No. 07-1216

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Writ of Certiorari to The Supreme Court of Oregon

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

When this case was last before it, this Court ruled that due process precludes a jury from imposing punitive damages to punish for alleged injuries to persons other than the plaintiff. The Court remanded the case to the Oregon Supreme Court with directions to "apply the standard we have set forth." *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007). On remand, however, the Oregon court failed to follow this Court's directive. Instead, it "adhered to" the judgment this Court had vacated, holding that Philip Morris had procedurally defaulted under state law and thereby forfeited its claim of constitutional error.

The question presented is:

Whether, after this Court has adjudicated the merits of a party's federal constitutional claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may instead hold the federal claim forfeited by interposing a state-law procedural rule in a way that serves no legitimate state interest and is neither firmly established nor regularly followed.

RULE 29.6 STATEMENT

Petitioner Philip Morris USA's corporate parent is Altria Group, Inc. Altria Group, Inc. is the only publicly-held company that owns ten percent or more of Philip Morris USA's stock.

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BRIEF FOR THE PETITIONER

OPINIONS BELOW

The decision of the Oregon Supreme Court (Pet. App. 1a-25a) is reported at 176 P.3d 1255. That court's earlier decision (Pet. App. 26a-66a) is reported at 127 P.3d 1165. The 2004 decision of the Oregon Court of Appeals (Pet. App. 67a-114a) is reported at 92 P.3d 126, and the 2002 decision of that court (Pet. App. 115a-154a) is reported at 48 P.3d 824. The trial court's oral ruling on Philip Morris's proposed instruction (Pet. App. 155a-165a) is unreported.

JURISDICTION

The decision of the Oregon Supreme Court was entered on January 31, 2008. The petition for a writ of certiorari was filed on March 24, 2008, and granted on June 9, 2008. This Court's jurisdiction rests on 28 U.S.C. § 1257(a).

STATEMENT

In *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007), this Court held that due process requires a trial court, upon request, to protect a defendant against the risk that a jury will punish it for injuries to persons not before the court. This Court observed that, during the trial of this case, Philip Morris had requested protection against that risk, but the Oregon courts rejected this request on the ground that punishment for harms to non-parties is constitutionally permissible. *Id.* at 1061, 1062. Finding that constitutional ruling erroneous, this Court "remand[ed] this case so that the Oregon Su-

preme Court can apply the standard we have set forth." *Id.* at 1065.

On remand, however, the Oregon Supreme Court failed to follow this direction. Instead, it held that Philip Morris had forfeited the federal right recognized by this Court because it had not complied with a state-law procedural requirement that had never before been invoked by any Oregon court in this case during nine years of appellate litigation.

The Oregon Supreme Court was not free to disregard this Court's express directive to apply the federal constitutional principle that it announced. Nor did it have the power to re-examine on remand this Court's premise that the federal question was properly before it. Moreover, the waiver theory asserted by the Oregon Supreme Court on remand is in any event not an adequate ground for refusing to entertain Philip Morris's federal claim. As applied in a case such as this one, the rule serves no legitimate purpose. It has never been applied under circumstances remotely like those presented here, and appears to be nothing more than a pretext for refusal to protect Philip Morris's due process rights. Reversal is required to protect litigants' federal constitutional rights, the integrity of the federal system, and judicial economy in this Court's resolution of constitutional issues.

A. The Trial

Jesse Williams began smoking cigarettes in 1950. Pet. App. 5a. After 1955, Williams smoked Marlboros, which are manufactured and marketed by Philip Morris. *Id.* at 29a. Williams eventually smoked three packs of cigarettes a day. He was diagnosed with cancer in 1996 and died in March 1997.

Ibid. Alleging negligence, strict product liability, and fraud, Williams's widow sued Philip Morris.

At trial, plaintiff mounted a wide-ranging attack on Philip Morris's conduct over a period of 50 years. In closing arguments, plaintiff urged the jury to punish Philip Morris not only for the harm caused to Williams but also for unidentified harms suffered by countless other, unidentified Oregon smokers who were not before the court and whose individual circumstances were never presented to the finder of fact. 127 S. Ct. at 1061, 1063.

Philip Morris submitted a proposed jury instruction covering the subject of punitive damages (Requested Instruction 34) which, in a separately numbered paragraph, would have told the jury "not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims." J.A. 32a-33a.[1] At the charge conference, the trial court engaged in what the Oregon Supreme Court called a "line-by-line" analysis of Philip Morris's proposed charge, Pet. App. at 16a, and addressed the instruction on harms to non-parties as a

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[1] The full paragraph, addressing proportionality and harms to non-parties, stated:

> (1) The size of any punishment should bear a reasonable relationship to the harm caused to Jesse Williams by the defendant's punishable misconduct. Although you may consider the extent of harm suffered by others in determining what that reasonable relationship is, you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims and award punitive damages for those harms, as such other juries see fit.

J.A. 32a-33a.

distinct issue. Philip Morris argued that the instruction was required by the federal Constitution. J.A. 12a-20a. The trial court, however, ruled that an instruction forbidding punishment for harm to non-parties was *not* constitutionally required and, accordingly, declined to give the requested instruction. *Id.* at 20a.

Plaintiff voluntarily dismissed her strict product liability claim, and the jury found for her on her fraud and negligence claims. It awarded $821,485 in compensatory damages (reduced to $521,485 pursuant to Oregon's statutory cap on wrongful death damages). The jury also awarded $79.5 million in punitive damages for fraud; it declined to impose punitive damages for the conduct underlying the negligence claims.

On post-trial motions, the trial court held that the punitive damages award was "excessive under federal standards" (Pet. App. 38a) and reduced it to $32 million. Both sides appealed.

B. Initial Appeal And GVR

Philip Morris argued on appeal, *inter alia*, that the jury should have been instructed not to impose punitive damages to punish for harms to non-parties. The Oregon Court of Appeals rejected that contention on the merits. Pet. App. 140a. It further concluded that the jury's verdict was not unconstitutionally excessive and accordingly reinstated the $79.5 million award. *Id.* at 152a, 154a. Including interest, the award now amounts to over $145 million.

After the Oregon Supreme Court denied discretionary review, Philip Morris petitioned this Court for a writ of certiorari, raising both the harms-to-non-parties issue and the excessiveness claim. This

Court granted the petition, vacated the judgment, and remanded to the Oregon Court of Appeals for reconsideration in light of *State Farm Mutual Automobile Insurance Co.* v. *Campbell*, 538 U.S. 408 (2003), which (i) held that a State may not "award[] punitive damages to punish and deter conduct that [bears] no relation to the [plaintiff's] harm" (*id.* at 422) and (ii) clarified the proper application of the *BMW* guideposts for determining whether a punitive award is excessive. See *Philip Morris USA Inc.* v. *Williams*, 540 U.S. 801 (2003) ("*Williams I*").

C. Proceedings On The First Remand

On remand, the Oregon Court of Appeals ruled that *State Farm* had no impact on its conclusions and again upheld the jury's $79.5 million punitive verdict, principally because of alleged harm Philip Morris caused to unidentified members of the "Oregon public." Pet. App. 112a-113a, 114a. The Court of Appeals once again rejected—on the merits—Philip Morris's argument that the trial court had committed constitutional error by failing to give the proposed instruction barring punishment for harms to non-parties. The court held that punishment on that basis was entirely appropriate under the federal Constitution. *Id.* at 102a-105a.

Philip Morris again sought discretionary review from the Oregon Supreme Court. Pet. App. 173a-175a. This time, the Oregon Supreme Court accepted review. In affirming, the Oregon court recognized that there was no evidence that anyone other than Williams had relied on, or been injured as a result of, any of Philip Morris's representations. But it concluded that the jury nevertheless could have found that Philip Morris's conduct affected many smokers other than Williams. *Id.* at 35a; see also *id.*

at 55a. The court based that conclusion on its own "assessment of human nature"—an "assessment" that the court also "attributed" to the jurors. *Id.* at 36a n.1.

The Oregon Supreme Court rejected Philip Morris's argument that the trial court had violated the federal Constitution by failing to instruct the jury not to punish Philip Morris for harms to non-parties.[2] The court held that nothing in this Court's decisions "prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harms to non-parties." Pet. App. 48-49a. The Oregon Supreme Court then rejected Philip Morris's excessiveness claim. *Id.* at 54a, 66a.

Philip Morris filed a second petition for certiorari, which this Court granted.

