

No. 07-1216

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IN THE
Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,

v.

MAYOLA WILLIAMS,
Respondent.

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

**BRIEF OF WASHINGTON LEGAL FOUNDATION
AND ALLIED EDUCATIONAL FOUNDATION
AS AMICI CURIAE IN SUPPORT OF PETITIONER**

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QUESTIONS PRESENTED

1. Whether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may interpose—for the first time in the litigation—a state-law procedural bar that is neither firmly established nor regularly followed.

2. Whether a punitive damages award that is 97 times the compensatory damages may be upheld on the ground that the reprehensibility of a defendant's conduct can "override" the constitutional requirement that punitive damages be reasonably related to the plaintiff's harm.

In their brief, *amici curiae* will focus only on the first of the two questions presented.

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INTEREST OF *AMICI CURIAE*¹

The Washington Legal Foundation (“WLF”) is a non-profit public interest law and policy center based in Washington, D.C., with supporters nationwide. WLF regularly appears before federal and state courts promoting economic liberty, free enterprise principles, and a limited and accountable government. WLF’s Legal Studies Division also publishes monographs and other publications on these topics.

In particular, WLF has devoted substantial resources over the years through litigation and publishing to promote civil justice reform, including tort reform and opposing excessive punitive damages and attorneys’ fee awards. WLF appeared as *amicus curiae* in this case when it was before this Court previously. *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007).

The Allied Educational Foundation (“AEF”) is a non-profit charitable and educational foundation based in New Jersey. Founded in 1964, AEF is dedicated to promoting education in law and public policy and has appeared as co-*amicus curiae* with WLF in this case and in other punitive damages cases in this Court. *See, e.g., State Farm Mut.*

¹ Pursuant to S. Ct. R. 37, *amici* state that: (1) all parties have consented to the filing of this brief; (2) notice of intent to file this brief was given to respondent on April 18, 2008, after the time required by Rule 37, but respondent does not object on that basis to the filing of this brief; (3) no counsel for any party has authored this brief in whole or in part; and (4) no party or entity, other than *amici curiae*, its members or its counsel, has made any monetary contribution to the preparation or submission of this brief.

Auto. Ins. Co. v. Campbell, 538 U.S. 408 (2003); *BMW of N. America, Inc. v. Gore*, 517 U.S. 559 (1996).

Amici are concerned that unless review is granted and the Oregon Supreme Court judgment is vacated, this Court's judgment in this and other constitutional cases are vulnerable to being undermined by lower courts. Such a result would not serve the interests of justice and finality.

STATEMENT OF THE CASE

1. This case comes back to this Court for a second time following the refusal of the Oregon Supreme Court to apply the directive of this Court in reversing and remanding the case for further consideration. Rather than apply the constitutional standard set out in this Court's prior opinion, the Oregon Supreme Court ignored this Court's decision by concocting a state law procedural ground—not applied by the Oregon courts at any previous point in this litigation—to reaffirm its prior decision. The Court should grant *certiorari* again to enforce the rule of law it previously announced and to ensure that its mandate is not ignored.

In its decision in *Philip Morris USA v. Williams*, 127 S. Ct. 1057, 1065 (2007), the Court concluded that the Oregon Supreme Court had “applied the wrong constitutional standard when considering Philip Morris’ appeal.” The Court remanded the case to the Oregon Supreme Court, instructing it to “apply the [constitutional] standard set forth” in the Court’s opinion. *Id.* Rather than comply, the Oregon Supreme Court instead ruled that because the jury instruction proposed by Philip Morris purportedly had technical flaws wholly unrelated to the due process issues addressed by this Court—which had been

considered on the merits by the Oregon courts at all stages of the litigation—state procedural rules dictated re-affirmance of its prior opinion without the need to apply the due process principle laid down by this Court. Pet. App. at 21a.

The Oregon Supreme Court's decision effectively disregarded this Court's directions and, in the process, denied Philip Morris the due process right that this Court previously indicated must be enforced on remand. This Court should grant *certiorari* in this case for two reasons: to make clear that lower courts may not pick and choose when to follow a directive from this Court, and to ensure that petitioner's due process rights are protected.

