

No. 14-____

IN THE
Supreme Court of the United States

QUICKEN LOANS INC.,

Petitioner,

v.

LOURIE BROWN & MONIQUE BROWN,

Respondents.

**On Petition for Writ of Certiorari to the
Supreme Court of Appeals of West Virginia**

PETITION FOR WRIT OF CERTIORARI

Thomas R. Goodwin
Johnny M. Knisely II
GOODWIN & GOODWIN LLP
300 Summers St.
Suite 1500
Charleston, WV 25301
(304) 346-7000

Jeffrey B. Morganroth
Counsel of Record
MORGANROTH & MORGANROTH
344 North Old Woodward Ave.,
Suite 200
Birmingham, MI 48009
(248) 864-4000
jmorganroth@morganrothlaw.com

Meir Feder
David T. Raimer
JONES DAY
222 E. 41st St.
New York, NY 10017
(212) 326-3939

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Counsel for Petitioner

QUESTIONS PRESENTED

1. Whether a state court may evade its obligation to apply the United States Constitution and this Court's cases by asserting that expressly and pervasively raised federal constitutional claims were purportedly waived.

2. Whether, in applying the punitive to compensatory damages ratio of *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), court-awarded attorney's fees are properly included as compensatory damages.

PARTIES TO THE PROCEEDING

Petitioner Quicken Loans Inc., was the Petitioner-Defendant in the Supreme Court of Appeals of West Virginia. Respondents Lourie Brown and Monique Brown were Respondents-Plaintiffs before that court.

CORPORATE DISCLOSURE STATEMENT

Petitioner Quicken Loans Inc. is a privately held corporation. No publicly held company owns 10% or more of Quicken Loans' stock.

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PETITION FOR WRIT OF CERTIORARI

This case, which arose from a dispute over a \$144,000 mortgage loan, involves what the dissent below correctly identified as the Supreme Court of Appeals of West Virginia’s “contumacious refusal to heed” this Court’s binding interpretation of the U.S. Constitution with respect to punitive damages awards. Pet. App. 93a. The court below flatly refused to consider Petitioner’s federal constitutional challenge to a \$2.17 million punitive damages award that dwarfed, by a 124 to 1 ratio, the less than \$17,500 in restitution liability in the case. Faced with briefing that pervasively argued that the punitive award violated federal due process standards, and that cited *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), no fewer than 14 times in support of that argument, the court below baldly asserted that Petitioner had never raised “any issue pertaining to *BMW* and *State Farm*” and refused to address the federal issues—so “brazenly ignor[ing]” this Court’s cases, according to the dissent, as to be “virtually begging to be reversed by” this Court. Pet. App. 85a.

This Court has repeatedly intervened to ensure that state courts do not consider themselves free to render federal protections meaningless—or to insulate their decisions from this Court’s review—by evading their obligation to apply governing federal law. As the Court emphasized just three Terms ago in summarily reversing another decision from the court below, “[w]hen this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.” *Marmet Health Care Ctr., Inc. v. Brown*, 132 S. Ct.

1201, 1202 (2012) (per curiam); *see also Youngblood v. West Virginia*, 547 U.S. 867, 869 (2006) (per curiam) (summarily vacating West Virginia Supreme Court of Appeals decision for failing to address properly raised federal issue). Of course, “whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question.” *Street v. New York*, 394 U.S. 576, 583 (1969). This Court should grant certiorari and either summarily reverse the judgment below—remanding for decision of the federal issues on the merits—or set the case for full briefing and argument.

In addition, even apart from the need to ensure that state courts do not disregard their duty to address properly raised federal issues, this case also presents a discrete substantive question that requires this Court’s resolution: whether a court may inflate the “compensatory” portion of the punitive-to-compensatory ratio analysis required by *State Farm* by treating court-awarded attorney’s fees as compensatory damages. Here, the West Virginia courts, adopting a minority view in the lower courts, transformed a manifestly unconstitutional 124:1 ratio into a purported 3.53:1 ratio by treating \$596,199.89 in attorney’s fees and costs as compensatory damages. Such sleight of hand is contrary to the reasoning of this Court’s punitive damages cases—and to the implicit holding of *State Farm*—and it conflicts with the decisions of multiple other courts. This issue is independently in need of this Court’s clarification of what due process requires, and it, too merits a grant of certiorari.

OPINIONS BELOW

There were two decisions by the Supreme Court of Appeals of West Virginia in this case. The first opinion, Pet. App. 127a-91a, is reported at 737 S.E.2d 640, while its second opinion, Pet. App. 1a-93a, which followed a remand, is reported at 2014 W. Va. LEXIS 1307. The denial of Petitioner's petition for rehearing following the second appeal, Pet. App. 229a, is unreported. The merits decision of the Circuit Court of Ohio County, Pet. App. 197a-228a, its initial order on punitive damages and fees, Pet. App. 192a-96a, and its subsequent opinion on remand, Pet. App. 94a-126a, are unreported.

JURISDICTION

This Court has jurisdiction under 28 U.S.C. § 1257(a). The Supreme Court of Appeals of West Virginia entered its final judgment on November 25, 2014, Pet. App. 1a, and denied the petition for rehearing on February 4, 2015, Pet. App. 229a. This petition is timely filed on March 25, 2015.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourteenth Amendment to the U.S. Constitution provides:

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor

deny to any person within its jurisdiction the equal protection of the laws.

U.S. Const. amend. XIV, § 1.

Article VI of the U.S. Constitution states, in relevant part:

This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, any Thing in the Constitution or Laws of any State to the Contrary notwithstanding.

Id. art. VI, cl. 2.

