GRANTED

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

REPLY BRIEF FOR THE PETITIONER

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In its effort to preserve the grossly excessive punitive damage verdict assessed below, Respondent puts its own twist on the facts, misstates Court precedents, and distorts the position of Petitioner. The result is a triumph of irrelevancy. Carefully scrutinized, Respondent's arguments do nothing to undermine the force of Petitioner's claim. On the sole issue presented—*i.e.*, the proper standard for evaluating a trial court's ruling on a challenge to the constitutionality of a punitive damage award—this Court should rule that only an independent, *de novo* review can ensure that the Due Process Clause functions effectively as a safeguard against the imposition of grossly excessive punitive awards.

REPLY TO FACTUAL MISREPRESENTATIONS

Although of only marginal relevance to the single legal issue on which this Court granted certiorari, Respondent's Statement of the Case takes unwarranted liberties with the record that first demand correction.

1. Seeking to exaggerate the so-called reprehensibility of Petitioner's conduct, and also ratchet up its own "potential damages," Respondent gratuitously faults Petitioner for (i) copying a Leatherman PST rather than designing an original tool, and (ii) attempting to overtake five percent of Respondent's market share. (Br. 1-2). Yet, the Ninth Circuit, in vacating the jury's trade dress infringement verdict, expressly adjudged Petitioner's copying of the unpatented PST to be *entirely legal*. (Pet. App. 10a-16a). Respondent is, therefore, less than candid in its suggestion that Petitioner's references to long-term market goals and projected profit margins have a connection to the measure of damages flowing from Petitioner's false advertising.

2. Respondent also highlights Petitioner's decision not to recall all improper marketing materials from its sales personnel until November 20, 1996. (Br. 3, 6). Nowhere

emphasized, however, is the more telling (and wholly undisputed) fact that Petitioner voluntarily removed the ToolZall from the marketplace in October 1996, barely two months after introducing the product. (Tr. 733). Thus, even if consumers had sought to purchase a ToolZall thereafter based on the initial ad—and there is no record evidence to that effect—they would have been unable to do so because the item had been discontinued. Any placement of the ad in publications in the late Fall of 1996, therefore, had absolutely no effect on Respondent's sales or reputation. Stated another way, Respondent could not possibly have incurred any injuries from Petitioner's advertisements appearing after October 1996.

3. Respondent further argues here that Petitioner's use of a PST mock-up in ToolZall advertisements created confusion and "may" have caused retailers to place orders for the ToolZall under the belief that it was manufactured by Respondent. (Br. 3). This theory has absolutely no record support. Moreover, Respondent advances it as though oblivious to the Ninth Circuit's holding that Petitioner had a legal right to copy the PST and sell it to the public. Also inconvenient to this theory, and thus apparently not worthy of mention by Respondent, is the appeals court's explicit statement that, because the visual distinctions between the mock-up photo and the genuine ToolZall were virtually imperceptible, consumers purchasing a ToolZall based on the mock-up photo would have received exactly the item for which they paid. (Pet. App. 3a).

4. Finally, Respondent insists that the $4.5 million punitive damage award was not excessive when analogized to Oregon's Unlawful Trade Practices Act ("UTPA"), a statute authorizing the state attorney general to pursue penalties of $25,000 *per violation* for the commission of prohibited acts. (Br. 7). Not surprisingly, Oregon case law nowhere supports such a post-hoc multiplier theory. Here, Petitioner prepared a *single* mock-up of a modified PST which was furnished to its resellers in a *single* distribution. Those resellers' subsequent use of the mock-up in their own advertisements—and the extent to which they might have done so is unknown—in no way suggests that Petitioner engaged in an additional, discrete UTPA violation each time an ad was run, particularly after Petitioner had removed its ToolZall from the market.

ARGUMENT

I. Recent Supreme Court Case Law Addressing Substantive Due Process Limitations on Punitive Damage Awards Is Not Critical of Independent Appellate Review

Upon reading Respondent's discussion of this Court's recent punitive damage precedents, one might think that the standard of review issue presently before the Court is already well settled. Respondent even asserts that "this Court has repeatedly addressed the issue of judicial review of punitive damage awards and has consistently rejected any form of independent or de novo scrutiny by federal appellate courts." (Br. 11). This contention irresponsibly misstates the Court's prior decisions.

