No. 17-

IN THE
Supreme Court of the United States

CRANE CO.,
Petitioner,
v.
JEANETTE G. POAGE,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals, Eastern District

PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

The Due Process Clause requires States to adopt procedures that prevent arbitrary punitive damages awards. *Philip Morris USA* v. *Williams*, 549 U.S. 346, 352 (2007). "Exacting appellate review" is one such procedural requirement. *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003). Multiple courts have held that this review must consider factors that both support and undermine an award. The court below, in contrast, focused exclusively on factors supporting the punitive damages award. Moreover, the court upheld a $10 million award that was twelve times the already substantial compensatory damages award, without even considering the multiple awards petitioner has faced and may continue to face in similar suits. In doing so, the court deepened the confusion that abounds in the lower courts regarding the "constitutional outer limit[s]" on punitive damages awards for defendants who face substantial liability in multiple suits arising out of a single course of conduct. *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 515 n.28 (2008).

The questions presented are:

1. Whether the Due Process Clause requires appellate review that considers factors undermining the reasonableness of a punitive damages award?

2. Whether the Due Process Clause prohibits a punitive damages award that is more than ten times a substantial compensatory damages award against a defendant who faces multiple suits arising from a single course of conduct?

PARTIES TO THE PROCEEDING

Petitioner Crane Co. was the defendant-appellant below.

Respondent Jeanette G. Poage was the plaintiff-respondent below.

RULE 29.6 DISCLOSURE STATEMENT

Crane Co. has no parent corporation, and no publicly held corporation owns 10% or more of its stock.

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Crane Co. respectfully petitions for a writ of certiorari to review the judgment of the Missouri Court of Appeals, Eastern District in this case.

OPINIONS BELOW

The opinion of the Missouri Court of Appeals (Pet. App. 1a-53a) is reported at 523 S.W.3d 496. The order of the state trial court awarding $822,250 in compensatory damages and $10 million in punitive damages against Crane Co. (Pet. App. 54a-55a) is not reported. The Missouri Supreme Court's order denying further review (Pet. App. 56a-57a) is also unreported.

JURISDICTION

The Missouri Court of Appeals entered judgment on May 2, 2017. The Missouri Supreme Court denied

Crane Co.'s timely application to transfer the case on August 22, 2017. On October 26, 2017, Justice Gorsuch extended the time for filing a petition for a writ of certiorari, up to and including December 20, 2017. *See* No. 17A470. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Due Process Clause of the Fourteenth Amendment, U.S. Const. amend. XIV, § 1, provides:

> No State shall * * * deprive any person of * * * property[] without due process of law[.]

INTRODUCTION

Punitive damages awards are among the government actions most likely to give rise to a due process violation because they "pose an acute danger of arbitrary deprivation of property." *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994). State and federal courts have struggled, however, to apply clear and consistent constitutional limits in this arena. The result is a patchwork system in which a defendant's rights under the Due Process Clause often depend on the courthouse in which he is appearing.

This case provides an opportunity to offer much-needed guidance with respect to two particular areas of confusion: the appropriate scope of appellate review and the constitutional limits on punitive damages awards against a defendant who faces multiple suits arising from a single course of conduct.

Turning first to the question of appellate review, this Court has long recognized that an appellate

court must perform "a thorough, independent review" of a punitive damages award to ensure that it is reasonable and comports with the Constitution. *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 441 (2001). The Court has not specified, however, whether that review must analyze both the factors tending to support an award and those tending to undermine it. A split has therefore emerged: Multiple courts have concluded that the "[e]xacting appellate review" required by the Due Process Clause, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 418 (2003), requires a court of appeals to evaluate the evidence as a whole, rather than exclusively focusing on factors supporting the award. Other courts, however, have held that the consideration of the effect of "any mitigating factors" is exclusively "for the jury." *Carpentier* v. *Tuthill*, 86 A.3d 1006, 1013-1014 (Vt. 2013). The court of appeals below adopted the latter approach, focusing exclusively on the evidence favoring the jury's punitive damages award and disregarding multiple extenuating factors presented by petitioner Crane Co. This Court's intervention is warranted to clarify that the Due Process Clause prohibits such a lopsided form of appellate review.

