IN THE COURT OF APPEALS OF ARKANSAS

CASE NO. CA 08 00834

BEVERLY ENTERPRISES, INC., *ET AL.* — APPELLANTS

v.

VALERIE KEATON, Individually and as Administratrix of the Estate of HERMAN JOHNSON, Deceased — APPELLEE

AMICI CURIAE BRIEF OF AMERICAN TORT REFORM ASSOCIATION, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, NFIB SMALL BUSINESS LEGAL CENTER, COALITION FOR LITIGATION JUSTICE, INC., AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, NATIONAL ASSOCIATION OF MUTUAL INSURANCE COMPANIES, AMERICAN CHEMISTRY COUNCIL, AMERICAN PETROLEUM INSTITUTE, AMERICAN HEALTH CARE ASSOCIATION AND THE NATIONAL CENTER FOR ASSISTED LIVING, PHARMACEUTICAL RESEARCH AND MANUFACTURERS OF AMERICA, AMERICAN TRUCKING ASSOCIATIONS, AND ASSOCIATION OF AMERICAN RAILROADS IN SUPPORT OF DEFENDANTS-APPELLANTS

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QUESTION PRESENTED

Whether the trial court erred in holding that Ark. Code Ann. § 16-55-208, a flexible cap on punitive damages awards for unintentional acts, violates Article V § 32 (workers' compensation; limitations on recoveries for injuries to persons or property or death) and Article IV § 2 (separation of powers) of the Arkansas Constitution.

STATEMENT OF INTEREST

As organizations that represent Arkansas companies and their insurers, *amici* have an interest in supporting laws that set appropriate limits on punitive damages. *Amici*'s members also have an interest in supporting laws that protect defendants, particularly individuals and smaller businesses, from punitive damages overkill. In addition, *amici*'s members have an interest in ensuring that the civil litigation environment in Arkansas is fair and balanced, reflects sound policy, and promotes due process. The subject cap furthers these goals. Accordingly, *amici* urge the Court to uphold the cap.

STATEMENT OF FACTS

Amici adopt the Appellants' Statement of Facts.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The subject appeal focuses on the General Assembly's broad public policy power to create a fair and flexible outer limit on punitive damages awards. Punitive damages serve no compensatory purpose.

In recent years, the United States Supreme Court and a majority of states have

taken measures to rein in excessive punitive damages that may violate defendants' due process rights.

Ark. Code Ann. § 16-55-208 does not violate Article V § 32 of the Arkansas Constitution, because punitive damages fall outside the scope of Section 32's prohibition against statutory limits on compensatory damages. Punitive damages may be awarded "in" personal injury and death cases, but they are not awarded "*for injuries* resulting in death or for injuries to persons or property."

The cap also does not violate the separation of powers reflected in Article IV § 2 of the Arkansas Constitution. The cap does not intrude on the judiciary's constitutional powers or jurisdiction. Trial courts continue to have the power to remit damages within the confines of the statute. The General Assembly has not acted unreasonably or arbitrarily. Indeed, if the Court were to strike down the cap, the Court would be violating the separation of powers by sitting as a "super legislature."

ARGUMENT

I. Punitive Damages: A Historical Overview

Punitive damages are not normal civil or tort law damages. They are not awarded to compensate for harm; that purpose is accomplished by compensatory damages, which provide compensation for both economic and noneconomic losses. Punitive damages are "a *penalty* for conduct that is malicious or perpetrated with the deliberate intent to injure another," *Advocat, Inc. v. Sauer*, 353 Ark. 29, 50, 111

S.W.3d 346, 358 (emphasis added), *cert. denied*, 540 U.S. 1012 and 540 U.S. 1004 (2003), and amount to "a windfall for the plaintiff." *Union Pac. R.R. Co. v. Barber*, 356 Ark. 268, 305, 149 S.W.3d 325, 350, *cert. denied*, 534 U.S. 940 (2004).The modern Anglo-American doctrine of punitive damages dates back to two English cases, *Huckle v. Money*, 95 Eng. Rep. 768 (C.P. 1763), and *Wilkes v. Wood*, 98 Eng. Rep. 489 (C.P. 1763), which first used the term "exemplary damages" and expressed that "the punitive and deterrent purposes of damages awards could be separated from their compensatory function." D. Dorsey Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. Rev. 1, 14 (1982); *see also* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived Its Origins*, 37 Vand. L. Rev. 1117 (1984). These cases were followed by others approving punitive damages awards in a narrow category of torts involving conscious and intentional harm inflicted by one person on another, such as assault and battery, false imprisonment, and trespass. Punitive damages were allowed in these cases to supplement the criminal law system, which in eighteenth century England "punished more severely for infractions involving property damage than for invasions of personal rights." James B. Sales, *The Emergence of Punitive Damages in Product Liability Actions: A Further Assault on The Citadel*, 14 St. Mary's L.J. 351, 355 (1983).

