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

REPLY BRIEF FOR THE PETITIONER

STEPHEN M. SHAPIRO
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

MIGUEL A. ESTRADA
THEODORE J. BOUTROUS JR.
DAVID DEBOLD
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
SCOTT A. CHESIN
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner
(Additional counsel listed on inside cover)

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

TABLE OF CONTENTS

Page

TABLE OF CONTENTS—continued

Page

TABLE OF AUTHORITIES

Page(s)

CASES

TABLE OF AUTHORITIES—continued

Page(s)

TABLE OF AUTHORITIES—continued

Page(s)

OTHER AUTHORITIES

TABLE OF AUTHORITIES—continued

Page(s)

REPLY BRIEF FOR THE PETITIONER

Despite her strenuous efforts, plaintiff cannot explain away the Oregon Supreme Court's blatant refusal to follow this Court's instructions. This Court held in *Williams II* that "a jury may not punish for the harm caused others," reversed the judgment resting on that error, and remanded the case for application of the proper constitutional standard. 127 S. Ct. at 1065.

Instead of following this Court's clear directions, the Oregon Supreme Court reinstated its judgment without ever applying the constitutional standard. It declared for the first time, after nine years of appellate litigation, that Philip Morris's proposed instruction on harm to non-parties "was flawed for reasons that we did not identify in our former opinion"—"reasons unrelated to the issues addressed by the United States Supreme Court." Pet. App. 3a, 15a.

It is simply double-talk to contend that "apply the standard" means "find an excuse not to apply the standard." And it is wholly disingenuous to contend that the "correct in all respects" rule is a firmly established and regularly followed state ground when it never has been applied by any Oregon court in circumstances remotely like those presented here. As applied in this case, the rule advances no legitimate purpose but simply insulates constitutional error from meaningful appellate review, a result at odds with the supremacy of federal law.

Finally, plaintiff has little to say about the issue that the Oregon Supreme Court *should have* addressed on remand from *Williams II*: the appropriate remedy for the trial court's constitutional error. We submit that the only proper remedy is a new trial

and that this Court should grant that remedy itself in order to avoid further error and delay.

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

A. The Oregon Supreme Court Did Not Purport To Apply The Constitutional Standard.

1. This Court's remand instructions were unambiguous: "to apply the [constitutional] standard we have set forth." 127 S. Ct. at 1065. In her merits brief, plaintiff reprises the principal argument that she made in her opposition to certiorari—that the Oregon Supreme Court did in fact apply the constitutional standard, because its opinion rested on a finding that Philip Morris failed to make a proper "request" for protection of its rights. Br. 45.

But as we explained in our opening brief (at 17-18), that argument cannot be squared with the express language of the Oregon Supreme Court's opinion: "there is 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). After finding that Philip Morris's proposed instruction was "erroneous in a number of ways that are *unrelated* to the issues addressed by the United States Supreme Court," *id.* at 15a, the Oregon court simply reaffirmed the judgment "*without reaching* the federal question." *Id.* at 13a (emphasis added).

In the face of this inescapably clear language, plaintiff relies on footnote 4 of the Oregon court's opinion. That footnote stated that "we understand

the Court's use of the phrase 'upon request' to be an acknowledgment of the authority of states to place reasonable procedural requirements on any requests for instructions, including requests like the one at issue here." Pet. App. 13a (citation omitted). Considered in the context of this Court's opinion, however, the "upon request" language cannot bear the weight that plaintiff seeks to place on it.

The Court's instruction was to "apply the standard we have set forth." That "standard" is the *substantive* constitutional standard—the prohibition on punishment for harms to non-parties, which the Oregon Supreme Court explicitly declined to apply. This Court's use of the phrase "upon request" earlier in the opinion was not an invitation to find a way to *avoid* applying that constitutional standard on remand. The Court was well aware of plaintiff's state-law waiver arguments, but nowhere did it ask the Oregon Supreme Court to revisit those arguments.

Indeed, the Court twice approvingly quoted Philip Morris's requested instruction on harms to non-parties. 127 S. Ct. at 1061, 1064. The Court further noted that Philip Morris requested that instruction "in light of" plaintiff's counsel's exhortation that the jury "'think about how many other Jesse Williams[es] in the last 40 years in the State of Oregon there have been.'" *Id.* at 1061. And the Court observed that Philip Morris had argued at the charge conference that its proposed instruction was constitutionally required. *Id.* at 1064. When the Court used the phrase "upon request," it was therefore describing what Philip Morris had done and explaining that litigants in future cases must also request protection of their constitutional rights, rather than

wait to raise the issue after the conclusion of the trial.

2. Our opening brief cited a host of cases in which this Court has corrected the failure of lower courts to follow its mandates. PM Br. 14-17. Plaintiff has little to say about these decisions. She does not even mention *Yates* v. *Aiken*, 484 U.S. 211 (1988), a closely analogous case where the lower court relied on state-law theories in order to avoid this Court's direction to apply a federal constitutional standard. This Court unanimously reversed.

