

Case No. 14-8082

UNITED STATES COURT OF APPEALS
FOR THE TENTH CIRCUIT

AMBER NICOLE LOMPE,
Plaintiff–Appellee,

v.

SUNRIDGE PARTNERS, LLC and
APARTMENT MANAGEMENT CONSULTANTS, LLC,
Defendants–Appellants.

On Appeal from the United States District Court
District of Wyoming (Cheyenne)
Honorable Alan B. Johnson
No. 2:12-cv-00088-ABJ

**BRIEF OF AMICI CURIAE AMERICAN TORT REFORM ASSOCIATION,
NATIONAL FEDERATION OF INDEPENDENT BUSINESS,
AND NATIONAL ASSOCIATION OF MANUFACTURERS
IN SUPPORT OF APPELLANTS AND REVERSAL**

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Corporate Disclosure Statement

Pursuant to Federal Rule of Appellate Procedure 26.1, the undersigned state that none of the amici are corporations that issue stock or have parent corporations that issue stock.

Statement of Consent

All parties to this appeal have consented to the filing of this brief pursuant to Federal Rule of Appellate Procedure 29(a). No party's counsel authored this brief in whole or in part, and no one other than amici, their members, or their counsel contributed money intended to fund the preparation or submission of this brief.

Identity and Interest of Amici Curiae

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 briefs in appellate cases that have addressed important liability issues.

The National Federation of Independent Business Small Business Legal Center (NFIB Legal Center) is a nonprofit, public interest law firm established to provide legal resources and be the voice for small businesses in the nation’s courts through representation on issues of public interest affecting small businesses. The National Federation of Independent Business (NFIB) is the nation’s leading small business association, representing 350,000 members in Washington, D.C., and all 50 state capitals. Founded in 1943 as a nonprofit, nonpartisan organization, NFIB’s mission is to promote and protect the right of its members to own, operate and grow their businesses. To fulfill its role as the voice for small business, the NFIB Legal Center frequently files amicus briefs in cases that will impact small businesses.

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 in all 50 states. Manufacturing employs over 12 million men and women, contributes roughly \$2.1 trillion to the U.S. economy annually, has the largest

economic impact of any major sector and accounts for two-thirds of private-sector research and development. Its mission is to enhance the competitiveness of manufacturers and improve American living standards by shaping a legislative and regulatory environment conducive to U.S. economic growth. NAM participates in preparing and filing amicus briefs addressing issues that impact its members.

Introduction and Summary of the Argument

This case illustrates the danger of using evidence of wealth in the punitive damages phase at trial. More importantly, it illustrates why the United States Supreme Court does not allow a defendant's wealth to increase the constitutional limit for particular punitive damages awards. While states—such as Wyoming—may allow *juries* to consider a defendant's wealth in awarding punitive damages, that choice does not impact the scope of the constitutional limit on punitive damages awards. For that reason, this court should ignore any evidence of wealth in the record when determining whether the punitive damages awards here exceed constitutional limits. And this court should clarify that district courts in this circuit should not consider evidence of wealth as a reason to increase the constitutional limit governing a particular punitive damages award.

Under Wyoming law, plaintiffs are required to put on evidence of a defendant's net worth in the punitive damages phase of trial. As a result, the alleged wealth of the two defendants here played a central role in the multi-million dollar damages award. It was not a coincidence that after being presented with evidence purportedly showing the defendants' wealth and being told that they needed to award an amount of punitive damages that “will get [the defendants'] attention,” the jury awarded \$22,500,000 in punitive damages against AMC and \$3,000,000 in punitive damages against Sunridge. Nor is it a coincidence that those amounts aligned with figures that supposedly accounted for the defendants' “wealth” over the span of several years.

The amici ask this court to hold that a defendant's wealth can never be used to increase the constitutional limit of a punitive damages award. This rule avoids the problems associated with wealth evidence, including its lack of correlation with a defendant's true financial position. More importantly, it follows from the United States Supreme Court's nearly twenty-year practice of ignoring the wealth of defendants when applying the *Gore* guideposts to review punitive damages awards.

First, while members of the United States Supreme Court have continued to disagree over whether and how *juries* may consider wealth evidence in setting a punitive damages award, the court's 2003 decision in *State Farm v. Campbell* clarified that when a *court* reviews a jury's award, wealth evidence cannot make an otherwise unconstitutional award constitutional. 538 U.S. 408, 427 (2003) (“[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award.”). In other words, the fact that a defendant is particularly wealthy does not increase the constitutional limit governing whether a punitive damages award against that defendant violates its right to substantive due process.

