No.

In The

Supreme Court of the United States

LAWNWOOD MEDICAL CENTER, INC.,

Petitioner,

v.

SAMUEL H. SADOW,

Respondent.

On Petition for a Writ of Certiorari to The Court Of Appeal of Florida, Fourth District

---

PETITION FOR A WRIT OF CERTIORARI

J. BRETT BUSBY
Bracewell & Giuliani LLP
711 Louisiana St., Ste. 2300
Houston, TX 77002
(713) 223-2300

MIKE A. HATCHELL
Counsel of Record
CHARLES R. "SKIP" WATSON, JR.
Locke Lord Bissell & Liddell LLP
100 Congress Ave., Ste. 300
Austin, TX 78701
(512) 305-4700
mahatchell@lockelord.com

Counsel for Petitioner

WILSON-EPES PRINTING CO., INC. – (202) 789-0096 – WASHINGTON, D. C. 20002

Blank Page

QUESTIONS PRESENTED

The jury found that an officer of Lawnwood Medical Center defamed Dr. Samuel Sadow, and it awarded him $0 in compensatory damages and $0 in nominal damages but $5,000,000 in punitive damages. Under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), appellate courts must analyze three guideposts to determine whether an award of punitive damages is unconstitutionally excessive. The Florida Court of Appeal expressly declined to apply those guideposts, holding that state law and Lawnwood's net worth supported the award.

The question presented is whether the $5,000,000 award of punitive damages against Lawnwood—which may be the largest award ever upheld in a nominal damages case after *BMW*—is excessive in violation of the Due Process Clause, and whether the Florida court's handling of that question denied Lawnwood procedural due process. In particular, the Florida court's answers to the following subsidiary questions conflict with decisions of this Court and other lower courts:

1. Are punitive damages for intentional harm exempt from the guidepost analysis?
2. Can state law exempt punitive awards for certain conduct from the guidepost analysis mandated by the Federal Constitution?
3. When actual damages are small or nominal, may a court rely on the defendant's wealth—rather than awards in similar cases or comparable legislative penalties—as an objective indicator of whether a punitive award is constitutional?

CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6, petitioner states that it is a wholly owned subsidiary of Hospital Corp., LLC, which is privately held. No publicly owned corporation owns 10% or more of petitioner's stock. Petitioner's ultimate parent is Hercules Holding II, LLC, and some of Hercules's members are affiliated with Bank of America Corporation, which is publicly held.

TABLE OF CONTENTS

TABLE OF CONTENTS
(continued)

Page

TABLE OF CONTENTS
(continued)

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

CONSTITUTIONS AND STATUTES

PETITION FOR A WRIT OF CERTIORARI

Lawnwood Medical Center Inc. respectfully petitions for a writ of certiorari to review the judgment of the District Court of Appeal of the State of Florida for the Fourth District in this case.

OPINIONS BELOW

The judgment of the Circuit Court for St. Lucie County, Florida (App., *infra*, 54a-55a) is unreported. The opinion of the court of appeal (App., *infra.*, 1a-52a) is reported at ___ So. 3d ___, 2010 WL 1066833. The court of appeal certified the following question to the Florida Supreme Court as one of "great public importance":

> Are punitive damages of $5,000,000 arbitrary or excessive under the Federal Constitution where the jury awarded no compensation beyond presumed nominal damages but found that defendant intentionally and maliciously harmed plaintiff by slanders per se?

App., *infra*, 51a. The Florida Supreme Court declined to exercise jurisdiction over this question and denied the petition for review in an unreported order. *Id.* at 53a.

JURISDICTION

The court of appeal affirmed the judgment on March 24, 2010. App., *infra*, 1a. The Florida Supreme Court denied review on April 27, 2010. *Id.* at 53a. On July 15, 2010, Justice Thomas extended the time within which to file a petition for a writ of certiorari to and including August 25, 2010. On August 17, Justice Thomas further extended the time to and

including September 15, 2010. This Court has jurisdiction pursuant to 28 U.S.C. § 1257(a).

CONSTITUTIONAL PROVISION INVOLVED

The Fourteenth Amendment to the United States Constitution provides in relevant part:

> No State shall * * * deprive any person of * * * property, without due process of law * * * .

U.S. Const. Amend. XIV, § 1.

STATEMENT

The fundamental issue in this defamation case is whether a court can uphold punitive damages of $5,000,000 without applying the three guideposts this Court adopted to determine whether a punitive award is excessive in violation of the Due Process Clause of the Fourteenth Amendment. See *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574-75 (1996). Dr. Samuel Sadow alleged that an officer of Lawnwood Medical Center made defamatory statements about him to one colleague, but he stipulated that he suffered no economic damages. The jury found defamation and awarded Dr. Sadow $0 in non-economic and $0 in nominal damages but $5,000,000 in punitive damages.

In affirming the award, the Florida Court of Appeal expressly rejected the guidepost analysis by: (1) substituting state laws on punitive damages for this Court's five-factor reprehensibility analysis; (2) comparing the size of the punitive award to the defendant's wealth rather than the plaintiff's harm; and (3) ignoring the comparable legislative penalty of $1,000. Thus, Lawnwood was denied the analytical procedures this Court requires to ensure that punitive awards comport with due process.

The Florida court correctly recognized that this decision is of "great public importance." App., *infra*, 51a. It exempts punitive damage awards from searching due process scrutiny in cases involving intentional harm or conduct that state law excepts from a punitive damages cap. Thus, awards in these large categories of cases will be constrained only by the court's subjective assessment of reprehensibility and the defendant's personal ability to pay. Furthermore, similar conduct by defendants will be subject to different federal constitutional limits depending on which State's law applies. These results are the antithesis of the fairness and predictability guaranteed by the Due Process Clause.

The Court should summarily reverse the Florida court's decision because it directly contradicts this Court's mandate that every appellate court conduct an exacting *de novo* review of the three guideposts. In addition, each of the Florida court's reasons for holding the guideposts inapplicable conflicts with decisions of this Court and other lower courts. For example, the court's position that the guideposts do not apply to intentional harm is contrary to *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), which applied each guidepost to claims including intentional infliction of emotional distress. Similarly, the Florida court's decision not to apply the guideposts to conduct that state law marks for substantial punitive damages conflicts with *State Farm*'s holding that state law is no substitute for the constitutional principles set forth in *BMW*. And the Florida court's use of the defendant's wealth to determine whether the punitive award is proportional is precisely the sort of inflationary use of wealth evidence that *State Farm* condemned. When the guideposts are properly applied, they show that the

$5,000,000 award of punitive damages against Lawnwood is arbitrary and excessive.

