No. 05-1256

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

KENNETH S. GELLER
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

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

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
DANIEL B. KIRSCHNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

MURRAY R. GARNICK
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES:

TABLE OF AUTHORITIES – continued

Page(s)

TABLE OF AUTHORITIES – continued

Page(s)

STATUTES:

MISCELLANEOUS:

REPLY BRIEF FOR THE PETITIONER

Respondent fails to address the two issues as to which the Court granted review. She offers no justification for allowing the jury to punish Philip Morris for harms allegedly suffered by non-parties; to the contrary, she concedes that a jury may *not* do so. Nor does she defend the proposition, adopted by the Oregon Supreme Court, that a reviewing court may disregard the ratio guidepost if it concludes that the jury could have found the defendant's conduct to be highly reprehensible. Instead, she has reformulated the questions to raise points that petitioner has never contested. She does so because she has to: the Oregon Supreme Court's decision is indefensible and unsustainable.

I. A JURY IN AN INDIVIDUAL CASE MAY NOT PUNISH FOR HARMS TO NON-PARTIES.

Our opening brief argued that the Oregon courts violated procedural due process by holding that the jury could impose punitive damages – in the Oregon Supreme Court's words – to "punish a defendant for harm to non-parties." Pet. App. 18a. Respondent makes no attempt to defend this holding, which is flatly contrary to this Court's precedent. See *State Farm Mut. Auto. Ins. Co.* v. *Campbell*, 538 U.S. 408, 423 (2003); PM Br. 10.

Instead of engaging the question presented, respondent offers two unremarkable and uncontested propositions: that harm to non-parties can properly be *considered* in gauging the reprehensibility of a tort; and that punitive damages can help protect the public by means of general deterrence. Neither proposition supports the decision below or is even responsive to the questions presented.

1. Respondent presents no response to our showing that the procedure endorsed below is a recipe for the arbitrary deprivation of property because it permits a defendant to be

punished for harms to unidentified individuals who are not before the court without (i) any adequate opportunity to show that those unidentified non-parties might lack valid claims, (ii) any meaningful protection against identical future claims by those persons, or (iii) any allowance for cases that the defendant has previously won or will win in the future. PM Br. 10-17; see also Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 MINN. L. REV. 583, 596 (2003). Oregon's procedure is foreclosed by this Court's holding in *State Farm* that "[d]ue process does not permit courts, in the calculation of punitive damages, to adjudicate the merits of other parties' hypothetical claims against a defendant." 538 U.S. at 423.[1]

Far from contesting these points, respondent concedes that "[t]obacco litigation has generally not been found to qualify for class-action treatment, either because individual causation issues predominate or because separate adjudications would not be dispositive of others' interests." Br. 34 n.22. This concession underscores a crucial point: an individual plaintiff such as Mayola Williams should not be allowed to recover what amounts to class-wide punitive damages in a trial that was not subject to the procedural re-

---

[1] Respondent claims (Br. 42) that we have "assign[ed]" this dispositive statement in *State Farm* a "weight it cannot bear." In support of that assertion, she relies on Professor Sharkey's "'more contextualized and nuanced reasoning'" "'that the Court was primarily concerned with limiting the extraterritorial or out-of-state reach of punitive damages'" (Br. 44, quoting Catherine M. Sharkey, *Punitive Damages as Societal Damages*, 113 YALE L.J. 347, 350 (2003)). This interpretation is wrong: it cannot be squared with the Court's treatment of the non-party punishment issue as an independent and "more fundamental" concern (*State Farm*, 538 U.S. at 422), or with its observation that the problem relates to "the possibility of multiple punitive damages awards for the same conduct" and to the fact that "nonparties are not bound by the judgment some other plaintiff obtains" (*id.* at 423).

quirements and substantive limitations associated with class-action suits – requirements and limitations that provide critical due process protections to defendants.

Fraud claims of the type brought by respondent are unsuited for class treatment precisely because the issues they present require individualized showings that are impossible to prove for an undifferentiated mass of smokers. Pet. Br. 15-16. It necessarily follows that it is unacceptable to permit a single jury to *punish* a defendant for defrauding a class of non-parties in a case brought by an individual. To allow such global punishment in a case brought by an individual plaintiff would, among other flaws, deprive the defendant of the protective res judicata effect of a class action. The *de facto* class action permitted by the court below yields exactly the result that this Court foreclosed in *State Farm*: punishment for harm to non-parties that "creates the possibility of multiple punitive damages awards for the same conduct" because "nonparties are not bound by the judgment [the] plaintiff obtains." 538 U.S. at 423.

