**No. 01-1289**

IN THE

# Supreme Court of the United States

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STATE FARM MUTUAL AUTOMOBILE INSURANCE CO.,

*Petitioner*,

v.

CURTIS B. CAMPBELL AND INEZ PREECE CAMPBELL,

*Respondents*.

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**On Writ Of Certiorari to the Supreme Court of Utah**

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## AMICUS CURIAE BRIEF OF THE ASSOCIATION OF TRIAL LAWYERS OF AMERICA IN SUPPORT OF THE RESPONDENTS

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IN THE

# Supreme Court of the United States

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## IDENTITY AND INTEREST OF *AMICUS CURIAE*

The Association of Trial Lawyers of America ["ATLA"] respectfully submits this brief as *amicus curiae*. Letters of consent of the parties to the filing of amicus briefs have been filed with the Court.[1]

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[1] Pursuant to Rule 37.6, Amicus discloses that no counsel for a party authored any part of this brief, nor did any person or entity other than Amicus Curiae, its members, or its counsel make a monetary contribution to the preparation or submission of this brief.

ATLA is a voluntary national bar association whose approximately 50,000 trial lawyer members primarily represent individual plaintiffs in civil actions. Some plaintiffs have been harmed by misconduct deemed so egregious that state law permits juries to award punitive damages for the purpose of punishment and deterrence.

In ATLA's view, the fairness of such awards is best assured by fair procedures. The proposition that the amount of punitive damages is additionally limited by substantive due process is both unwarranted and unworkable. ATLA members, whose professional lives are devoted to working with America's trial courts and juries, believe that clear and appropriate guidance to jurors will best enable them to carry out their duty to assess punitive damages fairly and responsibly.

## SUMMARY OF THE ARGUMENT

1. This Court should overrule its prior holding in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), that substantive due process imposes a limit on the amount of a punitive damage award arrived at under procedures that comport with fundamental fairness. The precedents relied upon by the Court do not support such a radical expansion of the substantive component of the Due Process Clause. The Court's holding disregards the Court's own considered reluctance to expand the open-ended reach of substantive due process and hearkens back to the discredited *Lochner* era of judicial activism.

Federal substantive due process review adds little to the protections against excessive punitive damage awards already provided by state courts

employing standards developed at common law. To the extent that the constitutional standard is equivalent to common-law excessiveness it merely places this Court in the position of a Court of Additional Appeals from state courts. Constitutional review of punitive damages cannot provide more detailed or precise rules without abandoning the roots of due process in traditional practice and appearing to impose the personal convictions of the majority of the Court.

Federal substantive due process review also entangles this Court in matters of state law and policy that are appropriately left to state courts and legislatures.

2. Protection against arbitrary and excessive punitive awards is best accomplished by requiring that the factors that are relevant to assessing an appropriate amount of damages be submitted to juries, accompanied by clear and specific instructions. This Court has long recognized the importance of appropriate jury instruction in protecting the rights of litigants.

Properly instructed, juries are clearly capable of carrying out their duty to assess punitive damages fairly and responsibly. Empirical studies overwhelmingly demonstrate that juries make decisions based on the evidence presented to them, conscientiously follow the trial court's instructions, and render verdicts that generally conform to the outcomes that judges themselves would return. Attacks on the capacity of juries to carry out their responsibilities within the law are not supported by objective research.

## ARGUMENT

### I. THIS COURT SHOULD OVERRULE ITS PRIOR HOLDING THAT THE DUE PROCESS CLAUSE PLACES SUBSTANTIVE LIMITS ON PUNITIVE DAMAGE AWARDS.

#### A. Substantive Due Process Review of Punitive Damage Awards Lacks Support in the Constitutional Text, Historical Practice and this Court's Precedent.

Not long after the Fourteenth Amendment was added to our Constitution, this Court upheld a Missouri penalty statute as well as the long-recognized authority of juries under the common law to award "exemplary" damages "whenever malice, gross neglect, or oppression" accompany wrongful injury. *Missouri Pacific Ry. Co. v. Humes*, 115 U.S. 512, 521 (1885). Justice Field pointedly told petitioners that the Due Process Clause must not be used as "a means of bringing to the test of the decision of this court the abstract opinions of every unsuccessful litigant in a state court of the justice of the decision against him." *Id.* at 520.

The Court has been particularly vigilant against expansion of the substantive component of the Due Process Clause, for compelling reasons:

> [T]he Court has always been reluctant to expand the concept of substantive due process because guideposts for responsible decisionmakers in this uncharted area are scarce and open-ended. The doctrine of judicial self-restraint requires us to

> exercise the utmost care whenever we are asked to break new ground in this field.

