No. 20-1426

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

TATA CONSULTANCY SERVICES LIMITED *and* TATA AMERICA INTERNATIONAL CORP. D/B/A TCS AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF IN OPPOSITION

CONSTANTINE L. TRELA, JR.
ROBERT N. HOCHMAN
NEIL H. CONRAD
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

CHRISTOPHER M. EGLESON
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

CARTER G. PHILLIPS*
DANIEL J. FEITH
DANIEL J. HAY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondents

* Counsel of Record

June 11, 2021

QUESTION PRESENTED

A Wisconsin statute caps punitive damages at twice compensatory damages. After the jury in this case returned a punitive damages award substantially in excess of that cap, the district court entered a judgment awarding Petitioner Epic Systems Corporation, which had suffered no lost business or quantifiable competitive harm, $140 million in compensatory damages and the statutory maximum of $280 million in punitive damages. On appeal, the Seventh Circuit vacated the punitive damages award. Applying the guideposts established by this Court in *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), the Seventh Circuit concluded that the $280 million award was grossly excessive and therefore violated the Constitution's guarantee of due process. The question presented is:

Whether a punitive damages award that complies with a state's statutory cap on punitive damages necessarily satisfies the Constitution's guarantee of due process without regard to the analysis required by this Court's decision in *Gore*.

RULE 29.6 STATEMENT

Respondent Tata America International Corporation (d/b/a TCS America) (TAIC) is a wholly owned subsidiary of Respondent Tata Consultancy Services Limited (TCS). A majority of TCS's shares are held by Tata Sons Private Limited. No publicly traded company owns 10% or more of TCS's or TAIC's stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

CASES Page

TABLE OF AUTHORITIES—continued

STATUTES

INTRODUCTION

In *BMW of North America, Inc.* v. *Gore*, this Court established three "guideposts" courts must consider to assess whether punitive damages awards are grossly excessive, in violation of the Constitution's guarantee of due process. 517 U.S. 559 (1996). In the decision below in this trade secret misappropriation case, the Seventh Circuit applied these guideposts and concluded that the $280 million punitive damages award entered by the district court, on top of a $140 million compensatory damages award, was grossly excessive. This conclusion rested mainly on two determinations. First, while the court found that the conduct of Respondent Tata Consultancy Services (TCS) warranted punishment, it was not reprehensible to "an extreme degree."[1] And, second, the compensatory damages award Petitioner Epic Systems received was itself "substantial," especially given that it was calculated based on supposed benefit to TCS rather than any harm or injury to Epic, and any harm Epic suffered was negligible and "significantly smaller" in amount.

Epic's petition does not argue that the Seventh Circuit misapplied *Gore*. Instead, Epic contends that the Seventh Circuit should not have applied *Gore* at all. Epic asks this Court to overrule *Gore* and replace it with a rule that a punitive damages award necessarily satisfies due process so long as it is within the statutory limit on punitive damages under state (here, Wisconsin) law. In Epic's view, because Wisconsin law caps punitive damages at twice compensatory damages, any award in any case decided under Wisconsin law within that limit satisfies federal due process.

---

[1] This brief refers to Respondents Tata Consultancy Services and Tata America International collectively as "TCS."

Epic's petition should be denied for three independent reasons. *First*, Epic forfeited the sole question presented: whether a punitive damages award that complies with a statutory punitive damages cap automatically complies with constitutional due process requirements. In both the district court and before the Seventh Circuit panel that decided the appeal, Epic never once advanced the *per se* rule it urges here; rather, Epic argued that the trial court's award satisfied *Gore*'s multi-factor test. Epic first raised the argument it now presses on rehearing, and because the Seventh Circuit denied rehearing, no court has passed on the issue. Because this Court is one "of review, not of first view," *Cutter* v. *Wilkinson*, 544 U.S. 709, 718 n.7 (2005), Epic's request for certiorari on an issue not raised before or decided by either of the courts below should be denied.

Second, the question presented does not warrant this Court's review. The Seventh Circuit's fact-bound decision did not announce any broadly applicable legal rule—much less one that conflicts with decisions of other courts. Epic points to no decision of any court declaring the *Gore* factors unmanageable or even questioning the applicability of *Gore*, much less calling for its abandonment. Nor have any *amici* joined Epic in calling for the Court to revisit or clarify its punitive damages precedents. Epic asserts that three other circuits have held that "the *Gore* factors have limited, if any, applicability" where a statutory cap on punitive damages provides notice of a defendant's potential liability. Pet. 18-19. But the decisions Epic cites all involved a specific federal statute, Title VII, that sets an *absolute cap*, not a ratio or multiple, of $50,000 to $300,000 on compensatory and punitive damages *combined*. Those decisions held that, in the specific con-

text of Title VII—where compensatory damages are often nominal or under-compensatory, and where the statute caps total damages and requires a plaintiff to show reprehensible conduct to obtain punitive damages—punitive damages awards will comport with due process. But nothing about those decisions calls into question *Gore*'s applicability to a case like this one, involving common law punitive damages. And neither those decisions nor any others adopt the *per se* rule Epic advances in its petition.

Epic's argument that the decision below casts doubt on federal statutes awarding double or treble damages is equally meritless. This Court has already made clear that its due process framework does not call into question such statutory damages multipliers. Such multipliers differ from common law punitive damages in several fundamental respects, and consequently do not raise the same due process concerns.

