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In The
Supreme Court of the United States

October Term, 1992

TXO PRODUCTION CORP.

vs.

ALLIANCE RESOURCES CORP., THE TUG FORK LAND
COMPANY, GEORGE KING and GROVER C. GOODE,

Respondents.

On Writ Of Certiorari
To The Supreme Court Of Appeals
Of West Virginia

BRIEF OF AMICUS CURIAE
NATIONAL ASSOCIATION OF SECURITIES AND
COMMERCIAL LAW ATTORNEYS IN
SUPPORT OF RESPONDENTS

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BRIEF OF *AMICUS CURIAE*
NATIONAL ASSOCIATION OF SECURITIES AND
COMMERCIAL LAW ATTORNEYS IN
SUPPORT OF RESPONDENTS

I. INTRODUCTION AND 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 and its members are devoted to representing victims of corporate abuse, fraudulent schemes and so-called "white-collar" criminal activity in cases that have the potential for advancing the

state of the law, educating the public, modifying corporate behavior, deterring wrongdoers and improving the access of victims to justice and adequate compensation for the wrongs that have been inflicted upon them. NASCAT and its members advocate the enactment and enforcement of effective laws to protect investors, consumers and small businesses from fraudulent, deceptive and manipulative practices. NASCAT's members frequently represent plaintiffs in a variety of individual, class action and derivative cases prosecuted under the federal antitrust, securities and environmental laws, equivalent statutes of the fifty States and state common law governing fraud and deceit, breach of fiduciary duty and similar torts. NASCAT and its members have an interest in the effective private enforcement of such statutes and in the development of case law that effectively deters wrongdoers.

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

In *TXO*, the West Virginia Supreme Court of Appeals affirmed a jury verdict for Respondents, finding that

¹ The decision of the Supreme Court of Appeals of West Virginia is reported as *TXO Production Corp. v. Alliance Resources Corp.*, 187 W. Va. 457, 419 S.E. 2d 870 ("*TXO*"), *cert. granted*, ___ U.S. ___, 113 S. Ct. 594 (1992).

Petitioner, TXO Production Corporation ("TXO"), a subsidiary of USX, had knowingly and intentionally brought a frivolous declaratory judgment action against Respondents to clear a purported cloud on title. TXO's real intent, as the court below found, was to reduce the royalty payments under a 1,002.74 acre oil and gas lease. Respondents counterclaimed alleging that TXO's actions were a slander of title. The McDowell County, West Virginia, jury which heard the evidence at trial returned a verdict in favor of Respondents, awarding them \$19,000 in compensatory damages and \$10 million in punitive damages. 419 S.E. 2d at 875. In its exhaustive opinion, the West Virginia Supreme Court of Appeals held that the jury had properly weighed conflicting evidence and found the "requisite malice" for an award of punitive damages against TXO, *id.* at 878. The court further concluded that the evidence showed that it had committed "unsavory and malicious practices," *id.* at 880. Significantly, the court below stated that "the record shows that this was not an isolated incident on TXO's part – a mere excess of zeal by poorly supervised, low level employees – but rather part of a pattern and practice by TXO to defraud and coerce those in positions of unequal bargaining power vis a vis TXO's superior legal firepower." *Id.* at 881.

The court below also held that the trial court had properly admitted, under W. Va. R. Evid. 404(b), uncontradicted testimony by four lawyers to negate TXO's trial defenses of "good faith or the lack of malice." *Id.* Respondents offered the undisputed evidence of similar wrongful conduct engaged in by Petitioner in Louisiana, Texas and Oklahoma, *id.* at 881-83, "to disprove TXO's good faith defense and to show that this case was but part of a

pattern and practice of deception and chiseling by TXO.”
Id. at 883.

This much of the record in this case and the decision of the court below is beyond dispute. TXO has been found guilty of intentional, malicious acts directed toward Respondents, as well as a pattern and practice of fraudulent and deceptive conduct targeting other persons similarly situated. Taking all of the evidence (both disputed and otherwise) into account, the jury returned a verdict for Respondents on their counterclaim for slander of title and awarded compensatory and punitive damages. Thus, the only issues before this Court concern whether the trial court’s jury instructions, the jury’s award of \$10 million in punitive damages, the trial court’s post-verdict review of that award, and appellate review of the verdict satisfy the standards of procedural and substantive due process applied by this Court in *Haslip v. Pacific Mutual Life Ins. Co.*, 499 U.S. ___, 111 S. Ct. 1032 (1991) (“*Haslip*”).

