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 OF CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS *AMICUS CURIAE* IN SUPPORT OF APPELLANT/CROSS-APPELLEE UNITED PARCEL SERVICE, INC.

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

Jeffrey S. Bucholtz
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737

Merritt E. McAlister
Val Leppert (application for admission pending)
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100

Counsel for Chamber of Commerce of the United States of America

DATED: October 13, 2017 *Additional counsel listed on inside cover

Warren Postman
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
Telephone: (202) 463-5685

Counsel for Chamber of Commerce of the United States of America

CORPORATE DISCLOSURE STATEMENT

The Chamber of Commerce of the United States of America is a nonprofit corporation organized under the laws of the District of Columbia. It has no parent corporation. No publicly held corporation owns ten percent or more of its stock.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Rules

Regulations

Constitutional Provisions

STATEMENT OF INTEREST[1]

The Chamber of Commerce of the United States of America ("Chamber") is the world's largest business federation. It represents 300,000 direct members and indirectly represents the interests of more than three million U.S. businesses and professional organizations of every size, in every industry, and from every region of the country. A principal function of the Chamber is to represent its members' interests by filing *amicus curiae* briefs in cases involving issues of vital concern to the nation's business community.

The district court's decision in this case, particularly the $237 million penalty it assessed against UPS, is of great concern to the Chamber because it would set a dangerous precedent if left uncorrected. The penalty is grossly disproportionate to the harm caused by UPS's conduct, inflicts needless and duplicative punishment for the same conduct, punishes UPS for having defended the claims against it, and violates basic notions of due process. The threat of such excessive and unfair punishment can chill commerce in the United States. The Chamber therefore has an interest in this Court rejecting the imposition of disproportionate and unconstitutional penalties such as the one in this case and files this brief with the consent of all parties. *See* Fed. R. App. P. 29(a)(2).

---

[1] No counsel for any party authored this brief in whole or part; no party or counsel made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae* made such a contribution.

INTRODUCTION AND SUMMARY OF ARGUMENT

The district court determined that the State and City of New York lost $9.4 million in tax revenue because a small number of sellers used UPS's services to ship untaxed cigarettes from Indian reservations to other places in New York. According to the district court, UPS should have done more to discover these activities and its failure to do so violated an agreement (the "AOD") that UPS entered with the State of New York a few years earlier. The court then assessed a total of $237 million in civil penalties against UPS. Nearly a quarter billion dollars was a wildly disproportionate punishment under the facts found by the district court. That penalty award cannot stand for several reasons:

I. As an initial matter, the $237 million penalty violates substantive due process. The Supreme Court has long held that the due process clause places substantive limitations on the size of monetary penalties. A grossly excessive award does not further any legitimate government interest in punishment and deterrence and thus becomes an arbitrary deprivation of property. To determine when an award is grossly excessive, the Supreme Court has developed a three-part analysis that examines (1) the degree of reprehensibility or culpability of the defendant's conduct, (2) the relationship (or ratio) between the penalty and the harm caused, and (3) the sanctions imposed in other cases for comparable misconduct.

Here, all three considerations compel the conclusion that the $237 million penalty is grossly excessive and therefore crosses the constitutional line. First, UPS's conduct falls on the low end of the culpability spectrum because the harm was economic and UPS neither disregarded the safety of others nor engaged in fraud or other trickery. UPS's management did not participate in or ratify the alleged transgressions, which renders *any* punitive award suspect and forecloses a finding of a high degree of culpability.

Second, the relationship between the penalty and the harm caused makes it clear that the punitive amount is grossly disproportionate. The district court awarded the government $9.4 million in compensatory damages, which was substantial by any standard. The court then went radically astray by assessing a penalty more than 25 times greater. This was far out of line with established practice; indeed, the Supreme Court and this Court have cautioned that a ratio of 1:1 may reach the constitutional maximum in a case where (as here) the defendant must already pay a substantial amount in compensatory damages.

The third criterion (sanctions in comparable cases) further confirms that the $237 million penalty is grossly excessive. The award far exceeds the criminal fine that a court can assess even against the principal bad actor in a tax evasion scheme, which UPS was not. Tellingly, the district court cited no case involving similar conduct where a punitive award of this magnitude was upheld on appeal.

