

IN THE COURT OF APPEALS
OF THE STATE OF NEW MEXICO

DENNIS MURPHY, Personal Representative :
of the Estate of JOHNNIE HERDON, :

Plaintiff/Appellee, :

v. :

RIO RANCHO CENTER; GENESIS :
HEALTHCARE, LLC; GENESIS :
ELDERCARE PHYSICIAN SERVICES, :
LLC; and IPC HOSPITALISTS OF NEW :
MEXICO, INC. and TEAMHEALTH, INC., :

Defendants/Appellants. :

A-1-CA-42700

District Court No.:
D-101-CV-2021-00019

Appeal from the First Judicial District Court
The Honorable Kathleen McGarry Ellenwood

**AMICI CURIAE BRIEF OF CHAMBER OF COMMERCE OF THE
UNITED STATES OF AMERICA, AMERICAN TORT REFORM
ASSOCIATION, AND AMERICAN PROPERTY CASUALTY INSURANCE
ASSOCIATION IN SUPPORT OF DEFENDANTS/APPELLANTS**

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CERTIFICATE OF COMPLIANCE

Pursuant to Rules 12-318 NMRA and 12-305 NMRA, this is to certify that this Brief was prepared using a proportionally-spaced typeface (Times New Roman, 14 point font), and contains 4,323 words (inclusive of footnotes) according to the word processing system used to prepare the brief (Word for Microsoft 365).

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QUESTIONS PRESENTED

1. Whether the district court applied the incorrect standard in review in the award of punitive damages.
2. Whether the jury's award of punitive damages was unconstitutionally excessive.

INTEREST OF AMICI CURIAE¹

Amici curiae are the Chamber of Commerce of the United States of America (U.S. Chamber), American Tort Reform Association (ATRA), and American Property Casualty Insurance Association (APCIA). These organizations and their members have a strong interest in this case because it implicates the circumstances under which a jury may award punitive damages and the extent to which a civil defendant may be punished in accordance with their constitutional due process rights. *Amici* seek to ensure that courts properly assess the excessiveness of punitive damages awards in accordance with the well-settled precedent of the U.S. Supreme Court and that of the appellate courts in this State.

The U.S. Chamber is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in

¹ No party or counsel for a party authored this brief in whole or in part. No person or entity other than the *amici* made a monetary contribution intended to fund the preparation or submission of the brief.

every industry sector, and from every region of the country—including throughout the State of New Mexico. An important function of the U.S. Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and federal and state courts. To that end, the U.S. Chamber regularly files *amicus curiae* briefs in cases, like this one, that involve state tort and punitive-damages liability.

ATRA is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus* briefs in cases involving important liability issues, including over punitive damages.

APCIA is the primary national trade association for home, auto, and business insurers. It promotes and protects the viability of private competition for the benefit of consumers and insurers, with a legacy dating back one hundred and fifty years. APCIA's member companies represent nearly 63% of the United States' property casualty insurance market and write more than \$2.6 billion in premiums in the State of New Mexico, including over 77% of the state's commercial insurance market. On issues of importance to the insurance industry and marketplace, APCIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums at the federal and state levels and submits *amicus* briefs in significant cases before federal and state courts.

Counsel for the parties received timely notice of *amici*'s intent to file this brief in accordance with Rule 12-320(D)(1) NMRA.

INTRODUCTION AND SUMMARY OF ARGUMENT

This case raises critical constitutional issues governing the procedural and substantive due process constraints on punitive damages for all civil lawsuits. In this case, the jury awarded punitive damages in a ratio of 18:1 against Defendants at trial—finding Defendants liable for \$412,500 in compensatory damages and \$7.5 million in punitive damages—which presents serious due process concerns. The trial court, in refusing to reduce this award on post-trial motions, made two errors fundamentally inconsistent with Defendants' due process rights. First, it did not follow the procedure for reviewing punitive damages for excessiveness. Instead of assessing the \$7.5 million punitive damages award against the limits on punitive damages established by the U.S. Supreme Court and Supreme Court of New Mexico, it applied common-law standards for remittitur for all types of damages. Second, it did not reduce the award to a constitutionally acceptable amount, which requires a single-digit ratio between punitive and compensatory damages—generally 1:1 to 4:1—in cases like this one that do not involve intentional or malicious misconduct.

