No. 20-1426

In the Supreme Court of the United States

EPIC SYSTEMS CORPORATION, PETITIONER

v.

TATA CONSULTANCY SERVICES LIMITED, ET AL.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE

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QUESTION PRESENTED

Whether the court of appeals erred in holding that the state-law punitive-damages award in this case exceeded the maximum amount allowed by the Due Process Clause.

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INTEREST OF THE UNITED STATES

This brief is submitted in response to the Court's order inviting the Solicitor General to express the views of the United States. In the view of the United States, the petition for a writ of certiorari should be denied.

STATEMENT

A. "Punitive damages may properly be imposed to further [the government's] legitimate interests in punishing unlawful conduct and deterring its repetition." *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 568 (1996). This Court has held, however, that the Due Process Clause prohibits "grossly excessive" punitive-damages awards, *id.* at 562 (quoting *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (plurality opinion)), because such an award "furthers no legitimate purpose and constitutes an arbitrary deprivation of property," *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S.

408, 417 (2003). The Due Process Clause requires that "an award of punitive damages [be] based upon an 'application of law, rather than a decisionmaker's caprice,'" *id.* at 418 (quoting *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 436 (2001)), and that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that [the government] may impose," *Gore*, 517 U.S. at 574.

In *Gore*, the Court articulated "[t]hree guideposts" to structure the due-process inquiry. 517 U.S. at 574. The first guidepost looks to the "degree of reprehensibility of the defendant's conduct," to ensure that an award is not "'grossly out of proportion to the severity of the offense.'" *Id.* at 575-576 (quoting *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 22 (1991)). For example, "'trickery and deceit' * * * are more reprehensible than negligence." *Id.* at 576 (quoting *TXO*, 509 U.S. at 462 (plurality opinion)). The second guidepost evaluates "the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," bearing in mind a "long legislative history, dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages to deter and punish." *Campbell*, 538 U.S. at 424-425. The third guidepost looks to "civil penalties authorized or imposed in comparable cases," *Gore*, 517 U.S. at 575, reflecting the "'substantial deference'" that courts should give "to legislative judgments concerning appropriate sanctions for the conduct at issue," *id.* at 583 (citation omitted).

B. Petitioner licenses customizable software to healthcare providers for the management of their pa-

tients' records. Pet. App. 3a. To assist providers in using the software, petitioner operates a web portal called UserWeb, a repository of training materials, guides, and updates. *Id.* at 3a-4a. UserWeb contains trade secrets and other confidential information pertaining to petitioner's software. *Id.* at 4a.

Petitioner's largest client, Kaiser Permanente, hired respondent to assist it in implementing updates to petitioner's software and testing its functionality. Pet. App. 4a-5a.[1] In addition to offering consulting services, respondent produced its own health-records software, which at the time was licensed principally in India. *Id.* at 5a. In light of this potential conflict of interest, petitioner declined respondent's repeated requests for full access to the confidential information stored on UserWeb. *Id.* at 5a-6a.

In 2011, respondent hired an individual who had previously obtained UserWeb login credentials by falsely identifying himself as a Kaiser employee. Pet. App. 6a. Once employed by respondent, that person informed his supervisor of his credentials, and the supervisor instructed him to access the UserWeb portal. *Ibid.* During the next two years, dozens of respondent's employees downloaded more than 150,000 pages from UserWeb, including confidential information and trade secrets. *Ibid.*; see *id.* at 77a. Respondent used the information to prepare a "comparative analysis" to help determine the viability of entering the U.S. market to compete with petitioner. *Id.* at 7a. That analysis compared respondent's software with petitioner's software

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[1] Respondent Tata America International Corp. is wholly owned by respondent Tata Consultancy Services Ltd. For ease of reference, and consistent with the decision below, this brief refers to the two entities collectively as "respondent." See Pet. App. 2a n.1.

and identified functional discrepancies between the two products. *Id.* at 7a-8a.

A whistleblower eventually brought respondent's misconduct to light. Pet. App. 8a. But even then, when Kaiser and petitioner investigated, "multiple * * * employees [of respondent] lied to investigators about [respondent's] access to UserWeb." *Ibid.* One of those employees later admitted that his manager had instructed him to lie. *Id.* at 44a.

