No. 522A02 **TWENTY-SEVEN-A DISTRICT**

SUPREME COURT OF NORTH CAROLINA

DAN RHYNE and **ALICE RHYNE,** **Plaintiff-Appellants,** **v.** **KMART CORPORATION,** **SHAWN ROBERTS, and** **JOSEPH HOYLE,** **Defendant-Appellee.**	**From N.C. Court of Appeals** **(COA00-1516)** **From Gaston County** **(No. 98 CVS 5194)**

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AMICI CURIAE BRIEF OF WASHINGTON LEGAL FOUNDATION AND ALLIED EDUCATIONAL FOUNDATION IN SUPPORT OF DEFENDANT-APPELLEE

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Philip R. Isley
N.C. State Bar No. 19094
BOYCE & ISLEY, PLLC

Post Office Box 1990
Raleigh, NC 27602-1990
(919) 833-7373
pisley@boyceisley.com

Daniel J. Popeo
Paul D. Kamenar
WASHINGTON LEGAL FOUNDATION

2009 Massachusetts Ave., N.W.
Washington, D.C. 20036
(202) 588-0302
pkamenar@wlf.org

Counsel for Amici Curiae

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QUESTION PRESENTED

Is North Carolina's statute, N.C.G.S. § 1D-25, which limits punitive damage awards to the greater of three times compensatory damages or $250,000, constitutional?

INTEREST OF AMICI CURIAE

The Washington Legal Foundation (WLF) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. Founded in 1977, WLF has devoted substantial resources over the last 25 years through litigation and publishing to promote civil justice reform, including opposing excessive punitive damages and excessive attorneys' fee

awards. WLF supporters include consumers, workers, small business owners, shareholders, and others who would be adversely affected by the award of the excessive punitive damages in this and other cases. WLF appeared as amicus curiae in major punitive damages cases before the U.S. Supreme Court, including *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513 (2003); *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443 (1993); and *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1 (1991). WLF has also filed amicus briefs in State court raising the constitutionality of limits on punitive and certain other damages, including the case at bar in the court below. *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 562 S.E.2d 82 (2002).

In addition, WLF has published numerous articles on punitive damages through its Legal Studies Division. *See, e.g.*, Arvin Maskin, *et al.*, *A Punitive Damages Primer: Legal Principles and Constitutional Challenges* (Washington Legal Found. Monograph, 1994); Victor E. Schwartz, *et al.*, *Multiple Imposition of Punitive Damages: The Case For Reform* (Washington Legal Found. Working Paper No. 50, 1992); Theodore B. Olson & Theodore J. Boutrous, *The Constitutionality of Punitive Damages* (Washington Legal Found. Legal Backgrounder 1989).

The Allied Educational Foundation (AEF) is a non-profit

charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in diverse areas of law, including law and public policy. AEF has appeared as amicus curiae before the U.S. Supreme Court in numerous cases as co-amicus with WLF that are relevant to this case, including *State Farm Mut. Auto. Ins. Co. v. Campbell*, *BMW of N. Am. Inc. v. Gore*, and *Pacific Mut. Life Ins. Co. v. Haslip.* AEF also appeared as co-amicus with WLF in this case in the court below.

WLF and AEF believe that they can bring a broader perspective on the issues presented in this case which will assist the Court in deciding this appeal. The accompanying brief will demonstrate that, as a matter of constitutional law and sound public policy, this Court should affirm the judgment below. In order to avoid duplicating arguments of the Defendant-Appellee and other supporting amici, WLF and AEF will focus their brief primarily on the question raised by Plaintiff-Appellants that the punitive damages cap violates due process and equal protection, including the taking of property without compensation.

STATEMENT OF THE CASE AND INTRODUCTION

Amici adopt by reference the Statement of the Case and Facts as presented by the Defendant-Appellee. In brief, the Plaintiffs sued the Defendants for injuries suffered, including false imprisonment and malicious prosecution, relating to an altercation between them and two Kmart security guards outside a

Kmart store. The Plaintiffs were awarded a combined total of $18,985 in compensatory damages, and a combined punitive damages award of $23 million. The punitive damages award was reduced to $250,000 for each Plaintiff by the trial court after applying the statutory limit on punitive damages awards, N.C.G.S. § 1D-25, which limits such awards to the greater of three times compensatory damages or $250,000.[1] The Court of Appeals upheld the constitutionality of § 1D-25 in a divided opinion.

The Plaintiff-Appellants challenge the constitutionality of the cap on several grounds, claiming that it violates the right to trial by jury, separation of powers, taking of property without just compensation, equal protection, due process, North Carolina's open courts guarantee, and is void for vagueness. While all these arguments are without merit and were rejected by the Court of Appeals, amici will focus on Plaintiff-Appellants' challenge to the cap as constituting an unlawful taking of private property, and violating due process and equal protection.

ARGUMENT

I. NORTH CAROLINA'S PUNITIVE DAMAGES CAP DOES NOT CONSTITUTE A TAKING OF PROPERTY WITHOUT JUST COMPENSATION, NOR DOES IT VIOLATE EQUAL PROTECTION OR DUE PROCESS.

