

No. D045154

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA  
FOURTH APPELLATE DISTRICT, DIVISION ONE

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BENETTA BUELL-WILSON and BARRY S. WILSON,

*Plaintiffs, Respondents, and Cross-Appellants,*

v.

FORD MOTOR COMPANY and DREW FORD,

*Defendants, Appellants, and Cross-Respondents.*

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On Appeal From The San Diego County Superior Court  
The Honorable Kevin A. Enright  
No. GIC800836

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**APPLICATION OF  
THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.  
FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF  
AND *AMICUS CURIAE* BRIEF IN SUPPORT OF  
DEFENDANT/APPELLANT FORD MOTOR COMPANY**

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**APPLICATION OF THE PRODUCT LIABILITY ADVISORY COUNCIL, INC.  
FOR PERMISSION TO FILE *AMICUS CURIAE* BRIEF IN SUPPORT OF  
DEFENDANT/APPELLANT FORD MOTOR COMPANY**

To the Honorable Judith McConnell, Presiding Justice:

The Product Liability Advisory Council, Inc. (“PLAC”) respectfully applies for permission to file the attached *amicus curiae* brief in support of defendant/appellant Ford Motor Company. PLAC is a non-profit association with 128 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, with emphasis on the law governing the liability of manufacturers of products. PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Indeed, this Court permitted PLAC to file an amicus brief when this case was last before it. A list of PLAC’s corporate members is attached to the brief as Appendix A.

Because many of PLAC’s members are frequently the subjects of suits seeking large amounts of punitive damages, PLAC has a strong interest in ensuring the fair and rational administration of such damages. On remand from the Supreme Court for further consideration in light of *Philip Morris USA v. Williams* (2007) 127 S.Ct. 1057, this case implicates at least two recurring issues of great significance to PLAC’s members.

First, respondents contend that this Court’s reduction of the punitive award to \$55 million is an adequate remedy for the trial court’s error in refusing to instruct the jury that it could not punish Ford for the impact of its design decisions on non-parties. Because it frequently happens that courts make prejudicial errors in instructing juries and/or in the admission or exclusion of evidence, PLAC has a strong interest in explaining to this Court why a traditional remittitur or reduction of a punitive award to the constitutional maximum is a constitutionally inadequate remedy for such errors. Instead, the only permissible remedies are either an unconditional new trial or a “reverse remittitur”—an order granting a new trial unless the *defendant* agrees to pay an amount determined by the court to be the constitutional maximum. Our brief explains why this “reverse remittitur” does not infringe on the rights of either the plaintiff or the defendant.

Second, in the event that the Court decides that the appropriate remedy is anything other than an unconditional new trial, PLAC has a strong interest in explaining why concerns expressed by the Supreme Court in *Williams* dictate reconsidering this Court’s conclusion that \$55 million is a constitutionally permissible punishment. To be specific, the Supreme Court repeatedly expressed concern about modern-day punitive awards that are “sufficiently large [that they] impose one State’s (or one jury’s) policy choice, say as to the conditions under which (or even whether) certain products can be sold upon neighboring States with different public policies” (127 S.Ct. at 1062 (internal quotation marks omitted); see also *id.* at 1064) and that now may be “many times the size of such awards in the 18th and 19th centuries,” even after adjusting for inflation (*id.* at 1064).

The concern about a single jury's award trumping the policy decisions of other States suggests that reviewing courts must consider whether, if the same size award were imposed in every other State, the aggregate punishment would exceed what reasonably could be thought necessary to punish and deter the defendant for the impact of its conduct nationwide. This is a variant of the "internal consistency test" used by the Supreme Court to determine whether state taxes on interstate transactions are "fairly apportioned," which is a prerequisite for upholding such taxes under the Commerce Clause.

The Court also repeated in *Williams* concerns it had expressed in earlier cases about large punitive awards posing a severe risk of arbitrariness and depriving defendants of fair notice of the magnitude of the punishment they could suffer. Taken together, the Court's statements about arbitrariness and inadequate notice are a signal that reviewing courts must give greater consideration to the *absolute* amount of the punitive damages imposed and that the ultimate question in any excessiveness inquiry must always be whether a smaller amount would be sufficient to accomplish the State's interests in retribution and deterrence. As our *amicus brief* explains, in undertaking that ultimate inquiry, courts must consider, *inter alia*, the extent to which the compensatory damages and other costs borne by the defendant as a result of its conduct already suffice to accomplish those interests, and, when applicable, the fines actually imposed by the relevant expert regulatory authority for the defendant's conduct and/or similar conduct committed by other regulated entities. Here, those considerations compel the conclusion

that \$55 million is a grossly excessive punishment for the impact of Ford’s design decisions on respondents.

The arguments made in the attached brief reinforce, but do not replicate, the arguments made by Ford. Indeed, many of the specific points made in this brief—including our advocacy of a “reverse remittitur,” our analogy to the “internal consistency test,” and our explanation of why the Court’s focus should be on the *absolute* size of the punitive award rather than solely on its relationship to the compensatory damages—are not specifically advanced by Ford, though each is fairly embraced within the arguments that Ford does make. Accordingly, PLAC submits that the attached brief should be of assistance to the Court in determining the impact of *Williams* on this case.

#### CONCLUSION

The application for permission to file the attached *amicus curiae* brief should be granted and the brief filed.

Respectfully submitted.

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## **INTEREST OF THE *AMICUS CURIAE***

The Product Liability Advisory Council, Inc. (“PLAC”) is a non-profit association with 128 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, with emphasis on the law governing the liability of manufacturers of products. PLAC’s perspective is derived from the experiences of a corporate membership that spans a diverse group of industries in various facets of the manufacturing sector. Since 1983, PLAC has filed over 600 briefs as *amicus curiae* in both state and federal courts presenting the broad perspective of product manufacturers seeking fairness and balance in the application and development of the law as it affects product liability. Indeed, PLAC filed an amicus brief when this case was last before the Court. A list of PLAC’s corporate members is attached as Appendix A.

Because many of PLAC’s members are frequently the subjects of suits seeking large amounts of punitive damages, PLAC has a strong interest in ensuring the fair and rational administration of such damages. On remand from the Supreme Court for further consideration in light of *Philip Morris USA v. Williams* (2007) 127 S.Ct. 1057, this case implicates at least two recurring issues of great significance to PLAC’s members: (i) the proper remedy when a court makes a prejudicial instructional or evidentiary error bearing on the jury’s determination of punitive damages; and (ii) the proper methodology for determining whether a particular amount of punitive damages is unconstitutionally excessive. Accordingly, PLAC has a strong interest in expressing its views about these two important, recurring issues.

