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

SUPPLEMENTAL BRIEF FOR PETITIONER

Nick G. Saros
Jenner & Block LLP
633 West 5th Street,
Los Angeles, CA 90071
(213) 239-5100

Kristin G. Noel
Quarles & Brady LLP
33 East Main Street
Madison, WI 53703
(608) 251-5000

Michael T. Brody
Counsel of Record
Jenner & Block LLP
353 North Clark Street
Chicago, IL 60654
(312) 222-9350
mbrody@jenner.com

Attorneys for Petitioner

RULE 29.6 STATEMENT

The corporate disclosure statement included in the Petition for a Writ of Certiorari remains accurate.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

Cases

Statutes

Other Authorities

The Solicitor General on behalf of the United States as Amicus Curiae acknowledges the decision below is wrong. Statutes capping or mandating enhanced damages have been a part of our legal tradition for 700 years, and neither the Solicitor General nor Respondent has identified a single decision striking down on due process grounds a punitive damages award that complied with a legislature's specified ratio.

The Solicitor General likewise makes clear there is no obstacle to the Court's consideration of the issue presented. *See* SG Br. 16-17. Still, the Solicitor General asserts the Court should not hear the case but that argument demonstrably misstates what happened below. In support of its claim for punitive damages, Petitioner presented its statutory notice argument to the Seventh Circuit on rehearing, the Seventh Circuit called for a response, and *the Seventh Circuit amended its opinion squarely to reject the argument*: "Today, we hold only that, although the Wisconsin statute permits a 2:1 ratio, the constitutional protection under these circumstances goes further." Pet. App. 51a n.6 (opinion amended on rehearing). The contention that Petitioner raises a new argument that the Seventh Circuit "did not address" (SG Br. 16) is mistaken. The Seventh Circuit's holding that the Constitution's due process protection "goes further" and requires the invalidation of an award that complies with Wisconsin's 2:1 ratio—is the very holding that Petitioner challenges here.

The Solicitor General also maintains the Court can wait to see if the full implications of the Seventh Circuit's decision play out and then grant certiorari at that time. *See* SG Br. 23. The Solicitor General ignores how cases

involving this issue will play out and have already played out. Courts applying the Seventh Circuit's erroneous decision will offer a plaintiff a remittitur presenting the prevailing plaintiff with a dilemma: accept remittitur and forego an appeal or risk a new trial. Nearly all plaintiffs will accept the remittitur, suffer the impact of the Seventh Circuit's decision, and the Solicitor General's promised vehicle to correct this manifest error will never arise. Nor is this a theoretical concern: *it has already happened*. *See infra* 8. The Solicitor General's assertion that this Court can wait ignores the *unreviewable* consequences of that decision.

The Solicitor General's suggestion that the Court should just let this one pass is particularly inapt. Respondent will escape full responsibility for its wrong, rewarding it for its massive theft of intellectual property and its campaign of concealing the truth throughout the litigation. And, Respondent will prevail on grounds the Solicitor General agrees are erroneous. This case presents an appropriate vehicle to decide the issue presented in the Petition.

I. The Decision Below Is Indefensible.

The Solicitor General acknowledges the decision below is incorrect. Whether the due process protection is procedural or substantive, the Solicitor General recognizes it must be informed by the legislative judgment inherent in creating a statutory limit. SG Br. 9-11. The court below failed to do so and to the extent they are even relevant, misapplied the *Gore* factors. The Solicitor General makes clear that the decision below is wrong. SG Br. 11-15.

II. The Issue Was Presented And Ruled Upon Below.

First, the Solicitor General asserts Petitioner's argument was neither presented nor passed upon below. SG Br. 15-17. The Solicitor General is incorrect.

Proof that the Seventh Circuit considered and rejected Petitioner's due process argument is found in the opinion itself. In footnote 6, added upon consideration of the rehearing petition, the court stated "the due-process guarantee may be more protective than a statutory cap in one case but less protective in another." Pet. App. 51a n.6. Addressing the argument Petitioner raised on rehearing, the court continued "we hold only that, although the Wisconsin statute permits a 2:1 ratio, the constitutional protection under these circumstances goes further." *Id.* Having considered and rejected Petitioner's argument, the issue presented is appropriate for further review.

The Solicitor General acknowledges that once a 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." SG Br. 16, citing *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)). Here, there is no doubt that Petitioner always claimed that the district court's award of punitive damages was consistent with the federal Due Process Clause. *See also Hemphill v. New York*, 142 S. Ct. 681, 689 (2022).

