IN THE SUPREME COURT OF TENNESSEE
AT NASHVILLE

TAMARIN LINDENBERG,

Plaintiff/Petitioner,

v.

No. M2015-02349-SC-R23-CV

JACKSON NATIONAL LIFE INSURANCE COMPANY

Trial Court No. 13-cv-02657-JPM-cgc (W.D. Tenn.)

Defendant/Respondent,

and

STATE OF TENNESSEE,

Intervenor-Respondent.

BRIEF OF *AMICI CURIAE* TENNESSEANS FOR ECONOMIC GROWTH, TENNESSEE CHAMBER OF COMMERCE & INDUSTRY, TENNESSEE BUSINESS ROUNDTABLE, TENNESSEE HOSPITAL ASSOCIATION, TENNESSEE MEDICAL ASSOCIATION, STATE VOLUNTEER MUTUAL INSURANCE COMPANY, ASSOCIATED BUILDERS AND CONTRACTORS – GREATER TENNESSEE CHAPTER, CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, NATIONAL ASSOCIATION OF MANUFACTURERS, AMERICAN MEDICAL ASSOCIATION, NFIB SMALL BUSINESS LEGAL CENTER, AMERICAN TORT REFORM ASSOCIATION, AMERICAN INSURANCE ASSOCIATION, PROPERTY CASUALTY INSURERS ASSOCIATION OF AMERICA, AMERICAN COATINGS ASSOCIATION, BEAMAN AUTOMOTIVE GROUP, THE BUN COMPANIES, COMPASS PARTNERS LLC, COMMUNITY HEALTH SYSTEMS, INC., HCA, INC., LEE COMPANY, AND SMITH SECKMAN REID IN SUPPORT OF THE CONSTITUTIONALITY OF TENNESSEE'S STATUTORY LIMIT ON PUNITIVE DAMAGES

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INTEREST OF *AMICI CURIAE*

Amici include organizations representing businesses, healthcare providers, and insurers, along with several prominent Tennessee-based employers, which are concerned with the predictability and fairness of the civil justice system. *Amici* have an interest in ensuring that the civil litigation environment in Tennessee is balanced, reflects sound policy, and respects due process. Limiting punitive damages to the greater of two times the compensatory damages awarded or $500,000, as provided by Tenn. Code Ann. § 29-39-104(a)(5), furthers these goals. This law, enacted in 2011, prevents unpredictable liability, excessive awards, and punishment disproportionate to conduct at issue. Without a statutory limit on punitive damages, those that do business and provide healthcare in Tennessee are at risk of significant and unwarranted liability exposure. Maintaining the statutory limit is important to the solid reputation of Tennessee's civil justice system and the state's continued economic growth. Full statements of interest of the organizations and businesses joining this brief are included as an appendix to this brief.

INTRODUCTION AND SUMMARY OF ARGUMENT

Tennessee joined many of its sister states in 2011 when it placed statutory limits on punitive damage awards. These laws establish sound public policy on liability issues by moderating drastic, inappropriate expansion in the availability, size, and unpredictability of punitive damage awards over the past half century. Courts of last resort in nearly all of these states have upheld these enactments as fully within their legislatures' authority, including in North Carolina whose constitution provided the basis for the Tennessee Constitution. *See Rhyne v. K-Mart Corp.*, 594 S.E.2d 1 (N.C. 2004). These courts have found, just as this Court has in respecting legislation regarding related liability issues, that it is the proper role of legislatures to establish available penalties in civil actions.

Punitive damages are, by definition, penalties awarded in addition to compensatory damages. *See Goff v. Elmo Greer & Sons Const. Co.*, 297 S.W.3d 175, 187 (Tenn. 2009) (finding compensatory and punitive damages serve "vastly different" purposes). This Court accordingly has reserved punitive damages for the narrow set of cases in which a defendant wrongfully injures someone through malicious, intentional, fraudulent, or reckless conduct. *See Hodges v. S.C. Toof & Co.*, 833 S.W.2d 896, 901 (Tenn. 1992); Tenn. Code Ann. § 29-39-104(a)(3). While the plaintiff keeps the award as a windfall, the Court has recognized that the societal purpose of punitive damages is to punish "the wrongdoer and to deter the wrongdoer and others from committing similar wrongs." *Hodges*, 833 S.W.2d at 900; *see also* Restatement (Second) of Torts § 908 (1979) (same).

The General Assembly's 2011 reforms complement the measures this Court has taken to reduce the injustice of excessive punitive damages. In addition to the standards discussed above, this Court has applied a heightened burden of proof before allowing punitive damages; it requires a plaintiff to show that a defendant's conduct warrants an award of punitive damages through "clear and convincing evidence." *Hodges*, 833 S.W.2d at 901. As part of the 2011 reforms, the General Assembly codified these standards and this burden of proof; it also required the punitive damage phase of the case to be bifurcated from the assessments of liability and damages, much like the sentencing phase of a criminal act, and set forth factors for the trier-of-fact to consider. Tenn. Code Ann. § 29-39-104(a)(1). Finally, it placed monetary limits on awards to guard against excessive punishment, establishing that punitive damages generally cannot exceed the

greater of twice the amount of compensatory damages or $500,000. *See* Tenn. Code Ann. § 29-39-104(a)(5).[1]

The General Assembly has the constitutional authority to make public policy judgments as to which types of conduct warrant punishment and to set the range of permissible penalties.[2] As this brief explains, the General Assembly's decision to adopt reasonable limits on punitive damages furthers the valid legislative interest in facilitating a fair civil justice system and a strong economy. It also gives credence to the right to a jury trial and the separation of powers doctrine. This Court has traditionally respected the General Assembly's policymaking role in shaping the State's civil justice system. *See, e.g., Mills v. Wong*, 155 S.W.3d 916, 922 (Tenn. 2005) (recognizing the legislature's authority "to place reasonable limitations on rights of action in tort which it also has the power to create or to abolish"). It should do so here as well and hold that the statutory limits on punitive damages are a constitutional means of fostering predictable, proportional, and fair penal liability.

