No. 09-297

IN THE
Supreme Court of the United States

FORD MOTOR COMPANY,
Petitioner,

v.

BENETTA BUELL-WILSON, ET AL.
Respondents.

On Petition For A Writ Of Certiorari To The California Court Of Appeal

REPLY BRIEF FOR PETITIONER

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REPLY BRIEF FOR PETITIONER

Respondents' brief in opposition unwittingly highlights the confusion surrounding how courts should resolve as-applied vagueness challenges to punitive damage awards.

The relevant question is not, as Respondents would have it, whether Ford had notice that a California jury could impose punitive damages in a design defect case; rather, it is whether Ford had notice of how it could tailor its conduct to comply with the law and avoid punishment. As to that question, Respondents have no answer. The flaw in Respondents' argument is the same flaw manifest in the decision below, as well as in the decisions of the many other state courts that follow the same misguided approach: if a defendant can be punished for conduct that reasonable persons could conclude was lawful — as Ford was in this case — then the defendant lacks the fair notice that would enable it to conform its conduct to the law and avoid punishment.

This is a critical issue of procedural due process that affects businesses and individuals throughout the country, as evidenced by the *amicus* filings urging this Court to grant review. *See, e.g.*, Chamber Br. 2 (this case is of "enormous interest to the American business community"); PLAC Br. 2 ("California courts have embraced a regime of *post hoc* second guessing that would deprive any manufacturer of the ability to know in advance whether its decisions will subject it to punishment."). California and other States have effectively insulated their punitive damages statutes from as-applied vagueness challenges by incorrectly treating as-applied challenges as facial challenges and then denying them on that ground. The confusion in the lower courts has resulted in defendants being subjected to massive, multimillion-

dollar punishments — including the $55 million sanction in this case, the largest punitive damages award affirmed on appeal in California history — for conduct that reasonable people could conclude was lawful.

This Court should grant review and hold that an as-applied vagueness challenge to a punitive damages statute should be sustained if the defendant's conduct was objectively reasonable, and that the California courts' refusal to apply such a rule violated due process.

I. FORD PRESERVED ITS VAGUENESS CHALLENGE.

Respondents erroneously contend that Ford "forfeited" its vagueness challenge. Opp. 5-11. "Where the highest state court assumes or holds that a federal question is properly before it and then proceeds to consider and dispose of that issue, the Supreme Court's concern with the proper raising of the federal question in the state courts disappears." Eugene Gressman, et al., SUPREME COURT PRACTICE 197 (9th ed. 2007). Here, the California Court of Appeal, in the decision under review, squarely addressed and resolved Ford's due process vagueness challenge. *See* Pet. App. 61a ("Ford contends that if punitive damages can be awarded on this record, Civil Code section 3294 is unconstitutionally vague because it failed to give Ford fair notice that its conduct could subject it to punitive damages. This contention is also unavailing."). Respondents agree. *See* Opp. 23 ("the Court of Appeal rejected Ford's as-applied claim on the merits").

Ford then filed a petition for review in the California Supreme Court presenting the following issue: "As a matter of . . . federal due process, are punitive damages prohibited in product liability cases where

the manufacturer's design conformed to objective indicators of reasonable safety, including industry standards and custom, governmental safety standards and policy judgments, and the existence of a genuine debate about what the law requires?" Petition for Review 1; *id.* at 35–38. Although the California Supreme Court may limit grants of review to only a subset of the issues presented, *see* Cal. R. Ct. 8.516(a)(1), the court granted review as to Ford's *entire* petition, including the federal due process vagueness challenge, before dismissing the petition.

In short, no California court has ever held that Ford waived its vagueness challenge; the court of appeal squarely ruled on it, and the Supreme Court granted review on it. Where, as here, the state courts have decided the issue, "[t]here can be no question as to the proper presentation of a federal claim." *Raley v. Ohio*, 360 U.S. 423, 436–37 (1959).