## ARGUMENT

Respondents act as if the Supreme Court's remand for further consideration in light of *Philip Morris USA v. Williams* (2007) 127 S.Ct. 1057 was an empty gesture. They suggest that this Court need do nothing more than rubber-stamp its original opinion. But they are engaged in wishful thinking. Not only does *Williams* establish definitively that the superior court erred by refusing to instruct the jury that it could not punish Ford for the impact of its conduct on non-parties, but it also expresses concerns about the administration of punitive damages that compel the conclusion that this Court erred in holding that a \$55 million exaction comports with due process.

We will not repeat Ford's argument about why the superior court committed prejudicial error by refusing to instruct the jury not to use its verdict to punish Ford for harms to nonparties. Ford already has more than adequately made the point. Instead, we focus on the remedial issue, which is one that recurs with regularity in punitive damages cases.

As we explain in Part I, respondents' contention that this Court's reduction of the punitive award to \$55 million is an adequate remedy for the trial court's instructional error is mistaken. A reduction of the punitive damages to the amount a reviewing court determines to be the constitutional maximum fails to account for the distinct possibility that a properly instructed jury would have imposed a punishment below that level. Such a remedy accordingly fails to cure the constitutional error. Instead, the only permissible remedies are either an unconditional new trial or a "reverse remittitur"—*i.e.*, an order granting a new trial unless the *defendant* agrees to pay an amount determined by the court to be the constitutional maximum. Unlike a traditional remittitur, a "reverse remittitur" is an adequate remedy for the defendant because the defendant

retains the option of a new trial. At the same time, it infringes no rights of the plaintiff because it is well-recognized that courts have the power to reduce excessive punitive awards to the constitutional maximum without affording the plaintiff the option of a new trial.

As we explain in Part II, in the event that the Court opts not to grant Ford an unconditional new trial, the concerns expressed by the Supreme Court in *Williams* dictate reconsidering this Court's conclusion that \$55 million is a constitutionally permissible punishment. To be specific, the Supreme Court repeatedly expressed concern about modern-day punitive awards that are "sufficiently large [that they] impose one State's (or one jury's) policy choice, say as to the conditions under which (or even whether) certain products can be sold upon neighboring States with different public policies" (127 S.Ct. at 1062 (internal quotation marks omitted); see also *id.* at 1064) and that now may be "many times the size of such awards in the 18th and 19th centuries," even after adjusting for inflation (*id.* at 1064). The Supreme Court's concern about a single jury's award trumping the policy decisions of other States suggests that reviewing courts must consider whether, if the same size award were imposed in every other State, the aggregate punishment would exceed what reasonably could be thought necessary to punish and deter the defendant for the impact of its conduct nationwide. Because this Court did not undertake such an analysis in its original opinion, this newly articulated concern provides an especially strong reason for reconsidering the Court's determination that a \$55 million punishment is constitutional.

In *Williams*, the Court also repeated the concerns it had expressed in earlier cases about large punitive awards posing a severe risk of arbitrariness and depriving defendants of fair notice of the magnitude of the

punishment they could suffer. Taken together, the Court's statements about arbitrariness and inadequate notice are a signal that reviewing courts must give greater consideration to the *absolute* amount of the punitive damages imposed and that the ultimate question in any excessiveness inquiry must always be whether a smaller amount would be sufficient to accomplish the State's interests in retribution and deterrence. In undertaking that ultimate inquiry, courts must consider, *inter alia*, the extent to which the compensatory damages and other costs borne by the defendant as a result of its conduct already suffice to accomplish those interests, and, when applicable, the fines actually imposed by the relevant expert regulatory authority for the defendant's conduct and/or similar conduct committed by other regulated entities. Here, those considerations compel the conclusion that \$55 million is a grossly excessive punishment for the impact of Ford's design decisions on respondents.

**I. THIS COURT'S PREVIOUS REMITTITUR IS AN INADEQUATE REMEDY FOR THE TRIAL COURT'S CONSTITUTIONAL ERROR.**

Ford well explains in its briefs why it was prejudicial error for the superior court to refuse to instruct the jury not to punish Ford for the impact of its conduct on non-parties. We accordingly do not repeat those arguments. We instead address respondents' contention that the Court's reduction of the punitive damages to \$55 million is an adequate remedy for the instructional error because "the two remittiturs have, at a minimum, collectively reduced the award to much less than any amount that it is reasonably probable that this jury would have awarded if Ford had properly requested, and received, an instruction prohibiting direct punishment for third party harm, but permitting its consideration in determining reprehensibility." Resp. Supp. Letter Br. 6; see also Resp. Br. 6-8 (arguing

that “the already-remitted punitive damages award to \$55 million[] is consistent with *Philip Morris*”).

By saying that the Court “reduced the award to much less than any amount that it is reasonably probable that this jury would have awarded if Ford had properly requested, and received, an instruction prohibiting direct punishment for third party harm” (Resp. Supp. Letter Br. 6), respondents implicitly concede that a reduction to the constitutional maximum would be an inadequate remedy. Yet there can be no question that, in its first opinion, this Court concluded that \$55 million was the constitutional maximum, not the least amount that a correctly instructed jury could have imposed. See *Buell-Wilson v. Ford Motor Co.* (2006) 141 Cal.App.4th 525, 571. Accordingly, respondents’ argument defeats itself.

Respondents’ tacit concession aside, it should be self-evident that a traditional remittitur or reduction to the constitutional maximum cannot be an adequate remedy for the superior court’s prejudicial instructional error. That is because there is no way to know what amount of punishment a properly instructed jury would have imposed. Had it understood that it could punish Ford only for the impact of its conduct on respondents, the jury could well have selected a punitive award that was a tiny fraction of the one it actually imposed.

It has long been the rule in cases of excessive damages that “where the circumstances clearly indicate that the jury [was] influenced by \* \* \* a reckless disregard of the instructions of the court,” a traditional remittitur “cannot be allowed.” *Ark. Cattle Co. v. Mann* (1889) 130 U.S. 69, 75. It follows that, when the jury was not properly instructed in the first place, a traditional remittitur is just as impermissible.

