

No. _____

In the
Supreme Court of the United States

LARRY GRANT,
Petitioner,

v.

TOM BENNETT AND
JAMES B. BONHAM CORPORATION,
Respondents.

On Petition for a Writ of Certiorari
to the Supreme Court of Texas

PETITION FOR CERTIORARI

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QUESTIONS PRESENTED

This dispute concerns the potential harm aspect of the constitutional test for exemplary damages. Bennett committed malicious prosecution by procuring a felony indictment against Grant—who was a witness against him in a different civil case. Pet. App. 68a. As Grant was merely a ranch hand, of limited means, his provable actual damages were a modest \$10,703. *Id.* at 5a.

The courts thus had to confront the lurking question of “potential harm.” The Texas Supreme Court held that the Constitution bars States from keying exemplary damages to “potential harm” absent proof that each such harm was statistically likely. *Id.* at 17a.

The questions presented are:

1. Whether States can use exemplary damages to punish or deter classes of particularly egregious misconduct that threaten enormous harm to both private and public interests, without needing to show “to a probability” (Pet. App. 15a) that each specific threatened harm is statistically likely.
2. Whether the *Gore* framework remains viable if the “actual or potential harm” analysis prevents States from imposing exemplary damages that are substantial enough to meaningfully deter or punish an intentional wrongdoer like Bennett, who has targeted a financially vulnerable victim.

IDENTITY OF PARTIES

The Petitioner is Larry Grant. One of the Respondents is Tom Bennett. The other Respondent is the “James B. Bonham Corporation,” a privately held Texas corporation the ownership of which is, according to this record, held by Bennett’s family.

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OPINIONS BELOW

The opinion of the Supreme Court of Texas is reported at 525 S.W.3d 642 (Tex. 2017). The opinion of the intermediate court of appeals is reported at 460 S.W.3d 220 (Tex. App.—Austin 2015).

An older decision that the opinion below refers to by the shorthand “*Bennett I*” is not a part of this cause, although it did involve the same Respondents. The Petitioner Grant was not a party to that previous civil case but was, instead, one of the key witnesses against the Respondents, who were ultimately found liable for the conversion of a neighbor’s cattle. That previous case is reported as *Bennett v. Reynolds*, 315 S.W.3d 867 (Tex. 2010).

JURISDICTION

The opinion and judgment of the Supreme Court of Texas were issued on April 28, 2017. (App. 1a) The court denied rehearing on September 22, 2017. (App. 97a)

This Court has jurisdiction to review the final judgment of the highest court of a state that rests on a question of federal constitutional law. 28 U.S.C. §1257.

CONSTITUTIONAL PROVISION INVOLVED

The opinion below interprets and turns on the Due Process Clause of the Fourteenth Amendment: “nor shall any State deprive any person of life, liberty, or property without due process of law.” U.S. CONST. amend. XIV, §1.

This petition does not directly involve statutory provisions, but some Texas statutes are mentioned in the analysis. The statutory system that the Texas Legislature has enacted to regulate exemplary damage awards—including a provision that singles out categories of especially culpable misconduct for heightened penalties—is found at Chapter 41 of the Texas Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE §41.001, *et seq.*; *see* App. at 10a.

The statute by which the Texas Legislature has quantified the compensation to be paid to innocent persons wrongfully imprisoned is in Chapter 103 of the Civil Practice and Remedies Code. TEX. CIV. PRAC. & REM. CODE §103.052; *see* App. at 16a & 76a. The lump-sum portion of compensation under this statute is \$80,000 for each year that a person was wrongfully imprisoned. *Id.*

STATEMENT

A. Prologue to this malicious prosecution

This dispute grows from “an infamous cattle-rustling incident in San Saba County.” (App. 2a). In 2000, a Texas rancher named Tom Bennett instructed one of his ranch hands to load and sell thirteen cattle that were actually the property of his neighbor, Randy Reynolds. (App. 2a). That ranch hand, Larry Grant, was concerned about this directive and took some photographs of the cattle showing the neighbor’s distinctive cattle brand. (App. 2a & 27a).

Grant later served as a key witness in a civil suit between Reynolds and Bennett. (App. 52a). Eventually, the courts of Texas concluded that Bennett was

liable to Reynolds for conversion and had to pay him a small amount of exemplary damages. (App. 27a). The *Reynolds* case ended in 2010; those claims are not at issue here.¹

The present dispute grows out of Bennett’s vendetta against Grant for having been a witness in that civil suit. Shortly after Grant began telling his side of the story, and while he was still a civil witness, Bennett filed the present lawsuit—which began as a slander claim by Bennett against Grant. (App. 5a). Bennett pursued that slander claim for nearly a decade; after a merits trial, the district court concluded that, not only was that slander claim meritless, but that it had been groundless and warranted sanctions under Texas law.² (App. 5a).

In a separate civil suit, Bennett also sued Grant, Reynolds, and one of Randy Reynolds’s lawyers, alleging that they had formed a conspiracy that caused him to suffer the adverse judgment in the *Reynolds* case. *Bennett, Bonham & Paris v. Reynolds*, No. 03-12-00568-CV, 2014 Tex. App. LEXIS 9345 (Tex. App.—Austin Aug. 22, 2014, pet. denied). That civil filing also led to a sanctions award against Bennett, his corporation, and his attorney, which was ultimately affirmed on appeal. *Id.*

¹ The opinion below labels the *Reynolds* case “*Bennett I*,” a nomenclature that incorrectly suggests a continuity of parties or claims. (App. 2a). Bennett was indeed a party to *Reynolds*; Grant was, however, just a witness.

