

# THE NEED TO CLARIFY THE MEANING OF U.S. SUPREME COURT REMANDS: The Lessons of Punitive Damages' Cases

Erwin Chemerinsky<sup>†</sup> & Ned Miltenberg<sup>\*</sup>

Two decades ago, Professor Arthur D. Hellman wrote that “[t]he most puzzling mode of disposition in the Supreme Court’s repertory is the summary order vacating the judgment below and remanding the case to the lower court ‘for further consideration in light of’ a Supreme Court decision.”<sup>1</sup> Nothing in the last 20 years has provided any clarity as to how lower courts are to treat “GVR”—grant, vacate, and remand—orders. The confusion exists in the press, among lawyers and, most importantly, in the lower courts.

In the last year, each of the authors has had the experience of handling a case in the U.S. Supreme Court and then in the lower courts after GVRs were ordered. Last April, in *State Farm Mutual Automobile Insurance Co. v. Campbell*,<sup>2</sup> the Supreme Court determined that a punitive damage award rendered by a Utah jury and upheld by the Utah Supreme Court was so “grossly excessive” it violated the Fourteenth Amendment’s guarantee of Due Process.<sup>3</sup> Within two weeks of that ruling, the Supreme Court issued the first of ten “GVR” orders in punitive damage cases in which petitions for certiorari had been “held” by the Court pending its disposition in *State Farm*.<sup>4</sup> Among the ten GVRs issued were ones in *Ford Motor Co. v. Romo*<sup>5</sup>

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<sup>†</sup> Sydney M. Irmas Professor of Public Interest Law, Legal Ethics, and Political Science, University of Southern California.

<sup>\*</sup> Senior Litigation Counsel, Center for Constitutional Litigation, P.C., Washington, D.C.

1. Arthur D. Hellman, *The Supreme Court’s Second Thoughts: Remands for Reconsideration and Denials of Review in Cases Held For Plenary Decisions*, 11 HASTINGS CONST. L.Q. 5, 5 (1983).

2. \_\_\_ U.S. \_\_\_, 123 S. Ct. 1513 (2003).

3. *Id.* at 1520.

4. Those ten post-*State Farm* GVRs were: *Philip Morris USA Inc. v. Williams*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 56 (2003); *Chrysler Corp. v. Clark*, \_\_\_ U.S. \_\_\_, 124 S. Ct. 102 (2003) (mem.); *Cass v. Stephens*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 2213 (2003) (mem.); *Ford Motor Co. v. Estate of Smith*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 2072 (2003) (mem.); *Ford Motor Co. v. Romo*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 2072 (2003) (mem.); *San Paolo U. S. Holding Co. v. Simon*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1828 (2003) (mem.); *DeKalb Genetics Corp. v. Bayer CropScience, S.A.*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1828 (2003) (mem.); *Key Pharm., Inc. v. Edwards*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1781 (2003) (mem.);

and *Ford Motor Co. v. Estate of Smith*,<sup>6</sup> in which the authors served as Supreme Court Counsel for the Respondents.

Advocates for punitive damages “reform” were quick to proclaim that the Supreme Court’s three-sentence GVR orders in these ten cases had substantive meaning. In their estimation, the Court actually had issued eleven significant punitive damage decisions during the 2002-2003 term rather than just one. Thus, the American Insurance Association celebrated, saying that the *Smith* and *Romo* GVRs were not docket-clearing devices or even mere applications of *State Farm*, but instead were important, tangible rulings in their own right, ones that “broadened the application of [*State Farm*] . . . by applying the same rules for determining the amount and basis for a punitive damages award to cases involving personal injuries.”<sup>7</sup> And the American Tort Reform Association (ATRA) boasted that *Campbell*, *Romo*, and *Smith* collectively showed that the “plaintiffs’ lawyers’ golden goose for punitive damages is now dead.”<sup>8</sup>

While ideological partisans are assured and positive about what the GVR orders mean, lower courts seem perplexed. In *Romo*, the California Court of Appeal promptly ordered a new round of briefing and scheduled oral argument on the significance of *State Farm* on their prior decision upholding a jury’s award of \$290 million against Ford for its highly

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*Anchor Hocking, Inc. v. Waddill*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1781 (2003) (mem.); *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Textron Financial Corp.*, \_\_\_ U.S. \_\_\_, 123 S. Ct. 1783 (2003) (mem.).

5. *Romo*, 123 S. Ct. at 2072.

6. *Smith*, 123 S. Ct. at 2072.