D. This Court's Decision

This Court granted review on two questions: (i) whether due process permits a jury to punish a defendant for the effects of its conduct on non-parties; and (ii) whether the constitutional requirement of a reasonable relationship between punitive and compensatory damages is inapplicable in cases where the jury could have found the defendant's conduct to be

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[2] Far from suggesting that Philip Morris's federal claim had been forfeited, the Oregon Supreme Court gave every indication that the claim of error for failure to give the instruction had been preserved. After considering and rejecting that claim *on the merits*, the court went on to note that Philip Morris had not preserved any *other* challenge based on punishment for harms to non-parties. Pet. App. 51a-52a. In particular, the court refused to consider Philip Morris's separate argument attacking the instructions "actually given," because "Philip Morris did not preserve that argument." *Ibid.*

highly reprehensible. See *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1062 (2007) ("*Williams II*"). The Court found it necessary to rule only on the first of these questions, holding that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties or those whom they directly represent, *i.e.*, injury that it inflicts upon those who are, essentially, strangers to the litigation." *Id.* at 1063.

Having held "explicitly that a jury may not punish for the harm caused others," 127 S. Ct. at 1065, the Court drew a critical distinction that had been anticipated by Philip Morris's proposed instruction: that while a jury may consider harms to non-parties in gauging the reprehensibility of the defendant's misconduct, the jury must *not* "go further than this and use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064. The Court "conclude[d] that the Due Process Clause requires States to provide assurance that juries are not asking the wrong question, *i.e.*, seeking, not simply to determine reprehensibility, but also to punish for harm caused strangers." *Ibid.* Where the risk of jury confusion is

> a significant one—because, for instance, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—*a court, upon request, must protect against that risk.* Although the States have some flexibility to determine what *kind* of procedures they will implement, *federal constitutional law obligates them to*

> *provide some form of protection in appropriate cases*.

Id. at 1065 (emphases added; emphases of "kind" and "some" in original).

The Court also recognized that Philip Morris had requested protection against the risk of punishment for harms to non-parties by proposing an instruction that "distinguishe[d] between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." 127 S. Ct. at 1064 (quoting Philip Morris's proposed instruction). The Oregon Supreme Court, like the trial court and the Oregon Court of Appeals before it, had "rejected that claim" on the merits. *Ibid.*

This Court concluded its opinion by telling the Oregon Supreme Court precisely what was to be done on remand:

> As the preceding discussion makes clear, we believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris's appeal. We remand this case *so that the Oregon Supreme Court can apply the standard* we have set forth.

127 S. Ct. at 1065 (emphasis added). Because application of the proper constitutional standard could lead to either "the need for a new trial, or a change in the level of the punitive damages award," *ibid.*, the Court did not reach the excessiveness question.

Justice Ginsburg's dissent, joined by Justices Scalia and Thomas, asserted that the Court should not have reached the merits of the federal constitutional claim. The dissent stated that Philip Morris

had not "preserve[d] any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument." 127 S. Ct. at 1068. The dissent further suggested that Philip Morris's proposed jury instruction had not been sufficient to preserve its claim of constitutional error. *Id.* at 1069.[3] That view was implicitly rejected by the Court when it addressed Philip Morris's due process claim on the merits.

E. Proceedings On The Second Remand

On remand, the Oregon Supreme Court did not "address the constitutional standard that the United States Supreme Court has articulated" but instead "adhere[d] to" the opinion that this Court had vacated. Pet. App. 13a, 22a. The Oregon court assumed that the portion of the proposed instruction that addressed harms to non-parties "clearly and correctly articulated the standard required by due process" and was therefore correct as a matter of federal law. *Id.* at 21a. Nonetheless, the court held that it did not need to apply that standard, because Philip Morris's proposed jury instruction "was flawed for reasons that we did not identify in our former opinion," *id.* at 3a—reasons that had never been relied upon by either the Oregon Court of Appeals or the Oregon Supreme Court in nine years of appellate litigation, but that the Oregon court now insisted "we must consider, before we address the constitutional standard" articulated by this Court. *Id.* at 13a.

Philip Morris's error, according to the Oregon Supreme Court, was that it submitted its proposed

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[3] Justice Stevens wrote separately, disagreeing with the majority on the merits only. 127 S. Ct. at 1065-67.

instruction on harms to non-parties in the same document that contained other proposed instructions on punitive damages, each presented as a separate paragraph, and that one of the other proposed instructions "did not state [Oregon] law correctly." Pet. App. 21a. That paragraph would have told the jury that it "may," rather than "shall," take into account various statutory factors in awarding punitive damages. It also would have told the jury to consider the extent to which any misconduct by Philip Morris was motivated by "illicit" profits, as opposed to having the jury consider all profits Philip Morris actually received from its sale of cigarettes in Oregon, whether or not arising from tortious activity. *Id.* at 18a-22a.

Those supposed errors had no impact on the trial court's refusal to instruct on harms to non-parties. As the Oregon Supreme Court recognized, the trial judge had "reviewed the proposed jury instructions line-by-line," Pet. App. 16a, and had denied Philip Morris's federal claim on the merits. But the court below nevertheless held that Philip Morris had forfeited its constitutional claim by "placing all the party's eggs in one instructional basket" (*id.* at 15a), and that this forfeiture was "an independent and adequate ground for affirming the trial judge's ruling." *Id.* at 13a.

SUMMARY OF ARGUMENT

I. The Oregon Supreme Court has disregarded the instructions of this Court, which held that "the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris's appeal" and remanded the case "so that the Oregon Supreme Court can apply the standard we have set forth." 127 S. Ct. at 1065. The Oregon Supreme Court had no authority to refuse to "apply" the cor-

rect constitutional standard and instead find Philip Morris's federal claim barred by a "preliminary, independent state law standard." Pet. App. 13a. This Court has repeatedly rejected lower courts' attempts to skirt its mandates in this manner. See, *e.g.*, *Stanton* v. *Stanton*, 429 U.S. 501 (1977); *Yates* v. *Aiken*, 484 U.S. 211 (1988).

Even apart from this Court's explicit instruction, it was improper for the Oregon Supreme Court to reexamine a basic premise of this Court's opinion in *Williams II*: the determination that Philip Morris's constitutional claim had been fairly and accurately presented to the trial court and should be addressed on the merits on remand. On both previous occasions leading to remands from this Court, the Oregon courts decided the merits of the federal claim despite plaintiff's repeated arguments that the issue had not been properly preserved. The Oregon Supreme Court was not free to erect a state-law procedural barrier for the first time on remand in order to evade this Court's directions and uphold a judgment that this Court found to be infected by constitutional error. *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. 240, 243-44 (1959) (per curiam); *Yates*, 484 U.S. at 217.

II. There is a second, independent reason for reversal: the Oregon Supreme Court's rationale for refusing to address Philip Morris's due process claim does not constitute an adequate state ground for the judgment.

Whether a party preserved a constitutional claim is a question of federal law. *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). Although this Court will recognize a state-law procedural bar to a federal claim if the rule is regularly followed and its applica-

tion in the particular case serves legitimate state interests, the Court has repeatedly held that state courts cannot deploy novel or unreasonable rules, or apply otherwise legitimate rules in unreasonable ways, in an effort to thwart constitutional claims. See, *e.g.*, *Osborne* v. *Ohio*, 495 U.S. 103 (1990); *Lee* v. *Kemna*, 534 U.S. 362 (2002). Here, as this Court observed, Philip Morris proposed a jury instruction that correctly stated the federal standard, and also made clear at the charge conference its position on the federal issue. That was sufficient to invoke its constitutional right. The Oregon Supreme Court's novel application of a requirement that the proposed instruction be "correct in all respects"—an application completely divorced from the rule's purpose—reflects the type of "pointless severity" that this Court has held inadequate to bar federal claims. *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964).

The Oregon courts frequently have described the purpose of requiring that a proposed instruction be "correct in all respects" as being to ensure that trial judges are fairly and specifically apprised of parties' requests and to avoid burdening trial judges with the job of rewriting incorrect instructions. The Oregon Supreme Court's extension of this requirement to impose a forfeiture simply because an accurate proposed instruction on federal law appeared on the same page as a supposedly incorrect instruction on a different point of law would not serve the purpose of freeing courts from editing responsibilities. Its only effect would be to force counsel to submit individual requests on separate pages, rather than separating those requests with paragraph indentations.