² The court below affirmed an award of \$269,644.50 in sanctions for Bennett having brought this groundless slander claim. (App. 22a). The sanctions award does not involve any issue of federal law and is final below.

B. Bennett’s malicious felony prosecution of Grant, who was a witness against him

Meanwhile, Bennett also relentlessly sought to have criminal charges brought against Grant. Bennett “admitted at trial that his primary ‘goal’ in doing so was to put ‘Grant in prison . . . for what he’s done to me.’” (App. 3a).

Bennett shopped his accusations to the elected district attorneys in four different counties, reshaping the facts as he went. (App. 3a). The first refused to prosecute; the second refused to prosecute; the third refused to prosecute; and the fourth, in Bennett’s local Navarro County, merely referred the matter to federal authorities. (App. 3a.). Bennett persisted, contacting that fourth district attorney once again with a still-evolving story—one tailored to address some of that prosecutor’s stated concerns. (App. 3a). The district attorney testified that this made him “‘skeptical’ of the new information because it ‘appeared that there was maybe some tailoring of the facts going on to fit the statute.’” (App. 3a).

Bennett persisted, hiring an attorney to submit a legal memorandum outlining a new theory of criminal liability, which was submitted again to the local district attorney. (App. 4a). The district attorney relented despite his doubts, taking the question to a grand jury, which entered a no-bill on those charges. (App. 4a).

Bennett persisted, tasking his private attorney to draw up a petition demanding the appointment of a special prosecutor for his case. (App. 44a-45a). Bennett took the lead in obtaining 250 signatures for this petition: “it was mostly me.” (App. 31a). The petition circulated by Bennett named one of his neighbors,

Robert Dunn, as the person who should be appointed special prosecutor. (App. 4a & 31a).

The local district attorney once again relented to Bennett's demands. (App. 4a). Dunn was appointed special prosecutor. (App. 4a). Even to the special prosecutor, Bennett's story continued to evolve, adding embellishments about supposed specific dollar figures demanded and supposed transcripts of taped conversations. (App. 33a-34a).

The special prosecutor took Bennett's latest accusations to a grand jury, which returned a felony indictment against Grant. (App. 5a & 34a). This indictment required Grant to find the means to post a \$10,000 bond or face immediate and indefinite imprisonment. (App. 11a & 59a). The charges carried a potential penalty of two to ten years, as well as a potential fine of \$10,000. (App. 59a & 75a).

Grant's criminal-defense counsel later filed a motion to quash, arguing that the facts alleged in the indictment fell outside the proper statute of limitations. (App. 34a). The special prosecutor testified that he believed the charge was within the proper statute of limitations for this offense.³ The criminal court in Navarro County sided with Grant, dismissing the felony

³ The prosecutor was not confined to the dates stated in the indictment. Texas criminal procedure allows prosecutors to come forward with evidence showing dates of activity later than those stated in an indictment. *Klein v. State*, 273 S.W.3d 297, 303 n.5 (Tex. Crim. App. 2008) (approving instruction: "the State is not required to prove the exact date alleged in the indictment..."). The Texas Court of Criminal Appeals, which has the final word on Texas criminal law, has "overruled complaints about a variance between the pleading and

indictment nine months after it was brought. (App. 5a).

C. Proceedings

1. District Court

After the conclusion of the criminal case that Bennett had procured against him,⁴ Grant filed an amended answer with a counterclaim for malicious prosecution. (App. 19a). The district court found, after a jury trial, that Bennett was liable for malicious prosecution and had caused actual damages of \$10,703, a mix of attorney's fees and a modest amount of mental-anguish damages. (App. 5a). The district court also concluded that Bennett's conduct qualified under the Texas statute for an award of exemplary damages in excess of the \$250,000 cap that would normally have applied to small awards of actual damages. (App. 11a). The district court entered a final judgment awarding \$1,000,000 in exemplary damages against each of these two defendants. (App. 95a).

2. Intermediate Appellate Court

The court of appeals sitting in Austin affirmed, after its suggested remittitur was accepted. (App. 91a). On exemplary damages, the court of appeals held that Bennett's conduct met the criteria to qualify for a heightened exemplary award under the Texas statute. (App. 57a).

proof of relevant dates, even if the discrepancy is as much as several years." *Id.*

⁴ Under Texas law, one of the elements of malicious prosecution is that the prosecution be terminated in the plaintiff's favor. (App. 35a-36a). Another is that the plaintiff be actually innocent. (App. 36a).

Bennett also challenged the exemplary award under the federal constitution. The court of appeals looked to the formulation of this test in *TXO* and in *Gore*:

U.S. Supreme Court precedent requires us to compare the exemplary damages awarded in this case to both “the harm that has actually occurred” and the potential harm that Grant would have sustained if Bennett’s “wrongful plan had succeeded.”

(App. 76a) (citing *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 460 (1993); *BMW of N. Am. v. Gore*, 517 U.S. 559, 581 (1996)).

Focusing on the what harm Bennett had intended to inflict on Grant through his malicious conduct, the court of appeals held that “the record conclusively shows that Grant would have been imprisoned for two to ten years if Bennett had succeeded in his illicit scheme.” (App. 75a).