Finally, this Court's review is needed to clarify what objective criteria ensure the reasonableness and predictability of punitive damages in cases where actual damages are small or nominal. The Florida court's decision to focus on the defendant's wealth conflicts with decisions of other courts that focus on punitive awards in comparable cases. Lawnwood has found no decision upholding a comparable punitive award in a defamation case, or in any case where compensatory damages are small or non-existent. This lack of similar awards confirms that the $5,000,000 punitive award is excessive and should be reversed.

A. Factual background

This lawsuit is the result of a bitter business dispute between Dr. Sadow, his former partner Dr. Peter Downing, and Lawnwood Medical Center. When Lawnwood began building a new facility to offer cardiovascular surgery, Dr. Downing expressed interest in contracting for exclusive surgical privileges, while Dr. Sadow applied for non-exclusive privileges. The executive committee of the medical staff approved Dr. Sadow's application, but Lawnwood's board of trustees preferred an exclusive arrangement and contracted with Dr. Downing. Dr. Sadow then sued Lawnwood for breach of contract, alleging that its actions violated the medical staff bylaws. The jury found that Lawnwood had breached the bylaws and awarded Dr. Sadow over $1.5 million. The breach of contract claim is not at issue in this Court.

Instead, this petition concerns a defamation claim that was belatedly tacked on to the lawsuit.

While Dr. Sadow's suit was pending, Lawnwood CFO Robert Dunwoody told one new staff member, Dr. Raul Pinon, that Pinon should not refer patients to Dr. Sadow. Dunwoody explained that Dr. Sadow was suing the hospital and stated that he "is not a good doctor," he "has had multiple lawsuits filed against him," and "I would not send my dog to him for surgery." App., *infra*, 15a. Nevertheless, Dr. Pinon did establish a relationship with Dr. Sadow and referred at least one patient to him. Dr. Sadow learned of Dunwoody's comments some seven or eight months after they were made, and one year after learning of them he added claim for defamation to his suit.

B. At trial, the jury awards compensatory damages of $0 but punitive damages of $5 million for slander.

Dr. Sadow's claims for breach of contract and defamation proceeded to trial. With respect to defamation, Dr. Sadow argued that Dunwoody's statements to Dr. Pinon constituted slander per se, but he stipulated that the statements did not cause him any economic damages in the form of lost business. Instead, he sought only non-economic damages for injury to his reputation and mental anguish, as well as punitive damages.

At the end of the first phase of the trial, the jury found that Lawnwood had slandered Dr. Sadow but awarded him $0 in damages for injury to reputation and mental anguish. App., *infra*, 64a. The jury was told that it could award nominal damages "to vindicate a right where a wrong is established but no damage is proved," but again it awarded $0. *Id.* at 59a, 64a. The jury did find that punitive damages were warranted, however, on the ground that Lawnwood's "primary purpose in making the state-

ment was to indulge ill will, hostility, and an intent to harm Dr. Sadow," and that its "intentional misconduct" was "a substantial cause of loss, injury, or damage to Dr. Sadow." *Id.* at 60a.

As the court of appeal observed, "[t]he evidence in the second phase * * * was devoted almost exclusively to [Lawnwood's] financial condition." App., *infra*, at 18a. Dr. Sadow's financial expert testified that Lawnwood's net worth was $100 million and that "punitive damages from $30-38 million would not financially destroy the hospital." *Id.* at 19a.

In closing, Dr. Sadow's counsel suggested a punitive award of $10 million and urged the jury to "grant an award of punitive damages that will punish the hospital in light of its financial condition." Tr. 42:5608-09; see also *id.* at 5638-39 ("it's clear this is a hospital that operates at a high profit margin with high net worth, and a punishment needs to get their attention by being in a sufficient amount to hurt them"). He also sought to remove Florida's cap on punitive damages by asserting that Lawnwood "had a specific intent to harm Dr. Sadow" and its conduct "did in fact harm" him. App., *infra*, 67a. Dr. Sadow's counsel argued repeatedly that the jury should find intent and harm because it had already "made that finding in the prior part of [the] case" when it determined that punitive damages were warranted. Tr. 42:5603; see also *id.* at 5607, 5628-30, 5632.

At the end of the second phase, the jury was instructed to consider "the nature, extent and degree of the misconduct" and Lawnwood's "financial resources" in determining the amount of punitive damages. App., *infra*, 66a-67a. It awarded Dr. Sadow $5 million in punitive damages and found that Lawnwood had a specific intent to, and did, harm Dr. Sa-

dow. *Id.* at 68a. But the jury answered "no" when asked whether "the wrongful conduct of Lawnwood [was] motivated solely by unreasonable financial gain" and whether "the unreasonably dangerous nature of the conduct, together with the high likelihood of injury resulting from the conduct, [was] actually known by Lawnwood." *Ibid.*

In support of its motion for remittitur, Lawnwood argued "that the $5 million award violates due process of law under the Fifth and Fourteenth Amendments to the United States Constitution" as interpreted in *BMW* and *State Farm.* Def.'s Mem. of Law in Supp. of Post-Trial Mots. 14. The trial court denied Lawnwood's motion, concluding that the punitive award "is not excessive." Order Denying Def.'s Mots. 7.

C. The court of appeal affirms the punitive damages by expressly rejecting this Court's guidepost analysis.

On appeal, Lawnwood again argued that "[t]he jury's punitive damages award is constitutionally excessive." Appellant's Br. 29. In particular, Lawnwood relied on this Court's decisions in *BMW* and *State Farm*, which require courts reviewing such a challenge to apply three guideposts. Lawnwood argued that the $5 million punitive award is excessive under the guideposts because: (1) the reprehensibility of its conduct was not high under the five factors discussed in *State Farm*; (2) Dr. Sadow's compensatory damages are $0, so the ratio between punitive and compensatory damages cannot even be calculated; and (3) the comparable legislative penalty for libel under Florida law is only $1,000 under Fla. Stat. §§ 775.083(1)(d) and 836.01. See Appellant's Br. 29-40.

The Florida Court of Appeal affirmed the punitive award. It expressly refused to apply the three guideposts of *BMW* and *State Farm*, reasoning that this case was instead governed by the earlier plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993). App., *infra*, 27a-32a. In the court's view, *BMW* and *State Farm* are limited to "minor economic injuries" resulting from "modestly reprehensible business or commercial trade practices," *id.* at 32a, 41a, while *TXO* "supports considerable punishment without proportionality for conduct willfully and maliciously harming the plaintiff." *Id.* at 30a. The court thus rejected the ratio guidepost, holding that "the applicable rule of decision for this case is really from *TXO*: extraordinary wrongdoing justifies extraordinary civil punishment without limiting ratios." *Id.* at 46a. The court also declined to apply the five *State Farm* factors that define the reprehensibility guidepost, concluding that they were meant for cases in which "the harm was only economic." *Id.* at 44a n.30. The court did not even mention the comparable penalties guidepost.