*Collins v. City of Harker Heights*, 503 U.S. 115, 125 (1992); *Washington v. Glucksberg*, 521 U.S. 702, 720 (1997).[2]

Nevertheless, the Court did indeed break new ground in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), overturning for the first time an award of punitive damages deemed so "grossly excessive" as to violate the Due Process Clause of the Fourteenth Amendment. *Id.* at 562.

ATLA respectfully urges this Court, upon reconsideration of its precedents, legal traditions, and in view of its subsequent decisions, to overrule *BMW* to the extent that it requires courts to enforce substantive due process limits on the amount of punitive damage awards imposed using procedures that comport with fundamental fairness.

The majority opinion in *BMW* relied on the proposition, hinted at in *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991), and explicitly stated in the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 453-54 (1993), that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits beyond which penalties may not go."

The five cases cited in *TXO* and referenced in *BMW*, 517 U.S., at 652, offer scant support for imposing

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[2] The very phrase "substantive due process" has been called "a contradiction in terms -- sort of like 'green pastel redness.'" John Hart Ely, DEMOCRACY AND DISTRUST 18 (1980).

federal substantive limits on jury awards of punitive damages under the Due Process Clause.

*Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907), upheld a South Carolina statute imposing a $50 penalty on a common carrier for failing to settle a claim for a lost shipment valued at $1.75. The statute was not challenged as a violation of due process, but as a denial of equal protection, singling out carriers for an unreasonable penalty not imposed on other debtors. *Id.* at 76. The Court upheld the penalty, although it "may be large as compared with the value of the shipment," because it served in part "as compensation of the claimant for the trouble and expense of the suit." *Id.* at 77-78.

*St. Louis, I.M. & S.R. Co. v. Williams*, 251 U.S. 63 (1919) upheld a statutory penalty of $75 plus costs of suit against the railroad for each of two schoolgirls who were overcharged in their fares by 66 cents. Significantly, the court stated that the validity of the penalty was not to be judged by the ratio of the penalty to the overcharge. Rather "considered with due regard for the interests of the public, the numberless opportunities for committing the offense, and the need for securing uniform adherence to established passenger rates, we think it properly cannot be said to be so severe and oppressive as to be wholly disproportioned to the offense or obviously unreasonable." *Id.* at 66-67.

*Standard Oil Co. of Ind. v. Missouri*, 224 U.S. 270, 286 (1912) upheld a penalty under a Missouri anti-trust statute amounting to $50,000, "which some of the Missouri court thought should have been a million dollars." *Id.* at 282. The Court pointed out that it is the responsibility of the state supreme court under the

common law to avoid excessive damages. But there is no due process review of the amount of damages imposed by the state court under fair procedures.

> The 14th Amendment guarantees that the defendant shall be given that character of notice and opportunity to be heard which is essential to due process of law. When that has been done, the requirements of the Constitution are met, and it is not for this court to determine whether there has been an erroneous construction of statute or common law.

*Id.* at 287.

In *Southwestern Telegraph & Telephone Co. v. Danaher*, 238 U.S. 482 (1915), the Court set aside a $6,300 penalty imposed under an Arkansas statute against a telephone company for discriminatory pricing and service as "plainly arbitrary and oppressive." However, the due process violation did not lie in the amount of the penalty, but in the absence of any intentional or reckless wrongdoing or departure from any standard of conduct by the company or any means of testing the reasonableness of the regulation in court. *Id.* at 491.

*Waters-Pierce Oil Co. v. Texas*, 212 U.S. 86 (1909), upheld $1.6 million in penalties imposed under a Texas anti-trust statute. "We can only interfere with such legislation and judicial action of the states enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law." The Court found the penalty not excessive, solely on the basis of the wealth of the defendant, which "amounted to more than forty millions of dollars, as testified by its president." *Id.* at 112.

ATLA submits that these decisions provide little support for the proposition that a punitive damage awards arrived at under fair procedures may violate substantive due process.

The objection is not simply that these are *Lochner*-era cases.[3] Without exception, the cited decisions involve statutory penalties. As Justice Souter explained in *County of Sacramento v. Lewis*, 523 U.S. 833 (1998), the Court's substantive due process jurisprudence has addressed legislation and executive action, developing a distinct mode of analysis for each. *Id.* at 846. The Court has no historical or constitutional framework for analyzing the substantive due process claims raised within the judicial branch of government by civil litigants whose liability for punitive damages comports with state law and was imposed under fundamentally fair procedures.