Third, and finally, the decision below reflects a straightforward, fact-intensive, and correct application of the guideposts established in *Gore* and reaffirmed in *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003). Indeed, recognizing that the Seventh Circuit correctly applied controlling precedent to the facts of this case—facts that include a substantial compensatory award and negligible harm to the plaintiff—Epic closes its petition with a last-ditch request to overrule *Gore* and *State Farm*. But, as noted above, Epic relied extensively on those decisions below, adopting this new argument only at the rehearing stage, and, in any event, Epic's new request is meritless.

For all of these reasons, Epic's petition should be denied.

STATEMENT OF THE CASE

A. District Court Proceedings

Epic is a Wisconsin corporation that develops and sells electronic health record (EHR) software applications. Pet. App. 3a-4a. Epic provides its customers access to a Web-based platform called "UserWeb," which contains administrative guides, training manuals, software updates, and other resources to help customers implement and use Epic's software. Pet. App. 4a.

In 2011, Kaiser Permanente, the largest managed healthcare organization in the United States, hired TCS to provide testing and support services for the EHR software Kaiser had licensed from Epic. Pet. App. 5a. To facilitate TCS's work, Kaiser and TCS requested that Epic grant TCS access to UserWeb, but Epic refused. Pet. App. 5a-6a. As a result, when TCS needed information or resources related to Epic's software in order to provide its services to Kaiser, TCS had to obtain the information and resources through Kaiser, a cumbersome and time-consuming process. D. Ct. Dkt. 891, at 128-36.

Later in 2011, after beginning its Kaiser work, TCS hired Ramesh Gajaram. After being hired, Gajaram informed a supervisor that he had obtained a UserWeb account at a prior job. Pet. App. 6a. In violation of TCS's internal policies, Gajaram and other employees used Gajaram's account to access material on the UserWeb portal. Pet. App. 5a-7a. When this conduct came to light, Epic sued TCS in federal district court, asserting trade-secret misappropriation, unjust enrichment, and other federal and Wisconsin state-law claims. Pet. App. 8a-9a.

At trial, Epic's account of how TCS used Epic's confidential information, and of the corresponding harm

Epic suffered, constantly evolved as Epic's grand theory of corporate misconduct unraveled. Initially, Epic alleged that TCS accessed UserWeb to obtain confidential information that TCS then used to improve its own EHR software, Med Mantra.[2] Pet. App. 9a-10a; see also Pet. App. 25a-30a (explaining how Epic failed to show that TCS used proprietary information to improve Med Mantra). When the evidence failed to support that theory, Epic abandoned it and instead focused on an eleven-page "comparative analysis." That document listed a number of software "modules"; noted whether each was available in Med Mantra and Epic's software; and then listed Med Mantra's functions and noted whether or not Epic's software also offered each one. Pet. App. 9a-10a. But, again, Epic's evidence came up short. Before the damages phase of the trial, Epic had to concede that there was no evidence that TCS used any of the information it obtained from UserWeb to develop the Med Mantra functions summarized in the comparative analysis. See TCS Br. (App. Dkt. 19), at 28-32.

Unable to show that it suffered any actual harm from TCS's use of the comparative analysis, Epic based its damages claim on the benefit TCS supposedly gained from using Epic's information to prepare the spreadsheet. Pet. App. 10a. Yet, instead of presenting the jury with evidence of what it cost to develop the *list* of Epic's software features reflected in the comparative analysis, Epic presented evidence of how much it would have cost TCS to develop the actual *software features* identified in the spreadsheet (which TCS did not do). Pet. App. 10a-11a. In other words, despite having abandoned its original theory of the case, Epic

---

[2] At the time, Med Mantra was not offered in the United States and was used predominantly in India. Pet. App. 5a.

used that discarded theory as the basis for its damages model.

The jury found TCS liable and awarded Epic nearly $1 billion in damages: $140 million for unjust enrichment based on TCS's development of the spreadsheet, another $100 million in unjust enrichment damages for TCS's use of unspecified " 'other' confidential information," and $700 million in punitive damages.[3] Pet. App. 11a.

Following post-trial motions, the district court vacated the $100 million damages award as unsupported by the evidence and reduced the punitive damages award to $280 million pursuant to a Wisconsin statute allowing punitive damages of up to twice the amount of compensatory damages. Pet. App. 65a-69a, 75a-78a; see Wis. Stat. § 895.043(6). In doing so, the court rejected TCS's argument that state law prohibited any punitive damages award and that, alternatively, a punitive damages award of the statutory maximum amount was grossly excessive under state law and the federal Constitution. The district court instead accepted Epic's argument that the $280 million award was supported by *Gore*, *State Farm*, and Wisconsin

---

[3] The $700 million award followed a closing argument in which Epic highlighted TCS's substantial net worth, see Separate App'x (App. Dkt. 20), at 333-34, in a trial that pitted a well-regarded local company, which employs about 9,000 people in the area, Trial Tr. (D. Ct. Dkt. 889), at 6, against a foreign-headquartered defendant whose foreign-born employees engaged in misconduct. Epic even highlighted during its opening statement that Epic's founder and CEO had lived in Madison, Wisconsin (where the trial took place) for nearly 50 years and had "decided that she's going to donate the vast bulk of her personal wealth to charity." *Id.* at 7-8. As this Court observed in *Honda Motor Co.* v. *Oberg*, the risk of excessive punitive damages awards is particularly acute where defendants are "big businesses, particularly those without strong local presences." 512 U.S. 415, 432 (1994).

cases applying "substantively identical" analyses. Pet. App. 75a-80a. Epic did not argue that, nor did the district court consider whether, Wisconsin's statutory cap made application of *Gore*'s test unnecessary.

