

Case No. SC21-175  
L.T. Case No. 5D19-2549

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**IN THE SUPREME COURT OF FLORIDA**

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BRINDA COATES, AS PERSONAL REPRESENTATIVE OF THE ESTATE OF LOIS STUCKY,

*Plaintiff/Petitioner,*

v.

R.J. REYNOLDS TOBACCO Co.,

*Defendant/Respondent.*

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On Review from the District Court of Appeal of Florida, Fifth District

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**BRIEF OF PRODUCT LIABILITY ADVISORY COUNCIL, INC.  
AS AMICUS CURIAE IN SUPPORT OF DEFENDANT/RESPONDENT**

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## **IDENTITY AND INTEREST OF AMICUS CURIAE**

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit professional association of corporate members representing a broad cross-section of American and international product manufacturers. See [https://plac.com/PLAC/Membership/Corporate\\_Membership.aspx](https://plac.com/PLAC/Membership/Corporate_Membership.aspx). Those companies seek to contribute to the improvement and reform of law in Florida and elsewhere, with emphasis on the law governing the liability of manufacturers of products and those in the supply chain. PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. In addition, several hundred of the leading product litigation defense attorneys are sustaining (non-voting) members of PLAC. Since 1983, PLAC has filed more than 1,100 briefs as amicus curiae in both state and federal courts, including this Court, on behalf of its members, while presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product risk management.

PLAC has a strong interest in this case because plaintiffs in product liability cases often ask the jury to award punitive damages against manufacturers, sometimes in amounts that bear little relation to their actual

damages. PLAC's members have a strong interest in ensuring that courts faithfully apply the constitutional limitations on punitive damage awards, including the requirement that any punitive damage award bear a reasonable relationship to the amount of the compensatory damage award.

### **SUMMARY OF ARGUMENT**

The United States Supreme Court has recognized that punitive damages pose special constitutional dangers. They are often awarded in arbitrary amounts that bear little relation to a plaintiff's actual damages.

In its seminal *BMW v. Gore* ruling, the Court established a framework for assessing the constitutionality of punitive damage awards and ensuring they comport with due process. See 517 U.S. 559 (1996). The Court recognized three guideposts for reviewing such awards: the reprehensibility of the defendant's conduct, the amount of penalties that could be imposed for comparable conduct, and—most relevant here—the ratio between the compensatory and punitive damage awards. *Id.* at 580.

As certified by the Fifth District, the question presented is whether the ratio requirement may be disregarded “[w]hen other factors support the amount of punitive damages awarded.” DCA:290. In this case, the jury awarded Plaintiff \$150,000 in compensatory damages (reflecting a 50% reduction from \$300,000 based on Plaintiff's comparative negligence) and

\$16,000,000 in punitive damages. The ratio is approximately 107:1. If the ratio requirement applies, this is not a close case. The United States Supreme Court has held that rarely can a ratio exceed 9:1, and that where, as here, “compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee.” *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003).

This Court should enforce rather than disregard the ratio requirement for two main reasons.

First, it is constitutionally mandated. The United States Supreme Court has specifically instructed that “our cases have announced due process standards”—including the ratio requirement—“that every award must pass.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008). The Court drew upon centuries of common law in holding that due process *requires* a reasonable relationship between the harm to the plaintiff (measured by the amount of the compensatory damage award) and the punishment that may be imposed on the defendant (measured by the amount of the punitive damage award). Ensuring a rational connection between the two damage awards protects against the arbitrariness and irrationality that all too often infects awards of punitive damages.

Second, even if the ratio requirement were not a constitutional mandate, it would make sense as a way of guiding juries and preventing the imposition of punitive damage awards that are irrational, arbitrary, or unconstitutionally excessive. Jurors often face difficulty in determining the amount of punitive damages because they are given skeletal instructions, or directed to consider various factors (e.g., the defendant's level of reprehensibility) without being told how to quantify their assessments, or how to translate their evaluation of the defendant's conduct into a precise dollar award. For that reason, jurors often look to anchors—some dollar figure presented to them in the evidence or argument—as a starting point in determining an award. Rather than have the jury rely on inappropriate anchors—as occurred here, where the jury was told that the Defendant's net worth was \$23.9 billion, and Plaintiff's counsel demanded a \$10 million award—the jury should be given the most important anchor of all: an instruction that its punitive damage award must bear a reasonable relationship to its compensatory damage award. This is particularly important in product liability cases like this one, where the defendant is a large, nonresident corporation, and where jurors can be swayed by impermissible considerations and persuaded to impose excessive and unconstitutional punitive damage awards.

