No. 07-1216

IN THE
Supreme Court of the United States

PHILIP MORRIS USA,
Petitioner,
v.
MAYOLA WILLIAMS,
Respondent.

On Writ of Certiorari to the Supreme Court of Oregon

BRIEF OF THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA AS AMICUS CURIAE IN SUPPORT OF PETITIONER

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QUESTION PRESENTED

Whether, after this Court has adjudicated the merits of a party's federal claim and remanded the case to state court with instructions to "apply" the correct constitutional standard, the state court may interpose – for the first time in the litigation – a state-law procedural bar that is neither firmly established nor regularly followed.

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BRIEF OF AMICUS CURIAE THE CHAMBER OF COMMERCE OF THE UNITED STATES OF AMERICA IN SUPPORT OF PETITIONER

The Chamber of Commerce of the United States of America ("the Chamber") respectfully submits this brief as *amicus curiae* in support of petitioner. Letters of consent have been filed with the Clerk.[1]

INTEREST OF AMICUS CURIAE

The Chamber is the nation's largest federation of business companies and associations. The Chamber represents an underlying membership of more than 3,000,000 business and professional organizations of every size and in every sector and geographic region of the country. An important function of the Chamber is to represent the interests of its members by filing *amicus curiae* briefs in cases involving issues of national concern to American business.

The Chamber is filing this brief in support of petitioner because the rational and equitable administration of punitive damages is a matter of profound concern to the Chamber's members. The Chamber's members welcomed this Court's decision in *Philip Morris USA v. Williams*, 549 U.S. 346, 127 S. Ct. 1057 (2007) ("*Williams II*"), which appropriately recognized that the Due Process Clause forbids punishing defendants for harm sustained by those not party to the litigation. Yet a number of courts have

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[1] No counsel for a party authored this brief in whole or in part; no such counsel or party made a monetary contribution intended to fund the preparation or submission of this brief; and no person other than *amicus curiae*, its members, or its counsel has made such a monetary contribution.

resisted the principles set forth in *Williams II* and its antecedents. The decision of the Oregon Supreme Court on remand from this Court's decision in *Williams II* illustrates the problem. The Oregon court sidestepped this Court's mandate to apply the constitutional standard set forth in *Williams II* by interposing a novel state procedural bar to affirm the judgment against petitioner "without reaching the federal question." Pet. App. 13a. A number of other state courts have employed similar devices to avoid applying this Court's punitive damages precedents. The Chamber submits that by reversing the Oregon Supreme Court's decision below this Court would signal that it will not tolerate resistance to administering punitive damages awards according to the constitutional requirements identified in this Court's decisions.

Because the Chamber's members appear repeatedly before this Court and lower courts at both the state and federal levels, the Chamber also has a significant interest in the predictability afforded when lower courts hew faithfully to this Court's precedents and reach the merits of federal claims fairly presented. In practical effect, lower courts are the primary guardians of federal rights; disparate regard for the scope of those rights results in dramatically disparate rulings, including wildly varying punitive damages awards. A decision by this Court reaffirming *Williams II* would do much to secure the important due process rights protected by that decision in federal and state courts nationwide.

The Chamber therefore respectfully submits this brief urging the Court to reverse the decision below and thereby ensure the integrity of this Court's mandate in *Williams II*.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

The question presented in this case – whether a lower court may, for the first time on remand, invent a state procedural obstacle to avoid applying federal constitutional law as mandated by this Court – has obvious implications for the institutional authority of this Court. But it has broader implications as well. American businesses rely on the predictability of legal rules enunciated by this Court and other reviewing tribunals – a predictability severely undermined when lower courts depart from this Court's rulings and the principles they set forth. The concern is all the more substantial when the issue involves punitive damages, which already suffer the "real problem" of "stark unpredictability." *Exxon Shipping Co. v. Baker*, 128 S. Ct. 2605, 2625 (2008); *see Pac. Mut. Life Ins. Co. v. Haslip*, 499 U.S. 1, 42 (1991) (Kennedy, J., concurring); *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 350 (1974).