7. Press Release, American Insurance Association, U.S. Supreme Court Remands, Instructs Lower Courts to Use New Punitive Damages Standards in Personal Injury Cases; AIA Sees Positive Impact on Customers and Insurers (May 20, 2003), available at [www.aiadc.org/dochandle.asp?file=/outbound/pubaffairs/PA\\_9968\\_9690.htm&root=\\webdb1](http://www.aiadc.org/dochandle.asp?file=/outbound/pubaffairs/PA_9968_9690.htm&root=\\webdb1) (last visited March 23, 2004).

8. Press Release, American Tort Reform Association, U.S. Supreme Court Action Confirms: Last Month’s Opinion on Punitive Damages Applies to Product Liability Cases (May 19, 2003), available at [www.atra.org/show/7561](http://www.atra.org/show/7561) (last visited March 23, 2004). Other organizations made similar pronouncements about *State Farm*’s “revolutionary” meaning. See, e.g., Press Release, National Association of Manufacturers, NAM Hails High Court’s Ruling Against ‘Excessive’ Punitive Damages Awards; Sees Possible ‘Breakthrough’ as Litigation’s Drag on Competitiveness, Jobs Continues (Apr. 7, 2003), available at [www.nam.org/tertiary.asp?TrackID=&CategoryID=611&DocumentID=26236](http://www.nam.org/tertiary.asp?TrackID=&CategoryID=611&DocumentID=26236) (last visited March 23, 2004) (hailing *State Farm* as “an important breakthrough in our continuing efforts to make judges more aware of the fact that elements of our judicial system are out of control.”), and Press Release, U.S. Chamber of Commerce, Supreme Court Limits Size & Appropriateness of Punitive Damage Awards; \$145 Million Utah Ruling Held Unconstitutional (Apr. 7, 2003), available at [www.uschamber.com/nclc/news/alerts/alert030407.htm](http://www.uschamber.com/nclc/news/alerts/alert030407.htm) (last visited March 23, 2004) (extolling *State Farm* as “a major victory for the business community’s long-standing concern over unfair . . . punitive damages awards”).

reprehensible conduct that led to three deaths. At oral argument, counsel for the Romos (Erwin Chemerinsky), urged the court to reinstate its prior decision by finding that it was completely consistent with the Supreme Court's decision in *State Farm*. A judge on the panel responded incredulously to this suggestion. He predicted that if the court reinstated its prior judgment, the Supreme Court would just reverse them again. The reply was made that this was not true at all, especially if the court took minimal pains to explain why their ruling was correct under *State Farm*. The judge simply shook his head. It was obvious that he saw the GVR order as a decision on the merits, indeed, as an absolute and unqualified disapproval of his court's prior ruling, and thus felt the need to dramatically change that ruling.

It soon became clear that his views and concerns were shared by his colleagues, as that is exactly what the court did, completely reversing its earlier decision and doing so within a fortnight of the oral argument. The three-judge panel that had earlier upheld the jury's \$290 million punitive damage award, emphasized that Ford's behavior amounted to "involuntary manslaughter."<sup>9</sup> On remand, however, that same panel concluded that *State Farm* had radically changed the law of punitive damages and that the metamorphosis was so great as to necessitate a draconian, 92% reduction of the punitive damages award in *Romo*, to just over \$23.7 million.<sup>10</sup>

Interestingly, other courts have read *State Farm* and the ten GVR orders that followed in its train, much differently than the *Romo* court, and have either reinstated their earlier decisions or ordered far less sweeping reductions.<sup>11</sup> These courts do not see GVR orders as disapproving the earlier decisions but simply as orders for reconsideration in light of a subsequent Supreme Court decision.

This article is a plea for the Supreme Court to clarify the meaning of a GVR order. Also, we believe that it is essential that the Supreme Court use GVRs more sparingly. Today, it is typical for the Court to issue GVR orders rather reflexively, even when its underlying decision on the merits of one case provides scant reason for revising a lower court's ruling in a

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9. *Romo v. Ford Motor Co.*, 122 Cal. Rptr. 2d 139, 164–66 (2002).

10. *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 804, 812 (2003).

