's fees and as a result rejects a $500,000 punitive award, *see Mendez*, 540 F.3d at 1120, whereas a state supreme court within the Ninth Circuit upholds

a $1.3-million award by including attorney's fees, Pet. App. 20a, the law does not provide a "fair probability"—indeed, does not provide any probability—that defendants will "suffer[] in like degree when they wreak like damage," *Exxon*, 554 U.S. at 502.

If allowed to stand, moreover, the decision below offers a roadmap for other courts on how effectively to turn "well-established constraints on punitive damages" into meaningless exercises. *State Farm*, 538 U.S. at 427. Because attorney's fees are often large in relation to compensatory damages—as here and in many of the other cases cited in Part I.B, *supra*—they can frequently be used to rationalize otherwise excessive punitive awards. And a trial court's acknowledged discretion as to the amount of attorney's fees likewise provides it with substantial room to insulate itself from the otherwise *de novo* review that would apply to a review of a punitive-damages award. *See Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 443 (2001). The Court has cautioned against allowing states to evade its punitive-damage limits in the due-process context. "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*." *State Farm*, 538 U.S. at 427. That concern is even more appropriate in this admiralty case, in which this Court, not state courts, exercises final responsibility to create the proper "judge-made law." *Exxon*, 554 U.S. at 502.

Finally, the question arises frequently. Punitive damages and attorney's fees are routinely available for the same state or federal claims. They are, of course, both available for the claim at issue here. *See Atl. Sounding Co. v. Townsend*, 129 S. Ct. 2561, 2575

(2009); *Vaughan*, 369 U.S. at 530-31. Additionally, an array of federal statutes authorizes both types of awards. For example, 42 U.S.C. § 1988 makes attorney's fees available under numerous civil-rights statutes, many of which permit punitive damages, including 42 U.S.C. § 1983, *see Mendez*, 540 F.3d at 1120-23, Title VII, *see* 42 U.S.C. § 1981a(a)(1), and the Americans with Disabilities Act of 1990, *see* 42 U.S.C. § 1981a(a)(2). Both awards are also expressly available under the Fair Housing Act, *see* 42 U.S.C. § 3613(c), and the Fair Credit Reporting Act, *see* 15 U.S.C. § 1681n(a)(2)-(3), among many others. Moreover, attorney's fees and punitive damages are routinely available together under many state claims. *See, e.g.*, Brown & Helper, *Comparison of Consumer Fraud Statutes Across the Fifty States*, 55 Fed'n Def. & Corp. Couns. Q. 263, 279-82 (2005) (both available under a majority of states' consumer fraud statutes); Frankel, *Secret Sabermetrics: Trade Secret Protection in the Baseball Analytics Field*, 5 Alb. Gov't L. Rev. 240, 244, 279 n.214 (2012) (both available under the Uniform Trade Secrets Act).

D. The Decision Below Is Simply Wrong

Lastly, the Washington Supreme Court was simply mistaken to use attorney's fees in the ratio. In addition to the direct inconsistency with *Exxon*'s and *State Farm*'s definition of the prescribed ratio, detailed in Part I.A, *supra*, the decision below cannot be squared with the reasoning of those cases. *First*, the Court has required a comparison to compensatory damages because those damages measure the harm caused by the defendant's conduct. *See, e.g.*, *BMW*, 517 U.S. at 582 ("The $2 million in punitive damages awarded to Dr. Gore by the Alabama Supreme Court

is 500 times the amount of *his actual harm as determined by the jury*." (emphasis added)). Attorney's fees, in contrast, are not a measure of harm; they are a measure of subsequent litigation cost—and one that, as in this case (where the attorney's fees were more than ten times the amount of maintenance-and-cure damages), can easily overwhelm the actual harm found by the jury. The inclusion of attorney's fees turns the required proportionality between punitive damages and the harm caused by the wrongful conduct into a nonsensical requirement that punitive damages be proportional to litigation cost.[6]

Second, a core problem addressed by the *Exxon* ratio "is the stark unpredictability" of punitive awards. 554 U.S. at 499; *see also id.* at 501 ("We are aware of no scholarly work pointing to consistency across punitive awards in cases involving similar claims and circumstances."). Alleviating this problem, the punitive-to-compensatory ratio provides an objective baseline against the "risks of arbitrariness, uncertainty, and lack of notice" that result from unconstrained punitive awards. *Williams*, 549 U.S. at 354.

