No. _____

# In The
# Supreme Court of the United States

MONETTE E. SACCAMENO,

*Petitioner,*

v.

OCWEN LOAN SERVICING, LLC and
U.S. BANK NATIONAL ASSOCIATION, as trustee for
C-BASS MORTGAGE LOAN ASSET-BACKED
CERTIFICATES, Series 2007 RP1,

*Respondents.*

**On Petition For Writ Of Certiorari**
**To The United States Court Of Appeals**
**For The Seventh Circuit**

## PETITION FOR WRIT OF CERTIORARI

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## QUESTIONS PRESENTED

I. Does the Reexamination Clause of the Seventh Amendment allow the Circuit Court to fix the amount of punitive damages without offering a remittitur or new trial?

II. In light of this Court's holdings in *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019) and *S. Union Co. v. United States*, 132 S. Ct. 2344, 2350–51 (2012) should this Court expressly overrule *Gasperini v. Ctr. for Humanities, Inc.*, 116 S. Ct. 2211, 2240 (1996) and *Cooper Indus. v. Leatherman Tool Grp.*, 121 S. Ct. 1678 (2001)?

## PARTIES TO THE PROCEEDING

Petitioner Monette E. Saccameno was the plaintiff in the district court proceedings and appellee in the court of appeals proceedings. Respondents Ocwen Loan Servicing, LLC and U.S. Bank National Association, as trustee for C-Bass Mortgage Loan Asset-Backed Certificates, Series 2007 RP1 were the defendants in the district court proceedings and appellants in the court of appeals proceedings.

## RELATED CASES

*Saccameno v. Ocwen Loan Servicing, LLC, et al.*, 1:15-cv-01164, U.S. District Court for the Northern District of Illinois, Eastern Division, Memorandum Opinion and Order entered March 1, 2019.

*Saccameno v. Ocwen Loan Servicing, LLC, et al.*, 19-1569, U.S. Court of Appeals for the Seventh Circuit, Opinion entered November 27, 2019.

*Saccameno v. Ocwen Loan Servicing, LLC, et al.*, 19-1569, U.S. Court of Appeals for the Seventh Circuit, Final Judgment entered November 27, 2019.

*Saccameno v. Ocwen Loan Servicing, LLC, et al.*, 19-1569, U.S. Court of Appeals for the Seventh Circuit, Petition for rehearing denied January 21, 2020.

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## PETITION FOR A WRIT OF CERTIORARI

Monette E. Saccameno petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit in this case.

## OPINIONS BELOW

The Seventh Circuit's opinion is reported at *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071 (7th Cir. 2019) and reproduced at App. 1–35. The Seventh Circuit's denial of petitioner's motion for panel or *en banc* rehearing is reproduced at App. 139–40. The opinion of the District Court for the Northern District of Illinois is reproduced at App. 36–134.

## JURISDICTION

The Court of Appeals entered its opinion on November 27, 2019. App. 1–35. The Circuit then denied a timely petition for panel or *en banc* rehearing on January 21, 2020. App. 139–40. This Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

## CONSTITUTIONAL PROVISIONS INVOLVED

This case involves the scope of Monette Saccameno's rights to a jury trial under the Seventh Amendment of the Constitution.

Amendment VII

> In suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any court of the United States, than according to the rules of the common law.

## INTRODUCTION AND STATEMENT OF THE CASE

The issue presented in this case is one of first impression. On review, the Seventh Circuit fixed Saccameno's punitive damages to a sum certain without offering a remittitur or the choice of a new trial. This practice has recently developed in the circuit courts without this Court's approval or review. Saccameno's petition for certiorari review is the first time an aggrieved verdict winner has challenged this now widespread practice.

The Seventh Circuit's decision contains a lengthy factual discussion of the underlying case. App. 3–20. Saccameno adopts that statement of the facts as if set out here in full. At the conclusion of the trial evidence and arguments, the duly sworn jury was properly instructed on the law. This included a specific instruction to the jury that "[a]ll parties are equal before the law. A corporation is entitled to the same fair treatment that you would give any individual person." App. 151. The jury was also given instructions that they could,

but were not required to, award punitive damages and then given instructions about how to determine punitive damages based upon the familiar *BMW v. Gore* standards. App. 152–55. No evidence of Ocwen's wealth was presented to the jury.

After hearing the evidence and receiving instructions, the jury began deliberations the afternoon of April 10, 2018. Their deliberations continued until the afternoon of April 11, 2018 when they notified the Court of their verdict at approximately 2:28 p.m. The jury's verdict was fully favorable to Monette Saccameno on all issues. The jury fixed compensatory damages at $582,000. The jury also found Ocwen deserved to be punished for its conduct. On that point, the jury fixed Ocwen's punishment in the amount of $3,000,000 through its punitive damages verdict.

Post-trial, Ocwen challenged the verdict on numerous grounds including unconstitutional excessiveness. Ocwen made this argument in a factual vacuum. Ocwen offered nothing by way of evidence to show the punitive damages verdict would have any material impact on its operations or its financial position and the trial court made no analysis of the point. The trial court ultimately rejected all of Ocwen's post-verdict arguments in a lengthy, detailed opinion. App. 36–134.