A. THE CAP DOES NOT TAKE PRIVATE PROPERTY BECAUSE PLAINTIFFS HAVE NO VESTED

[1] Amici agree with Kmart's argument in its cross-appeal that the statutory cap on punitive damages is $250,000 per defendant, rather than $250,000 per plaintiff.

PROPERTY INTEREST IN A PUNITIVE DAMAGES AWARD THAT HAS NOT BEEN REDUCED TO A JUDGMENT.

The Plaintiffs argue at some length in their new brief that the statutory cap on punitive damages found in N.C.G.S. § 1D-25 constitutes a taking of private property without just compensation in violation of Article I, § 19 of the North Carolina Constitution ("Law of the Land" provision). Rhyne New Br. at 62-66.[2] The argument is based on Plaintiffs' assertion that the right to seek and obtain punitive damages somehow constitutes a constitutional inalienable right to "the enjoyment of the fruits of their own labor." N.C. Const., Art. I, § 1. *Id*. at 63.

The Rhynes first argue that, even though the statutory cap on punitive damages found in N.C.G.S. § 1D-25 was on the books well over two years *before* their tort claims even accrued (and therefore they lacked any reasonable expectation of receiving punitive damages awards in excess of the cap), they (and their attorneys) nevertheless expended considerable time and effort to convince the jury to award them punitive damages of $23 million,

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[2] North Carolina's "Law of the Land" provision, N.C. Const. Art. I, § 19, has been interpreted to be essentially co-extensive with the Fourteenth Amendment of the U.S. Constitution. *See Southern Blasting Services, Inc. v. Wilkes County*, 162 F. Supp. 2d 455, 459, 460 (W.D.N.C. 2001) (North Carolina's "Law of the Land" Clause analysis is virtually identical to analysis under the Fourteenth Amendment.").

an amount characterized as "grossly excessive" by even the dissent below. The trial court then reduced the $23 million award to $500,000 purportedly pursuant to the statutory cap, and judgment was subsequently entered in that amount (in addition to compensatory damages of $18,985). The Rhynes then claim they were denied most of the "fruits of their labor" in obtaining the award, and thus, their property was allegedly taken without just compensation.[3] Rhyne New Br. at 64. Amici submit that this argument is simply without merit. Similar arguments have been soundly rejected by other courts, and this Court should do the same.

In the first place, it is clear that the right to seek punitive damages, the predicate of Rhynes' argument, is not a property right. *See Osborn v. Leach*, 135 N.C. 628, 632-33, 47 S.E. 997, 813 (1904) ("[t]he right to have punitive damages assessed is therefore not property."). Furthermore, once a punitive damages verdict is returned by the jury, it is at best an inchoate right; it becomes something of value if and only if the verdict is reduced to a formal judgment by the court in accordance with both statutory and constitutional law. *See, e.g., State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513

[3] The Plaintiffs appear to be making both a facial and an as-applied takings argument in this appeal.

(2003). The Rhynes may be confusing the issue somewhat by referring at times to the excessive punitive damages verdict as though it were a "judgment." *See* Rhyne New Br. at 63 ("Yet, the [North Carolina] legislature has denied that right to the Rhynes by imposing a cap on this *judgment*"); *id*. at 64, n.14 ("The Court of Appeals concede, in upholding the cap, that the punitive *judgment* was the product of a fair and proper trial. 562 S.E. 2d at 89.") (emphasis added). To reiterate, there is no such "judgment" until after the court reduces the punitive damages verdict to a formal judgment in accordance with the statutory formula.

But even if the verdict is reduced to a judgment, the Court of Appeals correctly held that "punitive damages do not constitute property belonging to an individual. Thus, there simply can be no taking of property by placing a cap on punitive damages and no infringement of the right to enjoy the fruits of one's own labor." *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 683, 562 S.E.2d 82, 91 (2002).

Indeed, several courts have soundly rejected similar takings claims against legislative measures that even require a portion of the punitive damages, which are in fact reduced to a judgment, be paid to the state. This is not an altogether unreasonable proposition inasmuch as punitive damages are quasi-criminal fines

designed to punish the defendant, rather than to provide a windfall to plaintiffs and their attorneys. For example, in *Cheatham v. Pohle*, 789 N.E. 2d 467, 2003 Ind. LEXIS 440 (May 30, 2003), the Supreme Court of Indiana recently rejected a broad-based constitutional attack similar to the one the Rhynes make here. The attack included a takings challenge to Indiana's allocation statute, which requires 75 percent of the punitive damages award be paid by the clerk to the state victim compensation fund and 25 percent to the plaintiff. In doing so, the Indiana court first examined the nature of punitive damages to determine whether there was a property right involved:

> As a matter of federal law, state legislatures have broad discretion in authorizing and limiting the award of punitive damages, just as they do in fashioning criminal sanctions. *BMW of N.A., Inc. v Gore*, 517 U.S. 559, 568 (1996). Victims in a criminal case have no claim to benefit from criminal sanctions. * * * * For the same reason, it has been consistently held that civil plaintiffs have no right to receive punitive damages.