Instead of performing this federal constitutional analysis, the court focused on Florida law, observing that Florida treats Lawnwood's conduct as highly reprehensible. App., *infra*, 31a-41a. The court held that the statutory exception to Florida's punitive damages cap gives defendants who commit intentional harm "clear warning" that "they can lawfully be punished to the extent of their personal ability to pay." *Id.* at 32a. It reasoned that this statute "allowing punitive damages without proportionality for intentional, malicious harm satisfies any *BMW* and *State Farm* concern for fair notice. The Due Process Clause is thus satisfied by this statute." *Ibid.*. The court also pointed to Florida defamation law, noting

that nominal damages are conclusively presumed to result from defamation per se. *Id.* at 36a. Moreover, "liability alone for intentionally malicious defamation per se will support substantial punishment in punitive damages" under Florida law, even without any finding of compensatory damages. *Id.* at 38a. The court believed that this treatment satisfied any federal constitutional concerns.

Finally, the court redefined the "proportionality" concern of *BMW* and *State Farm* to focus not on the relationship between the punitive award and the plaintiff's harm (as the ratio guidepost does), but on the relationship between the punitive award and the defendant's wealth. App., *infra*, 47a-49a. It observed that "[a] fine of $5,000,000 is * * * only 5% of [Lawnwood's] net worth," which "might rationally be thought by some as inadequate for a malicious defamer of such resources." *Id.* at 48a. The court then held that "[w]hen the tortfeasor has a $100,000,000 pile of unencumbered wealth, nothing in federal or Florida law suggests that 5% of that pile is arbitrary or excessive for maliciously and intentionally slandering a respected surgeon to destroy his professional reputation." *Id.* at 48a-49a. In the court's view, "[t]hat is the true application of federal proportionality in this punitive damages case." *Id.* at 49a. The court concluded "that the jury's verdict was not disproportionate under federal law in the intended sense." *Ibid.*

D. The court of appeal certifies the "great public importance" of its decision, but the Florida Supreme Court denies review.

At the end of its opinion, the court of appeal recognized the "great public importance" of properly applying *TXO*, *BMW*, and *State Farm* in reviewing punitive awards for intentionally harmful conduct such as defamation per se. App., *infra*, 51a. Accordingly, it certified to the Florida Supreme Court the question whether the $5 million award of punitive damages was unconstitutionally excessive. *Ibid.* The supreme court declined to review the question, however. *Id.* at 53a.

REASONS FOR GRANTING THE PETITION

Courts must independently review punitive damages awards to ensure that they are not excessive in violation of the Due Process Clause of the Fourteenth Amendment. State exceptions to statutory punitive damages caps cannot supplant the standards mandated by this Court for this independent constitutional review. In this case, the Florida court substituted Florida's standards of intentional harm and presumed damages in place of this Court's constitutional standards of due process. When, as here, this Court's due process guideposts are not employed, the defendant's wealth becomes the only objective guidepost for awarding punitive damages, and constitutionally impermissible punitive awards are inevitable.

I. THIS CASE MERITS SUMMARY REVERSAL.

Summary reversal is appropriate to "correct a clear misapprehension" of federal law. *Brosseau v. Haugen*, 543 U.S. 194, 198 n.3 (2004) (per curiam). That special remedy is warranted here to address the Florida Court of Appeal's significant misapplication of this Court's punitive damages jurisprudence. Relying heavily on state law, the Florida court deliberately refused to apply the three constitutional guideposts that *BMW* and *State Farm* require all courts to use in reviewing punitive damages. See Part II, *infra*. As another recent case confirms, Florida courts limit "the full three-part analysis set forth in [*State Farm* and *BMW*]" to cases involving "purely economic consequences of only slight individual financial harm." *James Crystal Licenses, LLC v. Infinity Radio Inc.*, __ So.3d __, 2010 WL 1979139, at *6 (Fla. Ct. App. May 19, 2010); *see id.* at *8 (noting that this decision "abandoned the proportionality analysis"). Florida has thus exempted many cases from the due process analysis this Court mandated to ensure that civil punishment is not arbitrary or unreasonable.

Summary reversal would allow the Court to clarify that state law is not an escape hatch from the constitutional standards governing review of punitive damages while also preventing injustice in this case and conserving the Court's scarce resources. This remedy is especially necessary because the issues on which the Florida court parts company from this Court are recurring ones that go to the heart of due process and will change the outcomes in many cases. Under the Florida court's decision, the guideposts will no longer constrain punitive damage

awards in cases involving intentional harm, or cases involving conduct that state law identifies as especially reprehensible or exempts from a statutory punitive damages cap. See Part II.A., *infra*. In those categories of cases, which arise frequently, punitive damages will be limited only by the defendant's "personal ability to pay." App., *infra*, 32a.

In addition, under the Florida court's decision, the standard for finding punitive damages excessive under the Federal Constitution will vary based on state law as well as each court's subjective comparison of the defendant's wealth to its conduct. Such a standard will inevitably lead to arbitrary variations in punitive awards for similar conduct: the very evil this Court intended to curtail by requiring "[e]xacting appellate review" of the three guideposts. *State Farm*, 538 U.S. at 419; see also *Exxon Shipping Co. v. Baker*, 128 S.Ct. 2605, 2627 (2008) (discussing the unfairness of unpredictable punitive awards); *BMW*, 517 U.S. at 587 (Breyer, J., concurring).

This Court has mandated a "thorough, independent" *de novo* appellate review of the guideposts it announced for use in every punitive damages case. *Cooper Indus., Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424, 436-37, 441 (2001); *Exxon Shipping*, 128 S.Ct. at 2626. The Court should take this opportunity to make clear that States cannot opt out of the guideposts, which are necessary to assure the "uniform general treatment of similarly situated persons that is the essence of the law itself." *Cooper Indus.*, 532 U.S. at 436.

II. THE DECISION BELOW DEFIES THE STANDARDS THIS COURT MANDATED TO ENSURE THAT PUNITIVE DAMAGES AWARDS DO NOT VIOLATE DUE PROCESS.

A. The Florida Court Refused To Apply The Guideposts.

In *BMW* and *State Farm*, this Court "announced due process standards that *every award* [of punitive damages] must pass." *Exxon Shipping*, 128 S.Ct. at 2626 (emphasis added). Those cases

> instructed courts reviewing punitive damages to consider three guideposts: (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.

State Farm, 538 U.S. at 418. In addition, they "instructed courts to determine the reprehensibility of a [defendant's conduct] by considering" five factors, namely, whether:

> the harm caused was physical as opposed to economic; the tortious conduct evinced an indifference to or a reckless disregard of the health or safety of others; the target of the conduct had financial vulnerability; the conduct involved repeated actions or was an isolated incident; and the harm was the result of intentional malice, trickery, or deceit, or mere accident.

