

No. 13-35513; 13-35518

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ROCKY BIXBY; LAWRENCE ROBERTA; RONALD BJERKLUND;
CHARLES ELLIS; MATTHEW HADLEY; COLT CAMPREDON;
VITO PACHECO; BRIAN HEDIN; CHARLES SEAMON; AARON
ST. CLAIR; BYRON GREER; JASON ARNOLD,
Plaintiffs—Appellees—Cross-Appellants,

v.

KBR, INC.; KELLOGG BROWN & ROOT SERVICES, INC.,
Defendants—Appellants—Cross-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF OREGON
PAUL PAPAK, DISTRICT JUDGE • CASE No. 3:09-cv-00632-PK

**MOTION OF DRI – THE VOICE OF THE DEFENSE BAR
FOR LEAVE TO FILE AMICUS CURIAE BRIEF IN
SUPPORT OF DEFENDANTS—APPELLANTS—
CROSS-APPELLEES KBR, INC. AND KELLOGG
BROWN & ROOT SERVICES, INC.**

[SUBMITTED CONCURRENTLY WITH AMICUS CURIAE BRIEF]

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

Amicus curiae DRI – The Voice of the Defense Bar (DRI) respectfully moves for leave to file the attached amicus curiae brief. DRI obtained consent of the attorneys for Defendants—Appellants—Cross-Appellees KBR, Inc. and Kellogg Brown & Root Service, Inc. (KBR) to file its brief. DRI endeavored to obtain consent of Plaintiffs—Appellees—Cross-Appellants Bixby, et al., but was unable to do so. Although DRI informed Plaintiffs’ counsel of the subject matter of DRI’s brief, he refused to consent without pre-approving a draft of the brief. *See* Circuit Rule 29-3.

DRI is an international organization that includes more than 22,000 attorneys defending businesses and individuals in civil litigation. To this end, DRI seeks to address issues important to defense attorneys, to promote the role of the defense lawyer, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent. As such, DRI has a strong interest in securing a decision by this Court that a State may not impose punitive damages based on conduct occurring solely in a foreign country, especially where the foreign country does not allow for punitive damages and where the

foreign conduct grew out of efforts to advance an important federal interest. *See* Fed. R. App. P. 29(b)(1).

An amicus brief is desirable because this Court's decision will be important not just to the parties in this case, but to all who are engaged in foreign commerce. Further, the matters asserted in the proposed amicus brief are relevant to the disposition of the case because the availability of punitive damages is central to KBR's appeal. *See* Fed. R. App. P. 29(b)(2).

No party or party's counsel authored this brief in whole or in part. No party or party's counsel contributed money to fund the preparation or submission of this brief. No other person except DRI and its counsel contributed money to fund the preparation or submission of this brief. *See* Fed. R. App. P. 29(c)(5).

DRI respectfully requests that the Court grant leave to file the brief submitted concurrently with this motion.

August 2, 2013

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By: /s/ Eric S. Boorstin
Eric S. Boorstin

Attorneys for AMICUS CURIAE
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BAR**

CERTIFICATE OF SERVICE

I hereby certify that on August 2, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

Participants in the case who are registered CM/ECF users will be served by the appellate CM/ECF system.

Signature: /s/Eric S. Boorstin

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CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1, disclosure is hereby made by amicus curiae DRI – The Voice of the Defense Bar of the following corporate interests:

a. Parent companies of the corporation/association:

None.

b. Any publicly held company that owns ten percent (10%) or more of the corporation/association:

None.

INTEREST OF AMICUS CURIAE

DRI – The Voice of the Defense Bar is an international organization that includes more than 22,000 attorneys defending businesses and individuals in civil litigation. To this end, DRI seeks to address issues important to defense attorneys, to promote the role of the defense lawyer, and to improve the civil justice system. DRI has long been a voice in the ongoing effort to make the civil justice system more fair, efficient, and—where national issues are involved—consistent.

To promote these objectives, DRI participates as amicus curiae in cases raising issues of importance to its members, their clients, and the judicial system. DRI has a strong interest in securing a decision by this Court that a State may not impose punitive damages based on conduct occurring solely in a foreign country, especially where the foreign country does not allow for punitive damages and the foreign conduct grew out of efforts to advance an important federal interest. Such a decision will be of significant importance not only to the parties in this case, but to all potential defendants engaged in foreign commerce. *See Fed. R. App. P. 29(b)(1).*

STATEMENT OF COMPLIANCE WITH RULE 29(c)(5)

This brief is submitted pursuant to Rule 29(b) of the Federal Rules of Appellate Procedure, accompanied by a motion for leave to file. No party or party's counsel authored this brief in whole or in part; no party or party's counsel contributed money to fund the preparation or submission of this brief; and no other person except amicus curiae and its counsel contributed money to fund the preparation or submission of this brief.