Plaintiff attempts, in scattershot and unpersuasive fashion, to distinguish our other cases on their facts. For example, she asserts that *Stanton* v. *Stanton*, 429 U.S. 501 (1977), is not "on point" because the Utah Supreme Court there openly disagreed with this Court's equal-protection analysis as being "'blind to the biological facts of life.'" Br. 46 (quoting 429 U.S. at 503). And she contends that *Smith* v. *Texas*, 127 S. Ct. 1686 (2007), is irrelevant because the state court there "predicated its procedural bar 'on a misunderstanding of the federal right' at issue." Br. 47. Both of these rationales are unavailing: it does not matter whether the lower court's failure to follow the mandate constitutes overt defiance or simple misunderstanding—neither is permissible. See *Utah Public Serv. Comm'n* v. *El Paso Nat. Gas Co.*, 395 U.S. 464 (1969).[1]

---

[1] The State of Oregon, in its amicus submission, claims that *Yates* and *Stanton* do not apply because on remand in those cases, "the state courts reached decisions that were at *odds* with this Court's earlier decision, and that were not simply based on an *alternative ground*." Or. Br. 6 (emphasis added). That is not correct; both state courts in those cases, like the

B. The Oregon Supreme Court Was Not Authorized To Re-Examine The Premise Underlying This Court's Decision.

Our opening brief explained that this Court's ruling in *Williams II* rested on the premise that Philip Morris's constitutional claim was properly presented. PM Br. 19-25. Indeed, in *Williams II*, plaintiff put forward an array of waiver arguments in her briefs in opposition to certiorari and on the merits—including the argument that Philip Morris's instruction was not "correct in all respects." See n.5 *infra*. This Court nevertheless reached the merits of Philip Morris's federal claim, as had the Oregon Supreme Court, and remanded for application of the correct substantive constitutional standard. The determination that Philip Morris's claim was properly presented thus became law of the case, which encompasses "everything decided by necessary implication." *Fogel* v. *Chestnutt*, 668 F.2d 100, 108-109 (2d Cir. 1981) (Friendly, J.). The Oregon Supreme Court was not free on remand to reach a contrary conclusion.

Relying on two dissenting opinions, plaintiff asserts that it is "'not uncommon'" for a state court on remand to reinstate a judgment that this Court has found to be constitutionally flawed. Br. 48 (citing *Smith* v. *Texas*, 127 S. Ct. at 1703 (Alito, J., dissent-

Oregon court here, purported to base their post-remand decisions on "alternative" grounds. In *Yates*, the state court refused to consider, as it was instructed to do, whether a federal decision applied retroactively to the defendant's claim; instead, it held that no relief was available under state law. Similarly, in *Stanton*, the state court on remand attempted to skirt this Court's mandate by re-framing the federal issue altogether. In both cases, however, this Court held that a state court may not evade a mandate by changing the subject in this fashion.

ing), and *Oregon* v. *Hass*, 420 U.S. 714, 729 (1975) (Marshall, J., dissenting)).[2] She further argues that "[n]othing in federal law requires a state court to dispose of state issues first." Br. 49. These arguments are not responsive. We do not suggest that a state court may *never* identify on remand a state-law basis for a judgment that this Court has vacated. Rather, our argument is narrower: in a case like this one—where the parties have litigated the preservation of a constitutional claim in their briefs before this Court, and the Court proceeds to address the claim on the merits and directs the lower court to "apply" the constitutional rule it has announced—law of the case precludes the state court from invoking waiver in order to avoid following the Court's instructions. See PM Br. 22-24; *NAACP* v. *Alabama ex rel. Patterson*, 360 U.S. 240, 244 (1959) (per curiam) (the state court

---

[2] The majority in *Smith* held that the state court could *not* adopt a new procedural default rule on remand to nullify a right that had been upheld by this Court. 127 S. Ct. at 1698-99. It is worth noting, moreover, that the cases cited in the *Smith* dissent do not support the Oregon Supreme Court's decision here. Each was a remand following a GVR order; none involved any substantive decision by this Court. None involved any direction to "apply" a substantive constitutional rule. And none involved a state procedural bar invoked for the first time on remand. See *State* v. *Wedgeworth*, 127 P. 3d 1033 (Kan. 2006); *Saldano* v. *State*, 70 S.W.3d 873 (Tex. Crim. App. 2002); *Booker* v. *State*, 511 So. 2d 1329 (Miss. 1987); *Gaskin* v. *State*, 615 So. 2d 679 (Fla. 1993); *Happ* v. *State*, 618 So. 2d 205 (Fla. 1993); *State* v. *Hallum*, 606 N.W.2d 351 (Iowa 2000).