To the extent the precedents reviewed above support substantive due process limits on statutory penalties, they do not and should not extend to civil jury awards. First, the Court was addressing statutory penalties established in advance without regard to the circumstances of any particular violation. So, for example in *Williams* and *Seaboard*, the defendants argued, essentially, that the statutes afforded *too little* discretion, i.e., that the penalty was disproportionate as applied, in view of the relatively small losses suffered by the specific plaintiffs. Jury awards of punitive

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[3] The fact that the *Lochner* dissenters voted with the court in these cases is not surprising. *Cf. TXO*, 509 U.S., at 455. The Court upheld the penalty in every case except *Danaher*, which did not address excessiveness at all, *See BMW*, 517 U.S., at 601 (Scalia, J., dissenting).

damages, by contrast, *are* tailored to the circumstances of each individual case, serving the State's interest in "meaningful individualized assessment of appropriate deterrence and retribution." *Haslip*, 499 U.S., at 20.

Second, the Due Process Clause is, of course, directed at *government* action. *Daniels v. Williams*, 474 U.S. 327, 331-32 (1986); *DeShaney v. Winnebago County D.S.S.*, 489 U.S. 189 (1989). The jury, however, has historically served as a shield between the government and citizens. *Parklane Hosiery Co. v. Shore*, 439 U.S. 322, 343 (1979) (Rehnquist, C.J., dissenting); Alan Howard Scheiner, *Judicial Assessment of Punitive Damages, the Seventh Amendment and the Politics of Jury Power*, 91 Colum. L. Rev. 142, 146-56 (1991). The jury, of course, must act in accord with fair procedures. But the Court should not impose federal substantive due process limits on the fruits of the jury's labors based solely on the Court's willingness early in the last Century to scrutinize products of state legislatures.

Finally, the legacy of that historical period argues powerfully against embarking on a similar campaign against punitive damage awards upheld by state courts.

Justice White, writing for the Court in *Bowers v. Hardwick*, 478 U.S. 186 (1986), warned:

> The Court is most vulnerable and comes nearest to illegitimacy when it deals with judge-made constitutional law having little or no cognizable roots in the language or design of the Constitution. That this is so was painfully demonstrated by the face-off between the Executive and the Court in the 1930's, which resulted in the repudiation of much of the substantive gloss that the Court had

> placed on the Due Process Clauses of the Fifth and Fourteenth Amendments. There should be, therefore, great resistance to expand the substantive reach of those Clauses . . .

*Id.* at 194-95. Justice White was, of course, referring to the era named for *Lochner v. New York*, 198 U.S. 45 (1905). Ignoring Justice Holmes' admonition that "the Constitution is not intended to embody a particular economic theory," *Id.* at 75 (Holmes, J., dissenting), the Court used substantive due process to invalidate state economic regulations deemed by the Court as "clearly arbitrary and unreasonable, having no substantial relation to the public health, safety, morals, or general welfare." *Euclid v. Ambler Realty Co.*, 272 U.S. 365, 395 (1926).

Few doctrines have been as firmly rejected by this Court. *See, e.g., Ferguson v. Skrupa*, 372 U.S. 726, 730-31 (1963) ("we emphatically refuse to go back to the time when courts 'used the Due Process Clause to strike down state laws, regulatory of business or industrial conditions, because they may be unwise, improvident, or out of harmony with a particular school of thought.'"), quoting *Williamson v. Lee Optical*, 348 U.S. 483, 488 (1955). *Lochner* is now viewed as "one of the most ill-starred decisions that [the Court] ever rendered. William H. Rehnquist, THE SUPREME COURT: HOW IT WAS, HOW IT IS 205 (1987). In the years following its unlamented end in *West Coast Hotel Co. v. Parish*, 300 U.S. 379 (1937), the *Lochner* era has served as a cautionary reminder of the wisdom of "caution and

restraint" on the part of the Court. *Moore v. City of East Cleveland*, 431 U.S. 494, 503 (1977).[4]

The Court has most emphatically rejected any expansionist constitutional reasoning that "would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). The Due Process Clause, the Court has stated, must not be used "to impose federal duties that are analogous to those traditionally imposed by state tort law." *Collins v. City of Harker Heights, supra,* 503 U.S. at 128. Nor should it "supplant traditional tort law in laying down rules of conduct to regulate liability for injuries that attend living together in society." *Lewis*, 523 U.S., at 848, quoting *Daniels v. Williams,* 474 U.S. 327, 332 (1986). ATLA urges this Court to reconsider its holding in *BMW* in the light of its own wise advice.

The Court looks to "Our Nation's history, legal traditions, and practices [to] provide the crucial guideposts . . . that direct and restrain our exposition of the Due Process Clause." *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997). The majority opinion in *BMW*

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[4] Judge Posner has written that substantive due process still "stinks in the nostrils of modern liberals and modern conservatives alike." Richard A. Posner, OVERCOMING LAW 179-80 (1995). Yet, he observes, "there is a movement afoot (among scholars, not as yet among judges) to make the majority opinion in *Lochner* the centerpiece of a new activist jurisprudence." Richard A. Posner, THE FEDERAL COURTS: CRISIS AND REFORM 209 n.25 (1985). *See also* Michael J. Phillips, *Another Look at Economic Substantive Due Process*, 1987 Wis. L. Rev. 265, 266 n.7, offering notable examples of that "movement."

leads this Court into foreign territory – substantive control of state court damage awards. It is an area in which the Court acts without solid support in precedent and historical practice and which has traditionally been governed by state courts and legislatures.

