No. 07-1216

In the Supreme Court of the United States

PHILIP MORRIS USA,

Petitioner,

v.

MAYOLA WILLIAMS,

Respondent.

On Petition for a Writ of Certiorari to The Supreme Court of Oregon

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

Respondent's brief fails to come to grips with the fundamental errors that warrant this Court's review. At trial, Philip Morris requested that the jury be instructed not to impose punishment for harm to persons who were not parties to the litigation. The trial court addressed that clear and straightforward request separately from the rest of Philip Morris's proposed charge and rejected it on the merits, reasoning that due process does not require such an instruction. The Oregon appellate courts upheld that decision, also on the merits. This Court disagreed, holding that, "upon request," a party is entitled to "*some* form of protection" against the risk of punishment for harms to non-parties. *Philip Morris USA* v. *Williams*, 127 S. Ct. 1057, 1065 (2007). The Court explicitly stated that "the Oregon Supreme Court applied the wrong constitutional standard when considering Philip Morris' appeal," and remanded for the state court to "apply" the correct standard. *Ibid.*

The Oregon Supreme Court refused to do so. Instead, it found (for the first time in nine years of appellate litigation) that supposed errors of state law in "unrelated" portions of the proposed charge – errors that indisputably had no impact on the trial court's refusal to instruct the jury on harm to non-parties – barred consideration of petitioner's federal claim. Pet. App. 15a. Respondent's arguments in defense of that ruling ignore the plain language of this Court's mandate; disregard the course of the proceedings below; and provide a roadmap for state courts seeking to frustrate the invocation of federal rights.

I. THIS COURT SHOULD ORDER THE OREGON SUPREME COURT TO APPLY THE STANDARD SET FORTH IN *WILLIAMS*.

A. The Oregon Supreme Court Defied This Court's Directive.

This Court remanded with the unambiguous instruction "to apply the [constitutional] standard we have set forth." 127 S. Ct. at 1065. The Oregon Supreme Court declined to do so. Instead, it found 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 explained that "[a] state law decision * * * may be affirmed, *without reaching the federal question*, if there is an independent and adequate state ground for doing so. * * * We believe that this is such a case * * *." *Ibid.* (emphasis added).

In the face of this clear language, respondent asserts that the Oregon Supreme Court "faithfully applied" this Court's constitutional standard on remand by finding that petitioner's "request" was inadequate. Opp. 10, 11-12, 14, 25. Respondent's attempt to shoehorn the Oregon court's decision into seeming compliance with this Court's mandate fails, for two reasons.

First, contrary to her strident rhetoric (Opp. 11, 12, 13), it is respondent who mischaracterizes the Oregon Supreme Court's decision. This Court's directive was to "apply" the substantive "constitutional standard" – the prohibition on punishment for harms to non-parties. The Oregon court refused, however, to "address the constitutional standard" at all, Pet.

App. 13a, much less to do so "faithfully." Opp. 13. Instead, the court found that because Requested Instruction No. 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 thus sidestepped the constitutional standard.

Second, the Oregon court did not find, and could not have found, that Philip Morris's "request" for protection of its constitutional rights was inadequate as a matter of federal law. Respondent does not dispute that this is a question of federal law and that "the assertion of Federal rights, when plainly and reasonably made," cannot be defeated by "local practice." *Davis* v. *Wechsler*, 263 U.S. 22, 24 (1923). The federal right at issue 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. See *Williams*, 127 S. Ct. at 1065.

It is beyond dispute that this case involves a request "plainly and reasonably made." Philip Morris tendered a clear, straightforward, and accurate request for protection against the risk of unconstitutional punishment for non-party harms.[1] The trial

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[1] Reprising her prior, unsuccessful arguments to this Court, respondent asserts that Requested Instruction No. 34 misstated the federal standard. Opp. 25, 27-29. The Oregon Supreme Court made no such finding; to the contrary, it assumed that the relevant portion of the instruction "clearly and correctly articulated the standard required by due process." Pet. App. 12a. More importantly, *this* Court explained that the proposed instruction accurately stated due process requirements by prop-

court (and subsequently the Oregon appellate courts) addressed that request separately from other components of the proposed punitive damages instruction and rejected it on the merits.[2] The fact that the request was part of a proposed instruction that allegedly contained errors of state law on "unrelated" subjects does not obviate the fact that an appropriate request was made – and made unequivocally. That request was sufficient to trigger Philip Morris's due process right to protection from unconstitutional punishment.