The doctrine promptly crossed the Atlantic to early America. *See Patterson v. Thompson*, 24 Ark. 55, 1862 WL 487, *6 (1862) (exemplary damages "punish defendants for wrongs that the law does not enumerate as crimes."); *L.R. & F.S. R.R.*

Co. v. Payne, 33 Ark. 816, 1878 WL 1345, *4 (1878) (describing exemplary damages as the "civil justice ancillary to the deterring influences of more direct punishments on behalf of the State."). As in England, punitive damages were limited to intentional tort cases. In general, punitive damages "merited scant attention," because they "were rarely assessed and likely to be small in amount." Ellis, 56 S. Cal. L. Rev. at 2. Typically, punitive damages awards only slightly exceeded compensatory damages awards, if at all.

Beginning in the late 1960s, courts began to allow punitive damages in cases that did not involve intentional misconduct, such as in product liability actions. *See Toole v. Richardson-Merrell, Inc.*, 251 Cal. App. 2d 689 (1967) (holding for the first time that punitive damages were recoverable in a strict product liability action); *Forrest City Mach. Works, Inc. v. Aderhold*, 273 Ark. 33, 44, 616 S.W.2d 720, 726 (1981) (allowing punitive damages in a product liability case). The simultaneous development of strict product liability, *see* Ark. Code Ann. § 4-86-102 (adopted 1973), and the advent of "mass tort" litigation raised the risk that a defendant could be subjected to repeated punishment for an alleged risk in a *single* product line. The "perfect storm" that was created by these dramatic changes in punitive damages and liability law began to impact the frequency and size of punitive awards.

For example, until 1976, there were only three reported appellate court decisions upholding awards of punitive damages in product liability cases, and in each case the awards were relatively modest. *See Gillham v. Admiral Corp.*, 523 F.2d

102 (6th Cir. 1975), *cert. denied*, 424 U.S. 913 (1976) ($125,000 compensatory, $100,000 punitive); *Toole, supra* ($175,000 compensatory, $250,000 punitive); *Moore v. Jewel Tea Co.*, 253 N.E.2d 636 (Ill. App. 1969) ($920,000 compensatory, $10,000 punitive), *aff'd*, 263 N.E.2d 103 (Ill 1970).

Then, in the late 1970s and 1980s, the size of punitive damages awards "increased dramatically," George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982), and "unprecedented numbers of punitive awards in product liability and other mass tort situations began to surface." John Calvin Jeffries, Jr., *A Comment on The Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 142 (1986); E. Donald Elliott, *Why Punitive Damages Don't Deter Corporate Misconduct Efficiently*, 40 Ala. L. Rev. 1053, 1061 (1989) (noting a "general trend toward awarding punitive damages more frequently and in larger amounts in recent years."). One commentator observed, "Today, hardly a month goes by without a multi-million dollar punitive damages verdict in a product liability case." Malcolm Wheeler, *A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 Ala. L. Rev. 919 (1989). By 1991, the United States Supreme Court expressed concern that punitive damages had "run wild." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *see also TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor, J., dissenting) ("Recently, . . . the frequency and size of such awards have been skyrocketing" and "it appears that the upward trajectory continues unabated."). Between 1996 and 2001, the annual

number of punitive damages awards exceeding $100 million doubled. *See* John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transn'l L. 391, 392 (2004).

It is against this backdrop that the United States Supreme Court began to impose increasing strict limits on punitive damages, *see Haslip* (1991), *TXO* (1993); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *BMW of North Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2002); *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *Phillip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057 (2007); *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605 (2008), and states including Arkansas began to enact reforms such as Ark. Code Ann. § 16-55-208. *See* Victor E. Schwartz *et al.*, *Reining In Punitive Damages "Run Wild": Proposals for Reform By Courts And Legislatures*, 65 Brook. L. Rev. 1003 (2000). Now, a majority of states either limit[1] or bar punitive damages.[2]

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[1] *See* Ala. Code § 6-11-21; Alaska Stat. § 9.17.020; Ark. Code Ann. § 16-55-208; Colo. Rev. Stat. § 13-21-102; Conn. Gen. Stat. Ann. § 52-240b; Fla. Stat. Ann. §§ 768.73, Ga. Code Ann. § 51-12-5.1 (f)-(g); Idaho Code Ann. § 6-1604; Ind. Code Ann. § 34-51-3-4; Kan. Stat. Ann. § 60-3702; Me. Rev. Stat. Ann. tit.28-A § 2-804(b) (wrongful death); Miss. Code Ann. § 11-1-65; Mo. Ann. Stat. § 510.265.1; Mont. Code Ann. § 27-1-220; Nev. Rev. Stat. Ann. § 42.005; N.J. Stat. Ann. § 2A:15-5.14; N.C. Gen. Stat. § 1D-25; N.D. Cent. Code § 32.03.2-11(4); Ohio Rev. Code Ann. § 2315.21; Okla. Stat. Ann. tit. 23, § 9.1; Tex. Civ. Prac. & Rem. Code Ann. § 41.008; Va. Code Ann. § 8.01-38.1.

[2] Nebraska bars punitive damages on state constitutional grounds. Louisiana, Massachusetts, and Washington, and New Hampshire permit punitive damages only when authorized by statute. Michigan recognizes only exemplary damages supportable as compensatory, rather than truly punitive, while Connecticut has limited punitive recovery to the expenses of bringing the action. *See Baker*, 128 S. Ct. at 2622-2623.