C. Petitioner filed suit in the United States District Court for the Western District of Wisconsin, alleging a variety of state and federal claims, including misappropriation of trade secrets, fraudulent misrepresentation, and unfair competition. See Pet. App. 57a, 73a.

1. Respondent's misconduct continued into pretrial discovery. See Pet. App. 9a. As a sanction for respondent's "repeated, egregious failures to maintain and allow timely access to relevant discovery materials," the district court permitted the jury to draw an adverse inference in specified circumstances. *Id.* at 61a; see *id.* at 9a.

The district court bifurcated proceedings into liability and damages phases. Pet. App. 9a. At the liability stage, the jury found in petitioner's favor on all claims. *Ibid.* At the damages stage, the jury returned an award of $140 million in compensatory damages for respondent's use of petitioner's data to create the comparative analysis, and an additional $100 million for other uses of petitioner's confidential information. *Id.* at 11a. The jury also awarded $700 million in punitive damages. *Ibid.*

Respondent filed post-trial motions challenging the jury's damages awards. The district court upheld the $140 million compensatory award for respondent's illicit

use of petitioner's data to perform the comparative analysis. The court explained that this amount reflected the cost that respondent would otherwise have been required to incur in order to develop the aspects of petitioner's software reflected in the analysis. Pet. App. 66a-67a. The court set aside, for lack of sufficient evidentiary support, the additional $100 million award for other uses of petitioner's data. *Id.* at 69a.

Based on its reduction of the compensatory-damages award to $140 million, the district court also reduced the punitive-damages award to $280 million, the maximum amount permitted by Wisconsin law. Pet. App. 75a. Wisconsin law authorizes punitive damages for a wide range of torts when "the defendant acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff," while limiting such awards to "twice the amount of any compensatory damages * * * or $200,000, whichever is greater." Wis. Stat. § 895.043(3) and (6).[2] The court rejected respondent's argument that even the reduced punitive-damages award violated the Due Process Clause. Pet. App. 75a-80a. Applying the *Gore* guideposts, the court found that respondent's "widespread, knowing and unauthorized access and downloading of [petitioner's] confidential information" was reprehensible, and that a 2:1 ratio of punitive to compensatory damages "falls well within the range" of reasonableness. *Id.* at 77a-78a.

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[2] The district court also relied on a special cap applicable to trade-secret claims that likewise limits punitive damages to twice the amount of compensatory damages, Wis. Stat. § 134.90(4)(b). See Pet. App. 75a. Because the certiorari petition does not mention that provision, see Pet. 2-3, and the court of appeals did not discuss it, this brief similarly limits its discussion of Wisconsin law to Section 895.043.

2. On appeal, respondent renewed its constitutional challenge to the punitive-damages award. See Pet. App. 40a. Applying the guideposts articulated in *Gore*, the court of appeals agreed with respondent that the award was constitutionally excessive. *Id.* at 40a-51a.

As to the first guidepost, reprehensibility, the court of appeals analyzed "five factors" that it gleaned from *Campbell*. Pet. App. 41a. The court acknowledged that respondent's conduct "involve[d] a repeated course of wrongful acts," and that the harm to petitioner resulted from respondent's "intentional attempts to deceive" petitioner. *Id.* at 43a-44a. The court emphasized, however, that respondent had neither caused "physical harm" nor "evinced an indifference to or a reckless disregard of the safety of others," and that petitioner "is not financially vulnerable." *Id.* at 42a-43a. In the court's view, although respondent's "conduct justifies punishment," it "was not reprehensible 'to an extreme degree.'" *Id.* at 45a (citation omitted).

With respect to the second guidepost, the ratio between punitive damages and harm or potential harm, the court of appeals noted that this case presents "an unusual issue" because the compensatory award reflects "the benefit to [respondent]" resulting from its theft of trade secrets, not "any harm suffered by [petitioner]." Pet. App. 45a. The court found, however, that respondent had "waived any argument that the compensatory award is the incorrect denominator in the ratio analysis." *Id.* at 46a. Assessing the award on that basis, the court concluded that the ratio between punitive and compensatory damages generally "'should not exceed 1:1' where the compensatory award was 'substantial.'" *Id.* at 50a (citation omitted).

