17-1993 (L)

17-2107, 17-2111 (XAP)

In the United States Court of Appeals for the Second Circuit

THE STATE OF NEW YORK, THE CITY OF NEW YORK

Appellees/Cross-Appellants,

v.

UNITED PARCEL SERVICE, INC.,

Appellant/Cross-Appellee

BRIEF FOR *AMICI CURIAE*, THE STATES OF LOUISIANA, ARKANSAS, AND THE COMMONWEALTH OF KENTUCKY, BY AND THROUGH GOVERNOR MATTHEW G. BEVIN, IN SUPPORT OF APPELLANT/CROSS APPELLANT, UNITED PARCEL SERVICE

On Appeal From the United States District Court
For The Southern District of New York
Case No. 15-cv-1136

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INTEREST OF *AMICI CURIAE*

Amici are the States of Louisiana, Arkansas, and the Commonwealth of Kentucky, by and through Governor Matthew G. Bevin who file this brief pursuant to Federal Rule of Appellate Procedure 29(a). The *amici* States have a vital interest in maintaining the integrity of the rule of law regarding constitutionally permissible punitive damage awards. Thus, the *amici* States oppose the arbitrarily high, constitutionally infirm penalties at issue in this case. Additionally, *amici* States are charged with protecting the rights and interests of corporate as well as private citizens, and the district court's ruling has serious equal protection implications that should be considered in adjudicating this appeal.

ARGUMENT

I. THE PENALTY AWARD OF $237.6 MILLION IS SO EXCESSIVE IT IS UNCONSTITUTIONAL.

The district court found it necessary to "capture [UPS's] attention" and make a "corporate impact on UPS as a whole." *See* Dkt. 535, at pp. 200-202; Dkt. 536, at pp. 8-9. The district court endeavored to do so by levying, in addition to compensatory damages, penalties (under each theory of liability) that are so high they bear no relationship to the wrongful conduct arguably established by the record at trial. [1] The penalty award is instead over-inflated in terms of the Appellees' discrete claims, and entirely disproportionate and cumulative taken as a whole. For these reasons, the $237.6 million in penalties—compared to compensatory damages of $9.4 million—are unconstitutional as a matter of Due Process and the Excessive Fines Clause. *Amici* States respectfully request that the Court vacate these penalties and remand for calculation within the constitutional bounds that should have guided the district court in the first place.

A. The Penalties Amount to a Taking of Property Without Due Process.

It is an idea "enshrined in our constitutional jurisprudence" that States may not "impos[e] a grossly excessive punishment." *BMW of N. Am. v. Gore*, 517 U.S.

[1] The District Court found UPS "bears a lower level of culpability for the impact on public health than other entities." The entire causation analysis is questionable. The court characterized UPS's role in shipping packages as "unlawful enablement of a public health impact…" *See* Dkt. 535, at pp. 197.

559, 562 (1996) (internal citation omitted). That is, "[e]lementary notions of fairness … dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose." *Id.* at 574. But the district court merely recognized that these enshrined "principles … are useful to bear in mind." *See* Dkt. 536, at pp. 6-9. The astronomical award of penalties did not result (nor could it have) from an actual application of the Due Process Clause to the case. The penalties should be vacated and remanded for recalculation.

Gore outlined three factors in assessing whether a punishment is grossly excessive: reprehensibility of the defendant's conduct; disparity between harm actually suffered and the punitive damages; and disparity between the remedy at issue and the penalties authorized or imposed in comparable cases. *Id*. at 575; *see also State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 418 (2003). While *Gore* dealt with punitive damages awarded in tort, elementary notions of fairness and due process are no less applicable in the context of statutory penalties payable to the government. *See Parker v. Time Entm't Co.*, 331 F.3d 13, 22 (2d Cir. 2003) (due-process concerns may be implicated by penalties assessed under statute).

The Supreme Court recognized in *Gore* that the reprehensibility of the defendant's conduct is the "most important indicium of the reasonableness of a punitive damages award." *Gore*, 517 U.S. at 575. And reprehensibility varies

directly with the defendant's "indifference to reckless disregard for the health and safety of others." *See State Farm Mut. Auto. Ins. Co v. Campbell*, 538 U.S. 408, 419 (2003). The district court not only failed to assess this factor, but if it had, the record would have made clear that UPS's conduct could at most be described as "turning a blind eye," which itself is insufficient to support an award of substantial penalties. *See* Dkt. 535, at pp. 203-04; *Von Hofe v. United States*, 492 F. 3d 175, 189 (2d Cir. 2007).

