No. 99-2035

In the Supreme Court of the United States

COOPER INDUSTRIES, INC.,

Petitioner,

v.

LEATHERMAN TOOL GROUP, INC.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page

Cases:

TABLE OF AUTHORITIES — Continued

Page

TABLE OF AUTHORITIES — Continued

Page

TABLE OF AUTHORITIES — Continued

Page

TABLE OF AUTHORITIES — Continued

Page

BRIEF FOR THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

INTEREST OF THE AMICUS CURIAE

The Chamber of Commerce of the United States of America ("the Chamber") is the nation's largest federation of business companies and associations, with underlying membership of more than 3,000,000 businesses and professional organizations and 140,000 direct members of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing amicus curiae briefs in cases involving issues of national concern to American business. This brief is filed because the sound and fair administration of punitive damages is a matter of profound concern to the Chamber's members.[1]

INTRODUCTION AND SUMMARY OF ARGUMENT

Punitive damages are "strong medicine" (*BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 577 (1996)) that require appropriate procedural safeguards to contain the "acute danger of arbitrary deprivation of property" that they pose (*Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994)). Adequate jury instructions are important to this end, but not sufficient: "Jury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express biases against big businesses * * *." *Ibid*. Hence, it is essential that jury awards receive meaningful judicial scrutiny. See *Pacific Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 15-16 (1991) (describing common law procedure); *Oberg*, 512 U.S. at 432 (judicial review of punitive awards is required by due

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[1] Pursuant to Rule 37.6, amicus states that no counsel for a party authored this brief in whole or in part, and no person or entity other than amicus, its members, or its counsel made any monetary contribution to the preparation or submission of this brief.

process). Critically for present purposes, "*both* 'meaningful and adequate review by the trial court' *and* subsequent appellate review" have long been considered necessary to provide an adequate check against the risk of excessive punishment. *Oberg*, 512 U.S. at 420-421 (quoting *Haslip*, 499 U.S. at 20) (emphasis added); see also *Haslip*, 499 U.S. at 15 (noting that, traditionally, a jury award of punitive damages is "reviewed by trial *and* appellate courts to ensure that it is reasonable") (emphasis added).

The specific question here focuses on the federal appellate standard for reviewing a district court's ruling that the jury's punitive award was not unconstitutionally excessive. The standard-of-review issue, however, does not arise only in the case of constitutional challenges to punitive awards. Federal courts of appeals confront the same issue when excessiveness challenges are raised under substantive state law standards, which often overlap those of *Gore* (see, *e.g.*, *Haslip*, 499 U.S. at 20-22 (setting forth Alabama's standards)), or when the case arises under federal law (see, *e.g.*, *Hennessy v. Penril Datacomm Networks, Inc.*, 69 F.3d 1344, 1355-1356 (7th Cir. 1995) (reviewing Title VII punitive award).

The Seventh Amendment does not constrain the decision here, because in reviewing punitive awards for excessiveness trial and appellate courts are not re-examining any *fact* found by the jury. See *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 459 (1996) (Scalia, J., dissenting). In contrast to the finding of liability for the tort, from which it may be inferred that the jury found each of the indispensable elements of the tort, or the finding of liability for punitive damages, from which it may be inferred that the jury found the defendant's conduct to meet the state's standard (*e.g.*, malice or recklessness), it is not possible to infer from the *amount* of punitive damages that the jury made any particular finding.

The Court accordingly is free to select the standard of review that will best protect the constitutional rights at stake and most likely lead to a fair and tolerably consistent regime of punishments. Because the determination whether a punitive award exceeds lawful limits is a predominantly legal one, requiring comparison with conduct, punishments, and punitive/compensatory ratios in other cases, appellate courts are well suited to the task. Accordingly, both the institutional advantage enjoyed by appellate courts and the importance of obtaining consistency across cases dictate the need for non-deferential appellate review.

This case perfectly illustrates the need for meaningful appellate scrutiny. Cooper's conduct, even if reprehensible enough to cross the threshold separating punishable from non-punishable conduct, surely did so by only the barest of margins. Also, the harm suffered by Leatherman was slight, and any improper profits earned by Cooper as a result of its wrongful conduct were fully disgorged (and more) under the applicable measure of compensatory damages. Nevertheless, the jury, which received no meaningful guidance as to how to quantify the punishment, returned a startling $4,500,000 punitive verdict, 90 times the size of the already generous compensatory award. In the face of these considerations, the district court brushed off Cooper's excessiveness challenge with the observation that, in effect, its conduct had been less than perfect and it was a big company. Not a single consideration pertinent to the excessiveness inquiry received meaningful attention.

When the issue reached the court of appeals, that court did nothing more than invoke the abuse-of-discretion standard as justification for refusing to examine in any meaningful way what the district court had done. By so doing, it declined to treat a number of plainly legal issues embedded in the district court's ruling, most notably: (1) What factors in this case, if any, support punitive damages in such a high multiple of

compensatory damages? (2) In what respect, if any, was Cooper's conduct so reprehensible as to warrant especially severe punishment? Or, alternatively, may the degree of reprehensibility be ignored in considering the excessiveness claim? (3) May seven-figure punitive damages be upheld merely on the basis of the defendant's financial circumstances?

These fundamentally legal questions deserve answers that advance the development of coherent and relatively uniform punishment criteria, especially when, as here, constitutional rights are at stake. It should not be acceptable in a fair and rational punishment system to adopt a standard of appellate review, as the Ninth Circuit has done, that effectively deprives trial courts of meaningful guidance for the performance of the excessiveness inquiry. Here, an apparently aberrational verdict returned by a poorly informed jury with no prior experience in judicial punishment was left undisturbed by a seemingly ill-considered trial court ruling (with which most other judges likely would have differed), yet these troublesome circumstances produced on appeal nothing more than a simple disclaimer of appellate responsibility.

In his concurring opinion in *Gore*, Justice Breyer observed that "detailed examination," rather than "more deferential review," is dictated when "rules that purport to channel discretion" "[do] not do so in fact." 517 U.S. at 594-596. As the present case confirms, the absence of meaningful constraints on jury discretion is inherent in any system in which juries are called upon to make unbounded punishment determinations. Accordingly, non-deferential review is necessary to ensure "the application of law, rather than a decisionmaker's caprice" and thereby "assure the uniform general treatment of similarly situated persons that is the essence of law itself." *Id*. at 587.