B. Appellate Proceedings

TCS appealed, and Epic cross-appealed. As relevant here, TCS argued that the punitive damages award was excessive under both Wisconsin law and the due process guarantees of the federal Constitution. TCS Br. (App. Dkt. 19), at 63-69. It also challenged both the compensatory and punitive damages awards on several state law grounds. *Id.* at 44-63.

In response, Epic defended both awards and cross-appealed the vacatur of the $100 million in unjust enrichment damages for "other confidential information." With respect to punitive damages, Epic again argued that the award was supported by both state and federal law. Epic Br. (App. Dkt. 28), at 44-50. In particular, Epic argued that a $280 million punitive damages award satisfied the multi-factor test established in *Gore* and *State Farm*. *Id.* at 47-50. As in the district court, Epic did not suggest that the Wisconsin statutory cap resolved TCS's due process challenge or had any relevance to it—indeed, Epic did not even cite the Wisconsin statute in its briefs.

The panel affirmed both the $140 million award for unjust enrichment stemming from the comparative analysis and the decision to vacate the $100 million award for "other" information. Pet. App. 14a-23a, 33a-35a. Then, carefully applying the *Gore* and *State Farm* guideposts *de novo*, the panel held that the $280 million award violated due process. Pet. App. 40a-51a. First, the panel assessed whether TCS's conduct was reprehensible. The court found that three of the five

relevant factors "weigh[] against finding TCS's conduct reprehensible": Epic suffered no physical harm, TCS evinced no indifference to or disregard of the safety of others, and Epic is not financially vulnerable. Pet. App. 42a. Only two of the reprehensibility factors favored Epic: TCS had accessed confidential information on UserWeb on multiple occasions, and this conduct had caused some harm to Epic. Pet. App. 43a-44a. This balance of factors, the panel concluded, indicates that TCS's "conduct warrants punishment" but "was not reprehensible 'to an extreme degree.' " Pet. App. 45a (quoting *Saccameno* v. *U.S. Bank Nat'l Ass'n*, 943 F.3d 1071, 1088 (7th Cir. 2019)).

Next, the panel considered the ratio between punitive damages and "the harm or potential harm" caused by TCS. The court recognized that this case presented "an unusual issue in determining the amount of 'harm' " because the award of unjust enrichment damages "does not reflect Epic's harm." Pet. App. 45a. Indeed, the panel observed that "*if* Epic suffered quantifiable economic harm, that harm is *significantly smaller* than $140 million." Pet. App. 45a-46a (emphases added). The panel further observed that Epic's compensatory damages are "substantial" and that this Court had stated in *State Farm* 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 *State Farm*, 538 U.S. at 425). Accordingly, the panel concluded that "multiplying the substantial compensatory award—calculated on the basis of TCS's benefit rather than Epic's loss—is unnecessary to reflect Epic's uncertain economic harm." Pet. App. 50a.

Third, the Seventh Circuit considered "the difference between the punitive award authorized by the jury

and civil penalties imposed in comparable cases." Pet. App. 50a. The court observed that both a $280 million award and a $140 million award are within Wisconsin's statutory cap, and that the cap "is one indication of what the Wisconsin legislature has judged to be an inappropriate sanction for reprehensible conduct." Pet. App. 50a-51a. The panel therefore concluded that "the final guidepost does not point toward a $280 million or $140 million punitive-damages award being unconstitutional." Pet. App. 51a.

Finally, considering the three *Gore* guideposts together, the panel held that "[t]he facts and circumstances of this case do not justify awarding $280 million in punitive damages." Pet. App. 51a. The panel thus remanded for the district court to "reduce punitive damages to, at most, $140 million." Pet. App. 51a.

Epic petitioned for panel and en banc rehearing, arguing for the first time that any punitive damages award that complies with Wisconsin's statutory cap on punitive damages necessarily satisfies due process because the statute provides defendants with adequate notice of their potential liability. Epic Reh'g Pet. (App. Dkt. 59). The Seventh Circuit denied rehearing and issued an amended opinion making some changes but not addressing Epic's new argument. Pet. App. 54a; see Pet. 12 (court made "minor changes" to opinion).

Following issuance of the Seventh Circuit's mandate, the parties submitted briefs in the district court addressing the appropriate award of punitive damages in light of the Seventh Circuit's decision and instructions. D. Ct. Dkt. 1040-42. That question remains pending in the district court.

REASONS FOR DENYING THE PETITION

I. EPIC HAS FORFEITED THE QUESTION PRESENTED.

This Court has stressed that it "ordinarily will not decide questions not raised or litigated in the lower courts." *City of Springfield* v. *Kibbe*, 480 U.S. 257, 259 (1987) (per curiam) (dismissing writ as improvidently granted); accord, *e.g.*, *NCAA* v. *Smith*, 525 U.S. 459, 470 (1999) ("[W]e do not decide in the first instance issues not decided below."). This rule "maintain[s] the integrity of the process of certiorari," *Taylor* v. *Freeland & Kronz*, 503 U.S. 638, 645-46 (1992), and serves "a constellation of practical considerations, chief among which is [the Court's] need for a properly developed record on appeal," *Bankers Life & Cas. Co.* v. *Crenshaw*, 486 U.S. 71, 79-80 (1988) (refusing to resolve a question about punitive damages limitation in the first instance). The Court has made clear that it will consider issues not raised or passed on below only in "exceptional circumstances." *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 360 n.5 (1994).