Id. at 471.

The Indiana Supreme Court proceeded to analyze the plaintiffs' takings argument under both the state and federal constitution by looking at the property interest in question:

> If the law recognizes a wrong, an injured person has the right to be compensated for any injury. But it is equally well settled in Indiana and elsewhere that no one has a right to recover punitive damages, however outrageous the conduct of the offender (citations omitted).
>
> * * * *

> Specifically, any interest the plaintiff has in a punitive damages award is a creation of state law. The plaintiff has no property to be taken except to the extent state law creates a property right. *Board of Regents v. Roth,* 408 U.S. 564, 577, 92 S.Ct. 2701, 33 L.Ed.2d 548 (1972). The Indiana legislature has chosen to define the plaintiff's interest in a punitive damages award as only twenty-five percent of any award, and the remainder is to go to the Violent Crime Victims' Compensation Fund. *The award to the Fund is not the property of the plaintiff. Nor is her prejudgment claim a property interest.* Rather, the claim she had before satisfaction was, pursuant to statute, a claim to only one fourth of any award of punitive damages. As a result, there is no taking of any property by the statutory directive that the clerk transfer a percentage of the punitive damages award to the Fund.

Id. at 473 (emphasis added). Limits on punitive damages awards have been similarly upheld in Alaska, Oregon, Georgia, Florida and Iowa.[4]

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[4] See *Evans v. State*, 56 P.3d 1046, 1058 (Alaska 2002) (Alaska's statute which allocates fifty percent of a punitive damages award to the state general fund, does not effect a taking because it amounts to a cap on the amount of punitive damages that may be awarded *before* any award is rendered to a plaintiff, and thus, consistent with the legislature's power to limit or abolish punitive damages); *DeMendoza v. Huffman,* 334 Or. 425, 51 P.3d 1232, 1247 (2002) (Oregon law which allocates sixty percent of punitive damages awards to the state, does not effect a taking because a party has no prejudgment property interest in a punitive damages award); *Mack Trucks v. Conkle*, 263 Ga. 539, 436 S.E.2d 635, 639 (1993) (Georgia law allocating seventy-five percent of punitive damages in a product liability case to the state, does not amount to a taking because the societal interest in deterrence of wrongful conduct is better served this way and the benefit belongs to society as a whole); *Gordon v. State*, 608 So.2d 800, 802 (1992) (Florida Supreme Court found that there is no vested property right in an award of punitive damages, and upheld the provision limiting attorneys' fee which can only be calculated from portion payable to claimant); *State v. Moseley*, 263 Ga. 680, 436 S.E. 2d 632, 634 (1993); *Shepherd Components, Inc. v. Brice Petrides-Donohue & Assoc. Inc.,* 473 N.W.2d 612, 619 (Iowa 1991) (Iowa Supreme Court held that there is no vested

Faced with this overwhelming weight of judicial authority against the Rhynes' takings argument -- none of which they cite in their brief, let alone attempt to refute or distinguish -- the Rhynes rely on a single takings case involving punitive damages, *Kirk v. Denver Publishing Co.*, 81 P.2d 262 (Colo. 1991). Rhyne New Br. at 66. Amici submit, however, that the *Kirk* case is materially different and distinguishable from the case at bar.

The Colorado statute at issue in *Kirk* required that the plaintiff, after having *received* the full punitive damages judgment from the defendant, pay thirty percent of the proceeds into a general state fund. *Id.* at 263. Thus, the Colorado statute required the vesting of the state's interest in the award only after the judgment had been paid to the plaintiff. *Id.* at 266. The effect of the statute was thus viewed as a taking of property because it was first reduced to a judgment, then received by the plaintiff, and required to be paid to the state fund. In the other states that allocate punitive damages awards, the clerk receives the punitive awards first and then makes the appropriate distributions. In the case at bar, the punitive damages verdicts totaling $23 million were never even reduced to a judgment, let alone received by the Rhynes.

In short, there is no property right to seek a punitive

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right to an award of punitive damages.).

damages award, nor is the jury's verdict a vested property right. Therefore, nothing was taken when the verdict was reduced by the statutory cap, and subsequently memorialized in a judgment.

B. THE CAP DOES NOT VIOLATE EQUAL PROTECTION OR DUE PROCESS BECAUSE IT DOES NOT DISCRIMINATE AGAINST ANY SUSPECT CLASS AND IS REASONABLY RELATED TO A GOVERNMENTAL PURPOSE.

Plaintiffs argue that the cap violates equal protection under Art. I, § 19 of North Carolina's constitution because some plaintiffs will receive 100 percent of a punitive damages verdict, while others, who are awarded excessive amounts like the Rhynes, may receive only a portion of their verdicts due to the cap. Rhyne New Br. at 67. Because they claim that the cap burdens an alleged fundamental right to trial by jury for punitive damages, the Plaintiffs ask the court to use strict scrutiny in assessing the cap's constitutionality.

