No. 17-900

IN THE
Supreme Court of the United States

CRANE CO.,
Petitioner,
v.
JEANETTE G. POAGE,
Respondent.

On Petition for a Writ of Certiorari to the Missouri Court of Appeals, Eastern District

REPLY BRIEF IN SUPPORT OF CERTIORARI

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INTRODUCTION

This Court's intervention is urgently needed to resolve the widespread confusion in the lower courts regarding the constitutional limits on punitive damages. Respondent's brief in opposition merely underscores the point.

The petition described the clear split between appellate courts that consider mitigating factors in reviewing the constitutionality of a punitive damages award (such as the Second and Fifth Circuits) and courts that ignore extenuating evidence entirely (such as the Vermont Supreme Court and the Missouri court below). Tellingly, respondent does not even attempt to deny that the lower courts have approached mitigating circumstances differently.

Instead, respondent tries to excuse the split by arguing that the Vermont Supreme Court rejected the consideration of mitigating circumstances while applying the wrong standard of review. But the fact that the Vermont Supreme Court's punitive damages analysis is infected by a second error emphasizes the extent of the confusion on this issue, making this Court's intervention *more* necessary, not less.

Moreover, respondent's intimation that the refusal to consider mitigating circumstances must be the product of an error is striking because the Missouri court below *also* refused to examine mitigating factors as part of its Due Process analysis. Respondent attempts to circumvent that problem by mixing and matching the state law and Due Process analyses to create the illusion that the court considered evidence that it did not. But the court's analysis of the constitutionality of the punitive damages award is devoid of any consideration of the compelling mitigating circumstances in this case, including the fact that petitioner's liability arises from its sale of materials designed according to naval specifications for use on naval ships. In short, the first question presented implicates a clear split; the court below is on the wrong side of it; and certiorari review is plainly warranted.

Turning to the second question presented, respondent cannot explain how the $10 million punitive damages award in this case comports with Due Process, particularly given the mass tort context in which this suit arises. This Court has made clear that punitive damages are permissible only when the compensatory liability is insufficient to meet the State's legitimate goals of punishment and deter-

rence. And it has stated that a 1:1 ratio of punitive to compensatory damages may be the constitutional maximum in the face of substantial compensatory liability. Yet here, the Missouri Court of Appeals affirmed an award that was *twelve* times the substantial compensatory award, despite the fact that petitioner may face extensive compensatory liability in other suits throughout the country.

Unable to defend that holding, respondent misleadingly asserts that petitioner has waived its Due Process challenge. But petitioner repeatedly raised a Due Process claim in the courts below, properly preserving it for this Court's determination. And respondent's suggestion that petitioner forfeited its constitutional challenge by declining to take advantage of an inapposite state law provision for obtaining punitive damages setoffs misunderstands the nature of petitioner's challenge: Crane Co. alleges that the $10 million award violates the Due Process Clause because it cannot possibly take account of the punitive and deterrent effects of the substantial *compensatory* damages in this case and in other suits based on the same conduct. A setoff for prior *punitive* damages would not remedy that problem.

Finally, while respondent repeatedly emphasizes that this Court has "decline[d] * * * to impose a bright-line ratio" for every punitive damages case, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 425 (2003), the opposite of a bright-line rule is not utter confusion. The disarray in the lower courts is reason enough for this Court's intervention, and the decision below—with its virtually unprecedented

12:1 ratio of punitive to compensatory damages—provides an ideal vehicle for this Court's review.

ARGUMENT

I. THE COURT SHOULD RESOLVE THE SPLIT REGARDING THE ROLE OF MITIGATING FACTORS.

The petition described a clear split regarding whether appellate courts must consider mitigating factors in reviewing a punitive damages award under the Due Process Clause. Respondent does not deny that multiple federal and state courts consider mitigating factors as part of the constitutional analysis required by *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 583 (1996), and *State Farm*. *See Payne* v. *Jones*, 711 F.3d 85, 101-102 (2d Cir. 2013); *Cooper* v. *Morales*, 535 F. App'x 425, 433 (5th Cir. 2013) (per curiam); *Aken* v. *Plains Elec. Generation & Transmission Co-op., Inc.*, 49 P.3d 662, 669 (N.M. 2002).[1] Respondent also admits that the Vermont Supreme Court refused to consider mitigating factors in *Carpentier* v. *Tuthill*, 86 A.3d 1006, 1013-1014 (Vt. 2013). And, try as she might, respondent cannot disguise the fact that the Due Process analysis performed by the Missouri court below did not consider *any* of the extenuating factors set forth by