Turning next to the constitutional limits on punitive damages awards in the mass tort context, this Court has recognized that when compensatory damages are "substantial," the Constitution typically tolerates no more than a 1:1 ratio of punitive to compensatory damages. *State Farm*, 538 U.S. at 418, 425-426. That ensures that a defendant has "fair notice of the severity of the penalty that a State may impose" and guards against "arbitrary punishments" untethered to the State's interests in pun-

ishment and deterrence. *Philip Morris USA* v. *Williams*, 549 U.S. 346, 352 (2007) (ellipses and internal quotation marks omitted). But the lower courts are deeply divided as to how the *State Farm* presumption should be applied, even with respect to torts that give rise to only a single suit. *Compare Williams* v. *ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (insisting on a 1:1 ratio because of the "substantial" $600,000 compensatory damages award), *with Rhone-Poulenc Agro, S.A.* v. *DeKalb Genetics Corp.*, 345 F.3d 1366, 1371-1372 (Fed. Cir. 2003) (permitting a more than 3:1 ratio despite a $15 million compensatory award). And, when courts confront mass torts that produce multiple, substantial compensatory awards in different courts throughout the country, the problem becomes even more complicated.

In those circumstances, courts often proceed like the court below, ignoring the punitive and deterrent effects of the awards a defendant has faced and will face in related suits nationwide. The result is unpredictable punitive damages awards that are untethered to States' legitimate retributive goals. Even worse, this suit-by-suit approach means that a defendant may pay a different ratio of punitive to compensatory damages depending on whether plaintiffs sue jointly (allowing the court to consider the damages in the aggregate) or individually. Such an arbitrary result is anathema to the Due Process Clause.

The decision below illustrates the urgent need for this Court's intervention. The Missouri Court of Appeals affirmed an $822,250 compensatory damages award and a *$10 million* punitive damages award

arising from Crane Co.'s use of asbestos-containing gaskets and packing materials in valves which it sold in accordance with military specifications to the U.S. Navy during and shortly after World War II. In performing the requisite "[e]xacting appellate review" of this award, the court was anything but "[e]xacting." Instead, it focused exclusively on evidence supporting the award, ignoring the ample extenuating evidence that Crane Co. put forward. Thus, the court affirmed the punitive damages award without considering that Crane Co. supplied its valves to meet naval warship demands; without considering that those valves were produced according to the Navy's detailed specifications requiring the use of asbestos-containing gaskets and packing materials; and without even acknowledging that two decades after the asbestos exposure in question, published information still indicated that asbestos-containing gaskets and packing materials posed no health hazards.

The lower court then compounded its error by affirming the constitutionality of a 12:1 ratio of punitive to compensatory damages, even though the compensatory damages award was substantial and even though Crane Co. has already incurred and may continue to incur extensive liability in other suits arising out of the same course of conduct.

Because similarly unconstitutional deprivations of property under the guise of punitive damages awards are occurring throughout the country, this Court's immediate review is warranted.

STATEMENT

1. Crane Co. supplied valves to the U.S. Navy during and after World War II for use on naval war-

ships. It supplied these valves pursuant to the Navy's exacting and precise specifications. Pet. App. 2a, 13a & n.6. Some of the valves used encapsulated and non-friable asbestos-containing gaskets and packing materials as required by naval specifications, *id.* at 13a, but the scientific literature at the time did not express concerns that working with encapsulated asbestos-containing gaskets and packing materials might give rise to illness. Indeed, even in the 1970's, multiple sources still indicated that asbestos-containing gaskets posed no health hazards in the forms used in shipyards, *id.* at 62a-64a, and the first published article detailing potential risks from asbestos-containing gaskets was published in 1991, *id.* at 61a-62a.

Though Crane Co. stopped selling valves that used asbestos-containing materials decades ago, *id.* at 33a, in recent years, it has faced an onslaught of lawsuits related to injuries that allegedly resulted from exposure to its products on naval ships. *See, e.g.*, Crane Co., Quarterly Report (Form 10-Q) at 17-19 (May 5, 2017). The decision below resulted from one such suit.

