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IN THE SUPREME COURT OF PENNSYLVANIA

13 WAP 2022 & 14 WAP 2022

THE BERT COMPANY d/b/a NORTHWEST INSURANCE SERVICES,

Plaintiff/Appellee,

v.

MATTHEW TURK, FIRST NATIONAL INSURANCE AGENCY, LLC, FIRST NATIONAL BANK, AND F.N.B. CORPORATION,

Defendants/Appellants.

Appeal of: Matthew Turk, First National Insurance Agency, LLC, First National Bank, and F.N.B. Corporation

BRIEF OF AMICI CURIAE THE AMERICAN ASSOCIATION FOR JUSTICE AND THE PENNSYLVANIA ASSOCIATION FOR JUSTICE IN SUPPORT OF PLAINTIFF/APPELLEE

Appeal from Order of the Superior Court of Pennsylvania at 817 WDA 2019 (consolidated with No. 975 WDA 2019) dated May 5, 2021 (reargument denied July 14, 2021), affirming the April 29, 2019 Order of the Court of Common Pleas of Warren County, Pennsylvania, A.D. 260 of 2017

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STATEMENT OF INTEREST OF *AMICI CURIAE*[1]

The American Association for Justice ("AAJ") is a national, voluntary bar association established in 1946 to strengthen the civil justice system, preserve the right to trial by jury, and protect access to the courts for those wrongfully injured. With members in the United States, Canada, and abroad, AAJ is the world's largest plaintiff trial bar. AAJ's members primarily represent plaintiffs in personal injury actions, employment rights cases, consumer cases, and other civil actions, including in Pennsylvania. Throughout its more than 75-year history, AAJ has served as a leading advocate for the right of all Americans to seek legal recourse for wrongful conduct.

The Pennsylvania Association for Justice ("PAJ"), formerly Pennsylvania Trial Lawyers Association, is a non-profit organization comprised of 2,000 members of the trial bar of the Commonwealth of Pennsylvania. For nearly 50 years, PAJ has promoted the rights of individual citizens by advocating the unfettered right to trial by jury, full and just compensation for innocent victims, and the maintenance of a free and independent judiciary. The organization opposes, in any format, special

[1] Pursuant to Pennsylvania Rule of Appellate Procedure 531(a)(2), nobody other than the *amici* the American Association for Justice, the Pennsylvania Association for Justice, and their counsel paid for or authored the brief in whole or in part.

privileges for any individual, group, or entity. Through its *Amicus Curiae* Committee, PAJ strives to maintain a high profile in the state and federal courts of the Commonwealth by promoting, through advocacy, the rights of individuals and the goals of its membership.

QUESTIONS PRESENTED

1. Whether, in cases where the compensatory damages award is substantial, a punitive-to-compensatory damages ratio exceeding 9:1 is presumptively unconstitutional under U.S. Supreme Court precedent?

2. Whether in cases involving joint and several liability—where compensatory damages are awarded, cumulatively, against all defendants and not on an individualized basis—the constitutionally permissible ratio of punitive-to-compensatory damages is calculated on a per-judgment basis and not a per-defendant basis?

3. Whether, in reviewing the constitutionality of a punitive damages award, a court cannot consider the speculative potential harm that the plaintiff could have suffered and introduce it as a post hoc justification for the award, especially when the plaintiff did not present evidence of potential harm to the jury?

SUMMARY OF ARGUMENT

This Court should affirm the thoughtful and well-considered opinion of the Superior Court. The Constitution imposes no mathematical bright line on punitive damages. Precedent also states that ratios are not binding. For these reasons, creating a presumption that must be rebutted on the basis of evidence and arguments that are themselves presumptively valid because they resulted in a jury's verdict, makes little sense.

Moreover, a ratio provides an inappropriate device for a presumption of unconstitutionality because ratios are fundamentally inconclusive, perform a subsidiary role to that of reprehensibility, fail to account for all the evidence supporting a punitive damage assessment, and rarely include a monetary assessment of potential harm.