2. Lacking any basis for defending the Oregon Supreme Court's holding, respondent pretends that the court did not allow punishment for harm to non-parties after all. She maintains that the holding below simply permitted the jury to "consider[]" the harm to others "in its reprehensibility analysis." Br. 42. This revisionist account of the ruling below is demonstrably wrong. The Oregon Supreme Court expressly held that the Constitution does not "prohibit[] the state, acting through a civil jury, from using punitive damages to *punish* a defendant for harm to non-parties." Pet. App. 18a (emphasis added). Indeed, the proposed jury instruction that it rejected as legally inaccurate is virtually identical to respondent's contention here; it would have informed the jury that it may "consider the extent of harm suffered by others in determining" what award bears a reasonable relationship "to the harm caused to Jesse Williams," but that it could not

"punish the defendant for the impact of its alleged misconduct on other persons." PM Br. 4. In rejecting this proposed instruction, the Oregon Supreme Court reasoned that, "if a jury cannot punish for the conduct [that allegedly harmed non-parties], then it is difficult to see why it may consider it at all." Pet. App. 18a n.3.

3. The error below arises from a conflation of what respondent now recognizes to be two fundamentally different things: (i) considering non-party harms for purposes of assessing reprehensibility, and (ii) actually punishing for those harms. Respondent concedes that "consideration of total harm" to non-parties in assessing reprehensibility is "not the same" as "punishment for" that harm, and that the former is permissible but the latter is not. Br. 35-36. As we discussed in our opening brief (at 22), this Court has repeatedly drawn this important distinction both in the punitive damages context and in the analogous context of criminal sentencing.[2] A court may enhance the punishment for the harm caused to a plaintiff in light of the nature of the wrong, including whether it endangered a single individual or many individuals. But the extent of any such enhancement is strictly con-

---

[2] See *State Farm*, 538 U.S. at 423 (non-party harm may be taken into account in assessing reprehensibility because "'repeated misconduct is more reprehensible than an individual instance of malfeasance,'" but a court cannot impose actual "punishment" for non-party harms "under the guise of the reprehensibility analysis" because that would "create[] the possibility of multiple punitive damages awards for the same conduct"); *BMW of N. Am., Inc.* v. *Gore*, 517 U.S. 559, 574 n.21 (1996) ("evidence" of non-party harms "may be relevant to the determination of the degree of reprehensibility" but cannot be used as a "multiplier in computing the amount of [the] punitive sanction"). Similarly, in criminal sentencing, a court may take a recidivist's other misconduct into account in imposing a sentence within the permissible range for the specific crime at issue in the case, but it may not punish for anything other than the offense of conviction. See *Ewing* v. *California*, 538 U.S. 11, 25-26 (2003); *United States* v. *Watts*, 519 U.S. 148, 154 (1997) (per curiam); *Witte* v. *United States*, 515 U.S. 389, 400 (1995).

fined: the resulting punishment must remain *within the permissible range of penalties for the harm to the plaintiff*. Thus, although the degree of wantonness reflected in a civil defendant's conduct may warrant an enhanced punitive award for the impact of that conduct on the plaintiff, that is fundamentally different from punishing the defendant for harms to non-parties who have not proven their claims and who would not be bound by the result. The former weighs the degree of reprehensibility of the defendant's conduct for purposes of assessing the appropriate award to a single plaintiff for his or her harm; the latter impermissibly punishes a defendant for unproven harm and engenders both "the possibility of multiple punitive damages awards for the same conduct" (*State Farm*, 538 U.S. at 423) and the risk of "'double count[ing]' by including in the punitive damages award some of the compensatory, or punitive, damages that subsequent plaintiffs would also recover" (*BMW*, 517 U.S. at 593 (Breyer, J., concurring)).[3]

Because – as respondent asserts and as we agree – this distinction is a correct statement of the law, the jury should have been so instructed and the Oregon Supreme Court's rejection of just such an instruction as "not accurately reflect[ing] the law" (Pet. App. 21a) was reversible error. And respondent offers no meaningful response to our argument that, if punishment for harms to non-parties is unconstitutional, then the Due Process Clause entitled Philip Morris to the instruction that it requested. PM Br. 23-25. Indeed, this Court in *State Farm* recognized the need to give a similar

---

[3] Another way to perceive the difference is in relation to future punitive awards. If harm to others is merely a factor in the reprehensibility calculus, then it should be proper for each successful plaintiff to receive a similar award. (Plainly, the current award cannot pass any such test.) If, on the other hand, non-party harms have already been punished, then no further punitive damages should be imposed when those persons bring their own suits.

instruction to tell the jury that it could not punish for out-of-state harms. 538 U.S. at 422.[4]