Dissatisfied, Ocwen appealed to the Seventh Circuit. The Seventh Circuit laid out Ocwen's indefensible abuse of Monette Saccameno in the factual portion of its opinion. App. 3–20. Ocwen ignored the bankruptcy discharge order that allegedly protected Monette

Saccameno for 1,735 days. Ocwen oppressed and abused Monette Saccameno for four years and nine months. If this time is converted first into total hours, and then into 40 hour work weeks, Ocwen's abuse lasted as long as a twenty-year work career. In its reprehensibility analysis, the Seventh Circuit found record evidence that Ocwen was a recidivist (App. 25) who had exploited a financially vulnerable consumer. App. 23.

In its review of the punitive damages award, the Seventh Circuit made a number of findings of fact. First, Ocwen's conduct amounted to reckless indifference rather than either malicious or intentional conduct. Second, Ocwen's conduct was reprehensible but not to an extreme degree. App. 25. The Circuit Court also found that Ocwen was indifferent to Saccameno's rights arising from her bankruptcy. App. 25. The Circuit panel ignored Ocwen's admission that its conduct was in knowing violation of the bankruptcy discharge order. As this Court well knows, the discharge injunction is a court order intended to prevent the very types of harm Ocwen inflicted on Saccameno in this case. Ocwen's open defiance of the discharge injunction lasted four years and nine months.

The Circuit also made no mention of Ocwen's failure to comply with Rule 3002.1 of the Federal Rules of Bankruptcy Procedure. Rule 3002.1 requires a mortgage servicer to notify the bankruptcy court before the discharge is entered if it believes a debtor has not paid all monies due under their bankruptcy plan. Ocwen did not even bother to respond to this notice in

Saccameno's bankruptcy case despite the fact that the Rule mandates a response. Ocwen's proper compliance with Rule 3002.1 admittedly would have prevented the years of abuse Saccameno suffered.

The Circuit did acknowledge Ocwen was the subject of two consent decrees and used that information as a factor in finding recidivism. App. 24–25. The Circuit did not discuss, and apparently did not consider, the purpose of these consent decrees. These consent decrees are court orders entered for the purpose of arresting Ocwen's systemic institutional failings as a mortgage servicer. These court orders imposed a number of going forward legal obligations on Ocwen. These obligations were imposed in an effort to stop Ocwen's ongoing consumer harm potentially impacting millions of consumers. App. 141–49. Record evidence demonstrated Ocwen's conduct breached its going forward obligations under these court orders.

In deliberating appropriate punishment for Ocwen this jury had the right to consider all of this substantial record evidence. The evidence showed Ocwen's conduct violated multiple court orders for a period of *years*. The evidence clearly demonstrated Ocwen's misconduct had the potential to harm millions of consumers. The Circuit did not find this evidence worthy of mention. Instead, the Circuit found, without any discussion of the need for effective punishment and deterrence, that this duly sworn jury's verdict was unconstitutional. App. 21. The Circuit made a point of limiting Ocwen's conduct to "a single $135,000 mortgage loan." App. 31. This limitation ignored the record evidence

that Ocwen used its defective systems and processes to service millions of mortgage home loans and Ocwen's misconduct subjected millions of consumers to immense potential harm. App. 25, 146–49. Ocwen's misconduct had the potential to cause consumers the loss of their home and to be subjected to never-ending abusive, erroneous, and illegal collection efforts.

After making all of the factual findings detailed herein, the Circuit then found that the "maximum permissible punitive damages award is $582,000." App. 34. The Circuit also found the "constitutional limit of a punitive damage award is a question of law not within the province of the jury, and thus a court is empowered to decide the maximum permissible amount without offering a new trial." App. 34–35. With this sentence, the Circuit effectively wrote the Seventh Amendment completely out of the Constitution.

## REASONS FOR GRANTING THE PETITION

Unless this Court intervenes, *Saccameno* is the Seventh Amendment's gravestone. *Saccameno* represents a complete decoupling of the Circuit Courts of Appeal from any constitutional restraints imposed by the Seventh Amendment. *Saccameno* imbues the Circuit Courts of Appeal with unchecked power to find facts and fix punishment contrary to the jury's findings in civil litigation. If this Court endorses the Seventh Circuit's rationale, then *Saccameno* will be known as the case where "the heart and lungs, the mainspring

and the center wheel" of our constitutional liberties died.

The Petitioner invites this Court to use this case to make a final decision. Either expressly end the People's rights to have a jury determine punitive damages or put an end to this perpetual, coordinated assault on the People's Seventh Amendment rights by corporate "citizens." Saccameno urges the Court to grant this petition and use this case to reassert the proper *limited* role of the Circuit Courts of Appeal and reestablish the People's rights to have a jury determine damages in civil litigation once and for all.