STATEMENT OF THE CASE

This case arises out of a July 2006 loan agreement between Respondent Lourie Brown and Petitioner, pursuant to which Respondent sought to refinance a home. Pet. App. 136a-37a. Petitioner lent her \$144,800, which she used to retire approximately \$95,000 in debt and, among other things, to purchase a new automobile. Pet. App. 136a-47a. In the process, Respondent's monthly debt service was reduced by over three hundred dollars, from \$1,460 to \$1,144. Pet. App. 143a-44a. Respondent defaulted after making only two timely payments, and Petitioner instituted foreclosure proceedings. Pet. App. 4a, 147a-49a.

A. *Quicken Loans I*

1. Circuit Court Proceedings

Respondent countered by filing suit against Petitioner and several other parties. Pet. App. 4a, 6a, 148a-49a. Claiming that Petitioner had harmed her by lending her more money than her house was worth, Respondent alleged fraud and violations of various provisions of the West Virginia Consumer Credit and Protection Act. Pet. App. 4a-6a, 148a-50a.

After a bench trial, the Circuit Court held that Quicken Loans had engaged in fraudulent conduct, crediting Respondent's uncorroborated testimony about a purported verbal promise to allow her to refinance the loan within "three to four months." Pet. App. 156a-58a, 221a-22a. The court also deemed fraudulent Quicken Loans' alleged failure to properly disclose a balloon payment due at the end of the 30-year loan term, even though the payment had been disclosed in three separate documents provided to Respondent, and Respondent admitted to being aware of the obligation before signing the loan documents. Pet. App. 145a, 152a-56a, 222a. In addition, the court ruled that the loan agreement was substantively unconscionable. Pet. App. 149a, 215a-17a. Based on these findings, the Circuit Court canceled Respondent's obligation to repay any part of the loan and awarded her restitution of \$17,476.72. Pet. App. 149a, 217a.

A subsequent hearing on fees and punitive damages resulted in Respondent being awarded attorney's fees and costs of \$596,199.89 and \$2,168,868.75 in punitive damages. Pet. App. 150a, 193a-96a. The court stated that it arrived at the punitive figure by

“applying a factor of three times the compensatory damages and attorney fees.” Pet. App. 196a.

2. Petitioner’s First Appeal

On appeal to the West Virginia Supreme Court of Appeals, in addition to appealing the Circuit Court’s findings on liability, Petitioner extensively challenged the punitive damages award under both West Virginia law and the federal Constitution, contending, as to its federal challenge, that the “award of punitive damages was grossly excessive and deprived Quicken Loans of due process.” Pet. App. 288a, 293a. Petitioner’s federal constitutional argument was made repeatedly and in detail, with Petitioner expressly invoking this Court’s decision in *State Farm* at least nine times in its opening brief and five times in its reply brief. Pet. App. 254a, 288a-302, 389a-402. As part of that argument, Petitioner noted that the purported “compensatory damages” on which the punitive award was based consisted almost entirely of attorney’s fees—with \$596,199.89 in attorney’s fees and costs against less than \$17,500 in restitution—and contended at length that by “treating . . . attorneys fees as compensatory damages” when computing the ratio between compensatory and punitive damages, “the Circuit Court erred under both West Virginia law and the U.S. Constitution.” Pet. App. 296a.

The West Virginia Supreme Court of Appeals affirmed most of the liability findings, but concluded that the lower court erred in canceling Respondent’s loan obligation and in refusing to permit Petitioner an offset for money Respondent received from a pre-trial settlement with two co-defendants. Pet. App. 7a-8a, 168a-76a, 188a-91a. As to punitive damages, the court held that attorney’s fees “are properly con-

sidered compensatory damages for the purposes of calculating punitive damages,” and thus, “the circuit court did not err by using attorney fees and costs to calculate the punitive damages award.” Pet. App. 8a, 181a-88a. However, the court vacated the punitive damages award because the order “lacked the necessary analysis and findings required” under its prior decision in *Garnes v. Fleming Landfill, Inc.*, 413 S.E.2d 897 (W. Va. 1991), and “remanded [the case] for further proceedings consistent with [its] opinion,” Pet. App. 181a, 191a.

B. *Quicken Loans II*

1. Circuit Court Proceedings

On remand, the Circuit Court once again effectively canceled Respondent’s obligation to repay the loan, leaving Petitioner with only a “lien” on “the net proceeds from [any] sale of the property,” should one ever occur. Pet. App. 11a, 100a-01a. The court also added a new \$98,800 in purported damages, asserting without explanation that the amount by which the loan exceeded the value of the property somehow constituted “damages.” Pet. App. 11a, 125a. It increased the award of attorney’s fees from \$596,199.89 to \$875,233.44, adding \$279,033.55 for the cost of the *Quicken Loans I* appeal and post-appellate proceedings. Pet. App. 11a, 121a-23a, 125a-26a. And, after conducting the mandated analysis under *Garnes*, the court ordered \$3,500,000 in punitive damages, once again deeming attorney’s fees and costs to be compensatory for purposes of the ratio. Pet. App. 12a, 101a-21a, 124a-25a. The enhanced punitive award resulted from applying the original 3.53:1 ratio to the augmented awards of compensatory damages and attorney’s fees. Pet. App. 12a, 125a & n.16.

2. Petitioner's Second Appeal

Petitioner once again appealed, and once again argued at length that the lower court's award of punitive damages was grossly excessive and deprived Petitioner of substantive due process. Pet. App. 86a. Petitioner also contended, among other things, that the Circuit Court had run afoul of the Supreme Court of Appeals' mandate by supplementing Respondent's relief on remand.

