No. 07-1216

In the
Supreme Court of the United States

PHILIP MORRIS USA INC.,

Petitioner,

v.

MAYOLA WILLIAMS,
Personal Representative of the
Estate of Jesse D. Williams, Deceased,

Respondent.

On Writ of Certiorari
to the Supreme Court of Oregon

BRIEF AMICUS CURIAE OF PACIFIC LEGAL FOUNDATION 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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INTEREST OF AMICUS CURIAE[1]

Pacific Legal Foundation (PLF) was founded over 30 years ago and is widely recognized as the largest and most experienced nonprofit legal foundation of its kind. PLF litigates matters affecting the public interest at all levels of state and federal courts and represents the views of thousands of supporters nationwide who believe in limited government and economic freedom. In furtherance of PLF's continuing mission to defend economic liberty, the Foundation created its Free Enterprise Project. Through that project, the Foundation seeks to protect the free enterprise system from abusive regulation and a civil justice system that grants excessive liability awards. PLF has participated before this Court and the Supreme Courts of California, Illinois, New Jersey, and other states in cases involving the reach and scope of civil liability and the abuse of punitive damages. *See*, *e.g.*, *Philip Morris USA v. Williams*, 127 S. Ct. 1057 (2007); *Bullock v. Philip Morris USA, Inc.*, 159 Cal. App. 4th 655 (2008); *Johnson v. Ford Motor Co.*, 113 P.3d 82 (Cal. 2005); *In re Lead Paint Litigation*, 924 A.2d 484 (N.J. 2007); *State v. Lead Industries Ass'n, Inc.*, Nos. 2004-63-M.P., 2006-158-Appeal, 2007-

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[1] Pursuant to this Court's Rule 37.3(a), all parties have consented to the filing of this brief. Counsel of record for all parties received notice at least 10 days prior to the due date of the Amicus Curiae's intention to file this brief. Letters evidencing such consent have been filed with the Clerk of the Court.

Pursuant to Rule 37.6, Amicus Curiae affirms that no counsel for any party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. No person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

121-Appeal, 2008 WL 2605396 (R.I. July 1, 2008). PLF attorneys have also published articles on the dangers that a runaway civil justice system poses to American consumers and entrepreneurs. *See*, *e.g.*, Deborah J. La Fetra, *Freedom, Responsibility, and Risk: Fundamental Principles Supporting Tort Reform*, 36 Ind. L. Rev. 645 (2003); Deborah J. La Fetra, *A Moving Target: Property Owners' Duty to Prevent Criminal Acts on the Premises*, 28 Whittier L. Rev. 409 (2006).

SUMMARY OF ARGUMENT

While the federalist system affords states broad discretion to act within the boundaries of the Constitution, they should not be free to manipulate state law in ways that subvert federally protected individual rights. This principle applies no less to state judiciaries than to state legislatures. The requirements of due process and equal protection, among others, bar state courts from interpreting state laws in ways that evade those limits. In short, state autonomy in the federalist system is limited by individual rights, and these limits are as essential when the state acts through the judicial process as when it acts through the legislative process.

In evaluating whether a state court has exceeded the boundaries of its legitimate constitutional discretion, this Court needs a baseline from which to judge state action. When a state judiciary deviates in sudden, unforseen, or arbitrary ways from traditional legal standards, it can violate the Fourteenth Amendment. *See*, *e.g.*, *Bouie v. City of Columbia*, 378 U.S. 347 (1964); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958). Without a baseline it would be a simple matter for courts to evade

constitutional restrictions by simply redefining or retroactively altering the content of those rights that are defined by state law, and thereby defining whatever acts a state chooses to perform as "due process of law."

One area of the law in which such legerdemain has been frequent is in the realm of property rights. State courts frequently reinterpret state common law principles regarding property rights in ways that transfer these rights to the state without just compensation. This Court has occasionally observed that states may not "defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes v. Washington*, 389 U.S. 290, 296-97 (1967) (Stewart, J., concurring). Yet state courts continue to do just that. This Court should make clear that the baseline from which to evaluate the constitutionality of deviations by state courts should be those traditional common law understandings which historically inform the content and boundaries of individual rights, and not simply whatever legal order a state may choose to erect through judicial or legislative pronouncement.