Id. at 419.

This Court has "*mandated* appellate courts" to review *de novo* the application of these guideposts to the jury's award. *Id.* at 418 (emphasis added). It is this "[e]xacting appellate review [that] ensures that an award of punitive damages is based on an 'application of law, rather than a decisionmaker's caprice.'" *Ibid.* (quoting *BMW*, 517 U.S. at 587 (Breyer, J., concurring)).

The Florida court did not follow these instructions. It expressly declined to apply the five reprehensibility factors and the ratio guidepost, and it simply ignored the comparable penalties guidepost. App., *infra*, 30a-32a, 44a n.30, 46a. Thus, its decision directly contradicts the holdings of this Court quoted above, which mandate that every appellate court conduct an exacting review of the three *BMW* guideposts.

The specific reasons that the Florida court gave for insulating a wide swath of punitive damages awards from exacting due process scrutiny also conflict with this Court's decisions. The Florida court concluded that the constitutional constraints recognized in *BMW* and *State Farm* are inapplicable to punitive awards for intentional harm and to awards for conduct that state law marks for substantial punitive damages. See p. 8, *supra*. It also relied on Lawnwood's net worth to hold that the award here satisfied the constitutional requirement of proportionality. App., *infra*, 47a-49a. None of these rationales withstands scrutiny.

1. Intentional harm cases are not exempt from guidepost review. The Florida court began its due process analysis by asking "whether this case

is governed by *State Farm* and *BMW* or perhaps instead by *TXO* where no ratio was used." App., *infra*, 27a. It observed that *TXO* involved "intentional wrongdoing," *ibid.*, and that Justice Kennedy emphasized in his concurrence that "'TXO acted with malice.'" *Id.* at 29a (quoting *TXO*, 509 U.S. at 468 (Kennedy, J., concurring)). In contrast, the court viewed "the *State Farm* and *BMW* ratios" as "intended mainly for modestly reprehensible business or commercial trade practices causing individual damages limited in size, extent, or amount." *Id.* at 32a. The court also held that the five reprehensibility factors that *State Farm* instructed courts to consider are limited to cases in which "the harm was only economic." *Id.* at 44a n.30.

Applying this view, the court concluded that the "minor economic injuries in [*BMW* and *State Farm*] pale into insignificance next to the calumnies proven here," where the jury found that Lawnwood specifically intended to harm Dr. Sadow's reputation. App., *infra*, 41a. "Hence the applicable rule of decision in this case is really from *TXO*: extraordinary wrongdoing justifies extraordinary civil punishment *without limiting ratios*." *Id.* at 46a (emphasis added). The court thus declined to apply the ratio guidepost and reprehensibility factors.

The Florida court's analysis is flatly contrary to this Court's decisions in *BMW* and *State Farm*. With respect to ratio, *BMW* incorporated *TXO* into its analysis, recognizing that in *TXO* "the relevant ratio was not more than 10 to 1." *BMW*, 517 U.S. at 581. In *State Farm*, the Court stated that "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. Thus, *TXO*

does not support punitive damages for intentional harm "without limiting ratios," as the Florida court claims. App., *infra*, 46a. This Court recently confirmed that the ratio between punitive and compensatory damages is an "indisputable" "central feature in our due process analysis"—a feature that "every award must pass." *Exxon Shipping*, 128 S.Ct. at 2626, 2629.

As to reprehensibility, *BMW* cited *TXO* in recognizing intentional injury as one of the factors bearing on reprehensibility. *BMW*, 517 U.S. at 576. Yet the Florida court declared that reprehensibility exists as a matter of law based solely on intent to harm a person's reputation, App., *infra*, 31a-41a, disregarding the other four factors that this Court has "instructed courts to * * * conside[r]" in determining whether the defendant's conduct is sufficiently reprehensible to justify the amount of punitive damages awarded. *State Farm*, 538 U.S. at 419. Excluding those other factors is contrary to this Court's admonition that the existence of only one factor, such as malicious intent, "may not be sufficient to sustain a punitive damages award." *Ibid.*

The linchpin of the Florida court's conclusion that *TXO* exempts cases of intentional harm from the guideposts is its view that *BMW* and *State Farm* are limited to "modestly reprehensible business and commercial trade practices" that cause only limited economic harm. App., *infra*, 32a. To the contrary, one of the reprehensibility factors is whether "the harm caused was physical as opposed to economic," *State Farm*, 538 U.S. at 419, which confirms that the factors also apply to non-economic harm. Thus, review of all five factors is not optional.

The facts of *State Farm* also belie the Florida court's characterization. The jury found State Farm liable not only for bad faith and fraud but also intentional infliction of emotional distress, which by definition involves intentional, non-economic harm. *State Farm*, 538 U.S. at 425-26. The Utah Supreme Court held that awards of $1 million in non-economic damages to compensate the Campbells for this intentional harm were not excessive. *Campbell v. State Farm Mut. Auto. Ins. Co.*, 65 P.3d 1134, 1166 (Utah 2001), rev'd on other grounds, 538 U.S. 408 (2003). This Court's decision to apply the *BMW* guideposts in reviewing the constitutionality of the punitive damages award in *State Farm* thus confirms that those guideposts apply equally to cases involving intentional harm.

The Florida court also departed from this Court's precedent by removing actual harm from the reprehensibility equation. Four of the five factors, including intentional malice, require harm to the plaintiff or indifference to the health or safety of others. *State Farm*, 538 U.S. at 419. Absent actual harm, there can be no reprehensibility. *Id.* at 422-23, 426.

Actual harm measured by damages is the objective polestar that guides this Court's entire substantive due process review. It is an integral part of both the proportionality and the reprehensibility guideposts. It makes the amount of potential punitive damages predictable, providing notice of the severity of the offense. *BMW*, 517 U.S. at 574. Thus, in *State Farm*, this Court repeatedly emphasized that to be punishable, "conduct must have a nexus to the specific harm suffered by the plaintiff." 538 U.S. at 422. Again, a "defendant should be punished for the conduct that harmed the plaintiff, not for being an un-

savory individual or business." *Id.* at 423. In the absence of comparable civil penalties, actual damages are the only objective reference point with the capacity to transform punitive damages from inherently arbitrary to reasonably predictable. *See Exxon Shipping*, 128 S.Ct. at 2625-26, 2629. The Florida court's decision to exclude actual harm from its analysis thus cannot be squared with this Court's jurisprudence.

In sum, the plurality decision in *TXO* cannot bear the weight that the Florida court placed on it. When *TXO* was decided, this Court had not yet developed the contours of due process review of punitive damages awards, as the divided opinion in that case shows. Yet the concerns voiced in the plurality opinion and Justice Kennedy's concurrence, such as Justice Kennedy's focus on whether the defendant's conduct was malicious, were later incorporated into the three-guidepost analysis used by a majority of this Court in *BMW* and *State Farm*.