### B. Substantive Due Process Review Adds Little to Judicial Safeguards Against Excessive Awards Already Provided By Common Law.

The Court might well overcome its reluctance to extend substantive due process to this field of law historically administered by the states if, as Justice Scalia has remarked, "it had something useful to say." *BMW*, 517 U.S., at 602 (Scalia, J., dissenting). ATLA respectfully submits that review of punitive damage awards for gross excessiveness under the substantive component of the Due Process Clause does not – and cannot – add significantly to the protection against arbitrary awards already provided by state courts.

State courts, applying the principles of the common-law, review punitive damage verdicts for excessiveness. Indeed, this Court has held that such review is so rooted in the common-law tradition and so important a safeguard against arbitrary and excessive verdicts, that it is required of state courts as a matter of procedural due process. *Honda Motor Co. v. Oberg*, 512 U.S. 415, 421-26 (1994).

This Court has not clearly differentiated substantive due process excessiveness from common law excessiveness. The Court's discussions suggest that the two standards share common-law roots and are roughly equivalent. The Court held in *Haslip* that the common-law method of assessing punitive damages,

including judicial review "to ensure that it is reasonable" comports with due process. 499 U.S., at 15. At the same time, the Court has steadfastly maintained that its "constitutional calculus" is informed by a "general concer[n] of reasonableness." *BMW*, 517 U.S., at 583; *TXO*, 509 U.S., at 458; *Haslip*, 499 U.S., at 18. This equivalence comports with the Court's foundational due process principle that "traditional practice provides a touchstone for constitutional analysis." *Oberg*, at 430, citing *Murray's Lessee v. Hoboken Land & Improvement Co.*, 18 How. 272, 15 L.Ed. 372 (1856).

However, a constitutional standard that essentially duplicates state common-law review offers little in the way of additional protection against excessive awards, which is the Court's apparent objective. It merely transforms excessiveness into a federal constitutional question and this Court into a Court of Additional Appeals from state supreme courts.

The argument that a federal level of review is necessary to correct erroneous or overly deferential application of excessiveness review by state courts is not persuasive. This Court has long rejected the notion that asserted errors by state courts applying state law are reviewable as federal due process violations. *See Missouri Pacific Ry. Co. v. Humes*, *supra*, 115 U.S., at 520-21. Moreover, this Court has already made clear:

> [S]tate law generally imposes a requirement that punitive damages be "reasonable" . . . [However,] we do not suggest that a defendant has a substantive due process right to a correct determination of the "reasonableness" of a punitive damages award.

*TXO*, 509 U.S., at 458, n.24.

The Court has also suggested that the federal due process standard of excessiveness might be *less* stringent than the common-law standard. The plurality in *TXO* stated that "violation of a state law 'reasonableness' requirement would not, however, necessarily establish that the award is so 'grossly excessive' as to violate the Federal Constitution." 509 U.S., at 458, n.24. If that is the case, it would appear even less likely that substantive due process review can remedy problems of excessiveness that concern the Court. More importantly, to enforce a federal outer limit on punitive damage awards that is not tethered to the common-law standard raises concerns that substantive due process may simply mask a "gut feeling" that a particular award is too much. As Justice Kennedy warned:

> A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend.

*Id.* at 466-67 (Kennedy, J., concurring in part).

Nor can it be argued that a federal constitutional limit on the amount of punitive damages permits this Court to issue more refined and specific rules to deal with excessive awards. The Court has repeatedly turned away entreaties to establish a categorical or formulaic test, emphasizing that the due process clause simply cannot provide such precision. *Haslip*, 499 U.S.,

at 18 ("We need not, and *indeed we cannot*, draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case.") (emphasis added); *BMW*, 517 U.S., at 582-83; *TXO*, 509 U.S., at 458.

This response highlights the difficulty of employing substantive due process to regulate punitive damage awards. Mere "platitudes," as Justice Scalia points out, provide no useful guidance to the state and lower federal courts. *BMW*, 517 U.S., at 606 (Scalia, J., dissenting). However, the more specific and categorical the limitations this Court might impose, the less they resemble constitutionally mandated due process and the more they simply appear to reflect the predilections of a majority of the Court.

