No. 14-106

IN THE
# Supreme Court of the United States

JOHN E. STEVENSON AND JANE E. STEVENSON,
*Petitioners*,

v.

FIRST AMERICAN TITLE INSURANCE COMPANY,
*Respondent*.

**On Petition for a Writ of Certiorari to the Supreme Court of Wisconsin**

## BRIEF IN OPPOSITION FOR RESPONDENT


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## QUESTION PRESENTED

In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), this Court held that "courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards," noting that, in deciding whether "the relevant constitutional line . . . has been crossed," this Court has "engaged in an independent examination of the relevant criteria." *Id.* at 434-35, 436. The question presented for review is:

Whether the Wisconsin Supreme Court erred in holding that the question whether the size of a punitive damages award "accords with the constitutional limits of due process" is "subject to de novo review" without "deference to the amount of the jury's award." Pet. App. 12a, 14a n.17.

## CORPORATE DISCLOSURE STATEMENT

Pursuant to Rule 29.6 of the Rules of this Court, respondent First American Title Insurance Company states the following:

First American Title Insurance Company is a wholly owned subsidiary of First American Financial Corporation, a publicly traded corporation. No publicly held corporation owns 10% or more of the stock of First American Financial Corporation.

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In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), this Court described and applied "three guideposts" to determine whether an award of punitive damages is unconstitutionally excessive. *Campbell*, 538 U.S. at 418. In *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), this Court made clear that, in applying the due-process standard, a reviewing court must engage in "an independent examination of the relevant criteria." *Id.* at 435. *Leatherman* "mandate[s] appellate courts to conduct *de novo* review of a trial court's application of [the *Gore* guideposts] to the jury's award." *Campbell*, 538 U.S. at 418.

In the decision that petitioners seek to challenge, the Wisconsin Supreme Court followed this Court's decisions in determining that a punitive damages award of $1,000,000 – in a case in which compensatory damages for purely economic harm were less than $30,000 – exceeded the due-process limit. The court stated that it would "accord[] deference" to the jury's decision to award punitive damages, Pet. App. 12a, and that it would view the evidence "in the light most favorable to the plaintiff," *id.* at 14a n.17 (internal quotation marks omitted). But, "[g]iven that punitive damages awards mandate de novo review," the court held that it would not "defer[] to the amount of the jury's award." *Id.* Finding "no especially egregious conduct," the court determined, "in consideration of the case law, that the appropriate amount of punitive damages in this case is $210,000," approximately three times the "compensatory and potential damages" and "just below the constitutional 'line' mentioned by the Supreme Court

in [*Gore*] and [*Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991)]." *Id.* at 23a-24a.

The petition does not provide any reason for this Court to review that decision. To the extent that petitioners seek to challenge the *de novo* standard of review applied by the Wisconsin court in deciding that the punitive damages award was unconstitutional, their challenge is waived and in any event foreclosed by this Court's precedents. To the extent that petitioners complain that the court failed to accord appropriate weight to the jury's findings of fact, that complaint is without basis: there is nothing in the opinion to support the conclusion that the court discounted the jury's weighing of the evidence. And, to the extent that the petition argues that state courts follow conflicting approaches in setting the level of punitive damages when the jury's award violates due process, petitioners fail to show that any such conflict exists.

The petition should be denied.

## STATEMENT

**1.** Robert and Judith Kimble ("the Kimbles") purchased lakefront real estate in Nasewaupee, Wisconsin, in October 2004. Pet. App. 3a. The deed conveying the property to the Kimbles warranted that two easements provided access to the plot. *Id.* According to the opinion of the Wisconsin Supreme Court, both easements crossed land owned by Land Concepts, Inc., *id.* & n.5, though First American disputes this. When the Kimbles purchased the property, respondent First American Title Insurance Company ("First American") issued them a title insurance policy. *Id.* at 3a. The policy insured the Kimbles against loss due to a lack of access to the property or unmarketability of title. *Id.* at 3a-4a.