NASCAT supports Respondents’ position and believes that the decision of the court below should be upheld for several reasons. First, this Court must recognize that the States are responsibly modifying their statutes and common law to accommodate reasonable public policy concerns about punitive damage awards; indeed, as this Court recently acknowledged, “[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

² See also *Browning-Ferris Indus., Inc. v. Kelco Disposal, Inc.*, 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, and the factors the jury

Even *amici* supporting Petitioner concede that the States "are free to establish different standards for use by juries in fixing the amount of punitive damages." Brief of Arthur Andersen & Co., *et al.*, at 11. Over the past ten years the State legislatures – the elected representatives of the people – have overhauled the punitive damage laws of nearly every State and have enacted numerous different safeguards 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; or (4) some combination of several of these measures. As demonstrated herein, *see* Part II.A. and Appendices A-F, *infra*, these changes in State law accommodate public policy concerns raised by Petitioner and its *amici* and are responsive to this Court's mandate in *Haslip*. The present system satisfies due process because it does not leave the jury without meaningful restraints and, to the extent further modification is needed, this Court should leave reform of punitive damages law to the political process, as Justices Scalia and O'Connor acknowledged in *Haslip*.³

may consider in determining their amount, are questions of state law.").

³ Justice Scalia stated in his concurring opinion in *Haslip*, decided just two years ago:

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

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. . . ."). While the distinction may be difficult to draw in practice with the due process clause, in particular, because "reasonableness" and "fairness" are elements of both wisdom and due process, 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 "such overwhelming evidence is not to be found" because, "[o]n the contrary, the present system satisfies due process." Riggs, *Constitutionalizing Punitive Damages: The Limits of Due Process*, 52 Ohio St. L.J. 859, 915 (1991).⁴

are limited to three times the amount of compensatory damages); Va. Code § 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.

111 S. Ct. at 1054 (Scalia, J., concurring); see also *id.* at 1067 (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.").

⁴ In his insightful article analyzing this Court's decision in *Haslip*, Professor Riggs of Brigham Young University offered the following (unsolicited) guidance to this Court:

The law of punitive damages may (or may not) stand in need of substantial reform. If reform is needed, constitutionalizing the law is a clumsy, inappropriate way to achieve it. The due process clause undoubt-

In addition, the federal circuit and district courts and state trial and appellate courts have considered dozens of challenges to punitive damage awards since *Haslip* was decided by this Court. As detailed herein, *see* Part II.B., *infra*, those courts are fairly applying the substantive and procedural due process standards established by this Court in *Haslip*, 111 S. Ct. at 1041-46, as demonstrated by the careful trial and appellate court review of the \$10 million punitive damages award at issue here. *See TXO*, 419 S.E. 2d at 886-90. Post-*Haslip* cases from other 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

edly could be used as an instrument of reform because its contours are so vague and its substance so amorphous. For that very reason, however, the Court should hesitate to read new meaning into it unless fundamental rights can be protected in no other way. Otherwise due process becomes a cover for judicial legislation, a function now wholly eschewed by the Court in the past but one not conferred by the Constitution. A punitive damages claim involves no right more fundamental than money, and it is peculiarly amenable to legislative reform. Many legislatures have already given consideration to the matter. Without a clear mandate from the Constitution, the Court should leave reform of punitive damages law to the political process.

Id. at 917.

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

properly instructed as to what factors must be considered before punitive damages may be awarded; (3) trial courts are conducting careful post-verdict reviews of punitive damage awards and setting aside (or reducing by remittitur) those awards which 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.

Finally, NASCAT believes that the availability of punitive damages is an essential weapon in the continuing struggle which consumers, investors and small businesses must wage against fraudulent schemes⁶ and

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 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). 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).

⁶ The financial costs incurred by society as a result of fraudulent activity are enormous. In 1974, the U.S. Chamber of Commerce estimated that approximately \$42 billion was lost to fraud per year. Chamber of Commerce of the U.S., *A Handbook on White Collar Crime: Everyone's Problem, Everyone's Loss* 6 (1974). A decade later, the Attorney General of the United States observed

white-collar crime⁷ which constantly threaten to cheat them of their hard-earned savings and opportunities.⁸

that white-collar crime, principally fraud, costs society nearly \$200 billion annually. 1985 Att'y Gen. Ann. Rep. 42; see also *White Collar Crime: Hearings Before the Senate Committee on the Judiciary, 99th Cong., 2d Sess. Parts I-III (1985)*. That now dated annual loss figure is similar in dimensions to our nation's drug problem, which is most often described as an epidemic. See *Drug Enforcement: Hearings on H.R. 526 Before the Subcommittee on Crime of the House Committee on the Judiciary, 99th Cong., 2d Sess. 1 (1986)* (remarks of Rep. Hughes) (\$110 billion spent annually on drugs while lost productivity costs approximately \$60 billion per year).