The Supreme Court of Appeals agreed that the lower court had violated its mandate by effectively canceling Respondent's loan obligation and adding to the damages and attorney's fees. Accordingly, the court reversed the cancellation of the loan, Pet. App. 22a-79a, "reduc[ed] the compensatory damages to [the \$17,476.72] originally awarded by the circuit court[.]" Pet. App. 25a, 79a, and "reverse[d] all attorney fees and costs . . . above and beyond the \$596,199.89 awarded prior to the first appeal," Pet. App. 43a & n.22, 79a-80a. For similar reasons, the court returned the punitive damages award to the original amount of \$2,168,868.75. Pet. App. 44a-46a, 80a.

In assessing whether that punitive damages award was nonetheless excessive, the court addressed only "whether it exceeds state law limits on excessiveness." Pet. App. 53a. By a 3-2 vote, the court refused to address Petitioner's federal constitutional challenge, asserting that Petitioner had "waived [its] federal substantive due process challenge" by purportedly failing "to raise any issue pertaining to *BMW [of N. America, Inc. v. Gore, 517 U.S. 559 (1996)]* and *State Farm*" in "its brief and reply brief in the *first* appeal." Pet. App. 53a.

In upholding the award as not excessive under state law standards, Pet. App. 53a-70a, the court reaffirmed its holding in *Quicken I* that “attorneys fees and costs . . . shall be included in the compensatory to punitive damages ratio.” Pet. App. 68a. The court thus “add[ed] \$596,199.89—the amount representing attorney fees and costs awarded pursuant to the circuit court’s [initial] order—to the \$17,476.72 restitution figure” to arrive at a “total compensatory damages award” of \$613,676.61. Pet. App. 68a. This produced a 3.53:1 ratio to the \$2,168,868.75 punitive damages award, which the court deemed “fair” and consistent with its state law precedent. Pet. App. 68a-69a.

Justices Benjamin and Loughry dissented from the court’s waiver ruling, concluding “upon independent review of the appendix record and the briefs submitted by the parties” that Petitioner had preserved its federal constitutional challenge. Pet. App. 53a n.26. Justice Loughry went further, explaining that “there is no question that the petitioner[] plainly asserted a due process challenge to the punitive damages award in both *Quicken I* and in the instant appeal.” Pet. App. 86a. Indeed, in the first appeal, “one of the petitioner’s most significant assignments of error was that the punitive damages award was ‘grossly excessive and deprived Quicken Loans of due process.’” Pet. App. 86a. And in the second appeal, “the petitioner reasserted a substantive due process challenge,” making “six separate assignments of error directed at the various aspects of the substantive due process deprivation arising from the punitive damages award.” Pet. App. 86a.

In addition to its “misguided” and “stubborn refusal to review the punitive damage award in this case against the edicts of *Gore* and *State Farm*,” Pet. App. 87a, 90a, Justice Loughry critiqued the majority’s decision to treat attorney’s fees as compensatory damages, Pet. App. 81a-85a, concluding that “the fact that the Court felt the need” to “reduc[e] the ratio of punitive to compensatory damages” through a “tortured inclusion of attorney’s fees and costs” is “further evidence of the majority’s misapprehension of the manner in which punitive damages must be reviewed by this Court.” Pet. App. 92a. According to Justice Loughry, “[r]ather than creating the artifice that attorney’s fees and costs are compensatory damages . . . , the actual compensatory damage award of \$17,476.72 should have been used to examine the [punitive] award in terms of an acceptable multiplier.” Pet. App. 93a.

Justice Loughry maintained that these errors, in sum, reflect a “contumacious refusal to heed the United States Supreme Court’s holdings and [an] insistence on a result-oriented analysis to uphold plainly-excessive punitive damages awards.” Pet. App. 93a. In the view of the dissent, the Supreme Court of Appeals has repeatedly “chosen to ignore federal jurisprudence by affirming . . . punitive damages verdict[s] that violate[] principles of due process.” Pet. App. 81a, 93a (citing *Manor Care v. Douglas*, 763 S.E.2d 73 (W. Va. 2014)). Operating “under the astonishingly mistaken belief” that it need not apply binding federal precedent, he observed, the majority “again chose[] to brazenly ignore the United States Supreme Court’s jurisprudence regarding punitive damages, virtually begging to be reversed by that body.” Pet. App. 85a.

Petitioner filed a petition for rehearing documenting that, contrary to the assertion of the majority below, it had raised its federal contentions in plain terms in numerous places in its briefs on the initial appeal. By a 3-2 vote, the court denied the petition without explanation. Pet. App. 229a.

REASONS FOR GRANTING THE PETITION

It is axiomatic that “the federal judiciary is supreme in the exposition of the law of the Constitution,” *Cooper v. Aaron*, 358 U.S. 1, 18 (1958), and that state courts are bound to follow this Court’s interpretation of that document, *id.* “When this Court has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.” *Marmet*, 132 S. Ct. at 1202.

As to punitive damages, this Court’s cases have established “substantive constitutional limitations” rooted in the Due Process Clause of the Fourteenth Amendment. *E.g.*, *State Farm*, 538 U.S. at 416, 422-23; *BMW*, 517 U.S. at 585-86. Those cases establish several “guideposts” for review of punitive awards, and among those guideposts, a “central feature in [this Court’s] analysis” has been the “ratio between compensatory and punitive damages.” *Exxon Shipping Co. v. Baker*, 554 U.S. 471, 507 (2008). While “reject[ing] the notion that the constitutional line is marked by a simple mathematical formula,” *BMW*, 517 U.S. at 582, this Court has held that “few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process,” *State Farm*, 538 U.S. at 425.

In this case, rather than apply—or even purport to apply—this Court’s decisions, the West Virginia Supreme Court of Appeals took the extraordinary step

of entirely refusing to consider federal constitutional claims that were clearly and repeatedly raised by Petitioner. This Court’s intervention, whether by summary reversal, *see Youngblood*, 547 U.S. at 869 (summarily vacating West Virginia decision that did not address petitioner’s “clearly presented . . . federal constitutional” claim), or after full briefing and argument, is a necessary corrective to such a “fail[ure] to implement” this Court’s precedents, *Marmet*, 132 S. Ct. at 1202.