To quantify the magnitude of the intended harm, so that it could be compared to the exemplary award, the court of appeals looked to a Texas statute that compensates those who have been wrongfully imprisoned and later exonerated.⁵ (App. 76a). As the court put it, “the State’s restitution payments reflect the value the Legislature has placed on a year of life lost to wrongful imprisonment and provide a guidepost for the potential damages in this case.” (App. 77a.). Those

⁵ Grant was in a similar position because the district court had concluded, as an element of Texas’s claim for malicious prosecution, that Grant was innocent of the underlying crime. (App. 36a).

payments could have been \$80,000 in a lump-sum payment for each year of imprisonment, added to an annuity valued at \$80,000 for each year.⁶ (App. 76a). The court chose to make some conservative estimates—choosing the two-year minimum sentence and including only the lump-sum amount, not the annuity (which might vary based on the number of years of life remaining). (App. 77a). From that legislative benchmark, the value the court of appeals used to evaluate potential harm was thus \$160,000. (App. 77a).

Adding that figure to the \$10,703 in other damages, the court of appeals determined the total “actual or potential harm” to be \$170,703. (App. 77a). It then concluded that, in light of the constitutional factors, “a ratio of 3:1 exemplary damages compared to the actual and potential damages passes constitutional muster. This results in an award of \$512,109 against each defendant.” (App. 81a). The court of appeals suggested that Grant accept a remittitur to that amount; after he accepted the remittitur, the court of appeals affirmed the judgment as modified. (App. 91a-92a).

3. Texas Supreme Court

Bennett filed a petition for review in the Texas Supreme Court asking for it to address that federal question. The petition urged that the court of appeals—in language borrowed from this Court’s opinions—had:

articulated two conflicting standards for determining potential harm: (1) analysis of the harm likely to result from the defendant’s bad acts, versus (2) analysis of the harm that

⁶ TEX. CIV. PRAC. & REM. CODE §103.052.

would have ensued if the tortious plan had succeeded.

(App. 15a). Bennett argued that the court of appeals should not have considered “harm that would have ensued if the tortious plan had succeeded” unless it could also be shown that that specific harm was “likely to result.” (App. 15a). The Texas Supreme Court ultimately agreed, concluding that the only legally controlling test was likelihood; that this Court’s discussion of the wrongdoer’s intended harm was merely “an example of the former [standard].” (App. 15a).

Dismissing any of this Court’s “wording differences” as being merely “semantic, not substantive” (App. 15a), the court below held that the sole constitutional test was “the harm likely to result”—a question of probability, rather than foreseeability. From that sole focus on likelihood, the court concluded that looking at the harm Bennett intended to inflict—the magnitude of harm foreseeable to Bennett—was “contrary to the definition of potential harm provided by the United States Supreme Court.” (App. 18a).

Having held that the exclusive path to potential harm is “the harm likely to result,” the court went on to evaluate what that meant in the context of exemplary damages. It concluded that the Constitution put “the burden of proof ... on Grant to show to a probability, not merely to a speculation, that he would suffer these damages.” (App. 15a). On these facts, the court held that the constitutional test meant “Grant bore the burden to prove the criminal justice system would ultimately fail to resolve this case correctly.” (App. 17a). Here, that demanded “evidence that he could be

convicted, ... imprisoned, exonerated, and fully compensated.” (App. 17a).

Without proof of statistical likelihood, the court held that the ratio guidepost “should have only focused on the probable damages resulting from the malicious prosecution, not the consequences of wrongful imprisonment.” (App. 16a-17a). It reversed and remanded for a new remittitur. (App. 22a). The court denied rehearing on September 22, 2017. (App. 97a).

D. How the federal issue was presented

The federal issue is whether the “actual or potential harm” described by *State Farm Mutual Insurance Co. v. Campbell*, 538 U.S. 408, 418 (2003), can fairly include the harm of wrongful imprisonment—when it was the defendant’s avowed purpose for bringing false felony charges against a plaintiff who was an adverse witness in a civil case.

This federal question became the basis for the judgment below, reflected in the opinion’s opening paragraph:

[W]e consider how the harm likely to result from a malicious prosecution should be evaluated in calculating exemplary damages. We conclude the court of appeals erred in considering the harm that plaintiff would suffer from wrongful imprisonment...

(App. 1a) This question was presented to the Texas Supreme Court by the Respondents here who, while seeking that court’s discretionary review, argued that this Court’s opinions had “articulated two conflicting

standards for determining potential harm: (1) analysis of the harm likely to result from the defendant's bad acts, versus (2) analysis of the harm that would have ensued if the tortious plan had succeeded." (App. 15a). The court held that it was unconstitutional under federal law to base exemplary damages on "the harm that would have ensued if the tortious plan had succeeded"—here, Bennett's avowed goal of seeing Grant imprisoned—unless one could also show the statistical probability that "the criminal justice system would ultimately fail to resolve this case correctly." (App. 17a).

The intermediate Texas court of appeals was also presented with this federal question, during its consideration of the amount of exemplary damages. (App. 75a-78a). That court ruled on the question and held that this aspect of the federal constitutional test did permit consideration of the magnitude of potential harm that the defendant set out to inflict. (App 77a-78a). Its judgment suggesting a remittitur was based on its application of this federal law. (App. 89a).

REASONS FOR GRANTING THE PETITION

I. In the Due Process Test for Exemplary Damages, Potential Harm Must Be a Matter of Foreseeability and Culpability, Not Statistical Likelihood.

“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.” *BMW of N. Am. v. Gore*, 517 U.S. 559, 568 (1996); *see also Exxon Shipping Co. v. Baker*, 554 U.S. 471, 492 (2008) (“the consensus today is that punitives are aimed not at compensation but principally at retribution and deterring harmful conduct.”).

This constitutional framework polices only the outer bounds of awards because, “[i]n our federal system, States necessarily have considerable flexibility” in setting the punitive damages “in different classes of cases.” *Gore*, 517 U.S. at 568. It is “[o]nly when an award can be fairly characterized as ‘grossly excessive’ in relation to those interests” that it veers into unconstitutionality. *Id.*; *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003) (“To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.”).