But the district court never performed any due process review. Rather than apply the Supreme Court's three criteria, the district court simply declared that the Supreme Court's due process jurisprudence (or at least *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), the only case the district court considered) was "distinguishable" because this case involved statutory penalties as opposed to punitive damages. This overlooks that the Supreme Court's substantive due process jurisprudence began with cases involving statutory penalties and that its three-pronged analysis is simply a framework designed to help courts determine when a penalty award runs afoul of the "grossly excessive" standard—the same standard that undoubtedly applies to statutory penalties. The district court offered no cogent reason why this framework should not apply to statutory civil penalties.

Relatedly, the district court erred when it distinguished *Gore* on the ground that this case does not present the concerns about lack of notice that were discussed in *Gore*. This rationale ignores the Supreme Court's unambiguous holding that a grossly excessive award is also a violation of *substantive* due process, which (unlike a procedural due process violation) cannot be cured by advance notice. Likewise, the district court improperly distinguished *Gore* on the ground that it was not a class action and thus did not involve widespread harm. That the harm in this case may be different than the harm in *Gore* cannot mean that the due process clause does not apply at all; it simply means that the relevant factors of the analysis

may weigh differently than they did in *Gore*. The district court's attempt to distinguish away the well-established substantive due process protection against grossly excessive penalties cannot withstand scrutiny. The penalty is plainly disproportionate in this tax revenue case and thus violates the due process guarantee against arbitrary punishment. If left standing, it would send a terrible message to businesses and may even chill commerce in the United States.

II. The $237 million penalty also violates procedural due process. The district court openly increased the punishment because UPS did not accept responsibility and instead exercised its right to contest the claims at trial. But the Supreme Court has long held that procedural due process requires an opportunity to litigate the issues raised and to present every available defense. This right would be empty if a defendant can be punished for exercising it. Yet that is what the district court did here. In its damages order, the district court declared that UPS deserved a high amount of punishment because it failed to "accept responsibility" at trial and "persisted in claiming it did nothing wrong." If a defendant could be punished for exercising its due process right to put the plaintiff to its burden of proof, defendants would face an unconstitutional dilemma—capitulate and forfeit the due process right to defend, or risk heightened punishment. This Court should make clear that punishing a defendant for going to trial is a due process violation of the most basic sort.

ARGUMENT

I. THE $237 MILLION PENALTY IS GROSSLY EXCESSIVE AND THEREFORE VIOLATES SUBSTANTIVE DUE PROCESS.

"No person shall be . . . deprived of . . . property, without due process of law." U.S. Const. amend. V. As explained below, (A) this provision places substantive limits on the size of monetary penalties, (B) the $237 million penalty in this case far exceeds those limits under the Supreme Court's required analysis, and (C) the district court's failure to perform the required analysis was error.

A. The Due Process Clause Places Substantive Limits On The Size Of Monetary Penalties.

A century ago, the Supreme Court had already recognized that "grossly excessive" statutory penalties "amount to a deprivation of property without due process of law," *Waters-Pierce Oil Co. v. State of Texas*, 212 U.S. 86, 111 (1909), especially when the monetary penalty is "grossly out of proportion to the possible actual damages." *Missouri Pac. R. Co. v. Tucker*, 230 U.S. 340, 351 (1913) (statutory penalty of $500 ($12,275 inflation-adjusted) violated due process where defendant collected $3.02 ($74.15 inflation-adjusted) in excess of permissible transportation charge); *St. Louis, I.M. & S. Ry. Co. v. Williams*, 251 U.S. 63, 66–67 (1919) (due process prohibits monetary penalties that are "wholly disproportioned to the offense and obviously unreasonable"). The Supreme Court's early cases also recognized that aggregating statutory penalties can result in a punishment that is "plainly arbitrary and oppressive as to be nothing short of a taking of [a

company's] property without due process of law." *Sw. Tel. & Tel. Co. v. Danaher*, 238 U.S. 482, 491 (1915) (aggregated penalty of $6,300 ($150,000 inflation-adjusted) violated due process).

