No. 10-371

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

REPLY FOR PETITIONER

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REPLY FOR PETITIONER

Dr. Sadow's reply cannot escape these stark realities: the Florida court determined reprehensibility based on state law rather than this Court's multifactor analysis, abandoned the ratio of punitive to compensatory damages in favor of comparing the punitive award to Lawnwood's wealth, and ignored the penalty that Florida prescribed for comparable conduct. In these ways, the Florida court refused to follow both this Court's guideposts and its procedures for their exacting, *de novo* application to the punitive award.

Dr. Sadow condones these significant departures from this Court's holdings because the Court left open the possibility that higher ratios of punitive to compensatory damages may be justified when compensatory damages are not substantial. Opp. 12, 17-18. Yet he does not dispute that this situation arises frequently, lower courts are deeply split over how to address it, and this case is a superior vehicle for resolving this important split. Pet. 31-36. The Court's guideposts must also inform this situation, not free States to make up their own eclectic criteria, as Dr. Sadow advocates.

Dr. Sadow's abandonment of the guideposts only highlights the worst problems of the Florida court's *ad hoc* approach: using exceptions to state punitive caps to make a defendant's ability to pay the sole constitutional limit; discarding the objective guideposts based on an incomplete reprehensibility analysis; singling out speech for severe punishment; and second-guessing jury damage findings with unsupported speculation about potential harm. The amicus briefs in *Shell Oil Co. v. Hebble*, No. 10-349, confirm that many of these problems are important and re-

curring. Allowing such departures from the establishhed guideposts can only yield arbitrary and unpredictable results, not the uniform treatment of similar cases that is this Court's goal.

I. THIS CASE IS AN IDEAL VEHICLE TO SETTLE THE DIVISIVE AND RECURRING QUESTION OF HOW DUE PROCESS LIMITS PUNITIVE AWARDS WHEN COMPENSATORY DAMAGES ARE SMALL.

Dr. Sadow does not dispute that this $5 million punitive award may be the largest upheld since *BMW* in any case with little or no compensatory damages. Instead, he argues that the award is permissible because this Court left open the possibility of relaxing the ratio guidepost in some small-damage cases, such as those involving particularly egregious acts. Opp. 12, 17-18.

Yet the lower courts are divided over how to use ratio or other objective indicators to ensure that punitive awards are reasonable and proportionate when compensatory damages are not substantial. Pet. 31-36. Indeed, one of the *Hebble* amicus briefs confirms that many courts are abusing this Court's "particularly egregious acts" dictum, discarding the ratio guidepost altogether by subjectively deeming a defendant's conduct egregious without applying the five reprehensibility factors identified by this Court. Brief of Product Liability Advisory Council, Inc. as Amicus Curiae in Support of Petitioners at 8-12, *Shell Oil Co. v. Hebble*, No. 10-349, 2010 WL 4641633 ("PLAC Br."); see also Pet. 32 n.2.

That is precisely what the Florida court did here. Pet. App. 44a n.30, 47a; see Pet. 13, 16. Such "fail[ure] to diligently police the 'particularly egre-

gious' exception * * * insulate[s] from due-process review precisely those cases * * * where juries are most likely to grant arbitrary and excessive awards." *Bennett v. Reynolds*, 315 S.W.3d 867, 879 (Tex. 2010).

Dr. Sadow has no answer to this split, except to suggest that this case is unique and not likely to recur. Opp. 10. He is mistaken. The cases cited in the petition (at 32-33) show that substantial punitive damages frequently accompany limited actual damages, and this Court has recognized the importance of guidance for courts reviewing the constitutionality of punitive awards in such cases. *State Farm*, 538 U.S. at 425; *BMW*, 517 U.S. at 582.

The Court has not yet reviewed such a case, however, and this petition provides an excellent vehicle for doing so. Dr. Sadow concedes that Lawnwood has preserved its due process challenge (Opp. 7-8), and the disparity here between the $5 million punitive award and $0 compensatory award vastly exceeds the 9:1 ratio that ordinarily marks the outer limit of what due process allows. *State Farm*, 538 U.S. at 425. The Court should resolve the split and provide a meaningful objective check on the size of punitive awards for cases where compensatory damages are not substantial.

II. THE FLORIDA COURT REFUSED TO APPLY THIS COURT'S GUIDEPOSTS, AND ITS HOLDINGS WILL HAVE PERVERSE EFFECTS IF ALLOWED TO STAND.