ARGUMENT

I. PUNITIVE DAMAGES EXCESSIVENESS CLAIMS PRESENT PREDOMINANTLY LEGAL ISSUES

"[D]ecisions by judges are traditionally divided into three categories, denominated questions of law (reviewable *de novo*), questions of fact (reviewable for clear error), and matters of discretion (reviewable for 'abuse of discretion')." *Pierce v. Underwood*, 487 U.S. 552, 558 (1988). The standard of review thus turns on the nature of the district court's decision on a claim that a punitive damages verdict is excessive (either constitutionally or otherwise). Such an analysis establishes that these determinations could reasonably be classified either as rulings of law or as mixed fact-law questions, but that in either event appellate review should be *de novo*.

A. A Trial Court's Ruling On Excessiveness Requires Application Of Legal Standards.

Just as it is not possible to discern the appropriate standard of appellate review without an understanding of the function being performed by the trial court, so one cannot understand the trial court's role without a clear picture of the jury's function.

1. First, a jury's selection of a punitive amount is not at all like its determination of liability for the underlying tort or for punitive damages. The latter, like a finding of guilt in a criminal case, must be supported by proof of each of a number of identified elements. Because a finding of liability *is* a finding that each indispensable element has been established, the standard of review is the same as for any other jury finding of fact: the reviewing court determines "whether, after viewing the evidence in the light most favorable to the prosecution [or plaintiff], *any* rational trier of fact could have found the essential elements of the crime [or of the tort or of punitive

liability]" under the applicable standard of proof. *Jackson v. Virginia*, 443 U.S. 307, 319 (1979) (emphasis in original).

In contrast, the jury's function in setting the amount of punitive damages does *not* involve determining whether any particular fact has been proven. The jury accordingly is *not* instructed that it must find particular facts and rarely, if ever, is told to return a special verdict answering specific factual questions bearing on the amount of punitive damages. Instead, juries typically are told little more than that they have discretion in setting the amount of punitive damages and that the purposes of punitive damages are to deter and punish. Sometimes, but by no means always, juries are also instructed on various factors that the state considers relevant to the setting of punitive damages, such as the nature of the defendant's wrong, the extent of harm it inflicted or threatened, and, occasionally, additional factors such as the defendant's motives, its conduct following discovery of its wrongdoing, the profitability of the misconduct, and the defendant's finances. See, *e.g.*, *Oberg*, 512 U.S. at 441 n.6 (quoting Oregon instruction); *TXO Prod. Corp. v. Alliance Resources Corp.*, 509 U.S. 443, 463 n.29 (1993) (quoting West Virginia instruction); *Haslip*, 499 U.S. at 6 n.1 (quoting Alabama instruction).

The present case is typical. The jury was instructed under Oregon law to consider the following factors in setting its punitive award: (1) the character of the defendant's conduct; (2) the defendant's motive; (3) the sum of money that would be required to discourage the defendant and others from engaging in such conduct in the future; and (4) the defendant's income and assets. J.A. 14. But, as is almost universally the case, the jury was given no guidance as to how to weigh those factors. It was not, for example, told that the net worth of a defendant cannot justify a high award if the degree of reprehensibility is

low, a proposition that is implicit in *Gore* and that has been expressly articulated by several lower courts.[2]

Moreover, it is typically the case that juries are not instructed on all of the factors that reviewing courts consider in evaluating whether a jury's punitive verdict is excessive under state law or the Due Process Clause. For example, as is common practice in the federal courts, the jury in this case was not instructed to consider two of the three critical excessiveness guideposts identified in *Gore* – namely, the amount of harm suffered by the plaintiff and the civil and criminal penalties applicable to the defendant's conduct. See 3 DEVITT *ET AL.*, FEDERAL JURY PRACTICE AND INSTRUCTIONS § 85.19, at 345-346 (1987) (setting forth standard federal instruction, which mentions none of the *Gore* guideposts); EIGHTH CIRCUIT MANUAL OF MODEL JURY INSTRUCTIONS: CIVIL § 4.53, at 75-76 & n.3 (1999) (model instruction for punitive damages in civil rights actions fails to mention *Gore* guideposts); FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CIVIL § 15.13, at 198

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[2] See, *e.g., Bowden v. Caldor, Inc.*, 710 A.2d 267, 279 (Md. 1998) ("merely because a defendant may be able to pay a very large award of punitive damages * * * does not justify an award which is disproportionate to the heinousness of the defendant's conduct"); *Leab v. Cincinnati Ins. Co.*, 1997 WL 360903, at *16 (E.D. Pa. June 26, 1997) ("To accept [plaintiff's] contention that a punitive damages award against a wealthy corporate defendant must be significant in order to have any effect would mean that any punitive damages award against a Fortune 500 company must necessarily be in the millions of dollars to affect the company's behavior. The law makes no such requirement.") (citation omitted); *Groom v. Safeway, Inc.*, 973 F. Supp. 987, 995 (W.D. Wash. 1997) (defendant's wealth could not justify $750,000 punitive award when none of the *Gore* factors supported an award of that amount); *Creative Demos, Inc. v. Wal-Mart Stores, Inc.*, 955 F. Supp. 1032, 1044 (S.D. Ind. 1997), vacated on other grounds, 142 F.3d 367 (7th Cir. 1998); *Florez v. Delbovo*, 939 F. Supp. 1341, 1345 (N.D. Ill. 1996); *Pivot Point Int'l, Inc. v. Charlene Prods., Inc.*, 932 F. Supp. 220, 223 (N.D. Ill. 1996); *Utah Foam Prods. Co. v. Upjohn Co.*, 930 F. Supp. 513, 531 (D. Utah 1996), aff'd, 154 F.3d 1212 (10th Cir. 1998), cert. denied, 526 U.S. 1051 (1999).

(1999) (pattern instruction states only: "[T]he amount can be as large as you believe necessary to fulfill the purposes of punitive damages. You may consider the financial resources of the defendant in fixing the amount of punitive damages.").

Likewise, courts generally do not inform juries of some important state-law limits on the size of punitive damage awards, including other punitive awards against the same defendant for the same course of conduct, or punitive awards levied against other defendants for comparable conduct. Indeed, some states affirmatively prohibit jury instructions on particular factors. See, *e.g.*, *Wilson v. Dukona Corp., N.V.*, 547 So. 2d 70, 73 (Ala. 1989) ("jury is not allowed to consider the financial position of the defendant," but "defendant's financial position is * * * a consideration essential to a post-judgment critique of a punitive damages award"); *Bowden*, 710 A.2d at 281 (jury should not be instructed on other punitive awards, either against the defendant or against others, but court may consider those awards in reviewing for excessiveness); *id*. at 285 ("simply because a principle should be considered by the court in reviewing a punitive damages award for excessiveness does not mean that the same principle should give rise to an appropriate issue at the trial before the jury or an appropriate issue for a jury instruction"); 1 SCHLUETER & REDDEN, PUNITIVE DAMAGES § 5.6(B)(4), at 310-331 (2000) (reproducing sample state jury instructions).