2. In 2013, respondent sued Crane Co., alleging that James E. Poage was injured and died as a result of asbestos exposure while working with Crane Co.'s products on a naval ship from 1954 to 1958. Pet. App. 2a-3a.

The case went to a jury, who awarded respondent $10 million in punitive damages and $1.5 million in compensatory damages. *Id.* at 3a. The trial court subsequently reduced the compensatory damages award to account for respondent's settlements with other defendants. *Id.* at 55a. Thus, the final com-

pensatory damages award entered against Crane Co. was $822,250, resulting in a 12:1 ratio of punitive to compensatory damages. *Id.* at 3a, 39a.

3. Crane Co. appealed, arguing, as relevant, that the evidence did not support the trial court's decision to submit punitive damages to the jury and that the amount of punitive damages awarded was excessive under the Due Process Clause and Missouri state law. *Id.* at 21a, 36a, 44a. The Missouri Court of Appeals disagreed.

The court first evaluated whether the punitive damages claim should have been submitted to the jury. *Id.* at 21a-32a. In doing so, it refused to consider the ample evidence Crane Co. offered that demonstrated that its behavior was not reprehensible. The court explained that in deciding whether to submit punitive damages to the jury, "[o]nly evidence that tends to support the submission should be considered." *Id.* at 21a (internal quotation marks omitted).

The court next considered whether the punitive damages award violated the limits of the Due Process Clause. *Id.* at 37a-42a. It therefore examined whether Crane Co.'s conduct was sufficiently reprehensible to justify the $10 million award, but it once again focused exclusively on evidence supporting the jury's verdict. *Id.* at 38a-39a. It did not consider the extensive extenuating evidence put forward by Crane Co. It ignored, for example, that Crane Co. sold its valves to the Navy for use on naval warships pursuant to detailed naval specifications that called for the use of asbestos-containing materials. *Id.* at 59a-60a, 64a-74a. And it ignored that at the time of the relevant exposure, there were *no* scientific articles

addressing the risks associated with asbestos-containing gaskets. *Id.* at 61a-64a.

Based on this review, the Court of Appeals found that Crane Co.'s conduct was sufficiently reprehensible to justify the 12:1 ratio of punitive to compensatory damages awarded. In making that finding, the court emphasized that—in its view—Crane Co.'s wealth necessitated the imposition of a large punitive damages award to deter Crane Co.'s conduct. *Id.* at 39a-40a. The court made no mention, however, of the extensive compensatory and punitive damages awards arising from the same conduct that Crane Co. has faced and is likely to face in other suits under respondent's theory of liability. Indeed, the court ignored the punitive and deterrent effects of these other awards, even while finding no fault with respondent's closing argument which referenced the "thousands of people * * * all around the world" who were exposed to asbestos-containing gaskets. *Id.* at 34a-35a.

4. Crane Co. timely sought transfer to the Missouri Supreme Court. Crane Co. argued, among other things, that the Due Process Clause does not permit a form of appellate review that focuses exclusively on evidence tending to support a punitive damages award, while ignoring evidence that undermines it. Crane Co. further contended that the Due Process Clause does not tolerate a punitive damages award that is more than ten times the compensatory damages awarded, particularly when a defendant faces multiple suits arising out of the same conduct.

The Missouri Supreme Court denied Crane Co.'s application to transfer without comment. This petition followed.

REASONS FOR GRANTING THE PETITION

I. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE SPLIT REGARDING THE SCOPE OF APPELLATE REVIEW OF PUNITIVE DAMAGES AWARDS.

This case provides an ideal vehicle for the Court to consider whether the Due Process Clause is satisfied when appellate review of a punitive damages award focuses exclusively on factors that support the jury's award. Multiple lower courts have concluded that "[e]xacting appellate review" must also consider extenuating factors. But the Vermont Supreme Court has rejected that approach, and the lower court here did the same, wholly disregarding the ample extenuating evidence undermining the $10 million award in this case. Certiorari review is necessary to decide whether the Constitution permits appellate courts to tilt the playing field in this manner.