This Court should correct the ruling below. As the Court has made clear, the Fourteenth Amendment's Due Process Clause "entitles litigants to fair notice of the conduct that may be punished by a state's punitive damages system, and fair notice

of the severity of the penalty.” *Dollens v. Well Fargo Bank, N.A.*, 2021-NMCA-039, ¶ 19, 495 P.3d 580. The U.S. Supreme Court has set forth strict due process limits on punitive damages to eliminate “unpredictable outlier cases that call the fairness of the system into question.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2009). Central to this jurisprudence is a requirement that courts compare the amount of punitive damages to the compensatory award and reduce punitive damages that exceed the constitutional maximum ratio. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 581 (1996). When compensatory damages are substantial, as here, even a punitive damages ratio *equal* to compensatory damages “can reach the outermost limit of the due process guarantee.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 426 (2003). Thus, the double-digit ratio of 18:1 here is clearly excessive.

For these reasons, *amici* respectfully request that the Court overturn the district court’s order, instruct district courts generally that they must conduct the proper constitutional analysis for the excessiveness of punitive damages, and then reduce the punitive damages award in this case to a constitutionally defensible ratio—as other courts following the U.S. Supreme Court’s guidance have done.

ARGUMENT

I. THE U.S. SUPREME COURT HAS SET FORTH CLEAR DUE PROCESS LIMITS FOR THE IMPOSITION OF PUNITIVE DAMAGES THAT MUST BE ADHERED TO IN THIS CASE

For much of American jurisprudence, the availability of punitive damages “merited scant attention” because these awards “were rarely assessed and likely to be small in amount.” Dorsey D. Ellis Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 2 (1982). As this case shows, this paradigm no longer exists. The availability and size of punitive awards have expanded dramatically over the past five decades. *See, e.g.*, Jonathan LaCour, ‘Nuclear Punitives’ Could Be the New Normal for Damages, Bloomberg Law, Jan. 31, 2022.²

In the second half of the twentieth century, the scope of misconduct giving rise to punitive damages broadened significantly. Punitive damage awards were no longer reserved for intentional, malicious, or willful misconduct. As here, courts began allowing punitive damages in unintentional tort cases. *See Toole v. Richardson Merrell, Inc.*, 251 Cal. App. 2d 689 (Cal. Ct. App. 1967) (holding for the first time that punitive damages were recoverable in products liability). The standards for awarding punitive damages changed so dramatically that they were

² *See also Nuclear Verdicts: An Update on Trends, Causes, and Solutions*, U.S. Chamber Inst. for Legal Reform (May 2024) (analyzing 1,288 verdicts of \$10 million or more in state and federal courts from 2013–2022 and finding that large verdicts grew significantly in frequency and amount).

“awarded in cases in which liability of any sort would have been almost out of the question” in earlier times. Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133, 133 (1982).

In the late 1970s, the size of punitive damages awards started to increase dramatically. Plaintiffs’ lawyers began seeking them regularly and became skilled at inflaming juries against defendants. See George L. Priest, *Punitive Damages and Enterprise Liability*, 56 S. Cal. L. Rev. 123, 123 (1982); John Calvin Jeffries, Jr., *A Comment on the Constitutionality of Punitive Damages*, 72 Va. L. Rev. 139, 142 (1986) (seeing “unprecedented numbers of punitive awards in product liability and other mass tort situations”). By the late 1980s, “hardly a month [went] by without a multi-million dollar punitive damage verdict.” Malcolm Wheeler, *A Proposal for Furthering Common Law Development of the Use of Punitive Damages in Modern Products Liability Litigation*, 40 Ala. L. Rev. 919, 919 (1989).

Starting in the early 1990s, the U.S. Supreme Court heard a series of cases to address the excessiveness of punitive damages awards. The Court found that punitive damages had “run wild,” *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991), with Justice O’Connor observing that “the frequency and size of such awards have been skyrocketing” and “it appears that the upward trajectory continues unabated.” *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O’Connor J., dissenting). Even still, 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. Transnat'l L. 391, 392 (2004). The “high stakes and high variability of punitive damages” became a national concern because they could “pose a catastrophic threat of corporate insolvency.” Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 285 (1998).

To respond to this growth in the size and frequency of punitive damages awards, the U.S. Supreme Court increasingly set forth strict constitutional limits on their availability and amount. *Haslip* was the first case in which the Court raised concerns that excessive punitive damage awards violate the Fourteenth Amendment. *See* 499 U.S. at 18. As the Court explained a few years later, “[p]unitive damages pose an acute danger of arbitrary deprivation of property.” *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994). In 1996, the Court struck down an excessive punitive damages award for these reasons, setting forth the test requiring courts to compare punitive damages to the compensatory award. *See Gore*, 517 U.S. at 580-83.