ARGUMENT

I

THE AUTONOMY OF STATES IN THE FEDERAL SYSTEM IS LIMITED BY FEDERAL CONSTITUTIONAL STANDARDS AND INDIVIDUAL RIGHTS

A. States Do Not Have Discretion to Act Arbitrarily or Otherwise Violate Individual Rights

State autonomy in the federalist system "is not just an end in itself," but exists to better secure the rights of individuals. *New York v. United States*, 505 U.S. 144, 181 (1992). Thus while state judiciaries enjoy supreme authority to interpret state laws, they may not use that authority to violate federally protected individual rights, and they may not appeal to federalism to justify their doing so.

While these points may seem basic, it is worth emphasizing that states enjoy autonomy under the federal system ss a means to the attainment of certain substantive constitutional ends: specifically, the ends of securing such rights as life, liberty, and the pursuit of happiness. Declaration of Independence, 1 Stat. 1 (1776). Unfortunately, many judges and contemporary legal commentators tend to treat state power as an end in itself, or as an institution designed to allow states to "experiment" with legislation that violates individual rights. *See*, *e.g.*, Raoul Berger, *Federalism: The Founders' Design* 53 (1987) (portraying the Founders "solicit[ous] for preservation of the States" as an end in itself), Robert J. Delahunty & Antonio F. Perez, *Moral Communities or a Market State: The Supreme Court's Vision of the Police Power in the Age of Globalization*,

42 Hous. L. Rev. 637, 640 (2005) ("The Constitution does not assign to the national government the responsibility for pursuing any substantive conception of the good."), *Lawrence v. Texas*, 539 U.S. 558, 605-06 (2003) (citation omitted) (Thomas, J., dissenting) (finding that states may violate individual liberty for "uncommonly silly" reasons). But it is not logically possible to understand something by reference only to its means without also understanding its end. *See* Aristotle, *Physics* 194b, *reprinted in* Aristotle, *The Basic Works of Aristotle* 240 (Richard McKeon ed., 1941) ("[M]en do not think they know a thing till they have grasped the 'why' of it (which is to grasp its primary cause)"). Federalism must be understood with reference to its end: States do not enjoy autonomy simply on the presumption that state autonomy is a good; they have that discretion because—and only to the extent that—such discretion serves the "substantive conception of the good" which the Constitution explicitly contemplates. That conception is clear from the very beginning, in the Constitution's reference to "preserv[ing] . . . Liberty," which it explicitly describes as a "Blessing[]."

James Madison made this fact clear in the ratification debates, when he remarked that it was "preposterous" to object to the Constitution on the grounds that it "may derogate from the importance of the governments of the individual States[.]" *The Federalist* No. 45, at 288-89 (James Madison) (Clinton Rossiter ed., 1961). The Revolutionary War had not been fought, and "the precious blood of thousands spilt" just so that "individual States . . . might enjoy a certain extent of power, and be arrayed with certain dignities and attributes of sovereignty[.]" *Id.* at 289. On the contrary, the Revolution had been fought so that "the

people of America should enjoy peace, liberty, and safety." *Id.* Recognizing that "the real welfare of the great body of the people, is the supreme object to be pursued; and that no form of government whatever has any other value than as it may be fitted for the attainment of this object," also meant recognizing that state autonomy was limited by individual rights. *Id.* Thus, "as far as the sovereignty of the States cannot be reconciled to the happiness of the people, the voice of every good citizen must be, Let the former be sacrificed to the latter." *Id.* State autonomy in the federal system is thus an *instrumental* good, and not a good in itself which the Constitution incorporates for the sake of protecting states. Simply put, there is no legitimate state interest in violating individual rights.

The Constitution is not a treaty among sovereigns who are free to act in violation of the rights of citizens, but a sovereign authority which restricts state autonomy by both explicit and implicit limitations. *Martin v. Hunter's Lessee*, 14 U.S. (1 Wheat.) 304, 324-25 (1816). The explicit restrictions are set forth in Article I, section 10, and elsewhere, while the implicit restrictions are established by the traditionally recognized individual rights lying at the center of American constitutional jurisprudence. *See*, *e.g.*, *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934) (protecting rights "so rooted in the traditions and conscience of our people as to be ranked as fundamental"); *Palko v. Connecticut*, 302 U.S. 319, 325 (1937) (protecting rights "implicit in the concept of ordered liberty"). States may not violate either the enumerated or unenumerated rights of individuals, regardless of the broad autonomy they enjoy under federalism.