11. *See, e.g., Rhone-Poulenc Agro, S.A., v. DeKalb Genetics, Corp.*, 345 F.3d 1366, 1371-72 (Fed. Cir. 2003) (refusing to disturb, after GVR, original punitive damages award as being unconstitutionally excessive); *Simon v. San Paolo U.S. Holding Co.*, 113 Cal. App.4th 1137, 1167, 7 Cal. Rptr. 3d 367, 393 (2003); *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 577 (Or. App. 2003) (reducing punitive damages award by 60%, transforming what had been a 10:1 ratio to a 4:1 ratio). *But see Bocci v. Key Pharmaceuticals, Inc.*, 76 P.3d 669 (Or. App. 2003) (reducing previously upheld punitive damages award by 80%, cutting the relevant ratio from 45:1 to 7:1).

different case. The Court should more carefully review the record and read the briefing in cases in which certiorari has been held in abeyance before issuing GVR orders in such cases, and it should order a GVR in such a case only if there is good reason to believe that a lower court's decision needs to be revised in light of the Supreme Court's new ruling.

Part I of this article discusses the traditional understanding of GVR orders. Part II looks in detail at the recent experience with GVRs in the area of punitive damages. Finally, Part III offers proposals for reforming the GVR process.

### I. THE TRADITIONAL UNDERSTANDING OF GVRs

Supreme Court Rule 16.1 provides the authority for GVR orders. The Rule simply states: “[a]fter considering the documents distributed under Rule 15, the Court will enter an appropriate order. The order may be a summary disposition on the merits.”<sup>12</sup> This Rule was adopted in 1980,<sup>13</sup> though it merely codified a practice that had long existed. Interestingly, no Supreme Court Rule explicitly mentions the practice of granting certiorari, vacating the lower court decision, and remanding the case for further proceedings.

In *Henry v. City of Rock Hill*,<sup>14</sup> the Supreme Court noted that it has historically issued GVRs whenever it has issued a new opinion that it believed might have informed the lower court's decision if that opinion had been available prior to that decision.<sup>15</sup> In *Lawrence v. Chater*,<sup>16</sup> the Court set forth the two-part test it presently uses for determining when a GVR order is appropriate.<sup>17</sup> That test provides:

Where intervening developments, or recent developments that we have reason to believe the court below did not fully consider, reveal a reasonable probability that the decision below rests upon a premise that the lower court would reject if given the opportunity for further consideration, and where it appears that such a redetermination may determine the ultimate outcome of the litigation, a GVR order is, we believe, potentially appropriate.<sup>18</sup>

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12. SUP. CT. R. 16.1.

13. ROBERT L. STERN, ET AL., SUPREME COURT PRACTICE 314 (8th ed. 2002).

14. 376 U.S. 776 (1964).

15. *Id.* at 776.

16. 516 U.S. 163 (1996).

17. *Id.* at 167–68.

18. *Id.* at 167.

Such an order would become “ultimately” appropriate depending upon the “equities” of the case:

If it appears that the intervening development . . . is part of an unfair or manipulative litigation strategy, or if the delay and further cost entailed in a remand are not justified by the potential benefits of further consideration by the lower court, a GVR order is inappropriate.<sup>19</sup>

The Supreme Court has been clear that a GVR order is not a disposition of the merits. In *Henry*, the Court stressed that a summary disposition does “not amount to a final determination on the merits.”<sup>20</sup> The Court has been equally clear that a remand order is not just a polite way of summarily reversing a lower court’s decision. Indeed, summary reversal remains an option often used by the Court.<sup>21</sup> Rather a GVR simply “indicate[s] that we [find the intervening precedent] sufficiently analogous and, *perhaps*, decisive, to compel reexamination of the case.”<sup>22</sup> Three years ago, the Court reiterated its view that a GVR is simply a routine, docket-clearing device and definitely “[i]s not ‘a final determination on the merits.’”<sup>23</sup> The leading treatise on the Supreme Court concludes:

It seems fairly clear that the Court does not treat the summary reconsideration order as the functional equivalent of the summary reversal order and the lower court is being told simply to reconsider the entire case in light of the intervening precedent – which may or may not compel a different result.<sup>24</sup>

## II. THE EXPERIENCE WITH GVRs: THE EXAMPLE OF PUNITIVE DAMAGES

The problem, however, is that a GVR order may appear inherently ambiguous to the lower court, and perhaps more than a bit frightening. The lower court’s prior decision has been expressly reversed by the Supreme Court and it has been brusquely directed to reconsider its earlier decision. The Supreme Court provides no guidance as it believes that the lower court’s ruling was wrong or even whether it gave more than superficial consideration to the earlier case. Indeed, the typical GVR order is short and

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19. *Id.* at 168.

20. *Henry*, 376 U.S. at 777 (emphasis added).

21. *See, e.g.*, *City of Los Angeles v. David*, \_\_ U.S. \_\_, 123 S. Ct. 1895 (2003) (reversing the 9th Circuit’s finding of a due process violation).

