NO. 22-0521

IN THE SUPREME COURT OF TEXAS

ROBERTO ALONZO AND NEW PRIME, INC.,

Petitioners,

v.

CHRISTINE JOHN AND CHRISTOPHER LEWIS,

Respondents.

On Petition for Review from No. 14-20-00148-CV
in the Fourteenth Court of Appeals at Houston

BRIEF OF *AMICI CURIAE* CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA, AMERICAN TORT REFORM ASSOCIATION, AND AMERICAN TRUCKING ASSOCIATIONS IN SUPPORT OF PETITIONERS

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Am. Transp. Research Inst., UNDERSTANDING THE IMPACT OF NUCLEAR VERDICTS ON THE TRUCKING INDUSTRY (June 2020)..... 17, 18

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INTEREST OF *AMICI* CURIAE[1]

The Chamber of Commerce of the United States of America (the "Chamber") is the world's largest business federation. It directly represents approximately 300,000 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 curiae* briefs in cases, like this one, that raise issues of concern to the nation's business community.

The American Tort Reform Association ("ATRA") is a broad-based coalition of businesses, corporations, municipalities, associations, and professional firms that have pooled their resources to promote reform of the civil justice system with the goal of ensuring fairness, balance, and predictability in civil litigation. For more than three decades, ATRA has filed *amicus curiae* briefs in cases, like this one, involving important liability issues.

The American Trucking Associations ("ATA") is the national association of the trucking industry. Its direct membership includes over 3,000 trucking companies and industry suppliers, and in conjunction with its federation of affiliated organizations, it represents over 30,000 motor carriers of every size, type, and class of operation.

[1] No counsel for a party authored this brief in whole or in part, and no entity or person other than *amici curiae*, their members, or their counsel made a monetary contribution intended to fund the preparation or submission of this brief. *See* TEX. R. APP. P. 11.

The motor carriers represented by ATA haul a significant portion of the freight transported by truck in the United States, and virtually all operate in interstate commerce among the states. ATA regularly files briefs as *amicus curiae* in courts throughout the nation, to represent the common interests of motor carriers in cases, like this one, involving issues of great importance for the trucking industry.

This case significantly affects the interests of *amici*'s members. In this personal-injury case arising from a trucking accident, the court of appeals blessed a jury's $12 million non-economic damages award against trucking company New Prime when no *evidence* justified that amount, only *unsubstantiated anchoring*. And though charged to ensure that evidence and reason supported the amount of non-economic damages awarded, the court refused to consider how that award compared to the plaintiffs' economic damages or to non-economic damages awarded in comparable cases. Like Petitioner New Prime, many of *amici*'s members and thousands of other businesses operate in Texas, regularly engage in litigation in Texas, and can face awards of non-economic damages. *Amici* thus have an interest in Texas courts' requiring that non-economic damages amounts have a rational basis grounded in evidence.

SUMMARY OF ARGUMENT[2]

Last June in *Gregory v. Chohan*, this Court reversed a $15.065 million mental-anguish award in another trucking-accident case, involving wrongful death. 670 S.W.3d

[2] This brief adds all emphasis and omits internal quotation marks and citations in quoted materials unless otherwise indicated.

546 (Tex. 2023). There, a Court plurality reaffirmed two principles of Texas law on non-economic damages. *First*, evidence and reason must justify not only the existence of non-economic damages, but also the amount. *Id.* at 551 (Blacklock, J., plurality op.). "Juries cannot simply pick a number and put it in the blank." *Id. Second*, courts of appeals "have a duty" to conduct a "meaningful evidentiary review" of that amount. *Id.* at 550, 555. Such review demands "a rational connection, grounded in the evidence, between the injuries suffered and the dollar amount awarded." *Id.* at 551.[3]

Those principles require reversal here. Building on the foundation laid in *Gregory*, the Court should issue a majority opinion that clearly bars unsubstantiated anchoring. This psychologically powerful tactic causes juries to render awards untethered to evidence and reason, leading to unjustly massive verdicts that hurt the Texas economy and, in turn, Texas citizens. Further, the Court should clarify that, to fulfill their judicial duty to meaningfully review non-economic damages awards in personal-injury cases, courts can and should consider (A) the ratio between a plaintiff's proven economic damages and the non-economic damages award, as well as (B) non-economic damages awards in comparable cases. Ratios are relevant in personal-injury cases because the objective amount of a plaintiff's economic damages will often correlate with the nature, severity, and duration of the plaintiff's non-economic damages. Comparisons to amounts awarded for pain and mental anguish in similar cases likewise give courts an objective reference point to aid their review.