Finally, there would appear to be no natural stopping place for the Court's venture into applying economic substantive due process to jury awards. As the Court has noted, there are many issues entrusted to the broad discretion of juries, including various types of noneconomic damages, that resist mathematical precision. *See Haslip*, 499 U.S., at 20. Opening the door to substantive review of jury decisionmaking may well invite disappointed state court litigants of many stripes to seek to make the Due Process Clause "a font of tort law to be superimposed upon . . . States." *Paul v. Davis*, 424 U.S. 693, 701 (1976). It is a door which this Court should shut.

### C. To The Extent The Eighth Amendment Applies To Excessive Punitive Awards, Substantive Due Process Is Inapplicable

This Court's opinion in *Cooper Industries, Inc., v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), presents

an additional reason for the Court to overrule *BMW*. The Court in *Cooper Industries* described punitive damages as "quasi-criminal" penalties which "operate as 'private fines,'" 532 U.S., at 432. The Court further stated:

> Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States.

*Id.* at 433-34. Although the matter is not free from doubt,[5], the quoted language strongly suggests that the Court now views the Excessive Fines Clause as applicable, through the Fourteenth Amendment, to state court awards of punitive damages.

If the Excessive Fines Clause is now available for defendants to challenge the excessiveness of punitive damages, then the Eighth Amendment "provides an explicit textual source of constitutional protection" and claims of unconstitutional government action must be analyzed under "that Amendment, not the more generalized notion of 'substantive due process.'" *Graham v. Connor,* 490 U.S. 386, 395 (1989). *See also id.* at 395 n.10 (convicted prisoners claiming excessive force

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[5] The Court in *Cooper Industries* did not explicitly overrule its holding in *Browning-Ferris Industries, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 260 (1989), that the "Excessive Fines Clause does not apply to awards of punitive damages in cases between private parties."

may not rely on substantive due process because any protection substantive due process might afford is, "at best redundant of that provided by the Eighth Amendment," citing *Whitley v. Albers*, 475 U.S. 312, 327 (1986)); *County of Sacramento v. Lewis*, 523 U.S. 833, 842-43 (1998).

### D. Substantive Due Process Intrudes Upon Matters Of State Law And Policy Which Are Best Left To State Courts And Legislatures.

Substantive due process review of punitive damage awards necessarily invites this Court to interpose its own views regarding matters of state law and policy. The Court in *BMW* sought to establish due process "guideposts" – reprehensibility, ratio, and comparable sanctions – which might appear at first blush to command uniform agreement. However, "their necessary effect is to establish federal standards governing the hitherto exclusively state law of damages." *BMW*, 517 U.S., at 605 (Scalia, J., dissenting).

Reprehensibility, for example, beyond the broad proposition that misconduct causing personal injury is more blameworthy than that resulting in economic harm, *see id.* at 576, masks important state policy issues.

Outrage reflects values, and is not uniformly scaled among Americans in all parts of the nation. The people of Utah, for example, may view drunk driving as particularly worthy of punishment and deterrence. *See* Utah Code Ann. § 78-18-1(1)(b) (exempting civil suits involving driving while intoxicated from statutory restrictions on punitive damages.) The people of West Virginia, as was brought to this Court's attention in *TXO*, view with particular outrage the fraudulent exploitation of the state's mineral resources.

The residents of a state with a large industrial labor force may react with a greater degree of outrage at willful disregard of workplace safety. Other states may assign particular blameworthiness to fraudulent schemes that prey on senior citizens.

State courts and legislatures bear the responsibility of ensuring that the law reflects the values of the state's people. It is surely not the role of this Court to declare, as a matter of constitutional law, that a state takes the safety of its highways or its workplaces overly seriously.

Although the Court's "ratio" guidepost can be expressed mathematically, the Court emphatically rejected the imposition of a bright-line limit. *BMW*, 517 U.S., at 582-83. The Court suggested that various circumstances may warrant a relatively high ratio of punitive to compensatory damages, such as where a particularly egregious act results in a small economic loss. *Id.* Thus this guidepost may involve the Court in value judgments similar to reprehensibility.

The "sanctions for comparable misconduct" guidepost presents even greater potential intrusion into matters of state law. First, the identification of appropriately comparable sanctions is not a mere mechanical process. For example, where the defendant has marketed a dangerously defective vehicle, resulting in fatalities, should the relevant sanction be the nominal fine provided for in the Vehicle Code or the penalty for negligent homicide? *See Romo v. Ford Motor Co.*, 99 Cal. App. 4th 1115, 1159, 122 Cal.Rptr.2d 139, 164 (2002). Indeed, in this case, State Farm argues strenuously to this Court that it was deprived of due process because the Utah court erred in its determination of the penalties provided for

comparable misconduct under the Utah Unfair Claims Practices Act, Utah Code Ann. 31A-26-301 *et seq.*, the Utah Pattern of Unlawful Activity Act, Utah Code Ann. 76-10-1602(4), and various provisions of the Utah Criminal Code. Brief of Petitioner, at 38-41.