Citing these early precedents about seventy years later, the Supreme Court reaffirmed that "the Due Process Clause places outer limits on the size of a civil damages award made pursuant to a statutory scheme." *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 276–77 (1989). In other words, the clause "imposes *substantive* limits 'beyond which penalties may not go.'" *TXO Prod. Corp. v. All. Res. Corp.*, 509 U.S. 443, 453–54 (1993) (plurality opinion) (quoting *Seaboard Air Line R. Co. v. Seegers*, 207 U.S. 73, 78 (1907)) (emphasis added). Again relying on the early case law from the statutory penalty context, the Court eventually concluded that these same limitations also applied to awards of punitive damages. *See TXO*, 509 U.S. at 453–59 (plurality opinion). This makes sense, as "the remedy of civil penalties is similar to the remedy of punitive damages," *Tull v. United States*, 481 U.S. 412, 423 n.7 (1987), and the two are often analogized. *See, e.g., Exxon Shipping Co. v. Baker*, 554 U.S. 471, 494–95 (2008) (comparing punitive damages to statutory damages under certain schemes); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974) (punitive damages "are private fines levied" to punish and deter).

The Supreme Court then developed a framework to determine when a monetary punishment meets the "grossly excessive" standard from its early case law. In *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001), the Court explained that there is no "mathematical formula" but that lower courts must perform a three-pronged analysis that considers (1) "the degree of the defendant's reprehensibility or culpability," (2) "the relationship between the penalty and the harm to the victim caused by the defendant's actions," and (3) "the sanctions imposed in other cases for comparable misconduct." *Cooper*, 532 U.S. at 434–35 (citing *Gore* and *United States v. Bajakajian*, 524 U.S. 321, 336–44 (1998)). As discussed next, an application of these three prongs leaves no doubt that the $237 million penalty here is grossly excessive and thus violates substantive due process.

B. The $237 Million Penalty Exceeds The Substantive Due Process Limits Under The Supreme Court's Analysis

All three prongs of the Supreme Court's analysis show that the district court's punitive award was grossly excessive.

1. To properly assess the degree of reprehensibility or culpability, the Supreme Court has identified several factors: (a) whether the harm caused was physical or merely economic; (b) whether the defendant displayed an indifference to or reckless disregard of the health or safety of others; (c) whether the victim was financially vulnerable; (d) whether the defendant's transgression was an isolated

incident or was part of a pattern of repeated misconduct; and (e) whether the defendant's conduct constituted intentional malice, trickery, or deceit, or mere accident. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 419 (2003). In this case, all of these factors point to the very low end of the culpability spectrum. The plaintiffs' harm was economic (loss of tax revenue); UPS did not disregard anyone's safety; the plaintiffs have not shown financial vulnerability; UPS's conduct was confined to a certain time period and to a certain geographic area; and UPS did not engage in trickery or deceit. *See* UPS Br. 110–14. The Supreme Court has cautioned that the existence of only "one of [the five] factors weighing in favor of a plaintiff may not be sufficient" to support *any* monetary penalty, and "the absence of all of them renders any [punitive] award suspect." *State Farm*, 538 U.S. at 419.

Also worth noting is that no UPS employee above a driver or field-level account executive had actual knowledge of shipments of unstamped cigarettes. UPS Br. 112. Once UPS's management obtained such knowledge, it responded appropriately. (ECF 535:11–12, 16, 20, 38, 41–43). The district court overlooked the legal implications of these facts. The liability theory here is based solely on imputing the knowledge of various lower-level employees to UPS as a corporate entity. To the extent that can even be a valid basis for liability, "[t]he common law has long recognized that agency principles limit vicarious liability for punitive

awards." *Kolstad v. Am. Dental Ass'n*, 527 U.S. 526, 541 (1999). Even under the facts as found by the district court, the court could not reasonably assign a high level of culpability to UPS.

2. The second and "perhaps most commonly cited indicium" of an excessive monetary penalty "is its ratio to the actual harm inflicted on the plaintiff." *Gore*, 517 U.S. at 580. While there is no "bright-line ratio," the Supreme Court has made clear that "few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." *State Farm*, 538 U.S. at 425. Elaborating on this point, the Court has suggested that a punitive award of more than four times the amount of compensatory damages often "might be close to the line" of constitutional impropriety, *see Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 23–24 (1991), and that in cases where the defendant must already pay a substantial amount in compensatory damages, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee," *State Farm*, 538 U.S. at 425.

Here, the compensatory damages award of $9.4 million is substantial by any standard. The district court then added a staggering $237 million in monetary penalties on top of the already substantial compensatory award. This ratio of more than 25:1 far outstrips the permissible "relationship between the penalty and the

harm to the victim caused by the defendant's actions." *Cooper*, 532 U.S. at 433–35. The result was a penalty that was "grossly out of proportion to the possible actual damages," *Missouri Pac. R. Co.*, 230 U.S. at 351, and thus contravenes Supreme Court precedent, *see id.; State Farm*, 538 U.S. at 419; *Danaher*, 238 U.S. at 490–91.

