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 OF AMICI CURIAE LAW PROFESSORS IN SUPPORT OF RESPONDENTS

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**Pro hac vice motion pending*

ATTORNEYS FOR AMICI CURIAE LAW PROFESSORS

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[1] Pursuant to Texas Rule of Appellate Procedure 11(c), Professors Engstrom, Engstrom, Hyman, and Silver note that they were compensated for their work on this submission at their customary rates by the law firm of Arnold & Itkin LLP. The opinions expressed herein are entirely the professors' own, however, as the many citations to their published writings reflect. Credentials of all signatories are offered for the purpose of identification only.

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SUMMARY OF ARGUMENT

Unhappy with the damages awarded in the case below, Petitioners would have this Court break new ground to cabin noneconomic damages by taking two new, controversial, and ill-advised steps. First, Petitioners contend that this Court should declare that, in assessing noneconomic damage awards going forward, lower courts should compare the verdict in the instant case to awards in past "similar" cases (i.e., perform a comparative analysis). *See* Petitioners' Br. at 25; *id* at 34 (faulting the appellate court for its failure to "compare[] any of the awards to awards sustained in other cases"). Second, Petitioners insist that, "[i]n many respects, noneconomic damages and punitive damages are similar in nature and present similar problems in review for excessiveness." *Id*. at 19. Given these purported similarities, Petitioners argue that this Court should borrow from the U.S. Supreme Court's punitive damage jurisprudence to create permissible ratios between noneconomic and economic damages. Neither of Petitioners' "fixes" withstands scrutiny.

Petitioners' first suggested reform—the notion that lower courts should be made to "compar[e] verdicts in different cases"—is a bad idea because it is, for all intents and purposes, impossible. The data to make such comparisons do not exist—and, where the idea has been tried, it has been a disaster. *E.g.*, *Cuevas v. Wentworth Grp*., 144 A.3d 890, 904 (N.J. 2016) ("We conclude that the comparison of

supposedly similar verdicts to assess whether a particular damages award is excessive is ultimately a futile exercise that should be abandoned.").

Petitioners' second suggested reform—the creation of ratios to tether economic and noneconomic damages, just as we tether punitive to compensatory damages—is similarly misguided and betrays a fundamental misunderstanding of these distinct damage categories. In fact, the two "heads" of damages (noneconomic, on the one hand, and punitive, on the other) are fundamentally different, with a different history, purpose, treatment, and effect.

Tethering punitive damages to compensatory damages is at least defensible because punitive damages exist to punish, and punishments vary based on the harm the defendant inflicts. As this Court has explained: "The legal justification for punitive damages is similar to that for criminal punishment," and, whether one is meting out punitive damages or criminal penalties, the punishment "must have a nexus" to the victim's "specific harm." *Safeshred, Inc. v. Martinez*, 365 S.W.3d 655, 663 (Tex. 2012). In the punitive–compensatory realm, ratios ensure that this necessary "nexus" between harm and punishment is sufficiently tight.

Not so with the subcategories that compose compensatory damages. When one parses the two compensatory damage subcategories (noneconomic, on the one hand, economic on the other), there is no logical nexus on which ratios can be based because the pain a plaintiff suffers bears no regular or necessary relationship to her

economic loss. After all, in an accident leading to an arm amputation, a book narrator does not suffer systematically less pain than a professional baseball player simply because her livelihood isn't threatened. Indeed, in the extreme case, certain tortious conduct gives rise *exclusively* to noneconomic damages, while, on other occasions, plaintiffs are *precluded* from recovering for noneconomic loss. *Compare* Restatement Third, Torts: Liability for Physical and Emotional Harm § 47 (AM. L. INST. 2012) (discussing claims for negligently inflicted emotional distress, where, often, the plaintiff sustains no economic loss), *with Douglas v. Delp*, 987 S.W.2d 879, 884–85 (Tex. 1999) (barring plaintiffs asserting legal malpractice claims from recovering even a penny for noneconomic loss, even when their pecuniary damages are substantial).

Unlike punitive and compensatory damages, which are linked, the *components* of compensatory damages operate independently. Given this independence, the willy-nilly importation of ratios from the compensatory–punitive damage realm (where they make sense) to the economic–noneconomic damage realm (where they do not make sense) would violate the bedrock principle that a plaintiff is entitled to damages equal to the harm incurred, nothing less and nothing more.

The imposition of economic–noneconomic ratios would also work substantial mischief. As we explain below, Petitioners' suggested reform would unconscionably

elevate the pain suffered by high-income-earners over that suffered by low-income-earners, and it would systematically disadvantage certain Texans—particularly women, children, and the elderly. As such, Petitioners' second proposal is not only contrary to well established principles of tort law. It is also regressive and retrograde.

Finally, a through-line of Petitioners' argument, amplified by their supporting amici in the insurance industry, is that these radical reforms are needed to check "skyrocketing" noneconomic damage awards. Ins. Co. Amicus Br. at 17; *see id*. at 10 (lamenting "the current trend toward higher and higher noneconomic damage awards"). However, the undersigned amici—a group which includes some of the country's most respected legal empiricists—have carefully and resolutely scoured the best publicly available data looking for evidence of such an uptick, and we have found none. In fact, the publicly available evidence suggests just the opposite: not an uptick in noneconomic damages in Texas, *but a decline*.

Meanwhile, even while Petitioners' and their amici speak of "skyrocketing" damage awards—and even as they sit atop a pile of proprietary data that could assist this Court—they have not offered any proof to substantiate their claims. That silence speaks volumes—and their unsupported say-so is a thin reed on which to rest a revolution in Texas tort law.

Texas's standard for the appellate review of noneconomic damages has worked well for decades. *See Pope v. Moore*, 711 S.W.2d 622, 624 (Tex. 1986) (per

curiam) ("In determining whether damages are excessive, trial courts and courts of appeals should employ the same test as for any factual insufficiency question."); *accord Thomas v. Womack*, 13 Tex. 580, 584–85 (1855) (cautioning that courts, in the review of damages, ought not "substitute the opinion of the Judge for the verdict of the jury"). There is no reason to depart from that time-tested formula here.

ARGUMENT

I. Comparative Review of Noneconomic Damages Using Past Awards in "Similar" Cases is Misguided and Unworkable

Petitioners would have this Court rule that, in Texas, courts ought to evaluate noneconomic damage awards in one case by assessing awards in past "similar" cases. This suggested reform may be facially appealing. But, for numerous reasons, it is misguided and unworkable.

For starters, the data necessary to make these comparisons do not exist. Then, even if ample data *were* available, courts would not know which particular facets of cases to compare. Finally, beyond these practical difficulties, the very idea of comparative review is conceptually flawed. Comparative review rests on the notion that one can discern the "right" damages for Plaintiff A by looking at past damages previously awarded to Plaintiffs B, C, D, and E. But, in fact, there is no reason to believe that those past judgments are somehow "better" than the current one. To the contrary, because, as this Court has itself recognized, "[i]ndividuals experience mental anguish in myriad ways, so each case is unique," *Anderson v. Durant*, 550 S.W.3d 605, 619 (Tex. 2018), comparative review *inevitably* pairs apples with oranges—and it serves to confuse, rather than clarify, the damage inquiry.

These practical and conceptual challenges are easy to see—and we elaborate them below—but some courts have nonetheless learned the hard way. *Cuevas v. Wentworth Group* is particularly instructive—and provides a cautionary tale. In

2011, the New Jersey Supreme Court had expressly endorsed the use of comparable verdicts in remittitur motions. *See Ming Yu He v. Miller*, 24 A.3d 251, 266 (N.J. 2011). But, fast forward five years and, in 2016, a unanimous New Jersey Supreme Court abruptly ended that experiment. "What we have come to learn, perhaps too slowly," said the court, is that "a true comparative analysis is illusory," *Cuevas*, 144 A.3d at 904–05, "futile," *id*. at 905, and neither "sound in principle [n]or workable in practice," *id*. at 893. The court pulled the plug because, among other infirmities, "the facts and plaintiffs in every personal-injury . . . case are fundamentally different." *Id*. at 905. And, even if a perfect comparator *could* be located, that discovery would forestall rather than resolve the inquiry, as "the next question would be, which jury conferred the right monetary award?" *Id*. The instant jury? Or, the prior one? All told, the court concluded: "We do not believe that having our trial courts review snippets of information about cases that are not truly comparable is a worthwhile use of judicial resources or likely to bring greater justice to either plaintiffs or defendants." *Id*. at 906–07.