1. This Court has long recognized the importance of "[e]xacting appellate review" in ensuring that a jury's punitive damages award complies with the requirements of the Due Process Clause. *State Farm*, 538 U.S. at 418. Thus, in *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1 (1991), the Court emphasized that the common law system for awarding punitive damages typically features "review[] by trial and appellate courts to ensure that [a punitive damages award] is reasonable." *Id.* at 15. And the *Haslip* Court upheld the constitutionality of the punitive damages award challenged in that case only after approving of the extensive "post-trial procedures for scrutinizing punitive [damages] awards" that the Alabama Supreme Court had adopted. *Id.*

at 20. In *Honda Motor*, this Court went further, holding that Oregon's "limited judicial review of the size of punitive damages awards" violated the Due Process Clause because judicial review provides a vital check on arbitrary awards. 512 U.S. at 420.

Since *Haslip* and *Honda Motor*, the Court has repeatedly recognized that an appellate court must engage in "a thorough, independent review" of a punitive damages award. *Cooper Indus.*, 532 U.S. at 441. As this Court explained in *State Farm*, "[e]xacting appellate review ensures that an award of punitive damages is based upon an 'application of law, rather than a decisionmaker's caprice.'" 538 U.S. at 418 (quoting *Cooper Indus.*, 532 U.S. at 436).

The Court has not, however, provided guidance regarding the role that extenuating or mitigating factors should play in appellate review. *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 583 (1996), and *State Farm* offered a list of "factors weighing in favor of" a punitive damages award, cautioning that the "absence of" such factors should cause an appellate court to "suspect" the propriety of the award. *State Farm*, 538 U.S. at 419 (citing *Gore*, 517 U.S. at 575-577). But the Court has been silent as to what an appellate court should do when it is confronted with extenuating factors that cut against the jury's punitive damages award. A split has therefore emerged.

2. Multiple courts have concluded that "[e]xacting appellate review" requires a court to look at both the evidence supporting a jury's punitive damages award and the evidence tending to undermine it. For example, in *Payne* v. *Jones*, 711 F.3d 85 (2d Cir. 2013), the Second Circuit found that a punitive

damages award was "unreasonably high" because of the presence of "significant mitigating factors," including the plaintiff's own behavior. *Id.* at 101-102. The Fifth Circuit, too, has recognized the significance of "mitigating factors" in evaluating the constitutionality of punitive damages awards. *Cooper* v. *Morales*, 535 F. App'x 425, 433 (5th Cir. 2013) (per curiam). And the New Mexico Supreme Court has explained that a court reviewing the constitutionality of a punitive damages award must generally evaluate the "nature of the wrong considering aggravating *and mitigating* circumstances." *Aken* v. *Plains Elec. Generation & Transmission Co-op., Inc.*, 49 P.3d 662, 669 (N.M. 2002) (emphasis added).

3. By contrast, the Vermont Supreme Court has refused to consider "mitigating factors that diminish the reprehensibility of [a defendant's] conduct," such as his low I.Q. *Carpentier*, 86 A.3d at 1013-1014. The Vermont court explained that "it [is] for the jury, as factfinder, to decide the degree of reprehensibility of [a defendant's] conduct, *including the effect of any mitigating factors*." *Id.* (emphasis added).

The decision below adopted the same approach. In deciding whether Crane Co. acted reprehensibly when it provided valves that used asbestos-containing materials for naval ships, the Missouri Court of Appeals cataloged several factors that it believed counseled in favor of the award, including Crane Co.'s wealth. Pet. App. 38a-40a. But the court refused to even consider other evidence establishing significant extenuating circumstances. Thus, the court ignored evidence demonstrating that (1) Crane Co. supplied valves to the Navy during and

after World War II, *id.* at 60a, 66a; (2) Crane Co. produced the valves with asbestos-containing gaskets and packing materials as required by detailed specifications provided by the Navy that called for the use of asbestos-containing materials, *id.* at 59a-60a, 65a-72a; and (3) multiple reliable sources published two decades after Crane Co. sold any valve at issue to the Navy indicated there were *no* health hazards associated with asbestos-containing gaskets, *id.* at 61a-64a.