Justice Marshall's point in *Hass* was that on remand a state court should be permitted to provide *greater* substantive protection for constitutional rights than this Court had prescribed. As we discussed in our opening brief (PM Br. 24 n.6), just the opposite—the use of state law to *curtail* federal rights—happened here.

on remand is "foreclosed from re-examining the grounds of our disposition").[3]

Plaintiff offers no response to our argument that the course of proceedings below is antithetical to the goal of sound judicial administration set forth in *Michigan* v. *Long*, 463 U.S. 1032, 1041 (1983). See PM Br. 24-25. Instead, plaintiff argues that it would be "fundamentally unfair" to hold that she cannot rely on arguments "that the Oregon Supreme Court reached only after learning that it had misapplied federal law." Br. 52-53.

That contention is meritless. First, as we discuss below (at 22-23), the fact that the Oregon courts never addressed plaintiff's waiver arguments—which are significantly less complex than the underlying constitutional issue—during nine years of appellate litigation demonstrates, at a minimum, that the Oregon Supreme Court viewed those waiver arguments as insubstantial before this Court reversed its decision on the merits. See *Lee* v. *Kemna*, 534 U.S. 362, 380 (2002).

Second, plaintiff's assertion (Br. 3, 50-51) that the "procedural context" of this case somehow precluded the Oregon Supreme Court from reaching her state-law arguments earlier in the litigation is frivolous. The Oregon courts were perfectly free to rule

---

[3] Plaintiff asserts that *Patterson* is "wholly inapplicable as it holds only that a litigant cannot invoke and a state court cannot rely on arguments *presented for the first time after remand* * * *." Br. 46-47 (emphasis in original); see also *id.* at 47 (distinguishing *Smith* on the same basis). But *Patterson* and *Smith* clearly hold that the lower court may not second-guess the underlying premise of this Court's decision remanding a case.

on those arguments at any time before this Court's decision on the merits in *Williams II*. The Court's order in *Williams I* vacating and remanding for further consideration in light of *State Farm* did not preclude the state courts from reaching plaintiff's state-law clams.

In any case, plaintiff has had a full opportunity to argue her state-law waiver points; indeed, she has presented them to this Court four separate times.[4] Those arguments did not deter the Court from reaching the merits and instructing the Oregon court to apply the constitutional standard, because as a matter of federal law they were inadequate to bar Philip Morris's clearly presented federal claim. And because the Oregon court previously "has considered the merits of the federal claim, it has a duty to grant the relief that federal law requires." *Yates*, 484 U.S. at 217-18.

---

[4] In this Court, plaintiff repeatedly argued that Philip Morris waived its constitutional claim by presenting its instruction on harms to non-parties on the same page as other instructions that misstated state law. Brief in Opp., No. 02-1553, at 15 n.6; Brief in Opp., No. 05-1256, at 22-24; Respondent's Br., No. 05-1256, at 46-49; Brief in Opp., No. 07-1216, at 24-32. Plaintiff's counsel appears to have conjured up an inexhaustible supply of such linguistic criticisms, which can be invoked at any time to avoid adverse decisions of this Court and escape its directions. Br. 20-25. This Court has not endorsed that "sporting theory of justice." *Communist Party of U.S.* v. *Subversive Activities Control Bd.*, 367 U.S. 1, 31-32 (1961).

II. THE GROUND OFFERED BY THE OREGON SUPREME COURT FOR REINSTATING ITS JUDGMENT WAS NOT ADEQUATE TO BAR RELIEF FOR THE CONSTITUTIONAL VIOLATION.

We argued in our opening brief that the state-law ground invoked by the Oregon Supreme Court was, in any event, inadequate to bar Philip Morris's due process claim. Plaintiff does not dispute that the preservation of a constitutional claim is a federal question. PM Br. 26. Philip Morris's request for protection of its constitutional rights was "plainly and reasonably made." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). See PM Br. 27-30; 127 S. Ct. at 1061, 1064 (finding that Philip Morris "asked" for a written instruction and "argued" in its favor at the charge conference). As applied in this case, the "correct in all respects" rule serves no legitimate purpose, and it has been neither firmly established nor regularly followed. Plaintiff barely responds to these arguments, and does not address the many decisions from this Court that consider the adequacy of state-law bars to federal claims. Instead, she devotes the majority of her brief to issues that are either irrelevant or undisputed.

A. Plaintiff Cannot Identify A Legitimate Purpose For The Procedural Bar Asserted Below.

In our opening brief, we reviewed the purpose of Oregon's "correct in all respects" rule. As state appellate courts consistently have declared, the rule exists to ensure that trial judges are not forced to "patch up" error-ridden instructional requests to make them conform to the law. PM Br. 30-31 (quoting *Hooning* v. *Henry*, 213 P. 139, 141 (Or. 1923)).

