No. 19-2495 & 19-2496

In the United States Court of Appeals
for the Third Circuit

ANGELA HYMAN,
Appellee/Cross-Appellant

v.

BRYAN DEVLIN,
Appellant/Cross-Appellee

On Appeal from the United States District Court
for the Western District of Pennsylvania
Case No. 3:17-cv-00089

APPELLEE/CROSS-APPELLANT'S REPLY BRIEF

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INTRODUCTION

Corporal Devlin's response brief is notable for what it does not say. Nowhere does Devlin deny that he threatened to assault and arrest Angela's wife unless she complied with his unconstitutional demand to get out of Angela's car, so that a repo-man—without a court order—could take it away. Nor does Devlin deny that he knew that it is unconstitutional for a law enforcement officer to aid a private repossession. Devlin does not even deny that given the chance, he would do it all over again. Devlin asserts that the jury's punitive-damages award was infected with "irrationality, passion, and prejudice." Devlin Response 9. But he offers no explanation for why an ordinary, rural, Johnstown, Pennsylvania jury would be biased against a state trooper or in favor of Angela and her wife.

A jury's punitive-damages award may only be reduced on constitutional grounds when it is so "arbitrary," so "grossly excessive," that it "furthers no legitimate purpose." *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 417 (2003). Devlin has not come close to demonstrating that the award here meets this standard. To the contrary, the jury's award was a perfectly reasonable response to Devlin's egregious abuse of power—and necessary to deter him and others from repeating it. This Court should reinstate the jury's award in full.

ARGUMENT

I. The jury's punitive-damages award complies with substantive due process.

A. Threatening to assault and falsely arrest an innocent person to unconstitutionally facilitate a private repossession is extremely reprehensible.

Devlin's lead punitive-damages argument is that "the reprehensibility factors do not justify a punitive damage award" at all. Devlin Response 16.[1] In other words, Devlin contends that it is not reprehensible for a law enforcement officer to aid a private repossession—aid that this Court has repeatedly held is unconstitutional—by threatening to assault and arrest an innocent woman. As the district court held, this contention is meritless. All five reprehensibility factors support reinstating the jury's punitive-damages award.[2]

Devlin's threats of violence caused substantial physical and emotional harm. Before the trial court, Devlin conceded that the "the jury's verdict can support a determination that the harm" he caused "was physical." Dkt. No. 149, at 23. On appeal, however, Devlin contends for the first time that his threats, and the harm they caused, were somehow purely economic. Devlin

[1] As explained below, not only is this argument meritless, to the extent Devlin asks this Court to reduce the punitive-damages award or eliminate it entirely, the argument is forfeited because Devlin did not raise it in his opening brief. *See infra* pages 24-25.

[2] Unless otherwise specified, all internal quotation marks, alterations, and emphases are omitted in quotations throughout the brief.

Response 10-11. Devlin was right the first time. As explained in the principal brief (at 38), a threat of physical force is, by definition, a "primarily physical" harm. *See Romanski v. Detroit Entm't, L.L.C.*, 428 F.3d 629, 643 (6th Cir. 2005). Indeed, "acts *and threats* of violence" are "at the top" of the "hierarchy of reprehensibility." *Swinton v. Potomac Corp.*, 270 F.3d 794, 818 (9th Cir. 2001) (emphasis added).

Devlin does not argue otherwise. Instead, he argues that because his threats were directed at Angela's wife, rather than Angela herself, they cannot be considered. Devlin Response 11. But as Devlin himself concedes elsewhere in his brief, the Supreme Court has expressly held that harm to others may be considered in determining the reprehensibility of a defendant's misconduct. *See Philip Morris USA v. Williams*, 549 U.S. 346, 355 (2007); Devlin Response 19 n.2 ("The harm to nonparties is relevant to determine the reprehensibility of an act."). Thus, Devlin's threats of physical force are themselves sufficient to hold that the harm he caused was "primarily physical in character," not economic. *Romanski*, 428 F.3d at 643.

So too is the impact those threats had on Angela. *See* Hyman Principal Br. 38-39. Devlin does not seriously contest that Angela suffered physical and emotional harm. Instead, he argues that he was not the cause of that harm—the repossession itself was. This is pure sophistry. It's undisputed that absent Devlin's threats to assault and arrest Angela's wife if she did not comply, the repossession never would have happened. *See* Appx0428-30 (Devlin testifying that, without his intervention, the

repo-man couldn't have taken Angela's car). Furthermore, Angela's physical and emotional harm stemmed not just from her car being taken, but from having to stand by and watch Devlin threaten her wife with violence and false arrest. Devlin cannot possibly argue that he was not the cause of his own threats.