Nor can the 25:1 ratio be reconciled with this Court's decisions applying the Supreme Court's due process analysis. For example, this Court held in *Thomas v. iStar Financial, Inc.* that a monetary penalty should not significantly exceed the actual damages where, as here, the defendant's conduct did "not result in physical injury . . . nor . . . evince an indifference to or reckless disregard for the health or safety of others." 652 F.3d 141, 148 (2d Cir. 2011). In the same vein, this Court concluded in *Turley v. ISG Lackawanna, Inc.* that a 2:1 ratio "constitut[ed] the maximum allowable" where the defendant's conduct was "egregious in the extreme" but, as here, the defendant already had to pay significant compensatory damages ($1.32 million) that were difficult to measure. *See* 774 F.3d 140, 165–67 (2d Cir. 2014); *see also Payne v. Jones*, 711 F.3d 85, 103 (2d Cir. 2013) (finding $300,000 punitive award excessive in light of $60,000 compensatory damages). These cases conflict with the decision below: the injury here was economic, UPS's conduct falls on the low end of the culpability scale, and the compensatory

damages were already substantial, so the 25:1 ratio is inexplicably and indefensibly high.

Confirming that this ratio is indicative of a grossly excessive award, courts around the country have struck down awards with much lower ratios. *E.g.*, *Jones v. United Parcel Serv., Inc.*, 674 F.3d 1187, 1207 (10th Cir. 2012) (holding that $2 million punitive award was excessive where "the jury's award of $630,307 in actual damages was [already] substantial"); *Mendez-Matos v. Municipality of Guaynabo*, 557 F.3d 36, 55 (1st Cir. 2009) (reducing punishment to an amount equal to compensatory damages where conduct was reprehensible but not particularly egregious); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 488–89 (6th Cir. 2007) (reversing punitive award of $3.5 million in a copyright infringement case when the plaintiff received a "substantial" compensatory award of $366,939); *CGB Occupational Therapy, Inc. v. RHA Health Servs., Inc.*, 499 F.3d 184, 193 (3d Cir. 2007) ("Heeding the Supreme Court's admonition that few awards exceeding the single-digit threshold will satisfy due process, we conclude that the 18:1 ratio in this case crosses the line into constitutional impropriety"); *Clark v. Chrysler Corp.*, 436 F.3d 594, 606 (6th Cir. 2006) (holding that 13:1 ratio was excessive and finding a ratio of 2:1 appropriate where defendant's conduct was only moderately reprehensible); *Bains LLC v. Arco Prods. Co., Div. of Atl. Richfield Co.*, 405 F.3d 764, 777 (9th Cir. 2005)

(instructing district court to remit $5 million punitive award "to a figure somewhere between $300,000 and $450,000" where "[t]he jury found $50,000 of actual harm"); *Boerner v. Brown & Williamson Tobacco Co.*, 394 F.3d 594, 603 (8th Cir. 2005) (remitting $15 million punitive damages award to $5 million where plaintiff received $4.025 million in compensatory damages); *Williams v. ConAgra Poultry Co.*, 378 F.3d 790, 799 (8th Cir. 2004) (remitting punitive damages award to equal the $600,000 compensatory damages).

In short, the 25:1 ratio in this case is an outlier. The district court's penalty award bears no reasonable relationship to the harm suffered and is also entirely incongruent with UPS's profits from any alleged illegal shipments ($475,000).

3. The third and final consideration under the Supreme Court's excessiveness analysis is "the sanctions imposed in other cases for comparable misconduct." *Cooper*, 532 U.S. at 434–35. As explained in UPS's brief, the criminal penalty applicable to the principal wrongdoer in a tax evasion case is a fine of equal to or double the amount of pecuniary loss suffered by the government. *See* U.S.S.G. §§ 2E4.1, 2T4.1, 8C2.4(d), 8C2.6. In other words, a criminal defendant found guilty of sending unstamped cigarettes in order to evade taxes would face a penalty reflecting a ratio between 1:1 and 2:1 to the loss in tax revenue—here, somewhere between $9 million and $18 million. Of course, the principal bad actors here were the various shippers who broke the law and violated

UPS's policy by shipping unstamped cigarettes. Nonetheless, the district court levied a penalty against UPS that far exceeds the criminal sanction that could be assessed against the principal wrongdoer.

