No. 24-_____

IN THE

Supreme Court of the United States

SIERRA HEALTH AND LIFE INSURANCE COMPANY, INC.,

Petitioner,

v.

SANDRA L. ESKEW, AS SPECIAL ADMINISTRATOR OF THE ESTATE OF WILLIAM GEORGE ESKEW,

Respondent.

On Petition For A Writ Of Certiorari To The Supreme Court Of Nevada

PETITION FOR A WRIT OF CERTIORARI

TODD L. BICE
JORDAN T. SMITH
TYLER W. STEVENS
PISANELLI BICE, PLLC
400 S. 7th Street, Suite 300
Las Vegas, NV 89101

MIGUEL A. ESTRADA
THOMAS H. DUPREE JR.
Counsel of Record
LOCHLAN F. SHELFER
JEFF LIU
LAVI M. BEN DOR
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8500
TDupree@gibsondunn.com

Counsel for Petitioner

QUESTION PRESENTED

The Constitution requires that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996). In *Gore*, the Court held that the "fair notice" principle requires that punitive damages awards be reviewed for excessiveness under three due process guideposts.

In this case, the Nevada Supreme Court held that the *Gore* guideposts were inapplicable and affirmed a $160 million punitive damages award that was eight times the largest such award ever upheld in Nevada history. The court explained that a constitutional excessiveness review was unwarranted because Nevada has a statute capping punitive damages awards—and it exempts from the statutory cap bad-faith claims against insurers like petitioner. Thus, in the Nevada court's view, petitioner had the constitutionally mandated "fair notice" that punitive damages could be imposed in *any* amount.

The question presented is whether *Gore*'s constitutional protections against excessive punishments are inapplicable in cases where punitive damages are imposed under statutes that purportedly authorize the award.

PARTIES TO THE PROCEEDING AND RULE 29.6 DISCLOSURE STATEMENT

1. All parties to the proceeding are named in the caption.

2. Petitioner Sierra Health and Life Insurance Company, Inc. is a Nevada corporation. It is a subsidiary of United HealthCare Services, Inc., which is in turn a subsidiary of UnitedHealth Group Incorporated. No other publicly held corporation owns 10% or more of Sierra Health and Life Insurance Company, Inc., United HealthCare Services, Inc., or UnitedHealth Group Incorporated.

RELATED PROCEEDINGS

District Court of Nevada, Eighth Judicial District Court, Clark County:

Eskew v. Sierra Health & Life Ins. Co.,
No. A-19-788630-C (Oct. 7, 2022)
(amended judgment upon the jury verdict)

Supreme Court of Nevada:

Sierra Health & Life Ins. Co. v. Eskew,
No. 85369 (Aug. 5, 2024)
(order of affirmance)

TABLE OF CONTENTS

Page

TABLE OF APPENDICES

Page

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Constitutional Provisions

Other Authorities

PETITION FOR A WRIT OF CERTIORARI

Petitioner Sierra Health and Life Insurance Company, Inc. respectfully petitions for a writ of certiorari to review the judgment of the Supreme Court of Nevada.

OPINIONS BELOW

The Nevada Supreme Court's opinion (App. 1a) is unreported but is available at 2024 WL 3665443. The Nevada Supreme Court's denial of rehearing (App. 17a) is unreported. The Nevada District Court's judgment (App. 14a) is unreported.

JURISDICTION

The judgment of the Nevada Supreme Court was entered on August 5, 2024. App. 1a. Petitioner's timely petition for rehearing was denied on November 12, 2024. App. 17a. On January 27, 2025, Justice Kagan extended the time within which to file a petition for a writ of certiorari to March 12, 2025. On February 24, 2025, Justice Kagan granted a further extension to April 11, 2025. This Court's jurisdiction is invoked under 28 U.S.C. § 1257(a).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Due Process Clause of the Fourteenth Amendment to the United States Constitution provides:

> [N]or shall any State deprive any person of life, liberty, or property, without due process of law . . . .

U.S. Const. Amend. XIV, § 1.

The Eighth Amendment to the United States Constitution provides:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const. Amend. VIII.

Nevada Revised Statutes § 42.005(2)(b) provides:

> The limitations on the amount of an award of exemplary or punitive damages prescribed in subsection 1 do not apply to an action brought against: . . . An insurer who acts in bad faith regarding its obligations to provide insurance coverage.

STATEMENT

Decades after *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), and *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), some courts continue to treat punitive damages as essentially committed to jury discretion. This case has all the hallmarks of punitive damages "run wild," *Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 18 (1991), and raises the same concerns that led this Court to intervene and recognize constitutional limits on punitive damages in the first place.

In a 5-2 decision, the Nevada Supreme Court upheld a jury's award of $160 million in punitive damages against petitioner Sierra Health & Life Insurance Co. (SHL), based on a claim that SHL acted

in bad faith when it denied coverage for a then-unproven treatment for lung cancer. The award is more than eight times the largest punitive award ever previously upheld in Nevada history. And the court upheld the award without conducting *any* meaningful inquiry into its excessiveness, let alone apply the "thorough [and] independent review" this Court has held is constitutionally mandated. *Cooper Indus.*, 532 U.S. at 441.