## I. *Saccameno* is a Case of First Impression.

The Seventh Circuit's decision crosses the Rubicon of Seventh Amendment jurisprudence by fully usurping the Reexamination Clause. The Seventh Circuit fixed the amount of Saccameno's punitive damages without offering a remittitur or the choice of a new trial. App. 34–35. Without analysis, the Seventh Circuit followed decisions of other Circuit Courts of Appeal that had acted similarly.

This practice appears to have originated with an ill-reasoned decision from the Eleventh Circuit, *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1331–32 (11th Cir. 1999). Other Circuits seem to have adopted *Johansen*'s extension of appellate judicial power without

seriously analyzing its underlying rationale.[1] The *Johansen* Court, relying upon *New York, L.E. & W.R. Co. v. Estill*, 13 S. Ct. 444, 454 (1893), decided it could liquidate punitive damages without offering a remittitur. This decision was not challenged by the verdict winner.[2] *Johansen*'s logical support for this judicial overreach is clearly flawed. At issue in *Estill* was an award of interest by a jury on a claim where interest was unavailable as a matter of law. Because the interest awarded in the jury verdict was identifiable, separate from other damages awarded, and wholly illegal under applicable law, this Court simply struck the interest award and otherwise affirmed the verdict. *Estill* provides no license for the immolation of the Seventh Amendment. *Johansen* and the other cases relied upon by the Seventh Circuit for its actions in *Saccameno* have never been subject to review by this Court.

This Court has repeatedly rejected appellate court decisions fixing compensatory damages as a Seventh Amendment violation. *Hetzel v. Prince William Cty., Va.*, 118 S. Ct. 1210, 1211–12 (1998). *Hetzel* noted support for this position in *Dimick v. Schiedt*, 55 S. Ct. 296,

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[1] See *Lompe v. Sunridge Partners, LLC*, 818 F.3d 1041 (10th Cir. 2016); *Cortez v. Trans Union, LLC*, 617 F.3d 688, 717–18 (3d Cir. 2010); *Bisbal-Ramos v. City of Mayaguez*, 467 F.3d 16, 27 (1st Cir. 2006); *Leatherman Tool Grp., Inc.*, 285 F.3d 1146, 1151 (9th Cir. 2002); *Ross v. Kansas City Power & Light Co.*, 293 F.3d 1041, 1049–50 (8th Cir. 2002); and most recently *Williams v. First Advantage LNS Screening Sols. Inc*, No. 17-11447, 2020 WL 103659 (11th Cir. Jan. 9, 2020).

[2] Presumably because *Johansen* left the verdict winner with a punitive damages award of $4,350,000.

301 (1935); and *Kennon v. Gilmer*, 9 S. Ct. 696, 697–99 (1889). This authority would appear to prohibit the Seventh Circuit's action in this case. However, this Court distinguished *Hetzel* without exposition in *Cooper Indus., Inc. v. Leatherman Tool Grp.*, *Inc*., 121 S. Ct. 1678 (2001) by simply distinguishing punitive damages from compensatory damages. As will be shown, *Cooper* cannot be reconciled with the role of the jury and the limitations on appellate judicial power to reexamine facts guaranteed by the Seventh Amendment.

### A. The Seventh Amendment's Guarantees Cannot Mean Less Today than they did at Adoption.

Just a few short months ago this Court wrote that "the Constitution's guarantees cannot mean less today than they did the day they were adopted [ . . . ]" *United States v. Haymond*, 139 S. Ct. 2369, 2376 (2019). *Haymond* is the most recent decision in a line of cases commonly referred to as "*Apprendi*" cases because they arise from and extend the holding of *Apprendi v. New Jersey*, 120 S. Ct. 2348 (2000). The *Apprendi* cases expressly prohibit *any* judicial fact finding respecting punishment in criminal cases arising under the Sixth Amendment. The *Apprendi* cases vest punishment fact finding *solely* in the hands of the jury, and, by their logic conflict with and implicitly overrule *Cooper*. *Cooper* expressly endorses judicial fact finding with respect to *only* punitive damages awards in civil litigation between citizens. This is a judicially

manufactured rule that cannot withstand constitutional scrutiny.

How does a Sixth Amendment case overrule a Seventh Amendment case? In *Haymond*, Justice Gorsuch wrote "[j]ust as the right to vote sought to preserve the people's authority over their government's executive and legislative functions, the right to a jury trial sought to preserve the people's authority over its judicial functions." *Id.* at 2375. *Haymond* teaches the Sixth and Seventh Amendments are coequal, indistinguishable guarantors of the People's right to a jury trial. Justice Gorsuch wrote:

> "Together with the right to vote, those who wrote our Constitution considered the right to trial by jury "the heart and lungs, the mainspring and the center wheel" of our liberties, without which "the body must die; the watch must run down; the government must become arbitrary." Letter from Clarendon to W. Pym (Jan. 27, 1766), in *1 Papers of John Adams* 169 (R. Taylor ed. 1977)." *Id.* at 2375.