While the United States Supreme Court was less blunt about wealth evidence before *State Farm*, the notion that a defendant's wealth does not increase the constitutional limit on a punitive damages award is not new. A close reading of cases both before and after *State Farm* reveals that, despite evidence and parties' arguments to the contrary, the court has not considered wealth to be a relevant factor in conducting its constitutional review of a punitive damages award since the early 1990s. Rather, the

United States Supreme Court has continued to apply the three so-called *Gore* guideposts without reference to wealth evidence. This further signals that a defendant's wealth does not bring an excessive punitive damages award within constitutional limits. This court should apply the *Gore* factors without considering the defendants' wealth as part of that analysis.

Second, the United States Supreme Court's decision to distance itself from wealth evidence in reviewing punitive damages awards makes sense. Wealth evidence is easily manipulated and often distorts a defendant's financial position or ability to pay an award at the time of trial. In addition, relying on wealth evidence to justify penalties against corporations is more likely to impact shareholders, customers, and employees, than it is to harm those responsible for the harm caused to the plaintiff. Because wealth evidence is inconsistent, problematic, prejudicial, and an ineffective way to target those responsible for the conduct, courts should not rely on wealth evidence to justify awards under the Due Process Clause.

Third, to the extent wealth evidence is relevant to the constitutional review of a punitive damages award, reviewing courts should consider wealth evidence only in a way that is consistent with the *Gore* guideposts, i.e., to *reduce* punitive damages awards that are unconstitutionally excessive where there is no relationship between the defendant's wealth and the plaintiff's harm.

Argument

I. Courts Should Not Employ Evidence of Wealth to Increase the Constitutional Limit of a Jury's Punitive Damages Award

The United States Supreme Court has long been suspicious of wealth evidence and its impact on punitive damages awards. *See, e.g., Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991) (“[t]he factfinder must be guided by more than the defendant’s net worth” and plaintiffs should “not enjoy a windfall because they have the good fortune to have a defendant with a deep pocket.”). And while some of the court’s early punitive damages cases suggest wealth evidence might be relevant to whether a punitive damages award is constitutional,¹ the court has steadily retreated from that suggestion over the past twenty years. A review of the United States Supreme Court’s cases addressing punitive damages, as well as its statements about wealth evidence since the mid-90s, illustrates that the court has abandoned any suggestion that a defendant’s wealth may be used to increase the constitutional limit of a punitive damages award. The amici ask this court to recognize, announce, and apply that rule in this case.

The court began its critique of wealth evidence in *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994). There the court held that, while juries have wide latitude in setting awards, defendants have a constitutional right to post-verdict review of those awards. In

¹ *See, e.g., TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 462 (1993) (plurality opinion) (“The punitive damages award in this case is certainly large, but in light of the amount of money potentially at stake, the bad faith of the [defendant], the fact that the scheme employed in this case was part of a larger pattern of fraud, trickery and deceit, and [defendant’s] wealth, we are not persuaded that the award was so ‘grossly excessive’ as to be beyond the power of the State to allow.”).

its opinion, the court explained that judicial review of awards was essential because “[p]unitive damages pose an acute danger of arbitrary deprivation of property.” *Id.* at 432. The court explained, “[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant’s net worth creates the potential that juries will use their verdicts to express biases against big businesses, particularly those without strong local presences.” *Id.* The court further commented that “the rise of large, interstate and multinational corporations” has only “aggravated the problem of arbitrary awards and potentially biased juries” and therefore judicial review of those awards was necessary to guard against unconstitutional damages awards. *Id.* at 431. Although the court did not address whether wealth evidence should be considered in reviewing whether an award is constitutional, its statements about juries and wealth suggest that such evidence cannot be used to increase the constitutional limit of awards.

And in fact, the court refused to consider wealth evidence at all in its constitutional review of an award just two years later in *BMW of North America v. Gore*, 517 U.S. 559 (1996). In that case, the court applied what have come to be known as the “*Gore* guideposts”² to review and reverse as unconstitutionally excessive a jury’s \$2 million punitive damages award against BMW. *Id.* at 574-86. Tellingly, despite BMW’s extensive resources, the court did not consider wealth evidence in applying the

²The *Gore* guideposts require the court to consider: (1) the degree of reprehensibility of the defendant’s misconduct; (2) the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages award; and (3) the difference between the punitive damages awarded by the jury and the civil penalties authorized or imposed in comparable cases. *Gore*, 517 U.S. at 574-86. Notably absent from this list is any reference to the defendant’s wealth.

guideposts, implicitly rejecting the plaintiff's argument that the \$2 million punitive damages award should be upheld because it was so small in relation to BMW's wealth.³ The court's only reference to wealth evidence in the opinion was its statement that "the fact that BMW is a large corporation rather than an impecunious individual" should *not* impact its rights. *Id.* at 585. If the court believed that the constitution permits a larger award to deter a more wealthy defendant, the court would have considered BMW's wealth.