Instead, the court held that a constitutional excessiveness review was not required. The court explained that Nevada had enacted a statutory cap on punitive damages, but had exempted from the cap bad-faith claims against insurers. App. 8a n.2 (citing Nev. Rev. Stat. § 42.005(2)(b)). Thus, in the court's view, "SHL had ample notice that it could be subject to such a punishment for dealing in bad faith." App. 8a n.2. The court did not apply the three guideposts this Court recognized in *Gore* and *State Farm*—which look to the defendant's level of reprehensibility, the ratio between the punitive and compensatory damages awards, and the civil penalties authorized or imposed for comparable conduct, *see Gore*, 517 U.S. at 574; *State Farm*, 538 U.S. at 424-25—but simply rejected SHL's argument that the punitive award violated due process on the theory that insurers should know that punishment is unlimited in Nevada.

The lower courts have split over the question presented here: whether *Gore*'s constitutional protections apply when punitive damages are imposed under a statute that purportedly authorizes the award—either because the award falls below a statutory cap or because, as here, the particular claim is exempt from the statutory cap. The majority of

courts—including the Third, Seventh, Eighth, Tenth, and Eleventh Circuits—hold that all punitive damages awards are subject to the constitutional limits recognized in *Gore*. Other courts—including the Second, Fifth, and Ninth Circuits—agree with the Nevada Supreme Court that *Gore*'s constitutional limits do not apply when a punitive damages statute purports to authorize and give fair notice of the amount of punitive damages that may be awarded.

The Court should grant certiorari and reverse.

1. The Court has held that the Due Process Clause prohibits "grossly excessive" punitive damages awards, *Gore*, 517 U.S. at 562 (quoting *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 454 (1993) (plurality)), because such an award "furthers no legitimate purpose and constitutes an arbitrary deprivation of property," *State Farm*, 538 U.S. at 417. The Constitution requires that "an award of punitive damages [be] based upon an 'application of law, rather than a decisionmaker's caprice,'" *id.* at 418 (quoting *Cooper Indus.*, 532 U.S. at 436), and that "a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose," *Gore*, 517 U.S. at 574.

In *Gore*, the Court recognized "[t]hree guideposts" that structure the constitutional inquiry. 517 U.S. at 574. The first guidepost looks to the "degree of reprehensibility of the defendant's conduct," to ensure that an award is not "'grossly out of proportion to the severity of the offense.'" *Id.* at 575-76 (quoting *Haslip*, 499 U.S. at 22). The second guidepost evaluates "the ratio between harm, or potential harm, to the plaintiff

and the punitive damages award." *State Farm*, 538 U.S. at 424. And the third guidepost looks to "civil penalties authorized or imposed in comparable cases." *Gore*, 517 U.S. at 575.

2. In February 2016, William Eskew, who was afflicted with stage IV lung cancer, submitted a request to SHL seeking coverage for proton therapy treatment. 15 Nev. Sup. Ct. J.A. 3011. The insurance contract, however, did not cover treatments that were "unproven" or not "medically necessary," and SHL determined that proton therapy was neither proven nor medically necessary in Mr. Eskew's case. App. 3a; 15 Nev. Sup. Ct. J.A. 3043. SHL accordingly denied coverage, and Mr. Eskew did not appeal that denial. 15 Nev. Sup. Ct. J.A. 3043; *see* 7 Nev. Sup. Ct. J.A. 1489-90.

SHL's determination was based on its 26-page medical policy, which adhered to the then-prevailing medical consensus that proton therapy was not a proven or medically necessary treatment for lung cancer. App. 3a; 15 Nev. Sup. Ct. J.A. 3105-06. The determination also aligned with the policies of the nation's 12 largest insurers, none of which deemed proton therapy medically necessary to treat lung cancer. App. 3a; 11 Nev. Sup. Ct. J.A. 2301-08. SHL instead authorized coverage for intensity-modulated radiation therapy—the most widely administered therapy for lung cancer. 7 Nev. Sup. Ct. J.A. 1490-93. Mr. Eskew received this treatment. 7 Nev. Sup. Ct. J.A. 1500. His cancer progressed, and he passed away in March 2017. 17 Nev. Sup. Ct. J.A. 3373.

Respondent Sandra Eskew, the administrator of Mr. Eskew's estate, sued SHL in February 2019 for

bad-faith denial of coverage, and the case went to a jury in March 2022. App. 14a; 1 Nev. Sup. Ct. J.A. 1-8. Respondent did not allege that the denial of proton therapy caused or even hastened Mr. Eskew's death. 16 Nev. Sup. Ct. J.A. 3342. Rather, respondent sought damages only for Mr. Eskew's emotional distress caused by the denial of coverage, and for his pain and suffering from esophagitis. 1 Nev. Sup. Ct. J.A. 19-20. Respondent also sought punitive damages. 1 Nev. Sup. Ct. J.A. 23.

The jury awarded respondent $40 million in compensatory damages—all for noneconomic harm (emotional distress and pain and suffering). App. 7a-9a, 15a. The trial proceeded to a second phase on punitive damages, and after less than an hour of deliberation, the jury awarded respondent an additional $160 million in punitive damages. App. 15a; *see* 14 J.A. 2902-05. SHL moved for a new trial or remittitur, arguing that the jury's punitive damages award was grossly excessive and unconstitutional under *Gore* and *State Farm*. 17 Nev. Sup. Ct. J.A. 3411-16. The trial court denied the motion without explanation. App. 11a-12a.

3. SHL appealed to the Nevada Supreme Court. SHL again contended that the $160 million punitive damages award was unconstitutionally excessive under *Gore* and *State Farm*. Nev. Sup. Ct. Appellant Br. 67-73.