Respondent cites prominently to the abuse of discretion language in both *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989), and *Gasperini v. Center for Humanities, Inc.*, 518 U.S. 415, 435 (1996). As Petitioner noted in its opening brief, however, the dicta in *Browning-Ferris* revolved around the appellate review standard for trial court determinations of punitive damage excessiveness only in the context of discretionary Rule 59 new trial motions. 492 U.S. at 278-79. The Court did not address the issue here concerning the proper review for non-discretionary, constitutional inquiries into legal excessiveness. The distinction is critical; the latter probes whether the jury's punitive verdict is sustainable *as a matter of law*, while the former asks whether, on the record as a whole, *the trial judge's opinion* that the verdict comports with the interests of justice can be sustained.

Likewise, *Gasperini* is not controlling. That case did not even involve punitive damages, and the Court there was not called upon to decide the review standard for testing the constitutionality of a punitive award. Rather, the Court in *Gasperini* focused only on *compensatory* damages, holding that the Seventh Amendment's Reexamination Clause dictated deferential review of a claim of excessiveness in such a context. In addition to the Seventh Amendment concerns, deferential review was the recommended course because the judicial inquiry revolved around the jury's historical fact determinations as to the extent of plaintiff's injury. By contrast, with punitive damages the calculation of an appropriate award is not a "fact" that is "tried" to the jury. *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting). Consequently, neither constitutional nor prudential considerations favor deferential review with respect to punitive damage verdicts.

Respondent also badly misreads *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1 (1991). While holding that the common law method for assessing punitive damages is not *per se* unconstitutional, the Court made clear in *Haslip* that its ruling on facial constitutionality was "not the end of the matter." *Id.* at 18. It then proceeded to thoroughly scrutinize the facts of the case. In ultimately upholding the award, the Court relied in large part on the Alabama Supreme Court's development and consistent application of "detailed substantive standards" to evaluate punitive damages on appeal. *Id.* at 21. The Court remarked that this rigorous appellate review distinguished Alabama's system from problematic schemes in other states in which punitive awards could be modified only if they were perceived to be "manifestly and grossly excessive" or the product of such "passion, bias and prejudice on the part of the jury . . . as to shock the conscience." *Id.* at 21 n.10.

Nor does the plurality opinion in *TXO Production Corp. v. Alliance Resources Corp.*, 509 U.S. 443 (1993), preclude a *de novo* appellate review standard for discerning constitutional excessiveness. That case, in fact, had nothing to

do with excessiveness review in the court of appeals. To the extent the circuit's constitutional analysis parallels that of the district court, it is noteworthy that, although the plurality expressed reluctance to adopt either the "heightened scrutiny" test proposed by the petitioner, or the rational basis test urged by the respondent, *id.* at 455-57, the analysis undertaken in *TXO Production Corp.* was the precursor to the model adopted just three years later in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).

Far from endorsing deferential review of constitutional challenges to excessive punitive awards, the preceding cases reflect, if anything, a trending in just the opposite direction. For years, this Court resisted, except in purely hypothetical terms, the invitation to impose a substantive due process limitation on punitive damages and adopt objective criteria by which to assess the constitutionality of such awards. With the explosive growth in staggeringly excessive punitive damage verdicts, however, has come an increasing awareness in this Court's decisions that the constitutional implications compel a more demanding scrutiny as a check against awards bearing no reasonable relationship to the conduct in question. The progression from *Browning-Ferris* to *Haslip* to *TXO Production Corp.* to *Gore* has generally been one moving away from deferential review insofar as the constitutional excessiveness of punitive damages is concerned, and toward a more exacting, independent examination. *De novo* appellate review is not a break with that precedent, but the next logical and, Petitioner submits, constitutionally necessary step.