Second, proper evaluation of civil or criminal sanctions under state law frequently requires interpretation of the relevant statute. In this case, for example, State Farm argues to this Court that the Utah Supreme Court erred in interpreting Utah Code Ann. 76-3-303 as authorizing imprisonment for misconduct comparable to State Farm's. Brief of Petitioner, at 40.

Finally, civil and criminal penalties do not exist in isolation from punitive damages. Some states, as a matter of policy, may rely more heavily on punitive damage awards precisely because they are perceived as a more effective punishment and deterrent than other penalties. As the California Court of Appeal stated:

> It is precisely because monetary penalties under government regulations prescribing business standards or the criminal law are so inadequate and ineffective as deterrents against a manufacturer and distributor of defective products that punitive damages must be of sufficient amount to discourage such practices.

*Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757, 820, 174 Cal. Rptr. 348, 389 (1981).

One need not agree with the wisdom of any of a state's policy choices to recognize that they are state policies and state choices. Federal judges countermanding those policies under the rubric of

substantive due process represents a dramatic affront to the principles of federalism.

## II. PROCEDURAL DUE PROCESS PROHIBITS COURTS FROM EXCLUDING EVIDENCE AND REFUSING CLEAR JURY INSTRUCTIONS ON ISSUES RELEVANT TO THE APPROPRIATE AMOUNT OF PUNITIVE DAMAGES.

### A. Proper Jury Instructions Are Key to Preventing Arbitrary or Biased Verdicts.

Rejecting the pursuit of a chimerical substantive due process limit need not leave defendants facing punitive damages "run wild." *Haslip,* 499 U.S., at 18. This Court has already recognized that procedural safeguards, most especially clear and specific instructions to the jury regarding the proper evaluation of the evidence and application of the factors relevant to the amount of punitive damages, are the most effective means of protecting against arbitrary awards.

Members of this Court have expressed concern with the frequency and size of punitive damage awards. *See, e.g., Haslip,* 499 U.S., at 61-62 (O'Connor, J. dissenting) ("Recent years . . . have witnessed an explosion in the frequency and size of punitive damage awards); *TXO,* 509 U.S., at 500 (O'Connor, J., dissenting) (similar).

ATLA submits that, while a few awards may raise judicial eyebrows, there is no evidence of a widespread, dramatic increase in punitive damages. One salutary result of this Court's attention to punitive damage awards has been to prompt extensive empirical research. Professor Michael Rustad offers a detailed overview of the results of these studies,

conducted by respected and objective researchers using a variety of data sets. The results uniformly demonstrate that punitive damages generally are awarded relatively infrequently and tend to be modest in amount. Michael L. Rustad, *Unraveling Punitive Damages: Current Data and Further Inquiry*, 1998 Wis. L. Rev. 15 (1998).

A comprehensive summary of this empirical research is set forth in the Brief of Amici Curiae of Certain Leading Social Scientists and Legal Scholars.

The members of the Court who have raised concerns regarding punitive damages have also clearly identified the root cause: woefully unguided juries. Punitive damage awards become suspect where juries are told "little more than . . . to do what they think is best" and are "left largely to themselves in making this important, and potentially devastating, decision." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 281 (1989) (Brennan, J., concurring); *see also TXO,* 509 U.S., at 474 (O'Connor, J., dissenting) (noting that "the risk of prejudice, bias and caprice" in jury decisions involving punitive awards is especially high because "juries sometimes receive only vague and amorphous guidance").

The Court in *Haslip* recognized that jury instructions which properly "enlightened the jury as to the punitive damages' nature and purpose" would "reasonably accommodate[] [the defendant's] interest in rational decisionmaking" as well as the state's interest "in meaningful individualized assessment of appropriate deterrence and retribution." 499 U.S., at 19-20. As this Court has emphasized, jury instructions are "a well established and, of course, important check against excessive awards." *Oberg*, 512 U.S., at 433.

Indeed, they are so important that a court's failure to give the jury appropriate instructions for assessing punitive damages must be viewed as "inconsistent with due process." *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in judgment).

Despite this Court's emphasis in *Haslip* on the importance of effective jury instruction, Justice O'Connor has observed, "many courts continue to provide jurors with skeletal guidance that permits the traditional guarantor of fairness--the jury itself--to be converted into a source of caprice and bias." *TXO,* 509 U.S., at 500-01 (O'Connor, J., dissenting). Ford Motor Co. in its amicus brief informs this Court that some courts persist in delivering "bare-bones" and skeletal jury instructions. Brief of Ford Motor Co. at 22-23. (citing examples). Indeed, although ATLA disagrees with Ford's specific substantive complaints, ATLA agrees with Ford's general proposition that, as this Court has long recognized, "proper jury instructions are crucial" to ensure that jury verdicts are consistent with constitutional limits on state authority." Id. at 20.

