No. 20-1426

IN THE
Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

TATA CONSULTANCY SERVICES LIMITED &
TATA AMERICA INTERNATIONAL CORPORATION
(D/B/A TCS AMERICA),
Respondents.

On Petition For A Writ Of Certiorari to the United States Court Of Appeals For The Seventh Circuit

REPLY IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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REPLY ARGUMENT

The Due Process Clause applies to awards of punitive damages as needed to "dictate that a person receive *fair notice* . . . of the severity of the penalty that a State may impose." *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 574 (1996) (emphasis added); *see State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416-17 (2003). TCS does not challenge that at all times relevant to this dispute the Wisconsin statute gave fair notice to TCS of the conduct that could trigger an award of punitive damages and the potential severity of that award.

In place of the certainty of the Wisconsin statute, which reflects the judgment of the Wisconsin legislature, the Seventh Circuit applied a post-verdict, multi-factor factual analysis, which it draped in Constitutional trappings. The Seventh Circuit's decision conflicts with decisions of this and other courts evaluating punitive damages under the Due Process Clause. No decision of this Court, or any other, supports finding a punitive damage award of two times compensatory damages is unconstitutional where that award complies with a statutory ratio. And, numerous statutes enacted over centuries have authorized or required similar multiples.

In its Brief in Opposition ("BIO"), TCS argues Epic forfeited the Question Presented, there is no circuit split, and the Seventh Circuit properly applied this Court's decisions. TCS is incorrect and review by this Court is merited.

I. Epic Has Not Forfeited The Question Presented.

TCS argues this Court should not review the Question Presented because Epic did not raise the question below. BIO 10-12. TCS is incorrect, as its authorities demonstrate. Epic may raise in this Court any argument supporting its *claim* that Epic is entitled to the full amount of punitive damages awarded by the jury and found by the district court to comply with Wisconsin law.

The "traditional rule" is "that 'once a federal claim is properly presented, a party can make any argument in support of that claim; parties are not limited to the precise arguments they made below.'" *Lebron v. Nat'l R.R. Passenger Corp.*, 513 U.S. 374, 379 (1995) (quoting *Yee v. City of Escondido*, 503 U.S. 519, 534 (1992) (alteration omitted)). Epic asserted a claim for punitive damages; it argued in the district court and in the Court of Appeals that the punitive damage verdict returned by the jury and upheld by the district court complied with due process. Dist. Dkt. 926; App. Dkt. 28. Epic's argument in the Petition supports its consistently-asserted claim that the judgment was constitutional.

In similar circumstances, this Court has considered arguments first raised on review in support of a claim presented below. *See Yee v. City of Escondido*, 503 U.S. 519, 534-35 (1992). In *Yee*, petitioners argued an ordinance violated the Constitution in two ways, only one of which was argued below. This Court found that having raised the claim below, "petitioners could have formulated any argument they liked in support of that

claim here." Here, Epic raised the claim that it is entitled to punitive damages and the district court's punitive damage award satisfies due process.

TCS also relies on *Bankers Life & Cas. Co. v. Crenshaw*, 486 U.S. 71 (1988), in which the Court's plurality refused to resolve in the first instance a question about the limitation on punitive damages. In that case, however, the claim had not been brought in the lower court in any manner. As is evident from the opinions below and the briefing that led to those opinions, Pet. App. 57a, 1a, Epic and TCS addressed due process limitations on punitive damages.

Finally, to the extent this Court concludes Epic was obligated to give the Seventh Circuit an opportunity to evaluate the precise argument it raises here, Epic satisfied that obligation. Both in oral argument, App. Dkt. 52, Oral Argument at 41:20-42:00 (Jan. 16, 2020), http://media.ca7.uscourts.gov/oralArguments/oar.jsp?caseyear=19&casenumber=1528&listCase=List+case%28s%29&amonth=, and in its rehearing petition, App. Dkt. 59, Epic presented the precise argument it raises here. The Seventh Circuit considered that argument, ordering TCS to respond to Epic's rehearing petition. App. Dkts. 60; 66. Thus, not only did Epic raise the claim, but Epic presented, and the Seventh Circuit considered, the specific argument here at issue.

II. Review Is Needed To Achieve Uniformity Among The Circuits Consistent With Decisions Of This Court And The Tradition Of Statutory Damages.