A. The Data Needed to Make Valid Comparisons are Not Publicly Available

The first reason why Petitioners' suggested reform will not work is that courts implementing Petitioners' proposal would need reliable data about the noneconomic damage awards *actually awarded* to plaintiffs in past cases. Having a repository of reliable data, then, is a condition precedent of Petitioners' favored reform. But, the

undersigned amici have, collectively, more than a century of experience gathering, coding, and analyzing data about the civil justice system. And, based on that experience, we can state confidently and without qualification: Sufficient reliable data about past verdicts do not exist. The condition precedent is wanting—and, given its absence, Petitioners' reform falls flat.

It is well accepted that data about the civil justice system are woefully incomplete. Empirical researchers struggle to answer even the most basic of questions. We do not know, for instance, how many civil trials are conducted each year.[2] We do not know how many cases go to trial in each case category. And, critical for our current purposes, we do not know the outcome of many trials that do take place. *See* Herbert M. Kritzer, *The Trials and Tribulations of Counting "Trials,"* 63 DEPAUL L. REV. 415 (2013) (cataloging the challenges one confronts when trying to figure out even simple questions, such as how many trials are held each year, even

[2] Even when we think we have good data of, say, the number of federal civil trials, upon close inspection, the numbers tend to blur. For instance, Table C-4 of the Administrative Office of U.S. Court data reports that there were 2,920 federal civil trials in 2014. Yet, Professor Jonah Gelbach has recently completed a rigorous study of federal civil cases that had docketed trial activity in calendar year 2014. Sifting through hundreds of thousands of dockets, Gelbach found only 1,574 federal cases that had a bench or jury trial in 2014—which creates a puzzling anomaly. *See* Nora Freeman Engstrom, *The Diminished Trial*, 86 FORDHAM L. REV. 2131, 2140 (2018) (reporting and seeking to explain this anomaly while concluding that "Table C-4 offers a fairly crude—and generous—indicator of classic trial activity"). Likewise, in Texas, Chief Justice Nathan Hecht once observed a similar phenomenon—that "[t]he numbers of non-jury trials in civil cases reported to [Office of Court Administration] do not appear to reliably reflect trials in the conventional sense." Justice Nathan L. Hecht, *The Vanishing Civil Jury Trial: Trends in Texas Courts and an Uncertain Future*, 47 S. TEX. L. REV. 163, 168 (2005).

in federal court, where our data tends to be more complete); Justice Nathan L. Hecht, *Jury Trials Trending Down in Texas Civil Cases*, 69 TEX. B.J. 854 (2006) ("Data for the state court systems, when available at all, is difficult to compile and compare . . . ."); Nora Freeman Engstrom, *Measuring Common Claims About Class Actions*, JOTWELL (Mar. 16, 2018) ("Most of the action in the civil justice system (and the majority of tort law) occurs in the states, and state court data are remarkably spotty and incomplete. And, even when we think we have good statistics—of the annual number of federal civil trials, for example—it turns out that various gaps and holes confound clear conclusions.").

Nor is there any systematic, official record of factfinders' past verdicts. The blunt fact is that no one knows what past judges or juries award, or have awarded, to American plaintiffs in any given year.

Jury verdict reporters exist, and they can be—and often are—profitably consulted. But their data are incomplete and unrepresentative. *See, e.g.,* David A. Hyman, Bernard S. Black, Kathryn Zeiler, Charles Silver & William M. Sage, *Do Defendants Pay What Juries Award?—Post-Verdict Haircuts in Texas Medical Malpractice Cases*, 1988-2003, 4 J. OF EMPIRICAL LEGAL STUD. 3, 8 (2007) (explaining that U.S. jury verdict reporters are unreliable because they are "incomplete and subject to sample selection bias"); Neil Vidmar, Felicia Gross & Mary Rose, *Jury Awards for Medical Malpractice and Post-Verdict Adjustments of*

those Awards, 48 DEPAUL L. REV. 265, 272–73 (1998) ("The clerks who gather the data for commercial verdict reporters sometimes get their estimates of special damages from the plaintiff lawyer only or from the defendant lawyer only while, for other cases, they may get them from both sides and average any differences. Plaintiff lawyers are prone to overestimate special damages while defense lawyers will underestimate them.") [hereinafter Vidmar et al.].[3]

Likewise, a party can search on Westlaw and Lexis for comparables. But these sources, too, are woefully deficient because "[t]he cases that are reported are but a fraction, and maybe a small fraction, of the universe of jury awards."[4] *Deloughery v. City of Chicago*, 2004 WL 1125897, at *5 (N.D. Ill. 2004), *aff'd*, 422 F.3d 611 (7th Cir. 2005); *accord* David Freeman Engstrom, *The Twiqbal Puzzle and Empirical Study of Civil Procedure*, 65 STAN. L. REV. 1203, 1214–15 & n.24 (2018) (explaining how and why opinions on Westlaw and Lexis cannot be counted on to supply representative data). And indeed, this problem comes through vividly in the present case, as Justice Schenck, even while apparently advocating for reliance on comparators, lamented that he was having difficulty doing so, given the "relatively

[3] More concretely, only four of the ten most recent entries in Westlaw's Texas Jury Verdicts and Settlement database were tried to juries and in none of those cases was the injury death.

[4] Lexis's Jury Verdicts and Settlements databases is similarly thin. A recent search on "(noneconomic" or pain or suffering) and (death and trial and jury)" yielded only 27 Texas-specific results (some of which were cases that settled or produced defense verdicts), and most of the deaths had causes other than vehicular collisions.

few cases available and their wide range." *Gregory v. Chohan*, 615 S.W.3d 277, 330 (Tex. App.—Dallas 2020, pet. granted) (Schenck, J., dissenting).

Further exacerbating these difficulties: Even when verdicts are available, relatively few verdicts separately identify economic and noneconomic damages, stunting comparisons involving only the latter category. *See* Herbert M. Kritzer, Guangya Liu & Neil Vidmar, *An Exploration of "Noneconomic" Damages in Civil Jury Awards*, 55 WM. & MARY L. REV. 971, 986 (2014) (discussing this significant concern); JoEllen Lind, *The End of Trial on Damages? Intangible Losses and Comparability Review*, 51 BUFF. L. REV. 251, 273 (2003) (same).

For an illustration, consider *Clanton v. United States*, 2018 WL 3609225 (S.D. Ill. 2018), *aff'd*, 943 F.3d 319 (7th Cir. 2019). In *Clanton*, the court tried to find similar cases pursuant to the Seventh Circuit's requirement that federal courts conducting bench trials consider comparators. But, in trying to follow the Seventh Circuit's mandate, the *Clanton* court observed that both parties (the plaintiff on the one side, and the U.S. government on the other) had scoured available sources to supply the court a total of nineteen verdict summaries that they "deemed to be comparable to [the plaintiff's] case." *Id.* at *3. Yet those summaries, the court concluded, were unreliable and incomplete. As the court put it, "the lack of details and the age of some of the verdicts made it difficult, if not impossible, for the Court

to assess how comparable the cases really are to [plaintiff's]." *Id*. at *4. The court lamented:

> For all but one case, the parties provided the Court with verdict summaries which, generally speaking, contain only bare-bones information. For example, most of the verdict summaries do not discuss the status of the plaintiff's health or what his or her daily life looked like before the injury. Some do not indicate the plaintiff's age, employment status, or the composition of the plaintiff's family. Most do not describe the precise nature of the injury . . . . The verdict summaries do not review the evidence presented regarding the plaintiff's pain and suffering, emotional distress, or loss of enjoyment of life. And most of the verdict summaries do not discuss the plaintiff's prognosis, what future medical treatment he or she will need, or the plaintiff's life expectancy.
>
> Additionally, a number of the verdict summaries indicate only that the noneconomic damages award was for "pain and suffering." The Court was unable to discern if that meant *past* pain and suffering, or if that meant both *past and future*. The Court also could not tell if the juries considered but decided to award other categories of noneconomic damages, such as emotional distress, loss of a normal life, disfigurement, and shortened life expectancy. Finally, twelve of the nineteen cases cited by the parties have verdicts that were awarded at least a full decade before the bench trial in this case. In fact, four of those awards are close to twenty years old. These awards would undoubtedly be worth substantially more today due to inflation.