In the first place, as the Court of Appeals correctly held, there is no fundamental or constitutional right to trial by jury for punitive damages because the claim for punitive damages is not a "cause of action `respect[ing] property.'" *Rhyne v. K-Mart Corp.*, 149 N.C. App. 672, 678, 562 S.E. 2d 82, 88 (2002). Furthermore, the differences in the classifications of those who may receive different levels of punitive damages awards are not the usual "suspect classes" based on race, alienage, or ancestry. *See State ex rel. Carolina Util. Comm'n v. Customers Ass'n, Inc.,* 336 N.C. 657 at 681, n.5, 446 S.E.2d at 346 n.5 (1994).

Accordingly, the cap is subject to only a rational basis review rather than strict scrutiny.

Because the legislation comes to this Court with a "presumption of validity," *Huntington Properties, LLC v. Currituck County*, 153 N.C. App. 218, 569 S.E.2d 695 (2002), Plaintiffs bear the heavy burden of showing that the cap on its face does not bear *any* "rational relationship to any conceivable legitimate interest of government." *Id.* Amici submit that Plaintiffs have not met, nor can they meet, this heavy burden. Rather, the cap easily satisfies rational basis review.

The lower court found that the cap bears a rational relationship to the government's goal of promoting economic development and fostering confidence in North Carolina's tort system. *Rhyne*, 149 N.C. App. at 683, 562 S.E.2d at 991. The Rhynes attempt to demonstrate that there is no rational basis for the cap because they claim there was no punitive damages "crisis" in North Carolina or elsewhere to justify the cap. Rhyne New Br. at 71. But even if that were true, the legislative branch of government need not sit idly by waiting for a crisis to occur before they react; it can be proactive by enacting prophylactic measures that prevent the deleterious effect of excessive punitive damages awards which have been occurring on a more frequent and increasing basis. As the Court of Appeals below correctly observed, "there is no requirement that the legislature be reactive. There does not have to be a present crisis in North

Carolina *or even in the United States*. Whenever it would be reasonable, the legislature may, and *should, be proactive*." *Rhyne*, 149 N.C. App. at 683, 562 S.E. 2d at 991 (emphasis added).

Indeed, the punitive damages award in this very case resulted in a grossly excessive amount of $23 million (where the ratio to compensatory damages is a staggering 1,211 to one). This monstrous award is "Exhibit A" for capping skyrocketing punitive damages, and vindicates the wisdom and foresight of the North Carolina legislature to set a cap on the awards. Other examples of outrageously high and excessive punitive damage awards are legion, and cited by other amici. *See, e.g., BMW of N. Am., Inc. v. Gore,* 517 U.S. 559 (1996) ($2 million punitive damage award where compensatory damages was $4,000); *State Farm v. Campbell,* 123 S.Ct. 1513 (2003) ($145 million punitive damage award reversed where compensatory award was $1 million). *See also Apex Development Corp. v. Texaco, Inc.*, Local Dkt # 1999-11204-CA-01 (11th Jud. Cir. Ct., Fla.); Haggman, "Chevron Texaco Subsidiary Hit With $33.8M Punitive Damages Verdict," *Miami Daily Business Review*, July 3, 2003. In *Apex*, a Miami-Dade County, Florida jury recently found that Chevron-Texaco was not liable for any compensatory damages in a fraud lawsuit because the plaintiff suffered no economic damages due to the fraud; nevertheless, the jury returned a $33.8 million punitive damages verdict at the urging of the plaintiffs' counsel to set the award

at 0.0075 percent of Texaco's $3 billion net value.[5]

In an attempt to demonstrate that the cap lacks a rational basis, the Plaintiffs disparagingly quote Rep. Charles Neely who, according to the Plaintiffs, defended the cap on "anticipatory grounds: `We need to fix this ship before it sinks.'" Rhyne New Br. at 72-73. Rep. Neely was further quoted at the time as stating:

"I don't know that it's out of hand here, but I know

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[5] Under North Carolina law, punitive damages "may be awarded only if the claimant proves that the defendant is liable for compensatory damages and that one of the following aggravating factors was present and was related to the injury for which compensatory damages were awarded: (1) Fraud; (2) Malice; (3) Willful or wanton conduct." N.C.G.S. § ID-15(a). The reasoning supporting Rhynes' arguments challenging the cap on punitive damages could similarly apply in challenging N.C.G.S. § 1D-15(a) that effectively sets a cap of "zero" on the recovery of punitive damages where no compensatory damages were awarded. This would be true particularly if the defendant did not request a bifurcated trial. *See Ward v. Beaton*, 144 N.C. App. 44, 539 S.E.2d 30 (2000) (evidence relating to punitive damages can be admitted at any time during plaintiff's case-in-chief if bifurcation not requested). The North Carolina jury is not instructed that it cannot award punitive damages if they do not award compensatory damages. Rather, they are instructed pursuant to N.C.G.S. § 1D-40 to consider the several factors for assessing punitive damages outlined in N.C.G.S. § 1D-35. Since the purposes of punitive damages under North Carolina law is to "punish" the defendant and "deter" the defendant and others from "egregiously wrongful acts," N.C.G.S. § 1D-1, and since "actual damages" to the plaintiff is only one of nine listed factors that the jury is directed to consider in determining the amount of punitive damages under N.C.G.S. § 1D-35(2), one can easily construct a scenario like that in *Apex* where no compensatory damages would be awarded, but where the other factors for assessing punitive damages were found applicable, such as an egregious wrongful act. Thus, § 1D-15(a), which effectively caps punitive damages at zero if there are no compensatory damages awarded, would be vulnerable to attack if the Rhynes were to prevail in this appeal.