As a substantive-due-process analysis, the *Gore* test “appropriately begins with an identification of the state interests that a punitive award is designed to serve.” *Id.* at 568. Its three guideposts assess the fit between the punitive award and the State’s interest in punishing and deterring egregious misconduct. The

second *Gore* guidepost—which is at issue in this petition—compares the magnitude of the penalty against the magnitude of the misconduct threatening that state interest, looking for “the disparity between the harm or potential harm suffered by [the victim] and his punitive damage award.” *Id.* at 575.

A. The question: Is potential harm a matter of foreseeability or statistical likelihood?

The Court has alluded to potential harm in almost all of its modern punitive-damage cases. In *TXO*, the Court noted the importance of considering “the magnitude of the *potential harm* that the defendant’s conduct would have caused to its intended victim if the wrongful plan had succeeded.” *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 461 (1993) (emphasis in original).

In *Gore*, the Court characterized *TXO* as “confirming that the proper inquiry is ‘whether there is a reasonable relationship between the punitive damages award and *the harm likely to result* from the defendant’s conduct as well as the harm that actually has occurred.’” 517 U.S. at 581 (*TXO*, 509 U.S. at 460 (emphasis in original), quoting *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 21 (1991)). As for what that meant, the Court explained:

[I]n upholding the \$10 million award in *TXO*, we relied on the difference between that figure and the harm to the victim that would have ensued if the tortious plan had succeeded.

That difference suggested that the relevant ratio was not more than 10 to 1.

Id. at 581 (citing *TXO*, 499 U.S. at 462).⁷

In *Philip Morris USA v. Williams*, the Court reiterated the propriety of measuring the scale of a punitive award against the potential harm, emphasizing that the appropriate inquiry was “harm potentially caused *the plaintiff*.” 549 U.S. 346, 354 (2007) (emphasis in original).

And in *Exxon Shipping v. Baker*, in which the Court was sitting as the common-law court of last resort, several Justices noted that the harm from the tanker accident could have been far worse. 554 U.S. at 478; *id.* at 523 (Ginsberg, J., dissenting) (“Horrendous as the spill from the *Valdez* was, millions of gallons more might have spilled as a result of Captain Hazelwood’s attempt to rock the boat off the reef.”); *id.* at 525 (Breyer, J., dissenting) (“as Justice Ginsberg points out, the damage easily could have been quite worse”).

But the Court has been silent about exemplary damages in state-court judgments for more than a decade. And today the two most populous States disagree about the central constitutional role of potential harm. The question that has divided them is fundamental: whether the phrase “harm likely to result” reflects a measure of foreseeability and thus culpability of the

⁷ *State Farm* did not discuss potential harm, but its recitation of the test carried forward the phrase. 538 U.S. at 417 (“the disparity between the actual or potential harm suffered by the plaintiff and the punitive damages awarded”).

misconduct, or whether, as the court below held, it reflects a mechanical notion of statistical likelihood.

The California Supreme Court held that, when *Gore* and *TXO* describe the potential harm as harm “that is likely to occur from the defendant’s conduct,” they are asking what harm is foreseeable. *Simon v. Sao Paolo U.S. Holding Co., Inc.*, 113 P.3d 63 71-72 (Cal. 2005). It observed the link between foreseeability and fair notice:

A potential injury that was foreseeable from the defendant’s conduct—whether because it constituted an unintended but reasonably likely risk or because it was a goal of the tortfeasor’s conduct—is properly considered because the tortfeasor had notice of the likelihood of such an injury. Considering such injuries in assessing punitive damages therefore comports with the due process mandate that “a person receive fair notice ... of the severity of the penalty that a State may impose.”

Id. at 74 (quoting *Gore*, 517 U.S. at 574).

The California court underscored what should be an obvious point: A potential harm that is the very “goal of the tortfeasor’s conduct” is foreseeable. *Id.* Such a person has fair notice of the stakes of their conduct, which are in proportion to the magnitude of harm that they are intending to inflict.

The Texas Supreme Court has read that same passage of *Gore* quite differently. (App. 15a) (“The United States Supreme Court clarified as much in *Gore*...”). As interpreted by the Texas court, the Constitution does not permit a State to punish or deter misconduct

in proportion to the magnitude of the harm that was the specific “goal of the tortfeasor’s conduct.” (App. 15a). Instead, it saw the extended discussion of a wrongdoer’s intent in *Gore* as merely reflecting “wording differences” about a statistical-likelihood test. (App. 15a).

This divergence goes to the heart of the constitutional test. The Texas view of potential harm is much narrower and more rigid than the view of *TXO* and *Simon*—permitting only those potential harms so concrete and amenable to proof that they can be “show[n] to a probability” (App. 15a) to be the statistically likely outcome of the defendant’s conduct, even if the wrongdoer acted with malice and a specific intent to inflict that exact harm (as did Bennett here).

B. Viewing potential harm in terms of statistics breaks the constitutional link between punitive damages and its criminal analogues.

When determining how to evaluate whether a civil award of exemplary damages might be grossly excessive, the Court looked by analogy to its jurisprudence about when criminal penalties become grossly excessive. *Cooper Indus. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434 (2001). In both contexts, States face constitutional limits on the severity of punishments they can impose, and the Court has “focused on the same general criteria.” *Id.* at 434-35.