22. *Henry*, 376 U.S. at 777.

23. *Tyler v. Cain*, 533 U.S. 656, 666 n.6 (2001) (emphasis added) (citation omitted).

24. STERN, *supra* note 16, at 319.

cryptic, consisting of nothing more than a formulaic three-sentence recitation. For example, the GVR issued in *Ford Motor Co. v. Estate of Smith*,<sup>25</sup> consists, in its entirety, of the following incomplete sentence fragments:

On petition for writ of certiorari to the Supreme Court of Kentucky. Petition for writ of certiorari granted. Judgment vacated, and case remanded to the Supreme Court of Kentucky for further consideration in light of *State Farm Mutual Automobile Insurance Company v. Campbell* . . . .<sup>26</sup>

But it is understandable that the one message that judges take from a GVR order is that they have been reversed by the United States Supreme Court.

The effects of the ambiguity are heightened because most appellate courts, particularly at the state level, have little experience dealing with GVRs and, thus, are unsure of their meaning. Thus although the number of GVRs issued each year has nearly tripled from the 1960s, the total issued in any single year has rarely ranged above eighty per year and has never reached into the triple digits. In *Romo*, for example, after the Supreme Court issued its GVR, the lawyers representing the plaintiffs tried to research the California Court of Appeal's procedures on remand. When diligent efforts uncovered no rules or precedents, the lawyers telephoned the Clerk's office to inquire about the court's standards and practices regarding GVRs. The court clerk quickly said that no procedures existed because even courts that busy had never previously dealt with a GVR. Nor are state appellate judges experts on U.S. Supreme Court practice. Because of the relative paucity of GVRs, these busy judges would rarely, if ever, have occasion to read the few things that the Supreme Court has said about GVRs. Confusion among lower courts, especially state courts, about the meaning of remand orders is thus not at all surprising.

Also, not surprisingly, lawyers who lost in the original decision before the lower court try and argue that the GVR order is both a decision on the merits and an admonition to the lower court to revise its earlier decision or face the consequences. For example, in the *Ford v. Smith* case, in its initial brief to the Kentucky Supreme Court on remand, Ford stressed three times that the Supreme Court's GVR constituted a decision on the merits, that must be obeyed.<sup>27</sup> Ford supported its claim in *Smith* by quoting from a

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25. 123 S. Ct. 2072 (2003) (mem) (citation omitted).

26. *Id.*

27. See, e.g., Brief for Ford Motor Co. at 9, *Ford Motor Co. v. Smith*, \_\_ S.W.3d \_\_ (Ky. \_\_) (No. 2004-SC-\_\_) (“Despite plaintiff’s insistence that the \$15 million award was not excessive under *State Farm*, the Supreme Court vacated this Court’s opinion and remanded this case to this Court to reconsider its judgment . . . .”) (emphasis added); *id.* at 1, 5–6.

1984 Judicature article by Professor Hellman for the proposition that “GVR orders are issued when the justices have found enough similarity between the case before it and the intervening decision to indicate, *as a prima facie matter*, that the judgment below is in error . . . .”<sup>28</sup>

Ford, however, neglected to note that it had lifted Hellman’s quote out of context (Ford omitted the opening words of Hellman’s sentence: “Rather, the Court appears to be saying . . . .”) and that Hellman was merely stating a hypothesis to be researched not one already confirmed. Ford also failed to mention that Professor Hellman further stated:

[W]hile the Court does not automatically direct reconsideration of all cases that have been set aside to await the announcement of a plenary decision, *the criteria for this mode of disposition [i.e., a GVR] are not exacting*. Specifically, a general similarity of issues and a surface inconsistency in results will usually suffice to persuade the justices to remand a case rather than deny review.<sup>29</sup>

Nor did *Ford* reveal that Professor Hellman’s research actually disproved that hypothesis, demonstrating that courts that do not reverse their prior decisions after receiving a GVR have scant reason to fear a second grant of certiorari.<sup>30</sup> As Hellman noted:

[I]n the subsequent history of the cases in which the lower courts adhered to their prior determinations . . . [m]ost of the litigants who had obtained the remand orders in the first round of proceedings sought Supreme Court review once again, *but very few [approximately 10%] of them succeeded in overturning the reinstated judgments*.<sup>31</sup>

Although Professor Hellman’s conclusion is open to question because of the vintage of the cases he studied (which date back to the 1960s and 1970s), an analysis of the post-GVR histories of more recent cases yields the same results. Thus, for example, although the Supreme Court granted seven GVRs after its decisions concerning punitive damages in *BMW of North America, Inc. v. Gore*,<sup>32</sup> and although the party that won certiorari was disappointed with the results in three of those cases and filed second

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28. *Id.* at 9 (quoting Arthur D. Hellman, *Granted, Vacated and Remanded, – Shedding Light on a Dark Corner of Supreme Court Practice*, 67 JUDICATURE, 389, 393 (1984)) (emphasis added).