> there are [punitive damage award] abuses here," he said. "If there is one thing that brings discredit on the [tort] system, there's no need to wait for a bunch of [problems] to do something about it."
>
> * * * *
>
> Protecting business could help wronged consumers in the long run, Neely argued.
>
> Some businesses, such as the large asbestos manufacturer Manville Corp., go bankrupt because of large punitive claims, which leave them little or no money to pay all the parties seeking compensation, he said.
>
> If business weren't hit with such large punitive costs, they would be able to compensate victims for lost wages or pain and suffering, he said.

The Durham Herald Co., *Raleigh Extra*, May 14, 1995 (submitted to this Court as an exhibit to Plaintiff-Appellants' Motion For the Court to Take Judicial Notice).

The Rhynes dismiss these legitimate and rational legislative concerns of Rep. Neely and many members of the public and business community as "palpably wrong as a matter of law." Rhyne New Br. at 73. In doing so, the Rhynes cite this Court's holding in *State v. Ballance*, 229 N.C. 764, 51 S.E.2d 731 (1949), for the proposition that legislation [6]is justified under the rational basis test if it is "reasonably necessary *to promote* the accomplishment of a public good, or *to prevent* the infliction of a public harm." (emphasis added).

But Rep. Neely's statements, and even the Plaintiffs'

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[6] In *Ballance*, this Court held that there was no rational basis for the legislature to require that photographers be licensed as an occupation and be required to pass technical and character tests. Plaintiffs cite no other case where the North Carolina courts have struck down economic legislation for failing to meet the rational basis test.

characterization of them as being "anticipatory" of the problem, evidence precisely the kind of legitimate foresight required to make informed policy choices. The statutory cap clearly meets this Court's test in *Ballance*: the cap *promotes* predictability and rationality of our tort system, *promotes* economic development, and helps ensure that victims are compensated, all of which are certainly in the public interest. The fact that the award of punitive damages may be relatively rare in North Carolina says nothing about how often they are sought in lawsuits, and does not address businesses' genuine concern that the very unpredictability of a large award has a chilling effect on business and commercial activity and operations. At the same time, the legislative cap is proactive, and thus *prevents* the infliction of public harms caused by excessive punitive damages, such as higher costs and prices of goods and services, reduced professional services, decreased product development, loss of jobs, gratuitous wealth transfers through windfall awards, and public disrespect for the lottery-like civil justice system.

In response, Plaintiffs simply offer contrary statements of other legislators and proffer disputed studies allegedly showing that there is no punitive damage crisis in North Carolina or elsewhere worth fixing or preventing. Precisely because there is a policy dispute about the problem, it is the role of the legislative branch in a democracy, rather than the judiciary, to make the judgment call on how best to address those concerns. In

short, the Plaintiffs are the ones who are "palpably wrong" rather than Rep. Neely and his colleagues when Plaintiffs suggest that the legislative branch must remain passive, and can only react to put out fires rather than take prophylactic measures to prevent them. Arguments similar to the Plaintiffs were made and properly rejected in *Southern Blasting Services v. Wilkes County*, 162 F.Supp. 2d 455, 460 (W.D.N.C. 2001) regarding the licensing law imposed on businesses engaged in hazardous activity.

> In addition, the Court is unpersuaded by Plaintiffs' safety evidence. The fact that Plaintiffs are unaware of any magazine site explosions is simply not conclusive of the irrationality of the [licensing] Ordinances. Moreover, whether Plaintiffs' operations are already regulated by federal law is irrelevant to the reasonableness of the Ordinances.

Id. at 460. So too here, the Rhyne's arguments that excessive punitive damages awards are rare in North Carolina, or the suggestion that excessive punitive damages "are already regulated by federal law" as the result of the application of the due process factors outlined in *State Farm v. Campbell,* is irrelevant to the reasonableness of the cap as valid economic legislation.

Plaintiffs fare no better in arguing that the cap fails the rational basis test with respect to Equal Protection. Under the rational basis test, this Court has held that a "statute . . . will not be set aside merely because it results in some inequalities in practice." *Duggins v. North Carolina State Board of CPA Examiners*, 294 N.C. 120, 131, 240 S.E.2d 406, 413 (1978). Here, Plaintiffs attempt to show inequalities by posing a set of

tedious and legally irrelevant hypotheticals based on the facts in *BMW v. Gore* and those in the case at bar, to illustrate how applying the cap *might* result in allegedly unfair or arbitrary awards.