Changing tack, Devlin argues that he cannot be held responsible for any physical or emotional harm he caused because his conduct may not have been the sole cause of that harm. Devlin Response 11. Perhaps Angela's pre-existing medical conditions, Devlin speculates, or her previous experience of being stalked by a police officer exacerbated the harm she suffered as a result of Devlin's threats the night of the repossession. *See id.* But the jury already considered that and concluded Devlin's conduct caused Angela's injuries. It had to in order to rule in Angela's favor. The question here is simply whether the nature of those injuries was physical and emotional or solely economic. There's no doubt that it was the former: After Devlin came to her house threatening violence and assault, Angela lived in fear. For days, she could not eat or sleep. Appx0491-92. Her blood pressure spiked so high she required hospitalization. Appx0492. These are emotional *and physical* harms—*in addition* to the physical nature of Devlin's threats themselves.[3]

[3] The Seventh Circuit's decision in *Saccameno*, which Devlin relies on, does not suggest otherwise. *Saccameno v. U.S. Bank Nat'l Ass'n*, 943 F.3d 1071 (7th Cir. 2019). *Saccameno* makes clear that "physical symptoms"—such as, here, an increase in blood pressure, loss of appetite, and sleeplessness—constitute physical harm, even when those symptoms accompany emotional harm. *See id.* at 1087.

Perplexingly, Devlin seems to suggest that the district court weighed this factor in his favor. *See* Devlin Response 11 ("[T]he district court's findings were not clearly erroneous."). It did not. The district court held that Devlin caused Angela emotional and physical harm—harm the court found "reprehensible." Appx0045.

Devlin was indifferent to the health and safety of others. As an initial matter, Devlin again misrepresents the district court's conclusion, asserting that the court found that this prong weighed in his favor. Devlin Response 12. That's just not true. The district court found that Devlin's threat to break Angela's car window and forcibly pull her wife, Shyree, out of the car evinced indifference to the health and safety of others and weighed in favor of finding Devlin's conduct reprehensible. Appx0046.[4]

Devlin asks this Court to hold otherwise—to rule, contrary to the district court, that a law enforcement officer threatening to assault a woman for doing nothing more than sitting peacefully in her own driveway does not evidence indifference to the safety of others. In fact, Devlin argues, he *deserves credit* because he "mere[ly]" threatened to assault Angela's wife; he didn't actually do so. Devlin Response 12 ("Devlin's mere words with no physical action *weigh in his favor*." (emphasis added)). This Court should not credit a police officer for threatening

[4] To be sure, the district court undervalued the extent to which this factor weighs in Angela's favor. *See* Hyman Principal Br. 39-40. But the court did hold that the factor weighs in her favor. Appx0046.

violence against an innocent citizen, regardless of whether he carried out those threats.

Of course, in this case, Devlin did not choose of his own accord not to carry out his threats. Angela's wife Shyree never gave him the chance. Rather than face the assault and false arrest Devlin threatened, Shyree gave in to Devlin's unconstitutional demands. Devlin argues that we can't know for sure whether he would have gone through with his threats had Shyree not complied. But Devlin did not testify at trial—nor has he said since—that he wouldn't have done so. And, in any event, Devlin's willingness to casually threaten violence against innocent citizens to unconstitutionally dispossess them of their property itself displays indifference to their health and safety. *Cf. Planned Parenthood of Columbia/Willamette Inc. v. Am. Coal. of Life Activists*, 422 F.3d 949, 958 (9th Cir. 2005) (holding threats of violence evinced indifference to health and safety of others).

Devlin's target was financially vulnerable. Devlin argues (at 13) that this Court should ignore Angela's financial vulnerability because "there is no evidence" that he targeted Angela for that reason or that he "act[ed] to further his own financial gain." This contention is factually suspect and legally incorrect. As a factual matter, the district court found that the jury *could* have concluded Devlin "targeted" Angela "because he believed she was a deadbeat." Appx0046. And as a legal matter, a victim's financial vulnerability weighs in favor of punitive damages,

even if the defendant did not intentionally exploit that vulnerability. *Saccameno*, 943 F.3d at 1087. Targeting a financially vulnerable person is more reprehensible than targeting someone who is financially secure, regardless of the motive for doing so.[5]

