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In The
Supreme Court of the United States

October Term, 1994

BMW OF NORTH AMERICA, INC.,

Petitioner,

v.

IRA GORE, JR.,

Respondent.

On Writ Of Certiorari
To The Alabama Supreme Court

BRIEF OF AMICUS CURIAE NATIONAL
ASSOCIATION OF SECURITIES AND
COMMERCIAL LAW ATTORNEYS (NASCAT)
IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether the Due Process Clause of the Fourteenth Amendment mandates additional procedural or substantive limitations on punitive damage awards by state courts.

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INTEREST OF AMICUS CURIAE

The National Association of Securities and Commercial Law Attorneys ("NASCAT") is an association of law firms and attorneys who litigate antitrust, commercial, consumer, environmental and securities fraud cases in federal and state courts. NASCAT's members represent victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity, including victims of the type of consumer fraud at issue in this case. In civil actions challenging such wrongdoing, NASCAT's members not only seek compensation for victims, but also attempt to deter wrongdoers, modify corporate behavior and improve the access of victims to justice. As part of these efforts, NASCAT advocates the enactment and enforcement of effective state and federal laws to prevent fraudulent, deceptive and manipulative business practices.

Claims for punitive damages are an important weapon used by NASCAT members to enforce laws protecting investors, consumers, small businesses, the environment and the integrity of the securities markets. Accordingly, with the written consent of the parties NASCAT files this *amicus curiae* brief in support of Respondent and urges this Court to affirm the decision of the court below.¹

SUMMARY OF ARGUMENT

In this case, the Alabama Supreme Court affirmed a jury verdict for Respondent, finding that there was substantial and sufficient evidence from which the jury could conclude that Petitioner, BMW of North America, Inc. ("BMW"), a wholly-owned subsidiary of Bayerische Motoren Werke, A.G., had deliberately engaged in a nationwide scheme to conceal from

¹ Letters of consent have been filed with the Clerk of the Court. The decision of the Alabama Supreme Court is reported as *BMW of North America v. Gore*, 646 So. 2d 619 (Ala. 1994) ("BMW"), *cert. granted*, ___ U.S. ___, 115 S. Ct. 932 (1995). Citations to the slip opinion reprinted in Appendix A to Petitioner's Brief are cited herein as "A-___."

consumers that certain “new” vehicles sold by BMW had, in fact, been refinished before sale to such an extent that the vehicles had suffered a substantial (and undisclosed) decline in market value. A-7a, A-11a. BMW’s fraudulent scheme was perpetrated under an official corporate policy of indifference to the consumer. BMW unilaterally elected to disclose damage to its vehicles to consumers *only* if the cost of repair was more than 3% of the manufacturers’ suggested retail price, A-11a, in utter disregard for the impact that such repairs might have on the market value of its customers’ substantial investment in the expensive cars sold by BMW. This deliberate consumer fraud, which impacted many consumers in (relatively) small individual amounts but reaped large profits for BMW, is precisely the type of situation in which the individual states should be permitted to fashion punitive damages awards in order to punish and deter corporate wrongdoing. NASCAT supports Respondent’s position in this case and believes that the decision of the court below should be upheld for several reasons.

First, in the words of this Court, “[p]unitive damages have long been a part of traditional state tort law.” *Silkwood v. Kerr-McGee Corp.*, 464 U.S. 238, 255 (1984).² As Justice Scalia recently observed in *TXO Prod. Corp. v. Alliance Resources Corp.*, ___ U.S. ___, 113 S. Ct. 2711 (1993) (“*TXO*”), “[s]tate legislatures and courts have ample authority to eliminate any perceived ‘unfairness’ in the common-law punitive damages regime, and have frequently exercised that authority in recent years.” *Id.* at 2727-28 (Scalia, J., concurring in judgment) (citing NASCAT’s *Amicus Curiae* Brief). In the last decade, the legislatures of many states have overhauled their respective punitive damage laws and have

² See also *Browning-Ferris Indus. v. Kelco Disposal*, 492 U.S. 257, 278 (1989) (“In a diversity action, or in any other lawsuit where state law provides the basis of decision, the propriety of an award of punitive damages for the conduct in question, and the factors the jury may consider in determining their amount, are questions of state law.”).