In 2001, the court continued its departure from relying on wealth evidence. In *Cooper Industries Inc. v. Leatherman Tool Group*, the court clarified that judicial review of a jury's award of punitive damages is *de novo*, not abuse of discretion. 532 U.S. 424, 431 (2001). Under that standard, courts owe no deference to a jury's consideration of wealth evidence (or anything else) in setting a punitive damages award. The court explained that "[r]equiring the application of law, rather than a decisionmaker's caprice, does more than simply provide citizens notice of what actions may subject them to punishment; it also helps to assure the uniform general treatment of similarly situated persons that is the essence of the law itself." *Id.* at 436 (quoting *Gore*, 517 U.S. at 587). This statement confirms that the federal due process limits do not differ based upon the wealth or financial evidence in a particular record, especially where different states have different rules concerning the introduction of wealth evidence for juries to consider.

³ Brief of Respondent, *BMW North America v. Gore*, 517 U.S. 559 (1996) at 12, 39 (arguing award was reasonable when compared to BMW's "wealth" and "the evidence showed that 'even [a] \$4 million judgment would not have a substantial impact' on BMW's financial position.").

Tellingly, the court again analyzed the *Gore* guideposts without reference to wealth. *Id.* at 440-43. The court's failure to do so was significant because both the trial court and the appellate court had relied on the defendant's "size and assets" to determine that the jury's punitive damages award was not unconstitutionally excessive. *See Leatherman Tool Group Inc. v. Cooper Indus., Inc.*, 205 F.3d 1351, at *1 (9th Cir Dec. 17, 1999) (unpublished opinion); *see also* Brief of Respondent at 7, 9, *Cooper Industries v. Leatherman Tool Group*, 532 U.S. 424 (2001) (No.99-2035).

In 2003, the court removed any lingering ambiguity concerning whether a defendant's wealth can be used to increase the constitutional limit for a punitive damages award. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003). In *State Farm*, the jury awarded \$2.6 million in compensatory damages and \$145 million in punitive damages. *Id.* at 415. The trial court reduced the awards to \$1 million and \$25 million respectively, but the Utah Supreme Court reinstated the awards relying in part on State Farm's "massive wealth." *Id.* The United States Supreme Court reversed, criticizing the Utah Supreme Court's reliance on the wealth evidence in evaluating whether the punitive damages award fell within constitutional limits. The court explained that wealth "bear[s] no relation to the award's reasonableness or proportionality to the harm" and that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *Id.* at 427. The court then vacated the punitive damages award explaining that "[t]he remaining premises for the Utah Supreme Court's decision bear no relation to the

award's reasonableness or proportionality to the harm. They are, rather, arguments that seek to defend a departure from well-established constraints on punitive damages." *Id.*

Finally, in the court's most recent punitive damages decision, *Exxon Shipping Co. v. Baker*, the court held that punitive damages awards in maritime cases generally may not exceed the amount of compensatory damages. 554 U.S. 471, 514-15 (2008). Once again, the plaintiffs focused on the defendant's net worth at trial, urged the jury to send "a message" to the company, and argued on appeal that the punitive damages award "represents barely more than three weeks of Exxon's current net profits."⁴ But the court again ignored evidence of the defendant's wealth, reaffirming that this type of evidence should not be considered in reviewing a jury's punitive damages award.

These cases demonstrate that, whatever the status of wealth evidence was prior to *State Farm*, evidence of wealth cannot be used to increase the constitutional limit for a punitive damages award after *State Farm*. This court should clarify that the federal due process limits do not increase simply because a defendant is particularly wealthy.