Indeed, the U.S. Supreme Court has reached that very conclusion in the context of criminal sentencing. In *Hicks v. Oklahoma* (1980) 447 U.S. 343, the jury was instructed that, if it found the defendant guilty, it was required to sentence him to 40 years imprisonment in accordance with the State's habitual offender statute. Because that statute was subsequently invalidated, the defendant sought a new trial on the punishment. The state appellate court rejected his claim on the ground that the sentence imposed on the defendant remained within the range (ten years to life) from which a properly instructed jury could have selected its penalty. The Supreme Court vacated and remanded, explaining that "Oklahoma denied the petitioner the jury sentence to which he was entitled under state law, simply on the frail conjecture that a jury *might* have imposed a sentence equally as harsh as" the one it imposed under the invalid statute. *Id.* at 346 (emphasis in original). Because there was a "substantial" possibility that the jury might have imposed a less severe penalty had it not been instructed about the invalid statute, due process required that the defendant be afforded a new trial on the appropriate sentence. *Id.*

More to the point, the U.S. Court of Appeals for the Ninth Circuit has twice considered this remedial issue in the wake of *Williams*. See *Merrick v. Paul Revere Life Ins. Co.* (9th Cir. Aug. 31, 2007) 2007 WL 2458503; *White v. Ford Motor Co.* (9th Cir. Aug. 30, 2007) 2007 WL 2445952. In both cases, the Ninth Circuit concluded that the district court had committed prejudicial error by refusing to instruct the jury that it could not punish the defendant for the impact of its conduct on nonparties, and in both cases the Ninth Circuit held that the defendant was entitled to a new trial on punitive damages. As that court explained, a traditional remittitur is "less appropriate [than a new trial] where the constitutional error stems

from misguidance regarding the way the jury may use evidence in setting an amount.” *Merrick*, 2007 WL 2458503, at \*8; see also *White*, 2007 WL 2445952, at \*7 (“remittitur is not designed to compensate for excessive verdicts in cases where [a] jury is improperly instructed”) (citing *Werbungs Und Commerz Union Austalt v. Collectors’ Guild, Ltd.* (2d Cir. 1991) 930 F.2d 1021, 1027).

Although a traditional remittitur is an inadequate remedy for the constitutional violation that took place here, a new trial is not the sole alternative. A “reverse remittitur”—*i.e.*, an order granting a new trial unless the defendant agrees to pay an amount determined by the court to be the constitutional maximum—would fully remedy the error as well. That is because Ford would retain the option of a new trial if it believed that it could fare materially better than the court-determined constitutional maximum. Meanwhile, no right of respondents would be infringed by denying them the option of a new trial because plaintiffs are never entitled to receive more than the constitutional maximum. As the California Supreme Court has explained, because “constitutional excessiveness is a legal issue [that] appellate courts determine independently, we do not, in determining the maximum constitutional award ourselves, decide any question of fact [that] the plaintiff has a right to have decided by a jury.” *Simon v. San Paolo U.S. Holding Co.* (2005) 35 Cal.4th 1159, 1187 (citations omitted). Indeed, “[o]nce a maximum constitutional award has been determined, \* \* \* a new trial on punitive damages would be futile” because, if in the new trial “the plaintiff obtained more than the constitutional maximum, the award could not be sustained.” *Id.* at 1188 (quoting *Johansen v. Combustion Eng’g, Inc.* (11th Cir. 1999) 170 F.3d 1320, 1332 fn. 19) (emphasis deleted).

In theory, a traditional remittitur to the *minimum* amount that a properly instructed jury could award would also be a valid remedy because the plaintiff would have the option of a new trial, and the defendant cannot complain about being made to pay the minimum penalty. In practice, however, such a remedy would be pointless because the minimum amount that a properly instructed jury could impose is always zero. See, e.g., *Aozora Bank Ltd. v. 1333 N. Cal. Blvd.* (2004) 119 Cal.App.4th 1291, 1294 (noting that, in retrial of amount of punitive damages, jury awarded zero).<sup>1</sup> And because the plaintiff will never accept a remittitur to zero, there will always be a new trial.

In sum, there are two equally acceptable means of remedying the constitutional violation that took place here: an unconditional new trial or a “reverse remittitur.” Respondents’ suggestion that this Court unwittingly provided the necessary remedy when it ordered a traditional remittitur to \$55 million is simply wrong.

**II. WILLIAMS CONFIRMS THAT \$55 MILLION FAR EXCEEDS THE CONSTITUTIONAL MAXIMUM PUNISHMENT FOR THE IMPACT OF FORD’S CONDUCT ON RESPONDENTS.**

If the Court decides that the appropriate remedy is anything other than an unconditional new trial, it will need to consider whether *Williams* undermines its original determination that \$55 million is the constitutional maximum punishment. We submit that it clearly does.

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<sup>1</sup> Respondents’ suggestion that no properly instructed jury would impose less than \$55 million in punitive damages (Resp. Supp. Letter Br. 6) is baseless. After all, the verdict in this case was rendered by the minimum permissible majority (9-3), and at least a dozen other juries have not held Ford liable at all, much less imposed gargantuan punitive awards.

Although *Williams* first and foremost is about the procedures necessary to ensure that punitive damages are administered fairly, the opinion expresses concerns about punitive damages that bear squarely on the substantive determination about the permissible amount of such damages. As it turns out, this Court’s original determination that \$55 million is a permissible punitive award in this individual case was not sufficiently sensitive to these concerns. Further analysis is needed to ensure that any award ultimately upheld by this Court does not run afoul of the concerns expressed in *Williams* and its predecessors. That analysis, we submit, compels the conclusion that \$55 million far exceeds the constitutional maximum punishment for the impact of Ford’s design decisions on respondents.

**A. *Williams* And Its Predecessors Express A Range Of Concerns About Large Punitive Awards That Necessitate Reconsideration Of This Court’s Determination That \$55 Million Is A Constitutionally Permissible Punishment For The Impact Of Ford’s Conduct On Respondents.**

*Williams* concisely describes three concerns that have animated the Court to hold that “the Constitution imposes certain limits, in respect both to procedures for awarding punitive damages and to amounts forbidden as ‘grossly excessive.’” 127 S.Ct. at 1062. The first two are familiar ones that it had expressed in earlier cases; the third, though perhaps implicit in earlier cases, was much more clearly and directly articulated in *Williams*.

First, unbridled punitive awards “may deprive a defendant of ‘fair notice . . . of the severity of the penalty that a State may impose.’” *Id.* (quoting *BMW of N. Am., Inc. v. Gore* (1996) 517 U.S. 559, 574). That is particularly true when the amount of punitive damages dwarfs the level of fines typically meted out by the relevant regulatory authorities. See *BMW*, 517 U.S. at 584.

Second, large punitive awards “threaten ‘arbitrary punishments,’ *i.e.*, punishments that reflect not an ‘application of law’ but ‘a decisionmaker’s caprice.’” *Id.* (quoting *State Farm Mut. Auto. Ins. Co. v. Campbell* (2003) 538 U.S. 408, 418). After all, jurors lack the expertise of regulators and may even possess “biases against big businesses,” yet are frequently given unlimited discretion in setting an amount of punitive damages. *State Farm*, 538 U.S. at 417 (quoting *Honda Motor Co. v. Oberg* (1994) 512 U.S. 415, 432). A punitive award is arbitrary when it exceeds the amount needed to accomplish the State’s interests in retribution and deterrence. See *id.* at 419-20 (“a more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives, and the Utah courts should have gone no further”); *BMW*, 517 U.S. at 584 (the relevant question is “whether a lesser deterrent would have adequately protected the interests of Alabama consumers”).