While acknowledging this rule, the Solicitor General invites this Court to decline to review the case. Yet the Solicitor General has relied on the same line of argument in cases in which this Court has granted review. *See, e.g.*, Petitioners' Reply Brief, *Johnson v. Arteaga-Martinez*, No. 19-896, 2021 WL 6118329 (U.S. Dec. 2021); Brief for United States as Amicus, *Comptroller of Treasury of Maryland v. Wynne*, 575 U.S. 542 (2015) (No. 13-485), 2014 WL 1348934; and Petitioner's Reply Brief, *United States v. Virginia*, 518 U.S. 515 (1996) (No. 94-1941), 1996 WL 32776. In each case, the United States remained free to make any argument in support of its claim. Applying this well-established legal principle, frequently relied upon by the government, the question presented in the Petition may be reviewed by this Court. Given the acknowledged error below and the importance of this case to the consideration of enhanced damages, review is proper.

III. The Court Should Grant Review.

A. There Is A Conflict In The Circuits.

The other federal circuits to address statutory limits on enhanced damages have, unlike the Seventh Circuit, found the existence of a statute fundamentally changes the analysis, narrowing, if not eliminating the role of the *Gore* factors. The Solicitor General's attempts to distinguish these cases are ineffective.

The Solicitor General claims the Second Circuit did not account for statutory caps in its due process analysis in *Luciano v. Olsten Corporation*, 110 F.3d 210 (2nd Cir. 1997). SG Br. 17. The Solicitor General is incorrect. To

the Second Circuit, the existence of a statutory cap limited the applicability of the *Gore* factors to those awards that "would 'shock the judicial conscious and constitute a denial of justice.'" 110 F.3d at 221 (citation omitted). That is not the standard that would be applied in the absence of a statutory cap, nor is it the standard applied by the Seventh Circuit here.

Similarly, in *ASARCO* and *Abner*, courts found Title VII's damage cap obviated the need for applying the *Gore* factors at all. *Arizona v. ASARCO LLC*, 773 F.3d 1050, 1055-56 (9th Cir. 2014); *Abner v. Kansas City S. R.R. Co.*, 513 F.3d 154, 164-65 (5th Cir. 2008). As the EEOC argued in *ASARCO*, statutory caps define the outer limits of acceptable enhanced damages such that "no additional scrutiny under the due process clause is warranted." Brief of EEOC as Amicus at 3, *ASARCO*, No. 11-17484 (9th Cir. Jan. 21, 2014), ECF No. 63-1.

The Solicitor General attempts to distinguish these cases on the ground that Title VII reflects a legislative determination for a particular area of misconduct, namely employment discrimination. SG Br. 17-18. Never mind that Title VII is not a narrow statute. It covers a wide swath of liability—from discrimination in hiring to hostile workplace claims to retaliation, and everything in between—arising from discrimination based on a variety of prohibited actions. Similarly, the Wisconsin statute is itself not a statute of general applicability. It exempts many statutory claims from its punitive damages provision. Wis. Stat. § 895.043(2), (6).

But it does not matter if a legislature established an enhanced damage cap for a narrow claim or a broad area

of law: either reflects legislative judgment that the Solicitor General elsewhere concedes must "inform" the constitutional question. SG Br. 8-9. In attempting to distinguish the Title VII cases, the Solicitor General focuses on legislative judgments involved in the adoption of Title VII. The remedial scheme in Title VII was novel when it was enacted in 1991. Civil Rights Act of 1991, § 102, Pub. L. 102-166, 105 Stat. 1071. Likewise, the broad remedial scheme created by the antitrust laws was new. The remedies under Title VII and the Clayton Act are not exempt from the *Gore* guideposts because they involve employment or monopolies or because of their historical background. To the contrary, they are not subject to the same *Gore* analysis because they reflect the authority of a legislature to define the limits of enhanced damages, which authority has never been questioned on due process grounds. The Seventh Circuit's decision breaks new ground, splitting from the other circuits.