Respondents' entire waiver argument rests on the claim that Ford's *prior* petition for review — *i.e.*, the one that Ford filed after the court of appeal's first decision in this case, and before this Court's GVR order — did not preserve the vagueness challenge. Respondents are mistaken: Ford specifically raised this issue in its first petition for review in a manner that more than adequately met California's liberal standards for presenting issues for review. *See Adams v. Murakami*, 54 Cal. 3d 105, 114 n.5 (1991). Ford raised the issue prominently in the introduction and elsewhere in its first petition for review, *see* Pet. for Review 1, 3, 11 n.2, Resp. App. 5a, 7a, and then presented it again in its first petition for certiorari, which was granted by this Court, over Respondents' objection that the issue had been waived. *See United States v. Williams*, 504 U.S. 36, 40 (1992) (in granting certiorari, the Court "necessarily considered and rejected" the respondent's waiver argument).

Even if Respondents were correct — which they are not — in claiming that Ford did not raise the vagueness issue in its first petition for review, it would not matter because the court of appeal squarely addressed and resolved it on remand. And California law clearly provides that when a case is remanded through a GVR order from this Court, "the cause in its entirety is properly before" the state courts on remand. *People v. Hamilton*, 45 Cal. 3d 351, 363 (1988).

II. THIS CASE PRESENTS A QUESTION OF GREAT IMPORTANCE THAT HAS DIVIDED THE LOWER COURTS.

1. Respondents' argument mirrors the mistaken approach the California courts have taken. Respondents contend that Ford had notice that punitive damages could be imposed for "knowingly designing and selling a vehicle that exposes consumers to risk of severe injury or death, when the defect could be corrected at minimal cost." Opp. 12.

Respondents fundamentally miss the point that the type of general notice on which they and the California courts rely is insufficient as a matter of due process because it provides no standard to which a defendant can conform its conduct and thereby avoid the risk of punishment. *All* motor vehicles — and indeed many other products — present a risk of injury or death, and whether a particular risk renders a product "defective" is often a judgment call over which reasonable people can and do disagree. *See* David G. Owen, *Problems in Assessing Punitive Damages Against Manufacturers of Defective Products*, 49 U. Chi. L. Rev. 1, 37-38 (1982) ("[t]he very notion of how much design safety is enough . . . involves a morass of conceptual, political, and practical issues on which juries, courts, commentators, and legislatures strongly disagree" and "[t]here is there-

fore a vast defect 'no man's land' where a manufacturer has no idea whether it is on the right or wrong side of the law").

Moreover, determining whether a product is "defective" requires more than assessing the cost of "correcting" the alleged "defect"; it also requires considering the effect on the product's utility or desirability to consumers, not to mention any new dangers that might be created through an alternative design. *See Dreisonstok v. Volkswagenwerk, A.G.*, 489 F.2d 1066, 1075 (4th Cir. 1974) (design that does not maximize safety is not "defective" where there are utility benefits); AAM Br. 8 ("an automobile manufacturer could make every car it designs a tank, but few consumers could afford to purchase it").

Thus, the fact that a defendant has notice that punitive damages could be imposed for knowingly selling a product that a jury may later find "defective" is not the type of notice that permits a product seller to conform its conduct to the law and *avoid* being assessed punitive damages — and therefore fails to comport with due process. *See City of Chicago v. Morales*, 527 U.S. 41, 58 (1999) (the "purpose of the fair notice requirement is to enable the ordinary citizen to conform his or her conduct to the law"); *United States v. Kozminski*, 487 U.S. 931, 949-50 (1988) ("statutes [that] provide almost no objective indication of the conduct or condition they prohibit . . . would fail to provide fair notice"); *United States v. Santos*, 128 S. Ct. 2020, 2025 (2008) (opinion of Scalia, J.) (criminal statutes should be construed in defendant's favor given "the fundamental principle that no citizen should be held accountable for a violation of a statute whose commands are uncertain, or subjected to punishment that is not clearly prescribed"). Rather, under the California approach, manufacturers can conform their conduct to avoid punishment only by refusing to sell any product that

poses any risk of injury that some jury might one day find renders the product defective, even if other juries, an entire industry, and the federal government could — and did — reasonably reach the opposite conclusion.