II. Judicial Examination of Punitive Damage Awards for Constitutional Excessiveness Is Essentially a Legal Inquiry

A. There Are No Jury Findings on Which to Defer in the Constitutional Analysis

Respondent defends an abuse of discretion standard of review largely on the theory that the judicial inquiry into constitutional excessiveness is so intertwined with the underlying factual issues tried to the jury that deferential review is required. But the facts tried to the jury (*i.e.*, the historical facts) are clearly not under scrutiny on a claim of constitutional excessiveness of a punitive damage award. Indeed, the constitutional challenge is heard only if the other attacks on the jury verdict fail.[1] The question on appeal at that point is not one of error as to the findings of liability, the award of compensatory damages, or even the determination to mete out punishment. Those issues are established components and, to the extent they remain in dispute, are resolved in the plaintiff's favor unless no reasonable view of the evidence would allow them to be considered in such a manner. *See Reeves v. Sanderson Plumbing Prods., Inc.*, 120 S. Ct. 2097, 2109-10 (2000); *TXO Prod. Corp.*, 509 U.S. at 447.

The constitutional inquiry, however, is focused elsewhere. As *Gore* teaches, the Court takes as a given the jury's findings on both the defendant's liability and the damages incurred by the plaintiff as a consequence, and examines only whether the punishment imposed is grossly disproportional to

[1] It is well settled that this Court, like other federal courts, endeavors to entertain constitutional challenges only as a last resort, *i.e.*, only after it is determined that other non-constitutional attacks on the verdict cannot dispose of the case without reaching the constitutional issue. *See Ashwander v. Tennessee Valley Auth.*, 297 U.S. 288, 346-47 (1936) (Brandeis, J., concurring).

the behavior condemned. This analysis calls not for a retrying of historical facts, but for measuring the punitive award (i) on a scale of reprehensibility, (ii) in relationship to the seriousness of the actual or threatened injury, and (iii) through the prism of comparable legal and legislative sanctions. Each of these measurements looks for guidance to outside criteria of general applicability that not only are legal in nature, but were not on trial in the courtroom. There is thus nothing in the guidepost analysis to which either trial or appellate courts have cause to defer in deciding whether a punitive award is unconstitutionally excessive.

Respondent's argument to the contrary strains to link the *Gore* guideposts to the jury's findings on the merits of the case. The "reprehensibility" guidepost, it asserts, is "tied up within the jury's verdict." (Br. 29). Yet, where the defendant's misconduct falls along a continuum of blameworthiness was neither asked of, nor answered by, the jury. Nor is it the sort of question that can be discretely introduced at trial without a claim of unfair prejudice from one side or the other based on opposing counsel's selection of purportedly "comparable" conduct.

The comparison between the jury's compensatory and punitive awards is no more an issue for the jury. By quoting *Gore* completely out of context, Respondent claims that this factor requires an analysis of the "actual harm . . . determined by the jury." (Br. 29). Petitioner concedes that, in applying this ratio guidepost, reviewing courts use as the baseline the amount of compensatory damages left standing following the resolution of any challenges thereto. But identifying that baseline is only the starting point with respect to the proportionality prong of the constitutional excessiveness equation. What is critical is whether the punishment imposed for inflicting harm upon the plaintiff is "within a constitutionally acceptable range" in light of how other similar violators have been punished in the past. *Gore*, 517 U.S. at 583. That question can be answered only through an examination of other experiences found largely in legal precedent. Juries do

not, and should not, engage in such an extrinsic analysis. Courts can and do.

The same can be said for the third of the *Gore* guideposts, *i.e.*, the mandate to look to analogous statutory penalties. Respondent argues that this component does not revolve around abstract legal interpretations of criminal and civil provisions, but implicates factual controversies as to the relationship between the defendant's conduct and the type of behavior punished by the legislative sanction. (Br. 30). Even if true, these are not the sort of "controversies" that are tried to the jury, nor in any meaningful respect discernible from the evidentiary record. The various legislative sanctions that might bear on the excessiveness issue, and their applicability to the conduct found by the jury, are unmistakably legal questions for the court to decide.