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[1] There are public policy exceptions for when the statutory limits do not apply, such as when a defendant acted with "specific intent to inflict serious physical injury. *See* Tenn. Code Ann. § 29-39-104(a)(7). These exceptions are not implicated in this case.

[2] Whether punitive damages are available here is still being contested based on the General Assembly's enactment of Tenn. Code Ann. § 56-7-105(a), which establishes monetary penalties where insurance benefits are not timely paid in good faith. The U.S. Court of Appeals for the Sixth Circuit has ruled that this statute "precludes punitive damages . . . because it provides the exclusive extracontractual remedy for an insurer's bad faith refusal to pay on a policy." *Heil Co. v. Evanston Ins. Co.*, 690 F.3d 722, 728 (6th Cir. 2012). *Amici* urge the Court to avoid any statement in its ruling in this case that could be misinterpreted as either implicit or explicit acceptance of the availability of punitive damages in insurance bad faith cases.

ARGUMENT

I. STATUTORY LIMITS ON PUNITIVE DAMAGES ARE NEEDED TO MODERATE THE DRASTIC AND INAPPROPRIATE EXPANSION IN THE AVAILABILITY, SIZE, AND UNPREDICTABILITY OF PUNITIVE AWARDS

For several decades, legislatures and courts have been placing limits on punitive damages because the availability and size of these awards have expanded significantly, making them unpredictable and unjustifiable. These legislative and judicial reforms work together to create a fairer, more predictable system for determining the appropriate targets and amounts of these civil penalties.

A. The Initial and Dramatic Rise in Punitive Damages

The origin of punitive damages dates to English common law, where they were strictly limited to a narrow category of torts involving conscious and intentional harm in which the defendant's conduct was an "affront to the honor of the victims." D. Dorsey Ellis., Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 14-15 (1982); *see also* James B. Sales & Kenneth B. Cole, Jr., *Punitive Damages: A Relic That Has Outlived its Origin*, 37 Vand. L. Rev. 1117, 1121-22 (1984) (observing that early punitive damage awards provided compensation in addition to that which was recoverable at the time). When punitive damages first appeared in Tennessee, they served similarly narrow purposes, subjecting a defendant who acted maliciously and with a "degree of insult" to damages beyond pecuniary loss. *See Wilkins v. Gilmore*, 21 Tenn. 140, 141 (1840). Soon thereafter, this Court firmly established that the purpose of punitive damages is to punish the defendant and deter others from similar conduct. *See Polk, Wilson & Co. v. Fancher*, 38 Tenn. 336, 341 (1858).

For much of English and American jurisprudence, punitive damages awards "merited scant attention," because they "were rarely assessed and likely to be small in amount." Ellis, 56 S. Cal. L. Rev. at 2. Over time, however, the scope of conduct for which punitive damages were

awarded was broadened, both nationally and in Tennessee. Punitive damage awards were no longer reserved for intentional, malicious, or willful misconduct, but could be imposed for reckless actions and even gross negligence. *See Inland Container Corp. v. March*, 529 S.W.2d 43, 45 (Tenn. 1975) (permitting punitive damages for "gross negligence" or acts done "so recklessly as to imply disregard of social obligations"). The standards fell so low that punitive damages were "awarded in cases in which liability of any sort would have been almost out of the question" a decade or two earlier. Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages: A Comment*, 56 S. Cal. L. Rev. 133, 133 (1982).

Due to the vagueness of the standards for punitive damages, awards became highly unpredictable. *See, e.g.,* Lara W. Short, *New Challenges to Punitive Damages in Tennessee*, 26 Tenn. B.J. 16 (Apr. 1990) (examining Tennessee punitive damage awards between 1972 and 1982). There was "no logical pattern" for why some cases resulted in punitive damages lower than compensatory damages while others had the opposite result. *Id.* They also became increasingly commonplace, particularly with the advent of strict product liability and mass tort litigation in the 1970s and 1980s. Further, the size of punitive awards "increased dramatically." 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) (recognizing "unprecedented numbers of punitive awards in product liability and other mass tort situations"). By the late 1980s, practitioners observed that "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).

B. Closer Judicial Review is Helpful, But Insufficient

In 1991, the U.S. Supreme Court recognized that punitive damages had "run wild." *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991); *cf. TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 500 (1993) (O'Connor J., dissenting) ("[T]he frequency and size of such awards have been skyrocketing" and "it appears that the upward trajectory continues unabated."). Over the next twenty years, a series of U.S. Supreme Court cases placed constitutional safeguards on the process for awarding and quantifying punitive damages. These controls include procedural requirements for meaningful judicial review, substantive restrictions on the proportional amount of the awards, and limitations on a trial court's ability to consider activity outside its jurisdiction as the basis for punitive awards.[3]

This Court took comparable measures because of the unpredictable nature of punitive damage awards in this State. In 1992, the Court found that Tennessee's standard for punitive damages was too "vague" and "overbroad," particularly with respect to permitting awards for "gross negligence." *Hodges*, 833 S.W.2d at 900-901. The Court instructed that punitive damages are to be reserved for the "most egregious of wrongs" and restricted their availability to cases in which there is clear and convincing evidence of intentional, fraudulent, malicious, or

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[3] *See State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) (finding "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process" and that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee"); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 433 (2002) (requiring *de novo* review); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 560, 575-83 (1995) (adopting guideposts for when a punitive damage award is excessive); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994) (requiring adequate judicial review of punitive damage awards); *TXO Prod. Corp.*, 509 U.S. at 456 (recognize substantive limitations on the size of punitive damage awards); *Haslip*, 499 U.S. at 31 (finding the Due Process Clause requires "significantly definite and meaningful constraint on the discretion [of the jury] to award punitive damages"); *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008) (finding, as a matter of federal maritime law, outlier punitive damage awards are best constrained by general 1:1 ratio between punitive and compensatory damages, representing a ratio just above the median).

reckless conduct. *Id.* at 901. As discussed above, the Legislature codified the *Hodges'* standard and burden of proof in the Civil Justice Act of 2011, which helped create a more predictable and rational punitive damage legal environment. *See* Tenn. Code Ann. § 29-39-104(a)(1).