⁷ The Chief Justice has stated that "[w]hite-crime is 'the most serious and all-pervasive crime problem in America today.'" *Braswell v. United States*, 487 U.S. 99, 115 n.9 (1988) (quoting Conyers, *Corporate and White-Collar Crime: A View by the Chairman of the House Subcommittee on Crime*, 17 Am. Crim. L. Rev. 287, 288 (1980)). The Chief Justice added, "[a]lthough this statement was made [by Rep. Conyers] in 1980, there is no reason to think the problem has diminished in the meantime." *Id.* Unfortunately, this pattern of lawlessness has been present throughout much of modern history and it shows no signs of abating, as demonstrated by the facts of this case. Writing in the early days of this century, Louis Brandeis prophetically stated, "[t]he goose that lays the golden eggs has been considered a most valuable possession. But even more profitable is the privilege of taking the golden eggs laid by someone else's goose." L. Brandeis, *Other People's Money* 17-18 (1914).

⁸ See The President's Commission on Law Enforcement and Administration of Justice, *The Challenge of Crime in a Free Society* 33-34 (1967) ("Fraud is especially vicious when it attacks, as it so often does, the poor or those who live on the margin of poverty. Expensive nostrums for incurable diseases, home improvement frauds, frauds involving the sale or repair of cars and other criminal schemes create losses which are not only sizeable in gross but are also significant and possibly devastating for individual victims.").

The continued availability of punitive damages, 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*, 419 S.E. 2d at 888. Private citizens, investors and small businesses should not be deprived of one of their most effective weapons to combat fraud and white collar crime; indisputably, the threat of punitive damages properly and effectively deters individual and corporate wrongdoers from engaging in fraudulent schemes,⁹ especially when measured by the actual or potential fruits of their wrongdoing.¹⁰ Any rule of law which makes punitive damages

⁹ Since colonial days, this Court, the lower federal courts and the courts of the fifty States have recognized that the purpose of punitive damages is to punish wrongdoers and deter similar wrongful conduct by other persons or entities. See *Wackenhut Applied Technologies v. Sygnatron*, 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, 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); *Restatement (2d) of Torts*, § 908(2), comment (b) (1979) ("[T]he purpose of punitive damages is not compensation of the plaintiff but punishment of the defendant and deterrence.").

¹⁰ It is well settled (and undisputed by various *amici* who support Petitioner) that "[t]he amount of gain or profit that the defendant has received from the plaintiff as a result of his misdeeds is an appropriate element in measuring deterrence." Brief *Amici Curiae* for the American Council of Life Insurance, *et al.*, at 15 (citing *Haslip*, 111 S. Ct. at 1045); see also *id.* at 15-16 ("The defendant's profits from his misconduct - or, in some cases, the expected profits where the defendant fails to profit as expected - are objectively-based and often ascertainable without substantial difficulty."); see also Brief of Arthur Andersen &

less available concomitantly lessens their necessary deterrent value.¹¹

In contending that they are unfairly caught in the web of tort litigation and that the present system of awarding punitive damages threatens their existence, the "Big Six" accounting firms who appear as *amici* for Petitioner have apparently forgotten their undisputed contribution to this country's ongoing savings and loan crisis by failing to fulfill their "public watchdog" role. See *United States v. Arthur Young & Co.*, 465 U.S. 805, 817-18 (1984). The General Accounting Office (GAO) and the Office of Thrift Supervision (OTS) have been sharply critical of the accounting profession for its utter failure to uncover widespread fraud in failing financial institutions,¹² and (former federal prosecutor) Judge Royce C.

Co., et al., at 11 (observing that "courts adjudicating constitutional challenges to punitive [damages] awards can and should look to the various factors that have been identified by legislatures, courts, and commentators as reasonable considerations in fixing the proper amount of punitive damages . . . including profitability to the defendant . . . [and] the potential and actual harm caused by the defendant's conduct. . . .").

¹¹ 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) inducement for private law enforcement; (6) compensation to victims for otherwise uncompensable losses; and (7) payment of the plaintiff's attorney's fees. Ellis, *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 3 (1982).

¹² Running through the ongoing savings and loan crisis is the general problem of fraudulent financial reporting. When