Respondents contend that the text of California Civil Code section 3294(a) provided fair notice because it "carefully defines the circumstances in which punitive damages can be awarded." Opp. 13. But this case concerns how the California courts have *interpreted and applied* this statutory language. As Ford has shown, they have done so in a way that permits punishment for objectively reasonable conduct, thus denying defendants fair notice of "the conduct that will subject [them] to punishment." *BMW v. Gore*, 517 U.S. 559, 574 (1996).

Nor does the fact that the statute contains a scienter requirement cure the vagueness problem because a defendant cannot know in advance what conduct, if done "knowingly," will subject it to punitive damages. *See Screws v. United States*, 325 U.S. 91 (1945). "'Willfully' doing something that is forbidden, when that something is not sufficiently defined according to the general conceptions of requisite certainty in our criminal law, is not rendered sufficiently definite by that unknowable having been done 'willfully.'" *Id.* at 154 (opinion of Roberts, J.).

2. Respondents insist that the California courts "remain open for consideration" of as-applied vagueness claims. Opp. 25. But the court of appeal rejected Ford's vagueness challenge by reasoning that the court in *Grimshaw v. Ford Motor Co.*, 119 Cal. App. 3d 757 (1981), considered the "same issue" — even though the facts of *Grimshaw* were completely different, and even though the *Grimshaw* court took the same misguided approach by relying on previous decisions rejecting vagueness challenges in cases in-

volving drunk driving, failure to properly set a railway switch, and intentionally failing to fix a fuel pump. *See id*. at 811.

Respondents argue that *Grimshaw* itself involved an as-applied challenge. Opp. 22. But if Respondents are correct — and they are not — then the *Grimshaw* court made the same error the court of appeal made here: it resolved an as-applied challenge by relying on old cases that rejected vagueness challenges based on entirely different facts. The California courts' formulaic denial of various as-applied challenges hardly demonstrates an openness to considering these challenges on the merits.

Respondents err in relying on the court of appeal's mention of its prior state-law sufficiency-of-the-evidence analysis. Opp. 23. In conducting that analysis, the court rejected Ford's argument that state law precluded imposing punitive damages for objectively reasonable conduct. Pet. App. 56a. Furthermore, the court gave no weight to conclusions reached by the federal government, and it treated as entirely irrelevant evidence that the product at issue was among the safest of its kind. Thus, the court in applying the *state-law* standard disregarded facts critical to the *constitutional* standard.

Respondents' hyperbolic contention that accepting Ford's argument would "eviscerate" state punitive damages statutes, Opp. 12 n.6, demonstrates their fundamental misunderstanding of the nature of Ford's as-applied challenge. Accepting Ford's argument would leave the statute intact and completely enforceable with respect to objectively unreasonable conduct that falls within its scope. *See Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021, 1028 (9th Cir. 2009). To solve the due process problem, all the California courts would have to do is interpret the California statute the same way this

Court interpreted the federal statutes at issue in *Safeco Insurance Co. of America v. Burr*, 551 U.S. 47 (2007), and *Screws*, 325 U.S. 91.

Respondents err in claiming that Ford's *amici* are advancing a substantive due process argument. The *amici*'s point is *not* that compliance with federal standards is a bar to punitive damages, but rather that such compliance must be treated as *relevant*. *See* DRI Br. 14 ("[T]he objective standards imposed by [safety] agencies . . . should be deemed highly relevant, if not dispositive, for due process purposes."). Indeed, the fact that conduct complies with judgments made by federal regulators is powerful evidence that it is objectively reasonable. *See Safford Unified Sch. Dist. No. 1 v. Redding*, 129 S. Ct. 2633, 2644 (2009) (defendant's conclusion about the propriety of conduct was objectively reasonable where it was consistent with that of numerous judges expressed in "well-reasoned majority and dissenting opinions"); *Gore*, 517 U.S. at 570 (the "diversity" of state disclosure laws "demonstrates that reasonable people may disagree about the value of a full disclosure requirement"). Refusing to consider the existence of such judgments, by contrast, demonstrates a lack of interest in the constitutionally-significant issue of what notice has been provided to a defendant seeking to conform its conduct to the requirements of the law.