Plaintiff does not seriously dispute this explanation. See, *e.g.*, Br. 10. Because that rationale has no relevance here, however, she claims (Br. 42) that we have only "partially describe[d]" the purpose of the rule. But her proffered additional justifications add no more substance. The rule, she says, ensures "that counsel do their part in preventing courts from providing juries with erroneous instructions"; it is thus "an important element in avoiding flawed trials." Br. 43. All of this is uncontroversial, as are plaintiff's appeals to "judicial efficiency" and "finality." *Id.* But in 56 pages of briefing, plaintiff never explains how these goals are served by a requirement that a proposed instruction be correct in all respects, *including* respects that have nothing to do with the federal issue and even when the trial court considered (and rejected) the defendant's position on that issue independently and on the merits.

In this case, the trial judge rejected Philip Morris's request for an instruction on harms to non-parties not because she identified errors of state law in other portions of the proposed charge but rather because she believed that no "case law * * * says [the harm-to-others] element has to be there for the jury." J.A. 20a. Even if Philip Morris had atomized its requested instructions and printed each clause, sentence, or idea on a separate page, the judge still would not have given the requested instruction on harms to others. On the other hand, had the trial judge accepted defense counsel's constitutional argument, she could have given Philip Morris's correct charge on harms to non-parties, while rejecting the "unrelated" instructions (contained in a separate paragraph) now criticized by plaintiff. She would thus have avoided a "flawed trial" and an "errone-

ous" jury charge without assuming any editing responsibilities whatsoever.

In the face of that reality, plaintiff makes several implausible arguments. First, she argues that "[t]here * * * was no trial-level ruling rejecting the Philip Morris position on 'harm to others.'" Br. 16. She has made this argument before, and this Court has not accepted it, for good reason. See 127 S. Ct. 1061 (noting that trial judge "rejected" Philip Morris's instruction). We invite the Court to read the transcript of the relevant discussion, which runs from J.A. 17a through J.A. 20a. It is not ambiguous. The judge explicitly acknowledged (at 18a) that she needed to decide "whether there is a constitutional standard that I'm obliged to invoke here for the jury's consideration." She then indicated (at 19a) that there was no such standard. Defense counsel disagreed. The judge then asked (at 20a) if any "case law" required an instruction on harms to nonparties. Counsel answered that the requirement was embodied in *BMW* v. *Gore*—at the time, this Court's latest pronouncement on the subject. The judge then reiterated her decision that the instruction was unnecessary.

Faced with this clear record, plaintiff resorts to an even more implausible argument. She asserts (Br. 14-15) that the claim was waived because Philip Morris acquiesced in the judge's decision not to give the harm-to-others instruction. But when counsel said "okay" following the judge's unequivocal rejection of the proposed instruction, he clearly was not agreeing with the judge's position, with which counsel had expressly disagreed twice already. He was

simply acknowledging that he had lost the argument.[5]

Next, unable to explain how the rule as applied here would assist the trial judge, plaintiff resorts to recasting the rule as "a principle of appellate review," rather than "a rule of trial court procedure." Br. 38. She now *concedes* that "[t]he [Oregon Supreme Court], as did this Court in *Williams II*, *recognized that Philip Morris had preserved its due-process argument for appellate review* in the context of the failure to give its proposed instruction No. 34." Br. 49 (emphasis added). Yet she argues that Philip Morris's "successful preservation of that objection * * * could not foreclose consideration of a remaining state-law issue, specifically, whether it was error for the trial court to refuse a requested instruction that was not clear and correct in all respects." *Id.* On appellate review, plaintiff asserts, it does not matter what happened at the trial; an appellate court is free to ignore a trial judge's constitutional errors so long as the court can identify some unrelated instruction on the same page of the party's proposed charge that was not "correct."

---

[5] There also is no merit to plaintiff's suggestion (Br. 14 n.2) that Philip Morris has no cause for complaint because the judge agreed to give an "alternative" instruction that defense counsel proposed. The "alternative" request was a fall-back proposal offered in the event that the court denied the primary request. It is commonplace in Oregon and elsewhere for counsel to offer such alternative requests; we are aware of no case (and plaintiff cites none) in which a court has suggested that a claim of instructional error can be waived in this way. See Oregon State Bar, *Civil Proceedings and Practice* § 40.8 (1994) ("If instructions are requested in the alternative, the preferred instruction should be listed first.").

This bizarre argument, made now for the first time and without citation to any authority, is belied by the long line of Oregon cases stating that the "correct in all respects" rule is intended to free trial judges of editing responsibilities. See PM Br. 30. In any event, the argument hardly advances plaintiff's position. Even if the trial court's decision to deny Philip Morris's request for a jury instruction was "not error" as a matter of state law, it *was* error as a matter of due process. *Yates*, 484 U.S. at 214-216.