That the West Virginia court cloaked its “contumacious refusal” to apply this Court’s jurisprudence, Pet. App. 93a, with a transparently unfounded finding of waiver is of no moment. “The issue whether a federal question was sufficiently and properly raised in the state courts is itself ultimately a federal question, as to which this Court is not bound by the decision of the state courts.” *Street*, 394 U.S. at 583. And here, even a passing review of the record reveals that the waiver finding is “without any fair or substantial support.” *Wolfe v. North Carolina*, 364 U.S. 177, 185 (1960). The entire structure of our dual federal and state court systems depends on the state courts’ faithful application of federal law and the U.S. Constitution. This Court therefore has rightly intervened when state courts have improperly declined to address federal claims—including, on more than one occasion, where it is the West Virginia Supreme Court of Appeals that has been recalcitrant about applying governing federal law.

In addition, entirely apart from this need to vindicate the duty to apply governing federal law, this case presents a recurring and important federal issue on which the lower courts are split, which requires

this Court's resolution: whether attorney's fees and costs are properly treated as compensatory damages for purposes of the *State Farm* ratio between punitive and compensatory damages.

Accordingly, this Court should grant certiorari and either set the case for plenary review or summarily reverse the decision of the Supreme Court of Appeals and remand for consideration of the federal issues on the merits.

I. THIS COURT'S INTERVENTION IS NECESSARY TO CORRECT THE WEST VIRGINIA COURT'S REFUSAL TO CONSIDER EXPRESSLY AND REPEATEDLY RAISED FEDERAL CONSTITUTIONAL CLAIMS

The stated basis for the lower court's "brazen[]" refusal to apply this Court's punitive damages precedents, Pet. App. 85a, was its indefensible assertion that Petitioner failed "in its brief and reply brief in the first appeal to raise any issue pertaining to *BMW* and *State Farm*," Pet. App. 53a (emphasis omitted). This assertion cannot withstand even cursory scrutiny.

1. This Court has consistently made clear that state courts cannot evade their obligation to apply federal law, or insulate their decisions from federal review, by purporting to find those claims waived. It is well established that "[t]he consideration of asserted constitutional rights may not be thwarted by simple recitation that there has not been observance of a procedural rule with which there has been compliance in both substance and form, in every real sense." *NAACP v. Flowers*, 377 U.S. 288, 297 (1964). "Whatever springes the State may set for those who are en-

deavoring to assert rights that the State confers, the assertion of federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice.” *Davis v. Wechsler*, 263 U.S. 22, 24 (1923).

Accordingly, this Court has held that whether a litigant “adequately presented” a federal question to a state court “is itself a federal question.” *Lovell v. City of Griffin*, 303 U.S. 444, 449-50 (1938); *see also Street*, 394 U.S. at 583 (same); Shapiro et al., *Supreme Court Practice* § 3.IV.18, at 189 (10th ed. 2013). Here, there can be no reasonable dispute that Petitioner’s federal punitive damages claim was “brought to the attention of the state court with fair precision and in due time.” *New York ex rel. Bryant v. Zimmerman*, 278 U.S. 63, 67 (1928).

Indeed, it is hard to see how Petitioner could have raised its federal issues more clearly or pervasively. Beginning with its notice of appeal in *Quicken Loans I*, Petitioner argued that “[t]he Circuit Court’s award of punitive damages was grossly excessive and deprived Petitioner of substantive due process.” Pet. App. 249a. Petitioner elaborated, citing *State Farm* for the proposition that “[t]he simplest reason why this Court should review the constitutionality of this punitive damages award is that it is constitutionally required to do so,” and explaining that “‘appellate courts [must] conduct de novo review’ of awards of punitive damages applying the guideposts announced in *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996).” Pet. App. 249a-50a (citation omitted).

Likewise, in its initial brief before the Supreme Court of Appeals, Petitioner squarely and repeatedly presented the federal due process challenge. For ex-

ample, Assignment of Error No. 4 stated that the lower court “improperly and unconstitutionally inflated the [punitive damages] award by adding attorney’s fees . . . to the ‘compensatory damages’ amount it used as a multiplier in calculating the award.” Pet. App. 254a. The very first line of a subsection entitled “[t]he Circuit Court’s award of punitive damages was grossly excessive and deprived Quicken Loans of due process” was a citation to *State Farm*. Pet. App. 293a. Petitioner went on to cite *State Farm* no fewer than nine times, arguing that the lower court had violated “long-settled principles of federal due process” and “erred under both West Virginia law and the U.S. Constitution, grossly inflating the punitive damages award by treating . . . the attorney’s fees as compensatory damages.” Pet. App. 294a, 296a; *see also* Pet. App. 293a (“Even had the Circuit Court conducted a procedurally adequate [state-law] review—and it did not—Quicken Loans has a *further* substantive due process right to be free of arbitrary punishment for which it had no reasonable notice.” (emphasis added) (citing *State Farm*, 538 U.S. at 416-417)); Pet. App. 295a (“The ratio of punitive damages to the award of restitution exceeds 120-to-1, far more than the applicable West Virginia *and federal standards*.” (emphasis added)).