II. Evidence of Wealth Does Not Provide a Consistent or Meaningful Measure for Evaluating the Constitutionality of a Punitive Damages Award

Ignoring evidence of wealth in applying the *Gore* guideposts makes sense because there is no uniform approach to how wealth evidence is presented to juries, who has the burden of presenting it, how it may be used, or even what "wealth" means. Perhaps more important, evidence of wealth is easily manipulated and does not often reflect the

⁴ See Brief of Product Liability Advisory Council, Inc., as Amicus Curiae Supporting Petitioners at 23, *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008).

financial reality for a company.⁵ And relying on wealth evidence to justify large punitive damages awards often harms individuals and employees of the corporation not responsible for the tortious conduct.⁶ Indeed, numerous courts and commentators have remarked that wealth evidence does little more than invite punishment based on status—on who the defendant is, rather than on what the defendant has done.⁷ To eliminate these potential concerns, courts should avoid consideration of wealth evidence in reviewing punitive damages awards.

First, because federal due process review of a punitive damages award must be applied consistently across states, and there is no uniform approach to how states permit

⁵ See e.g., *Pfeifer v. John Crane, Inc.*, 164 Cal. Rptr. 3d 112, 142 (Cal. Ct. App. 2013) (noting that while “net worth” is the most common measure of the defendant’s ability to pay a punitive damages award it is “subject to easy manipulation.”)

⁶A. Mitchell Polinsky & Steven Shavell, *Punitive Damages: An Economic Analysis*, 111 Harv. L. Rev. 869, 911 (1998) (noting high punitive damages awards based on wealth evidence will lead corporations to take excessive precautions, undesirably curtail their activities, set prices above the proper level, and in an extreme case, withdraw products from the marketplace despite value of products to society).

⁷See, e.g., *Mathias v. Accor Economy Lodging, Inc.*, 347 F.3d 672, 676 (7th Cir. 2003) (“sanctions should be based on the wrong done rather than on the status of the defendant; a person is punished for what he does, not for who he is, even if the who is a huge corporation”); *Leab v. Cincinnati Ins. Co.*, No. Civ. A. 95-5690, 1997 WL 360903, at *16 (E.D. Pa. June 26, 1997) (memorandum decision) (“To accept [plaintiff’s] contention that a punitive damages award against a wealthy corporate defendant must be significant in order to have any effect would mean that any punitive damages award against a Fortune 500 company must necessarily be in the millions of dollars to affect the company’s behavior. The law makes no such requirement.”); *Bowden v. Caldor, Inc.*, 710 A.2d 267, 279 (Md. 1998) (“merely because a defendant may be able to pay a very large award of punitive damages . . . does not justify an award which is disproportionate to the heinousness of the defendant’s conduct”); see also Kenneth S. Abraham & John C. Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant’s Wealth*, 18 J. Legal Stud. 415, 416 (1989) (focusing on the defendant’s wealth is “unwise” because it invites conjecture into past misconduct and encourages punishment based on mere status).

the use of wealth evidence,⁸ it makes little sense for a defendant's wealth to increase the constitutional limit for a punitive damages award. Indeed, permitting courts to consider this type of evidence would result in the federal Due Process Clause varying from state to state.⁹ For example, states like Wyoming *require* juries to consider certain wealth evidence in setting a punitive damages award.¹⁰ In other states, wealth evidence is permitted but not required.¹¹ And other states, like Colorado, prohibit the introduction of wealth evidence because of its high tendency to prejudice the jury and inflate punitive damages awards.¹² The records coming from cases arising in those states will differ. For

⁸ Dorsey D. Ellis, Jr., *Punitive Damages, Due Process, and the Jury*, 40 Ala. L. Rev. 975, 975-76, 987-88 (1989) (noting the volatility and variance of awards).

⁹ Cordell A. Hull, *Extraterritoriality and Punitive Damages: Is There A Workable System? The U.S. Supreme Court Should Speak More Definitively on the Extent to Which Conduct in Other Instances and Net Worth May Be Used Against Defendants*, 70 Def. Couns. J. 439, 445-46 (2003) (noting that different jurisdictions have varying rules on the intended effect of punitive damages, some prohibiting punitive damages awards that would bankrupt the defendant and others holding that bankruptcy would not bar a punitive damages award).

¹⁰ California is the leading proponent of the rule that wealth evidence must be introduced. *See, e.g., Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 78-80 (Cal. 2005); *Adams v. Murakami*, 813 P.2d 1348, 1350-55 (Cal. 1991) (en banc). Evidence of the defendant's "net worth" is also required in Wyoming, the state at issue here. *See, e.g., Rosty v. Skaj*, 272 P.3d 947, 959-60 (Wyo. 2012) (noting that Wyoming model jury instructions require consideration of the "financial condition" of the defendant, specifically, "net worth" or "assets"); *see also Bennett v. Huish*, 2007 UT App 19, ¶ 38, 155 P.3d 917 ("In assessing the amount of punitive damages to be awarded, the trier of fact must consider seven factors, one of which is the relative wealth of the defendant.").

