No. 07-806

In the Supreme Court of the United States

PHILIP MORRIS USA INC., BROWN & WILLIAMSON HOLDINGS, INC., LORILLARD TOBACCO COMPANY and R.J. REYNOLDS TOBACCO COMPANY,

Petitioners,

v.

RONALD ACCORD, *et al.*

Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Appeals Of West Virginia

REPLY BRIEF FOR PETITIONERS

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REPLY BRIEF FOR PETITIONERS

The Brief in Opposition ("Opp.") completely fails to come to terms with the essential and unavoidable constitutional problem identified by the Petition: This trial plan *guarantees* that punitive liability and punitive damages will be assessed in an arbitrary fashion that directly contravenes the due process precedents of this Court. It has two principal flaws. First, the Phase I jury will be asked to assess punitive liability, and to impose a punitive-damages multiplier, based entirely on aggregate proof. It will do so before compensatory liability has been determined for even a single plaintiff, before petitioners have had an opportunity to assert their affirmative defenses, and before it will be possible to get any sense of defendants' total compensatory liability. And second, the Phase I jury's findings will subsequently be applied in the trials of *all* the plaintiffs—even those who were not harmed by whatever conduct the first jury found to be egregious. Respondents nowhere explain how this approach to the assessment of punitive damages can be reconciled with the Due Process Clause.

Instead, they attempt to persuade this Court that it should stay its hand until *after* petitioners have been subjected to this unlawful trial procedure because the outcome of the trial is uncertain. But our due process challenge is *procedural*, and the procedure at issue here is set in stone. Respondents *agree* that West Virginia's highest court has twice rejected petitioners' constitutional objection to the trial plan (see Opp. 6, 10 n.9), and that the trial court has denied petitioners' requests that the trial plan be

amended. They *concede* that there is a clear split of authority among the lower courts. And they *concur* that "reverse bifurcation" is West Virginia's established method for trying mass-tort cases (Opp. 1), one that will not change until its courts receive a "clear indication" that this practice must end. *In re Tobacco Litig.*, 624 S.E.2d 738, 741-42 (W. Va. 2005). Thus, respondents admit what they could not plausibly deny: that the question of this trial method's constitutionality will recur until it is decided by this Court, and that it is exceedingly important to the litigation landscape. See Brief of *Amicus Curiae* Chamber of Commerce of the United States.

In sum, both by its words and by its silence, the brief in opposition adds to the mounting evidence that the time has come for this Court to review West Virginia's use of "reverse bifurcation" in mass-tort cases like this one, in which differently-situated plaintiffs propose disparate theories of liability resting on diverse allegations of harmful conduct.

A. Immediate Review Is Warranted Because Constitutional Harm Is Certain To Occur.

Respondents' argument that the constitutional harm posed by the trial plan is merely "contingent" (Opp. 11, 12) is meritless.

1. As respondents recognize, "the Constitution imposes limits on *both* the procedures for awarding punitive damages *and* amounts forbidden as 'grossly excessive.'" Opp. 4 (quoting from the reporter's syllabus to *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1059 (2007)) (emphases added). Petitioners' constitutional challenge is squarely directed at the *procedural* failings of the trial plan, which violates

due process by creating an undue risk that punitive liability and punitive damages will be determined in an arbitrary manner. See*, e.g.*, Pet. 12. There is nothing at all uncertain or contingent about the *procedure* that the West Virginia courts plan to employ in this case. To the contrary, as respondents concede (Opp. 7, 8), the trial plan's contours have been conclusively fixed by the trial court, notwithstanding Judge Recht's continuing expressions of constitutional concern (Pet. 9), and the Supreme Court of West Virginia has denied petitioners' request for relief. It is therefore clear that the West Virginia courts *will* employ this trial plan.

2. The constitutional-avoidance canon presents no obstacle to the Court's immediate review. The constitutional question presented in the petition rests on firm and unchanging ground—it is not "abstract, hypothetical or contingent." Opp. 13 (quoting *Clinton* v. *Jones*, 520 U.S. 681, 690 n.11 (1997)). There is no antecedent and uncertain question of state law that remains to be decided. See, *e.g.*, *Spector Motor Serv., Inc.* v. *McLaughlin*, 323 U.S. 101, 104-05 (1944)). Nor has there been any suggestion that, after accepting jurisdiction, this Court could avoid the Due Process question presented in the petition by deciding the case on other grounds. See, *e.g.*, *Burton* v. *United States*, 196 U.S. 283, 295 (1905)). In contrast to *Clinton*, 520 U.S. at 690, moreover, this is not a case in which important constitutional questions lie beyond the scope of the questions presented in the petition. Rather, the precise question raised by petitioners is whether West Virginia's plan for adjudicating mass-tort cases of this kind is foreclosed by the Due Process Clause. See Pet. i. In sum, because the West Virginia courts' trial procedure is set and certain, the Court need not wait any

longer before assessing the trial plan's constitutionality. See *Bandini Petroleum Co.* v. *Super. Ct.*, 284 U.S. 8, 13-17 (1932) (granting review in advance of trial of order denying request for a writ of prohibition where petitioners contended that enforcement of a state statute would violate due process).