Devlin is likely to repeat his misconduct. Devlin does not dispute that he will continue to repeat his misconduct "in the future." *See* Devlin Response Br. 14. But, Devlin argues, that doesn't matter. According to Devlin, the Supreme Court in *Gore* held that the repeated-misconduct factor is exclusively backwards-looking—that all that matters is whether the defendant has done this before; whether he'll do it again is irrelevant. *See* Devlin Response Br. 14. But the Supreme Court didn't say that. What the Supreme Court said was "evidence that a defendant has repeatedly engaged in prohibited conduct while knowing or suspecting that it was unlawful would provide relevant support for an argument that strong medicine is required to

[5] In arguing to the contrary, Devlin yet again mischaracterizes the district court's opinion. Devlin suggests (at 13) the district court stated that the financial-vulnerability factor is "fundamentally designed to test whether or not the tortfeasor acted to further his own financial gain." But that's not what the district court said. The district court said Devlin's conduct would have been "*more* reprehensible" had he acted to further his own financial gain. Appx0047 n.20 (emphasis added). Similarly, Devlin notes (at 13) that the Supreme Court has listed "behavior driven primarily by desire for personal economic gain" as an "earmark of exceptional blameworthiness." True enough. But the Court did not say this in the context of discussing financial vulnerability. *See Exxon Shipping Co. v. Baker*, 554 U.S. 471, 513 (2008). Nor did it suggest that financial vulnerability is irrelevant if a defendant was not primarily driven by financial gain. *See id.* Like the desire for personal economic gain, the threat of violence is also an earmark of exceptional blameworthiness. *See Gore*, 517 U.S. at 576. And in either case, a target's financial vulnerability increases the reprehensibility of the conduct. The Supreme Court has never held otherwise.

cure the defendant's disrespect for the law." *BMW of North America, Inc., v. Gore*, 517 U.S. 559, 576–77 (1996). The Court did not say that *only* evidence of past misconduct is sufficient to demonstrate such "strong medicine" is necessary. That would make no sense.

Repeated past misconduct "*supports*" the conclusion that—absent sufficient deterrence in the form of substantial punitive damages—the defendant will continue to disobey the law. A defendant's own admission *proves* it. Devlin unabashedly admitted on the stand that, given the chance, he'd "absolutely" do it all over again. Appx00431. Strong medicine is necessary to deter him from doing so.[6]

Devlin's conduct was malicious. Devlin does not contest the district court's conclusion that "a reasonable jury [could] conclude that Devlin maliciously violated [Angela's] rights by consciously aiding in the repossession, despite knowing that it was unconstitutional to do so." Appx0031. Nor could he. As the district court pointed out, Devlin testified that he *knew* it was unconstitutional for a police officer to aid a private repossessor in taking someone's property. Appx0031. And, during the repossession itself, Angela's daughter, a law student, was on the phone with Devlin *telling* him he was acting unlawfully and pleading with him to stop. *See, e.g.*,

[6] Contrary to Devlin's suggestion, this Court's decision in *CGB Occupational Therapy* supports this conclusion. *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 191 (3d Cir. 2007). There, this Court resisted the defendant's effort to construe the repeated-misconduct factor overly narrowly. *See id.*

Video at 00:22-00:36, 00:52-00:56, 1:44-2:07. Yet he continued to threaten violence and arrest if Angela and her wife did not permit Angela's car to be taken. *See* Appx0031 (district court explaining that "Devlin made several remarks" the night of the repossession "that could have led the jury to reasonably conclude that he consciously violated Hyman's rights").

This is malice. *See* Hyman Principal Br. 41. Devlin does not argue otherwise. Instead, he argues that malice isn't enough. According to Devlin, this factor requires something more: either an "evil motive"—which Devlin does not define—or a "premeditated plan to commit an illegal act." Devlin Response 15. Devlin does not cite a single case imposing or even mentioning such a requirement. His entire argument hinges on his interpretation of a single word in the Supreme Court's description of this factor. In that description, Devlin emphasizes, the Supreme Court uses the phrase "intentional malice." *See id*. According to Devlin, the word "intentional" must mean "evil motive" or "premeditated plan." But that is not what the word intentional means. *See* Intentional, Oxford English Dictionary, *available at* https://www.oed.com/ (defining intentional as "[d]one on purpose, resulting from intention; intended").