B. Respondent Offers No Justification For The Imposition Of A State-Law Bar After This Court's Ruling On The Merits Of The Federal Claim.

In defense of the Oregon Supreme Court's decision to interpose a state-law procedural bar for the first time on remand from this Court, respondent insists that the Oregon courts have discretion to depart from their "usual practice of considering state

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erly "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." *Williams*, 127 S. Ct. at 1064. Cf. *United States* v. *Williams*, 504 U.S. 36, 40 (1992) (when the Court reaches the merits of a federal claim, in the face of respondent's assertions that the claim was not properly presented, this Court "necessarily considered and rejected" those assertions).

[2] Respondent's new assertion (Opp. 8-9) that Philip Morris failed to preserve its constitutional argument in the Oregon Court of Appeals and the Oregon Supreme Court is completely undermined by the fact that the state appellate courts and this Court reached its merits *five* times in this litigation. See Pet. App. 161a-162a (charge conference); 140a (Oregon Court of Appeal); 102a-105a (Oregon Court of Appeal on remand); 8a (Oregon Supreme Court); *Williams*, 127 S. Ct. at 1065.

grounds before addressing federal issues." Opp. 17. Even if the Oregon courts can depart from their customary decisional hierarchy – and respondent cites no precedent for such action[3] – that does not mean it is permissible for the Oregon Supreme Court to turn this Court's grant of review and decision on the merits into a meaningless exercise. *Michigan* v. *Long*, 463 U.S. 1032 (1983), put state courts on notice that if they decide a federal issue, this Court will conclude that there was no independent and adequate state ground that could support the same judgment. Pet. 16-17. That rule would make no sense if the state courts were free on remand to find, belatedly, a state procedural ground that effectively renders this Court's ruling a nullity. Respondent is silent on this point.

Respondent's reliance upon a 1982 Vermont decision and a 1971 New Jersey case for the proposition that "other state courts have addressed federal constitutional concerns first," Opp. 18, is misplaced: in neither case did the state court invoke the state-law ground after a remand from this Court on the federal claim. Indeed, in *Vermont* v. *Badger*, 450 A.2d 336 (Vt. 1982), the court specifically stated that state-law issues should be addressed *before* a case goes to this

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[3] Ignoring the substantial body of Oregon case law setting forth the decisional hierarchy, respondent cites one case in which an Oregon court addressed a federal law challenge to a prison procedure prior to addressing a state law challenge. Opp. 18 n.6. This ordering of distinct issues within a single opinion hardly suggests that a court may reject a federal claim on the merits and then, on remand from this Court, hold for the first time that the federal issue was unpreserved. See also Pet. 19 n.7 (distinguishing cases where state substantive law affords *broader* protection than federal law).

Court: "Fulfillment of this Court's responsibilities as a member of the federalist system requires us to consider the availability of state grounds *before* federal appeal." *Id.* at 347 (emphasis added). See also *Avdel Corp.* v. *Mecure*, 277 A.2d 207 (N.J. 1971) (cited at Opp. 18) ("look[ing] first to the decisions of the United States Supreme Court" only because state statute would "allow out-of-state service to the uttermost limits permitted by the United States Constitution").

In sum, respondent fails to cite *any* authority in support of the Oregon Supreme Court's decision to invoke a state-law bar to Philip Morris's federal claim for the first time on remand from this Court. Nor does she explain why the lower courts should be permitted to waste this Court's resources in such a manner.