Respondent also appears to suggest that the Oregon Supreme Court's review of the punitive award for excessiveness somehow cured the failure to instruct the jury correctly. See Br. 42. But that failure irremediably tainted the verdict. Respondent's counsel urged the jury to punish for harms to all Oregonians affected by smoking. J.A. 197a, 199a. And instead of giving petitioner's proffered instruction admonishing the jury not to punish for non-party harms, the trial court charged the jury that it was free to award any amount up to the $100 million arbitrarily requested in the complaint. See PM Br. 4. Post-trial review could not cure the resulting prejudice: in Oregon, as in most jurisdictions, excessive awards are remitted only to the *greatest* amount a jury could lawfully have awarded. See *Waddill* v. *Anchor Hocking, Inc.*, 78 P.3d 570, 576-77 (Or. Ct. App. 2003). Here, a properly instructed jury might well have awarded less than that maximum, so remittitur does not remedy the constitutional violation. See PM Br. 24 n.10; cf. *Minneapolis, St. P. & S. Ste. M. Ry.* v. *Moquin*, 283 U.S. 520, 521 (1931) (remittitur is inadequate for a verdict produced by passion and prejudice).

4. Respondent claims that Oregon's existing procedures are sufficient to guard against multiple punishment; in particular, she relies (Br. 45) on the provision allowing evidence

---

[4] Respondent contends (Br. 48) that the court was right to deny the proposed instruction because it was internally inconsistent as to the relevance of petitioner's financial condition. In making that argument, however, respondent misleadingly quotes from two *separate*, *alternative* versions of petitioner's proposed instruction. The primary version stated that the jury could not rely on petitioner's wealth in setting punitive damages (J.A. 280a); the fallback version instructed the jury that it *could* consider that evidence, but that it could not punish petitioner "simply because it is large." J.A. 281a. This wholly proper "inconsistency" has no bearing on the claim of instructional error here.

of past punitive damages payments to be introduced in future cases. OR. REV. STAT. § 30.925(2)(g). That procedure, however, is no protection at all.

First, to the extent the defendant wins its subsequent cases, this system makes no provision for it to receive "credit" against the earlier, global punitive award. See PM Br. 12-13.

Second, respondent has taken the position that, under the jury-trial provision of the Oregon Constitution, a court may not consider on post-verdict excessiveness review any facts that have not been presented to the jury. If that view is correct, a defendant wishing to avail itself of this "protection" must tell the subsequent jury that one or more earlier juries found its conduct to be so reprehensible as to warrant severe punishment. Particularly in Oregon, where courts often deny a defendant's request for a bifurcated trial (see, *e.g.*, *Bremner* v. *Charles*, 821 P.2d 1080, 1083 (Or. 1991) (en banc) (bifurcation should not be granted routinely)), such a disclosure will be highly prejudicial to the defendant's prospects of winning on liability.

Third, it is not clear that prior awards that are still subject to appeal can be considered. Cf. *Bullock* v. *Philip Morris USA, Inc.*, 42 Cal. Rptr. 3d 140, 171 n.26 (Cal. Ct. App.) (refusing to consider, on post-verdict review, "two specific prior California punitive damages awards totaling $59 million that became final after judgment was entered by the trial court in this matter"), rev. granted, 141 P.3d 718 (Cal. 2006).

Finally, and most fundamentally, there is no guarantee that a subsequent jury will take the prior judgments into account by giving the defendant an appropriate credit for them. It is at least equally likely that the subsequent jury would use the prior awards as a measuring stick for its own large punitive award, resulting in excessive and multiple punishment.

5. Respondent (and her amici) also repeatedly insist that prior to the enactment of the Fourteenth Amendment, exemplary damages were viewed as an established remedy and some courts invoked deterrence and the interests of the general public as legitimate objectives of that remedy. *E.g.*, Resp. Br. 37-42; Amar/McEvoy Br. 5-23. Those points are both uncontroversial and irrelevant. What matters here is that there was a general consensus among 19th-century courts that punitive damages were imposed to punish only for the injuries the defendant had inflicted upon the plaintiff before the court. See PM Br. 18-20; ATRA Br. 5-21. Notwithstanding respondent's assertion (Br. 36 n.25), not a single one of the cases cited by her or her *amici* allowed punishment for harms to others, or even remotely suggested that such a result was permissible.[5]

Consider, for example, respondent's repeated reliance (Br. 38, 39, 41 n.33; App. A at 1a) on *Bishop* v. *Stockton*, 3