In short, the jury essentially is asked to make an impressionistic judgment about the amount of punishment to exact. This mode of proceeding contrasts strikingly with the manner in which federal courts have traditionally set criminal penalties, and even more so with current practice. The federal criminal sentencing process begins with the preparation of a presentence report by a probation officer that contains various factual determinations pertinent to sentencing – for example, the crime of which the defendant was convicted, the

defendant's criminal history, whether a weapon was present when the crime was committed, the extent of the loss suffered by the victims, the vulnerability of the victims, the role of the defendant in the offense, and the defendant's acceptance of responsibility and cooperation with authorities. Often, these facts are undisputed; if a fact is in dispute, the trial court must weigh the evidence and make its own finding before it may rely on the disputed fact in sentencing. Under the sentencing guidelines, the uncontested facts and the additional facts found by the court are used to establish an offense level and a criminal history score. A grid is then consulted to determine the range of sentences that may be imposed. The district court chooses a penalty from within the range unless it finds a basis for either an upward or downward departure, in which case the basis for departure must be explained. The purpose and effect of this process are to ensure, to the greatest extent practicable, that defendants of similar culpability are treated similarly. See *Koon v. United States*, 518 U.S. 81, 92 (1996); *Mistretta v. United States*, 488 U.S. 361, 365-368 (1989).

A jury setting punitive damages benefits from none of the refinements and guidance available to a sentencing judge. Unlike a sentencing judge, whose determination of a criminal penalty receives highly deferential review except to the extent it may reflect embedded errors of law (*Koon*, 518 U.S. at 96-100), a civil jury is not constrained by a range of penalties that has been carefully designed for the particular conduct at issue. Nor (unlike the sentencing judge) is the jury required to make subsidiary factual findings that truly structure and discipline its punishment inquiry.

2. The task of setting an amount of punitive damages also differs markedly from that of fixing compensatory damages. A jury's determination of compensatory damages, although governed by the substantive tort principle of "make whole" damages, requires factual findings about the extent of the

plaintiff's injury.[3] To take a recent example, in *Gasperini v. Center for Humanities, Inc*., 518 U.S. 415 (1996), the task for the jury and lower courts was to determine the dollar value of the plaintiff's missing property – an inherently factual inquiry. See *id.* at 420-421 (describing differing assessments of the value of the plaintiff's loss). By contrast, as three members of this Court have already expressly concluded, "[u]nlike the measure of actual damages suffered, which presents a question of historical or predictive fact, the level of punitive damages is not really a 'fact' 'tried' by the jury." *Id.* at 459 (Scalia, J., joined by Rehnquist, C.J., and Thomas, J., dissenting) (citation omitted); see also *Atlas Food Sys. & Servs., Inc. v. Crane Nat'l Vendors, Inc*., 99 F.3d 587, 594 (4th Cir. 1996) (jury's punitive award is "not a factual determination about the degree of injury but is, rather, an almost unconstrained judgment or policy choice about the severity of the penalty to be imposed, given the jury's underlying factual determinations about the defendant's conduct"). To be sure, the setting of punitive damages may involve some implicit factual determinations – for example, that the defendant was or wasn't involved in an effort to cover up its misdeed.[4] But the ultimate determination is an essentially unbounded judgment call. See, *e.g.*, FIFTH CIRCUIT PATTERN JURY INSTRUCTIONS: CIVIL § 15.13, at 198 (1999) ("the amount can be as large as you believe necessary to fulfill the purposes of punitive damages").

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[3] This is not to say that it will necessarily be easy to quantify the amount of harm suffered by a plaintiff: often it will be difficult, particularly with respect to awards for pain and suffering. But whatever difficulties of valuation exist, the question being asked is still factual: how much loss has flowed or will flow from the defendant's actionable conduct?

[4] It bears repeating, however, that juries are seldom asked to render special verdicts with regard to the amount of punitive damages. Hence, there generally is no way for a reviewing court to know whether or not the jury found a particular aggravating (or mitigating) fact.

3. It follows from this that the suggestion that a jury's award of punitive damages should be reviewed by the trial court under *Jackson*'s rational juror standard (see Brief of Erwin Chemerinsky and Arthur F. McEvoy as Amicus Curiae In Support of Petitioner (filed Aug. 3, 2000)) is misguided. Because it is not possible to tell what facts (if any) the jury found in setting an amount of punitive damages or what relative weight it gave to any facts that may have been found, deference to phantom factual determinations is unwarranted.[5]

Moreover, the judicial task in ruling on an excessiveness claim is fundamentally different from that of the jury in setting a verdict in the first instance. The trial court's job is to determine, under the standards and factors articulated by state law and federal constitutional law, whether the amount selected by the jury has gone beyond the boundary that marks the limits of its discretion. The jury is not asked anything about the outer limits of lawful punishment, but instead is asked to select a place within the allowable range that is appropriate for the case before it (never knowing, of course, what the high end of that range might be). The trial court's function in reviewing the jury's gestalt judgment is a quintessentially "legal" one that involves consulting precedent and making comparative judgments. In general, the *Gore* guideposts (and state-law factors) entail this sort of legal inquiry.

Consider the first guidepost: the *degree* of reprehensibility of the defendant's conduct. Although the jury is instructed to

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[5] To take an example from undersigned counsel's actual experience, it is impossible to discern merely from the size of a $150 million punitive verdict against a large corporation whether the jury found the defendant's conduct to be especially reprehensible, as was argued by plaintiffs' counsel in defending the award, or instead concluded, as a number of jurors stated during post-verdict interviews, that, although the jury did not deem the conduct to be especially reprehensible, neither was an award of that magnitude seen as severe punishment given the defendant's hefty finances.

consider "the character of the defendant's conduct," it is given no guidance as to what that means. It is not told, for example, that conduct that barely passes the threshold for punitive liability (as surely is the most that can be said of petitioner's conduct in this case) properly warrants only a small penalty. See *Gore*, 517 U.S. at 580 ("That conduct is sufficiently reprehensible to give rise to tort liability, and even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award."). Nor is the jury instructed that "some wrongs are more blameworthy [and hence warrant higher penalties] than others" (*id*. at 575), much less given any guidance for determining where on the "hierarchy of reprehensibility" (*Schimizzi v. Illinois Farmers Ins. Co.*, 928 F. Supp. 760, 785 (N.D. Ind. 1996)) the conduct at issue should be placed.