enacted a range of procedural safeguards and substantive limits, including (1) statutory “caps” or proportionality rules on punitive damage awards; (2) requiring a finding of clear and convincing evidence (or even proof beyond a reasonable doubt) before such damages may be awarded; (3) requiring bifurcated trials; and/or (4) some combination of several of these measures.³ As demonstrated in Part A and Appendices A-F, *infra*, these changes in state law have been enacted to accommodate the public policy concerns raised by Petitioner and its *amici*. To the extent further modification of state law is needed, this Court should leave reform of punitive damages law and procedure to the political process, as Justices Scalia, O’Connor and Kennedy have acknowledged.⁴

³ See generally Janie L. Shores, *A Suggestion for Limited Tort Reform: Allocation of Punitive Damage Awards to Eliminate Windfalls*, 44 Ala. L. Rev. 61, 84-89 (1992) (comprehensively outlining limits that many states have placed on punitive damage awards and procedures to be followed in such cases); 2 James D. Ghiardi & John J. Kirchner, *Punitive Damages Law and Practice* § 21.17 (Supp. 1989) (same).

⁴ In *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991) (“*Haslip*”), Justice Scalia stated in his concurring opinion:

State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so. See, e.g., Alaska Stat. Ann. § 09.17.020 (Supp. 1990) (punitive damages must be supported by “clear and convincing evidence”); Fla. Stat. § 768.73(1)(a) (1989) (in specified classes of cases, punitive damages are limited to three times the amount of compensatory damages); Va. Code Ann. § 8.01-38.1 (Supp. 1990) (punitive damages limited to \$350,000). It is through those means – State by State, and, at the federal level, by Congress – that the legal procedures affecting our citizens are improved.

Id. at 39 (Scalia, J., concurring); see also *id.* at 63-64 (O’Connor, J., dissenting) (“As a number of effective procedural safeguards are available, we need not dictate to the States the precise manner in which they must address the problem. We should permit the States to experiment with different methods and to adjust these methods over time.”); *id.* at 42 (“the usual protections given by the laws of the particular State must suffice until

When this Court addresses state law its primary concern is the constitutionality, not the wisdom, of the law. *See Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) (“We would not, of course, invalidate state law simply because we doubt its wisdom”). This Court “should hesitate to overturn long-established law on due process grounds without overwhelming evidence that the law is indeed unreasonable and unfair” and, in the case of state law on punitive damages, “such overwhelming evidence is not to be found” because “the present system satisfies due process.” Robert E. Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L.J. 859, 915 (1991) (“Riggs, *Constitutionalizing Punitive Damages*”).

Second, federal and state trial and appellate courts have considered dozens of challenges to punitive damage awards since *Haslip* and *TXO* were decided by this Court and every empirical measure demonstrates that they are fairly applying the substantive and procedural due process standards established by this Court through careful review (and remittitur where appropriate) of punitive damage awards. As detailed in Part B, *infra*, post-*Haslip* and *TXO* cases from many jurisdictions demonstrate that the federal and state trial and appellate courts are following this Court’s mandate to ensure that (1) juries are permitted to consider only admissible evidence when determining whether defendants are guilty of fraud, malice, or oppression, the predicates to any punitive damages award;⁵ (2) juries are properly instructed as to what factors

judges or legislators authorized to do so initiate system-wide change”) (Kennedy, J., concurring in judgment). *See generally* Robert W. Pritchard, *The Due Process Implications of Ohio’s Punitive Damages Law*, 19 U. Dayton L. Rev. 1207, 1223 (1994).

⁵ Most courts have adopted the criteria set forth in the *Restatement (Second) of Torts* § 908(2) (1979):

Punitive damages may be awarded for conduct that is outrageous, because of the defendant’s evil motive or his reckless indifference to the rights of others. In assessing punitive

must be considered before punitive damages may be awarded;⁶ (3) trial courts are conducting careful post-verdict reviews of punitive damage awards and setting aside, or reducing by remittitur, those awards that are excessive and/or unsupported by the evidence; and (4) appellate courts are meticulously reviewing such awards to ensure that substantive and procedural due process has been provided.