The Court should take this opportunity to make clear that *TXO* does not authorize lower courts to short-circuit the guidepost analysis and focus solely on reprehensibility as measured by intent to harm. That approach, which the Florida court took here, impermissibly allows a court "to rel[y] upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution." *TXO*, 509 U.S. at 466-67 (Kennedy, J., concurring).

2. State law does not alter the due process analysis. The Florida court also relied on state law to create an exception to the three-guidepost constitutional analysis mandated by this Court. It even believed that this Court's jurisprudence allows such

state-law exceptions to federal due process review, claiming that this Court's opinions in *BMW* and *State Farm* authorize States to "specify some unusually reprehensible conduct for punitive damages that need not be proportioned to compensatory losses." App., *infra*, 27a. Based on this mistaken premise, the court concluded that "[t]he Due Process Clause is * * * satisfied" by the Florida statute removing the cap on punitive damages for intentional harm. *Id.* at 32a. The court also "declin[ed] to apply the *State Farm* and *BMW* ratios" on the ground that Florida law treats intentionally malicious defamation as sufficiently reprehensible that "liability alone * * * will support substantial punishment in punitive damages," even without any finding of compensatory damages. *Id.* at 32a, 38a.

State Farm unequivocally rejects such reliance on state law and policy as a substitute for constitutional scrutiny of punitive damages awards. "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in [*BMW*]." *State Farm*, 538 U.S. at 427; *see also id.* at 416-17. Whether state law "authorizes the jury to consider and assess punitive damages without any finding of an amount of compensatory damages" (App., *infra*, 39a-40a) is simply a different question from whether the resulting punitive damages award is excessive as a constitutional matter under the *BMW* guideposts.

Furthermore, one of the principles set forth in *BMW* is that every defendant must receive "fair notice not only of the conduct that will subject him to punishment, but also of the *severity* of the penalty that a State may impose." *BMW*, 517 U.S. at 574

(emphasis added). The required notice of severity is not provided by a statute that authorizes uncapped punitive damages for intentional or malicious torts "to the extent of [defendants'] personal ability to pay." App., *infra*, 32a. "The Due Process Clause does not permit a State to classify arbitrariness as a virtue." *State Farm*, 538 U.S. at 417-18 (alteration and internal quotation marks omitted).

Especially troubling is the Florida court's use of state law to reject the ratio guidepost. In its view, "[d]eclining to apply the *State Farm* and *BMW* ratios" is proper because the state cap statute "eliminates proportional ratios in cases of unusual reprehensibility." App., *infra*, 32a. To the contrary, this Court has consistently recognized that *BMW*'s principles must be implemented with care to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the amount of general damages recovered." *State Farm,* 538 U.S. at 426.

The Florida court's holding is a classic example of violating due process by asking the wrong questions. See *Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007). There can be no check on the inherent arbitrariness of punitive takings absent a consistent gauge by which all such takings are measured. And this Court has consistently held that the gauge is harm actually or potentially caused to the plaintiff. Whether a defendant's conduct falls within an exception to a state punitive damages cap statute is completely irrelevant to that gauge. Nothing in this Court's jurisprudence justifies abandoning the objectives of reasonable and proportionate punitive damages or any of the three guideposts this Court announced to assure they are achieved.

Finally, the Florida court's refusal to review punitive damage awards using this Court's three guideposts denies defendants procedural due process. Indeed, the Florida court's use of state law to override the constitutional guideposts raises the same presumption of a due process violation that Oregon's "abrogation of well-established common-law protection against arbitrary deprivations of property" raised in *Honda Motor Co. v. Oberg*, 512 U.S. 415, 430 (1994). The Court should grant certiorari to make clear that state law is no substitute for the exacting review of constitutional guideposts mandated by *BMW* and *State Farm*.

3. A defendant's wealth does not determine the proportionality of a punitive award. The Florida decision demonstrates why a defendant's wealth cannot make up for the failure to consider key due process guideposts. See *State Farm*, 538 U.S. at 428. Wealth necessarily injects arbitrariness and bias into a punitive damages award. *Ibid.*; *Oberg*, 512 U.S. at 432. Yet the Florida court substituted Lawnwood's wealth for the objective due process guideposts of proportionality to actual harm (*i.e.*, ratio) and comparable penalties.

With reprehensibility fixed by the evidence offered at the liability phase of the trial, the punitive damages phase "was devoted almost exclusively to the financial condition" of Lawnwood. App., *infra*, 18a. That evidence revealed a net worth "exceeding $100 million," *id.* at 18a-19a, though given the substantial value tied up in the hospital's building only about $30 to $38 million could be accessed without financially destroying its ability to operate and care for patients. *Ibid.*; Tr. 42:5598-99, 5608, 5618. Dr. Sadow's counsel urged the jury to make a sizable

award that would punish Lawnwood in light of its financial condition. See p. 6, supra.

On appeal, the Florida court relied on Lawnwood's wealth as its sole objective reason for upholding the punitive award. Given the jury's refusal to find that Dr. Sadow suffered compensable harm, the court focused instead on Lawnwood's financial condition, which it mischaracterized as "a $100,000,000 pile of unencumbered wealth." App., *infra*, 48a. Comparing that wealth to the punitive award, the court concluded that the "Due Process Clause's concern for excessiveness" was satisfied because "nothing in federal or Florida law suggests that 5% of that pile is arbitrary or excessive" punishment for Lawnwood's conduct. *Id.* at 48a-49a. According to the court, "[t]hat is the true application of federal proportionality in this punitive damages case." *Id.* at 49a.

Under the Florida court's analysis, no amount of punitive damages up to a defendant's net worth can be unconstitutionally arbitrary or excessive because Florida's punitive damages cap exception gives "clear warning that for intentional and malicious harm [defendants] can be punished to the extent of their personal ability to pay." App., *infra*, 32a. This use of wealth to review the amount of punitive damages awarded resulted in an unreasonable, grossly excessive award that constituted an arbitrary taking of Lawnwood's property.

This Court has repudiated the use of a defendant's wealth to justify an otherwise unconstitutional punitive damages award. *State Farm*, 538 U.S. at 427. When, as here, the defendant's wealth "had little [or nothing] to do with the actual harm sustained" by the plaintiff, it "cannot make up for the failure of other factors" to support the award. *Id.* at

428. In the absence of actual harm sustained by the plaintiff, evidence of the defendant's wealth "provid[ed] an open-ended basis for inflating" the maximum permissible award. *Id.* Here, wealth provided literally the only objective evidence supporting the amount of the award, and the only constraint on that amount. When used in this way, wealth precludes the "reasonableness and proportionality" required to satisfy the Due Process Clause. *Ibid.*

B. The Guideposts Show That This $5 Million Punitive Award Is Excessive.

The Florida court's failure to follow this Court's mandatory instructions for constitutional review of punitive damages changed the outcome of this case. Applying the three guideposts to these facts demonstrates that the $5 million punitive damages award is an arbitrary and excessive deprivation of property in violation of the Due Process Clause.