This point was made clear in *New State Ice Co. v. Liebmann*, 285 U.S. 262 (1932). There, dissenting Justice Brandeis famously observed that "one of the happy incidents of the federal system" was that a state could "serve as a laboratory; and try novel social and economic experiments." *Id.* at 311. But the majority in *Liebmann* responded that "unreasonable or arbit[r]ary interference or restrictions cannot be saved from the condemnation of that amendment merely by calling them experimental." *Id.* at 279. Although it is true that states may "indulge in experimental legislation," they may not do so "by enactments which transcend the limitations imposed upon them by the Federal Constitution," because "there are certain essentials of liberty with which the state is not entitled to dispense in the interest of experiments." *Id.* at 279-80.[2] Again, in *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535, 546 (1942), Justice Jackson reiterated this point: "[t]here are limits to the extent to which a legislatively represented majority may conduct biological experiments at the expense of the dignity and personality and natural powers of a minority."

While the government of Oregon is therefore supreme in regulating its internal affairs, and its judiciary is the supreme interpreter of state law, this Court rightly retains power to intercede on behalf of citizens whose federal constitutional rights are violated under the color of state law. The state may not appeal

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[2] As Professor Jack Balkin observes, the New Deal jurisprudential revolution has meant that few people today remember the majority opinion's response to Justice Brandeis' "laboratory" argument. J.M. Balkin, *Federalism and the Conservative Ideology*, 19 Urb. Law. 459, 465 (1987).

to the values of federalism to defend actions which deprive citizens of the rights to due process of law, equal protection of the laws, and other federally recognized constitutional rights.

B. Federal Constitutional Limits on State Autonomy Apply to State Judiciaries No Less Than to State Legislatures

While the protections accorded by the Fourteenth Amendment have usually been applied in cases involving state *legislative* action, they also apply to the actions of state judiciaries. *State Farm Mut. Auto. Ins. Co. v. Campbell*, 538 U.S. 408 (2003); *BMW of North America, Inc. v. Gore*, 517 U.S. 559 (1996). State courts are not free to act arbitrarily in the interpretation of state law, since lawfulness itself requires at a minimum that a state must treat individuals in a fundamentally fair, or nonarbitrary, way. *See District of Columbia v. Heller*, 128 S. Ct. 2783, 2817 n.27 (2008) ("'[R]ational basis' is not just the standard of scrutiny, but the very substance of the constitutional guarantee."). This Court has repeatedly held that state courts cannot use their exclusive authority to interpret state law as an opportunity to violate individual rights or to subvert constitutional guarantees under the guise of interpretation.

In *Bouie*, 378 U.S. 347, several civil rights protestors engaged in a sit-in remained at a lunch counter after being ordered to leave. The state's law against trespassing only barred entry onto property after being warned not to enter; it did not prohibit a person who lawfully entered from remaining in a place after being told to leave. Nevertheless, the South Carolina Supreme Court interpreted the law to

prohibit staying on land after being ordered off, and it upheld the criminal convictions of the demonstrators. This Court reversed, because "by applying such a construction of the statute . . . the State has punished them for conduct that was not criminal at the time they committed it, and hence has violated the requirement of the Due Process Clause that a criminal statute give fair warning of the conduct which it prohibits." *Id.* at 350. The Court took pains to note that *Bouie* was not a "void for vagueness" case. *Id.* at 351. On the contrary, "the language of [the trespass law] was admirably narrow and precise; the statute applied only to 'entry upon the lands of another . . . after notice . . . prohibiting such entry.'" *Id.* at 351-52. But the state court's decision "unforeseeably and retroactively expanded [the statute] by judicial construction." *Id.* at 352. This arbitrary inconsistency with prior law was so radical as to violate the basic principles of fairness in the Due Process Clause.

Slightly more complicated was *Alabama ex rel. Patterson*, 357 U.S. 449, in which the state demanded that the NAACP hand over a list of members. The Association refused, and was held in contempt. *Id.* at 451. This Court granted certiorari, but the state argued that it lacked jurisdiction, because the NAACP had not adequately sought review by the appropriate writ to the state supreme court. *Id.* at 454-55. This error, the state continued, justified the Alabama Supreme Court in denying review, and because that denial was a state law procedural matter, this Court was barred from examining the underlying merits. *Id.* at 455. But this Court rejected this argument as a matter of *state* law:

> We are unable to reconcile the procedural holding of the Alabama Supreme Court in the present case with *its past unambiguous holdings* as to the scope of review available upon a writ of certiorari addressed to a contempt judgment . . . . [Citing several Alabama state decisions.] . . . [W]e can discover nothing in *the prior state cases* which suggests that mandamus is the exclusive remedy . . . . Nor, so far as we can find, do any of these prior decisions indicate that the validity of [contempt] orders can be drawn in question by way of certiorari only in instances where a defendant had no opportunity to apply for mandamus.