[3] Justices Lehrmann, Huddle, and Young did not participate in *Gregory*. No participating justice dissented.

ARGUMENT

I. A Court majority opinion should clearly prohibit unsubstantiated anchoring, which produces nuclear verdicts unmoored from evidence and harmful to Texas.

Although the proper amount of compensation for pain and suffering or mental anguish cannot be proven with mathematical certainty, jurors must be given a "rational reason grounded in the evidence" for "*why* a given amount of damages, or a range of amounts, would be reasonable and just compensation." *Gregory*, 670 S.W.3d at 561 (original emphasis). This standard necessarily forecloses unsubstantiated anchoring.

As a plurality observed in *Gregory*, unsubstantiated anchoring is "a tactic whereby attorneys suggest damages amounts by reference to objects or values with no rational connection to the facts of the case." *Id.* at 557. Examples include counsel (1) declaring—with no evidentiary basis—the amount of non-economic damages counsel believes a plaintiff suffered or will suffer; (2) comparing a plaintiff's damages to values unrelated to the evidence, like the cost of an expensive painting; or (3) making per diem arguments that ask jurors to assign an arbitrary dollar value for each unit of time (*e.g.*, hour, day, week, or month) that a plaintiff has suffered or will suffer. Plaintiffs' counsel in *Gregory* attempted in closing argument to anchor the jury to a high mental-anguish damages amount by comparisons to the cost of a $71 million Boeing F-18 fighter jet, a $185 million Mark Rothko painting, and the amount of miles driven by the defendant trucking company. *Id.* at 557–58. Such tactics take the jury out of the realm of compensating harm with an amount rationally connected to evidence. *Id.* at 556.

Likewise here, instead of justifying non-economic damages amounts with evidence and reason, plaintiffs' counsel substituted unsubstantiated anchoring for proof. But worse than *Gregory*, counsel's anchoring began in *voir dire*. Before any evidence, counsel asked the venire whether they could award $10–12 million in non-economic damages. Pet. Br. 21–22. Counsel then revisited that anchor in closing argument, referencing the $10–12 million figure repeatedly. *Id.* at 24–26. Counsel made no effort to rationally connect that range to any evidence of pain or mental anguish; counsel merely compared the plaintiffs' pain and mental anguish to salaries of baseball players and the value of a van Gogh painting. *Id.* at 25–26. That unsubstantiated anchoring plainly influenced the jury, which returned a verdict of $12 million untethered to any evidence.

Other jurisdictions have long recognized that such anchoring effectively substitutes counsel's biased advocacy for evidence. *E.g.*, *Stassun v. Chapin*, 188 A. 111, 111 (Pa. 1936) ("In cases where the damages are unliquidated and incapable of measurement by a mathematical standard, statements by plaintiffs' counsel as to the amount claimed or expected are not to be sanctioned, because they tend to instill in the minds of the jury impressions not founded upon the evidence."); *Henne v. Balick*, 146 A.2d 394, 398 (Del. 1958) ("[T]he use by counsel for plaintiff of a mathematical formula setting forth the claim of pain and suffering on a per diem basis was merely a speculation of counsel for plaintiff unsupported by the evidence and was for that reason improper. . . . [I]n many cases . . . the purpose of such use is solely to introduce and

keep before the jury figures out of all proportion to those which the jury would otherwise have had in mind, with the view of securing from the jury a verdict much larger than that warranted by the evidence."); *Caley v. Manicke*, 182 N.E.2d 206, 209 (Ill. 1962) ("[A]n impartial jury which has been properly informed by the evidence and the court's instructions will, by the exercise of its conscience and sound judgment, be better able to determine reasonable compensation than it would if it were subjected to expressions of counsels' partisan conscience and judgment on the matter.").