3. Any postponement of review would produce an enormous waste of judicial resources. Respondents offer a dubious calculation of the number of "judge years" it would take for the West Virginia courts to try plaintiffs' disparate claims separately (Opp. 9), but they fail to offer an analogous computation of the number of "judge years" that will be squandered in unsalvageable Phase II trials (*ibid.*) should the trial plan later be overturned. By any measure, the burden placed on the West Virginia courts if review were to be delayed while those tainted proceedings move forward in courtrooms all across West Virginia would be staggering.

The risk of wasted resources is all the more substantial because this case is only one of several large "reverse bifurcation" proceedings pending in that state, as the experience of numerous *amici* confirms. See Brief for *Amici Curiae* Ciba Corp., *et al.* Immediate review is the appropriate course.

B. The Trial Plan Cannot Be Reconciled With *State Farm* Or *Williams*.

This Court's punitive damages precedents establish, *inter alia*, that any assessment of punitive damages must be narrowly focused on the defendant's conduct toward the plaintiff, may be imposed only after a defendant has had a "full opportunity to defend against the charge," *Williams*, 127 S. Ct. at 1063, and must depend on whether and to what extent the

plaintiff's proven compensatory damages are insufficient to serve the state's objectives of punishment and deterrence. See Pet. 13. To this end, the Due Process Clause imposes an affirmative obligation on the state courts to establish procedures that protect against the *risk* that a jury will abandon its proper focus and instead mete out punishment based on its view that a particular defendant is "an unsavory individual or business." *State Farm Mut. Auto Ins. Co.* v. *Campbell*, 538 U.S. 408, 423 (2003). See also *Williams*, 127 S. Ct. at 1065.

The trial plan violates each of these commands because it establishes a procedure in which the jury, asked to assess whether any defendant's conduct warrants punitive damages, and if so, in what degree, will be unable to perform its task in a rational way. Rather, the Phase I jury will be compelled to speculate about such crucial questions as the number of persons harmed, if any, by each aspect of each defendants' conduct, the severity of any resulting injuries, and whether the law permits the defendants to be held liable for those alleged harms—none of that information will be known or knowable until Phase II. See Pet. 16-17. Moreover, by establishing a one-size-fits-all multiplier that will apply equally to all follow-on cases, no matter what the specific factual basis for the particular plaintiff's claim, the trial plan ensures that at least some plaintiffs—and perhaps every plaintiff awarded compensatory damages—will recover punitive damages for conduct that did *not* form the basis for the first jury's findings. See Pet. 18.

Without responding directly to these arguments, respondents offer two rationales for their assertion

that this trial plan can be squared with *State Farm* and *Williams*. Each is meritless.

1. First, respondents contend that the trial plan is constitutionally permissible because their claims are all alike: all 735 of them claim that they were injured as a result of smoking cigarettes. This commonality, they assert, is sufficient to warrant the trial of the hundreds of claims as an undifferentiated mass. This remarkable assertion is manifestly false: *State Farm*'s nexus requirement cannot be satisfied at that level of generality. First of all, the sale of cigarettes is not a tort. Each of the smokers in these consolidated cases must plead and prove a tort claim based on a particular set of allegations about particular defendants' conduct toward that smoker.

Second, the claims of plaintiffs who used different tobacco products produced by different manufacturers at different times, and who allege different injuries resulting from different types of conduct, are hardly uniform. This Court explained more than a decade ago that product-liability claims arising out of different factual circumstances must be treated as *different*, even when the same kind of product allegedly caused each plaintiff's injury: "These factual differences *** translate into significant legal differences." *Amchem Prods., Inc.* v. *Windsor*, 521 U.S. 591, 609 (1997) (internal quotation marks omitted). Accord *Castano* v. *Am. Tobacco Co.*, 84 F.3d 734, 742 n.15 (5th Cir. 1996). Recognizing the disparities among plaintiffs' claims, respondents' counsel long ago conceded that "some of the issues that we will try [in Phase I] surely will not apply to everyone. Maybe some of them won't apply to anyone." Pet. 9.