Specifically, the Court established three “guideposts” that courts must follow in evaluating punitive damage awards. Courts must assess: (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 applicable to comparable misconduct. *See id.* at 575. The Court stated that the “most commonly

cited indicium of an unreasonable or excessive punitive damages award is its *ratio* to the actual harm inflicted on the plaintiff.” *Id.* at 581 (emphasis added). The New Mexico Supreme Court adopted this three-part test in *Aken v. Plains Elec. Generation & Transmission Co-op, Inc.*, 2002-NMSC-021, 132 N.M. 401. And this Court echoed the U.S. Supreme Court’s explanation for this criteria, citing its statement that “[e]lementary 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.” *Dollens*, 2021-NMCA-039, ¶ 19 (quoting *Gore*, 517 U.S. at 574).

Over the past 30 years, the U.S. Supreme Court, along with a multitude of federal and state courts, repeatedly has reaffirmed that assessing the ratio of punitive to compensatory damages, along with the other factors, is needed to allow members of the public—including businesses—to shape their conduct according to their *expected* liability. *See, e.g., State Farm*, 538 U.S. at 416 (due process “prohibits the imposition of grossly excessive or arbitrary punishments on a tortfeasor”); *Baker*, 554 U.S. at 499 (the limits prevent the “unpredictability of punitive awards”); *Payne v. Jones*, 711 F.3d 85, 94 (2d Cir. 2013) (“[J]udgments awarding unreasonable amounts as damages [also] impose harmful, burdensome costs on society.”). Allowing any undue awards to stand “establishes a precedent for excessive awards,”

will “encourage future jurors to impose similarly large” awards, and could cause “serious harm” to state and national economies. *Payne*, 711 F.3d at 94.

Thus, it is a constitutional imperative that the three-part test for excessiveness, which includes assessing the ratio of punitive to compensatory damages, be applied to the punitive damages award in this case.

II. THE DISTRICT COURT VIOLATED DEFENDANTS’ DUE PROCESS RIGHTS BY APPLYING THE INCORRECT STANDARD AND NOT ASSESSING THE RATIO BETWEEN PUNITIVE AND COMPENSATORY DAMAGES

In response to the first question presented, the district court clearly violated Defendants’ procedural due process rights by not assessing the ratio of the \$7.5 million punitive damages award to the harm the jury found they inflicted on the plaintiff—which the jury assessed at \$412,500. In *Aken*, the New Mexico Supreme Court explained that the full three-part analysis is required because each part helps ensure that “meaningful and adequate review” will be conducted whenever a jury awards punitive damages. 2002-NMSC-021, ¶ 14. Under this regime, district courts must give defendants an “adequate hearing” after a verdict and issue an order addressing all three indicia for assessing when punitive damages may be excessive. *Id.* (citing *TXO*, 509 U.S. at 464-65). Therefore, the district court here was clearly required to assess the punitive to compensatory damages ratio. *See Baker*, 554 U.S. at 507 (calling this ratio “a central feature in our due process analysis”).

In its post-verdict order, though, the district court did not address the ratio of punitive to compensatory damages in this case at all. Instead, it largely focused its analysis on state common-law standards for when remittitur of any award is needed. Specifically, it applied the “shock the conscious” standard, which is not an element of constitutional due process but a common-law remittitur standard for assessing the excessiveness only of *compensatory* damages—not punitive damages. *See Order* at 3-5 (citing *Sandoval v. Chrysler Corp.*, 2009-NMCA-095, 146 N.M. 853 (excessiveness of loss of future earnings and pain and suffering damages); *Ennis v. Kmart Corp.*, 2001-NMCA-068, 131 N.M. 32 (excessiveness of pain and suffering damages); and *Lujan v. Reed*, 1967-NMSC-262, 78 N.M. 556 (excessiveness of compensatory awards)). In addition, the district court referred to the damages here as “noneconomic loss,” *id.* at 4, even though punitive damages do not compensate for loss, but penalize and deter others from engaging in reprehensible conduct, which is why they are subject to heightened review and constitutional limitations.