The most significant problem with plaintiff's argument, however, is that such a rule would be wholly irrational. Plaintiff would have this Court believe that in Oregon, when a trial judge rejects an instructional request on the merits for a reason that is erroneous as a matter of federal law, the ruling is nonetheless not "error" if an appellate court is able to identify some unrelated point in a separate paragraph of the party's proposed charge that is stated incorrectly. Plaintiff thus proposes a game of "gotcha" in the Oregon appellate courts in which claims of instructional error are routinely denied regardless of their merit. The only justification for such a rule that plaintiff can muster is that it would "minimize[] costly retrials" and "achieve finality in judgments." Br. 43. In other words, according to plaintiff, Oregon appellate courts may choose to ignore valid requests for important due process protections because the State has an interest in eliminating meaningful appellate review of erroneous judgments. That implausible state interest, which has never been expressed by any Oregon court, is plainly not adequate to defeat a litigant's constitutional rights.

As this Court has held repeatedly, even rules that serve *important* state interests can still be in-

adequate to bar assertions of federal rights if those rules are applied in "exorbitant" or unnecessarily severe ways. *Flowers* illustrates this proposition. The respondent there made the same argument that plaintiff asserts here: that Alabama had a "long standing rule of frequent application that where assignments of error are argued together and one is without merit, the others will not be considered." Br. for Resp., No. 63-169, at 3. That rule had been applied for "sixty years" in "an unbroken line of decisions." *Id*. at 4. This Court nonetheless reversed, finding the state ground inadequate because the rule had been applied with "pointless severity" in the case before it. *NAACP* v. *Alabama ex rel. Flowers*, 377 U.S. 288, 297 (1964) (cited at PM Br. 12, 32, 33). Plaintiff, who defends a rule that jury instructions proposed together may all be disregarded if one is without merit, nowhere addresses *Flowers* in her brief.[6]

In short, when plaintiff's explanation of Oregon law is compared to this Court's precedents, it is clear that the application of the correct in all respects rule here serves no legitimate or reasonable purpose. It

---

[6] See also, *e.g.*, *Lee*, 534 U.S. at 376 (holding that a rule requiring written motions is "generally sound" but was nonetheless inadequate in that case to bar consideration of the federal claim); *Osborne* v. *Ohio*, 495 U.S. 103, 123 (1990) (recognizing that the state's general interest in "preventing trial courts from providing juries with erroneous instructions" was important, but still an inadequate basis for failing to charge the jury as due process requires). If the defendant in *Osborne* (who never requested a jury instruction) was entitled to a new trial before a properly-instructed jury, it follows *a fortiori* that Philip Morris (which proposed an instruction in writing that correctly stated federal law) is entitled to that relief.

therefore cannot be adequate to bar Philip Morris's federal claim.

B. Plaintiff Has Not Shown That The Procedural Bar Asserted Below Is "Firmly Established" Or "Regularly Followed."

Not only does the procedural bar at issue here serve no legitimate state interest; it also is neither "firmly established" nor "regularly followed." We demonstrated in our opening brief that prior to this case, no Oregon appellate court had ever invoked the "correct in all respects" rule to cast aside a *perfectly correct* instructional request, considered individually and rejected on the merits, simply because an appellate court is later able to identify an *unrelated* error in a *separately numbered* paragraph of the proposed jury charge. We also showed that the decision below conflicts with two separate aspects of previously-settled Oregon law: (i) the rule that litigants are not required to make "futile" and repetitive gestures in order to preserve an argument for appeal, and (ii) the "axiom" that Oregon courts do not reach federal constitutional issues if the case may be resolved by resort to state law.

Unable to rebut these points, plaintiff tries to change the subject. She devotes nine pages (Br. 20-29) to an elaborate history of the "correct in all respects" rule and a catalogue of supposed errors in Philip Morris's requested jury charge. But it is irrelevant whether the Oregon Supreme Court was right in finding that other paragraphs of Instruction 34 contained state-law "errors," or whether (as plaintiff asserts at Br. 23-25) the proposed charge included *additional* errors that were so trivial as to go unmentioned by *any* of the Oregon courts. The only question is whether such errors can properly justify

the trial court's refusal—for a different and unambiguously erroneous reason—to instruct the jury not to punish Philip Morris for harms to non-parties.[7]

1. Plaintiff Has Identified No Case In Which The "Correct In All Respects" Rule Has Been Applied In The Manner Asserted Below.

Plaintiff claims that the court below applied the "correct in all respects rule" in its "traditional manner" (Br. 33) and that Philip Morris was on notice that the Oregon courts require counsel to submit every sentence of a proposed instruction on its own

---

[7] Even if these supposed errors had some genuine bearing on the proposed harms-to-non-parties charge, they were sufficiently inconsequential that reliance on them to foreclose a constitutional right deemed "important" by this Court (127 S. Ct. at 1064) would have been erroneous. Philip Morris's instruction asked the jury to consider only "illicit" profits because this Court had previously held that lawful business activities may not be penalized. See *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 572-72 (1996). And Philip Morris used the word "may" instead of "shall" because the jury has broad discretion in setting the amount of punishment—and indeed in deciding whether to impose any punitive damages at all. There is no need to quote a statute verbatim in jury instructions, and important due process rights should not be nullified on the basis of such linguistic quibbling.