The court of appeals held that the third guidepost, comparable civil penalties, "generally deserves less weight than the other two." Pet. App. 50a (citation omitted). The court nonetheless recognized that Wisconsin's "statutory cap on punitive damages * * * is one indication of what the Wisconsin legislature has judged to be an inappropriate sanction for reprehensible conduct: any punitive award exceeding a 2:1 ratio is inappropriate." *Id.* at 51a. The court therefore acknowledged that the third guidepost "does not point toward" the award "being unconstitutional." *Ibid.*

In light of these considerations, the court of appeals remanded for the district court to reduce the punitive-damages award "to, at most, $140 million"—"a 1:1 ratio relative to the compensatory award." Pet. App. 51a.

3. Petitioner requested panel and en banc rehearing. Pet. App. 54a. In the rehearing petition, petitioner argued for the first time that respondent's constitutional challenge should be resolved without reference to the *Gore* guideposts because the Wisconsin statutory cap satisfies any due-process concerns by providing defendants fair notice of their maximum exposure. See C.A. Pet. for Reh'g 7-9.[3] The panel modified its opinion in minor respects but did not address petitioner's new argument. Pet. App. 1a; see Pet. 12. The Seventh Circuit denied rehearing en banc without recorded dissent. Pet. App. 53a-54a.

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[3] Petitioner asserts that it raised this contention at oral argument. Cert. Reply Br. 3. But in the cited exchange, petitioner's counsel never mentioned the Wisconsin statute, let alone argued that it made the *Gore* guideposts irrelevant. See C.A. Docket Entry No. 52, Oral Argument at 41:20-42:00 (Jan. 16, 2020), https://go.usa.gov/xt2eA.

DISCUSSION

This Court has construed the Due Process Clause to "prohibit[] the imposition of grossly excessive or arbitrary punishments on a tortfeasor." *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 416 (2003). Petitioner contends (Pet. 13-18) that this rule rests exclusively on a fair-notice rationale, such that a punitive-damages award that complies with a statutory cap necessarily survives due-process review. Petitioner's conception of the applicable due-process rule is overly narrow. Nevertheless, because courts must "'accord 'substantial deference' to legislative judgments concerning appropriate sanctions for the conduct at issue,'" *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 583 (1996) (citation omitted), statutory limits should materially inform the analysis. The court of appeals' assessment of the three *Gore* factors gave insufficient weight to Wisconsin's statutory cap and misapprehended those factors in other ways as well.

The deficiencies in the court of appeals' analysis, however, do not warrant this Court's review. Petitioner's current, notice-based claim was neither pressed nor passed upon below, and this case does not implicate a conflict in the circuits. And while petitioner suggests (Pet. 24) that the decision below calls into question various federal statutes that authorize or mandate enhanced-damages awards, those statutes differ materially from the Wisconsin law at issue here. Properly read, the court of appeals' decision has no necessary implications for the constitutionality of those federal provisions. Further review is not warranted.

A. The Court Of Appeals' Analysis Was Incomplete

1. Statutory limits on punitive-damages awards inform the Gore *analysis*

The due-process standard articulated in *Gore* is best suited to evaluating the constitutionality of "unrestricted state common law damages awards." *Arizona* v. *ASARCO LLC*, 773 F.3d 1050, 1057 (9th Cir. 2014) (en banc). Such an award was at issue in *Gore* itself, where the jury was vested with "fairly unbounded discretion." 517 U.S. at 595 (Breyer, J., concurring); see *id.* at 565 (majority opinion). Neither *Gore* nor *Campbell* involved a statutory cap on punitive damages. See *ibid.*; *Campbell*, 538 U.S. at 415. The Court therefore had no occasion to address the proper due-process test when the legislature has made a specific judgment about the size or availability of punitive damages.

Petitioner contends (Pet. 16) that the *Gore* Court eschewed "substantive limits" on punitive damages and instead sought exclusively to assess "whether a defendant had fair notice." In petitioner's view, "[w]here the statute provides unambiguous prior notice to the defendant of the possible scope of punitive damages that its conduct may trigger, the notice justification for due process review is satisfied." Pet. 17.