To be clear, although constitutional restraints on punitive damages and traditional remittitur both involve judicial determinations of damages, they operate independently. They are derived from different authorities, work in different ways, and impose different standards. Remittitur is a process by which a court invokes its inherent authority to reduce, or propose to reduce, the damages the jury awarded because that award is too high for the facts of that case to support. *See Morga v.*

FedEx Ground Package Sys., Inc., 2022-NMSC-013, 512 P.3d 774. In such cases, a court can conclude there is sufficient evidence only for the jury’s liability finding, not its damages calculations. Rather than order a new trial, the court can suggest a reduction of the jury’s award to an amount supportable by the facts. *See id.* The ultimate decision is in the hands of the plaintiff, who can accept the remitted verdict, opt for a new trial, or accept remittitur under protest and appeal it under an abuse-of-discretion standard. *See Allsup’s Convenience Stores, Inc. v. North River Ins. Co.*, 1999-NMSC-006, ¶ 7, 127 N.M. 1. The goal is to save “the time and expense of a new trial if the plaintiff will accept a lesser sum as a verdict.” *Id.* at ¶ 10.

Defendants here sought to have the district court perform its “constitutional duty to insure that the award does not violate due process.” *Jolley v. Energen Res. Corp.*, 2008-NMCA-164, ¶ 31, 145 N.M. 350. As discussed above, this review requires a court to address “each relevant factor” in *Gore*, including the ratio of punitive damages to compensatory damages. *Aken*, 2002-NMSC-021, ¶ 19. This Court, when assessing the analysis—or lack thereof—in a district court’s order, applies a *de novo* standard of review, meaning it looks at these issues anew, without any deference to the lower court’s conclusions. *See id.* The New Mexico Supreme Court has explained that the Court of Appeals, when reviewing a punitive damages award for constitutional excessiveness, is “confronted with a grave responsibility—armed with the power to strike down an award on a *de novo* basis, the court must

actually conduct an analysis of the reasonableness of the jury verdict.” *Id.*; *see also Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424 (2002) (requiring *de novo* review for punitive damages).

Thus, it is now incumbent on this Court to properly “examine the relationship between compensatory and punitive damages.” *Dollens*, 2021-NMCA-039, ¶ 21. *Dollens* is instructive because, as here, the district court there also “did not address the relationship between Plaintiff’s actual damages and the punitive damages awarded.” *Id.* This Court vacated that order to “*some* rational relationship between the injury *in this case* and the punitive damages award.” *Id.* (emphasis in original). It also observed, echoing the U.S. Supreme Court, that ““few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.”” *Id.* ¶ 35 (quoting *State Farm*, 538 U.S. at 424). Thus, it is clear that the district court’s order is constitutionally infirm, and this Court must replace it with its own independent constitutional analysis.

III. THE PUNITIVE DAMAGES AWARD IS UNCONSTITUTIONALLY EXCESSIVE BECAUSE THE RATIO BETWEEN PUNITIVE AND COMPENSATORY DAMAGES EXCEEDS ACCEPTED LIMITS

In assessing the ratio in this case between the punitive and compensatory awards, the Court should be guided by the U.S. Supreme Court’s admonition that punitive damages must be fair and predictable to pass constitutional muster. *See, e.g., TXO*, 509 U.S. at 454 (plurality) (“[T]he Due Process Clause of the Fourteenth

Amendment imposes substantive limits “beyond which penalties may not go.”). The Court has observed that “punitive damages overall are higher and more frequent in the United States than they are anywhere else” and, “in many instances[,] a high ratio of punitive to compensatory damages is substantially greater than necessary to punish or deter.” *Baker*, 554 U.S. at 496, 499. Put simply, punitive damages cannot “dwarf the corresponding compensatories.” *Id.* at 500. Otherwise, as the state high court has affirmed, the excessiveness becomes “an arbitrary deprivation of property in violation of substantive due process.” *Aken*, 2002-NMSC-021, ¶ 12 (cleaned up).

It is now widely settled that where the compensatory award is substantial, as it is here, a punitive-damages award should generally be capped at a 1:1 ratio absent some other extraordinary circumstance. *See, e.g., Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041, 1073-74 (10th Cir. 2016); *Boerner v. Brown & Williams Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005). In *State Farm*, the U.S. Supreme Court “addressed [the ratio] guidepost with markedly greater emphasis and more constraining language,” adding that “an award of more than four times the amount of compensatory damages might be close to the line of constitution impropriety.” *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005) (citing *State Farm*, 538 U.S. at 425).³ This higher ratio, though, is reserved for “a particularly

³ *See also Baker*, 554 U.S. at 514-15 (“[A] single-digit maximum is appropriate in all but the most exceptional of cases,” and “when compensatory damages are

egregious act”—which generally requires intent and maliciousness, or when there is “only a small amount of economic damages” such that a lower ratio will not be sufficient to punish or deter. *Id.* Neither circumstance exists here.