The Nevada Supreme Court declined to apply the *Gore* guideposts and affirmed. Reviewing the jury's punitive damages award under a "substantial evidence" standard, the court found "substantial evidence of SHL's conduct in mishandling [Mr.

Eskew's] claim." App. 8a. The court then held that the award did not "violat[e] [SHL's] constitutional right to due process" because "SHL had ample notice that it could be subject to such a punishment" based on a Nevada statute "exempting insurance bad faith claims from [Nevada's] statutory limit on the punitive-to-compensatory damages ratio." App. 8a n.2 (citing Nev. Rev. Stat. § 42.005(2)(b)).

Justices Pickering and Lee dissented. They stated that the majority had "serious[ly]" erred, and that "the punitive damages . . . are excessive and should have been substantially remitted" under *State Farm*. App. 9a-10a (citing *State Farm*, 538 U.S. at 416-18). The court denied rehearing. App. 17a.

REASONS FOR GRANTING THE PETITION

I. The Nevada Supreme Court's Decision Deepens An Existing Conflict Over The Constitutional Standards Governing Punitive Damages Awards.

The decision below widens an entrenched split on whether the *Gore* guideposts apply when a statute purportedly authorizes the punitive damages award. Because the federal constitutional protections against grossly excessive punitive damages awards should not vary by circuit or state, this Court should grant review.

1. The Third, Seventh, Eighth, Tenth, and Eleventh Circuits hold that the *Gore* guideposts apply even when there is a statutory cap or another statute that purports to authorize the award. These courts reject the holding of the Nevada Supreme Court—that the existence of a statute authorizing the punitive damages award alone satisfies due process—and

conduct a *Gore* constitutional excessiveness review regardless.

The Third Circuit, in *Inter Medical Supplies, Ltd. v. EBI Medical Systems, Inc.*, 181 F.3d 446 (3d Cir. 1999), confronted a "verdict of $48 million in compensatory damages" and a punitive damages award of $50 million. *Id.* at 450. A New Jersey law "limit[ed]" the plaintiff's punitive damages to "either $350,000, or five times the compensatory damages, whichever is greater." *Id.* at 463 (citing N.J. Stat. Ann. § 2A:15-5.14). Although the award fell within this statutory limit, the Third Circuit still applied *Gore* to hold that the award was excessive and "that the proper, reasonable punitive damages award is no more than $1 million." *Id.* at 468-69.

The Seventh Circuit, in *Epic Systems Corp. v. Tata Consultancy Services Ltd.*, 980 F.3d 1117 (7th Cir. 2020), held that "compl[iance] with [a State's] statutory cap on punitive damages" does not permit courts to ignore *Gore*'s "three 'guideposts.'" *Id.* at 1140, 1143. There, a Wisconsin law capped punitive damages at twice the amount of compensatory damages, and the jury's award was under that statutory cap. *See id.* at 1136 (citing Wis. Stat. Ann. § 895.043(6)). The court nonetheless applied the *Gore* guideposts, concluding that because the defendant's conduct "was not reprehensible 'to an extreme degree,'" the award must be reduced to a "1:1 ratio." *Id.* at 1141-42, 1144.[1]

---

[1] The Seventh Circuit reached the same conclusion in *Saccameno v. U.S. Bank National Association*, 943 F.3d 1071 (7th Cir. 2019). There, the court held that while "statutory limits

The Eighth Circuit, in *Grant ex rel. United States v. Zorn*, 107 F.4th 782 (8th Cir. 2024), struck down a "punitive sanction of $6,733,896" under the False Claims Act, even though it fell "within . . . statutory limits." *Id.* at 800. Although the court conducted its analysis under the Excessive Fines Clause, it underscored that "cases analyzing punitive damages under the Due Process Clause are instructive in analyzing punitive sanctions under the Excessive Fines Clause." *Id.* at 798. The punitive sanction at issue was "seventy-eight times the amount of actual damages awarded." *Id.* at 799. Applying *State Farm*, the court held that the sanction could not withstand constitutional scrutiny because the defendant's conduct was not reprehensible and caused only economic loss. *Id.* at 800. Notwithstanding the statutory limits, the court remanded with instructions to the district court to "ensure the punitive sanction falls within an appropriate single-digit multiplier of the amount of compensatory damages." *Id.* at 800-01.

The Tenth Circuit, in *BNSF Railway Co. v. U.S. Department of Labor*, 816 F.3d 628 (10th Cir. 2016), reviewed a $125,000 punitive damages award that fell within a statutory $250,000 punitive damages cap. *Id.* at 643. The court rejected the contention that reviewing courts "need not consider the [*Gore*] guideposts because the Act provides a statutory cap for punitive damages that ensures [defendants] receive fair notice of potential punitive-damages

---

on punitive damages" may constrain punitive damages awards in the first instance, courts must still "decide the maximum permissible amount" using the *Gore* guideposts. *Id.* at 1078, 1092.

awards." *Id.* In the Tenth Circuit, courts "*must* use the guideposts." *Id.* (emphasis added).