More recently, the Fifth Circuit condemned anchoring in the course of reversing a $141.5 million non-economic damages verdict. Plaintiffs' counsel told the jury to award damages "by the day, by the hour, by the minute" and then argued that if the defendants "will pay their experts a thousand dollars an hour to come in here, when you do your math back there don't tell these plaintiffs that a day in their life is worth less than an hour's time of this fellow, or people they put on the stand." *In re DePuy Orthopaedics, Inc., Pinnacle Hip Implant Prod. Liab. Litig.*, 888 F.3d 753, 787 n.71 (5th Cir. 2018). The court criticized counsel's per diem anchoring as "mean[ing] simultaneously to activate the jury's passions and to anchor their minds to a salient, inflated, and irrelevant dollar figure." *Id.*

In line with these courts, *Gregory* reflects that at least a majority of this Court's justices rightly consider unsubstantiated anchoring impermissible. *See* 670 S.W.3d at 558 (plurality op.) ("Unsubstantiated anchors like those employed here have nothing to do with the emotional injuries suffered by the plaintiff and cannot rationally connect the

extent of the injuries to the amount awarded."); *id.* at 575 (Devine, J., concurring) ("counsel's improper [anchoring] jury argument could have influenced the damages award."); *id.* at 577 (Bland, J., concurring) ("[T]hese [anchoring] arguments destroyed any rational connection the verdict has to the mental anguish evidence presented.").

But because *Gregory* did not produce a majority opinion, plaintiffs' lawyers—including Respondents' counsel here—have argued that it is not precedential. *See* Resp. Br. 10–11. With unified voice, therefore, the Court should now condemn unsubstantiated anchoring in a majority opinion. Irreconcilable with this Court's requirement that the amount of non-economic damages be grounded in evidence, unsubstantiated anchoring powerfully influences juries to render nuclear verdicts that harm Texas's business climate and consumers.

Contrary to Respondents' arguments, *id.* at 26, this Court need not wait for the Legislature to address unsubstantiated anchoring particularly or review of non-economic damages awards generally. As *Gregory* explained, this Court has taken the lead in defining the scope of non-economic damages, both in expanding the types of injuries for which non-economic damages are available and in setting the evidentiary standard for their recovery. 670 S.W.3d at 553–55.[4] Ensuring that non-economic damages

[4] *Strickland v. Medlen*, 397 S.W.3d 184 (Tex. 2013), is not to the contrary. There, this Court refused to overrule its prior precedent disallowing mental-anguish damages for the death of a pet. *Id.* at 196–97. Rather than create a new cause of action that would have dramatically expanded the class of claimants for non-economic damages, the Court deferred to the Legislature. *Id.* Here, Petitioners and *amici* are not asking the Court to create a new cause of action or upend decades of settled law, but rather to apply its previous precedents to define the type of evidence that will support the amount of an economic damages award.

awards are based solely on evidence and reason—and not on improper considerations like unsubstantiated anchoring—fits squarely within this Court's constitutional role as steward of the common law.

A. Empirical evidence shows that unsubstantiated anchoring powerfully influences jurors to increase damage awards.

Psychologists have long recognized the power of anchoring: "the bias in which individuals' numerical judgments are inordinately influenced by an arbitrary and irrelevant number."[5] Anchoring is so psychologically powerful that it influences a person's decision-making even when the person *knows* the anchor is arbitrary and irrelevant.[6] In one famous study, college students watched a spinning wheel seemingly generate a random number, then answered a question about the percentage of African nations in the United Nations. The anchor influenced their answers even though the students knew the number was arbitrary and irrelevant.[7]

If people on notice that a number is arbitrary could not resist the anchor, then unsuspecting jurors certainly cannot, for they have no warning that the unsubstantiated amount an attorney urges is actually arbitrary and irrelevant. Instead, a "jury is likely to infer that counsel's choice of a particular number is backed by some authority or legal precedent." *Consorti v. Armstrong World Indus.*, 72 F.3d 1003, 1016 (2d Cir. 1995), *vacated on*

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[5] Don Rushing et al., *Anchors Away: Attacking Dollar Suggestions for Non-Economic Damages in Closings*, 70 DEFENSE COUNSEL J. 378, 379 (2003) (quoting Gretchen B. Chapman & Brian H. Bornstein, *The More You Ask For, the More You Get: Anchoring in Personal Injury Verdicts*, 10 APPLIED COGNITIVE PSYCHOL. 519, 538 (1996)).