C. The State-Law Ground Invoked Below Is Not An Independent And Adequate Basis For The Judgment.

The decision below fails for a third reason: the procedural rule on which it rests is anything but "firmly established and regularly followed," and therefore is not adequate as a matter of federal law to bar Philip Morris's federal claim. See Pet. 25-29. At oral argument on remand, the Oregon Supreme Court justice who ultimately wrote the opinion signaled the court's apparent willingness to manipulate state procedural rules, proclaiming that this Court "assumes we're proceeding in good faith" and therefore "wouldn't care for one second" if the Oregon court departed from its procedural precedents. Pet. App. 181a.

And depart it did. Respondent spends many pages demonstrating that the "correct in all respects" rubric has been part of Oregon practice for decades – as we recognized in the petition. See Pet. 27. But the deciding question is not whether such a rule exists in Oregon, but whether the rule's peculiar application here was established and foreseeable at the time the instruction was proposed. Respondent fails to cite to a single case in which an Oregon court has invoked the "correct in all respects" requirement as the basis for rejecting an instruction on one subject (separately considered and ruled upon by the trial court) merely because it appeared under the same heading as a defective instruction *on an entirely separate point of law*. Not one of the cases cited at Opp. 21-23 stands for the proposition she asserts: that it is permissible to refuse a valid instruction because some unrelated part of the proposed charge is invalid.[4]

Harvey v. *Tyler*, 69 U.S. 328 (1864) (cited at Opp. 21) is especially inapposite: there, the trial court denied a series of requested instructions, even though

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[4] See *Simpson* v. *Sisters of Charity*, 588 P.2d 4, 13 (Or. 1978) (requested instruction covered a single topic); *McCaffrey* v. *Glendale Acres, Inc.*, 440 P.2d 219, 222 (Or. 1968) (same); *Roop* v. *Parker Nw. Paving Co.*, 94 P.3d 885, 903-904 (Or. Ct. App. 2004) (same); *Dacus* v. *Miller*, 479 P.2d 229, 232 (Or. 1971) (en banc) (requested instruction was confusing in its entirety); *Beglau* v. *Albertus*, 536 P.2d 1251 (Or. 1975) (en banc) (general, oral request for an instruction without proposed language did not preserve claim); *Brigham* v. *S. Pac. Co.*, 390 P.2d 669 (Or. 1964) (en banc) (party waived claim by failing to specify the particular language in the court's charge that it found objectionable); *Hooning* v. *Henry*, 213 P. 139 (Or. 1923) (court is not required to give a limiting instruction entirely different from the one requested).

some were proper. This Court upheld the denial not for the formalistic reason that the instructions were requested as part of a series, but rather because counsel had failed to call to the court's attention the need for an instruction on the specific point of law at issue. See *id.* at 339. See also *Beaver* v. *Taylor*, 93 U.S. 46, 54 (1876) (cited at Opp. 21) (same). *Harvey*'s requirements were satisfied here: when the trial judge went through the proposed instruction line by line, defense counsel called particular attention to the need to instruct the jury not to punish for harm to non-parties, and the trial judge made a separate ruling rejecting that specific point. Pet. App. 6a, 16a, 156a-162a.[5]

Nor is respondent's argument bolstered by her bizarre claim that "the Oregon courts, in this very matter, had repeatedly asserted the venerable 'clear and correct in all respects' requirement." See Opp. 3-4 (citing Pet. App. 140a, 52a); Opp. 16. In both of those earlier instances, the Oregon courts held that Requested Instruction No. 34 was defective, and therefore was properly rejected by the trial court, *because it erroneously barred punishment for harm to non-parties* – precisely the rule that this Court ultimately repudiated. See Pet. App. 51a-52a; *id.* at 140a. In neither decision did the court rely on sup-

[5] Accordingly, it is irrelevant that defense counsel did not reiterate this specific point after closing argument. At the time of trial in this case, Oregon's procedural rules did not require a party to note an exception to the trial court's failure to give a requested instruction. Simply requesting the instruction "preserved for appeal the question whether the trial court erred in failing to give that instruction to the jury." *Beall Transp. Equip. Co.* v. *S. Pac. Transp. Co.*, 60 P.3d 530, 535 (Or. 2002).

posed errors of *state* law in *other* portions of the proposed instruction.