Epic did not raise the question it seeks to present in its petition either in the district court or at the panel stage below. Throughout those proceedings, in briefs totaling over 300 pages, Epic never once even hinted at the argument it makes here: that a punitive damages award that complies with the Wisconsin statutory cap necessarily satisfies the Constitution's due process guarantee. Nor, unsurprisingly, did either lower court ever address this argument. See *Lebron* v. *Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (issued must be raised or "passed upon" below).

Instead, in two separate rounds of post-trial briefing before the district court, Epic argued (successfully) that the $280 million punitive damages award was

consistent with *Gore* and *State Farm* in light of the facts and circumstances of this case. D. Ct. Dkt. 926, 1007. It then defended the district court's punitive damages award in the Seventh Circuit on the same basis. Epic Br. (App. Dkt. 28), at 59. Epic's briefing could not have been clearer on this point. It acknowledged that this Court has "*directed* lower courts to consider the three factors previously identified in [*Gore*]" and that, under the "degree of reprehensibility" factor, "courts *must* consider all aspects of the defendant's conduct." *Id.* at 47-48 (emphases added). Epic then argued that, under those factors, the $280 million punitive damages award was appropriate. *Id.* at 48-50. Having argued that *Gore* and *State Farm* fully govern this case, Epic may not now "complain on appeal of errors that [it] invited or provoked the [lower courts] to commit." *United States* v. *Wells*, 519 U.S. 482, 487-88 (1997); see also *Kibbe*, 480 U.S. at 259 ("[T]here would be considerable prudential objection to reversing a judgment because of instructions that petitioner accepted, and indeed itself requested.").

Epic first argued that *Gore* does not apply in its petition for rehearing. That is too late. This Court and the Seventh Circuit both hold that issues not raised until the rehearing stage are not properly presented for review. See *Hoover* v. *Ronwin*, 466 U.S. 558, 574 n.25 (1984) (failing to raise an issue before the rehearing stage "precludes our consideration"); *Easley* v. *Reuss*, 532 F.3d 592, 595 (7th Cir. 2008) (per curiam).

Epic rightly does not argue that this is an exceptional case justifying this Court's consideration of the question presented in the first instance. Epic's new argument was available throughout this litigation, and Epic grabbed hold of it only after the Seventh Circuit correctly invalidated the punitive damages award

under the *Gore* framework. Epic's sole question presented, therefore, is not preserved for certiorari review. On this basis alone, this Court should deny the petition.

II. EPIC HAS FAILED TO IDENTIFY ANY CIRCUIT SPLIT.

Even if Epic had preserved the question presented in its petition, this Court's intervention would not be necessary "to clarify the law." *City & Cty. of San Francisco* v. *Sheehan*, 135 S. Ct. 1765, 1774 (2015). Epic contends that the Court should grant certiorari to resolve a putative conflict among the circuits, Pet. 16-21, and to address how the decision below might apply to other areas of federal law, Pet. 24-25. These arguments are meritless: there is no conflict, and the decision below does not apply beyond the specific facts of this case.

A. The Decision Below Does Not Conflict with the Decisions of Any Other Circuit.

Epic argues that the Seventh Circuit's decision "conflicts with decisions of … other courts evaluating punitive damages under the Due Process Clause." Pet. 5. Epic points to decisions of the Second, Fifth, and Ninth Circuits applying Title VII's *total damages* cap of $50,000 to $300,000. Pet. 18-21; see 42 U.S.C. § 1981a(b)(3). But those decisions—none of which Epic cited at the panel or rehearing stage below—addressed the applicability of *Gore* and *State Farm* to the distinct features of Title VII's "carefully crafted statutory scheme." *Arizona* v. *ASARCO LLC*, 773 F.3d 1050, 1055 (9th Cir. 2014) (en banc). None calls into question whether the *Gore* guideposts apply "when reviewing a common law punitive damages award," and none stands for the *per se* rule Epic advances here. *Id.* at 1055-56. In short, there is no conflict.

1. The Ninth Circuit's decision in *ASARCO*, which affirmed an award of $1 in nominal damages and $300,000 in punitive damages, offers the most in-depth analysis of due process review of Title VII punitive damages award. *ASARCO* recognized that *Gore* and *State Farm* are fully applicable "when reviewing a common law punitive damages award." *ASARCO*, 773 F.3d at 1055-56. It further acknowledged that "*Gore* is undeniably of some relevance in [the Title VII] context," and that "even awards conferred under a carefully crafted statutory scheme governing punitive damages could fail to comport with due process." *Id.* at 1055. But *ASARCO* ultimately held that three distinct features of the Title VII context make "the rigid application of the *Gore* guideposts … less necessary or appropriate," while still ensuring that "awards under the statute comport with due process." *Id.* at 1056.

First, the Ninth Circuit observed that Title VII "clearly sets forth the type of conduct, and mind-set, a defendant must have to be found liable for punitive damages." *Id.* To obtain punitive damages under Title VII, the claimant must prove both that the defendant engaged in intentional employment discrimination, and that the defendant did so "with malice or with reckless indifference to the federally protected rights of an aggrieved individual." 42 U.S.C. § 1981a(a)(1), (b)(1). These provisions, the *ASARCO* court stressed, did not *displace* the reprehensibility requirement; rather, the elevated standard under Title VII "satisfies *Gore*'s concern that conduct must be reprehensible." 773 F.3d at 1057.