And yet it is the subject of punitive damages that seems to have engendered particular resistance among lower courts to this Court's rulings. The Oregon Supreme Court's effort to avoid *Williams II* in this case exemplifies this unfortunate pattern, which is also reflected in other courts' treatment of not only *Williams II* but also *State Farm Mutual Automobile Insurance Co. v. Campbell*, 538 U.S. 408 (2003). Both cases erected important substantive and procedural bulwarks against the "remarkable" variance in punitive verdicts, *Exxon Shipping*, 128 S. Ct. at 2625 – a variance fundamentally contrary to our basic conception of law, *see BMW of N. Am., Inc. v. Gore*, 517 U.S. 559, 587 (1996) (Breyer, J. concurring) ("Requiring the application of law, rather than a de-

cisionmaker's caprice . . . helps to assure the uniform general treatment of similarly situated persons that is the essence of law itself."), and to the conception of just punishment our law embodies, *see Exxon Shipping*, 128 S. Ct. at 2627 ("[A] penalty should be reasonably predictable in its severity, so that even Justice Holmes's 'bad man' can look ahead with some ability to know what the stakes are in choosing one course of action or another. And when the bad man's counterparts turn up from time to time, the penalty scheme they face ought to threaten them with a fair probability of suffering in like degree when they wreak like damage." (citation omitted)). But such bulwarks are only as effective as the respect they are accorded by the lower courts that apply them. And when lower courts refuse to apply them seriously – or, worse, when courts circumvent them through dubious procedural devices – the principles this Court has enunciated cannot serve their objective of mitigating lawless variability in punitive damages verdicts. If the Oregon Supreme Court's decision here is affirmed, other courts will be encouraged to find similarly novel ways to avoid *Williams II* and *State Farm*, as some already have. To ensure respect for this Court and for the important principles of law it has set forth – not only on the subject of punitive damages, but also on any other subject – the judgment below must be reversed.

ARGUMENT

I. State Courts Are Not Consistently Applying *Williams II*

This Court's decision in *Williams II* provided U.S. businesses and other litigants an important measure of protection against global punishment in individual

cases and the concomitant risk of multiplicative remedies. In holding that "the Constitution's Due Process Clause forbids a State to use a punitive damages award to punish a defendant for injury that it inflicts upon nonparties," the decision reaffirmed the bedrock principle that defendants cannot be punished without first receiving "'an opportunity to present every available defense.'" *Williams II*, 127 S. Ct. at 1063 (quoting *Lindsey v. Normet*, 405 U.S. 56 (1972)). But *Williams II* has not received a uniformly warm reception in the lower courts. No case illustrates the point better than the Oregon Supreme Court's own treatment of *Williams II* itself on remand.

When this Court remands a case to a state or lower federal court for further proceedings, that court cannot "go back of, or subvert, what was settled by the opinion and mandate in the present case[]." *Gaines v. Rugg*, 148 U.S. 228, 244 (1893); *see also Briggs v. Pa. R.R. Co.*, 334 U.S. 304, 306 (1948) (a court of appeals "has no power or authority to deviate from the mandate issued by" this Court). The court may not "reconsider questions which the mandate has laid at rest," *FCC v. Pottsville Broadcasting Co.*, 309 U.S. 134, 140 (1940), and it may not "give any other or further relief . . . than to settle so much as has been remanded," *In re Sanford Fork & Tool Co.*, 160 U.S. 247, 255 (1895). Requiring lower courts to comply with the directives issued by this Court ensures that this Court's decisions are predictably applied and that litigants are able to rely on those decisions as issued.

This Court's mandate in *Williams II* was clear. The outstanding issue in the case when it arrived in this Court was whether "Oregon had *unconstitution-*

ally permitted [petitioner] to be punished for harming nonparty victims." 127 S. Ct. at 1062 (emphasis added). And having decided that "the Oregon Supreme Court applied the wrong constitutional standard" – thereby allowing such impermissible punishment – this Court remanded the case "so that the [state court could] apply the standard" set forth in *Williams II*: a jury may not "use a punitive damages verdict to punish a defendant directly on account of harms it is alleged to have visited on nonparties." *Id.* at 1064, 1065.

But the Oregon court did not reach, much less "apply," this Court's standard. Instead, it invoked an "independent state law" rule under which it affirmed the judgment against petitioner "without reaching the federal question." Pet. App. 13a. As petitioner's brief explains, that was error.

But it was, unfortunately, not an entirely isolated error. In the eighteen months since *Williams II* was decided, a number of state courts also have failed to give full and faithful effect to the decision, even when directly ordered by this Court to reconsider an opinion in light of the case.