Finally, while this case presents a split, Petitioner notes that this Court has reviewed a prior punitive damages case based on the issue's apparent importance. In *Campbell*, Petitioner asserted there was a split as to the application of the *Gore* factors. Petition for Writ of Certiorari at 18-19, *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003) (No. 01-1289), 2002 WL 34544120. Respondent asserted the so-called split was fact-bound. In reply, the successful Petitioner explained that the Utah Supreme Court's opinion authorized plaintiffs to seek punitive damages based upon a "roving inquiry into a corporate defendant's nationwide business practices and conduct." Reply Brief at 8, *Campbell*, 2002 WL 34544312. Petitioner argued the "unbounded

expansion" of permissible punitive damages violated due process. The Court used the case as an opportunity to explain further its analysis in *Gore*. Likewise, here, this case presents an opportunity for the Court to guide the lower courts in the application of the Due Process Clause to statutes constraining jury discretion in awarding enhanced damages.

B. The Question Presented Should Be Considered Now.

The Solicitor General states review of the issue here may benefit from "additional consideration" in the lower courts. SG Br. 18. Any additional consideration is likely to be illusory. Enhanced damages are often reduced through a remittitur, making it unlikely that a plaintiff will be able to preserve the error Petitioner raises in this case. Moreover, the importance of this issue merits review now.

Courts commonly resolve post-trial motions asserting damages are excessive through a remittitur. *See* 11 Charles Alan Wright et al., *Federal Practice & Procedure*, § 2815 Westlaw (3d ed. database updated Apr. 2021); *Linn v. United Plant Guard Workers of Am., Local 114*, 383 U.S. 53, 65-66 (1966) ("If the amount of damages is excessive, it is the duty of the trial judge to require a remittitur or a new trial."). A remittitur presents the plaintiff with a choice: accept a lower damages award or risk a dramatically different outcome on retrial. One study found that 98% of plaintiffs chose remittitur or settlement over a new trial. *See* Suja A. Thomas, *Re-Examining the Constitutionality of Remittitur Under the Seventh Amendment*, 64 Ohio

State L.J. 731, 735 (2003). An accepted remittitur is not reviewable. *Donovan v. Penn Shipping Co.*, 429 U.S. 648, 650 (1977) ("[W]e now reaffirm the longstanding rule that a plaintiff in federal court . . . may not appeal from a remittitur order he has accepted.").

This practice has already shielded one district court's application of the Seventh Circuit's decision from review. In *Syntel Sterling Best Shores Mauritius Limited v. TriZetto Group, Inc.*, the district court relied on the Seventh Circuit's decision to hold that a 2:1 award, in accordance with the federal Defend Trade Secrets Act ("DTSA"), 18 U.S.C. § 1836, was excessive. No. 15 Civ 211, 2021 WL 1553926, at *8-11 (S.D.N.Y. Apr. 20, 2021). On post-trial motions the court applied the *Gore* guideposts and the Seventh Circuit's reasoning in *Epic* to reduce the punitive award from 2:1 to 1:1. *See, e.g.*, *id.* at *11 ("The jury's punitive award was twice its compensatory award or approximately $570 million, for a ratio of 2:1. As in *Epic* . . . , this punitive damages award is excessive."). The prevailing party accepted. By using the Seventh Circuit's analysis to direct a remittitur, the district court's limitation on the Congressionally authorized enhanced damage provision is immune from review.[1]

[1] In the instant case, the Seventh Circuit did not order a remittitur. It remanded with instructions to award punitive damages consistent with its opinion. Pet. App. 52a. The district court has not ruled, no doubt awaiting the conclusion of these proceedings. If the district court awards Petitioner punitive damages of $140 million, as Petitioner argues the Seventh Circuit's decision requires, Respondent would likely contend that a later appeal by Petitioner asserting the Seventh Circuit erred in its 2020 ruling has already

In addition, the Petition presents the opportunity to correct a serious error having outsized consequences. While punitive damages under Wisconsin law, are limited to extreme situations, this case presents circumstances in which enhanced damages at the top of the allowable Wisconsin range are plainly appropriate. As the district court stated, an argument to the contrary was "meritless, if not frivolous." Pet. App. 73a. Respondent engaged in repeated wrongful acts, purposefully accessing and downloading Petitioner's confidential information for years. Pet. App. 6a-7a. Petitioner's harms resulted from Respondent's repeated, intentional acts. To make matters worse, Respondent's management instructed its employees involved in the deception to lie about their conduct. Pet. App. 43a-44a. Few cases present such proven, repeated, intentional, malicious misconduct. Moreover, given the scope of the theft, the value of the material Respondent stole, and the size and wealth of Respondent, this case presents the chance to assess a significant award of punitive damages in the amount authorized by a statutory cap. Even setting aside the likelihood that a remittitur will shield future awards in other cases from review, this case presents a rare opportunity to correct a serious error where the egregiousness of Respondent's conduct allows the Court to focus on the legal issue, free from factual arguments for leniency.