Finally, the Eleventh Circuit, in *Williams v. First Advantage LNS Screening Solutions Inc.*, 947 F.3d 735, 746 (11th Cir. 2020), reduced a punitive damages award under *Gore*, even though the statute at issue authorized punitive damages in "such amount . . . as the court may allow," 15 U.S.C. § 1681n(a)(2). The court's holding reflects its longstanding view that "constitutionally adequate notice of potential punitive damage liability in a particular case depends upon whether this defendant had reason to believe that his specific conduct could result in *a particular damage award*." *Johansen v. Combustion Eng'g, Inc.*, 170 F.3d 1320, 1337 (11th Cir. 1999) (emphasis added).

2. The Second, Fifth, and Ninth Circuits, by contrast, hold that *Gore* does not apply when there is a statute that caps punitive damages or otherwise purports to provide fair notice of the award.

The Second Circuit, in *Luciano v. Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997), held that an award of punitive damages that falls below a statutory cap should be reduced "[o]nly where [the] award . . . shock[s] the judicial conscience and constitute[s] a denial of justice." *Id.* at 221 (internal quotation marks omitted). A *Gore* analysis is not required.

The Fifth Circuit, in *Abner v. Kansas City Southern Railroad Co.*, 513 F.3d 154 (5th Cir. 2008), held that where a statute caps punitive damages, there is no need for a *Gore* inquiry so long as the cap itself is constitutionally sound. In such a case, the only individualized inquiry required is a review of "the sufficiency of [the] evidence to support the statutory

threshold" for punitive damages. *Id.* at 164. That alone is the "determinant of constitutional validity," and "a ratio-based inquiry" under *Gore* and *State Farm* "becomes irrelevant." *Id.*

Finally, the Ninth Circuit, in *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014) (en banc), held that "the rigid application of the *Gore* guideposts is less necessary or appropriate" when reviewing a "punitive damages award arising from a statute that rigidly dictates the standard a jury must apply in awarding punitive damages." *Id.* at 1055-56. The court explained that the "first consideration is the statute itself, through which the legislature has spoken explicitly on the proper scope of punitive damages." *Id.* at 1056. Thus, the court concluded, the legislature can "supplan[t] traditional ratio theory and effectively obviat[e] the need for a *Gore* ratio examination." *Id.* at 1057.[2]

3. Here, the Nevada Supreme Court went even further. Respondent urged below that "Nevada law gave [SHL] all the notice it needed when it exempted bad-faith claims like this one from the statutory 3:1 punitive-damages cap," and that this "legislative choice" was "entitled to deference." Nev. Sup. Ct. Resp. Br. 4, 24-25. The Nevada Supreme Court

---

[2] To be sure, the Tenth Circuit in *BNSF Railway Co.*, 816 F.3d 628, agreed with the Ninth Circuit that, when applying *Gore* and *State Farm*, "the 'landscape of our review is different' in this statutory context." *Id.* at 643 (quoting *ASARCO*, 773 F.3d at 1055). But the Tenth Circuit did not endorse the Ninth Circuit's view that a legislature can "effectively obviat[e] the need for a *Gore* ratio examination." *ASARCO*, 773 F.3d at 1057. Rather, the Tenth Circuit explained, courts "must use" the guideposts, including the "ratio guidepost." *BNSF Ry. Co.*, 816 F.3d at 643-45.

agreed, holding that "SHL had ample notice that it could be subject to such a punishment" based on that Nevada statute alone, Nev. Rev. Stat. § 42.005(2)(b). App. 8a n.2. The Nevada Supreme Court thus refused to apply any constitutional excessiveness analysis at all when the state legislature has purportedly determined that a particular category of misconduct—here, bad-faith insurance claim denial—is sufficiently reprehensible to warrant uncapped punitive damages.

The Nevada Supreme Court's holding deepens the divide among the courts and warrants this Court's review.

II. The Decision Below Is Wrong.

The Nevada Supreme Court's approach is also incorrect. The Constitution requires that courts independently review punitive damages awards to ensure that they are not excessive in relation to the state's legitimate interests. The decision below flouts that established principle and this Court's precedents.

A. Courts must apply the *Gore* guideposts.

1. This Court has repeatedly "instructed courts reviewing punitive damages to consider three guideposts" in determining whether an award is constitutional. *State Farm*, 538 U.S. at 418-19; *Cooper Indus.*, 532 U.S. at 440; *Gore*, 517 U.S. at 574-85. A court must evaluate (1) the "degree of reprehensibility of the defendant's conduct," (2) "the ratio between harm, or potential harm, to the plaintiff and the punitive damages award," and (3) "civil penalties authorized or imposed in comparable cases." *Gore*, 517 U.S. at 575-76; *State Farm*, 538 U.S. at 424. That well-established test guides courts in analyzing whether a punitive damages award is "'reasonable in

[its] amount and rational in light of [its] purpose,'" *Cooper Indus.*, 532 U.S. at 436 & n.9, as well as whether the defendant "receive[d] adequate notice" of "the conduct that will subject him to punishment" and "the magnitude of the sanction that [the state] might impose," *Gore*, 517 U.S. at 574.

The Court has been equally clear that this due process inquiry necessitates "[e]xacting appellate review." *State Farm*, 538 U.S. at 418. In *Cooper Industries*, the Court held that "courts of appeals should apply a *de novo* standard of review" when reviewing a trial court's ruling on the amount of a punitive damages award and conduct a "thorough, independent review" of the award using the *Gore* guideposts. 532 U.S. at 436, 441. This framework—rigorous application of the three guideposts, followed by plenary appellate review—implements the "[e]lementary notions of fairness enshrined in our constitutional jurisprudence" by requiring that an award of punitive damages be based upon an "'application of law, rather than a decisionmaker's caprice.'" *Gore*, 517 U.S. at 574; *Cooper Indus.*, 532 U.S. at 436.