## ARGUMENT

This Court accepted for decision the question certified by the Fifth District Court of Appeal: “When other factors support the amount of punitive damages awarded, but the award is excessive compared to the compensatory award, does the amount of punitive damages that may legally be imposed for causing the death of a human being depend on the actual amount of compensatory damages awarded to the decedent’s estate, even when that compensatory award is modest and the punitive award would be sustainable compared to awards in other cases for comparable injuries caused by comparable misconduct?” DCA:290.

The answer to that question is yes. The United States Constitution mandates a reasonable relationship—or ratio—between the amount of compensatory damages and the amount of punitive damages. And even if it were not constitutionally mandated, the ratio requirement makes sense as a way of guiding the jury’s deliberations and helping ensure that any award of punitive damages is rational, reasonable, and proportionate to the harm caused.

### **I. THE CONSTITUTIONALLY MANDATED RATIO REQUIREMENT PROTECTS AGAINST ARBITRARY AND EXCESSIVE PUNITIVE DAMAGE AWARDS.**

The United States Supreme Court recognized the ratio guidepost as a way of bringing rationality into a punitive damages landscape that for

decades had been plagued by vague legal standards, inadequate protections for defendants, and arbitrary lottery-like awards.

Although punitive damages “serve the same purposes as criminal penalties,” *State Farm*, 538 U.S. at 417, they are imposed without the same procedural protections that apply in criminal proceedings. Juries are often given ambiguous instructions on how to decide if punitive damages are warranted and, if so, the amount of the penalty. *See id.* at 418 (“[v]ague instructions . . . do little to aid the decisionmaker”); *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994) (“[j]ury instructions typically leave the jury with wide discretion in choosing amounts”). Compounding these problems are the vague and indeterminate standards that frequently govern punitive damage determinations, leading juries to make ad hoc judgments as to whether the particular conduct was sufficiently egregious to warrant a civil sanction.

Because “the Due Process Clause does not permit a State to classify arbitrariness as a virtue,” *State Farm*, 538 U.S. at 417-18 (quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 59 (1991) (O’Connor, J., dissenting)), courts have a special responsibility to enforce the “procedural and

substantive limitations on [punitive damage] awards,” *State Farm*, 538 U.S. at 416, and ensure they are fair and proportional.<sup>1</sup>

Requiring a reasonable ratio between compensatory and punitive damages ensures fairness and proportionality. In *Gore*, the Court recognized that the “perhaps most commonly cited indicium of an unreasonable or excessive punitive damages award is its ratio to the actual harm inflicted on the plaintiff.” 517 U.S. at 580. The Court cited common law cases from the nineteenth century to illustrate the “long pedigree” of “[t]he principle that exemplary damages must bear a ‘reasonable relationship’ to compensatory damages,” and noted that dozens of “different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages.” *Id.* at 580-81 & nn.32-33. Although the Court declined to “draw a mathematical bright line between the constitutionally acceptable and the constitutionally unacceptable that would fit every case,” it emphasized that “a general concern of reasonableness properly enters into the constitutional calculus.” *Id.* at 583 (cleaned up).

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<sup>1</sup> This discussion addresses the federal constitutional limitations on punitive damages as they have been recognized by the United States Supreme Court. But many of these limitations, including the requirement that the amount of punitive damages must bear a relationship to the amount of compensatory damages, are also recognized under Florida law. See *Schoeff v. R.J. Reynolds Tobacco Co.*, 232 So.3d 294 (Fla. 2017).

The Court refined its ratio analysis in *State Farm*. Although the Court “decline[d] again to impose a bright-line ratio,” it held that “in practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process.” 538 U.S. at 425. Noting the “long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages,” the Court emphasized that “an award of more than four times the amount of compensatory damages might be close to the line of constitutional impropriety.” *Id.* And “[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limits of the due process guarantee.” *Id.*

The United States Supreme Court has made clear that the ratio requirement is not optional. It is a constitutional mandate that cannot be disregarded or overridden by other factors or considerations. As such, “*courts must ensure* that the measure of punishment is both reasonable *and proportionate* to the amount of harm to the plaintiff and to the general damages recovered.” *State Farm*, 538 U.S. at 426 (emphases added). “The principles set forth in *Gore*”—including the ratio requirement—“must be implemented with care, to ensure both reasonableness and proportionality.” *Id.* at 428. As the Court underscored in *Exxon Shipping Co. v. Baker*, “our

cases have announced due process standards that *every award must pass.*” 554 U.S. 471, 501 (2008) (emphasis added).