As for plaintiff's suggestion (Br. 21-22) that Philip Morris's request did not accurately reflect *federal* law, that argument has already been made—and rejected—in this Court. This Court held in *Williams II* that Instruction 34 properly "distinguished 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. And the Oregon Supreme Court assumed that the relevant portion of the instruction "clearly and correctly articulated the standard required by due process." Pet. App. 12a.

sheet of paper. Br. 28-29 & n.13. Neither argument has merit.

First, plaintiff's assertion (at 36) that "Oregon has consistently applied the rule as it was applied in this case, where the basis for rejecting the instruction was different than the legal point raised by appellant," is simply not true. *None* of the cases cited at Br. 36 or anywhere else in plaintiff's brief stands for the proposition she asserts: that it is permissible to refuse a correct instruction on a discrete legal issue because a separately designated paragraph on a distinct point of law contains an error.[8]

---

[8] In none of the cases did the court find that *any* part of the proposed instruction was valid. In fact, most of the decisions indicate that the entire proposal was properly rejected, either because it was erroneous in all pertinent respects or because the relevant legal propositions were contained elsewhere in the charge that was given. See *Owings* v. *Rose*, 497 P.2d 1183, 1188 (Or. 1972); *State* v. *Reyes-Camarena*, 7 P.3d 522, 528 (Or. 2000); *Schultz* v. *Shirley*, 220 P.2d 86, 88 (Or. 1950); *Burke* v. *American Network, Inc.*, 768 P.2d 924, 925-27 (Or. Ct. App. 1989). In the two other cases, the court rejected instructional requests because the proposing party *never actually proposed a specific instruction*, and instead merely cited a set of statutes. The Oregon Supreme Court deemed such requests "wholly insufficient." *Hotelling* v. *Walther*, 148 P.2d 933, 935 (Or. 1975); *Beglau* v. *Albertus*, 536 P.2d 1251, 1255-56 (Or. 1975).

The cases cited at Br. 28 are similarly inapposite, as are those in plaintiff's "appendix" and those cited by the amicus Oregon trial lawyers. See, *e.g.*, *Simpson* v. *Sisters of Charity of Providence*, 588 P.2d 4, 13 (Or. 1978) (requested instruction covered a single topic and incorrectly stated the relevant standard; "valid" portions of charge were adequately expressed in other instructions given to jury); *Dacus* v. *Miller*, 479 P.2d 229, 232 (Or. 1971) (requested instruction was "technically incorrect" and "confusing" in its entirety); *McCaffrey* v. *Glendale Acres, Inc.*, 440 P.2d 219, 222 (Or. 1968) (requested charge in-

Plaintiff's assertion that *this* Court has endorsed the rule as applied below is equally baseless. In *Harvey* v. *Tyler*, 69 U.S. 328 (1864) (cited at Br. 35-36), the trial court denied a series of requested instructions, even though some were proper. This Court upheld the denial *not* because the instructions were requested as part of a series, but because counsel failed to offer anything other than a general objection to the denial. See *id*. at 339. See also *Beaver* v. *Taylor*, 93 U.S. 46, 54, 55 (1876) (cited at Br. 35) ("If the *entire charge* of the court is excepted to, or a series of propositions contained in it is *excepted to in gross*, and any portion thus excepted to is sound, the exception cannot be sustained. * * * An exception to such portions of a charge as are variant from the requests made by a party, *not pointing out the variances*, cannot be sustained.") (emphasis added).

Of course, counsel in this case did precisely what *Harvey* and *Beaver* held was required: he called his specific request to the trial court's attention and received a specific ruling. PM Br. 29-30. In modern times, moreover, this Court has rejected exactly the type of "correct in all respects" argument that plaintiff presents here to nullify constitutional rights. See *Flowers*, 377 U.S. at 297.

Second, there is no merit to plaintiff's argument (see, *e.g.*, Br. 28 n.12, 29 n.13, 35 n.18) that Philip Morris's submission departed from traditional Oregon practice. It is demonstrably wrong to assert (see, *e.g.*, Br. 6) that there is anything unusual about re-

---

correctly stated a single, discrete point of law); *Roop* v. *Parker Northwest Paving Co*., 94 P.3d 885, 903-04 (Or. Ct. App. 2004) (same). It is no wonder that the Oregon amicus brief acknowledges (at 9, 12) that such cases are not "on point" or "on all fours."

questing a punitive damages instruction that groups several different legal points under one heading. Indeed, the Oregon *pattern instruction* on punitive damages, which plaintiff cites as a model of proper form (Br. 33-34), does just that. See U.C.J.I. § 75.06.

It is likewise incorrect to suggest (see Br. 34-35) that a party departs from standard practice by offering variations from the form instruction. In fact, the current version of the pattern instruction on punitive damages contains an express "caveat" that *encourages* both litigants and judges to edit the pattern in order to conform to developments in federal constitutional law. See *id.* (warning judges to "consider whether recent Oregon or federal decisions make this instruction incorrect or obsolete" and encouraging parties to propose alterations to the pattern to take into account the "rapidly evolving * * * law on the subject of punitive damages").