Unsurprisingly, the district court could not cite a single case involving similar conduct where a monetary penalty of this magnitude was affirmed. The highest statutory award that has survived the Supreme Court's due process scrutiny is $1.62 million (about $40 million in today's dollars) in *Waters-Pierce Oil Company*, where the defendants engaged in a widespread conspiracy to fix oil prices. *See* 212 U.S. at 111. As for punitive damages, the largest award ever approved by the Supreme Court was $507.5 million in *Exxon Shipping*, 554 U.S. at 514. There, a shipping accident caused a devastating oil spill and total relevant compensatory damages of $507.5 million. *Id*. The Supreme Court held that "[a] punitive-to-compensatory ratio of 1:1" was the maximum penalty that could be assessed under federal common law in those circumstances. *Id*. Here, the district court imposed a penalty that was almost half of the colossal award in *Exxon Shipping*, even though the harm the court found here is not remotely comparable to the historic environmental disaster at issue in *Exxon Shipping*.

The $237 million penalty is untethered from precedent. It ignores the Supreme Court's factors for assessing the level of the defendant's culpability, it lacks any logical relationship to the harm caused by UPS's conduct, and it is out of

line with sanctions in comparable cases. All three prongs of the Supreme Court's analysis compel the conclusion that the award here is grossly excessive in violation of the due process clause. *Missouri Pac. R. Co.*, 230 U.S. at 351; *Danaher*, 238 U.S. at 490–91; *Gore*, 517 U.S. at 562; *State Farm*, 538 U.S. at 419.

C. The District Court's Failure To Perform The Required Analysis Was Error.

Contrary to the principles just discussed, the district court never engaged in any serious due process analysis of the monetary penalty. Its damages opinion (ECF 536) never mentions due process or cites any of the relevant cases. The district court's only discussion of due process is in its liability opinion (ECF 535)—where the court merely stated that it found the Supreme Court's decision in *Gore* distinguishable because (1) this case involves statutory penalties as opposed to punitive damages; (2) the lack-of-notice concerns in *Gore* are supposedly not present here; and (3) *Gore* was a suit by a single plaintiff and not a class action. (*Id*. at 206–09). Respectfully, all three points miss the mark:

1. The notion that the Supreme Court's due process jurisprudence applies only to punitive damages and not to statutory penalties is mistaken. As explained earlier, that jurisprudence actually began with statutory penalties, *see, e.g.*, *Waters-Pierce Oil Co.*, 212 U.S. at 111; *Missouri Pac. R. Co.*, 230 U.S. at 351, and the Court then relied on those early cases to extend those due process limitations to punitive damages, *see Browning-Ferris*, 492 U.S. at 276–77; *TXO Prod. Corp.*,

509 U.S. at 453–59. And when it explained the three-pronged analysis in *Cooper*, the Supreme Court repeatedly cited its decision in *Bajakajian*, another case involving statutory penalties. *See Cooper*, 532 U.S. at 435. The three-part framework simply helps determine when a monetary penalty meets the "grossly excessive" standard from the early statutory cases. *See Gore*, 517 U.S. at 583–85.

Consistent with that understanding, other appellate courts have applied the three-pronged analysis to monetary penalties assessed pursuant to statutes. *See U.S. ex rel. Drakeford v. Tuomey*, 792 F.3d 364, 389 (4th Cir. 2015) (applying three-pronged analysis to statutory penalties imposed under a federal statute); *San Huan New Materials High Tech, Inc. v. Int'l Trade Com'n*, 161 F.3d 1347, 1363–64 (Fed. Cir. 1998) (same); *U.S. Sec. & Exch. Comm'n v. Brookstreet Sec. Corp.*, 664 F. App'x. 654, 657 (9th Cir. 2016) (unpublished) (same); *see also Murray v. GMAC Mortg. Corp.*, 434 F.3d 948, 954 (7th Cir. 2006) (citing *State Farm* for proposition that an "unconstitutionally excessive" statutory penalty award must be reduced).[2] Most important, this Court has indicated that the Supreme Court's three-part due process inquiry applies to statutory penalties. In *Parker v. Time Warner Entertainment Co., L.P.*, 331 F.3d 13 (2d Cir. 2003), this Court considered the

