No. 21-0017

In the Supreme Court of Texas

SARAH GREGORY AND NEW PRIME, INC.,

Petitioners,

v.

JASWINDER CHOHAN, INDIVIDUALLY AND AS NEXT FRIEND AND NATURAL MOTHER OF GKD, HSD, AND AD, MINORS, AND AS REPRESENTATIVE OF THE ESTATE OF BHUPINDER SINGH DEOL, DARSHAN SINGH DEOL, AND JAGTAR KAUR DEOL,

Respondents,

On Petition for Review from the Fifth Court of Appeals at Dallas, Texas
No. 05-18-00167-CV

BRIEF FOR *AMICUS CURIAE* THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONERS

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INTEREST OF *AMICUS CURIAE*[*]

The Chamber of Commerce of the United States of America is the world's largest business federation. It represents approximately 300,000 direct members and indirectly represents the interests of more than three million companies and professional organizations of every size, in every industry sector, and from every region of the country. An important function of the Chamber is to represent the interests of its members in matters before Congress, the Executive Branch, and the courts. To that end, the Chamber regularly files *amicus* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The Chamber has a substantial interest in ensuring that Texas business owners may engage in common commercial business practices without being subject to exorbitant damages awards. The Chamber also has a substantial interest in ensuring that Texas's judicial system continues to adhere to the rule of law, which is essential in maintaining

[*] No party's counsel authored this brief in whole or in part, and no party's counsel made a monetary contribution intended to fund the preparation or submission of this brief. No entity or person, other than *amicus curiae*, its members, or its counsel, made any monetary contribution intended to fund the preparation or submission of this brief. *See* Tex. R. App. P. 11.

the predictability and stability that are crucial to one of the most robust economies in the nation and the world.

INTRODUCTION

Noneconomic damages awards are inherently unpredictable. Jurors are left—without any real measuring stick—to assign dollar amounts to real but intangible emotional pain and suffering. For centuries, reviewing courts have sought to combat the risk of sweeping (and indeed irrational and unfair) variations in noneconomic damages awards by using objective measures to determine whether those awards are excessive.

One objective, easily administrable measure has been widely accepted and has stood the test of time—the comparative approach, under which reviewing courts compare noneconomic damages awards in similar cases to determine whether a verdict is an outlier. As Justice Scalia explained, that approach is the only "discernible standard" for "review of the ***amount*** of the verdict by . . . appellate courts." *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 37 (1991) (Scalia, J., concurring).

The court of appeals here seriously erred by straying from that well-worn path and refusing to engage in a traditional comparative analysis. In abjuring its responsibility to conduct meaningful review of the damages awarded in this case, the court transgressed the well-settled,

common-sense principles of noneconomic damages awards that help ensure a predictable, consistent judicial system—which, in turn, is essential to the rule of law and the economic flourishing that it fosters. This Court should grant the petition, reverse the decision below, and restore meaningful review of noneconomic damages awards.

ARGUMENT

I. The court of appeals reversibly erred in rejecting the comparative approach to reviewing noneconomic damages.

In reviewing the noneconomic damages awarded here, the court of appeals refused to consider awards upheld in similar cases. That was a serious error. By renouncing the comparative approach, the court of appeals scrapped all vestiges of objectivity in noneconomic-damages review—ignoring centuries of caselaw and diverging from this Court's approach in the analogous area of punitive damages.

A. Historical standards for mental-suffering damages provided objectivity to judicial review of such awards.

English courts initially shunned mental-suffering damages because they were "inherently subjective." *Parkway Co. v. Woodruff*, 901 S.W.2d 434, 442 (Tex. 1995). Likewise, English courts prohibited wrongful-death actions altogether, because the resulting damages were "uncertain and

potentially explosive in size." Victor E. Schwartz & Emily J. Laird, *Non-Economic Damages in Pet Litigation: The Serious Need to Preserve a Rational Rule*, 33 Pepp. L. Rev. 227, 268 (2006).

Even as courts liberalized those rules, they also sought objective standards to govern review of noneconomic damages awards. For instance, courts began to allow recovery of mental-anguish damages if the anguish was "(1) accompanied by a physical injury resulting from a physical impact, or (2) produced by a particularly upsetting or disturbing event." *Woodruff*, 901 S.W.2d at 442. Texas law generally agreed. *See id.* at 442–43 (citing *Hill v. Kimball*, 13 S.W. 59, 59 (Tex. 1890) ("Probably an action will not lie when there is no injury except the suffering of the fright itself.")). Under those standards, reviewing courts had objective guideposts: They could analyze the physical injury or the disturbing event.

Even as these exceptions expanded, courts maintained objective standards to review the resulting noneconomic damages awards. For instance, when physical ***impact*** became irrelevant, courts still required some physical ***manifestation*** of anguish. *Id.* at 442–43. Likewise, as courts relaxed the physical-impact requirement, they limited recovery to

those "in the 'zone of danger'" along with "specified parties beyond this zone." *Id.* (citation omitted). Texas law generally agreed. *See id.* (citing *Gulf, C. & S.F. Ry. Co. v. Hayter*, 54 S.W. 944, 945 (Tex. 1900) (relaxing the physical-impact requirement); *Freeman v. City of Pasadena*, 744 S.W.2d 923, 923–24 (Tex. 1988) (extending recovery to bystanders)).