Id. at *4 (citations omitted).

It is worth pausing to appreciate that a federal judge encountered the above difficulties when she—with the motivated help of the U.S. Department of Justice—

tried to locate comparators to assess damages for one individual plaintiff. It, essentially, could not be done.

Nor is the *Clanton* court alone. Other courts endeavoring to compare verdicts have similarly found the process to be utterly unworkable. Sometimes, the effort runs aground on the fact that truly similar cases are simply not available. *E.g., Osterhout v. Bd. of Cnty. Commissioners of LeFlore Cnty., Oklahoma*, 10 F.4th 978, 999 (10th Cir. 2021) (trying to engage in a comparative review where 17 supposedly similar cases had been identified but ultimately concluding that, of those 17, none were actually similar; in particular, 11 were "at least 25 years old" while "[f]our of the other six cases involve[d] far different injuries," and two featured "weaker evidence"); *Ream v. Burke Asphalt Paving*, 2003 WL 22092715, at *9 (Mich. Ct. App. 2003) (rejecting all of defendants' comparators because "none of their comparison cases involve the type of multiple fractures of the same leg that Linda Ream sustained" and declining to "combine average damage awards of different injuries as if from an a' la carte menu"), *judgment vacated in part, appeal denied in part*, 688 N.W.2d 823 (Mich. 2004); *Morga v. FedEx Ground Package Sys., Inc*., 512 P.3d 774, 785 (N.M. 2022) (rejecting the defendants' comparator while observing that the decedents in the instant case "share no apparent similarities with the [supposedly similar] decedent"); *Gregory*, 615 S.W.3d at 330 (Schenck, J., dissenting) (attempting a comparative analysis but conceding that the exercise

offered only limited guidance because of the "relatively few cases available and their wide range").

Sometimes, courts fail in their efforts because, given the skeletal information available, it is impossible to know whether an available comparator is *actually* adequately similar. *E.g., Ocampo v. Paper Converting Mach. Co*., 2005 WL 2007144, at *5 (N.D. Ill. 2005) (lamenting that "given the paucity of facts available about the other scalp avulsion cases, it is difficult to assess how comparable those cases really are [to the plaintiff's], apart from involving the same type of accident"); *Deloughery*, 2004 WL 1125897, at *5 (noting that "the description of the evidence found in reported district and appellate court decisions typically does not permit a realistic determination of whether the case is truly comparable to the one being evaluated"); *Reck v. Stevens*, 373 So. 2d 498, 505 (La. 1979) (observing that, "whether two cases are so similar as to produce like quantum judgments is hardly discernible by gleaning the facts of the comparable decision from simply a written opinion of an appellate tribunal"); MARC A. FRANKLIN, ROBERT L. RABIN, MICHAEL D. GREEN, MARK A. GEISTFELD & NORA FREEMAN ENGSTROM, TORT LAW AND ALTERNATIVES 734 (11th ed. 2021) (recognizing the fruitlessness of comparative review and observing: "Among other impediments, only partial information about past verdicts and settlements is currently available, making it hard to know which past cases are actually 'similar' to the case at bar.") [hereinafter FRANKLIN ET AL.].

B. Even if Ample Data Were Available, Problems Would Persist

Even if the above data problems could—magically—be solved, comparisons would still be conceptually flawed and practically unworkable.

First, even with all the data in the world, a court still would not know *what*, exactly, is *supposed* to be compared. Borrowing an example from the influential Dobbs treatise,[5] suppose a prisoner, in government custody, is asphyxiated, in a death that takes approximately three minutes prior to the prisoner's loss of consciousness. To find a proper comparator for the prisoner's pre-death damages, are courts supposed to look to prisoner cases? To prisoner cases in the same (or maybe a similar?) jurisdiction? Over what time frame? To all recent cases where the decedent was in pain for three minutes prior to dying? To those cases, too, where the individual was asphyxiated but survived? To all asphyxiation cases, but only in prisons? To drowning cases, including those from out of state? To state these questions underscores the futility of the exercise. DAN B. DOBBS, PAUL T. HAYDEN & ELLEN M. BUBLICK, THE LAW OF TORTS § 479 (2022 update).[6]

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[5] The descriptor "influential" is well-earned. The Dobbs treatise has been cited by courts hundreds of time—and it has been repeatedly relied upon by both this court, *e.g.*, *Allen-Pieroni v. Pieroni*, 535 S.W.3d 887, 888 (Tex. 2017); *City of Watauga v. Gordon*, 434 S.W.3d 586, 589 (Tex. 2014), and the U.S. Supreme Court, *e.g.*, *McDonough v. Smith*, 139 S. Ct. 2149, 2156 (2019); *Universal Health Servs., Inc. v. United States*, 579 U.S. 176, 189 (2016).

[6] Likewise, consider two amputees who both lose their right arms. Two such cases would seem similar. But, "[o]ne person who has a limb amputated will experience severe phantom pain whereas another will experience little or no such pain." Vidmar et al., *supra* at 273. Then, adding to the divergence, what if one plaintiff is young and the other is old? "A twelve-year-old amputee with severe phantom pain can be actuarially expected to endure sixty or more years of that pain

Then, even if the court manages to find proper comparators, and even if it is true that the damages in the prior case diverge from damages that the jury awarded in the current case, the court is still left with an impossible determination because *who is to say that the prior jury—and not the instant jury—is the one that got it right*? *See Alonzo v. John*, 647 S.W.3d 764, 774 (Tex. App.—Houston [14th Dist.] 2022, pet. filed) (recognizing that, even when the instant award eclipses past awards, that "does not necessarily show that the jury's award is excessive"); *accord Geressy v. Digital Equip. Corp*., 980 F. Supp. 640, 657 (E.D.N.Y. 1997) ("Once the court has chosen a group of settlements and verdicts with which to compare the verdict under consideration, there is no simple method for determining whether that verdict is reasonable vis-a-vis those in the normative group."), *aff'd in part sub nom. Madden v. Digital Equip. Corp*., 152 F.3d 919 (2d Cir. 1998); RUSSELL L. WEAVER & MICHAEL B. KELLY, PRINCIPLES OF REMEDIES LAW 232 (4th ed. 2022) (explaining that, although comparative review has some "intuitive appeal" it is beset by practical difficulties including "it assumes, without basis, that the earlier awards were correct" when in fact those prior awards "easily could have been too law and the present jury just right").

whereas a seventy two-year-old can be expected to endure a briefer period." *Id*. Then, what if one plaintiff enjoyed playing the violin (and now can't) but the other enjoyed singing (and still can)? How is a court supposed to account for these and myriad other differences?

Lastly, even if we had a comprehensive and searchable repository of past awards (which we lack), and even if we had particular confidence in prior rulings (which we also lack), any effort to identify the "right" award for Plaintiff A by examining past damage awards to Plaintiffs B, C, D, and E would still run aground on the highly individualized nature of noneconomic damages. Comparative review, at bottom, rests on the premise that *various plaintiffs* (and not just various underlying injuries) are alike. That is a fallacy. In fact, as Petitioners and this Court have both recognized: "'Individuals experience mental anguish in myriad ways, so each case is unique.'" Petitioners' Br. at 35 (quoting *Anderson*, 550 S.W.3d at 619).

The fact is, even if two individuals are hurt in precisely the same way, at the same time, by the same defendant, in the same jurisdiction, it does not mean that those two individuals will similarly suffer. In fact, decades of scientific research have shown that the opposite is true. For one person, an injury or illness might be intolerable, while for another, it might be easily endured. *See* Roger B. Fillingim, *Individual Differences in Pain: Understanding the Mosaic that Makes Pain Personal*, 158 PAIN S11, S11 & S15 (2017) (amassing decades of evidence proving that "[t]he experience of pain is characterized by robust interindividual differences," including that "experimental stimulus delivered at a standardized intensity elicits subjective pain reports that vary dramatically between individuals," the same painful stimuli activate different brain activity in different subjects, and "pain reports

following the same surgical procedure vary greatly across patients"); Ingrid Wickelgren, *MIND on Pain, Why People Experience Pain Differently*, SCI. AM., Sept. 1, 2009 (reporting that "doctors and scientists have known for decades, if not centuries, that human beings . . . differ greatly in how sensitive they are to pain").

