NO. 07-1216

IN THE

Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

BRIEF IN OPPOSITION

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QUESTIONS PRESENTED

The Oregon Supreme Court first reviewed this case after this Court granted, vacated, and remanded (GVR) the matter for reconsideration in light of *State Farm Mutual Automobile Insurance Co., v. Campbell,* 538 U.S. 408 (2003). The Oregon courts reviewed various federal claims made by Philip Morris based on *State Farm* and reinstated the verdict. Neither court, however, considered the state law issues raised and briefed by Respondent throughout the litigation. This Court granted certiorari and then announced a new rule involving legitimate and illegitimate uses of evidence concerning harm to others and indicated that certain protections must be provided "upon request." On remand, the Oregon Supreme Court reached Respondent's other claims about the propriety of Petitioner's request for a jury instruction.

In light of this history, the questions presented by the Petition should properly be considered to be:

1. Whether, after this Court remanded a case to state court with instructions to apply a new standard to be invoked "upon request," the state court may consider state law grounds previously asserted and briefed to decide whether such a proper request was made.

2. Whether the ratio between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict or whether the reprehensibility of defendant's misconduct remains "the most important indicium of the reasonableness of a punitive damages award."

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BRIEF FOR RESPONDENTS IN OPPOSITION

Respondent Mayola Williams respectfully requests that this Court deny the petition for writ of certiorari, seeking review of the Oregon Supreme Court's most recent decision in this case.

STATEMENT OF THE CASE

Each of the Oregon Supreme Court's decisions in this case has been on remand from this Court. After the Oregon Court of Appeals heard the first appeal from the trial court, the state's high court declined discretionary review. This Court issued a GVR in light of its new decision in *State Farm Mutual Automobile Insurance Co. v. Campbell,* 538 U.S. 408 (2003). The Oregon Court of Appeals and the Oregon Supreme Court then reviewed the case under the federal standards set forth in that case. Both courts declined at that time to consider Respondent's state-law arguments because they believed their understanding of the federal issue was dispositive.

This Court subsequently granted certiorari. After briefing and oral argument, it reversed and remanded so that the Oregon Supreme Court could apply the new standard it announced. *Philip Morris USA v. Williams,* 127 S.Ct. 1057, 1065 (2007). The Court reaffirmed "a State's legitimate interest in punishing unlawful conduct and deterring its repetition." *Id.* at 1062 (citation omitted). It also specifically endorsed the propriety of the Oregon Supreme Court's prior ruling that a "'jury could consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large.'" *Id.* at 1064, quoting Pet. at 48a. It further held that

"[e]vidence of actual harm to nonparties can help to show that the conduct that harmed the plaintiff also posed a substantial risk of harm to the general public, and so was particularly reprehensible." *Id.* Thus, a jury may punish misconduct to reflect the degree of its reprehensibility.

At the same time, however, a jury may not go further and directly "punish for harm caused strangers," 127 S.Ct. at 1064, because there is "no opportunity to defend against the charge, by showing, . . . that the other victim was not entitled to damages." *Id.* at 1063.

This Court required that, in appropriate cases and when properly requested, there be some protection against juries answering the "wrong question, i.e., seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." 127 S.Ct. at 1064. It found the grounds upon which the Oregon court rejected Philip Morris's Requested Instruction No. 34 unclear: although "one might read some portions of the Oregon Supreme Court's opinion as focusing only upon reprehensibility," "we believe that the Oregon Supreme Court applied the wrong constitutional standard." *Id.* at 1064, 1065. That belief was based on a footnote in the Oregon court's opinion that opined that "[i]t is unclear to us how a jury could 'consider' harm to others, yet withhold that consideration from the punishment calculus," and "[i]f a jury cannot punish for the conduct, then it is difficult to see why it may consider it at all." *Id.* at 1064-65, quoting 127 P.3d, at 1175, n. 3 (Pet. at 49a n.3).

The case was remanded to the Oregon Supreme Court to "apply the standard" now enunciated for the first time. *Id.* at 1065. That standard requires that where the risk of a jury misunderstanding the legitimate role of evidence concerning harm to others is "significant," the trial court "upon request, must protect against that risk." *Id.* The Court gave states flexibility to decide what kind of process to afford but insisted that states must provide "*some* form of protection in appropriate cases." *Id.* (emphasis by the Court).

Upon remand, the Oregon Supreme Court meticulously reviewed this Court's decision and faithfully followed it. *See* Pet. at 3a, 7a-12a. This Court required protection against jury confusion "upon request," and the Oregon Supreme Court considered that requirement first, including objections to Philip Morris's requested instruction raised by Mrs. Williams throughout the litigation, *see* Pet. at 9a n.2, some of which were ruled upon by the trial court in Respondent's favor. The court found that Philip Morris's legally erroneous and self-contradictory proposed instruction failed to satisfy reasonable and longstanding state-law requirements on what constitutes a proper request.

Nothing in this Court's prior opinion required Mrs. Williams to abandon her state-law grounds for rejecting the requested instruction. Contrary to Philip Morris's naked assertion that the Oregon Supreme Court applied a "rule that had never before been invoked by any Oregon court during the nine years of appellate litigation in this case," Pet. at 2, the Oregon courts, in this very matter, had repeatedly asserted the venerable "clear and correct

in all respects" requirement. *See, e.g.*, Pet. at 140a & 52a. Once the Oregon court determined there was no error in denying Philip Morris's Requested Instruction No. 34, the court had no cause to reexamine again the size of the punitive damage award for gross excessiveness under the Due Process Clause.

A. TRIAL

The claim that gave rise to this litigation involved a massive market-directed fraud driven by deliberate decisions at the company's highest levels that were intended to deceive customers and knowingly endanger their health in order to reap enormous profits. It was one of the longest running, most profitable, and deadliest frauds in the annals of American commerce, and one that continued until after the verdict in this case. Undertaken in concert with other cigarette manufacturers, the scheme led by Petitioner created the largest preventable public health disaster of the twentieth century. Philip Morris knew that their seemingly science-based campaign to dispute that smoking caused cancer would have a special impact on those who were highly addicted, as Jesse Williams was. Yet, for more than 40 years, Philip Morris knew, and admitted internally, that what they were denying was actually true: cigarettes cause lung cancer.