The assertion that Petitioner failed to discuss the federal question in its reply brief on the initial appeal is equally extraordinary. To take just a few examples, Petitioner explicitly argued that “attorney’s fees can[not] properly be considered ‘harm’ for purposes of the compensatory-to-punitive ratio inquiry required by both West Virginia law and the U.S. Constitution” and that that the resulting award “was grossly excessive under both West Virginia law and the U.S. Con-

stitution.” Pet. App. 390a, 392a; *see also* Pet. App. 397a (“[T]he award of attorney’s fees to Plaintiffs cannot properly be treated as compensatory damages under either the U.S. Constitution or West Virginia law. *State Farm v. Campbell* itself declined to treat attorney’s fees as compensatory damages in the relevant ratio, and attorney’s fees are not a measure of the ‘harm’ caused by the defendant.”).

These citations could continue at length, *see generally* Pet. App. 230a-305a, 372a-405a (evidencing numerous additional places where the federal constitutional issue was raised), but there is no need to belabor the point. “Where it is inescapable that the defendant sought to invoke the substance of his federal right, the asserted state-law defect in form must be more evident than it is here.” *James v. Kentucky*, 466 U.S. 341, 349-51 (1984). On any fair reading of the record, it is impossible to conclude that Petitioner “failed . . . to raise any issue pertaining to *BMW* and *State Farm*.” Pet. App. 53a. To the contrary, a federal due process challenge was “one of petitioner’s most significant assignments of error.” Pet. App. 86a. Indeed, the notion that Petitioner—or any litigant—would waive its federal constitutional right to exacting, de novo appellate review of a seven-figure punitive damages award defies belief. In such circumstances, the state court’s waiver claim is “so certainly unfounded that it properly may be [rejected as] a mere device to prevent a review of the decision upon the federal question.” *Enterprise Irrigation Dist. v. Farmers Mut. Canal Co.*, 243 U.S. 157, 164 (1917).

2. The conclusion that the waiver holding was a “mere device” to evade this Court’s jurisdiction is bolstered by the fact that the West Virginia court’s

“stubborn refusal” to apply federal law does not appear to be an isolated event. Pet. App. 90a. That court’s resistance to this Court’s punitive damages cases has been so consistent that the dissent described the court below as operating “under the astonishingly mistaken belief that federal punitive damages jurisprudence is not applicable to [its review of] punitive damages.” Pet. App. 85a; *see also* Pet. App. 81a, 85a, 91a, 93a (citing *Manor Care*, 763 S.E.2d 73, as an example of a case in which the West Virginia Supreme Court of Appeals upheld a punitive award that far exceeded the limits set by this Court).

Nor is this the first instance in recent years in which West Virginia’s high court has effectively refused to apply this Court’s precedent. In *Marmet Health Care Center, Inc. v. Brown*, that court held that the Federal Arbitration Act did not apply to agreements between nursing homes and patient’s family members, referring to this Court’s contrary precedent as “tendentious” and “created from whole cloth.” 132 S. Ct. at 1203. This Court summarily and unanimously reversed, explaining that when it “has fulfilled its duty to interpret federal law, a state court may not contradict or fail to implement the rule so established.” *Id.* at 1202. Likewise, in *Youngblood v. West Virginia*, a case analogous to the one at hand, the Supreme Court of Appeals chose not to consider “specific constitutional claims” that were “clearly presented” by the petitioner. 547 U.S. at 869-70. This Court summarily vacated that decision, remanding the case for consideration of the federal claims. *Id.*

It should go without saying that the federal “Constitution [is] the supreme law of the land, U.S. Const. art. VI, cl. 2, and this Court’s “final authority to con-

strue [that document] cannot, at this point in the Nation's history, be reasonably doubted," *Danforth v. Minnesota*, 552 U.S. 264, 308 (2008) (Roberts, C.J., dissenting); *Cooper*, 358 U.S. at 18. "[T]he judges in every state [are] bound thereby, anything in the constitution or laws of any state to the contrary notwithstanding." U.S. Const. art. VI, cl. 2; *Chesapeake & O. R. Co. v. Martin*, 283 U.S. 209, 220-21 (1931) (stating that this Court's interpretation of federal law is "binding upon the state courts and must be followed"). Where, as here, a state court effectively refuses to apply plainly applicable federal law, this Court's intervention is necessary, and summary reversal is an appropriate remedy. See *Marmet*, 132 S. Ct. at 1203; *Youngblood*, 547 U.S. at 869-70; see also, e.g., *Nitro-Lift Technologies, LLC v. Howard*, 133 S. Ct. 500 (2012) (per curiam) (summary reversal of decision the Oklahoma Supreme Court purported to rest on independent state ground); *Presley v. Georgia*, 558 U.S. 209 (2010) (per curiam) (summarily reversing Supreme Court of Georgia); *CSX Transp., Inc. v. Hensley*, 556 U.S. 838 (2009) (per curiam) (summarily reversing Tennessee Court of Appeals); Shapiro, *supra*, § 5.I.12(c), at 353 (noting that "the Court has shown no reluctance to summarily reverse a state court decision found to be clearly erroneous").

* * *

As it is indisputable that Petitioner complied "both [in] substance and form" with all relevant procedural requirements "in every real sense," *Flowers*, 377 U.S. at 297, the Supreme Court of Appeals' refusal to address Petitioner's federal constitutional claims cannot be countenanced. This Court's intervention is neces-

sary to correct this evasion of the duty to apply governing federal law.

II. THE QUESTION WHETHER ATTORNEY'S FEES MAY BE TREATED AS COMPENSATORY DAMAGES IN THE *STATE FARM* PUNITIVE-TO-COMPENSATORY RATIO INDEPENDENTLY REQUIRES THIS COURT'S REVIEW

This case also squarely presents a discrete issue that has produced a division of authority in the lower courts and is in need of this Court's review: the important and recurring question whether, for purposes of *State Farm's* punitive-to-compensatory damages ratio, a court may inflate the compensatory denominator of the ratio by treating attorney's fees as compensatory damages.