While extraordinary and unjustified punitive awards can be reduced on appeal, the General Assembly made a valid judgment that clearer limits on punitive damages were necessary for reining in excessive punitive damage awards. This judgment is well-founded. The U.S. Supreme Court has suggested that, in cases where "compensatory damages are substantial, then a lesser ratio, perhaps only 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, 425 (2003). However, the Court has not adopted a bright-line ratio and, in all events, the federal constitutional limits on punitive damage awards set only the outermost limit, beyond which such awards are inconsistent with even the most basic conceptions of due process. Thus, there is no broad-based judicial measure for assuring sensible limits, only limits that meet the bare minimum required by due process. Indeed, many federal and state courts have not reversed punitive damage awards that have even exceeded the guidelines provided by the U.S. Supreme Court. *See* Laura J. Hines & N. William Hines, *Constitutional Constraints on Punitive Damages: Clarity, Consistency, and the Outlier Dilemma*, 66 Hastings L.J. 1257, 1301-02 (2015); *see also* W. Kip Viscusi, *The Blockbuster Punitive Damage Awards*, 53 Emory L.J. 1405, 1406 (2004) (explaining the difficulty of translating "moral outrage at wrongful conduct into a dollar penalty amount").

Further, the appellate process can be expensive and time consuming, and requires one to litigate cases all the way through both trial and appeal. It also does not relieve the undue pressure that the threat of outsized punitive awards place on settlement values, particularly when

the defendant is perceived to be a "deep pocket." The Bureau of Justice Statistics has found that in cases where an individual is suing a company, for example, punitive damages are awarded one out of every three times they are requested. *See* Thomas Cohen & Kyle Harbacek, Punitive Damages Award in State Courts, 2005, at 4 (U.S. Dep't of Justice Statistics 2011). These dynamics present "a weighty factor in settlement negotiations and inevitably result[] in a larger settlement agreement than would ordinarily be obtained." *See Dunn v. HOVIC*, 1 F.3d 1371, 1398 (3d Cir. 1993) (Weis, J., dissenting), *modified in part*, 13 F.3d 58 (3d Cir. 1993). Overall, "the availability of unlimited punitive damages affects the 95% to 98% of cases that settle." George L. Priest, *Punitive Damages Reform: The Case of Alabama*, 56 La. L. Rev. 825, 830 (1996).

Thus, while the U.S. Supreme Court and this Court have appropriately strengthened judicial scrutiny of punitive damage awards, judicial rulings alone cannot fully address the injustices of excessive, unpredictable and disproportionate punitive damage awards.

II. TENNESSEE'S STATUTORY LIMITS ON PUNITIVE DAMAGES PROMOTE PUBLIC CONFIDENCE IN THE CIVIL JUSTICE SYSTEM AND ADVANCE SOUND ECONOMIC POLICY

Many state legislatures have enacted commonsense statutory limits on punitive damages, often to complement court rulings, in order to guard against the recent trend of unjustifiable punitive damage awards and improperly inflated settlement values.[4] Several states, including

[4] *See* Ala. Code § 6-11-21; Alaska Stat. § 9.17.020; Colo. Rev. Stat. § 13-21-102(1)(a); Conn. Gen. Stat. § 52-240b (product liability); Fla. Stat. Ann. § 768.73; Ga. Code Ann. § 51-12-5.1(f); Idaho Code Ann. § 6-1604; Ind. Code Ann. § 34-51-3-4; Kan. Stat. Ann. § 60-3702; Me. Rev. Stat. tit. 28-A § 2-804(b) (wrongful death); Miss. Code Ann. § 11-1-65(3)(a); Mont. Code Ann. 27-1-220(3); Nev. Rev. Stat. § 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 § 2315.21; Okla. Stat. tit. 23, § 9.1; 40 Pa. Cons. Stat. Ann. § 1303.505 (healthcare providers); S.C. Code Ann. § 15-32-530; Tenn. Code Ann. § 29-39-104; Tex. Civ. Prac. & Rem. Code § 41.008; Va. Code Ann. § 8.01-38.1; W. Va. Code § 55-7-27; Wis. Stat. § 895.043(6). In addition, Louisiana, Massachusetts, Michigan,

Colorado, Florida, Kansas, Oklahoma, Nevada, North Dakota, Texas, and Virginia have had statutory limits on punitive damages since the 1980s. *See* Am. Tort Reform Ass'n, Punitive Damages Reform, *at* http://atra.org/issues/punitive-damages-reform (compiling state legislation). Tennessee is among the states – including South Carolina (2011), Wisconsin (2012), and West Virginia (2015) – which recently adopted statutory limits because of ongoing concerns with excessive, unpredictable and disproportionate punitive damages awards. *See* S.C. Code Ann. § 15-32-530; W. Va. Code § 55-7-27; Wis. Stat. § 895.043(6).

The Tennessee General Assembly made a considered policy decision to limit punitive damages in civil actions to two times compensatory damages or $500,000, whichever is greater. It also created public policy exceptions for when these limits do not apply, for example, when the defendant acted with specific intent to harm the plaintiff.[5] *See* Tenn. Code Ann. § 29-39-104(a). These reasonable limits promote sound public policies and an environment that is fair to all litigants, while still providing appropriate incentives to act within societal norms. Experience has shown that statutory limits on punitive damages also can result in a more timely recovery of compensatory damages; predictability fosters settlement, and proportional punitive damage awards will not be subject to lengthy appeals.[6]

Nebraska, New Hampshire, and Washington do not permit punitive damage awards or allow them only when expressly authorized for a specific action by statute.