This quote captures the importance of the right to a jury trial, but it lacks important context clearly supporting the Petitioner's argument:

> "So it is also in the tryal of causes between party and party: No man's property or liberty can be taken from him, till twelve men in his Neighbourhood, have said upon oath, that by laws of his own making it ought to be taken away, i.e. that the facts are such as to fall within such laws[. . . . ]

> These two popular powers [the right to vote and the right to trial by jury] therefore are the heart and lungs, the main spring, and the center wheel, and without them, the body must die; the watch must run down; the government must become arbitrary, and this our law books have settled to be the death of the laws and constitution. In these two powers consist wholly, the liberty and security of the people: They have no other fortification against wanton, cruel power: no other indemnification against being ridden like horses, fleeced like sheep, worked like cattle, and fed and cloathed like swine and hounds: No other defence against fines, imprisonments, whipping posts, gibbets, bastenadoes and racks." Letter from Clarendon to W. Pym (Jan. 27, 1766), in *1 Papers of John Adams* 169 (R. Taylor ed. 1977).

This added context clearly demonstrates the Founders placed coequal preeminence on the right to trial by jury in both the civil and criminal courts.

### B. What did the Seventh Amendment Guarantee at Adoption?

If "the Constitution's guarantees cannot mean less today than they did the day they were adopted [ . . . ]" then we must understand what the Seventh Amendment guaranteed at adoption. For this we turn to relevant history of the English common law. According to Blackstone, the trial by jury had been used since "time out of mind" in England, was co-equal with the first

civil government, and was mentioned as early as the laws of King Ethelred and not as a new creation.[3] See 3 W. Blackstone, *Commentaries on the Laws of England* (1769), at 349 (hereinafter "*Blackstone*"). Blackstone also declared that "the only effectual and legal verdict is the public verdict; in which they openly declare to have found the issue for the plaintiff, or for the defendant; and if for the plaintiff, they assess the damages also sustained by the plaintiff, in consequence of the injury upon which the action is brought." *Id.* at 377. Blackstone wrote "the trial by jury even has been, and I trust ever will be, looked upon as the glory of the English law . . . it is the most transcendent privilege which any subject can enjoy, or wish for, that he cannot be affected either in his property, his liberty, or his person, but by the unanimous consent of twelve of his neighbors and equals." *Id.* at 379.

During the Ratification debates, securing the right to a civil jury trial and the right of the jury to determine the facts was of utmost concern. "If the court, upon appeals, are to determine both the law and the fact, there is no room for a jury, and the right of trial in this mode is taken away." Letter of Finis, P. Ford, *Pamphlets On The Constitution* 114 (1888). "Trial by Jury is our birth-right; and tempted to his own ruin, by some seducing spirit, must be the man, who in opposition to the genius of United America, shall dare to attempt its subversion." John Dickinson, Letter of Fabius IV (1788), P. Ford, *Pamphlets On The Constitution*, 186

[3] Ethelred I reigned from 866-871 AD. See http://www.englishmonarchs.co.uk/saxon_5.htm last visited 12/2/2019.

(1888). In fact, some supporters of ratification argued that punitive damages awards by juries would be a bulwark against government violations of the People's rights. "[S]uppose, I say, that they commit similar or greater indignities, in such cases a trial by jury would be our safest resource, heavy damage would at once punish the offender and deter others from committing the same[.]" "A Democratic Federalist," Pennsylvania Packet, Oct. 23, 1787, *Pennsylvania and the Federal Constitution* 1787-1788, at 154 (J. McMaster & F. Stone eds. 1888).

The Seventh Amendment is an explicit limit on judicial power. The holding in *Capital Traction Co. v. Hof*, 19 S. Ct. 580, 583 (1899) confirms this position. *Capital Traction* holds the reexamination clause of the Seventh Amendment "is still more important, and we read it as a substantial and independent clause: 'No fact tried by a jury shall be otherwise re-examined, in any court of the United States, than according to the rules of the common law.' This is a prohibition to the courts of the United States to re-examine any facts, tried by a jury, in any other manner." Other historical writings affirm the proposition: "[t]he judges answer to questions of law: but no further. . . . the jurors answer to the question of fact." Letter from Clarendon to W. Pym (Jan. 27, 1766), in *1 Papers of John Adams* 168 (R. Taylor ed. 1977). These authorities make clear that the Seventh Amendment *guarantees* to the People the right of the jury to determine damages. If this Court's words in *Haymond* have any meaning, then *Saccameno* clearly cannot stand.

### C. Who was Vested with the Power to Determine Punitive Damages at Adoption?

There does not appear to be any historical dispute that the jury was vested with the obligation to determine damages prior to the adoption. See *Blackstone*, 377. There also does not appear to be any dispute that the jury is vested with authority to determine punishment through the imposition of punitive damages. On this point Justice Thomas has previously written: "[i]t has long been recognized that "by the law the jury are judges of the damages." *Lord Townshend v. Hughes*, 2 Mod. 150, 151, 86 Eng. Rep. 994, 994–95 (C.P. 1677)." *Feltner v. Columbia Pictures Television, Inc.*, 118 S. Ct. 1279, 1287 (1998) (collecting cases) (authorizing the jury to fix damages including punitive damages). Justice Ginsburg's dissent from *Cooper* recognized the common law had always left the task of assessing punitive damages to the discretion of the jury arguing "there can be no question that a jury's verdict on punitive damages is fundamentally dependent on determinations we characterize as factfindings" and "[o]ne million dollars' worth of pain and suffering does not exist as a 'fact' in the world any more or less than one million dollars' worth of moral outrage." See *Cooper*, 121 S. Ct. at 1690–91.