Notably, the criminal law imposes punishments on wrongdoers based on their culpability (often expressed by intent), not confined to the statistical likelihood that their conduct would, “to a probability” (App. 15a), have caused some unrealized harm. This

deeper focus on moral culpability is baked into the categories of intent familiar to the penal codes of many states, including Texas. *See* MODEL PENAL CODE §2.02; TEX. PENAL CODE §6.03 (defining culpable mental states for intentional, knowing, reckless, and negligent conduct); *id.* §6.03(a) (“A person acts intentionally ... when it is his conscious objective or desire to engage in the conduct or cause the result.”).

A defendant can be punished for a criminal intent even when the harm is impossible on the particular facts. There is a class of inchoate crimes (such as conspiracy or attempt) for which “impossibility of completing the crime because the facts were not as the defendant believed is not a defense.” *United States v. Williams*, 553 U.S. 285, 300 (2008). “All courts are in agreement that what is usually referred to as ‘factual impossibility’ is no defense to a charge of attempt.” *Id.* (quoting 2 W. LAFAYETTE, SUBSTANTIVE CRIMINAL LAW §11.5(a)(2) (2d ed. 2003)). Drug crimes can be prosecuted, even if the specific “drugs” involved were not real drugs. *United States v. Amaro-Santiago*, 824 F.3d 154, 168 (1st Cir. 2016). Terrorist bombers can be prosecuted even if the “bombs” that they used were, in fact, inert and harmless. *United States v. Hamrick*, 43 F.3d 877, 882-83 (4th Cir. 1995). We readily recognize in the analogous criminal context that the state has a legitimate interest in deterring and punishing misconduct based on the culpability of the wrongdoer—the harm they set out to cause, through their wrongful plan.

Indeed, even crimes based on recklessness can extend to situations in which the statistical risk is vanishingly small. As Justice Thomas has noted, the concept of recklessness in the Model Penal Code supports

criminal penalties for recklessness against “very small risks when there is no justification for taking the risk.” *Voisine v. United States*, 136 S. Ct. 2272, 2288 n.5 (2016) (Thomas, J., dissenting). “Thus, it would be reckless to play Russian roulette with a revolver having 1,000 chambers, even though there is a 99.9% chance that no one will be injured.” *Id.* Subjecting an innocent person to *some* risk of a terrible harm, without justification, is something that States can and do punish.

If the Court’s approach to exemplary damages is to remain coherent, States should be able to serve those same punitive interests through exemplary damages—even when (as here) the wrongful plan turns out to be, not just malicious in intent, but foolish in design. This record leaves no doubt that Bennett set out “to put ‘Grant in prison ... for what he’s done to me,” namely, being a witness against him in a civil case (App. 3a). Bennett did not contest, at any stage on appeal, that Grant was factually innocent of the underlying crime. Bennett not only was aware of the risk that an innocent would be imprisoned—that was his explicit goal.

States surely have a legitimate interest in punishing and deterring the malicious felony prosecution of a witness in a civil case, both to protect the integrity of the justice system and to protect innocents from a deprivation of liberty.

Yet, citing “the definition of potential harm provided by the United States Supreme Court” (App. 18a), the court below held that it was constitutionally barred from affirming exemplary damages of this magnitude. It held that—in the context of exemplary

damages—any “potential harm” would need to be statistically likely, “to a probability,” before States could properly weigh that into the analysis. (App. 15a). By that blinkered view of potential harm, a State cannot meaningfully punish or deter misconduct through punitive damages unless the 1000-chamber revolver of Justice Thomas’s hypothetical had been loaded with more than five hundred bullets.

C. Potential harm is also crucial to accomplish the legitimate goals of tort law.

Reducing “potential harm” to a purely statistical question, rather than one of foreseeability and culpability, guts the ability of States to serve their legitimate interests in punishing and deterring the worst tortious misconduct.

1. The hypotheticals that the Court has chosen to illuminate these principles strongly suggest that States have a legitimate interest in deterring or punishing conduct that might fall short of such a *statistical* threshold, yet are likely in the *foreseeability* sense. The most vivid is a bullet fired into a crowd that just misses hitting a person, and instead hits a pair of glasses:

For instance, a man wildly fires a gun into a crowd. By sheer chance, no one is injured and the only damage is to a \$10 pair of glasses. A jury reasonably could find only \$10 in compensatory damages, but thousands of dollars in punitive damages to teach a duty of care.

TXO, 509 U.S. at 459-60 (quoting *Garnes v. Fleming Landfill*, 413 S.E.2d 897, 902 (W.V. 1991) (citing C.

Morris, *Punitive Damages in Tort Cases*, 44 HARV. L. REV. 1173, 1181 (1931))).

Now consider how that hypothetical plays out under a statistical approach to potential harm. In such a world, the court would demand—in addition to the obvious recklessness of the conduct—additional proof about the marksmanship of the shooter, the dispersal pattern of the crowd at the pivotal moment, the odds that this model of gun might misfire, or other details that might tangentially bear on the statistical odds that a person (rather than a pair of glasses) would be struck by a bullet. By the logic of the statistical approach, a State is constitutionally barred from even considering that potential harm unless it can be “show[n] to a probability” (App. 15a) that a person would be struck. The statistical approach would shrink any punitive award to a scale that fails to capture the enormity of the misconduct.

The lesson seems clear enough. As the Court’s hypothetical teaches, the constitutional concern is foreseeability and culpability, not statistical likelihood. By rejecting that view, the Texas court has, in effect, punished Bennett only to the scale of the broken pair of glasses.

2. Consider a second situation the Court has addressed: the fraudulent scheme at issue in *TXO* itself, in which the company was alleged to have trumped-up challenges to deeds in an effort to obtain some valuable mineral rights. 509 U.S. at 447-50. In actuality, the courts of West Virginia did stop that scheme from having its intended effect. *Id.* at 451 (noting that TXO was even sanctioned for the attempt).

