No. 94-896

IN THE

Supreme Court of the United States

OCTOBER TERM, 1994

BMW OF NORTH AMERICA, INC.,
Petitioner,

v.

IRA GORE, JR.,
Respondent.

On Writ of Certiorari to the Supreme Court of Alabama

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

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BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF THE PETITIONER

INTEREST OF THE AMICUS[1]

The Chamber of Commerce of the United States of America (the "Chamber"), a nonprofit corporation organized and existing under the laws of the District of Columbia, is the largest federation of business, trade,and professional organizations in the United States. It represents the interests of over 215,000 corporations, partnerships, and proprietorships, as well as several thousand state and local chambers of commerce and trade and professional associations. The Chamber regularly represents the interests of its members in critical matters before the courts, the

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[1] The parties' letters of consent have been filed with the Clerk pursuant to Rule 37.3 of this Court.

United States Congress, the Executive Branch, and independent regulatory agencies of the federal government.

The Chamber has a significant interest in the questions presented in this case. In recent decades, punitive damages awards have become increasingly common, reaching into the millions and even hundreds of millions of dollars in individual cases. Businesses such as those represented by the Chamber are the primary targets of punitive damages claims and often suffer unpredictable and arbitrary awards. As a consequence, the Chamber and its members have a strong interest in ensuring that such awards are not excessive and that they are imposed in a manner that is fair, rational, and consistent with the Constitution's guarantee of Due Process.

INTRODUCTION AND SUMMARY

The Chamber agrees with the Petitioner that the punitive damages award approved by the Alabama Supreme Court violates the Due Process Clause because it is grossly excessive. The Chamber also agrees that the State of Alabama cannot constitutionally award punitive damages based upon Petitioner's conduct in other States. The Chamber believes, however, that the decision below also suffers from another fundamental flaw. Whatever substantive limits the Due Process Clause may place upon the size of punitive damage awards or the consideration of out-of-state conduct, it first and foremost requires that punitive damage awards be fixed through procedures that are fair and non-arbitrary. The decision below violates this fundamental requirement.

The Alabama Supreme Court found that the jury's punitive damages verdict was infected with error. It determined that the jury had based all but a fraction of its $4,000,000 punitive damages award upon its improper consideration of Petitioner's conduct outside the State of Alabama. Nevertheless, the Alabama Supreme Court did not order a new trial. Nor did it relieve Petitioner of the obligation of paying the $3,944,000 attributable to the jury's error. Instead, it permitted Respondent to avoid a new trial by "remitting" the punitive damages award to

$2,000,000, an amount it determined that a reasonable jury *could* have awarded.

This decision violates the Due Process Clause of the Fourteenth Amendment. As this Court observed last Term, in Due Process cases, "traditional practice provides a touchstone for constitutional analysis." *Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2339 (1994) (citations omitted). The Alabama Supreme Court's use of the remedy of remittitur departs radically from traditional practice. Traditionally, remittitur was used to remedy a trial error only where it rendered the error harmless. Current practice is virtually the same. Thus, where a jury bases its damages calculation on an improper factor (here, Petitioner's out-of-state conduct), courts do not remit the damages to an amount the jury could have awarded: they remit all damages affected by the jury's consideration of the improper factor. The Alabama Supreme Court's refusal to follow this practice in this case "raises a presumption that its procedures violate the Due Process Clause." *Id.* at 2339. Moreover, because the Alabama Supreme Court's departure from traditional (and current) practice is unjustified, it violates Due Process. *See id.* at 2339-41.

The way in which the Alabama Supreme Court calculated the remittitur in this case was fundamentally unfair as well. The jury based its punitive damages award on the profits Petitioner allegedly earned from its practice of selling automobiles without disclosing certain repairs. Although the Alabama Supreme explicitly noted that it was considering only Petitioner's fourteen or so sales in the State of Alabama, it did not remit the punitive damages verdict to $56,000, the profits allegedly earned on those sales. Instead, it remitted the punitive damages verdict to $2,000,000, nearly 400 times that amount. While the Alabama Supreme Court did not explain what theory it used to derive the $2,000,000 figure from the evidence in the record, it is clear that that theory was neither presented to, nor adopted by, the jury. However, as a majority of this Court recognized in *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), a punitive damages award cannot be based upon a theory never presented to the jury. As a consequence, when the

Alabama Supreme Court decided this case based upon a factual theory not presented to the jury, it violated Due Process. *See Spevack v. Klein*, 385 U.S. 511 (1967); *Saunders v. Shaw*, 244 U.S. 317 (1917).