[5] Tennessee's limit on punitive damages does not apply if the defendant had a specific intent to inflict serious physical injury; the defendant intentionally falsified, destroyed or concealed records containing material evidence; the defendant was under the influence of alcohol, drugs or any other intoxicant or stimulant, resulting in the defendant's judgment being substantially impaired, and causing the injuries or death; or the defendant's act or omission resulted in the defendant being convicted of a felony, and that act or omission caused the damages or injuries. Tenn. Code Ann. § 29-39-104(a)(7).

[6] In personal injury cases, particularly those involving mass torts, the statutory limit on punitive damages also helps preserve assets for deserving claimants who may otherwise see their compensatory recoveries limited if defendants' resources are depleted by earlier-filing plaintiffs who obtain "windfall" awards. This has happened, for example, in the asbestos context. *See*

The concepts of proportionality and a monetary ceiling are also consistent with the factors that courts have traditionally considered in upholding civil punishments: they reduce the opportunity for arbitrary and excessive punishment, and assure "fair notice" of the severity of a punishment. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 560, 574 (1995). Indeed, Tennessee's punitive damage statute follows a similar approach to other Tennessee laws that provide penalties for comparable wrongdoing. *See, e.g.,* Tenn. Code Ann. § 47-18-109(a)(3) (authorizing court to award up to three times the actual damages sustained for willing or knowing violations of Tennessee Consumer Protection Act). As former Justice Lewis Powell has expressed, it is important for government to "bring the law of punitive damages into conformity with our notions of just punishment." Lewis Powell, *The "Bizarre" Results of Punitive Damages*, Wall St. J., Mar. 8, 1995, at A21 (stating decision-makers should not have "virtually unlimited discretion to impose punishment").

In addition to this sound legal basis, Tennessee's limits on punitive damages place the State wholly within the mainstream of American jurisprudence, as other states' laws have similarly tied punitive damages to compensatory awards and set comparable maximums. *See, e.g.*, Colo. Rev. Stat. § 13-21-102(1)(a) (cannot exceed compensatory damages); Conn. Gen. Stat. Ann. § 52-240b (two times compensatory damages in product actions); Ga. Code Ann. § 51-12-5.1(f) ($250,000 limit unless defendant acted with specific intent to harm); Idaho Code Ann. §6-1604 (three times compensatory damages or $250,000); N.C. Gen. Stat. § 1D-25 (three times compensatory damages or $250,000 with no exceptions); N.D. Cent. Code § 32.03.2-11(4) (two times compensatory damages or $250,000); Okla. Stat. Ann. tit. 23, § 9.1 (two times

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Mark A. Behrens & Cary Silverman, *Punitive Damages in Asbestos Personal Injury Litigation: The Basis for Deferral Remains Sound*, 8 Rutgers J. L. & Pub. Pol'y 50, 51 (2011).

compensatory damages or $500,000); Va. Code Ann. § 8.01-38.1 ($350,000 limit); Wis. Stat. § 895.043(6) (two times compensatory damages or $200,000).

The General Assembly appreciated that Tennessee businesses and residents must compete economically with these states, including neighboring Alabama, Georgia, Mississippi, North Carolina, and Virginia, which have imposed reasonable statutory boundaries on punitive damage awards.[7] Manufacturing companies, physicians and other economic actors are sensitive to a state's legal environment when deciding where to locate. "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).

Likewise, other countries, with whom Tennessee and its sister states also compete for jobs, either generally limit the availability of punitive damage awards or do not recognize them at all. *See* Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. Times, Mar. 26, 2008 (reporting that "[m]ost of the rest of the world views the idea of punitive damages with alarm" and finds that punishment should be meted out only through the criminal justice system); John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transnat'l L. 391, 421 (2004) (finding that the most widespread use of punitive damages is in the United States). If Tennessee's legal climate is viewed as having excessive, unpredictable and disproportionate liability exposure, then job-creators, physicians, and others will have an incentive to go where they will receive fairer treatment. Therefore, statutory limits on punitive damages "promote public confidence in and bring more certainty to our system of civil redress, shielding [the State]

[7] *See* Ala. Code § 6-11-21; Ga. Code Ann. § 51-12-5.1(f); Miss. Code Ann. § 11-1-65(3)(a); N.C. Gen. Stat. § 1D-25; Va. Code Ann. § 8.01-38.1.

from problems encountered in other states, and encouraging business to bring much needed employment and other economic resources to this state." *Rhyne*, 594 S.E.2d at 17.

Opponents of statutory limits generally contend that the threat of unlimited punitive damages is necessary to deter misconduct and protect the public from irresponsible behavior. *Amici* are aware of no empirical studies supporting this view. Further, excessive punitive damages do not serve this purpose. Outlier punitive damages awards are wholly unpredictable, which is a reason they violate due process. *See Gore,* 571 U.S. at 574 (explaining that each of the Court's three "guideposts" for assessing punitive damages ultimately "indicates that [the defendant] did not receive adequate notice of the magnitude of the sanction that [the State] might impose"). They have no deterrent effect beyond that of reasonably foreseeable punitive damages awards. *See Campbell*, 538 U.S. at 417 ("To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.").

Accordingly, reasonable limits on punitive damages have received support from influential legal public policy groups. *See* Am. Law Inst., 2 Enterprise Responsibility for Personal Injury—Reporters' Study 258-59 (1991) (endorsing concept of ratio coupled with alternative monetary ceiling); Am. College of Trial Lawyers, Report on Punitive Damages of the Committee on Special Problems in the Administration of Justice 15 (1989), *at* https:// www.actl.com/library/report-punitive-damages-committee-special-problems-administration-justice (proposing limits of two times compensatory damages or $250,000). Both sound legal and economic public policies support Tennessee's reasonable limits on punitive damages.