This Court should hold that a court's refusal to provide instructions reasonably calculated to enable the jury to evaluate the evidence and apply the factors relevant to the amount of punitive damages in accordance with state law violates procedural due process.

Unfortunately, the Court's substantive due process decision in *BMW* does little to improve the fairness and reliability of jury decisionmaking. The focus of the majority's opinion is to erect due process "guideposts" to be applied by reviewing courts in evaluating the excessiveness of punitive awards. The

criteria and evidence the Court deems important to the appropriate amount of punitive damages need not be presented to the jury at all. For reviewing courts to set aside jury awards on the basis of facts and factors that were not introduced at trial does nothing to improve the fairness of punitive damages verdicts. Rather, this process trivializes the ideal of trial by jury.

Justice O'Connor has cut to the heart of the matter:

> By giving these factors to juries, the State would be providing them with some specific standards to guide their discretion. This would substantially enhance the fairness and rationality of the State's punitive damages system.

*Haslip*, 499 U.S., at 57 (O'Connor, J., dissenting) (referring to factors established by Alabama court).[6]

This Court should hold that, as a matter of procedural due process, litigants are entitled to present

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[6] Some states expressly provide that such evidence may be introduced. *See, e.g.*, Ore. Rev. Stat. § 30.925(3)(g) (1991) (in assessing punitive damages in product liability actions, the jury may consider "punitive damage awards to persons in situations similar to the claimant's and the severity of criminal penalties to which the defendant has been or may be subjected"); *Tuttle v. Raymond*, 494 A.2d 1353, 1356 (Me. 1985) (defendant entitled to present factfinder with evidence of any criminal punishment imposed, as mitigating factor); *Cheevers v. Clark*, 449 S.E.2d 528 (Ga. App. 1994) (defendant in personal injury suit seeking punitive damages for harm caused by drunk driving permitted to read to the jury the criminal penalties applicable if he were prosecuted); *Owens-Corning Fiberglas Corp. v. Ballard*, 749 So.2d 483, 488 (Fla. 1999) (punitive awards in other cases is a proper factor for juries to consider in deciding the amount of punitive damages to award).

evidence and argument relevant to any factor affecting the appropriate amount of punitive damages. *Cf. Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 108 (4th Cir. 1991) (A federal court "cannot consistent with the Seventh Amendment, evaluate a jury's verdict based on evidence that the jury was not permitted to consider at trial or on a legal standard not given to the jury."). *See also,* Charles Jared Knight *State-Law Punitive Damage Schemes And The Seventh Amendment Right To Jury Trial In The Federal Courts*, 14 Rev. of Litig. 657, 698-703 (1995).

### B. Juries Are Competent to Render Fair Verdicts When Properly Instructed.

Our justice system entrusts many important decisions to ordinary Americans sitting as jurors, even where life and liberty are at stake. See *Ring v. Arizona,* 122 S.Ct. 2428 (2002) (statute allowing trial judge to determine the presence of the aggravating factors required for imposition of the death penalty violates the Sixth Amendment right to a jury trial); *Apprendi v. New Jersey,* 530 U.S. 466 (2000) (any fact that increases penalty for a crime beyond the prescribed statutory maximum must be submitted to the jury).

The Constitution values the role of the jury in administering justice in both civil and criminal actions and its capacity to tailor its decisions to the unique circumstances of a case. *See Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 624 (1991).

As this Court stated in a capital punishment case,

> the inherent lack of predictability of jury decisions does not justify their condemnation. On the contrary, it is the jury's function to make the difficult and uniquely human judgments that defy

> codification and that 'build discretion, equity and flexibility into a legal system.'

*McKlesky v. Kemp*, 481 U.S. 279, 331 (1987). *See also Parklane Hoisery Co. v. Shore*, 439 U.S. 322, 343-44 (1979) (Rehnquist, J., dissenting) ("Trial by a jury of laymen rather than by the sovereign's judges was important to the founders because juries represent the layman's common sense, the 'passional elements in our nature,' and thus keep the administration of law in accord with the wishes and feelings of the community.") (quoting Oliver W. Holmes, COLLECTED LEGAL PAPERS 237 (1920)).

Empirical studies overwhelmingly demonstrate the wisdom of citizen participation in the justice system. One of the largest empirical studies of actual jury performance, sponsored by the Roscoe Pound Foundation, found that:

> Juries overwhelmingly take their duties seriously . . . Juries are evidence-oriented . . . with the personalities of the participants in the trial and other subsidiary matters only of minor concern to them . . . Juries as a group apparently also understand enough of the law that they are able to arrive at legally supportable verdicts in a very large majority of cases . . . The evidence also strongly suggest that jurors rarely increase the size of an award because they think the defendant has ample insurance to cover it, nor do they ordinarily make awards out of sympathy.