II. Arkansas Constitution Article V § 32 Does Not Restrict the Legislature's Ability to Limit Punitive Damages

Plaintiff challenges Ark. Code Ann. § 16-55-208 as violating Article V § 32 of the Arkansas Constitution. Article V § 32 provides in relevant part: "no law shall be enacted limiting the amount to be recovered *for injuries* resulting in death or for injuries to persons or property. . . ." *Id.* (emphasis added). Punitive damages may be awarded "in" personal injury and death cases, but they are not awarded "for" such harms. Rather, punitive damages serve as a *penalty* to further society's interests in deterring quasi-criminal conduct. Plaintiff's argument blurs this critical distinction.

1. Punitive Damages Are Non-Compensatory; Article V § 32 Only Applies to Limits on Compensatory Damages

As explained, punitive damages are "a penalty for conduct that is malicious or perpetrated with the deliberate intent to injure another." *Advocat, Inc.*, 353 Ark. at 50, 111 S.W.3d at 358; *Routh Wrecker Serv., Inc. v. Washington*, 335 Ark. 232, 244, 980 S.W.2d 240, 240 (1998). "Their premise is that the compensatory damages have made the plaintiff whole, but further sanctions are justified to punish the defendant for its conduct in the case and to deter future, similar conduct by the defendant and others." *Jim Ray, Inc. v. Williams*, 99 Ark. 315, - S.W.3d - , 2007 WL 1831790 (Ark. App. June 27, 2007). As the Arkansas Supreme Court explained in *Holmes v. Hollingsworth*, 234 Ark. 347, 352 S.W.2d 96 (1961), ***"Punitive damages are not intended to remunerate the injured party for the damages sustained.*** Punitive damages are the penalty which the law inflicts on the guilty party, and are allowed as

a warning or an example to others." 234 Ark. at 353, 352 S.W.2d at 100 (emphasis added); *see also Harold McLaughlin Reliable Truck Brokers, Inc. v. Cox*, 324 Ark. 361, 373, 922 S.W.2d 327, 334 (1996) ("Appropriate compensation is not the test, but rather such damages are to be a penalty for conduct that is malicious or perpetrated with the deliberate intent to injure another.").

Likewise, in *Ray Dodge, Inc. v. Moore*, 251 Ark. 1036, 479 S.W.2d 518 (1972), the Arkansas Supreme Court explained, ***"compensation of a plaintiff is not the purpose of exemplary or punitive damages*** and an award may be somewhat of a windfall to him." 251 Ark. at 1044, 479 S.W.2d at 523; *see also Matthews v. Rodgers*, 279 Ark. 328, 336, 651 S.W.2d 453, 458 (1983) (punitive damages "constitute a penalty" amounting to "a windfall to the plaintiff."); *Union Pac. R.R. Co.*, 356 Ark. at 305, 149 S.W.3d at 350 (punitive damages amount to "a windfall for the plaintiff."); *Missouri Pac. R.R. Co. v. Arkansas Sheriff's Boys' Ranch*, 280 Ark. 53, 57-58, 655 S.W.2d 389, 392 (1983) *("[T]he measure of punitive damages is unlike the measure of compensatory damages* because punitive damages may validly amount to a windfall for a plaintiff.") (emphasis added).

The distinction between punitive and compensatory damages also was explained in *National Bank of Commerce (of El Dorado, Ark.) v. McNeil Trucking Co., Inc.*, 309 Ark. 80, 828 S.W.2d 584 (1992): *"Our common law authorizes the assessment of punitive, or punishment, damages against a wrongdoer as a way of furthering our governmental interests of deterring willful or wanton tortious conduct.* These damages are awarded

directly to the private plaintiff, rather than to the government, as are fines when the criminal law is used to advance similar governmental interests." 309 Ark. at 88, 828 S.W.2d at 588 (Dudley, J., concurring) (emphasis added). ***"The purpose of punitive damages is to vindicate the public interests; not to award the plaintiff a windfall. The windfall to the plaintiff is only a secondary result."*** 309 Ark. at 89, 828 S.W.2d at 589 (Dudley, J., concurring) (emphasis added).

In addition, the Arkansas Supreme Court has made clear that the restriction in Ark. Const. Art. V § 32 goes only to the "amount to be recovered for injuries resulting in death or for injuries to persons or property" and does not broadly foreclose legislative action with respect to other types of recoveries. In *Southwestern Bell Tel. Co. v. Wilks*, 269 Ark. 399, 402, 601 S.W.2d 855, 856 (1980), the Court upheld the constitutionality of a tariff limiting a telephone company's liability for listing omissions in the yellow pages telephone directory. The Court said, "we do not think that Article 5, Section 32 contemplates the type of injury sustained in this case by appellee that is, damage to his earnings from his optometric practice" 269 Ark. at 402, 601 S.W.2d at 856. It would be illogical to conclude that the General Assembly could restrict injuries for economic interests – which are compensatory in nature – yet somehow be blocked from limiting non-compensatory punitive damages. Indeed, in *Reimer v. Delesio*, 442 A.2d 731, 737 (Pa. Super. 1982), *aff'd*, 462 A.2d 1308 (Pa. 1983), a Pennsylvania trial court upheld a no-fault automobile insurance law which completely abolished punitive damages – notwithstanding language in Article III § 18