The Supreme Court's full description of this factor makes this clear: Courts, the Supreme Court instructs, should consider whether the harm resulted from "intentional malice, trickery, or deceit," on the one hand, "*or mere accident*," on the

other. *State Farm*, 538 U.S. at 409 (emphasis added). In other words, the question is whether the defendant acted deliberately or "mere[ly]" made a mistake. Nowhere does the Court require an "evil motive," whatever that might mean. Indeed, in *Gore*, the Court explained that this factor may be satisfied by "affirmative misconduct, *or* concealment of evidence of improper motive."[7] 517 U.S. at 579 (emphasis added); *see also TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 468 (1993) (Kennedy, J., concurring) ("TXO acted with malice. This was not a case of negligence, strict liability, or *respondent superior.* TXO was found to have committed . . . the intentional tort of slander of title."); *Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 233 (3d Cir. 2005) (factor satisfied because defendant's conduct was not "mere accident," but rather "a mix of purposefully indifferent inaction and intentionally dilatory action"); *Romanski*, 428 F.3d at 644 ("Defendants treated Romanski in an inexplicable and egregious way. Indeed, on this record a jury could reasonably infer that Brown acted with 'intentional malice' and not 'mere accident.' This is not a case of mistaken identity, nor one in which a law enforcement officer reasonably misread the circumstances.").[8]

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[7] Affirmative misconduct, the Court held, was not present in *Gore* because although the defendant omitted a material fact, it did not make "a deliberate false statement" and there was "a good-faith basis for believing" disclosure was not required. 517 U.S. at 579. In other words, the defendant did not act with intentional malice because it did not deliberately violate the law; it made a mistake. *See id.*

[8] The requirement that conduct be deliberate, rather than accidental, perhaps includes an element of premeditation in the sense that premeditated *means* deliberate.

This makes good sense: A law enforcement officer who threatens violence and false arrest to effectuate a repossession, despite knowing that the Constitution forbids law enforcement officers from aiding a repossession, is more deserving of punishment and in need of deterrence than one who simply makes a good faith mistake—regardless of the officer's motive for abusing his power. Devlin's conduct was no accident. He knowingly violated the law. As the district court held, that's malice.[9]

And, contrary to Devlin's assertions, his conduct was even more reprehensible because he lied on the stand in an attempt to cover it up. Devlin does not dispute the legal principle that a defendant's conduct is more reprehensible if they lie about it afterwards. *See Davis v. Rennie*, 264 F.3d 86, 116 (1st Cir. 2001). Instead, Devlin tries

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See Gov't of V.I. v. Lake, 362 F.2d 770, 776 (3d Cir. 1966). But Devlin cites—and we have found—no authority for the proposition that a defendant's conduct is not malicious unless he planned it for some minimum period of time as Devlin (and the district court) seem to suggest. *Cf. id.* (Premeditation does not "require[] . . . that the accused shall have brooded over his plan . . . entertained it for any considerable period of time. Although the mental processes involved must take place prior to the [conduct], a brief moment of thought may be sufficient to form a fixed, deliberate design to [act].").

[9] Devlin seizes on the district court's definition of malice as "reckless indifference." Devlin Response 15. But he neglects to mention that the court made clear that, in its view, punitive damages are only warranted where the reckless indifference "amount[s] to outrageous conduct"—where it "is equivalent to an intentional violation of the plaintiff's rights." Appx0048. Admittedly, the district court's discussion of malice is not as clear as it could be. But it is clear that the district court found Devlin's conduct malicious and that it concluded this factor supported the conclusion that Devlin's conduct was reprehensible. *See* Appx0047-48. Given Devlin's conduct—and his admission that he knew law enforcement officers may not aid a civil repossession—any other conclusion would be both factually and legally unsupportable.

to minimize his testimony as merely "differ[ing]" from Angela's "on certain details." Devlin Response 16. But Devlin's testimony did not merely "differ" from Angela's. Devlin told a different story on the stand than the story told by every other officer on the scene that night—a different story than what was captured on video.[10]

B. The jury's punitive damages award bore a reasonable relationship to the harm Devlin caused and threatened.

As the Supreme Court explained in *Gore*, the purpose of this guidepost is to determine "whether there is a reasonable relationship between the punitive damages award," on the one hand, and the harm the defendant's conduct caused and "threatened," on the other. *Gore*, 517 U.S. at 581-82. Devlin contends that he has a constitutional right to a punitive-damages award that is no more than a single-digit multiple of the compensatory-damages award—that no greater ratio would be reasonable. *See* Devlin Response 17. This argument is doubly wrong.