There is, accordingly, no part of the *Gore* analysis that suggests, let alone requires, paying homage to the jury's deliberations, since those deliberations do not encompass the guidepost inquiries.[2] Indeed, contrary to Respondent's assertion that *Gore* puts the punitive issue on a deferential review track, Petitioner reads the case as signaling just the opposite. To be sure, the Court there accepted, as it should, those jury findings that were *readily discernible* from the verdict—*i.e.*, elements of the underlying causes of action that were essential to the finding of liability and the award of damages. Affording deference to such historical facts is unremarkable. It does not follow, however, and certainly did not follow in *Gore*, that any such deference extends to the separate inquiries to be asked post-verdict in ascertaining whether the punishment meted out by the jury passes constitutional muster. Examination of those judgment questions was undertaken by the Court *independently* as to each prong.[3]

[2] The constitutional analysis in no way lends itself to the "rational factfinder" test proposed by *amicus* Professor McEvoy. That standard derives from *Jackson v. Virginia*, 443 U.S. 307 (1979), as a "sufficiency of the evidence" test for assessing a jury's *findings of fact*. Here, by contrast, as noted in Part III, *infra*, the jury is not acting in its traditional role as "factfinder" in levying punitive damages, but is making a separate, and much different *policy judgment* as to matters of retribution and deterrence. In examining whether that policy judgment is constitutionally acceptable, the inquiry plainly is not an evidentiary probe of the factual record undertaken by the "rational factfinder" in *Jackson*. Rather, it is a legal analysis framed by the factors articulated in *Gore*, each of which look to punishment handed out elsewhere for similar or identical conduct in order to determine whether the sanctions imposed in the case at bar have a reasonable relationship to the offense committed. The distinction between the two standards is the difference between a review of the underlying facts, and a review on the law—elevated in this instance to constitutional importance. As with most other constitutional issues, (*see* Petitioner's Opening Br. at 18-23), *de novo* appellate review best safeguards the fundamental right in need of protection.

[3] Respondent maintains that "it makes little sense" for an appellate court to examine *de novo* a trial court's ruling on a constitutional challenge to the excessiveness of a punitive damage award while, at the same time, reviewing the lower court's determination as to whether the punitive award is against the weight of the evidence under an abuse of discretion standard. (Br. 40). That is, however, precisely what appellate courts do routinely when litigants challenge district court rulings on both legal and factual bases. *See, e.g.*, *Ornelas v. United States*, 517 U.S. 690, 699 (1996) (trial judge's determination of reasonable suspicion and probable cause is reviewed *de novo*, but historical fact findings undergirding that determination are examined for clear error); Steven A. Childress & Martha S. Davis, *Federal Standards of Review* § 4.23 (3d ed. 1999) (overall validity of district court's jury instructions is evaluated *de novo*, but the failure to give a particular instruction is reviewed for abuse of discretion). Respondent's suggestion to adopt for convenience in such circumstances an appellate unitary abuse of discretion standard again loses sight of the fact that the trial court's guidepost analysis endeavors to determine whether the punitive award is unduly excessive *as a matter of law*. For the reasons stated here and in Petitioner's opening brief, this essentially legal inquiry is not properly subject to deferential review.

B. Deference to the District Judge's Legal Conclusions on the Constitutional Excessiveness Analysis Is Unwarranted

Respondent further contends that a deferential review standard should apply because trial judges, by virtue of their participation in the trial proceedings, are better suited than their appellate counterparts to review constitutional excessiveness challenges to punitive damage awards. (Br. 35). Here, too, the argument appears insensitive to the nature of the constitutional issue on review. Respondent seeks to shape the excessiveness inquiry to include not only *Gore*'s guidepost analysis, but also review of factual disputes submitted to the jury and, in post-trial motions, to the district judge. It is these latter disputes—Respondent identified as examples a defendant's good faith, and the question of potential but unrealized harm flowing from a defendant's misconduct—that Respondent claims justify deferential review.

As indicated, however, Petitioner's disagreement with Respondent is not over the review standard that applies to disputed facts tried to the jury, including how those facts may have been treated by the district judge on post-trial motions (whether based on the court's own evaluation of witness credibility and demeanor or otherwise). It is well settled that such findings and determinations are entitled to appellate deference. *See Ornelas v. United States*, 517 U.S. 690, 699 (1996).