2. The brief in opposition also asserts that *Williams* holds "that evidence of harm to others is rele-

vant to the determination of a punitive damages multiplier" (Opp. 14), and that this "holding" defeats our argument that each plaintiff's claim for punitive damages must be based on the harm done to that particular plaintiff. But due process requires more than that a jury charged with assessing punitive damages be presented only with relevant evidence. It also requires that the jury's *consideration* of that evidence be guided to guard against the risk that its conclusion will be arbitrary. *Williams*, 127 S. Ct. at 1062. Under this trial plan, the Phase I jury's determination cannot be adequately guided because it will not possess the necessary facts about the plaintiffs and their specific claims to decide whether or how the defendants should be punished for their conduct. Cf. *White* v. *Ford Motor Co.*, 500 F.3d 963, 975 (9th Cir. 2007) (evidence of plaintiffs' conduct is indispensable to jury's consideration of punitive liability and punitive damages because "reprehensibility is judged in relation to the conduct and actions of others, not merely by looking at [defendant's] conduct in the abstract"). Because of this core failing, the Phase I jury's findings will inevitably represent "not 'an application of law', but a decisionmaker's caprice.'" *Williams*, 127 S. Ct. at 1062 (quoting *State Farm*, 538 U.S. at 416, 418). Such "arbitrary punishments" are wholly inconsistent with Due Process even when based on relevant evidence. *Williams*, 127 S. Ct. at 1062. Accordingly, even if it were sound, this argument could not save the trial plan.

Second, and more fundamentally, the central holding of *Williams* was precisely that "a jury may not punish for the harm caused others." 127 S. Ct. at 1065. Although the jury may consider harms to nonparties in gauging the reprehensibility of the defendant's conduct, a plaintiff cannot recover punitive

damages for anyone's injuries but his own.[1] The trial plan violates that principle because it fails to ensure that each Phase II punishment is imposed only because, and to the extent that, the Phase I jury found the conduct that affected the specific Phase II plaintiff to be worthy of punishment. Pet. 18-19.

C. The Question Whether The Due Process Clause Forbids The Use Of "Reverse Bifurcation" To Assess Punitive Damages Is Squarely Presented, Is The Subject Of A Split Of Authority, And Is Recurring And Important.

Immediate review is warranted because the constitutional question whether "reverse bifurcation" may be employed to resolve aggregated punitive-damages claims in mass-tort cases is ripe for consideration, and because the Supreme Court of Appeals of West Virginia has decided this federal question "in a way that conflicts with the decision of another

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[1] Respondents' allegation that petitioner Philip Morris USA Inc. has advanced contrary positions on the proper role of evidence of harm to others is without foundation. See Opp. 8, 11-12. Petitioners affirmatively stated before the West Virginia Supreme Court of Appeals that reprehensibility "is a factor in assessing the amount of punitive damages," see Petitioners' Supplemental Submission In Support Of Petition For Writ of Prohibition, at 2. Philip Morris likewise argued to this Court in *Williams* that harm to others may be considered for the limited purpose of "assessing the reprehensibility of the specific conduct that injured the plaintiff." Reply Br. for Petitioner, *Philip Morris USA* v. *Williams*, No. 05-1256, 2006 WL 1267580, at *1 (U.S. May 8, 2006). Thus, neither in West Virginia nor in this Court has Philip Morris denied that "a plaintiff may show harm to others in order to demonstrate reprehensibility." *Williams*, 127 S. Ct. at 1064.

state court of last resort or of a United States court of appeals," S. CT. R. 10(b). See Pet. 20-23.

This question is also both recurring and important. The West Virginia courts have proclaimed that "reverse bifurcation" is their "system of mass-tort litigation," and will remain so until they receive a "clear indication" from this Court that this practice must end. *In re Tobacco Litig.*, 624 S.E.2d at 741-42. Until that day, it appears that one industry after another will be subjected to this unconstitutional and coercive trial procedure. Yesterday, it was asbestos defendants. See Petition for Writ of Certiorari, *Mobil Corp.* v. *Adkins*, No. 02-132, 2002 WL 32134868 (U.S. July 24, 2002). Today, it is tobacco defendants. And representatives of the chemical industry have announced that they will seek relief from "reverse bifurcation" in just a few weeks' time. See Brief for *Amici Curiae* Ciba Corp., *et al.*, at 4 & n.4. Others will surely follow.

This procession need not continue. This court should instead exercise its unquestioned jurisdiction to provide guidance on the crucial question whether punitive liability and punitive damages may be tried in the aggregate, in a mass-tort case involving diverse claims of misconduct, before a jury that knows nothing about the merits of any particular plaintiff's claims.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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