2. This case arises out of the death of Jesse Williams from lung cancer, which was attributed to smoking. Mr. Williams's widow sued Philip Morris for negligence and deceit related to its cigarette marketing practices. Following trial, the jury found petitioner liable and awarded the respondent \$821,000 in compensatory damages, which was reduced to \$521,485 pursuant to Oregon's statutory cap, and \$79.5 million in punitive damages. The trial judge found the punitive damages award "excessive" under *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996), and reduced the award to \$32 million. Both sides appealed, and the Oregon Court of Appeals reinstated the \$79.5 million punitive damages award. The Oregon Supreme Court denied review, but this Court granted *certiorari*, vacated the decision, and remanded the case to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance v. Campbell*, 538 U.S. 408 (2003). *Philip Morris USA v. Williams*, 540 U.S. 801 (2003).

3. On remand, the Oregon Court of Appeals affirmed its prior opinion finding that the \$79.5 million punitive damages award was not excessive. *Williams v. Philip Morris USA*, 193 P.3d 126 (Or. Ct. App. 2004). The Court of Appeals rejected Philip Morris's argument that the trial court erred in failing to instruct the jury that it could not award punitive damages in order to punish petitioner for harm to non-parties. *Id.* at 142 (“[W]e are not persuaded by defendant’s argument that we erred in our previous decision when we rejected its argument that the trial court erred by failing to instruct the jury that it could not punish defendant for the impact of its misconduct on others.”). The Oregon Court of Appeals never raised, or even hinted at, the possibility that Philip Morris had failed to preserve its right to continue to argue that the trial court’s ruling on the jury instructions violated its due process rights. Rather, it addressed and rejected Philip Morris’s argument on the merits, and held that the trial court did not err in refusing to instruct the jury that it could not punish a defendant for alleged harm to non-parties.

4. Following the second decision by the Oregon Court of Appeals, the Oregon Supreme Court accepted the case. Its review was limited to two questions: whether a defendant is entitled to have the jury instructed “that punitive damages cannot be imposed for alleged harm to non-parties;” and whether the punitive damages award was unconstitutionally excessive. *Williams v. Philip Morris USA*, 127 P.3d 1165, 1171 (Or. 2006).² The Oregon Supreme Court held that the

² The Oregon Supreme Court declined to consider additional issues that it concluded had not been preserved by Philip Morris on appeal. 127 P.3d at 1171. It did not, however, indicate that Philip Morris had defaulted its constitutional challenge to the trial court’s failure to give its requested instruction that the jury may not punish for harm to non-parties.

instruction proposed by Philip Morris was incorrect to the extent it would have prohibited the jury from punishing for misconduct affecting third parties. *Id.* at 1176. The Oregon Supreme Court also evaluated the propriety of the punitive damages award itself and held that it was not excessive. *See id.* at 1176-82. At no time did the Oregon Supreme Court—or any other Oregon court reviewing this case—indicate that there might be some state procedural ground barring further review of whether the jury’s consideration of harm to third parties violated Philip Morris’s constitutional rights. Instead, each time the Oregon courts reviewed the case prior to this Court’s ruling last year, they reviewed the merits of—and rejected—Philip Morris’s argument that it was improper to instruct the jury that it could punish Philip Morris for, among other things, harm it allegedly inflicted on non-parties.

5. This Court granted *certiorari* to consider two questions: (1) whether Oregon had unconstitutionally permitted Philip Morris to be punished for harming nonparty victims; and (2) whether Oregon in effect had disregarded the constitutional requirement that punitive damages be reasonably related to the plaintiff’s harm. *Philip Morris*, 127 S. Ct. at 1062. The Court answered the first question in the affirmative, holding that the Due Process Clause “forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties.” *Id.* at 1063. The Court explained that due process “requires States to provide assurances that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused to strangers.” *Id.* at 1064. The Court held that juries cannot punish for harm caused to non-parties even if the alleged harm was produced by the same or similar conduct—thereby rejecting the distinction the Oregon Supreme Court had relied upon in finding that *State Farm*

did not require reversal. *Id.* at 1065.³ Further, this Court held that “state courts cannot authorize procedures that create an unreasonable and unnecessary risk” that juries may be considering harm to others in seeking to punish a party—which is forbidden—rather than considering such harm “under the rubric of reprehensibility”—which is permissible. *Id.* It remanded the case and directed the Oregon Supreme Court to “apply the standard set forth” in the Court’s decision. *Id.* Because application of the constitutional standard the Court laid out had the potential to lead to a new trial or remittitur of the punitive damages award, the Court did not answer the second question—whether the punitive damages award was unconstitutionally excessive. 127 S. Ct. at 1065.

