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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 *AMICUS CURIAE* OF PRODUCT LIABILITY ADVISORY COUNCIL, INC. IN SUPPORT OF PETITIONERS

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This brief is filed on behalf of the Product Liability Advisory Counsel ("PLAC") as *amicus curiae* in support of Petitioner, with the consent of the parties.[1]

STATEMENT OF INTEREST

PLAC is a nonprofit association with more than 120 corporate members representing a broad cross section of American and international product manufacturers. These companies seek to contribute to the improvement and reform of law in the United States and elsewhere, with emphasis on the law governing the liability of manufacturers of products. PLAC's perspective derives from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Several hundred of the leading product liability defense attorneys in the country are also

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[1] Both parties were notified of PLAC's intention to file an amicus brief in support of Petitioner no later than April 11, 2008. Letters of consent from both parties are being filed with the Clerk contemporaneously with this brief. Gibson Dunn & Crutcher LLP ("Gibson Dunn") previously represented PLAC as *amicus curiae* in earlier phases of this litigation. After the conclusion of its representation of PLAC in those earlier proceedings, and after the decision of the Oregon Supreme Court in January 2008, Gibson Dunn was engaged as co-counsel for Petitioner. Portions of this brief are based in part on the prior briefs written for PLAC by Gibson Dunn. Beyond this, no counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than *amicus curiae* and its members (through regular dues payments) made a monetary contribution to this brief.

sustaining (nonvoting) members of PLAC. Since 1983, PLAC has filed more than 800 briefs as amicus curiae in both state and federal courts, including at least 70 briefs in this Court, presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. The corporate members of PLAC are listed in the Appendix.

The due process questions presented by this case are not unique to Philip Morris or the tobacco industry. Virtually all corporations are vulnerable to arbitrary and excessive punitive damage awards when juries are not given adequate instructions and reviewing courts decline to enforce the due process guideposts that help ensure reasonableness and proportionality. Because plaintiffs routinely seek punitive damages in product liability cases, and such cases present special dangers and concerns, the fair administration of punitive civil sanctions is an issue of great importance to product manufacturers.

STATEMENT OF THE CASE

Respondent Mayola Williams ("Plaintiff"), the widow of a smoker, sued Petitioner Philip Morris USA, alleging that Philip Morris's fraud in advertising and promoting cigarettes caused the death of her husband from lung cancer. *Williams v. Philip Morris Inc.*, 340 Or. 35, 38-43, 127 P.3d 1165, 1167-71 (2006)("*Williams I*").[2] Plaintiff "based her fraud claim on a 40-year publicity campaign by Philip

[2] Plaintiffs also asserted a negligence claim, but the punitive damage award at issue here is based exclusively on the fraud claim. *See Williams I*, 340 Or. at 44, 127 P.3d at 1171.

Morris . . . to undercut published concerns about the danger of smoking." *Id.* at 39, 127 P.3d at 1168. An Oregon jury awarded Plaintiff $800,000 in non economic damages (reduced to $500,000 pursuant to Oregon's statutory cap on wrongful death damages) and $79.5 million in punitive damages for fraud. *Id.* at 44, 127 P.3d at 1171. The ratio of punitive damages to compensatory damages is either 97:1 or 152:1, depending on whether the capped or uncapped damage award is used in the calculation.

After several years of appellate litigation, the Oregon Supreme Court, purporting to apply this Court's decision in *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003), held that the punitive damages award was not excessive. *Williams I*, 340 Or. at 63-64, 127 P.3d at 1182. The court acknowledged that "[a]ll arguable versions of the ratio substantially exceed the single-digit ratio (9:1) that the Court [in *State Farm*] has said ordinarily will apply in the usual case." *Id.* at 62, 127 P.3d at 1181. Nonetheless, the court reasoned that a high level of reprehensibility could "overrid[e]" the ratio guidepost:

> Single-digit ratios may mark the boundary in ordinary cases, but the absence of bright-line rules necessarily suggests that the other two guideposts—reprehensibility and comparable sanctions—can provide a basis for overriding the concern that may arise from a double-digit ratio.

Id. at 63, 127 P.3d at 1181.