III. COURTS HAVE OVERWHELMINGLY FOUND THAT STATUTORY LIMITS ON PUNITIVE DAMAGES ARE CONSTITUTIONAL

With respect to the questions certified here, both state and federal courts "consistently have upheld the constitutionality" of statutory limits on punitive damages, finding them fully

consistent with the right to jury trial and the separation of powers doctrines under state constitutions and the U.S. Constitution. Janet V. Hallahan, *Social Interests Versus Plaintiffs' Rights: The Constitutional Battle Over Statutory Limits on Punitive Damages*, 26 Loy. U. Chi. L.J. 405, 407 (1995). Tennessee jurisprudence is consistent with these mainstream principles of constitutional law. *See Lynch v. City of Jellico*, 205 S.W.3d 384, 390 (Tenn. 2006) (recognizing the Court's "strong presumption that acts passed by the legislature are constitutional").

A. Tennessee's Statutory Limit on Punitive Damages is Fully Consistent With the Jury's Fact-finding Role

Punitive damage limits, including those imposed by Tenn. Code Ann. § 29-39-104, do not violate the right to a trial by jury because they do not infringe upon the jury's fundamental fact-finding role. Under Section 29-39-104, the jury continues to decide disputed material facts regarding liability and determine the appropriateness of a penalty within the legally available remedies. Once the jury decides these issues, the constitutional mandate is met.[8]

The provision in the Tennessee Constitution guaranteeing the right to a jury trial is comparable to the Seventh Amendment of the U.S. Constitution. *Compare* Tenn. Const. Art. 1, § 6 (stating "the right to trial by jury shall remain inviolate") *with* U.S. Const. Amendment VII (stating "the right of trial by jury shall be preserved"). This Court has called the Seventh Amendment "an analogous provision" and held that the Tennessee Constitution "should be given the same interpretation" as courts have given the Seventh Amendment. *Newport Hous. Auth. v. Ballard*, 839 S.W.2d 86, 89 (Tenn. 1992). The U.S. Supreme Court has explained that the constitutional guarantee under the Seventh Amendment is "designed to preserve the basic

[8] It is questionable whether the right to jury trial provided by the Tennessee Constitution even applies to punitive damage awards, as punitive damages today bear little resemblance to the punitive damages that existed when the Tennessee Constitution was adopted in 1796. *See Young v. City of LaFollette*, 479 S.W.3d 785, 793-94 (Tenn. 2015). Also, the constitutional right to trial by jury does not apply to the plaintiff's bad faith claim, a statutory action created long after 1796. *See id.* (citing *Helms v. Tenn. Dep't of Safety,* 987 S.W.2d 545, 547 (Tenn.1999)).

institution of jury trial in only its most fundamental elements," namely for the jury to be the trier-of-fact. *Galloway v. United States*, 319 U.S. 372, 392 (1943); *see also Tull v. United States*, 481 U.S. 412, 425-27 (1987) (holding right to jury trial does not include assessment of civil penalties). It has never stood for the proposition that the legislature, or the courts, for that matter, cannot establish the legal remedies available to the jury.

Nearly every federal and state court considering the constitutionality of statutory punitive damage limits in conjunction with the right to trial by jury has found that placing bounds on such punishment is, in fact, constitutional. *See, e.g., Boyd v. Bulala*, 877 F.2d 1191, 1196 (4th Cir. 1989) (applying Virginia law); *Evans ex rel. Kutch v. State*, 56 P.3d 1046, 1051 (Alaska 2002); *Smith v. Printup*, 866 P.2d 985, 994 (Kan. 1993); *Rhyne*, 594 S.E.2d at 12-14; *Seminole Pipeline Co. v. Broad Leaf Partners, Inc.*, 979 S.W.2d 730, 758 (Tex. Ct. App.-Hous. 1998); *Pulliam v. Coastal Emergency Servs. of Richmond, Inc.*, 509 S.E.2d 307 (Va. 1999).

For example, Virginia's Supreme Court reasoned that "[o]nce the jury has ascertained the facts and assessed damages . . . the constitutional mandate is satisfied [and thereafter] it is the duty of the court to apply the law to the facts. *Pulliam*, 509 S.E.2d at 312 (internal citation omitted). Similarly, the Supreme Court of Alaska held that "[t]he decision to place a cap on damages awarded is a policy choice and not a re-examination of the factual question of damages determined by the jury." *Evans*, 56 P.3d at 1051 (upholding limits on punitive and noneconomic damages); *Reust v. Alaska Petroleum Contractors, Inc.*, 127 P.3d 807 (Alaska 2005) (affirming *Evans* that punitive damages cap is a policy choice and does not violate the right to a jury trial).

The Ohio Supreme Court observed that a statute limiting damages should be treated the same as laws enhancing damages, including statutes that treble jury awards. *Arbino v. Johnson & Johnson*, 880 N.E.2d 420, 476 (Ohio 2007). "We have never held that the legislative choice to

increase a jury award as a matter of law infringes upon the right to a trial by jury; the corresponding *decrease* as a matter of law cannot logically violate that right." *Id.* (emphasis in original). Additionally, the U.S. Court of Appeals for the Fourth Circuit found that because the legislature can "completely abolish a cause of action without violating the right to trial by jury . . . it may limit damages recoverable for a cause of action." *Boyd*, 877 F.2d at 1196. Once courts and legislatures establish the legal framework, the jury must stay within that framework and cannot order civil penalties where no such penalties are available at law.