First, as we explained in our principal brief, in civil rights cases like this one where an egregious violation—the intentional violation of a constitutional right by a

[10] Initially, the district court did not clearly explain its decision to ignore Devlin's false testimony in conducting the reprehensibility analysis. *See* Appx0047. But in its order denying reconsideration, the court made its reasoning clear: In the court's view, Devlin's false testimony was irrelevant because Devlin's "misrepresentations" occurred "after the repossession." Dkt. 163, at 4. This was legal error. A "punitive damages award may be justified not only by" a defendant's misrepresentations "on the date in question but also by their subsequent behavior." *Davis*, 264 F.3d at 115; *see* Hyman Principal Br. 41-42. Devlin does not argue otherwise.

law enforcement officer—results in minimal actual damages, a single-digit multiplier cannot properly capture the harm the defendant caused or the need to deter it. In such cases, therefore, the Constitution permits two-, three-, and even four-digit ratios. *See* Hyman Principal Br. 49. Devlin ignores this case law entirely.

Second, the relevant ratio is not between punitive damages and compensatory damages, but between punitive damages and harm, both actual and threatened. *See* Hyman Principal Br. 47. Devlin seems to recognize, at least intermittently, that the Court must consider not just the actual harm Devlin caused but also the harm his conduct threatened. *See, e.g.*, Devlin Response16 (heading referring to "actual or potential harm"). But, he contends, this Court may only consider the harm and potential harm to Angela herself. *Id.* at 18. The Court may not, Devlin insists, also consider the harm to Angela's wife. *See id.* This, too, is incorrect.

Of course, "a court may not search far and wide for unrelated instances of wrongful conduct by a defendant." *Brand Mktg. Grp. LLC v. Intertek Testing Servs., N.A., Inc.*, 801 F.3d 347, 365 (3d Cir. 2015). "But neither should a court wear blinders in conducting a due process analysis, remaining purposely oblivious to all harmful effects of a defendant's conduct" that "arise from the precise conduct at issue," simply because those harms "do not directly befall the plaintiff." *Id.* (considering potential harm to third parties stemming from defendant's conduct where, as here, those harms were "integrally related" to the plaintiff's harm and arose "from the

precise conduct at issue" in the lawsuit). Devlin's insistence to the contrary rests on a misreading of the Supreme Court's decision in *Philip Morris*.

As an initial matter, *Philip Morris* was a procedural due process case about how the jury should be instructed when deciding punitive damages. *See* 549 U.S. at 353. Devlin does not challenge the jury instructions here, nor does he raise any other challenge to the procedures by which the jury arrived at its award. Devlin's sole challenge is to the amount of the award: Devlin contends he has a *substantive* due process right to a smaller award. But the Court in *Philip Morris* expressly limited its opinion to the *procedural* requirements governing how juries award punitive damages; it declined to even address the defendant's contention that the amount of the award itself violated substantive due process. *See id.* By its terms, then, *Philip Morris* is irrelevant here. *See Seltzer v. Morton*, 336 Mont. 225, 285 (2007) (concluding *Philip Morris* "does not provide any new guidance as to how the *Gore* guideposts must be applied"). And in the nearly fifteen years since *Philip Morris* was decided, there has not been a single case in which this Court has relied on it to address whether a punitive-damages award is excessive.

Even if it were relevant, *Philip Morris* doesn't say what Devlin says it does. The facts of the case are instructive: The widow of a heavy smoker sued Philip Morris, the manufacturer of Marlboro cigarettes, for the death of her husband. *Id.* at 349. At trial, the plaintiff's lawyer suggested to the jury that, in awarding damages, it should

consider the harm Philip Morris had inflicted not just on the widow's husband, but on every Oregonian who had smoked Marlboros over the past four decades. *See id.* at 350. In response, Philip Morris asked the court to give a jury instruction "distinguish[ing] between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment," which it would not. *Id.* at 356. The trial court refused. *See id.* But the Supreme Court sided with Philip Morris. *See id.* at 357.