Yet, if a court were to adopt a presumption of unconstitutionality, that presumption should only apply to punitive damages that exceed "a single-digit ratio between punitive and compensatory damages, *to a significant degree*," as *State Farm* suggests. In many jurisdictions that have adopted the presumption at issue in this matter, the presumption applies when the ratio hits triple digits. It certainly should not apply where a ratio barely exceeds a single digit even under its most generous calculation and where a court's obligation is to permit the maximum award the Constitution permits.

Because only a significantly larger ratio should be considered constitutionally problematic and no such ratio is at issue in this case, the second question presented, concerning whether a court should calculate the ratio on a per-defendant or per-judgment basis, constitutes a request for an advisory opinion that this Court should decline to answer. Without a significant difference between single digits and this award that is enough to alter the constitutional calculus, this Court should await a better vehicle to answer this question. However, if the Court chooses to answer, the Superior Court's resolution of the issue is proper, particularly in light of the purposes served by joint and several liability.

Finally, the U.S. Supreme Court's analysis requires that potential harm be taken into account as part of the ratio's denominator. Thus, a court should consider the totality of the evidence and all reasonable inferences in favor of the jury's award in projecting the value of potential harm, especially when those harms are rarely monetarized by the jury or by the evidence.

ARGUMENT

I. NO PRESUMPTION OF UNCONSTITUTIONALITY SHOULD ATTACH TO A RATIO SLIGHTLY GREATER THAN SINGLE-DIGITS.

Reliance on ratios provides a poor substitute for constitutional analysis. Federal due process requires the reduction of a punitive-damage judgment

only when the amount is "grossly excessive," not subjectively excessive, not somewhat excessive, and not exceeding some imaginary mathematical bright line. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417, 424-25 (2003) (stating the "grossly excessive" standard and reiterating that the Court has "'consistently rejected the notion that the constitutional line is marked by a simple mathematical formula'") (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1996)).

Attaching a presumption to a ratio, particularly the modest ratios at issue here, regardless of how they are compared, improperly elevates a subsidiary guidepost well above its assigned station, as well as jettisons consideration of reprehensibility, which provides "the most important indicium of the reasonableness of the award." *Id.* at 419.

A. Ratios Provide Limited Information that Cannot Establish a Valid Constitutional Presumption.

1. Attaching a presumption to a ratio does not advance the analysis.

Presumptions constitute burden-shifting mechanisms that place a judicial thumb on the scale that only extraordinary countervailing evidence or other considerations can overcome. For example, "a statute enjoys a strong presumption of constitutionality." *Stilp v. Commonwealth*, 588 Pa. 539, 614, 905 A.2d 918, 963 (2006). The presumption resolves all doubts in

favor of the law's constitutionality. *Id.* To overcome any doubt, the party challenging constitutionality "bears the heavy burden of proving that the act clearly, palpably, and plainly violates the Constitution." *Id.*; *see also Crawford v. Marion Cnty. Election Bd*., 553 U.S. 181, 200 (2008) ("heavy burden").

Yet, where a punitive-damage verdict exists, the judge and an impartial, properly instructed jury have already reviewed extensive evidence and arguments, perhaps even in a bifurcated proceeding. *See, e.g.*, *Dubose v. Quinlan*, 643 Pa. 244, 248, 173 A.3d 634, 636 (2017). The "product of that process is entitled to a strong presumption of validity," perhaps even one that may be deemed "irrebuttable." *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 457 (1993). When two presumptions of equal strength collide, the validity of the jury's determination and Appellant's proposed presumption of unconstitutionality in this case, neither presumption remains. *Lynn v. Cepurneek*, 352 Pa. Super. 379, 388 n.7, 508 A.2d 308, 313 n.7 (1986). After all, what more can a plaintiff produce that was not before the judge and jury to reach the verdict. What more could rebut a presumption imposed after the jury's finding of egregious misconduct that justified the punitive damages?