Even if it could be argued that the ratio requirement is relaxed in cases involving awards of nominal damages, *see Exxon Shipping*, 554 U.S. at 494, this is not such a case. The jury awarded \$300,000 in compensatory damages—subsequently reduced to \$150,000 based on Plaintiff’s comparative negligence—an amount that cannot possibly be deemed nominal.

## **II. THE RATIO REQUIREMENT HELPS JURIES AVOID IRRATIONAL AND EXCESSIVE PUNITIVE DAMAGE AWARDS.**

Even if the Supreme Court had not established the ratio requirement as a constitutional mandate, it would make sense to instruct jurors that any award of punitive damages must bear a reasonable relation to the award of compensatory damages. Absent such guidance, jurors are at risk of latching on to inappropriate anchors, such as the defendant’s wealth or the amount demanded by plaintiff’s counsel. Instructing on the ratio requirement helps juries avoid imposing irrational or excessive punishments, a risk that is heightened in products cases like this one.

**A. Juries Often Look For Anchors In Awarding Punitive Damages.**

Juries frequently struggle in assessing punitive damages, because it can be difficult to assign precise dollar amounts to specific wrongdoing. Whereas compensatory damages “are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendant’s wrongful conduct,” *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001), punitive damages present a more difficult challenge. Punitive damages are imposed to achieve the “purposes of retribution and deterrence,” *Haslip*, 499 U.S. at 19; *see also Gore*, 517 U.S. at 568 (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”), but juries are often given little if any guidance as to how they should determine the precise amount of punitive damages necessary to achieve these goals.

Thus, when asked to make an award of punitive damages, jurors will often look for an anchor. That is, they will grasp for any tangible number that provides a starting point for calculating a reasonable award. This is not to say that the jury will always award the precise amount of the anchor. Rather,

the anchor provides a focal point that guides and channels deliberations. It provides an initial value that the jury then adjusts on its way to a final result.<sup>2</sup>

Two anchors that often appear in punitive damage cases are the defendant's net worth, and the amount of punitive damages requested by the plaintiff's lawyer. The problem is that neither number is a reliable or appropriate basis for determining the amount of a punitive damages award. In this case, however, those were the *only* numbers presented to the jury during the phase 2 proceeding in which punitive damages were assessed.

At the beginning of phase 2, the jury was instructed that it "should consider . . . the Defendant's financial resources" in awarding punitive damages, and told that the Defendant's net worth as of 2016 was \$23.9 billion. Tr. 3406-07, 3409. Then, over the Defendant's objection, Plaintiff's counsel told the jury that if you wanted to punish a child who was harming other children on the playground, "you look at how much they have in the piggy bank and you take away an amount that would be consistent with getting their attention." Tr. 3414. Counsel then stated that "\$23,900,000,000

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<sup>2</sup> There is an extensive academic literature on anchoring effects in decisionmaking generally, and in jury deliberations specifically. See, e.g., John W. Payne, et al., "Behavioral Decision Research: An Overview," in *Measurement, Judgment, and Decision Making* 303 (Michael H. Birnbaum ed., 1998); Gretchen B. Chapman & Brian H. Bornstein, "The More You Ask for, the More You Get: Anchoring in Personal Injury Verdicts," 10 *Applied Cognitive Psychology* 519 (1996).

. . . that's the net worth of R.J. Reynolds" and urged the jury to "assess an amount as punishment and that will send a message to R.J. Reynolds management and to others." Tr. 3416-17.

This argument was clearly improper. The United States Supreme Court has cautioned against the use of wealth evidence in awarding punitive damages. Although the Court has stopped short of prohibiting such evidence, it has emphasized that arguments about the defendant's wealth or net worth "bear no relation to the [punitive damage] award's reasonableness or proportionality to the harm," but rather "seek to defend a departure from well-established constraints on punitive damages." *State Farm*, 538 U.S. at 427. Moreover, the Court has declared that "[t]he wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award" and warned that evidence of a defendant's assets or net worth "provides an open-ended basis for inflating awards when the defendant is wealthy." *Id.* at 427-28 (quotation marks omitted).

The second number the jury was given was \$10,000,000—the amount that Plaintiff's counsel urged the jury to award. Counsel stated:

[W]hat is the amount that would be appropriate? I'm asking, for a company this size, the amount that would be appropriate would be \$10 million. Because \$10 million is what it takes . . . to get that message heard.