¹¹ *See, e.g., Bankers Multiple Line Ins. Co. v. Farish*, 464 So. 2d 530, 533 (Fla. 1985) (noting that net worth of defendant is one factor to consider, but it was an error to instruct jury that "the greater defendant's wealth, the greater must be punitive damages"); *Anderson v. Latham Trucking Co.*, 728 S.W.2d 752, 753 (Tenn. 1987) (recognizing that the defendant's financial status is admissible in an action for punitive damages, but absence of such evidence was not proper basis for remitting punitive damages award).

¹² Colo. Rev. Stat. Ann. § 13-21-102(6) ("In any civil action in which exemplary damages may be awarded, evidence of the income or net worth of a party shall not be

that reason, wealth evidence will distort the uniform constitutional standard set forth in *Leatherman*. See *Leatherman Tool Group, Inc.*, 532 U.S. at 436 (noting correctness review of punitive damages award “helps to assure the uniform general treatment of similarly situated persons that is the essence of the law itself”); see also *Pivot Point Int’l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996) (“Basing a decision on income and assets . . . calls into question the courts’ commitment to do equal justice to the rich and the poor.”).

Second, because “wealth” has no consistent definition,¹³ and what may be introduced as wealth evidence varies widely from state to state, it is neither a meaningful nor a consistent factor for evaluating a punitive damages award.¹⁴ One commentator has explained the problems with wealth evidence as stemming from the lack of a meaningful relationship between sales, earnings, profits, and overall financial condition:

Basic financial sheet data such as sales, profits, and net worth most often have been regarded as the relevant indicators of a corporation’s “wealth.”

considered in determining the appropriateness or amount of such damages.”); see also *S. Life & Health Ins. Co. v. Whitman*, 358 So. 2d 1025, 1026 (Ala. 1978) (“Our cases have long held that evidence of the defendant’s wealth is highly prejudicial and, therefore, inadmissible.”); *Hensley v. Paul Miller Ford, Inc.*, 508 S.W.2d 759, 764 (Ky. Ct. App. 1974) (“[I]n actions for punitive damages the parties may not present evidence or in anywise advise the jury of the financial conditions of either side of the litigation.”).

¹³ *Punitive Damages: Relationship to Defendant’s Wealth as a Factor in Determining Propriety of Award*, 87 A.L.R. 4th 141 § 2[b] (1991) (noting that a defendant’s net worth (assets minus liabilities) is the traditional guideline for assessing punitive damages, but that courts also look to other factors such as annual income).

¹⁴ See, e.g., *Zazú Designs v. L’Oreal, S.A.*, 979 F.2d 499, 508 (7th Cir. 1992) (“Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.”); *Peisner v. Detroit Free Press*, 242 N.W.2d 775, 781 (Mich. Ct. App. 1976) (noting that determining a defendant’s true financial situation would require far more than a presentation of the defendant’s balance sheet and statement of profits and losses).

Yet figures on a company's sales are often largely unrelated to a company's true financial prosperity, for very little of the gross earnings remains—even when times are good—after deducting the costs of materials, labor, sales administration, taxes, and increasingly, the cost of capital. Even profits after taxes are plainly not idle wealth, because the enterprise will fail if the owners do not receive a fair return on their investment. And even after the payment of dividends, although such retained “profits” may travel to the balance sheet adding to net worth, the remaining dollars hardly represent a pot of idle gold, ripe for plucking by the plaintiff and his lawyer, for usually they will be reinvested in plant, equipment, salaries and other future cost of operation—“the costs of staying in business.”¹⁵

The vagueness of the term “wealth” perhaps explains why different states define the term differently. For example, some jurisdictions define “wealth” to be net worth,¹⁶ while others focus on profits from wrongdoing,¹⁷ gross sales,¹⁸ net operating revenue,¹⁹ or total assets.²⁰ Courts refer to a company's “book value” or its “fair market value,”²¹ which may include world-wide worth, “nationwide worth,”²² or only in-state wealth.

¹⁵ David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 19 (1982).

¹⁶ See *supra* n.14.

¹⁷ Dan B. Dobbs, *Law of Remedies: Damages—Equity—Restitution* (West 2d ed. 1993) at 353 (noting actual or potential profit from wrongdoing as the relevant factor to consider).