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[1] Respondent suggests (at 6) that *Payne* is irrelevant because the Second Circuit considered the limits on punitive damages imposed by federal common law rather than the Constitution. But the *Payne* court specifically indicated that its analysis was guided by this Court's *constitutional* precedents. 711 F.3d at 101 (quoting *Gore*, 517 U.S. at 575, and citing *State Farm*, 538 U.S. at 417-419).

petitioner, including the fact that petitioner's allegedly wrongful conduct involved the sale of materials to the Navy, according to naval specifications, at a time when the scientific community had not identified any health risks associated with such materials.

Respondent nevertheless denies the existence of a cert-worthy split. Because her arguments are wholly unavailing, certiorari should be granted.

1. Respondent argues (at 6-7) that there is no real conflict in the lower courts because the Vermont Supreme Court's decision refusing to consider mitigating evidence *also* applied "abuse of discretion" review rather than the *de novo* standard this Court requires.

There are multiple problems with respondent's position. First, respondent seems to believe that the error with respect to the standard of review explains away the Vermont court's refusal to consider mitigating factors. But the court itself did not suggest that it was refusing to consider mitigating factors because of the "abuse of discretion" standard. Nor is there any reason to think that standard would foreclose the consideration of extenuating factors. The standard of review affects how clear the error needs to be; it does not affect what factors the court may consider.

Second, even if the standard of review did play a role in the Vermont court's refusal to consider mitigators, that would not erase the split. Whatever the rationale behind the Vermont Supreme Court's decision, *Carpentier* is the law in Vermont, and—like the decision below—*Carpentier* conflicts with decisions from multiple other jurisdictions that consider

mitigating factors as part of the Due Process analysis.

Third, the very fact that the Vermont Supreme Court misapplied this Court's precedent regarding the proper standard of review demonstrates the extent of the confusion in the lower courts regarding the nature of the "exacting appellate review" the Constitution requires. That too underscores the need for this Court's intervention.

2. Respondent next argues that *this* case does not implicate any split because the Missouri Court of Appeals *did* consider the mitigating factors petitioner set forth. That is incorrect.

Respondent relies (at 9-10) exclusively on a passage in which the court articulated factors, including "aggravating and mitigating circumstances," it might consider in assessing whether remittitur is required under Missouri state law. Pet. App. 43a. A passing reference in a portion of the opinion devoted to a *state law* analysis of the punitive damages award cannot possibly establish that the court appropriately considered mitigating factors in analyzing whether the award complies with the Due Process requirements of the *federal Constitution*. Indeed, the Missouri court emphasized the very different standard of review and requirements inherent in the state law analysis as compared to the Due Process analysis. Pet. App. 42a. In any event, even in the course of its state law analysis, the court did not mention let alone discuss *any* of the mitigating factors set forth by petitioner. Instead, it considered exclusively *aggravating* factors. *See* Pet. App. 43a.

3. In the end, respondent is left to contend (at 7-8) that even if there is a split regarding the role of

mitigating factors in the Due Process analysis, this Court should defer its consideration to some later date. But there is no reason to wait.

This Court has emphasized the importance of "exacting appellate review" in the Due Process analysis. Yet, until this Court intervenes, many lower courts will continue to provide a lopsided form of review that focuses exclusively on aggravating evidence, ignoring mitigating factors that might expose the unconstitutional excesses inherent in a particular award. Moreover, it is impossible to gauge the extent of the problem because this Court has never explicitly addressed the role of mitigating factors in the Due Process analysis, and many lower court opinions are silent on the issue. Thus, mitigating factors may not even be on many courts' radars *at all*.