Because pain affects different people differently, "different plaintiffs can experience different levels of pain and suffering from similar incidents" such that "two cases arising from similar incidents may not be all that similar at all." *Zurba v. United States*, 247 F. Supp. 2d 951, 962 (N.D. Ill. 2001), *aff'd*, 318 F.3d 736 (7th Cir. 2003); *Caterpillar Tractor Co. v. Boyett*, 674 S.W.2d 782, 790 (Tex. App.—Corpus Christi 1984, no writ) (recognizing that "the same loss will occasion different damages to different individuals"); WEAVER & KELLY, *supra* at 232 ("[C]omparisons cannot account for individual differences in sensitivity to pain. Pain that some shrug off others find debilitating.").

As long as that is true, and unless and until the American legal system abandons its bedrock commitment to individualized damage determinations, those two individuals (who are, in fact, differently hurt) are legally entitled to disparate sums. *See* Restatement Second, Torts § 903, Comment *a* (AM. L. INST. 1979) (explaining that courts should strive to create a "correspondence between the amount awarded as damages and the extent of the [plaintiffs'] suffering"). Put differently: As long as compensatory damages seek to provide a "correspondence" between

damages and the plaintiff's pain, *id*.—and *also* as long as "[t]he experience of pain is characterized by robust interindividual differences," Fillingim, *supra* at S15—even in a perfectly functioning system, we would never expect that two even identically injured plaintiffs' awards would be remotely similar.

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In conclusion, comparability review has superficial appeal, but that appeal disappears once one understands that the doctrine rests on at least four false assumptions: (1) that reliable and detailed data about past damage awards are available; (2) that courts, tasked with comparing cases will know which particular facets of disparate cases to compare; (3) that earlier judgments are somehow better than the current one; (4) and that two plaintiffs who look, on paper, to be similar actually suffered comparable pain.

Once one faces reality and recognizes that data are not available, that each case is composed of a constellation of idiosyncratic facts, that earlier judgments are not necessarily more reliable than the current one, and that "[i]ndividuals experience mental [and physical] anguish in myriad ways," *Anderson*, 550 S.W.3d at 619, it becomes clear that comparability review may look objective, but it isn't. Instead, comparability review consigns lower courts to engaging in a time-consuming, haphazard, and futile exercise, and it "provides an easily manipulable method whereby judges can substitute their own assessment of the appropriate damage

award for the jury's determination." J. Patrick Elsevier, Note, *Out-of-Line: Federal Courts Using Comparability to Review Damage Awards*, 33 GA. L. REV. 243, 269 (1998).[7]

Attuned to the above difficulties, *numerous* courts, from across the United States, have long resisted this "most unsatisfactory method of determining a proper award in a particular case."[8] *Turchi v. Shepherd*, 327 S.W.2d 553, 556 (Ark. 1959)

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[7] In Texas, courts have long resisted such power grabs. *See Thomas v. Womack*, 13 Tex. 580, 584 (1855) ("[T]he court will not substitute its own sense of what would be the proper amount of the verdict, and will not set aside a verdict for excessive damages, unless there is reason to believe that the jury were actuated by passion, or by some undue influence, perverting the judgment.").

[8] *E.g.*, *Stuart v. Matranga*, 328 P.2d 233, 235 (Cal. App. 1958) ("The question of amount of damages is primarily factual and is, therefore, not to be decided upon the basis of awards made in other cases."); *Cuevas*, 144 A.3d at 904 (abandoning comparability review as an "illusory" and "futile exercise"); *Campbell-Crane & Assocs., Inc. v. Stamenkovic*, 44 A.3d 924, 946 (D.C. 2012) ("[W]e decline to engage in comparisons with damages awarded in other cases."); *N. Tr. Co. v. Cnty. of Cook*, 481 N.E.2d 957, 961 (Ill. App. Ct. 1985) ("The propriety of an award of damages for personal injuries is not subject to mathematical computation, nor may it be measured by comparison with verdicts in other cases."); *Weinberger v. Boyer*, 956 N.E.2d 1095, 1114 (Ind. Ct. App. 2011) ("While it may be tempting to engage in a comparative analysis to aid us in the difficult task of evaluating the award at issue in this case, to do so would be a significant departure from Indiana's historical regard for the uniqueness of every tort claim and the belief that compensatory damage assessments should be individualized and within the province of the factfinder."); *McKissick v. Frye*, 876 P.2d 1371, 1388 (Kan. 1994) ("[T]here is no provision in current law for comparison of one plaintiff's recovery with another's to serve as the basis for overturning a jury's verdict."); *Reckis v. Johnson & Johnson*, 28 N.E.3d 445, 469 n.47 (Mass. 2015) (rejecting such comparators as a "dangerous game") (quotation marks and citation omitted); *Seltzer v. Morton*, 154 P.3d 561, 588 (Mont. 2007) ("[W]e reject the notion that a compensatory award for emotional distress upheld in one case is in any way relevant to the propriety or size of an emotional distress award in another case. Indeed, two victims of the same tortious conduct may be impacted in dramatically different ways."); *Wagaman v. Ryan*, 142 N.W.2d 413, 420 (Iowa 1966) (reiterating that "comparison of verdicts in different cases is not very helpful in determining the propriety of an award in a given case—each must be determined upon the evidence therein"); *Allied Concrete Co. v. Lester*, 736 S.E.2d 699, 708 (Va. 2013) ("[W]e have specifically rejected comparing damage awards as a means of measuring excessiveness.").

Numerous federal courts are in accord. *E.g.*, *Soto v. United States*, 11 F.3d 15, 18 (1st Cir. 1993) (rejecting comparative review given "the infinite variables involved in an award for pain");

("A comparison of awards made in other cases is a most unsatisfactory method of determining a proper award in a particular case, not only because the degree of injury is rarely the same, but also because the dollar no longer has its prior value."). And, numerous courts in Texas have long followed suit, holding that "[e]ach case must stand on its own facts and circumstances and a comparison with other cases on amounts of verdicts found therein is of little or no help." *McAllen Coca Cola Bottling Co. v. Alvarez*, 581 S.W.2d 201, 205 (Tex. Civ. App.—Corpus Christi 1979, no writ); *see, e.g., Primoris Energy Servs. Corp. v. Myers*, 569 S.W.3d 745, 760 (Tex. App.—Houston [1st Dist.] 2018, no pet.); *Harris v. Balderas*, 949 S.W.2d 42, 44 (Tex. App.—San Antonio 1997, no writ); *Boyett*, 674 S.W.2d at 790; *Missouri Pac. R. Co. v. Handley*, 341 S.W.2d 203, 205 (Tex. Civ. App.—San Antonio 1960, no writ). This Court should reaffirm that position here.

Johnson v. Offshore Exp., Inc., 845 F.2d 1347, 1356 (5th Cir. 1988) ("[W]e do not determine excessiveness of damage awards by comparing verdicts in similar cases, but rather we review each case on its own facts."); *Penetrante v. United States*, 604 F.2d 1248, 1252 (9th Cir. 1979) ("Damage awards turn on the facts of each case. While analogies to, and comparisons with, other cases may be helpful on many types of issues, their usefulness on questions of damages is extremely limited.") (quotation marks and citation omitted); *Burke v. Regalado*, 935 F.3d 960, 1036 n.60 (10th Cir. 2019) (explaining that comparators "yield no insight into the evidence the jurors heard and saw" and "detract from the appropriate inquiry, which is whether the verdict is against the weight of the evidence") (quotation mark and citation omitted); *Hoskie v. United States*, 666 F.2d 1353, 1358 n.4 (10th Cir. 1981) ("It is a difficult and often fruitless task to compare damages in one case with those in another . . . ."); *Sykes v. McDowell*, 786 F.2d 1098, 1105 (11th Cir. 1986) ("Comparison of verdicts rendered in different cases is not a satisfactory method for determining excessiveness *vel non* in a particular case and . . . each case must be determined on its own facts.'") (quoting *Wiley v. Stensaker Schiffahartsges*, 557 F.2d 1168, 1172 (5th Cir. 1977)).