ARGUMENT

I. ALTHOUGH THE ALABAMA SUPREME COURT FOUND THAT ALMOST ALL OF THE PUNITIVE DAMAGES AWARD WAS INFECTED WITH ERROR, IT REQUIRED RESPONDENT TO REMIT ONLY HALF OF THE AWARD.

The Alabama Supreme Court found that the jury should not have considered Petitioner's out-of-state sales when calculating the punitive damages award and that the jury based most of its award on those sales. It did not, however, award Petitioner a new trial or attempt to reduce the damages so as to render the jury's error harmless. Instead, the Alabama Supreme Court determined the maximum punitive damages award a jury could have awarded based upon the evidence of Petitioner's sales within Alabama and remitted the punitive damages award to that amount.

A. The Alabama Supreme Court Found That Almost All Of The Jury's Award Was Based Upon The Improper Consideration Of Sales Made Outside The State Of Alabama.

Respondent's counsel urged the jury to base its punitive damages award on the amount of profit BMW allegedly earned from its disclosure policy. Noting that BMW had sold nearly a thousand automobiles without disclosing repairs of $300 or more, Respondent's counsel contended that Petitioner had "profited some four million dollars" and that "[t]hey ought not be permitted to keep that." Appendix to Petition for Certiorari ("Pet. App.") 16a (internal quotation marks omitted). Accordingly, he asked the jury to "return a verdict of four million dollars." *Id.* (internal quotation marks omitted). He offered no other method by which to calculate the punitive damages award. Accordingly, when the jury returned $4,000,000 in punitive damages, the Alabama

Supreme Court had no trouble determining that "the jury's punitive damages award is based upon a multiplication of $4,000 (the diminution in value of the Gore vehicle) times 1,000 (approximately the number of refinished vehicles sold in the United States)." *Id.*[2]

The Alabama Supreme Court also had little trouble determining that this award was based almost entirely upon error by the jury. Of the one thousand or so sales to which Respondent's counsel referred, the record showed that at most fourteen occurred within the State of Alabama. *See* Pet. App. 17a n.6. The Alabama Supreme Court therefore concluded that the jury's punitive damages award was "based in large part on conduct that happened in other jurisdictions." *Id.* at 16a. The court below also concluded that the jury erred in considering that conduct because Respondent had failed to establish that the conduct was unlawful in the States where it occurred. *Id.* at 16a-17a. Accordingly, when the court examined the amount of the punitive damages award, it did not consider the out-of-state sales. *See id.* at 19a.

B. The Alabama Supreme Court Remitted Only Half Of The Punitive Damage Award Based On Its Conclusion That There Was Evidence Sufficient To Sustain An Award Of $2,000,000.

Since the jury should have considered only fourteen sales in fixing the amount of punitive damages, $3,944,000 out of the $4,000,000 in punitive damages awarded by the jury was tainted by error. Nevertheless, the Alabama Supreme Court did not order a new trial, nor did it reduce the amount of the award to $56,000. Instead, the Alabama Supreme Court permitted the Respondent to avoid a new trial by reducing the punitive damages award to $2,000,000 based upon its conclusion that this was a

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[2] This determination cannot be challenged in this Court: once a state court determines what motivated a jury's decision, this Court's "sole concern is as to the action it requires." *Minneapolis, St. P. & S. S. M. Ry. v. Moquin*, 283 U.S. 520, 521 (1931).

"constitutionally reasonable punitive damages award." Pet. App. 21a.

The Alabama Supreme Court offered little explanation for this decision. Although it stated that "[t]he determination of a proper award of punitive damages ultimately turns on the jury's determination of the facts warranting their imposition," (Pet. App. at 20a), it did not attempt to determine what the jury in this case awarded for the sales within Alabama. It did, however, quote from two cases in which the defendants challenged the sufficiency of the evidence against them. *See id.* at 20a-21a (quoting *Campbell v. Burns*, 512 So.2d 1341, 1343-44 (Ala. 1987), and *G.M. Mosley Contractors, Inc. v. Phillips*, 487 So.2d 876, 879 (Ala. 1986)). Specifically, it stated that it would "review the tendencies of the evidence most favorably to the prevailing party" and "indulge such reasonable inferences as the jury was free to drain from the evidence." Pet. App. at 20a (quotation omitted). It then declared that "a constitutionally reasonable punitive damages award in this case is $2,000,000." *Id.* at 21a. Thus, the Alabama Supreme Court appears to have remitted the punitive damages award to the maximum amount it thought the jury *could* have awarded based upon the evidence in the record.