The addition of attorney's fees into the ratio fundamentally conflicts with this reason for the ratio. The American Rule renders attorney's fees only intermittently available, and many of the cases where

---

[6] Indeed, if the relevant harm from a defendant's conduct included subsequent attorney's fees, it would make no sense to include those fees in the ratio only for plaintiffs who are awarded attorney's fees: the "harm" of paying one's attorney is the same regardless of whether the plaintiff is fortunate enough to qualify for an exception to the American Rule that each party bears its own fees.

an exception is potentially applicable will turn on an unpredictable exercise of the trial court's discretion. *See, e.g.*, *Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 46 (1st Cir. 2010) (noting that "district courts have broad discretion in determining when and whether to exercise inherent powers, particularly with respect to fee-shifting on account of a party's supposed bad faith").

Further, even when permitted, the amount that any plaintiff receives as attorney's fees will vary with the billing rates of the lawyer employed by the plaintiff, the complexity of the litigation, the extent of discovery and motion practice permitted by the trial judge, and the trial court's ultimate exercise of discretion as to the amount of fees awarded. *See, e.g.*, *Cardinal Health 110, Inc. v. Cyrus Pharm., LLC*, 560 F.3d 894, 902 (8th Cir. 2009) (noting that the "'district court's determination of the amount of the fee award is reviewed for abuse of discretion'").

Third, tying the amount of punitive damages to an award of attorney's fees produces various anomalies. For one thing, the very same attorney's fees would be deemed "compensatory damages" or "not compensatory damages" under the ratio depending solely on an unrelated after-the-fact determination of whether the court exercises its discretion to award them in a particular case. For another, a plaintiff who has received *greater* compensation (by receiving attorney's fees) will be entitled to greater punitive damages than a plaintiff who received *lesser* compensation (even though both will have incurred attorney's fees). *Cf. State Farm*, 538 U.S. at 426 (suggesting that punitive-damages ratios should be lower, not higher, when a plaintiff receives "complete compensation").

In short, the Washington Supreme Court's decision to include attorney's fees in the ratio will enhance the "stark unpredictability" of punitive damages that led the Court to adopt that ratio. *Exxon*, 554 U.S. at 499.

Fourth, the use of attorney's fees in the ratio conflicts with this Court's analysis that punitive awards are *more* suspect, not *less* so, if there is a likelihood that those damages "duplicate[]" a "component" of the plaintiff's "compensatory damages." *State Farm*, 538 U.S. at 426. In *State Farm*, for example, because the plaintiffs obtained compensatory damages for their emotional distress, which "already contain[ed] [a] punitive element," the Court found a smaller punitive award necessary. *Id.*

The Washington Supreme Court's decision suffers from the same duplication that concerned *State Farm*, because attorney's fees themselves frequently are a form of punishment. Indeed, as the dissent noted, Pet App. 28a, and as this Court made clear in *Townsend*, attorney's fees in maintenance-and-cure cases are themselves punitive relief, in that they are awarded only if the employer has engaged in a "callous," "willful and persistent" failure to pay maintenance and cure. *Vaughan*, 369 U.S. at 530-31. In other words, "the underlying rationale of 'fee shifting'" in these cases is "punitive, and the essential element in triggering the award of fees is therefore the existence of 'bad faith' on the part of the unsuccessful litigant." *Hall v. Cole*, 412 U.S. 1, 5 (1973); *see, e.g.*, *Chambers v. NASCO, Inc.*, 501 U.S. 32, 53-54 (1991). In *Townsend*, the Court cited *Vaughan* as the prime example of punitive relief "available in maintenance and cure actions," confirming that the Court views these attorney's fees as punitive. 129 S. Ct. at 2571. The

award of such punitive relief should *reduce*, not *increase*, the amount of additional punitive damages permitted.[7] The contrary decision of the Washington Supreme Court does not withstand scrutiny.