In this case, moreover, presenting the proposed instruction on harms to non-parties on a separate piece of paper would not have made the slightest difference. The trial court considered each paragraph of Requested Instruction 34 independently, and it rejected the paragraph on harms to non-parties on the merits because it believed, erroneously, that the instruction was not required by federal law. Accordingly, the outcome would have been exactly the same had Philip Morris submitted that paragraph by itself on a separate page. State courts cannot require litigants to engage in "arid ritual[s] of meaningless form" in order to preserve their federal claims. *James* v. *Kentucky*, 466 U.S. 341, 349 (1984); *Osborne* v. *Ohio*, 495 U.S. at 124.

Beyond this, the requirement imposed below is the antithesis of the "firmly established and regularly followed state practice" that can bar a federal claim. *James*, 466 U.S. at 348-49. The Oregon Supreme Court's decision departs markedly from established Oregon law in several ways. First, the Oregon courts had long held that there is no need for counsel to re-submit a proposed instruction in "completely correct" form if it is clear that such a submission would be rejected in any event. *State* v. *George*, 97 P.3d 656 (Or. 2004). Second, this case marks the *first* and *only* time in any reported Oregon decision that an appellate court has rejected an instruction on one subject, considered separately and addressed on the merits by the trial court, simply because it appeared under the same heading as a defective instruction on an entirely distinct point of law. Under the circumstances, Philip Morris lacked fair notice of the procedural requirement it supposedly violated; a party proffering a federal claim may not be ambushed by state courts in this manner. And third, it

has always been Oregon practice to decide questions of state law first, in order to avoid unnecessarily reaching federal constitutional issues. It was therefore implicit in the prior decisions on the merits that there was no state law procedural defect in the presentation of Philip Morris's claim.

III. As this Court recognized, Philip Morris properly requested protection from the risk of punishment for harms to non-parties. And the trial court infringed Philip Morris's federal constitutional rights by rejecting that request. The only adequate remedy for this constitutional violation is a new trial. A remittitur of the punitive award to the maximum amount permissible under the Constitution cannot cure the error, because a properly instructed jury might well have awarded less than the constitutional maximum. The Oregon courts should now be directed to award Philip Morris a new trial.

ARGUMENT

I. THE OREGON SUPREME COURT FAILED TO COMPLY WITH THIS COURT'S DIRECTIONS.

A. The Remand Required The Oregon Courts To "Apply" The Constitutional Standard.

When it failed to "apply the [constitutional] standard set forth" in this Court's decision, the Oregon Supreme Court violated a principle fundamental to the operation of our judicial system: that this Court's decisions must be scrupulously followed by the lower courts. As Justice Jackson explained, from "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." *Briggs* v.

Penn. R. Co., 334 U.S. 304, 306 (1948). See also, *e.g.*, *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895) (following a remand from this Court, a lower 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"); *Ex Parte Sibbald*, 37 U.S. 488, 492 (1838) (same). This Court has not hesitated to reverse lower court rulings that contravene the command of its decisions.

Stanton v. *Stanton*, 429 U.S. 501 (1977) (per curiam) is an example. When the case was first before it, this Court held that a Utah statute that established 21 as the age of majority for males and 18 as the age of majority for females violated the Equal Protection Clause. The Court "did not decide how Utah was to eliminate the discrimination between the genders," and instead "remanded the case to the Utah court for it to resolve this issue of state law." *Id.* at 501.

On remand, however, the Utah Supreme Court "did not consider the issue presented to it and held, instead, that the age-of-majority statute was constitutional as applied to females without considering the discrimination." 429 U.S. at 502. The Utah court's basis for skirting this Court's mandate was similar to the one advanced by the Oregon Supreme Court here: despite having reached the discrimination issue when the case was first before it, the Utah Supreme Court on remand asserted that the federal issue was not properly raised in the case. This Court reversed, rejecting the Utah court's attempt to reaffirm its earlier judgment on new procedural grounds and holding that the decision "obviously[] is inconsistent with our opinion in *Stanton I*." *Id.* at 503.

Similarly, in *Yates* v. *Aiken*, 484 U.S. 211 (1988), the defendant claimed that the trial court's instructions to the jury were erroneous both as a matter of state law and of federal due process. *Id*. at 212. After the South Carolina Supreme Court denied his habeas petition, Yates sought review from this Court, which summarily vacated the judgment and remanded the case for further consideration in light of its recent decision in *Francis* v. *Franklin*, 471 U.S. 307 (1985). On remand, the South Carolina court refused to grant the defendant relief because it believed that none was available under state law; critically, the court "did not consider whether [*Francis*] might apply retroactively" and entitle the defendant to relief under federal law. 484 U.S. at 213. This Court "granted certiorari because [it was] concerned that the South Carolina Supreme Court had not fully complied with [its] mandate," and reversed.

Of particular relevance here, the Court observed that "[o]ur mandate contemplated that the state court would consider whether, as a matter of *federal* law, petitioner's conviction could stand in the light of *Francis*." *Id.* at 215 (emphasis added). This Court went on to decide the question directly: "Since the state court did not decide that question, we shall do so." *Id.* It determined that the jury instructions were erroneous and that the petitioner's constitutional rights had been violated. *Id.* See also *Smith* v. *Texas*, 127 S. Ct. 1686, 1698-99 (2007) (reversing state court's reinstatement of judgment following remand, notwithstanding a new finding of procedural default, because the state court is "required to defer

to our finding" of a constitutional error in the jury charge).[4]

Decisions like these make clear that this Court will not condone the failure—whether intentional or merely erroneous—of lower courts to comply with the Court's remand instructions. The Court gave the Oregon Supreme Court clear directions when it remanded this case: "[W]e believe that the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal. We remand this case so that the Oregon Supreme Court can apply the standard we have set forth." 127 S. Ct. at 1065. This Court plainly contemplated that on remand the Oregon Supreme Court would provide an appropriate remedy for the violation of Philip Morris's constitutional right to be protected against the risk of punishment for harms to non-parties. That is why the Court stated in the very next sentence that the proceedings on remand might lead either to a "new trial, or a change in the level of the punitive damages award." *Ibid.*

Plaintiff's principal argument against the current grant of certiorari was that the Oregon Supreme Court did in fact "faithfully appl[y]" this Court's constitutional standard on remand. Cert. Opp. 13-15.

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[4] Accord, *Ford* v. *Georgia*, 498 U.S. 411, 417-18 (1991) (reversing state court decision that raised a new procedural bar to petitioner's federal claim *sua sponte* for the first time on remand from this Court); *Utah Pub. Serv. Comm'n* v. *El Paso Natural Gas Co.*, 395 U.S. 464, 471-72 (1969) (reversing after district court, on remand, had ordered a partial divestiture of a corporate acquisition that this Court had found to violate Clayton Act, an order that "[did] not comply with our mandate. * * * Only a cash sale will satisfy the rudiments of complete divestiture.").

That standard, plaintiff contended, entitles a defendant to protection against punishment for harm to non-parties only "upon request." According to plaintiff, the Oregon Supreme Court did what it was told to do when it found that there had not been a proper "request" at trial.

That contention flies in the face of the text of the Oregon court's opinion, which stated that there was a "preliminary, independent *state law standard* that we must consider, *before we address the constitutional standard* that the United States Supreme Court has articulated." Pet. App. 13a (emphasis added). The Oregon court then asserted that it had the power to reaffirm its judgment on the basis of an adequate state ground "*without reaching* the federal question." *Ibid.* (emphasis added).

This Court's instruction was to "apply" the substantive "constitutional standard" that the Court had announced. The Oregon court failed, however, to "address the constitutional standard" at all, Pet. App. 13a, much less to do so "faithfully." Opp. 13. Instead, the Oregon court found that because Requested Instruction 34 was "erroneous in a number of ways that are *unrelated to the issues addressed by the United States Supreme Court*," Pet. App. 15a (emphasis added), the submission of that instruction failed to preserve Philip Morris's constitutional claim *as a matter of state law*. *Ibid.* The Oregon Supreme Court simply sidestepped the substantive constitutional standard it was directed to "apply." Reversal is warranted, both to implement this Court's judgment in *Williams II* and to vindicate the Court's authority.