When the Kimbles listed the property for sale in 2008, Land Concepts sent a letter to their real estate agent stating that the Kimbles did not own any access rights across its land. *Id.* at 4a. The Kimbles contacted their insurance agent, who informed an employee of First American. *Id.* First American's employee sent a letter to the Kimbles in March 2008 indicating that he believed that one of the easements was defective but that the other (the "North Easement") continued to provide access to the property and that the title remained as insured. Because First American insured access but not a right of access in any particular place, he informed the Kimbles that First American had no duty to intervene in the dispute. *Id.* at 4a-5a. The Kimbles received a cash offer to purchase the property, but later claimed that, because the access issue was not promptly resolved, they lost the sale. *Id.* at 6a.

**2.** The Kimbles sued Land Concepts and petitioners (who had sold the lot to the couple who had in turn sold it to the Kimbles), later amending the complaint to add (among other claims and defendants) a breach of contract claim against First American. Pet. App. 3a & n.4, 6a. A few months later, the Kimbles settled claims against all defendants except First American; as part of the settlement, the Kimbles and petitioners paid Land Concepts $40,000 for an easement granting access over an existing road. *Id.* at 6a. Petitioners also paid the Kimbles $10,000 for an assignment of any claims under their title insurance policy and against First American. *Id.*

Petitioners then filed a cross-claim against First American, alleging breach of contract and breach of fiduciary duty and bad faith for its refusal to defend the title to the Kimbles' property. *Id.* Prior to trial, the court concluded that the property did not have

a right of access and that such lack of access had rendered title to the Kimbles' property unmarketable. The court concluded that coverage was therefore triggered under the title insurance policy; the court permitted the jury to decide whether First American was liable for breach of contract and breach of fiduciary duty and bad faith. *Id.* at 7a-8a. First American presented evidence that it had a good-faith belief that the North Easement provided access. *Id.* at 8a. There was, however, evidence from which a jury could conclude that the Kimbles' insurance agent had alerted First American to potential problems with the remaining easement, problems that First American did not acknowledge in its letter. *Id.* at 4a-5a. The jury returned a verdict in favor of petitioners, awarding $50,000 in compensatory damages for breach of contract and $1,000,000 in punitive damages. *Id.* at 8a. The trial judge reduced the compensatory damages award to $29,738.49 but did not reduce the punitive damages award, resulting in a punitive damages award more than 33 times the compensatory damages. *Id.* at 9a.

**3.** The court of appeals declined to review the punitive damages award "because we consider First American's argument to be insufficiently developed." Pet. App. 59a.

**4**. The Wisconsin Supreme Court reversed. In so doing, it credited the evidence that First American had acted in bad faith. Pet. App. 17a ("First American's conduct in the case at issue is reprehensible."). The Court stated:

> First American knew that the North Easement did not provide access to the Kimble Lot and that there was no reasonable alternative access point, and yet refused to honor its obligation to assist the Kimbles in defending their title. First Amer-

> ican further withheld the information it had in its possession from the Kimbles, causing them to waste valuable time and resources.

*Id.*; *see also id.* at 8a n.9 ("The evidence in the record is assumed to be sufficient to support the jury's findings in all respects except the size of the punitive damages award.").

The court noted that, while "the evidence must be viewed in the light most favorable to the plaintiff," that does not "require deference to the amount of the jury's award" in deciding the constitutional issue. *Id.* at 14a n.17 (internal quotation marks omitted). Applying the three factors set forth in this Court's opinion in *Gore*, the court concluded, first, that "the degree of reprehensibility . . . falls short of that found in prior Wisconsin cases supporting substantial punitive damages awards." *Id.* at 17a. Second, the court recognized that "a ratio of approximately 33:1" of punitive to compensatory damages "is transparently problematic under the United States Constitution." *Id.* at 19a.[1] Because "there are no special circumstances calling for a high ratio punitive damages award," the court determined that "the award in this case does not bear a 'reasonable relationship' to either the compensatory damages award or the