---

been decided. Review of the Seventh Circuit's limitation of punitive damages is proper now.

C. The Seventh Circuit's Decision Implicates Other Statutory Claims.

The Solicitor General's next argues the Seventh Circuit's decision does not threaten enhanced damages under federal statutes. SG Br. 19-23. The Solicitor General places statutes permitting or requiring enhanced damages in six categories. *Id.* Far from undermining the need for review, this argument demonstrates that review is proper. The Seventh Circuit's erroneous approach can affect any enhanced damages statute.

Initially, despite variations in statutory language, some federal statutes are directly comparable to the Wisconsin statute. For example, the DTSA, 18 U.S.C § 1836, is indistinguishable from the Wisconsin statute. The DTSA creates a civil remedy for theft of trade secrets. 18 U.S.C. § 1836(b). It permits precisely the same measure of damages employed in this case: defendant's unjust enrichment. 18 U.S.C. § 1836(b)(3)(B). Under the DTSA, juries may award enhanced damages up to two times compensatory damages. 18 U.S.C. § 1836(b)(3)(C). An early court to interpret its damages provision has already limited damages to a 1:1 enhancement ratio. *See supra* 8.

More importantly, the Solicitor General's six categories do not bear on whether the Court should hear this case. For example, the Solicitor General distinguishes the Wisconsin cap, which it categorizes as general, from other statutes it asserts warrant enhanced damages for particularized claims. SG Br. 19-20. Yet in prior discussion of the applicability of the *Gore* factors to

statutory claims, members of this Court have not distinguished between statutes limited to particular claims and general statutes. In his concurring opinion in *BMW of North America, Inc. v. Gore*, 517 U.S. 559, 595 (1996), Justice Breyer explained *statutes that* "classify awards and impose quantitative limits . . . would significantly cabin the fairly unbounded discretion created by the absence of constraining legal standards." Justice Breyer cited four state statutes that constrain the jury's determination of punitive damages, some of general application, and others limited to specific areas. In dissent, Justice Ginsburg discussed state legislative caps. Many of the provisions Justice Ginsburg referenced in the Appendix to her opinion were described as general in application. *See id.* at 614-19 (descriptions of statutes or pending legislation in Colorado, Delaware, Florida, Illinois, Indiana, Kansas, Maryland, Nevada, North Dakota, Texas, and Virginia).

The Solicitor General states the constitutionality of an enhanced damages award that falls within "longstanding traditions is virtually beyond question." SG Br. 21. Punitive damages have long been permitted for intentional torts, which include theft of trade secrets. *See Bass v. Chi. & N.W. Ry. Co.*, 42 Wis. 654, 672-73 (Wis. 1877) (Ryan, C.J., writing separately) (noting that punitive damages have been available in Wisconsin for intentional torts "as long ago as 1854" and "has been repeatedly affirmed since"). The Wisconsin statute limits jury discretion to a narrow range, and that range is consistent with a host of statutes of varying types. While the specifics of the statutes may differ, all reflect a legislative decision to limit the power of the fact-finder to punish.

The Solicitor General's argument about the statutory variations does not undermine the need for review. The Solicitor General agrees courts assessing punitive damages under a statute should consider the impact of the statute, which the Seventh Circuit failed to do. SG Br. 9-15. Regardless of whether the statute imposes a mandatory cap or a permissive one, allows the decision to be made by a jury or by a judge, or arises under a particular or a general statute, the failure to consider the statute is error. Because the Seventh Circuit's erroneous reasoning may be imported to any of the categories of statutes the Solicitor General posits, this case is appropriate for further review.

CONCLUSION

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

February 25, 2022

Respectfully submitted,

Michael T. Brody
Counsel of Record
Jenner & Block LLP
353 North Clark Street
Chicago, IL 60654
(312) 222-9350
mbrody@jenner.com

Nick G. Saros
Jenner & Block LLP
633 West 5th Street
Los Angeles, CA 90071
(213) 239-5100

Kristin G. Noel
Quarles & Brady LLP
33 East Main Street
Madison, WI 53703
(608) 251-5000

Counsel for Petitioner Epic Systems Corporation