Nor was this one-sided review limited to the Missouri Court of Appeals' constitutional due process analysis. To the contrary, *nowhere* in its review of the punitive damages award did the court even consider the propriety of forcing Crane Co. to pay a $10 million punitive damages award for selling products to the Navy, according to naval specifications, decades before published sources suggested potential health hazards associated with the form of asbestos involved. This Court should grant review to decide whether the Due Process Clause tolerates such one-sided review or whether—as the Second and Fifth Circuits and the New Mexico Supreme Court have concluded—due process demands a more even-handed review of a punitive damages award.

4. The issue is an exceedingly important one. Punitive damages awards "pose an acute danger of arbitrary deprivation of property." *Honda Motor*, 512 U.S. at 432. It is therefore vital for this Court to preserve the integrity of the procedural safeguards that cabin irrational and arbitrary awards, including "[e]xacting appellate review." *State Farm*, 538 U.S. at 418. The approach exemplified by the court below guts that safeguard, resulting in the affirmance of

awards, like this one, that are grossly excessive and arbitrary. And the risk is particularly pronounced where, as here, the reviewing court not only refuses to consider relevant mitigating evidence but also dwells on irrelevant details like the size of the defendant's checking account. *See, e.g.*, *Honda Motor*, 512 U.S. at 432 (assuming that appellate review will counter, not enhance, the risk that punitive damages awards will "express biases against big businesses").

Moreover, ignoring mitigating factors will often undercut important public policy goals. This case offers a vivid example. This Court has recognized that the government is often forced to rely on private contractors to help it produce items that it needs. *Watson* v. *Philip Morris Cos.*, 551 U.S. 142, 153-154 (2007). Yet the Missouri Court of Appeals refused to consider the fact that Crane Co. provided valves that used asbestos-containing materials to the military according to military specifications designed to ensure the efficacy of naval warships. If contractors such as Crane Co. are subject to extensive punitive damages for supplying essential products to the government, their ability to help the government in the future may suffer. Further, "[t]he financial burden of judgments against the contractors [may] be passed through, substantially if not totally, to the United States itself, since defense contractors will predictably raise their prices to cover, or to insure against, contingent liability for the Government-ordered designs." *Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 511-512 (1988).

Because the decision below declined to even consider Crane Co.'s mitigating evidence, it overlooked these vital policy concerns, unfairly punishing Crane

Co. and unnecessarily damaging the interests of the United States. This Court's review is warranted to prevent these harms and to ensure that "[e]xacting appellate review" remains a bulwark against arbitrary and unconstitutional punitive damages awards.

II. THE COURT SHOULD GRANT REVIEW TO RESOLVE THE CONFUSION REGARDING THE CONSTITUTIONAL LIMITS ON PUNITIVE DAMAGES IN MASS TORT CASES.

This case also provides an opportunity for the Court to consider the constitutional limits on punitive damages in cases where a defendant faces multiple, substantial punitive and compensatory damages awards arising from a single course of conduct. This Court's guidance on that issue is badly needed, as the lower courts are deeply divided regarding the appropriate limits on punitive damages in the face of *any* substantial compensatory award. That confusion only deepens when a defendant faces such liability across multiple suits.

A. The Lower Courts Are Divided Regarding The Constitutional Limits On Punitive Damages When Substantial Compensatory Damages Are Awarded.

In *State Farm*, this Court cautioned that "[w]hen compensatory damages are substantial," "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." 538 U.S. at 425. The lower courts, however, are deeply divided as to how that guidance should be enforced, with different appellate courts—

and even different panels within the same court—taking dramatically different approaches.

As a preliminary matter, courts are unable to agree even on what qualifies as a "substantial" compensatory award sufficient to trigger *State Farm*'s presumption. For example, the Sixth Circuit has found that a $366,939 award is substantial. *Bridgeport Music, Inc.* v. *Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007); *see also, e.g.*, *Jones* v. *United Parcel Serv., Inc.*, 674 F.3d 1187, 1195, 1208 (10th Cir. 2012) ($630,307 award is substantial); *ConAgra Poultry*, 378 F.3d at 799 ($600,000 award is substantial). But the Tennessee Supreme Court has determined that a $2.5 million award is *not* substantial. *Flax* v. *DaimlerChrysler Corp.*, 272 S.W.3d 521, 539 (Tenn. 2008); *see also Bullock* v. *Philip Morris USA, Inc.*, 131 Cal. Rptr. 3d 382, 399-401 & n.11 (Ct. App. 2011) ($850,000 award is not substantial).