1. Reprehensibility. Three of the five factors that *State Farm* instructed courts to use in determining reprehensibility (538 U.S. at 418-19) indisputably show that Lawnwood's conduct was not highly blameworthy: the harm caused was not physical; Lawnwood did not disregard the health or safety of others; and there is no evidence that Dr. Sadow was financially vulnerable. There can be no dispute about these factors.

Regarding the factor whether any harm was the result of intentional malice, the jury did find that Lawnwood intended to harm Dr. Sadow. As Dr. Sadow's counsel emphasized, however, the jury had to make this finding in order to award any punitive damages at all for defamation. See pp. 5-6, *supra.* Thus, the finding of intent to harm cannot provide a

basis for concluding that the conduct in this case was relatively more reprehensible than that in other defamation cases where punitive damages were awarded. In fact, a review of punitive awards in other defamation cases shows that awards well below $5 million are the norm for conduct much worse than saying bad things about a doctor to one other doctor. *See* Part III.B., *infra.* Compared to these cases, as well as cases in which a corporation disregards safety or causes physical harm, Lawnwood's conduct can hardly be called "the very worst institutional wrongdoing conceivable." App., *infra*, 45a.

Turning to the last factor, and putting aside the Florida court's hyperbole, the evidence showed that Lawnwood's defamation of Dr. Sadow was an isolated incident. Dr. Pinon testified that Dunwoody, Lawnwood's CFO, told him that Dr. Sadow was a bad doctor. There is no evidence that Dunwoody made similar comments about Dr. Sadow to any other doctors, much less that Lawnwood "set out to destroy Dr. Sadow's career in the community" as the Florida court asserted. App., *infra*, 45a. While there was evidence that Dunwoody made similar comments *about other doctors* to Dr. Pinon, those comments are not relevant to the reprehensibility analysis because there was no evidence they were slanderous as to the other doctors and no evidence that those nonparty doctors suffered any "actual harm." *Philip Morris*, 549 U.S. at 355. "Due process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims * * * under the guise of the reprehensibility analysis." *State Farm*, 538 U.S. at 423.

Other considerations mentioned by this Court also lessen the reprehensibility of Lawnwood's con-

duct. Dunwoody's statements were profitless to Lawnwood, and Dr. Pinon disregarded those statements and referred at least one patient to Dr. Sadow. Thus, Dr. Sadow stipulated that there was no economic "harm caused" by the statements, and the jury found no non-economic harm. *State Farm*, 538 U.S. at 419. In addition, there is no evidence that Dunwoody's defamation of Dr. Sadow "persisted" after Lawnwood learned of it, much less after it was "adjudged unlawful." *BMW*, 517 U.S. at 579.

Finally, the jury's $5 million award cannot be justified based on the Florida court's view that punishment "with a strong corrective impact on the defamer" was warranted. App., *infra*, 46a. As this Court recognized in *BMW*, assertions that punishment is "necessary to deter future misconduct" require consideration of "whether less drastic remedies could be expected to achieve that goal." 517 U.S. at 584. Here, the evidence showed that aside from Dr. Sadow, no one had ever made a claim of defamation by Lawnwood. Tr. 42:5568, 5570-71. Because Lawnwood did not have "a history of non-compliance" with defamation laws, "there is no basis for assuming that a more modest sanction would not have been sufficient to motivate full compliance" in the future. *BMW*, 517 U.S. at 585. To the contrary, Lawnwood created a defamation education program for its managers after the jury's verdict in the liability phase of this case. Tr. 42:5569.

In sum, as this Court observed in *State Farm*, only "one of these [reprehensibility] factors weighing in favor of a plaintiff may not be sufficient to sustain a punitive damages award." 538 U.S. at 419. Here, Dr. Sadow proved only the intentional harm factor, and as explained above even that factor does not

suggest that Lawnwood's conduct is more reprehensible than the conduct of other defendants punished for defamation. Accordingly, the reprehensibility guidepost indicates that $5 million is excessive punishment.

2. Ratio. The second guidepost also points to excessiveness because the ratio "between the actual or potential harm suffered by the plaintiff and the punitive damages award" of $5 million is infinite. *State Farm*, 538 U.S. at 418. Dr. Sadow stipulated that he suffered no economic damages, and he "recovered" $0 in non-economic "compensatory damages." *Id.* at 425-26. Moreover, he offered no evidence of any potential harm from Lawnwood's conduct. Thus, the Florida court erred in speculating that Dunwoody's statements to Dr. Pinon were "likely to have significant and long-lasting public and professional consequences." App., *infra*, 45a; see *BMW*, 517 U.S. at 582 (noting the lack of evidence of "potential harm"); *TXO*, 509 U.S. at 468 (Kennedy, J., concurring) (concluding that because "the record in this case does not contain evidence * * * regarding the potential harm from TXO's conduct," such harm cannot be used to sustain the punitive award).

Even if nominal damages of $1 were legally presumed under state law, as the Florida court held they should be (App., *infra*, 50a), the ratio would be 5,000,000:1. This astonishing ratio is certainly far more "breathtaking" than the 500:1 ratio found unconstitutional in *BMW* or the 145:1 ratio struck down in *State Farm*. *BMW*, 517 U.S. at 583; *see also State Farm*, 538 U.S. at 424-25. As this Court has said, "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a sig-

nificant degree, will satisfy due process." *State Farm*, 538 U.S. at 425.

Of course, the Court has also noted that "ratios greater than those we have previously upheld may comport with due process where a particularly egregious act has resulted in only a small amount of economic damages." *State Farm*, 538 U.S. at 425 (internal quotation marks omitted). That possible exception is inapplicable here, however, because the reprehensibility discussion above demonstrates that Lawnwood's conduct was not particularly egregious.[1] Moreover, even if the exception were applicable, there is nothing about Lawnwood's conduct that could possibly justify what may well be the largest amount of punitive damages ever upheld by an appellate court in a defamation case—or indeed in any case where the plaintiff was awarded nominal or small compensatory damages. See Part III.B., *infra*. As this Court pointed out in *Exxon Shipping*, many states apply a 3:1 limit—or alternatively a hard-dollar cap of far less than $5 million—even in cases involving malicious behavior. 128 S.Ct. at 2623, 2631.