SUMMARY OF THE ARGUMENT

The Supreme Court explained in *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) that a State may not impose punitive damages to regulate conduct that occurred outside of its jurisdiction. This prohibition is rooted both in the Due Process Clause and the Commerce Clause.

The Due Process Clause prohibits States from imposing punitive damages for a defendant's extraterritorial conduct because a potential defendant in a foreign jurisdiction does not have sufficient notice that its conduct in that jurisdiction may be civilly punished elsewhere. The Commerce Clause prohibits States from imposing punitive damages on

extraterritorial conduct because the Constitution reserves the power to regulate foreign and interstate commerce to Congress, not the States.

The district court should have applied these principles to overturn the punitive damages awarded under Oregon law because the damages were based solely on defendants' conduct in Iraq. The rationales underpinning *Gore* and *Campbell* are especially applicable in this case because plaintiffs made no showing that KBR's conduct violated Iraqi law, Iraqi law does not allow for punitive damages, and KBR's conduct grew out of its efforts to advance the United States war effort. The district court's use of Oregon criminal law to support the amount of punitive damages awarded was particularly inappropriate, given that Oregon's criminal statutes are expressly limited to conduct occurring within Oregon. The Court should vacate the punitive damages award against defendants.

ARGUMENT

I. ***GORE* AND *CAMPBELL* PROHIBIT A STATE FROM IMPOSING PUNITIVE DAMAGES ON EXTRATERRITORIAL CONDUCT, ESPECIALLY IF THAT CONDUCT IS LAWFUL WHERE IT OCCURRED.**

While compensatory damages are intended to compensate the *plaintiff* for harms suffered, punitive damages are aimed at the *State's*

interest in deterrence and retribution. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408, 416 (2003); *BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 568 (1996) (“Punitive damages may properly be imposed to further a State’s legitimate interests in punishing unlawful conduct and deterring its repetition.”). In fact, the particular State law at issue in this case—Oregon law—requires that 70 percent of its punitive damage awards be payable to the Oregon Attorney General rather than the plaintiff. Or. Rev. Stat. § 31.735 (2011).

A State does not have a legitimate interest, however, in punishing foreign conduct with foreign effects. *Gore* held that a State may not “impose sanctions on [a defendant] in order to deter conduct that is lawful in other jurisdictions.” 517 U.S. at 573. The Supreme Court reiterated this point a few years later in *Campbell*, when it observed again that “[a] State cannot punish a defendant for conduct that may have been lawful where it occurred.” 538 U.S. at 421. *Campbell* extended this principle one step further, explaining that States cannot impose punishment to regulate extraterritorial conduct, even if that conduct was *unlawful* where it occurred. *See id.* (noting as a “general rule” that a State does not have “a

legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State's jurisdiction”).

This Court, following the Supreme Court's lead, has already confirmed that a State cannot impose punitive damages even for unlawful extraterritorial conduct. *See White v. Ford Motor Co.*, 312 F.3d 998, 1017-1018 (9th Cir. 2002) (citing *Cont'l Trend Res., Inc. v. OXY USA Inc.*, 101 F.3d 634, 637 (10th Cir. 1996)).

II. GORE AND CAMPBELL'S PROHIBITION ON EXTRATERRITORIAL PUNITIVE DAMAGES IS ROOTED BOTH IN THE DUE PROCESS CLAUSE AND THE COMMERCE CLAUSE.

A. Due Process Clause.

The Due Process Clause of the Fourteenth Amendment prohibits any State from depriving a person of property without due process of law. However, “[p]unitive damages pose an acute danger of arbitrary deprivation of property.” *Campbell*, 538 U.S. at 417 (quoting *Honda Motor Co., Ltd. v. Oberg*, 512 U.S. 415, 432 (1994)). This danger exists because “[j]ury instructions typically leave the jury with wide discretion in choosing amounts, and the presentation of evidence of a defendant's net worth creates the potential that juries will use their verdicts to express

biases against big businesses, particularly those without strong local presences.” *Id.* (quoting *Honda Motor*, 512 U.S. at 432). Moreover, although punitive damages “serve the same purposes as criminal penalties, defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding.” *Id.*

To avoid damages so arbitrary as to violate the Fourteenth Amendment, “[e]lementary notions of fairness enshrined in [the Supreme Court’s] constitutional jurisprudence dictate that a person receive fair notice not only of [1] the conduct that will subject him to punishment, but also of [2] the severity of the penalty that a State may impose.” *Campbell*, 538 U.S. at 417 (quoting *Gore*, 517 U.S. at 574).

The Supreme Court’s prohibition on punitive damages for extraterritorial conduct enforces the notions of elementary fairness identified in *Gore* and *Campbell*. A defendant cannot possibly be said to have any sort of “fair notice” that its conduct in one jurisdiction will subject it to civil punishment according to the laws and public policies of another jurisdiction thousands of miles away.