Respondent fails, moreover, to explain how the decision below can be reconciled with Oregon precedent. In *State* v. *George*, the Oregon Supreme Court held that a party need not re-word and re-submit a proposed instruction if the trial court has rejected the proposal as a matter of substantive law (rather than because the original request was incorrectly worded), because doing so would be "an exercise in futility." See Pet. 26. Instead of addressing that holding, respondent constructs a straw man, explaining (Opp. 22-23) that a different holding in *George* (involving instructions given pursuant to statutory mandates) does not apply here.

Respondent asserts, in conclusory fashion, that the futility rule is not satisfied here. Opp. 22. But it plainly would have been futile for Philip Morris to resubmit an instruction that corrected the wording of unrelated proposals. At the charge conference, the parties argued separately the harm-to-others portion of the proposed instruction. Pet. App. 156a-162a. The trial court made a separate and independent ruling with respect to Philip Morris's request for an instruction on that subject. See *id.* at 163a ("The Court: So I think I have satisfactorily worked my way through your Element No. 1" of Proposed Instruction No. 34). Accordingly, even if the instruction had not included the "errors" identified by the Oregon Supreme Court on remand, the trial court *still* would have declined to instruct the jury on punishment for harms to non-parties, because the trial

court rejected the instruction on its merits. This is precisely the situation addressed in *George*.[6]

II. THE QUESTION WHETHER THE RATIO GUIDEPOST MAY BE "OVERRIDDEN" IS AS WORTHY OF REVIEW TODAY AS IT WAS TWO YEARS AGO.

Respondent's principal argument on the second question presented – that this Court "chose not to resolve" it in 2007 and therefore should not grant review on it now – ignores the reason this Court previously did not reach the excessiveness issue. It was not because the Court deemed the issue unworthy of review, but rather because it expected the Oregon Supreme Court on remand to grant relief on the first question presented that would have mooted the excessiveness issue. See *Williams*, 127 S. Ct. at 1065. Respondent does not even attempt to defend the Oregon Supreme Court's holding (recently reaffirmed in that court's *Goddard* decision, see Pet. 29-30) that the ratio guidepost is expendable in cases where the jury could have made a finding of great reprehensi-

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[6] The decision below represents a departure from Oregon precedent in yet another respect: the Oregon court chose to overlook *respondent's* failure to preserve for appeal the two points on which the court relied in its remand opinion. Respondent's assertion that she "raised" these arguments "throughout the proceedings" (Opp. 10-11, 13, 15) is misleading: she failed to make one of the arguments before the trial court, and failed to present the other to the Oregon Court of Appeals. See *Amicus Curiae* Brief of Associated Oregon Industries et al. at 11-13; *Brokenshire* v. *Rivas & Rivas, Ltd.*, 957 P.2d 157, 158-159 (Or. 1988) (appellate court generally will not consider an argument that was not raised in the trial court); *Burke* v. *Oxford House of Oregon Chapter V*, 137 P.3d 1278, 1280 (Or. 2006) (refusing to address on review an argument that was not made before the Court of Appeals).

bility. Nor does she address the conflict between that holding and the approach taken by the Ninth Circuit in *Planned Parenthood of the Columbia/Willamette Inc.* v. *American Coalition of Life Activists*, 422 F.3d 949 (9th Cir. 2005), *cert. denied*, 547 U.S. 1111 (2006). See Pet. 31-32.

Respondent contends, as she did in 2006, that we have asked the Court to "elevate" the reasonable relationship requirement, which would "contradict this Court's assignment of primary responsibility" to the reprehensibility guidepost. Opp. 37. But the question presented is not whether the reprehensibility guidepost is more important than the other two. Rather, the question presented is whether a court's subjective determination of reprehensibility can "override" the requirement that there be a reasonable relationship at all. This Court found that question worthy of review in 2006, and it remains so.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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