Construing "all facts in the light most favorable to plaintiff," the court concluded that "there can be

no dispute that Philip Morris's conduct was extraordinarily reprehensible." *Id.* at 55, 127 P.3d at 1177. According to the court, Philip Morris engaged in a scheme to defraud "the plaintiff and many others," and it knew for decades that this scheme "was damaging the health of a very large number of Oregonians—the smoking public—and was killing a number of that group." *Id.* at 63, 127 P.3d at 1181-82. "Under such extreme and outrageous circumstances, we conclude that the jury's $79.5 million punitive damage award against Philip Morris comported with due process." *Id.* at 63-64 127 P.3d at 1182.

Philip Morris subsequently filed a petition for writ of certiorari in this Court raising three issues: (1) whether an appellate court's conclusion that the defendant's conduct was highly reprehensible can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm, (2) whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties, and (3) whether, in reviewing a punitive award for excessiveness, an appellate court is permitted to give the plaintiff the benefit of all conceivable inferences that might support a finding of high reprehensibility even if the jury made no such specific factual findings. This Court granted the petition, "limited to Questions 1 and 2." *Philip Morris USA v. Williams,* 547 U.S. 1162 (2006).

After oral argument, this Court held that due process permits consideration of harm to others in evaluating the reprehensibility of the defendant's conduct, but that due process prohibits the use of a punitive damage verdict to punish a defendant

directly for that harm. *Philip Morris USA v. Williams,* __ U.S. __, 127 S. Ct. 1057, 1063-64 (2007)(*"Philip Morris"*). This Court remanded to the Oregon Supreme Court to permit that court to "apply the standard we have set forth." *Id.* Because application of the correct standard "may lead to the need for a new trial, or a change in the level of the punitive damages award," this Court did not "consider whether the award is constitutionally 'grossly excessive.'" *Id.*

On remand, the Oregon Supreme Court addressed only the trial court's failure to give an instruction on the issue of harm to nonparties. *Williams v. Philip Morris Inc.,* 344 Or. 45, 176 P.3d 1255 (2008)(*"Williams II"*). It decided that the proposed jury instruction at issue was flawed for reasons "we did not identify in our former opinion," and that for these "other reasons" the trial court did not err in refusing to give that instruction. *Id.* at 48, 176 P.3d at 1257. With respect to the excessiveness of the award, the Court simply "reaffirm[ed] our prior opinion in all respects." *Id.*

SUMMARY OF ARGUMENT

In 2006, this Court granted certiorari on the question of whether a finding of "extraordinary reprehensibility" could "override" the ratio guidepost for evaluating punitive damage awards and support a punitive award that is 97 times greater than the compensatory award. Nothing has occurred since that time to alter this Court's conclusion that this issue is worthy of review. Lower courts remain divided on whether double-digit ratios of punitive to

compensatory damages are constitutional in cases where compensatory damages are substantial and an elevated degree of reprehensibility is found. In fact, the importance of this issue is highlighted by recent decisions demonstrating that "extraordinarily reprehensible" conduct cannot reliably be defined or identified. Indeed, the approach taken by many courts virtually ensures that "extraordinary" reprehensibility will be found in precisely those cases where any finding of any reprehensibility is most likely to be mistaken.

ARGUMENT

THIS COURT SHOULD ONCE AGAIN GRANT REVIEW TO RESOLVE CONFLICTS IN THE LOWER COURTS ON THE APPROPRIATE APPLICATION OF THE RATIO AND REPREHENSIBILITY GUIDELINES

The Court has held that the excessiveness of a punitive damages award should be determined by reference to three guideposts: (1) the reprehensibility of the defendant's conduct; (2) the ratio between punitive and actual or potential damages; and (3) the difference between the award and the civil penalties authorized or imposed in comparable cases. *State Farm*, 538 U.S. at 418. Less than two years ago, this Court granted Philip Morris's prior petition for a writ of certiorari specifically on the question of whether the reprehensibility guidepost could "override" the ratio guidepost and support a punitive damage award that is 97 times greater than the compensatory award. Although this Court did not need to reach that issue at that time, nothing has

changed to alter this Court's prior conclusion that the issue is indeed worthy of this Court's review.

On the contrary, lower courts remain deeply divided on whether *the reprehensibility guidepost can* support a double-digit ratio even when the compensatory award is substantial. Moreover, the importance of this conflict is compounded by disagreements among the lower courts concerning how reprehensibility should be evaluated, particularly in cases involving personal injury. Thus, review of issues relating to these guideposts is warranted today just as it was in 2006.

