No. 24A_____

IN THE

Supreme Court of the United States

SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.,

Applicant,

v.

SANDRA L. ESKEW, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM GEORGE ESKEW,

Respondent.

APPLICATION FOR AN EXTENSION OF TIME WITHIN WHICH TO FILE A PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF NEVADA

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TO THE HONORABLE ELENA KAGAN, JUSTICE OF THE SUPREME COURT OF THE UNITED STATES AND CIRCUIT JUSTICE FOR THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT:

Under this Court's Rule 13.5, applicant Sierra Health and Life Insurance Company, Inc. ("SHL") respectfully requests a 30-day extension of time, to and including March 12, 2025, within which to file a petition for a writ of certiorari to review the judgment of the Supreme Court of Nevada.* The Nevada Supreme Court entered its judgment on August 5, 2024, App., *infra*, 1a, and denied applicant's timely petition for rehearing on November 12, 2024, *id.* at 11a. Unless extended, the time within which to file a petition for a writ of certiorari will expire on February 10, 2025. The jurisdiction of this Court would be invoked under 28 U.S.C. § 1257(a).

BACKGROUND

This insurance coverage dispute presents an important question of law about the due process limits on punitive damages that has divided the federal courts of appeals and state supreme courts.

1. In February 2016, William Eskew, who was afflicted with stage IV lung cancer, submitted a request to SHL seeking coverage for proton therapy treatment. The insurance contract, however, did not cover treatments that were "unproven" or not "medically necessary," and SHL determined that proton therapy was neither proven nor medically necessary in Mr. Eskew's case. SHL accordingly denied

* Under this Court's Rule 29.6, applicant states that Sierra Health and Life Insurance Company, Inc. is a Nevada corporation. It is a subsidiary of United HealthCare Services, Inc., which is in turn a subsidiary of UnitedHealth Group Incorporated. No other publicly held corporation owns 10% or more of Sierra Health and Life Insurance Company, Inc., United HealthCare Services, Inc., or UnitedHealth Group Incorporated.

coverage, and Mr. Eskew did not appeal that denial. SHL's determination was based on its 26-page Medical Policy, which adhered to the then-prevailing medical consensus that proton therapy was not a proven or medically necessary treatment for lung cancer. The determination also aligned with the policies of the nation's 12 largest insurers, none of which deemed proton therapy medically necessary to treat lung cancer. SHL instead authorized coverage for intensity-modulated radiation therapy—the most widely administered therapy for lung cancer. Mr. Eskew received this treatment. His cancer progressed, and he passed away in March 2017.

Sandra Eskew, the administrator of Mr. Eskew's estate, sued SHL in February 2019 for bad-faith denial of coverage, and the case went to a jury in March 2022. Plaintiff did *not* allege that the denial of proton therapy caused or even hastened Mr. Eskew's death. Rather, Plaintiff sought damages only for emotional distress caused by the denial of coverage, and for Mr. Eskew's pain and suffering caused by his development of esophagitis. Plaintiff also sought punitive damages. Ultimately, the jury awarded Plaintiff $40 million in noneconomic compensatory damages and, after less than an hour of deliberation, $160 million in punitive damages. The $40 million award for emotional distress and pain and suffering is five times the largest such award ever upheld in Nevada history. The $160 million punitive award is more than eight times the largest punitive award ever upheld in Nevada history. Over two dissenting votes, the Nevada Supreme Court upheld the awards.

2. "Punitive damages may properly be imposed to further a State's legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559, 568 (1996). This Court has held, however, that

the Due Process Clause prohibits "grossly excessive" punitive damage awards, *id.* at 562 (quoting *TXO Product Corp.* v. *Alliance Resources Corp.*, 509 U.S. 443, 454 (1993) (plurality)), because such an award "furthers no legitimate purpose and constitutes an arbitrary deprivation of property," *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408, 417 (2003). The Due Process Clause requires that "an award of punitive damages [be] based upon an 'application of law, rather than a decisionmaker's caprice,'" *id.* at 418 (quoting *Cooper Industries, Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 436 (2001)), and that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose," *Gore*, 517 U.S. at 574.

In *Gore*, the Court recognized "[t]hree guideposts" to structure the due process inquiry. 517 U.S. at 574. The first guidepost looks to the "degree of reprehensibility of the defendant's conduct," to ensure that an award is not "grossly out of proportion to the severity of the offense.'" *Id.* at 575-76 (quoting *Pacific Mutual Life Insurance Co.* v. *Haslip*, 499 U.S. 1, 22 (1991)). The second guidepost evaluates "the ratio between harm, or potential harm, to the plaintiff and the punitive damages award." *State Farm*, 538 U.S. at 424. And the third guidepost looks to "civil penalties authorized or imposed in comparable cases." *Gore*, 517 U.S. at 575.

3. In this case, the Nevada Supreme Court declined to apply this Court's due process guideposts for punitive damages. Reviewing the jury's punitive damages award only for "substantial evidence," the court first pointed to purportedly "substantial evidence of SHL's conduct in mishandling [Mr. Eskew's] claim." App. 7a. The court then held that the award did not "violat[e] [SHL's] constitutional right to due

process" because "SHL had ample notice that it could be subject to such a punishment" based on a Nevada statute "exempting insurance bad faith claims from [Nevada's] statutory limit on the punitive-to-compensatory damages ratio." App. 8a n.2. Because SHL supposedly had "fair notice" based on this state statute alone, App. 8a n.2, the Nevada Supreme Court did not apply the *Gore*/*State Farm* guideposts. Two Justices dissented, urging that the majority had "serious[ly]" erred, and that "the punitive damages * * * are excessive and should have been substantially remitted" under *State Farm*. App. 9a (citing *State Farm*, 538 U.S. at 416-418). The court summarily denied rehearing. App. 11a.