Moreover, because the verdict upheld by a judge is evidence-based and a ratio comprises a very incomplete measure of the disparity between actual and potential damages and the egregiousness of the misconduct, a

ratio constitutes the weaker of the two presumptions. Still, presumptions have little role in the review of punitive damages. Both the evidence and arguments on punitive damages are reviewed for constitutional excessiveness *de novo*. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001). That analysis should suffice to establish the constitutional propriety of the size of the jury's award.

2. A presumption elevates a mathematical formula the Supreme Court has consistently rejected.

Beyond the problems inherent in applying a presumption, attaching a presumption to a 10:1 ratio cannot be reconciled with the Supreme Court's treatment of ratios. In its most extensive explanation of the standards for determining gross excessiveness, the Court held that ratios "are not binding," even when "instructive." *State Farm*, 538 U.S. at 425. To put an even finer point on that holding, the Court has "consistently rejected the notion that the constitutional line is marked by a simple mathematical formula, even one that compares actual and *potential damages* to the punitive award." *BMW*, 517 U.S. at 582 (emphasis added). Although "[s]ingle-digit multipliers are more likely to comport with due process, while still achieving the State's goals of deterrence and retribution, than awards with ratios in range of 500 to 1," no constitutional limit necessarily rules out even a 500-to-1 ratio "because there

are no rigid benchmarks that a punitive damages award may not surpass." *State Farm*, 538 U.S. at 425.

The constitutional-excessiveness inquiry derives from the guarantee of substantive due process, which itself has generated great controversy so that courts employ considerable "judicial restraint" in its application "because guideposts for responsible decisionmaking in this unchartered area are scarce and open-ended." *Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992) (citation omitted). In fact, the Court has described substantive due process as a "a treacherous field," resting too often on the personal "predilections" of the then-serving judges. *Moore v. City of E. Cleveland*, 431 U.S. 494, 502 (1977). Even so, its deficits are not cured by "drawing arbitrary lines." *Id.*

The Constitution rebels at reliance on numerical values in this field, and punitive-damage jurisprudence has properly eschewed that approach. The Constitution contains certain numbers. For example, it explicitly states that the President of the United States must be 35 years old and a U.S. resident of at least 14 years. U.S. Const. art. II, § 1, cl. 5. We also read the Constitution to imply some others, such as the guarantee through the Equal Protection Clause of one person, one vote. *See Reynolds v. Sims*, 377 U.S. 533, 561 (1964). The Due Process Clause of the Fourteenth Amendment,

however, neither contains explicit numerical values nor implies any. Attaching a constitutional presumption based on incomplete ratios constitutes the type of judicial legislation that justifies the criticism substantive due process often receives.

3. A presumption based on ratios fails to account for more key factors.

Ratios do not take into account the egregiousness of the misconduct at issue, and rarely include potential harm. As a result, ratios like the ones under consideration here are skewed in favor of a defendant even though the evidence advises differently.

a. The gravity of the offense should govern any presumption on punitive damages.

Mechanical application of a ratio, even to establish a presumption, fails to "adequately take account of the seriousness of [the defendant's] misconduct." *Kemp v. Am. Tel. & Tel. Co.*, 393 F.3d 1354, 1364 (11th Cir. 2004). In *Kemp*, the plaintiff sued AT&T for fraudulent billing practices and the collection of illegal gambling debts in violation of RICO. A jury awarded the plaintiff, $115.05 in actual damages for his purely economic losses, which were then trebled under the RICO, and punitive damages of *one million dollars*. The Eleventh Circuit reduced the punitive damages to $250,000,

which still amounted to a more than 724:1 ratio in that low economic damage case.