B. Commerce Clause.

The Commerce Clause of Article I, Section 8 of the Constitution reserves the power to regulate foreign and interstate commerce to Congress, not the States. As *Gore* recognized, a State's power to impose burdens on an interstate market is subordinate to the federal power over interstate commerce. 517 U.S. at 571. *Gore* held that the punishment imposed on the defendant was unconstitutional, in part, because it "implicate[d] the federal interest in preventing individual States from imposing undue burdens on interstate commerce." *Id.* at 585.

In addition to the federal interest, *Gore* recognized that one State's power is constrained by the need to respect the interests of other States. *Id.* at 571. *Campbell* similarly held that "[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction." 538 U.S. at 422.

In sum, *Gore* and *Campbell*'s prohibition on punitive damages based on extraterritorial conduct protects both (1) the interests of the federal

government in regulating interstate commerce, and (2) the interests of each State in regulating its own affairs.

III. THE DUE PROCESS AND COMMERCE CLAUSE RATIONALES OF *GORE* AND *CAMPBELL* ARE ESPECIALLY APPLICABLE TO CONDUCT OCCURRING IN A FOREIGN NATION.

Applying a State's law to punish conduct that occurred solely in a *foreign country*, rather than just a foreign State, further obscures the notice a potential defendant must have of what conduct is proscribed and what penalties he risks. *Cf. Kiobel v. Royal Dutch Petroleum Co.*, 133 S. Ct. 1659, 1664 (2013) (quoting *Microsoft Corp. v. AT&T Corp.*, 550 U.S. 437, 454 (2007) (there is a "presumption" that domestic law "governs domestically but does not rule the world"). It also interferes with the federal power to regulate international commerce and the foreign interest in maintaining sovereignty.

Preserving the power of the federal government to speak for the whole nation may preclude a State from applying its own law to award punitive damages. When a jury awards significant punitive damages under State law based on foreign conduct, the jury imposes the State's (or jury's) policy choice abroad. *See Philip Morris USA v. Williams*, 549 U.S.

346, 352-53 (2007). However, States are generally barred from intruding on the exclusive national authority in foreign affairs. Restatement (Third) of Foreign Relations Law of the United States § 402 (1987), reporter's note 5 (1987) (citing *Zschernig v. Miller*, 389 U.S. 429, 432 (1968)). The Commerce Clause further constrains a State's power to project its laws internationally because of "the special need for federal uniformity" "[i]n the unique context of foreign commerce." *Wardair Can. Inc. v. Fla. Dep't. of Revenue*, 477 U.S. 1, 8 (1986). Thus, a party engaging in international commercial conduct to further a critical federal interest would have good reason to believe that its conduct would not be punished through state tort law.

The interests of a sovereign foreign nation may also preclude a State from applying its own law abroad. "[I]nternational comity encourages U.S. courts to apply foreign law in appropriate cases or to limit domestic assertions of jurisdiction in order to respect the sovereignty of foreign states and their courts." Donald Earl Childress III, *Comity As Conflict: Resituating International Comity As Conflict of Laws*, 44 U.C. Davis L. Rev. 11, 11 (2010). Punitive damages in particular implicate international comity. Most civil law countries do not allow for punitive damages in

private actions, and consider punitive damages to be a penal sanction that may be imposed only in criminal proceedings. John Y. Gotanda, *Punitive Damages: A Comparative Analysis*, 42 Colum. J. Transnat'l L. 391, 396 (2004). Some countries even consider the prohibition on punitive damages to be a matter of fundamental public policy, and for that reason refuse to recognize foreign awards of punitive damages. *Id.*; see also Francesco Quarta, *Recognition and Enforcement of U.S. Punitive Damages Awards in Continental Europe: The Italian Supreme Court's Veto*, 31 Hastings Int'l & Comp. L. Rev. 753 (2008); Adam Liptak, *Foreign Courts Wary of U.S. Punitive Damages*, N.Y. Times, Mar. 26, 2008. To award punitive damages based solely on foreign conduct risks impeding a sovereign nation's ability to set the permissible means to punish conduct within its own borders.

IV. ANY PUNITIVE DAMAGES IN THIS CASE VIOLATE *GORE* AND *CAMPBELL*.

Although the district court addressed KBR's challenge to the amount of punitive damages, see DC Dkt. 724 at 57-61, the district court never addressed KBR's argument that its conduct in Iraq could not be the proper basis for *any* punitive damages under Oregon law, see DC Dkt. 654 at 15,

54 (raising argument); DC Dkt. 717 at 58-59 (same). This was error. Before the court applied the three *Gore/Campbell* guideposts to determine whether the punitive damages award was excessive, it should have first assessed whether it was permissible for Oregon to award any punitive damages for extraterritorial conduct. *See White v. Ford Motor Co.*, 312 F.3d 998, 1013 n.56 (9th Cir. 2002).