3. Comparable penalties. "Comparing the punitive damages award and the civil or criminal penalties that could be imposed for comparable misconduct provides a third indicium of excessiveness." *BMW*, 517 U.S. at 583. As this Court has explained,

---

[1] The possible exception that "the monetary value of noneconomic harm might have been difficult to determine," *State Farm*, 538 U.S. at 425, also does not apply here because the jury found that Dr. Sadow suffered no non-economic damages. App., *infra*, 64a.

"a reviewing court * * * should accord substantial deference to legislative judgments concerning appropriate sanctions for the conduct at issue." *Ibid.* (internal quotation marks omitted). Here, the Florida Legislature has authorized a maximum criminal penalty of $1,000 for libel, which is the written equivalent of slander. See Fla. Stat. §§ 775.083(1)(d), 836.01. The Florida court erred by ignoring this objective benchmark, which is particularly useful for preventing excessive punishment in cases where only nominal or small compensatory damages are awarded.

* * *

For these reasons, a $5 million award of punitive damages for slander that was not highly reprehensible, and caused no damages, is unconstitutionally excessive. This Court should grant certiorari and hold, either summarily or after full briefing, that the punitive award against Lawnwood violates the Due Process Clause.

III. THE FLORIDA COURT'S REASONS FOR DEPARTING FROM THE GUIDEPOSTS CONFLICT WITH DECISIONS OF OTHER COURTS.

This Court has directed lower courts to "ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the amount of general damages recovered." *State Farm,* 538 U.S. at 426. As explained in Part II.A., the Florida court sidestepped this directive by exempting large categories of cases from the guideposts. Lawnwood submits that the Florida court's refusal to apply the guideposts is flatly con-

trary to this Court's punitive damages jurisprudence and warrants summary reversal. Even if this Court disagrees, however, the Florida court's decision at least conflicts with decisions of federal and state courts that apply the full guidepost analysis to these categories of cases. Because such cases arise frequently, this Court should resolve the conflict and make clear that the guideposts apply to all punitive awards.

The Florida court also held that the proportionality inquiry should focus not on the plaintiff's harm but on the defendant's net worth. App., *infra*, 46a-49a. As explained below, this holding deepens a disagreement among the lower courts over how to determine if punishment is unreasonable or disproportionate in cases where the plaintiff receives only nominal or small compensatory damages. To Lawnwood's knowledge, no court deciding such a case has upheld a punitive award approaching the $5 million award affirmed by the Florida court here. The Court should review this important and recurring question.

A. Other Courts Apply The Guideposts To Cases Like This One.

One of the Florida court's principal justifications for permitting "considerable punishment without proportionality" is that "reprehensibility is at its highest" in defamation cases because state law affords "singular protection" to "personal reputation." App., *infra*, 36a, 41a. Given that Florida law permits a jury to award punitive damages for intentionally harmful defamation without finding compensatory damages, the court "[d]ecline[d] to apply the *State Farm* and *BMW* ratios." *Id.* at 32a. It also declined to apply the five reprehensibility factors from those cases, reasoning that the economic injuries there

were "almost trivial" compared to reputational injuries. *Id.* at 41a.

In contrast, other courts around the country apply all of the *BMW* guideposts to defamation cases. *E.g., Stamathis v. Flying J, Inc.*, 389 F.3d 429, 436, 443-44 (4th Cir. 2004); *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 452, 467-69 (3d Cir. 1999); see also *Superior Fed. Bank v. Jones & Mackey Constr. Co.*, 219 S.W.3d 643, 647-54 (Ark. Ct. App. 2005); *Cent. Bering Sea Fishermen's Ass'n v. Anderson*, 54 P.3d 271, 277, 284-85 (Alaska 2002); *Coachmen Indus., Inc. v. Dunn*, 719 N.E.2d 1271, 1274, 1278-79 (Ind. Ct. App. 1999).

In rejecting the ratio guidepost, the Florida court also relied heavily on the exception to the state punitive damages cap statute that "eliminates mathematical proportionality" for intentional harm, concluding that "[t]he Due Process Clause is * * * satisfied by this statute." App., *infra*, 31a-32a. The Texas Supreme Court has held, however, that a state cap statute is no substitute for the guidepost analysis of whether a punitive award is unconstitutionally excessive. *Tony Gullo Moters I, L.P. v. Chapa*, 212 S.W.3d 299 (Tex. 2006). The court reasoned that "while 'state law governs the amount properly awarded as punitive damages,' that amount is still 'subject to an ultimate federal constitutional check for exorbitancy.'" *Id.* at 307 (quoting *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 430 n.12 (1996)). Applying the guideposts, the court concluded that although the statutory cap was $200,000, a punitive award of $125,000 was excessive where the compensatory damages were approximately $29,000. *Id.* at 308-10.

Finally, the Florida court held that "*TXO* supports considerable punishment without proportionality" for intentional harm. App., *infra*, 30a. Lawnwood is aware of no other case holding that *TXO* exempts punitive awards for intentional harm from the ratio guidepost altogether. To the contrary, courts have consistently applied that guidepost to cases involving intentional harm. *E.g.*, *Int'l Union of Operating Eng'rs Local 150 v. Lowe Excavating Co.*, 870 N.E.2d 303, 320 (Ill. 2006); *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63, 76 (Cal. 2005).

As discussed in Part I above, these disagreements are important because cases involving intentional harm and exceptions to state punitive damage caps arise frequently. Accordingly, the Court should grant certiorari to resolve them, either summarily or after full briefing.

B. Courts Disagree About The Constitutional Limits On Punitive Awards When Compensatory Damages Are Not Substantial.

This Court has not yet reviewed any punitive damages case in which the compensatory damages were lower than the $4,000 awarded in *BMW*. In both *BMW* and *State Farm*, however, it observed that "ratios greater than those we have previously upheld may comport with due process" when "'a particularly egregious act has resulted in only a small amount of economic damages,'" or when the injury is hard to detect or to value. *State Farm*, 538 U.S. at 425 (quoting *BMW*, 517 U.S. at 582). The state and lower federal courts review many punitive damages cases involving nominal or small compensatory damages, and they are divided over how to apply this

Court's observation while also ensuring that the punitive awards are "reasonable and proportionate." *Id.* at 426; see also *BMW*, 517 U.S. at 583 (noting that "'[a] general concer[n] of reasonableness'" continues to apply to such cases). This Court's guidance is needed.