II. THE DECISION BELOW DEPRIVED PETITIONER OF DUE PROCESS BY ELIMINATING A TRADITIONAL PROCEDURAL PROTECTION WITHOUT JUSTIFICATION.

The Due Process Clause of the Fourteenth Amendment provides that no State shall "deprive any person of life, liberty or property, without due process of law." U.S. Const. amend. XIV. In determining what process is due, this Court has looked to the procedures traditionally used by courts in this country on the theory that "history and widely shared practice [are] concrete indicators of what fundamental fairness and rationality require." *Schad v. Arizona*, 501 U.S. 624, 640 (1991) (plurality opinion); *see, e.g., Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. 2331, 2339 (1994); *In re Winship*, 397 U.S. 358, 361 (1970); *Tumey v. Ohio*, 273 U.S. 510 (1927); *Murray's Lessee v. Hoboken Land &*

Improvement Co., 59 U.S. (18 How.) 272 (1856); *see also Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. at 2342 n.12 (noting that for purposes of the Fourteenth Amendment, the nineteenth century is "the crucial time") (quotation omitted). Although some aspects of remittitur practice remain unsettled to this day, one thing is clear: under traditional (and prevailing current) practice, remittitur is permitted only where the remittitur renders harmless the error found by the Court. Because the Alabama Supreme Court departed from this practice, and because it did so without justification, it deprived Petitioner of the process due under the Fourteenth Amendment.

A. The Decision Below Radically Departed From Traditional Remittitur Practice.

A remittitur is a conditional grant of a new trial. It is employed when an error that undermines the accuracy of the damages award, but does not cast doubt upon the underlying finding of liability has been committed. In such circumstances, courts in this country have, where appropriate, offered the party benefitting from the verdict the option of avoiding a new trial by "remitting" the damages to a specified amount. The purpose of this remedy is to excise those parts of the verdict that are erroneous and preserve those parts that are not. In short, remittitur is supposed to have "the effect of merely lopping off an excrescence." *Dimick v. Schiedt*, 293 U.S. 474, 486 (1935).

When the Fourteenth Amendment was adopted in 1868, the crucial time for purposes of analysis under that Amendment's Due Process Clause, *see Honda Motor Co., Ltd. v. Oberg*, 114 S. Ct. at 2342; *Burnham v. Superior Court of Cal., County of Marin*, 495 U.S. 604, 611 (1990), remittitur was permitted in only two situations: (1) where an identifiable error at trial led to an ascertainable amount of damages; and (2) where there was no identifiable error, but the award of damages was deemed excessive.

As this Court recognized last Term, remittitur has long been used in the "pure" excessiveness situation. *See Honda Motor Co., Ltd v. Oberg*, 114 S. Ct. at 2337 & n.3. In 1822, Justice

Story, sitting as a Circuit Justice, found a jury's verdict excessive and ruled "that the cause should be submitted to another jury, unless the plaintiff is willing to remit $500 of his damages." *Blunt v. Little*, 3 F. Cas. 760, 762 (C.C.D. Mass. 1822) (No. 1,578). Although there was some disagreement in the nineteenth century over the use of remittitur in pure excessiveness cases,[3] the use of remittitur in such cases was recognized by this Court and is now well-established. *See Arkansas Valley Land & Cattle Co. v. Mann*, 130 U.S. 69 (1889); *see generally* F. James, G. Hazard & J. Leubsdorf, *Civil Procedure* § 7.29, at 400-04 (1994).