Indeed, the Alabama Supreme Court's decision in this case presents but one example of the care and thoroughness being exercised by the lower courts in their post-verdict reviews of punitive damage awards. The court below analyzed the verdict under the very same standards held by this Court to comport with due process in *Haslip* and it determined that the jury had apparently improperly considered BMW's non-Alabama conduct in setting the amount of punitive damages. A-16a-17a. Accordingly, the court below *reduced* the award to reflect *only* BMW's Alabama conduct, as well as all of the other factors that this Court held in *Haslip* should be considered in a post-verdict review of a punitive damage award. A-17a-21a. Thus, the Alabama Supreme Court complied with the requirements of due process in this case.

Third, although the remitted punitive damages award was arguably large relative to the compensatory damages award in this case, it was not "grossly excessive" in violation of the

damages, the trier of fact can properly consider the character of the defendant's act, the nature and extent of the harm to the plaintiff that the defendant caused or intended to cause and the wealth of the defendant.

See, e.g., Tunis Bros. Co. v. Ford Motor Co., 952 F.2d 715, 740 (3d Cir. 1991) (applying Pennsylvania law), *cert. denied*, ___ U.S. ___, 112 S. Ct. 3034 (1992). For a state-by-state summary of types of wrongful conduct giving rise to liability for punitive damages, *see* R. Schloerb, R. Blatt, R. Hammesfahr & L. Nugent, *Punitive Damages: A Guide to the Insurability of Punitive Damages in the United States and Its Territories* 18-26 (1988).

⁶ For examples of state pattern jury instructions specifying when punitive damages may be awarded, *see* 1 L. Schlueter & K. Redden, *Punitive Damages* 204-39 (2d ed. 1989); *see also* Appendix D, *infra*.

Due Process Clause of the Fourteenth Amendment. As the court below concluded, BMW engaged in a deliberate scheme of deception that had the potential to cause incalculable damage to future consumers of its automobiles. As the plurality opinion of this Court found in *TXO*, “the shocking disparity between the punitive award and the compensatory award . . . dissipates when one considers the potential loss . . . had petitioner succeeded in its illicit scheme.” 113 S. Ct. at 2722. Moreover, a large punitive damages award against BMW was necessary to accomplish the objectives that courts have long recognized are the primary purposes of punitive damages.⁷ The jury properly punished a large wealthy company which had engaged in deliberate and widespread wrongdoing by imposing a penalty that stung – a significant monetary penalty, not just a nominal cost of doing business. The punitive damages award also deterred future

⁷ The purpose of punitive damages is to punish wrongdoers and deter similar wrongful conduct by other persons or entities. *See, e.g., Wackenhut Applied Technologies Center, Inc. v. Sygnatron Protection Systems, Inc.*, 979 F.2d 980, 985 (4th Cir. 1992) (applying Virginia law) (“The purpose of punitive damages is to punish and deter.”) (citation omitted); *Adams v. Murakami*, 54 Cal. 3d 105, 110, 284 Cal. Rptr. 318, 813 P.2d 1348, 1350 (1991) (“The public’s goal is to punish wrongdoing and thereby to protect itself from future misconduct, either by the same defendant or other potential wrongdoers.”) (citation omitted). *See also Gertz*, 418 U.S. at 350 (characterizing punitive damages as “private fines levied by civil juries to punish reprehensible conduct and to deter its future occurrence”); *Restatement (Second) of Torts* § 908(2), comment a (1979) (“The purposes of awarding punitive damages . . . are to punish the person doing the wrongful act and to discourage him and others from similar conduct in the future.”); Note, *Tightening the Constitutional Noose Around Punitive Damages Challenges: TXO, What It Means, and Suggestions That Address Remaining Concerns*, 68 S. Cal. L. Rev. 203, 223 (1994); Comment, *Constitutional Law – Punitive Damages Award Not Violative of the Due Process Clause*, 28 Suffolk U. L. Rev. 208, 210 (1994); Michael Rustad & Thomas Koenig, *The Historical Continuity of Punitive Damages Awards: Reforming the Tort Reformers*, 42 Am. U. L. Rev. 1269, 1284-1304 (1993) (tracing punitive damages awards from 2000 B.C. to present).

wrongdoing by compelling BMW to change its nondisclosure policy, A-20a, thereby providing all of its future consumers with important information about their investments in BMW cars.⁸