3. Respondents largely ignore the many vagueness decisions from this Court that conflict with the decision below, *see* Pet. 15, 21-24, and focus on three cases that are either irrelevant or support Ford's position. Opp. 18-19. In *TXO Production Corp. v. Alliance Resources Corp*., 509 U.S. 443, 465 (1993), a plurality considered an entirely different argument than the one presented here: that a state procedure was unconstitutionally vague "because petitioner had no notice of the possibility that the award of punitive

damages might be divorced from an award of compensatory damages." Likewise, in *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. 1, 24 n.12 (1991), the Court considered a challenge to the *amount* of a punitive damage award, and expressly noted that "[d]ecisions about the appropriate consequences of violating a law are significantly different from decisions as to whether a violation has occurred." And in *Smith v. Wade*, 461 U.S. 30 (1983), the Court did *not* reject a vagueness challenge, but simply held that an award of punitive damages against public officials under 42 U.S.C. § 1983 could be based on recklessness without proof of actual malicious intent. In fact, the *Smith* Court rested its decision on the fact that the defendants in the case were entitled to qualified immunity before *any* liability could be imposed. *See* 461 U.S. at 55. Thus, the Court did not permit an award of punitive damages for objectively reasonable conduct.

Respondents dismiss this Court's qualified immunity cases as "irrelevant" to the vagueness inquiry, but in doing so they ignore the basis for *Smith*, and ignore *United States v. Lanier*, 520 U.S. 259, 270-71 (1997), where the Court equated its approach to qualified immunity with its approach to vagueness.

4. Ford's petition also showed that certiorari is warranted to resolve the circuit split over how as-applied vagueness challenges should be resolved. Pet. 19-26. Respondents urge the Court to ignore the cases Ford cites because they do not involve punitive damages and supposedly do not assess the objective reasonableness of the defendant's conduct. Opp. 25-26. But the fact that these are not punitive damages cases *supports* certiorari because these cases illustrate that the confusion in the lower courts over as-applied vagueness challenges is not limited to punitive damages cases, but impacts a broad variety of

challenges to civil and criminal laws and regulations. And Respondents are simply wrong in claiming that none of these cases involved assessing the objective reasonableness of the conduct at issue. *See Haggblom v. City of Dillingham*, 191 P.3d 991, 997 (Alaska 2008) ("[n]o reasonable person would conclude" that "provocation" occurred); *Canyon Ferry*, 556 F.3d at 1029-30. It is true that other courts have rejected as-applied vagueness challenges without considering the objective reasonableness of the defendant's conduct — but that is precisely Ford's point.

Respondents seek to explain away the conflict between the decision below and *B & B Insulation, Inc. v. OSHRC*, 583 F.2d 1364 (5th Cir. 1978), and *S & H Riggers & Erectors v. OSHRC*, 659 F.2d 1273 (5th Cir. 1981), on the basis that the Fifth Circuit cases involved a federal standard that was so vague that members of the Occupational Safety and Health Review Commission had disputed its meaning. But in the instant case, eleven Ford Explorer cases had gone to judgment before the Buell-Wilson trial, and in all eleven cases judgment was entered in Ford's favor. Just as the Commission members could not agree in the Fifth Circuit cases, the members of the first twelve juries here could not agree (indeed, the vast majority of them agreed with Ford).

* * *

Although this Court has repeatedly considered constitutional limitations on the *amount* of punitive damages that may be awarded in civil cases, it has generally not considered the antecedent question of what constitutional requirements attend the imposition of punitive damages in the first place. That is a question of procedural due process, and as this case demonstrates, state courts have been reluctant to afford defendants faced with the prospect of punitive

damages the basic protection of notice of the conduct for which they might be punished. *Ex ante*, Ford was simply without notice sufficient to conform its conduct to what the jury in this case would later decide was warranted. On the contrary, the objective factors it could have considered at the time of the conduct that would later be reviewed indicated that its conduct was *consistent* with reasonable conduct. This Court should grant certiorari to make clear that an award of punitive damages is not constitutional in the absence of reasonable notice.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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