Petitioner is mistaken. The relevant precedents rest on both "procedural *and* substantive" justifications. *Campbell*, 538 U.S. at 416 (emphasis added). Although fair notice is a critical consideration, see *Gore*, 517 U.S. at 574, the Due Process Clause also "imposes substantive limits 'beyond which penalties may not go.'" *TXO Prod. Corp.* v. *Alliance Res. Corp.*, 509 U.S. 443, 454 (1993) (plurality opinion) (quoting *Seaboard Air Line Ry.* v. *Seegers*, 207 U.S. 73, 78 (1907)). On its face, the determination whether an award is "grossly excessive,"

Campbell, 538 U.S. at 416, necessarily entails an inquiry (albeit a deferential inquiry) into whether "the measure of punishment is both reasonable and proportionate," *id.* at 426; see *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 433-434 (2001) (describing the "'grossly excessive'" standard as a "substantive limit[]") (citation omitted).

Nevertheless, although a statutory cap does not obviate all constitutional concerns, this Court has long recognized that "legislative judgments concerning appropriate sanctions for the conduct at issue" deserve "'substantial deference.'" *Gore*, 517 U.S. at 583 (quoting *Browning-Ferris Indus. of Vt., Inc.* v. *Kelco Disposal, Inc.*, 492 U.S. 257, 301 (1989) (O'Connor, J., concurring in part and dissenting in part)). Legislative determinations about the availability and scope of punitive damages are relevant to each *Gore* guidepost.

As to the first guidepost, the legislature's decision to authorize or require enhanced damages for a specific category of misconduct often reflects its judgment that such conduct is especially reprehensible. See *ASARCO*, 773 F.3d at 1057 (noting that statute at issue "clearly sets forth the type of conduct, and mind-set, a defendant must have to be found liable for punitive damages"). As to the second guidepost, a statutory provision that limits punitive damages to a specified multiple of compensatory damages embodies the legislature's judgment as to the appropriate ratio, reflecting, for example, the difficulty of "detect[ing]" the misconduct in question. *Gore*, 517 U.S. at 582; see *Abner* v. *Kansas City S. R.R.*, 513 F.3d 154, 164 (5th Cir. 2008) (noting "that Congress has effectively set the tolerable proportion"). And as to the third guidepost, a court has little (if any) need to advert to "the civil or criminal penalties

that could be imposed for comparable misconduct," *Gore*, 517 U.S. at 583, when the legislature has specifically addressed the availability and permissible amount of punitive damages for a particular wrong. See *ASARCO*, 773 F.3d at 1058 ("We need not search outside the statutory scheme Congress enacted for legislative guidance in other contexts.").

2. The court below misapplied the Gore *factors*

In analyzing the three *Gore* factors, the court of appeals failed to appreciate the significance of Wisconsin's statutory cap on punitive damages. The court also misapprehended other aspects of this Court's due-process jurisprudence.

a. With respect to the reprehensibility guidepost, the court of appeals acknowledged that respondent had made "repeated, intentional attempts to deceive [petitioner]." Pet. App. 44a. The court nevertheless concluded that respondent's conduct was not sufficiently egregious to justify the $280 million award. The court based that determination largely on the facts that respondent's theft of trade secrets had not "evinced an indifference to or a reckless disregard of the safety of others" and that petitioner "did not suffer physical harm." *Id.* at 42a.

The court of appeals' focus on physical harm and safety could be read to place victims of economic torts at a structural disadvantage in obtaining enhanced damages. That outcome would be inconsistent with the Wisconsin legislature's judgment that certain economic torts may warrant punitive damages up to twice the amount of compensatory damages. See Wis. Stat. § 895.043(2) and (6) (setting a generally applicable limit, but excluding discrete torts and violations). To be sure, the Wisconsin statute applies to multiple torts and thus

reflects a less particularized judgment as to reprehensibility than do the various federal statutes that target specific substantive categories of misconduct. See p. 19, *infra*. But in addition to exempting certain types of wrongdoing from the punitive-damages cap, Wis. Stat. § 895.043(2) and (6), Wisconsin law authorizes punitive damages only when tortfeasors "act[] maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff," *id.* § 895.043(3). Although that standard turns on the defendant's state of mind rather than on the substantive misconduct involved, it reflects a legislative judgment about the types of wrongdoing that potentially warrant punishment, and it is consistent with this Court's observation that "'trickery and deceit' are more reprehensible than negligence." *Gore*, 517 U.S. at 576 (citation omitted). The court of appeals inappropriately discounted the Wisconsin-law provisions that both authorize and limit the imposition of punitive damages.