Even when courts agree that an award is "substantial," they often disagree as to the maximum ratio of punitive to compensatory damages that the Due Process Clause permits. Some take the *State Farm* Court at its word, insisting on a 1:1 ratio when the compensatory damages are sufficiently large. For example, in *ConAgra Poultry*, the Eighth Circuit reduced a punitive damages award that was "more than ten times the compensatory award" to reflect a 1:1 ratio given the "large compensatory award" of $600,000. 378 F.3d at 799; *see also Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 602-603 (8th Cir. 2005) (concluding that "a ratio of approximately 1:1 would comport with the requirements of due process" "given the $4,025,000 compensatory damages award," even though the defendant had

engaged in "highly reprehensible" misconduct, "misled consumers," and "exhibited a callous disregard" for public health, resulting in "a most painful, lingering death"). *But see Stogsdill* v. *Healthmark Partners, LLC*, 377 F.3d 827, 833 (8th Cir. 2004) (noting that a $500,000 compensatory damages award was "substantial" but nonetheless permitting a 4:1 ratio).

The Tenth Circuit, too, has reduced punitive damages awards to reflect the 1:1 ratio that this Court has suggested. Faced with a $1.95 million compensatory damages award, it reduced the punitive damages to reflect a 1:1 ratio rather than the 11.5:1 ratio imposed by the jury. *Lompe* v. *Sunridge Partners, LLC*, 818 F.3d 1041, 1070, 1075 (10th Cir. 2016). Similarly, in *Bach* v. *First Union National Bank*, 486 F.3d 150 (6th Cir. 2007), the Sixth Circuit invoked *State Farm*'s "helpful guideline[]," holding that given a "substantial" compensatory damages award of $400,000, "an award of punitive damages at or near the amount of compensatory damages" was the constitutional maximum. *Id.* at 156; *see also Morgan* v. *N.Y. Life Ins. Co.*, 559 F.3d 425, 443 (6th Cir. 2009) (determining maximum ratio is 1:1 when compensatory damages are $6 million).

The court below, however, broke with these precedents and upheld a punitive damages award of $10 million even though it was *twelve times* the substantial compensatory damages award of $822,250. Nor is it the only court to have disregarded *State Farm*'s guidance with respect to the constitutional limits on punitive damages in the face of a substantial compensatory award. For example, in *Rhone-Poulenc Agro*, the Federal Circuit upheld a $50 million punitive damages award that was more than three times

the compensatory damages award of $15 million, and it allowed that award to stand even after it was initially vacated and remanded in light of *State Farm*. 345 F.3d at 1368, 1371-1372. Similarly, an Oklahoma court affirmed a punitive damages award of $53.6 million, even though the award was more than four times the compensatory damages award of $13.2 million. *Hebble* v. *Shell W. E & P, Inc.*, 238 P.3d 939, 941, 947 (Okla. Civ. App. 2009).

This disarray in the lower courts is reason enough for this Court's intervention. *See* Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 Hastings L.J. 1257, 1302 (2015) ("If the Supreme Court intends 1:1 to represent a significant restraint on punitive damages in cases involving 'substantial' compensatory damages, that message is not being well received by lower courts, most of whom do not expressly consider the 'substantial' rationale at all."). And the decision below—which affirmed a 12:1 ratio of punitive to compensatory damages that is virtually unprecedented in the post-*State Farm* era—provides an ideal vehicle for this Court's review.

B. The Confusion In The Lower Courts Is Even Greater When A Single Course Of Conduct Leads To Multiple, Substantial Compensatory Damages Awards.

The obvious confusion in the lower courts with respect to the constitutional limits on punitive damages in the face of substantial compensatory awards becomes even more severe where—as here—a single course of conduct gives rise to many such awards in courts throughout the country. *See generally* James

A. Henderson Jr., *The Impropriety of Punitive Damages in Mass Torts*, 52 Ga. L. Rev. (forthcoming), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3009389.