B. A State Court Is Not Free To Re-Examine, On Remand, The Premise Of This Court's Decision On The Merits.

Beyond its failure to follow this Court's instructions on remand, the Oregon Supreme Court improperly re-examined and rejected a major premise on which the Court's decision rested. When this Court implicitly or necessarily resolves an issue in rendering its decision in a particular case, that resolution becomes law of the case and is binding on the lower courts. In *Williams II*, plaintiff argued broadly under Oregon's "correct in all respects" rule that Philip Morris had forfeited its claim for a protective instruction. Philip Morris responded with a showing that it had preserved its claim by making it clearly and on a timely basis in the trial court and on appeal. This Court agreed with Philip Morris when it reached the merits of the due process claim and remanded for application of the proper constitutional standard. The Oregon Supreme Court should not have second-guessed the fundamental premise of *Williams II*.

In its petition for certiorari and its opening brief in *Williams II*, Philip Morris set forth the text of its proposed instruction on harms to non-parties and summarized the oral argument that it had presented at the trial court's charge conference. Petitioner's Brief, No. 05-1256, at 4; Petition, at 14-15. Philip Morris argued that it had a due process right to the instruction, that the instruction was accurate as proposed, and that the trial court's failure to give the instruction was highly prejudicial. Br. 23-25; Reply Br.

5-6.[5] Invoking Oregon's "correct in all respects" rule, plaintiff asserted in broad terms both in opposition to certiorari and in her merits brief that the proposed instruction on harms to non-parties was properly denied because it failed "to meet minimum requirements for accuracy and clarity," was "erroneous and self-contradicting," was not "altogether free from error," and was unduly "lengthy" and "confusing." Respondent's Brief, No. 05-1256, at 46-49; Brief in Opposition at 22-24.

Three of the dissenting Justices found merit in plaintiff's waiver argument:

> The Court's order vacating the Oregon Supreme Court's judgment is all the more inexplicable considering that Philip Morris did not preserve any objection to the charges in fact delivered to the jury, to the evidence introduced at trial, or to opposing counsel's argument. The sole objection Philip Morris preserved was to the trial court's refusal to give defendant's requested charge number 34. * * *
>
> Under [the proposed] charge, just what use could the jury properly make of "the extent of harm suffered by others"? The answer slips from my grasp. A judge seeking to enlighten rather than confuse surely would resist delivering the requested charge.

127 S. Ct. at 1068-69 (Ginsburg, J., dissenting).

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[5] The joint appendix contained the transcript of Philip Morris's argument at the charge conference in support of the requested instruction (Joint Appendix, No. 05-1256, at 190a-196a) and the full text of Requested Instruction 34. *Id.* at 279a-281a.

But the majority implicitly rejected that forfeiture argument. This Court recognized that Philip Morris "asked" for the instruction and "argued" in its favor in the trial court. 127 S. Ct. at 1064. And the Court found that the proposed instruction accurately stated due process requirements by "distinguish[ing] between using harm to others as part of the 'reasonable relationship' equation (which it would allow) and using it directly as a basis for punishment." *Ibid.*

The ruling of this Court requiring the Oregon court to "apply" the *Williams II* due process standard on remand rested on the premise that Philip Morris had preserved its constitutional claim. And that is now law of the case, binding on the Oregon courts. See *United States* v. *Williams*, 504 U.S. 36, 40 (1992) (when the Court reaches the merits of a federal claim, in the face of the plaintiff's assertions that the claim was not properly presented, this Court "necessarily considered and rejected" those assertions); *Sullivan* v. *Little Hunting Park, Inc.*, 396 U.S. 229, 232 (1969) (reversing state court that adhered on remand to its earlier ruling that federal claim was barred by state procedural default: "When the case was first here respondents opposed the petition, claiming [the state rule] was not complied with. Petitioners filed a reply brief addressing themselves to that question. Thus the point now tendered was fully exposed when the case was here before, though we ruled on it *sub silentio*."). When, on remand, the Oregon Supreme Court renewed the issue of preservation and found waiver under state law (on a more attenuated theory than that invoked by the dissenting Justices in *Williams II*, see *infra* pp. 27-35), it effectively re-examined the underpinnings of this Court's decision—and exceeded its authority.

In *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. 240 (1959) (per curiam), this Court rejected a state court's similar attempt to manufacture a new state-law ground for affirmance on remand. This Court had held unconstitutional a judgment of civil contempt against the NAACP for failing to disclose the names and addresses of its members. The Court "remanded the case to the Supreme Court of Alabama 'for proceedings not inconsistent with' our opinion." *Id.* at 241. On remand, the Alabama Supreme Court refused to vacate the contempt judgment, finding for the first time that the NAACP had failed to comply with other aspects of the State's order. *Id.* at 242.

This Court reversed, holding that the lower court had erred by finding a new rationale for upholding the judgment on remand despite the federal constitutional defect previously identified by this Court. When the case had been before this Court,

> [t]he State made not even an indication that other portions of the production order had not been complied with and, therefore, required its affirmance. * * * That was also the basis on which the issue was briefed and argued before us by both sides after certiorari had been granted. * * * And that was the premise on which the Court disposed of the case. * * * In these circumstances the Alabama Supreme Court is foreclosed from re-examining the grounds of our disposition.

Patterson, 360 U.S. at 243-44.

Likewise, in *Yates*, where the Court's "mandate contemplated that the state court would consider" whether its judgment "could stand" in light of new

constitutional law announced by the Court (484 U.S. at 215), this Court warned the South Carolina Supreme Court against adopting a state-law procedural rule in order to defeat the federal right:

> Respondents also argue that South Carolina has the authority to establish the scope of its own habeas corpus proceedings and to refuse to apply a new rule of federal constitutional law retroactively in such a proceeding. We reject this argument * * *. [W]e do not read the South Carolina Supreme Court's opinion as having placed any limit on the issues that it will entertain in collateral proceedings. *Since it has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires.*

484 U.S. at 217-18 (emphasis added). Had the South Carolina Supreme Court held on remand that the petitioner waived his due process claim, it plainly would have contravened this Court's directive and overstepped its authority—as the Oregon Supreme Court did in this case.

Patterson and *Yates* compel reversal here. As in those cases, the state court lacked the power to reexamine the premise of this Court's decision and thereby render this Court's ruling on the merits a meaningless exercise. Because the Oregon Supreme Court considered previously the merits of the federal claim, it now "has a duty to grant the relief that federal law requires." A state court on remand may not belatedly raise a state-law ground in order to avoid execution of this Court's directions. See *Smith*, 127 S. Ct. at 1698-99 (because the state court was obliged to "defer to our finding" of a federal constitutional violation, it was not free to raise "a new state proce-

dural bar" as a means to avoid the directions of the mandate); *Sibbald*, 37 U.S. at 488 (lower court on remand may not "intermeddle with [the case] further than to settle so much as has been remanded"). Indeed, this Court had the option, each of the last two times it considered this case, to apply the proper constitutional standard directly and order its own remedy, rather than remanding to allow the Oregon courts to do so. 28 U.S.C. § 2106. It cannot be the case that, as a result of the remand, Philip Morris lost its remedy for violation of its constitutional rights.[6]

When this Court grants certiorari in a state case because the lower court has apparently misperceived federal constitutional law, it proceeds to resolve the constitutional issues in a manner that conserves the Court's own limited resources. As it explained in *Michigan* v. *Long*, 463 U.S. 1032 (1983):

> [W]hen * * * a state court decision fairly appears to rest primarily on federal law, or to be interwoven with the federal law, and when the adequacy and independence of any possible state law ground is not clear from

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[6] In some cases a state court's ruling on points of state law following remand may be consistent with the Court's opinion and mandate, and on occasion this Court invites resolution of such issues. See, *e.g.*, *Orr* v. *Orr*, 440 U.S. 268 (1979). This is not such a case. Moreover, on remand from this Court, state courts remain free to recognize and apply state-law principles that offer broader protection of rights than federal law provides. See, *e.g.*, *Cooper* v. *California*, 386 U.S. 58, 62 (1967); cf. *Danforth* v. *Minnesota*, 128 S. Ct. 1029, 1038-42 (2008). The decision of the Oregon Supreme Court, by contrast, would defeat a federal right recognized by this Court and deviate from clear instructions given to it.

> the face of the opinion, we will accept as the most reasonable explanation that the state court decided the case the way it did because it believed that federal law required it to do so.

Id. at 1040-41. The Court rejected the alternative approach of remanding an ambiguous case back to state court for clarification of the grounds upon which it rested, in part "because of [concerns about] the delay and decrease in efficiency of judicial administration." 463 U.S. at 1039-40. Indeed, the Court observed in *Long* that it "disfavor[s]" such requests, and "require[s] a clear and express statement that a decision rests on adequate and independent state grounds." *Id.* at 1042 n.7.