One stark example is *Buell-Wilson v. Ford Motor Co.*, 73 Cal. Rptr. 3d 277, 290 (Cal. Ct. App.), *modified on other grounds and reh'g denied*, 2008 Cal. App. LEXIS 515 (Cal. Ct. App.), *review granted*, 2008 Cal. LEXIS 8246 (Cal. 2008). On remand from this Court in light of *Williams II*, *see Ford Motor Co. v. Buell-Wilson*, 127 S. Ct. 2250 (2007), the California Court of Appeal concluded that *Williams II* "d[id] not require that [it] change any of the holdings in its original opinion." 73 Cal. Rptr. 3d at 290. Like the Oregon Supreme Court, the California court in

Buell-Wilson concluded that the defendant did not properly preserve its argument against punishment for nonparty harm under state law and thus had forfeited it. The court in *Buell-Wilson* went further, however, and determined that *Williams II* was inapplicable because "there was no evidence or argument at trial that created a significant risk that the jury, in deciding the amount of punitive damages to award, punished [the defendant] for harm it caused to third parties." *Id.*

That conclusion is inexplicable. The California Court of Appeal itself recognized that plaintiffs had introduced evidence of the defendant's "reckless disregard for the safety of others," the "repeated nature of [the defendant's] conduct," and "serious injuries to [drivers of the] Bronco II," even though that was not the type of vehicle driven by the plaintiff. *Id.* at 312, 319. It further recognized that plaintiff's counsel had reminded the jurors during closing argument that they "ha[d] heard of others in California" who had been hurt, that defendant "had had the same problem before," and that defendant "chose to put people in wheelchairs, brain damaged or death" through its "[w]illful disregard of the health and safety of [plaintiff] and those like her." *Id.* at 341-42. If that evidence and argument does not pose a "significant" or "unreasonable and unnecessary risk" that a defendant will be punished for harm caused to nonparties, *Williams II*, 127 S. Ct. at 1065, it is difficult to imagine in what circumstances the California court would conclude that *Williams II* does apply.[2]

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[2] Remarkably, the *Buell-Wilson* court rendered its decision days after a separate panel of the California Court of Appeal recognized that *Williams II* and *State Farm* compelled *reversal* of a punitive damages award potentially traceable to harm to

The analysis of the Louisiana Court of Appeal in *Grefer v. Alpha Technical*, 965 So. 2d 511 (La. Ct. App. 2007), *cert. denied*, 128 S. Ct. 2054 (2008), reflects a similar unwillingness to fairly implement this Court's decision. On remand from this Court in light of *Williams II*, *see Exxon Mobil Corp. v. Grefer*, 127 S. Ct. 1371 (2007), the Court of Appeal declared that it would "stand by [its] initial decree" affirming an award of $112 million in punitive damages in a case involving the contamination of land with radioactive waste. 965 So. 2d at 526. The plaintiffs' only claim was for property damage; they did not live or work on the property and were not exposed to the contamination. *Id.* Yet plaintiffs' counsel urged the jury to award punitive damages based on health risks that the contamination of their property allegedly posed to the public and to employees who cleaned pipes on plaintiffs' land – individuals who could, *and did*, bring their own lawsuits against the defendants. *See infra* at 17. And the jury instructions, to which the defendants repeatedly objected, allowed the jury to award punitive damages based solely on harm to the public. *See* 965 So.2d at 516-17 ("[Y]ou may award exemplary damages against a defendant when the plaintiff shows that the defendants were wanton or reckless in their disregard for public safety.").

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nonparty victims. *See Holdgrafer v. Unocal Corp.*, 73 Cal. Rptr. 3d 216, 238-39 (Cal. Ct. App. 2008). The Supreme Court of California has since granted the defendant's petition for review in *Buell-Wilson* and deferred briefing pending this Court's consideration of this case. *See* 2008 Cal. LEXIS 8246 (Cal. 2008). This Court's disposition of this case thus will have considerable import for the treatment of *Williams II* in the State of California.