[2] Some circuits have declined to apply the three-part framework to statutory penalties. *See, e.g., Sony BMG Music Entm't v. Tenenbaum*, 719 F.3d 67 (1st Cir. 2013); *Sanders v. Allison Engine Co.*, 703 F.3d 930 (6th Cir. 2012); *Capitol Records, Inc. v. Thomas-Rasset*, 692 F.3d 899 (8th Cir. 2012). For the reasons explained in the text, those decisions are incorrect.

certification of a class seeking statutory damages under the Cable Communications Policy Act. *Id*. at 15. In so doing, this Court acknowledged that "the potential for a devastatingly large damages award, out of all reasonable proportion to the actual harm suffered by members of the plaintiff class, may raise due process issues." *Id*. at 22. Specifically, the aggregation of claims "may expand the potential statutory damages so far beyond the actual damages suffered that the statutory damages come to resemble punitive damages." *Id*. Relying on *State Farm* and *Gore* and their requirement of a reasonable ratio between the penalty and the actual harm, this Court then recognized that "in a sufficiently serious case the due process clause might be invoked, not to prevent certification, but to nullify that effect and reduce the aggregate damage award." *Parker*, 331 F.3d at 22; *see id.* at 26 (Newman, J., concurring) (citing *State Farm*, *Gore*, and *Cooper* and reiterating the same due process concerns).

Against this background, the district court was not free to "distinguish" away the Supreme Court's due process jurisprudence. This case does not present a challenge to the legislative determination that, for example, a violation of the relevant provision of the New York Public Health Law (PHL) carries a maximum penalty of $5,000 per knowing shipment of unstamped cigarettes. Rather, the concern here is the district court's application of multiple penalties to create a total punishment that is wildly disproportionate to UPS's conduct and the harm caused.

Senseless punishment violates the due process guarantee against arbitrary deprivation of property, whether it comes in the form of punitive damages or in the form of statutory penalties. The same analytical framework applies in both scenarios. *Cf. Tull*, 481 U.S. at 423 n.7 (recognizing that "the remedy of civil penalties is similar to the remedy of punitive damages").

2. Relatedly, the district court was wrong to distinguish the Supreme Court's due process jurisprudence because this case supposedly did not involve a lack of advance notice of the potential penalties. True enough, the Supreme Court's decision in *Gore* relies in part on the *procedural* due process requirement "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." 517 U.S. at 574. But the district court overlooked the Supreme Court's holding that the due process clause also "imposes *substantive* limits beyond which penalties may not go." *TXO Prod. Corp.*, 509 U.S. at 453–54 (quotation marks omitted; emphasis added); *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 420 (1994) ("Our recent cases have recognized that the Constitution imposes a substantive limit on the size of punitive damages awards."); *Cooper*, 532 U.S. at 433 (same).

Explaining the substantive component in *State Farm*, the Court first noted that punitive awards are "aimed at deterrence and retribution" and then held that "[t]o the extent an award is grossly excessive, it furthers no legitimate purpose and

constitutes an arbitrary deprivation of property." 538 U.S. at 416–17. A grossly excessive award therefore violates substantive due process, "even when the defendant has adequate notice of the amount at issue." *VF Corp. v. Wrexham Aviation Corp.*, 686 A.2d 647, 661 (Md. Ct. Spec. App. 1996) (applying three-pronged analysis even though defendant had adequate notice), *aff'd in part and rev'd in part on other grounds*, 715 A.2d 188 (Md. Ct. App. 1998). All the advance notice in the world does not turn a grossly excessive award into a constitutionally permissible penalty.

But even assuming *arguendo* that a lack of notice were required for the due process clause to apply, the district court's distinction would still be error. UPS may have had notice of the penalty ranges stated in the AOD, the PHL, or the PACT Act—but UPS could not have reasonably expected that a court would apply these provisions as the district court did here, much less that it would aggregate the amounts under various statutes to assess duplicative punishment for the same conduct. The district court's "notice" distinction thus would fail in any event.

3. Even less persuasive is the district court's attempt to distinguish the Supreme Court's due process cases on the ground that those cases (specifically *Gore*) did not arise in the context of a class action. This distinction is misguided, both factually and legally. As a factual matter, this case was not a class action either. Nor was it a *parens patriae* action where the State would have been

representing the interests of consumers. Instead, this was the State (and the City) bringing suit in their capacity as revenue agents to collect unpaid taxes.