Eventually, even these exceptions largely eroded. *Id.* (citing *St. Elizabeth Hosp. v. Garrard*, 730 S.W.2d 649, 653 (Tex. 1987) (removing any physical-injury requirement), *overruled on other grounds by Boyles v. Kerr*, 855 S.W.2d 593 (Tex. 1993)). As this Court acknowledged, "[t]he erosion of these proxies . . . has created a vacuum." *Id.* at 444. The unmooring of mental-suffering damages from objective measures "open[ed] a wide and dangerous field" in which damages could become unpredictable and review could become toothless. *Harned v. E-Z Fin. Co.*, 254 S.W.2d 81, 86 (Tex. 1953) (quotation marks and citation omitted).

In response, this Court looked to objective factors to determine the *fact* of mental anguish. *See Woodruff*, 901 S.W.2d at 444 (requiring "direct evidence of the nature, duration, or severity of" the mental anguish or "evidence of a high degree of mental pain and distress that is

more than mere worry, anxiety, vexation, embarrassment, or anger") (internal quotation marks omitted). And it stressed the importance of "evidence to justify the ***amount*** awarded." *Saenz v. Fid. Guar. Ins. Underwriters*, 925 S.W.2d 607, 614 (Tex. 1996) (emphasis added) (requiring "appellate courts to conduct a meaningful evidentiary review" to ensure that a mental-anguish award provides "fair and reasonable compensation").

B. The comparative approach has been well settled for centuries.

For hundreds of years, courts have helped ensure objective appellate review of damages awards by comparing the awards before them against awards in factually similar cases. Yet the court of appeals dismissed that approach, asserting "each award of non-economic damages is a unique exercise of the jury's discretion" and citing the platitude that "each case must be measured by its own facts." *Gregory v. Chohan*, 615 S.W.3d 277, 306–07 (Tex. App.—Dallas 2020, pet. filed) (internal quotation marks omitted). Such toothless review is markedly out of step with centuries of history and precedent. Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 Harv. J.L. & Pub. Pol'y 231, 242 (2003)

("[T]here is a long history of courts considering awards in factually comparable cases as part of the inquiry into whether an award of noneconomic compensatory damages is excessive.").

Around the middle of the eighteenth century, English courts began to uphold or set aside verdicts depending on whether similar verdicts had been upheld or set aside previously. *See*, *e.g.*, *Wilford v. Berkeley* (1758) 97 Eng. Rep. 472, 472; 1 Burr. 609, 609 (describing a case that was "exactly similar to this [case]; and the very same sum . . . was given"); *Goldsmith v. Lord Sefton* (1796) 145 Eng. Rep. 1046, 1046; 3 Anst. 808, 809 (comparing the award with that in another case where "the injury was much more serious than here, the damages not so great, yet the verdict was set aside").

Early American courts likewise used a comparative approach. *See*, *e.g.*, *Clapp v. Hudson R.R. Co.*, 19 Barb. 461, 463–67 (N.Y. Gen. Term. 1854) (analyzing verdicts in three similar cases). Courts even enlisted the comparative approach to review compensatory awards for pain and suffering. *See Murray v. Hudson River R. Co.*, 47 Barb. 196, 200–04 (N.Y. Gen. Term. 1866) (analyzing a man's "pain and suffering, for which he

ought to be compensated" by recognizing that "[h]is injury is . . . less severe than several of those in which new trials were awarded").

In Texas, appellate courts have used the comparative approach since at least the late 1800s. *E.g. San Antonio & A.P.R. Co. v. Long*, 28 S.W. 214, 216 (Tex. Civ. App. 1894, writ ref'd) ("[H]eavier verdicts have been sustained in cases where the injuries were not greater than in this case."); *accord Galveston, H. & S.A. Ry. Co. v. Duelm*, 24 S.W. 334, 336 (Tex. Civ. App. 1893, no writ); *Tex. & N.O.R. Co. v. Harrington*, 241 S.W. 250, 251 (Tex. Civ. App.—Beaumont 1922, no writ) (deciding that the damages award "does not seem to be out of proportion to the judgment for $20,000 . . . which we approved in" another case); *Baker v. Bell*, 219 S.W. 245, 250 (Tex. Civ. App.—San Antonio 1919, no writ) (considering "perhaps, a hundred cases" and comparing the case before it with those involving similar injuries); *Tex. & P. Ry. Co. v. Crown*, 220 S.W.2d 294, 299 (Tex. Civ. App.—Eastland 1949, writ ref'd n.r.e.) (attempting "to examine every comparable case").

So too with this Court, which has enlisted the comparative approach to guard against excessive damages for over a century. *See Mo. Pac. Ry. Co. v. Jones*, 12 S.W. 972, 974 (Tex. 1889) (comparing a damages

award against awards in two similar cases); *Anderson v. Durant*, 550 S.W.3d 605, 620 (Tex. 2018) ("The jury's $400,000 award [for mental-anguish damages] appears to be excessive compared to awards in cases involving similar or more egregious behavior . . . .").