Remittitur was also traditionally used in connection with identifiable errors at trial. The first case in which this Court employed the remedy, *The President, Directors and Company of the Bank of the Commonwealth of Kentucky v. Ashley*, 27 U.S. (2 Pet.) 327 (1829), involved such an error. In that case, the jury found the defendant liable for 68 bank notes. When the defendant appealed on the basis that the pleadings only described 67 of those notes and that one of the notes was therefore not properly before the jury, this Court simply remitted the amount of the verdict attributable to that note. *See id.* at 329-30. This Court also employed remittitur where interest was improperly allowed (*see Washington & G. R.R. v. Harmon's Administrator*, 147 U.S. 571, 590 (1893)), where the jury was instructed to use an incorrect interest rate (*see Hopkins v. Orr*, 124 U.S. 510 (1888)), and where a special verdict was based upon a claim not properly before the court (*see Phillip & Colby Constr. Co. v. Seymour*, 91 U.S. 646, 654-56 (1875)). In each instance, by reducing the

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[3] *See, e.g., Thomas v. Womack*, 13 Tex. 580, 585 (1855) (objecting that in such cases there are no "rules or principles by which to ascertain the excess"); *see also* G. Field, *A Treatise on the Law of Damages* 698 (1876) ("If the damages rest in part on the estimation of a jury, and are incapable of being computed by any fixed measure, the court cannot permit the plaintiff to remit anything by way of excess, and keep his verdict.") (footnote omitted).

amount of the verdict, the Court was able to render the particular error harmless.

Where there was error at trial, remittitur was permitted only if the damages affected by that error could be ascertained and rendered harmless. In this Court, the rule was that "to avoid the granting of a new trial on account of error affecting a part thereof, [the Court may enter] a remittitur as to such erroneous part, where the court can clearly distinguish and separate the same." *Hansen v. Boyd*, 161 U.S. 397, 411 (1896). The same principle was recognized in numerous state court opinions, *see, e.g.*, 4 *Corpus Juris* § 3136, at 1137-38 & n.63 (W. Mack & W. Hale eds. 1916) (listing cases); R. Pound, *Appellate Procedure in Civil Cases* 252 n.5 (1941) (same), and contemporaneous treatises.[4]

Some courts, when confronted with a trial error, rendered it harmless by remitting the damages to a level that could not possibly have been affected by the error at trial. Thus, for example, in *Chicago, R.I. & P. Ry. v. Batsel*, 140 S.W. 726 (Ark. 1911), where the Arkansas Supreme Court could not ascertain the precise effect of an improper argument before the jury, it simply remitted the damages to a figure "so low that there can be no reasonable ground to believe that a jury of average judgment, after considering the evidence would, when properly instructed as to the law, allow plaintiff an amount less than that

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[4] *See, e.g.*, G. Field, *A Treatise on the Law of Damages* 697 ("[w]here by reason of erroneous instructions, a verdict for too large a sum is given, the defect may be cured by *remittitur*, if the excess can be clearly ascertained by computation"); F. Hilliard, *The Law of New Trials* 576-77 (1872); 4 T. Sedgwick, *A Treatise on the Measure of Damages* § 1331, at 2681 (9th ed. 1913); 2 J.G. Sutherland, *Sutherland on Damages* § 459, at 1502 (4th ed. 1916) ("If the jury have decided, upon the testimony, several items or elements of damages, and on review one or more of them are held to be improperly included, a remission of so much as was held thus improperly allowed, when the amount can be ascertained, will remove the objection of such excess.") (footnote omitted).

named." *Id.* at 727 (quotation omitted); *see also Koenigsberger v. Richmond Silver Mining Co.*, 158 U.S. 41, 52 (1895) (setting remittitur at a level so low that "no injustice was done to the defendant by accepting the testimony which it had introduced").[5] Amicus has not been able to locate a single case in which a court in the nineteenth century remitted damages without ensuring that any error at trial was rendered harmless. *Cf. O'Neal v. McAninch*, No. 93-7407, slip op. at 4 (U.S. Feb. 21, 1995) ("[T]he original common-law harmless-error rule put the burden on the beneficiary of the error . . . . to prove that there was no injury.") (quotation omitted)

Where nineteenth-century courts could not readily ascertain the amount of damages affected by an error at trial — and, therefore could not be sure that remittitur had rendered an error harmless — they would grant a new trial, not remittitur. Indeed, this principle is nearly as old as the practice of remittitur itself. Less than ten years after Justice Story's opinion in *Blunt v. Little*, which is reputed to be the first application of the remedy in this country, the Supreme Judicial Court of Massachusetts refused to apply remittitur where the effect of an error at trial was not ascertainable. *See Lambert v. Craig*, 29 Mass. 199, 202 (1831).