6. On remand, the Oregon Supreme Court framed its task as “apply[ing] the constitutional standard set by the Supreme Court in [its] consideration of the sole issue raised by Philip Morris, *viz.*, whether the trial court erred in refusing to give [Philip Morris’s] proposed jury instruction [.]” Pet. App. at 13a-14a. Because the Oregon Supreme Court found that Philip Morris’s proposed jury instructions did not state Oregon law correctly on issues wholly distinct from the due process issue before it, it refused to apply the rule enunciated by this Court and instead reaffirmed its prior ruling. *Id.* at 21a-22a.

³ The Oregon Supreme Court had held that *State Farm* did not require it to reverse the punitive damages award because that case only prohibited juries from considering harm to third parties arising from *dissimilar* conduct. 127 P.3d at 1175-76.

REASONS FOR GRANTING THE PETITION

The Oregon Supreme Court's refusal to follow this Court's clear directive should not be tolerated. This Court spent significant amounts of its limited time and resources in resolving an open issue whose merits the Oregon courts had determined without the slightest indication of any state law impediment to doing so. Rather than apply the constitutional standard enunciated by this Court, however, the Oregon Supreme Court instead decided—for the first time on remand from this Court—to invoke a state law procedural bar to consideration of petitioner's due process rights—essentially rendering this Court's prior decision an advisory opinion. Lower courts cannot be allowed to pick and choose which of this Court's mandates they will follow. If the Oregon Supreme Court's disregard for this Court's directives is allowed to stand, it will encourage other lower courts to employ similar tactics in the future whenever they disagree with the results of this Court's review. Accordingly, this Court should grant *certiorari*.

I. THE OREGON SUPREME COURT'S FAILURE TO UPHOLD PETITIONER'S DUE PROCESS RIGHTS RAISES SERIOUS ISSUES THAT SHOULD BE ADDRESSED BY THIS COURT.

A. The Oregon Supreme Court Should Be Required To Apply This Court's Previous Decision.

This Court's prior ruling could not have been more clear—the due process clause “forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties . . . who are, essentially, strangers

to the litigation.” *Philip Morris*, 127 S. Ct. at 1063. Moreover, this Court held that the Due Process Clause “requires States to provide assurances that juries are not asking the wrong question,” and in the process punishing defendants for harm to those strangers. *Id.* at 1064. That proposition was presented to this Court by petitioner after being rejected on the merits by not only the Oregon Supreme Court, but also the Oregon Court of Appeals (twice) and the trial court. Instead of faithfully applying this Court’s ruling on remand, however, the Oregon Supreme Court invoked a novel procedural rule—for the first time in nine years of this litigation—to avoid remedying the constitutional infirmities identified by this Court.

It is a fundamental and bedrock principle of American jurisprudence that the United States Supreme Court is the ultimate arbiter of cases or controversies that come before it. *See Martin v. Hunter's Lessee*, 14 U.S. 304 (1816). Accordingly, *all* lower courts must abide by decisions rendered by the Supreme Court. *See Briggs v. Penn. R. Co.*, 334 U.S. 304, 306 (1948) (“In its earliest days this Court consistently held that an inferior court has no power or authority to deviate from the mandate issued by an appellate court.”) (citations omitted). Indeed, the Supreme Court explained over one hundred years ago the requirement that a lower court strictly comply with a Supreme Court mandate:

When a case has been once decided by this court on appeal, and remanded to the circuit court, whatever was before this court, and disposed of by its decree, is considered as finally settled. The circuit court is bound by the decree as the law of the case, and must

carry it into execution according to the mandate. That court cannot vary it, or examine it for any other purpose than execution; or give any other or further relief; or review it, even for apparent error, upon any matter decided on appeal; or intermeddle with it, further than to settle so much as has been remanded.