Id. at 456-57 (emphasis added). The Court went on to hold that states may not abuse their judicial autonomy to evade review by the United States Supreme Court: "Novelty in procedural requirements cannot be permitted to thwart review in this Court applied for by those who, in justified reliance upon prior decisions, seek vindication in state courts of their federal constitutional rights." *Id.* at 457-58. *Patterson* makes clear that this Court retains power to inquire into state law to ensure that the judiciaries of the states are not abusing their authority to avoid enforcement of federal constitutional guarantees. This Court has followed that rule in many other cases. *See*, *e.g.*, *Osborne v. Ohio*, 495 U.S. 103, 124-25 (1990); *James v. Kentucky*, 466 U.S. 341, 348-49 (1984); *Douglas v. Alabama*, 380 U.S. 415, 421-22 (1965); *Davis v. Wechsler*, 263 U.S. 22, 24-25 (1923).

In *Ward v. Bd. of County Comm'rs of Love County, Okla.*, 253 U.S. 17 (1920), the Court observed that it

has power to inquire not only into whether a litigant properly alleged federal rights, "but also whether [those rights were] denied in substance and effect, as by putting forward nonfederal grounds of decision that were without any fair or substantial support." *Id.* at 22 (citing cases). The Court has this power because "if nonfederal grounds, plainly untenable, may be . . . put forward successfully, our power to review easily may be avoided." *Id.*

The Due Process Clause, among other constitutional provisions, places a significant limit on the power of a state judiciary to rest its decisions on independent nonfederal grounds; this limit "cannot be disregarded without neglecting or renouncing a jurisdiction conferred by law and designed to protect and maintain the supremacy of the Constitution and the laws made in pursuance thereof." *Id.* at 23. Indeed, *even where the nonfederal grounds might otherwise suffice*, this Court has power to examine those grounds where it is clear from the context of a case that they are being arbitrarily or unequally used by a judiciary determined to avoid this Court's judgment: "[o]rdinarily, violation of 'firmly established and regularly followed' state rules . . . will be adequate to foreclose review of a federal claim. There are, however, exceptional cases in which exorbitant application of *a generally sound rule* renders the state ground inadequate to stop consideration of a federal question." *Lee v. Kemna*, 534 U.S. 362, 376 (2002) (citation omitted; emphasis added). *See also Simpson v. Matesanz*, 175 F.3d 200, 207-08 (1st Cir. 1999) ("When the state ground rests on a state finding of procedural waiver, federal courts will consider whether the state had consistently applied the state rule to determine whether the state ground is adequate.").

This Court's power to inquire into the "adequacy" of the supposedly independent state grounds for a state judicial determination is essential to maintaining its authority to render judgments on federal constitutional matters and to enforce federal constitutional rights. Procedural fairness requires states to abide by predictable and stable rules which give defendants a fair opportunity to vindicate their federal rights. When a state court's decisions change rapidly, unpredictably, or without sufficient guiding principle, they may be "changing the rules in the middle of the game," in violation of due process. *See further* Henry Paul Monaghan, *Supreme Court Review of State-Court Determinations of State Law in Constitutional Cases*, 103 Colum. L. Rev. 1919, 1919 (2003) ("The Constitution or federal law imposes a duty of fidelity to prior state law . . . and the claim is that the state court materially and impermissibly departed from that law at a later point in time.").

C. State Courts Have Abused Their State-Law Supremacy to Deprive Citizens of Federal Constitutional Rights

The fact that state judicial decisions are immune from federal review when they are based on an adequate, independent state ground creates an incentive for state courts to manipulate their determinations to avoid this Court's oversight.