2. Despite these emphatic instructions, the Nevada Supreme Court waved away SHL's constitutional objection without applying the *Gore* guideposts. The court upheld the jury's unprecedented $160 million award—again, eight times larger than any award previously upheld in the state—based solely on the notion that Nevada law gave SHL "ample notice" that there was no limit to how high the jury could go in awarding punitive damages. App. 8a n.2. That opinion affirmed a trial court decision that summarily rejected SHL's constitutional challenge to

the award without comment. App. 11a-12a; *cf. Cooper Indus.*, 532 U.S. at 436, 440-41 (contemplating that both the trial court and the appellate court will explain how they applied the constitutional guideposts); *State Farm*, 538 U.S. at 418 (same). The lower courts' refusal to apply the *Gore* guideposts falls far short of the "[e]xacting," "thorough," and "independent" appellate review this Court requires. *State Farm*, 538 U.S. at 418; *Cooper Indus.*, 532 U.S. at 441.

The Nevada Supreme Court applied a "substantial evidence" standard, App. 8a, instead of the *de novo* standard mandated by *Cooper Industries*. The court stressed the jury's "wide latitude" in awarding damages, and it deferred to what it assumed was "the jury's valuation" of the evidence. App. 7a-8a. But while an appellate court typically defers to the trial court's findings of *fact*, "the jury's award of punitive damages does not constitute a finding of 'fact'" but rather a conclusion of *law*. *Cooper Indus.*, 532 U.S. at 437. That is why the appellate court "must review the [trial court's] application of the *Gore* test *de novo*." *Id.* at 440 n.14. The Nevada Supreme Court failed to do so.

The statute the Nevada Supreme Court relied upon to strip SHL of its constitutional protections, Nev. Rev. Stat. § 42.005(2)(b), exempts insurance bad-faith claims from the statutory cap that limits punitive damages awards. But states cannot strip away federal constitutional protections by purporting to authorize unlimited damages. Rather, removing any statutory limit on punitive awards *eliminates* any notice of the amount of a penalty that could be imposed—it does not amount to "fair notice" to say

"anything goes." By removing a punitive damages cap for a certain type of claim, the Nevada law gives no notice "of the severity of the penalty" an insurer might face. *Gore*, 517 U.S. at 574. And it fails to afford a defendant "constitutionally adequate notice of . . . whether *this defendant* had reason to believe that *his specific conduct* could result in *a particular damage award*." *Johansen*, 170 F.3d at 1337 (emphases added). Under this Court's precedents, whether SHL "receive[d] adequate notice of the magnitude of the sanction that [Nevada] might impose" depends in every case on an award-by-award application of the constitutional guideposts. *Gore*, 517 U.S. at 574; *accord Exxon Shipping Co. v. Baker*, 554 U.S. 471, 501 (2008) ("every award must pass" this Court's "due process standards").

No constitutional principle authorizes legislatures definitively to "suppl[y] an answer" to *both* "the questions of what a fine should be *and* whether it's [constitutionally] excessive." *Yates v. Pinellas Hematology & Oncology, P.A.*, 21 F.4th 1288, 1318 (11th Cir. 2021) (Newsom, J., concurring) (emphasis added); *Zorn*, 107 F.4th at 800 (same). If it were otherwise, "[a] State could defeat the Due Process Clause by adopting a law at odds with the Due Process Clause"—an obvious case of "circularity." *Mallory v. Norfolk S. Ry. Co.*, 600 U.S. 122, 168 (2023) (Barrett, J., dissenting). The Nevada Supreme Court erred in deeming the mere existence of a statute sufficient to resolve the constitutionality of the punitive damages award.

B. Alternatively, the Excessive Fines Clause requires that courts consider whether a punitive damages award authorized by statute is excessive.

Although the Court has repeatedly held that "[t]he Due Process Clause of the Fourteenth Amendment prohibits the imposition of grossly excessive" punitive damages awards, *State Farm*, 538 U.S. at 416, the Constitution supplies another textual basis for that prohibition: the Eighth Amendment's ban on "impos[ing]" "excessive fines." U.S. Const. Amend. VIII. This Court held in *Browning-Ferris Industries of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257 (1989), that the Excessive Fines Clause "does not apply to awards of punitive damages in cases between private parties." *Id.* at 260. But "[t]hat result is neither compelled by history nor supported by precedent." *Id.* at 283 (O'Connor, J., concurring in part and dissenting in part). If the Court is not inclined to constrain punitive damages by reinforcing *Gore* and *State Farm*'s "substantive limits," *Cooper Indus.*, 532 U.S. at 433, it should revisit *Browning-Ferris* and return to the original understanding of the Excessive Fines Clause.[3]

---

[3] SHL preserved its Excessive Fines argument in its petition for rehearing before the Nevada Supreme Court. *See* Nev. Sup. Ct. Pet. for Reh'g 4, 20-25. Although the court did not pass on the argument (as would be expected since it is not an open question given *Browning-Ferris*), SHL's motion suffices to preserve the issue under this Court's "pressed or passed upon" standard. *See Illinois v. Gates*, 462 U.S. 213, 218 & n.1 (1983) (looking to whether issue was "raised" in the proceedings below); *see also Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71, 77

1. *Browning-Ferris* established its private-party limit on the Excessive Fines Clause by reasoning that "fines" are best "understood to mean a payment to a sovereign as punishment for some offense" assessed in criminal cases. 492 U.S. at 265. The Court also pointed to the Eighth Amendment's "purpose" of preventing "governmental abuse of its 'prosecutorial' power"—an aim the Court deemed irrelevant in disputes between private parties. *Id.* at 266-68.