The course of proceedings followed by the Oregon Supreme Court here is contrary to the goal of sound judicial administration set forth in *Long*. In their consideration of this case over a period of nine years, the Oregon courts never even suggested that Philip Morris had failed to preserve its constitutional claim; they rejected that claim on the merits.[7] Even apart from considerations of judicial economy, moreover, invocation of a state default rule after both the state court and this Court have decided a federal question on the merits raises the specter of procedural manipulation aimed at avoiding the faithful application of this Court's constitutional rulings.

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[7] The Oregon courts were well aware of plaintiff's argument that Philip Morris's federal claim was procedurally barred by errors of state law in the proposed instruction; plaintiff briefed that contention several times. See, *e.g.*, App. Br. to Or. Ct. App. (Jan. 2004), at 18-19; App. Resp. to Br. on the Merits, Or. Sup. Ct. (March 2005), at 33-34.

II. THE STATE-LAW GROUND INVOKED BELOW WAS NOT ADEQUATE TO DEFEAT PHILIP MORRIS'S DUE PROCESS RIGHTS.

This Court should reverse for a second, independent reason: the procedural bar invoked by the Oregon Supreme Court is not an adequate state ground for the judgment. The adequacy of a state-law bar to a due process challenge is "itself a federal question." *Douglas* v. *Alabama*, 380 U.S. 415, 422 (1965). The Oregon Supreme Court's assertion on remand that its newfound waiver theory was "an independent and adequate state ground for affirming the trial court's ruling," Pet. App. 13a, is entirely irrelevant: the sufficiency of a state-law procedural rule to bar a federal constitutional claim turns not on the state court's characterization of that rule but rather on whether the rule meets the established *federal* standards for adequacy. *Douglas*, 380 U.S. at 422. As Justice Holmes explained for the Court, "[w]hatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923).

The procedural bar asserted by the Oregon Supreme Court fails to meet this Court's standards. As applied in this case, the correct-in-all-respects rule serves no legitimate state purpose. And it is neither firmly established nor regularly followed in the manner at issue here. Philip Morris did not have adequate contemporaneous notice of the required procedure.

A. As Applied In This Case, The Procedural Rule Invoked By The Oregon Supreme Court Serves No Legitimate State Interest.

Philip Morris proposed a jury instruction that correctly stated the constitutional principle, and defense counsel presented oral argument on the point. That was sufficient to preserve Philip Morris's federal claim. See *Osborne* v. *Ohio*, 495 U.S. 103, 125 (1990) ("an objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests"). The Oregon Supreme Court's application of a stricter rule serves no legitimate state interest and is therefore inadequate as a matter of federal law.

1. Philip Morris Presented Its Federal Claim To The Trial Court, Which Fully Understood The Claim And Rejected It On The Merits.

Philip Morris adequately preserved its federal claim. As this Court explained, "Philip Morris asked the trial court to tell the jury that 'you may consider the extent of harm suffered by others in determining what the reasonable relationship is' between any punitive award and 'the harm caused to Jesse Williams' by Philip Morris's misconduct, 'but you are not to punish the defendant for the impact of its alleged misconduct on other persons, who may bring lawsuits of their own in which other juries can resolve their claims.'" 127 S. Ct. at 1061 (ellipses and brackets omitted) (quoting from joint appendix). Philip Morris made that request in a separately numbered paragraph of its Requested Instruction 34—a paragraph that was, under this Court's holding in *Wil-*

liams II, correct in all respects. As the Oregon Supreme Court acknowledged (Pet. App. 6a), the trial court conducted a "line-by-line" analysis of Philip Morris's proposed charge and considered and ruled upon the harms-to-non-parties instruction as a distinct issue, rejecting it on the merits. *Id.* at 6a, 16a, 156a.

On remand from this Court, the Oregon Supreme Court refused to remedy this constitutional error because it identified two supposed errors of *state law* in a different paragraph of Requested Instruction 34. This separate paragraph, designated as paragraph 2, would have told the jury that it "may," rather than "shall," take into account various statutory factors in awarding punitive damages. And it would have asked the jury to consider the extent to which Philip Morris was motivated by "illicit" profits, as opposed to having the jury consider all profits Philip Morris may have received from the sale of cigarettes in Oregon, lawful as well as tortious. *Id.* at 18a-22a.

These purported errors in paragraph 2 had no effect at all on the court's consideration of the correct instruction on harms to non-parties that was designated as paragraph 1. The Oregon Supreme Court nevertheless faulted Philip Morris for including paragraph 1 and paragraph 2, along with other legal principles pertaining to punitive damages, within Requested Instruction 34. The court observed that it is dangerous for counsel to place "all the party's eggs in one instructional basket." Pet App. 15a. Under the Oregon Supreme Court's approach, had Philip Morris submitted the harms to non-parties instruction on a separate sheet of paper, the federal claim would have been preserved.

But the format of Philip Morris's requested instruction—a single "punitive damages" instruction containing multiple paragraphs covering distinct points of law—tracks the structure of the state's pattern jury instructions on punitive damages, U.C.J.I. § 75.01-06.[8] Indeed, plaintiff too submitted a single, global punitive damages instruction for the court's consideration. During the charge conference, the trial judge was working from a copy of *plaintiff's* Requested Instruction 34. The structure of that version paralleled both Philip Morris's and the state's pattern instruction; it too grouped a number of separate legal rules, in separate paragraphs, under a single heading, borrowed from the model charge: "PUNITIVE DAMAGES—PRODUCTS LIABILITY." J.A. 35a-36a. Everyone in the courtroom understood that each party was asking the judge to depart from the pattern instruction in several distinct respects, captured in separate paragraphs in the parties' respective instructions.

The trial court considered and rejected Philip Morris's proposed harm to non-parties instruction as a freestanding matter. Philip Morris argued that the Constitution prohibits punishment for harms to non-parties. J.A. 18a-19a. The trial court asked defense counsel to identify cases holding "that this element * * * has to be there for the jury." *Id.* at 20a. Counsel acknowledged that there was no case

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[8] U.C.J.I. § 75.06 is one of several model jury instructions for punitive damages, and its structure is typical of the group: under one heading, the instruction contains separate paragraphs explaining the standard for punitive liability; the burden of proof (clear and convincing evidence); the jury's discretion; and the multiple factors relevant to setting the amount of punitive damages.

squarely on point but argued that harm to non-parties was a "consideration[] that the [Supreme] Court looked at in the *BMW* case and a number of others." Because no case directly held that such an instruction was necessary, the court refused to give one. *Ibid.* Thus, the trial court refused to charge the jury on harms to non-parties not because it believed that *other paragraphs* of the instruction misstated *state* law, but because the court disagreed with Philip Morris's position that the instruction on harms to non-parties was required by *federal* law. The fact that this instruction happened to appear along with other paragraphs of Philip Morris's proposed charge under a single heading, rather than under its own separate heading, had no effect on the trial court's ruling at the charge conference.

2. The Waiver Rule Adopted Below Serves No Legitimate State Interest.

The Oregon Supreme Court's "correct in all respects" requirement serves no legitimate purpose as applied in this case. For nearly a century, the Oregon courts have been clear about the purpose of the "correct in all respects" rule: it exists to ensure that trial judges are fairly apprised of a party's request, and to avoid placing on the trial judge the burden of editing an incorrect requested instruction on a particular legal point to bring it into line with the law. See, *e.g.*, *Sorenson* v. *Kribs*, 161 P. 405, 410 (Or. 1916) ("[i]f a contrary rule obtained, it would not be necessary for counsel carefully to prepare requested instructions"); *Brigham* v. *Southern Pac. Co.*, 390 P.2d 669, 671 (Or. 1964) ("The court was not required to edit the instructions given [by the parties] and eliminate that part which may have been objectionable."); *Hooning* v. *Henry*, 213 P. 139, 141 (Or. 1923)

("it is not the duty of the court to patch up a request to make it conform to the law of the case").

When a party proposes an instruction on a particular point of law that is partially correct but partially incorrect, it should not be the court's job to sort the wheat from the chaff. But a "correct in all respects" rule makes no sense and serves no purpose when applied to a series of requested instructions on *different* points of law, each argued separately by counsel and considered separately by the court. A rule like the one applied at the eleventh hour of this case would not free courts from editing responsibilities. Its only effect would be to force counsel to submit individual requests on separate pieces of paper. The substance of the requests, and the judge's consideration of them, would be exactly the same. Thus, even assuming that the Oregon court did identify real "errors" in other paragraphs of the proposed charge, the court's reliance on them to foreclose Philip Morris's due process claim is indefensible.