We submit that the ascertainment of a reprehensibility spectrum that is coherent, rational, and consistent across cases is a function that only courts can carry out effectively. Even if juries were routinely provided with detailed guidance for locating conduct on the reprehensibility spectrum, and required to make the necessary factual findings (*e.g.*, whether the conduct was an isolated incident or part of a pattern), they would remain at a marked institutional disadvantage when it comes to monetarizing the effect of those findings. Unlike courts, which have the benefit of being able to compare conduct in one case with that in prior cases, juries operate largely with blinders on. Having reached an assessment of the degree of culpability of particular conduct, they remain without means of knowing what weight that reprehensibility level ought to be given in the complex, multi-factor punishment calculus. Courts, by contrast, have the experience and the access to information necessary to determine whether a particular dollar figure is or is not excessive for conduct of a particular type. See, *e.g.*, *Mathie v. Fries*, 121 F.3d 808, 817 (2d Cir. 1997)

(comparing punitive award in case at bar to those in cases involving similar misconduct, and reducing award from $500,000 to $200,000); *Schimizzi*, 928 F. Supp. at 783-785, 786, 787 (comparing punitive award in bad faith case to prior Indiana bad faith awards, and reducing punishment from $600,000 to $135,000). As three members of this Court observed in *Gore*, jurors cannot be expected "to interpret law like judges, who work within a discipline and hierarchical organization that normally promotes roughly uniform interpretation and application of the law." 517 U.S. at 596 (Breyer, J., concurring, joined by O'Connor and Souter, J.J.).

The ratio of punitive to actual or potential harm provides the second due process guidepost. While this standard includes a factual component – the jury's assessment of the plaintiff's actual damages – it too, involves a predominantly legal inquiry. The question asked by the district court is not simply: "What is the ratio?" Rather, it is whether the disparity between the punitive damages and the compensatory award (and/or the plaintiff's potential, but unrealized, harm) is so dramatic as to be outside the "constitutionally [or legally] acceptable range." *Gore*, 517 U.S. at 583 (characterizing the 500:1 ratio approved by the Alabama Supreme Court as "breathtaking"). The ratio analysis entails a normative judgment as to the legally tolerable extent of disparity. This, too, requires a comparison between the ratio in the case under review and those in other cases in order to give effect to the legal standard requiring a reasonable relationship between the punishment and the harm caused or threatened. *Id*. at 581-582 (contrasting ratio approved by Alabama courts with ratios upheld in *Haslip* and *TXO*).

Importantly, neither reprehensibility nor ratio is an independent variable. All else being equal, the tolerable ratio increases with the degree of reprehensibility of the conduct and declines as the amount of compensatory damages rises. For example, a case of low reprehensibility may warrant a 1:1 ratio,

while substantially more egregious conduct causing the same amount of harm may justify a 4:1 ratio (or even more in exceptionally egregious instances). Similarly, a ratio of 100:1 or higher may be justified when compensatory damages are nominal or small, while a ratio of even 1:1 may be excessive when compensatory damages are high (see, *e.g.*, *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 467-468, 468-469 (3d Cir. 1999) ($50 million punitive award reduced to $1 million where compensatory damages were $48 million), cert. denied, 120 S. Ct. 791 (2000)), and/or when they substantially exceed the defendant's gain from the wrongful conduct. Yet the only non-arbitrary way to determine whether a particular ratio is excessive for the particular set of variables present in a given case is to consider ratios that have been permitted in other cases. Juries cannot and do not perform that inherently legal function. Only judges can.

The third *Gore* guidepost is the most transparently legal in nature, for it requires the reviewing court to consider whether the jury's award is "substantially greater" than statutory penalties for comparable conduct. 517 U.S. at 584. For this component of due process analysis, the court must undertake traditional legal research, seeking to identify potentially applicable statutes and penalties.[6] Then it must once again offer a judgment as to whether the disparity between those penalties and the jury award is so substantial as to indicate that

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[6] This is not to say that, when the appropriate penalty for comparison purposes is obvious, the jury should not be told about it. But often there will be dispute as to the existence of an analogous penalty or the manner of its application; resolution of such disputes presents a legal issue for the court. Moreover, once any such dispute is resolved – whether it is before the jury retires to deliberate (in which case it should be instructed to consider that penalty) or after – the question whether the statutory penalty gave adequate notice of the amount of the jury's punishment is ultimately a legal one for the court to make based in part on disparities between the verdict and statutory penalties that have been tolerated or disapproved in prior cases.

the verdict is profoundly out of line with legislative judgments as to the appropriate punishment for such conduct, so that the defendant lacked fair notice that it was risking sanctions of the magnitude issued by the jury.

As part of the notice-based inquiry under the third guidepost, the Court observed that, "at the time BMW's policy was first challenged, there does not appear to have been any judicial decision in Alabama or elsewhere indicating that application of that policy might give rise to such severe punishment." 517 U.S. at 584. In reaching that conclusion, the Court obviously undertook its own survey of punitive damages cases. That, needless to say, is a legal function to be performed by courts. By contrast, it makes no sense to treat the existence or non-existence of prior, equivalently sized punitive awards for similar conduct as a factual issue that a jury can routinely resolve and as to which judicial deference is warranted.

4. In each of the foregoing respects, the excessiveness inquiry under *Gore* and comparable state-law standards is analogous to the application of a statutory damages cap, which surely presents a straightforward question of law with respect to which the jury is owed no deference. See, *e.g.*, *Pavon v. Swift Transp. Co*., 192 F.3d 902, 910 (9th Cir. 1999); *Hudson v. Reno*, 130 F.3d 1193, 1199 (6th Cir. 1997). Of course, damage caps are stated in absolute and fairly precise terms, whereas the legal standards for excessiveness involve relative and more ambiguous standards. Thus, one may debate the respective merits of these two modes for controlling damages. Compare *Gore*, 517 U.S. at 582-583 (rejecting categorical approach), with *id.* at 605 (Scalia, J., dissenting) (criticizing "guideposts" approach). Still, the mere fact that *Gore* and state laws articulate their excessiveness standards in relative and somewhat malleable terms does not deprive them of their status as legal standards against which the size of a punitive award must be measured. As this Court explained in a slightly

different context, the fact that the district courts are called upon to apply standards that are not reducible to a "'neat set of legal rules'"does not of itself rob the district court's decision of its legal nature. *Ornelas v. United States*, 517 U.S. 690, 695-696 (1996) (district court rulings concerning "reasonable suspicion" and "probable cause" are legal rulings reviewable *de novo* notwithstanding the ambiguity of those concepts).