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[1] Adding the amount that the Kimbles spent "to purchase the access to their property that their title policy was supposed to insure" yielded a "$69,738.49 figure" that "still represents a problematic ratio of approximately 14:1." Pet. App. 21a. The court considered that expenditure – even though that evidence was not before the jury – because it "was before the circuit court and was made a part of the record on appeal." *Id.* at 21a n.23. The court rejected the argument that the appropriate potential damages figure was the full $1.3 million sales price for the Kimbles' home, because petitioners "can point to no indication in the record that the full value of the Kimbles' property was ever in danger." *Id.* at 19a.

potential harm faced by the Kimbles." *Id.* at 21a-22a.[2] Third, the court considered that First American "could be subject to a criminal penalty, including a fine of up to $10,000." *Id.* at 22a.

Given the absence of any evidence of "especially egregious conduct supporting a high ratio punitive damages award," the court "conclude[d] that the punitive damages award against First American is excessive" in violation of the Due Process Clause. *Id.* at 23a. The court reduced the award of punitive damages to $210,000, approximately three times the amount of compensatory and potential damages, which the court said was "just below the constitutional 'line' mentioned by the Supreme Court in [*Gore*] and *Haslip*." *Id.* at 24a.

**5.** Chief Justice Abrahamson, joined by Justice Bradley, dissented. She stated that the "majority opinion . . . ignored and misapplied" the standards for evaluation of punitive damages articulated by the Wisconsin Supreme Court in *Trinity Evangelical Lutheran Church & School-Freistadt v. Tower Insurance Co.*, 661 N.W.2d 789 (Wis. 2003). *See* Pet. App. 40a. The dissent did not take issue with the standard of review applied by the majority.

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[2] The court noted that the "Wisconsin Legislature recently enacted a law limiting punitive damages awards," capping such awards "at a 2:1 ratio of compensatory damages or $200,000, whichever is greater." Pet. App. 21a n.24. "While the statute is not applicable to this case, it is nonetheless appropriate to consider the legislature's judgment of a reasonable disparity of punitive to compensatory damages." *Id.* The action of the Wisconsin legislature means that the question presented is unlikely to recur in Wisconsin, providing a further reason that this case does not warrant review.

## REASONS FOR DENYING THE PETITION

The petition should be denied because it presents no substantial issue concerning the appropriate standard of review that courts should apply in considering a due-process challenge to an award of punitive damages.

### I. ANY CHALLENGE TO THE *DE NOVO* STANDARD OF REVIEW APPLIED BY THE WISCONSIN COURT IS WAIVED AND FORECLOSED BY THIS COURT'S PRECEDENTS

To the extent that petitioners challenge the holding of the state court "that federal due process requires judges to conduct *de novo* review of the amount of punitive damages," Pet. 27, that challenge is waived and foreclosed by *Campbell*, *Leatherman*, and *Gore*.

Petitioners acknowledged in the court below that, "if the Court were to reach the merits of First American's appeal and consider the due process validity of the punitive damage award, its review is *de novo*." Resp. Wis. Sup. Ct. Br. 21. Any argument that the *de novo* standard does not apply to a court's review of a "jury's punitive damages verdict," Pet. 28, was accordingly waived below.

In any event, this Court's cases (which petitioners do not purport to challenge) establish that the *de novo* standard of review that the Wisconsin court applied is correct. In *Gore*, the Court rejected a jury award of $2 million in punitive damages, finding that "the grossly excessive award . . . transcends the constitutional limit." 517 U.S. at 585-86. Likewise, in *Campbell*, this Court overturned a jury award of $145 million in punitive damages, applying "the *Gore* guideposts to the facts of this case" to find that the award "was neither reasonable nor proportionate to

the wrong committed," and indicating that the evidence "likely would justify a punitive damages award at or near the amount of compensatory damages." 538 U.S. at 429. As the *Leatherman* Court stated, *Gore* involved "an independent examination of the relevant criteria" to determine whether the award was consistent with due process, 532 U.S. at 435, as did *Campbell*.

