No. 19-646

IN THE
Supreme Court of the United States

ALAINA ADKINS AND
MAXIM HEALTHCARE SERVICES, INC.,
Petitioners,

v.

JESSE MICHAEL COLLENS,
Respondent.

On Petition for Writ of Certiorari
to the Supreme Court for the State of Alaska

REPLY TO OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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THE STATUTORY CIVIL PENALTY IMPOSED IN THIS CASE ALLOWED AN AWARD OF $500 OR $12.9 MILLION, BUT NOTHING IN BETWEEN, AND PROVIDED NO METHOD FOR ANALYZING OR ADJUSTING THE AWARD TO ENSURE IT COMPLIED WITH THE FOURTEENTH AMENDMENT'S DUE PROCESS CLAUSE

This case presents an excellent vehicle for the Court to address when and whether statutory civil damages offend the Fourteenth Amendment's Due Process clause, and to provide clarifying guidance for lower courts.

Collens quarrels on the margins of Maxim's petition, but offers no credible argument to support the grossly excessive and disproportionate statutory civil damages imposed in this case.

In granting a conditional stay of judgment, a Justice from the Alaska Supreme Court noted: "Maxim makes a convincing argument that it has serious and substantial questions to raise concerning whether the treble damages awarded under the Alaska Unfair Trade Practices Act (and potentially the punitive damages awards) violate the Due Process Clause of the Fourteenth Amendment." App. 2a (filed with Petition).

If, as Collens argues, there is no basis for this Court's review, the Alaska Supreme Court would never have granted a stay.

All of the arguments that Collens raises in its response to the petition were rejected by the Alaska Supreme Court in granting a conditional stay.

The issues presented by this case are questions of law that do not implicate any disputed or unresolved facts.

Maxim has not mischaracterized the damages at issue in its petition. To the contrary, Maxim squarely addressed the unconstitutional nature of the statutory civil damages that were imposed in this case. However, all of the damages are relevant for that inquiry because, where substantial damages are awarded (and they were here), this Court's precedent cautions that exemplary damages should normally be limited to a 1:1 ratio. *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003); *Exxon v. Baker*, 554 U.S. 471, 513 (2008). Collens ignores this precedent.

Collens' interpretation of existing circuit precedent is countered by the scholars and commentators cited and discussed in Maxim's petition who have reached a different conclusion.

As addressed in the petition, there is tremendous confusion regarding when and whether statutory civil damages offend the Fourteenth Amendment's Due Process clause. The confusion cuts across state and federal jurisdictions, implicating dozens of state and federal statutes.

Here, as applied in this case, Alaska's Unfair Trade Practices Act allowed imposition of a statutory civil penalty of $500 *or* $12.9 million (treble damages), but nothing in between these two extremes with no method for any court to adjust the ultimate award. Comparable punitive damages serving an overlapping purpose (to punish and deter)

are subject to caps, must satisfy due process tests established by *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 575-85 (1996) and may be reduced by remittitur.

Maxim never had any notice that providing healthcare would lead to such a grossly disproportionate judgment when there was no death, no physical injury, and no complications affecting Collens.

No objectively reasonable argument supports a statutory civil penalty of $500 or $12.9 million, but nothing in between these extremes.

No rational, reasonable system should allow imposition of $12.9 million in statutory civil damages imposed by legislative fiat that cannot be reduced even though comparable punitive damages are subject to caps, must satisfy due process tests established by *Gore*, and may be reduced by remittitur.

Separate from the existing circuit split and lower court confusion, this case merits review under *St. Louis I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63 (1919), precedent again ignored by Collens.

No objectively reasonable argument supports $12.9 million as a statutory civil penalty. The temporary suspension of Collens' private duty nursing agreement resulted in damages valued by Collens' expert at $287,000. App. 79a, ¶ 76 (filed with Petition). There was no death, no physical injury, and no complications attending Collens' condition. Even though Collens was lawfully

discharged in February 2013, the Superior Court imposed contract damages covering Collens' expected life span, resulting in damages of $4.3 million. This is a substantial amount by any measure. If this were a punitive damages case, principles announced by *State Farm Mutual Automobile Ins. Co. v. Campbell*, 538 U.S. 408, 425 (2003) and *Exxon v. Baker*, 554 U.S. 471, 513 (2008) would limit the penalty to a 1:1 ratio.

This case merits review on several grounds. The issues implicate significant federal questions under the Fourteenth Amendment's Due Process clause for which lower courts desperately need instruction.