II. Any Attempt to "Borrow" Ratios from Punitive Damage Jurisprudence Is Similarly Unprincipled and Unwise

Petitioners additionally contend that courts should not only look *across* verdicts—in Petitioners' view, courts should also look *within* verdicts and strive to create some proportionality between economic and noneconomic awards. As we explain below, their proposal betrays deep confusion about these disparate damage categories and the historical role each has played. Petitioners' invitation is both legally unsound and practically destructive.

A. Petitioners' Attempted Alchemy Between Punitive and Noneconomic Damages Defies Both Law and Logic

In insisting that economic and noneconomic damage awards must march in lockstep, appellants grasp at authority outside the noneconomic damages realm, citing to *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559 (1996), which addressed similarities between compensatory and punitive damages. Petitioners' Br. at 27–28. Then, with something of a sleight of hand, Petitioners argue that, just as punitive damages are tethered to (and ought to be a reasonable ratio of) compensatory damages, noneconomic damages ought to be tethered to (and ought to be a reasonable ratio of) economic damages. *See id*. at 24 ("Standards for reviewing punitive damages that have been developed over the last 30 or 40 years are readily transferable to noneconomic damages."); *id*. at 19 ("In many respects, noneconomic

damages and punitive damages are similar in nature . . . ."); *id*. at 6 (stating that punitives are "close cousins of noneconomic damages").[9]

Petitioners' attempted alchemy between punitive damages and noneconomic damages fails for two reasons. First, it fails to account for the fact that economic and noneconomic damages stand in a fundamentally different relationship to one another than punitive damages and noneconomic damages. As we illustrate below, punitives and compensatories are logically related. Both are, and are supposed to be, keyed to the amount of harm the defendant has caused. In stark contrast, any link between economic and noneconomic damages is largely fortuitous: The pain a plaintiff suffers bears no regular or necessary relationship to her economic loss. As a result, applying ratios to link punitive damages to compensatory damages is logical. But applying ratios to link economic and noneconomic damages, as Petitioners demand,

[9] Although Petitioners insist that "[i]n many respects, noneconomic damages and punitive damages are similar in nature," Petitioners' Br. at 19, in fact, the opposite is true. As the U.S. Supreme Court has explained, the two heads of damages "serve different purposes." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *see also infra* note 11. Then, beyond these different purposes, the two damage categories have a different history, and they are awarded pursuant to different procedures, using different standards, pursuant to the entry of different evidence, (sometimes) against different defendants, and subject to different forms of appellate review. For history, see *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 490–92 (2008). For procedures, see TEX. CIV. PRAC. & REM. CODE ANN. § 41.013; *Transportation Ins. Co. v. Moriel*, 879 S.W.2d 10, 29–30 (Tex. 1994) (requiring "bifurcated trials in punitive damage cases"). For standards, see *id*. at 18 (demanding that defendant's conduct be significantly more aggravated than negligence). For evidence, see *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 40 (Tex. 1998) (authorizing the admissibility of otherwise-inadmissible evidence "in mitigation of punitive damages"). For "different defendants," see TEX. CIV. PRAC. & REM. CODE ANN. § 41.005 (limiting an employer's vicarious liability for punitives). For appellate review, see *State Farm*, 538 U.S. at 418 (demanding that punitives be assessed de novo). Indeed, the two heads of damages are even treated differently for tax purposes. *See* 26 U.S.C. §§ 104, 104(a)(2).

makes no sense at all—and it violates the bedrock principle that a plaintiff is entitled to damages equal to the harms she has suffered, nothing less and nothing more. *See Moriel*, 879 S.W.2d at 16 (explaining that compensatory damages seek to "make the plaintiff 'whole").[10]

Second, Petitioners' ratio approach, if accepted by this Court, would be both regressive and retrograde. It would unconscionably elevate pain suffered by the wealthy over pain suffered by the poor. *See Morga*, 512 P.3d at 785 ("Tethering noneconomic harm to economic damages places a thumb on the scale for wealthier plaintiffs."). And it would seriously restrict damages available for women, children, and the elderly. We discuss each in turn.

1. Punitive Damages and the Component Parts of Compensatory are Distinct

Petitioners' attempt to draw similarities between punitive and noneconomic damages, and to tether subcategories of compensatory damages in parallel to punitive damages and compensatories, suggests a startling misunderstanding of these distinct damage categories. In fact, the two "heads" of damages (noneconomic, on the one hand, and punitive, on the other) are fundamentally different, with a

[10] Even Petitioners concede this essential point, recognizing that the "purpose" of compensatory damages is to "'to place the plaintiff in the position in which he would have been absent the defendant's tortious act,'" and, as such, compensatory damages exist to make the victim whole, "no less and no more." Petitioners' Br. at 8 (quoting *J & D Towing, LLC v. Am. Alternative Ins. Corp.*, 478 S.W.3d 649, 655 (Tex. 2016)).

drastically different history, purpose, and effect. *See* footnote 9 (collecting evidence).

As this Court has recognized, tethering punitive damages to compensatory damages makes sense because, like our criminal laws, *punitive damages exist to punish*—and, in Texas and elsewhere, punishments appropriately vary based on the harm the actor inflicts.[11] *See Martinez*, 365 S.W.3d at 663 (explaining that "[t]he legal justification for punitive damages is similar to that for criminal punishment" and that, whether one is meting out punitive damages or criminal penalties, the punishment "must have a nexus to the specific harm suffered by the" victim of defendant's wrongdoing) (quotation marks and citation omitted).

[11] There is no question that punitive damages, unlike compensatory damages, exist to punish. TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(5) ("'Exemplary damages' means any damages awarded as a penalty or by way of punishment but not for compensatory purposes. Exemplary damages are neither economic nor noneconomic damages. 'Exemplary damages' includes punitive damages."); *Moriel*, 879 S.W.2d at 16 (explaining that, as compared to compensatory damages "[p]unitive damages have an altogether different purpose" and that "[t]he legal justification for punitive damages is similar to that for criminal punishment"). Indeed, Petitioners concede the point. *See* Petitioners' Br. at 28 (conceding that "society's goals for noneconomic damages and punitive damages are not the same: the former are intended to compensate, the latter to punish and deter"); *accord Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 432 (2001) ("Although compensatory damages and punitive damages are typically awarded at the same time by the same decisionmaker, they serve distinct purposes. The former are intended to redress the concrete loss that the plaintiff has suffered by reason of the defendants wrongful conduct. The latter, which have been described as quasi-criminal, operate as private fines intended to punish the defendant and to deter future wrongdoing.") (quotation marks and citations omitted).

Reflecting this nexus between victim harm and appropriate punishment, in the criminal realm, a defendant who commits an assault is punished more harshly if the assailant's victim dies and less harshly if the victim lives. *Compare* TEX. PENAL CODE ANN. § 19.02(b)(2), *with id*. § 22.01. If a criminal defendant inflicts serious injury, he will be punished more harshly than if the injury he inflicts is merely trivial. U.S. SENTENCING GUIDELINE § 5K2.2 ("If significant physical injury resulted, the court may increase the sentence above the authorized guideline range."). Or, if a defendant robs another, the punishment will vary based on the value of the stolen property. *See* TEX. PENAL CODE ANN. § 31.03(e) (classifying theft as everything from a Class C misdemeanor to a "felony of the second degree" based on the "value of the property stolen"). The more harm the actor inflicts, the more severe the criminal punishment. Harm and punishment go hand-in-hand.

So, too, for punitives. Like criminal penalties, punitive damages—which exist to punish—vary based on the harm the defendant inflicts. As above, the more serious the harm (as measured by compensatory damages), the larger the punishment (as measured by punitive damages). *See* Restatement Second, Torts § 908, Comment *e* (AM. L. INST. 1979) (explaining that, when awarding punitives, the factfinder is to consider "the extent of harm to the injured person" just as, in "criminal law," when determining a crime's "seriousness," one considers the harm inflicted upon the victim). Indeed, this essential linkage between harm and proper punishment is the

entire point of the Supreme Court's required ratios. *See Campbell*, 538 U.S. at 426 (explaining that, in awarding punitive damages, "[a] defendant should be punished for the conduct that harmed the plaintiff" and, given this nexus between harm and punishment, "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff"); *Cooper Indus.*, 532 U.S. at 434–36 (explaining that, when awarding punitive damages, as when meting out criminal punishments, courts must assess "the relationship between the penalty and the harm to the victim caused by the defendant's actions"). Again: In the punitive damages realm, there is a tight nexus between punishment and harm, just as, in the criminal law realm, there is a tight nexus between punishment and harm.