---

[5] In fact, several of the cases included in respondent's 24-page Appendix were also cited by ATRA in support of petitioner, because they specifically reject punishment for non-party harms. See, *e.g.*, *Phelin* v. *Kenderdine*, 20 Pa. 354, 1853 WL 6203 (Pa. 1853), and *Coryell* v. *Colbaugh*, 1 N.J.L. 77, 1791 WL 380 (N.J. 1791), cited at Resp. App. A at 15a, 18a; ATRA Br. 14–15 & n.11. Amici Amar and McEvoy devote much of their attention to *Wilkes* v. *Wood*, Lofft 1, 98 Eng. Rep. 489 (K.B. 1763), and *Huckle* v. *Money*, 2 Wils. 205, 95 Eng. Rep. 768 (K.B. 1763). See Amar/McEvoy Br. 5-9. But as ATRA explains (at 12-13), there was no suggestion in either of those cases that the punishments could or should reflect the harm done to anyone but the particular plaintiff.

Finally, respondent seeks support (Br. 43) in a footnote in *BMW* in which this Court observed that "respect for the error-free portion of the jury verdict would seem to produce an award of $56,000 ($4,000 multiplied by 14, the number of repainted vehicles sold in Alabama)" as opposed to the $2 million in punitive damages left standing by the Alabama Supreme Court (517 U.S. at 567 n.11). But the issue of the propriety of punishing for harm to non-parties within the State was not raised in that case, much less resolved by this Court.

F. Cas. 453 (C.C. Pa. 1843), aff'd, 45 U.S. (4 How.) 156 (1846). The plaintiff in *Bishop* sued the owner of a stagecoach after she was injured when the stagecoach overturned. The *Bishop* court did, as respondent says, justify punitive damages as a means of "protect[ing] the community from future risks and wrongs." 3 F. Cas. at 455. But when it came to assessing the appropriate amount of punitive damages, the court focused on the particular circumstances giving rise to the plaintiff's injuries. *Ibid.* The court gave no indication that injuries to other persons in this or past accidents involving stagecoaches owned by the same defendant could or should be considered, much less that the jury could punish for such injuries.[6] Not only do the other examples proffered by respondent fail to support the argument that punitive damages historically could be employed to punish for harms to non-parties; they explicitly *contradict* that position.[7]

In short, the historical record simply confirms that the Oregon Supreme Court erred in holding that a jury in an in-

---

[6] Respondent's discussion (Br. 40-41; App. A at 9a, 13a-14a) of two other cases, *Hopkins* v. *Atlantic & St. Lawrence R.R.*, 36 N.H. 9, 1857 WL 2820 (1857), and *Frink & Co.* v. *Coe*, 4 Greene 555, 1854 WL 228 (Iowa 1854), similarly confuses a justification for allowing punitive damages based on societal interests with the conduct for which a jury can punish (or, in many of the older cases, even consider). See ATRA Br. 19 n.15.

[7] For example, in *Phelin* v. *Kenderdine*, *supra* – another case respondent cites repeatedly (Br. 6 n.2, 40 n.32; App. A at 18a-19a) – the Pennsylvania Supreme Court allowed the father in a seduction case to present evidence of breach of promise to marry even though the daughter could bring her own action on that breach. The court reasoned that this was permissible precisely because in the case at hand the jury could punish only for harm to the father. Similarly, in another case from respondent's Appendix (at 15a), *Coryell* v. *Colbaugh*, *supra*, an action for breach of promise of marriage, the court barred the defendant's proffered evidence that the father had already recovered exemplary damages for seduction because the father's suit "was her father's action – she is not to be affected by it here." 1791 WL 380, at *1.

dividual case may impose punitive damages that "punish a defendant for harm to non-parties."

II. THE $79.5 MILLION PUNITIVE AWARD IS UNCONSTITUTIONALLY EXCESSIVE.

A. Respondent Does Not Defend The Oregon Supreme Court's Analysis Of The Guideposts.

Remarkably, respondent ignores the second question as to which this Court granted review: whether the Oregon Supreme Court erred in holding that the constitutional requirement of a reasonable relationship can be "overrid[den]" if the jury could have found that the defendant's conduct was "highly reprehensible" and might constitute manslaughter. Instead of defending this holding, she reframes the second question as "[w]hether the *ratio* between compensatory and punitive damages comprises the conclusive and overriding guidepost as to the reasonableness of a punitive damages verdict." Resp. Br. i (emphasis added); see also *id.* at 26. But we have never taken the position that the ratio guidepost, or any other factor, is the "conclusive" measure of excessiveness. In contrast to the Oregon Supreme Court's approach, we argued in our opening brief (at 25-33) that (i) all three guideposts must be considered together; (ii) *no* single criterion, including ratio, is sufficient on its own to assess the constitutionality of an award; and (iii) the ratio guidepost cannot be jettisoned, because it alone serves several functions that are critical to the excessiveness inquiry. Respondent answers none of these points.