1. Long ago, Judge Friendly recognized that, as a historical matter, punitive damages were typically awarded only in cases where "the number of plaintiffs [was] few," and where it was likely "they w[ould] join, or c[ould] be forced to join, in a single trial." *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838-839 (2d Cir. 1967). That meant that a single jury could consider the reprehensibility of a defendant's conduct, assess whether the compensatory damages awarded were sufficient to punish and deter that conduct, and then award any additional punitive damages necessary to meet the State's goals of punishment and deterrence. *Haslip*, 499 U.S. at 18.

Times have changed. Punitive damages awards are now relatively common in products liability and mass tort cases in which the number of plaintiffs is many and the odds of joining them in a single suit are increasingly slim. *See, e.g.*, *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 597, 609 (1997) (noting that a single class in the asbestos context would involve "hundreds of thousands, perhaps millions, of individuals [who were], . . . or some day may be, adversely affected by past exposure" to "different asbestos-containing products, in different ways, over different periods, and for different amounts of time").

This Court's Due Process Clause precedents have not kept up with those changes. Instead, they assume that the historical model still prevails, such that a single court will mete out the full compensato-

ry and punitive damages awards that a defendant will face for a particular course of conduct. For example, in *State Farm*, this Court emphasized that "punitive damages should only be awarded if the defendant's culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." 538 U.S. at 419. However, neither the *State Farm* Court nor any of its successors has explained how a jury or even a judge can determine whether a defendant's conduct will be adequately "punish[ed] or deterr[ed]" after he has "paid compensatory damages" when there is no way of knowing the total compensatory damages the defendant will face for such conduct.

That fundamental informational deficit plagues every mass tort case that is litigated through individual suits: Until the very last suit is decided, a judge or jury will have no way of determining the defendant's aggregate compensatory liability and no way of assessing whether additional punitive damages will serve any purpose at all. The result is punitive damages awards that are necessarily arbitrary, unpredictable, and untethered to their retributive goals—the very antithesis of what the Due Process Clause demands. *See Philip Morris*, 549 U.S. at 352 (due process prohibits "arbitrary punishments" and requires that a defendant have "fair notice" of a potential penalty (internal quotation marks omitted)).

2. The decision below typifies the problem. In affirming a $10 million punitive damages award against Crane Co., the Missouri Court of Appeals did not even consider the punitive and deterrent effects

of the myriad other suits that Crane Co. has faced and will face as a result of the same course of conduct. *See, e.g.*, Crane Co., Quarterly Report, *supra*, at 17-19 (detailing the thousands of claims and millions of dollars in liability that Crane Co. has faced as a result of asbestos-related litigation). Millions of dollars in punitive damages cannot possibly be necessary to "punish[] or deter[]" Crane Co.'s sales of valves that use asbestos-containing materials in light of the overwhelming aggregate compensatory liability it faces. Indeed, it is unclear how the deterrence interest could even be served in this context because Crane Co. stopped selling any valves that use asbestos-containing materials *decades* ago.

Nor does the punitive damages award against Crane Co. satisfy the Due Process Clause's requirement of "fair notice . . . of the severity of the penalty that a State may impose." *Philip Morris*, 549 U.S. at 352 (internal quotation marks omitted). There is no way that Crane Co. would have been on notice that it would face such a severe penalty as a result of sales it made to the Navy pursuant to naval specifications more than half a century ago. And the due process violation is all the more acute because Crane Co. not only faces multiple additional compensatory damages awards from the same conduct, it also faces multiple additional *punitive* damages awards: This Court has cautioned that the Constitution forbids "'double count[ing]'" with respect to punitive damages, *State Farm*, 538 U.S. at 423 (quoting *Gore*, 517 U.S. at 593 (Breyer, J., concurring)). But Crane Co. has already faced *three* punitive damages awards arising from its sales of valves that use asbestos-containing materials to the Navy, *see* Crane Co., Quarterly Report, *supra*, at 17-19 (citing cumulative punitive damages

awards of $18.5 million and individual punitive damages awards of $3.5 million (after remittitur from $11 million), $5 million, and the $10 million award from this case). Without this Court's interference there may be far more.