Federal appellate courts across the United States have adhered to this instruction, reducing punitive-damages awards to a 1:1 ratio when the compensatory damages are deemed similarly “substantial” as those here. *See, e.g., Bach v. First Union Nat’l Bank*, 486 F.3d 150 (6th Cir. 2007) (ordering remittitur of \$2,628,600 punitive award to no more than \$400,000, where compensatory damages were \$400,000); *Saccameno v. U.S. Bank Nat’l Ass’n*, 943 F.3d 1071, 1078 (7th Cir. 2019) (reducing a punitive-damages award of \$3 million to the size of the compensatory-damages award of \$582,000, which was considered a “large total compensatory award”); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (reducing punitive award with 10:1 ratio to 1:1 ratio because “plaintiff’s large compensatory award” of \$600,000 “militates against departing from the heartland of permissible exemplary damages”); *Noyes v. Kelly Servs., Inc.*, 349 Fed. App’x 185, 187 (9th Cir. 2009) (affirming reduction of \$5.9 million punitive damages award to roughly \$650,000 to reflect a 1:1 ratio of punitive to compensatory damages); *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1206-08 (10th Cir. 2012) (reducing \$2

substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee.”).

million punitive award to amount equal to the \$630,307 compensatory award); and *Payne*, 711 F.3d at 103 (reducing punitive-damages award of \$300,000 to \$100,000 when the compensatory damages were \$60,000 “given the substantial amount of the compensatory award”).

State courts similarly have reduced punitive damages awards under this jurisprudence, including to an amount equal to compensatory damages. *See, e.g., Roby v. McKesson Corp.*, 219 P.3d 749, 770 (Cal. 2009) (holding that 1:1 was constitutional maximum in light of the “relatively low degree of reprehensibility and the substantial award of noneconomic damages”); *Weinstein v. Prudential Prop. & Cas. Ins. Co.*, 233 P. 3d 1221, 1262 (Idaho 2010) (reducing \$6 million punitive award to \$1.89 million, the amount of compensatory damages); *Thistlethwaite v. Gonzalez*, 106 So. 3d 238, 267-68 (La. Ct. App. 2012) (reducing punitive award to a 1:1 ratio, citing the high level of compensatory damages); *Burns v. Prudential Sec., Inc.*, 857 N.E.2d 621, 659 (Ohio Ct. App. 2006) (reducing punitive award from \$250 million to \$6.8 million where compensatory damages were about \$6 million).

Thus, in response to the second question presented, the jury’s ratio of punitive to compensatory damages of 18:1 is clearly unconstitutionally excessive. As indicated, this Court has acknowledged that few awards exceeding a single-digit ratio would satisfy due process, but the ratio that is appropriate here is in the low single digits—generally 1:1 and certainly no higher than 4:1.

IV. THE COURT MUST REDUCE THE PUNITIVE DAMAGES AWARD TO A CONSTITUTIONALLY ACCEPTABLE RATIO BECAUSE THIS CASE DOES NOT JUSTIFY A DOUBLE-DIGIT RATIO

When the Court assesses the facts of this case, it will be clear that it does not involve the types of special circumstances justifying a high punitive to compensatory damages ratio. First, this case involves a substantial award; Plaintiff's compensatory award from these Defendants is \$412,500, on top of the amount Plaintiff separately received from the defendants who settled before trial. *Accord Aken*, 2002-NMSC-021, ¶ 24 (referring to a \$100,000 compensatory award as being “substantial in itself”). Second, this case does not involve the type of reprehensibility—namely intent, malice, trickery, or deceit—that could justify a higher punitive damages award. *See Allsup's Convenience Stores, Inc.*, 1999-NMSC-006, ¶ 54 (noting the key factor is the “mental state underlying liability”). The district court asserted that Defendants' demeanor at trial could justify a higher award, but defending oneself against liability must not be turned into a factor for punitive damages. *See Order* at 5 (admonishing Defendant for not accepting responsibility for Plaintiff's death). As the State Supreme Court has held, allegations of negligence or recklessness cannot justify the high ratio here. *See Aken*, 2002-NMSC-021, ¶ 21.