These rulings echo constitutional pronouncements this Court has made about the right to jury trial in this State. This Court has similarly recognized that the "primary aspect" of the right to jury trial is for an unbiased, impartial jury to determine "all contested factual issues." *Ricketts v. Carter*, 918 S.W.2d 419, 421 (Tenn. 1996). It has held that the General Assembly has "sovereign power prospectively to limit and even to abrogate common law rights of action." *Mills,* 155 S.W.3d at 922 (citing *Duke Power Co. v. Carolina Envtl. Study Group, Inc.*, 438 U.S. 59, 83-84, 88 n.32 (1978)). It similarly does not allow juries to impose awards, including punitive damages, that are not available or where the legislature has provided alternative punishment. *See Concrete Spaces, Inc. v. Sender*, 2 S.W.3d 901, 912 (Tenn. 1999) (finding punitive damages are not available under the Tennessee Consumer Protection Act because the General Assembly authorized treble damages for willful or knowing violations). These holdings reflect the fundamental reality that the scope of available remedies, including punitive damages, is a legal question for the General Assembly and courts, not a contested factual issue for the jury.

The absence of relevant case law to the contrary in other states is striking. The Supreme Court of Alabama, which struck down a punitive damage limit in *Henderson v. Alabama Power Co.*, 627 So. 2d 878 (Ala. 1993), has since clarified that the state constitution does not restrict its

legislature "from removing from the jury the unbridled right to punish." *Ex Parte Apicella*, 809 So. 2d 865, 874 (Ala. 2001). The Arkansas Supreme Court invalidated a punitive damage limit, but only pursuant to a unique provision of the Arkansas Constitution barring limits on recovery outside the employment context. *Bayer CropScience LP v. Schafer*, 385 S.W.3d 822 (Ark. 2011). Finally, among state high courts, only the Missouri Supreme Court has invalidated a broad-based statute limiting punitive damages based on an interpretation of the state's right to jury trial. *See Lewellen v. Franklin*, 441 S.W.3d 136 (Mo. 2014). The Missouri ruling is an outlier that is contrary to the decisions in the overwhelming majority of courts to rule on this issue, and is inconsistent with Tennessee jurisprudence. In fact, it has harmed the reputation of the state's civil justice system.[9]

The Court should uphold the constitutionality of Tenn. Code Ann. § 29-39-104. It is consistent with the mainstream of rulings on the right to a jury trial and Tennessee jurisprudence.

B. Identifying Conduct Subject to Punishment, and Setting a Maximum Penalty, is a Public Policy Decision Within the Legislative Realm

The punitive damage limitations imposed by Tenn. Code Ann. § 29-39-104 represent a permissible exercise of legislature authority and do not encroach on powers vested exclusively in the judiciary. Punitive damages are awarded based on public policy, reflecting a judgment that a certain type of conduct warrants punishment. *Rhyne*, 594 S.E.2d at 9-10. As this Court and others have ruled, legislatures have clear authority to establish the range of penalties for wrongful conduct. *See id.; State v. Hinsley*, 627 S.W.2d 351, 355 (Tenn. 1982) (recognizing, in

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[9] *See* Carter Stoddard, *Survey: Missouri Among Worst States for Legal Fairness, Missourian*, Sept. 11, 2015, *at* http://www.columbiamissourian.com/news/state_news/survey-missouri-among-worst-states-for-legal-fairness/article_7d52876a-572d-11e5-9087-43bbfaab0ca4.html (reporting that attorneys and executives of major employers cited this ruling as the reason for lowering their ranking of the fairness of Missouri's liability system in 2015).

criminal law, the General Assembly's authority to "distinguish among the ills of society" and determine an appropriate punishment "without violating constitutional limitations").

Most states have held that statutory limits on damages "cannot violate the separation of powers." *Evans*, 56 P.3d at 1055-56; *see also Garhart v. Columbia/Healthone, L.L.C.*, 95 P.3d 571, 581 (Colo. 2004); *Arbino*, 880 N.E.2d at 490; *Judd v. Drezga*, 103 P.3d 135, 145 (Utah 2004); *Pulliam*, 509 S.E.2d at 319; *Estate of Verba v. Ghaphery*, 552 S.E.2d 406, 411 (W. Va. 2001). Statutory limits are a constitutional alteration to damages that are applied to all cases as a matter of public policy. *See Garhart*, 95 P.3d at 581; *Gourley v. Nebraska Methodist Health Sys., Inc.*, 663 N.W.2d 43, 77 (Neb. 2003).

As the Idaho Supreme Court ruled, "[b]ecause it is properly within the power of the legislature to establish statutes of limitations, statutes of repose, create new causes of action, and otherwise modify the common law without violating separation of powers principles, it necessarily follows that the legislature also has the power to limit remedies available to plaintiffs without violating the separation of powers doctrine." *Kirkland v. Blaine County Med Ctr.*, 4 P.3d 1115, 1122 (Idaho 2000) (upholding statutory limit on noneconomic damages); *see also Rhyne*, 594 S.E.2d at 9 (recognizing validity of similar legislative actions). "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 (internal quotation omitted).[10]

This Court has similarly respected the General Assembly's role in modifying common law rights, remedies and punishments. *See, e.g., Lynch v. City of Jellico*, 205 S.W.3d 384 (Tenn.

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[10] *See* Victor E. Schwartz & Leah Lorber, *Judicial Nullification of Civil Justice Reform Violates the Fundamental Federal Constitutional Principle of Separation of Powers: How to Restore the Right Balance*, 32 Rutgers L.J. 907, 908-13 (2001) (documenting state legislatures' delegation of the development of common law to the judiciary, judicial expansion of the availability of punitive damages, and legislative response through adopting reforms).