[6] Daniel Kahneman, THINKING FAST AND SLOW 119 (2011).

[7] *Id.*

other grounds, *Consorti v. Owens-Corning Fiberglas Corp.*, 518 U.S. 1031 (1996). Such anchors thus "have a real potential to sway the jury unduly." *Id.*

Studies confirm this.[8] Since the 1950s, studies have shown that the higher the lawyer's anchor, the higher the ultimate award.[9] "[A]s the demand increases, so does the award—indeed, so much so that one study's title provocatively suggests that 'the more you ask for, the more you get.'"[10] In one recent study, the amount that mock jurors awarded for future pain and suffering increased from a mean of $473,489 and a median of $225,000 with no anchoring to a mean of $1.9 million and a median of $1 million when plaintiffs' counsel requested $5 million in damages for pain and suffering.[11] Another recent study showed that increasing the amount demanded from $250,000 to $5,000,000—without any evidentiary basis—quadrupled a mock jury's award of non-economic damages from $64,623 to $277,857.[12] Studies also reveal that per diem anchors—asking the jury to award an amount per unit of time (seconds, minutes, hours, days, or weeks) that the plaintiff suffered—can also drive up awards.[13] Indeed, anchoring

[8] *E.g.*, Mark A. Behrens et al., *Summation Anchoring: Is it Time to Cast Away Inflated Requests for Noneconomic Damages?*, 44 AM. J. TRIAL ADVOC. 321, 324 & n.16 (Spring 2021).

[9] John Campbell et al., *Time is Money: An Empirical Assessment of Non-Economic Damages Arguments*, 95 WASH. U. L. REV. 1, 13–15 & nn.61–62 (2017) (collecting studies).

[10] *Id.* at 14 (quoting Chapman & Borstein, *supra* n.5, at 519).

[11] *Id.* at 17, 22.

[12] John Campbell et al., *Countering the Plaintiff's Anchor: Jury Simulations to Evaluate Damages Arguments*, 101 IOWA L. REV. 543, 561 (2016).

[13] Bradley D. McAuliff & Brian H. Bornstein, *All Anchors Are Not Created Equal: The Effects of Per Diem Versus Lump Sum Requests on Pain and Suffering Awards*, 34 L. & HUMAN BEHAV. 164, 167, 170–71 (2010) (describing a mock trial study where quantifying plaintiffs' damages at $10 per day increased the mock jury's award).

remains powerful even when the jury does not adopt the anchor wholesale, as jurors will use the anchor as a baseline and discount from that number.[14]

B. Unsubstantiated anchoring produces outsized verdicts that harm Texas's business climate and consumers.

Unsurprisingly, the effects of unsubstantiated anchoring appear not only in studies, but in real-world verdicts—including in Texas. Over the last decade, "nuclear verdicts"—verdicts of over ten million dollars—have exploded, and they continue to increase in size. The median reported nuclear verdict grew from $19.3 million in 2010 to $24.6 million in 2019, a 27.5% cumulative increase.[15] The rise in median nuclear verdicts was particularly steep for auto accident cases, which grew from $15.2 million in 2010 to $24.8 million in 2019.[16] And Texas has been a nuclear-verdict leader: from 2010 to 2019, Texas juries awarded 132 nuclear verdicts, the fourth most in the country in absolute terms and tenth most per capita.[17] Importantly, many of the country's nuclear verdicts—as the verdicts in *Gregory* and in this case both attest—can be directly tied to the use of anchoring tactics.[18]

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[14] *See*, *e.g.*, U.S. Chamber of Commerce Inst. for Legal Reform, NUCLEAR VERDICTS: TRENDS, CAUSES & SOLUTIONS 27 (2022) [NUCLEAR VERDICTS]; *Hodge v. State Farm. Mut. Auto. Ins. Co.*, 884 N.W.2d 238, 255–56 (Mich. 2016) (Markman, J., concurring) (recognizing that a "jury's final award may sometimes be unduly affected by a large initial presentation of damages," which jurors may then "discount" based on plaintiff's credibility or other factors).