of the Pennsylvania Constitution that is virtually identical to (and, in fact, served as the model for) Article V § 32 of the Arkansas Constitution. The court in *Reimer* said that the punitive damages reform did not run afoul of Pennsylvania's Constitution, in part, because the statute did "not limit appellant's right to be made whole or fully compensated for the injuries she sustained as a consequence of appellee's negligence." *Id.* at 737; *see also Singer v. Sheppard*, 346 A.2d 897, 908 (Pa. 1975) (The framers of the Pennsylvania Constitution sought to prevent legislation *"which would impinge upon the right of one injured through the negligence of another to full recovery* ***for the losses suffered.***") (emphasis added). It is also telling that Pennsylvania has chosen to abolish punitive damages in medical liability actions. *See* 40 Pa. Stat. § 1303.505(d).

2. U.S. Supreme Court: Punitive Damages Are Non-Compensatory

The United States Supreme Court has recognized "that in our judicial system compensatory damages and punitive damages, although usually awarded at the same time by the same decisionmaker, serve different purposes." *Campbell*, 538 U.S. at 416. Compensatory damages "are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct." *Id.* (quoting *Cooper Indus.*, 532 U.S. at 432). By contrast, punitive damages serve a broader function; they are aimed at deterrence and retribution. *See id.* at 416; *Cooper Indus.*, 532 U.S. at 432; *Gore*, 517 U.S. at 568; *Haslip*, 499 U.S. at 19; *see also Williams*, 127 S. Ct. at 1066 (Stevens, J., dissenting) ("[A] punitive damages award, instead of serving a compensatory purpose, serves the entirely different purposes of retribution

and deterrence that underlie every criminal sanction."); *id* at 1068 (Scalia, J., dissenting) ("The purpose of punitive damages, it can hardly be denied, is not to compensate, but to punish."). Indeed, in *O'Gilvie v. United States*, 519 U.S. 79 (1996), the Court held that punitive damages in a tort suit were not received "on account of" personal injuries, therefore such awards do not fall within the Internal Revenue Code's exclusion for "any damages received . . . on account of personal injuries" and are taxable.

III. ARK. CODE ANN. § 16-55-208 PROMOTES DUE PROCESS AND REPRESENTS SOUND PUBLIC POLICY

1. U.S. Supreme Court Decisions Support State Punitive Damages Caps

In enacting Ark. Code Ann. § 16-55-208, the General Assembly heeded important constitutional law developments in a series of cases where the U.S. Supreme Court has warned that state courts may not impose punishment that violates civil defendants' due process rights and said that state legislatures can prevent such injustice by enacting caps limiting punitive damages to a small multiple of compensatory damages.

A. Ark. Code Ann. § 16-55-208 Protects Civil Defendants From Arbitrary and Excessive Punitive Damages

In *Haslip* (1991), the Court for the first time acknowledged that excessive punitive damages awards could violate the Fourteenth Amendment. 499 U.S. at 18. The Court said that a 4-1 ratio between punitive damage "may be close to the line" of "constitutional impropriety." *Id.* at 23-24. In *TXO* (1993), a plurality of the

Court said that "the Due Process Clause of the Fourteenth Amendment imposes substantive limits 'beyond which penalties may not go.'" 509 U.S. at 454. In *Oberg* (1994), the Court departed from substantive due process questions, holding that states must allow for judicial review of the size of punitive damages awards. The Court, however, noted that "[p]unitive damages pose an acute danger of arbitrary deprivation of property," and affirmed "that the Constitution imposes a substantive limit on the size of punitive damages awards." *Id.* at 432, 420.

Then, in 1996, the Court in *Gore* struck down an excessive award for the first time. The Court stated: "*Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.*" 517 U.S. at 574 (emphasis added). The Court provided three "guideposts" for states to follow: (1) the degree of reprehensibility of the defendant's conduct, (2) the ratio of punitive damages to the harm inflicted on the plaintiff, and (3) the civil or criminal penalties that could be imposed for comparable misconduct. *See id.* at 575. The Court emphasized that "a comparison between the compensatory award and the punitive award is significant." *Id.* at 581. Justice Breyer observed for three concurring justices: "Requiring the application of law, rather than a decision-maker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to *assure* the *uniform general treatment* of similarly situated persons that is the essence of the law itself." *Id.* at 587 (Breyer, J., concurring)

(emphasis added).

In *Cooper Industries* (2002), the Court held that appellate courts reviewing punitive damages for excessiveness must apply a *de novo* standard of review. *See* 532 U.S. at 431. The Court began its analysis with this helpful description of the fundamental difference between compensatory and punitive damages:

> [Compensatory damages] are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant's wrongful conduct. [Punitive damages], which have been described as "quasi-criminal," operate as "private fines" intended to punish the defendant and to deter future wrongdoing. A jury's assessment of the extent of a plaintiff's injury is essentially a factual determination, whereas its imposition of punitive damages is an expression of its moral condemnation. *Id.* at 432 (citations omitted).