But there is no reason for appellate deference on the ultimate constitutional determination of excessiveness. That inquiry begins where the trial record, as modified by any district court findings on subsidiary matters, ends. The constitutional task is then to assess the *established* facts, viewing any disputed facts on appeal most favorably to the prevailing party, *see Reeves*, 120 S. Ct. at 2109-10, in light of the controlling legal principles. Appellate judges are as well suited as trial judges to perform that assessment. If, of course, the circuit "finds that the district court's analytical sophistication

and research have exhausted" the legal excessiveness inquiry—as surely cannot be suggested from the single sentence of explanation articulated by the trial judge here—"little more need be said in the appellate opinion." *Salve Regina College v. Russell*, 499 U.S. 225, 232-33 (1991). "Independent review, however, does not admit of unreflective reliance on a lower court's inarticulable intuitions." *Id.*

Nor do trial judges have any institutional advantage in assessing whether, *as a matter of law*, a particular punitive award has crossed a threshold of rationality into the "zone of arbitrariness." *Gore*, 517 U.S. at 568. Indeed, only appellate decisions carry binding precedential value, and thus they alone can serve as the vehicle for clarifying the governing substantive standards and developing a cogent body of law.[4]

Respondent gains no traction by pointing to *Koon v. United States*, 518 U.S. 81 (1996), as authority for deferential review. The Court there adopted an abuse of discretion standard for reviewing criminal sentences imposed by district courts under the federal Sentencing Guidelines. Unlike here, however, the Court noted in *Koon* that Congress, in the Sentencing Reform Act, had explicitly directed appellate courts to "give due deference to the district court's application of the guidelines to the facts." *Id.* at 97 (quoting 18 U.S.C. § 3742(e)(4)). Moreover, the key issue on review in *Koon*—the propriety of departing from the guidelines—was recognized by the Court as being necessarily and substantially de-

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[4] Respondent dismisses this consideration by suggesting that the number of federal appeals of punitive damage awards would likely be small. (Br. 37). While Petitioner believes otherwise, particularly in light of the increasing number of "staggering" punitive awards in recent years, *see Haslip*, 499 U.S. at 61-62 (O'Connor, J., dissenting), even on Respondent's assumption, this Court remarked in *Gore* that a paucity of cases appealing punitive awards on grounds of excessiveness "does not justify an abdication of [the Court's] responsibility to enforce constitutional protections" in extraordinary cases. *Gore*, 517 U.S. at 586 n.41.

pendent upon fact findings of the trial judge and, as such, an issue that "embodies the traditional exercise of discretion by a sentencing court." *Id.* at 98-100. As already discussed, the same cannot be said of the predominant legal questions presented in a constitutional challenge to the excessiveness of a punitive damage award.

This does not mean that the constitutional inquiry is aimed at producing some bright line result that marks for all cases the precise demarcation between constitutionally acceptable and unacceptable punitive awards. Importantly, the *Gore* inquiry does not seek to isolate the "optimal" or "correct" punitive damages in any given case, but recognizes that there is a wide spectrum of constitutionally permissible punitive awards.[5] *Gore* simply provides the analytical framework for probing whether the jury's award exceeds a legal threshold erected by the Due Process Clause. Both marking and insuring adherence to this boundary require the establishment

[5] The Association of Trial Lawyers of America argues in its *amicus* brief (p. 21) that punitive damages must have a wild-card component lest they be reduced to a mere "cost of doing business" for defendants. While it is debatable whether punitive awards *must* be wholly unpredictable, Petitioner has never suggested that they need fit within some rigid grid. Nor does the present issue in any respect threaten whatever wild-card characteristic may now adhere to the range of possible punitive awards that fall *within* constitutional boundaries. Nevertheless, if the substantive due process protections outlined by this Court are to be more than empty words, there must be a *discernible outer limit* to what is constitutionally acceptable. *See Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting) ("[T]he Due Process Clause does not permit a State to classify arbitrariness as a virtue. Indeed, the point of due process—of the law in general—is to allow citizens to order their behavior. A State can have no legitimate interest in deliberately making the law so arbitrary that citizens will be unable to avoid punishment based solely upon bias or whim."). The only question here is the proper review standard for ascertaining when that outer limit has been exceeded.

and maintenance of clear (and binding) standards that come only with *de novo* appellate review.[6]