The Court was mistaken. As Justice O'Connor explained in partial dissent, the *Browning-Ferris* majority took too narrow a view of the history of the term "fines." The meaning of the term "fine" at the Founding was "much more ambiguous" than the majority acknowledged, and a number of "courts and commentators" at the time understood "fine" to encompass civil penalties in private disputes. 492 U.S. at 295-97. Indeed, the historical evidence shows that the Excessive Fines Clause "sweep[s] broadly and impose[s] limitations upon all manner of fines, civil or criminal," and "cover[s] private as well as public fines." Calvin R. Massey, *The Excessive Fines Clause and Punitive Damages: Some Lessons from History*, 40 Vand. L. Rev. 1233, 1275 (1987).

That historical understanding of "fine" accords with the Excessive Fines Clause's origin in "limitations in English law on monetary penalties exacted *in civil* and criminal cases to punish and deter misconduct." 492 U.S. at 287 (opinion of O'Connor, J.) (emphasis altered). The earliest such penalties date back to shortly after the Norman Conquest, when an

---

(1988) (indicating that issue can be reviewed if "adequately raised . . . on rehearing" below).

"amercement"—a civil punishment—was imposed for "conduct offensive to the Crown" and paid to the Crown or a feudal lord. *Id.* at 287-88. Magna Carta later tied amercements to "the manner of the fault" for which they were imposed, prohibiting disproportionate (i.e., excessive) punishment. *Id.* at 288-89. Amercements were slowly replaced with "fines," which were originally paid as a way to avoid a prison sentence but eventually came to resemble amercements. *Id.* at 289-90.

The English Bill of Rights in 1689 included a prohibition on "excessive Fines"—the predecessor to the Clause in our Constitution. As a "declarat[ion]" of the common law at the time, the English Bill of Rights incorporated Magna Carta's "prohibition against excessive amercements," which applied in the civil context and also embraced the contemporaneous understanding of "fine," which extended to "all monetary penalties, 'whether imposed by judge or jury, in both civil and criminal proceedings.'" 492 U.S. at 290-91 (opinion of O'Connor, J.).

It did not take long after that for "the English [to] first recogniz[e] the power of a jury to impose 'exemplary' or punitive damages in a tort action." Gerald W. Boston, *Punitive Damages and the Eighth Amendment: Application of the Excessive Fines Clause*, 5 Cooley L. Rev. 667, 728-32 (1988). Soon enough, the English courts "simply transplanted the reparative and punitive functions from [amercements in] medieval times to [punitive damages in] the modern practice of private torts"—and courts on this side of the Atlantic followed their lead. *Id.* By the Founding, "fines" were understood to include all punitive sanctions imposed in civil or criminal cases.

2. Subsequent decisions of this Court have also eroded *Browning-Ferris*'s foundations. Although the *Browning-Ferris* Court expressed skepticism that the Excessive Fines Clause could ever apply outside the criminal context, 492 U.S. at 262-63, the Court later held that the Clause reaches "civil sanction[s]" that serve at least in part "to punish," *Austin v. United States*, 509 U.S. 602, 609-10 (1993); *accord Timbs v. Indiana*, 586 U.S. 146, 155 (2019) (civil sanctions "are fines for purposes of the Eighth Amendment when they are at least partially punitive").

Punitive damages readily fit that bill. As this Court has repeatedly recognized, punitive damages are "a form of punishment." *Opati v. Republic of Sudan*, 590 U.S. 418, 429 (2020); *see Browning-Ferris*, 492 U.S. at 297 (opinion of O'Connor, J.) ("The Court's cases abound with the recognition of the penal nature of punitive damages." (collecting cases)). The Court has also acknowledged that punitive damages further some of "'the same'" interests "'advanced by the criminal law'"—namely, "'punishment and deterrence.'" *Exxon Shipping Co.*, 554 U.S. at 504-05.

It makes no difference that punitive damages are awarded by a civil jury to a private litigant, rather than levied directly by the state. Since *Browning-Ferris*, this Court has recognized that a jury asked to decide a punitive damages request is tasked with assessing "the degree of *the government's interest* in punishing and deterring willful misconduct." *Edmonson v. Leesville Concrete Co.*, 500 U.S. 614, 625 (1991) (emphasis added). And if it issues an award, that jury "exercises the power of the court and of the government that confers the court's jurisdiction." *Id.* at 624. So "[t]he fact that the government delegates

some portion" of its power to punish conduct to private parties does not change the nature of the sanctions that those parties extract. *Id.* at 626; *see also Mo. Pac. Ry. Co. v. Humes*, 115 U.S. 512, 522-23 (1885) ("it is not a valid objection" that the party collecting a fine is "the sufferer instead of the state"). That is especially clear where, as here, a punitive damages award has arguably been authorized by the state legislature and imposed by an order from a state court. The award is therefore a "fine" for Eighth Amendment purposes. *See* Stephen R. McAllister, *A Pragmatic Approach to the Eighth Amendment and Punitive Damages*, 43 U. Kan. L. Rev. 761, 776-80 (1995). And excessiveness under the Excessive Fines Clause would be assessed by "the same general criteria" this Court has adopted under the Due Process Clause—namely, the defendant's culpability, the relationship between the penalty and the harm caused, and sanctions imposed in other cases for similar misconduct. *Cooper Indus.*, 532 U.S. at 435.