In *Campbell* (2003), the Court again reversed a large award. Of significance here is the Court's discussion of the second *Gore* guidepost – the relationship between punitive damages and the plaintiff's harm. The Court said that, "in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process," repeated its *Haslip* and *Gore* statements that "an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety," and also referred to "a long legislative history . . . providing for sanctions for double, treble, or quadruple damages to deter and punish." 538 U.S. at 425. Finally, the Court stated, "When compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee."

Id.

Most recently, in *Baker* (2008), the Court, sitting as a common law court, explained that the "real problem" with punitive damages is their "stark unpredictability" – "the spread is great, and the outlier cases subject defendants to punitive damages that dwarf the corresponding compensatories." 128 S. Ct. at 2625. The Court, emphasizing that "*a penalty should be reasonably predictable in its severity*," *id.* at 2627, and concluded that "*as long 'as there are no punitive-damages guidelines, corresponding to the federal and state sentencing guidelines, it is inevitable that the specific amount of punitive damages awarded . . . will be arbitrary.*" *Id.* at (emphasis added; citation omitted). The Court then settled on a 1:1 ratio of punitive damages to compensatory damages as a "fair upper limit" in maritime cases. *See id.* at 2633. The ratio in Ark. Code Ann. § 16-55-208 clearly is intended to and does comply with the teachings of the U.S. Supreme Court. Further, it is particularly appropriate in tort cases, where plaintiffs often receive substantial compensatory damages. In these circumstances, as the U.S. Supreme Court has stated, even a 1:1 ratio can impose a severe sanction that crosses the line into unconstitutionality. *See Campbell*, 538 U.S. at 425.

B. State Legislatures May Enact Punitive Damages Caps

The Court also has made clear that there is no federal constitutional reason why state *legislatures* may not cap punitive damages in their states. For example, in *Haslip* (1991), Justice Scalia said, "State legislatures . . . have the power to restrict or abolish

the common-law practice of punitive damages, and in recent years have increasingly done so." 499 U.S. at 39 (Scalia, J., dissenting); *see also TXO*, 509 U.S. at 472 (Scalia, J., dissenting) ("State legislatures . . . have ample authority to eliminate any perceived 'unfairness' in the common-law punitive damages regime. . . .").

In *Gore* (1996), the Court explained, "States necessarily have considerable flexibility in determining the level of punitive damages that they will allow. . . ." 517 U.S. at 568. Concurring, Justice Breyer commented favorably on "legislative enactments . . . that . . . impose quantitative limits that would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards." *Id.* at 595 (Breyer, J., concurring). Again, in *Cooper Industries* (2002), the Court explained, ***"As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damages awards."*** 532 U.S. at 432 (emphasis added). The Court also noted. "A good many States have enacted statutes that place limits on the permissible size of punitive damages awards." *Id.* In *Campbell*, (2003), Justice Ginsburg said that "damages-capping legislation may be altogether fitting and proper," and noted that "the handiwork in setting a single-digit and 1-to-1 benchmarks could hardly be questioned." *Id.* at 431, 438 (Ginsburg, J., dissenting).

In short, U.S. Supreme Court opinions have repeatedly blessed state laws intended to assure that state courts comply with federal due process requirements. In fact, it is likely that if the states had taken more effective measures to address

unpredictable and excessive punitive damages sooner, the U.S. Supreme Court may not have been so active in imposing federal requirements. As a federal Fourth Circuit judge has explained,

> ***The relevant lesson learned from the punitive damages experience is that when the tort system becomes infected by a growing pocket of irrationality, state legislatures must step forward and act to establish rational rules.*** For some eight years, the Supreme Court had wrestled with the failure of state legislatures to act to rationalize punitive damage awards and had suggested that at some point constitutional limits would be reached. In 1996, as held in *BMW of North America,* they were.

Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L. Rev. 1401, 1414 (2004) (emphasis added).

2. The Overall Legislative Judgment Here Is Not Arbitrary

Even if this Court finds Article V § 32 of the Arkansas Constitution to apply, the cap still passes constitutional muster. Contrary to Plaintiff's assertion that this Court should apply "strict scrutiny" review here, the Arkansas Supreme Court has *consistently applied* a deferential "rational basis" review to civil justice reform legislation, *see Davis v. Parham*, 362 Ark. 352, 363, 208 S.W.3d 162, 169 (2005); *Eady v. Lansford*, 351 Ark. 249, 256, 92 S.W.3d 57, 61 (2002); *Raley v. Wagner*, 346 Ark. 234, 242, 57 S.W.3d 683, 688 (2001); *Adams v. Arthur*, 333 Ark. 53, 89, 969 S.W.2d 598, 616 (1998); *Owen v. Wilson*, 260 Ark. 21, 26, 537 S.W.2d 543, 545 (1976); *Carter v. Hartenstein,* 248 Ark. 1172, 455 S.W.2d 918 (1970), *appeal dismissed*, 401 U.S. 901 (1971), including an Article V § 32 challenge, *see White v. City*