Where—as here—a party asserts a federal right clearly and gives the trial court an adequate opportunity to consider its argument on the merits, the claim is preserved as a matter of law. See *Douglas*, 380 U.S. at 422 ("[A]n objection which is ample and timely to bring the alleged federal error to the attention of the trial court and enable it to take appropriate corrective action is sufficient to serve legitimate state interests, and therefore sufficient to preserve the claim for review here."). The Oregon Supreme Court's rigid reliance upon a requirement that a proposed "instruction" be "correct in all respects," even in respects that have nothing to do with the federal issue and even when the trial court decided that federal issue independently and on the merits, is a clas-

sic example of the "pointless severity" that this Court has repeatedly held inadequate to bar federal rights. See, *e.g.*, *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964).

For example, in *Osborne* v. *Ohio*, 495 U.S. 103 (1990), the Court ruled that a party has no duty to ask for a jury instruction on a point of law that the trial court has already rejected. Osborne was convicted under an Ohio child-pornography statute. In rejecting his overbreadth challenge, the Ohio Supreme Court held that the statute required, *inter alia*, a finding of lewdness. Osborne pointed out that the jury had not been asked to make such a finding, rendering his conviction unconstitutional. But the Ohio Supreme Court held that Osborne had waived that argument when he failed to ask for an instruction on the subject.

This Court reversed and remanded for a new trial before a properly instructed jury, finding that the Ohio court's waiver theory did not result in forfeiture. Osborne had argued earlier in the case that the court should require the prosecution to prove lewdness, and the court had rejected that argument.

> [W]e believe that we may reach Osborne's due process claim * * *. The trial judge, in no uncertain terms, rejected counsel's argument that the statute was overbroad. The State contends that counsel should then have insisted that the court instruct the jury on lewdness because, absent a finding that this element existed, a conviction would be unconstitutional. Were we to accept this position, we would force resort to an arid ritual of meaningless form, and would further no perceivable state interest.

495 U.S. at 124 (citations, ellipses, and quotation marks omitted). If the State's asserted ground was inadequate in *Osborne*, the ground invoked here is certainly inadequate. Unlike Osborne, Philip Morris *did* ask for a jury instruction that correctly stated federal law—an instruction that the trial court rejected on the merits.

The rule announced below also bears a striking resemblance to the forfeiture doctrine applied by the Alabama Supreme Court in *Flowers*. There, the state court refused to reach the merits of the plaintiff's constitutional claim because it found errors in other portions of the plaintiff's brief: "[W]here unrelated assignments of error are argued together and one is without merit, the others will not be considered." 377 U.S. at 295 (internal quotation marks omitted). This Court rejected the "pointless severity" with which the Alabama Supreme Court applied this rule, noting that the NAACP's brief had simply grouped its assignments of errors together under the same numerical heading for stylistic purposes. *Id.* at 297. Similarly, Philip Morris grouped separate parts of the jury instructions addressing punitive damages under a single, general heading ("PUNITIVE DAMAGES—PRODUCTS LIABILITY") for the convenience of the court and in conformity with the format of Oregon's model jury instructions. J.A. 31a-34a. The supposed errors in other paragraphs had no effect on the court's consideration of the relevant instruction.

Lee v. *Kemna*, 534 U.S. 362 (2002), likewise compels reversal here. In that case, a criminal defendant made an oral request for a continuance after several defense witnesses inexplicably disappeared from the courtroom. The judge denied the motion

from the bench, explaining that he would be unavailable the following day because of a personal obligation. Following conviction, the defendant appealed, arguing that the failure to grant a continuance had violated his due process rights. The Missouri Court of Appeals held that the federal claim was not properly preserved because the request for a continuance had not been in writing or accompanied by an affidavit.

On habeas review, this Court accepted the state court's contention that Missouri law required continuance motions to be in writing and accompanied by affidavits. Nevertheless, the Court explained, there are "exceptional cases in which exorbitant application of a generally sound rule renders the state ground inadequate to stop consideration of a federal question." 534 U.S. at 376. The Court identified three considerations that led it to conclude that the case before it fit that mold. Each of those three factors applies with at least equal force here.

First, "when the trial judge denied Lee's motion, he stated a reason that could not have been countered by a perfect motion." *Id.* at 381. In other words, the trial judge did not deny the motion because it was made orally; he denied it because of a personal scheduling conflict the following day. Even if the continuance motion had complied with the state's procedures, it still would have been denied. The same is true here.

Second, the Court noted in *Lee* that "no published Missouri decision directs flawless compliance" with the state rules cited by the Missouri court. *Id.* at 382. Again, the same is true here. The "correct in all respects" rule had never before been applied by the Oregon courts to effect a waiver of a party's right

to a jury instruction that correctly stated the law and that was considered independently by the parties and the court, simply because of a supposed error in a separately numbered paragraph of the instruction on a separate topic. See pp. 39-40 *infra*.

Third, the Court explained in *Lee* that in any case, the defendant "substantially complied" with the state rule by asking for a continuance in clear terms. Even a rule of "undoubted legitimacy" ceases to be a bar where it is "substantially met" by the defendant's invocation of a federal right. *Id.* at 385. Here, the Oregon rule was "substantially met" by Philip Morris's proffer of a separate paragraph correctly stating the governing legal standard. As a matter of federal law, then, Philip Morris properly preserved its constitutional claim.

B. The Rule Announced By The Oregon Supreme Court Was Neither "Firmly Established" Nor "Regularly Followed."

The Oregon Supreme Court's holding that Philip Morris forfeited its due process rights fails for a second reason. A state procedural default rule is not adequate to bar a federal claim unless the rule is a "firmly established and regularly followed state practice." *James* v. *Kentucky*, 466 U.S. 341, 348-49 (1984). A state rule that is novel or applied inconsistently is inadequate to preclude consideration of a federal claim. See, *e.g.*, *Barr* v. *City of Columbia*, 378 U.S. 146, 149 (1964); *NAACP* v. *Alabama ex rel. Patterson*, 357 U.S. 449, 457-58 (1958). "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Ford* v. *Georgia*, 498 U.S. 411, 423 (1991)

(quoting *Patterson*, 357 U.S. at 457-58). Indeed, even where a state procedural rule is "sensible" in the abstract, *Ford*, 498 U.S. at 422, it cannot bar consideration of a federal claim if it is not applied "evenhandedly to all similar claims." *Hathorn* v. *Lovorn*, 457 U.S. 255, 263 (1982).

The hyper-technical application of the "correct in all respects" rule at issue here, which represents a marked departure from the way in which the rule has consistently been applied in past cases, is precisely the type of novel, ambushing bar that cannot foreclose a federal claim.

1. The Decision Below Cannot Be Reconciled With Preexisting Oregon Precedent.

In *State* v. *George*, 97 P.3d 656 (Or. 2004) (en banc), the Oregon Supreme Court reaffirmed the rule that where the trial court rejects a proposed instruction as a matter of substantive law—and not because it finds fault with the wording of the proposed instruction—there is no need to submit a revised instruction, because doing so would be "an exercise in futility." *Id.* at 339. The decision below is squarely at odds with *George* and similar Oregon cases.

The defendant in *George* was charged with murder and presented an insanity defense. An Oregon statute then in effect required that juries in insanity cases be told what would happen to the defendant if his defense was accepted—that is, that he would be confined to a mental institution and released under certain circumstances. The State had a detailed pattern jury instruction for these purposes; defense counsel objected to its use and proposed an alternative instruction he argued was more "jury friendly."

The trial judge, however, refused to give *any* instruction on the consequences of an insanity verdict.

