No. 20-1426

IN THE

Supreme Court of the United States

EPIC SYSTEMS CORPORATION,
Petitioner,

v.

TATA CONSULTANCY SERVICES LIMITED *and* TATA AMERICA INTERNATIONAL CORP. D/B/A TCS AMERICA,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

SUPPLEMENTAL BRIEF IN OPPOSITION

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RULE 29.6 STATEMENT

Respondent Tata America International Corporation (d/b/a TCS America) (TAIC) is a wholly owned subsidiary of Respondent Tata Consultancy Services Limited (TCS). A majority of TCS's shares are held by Tata Sons Private Limited. No publicly traded company owns 10% or more of TCS's stock.

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Epic's petition for certiorari should be denied for the reasons set forth in TCS's brief in opposition and the Solicitor General's brief for the United States as *amicus curiae*. Epic's supplemental brief only confirms that the decision below is correct and that this case does not warrant the Court's review.

First, Epic faults the Seventh Circuit for not adopting an argument Epic never made. Epic contends that the decision below is "[i]ndefensible" because the decision's analysis of the punitive damages award's compliance with due process was not adequately "informed by the legislative judgment inherent in" Wisconsin's statutory cap. Pet'r Suppl. Br. 2. But Epic never suggested Wisconsin's statutory cap was relevant at all until the rehearing stage. See BIO 10-11. Epic simply ignores that "[i]n our adversary system, … in the first instance and on appeal, we follow the principle of party presentation," whereby parties "frame the issues for decision" and courts act as "neutral arbiter of matters the parties present." *Greenlaw* v. *United States*, 554 U.S. 237, 243 (2008).

The Solicitor General overlooks this principle as well, for even on rehearing Epic never suggested, as the Solicitor General does now, that "[l]egislative determinations about the availability and scope of punitive damages are relevant to each *Gore* guidepost." SG Br. 10. Both Epic and TCS framed the issue for decision as whether the punitive damages award comported with *Gore*'s guideposts, and neither suggested Wisconsin's statutory cap bears the significance Epic and the Solicitor General now accord it. See Epic Br. (App. Dkt. 28), at 47-48; TCS Br. (App. Dkt. 19), at 63-69; see also SG Br. 15 (noting that Epic's "brief before

the panel did not even cite the Wisconsin cap"). Accordingly, far from acting "[i]ndefensibl[y]," Pet'r Suppl. Br. 2, in resolving the case as it did, the Seventh Circuit performed precisely the role "assign[ed] to courts" of deciding the "matters the parties present[ed]," *Greenlaw*, 554 U.S. at 243. Epic's assertion to the contrary simply mischaracterizes the proceedings below.

Second, in its supplemental brief, Epic argues for the first time that the Seventh Circuit's amended decision actually ruled on Epic's rehearing argument that any punitive damages award within a statutory cap necessarily satisfies due process. Pet'r Suppl. Br. 3-4 (citing Pet. App. 51a n.6). This belated discovery is remarkable given that Epic's two prior briefs in this Court never suggested the decision below had considered this argument. To the contrary, in response to TCS's assertion of forfeiture, Epic argued in its reply that this Court could "consider[] arguments first raised on review in support of a claim presented below," Reply 2—an odd position to take if, as Epic now contends, its argument was not only presented to, but also "considered and rejected" by, the Seventh Circuit, Pet'r Suppl. Br. 3.

In any event, the eleventh-hour nature of Epic's reunderstanding of footnote 6 in the Seventh Circuit's amended opinion is telling. Epic never before invoked the footnote because the footnote plainly does not consider or reject Epic's core argument that *BMW of North America, Inc.* v. *Gore*, 517 U.S. 559 (1996), and *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), rest entirely on a "fair notice rationale," such that "notice of the potential severity of the punishment that state law allows" is all due process requires. Pet. 17-18. It merely states, in conclusory fashion, that the limits imposed by due process may "go[] further" than those imposed by a statutory

cap. Pet. App. 51a n.6. Even if this statement could be understood as a reference to Epic's newly-raised argument, it does not make this case a good vehicle for that issue. This Court "ordinarily await[s] 'thorough lower court opinions to guide [its] analysis of the merits,'" *Lucia* v. *SEC*, 138 S. Ct. 2044, 2050 n.1 (2018) (citation omitted), and a vague and conclusory footnote arguably addressing an issue raised for the first time on rehearing falls far short of this mark.

Third, Epic's efforts to manufacture a circuit split continue to rely on mischaracterizations of Title VII precedents. Those precedents do not conflict with the decision below for the reasons set forth by TCS and the Solicitor General. See BIO 12-17; SG Br. 17-18. In particular, none of those cases adopts Epic's bright-line rule that any punitive damages award within a statutory cap satisfies due process. Rather, in concluding that "rigid application" of the *Gore* guideposts is "*less* necessary or appropriate" for Title VII awards, the Ninth Circuit relied on numerous distinctive features of the Title VII scheme, including the inverse relationship between compensatory and punitive damages, the nominal nature of many Title VII compensatory damages awards, and the statute's focus on particular substantive misconduct (*i.e.*, employment discrimination). *Arizona* v. *ASARCO LLC*, 773 F.3d 1050, 1055-58 (9th Cir. 2014) (en banc) (emphasis added). The Fifth Circuit's analysis was similar. See *Abner* v. *Kan. City S. R.R.*, 513 F.3d 154, 164 (5th Cir. 2008). Yet these features are inapplicable here, and Epic notably does not argue otherwise.