Similarly, the suggestion made in plaintiff's brief (and embellished by the amicus trial lawyers) that informal "tips" in bar publications put Philip Morris on notice that proposing a single punitive damages instruction would cause it to forfeit its due process rights is wrong, both legally and factually. See Br. 28-29 & nn.12, 13. "Practice tips" from bar organizations are not pronouncements from courts or legislatures; they cannot put a party on notice of legal rules. In any event, the publications plaintiff cites all post-date the trial in this case by many years. Thus, even putting aside whether those *sorts* of documents could validly give notice of a state waiver

rule not embodied in the decisional law, *these* documents manifestly did not.[9]

2. Plaintiff Has Failed To Reconcile The Decision Below With State *v.* George.

In our opening brief (at 36-39), we showed that the decision below conflicts squarely with clear precedent from the Oregon Supreme Court. That court's opinion in *State* v. *George* states that Oregon's "requirements respecting preservation do not demand that parties make what the record demonstrates would be futile gestures." 97 P.3d 656, 662 (Or. 2004). Accord, *James* v. *Kentucky*, 466 U.S. 341, 349 (1984) (federal law likewise does not require litigants to engage in "arid ritual[s] of meaningless form" to preserve their claims); *Osborne*, 495 U.S. at 124 (same). Here, just as in *George*, the trial judge ruled that she would not give an instruction on the legal point counsel wished to present to the jury. "Redrafting" the instruction to eliminate the alleged errors of state law, or submitting the harms to nonparties charge on its own page (as plaintiff suggests Philip Morris should have done, Br. 39 & n.19) would

---

[9] Plaintiff points to the fact that Philip Morris organized its instructional requests differently when defending another case in Oregon three years after the *Williams* trial. See Br. 30 (discussing *Schwarz* v. *Philip Morris Inc.*, 135 P.3d 409 (Or. Ct. App. 2006)). But Philip Morris's proposed instructions in a later case say nothing about whether the company was on notice in 1999 that its submission of a combined instruction, modeled after Oregon's pattern instruction, would cause it to forfeit its constitutional claim. There are various ways to preserve a claim under both federal principles and state law. The Oregon pattern instructions show that state law has not heretofore *required* lawyers to waste paper and burden the trial court by breaking up their requests with each thought on a different page, though they may *choose* to do so.

not have made the slightest difference. The trial judge did not reject the instruction on harms to non-parties because it was combined with others that misstated Oregon law; she rejected the instruction because she believed due process did not require it.

Plaintiff asserts that *George* is inapplicable because an alternative holding in that case rested on a criminal statute that *required* the trial court to give the instruction at issue "without regard to whether the defendant wants or requests such an instruction, much less offers one that is a correct statement of the law." Br. 31. But the fact that *George* articulated an alternative basis for the decision does not render the court's pronouncement about "futility" mere "*dictum*," as plaintiff asserts. The court stated very clearly that it was rejecting the state's waiver argument "for two reasons," each independently sufficient. 97 P.3d at 661; see also *Schwarz,* 135 P.3d at 439-40 (Linder, J., concurring).

At bottom, plaintiff offers no response to our actual argument—that "resubmitting" a proposed instruction would have been just as futile in this case as in *George*. Her laborious parsing of that decision misses the point: *George* demonstrates that the Oregon Supreme Court does not regularly or consistently apply the "correct in all respects" rule in the rigid, pointless manner it did here. To the contrary, the application in this case represents a sharp break from precedent.

3. Plaintiff Offers No Defense Of The Oregon Court's Departure From The Established Decisional Hierarchy.

For decades, Oregon appellate courts have been clear that as a matter of state practice, they will ad-

dress all potentially dispositive issues of state law before reaching federal constitutional questions. See PM Br. 40-42. Here, of course, two different Oregon appellate courts, in three separate decisions issued over the course of nine years, consistently reached the merits of Philip Morris's constitutional claim—even though plaintiff had, equally consistently, pressed various state grounds for affirmance. This circumstance strongly indicates that prior to this Court's *Williams II* remand, the Oregon courts viewed plaintiff's state-law arguments as insubstantial. As in *Lee*, 534 U.S. at 380, it weighs heavily against a finding of adequacy.

Plaintiff does not respond to this argument, except to note that Oregon's "first things first" rule is a "prudential state practice" (Br. 48) and that "[n]othing in federal law requires a state court to dispose of state issues first" (Br. 49). Both of those statements are accurate but beside the point: for many years, the Oregon courts have consistently imposed the "first things first" rule on *themselves*. See PM Br. 41 (citing numerous cases).