Tr. 3417. Defense counsel objected, pointing out (correctly) that “\$10 million would be constitutionally inappropriate” and “a violation of due process” because “[t]hat type of ratio is well outside” what would be permissible in light of the \$150,000 compensatory damage award. Tr. 3417. The trial court overruled the objection, *id.*, and Plaintiff’s counsel hammered the point home, exhorting the jury that “it will take \$10 million to push this message and get it where it needs to go.” Tr. 3418. Counsel reprised the theme in rebuttal, telling the jury that “to assess this company with all its assets, enough to send a message, we’re asking for \$10 million to give that message to them.” Tr. 3439.

This argument too was improper. A \$10 million punitive damage award—67 times the amount of the compensatory damage award—would have been unconstitutional. Despite this, the court permitted counsel to anchor the jury’s deliberations with his \$10 million demand—a tactic that occurs all too often, as attorneys frequently request awards of damages greater than the evidence or law will support. *See, e.g., R.J. Reynolds Tobacco Co. v. Webb*, 93 So. 3d 331, 339 (Fla. 1st DCA 2012) (“[I]t is common practice for attorneys to suggest damages well in excess of the amount that could be sustained under the facts in the case.”), *disapproved of on other grounds by Odom v. R.J. Reynolds Tobacco Co.*, 254 So. 3d 268

(Fla. 2018); *Gresham v. Courson*, 177 So. 2d 33, 39 (Fla. 1st DCA 1965) (“[A]s a matter of practice the advocate usually suggests to the jury a figure for damages substantially in excess of the amount that is clearly supportable by the evidence and likewise in excess of the amount which he deems to be supportable in point of law should the jury happen to return a verdict approaching the amount suggested.”).

Here, the jury ultimately awarded even more than counsel’s extreme demand, imposing \$16 million in punitive damages—an amount roughly 107 times the compensatory damage award.

**B. Juries Considering Punitive Damages Should Be Anchored With A Reasonable Relationship Instruction.**

The jury was *not* given the most important and relevant anchor of all—an instruction that its punitive damage award must bear a reasonable relationship to its compensatory damage award. Focusing the jury’s attention on the amount of the compensatory damage award—not as a cap but merely as a relevant guidepost—mitigates the risk that the jury is swayed by irrelevant considerations such as the defendant’s net worth or an absurdly high amount demanded by the plaintiff’s counsel. Here, although the Defendant specifically requested a reasonable relationship instruction, see R1: 8616, the trial court stated: “I will not give this instruction. I think it’s an accurate statement of the law, but I think that’s for the Court to look at after

the verdict comes back and utilize remittitur, if it's appropriate, or grant a new trial if the Court is persuaded that – that the jury was unfairly influenced by something other than the evidence.” Tr. 3384.

In both criminal and civil cases, the United States Supreme Court has held that proper instructions are crucial procedural protections that ensure that jury verdicts are consistent with constitutional limits on state authority. In *Taylor v. Kentucky*, for example, the Court held that a Kentucky court had erred in not instructing the jury on the presumption of innocence, a constitutional safeguard required by due process. 436 U.S. 478 (1978). In rejecting the argument that no instruction was required because counsel had argued the point, the Court explained that “[i]t was the duty of the court to safeguard petitioner’s rights, a duty only it could have performed reliably.” *Id.* at 489; *see also Carter v. Kentucky*, 450 U.S. 288, 304 (1981) (“[M]ost certainly, defense counsel’s own argument . . . cannot have had the . . . effect that an instruction from the judge would have had.”).

Similarly, in *Cabana v. Bullock*, the Court held that “a jury’s verdict cannot stand if the instructions provided the jury do not require it to find each element of the crime under the proper standard of proof.” 474 U.S. 376, 384 (1986); *see also Pipefitters Local Union No. 562 v. United States*, 407 U.S. 385, 436 (1972) (holding that jury instructions failed to require proof of the

essential element for conviction, which was plain error). And in *Beck v. Alabama*, the Court held that juries must be instructed on any lesser-included offenses that are supported by the evidence. 447 U.S. 625, 641 (1980). Indeed, as demonstrated by a long list of capital punishment cases, the Court has consistently required that jury instructions must clearly reflect the limitations that the Constitution places on jury discretion. See, e.g., *Simmons v. South Carolina*, 512 U.S. 154, 163-64 (1994) (plurality opinion) (where a State makes “future dangerousness” relevant to capital sentencing, due process requires that the jury be informed that life sentence would render defendant ineligible for parole); *id.* at 172-73 (Souter, J., concurring) (defendant has a “right to require instructions on the meaning of the legal terms used to describe the sentences (or sentencing recommendations) a jury is required to consider”); see also *Stringer v. Black*, 503 U.S. 222, 237 (1992) (permitting jury to “[u]se . . . a vague or imprecise aggravating factor in the weighing process invalidates the sentence”).