Contrary to Devlin's assertion (at 8), the Court did not hold that juries (or courts) must ignore any harm a defendant caused that did not solely affect the plaintiff. Rather, it explained that harm to others *can* render misconduct more reprehensible—and therefore more worthy of punishment and in need of deterrence. *See id.* And, it held, juries *may* take that into account in awarding punitive damages. *See id.* They just may not use punitive damages to "*directly*" punish a defendant for inflicting harm on "strangers to the litigation." *Id.* at 352, 355 (emphasis added). The Court held, therefore, that "upon request," courts must issue a jury instruction to "protect against th[e] risk" that the jury will impermissibly punish the defendant directly for harm to strangers to the litigation, rather than permissibly consider that harm in determining the appropriate sanction for the misconduct at issue in the case. *Id.* at 357. This conclusion accords with the jury instruction Philip Morris was asking

for: that the jury may consider harm to others "as part of the reasonable relationship" inquiry, but not use it "directly as a basis for punishment." *Id.* at 356.

And it accords with Angela's argument here. Nothing in *Philip Morris* bars this Court from considering, "as part of the reasonable relationship" inquiry, the harm Devlin caused and threatened to cause Angela's wife, Shyree. For one thing, Shyree is not a stranger to the litigation, let alone an undifferentiated group of strangers akin to all Marlboro smokers. She's the plaintiff's wife. Devlin's threats—the threats that are the subject of this lawsuit—targeted her. Shyree testified at trial (by video deposition). And Devlin had an opportunity to defend himself. So even the concerns the Supreme Court raised about juries using punitive damages to directly punish defendants for harm to strangers do not apply here.[11]

In any event, Devlin does not argue that the jury "directly" punished him for harming Angela's wife—and Angela is not asking this Court to do so. But this Court

[11] *Philip Morris* was concerned with "strangers to the litigation" because, the Court explained, if a jury could "directly" punish a defendant for the harm it caused to an undifferentiated mass of people, such as all Marlboro smokers, the punitive-damages "equation" would become "near standardless." *Id.* at 353-54. "How many [ ] victims are there? How seriously were they injured? Under what circumstances did injury occur?" *Id.* Furthermore, the Court worried, it would be impossible for a defendant to defend itself against a charge that it harmed unidentified strangers to the litigation. *See id.* And permitting such punishment would mean that one state could effectively set policy for every other state by imposing huge penalties on conduct that harmed other states' residents, but was permissible in those states. *See id.* Considering harm to a plaintiff's spouse caused by the very misconduct at issue in the lawsuit does not raise any of these concerns.

should, in evaluating the jury's punitive-damages award, consider the harm and threatened harm to Angela's wife as part of the "reasonable relationship" inquiry. Indeed, *Philip Morris* itself described the reasonable-relationship prong as assessing whether there is a "reasonable relationship" between the punitive-damages award and "the harm the plaintiff (*or related victim*) suffered." *Id.* at 351 (emphasis added). And even if the relevant relationship was between the punitive damages and the harm suffered by Angela alone, this Court could—and should—still consider the harm to Angela's wife in determining whether that relationship is reasonable. Any other conclusion would conflict with *Philip Morris*'s instruction that juries may consider harm to nonparties, even strangers to the litigation, in determining the reprehensibility of a defendant's conduct. If juries may find a defendant's conduct more reprehensible because it harms non-parties and therefore may increase the punitive-damages award accordingly, a higher ratio between the punitive damages and the harm to the plaintiff will necessarily be reasonable where the defendant's conduct also harmed others.

Devlin raises two additional arguments, hoping to prevent this Court from considering all the harm he caused and threatened. Both are meritless. First, he contends (at 19) that Angela forfeited the argument that the Court should consider the potential harm to her wife. But Angela argued before the district court that this harm should be considered. See Dkt. 155, at 23. On appeal, Angela merely cites

additional sources to support that argument. *See Lawson v. Sun Microsystems, Inc.*, 791 F.3d 754, 761 (7th Cir. 2015) ("[N]o rule prohibits appellate amplification of a properly preserved issue.").

Second, Devlin contends that Angela "seeks to redefine her cause of action as a false arrest action and seeks to compare the punitive damages award in her case to other punitive damages awards in false arrest cases." Devlin Response 19. Neither is true. The awards Angela cites are compensatory-damage awards, not punitive damages. And by citing them, Angela does not seek to convert her cause of action into one for false arrest. Rather, these awards demonstrate how juries ordinarily value the harm Devlin threatened, and therefore provide a benchmark for valuing the potential harm in this case.

The awards, in fact, undervalue the potential harm here. If Shyree hadn't given in before Devlin could carry out his threats, Shyree would not have been the only one harmed. Angela would have been forced to watch a police officer violently arrest her wife. She would have been left alone, extremely ill and without her wife to take care of her. And she would have had to try to scrape together money for bail and a criminal defense attorney, neither of which she could afford. *See* Hyman Principal Br. 51.