*****

Whether under the Due Process Clause or the Excessive Fines Clause, courts have an independent obligation to ensure that state-sanctioned punishment does not outstrip the state's legitimate interests in punishment and deterrence. The Nevada Supreme Court's abdication of that responsibility here justifies this Court's intervention.

III. This Case Is A Good Vehicle.

The question presented is undeniably important, and this case is a suitable vehicle for the Court to resolve it. This case comes to this Court on a full record after a jury trial and orders on post-trial motions, and

no vehicle problems would complicate this Court's review. The decision below is a poster child for the growing trend in the lower courts of staggering punitive damages awards run amok, unconstrained by meaningful appellate review.

A. The question presented is important and recurring.

The question whether *Gore* and *State Farm* apply when a state statute purportedly authorizes a punitive damages award has significant stakes both for SHL—which faces an unprecedented $160 million punitive damages award—and beyond. Companies face serious and ever-growing risks of multimillion-dollar punitive damages awards. If the Nevada Supreme Court's decision is allowed to stand, lower courts may follow its lead in forgoing the required constitutional analysis in favor of blind deference to state legislative judgments.

1. This Court has long expressed "concern about punitive damages that 'run wild.'" *Haslip*, 499 U.S. at 18. The problem has only grown worse since this Court last addressed it. A 2010 study from Cornell University showed that, when requested, punitive damages were awarded in 35% of cases where plaintiffs prevailed at trial—including over 50% of cases where the compensatory damages award exceeded $1 million, and over 80% of cases where the compensatory damages award exceeded $10 million. Theodore Eisenberg et al., *The Decision to Award Punitive Damages: An Empirical Study*, 2 J. Leg. Analysis 577, 579, 599 (2010). More recent data show that "large verdicts for punitive damages remain both frequent and as large as ever." U.S. Chamber of Commerce, Institute for Legal Reform, *Unfinished Business:*

Curbing Excessive Punitive Damages Awards 11 (2023), https://tinyurl.com/2s4z967y. A survey by the U.S. Chamber of Commerce found that the median punitive damages award in recent years varied from $35 million in 2017 to more than $87 million in 2022—when the mean award was over $690 million. *Id.*

This trend is unsurprising given the rising frequency of high-dollar nationwide litigation against corporations. *See, e.g.*, Kelby Hutchison, *Columbus Jury Renders Verdict in $2.5 Billion Lawsuit Against Ford Motor Company*, Yahoo! (Feb. 14, 2025), https://tinyurl.com/mrw5wean; Frances Vinall, *Bayer Ordered to Pay $2.25 Billion After Jury Links Herbicide Roundup to Cancer*, Wash. Post (Jan. 27, 2024), https://tinyurl.com/54k2pjhz; Jonathan Stempel, *Jury Orders Mitsubishi to Pay $977 Mln over Crash Involving Defective Seatbelt*, Reuters (Oct. 31, 2023), https://tinyurl.com/22b9kruz. And the stakes are heightened by the fact that it has become "more unpredictable" whether and when a defendant will be hit with a multimillion-dollar award. Benjamin J. McMichael & W. Kip Viscusi, *Bringing Predictability to the Chaos of Punitive Damages*, 54 Ariz. St. L.J. 471, 471, 506-08 (2022). In fact, the occurrence of so-called "blockbuster" punitive damages awards (those of over $100 million) is so "random" that it is as hard to predict as the severity of natural disasters. *Id.*

The empirical evidence thus belies this Court's optimistic assertion in 2008 that "discretion to award punitive damages has not mass-produced runaway awards," and that courts and juries exercise "an overall restraint" in awarding punitive damages. *Exxon Shipping Co.*, 554 U.S. at 497-99. The ballooning size and frequency of punitive damages awards—combined

with the "stark unpredictability of punitive awards" that has long plagued the system, *id.* at 499—leaves companies exposed to a sizeable risk of financial ruin. Worse, the growth of outsized punitive damages awards has significant adverse effects both on businesses—which experience a chilling effect on their operations—and on consumers, as unexpected liabilities drive up the costs of goods and services. *See, e.g.*, James Boyd & Daniel E. Ingberman, *Do Punitive Damages Promote Deterrence?*, 19 Int'l Rev. L. & Econ. 47, 47-48 (1999); W. Kip Viscusi, *The Social Costs of Punitive Damages Against Corporations in Environmental and Safety Torts*, 87 Geo. L.J. 285, 322-27 (1998). The emergence of these dangers in the twenty years since this Court last considered the constitutionality of a punitive damages award in *State Farm* is ample reason for this Court's intervention now.