For example, in response to the 1964 Surgeon General's Report that smoking contributed substantially to mortality rates from lung cancer and other diseases, a Philip Morris vice president wrote that "we must, on a future basis, give smokers a psychological crutch and self-rationale to continue smoking." Pet. at 32a. Thereafter, the self-described

"brilliantly conceived and executed" public relations strategy to "defend itself" in "litigation, politics, and public opinion" was altered from the "vigorous denial" approach to a "counter propaganda" plan. J.A. 240a (2006 filing); Ex. 80 at 7-8, 83 at 1. In short, the new plan was designed to suggest "ready-made credible alternatives" to the idea that smoking causes disease, while still insisting that there was "no proof that smoking causes cancer." J.A. 319a. Philip Morris maintained this position as the industry leader throughout the 1970s, 1980s, and 1990s.

The evidence at trial established that Jesse Williams died of lung cancer in 1997 as a result of Philip Morris's lethal fraud. By then, Philip Morris had known for at least 40 years that cigarettes cause cancer and that millions of American smokers, about half of whom were Philip Morris customers, were addicted to the nicotine in cigarettes.

Although evidence established the breadth and general effectiveness of this extensive campaign, no evidence was adduced of other individuals who suffered harm. In support of a lesser assessment of reprehensibility, Philip Morris conceded that "[t]he jury found that one person – Jesse Williams – was harmed by the purported 'false controversy.'" Defendant's Reply Br. in Support of Motion for Reduction of Punitive Damages Award at 4-5.

Before closing arguments, Philip Morris proposed an extensive punitive damages instruction, its No. 34, spanning three-and-a-half pages, which the trial court reviewed on March 23, 1999. Pet. at 155a. The instruction, *inter alia,* would have told the jury:

- that it could consider harm suffered by non-parties in determining the reasonable relationship between punitive and compensatory damages.

- that the extent of harm to others was, with reprehensibility, "the paramount consideration" in evaluating punitive damages.

- that Philip Morris could be punished only to the extent that the harmful effects of cigarettes were unknown to the public.

- that the reprehensibility of Philip Morris's misconduct depended in part on the extent of its motivation to receive "illicit" profit from the sale of a legal product.

- that the Oregon statutory punitive damages factors were among the considerations the jury "may find to bear" on reprehensibility; and,

- that it could not "allow [its] decision to be influenced by the defendant's financial condition" but could "consider the defendant's financial condition as part of the process of arriving at an appropriate punishment."

App. at 1a-4a. Each of these were wrong as a matter of federal or state law.

At the instructional conference, focusing on the language Philip Morris says constituted a clarifying instruction on harm to others, the judge asked Philip Morris's counsel whether precedent requires an instruction "about proportionality." Pet. at 159a. Counsel responded, "It has always been addressed

post-verdict." *Id.* The judge then replied, "That's where I'm going to address it then." *Id.* The judge further explained that there was no need to instruct the jury not to compensate "for other claimants who haven't yet come to court," because "we have already told the jury that punitive damages are not compensatory damages." Pet. at 161a. The judge further stated that the point is "adequately guarded against by telling the jury punitive damages are not designed to . . . 'compensate plaintiff or anyone else for damages caused by defendant's conduct." Pet. at 162a. Rather than reject the idea that a jury may not punish for harm to others, the judge said, "we are not here to punish for other plaintiffs' harms." App. at 6a.

Plaintiff's counsel then raised objection to the use of the term "illicit profits," App. at 18a, which the Oregon Supreme Court later also found to be a fatal defect. Pet. at 20a-21a. The trial court agreed and declined to instruct on "illicit" profit. App. at 19a.

As this history makes clear, Philip Morris mischaracterizes the trial court's rejection of its proposed instruction when it claims that the trial judge determined that an instruction on harm to others "was *not* constitutionally required." Pet. at 4. *Cf.* App. at 6a (The court: "we are not here to punish for other plaintiffs' harms"). The trial court made no such holding but instead determined that no precedent required the court to give defendant's legally incorrect, argumentative, and confusing instruction. App. at 9a-10a, 13a-14a, 18a-19a. After closing argument, Philip Morris took exception to the trial court's failure to give its No. 34 *as a whole*. App.

at 23a ("We also take exception to the court's failure to give Defendant's 34 on punitive damages.").[1]

B. OREGON COURT OF APPEALS PROCEEDINGS

1. The 2002 Decision

On appeal, Philip Morris did not argue that the trial court should have instructed the jury not to punish it for causing harm to others. Its argument to the court of appeals (and to the Oregon Supreme Court thereafter) was that the trial court should have instructed that "punitive damages should bear a reasonable relationship to Williams' harm." Respt's Br. in Court of Appeals at 8, 44. Respondent's claim that it contended that "the jury should have been instructed not to impose punitive damages to punish for harms to non-parties" is simply false. Pet. at 5.[2]

The court of appeals rejected Philip Morris's argument that a proportionality instruction should have been given, noting that proposed instruction No. 34 was not correct in all respects. Pet. at 140a,

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[1] Although this Court assumed that Philip Morris asked for its instruction in response to closing arguments, 127 S.Ct. at 1061, 1063, the instructional conference in fact took place the day before closing arguments began. App. at 22a.

[2] Under Oregon's Rules of Appellate Procedure, Philip Morris failed to preserve the argument on which it now relies. ORAP 5.45(1) ("No matter claimed as error will be considered on appeal unless the claimed error was preserved in the lower court and is assigned as error in the opening brief.").

citing *Simpson v. Sisters of Charity of Providence in Oregon,* 588 P.2d 4 (Or. 1978). Philip Morris' repeated contention that the Oregon courts "never identified" the "clear and correct in all respects rule" is thus not true. The court of appeals also specifically acknowledged that Plaintiff raised other issues in the requested instruction that it did not reach. Pet. at 140a.

2. The 2004 Decision

After the Oregon Supreme Court denied discretionary review, this Court returned the case to the Court of Appeals for reconsideration in light of its new decision in *State Farm*. *See Philip Morris USA, Inc. v. Williams,* 540 U.S. 801 (2003). The Court of Appeals found nothing in *State Farm* that changed its analysis of the instructional issue. In addition, the court noted that

> As plaintiff points out, defendant's proposed instruction is also confusing, and the trial court could properly have refused to give it for that reason.