On appeal, the defendant challenged the failure to give his requested instruction. The Oregon Court of Appeals rejected the argument, citing the "correct in all respects" rule, because, in the estimation of the court, the defendant's proposed instruction was inaccurate in several respects. The Oregon Supreme Court reversed. Because the trial judge had ruled that he was not required to give *any* instruction on the consequences of an insanity verdict, it was immaterial that the defendant's proposed instruction might have contained its own inaccuracies. Even if the defendant had submitted a perfect instruction, his request still would have been denied. "Our requirements respecting preservation," the Oregon Supreme Court wrote, "do not demand that parties make what the record demonstrates would be futile gestures." *Ibid*.[9]

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[9] *George* did not break new ground; the decision was based on a long line of Oregon cases (dating back to *Sorenson* in 1916) holding that the purposes of appellate preservation rules "are to allow the adversary to present its position and to permit the court to understand and correct any error." *State* v. *Brown*, 800 P.2d 259, 266 (Or. 1990). See also *State* v. *Hitz*, 766 P.2d 373, 376 (Or. 1988) ("Efficient procedures are instruments for, not obstacles to, deciding the merits."). "[W]here the broad legal issue has been adequately identified to the trial court, the issue will be deemed preserved for purposes of appeal." *State* v. *Mack*, 183 P.3d 191, 194 (Or. Ct. App. 2008). This is true even if counsel has not identified "the source for his position," *State* v. *Doern*, 967 P.2d 1230, 1233 (Or. Ct. App. 1998), or "ma[de] an argument in support of [it]." *State* v. *Martin*, 897 P.2d 1187, 1189 (Or. Ct. App. 1995). Discussion between the court and counsel is deemed sufficient to "find that the issue was brought

The decision below cannot be reconciled with *George*. Just as in *George*, the trial court here rejected Philip Morris's proposed instruction because it believed—incorrectly—that such an instruction was not legally required. And just like in *George*, a submission from trial counsel that complied with the "correct in all respects" rule—in this case, a reprint of the harms-to-non-parties instruction on a separate page—would have been an utterly empty gesture.

Indeed, the argument for waiver is much weaker here than in *George*. The defendant in *George* proffered an instruction that the Oregon Supreme Court held was an incorrect statement of the law *on the particular point under consideration*. Philip Morris's instruction on harms to non-parties, by contrast, was assumed by the Oregon Supreme Court to be correct. The errors identified by the Oregon Supreme Court on remand concerned other subjects entirely.

Rather than try to distinguish *George* and its predecessors, the decision here under review simply ignored those precedents. At oral argument following remand from this Court, the member of the Oregon Supreme Court who authored both of its opinions in this case remarked that the court did not need to be concerned about the consistency of its ruling with prior opinions such as *George*, because "the United States Supreme Court wouldn't care for one second" about "[o]ur interpretation as to whether *George* is binding, useful, or irrelevant," and because this Court "assumes that we're proceeding in good faith, and there would be no basis, no matter what way we ruled on *George*, for the Court to assume anything

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to the trial court's attention." *State* v. *Harris*, 599 P.2d 456, 458 (Or. 1979).

different nor for you to claim anything different." J.A. 93a.

That is not a correct statement of the law. Although this Court does presume that state courts act in good faith, it is certainly empowered to examine closely the basis for a court's denial of a party's constitutional rights. See, *e.g.*, *Patterson*, 357 U.S. at 457-58 (holding that a purported state rule requiring appellants to file a writ of mandamus in order to preserve certain claims was inadequate to bar review because the rule was inconsistent with "prior state cases" on the subject); *Barr*, 378 U.S. at 149 (rejecting proffered state-law ground because it conflicted with four other state decisions). If a state procedural rule that is neither "firmly established" nor "regularly followed" cannot "prevent implementation of federal constitutional rights," *James*, 466 U.S. at 348-49, it follows *a fortiori* that a purported state practice that is starkly *inconsistent* with established state law is no bar at all. Any other result would permit a party trying to preserve its federal claim to be ambushed by unprecedented and unforeseeable applications of state procedural requirements.

2. The Decision Below Dramatically Expands The Scope Of The "Correct In All Respects" Rule.

In her brief opposing review, plaintiff argued that the "correct in all respects" rubric has been part of Oregon practice for many years. That is plainly true but likewise irrelevant: the decisive question is not whether such a rule exists in Oregon, but whether the rule's extraordinary *application* here was established and foreseeable at the time the instruction was proposed.

It was not. This case marks the first time in any reported Oregon decision that an appellate court has rejected an instruction on one point of law, after the trial judge considered that instruction separately at the charge conference, merely because it appeared under the same heading as a defective instruction on a different point of law. Indeed, in every decision applying the "correct in all respects" rule dating back at least to the 1916 *Sorenson* case, the issue was whether the proposed instruction's treatment of a particular subject was a correct statement of the specific legal proposition the litigant was raising on appeal.[10] Plaintiff has never cited any case in which an Oregon court has applied the "correct in all respects" requirement the way it was applied here. The decision below, far from applying a firmly established rule of state procedure, deviated dramatically from the way instructional requests have been treated by the Oregon courts in the past.

3. Settled Oregon Law Required The Oregon Courts To Consider Any State Procedural Bar Before *Addressing The Federal Constitutional Issue.*

Although the Oregon appellate courts had three prior opportunities to identify a state-law bar to Philip Morris's federal claim, they never did so. Rather, all three prior decisions reached the merits of Philip Morris's constitutional claim. See Pet. App. 47a, 104a-105a, 140a. That is significant: it is es-

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[10] See, *e.g.*, *Bennett* v. *Farmers Ins. Co.*, 26 P.3d 785 (Or. 2001); *State* v. *Reyes-Camarena*, 7 P.3d 522 (Or. 2000); *Beglau* v. *Albertus*, 536 P.2d 1251 (Or. 1975) (en banc); *Owings* v. *Rose*, 497 P.2d 1183 (Or. 1972); *Brooks* v. *Bergholm*, 470 P.2d 154 (Or. 1970).

tablished procedure in Oregon to decide all questions of state law first, in order to avoid unnecessarily reaching federal constitutional issues.

The Oregon Supreme Court has referred to this decisional hierarchy as "axiomatic." *State* v. *Moylett*, 836 P.2d 1329, 1332 (Or. 1992) ("By now, the appropriate method of resolving properly raised issues of criminal procedure in Oregon should be axiomatic. All issues should first be addressed on a subconstitutional level."); see also, *e.g.*, *State* v. *Kennedy*, 666 P.2d 1316, 1318 (1983) ("The history of this case demonstrates the practical importance of the rule, *often repeated* in recent decisions, that all questions of state law be considered and disposed of before reaching a claim that this state's law falls short of a standard imposed by the federal constitution on all states.") (emphasis added).

Given this firmly established hierarchy of decisional grounds, the fact that the Oregon Supreme Court applied the supposed bar only *after* this Court reversed it on the merits precludes a finding of adequacy. In *Lee*, this Court rejected the adequacy of the state procedural rule in part because the "asserted procedural oversights * * * were first raised more than two and a half years after [his] trial." 534 U.S. at 380. Indeed, neither the trial court nor the prosecutors in *Lee* made any contemporaneous reference to the supposed defects in the defendant's request. Those circumstances contributed to the Court's conclusion, discussed above (at p. 34), that the purported state bar to consideration of the defendant's due process claim was an unjustifiable application of a "generally sound" rule.

Here, of course, the procedural history is even more stark than it was in *Lee*. At least in *Lee*, the

asserted state bar was recognized by the appellate court at the first opportunity. In this case, by contrast, the Oregon courts rebuffed plaintiff's multiple invitations to find a state-law waiver of the federal issue—until *after* this Court remanded the case with instructions to apply the proper constitutional standard to Philip Morris's federal claim.

III. THIS COURT SHOULD DIRECT THE OREGON SUPREME COURT TO GRANT A NEW TRIAL.

This Court held in *Williams II* that it is "important that States avoid procedure that unnecessarily deprives juries of proper legal guidance." 127 S. Ct. at 1064. Where the risk of punishment for harms to non-parties "is a significant one—because, for example, of the sort of evidence that was introduced at trial or the kinds of argument the plaintiff made to the jury—a court, upon request, must protect against that risk." *Id.* at 1065. Thus, the federal right at issue here is the right to have the trial court, "upon request," provide "*some* form of protection" against the risk of jury confusion and the possibility of unconstitutional punishment. *Williams II*, 127 S. Ct. at 1065.

In this case, the "evidence that was introduced at trial" and the "kinds of argument the plaintiff made to the jury" clearly gave rise to a significant risk of unconstitutional punishment. Plaintiff's counsel presented evidence of allegedly false public statements made by Philip Morris over a 46-year period. As the Court observed, plaintiff's counsel then

> told the jury to "think about how many other Jesse Williams in the last 40 years in the State of Oregon there have been. * * * In

> Oregon, how many people do we see outside, driving home * * * smoking cigarettes? * * * Cigarettes * * * are going to kill ten [of every hundred]. [And] the market share of Marlboros [*i.e.*, Philip Morris] is one-third [*i.e.*, one of every three killed].