In *Leatherman*, this Court noted that "the question whether a [punitive damages award] is constitutionally excessive calls for the application of a constitutional standard to the facts of a particular case, and in this context *de novo* review of that question is appropriate." *Id.* (internal quotation marks omitted). Petitioners argue (at 28) that *Leatherman* – which the state court cited as authority for the *de novo* standard – is inapplicable because it "was not a federal due process holding" but instead an exercise of this Court's "supervisory authority over the lower federal courts." On the contrary, this Court's holding that "the constitutional issue merits *de novo* review" (532 U.S. at 431) is not, by its terms, limited to federal courts – *Leatherman* interprets the Due Process Clause and applies in state court just as it applies in federal court – and petitioners cite no decision of any state court that reads *Leatherman* in so cramped a fashion. Furthermore, *Leatherman* cannot, as a matter of logic, be limited to federal courts – leaving open the possibility of more deferential review of federal constitutional claims in state courts – because any such claim would, ultimately, be reviewable in this Court *de novo*. Indeed, as noted, both *Campbell* and *Gore* involved review of state-court jury awards.

Petitioners also note (correctly) that *Leatherman*'s holding addresses the standard of review on appeal

of a trial court's due-process holding. Nevertheless, the holding that *de novo* review is required on appeal indicates that a reviewing court cannot rely on a jury determination to hold that a particular level of punitive damages is constitutional. A court of appeals can carry out the required inquiry only by applying the constitutional test to the record facts, ultimately making an independent legal judgment as to whether the award comports with due-process limits. *See Leatherman*, 532 U.S. at 435. That is the inquiry that the Wisconsin court carried out.

Petitioners cannot rely on *Jackson v. Virginia*, 443 U.S. 307 (1979), or *Honda Motor Co. v. Oberg*, 512 U.S. 415 (1994) – both of which predate *Gore*, *Leatherman*, and *Campbell* – to argue for any different result. At the outset, petitioners made no argument before the Wisconsin court that those cases altered the "de novo" standard that petitioners conceded applied; petitioners never cited either *Jackson* or *Oberg* below.

In any event, there is no inconsistency between the decision below and those cases. *Jackson* held that, to prevail on a federal constitutional challenge to a state-court conviction, a habeas plaintiff would have to show that a "rational trier of fact" could not "find guilt beyond a reasonable doubt." 443 U.S. at 321. But, as this Court made clear in *Leatherman*, "the level of punitive damages is not really a 'fact' 'tried' by the jury," that is, it is not "a question of historical or predictive fact." 532 U.S. at 437 (internal quotation marks omitted). For that reason, "appellate review" of a district court's determination that a jury award is consistent with due process under a *de novo* standard "does not implicate . . . Seventh Amendment concerns." *Id.* Whether there is sufficient

evidence to support a finding of liability (or an award of *compensatory* damages, *see* Pet. 22-23) is a distinct question from whether the amount of a punitive damages award comports with due process. Because the legal determination whether the jury's award is constitutional is not a "fact" found by the jury, *Jackson* does not apply.

*Oberg*, in holding that the Oregon court's failure to provide any review of the level of punitive damages violated due process, did not address "what standard of review is constitutionally required" for such review. 512 U.S. at 432 n.10. The Court did observe that "there may not be much practical difference between review that focuses on 'passion and prejudice,' 'gross excessiveness,' or whether the verdict was 'against the great weight of the evidence,'" and suggested that "[a]ll of these may be rough equivalents of the standard this Court articulated in *Jackson*." *Id.* But that observation, assuming it is still valid after *Gore* and *Leatherman*, supports the judgment below: as the Wisconsin court noted, "stating that an award is 'so clearly excessive as to indicate passion and prejudice'" – the formulation articulated by the Wisconsin Supreme Court in *Trinity* – "is simply another way of referring to an award that violates due process." Pet. App. 14a n.17 (quoting *Trinity*, 661 N.W.2d at 801).