After the remand from this Court, the Louisiana Court of Appeal affirmed those instructions as "both permissible and constitutional," 965 So. 2d at 517, even though they allowed precisely the direct punishment for nonparty harm denounced in *Williams II*. *See* 127 S. Ct. at 1063. And in its independent review of the constitutionality of the punitive damages award, the Court of Appeal justified the award on the ground that the defendant, upon recognizing the possibility of contamination, *stopped* sending contaminated pipes to plaintiffs' land, because the court believed that decision put a *third*, "financially vulnerable" party out of business. *Grefer*, 965 So. 2d at 522. The court purported to analyze that third-party harm under the guise of "reprehensibility," but not only did the court effectively punish the defendants directly for the nonparty harm, it also failed to understand that only when the *same* "conduct that harmed the plaintiff also posed a substantial risk of harm to the general public" can nonparty harm be used to show reprehensibility. *Williams II*, 127 S. Ct. at 1064. The court's consideration of nonparty harm flowing from *different* conduct was flatly inconsistent with *Williams II*.

The Supreme Court of Appeals of West Virginia has ignored the dictates of *Williams II* as well. In *State ex rel. Chemtall Inc. v. Madden*, 655 S.E.2d 161 (W. Va. 2007), *cert. denied*, 128 S. Ct. 1748 (2008), the court affirmed as facially consistent with *Williams II* a lower court's decision to have a trial, before the plaintiff class was certified, on "whether the Defendants' actions and/or inactions justify punitive damages, and if so, what multiple of general damages will be assessed as a punitive damage multiplier." 655 S.E.2d at 164-65. As the *Chemtall* dis-

sent objected, however, a court that determines punitive damages before it determines the set of plaintiffs involved certainly contravenes the holding of *Williams II*. A defendant cannot possibly present "every available defense" to the charges against it when the defendant does not know who is making the charges or the number of charges being brought. *Id.* at 170 (Benjamin, J., dissenting in part); *see also Amicus Curiae* Br. of the Chamber et al. in Support of Petitioners, *Chemtall, Inc. v. Madden*, No. 33380, at 7-9 (Aug. 13, 2007) (arguing the same); *Amicus Curiae* Br. of the Chamber in Support of Petitioner, *Philip Morris USA Inc. v. Accord*, No. 07-806, at 2-3 (Jan. 16, 2008) (describing West Virginia Supreme Court of Appeals' approval of similar procedure in another case).

As these cases demonstrate, the continuing vitality of *Williams II* is far from secure. And this case could mean almost as much for the effect of *Williams II* as *Williams II* itself. Many lower courts will be watching this case not only for signals as to this Court's adherence to *Williams II*, but also for signals as to the latitude they may have to distinguish away or otherwise circumvent the decision. By disapproving the Oregon court's evasion of this Court's prohibition against punishment for nonparty harm, this Court can forcefully reject past efforts to evade *Williams II*, prevent future courts from following the same unlawful course, and reinforce a level of predictability in the application of its mandate that will benefit all litigants.

II. Lower Courts Are Also Failing To Apply *State Farm* Faithfully

The experience following this Court's decision in *State Farm* confirms that reversal of the Oregon court's decision is necessary here. Even before courts began evading the principle of *Williams II* as described above, a number of state courts were rejecting the holding and analysis of this Court's decision in *State Farm*. The subsequent history of that case provides a troubling glimpse into the likely future of *Williams II*, should the Oregon Supreme Court's failure to follow this Court's instructions go unchecked.

In *State Farm* this Court provided detailed guidance to state and lower federal courts on how to review punitive damages awards to ensure that they are not excessive and that defendants have fair notice of the potential awards to which they might be subject. The Court elaborated on each of three guideposts that it had previously instructed reviewing courts to consider: (1) the reprehensibility of the defendant's misconduct; (2) the ratio of punitive damages to harm suffered by the plaintiff; and (3) the civil penalties authorized or imposed in comparable cases. *See* 538 U.S. at 418. With respect to ratio, the Court instructed that, "[w]hen compensatory damages are substantial," an award "equal to compensatory damages" will often "reach the outermost limit of the due process guarantee." *Id.* at 425. The Court then concluded that applying "the *Gore* guideposts to the facts of [*State Farm* itself] . . . likely would justify a punitive damages award at or near the amount of compensatory damages." *Id.* at 429.

The significance of that ruling was underscored

just last term in *Exxon Shipping*, which adopted a 1:1 ratio as a mandatory cap on punitive damages in certain federal maritime cases, noting in the process that the same ratio might have been required in that particular case as a matter of due process as well. 128 S. Ct. at 2633-34 & n.28.