[15] NUCLEAR VERDICTS, *supra* note 14, at 7.

[16] *Id.*

[17] *Id.* at 14.

[18] *Id.* at 27–28 (referencing (1) a California products liability case where a jury's pain and suffering award of $37 million matched the plaintiff's anchor; (2) a New York premises liability case where the jury's $85 million award for pain and suffering matched the plaintiff's anchor; and (3) a Georgia trucking accident case where the plaintiff's counsel asked for $200 million in non-economic damages and the jury awarded $180 million).

Those anchoring tactics, and the nuclear verdicts they produce, poison Texas's business climate and threaten to derail the record economic growth in this State.[19] Such verdicts can kill small businesses, stifle business growth, and ratchet up prices for consumers.[20] The threat of nuclear verdicts also raises insurance rates and causes insurers to withdraw from the market altogether.[21]

Nuclear verdicts have especially harmed Texas's trucking industry, as insurance rates have "skyrocketed" with "double-digit growth for umbrella and commercial coverage, even for companies with excellent safety records," causing some operators to close their doors.[22] A 2020 study by the American Transportation Research Institute, chronicled a dramatic increase in both the frequency and amount of verdicts over $1 million from 2005 to 2019.[23] Since then, verdicts against trucking companies continue to increase. A study of reported verdicts and settlements in trucking cases from

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[19] *See* Office of the Texas Governor, "Texas Leads Nation with Fastest Economic Expansion," Mar. 31, 2023, https://gov.texas.gov/news/post/texas-leads-nation-with-fastest-economic-expansion#:~:text=As%20measured%20by%20the%20state's,%2C%20which%20grew%20at%202.6%25.

[20] NUCLEAR VERDICTS, *supra* note 14*,* at 34.

[21] *Id.* at 35.

[22] Keep Texas Trucking Coalition, LAWSUIT ABUSE AND ITS IMPACT ON THE TRANSPORTATION INDUSTRY (2020), http://keeptexastrucking.com/wp-content/uploads/2021/02/KTTC-2020Infographic-0122.pdf.

[23] Am. Transp. Research Inst., UNDERSTANDING THE IMPACT OF NUCLEAR VERDICTS ON THE TRUCKING INDUSTRY 15–19 (June 2020), https://truckingresearch.org/wp-content/uploads/2020/07/ATRI-Understanding-the-Impact-of-Nuclear-Verdicts-on-the-Trucking-Industry-06-2020-3.pdf. [AM. TRANSP. RESEARCH INST.]

June 2020 to April 2023 shows that Texas led the nation with a mean award of $114,617,913 and a median award of $4,500,000.[24]

Trucking companies and insurers' justifiable fears of outsized nuclear verdicts also drive up settlement amounts, leading trucking companies to pay up to nine-figure settlements even when liability is suspect.[25] These higher settlements and verdicts continue to escalate insurance rates, leading to a 37 percent increase in liability insurance premiums from 2012 to 2021.[26] These rising rates forced a number of companies out of business, and those that remained increased their shipping rates to cover the higher insurance costs, some of which were passed onto consumers.[27] "Because trucking is by far the most prevalent means by which communities throughout America get their goods, inflated and disproportionate verdicts against trucking companies affect everyone."[28]

Unsubstantiated anchoring and nuclear verdicts also threaten the State's economic health by causing businesses to lose confidence in Texas's legal system and to reconsider doing business here. "A defining characteristic of a stable and just society is that the law is applied even-handedly."[29] When non-economic damages vary widely from courthouse to courthouse, based not on evidence, but on counsel's anchoring techniques, trust in our legal system erodes. And that can cause businesses to curtail

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[24] U.S. Chamber of Commerce Inst. for Legal Reform, ROADBLOCK: THE TRUCKING LITIGATION PROBLEM AND HOW TO FIX IT 30 (2023) [ROADBLOCK].