Second, *ASARCO* distinguished the Title VII framework from "unrestricted state common law damages awards." *Id.* Title VII caps *total* compensatory and punitive damages at between $50,000 and $300,000

(excluding backpay), depending on the size of the employer. *Id.* at 1056-57; see 42 U.S.C. § 1981a(b)(3). This "narrow circumscription of punitive damages award" restricts damages to a relatively modest amount and ensures that "the odds of over-deterrence are low." *ASARCO*, 773 F.3d at 1057. Furthermore, by combining compensatory and punitive damages into a single total cap, Title VII reverses the presumption underlying *Gore*'s ratio analysis. *Gore* presumes that "the amount constitutionally available for a punitive damages award increases proportionately to the harm." *Id.* But under Title VII's total cap, "as the award for specified compensatory damages increases, the amount available for a punitive damages award decreases." *Id.* Accordingly, "formalistically apply[ing]" *Gore* in this context "makes little sense." *Id.*; see also Pet. 18 (conceding that Title VII involves "a different type of statutory cap").

Third, the Ninth Circuit considered the particular nature of Title VII injuries. Title VII violations "often result in injuries that are 'difficult to quantify in physical terms,' " and thus frequently—as in *ASARCO* itself—result in nominal damages. *ASARCO*, 773 F.3d at 1057-58. "Because nominal damages measure neither damage nor severity of conduct," the Ninth Circuit concluded that "it is not appropriate to examine the ratio of a nominal damages award to a punitive damages award." *Id.* at 1058; accord *Gore*, 517 U.S. at 582 ("A higher ratio may also be justified in cases in which the injury is hard to detect or the monetary value of noneconomic harm might have been difficult to determine.").

These three features of Title VII punitive damages awards, which were central to *ASARCO*'s reasoning, do not apply to common-law punitive damages under the statutory cap at issue here. First, unlike Title VII,

which governs only civil rights violations, Wisconsin's statutory cap applies to all claims for which punitive damages are available, including strictly economic torts recognized by *Gore* and *State Farm* as less reprehensible. See *State Farm*, 538 U.S. at 419. Second, Wisconsin's 2:1 ratio-based, statutory cap does not "reasonably cap[]" total liability or "supplant[] traditional ratio theory" by creating an inverse relationship between compensatory and punitive damages. *ASARCO*, 773 F.3d at 1057. And third, the compensatory damages here were anything but nominal, and exceeded any measure of harm or severity. There is thus no conflict between *ASARCO* and the decision below.

Indeed, *ASARCO* rejects Epic's fundamental premise that *Gore* and *State Farm* rest solely on a procedural fair notice rationale. See Pet. 15. *ASARCO* recognized that this Court "was also interested in avoiding arbitrary, biased, or ill-informed deprivation of property of defendants by juries" and in "align[ing] the punitive damages award with the severity of the wrongful act" and the "actual injury suffered." 773 F.3d at 1055-56. Those are precisely the concerns that guided the Seventh Circuit's analysis. See *supra* at 7-9.

2. The other cases Epic identifies also do not reflect a circuit split. In *Abner* v. *Kansas City Southern Railroad*, the Fifth Circuit adopted reasoning similar to *ASARCO*'s to affirm a $125,000 punitive damages award on top of nominal damages in a Title VII case. 513 F.3d 154 (5th Cir. 2008). The court explained 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." *Id.* at 164. The court further observed that the "[i]njury that results from discrimination under Title VII is often difficult to quantify in physical terms." *Id.* at 163. Again,

these features are absent in this case and distinguish *Abner* from the decision below.

In *Luciano* v. *Olsten Corp.*, the Second Circuit rejected the rule Epic advances here. 110 F.3d 210 (2d Cir. 1997). Rather than hold that a Title VII punitive damages award will always satisfy due process, *Luciano* recognized that a court *must* reduce even a below-cap award that " 'shock[s] the judicial conscience' … and thereby violate[s] due process." *Id.* at 221. Epic argues that the Second Circuit's use of the phrase "shock the judicial conscience" "substitut[es] a different standard for *Gore*'s guideposts entirely." Pet. 20-21. In fact, the Second Circuit has made clear that this "shock the judicial conscience" standard *is* the *Gore* standard. See *Lee* v. *Edwards*, 101 F.3d 805, 808-09 (2d Cir. 1996) ("[*Gore*] erected three guideposts that should assist us in the application of our standard, by which we deem excessive a punitive damage award that 'shocks our judicial conscience.' "); see also, *e.g.*, *Sooroojballie* v. *Port Auth.*, 816 F. App'x 536, 549 (2d Cir. 2020) (declining to reduce Title VII punitive damages award "after considering the three *Gore* factors").

Finally, Epic contends the Seventh Circuit's fact-bound decision conflicts with fact-bound decisions of other courts "uph[olding] substantial punitive damage awards involving ratios of two to one or greater." Pet. 21-22. The decision below, however, did not say that *all* substantial damages awards must be capped at a 1:1 ratio; it found only that the facts *here* did not support a higher award. Compare Pet. App. 49a ("The facts and circumstances of this case do not justify awarding $280 million in punitive damages" because TCS's conduct was not reprehensible "to an extreme degree" and the harm to Epic "does not support the size of the punitive-damages award."), with *Action Marine, Inc.* v. *Cont'l Carbon Inc.*, 481 F.3d 1302, 1320 (11th

Cir. 2007) (case relied on by Epic where defendant's knowing release of a possible carcinogen over a five-year period was "exceedingly reprehensible"). Furthermore, merely comparing ratios says nothing about the lawfulness of the award here. As discussed, *infra* at 22, this Court has repeatedly rejected the idea that the validity of punitive damages awards turns on a "bright-line ratio," *State Farm*, 538 U.S. at 425, or "simple mathematical formula," *Cooper Indus., Inc.* v. *Leatherman Tool Grp., Inc.*, 532 U.S. 424, 434-35 (2001).