Pet. at 105a, n.6.

C. OREGON SUPREME COURT PROCEEDINGS

1. The 2006 Decision

While most of its opinion after the *State Farm* remand addressed due process excessiveness, the Oregon Supreme Court agreed with the Court of Appeals that Requested Instruction No. 34 "was incorrect under state law," because it would not

permit the jury to "consider whether Williams and his misfortune were merely exemplars of the harm that Philip Morris was prepared to inflict on the smoking public at large." Pet. at 48a. Citing *Hernandez v. Barbo Machinery Co.*, 957 P.2d 147 (Or. 1998), the Court found no error in refusing a requested jury instruction that "'is not correct in all respects.'" Pet. at 52a. As explained in its 2008 decision, the Oregon Supreme Court "did not need to address [plaintiff's] alternate arguments" about why the request for Instruction No. 34 was incorrect because of its holding on the "federal due process" issue. Pet. at 9a n.2.

2. The 2008 Decision

On remand from this Court's 2007 decision, the Oregon Supreme Court revisited the instructional issue again. After extensively detailing that decision, the Oregon Supreme Court described its task as applying the new "constitutional standard," which meant that it had to determine "whether the trial court erred in refusing to give proposed jury instruction No. 34." Pet. at 12a-13a. The Court first undertook to address state law issues that Respondent had raised throughout the proceedings. The court reviewed its "well-understood standard governing claims of error respecting a trial judge's refusal to give a proffered instruction" and stated that reversal will be denied "unless the proposed instruction was '"clear and correct in all respects, both in form and in substance, and . . . altogether free from error."'" Pet. at 14a, quoting *Beglau v. Albertus*, 536 P.2d 1251, 1256 (Or. 1975).

The Oregon court acknowledged that the plaintiff had taken issue, *inter alia,* with the requested

instruction's treatment of the state statutory factors as merely permissive, as well as its focus on motivation to obtain "illicit" profits. The court "agree[d] with plaintiff on both points." Pet. at 15a. Philip Morris made no effort to defend the correctness of proposed instruction No. 34 on any of the grounds Plaintiff raised.

The court held that proposed instruction No. 34 contained legal error and was not therefore "correct in all respects" as required under Oregon law. Pet. at 21a.

REASONS FOR DENYING THE PETITION

I. PHILIP MORRIS HAS MISREPRESENTED THE RULING BELOW

Philip Morris has seriously misrepresented the decision below, as it has the decision of the trial judge. In a bid to make it appear that the Oregon courts are operating in "defiance" of this Court, Pet. at 13, Philip Morris purports to quote the Oregon Supreme Court and claim that it "refused to 'address the constitutional standard that the United States Supreme Court has articulated' and instead 'adhere[d] to' the opinion that this Court had rejected." Pet. at 11-12. To manufacture such a quotation, Philip Morris ignores what that court said and what it meant, which was:

> it is our task to apply the constitutional standard set by the Supreme Court . . . however, there is a preliminary, independent state law standard that we must consider, *before* we address the

> constitutional standard that the United States Supreme Court has articulated.

Pet. at 12a-13a (emphasis added). In doing so, that court was operating as this Court suggested:

> we understand the Court's use of the phrase, "upon request", to be an acknowledgement of the authority of states to place reasonable procedural requirements on any request for instructions. . .

Pet. at 13a n.4 (citation omitted).

After performing a thorough analysis that spans nine pages in the Petition's Appendix, the Oregon Supreme Court concluded that

> even assuming that proposed jury instruction No. 34 clearly and correctly articulated the standard required by due process, it contained other parts that did not state the law correctly. Accordingly, the trial court did not err in refusing to give it.

Pet. at 21a. The court then reaffirmed the "remaining aspects of the judgment against defendant." Pet. at 21a.

Misrepresentation also is the most charitable description that can be given to Philip Morris's statement that the longstanding procedural rule relied upon by that court constitutes a "novel and patently unreasonable application" of a rule "never before . . . invoked by any Oregon court during the

nine years of appellate litigation in this case." Pet. at 2. In fact, the rule was repeatedly invoked by the plaintiff, the Oregon Court of Appeals, and the Oregon Supreme Court. *See* Pet. at 52a & 140a. The flaws identified by the court below were identified at trial and throughout the appellate process. *See, e.g.*, Pet. at 9a, 140a; App. at 19a; Appellant's Reply and Cross-Responding Br. in Court of Appeals, May 2001, at 34-35.

Given the wide gulf between what has actually transpired in this case and what Philip Morris claims has occurred,[3] Respondent respectfully submits that this case is a particularly poor vehicle for the exercise of this Court's discretion to assert jurisdiction.

II. THE OREGON SUPREME COURT FAITHFULLY APPLIED THIS COURT'S STANDARD ON REMAND

A. Oregon Properly Considered Respondent's Timely State Law Objections to the Proposed Instruction

In its decision last term, this Court stated that it "believe[d]" that the Oregon Court had "applied the

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[3] Philip Morris also claims it "argued at the charge conference that the Constitution prohibits punishment for harm to non-parties." Pet. at 22, citing Pet. at 162a. A casual statement, unsupported by authority, that "I suppose you could declare the statute unconstitutional at some level" does not constitute preservation of a constitutional objection. *See Oregon v. Wyatt,* 15 P.3d 22, 27 (Or. 2000).

wrong standard" and remanded for reconsideration and application of the proper standard. That standard is that "upon request" in appropriate cases a court must protect against a significant risk that a civil jury might award punitive damages to punish for harm to non-parties. 127 S.Ct. at 1065. The Oregon Supreme Court understood that holding. Pet. at 11a. It "review[ed] that opinion in some detail." Pet. 9a. *See* Pet. at 7a-12a (describing and quoting from this Court's opinion). Philip Morris does not dispute the Oregon Supreme Court's description of this Court's opinion.

The Oregon Supreme Court also understood that the new constitutional rule announced by this Court "arose in the context of the trial court's refusal to give a particular proposed jury instruction that defendant had requested." Pet. at 3a. Agreeing with Plaintiff's well-preserved argument, the Oregon Supreme Court held that Philip Morris, in its Requested Instruction No. 34, had not made a proper request.[4] Pet. 21a. Its holding plainly applied the "upon request" provision of this Court's remand standard, finding it had not been satisfied. *See* Pet. 13a n.4.