UPS's liability arose, arguably, from failing to inspect certain packages based on the sporadic observations of low-level employees. And the district court imputed these observations to the entire corporation. But with no evidence of actual knowledge by those responsible for UPS's corporate policies, "the record in this case disclose[d] no deliberate false statements, acts of affirmative misconduct, or concealment of evidence of improper motive." *Gore*, 517 U.S. at 579, 80 (noting that "even a modest award of exemplary damages does not establish the high degree of culpability that warrants a substantial punitive damages award."). A corporation acting without direct knowledge may not necessarily be absolved of liability or punishment, but due process clearly required the district court to assess whether UPS's actions were sufficiently "reprehensible" to justify the huge award of penalties it imposed. The court failed to do so here.

There also is wide disparity between the harm actually attributable to UPS—$9.4 million in compensatory damages—and the $237.6 million in penalties. The district court assessed compensatory damages based on lost tax revenues, but it expressly concluded that UPS as a mere transporter actually bears a low level of responsibility for such harms. *See* Dkt. 535, at p.196. Assessing a penalty 25 times greater than the actual damages violates fundamental notions of fairness, particularly when UPS's conduct and the harm remedied by the compensatory damages was tenuous to begin with.

The third factor, whether the penalties are authorized by statute or imposed in comparable cases, is focused on whether the specific defendant had "fair notice" of the penalties to which it might be subjected. , 517 U.S. at 584. And this record does not support the contention that UPS, *See Gore* acting as a common carrier without direct knowledge of any wrongdoing, had fair notice that it could subjected to such extreme penalties. The district court noted that the statutes at issue and the AOD provided penalties ranging from up to $1,000 to $5,000 per violation. *See* Dkt. 535, at pp. 204-205. But at the same time the court found that the Appellees' claims required "UPS's 'knowing' transport of cigarettes," Dkt. 535, at pp. 144, it concluded that this burden could be satisfied by the imputed knowledge of low-level employees. Like BMW in *Gore*, UPS's awareness of maximum penalties does not equate to fair notice that the imputed knowledge of its employees could

subject it to penalties more than 25 times greater than a compensatory award. *See* 517 U.S. at 584. The penalties assessed were grossly excessive.

B. The Penalties Amount to Excessive Fines.

"The Eighth Amendment checks the government's power to punish: 'Excessive bail shall not be required; nor excessive fines imposed, nor cruel and unusual punishments inflicted.'" *Von Hofe v. United States*, 492 F.3d 175, 181 (2d Cir. 2007) (quoting U.S. Const. amend. VIII). The Supreme Court, in setting forth the factors for evaluating fines under the Eight Amendment, emphasized that "[t]he touchstone of the constitutional inquiry under the Excessive Fines Clause is the principle of proportionality: The amount of the forfeiture must bear some relationship to the gravity of the offense that it is designed to punish." *United States v. Bajakajian*, 524 U.S. 321, 334 (1998). Though the Supreme Court has declined to adopt a specific limit, it has emphasized that "if the amount of the forfeiture is grossly disproportional to the gravity of the defendant's offense, it is unconstitutional." *Bajakajian*, 524 U.S. at 337.

The Supreme Court established in *Bajakajian* that punishment must be based on a defendant's level of culpability and the magnitude of *actual* harm attributable to the *defendant's* conduct. In that case, the Supreme Court held that a forfeiture of more than 70 times the maximum fine was grossly disproportionate to the gravity of the defendant's offense. *Bajakajian,* 524 U.S. at 337-39 & n.14. The

Court noted that the defendant lacked a criminal purpose as well as the small harm caused by his conduct.