II. THE DECISION BELOW CONFLICTS WITH *EXXON* BY NARROWING ITS LIMITS ON PUNITIVE DAMAGES UNDER FEDERAL ADMIRALTY LAW

The Court should also grant certiorari to address whether, and to what extent, courts may depart from the 1:1 ratio between punitive and compensatory damages applied under federal admiralty law in *Exxon*. In addition to the Washington Supreme Court's manipulation of the ratio in this case to produce one purportedly less than 3:1, the court also interpreted *Exxon* in a way that significantly undermines the rule this Court established in that case. Specifically, the court below essentially limited *Exxon* to its facts, holding that "[t]he *Exxon* case cannot be read as establishing a broad, general rule limiting punitive damage awards, primarily because nowhere in the opinion can such a rule be found." Pet. App. 17a. The Washington Supreme Court asserted that this Court had "expressly limit[ed] its holding to the facts presented," *id.*, such that "[n]othing in the *Exxon* opinion can be read as overruling cases allowing higher punitive awards," Pet. App. 18a. The court thus distinguished *Exxon* from this case because in

---

[7] The duplication was further enhanced in this case because a "significant part" of the attorney time for which fees were awarded was time spent pursuing punitive damages. *See* Pet. App. 13a.

its opinion Icicle's conduct "was not just reprehensible, it was egregious." Pet. App. 19a.

This view that *Exxon* simply engaged in a traditional review of a punitive award without setting any new limits on punitive damages is irreconcilable with that decision. To begin with, the notion that the Court was not establishing any general rules for punitive awards conflicts with the Court's description of the problem that punitive damages pose. *See Exxon*, 554 U.S. at 499-503. The Court found the "real problem" to be "the stark unpredictability of punitive awards," noting that there is an unacceptable "spread between high and low individual awards" under current law. *Id.* at 499. In other words, the problem with punitive damages was not one limited to the facts of the case, but was a *systematic* problem that applied across the board, and thus required a general response.

The Washington Supreme Court's decision is equally inconsistent with the Court's solution to the problem. *Exxon* rejected a status-quo solution that would consider a host of factors on a case-by-case basis, expressing "skeptic[ism] that verbal formulations, superimposed on general jury instructions, are the best insurance against unpredictable outliers." *Id.* at 504; *cf. id.* at 523 (Ginsburg, J., dissenting) ("question[ing] whether there is an urgent need in maritime law to break away from the traditional common-law approach" (internal quotation marks omitted)). Rather, the Court's "best judgment" was to opt for "*quantified* limits" by "pegging punitive to compensatory damages using a ratio or maximum multiple." *Id.* at 506 (emphasis added).

Finally, the Washington Supreme Court's decision is inconsistent with the underlying reasons why *Exxon* opted for the specific 1:1 "qualified limit" in particular. The *Exxon* Court chose that ratio based on "studies cover[ing] cases of the *most* as well as the least blameworthy conduct triggering punitive liability." *Id.* at 512 (emphasis added). Those studies suggested a "median ratio for the *entire gamut* of circumstances at less than 1:1, . . . meaning that the compensatory award exceeds the punitive award in most cases." *Id.* (emphasis added). And it found that the merely reckless conduct at issue on the facts of the case should fall "at the median or lower" of these awards. *Id.* at 513 (noting that "a median ratio of punitive to compensatory damages of about 0.65:1 probably marks the line near which cases like this one largely should be grouped"). Yet *Exxon* ultimately opted for a greater 1:1 ratio (rather than the 0.65:1 ratio), illustrating that it was adopting a *broader* rule to govern more than just the facts of the case at issue. *Id.*