In the mid-1990's, when this Court was wrestling with the idea of constitutional limits on punitive damages, this Court began to analogize punitive damages to criminal fines and "quasi-criminal punishment." *Pac. Mut. Life Ins. Co. v. Haslip*, 111 S. Ct. 1032, 1062 (1991). This does not change the role assigned to the

jury to determine punitive damages. In fact, even if this Court declared that punitive damages were a criminal fine the jury would still have the constitutional duty to determine the amount to be imposed. This is because the Sixth Amendment vests the power to determine the amount of criminal fines in the jury.

In *Southern Union Co. v. United States*, Justice Sotomayor wrote "[t]he scope of the constitutional jury right must be informed by the historical role of the jury at common law." See 132 S. Ct. 2344, 2350–51 (2012). From that premise Justice Sotomayor determined that the amount of criminal fines to be imposed, if they be substantial, must be determined by a jury because *Apprendi* reserves to the jury "the determination of facts that warrant punishment for a specific statutory offense." (Emphasis supplied). *Apprendi*'s "animating principle" is the "preservation of the jury's historic role as a bulwark between the State and the accused at the trial for an alleged offense." *Id.* at 2350–51.

The Seventh Amendment and the reasoning in *Haymond* and *Southern Union* make no room for anyone other than the jury to determine punishment by fixing the amount of punitive damages in a civil trial. Further, these authorities teach that appellate judicial power has to be restrained. This is especially true with respect to making appellate findings that fix damages in an amount different than the jury. As history teaches, limitations on any form of power are always in danger. "It will not be denied that power is of an encroaching nature and that it ought to be effectually restrained from passing the limits assigned to it." James

Madison, *Federalist* 48, 1788. It is past time for this Court to acknowledge that punitive damages jurisprudence has emboldened judicial overreach as reviewing courts have disagreed with jury's decisions on damages. This practice must be forcefully cut off if the Seventh Amendment is to be anything other than a dead letter.

### D. What Does History Say about Excessive Verdicts?

There is historical authority for the judiciary to check excessive damages awards. Blackstone noted the first precedent for granting a new trial upon account of excessive damages given by the jury occurred in 1655. Historically this power was vested in the trial judge. Blackstone described the process thusly: After a verdict was entered, the trial judge *nisi prius* would certify the judgment to the Court at Westminster. If the trial judge was dissatisfied with the verdict because it was contrary to the evidence or because the jury gave exorbitant damages a new trial would be ordered. If two juries agreed in the same or a similar verdict a third trial was seldom awarded. See *Blackstone*, 387. The practice of review that developed required the trial judge to explain his reasoning for requiring a new trial so that posterity should not wonder why a new trial was awarded. This practice developed to the point that the decision to award a new trial was governed by the maxim "where justice was not done upon one trial, the injured party is intitled to another." See *Blackstone*, 388. No historical text vests the judiciary with

the authority to determine damages and impose them on the verdict winner. Rather, questions of damages were always returned to a new jury.

Blackstone wrote at length on the benefits of the second trial. Of great importance was the ability of the second trial to cure perceived problems with the first verdict. The parties could present the evidence to a second jury with the benefit of the experiences from the first trial. The trial court could be especially attuned to any problems that arose in the first trial and attend to the improvement of the presentation of the evidence to the jury. In a case where the concern is the size of the jury's verdict, a second verdict of similar size would confirm the first jury's findings. See *Blackstone*, 390–92. A lower verdict would tend to confirm the reviewing court's suspicion the first verdict was excessive. Regardless of the outcome, proceeding with a second trial preserved the People's right to have a jury determine damages in civil litigation.

This "Second Trial" rule provides greater fealty to the People's jury trial right than our present system. This Court can adopt a similar standard as that in Blackstone's time. The trial judge can order a remittitur or a second trial on damages if the court believes the jury verdict is exorbitant or justice was not done by the verdict. If the trial court affirmed the jury's initial verdict but the Circuit disagrees, then the Circuit could order a remittitur or second trial on damages to test the verdict. Rather than cloaking this process with the title of "constitutional review" and going through mental gymnastics to justify an appellate

court's disagreement with a jury's verdict, trial (and circuit) courts will be free to say plainly what they believe, i.e., the jury got the damages wrong. That opinion comes from the experiences and opinions of both the trial and circuit courts. However, the second jury's verdict on damages would be used to test the theory. By this method, both plaintiff and defendant would still have risk. The plaintiff would risk a lower verdict and the defendant would risk a higher verdict. Both litigants, if they chose to proceed, would understand that reviewing courts were going to enforce the outcome of the second trial with rare exception. This process would also take less time, cost less money to the litigants, and expend less appellate resources than the current system.