3. It gets worse. Had this case arisen in the class action context, the result might have been very different. In *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471 (2008), this Court clarified that the relevant "touchstone" for punitive damages in a class action is the total "class recovery," not the amount of an "individual award[]." *Id.* at 515 n.28. In other words, in the class action context, courts must assess whether "the defendant's culpability, after having paid" the *aggregate* "compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419. Applying that rule, the *Exxon Shipping* Court looked at the "substantial" class compensatory recovery against the defendant and suggested that the Constitution tolerated no more than a 1:1 ratio of punitive to compensatory damages. 554 U.S. at 515 n.28.

That is in sharp contrast to what happened below, where respondent sued individually and the court therefore used the "individual award[]" as the "touchstone," permitting a 12:1 ratio of punitive to compensatory damages despite the numerous other awards that Crane Co. may face. The result is an arbitrary situation in which a defendant may be better off if he is sued by multiple plaintiffs at the same time than if he is sued by each of those plaintiffs individually. For example, a defendant who faces 50 individual suits in which each plaintiff is

awarded $100,000 in compensatory relief may face far higher ratios of punitive to compensatory damages and far greater cumulative punitive damages than a defendant who faces a single class action brought by 50 plaintiffs seeking total compensatory damages of $5 million. Again, that arbitrariness is antithetical to the Due Process Clause.

4. In light of these severe problems, this Court might conclude that awarding punitive damages in mass tort cases involving substantial compensatory damages awards is one of the class of practices that is "so arbitrary and lacking in common sense in so many instances that it should be held violative of due process in every case." *Burnham* v. *Superior Court*, 495 U.S. 604, 628 (1990) (White, J., concurring in part and concurring in the judgment). At the very least, "given the need to protect" defendants who face multiple punitive damages awards for a single course of conduct "against the possibility (and the disruptive cost to the legal system) of awards that are unpredictable and unnecessary," a 1:1 ratio of punitive to compensatory damages "is a fair upper limit." *Exxon Shipping*, 554 U.S. at 513; *see also id.* at 515 n.28.

Whatever the solution, some form of relief from this Court is urgently needed. Permitting the persistence of arbitrary and excessive punitive damages awards harms defendants and plaintiffs alike. The harm to defendants is obvious: They are subjected to unfair and unpredictable awards that may destroy their businesses and their livelihoods. But the risk to plaintiffs is also substantial. Large punitive damages awards may deplete a defendant's funds, leaving it unable to cover even the compensatory damages awarded in later cases. In those circumstances, the

amount a plaintiff recovers will depend not on the severity of his injury or the reprehensibility of the defendant's conduct but instead on the time when he files suit.

That risk is more than theoretical. The proliferation of asbestos claims has caused more than one hundred companies to file for bankruptcy. *See* U.S. Gov't Accountability Office, GAO-11-819, *Asbestos Injury Compensation: The Role and Administration of Asbestos Trusts* 2 (2011); *In re Asbestos Prods. Liab. Litig.* (*No. VI*), No. MDL-875, 2014 WL 3353044, at *12 (E.D. Pa. July 9, 2014) (noting that "dozens of [asbestos] companies [have] declare[d] bankruptcy" as "asbestos litigation has * * * ballooned to enormous proportions"). The same pattern may repeat itself in any mass tort situation in which a defendant faces punitive damages awards for the same conduct in multiple suits that are separated by geography and time.

5. Finally, this case provides an ideal vehicle to decide the important constitutional questions presented in this petition. While the decision to be reviewed comes from an intermediate appellate court, this Court routinely grants review of cases in a similar posture. *See, e.g.*, *Cyan, Inc.* v. *Beaver Cty. Emps. Ret. Fund*, 137 S. Ct. 2325 (2017); *Murr* v. *Wisconsin*, 137 S. Ct. 1933 (2017). Moreover, Crane Co. timely sought review from the Missouri Supreme Court, raising precisely the issues it now presents to this Court. The Missouri Supreme Court's refusal to even consider Crane Co.'s challenge to a $10 million punitive damages award speaks volumes.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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