¹⁸ See, e.g., *Barnett v. La Societe Anonyme Turbomeca France*, 963 S.W.2d 639, 655 (Mo. Ct. App. 1997) (finding no error in allowing jury to consider evidence of defendant's gross sales in setting punitive damages award).

¹⁹ *Miller v. Equifax Info. Servs., LLC*, No. 311-CV-01231-BR, 2014 WL 2123560, at * 10 (D. Oregon May 20, 2014); *but see Sulton v. HealthSouth Corp.*, 734 S.E.2d 641, 645-46 (S.C. 2012) (concluding trial court erred by permitting evidence of defendant's net operating revenue).

²⁰ See, e.g., *Ainsworth v. Combined Ins. Co. of Am.*, 763 P.2d 673, 677 (Nev. 1988) (concluding that punitive damages award was constitutional when, “while large,” it reflected only .4% of company's “total assets”).

²¹ *Sanders v. Jackson*, 209 F.3d 998, 999 (7th Cir. 2000) (concluding net worth means “book value” as opposed to “fair market value”).

²² *Dillard Dep't Stores, Inc. v. Beckwith*, 989 P.2d 882, 887 (Nev. 1999) (holding department store chain's nationwide worth, rather than its worth solely in Nevada, could be considered in fixing punitive damages award).

Other courts limit a jury's consideration to the defendant's "net worth" at the time of the verdict,²³ its wealth at the time of the wrongful conduct,²⁴ or, as in this case (and arguably improperly), the company's financial performance over a span of several years prior to trial.²⁵ Given the many variables and modern accounting techniques, the determination of defendant's wealth will differ greatly across jurisdictions.²⁶ And if courts rely on such evidence to determine whether a particular award exceeds constitutional limits, constitutional rights will vary across jurisdictions.

Using a defendant's wealth to decrease the constitutional protection from an excessive punitive damages award is problematic for an additional reason. It punishes an entire company, and often others as well, for the tortious conduct of a few individuals who fail to act like the rest of the corporation—i.e., a poor manager, rogue employee, or local branch that chooses to depart from company-wide policy or practices. It is one thing to require the company to satisfy a punitive damages award for the conduct of its agents, but it is another entirely to allow that company's wealth to justify an otherwise

²³ *Jonathan Woodner Co. v. Breeden*, 665 A.2d 929, 941-42 (D.C. 1995) (vacating punitive damages award when it was based on financial statements that were five and seven years old, holding that punitive damages based on wealth of defendant requires proof of defendant's current net worth at time of trial).

²⁴ *American Pioneer Life Ins. Co v. Williamson*, 704 So. 2d 1361, 1366 (Ala. 1997) (noting that reduced punitive damages award would represent approximately 1% of company's net worth at the time of the wrongful conduct).

²⁵ It is worth noting that all of these approaches lead to practical problems in application. For example, if a defendant's wealth is based on net worth at the time of the verdict, the defendant could not have had notice of what its wealth would be several years later. In contrast, if punishment is based on the defendant's wealth at the time it committed the wrongful act, but the company lost resources between the wrongful act and judgment, the award could bankrupt the defendant.

²⁶ *See Owen, supra* n.16.

unconstitutional award that harms shareholders, employees, and customers of the corporation—people who often are not responsible for the tortious conduct at issue. Indeed, excessive punitive damages awards have caused companies to go bankrupt, lay off workers, and stop releasing new products.²⁷ This not only affects the company, but other businesses and individuals who rely on the company, and the public at large who would otherwise benefit from the development of new products and services.²⁸

This case exemplifies problems with wealth evidence and illustrates why courts should not rely on it in reviewing punitive damages awards. At the beginning of the punitive damages phase, the plaintiff told the jury that the case was not about a “mom-and-pop” operation and therefore the jury needed to consider how big of an award it would take to “get [the defendant’s] attention.” (App. 1869:8-20.) Plaintiff then told the jury that AMC and Sunridge “profited from their choices” and made “millions of

²⁷ See, e.g., Lester Brickman, *On the Theory Class’s Theories of Asbestos Litigation: The Disconnect Between Scholarship and Reality*, 31 Pepp. L. Rev. 33, 36-37 (2003) (discussing some of the “catastrophic” effects of punitive damages awards in asbestos cases, including about “seventy companies bankrupted . . . thousands of jobs lost, employee 401(k) plans decimated, and billions of dollars lost to investors”)