TCS argues the Question Presented arises from a "fact-bound" decision on which the lower courts are not divided. BIO 2, 12-18. TCS is incorrect. The question Epic presents is not fact bound at all. To the contrary, the Due Process Clause requires courts to follow simple, clear, legislatively-defined standards where they exist. TCS and the Seventh Circuit seek to replace those legal standards with a multi-factor test. When faced with similar legislative limits on punitive damages, courts have found the *Gore-Campbell* analysis to be inapplicable.[1]

A. The Seventh Circuit Improperly Injected Factual Uncertainty Into The Legal Standard Other Courts Have Applied.

TCS fails to cite any case in which a court disregarded the legislative determination of the due process limit. The Seventh Circuit's ruling is inconsistent with that of every court that has evaluated a total dollar cap on compensatory and punitive damages. In *Abner v. Kansas City Southern Railroad Co.*, 513 F.3d 154 (5th Cir. 2008), the Fifth Circuit held

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[1] In a further effort to raise factual disputes, TCS complains of Epic's closing argument. *See* BIO 6 n.3. This issue, which TCS did not raise on appeal, is forfeited.

the *Gore* analysis was relevant only if the cap itself offends due process, an argument not raised here. Likewise, the Second Circuit in *Luciano v. Olsten Corp.*, 110 F.3d 210 (2nd Cir. 1997), held a court may only reduce a punitive damage award below a relevant statutory cap where that award shocks the judicial conscience, a standard the Seventh Circuit did not apply.

TCS directs its attention to the Ninth Circuit's en banc decision in *Arizona v. ASARCO LLC*, 773 F.3d 1050 (9th Cir. 2014), where the court applied a different standard than the Seventh Circuit applied in this case. It held appellate review "is different when we consider a punitive damages award arising from a statute that rigidly dictates the standard a jury must apply in awarding punitive damages and narrowly caps hard-to-quantify compensatory damages and punitive damages." *Id.* at 1055. In that circumstance, the "rigid application of the *Gore* guideposts is less necessary or appropriate." *Id.* at 1056.

TCS attempts to distinguish this decision, first on the ground that Title VII "clearly sets forth the type of conduct, and mindset, a defendant must have to be found liable for punitive damages." BIO 13, quoting *ASARCO*, 773 F.3d at 1056. Yet Title VII and the Wisconsin statute use the same standard. Title VII requires the defendant to have acted "with malice or with reckless indifference" to the rights of the plaintiff. 773 F.3d at 1056. The Wisconsin punitive damage statute is the same. It requires the jury to find, as it was instructed here, that the defendant "acted maliciously toward the plaintiff or in an intentional disregard of the rights of the plaintiff." Wis. Stat. § 895.043(3); Dist. Dkt. 872 at 5-6.

Second, TCS attempts to distinguish *ASARCO* on the ground that Title VII caps the total amount of compensatory and punitive damages. That does not make the *Gore-Campbell* factors applicable. Those factors, particularly the comparability ratio, police the relationship between compensatory and punitive damages. Here, as in *ASARCO*, *Abner*, and *Luciano*, the legislature defined that process. If anything, *Gore* and *Campbell* should have greater applicability to total dollar cap cases where compensatory damages are low, as in *ASARCO*, because the resulting punitive damage ratio can become astronomical. Yet Congress and the Wisconsin legislature reached a different conclusion. Other Courts of Appeals have respected legislative conclusions in evaluating caps; the Seventh Circuit did not.

Third, TCS states Title VII violations result in injuries that are often "difficult to quantify." TCS asserts the same is true in this case. TCS argued Epic failed to quantify its entitlement to a compensatory award under Wisconsin law. Dist. Dkt. 914 at 14-24; App. Dkt. 19 at 44-60. The district court and the Seventh Circuit rejected that challenge. Dist. Dkt. 976 at 8-14; Pet. App. 12a-23a. Nonetheless, TCS's argument about the difficulty in quantifying Epic's damages, which it repeats in opposing certiorari, BIO 14-15, demonstrates this case is indistinguishable from *ASARCO*.

In the Second, Fifth, and Ninth Circuits, statutory caps are highly relevant, if not conclusive, in deciding due process challenges to punitive damage awards. In the Seventh Circuit, the law is to the contrary. This division in authority merits review from this Court.