Respondent's suggestion (Br. 26) that we advocate a "flat ratio approach for all cases, regardless of the facts" or a "mathematical bright-line straitjacket" is baseless. Even a cursory reading of our brief demonstrates the falsity of that contention. We explained that this Court's decisions describe a range of permissible multiples, generally between zero and nine (and zero to four when compensatory damages

are substantial, as here), and set forth certain well-defined circumstances in which the ratio can exceed the top of that range, none of which applies here. PM Br. 33-39. The reprehensibility guidepost is a key determinant of where along the spectrum the maximum ratio falls in any particular case; other factors include the size of the compensatory award, the existence of other possible deterrents, and the magnitude of the fines for comparable misconduct. *Id.* at 34-35. That approach, which is the essence of *State Farm* and *BMW*, allows all three guideposts to operate together.

B. The $79.5 Million Award Cannot Be Upheld.

Respondent does not – because she cannot – dispute our position that, under *State Farm*, a low-single-digit multiple is the constitutional maximum in most cases in which the compensatory award is substantial. See PM Br. 33-35. Nor does she challenge our showing that this Court's guidance in *State Farm* was drawn from centuries of Anglo-American legal history. PM Br. 35-38; see also ATRA Br. 21-30 & nn.18-19 (surveying the historical case law and noting that "punitive awards upheld on appeal were almost never more than one or two times the amount of the compensatory award" except where the actual damages were very small).[8]

Instead of contesting the validity of these general principles, respondent asks this Court to break new ground by holding that a 97:1 ratio can somehow satisfy due process

---

[8] Neither respondent nor any of her *amici* cites a single historical case allowing a large ratio – let alone a 97:1 ratio – when the compensatory damages were not small, and we are aware of no such decision. See PM Br. 36-38; ATRA Br. 21-30. The cases cited by Professors Amar and McEvoy all involved punitive and compensatory awards substantially smaller, even in 2006 dollars, than the $79.5 million punitive award and $521,845 compensatory award here. In particular, while the professors emphasize the "enormous" £300 punitive award in *Huckle* v. *Money*, *supra*, that award is only around $43,000 in 1996 dollars. *BMW*, 517 U.S. at 597 (Breyer, J., concurring); ATRA Br. 26-27 & n.23.

because of the circumstances of this case. She proposes various justifications for departing from *State Farm*, *BMW*, and *Haslip* and carving out a new rule for tobacco cases. Br. 6-34. Not one of those purported reasons comes close to justifying a ratio above the low single digits, let alone 97:1.

1. The presence of "highly reprehensible" conduct does not justify overriding the reasonable-relationship requirement.

Respondent's primary argument is that petitioner's conduct was "uniquely monstrous" and that the sky is therefore the limit for a punitive award. Br. 7-17. Indeed, this notion – that if the defendant's conduct is highly reprehensible there is effectively *no* limit on the amount of punitive damages that may be awarded – is a theme that runs through respondent's brief (and those of most of her amici).[9]

As we pointed out in our opening brief, characterizing the misconduct at issue as "extraordinarily reprehensible" or "uniquely monstrous" cannot change the fundamental nature of the excessiveness inquiry and certainly cannot justify jettisoning the reasonable-relationship requirement. This Court's decisions establish that the ratio guidepost alone addresses indispensable components of the excessiveness inquiry such as objectivity, proportionality, and the impact of the compensatory award on the need for additional deterrence. These components are especially critical to due process where, as here, allegations of gross misconduct evoke strong emotion and can easily arouse the passion and prejudice of the jury. See PM Br. 27-33.

Respondent's arguments only underscore this point. Although respondent uses an array of pejorative adjectives to

[9] The view that the conduct at issue here was highly reprehensible is hardly universal among juries: juries have returned *defense* verdicts in the vast majority of cases raising the same theory that plaintiff raised here. PM Br. 41 & n.29; see also R.J. Reynolds Br. 8-9 (compiling statistics).

describe petitioner's alleged misconduct, she offers no test for distinguishing between "reprehensible" conduct (which is a prerequisite for *any* award of punitive damages, and which respondent concedes is subject to the ratio constraints set forth in *State Farm*) and "highly reprehensible" conduct (as to which, she contends, sky-high ratios are perfectly acceptable). Her failure to do so demonstrates what we contended in our opening brief – that so-called "extreme reprehensibility" is a highly subjective, manipulable determination. See PM Br. 30-31. Indeed, courts and juries can find – and often have found – a defendant's conduct to be "highly reprehensible" even when that conduct was approved by relevant regulators and/or exonerated by prior juries. See Auto Mfrs. Br. 7-13, 28; PLAC Br. 9-13.