While Respondent asserts that discretionary review advances the clarity of the law just as much as a *de novo* standard, (Br. 37), this Court essentially answered that argument in *Salve Regina College*, *supra*. The Court there acknowledged that "the mandate of independent review will alter the appellate outcome only in those few cases where the appellate court would resolve an unsettled issue of . . . law differently from the district court's resolution, but cannot conclude that the district court's determination constitutes clear error." 499 U.S. at 237-38. Even so, the Court emphasized "that the differences between a rule of deference and the duty to exercise independent review is much more than a mere matter of degree. When *de novo* review is compelled, no form of appellate deference is acceptable." *Id.* at 238.

In sum, Respondent's brief offers no reasonable basis for adoption of an abuse of discretion standard on matters relating to the constitutional excessiveness of punitive damage awards. The Due Process Clause cannot function effectively as a bulwark against punitive awards grossly disproportional to the gravity of a defendant's malfeasance if there is not a coherent, analytical framework for appellate judges to apply *independently* as a check against overly excessive punishment. The alternative deferential review applied by the Ninth Circuit here underscores how inadequate an abuse of discretion standard is as a guardian of the constitutional right.

[6] Curiously, Respondent avers that, because there is no constitutional right to appellate review, there can be no right to *de novo* appellate review. (Br. 41-42). As the cases cited in Petitioner's opening brief reflect, (pp. 18-23), this Court has, on multiple occasions, clearly held otherwise. Moreover, even accepting for present purposes that appellate review is not constitutionally *mandated*, its *availability* is unquestioned, particularly on the issue of punitive damage "gross excessiveness."

III. The Seventh Amendment's Reexamination Clause Does Not Foreclose Independent Appellate Review of District Court Punitive Damage Excessiveness Determinations

Independent appellate review of the constitutionality of a punitive damage award is not barred by the Reexamination Clause of the Seventh Amendment. Respondent's contrary argument blurs the critical distinction between compensatory and punitive damages and essentially dismisses much of this Court's holding in *Gasperini*.

A. Historical Treatment of Punitive Damages Is Not an Impediment to Independent Appellate Review

Respondent, citing a litany of early cases holding that questions over the size of general damage verdicts present purely factual issues not subject to reexamination, first claims that there was no appellate review—let alone *de novo* review—available at common law for attacks on the excessiveness of punitive damage awards. (Br. 13-19). Yet this Court fully considered the very same line of jurisprudence in its recent *Gasperini* decision and, while acknowledging its existence, held that this precedent does not foreclose challenges that an award exceeds legal limits. The Court concluded that "[n]othing in the Seventh Amendment precludes appellate review of the trial judge's denial of a motion to set aside a jury verdict as excessive." *Gasperini*, 518 U.S. at 436 (internal alterations and citation omitted). Recognizing that the "fair administration of justice" dictates a threshold above which damage awards cannot go, a solid majority of the Court agreed that "whether that [threshold] has been surpassed is not a question of fact with respect to which reasonable men may differ, but a question of law." *Id.* at 435 (quotation omitted).[7]

It is true that the Court conditioned appellate review in *Gasperini* on the adoption of an abuse of discretion standard. *Id.* at 434-36. There, however, the only issue before the Court concerned the excessiveness of *compensatory* damages. In contrast to punitive awards, a jury's determination as to the proper quantum of actual damages sustained by the plaintiff is largely *factual* in nature. Thus, while the portion of the compensatory award constituting "unlawful excess" presents a legal question, *id.* at 443 (Stevens, J., dissenting),

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[7] In a related vein, Respondent urges the Court to reject any dichotomy between compensatory and punitive awards because there was no relevant distinction in the judicial treatment of such awards at common law. (Br. 22-24). The dramatic evolution of punitive damages, however, renders much of this early treatment irrelevant for purposes of the Seventh Amendment. At common law, juries typically awarded only a general damages verdict and did not segregate the punitive component from the compensatory award. James D. Ghiardi et al., *Punitive Damages Law & Practice* § 1.03 (1999); Theodore Sedgwick, *A Treatise on the Measure of Damages* 522 (4th ed. 1868) (noting that punitive damages often came in the form of a "severer verdict"). The judicial task, therefore, of assessing the division between the two different awards (or even the existence thereof) often was extraordinarily difficult and necessarily would have required a thorough examination of the facts. It is only a relatively recent phenomenon that juries have been specifically instructed as to the legal purpose of punitive damages and required to allocate the damage breakdown on their verdict.