As noted, the plain language of *Gore* and *Campbell* prohibits all punitive damages based solely on conduct occurring outside of the punishing State. *See* Part I. Moreover, the Due Process and Commerce Clause rationales behind that language squarely apply to the circumstances of this case. Plaintiffs never showed that KBR's conduct was unlawful in Iraq, where it occurred. *See Campbell*, 538 U.S. at 421 ("A State cannot punish a defendant for conduct that may have been lawful where it occurred."); *Bordenkircher v. Hayes*, 434 U.S. 357, 363 (1978) ("To 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."). KBR worked at the Iraqi oil facility under a contract with the U.S. Army to help it in a time of war, a quintessential federal concern that KBR should expect to be free from state regulation. *See Am. Ins. Ass'n v. Garamendi*,

539 U.S. 396, 416 (2003) (“[U]ntangling government policy from private initiative during wartime is often so hard that [federal] diplomatic action settling claims against private parties may well be just as essential in the aftermath of hostilities as diplomacy to settle claims against foreign governments.”). Iraq itself prohibits civil punitive damages, *see* DC Dkt. 556-1, and its policy choice should be respected as a matter of international comity. KBR should not have been expected to predict that its lawful conduct to help the United States war effort in a country that prohibits punitive damages would later be subject to punishment by the State of Oregon.

This Court should reject any attempt to justify the imposition of punitive damages under Oregon law on the theory that KBR’s conduct affected Oregon citizens working in Iraq. *Gore* and *Campbell* preclude such reasoning. Aside from the plain language of those opinions prohibiting extraterritorial punishment, both cases rely on *Bigelow v. Virginia*, 421 U.S. 809, 824 (1975), which observed that a State does not have authority to regulate extraterritorial conduct to protect the safety of its own citizens in other jurisdictions: “A State does not acquire power or supervision over the internal affairs of another State merely because the

welfare and health of its own citizens may be affected when they travel to that State.” *Gore*, 517 U.S. at 571 n.16; *Campbell*, 538 U.S. at 421. Consistent with the reasoning of *Bigelow*, the Seventh Circuit has held that the domiciliary States of passengers killed in an air crash in a foreign State had no interest in imposing punitive damages on the defendants because “[t]he legitimate interests of these states . . . are limited to assuring that the plaintiffs are adequately compensated for their injuries and that the proceeds of any award are distributed to the appropriate beneficiaries.” *In re Air Crash Disaster Near Chicago, Illinois on May 25, 1979*, 644 F.2d 594, 613 (7th Cir. 1981). Under *Gore* and *Campbell* (and consistent with *Bigelow* and *In re Air Crash Disaster*), Oregon has no legitimate basis for imposing punitive damages to regulate Iraqi conduct merely because it affected an Oregon domiciliary in Iraq.

V. USING OREGON CRIMINAL LAW TO SUPPORT THE AMOUNT OF PUNITIVE DAMAGES IS ALSO IMPROPER.

Not only did the district court err by allowing punitive damages based on conduct that occurred solely in Iraq, it compounded that error by using Oregon’s criminal assault statute to support the amount of punitive damages awarded, *see* DC Dkt. 724 at 59-60. KBR never received any “fair

notice” that its conduct in Iraq would be judged based on Oregon’s criminal law. Especially not when Oregon’s criminal jurisdiction statute, on its face, does not purport to reach the foreign conduct at issue in this case.

“Under the common law, the exclusive grounding of state jurisdiction is the territorial principle: a state has power to make conduct or the result of conduct a crime only if the conduct takes place or the result happens within its territorial limits.” 4 Wayne R. LaFave et al., *Criminal Procedure* § 16.4(c) (2012) (footnotes omitted). Oregon’s criminal jurisdiction statute, Or. Rev. Stat. § 131.215 (2011), follows this territorial principle. It extends only to cover conduct or consequences in Oregon that are an element of a criminal offense, ¶ (1), an attempt to commit a crime in Oregon, ¶ (2), a conspiracy to commit a crime in Oregon, ¶ (3), a conspiracy in Oregon to commit a crime elsewhere, ¶ (4), the omission of a legal duty that must be performed in Oregon, ¶ (5), or the violation of a statute that expressly prohibits conduct outside of Oregon affecting a statutorily protected interest in Oregon, ¶ (6).

No part of Oregon’s criminal jurisdiction statute is satisfied by conduct that occurred solely in Iraq causing an injury in Iraq. KBR would

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[FED R. APP. P. 32(a)(7)(C)]**

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August 2, 2013

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I hereby certify that on August 2, 2013, I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system.

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