That is analogous to the situation here. Bennett, like TXO, set out to deceive a justice system to accomplish his own ends. Bennett, like TXO, was eventually thwarted in that attempt. And Bennett, like TXO, was held liable by a district court for exemplary damages scaled to the magnitude of the potential harm that he set out to inflict.

But according to the Texas Supreme Court, it is unconstitutional to even weigh this potential harm unless it could be shown that the system would fail to stop the plan:

Grant bore the burden to prove the criminal justice system would ultimately fail to resolve this case correctly. He failed to meet this burden, providing no evidence that he could be convicted, let alone imprisoned, exonerated, and fully compensated.

(App. 17a). That logic cannot be squared with *TXO*. If that were the constitutional test, then it would have been unconstitutional to consider the range of potential harms threatened by TXO’s misconduct unless it could also have been shown that “the [civil] justice system would ultimately fail to resolve [those deeds].”

3. The foreseeability approach also fits how the Court has discussed potential harm in other cases. In *Cooper Industries*, the Court instructed a federal appellate court how it should evaluate a question of potential harm on remand: asking whether the full amount of the claimed potential harm “would have been attributable to [the specific] misconduct” at issue, discussing this as a question of “principal cause.” *Cooper Indus.*, 532 U.S. at 442. That does not appear

to be a statistical question, but one about the zone of legal culpability. It looks backwards from the harm itself, asking whether—if that harm did occur—the wrongdoing of the defendant would bear the legal blame. *Id.* (“attributable to [the] misconduct”). There was no suggestion that the record needed to have evidence that those lost sales would have been, looking forward from the moment of the tort, statistically likely to occur.

Similarly, in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), several Justices noted the vast potential harm that might have occurred had the sequence of events turned out slightly differently. But there was no suggestion that Exxon should have been exonerated from the penalty for those potential harms unless it could be shown, as the court below held, “to a probability” (App. 15a), that such a larger spill was statistically likely to occur. To the contrary, the opinions described “a maneuver which *could have* spilled more oil,” *id.* at 478 (emphasis added), and noted that “millions of gallons more *might have* spilled as a result of Captain Hazelwood’s attempt to rock the boat off the reef,” *id.* at 523 (Ginsberg, J., dissenting) (emphasis added).

If the Constitution truly demanded statistical likelihood as a threshold for weighing potential harm, one would expect that principle to have been noted and adhered to by *Exxon*, in which this Court was in the shoes of a common-law court of last resort—and was, if anything, modeling how the States should behave. But *Exxon* hints at no such burden.

II. Malicious Prosecution Offers an Ideal Vehicle to Clarify the Constitutional Role of Potential Harm.

A. Potential harm is at the center of this claim.

The tort of malicious prosecution offers a unique vehicle for addressing the role of potential harm within the *Gore* framework. That’s because one of the elements of the claim is the “termination of the prosecution in the plaintiff’s favor.” (App. 36a) (citing *Richey v. Brookshire Grocery Co.*, 952 S.W.2d 515, 517 (Tex. 1997)) Thus, the most severe of the harms threatened by a wrongdoer’s malicious distortion of the justice system to serve a personal vendetta—imprisonment, criminal fines, as well as the ignominy and civic disenfranchisement accorded to convicted felons—remain, and must remain, in the realm of potential harm.

B. It involves a state interest of enormous weight, transcending the “station in life” of the victim.

Punitive awards have long been levied for claims like malicious prosecution to protect the integrity of, and public confidence in, the criminal justice system. For example, in *Huckle v. Money*, 2 Wills. 205, 95 Eng. Rep. 768 (K.B. 1763), the court dealt with a printer whose items had been temporarily seized and who had been incarcerated for a period of hours. The court noted that brief inconvenience might warrant only a small amount of what it called “personal” damages. But it affirmed a much larger award, due to the public concerns implicated by the abuse of process:

the small injury done to the plaintiff, or the inconsiderableness of his station and rank in life did not appear to the jury in that striking light in which the great point of law touching the liberty of the subject appeared to them at the trial.

Id. The court recognized that a proper punitive award should reflect “the great point of law touching the liberty of the subject”—his freedom from wrongful incarceration—rather than being scaled down to fit the “inconsiderableness of [the plaintiff’s] station, and rank in life.” *Id.*

The magnitude of a State’s interest in avoiding wrongful imprisonment, or in protecting the integrity of the criminal-justice system, is not a function of the innocent’s wealth. To the contrary, this Court has enforced the precept that “[there] can be no equal justice where the kind of trial a man gets depends on the amount of money he has.” *Bearden v. Georgia*, 461 U.S. 660, 664 (1983) (quoting *Griffin v. Illinois*, 351 U.S. 12, 19 (1956) (plurality opinion) (alteration in original)). This principle been “applied in numerous other contexts,” *id.* (listing examples), reflecting the deep importance of the criminal justice system being evenhanded to those with and without means.

Indeed, the first *Gore* guidepost acknowledges the long history of treating wrongs that target the financially vulnerable as being more reprehensible, warranting heightened punishment. *State Farm*, 538 U.S. at 419 (“We have instructed courts to determine the reprehensibility of a defendant by considering whether: ... the target of the conduct had financial vulnerability”); *Gore*, 517 U.S. at 576 (Even purely

economic injuries, “especially when ... the victim is financially vulnerable, can warrant a substantial penalty.”). This is not merely a legitimate state interest, but one that has traditionally supported exemplary damages.