2006) (upholding Workers' Compensation Reform Act of 2004 under the Tennessee and U.S. Constitutions); *Mills*, 155 S.W.3d at 916 (upholding three-year medical malpractice statute of repose) (citing *Harrison v. Schrader*, 569 S.W.2d 822 (Tenn. 1978) (same)); *Newton v. Cox*, 878 S.W.2d 105 (Tenn. 1994) (upholding contingent fee cap for medical malpractice actions); *Jones v. Five Star Eng'g, Inc.*, 717 S.W.2d 882 (Tenn. 1986) (upholding ten-year product liability statute of repose); *Harmon v. Angus R. Jessup Assocs., Inc.*, 619 S.W.2d 522 (Tenn. 1981) (upholding four-year statute of repose for improvements to real property). In *Lavin v. Jordon*, the Court upheld the constitutionality of a statute that "capped" *compensatory* damages in cases where parents are subject to liability for acts of a child, recognizing that the wisdom of the statutory limit is a question for the legislature. 16 S.W.3d 362, 369-70 (Tenn. 2000).

The Court should reject Plaintiff's effort to reverse course and apply an expansive and unsupported reading of the Tennessee Constitution. Section 29-39-104 is exactly the type of legislation the U.S. Supreme Court had in mind as a complement to its constitutional bounds on punitive damages. *See Cooper Indus.*, 532 U.S. at 433 ("As in the criminal sentencing context, legislatures enjoy broad discretion in authorizing and limiting permissible punitive damage awards); *Gore*, 517 U.S. at 568 ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."). This view has been expressed even by jurists who oppose vigorous scrutiny of punitive damages under federal due process. *See Campbell*, 538 U.S. at 431, 438 (Ginsburg, J., dissenting) ("damages-capping legislation may be altogether fitting and proper," and "setting a single digit ratio and 1-to-1 benchmarks could hardly be questioned"); *Haslip*, 499 U.S. at 39 (Scalia, J., concurring) ("State legislatures and courts have the power to restrict or abolish the common-law practice of punitive damages, and in recent years have increasingly done so.").

Here, the General Assembly made a policy decision to limit punitive damage awards in ways that properly balance judicial and economic considerations. The statute (1) is in line with punishments typical at common law; (2) is similar to other penalties for comparable wrongdoing; (3) is similar to statutes in other states; (4) provides proper safeguards; (5) fosters settlement; and (6) is supported in its constitutionality by nearly all courts to consider the issue.

CONCLUSION

For these reasons, *Amici* respectfully urge the Court to find Tenn. Code Ann. § 29-39-104(a)(5) does not violate the right to jury trial or the State's separation of powers doctrine.

Respectfully submitted,

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APPENDIX: STATEMENTS OF INTEREST

Tennesseans for Economic Growth ("TEG") is a nonprofit public benefit corporation organized under section 501(c)(4) of the Internal Revenue Code for the promotion of public welfare, including the job growth and economic development in Tennessee. TEG coordinated a coalition of small, medium and large businesses operating in Tennessee, trade associations, and individuals in galvanizing support for the Civil Justice Act of 2011, which included the statutory limit on punitive damages at issue in this litigation.

The Tennessee Chamber of Commerce & Industry is the state chamber of commerce and is the Tennessee Manufacturers' Association, representing all facets of business and industry across the State. Formed in 1912, it is one of Tennessee's oldest and most respected business trade and public advocacy organizations dedicated to ensuring a positive business and regulatory climate.

The Tennessee Business Roundtable, LLC ("TBR") is a forum of strategic thinkers and business leaders who develop and seek to implement public policy that enhances a vibrant economic climate to optimize the quality of life and wellbeing for all Tennesseans. TBR develops policy through research and analysis, collaborates with state government and other business organizations, and provides leadership by bringing key business organization together to speak with one voice.

The Tennessee Hospital Association ("THA") promotes and represents the interests of hospitals and health systems in Tennessee. THA was established in 1938 as a not-for-profit membership association, to serve as an advocate for hospitals, health systems and other healthcare organizations and the patients they serve.

The Tennessee Medical Association ("TMA") is organized as a 501(c)(6) non-profit tax-exempt professional association. With over 8500 members, TMA is the largest professional association of physicians, residents and medical students in the state of Tennessee. Through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all Tennessee physicians, residents and medical students are represented in the TMA's policy making process. TMA members practice in every medical specialty area and every geographic area in Tennessee. The TMA was founded in 1830 to promote the science and art of medicine and the betterment of public health, and these constitute its mission. It represents the interests of its members before Tennessee courts, its General Assembly, and its executive branch. To that end, the TMA periodically files *amicus curiae* briefs in cases that raise legal issues of interest to the practice of medicine and delivery of health care in Tennessee.

State Volunteer Mutual Insurance Company ("SVMIC") was formed by a group of Tennessee physicians in 1975 in response to a medical liability insurance crisis. It was one of the first organizations in the nation created by physicians to insure their own medical liability risk. SVMIC insures over 19,000 physicians and advanced practice providers in Tennessee, Arkansas, Virginia, Kentucky, Alabama, Mississippi, and Georgia. SVMIC supports laws that have improved the medical liability environment in Tennessee and made Tennessee an environment for quality healthcare and a favorable place to practice medicine.

The Associated Builders and Contractors ("ABC") is nonprofit construction industry trade association. Members of the Greater Tennessee Chapter of ABC are dedicated to providing high-quality, low-cost, safe, on-time construction. These contractors employ thousands of workers in Tennessee who build commercial buildings, industrial plants, municipal and public works projects, roads and highways, homes, and provide a wide array of construction services.

ABC supports laws that stimulate economic growth and provide a fair and predictable liability environment for its members.

The Chamber of Commerce of the United States of America ("the Chamber") is the world's largest federation of businesses and associations. The Chamber represents 300,000 direct members and indirectly represents an underlying membership of more than three million U.S. businesses and professional organizations of every size and in every economic sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members in important matters before the courts, legislatures, and executive agencies. To that end, the Chamber regularly files *amicus curiae* briefs in cases that raise issues of vital concern to the nation's business community.