of Newport, 326 Ark. 667, 672, 933 S.W.2d 800, 803 (1996). The challenging party must show that the act is "not rationally related to achieving any legitimate objective of state government under any reasonably conceivable state of facts." *Whorton v. Dixon*, 363 Ark. 330, 333, 333 n.2, 214 S.W.2d 225, 228, 228 n.2 (2005). In addition, "[i]s is well settled that there is a presumption of validity attending every consideration of a statute's constitutionality. . . . Any doubt as to the constitutionality of a statute must be resolved in favor of its constitutionality." *Shipp v. Franklin*, 370 Ark. 262, - S.W.3d - (2007) (citation omitted). The subject cap passes this test.

Here, the General Assembly's decision to set a reasonable limit on punitive damages does not impede Plaintiff's ability to recover full damages for her alleged harm. In fact, implementing caps is likely to speed up such recoveries and promote judicial economy by avoiding "excessiveness reviews" by trial and appellate courts. In addition, the cap helps to preserve assets for sick claimants who may otherwise see their compensatory recoveries limited if defendants' resources are depleted by earlier-filing plaintiffs that obtain "windfall" awards. This has happened, for example, in the asbestos litigation. *See, e.g.*, Mark A. Behrens & Barry M. Parsons, *Responsible Public Policy Demands an End to the Hemorrhaging Effect of Punitive Damages in Asbestos Cases*, 6 Tex. Rev. L. & Pol. 137 (2001). "Large awards may also tend to depress innovation," W. Kip Viscusi, *The Blockbuster Punitive Damages Awards*, 53 Emory L.J. 1405, 1407 (2004); *see also Browning-Ferris Indus. of Vt., Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257,

282 (1989) (O'Connor, J., concurring in part and dissenting in part) (noting "a detrimental effect on the research and development of new products"), and "adversely impact consumers and stockholders because we intuitively know that most corporations will not, and perhaps cannot, just 'absorb' the costs. The costs must be borne by someone, and those 'someones' are the customers and stockholders." Lisa Litwiller, *From Exxon to Engle: The Futility of Assessing Punitive Damages As Against Corporate Entities*, 57 Rutgers L. Rev. 301, 335 (2004). The subject cap addresses these concerns.

The cap also helps to safeguard defendants' due process rights, including the right not to be subjected to arbitrary and excessive punishment, and the right to have "fair notice" of the severity of punishment that may be meted out. *Gore*, 517 U.S. at 574. "The high stakes and high variability of punitive damages are of substantial concern to companies, as punitive damages may pose a catastrophic threat of corporate insolvency," particularly for smaller businesses and individuals. W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 285 (1998).

Finally, the State's interest in deterring misconduct is preserved because defendants remain subject to reasonable punishment in individual cases and the General Assembly provided for potential penalties to be adjusted to keep up with inflation. The cap also promotes the State's interest in fostering a legal environment that is fair and attractive to existing and potential employers/taxpayers. Arkansas is

not isolated in the economy; it must compete with nearby states (most of which have punitive damages caps) and other countries (many of which prohibit or strictly limit punitive damages) to attract jobs. If the state's legal climate is not competitive, job-creators and service providers will go elsewhere. *See, e.g.,* Editorial, Joseph Nixon, *Why Doctors Are Heading to Texas*, Wall St. J., May 17, 2008, at A9, *abstract available at* 2008 WLNR 9419738.

The General Assembly had to make a policy decision that balanced all of these considerations. The cap not only promotes legitimate state objectives, but does so in a manner which is rationally related to achieving those goals and is not arbitrary. Indeed, the cap is (1) in line with punishments typical at common law, *see Baker*, 128 S. Ct. at 2632-33; (2) similar to other civil penalties for wrongdoing, *see id.* at 2632; (3) much like caps enacted in many other states, *see supra* note 1; (4) consistent with due process, *see* discussion *supra*; and (5) supported by recommendations made by influential groups including ABA Special Committee on Punitive Damages, *Punitive Damages: A Constructive Examination* 62 (1986) (recommending 3:1 ratio); American College of Trial Lawyers, *Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice* 15 (Mar. 3, 1989) (recommending greater of 2:1 ratio or $250,000); and a study commissioned by the American Law Institute. *See* 2 Am. Law Inst., *Reporters' Study on Enterprise Responsibility for Personal Injury: Approaches to Legal and Institutional Change* 257 (Apr. 15, 1991) (recommending adoption of a ratio).