A. Courts Remain Divided On Whether The Reprehensibility Guidepost Can Override The Ratio Guidepost.

1. As this Court recognized in *State Farm,* the three guideposts must be considered together along with the amount of the compensatory award. "[I]n practice, few awards exceeding a single-digit ratio between punitive and compensatory damages, to a significant degree, will satisfy due process." 538 U.S. at 425. However, a greater ratio may be constitutional where "a particularly egregious act has resulted in only a small amount of economic damages." *Id.* Conversely, when compensatory damages are substantial, "a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.*

The Oregon Supreme Court's opinion eschews this textured analysis of the three guideposts and the size of the compensatory award altogether.

Under the Oregon Supreme Court's approach, if the court determines that the jury could have found the defendant's conduct to be "extraordinarily reprehensible" and comparable to a crime, any punitive damage award may be upheld, regardless of the ratio of punitive to compensatory damages and regardless of the size of the compensatory award. *Williams I,* 340 Or. at 63, 127 P.3d at 1181-82. The Oregon Supreme Court's approach cannot be reconciled with this Court's opinions. This Court has never suggested that the three due process guideposts are independent factors in the sense that one may offset or trump another. Rather, the guideposts work together to cabin a punitive damage award to a constitutionally acceptable level that reflects fair notice of the severity of the penalty that may be imposed. Consequently, although reprehensibility may move the acceptable ratio within the established range of proportional damages, it does not render the ratio guidepost inapplicable, as the court below held.

In fact, by holding that subjective conclusions about the degree of a defendant's reprehensibility can "override" the constitutional requirement of a reasonable relationship, the decision below eviscerates the only objective guidance as to the appropriate amount of punitive damages. The reprehensibility guidepost, standing alone, "provides little guidance on how to relate culpability to the size of an award." *BMW of North America, Inc. v. Gore,* 517 U.S. 559, 590 (1996)(Breyer, J., concurring). Thus, focusing on reprehensibility and disregarding ratio, as the Oregon Supreme Court did in this case, renders the excessiveness inquiry a largely subjec-

tive exercise. Moreover, as discussed in detail below, it does so in precisely those cases involving personal injuries caused by products where juries—and even courts—are most likely to misapply the reprehensibility guidepost and where the additional protection of the ratio guidepost is most needed.

2. Some courts apparently agree with the Oregon Supreme Court that where a defendant's reprehensibility is elevated to some undefined degree the ratio guidepost can, and even must, be disregarded. For example, in *Mission Resources, Inc. v. Garza Energy Trust,* 166 S.W.3d 301, 319 (Tex. Civ. App. 2005), the court concluded that the "highly unlawful" nature of defendant's conduct "*prevents* this Court from concluding that the ratio 20 to 1 was grossly excessive." *See also Superior Federal Bank v. Jones & Mackey Const. Co.,* 93 Ark. App. 317, 327, 329, 219 S.W.3d 643, 651, 653 (2005)(a "significant" or "substantial" degree of reprehensibility supported ratio of 17.6:1); *Seltzer v. Morton,* 336 Mont. 225, 293, 300, 154 P.3d 561, 609, 614 (2007)(reducing 18:1 punitive award to 9:1 notwithstanding "highly reprehensible" conduct, but suggesting a higher ratio would have been proper if the conduct had been even more reprehensible). But the decision of the Oregon Supreme Court directly conflicts with the decisions of other courts. *See. e.g., Boerner v. Brown & Williamson Tobacco Co.,* 394 F.3d 594 (8th Cir. 2005)(reducing 4:1 punitive award to 1:1 notwithstanding "highly reprehensible" conduct); *Planned Parenthood of the Columbia/Willamette Inc. v. American Coalition of Life Activists,* 422 F.3d 949 (9th Cir. 2005), *cert. denied,* 547 U.S. 1111 (2006) (reducing double digit punitive awards to 9:1 not-

withstanding "particularly reprehensible" conduct); *Eden Electrical, Ltd. v. Amana Co.,* 370 F.3d 824, 829 (8th Cir. 2004), *cert. denied,* 543 U.S. 1150 (2005) (8:1 punitive award reduced by district court to 4:1 notwithstanding "extraordinarily reprehensible scheme to defraud").