The court of appeals' unfavorable treatment of economic interests stemmed in part from its narrow conception of the "five factors" it gleaned from *Campbell*. Pet. App. 41a; see *id.* at 41a-42a (quoting *Campbell*, 538 U.S. at 419). But those factors are nonexclusive and do not supplant consideration of all the relevant facts and circumstances. The Court in *Gore* observed that "infliction of economic injury, especially when done intentionally through affirmative acts of misconduct, * * * can warrant a substantial penalty." 517 U.S. at 576. Thus, "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to cure the defendant's disrespect for the law." *Id.* at 576-577. The

court of appeals accorded these considerations insufficient weight.

b. The court of appeals' assessment of the ratio guidepost was similarly flawed. The statutory cap at issue here represents the Wisconsin legislature's judgment regarding the maximum ratio for this category of claims, but the court accorded it no weight. This Court has long looked to history in applying the Due Process Clause, see, *e.g.*, *Pacific Mut. Life Ins. Co.* v. *Haslip*, 499 U.S. 1, 17-18 (1991), and Wisconsin's decision to cap punitive damages at twice compensatory damages fits within a well-established tradition, "dating back over 700 years and going forward to today, providing for sanctions of double, treble, or quadruple damages." *Campbell*, 538 U.S. at 425. "Some 65 different enactments during the period between 1275 and 1753 provided for double, treble, or quadruple damages," and "[p]resent-day federal law allows or mandates imposition of multiple damages for a wide assortment of offenses." *Gore*, 517 U.S. at 581 & n.33 (listing examples). The court of appeals erred in disregarding the tradition that the Wisconsin cap follows.

The court of appeals instead fastened on the *Campbell* Court's observation that, "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." Pet. App. 47a (quoting 538 U.S. at 425) (brackets in original). The court of appeals even suggested that, as a general rule, "the ratio 'should not exceed 1:1' where the compensatory award [i]s 'substantial.'" *Id.* at 50a (citation omitted).

That conclusion oversimplifies the relevant portion of *Campbell*. The fact that a particular compensatory

award is "substantial," Pet. App. 47a (citation omitted), is not dispositive standing alone. It would be illogical to suggest that the *more* harm a defendant inflicts, the *less* susceptible he is to punitive damages. Rather, the size of an award must be assessed in light of the purposes of both punitive damages generally and the due-process inquiry. A small compensatory award, for instance, may indicate that any "noneconomic harm" was "difficult to determine," thus justifying a larger punitive award. *Campbell*, 538 U.S. at 425 (quoting *Gore*, 517 U.S. at 582). The court of appeals misapprehended this Court's precedents when it placed undue emphasis on the size of the compensatory award standing alone.

c. Finally, the court of appeals acknowledged that, because the challenged award complied with Wisconsin's statutory cap, the comparable-penalties guidepost did not support a finding of unconstitutionality. Pet. App. 51a. The court stated, however, that this factor "generally deserves less weight than the other two." *Id.* at 50a (citation omitted). Indeed, it is unclear whether the court accorded the statutory cap *any* weight, as the court stated before even discussing the cap that "a 2:1 ratio exceeds the outer-most limit of the due process guarantee in this case." *Ibid.*

At the very least, the court's analysis gave insufficient weight to the third guidepost. The legislature's judgment as to the appropriate maximum penalty for particular misconduct is entitled to "substantial deference." *Gore*, 517 U.S. at 583 (citation omitted); cf. *United States* v. *Bajakajian*, 524 U.S. 321, 336 (1998) (observing, in the Excessive Fines Clause context, that "judgments about the appropriate punishment for an offense belong in the first instance to the legislature").

A reasonable statutory cap is also responsive to fundamental concerns underlying due-process limits on punitive damages. It gives potential tortfeasors "fair notice" of the "maximum civil penalty." *Gore*, 517 U.S. at 584. And by constraining the scope of jury discretion, it reduces the risk that "juries will use their verdicts to express biases." *Campbell*, 538 U.S. at 417 (citation omitted).

B. Further Review Is Not Warranted

Although the court of appeals' due-process analysis suffered from material flaws, its judgment does not warrant this Court's review.

1. Petitioner's current, notice-based argument was neither pressed nor passed upon below

This case is a poor vehicle for resolving the question whether a punitive-damages award that complies with a reasonable statutory cap necessarily satisfies the Due Process Clause. As "a court of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), this Court typically restricts its review to questions that were "pressed" or "passed upon" below, *Timbs* v. *Indiana*, 139 S. Ct. 682, 690 (2019). That approach ensures that the Court has the benefit of a lower court's reasoning in analyzing complex legal and factual issues. See, *e.g.*, *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 79-80 (1988) (plurality opinion).