Third, punitive awards “that, today, may be many times the size of such awards in the 18th and 19th centuries” even after adjusting for inflation (*Williams*, 127 S.Ct. at 1064) raise serious federalism concerns. That is because large punitive awards effectively “may impose one State’s (or one jury’s) ‘policy choice,’ say as to the conditions under which (or even whether) certain products can be sold, upon ‘neighboring States’ with different public policies.” *Id.* at 1062; see also *id.* at 1064 (reiterating concern that “punitive damages can, in practice, impose one State’s (or one jury’s) policies (*e.g.*, banning cigarettes) upon other States”).<sup>2</sup>

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<sup>2</sup> The Supreme Court had expressed federalism concerns before *Williams*. In *BMW*, for example, it observed that “no single State could [enact a policy for the entire Nation], or even impose its own policy choice on neighboring States” (517 U.S. at 571) and that, “[w]hile each State has ample power to protect its own consumers, none may use the punitive damages deterrent as a means of imposing its regulatory policies on the

This third concern is especially significant in product-liability cases. Almost all product-design decisions are national in scope. When deciding whether to implement a particular design feature, a manufacturer must balance many complex, countervailing interests—a process that often takes many years.<sup>3</sup> A jury can do its best to sift through the morass of available information and evidence, but its ability to do so will be severely constrained by its lack of time, resources, expertise, and perspective. Even with the help of partisan expert witnesses, there is still a severe risk of jury error because of confusion,<sup>4</sup> hindsight bias,<sup>5</sup> redistributionist impulses,<sup>6</sup> or

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entire Nation” (*id.* at 585). And in *State Farm*, it held not only that a State may not “punish a defendant for conduct that may have been lawful where it occurred,” but also that a State does not have “a legitimate concern in imposing punitive damages to punish a defendant for unlawful acts committed outside of the State’s jurisdiction” either. 538 U.S. at 421. It explained that “[a] basic principle of federalism is that each State may make its own reasoned judgment about what conduct is permitted or proscribed within its borders, and each State alone can determine what measure of punishment, if any, to impose on a defendant who acts within its jurisdiction.” *Id.* at 422. *Williams*, however, was the first time that the Court clearly linked this forbidden effect of intruding on the prerogative of other States to the absolute size of a punitive award.

<sup>3</sup> We discuss the balancing process that a manufacturer must undertake at pages 3-4 of our original amicus brief in this case.

<sup>4</sup> See Learned Hand, *Historical and Practical Considerations Regarding Expert Testimony* (1902) 15 HARV. L. REV. 40, 54 (noting “absurdity” of calling upon a jury to decide which of two contradictory expert opinions to accept because “[i]t is just because they are incompetent for such a task that the expert is necessary at all”).

<sup>5</sup> We discuss the phenomenon of hindsight bias at pages 14-15 of our original amicus brief in this case.

<sup>6</sup> See *TXO Prod. Corp. v. Alliance Res. Corp.* (1993) 509 U.S. 443, 492-93 (O’Connor, J., dissenting) (detailing the various redistributionist arguments made in the case by plaintiffs’ counsel); *id.* at 468 (Kennedy, J., concurring) (noting that Justice O’Connor “ma[de] a plausible argument,

other “influences impermissible in our system of justice.”<sup>7</sup> If these influences result in a punitive award in the tens or hundreds of millions of dollars, there is every likelihood that the jury’s “policy choice” about the appropriate product design will be visited “upon ‘neighboring States’ with different public policies.” *Williams*, 127 S.Ct. at 1062.

The Supreme Court’s clear articulation of its concerns about large punitive awards necessitates revisiting this Court’s conclusion that \$55

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based on the record and the trial court’s instructions, that the size of the punitive award is explained by the jury’s raw, redistributionist impulses stemming from antipathy to a wealthy, out-of-state, corporate defendant”).

<sup>7</sup> *TXO*, 509 U.S. at 474 (O’Connor, J., dissenting) (citations omitted). As Justice O’Connor explained:

Our abiding faith in the jury system is founded on longstanding tradition reflected in constitutional text, and is supported by sound considerations of justice and democratic theory. The jury system long has been a guarantor of fairness, a bulwark against tyranny, and a source of civic values.

But jurors are not infallible guardians of the public good. They are ordinary citizens whose decisions can be shaped by influences impermissible in our system of justice. In fact, they are more susceptible to such influences than judges. Arbitrariness, caprice, passion, bias, and even malice can replace reasoned judgment and law as the basis for jury decisionmaking. \* \* \*.

\* \* \*

This is especially true in the area of punitive damages, where juries sometimes receive only vague and amorphous guidance. Jurors may be told that punitive damages are imposed to punish and deter, but rarely are they instructed on how to effectuate those goals or whether any limiting principles exist.

*Id.* at 473-75.

million is a constitutionally permissible punishment for the impact of Ford’s design decisions on respondents.<sup>8</sup> Before *Williams*, this Court (and others) believed, fairly enough, that the task of determining whether a punitive award is unconstitutionally excessive (and, if so, by how much) began and ended with applying the three “guideposts” identified in *BMW*. *Williams*, however, suggests that courts must also focus on whether the *absolute* amount of the punitive award implicates some or all of the Court’s three concerns about large punitive awards.

As we next explain, the \$55 million exaction approved by this Court in its original opinion implicates each of the Supreme Court’s three concerns. Sensitivity to those concerns compels the conclusion that, if an unconditional new trial is not ordered, a drastic further reduction of the punitive damages is required.

**B. A Re-Evaluation Of The Punitive Damages, Taking Due Account Of The Three Concerns Expressed In *Williams*, Dictates The Conclusion That \$55 Million Greatly Exceeds The Constitutional Maximum.**

To state the obvious, the \$55 million punitive award approved by this Court in its original opinion is “many times the size of such awards in the 18th and 19th centuries,” even after adjusting for inflation. *Williams*, 127 S.Ct. at 1064. As Justice Breyer (the author of *Williams*) observed in his concurring opinion in *BMW*, after adjusting for inflation using “historical rates of valuation,” the punitive awards of the 18th and 19th centuries ranged from \$25,000 to \$150,000 and thus pale in comparison to

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<sup>8</sup> We assume for purposes of this point that the Court did not mean the \$55 million award to be punishment for the impact of Ford’s conduct on other Californians who may have been injured as a result of the alleged defects at issue in this case. If it did, then it is self-evident that *Williams* requires the Court to revisit—and dramatically reduce—the award.

the \$2 million punitive award at issue in *BMW* “or other modern punitive damages figures.” *BMW*, 517 U.S. at 594-95, 597-98 (Breyer, J., concurring).