The existing conflict is well-illustrated by the Eighth Circuit's decision in *Boerner.* That case, like this one, involved a claim for personal injuries against the manufacturer of cigarettes. The jury awarded $4.025 million in compensatory damages and $15 million in punitive damages, a ratio of less than 4:1. The Eighth Circuit found that the defendant's conduct was "highly reprehensible" because the defendant knew it was selling an "extremely carcinogenic and extremely addictive" product and yet "actively misled consumers about the health risks associated with smoking." 394 F.3d at 602-03. Nevertheless, the court concluded that the punitive award was unconstitutionally excessive based on this Court's admonition that "[w]hen compensatory damages are substantial, then a lesser ratio, perhaps only equal to compensatory damages, can reach the outermost limit of the due process guarantee." *Id.* at 603, quoting *State Farm,* 538 U.S. at 425. Thus, the Eighth Circuit reduced the punitive award to $5 million, or "approximately 1:1." 394 F.3d at 603. This decision, holding a 4:1 ratio excessive notwithstanding "highly reprehensible" conduct closely related to that alleged in this case, is utterly inconsistent with the Oregon Supreme Court's decision that Philip Morris's conduct could "override" a 97:1 ratio.

B. The Issue Is Particularly Important Because Courts Remain Divided On How To Evaluate Reprehensibility In Personal Injury Cases.

Under the Oregon Supreme Court's decision, defendants whose conduct can be characterized as "extraordinarily" reprehensible (or, perhaps, "extremely," "egregiously," or "highly" reprehensible) are subject to potentially unlimited punitive damage awards unconstrained by the ratio guidepost. This potential would be a matter of serious constitutional concern even if "extraordinarily reprehensible" conduct could be reliably defined and identified. *See, e.g., BMW of North America, Inc. v. Gore,* 517 U.S. 559, 575 (1996)("Elementary notions of fairness enshrined in our constitutional jurisprudence dictate that a person receive fair notice not only of the conduct that will subject him to punishment, but also of the severity of the penalty that a State may impose.").

But such conduct cannot be reliably defined or identified. In this very case, for example, a conclusion that Philip Morris's conduct was "extraordinarily reprehensible" is at least suspect in light of the fact that in most similar cases, Philip Morris has been found not to be liable at all. In fact, as applied by many courts, the reprehensibility analysis is likely to lead to a finding of extreme reprehensibility in precisely those cases where any finding of reprehensibility is most likely to be mistaken: product liability cases, *i.e.*, cases (like this one) involving personal injuries allegedly caused by products.

1. A number of institutional and psychological factors coalesce in product liability cases to create a sort of "perfect storm" for product manufacturers. First, such cases often involve tragic personal injuries likely to provoke passion, prejudice and sympathy, and jurors are asked to make an evaluation—in hindsight and on the basis of arcane expert testimony and a complex factual record—as to whether a product design posed an "unreasonable" risk or whether the manufacturer disclosed sufficient information about that risk. In the highly charged atmosphere of a personal injury trial, the risks of the product (or conduct relating to the product)—often made painfully real by the presence of the injured persons in the courtroom—loom large while the theoretical benefits to society and to people not before the court pale in relative significance.

Judge Easterbrook explained this phenomenon in a products case involving an allegation that an escalator's emergency stop button was too prominent and attractive to children:

> The *ex post* perspective of litigation exerts a hydraulic force that distorts judgment. . . . .
>
> Come the lawsuit . . . the passenger injured by a stop presents himself as a person, not a probability. Jurors see today's injury; persons who would be injured if buttons were harder to find and use are invisible. Although witnesses may talk about them, they are spectral figures, insubstantial compared to the injured plaintiff, who appears in the flesh. . . . [N]o matter how conscientious jurors may be, there is a bias in the system. *Ex post* claims are overvalued and technical

> arguments discounted in the process of litigation. . . . And the claims of crippled neighbors receive more weight than do potential injuries to be felt by passengers (and stockholders) in other states.

Carroll v. Otis Elevator Co., 896 F.2d 210, 215-16 (7th Cir. 1990)(Easterbrook, J., concurring)(citations omitted).