The need for the ratio requirement's objective constraint is further revealed by how readily the Oregon Supreme Court invoked "extremely reprehensible" conduct despite the absence of any jury finding to that effect. Although respondent portrays the Oregon Supreme Court as having "reviewed this case de novo" to make such a finding (Br. 3-4, 6-7), that court actually did the opposite: it repeatedly deferred to "findings" that the jury, which returned a general verdict, never in fact made.[10] Nor can a finding of extreme reprehensibility simply be inferred from the size of the award: (1) the verdict was 20% lower than the maximum the jury was told it could award; and (2) for all that appears, the size of the award was driven by the evidence of Philip Morris's wealth, and by respondent's exhortations to punish for alleged harm to all Oregonians.[11]

---

[10] Respondent asserts (Br. 3), without citation, that the jury "specifically found that the scheme ensnared a large number of Oregonians * * *." The verdict form (J.A. 288a-291a) contains no such finding.

[11] In attempting to demonstrate that the jury "must have found" high reprehensibility, many of respondent's amici rely heavily on allegations of conduct (i) that had nothing to do with Jesse Williams; (ii) as to which

At bottom, the "high reprehensibility" exception that respondent proposes is functionally indistinguishable from the Oregon Supreme Court's holding that the possibility of a jury finding of high reprehensibility can "overrid[e]" the reasonable relationship requirement. The exception would swallow the rule. The due process constraints on punitive awards recognized by this Court would be eliminated whenever a court says that, taking the evidence in the light most favorable to a general verdict, the conduct could have met an undefined (and undefinable) concept of "high reprehensibility."

For all of these reasons, the *State Farm* Court identified only three potential exceptions to the single-digit ratio limit, each of which involves situations that are objectively identifiable and that do not present the prospect of repeated punitive awards: where (i) "a particularly egregious act has resulted in only a small amount of economic damages"; (ii) "the injury is hard to detect"; or (iii) "the monetary value of noneconomic harm might have been difficult to determine." 538 U.S at 425 (internal quotation marks omitted). The Court did not suggest that there might be another exception for "high reprehensibility," and it should not accept respondent's invitation to create one here.

2. The $79.5 million award cannot be justified as necessary to punish for harm to non-parties.

Respondent suggests that a 97:1 ratio is acceptable because the $79.5 million punitive award is a justifiable penalty for "the full impact of Philip Morris's misconduct on others in Oregon" and necessary for sufficient deterrence. Br. 23-26, 35.

These arguments suffer from precisely the same problems as the contention that punitive damages can properly punish

---

the jury found no punitive liability, such as claims of nicotine manipulation; and/or (iii) that are not even part of the record.

for non-party harms. Respondent's arguments presume that this case represents the sole opportunity to impose punitive damages for the impact of petitioner's conduct on large numbers of other Oregonians. That assumption, however, cannot be correct: either respondent's charges of "monstrous" reprehensibility that injured thousands of Oregonians have merit, and there will be further Oregon plaintiffs bringing suit seeking further punitive and compensatory awards, or else the scope of the tortious conduct and tortious harm is not as broad as respondent asserts and requires less deterrence. Either way, the ratio guidepost is essential (i) to ensure that the punitive awards are properly apportioned among the potential plaintiffs and that multiple awards do not lead to excessive overall punishment; (ii) to account for the deterrent effect of any compensatory awards, which will likely be substantial both individually and in the aggregate if respondent is correct about the scope of the conduct; and (iii) to prevent any one jury from nullifying the findings of other juries on similar claims. See PM Br. 28-29, 32-33. It is for this reason that *State Farm* made clear that that "the measure of punishment" must be kept "proportionate to the amount of harm *to the plaintiff*" (538 U.S. at 426; emphasis added) – not to the amount of harm to other persons not before the court.

It also bears mention that respondent's assertions regarding the scope of the harm *resulting from the alleged wrongful conduct* – as opposed to smoking per se – are entirely without record basis. There was absolutely no evidence regarding the impact of the alleged *fraud* on other Oregonians. See *State Farm*, 538 U.S. at 426-27 (plaintiffs sought to justify punitive award on ground that "State Farm's policies have affected numerous Utah consumers"; this Court rejected the argument because of "the Campbells' inability to direct us to testimony demonstrating harm to the people of Utah").[12]

---

[12] Respondent argues that the punishment not only must suffice to deter Philip Morris, but "'must also be sufficient to deter *others*.'" Br. 24 (cita-

Finally, respondent's related contention that the punitive award is necessary to disgorge all of petitioner's "ill-gotten gains" (Br. 21-23, 24-25, 31-34) is another variant of the erroneous argument that a punitive award can punish for nonparty harms. The very same gains could be disgorged over and over at the behest of every plaintiff seeking to "justify" similarly huge awards, again turning each individual case into a *de facto* class action that fails to provide defendant with the protections of a class action. See, *e.g.*, *Johnson* v. *Ford Motor Co.*, 113 P.3d 82, 93-94 (Cal. 2005) ("aggregate disgorgement" theories violate *State Farm* because they risk the imposition of multiple and duplicative punishment); *Oshana* v. *Coca-Cola Co.*, 2005 WL 1661999, at *10 (N.D. Ill. July 13, 2005).