Indeed, courts around the country steadfastly have adhered to lower-single-digit ratios, even when the harm was committed with greater reprehensibility than here—including when committed with intent or malice. *See, e.g., Ondrisek v.*

Hoffman, 698 F.3d 1020, 1030 (8th Cir. 2012) (“Despite the exceptionally reprehensible nature of [the defendant’s] conduct, it would be unconstitutional to let the punitive damages—and their 10:1 ratio to compensatory damages—stand”); *Mendez-Matos v. Guaynabo*, 557 F.3d 36, 54-55 (1st Cir. 2009) (reducing 10:1 ratio to 1:1 where defendant’s conduct “was reprehensible,” but “not particularly egregious.”); *Saccameno*, 2019 WL 6334280, at *10-11 (reducing punitive damages to a 1:1 ratio even though some reprehensibility factors were met because of the “substantial” \$582,000 compensatory award); *Jurinko v. Med. Protective Co.*, 305 F. App’x 13, 15, 27, 30 (3d Cir. 2008) (similarly reducing punitive damages from 3.13:1 to 1:1 ratio even though two of the reprehensibility factors were met).

These cases include those, as here, where plaintiffs alleged physical harm and death. *See, e.g., Lompe*, 818 F.3d at 1069, 1073-75 (reducing punitive damages from \$22.5 million to around \$2 million—11.5:1 ratio to 1:1—in personal-injury action because the “wrongful conduct consisted of a failure to act rather than any intent to injure through affirmative conduct”); *Mendez-Matos*, 557 F.3d at 53, 56 (reducing \$350,000 punitive award to \$35,000 where unlawful arrest presented “a real and serious threat of violence”); *Boerner*, 394 F.3d at 603 (reducing ratio from 3.7:1 to 1.2:1 in product defect case); *DiSorbo v. Hoy*, 343 F.3d 172, 176-77, 189 (2d Cir. 2003) (reducing punitive damages from \$1,275,000 to \$75,000 for police use of excessive force); *Blood v. Qwest Services Corp.*, 224 P.3d 301 (Ct. App. 2009),

aff'd, 252 P.3d 1071 (Colo. 2011) (finding a 1:1 ratio proper for severe and permanent injuries); *Thistlethwaite*, 106 So. 3d at 268 (1:1 ratio for drunk driving).

Finally, the Court should reject Plaintiff's invitation to base the compensatory damages part of the ratio on the total damages—as opposed to the amount of compensatory damages the jury assessed against these Defendants. To this end, the majority rule Plaintiff cites in its Response in Opposition to Defendants' Motion for Remittitur is inapplicable because Defendants are not seeking to apply their comparative fault percentage to the punitive damages award. They are seeking only to have their compensatory award compared to their punitive damages award. In New Mexico, punitive damages—like the apportioned amount of compensatory damages—“are personal to the wrongdoer,” and “[i]n determining whether a punitive award is justified, the focus is directed at the nature or character of the conduct of the defendant.” *Eckhardt v. Charter Hosp. of Albuquerque, Inc.*, 1998-NMCA-017, ¶ 33, 124 N.M. 549 (cleaned up). Here, the jury found Defendants liable for \$412,500 in compensatory damages and \$7,500,000 in punitive damages. These are the numbers the Court should use for its ratio calculation.

This Court faced a similar situation in *Jolley*. Although the Court did not answer this issue directly then, it appreciated that others have and cited an Oregon appellate court ruling rejecting “the contention that the ratio to consider is punitive damages to total damages without any deduction for the plaintiff's comparative

fault.” *Jolley*, 2008-NMCA-164, ¶ 36 (citing *Waddill v. Anchor Hocking, Inc.*, 78 P.3d 570, 576 n.6 (Or. Ct. App. 2003)). Penalizing defendants based on harm that they are not responsible for causing would violate their due process rights.

At bottom, this Court should give effect to New Mexico’s defendant-focused approach to punitive damages and the widely accepted constitutional limits on the size of a punitive damages award. Accordingly, it should limit the ratio of punitive to compensatory damages to the low single digits—generally a 1:1 ratio.

CONCLUSION

For these reasons, this Court should vacate the order below and reduce the punitive damages award in this case to a constitutionally accepted ratio.

Respectfully submitted,

SHOOK, HARDY & BACON L.L.P.

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Dated: March 5, 2026

CERTIFICATE OF SERVICE

I certify that, on March 5, 2026, a true and correct copy of the foregoing was filed electronically through the Odyssey File & Serve system, which caused counsel of record to be served by electronic means.

/s/ Dana L. Strueby
Dana L. Strueby