The Florida court's express refusal to follow this Court's guidepost cases alone warrants summary reversal. Yet its holdings are also spreading. Florida courts now limit "the full three-part analysis set

forth in [*State Farm* and *BMW*]" to cases involving "purely economic" harm. *James Crystal Licenses, LLC v. Infinity Radio Inc.*, 43 So. 3d 68, 76 (Fla. Ct. App. 2010).[1] If left unchecked, these decisions will stand as an invitation for States to dismantle the guideposts this Court carefully wrought to confine all punitive awards within the bounds of due process.

Dr. Sadow's brief confirms that Florida's holdings exempting large categories of cases from the guideposts are inimical to important constitutional values, including uniform and predictable treatment of similarly situated persons, free speech, and the right to trial by jury. The amicus briefs in *Hebble* also show that the Florida court's failure to analyze the five reprehensibility factors and its reliance on unsupported speculation about potential harm are important and recurring issues. These concerns should prompt this Court to make clear that exacting review of all guideposts is mandatory in all cases.

A. There can be no dispute that the Florida court refused to follow the guideposts. Merely reciting them is not enough; appellate courts must conduct an exacting, *de novo* review that applies the guideposts to the jury's punitive award. *State Farm*, 538 U.S. at 418. Although Dr. Sadow claims at the beginning of his brief that the Florida court did apply the guideposts (Opp. 1-4), he later concedes that it did not. Opp. 11, 15. He does not deny that other

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[1] Florida litigants are also using this case to argue that higher ratios are permissible under *TXO* even when compensatory damages are substantial. Appellee's Answer Brief at 22-24, *Philip Morris USA Inc. v. Hess*, No. 4D09-2666 (Fla. Ct. App. May 4, 2010), 2010 WL 2602780.

courts considering similar cases have applied the guideposts mandated by this Court. Pet. 28-31.

Reprehensibility: The Florida court declared Lawnwood's conduct reprehensible as a matter of state law simply because it intended to harm Dr. Sadow's reputation. Pet. 16. The court expressly disregarded the other four reprehensibility factors that this Court says must be considered, holding without support that they are limited to cases where the harm is merely economic. Pet. App. 44a n.30. Dr. Sadow does not defend this limitation or argue that the Florida court considered all five factors. Instead, he admits that the court "analyzed and applied the state law of Florida to measure the reprehensibility of Lawnwood's misconduct." Opp. 15. That analysis is not what this Court's precedent requires.

Other courts, including the court in *Hebble*, have similarly disregarded this Court's five-factor reprehensibility test in favor of a far more subjective reprehensibility review based on only one factor. *E.g.*, *Hebble v. Shell W. E&P, Inc.*, 238 P.3d 939, 947 (Okla. Civ. App. 2009) (intentional harm); *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Ins. Co.*, 661 N.W.2d 789, 810 (Wis. 2003) (Sykes, J., dissenting) (recidivism); see PLAC Br. 8-10; Brief of Amici Curiae Chamber of Commerce of the United States of America et al. in Support of Petitioners at 6-10, *Shell Oil Co. v. Hebble*, No. 10-349, 2010 WL 4641634 ("Chamber Br.").

This Court has held, however, that the existence of only one factor "may not be sufficient to sustain a punitive damages award." *State Farm*, 538 U.S. at 419. To ensure similar treatment for similar conduct, the Court should confirm that exacting review of all five reprehensibility factors is required.

Proportionality: The Florida court also expressly rejected the ratio or proportionality guidepost, holding that punishment "without limiting ratios" was proper and excluding actual harm from its analysis. Pet. App. 46a. Dr. Sadow concedes that the court limited the scope of the ratio guidepost to the kind of wrongdoing involved in *BMW* and *State Farm.* Opp. 11.[2] Surprisingly, he defends this limitation by arguing that the guideposts are too narrow and that courts should focus on vague considerations of fair notice, deterrence, and potential harm. Opp. 9, 11-12. To the contrary, this Court requires "[e]xacting," *"de novo"* review of the "application of [the guideposts] to the jury's award." *State Farm*, 538 U.S. at 418. While underlying state interests in punishment and deterrence may also be informative (Opp. 11), they were considered by this Court in creating the constitutional guideposts and thus provide no justification for disregarding them. *State Farm*, 538 U.S. at 416; *BMW*, 517 U.S. at 568, 574.