Despite the importance of the ratio principle described in *State Farm* and later applied in *Exxon Shipping*, the Utah Supreme Court on remand in *State Farm* held that due process permitted a punitive award *nine times* the size of the compensatory damages awarded. *See Campbell v. State Farm Mut. Auto. Ins. Co.*, 98 P.3d 409, 410-11 (Utah 2004). The court explicitly reasoned that *this Court had erred* in concluding that the compensatory award for emotional distress already contained a punitive element and decided instead that the damages for emotional distress actually justified a higher punitive award because conduct that causes emotional harm is "markedly more egregious" than conduct that causes economic harm. *Id.* at 418; *see id.* at 413. That reasoning turned the guidance provided by this Court in *State Farm* on its head.

Unfortunately, a number of courts have followed the Utah court's lead, ignoring this Court's ruling and sanctioning punitive awards with ever higher ratios where there were undeniably "substantial" compensatory damages. For example, in *Seltzer v. Morton*, 154 P.3d 561, 611-612 & n.32 (Mont. 2007), the court cited the Utah Supreme Court's decision on remand, and this Court's subsequent denial of State Farm's petition for certiorari, to justify a ratio of over 18:1 based on $1.1 million in compensatory damages for abuse of process and malicious prosecution. Similarly, in *Goddard v. Farmers Insurance*

Co. of Oregon, 120 P.3d 1260, 1281 & n.24, 1284 (Or. Ct. App. 2005), the court decided upon a 3:1 ratio after noting the 9:1 ratio on remand in *State Farm* and the denial of certiorari. The Oregon Supreme Court subsequently deemed the ratio too low, even though the case involved $1.28 million in compensatory damages, and increased it to 4:1. *See Goddard v. Farmers Ins. Co. of Oregon*, 179 P.3d 645, 670 (Or. 2008). And the Oregon Supreme Court in this very case affirmed a punitive damages award of *97 times* the amount of the compensatory damages – a ratio with no basis in any precedent of this Court. *See* Pet. 31-34; *see also*, *e.g.*, *Flax v. DaimlerChrysler Corp.*, 2008 Tenn. LEXIS 505 (Tenn. 2008) (5.35:1 ratio based on $2.5 million compensatory verdict); *Gibson v. Moskowitz*, 523 F.3d 657 (6th Cir. 2008) (2:1 ratio based on $1.5 million compensatory verdict); *Union Pac. R.R. v. Barber*, 149 S.W.3d 325 (Ark. 2004) (4.9:1 ratio based on $5.1 million compensatory verdict); *Henley v. Philip Morris Inc.*, 9 Cal. Rptr. 3d 29 (Cal. Ct. App. 2004) (6:1 ratio based on $1.5 million compensatory verdict), *cert. denied*, 544 U.S. 920 (2005); *Bocci v. Key Pharms., Inc.*, 79 P.3d 908 (Or. Ct. App. 2003) (7:1 ratio based on $5.5 million in compensatory damages).

Justices of the West Virginia Supreme Court of Appeals have expressed open hostility toward *State Farm*'s important pronouncement concerning permissible ratios,[3] and that court has refused to in-

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[3] *See*, *e.g.*, *Jackson v. State Farm Mut. Auto. Ins. Co.*, 600 S.E.2d 346, 367 (W. Va. 2004) (McGraw, J., concurring) (opining that in *State Farm*, "the majority of the nine justices did not focus on 'the degree of reprehensibility of the defendant's conduct,' but instead chose to substitute the jury's judgment with their own." (citation omitted)); *see also id.* at 366 (May-

struct a trial court on remand that "single-digit multipliers are more likely to comport with due process" or even that, to be probative, out-of-state lawful conduct "must have a nexus to the specific harm suffered by the plaintiff." *Jackson v. State Farm Mut. Auto. Ins. Co.*, 600 S.E.2d 346, 364-65 (W. Va. 2004) (Maynard, C.J., concurring in part and dissenting in part). And on the Louisiana Court of Appeal, at least one judge is of the opinion that the constitutionality of a punitive damages award should depend on whether "the defendant is an individual rather than a corporation," *Byous v. Ebanks*, 983 So. 2d 1033, 2008 La. App. Unpub. LEXIS 282, at *27 (La. Ct. App. 2008) (Murray, J., concurring with reasons), a factor completely *outside* the *State Farm* analysis, and one that expressly reflects improper "bias[] against big businesses," *Honda Motor Co. v. Oberg*, 512 U.S. 415, 432 (1994).