2. This Court's guidance is also badly needed. As the split of authority shows, *see supra* pp. 7-12, the issue recurs often. And many states have enacted statutes setting caps on punitive damages—typically either a maximum ratio of punitive to compensatory damages or a maximum dollar amount. *E.g.*, Alaska Stat. § 09.17.020; Colo. Rev. Stat. § 13-21-102; Idaho Code Ann. § 6-1604; Ind. Code § 34-51-3-4; Kan. Stat. Ann. § 60-3702; N.C. Gen. Stat. Ann. § 1D-25; Ohio Rev. Code § 2315.21; 23 Okla. Stat. Ann. § 9.1; Tex. Civ. Prac. & Rem. Code § 41.008; Va. Code Ann. § 8.01-38.1; *see also* Miss. Code Ann. § 11-1-65 (cap based on defendant's net worth). Like Nevada's, many of those laws contain exceptions to the cap for certain kinds of claims or certain categories of defendants. *See* Nev. Rev. Stat. § 42.005; *e.g.*, Ala. Code § 6-11-21 (punitive

damages caps inapplicable to certain kinds of claims, and lowered for defendants that are small businesses); N.J. Stat. Ann. § 2A:15-5.14 (cap on punitive damages does not extend to particular categories of cases); Tenn. Code Ann. § 29-39-104 (same); Tex. Civ. Prac. & Rem. Code § 41.008 (same); Wis. Stat. Ann. § 895.043 (same); *see also* Conn. Gen. Stat. § 52-240b (punitive damages cap applies only to one category of claim); Me. Rev. Stat. tit. 18-C, § 2-807 (same). On the Nevada Supreme Court's reasoning, all these statutes could be said to give defendants fair notice of limitless punitive damages.

If allowed to stand, the decision below would give state courts and legislatures a playbook to narrow *Gore* and *State Farm* from below. *Cf. Williams v. Philip Morris Inc.*, 182 Or. App. 44, 72 (2002) ("[T]he established Oregon law of punitive damages, including ORS 30.925(2), was sufficient to alert defendant to the possible punishment for its fraudulent scheme."), *cert. granted, judgment vacated, and remanded in light of* State Farm, 540 U.S. 801 (2003). Rather than countenance that result, this Court should step in and clarify the proper role, if any, that statutes purporting to authorize a punitive damages award should play in the constitutional excessiveness inquiry.

B. This case squarely and cleanly presents this issue for the Court's review.

This case is a suitable vehicle for addressing the question presented. The constitutionality of the punitive damages award was fully litigated below and was considered by both the majority and the dissent in the Nevada Supreme Court. This case comes to the

Court on a full record after a jury trial, and there are no factual disputes or vehicle issues that could complicate the Court's review.

Moreover, the issue is dispositive in this case, and the undisputed facts starkly underscore the need for independent judicial review of punitive damages awards. The record shows that, had the Nevada Supreme Court undertaken the requisite *de novo* constitutional inquiry, the unprecedented $160 million in punitive damages was plainly excessive under the *Gore* guideposts.

First, SHL did not act with a high degree of culpability or blameworthiness. It denied Mr. Eskew's request based on the plain language of the contract and its medical policy that took the position, consistent with the views of leading medical and scientific authorities and other large insurers, that proton therapy was not medically necessary to treat lung cancer. 15 Nev. Sup. Ct. J.A. 3043-45; *see* 11 Nev. Sup. Ct. J.A. 2301-08; 15 Nev. Sup. Ct. J.A. 3106-09, 3117-19. Nor was there any evidence that SHL acted with any intent to harm Mr. Eskew, or that it denied him coverage as part of a broader practice of denials. *See* 7 Nev. Sup. Ct. J.A. 1347; 15 Nev. Sup. Ct. J.A. 3106.

Second, the 4:1 ratio of punitive damages to compensatory damages was too high. This Court has stated that where the compensatory award is "substantial"—as the $40 million award here certainly was—a 1:1 ratio may be the "outermost" limit. *State Farm*, 538 U.S. at 425. And the compensatory damages here were based solely on noneconomic, emotional-distress damages—which already serve punitive purposes and are therefore "duplicated in the

punitive award." *Id.* at 426.

Third, the award here far exceeded the civil penalties issued in comparable cases. Nevada law punishes willfully engaging in deceptive trade practices with only a $5,000 penalty and willfully engaging in the unauthorized transaction of insurance with an up-to-$10,000 fine. Nev. Rev. Stat. §§ 598.0999(2), 679B.185(1). And the award outstripped by multiples *all* other awards upheld in the history of Nevada.

Finally, the Nevada Supreme Court's failure to publish its opinion is no obstacle to review.[4] If anything, the court's cursory rejection of SHL's constitutional objection demonstrates just how little attention lower courts have given to this Court's punitive damages precedents. A course correction is urgently needed.

[4] This Court has not hesitated to grant review of unpublished decisions. *E.g.*, *Martin v. United States*, No. 24-362; *Riley v. Bondi*, No. 23-1270; *Lora v. United States*, 599 U.S. 453 (2023); *N.Y. State Rifle & Pistol Ass'n v. Bruen*, 597 U.S. 1 (2022); *Stokeling v. United States*, 586 U.S. 73 (2019).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

TODD L. BICE
JORDAN T. SMITH
TYLER W. STEVENS
PISANELLI BICE, PLLC
400 S. 7th Street, Suite 300
Las Vegas, NV 89101

MIGUEL A. ESTRADA
THOMAS H. DUPREE JR.
Counsel of Record
LOCHLAN F. SHELFER
JEFF LIU
LAVI M. BEN DOR
GIBSON, DUNN & CRUTCHER LLP
1700 M Street, N.W.
Washington, D.C. 20036
(202) 955-8500
TDupree@gibsondunn.com

Counsel for Petitioner

April 11, 2025