As we discuss in further detail below, the absolute magnitude of this punitive award, which is the highest punitive exaction ever endorsed by a California appellate court in a published opinion, implicates each of the three concerns expressed in *Williams*. First, given that it exceeds by multiple millions of dollars the maximum fine that the National Highway Traffic Safety Administration (“NHTSA”) could have imposed on Ford had it actually concluded that Ford knowingly sold defective vehicles, this \$55 million punishment surely calls into question whether Ford had fair notice that it could be mulcted to this extent in a single lawsuit. Second, given the magnitude of the compensatory damages and the fact that NHTSA has not seen fit to order any corrective action in connection with the two design decisions at issue in this case, there should be serious doubt about whether a punishment of \$55 million is necessary to accomplish California’s interests in deterring and punishing “despicable” conduct in the design and marketing of automobiles and hence whether the punishment is instead an arbitrary deprivation of property. Third, because of its magnitude, a punishment of \$55 million creates a serious risk that one State’s (or one jury’s) views concerning the appropriate Ford Explorer design will be imposed on all other States.

**1. Ford did not have fair notice that it could be punished \$55 million in an individual case for selling a vehicle with a known design defect.**

In cases like this one, in which the defendant’s conduct is closely regulated by an expert federal agency with statutory power to impose fines, the best indicium of whether the defendant had fair notice that it could be

punished in the amount of the punitive award is the agency’s actual fining practice and, absent evidence of that, the maximum penalties that could be imposed by the agency for like conduct. *Johansen*, 170 F.3d at 1337 (“Whether a defendant had constitutionally adequate notice that his conduct might result in a particular damage award depends in large part upon the available civil and criminal penalties the state provides for such conduct.”).

In *BMW*, for example, the Supreme Court considered the maximum penalties authorized by the various States for the kind of non-disclosure at issue in that case and concluded that “[n]one of these statutes would provide an out-of-state distributor with fair notice that the first violation—or, indeed[,] the first 14 violations—of its provisions might subject an offender to a multimillion dollar penalty.” 517 U.S. at 584.<sup>9</sup> For this and other reasons, the Court held that a \$2 million punitive award—which it deemed “tantamount to a severe criminal penalty” (*id.* at 585)—was unconstitutionally excessive.

The same is true here—in spades. Ford is comprehensively regulated by NHTSA under the National Highway Traffic Safety Act. As

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<sup>9</sup> There was no need to consider actual fining practice in *BMW* because the punitive award was so much greater than the statutory maximum fines, which ranged from \$50 to \$10,000. *Id.* In certain categories of cases, for example environmental cases in which the statute provides for daily fines, the statutory maximum penalty is rarely, if ever, imposed, so it becomes much more important to consider the agency’s actual fining practice. As the Eleventh Circuit has explained, “[i]f a statute provides for a range of penalties depending on the severity of the violation, \* \* \* it cannot be presumed that the defendant had notice that the state’s interest in the *specific* conduct at issue in the case is represented by the maximum fine provided by the statute. \* \* \* For example, if the defendant had emptied a bottle of soda pop into a Georgia stream, it cannot reasonably be said that he was on notice [that] he could be fined \$100,000.” *Johansen*, 170 F.3d at 1337.

of the time of the design decisions at issue in this case, that statute prescribed a penalty of \$1,000 per vehicle up to a fleet-wide maximum of \$800,000 for, among other things, selling a vehicle with a known safety defect. See 49 U.S.C.A. §§ 30112, 30115, 30165(a) (1997). The \$55 million punitive award dwarfs the \$1,000 that Ford could have been fined for selling a vehicle containing known safety defects to respondents. Indeed, although *Williams* would appear to preclude comparing the punitive award in an individual case to the fleet-wide maximum penalty,<sup>10</sup> the punitive award here outstrips that figure by ***more than \$54 million***. The conclusion is inescapable that Ford lacked fair notice that it could be punished to the tune of \$55 million in an individual case. See *Clark v. Chrysler Corp.* (6th Cir. 2006) 436 F.3d 594, 608 (holding in individual design-defect case that \$3 million punitive award was “significantly larger than” the \$1,000 per-incident/\$800,000 fleet-wide maximum penalties set forth in 49 U.S.C. § 30165(a) and that the comparison therefore “may indicate that \$3 million is excessive”).<sup>11</sup>

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<sup>10</sup> *Williams*, of course, holds that it is unconstitutional to punish a defendant in an individual case for the impact of its conduct on non-parties. It follows that, in an individual case, the only relevant comparator is the fine for selling a single vehicle with a known safety defect. Cf. *Johnson v. Ford Motor Co.* (2005) 35 Cal.4th 1191, 1209-12 (concerns about multiple punishment and the impossibility of defending against the hypothetical claims of individuals who are not before the court preclude reliance upon an “aggregate disgorgement” theory to justify an eight-figure punitive award); *Gober v. Ralphs Grocery Co.* (2006) 137 Cal.App.4th. 204, 223 (holding, as part of comparable penalties analysis, that “hypothetical claims of other potential plaintiffs cannot be used to increase the [amount of punitive damages]”).

<sup>11</sup> Although having “less utility” (*State Farm*, 538 U.S. at 428), a comparison of the punitive damages to the most directly relevant criminal penalty confirms that Ford had no notice that it could be punished so severely. Section 387 of the California Penal Code provides that

In its original opinion, this Court gave three reasons for rejecting Ford’s invocation of the NHTSA fining scheme.

First, the Court held that Ford waived the argument by not raising it until its reply brief and thereby depriving the Wilsons of the opportunity to respond. *Buell-Wilson*, 141 Cal.App.4th at 570-71. We respectfully submit that that ground is now moot. Ford has raised the issue in its opening brief on remand (at page 55 & note 10), and the Wilsons have had the opportunity to respond. See Resp. Reply Br. 11. They also presumably will have an opportunity to respond to this *amicus* brief. Moreover, the Court’s ruling in this case is sure to be highly influential in future cases. Accordingly, bench and bar have a strong interest in this Court conducting a complete analysis of the excessiveness issue that is not constrained by arguments the parties made or didn’t make the last time the case was before the Court. See *Adams v. Murakami* (1991) 54 Cal.3d 105, 115 fn.5 (rejecting plaintiff’s waiver argument, even though defendant had not raised the relevant issue in the trial court, because “the primary interest that must be protected is the public interest in punitive damage awards in appropriate amounts” and the Court therefore “cannot allow the *public* interest to be thwarted by a defendant’s oversight or trial tactics”) (emphasis in original).