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[4] Philip Morris's attempt to compare the Oregon Supreme Court to South Carolina's in *Yates v. Aiken,* 484 U.S. 211 (1988), Pet. at 14, is unavailing. In *Yates,* this Court found that South Carolina wrongly ignored a decision that predated its ruling and had no procedural requirements that prevented application of that decision. Neither condition adheres to this matter.

The Oregon Court directly addressed this Court's remand instruction.[5] Petitioner's accusations of "defiance" and "disobedience" are groundless.

B. The Oregon Courts Could Not "Waive" Mrs. Williams's State Issues

Philip Morris concedes that the Oregon Supreme Court "unquestionably had the authority to interpose a valid independent and adequate state ground for refusing to consider the claim," but complains that "the Oregon courts lost the prerogative to invoke a state-law procedural bar" by not ruling on it in three prior "opportunities." Pet. at 16.

Yet, in its most recent decision, the Oregon Supreme Court noted that Plaintiff had consistently argued "that the refusal to give proposed instruction No. 34 was not error, because that instruction

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[5] Philip Morris, here as it did in the Oregon Supreme Court, asks for a new trial on the theory that the remand instruction was not addressed. Pet. at 15. While that is wrong and no flaw in the opinion below justifies the prayed-for remedy, Mrs. Williams submits that any appeal for a new trial would be manifestly unfair to a plaintiff nine years after the original trial and inappropriate under *Cooper Industries, Inc. v. Leatherman Tool Group, Inc.*, 532 U.S. 424 (2001). There, this Court insisted on "a *de novo* standard of review when passing on [trial] courts' determinations of the constitutionality of punitive damage awards," which it held does not inappropriately intrude on the proper function of juries or trial courts. *Id.* at 436, 437-40. This Court anticipated that the Oregon Supreme Court's *de novo* review of the award would cure any constitutional defect. 127 S.Ct. at 1065.

misstated other points of law." Pet. at 9a n.2. This Court, among others, has long noted that "as the prevailing party, the appellee was of course free to defend its judgment on any ground properly raised below whether or not that ground was relied upon, rejected, or even considered by the District Court or the Court of Appeals." *Washington v. Confederated Bands and Tribes,* 439 U.S. 463, 478 n.20 (1979). *Accord Outdoor Media Dimensions, Inc. v. Oregon,* 20 P.3d 180, 195-96 (Or. 2001).

Mrs. Williams's consistently reiterated objections distinguish this case from the controversy in *NAACP v. Alabama ex rel. Patterson,* 360 U.S. 240 (1959) (*per curiam*), on which Philip Morris relies. Pet. at 17-19. *Patterson* holds only that a litigant cannot invoke and a state court cannot rely on arguments *presented for the first time after remand.* 360 U.S. at 242-43. The burden had been on the party, not the court, to make and preserve those arguments. Moreover, in *Patterson,* but not here, prior state court precedent, on which Petitioner NAACP had properly relied, was inconsistent with the new procedural obstacles that the court devised. *See NAACP v. Alabama,* 357 U.S. 449, 457-58 (1957). In this case, as detailed below, the ruling was consistent with longstanding Oregon precedent.

Here, Mrs. Williams has repeatedly invoked Oregon's well-established "clear and correct in all respects" standard and has identified numerous state-law flaws in the instruction. This is not an instance of result-oriented pretext by a court, but instead a court addressing a party's timely objections as alternate grounds for its holding.

C. There is no Requirement that State Law Issues Precede the Determination of Federal Issues

It is Philip Morris, rather than the Oregon Supreme Court, that has asserted a novel and unprecedented "requirement" when the company claims that the "Oregon courts were required to apply [state rules] *before*—and not *after*—this Court decided the federal issue." Pet. at 3. Courts retain discretion to determine which issues they will address, which they find unnecessary to address, and in what order they will address them. *Cf. Lytle v. Household Mfg., Inc.*, 494 U.S. 545, 552, n.3 (1990) (finding it would not be a sensible exercise of discretion to address unnecessary issues). Even if it is often prudent to decide state issues before addressing federal constitutional issues, there is no requirement that the issues be resolved in that fashion.

Oregon's usual practice of considering state grounds before addressing federal issues in appropriate cases is based on the idea that where state law properly disposes of a question, there is no federal constitutional violation. *See, e.g., Oregon State Police Officers' Ass'n v. Oregon,* 783 P.2d 7, 10-11 (Or. 1989) ("The state does not deny any right claimed under the federal Constitution when the claim before the court in fact is fully met by state law."). That may support a prudential practice of considering state issues first, but it is not a

requirement from which courts may not vary.[6]

In fact, other state courts have addressed federal constitutional concerns first. Thus, for example, in *Vermont v. Badger,* 450 A.2d 336 (Vt. 1982), the Vermont Supreme Court first analyzed search-and-seizure and self-incrimination questions under the Fifth Amendment and then reached the cognate issues under the state constitution afterwards, resolving the matter on adequate and independent state-law grounds, an order of analysis that Philip Morris contends is prohibited. Vermont's court is not the only one to have adopted that order of analysis. *See, e.g., Avdel Corp. v. Mecure,* 277 A.2d 207, 209 (N.J. 1971) (looking "first to the rulings of the United States Supreme Court" to determine the due process limits of the state's long-arm rule).