B. The Seventh Circuit's Decision Ignores Historical Acceptance Of Statutory Multipliers.

Statutes authorizing or requiring treble damages are common and the tradition of accepting without due process concerns damages of two times the compensatory award, even where the compensatory award is substantial and arises from commercial loss, should inform this Court's interpretation of the Due Process Clause. Pet. 23-25. The Seventh Circuit's decision runs counter to this tradition.

TCS does not dispute that the Due Process Clause should be interpreted in keeping with historical tradition. Nor does TCS dispute that many statutes permit or require punitive or exemplary damages similar to those authorized by the Wisconsin statute. Instead, TCS argues that this Court held in *Gore* and in *Campbell* that its three-part analysis applies notwithstanding such statutes.

TCS is incorrect. In *Gore* and *Campbell*, there were no statutes authorizing or requiring a particular ratio of punitive damages, or capping those damages. Nonetheless, this Court looked to historical statutes for authority for using the ratio between a compensatory and punitive award as a guidepost. *Gore*, 517 U.S. at 580-81; *Campbell*, 538 U.S. at 425. That is precisely what the Wisconsin legislature has done. As has Congress and other state legislatures, Wisconsin established the acceptable ratio of punitive to compensatory awards. Under the Seventh Circuit's reasoning, all of those statutes are subject to judicial second-guessing: courts

could determine that the degree of reprehensibility or the existence of commercial, rather than personal injury, require a lower damage award than the treble damages mandated by antitrust law, for example. The absurdity of that outcome, in light of centuries of enforcement of such statutes, demonstrates the mischief created by the Seventh Circuit's erroneous decision.

Several members of this Court noted in *Exxon Shipping Co. v. Baker*, 554 U.S. 471 (2008), that selection of the appropriate limiting ratio reflects legislative judgment. *See id.* at 516 (Stevens, J.), 524 (Ginsburg, J.). The majority in *Exxon Shipping* held it was free to select an appropriate ratio because it was engaged in common law, not constitutional, analysis. *Id.* at 502-03. The Seventh Circuit's decision turned that reasoning upside down.

Rather than address this incongruity, TCS concentrates on whether the statutes at issue are punitive or compensatory. BIO 17-18. That distinction obscures the Seventh Circuit's error. Whether characterized as remedial, punitive, restitution, disgorgement, or something else, damages in excess of a compensatory award may be challenged under the Seventh Circuit's ruling on the theory that a defendant's conduct, although reprehensible, is not reprehensible enough to justify the damages permitted by statute. Likewise, the defendant could claim that where its injury caused commercial harm, rather than personal injury, damages authorized by statute must be reduced. The Due Process Clause has never been interpreted to police damage awards defined or capped by a statutory ratio.

TCS argues antitrust treble damages are not punitive, a distinction lost on any defendant ordered to pay them. TCS overstates the distinction between punitive and remedial purposes. For example, in *PacifiCare Health Systems, Inc. v. Book*, 538 U.S. 401, 405-06 (2003), the case relied upon by TCS, this Court surveyed prior cases describing treble and other multiple damages. It noted the many ways such damages have been described, concluding the characterization at issue was "to say the least, in doubt." The Court cited *Cook County v. United States ex rel. Chandler*, 538 U.S. 119, 130 (2002), in which it noted the treble damage remedy under the antitrust laws both have a compensatory purpose and also served "punitive objectives." *See also Pfizer, Inc. v. Gov't of India*, 434 U.S. 308, 314 (1978) (Section 4 of the Clayton Act serves a deterrent purpose as well as a remedial one).

The Seventh Circuit's decision can be applied to statutes that authorize or require multiple damage awards. That outcome will work a substantial change in the law. The Seventh Circuit's decision merits further review.

III. The Question Presented Does Not Require Application Of The *Gore-Campbell* Factors.

TCS argues the Seventh Circuit correctly applied *Gore* and *Campbell* and that Epic impliedly asks this Court to reverse those decisions. BIO 19-26. TCS's discussion of *Gore* and *Campbell* provides no reason to decline review.