First, Plaintiffs seriously misunderstand or misstate substantive due process jurisprudence in their desperate attempt to demonstrate the irrationality of the cap by posing different hypotheticals. For example, they try to show the disparity between possible punitive damages awards in two hypothetical cases: Case A's relatively larger economic harm inflicted on society by a tort feasor may very well yield a greater punitive damage award than Case B, where plaintiffs were physically and intentionally injured, but where the compensatory damages were relatively low. Plaintiffs baldly assert that "due-process analysis required by the U.S. Supreme Court, however, *mandates* that a *larger* award is merited in Plaintiff B's case than in Plaintiff A's." Rhyne New Br. at 70 (emphasis added). Neither the Supreme Court nor due process "mandates" larger punitive damages awards. Substantive due process is a right or protection afforded to defendants to use as a shield to ensure that their property is not taken arbitrarily by the government in the form of excessive punitive damages. The Plaintiffs have it backwards when they turn substantive due process protection around to argue that they have a positive entitlement, or have been "mandated," to receive comparatively equitable amounts of punitive damages

vis-a-vis other plaintiffs.

Plaintiffs also argue that it is possible that even though the reprehensibility of similar conduct in two cases may be the same, Plaintiff A may receive more punitive damages than Plaintiff B because the first may have more compensatory damages in the form of greater loss income. Rhyne New Br. at 69. Thus, although reprehensibility admittedly is a major factor for setting the level of punitive damages, the ratio of compensatory damages to punitive damages is also a primary factor to consider under *State Farm* and *BMW v. Gore*; applying that ratio may properly offset the emphasis of the reprehensibility factor in calculating punitive damages in otherwise similar cases.

In conclusion, the Plaintiffs fall far short of the mark in demonstrating that the cap does not serve a rational basis. The calibration chosen by the legislature does not have to be perfect, as long as it is reasonable, which this cap surely is.

1. A PUNITIVE DAMAGES CAP OF THE GREATER OF THREE TIMES COMPENSATORY DAMAGES OR $250,000 IS A REASONABLE LEGISLATIVE JUDGMENT DESIGNED TO ENSURE THAT SUBSTANTIVE DUE PROCESS RIGHTS ARE NOT VIOLATED BY JURIES AND CONSERVES SCARCE JUDICIAL RESOURCES IN REVIEWING PUNITIVE DAMAGE AWARDS FOR EXCESSIVENESS.

The very fact that jurors have broad discretion in setting punitive damages awards, and that such awards can be and have been erratic, is an additional legitimate governmental interest to set reasonable caps on punitive damages awards. It should be remembered that there are no limits in North Carolina on the

amount of compensatory damages a plaintiff may obtain, and that the legislature could abolish punitive damages altogether, or require that some or all of the award be allocated to the state. As one respected jurist summarized the issue:

> There is no question that juries have broad discretion to determine damages. "The measure of damages suffered is a factual question and as such is a subject particularly within the province of the trier of fact." (*Bertero v. National General Corp.* (1974) 13 Cal.3d 43, 65, fn. 12, 118 Cal.Rptr. 184, 529 P.2d 608.) But discretion must be distinguished from whim and serendipity. In the case of large awards, punitive damages should rarely exceed compensatory damages by more than a factor of three, and then only in the most egregious circumstances clearly evident in the record. In arguing for this standard, I do not mean to suggest that three times compensatory damages is a benchmark measure of punitive damages. (Cf. *Assessing Punitives, supra,* 107 Yale L.J. at p. 2127 & fn. 191.) Far from it. The standard is *an uppermost limit,* and most punitive damage awards should fall well *below* that limit. (See Eisenberg & Wells, *Punitive Awards after BMW, a New Capping System, and the Reported Opinion Bias* (1998) Wis. L.Rev. 387, 420, 422 (*Punitive Awards*) [charting punitive damage awards for all states in 1992 and for California from 1960-1984].)

Lane v. Hughes Aircraft Co. 93 Cal.Rptr.2d 60 Cal.(2000) (Brown, J., concurring). Clearly, if three times the compensatory damages is regarded as "an uppermost limit" in determining constitutional punitive damages awards, the cap here easily satisfies the rational basis test because it essentially codifies that constitutional guidelines for limiting awards.

> The statutes of other jurisdictions are also relevant. (See *In re Waltreus* (1965) 62 Cal.2d 218, 224, 42 Cal.Rptr. 9, 397 P.2d 1001 [borrowing from federal law in order to develop our common law rules of criminal procedure].) It is significant that our sister states have most frequently selected two or three times compensatory damages as the appropriate limitation on

> punitive damages. These jurisdictions include Connecticut, Delaware, Florida, Illinois, Indiana, Nevada, North Dakota, Oklahoma and Texas. (See *BMW of North America, Inc. v. Gore, supra,* 517 U.S. at pp. 615-616, 116 S.Ct. 1589 (appen. to dis. opn. of Ginsburg, J.).) Moreover, several jurisdictions have imposed stricter dollar limits (*ibid.*), even in the case of intentional and malicious discrimination. (See 42 U.S.C. §§ 1981a(b)(3) [upper limit of $300,000].) Thus, the limitation I would urge the courts to consider is a relatively modest one, allowing ample flexibility by authorizing courts to approve awards that exceed the limit where appropriate.