Finally, NASCAT believes that the availability of punitive damages is an essential weapon in the continuing struggle that consumers, investors and small businesses must wage against fraudulent schemes and white-collar crime, which constantly threaten to cheat them of their hard-earned savings and opportunities. The continued availability of punitive damages in cases of this kind in the words of the West Virginia Supreme Court of Appeals, "give[s] individual plaintiffs a sword with which to fight well-armored, bureaucratic defendants." *TXO Prod. Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E.2d 870, 888 (1992), *aff'd*, *TXO*, ___ U.S. ___, 113 S. Ct. 2711 (1993). Private citizens, investors and small businesses should not be deprived of one of their most effective weapons to combat fraudulent schemes and unfair business practices. Indisputably, the threat of punitive damages properly and effectively deters individual and corporate wrongdoers from engaging in wrongdoing, especially when such damages are measured by the actual or potential fruits of their schemes. Any rule of law that makes punitive damages less available concomitantly lessens the important social objectives of such awards.⁹

⁸ The plurality opinion in *TXO* made it clear that "[i]t is appropriate to consider the magnitude of the *potential harm* that the defendant's conduct would have caused to its intended victim if the wrongful plan had succeeded, as well as the possible harm to other victims that might have resulted if similar future behavior were not deterred." 113 S. Ct. at 2721-22 (emphasis in original).

⁹ Professor Dorsey Ellis, one of the leading academic commentators on the subject of punitive damages, identifies seven objectives for punitive damages that he gleans from judicial opinions and related commentary: (1) punishment of the defendant; (2) specific deterrence (to prevent the defendant from repeating the offense); (3) general deterrence (to prevent others from committing similar offenses); (4) preservation of the peace; (5)

ARGUMENT**A. The States Are Responsibly Modifying Their Punitive Damage Laws And This Court Should Not Interfere With That Continuing Political Process**

Over the past fifteen years, the elected representatives of the people have taken responsible steps to substantially modify their respective states' laws on punitive damages. Those modifications have taken various forms, including (1) imposing statutory "caps" or proportionality rules on punitive damage awards; (2) requiring a finding of clear and convincing evidence (or even proof beyond a reasonable doubt) before such damages may be awarded; (3) requiring bifurcated trials in which the trier of fact must determine defendant's liability for punitive damages before it assesses such damages; (4) authorizing only trial judges to assess punitive damages if a jury has determined that they are warranted; (5) requiring trial courts to exercise their power of remittitur to reduce excessive punitive damage awards; and/or (6) requiring successful plaintiffs to share punitive damage awards with the state. *See* Appendices A-F, *infra*. These legislative reforms demonstrate that some of the arguments raised against the common-law system of awarding punitive damages have been persuasive, at least in some quarters; however, "it does not make a case that change is constitutionally required and may indeed be better evidence that the issue of punitive damages is a policy matter appropriately left to legislatures and, perhaps, to courts exercising their common law powers." Riggs, *Constitutionalizing Punitive Damages*, 52 Ohio St. L. J. at 876.¹⁰ The

inducement for private law enforcement; (6) compensation to victims for otherwise uncompensable losses; and (7) payment of the plaintiff's attorney's fees. Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 3 (1982).

¹⁰ These legislative reforms include every solution to the punitive damages "problem" ever suggested by any Justice of this Court, *see Haslip*, 499 U.S. at 41 (O'Connor, J., dissenting), as well as those advocated by

states' legislative response to the so-called punitive damages "crisis"¹¹ may be categorized as follows:

commentators sympathetic to Petitioner and its *amici*. See David G. Owen, *The Moral Foundations of Punitive Damages*, 40 Ala. L. Rev. 705, 735-38 (1982); Malcolm Wheeler, *A Proposal For Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 947-60 (1982).