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[5] Professor Scott described this rule nearly seventy-five years ago:

> Where the court has made an erroneous ruling on the admission or exclusion of evidence as to the amount of damages, or has given an erroneous charge as to the measure of damages, it may be that it is impossible to say how much the jury would have awarded if no such error had been made. In such a case it would seem that a new trial upon the question of damages is necessary, unless the plaintiff is willing to accept the lowest amount which a jury could reasonably have awarded, if it had been uninfluenced by evidence which was improperly admitted, or if it had considered evidence which was improperly excluded, or if it had been properly instructed on the law.

A. Scott, *Fundamentals of Procedure in Actions at Law* 125 (1922) (footnote omitted); *see also* 4 *Corpus Juris* § 3147, at 1143 & n.7 (listing cases).

Moreover, by the end of the nineteenth century it was well-settled that

> [W]here the erroneous part of the damages found by the jury cannot be ascertained, and it is impossible to tell what the jury acted upon, or how they made up their verdict under the charge of the court, so as to correct the error and arrive at the amount they should have given, justice between the parties cannot be done by a *remittitur*.

2 J.G. Sutherland, *Sutherland on Damages* § 459, at 1504 (4th ed. 1916) (footnote omitted).[6] This limitation was critically important to defendants. It protected them from being compelled to accept a verdict based upon a theory not adopted by the jury and thereby deprived of notice and opportunity to be heard by the jury on that theory.[7]

Remittitur practice remains essentially the same today. Courts will not use remittitur where it is unclear that the remedy will render an error at trial harmless. Thus, in a case involving an improper argument to the jury, this Court refused to engage in "speculation as to the extent of the wrong inflicted on his

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[6] Numerous decisions recognized this rule. *See, e.g., Silver King of Arizona Mining Co. v. Kendall*, 201 P. 102, 105 (Ariz. 1921); *St. Louis, I. M. & S. Ry. v. Warren*, 48 S.W. 222, 225 (Ark. 1898); *Brunswick Light & Water Co. v. Gale*, 18 S.E. 11, 12 (Ga. 1883); *Chicago, M. & St. P. R.R. v. Hall*, 90 Ill. 42, 44-45 (1878); *Oldfather v. Zent*, 41 N.E. 555, 556 (Ind. 1895); *Noel Constr. Co. v. Armored Concrete Constr. Co.*, 87 A. 1049, 1056 (Md. 1913); *Sima v. Wright*, 256 N.W. 349, 351 (Mich. 1934); *Seeman v. Feeney*, 19 Minn. 79, 84 (1872); *Slattery v. City of St. Louis*, 25 S.W. 521, 522 (Mo. 1894); *Cross v. Wilkins*, 43 N.H. 332, 337 (1861); *Womble v. Leigh*, 142 S.E. 17, 18 (N.C. 1928); *St. Louis & S.F. R. Co. v. Criner*, 137 P. 705, 708 (Okl. 1913); *Whitman v. Atkinson T. & S. F. Ry.*, 116 P. 234, 239 (Kan. 1911); *Martin-Brown Co. v. Pool*, 40 S.W. 820, 822 (Tex. Ct. Civ. App. 1897); *Peterson v. Chess*, 159 P. 894, 895 (Wash. 1916).

[7] Plaintiffs, of course, had no objection to the adoption of a new theory on appeal since they could always refuse to remit and elect a new trial.

opponent." *Minneapolis, St. P. & S. S. M. Ry. v. Moquin*, 283 U.S. 520, 521 (1931). Numerous other courts have done the same.[8]

For example, in *Triangle Lumber Co. v. Acree*, 166 S.W. 958, 962-63 (Ark. 1914), a plaintiff attempted to cure the improper admission of evidence by remitting an amount that would be "supported and justified by the evidence." *Id.* at 962. The Arkansas Supreme Court found this standard unable to remedy trial error:

> Where no error has occurred at the trial except that judgment has been rendered for an excessive amount, that error is cured by reducing the judgment to such amount as is warranted by the evidence. But a different rule obtains in cases where . . . improper evidence was admitted, or competent and material