Thus, Epic fails to establish any split warranting this Court's review.

B. The Decision Below Does Not Affect Statutory Damages Multipliers.

Epic also argues that the decision below breaks from "hundreds of years of history and tradition" of permitting statutory damages multipliers in areas such as antitrust, RICO, and patent law. Pet. 23-25. This argument is baseless. *Gore* and *State Farm* have already made clear that the due process standards they applied, and that were applied by the Seventh Circuit here, control notwithstanding that "[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; accord *State Farm*, 538 U.S. at 425.

What Epic ignores is that statutory damages multipliers differ from common law punitive damages in important ways. Most notably, many such multipliers—including the RICO and antitrust treble damages provisions Epic cites—are remedial, not punitive. See, *e.g.*, *PacifiCare Health Sys., Inc.* v. *Book*, 538 U.S. 401, 406 (2003). Their purpose is to compensate victims and disgorge ill-gotten gains—not to punish wrongdoers beyond the measure of illicit benefit and harm.

See, *e.g.*, *Pfizer, Inc.* v. *Gov't of India*, 434 U.S. 308, 314 (1978).

The only punitive statutory damages multiplier Epic identifies is the enhanced damages provision of the Patent Act. See 35 U.S.C. § 284. Enhanced patent damages, however, are available only for "egregious infringement behavior" and are awarded by judges, not juries. *Halo Elecs., Inc.* v. *Pulse Elecs., Inc.*, 136 S. Ct. 1923, 1931-32 (2016). Furthermore, contrary to what Epic's approach would dictate, enhanced damages awards within the statutory limit are not lawful *per se*. Rather, district courts awarding enhanced damages must "take into account the particular circumstances of each case" and "consider all relevant factors in determining whether to award enhanced damages." *Polara Eng'g Inc.* v. *Campbell Co.*, 894 F.3d 1339, 1355 (Fed. Cir. 2018); compare *WCM Indus., Inc.* v. *IPS Corp.*, 721 F. App'x 959, 973 (Fed. Cir. 2018) (vacating enhanced damages award where "district court provided only a single conclusory sentence as to why it was awarding the maximum amount"), with *WCM Indus., Inc.* v. *IPS Corp.*, 809 F. App'x 957, 959 (Fed. Cir. 2020) (affirming enhanced damages award where, "[u]nlike in the district court's initial decision … here the district court provided a more complete analysis of the [relevant] factors and supported its analysis with record evidence"). Thus, enhanced patent damages are subject by statute to safeguards similar to those due process imposes on common law punitive damages. Nothing about the Seventh Circuit's fact-bound decision calls into question the validity of statutory damages multipliers in the patent context or elsewhere.

III. THE SEVENTH CIRCUIT CORRECTLY APPLIED *GORE* AND *STATE FARM*.

Finally, Epic contends that the Seventh Circuit's analysis conflicts with decisions of this Court. Not so. The Seventh Circuit correctly applied the due process framework for evaluating punitive damages awards set forth in *Gore* and *State Farm*, and Epic's contrary view rests on a basic misunderstanding of those cases. Indeed, Epic offers such a fundamental recharacterization of those decisions that it must, at the end of its petition, acknowledge what its entire argument implies: Epic is asking the Court to overrule *Gore* and *State Farm*. Once again, Epic never raised this argument below, and, in any event, its two-paragraph request offers no "special justification" for overruling precedent. Lastly, even setting these defects aside, this case is a poor vehicle to consider the question presented because, regardless of what the Constitution requires, Wisconsin law would dictate the same outcome on remand.

A. The Decision Below Correctly Analyzed the Punitive Damages Award Under the *Gore* and *State Farm* Guideposts.

The decision below reflects a correct and careful application of the three "guideposts" that *Gore* and *State Farm* direct courts to consider to determine whether punitive damages awards satisfy due process. Over nearly a dozen pages, the Seventh Circuit applied each guidepost to the facts and circumstances of this case and concluded, based on the nature of TCS's conduct, the degree of harm to Epic, and the size of the compensatory damages award, that $280 million of punitive damages is grossly excessive. See *supra* at 7-9; Pet. App. 40a-51a. Notably, Epic's petition takes no issue

with how the Seventh Circuit applied the individual guideposts here.[4]

Rather, Epic contends that the Seventh Circuit should not have considered the guideposts at all and should instead have held that any award within Wisconsin's statutory cap on punitive damages *per se* satisfies due process. According to Epic, *Gore* and *State Farm* rested only on a "fair notice rationale" that is satisfied whenever a statutory cap "assure[s] that the defendant is on notice of the potential severity of the punishment that state law allows." Pet. 17-18.

Epic, however, fundamentally misreads this Court's precedents. Epic's entirely procedural approach to due process ignores that "it is well established that there are procedural *and substantive* constitutional limitations on [punitive damages] awards." *State Farm*, 538 U.S. at 416 (emphasis added). Contra Pet. 16 (asserting that *Gore* and *State Farm* "declined to impose substantive limits"). These substantive limits prohibit the imposition of "grossly excessive" penalties, ensuring that punitive damages awards serve legitimate purposes of punishment and deterrence and do not "constitute[] an arbitrary deprivation of property." *Id.* at 416-17.