## II. *Gasperini* and *Cooper* should be overruled based upon *Haymond*.

The Seventh Circuit's decision that it could fix damages continues a disturbing trend first acknowledged almost twenty four years ago. On June 24, 1996, this Court, on a 5-4 vote, handed down a landmark decision in *Gasperini v. Ctr. for Humanities, Inc.*, 116 S. Ct. 2211 (1996). For the first time in our nation's history, this Court authorized appellate review, confined to abuse of discretion, of a federal trial court's denial of a motion to set aside a jury's verdict as excessive. Justice Ginsburg conceded that this was "a relatively late, and less secure, development." *Id.* at 2223. This decision arose against the background of judicial concern

about the size of jury awards.[4] This Court acknowledged in its opinion that the various Courts of Appeal were already engaged in this practice while also acknowledging earlier precedent deemed this practice inconsonant with the Reexamination Clause. *Id.*

Justice Scalia's full throated dissent in *Gasperini* hangs heavy over our present state of affairs. This dissent, coupled with *Haymond*, provides ample reasoning to revisit and overrule *Gasperini*:

> Today the Court overrules a longstanding and well-reasoned line of precedent that has for years prohibited federal appellate courts from reviewing refusals by district courts to set aside civil jury awards as contrary to the weight of the evidence. One reason is given for overruling these cases: that the Courts of Appeals have, for some time now, decided to ignore them. Such unreasoned capitulation to the nullification of what was long regarded as a core component of the Bill of Rights—the Seventh Amendment's prohibition on appellate reexamination of civil jury awards—is wrong. It is not for us, much less for the Courts of Appeals, to decide that the Seventh Amendment's restriction on federal-court review of jury findings has outlived its usefulness. *Id.* at 2230.
>
> Granting appellate courts authority to decide whether an award is "excessive or inadequate"

[4] It is fair to note that in this era there was a vast coordinated media campaign seeking to limit or eliminate tort lawsuits and the available damages arising from tort claims.

> in the manner of CPLR § 5501(c) may reflect a sound understanding of the capacities of modern juries and trial judges. That is to say, the people of the State of New York may well be correct that such a rule contributes to a more just legal system. But the practice of *federal* appellate reexamination of facts found by a jury is precisely what the People of the several States considered *not* to be good legal policy in 1791. Indeed, so fearful were they of such a practice that they constitutionally prohibited it by means of the Seventh Amendment. *Id.* at 2231.

Justice Scalia's cogent recitation of the relevant history also demonstrates the Reexamination Clause was a direct response to the Anti-Federalists' argument against ratification. The Clause provided an *explicit* constitutional guarantee against reexamination of jury findings and put to rest "apprehensions" of "new trials by appellate courts." The Reexamination Clause plainly barred reviewing courts from entertaining claims the jury's verdict was contrary to the evidence. *Id.* Justice Scalia also argued the Reexamination Clause barred appellate review not only of findings of liability but also the proper measure of damages including motions for new trial on the grounds that the damages were excessive. *Id.* at 2232. Justice Scalia's conclusion in dissent is also prescient:

> There is no small irony in the Court's declaration today that appellate review of refusals to grant new trials for error of fact is "a control necessary and proper to the fair

> administration of justice," *ante*, at 2223. It is objection to *precisely* that sort of "control" by federal appellate judges that gave birth to the Reexamination Clause of the Seventh Amendment. Alas, those who drew the Amendment, and the citizens who approved it, did not envision an age in which the Constitution means whatever this Court thinks it ought to mean—or indeed, whatever the Courts of Appeals have recently thought it ought to mean. *Id.* at 2240.

*Gasperini* opened the floodgates of appellate fact finding in civil litigation which have steadily eroded the Seventh Amendment for the last twenty-four years.[5] Following shortly on the heels of *Gasperini* this court published another landmark decision in *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 121 S. Ct. 1678 (2001). *Cooper* kicked open the door that *Gasperini* cracked by mandating de novo review of a district court's constitutional excessiveness inquiry. If *Haymond*'s holding that "the Constitution's guarantees cannot mean less today than they did the day they were adopted [ . . . ]" is true then *Cooper* and *Gasperini* cannot stand. Furthermore, there are ample practical reasons why they should not stand.

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[5] The cases are too numerous to list where a Circuit Court has engaged in judicial fact-finding regarding the proper amount of damages in a civil case between private parties.

### A. The Post *Gasperini* System Betrays the Seventh Amendment.

The Seventh Circuit reduced the jury's punitive damages verdict from $3,000,000 to $582,000 despite finding nothing factually wrong with the trial court's findings and itself determining that there was evidence to show Ocwen is a recidivist bad actor. App. 25. The Seventh Circuit made the finding that $582,000 was the constitutionally maximum amount of punitive damages that could be awarded under Saccameno's facts. App. 34–35. The Seventh Circuit tethered its finding of "maximum constitutionally permissible punitive damages" to the jury's determination of compensatory damages. App. 34.