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[8] *See, e.g., Hygh v. Jacobs*, 961 F.2d 359, 367 & n.1 (2d Cir. 1992); *Werbungs und Commerz Union Austalt v. Collectors Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991); *Baskin v. Hawley*, 807 F.2d 1120, 1135 (2d Cir. 1986); *Westbrook v. General Tire & Rubber Co.*, 754 F.2d 1233, 1242 (5th Cir. 1985); *Shu-Tao Lin v. McDonnell Douglas Corp.*, 742 F.2d 45, 50 (2d Cir. 1984); *International Paper Co. v. Busby*, 182 F.2d 790, 792 (5th Cir. 1950); *Hirsh v. Manley*, 300 P.2d 588, 593 (Ariz. 1956) ("[S]ince we cannot segregate the excess damages awarded to plaintiff, the remedy of remittitur is not available.") (citations omitted); *Faiman v. James D. Kauffman, Inc.*, 100 A.2d 842, 843 (Conn. 1953); *Price v. Mitchell*, 268 S.E.2d 743, 746 (Ga. Ct. App. 1980); *Smith v. Courter*, 531 S.W.2d 743, 749 (Mo. 1976) (en banc) ("The usual standard for deciding an issue of excessiveness is simply not available when the question to be decided is how much was compensatory and how much was punitive."), *overruled on other grounds*, *Tune v. Synergy Gas Corp.*, 883 S.W. 2d 10 (Mo. 1994); *Dallas Ry. & Terminal Co. v. Gossett*, 294 S.W.2d 377, 383 (Tex. 1956); *Dravo Corp. v. L.W. Moses Co.*, 492 P.2d 1058, 1071 (Wash. Ct. App. 1971) ("Where an improper element of damages is submitted to the jury, the vice may be cured by ordering a remission if the amount of such damages can be readily calculable with reasonable certainty.") (citations omitted).

> evidence was excluded. The rule in such cases was announced by Justice Riddick in the case of *St. L., I. M & S. R. Co. v. Adams*, as follows: 'What the court undertakes to do is simply to name an amount so low that there can be no reasonable ground to believe that a jury of average judgment, after considering the evidence, would, when properly instructed as to the law (or when uninfluenced by improper evidence, or on the other hand when given the right to consider improperly excluded evidence), allow plaintiff a less sum than that named, and which amount the court can clearly see is not excessive.'"

Id. at 962-63 (citation omitted). Thus, a damages award tainted by trial error must be remitted to an amount that will completely excise and render harmless that error.

The decision below violated this fundamental principle and in so doing radically departed from both traditional and current remittitur practice. The Alabama Supreme Court found that it was error for the jury to rely on Petitioner's out-of-state conduct. The amount of the punitive damages award affected by that error was easily ascertainable: since the jury based its calculation on the amount of profit that petitioner allegedly earned from its sale of cars with undisclosed repairs, the effect of its improper consideration of out-of-state sales could be determined by simply subtracting the profit petitioner allegedly earned from the sales within Alabama from the total award. That operation yields a remittitur of $3,944,000. Nevertheless, the Alabama Supreme Court allowed the Respondents to retain $1,944,000 in damages tainted by the jury's error by ignoring the jury's disgorgement-of-profits theory and adopting an unspecified theory not advanced to, or adopted by, the jury. This sharp departure from traditional practice violates Due Process.

B. The Alabama Supreme Court's Departure From Traditional Practice Violated The Due Process Clause.

In *Honda Motor Co., Ltd. v. Oberg*, this Court held that a State's "abrogation of a well-established common law protection against arbitrary deprivations of property raises a presumption that

its procedures violate the Due Process Clause." 114 S. Ct. at 2339. It also identified two situations in which that presumption could be rebutted: where changed circumstances obviated the need for the procedures and where an adequate substitute was provided. *See id.* at 2340. Given the Alabama Supreme Court's abandonment of the traditional restrictions on the use of remittitur, that presumption undoubtedly applies here, and there is no way that the procedures adopted by the Alabama Supreme Court can rebut that presumption. To the contrary, the procedures adopted below are patently irrational.

Plainly, the need for protection against improper damages awards has not disappeared. If anything, changed circumstances have increased the need for the procedural safeguards traditional practice provided: while multimillion dollar verdicts were virtually unknown twenty-five years ago, "[t]oday, hardly a month goes by without a multimillion dollar punitive damages verdict." *Pacific Mutual Ins. Co. v. Haslip*, 499 U.S. 1, 62 (1991) (O'Connor, J., dissenting) (quotation omitted); *see generally* M. Rustad, *In Defense of Punitive Damages in Products Liability: Testing Tort Anecdotes with Empirical Data*, 78 Iowa L. Rev. 1, 46, 61 (1992).