Confirming the Washington Supreme Court's conflict with *Exxon*, the dissent below properly recognized that, unlike the majority, many "other courts" have interpreted *Exxon* "as limiting punitive damage awards in maritime cases, with the potential for even broader application." Pet. App. 24a. In *Kunz v. DeFelice*, 538 F.3d 667 (7th Cir. 2008), for example, the Seventh Circuit noted—when exploring whether punitive damages should be similarly limited under 42 U.S.C. § 1983—that under *Exxon*, "as a matter of federal common law, a punitive damages award in an admiralty case may not exceed the compensatory award (that is, a 1:1 ratio is the upper limit for this class of cases)." *Id.* at 678. Similarly, the Ninth Cir-

cuit has stated that *Exxon*'s "1:1 ratio" under "the federal common law of maritime torts" provides a model for any analogous common-law limits on § 1983 cases. *Mendez*, 540 F.3d at 1122; *see also So. Union Co. v. Irvin*, 563 F.3d 788, 791 n.1 (9th Cir. 2009) ("[W]hen the Supreme Court selected a ratio for federal maritime law purposes, . . . it saw a ratio of one to one as the fair upper limit." (internal quotation marks omitted)). When discussing *Exxon*, several other circuits[8] and state courts[9] have similarly interpreted its scope.

---

[8] *See Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 54 n.14 (1st Cir. 2009) ("In [*Exxon*], the Court established a 1:1 ratio of punitive to compensatory damages under federal maritime law."); *JCB, Inc. v. Union Planters Bank*, 539 F.3d 862, 876 n.9 (8th Cir. 2008) ("[T]he Supreme Court determined that a 1:1 ratio of compensatory to punitive damages was appropriate in a maritime case."); *PAM, S.p.A. v. United States*, 582 F.3d 1336, 1341 (Fed. Cir. 2009) ("The [*Exxon*] Court ultimately settled on a rule where the appropriate upper limit ratio for punitive to compensatory damages in maritime cases was 1:1."); *Jurinko v. Med. Protective Co.*, 305 F. App'x 13, 27 n.15 (3d Cir. 2008) ("The Supreme Court recently found that a punitive damages award may not exceed a 1:1 ratio in the context of maritime law."); *Duckworth v. United States*, 418 F. App'x 2, 3 (D.C. Cir. 2011) (finding "the *Exxon* 1:1 ratio rule inapplicable" to claims arising under the Magnuson-Stevens Act).

[9] *See Sec. Title Agency, Inc. v. Pope*, 200 P.3d 977, 1001 (Ariz. Ct. App. 2008) (stating that *Exxon* held that "a 1:1 ratio is a fair upper limit for punitive damage awards" under "maritime law"); *Bridgeport Harbour Place I, LLC v. Ganim*, 30 A.3d 703, 735 n.55 (Conn. App. 2011) ("The Supreme Court determined that a 1:1 ratio was a fair upper limit for punitive damages in federal maritime cases."); *Modern Mgmt. Co. v. Wilson*, 997 A.2d 37, 52 n.17 (D.C. 2010) (describing *Exxon* to hold that a maritime punitive award "should be limited to an amount equal to compensatory damages"); *Peters v. Rivers Edge Min., Inc.*, 680 S.E.2d

* * * *

In sum, there is no dispute that the jury awarded $37,420 in compensatory damages on Clausen's maintenance-and-cure claim and $1.3 million in punitive damages arising out of the allegedly willful failure to pay that maintenance and cure. This roughly 34:1 ratio between punitive and compensatory damages would raise serious constitutional concerns under the Court's cases, and plainly cannot be justified under admiralty law after *Exxon*.

CONCLUSION

The petition for certiorari should be granted.

791, 825 (W. Va. 2009) (stating that *Exxon* found a 1:1 ratio to be "a fair upper limit in . . . maritime cases").

Respectfully submitted,

Michael A. Barcott
HOLMES WEDDLE
& BARCOTT, P.C.
999 Third Ave.
Suite 2600
Seattle, WA 98104

Meir Feder
Counsel of Record
Rajeev Muttreja
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939
mfeder@jonesday.com

Eric E. Murphy
JONES DAY
325 John H. McConnell
Blvd., Suite 600
P.O. Box 165017
Columbus, OH 43216

JUNE 4, 2012

Counsel for Petitioner