## II. THE ARGUMENT THAT THE WISCONSIN SUPRME COURT FAILED TO VIEW THE EVIDENCE IN THE LIGHT MOST FAVORABLE TO PETITIONERS AND TREATED THE VERDICT AS MERELY "ADVISORY" MISCHARACTERIZES THE COURT'S OPINION

Petitioners assert (at 17) that the Wisconsin Supreme Court did not "view[] the evidence in the light most favorable to the plaintiff" and suggest (at 20) that its failure to do so conflicts with *Jackson* and *Oberg*. As explained above, there is no inconsistency between the Wisconsin Supreme Court's opinion and those cases; in any event, that argument rests on a mischaracterization of the court's opinion. The court expressly acknowledged the holding from its own prior case that "the evidence must be viewed in the light most favorable to the plaintiff," while clarifying that this does not require the court to defer to the jury in deciding whether the amount of punitive damages is constitutionally excessive. Pet. App. 14a n.17 (internal quotation marks omitted). Petitioners do not explain how this standard of review differs from the standard that petitioners sought below. Petitioners assertion that the court below "rul[ed]" that "in punitive damages cases the evidence is not to be viewed in the light most favorable to plaintiff," Pet. 17 n.6, cannot be squared with the court's opinion.

Moreover, petitioners cannot point to any example of the court rejecting or questioning the jury's view of the evidence. The court made clear that it accepted plaintiffs' evidence concerning First American's alleged bad conduct (though First American contested the sufficiency of that evidence). *See* Pet. App. 8a & n.9, 17a. Petitioners do not argue that First Amer-

ican's conduct "endanger[ed] the health or safety of any person"; they do not argue that there was evidence that they were "financially vulnerable"; they do not argue that there was any evidence that First American had engaged in similar conduct toward others;[3] and they do not argue that there was evidence of "intentional malice" towards the Kimbles. *Id.* at 17a (citing *Campbell*, 538 U.S. at 419).[4] Petitioners complain (at 18) that the lower court's analysis "took no account of the evidence that, . . . when First American refused to defend the Kimbles' title . . . , First American perceived that its most cost-effective option for honoring its contract . . . would likely require paying [the policy limit of] $370,000." But there is no indication that the court discounted this alleged fact; rather, that fact was not relevant to its application of the *Gore* guideposts, which focus on the proportionality of the punitive damages award to the harm caused and the potential harm threatened by the alleged tort, which here was the cost of obtaining a right of access. Moreover, the relevance of the policy limit in determining whether the award of punitive damages was constitutionally excessive has

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[3] The dissent below argued that First American should be treated as a recidivist because the company "made a series of decisions that illustrate bad faith." Pet. App. 28a (internal quotation marks omitted). But the dissent was referring to "a pattern of repeated misconduct" *in dealing with the Kimbles*, *id.*, not to any other instance of "the same kind of conduct," *id.* at 18a (majority).

[4] Below, petitioners argued that First American's misrepresentations provided proof of "maliciousness," but petitioners do not claim that there is evidence that First American intended to inflict harm on the Kimbles out of ill will rather than out of a desire to avoid "a real big claim on the policy." Resp. Wis. Sup. Ct. Br. 38 (internal quotation marks omitted); *cf. Gore*, 517 U.S. at 576.

no apparent relationship to the standard of review, and the dissent, which criticized the majority on this point, Pet. App. 35a-36a, 38a, never questioned the standard of review the majority applied. A disagreement over the state court's application of a settled constitutional standard does not justify this Court's review. *See* Sup. Ct. R. 10.

Petitioners' claim (at 27) that the state court treated the jury verdict as "merely advisory" is likewise impossible to square with the state court's opinion. The court stated that, "once the issue of punitive damages is properly before the jury, its decision to award punitive damages is accorded deference." Pet. App. 12a. And, in any case where the jury's award is within the limits set by the Due Process Clause, the Wisconsin Supreme Court identified no federal-law basis to second-guess the level of a jury's punitive damages award.