Similarly, the Alabama Supreme Court's calculation of a "constitutionally reasonable punitive damages award" (Pet. App. 21a) is not an adequate substitute for a full remittitur. The standards the Alabama Supreme Court used in determining the amount of such an award — "review[ing] the tendencies of the evidence most favorably to the prevailing party" and "indulg[ing] such reasonable inferences as the jury was free to draw from the evidence" (*id.* at 20a (quotation omitted)) — were not designed to determine what the jury in this case would have awarded absent the improper consideration of Petitioner's out-of-state conduct. Nor were they designed to determine the *most* reasonable punitive damages award. Instead, the standards employed by the Alabama Supreme Court were designed to determine the *largest* reasonable punitive damages award, without considering either what the jury in this case would have, or what it should have, done.

In addition, the way in which the Alabama Supreme Court calculated the remittitur in this case was irrational. While standards employed by the Alabama Supreme Court in the decision below are sometimes used in "pure" excessiveness cases, *see, e.g.*, 6A J. Moore, *et al.*, *Moore's Federal Practice* ¶ 59.08[7] at 59-193 to 194 (2d ed. 1994); *but see* 11 C. Wright & A. Miller, *Federal Practice & Procedure* § 2815, at 104-05 (1973), they serve no rational purpose when, as here, there was an identifiable error at trial. Where there is an error above and beyond the excessiveness of the verdict, there is no basis for assuming that the jury intended to award the most it could — particularly where, as here, the punitive damages verdict appears to rest upon specific, mathematical computations.

Rather than rendering the error at trial harmless, the sufficiency standard employed below introduces a systematic bias towards large verdicts that preserve that error. By resolving all conflicts and making all inferences in favor of the plaintiff, the sufficiency standard employed by the Alabama Supreme Court makes the remittitur as small as possible and allows the plaintiff to retain as big a damage award as possible no matter what theories are presented to, and adopted by, the jury. Arbitrary and contrary to traditional practice, this approach violates Due Process.

III. THE PROCEDURES EMPLOYED BY THE ALABAMA SUPREME COURT IN THE DECISION BELOW WERE FUNDAMENTALLY UNFAIR.

In addition to departing radically and without justification from traditional remittitur practice, the decision below also deprived Petitioner of procedural safeguards fundamental to the due process of law.

It is well-settled that the Due Process Clause requires that "deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case." *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950); *see also Matthews v. Eldridge*, 424 U.S. 319, 333 (1976) ("The fundamental requirement of due process is the opportunity to be heard at 'a meaningful time and

in a meaningful manner.'") (citation omitted). Nevertheless, in the decision below, the Alabama Supreme Court calculated the amount of remittitur it offered to Respondent based upon a theory that was not presented to the jury. In so doing, it deprived Petitioner of the notice and opportunity to be heard.

Respondent presented a single theory to the jury — that Petitioner should be forced to disgorge the profits it earned through its disclosure policy — and the Alabama Supreme Court found that the jury, which returned exactly the amount of punitive damages Respondent requested, acted upon that theory. Thus, if the jury had considered only the fourteen sales in Alabama, its punitive damages award would have been $56,000, the amount of profit petitioner allegedly earned from the fourteen sales within Alabama. In approving an award of $2,000,000, the Alabama Supreme Court plainly did not base its decision upon the disgorgement-of-profits theory presented to, and accepted by, the jury.

This Court has repeatedly found that Due Process prohibits appellate courts from upholding decisions based upon theories not presented by the parties. *See, e.g., Dunn v. United States*, 442 U.S. 100, 106 (1979) ("[A]ppellate courts are not free to revise the basis on which a defendant is [found liable]."); *Eaton v. City of Tulsa*, 415 U.S. 697, 699 (1974) (per curiam); *Spevack v. Klein*, 385 U.S. 511, 518 (1967); *Garner v. Louisiana*, 368 U.S. 157, 164 (1961); *Cole v. Arkansas*, 333 U.S. 196, 202 (1948); *Saunders v. Shaw*, 244 U.S. 317, 319 (1917) (Holmes, J.).