But by the reasoning of the Texas Supreme Court, the ability of a State to further that legitimate interest must, in the context of exemplary damages, be scaled down to fit the thickness of the victim’s pocketbook.

The opinion below acknowledges the “tremendous” interest that States have in deterring malicious prosecutions that threaten the integrity of the justice system. (App. 17a). With regard to the first *Gore* guidepost, the opinion below acknowledges the obvious fact that “Bennett was on notice that the State had a substantial interest in preventing improper use of the criminal justice system and would punish those who sought to sully it.” (App. 13a-14a).

Nevertheless, it points to “the definition of potential harm provided by the United States Supreme Court,” (App. 18a), as the reason it could not affirm an exemplary award of the same magnitude.

As Justice Ginsberg and Chief Justice Rehnquist noted more than two decades ago in *Gore*, the buck stops here. This Court alone can review state courts of last resort, and the substantive-due-process approach to reviewing exemplary damages that it adopted “commits the Court, now and again, to correct” errors and misunderstandings that have emerged in this jurisprudence. *Gore*, 517 U.S. at 612-13 (Ginsberg, J., dissenting). So long as the current framework remains, “the Court will work at this business alone.” *Id.* at 613.

C. A statistical approach, rather than one based on foreseeability, would put the justice system itself on trial.

The unusual context of malicious prosecution highlights, not just the distortions to the justice system, but the sheer irrationality of the incentives that would flow from equating potential harm with statistical likelihood. The ideal is that no innocent person should be imprisoned. Certainly, a state should have a legitimate interest in reducing the chances of the innocent being wrongfully imprisoned from 20% to 10%, just as it would have in reducing those odds from 55% to 45%.

But by focusing on statistical likelihood, the court below concluded that the potential harm of wrongful imprisonment could not even weigh into the State's justification for exemplary damages unless: "Grant [met] the burden to prove the criminal justice system would ultimately fail to resolve this case correctly." (App. 17a). The court demanded not just some indication of a genuine risk, but that it must be "show[n] to a probability" that Grant himself would be wrongfully convicted. (App. 15a). That fixation on statistical likelihood led the court to hold that it would be "wrong to consider imprisonment-related [harms]." (App. 17a).

1. Putting the system on trial undermines these very state interests.

Calling it Grant's burden "to prove the criminal justice system would ultimately fail to resolve this case correctly," (App. 17a), the opinion demands that any future claimant seeking exemplary damages keyed to the potential harm of wrongful imprisonment must put the system itself on trial.

That twists and subverts the state interests here. These prosecutors were, the now-undisputed judgment of liability confirms, other victims of Bennett’s plan—they were led, by Bennett’s deceptions, into prosecuting an innocent man. Prosecutors should be indirect beneficiaries of the tort of malicious prosecution, which can deter and punish those who set out to deceive their offices for private vendettas. Meanwhile, as the wrongdoer who twisted the justice system to his own ends, Bennett should not see his own punishment reduced based on whether the prosecutors whom he misled happened to have a high or low conviction rate.

Yet such a procedure is compelled, according to the opinion below, by the “definition of potential harm provided by the United States Supreme Court.” (App. 18a).

2. The risk is not “zero” that an innocent person with a valid defense might be imprisoned.

With Panglossian panache, the opinion announces that, for a defendant in Grant’s position, “the chances of [imprisonment] occurring were essentially zero.” (App. 1a). But ours is not the best of all possible worlds, especially not for a defendant of limited means in Grant’s position. “This Court would have to be willfully blind not to know that there have in the past been prejudicial trial errors which called for reversal of convictions of indigent defendants, and that the number of those who have not had the means for paying for [costs to fight the process] is not so negligible as to invoke whatever truth there may be in the maxim *de minimis*.” *Griffin*, 351 U.S. at 23.

On the same day that the Texas Supreme Court was denying that there would be any real risk of incarceration for Grant—an innocent person of limited means indicted on a felony and facing a \$10,000 bond—the Southern District of Texas issued detailed findings illustrating how, in the real world, indigent defendants facing criminal charges in Texas’s cash-bail system face serious risks of being incarcerated.⁸ See *ODonnell v. Harris County*, 251 F. Supp. 3d 1052 (S.D. Tex. 2017). Although Judge Rosenthal’s order arose in a slightly different context (pretrial detention of misdemeanor defendants), it still speaks to the genuine risks of incarceration facing poor Texans charged with crimes, even when they have a valid defense.⁹

Not even the existence of an arguably valid defense, or being innocent, means a person charged with a serious crime has “essentially zero” chance of being incarcerated. Grant, like those defendants, faced a

⁸ This Court was asked to stay the effect of that preliminary order, an application denied by Justice Thomas. *Harris County v. ODonnell*, No. 16A1204 (Jun. 7, 2017).

⁹ Predictably, the Texas cash-bail system—where the path to release is to plead guilty or post a bond that might exceed one’s ability to pay—led even some innocents to plead guilty. *Id.* at 1104 (“many misdemeanor defendants ‘don’t really want to plead guilty, but something’s they want to get out of jail, return to family, return to work...’”). As Judge Rosenthal put the pieces together: “misdemeanor defendants abandon valid defenses and plead guilty to obtain faster release than if they contested their charges.” *Id.* at 1105; *id.* at 1106-07 (recounting testimony from a lawyer that many misdemeanor clients “chose to abandon valid defenses”); *id.* at 1107 (recounting testimony from a judge that “it was common to have misdemeanor clients who professed their innocence and had valid defenses nevertheless plead guilty in order to be released much earlier.”). “This Hobson’s choice is ... the predictable effect of imposing secured money bail on indigent misdemeanor defendants.” *Id.*

bond beyond his personal ability to pay. And unlike them, Grant faced a special prosecutor chosen by his accuser, an accuser who was lying about the allegation, and who another prosecutor testified had already been tailoring facts to increase the severity of the charge. Indeed, Bennett had already succeeded in manipulating the initial steps of the process. A fact-finder could reasonably believe that, at the time of indictment, Grant did face a genuine risk of incarceration.