In re Sanford Fork & Tool Co., 160 U.S. 247, 255 (1895) (citations omitted); *see also Chesapeake & O. Ry. Co. v. Martin*, 283 U.S. 209 (1931) (state courts are bound by the decisions of the United States Supreme Court construing federal law).

Given the well-settled role of the Supreme Court—and the concomitant requirement that lower courts comply with its mandates—the Oregon Supreme Court lacked the power to resolve the litigation in a manner inconsistent with this Court’s mandate on prior review. By engaging in an extreme exercise of “form over substance,” the Oregon Supreme Court employed a type of procedural gamesmanship that this Court should not countenance. If allowed to stand, it will provide a blueprint to other lower courts seeking to avoid this Court’s mandates where they do not agree with the decision this Court renders.

B. *Certiorari* Should Be Granted To Ensure That Other Courts Do Not Follow The Oregon Supreme Court's Lead In Disregarding The Directives Of This Court.

Unfortunately, the Oregon Supreme Court's procedural gamesmanship is not an isolated incident. In May 2007, this Court vacated the judgment in *Buell-Wilson v. Ford Motor Co.*, and remanded the case to the California Court of Appeal for reconsideration in light of the *Philip Morris* decision. 127 S. Ct. 2250 (2007). On remand, rather than apply this Court's mandate in *Philip Morris* as directed, the *Buell-Wilson* court followed the Oregon Supreme Court's lead and held that because the jury instructions Ford had proposed "incorrectly and incompletely stated the law," Ford had "forfeited its due process challenge to the punitive damages award." *Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277, 328 (Cal. Ct. App. 2008). In fact, the *Buell-Wilson* court cited the Oregon Supreme Court's action in this case in justifying its own ruling. *See id.* at 337.

Accordingly, the California Court of Appeal did not evaluate whether State procedures had adequately protected Ford against the risk that it would be punished for harm to non-parties, as directed by this Court in *Philip Morris*, 127 S.Ct at 1064. In fact, the California Court of Appeal went so far as to suggest that Ford's failure to preserve its objections meant that this Court did not have jurisdiction over Ford's due process claim, stating "[t]he United States Supreme Court lacks jurisdiction over federal questions 'not pressed or passed upon in state courts.'" *Buell-Wilson*, 73 Cal. Rptr.

3d at 332.⁴ As was the case in the Oregon courts, the California Court of Appeal never suggested on its initial review that this Court would not have jurisdiction to consider Ford's due process claims. Moreover, the suggestion that federal jurisdiction was improper makes no sense given that a number of courts, including this Court, spent time and resources ruling on Ford's due process claims on the assumption that the claims were ripe for review.

In the past, this Court has not hesitated to grant *certiorari* in order to correct a state court's attempt to use independent state law grounds as a pretext for ignoring the Court's mandate. *See, e.g., NAACP v. Alabama ex rel. Patterson*, 360 U.S. 240 (1959) (per curiam) (summarily reversing Alabama state court's refusal to apply this Court's mandate on the basis that the order at issue had state law deficiencies separate and apart from those found unconstitutional by this Court) (cited at Pet. 17-18); *Yates v. Aiken*, 484 U.S. 211, 218 (1988) (finding that South Carolina was bound to apply the federal relief found by the Court because "it [had already] considered the merits of the federal claim") (cited at Pet. at 19). Moreover, this Court has granted *certiorari* in situations where a lower court's actions in ignoring this Court's instructions were less egregious than occurred here. In *Miller-El v. Cockrell*, 537 U.S. 322 (2003), following the Fifth Circuit's refusal to grant a Certificate of Appealability (COA) on the petitioner's habeas

⁴ In an apparent attempt to backstop its refusal to apply the standard established by this Court in *Williams*, the California Court of Appeal also held that its award of punitive damages—which it reduced from \$76 million to \$55 million after adjusting plaintiff's non-economic damages—was not unconstitutionally excessive. *Buell-Wilson*, 73 Cal. Rptr. 3d at 318.