Although *State Farm* itself, as well as the reasoning of this Court's cases, is inconsistent with this approach, a growing minority of courts has justified excessive punitive damages awards by treating attorney's fees as compensatory damages. This case provides a stark example, as the "compensatory damages" that purportedly justified the \$2.17 million in punitive damages consisted almost entirely (more than 97%) of attorney's fees—thereby transforming a case involving a mere \$17,476.72 in restitution into one producing 124 times that amount in punitive damages. This Court's intervention is necessary to resolve the division in the lower courts and correct this means of evading the limits imposed by *State Farm*.

A. There Is a Conflict in the Lower Courts Regarding the Treatment of Attorney’s Fees for Purposes of the *State Farm* Ratio

There is a division of authority over whether—in applying the punitive-to-compensatory ratio under *State Farm*—an award of attorney’s fees is properly included in the compensatory-damages element of the ratio. Consistent with this Court’s cases, *see infra* Part II.B, most courts have excluded attorney’s fees from the ratio. But a growing number of courts, some of them cited in support of the holding below, *see* Pet. App. 185a-87a, have held that attorney’s fees are properly included as compensatory damages.

1. Several courts have flatly rejected plaintiffs’ requests to treat attorney’s fees as “compensatory” when analyzing whether the ratio between punitive and compensatory damages complied with federal law. The Utah Supreme Court adopted this approach on remand from this Court’s *State Farm* decision. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 419-20 (Utah 2004) (reading *State Farm* as “foreclose[ing] consideration of a compensatory damages award” inflated by attorney’s fees). The D.C. Court of Appeals has also declined to include attorney’s fees in the compensatory damages denominator, and went a step further by suggesting that an award of attorney’s fees should mean a reduced punitive award, not a greater one. *Daka, Inc. v. McCrae*, 839 A.2d 682, 701 n.24 (D.C. 2003) (attorney’s fees “includ[e] a certain punitive element’ and to that extent . . . favor[] a lesser rather than greater award of punitive damages” under this Court’s cases). More recently, the Supreme Court of Missouri agreed that

attorney's fees could not be treated as compensatory damages under *State Farm. Lewellen v. Franklin*, 441 S.W.3d 136, 147 n.15 (Mo. 2014) (holding that “[b]ecause compensatory damages are limited to the plaintiff's loss,” “the ratio does not include attorneys’ fees”).

In addition, the Arizona and California appellate courts have repeatedly rejected plaintiffs’ “attempts to alter the ratio by arguing that” their post-trial awards of attorney’s fees should be treated as compensatory damages. *Amerigraphics, Inc. v. Mercury Cas. Co.*, 107 Cal. Rptr. 3d 307, 329 (Ct. App. 2010); *Chasan v. Farmers Grp., Inc.*, No. 1 CA-CV 07-0323, 2009 WL 3335341, at *10 (Ariz. Ct. App. Sept. 24, 2009) *Bardis v. Oates*, 14 Cal. Rptr. 3d 89, 101 (Ct. App. 2004); *see also Baker v. Nat’l State Bank*, 801 A.2d 1158, 1168 (N.J. Super. App. Div. 2002) (stating that for purposes of the due-process ratio, “there is no reason to consider attorney fees to be part of compensatory damages”).

Finally, perhaps reflecting the obviousness of the correct approach, many decisions have (like *State Farm* itself) excluded attorney’s fees from the punitive-to-compensatory ratio without even addressing the possibility that attorney’s fees might properly be included—even where, as here, attorney’s fees dwarfed the compensatory damages. *See, e.g., Quigley v. Winter*, 598 F.3d 938, 956-58 (8th Cir. 2010); *Wallace v. DTG Operations, Inc.*, 563 F.3d 357, 362-63 (8th Cir. 2009); *Mendez v. Cnty. of San Bernardino*, 540 F.3d 1109, 1120-23 (9th Cir. 2008), *overruled on other grounds by Arizona v. ASARCO LLC*, 773 F.3d 1050, 1058 n.1 (9th Cir. 2014) (en banc); *Fabri v. United Techs. Int’l, Inc.*, 387 F.3d 109,

118, 126-27 (2d Cir. 2004); *Target Media Partners Operating Co. v. Specialty Mktg. Corp.*, No. 1091758, 2014 WL 4278879, at *1, *6 (Ala. Aug. 29, 2014); *Exposure Graphics v. Rapid Mounting Display*, No. 54069, 2012 WL 1080596, at *1 (Nev. Mar. 29, 2012).

2. In contrast to these cases, the Washington Supreme Court held, over a dissent, that it is proper to “include attorney fees as part of the compensatory damages award when calculating the punitive damages ratio.” *Clausen v. Icicle Seafoods, Inc.*, 272 P.3d 827, 836 (Wash. 2012) (en banc). Likewise the Illinois appellate courts have held in a series of cases “that an award of attorney fees should be taken into account as part of the compensatory damages factor.” *Blount v. Stroud*, 915 N.E.2d 925, 943 (Ill. App. Ct. 2009); see, e.g., *Lawlor v. N. Am. Corp. of Ill.*, 949 N.E.2d 155, 170 (Ill. App. Ct. 2011) (upholding \$1.75-million award because, while compensatory damages were only \$65,000, the plaintiff had been awarded \$600,000 in attorney’s fees). The decision below—while purporting not to address the issue under federal law, unequivocally took the view that that attorney’s fees “are properly considered compensatory damages for the purposes of calculating punitive damages.” Pet. App. 8a, 181a-88a.¹

¹ In addition, two federal circuit decisions have contributed to confusion in the lower courts on this issue by including attorney’s fees in the ratio where the attorney’s fees were effectively damages resulting from bad faith conduct. See *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224 (3d Cir. 2005) (fees resulting from insurance company bad faith); *Action Marine, Inc. v. Continental Carbon Inc.*, 481 F.3d 1302, 1321 (11th Cir. 2007) (fees resulting from litigant bad faith).