Plaintiff cites no authority that even questions the applicability of this principle. She cites only one Oregon case in this section of her brief, and that decision holds precisely the *opposite* of what she says it does. In *Oregon* v. *Kennedy*, 666 P.2d 1316 (Or. 1983), the Oregon Supreme Court emphasized "the practical importance of the rule * * * 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." 666 P.2d at 1318. The lower court's failure to follow that rule had wasted "a good deal of time and effort" and "needlessly spur[red] pro-

nouncements by the United States Supreme Court on constitutional issues." *Id*. at 1319.

Given this consistent tradition of addressing state-law issues first, the string of Oregon court decisions resolving the federal claims in this case demonstrates that the courts below attached no importance to plaintiff's state law waiver arguments.[10] Just as it did in *Lee*, this Court should find the belated state law waiver theory inadequate to defeat a federal claim.

III. PLAINTIFF OFFERS NO VALID REASON FOR DENYING PHILIP MORRIS A NEW TRIAL.

Plaintiff devotes few words to the principal issue that was actually left open for the Oregon court to address on remand—the appropriate remedy for the trial court's instructional error. Plaintiff does not de-

---

[10] The retired Oregon Supreme Court justices assert that the supposed state-law errors cited by the court below "ripened for consideration" only after this Court's remand. Ret. Just. Br. 6. That is not true. These issues were before the Oregon courts from the beginning; they were identified in plaintiff's briefs and argued (in some form) at every stage of the appellate process. If they had any merit, they could have been invoked to affirm the judgment at any stage.

The retired justices further claim that the Oregon courts complied with the "first things first" rule because in its first decision in this case, the Oregon Supreme Court purported to decide the "harm-to-others" question under both state and federal law. But consideration and denial of Philip Morris' claim on the merits necessarily entailed an analysis of federal constitutional law, which in fact dominated the court's opinion. Pet. App. 40a-66a. That analysis would have been completely unnecessary had the court found any of plaintiff's waiver arguments to be meritorious.

fend the legitimacy of her lawyer's closing argument, which asked the jury to punish Philip Morris for injuries to all the "other Jesse Williams[es] in the last 40 years in the State of Oregon." She does not dispute that the evidence and argument presented at trial gave rise to a significant risk of unconstitutional punishment for harms to non-parties; nor does she contend that the trial court's failure to protect against that risk was harmless error. See PM Br. 42-45. And she offers no response to our argument that a remittitur cannot cure constitutional instructional error. PM Br. 46-48. She argues only that it would be unfair to her if the case is re-tried at this late date, because "justice delayed is justice denied." Br. 54.

Apart from its obvious deficiencies, plaintiff's argument overlooks the fact that she has no due process right to recover punitive damages. Even a valid award of punitive damages is a windfall to which a plaintiff has no right under federal or state law. See, *e.g.*, *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 419 (2003) ("It should be presumed a plaintiff has been made whole for his injuries by compensatory damages."); *Smith* v. *Wade*, 461 U.S. 30, 52 (1983) ("a key feature of punitive damages [is that] they are never awarded as of right, no matter how egregious the defendant's conduct"). The Oregon courts recognized this when they upheld the Oregon split-share statute, under which the State of Oregon—which has filed an *amicus curiae* brief in this case to protect its monetary interest—is entitled to 60 percent of any punitive damages award. *DeMendoza* v. *Huffman*, 51 P.3d 1232, 1245 (Or. 2002) ("[A] plaintiff has no right or entitlement to punitive damages as a remedy * * *.").

Even more fundamentally, plaintiff has no right to recover any judgment that is the product of an unconstitutional procedure. She obtained the punitive award at issue here—which now exceeds $145 million—by asking the jury to punish Philip Morris for injuries to thousands of hypothetical Oregonians whose claims were never presented, much less proven. Indeed, even now she continues to defend the award based on alleged injuries to "millions of American smokers." Br. 1. Having chosen to make that argument at trial, she cannot wave away Philip Morris's right to challenge it.

Finally, the length of this litigation cannot fairly be attributed to Philip Morris, which was not responsible for the original error and which has never wasted any time in seeking relief from it. This Court has remanded the case to the Oregon courts twice, and—prompted by plaintiff—the Oregon courts have erroneously reinstated the judgment each time. That is why we now ask this Court to exercise its power to order a new trial.

CONCLUSION

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

Respectfully submitted.

STEPHEN M. SHAPIRO
Mayer Brown LLP
71 S. Wacker Drive
Chicago, IL 60606
(312) 782-0600

MIGUEL A. ESTRADA
THEODORE J. BOUTROUS JR.
DAVID DEBOLD
Gibson, Dunn & Crutcher LLP
1050 Connecticut Avenue, NW
Washington, DC 20036
(202) 955-8500

WILLIAM F. GARY
SHARON A. RUDNICK
Harrang Long Gary Rudnick
360 East 10th Avenue
Eugene, OR 97401
(541) 485-0220

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
SCOTT A. CHESIN
Mayer Brown LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

KENNETH S. GELLER
Mayer Brown LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

Counsel for Petitioner

NOVEMBER 2008