The classic example of this occurred at the height of the Civil Rights era, when southern state courts sought sometimes desperately for grounds to avoid this Court's mandates regarding desegregation. *Bouie* and *Patterson* are examples of this, but there are many others. *See Barr v. City of Columbia*, 378 U.S. 146, 149

(1964); *NAACP v. Alabama ex rel. Flowers*, 377 U.S. 288, 301-02 (1964); *Shuttlesworth v. City of Birmingham*, 376 U.S. 339 (1964) (*per curiam*) (summary disposition); *Wright v. Georgia*, 373 U.S. 284, 289 (1963). *See also* Laura S. Fitzgerald, *Suspecting the States: Supreme Court Review of State-Court State-Law Judgments*, 101 Mich. L. Rev. 80, 176 (2002); Robert Jerome Glennon, *The Jurisdictional Legacy of the Civil Rights Movement*, 61 Tenn. L. Rev. 869, 887-900 (1994).

State courts continue to employ this device today in other areas where enforcing constitutionally protected rights might be politically unpopular. Particularly common are cases involving the violation of private property rights. According to this Court's decision in *Lucas v. South Carolina Coastal Council*, 505 U.S. 1003 (1992), the Fifth Amendment requires compensation for state action that restricts such rights, but not for restrictions that "inhere" in the "background principles of the State's law of property and nuisance." *Id.* at 1029. Thus by using their common law powers to retroactively alter the "background principles" of ownership, state courts can transfer property rights to the state, while avoiding both the just compensation requirement and federal court review. This abuse continues despite Justice Stewart's observation that states should not be free to "defeat the constitutional prohibition against taking property without due process of law by the simple device of asserting retroactively that the property it has taken never existed at all." *Hughes*, 389 U.S. at 296-97 (Stewart, J., concurring). *See also* David L. Callies & J. David Breemer, *Selected Legal & Policy Trends in Takings Law: Background Principles,*

Custom and Public Trust "Exceptions" and the (Mis)use of Investment-Backed Expectations, 36 Val. U. L. Rev. 339, 379 (2002) ("newly discovering or expanding [background] principles in order to protect resources now deemed valuable . . . is inconsistent and irreconcilable with the protection of private rights in land").

The Oregon Supreme Court successfully used this tactic in *Stevens v. City of Cannon Beach*, 854 P.2d 449 (Or. 1993), *cert. denied*, 510 U.S. 1207 (1994), when owners of beach property sought a permit to build a seawall. The permit was denied, and the owners sued for just compensation, alleging that the denial amounted to a taking of their property for public use. *Id.* at 450-51. The court denied compensation on the grounds that "the common law doctrine of custom" barred landowners from excluding the public from the dry sand areas. *Id.* at 454. Yet this application of the doctrine of custom had been eliminated as a matter of law four years earlier in a case called *McDonald v. Halvorson*, 780 P.2d 714 (Or. 1989), a case which the *Stevens* court completely ignored. Instead, although the *McDonald* decision declared that "[t]he public has no right to recreational use of the [dry-sand area] because there is no factual predicate for application of the doctrine [of custom]," *id.* at 724, the *Stevens* court did not mention this case, and declared that because the doctrine of custom set a background principle barring property owners from excluding the general public, the owners could not claim that the denial of their permits had deprived them of any right to exclude. *Stevens*, 854 P.2d at 456. Thus the court held that the owners had not actually suffered a taking and were not due compensation.

Although this Court denied *certiorari*, Justices Scalia and O'Connor observed that the *Stevens* decision was an (ultimately successful) attempt to manipulate state law to avoid the federal Constitution's requirements as well as this Court's review: "As a general matter, the Constitution leaves the law of real property to the States. But just as a State may not deny rights protected under the Federal Constitution through pretextual procedural rulings, . . . neither may it do so by invoking nonexistent rules of state substantive law." 510 U.S. at 1211 (Scalia, O'Connor, JJ., dissenting from denial of cert.).