MAXIM'S DUE PROCESS ARGUMENTS WERE PROPERLY PRESERVED

Collens does not materially quarrel with any of Maxim's substantive arguments. He cannot.

Instead, Collens argues the due process issues were never properly preserved, briefly presenting that argument at the end of his response. In arguing waiver, Collens fails to note the statutory civil damages claim was never actually alleged in this case, but was instead added by the Superior Court by post-trial amendment. App. 94a-103a (filed with Petition).

Maxim argued the due process issues in both its Opening Brief and in a Supplemental Brief. *See* Opening Brief at App. 176a-177a (filed with Petition); Supplemental Brief at App. 219a-220a (filed with Petition).

Maxim argued the damages imposed in this case were grossly disproportionate to any actual harm, excessive, and ran afoul of due process principles established by *BMW Gore*, *State Farm*, *Exxon*, and their progeny. App. 176a-177a, 219a-220a (filed with Petition).

This Court has instructed there is "no general rule" regarding waiver, and instead has left it to the discretion of the reviewing appellate court. *Singleton v. Wulff*, 428 U.S. 106, 121 (1976)

All of the due process issues raised by Maxim's petition present pure questions of law. These are properly preserved under both Ninth Circuit and Alaska Supreme Court precedent. *See Scott v. Ross*, 140 F.3d 1275, 1283-84 (9th Cir. 1998); *Kimes v. Stone*, 84 F.3d 1121, 1126 (9th Cir. 1996); *Columbia Steel Casting Co., Inc. v. Portland Gen. Elec. Co.*, 111 F.3d 1427, 1443 (9th Cir. 1996); *Cragle v. Gray*, 206 P.3d 446, 450 (Alaska 2009).

The Alaska Supreme Court takes a "liberal approach towards determining whether an issue or theory of a case was raised . . . ." *Zeman v. Lufthansa German Airlines*, 699 P.2d 1274, 1280 (Alaska 1985). The appellant "need not have expressly presented every theory supporting an argument . . ., but can expand or refine details of an argument otherwise preserved on appeal." *Id.*

In order to determine whether "new" arguments will be considered, the Alaska Supreme Court considers whether they were raised below and, if not, whether they are closely related to arguments that were raised. *Zeman*, 699 P.2d at 1280.

Zeman is no outlier. The Alaska Supreme Court regularly accepts review of arguments that expand or refine previously presented arguments. *See O'Neill Investigations, Inc. v. Illinois Employers Insurance of Wausau*, 636 P.2d 1170, 1175 n.7 (Alaska 1981). *City of Hydaburg v. Hydaburg Co-op Ass'n,* 858 P.2d 1131, 1136 (Alaska 1993), *McConnell v. State,* 991 P.2d 178, 184 (Alaska 1999).

This Court observes the same principles. This Court will entertain arguments that are simply variations of an argument preserved below. For example, in *Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992), this Court held a regulatory taking argument was not waived by a party who argued physical taking below because they were not separate claims, but "separate arguments in support of a single claim-that the ordinance effects an unconstitutional taking." The Court observed, "[o]nce a federal claim 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." *Id.* at 534.

After the Alaska Supreme Court denied Maxim's petition for rehearing, Maxim moved for a conditional stay of the judgment, outlining the same due process arguments in its motion papers as it raised in its petition. App. 1a (filed with this Reply).

In order to secure a stay, Maxim was required to show, in part, that its proposed petition for certiorari had legal merit; that is, that it raised serious and substantial questions addressing the

merits that were not groundless or frivolous. App. 2a (filed with Petition).

The Alaska Supreme Court, in granting the stay, noted: "Maxim makes a convincing argument that it has serious and substantial questions to raise concerning whether the treble damages awarded under the Alaska Unfair Trade Practices Act (and potentially the punitive damages awards) violate the Due Process Clause of the Fourteenth Amendment." *See* App. 2a (filed with Petition).

If the due process issues were waived, or not properly preserved, the Alaska Supreme Court would never have granted the stay.

If the due process issues were waived, or not properly preserved, the Alaska Supreme Court would never have commented that Maxim raised a "convincing argument."

Maxim's arguments are properly preserved for this Court's review, and should be reviewed.

CONCLUSION

The Court should issue a writ of certiorari and review the Alaska Supreme Court's opinion to clarify when and whether civil statutory damages offend the Fourteenth Amendment's Due Process clause.

Respectfully submitted,

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