Not so for the *component parts* of compensatory damages. To see why, consider first a professional baseball player whose involvement in a car wreck results in the amputation of his arm. That hypothetical plaintiff would suffer similarly high levels of economic loss (lost wages, hefty hospital bills) and noneconomic loss (as amputations are disfiguring, painful, and traumatic). For our baseball player, it might just so happen that there is a nexus between the two damage subcategories.

But now suppose that the hypothetical victim is a book narrator. Now, the arm amputation will not occasion meaningful wage loss; our victim will be able to narrate, notwithstanding her injury. But that does not logically mean that her *noneconomic* damages (which, in Texas consist of, among other things, pain,

suffering, mental anguish, loss of enjoyment of life, inconvenience, and disfigurement) are somehow less meaningful. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 41.001(12) (defining the many components of "[n]oneconomic damages")

Our two hypothetical plaintiffs illustrate a critically important point: Unlike the relationship between compensatory damages and punitive damages, any relationship between the two *subcategories* of compensatory damages is largely fortuitous.

Indeed, in the extreme case, there is *no logical nexus at all*, and nothing to which ratios can be applied. Certain tortious conduct gives rise *exclusively* to economic damages (even when the conduct, logically, causes some emotional distress). *E.g.*, *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013) (concluding that a "bereaved" pet owner, whose "cherished dog" was negligently euthanized, was not entitled to recover a penny in noneconomic damages). Or, on the other side of the coin, substantial damages are sometimes awarded, absent any economic loss. *E.g.*, *Whittlesey v. Miller,* 572 S.W.2d 665, 667 (Tex. 1978) (recognizing that a spouse suing for lost consortium has incurred only noneconomic damages but emphasizing that "[t]he loss" is nevertheless "a real one requiring compensation").

Because economic and noneconomic damages lack any regular or necessary relationship to one another, Petitioners' proposal makes a mockery of the bedrock principle of tort law that a plaintiff's total damages should be individually calculated

so as to make the victim "whole." *Moriel*, 879 S.W.2d at 16. Indeed, Plaintiffs' misguided ratio proposal would rework centuries of tort law by keying a plaintiff's noneconomic damages to the mere fortuity of the amount of her economic loss. Hidden in Petitioners' sleight of hand is a revolution. And it is one this Court should reject.

2. Petitioners' Proposed Ratios Are Both Regressive and Retrograde

The baseball player/book narrator hypotheticals vividly illuminate the fact that Petitioners' proposed ratios violate bedrock principles of tort law. But the lack of any regular or necessary relationship between economic and noneconomic loss runs up against two *additional*—and uncomfortable—facts. The first fact is that, if two people from different professions or from different income brackets suffer equally agonizing and debilitating injuries, their economic losses (which consist of, inter alia, lost wages) will be wildly different. The second is that certain plaintiffs' damages (namely, women, children, and the elderly) frequently consist of *primarily* noneconomic loss. Given these facts, Petitioners' suggested reform is far less principled, and far more pernicious, than it may at first blush appear.

First, as the baseball player/book narrator hypotheticals show, two people with the same injury but different jobs will accrue different lost wages—and, hence, different economic loss. Unless we believe that physical pain is somehow tied to wage loss (which is absurd), it makes no sense to say that individuals' noneconomic

damages should rise or fall based on the wage loss a worker incurs. The book narrator's amputation is not significantly less painful than the baseball player's amputation. Yet Petitioners would have this Court give its blessing to precisely that assumption.

Furthermore, people do not just have *different jobs*—they have *differently lucrative* jobs. Economic loss, it follows, typically varies by income. As such, as a team of leading empiricists report: "The past and future economic losses of a forty-year-old corporate executive would be much greater than the losses of a seventy-year-old retired bricklayer, even if both suffered equally debilitating injuries." Vidmar et al., *supra* at 269.

All this means that, if, as Petitioners propose, this Court were to key noneconomic damages (which are *not* supposed to vary based on the plaintiff's income) to economic damages (which *are* supposed to vary based on the plaintiff's income), it would tilt a part of the tort law playing field that is, conceptually, supposed to remain flat. Or, as the neighboring Supreme Court of New Mexico very recently explained: "To allow such a relationship [between economic and noneconomic damages] would unfairly benefit wealthier plaintiffs and place less value on the pain and suffering, and even on the lives, of those of less wealth."[12]

[12] Additionally, Petitioners' proposed reform would systematically privilege white Texans and systematically discriminate against persons of color, who tend to be disproportionately unemployed and, when employed, disproportionately employed in lower-wage professions. *See*

Morga, 512 P.3d at 785 ; *accord Longfellow v. Jackson Cnty*., 2007 WL 682455, at *1 (D. Or. 2007) (rejecting defendants' suggestion that it impose a compelled ratio between economic and noneconomic damages, while observing that that "[a] further flaw in Defendants' proposed methodology is that the pain and suffering of a person working for minimum wage would be valued far below the pain and suffering of a rich man, though both sustain the identical injury").

But, "[t]ethering noneconomic harm to economic damages" does not *just* "place[] a thumb on the scale for wealthier plaintiffs." *Morga*, 512 P.3d at 785. Less obviously, it also puts a thumb on the scale in favor of men and middle-aged persons, as against women, children, and the elderly. These disparities arise because, in general, men tend to recover comparably more for economic loss, while women (who frequently stay home raising children or, when they work, are affected by stubborn wage differentials),[13] the elderly (who tend to be retired) and children (who tend to be enrolled in school) tend to recover comparably less. Given these persistent disparities, put bluntly: If Petitioners have their way, Texas's civil justice system will systematically (but irrationally) discount the pain endured by old persons, young persons, and stay-at-home moms. *See* BERNARD S. BLACK, DAVID A. HYMAN,

Joanne Doroshow & Amy Widman, *The Racial Implications of Tort Reform*, 25 WASH. U. J.L. & POL'Y 161, 169 (2007).

[13] According to the U.S. Bureau of Labor Statistics, as of 2021, women earned $.83 for every dollar earned by men. Bureau of Labor Statistics, U.S. Dep't of Labor, *The Economics Daily*, Jan. 24, 2022.

MYUNGHO PAIK, WILLIAM M. SAGE, AND CHARLES SILVER, MEDICAL MALPRACTICE LITIGATION: HOW IT WORKS, WHY TORT REFORM HASN'T HELPED 135 (CATO Inst., 2020) [hereinafter BLACK ET AL.] (explaining, based on a comprehensive study of Texas medical malpractice data, that "economic damages account for a lower proportion of payments to elderly plaintiffs than to adult nonelderly plaintiffs"); FRANKLIN ET AL., *supra* at 731 (explaining that "the composition of women's tort recoveries, on average, consist of relatively more for pain and suffering and less for economic loss, while the composition of men's tort recoveries tend to be reversed (and, overall, men's tort awards tend to be higher)"); Deborah R. Hensler, *Jurors in the Material World: Putting Tort Verdicts in Their Social Context*, 13 ROGER WILLIAMS U. L. REV. 8, 18 (2008) ("On average, juries award less in economic damages to women, the elderly, and children.").

Compounding the inequity, it well established that certain serious injuries, such as sexual or reproductive harm or sexual assault leading to impaired fertility, incontinence, and scarring, tend to be associated with very low economic losses.[14]

[14] *See* Joanna M. Shepherd, *Tort Reforms' Winners and Losers: The Competing Effects of Care and Activity Levels*, 55 UCLA L. REV. 905, 947 (2008) (explaining that certain injuries women suffer, including "[h]arm to reproductive systems, miscarriages, infertility, disfigurement from cosmetic surgeries, and pregnancy loss" are "compensated almost exclusively through noneconomic damages"); Lucinda M. Finley, *The Hidden Victims of Tort Reform: Women, Children, and the Elderly*, 53 EMORY L.J. 1263, 1266 & 1296 (2004) (reporting that "certain injuries that happen primarily to women are compensated predominantly or almost exclusively through noneconomic loss damages" and further reporting that, of women in California who were victims of gynecological malpractice, noneconomic damage awards vastly eclipsed awards for

After all, a woman does not need to miss much work just because a defendant's tortious conduct scars her or impairs her future fertility—and such an injury often occasions little, if any, time in the hospital. Yet again, by keying noneconomic damages to economic damages (which are near zero), Petitioners' reform would dramatically shortchange these and other similarly situated plaintiffs.[15]

In sum, Petitioners' proposal is not just regressive in more fully compensating the pain and suffering of higher-income "haves" relative to lower-income "have nots." It is also downright retrograde in its tendency to compensate certain segments of the population more stingily than others.