Of the three guideposts used to assess the constitutionality of a punitive-damage determination, reprehensibility provides "the most important indicium of the reasonableness of the award." *State Farm*, 538 U.S. at 419. The preferred position of reprehensibility in the gross-excessiveness inquiry reflects the one constant that has defined the law of punitive damages from its earliest antecedents to its most recent application: an appropriate punitive award reflects "'the enormity of the offense.'" *BMW*, 517 U.S. at 575 (quoting *Day v. Woodworth*, 54 U.S. (13 How.) 363, 371 (1851)). *That* proportionality principle, rather than any rigid ratio template, is "'deeply rooted and frequently repeated in common law jurisprudence.'" *Id.* at 575 n.24 (citation omitted). *See also Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15 (1991) ("[t]raditional common-law approach . . . consider[s] the gravity of the wrong."). The concept is reflected as well in Magna Carta, which, with respect to the English practice of amercements that some regard as a forerunner of punitive damages, required that fines be "in proportion to the magnitude of the offence." Magna Carta, ¶ 20 (1215).

Reprehensibility incorporates the notion that some acts of misconduct are more blameworthy than others. *BMW*, 517 U.S. at 575. The punitive-

damages inquiry, then, is a highly fact-sensitive undertaking, *State Farm*, 538 U.S. at 425, which reliance on ratios for presumptions of unconstitutionality undermines. Assessing reprehensibility properly considers "actual harm to nonparties [which] can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). That consideration, entirely appropriate to assessing reprehensibility, *id.* ("harm to others shows more reprehensible conduct"), is not part of the ratio analysis. *Id.*[2]

Moreover, under a presumption of unconstitutionality based solely on ratio, a court ignores what the Supreme Court has denominated as "aggravating factors." *BMW*, 517 U.S. at 576. Thus, under a ratio regime, a case like the present one but that had no aggravating factors, in which the

[2] Although a third guidepost, comparability, is also part of the constitutional analysis, the Supreme Court has recognized its limited utility, *State Farm*, 538 U.S. at 428, and punitive damages many times any comparable penalty are regularly let stand. In *State Farm*, for example, the most comparable civil penalty for the misconduct at issue was Utah's "$10,000 fine for an act of fraud." *Id.* Nonetheless, the Supreme Court itself suggested that $1 million in punitive damages might be appropriate, *id.* at 425, and later had no issue with the Utah Supreme Court's subsequent determination that more than $9 million in punitive damages were justified. *Campbell v. State Farm Mut. Auto. Ins. Co*., 98 P.3d 409, 418 (Utah), *cert. denied*, 543 U.S. 874 (2004). The Utah Supreme Court sagely acknowledged that "the quest to reliably position any misconduct within the ranks of criminal or civil wrongdoing based on penalties affixed by a legislature can be quixotic." *Id.* at 419. Indeed, when useful comparable penalties really do not exist, as they do not here, courts generally hold that the comparability guidepost "has no application." *Haynes v. Stephenson*, 588 F.3d 1152, 1159 (8th Cir. 2009).

punitive damages were set at a 9:1 level ($2,250,000 in punitive damages and $250,000 in compensatory damages), would have no presumption of unconstitutionality. On the other hand, this case, where at least the aggravating factors of financial vulnerability because the plot sought to destroy Bert Company, profit-motivation, and employment of deceit were present, Appellants seek to treat what is at worst an 11:1 ratio, representing a $550,000 increase in punitive damages, as so grossly excessive as to require a presumption of unconstitutionality. Such a regime improperly denigrates reprehensibility as the most important factor in determining the reasonableness of punitive damages and eliminates consideration of aggravating factors already proven at trial.

b. Ratios rarely reflect potential harm and provide a flawed basis to presume unconstitutionality.

The ratio Appellants propose to utilize to trigger their preferred presumption fails to reflect potential harm and is thus flawed. In formulating the ratio guidepost, the Supreme Court instructed courts to consider the "disparity between the actual or *potential harm* suffered by the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 418 (emphasis added). In other words, the value of the potential harm must be built into the ratio. However, because juries only assess actual harm in arriving at

compensatory damages and do not speculate or assign a number to additional potential, the ratio most courts rely upon improperly excludes potential harm, artificially raising the disparity in the resulting ratio. To overcome that limitation, courts then must imagine the enormity of the potential harm when they bother to account for it.