But regardless of precisely how (or even whether) the potential harm Devlin threatened is taken into account, the jury's award was reasonable: A law enforcement

officer threatened violence and arrest to knowingly violate Angela's constitutional rights. A $500,000 punitive-damages award is entirely reasonable in relation to that abuse of power.

C. Devlin had fair notice that his conduct was subject to serious sanction.

Devlin does not deny that his conduct was a crime, punishable by up to ten years in prison. *See* Hyman Principal Br. 54-55. He simply asks this Court to ignore that fact when considering whether the jury's punitive-damages award was constitutional. This Court should not do so. The availability of substantial criminal penalties puts a defendant on notice that their conduct is a serious "offense with formidable consequences." *Myers v. Cent. Fla. Invs., Inc.*, 592 F.3d 1201, 1223 (11th Cir. 2010). And fair notice is central to determining whether a punitive-damages award complies with due process. *Gore*, 517 U.S. at 574.

For this reason, in evaluating the constitutionality of punitive-damages awards, the Supreme Court has repeatedly looked to civil and criminal penalties for comparable misconduct. *Id.* at 583; *see also Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 22 (1991). Of course, the "possibility of a criminal sanction does not automatically sustain a punitive damages award." *State Farm*, 538 U.S. at 428. But it does demonstrate "the seriousness with which [the law] views the wrongful action," *id.*, and provides those who nevertheless undertake that action with "fair notice" of the "magnitude of the punitive sanctions" they could face, *Myers*, 592 F.3d at 1223.

Devlin contends that Angela waived this argument. But "parties are not limited to the precise arguments they made below." *See Yee v. City of Escondido*, 503 U.S. 519, 534 (1992); *accord Thompson v. Real Estate Mortg. Network*, 748 F.3d 142, 149 (3d Cir. 2014). Angela's position that the jury's carefully considered punitive-damages award comports with due process is not new on appeal. The criminal statute governing Devlin's misconduct is simply additional authority in support of this position. And even if it weren't, this Court should exercise its discretion to consider it anyway. Review here is de novo; Devlin has had a full opportunity to respond; and as the Supreme Court has explained, this prong, "which calls for a broad legal comparison, seems more suited to the expertise of appellate courts" anyway. *Cooper Indus., Inc. v. Leatherman Tool Grp., Inc.*, 532 U.S. 424, 440 (2001); *cf. Cause of Action v. Chicago Transit Auth.*, 815 F.3d 267, 281 n.19 (7th Cir. 2016) (exercising discretion to consider forfeited issues because they were "matters of law that have been fully briefed and argued and that [the Court] review[s] de novo").[12]

II. Devlin's request that this Court eliminate the punitive-damages award entirely based on qualified immunity is meritless, and his argument that the Court should further reduce the award is both meritless and forfeited.

1. Devlin argues (at 8) that Angela is not entitled to punitive damages at all because she "failed to establish that Corporal Devlin" violated her clearly-established

[12] Oddly, Devlin contends (at 20) that this Court should reject our request that it consider punitive-damages awards in other cases. We made no such request.

rights. This is essentially a rehash of Devlin's qualified immunity argument, repackaged as an argument against punitive damages. And it fails for the same reason: It has long been clearly established that law enforcement officers may not aid a civil repossession—and they certainly may not do so by threatening to arrest someone who stands in the way. *See* Hyman Principal Br. 24-32.

Devlin identifies four purported differences between this case and this Court's previous cases. None of these supposed differences demonstrate that a reasonable officer would not know that threatening violence and false arrest to effectuate a private repossession is unconstitutional. And at least two of the differences Devlin cites are not, in fact, differences at all. First, Devlin emphasizes (at 4) that the person he threatened to falsely arrest was not the car-owner, but a "third party" (Angela's wife). But that was true in *Abbott v. Latshaw* as well. 164 F.3d 141, 145 (3d Cir. 1998). Yet this Court denied qualified immunity to a police officer who threatened to arrest that third party so the repossession could proceed. *Id.* at 149.

Second, Devlin observes that "the state police were called to the scene by both parties," implying that a reasonable officer would only know it's unconstitutional to threaten violence and arrest if they were called to the scene by the repossessor. Devlin Response 4. But, again, in *Abbott*, this Court denied qualified immunity to an officer who was not called to the scene by the repossessor, but instead was called to the scene by another officer. *See Abbott*, 164 F.3d at 144-45.