In any event, respondent introduced no evidence of the purported amount of petitioner's "ill-gotten gain," but only evidence of the profits earned from selling cigarettes – itself not a tortious act. See *Cooper Indus., Inc.* v. *Leatherman Tool Group, Inc.*, 532 U.S. 424, 442 (2001) ("[the] wrongdoing surely could not be treated as the principal cause of Cooper's entire sales volume for a 5-year period"). There was not even evidence of profits derived from sales to Jesse Wil-

---

tion omitted; emphasis added); see also State AG Br. 3-7. But the uncontroversial fact that general deterrence is one objective of punitive damages does not justify ignoring the constitutional proportionality requirement in a particular case. Moreover, if respondent's characterization of the reprehensibility and magnitude of harms from the punishable conduct is in fact shared by juries in future cases, the total liability faced by the tobacco companies in civil litigation will be very substantial. And civil litigation is not the only mechanism for accomplishing deterrence. For example, the tobacco companies are responsible for billions of dollars in payments to the Attorneys General of all 50 States, including Oregon, for the same course of conduct at issue here. See PM Br. 40. The industry is also subject to extensive oversight both by the FTC and by the State Attorneys General pursuant to the MSA. *Id.* at 39-40.

liams, though that amount self-evidently could not justify the mammoth award here.

3. Respondent's other justifications for the $79.5 million award cannot withstand scrutiny.

Respondent also raises a number of additional arguments in an attempt to justify the $79.5 million punitive damage award. Not one has any merit.

a. Respondent contends (Br. 29) that wrongful-death damages understate the harm to the plaintiff because there is no compensation for "hedonic" losses – the decedent's loss of the years he otherwise would have lived. This rationale formed no part of the Oregon Supreme Court's reasoning, and it is legally meritless. In establishing a statutory cause of action for wrongful death (a cause of action not recognized at common law), the Oregon legislature provided a right to recover for certain economic and noneconomic harms. The legislature made the determination that the damages allowed under the statute (where none were recoverable previously) would "justly, fairly, and reasonably compensate" for the loss suffered by the plaintiff and that further hedonic damages were not necessary for full compensation. OR. REV. STAT. § 30.020(2); Minutes, Senate Comm. on Judiciary, HB 2350, June 8, 1973; see also *Greist* v. *Phillips*, 906 P.2d 789, 795, 797 (Or. 1995) (en banc) (statutory cause of action provides "substantial" damages).

If respondent and her amici believe that this legislative judgment is incorrect, the proper venue in which to seek relief is the Oregon legislature. Respondent's argument ultimately devolves into the untenable proposition that the Oregon courts can uphold awards that are concededly disproportionate to the plaintiff's damages award. If accepted, this argument would eviscerate the Due Process Clause's reasonable relationship requirement. In any event, even if respondent's point had some merit, it would not create a reasonable

relationship with the $79.5 million award and would still require a drastic reduction.

b. Respondent asserts (Br. 22) that, because Oregon employs various procedural safeguards in administering punitive damages, "the [punitive] award in this case should be accorded the deference due a properly rendered state court verdict." But even a verdict that is the product of adequate procedural safeguards is still subject to substantive limits: in both *BMW* and *State Farm*, the Court held the awards at issue to be excessive without expressing any disapproval of the state courts' procedures for assessing punitive damages. *BMW*, 517 U.S. at 585; *State Farm*, 538 U.S. at 419-20. There is no reason to give the verdict here any more deference than the verdicts in *BMW* and *State Farm*. Indeed, doing so would be inconsistent with the de novo review required by *Cooper Industries* and *State Farm*.