Legally, the district court's distinction overlooks that a defendant in a class action does not lose the substantive due process right to be free from grossly excessive punishment. Recognizing as much, this Court made clear in *Parker* that the three-pronged due process analysis applies to class actions, *see* 331 F.3d at 22, and other courts have employed it to review punitive awards in class actions, *see, e.g.*, *Engle v. Liggett Grp., Inc.*, 945 So. 2d 1246, 1264 (Fla. 2006), finding the distinction inconsequential, *see Burns v. Prudential Secs., Inc.*, 857 N.E. 2d 621, 653 (Ohio Ct. App. 2006).

The existence of due process protections also does not depend on the type or scope of the harm suffered by the plaintiffs, as the district court suggested (ECF 535, at 208). That the harm in this tax revenue case is different and perhaps more widespread than the harm in a single-plaintiff consumer-protection case like *Gore* does not mean that the due process analysis does not apply at all—it means only that some of the factors may weigh differently than they did in *Gore*. The three-pronged framework is flexible enough to govern a court's determination of whether a penalty is grossly excessive in a broad variety of cases, including this one.

* * * *

The district court performed no meaningful due process review at all. Its attempts to "distinguish" the Supreme Court's jurisprudence are not convincing—at bottom, they ignore that the Supreme Court decided long ago that statutory penalties *are*, in fact, subject to substantive due process limitations that prohibit awards "grossly out of proportion to the possible actual damages." *Missouri Pac. R. Co.*, 230 U.S. at 351. Applying the required analysis here makes clear that the $237 million penalty is precisely the type of arbitrary deprivation of property that the due process clause prohibits.

As this Court has noted, "[u]nchecked awards levied against significant industries can cause serious harm to the national economy." *Payne*, 711 F.3d at 94. If left unchecked, the $237 million penalty here would send the wrong message to businesses everywhere—that a district judge has the authority to arbitrarily assess duplicative punishment totally disproportionate to the offense and that due process protections can be "distinguished" away. The threat of such unfair punishment can chill commerce. Such unpredictable and irrational penalties could well lead to over-deterrence, leading companies to reject a large number of transactions that are almost certainly lawful and valuable based on the slight possibility that a few of them could trigger massive liability.

II. THE DISTRICT COURT'S CONSIDERATION OF UPS'S "FAILURE TO ACCEPT RESPONSIBILITY" VIOLATES PROCEDURAL DUE PROCESS.

The $237 million penalty award not only violates substantive due process, it also runs afoul of procedural due process: the district court admitted that it increased the punishment because UPS did not accept responsibility and instead exercised its right to contest the claims at trial.

1. "[T]he right to litigate the issues raised" is guaranteed "by the Due Process Clause." *United States v. Armour & Co.*, 402 U.S. 673, 682 (1971). Accordingly, "[d]ue process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972). This right to litigate and defend is empty if the defendant can be punished for exercising it. As the Supreme Court has put it, "[t]o punish a person because he has done what the law plainly allows him to do is a due process violation of the most basic sort." *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978). If punishment can be increased because the defendant exercised its right to defend and put the plaintiff to its burden of proof, then defendants face an unconstitutional dilemma—capitulate before trial by conceding liability and waive the due process right to defend, or face a serious risk of getting punished later for having exercised their right. Due process demands more: the right to defend is no right at all if defendants can be forced to waive that right on pain of punishment for exercising it.

Realizing this problem, courts around the country prohibit plaintiffs' lawyers from "urg[ing] the jury to punish the defendant for having the temerity to be in court," *Intramed, Inc. v. Guider*, 93 So. 3d 503, 507 (Fla. Ct. App. 2012), or from arguing that the defendant's assertion of a defense "is relevant to [prove entitlement to] punitive damages," *Holdgrafer v. Unocal Corp.*, 160 Cal. App. 4th 907, 935 & n.17 (2008). "[P]ursuing authorized forms of relief before courts or other governmental tribunals is a protected right and cannot be the basis for tort liability." *De Anza Santa Cruz Mobile Estates Homeowners Ass'n v. De Anza Santa Cruz Mobile Estates*, 94 Cal. App. 4th 890, 916, 918–22 (2001). Even "ultimately unsuccessful" "litigation positions and tactics" cannot support a punitive damages award. *Sobley v. S. Nat. Gas Co.*, 302 F.3d 325, 341–42 (5th Cir. 2002).