The district court, however, veered away from this proportionality "touchstone" for evaluating excessive fines. *Bajakajian*, 524 U.S. at 334-36. Notably, the district court failed to consider Second Circuit case law applying *Bajakajian* and holding that a defendant's lack of direct knowledge of an offense impacts whether a penalty is grossly disproportionate. *Von Hofe v. United States* cautioned that a fine may be excessive even where it amounts to a fraction of the maximum statutory penalty if the defendant lacks requisite culpability. 492 F.3d at 189. This Court held in *Von Hofe* that the forfeiture of a joint-tenant interest in property valued at approximately $124,000 was excessive given that the defendant did not intentionally participate in the enterprise. 492 F.3d at 189-91. This Court reached that conclusion despite the underlying offense authorizing a fine up to $1 million. *Id.*

The district court characterized UPS as at best "turning a blind eye" to others' criminal conduct without identifying direct evidence of UPS's complicity or actual knowledge. *Von Hofe*, 492 F.3d at 189-91. Yet UPS's corporate knowledge was imputed based on the collective observations of low-level employees across various locations. *Amici* States do not opine as to whether direct knowledge, by management or employees, is required to prove that UPS

committed an offense or even to assess some level of penalty. But the absence of such direct knowledge (and the district court's express and sole reliance on imputed knowledge) certainly should bear on the proportionality of the penalties. *See Bajakajian*, 524 U.S. at 339 (noting that the "level of culpability" is relevant to the proportionality determination). Because the district court failed even to take into account UPS's lack of direct knowledge, the resulting penalties are grossly disproportionate to UPS's culpability. And they violate the Eighth Amendment.

II. THE RULING HAS ALARMING DISCRIMINATION AND EQUAL PROTECTION IMPLICATIONS.

The trial court was dismissive of UPS's concern that the court would leave UPS with only two equally untenable and unlawful choices: either categorically reject all shipments from certain shippers in violation of its legal obligation under 49 U.S.C. § 1401(a) and 42 U.S.C. 1981, or impair the civil rights of those shippers (and their customers) by profiling and targeting them for disparate treatment while performing a public function. *Amici* States cannot be so cavalier. Native American shippers are entitled to equal protection of law and to be free from discrimination in making and enforcing commercial contracts. 42 U.S.C. 1981. Therefore, it is not a viable option for UPS to simply refuse to do business with Native American shippers because of the possibility that a shipment might contain contraband. The record below demonstrates that the shippers the court would have UPS target are entitled to and do in fact routinely tender lawful

shipments to UPS. UPS's only protection against future liability under the flawed premise of this ruling is to sequester and open each and every package tendered by such shippers, based on the racial/national origin characteristics of the shipper, to ensure that the contents are lawful. *Amici* States believe this may unlawfully infringe on the civil rights of the shippers and certainly unnecessarily subjects UPS to potential liability for civil rights violations either as discrimination by a nongovernmental entity under 42 U.S.C. 1981(c) or under color of state law pursuant to 42 U.S.C. 1983. *Amici* States urge this Court to strongly consider the broader implications of the trial court's ruling in adjudicating this appeal.

CONCLUSION

Amici States respectfully request that the Court vacate these penalties and remand for calculation within the constitutional bounds that should have guided the district court in the first place. Due process clearly required the district court to assess whether UPS's actions were sufficiently "reprehensible" to justify the huge award of penalties it imposed, which the court failed to do.

Moreover, the absence of direct knowledge (and the district court's express and sole reliance on imputed knowledge) certainly should bear on the proportionality of the penalties. The district court's failure to take into account UPS's lack of direct knowledge resulting in penalties grossly disproportionate to UPS's culpability violates the Eighth Amendment.

Finally, by assessing disproportionately large penalties in this case, based upon knowledge imputed from low level employees, the district court's ruling has civil right implications that should not been so cavalierly dismissed.

The trial court's judgments on liability, damages and penalties should be reversed.

Respectfully submitted:

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CERTIFICATE OF COMPLIANCE

I hereby certify that:

1. This brief complies with the type-volume limitations of Second Circuit rules 28.1.1(a) and 32.1(a)(4)(A), which are authorized by Federal Rule of Appellate Procedure 32(e), because, excluding the parts of the brief exempted by Federal Rule of Appellate Procedure 32(f), it contains 2,142 words, as determined by the word-count function of Microsoft Word 2010.

2. This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in a proportionately spaced typeface using Microsoft Word 2010.in 14-point Times New Roman font.

Dated: October 13, 2017

/s Elizabeth B. Murrill

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, an electronic copy of the foregoing was filed with the Clerk of Court for the United States Court of Appeals for the Second Circuit using the appellate CM/ECF system.

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