Dr. Sadow also offers two excuses for the Florida court's refusal to consider the proportionality of the punitive award to actual harm. Neither withstands scrutiny.

First, he suggests that some significance should be ascribed to the jury's $1.5 million award of com-

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[2] Dr. Sadow appears to suggest that the ratio guidepost was somehow waived because Lawnwood did not challenge the state-law decision that punitive damages for defamation can be awarded without actual damages. Opp. 3, 6, 8. Not so. As the petition explained (at 19), whether state law authorizes punitive damages is a different question from whether the resulting punitive award is unconstitutionally excessive.

pensatory damages for breach of contract. Opp. 4, 12. But breach of contract cannot support punitive damages. The jury was authorized to award punitive damages only for defamation, and the defamatory statements were distinct from the breaching conduct. Pet. 4-5. Damages unrelated to the conduct punished have no place in a due process review of punitive awards. *BMW*, 517 U.S. at 574 (fair notice of the "conduct that will subject him to punishment" and the "severity of the penalty" is required).

Second, Dr. Sadow asserts that the Florida court's consideration of potential harm from the defamation (Pet. App. 45a), as well as the state-law presumption of nominal damages from defamation per se (Pet. App. 50a), are enough to satisfy the guideposts. Opp. 2-3, 10-11, 13-14, 17. But presumed nominal damages of $1 cannot support a $5 million punitive award, and Dr. Sadow offered no evidence of potential harm above $1 from Lawnwood's conduct. This Court requires such evidence to uphold a punitive award based on potential harm. Pet. 26.

One of the *Hebble* amici observes that other courts have also used speculative assessments of potential harm to uphold otherwise-exorbitant ratios. PLAC Br. 13. Such unsupported speculation is the antithesis of due process because it allows each court to rely upon its own subjective, unpredictable reaction to a particular punitive award, resulting in different treatment of similar cases. Pet. 18.

Comparable penalties: Both Dr. Sadow and the Florida court studiously ignore the statutory penalty for libel chosen by Florida itself, which is only $1,000. Pet. 27-28. Such penalties should have special significance when actual damages are absent because they are the only objective guidepost available

to constrain excessive punitive awards. Here, the modest statutory penalty refutes the Florida court's premise that defamation is so egregious that it supports extraordinary punishment limited only by the defendant's ability to pay.

B. The fundamental flaw in the Florida court's opinion is not merely its failure to follow the guideposts, but also the serious consequences that flow from that failure. The court dismantled the guideposts for large categories of cases, including those involving intentional harm or any other conduct that state law excepts from a punitive damages cap. Dr. Sadow's brief vividly illustrates that the criteria the Florida court adopted in place of these guideposts create fundamental constitutional problems.

1. Dr. Sadow embraces the Florida court's holding that the State's removal of punitive damage caps gave Lawnwood fair notice of potential liability up to its ability to pay. Opp. 3, 9; Pet. App. 32a. Under this holding, any State can legislate away due process protections against excessive awards simply by giving notice that punitive damages will be unlimited. Any amount of punitives arbitrarily chosen by the jury will pass muster so long as it does not bankrupt the defendant. Such state-legislated arbitrariness is not fair notice of the severity of the penalty that may be imposed, and this Court has rightly rejected it as a substitute for exacting constitutional scrutiny of punitive awards. Pet. 19-20.

The consequences of Florida's approach will be far-reaching. The many state legislatures that capped punitive damages in certain cases as part of their tort reform efforts will be surprised to learn that they thereby nullified constitutional limits on punitive awards that were not capped. Similar con-

duct will be subject to different federal constitutional limits in each State. These results are flatly inconsistent with the uniform and predictable treatment of similarly situated persons guaranteed by the Due Process Clause.

Dr. Sadow is off base in emphasizing the Florida court's view that "reprehensibility is at its highest" in defamation cases because they have "Florida law's most severe condemnation, its highest blameworthiness, its most deserving culpability." Pet. App. 40a-41a; see Opp. 4, 15. The court's conclusion that the Constitution permits "extraordinary civil punishment without limiting ratios" for such "extraordinary wrongdoing" (Pet. App. 46a) is especially troubling because it gives no weight to the First Amendment. Courts should be more cautious when punishing speech; they should not hold that such punishment is essentially unlimited. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 349 (1974) ("The largely uncontrolled discretion of juries to award damages where there is no loss unnecessarily compounds the potential * * * to inhibit the vigorous exercise of First Amendment freedoms."). At minimum, cases involving speech should bear the full weight of this Court's guidepost analysis. Cf. *Bose Corp. v. Consumers Union of U.S., Inc.*, 466 U.S. 485, 499, 505 (1984) (appellate court must independently examine the record to ensure that unprotected speech is narrowly defined and protected speech will not be inhibited).