In briefing and argument before the district court and the Seventh Circuit panel, petitioner assumed that *Gore*'s multifactor analysis governed. At no point did petitioner suggest that Wisconsin's cap obviated the need to apply the *Gore* guideposts, and its brief before the panel did not even cite the Wisconsin cap. See Pet.

C.A. Br. 48 (accusing respondent of "fail[ing] to consider [the *Gore*] factors"). Consistent with the parties' submissions, the court of appeals assumed without discussion that *Gore* controls. Pet. App. 40a-41a, 51a. The court accordingly did not address the question whether Wisconsin's cap renders the *Gore* guideposts superfluous.

Petitioner's belated decision to raise its current, notice-based argument in its unsuccessful rehearing petition below does not make this case a suitable vehicle for resolution of the question presented. See Cert. Reply Br. 3; see also *Easley* v. *Reuss*, 532 F.3d 592, 595 (7th Cir. 2008) (per curiam) (declining to consider an argument raised for the first time in a rehearing petition). In denying that petition, the court of appeals did not (and had no obligation to) address petitioner's new theory. Granting review therefore would force this Court to grapple in the first instance with a complex question of constitutional law.

To be sure, as petitioner observes (Cert. Reply Br. 2), "once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below." *Lebron* v. *National R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee* v. *City of Escondido*, 503 U.S. 519, 534 (1992)) (brackets omitted). That rule sensibly ensures that, when this Court grants review, it may consider all relevant arguments before issuing its decision. Assuming that petitioner's notice-based theory qualifies as an "argument" rather than a "claim," *Lebron*, 513 U.S. at 379, the Court could therefore consider that argument in the event it granted the petition for a writ of certiorari. But the Court's ability to consider petitioner's new theory at the merits stage does

not change the fact that, for purposes of the Court's discretionary decision whether to grant the petition, the absence of any reasoned analysis below renders this case a poor vehicle for resolving the question presented.

2. There is no conflict in the circuits

Contrary to petitioner's assertion (Pet. 19-21), the decision below does not implicate any conflict in the circuits. Because the court of appeals did not address petitioner's current, notice-based claim, it is unclear what reasoning the court might have adopted, or what outcome it might have reached, if petitioner had timely raised its current argument based on the Wisconsin statutory cap.

Even if the court of appeals' decision is construed as implicitly rejecting that argument, the purportedly conflicting decisions that petitioner identifies are all meaningfully distinguishable. See Pet. 19-21 (discussing *ASARCO*, *supra*; *Abner*, *supra*; and *Luciano* v. *Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997)). Each of those decisions addressed the constitutionality of a punitive-damages award under Title VII of the Civil Rights Act of 1964, 42 U.S.C. 2000e *et seq.*, which prohibits specified forms of employment discrimination. Title VII authorizes punitive damages when defendants have acted with malice or reckless indifference, while placing an aggregate cap of between $50,000 and $300,000 (based on the size of the employer) on specified compensatory damages and punitive damages taken together. See 42 U.S.C. 1981a(b)(1) and (3)(A)-(D).

Luciano does not even arguably conflict with the decision below, as the Second Circuit conducted a complete due-process analysis without suggesting that the statutory cap affected that inquiry. See 110 F.3d at 221-222. In *ASARCO* and *Abner*, in contrast, the courts

acknowledged that the Title VII scheme informed the due-process analysis. See *ASARCO*, 773 F.3d at 1056 (deeming "the rigid application of the *Gore* guideposts * * * less necessary or appropriate" given the Title VII framework); *Abner*, 513 F.3d at 164 (concluding that "the combination of the statutory cap and high threshold of culpability for any award confines the amount of the award to a level tolerated by due process"). But Title VII and the Wisconsin statute are materially distinct. Unlike the Wisconsin statute, Title VII reflects a legislative determination that a particular substantive category of misconduct—discrimination in employment—is especially reprehensible. See *ASARCO*, 773 F.3d at 1056. Title VII also establishes "a consolidated damages cap that includes both specified compensatory and punitive damages," thereby "supplant[ing] traditional ratio theory"—since "as the award for specified compensatory damages increases, the amount available for a punitive damages award decreases." *Id.* at 1057. The facts of those cases differ from this one, too. The plaintiffs in both *ASARCO* and *Abner* were awarded nominal damages but no further compensatory damages, making "a ratio-based inquiry * * * irrelevant." *Abner*, 513 F.3d at 164; see *ASARCO*, 773 F.3d at 1058.