[25] *Id.* at 15–16.

[26] *Id.* at 14.

[27] AM. TRANSP. RESEARCH INST., *supra* note 23, at 50.

[28] ROADBLOCK, *supra* note 24, at 12.

[29] NUCLEAR VERDICTS, *supra* note 14, at 38.

operations or leave Texas entirely. For example, 89% of businesses responding to the latest U.S. Chamber of Commerce Institute for Legal Reform survey of state legal climates agreed that a state's litigation environment is likely to impact important decisions, including where to open locations or do business.[30]

* * *

Given the power and harm of unsubstantiated anchoring, the Court in a majority opinion should make clear to litigants and courts that unsubstantiated anchoring tactics—whether lump sum demands, per diem arguments, or comparisons to irrelevant values—are forbidden in Texas.

II. The Court should encourage the use of objective tools to determine whether a non-economic damages amount is fair and reasonable compensation.

If "assigning a dollar value to non-financial, emotional injuries" is inherently subjective (it is), yet factfinders and reviewing courts must still ensure that evidence and reason make non-economic damages amounts "fair and reasonable compensation" for the plaintiff's pain or mental anguish (they must), *Gregory*, 670 S.W.3d at 560 (plurality op.), then jurors and courts need tools "for lending some measure of objectivity and predictability" to their task. *Gregory v. Chohan*, 615 S.W.3d 277, 319 (Tex. App.—Dallas 2020) (*en banc*) (Schenck, J., dissenting), *rev'd*, 670 S.W.3d 546 (Tex. 2023). For juries and reviewing courts, one such tool is the ratio between a plaintiff's economic and non-economic damages. For reviewing courts, another tool is comparison to

[30] *Id.*

non-economic damage awards in similar cases. Here, the court of appeals declined to use either tool. This Court should make clear that, by doing so, the appellate court abdicated its responsibility to perform a meaningful evidentiary review of the jury's $12 million non-economic damages award.

A. Because a plaintiff's economic and non-economic damages often correlate in personal injury cases, jurors and courts should consider the ratio between the two.

The court of appeals below dismissed the 24:1 ratio between the plaintiffs' non-economic damages award and the economic damages incurred because "Appellants cite no case from *this* court endorsing the ratio analysis" and ratios are "typically used for evaluating constitutional limitations imposed on punitive damages and defamation claims." *Alonzo v. John*, 647 S.W.3d 764, 779 (Tex. App.—Houston [14th Dist.] 2022, pet. filed). But both this Court and other courts of appeals have considered ratios in reviewing non-economic damages awards.[31] The *Gregory* plurality rejected a requirement that reviewing courts consider the ratio between economic and non-economic damages in *wrongful-death* cases, viewing ratios as "ill-suited for a wrongful death claim because it

[31] *E.g.*, *Bentley v. Bunton*, 94 S.W.3d 561, 607 (Tex. 2002) (Hecht, J., plurality op.) ("But all of this is no evidence that Bentley suffered mental anguish damages in the amount of $7 million, more than forty times the amount awarded him for damage to his reputation. The amount is not merely excessive and unreasonable; it is far beyond any figure the evidence can support."); *FTS Int'l Servs., LLC v. Patterson*, 2020 WL 5047913, at *13 (Tex. App.—Tyler Aug. 26, 2020) (mem. op.), *pet. granted and remanded w.o. ref. to merits*, 2023 WL 2388215 (Tex. Jan. 27, 2023) (stating "ratio of nonpecuniary damage awards to those for pecuniary losses" is "a factor" in analyzing amount of non-economic damages, and "economic damages . . . less than ten percent" of the $24 million non-economic damages award "certainly suggest[s]" excessiveness); *Gordon v. Redelsperger*, 2019 WL 619186, at *6 (Tex. App.—Fort Worth Feb. 14, 2019) (mem. op.), *supplemented*, 2019 WL 1065916 (Tex. App.—Fort Worth Mar. 7, 2019, no pet.) ("The effort to quantify the analysis also sometimes looks to the ratio of nonpecuniary damage awards to those for pecuniary losses.").

is brought by the surviving family members, not the decedent whose primary economic loss is captured in a separate claim." 670 S.W.3d at 559 n.11. But that wrongful-death carveout did not deny the importance of ratios in other types of cases. To the contrary, the plurality observed that "certainly" circumstances exist in which "economic damages might correlate with noneconomic damages." *Id.* at 560.