III. OREGON'S 'CLEAR AND CORRECT' RULE IS FIRMLY ESTABLISHED AND REGULARLY FOLLOWED

Philip Morris's claim that it had no notice that Oregon followed the "clear and correct in all respects" rule or that it could be applied as the Oregon Supreme Court did in its most recent review, Pet. at 20, cannot be taken seriously. The "clear and correct"

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[6] Recently, the Oregon Court of Appeals reviewed a constitutional challenge by first examining federal due process grounds and, because that did not dispose of the matter, *then* reached claims that the practice violated the Oregon Constitution. *Smith v. Dept of Corrections,* -- P.3d ---, 2008 WL 942656 (Or. App. Apr. 9, 2008). Clearly, there is no requirement that Oregon courts first dispose of state issues before reaching federal ones.

rule was invoked by the Oregon appellate courts three different times in this case, including the decision below. Pet. 14a, 52a, 140a. The rule dates back to 1916 in Oregon, *Sorenson v. Kribs,* 161 P. 405, 409-10 (Or. 1916), and has been applied consistently since then.[7]

A. Oregon's "Clear and Correct in All Respects" Rule is Not Novel

The Oregon Supreme Court held that the trial court did not err in refusing Philip Morris's Requested Instruction No. 34 because the instruction was not "clear and correct in all respects," as it must be to comprise reversible error under Oregon law. Pet. at 21a. That is an independent and adequate state law ground for upholding the jury's verdict, *id.* at 13a, and provides no basis for this Court to exercise jurisdiction over the matter. *See Lee v. Kemna,* 534 U.S. 362, 376 (2002) ("Ordinarily, violation of 'firmly established and regularly followed' state rules – for example, those involved in this case--will be adequate to foreclose review of a federal claim."), quoting *James v. Kentucky,* 466 U.S. 341, 348 (1984).

Philip Morris contends that this Court should summarily reverse the Oregon Supreme Court's decision because it says that this procedural bar "is an arbitrary rule that is neither firmly established nor regularly followed, and of which Philip Morris

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[7] Philip Morris conflates assertions that the "clear and correct" rule has not been applied in this case with implications that the rule is not firmly established and regularly followed. *E.g.* Pet. at 26. Neither is true.

had no fair notice when presenting its proposed jury instructions." Pet. at 20. While the claim is preposterous, Philip Morris finds itself in this predicament because of its own decision to tie several propositions of law together in its legally erroneous Instruction No. 34.

This "novel" rule was considered "well settled" nearly 50 years ago. *Wiebe v. Seely,* 335 P.2d 379, 393 (Or. 1959). It was adopted in 1916, when the Oregon Supreme Court considered whether to adopt a rule that an instructional request, however flawed, would suffice to "call the attention of the court to the matter" or, on the other hand, to join what it characterized as the "great weight of authority",[8] concluding:

> In order to entitle a party to insist that a requested instruction be given to the jury, such instruction must be correct both in form and substance, and such that the court might give to the jury without modification or omission. If the instruction, as requested, is objectionable in any respect, its refusal is not error.

Sorenson, 161 P. at 410 (quotation omitted).

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[8] The court found that 15 states (Alabama, Arkansas, California, Colorado, Georgia, Illinois, Indiana, Maine, Maryland, Michigan, New York, Ohio, Oklahoma, Utah, and Wisconsin) followed the "correct in all respects" rule without contradiction. 161 P. at 410.

The rule has been restated, followed, and relied upon by the Oregon appellate courts in numerous cases, including a decision one year before trial in this case. *See Hernandez,* 957 P.2d at 151. *See also,* App. at 27a-28a (detailing Oregon cases).

Instructions that had valid parts have been properly refused because they "contained objectionable language," *Simpson,* 588 P.2d at 13; because they called upon the jury to make inferences outside the pleadings, *Dacus v. Miller,* 479 P.2d 229, 231-32 (Or. 1971); because they failed to "embod[y] the essentials as set out" in the relevant statute, *McCaffrey v. Glendale Acres,* 440 P.2d 219, 222 (Or. 1968); and because they contained "erroneous descriptions of the relevant statute." *Roop v. Parker Northwest Painting Co.,* 94 P.3d 885, 904 (Or. App. 2004). Requested instruction No. 34 contained similar fatal flaws that Mrs. Williams had previously identified. *See* pp. 25-31 *infra.*

The "clear and correct" rule is not an Oregon local invention. As long ago as 1864, in a case twice heard and concerning three series of instructions denied, this Court stated:

> if any proposition in the series ought to have been rejected, then *the court did not err in refusing the prayer, although there might have been propositions in the series, which, if asked separately, ought to have been given.*

Harvey v. Tyler, 69 U.S. 328, 338 (1864) (emphasis added). *See also Beaver v. Taylor,* 93 U.S. 46, 54 (1876) (emphasis added) (no error in refusing an instruction where it "was presented as one request;

and, *if any one proposition was unsound, an exception to a refusal to charge the series cannot be maintained.*) States other than Oregon have long applied a similar rule as well. *See* App. at 29a-30a.

Philip Morris also claims that Oregon does not regularly follow the "clear and correct in all respects" rule, accusing the Oregon Supreme Court of failing to apply its own precedent, *Oregon v. George,* 97 P.3d 656 (Or. 2004). The argument is unavailing, as the decision below makes plain. In *George,* the court held that a criminal defendant need not request a jury instruction on the consequences of an insanity verdict, under a statute that required the trial court to give such an instruction, *whether requested or not. Id.* at 662. *George* is therefore plainly distinguishable from the present case as there is no mandatory state statute supporting Philip Morris's proposed instructional language.

Nevertheless, Philip Morris seizes on alternative language in *George*, in which the court said it would not require an "exercise in futility." Pet. at 26, quoting 97 P.3d at 662. Nothing in the record, however, indicates that it would have been futile for Philip Morris to offer a correct jury instruction instead of its No. 34 or to draw the court's attention to issues it now has discovered with Plaintiff's closing argument. After closing arguments, Philip Morris took exception to refusal to give its No. 34 only as a whole, not in specific reference to any portion of it. App. at 23a. The Oregon Supreme Court specifically found that Philip Morris's complaint of "futility" was groundless on this record. Pet. at 16a n.5.

In Oregon, as in other jurisdictions, a trial judge is under no obligation to reformulate a party's flawed proposed jury instruction. *See Beglau,* 536 P.2d at 1256 ("The trial court cannot be required to edit proposed instructions and to omit parts that are incorrect or inapplicable."); *Brigham v. Southern Pac. Co.,* 390 P.2d 669, 671 (Or. 1964); *Hooning v. Henry,* 213 P. 139, 141 (Or. 1923). *Cf. Public Service Co. of Oklahoma v. Bleak,* 656 P.2d 600, 608 (Ariz. 1982) (not the duty of trial court to correct instruction and "separate the sheep from the goats"); *Roberts v. City of Los Angeles,* 167 Cal. Rptr. 320, 322 (Cal. App. 1980); *Duncan v. Strating,* 99 N.W.2d 559, 660 (Mich. 1959); *Hertz v. McDowell,* 214 S.W.2d 546, 550 (Mo. 1948); *Wrangham v. Tebelius,* 231 N.W.2d 753, 757 (N.D. 1975); *Martin v. Dayton Power & Light Co.,* 156 N.E.2d 328 (Ohio. App. 1958); *Honsinger v. Egan,* 585 S.E.2d 597, 601 (Va. 2003).