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economic loss, such that "[t]he median allocation of the award to noneconomic damages was 92.5%").

[15] Nursing home neglect or abuse cases are similar. *See* Michael L. Rustad, *Neglecting the Neglected: The Impact of Noneconomic Damage Caps on Meritorious Nursing Home Lawsuits*, 14 ELDER L.J. 331, 346 (2006) ("[T]he victims of nursing home neglect or abuse can typically receive only noneconomic damages."); Finley, *supra* at 1283–84 & 1306 (explaining that cases involving the "abuse of elderly nursing home patients" are "compensated almost entirely by noneconomic loss damages"). Meanwhile, some other injuries, just as a matter of happenstance, will inflict grievous pain but occasion little by way of economic loss. *E.g.*, *Walters v. Hitchcock*, 697 P.2d 847, 852 (Kan. 1985) (affirming a large damage award even though plaintiff, who "was not employed during the course of her 19-year marriage" claimed no lost wages and only $59,000 in medical bills, where, as a result of the defendant's tortious conduct, the plaintiff's esophagus was permanently shut and replaced with her colon, and, as a result, the plaintiff endured "a nightmare of pain, disability, hospitalizations and surgical procedures" and, for the rest of her life, will be unable to eat or lie flat and must cope with "severe disfiguring scars").

B. Numerous Courts Have Properly Rejected "Proportionality Requirements"

Given the above infirmities, it is not surprising that, when defendants in other states have floated the proposal that Petitioners now urge on this Court, they have been flatly rebuffed.

A recent opinion by the Supreme Court of New Mexico is particularly instructive. There, the defendants pointed "to the disparity between the economic and noneconomic damages awarded to support their claim that the jury's award was excessive." *Morga*, 512 P.3d at 785. Rejecting any effort to create an artificial nexus between economic and noneconomic damages, the court explained: "We recognize that some elements of a plaintiff's economic damages may bear a relationship to a plaintiff's noneconomic harm, but most do not." Indeed, the court found any effort to tether economic and noneconomic damages to be *particularly* inappropriate in cases of near-instantaneous wrongful death—where the decedents "did not survive the impact of the accident and therefore did not incur any medical expenses but were deprived of life itself, including all the joys and benefits that accompany it." *Id*. at 786.

Numerous other courts are in accord. *E.g., Longfellow*, 2007 WL 682455, at *1 ("I decline to adopt Defendants' theory regarding the proper ratio between economic and non-economic damages. . . .This methodology is unsuitable for computing non-economic damages. Injuries justifying a large award of non-

economic damages, such as permanent disfigurement and severe pain, are not always accompanied by commensurate economic harm."); *Burchell v. Fac. Physicians & Surgeons of Loma Linda Univ. Sch. of Med.*, 54 Cal. App. 5th 515, 530 (2020), *review denied* (Dec. 16, 2020) ("[W]e disagree that we should consider whether there was a 'reasonable relationship' between the award of economic and noneconomic damages here. . . . The relevant question is whether the values that make up the ratio are, separately, supported by the evidence."); *Saleh v. Ribeiro Trucking, LLC*, 32 A.3d 318, 327 n.9 (Conn. 2011) (noting that the court has consistently rejected attempts to tether noneconomic to economic damages); *Nye v. BNSF Ry. Co.*, 428 P.3d 863, 880 (Okla. 2018) (rejecting the defendant's argument that the "proportional difference between the agreed upon economic damages [plaintiff] suffered" and the "non-economic damages awarded" indicates that the latter was excessive; remarking that defendant "points to no statutory or case authority to support the proposition that the jury must adhere to some legal standard of proportionality between these two types of damages"); *Simmons v. Bisland*, 2009 WL 961522, at *7 (Tex. App.—Austin 2009, pet. denied) ("The applicable standard of review requires us to uphold non-economic damage awards that are supported by the evidence, regardless of any ratio of non-economic damages to economic damages."); 25A C.J.S. *Damages* § 348 (2022 update) ("Placing noneconomic damages in a ratio with economic damages is not a proper method for determining

whether the verdict is supported by substantial evidence; doing so fails to account for severe harm that results even absent pecuniary loss.").

Much like their misguided and unworkable effort to convince this Court to license comparative review of noneconomic damages using past awards in "similar" cases, Petitioners' second proposal, to impose a ratio between economic and noneconomic damages, defies both logic and of law. And, on top of that, ratios to tether a plaintiff's noneconomic damages to her economic loss are deeply regressive, in flagrant violation of longstanding principles of tort law.

III. There Is No Problem to Solve

Petitioners' proposals to require comparative analysis and tether economic and noneconomic damages, if accepted by this Court, would work a revolution in Texas tort law. What, this Court should ask, justifies that revolution? What, in other words, is the problem to be solved? In seeking to answer that question, a final through-line of Petitioners' argument, amplified by amici from the insurance industry, is that radical reforms are needed to rein in runaway verdicts. But if Petitioners' two-fold proposal to remake Texas tort law is misguided as a matter of logic and law, their empirical claims are simply wrong.

We have been down this road before. Twenty years ago, two of the undersigned amici, Professors Hyman and Silver, joined by other leading empiricists, published a series of peer-reviewed studies of medical malpractice

lawsuits using the Texas Closed Claim Dataset (TCCD), a publicly available time-series data set maintained by the Texas Department of Insurance (TDI).[16] The studies showed that, in the years preceding Texas's adoption of lawsuit restrictions in 2003, the state's malpractice liability system was stable. Whether measured in terms of claim frequency, payout per claim, defense costs, jury verdicts, or total costs, the data presented a picture of consistency in most respects, including the size of verdicts, and only moderate change in a few others. These findings conclusively demonstrated the falsity of assertions, made by the insurance industry and tort reform groups in lobbying efforts at the time, that jury verdicts and payouts had risen sharply. When rigorously scrutinized, 15 years' worth of data showed that they had not. *See* BLACK ET AL., *supra* at 54 ("Regression analysis confirms [that] . . . there was no statistically significant trend in either mean or median [jury] verdicts [in medical malpractice cases].").

Even so, representatives of the insurance industry have continued—and Petitioners and their supporting insurance amici continue before this Court—to make assertions of doubtful validity and without offering any rigorous evidence in support. The insurance amici contend, among other things, that "[j]uries' nearly unbridled discretion has led to increasingly high verdicts for noneconomic damages," and that

[16] The studies were updated and republished in BLACK ET AL., *supra*. TDI also verified the accuracy of the data in the TCCD by checking individual case reports against insurers' annual aggregate reports.

noneconomic damage awards are "skyrocketing." Ins. Amicus Br. at 13 & 17; *see id*. at 10 (describing the "current trend toward higher and higher noneconomic damage awards").