Personal-injury cases present such circumstances, making ratios a helpful tool. The *Gregory* plurality opined that the "nature, duration, and severity" of mental anguish are relevant to determining the appropriate compensation for that harm. *Id.* "Nature, duration, and severity" evidence is also relevant to the appropriate amount of pain and suffering damages. *E.g.*, *HCRA of Tex., Inc. v. Johnston*, 178 S.W.3d 861, 870 (Tex. App.—Fort Worth 2005, no pet.) (considering duration of pain). Proven economic damages, in turn, may shed objective light on the nature, duration, and severity of a plaintiff's pain and mental anguish. For example, a plaintiff who has undergone multiple surgeries resulting in hundreds of thousands or millions in medical bills will usually have suffered more pain and mental anguish than a plaintiff who received less extensive treatment and therefore accrued lower medical bills.

Indeed, the record suggests that plaintiffs' counsel in this case understood that the jury could reasonably find a correlation between the plaintiffs' economic damages and a reasonable non-economic damages award. Shortly before trial, the plaintiffs strategically dropped their claims for lost wages and medical expenses. Pet. Br. 50. That kept the jury from learning of the great disparity between their economic damages (discovery

established $50,000 in past medical expenses and $31,736.50 and $433,495 in future medical expenses) and the $10–12 million non-economic damages anchor. *Id.* at 50–51. And that prevented the jury from rightly assessing whether $10–12 million in non-economic damages properly quantified the plaintiffs' emotional harms from their injuries given that those injuries caused disproportionately smaller medical expenses.

Here, the court of appeals' refusal to consider the relationship between economic and non-economic damages—when economic damages are an objective measure that can correlate with the nature, duration, and severity of the plaintiffs' pain and mental anguish—was a dereliction of the reviewing court's duty to ensure that plaintiffs' non-economic damages award was based on evidence and reason. *Gregory*, 670 S.W.3d at 670 (plurality op.).

B. Comparisons to non-economic damages awards in other cases give courts an objective reference point when evaluating whether an award is rational.

In conducting its review, the court of appeals likewise refused to compare the plaintiffs' non-economic damages award to awards in similar cases. But for over 100 years, this Court and the courts of appeals have compared awards in similar cases when reviewing non-economic damage awards.[32] Even before that, English and early

[32] *E.g.*, *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 . . . ."); *San Antonio & A.P.Ry. Co. v. Long*, 28 S.W. 214, 216 (Tex. Civ. App.—San Antonio 1894, writ ref'd) ("[H]eavier verdicts have been sustained in cases where the injuries were not greater than in this case."); *Galveston, H. & S.A. Ry. Co. v. Duelm*, 24 S.W. 334, 336 (Tex. Civ. App.—San Antonio 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

American courts considered comparable awards.[33] More recently, the United States Supreme Court endorsed this comparative method for reviewing punitive-damages awards. *E.g., BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 575 (1996). And United States Supreme Court justices and commentators alike have observed the similarity in reviewing awards of punitive damages and non-economic damages, given the inherent subjectivity and unpredictability in both measures of damages.[34]

As with ratios, comparison to similar cases provides an objective criterion to aid appellate courts in the difficult task of reviewing non-economic damages awards. Use of "comparison is a recognition that the evaluation of emotional damages is not readily