This Court echoed this concern just this year in *Riegel v. Medtronic, Inc.*, 552 U.S. ___, 128 S.Ct. 999, 1008 (2008). In that case, this Court recognized the danger that a jury, evaluating the safety of a medical device, would find the device defective based on the risk of harm without giving adequate consideration to the corresponding benefits:

> A state statute, or a regulation adopted by a state agency, could at least be expected to apply cost-benefit analysis similar to that applied by the experts at the FDA: How many more lives will be saved by a device which, along with its greater effectiveness, brings a greater risk of harm? A jury, on the other hand, sees only the cost of a more dangerous design, and is not concerned with its benefits; the patients who reaped those benefits are not represented in court.

Id., 128 S. Ct. at 1008. *See also* Stephen Breyer, *Breaking the Vicious Circle: Toward Effective Risk Regulation,* 59 (1992)(the tort system "leaves the determination of 'too much risk' in the hands of tens of thousands of different juries who are forced to answer the question not in terms of a statistical life, but in reference to a very real victim needing com-

pensation in the courtroom before them," resulting in "random, lottery-like results").

2. Judge Easterbrook and this Court were addressing the risk that the *ex post* perspective of litigation will distort the jury's judgment, not with respect to reprehensibility, but with respect to the questions underlying liability for compensatory damages (*e.g.*, negligence, defect, or fraud). But the problem is compounded when punitive damages are also sought in these cases. Empirical research shows that the largest punitive damage awards are likely to be returned in those cases where the defendant engaged in a sound, socially-responsible cost-benefit analysis:

> The most consistent result across the different scenarios was that undertaking any type of risk analysis was harmful to the corporation's prospects both with respect to the probability of punitive damages and, more importantly, with respect to the magnitude of the award. . . . . Risk analyses and, in particular, analyses that value lives highly, are harmful to the company's prospects, whereas failing to think systematically about risks and undervaluing life is a less costly corporate strategy. The resulting incentives are perverse.
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> . . . .
>
> . . . . If the costs of the safety measure exceed the benefits, the company is not negligent in failing to adopt it, much less guilty of reckless behavior that would warrant punitive damages. But undertaking this kind of responsible risk analysis indicates that the

> company knew of the risk and intentionally inflicted it on a probabilistic basis, thus triggering punitive damages in the view of the mock jurors.

W. Kip Viscusi, *Corporate Risk Analysis: A Reckless Act?*, 52. Stan. L. Rev. 547, 588 (2000). In other words, this research suggests that jurors are likely to return the largest punitive damage awards in those cases where no damages at all, compensatory or punitive, should be awarded.

3. Notwithstanding the predictable fallibility of juries in cases of this nature, their judgments are typically treated as infallible by reviewing courts in evaluating the reprehensibility of the defendants' conduct. In this case, for example, the Oregon Supreme Court's evaluation of Philip Morris's reprehensibility was expressly predicated on a review of the record which "construe[d] all facts in favor of plaintiff, the party in whose favor the jury ruled." *Williams I*, 340 Or. at 55, 127 P.3d at 1177. Other courts use a similar standard of review. *See, e.g.*, *Buell-Wilson v. Ford Motor Co.*, 160 Cal. App. 4th 1107, 1124, 73 Cal. Rptr. 3d 277, 293 (2008)("disregarding contrary evidence submitted by" the defendant, even where uncontroverted). This standard of review requires reviewing courts to assume that the jury accepted as true everything claimed by the plaintiff that is supported by any evidence, that the jury drew all possible inferences from this evidence in favor of the plaintiff, and that the jury's findings (real or fictional) are indisputably correct. When a court evaluates reprehensibility based on all of these unrealistic assumptions, a finding of extreme reprehensibility in any product

liability case in which the jury has awarded punitive damages is virtually inevitable.

A regulatory agency that set public policy on the basis of such a distorted view of reality would correctly be seen to be acting irresponsibly. But courts like the Oregon Supreme Court assume that it is perfectly acceptable to make public policy based on just such a view of the evidence. If this is nevertheless an appropriate way for an appellate court to view the evidence, the resulting potential for serious error as a result cuts strongly against any due process rule that allows the reprehensibility analysis to override the ratio guidepost.