B. *De Novo* Appellate Review Of Excessiveness Rulings Is Supported By The Comparative Institutional Advantages Of The Appellate Courts.

Whether the district court's ruling is classified as one of law or as a mixed fact-law determination, *de novo* review is proper. To determine the standard for reviewing mixed questions, this Court asks whether, "'as a matter of the sound administration of justice, one judicial actor is better positioned than another to decide the issue in question.'" *Pierce*, 487 U.S. at 559-560 (quoting *Miller v. Fenton*, 474 U.S. 104, 114 (1985)). Because the appellate courts are removed from the logistical and time constraints faced by trial courts, and because they sit in panels, they enjoy an advantage when it comes to undertaking comprehensive legal analysis. *Salve-Regina College v. Russell*, 499 U.S. 225, 231-232 (1991). Appellate courts are also in a better position to engage in law elaboration – to establish uniformity and coherence across cases and hence to improve predictability. *Id*. at 231.[7]

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[7] By contrast, the determination under Rule 59 that the size of a verdict is (or is not) against the *weight* of the evidence or is (or is not) unjust is a discretionary one, subject to review only for abuse of discretion. So too is the selection of a remittitur amount below the legal maximum. Thus, if a district court were to conclude that (i) a $4.5 million punitive award is unconstitutional, (ii) the constitutional maximum is $1 million, but (iii) that amount would still be against the weight of the evidence, and (iv) a new trial should be ordered unless the plaintiff accepts a remittitur to $500,000, the first two determinations should be reviewed de novo, while the latter two

Finally, it merits mention that even the most conscientious trial judge's assessment of punitive verdict amounts is often colored, if only subconsciously, by his or her attitude toward the conduct of defense counsel or witnesses at trial. Non-deferential appellate review is thus warranted as a means of providing a detached second look at such awards to ensure that they reflect only the underlying tortious conduct.[8] See, *e.g.*, *Mathie*, 121 F.3d at 817 ("review of punitive awards for excessiveness is an especially appropriate context in which the reflective role of a court of appeals follows the often dramatic arena of a trial court"); see also *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. 485, 512 (1984) (affirming meaningful appellate review of a district court's finding of "actual malice" in part because that finding was evidently bound up with the district judge's frustration over the principal defense witness's "capacity for rationalization").

The foregoing considerations suggest that the appellate courts have a comparative advantage over trial courts in determining the question whether a punitive damage award is excessive. To be sure, such independent review "necessarily entails a careful consideration of the district court's legal analysis." *Salve-Regina*, 499 U.S. at 232. And where, unlike

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should be reviewed only for abuse of discretion.

[8] Although it is well established that discovery abuse and other litigation conduct should not be considered in setting punitive damages (see, *e.g.*, *Ostano Commerzanstalt v. Telewide Sys., Inc.*, 794 F.2d 763, 768 (2d Cir. 1986); *Midwest Enters., Inc. v. Generac Corp.*, 1993 WL 311944, at *1 (N.D. Ill. Aug. 10, 1993); *FDIC v. British-American Corp.*, 755 F. Supp. 1314, 1329 (E.D.N.C. 1991); *Citizens & Southern Nat'l Bank v. Bougas*, 265 S.E.2d 562, 563 (Ga. 1980); *Gonzales v. Surgidev Corp.*, 899 P.2d 594, 597 (N.M. 1995); *James v. Powell*, 225 N.E.2d 741, 747 (N.Y. 1967)), it is unrealistic to expect trial courts to remain wholly objective when reviewing an award imposed against a defendant whose agents (whether outside counsel, in-house counsel, or other in-house employees) the court regards to have been inadequately cooperative or even downright obstructive.

here, the district court has provided a focused analysis of punishment considerations, some subsidiary aspects of that analysis may reflect determinations that the district court is better positioned to make; as to them, an appellate court might justifiably elect to defer.[9] Nonetheless, after appropriate deference on such elements, the ultimate excessiveness decision must embody the independent judgment of the court of appeals.

As indicated above, the excessiveness inquiry under *Gore* and state-law standards is inherently comparative in nature. The courts are called upon to assess the relative reprehensibility of the defendant's conduct, as well as the relative disparity between the jury's punitive award and actual or potential harm, and between the punitive award and the statutory penalties for comparable conduct. Such inquiries, in turn, require careful and extensive review of decisional and statutory authority to determine where on the spectrum of reprehensibility to place the defendant's misconduct, whether the punitive/compensatory ratio in the case before the court is warranted in light of ratios that have been approved or disapproved in prior cases and the criteria utilized by the courts in identifying when comparatively high ratios may be condoned, and whether the analogous statutory penalties and/or prior punitive judgments could be said to have provided fair notice that the defendant could be mulcted in the amount imposed by the jury. Although district courts are by no means incompetent to perform these sorts of inquiries – and indeed should be required to undertake them diligently in the first instance – as in *Salve-Regina* they have no comparative advantage that justifies a deferential standard for reviewing their conclusions.

Furthermore, one of the basic ideas underlying the development of state and federal excessiveness standards is that

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[9] For example, a trial court might be in a better position to determine the credibility of statements of contrition and/or promises of future changes by corporate executives.

the law of punitive damages ought to promote greater uniformity and predictability with respect to frequency and amounts. See *Gore*, 517 U.S. at 574 ("[e]lementary notions of fairness enshrined in our constitutional jurisprudence dictate 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") (footnote omitted); *id*. at 587 (Breyer, J., concurring) ("the uniform general treatment of similarly situated persons * * * is the essence of law itself"). In the absence of statutory guidelines, that goal is best achieved by independent appellate court supervision. Ambiguous concepts such as reprehensibility "acquire content only through application." *Ornelas*, 517 U.S. at 697. Appellate decision-making thus offers the best hope of infusing these initially vague standards with greater clarity and predictability. *Id*. at 697-698 (noting ability of appellate courts to clarify even such highly ambiguous terms as "probable cause" and "reasonable suspicion").[10]

That the legal standards of excessiveness will benefit from appellate elaboration distinguishes the instant case from those in which the Court has selected an abuse-of-discretion standard. In *Cooter & Gell v. Hartarx Corp.*, 496 U.S. 384 (1990), for example, the Court adopted abuse-of-discretion review of Rule 11 rulings in large part because it saw little to be gained by way of law-elaboration. Instead, resolution of the question whether

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[10] At least one circuit has undertaken to provide its district courts with specific further guidance regarding the proper application of the *Gore* factors. See *FDIC v. Hamilton*, 122 F.3d 854, 861-862 (10th Cir. 1997) (stating that "in economic injury cases if the damages are significant and the injury not hard to detect, the ratio of punitive damages to the harm generally cannot exceed a ten to one ratio," that "even a 10:1 ratio will be unconstitutionally excessive in a broad range of cases," and that "[t]o determine the proper ratio in a given case," courts must compare the degree of reprehensibility of the defendant's conduct to that in prior punitive damages cases) (internal quotation marks and citation omitted).

a party was warranted in filing a particular pleading would have required the appellate courts to invest a good deal of effort in order to state "'not what the law now is, but what [a party] was substantially justified in believing it to have been.'" *Id.* at 403 (quoting *Pierce*, 487 U.S. at 561). *De novo* appellate review, by contrast, is favored when, as is true here, such review promises to introduce even a modicum of enhanced specificity into existing law. *Ornelas*, 517 U.S. at 697-698.