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proportion to the judgment for $20,000 . . . which we approved in" another case); *Baker v. Bell*, 219 S.W. 245, 250 (Tex. App.—San Antonio 1919, no writ) (considering "perhaps, a hundred cases" and comparing the case before it with those involving similar injuries and reversing based on excessive damages); *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" and suggesting remittur based in part on comparison to other cases); *Sunbridge Healthcare Corp. v. Penny*, 160 S.W.3d 230, 250 (Tex. App.—Texarkana 2005, no pet.) ("Even though each case must be judged on its own unique facts, it is proper to consider other approved awards in similar cases to determine if an award for pain and suffering is excessive."); *HCRA of Tex., Inc. v. Johnston*, 178 S.W.3d 861, 872 (Tex. App.—Fort Worth 2005, no pet.); *Cate v. Posey*, 2018 WL 6322170, at *5 (Tex. App.—Dallas, Dec. 4, 2018, no pet.) (mem. op.); *see also Longoria v. Hunter Express, Ltd.*, 932 F.3d 360, 365 (5th Cir. 2019) ("Although the guiding principle is factual sufficiency, a court may look to approved awards in other cases to help determine if the award under review is excessive." (applying Texas law)).

[33] *See* Paul DeCamp, *Beyond* State Farm: *Due Process Constraints on Noneconomic Compensatory Damages*, 27 HARV. J. OF L. & PUB. POL'Y 231, 248 (2003) (citing cases).

[34] *E.g.*, *Gasperini v. Ctr. for Humanities, Inc.*, 518 U.S. 415, 435 n.18 (1996) ("[T]he question whether an award of compensatory damages exceeds what is permitted by law is not materially different from the question whether an award of punitive damages exceeds what is permitted by law."); *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 446 (2001) (Ginsburg, J., dissenting) (noting that "[o]ne 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"); Paul DeCamp, *supra* n. 33, at 291 (noting that "the amorphous nature of the jury's task, the absence of objective criteria to safeguard against consideration of improper factors, and the lack of clear standards to facilitate meaningful judicial review of verdicts" are similar considerations for review of both non-economic and punitive damages).

susceptible to rational analysis." *Salinas v. O'Neill*, 286 F.3d 827, 830 (5th Cir. 2002). And decisions "that make a good-faith effort to employ a comparative analysis lend an air of principle and objectivity to the excessiveness review."[35]

Though numerous courts have managed it, the court of appeals concluded below that "comparison of injuries in different cases is virtually impossible" because each case is unique. *Alonzo*, 665 S.W.3d at 774. Indeed, every case is unique. But cases need not be identical in order to be sufficiently similar that comparison is useful for objectively determining whether a non-economic award is appropriate. For example, in *Anderson v. Durant*, 550 S.W.3d 605 (Tex. 2018), this Court noted that a $400,000 mental anguish award in a defamation case "appear[ed] to be excessive compared to awards in cases involving similar or more egregious behavior," even though the cases that the Court used for comparison were not factually identical. *Id.* at 620 & n.65. And courts can and should factor in cases' dissimilarities, too, when determining the appropriateness of the award before them. Such comparative reasoning is baked into our common-law system.

Comparison to other cases does not, as Respondents urge, "disregard the respective constitutional roles of juries and appellate courts." Resp. Br. 22. Texas appellate courts consider analogous cases in reviewing all manner of legal questions, and, indeed, have compared awards of non-economic damages since the nineteenth century in determining whether the evidence was sufficient to support an award.

[35] Paul DeCamp, *supra* n.33, at 264.

See supra n.32. Unsurprisingly, Respondents cite no case holding that comparison of similar damages awards presents a constitutional problem.

* * *

This Court should clarify that, to determine the appropriate award of non-economic damages in personal injury cases, (A) both factfinders and reviewing courts should consider the ratio between economic and non-economic damages, and (B) reviewing courts should consider how a non-economic award compares to awards in similar cases.

CONCLUSION

A measure of objectivity and predictability in the amount of non-economic damages awards promotes the rule of law and a positive business climate. The Court should reverse the court of appeals' judgment, prohibit unsubstantiated anchoring, and affirm the use of ratios and case comparisons as objective aids to reviewing non-economic damages in personal-injury cases.

Respectfully submitted,

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This brief complies with Texas Rules of Appellate Procedure 9.4(e) and 9.4(i)(2)(B) because it contains 5,352 words and was prepared by Microsoft Word in 14-point Garamond font for text and 12-point Garamond font for footnotes.

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