There is likewise no reason to conclude that the court set punitive damages at a level any lower than what it deemed to be the constitutional maximum. *Cf.* Pet. i. On the contrary, the Court stated that, in the absence of "especially egregious conduct," "the 7:1 ratio imposed in *Trinity* would be unconstitutionally excessive" and, "in consideration of the case law," that a ratio of 3:1 between punitive and "compensatory and potential damages" would be "just below the constitutional 'line.'" Pet. App. 23a-24a. To be sure, the court characterized $210,000 as "the appropriate amount," *id.*, but, far from suggesting an arbitrary choice, the use of the definite article ("*the* appropriate amount") indicates that the court was setting the award at the highest level that the federal Constitution would permit.

## III. THERE IS NO CONFLICT OF AUTHORITY ON THE STANDARD FOR DETERMINING WHETHER AN AWARD OF PUNITIVE DAMAGES IS UNCONSTITUTIONALLY EXCESSIVE

There is no conflict among state courts on the only question of federal law raised by the petition: whether a court should apply the *Gore* "guideposts" *de novo* when it determines whether an award of punitive damages is excessive in violation of the Due Process Clause, without deferring to the jury.[5] On

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[5] Federal courts of appeals likewise consistently apply a *de novo* standard in determining whether an award of punitive damages is constitutionally excessive. *See*, *e.g.*, *Bisbal-Ramos v. City of Mayaguez*, 467 F.3d 16, 27 (1st Cir. 2006) ("Whether an award of punitive damages is excessive under the Due Process Clause is a constitutional question that we review *de novo*."); *Payne v. Jones*, 711 F.3d 85, 100 (2d Cir. 2012) ("[R]eview is *de novo* when a punitive award is attacked as *constitutionally* excessive."); *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 189 (3d Cir. 2007) ("[w]e review the constitutionality of a punitive damages award de novo"); *EEOC v. Federal Express Corp.*, 513 F.3d 360, 371 (4th Cir. 2008) ("When . . . a punitive damages award [is] alleged to be constitutionally excessive, our review must be de novo.") (citing *Leatherman*, 532 U.S. at 436); *Alaniz v. Zamora-Quezada*, 591 F.3d 761, 780 (5th Cir. 2009) ("We review the constitutionality of punitive damage awards de novo."); *Bach v. First Union Nat'l Bank*, 486 F.3d 150, 153 (6th Cir. 2007) ("We review the district court's decision on the constitutionality of the punitive damages award *de novo*."); *EEOC v. AutoZone, Inc.*, 707 F.3d 824, 838 (7th Cir. 2013) ("We review a district court's due process analysis of punitive damages de novo."); *Quigley v. Winter*, 598 F.3d 938, 953 (8th Cir. 2010) ("We . . . review the proportionality determination de novo."); *Mendez v. County of San Bernardino*, 540 F.3d 1109, 1120 (9th Cir. 2008) ("[w]e review the district court's application of the *Gore* guide-posts to a jury's punitive damages award de novo"); *Hardeman v. City of Albuquerque*, 377 F.3d 1106, 1121 (10th Cir. 2004) ("The [Supreme] Court has

the contrary, courts in California, Massachusetts, Oregon, and South Carolina – the four States that petitioners claim defer to jury determinations – independently evaluate the constitutionality of punitive damages awards, while deferring to the jury's factual findings. That is the same standard that the Wisconsin court employed.

Thus, in *Simon v. San Paolo U.S. Holding Co.*, 113 P.3d 63 (Cal. 2005), the California Supreme Court held that, "[i]n deciding whether an award of punitive damages is constitutionally excessive under [*Campbell*] and its predecessors, we are to review the award de novo, making an independent assessment of the reprehensibility of the defendant's conduct, the relationship between the award and the harm done to the plaintiff, and the relationship between the award and civil penalties authorized for comparable conduct." *Id.* at 70 (citing *Campbell* and *Leatherman*); *see also Johnson v. Ford Motor Co.*, 113 P.3d 82, 88 (Cal. 2005) ("[R]ecent United States Supreme Court decisions require a court reviewing an award of punitive damages for constitutionality to make an independent assessment of the relationship between the award and the factual circumstances of the case.") (citing *Campbell* and *Leatherman*). Likewise, the Supreme Judicial Court of Massachusetts has repeatedly applied the three guideposts from *Gore* to determine the constitutionality of an award of punitive damages, distinguishing that question from the jury's discretion to set punitive damages *within*