Without it, the ratio utilized is terribly flawed. As the Supreme Court explained by using a classic example, if a man fires a gun into a crowd and miraculously only causes damage to a pair of glasses, a "jury reasonably could find only $10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care." *TXO Prod. Corp.*, 509 U.S. at 459 (plurality op.) (citation omitted). In *TXO*, punitive damages of $10 million accompanying only $19,000 in compensatory damages, a 526-to-one ratio, *id.* at 453, was justified on the basis of potential harm that was never reduced to a specific number. The *TXO* opinion explained that the "shocking disparity between the punitive award and the compensatory award … dissipates when one considers the potential loss to respondents, in terms of reduced or eliminated royalties payments, had petitioner succeeded in its illicit scheme." *Id.* at 462. The Court based its "dissipation" of the shocking disparity in the 526:1 ratio by speculating that potential harm may have been monetized at anywhere from $1 million to $8.3 million. *Id.*

Here, as well, the potential damages were substantial as the Appellants' actions sought to destroy Bert Company's business, take its clientele, and profit by its deceitful actions. The less-than-shocking disparity between the punitive and compensatory awards "dissipates when one considers the potential loss" even further.

c. Where courts have adopted presumptions of unconstitutionality, the ratios have been breathtakingly wide and not close to single digits.

A grossly excessive punitive damage award must evince so significant a disparity that justification is beyond contemplation. Too often single-digit ratios are used as a shorthand for what the Supreme Court said in *State Farm* – and a presumption based on that measure mistakes the shorthand for what the Court actually said. In discussing ratios, it stated awards exceeding a single-digit ratio between punitive and compensatory damages, the Court stated that "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 (emphasis added). In *State Farm*, that significant degree was a 145:1 ratio. Other courts have also recognized that requirement that the disparity should be significant. California, for example, requires that "ratios between the punitive damages award and the plaintiff's actual or potential compensatory damages [be] *significantly greater* than 9

or 10 to 1 [warrant] special justification" such as "extreme reprehensibility or unusually small, hard-to-detect or hard-to-measure compensatory damages." *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 77 (Cal. 2005) (emphasis added). *Simon* reduced a "'breathtaking' multiplier" of 340:1 on $5,000 in compensatory damages to $50,000, which it said, "though just exceeding the largest single-digit ratio amount, is in absolute size not extraordinary for fraudulent conduct." *Id.* at 77, 81. *Amici* submit the same considerations apply to the punitive damages at issue in this case.

At least some courts have required the use of a presumption on triple-digit ratios. For example, the South Carolina Supreme Court adopted a "presumption that the punitive damages award is an unconstitutional deprivation of property" where the punitive damages represented a 127:1 ratio. *Atkinson v. Orkin Exterminating Co.*, 604 S.E.2d 385, 392 (S.C. 2004). Similarly, it was a 145:1 ratio that caused the Supreme Court to reduce the punitive damages in *State Farm*.

On the other hand, a punitive damage award that "barely exceeds the 'single digit ratio' with a 10:1 disparity, has not triggered more probing scrutiny in this State. *Hollock v. Erie Ins. Exch*., 2004 PA Super 13, ¶ 40, 842 A.2d 409, 422 (2004). Similarly, the California Supreme Court overturned a reduction to a 3:1 ratio on $17,811.60 in compensatory damages, because

the ratio failed to give "express weight" in its reprehensibility analysis to the defendant's "practice of engaging in, and profiting from, wrongful conduct similar to that which injured the plaintiff." *Johnson v. Ford Motor Co.*, 113 P.3d 82, 97 (Cal. 2005). On remand the Court of Appeals in that case reset the ratio to 10:1, amounting to punitive damages of $175,000 in order to "vindicate California's 'legitimate interests in punishing unlawful conduct and deterring its repetition.'" *Johnson v. Ford Motor Co. ("Johnson II")*, 37 Cal. Rptr. 3d 283, 294 (Cal. App. 2005) (quoting *BMW*, 517 U.S. at 568).