District courts do enjoy a comparative institutional advantage when dealing with issues involving the supervision of litigation, and those that depend heavily on assessments of witness demeanor or on information that can be gleaned "[b]y reason of settlement conferences and other pretrial activities." *Pierce*, 487 U.S. at 560. Relatedly, *de novo* review is resisted when the appellate court can obtain needed information only by performing "the unaccustomed task of reviewing the entire record." *Ibid*. Excessiveness review, however, necessitates no special access to pre-trial proceedings: instead, the reviewing court considers the evidence that was before the jury as well as whatever additional information (such as punitive awards in other cases) may have been submitted in support of the post-trial motions. Accordingly, it will seldom be necessary for the court of appeals to undertake an unguided tour of the entire record on appeal.[11] Moreover, this Court has noted that even a fact-intensive decision can warrant independent review if the stakes of the decision are such that it "ordinarily has * * * substantial consequences" for one of the parties, including the imposition of significant liability. *Id.* at 563.

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[11] Of course, appellate review requires consideration of those portions of the record that have been relied on by the district court and/or the parties. That is hardly an "unaccustomed task": appellate courts routinely perform it when conducting, for example, *de novo* review of trial courts' determinations on motions for judgment as a matter of law.

The advantage of appellate courts is evidenced in the recent practice of both this Court and the courts of appeals. See *Ornelas*, 517 U.S. at 697 (that the Court had never deferred to trial courts in prior decisions concerning probable cause and reasonable suspicion suggests that deference is not warranted). In *Gore* itself, for example, there is no suggestion that appellate courts should defer to trial courts' determinations that punitive awards are not excessive. To the contrary, the Court's own evaluation of BMW's conduct, and its overall application of the three guideposts, exhibits none of the hallmarks of deferential review. Likewise, decisions of the courts of appeals often manifest little deference to trial courts or juries. See, *e.g.*, *United Phosphorous, Ltd. v. Midland Fumigant, Inc.*, 205 F.3d 1219, 1229 (10th Cir. 2000) (*Gore* guideposts assessed *de novo*, without deference to jury or district court); *United States v. Big D Enters., Inc.,* 184 F.3d 924, 932-933 (8th Cir. 1999) (upholding award based on independent review of evidence), cert. denied, 120 S. Ct. 1419 (2000); *Inter Med. Supplies*,181 F.3d at 469 (declining to defer to district court). But see *Johansen v. Combustion Eng'g, Inc*., 170 F.3d 1320, 1334-1337 (11th Cir. 1999) (district court's rulings on reprehensibility and disparity between compensatory and punitive damages should be reviewed deferentially), cert. denied, 120 S. Ct. 329 (2000).

C. Abuse-Of-Discretion Review Threatens To Undermine The System Of Procedural Checks On Punitive Damages.

The traditional alternative to *de novo* review is review for abuse of discretion. As we argue below, a proper understanding of abuse-of-discretion review reveals that, at least where the issue is punitive damages excessiveness, even that standard does not entail uncritical appellate deference to whatever the trial court has determined. Nonetheless, the Court ought to avoid invoking the concept of abuse-of-discretion

review in the punitive damages context because it is susceptible to being misunderstood as permitting or demanding toothless deference that would undermine the system of procedural checks on punitive awards put in place by the states and by this Court. That danger is strikingly illustrated by the decision of the Ninth Circuit in this case.

At trial, the jury first concluded that Cooper had infringed Leatherman's trademark rights in its tool but that no damages flowed from that infringement. It did find, however, that Cooper had engaged in "passing off," unfair competition, and false advertising. For these causes of action, the jury awarded $50,000 in compensatory damages, reflecting Cooper's gross profits on ToolZall sales prior to withdrawal of the product from the market. The jury also awarded punitive damages in the amount of $4.5 million, 90 times the compensatory figure.

In the face of defendant's excessiveness challenge, the district court, rather than engaging in the meaningful review envisioned by *Haslip*, *TXO*, *Oberg*, and *Gore*, issued a conclusory statement that the award was justified in light of "the nature of the conduct, evidence of intentional use of the modified [PST] and the size of an award necessary to deter future similar conduct given defendant's size and assets." Pet. App. 24a. No attempt was made to gauge the relative blameworthiness of Cooper's actions as compared to conduct involving malice, violence, ongoing wrongdoing, etc. Likewise, the district court did not even comment on the 90:1 ratio of punitive to compensatory damages. Nor did it consider any comparable statutory penalties. On review, the Ninth Circuit recognized that no consumer deception had resulted from Cooper's use of the photograph, nor harm to the reputation of plaintiff's PST tool. It nonetheless upheld the district court, ruling that, in light of the continued occasional appearance of the offending photograph, the court had not "abuse[d] its discretion." Pet. App. 4a.

If ever a case illustrated the need for meaningful appellate review and the dangers of adopting an abuse-of-discretion standard for rulings on excessiveness, it is this one. Indeed, it is hard to imagine a case in which a multimillion dollar award of punitive damages could be less defensible: the conduct at issue reflected no malice and barely rose to the level of conscious, deliberate wrongdoing; it inflicted little harm on the plaintiff or others; the measure of compensatory damages (forfeiture of all profits from ToolZall sales regardless of the extent to which those profits were attributable to punishable wrongdoing) already goes far to satisfying the state's deterrent objectives; and nothing in applicable Oregon or federal law would have given Cooper the slightest indication that its failure to stop its distributors from using the photograph could subject it to a penalty of 90 times the already generous measure of compensatory damages. Yet the district court's "reasons" for sustaining this preposterous verdict were nothing more than that the defendant's conduct was such as to subject it to punitive liability and that the defendant was, in effect, large enough to afford the exaction.