As these divergent cases show, the lower courts have divided over when, if ever, an award of attorney's fees may be treated as compensatory for purposes of the *State Farm* ratio.

B. The Inclusion of Attorney's Fees in the *State Farm* Ratio Conflicts with This Court's Precedent

The inclusion of attorney's fees in the *State Farm* ratio cannot be squared with this Court's cases.

State Farm itself excluded attorney's fees from the ratio in the face of an express argument that they should be included. The respondents in *State Farm* argued that the Court should include as "compensatory damages" not only the \$1 million compensatory award, but also over \$800,000 in attorney's fees and costs. See Br. of Respondents at *17 n.5, *State Farm*, 538 U.S. 408 (No. 01-1289), 2002 WL 31387421. This Court, however, excluded those amounts from its calculation and determined that the punitive-to-compensatory ratio was "145 to 1," 538 U.S. at 425—the ratio between the \$145 million punitive award and the \$1 million compensatory award. It further found the \$1 million award to be "complete compensation" for the plaintiffs. *Id.* at 426; *id.* at 412 (stating that "full compensatory damages are \$1 million"); see also *BMW*, 517 U.S. at 580 (noting "[t]he principle that exemplary damages must bear a 'reasonable relationship' to *compensatory damages*" (emphasis added)).

Likewise, *Exxon Shipping Co. v. Baker*, while not a constitutional case, adopted a ratio requirement for maritime cases that "pegg[ed] punitive to *compensatory* damages." 554 U.S. at 506 (emphasis added). When opting for a precise 1:1 ratio, this court relied

significantly on recommendations that compared punitive awards with the compensatory verdict alone—i.e., without including attorney’s fees. *See* 554 U.S. at 506-07; *see, e.g.*, ABA, Report of Special Comm. on Punitive Damages, Section of Litigation, Punitive Damages: A Constructive Examination 65 (1986) (“Our specific proposal is that a ratio be adopted of a punitive damages three times the *compensatory verdict*.” (emphasis added)). The Court also relied on a host of studies identifying ratios between compensatory and punitive damages. *See Exxon*, 554 U.S. at 497-98 & nn.13-14, 506-07 (citing Eisenberg et al., *Juries, Judges, and Punitive Damages: Empirical Analyses Using the Civil Justice Survey of State Courts 1992, 1996, and 2001 Data*, 3 J. of Empirical Legal Studies 263, 278 (2006); Vidmar & Rose, *Punitive Damages by Juries in Florida*, 38 Harv. J. Legis. 487, 492 (2001)). All of these studies appear to have addressed the ratio between punitive awards and the compensatory verdicts; there is no indication that any of them included attorney’s fees in the ratio.

This Court’s jurisprudence reflects the fact that the established and widely accepted meaning of “compensatory damages” in this country excludes attorney’s fees. Except in unusual cases—such as lawsuits for abuse of process—attorney’s fees are not an element of damages. *See, e.g., Doe v. Chao*, 540 U.S. 614, 625 n.9 (2004) (distinguishing “actual damages” from “costs and reasonable attorney’s fees”); *Landgraf v. USI Film Prods.*, 511 U.S. 244, 277 (1994) (describing “[a]ttorney’s fee determinations . . . [as] collateral to the main cause of action and uniquely separable from the cause of action to be proved at trial”); Fed. R. Civ. P. 54(d)(2) (noting that “a claim for attorney’s fees and related nontaxable expenses must be made by

motion unless the substantive law requires those fees to be proved at trial as an element of damages”). Indeed, under the American Rule, attorney’s fees normally are not recoverable, and even when they are (whether by statute, as a sanction for misconduct, or for some other reason), they are a form of collateral relief ordered as costs by the court, not an element of damages found by the factfinder. *See, e.g., Hutto v. Finney*, 437 U.S. 678, 697 (1978).

The treatment of attorney’s fees as compensatory damages is also inconsistent with this Court’s articulation of the ratio’s underlying purposes. *First*, this Court has required a comparison between punitive and compensatory damages because the latter measure the harm caused by the defendant’s conduct. *See, e.g., State Farm*, 538 U.S. at 426 (stating that “courts must ensure that the measure of punishment is both reasonable and proportionate to *the amount of harm to the plaintiff* and to the general damages recovered” (emphasis added)); *BMW*, 517 U.S. at 582 (“The \$2 million in punitive damages . . . is 500 times the amount of *his actual harm as determined by the jury.*” (emphasis added)). The inclusion of attorney’s fees turns the required proportionality between punitive damages and the harm caused by the wrongful conduct into a nonsensical requirement that punitive damages be proportional to litigation cost.

Second, a core problem addressed by the ratio “is the stark unpredictability” of punitive awards. *Exxon*, 554 U.S. at 499; *State Farm*, 538 U.S. at 417. But the addition of attorney’s fees into the ratio fundamentally conflicts with these goals. The American Rule renders attorney’s fees only intermittently available, and many of the cases where an exception

is potentially applicable will turn on an unpredictable exercise of the trial court's discretion. *See, e.g., Estate of Hevia v. Portrio Corp.*, 602 F.3d 34, 46 (1st Cir. 2010) (noting that "district courts have broad discretion in determining . . . fee-shifting on account of a party's supposed bad faith"). Further, the *amount* of a fee award will vary with the billing rates of the plaintiff's lawyer, the complexity of the litigation, the extent of discovery and motion practice, and many other factors.