Because Philip Morris and its counsel, "like everyone else, is presumed to know the law," *In re Conduct of Devers,* 974 P.2d 191, 197 (Or. 1999) (citation omitted), Philip Morris cannot contend in good faith that it had no notice of the relevant Oregon rule at the time it presented its proposed jury instructions, cannot contend in good faith that the rule was invented for this case,[9] and cannot aver in

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[9] In *Allison v. Fulton-DeKalb Hosp. Auth.,* 449 U.S. 939 (1980) (mem.), this Court dismissed a case from the Georgia Supreme Court for lack of jurisdiction where the Georgia court had avoided deciding the petitioner's federal constitutional claim on a newly announced state procedural rule, which conflicted with the state's civil practice statute and required litigants to raise federal constitutional claims earlier than other claims. Notice

good faith that the rule was applied in any fashion other than normally.[10]

B. Oregon's Supreme Court Did Not Err in Finding Requested Instruction No. 34 Not 'Clear and Correct in all Respects'

The Oregon Supreme Court's ruling that Requested Instruction No. 34 was not "clear and correct in all respects" is an independent and adequate ground for upholding the jury's verdict. *See Osborne v. Ohio,* 495 U.S. 103, 123 (1990) (failure to follow state law in requesting jury instruction "constitutes an independent and adequate state-law ground preventing us from reaching [party's] due process contention on that point."). Oregon's Supreme Court plainly relied upon the rule in its decision. Pet. at 13a. *Cf. Caldwell v. Mississippi,* 472 U.S. 320, 327 (1985) (state procedural bar actually relied upon by state court "as an independent basis for its disposition of the case" acts to "deprive this Court of jurisdiction"). It also responds to this Court's requirement there be a "request" for protection against an unreasonable risk of jury confusion as to the proper use of evidence of harm to others than plaintiff. 127 S.Ct. at 1065.

Philip Morris complains that the ways in which the Oregon court found proposed No. 34 erroneous comprise tangential "trivialities" – found in "other

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thus does not appear to be part of the adequate and independent state grounds inquiry.

10 *See* pp. 32 to 34 *infra* on Oregon's legitimate interest in its rule.

unrelated parts" of the instruction that did not concern punishment for harm to others. Pet. at 23, 25. Indeed, the Oregon court limited its analysis to errors of state law in proposed No. 34. Pet. at 15a-22a. Mrs. Williams had raised these and other objections throughout the case. Even though the Oregon Supreme Court did not reach some of these objections, all support rejecting the instruction under Oregon law. Still, Philip Morris fails to acknowledge that the very sentence that includes its proposed language about the impropriety of punishment for harm to others unquestionably misstates federal law concerning the *proper* use of harm to others in the punitive damage calculus.

1. Defendant's No. 34 misstated the relevance of the Oregon statutory factors

By statute, punitive damages, if any, "*shall* be determined and awarded based upon" specific enumerated statutory criteria. ORS 30.925(2) (emphasis added). Those criteria are limited to the likelihood of harm, defendant's knowledge, profitability of misconduct, and other factors. The statute is mandatory and exclusive, providing the only criteria on which the determination and award of punitive damages "shall be" based. Defendant's No. 34 proposed making that mandatory language permissive by advising that the jury "may find" the factors useful in assessing reprehensibility and leaving the door open to other unspecified factors. App. at 3a. Nothing in this Court's jurisprudence would justify loosening the statutory requirements by adding to the jury's discretion in this way.

To allow the jury such arbitrary leeway to devise their own criteria, as the language permitted, would not only have been error under ORS 30.925, it also implicates this Court's concern with "'arbitrary punishments,' ... that reflect not an 'application of law' but 'a decisionmaker's caprice.'" 127 S.Ct. at 1062 (quotation omitted). The trial court properly rejected it, and the Oregon Supreme Court properly agreed.

2. Defendant's request No. 34 misstated the "profit" factor

The Oregon Supreme Court held that Instruction No. 34 was wrong on the law of punitive damages because it misstated the statutory "profit" factor, as the trial court also ruled. Pet. 20a-21a, App. at 19a. ORS 30.925(2)(c) provides that one of the criteria on which the fact finder is to base its determination and award of punitive damages is "the profitability of the defendant's misconduct." In its request No. 34, Philip Morris asked the court to tell the jury it could base its determination of reprehensibility on "the degree to which the defendant was *motivated* by a desire to obtain *illicit profits* from its misconduct," after reminding the jury that the sale of cigarettes is legal. App. at 2a (emphasis added). The statutory factor is "profitability." It is not "motive to profit," and the addition of the modifier "illicit" is argumentative and legally erroneous. As the trial court ruled, "it doesn't have to be illicit profit. It could be legal profit." App. at 19a. Defendant has never demonstrated or even argued otherwise. The trial court properly rejected defendant's No. 34 for this reason alone. The Oregon Supreme Court properly agreed.

3. The core language on which Philip Morris relies misstates the law

Many of the legal misstatements that infect proposed instruction No. 34 appear in other parts of this long request, but a serious flaw is found in the central language on which defendant relies:

> The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although *you may consider the extent of harm suffered by others in determining what that reasonable relationship is,* you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

App. at 2a-3a (emphasis added).

That distinction is plainly wrong as a matter of this Court's punitive damages jurisprudence. The *BMW* guideposts utilized in evaluating due process excessiveness consider (1) the reprehensibility of defendant's misconduct; (2) proportionality or the reasonable relationship between punitive damages and the actual and potential harm to the plaintiff; and (3) comparable penalties. *BMW v. Gore*, 517 U.S. 559, 560-61 (1996). This Court made clear in this case that harm to others is properly relevant to the first guidepost – reprehensibility. 127 S.Ct. at 1064. That, however, is not what Philip Morris's No. 34

says. The proposed instruction would have made harm to others relevant to the "reasonable relationship" between punitive damages and harm to the plaintiff – the second *BMW* guidepost. This Court also made plain that the only harm to others relevant to deciding the *"reasonable relationship,"* is the harm or potential harm *to the plaintiff.* 127 S.Ct. at 1063. Philip Morris's No. 34, which states just the contrary, was wrong on the central point for which defendant now claims to have offered it.