Id. at 75. *See State Farm v. Campbell,* 123 S.Ct. at 1524 ("single-digit ratio" is a benchmark of due process).

In short, since it is reasonable for a court to protect the substantive due process rights of defendants by developing a common law rule that the uppermost limit of punitive damages should be three times the compensatory, the adoption of that rule by the legislative branch is not only *not* violative of equal protection or due process, but positively protects due process rights.

In addition, the cap will likely result in conserving scarce judicial resources in reviewing the excessiveness of punitive damage awards. Under *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), reviewing courts must conduct a *de novo* review of the amounts rather than give deference to the trial court's assessment of the award. This necessitates a review of the trial record, including voluminous exhibits and testimony. While the cap does not necessarily eliminate *de novo* review, such review may be rare because the cap will necessarily

constrain runaway awards that are now the grist for appellate review and remittitur proceedings.

2. THE CAP IS A RATIONAL MEASURE TO PREVENT THE PLUNDERING OF A DEFENDANT'S WEALTH IN COMPUTING THE AMOUNT OF PUNITIVE DAMAGES AWARDS.

Plaintiffs also complain that the cap is irrational because it is theoretically possible that a wealthy corporation would be protected from being hit with very large punitive damages awards. Plaintiffs argue that awards exceeding three times compensatory damages are allegedly needed "to have [a] deterrent effect"; otherwise, the "wealth [of a large company] makes the damages awarded under the cap inconsequential." Rhyne New Br. at 71. In the first place, there is no showing that astronomical awards are needed to properly punish or deter tortious conduct of a large company. Indeed, because large companies make easy targets for plaintiffs and their attorneys to redistribute wealth, as was obviously the case here, that in itself is a legitimate governmental reason for setting reasonable caps.

After all, criminal fines are generally fixed, regardless of the wealth of the wrongdoer, and they are generally limited to amounts that rarely exceed $10,000 for the kind of conduct alleged here. Criminal fines are meant to punish and deter just like punitive damages awards; consequently, a comparison of analogous criminal fines and penalties are one of the *BMW v. Gore* factors courts use to determine the excessiveness of the award.

More importantly, amici reject the Plaintiffs' unsupported premise that only large awards against large and wealthy corporations are necessary to achieve the purposes of punishment and deterrence.

As the Supreme Court recently reiterated, "The wealth of a defendant cannot justify an otherwise unconstitutional punitive damages award." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 123 S.Ct. 1513, 1525 (2003). On prior occasions, the High Court and many of its Justices have observed that the imposition of punitive damages "pose an acute danger of arbitrary deprivation of property. Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth create the potential that juries will use their verdicts to express biases against big business, particularly those without strong local presences." *Honda v. Oberg*, 512 U.S. 415, 432 (1994); *TXO Prod. Corp. v. Alliance Res. Corp.*, 509 U.S. 443, 464 (1993) (Rehnquist, C.J., Blackmun, Stevens & Kennedy, JJ.) ("[E]mphasis on the wealth of the wrongdoer increased the risk that the award may have been influenced by prejudice against large corporations, a risk that is of special concern when the defendant is a nonresident."); *id*. at 490 (White, O'Connor & Souter, JJ. dissenting) ("That a jury might have such inclinations [to redistribute wealth form large corporations] should come as no surprise. Courts long have recognized that jurors may view large corporations with great

disfavor."). As one commentator noted:

> Evidence of a defendant's net worth can lead to a punitive damages award based on bias, prejudice, or passion. Introduction of such evidence by plaintiffs is, at bottom, "an improper `appeal to class prejudice and pandering to the perception that corporations wield disparate power,'" generally made for no reason "`other than to prejudice . . . the jury's sworn duty to reach a fair, honest and just verdict.'"

Victor E. Schwartz, *et al.*, *Reining in Punitive Damages"Run Wild": Proposals for Reform by Courts and Legislatures*, 65 Brooklyn L. Rev. 1003 at 1006 (1999).

Not only are jurors prone to exact large punitive damage awards against corporations because of their size, judges are also prone to sanction the practice. Judicial review by state courts cannot be relied upon to remove the risk of excessive punitive damage awards against large out-of-state corporations due to bias. Judge Richard Neely, author of the opinion of the West Virginia Supreme Court of Appeals in the *TXO* case, has candidly explained the pressures on state judges as follows:

> After all, I'm not the only appellate judge who wants to sleep at night. As long as I'm allowed to redistribute wealth from out-of-state companies to injured in-state plaintiffs, I shall continue to do so. Not only is my sleep enhanced when I give someone elses' money away, but so is my job security, because the in-state plaintiffs, their families, and their friends will re-elect me.

Richard Neely, *The Product Liability Mess: How Business Can Be Rescued form the Politics of State Courts* 4 (1989), *quoted in* Bradley D. Toney, *The Chaotic and Uncertain Due Process Challenge to Punitive Damages*, 30 Williamette L. Rev. 635, n.306 (1994).