Here, a hospital administrator said bad things about a doctor to one other doctor. Nothing about this speech gave Lawnwood fair notice that it could suffer perhaps the largest award of punitive damages for defamation ever to survive a constitutional challenge. Pet. 34. The jury was required to find in-

tent to harm in order to award any punitive damages, so that finding does not mark this case for a more significant punitive award. Pet. 5-6, 23-24; see Chamber Br. 7-8. Nor do the administrator's comments about other physicians show heightened reprehensibility, as there was no evidence that they were slanderous or caused actual harm. Pet. 24.

2. As to proportionality, Dr. Sadow's reliance on potential harm and presumed nominal damages does not give the jury's verdict the respect it is due under the Seventh Amendment. While the jury found that Lawnwood harmed Dr. Sadow, it was instructed to consider both past and future damages and found that both were $0. Pet. App. 64a-65a, 68a. The Florida court's speculation about potential harm subverts the jury's role, especially given that it is unsupported by any evidence submitted at trial.[3] See PLAC Br. 13.

Dr. Sadow's defense of the Florida court's focus on Lawnwood's wealth rather than his actual harm (Opp. 3, 9, 16) ignores this Court's holding that wealth is a poor objective guidepost because it "provides an open-ended basis for inflating awards" and "express[ing] biases." *State Farm*, 538 U.S. at 417, 427-28. Nor can wealth be smuggled into the analysis as an aspect of deterrence because the evidence showed that a less drastic award would have achieved that goal. Pet. 25.[4]

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[3] At most, the potential harm would have been Dr. Sadow's loss of at least one referral from Dr. Pinon, who heard the defamation. Pet. 5. That harm was never quantified.

[4] Dr. Sadow faults Lawnwood for not objecting to the introduction of wealth evidence (Opp. 3), but that evidence

In sum, the Florida court flouted due process by holding that intent to harm supported extraordinary punitive damages despite the jury's award of $0 for actual harm, and that wealth was the only real limit on that punishment. These holdings resulted in a grossly excessive punitive award that application of the guideposts would have prevented.

III. APPELLATE REVIEW OF PUNITIVE AWARDS WITHOUT APPLYING THE GUIDEPOSTS MANDATED BY THIS COURT DENIES PROCEDURAL DUE PROCESS.

Having previously recognized substantive constitutional limits on the size of punitive awards, this Court held that a State's inability to review the awards for excessiveness raised "a presumption that its procedures violate the Due Process Clause." *Oberg*, 512 U.S. at 429-30. Later, after establishing the three due process guideposts, this Court held that they must be applied in a thorough, independent, *de novo* appellate review to assure "the uniform general treatment of similarly situated persons that is the essence of law itself." *Cooper Indus.*, 532 U.S. at 436, 441. Now that the Court has established "specific procedures [and] substantive criteria essential to satisfy due process," there should be no disagreement that a court's failure or refusal to apply them is a procedural violation of the Due Process Clause. *Oberg*, 512 U.S. at 437-38 (Ginsburg, J., dissenting); *id.* at 436 (Scalia, J., concurring); see also *Cooper In-*

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was admissible under state law. Lawnwood's point is that this evidence, even if lawfully admitted and used at trial, should not play a role in the constitutional analysis. *State Farm*, 538 U.S. at 427-28.

dus., 532 U.S. at 443 (Thomas, J., concurring); Pet. 21.

By legislatively proclaiming the reprehensibility of intentional harm, contorting proportionality to measure only the defendant's wealth, and simply ignoring comparable penalties, Florida has done more than "classify arbitrariness as a virtue." *State Farm*, 538 U.S. at 417-18. It has ignored the procedure for appellate review this Court prescribed to ensure that state awards of punitive damages do not deny due process.

CONCLUSION

The Court should summarily reverse the judgment of the Florida Court of Appeal or, alternatively, grant certiorari and set this case for plenary review.

Respectfully submitted.

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