The Ninth Circuit, in turn, simply disclaimed any responsibility for overseeing what the district court had done, treating abuse-of-discretion review as effectively no review at all, even as to embedded legal questions such as the legitimacy of sustaining a large award purely on the basis of a corporate defendant's finances. Compare cases cited at note 2, *supra*. As far as the court of appeals was concerned, an award of $4.5 thousand or of $4.5 million is equally valid, as long as the defendant can afford to pay it.

Rather than provide the "meaningful and adequate review" envisioned by this Court's decisions and necessary to ensure some minimum level of consistency and non-arbitrariness in punishments, the Ninth Circuit's conception of the appellate function will instead reinforce existing tendencies towards

unbridled and unchecked jury discretion – precisely the regime rejected by this Court in *Oberg*. See 512 U.S. at 432.

D. An Abuse-Of-Discretion Standard Is Not Compelled By *Browning-Ferris*.

Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc., 492 U.S. 257 (1989) ("*BFI*"), does not require use of the abuse-of-discretion standard in reviewing the issue of legal excessiveness. The bulk of the opinion in *BFI* was devoted to the question whether the Eighth Amendment provides a substantive constraint on the permissible size of a punitive award in a private civil case. The Court held that it does not, and that the petitioner's alternative reliance on the Due Process Clause had been waived. The Court went on to consider and reject the claim that federal common law also provides a substantive constraint on excessiveness. That left only state law as a possible source of legal limitation, but there was no claim before the Court that the judgment violated state law excessiveness standards.

In the course of discussing the argument invoking federal common law, the opinion contains the following dictum: "In reviewing an award of punitive damages, the role of the district court is to determine whether the jury's verdict is within the confines set by state law, and to determine, by reference to federal standards developed under Rule 59, whether a new trial or remittitur should be ordered. The court of appeals should then review the district court's determination under an abuse-of-discretion standard." *Id*. at 279 (footnote omitted).

The reference to "standards developed under Rule 59" is plainly to the branch of the Rule that empowers courts, in the interest of justice, to set aside verdicts that are against the weight of the evidence even if those verdicts are not so excessive as to be unlawful. Because Vermont had no criteria

for evaluating an award for excessiveness other than the state's general "grossly and manifestly excessive" standard (see *id*. at 278 n.24), the Court had no occasion to consider whether the standard for reviewing a district court's application of meaningful excessiveness criteria might differ from the standard applicable to the district court's exercise of its traditional "interests of justice" discretionary powers. It seems plain from the procedural posture of the case, as well as from the Court's repeated references to the district court's discretion regarding whether to grant a new trial (*id*. at 278, 279, 280), that the reference to the abuse-of-discretion standard was addressed only to the latter type of decision.[12]

Since the time of *BFI*, this Court and the states have developed objective legal standards to regulate the permissible size of punitive damage awards. As a result, the law today more clearly recognizes that district courts confronted with claims of excessive punitive damages perform two distinct tasks: (i) they determine whether the challenged punitive award is excessive *as a matter of law* (be it state law, federal statutory law, or federal constitutional law), and (ii) they decide whether the amount, even if not excessive as a matter of law, is so far against the weight of the evidence or otherwise unjust as to lead to the conclusion that the interests of justice require a new trial.[13] As the Eleventh Circuit has observed, the former inquiry

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[12] The same distinction appears to have been at work in *Gasperini*. In endorsing the abuse-of-discretion standard of review for claims of excessive compensatory damages, the Court stated: "The trial judge in the federal system * * * has . . . discretion to grant a new trial if the verdict appears to the judge to be against the weight of the evidence. This discretion includes overturning verdicts for excessiveness and ordering a new trial without qualification, or conditioned on the verdict winner's refusal to agree to a reduction (remittitur)." 518 U.S. at 433 (internal quotation marks, citation, and brackets omitted). The Court was not dealing with a claim that the award was excessive as a matter of law.

[13] Cf. *Tibbs v. Florida*, 457 U.S. 31 (1982) (double jeopardy protections

is in the nature of a ruling under Rule 50 that the verdict size is (or is not) sustainable as a matter of law, while the latter inquiry derives from the trial court's power to grant a new trial under Rule 59. *Johansen*, 170 F.3d at 1331-1332.[14]

Again, the comparison with fixed monetary caps is illuminating. When a trial court is confronted with a jury verdict that is supported by the evidence, yet exceeds an applicable statutory damages cap, the court does not typically order a new trial or offer the plaintiff the option to remit damages down to the cap. Rather, it simply reduces the verdict to the statutory ceiling and enters judgment as a matter of law. See, *e.g.*, *Patton v. TIC United Corp.*, 77 F.3d 1235, 1240,

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preclude retrial following finding of evidentiary insufficiency but not following trial court's "thirteenth juror" determination that verdict is against the weight of the evidence).

[14] Because the district court may grant a new trial in the interest of justice, it may likewise deny one subject to the plaintiff's remission of part of the award. The federal courts of appeals have split over whether the district court may suggest a remittitur to an amount that it determines to be fair and reasonable, or whether the remittitur instead must go no further than the maximum amount the jury could properly have awarded. Compare *Johansen*, 170 F.3d at 1332 n.20 (trial court may order a new trial unless plaintiff accepts a remittitur to an amount below the constitutional maximum), with *Earl v. Bouchard Transp. Co.*, 917 F.2d 1320, 1329 (2d Cir. 1990) (trial court's suggested remittitur may not be below maximum amount jury was permitted to award). The courts that have followed the latter view have not considered the differentiation discussed in text.

Some courts have suggested that a remittitur to an amount less than the legal maximum could run afoul of the Seventh Amendment. That concern is misplaced, for it is well-settled that the district court can order a new trial because of excessive damages without offering the plaintiff the option of remittitur at all. In addition, the plaintiff is always free to refuse the remittitur and proceed with a new trial. Thus, because the only effect of remittitur is to *increase* the plaintiff's options in the wake of a determination that justice necessitates setting aside the verdict, it is difficult to understand why the *amount* of a remittitur has any Seventh Amendment implications.

1245-1247 (10th Cir. 1996) (affirming district court's reduction of jury award pursuant to Kansas's cap on non-economic damages); *Wackenhut Applied Techs. Ctr., Inc. v. Sygnetron Prot. Sys., Inc.*, 979 F.2d 980, 983-985 (4th Cir. 1992) (affirming district court's reduction of punitive award pursuant to Virginia's cap).