Reprehensible conduct can justify significantly greater punitive damages than single-digit ratios produce. In an individual tobacco liability case, the Supreme Court heard oral argument in the case twice, but ultimately let a 97:1 ratio on ($79.5 million in punitive damages and $821,485.50 in compensatory noneconomic damages) stand. *Williams v. Philip Morris Inc.*, 176 P.3d 1255, 1257, 1258 (Or. 2008), *cert. dismissed as improvidently granted*, *Philip Morris USA Inc. v. Williams*, 556 U.S. 178 (2009).

Similarly, when AT&T was sued for fraudulent billing practices and the collection of illegal gambling debts in violation of RICO, the Eleventh Circuit reduced one million dollars in punitive damages as compared to the plaintiff's

actual economic losses of $115.05 to $250,000, *Kemp*, 393 F.3d at 1357, 1365, which still represented a ratio of more than 724:1.

In sum, a presumption of unconstitutionality tied to a ratio near single digits makes little sense, especially when weighed against the fundamentally inconclusive nature of ratios, its subsidiary role in the constitutional inquiry when compared to reprehensibility, its inherent limits because it does not reflect all the evidence or potential harm that justifies a punitive verdict, and its profound inconsistency with the concept of presumptions. After all, if a court reduces punitive damages, its objective must still be to permit "the maximum award the Constitution allows." *Johansen v. Combustion Eng'g, Inc*., 170 F.3d 1320, 1332 (11th Cir. 1999).

II. THIS CASE PROVIDES A POOR VEHICLE FOR DETERMINING WHAT GOES INTO A RATIO IN A MULTI-DEFENDANT CASE.

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 (emphasis added), this case with its 11:1 ratio when measured collectively or its lower ratios when measured per defendant fails to trigger a presumption of unconstitutionality, rendering an answer to the second question presented an advisory opinion. Appellants are not aggrieved by the question of how multi-defendant cases should be

treated for ratio purposes because resolution of the presumption question, as well as the constitutional propriety of the punitive damages, cannot turn on the existence of a ratio that slightly exceeds single digits, as explained *supra*. Moreover, when potential harm is added to the calculation, as the U.S. Supreme Court has instructed, *see id.* at 418, the highest ratio that could be calculated in this case falls within single digits. For that reason, the issue is non-justiciable, and justiciability provides an insuperable barrier to the issuance of inappropriate advisory opinions. *Firearm Owners Against Crime v. Papenfuse*, 261 A.3d 467, 481 (Pa. 2021).

Nonetheless, if this Court were to address this question, *amici* commend the careful and thorough analysis made by the Superior Court. Where joint and several liability exists, joint and several liability permits joinder of all defendants who have concurrent responsibility for the entire injury in a single lawsuit. *See* Restatement (3d) of Torts § 11 cmt. a, Reporters' Note at 110 (citation omitted). *See also* John G. Fleming, The Law of Torts 255, 257-58 (8th ed. 1992). Although the Supreme Court has held that ratios should not be based on harm visited upon those other than the plaintiff, *Philip Morris*, 549 U.S. at 355, nothing in our jurisprudence indicates that the separate assessment of the punitive liability for each of multiple defendants poses a due-process issue.

Instead, it is "settled by innumerable authorities that if injury be caused by concurring negligence of the defendant and a third person, the defendant is liable to the same extent as though it had been caused by his negligence alone." *Miller v. Union Pacific R. Co.*, 290 U.S. 227, 236 (1933). *Cf. Summers v. Certainteed Corp*., 606 Pa. 294, 316, 997 A.2d 1152, 1164 (2010).