127 S. Ct. at 1061 (ellipses and brackets in original).[11]

Such argument, coupled with the type of evidence introduced at trial,[12] created a significant "risk" that the jury was "confus[ed]" and that it punished Philip Morris for harms to non-parties. After all, the Oregon appellate courts upheld the $79.5 million punitive award precisely because they concluded, based on the trial record, that the alleged fraud caused harm to many persons other than Jesse Williams. The Oregon Court of Appeals, for example, wrote that "the jury could find on this record" that Philip Morris's actions "affected large numbers of tobacco consumers in Oregon other than Williams." Pet. App. 144a. It noted in a later opinion that "it would have been reasonable for the jury to infer that at least 100 members of the Oregon public" had been

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[11] Plaintiff's counsel made the same argument in his opening statement. See J.A. 9a ("To this day, they choose to deny any and all responsibility for the *massive harm caused to millions of people* by their product, including Jesse Williams and his family.") (emphasis added); *Id.* at 10a ("[T]he basis of the claim [is] [w]hat they told the American public, what they did to the American public, Jesse Williams being a part of it.").

[12] Plaintiff summarized this evidence in her merits brief in *Williams II*. Brief for Respondent, No. 05-1256, at 1, 7-15 (discussing, *e.g.*, conduct that affected "millions of American smokers" (*id*. at 1), and caused a "staggering number of deaths per year" (*id*. at 14)).

harmed by Philip Morris's actions. *Id.* at 112a. The Oregon Supreme Court likewise concluded, based on an "assessment of human nature" that it "attributed" to the jurors, that widespread injuries resulted from the alleged fraud. *Id.* at 36a n.1. Given that the reviewing courts explicitly relied on non-party evidence in exactly the manner forbidden by this Court's decision in *Williams II*, there can be no doubt that there was a "significant" risk that the jury did so as well. Yet no protection of any kind was afforded against this risk.

As this Court recognized, Philip Morris responded to this evidence and argument by requesting protection of its constitutional rights, both in the form of a jury instruction that correctly stated federal law and by "argu[ing] that the Constitution 'prohibits the state, acting through a civil jury, from using punitive damages to punish a defendant for harms to nonparties.'" 127 S. Ct. at 1064 (quoting the Oregon Supreme Court at Pet. App. 48a-49a). No such protection was provided. 127 S. Ct. at 1061-62.

The trial court's constitutional error plainly was not harmless: the jury responded to plaintiff's improper evidence and argument with a penalty that was nearly 100 times greater than plaintiff's compensatory damages. "[A] federal constitutional error can[not] be held harmless [unless] the court [is] able to declare a belief that it was harmless beyond a reasonable doubt." *Chapman* v. *California*, 386 U.S. 18, 24 (1967).[13] It is well established that "[w]hen dam-

[13] The *Chapman* standard is normally applied in criminal cases, but as this Court has noted, "civil and criminal harmless-error standards do not differ in their treatment of grave doubt as to the harmlessness of errors affecting substantial rights." *O'Neal* v. *McAninch*, 513 U.S. 432, 441 (1995). See also 11

ages instructions are faulty and the verdict does not reveal the means by which the jury calculated damages, 'the error in the charge is difficult, if not impossible, to correct without retrial, in light of the jury's general verdict,'" because the "effect of the erroneous instruction is * * * unknowable." *Memphis Cmty. Sch. Dist.* v. *Stachura*, 477 U.S. 299, 312 (1986) (quoting *Newport* v. *Fact Concerts, Inc.*, 453 U.S. 247, 256 n.12 (1981)).

This Court has already twice remanded this case to the Oregon courts, only to have the vacated judgment erroneously reinstated. In these circumstances, rather than remand for a third time without specific guidance, this Court should exercise its power to direct the grant of a new trial. See 28 U.S.C. § 2106 ("The Supreme Court * * * may affirm, modify, vacate, set aside or reverse any judgment, decree, or order of a court lawfully brought before it for review, and may remand the cause and direct the entry of such appropriate judgment, decree, or order, or require such further proceedings to be had as may be just under the circumstances.").

The Court has exercised that power in other instances where a lower court has repeatedly failed to execute this Court's mandate. See, *e.g.*, *Remmer* v. *United States*, 350 U.S. 377, 383 (1956) (where district court failed to comply with mandate, this Court again granted review, vacated the decision below, and remanded again with instructions to grant a new trial). Accord, *Yates*, 484 U.S. at 215; *Consolo* v. *Federal Maritime Comm'n*, 383 U.S. 607, 621 (1966)

Charles A. Wright, Arthur R. Miller, & Mary K. Kane, Federal Practice and Procedure § 2881 (2d ed. 1995) (in applying harmless error standards, "the courts have drawn no distinction between civil and criminal cases * * *.").

("[I]n view of the fact that this controversy already dates back more than eight years, that it has been before the Court of Appeals twice and that the relevant standard is not hard to apply in this instance, we think this controversy had better terminate now."); *O'Leary* v. *Brown-Pacific-Maxon, Inc.*, 340 U.S. 504, 508 (1951); *Tyler* v. *Magwire*, 84 U.S. 253, 290 (1872).

Although the Court broached the possibility that a remittitur or reduction of the punitive award might serve as remedy (see 127 S. Ct. at 1065), we respectfully submit that in these circumstances that remedy is not adequate. While a remittitur to the maximum amount the constitution would allow may be an appropriate and adequate remedy for an award whose only defect is excessiveness,[14] it does not suffice to remedy prejudicial *instructional* error. That is because there is no way to know what amount of punishment a properly instructed jury would have imposed. In this case, had the jury understood that it could punish Philip Morris only for the impact of its conduct on Jesse Williams, it might well have selected an award far below the constitutional ceiling.

This Court has recognized the need for a new trial to remedy instructional error that bears on the magnitude of a penalty. In *Hicks* v. *Oklahoma*, 447 U.S. 343 (1980), 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

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[14] Remittitur in Oregon is only to the largest constitutionally allowable amount. See, *e.g.*, *Goddard* v. *Farmers Ins. Co. of Oregon*, 179 P.3d 645, 670-71 (Or. 2008); *Waddill* v. *Anchor Hocking, Inc.*, 78 P.3d 570, 572 (Or. App. 2003).

that statute was subsequently invalidated, the defendant sought a new sentencing trial. The state appellate court rejected his claim on the ground that the sentence imposed on him remained within the range (ten years to life) from which a properly instructed jury could have selected its penalty. This 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.*

The Ninth Circuit has twice considered this remedial issue in civil cases in the wake of *Williams II*. See *Merrick* v. *Paul Revere Life Ins. Co.*, 500 F.3d 1007 (9th Cir. 2007); *White* v. *Ford Motor Co.*, 500 F.3d 963 (9th Cir. 2007). In both cases, it concluded that the district court had committed prejudicial error by refusing to instruct the jury regarding punishment for non-party harms, 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*, 500 F.3d at 1018; see also *White*, 500 F.3d at 973 ("remittitur is not designed to compensate for excessive verdicts in cases where [a] jury is improperly instructed") (citing *Werbungs Und Commerz Union*

Anstalt v. *Collectors' Guild, Ltd.*, 930 F.2d 1021, 1027 (2d Cir. 1991)).

For these reasons, the only adequate remedy for the violation of Philip Morris's constitutional rights is a new trial. We submit that the proper scope of that trial is a full re-examination of the entire case. See *Maxwell* v. *Portland Terminal R.R. Co.*, 456 P.2d 484, 486 (1969); *Gasoline Prods. Co.* v. *Champlin Refining Co.*, 283 U.S. 494, 500 (1931). But that is a question that should be decided in the first instance by the Oregon trial court, as it encompasses issues of both state law and federal due process.[15]

CONCLUSION

The judgment below should be vacated and the case remanded with instructions to grant a new trial.

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[15] The Oregon courts have long recognized a general rule in favor of complete retrial where a trial error taints a part of the jury's verdict. *Maxwell*, 456 P.2d at 486. A partial retrial is permissible only in "exceptional cases," where there is no risk of prejudice to a defendant. See *id.*; *Wolf* v. *Nordstrom, Inc.*, 637 P.2d 1280 (1981); *Talbert* v. *Farmers Ins. Exch.*, 166 Or. App. 599, 603-04 (Or. Ct. App. 2000) ("Remanding this case for a retrial on punitive damages alone creates the potential for inconsistent verdicts.").

Respectfully submitted.

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