The same practice holds true when a jury award includes an identifiable component of damages to which the plaintiff is not entitled as a matter of law, such as attorneys' fees or interest (*e.g.*, *New York, L.E. & W.R. Co. v. Estill*, 147 U.S. 591, 619-622 (1893) (striking the interest component of a jury award as unlawful and directing the trial court to enter judgment for the reduced amount)) or when a court determines awards for two claims to be duplicative (*e.g.*, *Caudle v. Bristow Optical Co.*, 224 F.3d 1014, 1023 (district court correctly reduced $15,000 state-law award to $5,000 after finding it to be duplicative of $10,000 Title VII award), amended, 2000 WL 1638648 (9th Cir. Nov. 2, 2000)).

Several federal and state courts have recognized this power in the context of rulings on punitive damage awards. See, *e.g.*, *Johansen*, 170 F.3d at 1331 ("A constitutional reduction * * * is a determination that the law does not permit the award. * * * [T]he power to [reduce the verdict] is located in the court's authority to enter judgment as a matter of law."); *Inter Med. Supplies*, 181 F.3d at 470 (concluding that "[punitive] award greater than $1 million is not reasonably necessary to punish and deter" and remanding for entry of punitive judgment of $1 million) (internal quotation marks omitted); *Mathie*, 121 F.3d at 817, 818 (holding that "the punitive damages award in this case may not exceed $200,000," "reduc[ing] the award of punitive damages to $200,000, and remand[ing] for entry of a revised judgment consistent with this opinion"); *Bowden*, 710 A.2d at 287 (trial court may order reduction of award without providing option of remittitur or new trial).

For the reasons discussed in Part I.A, the inquiry into whether the award exceeds legal limits is a predominantly legal one. Because the question is whether the verdict breaches the legal limit, the district court does not exercise discretion in performing this first inquiry, and review therefore cannot logically be pursuant to an abuse-of-discretion standard.

By contrast, a decision to remit below the legal maximum is highly discretionary: it calls upon the district court, as supervisor of the trial, to weigh the evidence and consider, in the court's own best judgment, whether allowing the jury's award to stand will result in an injustice. It follows that, as is the case with other claims that a verdict is against the weight of the evidence, the district court's ruling on such a contention should be reviewed deferentially.[15] Of course, a finding that a verdict is *not* excessive, as in this case, necessarily is of the former rather than the latter type. It therefore calls for *de novo* appellate review.

II. EVEN IF REVIEW IS FOR ABUSE OF DISCRETION, THAT STANDARD ENTAILS ONLY LIMITED DEFERENCE IN THE EXCESSIVENESS CONTEXT

Even if abuse of discretion is the proper rubric, it does not follow that such review ought to be pro forma or highly deferential. See *Gasperini*, 518 U.S. at 447-448 (Stevens, J.,

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[15] It is true that claims that punitive awards are excessive as a matter of law often are pursued by means of new trial motions under Rule 59 rather than by invocation of Rule 50. But the procedural avenue for raising the claim is of little moment. Many Rule 59 determinations are discretionary, but others – for example, a motion based on alleged errors in instructing the jury – are purely legal and are review *de novo* on appeal. It is the character of the alleged error that determines, in the first instance, the standard of review. Accordingly, when the motion (however denominated) asks the court to hold that the award exceeds the legal maximum, it asks the court to make a legal determination. That determination, even if rendered under Rule 59, is reviewable *de novo*.

dissenting). Whether a district court has 'abused' its discretion depends in large part on how much discretion the district court enjoyed in rendering its decision. In particular, when the district court is confronted with an issue that is largely legal in nature, abuse-of-discretion review is non-deferential simply because a district court by definition abuses its discretion when it makes a legal error. *Id.* at 441, 448. For example, although appellate courts review criminal sentencing rulings for abuse of discretion, when the issue is whether the district court was entitled as a matter of law to rely on certain factors in sentencing, "the court of appeals need not defer to the district court's resolution of the point." *Koon*, 518 U.S. at 100. As the Court explained, "[l]ittle turns * * * on whether we label review of this particular question abuse of discretion or *de novo*, for an abuse-of-discretion standard does not mean a mistake of law is beyond appellate correction. A district court by definition abuses its discretion when it makes an error of law." *Ibid.* (citation omitted). Similarly, in finding abuse of discretion to be the proper standard of review in Rule 11 cases, the Court emphasized that, were a sanction to be issued based on a misapplication of law, it would be reviewable and reversible as an abuse of discretion. *Cooter & Gell*, 496 U.S. at 402.

This Court and lower federal courts have applied similar reasoning to review of decisions awarding monetary or equitable relief in contravention of applicable legal standards. In *Pierce*, for example, the Court, applying an abuse-of-discretion standard (487 U.S. at 571), rejected a district court's upward adjustment of an attorney's fee award on the ground that the district court had misapplied the statutory "special factors" standard for such adjustments. *Id*. at 573-574; see also *Knitwaves, Inc. v. Lollytogs Ltd.*, 71 F.3d 996, 1012 (2d Cir. 1995) (reversing award of attorneys' fees as an abuse of discretion). In *Union Tool Co. v. Wilson*, the Court acknowledged that district courts have substantial discretion to

enter contempt orders and to set penalties for contempt, yet also insisted that a ruling "entered in such a proceeding is not exclusively or necessarily a discretionary one." 259 U.S. 107, 112 (1922) (citations omitted). As the Court explained, "legal discretion in such a case does not extend to a refusal to apply well-settled principles of law to a conceded state of facts." *Ibid*. (citations omitted). Finally, federal courts of appeals have held that, although district court rulings granting or denying injunctive relief are generally subject to abuse-of-discretion review, it is considered an abuse of discretion for the district court to misapply the law in determining, for example, the likelihood that a plaintiff's suit will ultimately prevail on the merits. *Planned Parenthood League v. Bellotti*, 641 F.2d 1006, 1009 (1st Cir. 1981).

In short, use of the "abuse of discretion" label rather than the *de novo* label does not of itself settle the question whether appellate review will be deferential or meaningfully searching. The degree of review is instead tied to the nature of the district court's ruling. In *Gasperini* itself, the Court equated abuse-of-discretion review with deferential review not because the two concepts are co-extensive, but because it was confronted in that case with the question of how courts of appeal should review the almost purely factual question of how much economic damage the plaintiff in fact suffered. Given that sort of fact-driven ruling, the district court's conclusion was held entitled to deference. By contrast, as explained above, where the issue is the excessiveness of a punitive damage award under *Gore* or state law, the district court is required to determine whether the law permitted the jury to enter so large an award. Such a ruling is reviewable by the appellate court for legal error without deference, or at least without undue deference, to the trial court. Any other result would foster the essentially anarchic regime exemplified by the court of appeals' excessively deferential application of the abuse-of-discretion standard.

Respectfully submitted.

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