Some courts have also evaded the holding of *State Farm* by interposing unjustifiable procedural bars, like the Oregon court did to avoid applying *Williams II* here. In *Prendergast v. Craft*, 2008 Ark. App. LEXIS 402 (Ark. Ct. App. 2008), for example, the Arkansas Court of Appeals decided that the defendant had "set[] out some of the elements" of a due

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nard, C.J., concurring in part and dissenting in part) ("I fervently hope that the next time a punitive damages award is reviewed by this Court, the majority will abide by the United States Supreme Court's decision in *Campbell*, even if it does not like or agree with *Campbell*'s holdings. . . . *Campbell* is the law of the land, and it must be applied everywhere in the United States, including in West Virginia."); *In re Tobacco Litig.*, 624 S.E.2d 738, 749 (W. Va. 2005) (Starcher, J., concurring) ("As the members of this Court have noted before, *State Farm v. Campbell* . . . was nothing more than a summary, a collation, of prior case law." (citing cases)).

process challenge to the punitive damages award, but had not "specifically ma[de]" a constitutional argument and thus had failed to preserve it. *Id.* at *14. That conclusion was "indefensible," *id.* at *20 (Hart, J., dissenting), since the defendant had made an argument that was expressly based on the *State Farm* factors, *id.* at *21. As Judge Hart explained in her dissent, the majority had "excused itself from analyzing the reprehensibility of [the defendant's] conduct in the exact way that [the defendant] argued this point to the trial court and . . . on appeal." *Id.* at *22. The majority's dodge of *State Farm* further illustrates the hostility of some courts to that decision.

State Farm is hardly an opaque decision; other courts have had no difficulty understanding that it does not permit grossly disproportionate punitive damages awards. *See*, *e.g.*, *Sec. Title Agency, Inc. v. Pope*, 2008 Ariz. App. LEXIS 118, at *72 (Ariz. Ct. App. 2008) (citing *State Farm* in reducing punitive damages award from $35 million to $6.1 million, the amount of compensatory damages); *Sun Pac. Farming Coop., Inc. v. Sun World Int'l, Inc.*, 2008 U.S. App. LEXIS 10345, at *4-*5 (9th Cir. 2008) (citing *State Farm* in vacating punitive damages award with 31:1 ratio); *Barnes v. Univ. Hosps. of Cleveland*, 2008 Ohio LEXIS 1776, at *21-*22 (Ohio 2008) (reversing punitive damages award and remanding for consideration in light of *State Farm*); *Bridgeport Music, Inc. v. Justin Combs Publ'g*, 507 F.3d 470, 489 (6th Cir. 2007) (citing *State Farm* and ordering district court to impose ratio between 1:1 and 2:1 because "a substantial compensatory damages award means that a lower ratio is needed to satisfy the requirements of due process"), *petition for cert. filed*, No. 07-1438 (U.S. May 19, 2008); *Williams v. Con-*

Agra Poultry Co., 378 F.3d 790, 799 (8th Cir. 2004) (quoting *State Farm* and "[a]ccordingly" reducing punitive damages to amount of compensatory damages); *see also Willow Inn, Inc. v. Pub. Serv. Mut. Ins. Co.*, 399 F.3d 224, 235 (3d Cir. 2005) (affirming award that "result[ed] in approximately a 1:1 ratio, which is indicative of constitutionality under *Gore* and *Campbell*"). *State Farm* is hardly a dead letter, in other words, but the continuing strength of its message depends on whether lower courts respect their obligation to adhere to it.

When *State Farm* was decided, it was hailed as a watershed decision that promised at last to bring some order and rationality to judicial review of punitive damages awards.[4] That initial promise becomes increasingly undermined, however, the more that lower courts are allowed to ignore or evade its principles. Reversal of the decision below will make clear to all courts that efforts to evade this Court's punitive damages decisions will not be countenanced.

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[4] *See, e.g.*, David G. Savage, *Justices Act to Restrict Punitive Damage Awards: The Supreme Court Ruling Is a Move to Control "Irrational and Arbitrary" Verdicts*, L.A. Times, Apr. 8, 2003, at 1 ("The . . . ruling sends a stern warning to state judges and juries to rein in excessive awards."); Editorial, *Punitive Damages on Trial*, Chi. Trib., Apr. 12, 2003, at C26 ("The high court drew some badly needed guidelines on what is reasonable when the courts award punitive damages in civil cases."); Lorraine Woellert & Mike France, *Tort Reform Has Friends in High Places*, Bus. Wk., Apr. 21, 2003, at 78 (arguing that "[t]he ruling should inject a level of predictability into high-stakes litigation").