29. Hellman, *supra* note 28, at 395 (emphasis added) (citations omitted).

30. *See id.*

31. *Id.* (emphasis added).

32. 517 U.S. 559 (1996) (finding a punitive damage award violated due process on the grounds that it was grossly excessive).

certiorari petitions, the Court did not grant a single one.<sup>33</sup> For this reason, courts that have received a GVR have little reason to fear being hit by lightning a second time.

Unfortunately, however, the Supreme Court's lack of guidance about the meaning of GVRs, combined with the inherent ambiguity of the Supreme Court's abbreviated orders in those cases, often causes lower courts to read far more into the Supreme Court's predicate decision than is appropriate.

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33. *Time Warner Entertainment Co., L.P. v. Six Flags Over Georgia, LLC*, 537 S.E.2d 397 (Ga. App. 2000), certiorari granted and judgment vacated by 534 U.S. 801 (2001), for reconsideration in light of *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), on remand to 563 S.E.2d 178 (Ga. App. 2002), and certiorari denied by \_\_\_ U.S. \_\_\_, 123 S. Ct. 1783 (2003); *Continental Trend Resources, Inc. v. OXY USA Inc.*, 44 F.3d 1465 (10th Cir. 1995), certiorari granted and judgment vacated by *Oxy USA Inc. v. Continental Trend Resources, Inc.*, 517 U.S. 1216 (1996), for reconsideration in light of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), on remand to *Continental Trend Resources, Inc. v. OXY USA Inc.*, 101 F.3d 634 (10th Cir. 1996), certiorari denied by 520 U.S. 1241 (1997); *Johansen v. Combustion Engineering, Inc.*, 67 F.3d 314 (11th Cir. 1995), certiorari granted and judgment vacated by 517 U.S. 1217 (1996), for reconsideration in light of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), on remand to 98 F.3d 1351 (11th Cir. 1996), on remand to 1997 WL 423108 (S.D. Ga. 1997), affirmed in part, vacated in part by 170 F.3d 1320 (11th Cir.), and certiorari denied by *Combustion Engineering, Inc. v. McGill*, 528 U.S. 931 (1999); *Jordan v. Clayton Brokerage Co. of St. Louis, Inc.*, 861 F.2d 172 (8th Cir. 1988), certiorari granted and judgment vacated by *Clayton Brokerage Co. of St. Louis, Inc. v. Jordan*, 499 U.S. 914 (1991), for reconsideration in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), appeal after remand, *Jordan v. Clayton Brokerage Co. of St. Louis, Inc.*, 975 F.2d 539 (8th Cir. 1992), and certiorari denied by *Clayton Brokerage Co. of St. Louis, Inc. v. Jordan*, 507 U.S. 916 (1993); *Sperau v. Ford Motor Co.*, 674 So.2d 24 (Ala. 1995), certiorari granted and judgment vacated by *Ford Motor Co. v. Sperau*, 517 U.S. 1217 (1996), for reconsideration in light of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), on remand to 708 So.2d 111 (Ala. 1997), and certiorari denied by 523 U.S. 1075 (1998); *Union Security Life Ins. Co. v. Evelyn Crocker*, 667 So.2d 688 (Ala. 1995), certiorari granted and judgment vacated by 517 U.S. 1230 (1996), for reconsideration in light of *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), on remand to 709 So.2d 1118 (Ala. 1997), and certiorari denied by 523 U.S. 1074 (1998); *Intercontinental Life Ins. Co. v. Lindblom*, 571 So.2d 1092 (Ala. 1990), certiorari granted and judgment vacated by 499 U.S. 956 (1991), for reconsideration in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), on remand to 598 So.2d 886 (Ala.), and certiorari denied by 506 U.S. 869 (1992); *Hospital Authority of Gwinnett County v. Jones*, 386 S.E.2d 120 (Ga. 1989), certiorari granted and judgment vacated by 499 U.S. 914 (1991), for reconsideration in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), on remand to 261 Ga. 613 (Ga. 1991), and certiorari denied by 502 U.S. 1096 (1992); *Wollersheim v. Church of Scientology*, 212 Cal. App. 3d 872, 66 Cal. Rptr. 2d 1 (Cal. App. 1989), certiorari granted and judgment vacated by *Church of Scientology of California v. Wollersheim*, 499 U.S. 914 (1991), for reconsideration in light of *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), on remand to *Wollersheim v. Church of Scientology of California*, 6 Cal. Rptr. 2d 532 (Cal.App.1992), review granted and opinion superseded by 832 P.2d 898, (Cal. 1992), and certiorari denied by *Church of Scientology of California v. Wollersheim*, 510 U.S. 1176 (1994).