For example, in *Spevack v. Klein*, the petitioner refused to produce certain documents based upon his Fifth Amendment privilege against self-incrimination. Before the Appellate Division of the Supreme Court of New York, the sole question that was briefed and argued was whether the privilege applied to the States. On appeal, the New York Court of Appeals adopted the respondent's position that the privilege was not applicable to the States. No doubt aware that *Malloy v. Hogan*, 378 U.S. 1 (1964), contradicted this position, the Court of Appeals added *sua sponte* that, even if the privilege applied to the States, the

documents fell under the "required records" exception. This Court reversed. First, it held that under *Malloy v. Hogan* the privilege against self-incrimination applies to the States. Then, this Court determined that the required records could not sustain the decision below because it had neither been briefed nor raised by the parties. Specifically, this Court held that, by raising this issue on its own without notice to, or argument by, the parties, the New York Court of Appeals denied the petitioner "all opportunity at the trial to show that the Rule, fairly construed and understandably should not be given a broad sweep" and "to make a record that the documents demanded . . . were private papers." 385 U.S. at 518-19 (plurality opinion) (footnote omitted); *id.* at 522 (Fortas, J., concurring in the judgment).

The same principle applies here. Whatever theory of the facts may have led the Alabama Supreme Court to affirm an award of $2,000,000, that theory was neither presented to the jury nor argued by either of the parties. Since this theory was not broached at trial, Petitioner had no chance to contest the factual assumptions underlying it. Similarly, since the theory was not argued by either party before the Alabama Supreme Court, Petitioner had no opportunity to contest its legal basis. As a consequence, it was fundamentally unfair for the Alabama Supreme Court to impose a $2,000,000 punitive damages award upon Petitioner based upon its newly-minted theory of the facts.

This principle has special application to cases involving punitive damages. In *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711 (1993), seven members of this Court applied the principles announced in *Spevack* and the other cases cited above to a punitive damages claim. At issue in *TXO* was a contract between the plaintiff, Alliance Resources Corporation, and the defendant, TXO Production Corporation, for oil and gas development rights. Finding that "Alliance introduced evidence showing . . . the amount of royalties that TXO sought to renegotiate" through a fraudulent attack on Alliance's title, the plurality determined that "the jury could well have believed that TXO was seeking a multimillion dollar reduction in its potential royalty obligation." *TXO Prod. Corp.*, 113 S. Ct. at 2716, 2722

(plurality opinion). The plurality therefore concluded that the jury's $10 million punitive damage award could be upheld based upon a "potential gain" theory because that theory was presented to the jury. *See id.*

Four other Justices agreed that the verdict could be sustained only on a theory presented to the jury. Justice Kennedy, concurring in the judgment, found that "the record in this case does not contain evidence, argument, or instructions regarding the potential harm from TXO's conduct." *Id.* at 2725 (Kennedy, J., concurring in part and concurring in the judgment). Accordingly, he felt compelled to "look for other explanations of the jury verdict to decide whether it may stand" and concluded that the punitive damage award could be sustained on the basis that the jury found that TXO acted with malice. *Id.* at 2725-26. Justice O'Connor, along with two other members of the Court, also concluded that the punitive damages award could not be upheld based upon the "potential gain" theory. In her opinion, that theory was not presented to the jury, but was "an after-the-fact rationalization invented by appellate counsel." *Id.* at 2736 (O'Connor, J., dissenting).

Implicit in these opinions is the principle that an appellate court cannot uphold a punitive damages verdict based upon a theory not presented to the jury. It made no difference that the West Virginia Supreme Court expressly addressed TXO's potential gain, beginning its analysis by considering "the potential harm that TXO's actions could have caused." *TXO Prod. Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870, 889 (W. Va. 1992), *aff'd*, 113 S. Ct. 2711 (1993). Not a single member of this Court suggested that the West Virginia Supreme Court's adoption of that theory could cure a failure on the part of Alliance to raise it at trial or the jury's failure to rely upon it. Instead, at least seven members of this Court operated on the assumption that the potential gain theory could sustain the judgment only if it had been the basis of the jury award. Because the theory upon which the Alabama Supreme Court awarded $2,000,000 in punitive damages was not the basis of the jury verdict, under *TXO*, the $2,000,000 award below cannot stand.

CONCLUSION

For the foregoing reasons, this Court should reverse the decision of the Alabama Supreme Court.

Respectfully submitted,

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