¹¹ A number of commentators have challenged the popular notion that awards of punitive damages are "skyrocketing." *TXO*, 113 S. Ct. at 2742 (O'Connor, J., dissenting); *Haslip*, 499 U.S. at 60 (O'Connor, J., dissenting); *Browning-Ferris Indus.*, 492 U.S. at 282 (O'Connor, J., dissenting). The author of a comprehensive empirical study of punitive damages awards in products liability cases concluded that both the frequency and size of punitive damages awards is "much less" than is generally believed. Michael Rustad, *Demystifying Punitive Damages in Products Liability Cases: A Survey of a Quarter Century of Trial Verdicts* 28 (Papers of the Roscoe Pound Found. 1991); see also Michael J. Saks, *Do We Really Know Anything About the Behavior of the Tort Litigation System - And Why Not?*, 140 U. Pa. L. Rev. 1147, 1256 (1992) (noting that while the mean (i.e., average) size of jury verdicts has increased due to a "very few cases with exceptionally large awards," median awards have risen only moderately); Stephen Daniels & Joanne Martin, *Myth and Reality in Punitive Damages*, 75 Minn. L. Rev. 1, 13 (1990) (observing that "the punitive damages debate has become a matter of public relations, propaganda, and the mobilization of prejudice and fear, rather than a matter of rational discourse"). In his comprehensive study, Professor Rustad found only 355 punitive damages awards in products liability cases between 1965 and 1990. See Michael Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 30, 38 tbl. 3 (1992). Further, only 22% of the punitive damages awards in his study were completely affirmed on appeal. *Id.* at 57 tbl. 14. In addition, he found that the median punitive damages award of \$625,000 was not significantly higher than the median compensatory damages award of \$500,000. *Id.* at 46. See also Stephen Daniels & Joanne Martin, *Jury Verdicts and the "Crisis" in Civil Justice*, 11 Just. Sys. J. 321, 328-29, 340-42 tbl. 4, 347-48 (1986) (study of jury awards in 43 counties of ten states between 1981 and 1985 in cases involving automobile accidents, products liability, medical malpractice, street hazards and premises liability leads to conclusion that juries' punitive damages awards have not caused a "crisis" in the insurance industry).

Bifurcation: At least 11 states – California, Connecticut, Georgia, Kansas, Minnesota, Missouri, Montana, Nevada, New Jersey, North Dakota and Ohio – require by statute bifurcation of the liability and damages phases of trials in which punitive damages may be assessed,¹² while the Supreme Court of Tennessee has imposed the same requirement.¹³

Burdens of Proof: The legislatures of at least 21 states – Alabama, Alaska, Arizona, California, Colorado, Georgia, Indiana, Iowa, Kansas, Kentucky, Minnesota, Mississippi, Montana, Nevada, North Dakota, Ohio, Oklahoma, Oregon, South Carolina, South Dakota and Utah – have enacted statutes imposing higher standards of proof¹⁴ than

¹² See Cal. Civ. Code § 3295(d) (1995); Conn. Gen. Stat. Ann. § 52-240(b) (1992); Ga. Code Ann. § 51-12-5.1(d)(1), (2) (1994); Kan. Code Civ. Proc. § 60-3701(a)-(b) (1994); Minn. Stat. Ann. § 549.20(4) (1994); Rev. Stat. Mo. § 510.263(1)-(3) (1994); Mont. Code Ann. § 27-1-221(7) (1994); Nev. Rev. Stat. § 42.005(3) (1993); N.J. Stat. Ann. § 2A:58C-5(b), (d) (1993); N.D. Cent. Code Ann. § 32.03.02-11(2) (1993); Ohio Rev. Code Ann. § 2315.21(C)(2) (Anderson 1994). These statutory provisions are summarized and/or quoted in Appendix A, *infra*.

¹³ See *Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992) (“In a trial where punitive damages are sought, the court, upon motion of defendant, shall bifurcate the trial. During the first phase, the factfinder shall determine (1) liability for, and the amount of, compensatory damages and (2) liability for punitive damages During this phase, evidence of a defendant’s financial affairs, financial condition, or net worth is not admissible. If the factfinder finds a defendant liable for punitive damages, the amount of such damages shall then be determined in an immediate, separate proceeding.”).

¹⁴ The function of the standard of proof is to “allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.” *Addington v. Texas*, 441 U.S. 418, 423 (1979). The “clear and convincing” standard of proof “is an important check against unwarranted imposition of punitive damages.” *Honda Motor Co. v. Oberg*, ___ U.S. ___, 114 S. Ct. 2331, 2341 (1994). The standard has been used “in civil cases involving allegations of fraud or some other quasi-criminal wrongdoing by the defendant” because “[t]he interests at stake in