Likewise, in *McBryde Sugar Co., Ltd. v. Robinson*, 504 P.2d 1330 (Haw. 1973), *cert. denied*, 417 U.S. 962 (1974), property owners sought declaratory relief regarding their rights to export water located on their land. The state supreme court, however, decided "[t]o the surprise of all concerned," that the waters belonged to the state and could not be sold. John Martinez, *Taking Time Seriously: The Federal Constitutional Right to Be Free from "Startling" State Court Overrulings*, 11 Harv. J. L. & Pub. Pol'y 297, 342 (1988). By retroactively redefining the property rights in ways that eliminated the right at stake in the case, the state supreme court effected a taking of property in a manner that avoided the just compensation requirement. The federal district court later concluded that "[t]his retroactive taking of private property for and by the State, without payment therefor, was clearly the result of 'perverse reading of prior law.'" *Robinson v. Ariyoshi*, 441 F. Supp. 559, 585 (D. Haw. 1977), *aff'd*, 753 F.2d 1468 (9th Cir. 1985), *rev'd*, 477 U.S. 902 (1986) (summary disposition). The state court's extreme alteration of background principles of state law was an attempt to "take away the private

property of the plaintiffs without paying them for it." 441 F. Supp. at 586.[3]

These cases indicate the need for constitutional baselines from which to measure legislative deviations. Eric R. Claeys, *The Penn Central Test and Tensions in Liberal Property Theory*, 30 Harv. Envtl. L. Rev. 339, 352 (2006) (Classical conceptions of property rights "set[] a baseline determining whether an owner is suffering a 'burden' to her property rights or merely being limited to her equal rights."). As Justices Scalia and O'Connor observed in *Stevens*, "[o]ur opinion in *Lucas*, for example, would be a nullity if anything that a state court chooses to denominate 'background law'—regardless of whether it is really such—could eliminate property rights." 510 U.S. at 1211. This problem—the power of state courts to redefine the

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[3] This Court ultimately reversed *Robinson* summarily, 477 U.S. 902 (1986), citing the then-new decision in *Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172 (1985). On remand, the Ninth Circuit concluded that the property owners had failed to exhaust their state remedies and therefore ordered the case dismissed. *Robinson v. Ariyoshi*, 887 F.2d 215, 216 (9th Cir. 1989). This outcome indicates the disproportionate impact of state court autonomy in just compensation cases. As the late Chief Justice Rehnquist recognized, victims of property takings—unlike the victims of any other kind of civil rights violation—are forced to litigate their cases in hostile state courts before seeking federal redress, and federal courts will routinely give preclusive effect to state court decisions. *San Remo Hotel, L.P. v. City & County of San Francisco, Cal.*, 545 U.S. 323, 351 (2005) (Rehnquist, C.J., concurring). As a result, state courts have even greater power to manipulate state law doctrines in ways that take property without compensation and avoid federal court review. *See id.* ("*Williamson County* all but guarantees that claimants will be unable to utilize the federal courts to enforce the Fifth Amendment's just compensation guarantee.").

state law background of a case in ways that eliminate individual rights and evade federal court review—has been a source of controversy in this Court for generations. *See Muhlker v. New York & Harlem R.R. Co.*, 197 U.S. 544, 570 (1905); *Backus v. Fort St. Union Depot Co.*, 169 U.S. 557, 565-66 (1898); *Ogden v. Saunders*, 25 U.S. (12 Wheat.) 213, 339 (1827) (Marshall, C.J., dissenting). But it has been exacerbated in recent years by the relaxed degree of scrutiny that federal courts apply to property and contract rights. Thanks to the extreme deference states are given in "rational basis" cases involving property rights—a degree of deference one federal judge characterized as "invit[ing judges] to cup our hands over our eyes and then imagine if there could be anything right with the statute," *Arceneaux v. Treen*, 671 F.2d 128, 136 (5th Cir. 1982) (Goldberg, J., concurring)—states now have extremely broad power to violate private property rights under the guise of interpretation, simultaneously evading federal constitutional protections.

Here, the Oregon Supreme Court set a similar trap for Philip Morris. After being repeatedly instructed to reconsider its punitive damages decision in light of federal constitutional guarantees, the court interposed a procedural rule for the first time, one which had not been addressed at earlier stages of the litigation, and in such a way as to block the application of federal due process rules. By manipulating state procedural devices, the Oregon Supreme Court deprived Philip Morris of its properly litigated constitutional objections by claiming that they were not properly raised. Long-established and generally understood procedural rules, however, establish legitimate expectations for litigants, and thereby set

up a baseline from which deviations can be judged in terms of due process. Just as the trespassers in *Bouie* had formed certain expectations on the basis of long-established legal principles which the state could not evade consistently with due process, so here the state may not interpose a procedural device and thus deprive Philip Morris of procedural fairness by the simple expedient of claiming that the procedure sets the content of Philip Morris' due process rights. Such a brazen political device should not be allowed to flout this Court's authority as a defender of the Constitution.