But damage awards were not skyrocketing before Texas's imposition of sharp restrictions in medical malpractice cases. As just noted, studying pro-plaintiff verdicts in 350 cases reported from 1988 through 2005, a team of researchers that included Professors Hyman and Silver found "no discernable evidence of time trends in [jury] awards, broken down by type of damages." BLACK ET AL., *supra* at 54. And Petitioners and their supporting amici do not explain why a system that was stable prior to 2003 (the year rigid constraints were imposed) has suddenly become dangerously unstable.[17]

Even stranger, *if* hard data supported Petitioners' amici's claims, they (uniquely) could have brought the receipts. The claims about "skyrocketing" judgments are being made by the insurance industry, after all, and the insurance industry possesses a wealth of proprietary time-series data about the filing and resolution of claims. Indeed, high-quality data of that sort is key to their business model and commercial success. Had they wanted to assist this Court, the insurance

[17] Interestingly, too, one of the very few sources the Insurance Amici offer to support their claim that Texas is beset by "ever-increasing awards of noneconomic compensatory damages" comes from 19 years ago and is accompanied by no data. Paul DeCamp, *Beyond State Farm: Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J.L. & PUB. POLICY 231, 265 (2003).

amici could have supported their assertions regarding "skyrocketing" noneconomic awards with statistics, and they could have released the underlying data so empiricists could rigorously test their claims, thus complying with both basic norms of scientific research integrity and adversarial testing within the civil justice system. They did not, and their silence is both deafening and telling.[18]

What might explain their silence despite their abundant data? Perhaps it is traceable to the fact that the data that are publicly available indicate that noneconomic damages in Texas may well be *falling*. To wit, in recent years, Texas's injury cost index has fallen sharply. Calculated by the Insurance Research Council

[18] To be sure, even if we witnessed an uptick in noneconomic damage awards (and there is, of course, no evidence of such an uptick), that would not mean much without an understanding of broader case patterns because, for example, mean payouts may rise, not because of juror generosity, but rather, because small claims are progressively squeezed out of the system (and, even if high-end awards do not increase, if low-end awards exit the system, that would cause mean and median awards to rise). *See* Myungho Paik, Bernard Black & David A. Hyman, *The Receding Tide of Medical Malpractice Litigation: Part 1—National Trends*, 10 J. OF EMPIRICAL LEG. STUD. 612, 613 (2013) (explaining that national data on medical malpractice shows that "small claims are being squeezed out of the tort system") [hereinafter Paik et al.].

Importantly here, there is some evidence that, in at least certain parts of the tort law ecosystem, *filings are down*. Pursuant to data maintained by the Insurance Research Council, in Texas, from 2008 through 2017, there was a 9 percent *drop* in the rate of auto filings (as measured by filed bodily injury claims per 100 insured vehicles). INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS, Fig. 4 at 17 (2019). Further, from 1990 through 2017, there was a 21 percent drop in the number of bodily injury claims per 100 property damage claims (indicating that, when Texans get in collisions serious enough to damage their cars, they are much less likely to seek compensation for personal injury). *Id*. Fig. 7 at 23. Meanwhile, medical malpractice filings in Texas also dropped sharply after 2003. Ronald M. Stewart et al., *Malpractice Risk and Cost Are Significantly Reduced after Tort Reform,* 212 J. OF AM. COLL. OF SURGEONS 463, 465 (2011) ("Implementation of comprehensive tort reform in Texas was associated with almost a 5-fold decrease in the risk of a malpractice lawsuit being filed."); Paik et al., *supra* at Tbl. 1, at 618 (revealing that, in Texas, paid medical malpractice claims per 1,000 physicians dropped 68.2 percent during the period 2001 through 2012).

(IRC), this index measures insurance dollars paid for auto *injury* claims per dollar paid for *property damage* claims. *See* INSURANCE RESEARCH COUNCIL, TRENDS IN AUTO INJURY CLAIMS 53, 58 (2019).[19] The intuition behind the index is that property damage claims reflect auto accident rates while also accounting for a state's inflation rate, population density, and demographics, and so they are a good benchmark against which to measure tort recoveries. After all, we would expect that, in a stable system, property damage claims and injury claims would march in something like lockstep. *Id*. at 13, 53. Given all this, as the IRC itself puts it, "[t]he injury cost index is a convenient way to compare the 'richness' of states' injury compensation systems." *Id*. at 58. And: "An above-average injury cost index value suggests a 'rich' auto injury compensation system that awards relatively large amounts to claimants for their injury-related expenses." *Id*. at 53. Designed to measure the "richness" of a state's injury compensation system, the index also provides a mechanism to detect trends, as an index that is climbing over time indicates a progressively more generous system, while an index that is falling over time indicates a system that is becoming stingier.

[19] If one seeks to assess the tort liability system, auto claims data is a good place to start as auto claims "account[] for more than half of all trials, nearly two-thirds of all injury claims, and three-quarters of all damage payouts." Nora Freeman Engstrom, *When Cars Crash: The Automobile's Tort Law Legacy*, 53 WAKE FOREST L. REV. 293, 295 (2018). For more on the IRC, which is a prominent research organization "supported by leading property and casualty insurance companies and associations," see INSURANCE RESEARCH COUNCIL, *About the IRC and its Mission*, https://www.insurance-research.org/about (last visited Oct. 22, 2022).

Now the numbers: From 1990 to 2015, Texas's injury cost index *dropped* a startling *49 percent*. *Id*. Fig. 19, at 60. Thus, Texas's system is becoming progressively stingier. In fact, Texas's injury cost index has fallen so sharply that Texas now boasts one of the three lowest cost indexes (i.e., one of the least "rich" award systems) in the United States. *Id*. As of 2015, Texas's index stood at 1.23, indicating that $1.23 was paid to compensate for auto injuries in Texas, as against every dollar paid for property damage claims. This put Texas well below the national average of 2.00. Indeed, as of 2015, only Iowa and North Dakota boasted lower injury cost indexes than Texas, and, in some states (Florida, for instance, at 3.67), indexes were significantly higher. *Id*. at 59–60.[20]

Meanwhile, data collected for the U.S. Bureau of Justice Statistics tell a similar story—of falling, rather than rising, damages. According to U.S. Bureau of Justice Statistics data, in 1992, the median jury trial tort award in three large Texas counties (Bexar, Dallas, and Harris) was $72,373 in inflation-adjusted (2022)

[20] Also notable: In the nation as a whole, noneconomic damages in auto claims are way down. Thus, in 1992, IRC-maintained data show that the average motorist recovered $3,928 in noneconomic loss (meaning, he or she received $3,928 more than her claimed economic loss). In 2002, ten years later, that figure had fallen to $2,725. But startlingly, by 2017, that figure was negative—which is to say, the average motorist recovered less than the economic losses the motorist incurred. We calculated these figures using data from INSURANCE RESEARCH COUNCIL, AUTO INJURY INSURANCE CLAIMS: COUNTRYWIDE PATTERNS IN TREATMENT, COST, AND COMPENSATION 40 (2008); INSURANCE RESEARCH COUNCIL, AUTO INJURY INSURANCE CLAIMS: COUNTRYWIDE PATTERNS IN TREATMENT, COST, AND COMPENSATION 7 (2014); INSURANCE RESEARCH COUNCIL, COUNTRYWIDE PATTERNS IN AUTO INJURY INSURANCE CLAIMS 8–9 (2018).

dollars.[21] But in 2005, the median tort award in those same counties was $21,519 in 2022 dollars. This indicates a stunning 70 percent drop.

Of course, we would like to assist this Court by offering additional—and more up to date—data to capture award trends in Texas, but we cannot because, beyond the information presented above, there is *no publicly available dataset with the needed information*.[22] To make sure, we exhaustively searched on Westlaw, Lexis, SSRN, ICPSR, and PubMed for all published empirical studies of Texas's liability system. We found none that employed a current, publicly available dataset that could be used to evaluate the truth of claims about jury awards of noneconomic damages in Texas.

The lack of an available dataset not only prevents anyone, including this Court, from assessing the truth of the insurance amici's unsupported assertions. It also, to return to a point made above, makes it impossible to reliably perform the comparative analysis that Petitioners urge upon this Court.

[21] These data are publicly available through an archive maintained by the Inter-university Consortium for Political and Social Research at the University of Michigan (ICPSR studies 6587, 2883, 3957, and 23864). In the latest study, from 2005, eight additional Texas counties were included. If one includes those counties, the median jury trial awards drops to $12,464, an 83 percent decline.

[22] The TCCD has not been updated since 2012. In 2015, the Texas legislature ordered TDI to stop collecting data. Meanwhile, the U.S. Bureau of Justice Statistics's most recent publicly-available trial data come from year 2005.

CONCLUSION AND PRAYER

For the above reasons, amici respectfully request that the Court affirm the judgment for Respondents below.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

1. This brief complies with the type-volume limitation of Texas Rule of Appellate Procedure 9.4(i)(2)(B) because it contains 11,979 words, excluding the parts of the brief exempted by Texas Rule of Appellate Procedure 9.4(i)(1).

2. This brief complies with the typeface requirements of Texas Rule of Appellate Procedure 9.4(e) because it has been prepared in Times New Roman 14-point font in text and Times New Roman 12-point font in footnotes.

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CERTIFICATE OF SERVICE

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