Given the legal and historical pedigree of the comparative approach, it's unsurprising Justice Scalia characterized it as the only "discernible standard" for "review of the ***amount*** of the verdict by . . . appellate courts." *Haslip*, 499 U.S. at 37 (Scalia, J., concurring). This Court should grant the petition, clarify that the comparative approach remains essential in reviewing noneconomic damages awards, and reverse the court of appeals' contrary decision.

C. Courts historically treated punitive and noneconomic damages indistinguishably for purposes of using the comparative approach.

The U.S. Supreme Court has adopted the comparative approach to review punitive damages awards. *See BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). Justices across the Court have acknowledged the analytical similarity in reviewing punitive and noneconomic damages.[1]

[1] *See*, *e.g.*, *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 446–47 (2001) (Ginsburg, J., dissenting) ("Punitive damages are thus not [u]nlike the measure of actual damages suffered, . . . in cases of intangible, noneconomic injury.")

That similarity underscores the value and importance of the comparative approach in also helping to ensure effective, consistent appellate review of noneconomic damages.

Historically, punitive and noneconomic damages posed precisely the same problem for reviewing courts. Although English courts made no distinction between ***punitive*** and ***noneconomic*** damages, *see Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 422 n.2 (1994), they did distinguish between ***economic*** and ***noneconomic*** damages, *see* DeCamp, *supra*, at 235–36. For instance, one court acknowledged the "great difference" between damages "where the sum and value may be measured," and damages that "are matter of opinion, speculation, ideal." *Beardmore v. Carrington* (1764) 95 Eng. Rep. 790, 792; 2 Wils. 244, 248.

Courts struggled to review noneconomic damages—punitive and compensatory alike—because both suffer from "a pervasive and inherent irrationality and unpredictability." Paul V. Niemeyer, *Awards for Pain and Suffering: The Irrational Centerpiece of Our Tort System*, 90 Va. L.

(internal quotation marks omitted); *Gore*, 517 U.S. at 607 (Scalia, J., dissenting) ("The elevation of 'fairness' in punishment to a principle of 'substantive due process' means that every punitive award unreasonably imposed is unconstitutional . . . . Indeed, if the Court is correct, it must be that every claim that a state jury's award of compensatory damages is 'unreasonable' . . . amounts to an assertion of constitutional injury.").

Rev. 1401, 1420 (2004); *cf. Cooper Indus.*, 532 U.S. at 446 (Ginsburg, J., dissenting) ("One million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage."). It's no surprise, then, that "different standards of judicial review were [not] applied for punitive and compensatory damages before the 20th century." *Oberg*, 512 U.S. at 422 n.2.

The similarities in punitive and noneconomic damages, "including their common history and treatment . . . logically call for comparable treatment." DeCamp, *supra*, at 291. This Court should clarify and confirm that the comparative approach is not just permitted but is essential to reviewing noneconomic damages awards—just as it is for punitive damages awards.

II. Objective review of noneconomic damages helps ensure predictability and certainty, which are essential to the rule of law.

Objective, comparative review of noneconomic damages awards brings much-needed predictability and certainty to an otherwise haphazard process—and in doing so, furthers the rule of law. The rule of law, in turn, is essential to economic flourishing—and Texas's robust economy proves the point.

In a 2019 survey of in-house general counsel, 89 percent agreed that "a state's litigation environment . . . is likely to impact important business decisions at their companies, such as where to locate or do business." U.S. Chamber Inst. for Legal Reform, *2019 Lawsuit Climate Survey: Ranking the States* 3 (Sept. 2019).[2] Damages awards are a significant component of a state's legal environment. *Id.* at 10, 16. And excessive damages awards "have a devastating potential for harm." *Haslip*, 499 U.S. at 42 (O'Connor, J., concurring). As just one example, the avoidance of "inconsistent, excessive, and unpredictable awards" helps "stabilize or lower insurance costs for . . . businesses." Mark A. Behrens & Cary Silverman, *Building on the Foundation: Mississippi's Civil Justice Reform Success and A Path Forward*, 34 Miss. C.L. Rev. 113, 122 (2015).

The bottom line is that while the threat of runaway damages awards incentivizes job creators to go elsewhere to receive fairer and more predictable treatment, meaningful review of noneconomic damages awards "encourage[s] businesses to bring much needed employment and

[2] Available at https://instituteforlegalreform.com/wp-content/uploads/2020/10/2019_Harris_Poll_State_Lawsuit_Climate_Ranking_the_States.pdf.

other economic resources" to Texas. *See Rhyne v. K-Mart Corp.*, 594 S.E.2d 1, 17 (N.C. 2004). Review and reversal of the decision below would have that salutary effect, too.

PRAYER

For the foregoing reasons, the Court should grant the petition for review and reverse the court of appeals' decision.

Dated: May 18, 2022

Respectfully submitted,

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