Because Epic ignores these substantive limits, it misconstrues what fair notice requires in the punitive damages context. "[F]air notice … of the severity of

---

[4] Whether the Fourteenth or Fifth Amendment's Due Process Clause applies here is of no moment because this Court's precedents suggest the same test applies under both amendments. See, *e.g.*, *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 494-95, 501-02 (2008) (applying *Gore* and *State Farm* in maritime case on petition for writ of certiorari to the Ninth Circuit); *DeKalb Genetics Corp.* v. *Bayer Cropscience, S.A.*, 538 U.S. 974 (2003) (mem.) (vacating decision of the Federal Circuit and remanding "for further consideration in light of *State Farm*").

the penalty that a State may impose," *Gore*, 517 U.S. at 574, requires notice *not* of the maximum penalty available under *any* circumstances, as Epic argues, but of the penalty available for the *specific* misconduct at issue. The "precise award in any case … must be based upon the facts and circumstances of the defendant's conduct and the harm to the plaintiff," so that the award bears a "reasonable" and "proportionate" relationship to the specific "wrong committed." *State Farm*, 538 U.S. at 425, 429. This "assure[s] … uniform general treatment of similarly situated persons that is the essence of law itself." *Cooper*, 532 U.S. at 436.

The guideposts established in *Gore* reflect this particularized approach to due process. The "most important" guidepost, as the decision below recognized, is "the degree of reprehensibility of the defendant's conduct." *Gore*, 517 U.S. at 575; see Pet. App. 41a. This guidepost reflects the "principle that punitive damages may not be 'grossly out of proportion to the severity of the offense.' " *Gore*, 517 U.S. at 576. Here, the Seventh Circuit applied this guidepost to determine that, while "TCS's conduct warrants punishment," it "was not reprehensible to an extreme degree." Pet. App. 45a (internal quotation marks omitted). That determination, in turn, undergirded the court's conclusion that "[t]he facts and circumstances of this case do not justify awarding $280 million in punitive damages." Pet. App. 49a.

Epic's approach to due process, by contrast, completely omits this "most important" guidepost. Epic gives no weight to reprehensibility, and its petition never even mentions the word. As a result, under Epic's proposed rule, the "accepted view that some wrongs are more blameworthy than others," *Gore*, 517 U.S. at 575, has no place. Instead, Epic would allow a state to impose maximum punitive damages on the

least blameworthy and most blameworthy tortfeasors alike, so long as that maximum amount, expressed merely as a multiple of a compensatory award, not an absolute maximum number, was specified in law. As *Gore* and *State Farm* recognize, however, due process does not countenance such "irrational and arbitrary" results. *State Farm*, 538 U.S. at 429; see *Gore*, 517 U.S. at 568.

Epic's argument also clashes with *Gore*'s second guidepost, the ratio between punitive damages and the actual or potential harm to the plaintiff. At the most basic level, Epic's argument would make this ratio the only consideration relevant to due process in states with statutory punitive damages caps. But this Court has been well-aware of such statutory caps at least since *Gore*, see, *e.g.*, *Cooper*, 532 U.S. at 433 & n.6; *Gore*, 517 U.S. at 615-16 (Ginsburg, J., dissenting), and it has never suggested that such laws obviate the need for courts to ensure that individual punitive damages awards are not arbitrary or grossly excessive relative to defendants' particular conduct. Rather, the Court has consistently treated the ratio as only "*a* central feature in our due process analysis," *Exxon Shipping Co.* v. *Baker*, 554 U.S. 471, 507 (2008) (emphasis added)—and not even the most important one at that.

Furthermore, Epic's argument advances the very sort of "bright-line ratio" test this Court has repeatedly rejected. *State Farm*, 538 U.S. at 425. In Epic's view, any punitive damages award within the maximum ratio allowed under Wisconsin law automatically satisfies due process. This Court's precedents reject any such "categorical," one-size-fits-all standard. *Gore*, 517 U.S. at 582. Instead, the Court has required a case-by-case approach and has expressly recognized 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." *State Farm*, 538 U.S. at 425; see also *id.* at 426 (identifying $1 million in compensatory damages as "substantial").

The Seventh Circuit held that this is such a case, where punitive damages equal to compensatory damages are the outermost due process limit.[5] It acknowledged that the district court had applied Wisconsin's 2:1 statutory cap and that "[o]ur court and Wisconsin courts have upheld significantly higher ratios." Pet. App. 46a-47a. But, applying *State Farm*, the Seventh Circuit held that the $140 million compensatory damages award in this case was "substantial" and warranted a lower ratio. Pet. App. 47a (observing that $140 million "far exceeds what other courts," including *State Farm*, "have considered 'substantial' "). Indeed, the court noted that this award was particularly high given that it was "based on the benefit to TCS, not … any harm suffered by Epic" and that any quantifiable harm Epic suffered was "significantly smaller." Pet. App. 45a-46a. Because TCS's conduct was not reprehensible "to an extreme degree," the Seventh Circuit concluded that "multiplying the substantial compensatory award—calculated on the basis of TCS's benefit rather than Epic's loss—is unnecessary to reflect Epic's uncertain economic harm." Pet. App. 49a-50a.

---

[5] In holding that $140 million represents the maximum punitive award due process will permit in this case, the Seventh Circuit made clear that it was not deciding that Epic should actually receive this amount. Pet. App. 51a. As the court explained, federal courts may reduce a punitive damages award beyond what due process requires when appropriate in light of statutory and common-law principles. Pet. App. 40a. The determination of the appropriate punitive damages award here is now pending before the district court.