At the very least, the State has a legitimate interest in ensuring that innocents like Grant are not funneled into this system by private vendettas like Bennett's. Reasoning that there is "essentially zero" chance that the system will fail the wrongfully accused defies all experience.

III. If the Constitutional Framework Sets the Trivially Low Ceiling Suggested by the Opinion's Model of "Potential Harm," the Framework Itself Warrants Reconsideration.

The opinion suggests that some other "likely harm[s]" short of imprisonment might be "appropriate to consider":

When concentrating solely on the likely harm from malicious prosecution, it is appropriate to consider, for example, that Grant would incur attorney fees in defending himself against criminal charges. It is also fair to consider time taken away from one's job by having to participate in criminal proceedings.

(App. 17a). But these are, so far as is discernable, not *potential* harms at all. Grant actually did incur attorney's fees, which although modest, were part of his

damages. (App. 5a). And Grant actually did have to travel from his home to the county where he was indicted. (App. 54a-55a). If crumbs are all the Constitution allows, then it cannot fairly be said that States have “considerable flexibility” to assess penalties for “different classes of cases.” *Gore*, 517 U.S. at 568.

These amounts are also shockingly trivial compared to the “tremendous” state interests (App. 17a) implicated by Bennett’s malicious felony prosecution of Grant for having been a witness in a civil case. Reducing the punitive award to the order of magnitude of Grant’s actual damages (\$10,703) will not meaningfully punish or deter this abuse of the criminal-justice system.

And if there is indeed such a low constitutional ceiling for exemplary damages for Bennett’s misconduct, it pales beside even to the \$269,644.50 in civil sanctions imposed in this very same case for the relatively minor transgression of bringing a groundless slander claim. (App. 22a). The state interest in deterring and punishing the malicious felony prosecution of an innocent, who was attacked in retaliation for his service as a civil witness, surely warrants a more severe punishment.

If the current framework for exemplary damages bars the imposition of exemplary damages in proportion to this potential harm, then it warrants reexamination. The Court might need to clarify and develop the test it has hinted at for situations “where a particularly egregious act has resulted in only a small amount of economic damages,” which might further

some of these same state interests.¹⁰ *State Farm*, 538 U.S. at 412.

Or it may be time for the Court acknowledge that the States have, through their own statutes and common law, largely addressed the specific problems that originally inspired the Court to act. *Gore*, 517 U.S. at 613-14 (Ginsberg, J.) (noting the “reexamination prominent in state courts and in legislative arenas” underscores “why the Court’s enterprise is undue”); *id.* at 595 (Breyer, J., concurring) (distinguishing situations in which “there are ... legislative enactments ... that classify awards and impose quantitative limits that would significantly cabin the ... discretion”). Texas is one of those states. *See id.* at 595 (contrasting the lack of standards in Alabama with Texas Civil Practice and Remedies Code §41.008); *id.* at 616 (Ginsberg, J.) (listing Texas among States that have enacted meaningful statutes). The Texas statute requires heightened proof, provides for a bifurcated trial, specifies what factors should be considered in assessing punitive damages, and provides statutory caps with exceptions for certain especially egregious misconduct. TEX. CIV. PRAC. & REM. CODE §§41.001, 41.003, 41.008, 41.009. Texas law also provides a channel for appellate review of the excessiveness of an award, based on enumerated factors reflecting the

¹⁰ Grant did raise that argument to both appellate courts below. But in a new case, the Texas Supreme Court has held that a plaintiff with damages as small as \$5000 might be ineligible for any lenience from its normal strict ratio analysis—no matter the egregiousness of the misconduct at issue. *Horizon Health Corp. v. Acadia Healthcare Co.*, 520 S.W.3d 848, 880 (Tex. 2017) (reasoning that if \$5000 is “substantial” enough to warrant exemplary damages under Texas law, “a plaintiff may not argue for an enhanced ratio on the theory that recovery was insubstantial for due-process purposes”).

state interest behind these awards—such as “the extent to which such conduct offends a public sense of justice and propriety.” *Id.* §41.011(5).

On appeal, Bennett did not challenge that the predicates to an exemplary award under the Texas statute were met. Nor did he challenge whether the award against him was excessive under the statutory factors set by Texas law. And he made no argument suggesting any form of bias or procedural error that would have affected the trial.

Texas provided him with ample process. Rather than avail himself of that process, Bennett chose to argue that Texas lacked any legitimate power to meaningfully punish him, even for a malicious prosecution that he did not dispute was reprehensible and deserved at least some measure of exemplary damages. Whether because substantive due process should not be fine-tuning state policy judgments, *see Gore*, 517 U.S. at 598-99 (Scalia, J., dissenting); *State Farm*, 538 U.S. at 429-30 (Thomas, J., dissenting), or whether deeper institutional concerns make it increasingly unwise for the Court to remain in this area of traditional state control, *Gore*, 517 U.S. at 607 (Ginsberg, J., dissenting); *State Farm*, 538 U.S. at 431, the federal constitutional framework should not invalidate this exemplary award.

CONCLUSION

The Court should grant the writ of certiorari.

Respectfully submitted,

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