III. Failure To Reaffirm The Procedural Protections Of *Williams II* Will Have Significant Adverse Consequences For Defendants In Punitive Damages Cases

A reversal of the judgment below is also necessary because of the importance of the *Williams II* decision to the fair administration of punitive damages procedures in the lower courts. Absent the protection extended by *Williams II*, defendants are subject to multiple punishments for causing the same harm. This Court explained as early as *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 under the guise of the reprehensibility analysis" because "in the usual case nonparties are not bound by the judgment some other plaintiff obtains" and "[p]unishment on these bases creates the possibility of multiple punitive damages awards for the same conduct." 538 U.S. at 423. The decisions that refuse to apply *Williams II* make concrete the risk of multiple punishment. In *Grefer*, for example, the trial court instructed the jury that it could award punitive damages based upon risk to the public health, and the court of appeal relied upon the harm to a third-party contractor and employees to justify the award. Yet those employees and members of the public had already filed their own suits against the defendant, seeking their own damages for the claimed health effects of the alleged contamination. *See*, *e.g.*, *In re Harvey TERM Litig.*, No. 01-8708 (La. Dist. Ct. Parish of Orleans, Div. D); *Warner v. ExxonMobil Corp.*, No. 02-19657 (Civ. Dist. Ct., Parish of Orleans, La. Aug. 18, 2005); *see also Rinehart v. Shelter Gen. Ins. Co.*, 2008 Mo. App. LEXIS 942

(Mo. Ct. App. 2008) (allowing consideration of a separate $23 million verdict against the defendant in assessing punitive damages).

In addition to the serious risk of double punishment, the state courts' failure to follow *Williams II* violates the very essence of due process: the right to be heard before a judgment may be entered for or against a party. *See Boddie v. Connecticut*, 401 U.S. 371, 377 (1971) ("due process requires, at a minimum, that absent a countervailing state interest of overriding significance, persons forced to settle their claims of right and duty through the judicial process must be given a meaningful opportunity to be heard"). A lower court that does not protect against the possibility of punishment for nonparty harm effectively turns the individual case into a *de facto* class action, without the *de jure* procedural protections deemed essential to the fair deployment of the class action device. *See*, *e.g.*, Pet. App. 55a (referring to the "broader *class* of Oregonians" addressed by the litigation (emphasis added)).

The due process risk inherent in such a proceeding is self-evident: if the class representative's claim is not typical of the other claims or if the class members' claims differ materially among themselves, proceeding on a representative basis will almost certainly deny the defendant its right to mount a full and fair defense against each individual claim. *See Broussard v. Meineke Disc. Muffler Shops, Inc.*, 155 F.3d 331, 345 (4th Cir. 1998); *see also Morgan v. United States*, 304 U.S. 1, 18 (1938) ("The right to a hearing embraces not only the right to present evidence but also a reasonable opportunity to know the claims of the opposing party and to meet them."). For example, the defendants in *Buell-Wilson* could

not prove that the ostensibly injured nonparties who had driven the Bronco II or had suffered accidents similar to that of the plaintiff would be unable "to establish specific elements" of their claims "or that the defendant [itself could have] establish[ed] unique affirmative defense[s]" to those claims. Thomas B. Colby, *Beyond the Multiple Punishment Problem: Punitive Damages as Punishment for Individual, Private Wrongs*, 87 Minn. L. Rev. 583, 601 (2003). And the defendants in *Chemtall* could not even begin to attack plaintiffs' claims against them because they did not know who the plaintiffs would be. *Chemtall*, 655 S.E.2d at 164.

In short, the Court's decision in *Williams II* is of critical importance in protecting against arbitrary punitive damages awards, and the lower courts' failure to follow the procedural requirements of the decision severely dilutes that protection. In order to ensure the continued force of the safeguards provided by *Williams II*, and to make clear that this Court's decisions must be followed by lower courts, this Court should reverse the decision of the Oregon Supreme Court.

CONCLUSION

For the foregoing reasons, and for the reasons stated by petitioner, the decision below should be reversed.

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August 20, 2008