IV. ARKANSAS CONSTITUTION ARTICLE IV § 2 DOES NOT RESTRICT THE LEGISLATURE'S ABILITY TO LIMIT PUNITIVE DAMAGES

The General Assembly has the power to prescribe outer limits on quasi-criminal punitive damages awards. "It is well settled that it is for the legislative branch . . . to determine . . . the nature and extent of the punishment which may be imposed." *Sparrow v. State*, 284 Ark. 396, 397, 683 S.W.2d 218, 219 (1985); *see also State v. Bruton*, 246 Ark. 293, 295, 437 S.W.2d 795, 796 (1969) ("Enactment of penal statutes . . . is a function of the legislative branch of our state government."); *Blake v. State*, 244 Ark. 37, 43, 423 S.W.2d 544, 548 (1968) ("[I]t is within the power of the legislature to classify crimes and determine punishment for such classifications"). "Because punitive damages are awarded to punish and deter defendants and '[l]egislatures have extremely broad discretion in defining criminal offenses,' it necessarily follows that legislatures also 'enjoy broad discretion in authorizing and limiting permissible punitive damages awards.'" *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 9 (N.C. 2004) (quoting *Cooper Indus.*, 532 U.S. at 432.). Furthermore, contrary to Plaintiff's assertion, the subject punitive damages cap does not intrude on the judiciary's constitutional powers or jurisdiction, and no court rule is "fundamentally compromised." *State v. Sypult*, 304 Ark. 5, 7, 800 S.W.2d 402, 404 (1990). The General Assembly has acknowledged the role of the trier of fact in determining the amount of punitive damages, yet has exercised its law-making power to limit such damages. *See Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 490 (Ohio

2007) ("statutory damages limits do not intrude on the judicial power to determine damages".). The statute makes the Arkansas civil justice system more predictable by narrowing the range of punitive damages awards. "The trial court continues to have the power to remit damages within the confines of the statute." *Waste Disposal Center, Inc. v. Larson*, 74 S.W.3d 578 (Tex. App.-Corpus Christi 2002).

The "majority of states," *Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004), have held that "caps cannot violate the separation of powers, because [they] do no constitute a form of remittitur." *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1055-56 (Alaska 2002); *see also Judd v. Drezga*, 103 P.3d 135, 145 (Utah 2004); *Estate of Verba v. Ghaphery*, 552 S.E.2d 406, 411 (W. Va. 2001); *Kirkland v. Blaine County Med. Center*, 4 P.3d 1115, 1122 (Idaho 2000); *Pulliam v. Coastal Emer. Servs. of Richmond, Inc.*, 509 S.E.2d 307, 319 (Va. 1999); *Wessels v. Garden Way, Inc.*, 689 N.W.2d 526, 529 (Mich. App. 2004); *Jenkins v. Patel*, 688 N.W.2d 543, 544 (Mich. App. 2004). Remittitur operates on a case-by-case basis whereas caps are a general alteration applied to all cases. *See Gourley v. Nebraska Methodist Health System, Inc.*, 663 N.W.2d 43, 77 (Neb. 2003); *Garhart*, 95 P.3d at 581.

"Indeed, were a court to ignore the legislatively-determined remedy . . . the court would invade the province of the legislature." *Gourley*, 663 N.W.2d at 77 (quoting *Etheridge v. Med. Center Hosp.*, 376 S.E.2d 525, 532 (Va. 1989)).

V. MOST STATE LEGISLATIVE POLICY DECISIONS ON PUNITIVE DAMAGES HAVE BEEN UPHELD

The vast majority of courts have recognized that a plaintiff has no "right" to a "windfall recovery." For example, punitive damages caps similar to the one at issue here have been upheld on separation of powers and other grounds by the Ohio Supreme Court, *see Arbino, supra*; the North Carolina Supreme Court, *see Rhyne, supra*; the Alaska Supreme Court, *see Evans, supra*; Texas appellate courts, *see Waste Disposal Center, Inc. v. Larson*, 74 S.W.3d 578 (Tex. App.-Corpus Christi 2002); *Hall v. Diamond Shamrock Refining Co., L.P.*, 82 S.W.2d 5 (Tex. App.-San Antonio 2001), *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730 (Tex. App.-Hous. 1998); and the Fourth Circuit, *see Wackenhut Applied Tech. Center, Inc. v. Sygnetron Prot. Sys., Inc.*, 979 F.2d 980 (4th Cir. 1992). Nationwide, the vast majority of courts have upheld punitive damages reforms:

> **Alabama:** *Ex Parte Apicella*, 809 So. 2d 865 (Ala. 2001), *cert. denied*, 534 U.S. 1086 (2002) (legislature may remove from the jury the unbridled right to punish).
>
> **Alaska:** *State v. Carpenter*, 171 P.3d 41 (Alaska 2007) (upholding law requiring plaintiffs to share punitive damages with the state); *Reust v. Alaska Petroleum Contactors, Inc.*, 127 P.3d 807 (Alaska 2005) (same); *Evans ex rel. Kutch v. State*, 56 P.3d 1046 (Alaska 2002) (upholding punitive damages cap).
>
> **Florida:** *Gordon v. State of Florida*, 608 So. 2d 800 (Fla. 1992) (upholding law requiring plaintiffs to share punitive damages with the state), *cert. denied*, 507 U.S. 1005 (1993); *Hipp v. Liberty Nat'l Life Ins. Co.*, 39 F. Supp. 2d 1359 (M.D. Fla. 1999) (upholding $100,000 cap on

Florida Civil Rights Act claims).