Epic's reliance on *Luciano* v. *Olsten Corp.*, 110 F.3d 210 (2d Cir. 1997), is even further misplaced. Epic contends that, in applying a "shock[s] the judicial conscience" standard to the punitive damages award in

Luciano, *id.* at 221 (citation omitted), the Second Circuit applied a different standard than it would have "applied in the absence of a statutory cap," Pet'r Suppl. Br. 5. Leaving aside that even this understanding of *Luciano* is inconsistent with Epic's proposed rule that an award within the statutory cap is *per se* valid, Epic's account of *Luciano* is mistaken. As the Second Circuit has made clear, courts determine whether an award shocks the conscience by applying the three-factor *Gore* analysis. See *Lee* v. *Edwards*, 101 F.3d 805, 809 (2d Cir. 1996) (explaining that "the Supreme Court erected three guideposts [in *Gore*] … by which we deem excessive a punitive damage award that 'shocks our judicial conscience'") (citing *Gore*, 517 U.S. at 574). Epic commits a similar error in relying on an amicus brief in *ASARCO* that argued that where there is a statutory cap on punitive damages, "no additional scrutiny under the due process clause is warranted." Pet'r Suppl. Br. 5. Epic omits that in that case, the Ninth Circuit *rejected* that position, expressly recognizing that *Gore* "is undeniably of some relevance in [the Title VII] context." *ASARCO*, 773 F.3d at 1055. Thus, there is no merit to Epic's assertion that these three cases held that "Title VII's damage cap obviated the need for applying the *Gore* factors at all," or otherwise conflict with the decision below. Pet'r Suppl. Br. 5.

Finally, Epic wrongly claims that the prospect of remittitur makes the question presented capable of repetition but likely to evade review because accepted remittiturs are not reviewable. See Pet'r Suppl. Br. 8. Although Epic is correct about the reviewability of accepted remittiturs, it is wrong about the implications of this rule. It is well-settled that, although a trial court's decision to offer a plaintiff the choice of a new trial or remittitur is not *immediately* appealable, the court's decision is reviewable upon conclusion of the

second trial. See 11 Charles Alan Wright et al., *Federal Practice and Procedure* § 2815 (3d ed. 2012). Indeed, as the Seventh Circuit has observed, "a plaintiff may expedite appeal by taking 'a pratfall' on a new trial, meaning that the plaintiff can accept defeat in the second trial by failing to put up a real fight and then appeal seeking reinstatement of the first jury's verdict." *Republic Tobacco Co.* v. *N. Atl. Trading Co.*, 381 F.3d 717, 739 (7th Cir. 2004).

Because a party can seek reinstatement of the initial jury verdict, there is no merit to Epic's suggestion that the risk of "a dramatically different outcome on retrial" from rejecting remittitur is too great for parties to bear. Pet'r Suppl. Br. 7. Had Epic been presented with a remittitur here, it could have walked away with a $140 million punitive damages award—hardly a bad outcome for a plaintiff that has received a compensatory award far in excess of any actual harm, see Pet. App. 45a-46a—or preserved its right to seek $280 million in punitive damages by rejecting remittitur, litigating further, and advocating on appeal for reinstatement of the original award. In the latter scenario, the only cost Epic (or similarly situated parties) would face is the expense of further legal proceedings, which is an expense parties must (and often do) bear as a result of the final judgment rule. To be sure, parties often complain about the burdens of that rule, but courts routinely reject the notion that those burdens foreclose meaningful opportunity to appeal interlocutory orders. See, *e.g.*, *Allied Chem. Corp.* v. *Daiflon, Inc.*, 449 U.S. 33, 34-37 (1980) (per curiam) (reversing grant of mandamus reinstating jury verdict because party was free to seek review of new-trial order after retrial); *Ash* v. *Ga.-Pac. Corp.*, 957 F.2d 432, 438 (7th Cir. 1992) ("Appeal awaits final decision, even if it is costly to reach that stage.").

Furthermore, as this case illustrates, there are ample opportunities for the issue Epic presents here to percolate through appellate courts via appeals in cases not involving remittiturs. Thus, there is no reason to believe, as Epic asserts, that the practice of remittitur will foreclose the possibility of appellate review in a case in which the plaintiff, unlike Epic here, adequately preserved the issue in the courts below.

CONCLUSION

For the foregoing reasons, and those set forth in TCS's Brief in Opposition, the petition should be denied.

Respectfully submitted,

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