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“[c]orporate liability for nondisclosure of [a] serious concealed danger subject to regulatory authority” shall not exceed \$1 million. The punitive award approved by this Court exceeds that *maximum* penalty by **\$54 million**. This disparity implicates not only the “fair notice” concern, but also the Supreme Court’s apprehension that “defendants subjected to punitive damages in civil cases have not been accorded the protections applicable in a criminal proceeding” (*State Farm*, 538 U.S. at 417). It turns fairness on its head to exact through the civil process—with its comparatively *weaker* procedural protections—a punishment that is \$54 million larger than would be permitted after a criminal trial.

Second, the Court held that the Safety Act contains a “savings clause that allows common law liability notwithstanding compliance with [the federal] standards, putting Ford on notice that it may be subject to private state actions that result in substantially higher damage awards than the civil penalties.” *Buell-Wilson*, 141 Cal.App.4th at 571. But the fact that the statute does not preempt private civil actions in no way means that it gives fair notice of sky’s-the-limit punitive damages awards. That is clear from the Supreme Court’s jurisprudence on this issue.

In *BMW*, for instance, the statutory scheme at issue contained a savings clause that allowed plaintiffs to seek unlimited punitive damages in private actions. See Ala. Code § 8-19-15 (1993) (provision in Alabama’s Deceptive Trade Practices Act titled “Savings Clause”). But the Supreme Court nevertheless found that the \$2,000 maximum fine provided for under that statute did not afford the defendant fair notice of the magnitude of the punishment it could suffer. See *BMW*, 517 U.S. at 584-85.

Likewise, in *State Farm* nothing in Utah’s Unfair Claims Practices Act (Utah Code §§ 31A-26-301 *et seq.*) expressly precluded unlimited punitive damages in private actions, but the Court nevertheless found it significant that the \$10,000 maximum fine provided for under that statute was “dwarfed by the \$145 million punitive damages award.” 538 U.S. at 428.

The Court’s third reason for giving no weight to the Safety Act’s \$1,000 per-vehicle/\$800,000 fleet-wide penalties was that Congress increased those penalties to \$5,000 and \$15 million in 2000, “indicating Congress’s belief that the original amounts were insufficient to deter vehicle manufacturers from placing defective automobiles on the road.” *Buell-Wilson*, 141 Cal.App.4th at 571. This rationale is mistaken for the

simple reason that an amendment enacted after the design decisions at issue cannot give fair notice of the magnitude of the sanction the defendant could incur for making those decisions. In any event, as discussed above, *Williams* precludes comparison of the punitive damages in an individual case to the maximum fleet-wide penalty, and the \$5,000 maximum penalty for the sale of a single vehicle with a known safety defect provides no more notice of the possibility of a \$55 million punishment in an individual case than does the original \$1,000 penalty.

In sum, in view of the fines that were provided by federal and state law for the conduct at issue, the conclusion is inescapable that Ford lacked fair notice that it could suffer a punishment of \$55 million in an individual case. Sensitivity to the “fair notice” concern therefore requires a drastic reduction of the punitive damages.

**2. Under the circumstances of this case, a \$55 million punishment constitutes an arbitrary deprivation of property.**

The Supreme Court’s concern about arbitrary deprivations of property is implicated whenever the punitive damages exceed an amount that is reasonably necessary to accomplish the State’s interests in deterrence and retribution. Put another way, the portion of a punitive award that goes beyond what is necessary to accomplish these interests is, perforce, arbitrary. See *State Farm*, 538 U.S. at 417 (“To the extent an award is grossly excessive, it furthers no legitimate purpose and constitutes an arbitrary deprivation of property.”). The Supreme Court accordingly has made clear that “punitive damages should only be awarded if the defendant’s culpability, after having paid compensatory damages, is so reprehensible as to warrant the imposition of further sanctions to achieve punishment or deterrence.” *Id.* at 419. And even when it is determined that

*some* amount of punitive damages is necessary, the question then becomes “whether a lesser deterrent would have adequately” served the State’s interests. *BMW*, 517 U.S. at 584; see also *State Farm*, 538 U.S. at 419-20 (“a more modest punishment for this reprehensible conduct could have satisfied the State’s legitimate objectives, **and the Utah courts should have gone no further**”) (emphasis added).

Here, two critical factors strongly suggest that \$55 million is far greater than necessary to advance California’s legitimate interests in retribution and deterrence and therefore constitutes an arbitrary deprivation of property.

First, NHTSA, the expert federal regulatory agency, thoroughly scrutinized the SUV design issues involved in this case and decided that no corrective action (and no penalty) was warranted. That an expert agency actually evaluated the conduct at issue and decided that no penalty at all was warranted is highly significant in determining the extent of the State’s interests in retribution and deterrence. That is because, unlike juries, regulatory agencies have the time, expertise, perspective, and investigatory resources to conduct a full and impartial investigation. And accordingly, an expert agency is far more qualified than a lay jury to make the “‘policy choice’ \* \* \* as to the conditions under which (or even whether) certain products can be sold” (*Williams*, 127 S.Ct. at 1062). Indeed, as Justice Breyer has aptly put it in an analogous context, it is “anomalous” to “grant greater power \* \* \* to a single state jury than to” an expert agency. *Medtronic, Inc. v. Lohr* (1996) 518 U.S. 470, 504 (Breyer, J., concurring). If NHTSA felt that no penalty was appropriate, it follows that a penalty of \$55 million is much greater than necessary to achieve California’s *legitimate* interests in retribution and deterrence.

Second, as the Supreme Court has explained, “[p]unitive damages aside,” “[d]eterrence \* \* \* operates through the mechanism of damages that are compensatory.” *Memphis Cmty. Sch. Dist. v. Stachura* (1986) 477 U.S. 299, 306-07.<sup>12</sup> Likewise, large awards of compensatory damages can have a punitive effect. See *State Farm*, 538 U.S. at 426 (“Much of the distress was caused by the outrage and humiliation the Campbells suffered at the actions of their insurer; and it is a major role of punitive damages to condemn such conduct. Compensatory damages, however, already contain this punitive element.”).