The experience on remand in *Romo v. Ford* is illustrative. The California Court of Appeal was so predisposed to the view that it had to change its earlier decision—or face a mortifying second reversal and remand from the Supreme Court—that it misread *State Farm* as adopting changes in the law of punitive damages that the Supreme Court had actually rejected.<sup>34</sup> First, the Court of Appeal surmised that the Supreme Court’s decision in *State Farm* meant that punitive damages are to be measured on the defendant’s conduct solely towards the plaintiffs in the case under consideration and are not to take into account the defendant’s conduct to other persons, even if they were similarly situated.<sup>35</sup> Next, the Court of Appeals concluded that the Fourteenth Amendment’s Due Process Clause would be violated if the jury or the court were allowed to consider the defendant’s financial condition in determining the amount needed to punish a defendant’s past misconduct or to deter similar misconduct by the defendant or others in the future.<sup>36</sup>

Thus, although the Court of Appeal concluded that the size of the jury’s award in that case had been appropriate under the then-existing California law, it read *State Farm* as implicitly adopting this new “private wrongs theory.”<sup>37</sup> According to the Court of Appeal:

In particular, under [California’s pattern jury instruction] BAJI No. 14.71, the jury in this case was instructed that, in addition to other factors, it should consider in arriving at an award of punitive damages “[t]he amount of punitive damages which will have a deterrent effect on the defendant in light of defendant’s financial condition.” As we have discussed above, this view of “actual” deterrence, while clearly supported by California law under *Grimshaw* [*v. Ford Motor Co.*, 119 Cal.App.3d 757 (1981)], fails to restrict the jury to punishment and deterrence based solely on the harm to the plaintiffs.<sup>38</sup>

But the Supreme Court in *State Farm* did not expressly or even implicitly adopt the “private wrongs” theory followed by the Court of Appeals in *Romo*. Quite the contrary, as the Supreme Court explicitly reaffirmed that punitive damages exist to punish and to deter similar wrongful conduct in the future. The *State Farm* Court stated, at the outset of its opinion:

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34. See *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793 (App. 2003).

35. *Id.* at 802.

36. *Id.* at 804–05.

37. *Id.* at 801.

38. *Id.* at 804–05.

[P]unitive damages serve a broader function; they are aimed at deterrence and retribution . . . . “Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition;” “[P]unitive damages are imposed for purposes of retribution and deterrence.”<sup>39</sup>

Thus, contrary to the Court of Appeal's premise, *State Farm* did not change the underlying theory of punitive damages or reject the ability of a state to award punitive damages to deter similar wrongful conduct in the future.

Moreover, *State Farm* reaffirmed the broad principle that evidence of a defendant's “other acts” may be used both to assess the reprehensibility of the defendant's conduct and to measure the appropriate size of a punitive damages award. Because it is reasonable to “presume” that “a plaintiff has been made whole [for his injuries] by compensatory damages,”<sup>40</sup> the Supreme Court has long recognized that the only sound rationale for allowing a private litigant to seek and collect punitive damages is that such damages are often the only means by which the public at large can vindicate its legitimate interest in punishing wrongdoing and in deterring future misconduct by the defendant or others.<sup>41</sup>

For this reason, both the venerable common law principle and the Supreme Court's continuing calculus have been straightforward—the greater the danger (both actual and potential) to the largest number of people, the higher the amount of punitive damages that should be, and generally will be, sustained.<sup>42</sup>

*State Farm* did nothing to disturb this basic rule. It directs courts to evaluate whether the defendant's “tortious conduct evinced an indifference to or a reckless disregard for the health or safety of others” and whether the defendant's conduct “involved repeated actions” towards others.<sup>43</sup> In neither instance are fact-finders and courts admonished to narrowly consider how the conduct affected the health and safety of just the plaintiff or to myopically gauge whether the defendant had engaged in “repeated” misconduct toward the plaintiff alone.<sup>44</sup>

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39. *State Farm Mut. Auto. Ins. Co. v. Campbell*, \_\_\_ U.S. at \_\_\_, 123 S. Ct. at 1519 (citations omitted).