The decision below illustrates why that is a problem: The court affirmed a $10 million punitive damages award without even considering that Crane Co. sold the relevant materials to the Navy, according to naval specifications. Pet. App. 13a; *see Boyle* v. *United Techs. Corp.*, 487 U.S. 500, 511-512 (1988) (emphasizing the dangers of inflicting heavy financial liability on government contractors); Pet. 13. To prevent that unjust result and similar errors in the future, this Court should grant certiorari.

II. THIS COURT SHOULD CLARIFY THE CONSTITUTIONAL LIMITS ON PUNITIVE DAMAGES IN MASS TORT SUITS.

As this Court has explained, "punitive damages should only be awarded if the defendant's culpability, *after having paid compensatory damages*, is so

reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence." *State Farm*, 538 U.S. at 419 (emphasis added). Further, "[w]hen compensatory damages are substantial, * * * a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 425. But, as the petition demonstrated, there is profound confusion as to when compensatory damages should be deemed sufficient to preclude punitive damages or to permit no more than a 1:1 ratio. And that confusion is particularly acute in the mass tort context, where a single course of conduct gives rise to multiple suits, each carrying the possibility of substantial compensatory damages.

1. Respondent offers no meaningful response. Instead, respondent insists (at 12-15) that petitioner has forfeited this question. But petitioner argued at the very first opportunity that the punitive damages award violated the federal Due Process Clause. Post-Trial Mot. 29-34 (The award is "clearly excessive under the Supreme Court precedents that define the outer limits that due process places on punitive damages awards."). And petitioner reasserted this claim in the Missouri Court of Appeals and in its timely application to transfer the case to the Missouri Supreme Court. *See* Br. 48-49, 51-54 ("The jury's punitive-damages award does not comport with principles of due process."); Appl. for Transfer in Mo. Ct. App. 5-10 ("A punitive-to-compensatory ratio as high as the one here is * * * constitutionally impermissible * * * ."); Appl. for Transfer in Mo. 7-11 ("[T]he appellate court applied the wrong standard in addressing Crane Co.'s Due Process challenge, and reached the wrong result.").

In addition, petitioner explicitly highlighted the Due Process concerns that arise when a defendant faces multiple suits as a result of the same course of conduct. Reply Br. 12-13 n.6 (citing *Roginsky* v. *Richardson-Merrell, Inc.*, 378 F.2d 832, 838-842 (2d Cir. 1967), for the proposition that "due process concerns * * * arise when the same conduct is punished on multiple occasions"); Appl. for Transfer in Mo. Ct. App. 6 n.1 ("This action is one of thousands pending against Crane Co. across the country involving the same basic allegations, and imposing punitive damages on Crane Co. here constitutes an excessive and unconstitutional punishment."); Appl. for Transfer in Mo. 9 ("[B]ecause the punitive award here punishes the same conduct that is at stake in numerous other suits across the country, it is necessarily arbitrary and duplicative.").

Thus, petitioner has clearly preserved this question. The Court's "traditional rule is that [o]nce a federal claim [like Due Process] is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (internal quotation marks omitted). Even if the "due process issues * * * sought to be presented * * * were never raised by Petitioner" below, which they were, this Court can "declar[e] what due process requires" because "that matter was fairly before the Court of Appeals." *Nelson* v. *Adams USA, Inc.*, 529 U.S. 460, 469-470 (2000).

Respondent also asserts (at 13) that petitioner has forfeited the question because it failed to seek a setoff for prior punitive damages awards under a

Missouri statute. But respondent misunderstands the nature of petitioner's Due Process challenge. Petitioner contends that the punitive damages award in this case is unconstitutionally arbitrary and untethered to the State's legitimate goals because it cannot possibly account for the total *compensatory* liability petitioner may face as a result of the same conduct. A setoff for prior punitive awards does not address that problem. In any event, such setoffs are of limited use in preventing duplicative punitive damages for defendants who face suits throughout the nation because there is no way to ensure that every State will provide for setoffs or calculate them in the same way.

2. On the merits, respondent contends (at 22-23) that there is no need for this Court to consider the question presented because punitive damages in mass tort suits do not pose any special challenges. Respondent is mistaken.