It then follows that each defendant who engaged in egregious misconduct sufficient to justify punitive damages must be assessed those damages independently for its own actions. Their responsibility for the compensatory damages is not diminished by the fact that contribution from other responsible parties may occur. They contributed to an indivisible injury. *See Firearm Owners*, 261 A.3d at 481. Like the gravity of the offense under punitive damages, culpability guides the application of joint and several liability so that considerations of any disparity should focus on each culpable defendant as compared to the plaintiff's conduct. *Id.*

When the Superior Court's trenchant analysis of the issue is viewed against this background, it becomes obvious that a per-defendant approach to ratios most accords with joint and several liability.

III. POTENTIAL HARM IS AN APPROPRIATE CONSIDERATION, EVEN WITHOUT AN EVIDENTIARY BASIS.

As *Amici* established, precedent not only considers potential harm an appropriate consideration, but further requires that potential harm be part of the denominator in any ratio analysis. *See* pp. 13-15 *supra*. Yet, potential harm seeks to project injuries that might occur if a course of conduct had succeeded, if mitigation had not occurred, or even the punitive damages were the product of repeated misconduct that previously had escaped detection. Proof of potential is not available in the same way that compensatory damages are available. And juries do not assign a monetary number to potential harm.

Projected harm is often the province of expert evidence. Yet, speculation about events that have not taken place often involves difficult methodological challenges. For example, last year the Supreme Court confronted a lawsuit brought by Florida against Georgia based on a claim that "Georgia consumes more than its fair share of water from an interstate network of rivers," which harms "economic and ecological interests" *Florida v. Georgia*, 141 S. Ct. 1175, 1178 (2021). The Court held that it could not credit one of Florida's experts for his modeling because "stronger evidence of actual past or threatened harm to species in the Apalachicola River" was

needed to make it "'highly probable'" that these species have suffered serious injury, let alone as a result of any overconsumption by Georgia." *Id.* at 1183.

Instead, as in *TXO*, courts have taken a common-sense approach where the circumstances suggest sufficient potential harm to justify lowering the ratio. In *TXO*, the Court expressed skepticism that the lost royalty payments if the defendant's illicit scheme had succeeded were between $5 million and $8.3 million. 509 U.S. at 462. Still, it was comfortable devising its own rubric and speculating that it could be "closer to $4 million, or $2 million, or even $1 million." *Id.* The Court's willingness to engage in speculation when the potential harm of unknown quantity was highly likely suggests that courts should undertake the task without requiring the making of a record that can be expensive yet still have limited value.

As in this case, common sense demonstrates that the harm that befell Bert Company could have been substantially greater and marked the end of its existence. Whatever value is put on the averted harm surely lowers the sole ratio projected at slightly above single digits to well within a range that poses no constitutional problem.

CONCLUSION

This Court should affirm the Superior Court's decision, upholding the punitive damages in this case. It should further deny that a ratio greater than single digits is presumptively unconstitutional. It should decline to settle the per-judgment or per-defendant question for determining the applicable ratio because that determination is not dispositive in this case and constitutes a request for an advisory opinion. Finally, this Court should hold that potential harm is always a proper consideration and need not be based on an evidentiary record when the inference of harm is strong.

Dated: August 15, 2022

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. The undersigned, Joseph R. Froetschel, is licensed to practice law in the Commonwealth of Pennsylvania, and is in good standing.

2. This Brief complies with the type-volume limitations of Appellate Rule 531 and does not exceed 7,000 words, as it contains 4,605 words.

3. This Brief complies with the typeface requirements of Appellate Rule 124(a)(4) because this Brief has been prepared in a proportionally spaced typeface using Microsoft Word, in Arial, 14-point font.

4. I certify that this filing complies with the provisions of the Public Access Policy of the Unified Judicial System of Pennsylvania: Case Records of the Appellate and Trial Courts that require fling confidential information and documents differently than non-confidential information and documents.

Dated: August 15, 2022

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PROOF OF SERVICE

I, Joseph R. Froetschel, hereby certify that on this 15th day of August, 2022, I have served the forgoing document to all counsel of record via PACFile and in accordance with the Rules of Appellate Procedure, which service satisfies the requirements of Pa.R.A.P. 121.

Dated: August 15, 2022

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