The very act of tethering the constitutionally maximum punitive damages to compensatory damages demonstrates the logical fallacy of this practice. On the one hand, the duly empaneled and sworn civil jury is fully capable of fixing the proper amount of compensatory damages under the unique facts of the case, but on the other, their verdict for punishment is constitutionally infirm. By finding the jury's punishment verdict unconstitutional the Circuit implicitly called into question the validity of the jury's decision making *in toto*.

The Seventh Circuit panel's review implicitly questioned the jury's ability to follow the law and their instructions by rejecting their punitive damages verdict. After doing so, that same panel then relied upon that same jury's compensatory damages award as the

measure for determining the constitutionally maximum punitive damages. Logic would seem to demand any compensatory damages award by a jury that has rendered an unconstitutional punitive damages award be discarded as well. Due Process would also seem to prevent a "constitutionally maximum punitive damages award" being tethered to a compensatory damages award in the absence of legislation making that connection.

To further illustrate why leaving the determination of damages to the circuit courts is a perversion of the Seventh Amendment, look no further than the Third Circuit's "gatekeeping role" explained by *Inter Med. Supplies, Ltd. v. EBI Med. Sys., Inc.*, 181 F.3d 446, 468 (3d Cir. 1999). The Third Circuit held "[o]nce we have determined that a punitive damages award as high as that set here does not accord with the analysis recommended by the Supreme Court in *BMW*, we are left to fulfill our role as gatekeeper in reviewing an award of punitive damages. It is not an enviable task. We have searched vainly in the case law for a formula that would regularize this role, but have not found one." The Third Circuit explained its punitive damages fact finding process this way:

> "[i]n the last analysis, an appellate panel, convinced that it must reduce an award of punitive damages, *must rely on its combined experience and judgment*. ***When different members reach different figures, they must seek an accommodation among their views***,

> a process that recurs throughout appellate decision making." *Id.* (emphasis supplied).

Is this the practice to replace the People's rights under the Seventh Amendment? May it never be! This practice is simply "jury deliberations," *sans evidence*, undertaken by an appellate panel of three rather than a jury of twelve. For reference, consider the instructions on disagreement among jurors given to the jury in *Saccameno*:

> *The verdicts must represent the considered judgment of each juror.* Your verdict, whether for or against the parties, must be unanimous.
>
> *You should make every reasonable effort to reach a verdict. In doing so, you should consult with one another, express your own views, and listen to the opinions of your fellow jurors. Discuss your differences with an open mind. Do not hesitate to reexamine your own views and change your opinion if you come to believe it is wrong.* But you should not surrender your honest beliefs about the weight or effect of evidence solely because of the opinions of other jurors or for the purpose of returning a unanimous verdict.
>
> All of you should give fair and equal consideration to all the evidence and ***deliberate with the goal of reaching an agreement that is consistent with the individual judgment of each juror.*** You are impartial judges of the facts. (emphasis supplied). App. 155.

A comparison of the Third Circuit's description of its process of determining appropriate punitive damages with the instructions provided to the jury in *Saccameno* shows the same principles are in play and reviewing courts are engaged in a form of "deliberations" that violate the Reexamination Clause. The Seventh Amendment guarantees to the People, through the jury, the sole power to fix the amount of any claim for unliquidated damages, including specifically punitive damages. Anything else violates the express guarantees of the Seventh Amendment.

### B. The Post *Gasperini* System Contradicts a Fundamental Tenet of Appellate Judicial Review.

Our post *Gasperini* world ignores another very large elephant in the room. Jurors each swear an oath they will well and truly try the matters in issue and render a true verdict according to the law and the evidence. It is manifestly unreasonable for this Court, or any other for that matter, to believe that district judges all over the United States will ignore jury misconduct or turn a blind eye to excessive verdicts. District judges watch juries very closely, just like the lawyers and the parties. If a jury is disengaged or makes a decision that doesn't line up with the evidence and the law, district courts are quick to order new trials.

Yet, in all of the propaganda routinely claiming jury excess we find the notion fairly assumed and universally accepted by reviewing courts. In accepting this

false premise of jury excess, reviewing courts ignore a fundamental tenet of appellate review. "Juries are presumed to follow the court's instructions." *CSX Transp., Inc. v. Hensley*, 129 S. Ct. 2139, 2141 (2009). In Saccameno's case, as in all cases involving corporate defendants, the jury was instructed:

> "All parties are equal before the law. A corporation is entitled to the same fair consideration that you would give to any individual person." App. 151.
>
> "You must follow these instructions even if you disagree with them. Each of the instructions is important, you must follow all of them. Perform these duties fairly and impartially. Do not allow sympathy to influence you." App. 150–51.

The jury was also clearly instructed to consider the issue of compensatory and punitive damages separately. However, the Seventh Circuit, relying on *State Farm v. Campbell*, 123 S. Ct. 1513, 1525 (2003), found that a portion of Saccameno's compensatory damages award was punitive in nature, without affording the jury even a modicum of deference to their ability to follow the instructions given. Compare App. 31–32 to 151–53. As to punitive damages, the jury was instructed:

> "If you find that punitive damages are appropriate, then you must use sound reason in setting the amount of those damages. Punitive damages, if any, should be in an amount sufficient to fulfill the purposes I described to you

> but should not reflect bias, prejudice, or sympathy toward any party." App. 154.
>
> The Court then gave the instructions incorporating the *Gore* guideposts for determining whether to award punitive damages and the amount of punitive damages. App. 154–55. The jury was also instructed to determine:
>
> "what amount of money is necessary to punish defendants and discourage them and/or others from future wrongful conduct?" This was followed with the limiting instruction that "the amount of punitive damages must be reasonable and in proportion to the actual and potential harm suffered by plaintiff." App. 155.