4. In addition, many appellate courts ignore all objective criteria in judging reprehensibility—including compliance with industry and government standards—and instead focus solely on the fact that the jury found malice and that serious injury resulted. In *Buell-Wilson*, for example, the California Court of Appeal upheld $55 million in punitive damages—plus an additional $23 million in non-economic damages—based on an alleged rollover defect in a sport-utility vehicle. In concluding that the defendant's reprehensibility was "high," the court (1) deemed evidence that the vehicle had one of the best rollover rates of any vehicle in its class to be "irrelevant . . . to the issue of punitive damages," (2) deemed compliance with federal government standards to be insignificant because such government standards "have failed to provide adequate consumer protection," and (3) ignored the fact that the verdict had been preceded by 13 consecutive defense verdicts in other cases alleging the same defect. 160 Cal. App. 4th at 1132, 1134-35, 1151, 1158, 73 Cal.

Rptr. at 299, 301, 314, 319; *see also, e.g., Action Marine, Inc. v. Continental Carbon, Inc.*, 481 F.3d 1302, 1320 n. 21 (11th Cir. 2007) (pet for cert. pending, No. 07-257 (filed Aug. 24, 2007))(finding defendant's conduct to be "exceedingly reprehensible" and deeming the fact that the State of Alabama permitted that conduct to be "of no consequence").[3]

5. The result in cases like *Buell-Wilson* and *Action Marine* is that defendants are found to have acted with a high degree of reprehensibility for conduct that is objectively reasonable, *i.e.*, conduct that reasonable people, including government regulators and other courts and juries, could find—and have found—was entirely reasonable. But not all courts make these types of errors in evaluating reprehensibility.

For example, in *Clark v. Chrysler Corp.*, 436 F.3d 594, 602-604 (6th Cir. 2006), the Sixth Circuit held that Chrysler's failure to conduct a particular type of test was not sufficiently reprehensible to justify a $3 million punitive award where "the test

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[3] The decision in *Action Marine* also illustrates that judges themselves are not immune to the same factors that occasionally lead jurors to reject cost-benefit analysis. In that case, the plaintiff claimed that the owner of a manufacturing plant should be punished for conduct that allowed some amount of carbon black to escape into the atmosphere. Based on the unproven "possibility" that carbon black was a carcinogen, the plaintiff argued that the defendant's conduct was more reprehensible because it reflected an indifference to health and safety. According to the Eleventh Circuit, the "possibility" that carbon black posed a danger to health, "*especially* when the possibility is not well defined, counsels for adoption of extraordinary precautions and justifies extraordinary penalties when available precautions are consciously ignored." 481 F.3d at 1319 n. 20 (emphasis added).

was neither required by the government nor used by other manufacturers" and there was a "good faith dispute" about whether the test was necessary.

7. The decision in *Clark,* unlike the decisions in *Buell-Wilson* and *Action Marine,* is consistent with this Court's precedent. In *BMW*, for example, this Court evaluated the reprehensibility of BMW's failure to disclose pre-sale repairs to a motor vehicle that did not exceed 3 percent of the suggested retail price. In doing so, this Court explicitly considered the fact that several state legislatures had adopted disclosure requirements, that BMW's disclosure policy "coincided with the strictest extant state statute," and that for purposes of deciding what must be disclosed "BMW could reasonably rely on state disclosure statutes for guidance." 517 U.S. at 578, 579.

Even more recently, in *Safeco Ins. Co. of America v. Burr,* __ U.S. __, 127 S. Ct. 2210 (2007), this Court reviewed a decision of the Ninth Circuit that would have permitted punitive damages to be awarded against a defendant for "recklessly disregarding" the requirements of federal law, even though the district court had found that the defendant's interpretation of that law was correct. This Court reversed and held that no punitive damages could be imposed because the defendant's conduct was "objectively reasonable" and the "statutory text and relevant court and agency guidance allow for more than one reasonable interpretation." *Id.,* 127 S. Ct. at 2215, 2216 n. 20. *Safeco* was not based on due process principles, but if objectively reasonable conduct is not sufficiently reprehensible to justify any punitive damages as a matter of federal law, the

objective factors that make such conduct objectively reasonable are logically relevant to the due process reprehensibility analysis.

8. For the reasons discussed above, this conflict in whether courts should consider objective indicators of reasonableness in evaluating reprehensibility is closely related to the issue raised by the petition and further supports review by this Court. In any event, however, the subjectivity that currently pervades reprehensibility analysis in many product liability cases, including this one, demonstrates the importance of adhering to the objectivity provided by the ratio guidepost, *particularly* in cases of alleged "extraordinary reprehensibility."

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

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