40. *Id.* at 1521.

41. *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1995) (citing *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 456 (1993)); *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21, 22 (1991)); see *EEOC v. Waffle House, Inc.*, 534 U.S. 279, 294–95 (2002) (citing *Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 266–70 (1981)).

42. See *TXO*, 509 U.S. at 459–60.

43. *State Farm*, 123 S. Ct. at 1521 (emphasis added).

44. *Id.*

What *State Farm* did do is clarify under what circumstances “other acts” evidence is constitutionally relevant and permissible in determining whether punitive damages should be awarded and, if so, in what amount.<sup>45</sup> The touchstone of using “other acts” evidence is the similarity of those acts to the conduct that specifically harmed or threatened the plaintiff. On one hand, a court may not base a punitive damages award on the wholly unrelated, “tangential,” or “hypothetical” claims of other parties, on a “defendant's dissimilar acts,” or on a defendant's status as “an unsavory individual or business.”<sup>46</sup> On the other hand, however, due process does not require that “other acts be identical” to those that harmed the plaintiff “to have relevance in the calculation of punitive damages.”<sup>47</sup>

Applying these standards to the facts in *State Farm*, the Supreme Court held that the “fundamental reason” that the quantum of punitive damages awarded in that case was so grossly excessive as to eclipse constitutional limits was that the Utah courts had not only considered but “rel[ie]d upon” grossly dissimilar conduct by State Farm to non-parties, going so far as “to punish and deter conduct that bore no relation to the [plaintiffs'] harm.”<sup>48</sup> Thus, the Utah courts erred by punishing State Farm not only for its mistreatment of the plaintiffs or similarly situated insureds, but also for its mishandling of insurance claims “that had *nothing to do with*” the kind of “third-party lawsuit” at issue in that case.<sup>49</sup>

As such, and contrary to the California Court of Appeal’s view in *Romo*, the Supreme Court's decision in *State Farm* was a narrow one:

In this case, because the Campbells have shown no conduct by State Farm similar to that which harmed them, the conduct that harmed them is the only conduct relevant to the reprehensibility analysis.<sup>50</sup>

The *Romo* Court completely ignored these critical caveats.

The California Court of Appeal also completely misread what the Supreme Court’s guidance on whether, when, and how a defendant’s financial condition could be examined in determining a constitutionally permissible punitive damages award. Thus, while the Court of Appeal believed that a defendant’s wealth was irrelevant, nothing in *State Farm* provides that a jury may not consider a defendant’s “wealth” or “financial condition” in awarding punitive damages in an amount sufficient to have a

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45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.* (emphasis added); *see id.* at 1519.

50. *Id.* at 1524.

deterrent effect on the defendant before the court. Indeed, the Court of Appeal's fundamental premise—that a jury may never consider a defendant's financial condition—directly conflicts with the Supreme Court's statement in *State Farm*: “The wealth of a defendant cannot justify an *otherwise* unconstitutional punitive damages award.”<sup>51</sup> The Court then approvingly quoted Justice Breyer's concurring opinion in *BMW*:

[Wealth] provides an open-ended basis for inflating awards when the defendant is wealthy . . . . That does not make its use unlawful or inappropriate; it simply means that this factor cannot make up for the failure of other factors, such as “reprehensibility,” to constrain significantly an award that purports to punish a defendant's conduct.<sup>52</sup>

Thus, contrary to the Court of Appeal's interpretation, *State Farm* did not reject consideration of a defendant's financial condition in determining the amount of punitive damages needed to deter and punish. All the Supreme Court said was that a defendant's wealth could not, *vel non*, be used to justify an “otherwise unconstitutional” punitive damages award.

Moreover, the Court of Appeal, in its belief that the Supreme Court's GVR order required the lower court to completely revise, and not merely “reconsider,” its earlier decision, saw *State Farm* as imposing a bright line rule that punitive damages could not be more than nine times greater than compensatory damages.<sup>53</sup> The Court of Appeal reaffirmed its earlier holding that Ford's conduct in marketing the 1978-79 Bronco was grossly reprehensible.<sup>54</sup> Thus, the *Romo* court declared:

Substantial evidence supports the jury's implicit conclusion that Ford acted with malicious conduct under aggravated circumstances; such a set of facts propels this situation toward the higher end of the reprehensibility scale. As stated in our original opinion, not only did Ford “wilfully and consciously ignore[] the dangers to human life inherent in the 1978 Bronco as designed, resulting in the deaths of three persons,” it also ignored its own internal safety standards, created a false appearance of the presence of an integral roll-bar, and declined to test the strength of the roof before placing it in production.”<sup>55</sup>

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51. *Id.* at 1525 (emphasis added).