Nowhere is that more obvious than in respondent's attempted defense (at 23) of the disparity between punitive damages assessments in class actions and in individual suits. Respondent forthrightly acknowledges that in a class action, the *aggregate* compensatory damages awarded to all class members are the touchstone for assessing whether and to what extent additional punitive damages are necessary. Yet she simultaneously asserts that if plaintiffs instead sue individually, the individual award should serve as the touchstone. The result is that a defendant may face different punitive liability depending on whether plaintiffs sue individually or as a group. That cannot possibly be consistent with the Due

Process Clause's protections against arbitrary and unpredictable awards.

Respondent's additional merits argument is equally flawed. Respondent contends (at 22) that imposing punitive damages in mass tort suits must be constitutional because the practice is well-established. But when Judge Friendly surveyed the history of punitive damages, he concluded otherwise, observing that traditionally they were awarded in cases where "the number of plaintiffs [was] few" and where it was likely "they w[ould] join, or c[ould] be forced to join, in a single trial." *Roginsky*, 378 F.2d at 838-839. Thus, even if some forms of punitive damages are consistent with the Due Process Clause because they existed when the Clause was ratified, the same cannot be said of punitive damages in mass tort cases.

3. Finally, respondent attempts to minimize the virtually unprecedented 12:1 ratio of punitive to compensatory damages in this case and to downplay the confusion in the lower courts regarding the constitutional limits on punitive damages in the face of *any* substantial compensatory award. *See* Pet. 17. But respondent's arguments on this score are unavailing and in fact point to an additional area of disagreement in the lower courts.

Respondent argues (at 15) that the ratio of punitive to compensatory damages is not 12:1 because the relevant compensatory damages number is the one awarded by the jury rather than the one awarded by the trial court, which reduced the compensatory award to account for respondent's settlements with other defendants. But the lower courts are divided regarding whether such setoffs are relevant in the

punitive damages analysis. For example, in *Hayes Sight & Sound, Inc.* v. *ONEOK, Inc.*, 136 P.3d 428 (Kan. 2006), the Kansas Supreme Court summarily concluded that "[t]here is no sound reason for subtracting setoff before calculating the ratio." *Id.* at 447-448. By contrast, in *Lompe* v. *Sunridge Partners, LLC*, 818 F.3d 1041 (10th Cir. 2016), the Tenth Circuit held that a court must assess the ratio only after deducting setoffs because a punitive damages award should be compared only with a "[d]efendant's individual portion of the total compensatory damages." *Id.* at 1068.

In addition to highlighting another split, respondent fails to explain away the two splits described in the petition regarding what constitutes a "substantial" compensatory award and what the appropriate ratio is when "substantial" compensatory damages have been awarded. Respondent suggests that the diverging decisions can be explained based on whether the case involved physical harm. But that explanation does not hold water.

Even in physical harm cases, the lower courts disagree about how large compensatory damages must be to be deemed "substantial." *Compare Flax* v. *DaimlerChrysler Corp.*, 272 S.W.3d 521, 539 (Tenn. 2008) (multi-million dollar award is not substantial in wrongful-death case), *with Boerner* v. *Brown & Williamson Tobacco Co.*, 394 F.3d 594, 598, 602-603 (8th Cir. 2005) ($4.025 million award is substantial in wrongful-death case). And they have come to diverging conclusions regarding the maximum ratio permitted in such cases. *Compare Boerner*, 394 F.3d at 603 (reducing 3:1 ratio to 1:1), *and Lompe*, 818 F.3d at 1073-1075 (applying 1:1 ratio in physical-

harm case with $1.95 million compensatory award), *with Manor Care, Inc.* v. *Douglas*, 763 S.E.2d 73, 94, 104-106 (W. Va. 2014) (upholding 7:1 ratio in physical-harm case despite "large compensatory award" of $4.6 million), *and Stogsdill* v. *Healthmark Partners, L.L.C.*, 377 F.3d 827, 833 (8th Cir. 2004) (applying 4:1 ratio in physical-harm case while acknowledging the "substantial" $500,000 compensatory award).

In short, the lower courts are in disarray, and this case—in which the court below affirmed a $10 million punitive damages award arising from the sale of materials to the Navy according to naval specifications—represents a strong opportunity to provide much needed guidance.

CONCLUSION

The petition should be granted.

Respectfully submitted,

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MARCH 2018