petition, this Court ruled 8-1 that there was substantial evidence of racial discrimination in the jury selection at petitioner's trial and ordered the Fifth Circuit to review the claims. On remand, the Fifth Circuit did follow this Court's explicit instruction to grant the COA. The Fifth Circuit, however, affirmed its prior ruling, holding that the petitioner "failed to show by clear and convincing evidence that the state court erred in finding no purposeful discrimination." *Miller-El v. Dretke*, 361 F.3d 849, 862 (5th Cir. 2004).

Notwithstanding that the Fifth Circuit followed this Court's explicit directions in granting the COA, it ignored the Court's strong statements regarding the "substantial evidence" put forth by the petitioner of racial discrimination in violation of *Batson*. *Miller-El*, 537 U.S. at 344 ("Disparate questioning [of African-American jurors] did occur . . . [, and] if the use of disparate questioning is determined by race at the outset, it is likely a justification for a strike based on the resulting divergent views would be pretextual. In this context the differences in the questions posed by the prosecutors are some evidence of purposeful discrimination.") (citing *Batson v. Kentucky*, 476 U.S. 79, 97 (1986)). Accordingly, the Court once again accepted review of the case and, because the Fifth Circuit failed to heed the Court's guidance regarding the substantial evidence of discrimination in the case, rather than remand the case again, the Court reversed the petitioner's conviction and ordered a new trial. *Miller-El v. Dretke*, 545 U.S. 231, 266 (2005). The Court held that the lower court's finding that there was no *Batson* violation in the jury selection "blinks reality," and that the Fifth Circuit's refusal to rectify the situation was "unreasonable as well as erroneous." *Id.*

Just as this Court granted *certiorari* in *Patterson*, *Yates*, and *Miller-El* to make sure that lower courts follow the Court's directives, it should also do so here. Allowing the Oregon Supreme Court's flagrant disregard for the Court's mandate to go unrectified would give lower courts—especially state courts invoking state law—an opportunity to manipulate this Court's rulings when policy concerns or other factors come into play. Whether it results in the imposition of excessive punitive damages or other violations of individual constitutional rights, the Court should step in to prevent such gamesmanship.

**C. The Oregon Supreme Court's
Decision Effectively and
Impermissibly Rendered This
Court's Prior Opinion Advisory.**

The Oregon Supreme Court's refusal to apply the correct due process standard to the jury instructions in this case has effectively mooted this Court's prior decision by depriving it of any effect on the judgment in the case. The Court should grant *certiorari* to ensure that its prior opinion is not retroactively nullified by the Oregon Supreme Court's disregard of this Court's mandate.

Doctrines of justiciability preclude federal courts from issuing advisory opinions. *Flast v. Cohen*, 392 U.S. 83, 96 (1968). This Court has referred to its inability to issue advisory opinions as the “oldest and most consistent thread in the federal law of justiciability.” *Id.*; *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 101-02 (1998) (noting that advisory opinions have been “disapproved by this Court from the beginning”); *United States v. Fruehauf*, 365 U.S. 146, 157 (1961) (citations omitted) (“[Advisory]

opinions, such advance expressions of legal judgment upon issues which remain unfocused . . . we have consistently refused to give.”); *Phelps v. Alameda*, 366 F.3d 722, 730 (9th Cir. 2004) (“[W]e remain bound by a longstanding line of Supreme Court precedent refusing to issue an opinion that does not affect the outcome of the case at bar.”). As Professor Chemerinsky has observed, “[t]he other justiciability doctrines [, standing, ripeness and mootness,] exist largely to ensure that federal courts will not issue advisory opinions.” ERWIN CHEMERINSKY, *FEDERAL JURISDICTION* § 2.2, at 57 (5th ed. 2007).

In holding for the first time on its second review of this case that petitioner’s proposed instruction contained errors of state law wholly unrelated to the issue confronted by this Court, the Oregon Supreme Court is essentially telling this Court that it does not agree with the Court’s directive and is going to ignore it. This Court should grant *certiorari* to prevent the Oregon Supreme Court, at this late stage, from rendering this Court’s prior opinion irrelevant on an issue of significant constitutional importance.