The Court has followed a similar course in civil cases. In *Monitor Patriot Co. v. Roy*, for example, the Court found fault in a trial court’s instruction to the jury on the issue of whether information on a political candidate’s criminal past was “relevant.” 401 U.S. 265 (1971). The Court held that the flawed jury instruction, “and others like it, left the jury far more

leeway to act as censors than is consistent with the protection of the First and Fourteenth Amendments in the setting of a political campaign.” *Id.* at 275. Similarly, in *Harte-Hanks Communications, Inc. v. Connaughton*, the Court held that “[b]y instructing the jury ‘in plain English’ at appropriate times during the course of the trial concerning the not-so-plain meaning of [the phrase ‘actual malice’], the trial judge can help ensure that the *New York Times* standard is properly applied.” 491 U.S. 657, 666 n.7 (1989) (citations omitted); see also *Masson v. New Yorker Magazine, Inc.*, 501 U.S. 496, 511 (1991) (“But the term [actual malice] can confuse as well as enlighten. . . . In place of the term actual malice, it is better practice that jury instructions refer to publication of a statement with knowledge of falsity or reckless disregard as to truth or falsity.”).

The same need to confine jury discretion within appropriate limits requires that juries be instructed on governing constitutional principles in punitive damage cases. “Vague instructions . . . do little to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory.” *State Farm*, 538 U.S. at 418. As the Court has emphasized, jury instructions are “a well-established and, of course, important check against excessive awards.” *Oberg*, 512 U.S. at 433; see also *Bankers Life & Cas. Co. v. Crenshaw*, 486

U.S. 71, 88 (1988) (O'Connor, J., concurring in part and concurring in judgment) (noting that a court's failure to give the jury proper standards for imposing punitive damages "appears inconsistent with due process").

States may not delegate to juries the power to punish under instructions that leave those juries without relevant legal guidance, and that accordingly fail to protect defendants' constitutional rights. In the punitive damages sphere—as in other areas of criminal and civil litigation—it is essential that juries be specifically advised of the limitations that the United States Constitution imposes on their authority, especially where, as here, the defendant is a large, nonresident corporation, as “[c]ourts long have recognized that jurors may view large corporations with great disfavor.” *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 490 (1993) (O'Connor, J., dissenting).

In addition to protecting the defendant's due process rights, instructing juries on the constitutional limits on punitive damage awards will benefit the courts and the public by producing more consistent and reliable punitive damage awards. Proper jury instructions will serve to educate both juries and the courts as to the constitutional boundaries. See *Cooper*, 532 U.S. at 436 (“Requiring 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 law itself.”) (quoting *Gore*, 517 U.S. at 587 (Breyer, J., concurring)). Proper jury instructions will also reduce the need for appellate courts to investigate whether a punitive damages award was based on impermissible considerations.

A reasonable relationship instruction is an important procedural protection that helps cabin jury discretion and reduces the likelihood of the jury’s returning an arbitrary punishment. See *Haslip*, 499 U.S. at 18 (citation omitted) (warning that “unlimited jury discretion . . . in the fixing of punitive damages may invite extreme results that jar one’s constitutional sensibilities”). Indeed, the Fourth Circuit has held that this instruction must be given when a jury is considering punitive damages under Virginia or South Carolina law. See *Johnson v. Hugo’s Skateway*, 974 F.2d 1408, 1415, 1418 (4th Cir. 1992) (en banc) (holding Virginia’s punitive damage charge unconstitutional because the jury was not required to be instructed that punitive damages must be proportional to compensatory damages); *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 109-10 (4th Cir. 1991) (jury imposing punitive damages under South Carolina law must be instructed that “any penalty imposed should bear a relationship to the nature and extent of the

conduct and the harm caused”). This Court should adopt the same approach.