Furthermore, punitive awards at common law often filled a necessary gap as a result of the unavailability of compensatory damages for pain, mental anguish, and other ethereal injuries. Ghiardi at § 1.02; *Haslip*, 499 U.S. at 61 (O'Connor, J., dissenting). Today non-economic injuries are fully compensable in our tort system. In short, the character and treatment of punitive damages has changed substantially since the time the Seventh Amendment was ratified. Thus, any refusal by early common law courts to entertain challenges to the excessiveness of such awards does not stand in the way of adopting an independent appellate review standard in this case.

deferential review appropriately recognizes that the determination of excessive compensation is significantly rooted in the district judge's own assessment of the record, including matters related to witness demeanor and credibility, to which appellate courts have long deferred.

By contrast, as previously discussed, the calculation of a *punitive* award is not a "fact" that is "tried by the jury." *Id.* at 459 (Scalia, J., dissenting). The objective is not to make the plaintiff whole or to resolve any controversy between the litigants; rather, punitive damages represent a "private fine." *Browning-Ferris*, 492 U.S. at 297 (O'Connor, J., concurring in part and dissenting in part). The jury is merely acting *in loco civitatis*, *see Gore*, 517 U.S. at 572 n.17, making a policy choice as to the degree of sanction necessary to punish the defendant and deter future misconduct. *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974). The Seventh Amendment's Reexamination Clause thus imposes no constraints on appellate review of punitive damages in this context. Indeed, as Justice Scalia has correctly observed, none of the Supreme Court's early cases restricting appellate review of purportedly excessive damages involved punitive awards. *Gasperini*, 518 U.S. at 459 (Scalia, J., dissenting).[8]

Respondent nonetheless pursues its Seventh Amendment argument by pointing to a number of cases and treatises stating that punitive damage awards rest within the discretion of the jury. (Br. 20-22 & n.11). These authorities, however,

[8] Respondent takes issue with the breadth of Justice Scalia's research and insists that *New York, Lake Erie & W. R.R. v. Winter's Adm'r*, 143 U.S. 60 (1892), did apply the Seventh Amendment's restrictions to a punitive damage award. There is no suggestion in that case, however, that the jury's $10,000 verdict represented anything more than a compensatory award. The Court carefully recounted the parade of horribles, which included both economic and physical injuries suffered by the plaintiff as a direct result of defendant's conduct. *Id.* at 62. In outlining the limits on its powers of review, the Court did not even hint that there was a punitive component to the award. *See id.* at 75.

do not suggest that the quantum of punitive damages is a "fact" tried to the jury; they simply underscore the obvious: there is a broad range of constitutionally permissible punitive awards in any given case, and the jury has considerable latitude in selecting a figure therein.[9]

In *Day v. Woodworth*, 54 U.S. 363 (1852), and *Missouri Pacific Railway Co. v. Humes*, 115 U.S. 512 (1885), for example, the Court did nothing more than uphold the facial constitutionality of punitive damage awards. The only issue in those cases was whether juries were empowered to impose damages in a sum exceeding the plaintiff's actual injuries. The Court responded in the affirmative, and held that a punitive award is traditionally left to the jury's discretion. *Day*, 54 U.S. at 371; *Missouri Pac. Ry.*, 115 U.S. at 521-23. The Court never confronted the question of whether the punitive damage award was *excessive as a matter of law*.

The same is true of *Barry v. Edmunds*, 116 U.S. 550 (1886). In *Barry*, in fact, the Court specifically noted in dictum that the jury's discretion in assessing a punitive award is not absolute and, thus, while generally not to be judicially disturbed, should expect no such deference from the courts if the jury's award is "so excessive or outrageous" as to contravene the rules of law. *Id.* at 565 (citation omitted).