Epic's only response is to suggest that *State Farm* and *Gore* apply only "where the law imposes no limit on a fact-finder's discretion to award punitive damages." Pet. 18. But, as noted, the Court in those cases acknowledged state statutes capping punitive damages awards, yet never suggested they obviate the need to apply the guideposts. Nor does the reasoning in those cases support limiting them in the manner Epic suggests. See *supra* at 19-23; cf. *Exxon Shipping*, 554 U.S. at 511 ("[A] legislative judgment that 3:1 is a reasonable limit overall is not a judgment that 3:1 is a reasonable limit in this particular type of case.").

Moreover, Epic's argument fails on its own terms because it does not actually require state law to impose any meaningful limit on punitive damages. If due process simply requires "that the defendant is on notice of the potential severity of the punishment that state law allows," Pet. 18, then *any* statutory cap—or, indeed, a law providing for no cap at all—would suffice. Provided they are within the parameters set by state law, punitive damages 145 times or 500 times greater than compensatory damages would automatically be constitutional. That is plainly not the law. See *State Farm*, 538 U.S. at 429 (holding that a punitive award 145 times greater than the compensatory award violates due process); *Gore*, 517 U.S. at 582 (holding that a punitive award 500 times greater than the plaintiff's actual harm violates due process).

B. Epic's Request to Reconsider *Gore* and *State Farm* Is Forfeited and Meritless.

Towards the end of its petition, Epic acknowledges what the foregoing discussion makes plain: the due process framework it proposes involves not applying *State Farm* and *Gore* but overruling them. See Pet. 25-26. Epic's request that the Court reconsider these decisions, however, is doubly flawed.

First, it is forfeited. Epic never argued below that *State Farm* and *Gore* were wrongly decided; to the contrary, it expressly relied on them to support the district court's punitive damages award. See *supra* at 6, 7, 10-23. "Where issues are neither raised before nor considered by the Court of Appeals, this Court will not ordinarily consider them." *Adickes* v. *S. H. Kress & Co.*, 398 U.S. 144, 147 n.2 (1970) (refusing to consider request to overturn precedent that had not been preserved below).

Second, Epic offers no "special justification" for reconsidering these precedents "over and above the belief 'that the precedent[s] w[ere] wrongly decided.' " *Kimble* v. *Marvel Entm't, LLC*, 135 S. Ct. 2401, 2409 (2015); see also *Dickerson* v. *United States*, 530 U.S. 428, 443 (2000). Epic simply objects to the fact that the Constitution's due process guarantee imposes limits on punitive damages beyond those imposed by state law. But there is nothing unusual about the Constitution imposing stricter limits on state action than a state's own laws—as further evidenced by the absence of *amici* in support of Epic's position.[6]

The decision on punitive damages below reflects a correct application of this Court's precedents to the facts and circumstances of this case, and Epic's belated request to reconsider those precedents—after having urged their application below—is meritless.

---

[6] Furthermore, as discussed *infra* § III.C, Wisconsin law actually dictates the same outcome as federal constitutional law. Epic's narrow focus on the statutory cap ignores that, under Wisconsin law, courts must evaluate punitive damages awards within the cap for excessiveness. See *Kimble* v. *Land Concepts, Inc.*, 845 N.W.2d 395, 407 (Wis. 2014).

C. The Decision Below Is Independently Supported by Wisconsin Law.

Finally, even if the legal question raised in the petition were properly presented and merited this Court's consideration, this case would be a poor vehicle for addressing it because Wisconsin law independently supports the Seventh Circuit's decision. Under Wisconsin law, courts assess whether a punitive damages award is excessive using a six-factor test that is "substantively identical" to *Gore*. *Kimble*, 845 N.W.2d at 407; see also *Mgmt. Comput. Servs., Inc.* v. *Hawkins, Ash, Baptie & Co.*, 557 N.W.2d 67, 71-72, 82-83 (Wis. 1996) (holding a 1.75:1 ratio in a case involving more egregious act of trade secret theft with substantially lower punitive damages was excessive under state law). Accordingly, TCS argued below that the $280 million punitive damages award is excessive under Wisconsin law as well as under the federal Constitution. TCS Br. (App. Dkt. 19), at 61-69. In fact, there is no Wisconsin case involving a punitive damages award anywhere close to $140 million, let alone $280 million, where the conduct did not involve a vulnerable victim, bodily or environmental harm, and other aggravating factors not present here. And although the Seventh Circuit did not reach this issue, it acknowledged that "Wisconsin courts apply a virtually identical test" to *Gore* and *State Farm*. Pet. App. 41a (internal quotation marks omitted). Thus, regardless of whether the $280 million punitive damages award violates federal due process, Wisconsin law would require the same outcome on remand.

CONCLUSION

For the foregoing reasons, the petition should be denied.

Respectfully submitted,

CONSTANTINE L. TRELA, JR.
ROBERT N. HOCHMAN
NEIL H. CONRAD
SIDLEY AUSTIN LLP
One South Dearborn
Chicago, IL 60603
(312) 853-7000

CHRISTOPHER M. EGLESON
SIDLEY AUSTIN LLP
555 West Fifth Street
Los Angeles, CA 90013
(213) 896-6000

CARTER G. PHILLIPS*
DANIEL J. FEITH
DANIEL J. HAY
SIDLEY AUSTIN LLP
1501 K Street, N.W.
Washington, D.C. 20005
(202) 736-8000
cphillips@sidley.com

Counsel for Respondents

June 11, 2021

* Counsel of Record