²⁸ See Andrew L. Frey, *Corporate Finances: Punitive Damages’ 800-Pound Gorilla* (October 14, 2014), <http://www.punitivedamagesblog.com/2014/10/corporate-finances-punitive-damages-800-pound-gorilla/> (“Blockbuster verdicts, to the extent they are in fact effective to bring about changes, may induce companies to take excessive precautions that raise the costs to consumers of goods and services beyond any associated benefit or that reduce the availability or utility of products.”); Bruce N. Kuhlik & Richard F. Kingham, *The Adverse Effects of Standardless Punitive Damage Awards on Pharmaceutical Development and Availability*, 45 Food Drug Cosm. L. J. 693, 693 (1990) (“There is a growing body of evidence that the threat of punitive damages deters the development and marketing of beneficial products”).

dollars.” (*Id.*) The plaintiff then introduced evidence of the defendants’ “income” and “profitability.” (App. 1874:11-18.)

The plaintiff claimed that Sunridge had a “total net cash flow” of \$1,594,741 over five years. (App. 1887:5-9.) But this figure did not include capital expenditures, debt payments, or actual equity of the company. As to AMC, instead of focusing on money derived from managing the Sunridge complex, the plaintiff’s expert added up AMC’s pre-tax profits from all of its operations in 13 different states over a span of several years leading up to trial—profits that had long since been legitimately distributed to AMC’s members. (App. 1891:10-13, 1893:13-21, 1894:3-16.) Next, plaintiff’s expert testified that AMC’s income from 2007 to 2012 was \$22,929,549 and claimed that he had “never seen rates of return on investment that even came close to approaching these levels of profitability.”²⁹ (App. 1895:11-16-1896:6-10.) Unsurprisingly, the introduction of that evidence caused the jury to rely on these numbers to come up with a shockingly high punitive damages award.

But the financial picture presented to the jury was not accurate. Because the defendants had lawfully distributed profits to its members, the entities no longer had those sums available to satisfy the award. Had the wealth evidence instead focused on the defendants’ net worth at the time of the verdict or had it been limited to profits from wrongdoing, the jury would have been presented with a very different financial picture.

²⁹ Notably, these figures failed to account for the company’s income tax liability, which turned out to be a significant sum.

Given how much wealth evidence varies across jurisdictions, courts should not rely on this evidence in determining the constitutional limit for a particular punitive damages award. This court should clarify that evidence of wealth can never increase the constitutional limit of a punitive damages award and apply that rule in this case.³⁰

III. To the Extent Wealth Evidence Is Relevant to the Federal Due Process Analysis, It Is a Mitigating Factor or Limited to Cases Where the Defendant's Wealth Stems From the Conduct Harming the Plaintiff

To the extent wealth evidence is relevant to the constitutional analysis, it should be considered only: (1) as a mitigating factor to reduce unconstitutional punitive damages awards; or (2) where a defendant's wealth is causally connected to the plaintiff's harm.

First, if wealth evidence is to be considered, it is relevant only to determining that a punitive damages award is "grossly excessive" in cases where a defendant has no ability to pay the judgment.³¹ Several courts have used evidence of wealth in this manner and for good reason.³²

³⁰ The United States Court of Appeals for the Ninth Circuit recently issued a split opinion reversing and vacating a punitive damages award after applying the *Gore* guideposts without relying on wealth evidence. *S. Union Co. v. Irvin*, 563 F.3d 788, 793-94 (9th Cir. 2009).

³¹ See, e.g., Lindsay J. Efting, *Punitive Damages: Will the Courts Still Punish the Wrongdoer After State Farm Mutual Automobile Ins. Co.?*, 49 S.D. L. Rev. 67, 98 (2003) (suggesting that after *State Farm*, evidence of wealth may be used only as a mitigating factor by the defendant).

³² *Id.*; see also *Stroud v. Lints*, 790 N.E.2d 440, 446 (Ind. 2003) ("An award that not only hurts but permanently cripples the defendant goes too far."); *Town of Jackson v. Shaw*, 569 P.2d 1246, 1253 (Wyo. 1977) ("The punitive allowance should be in an amount that would promote the public interest without financially annihilating the defendants.").