If any deference to the jury in *Saccameno* is shown, then it cannot be assumed that they did not follow the instructions they were given. The Circuit court here made factual findings and damages findings contrary to the jury based solely on the panel's interpretation of a cold transcript, the parties' briefing, and fifteen minutes of oral arguments per side. This can only be accomplished by casting aside the constraints imposed on judicial power by the Seventh Amendment. The very problem of having reviewing courts engage in "Monday morning quarterbacking" of jury decisions on damages was predicted and forewarned in one of the very earliest punitive damages cases decided by this Court. In his concurrence from *TXO Production Corp. v. Alliance Resources Corp.*, 113 S. Ct. 2711, 2724–25 (1993), Justice Kennedy wrote:

> To ask whether a particular award of punitive damages is grossly excessive begs the question: excessive in relation to what? The answer excessive in relation to the conduct of the tortfeasor may be correct, but it is unhelpful, for we are still bereft of any standard by which to compare the punishment to the malefaction that gave rise to it. A reviewing court employing this formulation comes close to relying upon nothing more than its own subjective reaction to a particular punitive damages award in deciding whether the award violates the Constitution. This type of review, far from imposing meaningful, law-like restraints on jury excess, could become as fickle as the process it is designed to superintend. *TXO*, 509 U.S. at 466–67, 113 S. Ct. 2711 (Kennedy, J., concurring).

The present practice is the living embodiment of Justice Kennedy's warning from *TXO*. This appellate judicial fact finding cannot be squared with the Reexamination Clause or the holdings from the *Apprendi* line of cases vesting authority to determine facts related to punishment in the jury alone. The Seventh Amendment guarantees to the People the right to have damages decisions made by juries. The Seventh Amendment does not say that juries will make damages decisions "except for" punitive damages cases. The practice of appellate reexamination of facts embodied by the decision in *Saccameno* is anathema to our Seventh Amendment guarantees. This Court should check this practice before it strangles the People's rights completely.

## III. What Does the Seventh Amendment and *Haymond* Require?

Our appellate courts abandoned the judicial restraint required by the Seventh Amendment in an effort to rein in perceived jury verdict excesses in the area of punitive damages. In fairness, it would be hard for anyone to contest that our punitive damages jurisprudence flows from a wellspring of cases built on outlier verdicts. We have based the entirety of this body of law on the rarest of exceptional cases where there were vast differences between compensatory and punitive damages. Sound judicial practices and precedent rarely arise from such extremes.

If *Haymond*'s command has any meaning, it is beyond time for this Court to abandon appellate adventurism and engage in the judicial restraint required by the Seventh Amendment. The Seventh Amendment does not foreclose reviewing courts from setting aside excessive verdicts. In fact, Blackstone's writings seemed to allow a second trial more freely than our present day by focusing on the idea of substantial justice between the parties. Clearly, the practice Blackstone described was one of "feel" and judicial opinion based on the outcome. The Seventh Amendment is strengthened and served by more retrials on the issue of damages. The Seventh Amendment is destroyed by judicial fiat when damages are fixed by reliance on cold dead transcripts and secretive appellate panel deliberations as to proper damages.

We must never forget that reviewing courts are far removed from the live presentation of evidence, the demeanor of the parties, the actions, attitudes and conduct shown to the jury and the judge at trial. All of these factors are rightfully part of the jury's decision making calculus. None of these things appear in a cold dead transcript. The Seventh Amendment undoubtedly prevents reviewing courts from substituting their opinions of damages for that of the jury. The Seventh Amendment does not, however, prevent a reviewing court from testing its opinion that a verdict is excessive with a second trial on damages before a new jury.

The relevant history is undisputed. The Seventh Amendment gives reviewing courts the right to order new trials. Our accepted historical practice gives reviewing courts the right to order remittitur. However, the Seventh Amendment does not grant reviewing courts the authority to substitute their opinion of damages for that of the jury. There is not a single jot or tittle in hundreds of years of relevant legal history and precedent accepting of this premise.



## CONCLUSION

The Petitioner's challenge to the panel's decision in *Saccameno* is a constitutional first. The decision in *Saccameno* fully eviscerates the Reexamination Clause with the stroke of a pen. No other civil litigant has challenged a Circuit court's authority to decide punitive damages and impose that decision on the verdict

winner. This practice flies in the face of the rights guaranteed by the Seventh Amendment. This Court should therefore grant a writ of certiorari in order to check this judicial overreach once and for all. This Court must restore the proper role of judge and jury required by the Seventh Amendment.

Respectfully submitted,

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