These deterrent and punitive effects are manifestly present here. Despite having won a dozen other cases raising precisely the same allegations of defect, Ford has now been made to pay a whopping \$27.6 million in compensatory damages. That figure is approximately 1,000 times the retail price of the vehicle in question and no doubt many thousands of times the actual profit Ford made from selling that vehicle. Especially given the California Supreme Court’s rejection of the “aggregate disgorgement” rationale for large punitive awards (see *Johnson*, 35 Cal.4th at 1209-12), a compensatory award that strips the profit from the sale of the vehicle thousands of times over surely is more than sufficient to serve the State’s *legitimate* interests in deterrence and retribution, making anything

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<sup>12</sup> See also 1 Dan B. Dobbs, *LAW OF REMEDIES* (2d ed. 1993) § 3.1, at 282 (“[e]ven if the defendant is not subject to punitive damages, an ordinary compensatory damages judgment can provide an appropriate incentive to meet the appropriate standard of behavior”); Gary T. Schwartz, *Deterrence and Punishment in the Common Law of Punitive Damages* (1982) 56 S. CAL. L. REV. 133, 137 (“ordinary civil damages—in the course of providing compensation—concurrently function to deter”); Clarence Morris, *Punitive Damages in Tort Cases* (1931) 44 HARV. L. REV. 1173, 1182 (“if the ‘compensatory’ damages are large, the defendant is severely admonished without the addition of any punitive damages”).

more than a modest amount of punitive damages an arbitrary deprivation of property.<sup>13</sup>

**3. A \$55 million punishment risks imposing the policy choices of one State (or jury) on other States.**

The Supreme Court’s third concern about large punitive awards—that they can effectively impose one State’s (or jury’s) policy preferences on all other States—also is implicated here. That can easily be confirmed by applying the “internal consistency” test that the Supreme Court uses to determine whether state taxes on interstate transactions are “fairly apportioned,” which is a requirement for enforceability under the Commerce Clause. This test hypothesizes that each State will replicate the tax and asks whether the tax’s “identical application by every State in the Union would place interstate commerce at a disadvantage as compared with commerce intrastate.” *Okla. Tax Comm’n v. Jefferson Lines, Inc.* (1995) 514 U.S. 175, 185. “A failure of internal consistency shows as a matter of law that a State is attempting to take more than its fair share of taxes from the interstate transaction, since allowing such a tax in one State would place

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<sup>13</sup> The fact that the \$55 million punitive award is “only” two times the compensatory damages is therefore irrelevant. In many cases, “the ratio [of punitive to compensatory damages] will be within a constitutionally acceptable range, and remittitur will not be justified *on this basis*.” *BMW*, 517 U.S. at 583 (emphasis added). But that in no way means that punitive awards that are modest multiples of the compensatory damages are immune from invalidation. As the Supreme Court has emphasized, “courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm to the plaintiff and to the general damages recovered.” *State Farm*, 538 U.S. at 426. An award that is a low single-digit multiple of the compensatory damages might not be disproportionate, but it still could be unreasonable in light of the facts and circumstances, which include the extent to which the compensatory damages and other financial and reputational consequences incurred by the defendant as a result of its conduct already serve to punish and deter.

interstate commerce at the mercy of those remaining States that might impose an identical tax.” *Id.*

Application of this test here compels the conclusion that the \$55 million punitive award unconstitutionally intrudes upon the prerogatives of California’s sister States: If the other 49 States were to allow \$55 million in punishment based on the design decisions at issue here, the total punishment would be \$2.75 *billion*. No one seriously could argue that a punishment of that enormity would be warranted for making design decisions that comport with industry standards, that have never been found problematic by the relevant federal safety agency, and that have been vindicated by juries in over a dozen trials around the country. The conclusion is thus inescapable that \$55 million is far “more than [California’s] fair share” of punishment for the design decisions at issue in this case.

Respondents argue that the aggregate punishment that would result if the punitive award here were replicated by the other 49 States is irrelevant because “there is no reason to believe that Ford will face 49 more \$55 million awards,” especially in light of Ford’s “‘eleven prior victories (and many others since)’ in Explorer cases.” Resp. Reply Br. 11. That argument is misguided for two reasons.

First, as explained above, the “internal consistency” test merely *hypothesizes* that each State will replicate the tax; it *does not require that each State actually do so*. See *Okla. Tax*, 514 U.S. at 185 (“Th[e] internal consistency test asks nothing about the degree of economic realty reflected by the tax, but simply looks to the structure of the tax at issue to see whether its identical application by every State [would create a Commerce

Clause problem].”).<sup>14</sup> The Supreme Court “hypothesizes a situation where other States have passed an identical [tax]” instead of looking to the actual taxes imposed by other States when applying the “internal consistency” test because otherwise “the validity of state taxes would turn solely on ‘the shifting complexities of the tax codes of 49 other States.’” *Goldberg v. Sweet* (1989) 488 U.S. 252, 261; see also *Stryker Corp. v. Director, Div. of Taxation* (N.J. 2001) 773 A.2d 674, 682-83 (“The internal consistency principle reflects a compromise between the Court’s desire to allow the states flexibility in choosing an apportionment formula and its recognition that if different states use different formulas, multiple taxation inevitably results.”) (internal quotation marks, emphasis, and citation omitted).

The same logic applies in this context. One State should not get to extract more than its “fair share” of the permissible aggregate punishment merely because another State has decided that the conduct isn’t worthy of punishment or hasn’t yet had a case in which the issue has been presented.

Second, the fact that Ford often wins at trial—including another trial in California (see *Gozukara v. Ford Motor Co.* (Cal. Sup. Ct. San Bernadino County Jan. 31, 2002) No. BCV04208)—is hardly a reason to uphold a \$55 million punishment against Ford in the one case that it loses. To the contrary, it is powerful evidence that the verdict here is aberrational and excessive.

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<sup>14</sup> See also *Phila. Eagles Football Club, Inc. v. City of Phila.* (Pa. 2003) 823 A.2d 108, 131 fn.28 (“[The lower court] misinterpreted [the internal consistency test] by requiring the [plaintiff] to present evidence that it was *actually* taxed in other jurisdictions. The Supreme Court has made clear that the proper inquiry is whether a taxpayer is subjected to the *risk* of multiple taxation.”) (citations omitted; emphasis in original).

## CONCLUSION

The Court should either grant Ford an unconditional new trial or employ a reverse remittitur that permits Ford to choose between a new trial and the constitutional maximum punishment. If the Court chooses the latter option, it should re-evaluate its decision that \$55 million is the constitutional maximum and instead conclude that the maximum is materially less than that figure.

Respectfully submitted.

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## **CERTIFICATE OF WORD COUNT**

According to the word-count facility in Microsoft Word, this brief, including footnotes but excluding those portions excludable pursuant to Rule 8.204(c)(3) is 7,557 words long and therefore complies with the word limit contained in Rule 8.204(c).