**C. The Ratio Requirement Is Particularly Important In Products Cases.**

The dangers of excessive punitive damage awards are acute in products cases like this one, where the plaintiff claims that a defective product injured a consumer. See *Haslip*, 499 U.S. at 61-62 (O’Connor, J., dissenting) (citing “the advent of product liability” as a reason for the “[r]ecent . . . explosion in the frequency and size of punitive damages awards”). Such cases often involve tragic personal injuries, and jurors are asked to make an evaluation—in hindsight and on the basis of arcane expert testimony and a complex factual record—as to whether a product design posed an “unreasonable” risk. The consequence is that jurors may be unable to make a dispassionate assessment of the manufacturer’s conduct, as the benefit of the design may seem abstract and theoretical when compared with the harm suffered by the injured plaintiff in the courtroom, whose injury may well have been avoided had the manufacturer employed what the plaintiff’s expert says, with the benefit of hindsight, would have been a “safer” alternative design.

As Judge Easterbrook explained in a products case involving an alleged design defect in the emergency stop button on an escalator:

The ex post perspective of litigation exerts a hydraulic force that distorts judgment. . . . [N]o matter how conscientious jurors may be, there is a bias in the system. Ex post claims are overvalued and technical arguments discounted in the process of litigation. And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states.

*Carroll v. Otis Elevator Co.*, 896 F.2d 210, 215-16 (7th Cir. 1990) (Easterbrook, J., concurring) (citation omitted). Similarly, as Justice Breyer has explained, our tort system “leaves the determination of ‘too much risk’ in the hands of tens of thousands of different juries who are forced to answer the question not in terms of a statistical life, but in reference to a very real victim needing compensation in the courtroom before them,” resulting in “a system much criticized for its random, lottery-like results.” Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation* 59 (1992). Juries sometimes impose massive punitive damage verdicts where there is legally insufficient evidence to impose any punitive damages at all. See, e.g., *Jimenez v. DaimlerChrysler Corp.*, 269 F.3d 439 (4th Cir. 2001) (reversing \$250 million punitive damage award in design defect case based on insufficiency of evidence).

Product liability claims were not known at common law and at the time of the ratification of the Fourteenth Amendment. Mass-marketed products are a modern development, and strict products liability itself was not

recognized until the second half of the twentieth century. See *Escola v. Coca Cola Bottling Co.*, 24 Cal. 2d 453, 462 (Cal. 1944) (Traynor, J., concurring). In the physical injury context, punitive damages at common law were reserved for cases involving intentional violence. Cf. *Gore*, 517 U.S. at 575 n.24 (quoting *Blanchard v. Morris*, 15 Ill. 35, 36 (1853) (“We cannot say [the exemplary damages] are excessive under the circumstances; for the proofs show that threats, violence, and imprisonment, were accompanied by mental fear, torture, and agony of mind”)). But the law of strict liability is focused not on the mental state of the defendant but on a retrospective balancing of societal risks and benefits, and the infliction of any punishment through the tort system was questioned early on by one of the judicial architects of the modern product liability doctrine. See *Seffert v. L.A. Transit Lines*, 56 Cal. 2d 498, 511 (1961) (Traynor, J., dissenting) (“There has been forceful criticism of the rationale for awarding damages for pain and suffering in negligence cases . . . . Such damages originated under primitive law as a means of punishing wrongdoers and assuaging the feelings of those who had been wronged. . . . They become increasingly anomalous as emphasis shifts in a mechanized society from ad hoc punishment to orderly distribution of losses through insurance and the price of goods or of transportation.”).

In short, the practice at issue here—which allows juries to inflict substantial punishments against product makers for their mass marketing of a lawful product—was unknown at common law and is a departure from the traditional uses of the civil justice system at the time the Fourteenth Amendment was ratified. This fact should inform any due process analysis of the punishment in this case and product liability cases more generally. See *Oberg*, 512 U.S. at 430 (noting that the Court has “stated from its first due process cases, [that] traditional practice provides a touchstone for constitutional analysis”); *id.* at 436 (Scalia, J., concurring) (concluding that by eliminating protections “traditionally accorded at common law,” Oregon “violate[d] the Due Process Clause”). At a minimum, it underscores the need to rigorously enforce the constitutional mandate that any award of punitive damages must bear a reasonable relation to the award of compensatory damages.

## CONCLUSION

The decision of the Fifth District Court of Appeal should be approved.

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WE HEREBY CERTIFY that a true and correct copy of the foregoing was electronically filed with the Clerk of Court through the Florida Courts eFiling Portal and served via e-mail on this 5th of January, 2022 to:

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## **CERTIFICATE OF COMPLIANCE**

Pursuant to Florida Rule of Appellate Procedure 9.210(2), counsel hereby certifies that the foregoing brief complies with the applicable font and word count requirements set forth in Florida Rules of Appellate Procedure 9.045 and 9.370 because it uses 14-point Arial font and contains 4,982 words.

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