Criminal cases reflect the same rule. This Court has long recognized that increasing the punishment "based on a defendant's decision to stand on his right to put the Government to its proof rather than plead guilty is clearly improper." *United States v. Hutchings*, 757 F.2d 11, 14 (2d Cir. 1985) (quotation marks omitted; alterations adopted); *see also United States v. Stratton*, 820 F.2d 562, 564 (2d Cir. 1987); *United States v. Whitten*, 610 F.3d 168, 195 (2d Cir. 2010) (vacating sentence because defendant's failure to accept responsibility was considered). Other circuits have likewise "held that a defendant cannot be

punished by a more severe sentence because he unsuccessfully exercises his constitutional right to stand trial" instead of accepting responsibility. *United States v. Devine*, 934 F.2d 1325, 1338 (5th Cir. 1991); *United States v. Kleinman*, 859 F.3d 825, 842 (9th Cir. 2017); *United States v. Moskovits*, 86 F.3d 1303, 1310 (3d Cir. 1996); *United States v. Osmani*, 20 F.3d 266, 269 (7th Cir. 1994) (same).

Along the same lines, the Supreme Court has admonished that any punishment must be based on the underlying offense at issue in the case. As the Court put it in the civil law context, "[a] defendant should be punished for the conduct that harmed the plaintiff, not for being an unsavory individual or business." *State Farm*, 538 U.S. at 423. Defending the case is not the conduct that allegedly harmed the plaintiff—it is the constitutionally protected way a defendant obtains a determination of whether its alleged conduct harmed the plaintiff. Punishing a defendant for having defended the case is thus "a due process violation of the most basic sort." *Bordenkircher*, 434 U.S. at 363.

2. Openly flouting these principles, the district court declared in its damages opinion that it considered "UPS's lack of acceptance of responsibility for their actions at issue in this case" in determining "what quantum of damages and penalties are appropriate." (ECF 536, at 2). Frustrated by UPS's response to the court's request for information about the number of relevant packages, the court punished UPS for its "consistent unwillingness to acknowledge its errors" and

because "UPS has persisted in claiming it did nothing wrong." (*Id.*) That was fundamentally unfair. UPS had every right to contest the claims. The district court's decision to hold UPS's choice to exercise its constitutional right to defend against it infringes the right "to litigate the issues raised," *Armour & Co.*, 402 U.S. at 682, and "to present every available defense," *Lindsey*, 405 U.S. at 66. The order below puts future defendants before the impermissible choice discussed earlier. The only way UPS could have avoided the district court's increased punishment would have been to waive its right to defend and instead concede responsibility. Due process does not allow a court to force defendants into such an unconstitutional dilemma.

CONCLUSION

The district court's penalty award violates both substantive and procedural due process. This Court should reverse.

Respectfully submitted.

/s/ Jeffrey S. Bucholtz

Warren Postman
U.S. CHAMBER LITIGATION CENTER, INC.
1615 H Street, N.W.
Washington, DC 20062
Telephone: (202) 463-5685

Jeffrey S. Bucholtz
KING & SPALDING LLP
1700 Pennsylvania Avenue, NW
Washington, DC 20006
Telephone: (202) 737-0500
Facsimile: (202) 626-3737

Merritt E. McAlister
Val Leppert (application for admission pending)
KING & SPALDING LLP
1180 Peachtree Street NE
Atlanta, Georgia 30309
Telephone: (404) 572-4600
Facsimile: (404) 572-5100

Counsel for Chamber of Commerce of the United States of America

DATED: October 13, 2017

CERTIFICATE OF COMPLIANCE

In accordance with Fed. R. App. P. 32(a) and Circuit Rule 32.1(a), I certify that the foregoing brief, exclusive of the exempted portions as provided in Fed. R. App. P. 32(a)(7)(B)(iii), contains 6,004 words and therefore complies with the type-volume limitations of Fed. R. App. P. 32(a)(7).

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz

DATED: October 13, 2017

CERTIFICATE OF SERVICE

I hereby certify that on October 13, 2017, I caused an electronic copy of the foregoing to be filed and served electronically on all registered counsel through the Court's CM/ECF system.

/s/ Jeffrey S. Bucholtz
Jeffrey S. Bucholtz