II. ALLOWING LOWER COURTS TO INVOKE POST-HOC PROCEDURAL ROADBLOCKS WASTES THE RESOURCES OF THE COURT AND THE PARTIES.

Apart from the bedrock principle that inferior courts must abide by this Court’s mandates, significant policy considerations lead to the same conclusion—this Court should not countenance attempts by state courts to interpose post-hoc procedural roadblocks as a way to avoid implementing decisions rendered by this Court. Specifically,

considerations of judicial economy and fairness to the parties weigh in favor of this Court granting *certiorari* to ensure that these compelling policy considerations are not frustrated by the inappropriate actions of the Oregon Supreme Court. The courts in the United States, including the United States Supreme Court, are faced with dockets that are becoming more and more crowded. In 2006, less than one percent of the cases filed in this Court were argued.⁵ This figure reflects the care with which this Court husbands its resources and evidences the need to make sure that cases that make it to the Court are ripe for review. *See, e.g., Schiro v. Indiana*, 493 U.S. 910, 910 (1989) (noting that United States Supreme Court's *certiorari* docket is "so crowded" and that "it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation"); *Rogan v. Menino*, 175 F.3d 75, 76 (1st Cir. 1999) (referring to "busy trial courts, struggling to manage crowded dockets").

In light of the ever-increasing demands on the court system, and the courts' limited resources to deal with these demands, it is imperative that attention be given to the important interests of judicial economy. *See United States v. Eufrazio*, 935 F.2d 553, 568 (3d Cir. 1991) (noting "[t]he public interest in judicial economy"); *see also Kerr v. U. S. Dist. Court for Northern Dist. of California*, 426 U.S. 394, 403 (1976) (noting that "particularly in an era of excessively crowded lower court dockets, it is in the interest of the fair and prompt administration of justice to discourage piecemeal litigation"); Amy Scott, *Limiting The Jurisdiction Of The Federal Circuit: How Holmes Alters The Landscape Of*

⁵ *See* 2007 YEAR-END REPORT ON THE FEDERAL JUDICIARY 9, available at <http://www.supremecourtus.gov/publicinfo/year-end/2007year-endreport.pdf>.

Patent Cases On Appeal, 38 GA. L. REV. 429, 433 (Fall 2003) (“The litigation explosion during the post-World War II era caused a backup of cases throughout the judicial system.”) (citation omitted). Allowing inferior courts to work an end-run around a Supreme Court decision after that decision has been rendered on the merits is entirely inconsistent with the importance of maintaining judicial economy in an era of over-crowded dockets. Indeed, it needlessly wastes the precious resources of the courts, as well as the time and energy of judges, clerks, attorneys, and parties.

In addition to wasting valuable time and resources, the gamesmanship of the Oregon Supreme Court is fundamentally unfair to the parties. Litigants should not be required to go through years of litigation and expense at multiple levels of state court proceedings—culminating in applications to this Court for relief (for now a third time)—only to have the state high court ignore this Court’s clear guidance. Yet, this is precisely the scenario that the Oregon Supreme Court has imposed upon Philip Morris, having waited until *after* this Court ruled before raising a purported independent and adequate state ground for decision for the *first* time. Allowing a state court to avoid the merits of a federal constitutional question after *it* has teed that question up for this Court runs afoul of the important goal of fundamental fairness to litigants. *See, e.g., Intercon Research Associates, Ltd. v. Dresser Industries, Inc.*, 696 F.2d 53, 57 (7th Cir. 1982) (noting that “one of the goals of the judicial system...is to ensure fundamental fairness to all parties”). The Court should grant *certiorari* to reinforce the principle that cases should not be sent to this Court unless they are ripe for review, and that once this Court decides an

issue, it is too late to interpose state law procedural barriers to prevent implementing this Court's rulings.

CONCLUSION

The petition for a writ of *certiorari* should be granted to address the Oregon Supreme Court's refusal to apply this Court's directive.

Respectfully submitted,

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