52. *Id.* at 1525–26 (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 591 (1995) (Breyer, J., concurring)).

53. *Romo v. Ford Motor Co.*, 6 Cal. Rptr. 3d 793, 813 (App. Dep't Super. Ct. 2003).

54. *Id.* at 806–07.

55. *Id.* (citations omitted).

The court thus found that Ford's conduct was "extremely reprehensible" and that this "weighs heavily in favor of substantial punitive damages."<sup>56</sup>

Nonetheless, the court said that in determining the appropriate amount of punitive damages the issue is "which single digit sufficiently punishes and deters."<sup>57</sup> The court thus assumed that *State Farm* requires that punitive damages be no more than nine times greater than compensatory damages. The court then chose a ratio of punitive damages that were approximately three to five times greater than compensatory damages.<sup>58</sup>

But contrary to the Court of Appeal's assumption, the Supreme Court in *State Farm* did not mandate the punitive damages be no more than nine times actual damages. In fact, the Supreme Court once more expressly rejected any such bright line rule. In *State Farm*, the Court reiterated that it has "consistently rejected the notion that the constitutional line [for excessive punitive damages] is marked by a simple mathematical formula."<sup>59</sup> Indeed, *State Farm* explained that because there are no rigid benchmarks for such awards, punitive-to-actual damages ratios "greater" than those previously upheld by that Court, "may comport with due process," as, for example, where "a particularly egregious act has resulted in only a small amount of economic damages."<sup>60</sup>

Quite significantly, *State Farm* did not overrule, or even call into question, the Supreme Court's ten-year-old ruling in *TXO Production Corp. v. Alliance Resources Corp.*,<sup>61</sup> where it upheld a punitive damage award that was 526 times greater than the actual damages awarded by the jury. Yet, the California Court of Appeal, perceiving that it had been overruled by the Supreme Court and evidently fearing that it would be overruled again unless it drastically revised its earlier decision, read the decision in *State Farm* far broader than what the Supreme Court actually held.

### III. CLARIFYING THE MEANING OF GVR'S

Published studies have shown, and our own recent search has confirmed, that the number of GVRs has increased dramatically in the past

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56. *Id.*

57. *Id.* at 803.

58. *Id.* at 818.

59. *State Farm Mut. Auto. Ins. Co. v. Campbell*, \_\_\_ U.S. at \_\_\_, 123 S. Ct. at 1524 (quoting *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 445, 458 (2003)).

60. *Id.* (quoting *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 582 (1995)).

61. 509 U.S. 443, 453 (1993).

three decades, especially since 1990.<sup>62</sup> Several reforms are necessary to forestall the kind of confusion that has transpired in the punitive damage cases since *State Farm*.

First, the Supreme Court should clearly and explicitly state that GVR orders are not decisions on the merits and that such orders imply no judgments about whether the prior decision actually is in need of substantial revision or reversal. One way to accomplish this would be to revise the text of the Supreme Court's rules to make this point explicit. As discussed above, the Supreme Court's Rules do not mention GVR orders at all. Rule 16.1 simply says that the Court may issue an order granting "a summary disposition on the merits."<sup>63</sup>

A specific rule should exist for GVRs and it should state that such orders are not substantive rulings, and that they should not be read as indicating any judgment about the earlier court of appeal's decision, other than that it should be reconsidered in light of the new Supreme Court decision. Additionally, pursuant to this new rule, every GVR order should explicitly state this. Lower courts, especially state appellate courts, are unlikely to be familiar with or even read the Supreme Court's rules. Therefore, it would be helpful to have the GVR order accompanied by a statement clarifying what it does and does not mean.

Second, the Supreme Court should limit the situations in which it uses the GVR. The Court should more closely review cases before issuing a GVR order to ensure that the remanded case truly involves issues that are addressed by the new Supreme Court decision. A GVR order is so easy for the Supreme Court: it disposes of a case without needing to address its merits. But the GVR only makes sense where the Supreme Court decision which is the basis for the order directly addresses the issues in the case that are being remanded.

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62. See J. Mitchell Armbruster, Note, *Deciding Not to Decide: The Supreme Court's Expanding Use of the "GVR" Power Continued in Thomas v. American Home Products, Inc. and Department of the Interior v. South Dakota*, 76 N.C. L. REV. 1387 (1998).

63. SUP. CT. R. 16.1.