The National Association of Manufacturers ("NAM") is the largest manufacturing association in the United States, representing small and large manufacturers in every industrial sector and all fifty states. The manufacturing industry employs over 12 million men and women, contributes roughly $2.17 trillion to the U.S. economy annually, has the largest economic impact of any major sector and accounts for three-quarters of private-sector research and development. The NAM is the powerful voice of the manufacturing community and the leading advocate for a policy agenda that helps manufacturers compete in the global economy and create jobs across the United States.

The American Medical Association ("AMA") is the largest professional association of physicians, residents and medical students in the United States. Additionally, through state and specialty medical societies and other physician groups seated in its House of Delegates, substantially all US physicians, residents and medical students are represented in the AMA's policy making process. The AMA was founded in 1847 to promote the science and art of

medicine and the betterment of public health, and these remain its core purposes. AMA members practice in every medical specialty area and in every state, including in Tennessee. The AMA joins this brief on its own behalf and as a representative of the Litigation Center of the American Medical Association and the State Medical Societies. The Litigation Center is a coalition among the AMA and the medical societies of each state, plus the District of Columbia, whose purpose is to represent the viewpoint of organized medicine in the courts.

The NFIB Small Business Legal Center, a nonprofit, public interest law firm established to protect the rights of America' s small-business owners, is the legal arm of the National Federation of Independent Business ("NFIB"). NFIB is the nation's oldest and largest organization dedicated to representing the interests of small-business owners throughout all fifty states. The approximately 325,000 members of NFIB own a wide variety of America's independent businesses from manufacturing firms to hardware stores.

Founded in 1986, the American Tort Reform Association ("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 over two decades, ATRA has filed *amicus curiae* briefs in cases before state and federal courts that have addressed important liability issues.

The American Insurance Association ("AIA"), founded in 1866 as the National Board of Fire Underwriters, is a leading national trade association representing approximately 325 major property and casualty insurance companies based in Tennessee and most other states. AIA members collectively underwrite more than $127 billion in direct property and casualty premiums nationwide, including more than $2.1 billion in this State, and range in size from small

companies to the largest insurers with global operations. AIA advocates sound and progressive public policies on behalf of its members in legislative and regulatory forums nationwide. AIA also files amicus curiae briefs in significant cases before federal and state courts, including this Court, on issues of importance to the insurance industry and marketplace.

The Property Casualty Insurers Association of America ("PCI") is a trade group representing nearly 1,000 property and casualty insurance companies, representing the broadest cross-section of any national trade association. PCI promotes and protects the viability of a competitive private insurance market for the benefit of consumers and insurers. PCI members are domiciled in and transact business in all fifty states, plus the District of Columbia and Puerto Rico. In addition to the diversified product lines they write, PCI members include all types of insurance companies, including stocks, mutuals, and companies that write on a non-admitted basis.

The American Coatings Association ("ACA") is a voluntary, nonprofit trade association representing some 300 manufacturers of paints, coatings, adhesives, sealants and caulks, raw materials suppliers to the industry, and product distributors.

Beaman Automotive Group ("Beaman") includes several automotive dealerships operating in Nashville, Murfreesboro, and Dickson, Tennessee. Beaman has an interest in promoting economic growth and maintaining a fair and predictable legal system in Tennessee.

The Bun Companies are a leading manufacturer and innovator in the wholesale baking, frozen dough and storage industries. Its family of businesses includes Tennessee Bun Company (bakeries in Nashville and Dickson, Tennessee) and Cold Storage of Nashville. The Bun Companies have an interest in job growth, economic development, and a stable legal system.

Compass Partners LLC is a Nashville-based full-service provider of construction management services. It has facilitated projects across a broad range of professional industries including Nashville icons LP Field, Schermerhorn Symphony Center, Music City Center, the Country Music Hall of Fame, and Vanderbilt University's Blair School of Music. Compass Partners supports laws that facilitate job creation in the construction industry.

Community Health Systems, Inc. (together with its affiliates herein referred to as "CHS") is located in Franklin, Tennessee. CHS affiliates own or lease 198 hospitals in 29 states that in total employ over 134,000 people, including approximately 3,928 physicians. In Tennessee, CHS's 19 affiliated hospitals employ over 16,000 people.

HCA Inc. (together with its affiliates, "HCA"), also known as Hospital Corporation of America, is the nation's largest non-governmental healthcare provider. In Tennessee, Nashville-based HCA operates thirteen hospitals and four surgery centers, employing over 21,000 people. Nationally, HCA owns and operates 165 hospitals and 115 ambulatory surgery centers in 20 states and employs approximately 204,000 people. Approximately four to five percent of all inpatient care delivered in the country today is provided by HCA facilities. HCA supports laws that foster a fair and predictable legal system and affordable healthcare.

Lee Company is the largest mechanical service provider in Tennessee, serving businesses and families for three generations. It employs 1,000 experienced heating and air conditioning repair technicians, electricians, plumbers, professional engineers, certified construction and facilities managers, and field personnel. Lee Company was among Tennessee businesses that took a leadership role in advocating for the state's 2011 civil justice reforms, including reasonable statutory bounds on punitive damage awards.

Smith Seckman Reid, Inc. ("SSR") is an employee-owned corporation, headquartered in Nashville, Tennessee. SSR focuses on providing engineering, commissioning, and technology services across the United States and around the world. For example, SSR served as the prime engineering consultant for updating the infrastructure of the Tennessee State Capitol building, a project completed in 2012. SSR supported Tennessee's Civil Justice Act of 2011, which has helped Tennessee attract and retain jobs by offering businesses a more predictable and fair liability system.

CERTIFICATE OF SERVICE

I hereby certify that a true and exact copy of the foregoing Brief of *Amici Curiae* was served upon the following counsel of record via U.S. Mail, postage prepaid:

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