Otherwise, wealth evidence is relevant only in cases in which the defendant's wealth stems from the conduct that caused the harm to the plaintiff. *Clark v. Chrysler Corp.*, 436 F.3d 594 (6th Cir. 2006). Unlike other approaches to wealth evidence, this analysis bears some relation to the *Gore* guideposts and avoids the unconstitutional punishment of individual and corporate defendants for their wealthy status instead of punishing them for the conduct at issue.³³ The United States Court of Appeals for the Sixth Circuit has adopted this approach. In *Clark*, Charles Clark was fatally injured in an automobile accident, and his wife successfully sued Chrysler on the theory that the vehicle was defectively and negligently designed. *Id.* at 596. The jury awarded \$471,258.26 in compensatory damages and \$3,000,000 in punitive damages. *Id.* at 597. Although the award was subsequently affirmed by the trial court and Sixth Circuit on appeal, Chrysler petitioned for further review after the United States Supreme Court issued its decision in *State Farm*. *Id.* at 597.

The United States Supreme Court granted Chrysler's petition, vacated the Sixth Circuit's judgment and remanded the case to the Sixth Circuit "for further consideration in light of *State Farm*." *Id.* The Sixth Circuit concluded that *State Farm* required the

³³ *State Farm*, 538 U.S. at 422 (noting punitive damages award was unconstitutional when it bore no relation to plaintiff's harm). And some courts have said that, without this link, a defendant's wealth is not even discoverable. See, e.g., *Pioneer Res. Corp. v. Nami Res. Co., LLC*, Civ. No. 04-465-DCR, 2006 WL 1635651, at * 1 (E.D. Ky. June 8, 2006) (unpublished decision) (noting there is a significant difference between considering profit derived from the defendant's misconduct and a "generalized inquiry into how deep the defendant's pockets actually are"); *Childrey v. Spectrum Health Worth Home Care, Inc.*, No. 1:05-CV-446, 2007 WL 1701836, at *2-3 (W.D. Mich. June 11, 2007) (unpublished decision) (to be discoverable, "a defendant's wealth must bear some relation to the harm sustained by the plaintiffs").

court to reduce the punitive damages award significantly. *Id.* The district court had therefore erred in ruling that because the plaintiffs were “purchaser[s] of one of Chrysler’s vehicles and Chrysler has substantial financial resources” that Chrysler’s conduct was reprehensible. *Id.* at 604.

The Sixth Circuit held that “Chrysler’s wealth ha[d] no connection to the actual harm sustained by Mr. Clark” and therefore it was an improper basis on which to support the punitive damages award. *Id.* Relying on *State Farm’s* language that “[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award,” the Sixth Circuit held that in order for evidence of wealth to be relevant to the constitutional analysis, “[i]t must bear some relation to the harm sustained by the plaintiff.” *Id.* (citing *State Farm*, 538 U.S. at 427). But there was no connection between Chrysler’s financial resources and the physical injury suffered by Mr. Clark, so Chrysler’s “wealth [was] an inappropriate basis for the \$3 million punitive damage award.” *Id.*

In cases such as the case at issue here, where there is no connection between the defendants’ purported “wealth” and the plaintiff’s harm, courts cannot rely on wealth evidence to make constitutional an otherwise unconstitutional award of punitive damages.

Conclusion

For twenty years, the United States Supreme Court has ignored evidence of wealth in its constitutional review of punitive damages awards. This court should expressly clarify that wealth evidence can never increase the constitutional limit of a punitive

damages award. To the extent wealth evidence plays any role in the constitutional review of punitive damages awards, it is relevant only as a mitigating factor or to the extent the defendant's wealth is causally linked to the plaintiff's harm.

DATED this 17th day of April, 2015.

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1. This brief complies with the type-volume limitation of Fed. R. App. P. 32(a)(7)(B) and Fed. R. App. P. 29(d) because this brief contains 6,132 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(a)(7)(B)(iii). I relied on my word processor to obtain this word count.
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DATED this 17th day of April, 2015.

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Certificate of Digital Submission and Privacy Redactions

I hereby certify that a copy of the foregoing *Brief of Amici Curiae American Tort Reform Association, National Federation of Independent Business, and National Association of Manufacturers in Support of Appellants and Reversal* as submitted in Digital Form via this Court's CM/ECF system is an exact copy of the written document filed with the Clerk and has been scanned for viruses with Microsoft Security Essentials version 1.165.3928.0 (updated April 17, 2015) and, according to the program, is free of viruses. I also certify that any required privacy redactions have been made.

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Certificate of Service

I hereby certify that on April 17, 2015, I electronically filed a true, correct, and complete copy of the foregoing *Brief of Amici Curiae American Tort Reform Association, National Federation of Independent Business, and National Association of Manufacturers in Support of Appellants and Reversal* with the Clerk of the Court for the United States Court of Appeals for the Tenth Circuit by using the appellate CM/ECF system, which electronically provided notice to:

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