Third, Devlin notes that he did not "hook or unhook" Angela's car "to the tow truck." Devlin Response 4. But no case from this Court has ever imposed such a requirement. Indeed, none of the officers whom this Court has denied qualified immunity for unconstitutionally aiding in a civil repossession hooked or unhooked the vehicle from the tow truck.

Finally, Devlin asserts that the tow truck "was in the roadway," suggesting that he acted out of concern for Angela's wife "and passing motorists." Devlin Response 4-5. But, as explained in our principal brief, this purported safety concern rests entirely on accepting Devlin's story about what happened that night—a story that is contradicted by his own statements on video and by every other witness to testify at trial; a version of events that, based on its verdict, was rejected by the jury. Hyman Principal Br. 19-24. This Court may not rely on that version of events. Qualified immunity requires that the facts be taken in the light most favorable to the party that prevailed at trial, Angela. *See id.* at 20. And on that version of events, there was no safety concern.

At most, therefore, the tow truck being "a little" in the roadway, *id.* at 23, meant that the tow-truck driver was violating the law. Devlin cannot (and does not) seriously argue that a reasonable officer would know it's unconstitutional to threaten violence and arrest to aid a civil repossession—unless the repo-man is violating the law, in which case the officer may assist him in doing so. There is no reading of

Supreme Court qualified immunity precedent that would compel this Court to accept that absurd proposition.

Devlin relies heavily on this Court's recent decision in *James v. N.J. State Police*, 957 F.3d 165, 169 (3rd. Cir. 2020). As an initial matter, that case was about an officer who shot a suspect after the suspect refused to drop his gun. *See id.* at 166. The Supreme Court has made clear that a higher degree of factual similarity is required to clearly establish the law in cases involving "split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation." *Kisela v. Hughes*, 138 S. Ct. 1148, 1152 (2018). No split-second judgments were required here. And it's undisputed that nobody on the scene posed any threat (except, of course, Devlin himself). *See* Hyman Principal Br. 10.

Even in the excessive force context, however, this Court did not—and could not, consistent with Supreme Court precedent, *see* Hyman Principal Br. 27-28—require that there be a previous case with identical facts. And *James* certainly did not hold that officers may escape liability for violating a person's constitutional rights by pointing to factual distinctions with previous cases that have no bearing on whether a reasonable officer would know that his conduct was unconstitutional. To the contrary, *James* requires only that the law be "sufficiently clear that every reasonable official would understand that what he is doing is unlawful." 957 F.3d at 169. The

law has long been clear that law enforcement officers may not aid a civil repossession. *See* Hyman Principal Br. 24-32. Indeed, it has long been clear that Devlin's specific conduct here—threatening to arrest a person, including a third party, who objects to a repossession—constitutes unconstitutional aid. *See id.* Under *James*, nothing more is necessary.

2. Almost offhandedly, Devlin argues for the first time that this Court should reduce the jury's punitive-damages award even further than the district court did. Devlin Response 22. This argument is not a defense of the district court's judgment. It is a challenge to that judgment. Devlin, therefore, forfeited the issue by failing to raise it in his principal brief. *See United States v. Pelullo*, 399 F.3d 197, 222 (3d Cir. 2005) ("It is well settled that an appellant's failure to identify or argue an issue in his opening brief constitutes waiver of that issue on appeal.").

In any event, Devlin's request is meritless. Police officers are charged with protecting the citizenry. Instead, Devlin acted as an armed agent of a repo-man, violating the constitutional rights of those he was supposed to protect. We place in our juries the right and responsibility to determine the amount of punitive damages necessary to punish and deter misconduct. The jury in this case sat for days, listening carefully to Angela, Devlin, and Devlin's fellow officers. The jurors watched the video of that night—Devlin repeatedly threatening violence and arrest, while Angela's daughter pleaded with him to stop. They heard Devlin's testimony

contradicted by witness after witness, including his fellow troopers. And they heard Devlin testify defiantly that if he had it to do all over again, he would "absolutely" do the same thing. After hearing all this, the jurors crafted an award they believed necessary to punish and deter this reprehensible conduct. Not $50 million or even $5 million, but $500,000—a perfectly reasonable response to a brazen, callous officer who abused his authority and testified that he'd do it again. Nothing about this award offends substantive due process. It should be reinstated.

CONCLUSION

This Court should reverse the district court's remittitur.

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Respectfully submitted,

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August 17, 2020 *<u>/s/ Jennifer D. Bennett</u>*
Jennifer D. Bennett