Georgia: *Mack Trucks, Inc. v. Conkle*, 436 S.E.2d 635 (Ga. 1993) (upholding law providing for only a single punitive damages award against a products liability defendant; upholding law requiring plaintiffs to share punitive damages with the state); *State of Georgia v. Moseley*, 436 S.E.2d 632 (Ga. 1993) (upholding punitive damages sharing statute), *cert. denied*, 511 U.S. 1107 (1994).

Illinois: *Bernier v. Burris*, 497 N.E.2d 763 (Ill. 1986) (upholding law banning punitive damages in healing art or legal malpractice cases); *Siegall v. Solomon*, 166 N.E.2d 5 (Ill. 1960) (upholding law banning punitive damages in actions for alienation of affections); *Smith v. Hill*, 147 N.E.2d 321 (Ill. 1958) (upholding law banning punitive damages for breach of promise to marry).

Indiana: *Cheatham v. Pohle*, 789 N.E.2d 467 (Ind. 2003) (upholding law requiring plaintiffs to share punitive damages with the state).

Iowa: *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assocs., Inc.*, 473 N.W.2d 612 (Iowa 1991) (upholding law requiring plaintiffs to share punitive damages with civil reparation trust fund); *Burke v. Deere & Co.*, 780 F. Supp. 1225 (S.D. Iowa 1991) (same), *rev'd on other grounds*, 6 F.3d 497 (8th Cir. 1993), *cert. denied*, 510 U.S. 1115 (1994).

Kansas: *Smith v. Printup*, 866 P.2d 985 (Kan. 1993) (upholding law requiring court to determine amount of punitive damages).

Maine: *Peters v. Saft*, 597 A.2d 50 (Me. 1991) (upholding $250,000 limit on nonmedical damages recoverable against servers of liquor).

Missouri: *Hoskins v. Business Men's Assurance*, 79 S.W.3d 901 (Mo. 2002) (upholding law requiring plaintiffs to share punitive damages with the state); *Fust v. Attorney General*, 947 S.W.2d 424 (Mo. 1997) (same).

Montana: *Meech v. Hillhaven West, Inc.*, 776 P.2d 488 (Mont. 1989) (upholding Wrongful Discharge From Employment Act limiting punitive damages).

New Jersey: *Germanio v. Goodyear Tire & Rubber Co.*, 732 F. Supp. 1297

(D.N.J. 1990) (upholding punitive damages provisions of Products Liability Act).

North Carolina: *Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004) (upholding punitive damages cap); *Southstar Funding, LLC v. Sprouse*, 2007 WL 812174 (W.D.N.C. Mar. 13, 2007) (upholding punitive damages cap).

Ohio: *Arbino v. Johnson & Johnson*, 880 N.E.2d 420 (Ohio 2007) (upholding punitive damages cap).

Oklahoma: *Gilbert v. Security Fin. Corp. of Okla., Inc.*, 152 P.3d 165 (Okla. 2006) (upholding statutory factors for juries to consider when awarding punitive damages); *Rodebush v. Oklahoma Nursing Homes, Ltd.*, 867 P.2d 1241 (Okla. 1993) (upholding statute allowing punitive damages cap to be lifted if court finds clear and convincing evidence of defendant's wrongdoing).

Oregon: *DeMendoza v. Huffman*, 51 P.3d 1232 (Or. 2002) (upholding law requiring plaintiffs to share punitive damages with the state); *Axen v. American Home Prods. Corp.*, 981 P.2d 340 (Or. App.) (same), *review denied*, 994 P.2d 124 (1999), *cert. denied*, 528 U.S. 1136 (2000); *Tenold v. Weyerhaeuser Co.*, 873 P.2d 413 (Or. App. 1994) (same), *review dismissed*, 901 P.2d 859 (Or. 1995); *Engquist v. Oregon Dept. of Agriculture*, 478 F.3d 985 (9th Cir. 2007) (same), *aff'd on other grounds*, 128 S. Ct. 2146 (2008).

Texas: *Waste Disposal Center, Inc. v. Larson*, 74 S.W.3d 578 (Tex. App.-Corpus Christi 2002) (upholding punitive damages cap); *Hall v. Diamond Shamrock Refining Co., L.P.*, 82 S.W.2d 5 (Tex. App.-San Antonio 2001) (upholding punitive damages cap), *rev'd on other grounds*, 168 S.W.3d 164 (Tex. 2005); *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730 (Tex. App.-Hous. 1998) (upholding earlier cap).

Virginia: *Wackenhut Applied Tech. Center, Inc. v. Sygnetron Prot. Sys., Inc.*, 979 F.2d 980 (4th Cir. 1992) (upholding punitive damages cap).

In contrast to these cases, Plaintiff seeks to convince this Court to use an expansive view of the Arkansas Constitution to sit as a "super legislature." This

Court should reject Plaintiff's invitation. *See* Victor E. Schwartz et al., *Fostering Mutual Respect and Cooperation Between State Courts and State Legislatures: A Sound Alternative to a Tort Tug of War*, 103 W. Va. L. Rev. 1 (2000).

CONCLUSION

For the reasons stated, *amici* ask this Court to reverse the court below and declare Ark. Code Ann. § 16-55-208 to be constitutional.

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