In short, any tension in the circuits is not yet ripe for this Court's review. As the Wisconsin statute and Title VII illustrate, legislative limits on punitive damages take different forms, with differing implications for the due-process analysis. See pp. 19-23, *infra* (discussing various federal enhanced-damages statutes). This Court's assessment of whether, and how, its existing due-process framework applies to statutory punitive-damages regimes would benefit from additional consideration of that question in the lower courts.

3. The decision below has limited significance

Petitioner suggests (Pet. 24-25) that the decision below threatens the availability of enhanced damages under various federal statutes. Properly read, however, the court of appeals' decision does not cast doubt on the validity of those statutes, virtually all of which differ materially from the Wisconsin cap.

First, while the Wisconsin cap applies to a wide variety of torts, see Wis. Stat. § 895.043(2) and (6), many federal enhanced-damages statutes target specific categories of misconduct. As discussed, Title VII targets intentional employment discrimination. See 42 U.S.C. 1981a(a)(1) and (b)(1). The more specifically a statute defines the range of covered conduct, the more likely it is that the statute embodies a particularized "legislative judgment[]" that the conduct warrants enhanced damages. *Gore*, 517 U.S. at 583 (citation omitted). For example, a statute tailored to a particular form of wrongdoing may embody a judgment that the conduct at issue reflects a sufficient "degree of reprehensibility" to warrant punitive damages. *Id.* at 575; see, *e.g.*, *BNSF Ry. Co.* v. *United States Dep't of Labor*, 816 F.3d 628, 644 (10th Cir. 2016) ("For the reprehensibility guidepost, we used § 1981a's plain language."). Alternatively, it may embody a determination that "the injury is hard to detect or the monetary value of noneconomic harm" is "difficult to determine" in a certain class of cases, thereby justifying a "higher ratio." *Gore*, 517 U.S. at 582. Under either rationale, the legislature's judgment deserves "substantial deference." *Id.* at 583 (citation omitted).

Second, whereas the Wisconsin statute limits punitive awards to a *maximum* of twice compensatory damages, see Wis. Stat. § 895.043(6), many federal statutes

mandate a particular damages multiplier. Under the Clayton Act, 15 U.S.C. 12 *et seq.*, for example, a successful plaintiff "shall recover threefold the damages by him sustained." 15 U.S.C. 15(a). Mandatory multipliers reflect an express legislative determination regarding the proper ratio between compensatory and enhanced damages. See *Gore*, 517 U.S. at 580, 583. They also alleviate, to a greater degree than a damages cap, the concerns underlying the *Gore* framework. Most notably, they remove jury discretion as to the amount of enhanced damages, thereby eliminating the prospect of an award predicated on "bias or whim." *Campbell*, 538 U.S. at 418 (quoting *Haslip*, 499 U.S. at 59 (O'Connor, J., dissenting)).

Third, although the Wisconsin cap, like other statutes authorizing "double, treble, or quadruple damages," accords with "a long legislative history," *Campbell*, 538 U.S. at 425, certain federal statutes manifest especially deep-rooted and particularized historical traditions. In patent-infringement suits, for example, "[e]nhanced damages are as old as U. S. patent law." *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 579 U.S. 93, 97 (2016). The Patent Act of 1952, 35 U.S.C. 1 *et seq.*, authorizes a court to "increase the damages up to three times the amount found or assessed," 35 U.S.C. 284, reflecting a historical tradition that dates back to 1793, when federal law "mandated treble damages in any successful infringement suit," *Halo Elecs.*, 579 U.S. at 97. The Clayton Act's treble-damages remedy for antitrust violations, see 15 U.S.C. 15(a), traces to the original enactment of the Sherman Act, 15 U.S.C. 1 *et seq.*, in 1890 and, in turn, to a 17th-century English law governing monopolies, see Edward D. Cavanagh, *Detrebling Antitrust Damages: An Idea Whose Time Has Come?*, 61

Tul. L. Rev. 777, 778, 782 n.23 (1987) (citing An Act concerning Monopolies and Dispensations with Penal Laws, and the Forfeitures thereof, 1623, 21 Jac. 1, c. 3, § 4 (Eng.)). The constitutionality of awards that fall within these longstanding traditions is virtually beyond question. Cf. *Washington* v. *Glucksberg*, 521 U.S. 702, 710 (1997) ("We begin, as we do in all due process cases, by examining our Nation's history, legal traditions, and practices.").