Nor does *Feltner v. Columbia Pictures Television, Inc.*, 523 U.S. 340 (1998), assist Respondent's Seventh Amendment argument. *Feltner* held only that the Seventh Amendment's jury guarantee applied to the determination of statutory damages under the federal Copyright Act. *Id.* at 353. Neither the availability, nor possible limits, of appellate

[9] Respondent misreads *Honda Motor Co.* as being to the contrary. (Br. 27-28). The Court there, as is its custom, simply accepted the Oregon Supreme Court's interpretation of Oregon law. 512 U.S. at 426-27 (citing *Van Lom v. Schneiderman*, 210 P.2d 461 (Or. 1949)). There is no suggestion in that opinion that, as a matter of *federal constitutional law*, the proper size of a punitive award is a fact tried to the jury.

review of the jury's award was in question. Clearly, the fact that a jury is vested with responsibility for calculating non-compensatory damages in the first instance in no way suggests that the court of appeals is constrained from scrutinizing that award for legal excessiveness. *Feltner* certainly carries no such suggestion. Indeed, at least with respect to exemplary damages, the exact opposite has historically been the practice:

> Under the traditional common-law approach, the amount of the punitive award is initially determined by a jury instructed to consider the gravity of the wrong and the need to deter similar wrongful conduct. The jury's determination is then reviewed by trial and appellate courts to ensure that it is reasonable.

Haslip, 499 U.S. at 15.

B. *Gasperini* Does Not Require the Adoption of a Deferential Review Standard in this Case

Respondent also relies on *Gasperini* to argue that the Seventh Amendment, if not a bar to reexamination of punitive awards, at least compels no more than deferential appellate review. In this regard, Respondent refers particularly to a footnote in the Court's opinion, *see* 518 U.S. at 435 n.18, that it reads as rejecting any distinction between compensatory and punitive damages for purposes of the scope of appellate review. Read in context, however, the footnote reference does not say what Respondent stretches it to say. The Court's marginal observation equated excessiveness review for compensatory and punitive damages only for the purpose of assessing the governing substantive law. *See id.* ("*[F]or purposes of deciding whether state or federal law is applicable*, the question whether an award of compensatory damages exceeds what is permitted by law is not materially different from the question whether an award of punitive damages ex-

ceeds what is permitted by law.") (emphasis added). Nothing in the referenced footnote, nor elsewhere in *Gasperini*, addressed the issue now before the Court as to the proper standard of appellate review when the question presented is whether a *punitive award* is constitutionally excessive.

Petitioner recognizes, of course, that the abuse of discretion standard adopted in *Gasperini* was premised in part on the Court's acceptance of a deferential appellate review standard in *Browning-Ferris* where the size of a punitive damage award was being challenged. *See id.* at 434-35. But the *Browning-Ferris* discussion of deferential review was with specific reference to a Rule 59 challenge that called the punitive award into question as being against the weight of the evidence or otherwise so unjust as to necessitate a new trial. *Browning-Ferris*, 492 U.S. at 278-80. It is well established that "the federal standards developed under Rule 59," *id.* at 279, empower district judges to order a new trial or remittitur even if the verdict is within a constitutionally acceptable range, and that appellate review of such action is deferential. *See Cone v. West Virginia Pulp & Paper Co.*, 330 U.S. 212, 216-18 (1947).

Notably, however, the Court in *Browning-Ferris* refused to decide the issue presented here as to whether the size of the punitive award violated the Due Process Clause because the petitioner there had failed to raise that issue below. *Browning-Ferris*, 492 U.S. at 276-77. The review standard for constitutional excessiveness has, therefore, yet to be directly addressed by this Court insofar as a punitive award is concerned. Unless due process guarantees no different protection against grossly excessive punitive damage awards than the highly deferential review available under Rule 59, a concept that would render *Gore* and its antecedents superfluous, appellate review of due process challenges must be more demanding than the deferential standard applicable to rulings on traditional new trial motions.

CONCLUSION

The judgment of the United States Court of Appeals for the Ninth Circuit should be reversed and the case remanded to the circuit with instructions to evaluate Petitioner's constitutional challenge to the punitive damage award under the proper standard of review.

Respectfully submitted,

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