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explicitly stated that 'courts of appeals should apply a *de novo* standard of review when passing on district courts' determinations of the constitutionality of punitive damages awards.'") (quoting *Leatherman*, 532 U.S. at 436); *Myers v. Central Florida Invs., Inc.*, 592 F.3d 1201, 1212 (11th Cir. 2010) ("we review *de novo* . . . the constitutionality of a punitive award").

the limits of the Due Process Clause. *See Aleo v. SLB Toys USA, Inc.*, 995 N.E.2d 740, 754-55 (Mass. 2013) (noting that the court does not "substitute [its] judgment for that of the jury" but that it must "determine whether the award exceeds constitutional bounds"); *Rhodes v. AIG Domestic Claims, Inc.*, 961 N.E.2d 1067, 1081 (Mass. 2012).[6]

The Supreme Court of Oregon "applies the constitutionally prescribed guideposts to [the] predicate facts to determine if, as a matter of law, the award [of punitive damages] is grossly excessive." *Goddard v. Farmers Ins. Co. of Oregon*, 179 P.3d 645, 663 (Or. 2008) (en banc). The court explained that, "in applying that standard, the reviewing court must in some sense reexamine the evidence in the record – not to redecide the historical facts as decided by the jury, but to decide where, for purposes of the *Gore* guideposts, the conduct at issue falls on the scale of conduct that does or might warrant imposition of punitive damages." *Id.* And in *Mitchell v. Fortis Insurance Co.*, 686 S.E.2d 176 (S.C. 2009), the Supreme Court of South Carolina noted *Leatherman*'s holding that "a de novo standard of review" is required "for determining the constitutionality of

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[6] *Bain v. City of Springfield*, 678 N.E.2d 155 (Mass. 1997), cited in the petition, is inapposite. The Supreme Judicial Court of Massachusetts there held that the Due Process Clause did not apply to an award of punitive damages against a municipality because "[t]he Fourteenth Amendment . . . has never been applied . . . to protect the state or its political subdivisions against persons." *Id.* at 162. The court "scrutinize[d] [the] punitive damage award[] . . . even though no constitutional due process rights are implicated," holding that the award was improper under state law because "the jury had been allowed to consider legally irrelevant elements in arriving at their award." *Id.* at 162-63 (citing *Gore*).

punitive damages awards" and directed lower courts to apply the three-part inquiry from *Gore*, supplemented by prior state-court decisions "only insofar as it adds substance the *Gore* guideposts." *Id.* at 184, 185. The court applied the *Gore* factors without deference to the jury, remitting the punitive damages award to an amount in "the outer limits of the single-digit ratio." *Id.* at 188 (citing *Campbell*, 538 U.S. at 425); *see also*, *e.g.*, *RRR, Inc. v. Toggas*, 674 S.E.2d 170, 171 (S.C. 2009) (per curiam) ("[A]fter conducting a *de novo* review and canvassing the facts, we conclude the punitive damages award was reasonable pursuant to *Gore*.").

Moreover, to the extent that there is variation in the verbal formulations that state courts employ in applying this Court's standards, petitioners fail to show that state supreme courts have reached irreconcilable results in cases like the one on review – that is, they have failed to show any substantive difference in the legal standards that various courts apply. The Wisconsin Supreme Court, taking the evidence in the light most favorable to the verdict and applying the standards articulated by this Court, found that "the punitive damages award . . . was excessive and deprived First American of its right to due process." Pet. App. 24a. Petitioners obviously disagree with that conclusion, but they offer no sufficient reason for this Court to review the legal standards that the Wisconsin Supreme Court applied.

## CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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