Amici submit that punishing large publicly-held corporations like Kmart inflicts punishment "only [on] the [shareholders], who took no part in the commission of the tort." *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 267 (1981). Furthermore, "[n]either reason nor justice suggests that such retribution should be visited upon the shoulders of blameless or unknowing [shareholders]." *Id.* Finally, since a corporation is a fictional entity, it "can have no malice independent of the malice of its [officers, directors, managing agents, and employees]." "Damages awarded for punitive purposes, therefore, are not sensibly assessed against the [corporate] entity itself." *Id.* As Circuit Judge Easterbrook noted:

> Corporations * * * are not wealthy in the sense that persons are. Corporations are abstractions; investors own the net worth of the business. These investors pay any punitive awards (the value of their shares decreases), and they may be of average wealth. Pension trusts and mutual funds, aggregating the investments of millions of average persons, own the bulk of many large corporations. Seeing the corporation as wealthy is an illusion, which like other mirages frequently leads people astray.

Zazu Designs v. L'Oreal, S.A., 979 F.2d 499, 508 (7th Cir. 1992). *See also Lane v. Hughes Aircraft Co.*, 22 Cal.4th at 427 (Brown, J., concurring) ("Many of the wealthiest defendants are corporations, and the size of a corporate defendant is not an additional evil that in itself warrants an enhanced penalty.").

Plaintiffs suggest that imposing multimillion dollar punitive damages awards against a wealthy company is necessary; otherwise it will internalize lower amounts as simply a cost of

doing business. But that is a simplistic notion. Assuming that a company and its officers are motivated purely by economic greed and the bottom line, it makes no sense for a company to continue engaging in liability causing conduct until the punitive damage awards reach astronomical proportions. While determining the proper amount of a punitive damage award is not an exact science, there remains a substantial body of scholarly economic research suggesting that the optimal levels of fines necessary to deter socially undesirable conduct are *not* related to the size or net wealth of the company. From an economic point of view, it is generally understood that:

> [P]rofit-maximizing organizations are interested in the marginal (not the total) costs of activities relative to the marginal benefits. The total wealth of the organization generally has little to do with the expected marginal costs or benefits of actions. It has been argued that, by linking punitive damages to wealth, the law creates too much deterrence for large corporations and too little for small ones.

Mogin, *Why Judges, Not Juries, Should Set Punitive Damages*, 65 Univ. of Chicago Law Rev. 179, 210 (1998). *See also* Robert D. Cooter, *Punitive Damages for Deterrence: When and How Much?*, 40 Ala. L. Rev. 1143, 1176-77 (1989); *Malcolm E. Wheeler, A Proposal for Further Common Law Development of the Use of Punitive Damages in Modern Product Liability Litigation*, 40 Ala. L. Rev. 919, 950-51 (1989); Dorsey D. Ellis, Jr., *Fairness and Efficiency in the Law of Punitive Damages*, 56 S. Cal. L. Rev. 1, 62 (1982). As explained by two prominent experts in the field:

> Deterrence theory is based on the * * * assumption that actors weigh the expected costs and benefits of their future actions. Specifically, a potentially liable defendant will compare the benefits it will derive from an action that risks tort liability against the discounted present expected value of the liability that will be imposed if the risk occurs. Whether a defendant is wealthy or poor, this cost-benefit calculation is the same. If, as is likely, a wealthy defendant derives no greater benefit from a given action than a poor defendant, then both will be equally deterred (or equally undeterred) by the threat of tort liability. A defendant's existing assets do not increase the expected value of a given future action. Therefore they do not require any adjustment in the level of sanction needed to offset that expected value. The defendant's wealth or lack of it is thus irrelevant to the deterrence of socially undesirable conduct.

Kenneth S. Abraham & John Calvin Jeffries, Jr., *Punitive Damages and the Rule of Law: The Role of Defendant's Wealth,* 18 J. Legal. Stud. 415 (1989). Deterrence is deemed effective if it removes the gain from the wrongful behavior, regardless of the company's net worth, assets, or income. As Judge Easterbrook aptly described it, assessing punitive damages on the basis of wealth suggests that "having a large net worth w[as] the wrong to be deterred!" *Zazu, supra,* at 508.

Accordingly, North Carolina's cap on punitive damages serves to act as a governor on the tendency of juries to impose excessive punitive damages on the basis of a defendant's wealth, and thereby prevents wealth redistribution, gratuitous punishment, and over-deterrence. These too are legitimate governmental concerns that justify the cap under a rational basis standard.

CONCLUSION

For the foregoing reasons and those presented by Defendant-Appellee, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

BOYCE & ISLEY, PLLC

By:________________
Philip R. Isley
N.C. State Bar No. 19094
Post Office Box 1990
Raleigh, NC 27602-1990
(919) 833-7373
pisley@boyceisley.com

WASHINGTON LEGAL FOUNDATION

By:______________________
Daniel J. Popeo
Paul D. Kamenar
2009 Massachusetts Ave., NW
Washington, D.C. 20036
(202) 588-0302
pkamenar@wlf.org

Counsel for Amici Curiae

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