Fourth, although this case involves punitive damages, some federal statutes authorize multiple damages for non-punitive purposes, such as to compensate a plaintiff whose harm is difficult to measure or "to induce private litigation to supplement official enforcement that might fall short if unaided." *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 494-495 (2008). The Lanham Act, 15 U.S.C. 1051 *et seq.*, for instance, authorizes courts to award treble damages so long as the award "constitute[s] compensation and not a penalty." 15 U.S.C. 1117(a); see, *e.g.*, *Taco Cabana Int'l, Inc.* v. *Two Pesos, Inc.*, 932 F.2d 1113, 1127 (5th Cir. 1991) (noting that enhanced damages may "provide proper redress to an otherwise undercompensated plaintiff where imprecise damage calculations fail to do justice"), aff'd, 505 U.S. 763 (1992). The *Gore* framework does not apply to non-punitive awards. The Court observed in *Campbell* that "[i]t should be presumed a plaintiff has been made whole for his injuries by compensatory damages, so punitive damages should only be awarded if the defendant's culpability * * * is so reprehensible as to warrant the imposition of further sanctions." 538 U.S. at 419. That mode of analysis is inapposite when a compensatory-

damages award cannot be presumed to make the plaintiff whole, or when an enhanced-damages award is predicated on something other than reprehensibility.

Fifth, whereas the punitive award in this case was capped at twice the compensatory damages, see Pet. App. 75a, certain federal laws authorize recovery of statutory damages without regard to an award of compensatory damages. Under the Copyright Act of 1976, 17 U.S.C. 101 *et seq.*, for instance, a successful plaintiff may elect to recover statutory damages of between $750 and $30,000 *rather than* actual damages. 17 U.S.C. 504(c)(1). This Court has assessed the constitutionality of such awards under a separate test that asks whether "the penalty prescribed is so severe and oppressive as to be wholly disproportioned to the offense and obviously unreasonable." *St. Louis, Iron Mountain & S. Ry. Co.* v. *Williams*, 251 U.S. 63, 67 (1919). The use of a separate test in this context is appropriate, as "*Gore's* second and third guideposts cannot logically apply to an award of statutory damages." *Sony BMG Music Entm't* v. *Tenenbaum*, 719 F.3d 67, 70 (1st Cir. 2013). "The second due process guidepost requires a comparison between the award and the harm to the plaintiff, but a plaintiff seeking statutory damages * * * need not prove actual damages." *Id.* at 70-71. And under the third guidepost, "statutory damages *are* the civil penalties authorized." *Capitol Records, Inc.* v. *Thomas-Rasset*, 692 F.3d 899, 908 (8th Cir. 2012), cert. denied, 568 U.S. 1229 (2013).

Sixth, although the punitive-damages determination in this case was entrusted to a jury, see Pet. App. 2a, some federal statutes entrust it to a judge. Under the Patent Act, for instance, a district judge determines whether a jury's damages award should be enhanced.

See *Halo Elecs.*, 579 U.S. at 103. But the *Gore* line of precedents is rooted in significant part in concerns about jury arbitrariness. "Jury instructions typically leave the jury with wide discretion in choosing amounts," raising the risk "'that juries will use their verdicts to express biases.'" *Campbell*, 538 U.S. at 417 (quoting *Honda Motor Co.* v. *Oberg*, 512 U.S. 415, 432 (1994)); see *Gore*, 517 U.S. at 596 (Breyer, J., concurring) (noting that "jurors" cannot be expected "to interpret law like judges"). When decisions concerning the possible enhancement of damages are entrusted to judges, those concerns are substantially reduced.

If a court of appeals relies on the Seventh Circuit's decision to hold that an enhanced-damages award under federal law violates the Due Process Clause, this Court's review may be warranted at that time. But given the important distinctions between the Wisconsin cap at issue here and the various federal laws that authorize enhanced damages, the decision below is not properly understood to affect those statutes.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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