Third, the use of attorney's fees in the ratio conflicts with this Court's analysis that punitive awards are *more* suspect, not *less* so, if there is a likelihood that those damages "duplicate[]" a "component" of the plaintiff's recovery. *State Farm*, 538 U.S. at 426. In this case, the attorney's fees are "properly characterized as punitive," as the dissent makes clear. Pet. App. 84a. Indeed, the same is true of many fee-shifting statutes, which ultimately seek to punish "bad behavior." Pet. App. 84a. As this Court has recognized, "the underlying rationale of 'fee shifting' is, of course, punitive." *Hall v. Cole*, 412 U.S. 1, 5 (1973); *see also, e.g., Chambers v. NASCO, Inc.*, 501 U.S. 32, 53-54 (1991). The award of such punitive relief should thus *reduce*, not *increase*, the amount of additional punitive damages permitted.

Finally, tying the amount of punitive damages to an award of attorney's fees would produce the anomaly that a plaintiff who has received *more* compensation (by receiving attorney's fees) will be entitled to even greater compensation (through increased punitive damages) than a plaintiff who received *less* compensation (because he was not awarded attorney's fees). *Cf. State Farm*, 538 U.S. at 426 (suggesting

that punitive-damages ratios should be lower, not higher, when a plaintiff receives “complete compensation”).

In short, including attorney’s fees in the ratio cannot be reconciled with this Court’s cases.

C. The Question Is Important, Recurring, and in Need of Immediate Resolution

The question whether attorney’s fees are properly included in the compensatory damages element of the ratio between punitive and compensatory damages is an important one in need of immediate resolution. The ratio is “perhaps [the] most commonly cited indicium of an unreasonable or excessive punitive damages award,” and one with a “long pedigree.” *BMW*, 517 U.S. at 580. It is a “significant,” *id.* at 581, and “central” part of the analysis, *Exxon*, 554 U.S. at 507.

Because punitive damages and attorney’s fees are routinely available for the same state or federal claims, courts frequently confront this issue. For example, 42 U.S.C. § 1988 makes attorney’s fees available under numerous civil-rights statutes, many of which permit punitive damages, including 42 U.S.C. § 1983, *see Mendez*, 540 F.3d at 1120-23, Title VII, *see* 42 U.S.C. § 1981a(a)(1), and the Americans with Disabilities Act of 1990, *see* 42 U.S.C. § 1981a(a)(2). Both awards are also expressly available under the Fair Housing Act, *see* 42 U.S.C. § 3613(c), and the Fair Credit Reporting Act, *see* 15 U.S.C. § 1681n(a)(2)-(3), among many others. Moreover, attorney’s fees and punitive damages are routinely available together under many state claims. *See, e.g.*, Brown & Helper, *Comparison of Consumer Fraud Statutes Across the Fifty States*, 55 Fed’n Def. & Corp. Counsel Q. 263, 279-82 (2005) (both available under a

majority of states' consumer fraud statutes); Frankel, *Secret Sabermetrics: Trade Secret Protection in the Baseball Analytics Field*, 5 Alb. Gov't L. Rev. 240, 244, 279 n.214 (2012) (both available under the Uniform Trade Secrets Act).

In addition, this question needs immediate resolution. The ratio exists to provide an *objective* factor for comparing punitive awards across cases and thereby to eliminate the “stark unpredictability” of unconstrained punitive awards. *Exxon*, 554 U.S. at 499. As this Court indicated, “a penalty should be reasonably predictable in its severity, so that even Justice Holmes’s ‘bad man’ can look ahead with some ability to know what the stakes are in choosing one course of action or another.” *Id.* at 502. But the ratio cannot serve this central purpose if, as exists now, courts take drastically differing approaches for calculating it. When the Ninth Circuit excludes attorney’s fees and as a result rejects a \$500,000 punitive award, *see Mendez*, 540 F.3d at 1120, whereas a state supreme court within the Ninth Circuit upholds a \$1.3-million punitive damages award by including attorney’s fees, *Clausen*, 272 P.3d at 836, the law does not provide a “fair probability”—indeed, does not provide any probability—that defendants will “suffer[] in like degree when they wreak like damage,” *Exxon*, 554 U.S. at 502.

If allowed to stand, moreover, the decision below offers a roadmap for other courts that so desire to turn “well-established constraints on punitive damages” into meaningless exercises. *State Farm*, 538 U.S. at 427. Because attorney’s fees are often large in relation to compensatory damages—as here and in many of the other cases cited in Part II.A—they can

frequently be used to rationalize otherwise excessive punitive awards. And a trial court's acknowledged discretion as to the amount of attorney's fees likewise provides it with substantial room to insulate itself from the otherwise *de novo* review that would apply to a review of a punitive-damages award. See *Cooper Indus., Inc. v. Leatherman Tool Grp.*, 532 U.S. 424, 443 (2001). This Court has cautioned against allowing states to evade its punitive-damage limits in the due-process context. "While States enjoy considerable discretion in deducing when punitive damages are warranted, each award must comport with the principles set forth in *Gore*." *State Farm*, 538 U.S. at 427. This Court's resolution of the status of attorney's fees in the *State Farm* ratio is necessary to prevent precisely such evasion.

CONCLUSION

For these reasons, the petition for certiorari should be granted and this Court should either summarily reverse the judgment below or set the case for full briefing and argument.

Respectfully submitted,

Jeffrey B. Morganroth

Counsel of Record

MORGANROTH & MORGANROTH

344 North Old Woodward Ave.,

Suite 200

Birmingham, MI 48009

(248) 864-4000

jmorganroth@morganrothlaw.com

Meir Feder

David T. Raimer

JONES DAY

222 E. 41st St.

New York, NY 10017

(212) 326-3939

Thomas R. Goodwin

Johnny M. Knisely II

GOODWIN & GOODWIN LLP

300 Summers St.

Suite 1500

Charleston, WV 25301

(304) 346-7000

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Counsel for Petitioner