First, the focus of Epic's argument is not that the Seventh Circuit misapplied *Gore* and *Campbell*. While Epic maintains the Seventh Circuit erred in reducing the punitive damage award, the source of that error and the issue on which Epic seeks review is the Seventh Circuit's failure to acknowledge, as other courts have acknowledged, that where a statutory cap provides fair notice of situations in which punitive damages may be awarded and their potential severity, *Gore* and *Campbell* have little, if any, applicability. Juries assess punitive damages, subject to the constraints of the Due Process Clause. In Wisconsin, the legislature has defined the due process limitation, and the Seventh Circuit erred in disregarding the statute.

Second, Epic does not invite this Court to overrule *Gore* and *Campbell* in the circumstances in which those cases are applicable: where the legislature has not provided notice of the potential severity of punitive liability. In an ordinary case involving punitive damages where state law does not impose due process limitations, *Gore* and *Campbell* may operate, as this Court held, to guide reviewing courts as they assure that punitive damage awards comply with the Constitution. This case is not that ordinary case, however. Unlike in *Gore* and *Campbell*, Wisconsin has already given fair notice of the potential severity of a punitive damage award.

Third, while Epic maintains *Gore* and *Campbell* do not apply in this circumstance, if the Court concludes those decisions apply by their terms to this case, the Court should reevaluate those decisions in light of the

procedural due process interest those decisions protect.[2] Wisconsin law provides ample notice to TCS and other entities operating in Wisconsin of the risk and potential severity of punitive damages. That notice – certain in its terms, clear in its application, and free from dispute as to its meaning – better serves the due process interest this Court seeks to protect. Only if this Court concludes the language of its prior decisions compels a different result need the Court reconsider or clarify those decisions. Pet. 25-26.

Fourth, TCS's argument that the Wisconsin legislature's determination of the acceptable outer limits of punitive damages is insufficient to protect TCS's due process rights is incorrect. BIO 22-24. TCS does not argue, nor could it do so credibly, that it was not on notice of the circumstances in which Wisconsin law

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[2] TCS asserts the Due Process Clause also imposes substantive limits, quoting the discussion in *Campbell* that Epic addressed in the Petition. *See* BIO 20; Pet. 15 (discussing *Campbell*, 538 U.S. at 416). This Court has repeatedly declined to establish substantive limits. *See, e.g.*, *Campbell*, 538 U.S. at 416-18. Instead, the Court recognized that "common-law procedures" and the "imprecise manner in which punitive damages systems are administered" can allow the indiscriminate imposition of punitive damages, with the resulting risk of a grossly excessive award that "furthers no legitimate purpose and constitutes an arbitrary deprivation of property." *Id.*, *citing Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991) (O'Connor, J., dissenting). Rather than impose substantive due process limits, the Court acted to avoid the arbitrary outcome that results from the standardless imposition of punitive damages. The Wisconsin statutory ratio and trial and appellate procedures guard against an arbitrary outcome.

permitted an award of punitive damages or its potential severity. That notice is in the statute books.

TCS's argument that applying the statute would permit an award of punitive damages where its conduct did not support punitive damages is also incorrect. BIO 21-22. In addition to the protection of a jury trial, TCS obtained review of the jury's determination in two post-trial motions and an appeal. Pet. App. 57a, 1a. The district court found that TCS's arguments that its conduct did not support punitive damages were "meritless, if not frivolous." Pet. App. 73a.

TCS resorts to hyperbole, suggesting a legislature could eliminate any due process review of a punitive damage award by imposing a ratio of "145 times or 500 times" the compensatory award. BIO 24. In such a case, reviewing courts could decide whether the statute provides meaningful due process protection against an arbitrary punishment. Where, as here, the ratio is two to one, no such argument can credibly be made. This Court has never invalidated a punitive award of two to one, this Court has held awards expressing single digit ratios are presumptively valid, and countless statutes enacted over centuries have permitted or required such damages.

Finally, TCS suggests that a punitive damage award could also be reduced for "statutory and common-law principles." BIO 23 n.5; *see also id.* at 26. TCS's argument misquotes the Seventh Circuit opinion. That language is found in the Seventh Circuit's discussion of constitutional avoidance – that is, a reviewing court should not rush to due process review where common

law and statutory doctrines provide a reason to reduce the award. Pet. App. 40a. Here, the Seventh Circuit engaged in that review process, finding the district court judgment complied with Wisconsin statutory and common law. Pet. App. 32a-39a. It also held TCS waived any other potential challenges at trial. Pet. App. 46a.

CONCLUSION

For the foregoing reasons, the Court should grant the Petition.

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