REASONS FOR GRANTING THE APPLICATION

1. The Nevada Supreme Court's erroneous decision deepens an entrenched circuit split on whether and how the *Gore*/*State Farm* guideposts apply to a punitive damages award when a statute purportedly authorizes the award.

The Third, Seventh, Eighth, Tenth, and Eleventh Circuits have rejected the Nevada Supreme Court's conclusion that statutes authorizing punitive damages for a certain category of claims or up to a certain amount provide sufficient fair notice to override the *Gore*/*State Farm* constitutional limitations. Those courts have recognized that even "compl[iance] with [a State's] statutory cap on punitive damages" does not permit courts to ignore this Court's "three guideposts." *Epic Systems Corp.* v. *Tata Consultancy Services Ltd.*, 980 F.3d 1117, 1140, 1143 (7th Cir. 2020) (internal quotation marks omitted); *see Inter Medical Supplies, Ltd.* v. *EBI Medical Systems, Inc.*, 181 F.3d 446, 463, 468-469 (3d Cir. 1999) (reducing punitive damages award under *Gore*, even though the jury's award complied with New Jersey law that limited

punitive damages to "five times the compensatory damages"); *Saccameno* v. *U.S. Bank National Association*, 943 F.3d 1071, 1078, 1086 (7th Cir. 2019) (reducing amount of a punitive damages award under the *Gore* factors, even though "the Illinois Consumer Fraud and Deceptive Business Practices Act . . . did allow punitive damages" in the amount of the jury's award); *Grant ex rel. United States* v. *Zorn*, 107 F.4th 782, 800 (8th Cir. 2024) (holding "punitive sanction of $6,733,896" unconstitutional, even though it fell "within * * * statutory limits"); *BNSF Railway Co.* v. *U.S. Department of Labor*, 816 F.3d 628, 643 (10th Cir. 2016) (rejecting argument that reviewing courts "need not consider the [*Gore*/*State Farm*] guideposts because the Act provides a statutory cap for punitive damages that ensures railroads receive fair notice of potential punitive-damages awards"); *Williams* v. *First Advantage LNS Screening Sols. Inc.*, 947 F.3d 735, 746 (11th Cir. 2020) (reducing punitive damages award under *Gore*/*State Farm*, even though statute expressly authorized punitive damages in "such amount * * * as the court may allow," 15 U.S.C. § 1681n(a)(2)).

Those courts correctly hold that punitive damages awards issued pursuant to authorizing statutes remain subject to constitutional scrutiny for excessiveness. That is because "constitutionally adequate notice of potential punitive damage liability in a particular case depends upon whether *this defendant* had reason to believe that *his specific conduct* could result in *a particular damage award*." *Johansen* v. *Combustion Engineering, Inc.*, 170 F.3d 1320, 1337 (11th Cir. 1999) (emphases added). And due process imposes constraints even on "statutes that place limits on the permissible size of punitive damages awards." *Cooper Industries*, 532 U.S. at 433. If the rule were otherwise, then legislatures could both "suppl[y] an answer to the questions of

what a fine should be *and* whether it's [constitutionally] excessive." *Yates* v. *Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1318 (11th Cir. 2021) (Newsom, J., concurring) (emphasis added).

The Second, Fifth, and Ninth Circuits, by contrast, have applied laxer scrutiny to punitive damages awards purportedly authorized by statutes. In the Second Circuit, an award of punitive damages that falls below a statutory cap should be reduced only when the award "shock[s] the judicial conscience and constitute[s] a denial of justice." *Luciano* v. *Olsten Corp.*, 110 F.3d 210, 221 (2d Cir. 1997) (internal quotation marks omitted). The Fifth Circuit eschews an award-by-award analysis of the *Gore* factors when the award falls under a statutory cap, but it separately analyzes whether the statutory cap itself "offends due process." *Abner* v. *Kansas City Southern Railroad Co.*, 513 F.3d 154, 164 (5th Cir. 2008). The Ninth Circuit has similarly held that "the rigid application of the *Gore* guideposts is less necessary or appropriate" when reviewing a "punitive damages award arising from a statute that rigidly dictates the standard a jury must apply in awarding punitive damages." *Arizona* v. *ASARCO LLC*, 773 F.3d 1050, 1055-1056 (9th Cir. 2014) (en banc). In the Ninth Circuit, the "first consideration is the statute itself, through which the legislature has spoken explicitly on the proper scope of punitive damages." *Id.* at 1056.

If anything, the Nevada Supreme Court went even further here in refusing to apply any due process-based excessiveness analysis *at all* when the state legislature has purported to determine that a particular category of misconduct—bad-faith insurance claim denial—is sufficiently reprehensible to warrant uncapped punitive damages. App. 8a n.2. The court's holding deepens the divide among courts and

conflicts with this Court's cases by entirely bypassing *Gore*'s and *State Farm*'s required assessment of "whether this defendant had reason to believe that his specific conduct could result in a particular damage award." *Johansen*, 170 F.3d at 1337. That holding warrants this Court's review.

2. Good cause exists for a 30-day extension of time to file a petition for a writ of certiorari. Undersigned counsel currently faces a press of other matters,[1] and SHL is not aware of any prejudice that would result from a 30-day extension.

CONCLUSION

For the foregoing reasons, SHL respectfully requests that the time within which to file a petition for a writ of certiorari be extended by 30 days, to and including March 12, 2025.

Respectfully submitted.

/s/ Thomas H. Dupree Jr.

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January 23, 2025

[1] Among other short-term obligations, undersigned counsel will be presenting argument in the Second Circuit on January 23 and in the Louisiana Supreme Court on January 27, and will be participating in an arbitration the week of February 3.