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Attorney for *amicus curiae*

## **Appendix A**

### **Corporate Members of the Product Liability Advisory Council, Inc.**

3M  
A.O. Smith Corporation  
Altec Industries  
Altria Corporate Services, Inc.  
American Suzuki Motor Corporation  
Andersen Corporation  
Anheuser-Busch Companies  
Appleton Papers, Inc.  
Arai Helmet, Ltd.  
Astec Industries  
BASF Corporation  
Bayer Corporation  
Bell Sports  
Beretta U.S.A Corp.  
BIC Corporation  
Biro Manufacturing Company, Inc.  
Black & Decker (U.S.) Inc.  
BMW of North America, LLC  
Boeing Company  
Bombardier Recreational Products  
BP America Inc.  
Bridgestone Americas Holding, Inc.  
Briggs & Stratton Corporation  
Brown-Forman Corporation  
CARQUEST Corporation  
Caterpillar Inc.  
Chevron Corporation  
Continental Tire North America, Inc.  
Cooper Tire and Rubber Company  
Coors Brewing Company  
Crown Equipment Corporation  
DaimlerChrysler Corporation  
The Dow Chemical Company  
E & J Gallo Winery  
E.I. DuPont De Nemours and Company  
Eaton Corporation  
Eli Lilly and Company

Emerson Electric Co.  
Engineered Controls International, Inc.  
Estee Lauder Companies  
Exxon Mobil Corporation  
Ford Motor Company  
Freightliner LLC  
Genentech, Inc.  
General Electric Company  
General Motors Corporation  
GlaxoSmithKline  
The Goodyear Tire & Rubber Company  
Great Dane Limited Partnership  
Harley-Davidson Motor Company  
The Heil Company  
Honda North America, Inc.  
Hyundai Motor America  
Illinois Tool Works, Inc.  
International Truck and Engine Corporation  
Isuzu Motors America, Inc.  
Jarden Corporation  
Johnson & Johnson  
Johnson Controls, Inc.  
Joy Global Inc., Joy Mining Machinery  
Kawasaki Motors Corp., U.S.A.  
Kia Motors America, Inc.  
Koch Industries  
Kolcraft Enterprises, Inc.  
Komatsu America Corp.  
Kraft Foods North America, Inc.  
Lincoln Electric Company  
Magna International Inc.  
Mazda (North America), Inc.  
Medtronic, Inc.  
Merck & Co., Inc.  
Michelin North America, Inc.  
Microsoft Corporation  
Mine Safety Appliances Company  
Mitsubishi Motors North America, Inc.  
Nintendo of America, Inc.  
Niro Inc.  
Nissan North America, Inc.

Nokia Inc.  
Novartis Consumer Health, Inc.  
Novartis Pharmaceuticals Corporation  
Occidental Petroleum Corporation  
PACCAR Inc.  
Panasonic  
Pfizer Inc.  
Porsche Cars North America, Inc.  
PPG Industries, Inc.  
Purdue Pharma L.P.  
Putsch GmbH & Co. KG  
The Raymond Corporation  
Raytheon Aircraft Company  
Remington Arms Company, Inc.  
Rheem Manufacturing  
RJ Reynolds Tobacco Company  
Sanofi-Aventis  
Schindler Elevator Corporation  
SCM Group USA Inc.  
Shell Oil Company  
The Sherwin-Williams Company  
Smith & Nephew, Inc.  
St. Jude Medical, Inc.  
Sturm, Ruger & Company, Inc.  
Subaru of America, Inc.  
Synthes (U.S.A.)  
Terex Corporation  
Textron, Inc.  
TK Holdings Inc.  
The Toro Company  
Toshiba America Incorporated  
Toyota Motor Sales, USA, Inc.  
TRW Automotive  
UST (U.S. Tobacco)  
Vermeer Manufacturing Company  
The Viking Corporation  
Volkswagen of America, Inc.  
Volvo Cars of North America, Inc.  
Vulcan Materials Company  
Watts Water Technologies, Inc.  
Whirlpool Corporation

Wyeth  
Yamaha Motor Corporation, U.S.A.  
Yokohama Tire Corporation  
Zimmer, Inc.

**CERTIFICATE OF SERVICE  
D045154**

I, Kristine Surzynski, declare as follows:

I am a resident of the State of California and over the age of eighteen years, and not a party to the within action. My business address is: Two Palo Alto Square, Suite 300, 3000 El Camino Real, Palo Alto, CA 94306. On October 2, 2007, I served the foregoing document(s) described as:

**APPLICATION OF THE PRODUCT LIABILITY  
ADVISORY COUNCIL, INC. FOR PERMISSION TO FILE  
AMICUS CURIAE BRIEF AND AMICUS CURIAE BRIEF  
IN SUPPORT OF DEFENDANT-APPELLANT FORD MOTOR CO.**

- By transmitting via facsimile the document(s) listed above to the fax number(s) set forth below on this date before 5:00 p.m.
- By placing the document(s) listed above in a sealed envelope with postage prepaid, via First Class Mail, in the United States mail at Palo Alto, California addressed as set forth below:
- By placing the document(s) listed above in a sealed overnight service envelope and affixing a pre-paid air bill, and causing the envelope to be delivered to an overnight service agent for delivery.
- By personal service. I caused such envelopes to be delivered by a messenger service by hand to the address(es) listed below:

THEODORE J. BOUTROUS, JR. WILLIAM E. THOMSON EILEEN M. AHERN GIBSON, DUNN & CRUTCHER LLP 333 South Grand Avenue Los Angeles, CA 90071-3197 Telephone: (213) 229-7000 Facsimile: (213) 229-7520	THEODORE B. OLSON PAUL DECAMP GIBSON, DUNN & CRUTCHER LLP 1050 Connecticut Avenue, NW Washington, DC 20036-5306 Telephone: (202) 955-8500 Facsimile: (202) 467-0539
<i>Attorneys for Ford Motor Company and Drew Ford</i>	<i>Attorneys for Ford Motor Company and Drew Ford</i>

<p>PAUL D. NELSON  PAUL J. KILLION  JACQUELINE G. ELLIOPULOS  LESLIE KURSHAN  MICHAEL J. DICKMAN  HANCOCK ROTHERT &amp; BUNSHOFT  LLP  Four Embarcadero Center, Suite 300  San Francisco, CA 94111-4168  Telephone: (415) 981-5550  Facsimile: (415) 955-2599</p> <p><i>Attorneys for Plaintiffs and  Respondents, Benetta Buell-Wilson  and Barry S. Wilson</i></p>	<p>DENNIS A. SCHOVILLE  LOUIS G. ARNELL  JAMES S. IAGMIN  SCHOVILLE &amp; ARNELL  1230 Columbia Street, Suite 800  San Diego, CA 92101  Telephone: (619) 232-9901  Facsimile: (619) 232-9904</p> <p><i>Attorneys for Plaintiffs and  Respondents, Benetta Buell-Wilson  and Barry S. Wilson</i></p>
<p>THE HONORABLE KEVIN A. ENRIGHT  SAN DIEGO COUNTY SUPERIOR  COURT  330 W. Broadway  San Diego, CA 92101</p>	<p>SUPREME COURT OF CALIFORNIA  350 McAllister Street  San Francisco, CA 94102-4783  (4 copies)</p>

I am readily familiar with the firm's practice of collection and processing correspondence for mailing. Under that practice it would be deposited with the U.S. Postal Service on that same day with postage thereon fully prepaid in the ordinary course of business.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on October 2, 2007, at Palo Alto, California.

\_\_\_\_\_  
Kristine Surzynski