John Guinther, THE JURY IN AMERICA 102 (1988). The study concludes that "juries are, on the whole, remarkably adept as triers of fact. Virtually every study

of them, regardless of research method, has reached that conclusion." *Id.* at 230.

In the years since that study, a wide array of social science research projects has examined the performance of juries in actual trials. A survey of the growing body of empirical findings, conducted under the auspices of the Division of Research at the Federal Judicial Center, found that "doubts about jury competence expressed by jury critics stand in sharp contrast to the judgments of scholars who conduct research on jury decisionmaking." Joe S. Cecil, Valerie P. Hans, and Elizabeth C. Wiggins, *Citizen Comprehension of Difficult Issues: Lessons from Civil Jury Trials,* 40 Am. U. L. Rev. 728, 744-45 (1991).

Additional recent empirical studies confirm that juries are capable of deciding cases on the basis of the evidence, that they conscientiously follow the trial court's instructions, and that their verdicts conform in large measure with the results that judge's themselves would return.

A detailed examination of these objective empirical studies is presented to this Court in an amicus brief prepared by many of the researchers themselves in the Brief of Amici Curiae of Certain Leading Social Scientists and Legal Scholars.

Those who attack juries as "inherently" arbitrary can point to no persuasive objective studies of real juries. See Brief of Certain Leading Business Corporations as Amici Curiae. That attack relies heavily on a study, partially funded by Exxon, involving mock-jury decisionmaking, published in Cass R. Sunstein, Daniel Kahneman, David Schkade,

*Assessing Punitive Damages (With Notes On Cognition And Valuation In Law)*, 107 Yale L.J. 2071(1998).

ATLA submits that, to the extent that study offers any useful insight, it is that clear and precise jury instructions are needed for fair and reasonable jury awards of punitive damages

The study gathered paid participants at a hotel where they were given packets containing general directions along with ten scenarios of about 200 words each describing personal injury lawsuits against medium and large corporations. Participants were asked how outrageous they found the defendant's behavior, the level of deserved punishment on a scale of 0 to 6, and a dollar amount of punitive damages they would award. *Id.* at 2095. Most participants completed their questionnaires in 30 to 45 minutes. *Id.* at 2146.

The results showed that participants were in close agreement with respect to the degree of outrageousness of the misconduct and the scaled level of punishment deserved. *Id.* at 2097-98. The dollar amounts participants would award as punitive damages, however, varied greatly. *Id.* at 2099-2100.

Based on these results, the researchers recommended that the responsibility of assessing the amount of damages be taken out of the hands of juries in cases involving punitive damages, pain and suffering, libel, sexual harassment and other civil rights violations, intentional infliction of emotional distress, administrative penalties, and contingent valuation. *Id.* at 2074. Judges, the researchers stated, were also unable to map a consistent dollar amount to particular misconduct. *Id.* at 2127. Instead, the researchers

recommended that this determination be made by "technocratic" experts. *Id.* at 2079.

In ATLA's view, the study most powerfully demonstrates what this Court already observed: that unlimited jury discretion and inadequate guidance from the court "may invite extreme results." *Haslip*, 499 U.S., at 18; *see also TXO*, 509 U.S., at 475 (O'Connor, J., dissenting) ("it cannot be denied that the lack of clear guidance heightens the risk that arbitrariness, passion, or bias will replace dispassionate deliberation as the basis for the jury's verdict."). Certainly the performance of test participants asked to make snap decisions based on minimal information, without evidence and argument from both sides, and without detailed jury instructions as to the appropriate factors for assessing punitive damages, bears this out.

Additionally, the study offers no support for the proposition that arbitrariness of awards can be addressed by requiring appellate judges to determine excessiveness as a matter of substantive due process. The researchers themselves point out that:

> Judges are not likely to be able to capture the community's sentiments with respect to either dollar awards or punitive intent. . . . The most important point is that judges too are likely to have difficulty in mapping normative judgments onto dollar amounts, and while judicial judgments may reduce variance, there is likely to be a continuing problem of erratic judgments or the use of anchors that introduce arbitrariness of their own.

*Id.* at 2127-28.

At the very heart of the attacks on juries, and implicit in the notion that judges must be armed with substantive due process authority to override jury verdicts, there lies a myth: The lawless jury. Two centuries of jurisprudence and extensive recent empirical research flatly contradict this dark and cynical portrait of Americans who take their place in the jury box. The myth is wrong. Due process of law finds no higher expression than in an informed and independent civil jury.

## CONCLUSION

For the above reasons, the decision of the Supreme Court of Utah should be affirmed.

Respectfully submitted,

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