When nominal or small compensatory damages are awarded, courts reviewing substantial punitive awards have taken different approaches. Some courts treat this Court's above-quoted observation as an absolute exception to the ratio guidepost, finding its constraints inapplicable if the defendant's conduct is particularly egregious or the injury is difficult to value.[2] If the defendant's conduct is not particularly egregious, courts have recognized that the ratio guidepost, while not dispositive, cuts against the constitutionality of the punitive award.[3]

Most courts have taken a middle position, however. While acknowledging that ratio is not the best tool for measuring excessiveness when actual damages are small or nominal, they recognize this Court's underlying concerns of reasonableness and proportionality, and they address those concerns by considering the size of punitive awards in similar

---

[2] *E.g.*, *Kemp v. AT&T Co.*, 393 F.3d 1354, 1363-64 (11th Cir. 2004); *Mathias v. Accor Econ. Lodging, Inc.*, 347 F.3d 672, 677 (7th Cir. 2003); see also *Roberie v. VonBokern*, No. 2004-SC-250, 2006 WL 2454647, at *8 (Ky. Aug. 24, 2006).

[3] *E.g.*, *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1122 (9th Cir. 2008); *Simon*, 113 P.3d at 76-78.

cases.[4] A few courts consider the defendant's wealth in addition to similar cases.[5]

The Florida court's decision conflicts with this middle position. The court considered the proportionality concern by focusing solely on the defendant's wealth. App., *infra*, 49a. Although Lawnwood's brief cited cases showing that constitutional punitive awards are far below $5 million when actual damages are small or nominal, the Florida court did not address those cases. Instead, it brushed the issue aside by citing three reports of substantial Florida verdicts for defamation in the health care setting. *Id.* at 48 n.37. Tellingly, however, none of those reports states that the damages included any punitive component at all. *Ibid.* The court cited only one (pre-*BMW*) case addressing an award of punitive damages for defamation, and the award upheld there was only $100,000—not $700,000 as stated by the Florida court. See *Zambrano v. Devanesan*, 484 So.2d 603, 607-08 (Fla. Ct. App. 1986); *cf.* App., *infra*, 48a n.37. That is certainly not a "comparable

---

[4] *E.g.*, *JCB, Inc. v. Union Planters Bank, NA*, 539 F.3d 862, 876-77 (8th Cir. 2008); *Saunders v. Branch Banking & Trust Co.*, 526 F.3d 142, 153-54 (4th Cir. 2008); *Lowe Excavating Co.*, 870 N.E.2d at 320-23; *Romanski v. Detroit Ent'mt, L.L.C.*, 428 F.3d 629, 645-47 (6th Cir. 2005); *Williams v. Kaufman County*, 352 F.3d 994, 1016 & n.78 (5th Cir. 2003); *Lee v. Edwards*, 101 F.3d 805, 810-11 (2d Cir. 1996); *see also Diversified Water Diversion, Inc. v. Standard Water Control Sys., Inc.*, No. A07-1828, 2008 WL 4300258, at *6-7 (Minn. Ct. App. Sept. 23, 2008).

[5] *E.g.*, *Saunders*, 526 F.3d at 154-55; *Romanski*, 428 F.3d at 647-48.

amount[]" to the $5 million award here. App., *infra*, 48a n.37.

The Florida court's refusal to consider the size of punitive awards in similar cases thus conflicts with the decisions above. If it had examined such cases, the outcome here would surely have been different. Most of the punitive awards upheld as constitutional in defamation cases are in the $30,000 to $400,000 range;[6] the largest awards of $1 million and $3.08 million accompanied substantial actual damages that are absent here.[7] Similarly, most of the punitive

---

[6] *Diversified Water Diversion,* 2008 WL 4300258, at *6-7 (upholding punitive award of $30,000 for repeatedly disparaging plaintiff to customers even after being warned to desist where actual damages were $0); *Stamathis*, 389 F.3d at 443 (upholding punitive award of $350,000 for having plaintiff arrested for larceny without probable cause where actual damages were $250,000); *Cent. Bering Sea Fishermen's Ass'n*, 54 P.3d at 275-76, 282, 284-85 (upholding punitive awards of $400,000 and $200,000 against association and president for accusing employee of stalking, threatening colleagues, and breaking into association offices in order to push her out of industry and cover up president's misappropriation where actual damages were $48,000); *Dunn*, 719 N.E.2d at 1278-79 (upholding punitive award of $200,000 for accusations of odometer tampering where actual damages were $30,000).

[7] *Superior Fed. Bank*, 219 S.W.3d at 648, 651-54 (affirming reduction of $5 million punitive award to $3.08 million where bank's use of racial insults and epithets to describe customer caused "consider-

awards upheld as constitutional in cases where only nominal or small compensatory damages were awarded are in the $5,000 to $250,000 range;[8] the largest award of $1.29 million was based on evidence of substantial potential harm that is absent here.[9]

---

able economic and reputational injuries" of $175,000); *Inter Med. Supplies*, 181 F.3d at 465-69 (reducing $100 million punitive award for defamation and other claims to $1 million where actual damages on all claims were $48 million).

[8] *Mendez*, 540 F.3d at 1120-23 (affirming reduction of $250,000 punitive award for false arrest to $5,000 where nominal damages were $2); *JCB*, 539 F.3d at 874-77 (reducing punitive award of just over $1 million for trespass to just over $100,000 where nominal damages were $1); *Saunders*, 526 F.3d at 152-55 (upholding punitive award of $80,000 where statutory damages were $1,000 for violation of Fair Credit Reporting Act); *Kemp*, 393 F.3d at 1357, 1362-65 (reducing $1 million punitive award for racketeering to $250,000 where actual damages were $115.05); *Williams*, 352 F.3d at 1001, 1016 (upholding punitive award of $15,000 for unconstitutional search where nominal damages were $100); *Mathias*, 347 F.3d at 674-78 (upholding punitive award of $186,000 for negligence where actual damages were $5,000).

[9] *Asa-Brandt, Inc. v. ADM Investor Servs., Inc.*, 344 F.3d 738, 743, 746-47 (8th Cir. 2003) (upholding punitive award of $1.25 million for breach of fiduciary duty where plaintiff received only nominal damages but offered evidence that potential harm was $3.9 million).

Moreover, as discussed above, the comparable legislative penalty in Florida is only $1,000. In light of these objective benchmarks, the Court should hold that the $5 million award of punitive damages is unconstitutionally excessive and reduce the award to no more than $250,000.

CONCLUSION

The Court should summarily reverse the judgment of the Florida Court of Appeal and reduce the award of punitive damages to no more than $250,000. In the alternative, the petition for writ of certiorari should be granted and the case set for plenary review.

Respectfully submitted.

J. BRETT BUSBY
Bracewell & Giuliani LLP
711 Louisiana St., Ste. 2300
Houston, TX 77002
(713) 223-2300

MIKE A. HATCHELL
Counsel of Record
CHARLES R. "SKIP" WATSON, JR.
Locke Lord Bissell & Liddell LLP
100 Congress Ave., Ste. 300
Austin, TX 78701
(512) 305-4700
mahatchell@lockelord.com

Counsel for Petitioner

SEPTEMBER 2010