In *Backus*, 169 U.S. 557, this Court described its power to inquire into the regularity of state judicial proceedings with regard to property rights, in words that apply to this case as well. "[T]he settled rule of this court in cases of this kind is to accept the construction placed by the supreme court of the state upon its own constitution and statutes as correct," wrote Justice Brewer for the majority, *id.* at 566, yet this Court "may examine proceedings had in a state court, under state authority, for the appropriation of private property to public purposes, so far as to inquire whether that court prescribed any rule of law in disregard of the owner's right to just compensation." *Id.* at 565. This Court must retain power to ensure that the state has not manipulated or altered its state law in ways that violate individual rights.

This case is one of the most stark instances of the abuse of judicial authority to change rules in the middle of the game in order to punish an unpopular defendant. At a previous stage of this litigation, for example, the Oregon Supreme Court even retroactively reinterpreted its criminal statute regarding

manslaughter in order to characterize Philip Morris' lawful sales of cigarettes as "manslaughter," thereby altering the "reprehensibility" element in the calculation of punitive damages. *See Williams v. Philip Morris Inc.*, 127 P.3d 1165, 1179-80 (Or. 2006). This despite the fact that for at least 45 years before that decision, Oregon law held unequivocally that corporations cannot commit manslaughter, *State v. Pacific Powder Co.*, 360 P.2d 530, 532 (Or. 1961), and that "[n]o criminal prosecution for corporate manslaughter has been successful in any United States mass products liability action." Thomas H. Koenig, *Crimtorts: A Cure for Hardening of the Categories*, 17 Widener L.J. 733, 771 (2008). This far-fetched interpretation of state law indicates the court's willingness to indulge even extreme applications of state law in its crusade to impose crushing punitive damages on Philip Morris for selling cigarettes—and to evade this Court's strictures on the limits of punitive damages. Yet even after this Court reversed the punitive damages award based on this outlandish reinterpretation of its laws, the Oregon Supreme Court nevertheless reaffirmed its earlier decision through a formalistic application of a procedural rule which had never until then been a focus of the litigation. It is difficult to explain such conduct except by reference to the fact that faithfully applying this Court's mandate "would have meant giving a victory to a hated tobacco-company defendant." Anthony J. Sebok, *The Oregon Supreme Court Once Again Affirms a Blockbuster Punitive Damages Award Against Philip Morris—Even in the Face of a U.S. Supreme Court Decision Seemingly to the Contrary*, FindLaw.com,

Feb. 12, 2008.[4] Such behavior is not excused by the principles of federalism and may not be permitted in the face of this Court's authority to protect federal constitutional rights. As the Rhode Island Supreme Court recently observed, courts

> can provide justice only to the extent that the law allows. Law consists for the most part of enactments that the General Assembly provides to us, whereas justice extends farther. Justice is based on the relationship among people, but it must be based upon the rule of law . . . . "The judge, even when he is free, is still not wholly free. He is not to innovate at pleasure. He is not a knight-errant roaming at will in pursuit of his own ideal of beauty or of goodness. He is to draw his inspiration from consecrated principles. He is not to yield to spasmodic sentiment, to vague and unregulated benevolence. He is to exercise a discretion informed by tradition, methodized by analogy, disciplined by system, and subordinated to 'the primordial necessity of order in the social life.'"

Lead Industries Ass'n, Inc., 2008 WL 2605396, at **2-**3 (footnote omitted) (quoting Benjamin N. Cardozo, *The Nature of the Judicial Process* 141 (1921)). The decision below is marked by repeated instances of biased, outcome-determinative decisions, the product of a desire to accomplish a just outcome whatever the cost. But whatever opprobrium might attach to the defendant in this case, it is entitled to a

[4] *Available at* http://writ.news.findlaw.com/sebok/20080212.html (last visited July 21, 2008).

consistent, orderly disposition of this case in a manner that respects its rights and obeys the mandates of this Court.

CONCLUSION

Philip Morris, like any other defendant, is entitled to a fair judicial proceeding by the settled rules of Anglo-American law. *Gore*, 517 U.S. at 585 ("The fact that [defendant] is a large corporation rather than an impecunious individual does not diminish its entitlement to fair [proceedings].").

The decision below should be *reversed*, and the Oregon Supreme Court instructed to comply with this Court's prior mandate.

DATED: August, 2008.

Respectfully submitted,

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