c. Respondent attempts to shoehorn this case into one of the *State Farm* exceptions to the single-digit ratio presumption by claiming that "fraud is by definition a form of misconduct that is hard to detect" and that appropriate deterrence therefore requires a greater penalty in fraud cases. Br. 30. But punitive damages claims commonly involve allegations of fraud, so respondent's interpretation of the "hard to detect" exception to single digit ratios risks swallowing the rule. Beyond that, respondent's argument is a gross overgeneralization. Certainly, some forms of fraud are clandestine. Here, however, there have been decades of public accusations that the tobacco industry had committed fraud, leading to thousands of very public lawsuits over the last 50 years (including litigation brought by virtually every State Attorney General and by the U.S. Department of Justice). See also *Cipollone* v. *Liggett Group, Inc.*, 505 U.S. 504, 513 (1992) (by 1962, "there were more than 7,000 publications examining the relationship between smoking and health"); *FDA* v. *Brown & Williamson Tobacco Corp.*, 529 U.S. 120, 138

(2000) (by 1965, "the adverse health consequences of tobacco use were well known, as were nicotine's pharmacological effects"); *Arturet-Vélez* v. *R.J. Reynolds Tobacco Co.*, 429 F.3d 10, 14-15 (1st Cir. 2005) ("such lawsuits against tobacco companies have been common for years, generating vast publicity and at least intermittent success"). These facts take this case far out of the "hard to detect" category.

d. Finally, respondent and her amici seek to justify the $79.5 million punitive award on the basis of Philip Morris's use of its resources to defend against lawsuits, as well as its litigation successes. Resp. Br. 33-34 & n.21; Trial Lawyers for Public Justice Br. 22-25; Tobacco Control Br. 11-19; AARP Br. 20-21; ATLA Br. 18-19. In addition to punishing a company for defending itself, that approach would call for a company to be punished *more* when large numbers of juries and courts have exonerated it. The fact that Philip Morris usually wins these cases at trial on the merits is a powerful reason why the punitive award here is excessive, not a reason for sustaining an otherwise unconstitutional penalty.[13]

---

[13] Ironically, respondent relies heavily on *Mathias* v. *Accor Economy Lodging, Inc.*, 347 F.3d 672 (7th Cir. 2003). But Judge Posner made clear both then and in *Gavin* v. *AT&T Corp.*, 2006 WL 2548238 (7th Cir. Sept. 6, 2006), that enhancing punishment based on a defendant's ability to make litigation expensive for the plaintiff is permissible only when the compensatory damages are very *small*, a factor that might make it difficult for the plaintiff to find competent counsel. When, as here and in most tobacco cases, there is a prospect of a substantial recovery, "the considerations that we have just canvassed fade." *Mathias*, 347 F.3d at 677; see also *Gavin*, 2006 WL 2548238, at *6.

The idea that it is hard to sue a tobacco company is also belied by the ready availability on the Internet of all the materials necessary to launch a tobacco suit, conveniently assembled in one location (known as "trial in a box"). See, *e.g.*, Trial in a Box, at http://www.tobacco.neu.edu/box/index.html; Byron G. Stier, *Resolving the Class Action Crisis: Mass Tort Litigation as Network*, 2005 UTAH L. REV. 863, 908-09 (detailing the

In any event, the Court already has rejected precisely this argument. In *State Farm*, "[t]he Utah Supreme Court sought to justify the massive [punitive] award by pointing to," *inter alia*, "the fact that State Farm will only be punished in one out of every 50,000 cases as a matter of statistical probability." 538 U.S. at 426. This Court flatly rejected that as a basis for the 145:1 ratio of punitive to compensatory damages, saying that it "bear[s] no relation to the award's reasonableness or proportionality to the harm." *Id*. at 427.

* * *

In short, the judgment in this case is irreconcilable with *State Farm*. Because "courts must ensure that the measure of punishment is both reasonable and proportionate to the amount of harm *to the plaintiff* and to the general damages recovered" (538 U.S. at 426; emphasis added), a punitive award that was returned after the trial court refused to tell the jury not to punish for harms to non-parties and that is 97 times the amount of the plaintiff's compensatory damages is unsustainable.

CONCLUSION

The judgment below should be reversed.

Respectfully submitted.

---

efforts of the plaintiffs' bar to make a common pool of information and money available to lawyers who wish to sue tobacco companies).

KENNETH S. GELLER
EVAN M. TAGER
NICKOLAI G. LEVIN
Mayer, Brown, Rowe & Maw LLP
1909 K Street, NW
Washington, DC 20006
(202) 263-3000

ANDREW L. FREY
Counsel of Record
ANDREW H. SCHAPIRO
LAUREN R. GOLDMAN
DANIEL B. KIRSCHNER
Mayer, Brown, Rowe & Maw LLP
1675 Broadway
New York, NY 10019
(212) 506-2500

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

MURRAY R. GARNICK
Arnold & Porter LLP
555 Twelfth Street, N.W.
Washington, DC 20004
(202) 942-5000

Counsel for Petitioner

OCTOBER 2006