Indeed, to consider harm to others in deciding the reasonable relationship, or "ratio," would constitute precisely the type of direct punishment for harm to others that this Court found inconsistent with due process, *see* 127 S.Ct. at 1063, because it suggests multiplying the compensatory damages by the number of victims affected by the same misconduct.

Further, Requested Instruction No. 34 erroneously and confusingly suggests that other juries may "award punitive damages for . . . harms" to others than plaintiff. Punitive damages punish for misconduct. Compensation targets harm. Maintaining that distinction, as the trial court did, and as proposed No. 34 failed to do, is crucial to keeping the jury on the right side of the line this Court drew in this case.

Proposed No. 34 was fundamentally wrong on the question of the proper role of harm to non-parties, which has become the central question in this case. That basic error was not some tangential triviality. The trial court was not required to tease that sentence apart, delete its erroneous premise, and revise it to describe the proper distinction laid down

by this Court eight years later.[11] There was no error in denying proposed instruction No. 34.

4. Philip Morris's No. 34 would have encouraged the jury to punish for harm to others

The last sentence of Requested Instruction No. 34 also contradicts this Court's holding in this case. In discussing the relevance of defendant's financial condition[12] to the amount of punitive damages, request No. 34 says:

> Finally, you may also consider the defendant's financial condition as part of the process of arriving at an appropriate punishment. . . . [Still,] the paramount consideration remains the degree of reprehensibility of any misconduct and *the extent of any harm caused by such misconduct.*

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11 At oral argument in this Court, Justice Souter called Philip Morris's Requested Instruction No. 34 bothersome and said "I have great difficulty in seeing how I could find that it was error to refuse to give the instruction." App. at 24a, 26a.

12 Before this Court last term, Respondent pointed out the contradictory treatment of the defendant's "financial condition" in Philip Morris's Requested Instruction No. 34 at paragraphs 6 and 11. Respondent's Br. at 48. While Philip Morris responded that they were part of alternate language, they were plainly not alternatives. *See* App. at 3a.

App. at 4a (emphasis added). Mrs. Williams agrees that the reprehensibility of a defendant's misconduct is the most important consideration for the jury in deciding the amount of punitive damages. However, to say that the other "paramount consideration," in addition to reprehensibility, is "the extent of any harm caused" by the misconduct is to suggest the opposite of what this Court held in this case. It would permit the jury to assess punitive damages for "the extent of *any* harm caused by such misconduct. By making harm to others a "paramount consideration" independent of reprehensibility, the rejected instruction would have created a greater risk that the jury might punish defendant "directly for harms it is alleged to have visited on nonparties." 127 S.Ct. at 1064. Permitting that type of direct punishment would squarely violate this Court's holding in this case. The trial court did not err in refusing to give this requested instruction.

5. Requested Instruction No. 34 would have tied the amount of punitive damages to the extent of public knowledge about the risks associated with smoking

Mrs. Williams objected to Requested Instruction No. 34 because it erroneously tied the amount of punitive damages to the extent of public knowledge (in other words, non-parties) about the dangers of smoking. In suggesting that the jury limit any punitive damages "to the extent that the risks from smoking were not a matter of general public knowledge," App. at 2a, Philip Morris sought to introduce an idea that was not only unprecedented and confusing, but wrong in a way that would have contradicted the very idea on which it now relies.

The instruction says, in effect, "You are not to punish defendant because cigarettes are dangerous except to the extent that defendant lied about the danger and the danger was unknown;" that is, "You may punish for harm to others to the extent that the public was misled about the dangers of cigarettes." Thus, proposed No. 34 would have asked the jury to assess punishment to the extent that nonparties were defrauded – or others were harmed. That is exactly what this Court prohibited.[13]

6. The trial court gave Philip Morris's "alternative" request

Proposed No. 34 included four numbered paragraphs purporting to cover the subject of the amount of punitive damages. App. at 3a-4a. The first of these, numbered "(1)," is the part on which Philip Morris focused these appeals. However, immediately following that paragraph, Philip Morris added the headline "[ALTERNATIVE]" above another paragraph "(1)" that read, "(1) You are not to punish the defendant for the impact of its conduct on individuals in other states." App. at 3a. The trial

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[13] Further, this part of proposed No. 34 would have allowed punitive damages only on plaintiff's fraud claim. The claim for negligence would also have supported punitive damages, though the jury did not ultimately award punitive damages on that claim. *Williams v. Philip Morris USA, Inc.*, 127 P.3d 1165, 1171 (Or. 2006). There was no legal ground for limiting punitive damages to the fraud claim in instructing the jury as the proposed instruction would have done by limiting punitive damages to punish for risks that were "unlawfully misrepresented by the defendant."

court's instructions to the jury in fact conveyed exactly this principle. Pet. at 164a ("the likelihood at the time that serious harm would arise *in this state* from the defendant's misconduct;" "profitability of the defendant's misconduct *in this state*" (emphasis added). The trial court covered defendant's alternative paragraph (1) in substance and no more was required. *See Hernandez*, 957 P.2d at 151-52 ("There also is no error by the trial court if the substance of the requested jury instruction, even if correct, was covered fully by other jury instructions given by the trial court."). The trial court committed no error.

7. The concerns relied upon by the Oregon Supreme Court are not trivial but further important state interests

While Philip Morris dismissively characterizes the Oregon Supreme Court's ruling as focused on trivialities, Pet. at 25, there is nothing trivial about an insistence on clear and correct jury instructions. The measure for whether a basis for decision is properly adequate and independent, even when firmly established and regularly followed is whether the state practice furthers a "perceivable state interest." *Henry v. Mississippi*, 379 US 443, 447-48 (1965). Philip Morris insists that Oregon has no legitimate interest in insisting that proffered instructions be "'clear and correct in all respects.'" Pet. at 24. Petitioner fails to explain, however, what part of Oregon's well-established "clear-and-correct-in-all-respects" rule it finds objectionable. Does Philip Morris mean to suggest that a state has no legitimate interest in ensuring that proposed instructions be "clear" or "correct?" Or does Philip Morris merely maintain that a state has no

justifiable interest in insisting that instructions not only be "clear and correct" but completely, fully, and wholly correct, *i.e.*, "in all respects?" Certainly, a State's legitimate interest in ensuring that instructions be "clear and correct," may also insist that the instructions be completely correct (and not partially so).

When a party requests a departure from existing or pattern jury instructions, courts understandably scrutinize the proposal closely. Unlike instructions vetted by a lengthy, dispassionate court-approved process or longstanding practice, party submissions cannot be assumed to have been impartially prepared and free of argumentative or biased language. Departure from accepted language risks the need for a new trial or reversal on appeal. Before utilizing a party's new proposal, a court must be satisfied that the proposed instruction does not confuse or mislead the factfinder and remains consistent with the evidence. For that reason, this Court has insisted that instructions, particularly in the realm of punitive damages, be adequate "to aid the decisionmaker in its task of assigning appropriate weight to evidence that is relevant and evidence that is tangential or only inflammatory." *State Farm,* 538 U.S. at 418.

Any rational discussion of an instruction examines it piece by piece. If doing so obligates a court to treat objectionable material piecemeal, as Philip Morris suggests, then the types of informal charge conferences as occurred here will no longer occur or the "clear and correct in all respects" rule will be effectively eliminated. The rule, however, is valid as an allocation not only of the burden of providing correct instructions but also of the risk of

error on appeal. Parties preserve error by separating instruction requests into discrete ideas.

The requirement is not a meaningless ritual designed to trap the unwary. Like the contemporaneous objection rule, Oregon's "clear and correct in all respects" rule "serves the State's important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Lee,* 534 U.S. at 376-77 (citation omitted). *See also Smith v. Texas,* 127 S.Ct. 1686, 1705 (2007) (Alito, J., dissenting) (explaining that the contemporaneous objection rule serves a well-recognized and legitimate state interest in "avoiding flawed trials and minimizing costly retrials."). A state also has a legitimate interest in allocating to the parties and their counsel the burden of providing trial courts with proposed jury instructions that are complete and correct in all respects. After all, the State has an "important interest in ensuring that counsel do their part in preventing trial courts from providing juries with erroneous instructions." *Osborne,* 495 U.S. at 123. Finally, the requirement serves the State's significant interest in the finality of judgments.

IV. THE PUNITIVE DAMAGES ASSESSED BY THE JURY AND UNANIMOUSLY APPROVED BY THE OREGON COURTS AFTER REPEATED REVIEWS COMPLIES WITH THIS COURT'S DUE PROCESS JURISPRUDENCE

Philip Morris asks this Court to take up the second question presented in its prior application, which this Court chose not to resolve last Term. The question is no more necessary to resolve at this time.

The "conflicts" identified by Philip Morris are insubstantial. Oregon has demonstrated it is fully capable of employing the "ratio" analysis as part of gross excessiveness review, and the punitive damages awarded in this case comport with this Court's jurisprudence.

To claim deep division over the ratio factor, Philip Morris cites two *intermediate state court* decisions that upheld ratios larger than single digits. Pet. at 33-34. Their mere existence in the fact-sensitive inquiry that punitive-damage review involves does not merit a need for this Court's guidance. Philip Morris makes no attempt to evaluate the factual circumstances of the misconduct in the cases it cites. Instead, they advance a theoretical revision of this Court's punitive damage review jurisprudence.

The Court has recently and repeatedly confirmed that "[t]he *most important indicium* of the reasonableness of a punitive damages award is the degree of reprehensibility of the defendant's conduct." *State Farm*, 538 U.S. at 419, quoting *BMW*, 517 U.S. at 575 (emphasis added). To the contrary, Philip Morris would have this Court treat the "ratio" guidepost as if it were the conclusive and overriding test of excessiveness, leaving reprehensibility to function only within a fixed ratio. In fact, Philip Morris misstates this Court's holdings by arguing that reprehensibility merely establishes where on the continuum of single-digit ratios the punitive damages should be pegged. *See* Pet. at 30 (arguing that this Court has established a range of constitutionally permissible ratios and suggested that the "degree of reprehensibility" (and the amount of compensatory damages) will determine where within that range the constitutional cut-off falls in a

particular case.). This Court has emphatically rejected the exercise in elementary-school mathematics that Philip Morris advances. *See, e.g., State Farm* 538 U.S. at 424-25.

Oregon's courts understand the usefulness and applicability of a ratio analysis. On March 6, 2008, the Oregon Supreme Court reduced a punitive damage verdict from a sixteen to one ratio to four-to-one, finding the original verdict substantially exceeded federal Due Process limits. *Goddard v. Farmers Ins. Co.,* 179 P.3d 645, 666 (Or. 2008). *Goddard* shows the careful approach that the Oregon Supreme Court takes to punitive damage excessiveness.

The fact is that States have different interests that are pursued differently with respect to punitive damages. *See BMW,* 517 U.S. at 568 ("States necessarily have considerable flexibility in determining the level of punitive damages that they will allow in different classes of cases and in any particular case."). For example, punitive damages substitute for the role other states assign to compensatory damages in wrongful death actions in Alabama. *See Lance, Inc. v. Ramanauskas,* 731 So.2d 1204, 1218 (Ala. 1999). In some states, such as Oregon, the State's interest is expressed by allocating significant portions of a punitive damage award to public purposes. *See, e.g.,* ORS 31.735 (60 percent of any award goes to crime victims fund). In Georgia, punitive damages are capped at $250,000 per plaintiff, unless there is a finding of an intent to harm. *See* Ga. Code § 51-12-5.1(f), (g). Such differences in State treatment of punitive damages

make the purely ratio-based comparison advocated by Philip Morris at odds with Our Federalism.

Philip Morris's proposed elevation of the ratio would contradict this Court's assignment of primary importance to the reprehensibility of defendant's misconduct. If any case can justify a substantial departure from the presumptively valid single-digit ratio, this is that case. Misconduct on this scale is reprehensible in the extreme. It will, one hopes, be vanishingly rare. It deserves rare punishment.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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